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(Short title of case)

Case Name: **People of St. Clair Shores v Michael Dorr**

1. Brief Type (select one): ☑ APPELLANT(S) ☐ APPELLEE(S) ☐ REPLY
   ☐ CROSS-APPELLANT(S) ☐ CROSS-APPELLEE(S) ☐ AMICUS
   ☐ OTHER [identify]:

2. This brief is filed by or on behalf of [insert party name(s)]: **Michael Dorr**

3. ☐ This brief is in response to a brief filed on _____ by _____.

4. ORAL ARGUMENT: ☑ REQUESTED ☐ NOT REQUESTED

5. ☐ THE APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID.
   [See MCR 7.212(C)(1) to determine if this applies.]

6. As required by MCR 7.212(C), this brief contains, in the following order: [check applicable boxes to verify]
   - ☑ Table of Contents [MCR 7.212(C)(2)]
   - ☑ Index of Authorities [MCR 7.212(C)(3)]
   - ☑ Jurisdictional Statement [MCR 7.212(C)(4)]
   - ☑ Statement of Questions [MCR 7.212(C)(5)]
   - ☑ Statement of Facts (with citation to the record) [MCR 7.212(C)(6)
   - ☑ Arguments (with applicable standard of review) [MCR 7.212(C)(7)]
   - ☑ Relief Requested [MCR 7.212(C)(9)]
   - ☑ Signature [MCR 7.212(C)(9)]
   - ☑ A separately filed appendix [MCR 7.212(C)(10) and MCR 7.212(J)]

7. This brief is signed by [type name]: /s/ **Derk A. Wilcox**
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STATE OF MICHIGAN
MICHIGAN COURT OF APPEALS

PEOPLE OF THE CITY OF ST. CLAIR SHORES,
Appellee,

- v -

MICHAEL DORR,
Appellant.

Docket No. 349910

LC No. 2019-000135 AR

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APPELLANT'S BRIEF ON APPEAL

Oral Argument Requested

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JURISDICTIONAL STATEMENT

This matter is an appeal of a Circuit Court's decision, which was in turn an appeal from a District Court's decision. This court, per its Order of November 6, 2019, has accepted jurisdiction to hear this appeal under MCR 7.205.

STATEMENT OF QUESTIONS INVOLVED

1. Can a Michigan resident be held criminally liable for actions that are not specifically prohibited by ordinance?

Appellant says:	No
Appellee says:	Yes
The Circuit Court said:	Yes

2. Does a residentially-zoned area that allows long-term home rentals and home-based businesses inherently disallow home-based short-term rentals where the ordinance doesn't have any language clearly prohibiting such use by the permanent resident?

Appellant says:	No
Appellee says:	Yes
The Circuit Court said:	Yes

3. Does a permanent resident of a home change the nature and permanency of his residency by conducting otherwise allowable business activities in his home?

Appellant says:	No
Appellee says:	Yes
The Circuit Court said:	Yes

4. Does having a short-term guest in a resident's permanent home change the nature of the permanent resident's occupancy?

Appellant says:	No
Appellee says:	Yes
The Circuit Court said:	Yes

INTRODUCTION

Appellant, MICHAEL DORR, is a resident of Appellee ST. CLAIR SHORES. Appellant was found guilty of a misdemeanor crime when he rented his home to an overnight guest through the home-sharing service Airbnb.

The issue in this matter is whether the Appellant violated the Appellees' Municipal Zoning Ordinance 15.050 when he allowed short-term renters to stay at his home. Appellant contends that the ordinance at issue contains no prohibition on such short-term rentals. In fact, the residential zone in question currently permits thousands of long-term rental units to exist in this residential district, and so the definition "one-family detached dwellings" does not exclude the use of a dwelling as a rental unit for either long term or short term. Furthermore, any home-based business is allowed as long as it doesn't alter the residential characteristics as clearly defined in the ordinance. Where an ordinance is silent on a matter, a defendant cannot be punished for violating an unwritten law. The old maxim, *nulla poena sine lege*, "no penalty without a law" still holds true. While municipalities have broad discretion to enact and enforce laws, they cannot enforce an unwritten law which has not been enacted and clearly stated.

This Brief will argue that, because the ordinance in question does not prohibit, nor even speak to short-term rentals, his misdemeanor conviction should be overturned. Alternately, the ordinance is unconstitutionally vague in this regard, and violates substantive due process. Therefore a resident cannot be criminally liable for actions which are not clearly prohibited, and the conviction should be overturned.

Similar matters have been before the Court of Appeals at least twice in the last year, and the Supreme Court has agreed to hear one of these similar matters – *Reaume v Township of Spring Lake*, SC Docket No. 159874. As discussed in the brief below, those two Court of Appeals

opinions (including *Reaume*) do not necessarily have broad application, and the matter at hand needs clarity as this issue appears to be increasing.

STATEMENT OF FACTS

Appellant, MICHAEL DORR, resides at and owns the single-family residence at 22515 Ten Mile Road in St. Clair Shores, Macomb County. Appellant has, in the past, rented out his home to short-term renters who have found him through the Airbnb service, or similar arrangements. Appellant's residence is in the area zoned "R-A One-Family General Residential."

This matter before the court stems from a misdemeanor Complaint issued to Appellant on or about September 12, 2018. The Complaint stated:

> Count 1. Violation of St. Clair Shores Municipal Zoning Ordinance 15.050
> Did then and there violate or attempt to violate City of St. Clair Shores Municipal Zoning Ordinance 15.050, at or near 22515 Ten Mile Rd., St. Clair Shores, Michigan, to wit: Unpermitted use of R-A Single Family Residentially Zoned Property.

The District Court, on December 19, 2018, held a summary disposition hearing where Appellant made arguments similar to what is argued here – namely that the ordinance did not clearly prohibit such short-term rentals; and therefore it is improper to hold someone criminally liable for an action that is not clearly prohibited. The hearing was a facial challenge to the language of the statute, and did not involve any factual questions. The trial court disagreed with Appellant, and held that the reasoning of a recent unpublished Court of Appeals opinion on a similar matter was persuasive – that the definition of "residential" in the ordinance inherently precludes the use of a residence for short-term rentals. (See page 32 of the Motion Hearing Transcript of December 19, 2018, in the Appendix.)

With the trial court having determined that the ordinance in question prohibited short-term rentals, the matter proceeded to trial. On February 6, 2019, a brief bench trial was held wherein Appellant admitted that he had in fact used his home for a short-term rental. There were no other

factual determinations made other than that he had engaged in a short-term rental. The judge then found him guilty of the misdemeanor crime of violating the zoning ordinance. Because of the expedited manner in which the trial was held, Appellant had agreed that on appeal he would only challenge the ordinance-interpretation issue that the trial court had decided at the December 19th hearing. There are no factual nor procedural matters for which an appeal is sought.

This matter was then appealed as of right from the District Court to the 16th Judicial Circuit Court pursuant to MCR 7.104. The matter was briefed by both parties at the Circuit Court, and a hearing and oral argument had been scheduled for June 17, 2019. However, the Circuit Court judge's clerk contacted the parties and requested that the matter be determined on the briefing, without oral argument. Both parties consented. The Circuit Court judge issued her ruling on July 3rd, 2019, and affirmed the District Court's ruling. This July 3rd judgment is the subject of this Appeal. Appellant filed an Application for Leave to Appeal the Circuit Court's decision on July 24, 2019. And on November 6, 2019, this court granted Leave to Appeal.

THE RELEVANT ZONING ORDINANCE

Cited Ordinance 15.050 governs RA One-Family General Residential Districts. Ordinance 15.051 – Intent (being section 35.9) states that "The intent is to provide for an environment of predominantly low-density single unit dwellings along with other residentially related facilities…" (See a copies of Ordinance 15.050 et seq. attached as Exhibit A in the Appendix.) [1]

Ordinance 15.052 – Principal uses permitted (being section 35.10), states, in relevant part, that "no building or land shall be used and no building shall be erected except for one or more of the following specific uses, unless otherwise provided in this Ordinance. (1) One-family dwellings.

[1] All ordinances cited herein were obtained from the website here: https://library.municode.com/mi/st._clair_shores/codes/compilation-general_and_zoning, last accessed on July 17, 2019.

… (6) Home occupations or businesses, subject to the standards of 15.516 Home Occupations or Businesses." (See Exhibit A, *supra*)

Ordinance 15.022(24) – Definitions – defines "Dwellings, One-Family" as "A detached or attached residential dwelling unit designed for and occupied by one (1) family only, and having individual entrance ways and garage facilities." (See Exhibit A, *supra*.)

Ordinance 15.022(33) defines "FAMILY" as: "(a) One or more persons related by blood or marriage occupying a dwelling unit and living as a single nonprofit housekeeping unit, or (b) A collective number of individuals living together in one house under one head, whose relationship is of a permanent and distinct domestic character, and cooking as a single housekeeping unit. This definition shall not include any society, club, fraternity, sorority, association, lodge, combine, federation, or group, coterie, or organization, which is not a recognized religious order, nor include a group of individuals whose association is temporary and resort-seasonal in character or nature." (See Exhibit A, supra.)

Ordinance 15.516 – Home Occupations or Businesses (allowed in RA One-Family General Residential Districts), states:

All home occupations or businesses shall be subject to the following requirements:

> 1. A home occupation or business must be clearly incidental to the principal use of the dwelling unit for dwelling purposes. All activities shall be carried on within the enclosed residential structure. There shall be no outside display of any kind, or other external or visible evidence of the conduct of the home occupation or business.
> 2. A home occupation or business shall not change the residential character of the premises or surrounding residential area, either in terms of use or appearance.
> 3. A home occupation or business shall not create a nuisance or endanger the health, safety, welfare, or enjoyment of any other person in the area, by reason of noise, vibration, glare, fumes, odor, unsanitary or unsightly conditions, fire hazards, or the like, involved in or resulting from such home occupation or business.
> 4. Only a resident of the dwelling shall be engaged or employed in the home occupation or business.

5. There shall be no vehicular traffic permitted for the home occupation or business, other than domestic trips and routine deliveries normally expected for a single dwelling in a residential area.
6. The home occupation or business shall not require, or result in, any exterior alterations to the dwelling or the property upon which the dwelling is located.
7. No material or mechanical or electrical equipment may be utilized except that which is necessarily, customarily, and ordinarily used for household or leisure purposes.
8. Direct sales of products to individuals on the premises of a home occupation or business shall be permitted if such occurrence does not violate any other sections of this ordinance and with the exception of garage sales. Garage sales shall abide by the provisions set forth in Section 19.156 Residential District Signs.
9. No storage or display of goods within the dwelling unit shall be visible from the outside of the dwelling unit.
10. The home occupation or business shall not require additional off-street parking spaces or loading/unloading areas.

Home based occupations or businesses shall not require a permit.

(See Exhibit A, *supra*.)

STANDARD OF REVIEW

This Court reviews the interpretation of ordinances de novo. *Soupal v Shady View, Inc*, 469 Mich 458, 462 (2003). Ordinances are interpreted in the same manner as statutes; this Court must apply clear and unambiguous language as written, and any rules of construction are applied "in order to give effect to the legislative body's intent." *Brandon Charter Twp v Tippett*, 241 Mich App 417, 422 (2000).

ARGUMENT

None of the provisions of Ordinance 15.050 prohibit short-term rentals. The property in question is a single-family residence with all the relevant characteristics. There is nothing about renting that changes the character of the usage. In fact, renting homes in the R-A One Family General Residential District is commonplace. A Freedom of Information Act (FOIA) request was submitted to St. Clair Shores which asked for "A list of all non-owner occupied rental units in areas zoned as single family residences (R-A Single Family Residentially Zoned)." St. Clair

Shore's response revealed that there are more than 2,000 certified rental units in the R-A Single Family Residentially Zoned district. (See the Affidavit of Jarrett Skorup attached as Exhibit B in the Appendix.)

It may be relevant to note that the long-term rental ordinance does not apply in this situation for the reason that the required registration applies specifically to "Owners of multi-residential rental premises and owners of non-owner occupied residences or rental premises…" (See, Ordinance 18.203 – "Registration of rental properties; application and inspection," a copy of which is attached as Exhibit C in the Appendix.) It is believed to be undisputed that this subject property is neither a multi-residential nor a non-owner occupied residence. Instead, it is a single-owner occupied dwelling that has been occasionally rented for a short time to paying guests.

So renting is not a use that is explicitly or even inherently inconsistent with the purpose of the district, as it is commonplace there.

It is also significant that "home occupation or business" usage is allowed in the district. Ordinance 15.516 describes home occupations or businesses, and shows that such home occupations or businesses are similar to the use of the home for short-term rentals. A plain reading of the ordinance would indicate to homeowners that such a use would be allowed. A short-term rental is incidental to the principal use of the dwelling unit – as this is Appellant's one and only residence. (See, Exhibit A, 15.516(1).) This short-term rental does not change the residential character of the premises or surrounding area. (See, Exhibit A, 15.516(2).) No one has alleged that the short-term rental has "create[d] a nuisance or endanger[ed] the health, safety, welfare, or enjoyment of any other person in the area, by reason of noise, vibration, glare, fumes, odor, unsanitary or unsightly conditions, fire hazards, or the like…" (See, Exhibit A, 15.516(3).) In short-term rentals, as in home occupations, only the resident of the dwelling is employed in the home occupation or business. (See, Exhibit A, 15.516(4).) Short-term rentals do not create

vehicular traffic "other than domestic trips and routine deliveries normally expected for a single dwelling in a residential area." (See, Exhibit A, 15.516(5).) The use has not resulted in exterior alterations, and none have been alleged. (See, Exhibit A, 15.516(6).) No material or mechanical or electrical equipment has been utilized except that which is necessary, customary, and ordinarily used for household or leisure purposes. (See, Exhibit A, 15.516(7).) No sale of products to individuals on the premises has been made. (See, Exhibit A, 15.516(8).) No storage or display of goods is visible outside of the dwelling unit. (See, Exhibit A, 15.516(9).) No additional off-street parking spaces or loading/unloading areas have taken place. (See, Exhibit A, 15.516(10).)

So a thorough reading of the home-occupation or business ordinance does not give any indication that a short-term rental in the zone would be prohibited. On the contrary, it would appear to allow such an activity, and do so without a permit. Yet the Appellee has argued that such a rental is a *per se* violation of the zoning ordinance.

It is not disputed that, in general, a municipality could regulate and perhaps ban such short-term rentals. It is believed that several municipalities have done so.[2] But those other municipalities have done so through validly-enacted ordinances which are specific on this matter. Michigan municipalities enjoy a broad range of powers. Michigan's form of government for home rule cities has often been summarized as any power not specifically enumerated and denied to the municipality is allowed. ""[P]owers granted to counties ... by [the] constitution and by law shall include those fairly implied and not prohibited by [the] constitution." *Rental Properties Owners Ass'n of Kent County v Kent County Treasurer*, 308 Mich App 498, 525 (2014).

[2] See, for example, The Detroit News, October 9, 2017, https://www.detroitnews.com/story/news/politics/2017/10/09/airbnbs-rights-nuisance-complaints/106455878/ "Other cities and townships — primarily vacation hotspots near water — have enacted short-term rental ordinances, including Grand Haven and Ferrysburg. In Traverse City, short-term rental homes are regulated like bed and breakfasts. Owners must be present when renters are there."

Home rule cites have broad powers to enact ordinances for the benefit of municipal concerns under the Michigan Constitution. Const. 1963, Art. 7, § 22 provides:

> Under general laws the electors of each city and village shall have the power and authority to frame, adopt and amend its charter, and to amend an existing charter of the city or village heretofore granted or enacted by the legislature for the government of the city or village. Each such city and village shall have power to adopt resolutions and ordinances relating to its municipal concerns, property and government, subject to the constitution and law. No enumeration of powers granted to cities and villages in this constitution shall limit or restrict the general grant of authority conferred by this section.

Const. 1963, Art 7, § 34 of the Michigan Constitution further states:

> The provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor.

The authority of home rule cities to enact and enforce ordinances is further defined by the home rule cities act, MCL117.1 *et seq*. It provides, in relevant part, at MCL 117.4j:

> For the exercise of all municipal powers in the management and control of municipal property and in the administration of the municipal government, whether such powers be expressly enumerated or not, for any act to advance the interests of the city, the good government and prosperity of the municipality and its inhabitants and through its regularly constituted authority to pass all laws and ordinances relating to its municipal concerns subject to the constitution and general laws of this state.

However, it must be remembered and emphasized that municipalities only have these powers when they "***adopt resolutions and ordinances*** relating to its municipal concerns," Michigan Constitution. Const. 1963, Art 7, § 22, supra, or where they "***pass all laws and ordinances*** relating to its municipal concerns." *Kent County,* supra. (Emphasis added.)

In the matter at hand, no law, resolution, or ordinance has been passed that clearly prohibits short-term residential rentals from occurring next door to the long-term rentals and home-based businesses which occur in the R-A One-Family General Residential District.

One of the foundational principals of our jurisprudence is *nulla poena sine lege* ("no penalty without a law"). Our United States Supreme Court has said:

> In this way we maintain two fundamental maxims. … The second, which is still more important, is '*Nullum crimen, nulla poena, sine lege*.' Unless there be a violation of law preannounced, and this by a constant and responsible tribunal, there is no crime, and can be no punishment.' 1 Cr. Law Mag. 56.

Sparf v United States, 15 SCt 273, 288 (1895). This has been more recently summarized:

> [This] violates a principle-encapsulated in the maxim *nulla poena sine lege* - which "dates from the ancient Greeks" and has been described as one of the most "widely held value-judgment[s] in the entire history of human thought." J. Hall, General Principles of Criminal Law 59 (2d ed.1960).

Rogers v Tennessee, 121 SCt 1693, 1703 (2001) (Scalia, A., dissenting).

This principle of the necessity of notice is one of the underlying bases for challenges to a statute or ordinance as being unconstitutionally vague. Our Court of Appeals has said that an ordinance is unconstitutionally vague when it does not give the person subject to it a clear understanding of the conduct that is prohibited. Examples (2) and (3) apply here:

> In *Dep't of State v. Michigan Ed. Ass'n—NEA*, 251 MichApp 110, 116, 650 NW2d 120 (2002), this Court set forth the three ways in which to challenge an ordinance on the basis that it is unconstitutionally vague:
> "A statute may qualify as void for vagueness if (1) it is overbroad and impinges on First Amendment freedoms, ***(2) it does not provide fair notice of the conduct it regulates, or (3) it gives the trier of fact unstructured and unlimited discretion in determining whether the statute has been violated***."

Shepherd Montessori Center Milan v Ann Arbor Charter Tp, 259 Mich App 315, 342-3 (2004) (emphasis added).

Such vagueness also gives rise to concerns about substantive due process:

> Substantive due process requires standards in a statute to be "reasonably precise" in order to ensure that individuals are not held responsible by the state for conduct that they could not reasonably understand to be proscribed. *Sillery v Bd of Medicine*, 145 Mich App 681, 686, 378 NW2d 570 (1985); *K Mart Corp v Dep't of State*, 127 Mich App 390, 395, 339 NW2d 32 (1983). Stated another way, "[t]o give fair notice, a statute must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited or required." *People v Noble*, 238 Mich App

> 647, 652, 608 NW2d 123 (1999) (internal citation omitted); *In re Gosnell*, 234 Mich App 326, 334, 594 NW2d 90 (1999).

Department of State v Michigan Education Association - NEA, 251 Mich App 110, 116 (2002).

Zoning ordinances have been found to be void for vagueness. For example, in *West Bloomfield Charter Township v Karchon*, 209 Mich App 43 (1995), an ordinance regulating behavior in "woodlands" was impermissibly vague:

> As is apparent, a clear definition of the term "woodland" is imperative to the validity of the ordinances. The definition of the term "woodland" is the foundation for the entire regulatory scheme of the ordinances. A clear understanding of the term "woodland" is critical to the administration and purpose of an ordinance that purports to regulate uses of wooded areas. ***Unless a person of common intelligence can understand what a "woodland" is, that person has no way of knowing whether contemplated activities are regulated or proscribed by the ordinances***.

West Bloomfield Charter Township, *supra*, at 51 (emphasis added). In the situation here, a person of ordinary intelligence has no way of discerning that short-term rentals in the district are outlawed when he reads the text of the ordinance.

No reasonable construction of Ordinance 15.050 provides fair notice to Appellant that he cannot occasionally host short-term renters. And any trier of fact who found a violation would have used "unstructured and unlimited discretion in determining whether the statute has been violated" for the reason that the ordinance does not mention such short-term rentals, nor indicate that such occasional use conflicts with the intended uses spelled out in Ordinance 15.052 – either a single-family dwelling and/or a home occupation or business. Because there is nothing in the ordinance to rely upon as regards to short-term rentals, finding a violation of this ordinance necessitates unstructured and unlimited discretion. Appellee does not possess such discretion. While it within Appellee's powers to enact such an ordinance, it has not done so yet. It cannot hold residents to account for a law which is not on the books.

The trial court relied on the reasoning of an unpublished Court of Appeals opinion which came out while this case was pending trial, *Concerned Property Owners of Garfield Township, Inc v Charter Township of Garfield*, Docket No. 342831 (2018 WL 5305235). A copy of this opinion is attached as Exhibit D in the Appendix. The trial court acknowledged that *Garfield* was not binding precedent, but still found it persuasive. See the December 19, 2018 Motion Hearing Transcript at 32.

However, the *Garfield* opinion should not persuade as it was wrongly decided and lacked crucial distinctions that are at issue here. *Garfield* was based on an ordinance that was similar to the one at issue here, and found that such language prohibited the use of property for any kind of transient occupation. However, it reached this conclusion by misapplying a Supreme Court case which dealt with the status of *timeshare* ownership - *O'Connor v Resort Custom Builder, Inc,* 459 Mich 335 (1999). *O'Connor* dealt with a form of rotating co-ownership where there was never one permanent resident. This went to the characteristic of the ownership and constant use – not whether certain occasional uses, such as home-based businesses or short-term rentals, were allowed to be conducted by the permanent resident. Further, there is no evidence that *Garfield* had an ordinance, such as Appellee has, which allows home-based businesses. So there is no analysis as to whether or not a short-term rental would easily fit into that category of business. Secondly, *O'Connor* dealt with restrictive covenants and its holding was based on contract interpretation. Contract interpretation differs from statutory/ordinance interpretation in at least one important respect – a vague contract can still be enforced and/or rewritten by the courts, while a vague criminal prohibition cannot. Lastly, *O'Connor* actual supports Appellant's position, not the Appellees, in regards to short-term rentals.

In greater detail: First, in *O'Connor*, the court dealt with a timeshare ownership arrangement, with a different family residing as the sole resident, for only a week, on a rotating

basis, and no single permanent resident. This is quite different from a single homeowner who has occasional guests staying with him. This distinction was made explicit in *O'Connor*. *O'Connor* determined that such a timeshare arrangement is "too temporary" to be considered a single-family use:[3]

> [W]hat's a residential purpose is the question. Well, a residence most narrowly defined can be a place which would be one place where a person lives as their permanent home, and by that standard people could have only one residence, or the summer cottage could not be a residence, the summer home at Shanty Creek could not be a residence if the principal residence, the place where they permanently reside, their domicile is in some other location, but I think residential purposes for these uses is a little broader than that. It is a place where someone lives, and has a permanent presence, if you will, as a resident, whether they are physically there or not. Their belongings are there. They store their golf clubs, their ski equipment, the old radio, whatever they want. It is another residence for them, and it has a permanence to it, and a continuity of presence, if you will, that makes it a residence.
>
> *O'Connor* at 345.

Here, there is no question that this is Appellant's permanent residence. He meets all of the criteria. It is where he lives. His belongings are there. He has renovated, improved, and kept up the house and treats it like any other homeowner might. The question is whether or not he can have overnight guests there who pay. Does his use change the characteristics of the residence such that it exceeds what is allowable by the ordinance? The short-term renters are not the resident. They are mere guests or home-based business clientele. As we saw, this residential zoning area allows home-based businesses so long as they do not affect specified signage, parking, traffic, etc. These qualifications are all consistent with the way the residence has been used – there have been no accusations to the contrary. None of the reasoning that applied to timeshare ownership applies to a long-term resident homeowner occasionally hosting short-term rentals.

[3] The *O'Connor* court adopted the trial court's reasoning as its own.

Second, the fact that *O'Connor* was based on restrictive covenants is significant, and makes it inapplicable to ordinances, as the *Garfield* court did. "[T]he Michigan Supreme Court has held that definitions employed in housing codes and zoning ordinances do not control the interpretation of restrictive covenants. *Phillips v Lawler*, 259 Mich. 567 (1932), *Morgan v Matheson*, 362 Mich 535, 541, (1961), Cf. *Karpenko v Southfield*, 75 Mich App 188, 193, n.3 (1977)." *Jayno Heights Landowners Ass'n v Preston*, 85 Mich App 443, 447 (1978). An important difference is that ordinances and statutes are struck down as unconstitutionally vague when they cannot be clearly read and understood. Contracts are not struck for that same reason. Rather, if the contract has a latent ambiguity, the courts may look to extrinsic evidence to determine what the parties originally intended, and try to enforce that meaning so both sides get the benefit of their bargain. See, for example, *Shay v Aldrich*, 487 Mich 648 (2010). With a criminal ordinance, courts may not struggle to interpret what the municipality really meant. If it is vague or ambiguous, it is not permitted to be enforced. "A statute may qualify as void for vagueness if … it does not provide fair notice of the conduct it regulates…" *Shepherd Montessori*, supra. The *O'Connor* court had to reach an interpretation of a contract between two private-party groups - certain home owners and the developer. This is significant because deed restrictions are something that one party may have relied upon when they entered into that contract. "We also emphasized in *Wood* the importance of protecting homeowners who rely on a restriction that their subdivision will be limited to residential purposes:" *O'Connor* at 341. If a deed restriction, even a vague one, is not enforced, one of the parties may lose the benefit of the bargain he made, and then he would have given up something and not gotten the agreed-upon benefit in return. That same problem does not occur with an ordinance because it is not a contract made between private parties. An ordinance is a law that all must obey, and it cannot be said that refusing to enforce a vague ordinance deprives the municipality of its bargain, or forces it to forgo whatever it gave up to get that bargain. The

municipality has suffered no hardship – if it wants to ban short-term rentals, it just has to go back and pass a clearly-written ordinance.

Lastly, as regards *O'Connor*, this Supreme Court opinion, which is binding precedent to the extent it applies to this situation, favors the Appellant. The *O'Connor* court specifically said that short-term rentals of residences were different from timesharing arrangements – a distinction that *Garfield* appears to have missed. The matter was at issue because it had been argued that enforcement of any restrictions against timeshare ownership had been waived because the developer had allowed short-term rentals. The Supreme Court in *O'Connor* held that short-term rentals where not the same as timeshares, and the allowance of them did not waive the restrictions on timeshares:

> With regard to whether plaintiffs waived the use restriction by allowing short-term rentals, we agree with the circuit court that such an alternative use is different in character and does not amount to a waiver of enforcement against interval ownership. Further, defendants have not demonstrated that the occasional rentals have altered the character of the Valley View subdivision to an extent that would defeat the original purpose of the restrictions.

O'Connor at 346. Yet the *Garfield* court used the *O'Connor* reasoning to apply to such short-term rentals, despite the *O'Connor court* holding that these were different.

While on appeal in the Circuit Court, another opinion on a similar matter was handed down. *Reaume v Township of Spring Lake*, ____ Mich App ___ (2019), was published after both parties had filed their initial briefs. The Appellee believed this opinion to be determinative, and the Circuit Court found that it dealt with "an ordinance with similar language." But the language at issue in *Reaume* has a significant difference and, to the extent which this opinion applies, it buttresses Appellant's contentions. *Reaume* cannot support Appellee's position because the zoning ordinance in question in *Reaume* had a significant difference from the one at issue here – Spring Lake's ordinance did not allow business activities in its R-1 Residential District. St. Clair Shores

allows such uses in its residential district. And *Reaume* in turn relies on a Supreme Court opinion which specifically says that a commercial use is not necessarily incompatible with a residential use. So even if St. Clair Shores did not specifically allow commercial activities in residential homes in its R-1 District, the Supreme Court precedent relied upon in *Reaume* says the opposite of what Appellee claims.

It is important to note that since this Leave to Appeal has been granted, our Supreme Court has considered the homeowner/appellant's application for leave to appeal in the matter of *Reaume*. (See a copy of the Supreme Court's November 27, 2019 Order requiring additional briefing on *Reaume*, included as Exhibit E.) The Supreme Court requested briefing on these issues:

> (1) whether the Court of Appeals improperly relied on the character of the relationship that defines the term "family" in the zoning ordinance in order to conclude that the permitted use of a "Dwelling, Single Family" in the R-1 district does not include short-term rentals; and (2) whether, aside from the definition of "family," the appellant met her burden of proof to establish that her actual use of 18190 Lovell Road as a short-term rental complied with the permitted use of the property as a "Dwelling, Single Family" before the township adopted Ordinance 255 and Ordinance 257.

Exhibit E, supra.

Reaume is similar to this matter in that it involves the interpretation of the meaning of "residential" in a zoning ordinance. But the zoning law at issue was significantly different than St. Clair Shores'. (It should also be significant that *Reaume* involved the issuance of a permit, and not a criminal prosecution, as previously discussed.) The *Reaume* court stated that its opinion "[I]s consistent with case law establishing that commercial or business uses of property, generally meaning uses intended to generate a profit, are inconsistent with residential uses of property. See *Terrien v Zwit*, 467 Mich 56, 61-65; 648 NW2d 602 (2002)." *Reaume* slip copy at 7. Even if this were a correct statement of law, it does not apply to our situation here. Appellant has shown how Appellee allows home-based businesses in its residential district. Home-based businesses are

"intended to generate a profit," and yet these are allowed in the residential district. Therefore such commercial use, regardless of what it "generally" is, cannot be inconsistent with such business uses specifically allowed in the Appellee's residential district. It is clearly allowed as a home-based business within the parameters of Ordinance 15.516, as Appellant has shown.

Furthermore, although *Reaume* does not apply here for the reason stated above, Appellant contends that, in drawing its conclusion, the *Reaume* court misconstrued our Supreme Court's holding in *Terrien v Zwit*, which it relied upon. The *Reaume* court stated that: "[C]ommercial or business uses of property, generally meaning uses intended to generate a profit, are inconsistent with residential uses of property." *Reaume*, slip copy at 7. What *Terrien* actually held is different, and bears significantly on our matter here.

Terrien involved a daycare facility operating in a subdivision that was subject to a restrictive covenant. *Terrien* at 60. The covenant specifically barred any commercial use of the property. The Supreme Court specifically held that banning commercial uses is not the same as permitting only residential uses. "We respectfully disagree with both lower courts. A covenant barring any commercial or business enterprises is broader in scope than a covenant permitting only residential uses." *Id* at 60. The covenant at issue in *Terrien*, stated: "No part or parcel of the above-described premises shall be used for any commercial, industrial, or business enterprises nor storing of any equipment used in any commercial or industrial enterprise." *Id* at 61. The *Terrien* court cited previous precedent from *Beverly Island Ass'n v Zinger*, 113 Mich App 322 (1982) which held:

> [*Beverly Island Ass'n*] further recognized that a "restriction allowing residential uses permits a wider variety of uses than a restriction prohibiting commercial or business uses." *Id*. While the former proscribes activities that are nonresidential in nature, the latter proscribes ***activities that, although perhaps residential in nature, are also commercial, industrial, or business in nature as well.***

Terrien at 63-64 (emphasis added). *Terrien* explicitly recognized that commercial and business uses can also be residential, and hammered home this point: "In other words, an activity may be both residential in nature and commercial, industrial, or business in nature." *Id* at 64. And in *Terrien*, the home use of a daycare was disallowed, not because it was in a residential area, but because it was a commercial business in an area where a covenant specifically prohibited commercial businesses. Using a variety of dictionary definitions for "commercial use," "commercial activity," and "business," the *Terrien* court found that the daycare operation was a prohibited business. *Terrien* then again emphasized this point in the majority's response to a dissent, which is part of the majority opinion:

> Justice Kelly's dissent first concludes that "family day care homes" are "residential in nature." However, as we have already pointed out, the issue here is not whether the operation of a "family day care home" is a residential use. Rather, the issue is whether such an operation is a commercial or business use. As we explained above, residential and commercial or business uses of property are not mutually exclusive; an activity may be both residential in nature and commercial or business in nature. Therefore, the dissent's assertion that "family day care homes" are residential in nature simply is irrelevant here, where the issue is whether the operation of a "family day care home" violates a covenant prohibiting *commercial or business* uses.

Terrien at 73 (emphasis in original, footnote omitted). In summary, the *Terrien* court held that it was not determining whether or not a business was a residential use because it could be both. Therefore *Reaume*'s statement that *Terrien* stands for the proposition that "commercial or business uses of property, generally meaning uses intended to generate a profit, are inconsistent with residential uses of property" is clearly wrong. *Reaume*, slip copy at 7. Our Supreme Court in *Terrien* was quite explicit that: "As we explained above, residential and commercial or business uses of property are not mutually exclusive." Supra.

Again, compare this to the current situation where Appellee's ordinance clearly allows home-based businesses and occupations, as well as long-term rentals. A reasonable person would

not conclude from the ordinances that short-term rentals are not allowed in a home where the owner resides, when both long-term rentals and home-based businesses are allowed in that residence. A conviction on that count violates due process, makes the ordinance unconstitutionally vague, and violates the principle that one cannot be convicted for something that is not clearly prohibited.

In the broader sense, the question is: Can zoning restrictions criminally penalize a homeowner when he is not put on fair notice of what is prohibited? It is undisputed that the zoned area allows long-term rentals. It is undisputed that the zoning area allows home-based businesses. The homeowner remains the only resident of the home. How then can a home-owner be expected to know that a short-term guest is not allowed? If such short-term rentals are disallowed, then homeowners could not know if hosting un-related guests is against the law. The fact that the guests pay for their stay does not change in any meaningful sense the way in which the home use affects the neighborhood. Without the police coming to investigate, the difference between paying and non-paying guests is not apparent to an objective, outside, observer. So how then can the former be banned and not the latter? Their effect on the neighborhood are identical. If such paying guests pose a problem due to noise or similar disruption, then the law can deal with that according to the problems they cause – presumably with ordinances that are already on the books.

But as the actions in this case show, a resident is being criminally prosecuted for an action that is not clearly prohibited. An analogous hypothetical would be if Appellant (or any resident) hosted a wedding and reception with many attendees. The police and city prosecutor show up and criminally charge the host. The resident correctly shows that the code does not prohibit nor even mention this use, nor any uses like it, and argues that such parties are a common use of residences. The prosecutor finds an opinion showing that a building in a residentially-zoned area may not be used exclusively as a wedding chapel and reception facility, and the trial court applies that to the

situation at hand. This is all wrong. The resident hosting a wedding and reception could have had no notice that what he was doing was illegal. Even if he had enlisted lawyers to investigate the matter, he would have gotten, at worst, conflicting opinions. It is more likely that the lawyers would say that it is fine and acceptable – go ahead and host the wedding. The nature of the guests does nothing to change the status of the permanent resident who hosted. What he was doing was a common enough use of his home. Homeowners host parties. Homeowners have overnight guests.

In addition to making a clear distinction between short-term rentals and timeshares, the true binding precedent from *O'Connor*, supra, is this citation:

> "[A]ll doubts are resolved in favor of the free use of property." This principle is fundamental, and elsewhere we have refused to infer restrictions that are not expressly provided in the controlling documents. *Margolis v. Wilson Oil Corp*., 342 Mich 600, 603 (1955).

What has happened in this matter is that the Appellee has impermissibly inferred restrictions that are not expressly provided for in the ordinances.

CONCLUSION AND REQUEST FOR RELIEF

In the matter before us, Ordinance 15.050 does not prohibit short-term rentals. The clear language of the ordinance makes no mention of such short-term rentals. Nor can the clear language be read to prohibit such rentals. Long-term rentals are clearly allowed. Enforcement of a non-existent law is not allowed. If the Ordinance were to be read as the City wishes it to be, it would be unconstitutionally vague without any of the necessary clarity which would have provided fair notice of the prohibited conduct. Such vagueness violates substantive due process. For these reasons the decision of the Circuit Court and the trial court should be overturned.

Additionally, for the reasons stated in this brief, Appellant believes that *Reaume* is not controlling on this matter, as the Circuit Court here appears to have held. If this court disagrees

with Appellant and believes that *Reaume* controls, yet agrees with Appellant that *Reaume* was wrongly decided and misapplied *Terrien*, then Appellant respectfully requests that this Court follow the procedures set forth in MCR 7.215(J)(2) and explain its disagreement with the prior decision.

Respectfully submitted,
December 30, 2019

/s/ Derk Wilcox
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