STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT

Fletcher Properties, Inc. et al.,

Plaintiffs,

v.

City of Minneapolis,

Defendant,

**ORDER GRANTING PLAINTIFFS' MOTION AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

File No. 27-CV-17-9410
Judge Bruce A. Peterson

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This matter came before the Court on April 23, 2018, on the parties' motions for summary judgment. Attorneys Tamara O. Moreland and Inga K. Schuchard appeared on behalf of Plaintiffs. Attorneys Kristen R. Sarff, Tracey N. Fussy, and Susan L. Segal appeared on behalf of Defendant. Based upon the arguments of counsel, the submissions of the parties, and all of the records, filings, and proceedings herein, the Court makes the following:

**ORDER**

1. Plaintiffs' motion for summary judgment is **GRANTED**.
2. Defendant's motion for summary judgment is **DENIED**.
3. Plaintiffs may submit a proposed injunction consistent with the discussion in the attached memorandum, which Defendant will be given an opportunity to comment on.
4. The attached Memorandum of Law is hereby incorporated.

Dated: June 7, 2018

**BY THE COURT:**

Bruce A. Peterson
Judge of the District Court

## MEMORANDUM

## I. INTRODUCTION

The City of Minneapolis (the "City"), Defendant in this case, along with tenant advocacy groups such as those who submitted an amicus brief, have engaged in extensive efforts to improve the availability of housing that its lower income citizens can afford. Helping ensure decent housing for vulnerable citizens is an important municipal function.

Rent subsidies provided under the federal Section 8 program are essential for making housing affordable for nearly 5,000 Minneapolis families. Unfortunately, there are not enough buildings accepting Section 8 vouchers for the families that have them, and the buildings that do are heavily concentrated in high poverty areas of Minneapolis. In a 2010 case about the Section 8 program, the Minnesota Court of Appeals has already stated that if all property owners were willing to accept Section 8 vouchers, it would advance the valid goal of increasing affordable housing availability.[1]

The City has wide-ranging authority under its charter and the Minnesota Constitution to address this issue. The function of the Court is not to review the wisdom of the City's chosen remedy, but only to enforce the minimal standard of rationality required by the Constitution. The City, however, has chosen to address the Section 8 problem indirectly by creating a new variety of discrimination—discrimination against a housing program—that is subjected to the same heavy legal penalties and public condemnation now reserved for discrimination against protected classes of people. Over three-quarters of the landlords in Minneapolis have thus

[1] *Edwards v. Hopkins Plaza Ltd. P'ship*, 783 N.W.2d 171, 179 (Minn. Ct. App. 2010).

suddenly become unfair discriminators. Because this far-reaching new kind of discrimination appears unsupported by logic or evidence, it fails to meet the minimum constitutional standards.

## II. SUMMARY JUDGMENT STANDARD

The standard for summary judgment is set forth in Minnesota Rule of Civil Procedure 56.03: "Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." In deciding summary judgment motions, "[t]he evidence [must be] construed in the light most favorable to the party opposing summary judgment." *J.E.B. v. Danks*, 785 N.W.2d 741, 747 (Minn. 2010). "The party moving for summary judgment has the burden to show that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law." *Valspar Refinish, Inc. v. Gaylord's Inc.*, 764 N.W.2d 359, 364 (Minn. 2009) (citing *O'Malley v. Ulland Bros.*, 549 N.W.2d 889, 897 (Minn. 1996)).

"[T]he party resisting summary judgment must do more than rest on mere averments." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). To raise a genuine issue of material fact, "the nonmoving party must present more than evidence 'which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions.'" *Valspar Refinish, Inc.*, 764 N.W.2d at 364 (quoting *DLH, Inc.*, 566 N.W.2d at 71). A genuine issue of material fact "'must be established by substantial evidence'" *DLH, Inc.*, 566 N.W.2d at 70 (citation omitted).

Since both parties here have moved for summary judgment, they both are of the view that the matter can be resolved on the basis of undisputed facts in the existing record.

## III. RELEVANT UNDISPUTED FACTS

### A. The Section 8 Program

Section 8 of the United States Housing Act of 1937 provides two types of housing assistance, project-based and tenant-based. (Pls.' Supp. Mem., at 3 (citing 42 U.S.C. § 1437f(b)(1-2)); Def.'s Supp. Mem., at 2.) Tenant-based housing assistance is provided through Housing Choice Vouchers ("Section 8 Vouchers") funded by the U.S. Department of Housing and Urban Development ("HUD") to assist tenants in being able to afford market-rent housing. (Pls.' Supp. Mem., at 3 (citing 42 U.S.C. § 1437f(b)(2); 42 U.S.C. § 1437f(o)); Def.'s Supp. Mem., at 2.) The Section 8 program is administered through local public housing authorities ("PHA"). *See* 42 U.S.C. § 1437f(b); 24 C.F.R. § 982.1(a)(1).

The Minneapolis Public Housing Authority ("MPHA") administers the Section 8 program in Minneapolis. (Def.'s Supp. Mem., at 2 (citing Compl. at ¶ 75); Pls.' Supp. Mem., at 3.) Under the Section 8 program, the MPHA determines the fair market rent for a rental unit based on the number of bedrooms in the unit. (Def.'s Supp. Mem., at 2 (citing Sarff Aff., Ex. 2 at 81:3-11, 82:13-17 ("3/14/18 Russ Dep.")).) The MPHA also establishes payment standards determining how much the Section 8 voucher holder will pay toward the established fair market rent, and how much the MPHA will subsidize. (*Id.*) Section 8 voucher holders typically pay 30% of their income toward rent and the MPHA subsidizes the remaining portion of rent. (*Id.* at 2 (citing 3/14/18 Russ Dep., at 81:12-22; Sarff Aff., Ex. 4 at 43, Ex. 5).) Annually, the MPHA administers about 4,870 vouchers, serving approximately 17,000 people. (*Id.* at 3 (citing Sarff Aff., Ex. 1 at 71:24-72:12 ("3/13/18 Hanson Dep."), Ex. 6 at 1).)

HCV holders are having difficulty finding housing in Minneapolis. (*Id.* at 5 (citing 3/13/18 Hanson Dep., at 70:21-71:1; 3/14/18 Russ Dep., at 55:19-56:8 ("[T]here is some

hardship in [HCV holders] trying to find units")).) The Director of the MPHA explained that the inability to find housing is a daily occurrence for HCV holders. (*Id.* (citing 3/13/18 Hanson Dep., at 68:19-21; Sarff Aff., Ex. 4, 11).) At any given time, 250 Section 8 families are searching for housing. (*Id.* at 3 (citing 3/13/18 Hanson Dep., at 73:20-25; Sarff Aff., Ex. 6 at 1).)

Of the 17,000 people served by the Section 8 program in Minneapolis, 53% are children, 84% are people of color, 78% are families headed by women, and 41% include households where someone has a disability. (*Id.* at 3 (citing Sarff Aff., Ex. 6 at 1).) To be eligible to receive a Section 8 voucher, a tenant must be a very low income-family. (Pls.' Supp. Mem., at 3 (citing 42 U.S.C. § 1437f(o)(4)).)

About 1,200 property owners are currently involved in the Section 8 program in Minneapolis. (Def.'s Supp. Mem., at 3 (citing Sarff Aff., Ex. 5).) However, a 2016 survey of Minneapolis rental listings by HOME Line, a nonprofit organization that provides legal advice to renters, revealed that only 57% of the particular listings surveyed were within rent limits affordable to HCV holders and, of those affordable listings, only 23% would actually accept HCV holders. (*Id.* at 5 (citing Sarff Aff., Ex. 9 at CITY003454; Ex. 10 at CITY003217; Ex. 4 at 71).) The HOME Line survey revealed that the vast majority of properties accepting Section 8 vouchers were concentrated in high poverty zip codes in North Minneapolis. (*Id.* at 6 (citing Sarff Aff., Ex. 9 at CITY003455).) 84% of owners have five or fewer units. (*Id.*) However, owners with 10 or more units house 62% of all Section 8 families in Minneapolis. (*Id.*)

## B. Participation in the Section 8 Program

Once a Section 8 voucher holder identifies a qualifying rental unit, the MPHA conducts an inspection of the unit to determine if it satisfies the program's Housing Quality Standards ("HQS"). (*Id.* at 3 (citing 3/13/18 Hanson Dep., at 39:18-40:4, 22:9-12).) If a unit fails the inspection, the owner may self-certify corrections for minor issues or, if there are significant health or safety violations, a re-inspection will be conducted. (*Id.* at 3 (citing 3/14/18 Russ Dep., at 40:21-41:8).) If a unit passes the inspection, the MPHA enters a payment agreement with landlords by using a HUD form known as a Housing Assistance Payment agreement (the "HAP Contract"). (*Id.* at 3 (citing 3/14/18 Russ Dep., at 26:18-27:1, 29:19-22, 40:16-20); Pls.' Supp. Mem., at 8 (citing 24 C.F.R. § 982.1(b)(2)); Moreland Aff., Ex. 1.) The HAP Contract also requires that the lease for the contract unit include word-for-word all provisions of Part C of the HAP Contract (the "Tenancy Addendum"). (Moreland Aff., Ex. 1, at 1, 4; *see* Def.'s Supp. Mem., at 3.)

## C. The Ordinance

On March 24, 2017, the Minneapolis City Council enacted amendments to Title 7 of the Minneapolis Code of Ordinances (the "Ordinance"). (Pls.' Supp. Mem., at 15 (citing M.C.O. § 139.40(e)(1) (as amended Mar. 24, 2017, Ord. No. 2017-010)); Def.'s Supp. Mem., at 15 (citing Sarff Aff., Ex. 40 at 08:11-9:00).) On December 8, 2017, the Minneapolis City Council adopted Ordinance No. 2017-078, and further amended the Ordinance. M.C.O. § 139.10 (as amended Dec. 8, 2017, Ord. No. 2017-078).[2]

[2] Any reference to the Ordinance beyond this point will be referring to the most recent version of the Ordinance, as amended on December 8, 2017.

The Ordinance generally prohibits owners and managing agents from discriminating against people in the leasing and renting of housing based on a person's receipt of public assistance or any requirements of a public assistance program. (Def.'s Supp. Mem., at 16.) "Public assistance program" is defined to include Section 8 vouchers. (*Id.* at 16-17 (citing M.C.O. §139.20).)

Under the Ordinance, "[i]t is an affirmative defense if the refusal, denial, or withholding is due to a requirement of a public assistance program and that requirement would impose an undue hardship." (*Id.* at 17 (citing M.C.O. §139.40(e)(1)).) Undue hardship with respect to M.C.O. § 139.40(e)(1) means:

> [A] situation requiring significant difficulty or expense when considered in light of a number of factors to be determined on a case-by-case basis. These factors include, but are not limited to:
>
> > (1) The nature and net cost of complying with any requirement of a public assistance program, taking into consideration existing property management processes;
> >
> > (2) The overall financial resources of the landlord, taking into consideration the overall size of the business with respect to the number of its employees, and the number, type, and location of its housing stock; and
> >
> > (3) The impact of complying with any requirement of a public assistance program upon the business and dwelling.

(*Id.* at 17 (citing M.C.O. §139.20).) The Ordinance contained several exemptions as follows:

> (1) Renting or leasing a room in an owner occupied single family dwelling.
>
> (2) Renting or leasing a single family dwelling, a single dwelling unit, or a single dwelling unit of a condominiums, townhouse, or housing cooperative, by the owner of the dwelling or dwelling unit, for no more than thirty-six (36) months, when such dwelling or dwelling unit is an owner occupied homestead at the start of the thirty-six (36) month period.
>
> (3) Renting or leasing a dwelling with two dwelling units when a person who owns or has an ownership interest in the dwelling is residing in the other dwelling unit.
>
> (4) Renting or leasing a single family dwelling, a single dwelling unit, or a single dwelling unit of a condominium, townhouse or housing cooperative, by the owner of the dwelling or dwelling unit, while the owner is on active military duty and when

> such dwelling or dwelling unit is an owner occupied homestead at the start of the active military duty.

(*Id.* at 18 (citing M.C.O. §139.30(b)(1)-(4)).)

The City exempted these four classes for multiple reasons, including the fact that the MPHA does not allow for the use of Section 8 vouchers in shared housing conditions such as the renting or leasing of a room in an owner occupied single-family dwelling. (*Id.* at 18 (citing 3/13/18 Hanson Dep., at 20:17-23; Ex. 43 at 4).) The Minnesota Human Rights Act also contains some similar exemptions. (*Id.* at 18 (citing Minn. Stat. §363A.21, subd. 1 (2017); Sarff Aff., Ex. 43 at 4).)

Along with the enactment of the Ordinance, the City Council directed staff to report on the development of a Landlord Incentive Fund to address property damage claims by owners. (*Id.* at 18 (citing Sarff Aff., Ex. 36 at 2:40:40-2:44:53; Ex. 39; Ex. 61 at 13:4-7 ("3/15/18 Schuchman Dep.")).) The Landlord Incentive Fund went into effect on January 1, 2018. (*Id.* at 19 (citing 3/15/18 Schuchman Dep., at 61:13-20-25).) It allows owners renting to Section 8 voucher holders to request reimbursement for damages in excess of their security deposit. (*Id.* at 19 (citing 3/15/18 Schuchman Dep., at 62:20-63:3, 63:8-10).) A request for reimbursement may be made for damage claims between $500 and $2,500. (*Id.* at 19 (citing 3/15/18 Schuchman Dep., at 63:4-7, 66:19-67:5 (explaining that other jurisdictions with similar owner incentive funds have experienced "very little actual demand" because "voucher holders don't commit any more damage necessarily than anyone else")).)

## D. <u>This Lawsuit</u>

On June 19, 2017, a group of fifty-five Minneapolis rental property owners (collectively referred to as the "Plaintiffs") jointly filed this action against the City of

Minneapolis (the "City"), seeking declaratory and injunctive relief against the enforcement of the Ordinance. (Compl. at ¶ 57-58.) The Plaintiffs allege that the Ordinance is preempted by state law; violates due process; is an unconstitutional partial regulatory taking; is an unlawful interference with freedom of contract; and violates equal protection rights. (*Id.* at ¶ 100-149.)

## IV. ANALYSIS

### A. Plaintiffs' Substantive Due Process Claim

The Minnesota Constitution provides that no person shall be deprived of life, liberty or property without due process of law. Minn. Const. Art. I, Sec. 7. Substantive due process protects individuals from arbitrary, wrongful governmental actions. *In re Linehan*, 594 N.W.2d 867, 872 (Minn. 1999).

The legal analysis employed to evaluate such a claim depends on the nature of the rights involved. Plaintiffs argue that the Ordinance affects the fundamental property rights of rental property owners. (Pls.' Supp. Mem., at 58-59.) Plaintiffs point out that "[i]f a challenged law implicates a fundamental right – such as the right to acquire, possess, and enjoy property – courts subject the law to strict scrutiny," and they cite a number of cases. (*Id.* at 58 (citing *In re Linehan*, 594 N.W.2d at 872; *Essling v. Markman*, 335 N.W.2d 237, 239 (Minn. 1983); *Thiede v. Town of Scandia Valley*, 14 N.W.2d 400, 405 (Minn. 1944); *State v. Wiseman*, 816 N.W.2d 689, 693 (Minn. App. 2012). However, none of the cases cited by Plaintiffs hold that the fundamental right to property includes the right to rent property as a business.

*Linehan* addressed whether a civil commitment statute violated the fundamental liberty right to freedom from physical restraint.[3] *Linehan*, 594 N.W.2d at 871-78. *Essling* addressed whether a statute prohibiting the sale of insurance to persons age 65 or older violated the fundamental rights to freedom of choice or contract.[4] *Essling*, 355 N.W.2d at 239-40. *Wiseman* addressed whether a statute criminalizing the refusal to submit to a blood test violated the fundamental liberty right to bodily integrity.[5] *Wiseman*, 816 N.W.2d at 692-94. Neither *Linehan*, *Essling*, nor *Wiseman* mention property. *See Linehan*, 594 N.W.2d at 871-78; *Essling*, 355 N.W.2d at 239-40; *Wiseman*, 816 N.W.2d at 692-96.

The only case cited by Plaintiffs that discusses a fundamental right to property is *Thiede*. *Thiede*, 14 N.W.2d at 403-10. *Thiede* addressed an attempt to remove a family receiving public assistance from their home and force them to move to another town. *Id.* at 402-06. The *Thiede* court described the fundamental right to property as "the right to acquire, possess, and enjoy property." *Id.* at 405. The *Thiede* court specified that "the owner of a freehold cannot, without his consent, be removed therefrom to his legal settlement for poor relief purposes in another municipality." *Id.* at 406. *Thiede* is unpersuasive because there the

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[3] The *Linehan* court stated that "[i]n determining whether a civil commitment law violates substantive due process, a court will subject the law to strict scrutiny, placing the burden on the state to show that the law is narrowly tailored to serve a compelling state interest." *Linehan*, 594 N.W.2d at 871-72.

[4] The *Essling* court stated that "[n]either this court nor the United States Supreme Court has recognized freedom of choice or contract as fundamental rights sufficient to invoke strict judicial scrutiny," and "[s]imilarly, age has never been considered a suspect classification." *Essling*, 355 N.W.2d at 239-40.

[5] The *Wiseman* court stated that "Wiseman has not demonstrated the existence of a fundamental right, recognized under either federal or Minnesota law, to passively or nonviolently refuse to submit to a constitutionally reasonable police search." *Wiseman*, 816 N.W.2d at 692-96.

fundamental property right was the right of a homeowner to not be forcefully removed from his home, which is very different from the right to rent property. *Id.* at 402-06.

The City contends that the property right at issue here is Plaintiffs' business right to rent their property. (Def.'s Opp'n. Mem., at 28-30.) The City cites multiple zoning ordinance cases that applied the lower, rational basis, standard rather than strict scrutiny even though the ordinance affected a property owner's property rights. (*Id.* (citing *Big Lake Ass'n v. St. Louis Cty. Planning Comm'n*, 761 N.W.2d 487 (Minn. 2009); *Amcon Corp. v. City of Eagan*, 348 N.W.2d 66 (Minn. 1984); *Honn v. City of Coon Rapids*, 313 N.W.2d 409 (Minn. 1981); *Rochester Ass'n of Neighborhoods v. City of Rochester*, 268 N.W.2d 885 (Minn. 1978)).) The City also cites two property tax classification cases that applied a rational basis review even though the classifications affected a property owner's property rights. (*Id.* (citing *Metro. Sports Facilities Comm'n v. Cty. of Hennepin*, 478 N.W.2d 487, 490-91 (Minn. 1991); *Matter of McCannel*, 301 N.W.2d 910, 918-19 (Minn. 1980)).)

In a 2014 case involving rental housing, the Minnesota Court of Appeals upheld an ordinance of the City of Winona restricting the number of rental housing units on any given block to 30% of the total properties. *Dean v. City of Winona*, 843 N.W.2d 249, 260-61 (Minn. Ct. App. 2014). Neither party argued that a fundamental right was involved, so the Court of Appeals applied a rational basis test. It seems unlikely that the Court of Appeals would have applied an incorrect standard even if the parties agreed on it. Moreover, the City has cited three trial court cases involving rental housing that do apply the rational basis test. (Def.'s Opp'n. Mem., at 29 (citing *Hills Dev., Inc., v. City of Florence, Kentucky*, 2017 WL 1027586

(E.D.K.Y. 2017);[6] *Longacre v. West Sound Util. Dist.*, 2016 WL 3186855 (W.D. Wash. 2016);[7] *McSwain v. Commw.*, 520 A.2d 527, 529-530 (Pa. Commw. Ct. 1987)).)[8]

These cases establish that the mere fact that legislation impacts property does not mean that the property right being affected is a fundamental property right. In this case, the Court will follow the lead of the *Dean* case.

As set forth in *Dean*, the rational basis standard requires that a challenged law promote a public purpose, that it not be an unreasonable, arbitrary, or capricious interference with a private interest, and that the means chosen bear a rational relation to the purpose served. *Dean*, 843 N.W.2d at 260. "There is a presumption in favor of the constitutionality of legislation and a party challenging constitutionality has the burden of demonstrating beyond a reasonable doubt a statute violates a provision of the constitution." *State by Humphrey v. Ri-Mel, Inc.*, 417 N.W.2d 102, 106 (Minn. Ct. App. 1987) (citing *McGuire v. C & L Restaurant, Inc.*, 346 N.W.2d 605, 611 (Minn.1984)). "'The burden is on the one attacking the legislative

[6] "[T]here is no recognized fundamental right to use your property however you wish or rent your property. And the Court 'declines to create today a new liberty interest' in renting property." *Hills Dev., Inc.*, 2017 WL 1027586, at *7.

[7] "Plaintiff offers no legal authority suggesting that his right to use, rent, or sell his property as he chooses is a fundamental property right subject to constitutional protection. Indeed, the Ninth Circuit has rejected substantive due process claims brought by plaintiffs challenging government action relating to water and sewer service, even though the plaintiffs claimed that the proposed actions would result in some plaintiffs being deprived of their property." *Longacre*, 2016 WL 3186855, at 2 (citing *Keller v. Los Osos Cmty. Servs. Dist.*, 39 Fed.Appx. 581, 583 (9th Cir. 2002)).

[8] "The appellant erroneously asserts that a fundamental right is involved here: his right to hold and use property. While someone deprived of property is entitled to due process, due process is not synonymous with a fundamental right. Rights which have been deemed to be fundamental, thus, triggering strict scrutiny, include privacy and freedom of speech, but do not include the right to freely hold and dispose of one's property." *McSwain*, 520 A.2d at 530 (citing *Greenacres Apartments, Inc. v. Bristol Township*, 482 A.2d 1356 (1984) (addressing an ordinance which required an inspection upon vacancy of an apartment before it could be re-rented and an annual fee from apartment building owners to implement the inspections)).

arrangement to negative every conceivable basis which might support it.'" *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973).

**1. Public Purpose**

The first inquiry is into the public purpose of the law. At the hearing, counsel for the City repeatedly stated that the purpose of the Ordinance was to increase stable housing opportunities for low income citizens without creating undue hardships for property owners. The Ordinance itself, however, contains an express statement of its purpose: "[i]t is the public policy of the City of Minneapolis and the purpose of this title to: (1) prevent and prohibit all discriminatory practices . . . (g) in real estate services . . . ." M.C.O § 139.10(b)(1)(g).

Thus, even if the overall goal of the Ordinance is to increase stable housing opportunities, the more specific goal is to accomplish that increase by eliminating discriminatory practices. There can be no doubt that this is a legitimate public purpose. In *Dean*, the court stated: "[w]e easily conclude that the public has a sufficient interest in rental housing to justify a municipality's use of police power as a means of regulating such housing." *Dean*, 843 N.W.2d at 258.

**2. Interference with Private Interests.**

The second inquiry is whether the Ordinance is an unreasonable, arbitrary, or capricious interference with a private interest.

***a) The Ordinance is not capricious***

The Ordinance is obviously not capricious. Black's Law Dictionary defines "capricious" as:

> "1. (Of a person) characterized by or guided by unpredictable or impulsive behavior; likely to change one's mind suddenly or to behave in unexpected ways. 2. (Of a

> decree) contrary to the evidence or established rules of law." CAPRICIOUS, Black's Law Dictionary (10th ed. 2014).

In *Dean*, the court held that an ordinance that "was adopted after a long, deliberate information-gathering process that considered public input, data, and expert review . . ." was "not an unreasonable, arbitrary, or capricious interference with private interests." *Dean*, 843 N.W.2d at 261.

Here, the City outlines the "nearly two years of discussion, study, research, and listening sessions with stakeholders, including owners, [Section 8 recipients], and the MPHA" on pages seven through nine of its memorandum in support of its motion for summary judgment. (*See* Def.'s Supp. Mem., at 7-9.) Moreover, the effective date of the Ordinance was put off a full year to enable landlords and tenants to be prepared for it. (*See id.* at 19.)

Plaintiffs complain that the process of developing the Ordinance included inadequate input from landlords. (*See* Pls.' Opp'n. Mem., at 4-5.) Nonetheless, Plaintiffs admit that landlords were allowed to attend at least two meetings, "a community meeting on February 28, 2017, and a stakeholder meeting in May 2016." (*Id.* at 4-5.) The Constitution requires that the adoption of an ordinance be deliberate and not impulsive, not that every voice get equal time.

***b) The Ordinance constitutes an interference with the rental of private housing property that is unreasonable or arbitrary***

The second prong of the test requires the court to review whether the ordinance is unreasonable or arbitrary. The relevant definition of "arbitrary" is, [d]epending on individual discretion; of, relating to, or involving a determination made without consideration of or regard for facts, circumstances, fixed rules, or procedures," so the Court will analyze

"unreasonable or arbitrary" together as both indicating the absence of reasons or evidence. ARBITRARY, Black's Law Dictionary (10th ed. 2014).

The City begins its brief by explaining,

> "In March 2017, the City of Minneapolis joined a number of jurisdictions by adopting an amendment to its Civil Rights ordinance generally prohibiting property owners from denying rental housing to individuals and families using Housing Choice Vouchers (HCV) to pay their rent." (Def.'s Supp. Mem., at 1.)

Although the effect of the Ordinance may be to "prohibit[] property owners from denying rental housing" to Section 8 renters, the Ordinance is found not in Title 12 of the Minneapolis Code relating to Housing, but in Title 7 relating to Civil Rights. *See* M.C.O § 139. The Ordinance is an anti-discrimination ordinance. Thus, the rationality of the Ordinance must be evaluated in this light.

The parties have submitted over two hundred and fifty pages of briefing and hundreds of pages of exhibits. Much of this material bears on the rationality of the Ordinance. A fair determination of this legal issue necessitates a review of the parties' principal assertions about the rationality of this anti-discrimination ordinance.

## I. Plaintiffs' Assertions Bearing on Rationality.

### *(a) The Veiled Claim of Discrimination*

The Plaintiffs' highlight the anti-discrimination nature of the Ordinance: "[t]he Amended Ordinance forces owners to participate in the Section 8 program under a veiled claim that owners are choosing not to voluntarily participate for discriminatory reasons."(Pls.' Supp. Mem., at 59.) Working through the definitions and prohibitions of the Ordinance bears out this assertion.

M.C.O. § 139.40 states, "[w]ithout limitation, the following are declared to be unfair discriminatory acts: . . .

> (e) Discrimination in property rights. It is an unlawful discriminatory practice for an owner . . . when . . . status with regard to a public assistance program, or *any requirement of a public assistance program is a motivating factor:*
>
> > (1) To refuse to sell, rent or lease, or to refuse to offer for sale, rental or lease; . . . or to represent that real property is not available for inspection, sale, rental, or lease when in fact it is so available; or to otherwise make unavailable any property or any facilities of real property." (emphasis added).

M.C.O. § 139.20 defines "[p]ublic assistance program" as "[f]ederal, state or local assistance, including medical assistance, or tenant based federal, state or local subsidies, including, but not limited to, rental assistance, rent supplements, and housing choice vouchers." "[H]ousing choice vouchers" are defined as "[t]enant-based assistance under the United States Housing Act of 1937, 42 U.S.C. § 1437f(o) (also known as Section 8)." M.C.O. § 139.20 defines "[d]iscriminate or discrimination" as "any act, attempted act, policy or practice, which results in the unequal treatment, separation or segregation of or which otherwise adversely affects any person who is a member of a class or combination of classes protected by this title." The introductory findings that support the Ordinance in M.C.O. § 139.10(a) state that "[t]he council finds that discrimination adversely affects the health, welfare, peace and safety of the community by, among other things, degrading individuals, fostering intolerance and hate, and creating and intensifying . . . substandard housing . . . thereby injuring the public welfare."

Citizens may complain about a violation of this Ordinance to the Minneapolis Commission on Civil Rights. *See* M.C.O. § 141.50. If the complaint is sustained, the violator is liable for compensatory damages in an amount up to three times the actual damages

incurred, damages for mental anguish or suffering, the attorney fees of the complaining party, punitive damages of up to $25,000, and a civil penalty paid to the City. M.C.O. § 141.50(r).[9]

Thus, the inescapable logic of the Ordinance is that any landlord who refuses to rent to a Section 8 tenant because of the requirements of the program has engaged in an unfair discriminatory act that results in the unequal treatment of a person in a protected class that degrades that individual and fosters intolerance and hate and is thereby subject to heavy penalties. The unusual feature of this ordinance is that it now includes the requirements of a public assistance *program* in what had previously been a list of protected characteristics of a *person* such as race, religion, national origin, and sexual orientation. The Plaintiffs point out the confusion in the Ordinance between not liking a program with not liking the people in the program:

> "The Amended Ordinance confuses an owner deciding what government programs to participate in with discrimination against the end-users of a program. *Id.* But a decision not to undertake the expense or rigors of a program is not discrimination against people of protected classes who use that program. A rental decision based on the administrative requirement of a program is not a decision based on a person's status at all." (Pls.' Supp. Mem., at 54-55.)

***(b) The Administrative Burdens of the Section 8 Program***

The Plaintiffs assert that there are valid business reasons for not participating in the Section 8 program: "[m]aking factually-backed business decisions about public assistance programs in which a property owner wants to participate, versus those which involve

[9] Under M.C.O. § 141.50(r) the hearing committee or examiner determines whether a respondent has engaged in discrimination through the complaint process. However, given the wording of the Ordinance, the refusal to participate in the Section 8 program for business reasons alone would support a finding of discrimination.

prohibitive administrative, training, and management burdens, is not discrimination." (Pls.' Supp. Mem., at 59.) A look at the operation of the Section 8 program clearly reveals the existence of reasons for a landlord to make a "factually-based business decision" not to participate.

A landlord who rents to a tenant with a Section 8 voucher is required to enter into two, non-negotiable agreements—a HAP Contract with the housing authority, and a Tenancy Addendum with the tenant. (*See* Def.'s Supp. Mem., at 3 (citing Sarff Aff., 3/14/18 Russ Dep., at 26:18-27:1, 29:19-22, 40:16-20); Pls.' Supp. Mem., at 8 (citing 24 C.F.R. § 982.1(b)(2)); Moreland Aff., Ex. 1 at 1, 4.) The HAP Contract and Tenancy Addendum contain a number of guidelines and restrictions:

- "Modification of the HAP contract is not permitted. The HAP contract must be word-for-word in the form prescribed by HUD." (Moreland Aff., Ex. 1 at 1.)
- "The lease for the contract unit must include word-for-word all provisions of the tenancy addendum required by HUD (Part C of the HAP contract)." (*Id.* at 4, ¶ 2(c).)
- "The initial lease term must be for at least one year. However, the PHA may approve a shorter initial lease term if the PHA determines that: [s]uch shorter term would improve housing opportunities for the tenant, and [s]uch shorter term is the prevailing local market practice." (*Id.* at 1, § 5.)

The HAP contract provides that "the rent to owner may at no time exceed the reasonable rent for the contract unit as most recently determined or redetermined by the PHA in accordance with HUD requirements." (*Id.* at 5, ¶ 6(a).) "The PHA may terminate the HAP contract if the PHA determines, in accordance with HUD requirements, that available program funding is not sufficient to support continued assistance for families in the program." (*Id.* at 4, ¶ 4(b)(5).) "The amount of the PHA housing assistance payment is subject to change during the HAP contract term in accordance with HUD requirements. . . ." (*Id.* at 5, ¶ 7(c)(2).)

"The owner must provide any information pertinent to the HAP contract that the PHA or HUD may reasonably require." (*Id.* at 6, ¶ 11(a).) The PHA and HUD "have full and free access to the contract unit and the premises, and to all accounts and other records of the owner that are relevant to the HAP contract. . . ." (*Id.* at 6, ¶ 11(b).)

"The owner may not assign the HAP contract to a new owner without the prior written consent of the PHA." (*Id.* at 7, ¶ 14(a).) "If the owner requests PHA consent to assign the HAP contract to a new owner, the owner shall supply any information as required by the PHA pertinent to the proposed assignment. (*Id.* at 7, ¶ 14(b).) "The PHA may inspect the contract unit and premises at such times as the PHA determines necessary, to ensure that the unit is in accordance with the HQS." (*Id.* at 4, ¶ 3(e).) "The PHA shall not make any housing assistance payments if the contract unit does not meet the HQS . . . ." (*Id.* at 4, ¶ 3(d).) "During the term of the lease . . ., the owner may only terminate the tenancy because of . . . [s]erious or repeated violation of the lease," and other specified grounds. (*Id.* at 10, ¶ 8(b).) "The owner may not terminate the tenancy for nonpayment of the PHA housing assistance payment." (*Id.* at 9, ¶ 5(d).)

In short, by participating in the Section 8 program, a landlord gives up varying degrees of control over the sale of the building, the amount and certainty of the income from the unit, the lease terms and the ability to terminate the lease for violations, access to the unit and to its business records, and must comply with new reporting and inspection requirements. The loss of control may even extend beyond the Section 8 unit; the Plaintiffs pointed out at the hearing that it might be awkward to terminate a privately paying tenant for violations of the lease that are serious but not repeated, or repeated but not serious, when the Section 8 tenant next door engages in the same conduct without consequences.

The only effort to quantify the economic impact of the Section 8 program on participating landlords is the study conducted by CBRE Valuation and Advisory Services. (*See* Moreland Aff., Ex. 29.) The City vigorously challenges the reliability of this study, which had a small sample size and incorporates questionable assumptions. (*See* Def.'s Opp'n. Mem., at 12-13.) However, even without measureable economic impact, the loss of control over business operations that comes with Section 8 participation provides a reasonable explanation, other than outright discrimination, for why landlords might want to stay out of the program.

***(c) The Evidence of Discrimination***

The Plaintiffs challenge the evidence the City relies on for the claim that they are discriminating: "The City cannot identify more than anecdotal and speculative evidence to support its claim that discrimination is preventing HCV tenants from finding housing. . . . Claiming that the people who utilize HCVs are disproportionately protected classes does not render an owner's decision not to participate in the HCV program discriminatory. In fact, the City considered no evidence that the property owners' motives are discriminatory." (Pls.' Supp. Mem., at 59.)

The City's initial brief contains a section entitled, "HOUSING CHOICE VOUCHER HOLDERS REGULARLY EXPERIENCE DISCRIMINATION, RESULTING IN THE DENIAL OF SUITABLE HOUSING AND OVER-CONCENTRATION IN AREAS OF POVERTY." (Def.'s Supp. Mem., at 4.) Despite this and other strong statements by the City about discrimination, an examination of all the citations to the record in all of the City's briefs mentioning discrimination reveals an important ambiguity about the term "discrimination" that may be at the heart of the dispute between these parties. When the Plaintiffs complain

about unsupported claims of "discrimination", they apparently mean acting out of prejudice against the tenants themselves. On the other hand, the City's evidence uses the word "discrimination" most often in the loose sense of landlords simply refusing Section 8 vouchers:

- The Director of public policy and organizing at Home Line, a statewide non-profit agency that provides legal advice for renters, testified that "we see a disproportionate numbers of voucher holders in Minneapolis asking for advice about housing instability, substandard conditions, and other rental issues that are extricably [sic] tied to the discrimination and lack of housing options that they face." (Sarff Aff., Ex. 36 at 1:55:44-1:58:06.) The survey he reported on demonstrated "that there were a lack of options in housing listings that were available to Section 8 voucher holders throughout the city" and "perceptions of Section 8 caused some renters difficulty in finding a home. . . ." (*Id.*) However, no evidence of prejudice was cited.[10] (*See id.*)

- The City cites to CITY005425, which appears to be a large sheet of poster paper containing handwritten notes from a listening session held on May 13, 2016, in the Cedar Riverside area, a largely Somali community. (Def.'s Supp. Mem., at 9 (citing Sarff Aff., Ex. 35 at CITY005425).) Two of the many circles on the large sheet of paper contain the words, "it touches people like me" and "a lot of discrimination," but there is no information presented about what the residents meant. (Sarff Aff., Ex. 35 at CITY005425.) Most of the circled comments on the paper concern problems with the Section 8 program, like inspections, language, paperwork, rent cap, and limitations on family members and mobility. (*Id.*)

- A representative of Congressman Keith Ellison's office testified that, "our office knows firsthand that Section 8 recipients experience rampant discrimination in the marketplace." (Sarff Aff., Ex. 36 at 1:01:57-1:03:23; 1:03:35-1:03:43.) However, the factual details of the representative's testimony consist of reports of frustration by tenants about finding landlords that will accept Section 8 vouchers, with no facts that the problem is due to prejudice. (*Id.*)

- Councilmember Elizabeth Glidden testified that "I thank Councilmember Goodman for what I think is a really good overview of what is really a whole package of things that started out with talking about discrimination faced by Section 8 voucher holders and this has been a 2 year journey of trying to listen as well as we can to stakeholders. Talking about what is a bigger picture of issues that prohibiting discrimination is one

[10] He also said "low income renters and people of color are taken advantage of by unscrupulous landlords." (Sarff Aff., Ex. 36 at 1:55:44-1:58:06.) That statement was linked to "several high profile legal cases in Minneapolis", not to landlords not participating in the Section 8 program.

piece of. But how can we work to make this whole system work as well as it can. At the end of the day prohibiting discrimination is about giving people a fair shot, a fair opportunity to be considered for housing in different areas of the city that today frankly that door is completely shut." (*Id.* at 2:57:48-3:02:45.) However, Councilmember Glidden does not mention prejudice. (*Id.*)

- A representative of the housing agency, AEON, testified that "giving them more access to quality affordable housing is key to improving their lives and stopping discrimination against those who utilize such innate vouchers [sic-presumably meaning Section 8 vouchers] can and will help achieve that goal." (*Id.* at 1:33:14-1:34:00.) The AEON representative did not provide any additional details. (*Id.*)

- The Director of Housing Policy and Development for the City of Minneapolis, Andrea Brennan, testified that a study was conducted by the City in 2016, as required of recipients of direct funding from the U.S. Department of Housing and Urban Development, "and the issue of Section 8 and discrimination came up through that community engagement process, . . . the primary issue that came up again and again and again in the community engagement was the inability to find a willing landlord to accept Section 8. That was by and far the most prevalent response that we heard, and, you know, there were definitely instances of, you know, specific discrimination issues that were raised. We heard that most often from families with children having difficulty . . . ." However, Director Brennan provided no details about what was meant by "discrimination" and the study mentioned does not appear to be in the record. (Moreland Aff., Ex. 11 at 68:8-71:24.)

In the evidence cited by the City, the only reference to discrimination based on prejudicial bias is a 2014 study conducted by the Metropolitan Council called "Choice, Place, and Opportunity: An Equity Assessment of the Twin Cities Region," (Def.'s Supp. Mem., at 6 (citing Sarff Aff., Ex. 13 at CITY002784).) The sentence that was quoted in the City's brief states: "Low-income residents of color may face barriers in the tenant-based Section 8 Housing Choice Voucher program, including shrinking federal program dollars, landlord reluctance to rent to voucher holders, and outright racial discrimination against voucher holders of color." (Sarff Aff., Ex. 13 at CITY002784.) "May" is an ambiguous term, and the section of the study specifically discussing Section 8 housing identifies three problems with the program-- the limited funding and long waiting lists, the rent caps, and the reluctance of

landlords to participate in the program. (*Id.* at Ex. 13 at CITY002854-56.) Neither in that section or in a long section on discrimination in the private housing market generally, which is supported by actual market surveys, does the study identify prejudicial discrimination as a reason landlords are staying out of the Section 8 program. (*Id.* at Ex. 13 at CITY002858-70.)

The City's Opposition brief contains a section entitled, "[t]he subtext of denying housing to HCV holders based on 'legitimate business' objections to the HCV program." (Def.'s Opp'n. Mem., at 4.) In that section the City quotes deposition testimony of three Plaintiffs' representatives that it characterizes as revealing "a discriminatory subtext to owners' refusal to rent to HCV holders to participate in the program." (*Id.* at 4.) The City picks out three aspects of this testimony—a cap on Section 8 tenants in one building, a landlord who opened up only one building to Section 8 tenants because it was in an "inner city" neighborhood, and a statement that Section 8 tenants cause more damage than market renters. (*Id.* at 5.) A review of the full testimony of the three representatives reveals a different picture. To begin with, all three of them emphasized the burdensome requirements of the Section 8 program as the basis for their actions. (*See* Sarff Aff., Ex. 48 at 102:1-103:23, 108:1-112:25; Ex. 52 at 92:1-98:14; Ex 55 at 82:1-84:10.)

Moreover, all three witnesses the City quotes had non-discriminatory reasons for the statements selected out by the City. The cap on the number of Section 8 tenants was because the owner had long term staff members who understood the administrative requirements of the Section 8 program and it would take a lot of time and would reduce profitability to train new staff members. (*See id.* at Ex. 52 at 92:1-94:25.)

The inner city building was an older building, and participating in the Section 8 program made sense because of the rents they could collect there and because there were a lot

of voucher holders in the area. (*See id.* at Ex. 48 at 108:1-112:25.) The building manager provided her view of the tenants: "They're people just like everybody else is in there, so I can't -- they're not in a different class. It's the program that's difficult to work in. It's not the people." (*Id.* at Ex. 48 at 111:1-7.)

And the statements about damages was not a stereotype but was extensively explained by the personal experiences of a life-long building manager who had rented to about 200 Section 8 tenants. (*Id.* at Ex. 55 at 87:3-11.) When he provided information to one of his building-owner clients about why they should stop participating in the Section 8 program a few years ago, the reason was not excessive damage but the administrative burdens the Plaintiffs complain about in this lawsuit: "[t]he problems that this program entails with respect to inspections, paperwork, downtime, the standards, lease violations, the additional labor work that was necessary to deal with these units, and the additional costs that were involved with respect to collecting." (*Id.* at Ex. 55 at 32:13-19.)

In all of the material reviewed above, there is no evidence of personal bias toward Section 8 tenants, that landlords are renting to some Section 8 tenants, such as white tenants, but not to minority tenants; that landlords are participating in other voucher programs with fewer minority tenants, or that there is any correlation between those landlords not participating in the Section 8 program and formal discrimination complaints or determinations for that or any other reason. In sum, the record bears out the Plaintiffs' assertion that the City has presented only anecdotal and speculative evidence of prejudice-based discrimination.

The role of the Court here is to assess whether there is any rational basis for the Ordinance, not to weigh competing evidence. But it should be noted that the Plaintiffs have submitted evidence of their lack of prejudicial motivation. [11]

### *(d) Future Housing Subsidy Programs*

The Plaintiffs assert that not only does the Ordinance claim that they are discriminating now, it does so if they decline to participate in any program in the future:

> "[t]he Amended Ordinance is written so broadly that it makes it 'discrimination in property rights' to refuse to participate in any future public assistance program that the federal, state, or local government may institute. The Amended Ordinance defines 'public assistance program' as: 'Federal, state or local assistance, including medical assistance, or tenant-based federal, state or local subsidies, including, but not limited to, rental assistance, rent supplements, and housing choice vouchers.' If another public assistance program is created in the future, the Amended Ordinance will mandate property owner participation in that program too, no matter what requirements it places on owners.'" (Pls.' Supp. Mem., at 20 (citations omitted).)

The Plaintiffs' assertion is accurate. The Ordinance makes no distinction between the current Section 8 program and any other public assistance program. The same chain of definitions and logic would therefore deem any landlord who refused to rent to a tenant because of any requirement of any housing assistance program enacted in the future to be engaging in an "unlawful discriminatory practice" which "results in the unequal treatment,

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[11] The Plaintiffs' brief summarizes this evidence as follows: "[t]hroughout this process, landlords have made clear that their issue is not with the tenants, it is with the program: Many owners/managers were quick to assert that they do not have a problem renting to low-income households that benefit from the Housing Choice Voucher program. They shared that there are no major differences in managing the people who participate in the program and the public at large. The challenge, owners stressed, came from dealing with the administrative burden of the program. As evidence of this, many owners/managers highlighted their willingness to accept voucher residents participating in local rental assistance programs with non-profit partners . . . . Plaintiffs' representatives also made clear that they would rent to HCV holders, just they would not participate in the program. In fact, based on situational differences between properties, some Plaintiffs actually do accept a certain number of HCV tenants at other properties in their portfolios." (Pls.' Opp'n. Mem., at 2-3 (citations omitted).)

separation or segregation of . . . any person" and thereby "degrad[es] individuals, fosters intolerance and hate, . . . thereby injur[es] the public welfare." M.C.O. § 139.10(a).

***(e) Availability of Procedural Protections***

Plaintiffs complain about another feature of the Ordinance--it provides no opportunity for a landlord to establish a non-discriminatory reason for not participating in the Section 8 program. As the Plaintiffs put it, "[i]n addition, the Amended Ordinance provides only one way of opting out of the HCV program, the affirmative defense of undue hardship . . . . Legitimate business reasons for nonparticipation in the HCV program, such as: 1) conflicting language between the owner's lease and the HAP Contract; or 2) policies and practices which conflict with the requirements of the HCV program and HAP Contract – such as duration of leases for more or less than one year, or not having separately metered utilities – will not serve as bases for nonparticipation." (Pls.' Supp. Mem., at 54-55.)

This is a valid assertion about the structure of the Ordinance. The undue hardship defense is essentially limited to the cost and business impact of compliance, and it does not provide for consideration of whether the landlord has non-discriminatory motives. *See* M.C.O. § 139.20.

## II. <u>The City's Assertions Bearing on Rationality.</u>

***(a) Shortage of Apartments available to Section 8 Renters.***

The City has extensively documented the housing problem at the core of this case. As the City states, "[a] 2016 survey of Minneapolis rental listings by HOME Line, a nonprofit organization that provides legal advice to renters, revealed that only 57% of the particular listings surveyed were within rent limits affordable to HCV holders and, of those affordable listings, only 23% would actually accept HCV holders." (Def.'s Supp. Mem., at 5 (citing Sarff

Aff., Ex. 9 at CITY003454; Ex. 10 at CITY003217; Ex. 4 at 71).) The most compelling proof of the problem is that, despite how valuable a Section 8 voucher is to a poor family, Greg Russ, the Chief Executive Officer for the MPHA, has reported that vouchers are returned to the MPHA on a regular basis because families could not find housing. (*Id.* at 5-6 (citing Sarff Aff., Ex. 2 at 29:4-13).) If a family cannot find housing with their voucher, the HCV goes unused. (*Id.* at 6 (citing Sarff Aff., Ex. 1 at 26:2-5).) Moreover, a graphic survey and chart by HOMELINE demonstrates that the buildings that do accept Section 8 tenants are heavily concentrated in high poverty zip codes on the North Side. (Sarff Aff., Ex. 9 at CITY003454, CITY03458-60.) The City has documented that such concentrated poverty is not healthy for the families living there. (Def.'s Supp. Mem., at 7 (citing Sarff Aff., Ex. 7 at 1-2).)

The dispute in this case is about the remedy; there is no doubt about the problem.

***(b) Disproportionately affected Minority Groups.***

The City asserts, "[t]he denial of housing opportunities for HCV holders has a disparate impact on people of color and those with disabilities." (Def.'s Supp. Mem., at 6 (citing Sarff Aff., Ex. 4 at 105, n. 8).)" Section 8 program demographics bear this out. Of the 17,000 residents currently participating in the HCV program, 53% are children. (*Id*. at 10 (citing Sarff Aff., Ex. 36 at 9:15-9:20).) 15% are seniors, 40% are disabled, 78% are women, and 85% are people of color. (*Id*. at 10 (citing Sarff Aff., Ex. 36 at 10:21-10:33, 46:37-47:45).) The median income overall for HCV holders is just over $15,000 compared to a median income in Minneapolis of $71,000. (*Id*. at 10-11(citing Sarff Aff., Ex. 36 at 9:58-10:24).) Thus any limitations on Section 8 housing will particularly affect these disadvantaged populations.

Additionally, Minneapolis data from an analysis prepared for the Family Housing Fund makes it "clear" that there is a correlation between the location of HCV holders and racially concentrated areas of poverty. (*Id*. at 6 (citing Sarff Aff., Ex. 15 at 18).)

### *(c) Perception of Discrimination*

Although the City has not presented direct evidence of prejudice based-discrimination, it has abundantly demonstrated that the holders of Section 8 vouchers encountering closed doors feel discriminated against. The City's submissions contain a number of poignant accounts of what it feels like for Section 8 voucher holders to encounter blanket refusals to rent to them. (*See* Sarff Aff., Ex. 35 at CITY005425; Ex. 36 at 1:01:57-1:03:23; 1:03:35-1:03:43; Moreland Aff., Ex. 11 at 68:8-71:24.) The City points out that "such advertisements [declining Section 8 vouchers] are akin to times when people would not welcome black people, Irish people, Jewish people, or people of different sexual orientations." (Def.'s Supp. Mem., at 15.)

## III. Analysis of Rationality

In view of the assertions bearing on the rationality of the Ordinance made by the parties, all of which valid, is the Ordinance arbitrary or unreasonable? The role of the Court is not to review the wisdom or policy merits of the Ordinance, but simply to ensure that it has some conceivable rational basis. Nonetheless, a straightforward analysis of the parties' assertions demonstrates that the City's assertions about the current problems, although compelling, provide no rational basis for the remedy provided by this anti-discrimination ordinance, whereas the Plaintiff's assertions directly undermine any rational basis.

To begin with, the inclusion of "any requirement of a public assistance program" in a list of protected characteristics of a person, like race, religion, and gender identity, is a

fundamental problem. Those kinds of personal characteristics of a person, and the classes of people who exhibit them, are protected by various civil rights laws because of legislative determinations that any reasons for treating someone differently because of those characteristics will simply not be recognized. Such reasons are illegitimate; they are expressions of prejudice and unfair stereotypes. As the Seventh Circuit Court of Appeals put it in a case applying state and federal statutes to Section 8 housing, the discrimination prohibited by civil rights laws is considered "socially evil."[12]

By including "any requirement of a public assistance program" in a list of protected characteristics of a person, the Ordinance is announcing that such requirements will also simply not be recognized as the basis for any action. Business reasons to dislike the requirements are now deemed illegitimate. This is indeed unusual, because business reasons are recognized all the time as a legitimate basis for different treatment—penthouse suites are rented to rich people but not to poor people.

The unusual inclusion of "any requirement of a public assistance program", as opposed to other business reasons for decisions, in a list of protected personal characteristics thereby connotes that acting based on such requirements is illegitimate for the same reason that acting based on those personal characteristics is illegitimate—such actions are

[12] "Civil rights and other anti-discrimination statutes, however, prohibit conduct we find "socially evil" and ban in circumstances other than housing. *See, e.g.,* 42 U.S.C. § 2000e *et seq.* ("Title VII") (prohibiting discrimination in employment on the basis of race, color, religion, sex, or national *1279 origin); 42 U.S.C. § 1981 (prohibiting racial discrimination in, among other things, the formation and enforcement of contracts); *see also University of Pennsylvania v. EEOC,* 493 U.S. 182, 193 (1990) ("Few would deny that ferreting out ... invidious discrimination is a great, if not compelling, governmental interest."); *Knapp v. Eagle Property Management Corp. United States Court of Appeals, Seventh Circuit* 54 F.3d 1272 (7th Cir. 1995).

expressions of hateful prejudice and unfair stereotypes. The introductory findings in the Ordinance leave no doubt that this is why it prohibits discrimination—discrimination adversely affects the community by "degrading individuals" and "fostering intolerance and hate." Under the Ordinance, the requirements of a public assistance program no longer have any legitimacy whatsoever as the basis for conduct because of a presumption that landlords are using those requirements as a veil for hateful prejudice against the people in the program.

In short, the Ordinance is based on a conclusive presumption that landlords refusing to rent to Section 8 tenants are motivated by prejudice; in the language of the Ordinance, they are engaged in "unfair" discrimination that promotes hatred and degradation. They are not making legitimate business decisions, they are really engaged in conduct that is "socially evil."

Thus, the Ordinance is not simply a requirement that landlords accept Section 8 tenants, it is a presumption that those who do not are motivated by prejudice toward Section 8 voucher holders. It is a conclusive factual presumption.

Neither party has cited any cases evaluating the constitutionality of an ordinance like this one. The only other jurisdiction with a provision prohibiting discrimination against the requirements of a program that the Court could find is Massachusetts. However, in applying that statute to a non-participating landlord, the Massachusetts court specifically noted that the constitutional validity of the statute had not been challenged.[13] *DiLiddo v. Oxford St. Realty, Inc.*, 876 N.E.2d 421, 426 (Mass. 2007). However, the use of conclusive presumptions in

[13] In *DiLiddo*, 876 N.E.2d at 426, "[t]he defendants ma[d]e no challenge, constitutional or otherwise, to the validity of the statute prohibiting landlords from discriminating on the basis of "any requirement" of housing subsidy programs, G.L. c. 151B, § 4(10)."

legislative enactments is a topic many courts have addressed, and some principles are evident.

In cases involving fundamental liberties, conclusive presumptions are generally not allowed. *See Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 633, 639, 646, 651 (1974) (holding invalid the conclusive presumption that every pregnant teacher in her fifth or sixth month of pregnancy is physically incapable of continuing to work because it violates the "long recognized [] freedom of personal choice in matters of marriage and family life[, which] is one of the liberties protected by the Due Process Clause"); *Stanley v. Illinois*, 405 U.S. 645, 649-58 (1972) (holding that a conclusive presumption that distinguishes and burdens all unwed fathers is constitutionally invalid as a matter of due process of law); *Turner v. Dep't of Employment Sec. & Bd. of Review of Indus. Comm'n of Utah*, 423 U.S. 44, 46 (1975) (holding "that the Utah unemployment compensation statute's incorporation of a conclusive presumption of incapacity during so long a period before and after childbirth is constitutionally invalid . . .").

In the field of economic regulation, cases have gone both ways. *See Vlandis v. Kline*, 412 U.S. 441, 453-54 (1973) (holding "that the permanent irrebuttable presumption of nonresidence (of state university students who applied from out of state) violates the Due Process Clause of the Fourteenth Amendment. . . "); *U. S. Dep't of Agric. v. Murry*, 413 U.S. 508, 514 (1973) (holding "that the deduction taken for the benefit of the parent in the prior year is not a rational measure of the need of a different household with which the child of the tax-deducting parent lives and rests on an irrebuttable presumption often contrary to fact, [which] therefore lacks critical ingredients of due process . . ."); *Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356, 377, (1973) (holding that "the Four Installment Rule (triggering disclosure requirements under the Truth in Lending Act) does not conflict with the

Fifth Amendment . . .” because “it does not conclusively presume[e] the existence of determinative facts”); *Weinberger v. Salfi*, 422 U.S. 749, 772 (1975) (holding that “[t]he Constitution does not preclude such policy choices (limiting the availability of Social Security death benefits to widows married more than nine months) as a price for conducting programs for the distribution of social insurance benefits,” which is different from “affirmative Government action which seriously curtails important liberties cognizable under the Constitution”); *Shreve v. Dep't of Econ. Sec.*, 283 N.W.2d 506, 509 (Minn. 1979) (holding that the irrebuttable presumption of a student’s nonavailability for work, which precludes a student from proving eligibility for unemployment compensation, does not offend the due process clause of either federal or state constitutions).

These and other cases reveal several factors that are significant in evaluating whether or not a conclusive presumption is constitutionally permissible. Courts do not review the merits of conflicting evidence about a presumption, but one basic consideration is whether there is any evidence supporting it. For example, in *U. S. Dep't of Agric. v. Moreno,* 413 U.S. 528, 529 (1973), the Supreme Court struck down an amendment to the Food Stamp Act barring from eligibility any households containing unrelated individuals. The principal basis for the ruling was the Court’s criticism of legislation apparently targeting unpopular groups like hippies and hippie communes, but the Court noted that the Government’s assumptions that such households are more likely to abuse the program and are more unstable to be “wholly unsubstantiated”. *Id.* at 535. In *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985), the Court determined that the record “failed to clarify” why mentally retarded residents of a group home should be subjected to any different density restriction than any other residents. The Supreme Court observed that, “The record does not reveal any

rational basis for believing that the proposed group home would pose any special threat to the city's legitimate interests." *Id.* at 433. *Cleburne* was an equal protection case, not a due process case, but the analysis used the same rational basis test.

Clarity about a court's role in reviewing evidence considered by a legislative body is provided by the well-known case about the Minnesota statute prohibiting the sale of milk in plastic cartons. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981). This was also an equal protection case, not a due process case, but the analysis used the same rational basis test. *See id. at* 461-62. The Minnesota Supreme Court had struck down the statute, but the United States Supreme Court reversed. *See id. at* 456-58, 474. The federal court repeatedly criticized the state court for evaluating the reliability of the evidence offered to support the statute—that the ban on plastic cartons would promote the use of environmentally superior containers, that the ban would reduce the economic dislocation of dairies having to switch to plastic, that the ban would save energy, and that the ban would reduce solid waste. *See id. at* 461-71. The Supreme Court stated that the question is not whether the legislature was right about facts but whether the factual issues were "at least debatable" and whether the facts relied upon "could not reasonably be conceived to be true." [14] *See id. at* 464.

The legislative arena is not a courtroom, and all the time, legislators have to make rough judgments and establish generalizations based on incomplete data. However, based on the evidence of discrimination presented in this case, all of which has been reviewed above, the City Council could not reasonably conceive that the principal reason that landlords are not

[14] "[T]hose challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Clover Leaf Creamery Co.*, 449 U.S. at 464.

participating in the Section 8 program is because of dislike of the tenants as opposed to dislike of the program requirements—thus warranting a presumption that all of them discriminating.

It goes without saying, of course, that if there is an absence of evidence that landlords are unfairly discriminating against Section 8 tenants now, there could simply be no such evidence about landlords who might choose not to participate in some other housing subsidy program that might come along in the future. The presumption of unfair discrimination as to participants in future programs is pure speculation.

A second factor in evaluating conclusive presumptions is whether those subjected to it have an opportunity to rebut it. For example, in *Vlandis*, the Supreme Court ruled that the absence of an opportunity to rebut a conclusive presumption was fatal to the statute in that case: "We hold only that a permanent irrebuttable presumption of non-residence . . . is violative of the Due Process Clause, because it provides no opportunity for students who applied from out of State to demonstrate that they have become bona fide Connecticut residents." *Vlandis*, 412 U.S. at 453-54.

In *Twin City Candy & Tobacco Co. v. A. Weisman Co.*, 149 N.W.2d 698, 705-06 (Minn. 1967), the Minnesota Supreme Court came to the same conclusion from the opposite direction—that an unconstitutional statute could be saved by changing a conclusive presumption to a rebuttable presumption: "we suggest that the difficulty of proof to which the Iowa court alluded may be overcome constitutionally by the adoption of a statue which makes a sale below cost prima facie evidence of predatory intent or effect. . . . [T]he better reasoned decisions hold there is no constitutional impediment in requiring that in civil litigation the vendor has the burden of proving his below-cost sales were made without predatory intent or

effect." This would be a different case if a blanket refusal to accept Section 8 vouchers were prima facie evidence of discrimination that a landlord had an opportunity to rebut.

A third factor in evaluating conclusive presumptions about motivation is the strength of an alternative explanation. Probably the most helpful cases in Minnesota are a pair of cases discussed by the parties. In *Weisman*, the Minnesota Supreme Court struck down a statute that made the sale of cigarettes below cost subject to criminal and civil penalties. *Id.* at 700. The statute stated:

> "Offering for sale, or sale of cigarettes below cost in the wholesale and retail trade is declared by the legislature to have the intent or effect of injuring a competitor, destroying or lessening competition, and is deemed an unfair and deceptive trade business practice and an unfair method of competition."

*Id.* Thus, like in this case, the legislature conclusively presumed nefarious intent from business conduct. *See id.* at 701-05. Some exceptions were provided, but, like in this case, there were obvious innocent reasons outside the exceptions for selling cigarettes below cost that had nothing to with injuring a competitor or destroying competition, like being overstocked and needing capital or simply making a mistake about cost calculations. *See id.* at 702-03. The Minnesota Supreme Court found this presumption, with no opening for a seller to prove innocent intent, unconstitutional. *See id.* at 702-06.

Eight years after *Weisman*, the Minnesota Supreme Court reached a contrary result with liquor than with cigarettes in *Fed. Distillers, Inc. v. State*, 229 N.W.2d 144, 158-59 (Minn. 1975). The statute challenged in *Fed. Distillers* required all licensed distillers to offer their products to all wholesalers on an equal basis; there could be no exclusive Minnesota distributors of any brand. *See id.* at 153-54. The statute was challenged on a number of grounds, but the court found the conclusive presumption that every distiller's refusal to deal

with a wholesaler was discriminatory to be the most serious challenge. *See id.* at 157-59. Like this case and *Weisman*, legitimate reasons were offered why a distiller might not want to deal with a particular wholesaler, like unsavory character or questionable sales practices, a poor record of promoting the distiller's product, or the ownership of a wholesaler by a competing distiller. *See id.* at 160.

The court in *Fed. Distillers* acknowledged the similarity of the case to *Weisman*, but reached the opposite result for two principal reasons. *See id.* at 158-61. First, the conclusive presumption was not as far-reaching as in *Weisman*—the presumption was that refusal to deal was discriminatory, but not that it was also necessarily intended to injure. In that sense the presumption was not necessarily inaccurate—refusal to deal for any reason was a form of economic discrimination. *See id.* at 159-60. But the court also was not persuaded by the business reasons proffered for refusing to deal. *See id.* at 157-58. The court observed that the liquor commissioner had regulatory power to deal with unsavory characters and unfair practices. *See id.* at 160. And allowing such a broad business reason would just reestablish distillers' control over whom they sold to. *See id.* at 159-60. A wholesaler who doesn't promote a distiller's product has the simple freedom not to buy it. *See id.* at 160. Finally, the record contradicted the assertion of prejudice from forced sale to a wholesaler controlled by a competing distiller. *See id.* at 159-160.

The present case is much more like *Weisman*-- the strength of the non-discriminatory business reasons to explain non-participation in the Section 8 program is unassailable.

The important considerations gleaned from this review of the available appellate authority, then, highlight that the Ordinance establishes a conclusive presumption that applies even to unknown programs, that is based only on very speculative evidence in the face of a

strong alternative explanation, and no opportunity is offered to rebut the presumption. That sounds arbitrary, but the City is entitled to rely on any conceivable rationale, and the three assertions it has established must be carefully considered. In *Cloverleaf Creamery Co.*, for example, the State identified four reasons why the classification between plastic and nonplastic nonreturnables was rationally related to the articulated statutory purposes, and the Supreme Court stated the rule: "[i]f any one of the four substantiates the State's claim, we must reverse the Minnesota Supreme Court and sustain the Act." *Clover Leaf Creamery Co.*, 449 U.S. at 465.

The fact that there is shortage of, and a concentration of, apartments available to Section 8 tenants certainly would make it rational to act directly on the problem, e.g., declare that the privilege of holding a rental housing license in the City of Minneapolis requires accepting Section 8 tenants. The shortage alone, however, can hardly be a rational basis for an ordinance based on an unsupported presumption about something entirely different, i.e. *why* landlords are staying out of the program.

The disproportionate impact of the shortage of Section 8 apartments on people of color and those with disabilities, like the shortage itself, certainly warrants attention. However, the Ordinance addresses motivations by landlords. The Ordinance prohibits intentional conduct, not the effects of conduct. Given the composition of the pool of Section 8 tenants, anything affecting the program—like restricting the number of available vouchers –would necessarily have a disproportionate impact on people of color or those with disabilities. So the disproportionate impact alone does not provide support for a presumption that landlords are unfairly and intentionally discriminating.

To be sure, as with the housing shortage itself, the high percentage of disadvantaged people with Section 8 vouchers might support special remedial measures, like a direct requirement that all landlords accept the vouchers. However, it does not support the accusation that those who do not are engaged in unfair discrimination.

Finally, the perception of discrimination by frustrated Section 8 voucher holders is troubling. But the stated purpose of the Ordinance is to prevent discriminatory practices themselves, and neither in the Ordinance itself nor in its briefing about the Ordinance does the City state that the purpose of the Ordinance is to address what might be considered a kind of civil unrest, i.e., vocal expressions of frustration. And while civil unrest might support some kind of legislative action, it does not support a conclusive presumption about landlords' motives.

The assertions established by the City, then, while indisputable and important, do not resurrect the rationality of deeming all non-participating landlords, now and forever and with no chance for rebuttal, to be acting out of unfair discrimination and prejudice. The Ordinance is an arbitrary response, albeit to a very real problem, and is therefore unconstitutional.

**3. <u>Rational Relation to the Purpose Served.</u>**

Having found the Ordinance to be unconstitutionally arbitrary, the Court need not address the third prong of the rational basis test. However, it is worth re-emphasizing that the problems with the Ordinance arise from the City's apparent uncertainty about its purpose. A purpose to increase the availability of affordable housing could be furthered simply by requiring landlords to accept Section 8 tenants. But the City has provided no reason to believe that the specific purpose of the Ordinance--to prohibit prejudice-based discrimination against people in the Section 8 program, which is already addressed by the protections for the long

list of personal characteristics already named in the existing ordinance,--would be furthered by a blanket accusation about the motives of most Minneapolis landlords.[15]

**B. Plaintiffs' Equal Protection Claim**

Article 1, Section 2, of the Minnesota Constitution provides, "[n]o member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof . . ." The Plaintiffs contend that the Ordinance creates "an arbitrary distinction between classes of rental housing owners." (Compl. at ¶ 145.)

Minnesota has its own three step test for analyzing such claims in the field of economic regulation, and it can be found in *Healthstar Home Health, Inc. v. Jesson*, 827 N.W.2d 444, 449-50 (Minn. Ct. App. 2012). The *Healthstar* case struck down the distinction between the reduced pay for personal care attendants who were relatives of the client compared to those who were not. *See id.* at 451-53. The court noted that the Minnesota test was more stringent than the federal test in that it would not accept hypothetical facts justifying a classification, but required that the legislature could reasonably have believed in actual facts supporting the distinction. *See id.* at 450.

The first step in the test requires that distinctions must not be arbitrary, but genuine and substantial, thereby providing a natural basis to justify legislation adapted to particular conditions and needs. *See id.* at 450-52. The classification in *Healthstar* failed the first step of

[15] The Plaintiffs have made a facial challenge to the constitutionality of the Ordinance, meaning they must establish that it is unconstitutional in all of its applications. Citing *McCaughtry v. City of Red Wing*, 808 N.W.2d 331, 339 (Minn. 2011) the City asserts that the Plaintiffs fail to establish facial infirmity because damages and application of the undue hardship defense require a case-by-case analysis. (*See* Pls.' Supp. Mem., at 48.) However, this Court's analysis, above, is based on the structure and presumptions of the Ordinance as they apply to all landlords and does not rest on the damages of any particular landlord.

the test. *See id.* at 450-52. The state contended that the difference between relatives and non-relatives was self-evident and cited studies only about unpaid relative care-givers. *See id.* at 450-52. The Court of Appeals ruled that the statutory distinction between relative and non-relative caregivers was based "purely on assumptions rather than facts". *See id.* at 451. The state there provided no evidence about the effect on relative givers of a reduction in income or on the corollary assumption that non-relative caregivers do not feel a moral obligation to provide services to their clients. That left just assumptions —that the existence of a moral obligation to care for a relative necessarily equated to an obligation to provide such care personally at a rate of pay lower than for a non-relative PCA, and that non-relative caregivers did not feel a moral obligation to provide care for their clients. *See id.* at 450-52.

The second step of the test requires that the classification be genuine or relevant to the purpose of the law. *See id.* at 452-53. The classification in *Healthstar* also failed the second step. The court found the assumption that relative caregivers would continue to provide services at reduced pay to be unsupported by any facts. *See id.* at 452-53.

The equal protection issue arises in this case because the Ordinance has several exceptions:

> (1) Renting or leasing a room in an owner occupied single family dwelling.
>
> (2) Renting or leasing a single family dwelling, a single dwelling unit, or a single dwelling unit of a condominiums, townhouse, or housing cooperative, by the owner of the dwelling or dwelling unit, for no more than thirty-six (36) months, when such dwelling or dwelling unit is an owner occupied homestead at the start of the thirty-six (36) month period.
>
> (3) Renting or leasing a dwelling with two dwelling units when a person who owns or has an ownership interest in the dwelling is residing in the other dwelling unit.
>
> (4) Renting or leasing a single family dwelling, a single dwelling unit, or a single dwelling unit of a condominium, townhouse or housing cooperative, by the owner

> of the dwelling or dwelling unit, while the owner is on active military duty and when such dwelling or dwelling unit is an owner occupied homestead at the start of the active military duty.

M.C.O. §139.30(b)(1)-(4).

The City has identified genuine distinctions between some of the exempt categories and the Plaintiffs—Section 8 vouchers cannot be used for a room in a single family house, and houses rented for 36 months or while the owner is on military duty do not provide stable, long-term housing for poor families.

But subsection (3) makes a distinction between the rental of owner-occupied duplexes, on the one hand, and larger apartment buildings, on the other, that appears to be arbitrary, rather than "genuine and substantial." *See* M.C.O. §139.30(b)(3). In evaluating the relevance of that distinction to the purpose of the Ordinance, the City's confusion about that purpose again raises a problem.

The City offers several bases for the distinction. The City points out that the vast majority of licensed rental units in Minneapolis are situated in multi-housing properties with three or more units. (Sarff Aff., Ex. 43 at 6.) That distinction may be relevant to a purpose to significantly increase the number of available housing units for Section 8 tenants, but it has nothing to do with the Ordinance's specific purpose of prohibiting discrimination.

The City focuses on the close proximity of duplex owners to their tenants. "Additionally, it was reasonable for the City to exempt duplex properties because of the shared nature of such housing situations for owner occupiers, with shared walls, entries, yards and/or other communal spaces". (Def.'s Supp. Mem., at 62.) No further explanation is provided; the City may be saying a duplex owner should not have to live near a kind of person they do not like. However, Title 7 of the Minneapolis ordinances already prohibits all

property owners from refusing to rent to someone based on protected characteristics such as race, religion, and gender identity. The premise of the new Ordinance is that landlords choosing not to participate in the Section 8 program are doing so as a pretext for prejudice against the people in the program. There appears to be no genuine distinction that would grant duplex owners permission to use the Section 8 program requirements as a pretext for discrimination but prohibit that "socially evil" conduct by larger owners.

Moreover, if socially evil conduct is to be permitted by people who might have to live near people they do not like, larger buildings occupied by owners should also be excluded.

Finally, the City says that duplexes are different because larger buildings are operated as a business and are more likely to be professionally managed. This sounds like the City is acknowledging the substantial burdens of the Section 8 program, which would be harder for duplex owners to bear. That would make sense if the only purpose of the Ordinance, as stated at the hearing, was to increase Section 8 options without creating undue burdens. But that problem is supposedly addressed by the Undue Hardship defense.

However, again, the stated purpose of the Ordinance is to prevent discrimination. No logic or evidence has been presented that duplex owners are less likely to engage in unfair and degrading discrimination than professionally managed building owners. The converse could as easily be true. If the rent is paid and the units are kept in good repair, the absentee owner of a large building might care little about the personal characteristics of who rents there. However, when it comes to sharing a wall and a yard with a large family of very poor people from another race, personal biases may be more likely to come into play. There would be more reason, not less, to apply the Ordinance to owner-managed buildings such as duplexes.

In *Healthstar*, the challenged statute failed the rational basis test because the presumption that relative caregivers would work for less was not supported by the facts. Here, too, there are no facts indicating that duplex owners are either less likely to discriminate or should be allowed to discriminate. This Ordinance, therefore, does not afford non-exempt landlords the equal protection of the law.[16]

In view of the Court's conclusion about the Plaintiffs' Due Process and Equal Protection claims, it is unnecessary to address Plaintiffs' remaining claims.[17]

## V. CONCLUSION

It is apparent from the record that the Ordinance is the result of hard work by many people of good will. Its invalidity will be a setback to them. However, in our constitutional system the means chosen to accomplish even a laudable goal must not transgress the constitutional rights of those affected. Over three-quarters of Minneapolis landlords do not now accept Section 8 vouchers. A conclusive presumption automatically tarring all of them

[16] The City contends that the Plaintiffs cannot even maintain an equal protection challenge because they are all large landlords who would not qualify for the exemptions available to small property owners. (Def.'s Opp'n. Mem., at 44-45.) "[T]o establish that [Plaintiffs] ha[ve] been denied equal protections of the laws, [Plaintiffs] must show that similarly situated persons have been treated differently." *State v. Cox*, 798 N.W.2d 517, 521-22 (Minn. 2011). "The focus, then, in determining whether two groups are similarly situated is whether they are alike in all relevant respects." *Id.* at 522; *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992); *St. Cloud Police Relief Ass'n v. City of St. Cloud*, 555 N.W.2d 318, 320 (Minn. Ct. App. 1996). In *Healthstar*, the plaintiffs were relative caregivers and successfully complained about the statutory distinction between them and non-relative caregivers. *Healthstar*, 827 N.W.2d at 450-52. Here the plaintiffs are similarly situated to the exempted categories in that both have rental licenses and until the passage of the Ordinance could choose whether or not to participate in the Section 8 program.

[17] As stated in the Court's Order Regarding Discovery and Scheduling, dated January 26, 2018, Plaintiffs' concede that they would not suffer any damages until the Ordinance takes effect. Given that the Ordinance has only been in effect since May 1, it will be up to the Plaintiffs to waive their damages claim or to request further proceedings regarding damages.

with the brush of discrimination violates their due process rights. And applying different standards for discrimination to duplex owners than to larger landlords violates the Plaintiffs' right to equal protection of the laws. The legal analysis set forth above suggests several remedies to the shortage of Section 8 apartments that would satisfy constitutional standards. In its current state this Ordinance is not one of them, and the Plaintiffs' motion must be granted and the City's denied.

/BAP/