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 Austria A. Relph

Application to the Supreme Court for Further Review (Amended & Substituted)

(Court of Appeals Decision: February 8, 2023)

Cornelius S. Qualley
c@qualleylaw.com

George Qualley IV
g@qualleylaw.com

Qualley Law, P.L.C.
P.O. Box 41718
Des Moines, Iowa 50311
Phone: (515) 974-5658

ATTORNEYS FOR THE PLAINTIFF-APPELLANT

Questions Presented for Review

I. Should the lower courts be required to apply the test established by this Court in *Iowa Grocery Ass'n of Iowa v. City of Des Moines.*

II. If the test established in *Iowa Grocer*y is not applied in this case, in what case would it apply?

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Statement Supporting Further Review

This Court should grant further review because "[t]he court of appeals has entered a decision in conflict with a decision of this court…on an important matter" Iowa R. App. P. § 6.1103(1)(b)(1). Specifically, the court of appeals established its own new, *broad* interpretation of a city's home rule authority in cases which fall under the prevue of Iowa Code §123. This directly conflicts with the specific tests and *narrow* interpretation of home rule authority established in *Iowa Grocery Ass'n of Iowa v. City of Des Moines.* 712 N.W.2d 675, (Iowa 2006). In doing so, the court of appeals has vastly expanded a city's home rule powers, greatly diminished the powers reserved to the state by the Iowa legislature in Iowa Code §123, and circumvented the tests established in *Iowa Grocery*. In short, the court of appeals has effectively eliminated any precedential value of *Iowa Grocery* in an important and consequential area of Iowa Law.

Additionally, this Court should grant further review because "[t]he case presents an issue of broad public importance that the supreme court should ultimately determine." Iowa R. App. P. § 6.1103(1)(b)(4). If *Iowa Grocery* does not apply to this case, when does it? One would be hard pressed to find a case which is so similar in both facts and law. The court of appeals admits that "some of the policy rationale behind *Iowa Grocery* could apply to this case" yet refused to apply the multi-part test established by this

Court in *Iowa Grocery*. (COA Decision, p. 7). As such, it is necessary for this Court to revisit the precedent established by *Iowa Grocery*.

Brief

I. Statement of the Case

Plaintiff, Lime Lounge, LLC ("Lime"), brought a declaratory judgment action against Defendant, City of Des Moines (the "City"), to challenge a so-called "zoning" ordinance—Des Moines Municipal Code (the "Municipal Code") §134-954 (the "Ordinance")—which authorizes the City to collect an administrative fee and requires the obtaining of a special permit as a *prerequisite* to an *application* for liquor licenses and beer and wine permits. (App. 69-70, 180-183, 229). Although the City argues that it has enacted a lawful "zoning ordinance," in reality, it has created a permit to apply for a liquor license.

Regardless of any other implications, without applying for a "Conditional Use Permit for Business Selling Wine, Liquor, and/or Beer {Section 134-954}" (hereinafter referred to as the "City Liquor Permit") and paying a non-refundable fee of more than $300, the City will not forward an application for a liquor license to the state. *Id*. The Board of Adjustment (the "Board") is the *sole arbiter* of whether the City Liquor Permit is approved or denied. As such, the Board is the *de facto* gatekeeper which determines whether or not someone can *apply*—not receive, but *apply*—for an Iowa liquor license. The court of appeals recognized this fact stating, "to operate

an establishment selling alcoholic beverages in Des Moines, **an additional step is required.**" (COA Decision, p. 3) (emphasis added).

The Legislature— in Iowa Code §123—and this Court—in a case remarkably similar to this one—have *clearly* prohibited additional fees and steps in the Liquor License application process. *Iowa Grocery* at 675-683. In *Iowa Grocery*, the Court found that the City of Des Moines cannot "[increase] its role in the licensing system." *Id* at 681. Nevertheless, this is exactly what the City has done once again with its City Liquor Permit process. In Des Moines, in order to obtain a liquor license, an applicant must obtain approval from *both* the Board *and* the City Council.

Iowa Grocery is **the** controlling case law with respect to this case which conclusively establishes that the Iowa Alcoholic Beverage Control Act, Iowa Code Chapter 123 (the "Act"), preempts the City's Ordinance. 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. *Id.* The City's Liquor Permit process does both.

II. Background and Facts

In Iowa (the "State"), the legislature has detailed a specific and streamlined process for the application of a liquor control license ("Liquor

License"). Iowa Code §123.32. The Act requires that a Liquor License application be "filed with the appropriate city council," which 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(1)-(2). The "necessary fee" is set forth in Iowa Code §§123.36, 123.134, and 123.179. The Act sets out a detailed, uniform fee schedule for all liquor license classes in the state of Iowa. If the application is approved by the city council, the Iowa Alcoholic Beverages Division (the "ABD") conducts "an investigation" and issues the license. Iowa Code §123.32(6)(b).

By all outward appearances, a Liquor License application in Des Moines follows the process proscribed by the Act, but this is not the case. The application process includes an additional step and a fee retained exclusively by the City. Furthermore, the City clerk will *not* present a Liquor License application to the City council for submission to the ABD until the Liquor License applicant complies with, *inter alia*, the Ordinance. (App. 69-70). While the Ordinance will be addressed later, the pertinent section is the requirement of a City Liquor Permit for certain types of establishments for the "selling of liquor, wine and beer," thereby adding an additional step and creating a non-uniform fee structure for *certain* Liquor License

applicants. (App 231). This is an irreconcilable conflict between state law and local ordinance.

The process to obtain a City Liquor Permit takes a minimum of one additional month; an application and notification fee of at least $300; various reviews, reports, and documents; a public hearing in front of the the Board; and a determination by the Board. (App. 180-183). The City Liquor Permit is a prerequisite for many Liquor License applicants, including anyone operating a "Tavern" or "Night Club," regardless of zoning district. (App. 231). In short, if an operator would like to open a bar in the city of Des Moines, they are *required* to obtain a City Liquor Permit and pay a minimum of $300 to the City *prior* to the City forwarding the application to the State. *Id*.

Since 2011, Lime has operated a bar/tavern in a property located at 435 E. Grand Avenue, Des Moines, IA. Lime was required to complete the City Liquor Permit application, obtain Board approval, and pay a fee to obtain a City Liquor Permit. (App. 56-63, 69-70, 231-235). Only after obtaining the City Liquor Permit did the City forward Lime's Liquor License application to the State. *Id*. Lime has maintained that license since 2011.

Lime is not unique in this requirement as many bars in the City of Des Moines have been forced to comply with the same process. (App. 71-88). Accordingly, Lime filed a petition for declaratory judgment on June

3, 2019. Lime filed for a temporary injunction, which was granted by the district court on October 4, 2019. The district court analyzed Lime's comparison of *Iowa Grocery* to the instant case and its vast similarities, stating that:

> The instant suit deals with the legality of…134-954 and its potential preemption by Iowa Code…concerning the State's rights to determine the regulatory scheme for distributing liquor licenses. Lime appears to have a substantial chance of prevailing on the instant issue…given that the Act does appear to proscribe the subject fees.
>
> …
>
> The City's requirement of an additional City Liquor Permit could very well be interpreted as an additional permit in contravention of the explicit language of the statute. If interpreted as such, it would seem that the City is infringing on the exclusive province of the State, contrary to the exact language of the law. Such an infringement would be preempted by the Act. Lime would appear to have a substantial chance of succeeding on the merits.

(App 200). The Defendant sought interlocutory appeal, which was denied. (App 194-195). After further proceedings, a bench trial was held. On January 20, 2022—more than two years after the temporary injunction was entered—the court entered an order of dismissal and dissolved the temporary injunction (which had been in place for over 27 months) without any deference or reference to the court's prior order or findings. (App. 5). Notably, the district court's final order took a *diametrically opposed* view to that adopted by the same court in its temporary injunction with respect to the

applicability of *Iowa Grocery*. Rather than apply the eight factor test which this Court established in *Iowa Grocery* (as the district court had done when entering its temporary injunction), it simply ignored the *clear precedent* without any apparent legal basis, holding that the case was "not particularly informative." (App 10). Rather than correct that error, the court of appeals doubled down, despite acknowledging that "some of the policy rationale behind Iowa Grocery could apply to this case." (COA Decision, p. 7). Remarkably, neither Court relied on contradictory legal precedent, but instead chose to simply ignore the precedent established by this Court.

III. The Court of Appeals Failed to Apply the Controlling Case Law.

Rarely does the Court have an opportunity to consider a case that is so factually similar to a prior case which served as the basis for a landmark ruling. In *Iowa Grocery*, the Plaintiff brought a declaratory judgment action, asserting that a City of Des Moines ordinance which authorized an additional administrative fee on applications for Liquor Licenses was preempted by state law. *Id* at 677-78. *Iowa Grocery* is so similar to this 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—Des Moines Liquor License applicants—charging a nearly identical fee—approximately $300-400—and with the

City relying on the *same* arguments and "authority" for its Ordinance—home rule authority. *Id*. In both cases, the fee is a *prerequisite* to the City forwarding the Liquor License to the State, and in both cases there is "no mechanism to refund [the fee]…if the license application is not approved." *Id* at 678. While the City now *admits* that the fee it charged in *Iowa Grocery* was contrary to law, the City once again cites Iowa Code §123.39(2) in support of its new Liquor License Permit fee, despite the fact that this Court struck down a nearly identical fee in *Iowa Grocery*.

The most significant holding of *Iowa Grocery* is the adoption of a *narrow* and *limited* view of home rule authority of a municipality—as intended by the legislature—with respect to all matters that relate to, encroach on, or otherwise involve Iowa Code §123. This is a clear departure from the general, *broad* home rule authority a city typically enjoys. In short, a city *must* overcome the eight factor test established by the *Iowa Grocery* Court when Iowa Code §123 is implicated or the ordinance is preempted.

The applicability and precedential value of *Iowa Grocery* to this case cannot be understated. The court of appeals recognized that "*some* of the policy rationale behind *Iowa Grocery could* apply to this case." (COA Decision p.7) (emphasis added) This is severely misplaced as *Iowa Grocery* is the *exclusive* controlling authority. This Court must correct the egregious

error of the court of appeals. Simply put, if *Iowa Grocery* does not apply to this case, there is almost no case where it would apply

IV. The Eight Factors of *Iowa Grocery*.

The *Iowa Grocery* court established eight factors which a municipality must overcome in order exercise its home rule authority when an ordinance is within the purview of Iowa Code §123. If the ordinance fails to meet **any** of these eight factors, it is invalid. While the court of appeals briefly mentioned, at best, two of the factors, it erred in failing to apply crucial language and specific elements of *Iowa Grocery* as set forth below.

(1) Additional Fee. (*Iowa Grocery* at 677-78).

The court of appeals acknowledged that the City requires a permit, along with the payment of a fee (which it keeps for itself), in order to apply for a Liquor License. (COA Decision, p.3). The court of appeals also also acknowledged that, identical to *Iowa Grocery* "the City will not forward the application on to the Division" without the payment of that fee. *Id* at 682. This is clearly prohibited by *Iowa Grocery:*

> 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.

Iowa Grocery at 681. (emphasis added). Despite the *Iowa Grocery* Court's clear mandate, the court of appeals held:

> whereas the city was expressly prohibited from imposing additional fees on liquor license applications in Iowa Grocery, here the city is acting under the authority conferred to it by Iowa Code section 123.39.

(COA Decision, p.8). This is wrong. The *Iowa Grocery* Court notes that "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* at 679. (emphasis added).

Iowa Code §123.39 simply does not—either implicitly or explicitly—give the local authority the authority to collect an additional fee. The powers granted to the local authority are specific, limited, and cannot be in conflict with the powers reserved to the state. The authority to levy fees is a power *exclusively* reserved to the state. Iowa Code §123.37. Likewise, the holding in *Iowa Grocery* is clear: "[t]he imposition of additional 'administrative fees' would circumvent the established procedure [in Iowa Code]". *Id* at 681.

The court of appeals's finding that the local authority is empowered to collect and retain an additional fee is clear error.

(2) Home Rule Authority. (*Iowa Grocery* at 678-79).

The court of appeals found that "the city had the authority, pursuant to the home rule doctrine and Iowa Code section 123.39, to regulate the premises of establishments selling alcohol." (COA Decision, p. 9). The *Iowa Grocery* Court specifically rejected this *exact argument* when the City advanced it in that case holding that: "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." *Iowa Grocery* at 679. This Court should reject that argument again.

The Court in *Iowa Grocery* addresses Iowa Code §123.39 and sets out what the local authority *is* allowed to do. *Id* at 679-680. While the local authority can "suspend a license or permit… or impose a civil penalty" and "adopt ordinances or regulations for the location of the premises of… licensed establishments" pursuant to Iowa Code §123.39, the ability to create an additional permit or levy an additional fee is conspicuously absent from those specifically enumerated functions. *Id.* In fact, the *Iowa Grocery* Court *clearly and specifically rejects* the contention that the City is entitled to create an additional procedure or levy an additional fee in order to obtain a Liquor License stating: "[f]or 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. For the court of appeals to come to a different conclusion than the Supreme Court on the basis of practically identical facts and law is clearly wrong.

(3) The Act and Police Power. (*Iowa Grocery* at 679-680).

The City relies almost exclusively on municipal zoning power and the court of appeals adopted this view concluding that the City Liquor Permit is a "a land-use regulation, not a regulation on the sale of alcohol." (COA Decision, p. 6). The *Iowa Grocery* Court *clearly rejected* this approach. At first glance, it may appear that the Ordinance is a legitimate 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 usurps the State's police power which is specifically reserved for the state in Iowa Code chapter 123.1:

> This chapter…**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.**

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

> 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**.

(emphasis added). Furthermore, this 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) (emphasis added).

The *Iowa Grocery* Court conducted the analysis the court of appeals did not, stating, "we do not believe section 123.37 applies to the city's actions." (COA Order, p. 6). In doing so, the court of appeals adopted a *broad* view of the powers granted to the local authority which is **directly contrary** to the *narrow* approach prescribed by *Iowa Grocery*. The *Iowa Grocery* Court clearly established a legislative grant of specific and "**limited** regulatory powers to local authorities," stating that "subject to a **handful of exceptions**, the general assembly **reserved in itself the power** to regulate Iowa's alcoholic beverage industry." (emphasis added). *Id* at 679 (emphasis added). Further, local authority is specifically defined in Iowa Code §123.3(26): "Local authority" means the **city council** of any incorporated city in this state…" (emphasis added). Here, as in *Iowa Grocery*, there is no specific grant of authority to the City.

The *Iowa Grocery* Court explicitly found that §123.37 applied to the

City's actions. *Id*. The court of appeals was bound by the rationale that the State, not the local authority, has broad police power in the area of alcoholic beverages and that the local ordinance cannot stand because it is not specifically enumerated as required by *Iowa Grocery*.

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 create zoning districts for establishment serving alcohol, but the City exceeds its authority and imposes a City Liquor Permit requirement. (App 231-235). The City Liquor Permit requirement is not related to the *location* of the establishment, but rather makes all bars/taverns *explicitly illegal* in the City without first obtaining the Board's approval. *Id.*

Furthermore, the Act specifically limits law making authority to the city council (in a city) and provides *no* lawmaking authority to the Board. Iowa Code §123.3(26). If the General Assembly wanted to grant lawmaking power to the Board, it certainly could have done so, as the Board is established pursuant to state law. Iowa Code §414. The Legislature could not have made it any more clear that the Act is an exercise of the state's "police power," which preempts *any* local ordinance Iowa Code §123.1.

(a) Different rules for different businesses.

As opposed to laws of a "general and permanent nature," the Ordinance permits the Board the unfettered ability to impose arbitrary and capricious "conditions" on potential liquor license *applicants***,** none of which are codified in state law:

> Any [City Liquor Permit] shall be subject to…general conditions, **together with such additional special conditions** as may be reasonably **required by the board**…

(App. 233) (emphasis added). Under the Ordinance, *prior to* forwarding a liquor license application to the State, the Board can impose virtually *any* condition on an applicant, and they do. Take four establishments located within *one block of each other*, all with the *same* state Liquor License, and all located in the *same* C-3B zoning district, and where the Board created completely arbitrary "conditions" unique to each establishment:

(1) **435 E. Grand (Lime):**

> 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).

(2) **525 E. Grand:**

> 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).

(3) **425 E. Grand:**

> 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).

(4) **440 E. Grand:**

> 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). Additionally, consider the following examples of arbitrary "conditions" the Board placed on *completely different* Liquor License applicants:

- "A security guard shall be on the premise between 6:00 PM and 11:00 PM daily."
- "The business shall not operate between 11:00 PM and 6:00 AM daily."
- "The site shall be kept in good repair and clear of any excess weeds or landscaping debris."
- "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."
- "The results of the data monitoring equipment shall be maintained on file for review by City staff at any time."

- "The business shall cooperate with police in addressing any littering on the premises."
- "There shall not be any outdoor speakers or amplified sound on the premise at any time."
- "There shall be no outdoor patio unless the..Board..grants future amendment..to allow for such."

(App. 82-87). The City contends that their ordinance does not result in individualized conditions on Liquor License applicants, but this claim is laid bare by the following exchange between Rooftop Bar, LLC and the City's Zoning Officer (SuAnn Donovan):

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

(App 79-81). The City Liquor Permit is a thinly veiled (or sometimes overt) mechanism to impose extra-legal requirements and collect additional fees.

(4) Transfer Fee. (*Iowa Grocery* at 680).

Here again, the court of appeals simply failed to conduct *any* analysis of the "irreconcilable conflict pertaining to transfer fees." *Iowa Grocery* at 680. Just as in *Iowa Grocery*, there is no transferability of a City Liquor Permit. (App. 181-182). Should a liquor license holder wish to move to a new location in the City, they must pay an additional City Liquor Permit fee.

Id. As in *Iowa Grocery*, this "does not assure uniformity within the state" as the "the City Council can set its own fees…without any regard for a fee established by the administrator." *Id*. Furthermore, this also introduces "inherent conflicts between the fee collection procedures established in the Act and those set forth in the ordinance." *Id*.

(5) Uniformity. (*Iowa Grocery* at 680-81).

The *Iowa Grocery* Court speaks clearly about the legislature's intent to ensuring uniformity in the Liquor License application process:

> 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…**The imposition of additional "administrative fees" would circumvent the established procedure**…we find the disputed ordinance disturbs, and does not substantially comply with, **the uniformity so meticulously established by the Act**

Id at 681-682. (emphasis added). The court of appeals failed to apply this factor of the test *at all*. The City has done *exactly* what the Court prohibited in *Iowa Grocery.* There is simply no way for a bar/tavern operator to obtain a Liquor License in Des Moines without *first* paying for and going through the City Liquor Permit process. The court of appeals recognizes this, stating "[t]he city will not consider a liquor control license application until the [City Liquor Permit], if necessary, is approved" and "to operate an

establishment selling alcoholic beverages in Des Moines, **an additional step is required.**" (COA Decision, p. 2, 3). The *Iowa Grocery* Court made it clear that the legislature *prohibits* "additional steps" in the process of obtaining a Liquor License. *Iowa Grocery* at 681-82.

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(a) Different fees and requirements for different businesses.

Iowa Code §123.30 specifies the *only* classes of Liquor Licenses which may be issued: wine permits (§123.173), beer permits (§123.124), and liquor control licenses (§123.30). Under the City Liquor Permit scheme, the City has created special requirements based on the type of business and the percentage of liquor, wine, or beer that they serve. (App. 231-232). For instance, a "Tavern and Night Club" must obtain a City Liquor Permit *regardless of the zoning district* and is subjected to additional fees and regulation. *Id*. A "[r]estaurant" located in the same zoning district is not required to obtain a City Liquor Permit if "at least 50 percent" of sales are from "food and food-related services." *Id*. The Ordinance goes on to define other establishments and requirements not contemplated or allowed under the Act. *Id*.

Under the Act, there is no differentiation between the requirements for a Liquor License for a restaurant and a bar, but that is not the case in Des

Moines. *Iowa Grocery* clearly prohibits this type of interference in the State licensing scheme.

(6) Existing Repayment Mechanism. (*Iowa Grocery* at 681).

The court of appeals failed to conduct *any* analysis with respect to the existing repayment mechanism element established by the Court. *Iowa Grocery* requires a "mechanism to refund the administrative fee if the license application is not approved." *Id* at 678. In this case, the City Liquor Permit fees operate identically to the fee charged by the City in *Iowa Grocery*—both are a *prerequisite* to the city forwarding the Liquor License application, and both are "nonrefundable" if denied. (App 180-183). This is *exactly* what *Iowa Grocery* prohibits. *Iowa Grocery* at 681. Similarly, if a City Liquor Permit were to be issued but a Liquor License was later denied, the fee for the City Liquor Permit would *not* be refunded. This directly contradicts Iowa Code §123.32(6)(a) which requires that "the fee…shall be returned to the applicant" if it is denied. Additionally, "[t]he City of Des Moines does not remit any portion of the 'application fee' or 'notification fee' collected for a [City Liquor Permit] to the State of Iowa." nor does it provide any accounting of any such fees collected to the State. (App 59). The exclusive fee schedule prescribed by the Act provides for reimbursement to the City for their role in approving Liquor License

applications and the City is *not entitled to collect an additional fee*.

Both factors were specifically cited in *Iowa Grocery* as a basis for striking down the City's fee: "[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. And: "[n]ormally, a municipal corporation can, as a home rule entity, impose license fees, permit fees, or franchise fees to cover the cost of…activities related to the exercise of its police power" however an additional fee is "is not appropriate because the City already receives compensation for these costs." *Id.*.

(7) Additional Requirement. (*Iowa Grocery* at 681-82).

The requirement of a City Liquor Permit *as a prerequisite* to a Liquor License application is explicitly prohibited by Iowa Code §123.37: "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." In direct contradiction of the Act, the Ordinance states that a City Liquor Permit "must be obtained" for "[t]he sale of alcoholic liquor, wine and beer." (App. 231-235). This clear conflict is sufficient for this Court to find that the Ordinance invalid and preempted by the Act.

The City argues that the City Liquor Permit process is an exercise of its zoning power, but answering one simple question which conclusively

illustrates that this scheme is nothing more than a license to obtain a license: why would anyone obtain an City Liquor Permit from the City other than to obtain a Liquor License from the state? (App. 181). The answer is simple: there is no other reason. *Id.* The City Liquor Permit serves *only one purpose* —to do that which is specifically prohibited by the Act—to create another permit for the sale of alcoholic beverages in Des Moines.

The court of appeals incorrectly found that "the requirement to obtain a [City Liquor Permit] is not a permit requirement 'for the sale of alcoholic beverages.'" (COA Decision, p. 6). This is *absolutely contrary* to the plain language of the City Liquor Permit application *itself*. (App. 181). The City readily admits—and the court of appeals acknowledged—that "the city will not consider a liquor control license application until the [City Liquor Permit], if necessary, is approved." (COA Decision, p.3). Even if the City were empowered to impose an additional permitting requirement, that permit must still comport with the factors set forth in *Iowa Grocery.* This is the critical step that the court of appeals missed. An ordinance is impermissible when the "the City has increased its role in the licensing system" whether a permit is under the guise of zoning, building, health, or any other category the City may concoct. *Id*. An "extra hurdle" of applying for an additional permit or "adding extra fees" is **unequivocally illegal.** *Iowa Grocery* at 681-82.

(8) Accountability. (*Iowa Grocery* at 682).

The Legislature set forth a specific, detailed, and *exclusive* fee structure for the application, transfer, and renewal of a Liquor Licenses. 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." Simply put, the Act does not allow municipalities to charge any application, transfer, or renewal fees other than those set by statute.

The *exclusive* benefit of the City Liquor Permit is to allow an individual to apply for a Liquor License. This requires a fee of over $300 which it does not remit or account for to the ABD. (App 181). This *directly* contradicts the statutory procedure for Liquor License applications. Iowa Code §§123.32(2), 123.36(8), 123.143. Here again, the court of appeals failed to analyze this factor of *Iowa Grocery* **at all**. *Iowa Grocery* held:

> Under the Des Moines ordinance, the City does not have to account to the Division for the total amount collected for the application….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. The City does not provide an accounting for any City Liquor Permit fees, nor does it remit any portion of those fees fees to the state. (App. 56-63, 180-183). Additionally, the *Iowa Grocery* Court addresses the compensation due a local authority, stating:

> Normally, a municipal corporation can…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. …However, in the present case, an "additional administrative fee" is not appropriate because the City already receives compensation for these costs.

Iowa Grocery at 681.

V. Conclusion

This case falls squarely within an area of law which this Court recently considered. The court of appeals erroneously adopted the *general* view that the City is entitled to exercise *broad* home rule powers instead of properly applying the *limited* powers and *explicit limitations* to the City's home rule powers established in *Iowa Grocery* and in Iowa Code §123.

While the local authority certainly *can* regulate the location of businesses with a Liquor License, those regulations are subject to—not in lieu of—the state's explicit exercise of police power in liquor licensing. Any action that implicates Iowa Code §123 must pass the *Iowa Grocery* test. For this Court to decline to review this case would be to return us to the pre *Iowa Grocery* era.

/s/ George Qualley IV
George Qualley
PIN# AT0008861
Qualley Law, P.L.C.
P.O. Box 41718, Des Moines, IA 50311
g@qualleylaw.com
Ph: (515) 974-5658
Attorney for the Plaintiff-Appellant

/s/ Cornelius S. Qualley
Cornelius S. Qualley
PIN# AT0011242
Qualley Law, P.L.C.
P.O. Box 41718, Des Moines, IA 50311
c@qualleylaw.com
Ph: (515) 974-5658
Attorney for the Plaintiff-Appellant

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/s/ Cornelius S. Qualley
Cornelius S. Qualley

IN THE COURT OF APPEALS OF IOWA

No. 22-0473
Filed February 8, 2023

LIME LOUNGE, LLC,
Plaintiff-Appellant,

vs.

CITY OF DES MOINES, IOWA,
Defendant-Appellee.

Appeal from the Iowa District Court for Polk County, Dustria A. Relph, Judge.

A business appeals a district court's denial of its motion for declaratory judgment, asserting an irreconcilable conflict between state law and a local ordinance. **AFFIRMED.**

Cornelius S. Qualley and George Qualley IV of Qualley Law, P.L.C., Des Moines, for appellant.

John O. Haraldson, Assistant City Attorney for City of Des Moines, for appellee.

Considered by Vaitheswaran, P.J., and Greer and Schumacher, JJ.

SCHUMACHER, Judge.

Lime Lounge, LLC (Lime Lounge) appeals a district court ruling that denied its request for a permanent injunction and dissolved a temporary injunction that restrained the City of Des Moines (Des Moines) from seeking to revoke Lime Lounge's state liquor license. Lime Lounge contends the basis for the revocation—Lime Lounge's failure to maintain their conditional use permit (CUP) as required by Des Moines's municipal code—is preempted by state law. Lime Lounge also claims the ordinance violates the equal protection clause of the state and federal constitutions. Further, they assert the CUP constitutes illegal spot zoning. We conclude the city's ordinance related to the CUP is not preempted by state law. Additionally, the ordinance does not violate the equal protection clause, nor does it amount to illegal spot zoning. Accordingly, we affirm.

I. Background Facts & Proceedings

Lime Lounge owns and operates a bar in the East Village of Des Moines, a mixed use neighborhood that contains commercial and residential buildings. The bar has operated since 2011, although not always in the current location.

Generally, to sell liquor or other alcoholic beverages in this state, an establishment must comply with the provisions of Iowa Code chapter 123 (2019). In particular, the establishment must submit a liquor control license application to the state Alcoholic Beverages Division (ABD). *See* Iowa Code §§ 123.2, .31. The code sets out the applicable fees for the applications. *See id.* § 123.36. Some of the fees, depending on the type of license, are remitted to the local authority—the city—in which the licensee operates. *Id.* § 123.36(8). Prior to the ABD receiving the application, however, the application must be filed with the local authority,

which is directed to either approve or disapprove of the application. *See id.* § 123.32(2). The application is then forwarded to the ABD. *See id.* If approved by the local authority, the ABD performs the necessary investigation of the establishment and either affirms, modifies, or reverses the local authority's decision. *See id.* § 123.32(6)(b). If the local authority disapproves of the application, the applicant has the ability to appeal the decision to the administrator of the ABD. *See id.* § 123.32(6)(a).

To operate an establishment selling alcoholic beverages in Des Moines, an additional step is required. Pursuant to Des Moines Municipal Code section 134-954, an establishment may be required to obtain a CUP in order to be approved by the city's Zoning Board of Adjustment (ZBOA). That section places different requirements on establishments based on the type of business they are engaged in—i.e., whether they are restaurants, bars, gas stations, etc.—the zoning district they are in, and the type of alcoholic beverages they serve. Des Moines, Iowa, Municipal Code § 134-954 (2019). A CUP is only granted if the business meets certain requirements, including maintaining trash receptacles, compliance with noise ordinances, and avoiding other issues that might constitute a nuisance. *Id.* § 134-954(b), (c). The CUP requires an application—distinct from the state liquor license control application—which is either approved or rejected by the ZBOA. It also requires payment of certain fees. The city will not consider a liquor control license application until the CUP, if necessary, is approved.

Lime Lounge obtained a CUP and had their liquor control license approved in 2011. In 2015, the ZBOA amended Lime Lounge's CUP after multiple noise complaints. The ZBOA revoked Lime Lounge's CUP in March 2016. Lime Lounge

challenged the revocation. The revocation was upheld on appeal. *Lime Lounge, LLC v. Zoning Bd. of Adjustment of Des Moines*, No. 18-0155, 2019 WL 480197, at *11 (Iowa Ct. App. Feb. 6, 2019).

On May 14, 2019, Des Moines filed a complaint with the ABD to revoke Lime Lounge's state liquor license on the basis of the establishment's failure to comply with local ordinances. *See* Iowa Code § 123.30(2). Lime Lounge filed a motion for declaratory judgment on June 3 and a motion for temporary injunction on July 29. The temporary injunction was granted October 4. Des Moines filed a motion to deny a permanent injunction and dismiss the suit on November 4, 2021. A bench trial was held. On January 20, 2022, the district court dissolved the temporary injunction, denied a permanent injunction, and dismissed the suit. Lime Lounge filed a motion to reconsider, which was denied. Lime Lounge now appeals.[1]

II. Standard of Review

Whether Des Moines's municipal code is preempted by state law or is illegal spot zoning are questions of law. As such, we review the court's ruling for correction of errors of law. *Pexa v. Auto Owners Ins. Co.*, 686 N.W.2d 150, 155 (Iowa 2004). We review constitutional challenges de novo. *State v. Mitchell*, 757 N.W.2d 431, 434 (Iowa 2008).

III. Is the Municipal Code Preempted by Chapter 123?

Lime Lounge contends Des Moines Municipal Code section 134-954 and the accompanying CUP requirement is preempted by Iowa Code chapter 123.

[1] Lime Lounge also sought a motion to stay, which was denied by the supreme court on August 2, 2022.

They claim the ordinance is preempted because it requires an additional permit and fees in order to obtain a state liquor license, which is in conflict with Iowa Code section 123.37. Lime Lounge also asserts the ordinance usurps the State's police power, *see* Iowa Code section 123.1, and violates the appeal procedure as established in state code. *See* Iowa Code §§ 123.32; .39.

Under article III, section 38A of the Iowa Constitution, municipalities generally have the authority to regulate their own affairs so long as their actions are not inconsistent with state law. The provision is referred to as "home rule." *Davenport v. Seymour*, 755 N.W.2d 533, 537-38 (Iowa 2008). When considering whether a local ordinance conflicts with state law, we utilize the doctrine of preemption. *Id.* at 538. "The general thrust of the preemption doctrine in the context of local affairs is that municipalities cannot act if the legislature has directed otherwise. When exercised, legislative power trumps the power of local authorities." *Id.* While there are generally three types of preemption—express, conflict, and field—Lime Lounge explicitly limits their claim to express preemption. *See id.* at 538-39. Express preemption "applies where the legislature has specifically prohibited local action in a given area." *Id.* at 538. We look to the "specific language used by the legislature" to determine whether express preemption applies. *Id.*

We first examine Des Moines's requirement that certain establishments obtain a CUP and pay additional fees. Iowa Code section 123.37(1) provides, "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 at any establishment . . . ." Lime Lounge suggests that provision expressly preempts the city's actions—only the State can impose permits and taxes.

We disagree. As a starting point, we do not believe section 123.37 applies to the city's actions. Municipal Code section 134-954 is expressly related to "[t]he *use of land* in all districts for the sale of alcoholic liquor, wine and beer." (Emphasis added). As the district court noted, "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." It's a land-use regulation, not a regulation on the sale of alcohol. Thus, the requirement to obtain a CUP is not a permit requirement "for the sale of alcoholic beverages."

Viewing the rest of chapter 123 supports this conclusion. *See Doe v. State*, 943 N.W.2d 608, 610 (Iowa 2020) (explaining that we read statutory provisions in context rather than in isolation). When we do so, it is apparent the legislature provides Des Moines the authority to impose regulations so long as they do not impose taxes and permits on liquor licenses themselves or restrict the hours during which alcohol may be sold. For instance, section 123.39(2) provides:

> *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.*

(Emphasis added.) That section expressly provides cities with the authority to regulate the physical premises of an establishment licensed by the State, and it

provides cities with the authority to adopt regulations related to "activities or matters" that affect the sale of alcohol so long as the regulations protect the "health, welfare and morals of the community." Iowa Code § 123.37(2). Municipal Code section 134-954 includes provisions related to trash collection, avoiding congestion and loitering, the location of doors facing certain streets, and noise limits. Preventing unsanitary conditions, ensuring the safety of patrons by limiting large groups and ensuring access to certain streets, and limiting unnecessary noise all relate to the health, welfare, and morals of the community. Thus, rather than being preempted by code, the legislature expressly provided cities with the authority to impose these types of regulations.

Lime Lounge contends this case is controlled by *Iowa Grocery Industry Association v. City of Des Moines*, 712 N.W.2d 675 (Iowa 2006). That case involved a Des Moines ordinance that required an administrative fee on applications for state liquor licenses separate from the fee imposed by state law. *Iowa Grocery*, 712 N.W.2d at 677-78. Our supreme court found the ordinance was preempted by Iowa Code chapter 123. In particular, the court noted the ordinance conflicted with the existing fee structure and repayment system, undermined uniformity in the license applications process, and imposed additional requirements on applications. *Id.* at 680-82.

While some of the policy rationale behind *Iowa Grocery* could apply to this case, we find the case inapposite. Fundamentally, the ordinances are distinct. In *Iowa Grocery*, the ordinance imposed a fee *on license applications. Id.* at 681. As such, the city administrative fee was directly preempted by chapter 123's provisions related to the application process and the imposition of fees for

applications. *Id.* Here, the CUP and accompanying fees are separate from the application for the state license. As explained above, the ordinance and permits regulate the use of premises selling alcohol rather than imposing regulations on the sale itself. Thus, whereas the city was expressly prohibited from imposing additional fees on liquor license applications in *Iowa Grocery*, here the city is acting under the authority conferred to it by Iowa Code section 123.39.

Lime Lounge's preemption claim involving the State's police powers is similarly without merit. It is true that section 123.1 notes that the chapter "shall be deemed an exercise of the police power of the state." However, section 123.39 permits cities to exercise their own power to regulate the health, welfare, and morals of the community. And section 123.30(2) requires establishments to comply with local ordinances. It would make little sense for the legislature to prohibit cities from imposing regulations while also requiring establishments comply with them.

We also find Des Moines's municipal code is not preempted by the appeal procedure of chapter 123. Lime Lounge essentially claims that once the ZBOA revokes a CUP, the only matter before the ABD is whether the licensee is complying with local ordinances that require a CUP. As a result, Lime Lounge asserts it is impossible to challenge the revocation of the CUP to the ABD. But the fact that the CUP revocation has collateral consequences does not undermine the appeal process found in chapter 123. The chapter clearly contemplates that non-compliance with local ordinances can be grounds for license revocation. *See* Iowa Code § 123.30(2). Any appeal to the ABD concerning non-compliance with a local ordinance would be focused on the act of non-compliance, not the validity of the

local ordinance. And we note that Lime Lounge already utilized the judicial process to challenge the validity of its CUP revocation. *See Lime Lounge*, 2019 WL 480197, at *5-6.

Des Moines's CUP requirement and accompanying fee is not preempted by the Iowa Code. As such, the city had the authority, pursuant to the home rule doctrine and Iowa Code section 123.39, to regulate the premises of establishments selling alcohol. We reject Lime Lounge's preemption claim.

IV. Equal Protection Clause

Lime Lounge asserts Municipal Code section 134-954(a) violates the equal protection clause of the Iowa and United States constitutions.[2] In particular, they allege the code allows the ZBOA to impose different restrictions on similar businesses that are arbitrary and capricious. The conditions imposed by Municipal Code section 134-954(a), which can include obtaining a CUP, requiring a certain amount of sales be obtained via food receipts, and imposing distance requirements to certain establishments like schools, are based on the type of business,[3] the zoning district the business occupies, and the type of liquor license it holds. Lime Lounge appears to only contest the portion of the code that requires certain businesses, but not others, to obtain a CUP.

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[2] "[W]hile we will generally apply the same analysis to federal and state equal protection claims, this court has not foreclosed the possibility that there may be situations where differences in scope, import, or purpose of the two provisions warrant divergent analyses." *Racing Ass'n of Cent. Iowa v. Fitzgerald*, 675 N.W.2d 1, 5 (Iowa 2004). Neither party suggests we should treat Lime Lounge's state and federal equal protection claims separately. As such, we analyze the claims together.

[3] Municipal Code section 134-954(a) establishes different requirements for "food sales establishments and retail sales establishments," gas stations or convenience stores, liquor stores, tobacco stores, restaurants, and taverns.

"[T]he Equal Protection clause 'is essentially a direction that all persons similarly situated should be treated alike.'" *Fitzgerald*, 675 N.W.2d at 7 (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985)). "Whether this ideal has been met in the context of economic legislation is determined through application of the rational basis test." *Id.* "Under this test, we must determine whether the classification is 'rationally related to a legitimate governmental purpose.'" *King v. State*, 818 N.W.2d 1, 27 (Iowa 2012) (citation omitted). "The classification is valid 'unless the relationship between the classification and the purpose behind it is so weak the classification must be viewed as arbitrary or capricious.'" *Id.* at 27-28 (citation omitted). Statutes carry "a strong presumption of constitutionality," and it is the plaintiff's burden to negate "every reasonable basis that might support the disparate treatment." *Fitzgerald*, 675 N.W.2d at 8 (citation omitted)

Lime Lounge makes two distinct claims here. First, they allege the varied requirements—particularly the necessity of obtaining a CUP and the fees necessary to do so—imposed on different establishments such as restaurants, bars, and retail establishments are arbitrary. *See* Des Moines, Iowa, Municipal Code § 134-954(a). Second, they allege the municipal ordinance allows the ZBOA to "impose virtually any condition which it can contemplate—and, more onerously—on an individualized basis." *See id.* § 134-954(c).

The city's classification system for various establishments selling alcoholic beverages does not violate Lime Lounge's equal protection rights. The city has a legitimate purpose in ensuring the health, welfare, and safety of the community. In relation to businesses that serve alcohol, cities have an interest in regulating

noise levels, maintaining clean public spaces, and ensuring the area is safe for patrons and other citizens. The distinction drawn by Des Moines's Municipal Code between bars, restaurants, and other retail establishments is rationally related to that purpose. As the city points out, bars tend to operate later in the evening than restaurants, be louder—both because of music and patrons—and have increased law enforcement involvement. This is particularly true when compared to retail establishments that sell alcohol that is consumed elsewhere. Requiring additional permitting—which delineates noise, lighting, and sanitary requirements—for certain businesses that are more likely to exhibit additional nuisance behaviors is rationally related to protecting the community.

We also reject Lime Lounge's claim that the ordinance allows the ZBOA unfettered discretion in imposing permitting restrictions. Contrary to Lime Lounge's contentions, the ZBOA is limited to imposing conditions "as may be reasonably required by the board to ensure that the criteria of subsection (b), above, are satisfied."[4] *Id.* Subsection (b) mandates that (1) the business's "location, design, construction and operation of the particular use adequately safeguards the health, safety and general welfare of persons" in the surrounding area, (2) the business is separate enough from other structures to prevent noise harming the adjoining areas, (3) the business does "not unduly increase congestion on the streets" of the area, and (4) the business does not constitute a nuisance. Thus, the board is limited to imposing individualized restrictions on

[4] The business must also comply with the "general conditions" found in Municipal Code section 134-954(c), which involves adequate lighting, compliance with noise ordinances, limiting loitering, and adequate trash removal.

businesses in only a handful of circumstances, all of which relate to minimizing the harmful impacts of the business on the community.

We acknowledge that certain individualized zoning restrictions could conceivably violate the equal protection clause. This is not such a case. As explained above, the city has an interest in protecting the community's health and welfare. The East Village of Des Moines is a mixed-use neighborhood, containing both commercial and residential buildings. Tailoring certain zoning restrictions related to noise, congestion, and other nuisance behavior to the specific circumstances of the area is rationally related to promoting the community's welfare.

V. Spot Zoning

Lime Lounge asserts Municipal Code section 134-954 amounts to 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." *Residential & Agric. Advisory Comm., LLC v. Dyersville City Council*, 888 N.W.2d 24, 45 (Iowa 2016) (quoting *Perkins v. Bd. of Supervisors of Madison Cnty*, 636 N.W.2d 58, 67 (Iowa 2001)). However, not all spot zoning is illegal. *Id.* We use a three-part test to determine if spot zoning is valid:

> (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. at 46 (citation omitted). "[T]here must be substantial and reasonable grounds or basis for the discrimination when one lot or tract is singled out." *Id.* (citation omitted).

First, we agree with the district court that the municipal code does not amount to spot zoning. Lime Lounge provided four examples of conditional use permits for neighboring properties that have minor variations in noise restrictions. However, these differences are merely semantic. Three of those properties, including Lime Lounge's, are restricted to non-amplified sound that cannot exceed what would be "considered background auditory in nature." Only one property is permitted to use amplified sound on certain occasions. Contrary to Lime Lounge's assertion, their property is not "a small island" with different restrictions than the rest.

Even if we were to consider this spot zoning, it would not be illegal. As noted above, the noise restrictions and other directives limiting nuisance behavior fall squarely within the city's police power. Furthermore, in the mixed-use community, utilizing permits with varied directives allows the city to pursue the dual goals of maintaining an entertainment district while also limiting the disturbances to the residential buildings in the area. Finally, the zoning in this case is consistent with that plan—establishments are given conditions that are relevant to limiting nuisance behavior for the surrounding buildings. Des Moines's zoning does not constitute illegal spot zoning.

VI. Conclusion

We find Des Moines Municipal Code section 134-954 is not preempted by state code. Further, the municipal code does not violate Lime Lounge's equal protection rights, nor does it constitute illegal spot zoning. The district court properly dissolved the temporary injunction and rejected Lime Lounge's request for a permanent injunction.

AFFIRMED.

IOWA APPELLATE COURTS

State of Iowa Courts

Case Number	**Case Title**
22-0473	Lime Lounge v. City of Des Moines

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