RESIDENTIAL USE RESTRICTIONS IN THE AGE OF AIRBNB

By Nick Curcio

What makes a house a home? This question, long posed as a philosophical one, prompts reflection about our relationships with the spaces we inhabit. Do we belong where we are, or are we just visitors passing through? Are the two mutually exclusive? Or can we make a "home" even in the most temporary of settings?

These questions increasingly have not only philosophical, but also legal, implications. As websites like Airbnb and Vacation Rentals by Owner (VRBO) grow in popularity, a significant trend has developed toward short-term occupancy in traditional dwelling structures. While the concept of renting one's house to short-term guests is not new—especially in tourist communities—new technologies have made it easier and more profitable. More and more people are using these websites to list their homes for occasional rentals, or even to list investment properties for rentals week after week.

Some argue that these new occupancy patterns are not truly residential in nature. In the last few years, suits have been filed across the country alleging that short-term rentals violate deed restrictions and local zoning ordinances designed to protect residential neighborhoods. These claims have not generally fared well in other states,[1] but have so far been quite successful in Michigan. This article examines the emerging caselaw in this area, focusing on two published decisions from the Michigan Court of Appeals.

Restrictive covenants: *Eager v Peasley*

In *Eager v Peasley*, the plaintiffs sued to prevent a neighboring property owner from renting her lake house on HomeAway.com. The lake house was subject to a deed restriction limiting its use to "private occupancy," and providing that only a "private dwelling" could be constructed. A separate provision in the deed prohibited all "commercial use."[2] In the summer preceding the lawsuit, the defendant rented the lake house to short-term guests for a total of 64 days, with rentals to 10 different families and a business group.[3] The owner herself lived in a neighboring county and did not occupy the lake house throughout the relevant period.[4]

In a split 2-to-1 decision, the Court of Appeals held that the defendant's use of the property violated both the requirement that the property be used as a private dwelling for private occupancy and the separate prohibition on commercial use.[5] The Court began its analysis by finding that the use of the terms "private dwelling" and "private occupancy" required the property be used for a "residential purpose." In doing so, it rejected the idea that the grantor intended only to regulate the type of structure that could be built on the property as opposed to the actual use of the structure.[6]

The Court then explored the meaning of the term "residential purpose." Drawing on a prior case involving time-share ownership, the Court determined that permanence is a key feature of residential use:

> [A residence] is a place where someone lives,…whether they are physically there or not. Their belongings are there. They store their golf clubs, their ski equipment, the old radio, whatever they want. [I]t has a permanence to it, and a continuity of presence, if you will, that makes it a residence.[7]

The *Eager* Court found this definition of "residence" to be dispositive, noting that none of the guests who occupied the defendant's lake house had the right to leave their belongings

between visits. The Court also found it significant that the defendant herself did not reside at the property; instead, she used it exclusively for short-term rentals. Based on these facts, it concluded that the deed unambiguously prohibited the defendant's pattern of usage.[8]

The Court next turned to the deed's prohibition on commercial use, concluding that it was an additional and even stronger basis to rule in favor of the plaintiff.[9] Whereas the residential-purpose inquiry turned on the nature and duration of occupancy, the Court's commercial-use analysis turned entirely on the exchange of money. Because the defendant charged her guests a rental fee, the Court found that the use was impermissibly commercial.[10]

In dissent, Judge Murphy argued that the language in the deed did not directly address short-term occupancies and was therefore ambiguous as to whether they were permitted.[11] Because of this ambiguity, he would have strictly construed the deed in favor of the free use of property. Judge Murphy also argued that the prohibition on commercial use should not be read to prohibit deriving income from one's property, but rather only to prohibit business-like activities from taking place on the premises. He noted that the lake house itself "completely retains its residential and familial character while being rented and there are no services provided on the site, as would be the case with a hotel or bed-and-breakfast establishment."[12] He also found it significant that courts in other states appear to have uniformly rejected claims that short-term rentals violate restrictions on commercial use.[13]

What does *Eager* mean for future cases?

While restrictive covenant disputes are decided on a case-by-case basis, there are a few key lessons to take from *Eager*. The most significant is that the Court did not view the requirement of residential use as being merely the converse of the prohibition on commercial use. Rather, the majority of the Court indicated that a use might be both residential and commercial, satisfying one provision of the deed but violating the other.[14]

This acknowledgment may lead to different results when an instrument requires residential use but does not prohibit commercial use. As explained above, the *Eager* Court found that the defendant did not use her lake house for a residential purpose because neither she nor anyone else maintained a permanent presence there. The short-term guests were the only occupants of the lake house. In light of this, there is a reasonable argument that a property owner could engage in *occasional* short-term rentals without violating a residential-use requirement. This argument would seem particularly strong in situations where the owner occupies the house as a principal residence and rents it only a few times a year. The argument might even be successful in the context of a second home, so long as the owner establishes a predominant and permanent presence in between the rental terms.

On the other hand, the *Eager* Court's interpretation of the commercial-use provision leaves little room to distinguish future cases. The Court's analysis strongly suggests that any exchange of money between the owner and occupant of a house renders the use commercial in nature. In fact, while the majority opinion says that its decision is limited to the context of short-term rentals,[15] both Judge Murphy in his dissent and an unpublished Court of Appeals decision argue that the reasoning applies just as strongly in the context of long-term rentals.[16]

Zoning regulations: *Reaume v Spring Lake Township*

Similar interpretive disputes arise in the context of municipal zoning ordinances. Before the popularity of Airbnb and VRBO, it was unusual for a zoning ordinance to address short-term rentals as a distinct land use.[17] In light of this silence, the legality of short-term rentals often turns on whether they fall within the scope of the various permitted uses in residential zoning districts, such as "dwellings," "dwelling units," and "single-family dwellings."

The dispute in *Reaume v Spring Lake Township* arose when the township replaced an ordinance that was silent on short-term rentals with a new ordinance expressly prohibiting them in parts of the community.[18] Reaume had been renting out a house in the township to short-term guests for approximately two years before the new ordinance was adopted. After its adoption, she argued that her rental operation was "grandfathered" as a lawful nonconforming use because short-term rentals were

At a Glance

Both private covenants and local zoning ordinances often limit the use of property to "residential" purposes. As home sharing becomes increasingly popular, the line between residential and commercial use is blurring. Courts in Michigan and across the country are grappling with how to apply longstanding restrictions to new contexts.

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permitted under the prior ordinance. The township countered that short-term rentals had always been unlawful and that the new ordinance was simply intended to clarify that fact.[19]

The Court of Appeals sided with the township, holding that the prior ordinance's definition of single-family dwelling "unambiguously excludes transient or temporary rental occupation."[20] According to the Court, the ordinance indicated that a dwelling must actually be occupied by one or more families, and a single-family dwelling must be reserved "for use and occupancy by one [f]amily only." The term "family" was defined as "[a] single individual or individuals, domiciled together whose relationship is of a continuing, *non-transient*, domestic character and who are cooking and living together as a single, nonprofit housekeeping unit." The Court held that the reference to non-transience "expressly excludes transitory or seasonal or otherwise temporary relationships," and therefore "clearly forbids short-term rental uses of property in R-1 zones."[21]

In doing so, the Court rejected the property owner's argument that the non-transient language referred to the nature of the familial relationship of the occupants as opposed to the nature of the occupancy in the dwelling. Under the property owner's reading, occupancy or use of a dwelling by one family could encompass any given family occupying the dwelling at a point in time, even if the occupancy itself is transient in nature.[22]

What does *Reaume* mean for future cases?

While *Reaume* provides insight as to how judges may approach these interpretive issues, its practical impact is uncertain. Unlike restrictive covenants—which are typically just a few pages in length—zoning ordinances span hundreds of pages, have dozens of defined terms, and are often updated piecemeal over decades. These features make their interpretation more challenging and nuanced, given the need to harmoniously construe the document as a whole. Accordingly, it is possible that variations in the wording or structure of other ordinances might provide grounds for distinguishing *Reaume*.

Though most zoning ordinances use similar terminology to the one in *Reaume*, several possible grounds for distinction come to mind. For one, the definitions in the Spring Lake ordinance clearly indicated that a dwelling must actually be occupied by a family.[23] This is not always the case, as many ordinances define "dwelling" to be a structure "designed or used" for family occupancy. Several courts in other jurisdictions have suggested that this variation in wording is significant, indicating that the definition can be satisfied solely by the design of the structure rather than its occupancy at any given time.[24]

Reaume could also be distinguished because the Court's decision relied in part on the conclusion that dwellings rented

on a short-term basis qualified as motels under the prior township ordinance, and were therefore allowed in commercial districts.[25] In many ordinances, however, the term "motel" is expressly limited to structures with multiple units available for occupancy.[26] Where that is the case, the structure of the zoning ordinance may provide less support for the idea that all transient occupancies, regardless of building type, are prohibited in residential districts.

Notably, to distinguish *Reaume*, a court would not need to find that these variations in wording conclusively establish an intent to permit short-term rentals in residential zones. Rather, a different result may be warranted even if the variations merely render the ordinance ambiguous. Under Michigan law, there are a few canons of construction that would arguably require the court to construe an ambiguity in favor of the property owner's desired use.[27]

Change on the horizon?

Eager and *Reaume* are the first published Court of Appeals cases to delve into these important interpretive issues, but they may not be the last word. In November, the Michigan Supreme Court granted oral argument on the application for leave to appeal in *Reaume*. The Court's interest in the case is unsurprising, given the state's large tourist economy and the growing popularity of online rental platforms. Moreover, the Court, which is often protective of property rights, may be concerned that the Court of Appeals's approach to these issues differs from that of courts in other states.[28]

Additionally, over the past few years, several bills have been introduced in the Michigan legislature to preempt certain regulations on short-term rentals. Some of these bills would require municipalities to allow short-term rentals, without special-use approval, in all residential districts.[29] Another proposed bill would allow municipalities to restrict short-term rentals to certain zoning districts but not totally prohibit them within the municipal boundaries.[30] Any of these proposals could impact cases like *Reaume*—and possibly even *Eager*[31]—by creating new parameters for short-term regulation across the state. ■

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ENDNOTES

1. See, e.g., *Eager v Peasley*, 322 Mich App 174, 200–202; 177; 911 NW2d 470 (2017) (Murphy, J., dissenting) (summarizing cases from other jurisdictions); *Bostik v Desoto County*, 225 So 3d 20, 27–28 (2017) (Barnes, J., dissenting) (same); *Tarr v Timberwood Park Owners Ass'n*, 556 SW3d 274; 61 Tex Sup Ct J1174 (2018); *Morgan County v May*, 305 Ga 305, 308; 824 SE2d 365 (2019).
2. *Eager v Peasley*, 322 Mich App at 177.
3. *Id.* at 177–179.
4. *Id.* at 189.
5. *Id.* at 192.
6. *Id.* at 182–183.
7. *Id.* at 185 (quoting *O'Connor v Resort Custom Builders, Inc*, 459 Mich 335, 345; 591 NW2d 216 (1999)).
8. *Id.* at 188–189.
9. *Id.* at 189.
10. *Id.* at 190–191.
11. *Id.* at 197.
12. *Id.* at 200.
13. *Id.* at 200–202 (citing appellate decisions from New Mexico, Maine, Oregon, Colorado, North Carolina, and Alabama). At least one case decided after *Eager* is in the same vein. *Tarr v Timberwood Park Owners Ass'n*.
14. *Id.* at 189.
15. *Id.* at 177 n 2.
16. *Id.* at 204 n 8 and *John H Bauckham Trust v Petter*, unpublished per curiam opinion of the Court of Appeals, issued September 19, 2017 (Docket No. 332643), p 5.
17. See Merriam & Bronin, eds, *Rathkopf's The Law of Zoning and Planning (Fourth Ed)* (New York: Thomson Reuters, 2019), § 81:11.
18. *Reaume v Spring Lake Township*, ___ Mich ___; ___ NW2d ___ (2019) (Docket No. 341654).
19. *Id.*, slip op at 1–2, 5.
20. *Id.*, slip op at 5–6.
21. *Id.*
22. *Id.*
23. *Id.* at 4 (noting that the ordinance defined "dwelling" as "any building or portion thereof which is occupied in whole or in part...by one (1) or more Families.").
24. *Morgan County v May*; *Heef Realty and Investments, LLP v City of Cedarburg Bd of Appeals*, 361 Wis 2d 185, 191 n 2; 861 NW2d 797 (2015); and *Salvatore v Cunningham*, 305 Md 421, 429; 505 A2d 102 (1986).
25. *Reaume*, slip op at 6.
26. See, e.g., City of Grand Rapids Zoning Ordinance § 5.16.02.
27. *Talcott v City of Midland*, 150 Mich App 143, 147; 387 NW2d 845 (1985) (explaining the presumption in favor of the free use of property). Because exclusionary zoning claims have a constitutional component, avoidance canons may also come into play.
28. For a summary of restrictive covenant cases, see *Eager v Peasley*, 322 Mich App at 200–202. Results in zoning interpretation cases have been more mixed, e.g., see *Bostik v Desoto County*; *Morgan County v May*; and *Slice of Life, LLC v Hamilton Twp Zoning Hearing Bd*, 207 A3d 886 (2019).
29. See, e.g., 2019 HB 4046.
30. 2019 HB 4563.
31. Some of the bills provide that the short-term rental of a dwelling "is not a commercial use of property," e.g., 2019 HB 4046. While this language is technically limited to the zoning context, some may view it as a repudiation of the reasoning in *Eager*.