NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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May 31, 2019

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Re: *Blake D. Ratcliff and Sara B. Ratcliff v. Board of Supervisors of Fairfax County*
Case No. CL-2018-001836, BZA Appeal Letter Opinion

Dear Counsel:

This matter came on for a hearing on the Petitioner's appeal of the Board of Zoning Appeals ("BZA") decision on April 10, 2019, and I took the matter under advisement. Since that time, I have thoroughly reviewed the record in this matter and considered the written and oral arguments of counsel, as well as the applicable case law cited by the parties.

Background facts:

Petitioners own a single-family detached house in Falls Church, Virginia. Petitioners live in the house for the majority of the year, but periodically rent the house online using services such

OPINION LETTER

as AirBnB. During the rental periods, guests rent the entire property and have access to the entire house. The Zoning Administrator issued a Notice of Violation ("Notice") to Petitioners on June 20, 2017 alleging a violation of Section 2-302(5) of the Fairfax County Zoning Ordinance. The Notice stated Petitioners' short-term rentals constituted transient occupancy in violation of Section 2-302(5). Petitioner Blake D. Ratcliff appealed the Zoning Administrator's Notice to the BZA on July 18, 2017. Petitioner Sara B. Ratcliff was not included in the appeal. The BZA upheld the Zoning Administrator's decision on January 10, 2018. This Petition was filed on February 2, 2018 and writ of certiorari was issued on February 8, 2018.

The issues raised in this appeal may be broken down into three main issues: (1) did Petitioners' use of their house as a short-term rental violate the Zoning Ordinance; (2) did Petitioners have a vested interest in using their house for short-term rental purposes; and (3) is Petitioner Sara B. Ratcliff able to recover for this appeal?

Analysis:

In deciding this matter, Virginia Code §15.2-2314 requires this Court to review a BZA decision for errors of law *de novo*, but "the proceeding on a writ of certiorari is not a trial *de novo* [,] [r]ather, the trial court's review is limited to determining whether the decision of the board of zoning appeals is plainly wrong or is based on erroneous principles of law." *Bd. of Zoning Appeals of James City Cty. v. University Square Assc.'s*, 246 Va. 290, 294-95 (1993) (citations omitted). The findings and conclusions of the BZA on any question of fact shall be presumed correct. The Supreme Court of Virginia has stated that:

> The BZA's decision is presumed to be correct and can be reversed or modified only if the trial court determines that the BZA applied erroneous principles of law or was plainly wrong and in violation of the purposes and intent of the zoning ordinance. The party challenging the BZA's decision has the burden of proof on these issues.
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> * * *
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> The review of a decision of a BZA on a petition for writ of certiorari is limited to the scope of the BZA proceeding. The reviewing court may only consider the correctness of the BZA's decision and must apply the standard of review set out above.[1]

Foster v. Geller, 248 Va. 563, 566-67 (1994) (citation omitted).

[1] It should be noted that during the April 10, 2019 hearing in this matter, the Court allowed testimony from the Petitioners. However, given the standard of review, that testimony and evidence was not considered for the purposes of this appeal.

Fairfax County Zoning Ordinance Section 2-302(5), the section Petitioners were found to have violated on the Notice, simply states that "[n]o use shall be allowed in any district which is not permitted by the regulations for the district." Fairfax Cty. Zoning Ordinance § 2-302(5).

Under Part Three of the Fairfax County Zoning Ordinance, Section 20-300: Definitions, a "dwelling" is defined as follows:

> A building or portion thereof, but not a MOBILE HOME, designed or used for residential occupancy. The term 'dwelling' shall not be construed to mean a motel, rooming house, hospital, or other accommodation used for more or less transient occupancy.

With regards to interpreting zoning ordinances, the Virginia Supreme Court has stated that:

> Nothing in the amendments to Code § 15.2–2314 eliminates the long-standing desire for consistent interpretation of zoning ordinances, an objective best accomplished by those charged with enforcing such ordinances. A consistent administrative construction of an ordinance by the officials charged with its enforcement is entitled to great weight.
>
> Deference to such administrative construction in such circumstances is appropriate for several reasons. Zoning ordinances establish and maintain order within local areas; in turn, uniform application and interpretation of specific zoning ordinances furthers this objective. Zoning administrators and boards of zoning appeals charged with applying zoning ordinances are able to ensure consistent application consonant with a local government's intent for specific ordinances. Such agencies develop expertise in the relationship between particular textual language and a local government's overall zoning plan.
>
> Each of these factors supports an appellate court's deference to the decision of a zoning administrator or board of zoning appeals in interpreting an ordinance unless that body "erred in its decision" concerning a matter of law. Moreover, these factors also reflect that the trial court did not err in affirming the BZA's application of the term "replaces" as a matter of law in requiring footprint location for replacement of the subject billboards.

Lamar Co., LLC v. Bd. of Zoning Appeals, 270 Va. 540, 547 (2005) (citations omitted).

In the case at bar, the zoning administrative boards have interpreted "transient occupancy" to mean occupancy of less than 30 days. The citations included in the record of these decisions demonstrates that the decisions were not contemplating a scenario analogous to the online rental sharing platforms at issue in this matter, but it is clear from the record that the BZA has been interpreting "transient occupancy" to involve occupancy for less than 30 days. The source of

where the 30-day time period comes from is unclear from the record. The Respondent takes the position that even one use of a dwelling for transient occupancy violates the zoning ordinance.

From statutory language alone, it appears that a dwelling will be considered a residential dwelling as long as the abode is used for a residential purpose a majority of the time as the phrase "other accommodation used for more or less transient occupancy" indicates that the main purpose of the accommodation is the critical consideration. The ordinance does not distinguish how often "transient occupancy" must occur before an abode is then deemed a non-dwelling or used in violation of the zoning ordinance. The ordinance does not state that absolutely no transient occupancy is allowed. Accepting the BZA's interpretation of "transient occupancy" as correct, the Court finds that the BZA decision was erroneous in this matter as the record shows that this abode was used more or less as Petitioners home, and not for transient occupancy.

As to the question of whether or not Petitioners possess a vested interest in using their home for short-term rentals, it appears that issue is not properly before the Court. The purpose of the appeal of the BZA's decision is for the Court to determine whether or not Petitioners violated the Zoning Ordinance by renting their house on websites such as Airbnb. The case should not be turned into a petition for declaratory judgment. Petitioners' vested-interest-argument appears more geared towards the other case Petitioners referenced that is pending in this Court regarding an amendment to the Zoning Ordinance. That issue does not need to be addressed in this case.

With regards to whether or not Petitioner Sara B. Ratcliff may recover if the Court rules favorably to her position in this matter, it appears that although Petitioner Sara B. Ratcliff is a necessary party to this proceeding, that does not mean she is entitled to recover. Virginia Code Section 15.2-2314 states in relevant part:

> Any person or persons jointly or severally aggrieved by any decision of the board of zoning appeals . . . may file with the clerk of the circuit court for the county or city a petition that shall be styled "In Re: date Decision of the Board of Zoning Appeals of [locality name]" specifying the grounds on which aggrieved within 30 days after the final decision of the board.
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> * * *
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> The governing body, the landowner, and the applicant before the board of zoning appeals shall be necessary parties to the proceedings in the circuit court. The court may permit intervention by any other person or persons jointly or severally aggrieved by any decision of the board of zoning appeals.

Va. Code Ann. § 15.2-2314.

Petitioner Sara B. Ratcliff's presence in the suit is necessary by statute, but she did not follow the correct procedure to perfect her appeal. The application for appeal dated July 18, 2017, lists Blake D. Ratcliff as the only appellant to the Zoning Administrator's Notice. Thus, Petitioner

Sara B. Ratcliff should not be able to overturn the original decision with regards to her alleged violation of the Ordinance.

Conclusion:

For those reasons, the Petition is granted and the decision of the BZA is reversed, with the relief only granted as to Petitioner Blake D. Ratcliff. An order is attached to this opinion.

Kind regards,

[redacted]

Dontaè L. Bugg
Judge, Fairfax County Circuit Court
19th Judicial Circuit

Enclosure

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

IN RE: JANUARY 10, 2018 DECISION
OF THE BOARD OF ZONING APPEALS
OF FAIRFAX COUNTY, VIRGINIA

Case Number CL-2018-0001836

Blake D. Ratcliff

and

Sara B. Ratcliff,

Petitioners,

v.

Board of Supervisors of Fairfax County
Virginia

Respondent.

ORDER

THIS MATTER CAME BEFORE THE COURT on the Petitioner's appeal of the January 10, 2018 decision of the Board of Zoning Appeals, and for the reasons stated in accompanying letter opinion that is incorporated in this Order by reference, it is hereby

ADJUDGED and ORDERED and DECREED that the Petition is GRANTED, and the decision of the Board of Zoning Appeals is reversed, with the relief only granted as to Petitioner Blake D. Ratcliff.

This matter is removed from the Court's June 7, 2019 docket.

ENTERED this 31st day of May 2019. [redacted]

JUDGE DONTAÉ L. BUGG

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.