IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

BONNIE KAY BROWNING, SCOTT S. TROEN, CHAMPAGNE CAMPAIGN L.L.C., *Plaintiffs* -vs- TOWN OF HOLLYWOOD PARK, TEXAS, *Defendant*	§ § § § § § § §	SA-23-CV-01485-XR

ORDER

On this date, the Court considered Plaintiffs' Motion for Preliminary Injunction (ECF No. 2), Defendant's response brief (ECF No. 9), Plaintiffs' reply brief (ECF No. 10), and the parties' oral arguments held on December 19, 2023. For the reasons discussed at the preliminary injunction hearing and set out more fully below, the Court **GRANTS** the motion.

BACKGROUND

This action arises out of Defendant Town of Hollywood Park, Texas ("the Town") passing Ordinance No. 2045 ("the Ordinance"), which amends the Town's zoning code to prohibit "short-term rentals" anywhere in the Town. ECF No. 2 at 4. Passed into law on November 14, 2023, the Ordinance defines short-term rentals as any rental of a residential property for less than thirty consecutive days. *Id.* The Ordinance also provides, "[s]hort-term rentals in existence and under contract at the time this Article becomes effective [November 14, 2023] have six months from the date of the signing of the ordinance to come into compliance with this Article." ECF No. 2-1 at 2. Ordinance violations can trigger fines of up to $2,000 per day for each offense. ECF No. 2 at 4.

Plaintiffs interpret this Ordinance to mean that "no new rentals may be booked after November 14, 2023," but that the "Town will not prosecute property owners for completing rentals

booked prior to November 14, 2023, and completed in the next six months [by May 14, 2024]." ECF No. 2 at 4. However, at the preliminary injunction hearing held on December 19, 2023, Defendant objected to Plaintiffs' interpretation of the Ordinance. Defendant insisted that the Ordinance permits residents who offered short-term rentals *before* November 14, 2023 to continue offering new short-term rentals until May 14, 2024, so long as the new rental contracts ended by May 14, 2024.[1]

Plaintiffs Bonnie Kay Browning and Scott S. Troen purchased a home located at 335 Donella Drive in the Town on August 17, 2021. ECF No. 2-3 at 1. Plaintiffs divide their time between the Town and another home in Virginia. ECF No. 2-3 at 1. Plaintiffs decided to market their property in the Town as a short-term rental on dates when they reside in Virginia, and, in an effort to increase the desirability of the property, Plaintiffs made substantial investments in the property. ECF No. 2-3 at 1. Specifically, Plaintiffs purchased new furnishings, decorations, windows, and doors; installed a water softener and reverse osmosis system; and cut down several trees on the property. ECF No. 2-3 at 1. Beginning in January 2023, Plaintiffs began leasing out the property in the Town on a short-term basis, with all but one lease being booked for under 30 days. ECF No. 2-3 at 1.

Plaintiff Champagne Campaign LLC, an entity owned and managed by Abby Argo, purchased 205 Mecca Drive in the Town in February 2021. ECF No. 2-2 at 1. Argo divides her time between this property and one located in Austin, prompting her to begin offering short-term

[1] In support of this argument, Defendant introduced a letter dated December 13, 2023 from City Secretary of the Town, Patrick Aten, that was mailed to all individuals believed to be operating short-term rentals. *See* ECF No. 10-4 at 2. This letter provides, "[i]ndividuals who are currently engaged in the operation of short-term rentals in the Town of Hollywood Park, have six months from the date of the signing of the ordinance, November 14, 2023, to come into compliance." ECF No. 10-4 at 2. The letter continues that this provision's "purpose is to allow these individuals engaged in the operation of short-term rentals prior to November 14, 2023, to continue operation of those short-term rentals until Tuesday May 14, 2023." ECF No. 10-4 at 2. The "property must already have been utilized as a short-term rental prior to" November 14, 2023 in order for Town residents to continue offering short-term rentals until May 14, 2023. ECF No. 10-4 at 2.

rentals on the property in March 2022. ECF No. 2-2 at 1. Like Browning and Troen, Argo made substantial investments in her property to enhance its rental desirability, including installing a new HVAC system, new plumbing, a new septic tank, lighting in exterior trees, and a privacy fence around the perimeter of the backyard. ECF No. 2-2 at 1.

Neither Plaintiffs nor their guests have ever received a nuisance complaint or citation from the Town. ECF No. 2-2 at 1; ECF No. 2-3 at 1. Further, when they purchased their properties and initiated improvements, the Town did not impose any restrictions on short-term rentals. *Id.* Plaintiffs provided affidavits affirming that, but for the Ordinance, they would continue to rent out their respective homes on a short-term basis. ECF No. 2-2 at 1; ECF No. 2-3 at 2.

On December 4, 2023, Plaintiffs filed a motion for preliminary injunction, requesting that the Court enjoin the Town from enforcing the Ordinance against them during this litigation. ECF No. 2.

DISCUSSION

I. Legal Standard

To secure a preliminary injunction, the movants must demonstrate by a clear showing: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable harm if the injunction is not granted; (3) that the threatened injury outweighs any harm that may result from the injunction to the non-movants; and (4) that the injunction will not undermine the public interest. *Valley v. Rapides Par. Sch. Bd.*, 118 F.3d 1047, 1051 (5th Cir. 1997). The Court looks to substantive law to determine the movants' likelihood of success on the merits. *Miss. Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 622 (5th Cir. 1985).

II. Analysis

A. Substantial Likelihood of Success on the Merits

Plaintiffs assert that the Ordinance—as a retroactive law—violates Article 1, Section 16 of the Texas Constitution, which provides that "[n]o bill of attainder, ex post facto law, retroactive law, or any other law impairing the obligation of contracts shall be made." TEX. CONST. ART. I, § 16. "A retroactive statute is one which gives preenactment conduct a different legal effect from that which it would have had without the passage of the statute." *Union Carbide Corp. v. Synatzske*, 438 S.W.3d 39, 60 (Tex. 2014). The Texas Supreme Court established a three-part test for determining whether a retroactive law is unconstitutional, directing courts to consider: "[1] the nature and strength of the public interest served by the statute as evidenced by the Legislature's factual findings; [2] the nature of the prior right impaired by the statute; and [3] the extent of the impairment." *Robinson v. Crown Cork & Seal Co.*, 335 S.W.3d 126, 145 (Tex. 2010).

Under the first factor, the Town asserts numerous public interest justifications for the Ordinance. Specifically, the Ordinance seeks to address the "increases in traffic, public nuisances, parking, noise, litter, and the influx of strangers into residential areas" that allegedly result from permitting short-term rentals. ECF No. 2-1 at 1. Further, the Ordinance states that the Town found this short-term rental ban necessary to "safeguard and protect the public health, safety, and welfare" of the Town and to "protect the beauty and integrity of [the Town's] residential ambiance." ECF No. 2-1 at 1.

However, there are no legislative factual findings in the record to support the conclusion that a ban on short-term rentals would resolve these concerns. Indeed, at the preliminary injunction hearing, the City Secretary for the Town, Patrick Aten, testified that he was not aware of the Town's police department or city council having performed any studies analyzing the difference

between the number of police calls for long-term rentals versus short-term rentals. Likewise, Aten only testified to generalized discussions at public City Council meetings regarding the Ordinance, not any express findings by the City Council in support of the Ordinance. Further, Aten testified that an existing law, Ordinance 1020, empowered the Town to issue citations and fines to residents committing nuisance-generating violations.[2] Accordingly, this factor weighs in favor of granting a preliminary injunction. *See Zaatari v. City of Austin*, 615 S.W.3d 172, 189–90 (Tex. App.—Austin 2019, pet. denied) (finding that a ban on short-term rentals "cannot be considered compelling" where nothing in the record indicated that the ban would prevent the city's stated concerns and the city passed other ordinances banning the nuisances at issue).

Under the second *Robinson* factor, Plaintiffs assert that property owners in Texas who "purchase property prior to the enactment of a short-term rental ban have a[n] 'established' property right" to engage in short-term rentals "subject to protection under Article 1, Section 16." ECF No. 2 at 8. Here, Plaintiffs submitted affidavits confirming that when they purchased their respective properties and made substantial investments for the purpose of generating additional short-term rental income, the Town did not restrict short-term rentals. ECF Nos. 2-2 at 1; ECF No. 2-3 at 1.

Several recent federal court decisions confirm that this argument will likely succeed. For instance, in *Anding v. City of Austin,* the Western District of Texas evaluated a 2016 short-term rental ordinance limiting short-term rental licenses in certain zoning districts to properties where the owner resided on the premises (the "homestead requirement"). No. 1:22-CV-01039-DAE,

[2] As Defendant correctly notes, Aten also identified deficiencies in Ordinance 1020, including that it required the police to issue multiple citations within a certain timeframe before a property could be designated a "nuisance-generating property." ECF No. 12 at 3. But Aten also testified that the police department relied on informal warnings rather than formal citations, undercutting Defendant's argument that Ordinance 1020 required the issuance of a burdensome number of citations before it could achieve it aims. Further, Plaintiffs direct the Court's attention to additional nuisance-type ordinances available to the Town in its reply. ECF No. 12 at 3.

2023 WL 4921530, at *2 (W.D. Tex. Aug. 1, 2023). There, because the plaintiffs had purchased their property in 2014—two years before the passage of the homestead requirement that would have prohibited them from engaging in short-term rentals—the court concluded that the plaintiffs "had a settled and reasonable expectation of a right to rent their property for short-terms when they purchased it in 2014" and the challenged ordinance was "unconstitutionally retroactive." *Id.* at *10; *see also Txi Operations, LP v. City of McKinney*, No. 4:20-cv-353, 2023 WL 161942, at *22 (E.D. Tex. Jan. 11, 2023) (finding that a city's rezoning and amortization of plaintiff's property violated plaintiff's reasonable and settled expectation to use its property as a concrete batch plant, where plaintiff "spent a significant amount of time and money investing in its property for the purpose of using it as a concrete batch plant, a use that was lawful when [plaintiff] invested its time and money").

Several recent state court opinions also affirm that Plaintiffs will likely be able to articulate a prior right impaired by the Ordinance. *See Zaatari* (finding "Austinites have long exercised their right to lease their property by housing short-term tenants"); *City of Grapevine v. Muns*, 651 S.W.3d 317, 345 (Tex. App.—Fort Worth 2021, pet. filed) (enjoining ordinance after finding that plaintiffs adequately pleaded a zoning ordinance impaired their right to "lease their properties on a short-term basis"). Given this line of federal and state court cases, the Court finds that Plaintiffs have demonstrated a substantial likelihood of success in alleging that the Ordinance impaired a prior right.[3]

Under the third *Robinson* factor concerning the extent of the impairment of the right, Plaintiffs have also demonstrated a substantial likelihood of success. Here, Plaintiffs argue that the

[3] Although the Court finds that Plaintiffs have demonstrated a likelihood of success in arguing that short-term rentals were an established practice and a historically permissible use in the Town for purposes of a retroactivity claim at the preliminary injunction stage, the Court reaches no final conclusion as to Plaintiff's ultimate success on this argument and, as always, will continue to evaluate this claim at the merits stage based on the evidence submitted by the parties.

Ordinance eliminates a settled right. Where an ordinance eliminates a right, "there is no disputing that the extent of the impairment is 'significant.'" *Anding*, 2023 WL 4921530, at *9.[4]

Accordingly, the Court finds that Plaintiffs have demonstrated a substantial likelihood of success on the merits.

B. Irreparable Harm

Plaintiffs have also demonstrated a substantial threat of irreparable harm if the injunction is not granted. At the preliminary injunction hearing, Plaintiffs testified that the passage of the Ordinance was financially devastating. Indeed, Plaintiff Browning testified that she would have to sell her home if she was not permitted to offer short-term rentals. Likewise, Argo represented that some of her renters book her property at least six months in advance for the more lucrative summer months. Consequently, without a preliminary injunction, Plaintiffs would suffer substantial financial injury.

The Fifth Circuit has found that such financial injury is sufficient to demonstrate irreparable harm where "the costs are likely unrecoverable." *Wages & White Lion Invs., L.L.C. v. United States FDA*, 16 F.4th 1130, 1142 (5th Cir. 2021) (finding irreparable injury where federal agency enjoyed sovereign immunity from any monetary damages). Because the Town's sovereign immunity likely precludes any subsequent financial recovery in this case, the Court finds that Plaintiffs have sufficiently demonstrated irreparable harm. *See St. Maron Props., L.L.C. v. City of Houston*, 78 F.4th 754, 762–63 (5th Cir. 2023) ("Sovereign immunity protects Texas and its political subdivisions—including municipalities . . . from suits for money damages.").

[4] Defendant argues in its response brief that a grace period can cure retroactivity concerns and alleviate the impairment of rights. ECF No. 9 at 3. But Defendant has not pointed the Court to any evidence indicating that the six-month period prior to the Ordinance's enforcement provides Plaintiffs with a reasonable period to recoup their investments. *Cf. TXI Operations*, 2023 WL 161942, at *22–23 (finding "whether the amortization period was reasonable depends on facts and circumstances that have not been fully developed").

C. Threatened Injury Outweighs Harm from Injunction

The Court finds that Plaintiffs have also sufficiently demonstrated that the threatened injury to Plaintiffs outweighs any harm from granting the preliminary injunction. The harm of granting a preliminary injunction in this matter will be minimal. Plaintiffs seek a preliminary injunction forbidding the Town from enforcing the challenged Ordinance against the Plaintiffs alone during the course of this litigation. As Plaintiffs' affidavits and testimony at the preliminary injunction hearing affirm, neither they nor their guests have ever received any nuisance complaints from the police or neighbors. *See* ECF Nos. 2-2 at 1, 2-3 at 1.

D. Public Interest

Finally, the Fifth Circuit permits district courts to issue a preliminary injunction if issuance "will not be adverse to public interest." *Star Satellite, Inc. v. Biloxi*, 779 F.2d 1074, 1079 (5th Cir. 1986). Nothing in the record before the Court indicates that permitting two homeowners who have never received any warnings or complaints from the Town to continue renting their properties on a short-term basis for the duration of this litigation would harm the public interest. Accordingly, the Court finds this factor weighs in favor of granting the injunction.

CONCLUSION

It is therefore **ORDERED** that Plaintiffs' Motion for Preliminary Injunction (ECF No. 2) is hereby **GRANTED.**

Defendant Town of Hollywood Park, Texas is hereby **ENJOINED** from enforcing the prohibition on short-term rentals contained in Ordinance 2045 against Plaintiffs pending final resolution of this case.

It is so **ORDERED**.

SIGNED this 22nd day of December, 2023.

XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE