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8 **EIGHTH JUDICIAL DISTRICT COURT**
9 **STATE OF NEVADA**

10 GREATER LAS VEGAS SHORT TERM
RENTAL ASSOCIATION, a non-profit
11 Nevada corporation; JACQUELINE FLORES,
President and Director,

12 Plaintiffs,

13 vs.

14 CLARK COUNTY and the BOARD OF
15 CLARK COUNTY COMMISSIONERS, a
political subdivision of the State of Nevada;
16 and the STATE OF NEVADA,

17 Defendants.

Case No. A-22-856311-P
Dept. No. 8

**SUPPLEMENTAL MEMORANDUM OF
POINTS AND AUTHORITIES RE:
SHORT-TERM RENTAL DECISIONS**

18 The Greater Las Vegas Short Term Rental Association, a non-profit Nevada corporation,
19 and Jacqueline Flores, President and Director (Rental Association), by and through their legal
20 counsel, Joseph C. Reynolds, Esq., and Ariel C. Johnson, Esq., of HUTCHISON & STEFFEN,
21 PLLC, hereby submits this Supplemental Memorandum of Points and Authorities regarding
22 decisions by other jurisdictions around the country involving short-term rental laws and which
23 support the arguments and constitutional issues being raised by the Rental Association in its
24 Motion for a Preliminary Injunction. Filing of a Supplemental Memorandum was approved and

1 requested by this Court at its November 17, 2022, hearing in this case. This Court directed the
2 Rental Association to provide authorities from jurisdictions that have specifically addressed
3 short-term rental laws. The Rental Association will respond to Clark County’s supplement on
4 the issue of standing on or before December 15, 2022.

5 As this Court has recognized, the Rental Association respectfully submits that the issues
6 presented in this case are primarily legal issues of *first impression in Nevada* and are brought
7 under both the United States and Nevada Constitutions. Argument on the Rental Association’s
8 pending Motion for a Preliminary Injunction is set for December 19, 2022. As set forth below,
9 the Rental Association respectfully submits that issuance of a preliminary injunction is necessary,
10 appropriate, and supported by either well-settled or emerging precedent when applied to the
11 unique facts of this case. Respectfully, implementation of the newly-enacted Title 7, Chapter
12 7.100 of the Clark County Code (hereinafter “the Ordinance”) should be enjoined. It contains
13 provisions that are *per se* unconstitutional and it should not be permitted to stand.

14 DATED this 1st day of December, 2022.

15 HUTCHISON & STEFFEN, PLLC

16 /s/ Joseph C. Reynolds

17 Joseph C. Reynolds (8630)

18 Ariel C. Johnson (13357)

19 *Attorneys for Petitioners*

20 *Greater Las Vegas Short Term Rental Association*
21 *and Jacqueline Flores, President and Director*

1 **SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES**

2 Prior to addressing authorities supporting the Rental Association’s request that a
3 preliminary injunction be issued by this Court, it is appropriate and may be beneficial to first
4 briefly summarize the procedural history of this case.

5 **I. PROCEDURAL HISTORY AND TIMELINES**

6 A brief summary of the procedural history and timelines of this case are as follows:

- 7 • On May 31, 2021, Assembly Bill (AB) 363 was passed by the
8 Nevada Legislature and signed into law by Nevada Governor Steve
9 Sisolak on June 4, 2021. AB 363 mandated that Clark County pass
10 new laws and permit short term rentals to operate in unincorporated
11 areas by July 1, 2022.
- 12 • On June 21, 2022, the Board of Clark County Commissioners
13 adopted provisions set forth in Title 7, Chapter 7.100 of the Clark
14 County Code it maintains comply with AB 363.
- 15 • On August 4, 2022, the Rental Association filed in this Court an
16 Amended Petition for Preliminary Injunction and Declaratory
17 Relief.¹ That pleading was served on both Clark County and the
18 Office of the Nevada Attorney General.
- 19 • On August 24, 2022, the Rental Association filed a First Amended
20 Petition for Preliminary Injunction and Declaratory Relief, adding a
21 cause of action under the Dormant Commerce Clause based on
22 newly-published precedent in the opinion *Hignell-Stark v. City of*
23 *New Orleans*, 46 F.4th 317 (5th Cir. 2022).
- 24 • On or about September 13, 2022, Clark County began accepting
applications for short term rental licenses pursuant to Chapter 7.100
of the Clark County Code.
- On September 21, 2022, Clark County responded to the Rental
Associations’ Amended Petition for Preliminary Injunction and
Declaratory Relief by filing a Motion seeking a more definite
statement pursuant to NRCPC 12(e).

¹ Of note, the pleading was “Amended” to correct a simple typographical error in the title page—no substantive amendments were made from the original filing.

- 1 • On October 3, 2022, the Rental Association responded to Clark
2 County's Motion by filing a Second Amended Complaint for
3 Declaratory and Injunctive Relief *and* a Motion for Preliminary
4 Injunction. The Rental Association also filed a limited Opposition
5 to Clark County's NRCP 12(e) Motion

- 6 • On October 18, 2022, Clark County filed its Answer to the Rental
7 Association's Second Amended Complaint. In its Answer, Clark
8 County also asserted Counterclaims against the Rental Association
9 and its President and Director Jacqueline Flores (Counterclaims Nos.
10 1 to 7).

- 11 • On October 20, 2022, a status/scheduling hearing was held before
12 this Court.

- 13 • On November 4, 2022, Clark County filed an Opposition to the
14 Rental Association's Motion for a Preliminary Injunction.

- 15 • On November 8, 2022, the Rental Association filed a Motion to
16 Dismiss Clark County's Counterclaims (Counterclaims Nos. 1-7)
17 pursuant to NRCP 12(b).

- 18 • On November 11, 2022, the Rental Association filed a Reply to
19 Clark County's Opposition to the Motion for a Preliminary
20 Injunction.

- 21 • On November 17, 2022, a hearing was held before this Court where
22 supplemental briefing by the parties was requested on or before
23 December 1, 2022, and a special hearing for arguments on the
24 Rental Associations' pending Motion for a Preliminary Injunction
was set for December 19, 2022.

- On November 22, 2022, Clark County filed a limited Opposition to
the Rental Association's NRCP 12(b) Motion to Dismiss its
Counterclaims (Counterclaims Nos. 1-7). On this date, Clark
County also filed its First Amended Counterclaims against the
Rental Association and its President and Director Ms. Flores
(Counterclaims Nos. 1-6).

- This Court has set a hearing for December 13, 2022, on the Rental
Association's pending Motion to Dismiss Clark County's
Counterclaims pursuant to NRCP 12(b).

- This Court has set a special hearing for December 19, 2022, to hear
arguments on the Rental Association's pending Motion for a
Preliminary Injunction.

- On March 13, 2023, the ability to apply for a short-term rental license pursuant to Chapter 7.100 of the Clark County Code will be closed by Clark County.

II. INTRODUCTION

In its Motion for Preliminary Injunction, the Rental Association is raising both facial (and within certain claims) as-applied challenges to Title 7, Chapter 7.100 of the Clark County Code under both the Nevada Constitution and the United States Constitution. These are as follows: allows for Arbitrary, Capricious, and Discretionary Enforcement in violation of the Fifth, Sixth, and Fourteenth Amendments; it is Void for Vagueness *and* Overbreadth in violation of the Fifth and Fourteenth Amendments; it establishes a Restraint on Freedom of Speech *and* Assembly in violation of the First Amendment; it constitutes a Government Taking of Property, including an Invasion of Privacy in violation of the Fourth and Fifth Amendments; it denies Due Process in violation of the Fourteenth Amendment; it denies Equal Protection in violation of the Eighth and Fourteenth Amendments; and it infringes upon the Dormant Commerce Clause in violation of Article 1, Section 8 of the United States Constitution. The Ordinance further violates provisions of AB 363 as enacted by the Nevada Legislature.

Undeniably, the Rental Association is raising numerous constitutional claims. However, the Ordinance as currently drafted is that bad. It is, perhaps, the most onerous short-term rental licensing scheme in the country.

With the passage of AB 363, the Nevada Legislature intended for short-term rentals to operate in unincorporated Clark County. This has yet to occur. Not only has Clark County failed to issue a single license pursuant to AB 363, but the Ordinance it has enacted pushes the limits and, in multiple instances set forth in the Rental Association's Second Amended Complaint and Motion for a Preliminary Injunction, crosses the boundaries of proper constitutional limitations on government action.

1 So far, the posture of Clark County in this litigation appears to be that prospective short-
2 term rental operators and patrons should simply be grateful for the opportunity to even apply for
3 a license to operate. Yet, this is not how our democracy works. Once a government entity enacts
4 a new law, it must comply with and respect constitutional limitations. The Ordinance does not.
5 It fails.

6 Every step of the licensing scheme and rules set forth in the Ordinance infringe upon well-
7 settled constitutional rights. This begins with application process and who is allowed to apply,
8 what information they are required to provided to provide to Clark County, and what rights they
9 have to waive to even be considered for a license to operate.

10 **III. THE APPLICATION PROCESS ITSELF IS UNCONSTITUTIONAL**

11 As a threshold matter, it is important to highlight for this Court that the very act of
12 applying for a short-term rental license requires an applicant to certify and provide Clark County
13 a blanket waiver of bedrock constitution rights under penalty of perjury. And perjury under
14 Nevada law is a felony. *See* NRS 199.120. Specifically, Section 7.100.090(c)(2) provides:

15 Each application must be accompanied by
16
17 a declaration signed *under the penalty of perjury* by the property
 owner(s) stating that: (I) the licensee shall abide by all requirements
 set forth in this Chapter

18 (Emphasis added). This is not just a certification that the information being provided by the
19 license applicant is true. It is a requirement that a license applicant agree to all Ordinance
20 provisions as a prerequisite and condition *to even apply* for a license. Thus, a violation of the
21 Ordinance *on its face* subjects a license to felony criminal prosecution in addition to civil and
22 other criminal penalties for an underlying violation. This mandatory applicant certification and
23 threat of criminal prosecution overshadows the entire application process and the Rental
24 Association's request for an injunction. It is not only a prospective request. It is an active one.

1 In other words, by requiring acquiescence to and acceptance of the Ordinance’s
2 proscriptions as a precondition to even submit a license application, Clark County is requiring a
3 license applicant to waive bedrock constitutional rights and protections and to subject themselves
4 to criminal liability. The criminal nature of the Ordinance—and the perjury certification—
5 heightens the burden upon Clark County to justify its provisions. *See Flamingo Paradise Gaming,*
6 *LLC v. Chanos*, 125 Nev. 502, 512, 217 P.3d 546, 553 (2009) (recognizing that a statute which
7 “involves criminal penalties or constitutionally protected rights” is subject to “a higher standard
8 of whether ‘vagueness permeates the text’”) (quoting *City of Las Vegas v. Dist. Ct.*, 118 Nev. 859,
9 862, 59 P.3d 477, 480 (2002)); *see also Chicago v. Morales*, 527 U.S. 41 (1999)). Accordingly,
10 the acquiescence to possible criminal penalties and the mandatory waiver of rights that are
11 implicated by the very act of even applying for a short-term rental license under the Ordinance
12 should inform this Court’s analysis of the Rental Association’s claims.

13 **IV. SHORT-TERM RENTAL LEGAL AUTHORITIES**

14 This case is complex. The issues are novel for Nevada. New technology, such as the
15 internet and cellphones, have become interwoven in society, personal life, and business operations.
16 Whether it is the development of the ride-share industry or the exponential growth in the number
17 of individuals who now work within their own homes, *i.e.*, the COVID-19 pandemic,
18 modernization is increasingly intersecting with and challenging conventional norms and
19 traditional business models. Unfortunately, these often find their way to the courthouse.

20 Legal decisions regarding laws enacted by local, county and state governments regarding
21 short-term rentals have been emerging throughout the country in recent years: Several have been
22 issued while the instant litigation has been pending before this Court. Extracting on-point
23 precedent is not always clear or easy. As each new law may be different, the outcome of the
24 analysis may be too. There are not always ‘apples-to-apples’ comparisons that can be made.

1 Courts throughout the country often reach mixed conclusions on different issues. The
2 Rental Association’s claims raised under the Nevada Constitution and the United States
3 Constitution are largely *ones of first impression in Nevada*. Respectfully, the Rental Association
4 submits that the issues raised are best reviewed by applying well-settled constitutional law, even
5 where that law has not specifically addressed short-term rentals. The Rental Association has cited
6 to that law and framework in its prior pleadings. Below are supplemental authorities from other
7 jurisdictions that have recently issued decisions involving short-term rentals that serve as either
8 on-point or persuasive authority supporting the Rental Association’s claims. Upon reviewing
9 these decisions, violations of the rights of speech and assembly, the right of privacy, and the right
10 to lease property have often been found by other courts when reviewing short-term rental
11 prohibitions enacted by government entities. They are applicable to this case.

12 Relevant authorities are set forth below.

13 **A. Short-Term Rental is a Residential Use: *Hawai’i Legal Case***
14 **(Decision Issued October 13, 2022)**

15 In the very recent case *Hawai’i Legal Short Term Rental Alliance v. City and County of*
16 *Honolulu*, No. 22-cv-247-DKW-RT, 2022 WL 7471692 *7 (D. Haw. October 13, 2022), the
17 United States District Court for the District of Hawaii recognized that “appellate courts of at least
18 nineteen states have decided that even rental stays of less than 30 days—nightly, weekend, or
19 weeklong stays—constitute residential uses or purposes.²

21 ² See, e.g., *Wihbey v. Pine Orchard Ass’n Zoning Bd. of Appeals in Branford*, 2021 WL 5014096
22 (Conn. Superior Ct. 2021); *Wilson v. Maynard*, 961 N.W. 2d 596 (S.D. 2021); *Craig Tracts*
23 *Homeowners’ Ass’n, Inc. v. Brown Drake, LLC*, 477 P.3d 283 (Mont. 2020); *Forshee v.*
24 *Neuschwander*, 914 N.W. 2d 643 (Wis. 2018); *Tarr v. Timberwood Park Owners Ass’n, Inc.* 556
S.W. 3d 274 (Tex. 2018); *Santa Monica Beach Prop. Owners Ass’n, Inc. v. Acord*, 219 So. 3d
111 (Fla. Ct. App. 2017); *Houston v. Wilson Mesa Ranch Homeowners Ass’n, Inc.*, 360 P.3d 255
(Colo. Ct. App. 2015); *Wilkinson v. Chiwawa Communities Ass’n*, 327 P.3d 614 (Wash.
2014); *Estates at Desert Ridge Trails Homeowners’ Ass’n v. Vazquez*, 300 P.3d 736 (N.M. Ct.
App. 2013); *Russell v. Donaldson*, 731 S.E. 2d 535 (N.C. Ct. App. 2012); *In re Toor*, 59 A.3d

1 Here, recognition by the United States District Court in *Hawai'i Legal* that use of a short-
2 term rental is a 'residential use,' as opposed to a business or commercial use, is relevant to the
3 Rental Association's claims, and the freedom of assembly, government takings, and invasion of
4 privacy claims in particular. Indeed, this legal recognition underscores that short-term rentals are
5 not necessarily vacant houses. They are homes and demand constitutional protection.

6 **B. Unconstitutional Restraint on Freedom to Assemble: *Zaatari* Case**
7 **(Decision Issued November 27, 2019)**

8 In *Zaatari v. City of Austin*, 615 S.W.3d 172 (2019), the Texas Court of Appeals held that
9 a short-term rental ordinance enacted by the City of Austin was unconstitutional because it
10 arbitrarily restricted the right to assemble on short-term rental properties. The Ordinance passed
11 by the City of Austin in *Zaatari* banned weddings, bachelor parties, sponsored events or similar
12 group activities "other than sleeping" between 10 p.m. and 7 a.m. It also prohibited no more than
13 6 unrelated adults or 10 related adults from being on the property at any time. *Id.* at 181, 192.³
14 The Texas Court of Appeals in *Zaatari* set forth a detailed analysis of the First Amendment to the
15 United States Constitution, as well as the Texas Constitution, and held that these prohibitions
16 were unconstitutional and violated the freedom to assemble. *See id.* at 191-202.

17
18
19 722 (Vt. 2012); *Slaby v. Mountain River Estates Residential Ass'n, Inc.*, 100 So. 3d 569 (Ala. Civ.
20 App. 2012); *Applegate v. Colucci*, 908 N.E. 2d 1214 (Ind. Ct. App. 2009); *Scott v. Walker*, 645
21 S.E. 2d 278 (Va. 2007); *Lowden v. Bosley*, 909 A.2d 261 (Md. Ct. App. 2006); *Mullin v.*
22 *Silvercreek Condo., Owner's Ass'n, Inc.*, 195 S.W. 3d 484 (Mo. Ct. App. 2006); *Pinehaven*
Planning Bd. v. Brooks, 70 P.3d 664 (Idaho 2003); *Yogman v. Parrott*, 937 P.2d 1019 (Or.
1997); *Catawba Orchard Beach Ass'n, Inc. v. Basinger*, 685 N.E. 2d 584 (Ohio Ct. App. 1996).

23 ³ Notably, in *Zaatari*, the City of Austin contended that the homeowners' challenge was not ripe
24 because the ordinance was not yet in effect at the time of the lawsuit. However, the *Zaatari* Court
rejected the City's argument, finding that the homeowners "raise a facial challenge" to an
ordinance whereby some provisions took effect immediately, some provisions were retroactive,
and some provisions will take effect in the future. *Zaatari*, 615 S.W.3d at 183-84.

1 In reaching its conclusion, the *Zaatari* Court held that restraints on the right to peaceably
2 assemble were subject to strict scrutiny, *see id.* at 192, and the City’s justification for the
3 limitation being based on generalized concerns regarding its health, welfare, and land regulation
4 were insufficient to set forth a compelling government interests and justify its high constitutional
5 burden and intrusion on First Amendment liberties. *Id.* at 202. The Texas Court of Appeals noted
6 that the ordinance was a regulation of private (not public) property and implicated both privacy
7 and property rights. *Id.* at 199. The ordinance failed to differentiate between peaceable and non-
8 peaceable assemblies and the reasons for the assemblies. *Id.* at 202.

9 Here, like the ordinance held unconstitutional in *Zaatari*, Section 7.100.160(a) of the
10 Ordinance adopted by Clark County similarly restricts the number of individuals that can be on
11 the property to 10, irrespective of their relationship or purpose for being on the property.
12 Identical to the unconstitutional ordinance in *Zaatari*, Section 7.100.180(c)(II) of the Ordinance
13 passed by Clark County prohibits any gatherings from 10:00 p.m. to 7:00 a.m. Like the
14 ordinances in *Zaatari*, no standards for enforcement of these *per se* prohibitions were enacted by
15 Clark County. Rather, the Ordinance is a blanket prohibition against individuals from associating
16 or assembling on private property without regard to the content or purpose of the gathering.
17 Additionally, Section 7.100.180(b) of the Ordinance uses vague terms prohibiting the residence
18 from being used for “[p]arties, weddings,^[4] and events” and “gatherings” that exceed 10
19 individuals.

20 The *Zaatari* case is on point and supports the Rental Association’s claim.

21 ///

22 ///

23 ⁴ It is noteworthy that the United States Court of Appeals for the Ninth Circuit has held that a
24 ‘wedding ceremony’ is independently protected speech under the First Amendment. *See*
Kaahumanu v. Hawaii, 682 F.3d 789, 799 (9th Cir. 2012) (“We have no difficulty concluding
that wedding ceremonies are protected expression under the First Amendment.”).

1 **C. Violation of Right to Privacy and Excessive Fines: *Kalthoff* Cases**
2 **(Decisions Issued July 15, 2021/February 22, 2022)**

3 In *Kalthoff v. Douglas County*, No. 3:21-cv-00293-RCJ-CLB, 2021 WL 3010006 (D. Nev.
4 2021), *aff'd* by 2022 WL 542671 (D. Nev. 2022), the United States District Court for the District
5 of Nevada held that a vacation home rental ordinance passed by the Douglas County Board of
6 Commissioners was unconstitutional and granted, in part, a temporary protective order and
7 injunction on behalf of homeowners. In its decision, the District Court of Nevada held that a
8 provision in the ordinance that required occupants of the home rental “to make the property
9 available for inspection at all times” by Douglas County failed to provide adequate notice and
10 violated the Fourth Amendment. *Id.* at *6.

11 The *Kalthoff* Court further found that a parking limitation in the ordinance failed rational
12 basis review and violated the due process clause of the Fourteenth Amendment, *see id.* at *7;
13 provisions of the ordinance that allowed for an appeal to an advisory board for citations issued
14 under the ordinance also violated the Due Process Clause of the Fourteenth Amendment because
15 the advisory board lacked objective decision makers and/or review, *see id.* at *7; and provisions
16 of the ordinance that allowed thousands of dollars of fines were “grossly disproportionate” and
17 violated the excessive fines clauses of the Eighth Amendment, *see id.* at *6.

18 Upon granting a partial temporary restraining order and injunction in favor of the
19 homeowners, the District Court of Nevada in *Kalthoff* acknowledged: “It is well established that
20 the deprivation of constitutional rights ‘unquestionably constitutes irreparable injury.’” *Id.* at *8
21 (quoting *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012)) (other internal citations and
22 quotations omitted).

23 Here, while not all provisions in the ordinance under review *Kalthoff* are identical to the
24 Ordinance passed by Clark County and at issue in the instate case, the decision is instructive.

1 Similar to *Kalthoff*, Section 7.100.170(i)(2) of the Ordinance provides that a short-term rental
2 owner “must” permit inspection of their home “with or without notice” and that they have a duty
3 “to provide access.” Additionally, Section 7.100.170(p) of the Ordinance provides that a short-
4 term rental owner “must” provide all financial information involving the home for three (3) years
5 upon request of Clark County. Also similar to *Kalthoff*, Section 7.100.230(b) and (d)(1)(II) of
6 the Ordinance allows for excessive fines and fees to be imposed by Clark County because fines
7 and fees may be imposed cumulatively and “in any order or combination” per offense up to
8 \$10,000. The Court in *Kalthoff* suggested that any fine over \$5,000 was excessive. *See id.* at *6.

9 The *Kalthoff* case supports the Rental Association’s claims.

10 **D. Violation of Right to Privacy and Unreasonable Searches: *Weisenberg* Case**
11 **(Decision Issued March 27, 2019)**

12 In *Weisenberg v. Town Board of Shelter Island*, 404 F.Supp.3d 720, 735-36 (E.D.N.Y.
13 2019), the United States District Court for the Eastern District of New York held that a short-term
14 rental ordinance that required operators to reveal their rental information for examination by the
15 Town Board upon request and with or without cause and without pre-citation review may violate
16 the Fourth Amendment. In reaching its decision, the *Weisenberg* Court cited to the United State
17 Supreme Court’s holding in *City of Los Angeles v. Patel*, 576 U.S. 409 (2015), where the United
18 States Supreme Court held that ““absent consent, exigent circumstances, or the like, in order for
19 an administrative search to be constitutional, the subject of the search must be afforded an
20 opportunity to obtain precompliance review before a neutral decisionmaker.”” *Id.* at 735 (quoting
21 *Patel*, 576 U.S. at 420). The District Court for the Eastern District of New York reasoned that
22 unchecked discretion of the Town Board to demand records from short-term rental operators
23 “could be used as a pretext for harassment.” *Id.* at 736.

24 Here, like *Weisenberg* (and also like the *Kalthoff* case *supra* at 10-11 above), Section

1 7.100.170(i)(2) of the Ordinance provides that a short-term rental owner “must” permit inspection
2 of their home “with or without notice” and that they have a duty “to provide access.” Additionally,
3 Section 7.100.170(p) of the Ordinance provides that a short-term rental owner “must” provide all
4 financial information involving the home for three (3) years upon request of Clark County. That
5 the Ordinance permits Clark County to both enter a short-term rental for an unannounced
6 inspection and/or to demand records with or without cause or precompliance review violates the
7 Fourth Amendment on its face. Furthermore, appealing to the unchecked discretion of the Board
8 of Clark County Commissioners for review of an enforcement decision would, similar to the
9 *Weisenberg* Court’s reasoning, “could be used as a pretext for harassment.” *Id.* at 736.

10 The *Weisenberg* case supports the Rental Association’s claims.

11 **E. First Amendment Prior Restraint on Speech: *Wheelahan* Case**
12 **(Decision Issued March 30, 2020)**

13 In *Wheelahan v. City of New Orleans*, No. 19-1170, 2020 WL 1503560 *13 (E.D. La.,
14 2020), the United States District Court for the Eastern District of Louisiana held that an ordinance
15 enacted by the City of New Orleans that required short-term rental operators to obtain a license
16 from the City and have the advertising of their rental property reviewed by the City before being
17 advertised on the internet may constitute an unconstitutional prior restraint on commercial speech
18 in violation of the First Amendment. The District Court for the Eastern District of Louisiana
19 recognized that “[a]dvertising is at the heart of commercial speech,” *see id.* at *12, and that the
20 City’s restraint is presumptively unconstitutional. *Id.* at *13. In reaching its decision, the
21 *Wheelahan* Court stated that the homeowner “alleges facts indicating that the STR Ordinances
22 impose a “permitting scheme” that controls the “time, place, and manner of speech” or require
23 the speaker to “obtain prior approval for any expressive activities.” *Id.* Thus, the Court held that
24 the homeowner’s claim, as pleaded, was sufficient to survive an attempt at dismissal by the City.

1 *Id.*

2 Here, Section 7.100.090(b)(4) of the Ordinance requires short-term rental license
3 applicants to provide Clark County with the names of all “rental sites that will be used to advertise
4 the short-term rental unit” as a condition of the license application. Section 7.100.170(f)(8) of
5 the Ordinance requires a short-term rental license applicant to provide Clark County with a list
6 the names of all advertising platforms that are used to list the rental home in a monthly report.
7 Like the District Court for the Eastern District of Louisiana concluded in *Wheelahan*, such
8 requirements are an unconstitutional prior restraint on a short-term rental license applicant’s right
9 to free speech.

10 The *Wheelahan* case supports the Rental Association’s claims.

11 **F. Violation of Fundamental Right to Lease Property: *City of Grapevine* Case**
12 **(Decision Issued December 23, 2021)**

13 In the case *City of Grapevine v. Muns*, 651 S.W.2d 317 (Tex. App. 2021), the Texas Court
14 of Appeals held that an ordinance passed by the City restricting short-term rentals (rentals less
15 than 30 days) violated the fundament right to lease private property in violation of the United
16 States Constitution and the Texas Constitution. The City contended that the ordinance was a valid
17 zoning regulation and that the homeowners challenging the ordinance did not have a vested right
18 in using their homes/property as short term rentals. However, the Texas Court of Appeals rejected
19 the City’s argument. The *City of Grapevine* Court held that

20 . . . although the [h]omeowners do not have a vested right arising
21 under the Zoning Ordinance to use their properties as STR’s [short
22 term rentals], ***we conclude that they have a fundamental leasing***
23 ***right arising from their property ownership***. Private property
24 ownership is a fundamental right. *Hearts Bluff Ranch, Inc. v. State*,
381 S.W.3d 468, 476 (Tex. 2012) (citing *Severance v. Patterson*,
370 S.W.3d 705, 709 (Tex. 2012) (op. on reh’g)); *Severance*, 370
S.W.3d at 709 (“Private property rights have been described ‘as
fundamental, natural, inherent, unalienable, not derived from the
legislature[,] and as pre-existing even constitutions.’” (quoting

1 *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 140 (Tex. 1977)).
2 Property ownership includes the right to lease to others. See
3 *Calcasieu Lumber Co. v. Harris*, 77 Tex. 18, 13 S.W. 453, 454
4 (1890) (“The ownership of land, when the estate is a fee, carries with
5 it the right to use the land in any manner not hurtful to others; and
6 the right to lease it to others, and therefore derive profit, is an
7 incident of such ownership.”); see also *Terrace v. Thompson*, 263
8 U.S. 197, 215 (nothing that “essential attributes of property” include
9 “the right to use, lease[,], and dispose of it for lawful purposes”).
10 The right to lease is a stick within a property owner’s metaphorical
11 bundle of rights. See Emily M. Speier, Comment, *Embracing
12 Airbnb: How Cities Can Champion Private Property Rights
13 Without Compromising the Health and Welfare of the Community*,
14 44 Pepp. L. Rev. 387, 395-97 (2017).

9 *Id.* at 346-47 (emphasis added). The Texas Court of Appeals in *City of Grapevine* proceeded to
10 conclude that the homeowners in that case “have a vested right to lease their properties and that
11 this right is sufficient to support a viable due-court-of law claim.” *Id.* at 347. A lower court’s
12 order granting declaratory relief and an injunction *against* the City’s short-term rental ordinance
13 was affirmed. *Id.*

14 Here, the Rental Association alleges numerous causes of action that the Ordinance enacted
15 by Clark County constitutes an unconstitutional government taking. The Rental Association’s
16 takings claims are raised in four categories: invasion of privacy,⁵ interference with property

20 ⁵ See Section 7.100.170(r) (requiring that at least 2 or more noise monitoring devices must be
21 installed on the short-term rental owner’s yard and pool); Section 7.100.170(r)(1)-(3) (providing
22 that “data” on noise levels must be maintained for sixty (60) days and provided to Clark County
23 “[u]pon request”); Section 7.100.170(o)(1)-(3) (requiring that a video surveillance camera must
24 be installed and recording footage maintained for sixty (60) days and provided to Clark County,
or a law enforcement agency, “[u]pon request”); Section 7.100.170(i)(2) (providing that a short-
term rental owner “must” permit inspection of their home “with or without notice” and that they
have a duty “to provide access”); Section 7.100.170(p) (providing that a short-term rental owner
“must” provide all financial information involving the home for three (3) years upon request of
Clark County).

1 fixtures,⁶ impaired use and enjoyment,⁷ and loss of economic benefit.⁸ As the *City of Grapevine*
2 Court found, each of these claims impairs a fundamental property right of a homeowner to lease
3 and use their property. Such impairments are unconstitutional.

4 The *City of Grapevine* case supports the Rental Association’s claims.

5 **G. Violation of Dormant Commerce Clause: *Hignell-Stark* Case**
6 **(Decision Issued August 22, 2022)**

7 In *Hignell-Stark v. City of New Orleans*, No. 21-30643, 2022 WL 3584037 (5th Cir. 2022),
8 the United States Court of Appeals for the Fifth Circuit reversed a lower court and held that a
9 short-term rental licensing scheme enacted by the City of New Orleans violated the Dormant
10 Commerce Clause on its face because it required short-term rental properties to be the primary
11

12
13 ⁶ See Section 7.100.170(r) (requiring at least 2 or more noise monitoring devices must be installed
14 on a short-term rental owner’s yard and an additional noise monitoring device is required for a
15 pool or spa); Section 7.100.170(o)(1)-(3) (requiring a video surveillance camera be installed);
Section 7.100.170(h) (requiring that the address be illuminated at night); and Section
7.100.170(q) (requiring that an 8.5 x 11 ‘placard’ on the exterior of the residence and in plain
public view).

16 ⁷ See Section 7.100.180(c)(2) (prohibiting a short-term rental property owner from using “all rear
17 and side yard outdoor lighting between the hours of 10:00 p.m. and 7:00 a.m.”); Section
18 7.100.180(c)(1)(I) (prohibiting the outdoor use of “any radio, receiver, stereo, musical
19 instrument, sound amplifier or similar device” irrespective of the noise level); Section
20 7.100.180(c)(1)(II) (prohibiting the outdoor use of “amenities, such as pools, spas, barbecues,
21 and firepits” between the hours of 10:00 p.m. and 7 a.m.); Section 7.100.180(a) (prohibiting the
22 residence from being used for “any purpose other than for dwelling, lodging, or sleeping and for
activities that are incidental to its use for dwelling, lodging or sleeping”); Section 7.100.180(b)
(prohibiting the residence from being used for “[p]arties, weddings, and events” and “gatherings”
that exceed 10 individuals); and Section 7.100.180(c) (prohibiting all “noise, light, smoke,
particulate matter, odors, and hazardous materials” from the residence that may annoy or disturb
the quiet, comfort, or repose of an ordinary person with reasonable sensibilities).

23 ⁸ See Section 7.100.080(f)(II) (arbitrarily providing that homeowners in Clark County who
24 happen to live within 1,000 feet of another short-term rental owner are automatically ineligible
for a short-term rental license); Section 7.100.160(a) (arbitrarily limiting the maximum
occupants to a maximum of ten 10 individuals); and Section 7.100.080 (arbitrarily prohibiting a
resident who owns a property not connected to a municipal wastewater system from applying).

1 residence of a licensee and, therefore, discriminated against out-of-state residents. In reaching its
2 decision, the Fifth Circuit rejected arguments by the City of New Orleans that the residency
3 requirement and the scheme’s burdens on interstate commerce were necessary to achieve the local
4 interests of reducing nuisances, increasing housing, and maintaining residential neighborhood
5 characteristics. *Id.* at *8. The Fifth Circuit stated: “The City has many options to address the
6 problems caused by [short-term rentals] in residential neighborhoods. But it chose the one the
7 Constitution forbids.” *Id.* at *9.

8 Here, while the Ordinance enacted by Clark County does not contain an identical
9 residency requirement for short-term rental licensees as the ordinance at issue and enacted by
10 the City of New Orleans, the Fifth Circuit’s holding in *Hignell-Stark* is still instructive and
11 applicable. Section 7.100.010(a) of the Ordinance adopted by Clark County states the purpose
12 of the Ordinance is to limit short-term rentals to promote “permanent, affordable housing for the
13 residents of the County.”

14 By doing so, however, the Ordinance discriminates against the investment in and
15 purchase of residential properties in Nevada by out-of-state individuals who may not own or
16 occupy a home in Clark County as their primary or full-time home, but who may still wish to
17 use and maintain that property as a short-term rental. It discriminates in two ways. First, Section
18 7.100.050 of the Ordinance sets forth an arbitrary one percent (1%) cap on available short-term
19 rental licenses in Clark County, which limits supply. Second, Section 7.100.179(d) of the
20 Ordinance mandates that a short-term rental licensee designate a Clark County resident as a local
21 representative who can be available and physically present at the property within thirty (30)
22 minutes notice, day or night. This local representative requirement is a *de facto* residency
23 requirement for a licensee holder and akin to the requirement held violative of the Dormant
24 Commerce Clause.

1 The *Hignell-Stark* case supports the Rental Association’s claims.

2 **H. Unfettered Discretion to Grant or Deny a License: *Hignell* Case**
3 **(Decided July 9, 2021)**

4 In *Hignell v. City of New Orleans*, No. 2:19-cv-13773-ILRL-JVM, 2021 WL 2886213
5 *2 (E.D. La 2021), the United States District Court for the Eastern District of Louisiana held that
6 the scheme governing whether or not applicants for a short-term rental license constituted an
7 impermissible prior restraint on speech in violation of the First Amendment. There, the District
8 Court for the Eastern District of Louisiana found that licensing scheme enacted by the City of
9 New Orleans allowed constitutionally impermissible and unfettered discretion to City officials
10 to review a license application. The *Hignell* Court stated that “without express standards for a
11 licensing scheme, courts may have difficulty determining whether the licensor is discriminating
12 against disfavored speech.” *Id.* at *2 (citing *Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S.
13 750 (1988)). The Court explained: “The department has *unfettered discretion* to grant or deny a
14 permit based on an applicant's eligibility but provides no guidance as to what makes an applicant
15 eligible or whether the dwelling unit meets the criteria established by law.” *Id.* (emphasis added).
16 It concluded: “It is unclear from the STR Ordinance that if an applicant follows the guidelines
17 exactly as written, that the city would grant the applicant's permit.”

18 Here, and like the ordinance in *Hignell*, the Ordinance enacted by Clark County are based
19 upon ambiguous protocols and subjective standards in the Ordinance that leave the fate of an
20 applicant to the personal discretion of any given reviewer. For example, Section 7.100.090(c)(8)
21 of the Ordinance authorizes Clark County to request “[a]ny other documentation or information
22 as the director of the Department may require as the director of the Department may require.”
23 Based on this language, Clark County may require one applicant to provide documents or
24 information and not require another applicant to do so. No standards are set forth in the

1 Ordinance on what or when additional documentation may be required. It is left undefined.

2 Section 7.100.100(a) of the Ordinance provides that Clark County itself ‘determines’
3 when licenses are available for issuance. Use of the term ‘determines’ is a grant of discretion
4 without objective criteria. Given that Clark County has tied the number of licenses that may be
5 issued to the population of unincorporated Clark County, as well as geography of home locations,
6 a moving target exists for available licenses. The Ordinance provides no algorithm or formula
7 on how this calculation will be determined.

8 Section 7.100.100(h) of the Ordinance provides:

9 At the *discretion* of the Department [Clark County], the residential
10 unit shall be subject to inspection or code compliance review by any
county agency or department.

11 (Emphasis added). The plain text of this Section means that Clark County, through its employees,
12 may subject an applicant to an inspection of their proposed short term rental unit, *i.e.*, their home,
13 without any basis whatsoever. Again, no standards or objective criteria are set forth in the
14 Ordinance to delineate who will be subjected to an inspection and who will not. It is left to
15 unmitigated and subjective discretion. Additionally, Section 7.100.110(a)(3) of the Ordinance
16 provides that an application may be denied “if the applicant fails or refuses to cooperate fully with
17 any inspection.” Cooperation, let alone ‘full’ cooperation, are ambiguous terms and leave the
18 determination of whether an applicant has ‘cooperated fully’ to Clark County’s unfettered and
19 standardless discretion.

20 Section 7.110.110(c)(2) of the Ordinance provides that as a condition of approval an
21 application must “agree to all such terms and conditions that the Department deems necessary for
22 health and safety of residents.” No standards or criteria are set forth in the Ordinance defining
23 what circumstances or conditions may trigger these additional licensure requirements.

24 The *Hignell* case supports the Rental Association’s claims.

1 **V. CONCLUSION**

2 The issues before this Court are ones of first impression in Nevada. As set forth above,
3 decisions by other state and federal jurisdictions throughout the country, including New York,
4 Texas, Hawaii, and Louisiana, as well as Nevada federal court, support the Rental Association’s
5 challenges to the Ordinance enacted by Clark County. These supplemental authorities, as well
6 as those set forth in the Rental Associations prior pleadings, support this Court issuing an order
7 identifying the constitutional infirmities and enjoining the Ordinance either in whole or in part
8 from further implementation and harm.

9 DATED this 1st day of December, 2022.

10 HUTCHISON & STEFFEN, PLLC

11 */s/ Joseph C. Reynolds*

12 _____
Joseph C. Reynolds (8630)

Ariel C. Johnson (13357)

13 *Attorneys for Petitioners*

14 *Greater Las Vegas Short Term Rental Association*
15 *and Jacqueline Flores, President and Director*

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Hutchison & Steffen, PLLC and that on this 1st day of December, 2022, I caused the above and foregoing document, entitled SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES RE: SHORT-TERM RENTAL DECISIONS to be served as follows:

- by placing the same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or
- to be sent electronically via the Court’s electronic service system; the date and time of this electronic service is in place of the date and in place of deposit in the mail; and/or
- to be served through Formal Service of Process (Proof of Service to follow)

to the parties or attorney(s) listed below at the address and/or facsimile number indicated below:

James B. Gibson, Chair Board of Clark County Commissioners 500 S. Grand Central Pkwy 6 th Floor Las Vegas, NV 89155 DistrictG@clarkcountynv.gov	Yolanda T. King, County Manager Clark County 500 S. Grand Central Parkway 6 th Floor Las Vegas, NV 89155
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/s/ Madelyn Carnate-Peralta
An Employee of Hutchison & Steffen, PLLC