

RESTRICTIVE COVENANTS MAY PREVENT SHORT-TERM RENTAL OF PROPERTY

Vacation and other short-term rental websites, such as Airbnb, VRBO and HomeAway, are becoming increasingly popular. However, common restrictions found in the chain of title to many residential properties may prohibit short-term rentals. Known as "restrictive covenants," these legal devices operate to determine what can or can't be done with or on real property.

Developers of real estate, whether in a subdivision, a condominium or a few parcels, frequently place restrictions on the property. For example, these restrictions may state that homes must be constructed of a certain size (such as no less than 2,000 sq. ft.), style (such as no more or less than two stories), or bar other particular features (such as circular driveways). Michigan courts view these restrictions as enforceable contracts between all property owners within the set of properties covered by the applicable restrictions.



Analyzing deed restrictions requires a court to balance two competing interests: The first, that land owners have broad freedom to make legal use of their property, and the second, that courts must normally enforce clear and unambiguous written deed restrictions governing the property.

The Michigan Court of Appeals recently reviewed deed restrictions stating that the property at issue be "a private dwelling" for "private occupancy only" and that no "commercial use" be made of the property. The property at issue, on a large and popular lake in northern Michigan, was rented to various guests for a majority of the weeks during the year. A neighboring property owner sued to prevent further rental of the property claiming that it violated the restrictive covenants that a property be for "private occupancy only" and not for "commercial use." The owner of the rental property argued that the rental of the cottage did not violate the restrictive covenants given that the individuals making use of the property were utilizing it for their own personal occupancy and no commercial business was being operated thereon.

The Court of Appeals disagreed with the owner, and found that Michigan case law supports the notion that transient and short-term use of property is not consistent with the notion of a private residence, which contemplates the occupant and/or owner residing at the property. The Court of Appeals noted that the renters are not allowed to leave their belongings at the property which revealed the transient nature of their occupancy. Despite the fact that no business was operated on the property, the Court of Appeals found that the act of renting the property to third-parties for short-term periods was itself a commercial use, even if the renters' activities were residential in nature. Thus, the homeowner was prohibited from renting the property on a short-term basis in the future.

A Michigan legislator introduced a bill in response to the case which, if passed, would effectively trump an association's or other deed restrictions on rentals of less than 28 days by legislatively declaring that these uses are "residential" and not "commercial." At the time of this article, the bill has not made it out of committee and has not yet passed either the House or the Senate.

While any legislation on the issue remains unsettled, the Court of Appeals decision makes clear that the rising popularity of short-term rentals does not automatically make your property eligible to be used for rental income. Before any attempt to rent property is made, a careful review of the title history to the property should be undertaken to determine whether any deed restrictions exist which would prohibit the rental.

Contact Mike Dorocak or one of our **real estate attorneys** if you or a client are considering renting residential property on a short-term basis to ensure that such activity is allowed on the property.