

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

**ELIZABETH EMMENS,
CORY AHRENS, HEATHER
NORDQUIST, CASA DEL
OSO SF, LLC, CORY SHIRK,
DIANA OLIVAR, LUNA
VISTA, LLC, EL SAGRADO, LLC
and CHARLES “TREY”
CORKERN, III**

No. CIV 23-0588 JB/JFR

Plaintiffs

vs.

**THE SANTA FE COUNTY BOARD OF
COMMISSIONERS and PENNY ELLIS
GREEN, in her official capacity as the Santa Fe
County Growth Management Director**

Defendants

PLAINTIFFS’ MOTION FOR PRELIMINARY INJUNCTION

NOW COME Plaintiffs who hereby move pursuant to Federal Rule of Civil Procedure 65 for a preliminary injunction prohibiting Defendants from enforcing Santa Fe County’s Short Term Rental (“STR”) Ordinance until this Honorable Court has an opportunity to issue a final judgment on the merits.

INTRODUCTION

Plaintiffs make this motion for a preliminary injunction on the grounds that (1) Plaintiffs have demonstrated a likelihood of succeeding on the merits of their claims that the County’s STR Ordinance and the manner in which it is enforced: (a) violates the dormant Commerce

Clause; (b) re-classifies STRs as commercial as opposed to residential contrary to New Mexico state law; (c) violates the Plaintiffs' rights under the Fourth Amendment; d) violates Plaintiffs' rights under the First Amendment; (e) has no rational basis or connection to its stated purpose or intent; (f) exceeds the limited authority granted to the County from state statutes and Dillon's Rule; and (g) denies STR owners, particularly non-owner occupied STR owners, equal protection; (2) Plaintiffs are likely to suffer irreparable harm in the absence of the relief requested; (3) the harm Plaintiffs are likely to suffer if the preliminary injunction is denied outweighs the harm that Defendants are likely to suffer as a result of the preliminary injunction; and (4) the public interest favors issuing the preliminary injunction. Furthermore, as discussed below, Defendants have made the status quo a moving target as it is almost constantly changing.

The Plaintiffs in this case are representative of all STR owners and operators in the County, and Plaintiffs have each purchased, developed, furnished, launched, and own properties that they intended to rent when they purchased their properties prior to the passage of the STR Ordinance, and have been renting as STRs in Santa Fe County. Moreover, each has been affected by the STR Ordinance, and the codes and other ordinances that it incorporates or is incorporated into, in ways which have violated their protected rights as private property owners and as citizens, caused them harm financially, and subjected them to various forms of harassment and unequal treatment by the County and its officers through its application process, and the unequal imposition of the Sustainable Land Development Code (the "SLDC").

The issues that are of primary concern to Plaintiffs include the following: 1) how the STR Ordinance and its permitting and application process has been tied to the SLDC, and how the County attempts to enforce the SLDC in an unequal manner, specifically targeting STR owners in an illegal, unconstitutional, retroactive, and intimidating manner, that has absolutely no

relation to the regulation of STRs or the STR Ordinance's stated findings and rational basis; 2) classifying residential STR dwellings as commercial and as businesses where commercial use occurs, as opposed to residential properties where purely residential use occurs, the ripple effects of which do not seem to have been considered by the County; 3) the moratorium on the granting of permits to non-owner occupied STRs and how the County treats similarly situated homes within the same zoning districts in different ways; and 4) various provisions in the Ordinance that overly, unnecessarily, and unconstitutionally intrude on the rights of private property owners in the County, including Plaintiffs. It is important to note and to understand that Plaintiffs are not arguing that STRs cannot be regulated, but rather arguing that if STRs are to be regulated, it must be done reasonably, lawfully, in a manner that does not employ unconstitutional governmental actions and tactics, and in a manner that does not overly burden or interfere with the rights of individuals and private property ownership.

Defendants passed the STR ordinance by amending the Business Registration and Licensing Ordinance (the "BRLO"), thereby making STR's subject to it as a category of business; and embedded the SLDC within it through a single mention in Section 7.1 of the ordinance. The SLDC is a massive 700-plus page law passed by the County in 2016 that governs all aspects of land use, permitting, and development within the County. By doing so, the County effectively incorporated the massive SLDC into the 10 page STR Ordinance. Furthermore, the SLDC is made subject to the New Mexico Existing Building Code (the "EBC"), among 16 other state codes and laws. To fully comprehend the full weight and power of the STR Ordinance and what STR owners are subject to once they apply for a permit or license, one must follow the trail of ordinances and codes that it incorporates and is incorporated into. The County's reasons, findings, concerns, intents, and purposes stated within the STR Ordinance as its attempt to

declare its rational basis include parking, traffic, trash, affordable housing, neighborhood density and characteristics, unfamiliarity with local law, noise, and similar type reasoning.

Defendants, through their amending of the BRLO with the STR Ordinance, are re-classifying STR's as commercial, rather than residential property which New Mexico case law does not support. Furthermore, the County does not have Home Rule status and, therefore, has no authority to make such a re-classification or to impose differential restrictions on how private property owners can use their property in a manner that is not uniform with other similarly situated classes or kinds of buildings within the same zoning district. The County is, however, treating homes that short term rent and homes that long term rent differently; and treating non-owner occupied and owner occupied homes that short term rent differently. The Ordinance places a moratorium on permits for non-owner occupied STRs which the County has already extended once, with no assurance it won't do so again with impunity and in perpetuity. Furthermore, the County is now attempting to treat non-owner occupied STRs differently depending upon their location within a census-designated place ("CDP") through its most recent proposed amendment to the STR ordinance. There are multiple CDPs within each County district.

Recent events have made the status quo a moving target. Following the Board of County Commissioners' lead, the County Assessor has proposed re-classifying STRs as commercial properties rather than residential and taxing them as such, thereby immediately reassessing those properties to current market value and raising the property taxes on these homes some 30% with no annual cap on tax increases. Notices and questionnaires have been sent out by the Assessor to all STR owners in both the City and County of Santa Fe requiring them to be answered and returned by late February. The proposed tax change would affect 100% of the non-owner

occupied STRs in both the city and the county and many of the owner occupied STRs as well. Such a re-classification and sudden property tax increase would not only put STR owners out of business, but could also result in people losing their homes and properties. Notices of Violation are suddenly being mailed by the County to STR owners, as well as some property owners who rent their homes for 30 days or more, who are given 14 days from the date of the notices to comply. These notices are being sent from San Francisco by one of the County's contracted firms and many of the recipients, including Plaintiffs Elizabeth Emmens and Cory Ahrens, did not receive them until 11 days after the date of the notices, giving them only 3 days to comply. These alleged violations carry heavy fines and potential criminal liability, and compliance generally subjects the STR owners to county harassment through its application of the SLDC. Finally, Defendants have proposed and published amendments to the STR Ordinance that will be voted on imminently and will undoubtedly pass. The amendments include limiting the total number of non-owner occupied licenses a single licensee, registrant, or owner can hold; limiting the number of non-owner occupied STRs allowed in certain CDPs to a percentage of total housing stock; and limit the total occupancy in any STR to 10 persons. Interestingly, the proposed amendments add a severability clause to the STR Ordinance.

Furthermore, Defendant Penny Ellis-Greene recently testified before Defendant Board of County Commissioners, that the Land Use Department is continually changing how it enforces the Ordinance and particularly its SLDC requirements regarding outbuildings used as STRs. She further testified that Land Use was "looking at" other changes to the registration and licensing process, further resulting in STR owners being unsure of what the requirements and processes will be from one day to the next.

ARGUMENT

Plaintiffs request for a preliminary injunction should be granted. A temporary restraining order or a preliminary injunction is an equitable remedy available within the discretion of the trial court. *Lundgrin v. Claytor*, 619 F.2d 61, 63 (10th Cir. 1980). While it is regarded as an extraordinary remedy, an injunction nonetheless should issue when the right to relief is “clear and unequivocal.” *Greater Yellowstone Coalition v. Flowers*, 321 F.3d 1250, 1256 (10th Cir. 2003). The burden is on the movant to make a prima facie showing of a probable right to the ultimate relief and a probable danger of injury if the motion is denied. *Lundgrin*, 619 F.2d at 63. Whether Plaintiffs are entitled to preliminary injunctive relief requires a balanced consideration of four factors: “(1) a likelihood of success on the merits; (2) a likelihood that movant will suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in movant’s favor; and (4) that the injunction is in the public interest.” *RoDa Drilling Co., et al. v. Siegal, et al.*, 552 F.3d 1203, 1208 (10th Cir. 2009) (citing *Winter v. Nat’l Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)); see also Fed. R. Civ. P. 65(b). Of the above factors, “[t]he likelihood-of-success and irreparable-harm factors are ‘the most critical’ in the analysis.” *Diamond Care Vida Encantada, LLC v. 2301 Collins Dr. NM, LLC*, No. CIV 23-0054 JB/GBW, 2023 U.S. Dist. LEXIS 15911, at *20 (D.N.M. Jan. 31, 2023) (citing *Nken v. Holder*, 556 U.S. 418, 434 (2009)). A party seeking a preliminary injunction that alters the status quo must make a strong showing both with regard to the likelihood of success on the merits and with regard to the balance of harms. *O Centro Espirita Beneficiente Uniao Do Vedgetal v. Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004).

Because the County is almost constantly changing, amending, and extending the STR Ordinance, how it is enforced, and its processes and requirements, STR owners cannot ever be

certain where they stand and what the future may hold for their ability to short term rent their properties. The status quo is a moving target in this case, and Plaintiffs' should not be subject to the higher burden required for such a disfavored preliminary injunction; but even if they are, for the reasons set forth in the Arguments below, Plaintiffs satisfy each of the above elements, thus warranting the imposition of immediate injunctive relief.

1. Likelihood of Success on the Merits

A. *The STR Ordinance Violates the Dormant Commerce Clause*

Section 6.1.4 of the STR Ordinance effectively placed a moratorium for a Non-Owner Occupied STR to obtain the required Business License for a period of one year after the effective date of the Ordinance. The County has already extended the moratorium once, with no assurance it won't do so again with impunity and in perpetuity. Furthermore, the County is now attempting to treat non-owner occupied STRs differently depending upon their location within a census-designated place ("CDP") through its most recent proposed amendment to the STR ordinance which will be voted on imminently. This is an additional attempt to limit non-owner occupied STRs. The proposed limits have been expressed as 10% of the total dwellings within a CDP, though some members of the Board are arguing for 5%, or for leaving it up to the individual board member representing that particular district. There are multiple CDPs within each County district. This is an example of the status quo being ever changing and STR owners not being able to know whether or not they will be allowed to continue in the near future. It further creates uncertainty for any prospective out of state purchaser who is planning to allay the cost of his purchase by short term renting as a non-owner occupied STR. The imposition of a preliminary injunction would put a halt to this kind of insecurity and uncertainty pending the outcome of the case.

The Board's, and Penny Ellis Green's, stated reasons for the moratorium is to "allow time for the Board to study and analyze relevant issues related to Non-Owner Occupied STRs", including affordable housing supply, conflicts with primary residential uses in traditional and historic communities, and non-compliance and enforcement issues. The moratorium on granting Business Licenses to non-owner occupied STRs, which can be extended at will, and the proposed limitations on non-owner occupied STRs within a CDP, interferes with interstate commerce and violates the dormant Commerce Clause on its face. Not only does the Ordinance treat owner occupied and non-owner occupied STRs differently, but it treats in state potential STR owners (those more likely to be owner occupied) differently from out of state STR owners.

The Ordinance, by placing a moratorium on non-owner occupied STRs interferes with interstate commerce on its face and should be scrutinized strictly. Defendants have cited *Rosenblatt v. City of Santa Monica*, 940 F.3d 439 (9th Cir. 2019) which ruled that a complete ban on non-resident STRs did not violate the dormant Commerce Clause as long as it effectuates a *legitimate* local public interest. The 5th Circuit, in a more recent case, came to a different conclusion. In *Hignell-Stark v. City of New Orleans*, 46 F.4th 317, 321 (5th Cir. 2022), the 5th Circuit considered a substantially similar STR Ordinance wherein the plaintiffs made a dormant commerce clause challenge to the ordinance's provision, which stated that no person could obtain an STR license unless the property was also the owner's primary residence. The court stated that "the homestead requirement discriminates on its face against out of state property owners. The City doesn't just make it more difficult for them to compete in the market for STRs ... it forbids them from participating all together". *Id.* at 326. The court held that because the homestead requirement facially discriminated against interstate commerce, it was thus *per se* invalid unless the defendant could prove that it "advances a legitimate local purpose that cannot

be adequately served by reasonable non-discriminatory alternatives.” *Id.* at 328. The court further determined that the defendant’s proffered interests, preventing nuisances, promoting affordable housing, and protecting the character of neighborhoods, could be adequately served by other non-discriminatory alternatives. *Id.* at 329. The defendant in *Hignell-Stark* argued, as have Defendants, that the requirement that the owner of the STR must live in the residence, discriminated against in-state owners as well as out of state owners and treats them the same. *Id.* at 327. The court held that even if the City’s justifications are true, the “purpose of, or justification for, a law has no bearing on whether it is facially discriminatory.” *Id.* The court further held that if the residency requirement also discriminates against in-state owners as well as out of state owners, “none of that matters because local ordinances that discriminate against interstate commerce are not valid simply because they also discriminate against intrastate commerce.” *Id.* Continuing, the court stated that regardless of the reasoning behind these motivations, “the STR Ordinance indisputably discriminates against out of state and out of city residents for the benefit of in city residents on its face. *Id.* at 326.

Similar to the New Orleans ordinance in *Hignell-Stark*, the County’s STR Ordinance discriminates against interstate commerce on its face. Therefore, its differential treatment and proposed differential treatment of non-owner occupied STRs is *per se* invalid unless Defendants can prove that it advances a legitimate local purpose that cannot be adequately served by reasonable non-discriminatory alternatives. Defendants stated findings and reasons for enacting the Ordinance and including the moratorium and treating non-owner occupied STRs differently are strikingly similar to both cities reasons in *Hignell-Stark* and *Rosenblatt*; i.e., in general, preventing nuisances, affordable housing, protecting neighborhoods, as well as parking, trash, and additional time to study the impact of non-owner STRs (though the ordinance was passed by

the Board some 9 months before the moratorium took effect). Their other stated reasons, to “allow time for the Board to study and analyze relevant issues related to Non-Owner Occupied STRs”, including affordable housing supply, conflicts with primary residential uses in traditional and historic communities, and non-compliance and enforcement issues, have already been debunked by the County’s own impact study and affordable housing study.

Even if there was a rational basis for these findings and reasons, which Plaintiffs argue there is not and that they do not rationally serve a *legitimate* local purpose, they can be adequately served by reasonable non-discriminatory alternatives, and in most cases, already are. As in *Hignell-Stark*, where the court found that the homestead requirement was unconstitutional under the dormant Commerce Clause, because there were a myriad of non-discriminatory alternatives that would adequately serve the City’s purpose, Defendants cannot prove that their stated reasons and findings could be served by other non-discriminatory alternatives either. Defendants could have also employed a myriad of alternatives such that there is no need to list them out in this Response. As the Fifth Circuit stated, “the City has many options to address its stated concerns about STRs, but it chose one the Constitution forbids.” *Id.* at 329. Furthermore, Santa Fe County is very different from Santa Monica and New Orleans, which are both large, compact cities. Santa Fe County is quite large in area, primarily rural, interspersed with small towns and villages. The local public interests that Defendants claim make more sense in Santa Monica and New Orleans, but they are not *legitimate* in a rural area like Santa Fe County.

Defendants may argue that, unlike the ordinance in *Hignell-Stark*, the County’s ordinance does not discriminate against all out of state owners, but only those who purchased their properties after the moratorium took effect. Those that purchased beforehand can still rent their properties as STRs. While this may be true, the ordinance still discriminates against potential out

of state purchasers and those who purchased after the moratorium took effect, from being able to rent their properties as non-owner occupied STRs. Those that purchased before the moratorium took effect are already renting their properties. The ordinance still has the effect of discriminating against potential out of state purchasers, including the out of state Plaintiffs, from doing so. Furthermore, the proposed amendment to the STR Ordinance could potentially effectively end the temporary moratorium and replace it with a more permanent limitation on non-owner occupied STRs within the County which would have the same effect. For the reasons stated above, Plaintiffs are likely to prevail on the merits of their dormant Commerce Clause claim.

B. The STR Ordinance Re-classifies STRs as Commercial as Opposed to Residential Contrary to New Mexico State Law

Treating the actual properties or dwellings that are rented as STRs as businesses where business activity occurs and regulating them as such is contrary to New Mexico law and constitutes unequal treatment of similarly situated residential properties in the County, denying STR owners equal protection. There is a nuance to this argument that is perhaps lost on Defendants and may require a further explanation. An individual or entity may have an “STR business” wherein, for example, they own and manage several STRs in the County with a centralized and separate office in the City of Santa Fe or Albuquerque, where they manage their properties. But there is no business activity or use occurring in the actual residential dwellings and homes that they own and rent. The *use* of those dwellings and homes and the activity that occurs in them remains purely residential. This is no different than if the individual or entity owned several long term rentals in the County and managed them from a separate office. In the context of modern property use, duration, whether of ownership or occupancy, is not a useful measure of whether property is being used in a residential way. Short term renters use property

in the usual and ordinary way: as a place of abode. The very purpose of a residential rental is to provide habitation (i. e., residence) for a specified duration. A residential renter's uses of a property – sleeping, eating, cooking, bathing, and socializing with other residents, is indistinguishable from an owner's use or that of a long term renter.

Defendants have cited the unreported case of *Tiller Design v. New Mexico Dept. of Taxation and Revenue*, a tax case focused on gross receipts tax, for the bold proposition that New Mexico law recognizes STRs as similar to hotels and other types of lodging businesses and thus they can be taxed and regulated as such. Plaintiffs are concerned with more than taxation, however, but, more importantly, while not denying that STRs can be regulated lawfully, whether STRs can be treated and regulated as a business similar to a hotel under New Mexico law. Furthermore, as an unreported case, *Tiller Design* does not carry much precedential weight.

Plaintiffs find the reported New Mexico appellate case of *Estates at Desert Ridge Trails Homeowners' Association v. Vazquez*, 300 P.3d 736 (Ct. App. 2013) more convincing and carrying more precedential weight than Defendant's unreported tax case. In *Estates*, the plaintiff/appellee HOA sought to enjoin the defendant from renting his home on a short term basis because, plaintiff argued, it violated the limiting language in the restrictive covenants that lots be used solely for "single-family residential purposes" and because of the HOA's rules and regulations barring certain business activities within the subdivision. *Id.* at 738. The HOA argued that the use of the home as a short term rental was inconsistent with the "single-family residential purposes" limitation because the nature of the rentals makes them more akin to business or commercial uses such as a hotel or lodging house. *Id.* at 740. The restrictive covenants of an HOA can be easily analogized to a county's ordinance that places restrictions on

private property ownership throughout the County. The fact that the County is a governmental entity does not alter the effect or applicability of the holding in this case.

The court stated that the HOA “does not argue that rentals in general are prohibited. Rather the HOA’s argument necessarily depends on drawing a distinction between short-term and long-term rentals, which assumes that while the latter are a permissible residential use, the former, by the nature of their duration, are transformed into a business or commercial use.” *Id.* at 740-741. The court disagreed with the HOA’s argument and the distinction between short term and long term rentals which the HOA implied, holding that “an economic benefit flowing to defendant from the rental of his home, whether long – or short term, does not by itself constitute an impermissible business or commercial activity. While the owner may be receiving rental income, the use of the property is unquestionably residential. The fact that the owner receives rental income is not, in any way, inconsistent with the property being used as a residence.” *Id.* at 742. The court further held that renting a property for residential purposes, whether short term or long term does not constitute a business or commercial activity. Either way the property is rented to people who use it for sleeping, eating, and other common residential purposes. *Id.* The owner of an STR, or several STRs, may be involved in an economic endeavor, but “the rental of a house or abode” to live in, “even for a short term is significantly different from using the property to conduct a business or commercial activity on the premises.” *Id.* at 741.

Furthermore, the ruling in *Estates* is in line with the vast majority of state courts in other jurisdictions. See *Vera Lee Angel Revocable Trust v. Jim O’Bryant & Kay O’Bryant Joint Revocable Trust*, 2018 Ark. 38, 7, 537 SW3d 254, 258 (2018), holding that “renting a property does not in any way change the essential character of the house as a residence.” See also *Keen v. City of Manhattan Beach*, 77 Cal App 5th 142, 149 (2002), holding “a residential building is used

for human habitation without regard to length of occupancy.” That the use may be for a shorter duration does not change its residential character. Use, not duration, is (and should be) determinative of whether a particular land use is consistent with residence purposes. "Residential use,' ... has been consistently interpreted" to mean "that the *use* of the property is for living purposes, or a dwelling, or a place of abode." *Lowden v Bosley*, 395 Md 58, 68; 909 A2d 261, 267 (2006) (emphasis added); *see also Tarr v Timberwood Park Owners Ass'n, Inc*, 556 SW3d 274, 289 (Tex 2018) ("[R]esidential purpose refers to the way the property is used.").

Nor does the fact that short term renters pay to use the property make a difference. For one thing, the possibility of profit has no relationship to the length of a lease. If that feature alone sufficed to make a use non-residential, then all leasing would be non-residential, regardless of duration. And homeowners, like renters, must pay to use the property too. *See Lowden*, 395 Md at 68-69 ("In addition to conventional rentals, a commercial benefit may be realized from residential property by persons or entities holding ground rents, mortgages, or deeds of trust.").¹

The County's STR Ordinance was included within the Business Registration and Licensing Ordinance by amendment and regulates STRs through its application process for either a Business Registration or a Business License, depending upon if the rental is owner occupied or not. The amended ordinance subjects STR owners to inspections and investigations of the properties on which the "licensed activity" will take place, and may result in the applicant having

¹ *See also Lake Serene Prop Owners Ass'n Inc. v Esplin*, 334 So 3d 1139 (Miss 2022); *Elk Point Country Club Homeowners' Ass'n, Inc v KJ Brown, LLC*, 515 P3d 837 (Nev 2022); *JBrice Holdings, LLC v Wilcrest Walk Townhomes Ass'n, Inc*, 644 SW3d 179 (Tex 2022); *Wilson v Maynard*, 961NW2d596 (SD 2021); *Craig Tracts Homeowners' Ass'n, Inc v Brown Drake, LLC*, 477 P3d 283 (Mont 2020); *Forshee v Neuschwander*, 914 NW2d 643 (Wisc 2018); *Tarr v Timberwood Park Owners Ass'n, Inc*, 556 SW3d 274 (Tex 2018); *Vera Lee Angel Revocable Tr v Jim O'Bryant & Kay O'Bryant joint Revocable Tr*, 537 SW3d 254 (Ark 2018); *Wilkinson v Chiwawa Communities Ass'n*, 327 P3d 614 (Wash 2014); *Scottv Walker*, 645 SE2d 278 (Va2007); *Lowden v Bosley*, 909 A2d 261 (Md 2006); *Pinehaven Plan Bd v Brooks*, 70 P3d 664 (Idaho 2003); *Yogman v Parrott*, 937 P2d 1019 (Or1997). *Houston v Wilson Mesa Ranch Homeowners Ass'n*, 360 P3d 255, 259 (Col Ct App, 2015); *Santa Monica Beach Property Owners Ass'n v Acord*, 219 So 3d 111, 115 (Fla Dist Ct App, 2017); *Applegate v Colucci*, 908 NE2d 1214, 1220 (Ind Ct App, 2009); *Mullin v Silvercreek Condo Owner's Ass'n*, 195 SW3d 484, 490 (Mo Ct App, 2006)"; *Russell v Donaldson*, 731 SE2d 535 (NC Ct App, 2012).

to obtain a Development Permit subject to the provisions of the SLDC, and further opens the door to most of the egregious, illegal, unequal, discriminatory, and unconstitutional behavior of the County that Plaintiffs allege and describe. Treating and regulating STRs as a business where the “licensed activity” that is taking place is purely sleeping, cooking, eating ... in other words, living; i.e. residential purposes, where no money is changing hands and no business or commercial activity is taking place, is contrary to the holdings made by the Court of Appeals of New Mexico in *Estates at Desert Ridge Trails Homeowners’ Association v. Vazquez*. New Mexico law draws no distinction between a short or long term rental that is purely for residential purposes, but the County’s STR Ordinance does just that and treats otherwise similarly situated properties differently and unequally, thereby denying STR owners equal protection.

The question presented also has very important implications for both the stability of property rights and the fundamental right to free use of one's land. For many, a home is the biggest financial investment they will ever make. And the ability to host others and defray the expenses of that purchase can be an essential aspect of that decision. Plaintiffs, and other owners in the County, who have mortgages on their private dwellings that were acquired as residential mortgages, risk the holders of their notes defaulting them or drastically altering the terms thereof if the mortgaged properties are suddenly classified as commercial and not residential. Furthermore, the ripple effects of residential private property being suddenly classified as commercial include creating costly and burdensome changes to property and liability insurance, property taxes, property values, and even title complications. These burdensome and disastrous ripple effects are already beginning to occur. Following the County’s lead, the Santa Fe County Assessor has proposed re-classifying STRs as commercial properties rather than residential and taxing them as such, thereby immediately reassessing those properties to current market value

and raising the property taxes on these homes some 30% with no annual cap on tax increases. Notices and questionnaires have been sent out by the Assessor to all STR owners in both the City and County of Santa Fe requiring them to be answered and returned by late February. The proposed tax change would affect 100% of the non-owner occupied STRs in both the city and the county, as well as many owner occupied STRs, and such a re-classification and sudden property tax increase would not only put STR owners out of business, but could result in people losing their homes and properties. Imagine the uncertainty of a home owner who, prior to purchasing their property, assessed its affordability by budgeting their residential mortgage payment, insurance, property taxes, and their ability to rent as an STR to defray some of the costs and yes, perhaps even make a profit, but now face uncertainty due their residential property being re-classified as commercial. The importance of this distinction of classifying STRs as commercial rather than residential and the disastrous affects that would result from it cannot be underestimated. Its ripple effects could potentially eradicate STRs from both the city and county, and result in people losing their homes and livelihoods. For the reasons discussed above, this re-classification is contrary to New Mexico law and Plaintiffs are likely to prevail on the merits of this claim.

C. The STR Ordinance, Through its Incorporation of the SLDC and the Manner in Which it is Enforced, Violates Plaintiffs' Rights Under the 4th Amendment

The Ordinance, its permitting and licensing procedures, its incorporation of the SLDC into each, and the manner and tactics employed by the County to enforce them, violates and has violated the Plaintiffs' and their guests' Fourth Amendment rights to be secure in their houses, papers, and effects from unreasonable searches and seizures. To fully comprehend the full weight and power of the STR Ordinance and what STR owners are subjected to once they apply for a permit or license, one must follow the trail of ordinances and codes that it incorporates and

is incorporated into, specifically, the SLDC. As stated above, the “licensed activity” taking place in these dwellings is purely residential, but by inappropriately and unlawfully having to apply for a Business Registration or License, STR owners, including Plaintiffs, are subject to surprise inspections without notice, enforcement officers trespassing on property without warrants when the owners are not at home, guests of the STR being harassed, frightened, and intimidated, and aerial surveillance of their homes and properties. These inspections are made for purposes that are unrelated to the County’s findings, reasons, and justifications for the STR Ordinance. They are made to find purported violations of the SLDC that other home based businesses in the County, long term renters, and other home owners, have not been subjected to, in order to force STR applicants into having to make expensive changes to their properties or disruptive variances in order to obtain a simple permit to rent their private property for residential purposes. These illegal inspections are used as a back door to harass STR owners through illegal applications of the SLDC.

The Board and Penny Ellis Green have weaponized the SLDC and set it loose on STRs in Santa Fe County. By defining STRs as performing a business or commercial use instead of a residential use, the Defendants have made STRs, particularly those STRs that are required to obtain a Business License; i.e., Non-Owner Occupied STRs, subject to the Business Registration and Licensing Ordinance; and, thereby, making Non-Owner Occupied STRs, and their owners, subject to inspections and investigations and potentially having to obtain a Development Permit subject to the provisions of the SLDC. The SLDC is a large and unwieldy instrument of some 700 pages. Defendants have used, and continue to use, the SLDC as a type of “backdoor” into the properties and lives of STR owners, with no rational basis or connection to their stated concerns of promoting the health and general welfare of the County (or their ten enumerated

findings). Neither does it have any rational basis or connection to their stated purposes and intent: to ensure the safety and welfare, protect peace and enjoyment of communities and neighborhoods; or protect water resources and the environment. That is because their stated concerns, purposes, and intent are a cynical and deceptive attempt to create what would appear like a rational basis to avoid having any court of competent jurisdiction, nullify their unlawful and unconstitutional ordinance. These concerns, purposes, and intents come straight out of the Host Compliance playbook.² The true purpose and intent of the Board and Penny Ellis Green in the passing of this ordinance and the weaponizing of the SLDC, is to make it so onerous and intimidating on STR owners trying to comply with the law and obtain the proper license or permit that they give up. That people from out of state cease buying their vacation homes that they also rent as Non-Owner Occupied STRs. Property owners in Santa Fe are scared to apply for their proper STR license or permit because of what they might be subjected to once they do. The true purpose and intent is to eradicate STRs from Santa Fe County.

The SLDC was updated in 2016 with the assistance and involvement of Penny Ellis Green. It has been enforced in egregious and unlawful ways that are the definition of tyrannical government overreach and it is laser focused on STRs and their owners. Once an owner applies for a Business License or Business Registration to operate an STR on their own property, they are vulnerable to intimidating “compliance officers”, wearing badges, trespassing on the owner’s property without notice, entering buildings without a warrant, being told that the owner’s ADU, that existed when the owner purchased the property, and then turned into a casita at great expense, is not in compliance and not a legal lot of record. Owners have been instructed to tear their casitas down, to pour concrete down shower drains, to remove driveways, give up water

² Host Compliance is purportedly a data crunching firm that works with municipalities and other governmental entities to, allegedly, collect data, and assist these entities in the formulation of ordinances to regulate STRs. Many ordinances around the country have strikingly similar concerns, purposes, and intents.

rights, and other egregious attacks on the owner's rights. Owners of STRs who have been besieged by the County wielding the SLDC as a weapon have been told to supply the County with the original development permits that they do not have due to the fact that they did not develop the property, but purchased it, as is, with casita, driveways, and water rights pre-existing. It is, in fact, the County, through the County Attorney, who is the custodian of public records, pursuant to Santa Fe County Resolution No. 2001-063. The County has been requiring STR owners charged with some alleged violation of the SLDC, who did not develop the properties, but purchased down the line of the chain of title, to provide the original development permits, for which the County, as legal custodian, has lost or misplaced. Furthermore, the County has been holding the present owners of these dwellings responsible for the actions or inactions of their predecessors in title and threatening them with potential criminal repercussions.

Furthermore, the Ordinance's requirement that STR owners notify their neighbors that they have a license for an STR and to give out private information, such as phone numbers has resulted in harassment by neighbors, including threats, trespass, and destruction of property. Even with their listings on AirBnb, VBRO, etc. their personal contact information is not released to guests until a few days in advance of their arrival. Guests communicate through a closed platform that does not allow outside of platform communications until after check in details are provided to the guest. Other home based business applicants in the County are not required to provide neighbors, who they may not know, like, or have issues with, their personal contact information. This requirement selectively targets STR owners, while other home based, or otherwise, businesses in the County are held to a different standard, thereby denying STR owners equal protection.

Interestingly, the County itself has not been adhering to the rules and regulations contained in the SLDC that incorporates the State's EBC. Section 4.2 of the STR Ordinance states that STRs are only allowed on property that is a Legal Lot of Record, and within a Dwelling legally recognized under the SLDC. Section 50.04 of the SLDC defines a "Dwelling" as "a structure ... that (1) has a bathroom and kitchen facilities permanently installed; and (2) is used or intended to be used by a person or persons for residential purposes." Section 7.2.7 of the SLDC adopts the New Mexico State Existing Buildings Code ("EBC"). Section 14.7.2.9, Chapter 1.b102(6) of the EBC states that "legal occupancy of any structure existing on the effective date of this Code (11/15/2016) shall be permitted to continue without change", regardless of whether or not a Building Permit or Land Development Permit was issued for the structure. Any structure that also meets the SLDC's definition for a "Dwelling" existing on 11/15/2016 shall also be permitted to be occupied and to continue without change. The County has failed to adhere to its own laws and is ignoring and contravening state law. For the reasons discussed above, Plaintiffs are likely to prevail on their claim that the STR Ordinance, through its incorporation of the SLDC and the manner in which it is enforced, violates Plaintiffs' rights under the 4th Amendment. A preliminary injunction would stop the illegal behavior discussed above pending the outcome of the case.

D. The STR Ordinance Violates Plaintiffs' Rights Under the 1st Amendment

The Ordinance violates the First Amendment because its arbitrary occupancy limits violate the Plaintiffs' rights to free association and assembly. The proposed amendment to the STR Ordinance purports to limit the total occupancy of any STR to 10 persons, regardless of the size of the home or number of bedrooms. Many of the out of state Plaintiffs use their properties that they rent as STRs as vacation homes as well. Presumably, the Ordinance's arbitrary

occupancy limits apply even in those times when Plaintiffs are occupying their properties. In these situations, how does the county determine who is in your home and when? How does a neighbor of a respective Plaintiff, determine whether Plaintiff is occupying his or her home and having a party or a wedding, or a family reunion or if the property is occupied by an STR guest? If the occupancy limits do not apply when the owner is occupying the home, are they now required to inform all of their neighbors and the County of their comings and goings, as well as all of their activities within their homes? If the occupancy limits do apply when a respective Plaintiff is occupying the home, then it violates that Plaintiff's First Amendment Rights. Much uncertainty exists as to whether and when the occupancy limits may apply and to whom. The Ordinance is, at the very least, unconstitutionally vague in that it is unclear whether a Plaintiff's First Amendment Rights might be violated, but the possibility is all too likely. For the reasons discussed above, Plaintiffs are likely to prevail on their claim that the arbitrary occupancy limits contained in, and the proposed amendment to, the STR Ordinance violates their rights under the 1st Amendment.

E. The STR Ordinance is not Supported by a Legitimate Rational Basis

The Board's stated reasons for regulating STRs is to "promote the health and general welfare of the County" and enumerate seven "findings" the vast majority of which it has not sought, and does not have, any data or information to support. Those seven findings are as follows: 1) STRs create more noise, traffic, trash, and offsite parking; 2) since their guests are visiting from elsewhere, they may not be familiar with the local law; 3) excessive occupancy poses risks to water resources, the environment, and septic systems; 4) chance of non-compliance with the fire code is high; 5) owner occupied STRs are less risky; 6) negatively impacting affordable housing; and 7) justifies the moratorium on non-owner occupied STRs

because it will avoid growth impact and temporarily stabilize local housing while the County investigates relevant issues related to non-owner occupied STRs. Defendants have cited case law standing for the proposition that reasons such as parking, traffic, trash, affordable housing, neighborhood density and characteristics, unfamiliarity with local law, and similar type reasoning account for a legitimate rational basis for the regulation of STRs regardless of whether the government authority knows these reasons to be true based on data or studies and whether or not the government authority believes it themselves.

Santa Fe County is large and primarily rural and, as stated in the Amended Complaint, STRs account for 1.1% of the dwellings in the County. There is no data, absolutely nothing to support how STRs negatively affect the concerns enumerated by the County and, considering the size of the County, its mostly rural make up, and the numbers of STRs in the County, most, if not all of them, don't make any sense. They are regurgitated findings and reasons to support a rational basis because they have worked before to support similar laws in cities and metropolitan areas where these types of concerns might be more legitimate. They make very little sense in Santa Fe County. Moreover, there are already existing laws and ordinances dealing with nuisances like noise, traffic and parking.

There is, however, data and studies that show quite the opposite. Similar to almost every municipality and county throughout the country that has enacted STR regulations; the County maintains that one its major reasons for enacting the STR Ordinance is that STRs have a detrimental effect on affordable housing within the County. The County has a total area of 1,911 square miles which is larger than the State of Rhode Island. As of the 2020 census, the population was 154,823 and contained 32,400 dwellings. As of 2023, the entire County contains 358 STRs, which is about 1.1% of all of the dwellings within 1,911 square miles. The average

home market value in the County is approximately \$700,000.00, and only two of the estimated 358 STRs in the County could qualify to be considered affordable housing. This major reason for enacting the STR Ordinance is contradicted by the County's own "Affordable Housing Plan" prepared by Sites Southwest, dated July 25, 2023, and adopted by County Resolution 2023-083 on the same date, some 10 months after the STR Ordinance was passed. Sites Southwest was contracted by the County to study the effect of non-owner occupied STRs on affordable housing within the County. This comprehensive Affordable Housing Plan does not identify that STRs have any negative impact on the supply of affordable housing in the County. In fact, the report makes no mention of STRs at all. The major impediment identified in the plan to the development of affordable housing in the County are the restrictive density, building height, and approval processes and requirements contained in the SLDC. According to the plan, with the adoption of the 2016 SLDC, the number of new houses built in the County plummeted due to the new land use regulations. The Affordable Housing Plan further states that "implementation of the SLDC regulations appears to increase development cost, discourage unique or creative designs, increase project uncertainty, extend the length of review and approval times, and may limit or prohibit some affordable housing strategies (such as those receiving financing affordable housing developments with funding sources that require alternative design criteria). Together, these regulatory challenges are seen as barriers that contribute to the housing supply shortage and result in less affordable housing options for Santa Fe County residents." The claim that STRs negatively impact the supply of affordable housing is an unsubstantiated fabrication.

Can stated reasons, findings, and justifications be a rational basis for a governmental body that can pass laws having drastic effects on its citizens and residents if those reasons, findings, and justifications are illegitimate and untrue, and the elected and unelected officials

who pass, enact, and enforce such laws cynically know they are illegitimate and untrue? STR owners, including Plaintiffs are being denied equal protection. Other home owners in the County that may rent long term, live permanently in their homes, or have other home based businesses are similarly situated, but the County unconstitutionally discriminates against STR owners because there is no evidence that STRs cause excessive traffic, noise, parking, or any of the other findings enumerated by the County. Plaintiffs contend that a legislative body that can pass laws that can have drastic effects on its citizens is not permitted to pass unconstitutional, unlawful, and harmful laws and escape scrutiny from the courts by cynically inventing reasons, findings, and concerns, so that they will appear to have some superficial rational basis for implementing laws that infringe on the rights of its citizens; all the while hiding from those citizens, and the courts, its true irrational basis. For the reasons discussed above, Plaintiffs are likely to prevail on their claim that the STR Ordinance is not supported by a legitimate rational basis.

F. The STR Ordinance Exceeds the Limited Authority Granted to the County from State Statutes and Dillon's Rule

The County has not been granted Home Rule status from the State of New Mexico and, therefore, do not have powers that are inconsistent with statutory or constitutional limitations placed on counties. Santa Fe County's authority is derived from Dillon's Rule; i.e., they are governed under general law, and are limited to the powers that have been explicitly defined by the New Mexico constitution and state statute. The STR Ordinance and the SLDC purport to be land use regulations. In effect, the terms "land use" and "zoning" are used interchangeably by the county. New Mexico Statute § 3-21-1 (2021), states that, "[f]or the purpose of promoting health, safety, morals or the general welfare, a county ... is a zoning authority and may regulate and restrict within its jurisdiction the:

- (1) height, number of stories and size of buildings and other structures;

- (2) percentage of a lot that may be occupied;
- (3) size of yards, courts and other open spaces;
- (4) density of population; and
- (5) location and use of buildings, structures and land for trade, industry, residence or other purposes.”

The statute further states that “the county zoning authority may:

- (1) divide the territory under its jurisdiction into districts of such number, shape, area and Form as is necessary to carry out the purposes of Sections 3-21-1 through 3-21-14; and
- (2) regulate or restrict the erection, construction, reconstruction, alteration, repair or use of buildings, structures or land in each district. All such regulations shall be uniform for each class or kind of buildings within each district, but regulation in one district may differ from regulation in another district.”

If zoning and land use regulation are the same, then, pursuant to the state statute quoted above, the county does not have the authority to apply control and abatement of “nuisances” such as noise, trash, parking on public streets, water use, etc.; nor should they be permitted to impose standards to regulate how or when a property owner may choose to rent their property. The use of the actual dwellings rented as STRs remains residential. The STR Ordinance is a particular use restriction on selected residential uses that are otherwise previously legally established under the County Land Use Code and where these uses have been constructed, inspected, and have been issued a lawful "certificate of occupancy" to operate as residential uses. The ability of a residential property owner to live in and/or to rent a residential unit is legally permitted by right.

Imposition of occupancy, noise, trash, parking on public streets, and water use restrictions is outside the scope of “Land Use” regulations. In addition, the imposition of

different standards on similarly situated residential uses within a zoning district is strictly prohibited by Section 3.21.1.B.(2). The STR Ordinance purports to be a land use regulation but in fact it is a special licensing and restrictions rule that does not run with the land as most other "land use" approvals or restrictions do, and imposes restrictions on the use and enjoyment of privately owned residential properties that are unique and different from other similarly situated residential developed properties within zoning districts where these same residential uses are permitted. The county is treating short-term and long-term housing rentals differently when they are the same; and treating non-owner occupied and owner occupied properties differently. This differential treatment is in conflict with Section 3.21.1.B.(2). Furthermore, it is important to note that the State of New Mexico has not given Santa Fe County the authority to regulate building codes. Santa Fe County does not have a building code department. Authority for building codes resides at the State level. Without Home Rule, the county has no authority to enact ordinances and regulations that conflict with State law. The County is overreaching its authority by violating the state statute noted above.

Finally, in the County's Code of Regulations, Chapter XV Land Usage, the SLDC is a land use *regulation*. The state code has a chapter for zoning and there is a chapter within the County's SLDC for zoning. The State of New Mexico gives the county limited authority to enact zoning and land use regulations and it is highly questionable that the county has the authority to regulate STRs under Land Use and the SLDC. The county does not have the authority to regulate owner occupied STRs differently from non-owner occupied; nor does the county have the authority to treat long term rentals differently from short term rentals, or to regulate how many occupants homeowners/STR owners can have, etc. Adding all of the above to the county's choice to "not honor" the Existing Building Code that is incorporated into the SLDC, as some

STR owners have been told, and to not honor the Custodian of Record ordinance, demonstrates a rogue pattern of abuse of power, governmental overreach and potentially illegal conduct.

New Mexico Statute § 3-21-5, states, “[t]he regulations and restrictions of the county ... zoning authority are to be in accordance with a comprehensive plan and be designed to:

- (1) lessen congestion in the streets and public ways;
- (2) secure safety from fire, flood waters, panic and other dangers;
- (3) promote health and general welfare;
- (4) provide adequate light and air;
- (5) prevent the overcrowding of land;
- (6) avoid undue concentration of population;
- (7) facilitate adequate provision for transportation, water, sewerage, schools, parks and other public requirements; and
- (8) control and abate the unsightly use of buildings or land.”³

The County’s STR Ordinance was not enacted in accordance with any verbal, written, or graphic statement of the physical and human resources of the community, the goals sought by the community, plans for the mobilization of the resources to achieve the goals, and means for implementing the plan. In fact, the STR Ordinance was enacted with no data or plan whatsoever to support its stated findings and purposes. For the reasons stated above, Plaintiffs are likely to prevail on their claim that the STR Ordinance exceeds the limited authority granted to the County from State Statutes and Dillon’s Rule.

G. The STR Ordinance Denies STR Owners Equal Protection

³ See also, *Board of Cty. Com’rs v. City of Las Vegas*, 95 N.M. 387 (N.M. 1980), discussing the necessity and requirement that a zoning authority adopt regulations and restrictions in accordance with a comprehensive plan, and voiding such a county regulation that was enacted without one.

An equal protection claim exists within each of the claims discussed above. In various ways discussed within the claims above, the County is treating all STR Owners, and specifically non-owner occupied STR owners, differently from other similarly situated property owners in the County. The STR Ordinance and the ordinances, laws, and codes it incorporates or is incorporated into, treats STRs differently from other home based businesses, long term rentals, and other residential properties. It treats owner-occupied STRs differently from non-owner occupied STRs. The County employs this differential treatment without having a legitimate rational basis for doing so. For these reasons and the reasons discussed in each of the claims above, Plaintiffs are likely to prevail on their claim that the STR Ordinance denies STR owners the equal protection guaranteed by the 14th Amendment.

2. Plaintiffs are Likely to Suffer Irreparable Harm in the Absence of Preliminary Injunctive Relief

Absent the relief requested, Plaintiffs, who are representative of all STR owners in the County, are likely to suffer irreparable harm in various ways. The STR Ordinance and the County's recent enforcement actions are depriving and will deprive Plaintiffs and other STR owners in the County, of income and the right to use their properties to their fullest benefit, and subject them to potential burdensome fines and potential criminal liability. The County, through its Code Enforcement Officer, Rick Lovato, recently mailed Notices of Violation threatening "further legal action and penalties" to STR owners, including Plaintiffs, Elizabeth Emmens and Cory Ahrens, that he claims are not in compliance with the ordinance. These alleged violations carry burdensome fines and potential criminal liability. Some property owners who rent their properties for a minimum stay of 30 days also received notices even though they are not classified as STRs. The notice further indicates that the County will inform rental platforms, such

as Airbnb and VRBO, that recipient properties are not in compliance, likely resulting in the platforms removing alleged non-compliant properties, further depriving STR owners of income.

To comply with the notices, STR owners are told to apply for their permits or licenses within 14 days. Defendants have argued that under the STR Ordinance, all an owner needs to do to continue renting their STR is to simply apply for a Business Registration or License. This wildly oversimplified statement fails to take into account the various other laws, codes and ordinances that are incorporated into the STR Ordinance, particularly the SLDC, and the harassment, and illegal and unconstitutional tactics and behavior the County employs once that application is made. Many STR owners, including some of the Plaintiffs, are and have been afraid to apply for their registrations and licenses because it exposes them to illegal and retroactive SLDC enforcement. STR owners, including many of the Plaintiffs, once they have made their applications, are subjected to surprise inspections without notice, enforcement officers trespassing on property without warrants when the owners are not at home, guests of the STR being harassed, frightened, and intimidated, and aerial surveillance of their homes and properties. These inspections are made for purposes that are unrelated to the County's findings, reasons, and justifications for the STR Ordinance. They are made to find purported violations of the SLDC that other home based businesses in the County, long term renters, and other residential properties have not been subjected to, in order to force STR applicants into having to make expensive changes to their properties or disruptive variances in order to obtain a simple permit to rent their private property for residential purposes. These illegal inspections are used as a back door to harass STR owners through illegal applications of the SLDC.

Prior applicants who applied for variances were subjected to a costly, lengthy, multi-stage variance process that includes hearings before Land Use, the SLDC Hearing Officer, the

Planning Commission, and eventually the Board itself. Land Use invariably opposes all variances because they “cannot” recommend approving variances for properties that do not conform to the SLDC. The variance process is basically a farce, and the only option open to applicants is to ride it through to the Board and hope to win 3 votes. Applicants worry, for very good reason, that failure to secure approval from the Board would subject them to enforcement action, including heavy fines, prison time, and court-ordered destruction of portions of their property.

Plaintiffs Elizabeth Emmens and Cory Ahrens have received a Notice of Violation because they have yet to apply for a permit or license because, based on their experience the last time they attempted to do so, they are too afraid and intimidated to do so. After their last attempt they were told by County officials after an inspection of their entire property that they would have to demolish one of their casitas, clear cut innumerable trees and landscaping, acquire a new street address, and other egregious requirements due to the County’s employment and weaponization of the SLDC illegally, specifically and unequally against STR owners. STR owners like Emmens and Ahrens are left with the irreparably harmful choice, of either paying high fines and facing criminal repercussions, discontinue renting as an STR, or be faced with having their constitutional rights violated and forced to make expensive and burdensome changes and variances affecting their entire properties. Violation of one’s Constitutional rights is inherently irreparable.

Furthermore, due to the County’s re-classification of STRs as commercial rather than residential, all STR owners in the County, including each of the Plaintiffs, face the irreparable harm of having the holders of their notes on their respective mortgages, that were acquired as residential mortgages, defaulting them or drastically altering the terms thereof because of the

sudden change of their properties to commercial. The ripple effects of such a reclassification, as discussed above, would leave all STR owners, including Plaintiffs, facing costly and burdensome changes to property and liability insurance, property taxes, property values, and even title complications. As discussed above, the County Assessor, following the Board's lead, is at this moment attempting to re-classify STRs from residential to commercial for property tax purposes, thereby immediately reassessing those properties to current market value and raising the property taxes on these homes some 30% with no annual cap on tax increases. Notices and questionnaires have been sent out by the Assessor to all STR owners in both the City and County of Santa Fe requiring them to be answered and returned by late February. The proposed tax change would affect 100% of the non-owner occupied STRs in both the city and the county, as well as many owner occupied STRs. Such a re-classification and sudden property tax increase would not only put STR owners out of business, but would likely result in people losing their homes, properties, and livelihoods. For the reasons stated above, Plaintiffs are likely to suffer irreparable harm in the absence of preliminary injunctive relief.

3. The Balance of Equities Tips in Plaintiffs Favor

The balance of harms and equities clearly tips in Plaintiffs' favor. Defendants have argued that because the Ordinance was enacted for the benefit of the public, the public will necessarily suffer if this Ordinance is enjoined. Are STR owners in the County not members of the "public"? Defendants have failed to explain what the benefits to the public are, or how the public will suffer. Presumably they refer to their findings and reasons within the STR Ordinance proffered to justify their rational basis that Plaintiffs' have argued are not legitimate and have no data to support. Conversely, the revenue made by the County off of the approximately 358 STRs in the County is in the millions of dollars which, if utilized wisely, is a substantial benefit to the

public. Plaintiffs and other STR owners, whose STRs account for approximately 1.1% of the dwellings in the County, have been subjected to, are still being subjected to, and will continue to be subjected to the illegal, unequal, discriminatory, unconstitutional, egregious overreach by Defendants, that similarly situated private property owners in the County (the rest of the “public”) are simply not subjected to. The irreparable harm that STR owners, including Plaintiffs, face has been detailed above.

Defendants are a governmental legislative body that has and continues to use methods and tactics during the permitting and application process, that has violated and, if allowed to continue, will continue to violate Plaintiffs’ protected Constitutional rights. Plaintiffs are private property owners. The Defendants have presented no data or facts to show how the balance of equities could possibly tip in their favor, as compared to the protected Constitutional rights intended to protect individuals and their rights as private property owners from government overreach being violated by these very Defendants. That, coupled with the irreparable harms Plaintiffs are likely to suffer described above, tips the balance of equities in Plaintiffs’ favor.

4. The Injunction is in the Public Interest

The injunction is in the public interest. If methods and tactics employed by Defendants, and portions of the STR Ordinance itself, are violating protected Constitutional rights of a certain small class of the public, whose STRs account for approximately 1.1% of the dwellings in Santa Fe County, including Plaintiffs, then the entire public of Santa Fe County will benefit from the injunction. Putting a check on government overreach which infringes on the rights of private property owners and its citizens is always in the public interest. Defendants have put forward no facts to illustrate how the public’s interest will not be served; particularly in comparison to the interests that will be served.

Furthermore, the County commissioned a study by Southwest Planning & Marketing to study the effects of STRs on communities. Testifying at a public hearing on the findings of the study on October 21, 2023, Defendant Penny Ellis-Greene stated that the study “...did not find that at current levels there was a drastic impact [by STRs] to communities.” In fact, the study found that STRs delivered clear economic benefits to property owners and businesses in the County. Penny Ellis-Greene further testified to the Board on November 30, 2023, that the County had only received one complaint about an STR since June of 2023. That complaint was about non-compliance with a local HOA rule. The County also commissioned a study on the factors limiting affordable housing in the region. That report does not mention STRs as having a negative impact on affordable housing, one of the County’s main concerns to justify its rational basis for the STR Ordinance. In fact, the study found that the SLDC was the primary culprit to affordable housing in the County. For the reasons stated above, the injunction is in the public interest.

CONCLUSION

Plaintiffs, through the arguments made above, have demonstrated that they should not be subject to the higher standard of scrutiny as the status quo is a constant moving target, but even if they are, Plaintiffs have demonstrated a high likelihood of success on the merits; that they are more than likely to suffer irreparable harm absent injunctive relief; that the balance of harms and equities tips in their favor; and that the injunction is in the public interest. For the foregoing reasons, Plaintiffs’ request for preliminary injunctive relief should be granted. Plaintiffs further request that the Court not require security or that security be approved in a reasonable amount to be determined by the Court; that the Court provide Plaintiffs with an opportunity to conduct expedited discovery; and order such further relief this Court deems appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 9, 2024, I filed the foregoing pleading electronically through the CM/ECF system, which caused all counsel of record to be served electronically, as more fully reflected on the Notice of Electronic Filing.

/s/ Stephen M. Domas _____

Stephen M. Domas