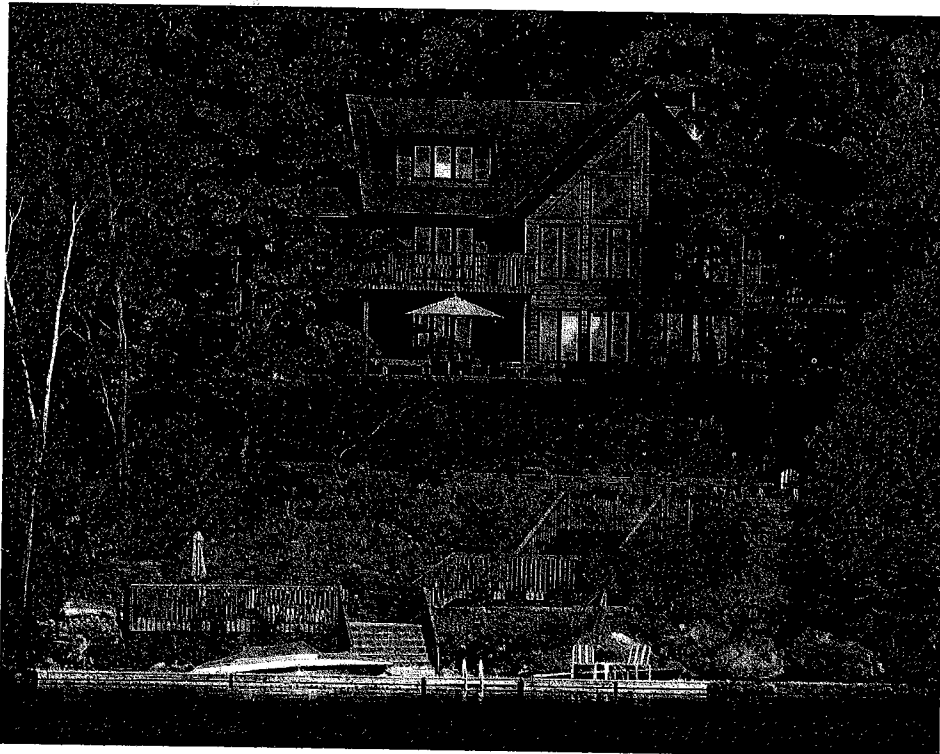


SCOTT V. WALKER

the Virginia Supreme Court Reaffirms its Prior Decisions Strictly Construing Certain Restrictive Covenants

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On July 8, 2007, the Virginia Supreme Court handed down what is only one in a long line of cases in which the Court has refused to enforce restrictive covenants that it deems ambiguous.

In *Scott v. Walker*, 274 Va. 209 (2007), the Virginia Supreme Court ruled that a recorded covenant that certain real property “shall [not] be used except for residential purposes,” could not be read to prohibit the short term rental of a single-family dwelling.

At issue in this case was the Scotts’ leasing of their single family dwelling on a nightly and weekly basis to guests and friends. The lot and the subdivision where the Scotts’ property is situated is part of the Smith Mountain Lake resort area of Virginia. The Scotts’ neighbors, the Walkers, filed suit against the Scotts to enforce the residential only restrictive covenants recorded against the title of the Scotts’ property.

After consideration of each party’s stipulated facts and oral arguments, the Bedford County Circuit Court entered an injunction against the Scotts to enjoin their weekly and nightly rental of their home on the ba-

In rendering its opinion that the Scotts' nightly and weekly rental of their lot was consistent with the covenant prohibiting the non-residential use of lots, the Virginia Supreme Court accepted the Scotts argument that the Bedford County Circuit Court's decision — which considered duration of use as a factor in determining what constitutes residential purposes — was in error.

sis that the restrictive covenant prohibiting the non-residential use of lots, "excludes the rental of the real property on a nightly and weekly basis. . ." (Walker v. Scott, Va. Cir. (Bedford County).


The Scotts appealed the order entered by the Bedford County Circuit Court. Since both parties had previously stipulated to the facts of the case, the Supreme Court reviewed the interpretation of the residential only restrictive covenant consistent with their prior covenant interpretation rulings, which have held that:

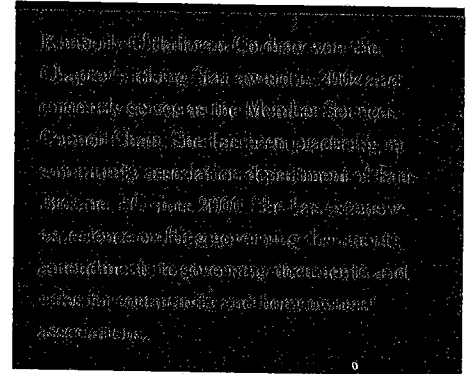
... it is the general rule that while courts of equity will enforce restrictive covenants where the intention of the parties is clear and the restrictions reasonable, they are not favored, and the burden is on him who would enforce such covenants to establish that the activity objected to is within their terms ...Scott at 212-213, citing Schwarzschild v. Welborne, 186 Va. 1052, 1058 (1947).

In rendering its opinion that the Scotts' nightly and weekly rental of their lot was consistent with the covenant prohibiting the non-residential use of lots, the Virginia Supreme Court accepted the Scotts' argument that the Bedford County Circuit Court's decision — which considered duration of use as a factor in determining what constitutes residential purposes — was in error. Additionally, the Virginia Supreme Court also noted, as asserted by the Scotts, that the developer of the subdivision where the Scotts' lot was located could have easily included language in the subdivisions restrictive covenants that would have prohibited short term rentals of lots in the subdivision.

Unlike the covenants at issue in the Scotts' case, the vast majority of community associations in the Washington D.C. metropolitan region have restrictive covenants that not only regulate the non-residential use of lots or units, but that also expressly require any leasing or rental of lots or units to be for a term of at least three to six months. Therefore, for many of the community associations in this region, if a similar enforcement action were to be pursued there would be an unambiguous covenant that the association could assert in its enforcement efforts.

In reviewing the Scotts' case, the court's decision serves as a reminder to the man-

agers, members, and other professionals who work with Virginia community associations, that enforcement of covenants requires a thorough review of all of the community association's restrictive covenants. Moreover, when examining whether to pursue enforcement of a specific covenant, both managers and board members should be mindful that any ambiguity in the covenant that is being enforced will be construed against the association and in favor of the lot owner, which means enforcement of broadly written restrictive covenants that prohibit "non-residential use" of lots or units, or that prohibit the "noxious and offensive" use of lots or units, should be pursued with caution. 



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