No. 05-23-01309-CV

In the Court of Appeals
Fifth District of Texas at Dallas

CITY OF DALLAS,
Appellant,

v.

DALLAS SHORT-TERM RENTAL ALLIANCE, et al.,
Appellees.

Appeal from the 95th Judicial District Court, Dallas County, Texas
Cause No. DC-23-16845

APPELLANT'S MOTION FOR REHEARING EN BANC

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PRELIMINARY STATEMENT

This case involves a challenge to the validity and enforceability of two *separate* ordinances, a Zoning Ordinance and a Registration Ordinance, enacted to regulate the operations of short-term rental ("STR") properties in the City of Dallas (the "City"). (Appellant's Br. 18-29; RR:258-59.) In December 2023, the trial court entered an order (the "TI Order") granting Appellees' application for a temporary injunction to prevent the City from enforcing the ordinances. (Appellant's Br. 29-30; CR:698-707.) The City timely appealed the TI Order arguing, in part, that the trial court abused its discretion in finding that Appellees had established a probable right to relief on any of their claims. A panel of this Court affirmed the trial court's decision, holding that Appellees established a probable right to relief on their due course of law claim and, without injunctive relief, would suffer probable, imminent, and irreparable injury to their vested property rights.[1] Mem. Op. at 7-9 (App. Tab 1). The en banc Court should reconsider the panel's decision.

[1] Justice Yvonne Rodriguez (ret.), sitting by assignment from the Eighth Court of Appeals in El Paso, authored the memorandum opinion issued on February 7, 2025.

First, at a minimum, the panel's decision and judgment warrants review because the panel's reasoning bears no relation to the Registration Ordinance, and the TI Order should be modified to permit enforcement of the Registration Ordinance. In the City's briefing and at oral argument, the City made clear that the Registration Ordinance is separate and distinct from the Zoning Ordinance. (Appellant's Br. 27-29; Appellant's Reply Br. 8-9; CR:340-41; RR:150-51, 174-77.)[2] Yet, the panel treated the ordinances as an integrated, indivisible unit. Mem. Op. at 7-8 (referring to enforcement of "the ordinances at issue" in the context of due course of law). The panel did not consider whether or how enforcement of the Registration Ordinance—which merely requires that STR operators register their properties with the City and sets forth a handful of modest rules for operating an STR—impedes (much less denies) Appellees of any vested right. *Id.* at 6-8. In fact, the panel's reasoning on Appellees' due course of law claim has no application to the Registration Ordinance at all. The Registration Ordinance does not "deny" Appellees of their "well-established rights to lease their property."

[2] Appellees' briefing and the trial court's TI Order also treat the Zoning Ordinance as separate from the Registration Ordinance. (Appellees' Br. 55-56; CR:703.)

Mem. Op. at 7. Rather, it helps STR operators facilitate any such rights by providing for registration and defining standards for operation. The panel's choice not to address the Registration Ordinance at all disregards Appellees' admission of their longtime support for the Registration Ordinance, both before its enactment and after initiating the underlying litigation. (Reply Br. 8-10; *see* RR:24-28, 817-21; CR:441-42.)

Second, the panel employed an improper analysis for Appellees' due course of law claim, which is the only theory upon which the panel affirmed the TI Order. In analyzing Appellees' probable right to relief on their due course of law claim, binding precedent requires courts to define the liberty or property interest at issue as narrowly and specifically as necessary, particularly when the challenged legislation is intended to address a novel condition such as the sudden growth of a new industry. While the panel focused on Appellees' "well-established rights to lease their property," Mem. Op. at 7-8,[3] the underlying dispute concerns a narrower stated interest—Appellees' operation of STRs and related businesses. (CR:31-33 [alleging that ordinances violate Appellees' rights

[3] To the extent the broad right to lease is at issue, Appellees do not and cannot allege that enforcement of the ordinances would preclude them from leasing their properties. To the contrary, it is undisputed that Appellees could lease their properties for a period of thirty days or more.

to operate STRs]). The en banc Court should address the issue of whether Appellees have a vested right to operate STRs or related businesses and the extent to which such operations may be regulated by the City.

Finally, while the panel correctly noted that Appellees were required to present "some evidence supporting every element" of their due course of law claim, the panel did not refer to any such evidence in the record. Assuming (without conceding) that Appellees had established a protected interest in operating STRs or related businesses, they would nonetheless have been required to present evidence that (1) the ordinances do not bear a rational relationship to at least one legitimate government interest, or (2) that the ordinances would impose an oppressive burden on Appellees in light of the government interest to be served. The panel's decision does not specify which of these dual theories it found Appellees had demonstrated a probable right to relief, nor did it identify evidence in the record demonstrating a probable right to relief on either theory.

In sum, the panel's memorandum opinion and judgment improperly conflates the Registration Ordinance with the Zoning Ordinance, deviates from binding precedent concerning the requirements for

establishing a due course of law violation, and in doing so improperly prevents the City from enforcing one or both of the ordinances during the pendency of this litigation. The City thus requests an en banc reconsideration of the panel's opinion.

STATEMENT OF ISSUES WARRANTING EN BANC RECONSIDERATION

1. Because the Registration Ordinance is separate and independently enforceable from the Zoning Ordinance and the reasoning employed by the panel does not relate to the Registration Ordinance, the Court should grant en banc review and modify the TI Order so that the Registration Ordinance is not enjoined.

2. The panel erred in determining that Appellees established a probable right to relief on their due course of law claim by defining Appellees' purported property interest at too broad of a level and improperly deferring to the trial court on the ultimate legal question of whether the evidence supports a due course of law claim.

ARGUMENT

I. Because the Registration Ordinance is separate and distinct from the Zoning Ordinance, the panel erred by conflating the two ordinances.

The Registration Ordinance and Zoning Ordinance are two independent pieces of legislation that are separate from and independently enforceable of one another. (*See* CR:47-77; *see also* Reply Br. 8-9; CR:340-41; RR:150-51, 174-77.)[4] The panel affirmed the TI Order on the theory that Appellees presented some evidence for all essential elements of their due course of law claim. Mem. Op. 6-8. Specifically, the panel reasoned that "Appellees have 'a vested right to lease their properties and this right is sufficient to support a viable due-course-of-law claim.'"[5] *Id.* at 7 (quoting *City of Grapevine v. Muns*, 651 S.W.3d 317, 347 (Tex. App.—Fort Worth 2021, pet. denied)). From this premise, the panel reasoned that Appellees "possessed well-established rights to *lease their property* and presented evidence tending to show that the City

[4] During oral argument to the panel, the City again emphasized that the Registration Ordinance is distinct from and, therefore, not dependent on the Zoning Ordinance.

[5] Appellee Danielle Lindsay does not allege that she owns or operates an STR or any rental property. Instead, she alleges only that she "runs a business . . . that provides cleaning, maintenance, and other support services to rental properties across the City." (CR:23.)

would deny them *those rights* by enforcing the *two ordinances at issue*." *Id.* (emphasis added).

Even assuming this reasoning applies as a basis for affirming the TI Order as to the Zoning Ordinance (which it does not for the reasons explained in section II below), it was improper for the panel to conflate the Registration Ordinance with the Zoning Ordinance and affirm the TI Order as to both ordinances on this basis. The Registration Ordinance does nothing to "deny" Appellees their "well-established rights to lease their property." Mem. Op. at 7. It merely requires that all STR operators, regardless of their property's location within the City, register their property with the City and comply with the Registration Ordinance's modest rules for operating an STR. (CR:67-68.) Similar rules have long been in place for long-term rentals within the City, *see* Dallas, Tex., Code §§ 27-29 through 27-44.1, without constitutional infirmity.

As such, Appellees were required to demonstrate that they have a probable right to relief as to the Registration Ordinance, independent of the Zoning Ordinance, and that they would suffer a probable immediate and irreparable injury from enforcement of the Registration Ordinance alone. Appellees did not and cannot satisfy this burden. To the contrary,

Appellees admit that they advocated *for* a registration ordinance—in this case, *the* Registration Ordinance—because it was necessary to establish a permitting process to identify the location and operation of STRs in the City, to require owners and operators to obtain a license and pay hotel occupancy tax ("HOT"), to establish and enforce noise limitations for STRs, to set occupancy and density limitations for STRs, to require an emergency contact available at all times for STRs, and to allow the City to revoke permits for STRs that repeatedly disturb neighboring properties. (RR:817-21; Reply Br. 8-9.) In fact, Appellees acknowledged that, even after initiating this litigation, they had only minor complaints regarding the Registration Ordinance's density and parking restrictions and the number of "strikes" an STR could incur before the City could revoke its permit. (CR:441-42; RR:28; Reply Br. 9-10.) But those requirements do not wholesale deprive them of the right to lease their properties, which was the panel's exclusive basis for affirming the TI Order. Moreover, with respect to their due course of law claim, Appellees not only admitted that the Registration Ordinance is rationally related

to at least two legitimate government interests,[6] but Appellees also failed to present any evidence (which was their burden, not the City's) that enforcement of the Registration Ordinance would impose an oppressive burden on them. *See Patel v. Tex. Dep't of Licensing & Regul.*, 469 S.W.3d 69, 87 (Tex. 2015).

Because Appellees could not show that enforcement of the Registration Ordinance would violate due course of law, they suggested that it could only take effect on "remaining STRs" *after* "the Zoning Ordinance regulate[d] 95% of STRs out of existence." (Appellees' Br. 48.) The panel appears to have adopted this view. Mem. Op. at 2 ["[The Zoning] Ordinance . . . banned short-term rentals in areas zoned for 'single-family residential' use while [the Registration Ordinance] regulated the *remaining* short-term rentals . . . ." (emphasis added)). Appellees provided no evidence for this construction, and the Registration Ordinance itself includes no provision indicating that it incorporates, depends on, or is subordinate to the Zoning Ordinance. As such, the Registration Ordinance should be construed independently,

[6] Appellees admit the Registration Ordinance is rationally related to promoting the health, safety, and welfare of the public and protecting against adverse impacts from excessive traffic, noise, and density. (RR:24-28, 817-21.)

and any burden associated with the Zoning Ordinance should not be imputed to the Registration Ordinance. *City of Dallas v. Blanton*, 200 S.W.3d 266, 277 (Tex. App.—Dallas 2006, no pet.) (finding that "words excluded from a statute were excluded on purpose").

Indeed, it is well settled that when a court holds that a provision of a statute or ordinance is invalid,

> the invalid portion of the ordinance or statute should be severed from the rest of the enactment, which remains in effect without the severed portion "unless all the provisions are connected in subject-matter, dependent on each other, operating together for the same purpose, or otherwise so connected in meaning that it cannot be presumed the legislature would have passed the one without the other."

Builder Recovery Servs., LLC v. Town of Westlake, 650 S.W.3d 499, 507 (Tex. 2022) (quoting *Rose v. Doctors Hosp.*, 801 S.W.2d 841, 844 (Tex. 1990)). This principle applies with even more force here, as the Registration Ordinance is a wholly separate piece of legislation that is able to operate within the bounds of the constitution regardless of the ultimate validity of the Zoning Ordinance.

In sum, the conflation of the Registration and Zoning Ordinances deviates from binding authority holding that *only* the potentially constitutionally infirm portions of an ordinance be enjoined, the panel's

reasoning affirming the TI Order bears no relationship to the Registration Ordinance, and Appellees have not otherwise demonstrated that they have a probable right to relief with respect to the Registration Ordinance or would suffer probable, immediate, and irreparable injury from its enforcement. As such, the City requests that the en banc Court reconsider the panel's decision as to the Registration Ordinance and modify the TI Order such that the Registration Ordinance may take effect pending the ultimate trial on the merits.

II. The panel misapplied the standard for determining whether Appellees have a probable right to relief on their due course of law claim.

Although the panel correctly held that, to be entitled to temporary injunctive relief, an applicant must present some evidence of at least one valid legal theory that raises bona fide issues as to its ultimate right to relief, Mem. Op. at 6, the panel applied an incorrect standard in assessing Appellees' probable right to relief under the due course of law clause. This issue warrants closer scrutiny by the Court en banc, as justices of the supreme court have observed that, specifically in the context of STRs, the extent to which local regulations of STRs pass constitutional muster is a question of "increasing and demonstrable importance." *City of Grapevine*

v. Muns, 671 S.W.3d 675, 676-77 (Tex. 2023) (Young, J., concurring in denial of review).

A. The panel did not identify a specific, circumscribed definition for the purported property interest at issue as required under binding precedent.

To establish a probable right to relief on their due course of law claim, Appellees were required to allege and present evidence that (1) they had a "liberty, property or other enumerated interest" that is entitled to protection and (2) if so, the City did not follow due course in depriving them of that interest. *Tex. S. Univ. v. Villarreal*, 620 S.W.3d 899, 905 (Tex. 2021) (citing *Univ. of Tex. Med. Sch. at Hous. v. Than*, 901 S.W.2d 926, 929 (Tex. 1995)). To be entitled to protection, a property interest must be "vested." *Tex. Dep't of State Health Servs. v. Crown Distrib., LLC*, 647 S.W.3d 648, 655 (Tex. 2022). Critically, courts must "define the [plaintiff-applicant's] interest as specifically as necessary to accurately reflect the constitution's language ('liberty' and 'property'), [the supreme court's] precedential construction of that language, and the realities of the deprivation the [plaintiffs] are claiming." *Id.* at 656. As the supreme court recently held, this "carefully circumscribed

description" is necessary to preserve the policymaking authority of legislative bodies:

> By extending constitutional protection to an asserted right or liberty interest, [courts] place the matter outside the arena of public debate and legislative action. [Courts] must therefore exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.

State v. Loe, 692 S.W.3d 215, 229-30 (Tex. 2024) (reversing and vacating temporary injunction order preventing enforcement of statute) (citing *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)). This narrow, careful defining of the purported right is particularly important when courts are considering "novel treatments for a novel condition." *Id.* at 232 (citing *Kansas v. Hendricks*, 521 U.S. 346, 360 n.3 (1997)).

The panel held that Appellees possess "well-established rights to lease their property." Mem. Op. at 7. This description of Appellees' putative property interest is far too broad. It is undisputed that neither the Zoning Ordinance nor the Registration Ordinance would prohibit Appellees from leasing their properties. At most, the Zoning Ordinance (but not the Registration Ordinance) prohibits Appellees from operating STRs in single-family residential zones. (RR:262-71.) And not even the

Zoning Ordinance prohibits Appellees from leasing their properties for thirty days or longer. Thus, when carefully described as required under *Crown Distributing* and *Loe*, the purported right for which Appellees seek constitutional protection is the "right" to operate STRs or related businesses, *not* the right to lease their properties.

No court has found a vested right to operate STRs or related businesses, and it is undisputed that, until the Zoning and Registration Ordinances were enacted, STRs were unregulated in Dallas. (CR:452-53; RR:87, 107-08, 137, 306.) Thus, by failing to specifically define the purported property interest, the panel could not have engaged in the proper analysis to determine whether Appellees have a probable right to relief on their due course of law claim.

B. The panel did not analyze the ordinances under the *Patel* standard.

There are two means of establishing a probable right to relief on a due course of law claim. *E.g.*, *Patel*, 469 S.W.3d at 87. Even if Appellees had a vested right to operate STRs and related business (which they do not), they were required to allege and present evidence that (1) the ordinances were not rationally related to a legitimate government interest, or (2) when considered as a whole, the ordinances' actual, real-

world effect as applied to Appellees would be so burdensome as to be oppressive in light of the government interest. *Id.* It is unclear which type of due course claim the panel credited Appellees with having established. The panel said that Appellees "presented evidence tending to show that the City would deny them" their right to lease their properties, but it did not specify whether this supposed denial resulted from the ordinances' lack of relation to a legitimate government interest or would operate to be legally oppressive. Mem. Op. 7-8. Assuming, without conceding, that Appellees were seeking protection for the broad right to lease property (rather than the specific right to operate STRs or related businesses), the panel should have considered whether (1) each ordinance, individually, was rationally related to a legitimate government interest and, if so, (2) whether the real-world effect of enforcing each ordinance, individually, would be so burdensome as to be oppressive. *Patel*, 469 S.W.3d at 87. Without engaging in this analysis, the panel could not properly conclude that the trial court did not abuse its discretion in enjoining the ordinances because that ultimate question is a question of law, *see id.*, for which the trial court was to receive no deference, *see Loe*, 692 S.W.3d at 226.

Because the panel did not employ the proper analysis of Appellees' probable right to relief on their due course of law claim, reconsideration by the en banc Court is warranted.

CONCLUSION & PRAYER

For these reasons, the City requests that the en banc Court grant its motion for rehearing en banc, vacate the panel's memorandum opinion and judgment, and either (1) render a judgment vacating the trial court's TI Order, or at a minimum (2) modify the trial court's TI Order such that it no longer enjoins enforcement of the Registration Ordinance.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this document contains 3,144 words, excluding the parts exempted by Texas Rule of Appellate Procedure 9.4(i)(2)(D), and has been prepared in a proportionally spaced 14-point Century Schoolbook typeface using Microsoft Word for Microsoft 365 MSO.

/s/ *Andrew G. Spaniol*
Andrew G. Spaniol

Dated: February 24, 2025

No. 05-23-01309-CV

In the Court of Appeals
Fifth District of Texas at Dallas

CITY OF DALLAS,
Appellant,

v.

DALLAS SHORT-TERM RENTAL ALLIANCE, et al.,
Appellees.

Appeal from the 95th Judicial District Court, Dallas County, Texas
Cause No. DC-23-16845

APPENDIX

AFFIRMED and Opinion Filed February 7, 2025

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-23-01309-CV

CITY OF DALLAS, Appellant
V.
DALLAS SHORT-TERM RENTAL ALLIANCE, SAMMY AFLALO, VERA ELKINS, DANIELLE LINDSEY, AND DENISE LOWRY, Appellees

On Appeal from the 95th District Court
Dallas County, Texas
Trial Court Cause No. DC-23-16845

MEMORANDUM OPINION

Before Justices Garcia, Smith, and Rodriguez[1]
Opinion by Senior Justice Rodriguez

The City of Dallas appeals the trial court's order granting appellees' application for a temporary injunction and enjoining the City from enforcing two ordinances concerning short-term rentals within the city limits. We affirm in this memorandum opinion. *See* TEX. R. APP. P. 47.4.

[1] The Hon. Yvonne T. Rodriguez, Senior Justice, Assigned.

Background

The City enacted ordinance numbers 32482 and 32473 in 2023 after studying the proliferation of short-term housing rentals in the Dallas market. Ordinance 32482 banned short-term rentals in areas zoned for "single-family residential" use while ordinance 32473 regulated the remaining short-term rentals and provided the process, including fees, through which owners could acquire the necessary permits to operate a short-term rental in Dallas. The Dallas Short-Term Rental Alliance—joined by Sammy Aflalo, Vera Elkins, Danielle Lindsey, and Denise Lowry—challenged the constitutionality of these two ordinances and requested injunctive and declaratory relief. After an evidentiary hearing, the trial court granted appellees' application for a temporary injunction and found appellees met their burden to establish they have a probable right of recovery on their cause of action against the City of Dallas and without injunctive relief, they faced a substantial risk of probable, imminent, and irreparable injuries.

Issues on appeal

In four issues on appeal, the City contends the trial court abused its discretion when it (1) granted appellees' application, (2) concluded appellees satisfied their extraordinary burden to prove their probable right to relief, (3) concluded appellees satisfied their extraordinary burden to prove a probable, imminent, and irreparable injury, and (4) granted equitable relief despite the Alliance's allegedly unclean hands. More specifically, the City argues the ordinances are not preempted by House

Bill 2127 (which it argues is unconstitutional), the trial court erred when it granted equitable relief to the Alliance's members despite it being "likely (if not certain) that some portion of [its] members have not registered or paid [hotel occupancy tax] on their [short-term rental] properties," and the trial court erred when it found appellees are likely to prevail on their arguments concerning due course of law, equal protection, regulatory takings, retroactivity, and the Zoning Enabling Act.

Temporary Injunctions and the Standard of Review

The purpose of a temporary injunction is to preserve the status quo of the subject matter of the litigation pending a trial on the merits. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). We review a trial court's order granting a temporary injunction for an abuse of discretion. *Tex. Educ. Agency v. Hous. Indep. Sch. Dist.*, 660 S.W.3d 108, 116 (Tex. 2023); *see also City of Dallas v. Brown*, 373 S.W.3d 204, 208 (Tex. App.—Dallas 2012, pet. denied). A trial court abuses its discretion when it misapplies the law to established facts or when the evidence does not reasonably support the trial court's determination of probable injury or probable right of recovery. *Brown*, 373 S.W.3d at 208. Under this standard, we defer to the trial court's factual findings if the evidence supports them, but we review legal determinations de novo. *State v. Loe*, 692 S.W.3d 215, 226 (Tex. 2024). We view the evidence in the light most favorable to the trial court's order, indulging every reasonable inference in its favor, and defer to the trial court's resolution of

conflicting evidence. *Amend v. Watson*, 333 S.W.3d 625, 627 (Tex. App.—Dallas 2009, no pet.).

To obtain a temporary injunction, an applicant must plead and prove three specific elements: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim. *Butnaru*, 84 S.W.3d at 204. The applicant has the burden of production to offer some evidence on each of these elements. *See In re Tex. Nat. Res. Conservation Comm'n*, 85 S.W.3d 201, 204 (Tex. 2002) (orig. proceeding). At the hearing for a temporary writ of injunction, the trial court is not determining the ultimate rights of the parties; instead, the only question before the trial court is whether applicants demonstrated their entitlement to preservation of the status quo pending trial on the merits. *See Walling v. Metcalfe*, 863 S.W.2d 56, 58 (Tex. 1993) (citing *Iranian Muslim Org. v. City of San Antonio*, 615 S.W.2d 202, 208 (Tex. 1981)); *Keystone Life Ins. Co. v. Mktg. Mgmt., Inc.*, 687 S.W.2d 89, 93 (Tex. App.—Dallas 1985, no pet.) ("[T]he only question before the trial court was whether to maintain the status quo—not to determine the ultimate rights of the parties.").

The City's brief does not attack appellees' pleading or proof of a cause of action against it under the Declaratory Judgment Act. Thus, we focus our analysis on appellees' proof of a probable right to the relief sought and a probable, imminent, and irreparable injury in the interim. *See* TEX. R. APP. P. 47.4 ("If the issues are

settled, the court should write a brief memorandum opinion no longer than necessary to advise the parties of the court's decision and the basic reasons for it.").

Analysis

A. Probable right to relief

In its second issue, the City argues the trial court erred when it concluded appellees "satisfied their extraordinary burden to prove a probable right to relief sufficient to enjoin enforcement of the [o]rdinances." In support of this contention, the City cites *Thompson v. City of Palestine* for the proposition that, "When the requested injunction would prevent enforcement of a municipal ordinance, the burden of proof is 'extraordinary.'" The City is mistaken; *Thompson* did not involve a temporary judgment and the supreme court did not require applicants for temporary injunctions against municipal ordinances to meet an "extraordinary" burden of proof. *See* 510 S.W.2d 579, 581 (Tex. 1974).[2]

Similarly, the City cites *Mayhew v. Town of Sunnyvale* for the proposition that, "To overcome this presumption [of an ordinance's validity], plaintiffs have the burden to prove that a challenged ordinance 'has no foundation in reason and is a mere arbitrary or irrational exercise of power.'" *See Mayhew*, 964 S.W.2d at 938.

[2] Instead, *Thompson* says: "We have also held that an 'extraordinary burden' rests on the party attacking the ordinance to show that no conclusive or even controversial issuable facts or conditions exist which would authorize the City Council to exercise the discretion confided to it, and that if reasonable minds may differ as to whether or not a particular zoning ordinance has a substantial relationship to the public health, safety, morals or general welfare, no clear abuse of discretion is shown and the ordinance must stand as a valid exercise of the city's police power." 510 S.W.2d at 581.

Again, the City mistaken. Instead, *Mayhew* (which does not contain the words "enjoin" or "injunction") says,

> A court should not set aside a zoning determination *for a substantive due process violation* unless the action has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial elation to the public health, the public morals, the public safety or the public welfare in its proper sense.

Id. (cleaned up and emphasis added). Thus, both *Thompson* and *Mayhew* are inapposite.

Properly construed, the probable right to relief element requires an applicant to present some evidence supporting every element of at least one valid legal theory that raises a *bona fide* issue as to their right to ultimate relief. *See Young Gi Kim v. Ick Soo Oh*, No. 05-19-00947-CV, 2020 WL 2315854, at *2 (Tex. App.—Dallas May 11, 2020, no pet.) (mem. op.). A party can prove their probable right of recovery by alleging the existence of a right and presenting evidence tending to show that the right is being denied. *Bureaucracy Online, Inc. v. Schiller*, 145 S.W.3d 826, 829 (Tex. App.—Dallas 2004, no pet.). State law creates and defines property rights. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972).

Appellees' pleading alleges they enjoy the right to lease their properties under Texas law. *See Calcasieu Lumber Co. v. Harris*, 77 Tex. 18, 13 S.W. 453, 454 (1890) ("The ownership of land, when the estate is a fee, carries with it the right to use the land in any manner not hurtful to others; and the right to lease it to others, and therefore derive profit, is an incident of such ownership."); *Severance v. Patterson*,

370 S.W.3d 705, 709 (Tex. 2012) (op. on reh'g) ("Private property rights have been described 'as fundamental, natural, inherent, inalienable, not derived from the legislature[,] and as pre-existing even constitutions.'"); *see also City of Grapevine v. Muns*, 651 S.W.3d 317, 346 (Tex. App.—Fort Worth 2021, pet. denied); *cf. id.* at 347 ("The right to lease is a stick within a property owner's metaphorical bundle of rights.") (citing Emily M. Speier, Comment, *Embracing Airbnb: How Cities Can Champion Private Property Rights Without Compromising the Health and Welfare of the Community*, 44 Pepp. L. Rev. 387, 395–97 (2017)). Appellees also introduced evidence the individual appellees had invested hundreds of thousands of dollars, excluding mortgages which exceed millions of dollars, into the short-term rental industry in Dallas and that the City intended to enforce the ordinances as soon as December 13, 2023.

The Texas Constitution provides: "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of law of the land." TEX. CONST. art. I, § 19. Appellees have "a vested right to lease their properties and this right is sufficient to support a viable due-course-of law claim." *City of Grapevine*, 651 S.W.3d at 347. Under the circumstances, we conclude appellees proved their probable right of recovery under their due-course-of-law argument because they alleged they possessed well-established rights to lease their property and presented evidence tending to show that the City would deny them those rights by enforcing the two ordinances at issue. *See*

Bureaucracy Online, Inc., 145 S.W.3d at 829; *see also Young Gi Kim*, 2020 WL 2315854, at *2 (requiring "some evidence supporting every element of at least one valid legal theory" to demonstrate a probable right to recovery). Thus, the trial court did not abuse its discretion when it concluded appellees met their burden to establish that they have a probable right of recovery on a cause of action against the City of Dallas. *See Grapevine*, 651 S.W.3d at 346; *see also* TEX. R. APP. P. 47.4; *cf. Brown*, 373 S.W.3d at 208 (a trial court abuses its discretion if the evidence does not reasonably support the trial court's determination of probable injury or probable right of recovery). We overrule the City's second issue.

B. Irreparable injury

While the City's brief purports to assign error concerning the trial court's findings that appellees faced irreparable injury, its arguments are restricted to (1) "A regulatory-taking claim necessarily implies that the purported harm is readily compensable with money damages," and (2) "injunctive relief is inappropriate if a plaintiff has stated a viable regulatory takings claim." The City cites no authority in support of the former and quotes *Patel v. City of Everman* in support of the latter. *See* 179 S.W.3d 1, 13 (Tex. App.—Tyler 2004, pet. denied) ("[Where] a party seeks monetary damages, he seeks a legal remedy, not an equitable one.").

Appellees did not make a regulatory-taking claim and their petition does not seek monetary damages. Instead, appellees sought injunctive and declaratory relief based on the alleged unconstitutionality of the City's ordinances. *See Wilburn v.*

Dacus, No. 05-16-00522-CV, 2017 WL 2464679, at *1 (Tex. App.—Dallas June 7, 2017, pet. denied) (mem. op.) ("It is an appellant's burden to discuss his or her assertions of error, and appellate courts have no duty—or even the right—to perform an independent review of the record and the applicable law to determine whether there was error."); *id.* at *2 ("We will not do the job of the advocate.") (quoting *Happy Harbor Methodist Home, Inc. v. Cowins*, 903 S.W.2d 884, 886 (Tex. App.—Houston [1st Dist.] 1995, no writ)). We recognize the City extensively briefed the viability of appellees' regulatory-taking claim, that appellees alleged the zoning ordinance is a taking, and that the City apparently perceived appellees' allegation to constitute a regulatory-taking claim. We disagree; instead of requesting monetary relief, appellees' allegation supported their argument for injunctive relief.

Additionally, the record contains both ordinances, both of which state they "take effect immediately from and after [their] passage and publication in accordance with the provisions of the Charter of the City of Dallas with enforcement action being taken no earlier than six months" from and after passage. This evidence supports the trial court's finding that without injunctive relief, appellees would suffer probable, imminent, and irreparable injury to their vested property rights. *See City of Grapevine*, 651 S.W.3d at 347 (concluding homeowners had "a vested right to lease their properties and that this right is sufficient to support a viable due-course-of law claim."); *cf. State v. Morales*, 869 S.W.2d 941, 943–44 (Tex. 1994) (to overcome prohibition against civil challenge to penal statute, litigant must allege that

penal statute is unconstitutional and "threatens irreparable injury to vested property rights"). Finally, the record contains at least some evidence supporting the trial court's effectively unchallenged finding that appellees would suffer irreparable injury without injunctive relief, thereby making the trial court's finding binding. *See McGalliard v. Kuhlmann*, 722 S.W.2d 694, 696 (Tex. 1986); *Walker v. Anderson*, 232 S.W.3d 899, 907 (Tex. App.—Dallas 2007, no pet.). Thus, we overrule the City's third issue.

C. Irrelevance of House Bill 2127

In its first issue, the City argues the trial court abused its discretion when it granted appellees' request for injunctive relief. Here, the City does not address whether appellees pled or proved a cause of action against the defendant, a probable right to the relief sought, or a probable, imminent, or irreparable injury in the interim. *See Butnaru*, 84 S.W.3d at 204. Instead, the City argues that its ordinances are not pre-empted by House Bill 2127 (which it argues is unconstitutional). The City also expressly argues that "to determine whether the trial court abused its discretion in granting the [temporary injunction application], it is necessary to address the merits of [appellees'] statutory pre-emption claim."

Assuming *arguendo* that House Bill 2127 does not preempt the City's ordinances, the constitutionality thereof is irrelevant to our review of the trial court's order for an abuse of discretion concerning appellees' due-course-of-law point. *See* TEX. R. APP. P. 47.4. Thus, we overrule the City's first issue on appeal.

D. Hotel occupancy taxes

In its fourth issue, the City argues the trial court erred when it enjoined the City from enforcing the two ordinances at issue because (1) at least 40% of existing short-term rental properties in Dallas have not registered or paid their hotel occupancy taxes, (2) it is more likely than not that some portion of the Alliance's members have not registered or paid their hotel occupancy taxes, and (3) the Alliance therefore sought equitable relief with unclean hands. However, the City cites no cases—and we have found none—in which the payment or nonpayment of hotel occupancy taxes by short-term rental owners prevents the granting of a temporary injunction where an applicant has proven a cause of action against the defendant, a probable right to the relief sought, and a probable, imminent, and irreparable injury in the interim. *See Butnaru*, 84 S.W.3d at 204. Further, the City has failed to show that the Alliance has a duty to pay such taxes or enforce the payment of such taxes amongst its members. Finally, while there is evidence that appellee Elkins was not current on her hotel occupancy tax payments at one time, there is also evidence she has paid it "faithfully since learning of her obligation to do so"; there is no other evidence in the record regarding non-payment of the hotel occupancy tax by any other plaintiff. We therefore conclude the City has not shown the trial court abused its discretion and overrule the City's fourth issue.

* * *

Having overruled the City's four issues on appeal, we affirm the judgment of the trial court.

/Yvonne T. Rodriguez/
YVONNE T. RODRIGUEZ
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

CITY OF DALLAS, Appellant No. 05-23-01309-CV V. DALLAS SHORT-TERM RENTAL ALLIANCE, SAMMY AFLALO, VERA ELKINS, DANIELLE LINDSEY, AND DENISE LOWRY, Appellees	On Appeal from the 95th District Court, Dallas County, Texas Trial Court Cause No. DC-23-16845. Opinion delivered by Justice Rodriguez. Justices Garcia and Smith participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellees DALLAS SHORT-TERM RENTAL ALLIANCE, SAMMY AFLALO, VERA ELKINS, DANIELLE LINDSEY, AND DENISE LOWRY recover their costs of this appeal from appellant CITY OF DALLAS.

Judgment entered this 7th day of February, 2025.