

NO. A13-1028

State of Minnesota  
 In Court of Appeals

Ethan Dean, Holly Richard,  
 Ted Dzierzbicki, and Lauren Dzierzbicki,

*Appellants,*

v.

City of Winona, a municipality,

*Respondent.*

RESPONDENT CITY OF WINONA'S BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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## STATEMENT OF THE ISSUES

1. Is the City's ordinance establishing the 30% Rule authorized?

The District Court held that the City has the authority to enact the 30% Rule pursuant to either its general police powers granted in the City of Winona Charter or the zoning authority granted under Minn. Stat. § 462.357.

Most Apposite Authorities:

Winona, Minn. City Charter  
Minn. Stat. § 462.357

State ex rel. Gopher Sales Co. v. City of Austin, 75 N.W.2d 780 (Minn. 1956)  
State v. Crabtree Co., 15 N.W.2d 98 (Minn. 1944)  
Lantos v. Zoning Hearing Bd. of Haverford Twp., 621 A.2d 1208 (Pa. Commw. Ct. 1993)

2. Does the 30% Rule violate Appellants' equal protection rights under Article 1, Section 2 of the Minnesota Constitution?

The District Court held that the City did not violate Appellants' equal protection rights because Appellants did not show that they were treated differently from similarly situated individuals or that the 30% Rule lacks a rational basis.

Most Apposite Authorities:

John Hancock Mut. Life Ins. Co. v. Comm'r of Revenue, 497 N.W.2d 250 (Minn. 1993)  
In the Matter of McCannel, 301 N.W.2d 910 (Minn. 1980)  
State v. Richmond, 730 N.W.2d 62 (Minn. Ct. App. 2007)

3. Does the 30% Rule violate Appellants' substantive due process rights under Article 1, Section 7 of the Minnesota Constitution?

The District Court held that the City did not violate Appellants' substantive due process rights because Appellants did not show that the 30% Rule lacks a rational basis.

Most Apposite Authorities:

Everything Etched, Inc. v. Shakopee Towing, Inc., 634 N.W.2d 450 (Minn. Ct. App. 2001)

4. Does the 30% Rule violate Appellants' procedural due process rights under Article 1, Section 7 of the Minnesota Constitution?

The District Court held that the City did not violate Appellants' procedural due process rights because Appellants did not show that the City unlawfully delegated its legislative authority to private owners.

Most Apposite Authorities:

Heffron v. Int'l Society for Krishna Consciousness, Inc., 452 U.S. 640 (1981)

Currin v. Wallace, 306 U.S. 1 (1939)

Leighton v. City of Minneapolis, 16 F. Supp. 101 (D. Minn. 1936)

## STATEMENT OF THE CASE

Appellants initiated this action on October 25, 2011 in the Winona County District Court challenging the City of Winona's ("City") ordinance limiting the number of rental licenses that may be issued per block in low density residential zones (the "30% Rule"). Appellants seek declaratory and injunctive relief, nominal damages and attorneys' fees based on claims that the City violated their equal protection and due process rights under the Minnesota Constitution. Appellants also claim that the City's legislative action enacting the 30% Rule was *ultra vires*.

On January 23, 2013, the parties brought cross motions for summary judgment. On April 17, 2013, the Honorable Jeffrey D. Thompson, Winona County District Court, issued a Summary Judgment Order and Judgment denying Appellants' motion and granting the City's motion. Judge Thompson dismissed Appellants' equal protection and substantive due process claims because they did not show disparate treatment between similarly situated individuals or that the 30% Rule lacks a rational basis. Judge Thompson dismissed Appellants' procedural due process claim because they did not show that the City unlawfully delegated its legislative authority. Finally, Judge Thompson dismissed Appellants' *ultra vires* claim finding the 30% Rule to be a valid exercise of either the City's general police power or zoning authority. The District Court entered judgment on April 17, 2013.

## STATEMENT OF THE FACTS

### The 30% Rule

The City enacted City Code ch. 33A, the Rental Housing Code, “to provide minimum standards to safeguard life or limb, health, and public welfare by regulating and controlling the use and occupancy, maintenance and repair of all buildings and structures within the City of Winona used for the purpose of rental housing.” Add.27. The City requires all owners wishing to rent their property to comply with the licensing, inspection and related requirements in the City Code. Add.29. The City has chosen to issue rental licenses to the entire property, rather than on a per unit basis. Id; R.2-4. If the owner is in compliance with all applicable standards, the City issues the rental license. Add.29.

The 30% Rule applies in low density residential neighborhoods and states, in relevant part:

. . . no more than 30 percent (rounded up) of the lots on any block shall be eligible to obtain certification as a rental property, including homes in which roomers and/or boarders are taken in by a resident family. A block is defined as a group of properties bounded entirely by streets, public land, railroad rights of way, zoning district lines, corporate limit lines, or physical features such as rivers, outcroppings, ponds or lakes; provided that final delineation of a block shall be made by City staff. When determining the number of eligible properties on a block, the number shall be the lowest number that results in 30 percent or more of the residential lots being rental.

\* \* \*

Add.30. A property owner may obtain a twelve (12) month temporary rental license under certain circumstances.<sup>1</sup> Add.31. Appellants concede the City’s authority to

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<sup>1</sup> The temporary rental license would allow a homeowner who is actively trying to sell his home to rent the property for twelve (12) months or until the property is sold, whichever happens first. Add.31. The property must comply with all applicable rental and zoning

regulate rental housing. R.20, R.28, R.32. Appellants' complaint is solely that the 30% Rule is unlawful. A.2 at ¶4. Appellants agree that the City properly regulates rental housing and its associated problems and impact on the community, but they simply disagree with the City Council's chosen method of addressing those problems.

### **Appellants' Properties**

Appellants all purchased their homes after the City enacted the 30% Rule. R.18, R.27, R.30. It is undisputed that Appellants Dean's and Dzierzbickis' homes are located on blocks that exceed the 30% rental limitation and they have not obtained rental licenses from the City. A.4 at ¶ 10. After initiating this case, the City issued Appellant Richard a standard rental license. *Id.* at ¶ 12. Richard has been and continues to rent her home. R.26; A.15 at ¶ 65. Neither Appellants nor their families have chosen to reside in their Winona homes. A.1 at ¶ 2.

### **Early Consideration of Rental Housing Regulations**

The City's consideration of regulations that led to the adoption of the 30% Rule began in 2003. From early 2003 through 2005, at the request of the City Council, the Planning Commission considered the effectiveness of the City's off-street parking regulations, especially with respect to rental housing, and related issues including the definition of "family" and limiting the number of rental properties per block in residential areas. R.33-82. City Staff determined that the City's rental housing regulations "may be

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standards and be licensed to no more than one family (excluding "unrelated" person living arrangements). *Id.* Appellants Dean and Richards previously obtained temporary rental licenses. A.4 at ¶ 13. A property owner may obtain another temporary license upon expiration. See Add.31.

inadequate or insufficient to offset potential negative effects of the conversion of structures into increased numbers of dwelling units and other activities which are designed to increase overall occupancy of dwelling units.” R.85. In December of 2004, the City adopted a moratorium on the issuance of new rental licenses so that City Staff could study how rental dwellings should be regulated. R.85-86. The focus of the study was to include the definition of “family” (i.e. how many unrelated persons can live together and still constitute a single family use), the number of dwelling units within a given structure, and off-street parking standards. Id. The City Council extended the moratorium for an additional six months on June 6, 2005. R.83-84.

#### **Parking Advisory Task Force**

In 2005, the City established a Parking Advisory Task Force (“Parking Task Force”) comprised of students, members of City Staff, and representatives from Winona State University, the Landlord Housing Association and the neighborhood. R.87. The Parking Task Force held meetings and found that major issues affecting the City included parking, density and deterioration of property, especially near the Winona State University campus. R.88-107. It also found that rental property, which amounted to 39% of residential properties in the City at the time, accounted for 52% of complaints received by the Community Development Department. R.88. It recommended adopting the 30% Rule to address these issues. R.98. The Parking Task Force’s rationale for 30% was that the ratio of rental to owner occupied properties represented the character of the community and it was reasonable to implement the restriction to protect inner City areas

from high rental concentrations. Id. The intent of the regulation was to spread rental properties throughout the City. Id.

### **Adoption of the 30% Rule**

On October 24, 2005 and November 14, 2005, the Planning Commission considered the 30% Rule. R.108-115. The Commission discussed dispersion of rental properties within the City and the effect of the Rule on property value. Id. The Commission found the Rule could stabilize neighborhoods and have a positive effect on property value. R.113. On November 14, 2005, the Commission voted to recommend that the City Council adopt the 30% Rule. R.116-17; R.119-20. On November 21, 2005, the City Council held a public hearing on and approved the 30% Rule.<sup>2</sup> R.116-122. The City Council finally approved the 30% Rule on December 5, 2005. R.123.

### **Rental Housing Task Force**

In March of 2009, the City created a Rental Housing Task Force (“Rental Task Force”) comprised of students and representatives of the Mayor and City Council, Winona Housing Association, Realtors and Winona State University to evaluate the 30% Rule. R.124-26. It held meetings to evaluate and provide recommendations concerning the 30% Rule. R.127-200. In an Executive Summary dated February of 2010, the Rental Task Force presented its recommendations to the City Council. R.191-200. The Rental Task Force found that since the 30% Rule was enacted in 2005, 180 properties had been

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<sup>2</sup> The City Council also amended the zoning ordinance to change the definition of “family” to include only three unrelated persons instead of five, and reduce the number of roomers in a home from four to two. R.119. Appellants are only challenging the 30% Rule. A.6 at ¶ 21.

newly certified for rental, most of which were conversions of owner-occupied homes.

R.191. After reviewing the neighborhoods adjacent to the University, it found, in relevant part:

- Not including properties located in the R-3, business and manufacturing districts, there are 775 properties in the area
- 371 of those 775 properties (48%) are certified as rental dwellings
- The range of rental properties per block is 0% to 100%
- All but fourteen blocks exceed 30%
- Of the properties not certified as rental dwellings, 147 have estimated market values below \$100,000. Because such properties likely could be supported by three unrelated persons (one “family” under the City’s present definition), any relaxation or lifting of the 30% Rule could make all of these properties ripe for rental housing purposes. Assuming all such properties converted to rental, the ratio in the study area would increase from 48% rental to 67%.

R.193. In July of 2010, the City’s Program Development Director concluded that based in part on the above findings, the 30% Rule “has preserved affordable housing and reduced conversion [of owner occupied homes] as intended.” R.201-02.

### **Recodification of the 30% Rule**

In February and March of 2012, the City of Winona Planning Commission and City Council, respectively, held public hearings with respect to Ordinance 3899 amending the City Code by placing the 30% Rule in the Rental Housing Code, Chapter 33A. R.203-25. The City notified Appellants, through their legal counsel, of both meetings, but neither Appellants nor their counsel chose to attend or participate in the hearings. R.226-29. On March 19, 2012, the City Council adopted Resolution 2012-15 approving Ordinance 3899 based on several findings. R.211-25. The City Council found that the City has the authority to regulate rental licensing under the City of Winona Charter and its general police powers. R.212. The City Council also found that moving

the 30% Rule is appropriate so that all rental housing requirements are contained in the Rental Housing Code. Id.

As additional support for approving Ordinance 3899, the City Council adopted and incorporated into Resolution 2012-15 a Memorandum prepared by Hoisington Koegler Group Inc. (“HKGi”) dated February 21, 2012 (the “HKGi Study”). R.215-25. In the HKGi Study, HKGi summarized its review of literature “relating to rental housing concentration and its negative impacts on neighborhood quality and livability.” R.215. Further, HKGi set forth its findings after compiling and analyzing “detailed data related to Winona’s rental housing concentration levels and its relationship to nuisance and police violations.” Id. HKGi made conclusions based on its literature review and detailed data analysis, including the following:

Our literature review of rental housing concentration and its effects, including the empirical studies of five cities, supports the conclusion that the concentration of rental housing results in negative impacts to the quality and livability of residential neighborhoods. In addition, our compilation and analysis of the relationship between Winona’s rental housing concentration and nuisance complaints/police violations data parallels the findings of the literature review. In particular, we find that concentrated rental housing in Winona has resulted in a much higher rate of nuisance complaints and police violations in concentrated rental housing blocks, impacting both rental and non-rental residential properties. Thus, based upon the literature review, including the empirical studies of five cities relevant to Winona’s rental housing issues, and the detailed analysis of Winona data, we conclude that the concentration of rental housing in Winona results in increased levels of nuisance and police violations in those neighborhoods. As these violations are indicators of increased nuisance and decreased property maintenance levels that negatively affect neighborhood quality and livability, we also conclude that the concentration of rental housing leads to decreased neighborhood quality and livability.

R.223.

## **Rebuttal of Appellants' Expert's Conclusions**

In response to the City's motion for summary judgment, Appellants introduced the Affidavit of David Phillips in rebuttal to the HKGi Study. A.94-124. Phillips did not appear before or submit any information or studies to the City Council for its consideration. Moreover, while Phillips accepted the City's underlying data as true, his manipulation of that data is faulty in several respects. R.6-8. Phillips' primary argument – that HKGi's analysis is not applicable because properties are used as the measure for rental housing concentration rather than dwelling units – is flawed. R.10. The intent of the City's regulations and HKGi's analysis was to measure the concentration of rental houses, not housing density. R.2; R.232.

Phillips' secondary argument that HKGi's analysis represents an apples-to-oranges comparison due to the combining of the residential areas north and south of Highway 61, is also flawed. R.10-11. Since significantly more lots, a majority of the rental housing certificates, and all of the "Over 30%" blocks were located north of Highway 61, the impact of the data from the residential areas south of Highway 61 does not significantly impact the overall results relating to nuisance complaints and police citations. R.11.

Rather than the HKGi Study being an apples-to-oranges comparison, Phillips' Affidavit actually represents an apples-to-oranges comparison. His analysis is based on an inappropriate measure (housing density and dwelling units) for addressing the issue of concentration of *rental houses*, which is appropriately measured by the number of properties. R.11. It is the concentration of rental property on a block that correlates to the negative consequences of such concentration. Accordingly, the HKGi Study remains

an accurate, applicable and conclusive analysis of rental property concentration issues and impact on neighborhood livability facing the City of Winona.

### STANDARD OF REVIEW

A party is entitled to summary judgment “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue of any material fact.” Minn. R. Civ. P. 56.03; Fabio v. Bellomo, 504 N.W.2d 758, 761 (Minn. 1993). Summary judgment is proper when there are no genuine issues of material fact and a determination of the applicable law will resolve the matter. Gaspord v. Wash. County Planning Comm’n, 252 N.W.2d 590, 591 (Minn. 1977).

The constitutionality of an ordinance is a question of law. Hard Times Cafe, Inc. v. City of Minneapolis, 625 N.W.2d 165, 171 (Minn. Ct. App. 2001). Ordinances are presumed valid and not set aside by the courts unless it is necessary and clear that they are invalid. Bolen v. Glass, 755 N.W.2d 1, 5 (Minn. 2008). The challenging party bears the heavy burden of proving that it is unconstitutional beyond a reasonable doubt. Bodin v. City of St. Paul, 227 N.W.2d 794, 797 (Minn. 1975). See also City of St. Paul v. Dalsin, 71 N.W.2d 855, 858 (Minn. 1955) (stating that the burden of proving an ordinance does not implicate a public interest and does not come within the city’s broad police powers is on the challenging party). An ordinance is only unreasonable if “it has no substantial relationship to the public health, safety, morals or general welfare,” and courts do not interfere with legislative discretion when the reasonableness of the ordinance is at least debatable. Holt v. City of Sauk Rapids, 559 N.W.2d 444, 445 (Minn. Ct. App. 1997). In order to prevail, Appellants must show that “it is not even

debatable that the [30% Rule] has any substantial relationship to public health, safety, or general welfare.” State v. Reinke, 702 N.W.2d 308, 311 (Minn. Ct. App. 2005).

## **ARGUMENT**

This case turns on whether the City has the authority to enhance and preserve the quality and livability of its community by enacting reasonable legislation to disburse rental properties and slow the conversion of owner occupied dwellings. Faced with the undisputed problems associated with concentrations of rental housing, including rapid conversion of owner occupied homes into rental housing, deteriorating housing conditions and disproportionate property-related crimes and nuisances in higher rental concentration areas, the City, after long and repeated study, enacted the 30% Rule to address these problems. Appellants have not shown that the City lacked the authority to enact the legislation through either its general police or zoning powers or that it violates their equal protection or due process rights. The 30% Rule is a rationally-based ordinance that should not be invalidated by this Court.

### **I. THE CITY HAD THE AUTHORITY TO ENACT THE 30% RULE**

Appellants have not satisfied their heavy burden of proving that the City lacked the authority to enact the 30% Rule. The 30% Rule is a valid exercise of the City’s broad police power under the “all powers” grant in the City of Winona Charter (“Charter”) to regulate rental housing. R.234. Appellants have not alleged, let alone shown, that the 30% Rule is an unreasonable exercise of the City’s general police powers. Instead, Appellants narrowly construe the 30% Rule as a zoning ordinance and argue that it unlawfully regulates the “occupant” rather than “use” of property. Because the 30% Rule

is a valid police power regulation, the court need not reach Appellants' zoning argument. To the extent considered a zoning regulation however, the ordinance lawfully regulates the use of buildings and structures pursuant to Minn. Stat. § 462.357, subd. 1. Regardless of whether the 30% Rule is classified as a police power regulation or zoning ordinance, it should be upheld as a valid exercise of the City's legislative authority.

**A. The 30% Rule is a valid general police power regulation.**

The City is a home rule charter city.<sup>3</sup> R.235. The Charter grants the City "all powers, rights, privileges and immunities granted to it by this Charter and by the constitution and laws of the State of Minnesota, and all powers existing in a municipal corporation at common law." R.234. Courts liberally construe charter provisions granting municipalities "all powers." City of Duluth v. Cerveney, 16 N.W.2d 779, 782 (Minn. 1944). This general grant of power is tantamount to the power granted under a general welfare clause and includes "broad municipal power of every name and nature whatsoever." Id. (citation omitted). "[I]n matters of municipal concern, home rule cities have all the legislative power possessed by the legislature of the state, save as such power is expressly or impliedly withheld." Bolen, 755 N.W.2d at 4-5. See also City of Duluth, 16 N.W.2d at 782. Thus, under its broad grant of power, the City "exercises police power within its jurisdiction to practically the same extent as the state itself." Id. at 783. "No specific legislative sanction is needed to vitalize the general welfare clause of a city

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<sup>3</sup> A home rule charter ". . . may provide . . . for the regulation of all local municipal functions as fully as the legislature might have done before home rule charters for cities were authorized by constitutional amendment in 1896." Minn. Stat. § 410.07.

charter” and “[n]o express grant of power to legislate upon any particular subject is necessary.” State v. Crabtree Co., 15 N.W.2d 98, 100 (Minn. 1944).

Police power means the “power of the state and its political subdivisions to impose such restraints upon private rights as are necessary for the general welfare.” In re 1994 and 1995 Shoreline Imp. Contractor Licenses of Landview Landscaping, Inc., 546 N.W.2d 747, 750 (Minn. Ct. App. 1996) (citation omitted). The police power “is essential and difficult to limit, as it includes all matters of public welfare.” Id. See also Crabtree Co., 15 N.W.2d at 100 (stating that cities “have a wide discretion in resorting to [police] power for the purpose of preserving public health, safety and morals, or abating public nuisances”). “It is entirely appropriate that each municipality of any considerable size should make its own police regulations for the preservation of the health, safety, and welfare of its own citizens.” Id. The Minnesota Supreme Court has long held:

The term ‘police power,’ as understood in American constitutional law, means simply the power to impose such restrictions upon private rights as are practically necessary for the general welfare of all. And it must be confined to such restrictions and burdens as are thus necessary to promote the public welfare, or, in other words, to prevent the infliction of public injury. And in the exercise of its police powers a state is not confined to matters relating strictly to the public health, morals, and peace, but, as has been said, there may be interference whenever the public interests demand it; and in this particular a large discretion is necessarily vested in the legislature, to determine not only what the interest of the public require, but what measures are necessary for the protection of such interests. If, then, any business becomes of such a character as to be sufficiently affected with public interest, there may be a legislative interference and regulation of it in order to secure the general comfort, health, and prosperity of the state, provided the measures adopted do not conflict with constitutional provisions, and have some relation to, and some tendency to accomplish the desired end. The subjects which may be legislated upon are, of necessity, continually arising as business increases, and new phases, conditions, and methods appear. The development of the law relating to the proper exercise

of the police power of the state clearly demonstrates that it is very broad and comprehensive, and is exercised to promote the general welfare of the state, as well as its health and comfort. And the limit of this power cannot and never will be accurately defined, and the courts have never been willing, if able, to circumscribe it with any definiteness. The inquiry, then, is as to how and to what extent the business in question had become affected with public interests.

State ex rel. Beek v. Wagener, 77 Minn. 483, 494-95 (Minn. 1899). The concept of “police power” is fluid and necessarily evolves with society:

Judicial concepts of what is a sufficient public interest to invoke the police power, and of whether a certain remedy is reasonably appropriate to accomplish its purpose without going beyond the reasonable demands of the occasion so as to be arbitrary, are not static but are geared to society’s changing conditions and views. In short, the police power keeps pace with social and economic developments of the day so as to justify regulatory restrictions which might well have been thought intolerable and unconstitutional when social relations were less complex.

City of Saint Paul, 71 N.W.2d at 858.

In summary, in determining whether to uphold the 30% Rule under the City’s general police power, the court need only consider whether 1) the ordinance promotes the public welfare and 2) it is reasonable. State ex rel. Gopher Sales Co. v. City of Austin, 75 N.W.2d 780, 783 (Minn. 1956) (stating that a police power regulation “will be upheld when it has for its object the public welfare and when it is reasonably related to the attainment of that objective”). While the necessity and scope of an ordinance may be debated, as long as it is “adopted in good faith, with an eye single to the public welfare, courts will not interfere.” Crabtree Co., 15 N.W.2d at 100. Further, when an ordinance is enacted pursuant to the police power, “fairly debatable questions as to its

reasonableness, wisdom, and propriety are not for the determination of courts, but for that of the legislative body on which rests the duty and responsibility of decision.” Id.

In this case, Appellants do not, and cannot, dispute the City’s police power authority to regulate rental housing through licensure.<sup>4</sup> See Franklin Theatre Corp. v. City of Minneapolis, 198 N.W.2d 558, 521 (Minn. 1972) (finding that there is no question that requiring a license as a condition to carrying on certain business activities is a proper exercise of the police power). The power to license rental properties necessarily includes the power to set standards and limit the number of rental licenses that may be issued. See State ex rel. Gopher Sales Co., 75 N.W.2d at 783 (finding that the power to license mechanical amusement devices includes the power to limit the number of licenses that may be issued to own and operate such devices). Here, the record confirms that the public welfare is served by limiting the number of rental licenses that may be issued per block. The City determined that concentrations of rental properties and conversion of owner occupied homes has reached such a magnitude as to negatively impact the quality and livability of residential neighborhoods, which clearly implicates the public interest.

Because the 30% Rule implicates the public welfare, the only remaining issue is whether it is reasonable. Appellants have not argued, let alone shown, that limiting the number of rental licenses has no substantial relationship to promoting the general welfare by improving neighborhood livability and slowing the conversion of owner occupied

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<sup>4</sup> Appellants suggest that if their property is safe, they are entitled to a rental license without further constraints imposed by the City. Apps.’ Br. p. 24. No Minnesota court has so constricted a city’s authority over rental housing. In contrast, the Court in City of Morris v. Sax Investments, Inc., 749 N.W.2d 1, 13 n.7 (Minn. 2008) expressly recognized that there are “many permissible areas” for municipal regulation of rental housing.

homes. Appellants also concede that the City's concerns about the problems associated with rental housing are legitimate and police powers are the proper mechanism to address these concerns. A.20 at ¶ 91. Appellants' disagreement with the City Council's chosen method to combat these problems is insufficient to satisfy their burden of proving the 30% Rule is invalid. See Holt, 559 N.W.2d at 446 (when an ordinance is supported by a rational basis, neither the existence of an alternative resolution to the problem or debate about the best resolution is a basis for declaring the ordinance unconstitutional).

Likely sensing the futility of claiming that the 30% Rule is an invalid police power regulation, Appellants argue that the ordinance must be construed and analyzed as a zoning regulation. Appellants' argument fails. First, Appellants' argument that the 30% Rule is a zoning ordinance that is not within the scope of the City's zoning authority is circuitous and nonsensical. Minnesota courts have long-recognized that zoning regulations are merely a form of police power regulation. Naegele Outdoor Adver. Co. of Minn. v. Village of Minnetonka, 162 N.W.2d 206, 210 (Minn. 1968). To be considered zoning, a regulation must fall within the definition of zoning in Minn. Stat. § 462.357, subd. 1. Denny v. City of Duluth, 202 N.W.2d 892, 894 (Minn. 1972). If a regulation does not fall within the statutory definition of "zoning," it is not by definition a zoning regulation and is therefore enacted and authorized under the City's broad general police power authority. As discussed above, when judged under the applicable police power standards, the 30% Rule is a valid exercise of that authority.

Second, Appellants' argument that the 30% Rule is a zoning ordinance in disguise is irrelevant. Apps.' Br. pp. 60-63. To the extent the ordinance is zoning, the City has

that authority under Minn. Stat. § 462.357, subd. 1 as discussed *supra* pp. 19-25.

However, the City's limitation of the 30% Rule's application to low density residential zones is simply a rational method of defining where the regulation applies. Further, Advantage Capital Management v. City of Northfield, 664 N.W.2d 421, 426 (Minn. Ct. App. 2003), is not dispositive as to the characterization of the 30% Rule. That case involved whether a building permit request was a "written request relating to zoning" under Minn. Stat. § 15.99. Appellants ignore that the 30% Rule not only regulates the use of buildings, a zoning function, it also regulates the rental housing business, a police power licensing function. Appellants' references to the Zoning Ordinance establishing "rental as a use" are also irrelevant. The Zoning Ordinance regulates where a use may occur and the 30% Rule regulates the number of licenses that may issue to engage in the business associated with that use. Finally, Appellants' reliance on the City's consideration of variances from the 30% Rule is misplaced because there is no prohibition on the City granting a variance outside the zoning context.

At best, Appellants have shown that it is at least debatable whether the 30% Rule should be characterized as a police power or zoning regulation. As stated, the 30% Rule regulates both the use of residential structures and the business of rental housing. In other words, the 30% Rule is a component of the rental licensing ordinance and one of many standards for issuance of the license. The City made a reasonable determination, based on the complexities of the problems associated with rental housing concentrations, to impose the limitation through the licensing ordinance and the general police powers granted by the Charter, rather than through its zoning authority under Minn. Stat. §

462.357, subd. 1. The Court should therefore refrain from disturbing the City's decision and find that the 30% Rule is a lawful police power regulation.

**B. If a zoning regulation, the 30% Rule is a valid exercise of that authority.**

Because the City lawfully enacted the 30% Rule pursuant to its general police powers, the Court does not need to address Appellants' zoning arguments. However, to the extent this Court finds that the 30% Rule must be justified as a zoning ordinance, the City acted within the scope of its authority under Minn. Stat. § 462.357, subd. 1.

Cities have been delegated land use planning authority by the legislature. Minn. Stat. §§ 462.351, *et seq.*; Denny, 202 N.W.2d at 894. The purpose of municipal planning is to “insure a safer, more pleasant and more economical environment for residential, commercial, industrial and public activities . . . and to promote the public health, safety, and general welfare.” Id. at § 462.351. The City may, by ordinance, regulate:

. . . the location, height, width, bulk, type of foundation, number of stories, size of buildings and other structures, the percentage of lot which may be occupied, the size of yards and other open spaces, the density and distribution of population, **the uses of buildings and structures for trade, industry, residence, recreation, public activities, or other purposes**, and the uses of land for trade, industry, residence, recreation, agriculture, forestry, soil conservation, water supply conservation, conservation of shorelands, as defined in sections 103F.201 to 103F.221, access to direct sunlight for solar energy systems as defined in section 216C.06, flood control or other purposes, **and may establish standards and procedures regulating such uses.**

Minn. Stat. § 462.357, subd. 1 (emphasis added).<sup>5</sup>

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<sup>5</sup> Minn. Stat. § 462.357 also identifies areas not subject to municipal zoning authority (e.g. earth sheltered construction as defined in section 216C.06, subdivision 14, relocated residential buildings, and manufactured homes built in conformance with sections 327.31

The plain terms of Minn. Stat. § 462.357, subd. 1 authorize the City to regulate and set standards for the use of residential buildings for the business of rental housing, separate from regulating the use of the underlying property. When a statute is “clear and free from all ambiguity, the plain meaning controls and is not disregarded under the pretext of pursuing the spirit.” Krummenacher v. City of Minnetonka, 783 N.W.2d 721, 726 (Minn. 2010) (citation omitted). Further, a statute is construed whenever possible to give effect to all of its provisions. Id. (citing Minn. Stat. § 645.16).

Section 462.357, subd. 1 plainly distinguishes between the authority to regulate 1) “the uses of buildings and structures for trade, industry, residence, . . . or other purposes” and 2) “the uses of land for trade, industry, residence, . . . or other purposes.” Appellants cite the first grant of authority but wrongly construe the statute to authorize the City to regulate solely the “*uses*’ of property, such as whether the property is put to residential, commercial, or industrial ‘use.’” Apps.’ Br. p. 55 (emphasis in original). Appellants’ interpretation that the City is only authorized to regulate the use of the land fails because it renders the additional express grant of authority to regulate the use of buildings meaningless. The only construction that gives effect to both grants of authority is that the City is authorized to not only regulate the use of the underlying property, but the use of the buildings and structures on the property. This distinction is especially important in

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to 327.35 that comply with all other zoning ordinances). Had the legislature meant to exclude this type of regulation, it would have said so in the plain text. See Lilly v. City of Minneapolis, 527 N.W.2d 107, 110 (Minn. Ct. App. 1995) (stating that when “a statute enumerates the persons or things to be affected by its provisions, there is an implied exclusion of others”) (citation omitted). It is a legislative determination on whether to restrict the City’s authority to regulate the use of structures.

the rental context, where the land is zoned residential but the use of the home on the land is being used as a commercial residence.

The 30% Rule does not impermissibly regulate the occupant, rather it regulates the use of buildings. Contrary to Appellants' position, the 30% Rule does not regulate "who" can use a home, but "how" that home can be used. As the District Court properly found, the 30% Rule does not regulate the identity of the occupants (such as requiring the owner to occupy a unit in the rental property) or address who can rent or live in a house. Instead, the 30% Rule is based on and regulates the business transaction that takes place in a use that is permitted by the zoning ordinance, similar to the City's licensing of liquor stores, pawn shops, etc. in zones allowing retail use. Consistent with Minn. Stat. § 462.357, subd. 1, the 30% Rule regulates use of residential homes for the business of rental housing, not occupancy.

While the Minnesota courts have not addressed the scope of municipal zoning authority to limit the number of rental licenses, other courts have upheld similar regulations because they regulate the use of the building to promote the general welfare. For example, in Lantos v. Zoning Hearing Bd. of Haverford Twp., the Township enacted an ordinance providing that single family homes could only be used for student housing by special exception, provided that certain requirements were satisfied. 621 A.2d 1208, 1201 (Pa. Commw. Ct. 1993). These requirements included:

No student home shall be located on a lot, any portion of which is closer to another lot lawfully used for a student home than a distance determined by multiplying times twenty (20) the required street frontage for a single family detached dwelling in the district in which the building is located.

Id. at 1209 n.1. The justifications for the ordinance were (1) illegal and excessive parking; “(2) disturbances and their effect on public tranquility; (3) the accumulation of debris and lack of routine maintenance permitted by absentee landlords; and (4) vandalism and theft.” Id. at 1211. The court found that the Township’s goal of preserving and fostering residential neighborhoods was legitimate. Id. (citing Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (recognizing that preserving the character and integrity of single-family neighborhoods, preventing undue concentration of population, preventing traffic congestion and maintaining property values are legitimate zoning purposes)). The court held that the ordinance was rationally related to achieving the Township’s legitimate goals. Id. at 1212.

The Lantos decision supports upholding the 30% Rule as a lawful zoning ordinance. In both this case and Lantos, the challenged ordinance limits the availability of a permit to allow rental of residential homes. Further, both governments enacted the rental restriction for similar legislative goals including addressing excessive parking and improving neighborhood livability. As the court held in Lantos, limiting rental housing concentrations is a rational method of achieving those legitimate zoning purposes.

Further, in Griffin Dev. Co. v. City of Oxnard, the City enacted an ordinance requiring as a prerequisite to converting apartments to condominiums a special use permit and compliance with the City’s standards on construction of new condominiums. 703 P.2d 339, 340 (Cal. 1985). The City determined that apartments and owner occupied condominiums served distinct population segments, each with its own needs and burdens on the community. Id. Additionally, “condominium conversions alter the social matrix

of the community, which, in turn, affects the community's growth pattern and need for services." Id. The court held that the City's goals were legitimate and the ordinance was a valid exercise of the City's police power. Id. at 344. The court recognized that the ordinance shared many of the goals of land use restrictions. Id. at 343. The court rejected plaintiff's lack of "change in use" argument, reasoning that plaintiff's "approach simply ignores the legitimate concerns which may prompt a city to regulate condominium conversions." Id. at 344. The City had broad authority to enact regulations addressing the "basic differences between owner occupied and rental housing." Id.

As in Griffin Dev. Co., the purposes of the 30% Rule, including preserving and maintaining residential neighborhoods, are legitimate zoning goals. Further, Appellants' "change in use" argument ignores the City's legitimate concerns with high concentrations of rental housing in residential neighborhoods. The City had discretion to use its zoning authority over the use of buildings to enact the 30% Rule to further its legitimate goals.

In addition, in Kasper v. Town of Brookhaven, the City limited rental of accessory apartments to owner occupied properties where no more than 5% of the lots within a 1/2 mile radius of the property contain accessory apartments. 142 A.D.2d 213, 215 (N.Y. App. Div. 1988). Reasons for the limitations included protecting property values and availability of affordable housing while preserving the character of single family residential neighborhoods. Id. The court upheld the limitations as reasonable despite the distinction between owner occupants and absentee owners. Id. at 219. Further, the court rejected plaintiff's argument that the limitations were invalid because they regulated occupancy rather than use, recognizing that "many zoning laws extend beyond the mere

regulation of property to affect the owners and users thereof” and the line distinguishing legitimate and illegitimate zoning power “cannot be drawn by resort to formula, but as in other areas of the law, will vary with surrounding circumstances and conditions.” *Id.* at 222-23. The court also reasoned that the challenged legislation did not “attach a personal condition to any individual landowner, nor is it unrelated to the use of property within the town.” *Id.* at 223. See also *In re Sherman v. Frazier*, 84 A.D.2d 401, 412 (N.Y. App. Div. 1982) (upholding a zoning ordinance limiting the issuance of permits to convert single family homes to two family homes to owners who will occupy the property); *Anderson v. Provo City Corp.*, 108 P.3d 701, 707 (Utah 2005) (upholding a zoning ordinance requiring owner occupancy as a prerequisite to renting accessory apartment). Similarly, the 30% Rule does not make any distinctions based on the identity of the property owner. The 30% Rule is rationally related to the regulation of the use of residential properties for the business of rental.<sup>6</sup>

Finally, Appellants’ uniformity argument fails. Minn. Stat. § 462.357, subd. 1 provides that zoning “regulations shall be uniform for each class or kind of buildings,

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<sup>6</sup> The panoply of foreign cases relied on by Appellants in support of their argument that the 30% Rule is invalid because it regulates occupancy are inapposite because they deal with regulation of condominium conversions, the form of property ownership, extension of non-conforming use rights, and private ownership of a landfill. The 30% Rule has no relation to Appellants’ cited cases and in particular to the form of property ownership. Unlike those cases, there is no prohibition on rental of an individual dwelling; rather, the regulation focuses on the concentration of rental on blocks to ameliorate the negative impacts of such concentration. In fact, in *McHenry State Bank v. City of McHenry*, 446 N.E.2d 521, 524 (Ill. Ct. App. 1983), the court held that the prohibition of condominium ownership “should not be prohibited entirely . . . unless doing so has a substantial relationship to the public welfare.” Here, not only is there no blanket prohibition on rental of single family homes, the City has demonstrated a substantial relationship to the public welfare by avoiding concentration of converted single family homes.

structures, or land and for each class of kind of use throughout such district . . .” The 30% Rule applies to all properties in the covered zoning districts regardless of owner, occupant or type of property.

## **II. APPELLANTS’ EQUAL PROTECTION CLAIM SHOULD BE DISMISSED**

To sustain their equal protection claim, Appellants must either show that the text of the law itself creates and prescribes different treatment for more than one class of similarly situated individuals or that the City applied the 30% Rule to them differently than to other similarly situated individuals. Only if Appellants make this threshold showing does the Court need to determine if the ordinance lacks a rational basis. The 30% Rule is a facially neutral ordinance that has been applied equally to all property owners in covered zones. Moreover, the 30% Rule is rationally-based. In reality, Appellants real complaint is about the effect of a neutral law, which does not constitute an equal protection violation.<sup>7</sup>

### **A. Appellants have not proven that they have been treated differently from other similarly situated property owners.**

All parties agree that to be actionable, disparate treatment between similarly situated property owners must result from the challenged regulation itself. Apps.’ Br. pp. 27-28. See also Schatz v. Interfaith Care Center, 811 N.W.2d 643, 656 (Minn. 2012) (stating that the threshold inquiry is whether plaintiff “is similarly situated to an individual who is treated differently under” the challenged regulation). Facial challenges

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<sup>7</sup> At best, Appellants have asserted a substantive due process challenge under the facts of this case. As discussed *supra* pp. 36-40, that claim also fails because the 30% Rule is rationally based.

require proof that “at least two classes are created by the statute, that the classes are treated differently under the statute, and that the difference in treatment cannot be justified.” State v. Richmond, 730 N.W.2d 62, 71 (Minn. Ct. App. 2007). A facially neutral statute only violates equal protection if the statute is applied in a way that makes distinctions between similarly situated people without a legitimate government interest.” Id. Individuals are only similarly situated if they are “alike in all relevant respects.” State v. Cox, 798 N.W.2d 517, 522 (Minn. 2011). See also Healthstar Home Health, Inc. v. Jesson, 827 N.W.2d 444, 449 (Minn. Ct. App. 2012) (holding that relative and non-relative PCAs are similarly situated because are PCAs all subject to the same statutes).

In this case, Appellants’ facial challenge lacks merit because the 30% Rule on its face does not distinguish between classes of property owners.<sup>8</sup> Instead, the ordinance is facially neutral and applies equally to all property owners in low density residential zones.<sup>9</sup> This case is not similar to cases with which the Minnesota courts have found

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<sup>8</sup> Facial constitutional challenges are difficult to establish and not favored by the courts. McCaughtry v. City of Red Wing, 831 N.W.2d 518, 522 (Minn. 2013). In order to succeed, Appellants would have to show that the 30% Rule operates unconstitutionally in all conceivable applications. Id. Appellants’ facial challenge fails because the ordinance applies to all property owners, not just those on blocks exceeding 30% rental, and does not prevent owners on blocks with less than 30% rental from obtaining a license. Moreover, even those owners on blocks exceeding 30% rental are not conclusively foreclosed from obtaining a license. Temporary licenses are available and standard licenses can become available through revocation or nonrenewal, as is the case on Richard’s block.

<sup>9</sup> This Court’s decisions in Healthstar Home Health, Inc. and Weir v. ACCRA Care, Inc., 828, N.W.2d 470, 473 (Minn. Ct. App. 2013) in which the challenged statute divided PCAs into two classes – relative and non-relative – are also distinguishable. Here, the City did not in its regulation create two classes, for example, by pre-selecting which lots or blocks that could be licensed for rental. The effect of the regulation may be that only

fault. Unlike this case, in State v. Russell, the statute, on its face, created two classifications by treating individuals possessing the same amount of cocaine differently based on the type of cocaine. 477 N.W.2d 886, 887 (Minn. 1991). The 30% Rule itself does not create any classifications by, for example, designating certain blocks that must comply while excluding other blocks all within the same zones. Similarly, in Mitchell v. Steffen, 504 N.W.2d 198, 201 (Minn. 1993), the statute limited benefits to Minnesota residents living in the state for less than six (6) months, creating a fixed class of individuals to be treated differently. Here, the legislation set a standard at 30%, but does not define or predetermine which property owners will receive rental licenses. That determination is made based on the changing facts and circumstances on each block, not the legislation. Appellants' facial claim therefore fails. See State v. Frazier, 649 N.W.2d 828, 834 (Minn. 2002) (recognizing that there can be no facial challenge when the statute on its face does not create the classification); Richmond, 730 N.W.2d at 71 (same).

Moreover, Appellants have not shown that the City has done anything other than apply the mathematical formula in its neutral ordinance on a first come first serve basis and are not claiming that there has been discriminatory application. Therefore, there can be no as-applied claim.

Appellants incorrectly claim that the 30% Rule distinguishes between property owners on blocks exceeding 30% rental and those on blocks with less than 30% rental. There are no "classes" created. Appellants are identifying nothing more than the impact

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some properties may be licensed, but that is the effect of a neutral regulation and is not actionable as an equal protection violation.

of the facially neutral regulation. Uneven effects within a class resulting from a uniformly applied regulation do not support an equal protection claim. See Council of Ind. Tobacco Mfrs. of Am. v. State, 685 N.W.2d 467, 473-74 (Minn. Ct. App. 2004) (“[e]ven where the effect on particular groups within a class is uneven, there is no constitutional violation so long as the basic classification is reasonable”); John Hancock Mut. Life Ins. Co. v. Commr’ of Revenue, 497 N.W.2d 250, 253 (Minn. 1993) (recognizing that uneven effects of legislation within the class resulting from the unique circumstances of class members does not constitute an equal protection violation).

Appellants make the same argument that was rejected in John Hancock – the 30% Rule’s limitation on how many rental licenses can be issued “unevenly effects” owners who want to rent, as compared to others. However, like in John Hancock, the alleged uneven effects are the result of the order in which the property owner sought a rental license, not the result of any discriminatory treatment established by the text or the City’s application of the ordinance and is “of no constitutional concern.”<sup>10</sup> Id. Since Appellants cannot make the threshold showing that the 30% Rule treats them differently than other similarly situated individuals, their equal protection claim fails without further analysis.

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<sup>10</sup> Even if the court finds the 30% Rule implicitly creates classifications as Appellants contend, which it does not, the classification is not between similarly situated groups. See Schatz, 811 N.W.2d at 656-57 (finding that classes that are not alike in all relevant respects are not similarly situated). As the District Court found, the composition of each block exists notwithstanding the 30% Rule and the number of licensed rentals on each block is relevant to determining whether to grant a license. Thus, Appellants are only similarly situated to those on blocks exceeding 30%, and they have made no showing that the City treated them differently among other owners on blocks exceeding 30%. The City applied the 30% Rule evenly and on an objective first come first serve basis.

**B. Appellants have not proven that the 30% Rule lacks a rational basis.**

Even if Appellants somehow meet the initial threshold, their claim should be dismissed because they have not proven that the 30% Rule lacks a rational basis. It is well-settled that legislative classifications not based on a suspect class must be upheld when supported by a rational basis. In the Matter of McCannel, 301 N.W.2d 910, 916-17 (Minn. 1980); Everything Etched, Inc. v. Shakopee Towing, Inc., 634 N.W.2d 450, 453 (Minn. Ct. App. 2001). The Minnesota Supreme Court recognizes:

The propriety of classification for the purpose of legislation is primarily for the legislature. Laws passed by the legislature are presumed to be valid, so we assume that the legislature makes inquiry and rightly determines the propriety of the classification which it adopts. This court will not disturb the legislative determination unless the classification is clearly arbitrary and has no reasonable basis.

In the Matter of McCannel, 301 N.W.2d at 917. Appellants concede that the rational basis standard is appropriate in this case.<sup>11</sup> Apps.' Br. p. 31.

The rational basis standard for equal protection challenges under the Minnesota Constitution requires a showing that:

- (1) The distinctions which separate those included within the classification from those excluded must not be manifestly arbitrary or fanciful but must be genuine and substantial, thereby providing a natural and reasonable basis

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<sup>11</sup> Amicus ACLU raises a "disparate impact" claim with respect to prospective tenants. The brief should be ignored by the court for several reasons. First, Appellants did not raise this type of constitutional challenge in the District Court and the ACLU is barred from raising it now. See State by Clark v. Applebaums Food Markets, Inc., 106 N.W.2d 896, 901 (Minn. 1960) (stating that "[a] brief filed amicus curiae in behalf of Red Owl Stores challenges the constitutionality of the act. Neither of the litigants have raised this issue. Amicus curiae may not do so. Consequently, we do not pass on this question"). Second, there is no party in the case (ie. a prospective tenant) with standing to raise such a claim. Finally, ACLU itself couches its factual assertions with disclaimers such as "may" and presents no basis on which to address the claim.

to justify legislation adapted to peculiar conditions and needs; (2) the classification must be genuine or relevant to the purpose of the law; and (3) the purpose of the statute must be one that the state can legitimately attempt to achieve.

Russell, 477 N.W.2d at 888. The Minnesota courts do not “hypothesize a rational basis to justify a classification . . . [but] have required a reasonable connection between the actual, and not just the theoretical, effect of the challenged classification and the statutory goals.” Id.

**i. Appellants have not shown that the classifications they draw from the 30% Rule are not genuine or substantial.**

Appellants must prove that the classifications they draw from the 30% Rule are arbitrary and not genuine and substantial. Russell, 477 N.W.2d at 888. In analyzing this prong of the test, courts hold that “[t]he difference between classes need not be great, and if any reasonable distinction can be found, a court should sustain the classification.” In the Matter of McCannel, 301 N.W.2d at 917.

According to Appellants, there is no genuine distinction between property owners who can and cannot get a rental license. Appellants’ argument, however, is based on the faulty premise that it does not matter which block they live on. The relevant inquiry is whether Appellants have proven beyond a reasonable doubt that the City lacked any genuine and substantial reason for distinguishing between owners on blocks exceeding 30% rental and those on blocks with less than 30% rental.<sup>12</sup>

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<sup>12</sup> Appellants’ argument that there is no distinction between the Dzierzbickis’ home and homes across the street which may be rented ignores that they are not on the same “block” as defined in the 30% Rule. Moreover, Appellants argument that there is no distinction between themselves and other owners who have expanded the number of

Appellants have not made this showing. First, Appellants do not, and cannot, challenge the City's determination that the appropriate percentage limit of rental concentration per block is 30%. See Holt, 559 N.W.2d at 446 (recognizing that "numbers chosen as legal limitations are often arbitrary: e.g., speed limits, building ordinance, statutes of limitation. The necessity of selecting some number arbitrarily does not render an ordinance itself arbitrary"). Second, Appellants ignore the City's determination that concentrations of rental properties higher than 30% per block is 1) not an appropriate balance of owner occupied to rental properties in the City and 2) associated with higher rates of property-related nuisances and crimes. Finally, contrary to Weir and Russell, where the legislative determination was based solely on anecdotal evidence, the City's decision enacting the 30% Rule is based on a ten year process and record of determining how to address the undisputed problems associated with rental housing concentrations in the City, cumulating in the HGKi Study. Thus, Appellants failed to show the 30% Rule does not satisfy this prong in the rational basis test.

**ii. Appellants have not proven that the distinctions in the 30% Rule are not genuine or relevant to the purposes of the regulation.**

This inquiry focuses solely on whether the legislative body could reasonably have found that the chosen means would actually address identified problems *based on the facts before it at the time of enactment*. Contrary to Appellants' position, courts do not (and cannot without violating separation of powers principals) inquire into whether the classifications in the law have actually furthered its purposes in practice or weigh the

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rental units in their property ignores that these other property owners already have a license and are therefore distinguishable.

availability of alternative methods for furthering the legislative purpose.<sup>13</sup> Grussing v. Kvam Impliment Co., 478 N.W.2d 200, 202 (Minn. Ct. App. 1991). This Court has recognized:

a court need not agree with the legislative body's determination, rather, 'those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the government decision maker' and 'they cannot prevail so long as it is evident from all the considerations presented to [the legislative body], and those of which we may take judicial notice, that the question is at least debatable.'

Id. See also Holt, 559 N.W.2d at 446 (stating that neither the existence of alternative methods for resolving a problem nor a debate as to the best method, provides a basis for declaring ordinances unconstitutional); Olson v. Blaeser, 458 N.W.2d 113, 118 (Minn. Ct. App. 1990) (recognizing that once it determines that a problem exists, the city is entitled to "a reasonable opportunity to experiment with solutions to the problem"). Thus, Appellants have the heavy burden of proving that it is not even debatable that the City Council could have reasonably determined based on the evidence before it that limiting the concentration of rental properties to 30% per block would further its purposes, including increasing neighborhood livability and slowing the conversion of owner occupied homes.

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<sup>13</sup> Appellants' reliance on Weir and Russell is misplaced because in each of those cases, the legislature's decision was based on assumptions or anecdotal evidence rather than facts. As a result, the court in Weir had to inquire into alternative methods for preventing fraud in an effort to ascertain whether there was an evident connection between the challenged regulation and preventing fraud. Here, studies and facts were presented and considered by the City.

Appellants have not met this burden. First, Appellants do not dispute that limiting the number of rental licenses per block achieves one of the primary goals of the 30% Rule – slowing the conversion of owner occupied homes to rental. Thus, no other analysis under this prong is necessary.

Second, Appellants have not shown that the distinction is not relevant to improving neighborhood livability. At the time of re-codifying the ordinance, the City relied on the HKGi study which provides factual evidence in support of the City's decision. There was no competing evidence submitted by Appellants or others at that time and the City Council reasonably concluded from all of the evidence before it and the legislative history of the regulation that limiting the number of rental licenses is a reasonable method of increasing neighborhood livability. Instead, Appellants proffer in this litigation conclusions by their own expert attempting to discredit the HKGi Study. That attempt fails because Appellants' expert's conclusions 1) are based on the faulty assertion that dwelling units, not the entire property, is the applicable unit of measurement and 2) erroneously compare crime statistics spread over the entire City, which is irrelevant to livability in residential neighborhoods. Appellants' expert accepted the City's data as true, but merely suggests a different analysis of the data that does not reflect the structure of the City's ordinance or enforcement policies. In order to have met their burden, Appellants would have to have submitted evidence conclusively establishing without a doubt that the factual record relied on by the City, including the HKGi Study, was wholly arbitrary. Appellants have not done so.

Third, Appellants narrowly define the City's purposes as addressing college students' anti-social behavior, remedying deteriorating housing conditions and reducing off-street parking. These are just a few of the stated purposes of the ordinance in the record, and Appellants ignore the broader purposes of improving neighborhood quality and livability and slowing the conversion of owner occupied homes to preserve the character of the neighborhood and availability of affordable housing. Appellants ignore that all of a statute's purposes do not have to be furthered in every conceivable scenario to pass constitutional muster, as legislatures are not required to act with mathematical exactitude in adopting social or economic regulations. Olson, 458 N.W.2d at 118.

In summary, Appellants disagree with the City Council's chosen method for addressing undisputed problems caused by concentrations of rental housing and submit a faulty expert report showing nothing more than a self-serving perspective of undisputed data. None of this meets Appellants' heavy burden of proving that there is no evident connection between limiting rental concentration to 30% and achieving the City's goals.

**iii. The purposes of the 30% Rule are legitimate.**

Appellants conceded in their Complaint and motion for summary judgment that the City's purposes for enacting the 30% Rule are legitimate. A.20 at ¶ 91. For the first time on appeal, Appellants claim that the 30% Rule fails prong three of the rational basis test because the *means* chosen by the City to achieve the purposes are overly broad. Apps.' Br. p. 43. Appellants' failure to raise this issue below prevents them from doing so before this court. Thiele v. Stich, 425 N.W.2d 580, 582 (Minn. 1988) (stating that

issues not raised before, or decided by, a lower court will not be considered for the first time on appeal). Thus, this prong is satisfied.

To the extent considered, Appellants have not proven beyond a reasonable doubt that the City lacked a legitimate purpose for enacting the 30% Rule. Appellants still concede the purposes underlying the 30% Rule are legitimate. Moreover, Appellants' reliance on Weir is misplaced.<sup>14</sup> In Weir, the court found that the legislative means were overly broad because the statute created an irrebuttable presumption that all relative personal care assistants who apply for unemployment benefits do so fraudulently. 828 N.W.2d at 476. Contrary to Appellants' argument, the 30% Rule does not create the presumption that all renters and rental property will negatively impact the neighborhood. Instead, the 30% Rule addresses concentration of rental property and slowing the conversion of owner occupied homes into rental. Appellants' "illegitimate means" argument therefore has no application.

Because Appellants have not proven that the 30% Rule lacks a rational basis, their equal protection claim should be dismissed.

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<sup>14</sup> This Court's imposition of the additional requirement that the means be legitimate in Weir departs from the rational basis test articulated by the Minnesota Supreme Court in Russell and its progeny. Indeed, in its decision in Healthstar Home Health, Inc., this Court expressed doubt as to whether an "illegitimate means" argument would apply outside the context of "means that were constitutionally suspect or involved invidious discrimination" and declined to address the issue. 827 N.W.2d at 453. Since neither of those circumstances are alleged in this case, the Court should refrain from considering Appellants' "illegitimate means" argument.

### III. APPELLANTS' SUBSTANTIVE DUE PROCESS CLAIM SHOULD BE DISMISSED

Appellants attack the validity of the 30% Rule under Minn. Const. art. 1, § 7 because it burdens their use and enjoyment of their property. The Minnesota Supreme Court has recognized:

[O]ne of the State's primary ways of preserving the public weal is restricting the uses individuals can make of their property. While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others. These restrictions are 'properly treated as part of the burden of common citizenship.'

Zeman v. City of Minneapolis, 552 N.W.2d 548, 554-55 (Minn. 1996). To succeed on their substantive due process claim, Appellants must prove that the 30% Rule lacks a rational connection to any legitimate governmental purpose. Everything Etched, Inc., 634 N.W.2d at 453. The parties agree that the rational basis standard applies. Apps.' Br. p. 45. Legislation lacks a rational basis "only when it rests on grounds irrelevant to the achievement of a plausible governmental objective." Id.

This Court does not need to reach the merits of this claim. It is well-settled that if legislation does not violate equal protection, it does not violate substantive due process because both require a rational basis. Id. Thus, if the court considers and finds that the 30% Rule is rationally based under the equal protection analysis, it automatically passes the less stringent due process standard.

Nevertheless, Appellants have not shown that the 30% Rule is invalid.<sup>15</sup>

Appellants do not argue that the 30% Rule is unrelated to the City's goals, including preserving neighborhood livability and slowing the conversion of owner-occupied homes into rental. As shown the 30% Rule is rationally-based.

Appellants' theory is that the 30% Rule is either over or under inclusive in regulating the right to rent. Appellants' imposition of a proportionality requirement, however, is an attempt to rewrite the substantive due process standard in Minnesota – if the regulation is rationally-based, it is valid. Appellants cite no controlling authority imposing the additional requirement that legislation be proportional. They are trying to impose a higher standard of review than the applicable rational basis standard.<sup>16</sup>

Appellants' reliance on foreign authority is equally unavailing. First, in Kirsch Holding Co. v. Borough of Manasquan, 281 A.2d 513 (N.J. 1971) and United Prop. Owners Ass'n of Belmar v. Borough of Belmar, 447 A.2d 933 (N.J. Super. Ct. 1982), the issue was whether a permanent ban of seasonal rentals was constitutional. The court in

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<sup>15</sup> Appellants cite the “right to acquire, possess, and enjoy property; and the right to establish a home” as protected property interests and contend the 30% Rule “denies affordable housing to prospective tenants and their own right to ‘establish a home.’” Apps.’ Br. pp. 45-46. Appellants have not been denied the right to acquire, possess or live in their homes. Thus, the only property interest at issue is their ability to rent. Moreover, Appellants’ attempt to raise a constitutional challenge on behalf of unnamed potential renters fails. See Irongate Enter., Inc. v. County of St. Louis, 736 N.W.2d 326, 333 (Minn. 2007) (recognizing that “[w]ith few exceptions, a person to whom a statute may constitutionally be applied will not be heard to challenge a statute on the ground that it may conceivably be applied unconstitutionally to others”).

<sup>16</sup> Appellants’ standard is akin to strict scrutiny, which applies when a suspect class or fundamental right is implicated and requires legislation to be “narrowly tailored to a compelling governmental purpose.” Greene v. Comm’r of Minn. Dept. of Human Servs., 755 N.W.2d 713, 725 (Minn. 2008).

Kirsch Holding applied a three-part rational basis test not imposed in Minnesota, which required the regulation to be “reasonably calculated to meet the evil and not exceed the public need or substantially affect uses which do not partake of the offensive character of those which cause the problem sought to be ameliorated.” 281 A.2d at 518. Both courts found the goal of the legislation was to prevent community disruption caused by groups of unrelated persons renting seasonal dwellings. The court in Kirsch Holding expressly recognized that general police powers are an appropriate mechanism for addressing “obnoxious personal behavior.” Id. at 253. However, the courts held that the ordinances were unreasonable zoning restrictions because they were excessively broad and prohibited too many harmless property uses. See also Ocean County Board of Realtors v. Twp. of Long Beach, 599 A.2d 1309, 1315 (N.J. Super. Ct. Law Div. 1991) (invalidating an ordinance defining family as overly broad).

The above-cited cases are distinguishable. The due process test in New Jersey is much more restrictive than Minnesota’s rational basis test, which only requires a showing of reasonableness.<sup>17</sup> Further, unlike the restrictions in those cases, the 30% Rule is not a permanent and complete ban on rental. Property owners can obtain a temporary rental license and, as in Richard’s case, a standard license if the percentage of rental on their

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<sup>17</sup> Amicus ACLU picks up a similar theme citing So. Burlington County NAACP v. Mount Laurel Twp., 336 A.2d 713 (N.J. 1975) for the proposition that the City has a requirement to have “inclusive” zoning. The Mount Laurel Twp. decision is based on the unique provisions of the New Jersey Constitution and has no bearing in Minnesota. Moreover, despite the Mount Laurel Twp. decision being touted around the country, not a single court outside of New Jersey has adopted it. Robert C. Holmes, The Clash of Home Rule and Affordable Housing: The Mount Laurel Story Continues; 12 CONN. PUB. INT. LJ, 325, 325-26 (2013).

block drops below 30% through nonrenewal or revocation. In addition, the City did not enact the 30% Rule solely to combat the anti-societal behavior of a small segment of Winona's rental population. Instead, the City found that the concentration of rental properties in general negatively impacts neighborhood livability and speeds conversion of owner occupied homes for use as rental properties.

Second, the plaintiff in Gangemi v. Zoning Board of Appeals of the Town of Fairfield, 763 A.2d 1011, 1014 (Conn. 2001), challenged a variance condition that the property be owner occupied. The court invalidated the condition because it served no purpose and violated public policy by permanently depriving plaintiff of its ability to rent the property, lowered the resale value of the property, applied only to plaintiffs' property and constituted economic waste. Id. at 1016-18. The court expressly limited its holding to the facts of the case, stating that “[w]e need not, and do not, decide whether a no rental condition may never be valid in the zoning context” and recognized that “[i]t may be that where such a condition is imposed by virtue of a statute or regulation that is of district-wide application and is tailored to a specific land use policy . . . such a condition might be valid.” Id.

The Gangemi decision is distinguishable.<sup>18</sup> The issue in Gangemi was whether a zoning condition was enforceable, not whether a charter city's rental licensing ordinance is a valid exercise of its general police powers. Further, unlike here, the condition in

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<sup>18</sup> If anything, Gangemi supports the City. Under Gangemi, a rental restriction is a valid zoning regulation if it serves a lawful and useful purpose. Appellants concede that problems exist and the City has the power to regulate rental housing, but they simply do not like the City Council's chosen method to address the problems. As previously argued, the 30% Rule is valid under the City's broad police power or zoning authority.

Gangemi permanently deprived plaintiff and all subsequent purchasers of the ability to rent the property. Here, the 30% Rule's restrictions are not permanent and do not forever bar Appellants or other purchasers from renting the Property, as evidenced by Richard's receipt of a license. Finally, the 30% Rule does not solely apply to Appellants.

Finally, in Fox v. Town of Bay Harbor Is., 450 So.2d 559, 560 (Fl. Ct. App. 1984), the challenged zoning ordinance limited the occupation of a garden level apartment to the person in charge of maintenance. The court invalidated the restriction because limiting the identity of the occupant bore no rational relationship to the purpose of the ordinance. Id. at 561. Here, the 30% Rule in no way interferes with Appellants' right to reside in their properties. Further, the 30% Rule does not contain any limitation on the identity of specific occupants. Appellants have therefore failed to cite any cases requiring anything more than a rational basis to uphold the 30% Rule.<sup>19</sup> Because the 30% Rule is rationally-based, the court should dismiss Appellants' substantive due process claim.

#### **IV. APPELLANTS' PROCEDURAL DUE PROCESS CLAIM LACKS MERIT**

To succeed on a procedural due process claim, Appellants must prove that the City denied them notice and an opportunity to be heard. Nexus v. Swift, 785 N.W.2d 771, 779 (Minn. Ct. App. 2010). Appellants do not allege that they were denied due process with respect to the City's legislative decisions enacting and re-codifying the 30% Rule or denying their requests for a rental license. Instead, Appellants' novel theory is that the

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<sup>19</sup> Appellants rely on Coalition Advocating Legal Housing Options v. City of Santa Monica, 105 Cal. Rptr. 2d 802 (Cal. Ct. App. 2001), but that case addressed privacy and equal protection, not substantive due process. Likewise, Appellants cite O'Connor v. City of Moscow, 202 P.2d 401 (Id. 1949), but that case involved a taking of a nonconforming use, not substantive due process. Thus, these cases are not relevant.

City unlawfully delegated its legislative authority to property owners. Courts in this and other jurisdictions that have addressed such claims have done so in the context of substantive due process and ultra vires claims. These courts have only invalidated regulations that expressly condition legislative action on the standardless consent of property owners, which is not the case here. Appellants have not proven any unlawful delegation by the City and their claim should be dismissed.

Appellants argue that by limiting the number of available rental licenses, the City unlawfully delegated to property owners the power to prohibit other owners from obtaining a license. Apps.' Br. p. 50. Specifically, the City created a system where the first owners to obtain a rental license can arbitrarily prevent the remaining owners on the same block from renting their property. *Id.* at 51. This claim fails for several reasons.

First, the City has not delegated its rental licensing authority to property owners. The City retains all authority to accept and process license applications and determine compliance with licensing standards imposed by the City. The City determines who is eligible for and issues all rental licenses and enforces related City Code provisions. As stated, the City enacted the 30% Rule as a valid licensing standard which operates on an objective first come first served basis.<sup>20</sup> See Heffron v. Int'l Society for Krishna Consciousness, Inc., 452 U.S. 640, 649 (1981) (recognizing that because the first come first served standard is objective, it is a rational method of issuing a limited number of permits); Davenport v. City of Alexandria, 683 F.2d 853, 855 (4th Cir. 1982) (same). An

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<sup>20</sup> Because the system is objective, a property owner's motivations for obtaining a rental license are irrelevant.

owner's acquisition of a rental license pursuant to City Code, and the resulting inability of his neighbor to obtain a license because the block exceeds 30% rental, results from a straight-forward application of the City's licensing standard. The City and operation of the 30% Rule, not the actions of owners, determines who obtains a rental license.

Second, Appellants have not cited any authority supporting their delegation theory. For example, in Eubank v. City of Richmond, the City passed an ordinance requiring the street committee to establish the building setback determined by 2/3 of the owners of property abutting the street. 226 U.S. 137, 141 (1912). The Court held that the ordinance was invalid because it left no discretion to the committee and provided no standards governing the owners' exercise of legislative authority. Id. 143-44. See also State of Wash. ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S.116, 118, 124-25 (1928) (invalidating an ordinance permitting use of property for philanthropic home upon written consent of 2/3 of owners within 400 feet because it leaves no discretion to the legislative authority and provided no standards for exercise of consent by owners); Foster v. City of Minneapolis, 97 N.W.2d 273, 274 (Minn. 1959) (holding that requiring consent by property owners as a prerequisite to amending the zoning ordinance is unreasonable because it "grants to adjoining owners the right to empower the council to act to impose property restrictions where otherwise it would have no such authority"); Concordia Collegiate Inst. v. Miller, 301 N.Y. 189, 192 (N.Y. 1950) (invalidating an ordinance allowing the board of appeals to grant variances if consented to by 80% of owners on the surrounding block because the board had no discretion to act without such consent and there were no constraints on the owners' exercise of consent).

All of the cases relied on by Appellants are distinguishable. In each case, the challenged regulation expressly conditioned legislative action on consent by owners, which vested legislative discretion in private parties. There is no express consent provision in the 30% Rule. Additionally, the regulations in the above-cited cases were invalid because there were no standards governing the property owners' exercise of discretion and in turn, the legislative action based on such consent was arbitrary. Here, even if the Court were to find some type of delegation, the 30% Rule operates on an objective first come first served basis and the motives of property owners are irrelevant. Finally, the courts striking down consent provisions found that the regulations were irrational, and as already established, the 30% Rule is a rationally-based regulation.

Finally, even if this Court finds the 30% Rule operates as consent legislation, the ordinance should be upheld. Consent provisions are valid when private action does not have the effect of legislation in that such action creates the restriction on other property. For example, in Leighton v. City of Minneapolis, the challenged regulation required consent by nearby property owners and majority approval by the city council for rezoning. 16 F. Supp. 101, 106 (D. Minn. 1936). The court upheld the statute because the consent provision did not deprive the council of discretion and was a jurisdictional prerequisite to the council's consideration of the application. Id. The court reasoned:

Where the law is complete in itself and its operation does not depend on an act of property owners, a consent provision is valid; but, where the law is not complete in itself, is not effective until the property owners act, and it is their action that imposes the restriction and that has the force and effect of law, it is invalid, because it then contains an unauthorized delegation of legislative power.

Id. See also Foster, 97 N.W.2d at 275 (distinguishing between consent provisions that “merely set in force an authorized power delegated to the council” and those that “in substance grants to adjoining owners the right to empower the council to act to impose property restrictions where otherwise it would have no such authority”); O’Brien v. City of Saint Paul, 173 N.W.2d 462, 465-66 (Minn. 1969) (stating that a consent provision that confers the power to legislate on the property owner is invalid, but is valid if the purpose of the consent is to waive or modify a restriction enacted by the legislature).

Further, consent provisions are valid when private action relates to enforcement, not enactment, of the legislation. In Curran v. Wallace, the challenged statute authorized the Secretary of Agriculture to establish markets only when two thirds of growers authorize the market through a referendum. 306 U.S. 1, 6 (1939). In determining that the statute did not unlawfully delegate legislative authority to the growers, the Court found:

Congress may feel itself unable conveniently to determine exactly when its exercise of the legislative power should become effective, because dependent on future conditions, and it may leave the determination of such time to the decision of an executive, or, as often happens in matters of state legislation, it may be left to a popular vote of the residents of a district to be affected by the legislation. While in a sense one may say that such residents are exercising legislative power, it is not an exact statement, because the power has already been exercised legislatively by the body vested with that power under the Constitution, the condition of its legislation going into effect being made dependent by the legislature on the expression of the voters of a certain district.

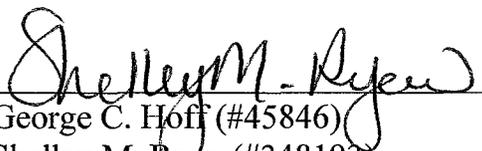
306 U.S. at 16. See also Early v. Richards, 35 App. D.C. 540, 546 (D.C. Ct. App. 1910) (recognizing that the legislature cannot delegate the power to make a law, “but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend”).

Here, the “consent” Appellants claim exists in the 30% Rule is that the first 30% of the property owners on a block who obtain rental licenses prevent all other owners on that block from renting their homes. This “consent” does not constitute legislative decision-making by the owners. Instead, the City retains all discretion over whether to issue a rental license. Further, the City’s legislative action enacting the 30% Rule and setting the standard is complete and does not depend on the actions of owners for its effectiveness. The only unknown is which 30% of the owners on each block are entitled to rental licenses and that is determined by application of the ordinance to the facts on each block. Thus, the 30% Rule is not an invalid consent regulation and Appellants’ procedural due process claim should be dismissed.

#### CONCLUSION

For the foregoing reasons, this Court should affirm the District Court’s decision and grant the City summary judgment dismissing Appellants’ Complaint.

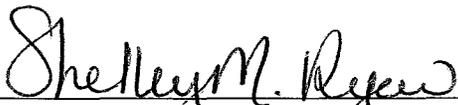
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CERTIFICATE OF COMPLIANCE  
PURSUANT TO MINN. R. CIV. APP. P. 132.01, Subd. 3(a)

This brief complies with the type-volume limitation of Minn. R. Civ. App. P. 132.01, Subd. 3(a) because this brief contains 13,364 words, excluding the parts of the brief exempted by Minn. R. Civ. App. P. 132.01, Subd. 3. This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman with a 13 point font.

Dated: September 16, 2013

  
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