Alicia E.
Ward 5 Resident,
Township of Severn, ON

Alitwenty.twenty@hotmail.com

Hi Alicia,

Re: Severn Township and Short-term rentals

Thanks for reaching out to me, and yes, I do remember talking to you at the Lakehead Information Session on short-term rentals back in October. From the material you have sent to me, it would appear that the whole story has yet to be told and so I have provided you with my opinion as to the state of short-term rentals in Severn Township. Should you wish to share my opinion with your neighbours, Township staff and Council, please feel free to do so. My goal here is to educate the reader and to present my thoughts so that others who wish to review my opinion, may do so, preferably in the public domain where their thoughts can in turn, be openly reviewed as well.

To begin, I should introduce myself. I am Gord Knox, BES, MCIP,RPP (retired) and acted as a planning consultant, mainly in Simcoe County for almost forty years. I was the planning consultant of record to some twelve Municipalities including the Town of Wasaga Beach for over thirty years. During that time, I authored numerous Official Plans and Zoning By-Laws, some for the first time, and I appeared before the Ontario Municipal Board on over two hundred occasions as an expert witness. I was also the President and a principal of an Engineering, Architectural and Urban Planning firm.

My involvement with short-term rentals first came about when my opinion was sought by two, long-time and valued friends, Professor Kim Pressnail and his brother Dr. Bryn Pressnail, who unfortunately both ended up with what can best be described as unsupervised disruptive hotels beside their homes in the Township of Oro-Medonte. From what you have told me, although you are in a different township, you like so many others, have been experiencing very similar problems.

Even though the following may be somewhat lengthy, I hope that it will be helpful in supporting you and your neighbours, and in enlightening and assisting the Township. I couldn't help but notice in your letter to the Township of October 19, 2019, that you have already let the Township know about some of very significant cases that I am about to review. As we will see, based on these cases and the existing Severn Zoning By-law, in my opinion, short-term rentals are not permitted in residential zones.

To explain how I reached this conclusion, I will begin by discussing how short-term rentals were characterized by the Ontario Municipal Board (OMB) in a 2011 case commonly referred to as the *Blue Mountains* case (*Sheldon Rosen and The Lodges at Blue Mountain Corporation v. Town of The Blue Mountains* (2011) PLO 80455). Madame Hussey, who was Vice Chair of the Board at the time, decided

the matter. With a background as a lawyer, she was a well-regarded member of the Board. I have appeared before Madame Hussey and found her to be a very astute and a well-versed member of the Board. I say this to set the stage that her decisions can be relied on and that they are well-considered, carefully reasoned, and written. The case involved the Town of The Blue Mountains which was trying to prohibit new short-term accommodations (STAs) in low-density residential zones. The zoning by-law amendment was appealed by short-term rental operators to the OMB and Madame Hussey, among her determinations, made the following significant findings:

> "The Board finds that STA units are distinct commercial entities with the goal of making a profit. This commercial entity has the potential to conflict with the character and stability of existing neighbourhoods because of the constant turnover of people and the difficulty that turnovers bring in controlling noise and other nuisance."[1]

> "There is convincing evidence of incompatibility and convincing evidence that the integrity and character of the low density residential neighbourhoods are being undermined by the presence of STA units in those areas. These are legitimate concerns to which the Municipality has turned its attention appropriately. The Board finds that the proposal is a reasonable response to the situation and represents good planning."[2]

In this case, "reasonable response" refers to the municipality selectively permitting STAs only in high-density multi-unit residential buildings. Without lengthening this review with further quotes from her decision, suffice it to say that she found short-term rentals to be commercial in nature and stated that these types of land uses were disruptive, out of character, and had no place in low-density residential areas.

Another significant case is an Ontario trial level decision known as the *Menzies* case (*Ottawa-Carleton Standard Condominium Corporation No. 961 v Menzies,* 2016 ONSC 7699 CanLII) that was heard before Mr. Justice Beaudoin of the Superior Court of Justice in 2016. The court made findings that were similar to the *Blue Mountains* case. This case dealt with a condominium corporation that was trying to stop a short-term rental that had appeared in their multi-unit residential building. The important part of this decision is that the Court declared short-term rentals were a hotel-like use.

> "Single family use" cannot be interpreted to include one's operation of a hotel-like business, with units being offered to complete strangers on the internet, on a repeated basis, for durations as short as a single night. Single family use is incompatible with the concepts of "check in" and "check out" times, "cancellation policies", "security deposits", "cleaning fees",

[1] *Sheldon Rosen and The Lodges at Blue Mountain Corporation v. Town of The Blue Mountains (2011)* PLO 80455 at p.15

[2] Note 1 at p.17

instructions on what to do with dirty towels/sheets and it (*ed: single-family use*) does not operate on credit card payments."[3]

In reading this last quote, it became even clearer to me that this short-term rental operator, like so many others, was using the Internet as their marquis and was essentially carrying on a commercial hotel business. In the end, the key message here is that the court characterized the short-term rental use as a commercial land use. Hotels are commercial land uses. Whether measured against the by-laws of a condominium corporation or measured against the zoning by-laws of a municipality, the conclusion is still the same. Short-term rentals are a commercial land use.

A more recently reported case is the *Toronto LPAT* decision (*Hodgart et al v. Toronto (City) PL 180082*) reported on November 18, 2019. To begin, the staff at City Hall had declared and publicized that short-term rentals were illegal in residential zones. However, given there were good underlying policy reasons including support of the City's huge multi-million dollar tourist industry and the lack of hotel space, the City permitted owners to use their principal residence as a short-term rental business when they were elsewhere. This permission to use one's principal residence as a short-term rental was intended to fulfill a useful tourism purpose by making Toronto and the tourist industry money. By prohibiting the non-owner occupied short-term rentals through the principal residence requirement, it was hoped that this would also free up units for sale and long term residential rentals, a result that has subsequently been anecdotally confirmed in press reports. The important thing to remember here though, is that the City said short-term rentals were illegal right out of the gate and then permitted them only under strict conditions. The Tribunal was firm in the opinion that zoning is prohibitive of everything except listed permitted uses and upheld the City's right to restrict short-term rentals to principal residences. Further, the Tribunal was only dealing with non-owner occupied short-term rental operators as appellants. The Tribunal called these 'dedicated short-term rentals' and found them to be commercial and not permitted.

The next case that I would like to consider is good news for municipalities that want to protect their citizens and seek to enforce their by-laws. In January 2020, a case which involved the City of Burlington was heard and the decision was rendered by Justice Gibson of The Superior Court of Justice (Court file No. CV-19-00005228-0000). The City applied for an injunction to stop a short-term rental operator from carrying on business in a residentially zoned area in violation of the residential zoning by-law. The judgement granted the injunction and ordered the owner to end the non-permitted use, instructed the City and the Sheriff to use whatever means necessary and reasonable to stop the non-permitted use including blocking access to the property and ordered to the owner to pay costs of $9500 to the City. The evidence needed for this successful prosecution is attached to the decision.

So now I would like to look at Severn Township. The Official Plan begins with policies and direction for the orderly development of safe and healthy communities, protection of public health and safety, to

[3] *Ottawa-Carleton Standard Condominium Corporation No. 961 v Menzies*, 2016 ONSC 7699 (CanLII) p.5

protect and enhance the character of developed areas and a vision where residents enjoy safe family living. The above words are basically taken straight from the 'Principles' articulated in Section 2 of the Planning Act. I think we should all have a good idea that living next to an unsupervised hotel where rotating groups of transients disrupt the neighbours is totally inconsistent with the above statements and vision.

Section B4.2 of the Official Plan speaks to Bed and Breakfast Establishments (B&B). The governing policies state that the use shall not have a negative impact on the enjoyment and privacy of neighbouring properties. The use must be secondary to the primary use of a dwelling as a residence. The use must be the principle residence of the owner operator, and the character of the dwelling as a private residence must be preserved. The operator must receive a license from the Township and I presume obtain a rezoning as a B&B is not listed as a permitted use in any zone that I could find. This leads to the question: why would the Township go to such lengths and detail for a B&B intended to be used by tourists and vacationers and then when it comes to short-term rentals indicate to a disrupted constituent that there isn't much the Township can do? If this were true then it certainly makes no sense anymore to apply for a B&B permission, rezoning and license when all one needs to do is advertise their home in the Internet and then leave and not come back until the party is over and care less about what impact this has on one's neighbours. B&B's have rarely been a problem because the home-owner is present and that is what made such good sense, but an unsupervised hotel makes no sense at all.

Alicia, your home is on the shoreline so I will review the Shoreline Residential Area section of the Official Plan. However, most if not all of the comments herein apply to all residential areas. To begin, Part A sets out the policy to maintain the existing character of this predominantly low-density residential area. Unsupervised hotels don't, I would suggest, really fit very well with this vision. As for uses, single detached dwellings are listed as permitted in C7.2 of the Official Plan. Small scale commercial such as convenience stores and bed and breakfast establishments may be permitted through rezoning. Note that there is no mention in the permitted uses of a variety of tenure or short-term rotating occupancy by non-residents outside of a permitted B&B.

In the material that you provided, there was a note from the Township that said the Township's consultants found nothing defining short-term rentals in the zoning by-law. That is not surprising, unless you really look for it, because short-term rentals have only been around in force for a short period of time and are basically a child of the Internet. Municipalities and Councils do have my sympathy in that short-term rentals, to a degree, appeared over night without warning, and who could have seen them coming.

However, the point here is that just because a use is not defined, doesn't mean that it is permitted. Zoning by-laws establish zones and then list the uses that are permitted, and only uses that are listed are permitted. Therefore, a use that is not listed such as a short-term rental is prohibited. Within the

Shoreline Residential Zones, the permitted uses can be found in Table 6.1 of By-law 2010-65 and the only applicable use listed is a "Single-detached dwelling". The By-law defines a "dwelling" as:

> "A building designed or used for residential occupancy by one or more persons, containing **one or more dwelling units as its principal use** (emphasis mine) but shall not include a commercial accommodation unit ***is*** (I believe the authors intended to use the word ***in***, not ***is***) a tourist establishment, mobile home with or without foundation, boarding house, or institutions."

The definition of a "dwelling" includes "one or more dwelling units as **its principal use***"* (emphasis mine). The statement of "principal use" might seem to some to open a door to a secondary use, such as a shot term rental. I do not know what permissible secondary uses were contemplated or permitted, possibly a home occupation, but I do know that a secondary use cannot be a short-term rental. As we have seen, short-term rentals have been characterized by the courts and tribunals as a commercial use and the definition of a dwelling specifically does not include a 'commercial accommodation unit'.

A "dwelling unit" referred to in the definition of "dwelling" is defined as:

> "A room or a suite of two or more rooms within a building, designed or intended for use by the occupants as a single, independent, and separate housekeeping establishment containing food preparation and sanitary facilities. For the purposes of this By-law, a dwelling unit does not include a tent, trailer, mobile home, guest cabin or a room or suite of rooms in a boarding or rooming house, hotel, motel, motor hotel or tourist home"

A housekeeping establishment can be characterized as a 'domicile' which is defined by Merriam-Webster as "a persons fixed, permanent, and principle home for legal purposes". The first sentence in the definition of a dwelling unit sounds just like the homes that we all occupy. The second sentence in the definition of a dwelling unit states that it does not include hotels and motels etc. I believe that this definition would have listed short-term rentals if they had been an issue when the by-law was written. As for a definition of a short-term rental, let's look at the definition of a commercial accommodation unit provided in Zoning By-law 2010-65:

> "A unit within a **tourist establishment** (emphasis mine) to be rented or occupied for the purposes of catering to the needs of the travelling public or vacationers by furnishing sleeping accommodation with or without food. Such rental or occupancy shall be in the form of normal daily rental, time-sharing license to use or interval ownership."

A Tourist Establishment is defined in the Township's Zoning By-law as:

> "The use of land, building or structures for the provision of commercial roofed accommodation where commercial accommodation units are offered for rent on a short-term or transient basis to the public who is travelling, vacationing, engaged in leisure or recreation or participating in conventions or meetings".

In my opinion, Zoning By-law 2010-65 already contains a definition of a short-term rental and it has been defined as a 'commercial accommodation unit'. Therefore, I would presume that it could well be argued that short-term rentals are only permitted in zones that permit tourist establishments, such as commercial Zones C1, C2, and C8.

This means that there are two ways of concluding that short-term rentals are not permitted in Shoreline Residential zones under zoning By-law 2010-65:

1) Short-term rentals are not permitted because they are not specifically listed as a permitted use and so they are prohibited;

2) Short-term rentals are not permitted because they are a form of commercial accommodation, and this use is specifically not included in shoreline residential but is permitted in other commercial zones.

Having reached the conclusion that short-term rentals are not permitted in Shoreline Residential zones in Severn Township, I would like to address an opinion that your Chief Administrative Officer provided to you. The opinion was supported by a reference to the *Puslinch* case (*Puslinch v Monaghan*, 2015 ONSC 2748 (CanLII)) and stated that this case was somehow determinative of your rights under the existing Severn Zoning By-law. It is my opinion that the *Puslinch* case does not in any way affect the illegality of short-term rentals in Shoreline Residential zones in Severn Township and the case should be given little if any weight at all.

In the *Puslinch* case, the Township of Puslinch tried to prevent the use of a short-term rental in single-detached dwelling. It is my understanding that the defendant, Ms. Monaghan, was carrying on a short-term rental business in a Resort Residential zone where the Township claimed such a use was prohibited because it was a Tourist Establishment use. The zoning by law contained a definition of a Tourist Establishment use but that use was not listed as being permitted in the Resort Residential zone. The Township brought a court action to enforce the zoning by-law. The court found in the defendant's favour, ruling that the by law definition of Tourist Establishment was "unacceptably vague, uncertain, and insufficiently specific" and was therefore of no effect to regulate short term rentals within the Resort Residential zone. The court reached this conclusion based on a finding that the manner in which the Township sought to apply the definition of a Tourist Establishment would result in outcomes that were implausible, unreasonable and unjust, and that this could not have been the intent of the legislators. The court noted in particular that the Township's interpretation would in fact

allow the use of the property as a short term accommodation as long it was not used for engaging in recreational activity. The court concluded that these inconsistent outcomes would in effect regulate people, not use, and that regulating people was outside of the power and the authority of the Township under the Planning Act.

The finding that Tourist Establishment use by-law was “unacceptably vague, uncertain, and insufficiently specific”, is specific to the particular by-law provisions and the approach taken by the Township of Puslinch in its interpretation and enforcement of the by-law. In my opinion the “unacceptably vague” finding is a conclusion that is specific to the unique wording of the by-law that was considered by the Court and would not be generally applicable to the zoning by-laws of other municipalities which contained different provisions and wording.

The Court also found that Puslinch tried to regulate “people” contrary to Section 34(35) of the Planning Act which provides that there can be no distinction on the basis of relationship, i.e. no “people zoning”. This principle is reflected in a long line of cases that followed the Supreme Court of Canada decision in the *Bell* case ((*Bell v. R.,* 1979 CanLII 36 (SCC), [1979] 2 SCR 212). The *Bell* case held that the municipality did not have the authority to zone based on the relationship of the occupants, but it did have the authority to zone based on use of the building, and put an end to the practice of “people” zoning. You can zone for “use” but you cannot zone for “people”.

However, when examining the Puslinch case closely I believe it is evident that the definition of a Tourist Establishment use in the Township’s by-law was not on its face “people zoning”. Rather I think it is clear that the court reached the “people zoning” conclusion not because of how the Tourist Establishment use was defined in the by-law, but because the evidence presented at trial suggested to the court that the manner in which the Township interpreted and attempted to enforce the by-law would result in different outcomes related to determinations based on “people” and not “use”. I would therefore conclude that this outcome is not inevitable for other enforcement cases based on zoning by laws in other municipalities, particularly in view of the decision in the Town of The Blue Mountains case referred to earlier.

Finally, I must point out that nowhere in the *Puslinch* decision could I find a statement that unless a use is specifically listed as a permitted use in a zone, it is prohibited. This is a fundamental principle of planning and one that the Township should have relied upon at the outset as it sought to regulate short-term rentals. For some reason that is unknown to me, the Township of Puslinch did not follow this path in their original approach to regulating short-term rentals.

I will now look at Severn Township’s Interim Control By-law. I understand that the Township has enacted By-law 2019-67, an Interim Control By-law regarding short-term rentals. In reviewing this By-law it seems that someone employed by the Township must have mistakenly believed that short-term rentals were somehow permitted uses in residential zones and therefore they needed to create a

pause to prevent further expansion while the Township figured out what to do with them. In my opinion, short-term rentals in residential zones were illegal prior to the enactment of the Interim Control By-law and they still are illegal land uses. Therefore, the Interim Control By-law serves no useful function what-so-ever except to put a pause on new short-term rentals in commercial zones where commercial accommodation units are permitted.

I understand that Council has expressed concern for people who have traditionally rented their cottage from time to time and have done so very responsibly without interfering with their neighbour's quiet enjoyment or affecting their safety and security. These types of rentals are often referred to as the Ma and Pa or casual rental. I have heard this concern expressed before and I share it.

Fortunately, the Township can do what other municipalities in Simcoe County have done. Collingwood and Clearview only investigate short-term rentals on a complaints-made basis. In the past, I very much doubt whether your Township has ever charged or even investigated a Ma or a Pa for renting their cottage. Why would they suddenly start charging people now? It is my understanding that enforcement officers have a discretion as to whether to lay a charge or not. So long as they exercise that discretion in good faith, the traditional cottage rental operator need not be charged unless they begin disrupting the neighbours, for example, by renting to strangers drawn from the Internet who have no regard as to how their behaviour affects the neighbours.

Support for the good faith exercise of this discretion can be found in the Supreme Court of Canada decision known as the *Polai* case (*Polai v Toronto (City)*, 1972 Carswell Ont 215, [1972] S.C.J. No. 73). In the *Polai* case, the court made it clear that the Township may in good faith selectively decide who to prosecute. So it is up to the Township which short-term rental operators it wants to prosecute for carrying on the short-term rental business and violating the zoning by-law and it is no excuse for a violator to claim that not all offenders are being prosecuted. Therefore, the Township doesn't have to address all known violators and relying on the *Polai* case may choose to investigate and prosecute the most blatant violators.

Given the Polai decision, the Ma and Pa cottage rental operator need not ever worry about being investigated so long as their visitors behave. The traditional cottage rental operator is typically, not a problem. However, the Ma and Pa operators who have rented responsibly for years should be just as fearful of disruptive short-term rental operators as everyone else. They don't want to be victimized by a disruptive short-term rental – no one wants to be victimized. If a disruptive operator begins carrying on business next to a Ma and a Pa, they too could have their lives disrupted particularly if the Township fails to enforce their existing zoning by-law that is designed to protect their safety and security and their quiet enjoyment.

I should note at this point that it would not surprise me to learn that disruptive operators may try to persuade the Township to amend the zoning by-law to permit the traditional cottage rental operators to continue. Does anyone really think that disruptive operators really care about the traditional Ma and Pa rental operator particularly given that they don't appear to care how their neighbours suffer

because of their commercial activities? I will suggest to you that they are acting out of self-interest. In my opinion, the Township does not need to nor should it amend the zoning by-law. The Township can enforce the zoning by-law they have just like Burlington or Collingwood or Clearview on a complaints-made basis. If the Township tries to legalize the traditional cottage rental through a zoning change, it will create an opening for disruptive operators to continue as they always have, no doubt disguising themselves and making spurious claims that they are really just a traditional Ma and Pa cottage rental operator. Trying to defend against such claims will lead to needless and costly litigation - costs that most Townships can ill afford to bear.

I will close now by repeating two conclusions that seem irrefutable to me:

1. Short-term rentals of dwelling units are commercial land uses, not residential and therefore not a permitted use, as being listed or otherwise, in low-density residential zones.

2. In my opinion, short-term rentals have no place or right next to traditional single-detached dwellings such as your home and for that matter the rest of the homes in Severn Township. As a final note, these uses have always been illegal and not permitted and any argument of being legal non-conforming uses simply does not apply.

To remove any doubt about these conclusions, I would welcome a critical review of my opinion by anyone expert in the field. It would be helpful for all to know whether an expert's opinion differs in any significant way from my own. Finally, there are a few tests and considerations that I would like all to ponder. Over the years I have come to understand and employ what I would call pillars of good land-use planning which have served me well. One being do not screw up your neighbour. In this case, the neighbours are the ratepayers who in my opinion are owed a duty of care from Council that the historic enjoyment of their property and their personal safety is preserved. Another is how would you feel if this happened to you? You could not possibly have seen it coming and yet, apparently no one cares to help you. As a final test, Council and staff should be asked who among them want to live beside an unsupervised hotel? Who wants to be one bad real-estate deal away from having a disruptive neighbour and having to move in order to protect their own safety, their security and their quiet enjoyment? If I were to ask for a show of hands, I think we all know the answer.

I will finish by acknowledging that I do not wish to be compensated for my work. As I wrote at the beginning of this opinion, I began looking into short-term rentals when two long-time friends needed help. Helping them and now you, just seems to be the right thing to do - to stand up when the truth seems hard to find and when it seems as if no one no is listening. Good luck Alicia and all the best. I hope this will be helpful.

Best Regards,

Gord Knox.