State of Minnesota
Winona County

District Court
Third District
Court File Number: **85-CV-11-2329**
Case Type: Civil Other/Misc.

ANTHONY B. SANDERS
KATELYNN K. MCBRIDE
527 MARQUETTE AVE STE 1600
MINNEAPOLIS MN 55402-1330

Notice of:

X	**Filing of Order**
X	**Entry of Judgment**
	Docketing of Judgment

Ethan Dean, Holly Richard, Ted Dzierzbicki and Lauren Dzierzbicki vs CITY OF WINONA, a municipality

You are hereby notified that the following occurred regarding the above-entitled matter:

X	A Summary Judgment Order and Judgment was filed on April 17, 2013.
X	Judgment was entered on April 17, 2013.
	You are notified that judgment was docketed on at in the amount of $. Costs and interest will accrue on this amount from the date of entry until the judgment is satisfied in full.

Dated: April 18, 2013

Sally A. Cumiskey/mkk, deputy
Court Administrator
Winona County District Court
171 West Third Street
Winona MN 55987
507-457-6385

cc: GEORGE C HOFF

A true and correct copy of this Notice has been served by mail upon the parties named herein at the last known address of each, pursuant to Minnesota Rules of Civil Procedure, Rule 77.04.

FILED
April 17, 2013
DISTRICT COURT
WINONA, MN 55987

STATE OF MINNESOTA

COUNTY OF WINONA

DISTRICT COURT

THIRD JUDICIAL DISTRICT

Court File No.: 85-CV-11-2329

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

Plaintiffs,

vs.

SUMMARY JUDGMENT ORDER AND JUDGMENT

City of Winona, a municipality,

Defendant.

This case was heard by District Judge Jeffrey D. Thompson on January 23, 2013, on cross motions for summary judgment. Plaintiffs (hereafter "Homeowners") were represented by Anthony B. Sanders and Katelynn K. McBride, 527 Marquette Ave., Ste. 1600, Minneapolis, MN 55402. Defendant (hereafter "the City") was represented by George C. Hoff, 160 Flagship Corporate Center, 775 Prairie Center Dr., Eden Prairie, MN 55344. All parties assert that there are no genuine issues of material fact and that this matter is appropriately decided as a matter of law. The Court allowed the City additional time to respond to Homeowners' affidavits and took this matter under advisement on January 31, 2013.

Upon the pleadings, affidavits, exhibits, and filed discovery, the Court having considered the arguments of counsel and being otherwise fully advised in the premises, finding no genuine issues of material fact,

It Is Ordered That:

1. The City's motion to strike the Second Affidavit of David Phillips is **DENIED**.

2. Homeowners' motion for summary judgment is **DENIED**.

3. The City's motion for summary judgment is **GRANTED**.

4. The following Memorandum is herein incorporated by reference.

LET JUDGMENT BE ENTERED ACCORDINGLY

DATED: April 17, 2013

BY THE COURT:

Jeffrey D. Thompson
District Court Judge

JUDGMENT

I hereby certify that the foregoing Order constitutes the Judgment of the Court.

DATED: April 17, 2013
(COURT SEAL)

SALLY A. CUMISKEY
COURT ADMINISTRATOR

by Mary K Keller
Deputy Clerk

MEMORANDUM

Statement of Undisputed Facts

Winona City Rental Property Code § 33A.03(i) provides in relevant part: "In R-R, R-S, R-1, R-1.5 and R-2 districts of the city, 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." There is an exemption for grandfathered-in lots and for certain zoning districts. There is also a temporary rental license available to a homeowner who is actively trying to sell his or her house for one year. This rule

("the 30% Rule") was adopted in 2005 in Chapter 43 of the city code, which deals with zoning. The 30% Rule was moved to the "Housing Rental Property" chapter in 2012, after this matter had commenced. There were some changes to the wording of the rule, but none relevant to this dispute.

History of the 30% Rule

In 2003, the Winona City Council requested that the Planning Commission consider the effectiveness of the City's off-street parking regulations, particularly regarding rental properties and most significantly around the Winona State University ("WSU") campus. Members of the Commission noted that the number of residential properties being converted from single-family to rental usage was increasing and that the parking demands for owner-occupied dwelling units is often different than rental dwellings. Suggested solutions to this growing problem included changing the definition of "family" as it pertains to single-family occupancy and limiting the number of rental properties per block in residential areas.

In December of 2004, the City Council adopted a resolution that put a moratorium on the certification of "new" rental housing units for a six-month period. During the moratorium, the Planning Commission initiated discussions and developed a tentative list of proposed code modifications pertaining to rental housing density and off-street parking issues. The Commission then held a series of public input meetings with rental landlords, homeowners, and others. In April of 2005, Mayor Jerry Miller, in conjunction with the Commission discussions, initiated a series of town meetings designed to deal with "density, parking, and aesthetic issues within the 'area' of the university." The meetings were attended by landlords, homeowners, students, and others. Following the last meeting, in late May of 2005, the Mayor created a core study group to identify issues and possible solutions pertaining to university neighborhoods to

forward to the Commission. The moratorium was extended another 6 months until December of 2005 to allow the study group and the Commission to complete their review, planning, and implementation.

A Parking Advisory Task Force was also formed in 2005 to consider these same issues and consider the Planning Commission's proposals. The Task Force noted that 39% of the City's dwelling units were rental, but 52% of the complaints received by the Community Development Department relate to rental occupancies. Due to this, it was suggested that the number of rentals in the City be restricted, perhaps on a "per block" basis. Concerning the Commission's proposals, the Task Force agreed that the definition of "family" should be modified so that only 3 unrelated persons can live in a single dwelling unit; it agreed that the number of roomers a resident family can keep be reduced from 4 to 2; and the Task Force agreed that the number of required off-street parking spaces per dwelling unit be increased from 1.5 to 2. In August of 2005, the Task Force began discussing the idea of restricting the number of rental units per block. Because rental housing units comprised approximately 39% of the total housing units in the City at the time, it was suggested that the number of rental units be restricted to 30% of the total properties on any given block.

At the August 2005 Task Force meeting, Committee Member Don Leaf emphasized that the ratio of rental properties to total properties represents community "character" and that such a restriction could protect inner city neighborhoods from heavy concentration of rental housing. After some debate, the Task Force adopted a motion to forward the 30% Rule to the Planning Commission for consideration, though it was discussed again at the September 1, 2005 meetings. There it was noted that the 30% Rule could prevent out-of-town people from purchasing residential property within the City and that it could hinder current residents' ability to sell their

property. These issues were noted and acknowledged, and the Task Force decided that it was in favor of the 30% Rule and would seek studies and findings on the effect of rental housing on the area.

On October 1, 2005, the Planning Commission discussed the 30% Rule. The Commission noted that the Parking Task Force believes that landlords and students often do not have any interest in how their properties appear and the effect they have on the community. Therefore, the Task Force believes that neighborhoods heavily populated with student rentals tend to become run-down and unattractive and a 30% per-block restriction on rental housing is appropriate. Some city staff were concerned that the rule might not be legal, but the City Attorney indicated that if the City Council finds that such a restriction will promote the public health, safety, morals and general welfare of the City's residents, it would be legal. It was also noted that some exceptions should be allowed for, such as a professor leaving the area for a year or two, for which a one-year exception or "special case clause" could be established. In an October 24, 2005 meeting, the Planning Commission noted that according to County data, in 2004, the Department of Community Development found that of the 99 addresses that had two or more calls for service that police responded to for noise and party complaints, 95 were rental units. The Commission also noted that 52% of the zoning violations that resulted in written violations during 2004 were for rental units while 39% of the City's housing units are rental. After further discussion, a public hearing was scheduled for November 14, 2005 on the issue. At the public hearing, the Commission voted 6 to 3 to recommend the 30% Rule to the City Council.

The City Council held a public meeting on November 21, 2005. A the meeting, the City Council discussed and adopted some of the other recommendations of the Task Force and the

Planning Commission, as well as opening a public hearing on the 30% Rule. Several members of the community spoke for and against the proposed rule. Most of the negative comments revolved around concerns that property values would suffer; most of the positive comments revolved around protecting neighborhoods and preventing areas from becoming completely dominated by rental units. The 30% Rule was passed at the November 21, 2005 meeting and adopted on December 5, 2005.

The 30% Rule was again raised at a February 23, 2009 Planning Commission meeting. The City Planner noted that since the rule was enacted, 142 dwelling units had been certified for rental and that they were dispersed throughout the City rather than concentrated. There was some disagreement among the Commission members as to whether the Rule was "working." The City Planner also noted that the City Council was in the process of creating a new task force to examine the 30% Rule. This task force was created by the City Council in March of 2009 with the goal of focusing on potential ways for residents to rent their homes on blocks over 30% in extraordinary circumstances and potential ways to encourage the conversion of rental properties into owner occupied structures. The task force conducted a study of a particular area around the WSU campus and determined that 48% of the 775 dwelling units were certified as rental and that if the 30% Rule was lifted, that number would increase to 67%. Ultimately, in February of 2010, the task force recommended that the City retain the 30% Rule. It was noted that "[a]lthough the general consensus of the Task Force was that the Rule has, since adoption, had the intended affect [sic] of dispersing rental patterns away from core university neighborhoods, not all were supportive of the method." The Program Development Director for the Department of Community Development characterized the 30% Rule as having "preserved affordable housing and reduced conversions as intended."

In February of 2012, a few months after Plaintiffs filed their complaint in this matter, the Planning Commission met to discuss moving the 30% Rule from Chapter 43 to Chapter 33A. The stated purpose of moving the Rule is that "other cities have included similar provisions in their housing codes—not in their zoning codes" and "the move is also recommended because the City's charter grants additional legal authority for ordinances such as the 30% rule." A memorandum was also prepared by the consulting firm Hoisington Koegler Group, Inc. ("HKG") in conjunction with this issue. In general, the memorandum supported the idea that there is a correlation between rental properties, particularly rentals to single family dwellings, and increased behaviors that lead to a decline in neighborhood livability. Specific to Winona, the HKG memorandum stated:

> 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 a decreased neighborhood quality and livability.

The 30% Rule was moved to Chapter 33A, where it is currently placed, in March of 2012.

Homeowners' Situations

Homeowners Dean and Richard each own a residential property in the City of Winona and the Dzierzbickis, a married couple, jointly own a residential property. Dean purchased a house near WSU in 2006 with the intention of residing there with his girlfriend and her family. By 2009, however, that relationship had ended and Dean was preparing for another tour in Iraq with the US Department of Justice. Because the market at the time made selling the house undesirable, Dean hoped to rent it out, but the 30% Rule prevented him from obtaining a rental license. Dean has been able to obtain temporary rental licenses and has been renting the home since 2010, but asserts that attempts to sell the property are often hindered when the potential

buyer learns that a long-term rental license is not available. Dean's property also does not comply with the City's off-street parking requirements, but he has been allowed to provide a second parking space by leasing an adjacent space while attempting to sell the house.

Ted and Lauren Dzierbicki live in Illinois. They purchased a house near WSU in 2007, when their daughter was attending school, and made significant improvements to the property. They planned to have their daughter live in the house and rent it out to other students. The house, however, is on a block in which more than 30% of the houses have rental licenses, so this plan could not come to fruition. Their daughter lived there until she graduated in May of 2010. Other students lived in the house paying only utilities and not rent until the fall of 2010, when the City determined that arrangement was also a violation. The house has been empty since May of 2010 and on the market since December of 2009. The Dzierbickis assert that the value of the property is significantly lower than it would be if a rental license were possible.

Richard purchased a house in December of 2006 while she was working at St. Mary's University in Winona. In 2009, she accepted an offer from the University of South Dakota to pursue a Ph.D. and put her house up for sale. After receiving no offers, she decided to rent. When Richard inquired about getting a rental license, she was informed that she was on a block in which more than 30% of the properties had a rental license, so her house was ineligible. She entered rent-with-option-to-buy with a potential purchaser, but in February of 2010, the City discovered this arrangement and ordered the renter out. Richard obtained a temporary license in April of 2010 and has had it renewed. The house went unrented for March and April. She also believes the inability to obtain a long-term rental license hindered her attempts to sell. After this lawsuit was filed, however, Richard discovered that another rental license on her block had lapsed and that she was eligible for a standard rental license. She obtained a license and has

been renting her home since.

Legal Analysis and Conclusion

Here, both parties have moved for summary judgment. Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03; *Offerdahl v. Univ. of Minn. Hosps. & Clinics*, 426 N.W.2d 425, 427 (Minn. 1988). The evidence must be viewed in the light most favorable to the nonmoving party. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). "A moving party is entitled to summary judgment when there are no facts in the record giving rise to a genuine issue for trial as to the existence of an essential element of the nonmoving party's case." *Nicollet Restoration, Inc. v. City of St. Paul*, 533 N.W.2d 845, 847 (Minn. 1995).

Standing

The City argues that Homeowners Dean and Richard's claims should be dismissed for lack standing. "Standing is the requirement that a party has a sufficient stake in a justiciable controversy to seek relief from a court." *State by Humphrey v. Philip Morris Inc.*, 551 N.W.2d 490, 493 (Minn. 1996) (citing *Sierra Club v. Morton*, 405 U.S. 727, 731-32 (1972)). A plaintiff has standing if the plaintiff has suffered some "injury-in-fact." *Id.*

The City argues that Dean lacks standing because his property does not have a second off-street parking space, thus, even without the 30% Rule, he would still be ineligible for a standard rental license. This argument fails. Dean may, as he has been doing while obtaining temporary rental licenses, lease an off-street parking space from someone else. Dean or a subsequent purchaser of his property could make a permanent or long-term arrangement for a

second space or possibly add another space to the property. Thus, there remains an issue of fact as to whether the 30% Rule has negatively affected the value of Dean's property and/or prevented him from selling it.

The City argues that Richard lacks standing because she was ultimately able to get a standard rental license when her block dropped below 30%, making her claims moot. This argument also fails. There is evidence that the 30% Rule caused Richard to lose at least two months of rental income. If Homeowners prevail and the 30% Rule is deemed unlawful, Richard will have a valid claim to at least the nominal damages requested in her prayer for relief. The Homeowners have standing in this matter.

In the interests of simplicity, the Court will refer to "Homeowners" hereafter as though they are each ineligible to obtain a standard rental license because of the 30% Rule.

Equal Protection and Substantive Due Process

"We presume statutes to be constitutional and exercise the power to declare a statute unconstitutional with extreme caution and only when absolutely necessary." *ILHC of Eagan, LLC v. County of Dakota*, 693 N.W.2d 412, 421 (Minn. 2005) (internal quotation marks omitted). The party challenging an ordinance or statute's constitutionality bears the burden of establishing that the statute is unconstitutional beyond a reasonable doubt. *Greene v. Comm'r of Minnesota Dept. of Human Services*, 755 N.W.2d 713, 724-25 (Minn. 2008) (citing *Gluba ex rel. Gluba v. Bitzan & Ohren Masonry*, 735 N.W.2d 713, 719 (Minn. 2007)). The Fourteenth Amendment to the United States Constitution guarantees that no state will "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Minnesota Constitution also guarantees that "[n]o member of this state shall be disenfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of

the land or the judgment of his peers." Minn. Const. art. 1, § 2. Minnesota courts have observed that "[b]oth clauses have been analyzed under the same principles and begin with the mandate that all similarly situated individuals shall be treated alike, but only invidious discrimination is deemed constitutionally offensive." *Kolton v. County of Anoka*, 645 N.W.2d 403, 411 (Minn. 2002) (internal quotation marks omitted).

Courts apply strict scrutiny to a legislatively-created classification that involves a suspect classification or a fundamental right. *Greene*, 755 N.W.2d at 725 (citing *Bituminous Cas. Corp. v. Swanson*, 341 N.W.2d 285, 289 (Minn.1983)). If strict scrutiny applies, the classification must be "narrowly tailored and reasonably necessary to further a compelling governmental interest." *Hennepin County v. Perry*, 561 N.W.2d 889, 897 n. 7 (Minn. 1997). If a constitutional challenge does not involve either a suspect classification or a fundamental right, courts are to review the challenge using a rational-basis standard. *Gluba*, 735 N.W.2d at 719. The parties agree that a rational-basis standard is appropriate in this case.

Under the federal constitution, the same rational-basis standard of review applies to due process and equal protection challenges to a statute or ordinance:

> The examining court must merely inquire whether (1) the act serves to promote a public purpose, (2) it is an unreasonable, arbitrary or capricious interference with a private interest, and (3) the means chosen bear a rational relation to the public purpose sought to be served.

Grussing v. Kvam Implement Co., 478 N.W.2d 200, 202 (Minn. App. 1991). In applying that test, 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 governmental 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.* (citing *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981)).

Minnesota courts, however, apply a less deferential rational-basis review for challenges to a statute or ordinance under the Minnesota Constitution's equal protection clause. The Minnesota rational-basis test provides:

> (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 to justify legislation adapted to peculiar conditions and needs; (2) the classification must be genuine or relevant to the purpose of the law; that is there must be an evident connection between the distinctive needs peculiar to the class and the prescribed remedy; and (3) the purpose of the statute must be one that the state can legitimately attempt to achieve.

Studor, Inc. v. State, 781 N.W.2d 403, 408 (Minn. App. 2010), *review denied* (Minn. July 20, 2010). "The distinction between the two tests is that under the Minnesota test we have been unwilling to hypothesize a rational basis to justify a classification, as the more deferential federal standard requires . . . Instead, there must be a reasonable connection between the actual, as opposed to the theoretical, effect of the classification and the statutory goals." *Id.* Thus, to determine if the 30% Rule violates the federal or state equal protection or substantive due process clauses, the Court need only analyze Plaintiffs' claim under the Minnesota equal protection standard. If the 30% Rule does not pass the Minnesota rational-basis test, it is unlawful and the Court need go no further; if it does pass the less deferential Minnesota rational-basis test, it also passes the rational-basis test used to analyze federal equal protection claims, as well as state and federal substantive due process claims. *See Id.* at 410 ("[I]f legislation does not violate equal protection, it does not violate substantive due process.") (quoting *Everything Etched, Inc. v. Shakopee Towing, Inc.*, 634 N.W.2d 450, 453 (Minn. App.2001), *review denied* (Minn. Dec. 11, 2001)).

Before getting to the rational-basis test, "the threshold question is whether the claimant is treated differently from others who are similarly situated, because the equal protection clause does not require the state to treat differently situated people the same." *Odunlade v. City of Minneapolis*, 823 N.W.2d 638, 647 (Minn. 2012). The "Equal Protection Clause does not forbid classifications. It simply keeps governmental decision-makers from treating differently persons who are in all relevant aspects alike." *State v. Johnson*, 813 N.W.2d 1, 12 (Minn. 2012) (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992)). On its face, the 30% Rule treats all of those to whom it applies—private, residential property owners in low density residential zones—equally. Homeowners argue that they are similarly situated to all residential property owners in low density residential zones, but are treated differently because some can get rental licenses (or have licenses and may add another renter) and they cannot. The City argues that owners on blocks with less than 30% rental are not similarly situated to those on blocks over 30% as it pertains to a rental-density regulation. Homeowners counter that the City's argument that people are not similarly situated because they are separated by the distinction created by the challenged legislation begs the question.

Homeowners slightly mischaracterize this argument. By creating the 30% Rule, the City set the line of demarcation at 30%, but the difference in the composition of city blocks exist with or without a legislatively defined trait. As noted above, the City is allowed to classify, but it may not treat "differently persons who are in all relevant aspects alike." The relative number of rental licenses on a property's block is relevant to whether or not that property should be issued a rental license. Thus, someone on a block with less than 30% rental and someone on a block with more than 30% rental are not alike in that relevant aspect. Fellow property owners on over 30% blocks that have rental licenses are similarly situated except that they were either grandfathered

in by having a rental license before 2005 or got a rental license before their block got up to 30%. In each case, that property owner obtained a rental license before the Rule was enacted or while his or her block had less than 30% rental. Those property owners are also not similarly situated.

Moreover, Homeowners cannot meet their burden of showing that the 30% Rule fails the Minnesota rational-basis test. Homeowners do not contest that the purposes of the Rule are legitimate; they argue it cannot meet the first two requirements of the Minnesota rational-basis test.

The distinctions are genuine and substantial. The City's purposes in enacting the 30% Rule include avoiding further concentration of rental properties and conversions from owner-occupied homes into rental properties. The goals are to serve the ultimate purpose of preserving the "character" of neighborhoods, maintaining affordable single-family housing, limiting deterioration of housing conditions, reducing on-street parking, and maintaining neighborhood "livability," which includes minimizing nuisance complaints and anti-social behavior.

Limiting the number of rental licenses per block is not an arbitrary or fanciful means of achieving these goals. Homeowners argue the "first-come, first-serve" nature of the Rule renders it inherently arbitrary, but that is just a symptom of genuine and substantial distinctions. There is a genuine distinction between someone on a block with over 30% rental and someone on a block with below 30% rental. When the person on the block below 30% applies for and receives a license, it could push that block to over 30%. This change in block composition may prevent an otherwise qualified renter from obtaining a license, but it is not arbitrary that the "first-comer" got the license. That person applied for a rental license on a block with less than 30% rental, so issuing that license conforms with the City's purpose of dispersing rentals to blocks at less than 30%. Regarding the actual number settled upon, which Homeowners

acknowledge is not a basis for their challenge, "numbers chosen as legal limitations are often arbitrary: e.g., speed limits, building ordinances, statutes of limitation . . . [t]he necessity of selecting some number arbitrarily does not render an ordinance itself arbitrary." *Holt v. City of Sauk Rapids*, 559 N.W.2d 444, 446 (Minn. App. 1997).

The classification is also genuine and relevant to the purposes of the Rule. There is evidence to suggest that the 30% Rule has dispersed rentals throughout the City and there is no real question that it has slowed the conversion of owner-occupied homes to rentals; Homeowners inability to convert their single-family homes to rental housing caused them to bring this lawsuit. It is reasonable for the City to conclude that the 30% Rule will ultimately have a positive effect on the character and livability of neighborhoods, particularly those around the WSU campus.

Homeowners offer alternative suggestions toward livability and anti-social behavior and assert that the Rule is overbroad in some respects while under-inclusive in others. They note that allowing already-licensed properties to add rental units can increase population density and burden on-street parking as much as licensing another property for rental; they argue that when more rigorously analyzed, the crime statistics in higher rental areas are not significantly different; and they argue that nuisance complaints, anti-social behavior, and housing deterioration could be more directly addressed by more strict enforcement of law, rules, and codes related to those specific issues. These may be legitimate critiques of the City Council's thought process and may weaken some of the Council's conclusions in adopting the 30% Rule, but they do not meet Homeowners substantial burden of establishing that the 30% Rule's classification is not genuine or relevant to the purpose of the Rule. Even if the Rule does not go as far as Homeowners suggest it could to reduce population density and on-street parking, it does curb rental-property density by preventing entire properties, such as those of the Homeowners,

from becoming full-time rentals. While there may be other ways to accomplish these goals, the City can articulate genuine reasons for maintaining a percentage of owner-occupied homes (or year-to-year rentals that are actively being sold) in an area can be expected to better discourage deterioration and preserve the character of the neighborhood. Homeowners may have created a fact issue on whether the 30% Rule is narrowly tailored to a compelling governmental interest, but that is not the applicable standard here.

Homeowners have not met their burden of showing that the 30% Rule is in violation of the Minnesota constitution's equal protection clause, nor have they raised a genuine issue of fact on that question. Consequently, Homeowners also cannot show that the 30% Rule violates the federal equal protection clause or the state and federal substantive due process clauses.

Equal Protection—As Applied

Homeowners' equal protection claims, as applied to them, are not substantially different than their facial equal protection claims addressed above. Essentially, Homeowners cannot get a rental license (or were delayed in getting it), but some lots on the same block with a rental license may expand to add additional rental units and lots on adjacent blocks that have less than 30% rental, sometimes just across a street, may obtain a rental license. As noted above, Homeowners are not similarly situated to property owners who already have a rental license or owners of properties on blocks with less than 30% rental. Even if they are considered similarly situated for these purposes, Homeowners cannot show that the 30% Rule lacks a rational basis for treating them differently for the same reasons articulated above.

Procedural Due Process

Homeowners argue that their state and federal procedural due process rights are infringed upon by the 30% Rule because it unconstitutionally delegates legislative authority to the other

property owners on their blocks. The argument is that fellow property owners have the power to prevent Homeowners from being able to rent by obtaining their own license, whether or not they intend to rent. Thus, the argument goes, the 30% of property owners that have obtained a standard rental license are given the authority to decide if any of the non-licensed properties on the block have any possibility of getting a rental license.

This argument relies on somewhat strained logic. The City has determined that to promote the public welfare, rental licenses should be a limited per block. As noted above, this is a reasonable determination. Because rental licenses are limited per block, as with anything limited to a finite amount, some people will necessarily have a rental license and others will not. It is a leap to view those who have obtained or retained licenses as operating in a legislative capacity simply by keeping their licenses. The incongruity of this view can be seen by the fact that on a block at or near 30%, it would only take one "vote" to allow a new renter, and the "voter," who votes by not renewing his or her license, has no input on which property may get the available license. This process is not analogous to 30% of the block being able to vote on how a neighbor uses his or her property, as Homeowners claim.

Regardless, even if one does view the 30% limit as providing that the rental license holders on a block must "consent" to a new rental license, Homeowners' claim fails. Homeowners rely heavily on *State ex rel. Foster v. City of Minneapolis*, 97 N.W.2d 273 (1959). There, the court held that a statute with a "consent" provision allowing a city to rezone property only after written consent of owners of two-thirds of the property within 100 feet of the property was invalid in the case where a property owner's right to use his property for commercial purposes was taken away upon application of his neighbors to rezone it to residential. If one were to view the 30% Rule as a "consent provision," it is more analogous to the one upheld in

Leighton v. City of Minneapolis, 16 F. Supp. 101 (D. Minn. 1936) and distinguished by the *Foster* court. There, the plaintiff was prevented from having her property rezoned from "multiple dwelling" to "commercial" because she could not obtain the required written consent of two-thirds of those within 100 feet of the property.

The *Leighton* court noted that the property would likely double in value if it were zoned commercial, but that the statute did not violate the plaintiff's substantive due process rights. *Id.* at 102, 106. The court distinguished the facts in *Leighton* from violations of the due process clause in which similar statutes and ordinances were not enacted with the express purpose of furthering the public health, safety, morals or the general welfare. *Id.* at 104-05. The purposes of the 30% Rule include curbing nuisance complaints and property deterioration and preserving neighborhood character. These purposes fall under the general umbrella of "the public health, safety, morals or the general welfare." The *Foster* court distinguished itself from *Leighton* because, while *Leighton* involved someone being unable to have her rights regarding use of the property expanded, *Foster* involved restricting a property's use to less than what was legal when it was purchased. *Foster*, 97 N.W.2d at 276 ("a purchaser of real property is entitled to place some reliance upon zoning ordinances which have classified the property being purchased.").

Here, Homeowners purchased homes without rental licenses on blocks with 30% or higher rental concentration **after** the 30% Rule was in place. Thus, each Homeowner would only need the "consent" of a neighbor to expand the legal uses of his or her property beyond what was available when the property was purchased. Homeowners purchased homes without rental licenses or the eligibility to obtain one. The 30% Rule, for reasons related to the general welfare of the City, is complete in and of itself and not dependent upon the vote or act of anyone. At most, the Rule provides for the removal or modification of its prohibition by the act of those

with rental licenses. *See Leighton*, 16 F.Supp. at 104. Even if the 30% Rule is somewhat awkwardly fit into the "consent provision" analysis, it does not violate Homeowners' right to procedural due process.

Ultra Vires

Homeowners also argue that the 30% Rule is invalid because it exceeds the scope of the City's authority. They argue that the Rule is an exercise of the City's zoning power under Minn. Stat. § 462.357, but it is unlawful because it does not regulate the "use" of the property, it regulates who uses the property. The City argues that the 30% Rule was enacted under the City's broad police powers, not its zoning authority or, in the alternative, the 30% Rule is a valid zoning regulation.

Ordinances are presumed to be valid, and are not to be set aside by the courts unless their invalidity is clear. *Bolen v. Glass*, 755 N.W.2d 1, 5 (Minn. 2008). Minn. Stat. § 462.357 provides in part:

> For the purpose of promoting the public health, safety, morals, and general welfare, a municipality may by ordinance regulate on the earth's surface, in the air space above the surface, and in subsurface areas, the location, height, width,. . . 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, . . . The regulations shall be uniform for each class or kind of buildings, structures, or land and for each class or kind of use throughout such district . . .

Homeowners argue that a rental regulation concerns who owns and occupies property, not the "use" of the property. If the 30% Rule regulates the "use" of property, it is authorized by Minn. Stat. § 462.357 and within the City's authority, provided its purpose is promoting the public health, safety, morals, and general welfare. As noted above, the 30% Rule's purposes qualify as promoting the public health, safety, morals, and general welfare.

Both parties appear to agree that Minnesota courts have not directly ruled on the issue of whether rental regulations concern "use" or "occupancy." Homeowners cite to a number of cases from other jurisdictions to show that residential rental restrictions relate to occupancy and not to "use." The City cites to other foreign cases in which rental restrictions are allowed under zoning authority. Homeowners characterize this as a "very minority rule." Without an applicable "rule" on this question, the Court must look at the specific ordinance challenged here and make its own determination.

Again, Homeowners strain logic to fit the 30% Rule into a categorization that serves their purposes. The 30% Rule is not about occupancy or who occupies a property, it is about how the property is used for residence. The Rule does not address who can rent a house, who can buy a house, or even who can live in a house, provided that person is not paying rent to the owner. The issue addressed by the 30% Rule is whether or not a home is being rented, it is completely silent on who lives there as long as that person is not renting. This particular rental regulation is more reasonably viewed as regulating the "use" of property than the "occupancy" of it.

Homeowners contend the Rule still runs afoul of Minn. Stat. § 462.357's requirement that the regulations be uniform because it allows some to rent and prohibits others from renting. The 30% Rule applies uniformly. If one is on a block with less than 30% rental, he or she is eligible for a rental license; if one is on a block with more than 30% rental, he or she is not eligible for a standard rental license. When there is a legitimate distinction, the fact that one person is eligible and another is ineligible does not mean the regulation is not uniform. As noted above, there is such a distinction in this case.

Further, if the 30% Rule falls under the City's broad police powers, it is valid. For a home rule charter city, such as Winona, "[a] city exercises police power within its jurisdiction to

practically the same extent as the state itself. This power is not confined to the narrow limits of precedents based on conditions of a past era. Rather, it is a power which changes to meet changing conditions, which call for revised regulations to promote the health, safety, morals, or general welfare of the public." *City of Duluth v. Cerveny*, 16 N.W.2d 779, 783 (Minn. 1944). "It is well established that an exercise of the 'police power' will be upheld where it has for its object the public health, safety, morality, or welfare, and where it is reasonably related to the attainment of those objectives." *State ex rel. Gopher Sales Co. v. City of Austin*, 75 N.W.2d 780, 783 (Minn. 1956). Because the Court has already noted that it considers the 30% Rule a "use" restriction, the zoning analysis and the "police powers" analysis are quite similar. The 30% Rule is a restriction put in place to advance the general welfare, to put it broadly. Whether the 30% Rule is considered a zoning ordinance or a "police powers" ordinance, it is valid.

Conclusion

In a prior order in this matter, this Court quoted Chief Justice John Roberts in a recent opinion: "We do not consider whether the Act embodies sound policies. That judgment is entrusted to the Nation's elected leaders." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2576 (2012). A year earlier, Minnesota Supreme Court Justice Paul H. Anderson quoted Chief Justice John Marshall:

> The question, whether a law be void for its repugnancy to the constitution, is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case. The [C]ourt, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.

Limmer v. Swanson, 806 N.W.2d 838, 841 (Minn. 2011) (quoting *Fletcher v. Peck*, 10 U.S. 87, 128, 3 L.Ed. 162 (1810)). The same considerations apply to this Court's review of an ordinance passed by the City's elected leaders. Homeowners must overcome a substantial burden to have the Court hold that an ordinance passed by the City Council is illegal or invalid.

There is no indication that the 30% Rule was enacted or conceived as an insidious means of keeping certain constitutionally protected classes of people out of certain neighborhoods or any other improper purpose. It is a good-faith attempt to address real problems. Homeowners articulate several ideas that they argue would better address the issues the 30% Rule is designed to address and note many reasons the Rule may not eliminate all of the ills the City hopes it will eliminate. The Court's role in this case is not to decide if the 30% Rule is a good idea, that decision belongs to the City Council. Some of the issues raised by Homeowners were also raised in the meetings and hearings in which the 30% Rule was considered. The City's elected leaders decided those issues did not outweigh the potential benefits of the 30% Rule. If Homeowners or some other interested party articulates the same ideas, issues, concerns, studies, and opinions regarding the 30% Rule to the City Council at some future meeting, perhaps with newly elected members, they may convince enough council members that the Rule does not serve the City well. That is the proper venue for arguing whether the 30% embodies sound policies.

The Court's role is to decide if Homeowners can meet their burden of showing that the 30% Rule is unconstitutional or otherwise invalid. Not only have Homeowners not shown they are entitled to summary judgment, they have not raised any genuine issues of material fact on the legality of the Rule. Separation-of-powers principles require that the ordinance be presumed constitutional and valid. Homeowners' attacks on the legality of the Rule are largely based on somewhat clever characterizations of the Rule and/or foreign case-law. These attacks are not

enough to overcome the presumption of legality and have this Court set aside the conclusions reached by the City's elected representatives.

For the above reasons, Homeowners' motion for summary judgment must be denied and the City's motion for summary judgment must be granted.