MAY
2022
VOLUME
14
NUMBER
9

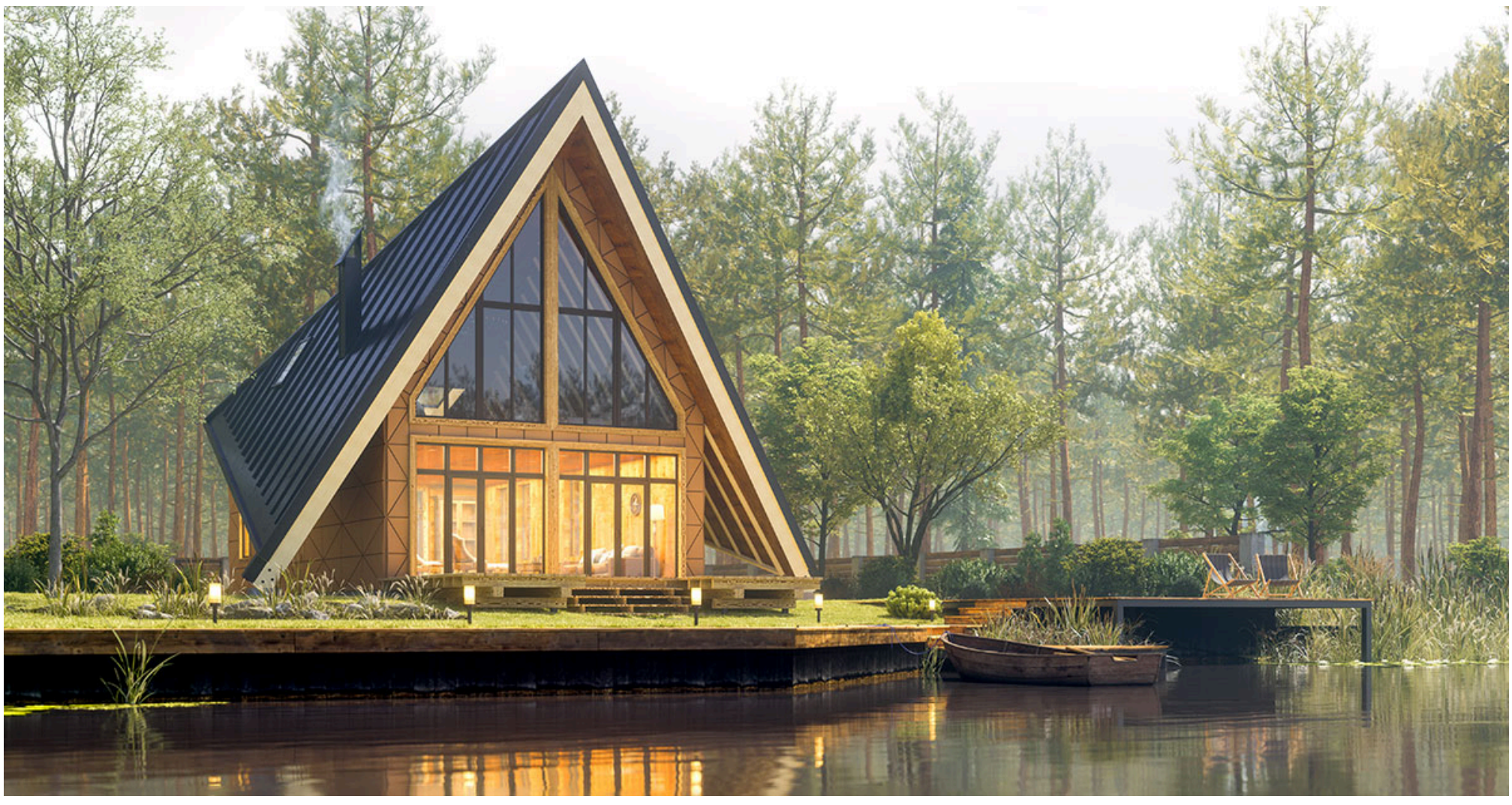
InsideTrack

MAY 18, 2022

Short-Term Rentals: As a Vacation Hub, Wisconsin Navigates the Laws of Leisure

The rise of short-term vacation rentals over the years, through websites like Airbnb and Vrbo, has created some legal friction between homeowners and municipalities.

JEFF M. BROWN



May 18, 2022 – Memorial Day is right around the corner. Soon families will pack their swim trunks, bug spray, and fishing tackle and head for vacation spots across Wisconsin.

For some, the destination is a cabin that's been in the family for generations. But an increasing number are turning to short-term rentals of private homes, a trend with implications for property, land use and municipal law.

Shift in Work-Life Balance

Several factors are behind the increase in short-term vacation rentals. One is the long American workweek and the decades-long rise of households with both parents working, which may leave less free time for family vacations.

Another is the advent of online vacation rental services like Airbnb and Vrbo. With a few photos and click of the mouse, absent owners can turn vacant homes into income properties, offering vacationers lodging choices beyond hotels and traditional bed-and-breakfasts.

Timeshares and Zoning

Short-term vacation rentals in Wisconsin and legal disputes surrounding them have been around for decades.

Jeff M. Brown *is a legal writer for the State Bar of Wisconsin, Madison. He can be reached by email or by phone at (608) 250-6126.*

Zoning law provided the backdrop for a dispute over a short-term vacation rental that reached the Wisconsin Court of Appeals in 1985.

It was a time when many families without a vacation home spent their week at the lake in a multi-family lodge (think "The Great Outdoors").

In that pre-internet era, one alternative to a lodge or a family cabin was the timeshare, an arrangement where multiple buyers own allotments of usage, usually in one-week increments, in a property.

John Harding sought a permit to build a timeshare in Door County. The property would be owned by 13 families, each entitled to occupy the property for four weeks each year.

The county turned Harding down, claiming the timeshare would violate a zoning ordinance that restricted the use of the property to a single-family dwelling.

In State ex rel. Harding v. Door County Adj. Board, 125 Wis. 23 269, 371 N.W.2d 403 (1985), the court of appeals held that the county zoning ordinance did not prohibit a timeshare, because the ordinance focused on how the property would be used by its occupants rather than by its owners.

Because the proposed time share would be used by a single family during any one four-week period, the court of appeals reasoned, it complied with the ordinance.

Single-Family Dwelling?

A similar zoning ordinance was at the center of a 2015 court of appeals case over short-term vacation rentals.

In Heef Realty & Invs., LLP v. City of Cedarburg Bd. of Appeals, 2015 WI App 23, 361 Wis. 2d 185, 861 N.W.2d 797, the court of appeals held that an ordinance did not prohibit short-term rentals in a zone in which "single-family dwellings" were allowed.

A related ordinance defined "dwelling" as buildings "designed or used exclusively as a residence … but not including boarding or lodging houses, hotels, motels, tents, cabins, or mobile homes."

The court of appeals began its analysis by noting a Wisconsin Supreme Court decision holding that zoning provisions must be clear and unambiguous because they represent a departure from the common law, which favors the free use of private property.

The *Heef* court then concluded that its decision in *State ex rel Harding* was controlling.

The City of Cedarburg argued that *State ex rel Harding* shouldn't control because that case turned upon whether a single family would be occupying the property at any one time, rather than whether renting a property to tourists or other temporary guests constituted a residential use.

But the court of appeals reasoned that terms like "single-family," "residential," and "dwelling" did not set temporal restrictions on the use of a property.

If the city wanted to require a certain period of occupancy before a property counted as a dwelling or a residence, the court of appeals held, it needed to do so with clear and unambiguous wording.

> “As new arguments are developed, new fact situations presented, and new legislation passed, the law will continue to evolve in this area.”
> – Justice A.W. Bradley, dissenting in Forshee v. Neuschwander.

A Not-So-Restrictive Covenant

A dispute over the applicability of a restrictive covenant to short-term vacation rentals made its way to the Wisconsin Supreme Court in 2018.

In Forshee v. Neuschwander, 2018 WI 62, 378 Wis. 2d 222, 904 N.W.2d 371 the supreme court affirmed (6-1) a court of appeals decision holding that a restrictive covenant prohibiting commercial activity on subdivision lots did not bar short-term rentals.

Lee and Mary Jo Neuschwander used their property in Hayward as a vacation home but used Vrbo to rent the home out on a short- and long-term basis when they weren’t there. Several neighbors objected to the rentals and sued the Neuschwanders.

The lead opinion, written by then-Chief Justice Patience Roggensack and joined by two other justices, held that the term “commercial activity” was ambiguous and therefore unenforceable.

The term was ambiguous, Roggensack explained, because it was undefined in the covenant and because the court was unable to divine the term’s meaning by looking to the context of the covenant.

In her concurrence, Justice Shirley Abrahamson concluded that the term “commercial activity” was unambiguous, and that the Neuschwanders hadn’t violated the covenant because short-term rentals were not commercial activity.

Abrahamson based her reasoning in part on her conclusion that the short-term renters were using the property for the same residential purposes that both the Neuschwanders and their neighbors were using their respective properties.

In his concurrence, Justice Daniel Kelly (joined by Justice Rebecca Bradley) concluded that the covenant only barred commercial activity on the property.

Renters were not engaged in the commercial activity of renting on the property, Kelly explained, but were rather engaged in the non-commercial activity of sleeping, cooking, eating, and relaxing.

Justice Ann Walsh Bradley dissented. The fact the Neuschwanders took in $55,784.93 in rent from the property in 2015 and paid $4,973.81 to the City of Hayward in room tax warranted a conclusion that the Neuschwanders were engaged in commercial activity on the property.

A.W. Bradley also warned that the lead opinion’s impact was not limited to residential properties used as short-term vacation rentals, given the historically widespread use of the term “commercial activity” in restrictive covenants.

Common Complaints

Among the complaints cited by neighbors opposed to short-term rentals are weekend rentals marked by binge drinking, loud music, cars cramming lakeside lanes, and overflowing garbage cans.

But the effects short-term rentals have on year-round residents can stretch beyond late-night annoyances.

Curt Witynski, deputy executive director for the League of Wisconsin Municipalities, said Ashwaubenon residents have complained that they’re being priced out of the housing market as values are driven up by nonresidents who buy houses in Brown County to rent them out for Packers games.

Balancing Act

Municipalities heard the complaints and moved to address them. Some cities and towns in Wisconsin enacted bans on renting property for less than 30 days at a time.

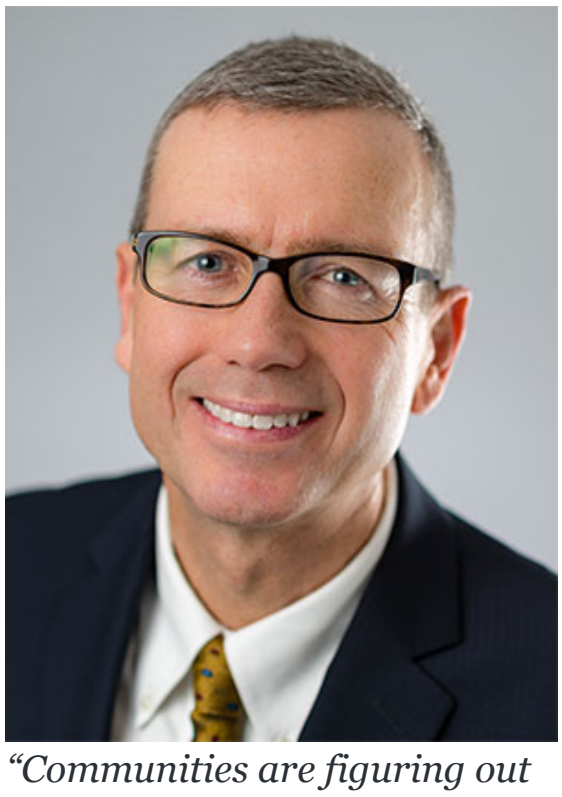
But in 2017, the legislature limited the ability of municipalities to restrict short-term rentals with an act that became law as part of the budget bill.

Under the act, a municipality may only prohibit rentals fewer than seven days in length. They may also cap the total number of days in a year when a property may be rented, as long as the cap numbers 180 or greater and the property is rented for periods of between six and 28 days at a time.

The maximum number of allowable rental days may run consecutively, but municipalities may not specify the season during which the days may run.

The act requires anyone who maintains, manages, or operates a short-term rental for more than 10 nights a year to obtain a tourist rooming house license from the Department of Agriculture, Trade and Consumer Protection (DATCP).

The act allows municipalities to enact short-term rental regulations that are not inconsistent with the act, including requiring the owners of short-term rentals to obtain a municipal license in addition the tourism rooming house license from DATCP.



"Communities are figuring out ways to adopt regulations which maybe aren't satisfying to everyone, but it is quieter," says Curt Witynski, Deputy Executive Director, League of Wisconsin Municipalities.

Municipalities Adapt

Witynski said the law is having an effect.

"Communities are figuring out ways to adopt regulations which maybe aren't satisfying to everyone, but it is quieter," Witynski said.

But having a law on the books is one thing, enforcing it another.

Rural municipalities with small tax bases, including many in areas of the state long popular with summer visitors, sometimes struggle to find the resources to enforce short-term rental ordinances.

Short-term rental regulations adopted by the Town of Holland in the wake of the act's passage were challenged in a lawsuit filed in Sheboygan County in June 2019.[1]

Those regulations specified the following:

- owners who lived more than 35 miles away from the rental property must hire a local property manager;
- owners must maintain homeowner's liability or business liability insurance and provide proof of insurance;
- the town could revoke the owner's municipal rental license for unpaid fees, taxes, or forfeitures or for any violation of state or local laws; and
- owners must provide at least one parking space for every four occupants.

The plaintiffs argued that the 2017 act preempted local short-term rental regulations. They also argued that: 1) the short-term rentals did not involve commercial activity; and 2) the town's regulations were inconsistent with the 2017 act.

But the circuit court granted the defendant's motion for summary judgment, ruling that the act left municipalities with some authority to regulate short-term rentals and the town's regulations were consistent with the act.

'A Reasonable Regulatory Framework'

Tom Larson, senior vice president of legal and public affairs with the Wisconsin Realtors Association, said his organization has filed multiple lawsuits around the state to compel municipalities to comply with the 2017 act and "create a reasonable regulatory framework."

With regard to some of the common complaints about short-term vacation rentals, Larson said municipalities should curb noisy and annoying behavior regardless of whether it's exhibited by short-term renters or full-time residents.

"It's the behavior that should be regulated, not the duration of the tenancy."

Larson said many people have long maintained second homes in Wisconsin, a tradition that's been a boon to the state's economy.

Many of those homes have been rented out informally for years, long before the advent of Airbnb and Vrbo, Larson said.

"We saw that as a huge economic development tool that we shouldn't shut down just because we don't like the nightly rentals. We have to recognize the difference and the important role it plays, especially in getting people to buy second homes in the state of Wisconsin and pay our property taxes while using very little resources."

The municipal bans on rentals of less than 30 days that popped up before passage of the 2017 act deprived local governments of much-needed revenue, Larson said.

"It's the behavior that should be regulated, not the duration of the tenancy," says Tom Larson, Senior Vice President of Legal and Public Affairs, Wisconsin Realtor Association.

Only the Beginning?

Larson said he expects that a lawsuit asserting that a local short-term rental ordinance conflicts with the 2017 act will make eventually make its way to the supreme court.

Justice A.W. Bradley apparently shares that expectation.

"As new arguments are developed, new fact situations presented, and new legislation passed, the law will continue to evolve in this area," Justice A.W. Bradley wrote in her dissent in *Forshee v. Neuschwander.*

"Restrictive covenants will be only one part of this evolution, as they intersect and overlap with the enforcement of local zoning ordinances that attempt to regulate this rapidly growing enterprise," continued Bradley. "There will inevitably be more litigation surrounding short-term rentals."

It sounds like the legal tussle over property rights in vacation homes is as inevitable as sunburns, mosquito bites, and tall tales about the one that got away.

Endnotes

[1] *Good Neighbors Alliance v. Town of Holland*, Case No. 2019CV000269.