

STATE OF MICHIGAN

54B DISTRICT COURT

CITY OF EAST LANSING,

Plaintiff,

v

File Nos. 13-30076-ON thru 13-300421-ON

PENELOPE TSERNAGLOU,

Defendant.

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**OPINION AND ORDER FOLLOWING FORMAL HEARING**

At a session of the court held May 1, 2014:

Present: Honorable Richard D. Ball, District Judge

On December 11, 2013, the court conducted a lengthy formal hearing resulting from defendant's denial of responsibility for 33 municipal civil infractions. Each citation alleged defendant violated section ES1010.2 of East Lansing's ordinances by renting property she owned at 1223 Chartwell Carriage Way North (the property), a residential condominium located within the City of East Lansing, Ingham County, MI without first obtaining a rental license from the City of East Lansing

The court finds the material facts to be as follows:

1. On November 5, 2012, defendant owned the property, and she continued to own the property through the seven-day period beginning Monday, July 1, 2013. Prior to November 5, 2012 she occupied the property as her personal residence.
2. During that period, i.e., November 5, 2012 through July 1, 2013, defendant permitted a third party, a friend, to occupy the property.
3. Defendant vacated the property prior to November 5, 2012 after she purchased a new residence located at 1197 Prescott Dr., East Lansing, MI.
4. To the extent defendant and the third party entered into an occupancy agreement for the property, it included an agreement to share utility expenses, and that the third party would perform an unspecified amount of labor and complete an unspecified number of repairs, renovations or upgrades to the property in order to make it more attractive for sale. No rent was charged by defendant.



5. At no time during the relevant time period specified above did defendant provide written notice to the City that she had arranged with the third party to "house-sit" or otherwise occupy the property. At no time did defendant apply to the City for a rental license.

6. The property was listed for sale by defendant throughout the relevant time period. At the outset of the listing in October, 2011 the selling price was set at \$114,900. Eventually the property was sold in September, 2013 for the amount of \$78,500. There is no question that while the property was listed for sale defendant was motivated to sell the property and was not motivated to mitigate her losses or profit by receiving rents. Defendant did not require from the third party a written lease or rental agreement.

7. In accordance with the requirements of MCL 600.8707(2), and in response to a complaint made by a neighbor to the 1223 Chartwell Carriage Way North property, an East Lansing code enforcement officer investigated a complaint that defendant rented the property without having obtained a license. He prepared citations and obtained written authorization from the city attorney to issue the citations.

8. For reasons that are not clear and are not relevant to the outcome of this proceeding, the city attorney authorized one citation per week. Apparently the city deemed the offenses allegedly committed by defendant to be less than egregious.

The Council of the City of East Lansing adopted a number of requirements and provisions that relate to rental of property by a property owner/landlord. The general purposes of the regulations are expressed in ordinance sections 101.2 and 101.3:

*101.2 Scope.* The provisions of this code shall constitute minimum standards for all primary and accessory structures and premises now in existence or hereafter constructed or developed. This code also:

- (1) Establishes standards for the inspection and annual licensing of rental units;
- (2) Fixes the responsibilities of owners, owners' legal agents, and occupants of all existing structures and premises; and
- (3) Provides for administration, enforcement and penalties.

*101.3 Intent.* The purposes of this code are to encourage the:

- (1) Maintenance and improvement of existing structures and premises to protect the health, safety and welfare of all occupants.
- (2) Conservation and preservation of neighborhoods.



(3) Achievement of clean, sanitary and blight-free residential and commercial environments.

(4) Regulation of residential density.

According to ordinance sections 1000.1 and 1000.2:

*1000.1 Scope.* This article shall regulate the lease or rental of every dwelling, with or without valuable consideration, by any person.

*1000.2 Purpose.* The regulation, inspection and licensing of rental property is intended to:

- (1) Protect the health, safety, and welfare of persons affected by or subject to the provisions of this article;
- (2) Ensure that rental unit owners, legal agents, and tenants are informed of, and adhere to, all applicable code provisions governing the use and maintenance of rental units;
- (3) Ensure that owners or legal agents inform tenants of their rights and responsibilities under written leases or other rental agreements before such leases and agreements are executed.

The introductory provisions set forth in the East Lansing code of ordinances include the following language in section 1-16:

**Sec. 1-16. Severability.**

- (a) It is the legislative intent of the city council in adopting this Code that all provisions and sections of this Code be liberally construed to protect and preserve the peace, health, safety, and welfare of the inhabitants of the City of East Lansing, and should any provision or section of this Code be held unconstitutional or invalid, such holding shall not be construed as affecting the validity of any of the remaining provisions or sections, it being the intent that this Code shall stand, notwithstanding the invalidity of any provision or section thereof.
- (b) The provisions of this section shall apply to the amendment of any section of this Code whether or not the wording of this section is set forth in the amendatory ordinance.

Defendant was cited for violating an East Lansing ordinance by renting the property without first obtaining a rental license. East Lansing ordinance ES-1010.2 provides, in part:

No person shall occupy, and no owner or owner's legal agent shall allow a person to occupy, a rental unit unless a Rental License





applicable to the unit has been issued and remains in effect. Each day that a violation exists shall constitute a separate offense.

While the ordinance provides for a separate violation, or citation, for every day a violation of the ordinance occurs, defendant was cited for violating the ordinance one day per week through the relevant time period.

The penalty for violation of the ordinance is payment of a civil fine plus costs and expenses incurred by the City "in connection with the action". The offense is a municipal civil infraction. The applicable procedural rule is MCR 4.101 and the applicable statutory authority for issuance of a municipal civil infraction may be found at MCL 600.8701 *et seq.*

East Lansing ordinance 1010.2 provides, in part:

A person who violates [ES 1010.2] shall be responsible for a civil infraction as defined by MCL 600.113 and as governed by MCR 4.100. Upon a finding of responsibility before any court of competent jurisdiction, the violator shall be punished by a fine of not less than \$250 for each offense plus the costs of the action including all expenses of the City, direct and indirect, in connection with the action.

State law provides for a maximum fine amount of \$500, MCL 600.8727(3) while the ordinance provides for a minimum fine of \$250 and a maximum fine of \$500. Defendant, if found responsible for each of the 33 municipal civil infractions issued, is exposed to payment of fines from \$8,250 to \$16,500, plus assessments (see MCL 600.8727(4), costs or expenses provided by law.

ES 1001.2(2) provides an exception to the rental license requirement:

***House Sitting.*** During the temporary absence of the owner and owner's family of a domicile for a period not to exceed two years in any five-year period the owner may permit up to two unrelated individuals or a family to occupy the premises without a rental license by notifying the code enforcement department, on a form provided by the department of the address of the owner's temporary domicile, the projected duration of the owner's absence and the identity of the unrelated individual or family who will occupy the premises during the owner's absence.

East Lansing ordinance ES-201.0 includes definitions of words which may be relevant to this matter, including:

**Guest:** Any person who occupies a room for living purposes in a dwelling or dwelling unit with or without compensation, for no longer than (3) thirty consecutive days, nor more than (60) days in one year.

**Occupant:** An individual, over (1) year of age, living, sleeping, cooking, eating in or otherwise actually having space in a dwelling, dwelling unit or a rooming unit.





The burden of proof to be applied by the court is preponderance of the evidence as provided by MCL 600.8721(3). Defendants have no right to a jury trial. 600.8721(4).

The court is the finder of fact in this proceeding. As such, it must weigh the evidence; it must determine the credibility of witnesses; it must consider the appropriate weight to be given to evidence admitted. Guidance with respect to fact-finding is set forth in M Civ JI 4.01 which provides that the finder of fact:

... must determine which witnesses to believe and what weight to give to their testimony. In doing so [the finder of fact] should consider each witness's ability and opportunity to observe, his or her memory, manner while testifying, any interest, bias or prejudice, and the reasonableness of the testimony considered in the light of all the evidence.

The court, as fact finder, may consider circumstantial evidence in the manner contemplated by M Civ JI 3.10:

Facts can be proved by direct evidence from a witness or an exhibit. Direct evidence is evidence about what we actually see or hear. For example, if you look outside and see rain falling, that is direct evidence that it is raining.

Facts can also be proved by indirect or circumstantial evidence. Circumstantial evidence is evidence that normally or reasonably leads to other facts. So, for example, if you see a person come in from outside wearing a raincoat covered with small drops of water, that would be circumstantial evidence that it is raining.

Circumstantial evidence by itself, or a combination of circumstantial evidence and direct evidence, can be used to prove or disprove a proposition. You must consider all the evidence, both direct and circumstantial.

Per M Civ JI 4.01:

[The finder of fact] must determine which witnesses to believe and what weight to give to their testimony. In doing so [he] may consider each witness's ability and opportunity to observe, his or her memory, manner while testifying, any interest, bias or prejudice, and the reasonableness of the testimony considered in the light of all the evidence.

At the conclusion of the formal hearing the court directed counsel to provide written closing arguments, and same have been duly and timely submitted by each side.

On the one hand the letter of the law as applied to the facts in this case leads to the conclusion that defendant violated the ordinance.

On the other hand it cannot be seriously argued that defendant's conduct was the type of conduct which the ordinance was designed to prohibit, and strict application of the ordinance and



its minimum fine provision does nothing to protect tenants in general from unscrupulous landlords or deter the defendant in the future from engaging in the kind of conduct the ordinance seeks to prohibit.

Per *Adams v Cleveland-Cliffs Iron Co.*, 237 Mich App 51, 57; 602 NW2d 215 (1999):

The general concept of "property" comprises various rights-a "bundle of sticks," as it is often called -which is usually understood to include "the exclusive right of possessing, enjoying, and disposing of a thing." Black's Law Dictionary (6th ed, 1990), p 1216. As this latter characterization suggests, the right to exclude others from one's land and the right to quiet enjoyment of one's land have customarily been regarded as separate sticks in the bundle. E.g., *Lucas v South Carolina Coastal Council*, 505 US 1003, 1044; 112 SCt 2886; 120 LEd2d 798 (1992) (Blackmun, J., dissenting) (addressing as separate "attributes of ownership" the rights of exclusion, alienation, and enjoyment); *Biggs v Comm'r of Internal Revenue*, 632 F2d 1171, 1177 (CA 5, 1980) ("title to real property . . . is nothing more than a bundle of potential causes of action: for trespass, to quiet title, for interference with quiet enjoyment, and so on," quoting *Starker v United States*, 602 F2d 1341, 1355 [CA 9, 1979]); Livingston, *Public Access to Virginia's Tidelands: A Framework for Analysis of Implied Dedications and Public Prescriptive Rights*, 24 Wm & Mary L R 669, 698 (1983) ("The notion of fee simple ownership carries with it the idea that the owner may exclude all others from his property, shall have the quiet enjoyment of it, and shall be free from unrecorded conflicting interests in it."), citing Cribbet, *Principles of the Law of Property* (2d ed, 1975), pp 263-332. Thus, possessory rights to real property include as distinct interests the right to exclude and the right to enjoy, violations of which give rise to the distinct causes of action respectively of trespass and nuisance. Prosser & Keeton, *Torts* (5th ed), § 87, p 622.

The court is of the opinion the ordinance is unconstitutional as applied to the facts of this case inasmuch as ". . . the prohibition bears [no] reasonable relationship to [protection of] the public health, safety, morals and general welfare". See *People v Victor*, 287 Mich 506, 515; 283 NW 666 (1939), citing *Carolene Products Co v Thompson*, 276 Mich 172; 267 NW 608 (1936).

Per *Carolene*, at 178:

The principles involved are well settled and do not need extensive citation of authorities. The Constitution guarantees to citizens the general right to engage in any business which does not harm the public. *People, ex rel. Valentine v Berrien Circuit Judge*, 124 Mich 664 (50 L.R.A. 493, 83 Am. St. Rep. 352). The constitutional right to engage in business is subject to the sovereign police power of the State to preserve public health, safety, morals or general welfare and





prevent fraud. In the exercise of the police power there must be not only a public welfare to be conserved or public wrong to be corrected, but there must be also a reasonable relation between the remedy adopted and the public purpose. 12 CJ p 929.

The primary determination of public need and character of remedy in the exercise of the police power is in the legislature. Unless the remedy is palpably unreasonable and arbitrary so as needlessly to invade property or personal rights as protected by the Constitution, the act must be sustained. The presumption favors validity and, if the relation between the statute and the public welfare is debatable, the legislative judgment must be accepted. *Kelley v Judge of Recorder's Court of Detroit*, 239 Mich 204 (53 ALR 273); *Price v Illinois*, 238 US 446, 451; 35 SCt 892 (1915).

But the ultimate duty to determine the validity of the act is in the courts. *People v Snowberger*, 113 Mich 86 (67 Am. St. Rep. 449).

Possibility of wrong to the public does not always justify prohibition of a business. Regulation only may be the reasonable remedy. "The constitutional guaranties may not be made to yield to mere convenience. The business here involved is legitimate and useful; and while it is subject to all reasonable regulation, the absolute prohibition of the use of shoddy in the manufacture of comfortables is purely arbitrary and violates the due process clause of the fourteenth amendment." *Weaver v Palmer*, 270 US 402, 415; 46 SCt 320.

"Invalidity may be shown by things which will be judicially noticed (*Quong Wing v Kirkendall*, 223 US 59, 64; 32 SCt 192), or by facts established by evidence." *Weaver v Palmer*, *supra*, 410.

The court is aware that the activity in which defendant engaged and which led to the issuance of the 33 citations was not necessarily business or commercial activity. Nevertheless it was an activity which arose out defendant's effort to dispose of her privately owned property under circumstances in which she was required to leave the property vacant for a lengthy period of time.

One could not characterize defendant as a predatory landlord, attempting to profit personally and financially by renting her property for a substantial sum of money. Indeed, she kept the property listed for sale when her personal and financial interests would have been better served by renting the property and actually obtaining a rental license.





The court has attempted to familiarize itself with the manner in which Michigan trial courts are to consider an "as applied" challenge to the constitutionality the government's enforcement of an ordinance.

If the court were to rely on direction from decisions of the United States Supreme Court, it would be hard pressed to figure out exactly how to apply those decisions. Generally, it appears the as applied analysis is first seriously discussed in *US v Salerno*, 481 US 739; 107 SCt 2095; 95 LEd2d 697 (1987). Thereafter the analysis is sometimes adopted by a majority opinion of the Court, or finds its way into a dissenting opinion by Justice Scalia. See, e.g. *City of Chi v Morales*, 527 US 41; 119 S. Ct. 1849; 144 L. Ed. 2d 67 (1999). There are commentators who have concluded that the analysis is applied when it leads to the result desired by a majority opinion and is abandoned or ignored when it does not lead to the result desired by the majority. Not much help, then, from the U.S. Supreme Court. See, e.g. Kreit, Making Sense of Facial and As-Applied Challenges, 18 Wm & Mary Bill Rts J 657 (2010).

The as applied analysis was first referenced by the Michigan Supreme Court in *People v Detroit, G H & M R Co*, 79 Mich 471; 44 NW 934 (1890) in a concurring opinion, at p 937 without citation.

A more recent as applied analysis is set forth in *Oshtemo Charter Twp v Kalamazoo County Rd Comm'n*, 302 Mich App 574; 841 NW2d 135 (2013) at p 144:

We conclude that MCL 257.726(3) is unconstitutional as applied to a reasonable township traffic control ordinance because the authority that it purports to grant to county road commissions conflicts with Article 7, § 29 of the Michigan Constitution. As this Court has recently recognized, "when a statute contravenes the provisions of the state constitution it is unconstitutional and void." The Legislature's authority does not extend to eradicating constitutional guarantees.

According to *Oberly v Township of Dundee*, unpublished per curiam opinion of the Court of Appeals issued September 20, 2012 (Docket No. 304122):

To establish that a zoning ordinance or land use regulation is unconstitutional "as applied," a plaintiff must demonstrate "(1) that there is no reasonable governmental interest being advanced by the present zoning classification or (2) that the ordinance is unreasonable because of the purely arbitrary, capricious, and unfounded exclusion of other types of legitimate land use from the area in question." [*Dorman v Clinton Twp*, 269 Mich App 638, 651-652; 714 NW2d 350 (2006)]

The court could write several more pages in connection with an analysis of the facial or as applied constitutionality of a local ordinance affecting property rights. The court could bog



down in a discussion of whether the federal constitution protects unenumerated rights or enumerated rights, or both. It chooses not to.

Here, the court is persuaded that insofar as application of the ordinance in question does nothing to further the established purposes of the ordinance or any governmental interest, under the circumstances of this case, and based on the facts set forth on this record, application of the ordinance is unconstitutional.

The citations are dismissed and

IT IS SO ORDERED.



Richard D. Ball P-26513  
District Judge

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By:   
Deputy Clerk

