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Regulating Short-term Accommodations in Blue Mountains – Lessons Learned

I am Terry Kellar and for the past 10 years I have been the Chair of the short-term accommodation committee of the Blue Mountain Ratepayers' Association. Lobbyists for the short-term rental or temporary accommodation industry often point to the Town of The Blue Mountains ("Blue Mountains" or the "Town") as a licensing success story. Some things have worked well, but licensing has failed to protect our residential neighbourhoods. Here are some things every home and cottage owner and member of a municipal council should know about our successes and the licensing mistakes that we've made in the Town of The Blue Mountains.

In 2009, Blue Mountains chose to protect the safety, security and integrity of all residential zones from the intrusion of short-term accommodations (STAs) by separating temporary accommodations including STAs from places where people reside. Blue Mountains accomplished this by passing official plan and by-law amendments. The amendments defined a "new use," a short-term accommodation, that was distinct from a residential use. This new use was designated as a commercial activity that was incompatible with, and was not permitted in, any residential zones. This new STA use was designated as a permitted use only in certain specified commercial resort zones. This approach was upheld by the Ontario Municipal Board[1] and leave to appeal the Board decision to the Divisional Court was denied. Other municipalities, including Oro-Medonte (2014) and Niagara Falls (2021)[2], adopted a similar planning approach.

Blue Mountains successfully excluded STAs from all residential neighbourhoods. Yet, following this success, for some unknown reason, the Town permitted owners of approximately 54 STA properties that were in existence at the time the by-law amendments were passed in 2009 to continue to carry on business in residential neighbourhoods as legal non-conforming uses ("LNCUs"). The problem? Under the old by-law, they were never legal. STAs and temporary accommodations were never a permitted use in residential zones. Since this happened before my involvement, it's not clear to me how these properties acquired the status of a legal non-conforming use. Perhaps Blue Mountains settled with the operators to avoid further litigation, or the Town mistakenly believed the previous zoning by-law permitted these STA uses. The result? Blue Mountains had no choice but to resort to licensing to try and control these legal non-conforming uses.

Unfortunately, after 10 years of trying, licensing has been a costly failure, but we don't know how costly. Despite requests by our residents' association, the Town has failed to disclose the costs of administering STAs. However, in 2018, the Director of Oro-Medonte Development Services reported that:

> "The Township (Blue Mountains) has invested significant time, money, and added new full time staff resources into their program and have indicated to date the cost of the program is estimated to exceed $1,000,000."[3]

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[1] *Sheldon Rosen and the Lodges at Blue Mountain Corporation v. Town of The Blue Mountains* [2011] PL080455 at p10.

[2] *Keenan v. Niagara Falls (City)* [2021] PL180774

[3] Andria Leigh, Oro-Medonte Development Services Report No. DS2018-012 at p.3, February 28, 2018.

Despite the expenditures of our tax dollars to try and control approximately 340 licensed[4] STAs, licensing conditions intended to impose a level of control have failed. Blue Mountains has not revoked one license. Conflicts continue. In reviewing OPP records provided by the Town, the incident rate of reported disruptions from licensed STA properties is vastly disproportionate to the rate generally in residential neighbourhoods. In the period 2017 to 2022, the OPP attended licensed STAs 11 times more frequently than all other dwellings. What municipality can afford to pay for such policing costs, particularly when the expenditures are ineffective at quelling disruptive behaviour?

Fines for noise or parking violations are just seen as a cost of doing business. Occupancy limits are almost impossible to enforce. Other conditions, like limits on total rental days or contract duration, require neighbours to constantly monitor activity at an STA, track visitor numbers, arrivals and departures, etc. and report to law enforcement. To protect their neighbourhoods, homeowners have been turned into monitors for absentee STA operators, some of whom make more than $100,000 annually. Their reward? Because no one wants to live near a licensed STA in a residential neighbourhood, their homes are worth less in the marketplace.

So what should a municipality do to avoid the mistakes made by the Town of The Blue Mountains? To protect residential zones, the first step is to retain legal counsel very experienced in municipal law. Experienced legal counsel can better inform municipalities and state what has already been established in numerous court and tribunal decisions: short term temporary accommodation is not a residential use of property.

In most municipalities existing zoning by-laws do not permit STAs in residential zones. This is due to a fundamental planning principle that is the cornerstone of municipal zoning by-laws. Under this principle the only land uses permitted in a zone are those that are specifically listed as permitted uses for that zone. If a use is not listed, then it is not permitted in that zone. Conducting a use that is not permitted is a violation of the zoning by-law. This is different and opposite to other types municipal laws which operate by prohibiting specified activities.

As a result, it is not necessary for a zoning by-law to expressly state that STAs are not permitted in residential zones in order for them to be illegal – it is only necessary to show that the zoning by-law does not list STAs or temporary accommodations as a permitted use in the zone. Experienced legal counsel are well familiar with this fundamental principle and can advise municipalities on the land uses specifically permitted in residential zones and whether STAs fall under that list; or alternatively that STAs are not listed as specifically permitted uses and are therefore illegal and not permitted in residential zones.

Once it is established that STAs are not a permitted land use and are therefore illegal in residential zones, the next step is enforcement. Prosecutions by a municipality with limited financial resources can be carried out on a priority basis. Only the most egregious need to be prosecuted using the powerful remedy of Section 440 of the Municipal Act. Once one or two successful prosecutions have been obtained, municipalities will be in a far better position to convince others illegally carrying on business to cease.

If, on the other hand, a municipality were to be misled and persuaded to change their existing zoning by-law before prosecutions were carried out in the mistaken belief that the existing zoning by-law did not

[4] The number of licensed short term accommodations reported by Blue Mountains in 2022.

prohibit STAs, it will be much more difficult to defend legal non conforming use claims. Ten years experience in Blue Mountains has shown that it is the LNCU STAs that have been most problematic. If by-law changes are made before prosecutions are carried out, municipalities will face what Blue Mountains faced - wealthy STA operators lined up with their very experienced lawyers who will argue that what their clients were doing before the zoning by-law was changed was legal. Even if this was not the case, it will become more difficult to defeat LCNU claims if the municipality has proceeded to make a change in the zoning by-law believing this to be necessary, when in fact the pre-existing zoning by-law already did not permit STAs in residential zones. Such legal non conforming use claims will, if successful, mean that restrictions brought about by the change in the zoning by-law cannot be applied to the LCNU STAs. Tax dollars will be wasted and neighbourhoods and lakefront communities will continue to be disrupted.

Municipalities need to avoid the same mistake that Blue Mountains made with legal non conforming use claims. Instead, as a first step, prosecute to establish that STAs are not permitted in residential zones under the existing zoning by-law. Then, if zoning by-law amendments are needed in order to permit STAs in designated commercial areas outside of residential zones, non conforming use claims by STAs operating in residential areas can be successfully defeated by pointing to the successful prosecution under the pre-existing zoning by-law.

Allowing LNCU status for STAs in residential zones without a vigourous and determined effort to enforce the municipality's existing zoning by-law and defeat these claims will be a serious failure by the municipality. It is clear from the Blue Mountains experience that any licensing scheme intended to control conflicts created by LCNU STAs in residential zones will have little hope of success and will be a very costly endeavour.

If a municipality has already opened the door to STAs and instituted bylaw changes and a licensing scheme that expressly permit STAs in the mistaken belief that they can control the conflicts, then licensing should not cost taxpayers anything. All of the costs of administering, policing and enforcing the licensing scheme should be paid for by the STA operators. These costs include all direct and indirect costs, including municipal liability insurance costs. Additionally, it should be mandatory for STA operators to pay for a contingency fund established to compensate neighbouring home and cottage owners who suffer damages and / or property value loss if a municipality is unable to control the conflicts caused by the very lucrative operation of hotel-like commercial businesses in residential zones.

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