

State of Minnesota

In Court of Appeals

Ethan Dean, Holly Richard, Ted Dzierzbicki
and Lauren Dzierzbicki,

Appellants,

vs.

City of Winona, a municipality,

Respondent.

**BRIEF AND ADDENDUM OF AMICUS CURIAE,
AMERICAN CIVIL LIBERTIES UNION OF MINNESOTA**

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OF MINNESOTA

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Introduction and Statement of *Amicus Curiae*¹

The American Civil Liberties Union of Minnesota (ACLU-MN) is a nonprofit, nonpartisan organization with approximately 8,500 members dedicated to the principles of liberty and equality embodied in the U.S. and Minnesota Constitutions and our state's civil rights laws. Since its founding in 1952, the ACLU-MN has engaged in constitutional litigation, both directly and as *amicus curiae*, in a wide variety of cases. Among those rights that the ACLU-MN has litigated to protect is the right to due process and equal protection.

The ACLU-MN respectfully urges this court to invalidate the City of Winona's ordinance prohibiting rental housing licenses in all residential zoning districts, except for the R-3 (multifamily) district, for properties that are located on blocks where more than 30 percent of the lots on the same block are already licensed. Appellant's Appendix at 133-4, 150-52. In addition to violating the homeowner's right to equal protection and due process, the Winona "30 percent rule" has a disparate impact on marginalized populations and treats rental housing tenants as second-class citizens. We recognize and acknowledge the fact that, due to the nature of the landlord-tenant relationship, the government has a legitimate interest in regulating rental housing. The government's legitimate interests include ensuring that tenants are not subject to substandard living conditions and providing both parties with adequate legal remedies to address breaches in the rental agreement. However, the government's legitimate interest in regulating rental housing code should not have the effect

¹ Counsel certifies that this brief was authored in whole by listed counsel for *amicus curiae* ACLU of Minnesota. No person or entity other than *amicus curiae* made any monetary contribution to the preparation or submission of the brief. This brief is filed on behalf of the American Civil Liberties Union of Minnesota, which was granted leave to participate as *amicus curiae* by this Court's Order dated July 9, 2013.

of denying property owners' rights to due process and equal protection and should not have a disparate impact on marginalized populations.

Statement of the Case and Facts

The ACLU-MN concurs with the Appellants' Statement of the Case and Facts and adopts and incorporates the facts set forth in the Brief of Appellants and the Appendix to Brief of Appellants.

Argument

I. Rental housing restrictions like the Winona 30 percent rule have a disproportionate impact on marginalized populations including minorities and lower income families.

The ACLU-MN agrees with Appellants that the Winona 30 percent rule violates the property owner's right to Equal Protection and Due Process; however, this court should also be cognizant about the impact that the rule has on the populations that are more likely to need rental housing – racial and ethnic minorities and lower income families.

A. Rental housing restrictions have historically been used to exclude minorities and low income people.

While it is common to use land use policies as a means of influencing a community's make-up, rental restrictions may have a disparate impact on marginalized populations. In *Home Sweet Home? The Efficacy of Rental Restrictions to Promote Neighborhood Stability*, 29 St. Louis U. Pub. L. Rev. 41 (2009) Ngai Pindell notes that "...rental restrictions may have the effect or intent of excluding the most economically vulnerable residents from neighborhoods, perhaps in violation of Fair Housing laws and related protections." Pindell, 29 St. Louis U. Pub. L. Rev. at 71. Historically, zoning rules have been used to exclude groups considered undesirable, including racial minorities, people with lower incomes and

renters, as a class, who were feared to have negative impacts on the economic and social fabric of the community. Pindell, 29 St. Louis U. Pub. L. Rev. at 74-5. This exclusionary impulse, however, is misplaced because, as is evident in the record in the case at bar, the harms that are assumed to be caused by rental housing – poor property maintenance, less stake in the community, vehicle issues – can often be true of homeowners; thereby making distinctions between renters and homeowners seem “arbitrary, exclusionary, and often mean spirited.” Pindell, 29 St. Louis U. Pub. L. Rev. at 46-47.

With this history in mind, it is important to view restrictions on rental property with skepticism to ensure that they do not keep out lower-income households by raising the cost of housing or limiting the supply of affordable housing. In order to ensure that renters as a class (and, consequently, vulnerable populations) are not excluded, municipalities must ensure an adequate amount of rental housing and dispense with the notion that renters are less desirable to the community than homeowners. Pindell, 29 St. Louis U. Pub. L. Rev. at 71. Municipalities should also consciously work to ensure that their rental housing regulations do not have a discriminatory impact. *Id.*

B. Census data suggest Winona has an unwelcome atmosphere for minorities and low income people.

A review of Census and other data suggests that Winona is less diverse than the State of Minnesota and that there is a serious lack of affordable housing available in Winona. While both phenomena undoubtedly have a myriad of causes, as explained below, the 30 percent rule likely impacts on the City’s overall diversity as well as the availability of affordable rental housing.

Census demographic data shows that Winona's population is less diverse compared to the State of Minnesota. While White non-Hispanic individuals accounted for 92% of the population of Winona with racial and ethnic minorities comprising the remaining 8% of the population, statewide numbers show White non-Hispanic individuals to be 82.4% of the population with racial and ethnic minorities comprising the remaining 17.6% of the population. Addendum at 3, 8. In contrast, in another university town of comparable size, the City of Moorhead has a White non-Hispanic population of 88.2% with a corresponding racial and ethnic minority population of 11.8%. Addendum at 13. The rate of growth for racial and ethnic minorities is also lower in Winona than it is for the entire state. Census data from 2000 show that White non-Hispanic individuals accounted for 93.7% of the population of Winona with racial and ethnic minorities comprising only 6.3% of the population. Addendum at 17. In contrast, the 2000 Census shows that White non-Hispanic individuals were 88.2% of the population with racial and ethnic minorities comprising the remaining 11.8% of the population. Addendum at 20. Therefore, while the percentage of Minnesota's racial and ethnic minority population statewide increased by 5.8 percentage points, the percentage growth of racial and ethnic minorities in Winona was only 1.7 percentage points – less than a third of the growth seen statewide.

Census Tenure Demographic data for the State of Minnesota and the City of Winona show that renter-occupied housing units are more likely to include racial and ethnic minorities than owner-occupied housing units. 97.5% of the occupants of owner-occupied housing units are White, non-Hispanic, compared to only 91.8% of the occupants of renter-occupied housing units in Winona. Addendum at 22. Likewise, the median income for

owner-occupied households is \$54,492 compared to only \$17,142 for renter-occupied households in Winona. Addendum at 25.

By limiting the number of properties that qualify for a rental license, the 30 percent rule artificially depresses the overall availability of rental housing. This has two impacts on the availability of affordable housing. First, rental housing units are an integral part of the affordable housing puzzle. Thus, a limit on rental housing likely has a direct impact on the number of affordable housing units in the City. *See* Pindell, 29 St. Louis U. Pub. L. Rev. at 73) (“Rental restrictions can also reduce the overall supply of rental housing, which disproportionately affects lower income residents who cannot afford a home.”).

Second, the cost of rental housing increases when the supply of rental housing is limited. Thus, a limit on rental housing likely has an indirect impact on the number of affordable housing units by increasing overall rental costs in the City. The lack of available rental housing, particularly affordable rental housing, has a disparate impact on populations that are traditionally marginalized such as immigrants, people living in poverty, and racial and ethnic minorities.

A recent comprehensive report by the Minnesota Housing Partnership documented the critical lack of affordable housing in Winona County. While the numbers are countywide, the City of Winona is the County’s largest municipality. According to the MHP report, 35% of renter households pay half or more of their income for housing, compared to only 9% for homeowners. Addendum at 30. Moreover, for every 100 extremely low-income renters there are only 38 units that are affordable and available in Winona County. Addendum at 29. While Winona County is not highlighted as one of the counties with the