

LAW OFFICES
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MEMORANDUM

DATE: 07/31/2023
TO: Jennifer Elowsky
FROM: Leann Kimberlin
RE: Milford Township – Short Term Rentals

Issue: How may short term rentals (STRs), such as Airbnb, be regulated in the Township?

Background and Regulatory issues in Michigan:

Several cases in the past few years in Michigan have highlighted the fact that short-term rental law still varies from local jurisdiction to local jurisdiction, with some courts varying as to the exact nature of the use, but one case in particular highlights the crux of the issue well.

In *Reaume v. Township of Spring Lake*, 328 Mich app 321, 937 NW2d 734 (2019), the Court of Appeals first ruled that operating a short-term rental is a commercial use of property and not a residential one and was thus prohibited in a residential zoning district. The ruling was then appealed to the Michigan Supreme Court, where the Supreme Court upheld the effect of the ruling, that the use was prohibited, but on a different basis: The court ruled that the short-term rental use of property fell within the township’s definition of a “motel,” not a “dwelling.” Because “motels” were not a permitted use in the residential zoning district, and the plaintiff’s property was zoned residential, the high court affirmed the appellate court ruling and concluded that short-term rentals were not allowed in the district.

One of the other main issues in the Court of Appeals case that the Michigan Supreme Court addressed was whether the definition of a “single-family dwelling” could apply to a family that was staying in a short-term rental on a temporary basis. The Court of Appeals ruled that a “family” for the purposes of single-family zoning did not apply to “individuals whose relationship is of a transitory or seasonal nature” and excluded transient or temporary rental occupation in that zoning on those grounds. The Supreme Court of Michigan, however, vacated that narrow question, affirming that a “family” for the purposes of single-family dwellings, although not being of a transitory nature with respect to each other, still could be transitory as it relates to their occupancy. This theoretically could lay the groundwork for allowing short-term rentals in residential single-family zoning districts if there are no other provisions of the community’s zoning ordinance that deal with temporary occupancy, like a “motel,” in which the use would more readily fit.

Interestingly, Park Township Michigan has the exact same ordinance, and after the Spring Lake court ruling, it decided to ban all STRs. Park Township was able to do so without consideration of nonconforming use issues as “motels” were never allowed in residential districts, and therefore the STR use (which had been occurring in some form for at least 48 years) was never permitted and would therefore not be considered “grandfathered” or legally nonconforming.

Other subsequent cases have sidestepped this issue of whether short-term rentals are allowed in single-family residential districts by ruling on other grounds. For example, in *Pigeon v. Ashkay Island, LLC*, unpublished 2021 Court of Appeals opinion, the court found that a short-term rental property was not permitted in a residential district because it met the definition of a “tourist home,” which is not permitted in the district. In that case, the subject Manchester Township zoning ordinance defined a “tourist home” as: *A dwelling in which overnight accommodations are provided or offered to transient guests for compensation. A tourist home shall not be considered or construed to be a multiple dwelling, motel, hotel, boarding or rooming house.* Tourist homes are permitted only in Manchester Township’s Community Commercial Center Zoning District, and therefore the residential STR was properly prohibited.

Another example is *Cherry Home Association v Baker*, an unpublished Court of Appeals opinion issued in 2021. There, the defendant’s property was subject to private deed restrictions which limited the use of the land to “residential use”. The defendant property owners began renting their lot on a short-term basis, and argued the lot was rented for use as a residence, and therefore permissible under the restrictions. The Court disagreed with this argument and held that the plain language of the restrictions clearly limited the use of lots in the community to residential use. The Court applied definitions of “residential” from prior holdings in the Michigan Supreme Court. Those definitions looked to the permanence in a residence, which is demonstrated by the occupant’s actions, including a continuity of being physically present in the residence and storing personal property within the residence. As noted by the Court, this use specifically excludes uses that are transitory in nature as “[t]here is no permanence, either physiologically or physically at that location.” The Court held that the weekly rentals did not establish the type of permanence needed to demonstrate residential use of the lot, and the use of the lot for short-term rentals was in fact a violation. Note, though, that this is an unpublished opinion that dealt specifically with a deed restriction, and not a municipal ordinance.

Confusion regarding how to define and regulate short-term rentals may be partly why the Michigan Legislature has considered statewide bills recently that would have brought some conformity to the issue. House and Senate bills from 2022, with identical language and backing from Republican legislators, would have allowed short-term rentals across the state as a permitted residential use in all residential zones without the need for a special use or conditional use permit. Under these bills, municipalities would have been allowed to regulate some of the effects of short-term rentals, such as traffic, noise and advertising, and would have been able to enforce ordinances for the protection of public health and safety, as long as they did not have the effect of prohibiting short-term rentals. These bills stalled in session and were not passed in 2022. To move forward, these bills must be reintroduced, something that has not happened thus far in 2023.

Existing Regulations in Milford Township:

The Township has enacted a residential rental ordinance. This ordinance regulates residential rentals generally and does not specifically differentiate between what may be considered a STR, as opposed to a longer term rental.

Additionally, Milford Township's zoning ordinance does not specifically regulate or prohibit residential rentals, STRs or otherwise, either by definition or as an excluded use in residential districts. Therefore, there are no specific ordinance provisions in place to indicate that STRs are in fact non-residential commercial activity, and there are also no ordinances mandating that a property owner must occupy their STR as a principal residence.

Accordingly, it appears that existing STRs that are properly registered as rentals follow current Township regulations and are operating legally.

If STRs are to be banned or otherwise regulated within the Township, amendments to the existing residential rental ordinance (Chapter 6, Article IV) and the zoning ordinance will be necessary.

Banning STRs:

Banning STRs may be problematic with respect to current STRs, as such STRs may be considered existing non-conforming uses upon institution of a ban. As discussed above, the Township currently allows residential rentals and provides a procedure for their legal operation through its residential rental ordinance. This ordinance does not distinguish between the length of the rental periods, nor does it specify that a rental use is considered a commercial activity. Thus, current STRs are legal if properly registered, giving rise to a nonconforming use status.

Other communities have banned STRs, but in those cases the communities were able to establish that STRs were never permitted uses under their zoning ordinances. For example, in the case of *Reaume v Township of Spring Lake*, 328 Mich app 321, 937 NW2d 734 (2019), previously discussed above, the Court of Appeals found that, pursuant to the Township's ordinance definition, the plaintiff's use of her property rendered it a motel, rather than a dwelling, and as such was prohibited in residential zones. The subject ordinance defines a motel to include a "[b]uilding . . . containing sleeping . . . [u]nits which may or may not be independently accessible from the outside with garage or [p]arking [s]pace located on the [l]ot and . . . occupied by transient residents."

The definition of "motel" in Spring Lake's ordinance is very broad and is inconsistent with the common definition of a motel that appears in other ordinances. Specifically, Milford Township's ordinance definitions for "motel" and "hotel" are markedly different than Spring Lake Township's, so the *Reaume* case does not provide much justification for a ban that would be applicable to currently existing STR uses in the Township. The pertinent definitions in Milford's ordinance are as follows:

MOTEL means a series of attached, semidetached, detached rental units containing bedroom, bathroom and closet space wherein each unit has a separate individual entrance leading directly from the outside of the building. No kitchen or cooking facilities are to be provided, with the exception of units for use of the manager and/or caretaker.

HOTEL means a building occupied or used as a, more or less, temporary abiding place of individuals or groups of individuals with or without meals, and in which there are more than five sleeping rooms, and in which no provision is made for cooking in any individual room.

Note that an argument could be made that STRs are "hotels" under the zoning ordinance definition as STRs are occupied as a "more or less, temporary abiding place of individuals", but this would only apply to homes that have more than five bedrooms. As the use is the same regardless of the number of bedrooms in the various STRs existing in the Township, such an argument would be

easily challenged. Also, any argument that a STR rental is a hotel would only allow for regulation in cases where the rental has more than five bedrooms, something that could easily be addressed by an STR rental operator.

In fact, the ordinance definition that most closely relates to a STR is the definition for a bed and breakfast, which is a permitted use in the R-1 and R-2 Districts, and a special use in the R-1-R District.

BED AND BREAKFAST OPERATIONS means a use which is subordinate to the principal use of a detached single-family dwelling as a single-family dwelling unit, and a use wherein transient guests are provided a sleeping room in return for payment and a breakfast at no extra cost. Such use is distinguished from a boardinghouse, roominghouse, hotel or motel.

For additional reference related to treatment of existing STRs, in 2020, the Ann Arbor City Council passed an ordinance banning dedicated short-term rentals in residential neighborhoods. In 2021, amid possible legal challenges from affected short-term rental owners, City Council updated the previous ordinance to allow existing dedicated short-term rentals to continue operating, ie. legal non-conforming uses. Grand Haven Township also instituted an ordinance regulating STRs, but only allowing them in an overlay zone which is comprised of the STRs that were in existence prior to the enactment of the ordinance, ie allowing for continuation by those STRs already in operation prior to enacting the ordinance.

Regulating STRs:

The Township may enact regulations specific to STRs. As opposed to an outright ban, those regulations would apply to both existing and new STRs as necessary for the public health, safety and welfare.