

ORDINANCE V. REGULATION

Definitions

Ordinance: legislation enacted by a municipal authority, applies throughout the municipality.

Regulation: a rule or order issued by a regulatory agency of a government and having the force of law.

In East Lyme, the Board of Selectmen enact ordinances – local laws – that apply town wide. Ordinances also allow the imposition of fines for violations.

Regulations, such as those regarding planning, zoning and inland wetlands, are created and adopted by the respective commissions pursuant to their respective statutory authority.

As applied to the Short Term Rental Subcommittee discussions

The East Lyme Zoning Commission has adopted regulations regarding the use of land in East Lyme (“Regulations”).

However, there are three quasi-municipal beach communities, (Black Point, Giants Neck and Crescent Beach) also known as Special Act communities, which have their own zoning authority and have adopted their own zoning regulations. The East Lyme Regulations do not apply to these communities.

In its deliberations the Subcommittee must consider what, if anything, to recommend to the Board of Selectmen regarding short term rentals (“STR’s”). If the Subcommittee recommends that some type of oversight or regulation is needed, it must also decide whether that should be in the form of an ordinance adopted by the Board of Selectmen or a zoning regulation, adopted through the Zoning Commission.

If the Subcommittee decides to recommend any type of regulation it is the Town Attorney’s strong advice that it be in the form of an ordinance, and not a zoning regulation. An ordinance would apply to all residences in East Lyme and could also provide for fines if the ordinance was violated. A regulation would not apply to the three beach communities.

Moreover, addressing STR’s via a zoning regulation also brings up the issue of pre-existing non-conforming uses. A pre-existing non-conformity is a use that is allowed at the time a zoning regulation is adopted or amended that regulates, restricts or prohibits that use. As applied here, any East Lyme resident who had used their residence as an

STR prior to the adoption or amendment of that zoning regulation would be allowed to continue that use as a pre-existing non-conformity.¹

In sum, if any recommendation is made, we urge that it be in the form of ordinance and not a zoning regulation. An ordinance applies to all residences in town, allows for the possibility of fines and avoids the complications of pre-existing non-conforming uses.

DEED RESTRICTIONS AND HOMEOWNER ASSOCIATION BYLAWS

As opposed to ordinances, which apply to the entire municipality, deed restrictions or homeowner's association (HOA) rules and bylaws are private agreements among the parties to the restriction or members of the HOA.

A deed restriction, or restrictive covenant, is a private agreement and/or restriction on the use of land, made between two or more parties, and generally has no influence on zoning or local ordinances. Schieffelin v. Westport PZC, 1993 WL 407955. A deed restriction can only be enforced by the parties, as opposed to an ordinance which is enforced by the municipality.

For example, a town enacts an ordinance requiring STR's be registered as a condition of operation. A properly registered STR is also subject to a deed restriction that grants a neighboring parcel a view easement over the STR property. The STR then stores boats on the property such that it violates a deed restriction/neighboring view easement. The ordinance would have no effect on the deed restriction, which could only be enforced by the neighboring property, i.e. the other party to the deed restriction.

Similarly, HOA rules or bylaws are private agreements among the members of the association as to how land may be used. By way of example, an HOA may have a rule against homes being used for commercial purposes, even though the municipality allows STR's so long as they are registered. If an HOA member operated an STR, that member would still be in violation of the HOA rules, even though STR's are allowed in the town.

¹ Although short term rental of residential property is not a specifically allowed use by the Regulations, the Connecticut Appellate Court ruling in Wihbey dictates that such a use is currently allowed, pending the outcome in the Supreme Court.