STATE OF MICHIGAN

COURT OF APPEALS

JEFFREY PIGEON, GREG BERKLEY, BLANDIS FAMILY LIVING TRUST, DEBORAH BLACKMORE, FRED BLACKMORE, JR., JOHN F. BURNISON, KEVIN CULKOWSKI, NANCY CULKOWSKI, JONATHAN DOYLE, FRANK E. DUNCAN, JOHN W. GARRETT, DEBORAH E. GARRETT, JOHN MASON HIMICH, MELIA HIMICH, TIMOTHY H. KOHLER, KAREN KRAUS, WILLIAM H. KRAUS, CHARLES A. KUMNICK, CHRISTINA KUMNICK, LINDA L. MOORE LIVING TRUST, MARY J. MAWBY, THOMAS E. MAWBY, DAWN I. MOORE, GORDON L. MOORE, SANDRA S. MOORE, WAYNE L. MOORE, ANTONI OLDAKOWSKI, MARK OLDAKOWSKI, ROZALIA OLDAKOWSKI, HARRY SABOURIN, SUSAN SABOURIN, DOUGLAS RAY SEXTON, JR., GERALDINE SEXTON, DONALD J. SPARKS, STEPHEN TRAMMELL, BROOKE WILBANKS, and JACK J. WILHELM,

Plaintiffs/Counter-Defendants-Appellants,

and

RANDALL F. DIETER,

Plaintiff/Counter-Defendant,

v

ASHKAY ISLAND, LLC,

Defendant/Counter-Plaintiff-Appellee.

UNPUBLISHED
January 28, 2021

No. 351235
Washtenaw Circuit Court
LC No. 18-000070-CZ

Before: SHAPIRO, P.J., and SAWYER and BECKERING, JJ.

PER CURIAM.

Plaintiffs' suit primarily alleges that defendant is conducting rental activity on its property in violation of the Manchester Township Zoning Ordinance (MTZO). The trial court denied plaintiffs' motion for summary disposition of that claim and granted summary disposition to defendant under MCR 2.116(I)(2) (nonmoving party entitled to judgment). Plaintiffs appeal that decision by leave granted.[1] Manchester Township filed an amicus brief in support of plaintiffs' argument on appeal. For the reasons stated in this opinion, we reverse.

I. BACKGROUND

Defendant is owned by Andrew and Nicole Bobo. At some point, the Bobos purchased a 70-acre parcel in Manchester Township. Much of the parcel is covered by Iron Mill Pond, an artificial, private lake which contains an eight-acre island (Ashkay Island). In 2014, the Bobos received a permit to build a "seasonal use cabin" on Ashkay Island. They then advertised the cabin, which the parties refer to as a house, for short-term rentals. In 2016, the Bobos conveyed the property to defendant via quit claim deed.

Plaintiffs are owners of real property that borders Iron Mill Pond. In January 2018, they sued defendant alleging that its use of Ashkay Island "as a resort, with short term rental of the house," violated the MTZO and constituted a nuisance per se as well as a private nuisance. Ashkay Island is located in the Rural Agricultural Zoning District (AR District), and plaintiffs alleged that defendant's use of the property as a vacation rental did not fall within any of the AR District's permitted uses. Plaintiffs requested an order enjoining defendant from operating a resort on its property. Plaintiffs filed an amended complaint asserting additional claims of breach of easement, quiet title, and adverse possession.[2]

In October 2018, plaintiffs moved for summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact) on their claim of nuisance per se. Plaintiffs stated that the operative facts were undisputed: after the house on Ashkay Island was built it was advertised for short-term rentals, and the Bobos did not reside in the house. Plaintiffs argued that, under the MTZO, transient lodging was not permitted in the AR District. They relied on caselaw indicating that short-term rentals were inconsistent with a "single family dwelling."

In response, defendant argued that its use of the house satisfied the MTZO's definition of a single-family dwelling, which is permitted in the AR District. Specifically, defendant contended that the house was residential in nature and that it was designed for, and used or held ready for use by, one family. Defendant presented the affidavit of Andrew Bobo who averred that he built the house for use by his family and for renters to use when his family was not using it. According to

[1] *Pigeon v Ashkay Island LLC*, unpublished order of the Court of Appeals, entered March 10, 2020 (Docket No. 351235).

[2] The additional claims, as well as defendant's counterclaim, are not relevant to the zoning issue and therefore will not be discussed.

Andrew, there had only been four instances between May 2016 and October 2018 in which the renters of the house were not a "family" as defined by the MTZO. Andrew further stated that he would no longer rent the house to any group of unrelated persons.

The trial court held a hearing on plaintiffs' motion and took the motion under advisement. The parties thereafter filed supplemental briefs in which they reiterated their arguments. After a second motion hearing, the trial court again took the motion under advisement, and later entered an order denying plaintiffs' motion for summary disposition and granting summary disposition to defendant on plaintiffs' claim of nuisance per se. The order provided in pertinent part:

> The Court finds that the rental of the said dwelling from time to time, for determinable periods of time, to one [1] single family, whether it is or not the same or a different family, is a permitted use under said Ordinance because that Ordinance does not require occupancy by a family for any stated or limited period of time. Therefore, the rental to different families from time to time is not prohibited by said Ordinance.

The trial court denied plaintiffs' motion for reconsideration.

II. ANALYSIS

Plaintiffs argue that the trial court erred by denying their motion for summary disposition of the nuisance-per-se claim. We agree.[3]

A use of land or a dwelling, building, or structure in violation of a zoning ordinance is a nuisance per se. MCL 125.3407. A private citizen may bring an action to abate a nuisance "arising from the violation of zoning ordinances or otherwise[] when the individuals can show damages of a special character distinct and different from the injury suffered by the public generally." *Towne v Harr*, 185 Mich App 230, 232; 460 NW2d 596 (1990).

A zoning ordinance is interpreted in accordance with the rules of statutory interpretation. *Brandon Charter Twp v Tippett*, 241 Mich App 417, 422; 616 NW2d 243 (2000). "When construing the provisions of a zoning ordinance, this Court seeks to discover and give effect to the legislative intent." *High v Cascade Hills Country Club*, 173 Mich App 622, 626; 434 NW2d 199 (1988). "A zoning ordinance must be construed reasonably with regard both to the objects sought to be attained and to the general structure of the ordinance as a whole." *Fass v Highland Park*, 320 Mich 182, 186; 30 NW2d 828 (1948).

[3] We review de novo a trial court's decision on a motion for summary disposition. See *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). We also review de novo the interpretation of a zoning ordinance. *Brandon Charter Twp v Tippett*, 241 Mich App 417, 421; 616 NW2d 243 (2000).

Under the MTZO, a single-family dwelling is a permitted use in the AR District. The parties disagree whether the house on Ashkay Island, because it is rented out by defendant only to individual families, constitutes a single-family dwelling. The parties focus on the following definitions found in the MTZO:

> **Dwelling**: Any building, or part thereof, containing sleeping, kitchen, and bathroom facilities designed for and occupied by one family. . . .
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> * * *
>
> **Dwelling, One-Family Or Single-Family**: An independent, detached residential dwelling designed for and used or held ready for use by one (1) family only. Single-family dwellings are commonly the only principal use on a parcel or lot.
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> * * *
>
> **Family**: One (1) or more persons related by blood, bonds of marriage, or legal adoption, plus up to a total of three (3) additional persons not so related who are either domestic servants or gratuitous guests, occupying a single dwelling unit and living as a single nonprofit housekeeping unit[.]
>
> A collective number of individuals living together in one dwelling unit, whose relationship is of a continuing non-transient domestic character, and who are cooking as a single nonprofit housekeeping unit. This definition shall not include any society, club, fraternity, sorority, association, lodge, coterie, or group of transitory or seasonal nature or for a limited duration of a school term or terms of other similar determinable period.

According to plaintiffs, the key word in the MTZO's definition of a "dwelling, one-family or single family," is "residential." They cite caselaw indicating that a "residence," at least for purposes of restrictive covenants, is a place where someone lives or has a permanent presence. See e.g., *Eager v Peasley*, 322 Mich App 174, 189; 911 NW2d 470 (2017). Plaintiffs argue that because renters are not residents of the house on Ashkay Island, defendant's property is not being used as a single-family dwelling. Defendant counters that the MTZO does not contain any requirement regarding how long a family must live in a dwelling, and argues that renting the house to one family (as that word is defined by the MTZO) at a time satisfies the requirement that the dwelling be "used or held for use by one [1] family only."

We need not resolve the parties' competing interpretations of what constitutes a single-family dwelling, however, because we agree with the Township that defendant's use of the house meets the definition a "tourist home," which is not permitted in the AR District. A tourist home is defined as follows: "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 the Community Commercial Center Zoning District (CC District).

The house on Ashkay Island is a dwelling that is being rented overnight to transient guests for compensation. Defendant asserts that the house is not a tourist home because the guests are

not provided overnight accommodations. Defendant does not elaborate on that assertion, however, and "[a] party cannot simply . . . announce a position and then leave it to this Court to discover and rationalize the basis for [its] claims . . . ." *Mitchell v Mitchell*, 296 Mich App 513, 524; 823 NW2d 153 (2012) (quotation marks and citation omitted). In any event, defendant is undoubtedly providing overnight accommodations as the renters are given exclusive occupation of the house along with numerous other amenities such as the use of the boats on the property. Accordingly, defendant is using the house as a tourist home.

Section 4.03A of the MTZO provides that "[u]ses shall be permitted [in a District] only if they are specifically listed herein." Because tourist homes are permitted only in the CC District, they are necessarily prohibited in the other districts, including the AR District where Ashkay Island is located. See *Pittsfield Twp v Malcom*, 375 Mich 135, 142; 134 NW2d 166 (1965) ("Under [an] ordinance which specifically sets forth permissible uses under each zoning classification, . . . absence of the specifically stated use must be regarded as excluding that use."); *Independence Twp v Skibowski*, 136 Mich App 178, 184; 355 NW2d 903 (1984) ("A permissive format states the permissive uses under the [zoning] classification, and necessarily implies the exclusion of any other non-listed use."). Therefore, defendant is violating the MTZO by operating a tourist home in the AR District. Plaintiffs are entitled to summary disposition of their nuisance-per-se claim.[4]

Reversed and remanded for further proceedings consistent with this opinion. Plaintiffs, as the prevailing party, may tax costs. MCR 7.219(A). We do not retain jurisdiction.

/s/ Douglas B. Shapiro
/s/ David H. Sawyer
/s/ Jane M. Beckering

[4] Plaintiffs and the Township rely on *Reaume v Twp of Spring Lake*, ___ Mich ___ (2020) (Docket No. 159874), in which the Supreme Court affirmed our holding that the plaintiff's use of a home as a short-term rental did not constitute a "dwelling" under the zoning ordinance because it met the ordinance's definition of a "motel." Although *Reaume* presents somewhat similar facts, we agree with defendant that the case is not controlling given the textual differences between the zoning ordinances. For example, in *Reaume* the zoning ordinance's definition of "dwelling" allowed for temporary occupation but expressly excluded "[m]otels or tourist rooms." *Reaume v Twp of Spring Lake*, 328 Mich App 321, 332; 937 NW2d 734 (2019), vacated in part ___ Mich ___. The ordinance in *Reaume* did not define tourist room, *id*. at 333, nor was there any reference to a tourist *home*. Because our goal is to discern the intent behind the MTZO, the interpretation of a similar, yet substantially different, ordinance does not aid our analysis.