Virginia Court Deems Home Daycares are a â??Residential Useâ?• in Neighborhood Squabble

Description

In underwriting title, with some frequency we are asked to write over or give affirmative coverage with respect to an apparent violation of the covenants, conditions and restrictions (â??CCRsâ?•) which we are told has existed for a number of years without any action to enforce by the association or owner with standing. Typically, in our analysis we look to affirmative defenses which are equitable in nature, and try to figure the odds of a successful defense in the event of an attempted enforcement. Underwriting counsel tend to be dubious unless it is very clear that the neighborhood has so transformed over time that the CCRs have no reasonable application. Even betting in that proposition can be very tricky. Occasionally a business decision will trump the cautious approach, but the underwriters usually remain shy for good reason.

Then there is the occasion where title insurance is not in play, and that typically is where the homeowner runs afoul of the association or an incensed neighbor over some activity that is alleged to violate a use or building restriction. The variety of such actions can be surprising, but one that is topical in todayâ??s world involves home based business. With telecommuter and small entrepreneurs, the home often becomes the office, and in some cases the infrastructure for business or even religious activity. It was not so long ago that such activity in the home was not in great favor, and many subdivisions came replete with Declarations prohibiting such activity. Here we look at a contemporary case where the developer seems to have disfavored home base business activity. Or, possibly the developerâ??s counsel simply used an old form for the Declaration with archaic language. The case summary follows.

Several homeowners operating home-based daycares found themselves defending themselves in a lawsuit filed by their homeownersâ?? association in the Fairfax County Circuit Court recently. In the case of Winstead Manor Homeowners Association, Inc. vs. Carlos Tramontana, et al., CL2016-0011804., the HOA sought both injunctive and declaratory relief against several homeowners within the HOA operating home-based daycares alleging that the businesses were strictly forbidden by the HOAâ??s governing documents.

At issue, were the covenants which declared in pertinent part:

1) The Lots shall be used for residential purposes exclusively, and no building shall be erected, altered or placed or permitted to remain on any such Lot, other than one used as a single-family dwelling, except as permitted by applicable local zoning ordinances

2) Except as permitted by Section 1 of this Article V, no portion of the Property shall ever be used or caused to be used or allowed or authorized in any way, directly or indirectly, for any business, commercial, manufacturing, mercantile, storing, vending or other such non-residential purposes . . .

In 2015, the HOA sent letters to the homeowners operating daycares demanding that they cease and desist from operating their daycares alleging breach of the HOA covenants. The Homeowners continued operation of the daycares and in 2016, the HOA filed suit citing irreparable harm, traffic and parking problems and noise complaints.

Both the defendant homeowners and the HOA filed cross motions for summary judgment. The defendant homeowners argued that Section 1 incorporated by reference Fairfax Countyâ??s zoning ordinances which allows home daycares as an accessory residential use. The HOA argued that the final clause of Section 1, which was set off by a comma, was not meant to modify the first clause of the sentence and asked the Court to follow the Rule of the Last Antecedent. The defendant homeowners argued that at best, the covenants were ambiguous and such ambiguity must be resolved in their favor.

After considering the briefs filed and arguments of counsel the Honorable Jan L. Brodie granted summary judgment in favor of the defendant homeowners finding that their use of the property was not prohibited by the HOA covenants.

Home based child care is recognized and permitted by state statute and by Fairfax County ordinance. For zoning purposes, it is an accessory use. Restrictions imposed by statute and ordinance can and typically are modified by special use permit requiring a full hearing before the board of supervisors. In the legal context, then, the use is consistent with residential use. Residential use has been considered in a line of Virginia cases involving a variety of uses, such as renting rooms, but there is no case of record in Virginia considering home child care. Judge Brodie tackled the language in Article V head on and concluded that it was not ambiguous. Itâ??s qualifying language in her judgment permits home based child care. She listened carefully to Plaintiffâ??s argument on the Rule of the Last Antecedent, and basically turned its argument against its position.

Our homeowners invested much time and expense in setting up their facilities which are impressive. They are much relieved that they will be able to continue with their child care activities as are their â??parents and kidsâ?•.

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