

IN THE SUPREME COURT OF IOWA

No. 22-0473

Polk County No. CVCV058214

LIME LOUNGE, LLC,

Plaintiff-Appellant

v.

CITY OF DES MOINES, IOWA,

Defendants-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY
HON. AUSTRIA A. RELPH

APPELLEE'S FINAL BRIEF

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ISSUES PRESENTED FOR REVIEW

I. THE COURT PROPERLY INTERPRETED *IOWA GROCERY ASS'N* AND HOME RULE

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City of Des Moines v. Gruen, 457 N.W.2d 340 (Iowa 1990)

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II. THE COURT CORRECTLY FOUND THAT IOWA CODE §123 DOES NOT PREEMPT DES MOINES MUNICIPAL CODE §134-954

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

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V. THE COURT PROPERLY DENIED LIME LOUNGE'S APPLICATION FOR PERMANENT INJUNCTION

Cases

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

Lewis Investments, Inc. v. City of Iowa City, 703 N.W.2d 180 (Iowa 2005)
Max 100 L.C. v. Iowa Realty Co., Inc., 621 N.W.2d 178 (Iowa 2001)

ROUTING STATEMENT

This case should be submitted to the Iowa Court of Appeals as it does not involve new or novel legal issues in existing case law.

STATEMENT OF THE CASE

Lime Lounge, LLC (“Lime Lounge”) the Appellant in this matter filed for a declaratory judgment action against Appellee, the City of Des Moines (the “City”). Appellant asserted that a City ordinance allowed the City to charge and collect administrative fees in connection with applications for liquor licenses and beer and wine permits in the way the City used Conditional Use Permits ("CUP"). (Ex. 4, 13, App. 69, 180). The Appellant argues the 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). Therefore, Appellant claims the administrative fees charged by the City under Municipal Code §134-954 (the “Ordinance”) are illegal under Iowa Code § 123.37. Appellant asserts the ordinance conflicts with the statutory procedures for the collection and distribution of application fees. The Appellant therefore asserts that 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. The district court disagreed with all the Plaintiff's arguments in its Orders of January 20, 2022, and February 9, 2022.

The Appellee asserts that the city ordinance falls squarely under the powers provided to it by Iowa Code §414 and expressly allows municipalities under the Iowa Beverage Control Act, §123.37 and §123.39. The Appellee asserts that the district court correctly found that the City had authority to use a CUP system as applied to Lime Lounge as a tavern and that it further properly found that the City had the authority to enforce its CUP system regarding the use of the land after the Appellant repeatedly violated the terms of the CUP of which it had previously agreed.

STATEMENT OF THE FACTS

Lime Lounge, LLC (“Lime Lounge”) is a bar on the property commonly known as 435 East Grand Avenue in Des Moines, Iowa. The property is in Des Moines known as the ‘East Village.’ In 2011, Lime Lounge, which had been licensed and operating at another location in Des Moines, sought and obtained a conditional use permit ("CUP") for a business selling wine, liquor, and or beer at that new address. (Ex. A Zoning Board of Adjustment (“ZBOA”) Decision Aug. 24, 2011.)

The Board issued the CUP subject to several conditions including:

2. Any business selling liquor, wine, and/or beer shall operate in accordance with a liquor license obtained through the Office of the City Clerk as approved by the City Council.

3. The business *shall comply with Article IV of Chapter 42 of the City Code pertaining to noise control.*

4. 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.*

5. Litter and trash receptacles shall be located in convenient locations inside and outside the premises, and operators of the business shall remove all trash and debris from the premises and adjoining public areas on a daily basis...

7. The Conditional Use Permit shall be subject to amendment or revocation if the Zoning Enforcement Officer determines that the operation of the business becomes a nuisance *or exhibits a pattern of violating the conditions set forth in the conditional use permit.*

-- (Ex. A, ZBOA Decision Aug. 24, 2011, p.2, App. 204)(emphasis added)

Every conditional use permit (CUP) is also subject to requirements set by ordinance including a requirement to comply with the City's noise ordinance. Municipal Code of the City of Des Moines, Iowa ("Municipal Code") § 134-954(c)(2).

The City of Des Moines has CUPs, variances, and exceptions for several activities, not just for businesses selling wine, liquor, or beer. (Ex. B, C, App. 228, 231)

As described by the Iowa Court of Appeals, disputes related to Lime Lounge's CUP were before the City of Des Moines Zoning Board of Appeals on several occasions in 2015 and 2016. (*Lime Lounge LLC v. City of Des Moines*, 927 N.W.2d 701, 2019 WL 480197, Feb. 6, 2019, at *2-4)

On March 23, 2016, the Board considered the Zoning Enforcement Officer's request for reconsideration of Lime Lounge's CUP. (*Id.* at *3) In addition to the facts relevant from prior meetings, the Board was given additional information. The Board was presented with comment cards from Lime Lounge's neighbors. (Ex. E, Tr. 1:18, App. 246) All four comment cards were adverse to Lime Lounge. (Ex. F, App. 320) The notes on three cards specifically noted excessive noise coming from the bar. (*Id.*) One card noted "Trash over there [sic] fence numerous police calls." (*Id.*) Several witnesses also spoke at the hearing about the noise from Lime Lounge. Bob Eikleberry, the owner of a business next door to Lime Lounge, spoke regarding excessive noise coming from Lime Lounge bar and its outdoor speakers. (Ex. E, Tr. 30 to 32, App. 276-78) Brad Bach, a resident who lived on the same block as Lime Lounge, spoke about noise from the bar. "So, this started, I've lived there for two years and I'm actually moving because of this occurrence. So, I just can't stand living in the East Village and not getting sleep Wednesday, Thursday, Friday, Saturday and sometimes Sunday nights." (Ex. E, 32-34, 278-80) "So

we've moved our bed out into the living room. We tried that. Sometimes that worked, sometimes it didn't. I went and stayed at my mother's house in Ankeny lately just so I can get some sleep." (Id.) Mr. Bach also testified about his fruitless efforts asking Lime Lounge to turn its music down. (Id.) Des Moines Police Sergeant Lori Neely spoke about noise complaints regarding Lime Lounge. (Ex. E, Tr. 36-38, App. 282-84) Neely stated that Brad Bach was not the only person who had complained about Lime Lounge. (Id.) Officer Ben Ihde testified about sound readings taken by him and other officers that exceeded permitted sound levels. (Ex. E, Tr. 43 to 48, App. 289-294)

After deliberation, the Board voted to revoke Lime Lounge's conditional use permit. (*Lime Lounge LLC v. City of Des Moines*, 927 N.W.2d 701, 2019 WL 480197, Feb. 6, 2019, at *4)

On March 31, 2016, Lime Lounge filed a petition for a writ of certiorari in Polk County District Court challenging the Board's revocation of its CUP. It asserted the Board's ruling was illegal in a myriad of ways and asserted various violations of regulatory procedure, erroneous statutory interpretation, and violations of the doctrines of res judicata and collateral estoppel. The district court found no illegality in the Board's action and annulled the writ. (*Lime Lounge LLC v. City of Des Moines*, 927 N.W.2d 701, 2019 WL 480197, Feb. 6, 2019, at *4)

On February 6, 2019, the Iowa Court of Appeals upheld the district court's decision. (*Id.*)

Following the revocation of Lime Lounge's CUP and the lengthy appeal process, the City filed a Complaint to Revoke Lime Lounge's liquor license with the Iowa Alcoholic Beverages Division on May 14, 2019. (Court Order of January 20, 2022, pg. 1, 2, App. 5, 6)

Lime Lounge sought and obtained a temporary injunction enjoining and staying any parties from pursuing action against Lime Lounge's liquor license based upon any alleged violation or non-compliance with City Ordinance 134-954. (*Id.*)

Lime Lounge requested the court hold Municipal Ordinance 134-954, including the requirement to obtain a conditional use permit as a prerequisite to obtaining a liquor license from the State, preempted by Iowa Code § 123, the Iowa Alcoholic Beverage Control Act, and therefore unenforceable and grant it a permanent injunction prohibiting action against its liquor license as a result of any alleged violations thereof. (*Id.*)

However, after a hearing before the district court on November 11, 2021, the latter issued a ruling denying a Permanent Injunction and dismissing all Lime Lounge's claims on January 20, 2022. (Court Order of January 20, 2022, pg. 14, App. 18)

The Court subsequently reaffirmed its decision on February 9, 2022, after Lime Lounge filed a Motion to Reconsider. Appellant then filed this timely appeal. (Court Order February 9, 2022, App. 20)

SUMMARY OF ARGUMENT

The district court properly denied the Appellant's Petition for a Permanent Injunction and dismissing the suit. The district court's decision was correct. Appellant had a valid CUP; the use of a CUP was a valid use of the City's home rule powers and use of land. Lime Lounge agreed to the terms of the CUP yet was shown to have repeatedly violated those same terms. For these reasons, the district court's decision should be upheld in its entirety.

PRESERVATION OF ERROR

Appellees do not dispute that the Appellant has properly preserved.

STANDARD OF REVIEW

Appellees agree that Appellant has properly stated the standard of review in this appeal, review based upon correction of errors at law. *Pexa v. Auto Owners Ins. Co.*, 686 N.W.2d 150, 155 (Iowa 2004); *Middle River Farms, LLC v. Antrim*, 884 N.W.2d 222 (table)(Iowa App. 2016), *Iowa R. App.* §6.907.

ARGUMENT

I. THE COURT PROPERLY INTERPRETED *IOWA GROCERY ASS'N* AND HOME RULE

Iowa Constitution, Article III, Section 38A, grants municipal corporations, such as the City of Des Moines, with home rule power with the authority to determine their local affairs and government. The City of Des Moines has broad authority to regulate matters of local concern to its community at large. See, *City of Des Moines v. Gruen*, 457 N.W.2d 340, 341 (Iowa 1990).

The key limitation on home rule is found in the second clause, "not inconsistent with the laws of the general assembly...". Appellant argues the provisions on liquor licensing within Iowa Code §123 meant the City's requirements of a Conditional Use Permit (CUP) are a tax on the sale of liquor. However, as the District Court correctly found, the City was acting under the broad power given to municipal corporations on issues of land use found under Iowa Code §414 for the health, safety, and general welfare of the community.

The legislature has granted municipalities zoning authority, upon which the City's use of Conditional Use Permits is based. A municipality has statutory authority to pass zoning laws "[f]or the purpose of promoting the health, safety, morals, or the general welfare of the community." *Iowa Code 414.1*. "A zoning ordinance, including amendments to it, carries a strong presumption of validity." *TSB Holdings, L.L.C. v. Bd. of Adjustment for City of Iowa City*, 913 N.W.2d 1, 14 (Iowa 2018). 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, 693 (Iowa 1993).

"A zoning ordinance, including amendments to it, carries a strong presumption of validity." *TSB Holdings, L.L.C. v. Bd. of Adjustment for City of Iowa City*, 913 N.W.2d 1, 14 (Iowa 2018)

The City may enact ordinances which are also the subject of state statutes, as long as the ordinance does not invade an area of law specifically reserved by the legislature for itself. *Sioux City Police Officers' Ass'n. v. City of Sioux City*, 495 N.W.2d 687, 693 (Iowa 1993). The City of Des Moines has the power to enact an ordinance on a matter which is also the subject of statute if the ordinance and statute can be harmonized and reconciled. *City of Council Bluffs v. Cain*, 342 N.W.2d 810, 812 (Iowa 1983). An ordinance can be "inconsistent" with a law of the Legislature and preempted only when the ordinance prohibits an act either permitted or prohibited by a statute. *Gruen*, 457 N.W.2d at 342; *Cain*, 342 N.W.2d at 812. In considering a claim that a city ordinance violates "home rule" powers, the statute must be interpreted in such a manner as to render it harmonious with the ordinance. See *Iowa Code* § 364.2(3); *Gruen*, 457 N.W.2d at 342; *Green v. City of Cascade*, 231 N.W.2d 882, 890 (Iowa 1975).

Of course, an ordinance concerning land use may necessarily affect in some manner, a liquor license. This is what the applicable City ordinance does

here. However, the purposes of the ordinance and the state licensing statute are separate and distinct and harmonious towards each other.

Lime Lounge asserts the CUP required by the City constitutes an impermissible tax under *Iowa Code* §123.37. As the district court noted, citing a prior court of a appeals decision directly related to this subject in particular, municipalities are permitted to “adopt ordinances or regulations for the location of ... liquor control licensed establishments” and to adopt ordinances “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.” *Lime Lounge v. City of Des Moines*, 927 N.W.2d 701 (table) *5 (Iowa Ct. App. 2019) citing *Iowa Code* § 123.39(2). Specifically, the state legislature has explicitly allowed municipalities the authority to “suspend any retail wine or beer permit or liquor control license for a violation of any ordinance or regulation adopted by the local authority.” *Id.* More specifically, precedent has held that this ordinance is allowed for this purpose between these same parties. *Id.*

A conditional use permit (CUP), is a device utilized by the City for several different land uses, including use for bars and taverns. The appellant was required, and agreed, to abide by the terms of this CUP utilized for the

purpose of maintaining the health, welfare, and morals of the community. (Ex. A Zoning Board of Adjustment (“ZBOA”) Decision Aug. 24, 2011.)

Lime Lounge has a liquor license, that fact alone, despite the appellant's assertion, is not a license to ignore the CUP agreed upon by the parties. They remain, through the CUP, to have responsibilities and limits due to zoning. This is true, to some extent, of any business owner operating under a zoning law, in this case particular to the location in which Lime Lounge wished to operate a tavern/nightclub.

Lime Lounge did not abide by this CUP, and through its own actions, violated that CUP and eventually had the CUP revoked.

Lacking a CUP could, of course, threaten the potential viability of Lime Lounge's liquor license with the State. But that question is not determined by the revocation of the CUP. The status of Lime Lounge's liquor license is for the determination of the Alcoholic Beverages Division. While the loss of the CUP does affect the use of the land, it does not alter the status, by that fact, of Lime Lounge's liquor license.

Contrary to the Appellant's claim, a payment made for a Conditional Use Permit is not the equivalent to an additional liquor license fee forbidden by *Iowa Code* §123.37. As the district court correctly noted, such a finding was

directly addressed by the Iowa Court of Appeals when the same Plaintiff argued the City had "effectively" revoked its liquor license when it revoked the CUP:

"Had the [Zoning] Board revoked a liquor license, Lime Lounge would have a stronger position" *Lime Lounge*, 927 N.W.2d 701 at *5.

The City utilized its powers provided under home rule over zoning for the promotion of the health, safety, morals, and/or general welfare of the community in revoking the CUP of Lime Lounge. That this revocation may potentially have an impact on the status of Lime Lounge's liquor license is secondary to the former and by that fact alone does not make the administrative fee for the CUP, paid several years before, a tax in violation of *Iowa Code* §123.

As stated above, municipalities are permitted to “adopt ordinances or regulations for the location of ... liquor control licensed establishments” and adopt ordinances “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.” *Iowa Code* § 123.39(2).

Further, the legislature has granted to municipalities the authority to “suspend any retail wine or beer permit or liquor control license for a violation of any ordinance or regulation adopted by the local authority.” *Id.* (emphasis added).

The legislature has also granted to municipalities zoning authority. *TSB Holdings, L.L.C. v. Bd. of Adjustment for City of Iowa City*, 913 N.W.2d 1, 14 (Iowa 2018).

Therefore, the City of Des Moines has clear statutory authority to pass zoning laws “[f]or the purpose of promoting the health, safety, morals, or the general welfare of the community.” *Iowa Code* §414.1. “A zoning ordinance, including any amendments to it, carries a strong presumption of validity.” *TSB Holdings*, 913 N.W.2d at 14.

Here, the City of Des Moines determined under its zoning authority that “[t]he sale of alcoholic liquor, wine and beer is permitted only in” designated zoning districts and “subject to the conditions applicable to the business” as identified in a table. See, Ex. C, *City of Des Moines Municipal Code* § 134-954(a). To be permitted to sell liquor, taverns and night clubs like Lime Lounge must be located within certain zoning districts and must obtain a CUP from the Zoning Board of Adjustment. *Id.* As the Court of Appeals noted, through its zoning power the City of Des Moines has allowed Lime Lounge to sell alcoholic beverages at its present location for the sole reason it had obtained a CUP, the terms of which Lime Lounge had agreed to abide by. *Lime Lounge*, 927 N.W.2d 701 at *6, § 134-954(b).

Appellant clearly takes the position that having obtained a CUP, it had no

further obligations imposed upon it. However, the CUP by its terms required Lime Lounge to comply with the conditions specified and the ban “shall be subject to further amendment or revocation if the zoning enforcement officer determines that the operation of the business becomes a nuisance or exhibits a pattern of violating the conditions set forth in the conditional use permit.” (emphasis added) As the Court of Appeals found, “[i]t would defy logic to conclude the “further amendment or revocation” was not within the Board's authority. (*Lime Lounge, LLC*, 927 N.W.2d 701 *6) (emphasis added). Essentially, Lime Lounge made a promise, it repeatedly violated this promise, and suffered the logical result of such repeated violations.

The zoning enforcement officer found reason to believe that Lime Lounge was operating in such a manner as to violate the CUP because of complaints and sound meter readings. These are issue separate and apart from Lime Lounge's liquor license. These were presented to the Zoning Board of Adjustment and the Board found that Lime Lounge violated the terms of the CUP. *Id.* at *7. A district court agreed, and the matter was then upheld on appeal.

As the district court noted, Lime Lounge's right to use its property to sell alcoholic beverages required compliance with several conditions, including compliance with article IV of chapter 42 of the Municipal Code. See Municipal

Code § 134-954(b), (c). The purpose of article IV of chapter 42—entitled “Noise Control”—is “to establish standards for the control of excessive noise in the city by setting maximum permissible sound levels for various activities to protect the public health, safety and general welfare.” *Id.* § 42-249. The purpose is in accord with the City's policy to promote an environment free from excessive noise.

Excessive noise unnecessarily jeopardizes the health and welfare and degrades the quality of the lives of the residents of this community. *Id.* § 42-248(5). The health, safety, and quality of the lives of the city's residents are important interests, balanced with a business's right to function without excessive regulation. See, *Lime Lounge*, 927 N.W.2d 701 at *8. Asking Lime Lounge to abide by the terms of its CUP is hardly excessive government regulation.

After several documented and recorded complaints, the City's Zoning Enforcement Officer, sought review of Lime Lounge's CUP. *Id.* § 134-954(c)(6) (“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.”).

Previously the Court of Appeals had specifically found that the Board had the authority to review the CUP and asserted violations under *Iowa Code* §414.12(1) and (3). See, *Lime Lounge, LLC*, 927 N.W.2d 701 *6.

Lime Lounge violated its CUP based upon behavior affecting the health, safety, morals, or general welfare of the community and thus its CUP revoked. This was due to behavior they had promised not to engage in, and for which they were found to have engaged in repeatedly. Lime Lounge has repeatedly argued that only the state has the power to revoke its liquor license. This assertion has never been contested by the City. Any such action regarding Lime Lounge's liquor license lies with the Alcohol and Beverage Division. The City has not revoked Lime Lounge's liquor license. The Zoning Board of Adjustment revoked Lime Lounge's CUP, a matter well-within the Board's authority. See, *Lime Lounge, LLC*, 927 N.W.2d 701 *8. How that will affect Lime Lounge's liquor license is up to the Alcoholic Beverages Division, not the City of Des Moines.

For the reasons stated above, Lime Lounge cannot prevail upon a claim against a valid City ordinance. The CUP can be enforced by the City of Des Moines, and the matter heard by the Alcoholic Beverages Division.

II. THE COURT CORRECTLY FOUND THAT IOWA CODE §123 DOES NOT PREEMPT DES MOINES MUNICIPAL CODE §134-954

Lime Lounge asserts the district court erred in finding Des Moines Municipal Ordinance 134-954 was not preempted by *Iowa Code* §123 because the ordinance requires an additional permit, specifically a conditional use permit, in order to sell alcohol.

The district court correctly found that this is a mischaracterization. City Ordinance 134-954 is a zoning ordinance, regulating land use. The ordinance does not require a permit for the sale of alcohol, it requires a permit to *use certain premises* for the sale of alcohol. This type of regulation is expressly permitted by *Iowa Code* §123.39(2):

Local authorities may suspend any liquor control license or retail wine or beer permit for a violation of any ordinance or regulation adopted by the local authority. Local authorities may adopt ordinances or regulations for the location of the premises of liquor control licensed and retail wine or beer permitted establishments and local authorities may adopt ordinances, not in conflict with this chapter and that do not diminish the hours during which alcoholic beverages may be sold or consumed at retail, governing any other activities or matters which may affect the retail sale and consumption of alcoholic beverages and the health, welfare and morals of the community involved. *Iowa Code* §123.39(2)(emphasis added).

City Ordinance 134-954 is an ordinance adopted to regulate the premises of liquor control licensed establishments in Des Moines as authorized by § 123.39(2). It governs “other activities or matters which may affect the retail sale and consumption of alcoholic beverages and the health, welfare and morals” of Des Moines neighborhoods where those

establishments are located. Nothing in the ordinance diminishes the hours during which alcoholic beverages may be sold or consumed at retail.

Further support for the validity of City Ordinance is found in *Iowa Code* §123.30(2):

A liquor control license shall not be issued for premises which do not constitute a safe and proper place or building which do not conform to all applicable laws, ordinances, resolutions, and health and fire regulations. . . . (emphasis added)

This statute placed authority with the local municipality to determine if premises where alcoholic beverages will be served are “safe and proper”. This is the very purpose of the City's CUP. Ordinances continue to apply to Lime Lounge, it cannot do as it pleases to the detriment of the community.

The district court properly found the City's ordinance 134-954 and the requirement of a CUP to not be a violation, nor to be preempted by, *Iowa Code* § 123, the Iowa Alcoholic Beverage Control Act.

A. The Fee for obtaining a CUP

Lime Lounge contends that the fee required to be paid with the CUP application is preempted by *Iowa Code* §123.37, which provides that the state has the exclusive power to provide liquor licenses. They rely on the holding of *Iowa Grocery*, in which the court found that an additional “administrative fee” charged by the City *on applications for liquor licenses and beer and wine permits* was preempted by *Iowa Code* § 123.37. *Iowa Grocery Industry Ass'n*

v. *City of Des Moines*, 712 N.W.2d 675, 678. (Iowa 2006)

The district court correctly found that *Iowa Grocery* is not dispositive of this case because the fee related to Lime Lounge is related to the CUP application, *not* the liquor license application. Further the CUP application fee is not required in order to obtain a liquor license from the State. *See* Des Moines, IA. Municipal Code § 134-954

Additionally, *Iowa Code* §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. *Iowa Code* §123.1 This is what the *Iowa Grocery* court relied on to find the fee imposed by the municipality expressly preempted. *Iowa Grocery*, 712 N.W.2d at 680. Therefore, as the district court noted, the holding in *Iowa Grocery* is not applicable to the present case.

Because the application fee associated with the CUP was a fee associated with zoning, and *not* an additional fee to obtain a liquor license, it was clearly not preempted by Iowa Code § 123.37.

B. Conditions imposed in order to receive a CUP

Lime Lounge argues that the conditions imposed in order to receive a CUP are arbitrary and capricious and preempted due to *Iowa Code* §123.30(3) setting out different classes of liquor control licenses. This argument is

erroneous. *Iowa Code* §123.30(3) regulates what type(s) of businesses can sell what type(s) of alcohol to what type(s) of patrons, and where those patrons can consume it. *Iowa Code* §123.30(3).

City Ordinance 134-954 only regulates the premises that alcoholic beverages are sold on, and the health, safety and general welfare of persons residing in the residential areas adjoining or surrounding the premises. This is squarely within bounds of what is allowed by *Iowa Code* §123.39(2). Therefore, Des Moines's ability to impose conditions to obtain a CUP is not preempted by or in conflict with *Iowa Code* §123.30(3).

C. Police Power

Lime Lounge claims *Iowa Code* §123.1 prevents Des Moines from adopting ordinances that would approve or deny liquor licenses. Lime Lounge is correct. However, City Ordinance §134-954 is a zoning ordinance promulgated by the City to regulate “the location of the premises of retail wine or beer and liquor control licensed establishments . . .” as specifically authorized by *Iowa Code* §123.39(2). City ordinance §134-954 does not approve or deny a liquor license under *Iowa Code* §123.

Lime Lounge claims the CUP requirement is not related to the premises of the liquor-controlled establishment but rather imposes arbitrary conditions on specific businesses through the guise of zoning. However, the requirements

of the CUP are related only to the use of a premises where alcoholic beverages are sold and designed to ensure that the “health, safety, and general welfare of persons residing in the adjoining or surrounding residential area” are safeguarded. *Municipal Code § 134-954(b)(2)*. These are the classic uses of zoning.

Lime Lounge also argues City Ordinance 134-954 is invalid because *Iowa Code §123* limits lawmaking authority to a city council and the ordinance gives lawmaking authority to a zoning board of authority. However, the City Council adopted City Ordinance §134-954 not the Zoning Board of Adjustment.

City Ordinance §134-954 does not usurp the police power reserved by the state in *Iowa Code §123*.

D. Appellate Procedure

Lime Lounge argues that City Ordinance §134-954 violates the enforcement and appeal procedure set forth in *Iowa Code §123* and illegally exercises power reserved for the State. Ordinance §134-954 is a zoning ordinance allowed by *Iowa Code §123.39(2)*. Once again, it does not include authority to revoke liquor licenses. Therefore, it does not interrupt the appellate procedure set out in *Iowa Code §123*. Further, *City Ordinance §134-*

954 has its own appellate procedure upon which Lime Lounge had already availed themselves unsuccessfully.

III. DES MOINES, IA MUNICIPAL CODE 134-954 DOES NOT IMPOSE ARBITRARY AND CAPRICIOUS CONDITIONS IN VIOLATION OF THE EQUAL PROTECTION CLAUSES OF THE IOWA AND UNITED STATES CONSTITUTIONS.

Municipal Ordinance 134-954 places different requirements for obtaining a CUP on businesses that sell alcohol based upon the particular type of business and how much of the business's gross receipts come from the sale of food and food-related services versus from the sale of alcohol.

As the district court noted, examples include a restaurant which is not required to obtain a CUP, regardless of where it is located in Des Moines, so long as 50% of its gross receipts comes from the sale of prepared food and food-related services, not including alcoholic beverages, whereas a business operating as a tavern or nightclub must obtain a CUP regardless of its location within Des Moines. *Municipal Code* §134-954. Public health, safety and general welfare of the public allows such a distinction between a restaurant and a tavern.

Lime Lounge contends that this disparate treatment between different types of businesses within Des Moines as related to the CUP requirement is a

violation of the Equal Protection Clauses of the Iowa and United States Constitutions.

Alleged violations of both the federal and state equal protection clauses, are generally interpreted the same. *Krull v. Thermogas Co.*, 522 N.W.2d 607, 614 (Iowa 1994). The Equal Protection Clause “is essentially a direction that all persons similarly situated should be treated alike.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). In regard to economic issues, such as this one, the test applied is the rational basis test:

“[T]he Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.” *Racing Assoc. of Central Iowa v. Fitzgerald*, 675 N.W.2d 1, 7 (Iowa 2004)

The purpose of Des Moines’ CUP requirement of ordinance 134-954(b) is to safeguard “the health, safety and general welfare of persons residing in the adjoining or surrounding residential area,” and prevent disruption to adjoining residential areas due to noise, vibration or light generated by the liquor licensed businesses, to avoid increased congestion on the streets in surrounding residential areas, and ensure the businesses are operated in a manner that constitutes a nuisance.

The businesses subject to City Ordinance 134-954 are grocery stores, gas stations/convenience stores, liquor stores, tobacco stores, restaurants, and taverns/nightclubs. Whether or not a CUP is required for each of these businesses depends on location and type of business.

Taverns and nightclubs must obtain a CUP regardless of their location, whereas restaurants which obtain most of their receipts from food sales do not, also regardless of their location. Liquor stores and tobacco stores must obtain a CUP in areas where they are allowed, and the requirement for a CUP for grocery stores and gas stations/convenience stores depends on size and location of the business.

Lime Lounge claims the requirement of a CUP for some businesses (taverns/nightclubs) as opposed to others (restaurants) violates the Equal Protection Clause. However, a tavern or nightclub is inherently different from a restaurant where most of the income is generated from food sales. The hours of business of a tavern or nightclub generally extend far later than a restaurant; the noise from music and patrons is generally louder in a tavern and nightclub than a restaurant and for extended hours; the potential need for law enforcement intervention due to unruly patrons is increased in taverns and nightclubs as opposed to restaurants and generally for later into the evening.

Given these logical concerns, classifications drawn in ordinance 134-954(a) and the CUP requirements imposed therein are reasonable in light of the ordinance's purpose.

Lime Lounge claims that ordinance 134-954(c) gives the zoning board broad power to impose virtually any condition which it can contemplate in violation of the Equal Protection Clause.

However, as the district court noted “[a] regulation is arbitrary and unreasonable when it is not authorized by statute or is contrary to unsupported by the facts.” *Residential and Agric. Advisory Comm, LLC. v. Dyersville City Council*, 888 N.W.2d 24, 44 (Iowa 2016) (citing *Baker v. Bd. of Adjustment*, 671 N.W.2d 405, 413 (Iowa 2003). At all times a strong presumption of the validity of an ordinance. *Perkins v. Bd. of Supervisors of Madison Cnty*, 636 N.W.2d 58, 67 (Iowa 2001) Requiring Lime Lounge to not negatively impact the lives of residents and other businesses in the area through excessive noise is hardly arbitrary or illogical.

The criteria address matters such avoidance of congestion in the streets of adjoining residential areas, operation of the business in a manner that does not constitute a nuisance, steps to prevent disruption to adjoining residential areas due to noise, vibration, or light, etc. They are clearly designed to safeguard the

“health, safety, and general welfare of persons residing in the adjoining or surrounding residential area.” Des Moines Municipal Code §134-954.

Iowa Code §123.39(2) allows cities to adopt ordinances or regulations for the location of the premises of establishments that sell alcohol that govern “any other activities or matters which may affect the retail sale and consumption of alcoholic beverages and the health, welfare and morals of the community involved.” Municipal Ordinance 134-954 falls squarely within the authority granted to the City by *Iowa Code* §123.39(2) and does not violate the Equal Protection Clause.

Lime Lounge has also provided a few examples of allegedly different conditions imposed regarding sound levels on other bars in the same area of the East Village to receive a Class E sound permit. As the district court noted while the wording in each ZBOA order differs slightly, overall, they imposed the same type of restrictions as *Municipal Code* 42-258. As the court noted, the 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 matter.

Lime Lounge has not overcome the strong presumption of the ordinance’s validity.

IV. DES MOINES MUNICIPAL CODE § 134-954 DOES NOT CONSTITUTE ILLEGAL SPOT ZONING.

Lime Lounge asserts Des Moines is engaging in 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*, 636 N.W.2d at 67. Spot zoning is neither per se illegal or improper, even when found, and courts employ a three-prong test to determine the legality. *Id.* Courts consider “(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.*”

Lime Lounge fell well-short of providing sufficient evidence demonstrating illegal spot zoning.

As the district court noted, even assuming *arguendo*, the City engaged in spot zoning, such zoning would be valid under the three-prong analysis. First, zoning of business and residential districts is clearly within its police powers. *Iowa Code* §123.39(2) Second, part of the benefit of the East Village is the proximity of residences to nightlife and other activities. To achieve this goal, it is reasonable that neighboring buildings could have different zoning distinctions. Third, the East Village where Lime Lounge is located is a mixed-use neighborhood with equal parts residential buildings and entertainment

venues. Fourth, as the District Court noted the language of various East Village taverns and night clubs were composed at different times, for different places but have essentially the same requirements even if the language is not identical in all respects.

Therefore, as the district court found, the City must necessarily treat certain parcels differently. Such treatment is consistent with the comprehensive plan of the neighborhood.

V. THE COURT PROPERLY DENIED LIME LOUNGE'S APPLICATION FOR PERMANENT INJUNCTION

For the reasons stated above, the district court properly denied the Plaintiff's request for a permanent injunction.

The Plaintiff did not prevail on the merits. See, *Lewis Investments, Inc. v. City of Iowa City*, 703 N.W.2d 180, 184 (Iowa 2005) citing *Max 100 L.C. v. Iowa Realty Co., Inc.*, 621 N.W.2d 178, 181 (Iowa 2001).

The City of Des Moines is clearly allowed to establish zoning laws and adopt a CUP to allow such operations not otherwise allowed by zoning, but with limitations and regulations that must be followed. An administrative charge related to a CUP is separate and apart from an additional administrative charge for a liquor license. The former is allowed within a municipalities home rule zoning authority, the latter, as in *Iowa Grocers*, was contrary to the express statutory language of the legislature.

The Plaintiff's claims are not "strikingly similar" to the administrative scheme previously found impermissible in *Iowa Grocery Industry Ass'n v. City of Des Moines*, 712 N.W.2d 675 (Iowa 2006). *Iowa Grocery* involved an additional tax upon an existing tax paid to the state, this case involves the use of land under municipal zoning. Prior case law and statute distinguish the two scenarios.

For this reason, as well as the other reasons stated above, the Plaintiff is unlikely to prevail upon the merits in this matter and their request for a temporary injunction should be denied. The district court correctly ruled for the City.

CONCLUSION

The district court's decision was supported by the evidence and law. The Appellant's Petition for Permanent Injunction was properly denied, and the matter properly dismissed. The district court's decision should be upheld in its entirety.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1), because this brief contains 6,735 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f), because this brief has been prepared in proportionally spaced typeface using Microsoft Office Word 2010 in 14-point Times New Roman.

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ATTORNEY'S COST CERTIFICATE

I certify that, as this Brief was filed via EDMS, the Appellee did not incur a cost in printing.

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CERTIFICATE OF SERVICE

I, John O. Haraldson, attorney for Appellees, hereby certify that I served the Appellee's Final Brief by EDMS to the following counsel on June 22, 2022.

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