NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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October 21, 2019

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Re: *John A. McEwan et al. v. Board of Supervisors of the County of Fairfax Virginia*
Case No. CL-2018-0002104

Dear Counsel:

As technology rapidly advances our economy, it generates tension between the government's ability to regulate and the entrepreneurship of its citizens. This strain gives rise to the conflict between the Petitioners' desire to utilize "Airbnb" and Fairfax County's zoning regulations before the Court.

Petitioners received a notice of violation from the Fairfax County Zoning Administrator and subsequently lost an appeal to the Board of Zoning Appeals ("BZA"). Petitioners requested review of this decision. After conducting a hearing on April 24, 2019, and receiving supplemental briefing, the Court took the matter under advisement. Ultimately, this case presents one central question:

> Whether the BZA correctly interpreted Zoning Ordinance § 20-300 (2017), when it concluded that a house rented through Airbnb for stays of less than 30 days is not defined as a dwelling?

**OPINION LETTER**

After considering the pleadings, evidence, and oral arguments presented by Counsel, the Court finds that the BZA correctly applied the Zoning Ordinance. The Court agrees that a house rented through Airbnb for less than 30 days is excluded from the definition of "dwelling" because it is an "accommodation used for more or less transient occupancy." Furthermore, the uncontested evidence demonstrates that the Petitioners have violated the Zoning Ordinance. Therefore, the Court affirms the decision of the BZA, and upholds the Notice of Violation.

## BACKGROUND

John A. McEwan and Mary Lou McEwan (collectively, "Petitioners") own 9319 Ludgate Drive in Alexandria, Virginia, located in Fairfax County ("the residence"). The residence was previously occupied by Mrs. McEwan's parents. Mrs. McEwan's mother moved in with the Petitioners following the death of Mrs. McEwan's father – the residence no longer has year-round occupants. In order to "avoid leaving the residence unoccupied throughout the year," the McEwans began to rent the residence in a periodic fashion through Airbnb, an internet rental service. According to the McEwans, guests "rent the entire home, have full access to the entire home and are the sole occupants of the home." Petitioner's Mem. In Support at 2.

The McEwans received a Notice of Violation from the Zoning Administrator on June 19, 2017. The violation indicated that the 9319 Ludgate property was being used as a short-term rental through Airbnb in violation of the Zoning Ordinance, stating:

> Absent a special exception or special permit, use of a dwelling in the R-2 District must comply with the definition set forth in Part 3 of Article 20 of the Zoning Ordinance, which defines "DWELLING" as "[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." The Zoning Administrator has consistently opined that transient occupancy is occupancy of a dwelling for a period of less than 30 days.
>
> Because you are using the Property as a short-term rental and permitting transient occupancy, you are in violation of Par. 5 of Sect. 2-302 of the Zoning Ordinance, which states:
>
> > No use shall be allowed in any district which is not permitted by the regulations for the district.

BZA Record at 10-11.

The McEwans appealed to the BZA on July 18, 2017. On appeal, the BZA found that the McEwans do not reside in the property, and that the property is used as a short-term rental. The decision emphasized that "Mr. McEwan admitted to the inspector that the property is rented out through Airbnb for transient purposes and event use." BZA Record at 261. With these facts, the

BZA concluded that Zoning Administrators have consistently interpreted the Zoning Ordinance with respect to transient occupancy, and upheld the determination of the Zoning Administrator on January 10, 2018. This appeal followed.

## STANDARD OF REVIEW

The authority of this appeal stems from Va. Code § 15.2-2314. "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 . . . . Upon the presentation of such petition, the court shall allow a writ of certiorari to review the decision of the board of zoning appeals . . . . The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review."

Where an appeal from the BZA is based on a determination of a zoning administrator in enforcing the Zoning Ordinance, "the findings and conclusions of the board of zoning appeals on questions of fact shall be presumed to be correct. The appealing party may rebut that presumption by proving by a preponderance of the evidence, including the record before the board of zoning appeals, that the board of zoning appeals erred in its decision. Any party may introduce evidence in the proceedings in the court. The court shall hear any arguments on questions of law de novo." Va. Code § 15.2-2314.

In addition to the statutory authority, the Supreme Court of Virginia provides the following governing principles: "[T]he BZA's decision is presumed to be correct and can be reversed or modified only if the . . . 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." *Foster v. Geller*, 248 Va. 563, 566 (1994). With respect to Zoning Ordinance construction, "[a] consistent administrative construction of an ordinance by the officials charged with its enforcement is entitled to great weight." *Trustees of Christ & St. Luke's Episcopal Church v. Board of Zoning Appeals of the City of Norfolk*, 273 Va. 375, 381 (quoting *Masterson v. Board of Zoning Appeals*, 233 Va. 37, 44 (1987)).

## ANALYSIS

The parties do not dispute the presumptively correct factual findings of the BZA. As such, the Court must consider whether 9319 Ludgate Drive falls under the Zoning Ordinance's dwelling definition.

The definition of "dwelling" under Part 3, Section 20-300 (2017) of the Ordinance in effect on the day of the violation reads:

> 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.

This Court's reading of the Zoning Ordinance is bound by the traditional canons of statutory construction. "Zoning laws should be given a fair and reasonable construction in the light of the manifest intent of the legislative body enacting them, the object sought to be attained, the natural import of the words used in common and accepted usage, the setting in which such words are employed, and the general structure of the ordinance as a whole." *Patton v. City of Galax*, 269 Va. 219, 229-30 (2005) (quoting *Mooreland v. Young*, 197 Va. 771, 775 (1956)). To give a fair and reasonable construction to the Zoning Ordinance, each sentence must be read as having operative meaning. *Monument Associates v. Arlington County Bd.*, 242 Va. 145, 150 (1991) ("[C]ourts must give effect, if possible, to every word of an enactment . . . ."). "[N]o part of an act should be treated as meaningless unless absolutely necessary." *Garrison v. First Federal Sav. & Loan Ass'n of S.C.*, 241 Va. 335, 340 (1991).

Petitioners maintain that the second sentence of the definition is not prohibitory – rather, the second sentence exists merely to distinguish a dwelling from other types of buildings. Petitioners argue that "[i]f a building is designed *or* used for residential occupancy, it is a Dwelling. But if a building is a motel, rooming house, hospital or some other accommodation used for transient occupancy, it is not a Dwelling." Petitioner's Mem. In Support at 4. Reading the Zoning Ordinance in this manner effectively renders the second sentence meaningless, and allows for results contrary to "the object sought to be attained, the natural import of the words used in common and accepted usage, the setting in which such words are employed, and the general structure of the ordinance as a whole." *Patton*, 269 Va. at 229-30 (quoting *Mooreland v. Young*, 197 Va. 771, 775 (1956)). If the second sentence is not prohibitory (instead, serving as contrast for the reader), then the second sentence is irrelevant to the definition. Furthermore, any "dwelling" could be converted to a motel, rooming house, hospital, or transient accommodation, but remain defined as a dwelling under the Zoning Ordinance. The purpose of the definition cannot be to define what a dwelling is and then simultaneously allow dwellings to be converted to uses contrary to that definition. Such an interpretation is not a "reasonable construction." *Id.*

This Court concludes that a motel, rooming house, hospital, or other accommodation used for more or less transient occupancy cannot be defined as a dwelling under the Zoning Ordinance. The first sentence sets forth a general definition of what a dwelling is – a building designed or used for residential occupancy. The second sentence describes specific exceptions of what a dwelling is not – a motel, rooming house, hospital, or other accommodation used for more or less transient occupancy. It follows that if a building is a motel, rooming house, hospital, or other accommodation used for more or less transient occupancy, that specific character of use precludes the building from being defined generally as a dwelling under the Zoning Ordinance.

In this case, 9319 Ludgate Drive is alleged to have been used for more or less transient occupancy, thereby taking the residence out of the dwelling definition. The Zoning Administrator interpreted "transient occupancy" as occupancy for a period of less than 30 days. Reviewing this interpretation, the BZA stated:

> I've read the cases cited by the Zoning Administrator. I'm not going to go through them individually. I've been on this Board for a number of years, and participated

> in a number of those cases, and I will, can say that I think the Zoning Administrator's interpretation of what constitutes transient occupancy has been consistent with her position or, of her position and that of previous Zoning Administrators for, for some time. It's not a new position.

BZA Record at 262. This Court also received into evidence Defendant's Exhibit 1, which consists of interpretations of the Zoning Ordinance by the Zoning Administrator from 1984, 1990, 1991, 1994, and 2010. In each case, the Zoning Administrator interpreted "transient occupancy" to mean an occupancy period of less than one month or 30 days. Consistent interpretations spanning more than three decades are entitled to great weight. *Trustees of Christ & St. Luke's Episcopal Church v. Board of Zoning Appeals of the City of Norfolk*, 273 Va. 375, 381 ("A consistent administrative construction of an ordinance by the officials charged with its enforcement is entitled to great weight."). Given that the BZA's use of this interpretation is not clearly erroneous, plainly wrong, or in violation of the purpose and intent of the Zoning Ordinance, this Court accepts the longstanding interpretation of "transient occupancy" as correct.

Applying the language of the Zoning Ordinance to 9319 Ludgate Drive, the Court finds that the BZA's conclusion that residence is not a dwelling was correct. The house stands empty but for periodic, short-term Airbnb rentals. Such use precludes defining the residence as dwelling under the Zoning Ordinance. In reaching this decision, the BZA did not apply erroneous principles of law, nor was it plainly wrong or in violation of the purpose and intent of the Zoning Ordinance. Its decision is therefore affirmed.

A similar case, *Ratcliff v. Board of Supervisors of Fairfax County*, ___ Va. Cir. ___ (Fairfax May 31, 2019), litigated before this Circuit reached a different conclusion. This Court feels compelled to address that ruling. In *Ratcliff*, petitioners periodically rented out their house through online services, such as Airbnb, for less than 30 days. Like the McEwans, petitioners received a Notice of Violation on the basis of short-term occupancy. The BZA upheld the Zoning Administrator's decision, and petitioners appealed to Circuit Court. Although accepting the 30 day interpretation of transient occupancy, Judge Bugg concluded 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", and found that the BZA's decision was erroneous because the property at issue was used as petitioner's home for a majority of the time. This Court respectfully disagrees with Judge Bugg's interpretation. As previously discussed, this Court finds that where a building is used for transient occupancy, such use precludes defining the building as a dwelling under the Zoning Ordinance. Despite competing interpretations of the zoning Ordinance, this case is also distinguishable based upon the evidence presented in the record. The factual circumstances of this case require affirming the BZA under either *Ratcliff* or this Court's rationale. The *Ratcliff* home was used as a dwelling for the majority of the time – the owners continuously resided in the property. Here, no one lives in the home save for transient Airbnb guests. This use cannot find safe haven under *Ratcliff*, nor does it find safe haven before this Court today.

**CONCLUSION**

For the reasons stated above, the decision of the BZA is affirmed. Enclosed is an order consistent with this Court's ruling.

Sincerely,

[redacted]

Daniel E. Ortiz
Circuit Court Judge

Enclosure

VIRGINIA

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

| | | |
|---|---|---|
| JOHN A. MCEWAN, ET AL., | ) | |
| | ) | |
| Petitioners, | ) | |
| | ) | |
| v. | ) | Case No. CL-2018-0002104 |
| | ) | |
| BOARD OF SUPERVISORS OF THE COUNTY OF FAIRFAX, | ) | |
| | ) | |
| | ) | |
| Respondent. | ) | |

# ORDER

**THIS CAUSE** came to be heard on the April 23, 2019, for Petitioner's appeal of the Board of Zoning Appeals ("BZA") decision.

**IT APPEARING** that the decision of the BZA was correct for the reasons set forth in this Court's opinion letter dated October 21, 2019; it is therefore

**ORDERED** that the decision of the BZA is AFFIRMED, and the Notice of Violation UPHELD.

ENTERED this 21 day of Oct., 2019.

[redacted]

Judge Daniel E. Ortiz

**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.**