

August 20, 2020

Via E-mail and U.S. Mail

Ann Arbor City Council
c/o Kevin McDonald, City Attorney
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Re: Supplement to Letter Opposing Short Term Rental Ordinance

Mr. McDonald:

As you know, our Firm represents Noah Hoffman and other residents that rent homes within the City of Ann Arbor (the “City”) on a short term basis. We previously submitted our letter dated July 16, 2020 and shared our concerns at the City Council meeting held on August 6, 2020. We are writing to supplement our letter and the concerns we raised at the City Council meeting. We hope this additional information will assist the City as it considers the proposed new ordinance.

**Lawful Short Term Rental Uses are Entitled
to Legal Non-Conforming Use Status**

We will begin by reiterating that *Reaume v Spring Lake*, speaks directly to the effect of new short term rental ordinances on existing short term rental properties. In *Reaume*, the Michigan Court of Appeals stated that “if that use [short term rental] actually was lawful prior to the adoption of the [short term rental ordinance], then the plaintiff has a right to continue using [the] property for short term rentals”. In June of 2020, the Supreme Court affirmed the foregoing reasoning and the prevailing law in Michigan that previously lawful short term rental properties are entitled to legal non-conforming use status after enactment of an ordinance that prevents them.

As previously discussed, the involved short-term rental properties are all currently lawful uses and, should the ordinance be enacted, they should all be entitled to legal non-conforming use status.

**The Proposed New Ordinance Is a Zoning Ordinance –
Not a Regulatory Ordinance**

The argument that the proposed ordinance is a regulatory ordinance (as opposed to a zoning ordinance) and that legal non-conforming use protection does not apply, is without merit. The fact that the City placed the new ordinance in the regulatory chapter of the ordinance (and not in the

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zoning chapter of the ordinance) does **not** make it a regulatory ordinance. Michigan law clearly states that a “disguised zoning ordinance” cannot be applied to terminate a vested land use.

The legal test for determining whether a regulatory ordinance is a “disguised zoning ordinance” is set forth in *Natural Aggregates v Brighton*, 213 Mich App 287 (1995) and *Sq Lake Condo Assoc v Bloomfield Township*, 437 Mich 310 (1991). Those cases provide that the determination of whether an ordinance is a zoning ordinance is not determined based on where the ordinance is lodged in the municipal ordinances. Rather, it is determined by considering the substance of its provisions and terms, and its relation to the plan of zoning in the city. Those cases state that a zoning ordinance usually regulates use of land according to districts, areas or location.

In this case, the new short term rental ordinance is clearly a zoning ordinance. If enacted, it would entirely eliminate (not merely regulate) certain short term rental uses. It would also entirely eliminate those uses based on the zoning district where the uses were previously permitted. **When the complete elimination of a use is tied to the zoning district that previously permitted the use, the new ordinance is not regulatory - - it is a zoning ordinance. As a zoning ordinance, previously existing, lawful short term rental uses are (or would be) entitled to legal non-conforming use protections based on the reasoning in *Reaume*.**

Existing Short Term Rental Uses are Lawful Uses

The foregoing analysis is based on the assumption that the existing short term rental uses are all lawful uses.

In this case, we are informed that the short term rental properties that we represent have been (i) operating in the City for years, (ii) are well known to the City and have not been concealed from the City, (iii) are registered with the City, (iv) hold “Certificates of Compliance” and (v) have been subjected to inspections and have been otherwise regulated by the City. Perhaps most importantly, we are also informed that none of the short term rental properties has ever received a citation (or even an accusation) that their use as a short term rental was prohibited (or not lawful) under any portion of the City’s ordinance regime.

The existing “lawful” status of each individual property is critical to whether it would qualify for legal non-conforming use status under the new ordinance. We do not foresee any question about this issue, but are glad to further discuss it, or our analysis, if it would assist you with your analysis. We would also be glad to share a list of the relevant short term rental properties and review their status with you or other City representatives. It is important to our clients that their lawful uses of their properties be distinguished from properties that have not been operating in a lawful manner.

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**The City Should Modify the Proposed Ordinance to
Protect Existing Short Term Rental Properties**


Once again, we urge the City to modify the proposed ordinance to expressly permit the continuation of existing, lawful short term rental uses. As previously mentioned, it is not only legally required under *Reaume*, but it is also the fair and equitable way to reconcile the competing interests and different views of the stakeholders.

As the City knows, our clients have invested in their properties in reliance on their right to use them for short term rental purposes. The loss of the right to rent their properties on a short term basis could have devastating financial consequences and would leave our clients with no choice but to pursue their legal rights. We all hope the new ordinance can be modified and that legal steps do not become necessary. We, and our clients, stand ready to assist the City with this process and hope to be part of a compromise that balances the various interests.

Thank you for your time and consideration of these thoughts. We would ask that you pass this on to the Mayor and City Council and add it to the record with respect to this matter. As always, please contact me with any questions. We look forward to speaking with you soon.

Very truly yours,

HONIGMAN LLP

By: 

J. Patrick Lennon

cc: Noah Hoffman
Heidi Mitchell