

IN THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
CIRCUIT CIVIL DIVISION CASE NO: 03-004365-CI-20

DAVID ALLBRITTON, et. al.

Plaintiffs,

vs.

CITY OF CLEARWATER,

Defendant.

FINAL DECLARATORY JUDGMENT

THIS CAUSE, having come on for Non-Jury Trial, and the Court having heard testimony of witnesses, having received evidence, having heard argument, and being otherwise fully advised in the premises, finds as follows:

This matter involves a claim for declaratory relief, relating to the applicability of Clearwater Ordinance 7105-03, adopted on April 17, 2003 ("the 2003 Ordinance"), to certain property on Clearwater Beach. The 2003 Ordinance prohibits short term rentals of less than 31 days of residential properties. Plaintiffs are the owners of thirty one (31) properties on Clearwater Beach that they allege have been lawfully rented on a short term basis prior to the enactment of the 2003 Ordinance. Plaintiffs contend that such use of their properties was lawful prior to the adoption of the 2003 Ordinance. Therefore, they seek a determination that their rental activity qualifies as a lawful non-conforming use, entitling them to grandfather status which would allow them to continue short-term rental of their properties.

In defense, the City of Clearwater ("Clearwater") alleges that short term rental of residential property was a prohibited use prior to the adoption of the 2003 Ordinance. In particular, it cites to definitions within the 1980 and 1999 City of Clearwater Land

Development Codes (“the Code” or “the City of Clearwater Code”) as evidence of the City’s prohibition of short term rentals on Clearwater Beach. Although the City admits that neither Code contains a specific prohibition as to short term rentals, it alleges that certain Code provisions taken together reveal that such rentals were prohibited prior to the adoption of the 2003 Ordinance. Defendant contends that the 2003 Ordinance was meant to be a clarification rather than a change to the Code. Accordingly, it argues, the Plaintiffs are not entitled to grandfather status since their use was not a lawful as it was prohibited prior to the 2003 Ordinance.

The parties stipulated to the dates that the twenty-four (24) of the properties owned by Plaintiffs began being rented on a short term basis. The Court hereby approves that Stipulation and incorporates it by reference herein. The parties presented evidence as to the short term rental start dates for the remaining seven following properties:

1. 1068 Eldorado Avenue (Dexter Properties)
2. 770 Mandalay Avenue (Kormendi)
3. 843 Eldorado Avenue (Kormendi/Powell)
4. 963 Mandalay Avenue (Kormendi/Powell)
5. 963.5 Mandalay Avenue (Scofield)
6. 975 Eldorado Avenue (Story)
7. 971 Eldorado Avenue (Lockwood)

Plaintiffs presented documents and testimony from individuals personally familiar with the rental histories, relating to the time frames during which each of the above properties began being rented out on a short term basis. Defendant offered the testimony of Raymond Massieu, and Lisa Cowley, residents of Clearwater Beach. As

discussed in more detail below, the Court notes that the establishment of a lawful nonconforming use runs with property and is not dependent on a particular owner. Thus, even if a Plaintiff purchased the property after the enactment of the 2003 Ordinance, the right to grandfather status, if applicable, runs with the land, not with the owner. Therefore the first issue before the Court relates to if and when each of the non-stipulated properties began being offered and intended to be used, as a short term rental property.

The Court has carefully considered all evidence presented and based on the personal knowledge and credibility of various witnesses, the Court finds that all non-stipulated properties were offered and intended to be used as short term rentals prior to the adoption of the 2003 Ordinance. Regarding the property located at 1068 Eldorado Avenue, the Court finds that it has been rented at a short term basis most likely since the 1930s, but definitely since 1997. This was confirmed by the Defendant's witness, Raymond Massieu, who testified that he had seen evidence of short term rentals at this address since 2002. The Court finds that based on the evidence and testimony of Ed Marchiselli, the property located at 770 Mandalay Avenue began being offered for short term rental at least in late 2002. Defendant's witness Mr. Massieu testified that he observed evidence of short term rentals on the property in early 2003.

Two of the properties at issue, 963 Mandalay Avenue and 963.5 Mandalay Avenue are contiguous properties owned together as one unit. The front property, 963 Mandalay contains a main house and the back property 963.5 Mandalay contains a two unit two story building. The parties presented testimony relating to whether all units were rented short term, or only a portion of the units. The Court finds that based on the evidence presented all of the property was intended and offered to be rented on a short

term basis prior to the enactment of the 2003 Ordinance. Testimony from Brian Andrus, the former property manager, indicated that the owners had some difficulty securing short term tenants and as a result, for a period of time they rented a portion of the property for longer than thirty one days. As discussed more fully below, the Court finds that the short term rental does not need to be the exclusive and continuous use of the property in order to establish a lawful non conforming use. The testimony and evidence presented to the Court satisfied the burden of proving that both properties were intended, offered and used as short term rentals prior to the enactment of the 2003 Ordinance. The Court notes that Defendant's witness Mr. Massieu testified that he observed evidence of short term rentals at 963 Mandalay Avenue in early 2003.

The Court heard and finds credible, testimony from Ted Remak, the boyfriend of the owner and the manager of the property located at and 975 Eldorado Avenue, that the property has been rented on a short term basis since at least 2001. The property located at 971 Eldorado Avenue is currently managed by Belloise Realty. Sal Belloise testified regarding the time frame during which these properties were rented on a short term basis. While the documentary evidence presented by Plaintiff was dated after the enactment of the 2003 Ordinance, Mr. Belloise testified that such rentals had begun prior to the adoption of the 2003 Ordinance. The Court finds Mr. Belloise testimony, based on personal knowledge to be credible and finds that short term rentals began prior to the enactment of the 2003 Ordinance.

A former owner of 843 Eldorado Avenue, Susan Withers, testified that based on her personal knowledge developed while she owned a neighboring house located at 847 Eldorado Avenue, the 843 property was being rented on a short term basis in 2001. She purchased the property as an investment based on that personal knowledge. The

Court finds Ms. Withers' testimony to be credible and finds that the short term rentals on 843 Eldorado began prior to the adoption of the 2003 Ordinance.

As to those properties identified above, based on the testimony and evidence presented, the Court finds that all began renting their properties on a short term basis prior to the adoption of the 2003 Ordinance. Accordingly, based on the stipulation between the parties and the Court's factual findings, all properties at issue began short term rentals prior to the adoption of the 2003 Ordinance.

The City contends that regardless of the start date, the properties are not entitled to grandfather status because the short term rentals were prohibited prior to the 2003 Ordinance and thus Plaintiffs' short term rentals were not a lawful nonconforming use. The Plaintiffs do not dispute the City's right to enact the 2003 Ordinance. Rather, they contend that the Codes in effect prior to the 2003 Ordinance did not prohibit short term rentals of property on Clearwater Beach. Therefore, the City's attempt to apply the Ordinance to abolish their right to continue to rent their properties on a short term basis violates their right to grandfather status and essentially amounts to an improper taking.

The City could point to no specific prohibition and no instances of enforcement of the ban prior to the adoption of the 2003 Ordinance. Accordingly, the parties seek a determination from the Court regarding whether such short term rentals were a lawful use prior to the enactment of the 2003 Ordinance, or whether such use was prohibited under either the 1980 or 1999 City Codes.

Municipalities such as the City of Clearwater, have the right to enact ordinances that restrict citizens' use of their property. *Verizon Wireless Personal Communications, L.P. v. Sanctuary at Wulfert Point Community Ass'n, Inc.*, 916 So.2d 850, 855 (Fla. 2nd DCA 2005)("To be sure, a city council may enact ordinances, amend them, and repeal

them.”) However, in order to enact an ordinance that limits a citizens property rights, the municipality must follow the proper procedure:

Under Florida law, ordinances which substantially affect the use of land must comply strictly with the notice requirements of § 166.041(3)(c) 1., Fla.Stat. This provision states in pertinent part:

(c) ... Ordinances that change the actual list of permitted, conditional, or prohibited uses within a zoning category, or ordinances initiated by the municipality that change the actual zoning map designation of a parcel or parcels of land shall be enacted pursuant to the following procedure:

* * *

2. In cases in which the proposed ordinance changes the actual list of permitted, conditional, or *prohibited* uses within a zoning category, or changes the actual zoning map designation of a parcel or parcels of land involving 10 contiguous acres or more, the governing body shall provide for public notice and hearings ... (Emphasis supplied).

“[S]trict compliance with the notice requirements of the state statute is a jurisdictional and mandatory prerequisite to the valid enactment of a zoning measure.”.... Attempts of local government to grant zoning changes without compliance with procedural requirements have been deemed invalid and void. . . .

Webb v. Town Council of Town of Hilliard, 766 So.2d 1241, 1244 (Fla. 1st DCA 2000)

(citations omitted).

In the present matter, the Plaintiffs stated numerous times on the record that they do not dispute the City’s authority to enact the 2003 Ordinance. However, Plaintiffs argue that the City can only prohibit the short term rentals by expressly doing so through the proper procedure and must make such prohibition clear and unequivocal as it did in the 2003 Ordinance.

The Plaintiffs presented testimony from The Honorable Owen Allbritton a retired Sixth Circuit Judge and Helen Dexter, a ninety-eight year old former owner of 1068 Mandalay Avenue, that for at least the last forty to seventy years, owners of property on Clearwater Beach have regularly rented out their homes to vacationers for

periods of less than thirty days. Such rentals have been open and obvious and regularly advertised.

All of the evidence presented to the Court indicates that City officials have been aware of short term rentals on Clearwater Beach for as long as they have been taking place. Various City officials were clearly under the opinion that Clearwater did not ban short term rentals prior to the 2003 Ordinance. *See e.g.*, Plaintiffs' Exhibit 11, Various e-mails between City Officials. For example, in an e-mail from Bob Hall dated July 10, 2002, he stated that "[w]e have never enforced on rental time periods and there is no ordinance governing in the City." Moreover, one of the Plaintiffs David Allbritton testified that he began renting his property located at 849 Mandalay Avenue on a short term in January of 2003. Mr Albritton stated that he had asked numerous City officials whether short term rentals were permitted on Clearwater Beach and none ever told him such use was prohibited. He served on the Municipal Code Enforcement Board for seven (7) years during which time the Board was never presented with a matter involving short term rentals.

Defendant contends that short term rentals on Clearwater Beach have always been illegal and certainly was prohibited under the 1980 and 1999 City Codes. However, Defendant is unable to point specifically to any section within the Code that expressly prohibits short term rentals prior to the enactment of the 2003 Ordinance. Rather, the City contends that such prohibition may be ascertained by reading several different sections of the Codes and piecing them together.

The 1980 Code provided that a permitted use for Plaintiffs' properties was as a "detached single family dwelling" which was defined as "a detached building or a unit in a townhouse structure designed for or occupied exclusively by one family." § 35.11,

1980 Clearwater City Code (*emphasis added*). Clearly all of the Plaintiffs' properties can be classified as detached buildings designed for one family. In 1999 the City amended the Code and adopted the City Development Code. At that time the Code was amended to include a definition for "overnight accommodations" as follows:

A building or a portion thereof designed and used primarily to provide sleeping accommodations for transient guests for a daily or weekly rental charge and including interval ownership and such office, meeting, restaurant facilities as are integral to the primary function.

§ 8-102, 1999 Clearwater City Code. The 1999 Code prohibited certain overnight accommodations, but continued to allow detached dwellings in Plaintiffs' neighborhoods. The definition for detached dwellings was somewhat changed to mean "a building separated from any other principal building and containing only one dwelling unit erected on an individual lot of record." A dwelling unit was defined as "a building or a portion of a building providing independent living facilities for one family including provisions for living, sleeping and complete kitchen facilities." § 8-102 1999 City of Clearwater Code. Moreover, the 1999 Code contains a section entitled Residential Rentals. Division 23, 1999 City of Clearwater Code. This is section discusses residential rentals, but does not contain any reference to time limitations, nor does it differentiate between long and short term rentals.

Pursuant to Florida Law, "[s]ince zoning regulations are in derogation of private rights of ownership, words used in a zoning ordinance should be given their broadest meaning when there is no definition or clear intent to the contrary and the ordinance should be interpreted in favor of the property owner." *Rinker Materials Corp. v. City of North Miami*, 286 So.2d 552, 553 (Fla. 1973). Moreover, an alleged prohibition in a

City Code must clearly give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden. As noted by the Second DCA:

A legislative enactment will not be declared vague unless the statute fails to give persons of ordinary intelligence fair notice of what constitutes the forbidden conduct and which, because of imprecision, may invite arbitrary and discriminatory enforcement.

State v. Baal, 680 So.2d 608, 610 (Fla. 2nd DCA 1996)(ordinance prohibiting citizen from entering a St. Petersburg public park between dusk and dawn unless they have prior authorization found constitutional because it provided sufficiently definite notice in commonly understood language to citizens of ordinary intelligence of what was prohibited.).

The Court finds that short term rentals of properties on Clearwater Beach were not prohibited under either the 1980 nor the 1999 Codes. Even piecing together various portions of the Code does not provide sufficiently definite notice in commonly understood language to citizens of ordinary intelligence of what was prohibited. Plaintiffs' properties are clearly all "detached single family dwellings" under the 1980 Code, based on the definition which included "a detached building . . . designed for . . . one family." § 35.11, 1980 Clearwater City Code. Moreover, under the 1999 Code, none of the properties at issue qualify as "overnight accommodations" as they were not "designed and used primarily to provide sleeping accommodations for transient guests . . . and including interval ownership and such office, meeting, restaurant facilities as are integral to the primary function." § 8-102, 1999 Clearwater City Code.

Alternatively, even if such Codes did prohibit short term rentals the Defendant did not offer any evidence that such change affecting the use of land in 1980 or 1999 was properly enacted in accordance with the applicable rules. It was well established

that short term rentals on Clearwater Beach were an established open and obvious use of land for a long time prior to the adoption of the 1980 Code. Therefore, even if the changes in either the 1980 or 1999 Codes included a prohibition on short term rentals, there has been no evidence that such restriction which would certainly substantially affect the use of land, complied strictly with the applicable requirements. Accordingly, any such new restriction would be a nullity. *See e.g., David v. City of Dunedin*, 473 So.2d 304, 306 (Fla. 2nd DCA 1985)(“Inasmuch as Ordinance No. 72-75, as amended by Ordinance No. 77-48, seeks to regulate “all exterior signs, so as to protect health and safety and to promote the public,” Dunedin, Fla., Code § 3-13 (1972), the ordinance and its amendment are zoning ordinances which are null and void if not strictly enacted pursuant to the requirements of section 166.041”); *Coleman v. City of Key West*, 807 So.2d 84, 85-86 (Fla. 3d DCA 2001), *review denied*, 828 So.2d 385 (Fla.2002) (court invalidated Ordinance relating to short term rentals based on the City's noncompliance with the notice provisions of the statutes relating to ordinance adoption.). The Court notes that prior to this action, no property owner on Clearwater Beach has challenged the issue of short term rentals under the 1980 or 1999 Codes. However, a challenge was never required because the City never enforced its alleged prohibition on short term rentals and prior to the adoption of the 2003 Ordinance, never clearly informed its citizens that such rentals were not permitted.

Since the Court finds that short term rentals were permitted under the prior codes, and all properties owned by Plaintiffs in this matter were intended and offered for use as short term rentals prior to the adoption of the 2003 Code, then the Court must determine whether the Plaintiffs are entitled to grandfather status allowing them to legally continue such rentals. Grandfather status can be explained as follows:

The application of zoning regulations to restrict an existing use of property, resulting in substantial diminishing of its value, may constitute a "taking" by the governmental agency which requires the payment of compensation under well-established principles of constitutional law. 82 Am.Jur.2d, Zoning and Planning, § 178. To avoid these consequences, zoning regulations generally "grandfather" the continuation of existing nonconforming uses on property subject to the zoning classification. *State v. Danner*, 159 Fla. 874, 33 So.2d 45 (1947).

Hobbs v. Department of Transp., 831 So.2d 745 (Fla. 5th DCA 2002)(quoting *Lewis v. City of Atlantic Beach*, 467 So.2d 751 (Fla. 1st DCA 1985)). "A nonconforming use is a "[I]and use that is impermissible under current zoning restrictions but that is allowed because the use existed lawfully before the restrictions took effect."” *Rollison v. City Of Key West*, 875 So.2d 659, 660 (Fla. 3rd DCA 2004)(quoting *Black's Law Dictionary* 1540 (7th ed.1999)). Moreover, it is well established that the lawful non conforming use flows with the property, not the owner:

We have been cited to no legal authority upholding the proposition that a municipality can terminate a grandfathered nonconforming use of property simply because the tenant and operating license holder of the establishment on the property undergoes a change. It is clear that the concept of grandfathered nonconforming use relates to the property and the use thereof, not to the type of ownership or leasehold interest in the property.

Hobbs, 831 So.2d 745 (citations omitted).

Both the 1980 and 1999 Clearwater City Codes contain nonconforming use provisions which provide for grandfather status for lawful nonconforming uses. 1980 City of Clearwater Code, Article II § 42.21, Nonconformities; 1999 City of Clearwater Code, Article 6, Nonconformity Provisions. The 1999 Code states the purpose of the nonconforming provisions as follows:

The purpose of this division is to regulate and limit the development and continued existence of uses, structures and lots which were lawful on the date of the adoption of this Code, but which would be prohibited, regulated, or restricted under the terms established herein. While

nonconformities may continue, it is the intent of this development code to bring nonconforming properties into compliance with the provisions of this code in conjunction with a change of use, redevelopment, or any other change of condition of the property in order to eliminate the nonconformity or to bring the nonconformity as practical as possible to a conforming state.

§ 6-101, 1999 City of Clearwater Code. A nonconforming use is defined in the Code as “any use of a building, structure or land lawfully established that does not comply with the provisions for the zoning district in which such use is situated.” § 8-102, 1999 City of Clearwater Code.

Based on the foregoing, the Court finds that the short term rental of the properties at issue in this litigation are all established nonconforming lawful uses which are entitled to grandfather status, exempting them for the application of the 2003 Ordinance. The Court notes that while the properties at issue herein are all entitled to grandfather status, such continued nonconforming use must comply with the terms set forth in the applicable City Code.

WHEREFORE, it is hereby,

ORDERED AND ADJUDGED that the City of Clearwater Land Development Codes did not prohibit the short term rentals of property on Clearwater Beach prior to the enactment of Clearwater Ordinance 7105-03, adopted on April 17, 2003.

IT IS FURTHER ORDERED AND ADJUDGED that the following properties (Plaintiff owners’ last names are in parenthesis) were all lawfully used as short term rentals prior to the enactment of the 2003 Ordinance and are entitled to grandfather status as lawful nonconforming uses pursuant to the terms of the City of Clearwater Land Development Code:

1. 1068 Eldorado Avenue (Dexter Properties)

2. 770 Mandalay Avenue (Kormendi)
3. 963 Mandalay Avenue (Kormendi/Powell)
4. 963.5 Mandalay Avenue (Kormendi/Powell)
5. 971 Eldorado Avenue (Scofield)
6. 975 Eldorado Avenue (Story)
7. 843 Eldorado Avenue (Lockwood)
8. 849 Mandalay Avenue (Allbritton)
9. 849-1/2 Mandalay Avenue (Allbritton)
10. 940 Narcissus Avenue (Chen)
11. 864 Eldorado Avenue (Chrysochoos)
12. 831 Eldorado Avenue (George)
13. 966 Lantana Avenue (Meek)
14. 975 Narcissus Avenue (Meek)
15. 1024 Eldorado Avenue (Mitcham)
16. 1021 Eldorado Avenue (Mitcham)
17. 1020 Mandalay Avenue (Mitcham)
18. 918 Lantana Avenue (Parks/Barkes)
19. 22 Laurel Street (Satterwhite)
20. 755 Bruce Avenue (Satterwhite)
21. 65 Gardenia Street (Satterwhite)
22. 947 Narcissus Avenue (Satterwhite)
23. 1012 Mandalay Avenue (Satterwhite)
24. 979 Eldorado Avenue (Story)
25. 724 Mandalay Avenue (Parks/Barkes)

- 26. 980 Narcissus Avenue (Withers)
- 27. 847 Eldorado Avenue (Wiggins)
- 28. 974 Mandalay Avenue (Hayslett)
- 29. 810 Lantana Avenue (Hagaman)
- 30. 805 Bruce Avenue (Hagaman)
- 31. 934 Narcissus Avenue (Uline)

IT IS FURTHER ORDERED AND ADJUDGED that the Court reserves jurisdiction to determine entitlement to attorney's fees, if applicable and costs and for any other further relief as may be appropriate, upon proper motion.

DONE AND ORDERED in chambers at Clearwater, Pinellas County, Florida, this ____ day of April 2007.

ORIGINAL SIGNED
APR 20 2007
NELLY N. KHOUZAM
CIRCUIT JUDGE

NELLY N. KHOUZAM
Circuit Court Judge

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