IN THE IOWA SUPREME COURT

No. 22-0473

LIME LOUNGE, LLC,
Plaintiff-Appellant,

vs.

CITY OF DES MOINES, IOWA,
Defendant-Appellee.

On Appeal from the Iowa District Court,
The Honorable Dustria A. Relph

Brief for Appellant

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Statement of the Issues Presented for Review

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(2) Des Moines Municipal Code §134-954 is Preempted by Iowa Code Chapter 123.

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(3) Failure to Grant Lime Lounge a Permanent Injunction (and Revocation of the Temporary Injunction) Was Clear Error.

Cases

Iowa Grocery Industry Ass'n v. City of Des Moines. 712 N.W.2d 675 (2006)

Statutes

Iowa Code §123

Routing Statement

This case should be transferred to the Iowa Court of Appeals because it involves the application of existing legal principles. Iowa R. App. P. 6.1101(3)(a).

Statement of the Case

Plaintiff, Lime Lounge, LLC ("Lime Lounge"), brings this declaratory judgment action against Defendant, the City of Des Moines (the "City"), to challenge a City ordinance that authorizes the City to charge and collect administrative fees in connection with applications for liquor licenses and beer and wine permits. (App 69-70, 180-183). These fees take the form of a fee to apply for a Conditional Use Permit ("CUP") which is *required* prior to the City submitting an application for a liquor license to the State. *Id*. These administrative fees are in addition to the application fees authorized by Iowa statute. Iowa Code §123.36 (establishes liquor control license fees); Iowa Code §123.134 (establishes seasonal, five-day, and fourteen-day license and permit fees); and 123.179 (establishing fees for permits). The additional administrative fees charged by the City under Municipal Code §134-954 (the "Ordinance") are illegal. "The power to establish licenses and permits and levy taxes as imposed in chapter 123 is vested **exclusively** with the state." Iowa Code § 123.37 (emphasis added). The Ordinance conflicts with the statutory procedures for the collection and distribution of application fees.

Additionally, the requirement codified in the Ordinance that a party seeking a liquor license in the City of Des Moines must first apply for and receive a CUP from the Zoning Board of Adjustment is inconsistent with the process for issuing liquor licenses, which is codified in Iowa law.

For these reasons, the Iowa Alcoholic Beverage Control Act, Iowa Code Chapter 123 (the "Act"), preempts the City's Ordinance, and the City may not charge or collect administrative fees in addition to the application fees authorized by statute, nor may it alter the process for obtaining a liquor license set forth by statute.

Statement of the Facts

I. Declaratory Judgment - Municipal Code §134-954

In the State of Iowa (the "State"), the legislature has detailed a specific and streamlined process for the application of a liquor control license, a retail beer permit, and a retail wine permit (hereinafter referred to collectively as a "Liquor License"). Iowa Code §123.32. This process is set forth in the the Act and is extraordinarily detailed in the process, procedure, and fee structure involved in the application and maintenance of a Liquor License in Iowa. Iowa Code §123. The State requires that a Liquor License application be "filed with the appropriate city council" and accompanied with the "necessary fee and bond, if required." Iowa Code 123.32(1). Iowa Code 123.31 details the application contents required. The local authority—the Des Moines city council in the instant case—is given *specific* and *limited* authority to "either approve or disapprove" the application and "forward the application with the necessary fee" to the State. Iowa Code §123.32(2). The "necessary fee" required by Iowa Code §123.32 is specifically set forth in Iowa Code §§123.36, 123.134, and 123.179 sets out a detailed, uniform fee schedule for all liquor license classes in the state of Iowa. If the application is approved by the local authority, the the ABD conducts "an investigation as the administrator deems necessary to determine that the applicant complies

with all requirements for holding a license or permit." Iowa Code §123.32(6)(b).

For businesses located in the city of Des Moines, the application process includes an additional layer of complexity, local oversight, and fees retained exclusively by the City—a process which differs from what is detailed in Iowa Code §123. By all outward appearances, a Liquor License application in the City follows the same process as proscribed by the Act. In reality, however, this is not the case. In Des Moines, an application for a Liquor License is only placed on the City council agenda "after all departments have signed off that the inspections are complete." (App 69-70) (emphasis added). In other words, the City Clerk will not present a Liquor License application to the City council for submission to the ABD until every department has approved the submission including, and most importantly in this case, City zoning. *Id*. Herein lies the basis for this declaratory judgment action—an irreconcilable conflict between state law and local ordinance.

The City requires that Liquor License applicants comply with, *inter alia*, Municipal Code §134-954 before they will even present a Liquor License application to the City council, and subsequently to the State. (App 69-70). While the Ordinance will be discussed further herein, the pertinent section is the requirement of a CUP for various types of establishments

within various zoning districts for the "selling of liquor, wine and beer," thereby adding an additional layer of regulation and a non-uniform fee structure for *some* Liquor License applicants. Municipal Code §134-954.

The CUP process involves a lengthy process of not less than one month; the payment of an application and notification fee of not less than $300; various reviews, reports, and documents; a public hearing in front of the Zoning Board of Adjustment ("ZBOA"); and a decision and order by the ZBOA. (App 180-183). The CUP is a prerequisite for many Liquor License applicants in the City, including anyone operating a "Tavern" or "Night Club", regardless of zoning district. In short, if an operator would like to open a bar in the city of Des Moines, they are *required*, pursuant to the Ordinance, to obtain a CUP and pay the associated fee regardless of the location within the City. Municipal Code §134-954.

Since 2011, Lime Lounge has operated a bar/tavern in a property located at 435 E. Grand Avenue, Des Moines, IA. As a businesses involved in the sale of alcoholic liquor, wine or beer located within the city of Des Moines, Lime Lounge was required to complete the CUP application process, obtain ZBOA approval, and pay the required fee of more than $300 to the City (which is retained by the City) to obtain a CUP. Municipal Code §134-954; (App 56-63, 69-70). Only after obtaining the CUP did the City forward Lime Lounge's Liquor License application to the State for approval.

Id. Lime Lounge was granted a Liquor License from the State and has maintained that license consistently since 2011. Lime Lounge filed a petition for declaratory judgment on June 3, 2019.

II. Temporary Injunction

The ZBOA revoked Lime Lounge's CUP on March 30, 2016. The basis was alleged sound violations, despite admitting that "Lime Lounge has never been convicted of any sound related violation through any criminal, civil, or administrative procedure." (App 63, 67). On or about May 14, 2019, the City initiated proceedings to revoke Lime Lounge's State Liquor License based solely on "not being able to comply with the City of Des Moines zoning ordinance section 134-954." (App 50-52). On July 29, 2019, Lime Lounge filed a motion for temporary injunction.

Lime Lounge's motion was supported by affidavit and comprehensive briefing. Briefing and oral arguments were heard by the district court, and an a temporary injunction was granted by the court on October 4, 2019 stating that "Lime would appear to have a substantial chance of succeeding on the merits." Additionally, the district court analyzed Lime Lounge's comparison of *Iowa Grocery* to the instant case and its vast similarities, stating that "Lime's argument has merit." *Iowa Grocery Ass'n of Iowa v. City of Des Moines*, 712 N.W.2d 675, (Iowa 2006); (App 200).

The Defendant sought interlocutory appeal, which was denied. (App 194-195). A trial scheduling order was entered in this matter on March 4, 2021 setting this matter for trial on November 11, 2021. On October 24, 2021, Defendant filed a motion to deny permanent injunction and dismiss suit. On November 4, 2021, Lime Lounge filed a resistance and motion to strike Defendant's October 24th motion. A bench trial was held. On January 20, 2022, the court entered an order captioned Ruling on Defendant's Motion to Deny Permanent Injunction and Dismissal. The Order dissolved the temporary injunction which had been in place for over 27 months without any deference or reference to the court's prior order. Lime Lounge filed a Motion to Reconsider and a Motion to Reinstate Temporary Injunction. The district court denied the motions and entered an amended order on February 9, 2022.

Argument

A. Preservation of Issues For Appellate Review

Lime Lounge preserved the issues for this appeal by way of raising the issues cited herein during oral arguments, briefing, and admitted evidence presented at a bench trial. Additionally, Lime Lounge filed a trial brief and accompanying motions, which further addressed and preserved the issues set forth herein. As such, Lime Lounge has preserved the issues presented herein at the district court level.

B. Standard of Review

"Generally, the standard of review in a declaratory judgment action is determined by the manner of trial in the district court." *See City of Riverdale v. Diercks*, 806 N.W.2d 643, 651 (Iowa 2011). The mere fact the petition was filed in equity does not control. *See Passehl Estate v. Passehl*, 712 N.W.2d 408, 413 (Iowa 2006). "[W]e consider the pleadings, relief sought, and nature of the case [to] determine whether a declaratory judgment action is legal or equitable." *Id*. at 414. If the "case was tried at law…our review is for the correction of legal error." *Middle River Farms, LLC v. Antrim*, 884 N.W.2d 222 (Table) (Iowa App. 2016) (citing Iowa R.App. P. 6.907 ; *City of Riverdal*e, 806 N.W.2d at 652).

C. Argument

I. Iowa Grocery Industry Ass'n v. City of Des Moines is Controlling Case Law in the Instant Case.

(1) The application of *Iowa Grocery* to Municipal Code §134-954

Precedential decisions certainly must involve *some* similarity to the instant case to be considered controlling, but rarely does a case involve as many similarities as *Iowa Grocery Industry Ass'n v. City of Des Moines*. 712 N.W.2d 675 (2006). In *Iowa Grocery*, the Plaintiff brought a declaratory judgment action against city of Des Moines, asserting that ordinance that imposed additional administrative fee on applications for liquor licenses and beer and wine permits was preempted by state Alcoholic Beverages Control Act. *Id*. *Iowa Grocery* is so relevant and similar to the instant case that it involves the *exact same* Defendant—the city of Des Moines—encroaching on the *exact same* State Act—Iowa Code §123—affecting a *nearly identical* group of Plaintiffs—Iowa Liquor License applicants and holders located in the City of Des Moines—and relying on the essentially the *same* arguments and "authority" for its Ordinance—home rule authority, among others. *Id*. In fact, the similarities extend *even further* as the amount of the fee is *nearly identical* in both cases—ranging from approximately $300-400—which were both a prerequisite to the City forwarding the Liquor License to the State, and in both cases provided "no mechanism to refund the

administrative fee if the license application is not approved." *Id* at 678. These are only the most striking similarities.

The Defendant in *Iowa Grocery* made very similar arguments as it does here. While the City now **admits** that the fee it charged in *Iowa Grocery* "was contrary to the express statutory language of the legislature," the City cited the very same statutory authority—Iowa Code §123.39(2)—in support of the fee it previously argued was valid in *Iowa Grocery*. However, that fee was struck down by the Iowa Supreme Court as being preempted by the Act. *Iowa Grocery*, 712 N.W.2d 675 (2006). In fact, *Iowa Grocery* very accurately reflects many of the arguments set forth by Lime Lounge and the impermissible conflicts created between the Ordinance and the Act herein. *Id*.

The arguments Lime Lounge sets forth in this brief are based on the very same rationale applied by the Iowa Supreme Court in *Iowa Grocery*. *Id*. First, the Court states that "Unlike the state statutory license fee, the ordinance provides no mechanism to refund the administrative fee if the license application is not approved." *Id* at 678. This is identical in the instant case as the CUP "fees are nonrefundable." (App 180-183). With respect to the Home Rule Amendment, the Court stated that:

> The district court concluded the Act preempted the City's authority to charge the administrative fee because **the fee conflicted with the general assembly's specific directions for**

> **governance in the area of alcoholic beverage permits**. After reviewing the controlling statutes, we agree with the district court.

Iowa Grocery at 679. The Court goes on to discuss the exclusive power the General Assembly granted itself, stating "the general assembly 'exclusively' reserved in itself the 'power to establish [liquor] licenses and [beer and wine] permits and levy taxes as imposed in [the Act].'" *Id* citing Iowa Code §123.37. And further that "Iowa Code section 364.6 states a city must 'substantially comply with a procedure established by a state law for exercising a city power.'" *Id* at 680. The Court then discusses an important factor which is identical to this case. The *Iowa Grocery* court states:

> One effect of a uniform statutory application fee system is that it keeps local authorities from using license or permit application fees to curtail liquor establishments within their jurisdiction. Without a uniform application fee system, a local authority could charge a large application fee to discourage new liquor permit applicants or to discourage renewals of existing permits. For example, under the guidelines set forth by the general assembly, an applicant planning to open a liquor establishment in the greater Des Moines area would pay the same application fee in the City of Des Moines or in the nearby city of Urbandale. The cost of applying for such a permit (and the cost of reapplying for subsequent permits) would not factor into the proprietor's decision of where to locate its business. However, if local authorities were allowed to set their own license application fees, then one city could raise its application fees and push liquor establishments into a nearby jurisdiction.
>
> The imposition of additional "administrative fees" would circumvent the established procedure. The benefit of a standardized application fee would be lost because each local

> authority would be able to discourage the proliferation of liquor establishments based on administrative fees, rather than application fees. For this reason we find the disputed ordinance disturbs, and does not substantially comply with, the uniformity so meticulously established by the Act.

Id at 681-682. The City has done **exactly** what the Court prohibited in *Iowa Grocery*. The City has created a fee structure which it exclusively controls. Municipal Code §134-954; (App 180-183). Additionally, the City does not provide an accounting for any CUP fees obtained nor does it remit any portion of the CUP fees to the state. (Ex. 56-63, 180-183). This is also **specifically prohibited** by *Iowa Grocery*, the court stating:

> Under the Des Moines ordinance, the City does not have to account to the Division for the total amount collected for the application. It only accounts for the fees collected under the statutory guidelines. This violates the established procedure and frustrates the general assembly's intent to monitor the flow of funds from license/permit applicants to local authorities.

Id at 682. Not only is the uniformity lost in the fee structure, but the process itself, as the ZBOA has been granted the power under the Ordinance to impose any restrictions which it may contemplate. As will be discussed further herein, that may include restrictions which vary from door to door within a single block. This cannot possibly be the uniformity demanded by the *Iowa Grocery* Court and the General Assembly. Additionally, the *Iowa Grocery* Court addresses the compensation due a local authority, stating:

> Normally, a municipal corporation can, as a home rule entity, impose license fees, permit fees, or franchise fees to cover the

> cost of "inspecting, licensing, supervising, or otherwise regulating" activities related to the exercise of its police power. *Home Builders Ass'n v. City of West Des Moines*, 644 N.W.2d 339, 347 (Iowa 2002). However, in the present case, an "additional administrative fee" is not appropriate because the City already receives compensation for these costs. Not only is the City already compensated for its role in the application process, but the City, with its large population, is compensated more for its application review process than other smaller cities or rural counties. The fact that the statutory fee schedule assures local authorities in larger cities larger application fees than local authorities in smaller cities or rural counties leads us to the conclusion that the general assembly appreciated and accounted for any additional costs involved in investigating and processing applications in larger cities.

Iowa Grocery at 681. Pursuant to the Ordinance, the City charges a sizable CUP "application" and "notification" fee, which is in excess to what the General Assembly has determined is sufficient. The Iowa Grocery court goes on to make a very important—and particularly relevant to the instant case—finding, stating:

> By adding extra fees, the City has increased its role in the licensing system—**if the applicant does not pay the City its additional administrative fee, the City will not forward the application on to the Division. This extra hurdle violates the application procedure established by the Act**. *See generally Richards v. City of Pontiac*, 305 Mich. 666, 9 N.W.2d 885, 888 (1943) *682 (finding conflict where a city imposed a licensing fee for trailer camps when the State had already entered the field and imposed a similar licensing fee).

Id at 681-682 (emphasis added). This is precisely what the City has accomplished through the Ordinance. The City violates this fundamental

principal through both the fee required for the CUP and the CUP process as a whole. The City clerk will not even present a liquor license application until "all departments have signed off that the inspections are complete" which includes the completion of the CUP requirement in the Ordinance. (App 69-70). As previously set forth herein, this undoubtedly create an "extra hurdle" in the licensing system and the City absolutely "increased its role in the licensing system" through the CUP procedure established in the Ordinance. *Iowa Grocery* at 681-682.

The *Iowa Grocery* court once again articulates the ***exclusive power*** of the state in the area of alcoholic beverages, stating:

> The general assembly's footprint covers the area of alcoholic beverage permits. The general assembly limits the ability of local authorities to regulate alcoholic beverages and "exclusively" reserves in itself the power to establish beer permits, wine permits, and liquor licenses.

Id at 682 (citing Iowa Code §123.1) (emphasis added). The *Iowa Grocery* court concludes by stating that:

> The general assembly has established a comprehensive and uniform procedure for controlling the fees surrounding the issuance and transfer of alcoholic beverage permits or licenses. This procedure clearly defines the local authority's role in the application process and compensates the local authority for its responsibilities.

Id at 683. The City's scheme was illegal when it was enacted and subsequently stricken down by the Court in *Iowa Grocery*. The CUP is a

transparent attempt at enacting a nearly identical—if not more onerous—scheme by the City.

(2) The District Court's failure to apply Iowa Grocery is clear error

Despite the obvious similarities and directly controlling logic applied by the Iowa Supreme Court in *Iowa Grocery*, the district court simply ignores the important precedential decision and states that "the holding in Iowa Grocery is not particularly informative for the case at hand." (App 25). This is clear error. It is hard to imagine a case that could be more informative for the case at hand. The logic applied by the Iowa Supreme Court in *Iowa Grocery*, as previously stated herein, directly contradicts many of the very arguments the district court relied on as the basis for its decision. This is in stark contrast to the district court's findings in its order for temporary injunction in which the court *did* apply Iowa Grocery and found *in favor* of Lime Lounge[1]. The district court failed to make any reference to its departure from its previous findings and application of *Iowa Grocery.*

In support of its erroneous decision failing to apply *Iowa Grocery* or any of the logic contained therein, the district court states that "the holding

[1] Hon. Judge Robert Hanson was the presiding judge over the case in 2019 and issued the temporary injunction order. (App 196-202). Hon. Judge Dustria Relph presided over the bench trial and issued the final order at issue in this appeal. (App 5-19, 20-34, 35-37).

in Iowa Grocery is not dispositive of this case because the fee in the current case is related to the CUP application, not the liquor license application, and the CUP application fee is not required to obtain a liquor license from the state." *Id*. However, the district court contradicts its own statement, holding that "[p]rior to submission of an application for a liquor license to the State, Des Moines, IA Municipal Code § 134-954 also requires businesses to obtain a conditional use permit ("CUP") to use a particular parcel of land for the sale of alcohol…[t]o obtain a CUP, an applicant must undergo a lengthy application process and pay a fee." (App 20-21). Further, the district court states "[a] business subject to the requirement of obtaining a CUP, must also pay the associated fees and comply with additional regulations as discussed at length herein." (App 28).

The district court also erroneously states that "[a]dditionally, § 123 specifically states that the administrator of the Iowa Alcohol Beverage Division may establish a uniform transfer fee to be assessed by local authorities, and that the fee is retained by the local authority. (App 25). This is another clear example of logic which was directly addressed (and rejected) by the Iowa Supreme Court in *Iowa Grocery*, in which the court stated:

> The Act outlines procedures for local authorities to collect the "necessary fee" prescribed by statute and to either forward that fee on to the alcoholic beverage division or to keep the fee and submit a receipt to the Division. See id. § 123.32(2). Either way, the local authority is required to report any funds received

> with the application. See id. §§ 123.32(2), .36(8), .143. Under the Des Moines ordinance, the City does not have to account to the Division for the total amount collected for the application. It only accounts for the fees collected under the statutory guidelines. This violates the established procedure and frustrates the general assembly's intent to monitor the flow of funds from license/permit applicants to local authorities. *Iowa Grocery* at 682.

The City admits that "[t]he City of Des Moines does not remit any portion of the 'application fee' or 'notification fee' collected for a Conditional Use Permit to the State of Iowa." (App 57-59). This clearly demonstrates the district court's misunderstanding of Iowa Code §123 and *Iowa Grocery* as the "uniform transfer fee" has already been established by the State and not include a CUP fee collected and retained by the City of Des Moines (without accounting to the State). Such a fee would clearly not be "uniform" across Iowa jurisdictions and violates the Act.

II. Des Moines Municipal Code §134-954 is Preempted by Iowa Code Chapter 123.

The City relies heavily (if not exclusively) on the power a municipality enjoys in enacting zoning ordinances, and understandably so as this is the City's only viable argument. However, their argument fails for numerous reasons. At first glance, it may appear that the Ordinance is an exercise of the City's zoning power—thanks to the City's deliberate attempt to disguise it as such—but it is not. Instead, the City through the Ordinance

usurps the State's police power which is specifically reserved for the state in Iowa Code chapter 123. Iowa Code §123.1 states:

> This chapter shall be cited as the "Iowa Alcoholic Beverage Control Act", and **shall be deemed an exercise of the police power of the state**, for the protection of the welfare, health, peace, morals, and safety of the people of the state, and all **its provisions shall be liberally construed for the accomplishment of that purpose.** It is declared to be public policy that the traffic in alcoholic liquors is so affected with a public interest that it should be regulated to the extent of prohibiting all traffic in them, **except as provided in this chapter.**

(emphasis added). The City's power to pass municipal ordinances is limited by, *inter alia*, the Iowa Constitution, which states, in part:

> **Municipal home rule.** SEC. 38A. Municipal corporations are granted home rule power and authority, **not inconsistent with the laws of the general assembly**, to determine their **local affairs and government**, except that **they shall not have power to levy any tax unless expressly authorized by the general assembly**.
>
> The rule or proposition of law that a municipal corporation possesses and can exercise only those powers granted in express words is not a part of the law of this state.

Iowa Constitution, Art. III, Sec. 38A (emphasis added). In short, and Ordinance must not be "inconsistent with the laws of the general assembly" and can only determine their "local affairs and government." *Id*. Furthermore, the Iowa Supreme Court has held that " [a] municipality may enact an ordinance on matters which are also the subject of state statutes,

unless the ordinance invades an area of law reserved by the legislature to itself." *Sioux City Police Officers' Ass'n v. City of Sioux City*, 495 N.W.2d 687 (Iowa, 1993) (internal citations omitted) (emphasis added). Specifically, the Ordinance is preempted by the Act in the following ways:

1. The Ordinance requires obtaining a permit for the sale of alcoholic liquor, wine or beer, which is in **direct violation** of the Act.

2. The Ordinance requires an additional permit fee retained by the City which is in **direct violation** of the Act.

3. The Ordinance imposes **arbitrary and capricious conditions** which violate the Act and the Equal Protection clause of the Iowa and US Constitutions.

4. The Ordinance usurps the police power reserved by the state in the Act.

5. The Ordinance violates the enforcement and appeal procedure set forth in the Act, and reserves illegal power to the City.

6. The Ordinance constitutes illegal spot zoning.

Any of these six elements would, by itself, be a sufficient basis to find the Ordinance to be invalid and unenforceable. However, the Ordinance extends far beyond a single conflict with the Act or violation of the law, as further described herein.

(1) The Ordinance requires obtaining a permit for the sale of alcoholic liquor, wine or beer, which is in direct violation of the Act.

The first and most important aspect of the Ordinance which constitutes an unambiguous violation of the Act is set forth in Iowa Code

§123.37. The mere fact that the City requires a CUP is specifically prohibited by Iowa Code §123.37, which states:

> **The power to establish licenses and permits** and levy taxes as imposed in this chapter **is vested exclusively with the state**. Unless specifically provided, **a local authority shall not require the obtaining of a special license or permit for the sale of alcoholic beverages, wine, or beer at any establishment**, or require the obtaining of a license by any person as a condition precedent to the person's employment in the sale, serving, or handling of alcoholic beverages, wine, or beer, within an establishment operating under a license or permit.

(emphasis added). The court need not rely on anything else in order to find the Ordinance invalid and preempted by the Act. The Ordinance states that "a conditional use **permit** must be obtained" for "[t]he sale of alcoholic liquor, wine and beer." Municipal Code §134-954. The Ordnance is unequivocally in direct violation of the Act. This is further supported on the City's CUP application which states on Addendum M: "Conditional Use **Permit for Business Selling Wine, Liquor, and/or Beer** (Section 134-954)." (App 180-182) (emphasis added).

The City has argued that the CUP process is an exercise of its zoning power. The many ways in which that argument fails will be set forth in detail in this brief. However, there is one simple and straightforward question which conclusively illustrates that the City's CUP scheme is nothing more than a "special license or permit for the sale of alcoholic beverages, wine or

beer" which is: **why would anyone obtain a CUP other than to obtain a liquor license for the sale of alcoholic beverages, wine or beer**? The answer is simple, no one would. *Id.* The CUP serves one purpose and one purpose only—to do that which is specifically prohibited by the Act—to create another "permit for the sale of alcoholic beverages, wine or beer" which is issued by the City. The CUP is nothing more than a license to obtain a license. This is a clear violation of Iowa Law.

The district court erred in its finding in this regard, stating that "[i]t governs…retail sale and consumption of alcoholic beverages and the health, welfare and morals…of Des Moines neighborhoods where those establishments are located." (App 24). This is clear error for numerous reasons stated herein, including that the Ordinance bans "Taverns and Night Clubs" in *every* Des Moines neighborhood without first obtaining a CUP and paying a fee to the City. Municipal Code §134-954.

(2) The Ordinance requires an additional permit fee retained by the City which is in direct violation of the Act.

In addition to establishing the ABD as the *exclusive* licensing entity for liquor licenses, the Iowa legislature set forth a specific, detailed, and *exclusive* fee structure for the application, transfer, and renewal of a Liquor Licenses in the state of Iowa. With respect to those fees, Iowa Code §123.37 states "[t]he power to **establish licenses and permits and levy taxes as**

imposed in this chapter is vested exclusively with the state." (emphasis added). Simply put, the Act does not allow local municipalities to charge any application, transfer, or renewal fees other than the fees set by state statute.

Under the Liquor License application scheme in the City, a CUP "**must be obtained**" for the "sale of alcoholic liquor, wine and beer" for a variety of business types. Municipal Code §134-954(a) (emphasis added). Moreover, the *exclusive* purpose of the CUP is to allow an individual to apply for a Liquor License. This requires an "application fee" of $300 and a "notification fee" of "$2.00 per parcel within 250 feet of subject property." (App 181). This fee additionally *directly* contradicts the statutory procedure for the collection, accounting, and distribution of collected fees related to Liquor License applications. Iowa Code §§123.32(2), 123.36(8), 123.143.

In addition to the foregoing violation of the Act, the CUP fees are "nonrefundable unless the appeal is withdrawn before City staff has begun review or mailed public notices." (App 181). As such, if a liquor license applicant applies for a CUP as required under the Ordinance and is denied a CUP, they will receive no refund of the fee paid. Similarly, if they do receive a CUP and are later denied a liquor license, either by the local authority or the ABD, they will not be refunded the fee paid for the CUP. This directly contradicts Iowa Code §123.32(6)(a) which states that:

> Upon receipt of an application having been disapproved by the local authority, the administrator shall notify the applicant that the applicant may appeal the disapproval of the application to the administrator. The applicant shall be notified by certified mail, and **the application, the fee, and any bond shall be returned to the applicant.**

(emphasis added). This, again, runs directly afoul to the intent of the General Assembly. The exclusive fee schedule prescribed by the Act provides for reimbursement to the City for their role in approving liquor, wine, and beer license applications. The City is simply *not entitled to collect an additional fee* for the purposes of reviewing an application mailing notices to individuals surrounding the proposed location of a prospective licensee. Moreover, "[t]he City of Des Moines does not remit any portion of the 'application fee' or 'notification fee' collected for a Conditional Use Permit to the State of Iowa." nor does it provide any accounting of any such fees collected to the State. (App 59). Additionally, this was specifically addressed by the Iowa Supreme Court in *Iowa Grocery* as a basis for striking down the City's fee in which the Court stated "[u]nlike the state statutory license fee, the ordinance provides no mechanism to refund the administrative fee if the license application is not approved." *Iowa Grocery* at 678. The CUP fee in the instant case is identical. The district court erred in its legal analysis and finding for this issue. (App 26).

(3) The Ordinance imposes arbitrary and capricious conditions which violate the Act and the Equal Protection clause of the Iowa and US Constitutions.

While the Ordinance purports to be a zoning regulation, it clearly is not. In reality, it establishes a scheme by which the City can enforce arbitrary and capricious "conditions" which have the force of law as applied to Liquor License holders. Article I, Section 6 of the Iowa constitution requires that "[a]ll laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens." The Ordinance violates the fundamental principal of Equal Protection in two distinct ways.

First, under the CUP scheme, the Ordinance has created a set of requirements specifically based on the type of business and the percentage of liquor, wine, or beer that they serve. Municipal Code 134-954(a). For instance, a "Tavern and Night Club" must obtain a CUP **regardless of the zoning district** and is subjected to the fees and additional regulation associated therewith. *Id*. A "Restaurant" located in the same zoning district is not required to obtain a CUP if "at least 50 percent of the gross receipts [are] derived from the sale of prepared food and food-related services." *Id*. The Ordinance goes on to define additional types of establishments and the requirements for each. *Id*.

Iowa Code §123.30 specifies the ***only*** classes which may be issued for wine permits (§123.173), beer permits (§123.124), and liquor control licenses (§123.30). The Iowa Code with respect to Liquor control licenses, for instance, states that "[l]iquor control licenses issued under this chapter **shall be** of the **following classes**…" Iowa Code §123.30(3). The classes differentiate based on business type, service type, alcohol type, and additional factors. A Class "A" liquor control license, for instance:

> …may be issued to a club and shall authorize the holder to purchase alcoholic liquors from class "E" liquor control licensees only, wine from class "A" wine permittees or class "B" wine permittees who also hold class "E" liquor control licenses only, and native wines from native wine manufacturers, and to sell liquors, wine, and beer to bona fide members and their guests by the individual drink for consumption on the premises only.

Iowa Code §123.30(3)(a). The Act provides for varying requirements, fee structures, and procedures for each type of license. This scheme under the Ordinance, however, has formulated an entirely different set of criteria for the classes of licenses and how the laws apply to each.

For the sake of argument, let us assume that there is a bar—"A's Bar"—that holds a class "C" liquor license and is located in the C-3B zoning district in the City. Let us also assume that this bar sells 100 alcoholic beverages per day and nothing else. Right next door, in the same zoning district, there is a very similar business—"B's Bar"—that holds the same

class "C" liquor license. B's Bar also serves 100 alcoholic beverages per day. However, unlike A's Bar, B's Bar *also* serves 100 hamburgers per day. Under the Act, these businesses are treated identically. Both business would be subjected to the same fees, the same licensing requirements, regulations.

However, the City's so-called "zoning" scheme in the Ordinance completely disrupts this parity and violates the Act. A's Bar will be subjected to a fundamentally different (and more lengthy) application process, additional application fees (non of which are remitted or accounted to the state) and the threat of "reconsideration" by the ZBOA in perpetuity. This is simply not what the General Assembly contemplated, nor is it substantiated by the Act in any way.

In addition, the Ordinance permits the unfettered imposition of arbitrary and capricious "conditions" on liquor license holders in the City, none of which are codified in state law. Specifically, Municipal Code §134-954(c) states:

> Any conditional use permit granted by the board of adjustment for the use of a premises for the sale of alcoholic liquor, wine and beer shall be subject to the following general conditions, **together with such additional special conditions as may be reasonably required by the board**…

(emphasis added). This provision of the Ordinance provides the ZBOA with the unfettered power to impose virtually *any* condition which it can contemplate—and, most onerously—on an individualized basis.

For example, take four establishments located within one block of each other, in the same zoning district, all with the same Class "C" Liquor License from the ABD, located in the C-3B zoning district. Under the Ordinance, the ZBOA can create completely arbitrary "conditions" unique to each bar with respect to, in this case, outdoor sound:

(a) **435 E. Grand Avenue (Lime Lounge)** - "Live outdoor music on any patio shall be limited to non-amplified performances. Any outdoor sound or music on any patio shall be limited to levels that would be considered background auditory in nature and shall be in accordance with a Type E sound permit." (App 71-72).

(b) **525 E. Grand Avenue** - "Live outdoor music on any rooftop patio shall be limited to non-amplified performances. Any outdoor sound or music on any rooftop patio shall be limited to levels that would be considered background auditory in nature." (App 73-74).

(c) **425 E. Grand Avenue** - "Any outside speakers or amplified sound on the outdoor patio shall be in accordance with a Type E Sound Permit. No amplified sound is permitted, and any outside speakers may not be used, after 10:00 PM on Sundays, Mondays, Tuesdays, Wednesdays, and Thursdays, and no amplified sound is permitted, and outside speakers may not be used, after 12:00 AM (midnight) on Fridays and Saturdays." (App 75-76).

(d) **440 E. Grand Avenue** - "The business shall comply with Article IV of Chapter 42 of the City Code pertaining to noise control. Any outdoor speakers or amplified sound shall only be in accordance with the appropriate sound permit. While the premise is allowed to obtain a Class E permit to allow for background sound that is auditory in nature only, any special events requiring a less restrictive sound permit shall be limited to two (2) calendar days within any given month." (App 7-78).

By way of the CUP procedure in the Ordinance, 525 E. Grand has a restriction that "there be no amplified sound on the patio." (App 73-74, 79-81). Lime Lounge at 435 E. Grand is permitted to use amplified sound on its patio, but must obtain a Class "E" Sound permit. (App 71-72). 425 E. Grand is permitted to use outdoor sound, but is restricted to use before 10:00 PM Sunday - Thursday and before midnight on Friday and Saturday. (App 75-76). Finally, 440 E. Grand is permitted to use outdoor sound with a sound permit, but is restricted from obtaining less restrictive sound permits to two days per month. (App 77-78).

The law with respect to outdoor sound is codified in the Des Moines Municipal Code Article IV - Noise Control, and outdoor sound is set forth in §42-258(e)(5). Municipal Code §42-258(e)(5) permits a sound permit for sound in a "commercially zoned area…for sound equipment to be used in an outdoor area" which "may be used only during regular hours of business

operation." For these four establishments, the ZBOA has created four entirely different and arbitrary regulations which respect to outdoor sound, despite outdoor sound being specifically codified—and allowed—by Municipal Ordinance. While this is one relevant example within a one-block radius of the Lime Lounge's establishment, this is far from a comprehensive list of the arbitrary "conditions" which the Ordinance permits the ZBOA to place on Liquor License holders in the City. A few additional examples from ZBOA orders for Liquor License holders are as follows:

- "11. A security guard shall be on the premise between 6:00 PM and 11:00 PM daily." (App 82)
- "7. The business shall not operate between 11:00 PM and 6:00 AM daily." (App 82)[2]
- "3. The site shall be kept in good repair and clear of any excess weeds or landscaping debris." (App 84).
- "7. Any business selling liquor, wine, or beer shall utilize sound monitoring equipment to ensure that the decibel level within the business shall never exceed 85 dB." (App 84).

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[2] This condition specifically violates the Act's prohibition on diminishing hours of alcoholic beverage sales, which states "Local authorities may adopt ordinances or regulations…that do not diminish the hours during which beer, wine, or alcoholic beverages may be sold or consumed at retail" Iowa Code 123.39(2).

- "2. The results of the data monitoring equipment shall be maintained on file for review by City staff at any time." (App 85).
- "5. The business shall cooperate with police in addressing any littering on the premises." (App 86).
- "4. The business shall comply with Article IV…there shall not be any outdoor speakers or amplified sound on the premise at any time." (App 87).
- "2. There shall be no outdoor patio unless the Zoning Board of Adjustment grants future amendment to the Conditional Use Permit to allow for such." (App 88).

There could be no better example of a violation of the Equal Protection clause than the Ordinance which arbitrarily imposes different, non-codified, restrictions on an individual basis. This is quite possibly best demonstrated by the following exchange between the Liquor License holder at 525 E. Grand (Roof Top Bar, LLC) and the Zoning Enforcement Officer (SuAnn Donovan):

> **Rooftop Bar**: "Hello Suann, I hope are well. With the current zoning in regards to music is that for the entire East Village or just the building located at 525 E Grand?
>
> **SuAnn Donovan**: "The **conditions imposed** by the board **for a liquor license** are **only applicable to 525 E Grand**."

(App 79-81) (emphasis added).

Ultimately, the manner in which the City has implemented the CUP procedure under the Ordinance is not a proper exercise of "zoning" power. It is instead, nothing more than a thinly veiled—or as demonstrated above in SuAnn Donovan's communication to a Liquor License holder, sometimes overt—mechanism by which to impose arbitrary and capricious requirements on liquor license holders in violation of Iowa law.

The district court erred in its legal analysis and finding for this issue. (App 26). The most telling statement by the district court is when it states that "[t]he insignificant difference in language used can be attributed to the fact they occurred over the course of nearly a decade and **likely had different individuals participating in the hearings.**" (App 31) (emphasis added). This is *precisely* what separates an arbitrary and capricious ordinance from a valid and enforceable ordinance. Iowa Code §362.2(16) states that an "Ordinance" means "a city law of a **general and permanent nature**." (emphasis added). Article I, Section 6 of the Iowa constitution requires that "[a]ll laws of a general nature shall have a uniform operation…" To suggest that it is acceptable for regulations to vary based on the "different individuals participating" is clearly erroneous.

(4) The Ordinance usurps the police power reserved by the state in the Act.

The General Assembly has exercised exclusive police power with respect to alcoholic beverages. Iowa Code §123.1 states:

> This chapter shall be cited as the "Iowa Alcoholic Beverage Control Act", and **shall be deemed an exercise of the police power of the state**, for the protection of the welfare, health, peace, morals, and safety of the people of the state, and all **its provisions shall be liberally construed for the accomplishment of that purpose.** It is declared to be public policy that the traffic in alcoholic liquors is so affected with a public interest that it should be regulated to the extent of prohibiting all traffic in them, **except as provided in this chapter.**

(emphasis added). Accordingly, any powers with respect to alcoholic beverages are specifically limited to what is provided for in the Act. Specifically, Iowa Code §123.39(2) provides authority for local authorities with respect to laws:

> **Local authorities** may adopt ordinances or regulations for the location of the premises of retail wine or beer and liquor control licensed establishments and local authorities may adopt **ordinances**, **not in conflict with this chapter** and that do not diminish the hours during which beer, wine, or alcoholic beverages may be sold or consumed at retail, governing any other activities or matters which may affect the retail sale and consumption of beer, wine, and alcoholic liquor and the health, welfare and morals of the community involved.

(emphasis added). Local authority is specifically defined in Iowa Code §123.3(26), which states: "Local authority" means the city council of any

incorporated city in this state, or the county board of supervisors of any county in this state…" Furthermore, Iowa Code §362.2(16) states that an "Ordinance" means "a city law of a **general and permanent nature**." (emphasis added).

Accordingly, a local authority certainly has the ability to pass ordinances creating zoning districts, specifying where an establishment serving alcohol may be located, and establishing restrictions of a "general and permanent nature." In fact, the Municipal Code accomplishes that very goal by allowing and disallowing establishments serving alcohol based on the zoning district. Municipal Code §134-954(a). However, the Ordinance goes far beyond that by imposing a CUP requirement. *Id*. The CUP requirement is not related to the *location* of the establishment, but rather imposes arbitrary conditions on specific *businesses* under the guise of zoning. *Id.*

The Act specifically limits law making authority to the city council (in a city) and provides **no lawmaking authority to the ZBOA**. Iowa Code §123.3(26). If the General Assembly wanted to grant lawmaking power (or any power for that matter) to the ZBOA in the Act, it certainly would have done so as the ZBOA is an entity established pursuant to state law. Iowa Code §414. Additionally, the Act permits laws created by the local authority

of "general and permanent nature," a definition which could not possibly apply to the arbitrary and individualized restrictions imposed by the ZBOA.

The district court erred in its analysis with respect to this argument. First, the district court engages in an analysis of preemption, however the only preemption that applies in this case is express preemption, discussing the higher burden of implied preemption is irrelevant. (App 23). As previously stated, the Iowa Legislature could not have made it any more clear that the Act preempts any local ordinance, stating that it "shall be deemed an exercise of the police power of the state…and all its provisions shall be liberally construed for the accomplishment of that purpose." Iowa Code §123.1.

The district court then states that "Lime Lounge argues further that City Ordinance 134-954 is invalid because Iowa Code § 123 limits lawmaking authority to a city council (in a city) and provides no lawmaking authority to a zoning board of authority…[w]hile this is correct, there is no evidence in this case that the ZBOA rather than the Des Moines City Council adopted City Ordinance 134-954." (App 27). Lime Lounge has never argued the ZBOA adopted the Ordinance, but rather that the ZBOA is imposing completely arbitrary and capricious conditions on Liquor License holders with no statutory authority to do so, as the evidence set fort herein clearly demonstrates.

(5) The Ordinance violates the enforcement and appeal procedure in the Act, and illegally exercises power reserved for the State.

The Act has set forth specific procedures for contested case hearings and appeals. Iowa Code §§17.10-17A.20, 123.32, 123.39, Iowa Code §185; (App 128-135). The CUP procedure of the Ordinance bypasses this exclusive process through the use of "conditions" in the CUP. The City has architected this end-run around the Act in the following manner:

- Municipal Code §134-954(a) requires that "[a] conditional use permit is required for the use of a premises for the sale of alcoholic liquor, wine or beer…"
- Municipal Code §134-954(c) allows the ZBOA to require "additional special conditions" which can and do consist of requirements which are themselves entirely inconsistent with (and in certain cases, directly contrary to) established laws or ordinances.
- Municipal Code §134-954(c)(6) states that if "the zoning enforcement officer **determines at any time** that the operation of such a business exhibits a pattern of violating **the conditions set forth in the conditional use permit**, the zoning enforcement officer may apply to the board to reconsider the issuance of the conditional use permit for such business."

- Upon such a "determination" by the zoning enforcement officer, Municipal Code §134-954(c)(6) then grants the ZBOA "the authority to…revoke the conditional use permit."

The City then applies to the ABD requesting that "the Licensee's liquor control license…be revoked…because the required CUP to have a liquor license at the location of the licensed premises has been revoked." (App 50-52).

In short, the Ordinance requires a Liquor License holder to obtain a CUP, allows the ZBOA to place any conditions it sees fit upon that CUP, allows the zoning enforcement officer to *unilaterally* make a determination that the licensee has violated the conditions established by the ZBOA, and then allows that same ZBOA to revoke the CUP. Municipal Code §134-954. Upon revocation of the CUP, the City then applies to the ABD for revocation of the Liquor License based on Iowa Code §123.30(2) which requires compliance with local ordinances. (App 50-52). The City cites a violation of the Ordinance for failure to maintain a CUP. *Id*. The City contends that the only relevant fact before the ABD is whether or not the license has a CUP and, if it does not, the license must be revoked. *Id*. While a decision by the ABD may be appealed through the judicial review process, the reviewing court would be limited by the same factual issue—whether or not the licensee has a CUP—effectively creating a sham proceeding. This is not

what the Act contemplates in the slightest. Furthermore, it is not a hypothetical, but precisely what the City has done to Lime Lounge, and what the district court previously halted by way of a temporary injunction. (App 47-52, 196-202).

The Ordinance creates a scheme by which the ZBOA—an unelected board—is effectively granted power to act as both the legislative and judicial body for Liquor License holders. The ZBOA may impose individualized, arbitrary conditions upon a licensee, revoke the CUP for what it deems is a violation of those conditions, and force the ABD to revoke the liquor license based *solely* on their decision to revoke the CUP. (App 47-52). This can be achieved **without any action** by the statutorily defined "local authority"—"the city council of any incorporated city…or the county board of supervisors of any county"—which are the *only bodies* authorize under the Act to perform any enforcement actions. Iowa Code 123.3(26).

This strips the ABD of two extremely important powers which the General Assembly specifically reserved to the state. An overview of this process is provided for in the ABD's "Guide To Compliance with Iowa's Alcoholic Beverages Laws." (App 128-135). First, the evidentiary contested case hearing which begins when "[l]aw enforcement officials, health officials, fire officials and Division investigators report violations of alcoholic beverages laws as well as other related laws by forwarding

investigation reports to the Division."[3] (App 128). Then, "[i]nvestigation reports are reviewed by an assistant attorney general, and when appropriate, contested case hearings are initiated through an administrative hearing complaint. *Id*. Under the Ordinance, the City effectively forces the ABD to initiate a case by proclaiming that without a CUP, the licensee cannot maintain a liquor license in the City. (App 50-52).

Next, "[w]hen an administrative hearing complaint is filed against a licensee, a contested case hearing is held…The licensee or their attorney may call witnesses, make arguments and introduce evidence." (App 130). The City turns the contested case hearing in to a sham proceeding by requesting that the ABD exclude "any evidence used for the purpose of attacking the legality of the revocation of Licensee's CUP be prohibited from being introduced into evidence" (App 177-179). Again, not a hypothetical, but exactly what the City has attempted to do to Lime Lounge. *Id*. In other words, the City contends that the contested case hearing consist only of whether or not the licensee has a CUP thereby eliminating any defense the licensee may have and any basis they ABD may have to find against the City. *Id*.

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[3] It is important to note that the Lime Lounge in this case has, by the city's own admission, never violated any law for which the City seeks to have its Liquor License revoked. (App 64-67).

The Act allows for a proposed decision to: (1) "impose a civil penalty", (2) "suspend the license from one to 365 days", (3) "revoke the license", or (4) "dismiss all or part of the allegations cited in the administrative hearing complaint." (App 130). The Ordinance effectively strips three of these powers from the ABD leaving **revocation as the only option**. *Id*. This is most concisely illustrated by the following statement by the zoning enforcement officer of the City:

> The Conditional Use Permit authorizes the area to be used as a tavern/bar and sell liquor. The Conditional Use permit was granted with the condition that there be no amplified sound on the patio…Should your business continue to have bands, DJs and other forms of entertainment with amplified sound I may take the conditional use permit back to the Zoning Board of Adjustment for reconsideration. If that happens **I will request the permit be pulled and thereby stop liquor sales**. (emphasis added).

The district court errs in its determination on this issue by failing to address Lime Lounge's comprehensive argument in any meaningful manner. (App 27). The district court states that "It does not include authority to revoke liquor licenses…[t]herefore, it does not interrupt the appellate procedure set out in Iowa Code § 123." Id. The district court is correct in that the ZBOA has no statutory authority to revoke liquor licenses, yet under the City's scheme, it is able to do precisely that, which is illegal. Once again, this is not a hypothetical, but precisely what the City has attempted against Lime Lounge. (App 50-54).

(6) The Ordinance constitutes illegal spot zoning.

Even if this Court held that the Ordinance constitutes a zoning power of the City, the way in which the Ordinance functions inherently results in the very definition of illegal spot zoning. "Spot zoning is the creation of a small island of property with restrictions on its use different from those imposed on surrounding property." *Perkins v. Bd. of Supervisors*, 636 N.W.2d 58 (Iowa, 2001) (internal citations omitted). This is precisely what the ZBOA creates when imposing arbitrary "conditions" on CUPs. Moreover, this is not merely an occasional result under an otherwise valid Ordinance. The sole purpose of the CUP as enacted by the City is to allow the ZBOA to engage in *ad hoc* "lawmaking" with respect to individual businesses.

For example, as previously stated herein, the ZBOA—even in the one-block radius around Lime Lounge's establishment—has created not less than four separate restrictions different than those imposed on surrounding properties. "In determining whether there is a reasonable basis for spot zoning, we consider the size of the spot zoned" and "the uses of the surrounding property." *Little v. Winborn*, 518 N.W.2d 384 (Iowa, 1994) (internal citations omitted). The sizes of the spot with the Ordinance purports to zone are ***individual businesses***. The City admitted this fact very

concisely, stating "[t]he conditions imposed by the board for liquor license are only applicable to 525 E. Grand." (App 79-81).

Spot zoning is only considered valid "if it passes a three-pronged test." *Perkins* at 68. The Court must determine "(1) whether the new zoning is germane to an object within the police power; (2) whether there is a reasonable basis for making a distinction between the spot zoned land and the surrounding property; and (3) whether the rezoning is consistent with the comprehensive plan." *Id*. The Ordinance does not meet any of the three required elements. First, the Act specifically states that it "shall be deemed an exercise of the police power of the state." Iowa Code 123.1. Accordingly, the liquor licensee is not "an object with the police power" of the City. *Perkins*, 636 N.W.2d at 68. Second, even in the limited example previously set forth herein within the one-block radius of Lime Lounge's establishment, there can be no "reasonable basis" for creating four entirely different restrictions with respect to outdoor sound. *Id*. Lastly, the "conditions" of the ZBOA are ***directly inconsistent*** with the comprehensive plan as they create deviations from the uniform application of the laws and zoning requirements.

The district court states that Lime Lounge has "not provided sufficient evidence to support a finding that the ordinance has resulted in 'a small island of property with restrictions on its use different from those imposed

on surrounding property'" and that the "examples are not informative." (App 32-33). Once again, these are not just "examples" but actual issued decision by the ZBOA for properties within a one block radius of Lime Lounge. (App 71-81). These ZBOA decisions contain the entirety of the document containing each arbitrary condition each business must comply with in order to maintain its CUP. It is erroneous for the district court to claim that these very documents do not contain "all the information needed to fully consider them" and that they are "not informative" as this is a copy of the official document issued by the ZBOA. (App 32-33).

III. Failure to Grant Lime Lounge a Permanent Injunction (and Revocation of the Temporary Injunction) Was Clear Error.

As previously stated herein, Plaintiff filed a motion for temporary injunction on July 29, 2019. That filing was supported by a detailed motion, affidavit, exhibits, and comprehensive briefing. A hearing was held on the temporary injunction on September 13, 2019 at which both parties were in attendance and presented oral arguments. The court issued an order granting Plaintiff's temporary injunction, finding that Plaintiff had established the necessary elements—threat of irreparable harm, likelihood of success on the merits, and balancing the harm of the parties and public. (App 196-202).

Plaintiff contends that the court, at the time it issued the temporary injunction, was familiar with the case and was fully advised and,

accordingly, issued a well-reasoned and competent decision. *Id*. The court at the time of trial issued an entirely contrary decision to the previous order of the court, with only a brief reference to the previous order. (App 21). The court's order was devoid of any analysis or reasoning as to the basis for the stark deviation. *Id*.

The temporary injunction issued by the court has been in place for over two years. The facts which formed the basis for the court's original determination have only increased in Lime Lounge's favor. There have been no substantial changes in circumstances other than the passing of a substantial amount of time. Accordingly, the district court erred in dissolving the temporary injunction and failing to issue a permanent injunction. (App 33).

(1) Threat of irreparable harm

The court previously identified the fact that Plaintiff was "in the midst of a contested case hearing with the Iowa Alcoholic Beverages Division" and that "that the stated reason the Alcoholic Beverages Division is considering revoking Plaintiff's license is the City's revocation of Plaintiff's CUP." (App 198). The City has resumed the ABD process under the same basis—failure to have a CUP—and accordingly, the threat of irreparable

harm Lime Lounge previously addressed and analyzed by this court remains the unchanged.

(2) Likelihood of success on the merits

The arguments and briefing presented by both parties to the court at the original temporary injunction hearing have similarly remained unchanged. The court, when considering the arguments and relevant case law determined that "Lime would appear to have a substantial chance of succeeding on the merits." (App 200). Further, after the original temporary injunction the Defendant City sought—and was denied—interlocutory appeal. (App 194-195).

Nevertheless, the district court in its Order, made a fundamental factual error and failed to apply or analyze directly relevant and controlling case law set forth by the Iowa Supreme Court in *Iowa Grocery Industry Ass'n v. City of Des Moines.* 712 N.W.2d 675 (2006). Plaintiff contends that if the correct facts and controlling law are applied to this case, Plaintiff has a high likelihood of success on the merits as was previously held by the district court. (App 196-202).

(3) Balancing of harm

The temporary injunction in this case was in place for over two years, and for good reason. The CUP, which is the basis of this litigation, was

revoked—under the municipal code which is the subject of this case—on March of 2016, **nearly six years ago**. The Plaintiff still, to this day, continues to operate under the same liquor license issued by the State of Iowa, renewed on an annual basis. Plaintiff has paid many thousands of dollars in liquor license fees which the State has collected. So too has the City collected its various taxes and fees which have resulted from the operation of Lime Lounge's business over that period. Furthermore, the City has collected hundreds of dollars every year from the Plaintiff for a sound permit which is renewed on an annual basis—a permit which Plaintiff was required to obtain as a condition of the CUP.

Despite not having a CUP—**because a CUP is not required under Iowa Law**—Lime Lounge has still been able to successfully operate subject to Iowa Alcoholic Beverages Division code (Iowa Code §123) as well as every other state law and local ordinance. Simply put, the court previously cited the Defendant's potential harm as "relatively minimal." (App 212). History has proven that to be correct. Any potential harm to the Defendant which existed over two years ago has only continued to decrease with the passage of time and, in actuality, is virtually non-existent. Nevertheless, without an injunction, the Plaintiff still stands—as it did over two years ago—to lose the ability to operate its business because of the City's illegal CUP scheme.

Conclusion

As such, the Appellant respectfully requests that this Court reverse and remand this case for findings consistent with the law and arguments set forth by the Appellant in this brief.

Request for Oral Argument

The Appellant respectfully requests that the Court set this matter for Oral Argument.

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Appellant certifies that its Brief has been filed electronically and, as such, there are no printing or duplicating costs to be assessed.

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/s/ Cornelius Qualley Dated: July 5, 2022

Certificate of Service

The undersigned certifies a copy of this combined certificate was served on July 5, 2022 upon the all attorneys of record and upon the clerk of the supreme court via EDMS.

/s/ Cornelius S. Qualley
Cornelius S. Qualley