NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
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September 18, 2019

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Re: *Cooper, et al.* v. *Board of Supervisors of Fairfax County*, CL 2018-12818

Dear Mr. Hanes and Ms. Hensley:

Plaintiffs' motion for partial summary judgment on Count VIII of the Second Amended Complaint was taken under advisement by the court on August 30, 2019 after argument by counsel. Having had the opportunity to consider the parties' memoranda (and attachments), the parties' oral arguments, and the portions of the record provided by the parties (including the video recording of the public hearing before the Board on July 10, 2018), the court DENIES Plaintiffs' motion for the reasons that follow.

Background

In Count VIII of the Second Amended Complaint, Plaintiffs contend that the "Board's adoption of the STL Zoning Ordinance Amendment and the Transient Occupancy Tax Amendment was unreasonable, arbitrary and capricious" (Second Amended Complaint ¶ 136) because, *inter alia*:

> (i) the Board imposed numerous unlawful, arbitrary and capricious requirements on the Plaintiffs' use of their residences for short-term rentals; (ii) the Board arbitrarily and capriciously deprived Plaintiffs of the by-right residential use of their residences; (iii) the Board deprived the Plaintiffs' of their vested rights in the residential use of their residences; (iv) the Board failed to properly initiate the STL Zoning Ordinance Amendment; (v) the Board

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acted without authority in violation of the Dillon rule; (vii)[1] the Board deprived Plaintiffs of their property rights through an unlawful downzoning; (vii) the Board deprived Plaintiffs of their procedural and substantive due process; (viii) the Board deprived Plaintiffs of their equal protection rights; and (ix) the Board authorized an unlawful search and seizure.

Second Amended Complaint ¶ 137.

Notwithstanding the comprehensive nature of Count VIII, Plaintiffs' motion for partial summary judgment argues only that the STL Zoning Ordinance Amendment and the Transient Occupancy Tax Amendment (hereinafter "Amendment") was unreasonable because "it deprived the Plaintiffs of the by-right short-term rental use of their properties without considering those rights and in a manner contrary to the Zoning Ordinance." Plaintiffs' Memorandum at 1. Accordingly, because the assertion only reflects ground (ii) of Count VIII, the court will DENY summary judgment as to all other grounds set forth in Count VIII, *i.e.*, grounds (i), (iii), (iv), (v), (vii)(*sic*), (vii), (viii), and (ix), and address only ground (ii).

Facts

The material facts which are not genuinely in dispute are:

1) Plaintiffs filing this Motion own their respective residential properties located in Fairfax County.

2) Plaintiffs' single-family dwellings are designed for residential occupancy.

3) Plaintiffs' dwellings are used, at least in part, for residential occupancy.

4) Plaintiffs engage in the short-term rental (*i.e.*, separate rental periods of less than 30 consecutive nights) of their dwellings using an online marketplace platform such as Airbnb.

5) Plaintiffs began short-term rentals of their dwellings prior to the Board's adoption of the Amendment.

6) The Board adopted the Amendment on July 31, 2018.

7) The Amendment purports to regulate the short-term rental of dwellings.

8) In connection with the Board's adoption of the Amendment, the Board was advised that the then-current Zoning Ordinance definition of "dwelling" "prohibits transient occupancy."[2]

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[1] Presumably, this should have been "(vi)".

[2] With respect to the remaining purported facts set forth in Plaintiffs' Memorandum on page 2 (Facts 8-10), the court finds that these are either not facts or are disputed.

I. The Amendment Is Not Unreasonable

Standard For Judicial Review

The parties agree on the basic standard for judicial review of the validity of a zoning ordinance, *i.e.*, because the Board is acting in legislative capacity in enacting a zoning ordinance, its action is:

> presumed to be reasonable. The presumption is rebuttable, but it stands until surmounted by evidence of unreasonableness. (Citation omitted). The litigant attacking the legislative act has the burden of producing probative evidence of unreasonableness. If he produces such probative evidence, the legislative act cannot be sustained unless the governing body . . . meets the challenge with some evidence of reasonableness. (Citation omitted). The governing body is not required to go forward with evidence sufficient to persuade the fact-finder of reasonableness by a preponderance of the evidence. It must only produce evidence sufficient to make the question "fairly debatable," for the legislative act to be sustained. (Citations omitted). "An issue may be said to be fairly debatable when, measured by both quantitative and qualitative tests, the evidence offered in support of the opposing views would lead objective and reasonable persons to reach different conclusions." (Citations omitted).

Ames v. Town of Painter, 239 Va. 343, 347-348 (1990).[3]

Ames further explained that the "fairly debatable" standard:

> cannot be established by a silent record. Unless the Board makes appropriate findings, supported by the record, *or* states appropriate conclusions supported by the record, *or* unless *the record itself, taken as a whole, suffices to render the issue fairly debatable,* probative evidence of unreasonableness adduced by a litigant attacking the Board's action will be deemed unrefuted. (Emphasis added).

239 Va. 343, 350.

Analysis

Plaintiffs argue that the Amendment is unreasonable *per se* because the Board "did not consider that the existing use of residential property included by-right short-term rentals, and it did not consider the Amendment's adverse effect on that use." Plaintiffs' Memorandum at 3-4. Moreover, according to Plaintiffs, the record "is devoid of any findings or conclusions resulting from the Board's consideration of the objective reality that short-term rentals were permitted prior to the Board's adoption of the Amendment" and that the record is "silent on the issue because the Board assumed and was advised the Zoning Ordinance prohibited short-term rentals." Plaintiffs' Memorandum at 4.

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[3] The cases cited by the Board, *City of Manassas v. Rosson*, 224 Va. 12 (1982) and *Eagle Harbor v. Isle of Wight County,* 271 Va. 603 (2006), applied the same standard.

The Board responds that, while there are no findings or conclusions made by the Board, the record is:

> replete with evidence demonstrating that residentially zoned properties throughout the County were being used for short-term rental at the time the Board considered the Zoning Ordinance Amendments. The staff report estimated that 1,500 active STLs operated in the County in the preceding year. [n. 14, citing Staff Report]. Many of the plaintiffs testified about the STL use of their properties during the public hearings, and they were not alone. [n. 15, citing *inter alia*, July 10, 2018 Board of Supervisors Public Hearing]. . . . In other words, not only was the Board advised that STL use was actively happening in Fairfax County, but the Board was also aware that some citizens considered STL a by-right, residential use of their properties. [n.17, citing July 10, 2018 Board of Supervisors Public Hearing].

Board's Memorandum at 3.[4]

Turning first to Plaintiffs' argument that the Amendment is unreasonable *per se* because the Board "did not consider that the existing use of residential property included by-right short-term rentals, and it did not consider the Amendment's adverse effect on that use" (Plaintiffs' Memorandum at 3-4), the court must initially divine the reason that an alleged failure to consider that the existing use of residential property included by-right short-term rentals could be unreasonable.

Plaintiffs' reason is apparently found in Code § 15.2-2284, which provides in part that "[z]oning ordinances . . . shall be drawn . . . with reasonable consideration for the existing use . . . of property . . . ." Accordingly, the failure of the Board to give "reasonable consideration" to the existing use of property when enacting a zoning ordinance would doom that ordinance. But giving "reasonable consideration" to the existing use of property does not require the Board necessarily to consider the specific issue of whether the existing use of residential property included by-right short-term rentals. Such a construction of Code § 15.2-2284 is not justified by its plain language in that it refers simply to "existing uses" of property.

Moreover, requiring consideration of whether the existing use of residential property included by-right short-term rentals assumes that short-term rentals *are* by-right. Plaintiffs, however, point to no constitutional provision or statute, and no case law interpreting any constitutional provision or statute, which was extant at the time of enactment of the Amendment (or even currently extant) which establishes that short-term rentals are by-right.

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[4] The omitted text stated:

> In addition, four of the plaintiffs had received notices of violation for their STL use and argued – in the course of their appeals to the Board of Zoning Appeals just a few months earlier – that the Zoning Ordinance did not ban STL at all.

Board's Memorandum at 3.

As the Board does not cite anything from the record for the source of this statement, the court will not consider it.

Plaintiffs point only to a decision of another judge of this court, *Ratcliff et al.* v. *Board of Supervisors of Fairfax County*, CL-2018-1836 (May 31, 2019), which held that the definition of "dwelling" (in § 20-300 of Part 3 of the previous version of the Zoning Ordinance), by excluding from the term "dwelling" "other accommodation used for more or less transient occupancy," did not prohibit transient occupancy where the "abode is used for a residential purpose a majority of the time . . . ." Letter Opinion at 4.

The *Ratcliff* court expressly declined, however, to decide if the property owner had "a vested interest in using their home for short-term rentals . . . ." *Id.* Thus, the most that can be drawn from *Ratcliff*, as Plaintiffs acknowledge, is that the previous version of the Zoning Ordinance "did not prohibit short-term rentals." Plaintiffs Memorandum at 4.

In view of the fact that Plaintiffs do not demonstrate any support for their contention that short-term rentals are by-right, the Board was not required to give "reasonable consideration" to such use.

The Board, however, *did* give consideration to short-term rentals and the Amendment's adverse effect on that use. Not only did several dozen property owners testify at the public hearing before the Board on July 10, 2018 about their use of their residences for short-term rentals, the Board chairman expressed her view (apparently joined in by the supervisors present as none of the other supervisors expressed a contrary view) that short-term rentals were prohibited by the then-existing zoning ordinance[5] and that the proposed ordinance would actually legalize short term rentals which theretofore were prohibited. In short, the Board gave "reasonable consideration" to the existing use of property (albeit disagreeing with many of the witnesses who testified) and the Amendment's effect on that use.

Because the Board gave "reasonable consideration" to the existing use of property and the Amendment's effect on that use, the enactment of the Amendment was not unreasonable *per se*. That being the case, the court is not required by *Ames* to go any farther in its inquiry, but must uphold the Amendment on the ground it was challenged by Plaintiffs in Count VIII.

But, even if the court were to conclude that the enactment of the Amendment was unreasonable because the Board believed that short term rentals were unlawful, the burden would then shift to the Board to show that "the record itself, taken as a whole, suffices to render the issue fairly debatable . . . ." *Ames*, 239 Va. at 350.[6]

The record here shows that the issue of whether short term rentals were unlawful *vel non* was fairly debatable. Against the backdrop of there being no constitutional provision or statute (and no case law interpreting any constitutional provision or statute) definitively concluding that short term

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[5] The Board chairman's view that short-term rentals were prohibited by the then-existing zoning ordinance was based upon the position taken by the Zoning Administrator. The Zoning Administrator was not asked, however, and did not volunteer, the reasons for her conclusion.

[6] The Board does not contend that it made "appropriate findings, supported by the record" or that it "state[d] appropriate conclusions supported by the record . . . ." *Ames*, 239 Va. at 350.

rentals were unlawful (or not), property owners who testified that they were hosting short term rentals believed that short term rentals were not unlawful, while the Board believed that they were unlawful.

A review of the definition of "dwelling" confirms why the issue would have been "fairly debatable" on July 10, 2018.

The first part of the definition of "dwelling" prior to the enactment of the Amendment was a "building or portion thereof . . . designed or used for residential occupancy." A residence which is used for short term rentals *is* "designed or used for residential occupancy" in that the property owners use it as a residence. Thus, the meaning of the first part of the definition is not debatable.

The second part of the definition ("dwelling" "shall not be construed" to mean a "motel, rooming house, hospital, or other accommodations used for more or less transient occupancy") is not, however, as certain because of the use of the virtually meaningless, and inherently contradictory, phrase "more or less" modifying "transient occupancy . . . ."

Because the phrase "other accommodations used for more or less transient occupancy" follows a list of specific words, construction of the phrase "other accommodations used for more or less transient occupancy" would be governed by the maxim of *noscitur a sociis*, which provides that the meaning of doubtful words in a statute:

> may be determined by reference to their association with related words and phrases. When general words and specific words are grouped together, the general words are limited and qualified by the specific words and will be construed to embrace only objects similar in nature to those objects identified by the specific words.

Andrews v. Ring, 266 Va. 311, 319 (2003).

Thus, because the *exclusive* function of a "motel, rooming house, hospital" is the use of rooms (albeit for differing uses), for compensation, by persons who are transients, the "other accommodations" would also appear to refer to accommodations whose exclusive functions are the use of rooms, for compensation, by persons who are transients. But, by using the phrase "more or less" (which, in context, could mean either "mostly" or "occasionally") to modify "transient occupancy," *i.e.*, so that the phrase could mean either "accommodations used for mostly transient occupancy" or "accommodations used for occasionally transient occupancy," the phrase is inconsistent with "motel, rooming house, hospital," making the meaning of what was not a "dwelling" a legally debatable issue.

The fact that the issue was not actually *debated* at the July 10, 2018 public hearing is of no moment; in view of the above-discussed language of the Zoning Ordinance, the fact that the Board and many members of the public took plainly contrary positions is sufficient to make the issue *debatable*.

Having found that the Board produced evidence sufficient to make the issue of the lawfulness of short term rentals "fairly debatable," it follows that the Amendment is not unreasonable because "it deprived the Plaintiffs of the by-right short-term rental use of their properties without considering those rights . . . ." Plaintiffs' Memorandum at 1. Plaintiffs' motion for partial summary

judgment as to ground (ii) of Count VIII is DENIED.

II. Failure To Follow the Zoning Ordinance

Plaintiffs argue that the Amendment was enacted "in a manner contrary to the Zoning Ordinance." Plaintiffs' Memorandum at 1. In particular, Plaintiff asserted that "the Board failed to follow its own Zoning Ordinance in adopting the Amendment." Plaintiffs' Memorandum at 5. The basis for Plaintiffs' assertion is that, prior to the Amendment:

> the Zoning Ordinance did not prohibit short-term rentals of residential dwellings. That is what this Court ruled in *Ratcliff*. But that is not what the Board assumed in adopting the Amendment. The Board assumed and was advised – contrary to its own Zoning Ordinance – that short-term rentals were illegal. The Board then took away these rights without any consideration in violation of its own Zoning Ordinance.

Plaintiffs' Memorandum at 5.

Plaintiffs fail to articulate in a comprehendible fashion how, even assuming that the Board erred in its understanding of the then-existing zoning ordinance, such a misunderstanding equates to a violation of the Zoning Ordinance. The court thus finds that, at least on this basis, the Board did not violate the Zoning Ordinance.

Renkey v. County Bd. of Arlington County, 272 Va. 369 (2006), cited by Plaintiffs, does not support their position. In *Renkey*, the plaintiffs:

> asserted that the County's re-zoning of the "R-5" portion of FBCC's property to "C-R" violated an eligibility requirement set forth in ACZO § 27A, which states that, in order "to be eligible" for "C-R" classification, the "site shall be located within an area . . . zoned 'C-3.'"

272 Va. at 372.

Thus, unlike in the case at bar, the plaintiffs in *Renkey* pointed to a specific provision of the zoning ordinance which they asserted was violated by the County.

Further, even if the Board received erroneous advice about the legality of the then-current law, that would not affect the reasonableness of the Amendment. *I.D.A. v. La France Cleaners*, 216 Va. 277 (1975) held that, in determining reasonableness:

> a court must look not to what a legislative body was told or to what it knew when it acted, but to what it could have known at that time. . . . [W]hether deliberate or innocent, misrepresentations of facts and circumstances made before a legislative body will not invalidate legislative action if the evidence shows that any facts and circumstances existing at the time it was taken were sufficient to sustain it.

216 Va. at 282-283.

As Plaintiffs have not shown that the Board violated the Zoning Ordinance, the court finds that the Amendment is not void. Plaintiffs' motion for partial summary judgment as to this ground of Count VIII is DENIED.

An appropriate order will enter.

Sincerely yours,

[redacted]

Richard E. Gardiner
Judge

OPINION LETTER

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

ANDREW COOPER, *et al.*	)	
	)	
Plaintiffs	)	
	)	
v.	)	CL 2018-12818
	)	
BOARD OF SUPERVISORS OF FAIRFAX COUNTY	)	
	)	
	)	
Defendant	)	

ORDER

THIS MATTER came before the court on Plaintiffs' motion for partial summary judgment on Count VIII of the Second Amended Complaint.

THE COURT, for the reasons set forth in the court's letter opinion of today's date, hereby DENIES Plaintiff's motion for partial summary judgment on Count VIII of the Second Amended Complaint.

ENTERED this 18th day of September, 2019.

[redacted]

Richard E. Gardiner
Judge

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA

Copies to:

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