

Downside Risk of Immediate Repeal of S.A.F.E. Housing Ordinance
Housing Justice Center
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Housing Justice Center provides this memo to summarize the significant downside risk of immediately repealing St. Paul’s S.A.F.E. Housing ordinance as a response to Judge Magnuson’s adverse preliminary injunction order in the *Lamplighter* case.

The strategy behind immediate repeal likely involves the following assumptions: (1) it would render inactive Judge Magnuson’s preliminary injunction in the *Lamplighter* case, which would make it easier for a revised ordinance to survive a constitutional challenge in the future; (2) it would lead to a new judge assignment in any future constitutional challenge; and (3) it would reduce the cost of litigation and the risk of having to pay plaintiffs’ attorneys fees. These assumptions are incorrect. For the reasons discussed below, immediate repeal will very likely make it more difficult and more expensive to pass similar tenant protection ordinances in the future—both for St. Paul and for other cities.

1. Immediate repeal would elevate the legal importance of a very harmful preliminary injunction ruling—with potentially irreparable harm done to the ability of St. Paul and other cities to pass similar tenant protection laws in the future.

- The fundamental problem with immediate repeal is that it will be viewed by the courts now and in the future as a tacit admission—and potentially a legally binding one—that Judge Magnuson’s order was correct. That is very dangerous because Judge Magnuson’s order is not only wrongly decided, it applies constitutional law in an unprecedented way that could broadly undermine the ability of any municipality to protect tenants going forward. The deadline for immediately appealing this order has already passed, but to capitulate entirely to a deeply flawed court order by immediately rescinding the ordinance could cause irreparable harm to the ability of St. Paul and other cities to pass similar tenant protection laws in the future.
- Immediate repeal will not necessarily end the current case or stop the preliminary injunction. Even after repeal, dismissing the case and terminating the preliminary injunction will require the plaintiffs and Judge Magnuson to be convinced that the case is “moot”—that is, there is no longer a live “controversy” between the parties. However, if the plaintiffs or Judge Magnuson suspect that St. Paul will pass a similar ordinance in the future, it is unlikely that they will be convinced the case is moot.
- Even if immediate repeal leads to the dismissal of the case, dismissal will create a legal argument for plaintiffs that any similar ordinance passed in the future is prohibited under the doctrines of “res judicata” or “collateral estoppel”—legal doctrines designed to stop a litigant from trying to “take a second bite at the apple” after losing the first case. The vagueness of the preliminary injunction order would help us counter such an

argument, but immediate repeal creates real risk that we would be barred from enacting similar ordinances in the future.

- Immediate repeal will elevate the importance of the preliminary injunction order as legal precedent in a way that may adversely affect other Minnesota cities attempting to pass and defend similar ordinances in the future. Most immediately, it will provide powerful ammunition to plaintiffs' attorneys against the Minneapolis ordinance (the same law firm as in the *Lamplighter* case) in their appeal to the Eighth Circuit. The plaintiffs' attorneys in the Minneapolis case will point to immediate repeal as an admission by St. Paul that such ordinances are unconstitutional.

2. There is a substantial chance that Judge Magnuson will be the Minnesota federal adjudicating a revised tenant protection ordinance.

- Until the case is dismissed, Judge Magnuson will continue to have jurisdiction over any revision we make to the current ordinance because plaintiffs will inevitably challenge it as prohibited under the current preliminary injunction.
- If the case is dismissed, there is a good chance that Judge Magnuson will be the judge on any new case challenging the constitutionality of a revised ordinance. The internal District of Minnesota case assignment process favors assignment of a new "related" case to judges who adjudicated the first "related" case. This internal judge assignment process is likely the reason that Judge Magnuson was assigned the *Lamplighter* case—because he had already been the judge on a "related case" involving a similar Minneapolis ordinance.
- Even if Judge Magnuson does not get the next case, a new judge will pay some degree of deference to Judge Magnuson's prior rulings, especially if St. Paul repeals the ordinance without challenging the ruling. They will also be suspicious of potential "judge-shopping" gamesmanship on our part.

3. Immediate repeal will not decrease the long-term cost of litigation.

- It is our understanding that St. Paul remains committed to enacting tenant protection measures similar to the current ordinance, which will surely be challenged by the same plaintiffs and/or lawyers here. Thus, the attorneys fees issue will continue to be an issue in the next litigation, quite possibly with the same judge—with the added problem that we will be vulnerable to the charge of gamesmanship.
- One way to reduce attorneys fees in this case would be to seek a stay of the litigation pending the ruling by the Eighth Circuit on the Minneapolis ordinance. There is a chance that the Eighth Circuit will follow the U.S. Supreme Court precedent that supports a municipality's legal power to enact ordinances like the current one—or at least make

rulings less extreme and damaging than Judge Magnuson's. If that is the case, then we will have an opening to change Judge Magnuson's thinking on the case. And even if the Eighth Circuit disappoints, we will get valuable information about how St. Paul can "repeal and replace" the ordinance in a smart, tactical way.

- One reason to think that a motion to stay pending the Eighth Circuit ruling might succeed here is because plaintiffs' counsel requested and obtained from Judge Magnuson a stay of the Minneapolis ordinance litigation pending the Eighth Circuit ruling on appeal.

Proposed Course of Action

- Table the vote on repealing the S.A.F.E. Housing Ordinance based on the rationale that the Eighth Circuit will be addressing legal issues that are highly relevant to the constitutionality of the ordinance, especially the tenant screening portion of the ordinance.
- Seek a stay of litigation in front of Judge Magnuson pending the Eighth Circuit ruling in Minneapolis case.
- In the event that the Eighth Circuit decision is adverse on the issue of tenant screening, prepare a revised ordinance that omits the tenant screening portion but retains the three other portions as part of a future "repeal and replace" strategy.