IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

LEILA MENDEZ, et al.,	
Plaintiffs,	Case No. 2016-CH-15489
v.	Hon. Sanjay T. Tailor
CITY OF CHICAGO, et al.,	Calendar 09
Defendants.	

DEFENDANTS' REPLY IN SUPPORT OF THEIR SECTION 2-619.1 MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

I. Plaintiffs' Challenge To The Commissioner's Adjustment Fails (Count II).

A. Plaintiffs lack standing to challenge the provision.

Plaintiffs' Response confirms that they rely on taxpayer standing for their challenge to the Commissioner's adjustment provision. Plaintiffs argue only that they pay taxes and the City uses general revenue funds "to implement the Ordinance." Resp. at 5-6. But as this Court has recognized, "a simple allegation of taxpayer status" will not support a taxpayer suit, Vill. of Leland v. Leland Cmty. Sch. Dist. No. 1, 183 Ill. App. 3d 876, 879 (3d Dist. 1989), and Plaintiffs must show that they "will be liable to replace public funds" used to administer the provision of the Ordinance at issue, Oct. 13, 2017 Order ("Order") at 5. See also Barber v. City of Springfield, 406 Ill. App. 3d 1099, 1102 (4th Dist. 2011). Even Plaintiffs' cases – which addressed statutory taxpayer standing against state officials under various versions of the Disbursement of Public Monies Act (currently codified at 735 ILCS 5/11-301) – all require the use of public funds as a threshold element for taxpayer standing.[1]

Plaintiffs identify no public funds used to implement the Commissioner's adjustment provision. They do not allege that the Commissioner's response to adjustment requests requires any expenditure of funds that would not otherwise occur. See Defs.' Mem. at 4. Moreover, Plaintiffs argue only that general revenue funds are used to implement the Ordinance as a whole. Resp. at 5-6. But this conclusory allegation about general revenues is insufficient, especially since the Ordinance expressly states that funding for administration and enforcement of the Ordinance is derived from the 4% tax imposed on shared housing unit or vacation rentals, see

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[1] See Barco Mfg. Co. v. Wright, 10 Ill. 2d 157, 160 (1956) (explaining that taxpayer standing cases "dealt with disbursement of funds out of the general revenue of the State or its agency[.]"); Snow v. Dixon, 66 Ill. 2d 443, 450 (1977) ("taxpayers of this State have been permitted to sue to enjoin the misuse of public funds"); Krebs v. Thompson, 387 Ill. 471, 473-74 (1944) ("an expenditure of public funds in pursuance of an unconstitutional statute . . . may be restrained at the suit of a taxpayer"); Crusius ex rel. Taxpayers of State of Ill. v. Illinois Gaming Bd., 348 Ill. App. 3d 44, 50 (1st Dist. 2004), aff'd on other grounds, 216 Ill. 2d 315 (2005) ("[Plaintiff] alleged [an] . . . injury to a legally cognizable interest in state resources.").

MCC § 3-24-030(B), a tax that Plaintiffs do not pay, see Defs' Mem. at 10-11. And even if the City uses general revenue funds to regulate some aspects of home sharing activity, Plaintiffs do not allege that they will be liable to replenish the City treasury for any funds spent specifically because of the Commissioner's adjustment. See Barber, 406 Ill. App. 3d at 1102.

Finally, Plaintiffs protest that "[t]he City has presented no grounds for the Court to reconsider" its interlocutory ruling that Plaintiffs had taxpayer standing for claims in their initial complaint. Resp. at 6. But there are at least two reasons the Court should do so. First, the Court did not specifically address whether Plaintiffs have standing to challenge the Commissioner's adjustment, as opposed to the Ordinance generally. See Order at 4-5. Second, the Court relied on a case that has since been vacated and is not controlling. See id. (quoting Jenner v. Ill. Dept. of Comm. & Econ. Opp., 2016 IL App. (4th) 150522, vacated, No. 121293, 2017 WL 6759144 (Ill. Nov. 15, 2017)). The Court should therefore dismiss Count II for lack of standing.

B. The Commissioner's adjustment provision does not violate due process.

Count II also fails on the merits. Plaintiffs do not contest that, because they bring a facial challenge, they must demonstrate that the adjustment provision is "incapable of any valid application." People v. Winningham, 391 Ill. App. 3d 476, 481, (4th Dist. 2009); see also Order at 18 (stating that a facial challenge fails if provision is valid under "at least one set of circumstances"). Yet Plaintiffs do not explain how they meet this demanding standard. Plaintiffs instead cite inapposite cases involving as-applied claims. See Yick Wo v. Hopkins, 118 U.S. 356, 368, 373-74 (1886) (noting that discretion in granting or withholding licenses is generally appropriate, but invalidating a regulation applied in a discriminatory fashion to Chinese nationals); Ward v. Vill. of Skokie, 26 Ill. 2d 415 (1962) (holding a zoning ordinance unreasonable as applied to a specific vacant parcel). Indeed, as the City demonstrated, it is easy to imagine applications in which the adjustment provision is not vague. Defs.' Mem. at 8-9.

Similarly, in discussing the factors the Commissioner may consider in evaluating an adjustment request, Plaintiffs fail to explain why the factors are incapable of any valid application, nor do they cite any cases holding similar language to be facially vague. See Resp. at 10-12. While Plaintiffs contend that the Ordinance is vague because it does not define each factor, see Resp. at 10-11, one of the cases they cite gives lie to this argument, see Polyvend, Inc. v. Puckorius, 77 Ill. 2d 287, 300 (1979) (dismissing due process claim where plaintiff objected to terms "not defined in the statute," as "they seem to be commonly used and understood words") (citing Hill v. Relyea, 34 Ill. 2d 552, 555 (1966), and Stofer v. Motor Vehicle Cas. Co., 68 Ill. 2d 361, 372 (1977)). Indeed, courts have rejected facial challenges to terms no more precise than those in the Ordinance, see Shachter v. City of Chicago, 2011 IL App (1st) 103582, ¶ 82 ("weeds" and "periodic care"); Jankovich v. Ill. State Police, 2017 IL App (1st) 160706, ¶ 93 ("danger" and "threat to public safety"); City of Chicago v. Reuter Bros. Iron Works, Inc., 398 Ill. 202, 206 (1947) (noise of a "disagreeable or annoying nature"), even where (unlike here) First Amendment rights were at stake, see Thomas v. Chicago Park Dist., 534 U.S. 316, 324 (2002) (upholding "material," "conflict," "inconsistent," and "unreasonable" in park rally permit ordinance); MacDonald v. City of Chicago, 243 F.3d 1021, 1028 (7th Cir. 2001) (upholding "substantially," "unnecessarily," and "sufficient" in parade permit ordinance).

Plaintiffs cite a handful of cases holding that ordinances prescribing general building design qualities insufficiently limited an agency's discretion to grant or deny building permits. See Resp. at 8. But those cases are inapposite because the ordinances at issue used general terms without any further guidance. See, e.g., Waterfront Estates Dev., Inc. v. City of Palos Hills, 232 Ill. App. 3d 367, 374 (1st Dist. 1992). Here, on the other hand, the Ordinance lists nine factors that sufficiently guide the Commissioner's decision-making. Ordinance §§ 4-6-300(1); 4-14-100(a). In this respect, the Ordinance is like the statute upheld by the Supreme Court in General

Motors Corporation v. State Motor Vehicle Review Board, 224 Ill. 2d 1 (2007), cited by Plaintiffs. Under that statute, a vehicle dealership seeking to operate within an existing dealership's market had to make a showing of "good cause" to a state agency. Despite the imprecision in that term, the court upheld the statute because the "agency's decision was guided by a list of statutory factors to aid its determination." Id. at 27. The challenged statute directed the agency to consider "relevant circumstances . . . including but not limited to" a list of specified factors. 815 ILCS 710/12. In concluding that this statutory approach was valid, the Supreme Court acknowledged how difficult it is "to anticipate every type of conduct that might constitute 'good cause,'" and explained that "fixing any more rigid a standard would subvert the very purpose behind the delegation of authority to the agency." Gen. Motors, 224 Ill. 2d at 25. General Motors refutes Plaintiffs' arguments that the legislature may not delegate "case-by case decisions" to an administrative official, Resp. at 8, that the Ordinance allows undue "discretion to grant or deny an adjustment based on 'relevant' factors the Ordinance does not even identify," id. at 9, and that the flexibility afforded by the Ordinance is not beneficial, id. at 13.[2]

As the face of the Ordinance provides adequate guidance to the Commissioner, Plaintiffs' facial claim in Count II fails as a matter of law. There is no basis for striking down the adjustment provision across the board when Plaintiffs have failed their burden of showing that the provision is vague in all of its applications, and when Plaintiffs do not allege that they have even sought, much less been denied, an adjustment under the provision.

[2] In addition, while Plaintiffs lament the lack of administrative regulations governing the Commissioner's adjustment process and contend that the Commissioner lacks special expertise about how shared housing uses at a particular location would impact the public, Resp. at 9-10, the Commissioner is authorized to promulgate regulations implementing the adjustment provision, see Ordinance § 4-14-070, and as the official charged with implementing and enforcing the Ordinance generally, the Commissioner certainly has expertise in how shared housing activity impacts the public.

II. Plaintiffs' Uniformity Clause Claim Fails As A Matter Of Law (Count VII).

A. Plaintiffs lack standing.

Plaintiffs allege that the 4% surcharge injures guests who rent shared housing units. Compl. ¶ 140. But absent any allegation of injury to Plaintiffs themselves, their claim fails. See Martin Oil Serv., Inc. v. Dept. of Revenue, 49 Ill. 2d 260, 266 (1971) (finding no standing because alleged injury did not impact plaintiff). Plaintiffs' Response claims that they are injured because they are required to collect and remit the 4% surcharge on home-sharing rentals. Resp. at 6. Not only do Plaintiffs fail to cite any case law supporting this theory of injury, it is not even pled in the complaint, and an argument made in a response brief does not cure a pleading deficiency. See West v. Kirkham, 147 Ill. 2d 1, 13 (1992) ("Defects in a party's pleadings cannot be cured by argument."). More importantly, Plaintiffs' argument is incorrect; it is the short term residential rental intermediaries (such as Airbnb), and not unit owners, who collect and remit the tax to the City. Ordinance §§ 4-13-220(d); 4-13-240(a)(iv). And even if Plaintiffs themselves collected and remitted the surcharge, they do not respond to the City's showing that the Hotel Accommodations Tax Ordinance, not challenged here, already obligates collection of a 4.5% tax on all hotel accommodations (including shared housing unit rentals), and there is no distinct collection injury to Plaintiffs simply because the amount collected has changed.

Plaintiffs further contend that the "surcharge also increases the effective price of Plaintiffs' rentals, making it harder for them to compete with other types of accommodations." Resp. at 6. Again, this is not pled in the Amended Complaint. Moreover, Plaintiffs' argument is undermined by their own pleading. Plaintiffs base their uniformity challenge on the allegedly disparate tax treatment of guests who stay "only at vacation rentals or shared housing units in Chicago." Compl. ¶ 133 (emphasis added). Plaintiffs do not explain why a class of customers

that stays only at shared housing units would do so less frequently based on the effective price of accommodations at which they do not stay.

Finally, Plaintiffs have no response to the City's showing that Plaintiffs lack taxpayer standing to challenge the 4% surcharge. Defs' Mem. at 10-11. Critically, they do not contend that the costs of collecting the applicable taxes (and hence the expenditures of public monies) have increased simply because the effective tax rate on their units has changed from 4.5% to 8.5%; all that has changed is the amount of money the City receives, but not the amount of taxpayer funds used to collect it. See Lyons v. Ryan, 201 Ill. 2d 529, 538 (2002) ("Plaintiffs offer no basis for this court to conclude that the salaries of state employees involved in the alleged scheme would not have been paid in the absence of the alleged scheme."). Accordingly, as with their claim in Count II, they fail to plead that they "will be liable to replace public funds" used to administer this Ordinance provision. See Order at 5; Barber, 406 Ill. App. 3d at 1102.

B. The 4% tax is constitutional as a matter of law.

Plaintiffs' sole argument on the merits is that their Uniformity Clause challenge cannot be dismissed on the pleadings, and that facts must be adduced to support the City's justifications for taxing shared housing units and vacation rentals differently than B&Bs and hotels. Resp. at 14. But as the City explained, such a challenge can and should be resolved on the pleadings where the reasonableness of the tax can be determined as a matter of law. Defs. Mem. at 11-13. See also Geja's Café v. Metro. Pier and Expo. Auth., 153 Ill. 2d 239, 248 (1992) ("if a state of facts can be reasonably conceived that would sustain it, the classification must be upheld"); DeWoskin v. Lowe's Chicago Cinema, 306 Ill. App. 3d 504, 523 (1st Dist. 1999) ("[A] uniformity challenge may be decided in the context of a section 2-615 motion."). And, as the City further explained, Jacobs v. City of Chicago, 53 Ill. 2d 421, 425 (1973), holds that zoning differences, as a matter of law, justify different tax treatment and defeat a uniformity challenge.

In Jacobs, individuals parking in residential areas were exempted from a tax while people parking in commercial or industrial areas were not. The uniformity challenge was deemed meritless because "[z]oning ordinances have long distinguished between residential, business, commercial and industrial uses and such common classifications are not invalid." Id. Plaintiffs have no response to this, other than to argue that the City has not explained how the zoning differences at issue here are "real and substantial" or justify different tax treatment. But the City did so, see Defs' Mem. at 12-13, and Plaintiffs make no attempt to attack this explanation.

C. Plaintiffs' challenge to the license fees fails to state a claim.

Plaintiffs allege that the license fees for B&Bs, vacation rentals, and shared housing unit operators are all $250. Compl. ¶¶ 143-45, 147. The City explained that a uniformity challenge to these fees fails because they are identical. Plaintiffs only argument in response is that "owners or tenants of shared-housing units who are not 'shared housing unit operators' (i.e., people who rent out only one shared housing unit)" do not pay a $250 fee. Resp. at 15. But Plaintiffs do not allege that they are shared housing unit operators (and therefore required to pay $250), and, accordingly, they are not injured by the $250 fee. See Martin, 49 Ill. 2d at 266. Moreover, charging a $250 fee to B&Bs, vacation rentals, and shared housing unit operators, but not owners of single shared housing units, is based on a real and substantial difference: The former are required to obtain licenses to conduct their businesses and are overseen directly by the City, whereas the latter need only register with the City, and the intermediary company (such as Airbnb) that lists the units undertakes significant enforcement and monitoring obligations on behalf of the City. See generally Ordinance, Chapter 4-13. In light of the City's greater direct role in overseeing B&Bs, vacation rentals, and shared housing unit operators, charging those entities a larger fee is reasonable. Thus, a uniformity challenge based on the difference in fees fails as a matter of law. See DeWoskin, 306 Ill. App. 3d at 523.

CONCLUSION

WHEREFORE, Defendants respectfully request that the Court dismiss Plaintiffs' Amended Complaint in its entirety, with prejudice.

Date: February 16, 2018

Respectfully submitted,

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