

January 14, 2020

Name Deleted
Address Deleted,
Oro-Medonte, ON
LXX YYY

Dear XXX,

Knox: Updated Opinion Regarding Short Term Rentals in Oro-Medonte

Further to my opinion letter dated November 18, 2019, you asked me to provide you with some additional comments regarding the recent Toronto LPAT decision, and the impact of the V1 zone with the residential permitted use of 'village commercial resort units'. As before, I have written this addenda to my original opinion letter with the understanding that the reader will be the Council of the Township of Oro-Medonte.

In my opinion letter of November 18, 2018, I introduced myself by stating that I am a retired Urban Planner, who worked mainly within Simcoe County for just under forty years and was the Planner of Record for over a dozen Municipalities writing many of their initial Official Plans and Zoning By-laws and have appeared as an expert witness before the OMB on over 200 occasions.

I will begin with the Local Planning Appeal Tribunal (LPAT or Tribunal) decision in the Toronto case. **The City of Toronto (City) stated, on its public website and in its submissions to LPAT, that all short term rentals of dwelling units (STR) were prohibited in residential zones under the City's existing zoning by-laws in place prior to the amendments giving rise to the appeal. This was based on the structure of the City's zoning by-laws which authorizes only those uses listed in the by-law as being permitted in a particular zone. This is the same structure as the Township of Oro-Medonte Zoning By-law.**

For policy reasons though, Toronto decided to proceed with zoning changes to allow short term rentals (STRs) to be operated in residential zones but only in a dwelling that was the principal residence of the STR operator. The changes were designed to balance the objectives of supporting tourism but at the same time addressing the shortage of permanent housing in the City and limiting commercialization of residential neighbourhoods.

To strike the balance between these competing policy objectives, the City decided to continue to prohibit short term rentals where the operator was not the principal resident, what the Tribunal called 'dedicated' short term rentals. Thus, the City chose to only allow and license STRs where the operator was the principal resident. This principal residence requirement triggered the LPAT appeal as a group of dedicated short term rental operators appealed the zoning by-law amendment. The Tribunal upheld the City's right to restrict STRs to only those operated from principal residences. STRs where the operator was not a principal resident (dedicated STRs) were found to be a commercial use and the Tribunal upheld the principal residence requirement stating that "the ZBAs (Zoning By-law Amendments) represent good planning in the public interest."¹

¹ At [150] Local Planning Appeal Tribunal ISSUE DATE: November 18, 2019 CASE NO(S) PL180082

Although the Tribunal was only dealing with appellants who were dedicated short term rental operators, the Tribunal stated that short term rental uses comprised a spectrum. At one end of the spectrum were dedicated STRs which were found to be commercial. At the other end of the spectrum, was home sharing where a principal resident utilized “excess space (e.g., bedrooms) or occasional absences (e.g., entire unit) for STR purposes as a direct extension of the occupancy of the dwelling unit as a place of permanent residence.”² The Tribunal was offering an opinion that it is possible that, at the opposite end of the STR spectrum from dedicated STRs, some level of occasional STR use may fall within the definition of a residential use. However, the Tribunal noted that such a finding would depend upon the intensity of use and went on to say, “although the context and facts differ, various authorities have found that temporary forms of accommodation for tourists and others do not constitute a residential use.”³

Significantly, the Tribunal also reiterated the established planning principle that residential areas are designed to be non-commercial areas where people reside and that commercial areas are intended as locations for business, with zoning by-laws routinely separating uses to prevent one type of use from infiltrating another.⁴

It must be noted that The Toronto LPAT decision dealt only with the City of Toronto’s authority to enact zoning by-law amendments to allow STRs to operate but only in the principal residence of the operator. It did not make any finding or decision as to whether STRs were permitted in residential zones under the Toronto zoning by-law prior to its amendment. It is also my understanding that the City of Toronto did not have a permitted use in place in its existing zoning by-law that specifically applied to STRs unlike the situation in Oro-Medonte (the Township) where there is already specific zoning in place permitting STRs to operate in the V1 zone as discussed below.

Having considered the Toronto LPAT decision, I still find that all STRs, with the exception of de minimis circumstances, are essentially a commercial use separate and distinct from any use of the dwelling for ordinary residential purposes. It is possible that the intensity of the activity may be so low, that perhaps when a home owner ‘home shares’ only once or twice a year, the STR use may fall within the definition of a residential use. This is not however the situation at issue in the Township. What is clear from the decisions on point is that temporary forms of accommodation have been repeatedly found to be commercial uses, and therefore, it is my opinion that non-occasional (i.e. more than de minimis) STR use of a dwelling unit, being a temporary form of accommodation, are essentially commercial in nature and a distinct and separate use of the dwelling unit. Under well-established planning principles, unless a STR use is specifically listed as a permissible use in a residential zone, they are prohibited. This principle is expressly stated in the Township Zoning By-law.⁵

Accordingly, I continue to be of the opinion that these STRs are not a permitted use and are illegal in the six Residential zones in the Township (i.e.R1, R2, RUR1, RUR2, SR, RLS).

In addition to this analysis, there is another basis on which I have concluded that STRs are illegal in Residential zones. This is the point that I outlined to Council on December 10, 2019 - the creation by the Township of the Village One (V1) zone and the listed permitted residential uses in that zone that include

² Note 1 at [87]

³ Note 1 at [91]

⁴ Note 1 at [90]

⁵ Township of Oro-Medonte Consolidated Zoning By-law 97-95, page 3, Section 3.0

'village commercial resort unit'.⁶ This use specifically captures and includes dwelling units that are used for STR purposes and therefore permits STRs to be operated in the V1 zone.

Back in 2014, when the V1 zone was created, it appears that Council addressed the issue of short-term rentals and established a specific use for that zone that expressly described short-term rentals. Council likely established the permitted use of 'village commercial resort unit' for the V1 zone because both the Township and the applicant for the new zoning believed that under the existing zoning by-laws STRs were illegal. Thus, when the V1 zone was established it was considered appropriate to include a new permitted residential use of village commercial resort unit in order to allow STR uses of residential dwelling units within that new zone.

It is evident from the manner in which this use is defined in the Zoning By-law that short term rental of an entire dwelling unit is considered as separate and distinct use from that of ordinary residential use. This use of a dwelling unit is not listed as a permitted use in any other zone in the Township and is therefore not permitted outside of the V1 zone.

This decision by Council to allow STRs in the V1 zone would necessarily have taken into account the nature of the V1 zone which is a mixed use commercial / residential zone with a wide variety of commercial uses permitted and only medium to high density residential allowed.

This restriction of STRs uses to the V1 mixed use zone is consistent with the Township zoning structure that does not allow other types of temporary accommodations in Residential zones. In particular hotels and motels are only permitted in the Local and General Commercial and Future Development zones. Bed and breakfast establishments are only permitted under the Zoning By-law in the Agricultural / Rural and Private Recreation zones. Boarding lodging and rooming houses are not permitted in any zone.

Since the Township has already defined a permitted use that describes a short term rental and has permitted that use in only the V1 zone, an operator of a STR who wants to carry on that business is restricted under the Zoning By-law to doing so only in the V1 zone. An operator who wishes to operate a STR in another zone, such as a Residential zone, can only do that legally if a site-specific variance is obtained which allows that use as an exception to the permitted uses designated for that zone.

It should be noted that in establishing the V1 zone, Council decided that STRs would not be permitted in single-detached dwellings. This presumably was based on Council's assessment that STR uses would be appropriate for higher density residential but not for single-detached residential zones. This is similar to the approach taken in The Town of The Blue Mountains (Blue Mountains) where, it is my understanding that new short term rentals are currently not permitted in low density residential (R1,R2,R3) zones.

Finally, it must be noted that the Township zoning structure which only permits STRs in the V1 zone is not in any way dependent upon whether the STR use is a commercial activity. The permitted use for village commercial resort units does not specify any requirement that the STR use be commercial in nature. In other words all STRs are permitted in the V1 zone and consequently all STRs are not permitted in any other zone, including residential zones, regardless of whether any particular STR operation is viewed as being commercial in nature.

⁶ Oro-Medonte Zoning By-law Amendment 2014-112

Accordingly, in view of the V1 zoning in place in the Township, I am of the opinion that STRs are not a permitted use and are illegal in the Residential zones in the Township. Although this conclusion is essentially the same as that reached based on the commercial nature of STRs, it has been reached based on a separate analysis of the V1 and related zoning.

This leads me to the question of enforcement. Further to my appearance before Council on December 10, 2019, I would like to provide some further thoughts about the enforcement of the existing zoning by-law. I understand from the questioning that there is a concern for accommodating the casual cottage rental operator. I think that we all can agree that such rentals, also known as the “Ma and Pa” rental or traditional rental are not the problem. Someone who owns a cottage doesn’t want a disruptive short term rental carrying on business next to them. Nobody does, including the Ma’s and Pa’s. The casual rental has never been, and never will be a problem. The Ma and Pa operators are usually self-governing because they themselves primarily use the cottage as their own residence and are therefore respectful of their neighbours and their community.

Licensing was originally proposed as a solution to controlling bad behaviour that inevitably arises when the operation of an unsupervised hotel-like business is allowed in a residential neighbourhood. The most efficient and effective means of controlling bad behaviour is to avoid the conflicts in the first place by enforcing the existing zoning by laws. In my opinion, licensing is not the answer. Enforcing the existing zoning by-laws is. Zoning by-laws exist to protect the integrity and character of residential neighbourhoods and prevent the intrusion of commercial uses into those zones.

It is my understanding that licensing isn’t working in Blue Mountains, as it is extremely costly to administer, property values next to a licenced STRs have declined, and condo boards are amending by-laws to prohibit STR uses. It is my understanding that the planning department in Blue Mountains is informing condo owners that if they want to prohibit STRs they can by amending their by-laws. I have also learned that four condo complexes are currently changing their by-laws. These are: ‘Far Hills’; ‘Rankin’s Landing’; ‘Apple Jack’; and ‘Apple Ridge’.⁷ In Oro-Medonte, the same thing is occurring at Horseshoe Valley. It is my understanding that the ‘High Vista’ condo has recently prohibited STRs in their by-laws.⁸ This leads me to believe that even in higher density zones, residential property owners, particularly if they are a resident, don’t want STRs, nor do they trust the municipality to control these land uses. It also leads me to conclude that in Blue Mountains, even when there is diligent enforcement to control adverse and disruptive behaviour in STRs, licensing is not effective.

If you try to develop a licensing scheme to allow the Ma and Pa to continue, you will be solving a non-problem and you will be needlessly adding a regulatory burden to the Ma and Pa that is completely unnecessary and you could end up opening a loop hole for the commercial operators to continue to carry on their short term rental business under the pretence or guise of being a casual rental operator. I would not be surprised to learn that commercial operators will ask you to amend the zoning with or without licensing in order to protect the Ma’s and Pa’s, and if you do, Council will have been duped into playing into their hands.

⁷ This information was kindly provided by Mr. C., a resident of the Town of The Blue Mountains who has been a part of the by-law amendment process. If you wish to follow up with him, I would be pleased to seek his permission to disclose his contact information.

⁸ This information was kindly provided by Ms. D., a resident of Oro-Medonte who has first hand knowledge of the condominium corporation known as ‘High Vista’. If you wish to follow up with her, I would be pleased to seek her permission to disclose her contact information.

Enforcing the existing by-law is what Clearview and Collingwood did. They enforced their existing zoning by-laws on a complaints-made basis. Although the Township has a duty to uphold their by-laws, the Township also has discretion when it comes to laying charges. So long as that discretion is exercised consistently and fairly, this can be an effective means of controlling and preventing the operation of commercial businesses in residential neighbourhoods. An isolated complaint of a minor nature against a Ma and Pa operator need not result in charges being laid; instead, a simple warning may suffice.

Finally, I understand that some Council members are worried about enforcing the existing zoning. What if we lose? Well, if the Blue Mountains Case, plus the Menzies case, plus the Toronto LPAT case doesn't reassure you, then I would suggest that you assist the Crown in preparing the best file you can to make sure that you don't lose. Clearview hasn't lost, Collingwood hasn't lost. Five cases before the courts in Collingwood, I believe is what Council was told. Well, if you go the licensing route and you diligently enforce your licensing provisions, I believe you will have far more than 5 cases before the courts and it will be a recurring problem that will burden future Councils, just like in the Town of The Blue Mountains. Ultimately, the safety and security of residential neighbourhoods is at stake here. I can't imagine where we would be if we didn't enforce our laws that prohibit theft because of concerns that the case might not be successful. I think everyone would agree that this would not represent the values of the society in which we all live and enjoy.

In conclusion, I think the time has come to stand back and express my dismay at what has been happening here. How is it that the Township, together with their legal counsel and the 'legal opinions' that have been referred to, were not aware of the V1 Zone and the obvious consequences of its existence, particularly in light of the fact that the Township adopted this rather significant zone only 5 ½ years ago? Or how was the Township not aware that a commercial activity is not permitted in residential zones? I can understand, if Council was not provided with complete information, that there was, for Council, a possibility that this topic was "a grey area of the law". In my opinion it never was a grey area of the law. With the existence of the Village One zone, the legality of short term rental uses is about as black and white as the subject can be. Outside of the V1 Zone, STR's are prohibited. There can be no other explanation or conclusion.

I trust that this has been helpful.

Yours Truly,

Original Opinion

November 18, 2019

Name Deleted
Address Deleted,
Oro-Medonte, ON
LXX YYY

Dear XXX,

You asked me to provide an opinion in regard to Short Term Rentals (STR's) in Oro-Medonte that will eventually be provided to Mayor and Council. I have written this opinion letter with the understanding that the reader will be your Township Council.

For your information, I am a retired Urban Planner, who worked mainly within Simcoe County for just under forty years and was the Planner of Record for over a dozen Municipalities writing many of their initial Official Plans and Zoning By-laws and have appeared as an expert witness before the OMB on over 200 occasions.

My initial review of the Townships Official Plan and Zoning By-law, particularly the Zoning By-law and the provision that commercial uses were specifically prohibited in single detached dwellings, brought me quickly to the opinion that STR's were, by their nature commercial, and therefore, not permitted uses and therefore illegal.

My review of the Blue Mountains OMB (2011) decision and the decision of the Superior Court of Justice (Menzie's case) heard by Mr. Justice Beaudoin (2016) further solidified my opinion that STR's were commercial uses and should not be permitted in single detached residential zones. In my opinion both matters were well considered and provided a clear understanding as to what these uses constituted. Again, both cases outlined that STR's are commercial land uses and for other noted reasons should not be expected or permitted in single detached dwelling areas.

In reviewing the two planning reports provided to Council concerning this matter, I was struck initially by the fact that staff had failed to offer Council with one additional option. That is that STR's are illegal land uses in single detached residentially zoned areas and unless it could be proven that these business activities had existed prior to 1997 and beyond, then the Township could and should enforce its by-laws and shut these uses down.

I think we can all agree that if someone wanted to convert their residential use in a residentially zoned area to a shoe store, restaurant or manufacturing facility, the Township response would be swift in stopping these types of activities. Since the decisions cited above concluded that STR's presented a motel-like land use for short term transient users i.e. a motel, i.e. a commercial use, why would the Township ignore this when it wouldn't ignore the others for a moment?

I understand that STR's have appeared unannounced across the Province and beyond and have to a degree caught many Municipalities by surprise. However a number of Municipalities such as the Town of The Blue Mountains, Wasaga Beach, and others have specifically prohibited STR's in single detached residential areas, and as far as I know have not recognized, as legal non-conforming, any uses that may have started up illegally. Unless the Zoning By-law is amended, an illegal use remains an illegal use.

In my opinion, STR's in Oro-Medonte are illegal. In the future, should the Township not take action to shut down these uses, it is reasonable to predict that the ratepayers may take the Township to Court and ask that the Township be directed to enforce its by-laws to eliminate STR's.

In the alternative, the Township could amend the zoning by-law to allow STR's and in the process notify every land owner in an R1 or SR zones. However it would seem inevitable that this move would be challenged resulting in a Tribunal hearing. Given past OMB and Court decisions I would think that the Township would have a very steep hill to climb. I should also suggest that to decide to license these uses, under current circumstances, would not make them legal but probably would put the Township in a very awkward spot if investments were made and in the end STR's are declared illegal.

In regard to the Interim Control Bylaw (ICB), it is difficult to understand what has apparently happened and the position taken by the Township. It only makes sense if the Township mistakenly decided STR's were legal, which in my opinion they are not. It would seem to me that the only way to legalize an STR would be by way of a Section 34 (Zoning By-law) amendment. As Section 38 (ICB) was only intended to create a pause, intended to stop a building permit for an unwanted use, to preserve the intent of an Official Plan designation; it cannot be believed that this section can in any way legalize an illegal use or somehow "grandfather" the illegal use.

I very much appreciate that Council may not have been provided with all the information related to STR's and I also understand that this may be a difficult issue to tackle. At the end of the day, however, it seems to me that Council has a duty to protect its citizens. From what I have learned, STR's can be extremely disruptive and costly to neighbours.

The final test for each member of Council is how would you feel if having purchased your home with the belief and knowledge that you were in a safe and quiet place only to have an uncontrolled STR pop up next to you, unannounced and be turned into the party house from hell? If you are anything like me, I know you wouldn't like it nor would you put up with it. Can you imagine thinking that there is really nothing you can do about it, but it has been suggested that licensing will somehow control it, which given the experience of others I can't believe. How would you feel because this is all about good land use planning, which in essence is about respecting and protecting your neighbour?

I trust that my opinion will be helpful to Council in dealing with this matter

Yours Truly,