
Coates' Canons Blog: Short-Term Rentals: Dwelling Units or Transient Accommodations?

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A town's zoning ordinance requires that all structures within a residential zoning district meet the definition of "dwelling unit." The town ordinance defines "dwelling unit" to mean, "a building, or portion thereof, designed and arranged and used for living quarters for one or more persons with cooking facilities, *but not including structures used for transient occupancy, such as hotels, motels or boarding houses.*" The town believes short-term rentals (STRs) are a type of transient accommodation that are prohibited as a land use within the residential zones. A property owner who operates a short-term rental in the R-1 district disagrees. The owner contends that STRs are "dwelling units" under the code. Who's right?

STRs as "dwelling units" or transient accommodations?

Most zoning ordinances have residential zoning districts where the primary permitted land use is single-family detached housing. The single-family structures allowed in residential zones are commonly defined as "dwelling units." Each jurisdiction is free to draft its own definition of this term, and, in doing so, a few municipalities have expressly excluded structures used for transient occupancy from being classified as dwelling units.

When it comes to short-term rentals, it can be tough to determine whether they meet the definition of "dwelling unit" or if the use is akin to the type transient occupancy that may be prohibited in residential zones. Structurally speaking, short-term rentals are the same as other residences located in a residential district. Also, short-term renters generally behave in a manner that is consistent with the residential use of property—eating, sleeping, cooking, socializing, etc. On the flip side, in exchange for compensation, short-term rentals can be book by transient guests for nightly rentals. Sometimes the renters stay as few as one to two nights. The transaction is therefore the same as booking and staying overnight at a hotel. Short-term renters are even required to pay the same taxes charged by hotels, motels, and B&B's. So, are short-term rentals "dwelling units" or a transient use of property?

In North Carolina we do not have case law that answers this question, and it is hard to say how our courts would rule. However, the New Hampshire supreme court recently tacked this issue in *Working Stiff Partners, LLC v. City of Portsmouth*, 2019 WL 4725178 (N.H. Sept. 27, 2019). Although the court's holding is not controlling in our state, it is nevertheless helpful to understand the New Hampshire court's analysis of this issue.

New Hampshire case law

In *Working Stiff*, the zoning ordinance at issue required that properties located in residential districts be designated as either single-family or two-family dwelling units. The code defined "dwelling unit" as a "building or portion thereof providing complete independent living facilities for one or more persons, including permanent provisions for living, sleeping, eating, cooking and sanitation. This use shall not be deemed to include such transient occupancies as hotels, motels, rooming or boarding houses."

The property owner argued that short-term rentals were not among the type of transient occupancies the zoning ordinance intended to prohibit in residential zones and were therefore a lawful use of property in residential districts.

The court was not convinced. The court noted the common usage of the term “transient” as meaning “passing through or by a place with only a brief stay or sojourn.” And it reviewed the ordinance’s definitions of hotel, motel, and boarding house, finding that each “contemplated the provision of lodging to paying guests on a daily basis.” As such, it suggested that short-term rentals “fit the mold” of the type of transient lodging contemplated in the zoning ordinance. The fact that the property was advertised on Airbnb as an accommodation for up to nine guests and could be booked at a nightly rate was key to the determination. In short, when a property is available for lodging at a daily rate on a very short-term basis, the court concluded the use is a transient occupancy and not that of a dwelling unit.

Texas case law

A Texas court recently struck down the portion of the City of Austin’s municipal STR zoning ordinance that eliminated property owners’ authority to operate Type-2 STRs (i.e., the rental of an entire dwelling unit that is not owner-occupied). See *Zaatar v. City of Austin*, No. 03-17-00812-CV, 2019 WL 6336186 (Tex. App. Nov. 27, 2019). I plan to discuss the court’s decision in my next blog post. However, it’s worth noting that the Texas court refused to sanction the idea that short-term rentals should be treated differently than owner-occupied homes for zoning purposes because “both short-term rentals and owner-occupied homes are residential in nature.” Thus, if asked to interpret a zoning ordinance like the one in the example, it is likely that a Texas court would conclude that STRs are “dwelling units” rather than transient accommodations.

Interpreting North Carolina zoning ordinances

Our courts are required to interpret zoning ordinances as written and to resolve any ambiguities in favor of the landowner. And, unless an ordinance prohibits a land use, that land use is allowed. *Land v. Vill. of Wesley Chapel*, 206 N.C. App. 123, 130 (2010). The takeaway here is that if a local government wants to regulate short-term rentals, the local zoning ordinances should be amended to clearly define STRs as a separate use of property and specify where this use is allowed to operate within the jurisdiction.

In our example, had the town had amended the ordinance to include STRs as a prohibited type of transient occupancy, the ambiguity would be resolved. If challenged, the court would interpret the town’s ordinance as written, likely finding that STRs are prohibited in residential zones. This will hold true unless the legislature passes a law to preempt the local regulation of STRs or our courts hold otherwise. In fact, bill was introduced to the NC legislature last summer that would have limited or blocked local authority to regulate STRs. The bill was dropped, but a similar proposal could resurface in the future.

Links

- law.justia.com/cases/new-hampshire/supreme-court/2019/2018-0491.html
- www.leagle.com/decision/intxco20191127a54