

Short-Term Rentals in Tiny Township - Zoning & Planning Considerations

The following points are for consideration regarding the application of the existing zoning framework to short-term rentals (STRs) in residential neighbourhoods in Tiny Township.

Introduction

- It is important that municipal Councils have all of the information regarding STRs including the planning and legal considerations. A well-informed Council will be more likely to make better decisions. This is a critical consideration as zoning changes effectively affect land uses forever. They cannot be undone.
- It is also critical for municipal Councils to obtain the best possible planning and legal guidance from very experienced and reputable professionals. These opinions should not be result-oriented.
- In the interest of transparency, these opinions should be published so that they are readily accessible in the public domain.
- Tiny Council deserves praise for publishing the legal opinion of Sarah Hahn of Barriston, and the planner's opinion of Jamie Robinson of MHBC provided to Council and both dated August 11, 2021. However, with respect, these opinions do not address some very important planning and zoning interpretation principles and decisions of the courts and tribunals that are directly relevant to the issue of STRs operating in the Township. These matters, which are summarized in the points which follow, should be carefully considered.

Zoning & Planning Considerations

1. Neither of the Opinions discusses or mentions the fundamental starting point for determining whether a use of land is permitted – that the only uses permitted in a zone are those that are specifically listed as a permitted use under the zoning by-law.

This principle is found in the Township's Zoning By-law as follows:

- Preamble, s. 6.0 - The only uses permitted in a zone are those that are specified in the By-law. If a use is not specifically mentioned as a permitted use in a zone then it is not permitted. Similarly, if a use is defined in Section 3.0 (Definitions) of the By-law but does not appear as a permitted use in any zone, then it is not permitted on your property by the by-law.
- 6.0 Permitted Uses, 6.1 - If a use is not listed in the table, it is not permitted.

This principle is necessary since it is not possible to foresee all of the possible uses of land that may arise in the future after the date that the zoning by-law is enacted.

In addition, when interpreting zoning by-laws it is necessary to interpret the by-law as a whole, coherently and with its overall purposes and objectives in mind.

2. Neither of the Opinions contains any analysis of the scope of the *dwelling unit* use that is permitted in a residential zone. This permitted use requires that the premises be used only for

*domestic use by individuals living as a single housekeeping unit.*¹ The mere fact that people are occupying a premises is not sufficient as the nature and character of their occupancy must fall within this requirement.

To interpret terms that are not otherwise defined in zoning by-laws, courts and tribunals use commonly accepted meanings and definitions found in dictionaries. Relevant definitions from Webster's are as follows:

"Domestic" - 'relating to the household or the family'.

"Household" - 'those who dwell under the same roof and comprise a family'; 'a social unit composed of those living together in the same dwelling'

"Housekeeping" – 'the management of a house and home affairs'

"Home" - 'ones place of residence'; 'the social unit formed by a family living together'

It is evident that temporary overnight accommodations offered to the public are a fundamentally different type of use from a domestic use as a place of residence. Temporary accommodations offered to the public do not appear to fall within the scope of the dwelling unit definition.

None of the above is discussed in the Opinions.

3. Neither of the Opinions discusses the fact that a property can be used for more than one land use purpose which are separate and distinct from one another. In these situations, all of the uses occurring on the property must be specifically permitted for the zone in which the property is located in order for those property uses to be legal.
4. The Planning Opinion focuses on the fact that the Zoning By-law does not contain any provisions that contain specifics as to occupancy tenures, i.e. whether the premises are owner occupied or rented, or as to the length of rental occupancy. Based on this statement the Planning Opinion then expresses the view that the rental of a dwelling unit is permitted. There is, however, a fundamental omission in this reasoning.

It is in no way disputed that a home may be rented out - it is critical to the housing supply that homes be rented to individuals who will reside in that place as their ordinary place of residence or domicile.

It is required, however, that the purpose of the rental fall within the *dwelling unit* definition – *domestic use as a single housekeeping unit, i.e. residential purposes.*

The Planning Opinion does not discuss this critical requirement that homes that are rented must continue to comply with the requirements for a *dwelling unit* in residential zones.

¹ The Zoning By-law defines a *dwelling unit* as follows: two or more rooms used, designed or intended for the domestic use of one or more individuals living as a single housekeeping unit, with living, sleeping and sanitary facilities, and one kitchen facility, having a private entrance from outside the building or from a common hallway or stairway inside or outside the building.

5. The Planning Opinion bases its conclusion (i.e. that any type of rental of a residential dwelling unit is permitted) on the fact that a rented dwelling unit would not meet the definition of a hotel or motel, and would not meet the definition of a tourist establishment unless it was exclusively used for short-term rentals.

This reasoning is at odds with the planning principle (referred to above) that the only uses permitted in a zone are those that are specifically listed as a permitted use. In other words when a new land use emerges, one that was not contemplated at the time of the enactment of the zoning by-law, it is to be treated as not being permitted. It is evident that STRs are a relatively new form of land use that would not have been contemplated when the Township's Zoning By-law was enacted.

Instead, the Planning Opinion takes the view that if an STR use does not fit within the definitions of a *hotel, motel or tourist establishment* that STRs in dwelling units in residential zones must therefore be permitted under the dwelling unit use. This is the exact opposite of how a zoning by-law is to be read and interpreted.

In addition, it is to be noted that the Zoning By-law does not attach any duration or frequency requirements to the bed and breakfast use (discussed further at 6. below). Bed and breakfast use is not permitted in a residential zone regardless of the duration or frequency of the temporary accommodations offered or provided. It is inconsistent to suggest that exclusive STR use of a dwelling unit would be needed in order to find that this use was not permitted under the Zoning By-law in a residential zone.

6. Neither of the Opinions considers or discusses the fact that *bed and breakfasts* are not permitted in residential zones. A *bed and breakfast* is a dwelling unit in which the owner resides and provides temporary accommodations to the public, limited to three bedrooms.² A bed and breakfast is not permitted in a residential zone regardless of the length or frequency of the accommodation.

These limits for bed and breakfasts (including the exclusion from residential zones) are similar to those in place in other municipalities and were put in place to prevent the disruptions that can occur from having a large turnover of non-residents coming in and out of a residential neighbourhood.

It is evident that an STR use of a dwelling unit is for all intents and purposes the same type of activity as that of a bed and breakfast with one significant exception. Unlike bed and breakfasts, STRs of entire homes are unsupervised as the owner of an STR is not resident in the premises when it is being rented to the public. Unsupervised rentals obviously have a far greater risk of disruption to the surrounding residential neighbourhood.

Bed and breakfasts use is defined in the Zoning By-law while a short-term rental use has not been defined. A previous Council included a definition of a bed and breakfast in the Zoning By-

² The Zoning By-law defines a *bed and breakfast* as follows: a part of a single detached dwelling unit in which not more than three bedrooms are used or maintained for the accommodation of the traveling public, in which the owner of the dwelling unit resides and supplies lodgings with or without meals for hire or pay but does not include a group home or tourist establishment.

law as a distinct and distinguishable use of a dwelling unit and specified the zones in which that use would be permitted. As noted above, STRs are essentially an unsupervised version of the activity that occurs at a bed and breakfast. To be both logical and consistent, it is evident that for a short-term rental use to be permitted it must be defined in the Zoning By-law and listed as a permitted use for a specified zone or zones. This is not discussed in the Opinions.

There is no logical basis on which it can be concluded that the Township's Zoning By-law permits an unsupervised STR use of a dwelling unit located in a residential zone while at the same time prohibiting a bed and breakfast to be operated in a dwelling unit in that residential zone.

7. The Legal Opinion states that renting out homes for residential purposes such as overnight accommodations is not considered to be a commercial use under the Township's Zoning By-law unless it rises to the intensity of use to be considered a commercial use.

This statement makes an assumption that renting out a home for temporary overnight accommodation is a residential purpose. There is no support provided as to why temporary overnight accommodation would be considered as a residential use. As noted above temporary overnight accommodations offered by STRs (i) do not fall within the scope of the dwelling unit definition, and (ii) are for all intents and purposes an unsupervised version of the same type of activity as occurs at a bed and breakfast - a use which is specifically defined and is not permitted in residential zones. It is therefore unclear as to how the Legal Opinion arrives at this assumption.

It must also be emphasized that the question is not whether the STR use is commercial – the question is whether providing temporary accommodations to the public is defined and specifically listed in the Zoning By-law as a permitted use for residential zones. Given that there are a number of land uses in the Zoning By-law that involve temporary accommodations (bed and breakfasts, hotels, motels, tourist establishments), all of which are prohibited in residential zones, it is not apparent as to how the Legal Opinion can conclude that the Zoning By-law permits essentially the same activity to be conducted in a dwelling unit in a residential zone. As noted in 1. above, when interpreting zoning by-laws it is necessary to interpret the by-law as a whole, coherently and with its overall purposes and objectives in mind.

As pointed out in 5. and 6. above, there are no duration or frequency provisions attached to the bed and breakfast use. Bed and breakfast use is not permitted in a residential zone regardless of the duration or frequency of the temporary accommodations offered or provided. It is inconsistent to suggest that the duration and frequency of an STR use of a dwelling unit are criteria to determine whether this use is permitted in a residential zone. No such conditions are used in respect of bed and breakfasts, and yet all bed and breakfasts are excluded from residential zones. This is not discussed in the Legal Opinion.

8. The Legal Opinion states that renting out homes for overnight accommodations is not considered to be a commercial use unless it falls within another definition such as a tourist establishment or bed and breakfast use.

As noted above, unless a use is specifically mentioned as a permitted use in a zone, it is not permitted. This is a fundamental principle of planning and this principle is specifically articulated in the Zoning By-law. It is clear from this fundamental planning principle that it is not necessary to show that the rental of a dwelling for temporary accommodation purposes falls within another definition in order to conclude that this use is not permitted. To suggest otherwise would be directly opposed to how the Zoning By-law is to be properly read and understood.

9. The Legal Opinion discusses the situation in which an owner of an STR could be grandfathered as a *legal* non-conforming use.³ It is important to recognize that this situation will not arise if it is determined that the current, existing Zoning By-law does not permit STRs to be operated in residential zones.

The premise of the Legal Opinion is that STRs are allowed under the existing Zoning By-law. This conclusion appears however to be in significant doubt based on the points raised above. If in fact STR uses are not permitted under the existing Zoning By-law, it would be highly unlikely that there would be any situations in practice where grandfathering of a legal non-conforming STR use would arise.

The existing Zoning By-law was enacted in January 2006. For a STR to be a legal non-conforming use, it would have had to have been permitted and in existence before January 2006 and it would have had to have been continuously used. It is highly unlikely and remote that there are in fact any STRs that have been continuously in operation from January 2006. As a result, a determination that the existing Zoning By-law does not permit STRs to operate in residential zones will not result in a situation where the Township will be required to allow any currently operating STRs to continue to operate.

Conclusions and Recommended Next Steps

- The Legal Opinion refers to and relies upon an opinion provided in 2011 to the Township by the firm Bugar Rowe and states that it remains a proper analysis of the issue. Bugar Rowe is a predecessor firm to Barriston.

It is however evident that in 2011 STRs, as they are now operated, were not well known or understood in terms of the impacts that they bring to residential neighbourhoods. At that point in time, there were few, if any, court or tribunal decisions that dealt with planning and zoning matters related to STRs.

Since the 2011 opinion was provided to the Township, there have been a number of important court and tribunal decisions dealing with STRs. Significantly, these decisions have established a number of new findings concerning STRs that were not available in 2011. Appendix A lists these decisions.

The Legal Opinion does not contain any analysis or discussion of these more recent decisions.

³ See Section 34(9) of the Planning Act, R.S.O. 1990, c. P.13, s.2

- It is also evident that the Planning Opinion has not taken into account these more recent developments concerning STRs and does not address several important aspects of the Township's Zoning By-law that are directly relevant to the issue.

Based on a review of public records, it is also apparent that the Township's planning consultant, MHBC, is currently acting as the land use planner representing a group of STR operators who are attempting to overturn zoning by-laws which prohibit STRs in a neighbouring municipality.

- As noted at the outset, when interpreting zoning by-laws it is necessary to interpret the by-law as a whole, coherently and with its overall purposes and objectives in mind. Both of the Opinions provided raise significant concerns as to whether there has in fact been a complete analysis of the Township's Zoning By-law and its overall objectives. The fact that the Township's planning consultant is currently representing STR operators in a legal challenge against a nearby municipality is of further significant concern.
- In these circumstances, it would be prudent and advisable to obtain second opinions from experienced and reputable legal and planning consultants who are independent from the incumbent advisors. This will ensure that there is a comprehensive and up to date analysis of this issue available to Council.
- In identifying independent planning and legal counsel it will be critical that there be public accountability and transparency. Any decisions made by Council will have a profound impact on residents of the Township and must be based on the best advice available. The selected advisors must have extensive background and expertise on the issue. In addition, in order to ensure that there is no perception by the public of anything less than complete objectivity, any firm selected must:
 - be free from any actual or perceived conflict of interest or bias, based on current or previous mandates or opinions which they have provided to the Township, and
 - not have any current involvement or retainers acting for any appellants or other parties that are attempting to oppose or overturn municipal by-laws relating to STRs or who are lobbying to have STRs legalized or licenced to operate in any municipal jurisdiction, including the Township.

Appendix

The following cases have been decided by the courts and tribunals since 2011 and are relevant to determining whether STRs are a permitted use in residential zones in the Township.

1. *Sheldon Rosen and the Lodges at Blue Mountain Corporation v. Town of The Blue Mountains*, [2011], PL080455.
2. *Hodgart et al. v. Toronto (City)*, [2019], PL180082.
3. *Ottawa-Carleton Standard Condominium Corporation No. 961 v. Menzies*, [2016], ONSC 7699.
4. *Blue View Chateaux Inc. v. Blue Mountains (Town)*, [2017], PL151018.