

No. 03-18-00307-CV

IN THE COURT OF APPEALS FOR THE THIRD DISTRICT
OF TEXAS AT AUSTIN

ROBERT ANDING AND ROBERTA ANDING

Appellants,

v.

CITY OF AUSTIN, TEXAS AND FERDINAND D. CLERVI,
AUSTIN MUNICIPAL COURT JUDGE.

Appellees.

On Appeal from Cause No. D-1-GN-17-002142
126th District Court of Travis County, Texas

BRIEF OF APPELLANTS

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Oral Argument Requested

June 4, 2018

IDENTITY OF PARTIES AND COUNSEL

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Appellees: City of Austin, Texas, and Ferdinand D. Clervi, Austin Municipal Court Judge

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Trial Court: Assigned to Travis County 126th District. 1000 Guadalupe Street, Austin, Texas 78701. Judges presiding in this case:

Hon. Darlene Byrne, 126th District (MSJ);

Hon. Amy Clark Meachum, 201st District (plea to the jurisdiction, motion to sever).

TABLE OF CONTENTS

INDEX OF AUTHORITIES	vi
ORAL ARGUMENT IS REQUESTED.....	x
STATEMENT OF THE CASE.....	xi
ISSUES PRESENTED.....	xii
INTRODUCTION	1
STATEMENT OF FACTS	2
I. THE ANDINGS LEASE OUT THEIR AUSTIN HOME FOR 30 DAYS OR MORE.....	2
II. AUSTIN REQUIRES A LICENSE FOR LEASES OF LESS THAN 30 DAYS.....	5
III. AUSTIN CITES THE ANDINGS FOR NOT HAVING AN STR LICENSE FOR LEASES OF 30 DAYS OR MORE	5
IV. THE CITY PROSECUTES THE ANDINGS FOR THEIR 30-DAY LEASES	7
V. THE TRIAL COURT REJECTS THE ANDINGS’ CONSTITUTIONAL VAGUENESS CHALLENGE	11
SUMMARY OF ARGUMENT.....	13
ARGUMENT	17
I. SUMMARY JUDGMENT REVIEW IS DE NOVO	17
II. THE TRIAL COURT SHOULD HAVE GRANTED THE ANDINGS’ MOTION FOR SUMMARY JUDGMENT ON THEIR DJ CLAIM	18
A. The Andings Have Standing to Bring a Constitutional Challenge	18
B. The STR Ordinance Exempts Rentals of 30 Days or More	20

C. Due Process Forbids Vague Ordinances	21
D. The Austin STR Ordinance is Unconstitutionally Vague As Applied.....	21
1. The City Applies the STR Ordinance to require actual, physical, continuous occupancy by all tenants	22
a. The Single-Tenant 30-Day Lease.....	22
b. The 2016 Multi-Tenant Leases	23
c. Avoidance is time-honored; evasion is not	24
d. People Are Free to Move and Travel.....	26
2. Multi-Tenant Leases Are Effectively Forbidden.....	28
3. The City’s Application of the STR Ordinance Interferes With Freedom of Movement and Contract.....	30
E. There Is No Universal Understanding What the Austin STR Ordinance Means.....	32
1. At Issue Is How Austin Applies the STR Ordinance.....	32
2. The Hotel Tax Definition Supports the Andings’ Case	34
F. The Andings’ Challenge is Not Hypothetical	35
G. The Standards for A Substantive Due Process Challenge Do Not Apply to an Unconstitutional Vagueness Challenge.....	36
III. THE TRIAL COURT SHOULD HAVE DENIED THE CITY’S MOTION FOR SUMMARY JUDGMENT ON ITS AFFIRMATIVE DEFENSE.....	39
A. The Claim of Constitutional Infirmary Stands On Its Own as a Valid DJ Claim	40
B. The DJ Suit Of Constitutional Infirmary Seeks Only Equitable Relief.....	42

C. The District Court Mandamus Petition Seeks Interpretation of the Law, But Not As Against the City.....	43
IV. THE TRIAL COURT ERRED IN GRANTING THE CITY’S PLEA TO THE JURISDICTION	44
A. District Courts Have Broad Mandamus Power over Municipal Courts	44
B. Mandamus Relief is Available When a Municipal Court Judge Applies the Law Incorrectly.....	47
1. Adequacy of Legal Relief By Appeal.....	47
2. Ministerial Act.....	49
V. THE MANDAMUS CLAIM SHOULD BE SEVERED	50
VI. REMAND IS NECESSARY FOR ATTORNEY’S FEES.....	51
PRAYER FOR RELIEF	51
CERTIFICATE OF SERVICE.....	52
CERTIFICATE OF COMPLIANCE.....	52
APPENDIX TO BRIEF OF APPELLANTS	53

INDEX OF AUTHORITIES

Cases

<i>Anderson v. City of Seven Points</i> , 806 S.W.2d 791 (Tex. 1991)	49
<i>Bailey v. Morawietz</i> , 04-07-00593-CV, 2008 WL 2037370 (Tex. App.—San Antonio May 14, 2008, no pet.).....	46
<i>Brown v. Todd</i> , 53 S.W.3d 297 (Tex. 2001)	19
<i>Bryan v. Darlington</i> , 207 S.W.2d 681 (Tex. Civ. App.-San Antonio 1947, writ ref'd n.r.e.)	26
<i>City of Kermit v. Spruill</i> , 328 S.W.2d 219 (Tex. Civ. App. 1959, writ refused n.r.e).....	26
<i>Double Diamond, Inc. v. Saturn</i> , 339 S.W.3d 337 (Tex. App.—Dallas 2011, pet. denied)	51
<i>F.C.C. v. Fox Television Stations, Inc.</i> , 567 U.S. 239 (2012)	37
<i>Helvering v. Gregory</i> , 69 F.2d 809 (2d Cir. 1934)	24
<i>Hogan v. Turland</i> , 428 S.W.2d 316 (Tex. 1968)	47
<i>In re Borunda</i> , 528 S.W.3d 149 (Tex. App.-El Paso 2017, no pet.)	45, 47, 49
<i>In re Cerberus Capital Mgmt., L.P.</i> , 164 S.W.3d 379 (Tex. 2005)	49
<i>In re Entergy Corp.</i> , 142 S.W.3d 316 (Tex. 2004)	47
<i>In re Marshall</i> , 04-02-00819-CV, 2002 WL 31662743 (Tex. App.—San Antonio Nov. 27, 2002, no pet.).....	46
<i>In re Perritt</i> , 992 S.W.2d 444 (Tex. 1999)	45
<i>In re Prudential Ins. Co. of Amer.</i> , 148 S.W.3d 124 (Tex. 2004)	47
<i>In re Shelby</i> , 297 S.W.3d 494 (Tex. App.—Dallas 2009, no pet.)	49

<i>In re Stokes</i> , 02-14-00288-CV, 2014 WL 5035547 (Tex. App.—Fort Worth Sept. 17, 2014, no pet.)	46
<i>Lindig v. City of Johnson City</i> , 03-11-00660-CV, 2012 WL 5834855 (Tex. App.—Austin Nov. 14, 2012, no pet.)	21, 37
<i>Lynn v. Bd. of Law Examiners</i> , 03-97-00478-CV, 1999 WL 46683 (Tex. App. – Austin 1999, no pet.)	21
<i>Martinez v. Thaler</i> , 931 S.W.2d 45 (Tex.App.—Houston [14th Dist.] 1996, writ denied)	46
<i>Mazzei v. Comm'r of Internal Revenue</i> , 16702-09, 2018 WL 1168766 (T.C. Mar. 5, 2018)	24
<i>McLane Co., Inc. v. Texas Alcoholic Beverage Comm'n</i> , 514 S.W.3d 871 (Tex. App.—Austin 2017, pet. denied).....	39, 43
<i>Morgan v. Compugraphic Corp.</i> , 675 S.W.2d 729 (Tex. 1984)	50
<i>Patel v. Texas Dep't of Licensing & Regulation</i> , 469 S.W.3d 69 (Tex. 2015)	15, 36, 42
<i>Saturn Capital Corp. v. Dorsey</i> , 01-04-00626-CV, 2006 WL 1767602 (Tex. App.—Houston [1st Dist.] June 29, 2006, pet. denied)	24
<i>Sherwin-Williams Co. v. Comm'r Of Revenue</i> , 438 Mass. 71, 778 N.E.2d 504 (2002).....	24
<i>Smith v. Flack</i> , 728 S.W.2d 784 (Tex. Crim. App. 1987)	45
<i>Tarr v. Timberwood Park Owners Assoc., Inc.</i> , No. 16-1005, 2018 WL 2372594 (May 25, 2018)	26, 27
<i>Tex. Workers Comp. Comm'n v. Garcia</i> , 893 S.W.2d 504 (Tex. 1995)	19, 20

<i>Texas Dept. of Transp. v. Sefzik</i> , 355 S.W.3d 618 (Tex. 2011)	39
<i>Thompson v. Velasquez</i> , 155 S.W.3d 551 (Tex.App.—San Antonio 2004, no pet.).....	45, 46
<i>Vill. of Tiki Island v. Ronquille</i> , 463 S.W.3d 562 (Tex. App.-Houston [1 st Dist.] 2015)	20
<i>Winfrey v. Chandler</i> , 159 Tex. 220, 318 S.W.2d 59 (Tex. 1958)	46
<i>Woods-Tucker Leasing Corp. of Georgia v. Hutcheson-Ingram Dev. Co.</i> , 642 F.2d 744 (5th Cir. 1981).....	24
<i>Zgabay v. NBRC Prop. Owners Assoc.</i> , No. 03-14-00660-CV, 2015 WL 5097116 (Tex. App. - Austin 2015, pet. denied)	17

Statutes

Tex. Civ. Prac. & Rem. Code § 37.004	39
Tex. Civ. Prac. & Rem. Code § 37.006	39
Tex. Civ. Prac. & Rem. Code § 37.009	51
Tex. Civ. Prac. & Rem. Code § 37.011	41
Tex. Civ. Prac. & Rem. Code Ch. 37 (DJ Act)	17
Tex. Gov't Code § 24.007	45
Tex. Gov't Code § 24.008	45
Tex. Gov't Code § 24.011	45
Tex. R. Civ. P. 166a(c).....	17
Tex. Tax Code § 156.101.....	35
Texas Gov't Code Ch. 24.....	16

Treatises

3 Sutherland Statutes and Statutory Construction § 64:1 (7th ed.) .	27
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Constitutional Provisions

Tex. Const. art. I, § 19	21
Tex. Const. art. V, § 8	44, 45
Texas Constitution art. V, § 8	16
U.S. Const. amend IX.....	21
U.S. Const. amend. V	21

Ordinances

Austin, Tex. Code of Ordinances § 25-2-3.....	32
Austin, Tex. Code of Ordinances § 25-2-511	5, 29
Austin, Tex. Code of Ordinances § 25-2-788	5
Austin, Tex. Code of Ordinances § 25-2-789	5, 20, 32
Austin, Tex. Code of Ordinances § 25-2-791	2

ORAL ARGUMENT IS REQUESTED

This case challenging the constitutionality of a municipal ordinance regulating short-term property leasing presents somewhat complex facts and procedure as well as important constitutional issues. Oral argument would assist the court.

STATEMENT OF THE CASE

Nature of the case: A homeowner sued a city to have a municipal short-term rental ordinance declared unconstitutionally vague as applied.

Trial court: Hon. Darlene Byrne, Travis County 126th District (MSJ); Hon. Amy Clark Meachum, Travis County 201st District (plea to the jurisdiction, motion to sever).

Course of proceedings: The homeowners sued for a declaratory judgment or in the alternative for mandamus relief against a municipal court judge. The parties filed cross-motions for summary judgment on the constitutional issues. After that was decided interlocutorily, the City sought to dismiss the mandamus request for lack of subject-matter jurisdiction. The City agreed to sever the mandamus portion of the case if the trial court denied the City's plea to the jurisdiction so that the constitutional claim would be final and appealable.

Disposition below: On cross-motions for summary judgment, the trial court dismissed the homeowners' constitutional claim. **Tab A.** It later dismissed their mandamus request for lack of subject matter jurisdiction. **Tab C.** That necessitated denial of the homeowners' request to sever the mandamus portion of their suit and thereby created finality for this appeal. **Tab D.**

ISSUES PRESENTED

1. If an ordinance expressly bars a property owner from leasing for less than 30 days, but the city also imposes unwritten, shifting requirements that bar the homeowner from leasing for 30 days or more, is the ordinance unconstitutionally vague as applied?
2. Does sovereign immunity bar a citizen from seeking to have a city ordinance declared unconstitutional as applied where the citizen seeks solely equitable relief?
3. Does a state district court have jurisdiction to hear a mandamus petition which seeks relief against a municipal court judge? (And if so, is ordinary appeal or mandamus the correct avenue for further review or relief?)

INTRODUCTION

The City of Austin forbids homeowners from renting out their homes for less than 30 days unless they obtain a short-term rental license. It naturally follows that a homeowner can rent out a home for 30 days or more without a license.

Wrong! Once the City targets a home for enforcement, the City imposes arbitrary, unwritten, contradictory requirements which make it impossible for a property owner to escape the short-term rental ordinance, no matter how long the rental term. The City forbids multiple tenants even though its ordinances expressly allow multi-tenant rentals. The City requires that all tenants physically and continuously occupy a home for 30 days or more and swoops in at any time to interrogate tenants about their comings and goings. The City requires that tenants produce their lease, but then when it is produced and shows a term of 30 days or more, the City continues prosecuting the owner for renting for short terms.

There is no escape from the Austin STR Ordinance if the City is determined to enforce it. The City makes things up as it goes along because it wrote a bare-bones ordinance that leaves everything beyond a 30-day term to guesswork. The City's STR ordinance does not give fair notice of a continuous occupancy requirement, or that multi-tenant leases are forbidden if any tenant is not present for the full term, or that leases must be posted for inspection. The STR ordinance is unconstitutionally vague as applied because enforcement is arbitrary and standardless.

STATEMENT OF FACTS

I. THE ANDINGS LEASE OUT THEIR AUSTIN HOME FOR 30 DAYS OR MORE

The Andings live in Houston but also own a handsome 5000-square foot, six-bedroom second home on Lake Austin which they use for family enjoyment. CR244, 269-70, 477-79, 482, 496. They don't qualify for an Austin short-term rental license because their Austin home is not their principal residence. CR269-70, 492, 509; *see* Austin, Tex. Code of Ordinances § 25-2-791(G) (owner principal residence requirement).¹ Accordingly, to avoid the STR ordinance altogether, they rent out their home for 30 days or more, sometimes to one tenant, sometimes to several. CR270, 496, 512, 682. They advertise the home solely for lease terms of 30 days or more. CR983, 990-92.² They employ an agent to manage their property, Turnkey Vacation Rentals, located in Austin. CR270, 345, 481, 496, 982.

The Andings' lease form is a garden-variety 30-day lease. **Tab G**; CR270-71; 347-394. The lease gives every signatory tenant full possession for the entire lease term and, concomitantly, obligates every tenant to pay the entire lease amount and fulfill all other tenant obligations under the lease. **Tab G**; CR498-500; CR682 (Tr. p. 35). The lease also allows the tenants in a multi-tenant lease to "enter into their own separate agreement for the sharing of the Property, including agreed upon periods of occupancy." **Tab G**. The

¹ Hereinafter, for brevity, simply "Ordinances."

² At summary judgment, portions of the City's affidavits concerning the Anding's ads were struck for lack of authentication and hearsay. **Tab B**.

Andings provide such a form if the tenants wish to use it, but it expressly states that the Andings are not party to it. **Tab H**; CR504-505. Nor do the Andings require the side agreement. CR270-71, 504-505, 515. It would be anomalous if it did: the side agreement requires each tenant to acknowledge and accept liability to the other tenants for breach. **Tab H**.

Whether there is any such side agreement or not, the full rent is due to the Andings before the end of the lease term regardless who actually stayed there, how long they stayed, or who writes the checks. CR270, 499-500, CR682 (Tr. p. 35). The Andings' leases run the full 30 days and afford every tenant sole and unfettered possession for all 30 days even if tenants, as among themselves, make side arrangements. CR80 (Tr. p. 56), 81 (Tr. p. 60), CR347 (lease ¶ 4), 353 (co-tenant side agreement), 485, 499, 982.

In testimony, the Andings' property manager explained that his firm handles the negotiations with prospective tenants for long-term (30 days or more) leases, usually online. CR79-82; CR504-508. If negotiations break down because a given tenant or tenants won't agree to the full monthly rent, the Andings don't lease the property. CR82 (Tr. p. 63). If multiple tenants do end up signing a lease, the property manager accommodates that and keeps track of paperwork but does not get involved in booting any tenant who doesn't abide by a sharing arrangement as among the tenants:

MR. SUTTON: So the lease leaves open the possibility that the tenants may share at the same time, right? They could all be there at the same time. And indeed, any one tenant could insist that she gets to stay there while Bill's there, right?

MR. CLARK: They could, yeah.

MR. SUTTON: Now, if they did, that might be a violation of their agreement as between each other?

MR. CLARK: That's right. With the landlord, that would not be an objection --

MR. SUTTON: Right.

MR. CLARK: -- (indiscernible).

MR. SUTTON: But the landlord is not doing that, correct? The --

MR. CLARK: Correct.

CR81 (Tr. p. 57). In sum, the Andings do not meddle with the tenants' comings and goings and their private affairs. CR507, 515.

The City's position initially seemed to be that the tenant side agreement was the problem, arguing that it renders the separate 30-day lease between landlord and tenants a subterfuge or sham. However, as will be seen, the City's position evolves each time the Andings try to comply, to the point where even a one-tenant lease with no side agreement triggers citations.

II. AUSTIN REQUIRES A LICENSE FOR LEASES OF LESS THAN 30 DAYS

The City's short-term rental ordinance requires a property owner to obtain an STR license if a home –

“is rented for periods of less than 30 consecutive days.”

Ordinances §§ 25-2-788, 789 (“STR Ordinance”) (**Tab E**). The STR Ordinance does not facially require anything other than a lease term of 30 days or more. It does not require continuous, physical occupancy by a tenant, for example. It does not forbid multi-tenant leases.³ It does not require residential leases to be posted, published, displayed, or available on demand for inspection. It does not forbid advertising for 30 days or more. There is literally, on the face of the ordinance, nothing for a property owner to do to avoid the STR licensure requirement except lease for 30 days or more. Yet the City imposes unwritten, ever-shifting additional requirements, as demonstrated in the following sections.

III. AUSTIN CITES THE ANDINGS FOR NOT HAVING AN STR LICENSE FOR LEASES OF 30 DAYS OR MORE

In 2016, the Andings began getting targeted by a neighbor who constantly phoned in complaints to the City, CR511, whereupon the City began sending code enforcement officers to the Andings' home regularly, CR271, 482-83, 488, 677. Officers would enter the Andings' property to investigate for ordinance violations and

³ Austin does, in fact, allow multiple-tenant leases among unrelated persons: the City allows up to six unrelated adults or ten unrelated seniors over 60 “to reside in a dwelling.” Ordinances § 25-2-511 (**Tab F**).

interrogate anyone present, including the Andings, their friends, their tenants, tenants' friends or guests, and people who perform services at the home. CR482-83. This made the Andings feel like criminals for using their own home. CR483.

The City started issuing warnings, administrative citations, and notices of violation for the Andings' failure to obtain an STR license and for advertising an STR. CR293-316; 330-331; 903-906; 1052-55. The City threatened the Andings with criminal charges, civil penalties of up to \$1,000 per violation, fees, suspension or cancellation of the Andings' certificate of occupancy, utility disconnection, civil injunctions or penalties, and demolition of the home. CR500-501; 503; 546.

After the City began prosecuting the Andings for the multi-tenant leases, the Andings tried to avoid further citations by renting to only one tenant for 30 days at a time. **Tab I** (including CR1064). To no avail: the City slapped the Andings with more citations in 2017 when there was only one tenant. CR977, 982-89. The code enforcement officers found, in their words, women "standing in front of the property" who said they were "renting the property for a 'girl's weekend'" and would be leaving after three days. CR819, 823. One of the code enforcement officers emailed the Andings' property manager, who pointed out that one tenant rented the house for the entire 30 days and offered to supply a copy of the lease. CR1064. Code enforcement nevertheless went out again the next day and

slapped the Andings with another citation. CR726-31/CR1050-55. There were no other tenants or in-force leases during those 30 days. CR977, 982-89. There was no early termination or other sham scenario that would let the tenant off the hook for the full 30 days of rent and all damages. There was nothing but that one tenant (and her friends, guests, or family, as may be the case) who bought and paid for 30-days' sole and exclusive use of the Andings' home. CR977, 982-89.

IV. THE CITY PROSECUTES THE ANDINGS FOR THEIR 30-DAY LEASES

The City prosecuted the 2016 multi-tenant citations administratively. CR299-302; 311-322; 328-333. The Andings argued at successive administrative hearings that leased their home solely for 30 days more in order to avoid violating the STR Ordinance, irrespective whether several tenants on a given lease separately entered into their own agreements to divvy up their occupancy. CR67-90 (Jan. 2017), 396-409 (July 2017 in part). The Andings established that they had also rented to a single tenant for 30 days in September 2016. CR82 (Tr. p. 62). They made no bones about their willingness to allow multiple tenants to enter into a lease to be able to afford to rent the large house. They argued vigorously that because every tenant was fully liable for all rent and damages, and thus entitled to a full 30 days of possession, their leases were ordinary long-term leases, not shams. CR 82-85.

At the administrative hearings and in subsequent courtroom testimony, the Andings have always conceded that a given tenant might stay for only a few days even if the tenant bought the entire 30 days. CR505, 683-84 (Tr. pp. 37, 40-41). The Andings don't care which tenant is in the house so long as all the rent gets paid. CR493-94, 504-505.

The City's position at the administrative hearing was unclear and its evidence contradictory. What it amounts to, however, is that prosecution of a homeowner depends on (1) whether the homeowner gets targeted by an irate neighbor, (2) whether a tenant comes and goes instead of staying put, and (3) whether a tenant keeps a written lease on hand for inspection. As the evidence showed:

- City code enforcement officers testified that they asked tenants how long they were *staying*, not the term of their leases. CR68 (Tr. p. 6), 69 (Tr. p. 12), 70 (Tr. p. 14), 72 (Tr. p. 21); CR679 (Tr. p. 23), 680 (Tr. p. 26). If the tenant answered by saying fewer than 30 days (for example, "the weekend"), the officers issued a citation. CR 69 (Tr. p. 6), 69 (Tr. p. 12); 70 (Tr. p. 14), 72 (Tr. p. 21); CR678 (Tr. p. 18), 680 (Tr. p. 26).
- No code enforcement officer reviewed an actual lease before issuing a citation nor used any legal process to obtain such evidence. CR71 (Tr. pp. 18-21), 73 (Tr. p. 27). One officer conceded that tenants "never have them on hand . . . that's

kind of a moot point.” CR71 (Tr. p. 18). The City never made any effort to learn whether a tenant had a right to a full 30 days of rental occupancy.

- At odds with trying to determine how long a tenant “stays,” the officers also testified that they would not have issued citations had they seen the Andings’ 30-day lease. CR71 (Tr. p. 25-26); CR676 (Tr. p. 12). They also testified that *if* they had been shown the 30-day lease, they would not have required each tenant to physically occupy the property for the full 30-day lease term. CR71 (Tr. pp. 25-27); CR676-77.
- Once the leases were presented, the City continued prosecuting the Andings nevertheless.

The most one can take away from the City’s presentations at the administrative hearings is that whether code enforcement issues a citation depends on the happenstances of a given tenant’s physical presence at the home as well as tenant recordkeeping. CR501 (testimony of Turnkey).

Accordingly, whether an owner gets *issued a citation* for not having an STR license depends on whether:

- a tenant who answers the door presents to the officers a written 30-day lease on the spot; or

- a tenant who answers the door but who does not have a copy of the lease intends to physically and continuously stay at the home for 30 days or more.

Nevertheless, as the evidence in this case also makes clear, whether a homeowner then gets *prosecuted* depends solely on whether a tenant “stayed” for less than 30 days, because the Andings’ ultimate production of a 30-day lease, whether with one tenant or with several, has never led the City to dismiss any citations or proceedings.

The hearing officer determined that the Andings’ multi-tenant leases were a “subterfuge” because the Andings provide and administer (through their property manager’s recordkeeping and rent collection practices)⁴ the side agreement between the tenants. CR120, 132. The hearing officer fined the Andings \$600 at the first hearing and \$4,445 at the subsequent hearing. The Andings ultimately appealed both hearing decisions to the Austin Municipal Court, which affirmed the first decision and abated the second pending the resolution of this lawsuit. CR324; 326; 334-336; 708-710.

The City has so far not set an administrative or municipal court hearing for the 2017 citations involving *one* tenant under a 30-day lease.⁵ In the district court proceedings below, however, the

⁴ The Andings accept however many checks make up the full rent and maintain with the lease papers any tenant side agreement.

⁵ The Andings would later learn that these citations were issued the

City has defended the validity of those 2017 citations on the basis that the tenant did not produce the lease on the spot – yet another requirement that the STR Ordinance does not impose. The City has made no move to dismiss those citations.

V. THE TRIAL COURT REJECTS THE ANDINGS’ CONSTITUTIONAL VAGUENESS CHALLENGE

The Andings filed suit in the district court seeking alternative avenues of relief:

- a declaratory judgment that the Austin STR ordinance is unconstitutionally vague as applied and therefore not enforceable at all; or
- mandamus relief that the district court order the municipal court to apply the STR Ordinance correctly.

CR993.⁶ They sought a temporary injunction to enjoin new citations but were denied. CR239 (TI order); CR450-580 (TI Hearing Tr.); 581-722 (TI Hearing Exhs.).

The parties filed cross-motions for summary judgment on the Andings’ constitutional claim, and the Andings objected to portions of affidavits submitted by the City. The Andings also sought summary judgment on an unpled claim that the Andings’ leases are

weekend before their temporary injunction hearing in this case, so they were not able to put them into evidence at that time.

⁶ The Andings had initially sought mandamus relief against Austin’s mayor but nonsuited it in the course of the litigation. Later, in their Third Amended Petition, the Andings sought mandamus relief against Municipal Court Judge Clervi. There are no live issues on appeal concerning the nonsuited mandamus petition against Mayor Adler.

exempt from the STR Ordinance. The City, for its part, also sought summary judgment on its ostensible defense of sovereign immunity, which duplicated its plea to the jurisdiction.

The parties' dueling summary judgment contentions were as follows:

Anding MSJ	City of Austin MSJ
Asked the court to declare the Austin STR ordinance unconstitutional.	Sought dismissal of the Andings' constitutional claim; and Asserted sovereign Immunity as barring a request for mere interpretation of a city ordinance.
Asked the court to declare the Andings' leases exempt from the Austin STR Ordinance. ⁷	Asserted sovereign Immunity as barring a request for mere interpretation of a city ordinance.

The trial court denied the Andings' motion for summary judgment and granted the City's. In a separate order, the trial court sustained the Andings' evidentiary objections to the City's misleading use of incomplete copies of the Andings' advertisements.

⁷ The trial court's dismissal of this claim for declaratory relief, which the Andings raised at summary judgment, is not being appealed. It is effectively the mandamus relief the Andings have sought in the district court since it attacks the municipal court judge's interpretation of the Austin STR Ordinance.

Following summary judgment, the City set a hearing on its plea to the jurisdiction seeking dismissal of the Andings' mandamus petition, which the trial court granted.⁸ The Andings had filed a motion to sever their DJ case from their mandamus case, which was heard at the same time. The City agreed at the hearing to severance if the trial court determined it had jurisdiction. Since the trial court granted the plea to the jurisdiction, severance became moot.

This appeal followed, along with the separate but related mandamus petition in this court assailing the district court's dismissal of the mandamus petition below.

SUMMARY OF ARGUMENT

Concerning the Andings' affirmative contentions:

The Andings have standing to bring a constitutional challenge because the way the City of Austin enforces the STR Ordinance prevents the Andings from leasing out their property for any duration, short or long.

The Austin STR Ordinance is vague as applied to the Andings. It facially allows property owners to avoid STR licensure if they lease out their homes for 30 days or more. Yet when the Andings lease for 30 days or more, the City still requires them to have an

⁸ The trial court at the same time denied the Andings' motion to sever their district court mandamus request from their DJ claim, a motion rendered moot by dismissal of the mandamus request. The City had agreed to severing the separate claims should they both proceed, however, so that this appeal could continue on the Andings' constitutional claims.

STR license. The City's rationale shifts every time the Andings try to comply, so they cannot escape prosecution. They are being hounded and vilified for mere avoidance of a law.

The City's first rationale was that it had not verified that the leases were 30-day leases, but when later shown the leases, it continued to prosecute.

The City's next rationale was that when multiple tenants agree as among themselves to divvy up their possessory period, the tenants' side agreement renders the original lease landlord-tenant lease a sham – an evasion of the ordinance rather than a mere avoidance of the ordinance. Yet the City's ordinances elsewhere contemplate and allow multi-tenant leases without any restriction on tenant sharing arrangements. In any event, when the Andings tried to comply by renting to only one tenant under a 30-day lease, and even offered up a copy of the lease, the City still cited them for not having an STR license and is still prosecuting them.

Thus, logically, there are only two possible rationales for the City's enforcement:

1. Every tenant (and resident) under a lease of 30 days or more must be physically and continuously present at a rental property for 30 days or more.
2. A copy of every lease of 30 days or more must be posted or else presented to the City on demand during any unannounced inspection.

The STR Ordinance does not contain these requirements and does not give fair notice of these requirements.

Even if the mandatory, continuous occupancy requirement were clear, it would still be too vague and standardless to be enforceable. People come and go as they please in a free society. Tenants are free to arrange their own affairs as among themselves, separate from landlord interference. The varieties of living arrangements are endless.

Concerning the City's affirmative contentions:

There is no universal understanding that municipal STR ordinances around the country apply to "*stays*" of less than 30 days. And the Austin STR Ordinance on its face applies to *leases* of less than 30 days, not *stays* of less than 30 days. The City offers no proof at all concerning how other cities enforce similar requirements.

The Texas Hotel Tax, expressly applicable to homes rented for less than 30 days, not only does not support the City's contentions, but undermines them: the Hotel Tax applies to "*the right to use or possess*" a rental property, not to the period of physical occupancy.

The Andings' dispute is not hypothetical. The Andings are being actively and continually prosecuted and with escalating consequences, including threatened demolition of their home.

The City is mistaken in framing this as a substantive due process challenge like the eyebrow threaders' challenge in *Patel*. The Andings are not contending that the City's STR Ordinance has

no valid basis, but instead that the City's enforcement of the STR Ordinance is arbitrary and standardless – that is, vague as applied. The showing the Andings must make for such a vagueness challenge is not the same as the showing required for a substantive due process challenge. The Austin STR ordinance must on its face give fair notice how to avoid the requirement of an STR license; as applied by the City, it does not.

Concerning the City's ostensible affirmative defense of sovereign immunity, that theory does not bar the Andings' unconstitutional vagueness claim. A declaratory judgment is the appropriate manner of bringing such a challenge so long as only equitable relief is sought, as is the case here. The Andings' constitutional claim is, moreover, separate and distinct from their request for mandamus relief as against the municipal court judge, as well as from the ongoing, parallel administrative processes which have their own, separate finalities upon final review by the municipal court.

Concerning the trial court's grant of the City's plea to the jurisdiction, the Andings have separately sought mandamus relief in this court. However, if that order is reviewable by ordinary appeal, then this Court should reverse because district courts have the power under both Texas Constitution art. V, § 8 and Chapter 24 of the Texas Government Code to order mandamus relief against municipal court judges. The standard for obtaining such relief is (1)

no adequate appeal remedy and (2) the existence of a ministerial act such as a failure to apply the law correctly. The Andings satisfied both prongs in seeking mandamus relief against the municipal court judge.

Concerning procedural matters, given that the City agreed below that this ordinary appeal should proceed on the merits of the constitutional issues, the Andings' mandamus petition, once live again in the district court, should be severed from their constitutional claim so that there are no finality issues precluding this ordinary appeal. Alternatively, this appeal should be abated pending resolution of severance on its merits on remand.

Should the Andings prevail on appeal, remand is necessary on their claim for discretionary attorney's fees under the DJ Act.

ARGUMENT

I. SUMMARY JUDGMENT REVIEW IS DE NOVO

Summary judgments are reviewed *de novo*. See *Zgabay v. NBRC Prop. Owners Assoc.*, No. 03-14-00660-CV, 2015 WL 5097116, at *1 (Tex. App. - Austin 2015, pet. denied) (mem. op.). Summary judgment is proper only if the movant establishes that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. *Id.*; Tex. R. Civ. P. 166a(c). When both parties seek summary judgment and the court grants one and denies the other, the court of appeals renders the judgment that the trial court should have rendered. *Id.*

II. THE TRIAL COURT SHOULD HAVE GRANTED THE ANDINGS' MOTION FOR SUMMARY JUDGMENT ON THEIR DJ CLAIM

The Andings sought summary judgment on their claim for declaratory judgment that the Austin STR Ordinance is unconstitutionally vague as applied. The City sought summary judgment dismissing that claim on the merits and on jurisdictional grounds.

So that all conceivable bases for the trial court's denial of the Andings' MSJ and grant of the City's MSJ are addressed, this brief is organized as follows:

Anding DJ claim MSJ contentions:	Section II.A - D
City Opposition to DJ MSJ contentions:	Section II.E - G
City MSJ contentions on defense:	Section III
City Plea to the Jurisdiction:	Section IV

The Andings' MSJ Contentions

A. The Andings Have Standing to Bring a Constitutional Challenge

The Andings have standing to challenge the constitutionality of the Austin STR ordinance as applied because they own, use, and operate a rental property in Austin and are therefore injured by the City's application of the STR ordinance to the Andings' leases of 30 days or more. The City did not contest standing below; it is briefed for purposes of clarity and completeness given that standing is an aspect of subject-matter jurisdiction.

Standing assures that there is a real controversy between the parties that can be determined by the judicial declaration sought. *Brown v. Todd*, 53 S.W.3d 297, 305 (Tex. 2001). To establish standing for declaratory relief, the Andings must claim that the Austin STR ordinance is unconstitutional and that it has, or likely will, injure them or restrict their rights in some way. *Tex. Workers Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 518 (Tex. 1995).

The Austin STR ordinance's facial application to rentals of less than 30 days injures the Andings because the City is enforcing the STR ordinance against their leases for 30 days or more. In so doing, the Andings are barred from renting *at all*:

- for *short terms* because licenses are not afforded to owners of second homes;
- for *long terms* because the City requires tenants under long-term leases to physically occupy a rental property for at least 30 consecutive days.

The Andings purchased and own Austin real property so that they could use it themselves and lease it to earn rental income at other times. CR481-484. Renting it out allows them to keep it; otherwise, they would have to sell it. CR484. They will be prohibited from leasing for any term owing to the City's manner of enforcing the ordinance to require all tenants to continuously occupy the home for 30 days or more, subject to drop-in interrogation. This obvious loss of use of the property as a rental property is sufficient to

establish standing. *See Vill. of Tiki Island v. Ronquille*, 463 S.W.3d 562, 587 (Tex. App.-Houston [1st Dist.] 2015) (STR owner had standing to challenge ban on rentals of the type the owner had planned upon when purchasing the property); *see generally Garcia*, 893 S.W.2d 504.

B. The STR Ordinance Exempts Rentals of 30 Days or More

Austin Ordinances § 25-2-789(A)(1), which applies to non-owner-occupied homes, is unconstitutionally vague as applied to the Andings. The ordinance requires an STR license where a home “is rented for periods of less than 30 consecutive days.” However, even though the Andings’ lease out their home for 30 days or more, the City still requires them to obtain an STR license. Thus, the ordinance is vague as applied since satisfying its facial requirements does not prevent prosecution.

The City relies heavily on the multi-tenant leases where tenants have side agreements to defend its position that the Andings’ leases are a sham, but the exception proves the rule: the City prosecutes the Andings when there only one tenant per 30-day lease. That exposes the City’s true position: that if a tenant does not actually stay at the property for the full term of a 30-day lease, then an owner can be prosecuted for not obtaining an STR license. Since the ordinance says nothing of the kind, it is necessarily vague as applied as more fully set out below.

C. Due Process Forbids Vague Ordinances

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* U.S. Const. amends. V, IX; Tex. Const. art. I, § 19; *Lynn v. Bd. of Law Examiners*, 03-97-00478-CV, 1999 WL 46683, at *4 (Tex. App. – Austin 1999, no pet.). The applicable legal standard is as follows:

A statute or ordinance is unconstitutionally vague if the persons regulated by it are exposed to risk or detriment without fair warning or if it invites arbitrary and discriminatory enforcement by its lack of guidance for those charged with its enforcement. Implicit in this constitutional safeguard is the idea that laws must have an understandable meaning and must set legal standards that are capable of application. It is established that a law fails to meet the standards of due process if it is so vague and standardless as to leave a governing body free to decide, without any legally fixed guidelines, what is prohibited in each particular case. Due process is violated and a law is invalid if persons of common intelligence are compelled to guess at a law's meaning and applicability.

Lindig v. City of Johnson City, 03-11-00660-CV, 2012 WL 5834855, at *3 (Tex. App.—Austin Nov. 14, 2012, no pet.) (internal citations and quotes omitted) (ordinance was unconstitutionally vague as applied).

D. The Austin STR Ordinance is Unconstitutionally Vague As Applied

The Austin STR ordinance is unconstitutionally vague as

applied in three respects:

1. The City Applies the STR Ordinance to require actual, physical, continuous occupancy by all tenants

a. The Single-Tenant 30-Day Lease

The City applies the ordinance to require actual, physical, continuous occupancy by every tenant for at least 30 consecutive days. The City cited the Andings in 2017 for a 30-day lease with only one tenant. That tenant may well have had guests staying with her, but that is irrelevant unless the City begins contending that every occupant of a property must also be bound as a tenant on a lease. In this case, the tenant (and her guests) had the run of the property for the 30 consecutive days of the lease.⁹ Nevertheless, the City slapped the Andings with a citation for not having an STR license because the tenant and her friends did not stay for the full 30 days the tenant paid for.¹⁰ The only possible explanation for the 2017 citations is that the City requires tenants to physically, continuously occupy a rental property for 30 days or more.

The City has offered incoherent arguments concerning the 2017 citations, contending that “[the Andings’] tenants admitted that they were using the property for only a few days and did not present any 30-day lease.” Which is it, the length of actual stay or

⁹ State and local maximum occupancy restrictions apply, but those are not at issue. *See, e.g.*, Tex. Prop. Code § 92.010 (lease occup. max.).

¹⁰ The 2017 citations are also for advertising a short-term rental on the internet, but the Andings’ ad expressly states that rentals are for a minimum of 30 days. CR983, 990-92.

the failure to produce a lease? If the City is contending that a violation occurs whenever tenants admit to not staying for their full lease term, then the City is conceding that it applies the STR Ordinance to require physical, continuous occupancy. If the City is contending that producing a 30-day lease cures a violation or satisfies the ordinance, then the City should have dismissed the 2017 citations once the Andings produced their leases. They Andings offered to do so *before the officers returned to the property a second time*, CR1064, and then they produced the leases during both the temporary injunction and summary judgment proceedings below. CR293-309; CR582-629. Yet the citations stand, and the City defends that apparently on the basis that a tenant failure to produce them on demand (which is not a legal requirement) sets the violation for not having an STR license in stone. Said the City in a summary judgment responsive filing:

[B]ecause the Code officers lacked such information, the Plaintiffs cannot prove that the City enforced the Ordinance inconsistently.

CR815. Even when the Andings can prove they had a 30-day lease, the City is so determined to prosecute that proof doesn't matter.

b. The 2016 Multi-Tenant Leases

The analysis for the multi-tenant leases is no different. The City prosecuted the Andings because the several tenants on a lease chose did not wish to cohabit the home during the term of the lease. But that does not change the fact that each tenant had full

possessory rights for the full term and concomitant rent and damage obligations.

c. Avoidance is time-honored; evasion is not

To cite the most obvious example, “there is not even a patriotic duty to increase one's taxes.” *Helvering v. Gregory*, 69 F.2d 809, 810 (2d Cir. 1934), rev'g 27 B.T.A. 223 (1932), *aff'd*, 293 U.S. 465, 55 S.Ct. 266, 79 L.Ed. 596 (1935). Parties are free to structure their affairs so as to avoid federal tax laws or minimize their effects. *See generally Mazzei v. Comm'r of Internal Revenue*, 16702-09, 2018 WL 1168766, at *24 (T.C. Mar. 5, 2018).

More broadly, parties are free to avoid laws, rules, and ordinances to which they do not wish to be subject so long as their actions are not a sham or mere contrivance to evade the law. *Id.*; *Sherwin-Williams Co. v. Comm'r Of Revenue*, 438 Mass. 71, 81, 778 N.E.2d 504, 514 (2002) (in “a rule-based system, objective in nature, that places principal importance on what taxpayers do and the economic consequences attached to those actions,” the question is “not . . . what may have subjectively motivated them to act in the first place.”); *cf. Woods-Tucker Leasing Corp. of Georgia v. Hutcheson-Ingram Dev. Co.*, 642 F.2d 744, 753 (5th Cir. 1981) (avoidance of Texas law by use of a choice of law clause is valid where the other state has a connection to the transaction); *Saturn Capital Corp. v. Dorsey*, 01-04-00626-CV, 2006 WL 1767602, at *8 (Tex. App.—Houston [1st Dist.] June 29, 2006, pet. denied) (same).

The Andings’ leases are simple avoidance, but even more

importantly, their avoidance of the Austin STR Ordinance is necessary because the Andings, as owners of a vacation home, cannot lease for short terms in Austin.¹¹ They *must* lease for 30 days or more in order to lease at all. No one would seriously contend that they may not lease their home for 30 days or more, yet the City's shifting requirements amount to as much.

A subterfuge to *evade* rather than merely *avoid* the Austin STR Ordinance would have suspicious telltales which are not present in this case. For example:

- lease clauses which undermine or prevent 30 days of full possession by a tenant;
- lease clauses which relieve tenants from liability for the full rent or the full damages to the house;
- toothless early termination clauses which excuse a tenant from all but a few days of pro-rated rent and thereby allow the property owner to rent serially for short terms under early-terminated leases;
- ostensible 30-day leases which overlap, giving the lie to the sole possessory interest of tenants on any lease.

No such telltales of evasion are present in this case. The Andings' leases are ordinary 30-day leases that run for full terms. They are

¹¹ While the Andings have not brought a constitutional challenge to the homesteading aspect of the Austin STR Ordinance, its problems are obvious since there is no rational basis for differentiating owners like the Andings, who use their own home as a vacation home, from owners who declare a home their homestead or principal residence.

the kinds of leases that the Andings have no choice but to use, and the Andings undeniably have the right to lease out their home, and to as many people as maximum occupancy laws or ordinances allow.

d. People Are Free to Move and Travel

The Texas Supreme Court recently invalidated several appellate decisions which had imposed a continuous, physical residency requirement on homeowners. Those decisions would have created havoc in the real estate market by barring owners from using their own vacation homes on weekends or renting them out for virtually any duration, short or long. *See Tarr v. Timberwood Park Owners Assoc., Inc.*, No. 16-1005, 2018 WL 2372594, at *13 (May 25, 2018) (restrictive covenant requiring “residential purposes” does not give fair notice that a home must be physically, permanently occupied). The *Tarr* case resoundingly affirms the principle that restrictions must give fair notice what is prohibited.

City zoning ordinances are interpreted similarly to deed restrictions: zoning laws are in derogation of common-law rights to the use of property, and are subject to strict construction favoring the free use of land. *City of Kermit v. Spruill*, 328 S.W.2d 219, 223 (Tex. Civ. App. 1959, writ refused n.r.e). An ordinance must be clear, precise, definite and certain in its terms. *Id.*; accord *Bryan v. Darlington*, 207 S.W.2d 681, 683 (Tex. Civ. App.-San Antonio 1947, writ ref'd n.r.e.) (“All restrictions of the free use of land are in derogation of the common law right to use land for all lawful purposes that go with the title and possession, and are to be

construed strictly against the person creating or attempting to enforce such restrictions.”); 3 Sutherland Statutes and Statutory Construction § 64:1 (7th ed.) (“The legislative grant of authority must be construed, whenever possible, so that it is no broader than that which the separation of powers permits.”).

This case is analogous to *Tarr* because the City applies the STR Ordinance such that “leased for less than 30 consecutive days” requires physical, continuous occupancy for 30 days – the same requirement that the Supreme Court refused to “interpret” into deed restrictions. Just like the ubiquitous “residential use only” restriction construed in *Tarr*, the STR Ordinance says nothing at all about any mandatory physical occupancy requirement, nor anything about tenants who occupy their leased premises only occasionally. The courts cannot “interpret” such a requirement into either an ordinance or a deed restriction that is silent on the point.

Examples show why the City’s application of the ordinance to require physical, continuous occupancy is so unfair and unpredictable:

- Three airline pilots and two flight attendants share a 6-month lease. At any given time, from zero to five persons may be physically occupying the home. When the City shows up to investigate one day, it finds no one home. The City cannot issue a citation because it sees nothing.
- The next day, the City finds one pilot home, but she is

outbound the next day, meaning she only stayed at the home one night. She doesn't return for a month owing to her complicated schedule. The City cites the property for being rented without an STR license even though she had full possessory rights for the entire 30 days.

- On another day, the City discovers all five renters, each with an overnight guest. None are scheduled to be home for more than three days. The City code enforcement officer asks one of the tenants how long he is staying. "Three days, then we all ship out," says the tenant. The City cites the property for being rented without an STR license.
- Same fact pattern, but one of the flight attendants quits his job. He never shows up at the house again. The remaining tenants, not wanting to continue paying more than 1/5 each, decide to quit the lease. The landlord, however, demands the full rent due, whether from any one or all the tenants. The City code enforcement officer shows up on a day when the last remaining tenant is outbound for good. "How long are you staying?" asks the officer. "Just tonight, then I'm never coming back," says the last tenant. The City cites the property for being rented without an STR license.

2. Multi-Tenant Leases Are Effectively Forbidden

The City also applies the ordinance to forbid multi-tenant

leases. When the Andings' tenants divvy up their possession periods, the City considers the actual 30-day term of the lease irrelevant and treats the home as a short-term rental of less than 30 days. This renders virtually any multi-tenant lease of 30 days or more (including annual leases) a short-term rental because people who share rent come and go as they please, as is their right.

There are endless reasons why individuals living together in a home would agree as among themselves to avoid or not trip over each other, anything from rotating medical-related stays to occupational demands to second-home use. But so long as every individual has the right under the lease to full-time possession and is liable for the full rent and all other obligations under the lease, then the lease is truly for the duration it says it is. The Andings would have no contractual right to boot any tenant during the 30-day lease term *even if* one tenant has a dispute with another over their respective occupancy periods.

The Andings did not have fair warning that the City would use the STR license ordinance to bar multi-tenant leases if all the tenants do not occupy the property all the time. Just the opposite, as the City's other ordinances allow up to six unrelated adults or ten unrelated seniors over 60 "to reside in a dwelling" without any mention of mandatory physical occupancy for those unrelated persons. Ordinances § 25-2-511. The Andings thus reasonably believed that multi-tenant occupancy was allowed and that tenants

could come and go as they please. And since a lease for anything from 30 days to 30 years is facially exempt from STR licensure, the Andings had no reason to expect that the City would apply the STR ordinance in a multi-tenant lease situation of 30 days or more.

***3. The City's Application of the STR Ordinance
Interferes With Freedom of Movement and Contract***

The City applies the ordinance to require landlords to police their tenants' comings and goings and to forbid tenants from entering into voluntary agreements as among themselves as to their shared leasehold interest. The City in effect forbids tenants from agreeing solely as among themselves how they wish to live their lives and conduct their private affairs.

Neither the City nor the administrative hearing decisions offer any rationale why tenants cannot divvy up their 30-day occupancy period as they wish. Such side arrangements have nothing to do with the validity or enforceability of the lease with the Andings. Since each tenant has a full possessory interest for the full lease term, and each is fully liable for the rent, the tenants' side agreement does not bind the landlord to anything nor relax the terms of the lease.

Yet the side agreement does conspicuously represent a bargained-for exchange as among the tenants concerning their own private affairs. The City applies the STR ordinance, in effect, to prevent adults from deciding how they wish to arrange their living affairs under a lease of *any* duration of more than 29 days. Nothing

in the STR ordinance gives a property owner fair warning that an arrangement solely as between the tenants concerning their comings and goings could result in penalties against the owner.

Summary of the Andings' MSJ Contentions

In summary as concerns the Andings' affirmative case, any owner would reasonably understand from the City's various ordinances that:

- (1) leases of 30 days or more are exempt from the requirement of an STR license;
- (2) leases to multiple tenants are allowed; and
- (3) there is no mandatory, physical, continuous occupancy requirement in order for a property to be considered "rented" for 30 days or more.

Yet the Andings' evidence shows that the City is enforcing the ordinance against them indiscriminately as to all rentals of all durations and numbers of occupants, and is in addition requiring mandatory, physical, continuous occupancy for 30 days or more by one, some, or all tenants on a lease. That means that virtually all leasing activity falls within the requirement of an STR license because tenants come and go, stay or travel, as they desire.

The trial court should have granted the Andings' motion for summary judgment on their affirmative claim for declaratory judgment that the Austin STR Ordinance is unconstitutionally vague as applied.

The City's Opposing MSJ Contentions

E. There Is No Universal Understanding What the Austin STR Ordinance Means

The City argues that what constitutes a short-term rental is universally understood and therefore not vague. CR422 (City MSJ at 11). Its several arguments on this score do not survive scrutiny.

1. At Issue Is How Austin Applies the STR Ordinance

The City argues that because a number of cities define a short-term rental as “[t]he rental of a property for a period of less than 30 consecutive days,” the definition is universally understood to apply to *stays* of less than 30 days. CR423-24. Thus, the City concedes it applies the STR Ordinance as requiring physical, continuous occupancy. The City offers zero evidence how other cities apply their ordinances or how other ordinances are “understood.” The City merely quotes a general definition of “short-term rental” under the Austin zoning ordinances (§ 25-2-3(b)(10)) which in its turn incorporates the STR ordinance under challenge (§ 25-2-789(A)(1)). Taken together, the Austin ordinances provide that a short-term rental is a **“temporary or transient” rental** (§ 25-2-3(b)(10)) of **“less than 30 consecutive days”** (§ 25-2-789(A)(1)).

All the City’s argument shows is that other cities, like Austin, require licenses if properties are rented for less than 30 days. That is neither proof nor argument as to how other cities enforce their ordinances or how “short-term rental” is understood. Furthermore,

the City's comparative analysis of several cities' ordinances reveals that, like the Austin STR ordinance, *none* of those other cities' ordinances facially impose a mandatory, physical, continuous occupancy requirement for tenants under a 30-day lease in order for the lease to be exempt from licensure. CR423. All one can say about the other ordinances is that cities around the country require that a lease be for 30 days or more to be exempt from STR licensure.

The City's argument is also deeply hypocritical. The City's code enforcement officers testified that they would not have issued citations had they been shown a 30-day lease on the spot.¹² They also denied that they would impose a physical, continuous occupancy requirement if shown a lease – yet more inconsistency in the City's position.¹³ Yet even after being provided with the Andings' 30-day leases, the City keeps issuing citations and prosecuting the Andings on the basis that the tenants do not physically, continuously stay for the entire duration of their leases. *Which is it?*

The City's motion for summary judgment is breathtaking on this score in its self-contradictoriness:

The Ordinance does not actually state on its face that the definition of an STR requires someone to “actually reside in the property continuously for 30 days or more.” The Ordinance applies to any property “that ... is rented for periods of less than 30 consecutive days.” Because the Plaintiffs' lease and CA arrangement still results in the use of the residential units on a transient basis, the

¹² CR278-79, 281-82, 285-87; CR397-400.

¹³ *E.g.*, CR399-400.

subject property's current use clearly falls within the definition of a STR under the Ordinance.

CR425-26. Paraphrased: the STR Ordinance does not require physical, continuous occupancy but tenants must physically and continuously stay at the property for 30 days or more. Rephrased: the STR Ordinance is silent as to physical, continuous occupancy, but the City enforces the requirement anyway.

While citations and prosecutions were piling up, the Andings tried to conform their leasing practices to the City's contentions by ceasing multi-tenant leases, but that has done no good. First the City says "show us the lease," but if presented with it, the City says, "it doesn't matter what the lease says." Austin applies "property is rented for less than 30 consecutive days" to mean "property is not physically and continuously occupied by its renters for 30 days or more." That's not what the ordinance says, and there is zero evidence that anyone anywhere understands it that way.

2. The Hotel Tax Definition Supports the Andings' Case

The City argues that a state tax designed for maximizing revenue informs the meaning of the Austin STR ordinance. CR422. Thus, according to the City, the Legislature intended to *bar* STR's and defeat state revenue goals by having its broad definition intended to capture revenue be utilized by cities when enforcing ordinances.

The argument makes no sense on its face, but in any event, it's undermined by the very statutory wording the City relies upon. The

Texas Hotel Tax exempts the imposition of the tax “on a person who has *the right to use or possess* a room in a hotel for at least 30 consecutive days” Tex. Tax Code § 156.101 (emph. added). As the highlighted language makes clear, actual, physical occupancy is *not* required for a lease to be exempt from the tax. All that is required is that a tenant has the *right* to such occupancy. That is what the Andings’ leases expressly, according to their clear terms, give to tenants.¹⁴ Whether a tenant *stays* for less than 30 days has no bearing on whether hotel tax is owed; month-to-month rentals are not taxed at the state level.¹⁵

F. The Andings’ Challenge is Not Hypothetical

The City next argues that the Andings’ challenge is based on purely hypothetical scenarios and thus does not present a justiciable controversy. CR426.

In fact, the Andings’ evidence establishes that they have been and continue to be prosecuted in the following scenarios:

- Renting to one tenant for 30 days;
- Renting to one tenant for 30 days where the tenant does not physically, continuously stay at the property for 30 days;
- Renting to multiple tenants;

¹⁴ CR347-392, 732/1056 (leases reciting tenant possessory periods).

¹⁵ The Andings property manager, Turnkey, to avoid compliance issues, remits state occupancy taxes for 30-day leases while awaiting clarification from the state comptroller. CR513-15.

- Renting to multiple tenants for 30 days where any of the tenants do not physically, continuously stay at the property for 30 days;
- Renting to multiple tenants who divide up their common possessory period under agreements between them separate from the lease.

At this point, with citations being issued when only one tenant leases the property for 30 days, and when any one tenant under a multi-tenant lease does not stay continuously for 30 days, it is impossible for the Andings to lease their property without the threat of enforcement by the City. The controversy is live and justiciable.

G. The Standards for A Substantive Due Process Challenge Do Not Apply to an Unconstitutional Vagueness Challenge

Finally, the City contends that the Andings must prove all the elements of a substantive due process challenge. CR426; *See Patel v. Texas Dep't of Licensing & Regulation*, 469 S.W.3d 69, 75–76 (Tex. 2015). In *Patel*, unlicensed eyebrow threaders challenged economic regulation not on the basis that it was unclear – it was only too clear that an occupational license to shape eyebrows required 1500 hours of instruction – but that it had no rational basis. *See id.* at 87. The Texas Supreme Court struck down the requirement as irrational.

This case, by contrast, falls under the separate vagueness doctrine. *See F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239,

253 (2012) (modern vagueness challenge requirements); *Lindig*, 2012 WL 5834855, at *4 (Texas application of vagueness doctrine). The Andings are not suing on the basis that the City *cannot* regulate short-term leasing, but that if the City *does*, its ordinance must give fair notice how to avoid the requirement of an STR license.

In a case holding unconstitutionally vague a common phrase (“substantial work”) that was being applied *ad hoc* by city officials, the Austin Court of Appeals quoted a long line of authority as follows:

“It is established that a law fails to meet the standards of due process if it is so vague and standardless as to leave a governing body free to decide, without any legally fixed guidelines, what is prohibited in each particular case.” *Id.* Due process is violated and a law is invalid if persons of common intelligence are compelled to guess at a law's meaning and applicability. *Attic Club*, 457 S.W.2d at 45; *Pennington v. Singleton*, 606 S.W.2d 682, 689 (Tex.1980); *Signad*, 682 S.W.2d at 646.”

Lindig, 2012 WL 5834855, at *3. The application of the law to the facts in that case is readily applicable to this case, with the relevant substitutions bracketed:

[P]eople of common intelligence do not have fair notice as to *[whether an STR license is required]* for a residential *[lease of 30 days or more]*. Just as important, the seemingly boundless discretion vested in the [code enforcement official] to interpret and apply the term invites arbitrary and discriminatory application. *Cf. Coffee City v. Thompson*, 535 S.W.2d 758, 763 (Tex. Civ. App.-Tyler 1976, writ ref'd n.r.e.) (“An ordinance leaving the question of issuing or denying building permits to the arbitrary discretion or determination of the city secretary

without any rule or standard to follow is invalid.”). . . . The City does not explain how a standardless determination by the *[code official]* survives a vagueness challenge merely because an appeal body can review that determination. We conclude that the absence of reasonable guidelines or standards renders the term *["rental of less than 30 consecutive days"]* unconstitutionally vague as applied to the *[Andings]* regardless of who is making that determination.

Id. at *5.

In this case, code enforcement officials show up at the Andings’ home and, based on nothing more than a tenant who states she is staying for a few days, issue a citation for the Andings’ failure to obtain an STR license. The Andings then appeal with an administrative procedure culminating in municipal court review, but at no point does providing a copy of a lease with a term of 30 days or more cause the City to relent. Instead, the City blames the Andings because tenants did not present a copy of the lease when code enforcement officers showed up, as if the *timing* of presentation of the lease dictates whether or not the Andings must obtain an STR license!

Whether or not the City has a rational basis for regulating STR’s, the City has not made clear what leases are *not* STR’s. Even a single tenant under a 30-day lease provides no safe harbor. At this point, based on the way the City applies the STR ordinance, *any* lease might be subject to enforcement on any given day because *any* tenant may not physically and continuously occupy the property for the full lease term.

Summary of the City's MSJ Contentions

The City has made no showing nor any valid argument that the Austin STR Ordinance is universally understood as a physical, continuous occupancy requirement which requires tenants to “stay” at a home for 30 consecutive days. Accordingly, the trial court should have denied summary judgment to the City on the Andings’ DJ claim.

III. THE TRIAL COURT SHOULD HAVE DENIED THE CITY’S MOTION FOR SUMMARY JUDGMENT ON ITS AFFIRMATIVE DEFENSE

The City also moved for summary judgment based on sovereign immunity, duplicating arguments the City made in its plea to the jurisdiction.¹⁶ CR414. However, sovereign immunity does not bar the Andings’ constitutional challenge.

The DJ Act allows a party to challenge the constitutional validity of a city ordinance. Tex. Civ. Prac. & Rem. Code §§ 37.004, 37.006(a); (b).¹⁷ However, it is conceded that that does not allow a party to have declared the meaning of an ordinance, or the party’s rights declared, or to challenge a city’s actions pursuant to an ordinance. *See Texas Dept. of Transp. v. Sefzik*, 355 S.W.3d 618, 622 (Tex. 2011); *McLane Co., Inc. v. Texas Alcoholic Beverage Comm’n*, 514 S.W.3d 871, 875 (Tex. App.—Austin 2017, pet. denied). The

¹⁶ A claim of sovereign immunity is not a defense as such because in most instances it implicates the existence of subject-matter jurisdiction. *See Rusk State Hosp. v. Black*, 392 S.W.3d 88, 95 (Tex. 2012).

¹⁷ The Andings served the Attorney General as also required. CR22.

court's jurisdiction is limited to striking down the ordinance or not, and granting equitable-type relief to give effect to its judgment.

The City contends that subject-matter jurisdiction is lacking because the Andings “are not challenging the validity of the [STR] Ordinance.” CR416. Instead, argues the City, the Andings are merely asking the court to *interpret* the STR Ordinance because the Andings disagree with how the City enforces it.

In fact, the Andings pursued *both* constitutional validity and interpretation at summary judgment, along with a separate mandamus request attacking the municipal court's interpretation. *See* table, *supra* at 13. The Andings do not appeal dismissal of their summary judgment motion's request for an interpretation of the STR Ordinance (that is, whether their leases are exempt). Instead, they appeal solely their well-pled constitutional claim, as explained in the next section.

A. The Claim of Constitutional Infirmary Stands On Its Own as a Valid DJ Claim

The Andings' constitutional claim stands on its own, separate from the parallel administrative processes (citations, administrative hearings, and municipal court appeals). The Andings are not even entitled to further appeal from municipal court review of administrative decisions. CITE. Accordingly, the Andings' lawsuit asks the court to declare that the STR Ordinance is unconstitutionally vague as applied because the City imposes unwritten requirements that make it impossible for the Andings to

comply or avoid prosecution.

The underlying administrative proceedings and continuing citations are, it is true, *implicated* in the Andings' DJ suit against the City. The administrative proceedings provide the *evidence* of how the City applies the STR Ordinance and prosecutes the Andings arbitrarily. That evidence depicts a pattern of inconsistent positions, unfair and arbitrary enforcement, and outright confusion on the City's part, forming the basis for the "as applied" part of the Andings' challenge to the constitutionality of the STR Ordinance. But procedurally, the administrative proceedings and this lawsuit in the courts run on different tracks toward different final judgments with different kinds of relief.

Should the Andings prevail *in this DJ suit against the City*, they would get declaratory relief and then be entitled to seek "supplemental relief" to enforce the declaratory judgment, and that supplemental relief could include an injunction barring the issuance of further citations. Tex. Civ. Prac. & Rem. Code § 37.011 (allowing supplemental applications "based on a declaratory judgment"). However, there is presumptively no way to disturb the finality of the one municipal court judgment in which the municipal court sat in review of the first administrative hearing and already upheld a \$600 fine.¹⁸ This DJ suit cannot alter the City's actions or undo a municipal court interpretation of the STR Ordinance that has

¹⁸ It will be recalled that another such appeal to the municipal court has been abated pending these proceedings.

become final.

Thus, the immediate effect of the Andings' DJ suit, if successful, would be *prospective* in nature in declaring the Austin STR Ordinance unconstitutional. The Andings will certainly argue it as the controlling law in the ongoing and abated administrative and municipal court proceedings and in any future citations the City issues, but a declaratory judgment in this case as against the City's ordinance would nevertheless stand as a separate judgment in a separate legal proceeding.

B. The DJ Suit Of Constitutional Infirmary Seeks Only Equitable Relief

The City appears to be contending that the Andings' constitutional claim seeks something other than equitable relief, thereby depriving the court of jurisdiction. Not so.

Sovereign immunity is inapplicable when a suit challenges the constitutionality of a statute and seeks only equitable relief. *Patel*, 469 S.W.3d t 75–76. In *Patel*, the Supreme Court upheld the eyebrow-threader's declaratory judgment suit against state officials to declare a licensing scheme unconstitutional. *Id.* at 76. The Court reiterated the rule of prior cases that the government entity responsible for the challenged law or actions *must* be a party. *Id.*

This case is procedurally identical to *Patel*. The Andings bring a constitutional challenge to the Austin STR ordinance via this declaratory judgment. The constitutional grounds are that vagueness deprives the Andings of due course of law. Furthermore,

the suit seeks solely equitable relief from enforcement of the ordinance, not money damages. This is not a case where the litigant has sought “bare statutory construction,” as in *McLane*. See 514 S.W.3d at 875. Rather, the Andings have asked the court to declare that the City of Austin’s STR ordinance is *unconstitutionally vague* in not setting forth any standards or definitions for what leases of 30 days or more are exempt from the STR licensure requirement. The court therefore has jurisdiction over the Andings’ constitutional challenge.

**C. The District Court Mandamus Petition
Seeks Interpretation of the Law, But Not
As Against the City**

The Andings’ live pleading also contains a petition for writ of mandamus directing the municipal court judge – who has abated one pending administrative decision appeal – to interpret and apply the Austin STR ordinance correctly. That aspect of the Andings’ case assumes for purposes of argument that the Austin STR Ordinance is constitutional but has been interpreted or applied incorrectly. It is logically possible that the Austin STR Ordinance gets adjudged constitutional while at the same time the Andings’ leases are adjudged exempt from the ordinance owing to their 30-day duration. The mandamus petition is thus an alternative proceeding to the DJ suit against the City. Should the Andings lose their DJ case, they hope to prevail separately in obtaining an order directing the municipal court to interpret the STR Ordinance as exempting the

Andings' leases from the requirement of licensure on the basis that the leases are for 30 days or more.

IV. THE TRIAL COURT ERRED IN GRANTING THE CITY'S PLEA TO THE JURISDICTION

The district court granted the City's plea to the jurisdiction dismissing the Andings' mandamus petition seeking relief against the municipal court judge. The Andings have filed a mandamus petition in this court seeking relief from that order; they file this ordinary appeal should this court lack jurisdiction to grant mandamus relief from the trial court's dismissal of the Andings' request for mandamus relief in that court.

Should this court reverse the trial court's order granting the plea to the jurisdiction, this court should likewise reverse the order denying severance because the City agreed to such so that this appeal could proceed on the Andings' DJ claim.

A. District Courts Have Broad Mandamus Power over Municipal Courts

District court mandamus jurisdiction derives from the Texas Constitution as implemented by statute. *See* Tex. Const. art. V, § 8; Tex. Gov't Code Ch. 24. Those provisions are as follows:

Tex. Const. art. V, § 8

District Court jurisdiction consists of exclusive, appellate, and original jurisdiction of all actions, proceedings, and remedies, except in cases where exclusive, appellate, or original jurisdiction may be conferred by this Constitution or other law on some other court, tribunal, or administrative body. District Court judges shall have the power to issue writs necessary to

enforce their jurisdiction.

Tex. Gov't Code § 24.007

JURISDICTION. (a) The district court has the jurisdiction provided by Article V, Section 8, of the Texas Constitution

Tex. Gov't Code § 24.011

A judge of a district court may, either in termtime or vacation, grant writs of mandamus, injunction, sequestration, attachment, garnishment, certiorari, and supersedeas and all other writs necessary to the enforcement of the court's jurisdiction

Tex. Gov't Code § 24.008

OTHER JURISDICTION. The district court may hear and determine any cause that is cognizable by courts of law or equity and may grant any relief that could be granted by either courts of law or equity.

A petition for writ of mandamus operates as a request for a court to command a lower court, tribunal, or public officer to do or not do something. *In re Perritt*, 992 S.W.2d 444, 446 (Tex. 1999) (orig. proceeding) .

A district court has mandamus jurisdiction over municipal court judges. *See* Tex. Const. art. V, § 8; Tex. Gov't Code § 24.011; *see, e.g., In re Borunda*, 528 S.W.3d 149, 153 (Tex. App.—El Paso 2017, no pet.) (orig. proceeding); *Thompson v. Velasquez*, 155 S.W.3d 551, 554 (Tex. App.—San Antonio 2004, no pet.) (orig. proceeding); *see also Smith v. Flack*, 728 S.W.2d 784, 799 (Tex. Crim. App. 1987) (Onion, P.J., dissenting) (opining that district courts have general mandamus authority in civil and criminal law matters).

At least three unpublished cases are to the same effect, citing multiple prior authorities and not even pausing to doubt the rule. *See In re Marshall*, 04-02-00819-CV, 2002 WL 31662743, at *1 (Tex. App.—San Antonio Nov. 27, 2002, no pet.) (orig. proceeding) ; *In re Stokes*, 02-14-00288-CV, 2014 WL 5035547, at *1 (Tex. App.—Fort Worth Sept. 17, 2014, no pet.) (orig. proceeding); *Bailey v. Morawietz*, 04-07-00593-CV, 2008 WL 2037370, at *1 (Tex. App.—San Antonio May 14, 2008, no pet.).

There are cases which declare, black-letter-style, that a district court's mandamus jurisdiction is limited to enforcing its own jurisdiction, but they are either readily distinguishable or else are *dicta*. *See, e.g., Martinez v. Thaler*, 931 S.W.2d 45, 45–46 (Tex. App.—Houston [14th Dist.] 1996, writ denied). In *Martinez*, for example, a fully independent basis for dismissal of the mandamus petition was that relief was sought against prison officials, not a municipal court judge. *Id.* In still other cases, specific criminal writs not listed in the Constitutional and statutory provisions are involved. *See, e.g., Winfrey v. Chandler*, 159 Tex. 220, 318 S.W.2d 59, 60 (Tex. 1958); *see generally, Thompson*, 155 S.W.3d at 553 (distinguishing all the arguably *contra* cases). A broad mandamus grant is plain from the Constitutional and statutory texts.

Accordingly, the district court in this case has the power to grant a writ of mandamus compelling Judge Clervi to act or refrain from acting; the state constitution, statutes, and decided cases all

establish such.

**B. Mandamus Relief is Available When a
Municipal Court Judge Applies the Law
Incorrectly**

A mandamus proceeding in the district court is a civil action even if the relief sought involves an underlying criminal action. *See Hogan v. Turland*, 428 S.W.2d 316, 316–17 (Tex. 1968). Thus, whether the underlying citations involved in this case are deemed civil or criminal in nature, mandamus relief in the district court is a civil proceeding.

To be entitled to such mandamus relief in the district court, the relator must show: (1) that there is no adequate remedy at law through normal appeal procedures; and (2) that the relief sought to be compelled is a ministerial act. *In re Borunda*, 528 S.W.3d at 152; *see generally In re Entergy Corp.*, 142 S.W.3d 316, 320–21 (Tex. 2004) (orig. proceeding) (explaining that courts want mandamus relief to be available to those parties who otherwise have no adequate remedy without the possibility of mandamus relief).

1. Adequacy of Legal Relief By Appeal

The word “adequate” is a proxy for the careful balance of jurisprudential considerations that determine when a court will use original mandamus proceedings to review the actions of lower courts. *In re Prudential Ins. Co. of Amer.*, 148 S.W.3d 124, 136 (Tex. 2004) (orig. proceeding) (orig. proceeding). An appellate remedy is adequate “when any benefits to mandamus review are outweighed

by the detriments.” *Id.*

The Andings exhausted the statutory appeal process for the 2016 citations. But the Andings have no way to stop the assembly line of citations and proceedings for identical asserted ordinance violations. The problem is intractable because the City is repeatedly prosecuting the Andings for the same asserted violations of Austin’s ordinances, and there is no reason to believe Judge Clervi will reverse himself. The result is escalating fines and the threat of more substantial penalties besides, such as loss of the right to occupy the property or even its demolition. This is the sort of problem that only mandamus can address, since repeated municipal court appeals for the same violations are futile and will never correct an erroneous application of the law.

Even worse, in the most recent citation involving one tenant who may not have physically occupied the property for the 30 days she had a sole and exclusive right of possession, the Andings have not apparently run afoul of the law as espoused by the administrative law judge or the municipal court judge: there is no multi-tenant side agreement since there is only one tenant. Yet the expense and uncertainty of additional administrative hearings and appeals threatens to outright deprive the Andings of the use of their property by injunction, revocation of their COO, or even demolition of their home. Where the law is incorrectly applied on a repeated basis and with escalating consequences, yet a party cannot seek

further appeal, then there is no adequate remedy at law under the flexible, balancing standard for the application of mandamus relief.

2. Ministerial Act

The nature of the Andings' mandamus request is for a ministerial act to be performed. The ministerial act requirement is satisfied where the relator shows a clear right to the relief sought. *In re Borunda*, 528 S.W.3d at 152. "A clear right to relief is shown when the facts and circumstances dictate but one rational decision 'under unequivocal, well-settled (i.e., from extant statutory, constitutional, or case law sources), and clearly controlling legal principles.'" *Id.*

Furthermore, a writ of mandamus may issue to correct a clear abuse of discretion by a public official. *Anderson v. City of Seven Points*, 806 S.W.2d 791, 793 (Tex. 1991). A judge abuses her discretion if she reaches a decision that is arbitrary and unreasonable so as to amount to a clear and prejudicial error of law or if the judge fails to correctly analyze or apply the law. *In re Cerberus Capital Mgmt., L.P.*, 164 S.W.3d 379, 382 (Tex. 2005) (orig. proceeding) (per curiam). A trial judge has no discretion in determining what the law is or in applying the law to the facts, and a clear failure by the judge to correctly analyze or apply the law will constitute an abuse of discretion affording mandamus as a remedy. *In re Shelby*, 297 S.W.3d 494, 496 (Tex. App.—Dallas 2009, no pet.) (orig. proceeding).

In this case, the Andings contend that the Respondent judge

misapplied the law to the facts, or that the decision is arbitrary and unreasonable, or that only one rational decision is possible. The Andings contend that, as a matter of law, that their leases of 30 days or more are exempt from the requirement of a short-term rental license according to the plain, facial terms of the city ordinance at issue. Whether or not the Andings ultimately prevail in that request for mandamus relief in the district court, the district court does have the jurisdiction to grant such relief.

V. THE MANDAMUS CLAIM SHOULD BE SEVERED

The trial court denied the Andings' motion to sever their mandamus petition from their declaratory judgment. **Tab D.** Normally, review would be for an abuse of discretion. *Morgan v. Compugraphic Corp.*, 675 S.W.2d 729, 734 (Tex. 1984). However, in this case, severance was moot once the trial court determined it lacked jurisdiction to hear the mandamus petition. Furthermore, the City agreed to severance should its plea to the jurisdiction be denied. Under these circumstances, this court should reverse the order denying the Andings' motion to sever if the trial court has jurisdiction over Andings' district court mandamus petition. Alternatively, this Court should abate this appeal for a set period for the trial court to decide the severance issue on the merits.

VI. REMAND IS NECESSARY FOR ATTORNEY'S FEES

The Andings pled for discretionary "equitable and just" attorney's fees under the DJ Act, Tex. Civ. Prac. & Rem. Code § 37.009. The trial court did not reach that issue because it dismissed the Andings' case.

Accordingly, if the Andings prevail to any extent on appeal, then case should be remanded to the trial court to adjudicate attorney's fees. *See Double Diamond, Inc. v. Saturn*, 339 S.W.3d 337, 347 (Tex. App.—Dallas 2011, pet. denied) (trial court determines fees for a DJ).

PRAYER FOR RELIEF

The Court should reverse the trial court's grant of summary judgment to the City and render summary judgment for the Andings on their claim that the Austin STR Ordinance is unconstitutionally vague. Remand is necessary on the Andings' claim for attorney's fees.

The Court should reverse the trial court's grant of the City's plea to the jurisdiction and remand the Andings' request upon the district court for mandamus relief against the municipal court, with instructions to sever that claim; or else the Court should abate this appeal until severance, which was mooted by the trial court's previous orders, is determined on its merits below.

Respectfully submitted,
/s/ JPS
J. Patrick Sutton
Texas Bar No. 24058143
1706 W. 10th Street
Austin Texas 78703
Tel. (512) 417-5903
jpatrickssutton@
jpatrickssuttonlaw.com
Attorney for Appellants

CERTIFICATE OF SERVICE

I certify that on June 4, 2018, per T.R.A.P. 6.3(b), a true and correct copy of this brief was served by efileing on:

Michael Siegel
Assistant City Attorney
City of Austin Law Department
michael.siegel@austintexas.gov

/s/ J. Patrick Sutton
Attorney for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

This document complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in Century Schoolbook 14-point for text and 12-point for footnotes. Spacing is expanded by .6 point for clarity. This document also complies with the word-count limitations of Tex. R. App. P. 9.4(i), if applicable, because it contains **12,095** words, excluding any parts exempted by Tex. R. App. P. 9.4(i)(1).

/s/ J. Patrick Sutton
Attorney for Appellants

IN THE COURT OF APPEALS FOR THE THIRD DISTRICT
OF TEXAS AT AUSTIN

ROBERT ANDING AND ROBERTA ANDING

Appellants,

v.

CITY OF AUSTIN, TEXAS AND FERDINAND D. CLERVI,
AUSTIN MUNICIPAL COURT JUDGE.

Appellees.

On Appeal from Cause No. D-1-GN-17-002142
126th District Court of Travis County, Texas

APPENDIX TO BRIEF OF APPELLANTS

Dec. 1, 2017 order on cross-MSJ's	Tab A
Dec. 1, 2017 order on Anding objections to City of Austin's MSJ evidence	Tab B
April 30, 2018 order granting City of Austin plea to the J	Tab C
April 30, 2018 order denying Anding motion to sever	Tab D
City of Austin STR Ordinance	Tab E
City Austin multi-tenant ordinance	Tab F
Anding lease form	Tab G
Co-tenant side agreement form	Tab H
Gena Carter lease of Sept.-Oct. 2017 w/ emails	Tab I

Tab A

DEC 01 2017 BE

At 12:28 P.M.
Valva L. Price, District Clerk

CAUSE NO. D-1-GN-17-002142

ROBERT ANDING and ROBERTA	§	
ANDING,	§	IN THE DISTRICT COURT OF
Plaintiffs	§	
	§	
VS.	§	
	§	TRAVIS COUNTY, TEXAS
CITY OF AUSTIN, TEXAS and STEVE	§	
ADLER, MAYOR OF THE CITY OF	§	
AUSTIN,	§	
Defendants	§	126 TH JUDICIAL DISTRICT

ORDER ON CROSS MOTIONS for SUMMARY JUDGMENT

Came on for consideration at a hearing on November 15, 2017, the:

- (1) City of Austin's Traditional Motion for Summary Judgment; and
- (2) Plaintiffs' Amended Motion for Partial Summary Judgment.

All parties appeared at the hearing through their respective counsel. After considering the cross motions and all relevant briefing (including all responses and replies on file at the time of the hearing) and all relevant summary judgment evidence (after the Court's separate ruling on Plaintiffs' Objections and Motion to Strike), in addition to having considered the oral arguments of counsel at the hearing and taking judicial notice of the file and taking the matter under advisement, the Court is now of the opinion that the City of Austin's Motion should be granted and Plaintiffs' Motion should be denied.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the City of Austin's Traditional Motion for Summary Judgment is hereby GRANTED; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiffs' Amended Motion for Partial Summary Judgment is hereby DENIED.

THE COURT FURTHER FINDS THAT, at the hearing, the Court granted the oral Motion for continuance regarding the City of Austin's Plea to the Jurisdiction and, therefore, the Court makes no ruling on the City of Austin's Plea to the Jurisdiction at this time.

D-1-GN-17-002142

SIGNED on the 1st day of December, 2017,

A handwritten signature in cursive script, appearing to read "Darlene Byrne", is written over a horizontal line.

DARLENE BYRNE
JUDGE PRESIDING

Tab B

DEC 01 2017 BE

At 12:28 P.M.
Velva L. Price, District Clerk

CAUSE NO. D-1-GN-17-002142

ROBERT ANDING and ROBERTA	§	
ANDING,	§	IN THE DISTRICT COURT OF
Plaintiffs	§	
	§	
VS.	§	
	§	TRAVIS COUNTY, TEXAS
CITY OF AUSTIN, TEXAS and STEVE	§	
ADLER, MAYOR OF THE CITY OF	§	
AUSTIN,	§	
Defendants	§	126 TH JUDICIAL DISTRICT

**ORDER ON THE PLAINTIFFS' OBJECTIONS TO
AND MOTION TO STRIKE DEFENDANTS' SUMMARY JUDGMENT EVIDENCE**

Came on for consideration at a hearing on November 15, 2017, the Plaintiffs' Objections to and Motion to Strike Defendants' Summary Judgment Evidence. All parties appeared at the hearing through their respective counsel. After considering the motion and the two relevant affidavits, and the oral arguments of counsel, the Court finds and determines as follows:

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiffs' Objections to Defendants' Summary Judgment evidence are SUSTAINED in part and OVERRULED in part as follows:

(1) Objections to AFFIDAVIT OF KHALID MARSHALL:

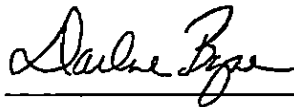
- a. Plaintiffs' Objection to portions of Paragraphs 4, 5, and 9 on basis of hearsay is **OVERRULED** due to the finding by the Court that the objected-to provisions fall under the hearsay exception at TRE 803(8) "record or statement of a public office".
- b. Plaintiffs' Objection to portion of Paragraph 6 regarding authentication and "hearsay" is **SUSTAINED**.
- c. Plaintiffs' Objection to portion of Paragraph 8 on the basis of "unsubstantiated factual and legal conclusion" is **OVERRULED**.

(2) Objections to AFFIDAVIT OF MARCO RAMOS:

- a. Plaintiffs' Objection to portion of Paragraph 4 on the basis of "unsubstantiated factual and legal conclusion" is **OVERRULED**.
- b. Plaintiffs' Objection to portions of Paragraphs 4, and 5 on basis of hearsay is **OVERRULED** due to the finding by the Court that the objected-to provisions fall under the hearsay exception at TRE 803(8) "record or statement of a public office".
- c. Plaintiffs' Objection to portion of Paragraph 7 on the basis of "BER T.R.E. 1002" is **SUSTAINED**.
- d. Plaintiffs' Objection to portions of Paragraphs 4, 5, and 9 on basis of hearsay is **OVERRULED** due to the finding by the Court that the objected-to provisions fall under the hearsay exception at TRE 803(8) "record or statement of a public office".
- e. Plaintiffs' Objection to portion of Paragraph 6 regarding authentication and "hearsay" is **SUSTAINED**.
- f. Plaintiffs' Objection to portion of Paragraph 8 on the basis of "unsubstantiated factual and legal conclusion" is **OVERRULED**.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Court STRIKES all paragraphs and portions of paragraphs for which Objections to Plaintiff's purported evidence are specifically sustained above.

SIGNED on the 1st day of December, 2017,



DARLENE BYRNE
JUDGE PRESIDING

Tab C

APR 30 2018 JC

At 1:56 P. M.
Velva L. Price, District Clerk

CAUSE NO. D-1-GN-17-002142

ROBERT ANDING and ROBERTA ANDING,	§	DISTRICT COURT
Relators,	§	
	§	
v.	§	
	§	
FERDINAND D. CLERVI, Austin Municipal	§	126th JUDICIAL DISTRICT
Court Judge,	§	
Respondent,	§	
	§	
CITY OF AUSTIN,	§	
Real Party in Interest.	§	TRAVIS COUNTY, TEXAS

ORDER SUSTAINING PLEA TO THE JURISDICTION

On March 8, 2018, the Court conducted a hearing on Judge Clervi's Plea to the Jurisdiction concerning the Third Amended Petition of Relators Robert and Roberta Anding ("Anding"). Anding and Judge Clervi appeared through counsel. The Court, having reviewed the pleas and the record in the case and having heard the argument of counsel, finds that Judge Clervi's plea is meritorious and should be sustained.

IT IS THEREFORE ORDERED that Judge Clervi's Plea to the Jurisdiction is in all respects SUSTAINED.

ENTERED this the 30th day of April, 2018.



PRESIDING JUDGE
AMY CLARK MEACHUM

Tab D

APR 30 2018 JC

At 1:56 P.M.
Velva L. Price, District Clerk

CAUSE NO. D-1-GN-17-002142

ROBERT ANDING and ROBERTA ANDING,	§	DISTRICT COURT
Relators,	§	
	§	
v.	§	
	§	
FERDINAND D. CLERVI, Austin Municipal	§	126th JUDICIAL DISTRICT
Court Judge,	§	
Respondent,	§	
	§	
CITY OF AUSTIN,	§	
Real Party in Interest.	§	TRAVIS COUNTY, TEXAS

ORDER DENYING MOTION TO SEVER

On March 8, 2018, the Court conducted a hearing on the Motion to Sever filed by Relators Robert and Roberta Anding ("Anding"). Anding and Judge Clervi appeared through counsel. The Court, having reviewed the pleas and the record in the case and having heard the argument of counsel, finds that Anding's motion is without merit and should be denied.

IT IS THEREFORE ORDERED that Anding's Motion to Sever is in all respects DENIED.

ENTERED this the 30th day of April, 2018.



PRESIDING JUDGE
AMY CLARK MEACHUM

Tab E

ORDINANCE NO. 20160223-A.1

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

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

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

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

- (A) This section applies to a short-term rental use that:
 - (1) is rented for periods of less than 30 consecutive days;
 - (2) is not part of a multifamily residential use; and
 - (3) is not owner-occupied and is not associated with an owner-occupied principal residential unit.
- (B) A short-term rental use under this section may not:
 - (1) include the rental of less than an entire dwelling unit;
 - (2) operate without a license as required by Section 25-2-791 (*License Requirements*);
 - (3) operate without providing notification to renters as required by Section 25-2-792 (*Notification Requirements*); or
 - (4) include a secondary dwelling unit or secondary apartment except as provided by Sections 25-2-774(C)(6) (*Two Family Residential Use*) and 25-2-1463(C)(6) (*Secondary Apartment Regulations*).
- (C) If a license for a short-term rental (Type 2) use meets the requirements for annual renewal under Section 25-2-791(E) (*License Requirements*) and the property received a notice of violation related to the life, health, or public safety of the structure, the property is subject to an inspection every three years by the building official to determine if the structure poses a hazard to life, health, or public safety.
- (D) A short-term rental (Type 2) use may not be located on a lot that is within 1000 feet of a lot on which another short-term rental (Type 2) use is located unless the license:

- (1) was issued on or before November 23, 2015;
- (2) is not suspended after November 23, 2015; and
- (3) is renewed timely.

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

- (A) This section applies to a short-term rental use that:
 - (1) is rented for periods of less than 30 consecutive days; and
 - (2) is part of a multifamily residential use.
- (B) A short-term rental use under this section may not:
 - (1) include the rental of less than an entire dwelling unit;
 - (2) operate without a license as required by Section 25-2-791 (*License Requirements*); or
 - (3) operate without providing notification to renters as required by Section 25-2-792 (*Notification Requirements*).

§ 25-2-791 LICENSE REQUIREMENTS.

- (A) This section applies to a license required under Section 25-2-788 (*Short-Term Rental (Type 1) Regulations*), Section 25-2-789 (*Short-Term Rental (Type 2) Regulations*), and Section 25-2-790 (*Short-Term Rental (Type 3) Regulations*).
- (B) To obtain a license, the owner of a short-term rental use must submit an application on a form approved ~~[provided for that purpose]~~ by the director. The application must include the following:
 - (1) a certification by the property owner and, if applicable, property manager that the property is not subject to outstanding City Code or state law violations ~~[a fee established by separate ordinance]~~;
 - (2) the name, street address, mailing address, and telephone number of the owner of the property;
 - (3) the name, street address, mailing address, and telephone number of the [a] local [responsible] contact required by Section 25-2-796 (*Local Contacts*) ~~[for the property]~~;
 - (4) the street address of the short-term rental use;
 - (5) proof of property insurance;

- (6) proof of payment of hotel occupancy taxes due as of the date of submission of the application; and
 - (7) any other information requested by the director.
- (C) Except as provided in subsection (G), the director shall issue a license under this section if:
- (1) the application includes all information required under Subsection (B) of this section;
 - (2) the proposed short-term rental use complies with the requirements of Section 25-2-788 (*Short-Term Rental (Type 1) Regulations*), Section 25-2-789 (*Short-Term Rental (Type 2) Regulations*), or Section 25-2-790 (*Short-Term Rental (Type 3) Regulations*);
 - (3) for a short-term rental use regulated under Section 25-2-789 (*Short-Term Rental (Type 2) Regulations*), no more than 3% of the single-family, detached residential units within the census tract of the property are short-term rental (including Type 2 and Type 1 second dwelling unit or secondary apartment) uses as determined by the Director under Section 25-2-793 (*Determination of Short-Term Rental Density*); and
 - (a) the structure has a valid certificate of occupancy or compliance, as required by Chapter 25-1, Article 9 (*Certificates of Compliance and Occupancy*), issued no more than ten years before the date the application is submitted to the director; or
 - (b) the structure has been determined by the building official not to pose a hazard to life, health, or public safety, based on a minimum life-safety inspection;
 - (4) for a short-term rental use regulated under Section 25-2-790 (*Short-Term Rental (Type 3) Regulations*), located in a non-commercial zoning district, no more than 3% of the total number of dwelling units at the property and no more than 3% of the total number of dwelling units located within any building or detached structure at the property are short-term rental (Type 3) uses as determined by the Director under Section 25-2-793 (*Determination of Short-Term Rental Density*); and
 - (a) the structure and the dwelling unit at issue have a valid certificate of occupancy or compliance, as required by Chapter 25-1, Article 9 (*Certificates of Compliance and Occupancy*),

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

- (b) the structure and the dwelling unit at issue have been determined by the building official not to pose a hazard to life, health, or public safety, based on a minimum life-safety inspection;
- (5) for a short-term rental use regulated under Section 25-2-790 (*Short-Term Rental (Type 3) Regulations*), located in a commercial zoning district, no more than 25% of the total number of dwelling units at the property and no more than 25% of the total number of dwelling units located within any building or detached structure at the property are short-term rental (Type 3) uses as determined by the Director under Section 25-2-793 (*Determination of Short-Term Rental Density*); and
 - (a) the structure and the dwelling unit at issue have a valid certificate of occupancy or compliance, as required by Chapter 25-1, Article 9 (*Certificates of Compliance and Occupancy*), issued no more than ten years before the date the application is submitted to the director; or
 - (b) the structure and the dwelling unit at issue have been determined by the building official not to pose a hazard to life, health, or public safety, based on a minimum life-safety inspection;[-]
- (6) if applicable, the Austin Water Utility determines the septic system complies with Chapter 15-5 (*Private Sewage Facilities*);
- (7) the property is not subject to outstanding City Code or state law violations;
- (8) the owner pays the fee established by separate ordinance;
- (9) the owner does not meet the standards described in Section 25-2-797 (*Repeat Offenses*); and
- (10) if applicable, the owner pays the fee required by Section 25-2-798 (*Non-Compliance Fees*).

(D) A license issued under this section:

- (1) is valid for a maximum of one year from the date of issuance, subject to a one-time extension of 30 days at the discretion of the director;
- (2) may not be transferred by the property owner listed on the application and does not convey with a sale or transfer of the property; and

- (3) satisfies the requirement for a change of use permit from residential to short-term rental use.
- (E) Except as otherwise provided in Subsection (F), a [A] license may be renewed annually if [the owner]:
- (1) the licensee pays a renewal fee established by separate ordinance;
 - (2) the licensee provides documentation showing that hotel occupancy taxes have been paid for the licensed unit as required by Section 11-2-4 (*Quarterly Reports; Payments*) for the previous year; [and]
 - (3) the licensee provides updates of any changes to the information required under Subsection (B) of this section;[-]
 - (4) the property is not subject to outstanding City Code or state law violations;
 - (5) the licensee or operator does not meet the standards described in Section 25-2-797 (*Repeat Offenses*);
 - (6) if applicable, the structure is determined by the building official not to pose a hazard to life, health, or public safety; and
 - (7) if applicable, the owner pays the fee required by Section 25-2-798 (*Non-Compliance Fees*).
- (F) The director may deny an application to renew a license if, on to the date the renewal application was submitted, the license for a short-term rental was suspended as authorized under Section 1307 (*License Suspension*) of Section 25-12-213 (*Local Amendments to the International Property Maintenance Code*) [An advertisement promoting the availability of short term rental property in violation of city code is prima facie evidence of a violation and may be grounds for denial, suspension, or revocation of a license].
- (G) After November 23, 2015, the director may not issue a license to operate a short-term rental use described in Section 25-2-789 (*Short-Term Rental (Type 2) Regulations*) except for an application received prior to September 17, 2015. In any event, the director may not issue a license pursuant to an application received after November 12, 2015.
- (H) The limitation in subsection (G) does not apply to an annual renewal authorized in subsection (E).
- (I) A violation of any provision of the City Code or other applicable law is grounds to deny, suspend, or revoke a license.

§ 25-2-792 NOTIFICATION REQUIREMENTS.

- (A) The director shall provide a packet of information with each license summarizing the restrictions applicable to short-term rental use, including:
- (1) the name and contact information of the local ~~[responsible]~~ contact designated in the application;
 - (2) occupancy limits applicable under Section 25-2-795 (Occupancy Limits for Short-Term Rentals) ~~[25-2-511 (Dwelling Unit Occupancy Limit)]~~;
 - (3) restrictions on noise applicable under Section 25-2-794 (General Requirements for Short-Term Rentals) ~~[Chapter 9-2 (Noise and Amplified Sound)]~~, including limitations on the use of amplified sound;
 - (4) parking restrictions;
 - (5) trash collection schedule;
 - (6) information on relevant burn bans;
 - (7) information on relevant water restrictions;
 - (8) information on applicable requirements of the Americans with Disabilities Act; and
 - (9) other guidelines and requirements applicable to short-term rental uses.
- (B) The licensee ~~[owner]~~ or operator of a short-term rental use must:
- (1) provide renters a copy of the information packet under Subsection (A) of this section; and
 - (2) post the packet conspicuously in the common area of each short-term ~~[dwelling rental]~~ unit included in the registration.
- (C) The director shall mail notice of the contact information for the local ~~[responsible]~~ contact to all properties within 100 feet of the short-term rental use, at the licensee's ~~[owner]~~ or operator's expense.

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

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

- (A) A licensee or guest of a short-term rental may not use or allow the use of sound equipment that produces sound in excess of 75 decibels at the property line between 10:00 a.m. and 10:00 p.m.
- (B) A licensee or guest of a short-term rental may not use or allow use of sound equipment that produces sound audible beyond the property line between 10:00 p.m. and 10:00 a.m..
- (C) A licensee or guest of a short-term rental shall not make or allow another to make noise or play a musical instrument audible to an adjacent business or residence between 10:30 p.m. and 7:00 a.m..
- (D) If a building permit prohibiting occupancy of the structure is active, no person may occupy, for sleeping or living purposes, the structure until final inspections have been passed and the building permit is closed.
- (E) A licensee or operator may not advertise or promote or allow another to advertise or promote a short-term rental without including:
 - (1) the license number assigned by the City to the short-term rental; and
 - (2) the applicable occupancy limit for the short-term rental.
- (F) An owner, or a person in control of a dwelling, may not advertise or promote, or allow another to advertise or promote, the dwelling as a short-term rental if the dwelling is not licensed by the director as a short-term rental.
- (G) A licensee or operator may not advertise or promote or allow another to advertise or promote a short-term rental in violation of the City Code or state law.
- (H) A person must obtain a license to operate a short-term rental before a property may be used as a short-term rental.
- (I) Requirements in this section apply only when the dwelling unit is being used as a short-term rental, and apply only to that dwelling unit. For purposes of this subsection, dwelling unit means the area being used as a short-term rental, including a partial unit described in Section 25-2-788(B)(1) (*Short-Term Rental (Type 1) Regulations*).

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

- (A) In this section:
 - (1) **ADULT** means a person 18 years of age or older.
 - (2) **DOMESTIC PARTNERSHIP** means adults living in the same household and sharing common resources of life in a close, personal, and intimate relationship.
 - (3) **UNRELATED** means not connected by consanguinity, marriage, domestic partnership, or adoption.
- (B) Unless a stricter limit applies, not more than two adults per bedroom plus two additional adults may be present in a short-term rental between 10:00 p.m. and 7:00 a.m.
- (C) A short-term rental is presumed to have two bedrooms, except as otherwise determined through an inspection approved by the director.
- (D) A licensee or guest may not use or allow another to use a short-term rental for an assembly between 10:00 p.m. and 7:00 a.m.
- (E) A licensee or guest may not use or allow another to use a short-term rental for an outside assembly of more than six adults between 7:00 a.m. and 10:00 p.m.
- (F) For purposes of this section, an assembly includes a wedding, bachelor or bachelorette party, concert, sponsored event, or any similar group activity other than sleeping.
- (G) A short-term rental use may not be used by more than:
 - (1) ten adults at one time, unless a stricter limit applies; or
 - (2) six unrelated adults.
- (H) Requirements in this section apply only when the dwelling unit is being used as a short-term rental, and apply only to that dwelling unit. For purposes of this subsection, dwelling unit means the area being used as a short-term rental, including the partial unit described in Section 25-2-788(B)(1) (*Short-Term Rental (Type 1) Regulations*).

§ 25-2-796 LOCAL CONTACTS.

- (A) A licensee of a short-term rental use who does not reside within the Austin Metro Area must identify an individual or individuals to serve as local contacts and respond to emergency conditions.
- (B) A local contact designated under subsection (A) must be present within the Austin Metro Area and be available to respond within two hours after being notified of an emergency by a guest of the short-term rental, by a City employee, or by an individual entitled to notice of the contact information under Section 25-2-792(C) (*Notification Requirements*), during any 24-hour period.
- (C) If there is a change related to a local contact, the licensee must provide updated or new information to the director in writing within three business days.

§ 25-2-797 REPEAT OFFENSES.

- (A) If the director finds that the licensee or operator failed to comply with Section 25-2-794 (*General Requirements for Short-Term Rentals*) or Section 25-2-795 (*Occupancy Limits for Short-Term Rentals*) at least twice in a 12-month period, the director may deny an application to renew a short-term rental license for a period of 12 months.
- (B) If the director finds that an owner or person in control of a property violated Section 25-2-794 (*General Requirements for Short-Term Rentals*) at least twice in a 12-month period, the director may deny an application for a short-term rental license for a period of 12 months.
- (C) If a property is the subject of repeated substantiated violations of City Code or state law during a 24-month period prior to applying for a license or renewing a license to operate a short-term rental, the director may deny the short-term rental license based on:
 - (1) the frequency of any repeated violations;
 - (2) whether a violation was committed intentionally or knowingly; and
 - (3) any other information that demonstrates the degree to which the owner or occupant has endangered public health, safety, or welfare.
- (D) A licensee may appeal the director's decision to deny an application in compliance with the process in Section 1308 (*Appeal From License Suspension or Denial*) of Section 25-12-213 (*Local Amendments to the International Property Maintenance Code*).

§ 25-2-798 NON-COMPLIANCE FEES.

- (A) A person that submits an application for a short-term rental license shall pay an additional fee if the application is submitted after the director sends a notice of violation or cites the person for operating a short-term rental without a license.
- (B) A person that submits a request to renew a short-term rental license shall pay an additional fee if the request is submitted after the director sends a notice of violation or cites the person for operating with an expired short-term rental license.
- (C) The fee described in this section shall be set by separate ordinance and be based on the City's cost to enforce the licensing requirements.

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

- (A) An advertisement promoting the availability of a short-term rental in violation of any City Code or state law requirement is prima facie evidence of a violation and is cause to issue an administrative citation for a violation of Sections 25-2-794(E),(F), or (G) (*General Requirements for Short-Term Rentals*).
- (B) Except for a short-term rental use described in Section 25-2-788 (*Short-Term Rental (Type 1) Regulations*), a visual inspection of more than six adults by a city employee at a short-term rental is prima facie evidence of and is cause to issue an administrative citation for a violation of Sections 25-2-795(B), (E), and (G)(2) (*Occupancy Limit for Short-Term Rentals*).
- (C) Except for a short-term rental use described in Section 25-2-788 (*Short-Term Rental (Type 1) Regulations*), a visual inspection of more than ten adults by a city employee at a short-term rental is prima facie evidence of and is cause to issue an administrative citation for a violation of Section 25-2-795(G)(1) (*Occupancy Limits for Short-Term Rentals*).

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

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

- (3) Single Family Residence Large Lot (SF-1) Zoning District;
- (4) Single Family Residence Standard Lot (SF-2) Zoning District;
- (5) Family Residence (SF-3) Zoning District;
- (6) Single Family Residence Small Lot (SF-4A) Zoning District;
- (7) Single Family Residence Condominium (SF-4B) Zoning District;
- (8) Urban Family Residence (SF-5) Zoning District; and
- (9) Townhouse and Condominium Residence (SF-6) Zoning District.

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

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

- central business (CBD)
- downtown mixed use (DMU)
- planned unit development (PUD)
- general-retail – mixed use (GR-MU)
- commercial services – mixed use (CS-MU)
- commercial services – vertical mixed use (CS-V)
- general retail – vertical mixed use (GR-V).

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

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

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

- (1) April 1, 2022; or
- (2) if the license for a short-term rental use is not renewed, the date on which the existing license expires.

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

202.1 Supplemental and Replacement Definitions.

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

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

1301 Inspections.

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

1307 License Suspension.

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

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

- (B) At the end of the time provided for correction of the violation(s), the code official shall re-inspect the location or records of the boarding house, hotel, rooming house, short-term rental, or bed and breakfast establishment and, if the conditions or practices have not been corrected, shall suspend the license and give written notice to the licensee that the license has been suspended.
- (C) On receipt of notice of suspension, the licensee shall immediately stop operation of the boarding house, hotel, rooming house, short-term rental, or bed and breakfast establishment, and no person may occupy for sleeping or living purposes any rooming unit therein, except that the code official may allow continued occupancy by the property owner of a short-term rental use subject to Section 25-2-788 (*Short-Term Rental (Type 1) Regulations*). The notice required by this subsection shall be served in accordance with the notice provisions of applicable law.
- (D) The code official may immediately suspend a license if the code official determines that the license was issued in error. A suspension is effective until the code official determines that the licensee has complied with the requirements of the City Code or any rule or regulation adopted under this Code. The code official shall give written notice to the owner of the property and the operator of the establishment that the license is suspended.
- (E) If a short-term rental is the subject of two or more substantiated violations of applicable law during the license period, the code official may suspend the short-term rental license. The code official must give notice to the licensee of a notice of intent to suspend a license issued under this subsection.
- (F) In determining whether to suspend a license as described in subsection (E), the code official shall consider the frequency of the substantiated violations, whether a violation was committed intentionally or knowingly, and any other information that demonstrates the degree to which a licensee has endangered public health, safety, or welfare.

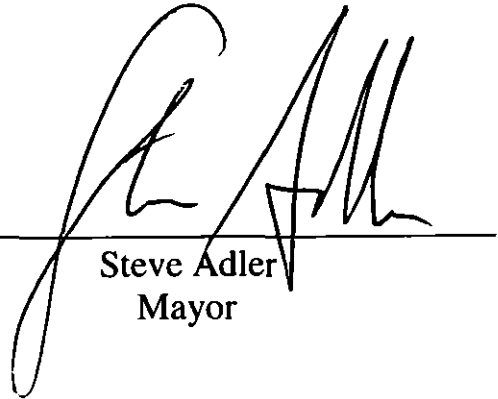
PART 8. Because of the amendments set forth in Parts 4 and 5 of this Ordinance, Council finds it is not necessary to set or hold the public hearing described in Ordinance No. 20151112-078 and waives the requirement.

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

PASSED AND APPROVED

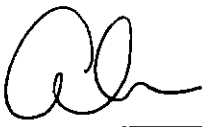
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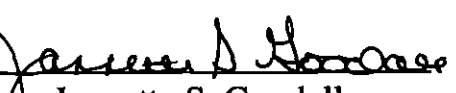
Steve Adler
Mayor

APPROVED:



Anne L. Morgan
City Attorney

ATTEST:



Jannette S. Goodall
City Clerk

Tab F

§ 25-2-511 - DWELLING UNIT OCCUPANCY LIMIT.

(A)

In this section:

(1)

ADULT means a person 18 years of age or older.

(2)

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

(3)

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

(B)

Except as otherwise provided in this section, not more than six unrelated adults may reside in a dwelling unit.

(C)

The regulations in Subsection (D) apply in the area defined in Subchapter F: Residential Design and Compatibility Standards Section 1.2.1.

(D)

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

(1)

Lake Austin Residence District (LA) Zoning District;

(2)

Rural Residence District (RR) Zoning District;

(3)

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

(4)

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

(5)

Family Residence (SF-3) Zoning District;

(6)

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

(7)

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

(8)

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

(9)

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

(E)

The requirements of Subsection (D) of this section do not apply if:

(1)

before March 31, 2014:

(a)

a building permit for the dwelling unit was issued; or

(b)

the use was established; and

(2)

after March 31, 2014:

(a)

the gross floor area does not increase more than 69 square feet, except to complete construction authorized before March 31, 2014 or to comply with the American with Disabilities Act, or

(b)

any interior remodel that requires a building permit does not result in additional sleeping rooms.

(F)

Not more than three unrelated adults may reside in a dwelling unit of a duplex residential use, unless:

(1)

before June 5, 2003;

(a)

a building permit for the duplex structure was issued; or

(b)

the use was established; and

(2)

after June 5, 2003, the gross floor area in the duplex structure does not increase more than 69 square feet, except for the completion of construction authorized before that date or to allow for compliance with the Americans with Disabilities Act.

(G)

For a two-family residential use or a site with a secondary apartment special use not more than four unrelated adults may reside in the principal structure, and not more than two unrelated adults may reside in the second dwelling unit, unless:

(1)

before November 18, 2004:

(a)

a building permit for the second dwelling unit was issued; or

(b)

the use was established; and

(2)

after November 18, 2004, the gross floor area does not increase more than 69 square feet, except for the completion of construction authorized before that date or to allow for compliance with the American with Disabilities Act.

(H)

A structure located on a site subject to Subsection (B) that is partially or totally destroyed by a natural disaster, act of god or fire does not become subject to Subsection (D), if a building permit to repair or reconstruct the structure is applied for within one year of the date of the partial or total destruction.

(I)

A group of not more than ten unrelated adults may reside in a dwelling unit if:

(1)

a majority of the adults are 60 years of age or older;

(2)

the adults are self-caring and self-sufficient and participate in the daily operation of the dwelling unit;
and

(3)

the adults live together as a single, non-profit housekeeping unit.

Source: Section 13-2-1; Ord. 990225-70; Ord. 030605-49; Ord. 031211-11; Ord. 0411118-59; Ord. 20100923-127; [Ord. 20140320-062, Pts. 1, 3, 3-31-14](#); [Ord. No. 20160223-A.1, Pt. 3, 3-5-16](#).

Appendix Tab G

5/27/16
NOT 5/26**Residential Lease**

This Residential Lease (this "Lease") is made and entered into on 5/27/16 (the "Effective Date"), by and between Robert Anding ("Landlord") and each tenant on the signature page attached hereto (each, a "Tenant", and collectively, the "Tenants"), with respect to the real Property and improvements thereon located at 2105 Big Horn Drive, Austin, Texas (the "Premises"), and the fixtures, furnishings and equipment located within (collectively with the Premises, the "Property").

NOW, THEREFORE, for good and valuable consideration and the mutual promises and undertakings herein, and other good and valuable consideration, the sufficiency of which is acknowledged, the parties hereto hereby agree as follows:

1. **Demise of Property.** Landlord hereby leases the Property to each Tenant, and each Tenant hereby leases the Property from Landlord upon the terms and conditions set forth herein.
2. **Term.** The term of this Lease (the "Lease Term") will run from: 5/27/16 to 6/26/16. *6 MONTHS IS GOOD?*
3. **Rent.** The Rent for the Property for the Lease Term is \$21,396, which is due to Landlord before the end of the Lease Term.
4. **Tenant Possessory Rights.** All Tenants to this Lease have full possessory interest and right of enjoyment of the Property for the entire Term of the Lease, regardless of whether any any given Tenant exercises that possessory interest at any given time during the term of the Lease. It shall not constitute a default under this Lease for the Tenants to enter into their own separate agreement for the sharing of the Property, including agreed upon periods of occupancy, but nothing shall relieve the Tenants of their obligations hereunder.
5. **Pets.** No pets are allowed at the Property without the express consent of Landlord. In the event Landlord has consented to having a pet on the Property during the Lease Term, the Tenant who brings the pet to the Property shall be subject to an additional fee as determined by Landlord.
6. **Real Property Taxes.** Landlord shall be responsible for the payment of all Real Property Taxes as the same become due and before delinquency. As used herein, Real Property Taxes shall mean all real Property taxes, assessments, levies, and other charges presently existing or subsequently imposed by any governmental or quasi-governmental authority having the direct or indirect power to tax and which are levied or assessed against the Property.
7. **Utilities.** Landlord shall be responsible for the payment of all water, gas, electricity, or other public utilities used upon or furnished to the Property during the Lease Term. Notwithstanding the foregoing, each Tenant agrees to pay for optional services fees such as pool heating if agreed by Tenant in advance.
8. **Landlord Compliance with Laws.** Landlord, at its cost and expense, shall comply with all requirements of all present and future laws, orders, ordinances, rules and regulations of Federal, State, County, Municipal and other authorities including any owners' association governing the Property which shall impose any duty upon the Landlord with respect to the Property or the use, occupation, control or enjoyment thereof, the conduct of any business therein or the construction, alteration or demolition of any improvement located on the Property.
9. **Tenant Compliance with Laws, House Rules and Residential Use.** The Tenants, on their part, shall comply with all requirements of all present and future laws, orders, ordinances, rules and regulations of Federal, State, County, Municipal and other authorities including any owners' association governing the Tenant's use of the Property, occupation, control or enjoyment thereof. Tenant shall use the Premises for residential purposes only and for no other purposes without the prior written consent of Landlord. Each Tenant covenants and agrees that he/she shall not use, or suffer or permit any person or persons to use the Property or any part thereof for any use or

purpose contrary to the provisions of the House Rules which, if attached, are incorporated herein by this reference, or any other reasonable rules and regulations which Landlord may make from time to time and provide to Tenant (the "House Rules") and each Tenant shall faithfully observe and comply with the House Rules. Landlord shall not be responsible to any Tenant for the nonperformance of any of such House Rules by or otherwise with respect to the acts or omissions of any Tenants or other occupants of the Property.

10. **Maintenance of Property.** During the Term, Landlord shall keep and maintain the Property in good order and repair, and shall allow no nuisance to exist or be maintained therein, including without limitation, the grounds, sidewalks, roads, parking and landscaped areas thereof. The Tenants shall not be obligated to make any repairs or replacements of any kind to the Property and all such repairs or replacements shall be made in a timely fashion by Landlord at Landlord's sole cost. Notwithstanding the foregoing, if there is any damage or destruction to the Property due to the negligence or willful misconduct of a Tenant or any of his/her agents, invitees or Tenants, then such Tenant shall be responsible for any reasonable, applicable insurance deductible (which shall be payable to Landlord upon demand), and such Tenant shall reimburse Landlord for all costs and expenses incurred by Landlord to repair such damage or destruction.
11. **Insurance.** Landlord shall, at its sole cost and expense, maintain at all times during the Term a policy of insurance in an amount required to cover the replacement cost of the Property or as otherwise required under Landlord's mortgage. In addition, Landlord shall maintain general liability insurance insuring Landlord against loss or other liability for personal and bodily injury to persons and/or damage to Property and/or death of any person and/or persons occurring in or about, or resulting from an occurrence in or about the Property.
12. **Assignment and Sublease.** No Tenant may assign or sublease any interest in this Lease without the prior written consent of the Landlord.
13. **Default.** Tenant failure to perform or fulfill any obligation under this Lease shall be a default curable upon 3 days' prior notice from Landlord. However, in the event that a Tenant, or any of his/her agents, guests or invitees, violate any laws or local ordinances, or breach the House Rules, Landlord may immediately terminate the Lease and exercise the remedies granted under this Lease or applicable law.
14. **Indemnity.** Each Tenant, with respect to such Tenant's use of the Property only, hereby assumes all risk of damage to Property or injury to persons in, upon or about the Property from any cause whatsoever (including, but not limited to, any personal injuries resulting from a slip and fall in, upon or about the Property) and agrees that Landlord, and Landlord's Property manager and agent, its shareholders, partners, and their respective officers, agents, servants, employees, and independent contractors shall not be liable for, and are hereby released from any responsibility for, any damage either to person or Property or resulting from the loss of use thereof, which damage is sustained by any person in, upon or about the Property or by such Tenant or by other persons claiming through such Tenant in, upon or about the Property. Should Landlord be named as a defendant in any suit brought against Landlord or any Tenant in connection with or arising out of such Tenant's occupancy of the Property, such Tenant shall pay to Landlord its costs and expenses incurred in such suit, including without limitation, its actual professional fees such as reasonable appraisers', accountants' and attorneys' fees. The provisions of this Section 15 shall survive the expiration or sooner termination of this Lease with respect to any claims or liability arising in connection with any event occurring prior to such expiration or termination.
15. **Arbitration.** Any controversy, dispute, or claim of any nature arising out of, in connection with, or in relation to the interpretation, performance or breach of this Lease, including any claim based on contract, tort or statute, shall be determined by final and binding arbitration conducted before a single arbitrator in Austin, Texas and administered by JAMS, or if JAMS shall not then exist, by such other nationally recognized dispute resolution organization to which the parties hereto agree.

- 16. Landlord's Property Manager and Agent.** TurnKey Vacation Rentals, Inc. ("TurnKey") is landlord's Property manager and authorized agent, who will perform services for the Landlord and Tenant as provided in this Lease. Tenant agrees that TurnKey and its authorized agents may access the Property to fulfill the obligations or enforce the terms of this Lease, including the House Rules, as provided herein.
- 17. Right of Inspection.** Each Tenant agrees, during the Lease Term, to make the Property available to Landlord or Landlord's agents (specifically including TurnKey) for the purposes of inspection, making repairs or improvements, to supply agreed upon services or in case of emergency. Except in the case of an emergency, Landlord shall give such Tenant reasonable advanced notice of such inspection. No Tenant shall, without Landlord's prior written consent, alter any locks to the Property.
- 18. Holdover.** If any Tenant holds over after the expiration of the Lease Term or fails to abide by the Tenant Agreement, such tenancy shall be from day-to-day only, and shall not constitute a renewal hereof or an extension for any further term. In such case, Tenant's share of the Rent shall be payable at a rate equal to two (2) times the Rent set forth in Section 3 above, plus the actual costs of re-accommodating future tenants that were scheduled to rent the Property. Such day-to-day tenancy shall be subject to every other applicable term, covenant and agreement contained herein. Nothing contained in this Section 18 shall be construed as consent by Landlord to any holding over by any Tenant, and Landlord expressly reserves the right to require any Tenant to surrender possession of the Property to Landlord as provided in this Lease upon the expiration of the Lease Term or other termination of this Lease. If a Tenant fails to surrender the Property upon the termination or expiration of the Lease Term, in addition to any other liabilities to Landlord accruing therefrom, such Tenant shall protect, defend, indemnify and hold Landlord harmless from all loss, costs (including reasonable attorneys' fees) and liability resulting from such failure, including, without limiting the generality of the foregoing, any claims made by any other Tenant or future tenants founded upon such failure to surrender and any lost profits to Landlord resulting therefrom.
- 19. Delay of Occupancy.** If any Tenant is unable to occupy the leased premises on the Effective Date because of a prior tenant's holding over of the leased premises, Landlord will not be liable to Tenant for such delay and this lease will remain enforceable. In the event of such a delay, the Effective Date will automatically be extended to the date Tenant is able to occupy the Property, and the expiration of the Lease Term will also be extended by a like number of days, so that the length of this lease remains unchanged. If any tenant is unable to occupy the leased premises after the 10th day after the Effective Date because of a prior tenant's holding over of the leased premises, the tenant denied possession may terminate this lease by giving written notice to Landlord before the leased premises become available to be occupied by Tenant, and Landlord will refund to said tenant any amounts paid to Landlord by said tenant. This paragraph does not apply to any delay in occupancy caused by cleaning or repairs.
- 20. Severability:** If any part of this Lease shall be held unenforceable for any reason, the remainder of this Agreement shall continue in full force and effect. If any provision of this Lease is deemed invalid or unenforceable by any court of competent jurisdiction, and if limiting such provision would make the provision valid, then such provision shall be deemed to be construed as so limited.
- 21. Entire Agreement and Conflicts:** This Lease constitutes the entire agreement between the parties and supersedes any prior understanding or representation of any kind preceding the date of this Lease. There are no other promises, conditions, understandings or other agreements, whether oral or written, relating to the subject matter of this Lease. To the extent any of the provisions are found to be in conflict with other provisions in the Lease, the following will take precedence, in order: the Lease, the House Rules, TurnKey Terms of Service or Privacy Policy

found at turnkeyvr.com/terms. The TurnKey Guest Agreement found at turnkeyvr.com/terms will not apply to this Lease.

22. **Governing Law.** This Lease Agreement shall be governed, construed and interpreted by, through and under the Laws of the State of Texas.
23. **Local Ordinance Rider.** The provisions of the Local Ordinance Rider attached hereto are made a part of this Lease and are incorporated herein by this reference.
24. **Electronic Signature and Delivery; Counterparts.** Landlord and the Tenants may execute signature pages to this Lease by online acceptance or e-mail, which copies shall be deemed to be an original executed signature page. This Lease may be executed in any number of counterparts, each of which shall be deemed an original and all of which counterparts together shall constitute one agreement with the same effect as if the parties had signed the same signature page.

[Signature pages to follow]

Local Ordinance Rider - Texas Statutory Provisions

1. **Maximum Occupancy.** Texas Property Code § 92.010 provides that the maximum lease occupancy is 3 adults per bedroom, without reference to any children. Tenant must adhere to this requirement no matter the circumstances.
2. **Landlord Repairs.** If Landlord fails to repair a condition that materially affects the physical health or safety of an ordinary tenant as required by this lease or the Property Code, Tenant may be entitled to exercise remedies under §92.056 and §92.0561 of the Texas Property Code. If Tenant follows the procedures under those sections, the following remedies may be available to Tenant: (1) terminate the lease and obtain an appropriate refund under §92.056(f); (2) have the condition repaired or remedied according to §92.0561; (3) deduct from the rent the cost of the repair or remedy according to §92.0561; and (4) obtain judicial remedies according to §92.0563. Do not exercise these remedies without consulting an attorney or carefully reviewing the procedures under the applicable sections. The Property Code presumes that 7 days is a reasonable period of time for the Landlord to repair a condition unless there are circumstances which establish that a different period of time is appropriate (such as the severity and nature of the condition and the availability of materials, labor, and utilities). Failure to strictly follow the procedures in the applicable sections may cause Tenant to be in default of the lease.
3. **Smoke Detectors.** Subchapter F, Chapter 92, Property Code requires the Property to be equipped with smoke detectors in certain locations. Requests for additional installation, inspection, or repair of smoke detectors must be in writing. Disconnecting or intentionally damaging a smoke detector or removing a battery without immediately replacing it with a working battery may subject Tenant to civil penalties and liability for damages and attorney fees under §92.2611, Property Code.
4. **Lien for Unpaid Rent.** Landlord will have a lien for unpaid rent against all of Tenant's nonexempt personal property that is in the Property and may seize such nonexempt property if Tenant fails to pay rent. Subchapter C, Chapter 54, Property Code governs the rights and obligations of the parties regarding Landlord's lien. Landlord may collect a charge for packing, removing, or storing property seized in addition to any other amounts Landlord is entitled to receive. Landlord may sell or dispose of any seized property in accordance with the provisions of §54.045, Property Code.
5. **Broker & Agent.** Landlord's broker and agent, Turnkey Vacation Rentals, Inc., will act as the property manager for Landlord.

Appendix Tab H

Co-Tenant Agreement

Each Co-Tenant signing below acknowledges that they are a Tenant to that Residential Lease dated May 27, 2016 (the "Lease" and the "Effective Date", respectively) for 2105 Big Horn Drive, Austin, Texas (the "Property"). As proposed Co-Tenants of the Property under the Lease, we wish to share the Lease costs among ourselves for the Lease Term prepare a schedule of the periods when we will stay at the Property. Therefore, we agree as among ourselves, without involvement by the Landlord or its agent or property manager, that each Co-Tenant will stay the Property on the days set forth below, and will contribute the amounts set forth below, towards the total Lease cost pursuant to this agreement (the "Agreement"). Accordingly, each Co-Tenant under the Lease hereby agrees as follows:

1. Capitalized terms used but not defined herein shall have the meanings given to them in the Lease.
2. The Co-Tenants collectively agree to share the Property as set forth in the occupancy schedule set forth below (the "Occupancy Schedule"). Each Co-Tenant agrees to abide by the Occupancy Schedule and shall only access the Property during the dates allocated to such Co-Tenant under the Occupancy Schedule (the "Occupancy Period").
3. Rent under the Lease is shared proportionally by each Co-Tenant based on the amounts set forth in the Occupancy Schedule.
4. Each Co-Tenant shall be liable for damages under the Lease or this Agreement only for acts or omissions directly caused by such Co-Tenant or his/her guests or invitees relating to such Co-Tenant's Occupancy Period (or any Holdover period), and not for damages arising out of any acts or omissions by any other Co-Tenant during any period outside of such Co-Tenant's Occupancy Period (or any Holdover period).
5. Each Co-Tenant acknowledges that failure to adhere to the Agreement may result in significant economic harm to other Co-Tenants. Each Co-Tenant acknowledges that he/she will be liable for any loss, costs (including reasonable attorneys' fees) and liability incurred by any other Co-Tenant or any future tenant of the Property resulting from such Co-Tenant's failure to abide by the Agreement.
6. Any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this agreement to arbitrate, shall be determined by binding arbitration in Austin, Texas before one arbitrator.
7. Co-Tenants agree that TurnKey Vacation Rentals, Inc., which manages the Property, is also empowered to administer and manage this Agreement for the mutual benefit of the Co-Tenants.
8. This Co-Tenant Agreement may be executed in any number of counterparts, each of which shall be deemed an original and all of which counterparts together shall constitute one agreement with the same effect as if the parties hereto had signed the same signature page and will be effective as of the Effective Date.

[Signature pages to follow]

Appendix Tab I

Residential Lease

This Residential Lease (this "Lease") is made and entered into on 9/10/2017 (the "Effective Date"), by and between Bob Anding ("Landlord") and each tenant on the signature page attached hereto (each, a "Tenant", and collectively, the "Tenants"), with respect to the real Property and improvements thereon located at 2105 Big Horn Dr, Austin, TX (the "Premises"), and the fixtures, furnishings and equipment located within (collectively with the Premises, the "Property").

NOW, THEREFORE, for good and valuable consideration and the mutual promises and undertakings herein, and other good and valuable consideration, the sufficiency of which is acknowledged, the parties hereto hereby agree as follows:

1. **Demise of Property.** Landlord hereby leases the Property to each Tenant, and each Tenant hereby leases the Property from Landlord upon the terms and conditions set forth herein.
2. **Term.** The term of this Lease (the "Lease Term") will run from: 9/10/2017 to 10/10/2017
3. **Rent.** The Rent for the Property for the Lease Term is \$3056.15 which is due to Landlord for the Lease Term.
4. **Tenant Possessory Rights.** All Tenants to this Lease have full possessory interest and right of enjoyment of the Property for the entire Term of the Lease, regardless of whether any any given Tenant exercises that possessory interest at any given time during the term of the Lease. It shall not constitute a default under this Lease for the Tenants to enter into their own separate agreement for the sharing of the Property, including agreed upon periods of occupancy, but nothing shall relieve the Tenants of their obligations hereunder.
5. **Pets.** No pets are allowed at the Property without the express consent of Landlord. In the event Landlord has consented to having a pet on the Property during the Lease Term, the Tenant who brings the pet to the Property shall be subject to an additional fee as determined by Landlord.
6. **Real Property Taxes.** Landlord shall be responsible for the payment of all Real Property Taxes as the same become due and before delinquency. As used herein, Real Property Taxes shall mean all real Property taxes, assessments, levies, and other charges presently existing or subsequently imposed by any governmental or quasigovernmental authority having the direct or indirect power to tax and which are levied or assessed against the Property.
7. **Utilities.** Landlord shall be responsible for the payment of all water, gas, electricity, or other public utilities used upon or furnished to the Property during the Lease Term. Notwithstanding the foregoing, each Tenant agrees to pay for optional services fees such as pool heating if agreed by Tenant in advance.
8. **Landlord Compliance with Laws.** Landlord, at its cost and expense, shall comply with all requirements of all present and future laws, orders, ordinances, rules and regulations of Federal, State, County, Municipal and other authorities including any owners' association governing the Property which shall impose any duty upon the Landlord with respect to

the Property or the use, occupation, control or enjoyment thereof, the conduct of any business therein or the construction, alteration or demolition of any improvement located on the Property.

9. Tenant Compliance with Laws, House Rules and Residential Use.

The Tenants, on their part, shall comply with all requirements of all present and future laws, orders, ordinances, rules and regulations of Federal, State, County, Municipal and other authorities including any owners' association governing the Tenant's use of the Property, occupation, control or enjoyment thereof. Tenant shall use the Premises for residential purposes only and for no other purposes without the prior written consent of Landlord. Each Tenant covenants and agrees that he/she shall not use, or suffer or permit any person or persons to use the Property or any part thereof for any use or purpose contrary to the provisions of the attached House Rules are incorporated herein by this reference, or any other reasonable rules and regulations which Landlord may make from time to time and provide to Tenant (the "House Rules") and each Tenant shall faithfully observe and comply with the House Rules. Landlord shall not be responsible to any Tenant for the nonperformance of any of such House Rules by or otherwise with respect to the acts or omissions of any Tenants or other occupants of the Property.

- 10. Maintenance of Property.** During the Term, Landlord shall keep and maintain the Property in good order and repair, and shall allow no nuisance to exist or be maintained therein, including without limitation, the grounds, sidewalks, roads, parking and landscaped areas thereof. The Tenants shall not be obligated to make any repairs or replacements of any kind to the Property and all such repairs or replacements shall be made in a timely fashion by Landlord at Landlord's sole cost. Notwithstanding the foregoing, if there is any damage or destruction to the Property due to the negligence or willful misconduct of a Tenant or any of his/her agents, invitees or Tenants, then such Tenant shall be responsible for any reasonable, applicable insurance deductible (which shall be payable to Landlord upon demand), and such Tenant shall reimburse Landlord for all costs and expenses incurred by Landlord to repair such damage or destruction.
- 11. Insurance.** Landlord shall, at its sole cost and expense, maintain at all times during the Term a policy of insurance in an amount required to cover the replacement cost of the Property or as otherwise required under Landlord's mortgage. In addition, Landlord shall maintain general liability insurance insuring Landlord against loss or other liability for personal and bodily injury to persons and/or damage to Property and/or death of any person and/or persons occurring in or about, or resulting from an occurrence in or about the Property.
- 12. Assignment and Sublease.** No Tenant may assign or sublease any interest in this Lease without the prior written consent of the Landlord.
- 13. Default.** Tenant failure to perform or fulfill any obligation under this Lease shall be a default curable upon 3 days' prior notice from Landlord. However, in the event that a Tenant, or any of his/her agents, guests or invitees, violate any laws or local ordinances, or breach the House Rules, Landlord may immediately terminate the Lease and exercise the remedies granted under this Lease or applicable law.

14. **Indemnity.** Each Tenant, with respect to such Tenant's use of the Property only, hereby assumes all risk of damage to Property or injury to persons in, upon or about the Property from any cause whatsoever (including, but not limited to, any personal injuries resulting from a slip and fall in, upon or about the Property) and agrees that Landlord, and Landlord's Property manager and agent, its shareholders, partners, and their respective officers, agents, servants, employees, and independent contractors shall not be liable for, and are hereby released from any responsibility for, any damage either to person or Property or resulting from the loss of use thereof, which damage is sustained by any person in, upon or about the Property or by such Tenant or by other persons claiming through such Tenant in, upon or about the Property. Should Landlord be named as a defendant in any suit brought against Landlord or any Tenant in connection with or arising out of such Tenant's occupancy of the Property, such Tenant shall pay to Landlord its costs and expenses incurred in such suit, including without limitation, its actual professional fees such as reasonable appraisers', accountants' and attorneys' fees. The provisions of this Section 15 shall survive the expiration or sooner termination of this Lease with respect to any claims or liability arising in connection with any event occurring prior to such expiration or termination.
15. **Arbitration.** Any controversy, dispute, or claim of any nature arising out of, in connection with, or in relation to the interpretation, performance or breach of this Lease, including any claim based on contract, tort or statute, shall be determined by final and binding arbitration conducted before a single arbitrator in Austin, Texas and administered by JAMS, or if JAMS shall not then exist, by such other nationally recognized dispute resolution organization to which the parties hereto agree.
16. **Landlord's Property Manager and Agent.** TurnKey Vacation Rentals, Inc. ("TurnKey") is landlord's Property manager and authorized agent, who will perform services for the Landlord and Tenant as provided in this Lease. Tenant agrees that TurnKey and its authorized agents may access the Property to fulfill the obligations or enforce the terms of this Lease, including the House Rules, as provided herein.
17. **Right of Inspection.** Each Tenant agrees, during the Lease Term, to make the Property available to Landlord or Landlord's agents (specifically including TurnKey) for the purposes of inspection, making repairs or improvements, to supply agreed upon services or in case of emergency. No Tenant shall, without Landlord's prior written consent, alter any locks to the Property.
18. **Holdover.** If any Tenant holds over after the expiration of the Lease Term or fails to abide by the Tenant Agreement, such tenancy shall be from day-to-day only, and shall not constitute a renewal hereof or an extension for any further term. In such case, Tenant's share of the Rent shall be payable at a rate equal to two (2) times the Rent set forth in Section 3 above, plus the actual costs of re-accommodating future tenants that were scheduled to rent the Property. Such day-to-day tenancy shall be subject to every other applicable term, covenant and agreement contained herein. Nothing contained in this Section 18 shall be construed as consent by Landlord to any holding over by any Tenant, and Landlord expressly reserves the right to require any Tenant to surrender possession of the Property to Landlord as provided in this

Lease upon the expiration of the Lease Term or other termination of this Lease. If a Tenant fails to surrender the Property upon the termination or expiration of the Lease Term, in addition to any other liabilities to Landlord accruing therefrom, such Tenant shall protect, defend, indemnify and hold Landlord harmless from all loss, costs (including reasonable attorneys' fees) and liability resulting from such failure, including, without limiting the generality of the foregoing, any claims made by any other Tenant or future tenants founded upon such failure to surrender and any lost profits to Landlord resulting therefrom.

19. **Delay of Occupancy.** If any Tenant is unable to occupy the leased premises on the Effective Date because of a prior tenant's holding over of the leased premises, if the premises are under repair or if they are otherwise unavailable for Tenant's occupancy as determined by Landlord, Landlord will not be liable to Tenant for such delay and this lease will remain enforceable. In the event of such a delay, the Effective Date will automatically be extended to the date Tenant is able to occupy the Property, and the expiration of the Lease Term will also be extended by a like number of days, so that the length of this lease remains unchanged. If any tenant is unable to occupy the leased premises after the 10th day after the Effective Date because of a prior tenant's holding over of the leased premises, the tenant denied possession may terminate this lease by giving written notice to Landlord before the leased premises become available to be occupied by Tenant, and Landlord will refund to said tenant any amounts paid to Landlord by said tenant. This paragraph does not apply to any delay in occupancy caused by cleaning or repairs.
20. **Severability:** If any part of this Lease shall be held unenforceable for any reason, the remainder of this Agreement shall continue in full force and effect. If any provision of this Lease is deemed invalid or unenforceable by any court of competent jurisdiction, and if limiting such provision would make the provision valid, then such provision shall be deemed to be construed as so limited.
21. **Entire Agreement and Conflicts:** This Lease constitutes the entire agreement between the parties and supersedes any prior understanding or representation of any kind preceding the date of this Lease. There are no other promises, conditions, understandings or other agreements, whether oral or written, relating to the subject matter of this Lease. To the extent any of the provisions are found to be in conflict with other provisions in the Lease, the following will take precedence, in order: the Lease, the House Rules, TurnKey Terms of Service and Privacy Policy found at turnkeyvr.com/terms. The TurnKey Guest Agreement found at turnkeyvr.com/terms will not apply to this Lease.
22. **Governing Law.** This Lease Agreement shall be governed, construed and interpreted by, through and under the laws of the State of TX. Tenant hereby waives any provisions of state, local or quasigovernmental authority applicable to the residential leasing of the Property which may be waived by tenants. All statutory residential lease provisions which may not be waived by a tenant are incorporated herein by this reference.
23. **Electronic Signature and Delivery; Counterparts.** Landlord and the Tenants may execute signature pages to this Lease by online

acceptance or e-mail, which copies shall be deemed to be an original executed signature page. This Lease may be executed in any number of counterparts, each of which shall be deemed an original and all of which counterparts together shall constitute one agreement with the same effect as if the parties had signed the same signature page.

[Signatures to follow]

House Rules

Pursuant to the Lease, you agree to the following House Rules for your rental of the Property. If you have any questions regarding your Lease or use of the Property, please call the Landlord's property manager, TurnKey, at (844)-551-6991.

1. Policies: Please treat our Property with the care you would at your own property and abide by following policies:

- Behave as you would in any home you live in, with respect for property and neighbors.
- No parties, noise that can be heard beyond the Property lot line or in adjacent units, or any illegal activity shall take place at the Property.
- No pets are allowed unless otherwise noted for specific properties and where you have paid a pet fee in connection with your Lease.
- No smoking is allowed in or around any Property.
- Please use common courtesy at the Property by keeping it clean, reporting any problems and taking garbage to the outside bins.

2. Swimming Pools, Hot Tubs, or Beach: If the Property that you have rented includes a pool or hot tub, or is on a beach, these can all be obviously dangerous. Tenants should observe and adhere to all rules and policies as posted at the Property and supervise all children at all times. Lifeguards are not provided. Decks and patios can be slippery when wet and can result in injury to anyone who is not careful. Tenant accepts and assumes all risks involved in or related to the use of a pool, hot tub, beach and deck/patio areas.

3. Property Damage Waiver: Tenant will be offered an optional Damage Waiver that protects Tenant against unintended damage done to the Property. This is not insurance, and the Damage Waiver does not apply to intentional damage done by the Tenant or Tenant's guests, or excessive wear and tear due to parties, smoking, pets or otherwise, or additional cleaning charges due to stains or spills, or fines incurred by the police or HOA due to noise, excessive trash or parking, or damage over the purchased amounts of either \$3,000 or \$5,000. If Tenant does not wish to purchase this Damage Waiver, a security deposit of \$3,000, \$5,000, or greater depending on Property will be required before the Lease Effective Date. If a Property requires an additional security deposit, Landlord will explain this to Tenant in detail before executing the Lease. Tenant acknowledges that any damage or fines not covered by the Damage Waiver or above the amount of any security deposit can be charged to Tenant. The Damage Waiver can be purchased up to the Effective Date of your Lease. You do not have to purchase this Damage Waiver.

4. Excessive Wear and Tear, Noise and Occupancy: If excessive wear and tear is found on the Property (or Premises), or additional cleaning is necessary due to spills, trash left on site, stains to furniture, carpeting, linens, paint, wallpaper, or flooring, Tenant authorizes Landlord to charge Tenant for additional fees. Tenant will be provided a receipt for any additional fees incurred upon request or as required by local regulations. If at any time the maximum number of Tenant's occupants is exceeded or if Landlord receives information about excessive noise, Landlord has the right to evict Tenant and all occupants immediately and to charge Tenant a minimum service fee of \$250 with no refund for the balance of the remaining Lease. If any sign of smoking is discovered Tenant authorizes Landlord to charge Tenant an additional minimum \$500 cleaning fee. Unless the Lease specifically allows, if any sign of any pet is discovered Tenant authorizes Landlord to charge Tenant an additional minimum \$500 cleaning fee. Landlord will return any balance of a security deposit to Tenant, less any charges or amounts owed by Tenant, within fourteen (14) days after the end of the Lease Term or as otherwise required by local laws or regulations.

5. Maintenance and Access: We have the right to enter the Property to address maintenance and repair issues or violations of any House Rules. This is an associated risk of renting a single family residence or condo. If a maintenance issue occurs that cannot be fixed in a reasonable amount of time and significantly affects your stay, we reserve the right to refund at our discretion or offer to relocate you to another Property.

6. Phone and Internet: Unless otherwise specified, all properties are equipped with a high-speed Wi-Fi connection where service is available and Landlord will provide you with any required Wi-Fi passwords. Landlord does not provide a land line phone for the Property.

7. Furnished Property: The Property is a furnished rental that will include bedspreads, linens, blankets, pillows, towels, a fully equipped kitchen, TV and furnishings unless otherwise specified. A limited supply of paper products, bath and dish soap are also supplied, but will not be replaced if consumed during your Lease.

8. Weather and Other Unforeseen Events: Landlord does not accept liability for any inconveniences arising from any temporary defects or stoppage in supply of water, gas, electricity or plumbing, damage caused by weather/road conditions, natural disasters, acts of God or other reasons beyond Landlord's control. No refunds will be given for any delays or cancellations due to such conditions.

9. Homeowners Association: Landlord cannot warrant the usability or condition of amenities provided through Homeowner associations, including, but not limited to pools, hot tubs, club houses, tennis courts, golf facilities, and picnic & beach facilities.

10. Indemnity: Neither Landlord nor TurnKey assumes any liability for loss, theft, damage or injury to Tenant, Tenant's guests or other occupants in the Property. The Tenant, for himself/herself, his/her heirs, assignors, executors and administrators, fully releases and discharges us and the Landlord and TurnKey from any and all claims, demands and causes of action by reason of

any injury or whatever nature which has or have occurred, or may occur to the Tenant, or any of Tenant's guests or other occupants of the Property as a result of, or in connection with the occupancy of the Property and agrees to hold Landlord and TurnKey free and harmless of any claim or suit arising therefrom. In any action concerning the rights, duties or liabilities of the parties to this Agreement, or their principals, agents, successors or assignees the prevailing party shall be entitled to recover reasonable attorney fees and costs.

11. Sale Contingency: In the event that the Property is sold or transferred, Landlord reserves the right to provide the Tenant with a comparable Property at no additional cost to the Tenant. Showings during occupancy are by appointment only at Tenant's prior approval.

[Signatures to follow]

Local Ordinance Rider - Texas Statutory Provisions

1. Maximum Occupancy. Texas Property Code § 92.010 provides that the maximum lease occupancy is 3 adults per bedroom, without reference to any children. Tenant must adhere to this requirement no matter the circumstances.
2. Landlord Repairs. If Landlord fails to repair a condition that materially affects the physical health or safety of an ordinary tenant as required by this lease or the Property Code, Tenant may be entitled to exercise remedies under §92.056 and §92.0561 of the Texas Property Code. If Tenant follows the procedures under those sections, the following remedies may be available to Tenant: (1) terminate the lease and obtain an appropriate refund under §92.056(f); (2) have the condition repaired or remedied according to §92.0561; (3) deduct from the rent the cost of the repair or remedy according to §92.0561; and (4) obtain judicial remedies according to §92.0563. Do not exercise these remedies without consulting an attorney or carefully reviewing the procedures under the applicable sections. The Property Code presumes that 7 days is a reasonable period of time for the Landlord to repair a condition unless there are circumstances which establish that a different period of time is appropriate (such as the severity and nature of the condition and the availability of materials, labor, and utilities). Failure to strictly follow the procedures in the applicable sections may cause Tenant to be in default of the lease.
3. Smoke Detectors. Subchapter F, Chapter 92, Property Code requires the Property to be equipped with smoke detectors in certain locations. Requests for additional installation, inspection, or repair of smoke detectors must be in writing. Disconnecting or intentionally damaging a smoke detector or removing a battery without immediately replacing it with a working battery may subject Tenant to civil penalties and liability for damages and attorney fees under §92.2611, Property Code.
4. Lien for Unpaid Rent. Landlord will have a lien for unpaid rent against all of Tenant's nonexempt personal property that is in the Property and may seize such nonexempt property if Tenant fails to pay rent. Subchapter C, Chapter 54, Property Code governs the rights and obligations of the parties regarding Landlord's lien. Landlord may collect a charge for packing, removing, or storing property seized in addition to any other amounts Landlord is entitled to receive. Landlord may sell or

dispose of any seized property in accordance with the provisions of §54.045,
Property Code.

IN WITNESS THEREOF, Landlord and Tenant have caused this Lease to be
executed as of the Effective Date.

TENANT:

/s/ Gena Carter

Gena Carter

LANDLORD:

TurnKey Vacation Rentals, Inc.

/s/ T.J. Clark

Authorized Signer for TurnKey Vacation Rentals, Inc.

Landlord's Property Manager and Leasing Agent

2105 Big Horn Complaints



Inbox x

TurnKey Emails x



Marshall, Khalid

Sep 29 (12 days ago) ☆



to me ▾

I am sitting in front of 2105 Big Horn and they are complaining about the hot tub.

The party present also stated that there is no shared lease agreement.



Khalid Marshall

Code Enforcement Officer

City of Austin Code Department

P: [512-974-7846](tel:512-974-7846) E: Khalid.Marshall@austintexas.gov

"For those to my left and right"



T.J. Clark <tj.clark@turnkeyvr.com>

Sep 30 (11 days ago) ★



to Veronica, Khalid ▾

Hi Khalid -

Thanks for your note. I'm not fully understanding the complaint about the hot tub but the tenant is correct - there is only one tenant on the current lease period (greater than 30 days). We would be happy to send a copy of this lease to you if you would like to see it. We are not permitting multiple tenants on leases until we resolve the issue in the legal process we are pursuing.

...



Marshall, Khalid

Sep 30 (11 days ago) ☆



to me ▾

Thank you for the reply. I'll be back out there tonight and I'll get you an email for someone. I told them that they may or may not see someone to fix it by the time they left on Sunday.

From: T.J. Clark [mailto:tj.clark@turnkeyvr.com]

Sent: Saturday, September 30, 2017 9:11 AM

To: Marshall, Khalid <Khalid.Marshall@austintexas.gov>

Cc: Veronica Gonzales <veronica.gonzales@turnkeyvr.com>

Subject: Re: 2105 Big Horn Complaints

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