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Travis County
D-1-GN-16-002620
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NO. D-1-GN-16-002620

AHMAD ZAATARI, MARWA ZAATARI, JENNIFER GIBSON HEBERT, JOSPEH "MIKE" HEBERT, LINDSAY REDWINE, RAS REDWINE VI, AND TIM KLITCH	§	IN THE DISTRICT COURT OF
Plaintiffs,	§	
and	§	
	§	TRAVIS COUNTY, TEXAS
TEXAS	§	
Intervenor,	§	
v.	§	
CITY OF AUSTIN, TEXAS AND STEVE ADLER, MAYOR OF THE CITY OF AUSTIN	§	
Defendants.	§	53RD JUDICIAL DISTRICT

PLEA IN INTERVENTION OF TEXAS

Texas intervenes under Rule 60 of the Texas Rules of Civil Procedure to ensure that the constitutional rights of property owners are protected. Texas is concerned that the ordinance at issue could amount to the type of loss of economic value of property for which the Texas and United States Constitutions require just compensation.

I. Background.

Short-term rentals ("STRs") are an increasingly popular feature of the sharing economy. They allow property owners to earn income by renting spare

bedrooms, or their entire homes or apartments. And they provide guests the convenience of staying in a furnished residence. Many turn to STRs for group vacations or extended business travel. They also attract interested homebuyers who wish to explore new neighborhoods and existing homeowners whose homes are under renovation.[1]

The City of Austin ("City") now effectively seeks to end STRs in non-owner occupied homes. In Ordinance No. 20160223-A.1 ("Ordinance"), the City halted the issuance of new STR licenses for such residences, imposed strict restrictions on existing licenses, and set a deadline when these licenses would be terminated, except in specified areas. AUSTIN, TEX., CODE §§ 25-2-491(C), 25-2-950 (2016); Austin, Tex., Ordinance No. 20160223-A.1, Parts 4–5 (February, 23, 2016). The Ordinance does not purport to compensate affected property owners. Several property owners who rely on income from STRs to pay for their homes filed this lawsuit, alleging that they will be forced to sell their homes as a result of the Ordinance.

Government officials, however, may not use their authority to violate constitutional rights. The Ordinance raises significant constitutional

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[1] *See*, *e.g.*, Lily Leung, *Business Booming for Airbnb "Hosts" Who Rent Out Their Homes*, Orange County Register, Sept. 15, 2015, *available online at* http://www.ocregister.com/articles/airbnb-682385-home-orange.html; Dustin Waters, *Advocates for Short-Term Rentals Gain Traction*, Charleston City Paper, Feb. 15, 2015, *available online at* http://www.charlestoncitypaper.com/TheBattery/archives/2016/02/15/advocates-for-short-term-rentals-gain-traction; TXP, Inc., *The Local Economic Impact of Short Term Rentals in Los Angeles* (2015), *available online at* http://stradvocacy.org/wp-content/uploads/2015/12/LosAngeles-STR-Report-Final-v2-100214.pdf; Corsun et al., *Short-Term Rentals in Denver*, *CO* (2014), *available online at* https://www.scribd.com/doc/300705947/University-of-Denver-White-Paper-analysis-of-Short-Term-Rentals-in-Denver.

questions, because it functionally ousts homeowners and investors from real property without just compensation. Thus, Texas intervenes.

II. Standard for Intervention.

Texas Rule of Civil Procedure 60 provides that "[a]ny party may intervene by filing a pleading, subject to being stricken out by the court for sufficient cause on the motion of any party." TEX. R. CIV. P. 60. "Rule 60 . . . provides . . . that any party may intervene" in litigation in which they have a sufficient interest. *Mendez v. Brewer*, 626 S.W.2d 498, 499 (Tex. 1982). "A party has a justiciable interest in a lawsuit, and thus a right to intervene, when his interests will be affected by the litigation." *Jabri v. Alsayyed*, 145 S.W.3d 660, 672 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (citing *Law Offices of Windle Turley v. Ghiasinejad*, 109 S.W.3d 68, 71 (Tex. App.—Fort Worth 2003, no pet.)). And an intervenor is not required to secure a court's permission to intervene in a cause of action, or prove that it has standing. *See Guar. Fed. Sav. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 657 (Tex. 1990).

There is no pre-judgment deadline for intervention. *Tex. Mut. Ins. Co. v. Ledbetter*, 251 S.W.3d 31, 36 (Tex. 2008) (citing TEX. R. CIV. P. 60; *Citizens State Bank of Sealy, Tex. v. Caney Invs.*, 746 S.W.2d 477, 478 (Tex. 1988)). Texas courts recognize an "expansive" intervention doctrine in which a plea in intervention may be untimely only if it is "filed after judgment," *Texas v. Naylor*, 466 S.W.3d 783, 788 (Tex. 2015) (quoting *First Alief Bank v. White*, 682 S.W.2d 251, 252 (Tex. 1984)), though even post-judgment interventions are

permissible under certain circumstances. *Ledbetter*, 251 S.W.3d at 36 (citing *In re Lumbermens Mut. Cas. Co.*, 184 S.W.3d 718, 725–26 (Tex. 2006)). There is no final judgment in this case. Texas's intervention is timely.

III. Texas Has an Interest in Texans' Constitutional Rights.

Texas is concerned that the Ordinance functions as an unconstitutional taking under both the United States and Texas Constitutions. U.S. CONST. amend. V, cl. 5 ("[N]or shall private property be taken for public use, without just compensation");[2] TEX. CONST. art. I, § 17 ("No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made, unless by the consent of the person . . . "). Both constitutions permit the taking of private property, but condition the exercise of that power by requiring that the public as a whole compensate those whose property is taken. *First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles*, 482 U.S. 304, 314–15 (1987) (explaining that the takings clause does not limit the governmental interference with property rights *per se*, but secures compensation in the event of a valid taking); *Sheffield Dev. Co. v. City of Glenn Heights*, 140 S.W.3d 660, 669 (Tex. 2004) (same under Texas Constitution).

A physical taking of private property is not required for an action to amount to a taking. If the government's regulation of private property is

[2] The Takings Clause of the Fifth Amendment to the U.S. Constitution was expanded beyond the federal government through the Fourteenth Amendment in *Chicago, Burlington & Quincy R.R. Co. v. City of Chi.*, 166 U.S. 226, 240–41 (1897).

sufficiently onerous, it may qualify as a "regulatory taking." Texas courts review claims of regulatory takings by looking to federal jurisprudence. *See, e.g.*, *Rowlett/2000, Ltd. v. City of Rowlett*, 231 S.W.3d 587, 591–92 (Tex. App.—Dallas 2007, no pet.).

Identifying when a regulatory taking exists can be a difficult task. The courts, "quite simply, ha[ve] been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government," *Penn Cent. Transp. Co. v. N.Y.C.*, 438 U.S. 104, 123–24 (1978). "Otherwise, however, whether regulation has gone 'too far' and become too much like a physical taking for which the constitution requires compensation requires a careful analysis of how the regulation affects the balance between the public's interest and that of private landowners." *Sheffield*, 140 S.W.3d at 671–72. Indeed, in 2005, a unanimous U.S. Supreme Court held that the primary analysis of a takings claim is "'[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations.'" *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538–39 (2005) (quoting *Penn Cent.*, 438 U.S. at 124).

Therefore, in evaluating a regulatory takings claim, courts are to focus "directly upon the severity of the burden that government imposes upon private property rights." *Id.* at 539. More specifically, the *Lingle* Court provided that regulatory takings are the functional equivalent to classic

takings when the government "ousts the owner from his domain." *Id.* Accordingly, "the economic impact of a regulation may indicate a taking even if the landowner has not been deprived of all economically beneficial use of his property." *Sheffield*, 140 S.W.3d at 672.

Recently, the First Court of Appeals held that an STR ordinance in the Village of Tiki Island constituted a regulatory taking. *Vill. of Tiki Island v. Ronquille*, 463 S.W.3d 562 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (affirming the judgment of the trial court on an accelerated appeal of a temporary injunction, pursuant to TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)). The court considered the economic impact of the ordinance and its interference with reasonable, investment-backed expectations. *Id.* at 578–82. As to the former, it found that the loss of future STR income reduced the value of the homeowner's property. *Id.* at 579. And as to the latter, it concluded that there was a reasonable investment-backed expectation based on the ability to offer STRs before the ordinance. *Id.* at 580–81. As the court noted, investment-backed expectations are rooted in "[t]he existing and permitted uses of the property" at the time a regulation is imposed. *Id.* at 580 (quoting *Hearts Bluff Game Ranch, Inc. v. Texas*, 381 S.W.3d 468, 491 (Tex. 2012)).

The First Court further observed that:

> A regulatory taking occurs when regulation (1) compels "the property owner to suffer a physical 'invasion' of his property," (2) "denies all economically beneficial or productive use of land," or (3) "does not substantially advance legitimate state interests." *Sheffield Dev. Co., Inc. v. City of Glenn Heights*, 140 S.W.3d 660, 671 (Tex. 2004). "Otherwise, however, whether regulation has

> gone 'too far' and become too much like a physical taking for which the constitution requires compensation requires a careful analysis of how the regulation affects the balance between the public's interest and that of private landowners." *Id.* at 671—72. "While each case must therefore turn on its facts, guiding considerations can be identified," including: (1) "the economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action." *Id.* at 672 (quoting *Connolly v. Pension Benefits Guar. Corp.*, 475 U.S. 211, 225, 106 S. Ct. 1018, 89 L. Ed. 2d 166 (1986)).

Vill. of Tiki Island, 463 S.W.3d at 575.

Here, the Plaintiffs allege that the loss of the STR income "ousts" them from their domain. Original Pet. for Injunctive Relief ¶¶ 16, 33, 42, 50; *Lingle*, 544 U.S. at 539. Without this revenue stream, they lack the means to pay their property taxes, mortgages, maintenance, and expenses on their homes. *Id.* ¶¶ 15–16, 24–33, 42, 50.

Further, Plaintiffs seem to have substantial investment-backed expectations. They purchased their homes with the intention of renting them as STR properties, or poured money into their existing residences for the purpose of attracting short-term renters. *Id.* ¶¶ 13, 38, 46–47. STRs were permitted when these outlays were made. Thus, a question is presented as to whether the City may pull the rug from under homeowners who invested in STR properties. *See Vill. of Tiki Island*, 463 S.W.3d at 580 (analyzing the conditions of the property before regulation is imposed).

Lastly, the character of the government action is not particularly strong. The City of Austin expressly allows owners who occupy their homes to conduct

short term rentals under a series of regulations aimed at curbing unwanted conduct. AUSTIN, TEX., CODE §§ 25-2-789(A)(3), 25-2-950 (2016); Austin, Tex., Ordinance No. 20160223-A.1, Part 1 (February, 23, 2016).

IV. Conclusion and Prayer.

The City's Ordinance may be a regulatory taking, resulting in a loss of value prohibited under the United States and Texas Constitutions without just compensation. Texas requests notice and appearance, and the opportunity to defend the rule of law before the Court. If the City's Ordinance is a regulatory taking prohibited under the United States and Texas Constitutions without just compensation, the Court should enter a permanent injunction prohibiting the City and its officials from enforcing the Ordinance until such time as a proper compensatory scheme, and accordant rights of due process, is implemented. Texas also prays for all other and further relief that this Court may deem proper in law or equity.

Respectfully submitted on this the 5th Day of October, 2016,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading has been served on all counsel of record or unrepresented parties on this 5th day of October, 2016, in accordance with Rule 21a of the Texas Rules of Civil Procedure, electronically through the electronic filing manager or by certified registered U.S. Mail.

/s/ Michael C. Toth
MICHAEL C. TOTH