IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

RAFAEL MARFIL, VERGE PRODUCTIONS, LLC, ENRICO MARFIL, NAOMI MARFIL, KOREY A. ROHLACK, DANIEL OLVEDA, AND DOUGLAS WAYNE MATHES, ***Plaintiff,***	§	**6:20-CV-00248-ADA-JCM**
v.	§	
CITY OF NEW BRAUNFELS, TEXAS, ***Defendants.***		

ORDER ADOPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Before the Court is the Report and Recommendation of United States Magistrate Judge Jeffrey C. Manske. ECF No. 20. The Report recommends that this Court grant Defendants' Motion to Dismiss (ECF No. 9) and deny Defendants' Motion to Amend (ECF No. 15). The Report and Recommendation was filed on July 29, 2021.

A party may file specific, written objections to the proposed findings and recommendations of the magistrate judge within fourteen days after being served with a copy of the report and recommendation, thereby securing *de novo* review by the district court. 28 U.S.C. § 636(b); Fed. R. Civ. P. 72(b). A district court need not consider "[f]rivolous, conclusive, or general objections." *Battle v. U.S. Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987) (quoting *Nettles v. Wainwright*, 677 F.2d 404, 410 n.8 (5th Cir. 1982) (en banc), *overruled on other grounds by Douglass v. United States Auto. Ass'n*, 79 F.3d 1415 (5th Cir. 1996)).

After Judge Manske granted an unopposed motion for extension of time to file objections to the report and recommendation, Plaintiff filed objections on August 25, 202. ECF No. 23. Additionally, the Plaintiff filed a supplement to its objection to the report and recommendation on

May 16, 2022. The Court has conducted a *de novo* review of the motion to dismiss, the responses, the report and recommendation, the objections to the report and recommendation, the supplement to the objection, and the applicable laws. After that thorough review, the Court is persuaded that the Magistrate Judge's findings and recommendation should be adopted.

IT IS THEREFORE ORDERED that the Report and Recommendation of United States Magistrate Judge Manske, ECF No. 20, is **ADOPTED**.

IT IS FURTHER ORDERED that Plaintiffs' objections are **OVERRULED**.

IT IS FURTHER ORDERED that Defendants' Motion to Dismiss (ECF No. 9) is **GRANTED** in accordance with the Report and Recommendation.

IT IS FINALLY ORDERED that Defendants' Motion to Amend (ECF No. 15) is **DENIED** as futile.

SIGNED this fifteenth day of September, 2022.

ALAN D ALBRIGHT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION

RAFAEL MARFIL, VERGE PRODUCTIONS, LLC, ENRICO MARFIL, NAOMI MARFIL, KOREY A. ROHLACK, DANIEL OLVEDA, AND DOUGLAS WAYNE MATHES, **Plaintiffs,**	§	
v.	§	**C.A. NO. 6:20-CV-00248-ADA-JCM**
CITY OF NEW BRAUNFELS, TEXAS, **Defendant.**	§	

REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

TO: THE HONORABLE ALAN D ALBRIGHT, UNITED STATES DISTRICT JUDGE

This Report and Recommendation is submitted to the Court pursuant to 28 U.S.C. § 636(b)(1)(C), Fed. R. Civ. P. 72(b), and Rules 1(f) and 4(b) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas, Local Rules for the Assignment of Duties to United States Magistrate Judges.

Before the Court is Defendant's Motion to Dismiss ("Def. 's Mot. to Dismiss", ECF No. 9), and the attendant Response ("Pls.' Resp.", ECF No. 12), Reply ("Def. 's Reply", ECF No. 13), and Sur-Reply in Opposition[1] thereto ("Pls.' Sur-Reply", ECF No. 14). Also before the Court is Plaintiffs' Motion to Amend Complaint ("Pls.' Mot. to Amend," ECF No. 15). For the reasons

[1] Plaintiffs did not move for leave to file the Sur-Reply. Thus, the Sur-Reply is not properly before the Court. *See* Local Rule CV-7 (detailing permitted filings). Nonetheless, the Court notes that the submitted authority, an Opinion from the Texas Attorney General on "[w]hether a local governmental entity under an emergency declaration has the authority to prevent an owner of a second home from occupying that property or limiting occupancy of housing based on length of the occupancy's term," is completely irrelevant to the Court's analysis. As illustrated below, the Ordinance in question was not enacted under an emergency declaration.

explained below, the undersigned **RECOMMENDS** that Defendant's Motion to Dismiss be **GRANTED** and Plaintiffs' Motion to Amend be **DENIED** as futile.

I. BACKGROUND

The City of New Braunfels ("City") is home to the Schlitterbahn, a massive waterpark attracting more than a million guests each summer. Pls.' Compl. at 7. In this case, each of the plaintiffs ("Homeowners") own a home in New Braunfels and share a similar story: a financial venture into the booming tourism industry, disrupted by a single line of a local government ordinance. *See generally* Pls.' Compl.

The City announced plans to begin regulating short-term rentals ("STRs") in 2011. Pls.' Compl. at 8. Owners engaging in STRs at that time were grandfathered in with special permits allowing them to continue renting for short terms. *Id.* Any later entrants to the market were not allowed the same permits. *Id.* Later in 2011, the City adopted the new zoning ordinance at subsection 5.17 of Chapter 144. *Id.* In the present case, the conflict arises from section 5.17 (the "Ordinance"), which states: "Short Term Rental within Residential Districts is prohibited." Ordinances § 144-5.17-3(a). Owners in commercially zoned districts may still seek a permit to engage in STRs. Ordinances § 144-5.17-3(c). The definition of STR and the penalty for violating the Ordinance are as follows:

> 5.17-2. Definitions
> . . . .
>
> Short term rental means the rental for compensation of one- or two-family dwellings, as defined in the IRC (International Residential Code), for the purpose of overnight lodging for a period of not less than one night and not more than 30 days other than ongoing month-to-month tenancy granted to the same renter for the same unit. This does not apply to hotels, motels, bed and breakfasts, resort properties as defined in this chapter, or resort condominiums.
> . . .
>
> 5.17-7. Enforcement/penalty

. . . .

(e) The provisions of this subsection are in addition to and not in lieu of any criminal prosecution or penalties as provided by city ordinances or county or state law.

(f) Proof. Prima facie proof of occupancy of a dwelling is established in any prosecution for violation of this section if it is shown that vehicles with Case 6:20-cv-00248-ADA-JCM Document 1 Filed 03/30/20 Page 8 of 22 Page 9 of 22 registrations to persons having different surnames and addresses were parked overnight at the dwelling. Establishment of a prima facie level of proof in this subsection does not preclude a showing of illegal "occupancy" of a dwelling by a person in any other manner.

(g) Offense. It is an offense for the property owner, any agent of the property owner, or the occupant(s) to directly occupy or indirectly allow, permit, cause, or fail to prohibit an occupancy in violation of this section 144-5.17. Each day that a unit is occupied in violation of this ordinance shall be considered a separate offense, and, upon conviction, shall be subject to a minimum fine of $500.00 to a maximum fine of $2,000.00 per violation.

(h) Each day of violation of said standards and provisions of this section constitutes a separate offense and is separately punishable, but may be joined in a single prosecution.

Ordinances § 144-5.17.

The May 9, 2011 council meeting cited "several workshops" on the "protection of residential neighborhoods" as support for the Ordinance. Pls.' Compl. at 9. The Ordinance's preamble also contains evidence of the basis for the restriction on STRs in residential zones. Ordinances § 144-5.17-1. It states that the purpose of 5.17 is to preserve STRs in some instances "while ensuring that such rental use does not create adverse impacts to residential neighborhoods due to excessive traffic, noise, and density." *Id.*

Plaintiff Homeowners all own homes in the City and are subject to the City of New Braunfels's ordinances. Pls.' Resp. at 10. Each Homeowner bought their home after the 2011 version of the Ordinance was adopted. *Id.* at 6. Homeowners state various reasons for engaging in STRs, including income, ease of travel for the owner, and desire to share their home. *Id.* at 11-12. None of the Homeowners intend to operate an ongoing business at their homes and hope to convey possession to tenants in the manner of ordinary home rental. *Id.* at 12-13.

Homeowners brought this action, alleging that the Ordinance deprives them of equal protection and due process under the U.S. and Texas Constitutions. *See generally* Pls.' Compl. In addition, or in the alternative, Homeowners allege that the state Constitution preempts the Ordinance. *Id.* The seeks to dismiss the Homeowners' claims under 12(b)(6).

II. LEGAL STANDARD

A. Federal Rule of Civil Procedure 12(b)(6)

Upon a motion to dismiss for failure to state a claim, a court may dismiss an action that fails to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). In deciding a Rule 12(b)(6) motion to dismiss for failure to state a claim, the Court accepts all well-pleaded facts as true, viewing them in the light most favorable to the non-movant. *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007).

To survive a motion to dismiss, a non-movant must plead enough facts to state a claim to relief that is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The Court determines whether the plaintiff has stated both a legally cognizable and plausible claim; the Court should not evaluate the plaintiff's likelihood of success. *Lone Star Fund V. (U.S.), LP v. Barclays Bank PLC*, 594 F.3d 383, 387 (5th Cir. 2010). Based upon the assumption that all the allegations in the complaint are true, the factual allegations must be enough to raise a right to relief above the speculative level. *Twombly*, 550 U.S. at 555. A court, however, need not blindly accept each and every allegation of fact; properly pleaded allegations of fact amount to more than just conclusory allegations or legal conclusions masquerading as factual conclusions. *Taylor v. Books A Million, Inc.*, 296 F.3d 376, 378 (5th Cir. 2002); *see Twombly*, 550 U.S. at 555; *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009).

When the non-movant pleads factual content that allows the court to reasonably infer that

the movant is liable for the alleged misconduct, then the claim is plausible on its face. *Iqbal*, 556 U.S. at 678. The plausibility standard, unlike the "probability requirement," requires more than a sheer possibility that a defendant acted unlawfully. *Id*. The pleading standard under Rule 8(a)(2) does not require detailed factual allegations but demands greater specificity than an unadorned, "the-defendant-unlawfully-harmed-me accusation." Fed. R. Civ. P. 8(a)(2); *Iqbal*, 556 U.S. at 678. A pleading offering "labels and conclusions" or "a formulaic recitation of the elements of a cause of action" will not suffice. *Twombly*, 550 U.S. at 555. Additionally, a complaint does not meet the standard if it tenders "naked assertion[s]" devoid of "further factual enhancement." *Id*. at 557. Evaluating the plausibility of a claim is a context-specific process that requires a court to draw on its experience and common sense. *Iqbal*, 556 U.S. at 679.

III. DISCUSSION

Homeowners allege that the Ordinance violates substantive due process and equal protection under the Texas and United States Constitutions. *See generally* Pls.' Compl. In addition, or in the alternative, Homeowners assert that Texas law preempts the Ordinance. *Id.* at 20.

For the following reasons, the Court determines today that Homeowners fail to allege facts at the 12(b)(6) stage sufficient to overcome the deferential rational basis test. Because Homeowners' Complaint contains constitutional challenges to a zoning ordinance, determining the standard by which the Court reviews the Ordinance is crucial. Moreover, the rational basis standard must coexist with Rule 12(b)(6) principles. Thus, the Court begins its analysis with a discussion of the appropriate standard of review. Next, the Court details Homeowners' due process and equal protection claims. Then, the Court analyzes the Homeowners' claims under the rational basis test within the 12(b)(6) framework. Finally, the Court analyzes Homeowners' state law preemption

claim. Accordingly, the Court **RECOMMENDS** the City's Motion to Dismiss be **GRANTED**, and Plaintiffs' Complaint be **DISMISSED WITH PREJUDICE** for failure to state a claim.

A. Texas case law indicates that the rational basis test applied within the scope of Rule 12(b)(6) is the appropriate standard of review for the Ordinance regarding Homeowners' equal protection and due process claims.

Homeowners present two arguments in support of strict scrutiny for the Ordinance. First, Homeowners argue that zoning ordinances are in derogation of common law property rights, and strict construction is accordingly appropriate. Pls.' Compl. at 18. The City argues strict construction does not apply when determining the constitutionality of an ordinance. Def. 's Mot. to Dismiss at 7. Instead, the City argues that the Ordinance is subject to rational basis review regarding the equal protection and due process claims. *Id.* at 7-8.

The Ordinance is subject to rational basis review. Defendant correctly points out that the concept of strict construction in the zoning ordinance context refers to the initial step of interpreting an ordinance to determine whether it applies to the conduct in question. Def. 's Mot. to Dismiss at 7 (citing *Town of Annetta S. v. Seadrift Dev.*, 446 S.W.3d 823, 825-26 (Tex. App. 2014)). Strict construction in the zoning restriction context generally does not apply to determining whether an ordinance is valid. *Id.* Instead, strict construction functions solely to determine when an ordinance applies to given conduct. *See, e.g., Town of Annetta S.*, 446 S.W.3d at 830 (finding that strict construction against the Town was appropriate to determine whether the word "regulation" in the ordinance encompassed the conduct in question); *Thomas v. Zoning Bd. of Adjustment*, 241 S.W.2d 955, 957 (Tex. App.—Eastland 1951) (finding that strict construction against the zoning board was appropriate to determine whether a swimming pool was an "accessory" under the ordinance); *Bryan v. Darlington*, 207 S.W.2d 681, 683 (Tex. App.—San Antonio 1947) (finding strict construction of a zoning restriction appropriate when determining

whether the structure in question violated the restriction); *Johnson v. Wellborn*, 181 S.W.2d 839, 841 (Tex. App.—San Antonio 1944) (finding that strict construction was appropriate to determine whether a home satisfies the requirements of a restrictive covenant).

Only one case, *City of Kermit*, similarly utilizes the concept of strict construction the way Homeowners attempt to use it. *See City of Kermit v. Spruill*, 328 S.W.2d 219, 223 (Tex. App.—El Paso 1959) (finding strict construction of fire limit ordinances appropriate for determining whether they were unconstitutionally vague). Even so, the court in *Kermit* cited *Thomas v. Zoning Bd. of Adjustment*, a case that utilizes strict construction only as an initial step in determining whether an ordinance applied to a given set of conduct. *See id. Kermit* is, therefore, an outlier and is unpersuasive to the Court in light of the abundance of case law to the contrary.

Second, Homeowners argue that the right to lease is fundamental. To prevail on a substantive due process claim, Homeowners must establish that they held a constitutional property right protected by the 14th amendment. *Spuler v. Pickar*, 958 F.2d 103, 106 (5th Cir. 1992). An independent source, like state law, must establish this right. *Hidden Oaks, Ltd. v. City of Austin*, 138 F.3d 1036, 1046 (5th Cir. 1998). Thus, Texas law must inform the determination of whether the right to lease is a fundamental property right. *Spuler*, 958 F.2d at 106.

Since STRs are a relatively novel issue, there is no consensus among the Texas courts in determining whether the right to lease property is a fundamental right protected by the Due Process Clause. Nonetheless, from a survey of Texas case law, the Court is convinced that the right to lease is not a fundamental right subject to strict scrutiny. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973) (reserving strict scrutiny for cases involving laws that operate to the disadvantage of suspect classes or interfere with the exercise of fundamental rights and liberties explicitly or implicitly protected by the Constitution).

Homeowners argue that short-term rentals are an established practice and are historically allowable, as stated recently by a Texas appellate court.[2] Pls.' Compl. at 5 (citing *Zaatari v. City of Austin*, 615 S.W.3d 172, 190-91 (Tex. Civ. App.—Austin Nov. 27, 2019)). The Court concedes that, at the baseline, the right to own private property is a fundamental right. *Hearts Bluff v. State*, 381 S.W.3d 468, 476 (Tex. 2012); *see City of Wink v. Griffith Amusement Co.*, 129 Tex. 40, 48 (Tex. 1936) ("the right of property is the right to use and enjoy, or dispose of the same, in a lawful manner and for a lawful purpose."). Even so, as Defendant correctly points out, Homeowners fail to identify a single case that concludes the right to lease is fundamental in Texas. Def. 's Reply at 2. Instead, Homeowners rely on dicta from a number of cases to support the novel right to lease claim. *See* Pls.' Compl. at 4-5 (citing *French v. Chevron U.S.A. Inc.*, 896 S.W.2d 795, 797 (Tex. 1995) (noting the right to lease is part of the bundle of sticks usually conveyed with title); *Calcasieu Lumber Co. v. Harris*, 13 S.W.453, 454 (1890) (explaining that "the right to lease to others, and therefore derive profit, is an incident of ownership"); *Markley v. Martin*, 204 S.W. 123, 125 (Tex. Civ. App.—San Antonio 1918) (stating that an owner has the "absolute right to lease her property and collect the rents")).

The Texas Attorney General intervened in *Zaatari* in favor of the Property Owners to contend that the ordinance's ban on short-term rentals of non-homestead properties was unconstitutionally retroactive because of the well-settled nature of the right to lease. *Zaatari*, 615 S.W.3d at 180. Nonetheless, no Texas or Fifth Circuit court, including the *Zaatari* court, has expressly held that the right to lease is fundamental and subject to strict scrutiny. Even if *Zaatari*

[2] *Zaatari* is currently pending review by the Texas Supreme Court. *Zaatari v. City of Austin*, 615 S.W.3d 172 (Tex. Civ. App.—Austin Nov. 27, 2019).

had expressly held that the right to lease is fundamental, the Texas Supreme Court has not yet reviewed the case.

Furthermore, as the City notes, the law is clear that a property owner within a city cannot lease property in a manner that the city has declared unlawful via zoning ordinances. *See Village of Euclid v. Amber Realty Co.*, 272 U.S. 365, 395 (1926); *City of Univ. Park v. Benners*, 485 S.W.2d 773, 778 (Tex. 1972) ("property owners do not acquire a constitutionally protected vested right in property uses once commenced or in zoning classifications once made"); *City of Houston v. Guthrie*, 332 S.W.3d 578, 597 (Tex. App.-Houston [1s Dist.] 2009) (finding that to a desire to lease a fireworks stand on their property during certain portions of the calendar year was not an "absolute right").

Lastly, the fundamental right to lease private property is inapposite to other traditionally protected interests. The Supreme Court considers the right to marry, have children, the upbringing of one's children, marital privacy, use contraception, and abortion fundamental rights. *See Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (collecting cases). As the City correctly points out, the right to lease property for short durations is objectively out of place on that list. Def.'s Reply at 2.

Because the Court is persuaded that the concept of strict construction of zoning ordinances is inapplicable to the present case and that the right to lease is not fundamental in Texas, rational basis is the appropriate standard of review for the Ordinance. In the zoning context, rational basis review is "extremely deferential." *Lee v. Whispering Oaks Homeowners' Ass'n*, 797 F.Supp.2d 740, 751 (W.D. Tex.—San Antonio). The court may ask whether there was a conceivable factual basis for the Ordinance and nothing more. *Id.* Generally, zoning ordinances are upheld and presumed to be valid if the classification in the law "is rationally related to a legitimate state

interest." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). The City is not required to articulate the purpose or rationale for the Ordinance expressly. *Heller v. Doe*, 509 U.S. 312, 320 (1993). Homeowners have the burden of negating every conceivable basis the City may have had for the Ordinance. *Id.* There is no need for the means to perfectly fit the ends, and a classification does not fail rational basis merely because it results in some inequality. *Id.* at 321. Even so, increased oversight by the courts is necessary when state laws impede on rights protected by the Constitution. *City of Cleburne*, 473 U.S. at 440.

For the sake of clarity, the relationship between rational basis review and Rule 12(b)(6) motions is worth briefly untangling. Rational basis review requires the enforcing party to prevail (the City) if there is any conceivable, reasonable justification for the Ordinance. *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 (1984). Rule 12(b)(6) requires the plaintiff (Homeowners) to win if "relief could be granted under any set of facts that could be proved consistent with the allegations." *Id.* at 104. Rational basis cannot overcome a plaintiff's established 12(b)(6) benefits. *Wroblewski v. City of Washburn*, 965 F.2d 452, 459-460 (7th Cir. 1992). Rule 12(b)(6) is a procedural standard, "while the rational basis standard is the substantive burden that the plaintiff will ultimately have to meet to prevail." *Id.* The Seventh Circuit resolved this dilemma in *Wroblewski*, stating:

> While we therefore must take as true all of the complaint's allegations and reasonable inferences that follow, we apply the resulting "facts" in light of the deferential rational basis standard. To survive a motion to dismiss for failure to state a claim, a plaintiff must allege facts sufficient to overcome the presumption of rationality that applies to government classifications.

Id. at 460.

Thus, in the present case, the Court must take all of Homeowners' allegations as true and apply these allegations as "facts" in the context of the deferential rational basis standard. *See id.*

To prevail, the alleged facts must be sufficient to overcome the presumption of rationality in the City's favor. *See id.* The Court will now briefly detail the contours of Homeowners' due process and equal protection claims.

1. Homeowners' Due Process Claim

The Fourteenth Amendment to the United States Constitution states that no person shall be "depriv[ed] of life, liberty, or property, without due process of law." Article I, § 19 of the Texas Constitution provides: "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land." There is no meaningful distinction between "due process" in the U.S. Constitution and "due course" in the Texas Constitution. *Univ. of Tex. Med. Sch. at Hous. v. Than*, 901 S.W.2d 926, 929 (Tex. 1995).

There are two types of due process violations: substantive, implicated here, and procedural. Substantive due process violations occur when a law removes a vested or fundamental right not expressly mentioned in the U.S. or Texas Constitutions. *See Washington v. Glucksberg*, 521 U.S. 702, 720-721 (1997) (stating that the Due Process Clause protects the fundamental liberties which are, objectively "deeply rooted in this Nation's history and tradition); *Moore v. East Cleveland, Ohio*, 431 U.S. 494, 503 (1977) (explaining that appropriate limits on substantive due process "come not from drawing arbitrary lines but rather from careful respect for the teachings of history [and] solid recognition of the basic values that underlie our society"). Moreover, substantive due process "forbids the government to infringe certain "fundamental" liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 301-02 (1993). Additionally, the U.S. Supreme Court requires a precise description of the asserted fundamental right. *Glucksberg*, 521 U.S. at 722.

Homeowners allege two instances of substantive due process violations, arguing that the Ordinance is both facially invalid and invalid as applied. Pls.' Compl. at 18. A facial challenge is an attack on the statute itself as opposed to a particular application of a statute. *City of L.A., Cal. v. Patel*, 576 U.S. 409, 415 (2015). It is the most difficult challenge to mount successfully because the challenger must establish that "no set of circumstances exists under which the act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). An as-applied attack on a statute asserts "that the statute, although generally constitutional, is unconstitutional when applied to the challenging party's particular circumstances." *Ex Parte Moon*, No. 01-18-01014-CR, 2020 at *9 (Tex. App. —Houston [1st dist.], no pet.). While Texas laws and the United States Constitution generally align, Texas offers additional review protection for parties asserting an as-applied challenge:

> The standard of review for as-applied substantive due course challenges to economic regulation statutes includes an accompanying consideration …: whether the statute's effect as a whole is so unreasonably burdensome that it becomes oppressive in relation to the underlying governmental interest.

Patel v. Tex. Dept. of Licensing and Regul., 469 S.W.3d 69, 86 (Tex. 2015).

Homeowners argue that the Ordinance is facially invalid and invalid as applied because requiring the designation of STRs as commercial is arbitrary for conflating the character of use with the duration of use. *Id.* In addition, Homeowners bring the as-applied challenge because of the "illusory" nature of the option to rezone to commercial and continue engaging in STRs. Pls.' Compl. at 7.

2. Homeowners' Equal Protection Claim

The Fourteenth Amendment of the U.S. Constitution states that equal protection of the laws shall not be denied to any United States citizen. U.S. Const. amend XIV, § 1. Article 1, Section 3 of the Texas Constitution guarantees that "[a]ll free men, when they form a social compact, have

equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services." The Texas standards mirror the federal framework for determining whether a statute violates the equal protection clause. *Rose v. Doctors Hosp.*, 801 S.W.2d 841, 846 (Tex. 1990). To prevail on an equal protection claim, a plaintiff must establish that the government treated that plaintiff differently than similarly situated parties without a rational basis for doing so. *Downs v. State*, 244 S.W.3d 511, 518 (Tex. App. – Fort Worth 2007). In Texas, municipalities "may regulate the location of and use of buildings for business, industrial, residential, or other purposes." Tex. Loc. Gov't Code § 211.003(a)(5). As established above, this legislation is upheld and presumed to be valid if the classification in the statute "is rationally related to a legitimate state interest." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

Homeowners allege two instances of alleged equal protection violations. First, Homeowners allege that owners in residentially-zoned areas who engage in rental periods exceeding 30 days can rent freely, but owners who rent for less than 30 days are banned. Pls.' Compl. at 14. Second, the owners who received permits at the outset of the STR regulations can continue engaging in STRs, while later owners are banned. *Id.*

3. Homeowners fail to allege facts sufficient at the 12(b)(6) stage to overcome the deferential rational basis test, and thus the due process and equal protection claims should be dismissed.

The Homeowners' due process and equal protection claims, viewing all allegations as true, do not overcome the Ordinance's presumption of rationality. The Ordinance appears to have several legitimate municipal purposes. First, the Ordinance aims to protect residential neighborhoods from the perceived issues that accompany STRs. The Ordinance itself states that "[t]his section is intended to. . .ensur[e] that [short-term] rental use does not create adverse impacts

to residential neighborhoods due to excessive traffic, noise, and density." Ordinances Ch. 144 § 5.17-1(a). Although not required to offer a rationale for the Ordinance, the council meeting in reference to the Ordinance cited workshops aimed at the "protection of residential neighborhoods." Pls.' Compl. at 9. Second, some members of the New Braunfels community oppose STRs. Homeowners' Complaint tells stories of neighbors regularly harassing owners for not living in the home full-time. *Id.* at 11-12. Third, the Ordinance seeks to preserve the residential nature of certain areas of the city. Homeowners state that central New Braunfels has remained mostly older, single-family dwellings due to residential zoning restrictions. Pls.' Compl. at 22.

Any one of these rationales for the Ordinance satisfies the rational basis test. *See City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (stating that zoning ordinances are upheld and presumed to be valid if the classification in the statute "is rationally related to a legitimate state interest"); *Wroblewski*, 965 F.2d at 459-460 (finding that the complaint's "conclusionary assertion that the policy is "without rational basis" [was] insufficient to overcome the presumption of rationality coupled with the readily apparent justification for the policy").

Homeowners complain that the City had no rational basis for concluding that homes rented out for short periods actually affect trash, noise, or parking more significantly than long-term rentals. *Id.* at 19. Even assuming this is true, the test is not whether STRs actually affect these elements but whether the Court can conceive that the Ordinance could potentially assuage these problems. *See Heller v. Doe*, 509 U.S. 312, 320 (1993) (stating that classifications must be upheld against equal protection claims if there is any reasonably conceivable state of facts that could provide a rational basis for the classification). Moreover, the Court need not use its imagination to conceive of the way zoning ordinances preserve the nature of a city center or understand a community member's concerns; these are scenarios that already exist. Pls.' Compl. at 11, 22.

Homeowners also complain that the distinction between short- and long-term rentals is an arbitrarily drawn line. Pls.' Compl. at 14. This complaint is also irrelevant under rational basis review because municipalities must draw the line somewhere. *See Heller*, 509 U.S. at 321 (explaining that a classification does not fail because it is merely "not made with mathematical nicety"); *R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980) ("The fact that the line might have been drawn differently at some points is a matter for legislative, rather than judicial consideration.").

Homeowners' complaint concerning the grandfather permits is unavailing in the same vein. Grandfathering is a legitimate, well-recognized legislative tool. *See S. Wine and Spirits of Am., Inc. v. Div. of Alcohol and Tobacco Control*, 731 F.3d 799, 812 (8th Cir. 2013) (explaining that grandfather clauses do not "doom the statute"; they do not "demonstrate the invalidity of rule from which they are carved"); *Lindquist v. City of Pasadena, Tex.*, 669 F.3d 225, 236 (5th Cir. 2012) (holding that preventing only new entrants into a market is sometimes more appropriate than an outright ban); *City of New Orleans v. Dukes*, 427 U.S. 297, 305 (1976) (stating that sometimes a gradual approach as opposed to an outright ban is appropriate, and not constitutionally impermissible). Furthermore, the Ordinance does not fail rational basis merely because a grandfather clause creates some inequality. *See Heller*, 509 U.S. at 321. Therefore, the undersigned **RECOMMENDS** that Defendant's Motion to Dismiss be **GRANTED** with respect to Plaintiffs' due process and equal protection claims.

B. Homeowners fail to plead a state-law preemption claim adequately, and the claim should be dismissed.

In addition, or in the alternative to the due process and equal protection claims, Homeowners allege that the Texas Constitution, combined with the Texas Property and Tax Codes, preempts the Ordinance. Pls.' Compl. at 20.

The Texas Constitution provides that city ordinances shall not "contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State." Art. XI, Sec. 5(a). The standard for implied preemption is as follows:

> The mere entry of the state into a field of legislation does not automatically preempt that field from city regulation. Rather, local regulation, ancillary to and in harmony with the general scope and purpose of the state enactment, is acceptable. Absent an express limitation, if the general law and local regulation can coexist peacefully without stepping on each other's toes, both will be given effect or the latter will be invalid only to the extent of any inconsistency.

City of Laredo v. Laredo Merch. 's Ass'n, 550 S.W.3d 586, 593 (Tex. 2018)

The City and Homeowners agree that there is no express preemption in the present case. Def. 's Mot. to Dismiss at 16*; see id.* (explaining that the Legislature's intent to limit local laws must "appear with unmistakable clarity"). Homeowners have the burden of overcoming a strong presumption against preemption. *Great Dane Trailers, Inc. v. Estate of Wells*, 52 S.W.3d 737, 743 (Tex. 2001).

Homeowners argue that the Ordinance undermines State legislative intent because the Legislature expressly taxes STRs as part of the hotel occupancy tax. Pls.' Compl. at 21. Even if the State taxes the STRs, this "does not automatically preempt that field from city regulation." *City of Laredo,* 550 S.W.3d at 593. Additionally, where the City permits STRs, they are subject to taxation. Tex. Tax Code § 156.001(b). As the City articulates, restricting the location of an STR is not contradictory to the tax code because the code merely mandates taxes where STRs are occurring. Def. 's Mot. to Dismiss at 16. Homeowners fail to articulate how the tax code requires a specific location or quantity of STRs. Def. 's Mot. to Dismiss at 16. Moreover, Texas law expressly authorizes zoning ordinances. *See* Tex. Loc. Gov. Code § 211.005(5) (granting municipalities the express power to regulate "the location and use of buildings, other structures, and land for business, industrial, residential, or other purposes"). This grant of power contains no

limitations as to whether the state taxes the regulated areas or whether the owner occupies the property as a tenant or not. *Id.*

Homeowners also fail to adequately allege how the Ordinance conflicts with the Texas Property Code. The definition of "lease" within the code contains no durational limits on leases. *See* Tex. Prop. Code § 92.001(3) (defining "lease" as "any written or oral agreement between a landlord and tenant that establishes or modifies the terms, conditions, rules, or other provisions regarding the use and occupancy of a dwelling"). Because state law does not expressly limit duration, the Ordinance is not preempted merely for enacting stricter regulations. *See, e.g. State v. Portillo*, 314 S.W.3d 210, 216 (Tex. App.—El Paso 2010) (holding that state helmet law does not preempt city helmet law merely because it was stricter); *Barnett v. City of Plainview*, 848 S.W.2d 334, 339 (Tex. App.—Amarillo 1993) (holding that state law does not preempt an ordinance when local law adds additional requirements to a state law).

As addressed above, implied preemption is disfavored, and Homeowners fail to allege facts to indicate that the Ordinance and Texas law cannot coexist peacefully. Therefore, the undersigned **RECOMMENDS** that Defendant's Motion to Dismiss be **GRANTED** with respect to Plaintiffs' state-law preemption claim.

C. Homeowners' Motion to Amend should be denied as futile.

Homeowners have recently sought leave to amend their Complaint. *See* Pls.' Mot. to Amend. As Homeowners point out, the only change the proposed Amended Complaint makes is the addition of another homeowner, Karen Naugle. *Id.* at 1. Because the proposed Amended Complaint does not substantively alter Homeowners' pleadings in a way that would change the above analysis, the Court **RECOMMENDS** that Plaintiffs' Motion to Amend be **DENIED** as futile.

IV. CONCLUSION

For the reasons explained above, the undersigned **RECOMMENDS** that Defendant's Motion to Dismiss be **GRANTED**. Plaintiffs' Complaint should be **DISMISSED WITH PREJUDICE** for failure to state a claim. The Court additionally **RECOMMENDS** that Plaintiffs' Motion to Amend be **DENIED** as futile.

V. OBJECTIONS

The parties may wish to file objections to this Report and Recommendation. Parties filing objections must specifically identify those findings or recommendations to which they object. The District Court need not consider frivolous, conclusive, or general objections. *See Battle v. U.S. Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987).

A party's failure to file written objections to the proposed findings and recommendations contained in this Report within fourteen (14) days after the party is served with a copy of the Report shall bar that party from de novo review by the District Court of the proposed findings and recommendations in the Report. *See* 28 U.S.C. § 636(b)(1)(C); *Thomas v Arn*, 474 U.S. 140, 150-53 (1985); *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415 (5th Cir. 1996) (en banc). Except upon grounds of plain error, failing to object shall further bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the District Court. *See* 28 U.S.C. § 636(b)(1)(C); *Thomas*, 474 U.S. at 150-53; *Douglass*, 79 F.3d at 1415.

SIGNED this 29th day of July, 2021.

JEFFREY C. MANSKE
UNITED STATES MAGISTRATE JUDGE