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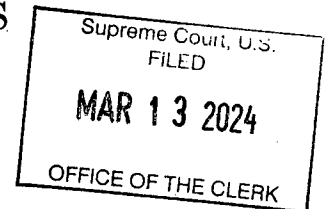
ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

Joanne Moskovic, et al.,
Petitioner,

vs.

City of New Buffalo, Michigan
Respondent.



ON PETITION FOR WRIT OF CERTIORARI FROM
THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner, and many other homeowners in the City of New Buffalo, Michigan, a beach community on the eastern shore of Lake Michigan less than one hour from Chicago, rented out her home to individuals and families for durations of less than one month (short term rental) prior to the City's passage of a new zoning ordinance which prohibited short term rentals in residential districts. Prior to the passage of the new zoning ordinance, the City passed a regulatory ordinance requiring a permit to rent one's home out for less than one month. After passing the permit regulatory ordinance, the City placed an 18 month moratorium on the issuance of permits and kept that moratorium in place until the time the new zoning ordinance passed, which prohibited Petitioner from obtaining a permit. When the City passed the new zoning ordinance, it included language in the ordinance that unless a homeowner had already been issued a permit at the time the zoning ordinance passed, no prior lawful non-conforming use could be established. These actions by the City prevent Petitioner from obtaining a short term rental permit, prevent Petitioner from qualifying as a "grandfathered" prior lawful non-conforming use under the City's new zoning ordinance and the Michigan Zoning Enabling Act, and therefore, prevent Petitioner from continuing to rent out her property on a short term basis.

1. Whether the Appellate Court erred in finding that Petitioner's use of her home, located in a residential zoning district, as a rental for one month

or less (“short term rental”) is not a residential use, but rather, is a commercial use, and should be prohibited in the residential zoning district.

2. Whether the Appellate Court erred in finding that Petitioner did not have a vested property right in the nonconforming use of her property as a short term rental at the time the City passed a new zoning ordinance prospectively prohibiting new short term rentals in residential zoning districts, despite the City Manager’s admissions that short term rentals were a legal and permitted use under the original zoning ordinance, despite the City’s actions in issuing permits for short term rentals prior to the passage of the new zoning ordinance, despite the City openly allowing short term rentals, including Petitioner’s, to exist in residential districts for decades prior to passing the new zoning ordinance, and despite the City’s written recognition of the importance of short term rentals to the local economy and tourism at the time it passed a permitting regulatory ordinance prior to passing the new zoning ordinance.

3. Whether the Appellate Court erred when it included an analysis of the meaning of the terms “domicile”, “residential”, and “family” in its finding that Petitioner did not have a vested property interest in the use of her home as a short term rental prior to the passage of the new zoning ordinance, when such analysis was not required or warranted to determine if Petitioner’s use of her property as a short term rental met the definition of “single family dwelling” under the original zoning ordinance when strictly interpreted.

4. Whether the Appellate Court erred in finding

that the City did not act arbitrarily and capriciously and did not violate Petitioner's substantive due process rights, commit a regulatory taking, and violate the Michigan Zoning Enabling Act when it retroactively destroyed Petitioner's prior lawful use of her property as a short-term rental by (a) adopting a regulatory ordinance requiring homeowners to obtain short-term rental permits; (b) imposing a moratorium on the issuance of those short-term rental permits and holding the moratorium in place for 18 months until it passed a new zoning ordinance; and (c) ending the moratorium simultaneously with amending its zoning ordinance to prohibit previously unpermitted short-term rentals in residential zoning districts.

LIST OF PARTIES

All parties do not appear in the caption of this case on the cover page. A list of all Plaintiffs to the proceeding in the United States Court of Appeals for the Sixth Circuit is as follows:

JOANNE MOSKOVIC;

ALEXANDER MOSKOVIC;

GENE KHALIMSKY;

CAROL SKOCZYLAS;

BARBRA HEALY;

CHRIS YONKER;

GARRETT BRUINIUS;

GERALD GAJOS;

DAN SKOCZYLAS;

JODI GRANT;

DIANE GAJOS;

JOLIE YONKER;

EDAN GELT;

JEFF SEGEBARTH;

WILLIAM CARROLL;

JOHN GRANT;

JOHN O'LOUGHLIN;

PARPAT LLC;

JOHN TAYLOR;

CYNTHIA MARQUARD;

218 S BRONSON LLC;

ADAM TYMOWSKI;

MELISSA PIORKOWSKI;

NICHOLAS HOLEVAS;

JARVIS HALL PROPERTIES, LLC;

MICHAEL DAVIS

RELATED CASES

218 S BRONSON LLC, et al. v. CITY OF NEW
BUFFALO, MICHIGAN, No. 1:21-cv-674,
consolidated into JOANNE MOSKOVIC, et al. v.
CITY OF NEW BUFFALO, MICHIGAN, No. 1:21-cv-
144, United States Court of Appeals for the Sixth
Circuit. Decision Date: December 14, 2023

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**APPENDIX B – Decision of the United States
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Reconsideration dated January 13, 2023**

**APPENDIX C – Decision of the United States
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I. PETITION FOR WRIT OF CERTIORARI

Petitioner, Joanne Moskovic, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

II. OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit appears at Appendix A to the Petition and is unpublished.

The opinion of the United States District Court for the Western District of Michigan, Southern Division, denying Petitioner's Motion for Reconsideration appears at Appendix B to the Petition.

The opinion of the United States District Court for the Western District of Michigan, Southern

Division, appears at Appendix C to the Petition and is unpublished.

III. JURISDICTION

This Petition is timely filed. The United States Court of Appeals for the Sixth Circuit issued and filed its decision on December 14, 2023. No Petition for Rehearing was filed. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

IV. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U. S. C. § 1254(1):

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

Mich. Const. art. 1, § 17:

No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. The

right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed.

Michigan Zoning Enabling Act, Mich. Comp. Laws Ann. § 125.3208(1) (West 2010):

If the use of a dwelling, building, or structure or of the land is lawful at the time of enactment of a zoning ordinance or an amendment to a zoning ordinance, then that use may be continued although the use does not conform to the zoning ordinance or amendment.

Michigan Zoning Enabling Act, Mich. Comp. Laws Ann. § 125.3208(3) (West 2010):

The legislative body may acquire, by purchase, condemnation, or otherwise, private property or an interest in private property for the removal of nonconforming uses and structures. The legislative body may provide that the cost and expense of acquiring private property may be paid from general funds or assessed to a special district in accordance with the applicable statutory provisions relating to the creation and operation of special assessment districts for public improvements in local units of government. Property acquired under this subsection by a city or village shall not be used for public housing.

U.S. Const. amend. V:

Private property shall not be taken for public use, without just compensation.

U.S. Const. amend. XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

V. STATEMENT OF THE CASE

A. PETITIONER PURCHASED HER PROPERTY FOR AND USED IT AS A SHORT TERM RENTAL FOR APPROXIMATELY 7 YEARS BEFORE THE CITY OF NEW BUFFALO PASSED ITS FIRST REGULATIONS ON SHORT TERM RENTALS AND THEN BANNED HER FROM RENTING SHORT TERM

Petitioner is one of 26 homeowners (Plaintiffs in the underlying lawsuit) who own 17 homes in New Buffalo, Michigan (the City), a lakefront resort community on Lake Michigan's east shore. Petitioner purchased her single family home, located

in a residential zoning district, in 2014, with the specific intention to rent out the property to others on a short term basis, which would allow her to use the property for personal use with her family when it was not rented. Petitioner invested significant funds into the purchase and improvement of her property to prepare it for short term rentals. Petitioner wished to and did earn additional income during the seven years of ownership prior to when the City imposed regulations and restrictions on short term rentals and then eventually banned them in all residential zones through the passage of a new zoning ordinance.

The City's regulations, restrictions, and eventual ban came in a three-part move. First, the City adopted a regulatory permit ordinance that required homeowners to obtain a short-term rental

permit to rent their homes for less than a month. In this ordinance, the City prefaced the permit requirement with language recognizing that a major part of the tourism industry in the City is the short-term rental or vacation rental marketplace and stated that the intent of the permit regulations was not to restrict or eliminate short term rentals. Second, the City imposed and held a moratorium on the issuance of those short-term rental permits for eighteen months, with the stated intention to revise the original regulatory ordinance only – not to restrict short term rentals. Third, after the City revised the original regulatory ordinance, it continued to hold the moratorium in place until it eventually amended its zoning ordinance to prohibit short-term rentals in residential zoning districts for any homeowner who had not secured a permit at the time of the new zoning ordinance. This action was in

direct contradiction with the City's stated purpose for holding the moratorium in place, which was to revise its regulatory permit ordinance, and instead divested Petitioner and other short term rental owners who had not yet obtained a permit of their vested property rights. After seven years of short term renting, Petitioner was suddenly banned by the City from renting her home out on a short term basis. In doing so, the City circumvented the requirements of procedural due process, substantive due process, and the Michigan Zoning Enabling Act, which requires the grandfathering of a prior lawful non-conforming use.

"Single-family detached dwelling units" are, and have always been, a land use permitted in the residential zoning district where Petitioner's home is located. Under the definitions specifically enumerated in the City's previous zoning ordinance, Petitioner's property qualifies as a single-family

detached dwelling unit and, as a result, is a permitted use in its residential zone. Under the previous zoning ordinance, the relevant definitions are as follows:

DWELLING — A detached building or portion thereof designed **or** (emphasis added) used exclusively as the home, residence **or** (emphasis added) sleeping place of one or more persons, not including accessory buildings or structures, either attached or detached . . .

DWELLING, SINGLE-FAMILY — A detached building, designed for **or** (emphasis added) occupied exclusively by one family.

Petitioner's home meets both of these definitions in that it is a detached building designed as the home, residence or sleeping place of one or more persons and was designed for one family.

B. THE DISTRICT COURT'S AND SIXTH CIRCUIT COURT OF APPEALS' ANALYSIS

Petitioner filed her Complaint against the City on February 12, 2021. Thereafter, Petitioner filed her Second Amended Complaint. The Second Amended

Complaint asserted the following claims against the City: violation of the doctrine of legislative equivalency (Count I); violation of Michigan's Zoning Enabling Act (Count II); violation of the Commerce Clause of the U.S. Constitution (Count III); violation of Michigan's Open Meetings Act (Count IV); violation of the right to substantive due process of the Michigan Constitution and the Fifth and Fourteenth Amendments to the U.S. Constitution (Count V); denial of procedural due process under the Michigan Constitution and the Fifth and Fourteenth Amendments to the U.S. Constitution (Count VI); denial of the right to equal protection in the Michigan Constitution and the Fourteenth Amendment to the U.S. Constitution (Count VII); regulatory taking in violation of the Michigan and U.S. Constitutions (Count VIII); and preemption under the Michigan Constitution (Count IX). (*Id.*).

Petitioner's Second Amended Complaint sought declaratory relief, damages, and attorney's fees under 42 U.S.C. § 1988.

On July 26, 2021, Petitioner moved for partial summary judgment on two of their claims: violation of the Doctrine of Legislative Equivalency (Count I) and violation of the Michigan Zoning Enabling Act (Count II). Both of those claims challenged the validity of the Moratorium. The District Court, on February 3, 2022, denied Petitioner's Motion. Resulting in extreme prejudice to Petitioner, the District Court failed to rule on the Summary Judgment Motion for over six months, during which the City ended the Moratorium and simultaneously passed a new zoning ordinance, and when the District Court ultimately did rule, it concluded that the disputes raised in the Motion for Summary Judgment were moot as a result of the

moratorium ending, without reaching the merits of the Motion. On June 15, 2022, Petitioner moved for partial summary judgment on the substantive due process and equal protection claims in her Second Amended Complaint. At that same time, the City moved for summary judgment on all of Petitioner's claims in the Second Amended Complaint.

On October 31, 2022, the District Court entered an order and an opinion on the parties cross-motions for summary judgment. The Order partially granted and partially denied both motions. Regarding 218 S Bronson LLC's equal protection claim, the District Court awarded summary judgment in its favor. Conversely, the District Court granted summary judgment in favor of the City with respect to all of Petitioner's claims.

Petitioner moved for reconsideration of the

District Court's opinion and order that resolved the parties' cross-motions for summary judgment. The District Court entered final judgment on January 24, 2023; it dismissed the case. Petitioner appealed the District Court's decision to the Sixth Circuit Appellate Court. On December 14, 2023, the Appellate Court affirmed the District Court's ruling. Petitioner timely filed this Petition for Writ of Certiorari.

VI. REASONS FOR GRANTING THE PETITION

The legalities and regulation of Short-Term Rentals, particularly in residential zoning districts, is a topic that has arisen in virtually every state in this country and is an extremely pressing issue to the public interest. Municipalities, counties, and states are all struggling with the emergence and prominence of short-term rentals. They are faced with balancing full time residents' intolerance for the

presence of short-term renters in their neighborhoods, against the constitutional rights of a homeowner to rent out their properties for economic benefit in the manner and for the length of their choosing. In addition to municipalities, counties, and states, homeowners' associations also have set forth their own unique regulations on short term rentals, sometimes in conflict with the governmental restrictions and regulations.

The U.S. Appellate Courts have ruled very differently amongst themselves, as have the State Supreme and Appellate Courts. The current law arising from these federal and state court decisions is a patchwork of inconsistent outcomes, making it virtually impossible for any property owner to know the extent of their constitutional right to rent their property on a short-term basis, particularly in residential zoning districts. Meanwhile,

governmental entities are extremely inconsistent in the severity or laxity of their regulation of and level of tolerance for and acceptance of short-term rentals.

Below is a sample of the varied court decisions across the various Appellate Circuits, State Supreme Courts, and State Appellate Courts:

Frazier v. Town of Blowing Rock, 286 N.C. App. 570 (2023) (vagueness of prior short term rental ordinance permitted grandfathering of nonconforming short term rental use)

Pratik Pandharipande, M.D. v. FSD Corporation, No. M2020-01174-SC-R11-CV (Tenn. Oct. 17, 2023) (restrictions limiting property use to residential purposes do not prohibit short term rentals)

City of Grapevine v. Muns, 651 S.W.3d 317 (Tex. App. - Fort Worth 2021) (single-family detached

dwelling as defined in the zoning ordinance does not prohibit STRs in the two zoning districts in which the Homeowners' properties are located)

Hignell-Stark v. City of New Orleans, 46 F.4th 317 (5th Cir. 2022) (a city cannot ban non-resident owners from renting out their homes for short terms)

JBrice Holdings, LLC v. Wilcrest Walk Townhomes Ass'n, 644 S.W.3d 179 (Tex. 2022) (neither the deed covenants nor the property code authorized the homeowners' association to impose a short-term rental restriction)

Zaatari v. City of Austin, 615 S.W.3d 172 (Tex. App. 2019) (municipal ordinance banning short-term rentals was retroactive because it operates to eliminate well-established and settled property rights that existed before the ordinance's adoption)

Wilson v. Maynard, 2021 S.D. 37 (short-term rentals are considered a residential purpose)

Reaume v. Twp. of Spring Lake, 943 N.W.2d 394 (Mich. 2020) (plaintiff's use of her property as a short-term rental was not a permitted use of a single-family dwelling under defendant's ordinance because it met the definition of motel in the ordinance)

Kalway v. Calabria Ranch HOA, LLC, 506 P.3d 18 (Ariz. 2022) (HOAs may not restrict short-term rentals in the vast majority of communities)

Slice of Life v. Hamilton Township Zoning Hearing Board, 207 A.3d 886 (2019) (Slice of Life's use of the premises was purely transient and such use is not a single-family use by a single housekeeping unit as defined in the local ordinance)

Short Term Rental Owners Ass'n of Ga., Inc. v.

Cooper, 31 F.4th 1315 (11th Cir. 2022) (short-term rentals were prohibited by the pre-amendment version of the Uniform Development Code, and thus remain prohibited today)

Steven Dixon v. City of Auburn, No. SC-2022-0741

(Ala. Oct. 27, 2023) (the City's adoption and enforcement of the short-term-rental ordinance did not violate Plaintiff's right to due process and equal protection as guaranteed by the Alabama Constitution)

Wood v. Evergreen Cond. Assoc., 2021 Ill. App.

200687 (Ill. App. Ct. 2021) (Wood granted her guests a mere license to use her unit, not a lease; there is no indication that Wood was renting her unit out for any other purpose besides residential; that Wood accepts reservations from her renters on the Internet

and receives payment over the Internet does not change the fact that the "business" at issue is the actual use of the unit itself, which necessarily occurs on the property)

Wallace v. Town of Grand Island, 84 A.D.3d 1088 (N.Y. App. Div. 2020) (the short-term rental law did not effect a regulatory taking of the plaintiff's property)

W. Mountain Assets LLC v. Dobkowski, 78 Misc. 3d 963 (N.Y. Sup. Ct. 2023) (the use of a property for short-term rentals violated a deed restriction limiting use to single family residential purposes only)

Wihbey v. Zoning Bd. of Appeals of the Pine Orchard Ass'n, 218 Conn. App. 356 (Conn. App. Ct. 2023) (rejecting defendants' claim that the use of any

property in the Pine Orchard Association for short-term rentals was impermissible under the 1994 regulations and therefore, short-term rentals were a lawful, permitted use consistent with the definitions of single-family dwelling and family in the 1994 regulations)

Yogman v. Parrott, 325 Or. 358, 937 P.2d

1019 (1997) (restrictive covenant in a subdivision declaration was ambiguous as to whether the requirement that the property be used solely as a residence referred to both permanent and short-term residencies)

Wilkinson v. Chiwawa Communities Assn., 180

Wash. 2d 241, 327 P.3d 614 (2014) (a restrictive covenant that limited use of lots to single family residential use while prohibiting industrial or

commercial use did not prohibit short-term vacation rentals of single-family homes)

Forshee v. Neuschwander, 914 N.W.2d 643 (Wis. 2018) (short term rental use held not to violate covenant prohibiting commercial activity)

Schroeder v. City of Wilmington, 872 S.E.2d 58 (N.C. Ct. App. 2022) (state law prohibits a registration requirement for short-term rentals)

Styller v. Zoning Board of Appeals of Lynnfield, 487 Mass. 588 (Mass. June 7, 2021) (affirming the prohibition of short-term rentals within single-family residential zoning districts)

It is imperative that this Court set forth a uniform set of guidelines, and, once and for all, settle this important issue of federal law so governmental entities, homeowners associations, and property

owners alike have a clear understanding of the extent to which short term rentals may be regulated or restricted, particularly in residential zoning districts.

In addition, in this case, the U.S. Court of Appeals for the Sixth Circuit departed from the accepted and usual course of judicial proceedings not only in its specific analysis, but also in its broad interpretation of the language of the original New Buffalo zoning ordinance. It also sanctioned such a departure by the District Court in its analysis of the existence of whether Petitioner's property rights had vested at the time the new zoning ordinance was passed. Such action by the lower courts requires an exercise of this Court's supervisory power.

VII. CONCLUSION

The petition for a writ of certiorari should be granted. Short term rental regulation and restriction, particularly in residential zoning districts, is of extreme importance to the public and to this country. This issue affects every individual property owner, whether a full time resident or a property owner looking to rent out their property on a short-term basis for economic gain, as well as every local and state government in the country.

Respectfully submitted,

Joanne Moskovic, Pro Se

Date: March 13, 2024

Resubmitted: May 3, 2024

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