



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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

Dear Mr. Hanes and Ms. Halyard:

This matter comes before the court on Plaintiffs' motion to reconsider the denial of their motion for partial summary judgment on Count VIII of the Second Amended Complaint.

Plaintiffs assert that this court found that "short-term rentals are a existing use of a Dwelling" and argue that, "[b]ased on the Court's undebatable finding, short-term rentals were an existing 'use' of property." Motion for Reconsideration at 1 & 3. Plaintiffs have mischaracterized the court's finding and reached an erroneous conclusion thereby.

What the court, in fact, found was that, under the first part of the definition of "dwelling," 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." Letter Opinion at 6 (emphasis added). Accordingly, what the court held was that, where the owners were themselves using the building as a residence, a residence which is used for short term rentals is a "dwelling." But it was the fact that the owners were also occupying the building that made it a "dwelling," not the fact that it was being used for short term rentals.

Moreover, that holding does not translate into a holding that short-term rentals were necessarily an "existing 'use' of property" because the second part of the definition of "dwelling" ("shall not be construed" to mean a "motel, rooming house, hospital, or other accommodations used for more or less transient

COUNTY OF FAIRFAX

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occupancy") must be taken account of in determining whether short term rentals are an "existing 'use' of property."

The second part of the definition of "dwelling" must be taken account of in determining whether short term rentals are an "existing 'use' of property" because among the "[p]ermitted uses" of property" in "every residential zoning district" was: "Dwellings, single family detached." Part 1, § 3-102(3). Accordingly, only if a use was as a "dwelling" could a use be by-right. It follows that only if a use met the definition of "dwelling" could it be by-right.

In the case at bar, while the court found that a residence used for short term rental, *while also occupied by the owner*, met the first part of the definition of "dwelling," the court did not go so far as to hold that all short term rentals fell within the definition of "dwelling," as Plaintiffs now appear to argue. Not only did the court decline to hold that short term rentals fell within both parts of the full definition of "dwelling" -- holding rather that the meaning of the second part of the definition was "fairly debatable" -- but the court also did not hold that short term rentals where the owner was not also occupying the residence fell within even the first part of the definition of "dwelling." So that the record is clear, the court now holds that a building which the owner is not also occupying at the time it is being used as a short term rental does not meet the definition of "dwelling" as it is not "designed or used for residential occupancy."

In light of the above, Plaintiffs' assertion that "[s]hort-term rentals constitute residential occupancy" is in error. Further, Plaintiffs' follow on contention -- that "[s]hort-term rentals" is "an expressly permitted by-right use of 'Dwellings' in every residential district in Fairfax County" -- is equally erroneous; since short term rentals do not constitute residential occupancy, short term rentals are not an expressly permitted by-right use of "dwellings."¹

Because short term rentals are not necessarily an expressly permitted by-right use of "dwellings," the Board was not required by Code § 15.2-2284 to give "reasonable consideration" to the specific issue of whether the existing use of residential property included by-right short-term rentals.

An appropriate order will enter.

Sincerely yours,

[REDACTED]
Richard E. Gardiner
Judge

¹ Indeed, Plaintiffs have the concept of "by-right" turned upside down. The law is not that short-term rentals are a "by-right use of 'Dwellings'" (Motion for Reconsideration at 3); the law is that "dwellings" are a by-right use in a residential zoning district. And if short-term rentals are to be a "by-right use of 'Dwellings,'" then that by-right use has to be found in the definition of "dwellings." Plaintiffs have not shown that short term rentals are a by-right use found in the definition of "dwellings."

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

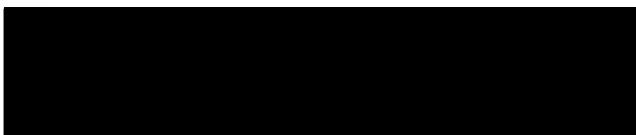
ANDREW COOPER, et al.)
Plaintiffs)
v.) CL 2018-12818
BOARD OF SUPERVISORS)
OF FAIRFAX COUNTY)
Defendant)

ORDER

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

ENTERED this 23rd day of September, 2019.



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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