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STATE OF MICHIGAN
IN THE SUPREME COURT

MICHAEL DORR,

Plaintiff-Appellant,

v

THE PEOPLE OF THE CITY OF ST. CLAIR SHORES,

Defendant-Appellee.

Supreme Court Docket No. 162337

Court of Appeals Docket No. 349910

Macomb County Circuit Court
Case No. 2019-000135-AR
Honorable Diane M. Druzinski

Municipal Court Case No. 031800005
Honorable Craigen J. Oster

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STATEMENT OF JURISDICSTION

Amicus Curiae, Michigan Realtors®, adopts the Jurisdictional Statement of Appellant, Michael Dorr, as stated in his Application for Leave to Appeal ("Application"), filed on December 9, 2020.

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STATEMENT OF QUESTIONS PRESENTED

I. WHETHER THE COURT OF APPEALS ERRED IN ITS CONCLUSION THAT THE OCCASIONAL USE BY DEFENDANT OF HIS PRINCIPAL RESIDENCE AS A SHORT-TERM RENTAL WAS NOT A PERMITTED USE WITHIN THE MEANING OF PLAINTIFF'S ZONING ORDINANCE?

The Court of Appeals answered:	"Yes."
The Circuit Court answered:	"No."
The District Court answered:	"No."
Plaintiff-Appellee answers:	"No."
Defendant-Appellant answers:	"Yes."
Amicus Curiae answers:	"Yes."

II. WHETHER PUBLIC POLICY CONCERNS FAVOR REVERSAL OF THE COURT OF APPEALS OPINION?

The Court of Appeals did not answer.

The Circuit Court did not answer.

The District Court did not answer.

Plaintiff-Appellee would answer:	"No."
Defendant-Appellant would answer:	"Yes."
Amicus Curiae answers:	"Yes."

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I. INTRODUCTION/STATEMENT OF INTEREST[1]

Second homes in Michigan resort areas, whether called cottages, cabins or camps, have been a mainstay of Michigan's vacation and tourist economy for generations. As second homes, they pay all school taxes – contributing state and local property tax support for both school operating and school debt expenses, often with high taxable values. For many owners, purchasing those homes would not have been possible without renting them for a portion of the year. On the flip side, without short-term rentals, many families would find it financially impossible to spend a week or two-week vacation together as a family in these resort communities if they could not rent a cabin or camp. As a result, renting is also a practice that goes back generations. It was not recently invented by the Internet, Airbnb or VRBO. The practice of renting second homes has long been permitted under existing zoning, as local zoning administrators have testified.[2]

Short-term rentals also support the value of other cottages and homes in resort communities. In fact, Michigan resort communities depend on short-term rentals as a regular and important part of the community and its economy. Local restaurants, art, book and gift shops, and other businesses, which constitute the heart of resort business communities, are financially dependent on vacationers and second home owners who rent these cottages and homes.

[1] Counsel for a party did not author any part of this Brief. Neither counsel for a party nor any party made a monetary contribution intended to fund the preparation or submission of this Brief.

[2] See, e.g., *Bauckham v Skarin*, unpublished opinion of the Allegan County Circuit Court, issued April 5, 2006, p 7, app sub nom *John H. Bauckham Trust v Petter*, unpublished opinion per curiam of the Court of Appeals, issued September 19, 2017 (Docket No. 332643), attached as Exhibit 1.

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The State of Michigan borders four out of five of the Great Lakes and boasts 3,288 miles of freshwater coastline, including 1,056 miles of island shoreline. That puts Michigan at the top of the list for the most freshwater coastline of any state in the continental United States.

Michigan's named rivers exceed 300 – 16 of which are designated Natural River systems. Michigan has 62,798 inland lakes with a surface area of 0.1 acres or larger, all providing critical aquatic habitats for 154 species of freshwater fish. Surrounding many of these inland lakes are Michigan's 74 State Parks. The value of the shoreline of Michigan's inland lakes alone exceeds $200 billion and generates $3.5 billion in local property tax revenue for local governments.

Michigan's bounty of natural resources has enabled its residents to enjoy the benefits of a year-round tourist industry through the promotion of recreational activities including fishing, hunting, boating, sailing, canoeing, kayaking, camping, bicycling, hiking, skiing, snowmobiling, snowboarding and ice skating. And, at last count, Michigan was fourth on the list of states with the most golf courses at 825.

With a multi-million dollar resort industry already in place, a state and country on the cusp of reopening as this brief is written, and a Governor who a long year ago was poised to "give new life to the Pure Michigan tourism promotion and branding campaign,"[3] the advent of online marketplaces for arranging short-term rental vacation homes moves Michigan's unique geography and long resort history forward. However, instead of supporting this vital part of Michigan's economy, local governments have turned zoning ordinances on their head, "reinterpreting" their ordinances to now prohibit short-term rentals – despite decades of prior

[3] Egan and Gray, *Whitmer Budget Revives Pure Michigan, Boosts Schools and Environment*, Detroit Free Press (February 7, 2020), p A1.

interpretation and practice to the contrary. The effect has been to eradicate the basic rights of long-time property owners. The right to continue lawful use of property is at the heart of zoning and constitutional protections for property owners, and "local control" should not be a cover for the elimination of those rights.

Michigan Realtors® (the "Association") is Michigan's largest nonprofit trade association, comprising 41 local boards and a membership of more than 33,000 brokers and salespersons licensed under Michigan law. Each year, the Association's members handle thousands of transactions involving short-term vacation rental property and act as professional property managers for these rental properties.

One of the primary goals of the Association is to oppose laws and court decisions which restrict or otherwise impede long-held property rights and the ability of its members to conduct and grow business in the State of Michigan. The opinion of the Court of Appeals in this case greatly diminishes the services the Association's members offer and stifles a traditional resort culture and economy.

In addition, the present case involves issues which are significant to both this State's jurisprudence and the Association's members. In general, the Court of Appeals decision impinges on the broad freedoms granted to Michigan citizens to legally use their property and, in this instance, be free from arbitrary criminal conviction. More specifically, the Court of Appeal's perplexing interpretation of the Ordinance at issue, to exclude short-term rentals, adversely impacts many similarly situated property owners, potential tourists, as well as employees and businesses associated with Michigan's tourist industry. The resultant depreciation of property values forecasts a drop in tax revenue for local governments and the support of Michigan's schools.

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The Association believes that this is a case of important public interest, and that the outcome of this case is of continued and vital concern to the Association, its members and residents of the State of Michigan. The Association's experience and expertise could be beneficial to this Court in the resolution of the issues presented by this appeal. In *Grand Rapids v Consumers Power Co,* 216 Mich 409, 415; 185 NW 852 (1921), this Court stated: "This Court is always desirous of having all the light it may have on the questions before it. In cases involving questions of important public interest, leave is generally granted to file a brief as amicus curiae . . . ." The Association, therefore, seeks leave to file this brief amicus curiae in support of the position of the Defendant-Appellant.

II. STATEMENT OF MATERIAL FACTS

The Association accepts and adopts the Statement of Facts set forth in Defendant-Appellant's Application, as highlighted by the following:

Defendant-Appellant Michael Dorr ("Dorr") owns a single-family residence located at 22515 Ten Mile Rd, St. Clair Shores, Michigan (the "Home"). The Home is Dorr's principal residence. The Home is in an area of St. Clair Shores (the "City") that is zoned "R-A One-Family General Residential." From all that appears, once in 2017 and sometime during 2018, Dorr rented the Home to a single guest for a single night through Airbnb. For this, he was convicted of a misdemeanor violation of City Zoning Ordinance, Sec. 15.050 in the District Court.

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Dorr appealed his conviction to the Macomb County Circuit Court which affirmed his conviction. Dorr then filed an Application for Leave to Appeal with the Court of Appeals which granted leave but then likewise, in a 2-1 decision, affirmed his conviction.[4]

III. ARGUMENT

A. Standard of Review

This Court reviews de novo the question of law involving the interpretation of an ordinance. *Soupal v Shady View, Inc*, 469 Mich 458, 462; 672 NW2d 171 (2003).

B. The Court of Appeals' Majority Erred in Its Interpretation of the City's Zoning Ordinance

The Court of Appeals majority construed the City's Zoning Ordinance in a novel fashion not previously advanced by the parties or the lower courts. This interpretation, however, does not withstand scrutiny and aptly demonstrates why the varying interpretations of this ordinance cannot justify Dorr's conviction or the loss of a lawful use of his property.

1. The Plain Language of the Ordinance Mandates Reversal of the Court of Appeals' Majority Opinion

In Michigan, the rules of statutory construction are applied when interpreting a zoning ordinance. *Kalinoff v Columbus Twp*, 214 Mich App 7, 10; 542 NW2d 276 (1995) (citation omitted). Accordingly, ordinances must be interpreted so as to give effect to the intent of the enacting legislative body. *Bonner v Brighton*, 495 Mich 209, 222; 848 NW2d 380 (2014). When the language used in an ordinance is clear and unambiguous, courts may not engage in judicial interpretation, and the ordinance must be enforced as written. *Id.* (citation omitted).

[4] The *per curiam* opinion bears Judge Borrello's name with Judge Jansen concurring "in the result only." Judge Swartzle authored a dissenting opinion. A copy of the Court of Appeals Opinion ("COA Op") is attached as Exhibit 2.

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“Courts may not rewrite the plain language of the [ordinance] and substitute their own policy decisions for those already made by the Legislature.” *McGhee v Helsel,* 262 Mich App 221, 226; 686 NW2d 6 (2004) (citation omitted).

The City Zoning Ordinance provides, in relevant part:

> In the R-A One-Family General Residential District no building or land shall be used and no building shall be erected except for one or more of the following specified uses, unless otherwise provided in this Ordinance.
>
> 1) One-Family detached dwellings.
>
> * * *
>
> (6) Home occupations or businesses, subject to the standards of 15.516 Home Occupations or Businesses.

City Zoning Ordinance (“CZO”), §15.052. Section 15.516 of the CZO 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.

CZO §15.516.

The Court of Appeals majority dismissed, without discussion, the claim that the occasional use of single-family residential property for short-term rentals is permitted under §15.052(1) as a “One-Family detached dwelling.” On the contrary, simply put, there is absolutely nothing in the CZO that prohibits short-term rentals. The Home *is* a “one-family detached dwelling,” as defined in the CZO: “A detached or attached residential dwelling unit designed for and occupied by one

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(1) family only, and having individual entrance ways and garage facilities." CZO §15.022(24). Even as a short-term rental, the Home is only used by one family at a time. Therefore, the plain language of the CZO does not prohibit short-term rentals in single-family residential zones – in fact, it does not address them at all. Therefore, the Court of Appeals majority interpretation of the CZO to the contrary improperly rejects the plain and unambiguous language of the CZO, adding legislative intent where none appears and, in fact, contrary to the intent as expressed in the ordinance.

2. The Court of Appeals' Majority Opinion Creates a Non-Harmonious Interpretation of the CZO

As relevant here, ordinances must be construed in a manner so as to avoid any interpretation which would render any provision surplusage or nugatory. *Johnson v Recca*, 492 Mich 169, 177; 821 NW2d 520 (2012). Stated otherwise, the various provisions of an ordinance should be interpreted in a manner that ensures that they work together in harmony. *Id.*

Here, not only does the CZO not expressly prohibit short-term rentals; it specifically allows them. "Tourist homes" are prohibited in areas zoned single-family residential. CZO §18.050. However, the CZO exempts from the definition of "tourist home," "any private residence or home, the owner or occupant of which is not ***regularly*** engaged in renting any rooms in such residence or home to permanent or transient roomers who are not related to such person." CZO §18.050 (emphasis supplied). As stated by the dissent:

> My reading is in-line with the city's regulation of a "tourist house." The ordinance defines a "tourist house" as "[a] dwelling in which overnight accommodations are provided or offered for transient guests for compensation, without provision of meals." *Id.* 15.022(86). This would seem the most logical place to regulate or prohibit Airbnb rentals, but the city specifically exempted from the

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> meaning of "tourist house" "any private residence or home, the owner or occupant of which is not *regularly* engaged in renting any rooms in such residence or home to permanent or transient roomers who are not related to such person." *Id.* 18.050 (emphasis added). Defendant was convicted of renting his residence on Airbnb for a single day, and the record shows that he had similarly rented his residence for one other day in the past. Two days over a year or more does not constitute "regularly engaged" in renting one's home on Airbnb.

COA Op, Dissent, pp 1-2, Exhibit 2. Again, the plain and unambiguous language of the CZO permits short-term rentals on the undisputed facts of this case.

3. The Court of Appeals' Majority Opinion is Contrary to the Express Intent of the CZO

The City argues that the intent behind Section 150.050 is found in Section 15.051, which states:

> The RA One-Family General Residential Districts are designed to be among the most restrictive of the residential districts. The intent is to provide for an environment of predominately low-density single unit dwellings along with other residentially related facilities which serve the residents in the district.

CZO §15.051. The City claims that this statement of intent supports the exclusion of short-term rentals. That is not true. To the contrary, this statement of intent does not in any way change the permitted use or outlaw short-term rentals. It says the intent is to allow "single unit dwellings" – the exact description of the property at issue here.

Moreover, the definition of "tourist homes" reinforces that conclusion, excluding them but with the clearly stated exception for short-term rentals if the owner is not "regularly engaged" in renting. In short, short-term rentals are, by the terms of the CZO, both residential in nature and consistent with its stated intent.

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4. The Court of Appeals' Majority Opinion Regarding Incidental Use is Flawed

The final error in the majority opinion of the Court of Appeals is its interpretation of CZO §15.516, which expressly allows home occupations and businesses which are "incidental" to the use of property as a dwelling unit. The Court of Appeals majority opinion states:

> Because defendant's short-term rental business directly depends on using the dwelling unit as a dwelling for guests, defendant's business fails to satisfy the condition in 15.516(1) that the "home occupation or business must be clearly *incidental* to the principal use of the dwelling unit for dwelling purposes." (Emphasis added.) The purpose of the business is identical, not incidental, to the principal use of the dwelling unit for dwelling purposes. Defendant's short-term rental business does not comply with the requirements in 15.516 and therefore is a prohibited use under 15.052(6).

COA Op, p 3, Exhibit 2. This "logic" is flawed.

First, if the use is identical, "using the dwelling unit as a dwelling," it is permitted by the terms of the CZO. In that case, the use need not be considered separately as a home occupation or business. The guests are, in fact, using the property for a use permitted under the CZO, and the matter is at an end.

Second, even if use as a short-term rental were considered as a business, nowhere does the CZO state that the incidental use of residential property as a business must be different from the primary use in order to comply with the CZO. Further, even if it did, use of property as one's principal residence ***is not*** identical to its use as a short-term rental. Simply put, in the first instance, an owner is using the property for the purpose of living there; in the second instance, an owner is operating a business – making money. These two uses are not identical. The real issue, therefore, is whether the business use is "incidental." In this case, it is. As stated by the dissent:

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> Moreover, I read the term "incidental" more broadly than does the lead opinion, as "incidental" in this context could have either a temporal or spacial meaning—in other words, (1) the use could be "incidental" if the entire space of the home was turned over to a business use on a brief, temporary basis (e.g., a single-day's rental), just as (2) the use could be "incidental" if a room of the home was turned over to a business use on a permanent basis (e.g., a home office). In (1), the temporal use is incidental, although the spacial use is not, while in (2), the spacial use is incidental, although the temporal use is not.

COA Op, Dissent, p 2, Exhibit 2. The majority opinion of the Court of Appeals' strained interpretation of the use as both not permitted as a dwelling, and then not permitted because it is also a dwelling is both strained and contradictory, and constitutes reversible error.

C. There are Sound Policy Concerns that Weigh in Favor of Reversing the Decision of the Court of Appeals

1. Michigan is an Outlier in Reinterpreting Ordinances and Covenants to Prohibit Short-Term Rentals

The decision of the Court of Appeals in this case, and its prior decisions addressing residential use of property, are contrary to the holdings in most states. The majority of states reject the reinterpretation of ordinances and restrictive covenants to prohibit short-term rentals, applying the same terms in zoning ordinances and property restrictions as those used in the CZO.

In *Brown v Sandy City Bd of Adjustment,* 957 P2d 207 (Utah App, 1998), the Utah Court of Appeals, construed a zoning ordinance with terms similar to the CZO in St. Clair Shores, and rejected the defendant city's reinterpretation of "single-family dwelling" as prohibiting short-term rentals. More specifically, in *Brown,* the city had permitted short-term rentals for years but reversed itself without amending the ordinance. The city emphasized there, as here, the statement of intent in the ordinance, to establish "a residential environment" and "quiet residential neighborhoods favorable for family life," and argued that short-term rentals do

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not further that goal. The court pointed out, however, that the city could have expressly prohibited short-term rentals and did not. Instead, not only did the Browns' use meet the express terms of a permitted use, but by failing to expressly prohibit short-term rentals, the defendant city implicitly determined that such practices were consistent with a residential environment. *Id.* at 212. The court stated:

> The Code specifically permits use of a dwelling for *occupancy* by a single family. Thus, if a single family occupies a home the structure is being used as permitted. . . The Code does not limit the permitted use by referencing the type of estate the occupying family holds in the property or the duration of the occupancy. Thus, it is irrelevant what type of estate, if any estate at all, the occupying family has in the dwelling, i.e., whether the family holds a fee simple estate, a leasehold estate, a license or no legal interest in the dwelling. It is equally irrelevant whether the occupying family stays for one year or ten days. The only relevant inquiry is whether the dwelling is being used for one year or ten days. The only relevant occupancy is whether the dwelling is being used for occupancy by a single family; if it is, the ordinance has not been violated.

Id. at 211 (emphasis in original).

Moreover, as applied by the courts in most states, the use of the term "residential" does not rule out short-term rentals; rather, the use by the family occupying the dwelling is itself residential. For example, in *Slaby v Mountain River Estates Residential Ass'n, Inc,* 100 So 3d 569 (Ala Civ App, 2012), the Court of Civil Appeals of Alabama held that a restriction to single family residential purposes only and specifically barring commercial use did not preclude property owners from renting their vacation home on a short-term basis. *Id.* at 576, 579 and 582. In accordance with the reasoning of the majority of courts from other jurisdictions, the court held that:

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> We agree with those courts that property is used for "residential purposes" when those occupying it do so for ordinary living purposes. Thus, so long as the renters continue to relax, eat, sleep, bathe, and engage in other incidental activities, as the undisputed evidence indicates renters did in this case, they are using the cabin for residential purposes.
>
> * * *
>
> We conclude that the restriction in the covenant at issue prohibiting "commercial use" of the property does not prohibit the Slabys from renting their property on a short-term basis. We agree with the reasoning in *Pinehaven Planning Board v Brooks, supra*, and the majority of other jurisdictions that have addressed the issue, that the purposes for which the property is used in this case, such as for eating, sleeping, and other residential purposes, does not amount to commercial use.

Id. at 579 and 582.

The *Slaby* court relied on *Pinehaven Planning Bd v Brooks,* 138 Idaho 826; 70 P3d 664 (2003), in which the restrictive covenants at issue contained provisions prohibiting "commercial or industrial ventures or businesses of any type" as well as a restriction for "no more than one (1) single family dwelling." *Id.* at 665. The owners of a home subject to these restrictive covenants listed the property for rental as a vacation home. The Pinehaven Planning Board sued the owners, seeking a declaration that the rental activity violated the restrictive covenants. The Idaho Supreme Court disagreed, stating:

> [R]enting the property for residential purposes, whether short or long-term, does not fit within these prohibitions. The only building on the [owners'] property remains a single-family dwelling and renting this dwelling to people who use it for the purposes of eating, sleeping, and other residential purposes does not violate the prohibition on commercial and business activity as such terms are commonly understood.

Id. at 668.

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Similarly, the Court of Appeals of Maryland, in *Lowden v Bosley,* 395 Md 58; 909 A2d 261 (2006), interpreted a similar provision restricting use of land for "single family residential purposes only." *Id.* at 262. Defendants intended to offer their homes as short-term vacation rentals or sell them to others who would offer the homes as short-term rentals. Plaintiffs filed a complaint for injunctive relief, damages and a declaratory judgment. The *Lowden* court held that "receipt of rental income in no way detracts from the use of the properties as residences by the tenants," and that "[t]he transitory or temporary nature of such use does not defeat the residential status." *Id.* at 267.

The Colorado Court of Appeals relied on the *Pinehaven* and *Lowden* opinions to conclude that prohibitions against commercial use in restrictive covenants did not bar short-term vacation rentals. In relevant part, the court stated:

> We agree with the cases discussed above [*Pinehaven* and *Lowden*] and conclude that short-term vacation rentals such as Houston's are not barred by the commercial use prohibition in the covenants. Our conclusion is consistent with the Colorado Supreme Court's holding, in a different context, that receipt of income does not transform residential use of property into commercial use. In *Double D Manor*, the court addressed a homeowners association's challenge to use of property in the subdivision as a home for developmentally disabled children. 773 P2d at 1046. In rejecting the association's argument that such use was not a permissible "residential use" because Double D used the property to earn money to pay wages and cover costs, the court stated: "Double D's receipt of funding and payment to its staff to supervise and care for the children do not transform the use of the facilities from residential to commercial." *Id.* at 1051.

Houston v Wilson Mesa Ranch Homeowners Ass'n, Inc, 360 P3d 255, 260; 2015 COA 113 (Colo App, 2015).

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In many cases, the facts make clear that the owners relied on existing law that permitted short-term rentals in purchasing or improving their homes. In Texas, the Court of Appeals upheld the trial court's grant of a temporary injunction enjoining the plaintiff Village from terminating defendant property owner's use of her home as a short-term vacation rental. The court described the circumstances under which it did so as follows:

> Hill has been renting her Tiki Island home short-term since 2007. She bought it as an investment for the purpose of rentals, and made substantial improvements to the property. Tiki Island's 2014 ordinance banning short-term rentals grandfathered certain identified properties that were already engaged in short-term rentals as of 2011. It is not evident from the record why Hill's use of her home for short-term rentals was not grandfathered, as she was engaged in short-term rentals before the 2011 grandfathering cut-off. The Village's excluding Hill from this grandfathered status, however, foreclosed Hill's existing investment use of her property without an avenue for recoupment. We thus hold that she has identified a vested right for purposes of conferring the trial court with jurisdiction to enter a temporary injunction in her favor.

Village of Tiki Island v Ronquille, 463 SW3d 562, 587 (Tex App, 2015).

In *Silsby v Belch*, 952 A2d 218; 2008 ME 104 (2008), the Supreme Court of Maine interpreted a restriction "that said premises will not be used for any commercial or industrial use." The court found that the restriction did not apply to a three-unit apartment building constructed on the property, holding that "[t]he property, like an owner-occupied, single-family residence beside it, remains a place for people to live. Its character is fundamentally different from a department store or service station." *Id.* at 222.

Similarly, the Oregon Supreme Court determined that property restricted "exclusively for residential purposes" and not for "commercial enterprise" did not preclude use of a beachfront residence as a short-term vacation rental. *Yogman v Parrott*, 325 Or 358; 937 P2d 1019 (1997).

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The court found that the provision at issue was ambiguous and, after examining the definitions of "residential" and "commercial enterprise," stated:

> In the absence of clarity in wording and in the absence of an understanding of the parties' actual intent, this maxim serves at least four purposes: to avoid imposing a restriction on the buyer of property that the buyer cannot reasonably be expected to know, to allow full use of property, see *Aldridge v Saxey*, 242 Or 238, 242; 409 P2d 184 (1956) (public policy favors untrammeled land use), to reduce litigation by increasing certainty, and to promote uniform interpretation of like covenants. Additionally, this court has stated that, "when property rights are at stake, consistency, that is, adherence to precedent, is a . . . virtue" because of the need for certainty. *Dorsey et ux v Tisby et ux*, 192 Or 163, 180; 234 P2d 557 (1951).

Id. at 1023 (footnote omitted).

The North Carolina Court of Appeals relied on *Yogman* as it addressed a restrictive covenant that provided that "no lots shall be used for commercial or business purposes." *Russell v Donaldson*, 222 NC App 702; 731 SE2d 535 (2012). The court held:

> Under North Carolina case law, restrictions upon real property are not favored. Ambiguities in restrictive covenants will be resolved in favor of the unrestricted use of the land. A negative covenant, prohibiting business and commercial uses of the property, does not bar short-term residential vacation rentals.

Id. at 539.

The New Mexico Supreme Court also relied on the *Yogman* decision in *Mason Family Trust v Devaney,* 146 NM 199; 207 P3d 1176 (2009). Therein, the court held that a deed restriction that permitted use for dwelling purposes only and not for business or commercial purposes, did not forbid the short-term rental, for dwelling purposes, by the owner of a vacation cabin. The court stated:

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> We think that rental of a house or abode for a short-term use as a shelter to live in is significantly different from using the property to conduct a business or commercial enterprise on the premises.

Id. at 1178. See also, *Estates of Desert Ridge Trails Homeowner's Ass'n v Vazquez*, 2013-NMCA-51; 300 P3d 736 (NC Ct App, 2013) ("Residential purpose" restriction in restrictive covenants did not bar homeowner's short-term rentals; an economic benefit flowing to the homeowner from the rental of his home, whether long- or short-term, does not by itself constitute an impermissible business or commercial activity under "residential purposes" restrictive covenant.).

In another Texas case, neighbors sued a homeowner and property owners association to prevent the homeowner from renting his home on a short-term basis. In *Schack v Property Owners Ass'n of Sunset Bay*, 555 SW3d 339 (Tex App, 2018), the court held that a restrictive covenant, which provided that property was intended for a single family dwelling unit, and its use was restricted to that purpose, was solely a structural restriction, and thus did not prohibit homeowner from renting his house on a short-term basis. *Id.* at 349.

In *Ross v Bennett*, 148 Wash App 40; 203 P2d 383 (2008), the Washington Court of Appeals construed a restrictive covenant limiting property use to "residential" or "residence purposes" under claims by plaintiff neighbors that defendant's short-term rental constituted a "commercial" use. The court stated:

> We agree with Bennett that the trial court erred in finding that short-term vacation rentals were prohibited by the CPE Covenant. On its face, the CPE Covenant does not prohibit the short-term rental of Bennett's house to a single family who resides in the home. The CPE Covenant merely restricts use of the property to residential purposes. Renting the Bennett home to people who use it for the purposes of eating, sleeping, and other residential purposes is consistent with the plain language of the CPE Covenant. The transitory or temporary nature of such use by vacation renters

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> does not defeat the residential status. This is consistent both with the evidence of context and with preserving the free use of the land.

Id. at 388.

The State of Wisconsin likewise favors the free and unrestricted use of property unless a restriction clearly applies to prohibit the use. *Forshee v Neuschwander*, 321 Wis 2d 757; 2018 WI 62; 914 NW2d 643, 647 (2018). Accordingly, upon consideration of whether the short-term rental of property constitutes a "commercial activity," barred by a restrictive covenant, the Wisconsin Supreme Court found that it did not. *Id.* at 649. In a concurring opinion, Justice Kelly stated:

> The restrictive covenant's plain meaning simply does not say what the [Plaintiffs] want it to say. No grammatical reading of the covenant could prevent the [Defendants] from renting their property – so long as the renters do not engage in "commercial activity" while residing there. The [Plaintiffs] do not appear to be claiming that activities like sleeping, cooking, eating, and recreating are commercial in nature. Nor could they – if such activity is commercial, the [Plaintiffs] could no more engage in it than the renters.

Id. at 656. *See also, Morgan Co v May*, 305 Ga 305; 824 SE2d 365 (2019) ("single-family detached dwelling" did not prohibit short-term rental).

Most recently, the State of Montana agreed with the majority of jurisdictions that focus on the activities being conducted on the short-term rental property – not the length of time that the activities are conducted. *Craig Tracts Homeowners' Ass'n, Inc v Brown Drake, LLC,* 402 Mont 223, 229; 2020 MT 305; 477 P3d 283 (2020). The Montana Supreme Court expressly declined to follow Michigan law; specifically, *Eager v Peasley*, 322 Mich App 174; 911 NW2d 470 (2017), in which the Michigan Court of Appeals held, in relevant part, that the use of lakefront

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property as a short-term rental violated a restrictive covenant which barred the "commercial use" of the property.[5] Instead, the Court followed the majority of jurisdictions that have held that "'residential purposes' provisions do not prohibit short-term rentals," citing:

> *Santa Monica Beach Prop Owners Ass'n v Acord,* 219 So 3d 111, 114 (Fla Ct App, 2017); *Houston v Wilson Mesa Ranch Homeowners Ass'n,* 360 P3d 255 (Colo Ct App, 2015); *Wilkinson v Chiwawa Communities Ass'n,* 180 Wash 2d 241; 327 P3d 614 (2014) (en banc); *Estates at Desert Ridge Trails Homeowners' Ass'n v Vazquez,* 300 P3d 736 (NM Ct App, 2013); *Slaby v Mountain River Estates Residential Ass'n,* 100 So 3d 569 (Ala Civ App, 2012); *Russell v Donaldson*, 222 NC App 702; 731 SE 2d 535 (2012); *Applegate v Colucci*, 908 NE 2d 1214 (Ind Ct App, 2009); *Mason Family Trust v DeVaney*, 146 NM 199; 207 P3d 1176 (NM Ct App, 2009); *Ross v Bennett*, 148 Wash App 40; 203 P3d 383 (2008); *Scott v Walker*, 274 Va 209; 645 SE 2d 278 (2007); *Lowden v Bosley*, 395 Md 58; 909 A2d 261 (2006); *Mullin v Silvercreek Condo Owner's Ass'n*, 195 SW 3d 484 (Mo Ct App 2006); *Pinehaven Planning Bd v Brooks*, 138 Idaho 826; 70 P3d 664 (2003); *Yogman v Parrott*, 325 Or 358; 937 P2d 1019 (1997) (en banc); *Catawba Orchard Beach Ass'n v Basinger*, 115 Ohio App 3d 402, 685 NE 2d 584 (1996).

Craig Tracts Homeowners' Ass'n, 402 Mont at 227.

As these cases illustrate, Michigan is an outlier in the reinterpretation of ordinances and covenants for "single-family" homes and "residential" use of prohibiting short-term rentals and proclaiming them as short-term rentals as commercial uses. From all that appears, the Court of Appeals in *Eager* did not consider the fact that short-term rentals do not result in any type of "commercial" use on the property. To the contrary, all activities engaged in by renters such as

[5] The *Eager* majority concluded that, under the definition of "commercial," found in this Court's opinion in *Terrien v Zwit,* 467 Mich 56; 648 NW2d 602 (2002), the "act of renting property to another for short-term use is a commercial use, even if the activity is residential in nature." *Eager v Peasley*, 322 Mich App 174, 190; 911 NW2d 470 (2017).

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sleeping and eating, are residential uses. Moreover, the transitory or temporary nature of such use does not defeat the residential status. And, neither does the owners' attempts to make a profit. The fact that the property may yield a profit does not change the residential nature of the activities occurring on the property. The use of the term "commercial" alone equally outlaws long-term or short-term rental. Such a far-reaching restriction to owner-occupancy strains interpretation where such a restriction could easily have been stated in plain terms. Accordingly, contrary to the *Eager* opinion, use limitations such as "no commercial" or "residential only" should not bar short-term rentals.

If the City in this case, or any unit of local government in future cases, wishes to prohibit short-term rentals, it has a solution: As the dissent states, COA Op, Dissent, p 2, Exhibit 2, and the Michigan Zoning Enabling Act ("ZEA"), MCL 125.3202, and the CZO, Sec. 3.6, expressly allow, the City may amend its zoning ordinance to clearly and plainly prohibit short-term rentals. As discussed in detail below, the strategic reason municipalities do not amend their ordinances is apparent: Doing so preserves the right of an owner to continue a lawful but now conforming use.

2. The Court of Appeals Opinion Contradicts Michigan's Zoning Enabling Act

Owners of land have broad freedom to make legal use of their property. *Thiel v Goyings,* 504 Mich App 484, 496; 939 NW2d 152 (2019). A legal use established under a zoning ordinance is a vested right and a subsequent amendment to a zoning ordinance cannot deprive the owner of that use. *Livonia Hotel, LLC v Livonia,* 259 Mich App 116; 673 NW2d 763 (2003). Cities and townships are circumventing these constitutional protections by not formally "amending" their zoning ordinances upon deciding to ban short-term rentals.

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In general, local governments have deprived property owners of vested property rights in short-term rentals in two ways. One is through regulatory ordinances seeking to prohibit short-term rentals or to impose regulations so onerous and/or expensive that property owners simply give up. Regulatory ordinances are enacted by municipalities under their police power and are not *zoning* ordinances. Const 1963, art 8, §22, *Charters, resolutions, ordinances; enumeration of powers*. By contrast, a zoning ordinance is one that regulates the use of land and buildings according to districts, locations or areas. *Square Lake Hills Condo Ass'n v Bloomfield Twp,* 437 Mich 310, 323; 471 NW2d 321 (1991). Because local governments in Michigan have no inherent power to enact zoning regulations, they may enact them only in accordance with the procedures and landowner protections (such as preserving prior nonconforming uses) of the ZEA. Regulatory ordinances, however, are not subject to the ZEA. Accordingly, by passing a regulatory ordinance instead of a zoning ordinance, a municipality can avoid having to comply with the ZEA. By avoiding having to comply with the ZEA, local governments can refuse to honor all prior nonconforming uses as legal. *Adams Outdoor Advertising v East Lansing*, 463 Mich 17, 22; 614 NW2d 634 (2000) (Nonconforming use analysis applies only to zoning regulations, and not to regulatory (public health and safety) regulations). The property owner is thereby hijacked of his/her vested property rights, without notice, without hearing and without compensation. Left unchecked by the Michigan judiciary, this practice promises to further erode the private property rights of Michigan citizens and deprive them of their constitutional rights.

The second manner in which local governments have deprived their citizens of their property rights by "reinterpreting" their zoning ordinances. In this instance, the municipality takes an ordinance, which had long been applied in a manner permitting short-term rentals in

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single-family zoning districts, and reinterprets it so as to now characterize short-term rentals as either "commercial" or some other nonpermitted use within a residential district. In other words, the ordinance is reinterpreted to make illegal that which had been treated for decades as legal. In virtually every instance, the "reinterpretation" is without any formal action (or even somewhat organized informal action) on the part of the unit of local government. As a result, there is no notice to the municipality's residents that legal conduct is now deemed illegal.

Reinterpreting a zoning ordinance, as opposed to *amending* a zoning ordinance, also eliminates the obligation of a municipality to recognize and permit prior nonconforming uses. Specifically, as to nonconforming uses, the ZEA provides:

> If the use of a dwelling, building, or structure or of the land is lawful at the time of ***enactment*** of a zoning ordinance or an ***amendment*** to a zoning ordinance, then that use may be continued although the use does not conform to the zoning ordinance or amendment.

MCL 125.3208(1) (emphasis supplied). Accordingly, where a municipality reinterprets its zoning ordinance to prohibit a property use that was previously permitted, that municipality divests property owners of valuable property rights by denying the continued use of property as nonconforming uses, in violation of the ZEA. MCL 125.3208. That outcome is also without compensation and unconstitutional. Const 1963, art 10, §2, *Eminent Domain*; *Compensation.*

In sum, by enacting the ZEA, the Legislature established a balance between the protection of vested property rights while allowing local governments to enact zoning regulations. Under the ZEA, local governments are free to construct zoning schemes and pass zoning laws but: (1) in accordance with the procedures of the ZEA – not via regulatory ordinances; and (2) through amendment – not reinterpretation. Local governments must allow for legal

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nonconforming uses or pay just compensation for their elimination. The Court of Appeals majority opinion allows municipalities to circumvent the ZEA and eliminate lawful uses of property.

IV. CONCLUSION

In conclusion, a municipality cannot advance a new and strained interpretation of its zoning ordinance without formal amendment in order to affect what it would like the ordinance to say. To the contrary, if a particular use is to be prohibited, that prohibition should be by clear and unambiguous language so property owners are adequately apprised of the law. And, if the zoning ordinance is not clear as to a certain prohibition, then any change must be accomplished through amendment, in accordance with the ZEA, so as to protect property owners' vested rights. This is particularly true where the municipality's "reinterpretation" results in a criminal conviction. All lower courts failed in this regard and their decisions should be reversed.

V. RELIEF REQUESTED

For all the foregoing reasons, Michigan Realtors® respectfully requests that this Honorable Court grant Michigan Realtors®' Motion for Leave to File this Amicus Brief, grant Defendant-Appellant's Application and reverse the majority opinion of the Court of Appeals.

McClelland & Anderson, LLP
Counsel for *Amicus Curiae*
Michigan Realtors®

/s/Melissa A. Hagen
Melissa A. Hagen (P42868)
David E. Pierson (P31047)

Date: March 22, 2021

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LIST OF EXHIBITS TO *AMICUS CURIAE* BRIEF SUBMITTED BY MICHIGAN REALTORS® IN SUPPORT OF THE APPLICATION FOR LEAVE TO APPEAL

1. *Bauckham v Skarin*, unpublished opinion of the Allegan County Circuit Court, issued April 5, 2006, app sub nom *John H. Bauckham Trust v Petter*, unpublished opinion per curiam of the Court of Appeals, issued September 19, 2017 (Docket No. 332643)

2. Court of Appeals Opinion

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EXHIBIT 1

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48TH CIRCUIT COURT
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ALLEGAN, MICHIGAN

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF ALLEGAN
48TH JUDICIAL CIRCUIT

JOHN BAUCKHAM et. al., Plaintiff, vs. JAMES AND LINDA SKARIN et. al., Defendant.	Court Address and Phone: Allegan County Building 113 Chestnut Street Allegan, MI 49010 (269) 673-0300 Assigned to Circuit Judge **Hon. Kevin W. Cronin** P38915 Case No. 15-054455-CH
Ruth Skidmore (P58913) Attorney for Plaintiffs 99 Monroe Ave. NW, STE 1100 Grand Rapids MI 49503	James Spurr (P33049) Attorney for Defendants 277 South Rose St., Ste. 5000 Kalamazoo, MI 49007

OPINION AND FINAL ORDER AFTER BENCH TRIAL

County Building in the City and County
of Allegan, State of Michigan, on the
5th day of April 2016
Present: The Honorable Kevin Cronin, Circuit Judge.

This dispute is between neighbors and owners of real property parcels in the Sunset Shores development in Casco Township, Allegan County, Michigan. The Plaintiffs seek declaratory and injunctive relief to enjoin the Defendant's from leasing their property to the public because this activity allegedly violates deed restrictions/ restrictive covenants barring commercial activity. Plaintiffs also seek an injunction on the theory that the Defendants are violating Casco Township zoning restrictions involving Low Density Residential (LDR) zones, thus creating a nuisance per se. On December 30, 2015, the Court granted partial summary disposition to Plaintiffs as to their commercial activity claim and the remaining issues were set for a bench trial.

The Defendants have countered these allegations by raising the equitable defense of unclean hands, stating that some of the Plaintiffs themselves have either rented their property or knew that rental activity was occurring and acquiesced in that activity. Plaintiffs should be estopped from enforcing the deed restrictions against the Defendants, they argue. The Defendants have also counter-sued on the theory that the Plaintiffs themselves are violating the deed restrictions with regard to the

number and type of outbuildings placed on their individual properties and the violation of property line setbacks for those outbuildings. The Defendants also make a claim of trespass based on the placement of structures (eg stairs, decks, a motorized tram and a shed) build by the Plaintiffs which encroach onto land that is owned by the all of the subdivision residents as tenants in common. This commonly-owned parcel, referred to the "Beach Parcel", touches the shore of Lake Michigan and includes a portion of the steep, grassy bluff adjoining the sandy beach. The trespass claim is also grounded on a theory that one of the Plaintiffs has increased the volume and concentration of surface water runoff down the bluff and onto the sandy beach. In line with the trespass claim, the Defendants make a claim for ejectment, and quiet title. And lastly, the Defendants make a claim for common law waste, based upon vegetation that was allegedly removed by the Plaintiffs while building their structures on the Beach Parcel.

The Court will first address the Plaintiff's claims and defenses thereto.

A. Commercial Activity (Deed Restrictions/ Restrictive Covenants)

1. In the Court's prior Decision and Order of December 30, 2015 granting partial summary disposition on the Plaintiff's motion for summary disposition, the Court found that the Defendants engaged in impermissible commercial activity when they rented their private homes on their individually-owned parcels to the public for a fee and that such commercial activity violated of the deed restrictions or restrictive covenants prohibiting commercial activity throughout the subdivision.

B. Equitable defenses to enforcement of deed restrictions/ restrictive covenants raised by the Defendants

2. The Defendants have raised the equitable defenses of waiver and unclean hands to prevent the enforcement of the Sunset Shores deed restrictions with regard to commercial activity. This claim is based on the allegation that: (1) the Plaintiffs either knew of commercial rentals and did nothing to prevent the activity, (2) Plaintiffs actively facilitated commercial rentals activity by referring renters to other parcel owners, or (3) the Plaintiffs themselves commercially rented their homes within Sunset Shores.

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3. With regard to whether a restriction has been waived, the Supreme Court has said that "whether or not there has been a waiver of a restrictive covenant or whether those seeking to enforce the same are guilty of laches are questions to be determined on the facts of each case as presented." *Grandmont Improvement Ass'n v. Liquor Control Comm.*, 294 Mich. 541, 544, 293 N.W. 744 (1940) as quoted in *Bloomfield Estates Improvement Ass'n, Inc v City of Birmingham*, 479 Mich 206; 737 NW2d 670 (2007).

4. When determining whether prior acquiescence to a violation of a deed restriction prevents a plaintiff from contesting the current violation, courts compare the character of the prior violation and the present violation. Only if the present violation constitutes a "more serious" violation of the deed restriction may a plaintiff contest the violation despite the plaintiff's acquiescence to prior violations of a less serious character. *Bloomfield Estates Improvement Ass'n, Inc v City of Birmingham*, 479 Mich 206; 737 NW2d 670 (2007).

5. Determining whether a "more serious" violation occurred will hinge on the facts of a particular case, some relevant factors that may be considered include: (1) whether the later violation involved the erection of a structure where no such structure had previously been permitted; (2) whether the later violation constituted a more extensive violation of restrictions on the size or extent of a building; (3) whether the later violation increased the use of land from a sporadic violation of the restriction to a continuous violation; (4) whether the later violation significantly increased the noise or pollutant level on restricted land; (5) whether the later violation increased the level of traffic occasioned by the prior violation; (6) whether the later violation permitted an action that had been previously prohibited; and (7) whether the later violation altered in some material respect the character of the use of the restricted property. *Bloomfield Estates Improvement Ass'n, Inc v City of Birmingham*, 479 Mich 206; 737 NW2d 670 (2007). The Supreme Court in *O'Connor v Resort Custom Builders, Inc,* found that Plaintiffs did not waive their restrictions when they previously allowed short-term rentals that became commercialized. 459 Mich 335; 591 NW2d 216 (1999).

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6. Michigan law provides that, even in the event of multiple prior breaches of a restriction, equity will grant relief if the restriction can be shown to be of value to complainant and such breaches have not resulted in a subversion of the original scheme of development resulting in a substantial, if not entire, change in the neighborhood. *Misch v Lehman*, 178 Mich 225; 144 NW 556 (1913). *Kustarz v Janesick*, 347 Mich 223; 79 NW2d 613 (1956)

7. Commercial rental activity has established a foothold in the subdivision, but fewer than 6 of over 200 total parcels have been involved. Although the number of short term rental periods have increased over time and the number of day time and overnight visitors to those rentals parcels have increased and surged for holiday partiers and wedding participants on occasion, there is no evidence that the character and use of the subdivision or has been significantly changed over time. The predominant use in the subdivision continues to be for single family residences where commercial rentals do not occur. The nature and character of the neighborhood has not been significantly or permanently altered and the development plan of the subdivision remains largely intact. The enforcement of these deed restrictions barring commercial rental activity still has significance and importance to it's residents.

8. The court finds credible the trial testimony which attributed to commercial renters both a sudden surge of population, but a variety of rude, inconsiderate, annoying and even dangerous activities associated with a non-stop "party like" atmosphere. The offensive behaviors including "cat call" solicitations to nearby female residents, beer bottles carelessly discarded into the waters of Lake Michigan, drunken, disorderly and argumentative behavior toward parcel owners, unsupervised minors on the beach who require water rescue, misuse of the roads, traffic congestion, parking problems and other ills. The profit-making parcel owners who rent are seldom, if ever, present to control or eject their short term renters, though a few renters have been invited never to return. The subdivision, lacking any functional, compulsory homeowner's association since the creation of the subdivision, is ill-equipped to manage the rental process and protect the rights of parcel owners.

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9. The court has considered the testimony of all of the named Plaintiffs and Defendants in this case. By our interpretation of the above case law, it is proper to issue an injunction to ban commercial activity in the subdivision even though one or more of the named Plaintiffs have unclean hands, provided that other Plaintiffs have clean hands. This Court finds at least three named Plaintiffs of the ten who testified, meet these criteria. One of the Plaintiffs whose claim for injunctive relief is not barred by unclean hands is Dr. Charles Zeller. The Court finds that Dr. Zeller credibly testified that he never acquiesced in commercial rental activity, never facilitated commercial rental activity in the subdivision, nor engaged in commercial rentals of his own parcel to members of the public for a fee in violation of the deed restrictions.

10. Accordingly, the Court finds that an injunction shall issue to equitably enforce the deed restrictions despite the fact that some of the Plaintiffs are barred by unclean hands because they have rented their own properties or acquiesced in that practice by other owners.

11. **THEREFORE**, it is further ordered that all rental activity for a fee occurring within the Sunset Shores **will cease and desist** effective on midnight, Tuesday, September 6, 2016. As prior stipulated on the record, the Court's opinion and order does not enjoin rental activity for which an enforceable contractual commitment has already been made for a rental ending prior to midnight on September 6. 2016, provided that an enforceable contractual commitment has been made prior to the date of this Decision.

Nuisance Per Se

12. The alternative theory proffered by the Plaintiffs to terminate rental activity in Sunset Shores is one of nuisance per se due to an alleged violation of the Casco Township zoning ordinance. The Defendant claims the Plaintiffs have no standing to make such a claim. The Court will first address the Defendant's claim that the Plaintiffs have no standing to independently assert a zoning violation. As articulated in *Indian Vill Ass'n v*

Shreve, 52 Mich App 35, 216 NW2d 447, (1974), the Supreme Court of this state has long recognized the propriety of private citizens bringing an action to abate public nuisances arising out of violations of zoning ordinances. *Baura v. Thomasma*, 321 Mich. 139, 32 N.W.2d 369 (1948); *Jones v. DeVries*, 326 Mich. 126, 40 N.W.2d 317 (1949); *Wolff v. Steiner*, 350 Mich. 615, 87 N.W.2d 85 (1957); *Cook v. Bandeen*, 356 Mich. 328, 96 N.W.2d 743 (1959). **THEREFORE** this Court finds that the Plaintiffs have standing to assert a zoning violation.

13. This Court applies the rules of statutory construction when construing a zoning ordinance. *Albright v. Portage,* 188 Mich.App. 342, 350, n. 7, 470 N.W.2d 657 (1991); *Settles v. Detroit City Clerk,* 169 Mich.App. 797, 808, 427 N.W.2d 188 (1988). Therefore, when the language used in an ordinance is clear and unambiguous, we may not engage in judicial interpretation, and the ordinance must be enforced as written. *Livingston Co. Bd. of Social Services v. Dep't of Social Services,* 208 Mich.App. 402, 406, 529 N.W.2d 308 (1995); *Oberlin v. Wolverine Gas & Oil Co.,* 181 Mich.App. 506, 511, 450 N.W.2d 68 (1989). *Kalinoff v Columbus Tp,* 214 Mich App 7; 542 NW2d 276 (1995).

14. The Court in *Indian Village* relied on the zoning ordinance in its decision to find a nuisance per se. As stipulated by the parties, the Court looks to the Casco Township Zoning Ordinance as approved on October 9, 2006 as amended through October 20, 2008. Chapter 8 of this ordinance describes a low-density residential zone, which is the type of zone in dispute in this case.

15. In a low-density residential district two commercial activities are expressly is permitted: (1) day care in family homes, and (2) adult foster care in family homes. All other commercial activities must require a special land use, including bed and breakfast establishments. Other than a bed and breakfast establishment, there are no other analogous commercial uses related to rental activity. In looking at the requirements for a bed and breakfast establishment, the Court finds that none of the current homes in Sunset Shores would meet the criteria for a bed and breakfast establishment due to a lack of paved public roads or sanitary sewer system.

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16. Alfred Ellingsen, the township zoning administrator, testified that he found no zoning violations on behalf of the Defendants regarding commercial activities. The ordinance definition of "Commercial" states as follows:

    > The use of property for the purchase, sale, barter, display, or exchange of goods, wares, merchandise, or personal services or the maintenance of service offices, recreation, amusement enterprise, or garage/yard sales operating more than twelve (12) days during any one (1) twelve (12) month period.

17. The Court finds the testimony of Mr. Ellingsen is not binding. The Court respectfully disagrees with Mr. Ellingsen's conclusion. This Court finds that the defendant's rental activity is a commercial sale of personal recreation services, impermissible under the zoning ordinance in zoning district where the subdivision is located. The record reflects that several of the homes are essentially being treated like hotels for guests.

18. **THEREFORE,** the Court finds that the Defendants are in violation of the Casco Township Zoning ordinance regarding commercial activity and this constitutes a *nuisance per se*.

Zoning enforcement and estoppel.

19. As a potential defense to zoning enforcement is the doctrine of estoppel. Generally a municipality is not precluded by estoppel from enforcing its zoning code. *Fass v. Highland Park,* 326 Mich 19, 28-29, 39 NW2d 336 (1949). However, where a building is created in good faith reliance on a permit issued by the municipality, and the only reasonable use for the property is in fact outside the regulations, an exception to the rule may be made. *Pittsfield Twp. v. Malcolm,* 375 Mich 135, 146-147, 134 NW2d 166 (1965). *City of Holland v. Manish Enterprises,* 174 Mich App. 509; 514; 436 NW2d 398, 401 (1988).

20. The Court finds that if private citizens can enforce a zoning restriction as a *nuisance per se,* then it would be logical and consistent to apply the same rules of estoppel in this context to private citizens enforcing a zoning restriction as a *nuisance per se*. Here, there

have been no declarations by Casco Township, or other residents of Sunset Shores, which the Defendants have detrimentally relied on regarding the construction or use of the structures on their property. All of the homes in Sunset Shores, as found on the record, are single family dwellings. **THEREFORE,** the Court finds that the Plaintiffs are not estopped from enforcing the zoning violations as a *nuisance per se.*

21. Continuing violations of the zoning ordinance concerning commercial activity are hereby enjoined on the same terms expressed as to the violations of the deed restrictions. See paragraph 11 *supra.*

THE DEFENDANT'S COUNTER CLAIMS: (1) violation of sunset shores property restrictions, (2) trespass upon property owned as tenants in common, (3) waste, (4) ejectment, and (5) quiet title

Violation of Sunset Shores Deed Restrictions (unrelated to commercial activity):

22. The Defendants filed a counter claim alleging violations of the Sunset Shores property restrictions. These violations deal with non-conforming structures built on individual lots, structures built on the Beach Parcel will be addressed separately. The specific restrictions the Defendants are complaining of are as follows:
    a. No building shall be erected or maintained on any lot in Sunset Shores other than a private residence and a private garage for the sole use of the owner or occupant…
    b. Any garage erected or maintained must conform in appearances and construction of the residence on such lot.
    c. No building shall be erected or maintained on any lot in Sunset Shores closer than 10 feet from front lot line, nor closer than 5 feet from back or side lot lines.
    d. No outside toilet or privy shall be erected or maintained in Sunset Shores.
    e. The placing of for sale signs on lots in Sunset Shores shall be prohibited.

23. As a preliminary matter, the Court finds that there has been no waiver or estoppel by the Defendants in enforcing these particular deed restrictions against the Plaintiffs.

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24. The Defendants allege the following as one of several violations against some or all of the Plaintiffs: (1) homes are constructed too close to property lines, (2) port-o-johns/ outside toilets were placed on lots during a party, (3) certain properties have more than one garage, (4) certain properties have sheds which are too small to park an automobile, (5) some homeowners placed for sale signs on some lots.

25. A stipulation was placed on the record that the Defendant is not seeking the tear down or alteration of anyone's home, garage, or secondary garage as a remedy for violation of the deed restrictions. However, it is clear to the Court that certain lot owners are in clear violation of the deed restrictions with regard to the number of garages and the encroachment of lot lines. **THEREFORE**, currently existing non-conforming homes and garages may remain in place. However future violations will not be afforded this protection unless stipulated by all property owners and recorded as such with the Register of Deeds.

26. No definition of "garage" appears in the deed restrictions. In construing restrictive covenants, the overriding goal is to ascertain the intent of the parties. *Tabern v. Gates,* 231 Mich. 581, 583, 204 N.W. 698 (1925). Where the restrictions are unambiguous, they must be enforced as written. *Hill v. Rabinowitch,* 210 Mich. 220, 224, 177 N.W. 719 (1920). However, restrictions are strictly construed against the would-be enforcer and doubts are resolved in favor of the free use of property. *Stuart v. Chawney,* 454 Mich. 200, 210, 560 N.W.2d 336 (1997). As noted by *Jayno Hts Landowners Ass'n v Preston,* 85 Mich App 443; 271 NW2d 268 (1978), the 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, 244 N.W. 165 (1932), *Morgan v. Matheson*, 362 Mich. 535, 541, 107 N.W.2d 825 (1961), Cf. *Karpenko v. Southfield*, 75 Mich.App. 188, 193, n.3, 254 N.W.2d 839 (1977).

27. A garage is the most common form of storage for private automobiles. *Nelson v Goddard*, 43 Mich App 615, 617; 204 NW2d 739, 740 (1972). "Garage" is commonly defined as "a building or wing of a building, as of a house, in which to park a car or cars." *The American Heritage Dictionary of the English Language* (1981).

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28. **THEREFORE,** any outbuildings which do not meet the definition of a garage, as defined in this order, will be removed within 90 days, at the owner's expense. This order includes the removal of "for sale" signs and outdoor toilets, the placement of which also violated the deed restrictions.

Trespass & Waste:

29. The Court will address these two claims together because they both share similar facts and legal principles as regard to the Beach Parcel. The Defendants complaint regarding waste is essentially one involving the removal of trees and brush on the Beach Parcel to accommodate the construction of private stairs and decks from the homes on the bluff leading to the lakeshore. This claim also applies to the removal of trees and brush and the addition of large boulders on the Beach Parcel regarding a rain-water erosion-control project. This rain-water control project is also the basis for the Defendant's trespass claim; the allegation is that the Plaintiff is accelerating the flow of rain water onto the Beach Parcel.

30. As a general principle, because every tenant in common has a right to possess the whole of the estate, a claim of trespass cannot lie as against another cotenant. 20 Am Jur 2d, § 98, p 198; 24 Callaghan's Michigan Civil Jurisprudence, Tenants in Common and Joint Tenants, §§ 7 & 10, pp 146, 150-151; *Merritt v Nickelson*, 407 Mich 544; 555; 287 NW2d 178 (1980). Principal distinction between trespass and waste is the character of the presence of the defendant on the land; in the case of waste, the injury is done by one rightfully in possession. *Stevens v. Mobil Oil Corp.*, 412 F.Supp. 809 (ED Mich 1976).

31. The Defendants argue that a trespass occurs though the diversion of surface water so that an amount of water in excess of natural flowage is channeled onto the land of a neighboring owner. *Allen v Morris Building Company*, 360 Mich 214, 103 NW2d 491 (1960). *Lewallen v City of Niles*, 86 Mich App 322, 272 NW2d 350 (1978) "the owner of the dominant estate may not, by changing conditions on his land, put a greater burden on the servient estate by increasing and concentrating the volume and velocity of the surface water." Id., at 335, 351.

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32. The Court finds that, as a matter of law, the Plaintiff cotenants cannot perform a trespass on the Beach Parcel. Even if one of the cotenants could be found to have trespassed pursuant to the Defendants' rain-water diversion theory, the Court finds that this claim also fails. The Court finds that the rain-water diversion project was granted proper permits. The Court also finds that the property on which this project occurred is a natural low-point that collects rain water from the subdivision. There was a major erosion problem where this project occurred; the water was originally being diverted through an approximately 8 inch plastic tube which failed. There was a very real danger that the bluff would be "blown out" by erosion. There was some brush and a small, dead tree that were removed to accommodate the project. The permit for the project implicitly authorized their removal. The project actually helped to disperse and slow the rain water, preserved the bank, and protected the common property as well as several individually owned parcels. There was no evidence that the erosion control project harmed any parcel owner's interest. This Court concludes that it did the opposite. Defendant's failed to prove any damage to the interests of individual lot owners or cotenants of the Beach Parcel. **THEREFORE**, the Defendant's claim for trespass is **DENIED** as to liability and damages.

33. As to the Defendant's claim for waste regarding the removal of trees and for damages pursuant to MCL 600.2919, this Court finds that Defendants did not present sufficient credible testimony to meet their burden of proving the improper removal of any trees or any reasonably specific value of damages. **THEREFORE**, the Defendant's claim for waste is **DENIED**.

Ejectment and Quiet Title:

34. The Court will address these two claims together because they both share similar operative facts and legal principles as regard to the Beach Parcel. As a factual basis, it is well-proven to the Court that the Plaintiffs, particularly those owning homes on the bluff adjacent to the Beach Parcel, have constructed stairs, decks, a motorized tram on rails and erected at least one outbuilding which rest in part or in whole on the Beach Parcel. It is also well proven that the cotenants that erected these structures on the Beach Parcel

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have set out to place locks, gates, and "no trespassing" signs on these structures, to the exclusion of all other cotenants.

35. It is undisputed in case law that tenants-in-common have a right to enjoy the whole estate. Tenancy in common is legal estate with each tenant having separate and distinct title to an undivided share of the whole; each is entitled to possession of the whole and every part thereof, subject to the same right in the other cotenants. *Quinlan Inv. Co. v. Meehan Companies, Inc.* 430 N.W.2d 805, 171 Mich.App. 635 (1988). "Tenants in common" are persons who hold land or other property by unity of possession; when two or more persons are entitled to land in such manner that they have undivided possession, but separate and distinct freeholds, they are tenants in common; not only is possession of one, possession of all, but tenants respectively have present rights to enter upon whole land, and upon every part of it, and to occupy and enjoy the whole. *Merritt v. Nickelson* 264 N.W.2d 89, 80 Mich.App. 663 (1978), affirmed 287 N.W.2d 178, 407 Mich. 544.

36. It is possible for a cotenant to adversely possess property held in common to the exclusion of other cotenants. Where land is owned by cotenants, an ouster of one of them is not effective, unless the possession asserted by the other as adverse has been taken and continued with intent to oust the other tenant. *Croze v. Quincy Mining Co.* 165 N.W. 786, 199 Mich. 515 (1917). A claim of adverse possession, as between tenants in common, must be clear and unambiguous. *Campau v. Campau* 8 N.W. 85, 45 Mich. 367 (1881). For a tenant in common to acquire title to land as against his cotenants by adverse possession, his exclusive claim of title and denial of cotenants' rights should be clear and unambiguous and brought home to cotenants' knowledge, either by express notice or by implication, in which case all doubt should be against ouster and the tenant in possession should be presumed to respect and recognize cotenants' rights until or unless the contrary clearly appears. *Taylor v. S.S. Kresge Co.* 40 N.W.2d 636, 326 Mich. 580 (1950). Where a cotenant is distinctly notified that the tenant in possession claims to own the land absolutely, his adverse possession begins to run from such notice. *Weshgyl v. Schick* 71 N.W. 323, 113 Mich. 22 (1897). To overcome the general rule that tenant in possession recognizes rights of his cotenants, the open, hostile holding out by one tenant must be established. *Horbes v. Ahearn* 120 N.W.2d 215, 369 Mich. 423

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(1963). For tenant in common to acquire title by adverse possession, presumption of occupancy as cotenant must be overcome by clearly inconsistent acts and declarations brought home to the cotenant. *Donohue v. Vosper* 155 N.W. 407, 189 Mich. 78 (1915), affirmed 37 S.Ct. 350, 243 U.S. 59, 61 L.Ed. 592.

37. As discussed above, it is well-established by the evidence that the cotenants that erected these structures on the Beach Parcel have set out to place locks, gates, and "no trespassing" signs on these structures to the exclusion of all other cotenants. The Court finds that the cotenants that built these structures and then placed locks, gates, and "no trespassing" signs on the structures did so openly, in a hostile and exclusory intent hostility to the exclusion of other cotenants. This exclusion was done clearly and unambiguously. Absent findings supporting adverse possession by Plaintiffs of the portions of the Beach Parcel they have occupied for decks, stairs, etc., all cotenants of Sunset Shores have a right to enjoy the entire Beach Parcel because the Beach Parcel is a held as tenants in common. Plaintiffs have not made any express claim for adverse possession in this case and at trial, they uniformly expressed no objection to the future use of the entire Beach Parcel, including their privately built improvements, by other co-tenants of the Beach Parcel.

38. **THEREFORE**, any potential claims for adverse possession by the Plaintiffs of any portion of the Beach Parcel against any cotenant, are hereinafter barred and **TITLE IS QUIETED** on the Beach Parcel to the enjoyment of all cotenants of Sunset Shores.

39. **IT IS FURTHER ORDERED** that within 90 days all locks, gates, and "no trespassing" signs will be removed from these structures to the extent that the structure exists on the Beach Parcel. These structures will exist for the use and benefit of all cotenants to the extent they exist on the Beach Parcel. If a lock it so remain on the shed located on the Beach Parcel, for example, then a key or lock combination must be provided to all of the cotenants.

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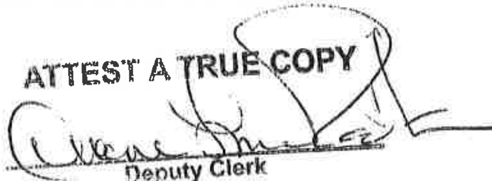
IT IS FURTHER ORDERED this Court finds that the current structures which encroach upon on the Beach Parcel include the stairs, decks, the motorized tram and a storage outbuilding. As to the parts of the structures which encroach on the Beach Parcel, minimal repairs may be performed on them in the future, but only to preserve the current function of the structure and not to expand the encroachment or extend the structures useful life. Once the structure has surpassed its useful life, the ultimate removal of any structure will be done at expense of the owner of the parcel adjoining the Beach Parcel and no contribution will be had from any other cotenant. If the encroaching structures are damaged by catastrophic acts of God the encroaching structure cannot be replaced.

40. **IT IS FURTHER ORDERED** the stairs leading to the beach at the end of Cliff Drive will be the official access stairs to the Beach Parcel, and are owned in joint tenancy by and are accessible for the use of all subdivision parcel owners. These stairs were constructed by the home-owners association. The restrictions on the other encroaching structures located on the Beach Parcel do not apply to these stairs.

IT IS SO ORDERED AND ADJUDGED.

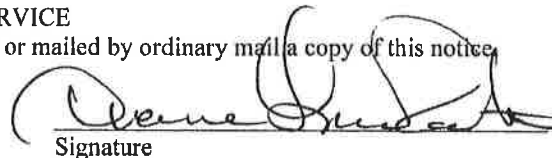
Kevin Cronin, Circuit Judge.



PROOF OF SERVICE

I certify that on this date, the above parties were personally served or mailed by ordinary mail a copy of this notice.

04-08-16
Date



Signature

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S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

UNPUBLISHED
September 19, 2017

JOHN H. BAUCKHAM TRUST, JOHN H. BAUCKHAM, Trustee of the John H. Bauckham Trust, BRUCE BRANDON, KATHY BRANDON, ROBERT BROUWER, SHARON BROUWER, CLARK REVOCABLE TRUST, SARAH J. CLARK, Trustee of the Clark Revocable Trust, WILLIAM COLE, SANDRA COLE, ROBERT & SHARON CURTIS TRUST, ROBERT CURTIS, Co-trustee of the Robert & Sharon Curtis Trust, SHARON CURTIS, Co-trustee of the Robert & Sharon Curtis Trust, TIMOTHY ISAACSON, JENNIFER ISAACSON, KEVIN MUNTTER, LAURIE MUNTTER, JOHN SHKOR, KERRY SHKOR, BOB SMITH, DIANE SMITH, CHARLES ZELLER, and PAMELA ZELLER,

Plaintiffs/Counter-Defendants-Appellees/Cross-Appellants,

v

No. 332643
Allegan Circuit Court
LC No. 15-054455-CH

MATTHEW PETTER, CONSTANCE PETTER, BERNARD T. DOHERTY, JOAN M. DOHERTY, KEVIN BOODY, JANALYN BOODY, PATRICK DOHERTY, and ANDREW T. SCHOFIELD,

Defendants,

and

JAMES SKARIN, LINDA SKARIN, HENKEL VACATIONS, LLC, DANIEL MOESCH, HEATHER MOESCH, MELISSA K. LOEW TRUST, and MELISSA K. LOEW, Trustee of the Melissa K. Loew Trust,

Defendants/Counter-Plaintiffs-Appellants/Cross-Appellees.

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Before: TALBOT, C.J., and O'CONNELL and CAMERON, JJ.

PER CURIAM.

Defendants James Skarin, Linda Skarin, Henkel Vacations, LLC, Daniel Moesch, Heather Moesch, Melissa K. Loew Trust, and Melissa K. Loew as trustee of the Melissa K. Loew Trust (collectively referred to as defendants[1]) appeal as of right an opinion and final order enforcing deed restrictions that prohibit use of restricted lots for commercial purposes. Plaintiffs cross-appeal the same order. We affirm in part, vacate in part, and remand for proceedings consistent with this opinion.

This mater involves a dispute among the owners of several lots in the Sunset Shores Subdivision in Casco Township concerning the rental activities taking place on lots owned by defendants. Defendants purchased their respective lots subject to the following deed restrictions:

> 1. No building shall be erected or maintained on any lot in Sunset Shore, sold by the grantor herein, other than a private residence and a private garage for the sole use of the owner or occupant, except those lots designated as Commercial on the plat map.
>
> * * *
>
> 3. No part of said premises shall be used for commercial or manufacturing purposes, except those lots designated as Commercial on the plat map.[2]

In 2015, plaintiffs filed suit against defendants, seeking a declaratory judgment and injunctive relief prohibiting defendants from engaging in short-term rental activity, which plaintiffs alleged violated the above deed restrictions. Plaintiffs also alleged that defendants' short-term rental practices constituted a nuisance per se because they violated Casco Township's zoning ordinances concerning permissible uses in districts zoned for low-density residential use.

Defendants raised several equitable defenses to plaintiffs' claims, arguing that short-term renting was a common and long-accepted practice in Sunset Shores. Defendants presented evidence demonstrating that a number of plaintiffs had acquiesced to or engaged in similar rental activity over the years, and that the neighborhood's voluntary homeowners association promulgated rules recognizing that vacation renters were welcome in the neighborhood. Defendants also asserted counter-claims regarding several plaintiffs' improper use of a parcel (the "Beach Parcel") jointly owned as tenants in common by the owners of all lots within Sunset Shores.

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[1] The remaining defendants named in plaintiffs' original complaint were dismissed before trial and are not relevant to this appeal.

[2] There are no lots designated as commercial on the plat map produced by the parties.

After discovery, the trial court granted partial summary disposition in plaintiffs' favor, finding that there was no material dispute concerning the following facts:

a. The defendants admitted in deposition to having constructive of actual knowledge of the deed restrictions when they purchased their lots.

b. On the internet, the Defendants advertise their properties to the public for short term rentals year round for a fee. Nightly occupancy rates range from between $250.00 per night and $400.00 per night.

c. Three of the Defendants have received a combined $140,000 in fees for short term rental of their subdivision properties during 2014.

d. Two of the Defendant's [sic] are Illinois residents, according to their deposition testimony.

e. Two of the Defendants admitted in their depositions that they spent less than two weeks on their subdivision lots in year 2014.

f. None of the Defendants make significant personal use of the property[.]

g. None of the Defendant's [sic] were present on the property when their licensees/customers were using the property.

h. Two Defendants employ 3rd party enterprises to provide "concierge" services and maid service, clear up after guests and perform grounds maintenance.

i. The Defendants collect and pay Michigan's 6% state use tax governing public accommodations in the nature of "hotel, motel and vacation rentals."[3]

In light of these findings, the trial court concluded that defendants were not using their respective properties as private residences and were instead engaging in commercial activity, i.e., renting the lots to the public for a fee, contrary to the deed restrictions. However, the court also found that material questions of fact existed concerning defendants' equitable defenses and plaintiffs' alternative nuisance theory. These issues, as well as defendants' counterclaims, proceeded to trial. The parties do not challenge the court's findings or conclusions of law regarding plaintiffs' dispositive motion.

Following a three-day bench trial, the court issued a written opinion and order rejecting defendants' equitable defenses and agreeing that defendants' rental activities violated the Casco Township zoning ordinance barring commercial activity in low-density districts. Based on its

[3] Footnote omitted.

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findings, the court entered an order prohibiting all rental activity within Sunset Shores. With respect to defendants' counterclaims, the court found that certain plaintiffs had installed fixtures on the commonly owned Beach Parcel, including stairs, decks, a motorized tram, and a storage outbuilding. These plaintiffs also took steps to preclude other cotenants from using the encroaching structures, thereby interfering with the other cotenants' right to use and enjoy the entire Beach Parcel. To remedy the problem, the court ordered that the existing structures be made available for the use and benefit of all cotenants and placed restrictions on the continued maintenance of those structures.

I. DEFENDANTS' EQUITABLE DEFENSES

On appeal, defendants contend that the trial court erred by rejecting their equitable defenses to enforcement of the deed restrictions. Plaintiffs, on the other hand, argue that we should not consider this issue because the limited scope of defendants' claim of appeal renders the issue moot. We agree with plaintiffs and decline to consider the merits of defendants' argument.

"Michigan courts exist to decide actual cases and controversies, and thus will not decide moot issues."[4] An issue is moot if its resolution in the aggrieved party's favor "cannot for any reason have a practical effect on the existing controversy."[5] As noted by plaintiffs, the trial court enjoined all further rental activity for two, independent reasons: (1) defendants' rental activities violated the deed restrictions banning use of defendants' lots for commercial purposes; and (2) defendants' rental activities amounted to a nuisance per se because they violated the Casco Township zoning ordinances. Despite the court's conclusion that there were two bases for granting injunctive relief, defendants explicitly excluded the trial court's ruling regarding the zoning violation from the scope of this Court's review, stating that they intended to seek modification of the ordinance through the legislative process. However, there is no indication that defendants' proposed amendments will be adopted by Casco Township. Thus, even if this Court were to agree that the trial court erred by rejecting defendants' equitable defenses to enforcement of the deed restrictions, reversal of that portion of the trial court's order would not have a practical effect on defendants' ability to resume their short-term rental practices, which would continue to be enjoined as a nuisance per se. Accordingly, this issue is moot and does not warrant further consideration.[6]

II. SCOPE OF INJUNCTION

Next, defendants argue that the trial court erred by enjoining all rental activity. We disagree.

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[4] *Thomas M Cooley Law Sch v Doe 1*, 300 Mich App 245, 254; 833 NW2d 331 (2013).

[5] *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 386; 803 NW2d 698 (2010).

[6] *Id*.

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Matters involving the interpretation of restrictive covenants involve questions of law that this Court reviews de novo.[7] A trial court's decision to grant injunctive relief is reviewed for an abuse of discretion, which occurs when "the court's decision falls outside the range of reasonable and principled outcomes."[8] This Court reviews a trial court's factual findings for clear error.[9] "A finding is clearly erroneous where, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake has been made."[10]

When the construction of a restrictive covenant is clear, "the mere circumstances of the breach of the covenant affords sufficient grounds for the court to interfere by injunction."[11] In this case, the court determined before trial that the restrictive covenants at issue unambiguously restricted use of the lots within Sunset Shores to residential purposes and categorically barred *all* commercial uses of the restricted lots. The court construed the term "commercial" to mean "able or likely to yield a profit," and found that defendants' practice of renting their lots to the public for a fee constituted a prohibited commercial use. The court's reasoning was consistent with caselaw construing similar restrictions on commercial uses[12] and supported by the record. While defendants maintain that the trial court should not have enforced the deed restrictions because of the equities involved, they do not seriously dispute the trial court's findings or rationale regarding their breach of the deed restrictions.

Instead, defendants take issue with the scope of the injunctive relief granted by the court, arguing that the court erred by prohibiting *all* rental activity, including long-term renting,[13] because the controversy at issue in the case related only to short-term rentals to vacationers. Defendants are correct in their contention that plaintiffs' request for relief was limited to enjoining continued operation of "vacation rentals," and that the parties did not present evidence concerning long-term renting at trial. However, MCR 2.601(A) provides that a court may grant any relief to which a party is entitled, "even if the party has not demanded that relief . . . ." As such, that the court's injunction exceeded the scope of the relief sought by plaintiffs is not dispositive.

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[7] *Johnson Family Ltd Partnership v White Pine Wireless, LLC*, 281 Mich App 364, 389; 761 NW2d 353 (2008).

[8] *Dep't of Environmental Quality v Gomez*, 318 Mich App 1, 32-33; 896 NW2d 39 (2016).

[9] *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003).

[10] *Id.*

[11] *Terrien v Zwit*, 467 Mich 56, 65; 648 NW2d 602 (2002) (citation omitted).

[12] See, e.g., *id.* at 64.

[13] Although the court did not explicitly ban long-term renting, we agree that the court's unequivocal prohibition against "all rental activity for a fee" is not limited to the short-term rental activity that plaintiffs' complained of below.

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Defendants' argument is unpersuasive because the court's rationale concerning defendants' short-term rental practices is equally applicable to rentals of any length, regardless of whether long-term renting was challenged by plaintiffs. As the trial court observed,

> "Commercial" is commonly defined as "able or likely to yield a profit." Random House Webster's College Dictionary (1991). "Commercial use" is defined in legal parlance as "use in connection with or for furtherance of a profit-making enterprise." Black's Law Dictionary (6th ed). "Commercial activity" is defined in legal parlance as "any type of business or activity which is carried on for a profit." *Id*.[14]

The act of renting property to a third-party for any length of time involves a commercial use because the property owner is likely to yield a profit from the activity. Restrictions barring commercial uses of property proscribe a wide variety of activities, even activities that are residential in nature, such as renting to residential tenants for extended periods of time.[15] As such, the trial court's decision to bar "all rental activity for a fee" was not outside the range of principled outcomes because the court was authorized to "interfere by injunction" as a result of defendants' breach of the deed restrictions, and the restrictions clearly barred any commercial activity from occurring on defendants' lots.[16]

III. DEFENDANTS' TRESPASS AND WASTE COUNTER-CLAIMS

Next, defendants argue that the trial court erred by rejecting their counterclaims against the Smith and Bauckham plaintiffs. We disagree.

This Court reviews a trial court's factual findings for clear error.[17] "A finding is clearly erroneous where, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake has been made."[18] Conclusions of law are reviewed de novo.[19]

In their first amended complaint, defendants brought a claim of trespass against several plaintiffs, alleging that

> Plaintiffs/Counter-Defendants Bauckham, Brouwer, Cole, Smith, Shkor and Zeller have trespassed upon the beach parcel owned in common . . . by i.) placing

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[14] *Terrien*, 467 Mich at 64.

[15] *Id*. at 62-63.

[16] Plaintiffs' did not respond to this issue in their brief on appeal. If plaintiffs are similarly dissatisfied by the extended scope of the court's injunction, there is nothing to prevent the parties from negotiating a more narrow remedy for the trial court's consideration.

[17] *Alan Custom Homes, Inc*, 256 Mich App at 512.

[18] *Id*.

[19] *Id*.

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personal property and installing real fixtures on the beach parcel, in such manner and with the intent and effect of excluding other co-owners from using that portion of the commonly owned beach parcel and ii.) cutting trees and removing natural vegetation beneficial to the natural beauty and stability of the dune and placing such at great risk of erosion, without first obtaining the unanimous consent and permission of all common owners.

Later, defendants clarified that their trespass claim against the Smiths involved an erosion control system commissioned by the Smiths, which purportedly caused an unnatural amount of surface water to flow from the Smith lot onto the Beach Parcel. The trial court rejected defendants' trespass claim reasoning that, as a matter of law, a cotenant cannot trespass on a commonly owned parcel. It also reasoned that defendants' water-trespass theory lacked merit because the erosion control system was installed with proper permits and there was no evidence that the project harmed the interest of any cotenant.

On appeal, defendants argue that the trial court erred by focusing on the Smiths' mitigating measures, rather than the technical trespass. In Michigan, an action for trespass requires "proof of an unauthorized direct or immediate intrusion of a physical, tangible object *onto land over which the plaintiff has a right of exclusive possession*."[20] Thus, while defendants are correct that the focus of a trespass claim must be on the challenged intrusion upon real property, their claim must fail because the trial court correctly concluded that the Smiths, as cotenants of the Beach Parcel, could not trespass upon their own property. One of the hallmark features of tenancy in common is that each cotenant is entitled to possession of the whole property.[21] Because the Smiths, like all cotenants of the Beach Parcel, have a possessory interest in the land, they did not cause a physical intrusion onto land that defendants had an exclusive right of possession over. This is not to say that cotenants are left without a legal or equitable remedy when faced with misuse of commonly owned property, as other theories of liability may support a similar claim. However, a trespass claim is not the appropriate vehicle for defendants' complaints concerning the erosion control system. The trial court did not err by rejecting defendants' trespass claim as pled.

Defendants also argue that the trial court erred by failing to rule upon their claim regarding the dilapidated stairs leading from the Bauckham lot, the remains of which encroach upon the Beach Parcel. On appeal, defendants characterize the presence of the remaining materials as an act of trespass and waste. The presence of the stair remnants could arguably fit into the broad scope of defendants' trespass claim, as pled in their amended complaint, because it involves the placement of personal property on the Beach Parcel. However, to the extent that this claim sounds in trespass, it must fail for the same reason: the Bauckham plaintiffs are also cotenants holding a possessory interest in the Beach Parcel.

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[20] *Adams v Cleveland-Cliffs Iron Co*, 237 Mich App 51, 67; 602 NW2d 215 (1999) (emphasis added).

[21] *Kay Investment Co, LLC v Brody Realty No 1, LLC*, 273 Mich App 432, 441; 731 NW2d 777 (2007).

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Defendants' alternative characterization of their claim as one for waste is at odds with their amended complaint. Defendants alleged a separate count for common law waste against "certain owners who own property adjacent to the Beach Parcel," alleging that these owners "have from time to time removed timber and brush from the Beach Parcel, thus committing waste and damaging the property as detailed above." Notably, the trial court *did* dispose of defendants' waste claim *as pled*, by finding that defendants failed to present sufficient credible testimony concerning the improper removal of trees or resulting damages, and defendants do not challenge this finding on appeal. We find no error in the trial court's failure to address a theory that was not properly pled or argued in a clear manner.

IV. EFFECT OF SETTLEMENT STIPULATION

On cross-appeal, plaintiffs argue that the trial court erred by failing to give effect to the parties' partial settlement stipulation placed on the record at trial. We conclude that the stipulation is ambiguous and the record requires further factual development.

Courts interpret a stipulation that "embod[ies] all the essential characteristics of a contract" like a contract.[22] Courts interpret contracts according to the parties' intent, so long as their intent is clear.[23] Accordingly, courts must determine if the stipulation is clear and unambiguous.[24] A stipulation is unambiguous "if it fairly admits of but one interpretation."[25] If the stipulation is unambiguous, "construction of the [stipulation] is a question of law for the court."[26] This Court reviews questions of law de novo.[27] A stipulation is ambiguous if "its language can be reasonably understood in different ways,"[28] or "a term is equally susceptible to more than a single meaning."[29] If ambiguous, "factual development is necessary to determine the intent of the parties"[30] and a court may consult relevant extrinsic evidence to determine the stipulation's meaning.[31] This Court reviews a trial court's factual findings for clear error.[32] "A

[22] *Bd of Co Rd Comm'rs v Schultz*, 205 Mich App 371, 378-379; 521 NW2d 847 (1994) (quotations and citation omitted).

[23] *Zurich Ins Co v CCR & Co (On Rehearing)*, 226 Mich App 599, 604; 576 NW2d 392 (1997).

[24] See *Upjohn Co v New Hampshire Ins Co*, 438 Mich 197, 206; 476 NW2d 392 (1991).

[25] See *Steinmann v Dillon*, 258 Mich App 149, 154; 670 NW2d 249 (2003).

[26] See *Klein v HP Pelzer Auto Sys, Inc*, 306 Mich App 67, 76; 854 NW2d 521 (2014) (quotations and citations omitted).

[27] *Id*. at 75.

[28] See *Steinmann*, 258 Mich App at 154.

[29] See *Dancey v Travelers Prop Cas Co of America*, 288 Mich App 1, 8; 792 NW2d 372 (2010) (quotations, emphasis, alteration, and citation omitted).

[30] See *Klein*, 306 Mich App at 76 (quotations and citations omitted).

[31] See *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 470-471; 663 NW2d 447 (2003).

[32] *Alan Custom Homes, Inc*, 256 Mich App at 512.

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finding is clearly erroneous where, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake has been made."[33]

In this case, the trial court found that a number of plaintiffs had constructed fixtures on the Beach Parcel, including stairs, decks, a motorized tram system, and at least one outbuilding, and that use of these structures was limited by locks, gates, and "no trespassing" signs. The parties discussed a stipulation that defendants agreed to withdraw their request that fixtures already situated on the Beach Parcel be removed and, in exchange, defendants could introduce four late-filed surveys of various Sunset Shores lots. Defense counsel explained the stipulation. Then, plaintiffs' counsel stated,

> I understand that what we agreed on is that there wouldn't be destruction, demolition or removal. So I mean if they're trying to hide something from me please let me know now, but the idea is the stuff that's been on the beach parcel gets to stay on the beach parcel. The requested relief I'm assuming is going to be limited now to they want to be able to use it. We don't agree to that, but we're not looking at a case where they're asking for the removal or the destruction or demolition of those structures that have been in place.

Further, plaintiffs' counsel opined that contribution should be required if the court ordered that the structures be made available for use by all cotenants, but cautioned that some plaintiffs might prefer to remove the structures if forced to make them open for common use.

The trial court ordered:

> As to the parts of the structures which encroach on the Beach Parcel, minimal repairs may be performed on them in the future, but only to preserve the current function of the structure and not to expand the encroachment or extend the structures useful life. Once the structure has surpassed its useful life, the ultimate removal of any structure will be done at the expense of the owner of the parcel adjoining the Beach Parcel and no contribution will be had from any other cotenant. If the encroaching structures are damaged by catastrophic acts of God the encroaching structure cannot be replaced.

To the extent that these structures remain in place, the trial court ruled that the exclusion of other cotenants from the portions of the parcel occupied by these structures was inconsistent with the remaining cotenants' rights. To remedy the problem, the court ordered the removal of locks, gates, and exclusionary signage within 90 days and declared that the structures would be available for the use and benefit of all cotenants thereafter.

On cross-appeal, plaintiffs argue that the trial court's order is inconsistent with the parties' stipulation because the parties intended that the existing structures would be allowed to remain on the Beach Parcel indefinitely. We agree. We conclude that the language in the

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[33] *Id.*

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stipulation is ambiguous because it can be reasonably understood in different ways. Determining the parties' intent requires further factual development. Therefore, we vacate the portions of the trial court's order discussed in this section and remand for an evidentiary hearing to determine the parties' intent in making the stipulation.[34] On remand, the trial court is free to resolve the ambiguities in the stipulation based on the proofs presented at the evidentiary hearing. Alternatively, the parties may reach a new stipulation and submit the new stipulation to the trial court. In all other respects, the balance of the trial court's decision is affirmed.

We affirm in part, vacate in part, and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Peter D. O'Connell
/s/ Thomas C. Cameron

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[34] See MCR 7.216(A)(5).

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EXHIBIT 2

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE CITY OF ST. CLAIR SHORES,

Plaintiff-Appellee,

v

MICHAEL DORR,

Defendant-Appellant.

UNPUBLISHED
October 29, 2020

No. 349910
Macomb Circuit Court
LC No. 2019-000135-AR

Before: SWARTZLE, P.J., and JANSEN and BORRELLO, JJ.

PER CURIAM.

Defendant appeals by leave granted[1] the circuit court order affirming his district court bench trial conviction for violating the City of St. Clair Shores Zoning Ordinance. For the reasons set forth in this opinion, we affirm.

I. BACKGROUND

Defendant was charged with a misdemeanor violation of City of St. Clair Shores Zoning Ordinance 15.050,[2] (R-A One Family General Residential District), based on an alleged impermissible use of R-A single family residentially zoned property. A bench trial was conducted in the district court, during which defendant testified that he was operating a short-term rental "Airbnb" out of his home in the City of St. Clair Shores on approximately July 15, 2018. There was no additional testimony introduced at trial. The city argued that its zoning ordinance did not

[1] *People of St. Clair Shores v Dorr*, unpublished order of the Court of Appeals, entered November 6, 2019 (Docket No. 349910).

[2] Throughout this case, the parties and the lower courts have referred to the City of St. Clair Shores Zoning Ordinance 15.050 as the ordinance (singular) at issue. Because 15.050 only contains the title, "R-A One Family General Residential District," while the relevant operative provisions and definitions are found in other sections, we will cite specific sections of the St. Clair Shores Ordinances as needed and will refer to the entire zoning scheme at issue as the St. Clair Shores Zoning Ordinance or "the zoning ordinance."

permit the operation of an Airbnb in a residential neighborhood. The district court found defendant guilty of violating the ordinance. Defendant appealed to the circuit court, which affirmed his conviction.

II. ANALYSIS

There is no factual dispute in this case that defendant was engaged in using his home for short-term rentals through Airbnb. The question presented is whether the zoning ordinance prohibited such use. Defendant argues that the zoning ordinance did not prohibit his conduct or, in the alternative, that the ordinance is unconstitutionally vague.

Defendant's arguments require this Court to interpret the zoning ordinance, which is a question of law that is reviewed de novo. *Brandon Charter Twp v Tippett*, 241 Mich App 417, 421; 616 NW2d 243 (2000). Ordinances are interpreted in the same manner as statutes. *Id.* at 422. If the language of the ordinance is clear and unambiguous, it is applied as written. *Id.*

This Court also reviews de novo void-for-vagueness challenges to the constitutionality of an ordinance. *People v Lawhorn*, 320 Mich App 194, 197 n 1; 907 NW2d 832 (2017). "To determine whether [an ordinance] is unconstitutionally vague, this Court examines the entire text of the [ordinance] and gives the words of the [ordinance] their ordinary meanings." *Id.* at 198 (quotation marks and citation omitted). "A court must also consider any judicial constructions of the [ordinance] when determining if it is unconstitutionally vague." *Id.*

St. Clair Shores Zoning Ordinance 15.051 provides:

> The RA One-Family General Residential Districts are designed to be among the most restrictive of the residential districts. The intent is to provide for an environment of predominately low-density single unit dwellings along with other residentially related facilities which serve the residents in the district.

St. Clair Shores Zoning Ordinance 15.052 provides in relevant part as follows:

> In the R-A One-Family General Residential District no building or land shall be used and no building shall be erected except for one or more of the following specified uses, unless otherwise provided in this Ordinance.
>
> (1) One-Family detached dwellings.
>
> * * *
>
> (6) Home occupations or businesses, subject to the standards of 15.516 Home Occupations or Businesses.

St. Clair Shores Zoning Ordinance 15.516 provides in relevant part as follows:

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

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> 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.

Because defendant was engaged in using his home to offer short-term *rental* accommodations, he was operating a business out of his home. Indeed, defendant affirmatively characterizes his activity of providing short-term rental accommodations to "paying guests" as a home business that defendant operates while continuing to live in the home as his sole personal residence, and he argues that it is therefore permitted under the zoning ordinance. Thus, defendant's activities fall within 15.052(6) for purposes of determining whether his short-term rental activity was prohibited by the zoning ordinance.

Because defendant's short-term rental business directly depends on using the dwelling unit as a dwelling for guests, defendant's business fails to satisfy the condition in 15.516(1) that the "home occupation or business must be clearly *incidental* to the principal use of the dwelling unit for dwelling purposes." (Emphasis added.) The purpose of the business is identical, not incidental, to the principal use of the dwelling unit for dwelling purposes. Defendant's short-term rental business does not comply with the requirements in 15.516 and therefore is a prohibited use under 15.052(6).

Next, defendant argues that the zoning ordinance is unconstitutionally vague because it does not provide fair notice of the conduct prohibited and gives the trier of fact unstructured and unlimited discretion in determining whether the ordinance has been violated.

"An ordinance is unconstitutionally vague if it (1) does not provide fair notice of the type of conduct prohibited or (2) encourages subjective and discriminatory application by delegating to those empowered to enforce the ordinance the unfettered discretion to determine whether the ordinance has been violated." *Plymouth Twp v Hancock*, 236 Mich App 197, 200; 600 NW2d 380 (1999). "To 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) (citation omitted). Additionally, a "criminal statute must provide standards for enforcing and administering the laws in order to ensure that enforcement is not arbitrary or discriminatory; basic policy decisions should not be delegated to policemen, judges, and juries for resolution on an ad hoc and subjective basis." *Lawhorn*, 320 Mich App at 202-203 (quotation marks and citation omitted).

When, as is the case here, a void-for-vagueness challenge does not involve First Amendment rights, "[a] defendant has standing to raise a vagueness challenge only if the statute is vague as applied to his conduct" and we review the challenge "on the basis of the particular facts of the case at issue." *Id.* at 199-200 (quotation marks and citation omitted; alteration in original). Moreover, "even if a statute may be susceptible to impermissible interpretations, reversal is not required where the statute can be narrowly construed so as to render it sufficiently definite to avoid vagueness and where the defendant's conduct falls within that prescribed by the properly construed statute." *Id.* at 200 (quotation marks and citation omitted).

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As explained above, the trial court correctly held that defendant's conduct clearly falls within the purview of the ordinance and is plainly prohibited by the language of the ordinance. St. Clair Shores Zoning Ordinance 15.556(1) requires that the home business be "incidental" to the use of the dwelling as a dwelling. We concur with the trial court that a person of ordinary intelligence would reasonably understand from this language that the business therefore cannot be coextensive with the primary use of the dwelling as a dwelling and that the ordinance therefore prohibits the type of short-term rental business that defendant was running from his home under these circumstances. Accordingly, the ordinance provides fair notice of the conduct prohibited and clear standards to prevent arbitrary or discriminatory enforcement. *Noble*, 238 Mich App at 652; *Lawhorn*, 320 Mich App at 202-203. We conclude that defendant has failed to demonstrate that the ordinance is unconstitutionally vague. "[T]he party challenging the constitutionality of a statute has the burden of proving the law's invalidity." *Lawhorn*, 320 Mich App at 199 (quotation marks and citation omitted).

Affirmed.

/s/ Stephen L. Borrello

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STATE OF MICHIGAN

COURT OF APPEALS

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Plaintiff-Appellee,

v

MICHAEL DORR,

Defendant-Appellant.

UNPUBLISHED
October 29, 2020

No. 349910
Macomb Circuit Court
LC No. 2019-000135-AR

Before: SWARTZLE, P.J., and JANSEN and BORRELLO, JJ.

JANSEN, J. (*concurring*).

I concur in the result only.

/s/ Kathleen Jansen

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Plaintiff-Appellee,

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Defendant-Appellant.

UNPUBLISHED
October 29, 2020

No. 349910
Macomb Circuit Court
LC No. 2019-000135-AR

Before: SWARTZLE, P.J., and JANSEN and BORRELLO, JJ.

SWARTZLE, P.J. (*dissenting*).

I respectfully dissent. I agree with the lead opinion that defendant was operating a business out of his residential home when he rented it as an "Airbnb." Therefore, to fall within the city's permissible use of a residential home as a "home business," the "business must be clearly incidental to the principal use of the dwelling unit for dwelling purposes." St. Clair Shores Zoning Ordinance 15.516(1).

Where I part with the lead opinion, however, is with its apparent conclusion that a permissible business use cannot involve any "lodging" or "rooming" in the residential home whatsoever. The term "dwelling purposes" in the home-business exception is not defined, although "dwelling unit" is: "A building, or portion thereof, designed for occupancy by one (1) family for residential purposes and having cooking facilities." A reasonable reading of the ordinance is that "dwelling purposes" is synonymous with "residential purposes," but unfortunately the latter term is also left undefined. As I read the ordinance (including the definition of a "family"), the terms "dwelling purposes" and "residential purposes" are intended to cover purposes that have "a permanent and distinct domestic character." *Id.* 15.022(33)(b). If this reading is a reasonable one, then a single-night's stay as an Airbnb rental would not qualify as a "dwelling purpose," and, as a result, the stay would not fall outside the home-business exception.

My reading is in-line with the city's regulation of a "tourist house." The ordinance defines a "tourist house" as "[a] dwelling in which overnight accommodations are provided or offered for transient guests for compensation, without provision of meals." *Id.* 15.022(86). This would seem the most logical place to regulate or prohibit Airbnb rentals, but the city specifically exempted from the meaning of "tourist house" "any private residence or home, the owner or occupant of

which is not *regularly* engaged in renting any rooms in such residence or home to permanent or transient roomers who are not related to such person." *Id.* 18.050 (emphasis added). Defendant was convicted of renting his residence on Airbnb for a single day, and the record shows that he had similarly rented his residence for one other day in the past. Two days over a year or more does not constitute "regularly engaged" in renting one's home on Airbnb.

Moreover, I read the term "incidental" more broadly than does the lead opinion, as "incidental" in this context could have either a temporal or spacial meaning—in other words, (1) the use could be "incidental" if the entire space of the home was turned over to a business use on a brief, temporary basis (e.g., a single-day's rental), just as (2) the use could be "incidental" if a room of the home was turned over to a business use on a permanent basis (e.g., a home office). In (1), the temporal use is incidental, although the spacial use is not, while in (2), the spacial use is incidental, although the temporal use is not.

Finally, while I disagree with the lead opinion's construction of the ordinance, if we assume that its construction is also a reasonable one, then I would conclude that the ordinance is unconstitutionally vague as-applied to defendant's conviction for renting his home for a single day. Simply put, if the city wants to regulate or prohibit Airbnb rentals and the like, then it should clearly say so.

Accordingly, I respectfully dissent.

/s/ Brock A. Swartzle

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