

# VACATION RENTAL PROPERTY ORDINANCES

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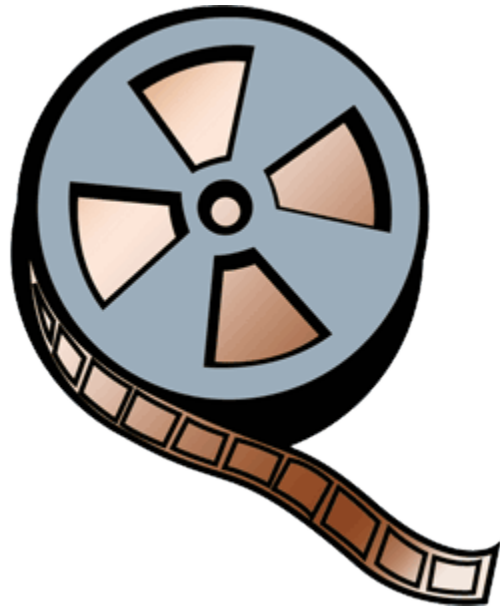
Weekly Rentals and Local Zoning

# Background

- As the Great Lakes State, Michigan has always had its share of vacation homes, many of which have been rented or shared.
- In recent years, the Internet has made short-term rentals (“STRs”):
  - ▣ More accessible,
  - ▣ More profitable, and
  - ▣ More common.
- Communities throughout Michigan are recognizing these trends and considering how to respond.

# So What's the Big Deal?

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# Really Though...

Some express concerns about:

- Occupancy – houses occupied by large groups of vacationers are out of character with neighborhoods with increased potential for nuisances.
- Size – Profit from high-occupancy STRs incentivizes larger houses with features out of character with neighborhoods.
- Parking – insufficient off-street parking for the number of renters.
- Behavior – inconsiderate renter behavior disturbing neighbors.

# Really Though... (Continued)

- ❑ Maintenance – some rental houses may be poorly maintained.
- ❑ Renter safety – Packing people into house raises fire-safety and other concerns.
- ❑ Saturation – STRs displace year-round residents.
- ❑ Schools – school enrollment can decline as saturation of STRs rises.
- ❑ Housing costs – use of homes for STRs may make homes too costly for year-round residents.

# Other Side of Coin...

Those who favor regulatory restraint emphasize:

- Affordability – some residents rely on rental income.
- Local economy – tourism depends on availability of STRs.
- Property values – aggressive regulation could depress home values.
- Legal Expenses – municipality may incur expenses enforcing ordinances and defending against lawsuits.
- Reputation – industries and other businesses are wary of communities that frequently change regulatory conditions

# Regulatory Challenges

- Little case law regarding STRs (for now).
- Hard to predict how existing zoning law applies to STRs because:
  - ▣ STRs are a “hybrid” use with both residential and commercial features.
  - ▣ STRs are an “overlay” use that exist simultaneously with an underlying zoning use (e.g., single-family home, two-family home, condo, etc.)
- Hard to determine when grandfathering applies.
- Regulation can take a wide variety of forms. Attorney needs to help client think through options.

# Initial Considerations for Regulation

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- Are existing STRs lawful?
- Is a temporary moratorium needed?
- What problems should the new regulation address?
- Can the problems be fixed by enforcing existing ordinances, or through generally applicable ordinances?
- If the community needs an STR specific-ordinance, should it be a zoning ordinance, a regulatory ordinance, or both?



# Are Existing STRs Lawful?

- Surprisingly hard question under many ordinances.
- Factors that might point to “no”:
  - ▣ Uses not specifically permitted are prohibited.
  - ▣ Restrictive covenants barring “commercial” uses apply to STRs.
- Factors that might point to “yes”:
  - ▣ Zoning ordinances often define “single family dwelling” based on characteristics of the structure (not duration of occupancy).
  - ▣ Courts defer to longstanding interpretations of ambiguous zoning ordinances.
  - ▣ Case law from other states.
- Important COA decision may be on its way.

# Temporary Moratoria

- When STRs are increasing rapidly, communities may want to freeze growth while considering new regulations.
- What is the best way to do this?
  - ▣ Imposing moratoria through ordinance amendment may be ineffective. Savvy property owners will establish and grandfather use before moratorium takes effect.
  - ▣ But are zoning moratoria by resolution permissible? A bit of a gray area.
- A resolution might be more defensible if:
  - ▣ Recitals clearly explain need.
  - ▣ The duration is expressly stated and brief (4 months?).
  - ▣ It directs staff not to “receive or process” applications, as opposed to not “approving” applications.

# Zoning v. Regulatory

- Once municipality determines an STR ordinance is needed, first big-picture question is where it should go.
- Zoning ordinances are special ordinances subject to heightened requirements and limitations.
- Zoning ordinances must:
  - ▣ Be adopted in accordance with the detailed procedures in the MZEA; and
  - ▣ “Grandfather” existing uses for which the property owner has vested rights, making them legally nonconforming.
- Where possible, using regulatory ordinances instead of zoning ordinances is advantageous.

# Zoning v. Regulatory (Continued)

- There are two key considerations in determining whether a regulation must be adopted through zoning:
  - ▣ Whether the regulation affects the use of land; and
  - ▣ Whether the regulatory scheme establishes different regulations for different zoning districts.
- The first factor is amorphous. In some abstract way, just about everything affects the use of land.
  - ▣ Analysis seems to turn on whether the regulation is aimed at the permissibility of the use itself, or at behavior associated with the use.
- As for the second factor, does applying a regulation throughout the entire municipality automatically make it a regulatory ordinance?

# Rough Break Down

## Zoning

- ❑ Restricting to certain zones.
- ❑ Saturation limits / quotas.
- ❑ Screening, parking, exterior features of structure.
- ❑ Requiring special-use approval.
- ❑ Prohibiting throughout municipality?

## Regulatory

- ❑ Registration / local agent.
- ❑ Required postings in dwelling.
- ❑ Building safety / inspection.
- ❑ Noise.
- ❑ Maximum Occupancy.
- ❑ Property maintenance.

# Defining “Short-Term Rental”

- Next big picture issue is the definition itself. What exactly are we regulating?
- Common base definition: “rental of a dwelling unit for compensation for a term of less than 29 nights.”
- Possible modifications:
  - ▣ Expressly exempting nursing homes, rehab clinics, etc.
  - ▣ “more than x times per year” or “except during \_\_\_\_\_”
  - ▣ “when principal occupant is not present”

# By Right v. Special Use

- When a zoning ordinance allows a use “by right,” a property owner can engage in the use so long as they comply with all dimensional regulations.
- By contrast, “special uses” require review and approval by the Planning Commission (“PC”).
- Special use criteria may include:
  - ▣ Objective and semi-objective standards to minimize adverse impacts on neighbors.
  - ▣ Objective criteria to limit saturation (e.g. “not within 150 feet of existing STR,” etc.)
- Special use criteria cannot tie approval to sheer opinion of neighbors.

# Other Drafting Considerations

- Would a reviewing court understand why regulation is needed? Would a “purpose” statement help?
- Will violations be possible to prove? Would presumptions help?
- If a property was used sporadically for STRs, is it grandfathered? At what level of frequency?
- How do you measure when a nonconforming STR use ceases?
- Does a new STR use in a nonconforming structure (e.g. a duplex) increase or expand the nonconformity? Should that be permitted?
- If new regulations create nonconforming STR uses, should that affect the ability to modify the dwelling?
- If you establish quotas for STRs, how do you determine priority for next available permit?



# Proof Problems – Use as an STR

- Using Internet listings as proof of use might raise hearsay and authentication problems.
- Occupant testimony might be hard to come by.
- Could have enforcement officers engage in “sham” rentals, like a drug bust. But this is pretty costly.
- Could prohibit advertising unlawful STRs, but:
  - ▣ Might raise First Amendment issues; and
  - ▣ Injunctive relief would go to advertising only (not use).

# Proof Problems – Occupancy Limits

- Might be difficult to enforce occupancy limits.
- Would need reasonable suspicion of some type of violation to enter home and count occupants.
- Some might claim they are only visiting (not occupying) the STR.
- Ordinance might establish a presumption like:
  - ▣ “An individual present in a dwelling unit during the term of a short-term rental shall be presumed to be an occupant unless it is between the hours of x and y, and circumstances clearly indicate the individual will not stay overnight.”

# Legal Challenges – Vagueness

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- Some have successfully challenged STR ordinances on vagueness grounds.
- When drafting, be careful of overlap in definitions of “short-term rental,” “bed and breakfast,” and other related terms.

# Legal Challenges – Regulatory Takings

- Some argue that applying occupancy limits to preexisting STRs can constitute a regulatory taking (esp. if limits are stringent and home is large).
- Under *Penn Central* test, courts consider:
  - ▣ The economic impact of the regulation on the claimant,
  - ▣ The extent to which the regulation has interfered with distinct investment-backed expectations, and
  - ▣ The character of the governmental action.
- Slippery test, but municipalities likely to prevail so long as caps are reasonably tied to renter safety or limiting adverse impacts on neighbors.

# Other Possible Challenges

Challengers might argue:

- Regulatory ordinance is “zoning ordinance in disguise” (*i.e.* improperly enacted).
- Saturation caps violate equal protection.
- Warrantless inspection regime violates Fourth Amendment.
- Limits on advertising violate First Amendment.

# Possible Legislation

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- HB 4503 – Would amend the MZEA to prohibit local regulation of STRs.
- STRs would be permitted by right in all “residential zones,” and could not be subject to special-use approval or other similar approval processes.

# Questions?



# Presenter Contact Info

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