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THIRD COURT OF APPEALS
AUSTIN, TEXAS
7/23/2018 1:05 PM
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No. 03-17-00812-CV

IN THE COURT OF APPEALS

FOR THE THIRD DISTRICT OF TEXAS

AUSTIN, TEXAS

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

Plaintiffs-Appellants/Cross-Appellees,

&

STATE OF TEXAS

Intervenor-Appellant/Cross-Appellee,

v.

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

Defendants-Appellees/Cross-Appellants.

From the 53rd Judicial District Court, Travis County, Texas
Cause No. D-1-GN-16-002620

CROSS-APPELLANTS CITY OF AUSTIN AND MAYOR STEVE ADLER'S REPLY BRIEF

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TO THE HONORABLE THIRD COURT OF APPEALS:

Appellees/Cross-Appellants City of Austin and Steve Adler (collectively the "City") respectfully submit their *Reply Brief*.

ARGUMENT IN REPLY

The trial court erred in denying the City's Plea to the Jurisdiction. As set out below, the trial court lacked subject-matter jurisdiction over Appellants and the State's claims because: 1) the City retains its immunity, and 2) Appellants and the State do not have standing.

If the City prevails on any one of the arguments below, there is no jurisdiction.

I. The City retains immunity for zoning decisions.

A. The City has broad authority to regulate the use of property.

The City has broad authority in zoning decisions, and case law supports the historic deference to zoning ordinances.

The City may enact laws "for the purpose of promoting the public health, safety, morals, or general welfare and a protecting and preserving places and area of historical, cultural, or architectural importance and significance." TEX. LOC. GOV'T CODE § 211.001. In particular here, the City may regulate "the percentage of a lot that may be occupied," "population density," and "the location and *use of buildings, other structures . . . .*" *Id.* at § 211.003 (emphasis added).

In addition to the Local Government Code, many cases discuss zoning authority and the deferential review applied by appellate courts.

Zoning is a governmental function that allows a "municipality, in the exercise of its legislative discretion, *to restrict the use of private property*." *Weatherford v. City of San Marcos*, 157 S.W.3d 473, 484 (Tex. App.—Austin 2004, pet. denied) (quoting *City of Brookside Vill. v. Comeau*, 633 S.W.2d 790, 792 (Tex. 1982)) (emphasis added). "Zoning decisions are vested in the discretion of municipal authorities; courts should not assume the role of a super zoning board." *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 933 (Tex. 1998).

The Texas Supreme Court has instructed that when a city adopts a zoning ordinance that limits a property owner's prospective expectations of profit, it does not violate the constitution so long as the regulation furthers a legitimate governmental interest. *Sheffield Dev. Co. Inc. v. City of Glenn Heights*, 140 S.W.3d 660, 677-79 (Tex. 2004).

A zoning ordinance is *presumed valid*, and the burden is on those seeking to prevent its enforcement "to prove the ordinance is arbitrary or unreasonable because it bears no substantial relationship to the public health, safety, morals or general welfare." *City of San Antonio v. Arden Encino Partners, Ltd.*, 103 S.W.3d 627, 630 (Tex. App.—San Antonio 2003, no pet.). "This *extraordinary burden* requires the complainant to show 'that no conclusive, or even fairly issuable facts

or conditions exist in support of the exercise of the police power.'" *Id.* (quoting *City of University Park v. Benners*, 485 S.W.2d 773, 779 (Tex. 1972) (emphasis added).

"If reasonable minds may differ as to whether or not a particular zoning ordinance has a substantial relationship to the public health, safety, morals or general welfare, no clear abuse of discretion is shown and the ordinance must stand as a valid exercise of the city's police power." *Id*. at 630 (citing *City of Pharr v. Tippitt*, 616 S.W.2d 173, 176 (Tex. 1981)).

The deferential inquiry applied in zoning disputes does not focus on the ultimate effectiveness of the ordinance. *Mayhew*, 964 S.W.2d at 938. Instead, the inquiry looks to whether the municipality could have rationally believed that the ordinance would promote its objectives. *Id.*

As this Court has observed, a city can "rezone the property to entirely prohibit previously permissible uses, even established uses, [and] the City can amend regulations that affect the prospective development of the property within the board zoning categories." *Williamson Pointe Venture v. City of Austin*, 912 S.W.2d 340, 343 (Tex. App.—Austin 1995, no writ). "The proposition that the legislative act of zoning entitles the landowner to develop his or her property free from all subsequent regulatory changes *is so contrary to established law* that the legislature, had it wanted to effect such a change, must have clearly so stated." *Id.*.

Finally, "a municipality's power to terminate existing property uses rendered nonconforming under zoning regulations is a valid exercise of the police power." *Board of Adjustment of City of Dallas v. Winkles*, 832 S.W.2d 803, 806 (Tex. App.—Dallas 1992, writ denied).

As these authorities confirm, the City was well within its authority to regulate short-term rentals. 2CR589-97; 598-612.

B. The filing of a declaratory-judgment action does not waive immunity.

Contrary to Appellants' argument, the mere filing of a declaratory-judgment action challenging the constitutionality of a zoning ordinance does not waive the City's immunity. Appt. Reply Br. 33.

The Uniform Declaratory Judgments Act ("UDJA") is not a grant of jurisdiction. *Chenault v. Phillips*, 914 S.W.2d 140, 141 (Tex. 1996). The UDJA is "'merely a procedural device for deciding cases already within a court's jurisdiction.'" *Id.* (quoting *State v. Morales*, 869 S.W.2d 941, 947 (Tex. 1994)).

As relevant here, the UDJA "gives the court no power to pass upon *hypothetical or contingent situations*, or determine questions not then essential to the decision of an actual controversy, although such questions may in the future require adjudication." *Riner v. City of Hunters Creek*, 403 S.W.3d 919, 922 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (emphasis added).

That the UDJA provides a "*narrow* waiver of immunity for claims challenging the validity of ordinances or statutes," does not end this Court's inquiry on immunity. *See Texas Parks & Wildlife Dep't v. Sawyer Trust*, 354 S.W.3d 384, 388 (Tex. 2011) (emphasis added).

C. Appellants must have a facially valid constitutional claim to defeat the City's immunity.

The Texas Supreme Court set out the test for governmental immunity in declaratory-judgment actions that challenge the constitutionality of a statute in *Klumb v. Houston Municipal Employees Pension Sys.*, 458 S.W.3d 1 (Tex. 2015). To overcome immunity and invoke the trial court's jurisdiction, Appellants must have a constitutional claim that is facially valid. *Id.* at 15. "Facially valid" means one that involves a constitutionally protected right. *Id.*

In *Klumb*, the dispute centered on the City of Houston's restructuring and outsourcing certain jobs. As a result, the pension system made changes that caused otherwise eligible members to be denied "retiree" status and required other employees to contribute to the pension fund despite being employed by a third party.

The employees sued, seeking damages and declaratory relief. The employees alleged violations of the due-course-of-law and equal protection provisions in the Texas Constitution. The pension system filed a plea to the

jurisdiction, contending that governmental immunity barred the constitutional claims. *Id.* at 7.

According to the Texas Supreme Court, "while it is true that sovereign immunity does not bar a suit to vindicate constitutional rights, . . *immunity from suit is not waived if the constitutional claims are facially invalid*." *Id.* at 13 (emphasis added).

The Court explained that "[b]efore any substantive or procedural due-process rights attach, however, the Petitioners must have a liberty or property interest that is entitled to constitutional protection." *Id.* "A constitutionally protected right must be a vested right which is 'something more than a mere expectancy based upon an anticipated continuance of an existing law.'" *Id.* (quoting *City of Dallas v. Trammell*, 101 S.W.2d 1009, 1014 (Tex. 1937)).

In *Klumb*, the employees' due-course-of-law claims were held to be facially invalid because the employees had no vested property right to pension-plan contributions or future retirement benefits. *Id.* A right emanating from a mere expectancy is not vested. *Id.* at 16. The employees cited no authority that elevated their interests in the pension fund from a mere expectancy to a constitutional guarantee. *Id.* Thus, there was no jurisdiction.

As for the employees' equal-protection claim, the Court noted that, because there was no suspect class and no fundamental right involved, the employees had

to demonstrate that the challenged decision was not rationally related to a legitimate governmental purpose. *Id*. at 13. The Court went on to explain the two legitimate governmental objectives—preserving the fund and preventing double-dipping. Thus, the equal-protection claims failed as a matter of law because they were facially invalid.

Accordingly, *Klumb* rejects Appellants' argument that the mere filing of a declaratory-judgment action challenging the constitutionality of a statute waives immunity.

Despite Appellants' argument that *Patel* replaced *Klumb*, many cases cite *Klumb*. Appt. Reply Br. 35.[1] For example, in *Mbogo v. City of Dallas*, Hinga raised a due-course-of-law challenge to a zoning ordinance that rendered his auto repair business nonconforming. *Mbogo v. City of Dallas*, No. 05-17-00879-CV, 2018 WL 3198398 (Tex. App.—Dallas June 29, 2018, no pet. h.). The ordinance allowed a five-year period for owners to recover their investment. *Id*. at *2.

The Dallas Court of Appeals cited *Klumb* and held that "property owners do not have a constitutionally protected, vested right to use property in any way they choose without restriction and despite existing rules in force at the time they acquire it." *Id*. at *8. The court rejected Hinga's contention that he had a unilateral

[1] *Klumb* and *Patel* were decided during the same term of the Texas Supreme Court only three months apart.

expectation to use his property as an auto repair business in perpetuity. *Id.* Hinga failed to establish a vested property interest entitled to due process protection. *Id.*

In *Lamar University v. Jenkins*, Jenkins sued the university for retaliation after it denied his application for tenured professor. *Lamar Univ. v. Jenkins*, No. 09-17-00213-CV, 2018 WL 358960, at *1 (Tex. App.—Beaumont January 11, 2018, no pet.). Jenkins sought declaratory judgment declaring that the University violated his rights to due course of law and free speech under the Texas Constitution. *Id.* at *5.

Applying the rule in *Klumb*, the Beaumont Court held that Jenkins's due-course-of-law claim was facially invalid because he failed to show that he had a protected property interest in continued employment with the Lamar University or in obtaining tenure. *Id.* The court further concluded that Jenkins's free-speech claim was also facially invalid. *Id.*

D. Appellants have no constitutionally protected right in the use of their property.

Like in *Klumb*, there is no constitutionally protected right involved in this case. As numerous authorities hold, Appellants have no vested constitutional right to the use of their properties as short-term rentals. Thus, the City retains immunity.

The Texas Supreme Court held more than 45 years ago that "property owners do not acquire a constitutionally protected vested right in property uses once commenced or in zoning classifications once made." *City of University Park*

v. Benners, 485 S.W.2d 773, 778 (Tex. 1972); *see also Arden Encino Partners, Ltd.*, 103 S.W.3d at 630 (property owners do not have a vested interest in particular zoning classifications; city may rezone as public necessity demands).

As this Court recognized, "[e]stablished law provides that no property owner has a vested interest in particular zoning categories." *Williamson Pointe*, 912 S.W.2d at 343. Otherwise, "a lawful exercise of the police power by the governing body of the city would be precluded." *Id.* (quoting *Benners*, 485 S.W.2d at 778).

The principle in *Benners* has been applied in many cases.

For example, this Court addressed the holding in *Benners* in *Weatherford v. City of San Marcos*, 157 S.W.3d 473, 483 (Tex. App.—Austin 2004, pet. denied). Weatherford raised equal-protection and due-process challenges following the City's denial of his requests to rezone his property and use portions of his land for commercial and multi-family developments. *Id*. at 479-81.

This Court noted that Weatherford "had no vested property right in any particular zoning classification." *Id.* at 483 (citing *Benners*, 485 S.W.2d at 778).

This Court also rejected Appellants' argument that public comment has no place in the analysis. In *Weatherford*, in its substantive due-process discussion, this Court observed that it "was the significant public opposition to Weatherford's requested development" that formed the basis of the City's decision. *Id.* at 484. Neighbors had voiced their concerns about increases in traffic and pollution,

changing the character of the neighborhood, urban sprawl, drainage and utilities problems, and changes in their quality of life. *Id.*; *see also Arden Encino Partners, Ltd.*, 103 S.W.3d at 630, n.2 (explaining that in a zoning dispute that a "city council's decision need not be based on what is presented at the zoning hearing. Instead, after all parties have had an opportunity to be heard, the council may act on its own knowledge of the community and its own appraisal of the public welfare").

This Court held that the City's decision to deny Weatherford's rezoning requests were rationally related to the general welfare—namely, protecting residents from the negative impact of urbanization and maintaining quality of life. *Id.*

In another case citing *Benners*, *City of La Marque v. Braskey*, the Houston First Court of Appeals addressed jurisdiction in a UDJA action that alleged a kennel ordinance constituted an unlawful taking. 216 S.W.3d 861, 862 (Tex. App.—Houston [1st Dist.] 2007, pet. denied).

Braskey operated a state-licensed cat shelter. A year after she began operations, the City cited her for violating the city's Kennel Location Ordinance. *Id.* The trial court declared that the ordinance did not apply and issued an injunction against its enforcement.

According to the Houston First Court, the trial court had jurisdiction only if Braskey had a vested property right that was threatened with irreparable harm. *Id.* at 863. The court noted that the issue was not whether Braskey had a property right in the facility, but instead whether she had a vested property right in the *use* of the facility as a cat shelter. *Id.*

According to the court, "property owners do not have a constitutionally protected vested right to use real property in any certain way, without restriction." *Id.* at 863-64 (citing *Benners*, 485 S.W.2d at 778). A right is "vested" when it "has some definitive, rather than merely potential existence." *Id.* at 864 (quoting *Texas S. Univ. v. State Street Bank & Trust Co.*, 212 S.W.3d 893, 903 (Tex. App.—Houston [1st Dist.] 2007, pet. denied)).

The court held that Braskey's use of her property as a facility for cats was not a constitutionally protected vested right "because it concerns only the way that her property is used, which is not an absolute right." *Id.* All of Braskey's alleged harms—death of the cats, closing her facility, and fines—concerned use of the property, not a constitutionally protected vested right. *Id.* Accordingly, the trial court lacked jurisdiction. *Id.*

Applying these controlling authorities, Appellants cannot overcome the City's immunity. Under *Klumb*, Appellants do not have a constitutionally protected right at stake. Under *Benners*, Appellants have no constitutionally

protected vested right to a particular use of their property. Further, Appellants have no guarantee that their licenses to operate short-term rentals will continue. 2CR502-03 (yearly application and renewal process).

In any event, the ordinance is rationally related to legitimate governmental purposes. City enacted the ordinance after an almost five-year period of consideration, investigation, public hearings, and staff and elected officials' comments that all demonstrated the need for further regulation and eventually discontinue short-term rentals in residential neighborhoods.

As set out in the City's opening brief, the ordinance was in response to concerns for public health, safety, and general welfare, as well as the public interest in preventing negative impacts on historic neighborhoods. Appe. Br. 6-8. These concerns were also set out in the City's *Response to Plaintiffs' and Intervenor's Motion for Summary Judgment*, Ex. M. 1CR797, 809, n.4-7.[2]

[2] Cites to the City's Ex. M are in the Clerk's Record as follows: Ex. M (3CR1367-69, 1373, 10250, 10255 (public health impacted by over-occupancy of residential properties without adequate septic system capacity); 3CR6728, 8886, 10759 (complaints about short-term rentals, including health and safety issues)).
Ex. M (3CR1411, 6007-08, 8601-02, 8886 (unsafe situations arising from drug and alcohol use at short-term rental properties; 3CR1279, 1368, 1582-83, 6303, 6728, 709 (neighborhood disturbances); 3CR1409, 1590, 1612, 1680, 5165, 5167, 710, 732-33, 786-87, 10349 (traffic impacts)).
Ex. M (3CR1278, 1392, 5767, 5791-92, 5796, 6009, 4785, 5176, 7269, 560, 8892, 12354, 10745, 10760, 10767 (impact on availability of affordable housing and rising housing prices); 3CR1279, 1358, 5789-90, 6269-70, 6303, 4771, 8601 (complaints that rental properties used for large events); 3CR1392, 5793, 6724, 4779, 4784, 5172, 12366, 12586, 9323, 10260, 10745 (impact of clustering of short-term rentals on character of surrounding neighborhood); 3CR6270, 9680, 10041, 10244, 10757, 11440 (need to regulate certain bad actors among short-term rental operators)).

E. Appellants' authorities are not controlling.

Finally contrary to Appellants' argument, the STR Ordinance does not eliminate "vested property rights." Appt. Reply Br. 36. Further, Appellants' cited authorities do not support a "right to lease" that cannot be regulated by the City.

Appellants cite *Village of Tiki Island v. Ronquille* for two propositions: 1) that STR owners have standing to challenge a ban on STRs; and 2) that there is a vested right to the use of homes as STRs. Appt. Reply Br. 31, 43 (citing *Tiki Island*, 463 S.W.3d 562, 578 (Tex. App.—Houston [1st Dist.] 2015, no pet.). Appellants stretch *Tiki* beyond its boundaries; the case does not stand for these broad substantive propositions.

Tiki Island is a waterfront community on Galveston Island. The majority of the homes in Tiki Island are owned by part-time occupants.[3] *Id.* at 564-65, n.1. The governing board of Tiki Island imposed an immediate ban on short-term rentals but provided for grandfather status to properties that had been used for short-term rentals before March 1, 2011. *Id.* at 568. Property owner Hill was not given grandfather status even though she had used her property as a short-term rental since before March 1, 2011. *Id.* at 569.

The trial court granted Hill's request for temporary injunction. *Id.*

Ex. M (3CR1392, 6008, 6264, 4771, 5162, 5168, 5179, 4070, 10756 (short-term rental use incompatible with residential nature of surrounding neighborhoods).

[3] An island vacation area, like Tiki Island, also carries with it an expectation that properties will be rented.

There are two significant factors that limit the application of *Tiki Island*. First, the case is an interlocutory appeal of a temporary injunction. The court of appeals did not strike down the ban on short-term rentals. In fact, the court of appeals concluded, "[w]hen Ordinance 05-14-02 was passed in 2014, it likewise *avoided running afoul of certain property owner's vested rights by grandfathering their 2011 existing use of their homes for short-term rentals*." *Id.* at 587 (emphasis added). That is, the court of appeals made clear that the real issue was the denial of Hill's grandfather status and her ability to obtain a temporary injunction.

Second, the portion of *Tiki Island* on which Appellants and the State rely is the court of appeals's discussion on Hill's application for temporary injunction. *Id.* at 583-87. That is, the issue was not Hill's standing to challenge the STR ban; it was whether Hill could meet the elements for a temporary injunction that challenged her property not being given grandfather status. As the court of appeals described it, Hill had a "concrete injury" that did not depend on any future actions. *Id.* at 583.

Notwithstanding these two limiting factors, the court of appeals found a "narrow" vested right when a new law restricts an existing commercial use of property without providing a means of recouping the owner's investment. *Id.* The holding that Appellants and the State cite from *Tiki Island* by its express terms, however, involves a critical factor not present here: "The Village's excluding Hill

from grandfathered status, however, foreclosed Hill's existing investment use of her property *without an avenue for recoupment*. We thus hold that she has identified a vested right for purposes of conferring the trial court with jurisdiction to enter a temporary injunction in her favor." *Id.* (emphasis added).

The court's analysis and conclusion turned on the fact that Hill had a "unique concrete imminent harm to her investment and business activities," that she was denied any opportunity to recoup her investment, and was inexplicably denied grandfather status. *Id.* at 587.

Appellants here have no concrete injury, have shown no imminent harm, and have been given the opportunity to recoup their investments. 2CR598, 609; 670, 673, 685, 758, 801-02.

Appellants cite two cases for the proposition that there is a "right to lease." *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC*, 363 S.W.3d 192, 294 (Tex. 2012); *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 140 (Tex. 1977); Appt. Reply Br. 43. Curiously, neither case mentions the word "lease," and neither supports the notion that there is a "right to lease" free from governmental regulation.

Denbury involved a private enterprise attempting to assert itself as a common-carrier pipeline with eminent-domain power. *Denbury Green*, 363 S.W.3d at 195. There was no issue in the case about a lease or a "right to lease."

Eggemeyer was a divorce case that raised the issue of whether one spouse could be divested of her separate property in favor of the other spouse. *Eggemeyer*, 554 S.W.2d at 138. Again, the opinion has not one word about a lease or a right to lease.

Even if there were a right to lease, it is still a "use" of property and *Benners* would still apply: because "property owners do not acquire a constitutionally protected vested right in property uses once commenced or in zoning classifications once made," the right to lease cannot be carved out and protected. *Benners*, 485 S.W.2d at 778. Further, because a lease is a use of property, it is not an absolute right. *See Braskey*, 216 S.W.3d at 864.

As this Court has observed, a city can "rezone the property to entirely prohibit previously permissible uses, even established uses [including a right to lease], [and] the City can amend regulations that affect the prospective development of the property within the board zoning categories." *Williamson Pointe*, 912 S.W.2d at 343. "The proposition that the legislative act of zoning entitles the landowner to develop his or her property free from all subsequent regulatory changes *is so contrary to established law* that the legislature, had it wanted to effect such a change, must have clearly so stated." *Id.*

If a "right to lease" were something different than every other right surrounding property, then certainly these cases would have carved it out as an exception to these controlling principles. Of course, no case does that.

Finally, Appellants' reliance on *Harvel v. Texas Dep't of Insurance* is misplaced.[4] Appt. Reply Br. 33. The Texas Supreme Court's opinion in *Klumb* controls the analysis for immunity not, *Harvel.*

Harvel is not a challenge to the validity or constitutionality of a statute or ordinance. Instead, it involved a declaratory-judgment action seeking to declare rights under a statute. *Harvel v. Texas Dep't of Ins.—Div. of Workers' Comp.*, 511 S.W.3d 248, 253 (Tex. App.—Corpus Christi-Edinburg 2015, pet. denied). It is well established that immunity is not waived for declarations of rights under a statute. *Id.* The Corpus Christi Court concluded there was no jurisdiction. *Id.* at 255.

The State's cited authority fares no better. The State relies on *City of New Braunfels v. Stop the Ordinances Please*, 520 S.W.3d 208 (Tex. App.—Austin 2017, pet. pending) for the proposition that once an owner invests or begins using property as a short-term rental, the right to lease vests because, as the State argues,

[4] Although Appellants cite the case as being from the Austin Court of Appeals, it is actually a case from the Corpus Christi Court of Appeals. *Harvel v. Texas Dep't of Insurance—Div. of Workers' Compensation*, 511 S.W.3d 248, 253 (Tex. App.—Corpus Christi-Edinburg 2015, pet. denied).

the right "has some definitive, rather than merely potential existence." State Resp. Br. 6-7 (quoting *Stop the Ordinances Please*, 520 S.W.3d at 214).

The State stopped short of citing the remainder of the passage. In the very next sentence, this Court stated: "[t]hus, appellees would unquestionably possess a 'vested property right' in the lawful possession of any disposable containers or coolers subject to the ordinances that they might own, either personally or (in the case of the businesses who are appellees) as inventory. But this right does not automatically translate to a 'vested property right' to use said property a particular way or in a particular location, although these activities may be aspects of broader *personal* rights or liberties." *Id.*

In that case, this Court found that the appellees failed to show any injury economic injury as a result of the ordinance and that the trial court lacked jurisdiction. *Id.* at 223-25.

II. The trial court lacked jurisdiction under the UDJA.

In addition to governmental immunity as a bar to the trial court's jurisdiction, Appellants and the State also cannot establish jurisdiction under the UDJA. As set out below, Appellants have not suffered an injury, and their claims are not ripe.

A. There is no *per se* injury.

Contrary to Appellants' argument, there is no *per se* injury with an alleged constitutional violation. Appt. Reply Br. 28.

Appellants contend that, as a matter of law, the denial of a constitutional right inflicts an irreparable injury. Appt. Reply Br. 28. Their sole support for this proposition is a First Amendment case involving a deprivation of freedom of speech. *Iranian Muslim Org. v. City of San Antonio*, 615 S.W.2d 202, 208 (Tex. 1981). It has no application here.

On its face, *Iranian Muslim Organization* is limited to "a constitutional right of free speech . . . being stifled by an unconstitutional ban." *Id.* Further, the case is not about the existence of an injury for purposes of establishing subject-matter jurisdiction. Instead, the "injury" discussion is about whether the group established a probable injury for purposes of injunctive relief. *Id.*

This Court has even acknowledged the limited application of *Iranian Muslim Organization. See Public Util. Comm'n of Texas v. City of Austin*, 710 S.W.2d 658, 660 (Tex. App.—Austin 1986, no writ). In *Public Utility Commission*, the City argued that the "denial of due process constitutes irreparable harm as a matter of law." *Id.* at 660-61.

In rejecting the application of *Iranian Muslim Organization*, this Court concluded that the case did not support the allegation that the denial of due process was irreparable harm *per se*. *Id.* at 661.

According to this Court, *Iranian Muslim Organization* "turn[s] on the denial of first amendment rights, which constitute a very different matter from the City's claimed loss of due process." *Id.* In rejecting the City's "harm per se" argument, the Court concluded, "the rule is not so firm or so sweeping as the City would have one believe," noting that "harm per se" applies in First Amendment violations and denial of equal protection in the racial-discrimination context. *Id.* 661-62.

Appellants offer no other support for their alleged "*per se*" injury argument.

B. The UDJA requires a justiciable, not hypothetical, controversy.

Contrary to Appellants' argument, the UDJA does not absolve them of having to show an injury. Appt. Reply Br. 28-30. The UDJA requires some injury and a ripe controversy.

The subject-matter jurisdiction of a trial court is invoked over a declaratory judgment if there is a "justiciable controversy as to the rights and status of the parties actually before the court for adjudication, and the declaration sought must actually resolve the controversy." *Brooks v. Northglen Ass'n*, 141 S.W.3d 158, 163-64 (Tex. 2004).

A "justiciable controversy involves a real and substantial conflict of tangible interests and not merely a theoretical or hypothetical dispute." *Bonham State Bank v. Beadle*, 907 S.W.2d 465, 467 (Tex. 1995). Thus, "jurisdiction under the UDJA, therefore 'primarily depends on the nature of the controversy; whether the controversy is merely hypothetical or rises to the justiciable level.'" *Trinity Settlement Servs., LLC v. Texas St. Securities Bd.*, 417 S.W.3d 494, 504 (Tex. App.—Austin 2013, pet. denied) (quoting *Texas Dep't of Pub. Safety v. Moore*, 985 S.W.2d 149, 154 (Tex. App.—Austin 1998, no pet.)).

A "justiciable controversy must be distinguished from an advisory opinion, which is prohibited under both Texas and federal constitutions." *Moore*, 985 S.W.2d at 143.

Under the UDJA, while it is not necessary for a plaintiff to have *incurred* damage or injury, there at least must be a "fact situation [that] manifests the presences of 'ripening seeds of a controversy.' Such appear where the claims of several parties are present and indicative of threatened litigation in the immediate future which seems unavoidable, even though the differences between the parties as to their legal rights have not reached the state of an actual controversy." *Texas Dep't of Pub. Safety v. Moore*, 985 S.W.2d 149, 153-54 (Tex. App.—Austin 1998, no pet.) (quoting *Ainsworth v. Oil City Brass Works*, 271 S.W.2d 754, 761 (Tex. Civ. App.—Beaumont 1954, no writ)). That is, a plaintiff is not required to show

an injury has already occurred, "provided the injury is imminent or sufficiently likely." *City of Waco v. Texas Nat. Res. Conservation Comm'n*, 83 S.W.3d 169, 175 (Tex. App.—Austin 2002, pet. denied).

The cases Appellants cite support the City's position that there is no jurisdiction. All four cases on which Appellants rely involved an injury or imminent injury to support jurisdiction. Appt. Reply Br. 29.

First, Appellants cite *City of Waco* as support for their argument that they do not have to show an injury to bring a declaratory judgment lawsuit. Appt. Reply Br. 29. Appellants, however, stop short of citing the entire sentence on which they rely. The sentence actually says, "[a] claimant is not required to show that the injury has already occurred, *provided the injury is imminent or sufficiently likely*." *Id.* (emphasis added). Appellants' Reply Brief omits the italicized language. Appt. Reply Br. 29.

City of Waco involved the ripeness of the city's declaratory-judgment action challenging a TNRCC permit-issuing process. *Id. at* 172. The dispute was whether the TNRCC had to adopt certain environmental safety measures before granting additional permits. *Id.* at 174-75.

In that case, there was no question that an injury had already occurred. The TNRCC failed to comply with state law and adopt compliance and pollutant allocation schedules for a river. Instead, the TNRCC continued an interim policy

of issuing permits at their discretion, which harmed the City's water source. The court found the City's claims ripe for judicial review. *Id.* at 177.

Appellants cite *Texas Dep't of Public Safety v. Moore* also for the proposition that they do not need an injury before filing a declaratory judgment action. Appt. Reply Br. 29.

But, like *City of Waco*, Moore already sustained an injury. Moore was denied a promotion within the DPS. Moore filed suit seeking declaratory relief that the DPS was not following a Government Code section that required applicants to take an examination to determine qualifications. The State argued there was no jurisdiction.

This Court concluded that the trial court received its jurisdiction from the controversy created by the DPS's application of the statute to Moore.

Next, Appellants cite *Texas Dep't of Banking v. Mount Olivet Cemetery Ass'n*, 27 S.W.3d 276, 282 Austin 2000, pet. denied) for the proposition that a plaintiff does not have to wait for an enforcement action before filing a declaratory judgment action. Appt. Reply Br. 29.

But there was an enforcement action pending against Mount Olivet when it filed the declaratory-judgment action. As this Court pointed out, the parties' dispute began when the Department's audits—in multiple years—reported that Mount Olivet owed money to the State. *Id.* at 282. The Department then reported

that Mount Olivet had violated State law. *Id.* The Department sent Mount Olivet a letter indicating its actions were in violation of the law and later cited Mount Olivet for violation of a statute. *Id.* The Department's notice of violation subjected Mount Olivet to civil and criminal penalties. *Id.* The Department *again* cited Mount Olivet for a law violation, refused to negotiate a short-term settlement, and referred the dispute to the Comptroller for an enforcement action. *Id.*

Under those facts, this Court found that there was a controversy that was not based on an abstract or hypothetical dispute and was therefore ripe. *Id.* at 282-83.

Finally, Appellants cite *Mitz v. Texas State Bd. of Veterinary Medical Examiners.* In that administrative-law case, the Veterinary Board had issued a first round of cease-and-desist letters, participated in informal conferences, and issued a second round of cease-and-desist letters that stated the plaintiffs were in violation of the law and that their cases would be referred to SOAH. 278 S.W.3d 17, 25 (Tex. App.—Austin 2008, pet. dism'd). As this Court concluded, such facts are sufficient to establish that an enforcement action was imminent or sufficiently likely to support jurisdiction. *Id.*

Thus, all four of Appellants' cases show that jurisdiction under the UDJA requires an injury, an imminent injury, or a pending enforcement action.

Unlike *City of Waco* and *Moore*, where injuries had occurred, Appellants have not been injured by the ordinance and no alleged injury is imminent. Further,

Appellants have not been cited by the City for violations as in *Mount Olivet* and *Mitz*. 2CR680, 725, 763-64, 809-10, 866, 895-96.

C. A controversy must be ripe to support jurisdiction.

Ripeness is a threshold matter that implicates subject-matter jurisdiction. *Robinson v. Parker*, 353 S.W.3d 753, 755 (Tex. 2011). Ripeness requires a "concrete injury for a justiciable claim to be presented." *Id.* (quoting *Patterson v. Planned Parenthood of Houston & Se. Tex.*, 971 S.W.2d 439, 442 (Tex. 1998)). Ripeness requires that, *at the time a lawsuit is filed*, the facts have "developed sufficiently so that an injury has occurred or is likely to occur, rather than being contingent or remote." *Patterson*, 971 S.W.2d at 442. Ripeness focuses on whether a case involves "'uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Patterson*, 971 S.W.2d at 442 (quoting 13A Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice and Procedure § 3532, at 104 (2001 Supp.)).

A case is not ripe "when the determination of whether a plaintiff has a concrete injury can be made only 'on contingent or hypothetical facts, or upon events that have not yet come to pass.'" *Robinson v. Parker*, 353 S.W.3d 753, 756 (Tex. 2011) (quoting *Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 852 (Tex. 2000)).

Appellants also cite *Moore* as support for their argument that their claims ripe and not hypothetical. Appt. Reply Br. 39-40.

Recall that *Moore* involved an employee who was not promoted to a higher position within the DPS. No doubt that Moore suffered an injury to support his claim for declaratory relief. *Moore* did not involve a sunset provision, nor did it involve the numerous hypothetical facts in the case that may never come to pass. *See supra* at 23.

Without authority, Appellants further contend that the sunset does not render their claims hypothetical. Appt. Reply Br. 40. Appellants' ripeness argument ignores the City's zoning power discussed above, assumes that Appellants have a vested property right in the use of their property (they do not),[5] and misses the point of ripeness.

Several cases guide this Court's analysis and show that the issues here are not ripe.

This Court addressed ripeness in *Trinity Settlement Servs., LLC v. Texas St. Securities Bd.*, 417 S.W.3d 494 (Tex. App.—Austin 2013, pet. denied). In that case, Trinity observed the Board's adverse actions taken toward another company engaged in the same business as Trinity. Trinity sought a declaration that the law did not apply to Trinity and that the investments that Trinity sold were not

[5] *See supra* at 8-12.

"securities" as defined by the Act. When Trinity filed suit, the Board had taken no action against it. *Id.* at 506.

This Court explained that, in "determining whether a cause is ripe for judicial consideration, we look to whether the facts have sufficiently developed to show that an injury has occurred, or is likely to occur." *Id.* (citing *City of Waco*, 83 S.W.3d at 175). In particular, for a "pre-enforcement" suit seeking a declaration of rights *before* the government takes action, "we have concluded the controversy is ripe for review only if 'an enforcement action is imminent or sufficiently likely.'" *Id.* (quoting *Atmos Energy Corp. v. Abbott*, 127 S.W.3d 852, 856 (Tex. App.—Austin 2004, no pet.)). That is, the plaintiff must demonstrate that the injury is imminent and "not merely remote, conjectural, or hypothetical." *Atmos*, 127 S.W.3d at 856.

In concluding the claims were not ripe, the Court explained that whether an action will be brought against Trinity "depends on many factual contingencies that have not yet come to pass and are not before the court, including whether Trinity chooses to begin selling viatical settlements, how Trinity ultimately structures its investments, the managerial efforts Trinity exerts in such sales, what type of investors purchase the viatical settlements, and whether the TSSB elects to bring an enforcement action against Trinity based on these future actions." *Trinity*, 417 S.W.3d at 506.

According to this Court, "Trinity's claim does not pose a pure question of law but instead asks the trial court to engage in a fact-based determination based upon contingent, hypothetical facts." *Id.* Further, that the Board had pursued another provider did not indicate an enforcement action against Trinity was imminent or sufficiently likely. *Id.* at 507. Accordingly, the Court concluded Trinity's claim was not ripe and thus failed to invoke the trial court's jurisdiction. *Id.*

The Texas Supreme Court considered a ripeness issue in *Waco ISD v. Gibson*. In that case, the Gibsons sued to challenge the school district's student-promotion policy for violations of the equal-rights and due-course-of-law provisions of the Texas Constitution. They contended that the school district's policy would disproportionately impact minority students. The issue before the Texas Supreme Court was ripeness of their claims.

The Court noted the well-established rule that ripeness considers, *at the time the suit is filed*, whether an injury has occurred or is likely to occur. *Gibson*, 22 S.W.3d at 852. The focus is whether the case involves uncertain or future events that may not occur as anticipated or may not occur at all. *Id.*

When the Gibsons sued, no student had been retained under the school district's new policy. Thus, the impact the Gibsons presumed was "only hypothetical when the suit was filed; it may not occur as anticipated, or may not

occur at all." *Id.* Simply stated, the Gibsons had not suffered a "concrete injury." *Id.*

The Texarkana Court of Appeals in *High Mountain Ranch Group, LLC v. Niece* addressed ripeness in a deed-restriction case. 532 S.W.3d 513 (Tex. App.—Texarkana 2017, no pet.). In that case, High Mountain filed a declaratory judgment action to declare that deed restrictions on its lot were illegal and void and sought to modify the residential-use restriction. *Id.* 515-16.

High Mountain contended that the lot was not useable with the residential restriction and that it could not be sold. *Id.* at 517. The defendants contended the issue was not ripe because High Mountain had not violated the deed restrictions. *Id.*

The court of appeals concluded that there was no threatened litigation. *Id.* at 518. There was no evidence that High Mountain intended to construct a commercial venture on the property. *Id.* Citing this Court's opinion in *Trinity*, the court of appeals concluded that the speculation about the ability to sell the property did not create a justiciable controversy. *Id.* at 519.

In *Texas Commission on Environmental Quality v. Guadalupe County Groundwater Conservation Dist.*, another ripeness case, the water district sued Post Oak regarding its application for a permit to operate a solid-waste landfill

filed with the TCEQ. No. 04-15-00433-CV, 2016 WL 1371775 (Tex. App.—San Antonio April 6, 2016, no pet.).

The court of appeals looked first to whether the water district's suit for declaratory judgment was ripe. The court of appeals noted that filing a declaratory judgment action does not avoid the ripeness doctrine. *Id.* at *4. The court noted a number of unknown contingencies that rendered the dispute unripe.

According to the court of appeals, the TCEQ had not granted Post Oak's permit application, the permit could be denied and the landfill never constructed, or the permit could be granted but under terms that were satisfactory to the water district. Thus, there was no concrete injury or imminent harm to support ripeness. *Id*.

Finally, in *Patterson v. Planned Parenthood of Houston & S.E. Tex., Inc.*,– another case where the Texas Supreme Court concluded the dispute was not ripe. Planned Parenthood challenged, on constitutional grounds, a rider attached to a family-planning appropriation. 971 S.W.2d 439, 440-41 (Tex. 1998). The Court concluded the dispute was not ripe. The record indicated that the Texas Department of Health had not finalized its plans regarding the rider and that there was no imminent harm to Planned Parenthood. *Id.* at 443-44. Resolution of the claims depended on the occurrence of contingent future events that may not occur as anticipated or may not occur at all. *Id.* at 444.

D. Appellants' and the State's claims are not ripe.

Appellants did not meet their burden to show injury using the standards in the four cases they cite. Appt. Reply Br. 31-32. As set out above, all four cases involved a present, pending dispute and injury. Appellants complain of an ordinance that has not been applied to them (there have been no code enforcement violations assessed against Appellants' properties) and that will not impact them (if ever) until April 1, 2022.

Appellants' alleged economic injuries are speculative at best and present no concrete injury. They are based on contingent events that may never occur. As Appellants admit, the ordinance "*could* force them to sell their properties." Appt. Reply Br. 31 (emphasis added). But none have sold and the ordinance gives Appellants time to recoup their investment. 2CR609. Appellants further speculate that the Redwines "would have to sell the property at a loss." Appt. Reply Br. 31. Yet, there is no evidence of the value of the properties or what the sales prices are.

In any event, Appellants chose to invest in properties for use as short-term rentals *after* the City had begun regulating short-term rentals. 2CR663, 665, 59, 799, 860-61. Nothing forecloses the City from continuing such regulation. It is also well-established that the government cannot guarantee profitability relating to real-estate investments. *See Mayhew*, 964 S.W.2d at 935-38; *Sheffield*, 140 S.W.3d at 677.

Further, Appellants and the State's challenges to the phase-out of Type 2 short-term rentals is not ripe. 2CR609. Numerous unknown factors show why Appellants and the State cannot now show any injury relating to the ban on Type 2 short-term rentals that does not take effect until April 1, 2022. To name a few, Appellants:

> • may not own their properties because of death, divorce, economic hardship, job changes that force them to move to another city, or any other myriad of reasons that cause owners to no longer own their property;
>
> • may not possess a short-term rental license in 2022, again for any number of reasons;
>
> • could decide to occupy their properties themselves;
>
> • could engage in long-term rentals; or
>
> • could take advantage of Austin's strong housing market and sell.

Further, the properties:

> • could burn to the ground or be destroyed by some other natural disaster; or
>
> • could be repossessed by the bank.

Finally, the City could repeal the ordinance before the sunset.

These, and countless other unknown facts, demonstrate the speculative nature of any alleged injury to Appellants and further show precisely why courts do not issue advisory opinions.

And Appellants' testimony confirms that their properties retain value and can be used even after the sunset in 2022. Mr. Zaatari testified that he or someone else could live in the property after the sunset, or that it could be used as a long-term rental. 2CR670, 673, 685. Ms. Redwine also testified that the sunset does not destroy the value of her property and that she too could use the property as a long-term rental. 2CR801-02. Ms. Hebert testified that she could sell her property instead of renting. 2CR758.

Moreover, Appellants have no evidence that they were denied their right to privacy, to assemble, or to freedom of movement. There have been no code-enforcement measures taken against Appellants. 2CR680, 725, 763-64, 809-10, 866, 895-96. Appellants' alleged "mandated underutilization" claim does not show any injury as the same occupancy limits apply to *all* residential properties. 2CR986-988 (City Code § 25-2-511).

Finally, *Tiki Island* does not show Appellants have sustained an injury. Appt. Reply Br. 31. *Tiki Island* involved an immediate ban on short-term rentals by parties not grandfathered and not given time to recoup their investment.

PRAYER FOR RELIEF

FOR THESE REASONS, and those set out in their opening Brief, the City of Austin and Mayor Steve Adler respectfully request that this Court:

- affirm the trial court's order granting the City's no-evidence motion for summary judgment;

- reverse the trial court's denial of the City's plea to the jurisdiction and render judgment that Appellants and the State lack standing; and

- reverse the trial court's order excluding the complete legislative record.

The City of Austin and Mayor Steve Adler request all further relief to which they are entitled.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Reply Brief contains a total of 7,490 words, excluding the parts exempted under Texas Rule of Appellate Procedure 9.4(i)(1), as verified by Microsoft Word 2013. This Reply Brief is therefore in compliance with Texas Rule of Appellate Procedure 9.4(i)(2)(D).

Laurie Ratliff

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of *Cross-Appellants Reply Brief* was served on Appellants/Cross-Appellees as indicated below in accordance with the Texas Rules of Appellate Procedure 9.5(e) on this 23rd day of July, 2018 via e-service:

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