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Board of Directors
Maple Grove Homeowners Association
Box 2621
Port Angeles, WA 98362

Re: Short-term Rentals of Properties within Maple Grove

Ladies & Gentlemen:

I have been requested to provide to you my comments on several questions which are currently before you concerning the short term rental of residential units within the Maple Grove planned unit development. These issues arise because of the growing trend whereby owners rent their residences out for short periods of time, typically one week or less for tourist and travel uses. Many questions are being addressed by cities, counties and residential development concerning these short term rentals, including parking, noise, and utility impacts, as well as the consistency of vacation and resort uses within a residential environment.

1. The Recently Adopted Clallam County Ordinance.

Clallam County has recently adopted an ordinance which regulates certain aspects of this type of use (Ordinance 913, September 27, 2016). The ordinance requires that a residence to be used for this purpose be inspected for compliance with the applicable fire codes, compliance by the owner with the design capacity requirements of the available sewer or on-site septic system serving the property, adequate on-site parking to accommodate the vacation rental guests, and the use of appropriate refuse containers.

As with all Clallam County civil ordinances, specifically including those dealing with land use, not much faith should be placed in the requirements of this ordinance, because of the County's dedication of few resources to the enforcement of this type of ordinance, and its resulting poor record in insuring compliance with their requirements.

2. The Maple Grove CC&Rs.

The Declarations of Covenants, Conditions & Restrictions of Record of Maple Grove (commonly known as the "CC&Rs") includes one section which may be considered to address some aspects of short term rentals, in Article II, section 2(k):

No trade, craft, business, professional, commercial or manufacturing enterprises or business or commercial activity of any kind shall be conducted or carried on upon any lot or within any building located in the Development (except for Lot 62)

There appear to be three restrictions which might apply to short term rentals out of this paragraph:

1. Are such activities “businesses”?
2. Are there ever “buses, trailers, campers or boats” associated with these uses parked on public streets within the development?
3. Do vacation rentals become a “nuisance” to the neighborhood?

The latter two are relatively minor, are probably intermittent, and are therefore difficult of enforcement (see below).

3. Are These Businesses?

The term “business” is legally quite broad. For business and occupation tax purposes, it is defined as any activity engaged in for the making of profit. RCW 82.04.140. In interpreting this statute, the courts give the word “business” its ordinary meaning. , Sellen Construction Company vs. Department of Revenue, 87 Wn.2d 878, 558 P.2d 1342 (1976), e.g., activities engaged in for the earning of money.

In a land use context, where the emphasis is upon the impacts of an activity upon the surrounding neighborhood, zoning ordinances generally allow profit making activities within residential areas, as long as they have minimal or no impacts. Clallam County’s zoning ordinance is typical in this regard. Clallam County Code, section 33.47.010 permits “home enterprises” within any residential zone, as long as the activity occurs within an owner occupied residence, and there are no outward aspects of a business visible, except through one permitted sign.

Washington has specifically considered the application of these two concepts to the question of short term vacation rentals as a “business” in “residential” subdivisions. In Ross vs. Bennett, 148 Wn.2d 40, 203 P.23d 383, *rev. den.*, 166 Wn.2d 1012 (2009), the court held that short term rentals were not “businesses” because the actual use of the property was “identical” to the use by any other owner, and “in no way detracts or changes the residential characteristics of the use by the tenant.” The court specifically rejected the argument based upon the B&O tax, saying only that, “We decline

to read a distinction between long and short term rentals into the... covenant{s}.” The court provided no analysis for this ruling, but it does represent the current law.

4. Possible Courses of Action Re Covenant Language For Short Term Rentals.

In two cases subsequent to Ross vs. Bennett, the courts have emphasized that prohibitions on short term vacation rentals are permitted, if they are specifically stated in a set of covenants, and if the restriction is validly adopted. See, e.g. Wilkinson vs. Chiwawa Communities Association, 180 Wn. 2d 241, 327 P. 3d 614 (2014).

At this time, then, the board has two options:

- 1) Do nothing, and short term rentals will continue to be permitted by both the Clallam County regulations and the covenants (as interpreted by the courts); or
- 2) Place a proposal to amend the covenants to prohibit short term rentals before the membership of the homeowners' association. This proposal could be phrased so as to permit home enterprise activities, if so desired.

The latter option has the value of allowing a decision on whether to regulate short term rentals to be made by the membership of the association.

5. Some Comments Re Enforcement of Covenants.

One difficulty which continually arises in regard to the enforcement of covenants relates to the inherent difficulty of the procedures available for enforcement. The only method for enforcement provided by the CC&Rs is through an action for an injunction, as provided by Article XI, section 1. Such actions may only be brought in superior court, and if contested, can be quite expensive in attorney's fees and costs, and are lengthy processes. While Article XII of the covenants allows the winner in such litigation to recover their attorney's fees, that is an after the fact remedy, which then requires collection. Collection of such a judgment is through a judgment lien, which requires either the sale of property, or the garnishment of wages. In any case, the path to enforcement is difficult.

One additional option for enforcement is available through the Homeowners Association Act, RCW Ch. 64.38. That statute permits board adoption of rules and regulations and the adoption of fines for the violation of those rules and regulations. Again, however, it is necessary to point out there is no collection mechanism created for these fines, and they would have to be reduced to judgment if not voluntarily paid, and, again collected through garnishment or judgment sales. One possible alternative in this regard is to amend the covenants to make unpaid fines become a lien similar to the lien for unpaid assessments, which would eventually see them paid through either foreclosure of the lien, or at the time of sale of the lien property.

6. A Comment About Board Liability.

Finally, it is my understanding that there has been some suggestion by members of the association that the board may have liability for either taking or not taking action in regard to the present situation. In that regard, please note that the covenants provide, at Article XI, section 1, that an action to enforce the covenants may be brought by any resident within the plat of Maple Grove. If the board chooses not to bring an action to enforce the covenant in regard to short term rentals, as long as it has a valid reason (in this case, the existence of contrary legal authority), it cannot be sued, as it is a reasonable "business judgment". If the individual homeowner believes a suit should be brought despite the contrary authority, that suit can be brought by him or her individually. Should the board decide to sue, it exposes itself to a claim for attorney's fees if the suit is lost. Beyond these consequences, there does not seem to be any board liability exposure.

If you have any further questions, please contact the undersigned.

Very truly yours,

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