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?
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.
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

- 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.
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.
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.”
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.
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?
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