STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

SUSAN REAUME,

Plaintiff-Appellant,

v

TOWNSHIP OF SPRING LAKE,

Defendant-Appellee.
_____/

Supreme Court No. 159874

Court of Appeals No. 341654

Ottawa County Circuit Court
No. 17-004964-AA

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APPELLANT SUSAN REAUME'S
REPLY IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

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REPLY ARGUMENT

Spring Lake spends about two pages in its Answer discussing the ordinance interpretation propounded by the Court of Appeals and the other 20 pages of its argument tossing up alternative reasons why the Court of Appeals could be affirmed. None of these alternative arguments were adopted by Spring Lake's Community Development Department or Township Board, many were implicitly rejected by the Court of Appeals, and all lack merit. Most importantly, none of these alternative arguments change the fact that the Court of Appeals' published opinion adopts a manifestly erroneous interpretation of ubiquitous zoning-ordinance provisions.

I. No fact-laden inquiries are required to review the Court of Appeals' zoning-ordinance interpretation, which has broad implications for communities throughout Michigan.

Spring Lake's scattershot response to Ms. Reaume's application starts by taking the position that this appeal involves deferential review of an "inherently local" and fact-specific decision by local administrative bodies. Actually, this appeal requires nothing more than interpretation of a zoning ordinance, which is a question of law reviewed de novo. The only reason the Community Development Department and Township Board rejected Ms. Reaume's claim of a lawful nonconforming use was because they concluded that short-term rentals were not lawful in the R-1 District even before the enactment of Ordinances 255 and 257. (App 16–19, 66.) The circuit court and Court of Appeals agreed. There are no unique factual issues impeding a decision on whether the lower agencies and courts correctly interpreted the pre-amendment Zoning Ordinance.

Spring Lake contends the legal interpretation requires "de novo review with deference" to the Township Board's interpretation, relying on *Macenas v Village of Michiana*, 433 Mich 380,

402; 446 NW2d 102 (1989).[1] It is true that *Macenas* spoke in terms of deference to a municipality's interpretation. This typically means giving "respectful consideration" to that interpretation and not overturning it without "cogent reasons" for doing so. *Id.* at 402. Only when the construction is "applied over an extended period by the officer or agency charged with its administration" is it given greater weight. *Id.* at 396. *Macenas* does not afford the Board's newly minted interpretation anything more than respectful consideration. If any interpretation is entitled to "great weight," it is that of Lukas Hill. As "zoning administrator," he is an officer charged with administering the zoning ordinance, i.e., with its enforcement. His statements reveal a tacit interpretation that the ordinance permitted short-term rentals until Ordinances 255 and 257 were enacted. (See Appl 5–6.) This interpretation long predates the Township Board's and supports Mr. Reaume's position on appeal.

There is also authority holding that ambiguous ordinances should be interpreted in favor of the property owner. See *Talcott v City of Midland*, 150 Mich App 143, 147; 387 NW2d 845 (1985) (stating that where doubts exist as to legislative intent in a zoning ordinance, they must be resolved in favor of the owner).

That said, the Court of Appeals ultimately applied no deference or presumptions in examining the zoning ordinance's terms, and this Court certainly owes the Court of Appeals no deference in reviewing its decision. Furthermore, no amount of deference "require[s] [the court] to endorse a board's insistence that 'black' means 'white.' " *Macenas*, 433 Mich at 402. The

[1] Notably, this Court in its last decision interpreting a municipal ordinance said that "because ordinances are treated as statutes for purposes of interpretation and review, [this court] also review[s] de novo the interpretation and application of a municipal ordinance." *Bonner v City of Brighton*, 495 Mich 209, 221–222; 848 NW2d 380 (2014). The very concept of de novo review is inconsistent with deference. See, e.g., *Dep't of Civil Rights ex rel Johnson v Silver Dollar Cafe*, 441 Mich 110, 116; 490 NW2d 337 (1992).

Court of Appeals' decision, and Spring Lake's position, that a single family cannot "temporarily" occupy a "dwelling" cannot be reconciled with the definition of "Dwelling," which includes a building "occupied in whole or in part as a home, residence, or sleeping place, either permanently *or temporarily*, by *one* (1) or more Families." See Spring Lake Zoning Ord § 205 (2016) (emphasis added), App 70 (hereafter "SLZO" or "Zoning Ordinance"). This Court should take a fresh look at these zoning-ordinance terms and definitions, especially since the meaning of dozens or even hundreds of zoning ordinances with substantially identical provisions hangs in the balance.

II. The Court of Appeals declined to rely on Spring Lake's alternative interpretations because they lack merit.

To prop up the Court of Appeals' decision, Spring Lake offers up a few other provisions in the ordinance that it believes support that court's ultimate ruling that short-term rentals were not allowed under the Zoning Ordinance. (Answer to Appl 22–28.) It points to the fact that the R-1 District has always been labeled a "Residential" zone, as if this label were inconsistent with the leasing of homes. It also argues that Ms. Reaume's use qualifies as a "bed and breakfast," a use not permitted in the R-1 District under the Zoning Ordinance. Importantly, none of these alternative grounds for affirming obviates review of the jurisprudentially significant interpretation actually adopted in the Court of Appeals' published opinion. Further, the Court of Appeals rightly declined to rely on these interpretations, as they lack merit.

First, the argument that Ms. Reaume is running a "bed and breakfast" does not comport with the plain language of that term's definition and the facts on record. That use was defined in the Zoning Ordinance as "[a]n operation in which transient guests are provided a sleeping room and board in return for payment, which operation is located in a Single Family Dwelling which is used to house a Family as it principal place of residence." SLZO § 203, App 53b. There is no

evidence that Ms. Reaume used her property as her primary residence or that she provided "board."

Second, Spring Lake's argument that labeling the R-1 District as a "Residential" zone requires use of Ms. Reaume's property as a residence proves far too much. As Spring Lake notes, specific provisions in legislation control over general ones. *Odom v Wayne Co*, 482 Mich 459, 471; 760 NW2d 217 (2008). Thus, the specific provisions enumerating what uses are allowed in a particular district govern over general labels ascribed to the entire district. The list of specific uses permitted by right and as a special use in the R-1 District includes several which are quite clearly not "residences," such as day care facilities, parks, and places of public assembly. SLZO § 407(B), App 78. The term "Dwelling" also appears in each of the residential zones, and it includes not just "residences" but also buildings occupied as a "sleeping place." *Id*. § 205, App 70. The Court of Appeals properly declined to rely on the generic label of "residential" to instead focus on the meaning of the more specific term, "Dwelling, Single-Family."

The Court of Appeals' key error instead lay in holding that occupancy of a "dwelling" by a single "family" could not be "temporary." (See Appl 13–15.) There are only three types of dwellings: Single-Family, Two-Family, and Multi-Family. SLZO § 205, App 70. They are distinguished in the Zoning Ordinance only by the number of families occupying the same building, not by the length of occupancy. *Id*. Further, the ordinance specifically says that a "Dwelling" may be occupied "temporarily" by one Family. *Id*. It was error to hold otherwise.

III. The Court of Appeals properly declined to rely on the case law Spring Lake cites because it is inapposite.

As it did in the Court of Appeals, Spring Lake cites to a number of cases that it claims support its interpretation. The Court of Appeals appropriately avoided relying on those cases. Most of these cases concern restrictive covenants and turn on the meaning of terms that are not at

issue in this appeal. The two cases that do address the term "single family dwelling" in an ordinance offer no analysis that supports Spring Lake's or the Court of Appeals' decision and involve definitions that are meaningfully distinct from those in play here.

In *O'Connor v Resort Custom Builders, Inc*, 459 Mich 335, 337; 591 NW2d 216 (1999), this Court considered the meaning of a provision in a restrictive covenant which provided that "[n]o lot shall be used except for residential purposes." In *Eager v Peasley*, 322 Mich App 174, 179; 911 NW2d 470 (2017), the Court of Appeals analyzed another restrictive covenant and held that the terms "private occupancy" and "private dwelling," and the prohibition against any "commercial use," precluded short-term rentals. And before that, in *Enchanted Forest Property Owners Ass'n v Schilling*, No. 287614, 2010 WL 866148, at *1 (Mich Ct App, Mar 11, 2010), the Court of Appeals dealt with the interpretation of another restrictive covenant that said: "Any structure erected shall be a private residence for use by the owner or occupant . . . . No part of said premises shall be used for commercial or manufacturing purposes." Spring Lake relies on these restrictive-covenant cases to argue that short-term rentals are not allowed because they are a "commercial use." That argument failed to convince the Court of Appeals and should not hold sway here either.

First, the term "Dwelling, Single-Family" and its attendant definitions, which control the outcome in this case, were not at issue in those cases. Conversely, this case does not involve terms such as "private residence" or "commercial use," which were at issue in those cases.

Second, nothing in the Zoning Ordinance suggests that leasing a home is a "commercial use" of the property as that term is used in the Zoning Ordinance or most other zoning ordinances for that matter. There is no special category for apartments or other rentals in the Zoning Ordinance (see App 62b); such use is subsumed under the definition of "Dwelling." At the same

time, dwellings are only permitted in the "residential" and "mixed use" districts; they are not permitted in the "commercial" districts. (See *id.*) Adopting Spring Lake's commercial-residential distinction would leave little if any room for rentals in Spring Lake and would conflict with other provisions in the ordinance like Section 352 (see Exhibit A), which specifically contemplates the rental of homes in subdivisions.

Finally, holding that any financial arrangement regarding the property that generates a profit for someone transforms the land use into an impermissible "commercial" use would result in all sorts of unintended and inadvisable consequences for residential property owners. Obviously, it would mean long-term rentals for residential use are barred. But it would also, for instance, mean that moving into a home as one's primary residence, renovating it, and flipping it one year later for a profit results in an unlawful "commercial use." At the end of the day, zoning ordinances are land "use" regulations. Whether the property yields a profit or not for someone with an interest in the property is not the determining factor in whether the land's "use" is commercial or residential.

By the same token, Ms. Reaume's financial arrangement with a family temporarily occupying the home says nothing about whether it is a "[b]uilding or portion thereof which is occupied in whole or in part as a . . . sleeping place, either permanently or temporarily, by one (1) or more Families." SLZO § 205, App 70. It also does not change the fact that the building itself is "designed for use and occupancy by (1) Family only," which is the definition of "Dwelling, Single-Family." *Id*. That explains why the Court of Appeals did not even cite to any of those cases or adopt this theory. The only question here is whether Ms. Reaume's use satisfies the terms of the Zoning Ordinance, which are completely different from those at issue in the restrictive-covenant cases discussed above.

As for the two cases that do address the term "single family dwelling," both involved definitions that are markedly different from the one at issue here. In *Laketon Township v Advanse, Inc* ("*Laketon II*"), 485 Mich 933; 773 NW2d 903 (2009), the definition of "dwelling" specifically included not only "one-family, two-family, and multiple family dwellings," but also "apartment-hotels, boarding and lodging houses." *Laketon Twp v Advanse, Inc* ("*Laketon I*"), No. 276986, 2009 WL 763447, at *4 (Mich Ct App, Mar 24, 2009) (quoting Laketon Township Zoning Ordinance, art I, § 102-10) (emphasis added). The Court of Appeals deemed the use permissible as an "apartment-hotel," "boarding house," or "lodging house," *id*. at *4, but was reversed because it overlooked the fact that the Residential District A restricted to "single family dwellings," a different subset of "dwelling," *Laketon II*, 485 Mich at 933. Neither the Court of Appeals nor this Court addressed the meaning of "single family dwellings."

Spring Lake's ordinance, by contrast, already restricts "Dwelling" to "Family" occupancies and excludes motels and tourist rooms. But it also nevertheless expressly permits "temporary" occupancy of the dwelling as a "home, residence, or sleeping place" by one family. SLZO § 205, App 70. Given these differences and the lack of on-point analysis in *Laketon II*, it is unsurprising that the Court of Appeals did not even cite it.

As for the one case the Court of Appeals did cite, *Concerned Property Owners of Garfield Township*, No. 342831, 2018 WL 5305235 at *1 (Mich Ct App, Oct 25, 2018), it declined to rely upon it for its analysis. See COA Op 7, App 7. The zoning ordinance in that case used the term "single family dwelling" and defined "dwelling" broadly "to include any 'building or structure or part thereof occupied as the home, residence or sleeping place of one or more persons either permanently or transiently,' " *Concerned Property Owners*, 2018 WL 5305235, at *2 (quoting Garfield Township's Ordinance 10, § 3.2), but a critical distinction lay in the definition

of "single family dwelling." This key term was defined as a "dwelling *unit* designed for exclusive occupancy by a single family," and "dwelling unit" was specifically defined as a "building or portion thereof designed exclusively for *residential* occupancy by one (1) family, and having cooking facilities." 2018 WL 5305235, at *2 (emphasis added). The Spring Lake Zoning Ordinance definitions in no way limit "single-family dwelling" to "residential" occupancy. See SLZO § 205, App 70.

To be sure, the *Concerned Property Owners* court also held that short-term rentals were precluded based on the definition of "family." *Id*. at *2. Similar to Spring Lake's Zoning Ordinance, "Section 3.2 [in Garfield Township's ordinance] defined 'family' to include relationships of a 'non-transient domestic character,' but to exclude those 'whose domestic relationship [was] of a transitory or seasonable nature or for an anticipated limited duration of a school term or other similar determinable period.' " *Id.* The panel interpreted this to mean that short-term rentals were precluded because they are "inherently transitory." *Id.* As in this case, the court conflated transient relationships between individuals with transient occupancy of property. These are not the same thing. The Court of Appeals in this case not only repeated that mistake but also enshrined it in a published opinion.

IV. Spring Lake never before disputed Ms. Reaume's prior use because the record clearly shows that her property was designed for single-family use and advertised accordingly.

Spring Lake argues for the first time in this appeal that even if the Court of Appeals erred in its interpretation, there is no evidence in the record of Ms. Reaume's prior use of the property for short-term rental by a single family. The Court of Appeals said in its opinion that "there was never any serious dispute that she actually was using the property for short-term rental

purposes." COA Op 6, App 6. There was also no dispute that Ms. Reaume's short-term rental was designed for single-family use and advertised as such; the record is clear on that point.

In the spring of 2015, Capstone Property Management listed the property for rent on the internet. Capstone listed the property as allowing renters to rent portions or all of the property, and several neighbors complained that Ms. Reaume had converted the property to multifamily use inconsistent with the R-1 District. (1/8/2016 Concerned Homeowners Ltr to the Township, App 60–61.) In turn, the zoning administrator, Lukas Hill, wrote a letter to Ms. Reaume citing her for the alleged conversion of the "single family dwelling . . . into a multifamily dwelling." (2/2/2016 Hill Ltr to Reaume, App 64.) Because Ms. Reaume had not converted the property into a multifamily dwelling, she immediately asked Capstone to correct the listing for the vacation rental. (4/7/2017 Reaume Aff ¶¶ 12–13, App 56.) Capstone corrected the listing language "to clarify that the Property was a *Single-Family* Dwelling." (*Id.* ¶ 13, App 56 (emphasis added).) After correcting the listing, Hill informed Reaume that the new listing language was acceptable and that he would "close the file." (*Id.* ¶ 14, App 57.) Spring Lake never again indicated to Reaume that it believed she was attempting to rent the property to multiple families and, indeed, since then the property has been listed and rented *solely* as a single-family dwelling.

Not only does the argument lack merit, it is not preserved for review. Spring Lake never made this argument in the circuit court or the Court of Appeals. It should not be permitted to raise this issue for the first time at this stage of the litigation.

V. The Court of Appeals correctly rejected Spring Lake's argument that Ordinance 255 is not subject to nonconforming use law.

Spring Lake also contends, as it did below, that even if Ms. Reaume's use conformed to the Zoning Ordinance, the nonconforming use law in Michigan's Zoning Enabling Act does not apply to Ordinance 255 because it was enacted under MCL 41.181 and not as a zoning ordinance

amendment. The Court of Appeals implicitly rejected this argument, holding that "if [Ms. Reaume's] use of the property actually was lawful prior to the adoption of Ordinances 255 and 257, then [she] has a right to continue using her property for short-term rentals." COA Op 5, App 5. Rightly so.

"A zoning ordinance is defined as an ordinance which regulates the use of land and buildings according to districts, areas, or locations." *Square Lake Hills Condo Ass'n v Bloomfield Twp*, 437 Mich 310, 323; 471 NW2d 321 (1991) (Riley, J). "The question whether or not a particular ordinance is a zoning ordinance may be determined by a consideration of the substance of its provisions and terms, and its relation to the general plan of zoning in the city." *Id*. The labels ascribed to it by the local government are not determinative. See *Krajenke Buick Sales v Kopkowski*, 322 Mich 250, 252; 33 NW2d 781 (1948). Saying an ordinance is not a zoning ordinance does not make it so.

Here, Ordinance 255 regulates the use of property for short-term rentals according to zones previously established in Spring Lake's Zoning Ordinance by specifically precluding short-term rentals in the R-1 District. This restriction qualifies as a "zoning ordinance." The fact that Spring Lake felt the need to duplicate this "zoning" provision in an amendment to the Zoning Ordinance through Ordinance 257 reinforces this conclusion. As a zoning provision, the prohibition on short-term rentals in the R-1 District is subject to the protections for nonconforming uses provided for in the Michigan Zoning Enabling Act, MCL 125.3208. The Court of Appeals did not err in holding that this nonconforming-use law applies to Ordinance 255.

CONCLUSION AND REQUESTED RELIEF

For the reasons given above and in Ms. Reaume's Application for Leave to Appeal, the Court should grant leave to review the Court of Appeals' published decision.

Respectfully submitted,

Dated: August 20, 2019

WARNER NORCROSS + JUDD LLP

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EXHIBIT A

B. The outside edge of the Pool wall shall not be located nearer than ten (10) feet to any Lot line. On a Waterfront Lot, a swimming pool shall be fifty (50) feet from the High Water Mark.

C. Each Pool shall be enclosed by a fence or a wall of a height no less than four (4) feet nor more than six (6) feet which is constructed in such manner that no person may enter the Yard or the area where the Pool is located without passing through a gate or door located on the Lot on which the Pool is situated. The fence may be placed on or anywhere inside the Lot lines of the Lot where the Pool is situated; provided, however, that no fence may be erected closer to a Street than a Building may be erected in the Zoning District in which the Pool is located.

D. All gates and doors which permit access to the Pool area shall be capable of being locked and shall be locked at all times when no person is present on the Lot on which the Pool is located.

E. A fence is not required if a Pool cover is installed per the Michigan Building Code, as amended.

F. For above-ground Pools, steps and ladders to the Pool shall be secured and locked, or removed when the Pool is not in use.

351 TEMPORARY DWELLINGS

Unoccupied parking or storage of temporary Dwellings, Recreational Vehicles, trailers, etc. on a Street or Front Yard is prohibited for more than forty eight (48) hours at a time. No person shall use or permit the use of any temporary Dwelling or trailer as a principal or seasonal Dwelling on any site, Lot, field, parcel or tract of land, except as part of a Campground licensed by the Michigan Department of Public Health.

352 TEMPORARY USES OR STRUCTURES REQUIRING ZONING ADMINISTRATOR AUTHORIZATION

A. Upon application, the Zoning Administrator shall issue a permit for a temporary office Building or Yard for construction materials and/or equipment which is both incidental and necessary to construction at the site where located. Each permit shall be valid for a period of not more than six (6) calendar months and shall be renewed by the Zoning Administrator for four (4) additional successive periods of six (6) calendar months or less at the same location if such Building or Yard is still incidental and necessary to construction at the site where located.

B. Upon application, the Zoning Administrator shall issue a permit for a temporary office which is both incidental and necessary for the sale or rental of real property in a new subdivision or housing project. Each permit shall specify the location of the office and

area and shall be valid for a period of not more than six (6) calendar months and shall be renewed by the Zoning Administrator for four (4) additional successive periods of six (6) calendar months or less at the same location if such office is still incidental and necessary for the sale or rental of real property in a new subdivision or housing project.

353 TREE REMOVAL

A. The purpose of this Section is to preserve Protected Trees because of their positive effects on the environment. Those positive effects include at least the following functions performed by trees:
   1. Creation of oxygen, filtration of pollution, moderation of climate, improvement of air quality, and filtration and conservation of water;
   2. Protection of property values;
   3. Preservation of the essential character of the community;
   4. Provision of critical wildlife habitat;
   5. Reduction of energy costs by providing shade;
   6. Reduction of noise;
   7. Reduction of stormwater runoff;
   8. Reduction of topsoil erosion; and
   9. Reduction of water temperatures.

B. This Section applies only to Lots which are at least five (5) acres in Lot Area and which include at least ten (10) Protected Trees.

C. The proposed removal of up to twenty (20) percent of the Protected Trees located on a Lot as of the effective date of this Ordinance, but outside of a Construction Zone on a Lot, may only be accomplished pursuant to a permit issued by the Zoning Administrator. The Zoning Administrator shall automatically issue the permit upon being satisfied that the removal of Protected Trees does not exceed twenty (20) percent.

D. The proposed removal of more than twenty (20) percent of the Protected Trees located on a Lot as of the effective date of this Ordinance, but outside of a Construction Zone on the Lot, may only be accomplished pursuant to a Special Land Use authorized by the Planning Commission per Section 947.

354 UNCLASSIFIED USES

The Planning Commission may find that a land use, while not specifically classified in this Ordinance as a permitted or Special Land Use, may be sufficiently similar to uses listed as permitted by right or as Special Land Uses. In that event, such unclassified uses may be reviewed and treated as similar classified uses within the Zoning District. In reaching such a finding, the Zoning Administrator shall first evaluate the proposed use in terms of the potential generation of traffic, congestion, noise, odors, dust, litter and similar impacts. In addition, the proposed use shall be evaluated to determine the degree to which it may support or conflict with the intent of the Zoning District and other permitted and Special Land Uses.