

VIRGINIA :

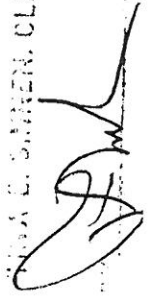
IN THE VIRGINIA BEACH CIRCUIT COURT

THE VIRGINIA ASSOCIATION )  
 OF REALTORS®, )  
 )  
 THE HAMPTON ROADS REALTORS® )  
 ASSOCIATION, )  
 )  
 RED LION PROPERTIES, LLC, )  
 )  
 and )  
 )  
 DIANE ONG, )  
 )  
*Plaintiffs,* )

v. )

Civil Action No. CL21-4787

THE CITY COUNCIL FOR THE CITY )  
 OF VIRGINIA BEACH, VIRGINIA, )  
 )  
 Serve: Mark D. Stiles, City Attorney )  
 City Attorneys' Office )  
 2401 Courthouse Drive )  
 Building 1, Room 260 )  
 Virginia Beach, Virginia 23456 )  
 )  
*Defendant.* )

FILED  
 VIRGINIA BEACH CIRCUIT COURT  
 21 OCT -7 PM 1:45  
 JESSICA B. SIMMONS, CLERK  


**APPEAL AND COMPLAINT FOR DECLARATORY RELIEF**

COME NOW the Plaintiffs, the Virginia Association of REALTORS® (“VAR”), the Hampton Roads REALTORS® Association (“HRRA”), Red Lion Properties, LLC (“Red Lion”), and Diane Ong (“Ms. Ong”) (collectively, the “Plaintiffs”), by counsel, and state the following for their Appeal and Complaint for Declaratory Relief:

1. This case challenges the legality of a zoning ordinance, adopted by the City Council of the City of Virginia Beach, Virginia (the “City Council”) on September 7, 2021 (the “September

7 Ordinance”), establishing and imposing certain restrictions on short term rentals (“STRs”) within the City of Virginia Beach, Virginia (the “City”). The September 7 Ordinance is attached hereto as **Exhibit A**.

2. The Plaintiffs, pursuant to Va. Code § 15.2-2285(F), now appeal the City Council’s adoption of the September 7 Ordinance and ask this Court to enter judgment declaring the Ordinance null and void.

### **PARTIES**

3. VAR is the largest professional trade association in Virginia, representing over 37,000 REALTORS® engaged in the residential, commercial, and property management real estate business in every locality in the Commonwealth. Founded in 1920, the Association serves as an advocate for and represents the interests of property owners and real estate professionals in the Commonwealth of Virginia. The real estate industry is one of the largest contributors to Virginia’s economy and is a driver of the state’s revenues to the tune of many billions of dollars. VAR is uniquely qualified to speak to matters of real property that come before this Court. VAR’s principal office is located at 10231 Telegraph Road, Glen Allen, Virginia 23059.

4. HRRA, originally formed in 1886 as the Norfolk Real Estate and Stock Exchange, is the local REALTOR® association representing over 4,500 REALTORS® in the greater Hampton Roads region. HRRA represents members in the counties of Southampton and Isle of White, and the cities of Chesapeake, Norfolk, Portsmouth, Suffolk, and Virginia Beach. HRRA advocates for and represents the interests of property owners and real estate professionals at the local level. HRRA’s principal office is located at 638 Independence Parkway, Chesapeake, Virginia 23320.

5. Red Lion is a Virginia Limited Liability Company with its principal office address at 4504 McGregor Drive, Virginia Beach, Virginia 23462. Red Lion is the owner of two STRs in the City: (1) 401 21st Street, Unit 5, Virginia Beach, Virginia 23451; (2) 1009 Barclay Square, Virginia Beach, Virginia 23451.

6. Ms. Ong is a citizen of the Commonwealth of Virginia. Ms. Ong is the owner of three STRs in the City: (1) 927 Pacific Avenue, Unit B, Virginia Beach, Virginia, 23451; (2) 905 Pacific Avenue, Unit A, Virginia Beach, Virginia 23451; and (3) 337 25th Street, Virginia Beach, Virginia 23451.

7. The City Council is the governing body of the City of Virginia Beach, a legal entity and political subdivision of the Commonwealth of Virginia that is capable of being sued. Va. Code §§ 15.2-1404, 8.01-385(3). The City Council's members are Mayor Robert M. "Bobby" Dyer, N.D. "Rocky" Holcomb, Michael Berlucchi, Barbary Henley, Louis Jones, John Moss, Aaron R. Rouse, Guy King Tower, Rosemary Wilson, and Sabrina Wooten.

### **JURISDICTION**

8. This Court has jurisdiction over the subject matter of this action pursuant to Va. Code §§ 8.01-184, 15.2-2285(F), and 17.1-513.

9. This Court has personal jurisdiction over the parties.

10. Venue in this Court is proper pursuant to Va. Code § 8.01-262.

### **FACTS**

11. The Plaintiffs are individuals, and the representatives of individuals, who own and operate STRs in the City of Virginia Beach, a popular tourist destination.

12. The Plaintiffs, as individuals, and as the representatives of those individuals, have owned and operated hundreds of STRs throughout the City for many years, alongside the bustling

hotels, bed and breakfasts, timeshares, and other vacation rental properties that welcome the millions of tourists who visit Virginia Beach each year.

13. State law allows localities, subject to certain exceptions, to, “by ordinance, establish a short-term rental registry and require operators within the locality to register annually.” Va. Code § 15.2-983(B).

14. Va. Code § 15.2-983(A) defines “operator” as “the proprietor of any dwelling, lodging, or sleeping accommodations offered as a short-term rental, whether in the capacity of owner, lessee, sublessee, mortgagee in possession, licensee, or any other possessory capacity” and “short-term rental” as “the provision of a room or space that is suitable or intended for occupancy for dwelling, sleeping, or lodging purposes, for a period of fewer than 30 consecutive days, in exchange for a charge for the occupancy.”

15. In addition to the express authority granted by the legislature to enact an STR registration ordinance, local governments may “regulate the short-term rental of property through general land use and zoning authority.” Va. Code § 15.983(D). The City of Virginia Beach has sought to regulate STRs through the enactment of Article 2 Section 241.2 of the City Zoning Ordinance (the “STR Ordinance”). Pursuant to the STR Ordinance, STRs are basically prohibited in all areas of the City except for Sandbridge by right (which was required by Chapter 758 of the Acts of the 2018 General Assembly) and in the Oceanfront only if they obtain a conditional use permit. *See* Article 2 Section 221 of the STR Ordinance.

16. The City recently enacted amendments to the STR Ordinance subjecting STRs to a number of new conditions, and in so doing, the City exceeded its authority.

### History of the STR Ordinance Amendments

17. The Virginia General Assembly had expressly directed that STRs “shall be permitted as a principal use in the area defined as the Sandbridge Social Service District.” (*See* ORD-3668.) On July 13, 2021, the City Council enacted an ordinance which effectively banned all new STRs *outside* of Sandbridge, Virginia. *Id.* That ordinance added Article 23 to the City Zoning Ordinance and amended Article 2 Section 241.2 of the STR Ordinance to “allow short term rentals, with appropriate restrictions, only in those areas directed by the General Assembly [*e.g.*, Sandbridge] and/or in such other areas in which a neighborhood requests a STR overlay and where [STRs] may be carried on without adversely affecting the quiet enjoyment of neighboring properties.” *Id.*

18. By way of the September 7 Ordinance, the City Council further amended Article 2 Section 241.2 of the City Zoning Ordinance.

19. The September 7 Ordinance establishes new rules for STRs that were registered with the City and paid transient occupancy taxes to the Commissioner of Revenue prior to July 1, 2018. Those “grandfathered” STRs are not required to obtain a conditional use permit but are subject to the conditions and requirements in Article 2 Section 241.2. In addition, “any grandfathered short term rental that continuously remains vacant, or not used as a short term rental, for a period of two (2) years or more, starting from the date of adoption [of the September 7 Ordinance], shall lose its “grandfathered” designation[.]”

20. Similarly, “[a]ny short term rental that received a conditional use permit between November 1, 2019 and September 7, 2021 and that is located within a zoning district where short term rentals are not a permitted or conditional use, shall be considered grandfathered and shall be

permitted to continue subject to the conditions of section 241.2 (1) through (15) and (17) as modified by the terms of the conditional use permit[.]”

### The New Smoke Alarm Rules

21. In addition, the September 7 Ordinance attempts to regulate the way in which STR owners configure smoke alarms and carbon monoxide detectors. Specifically, the September 7 Ordinance provides that:

The property owner or their representative shall provide to the City Planning Department permission for zoning inspectors to inspect the short term rental property annually. Such inspection shall include: 1) at least one fire extinguisher has been installed inside the unit, in plain sight, and where it is located, 2) all smoke alarms and carbon monoxide detectors are installed in accordance with the building code in affect at the time of construction and interconnected. Units constructed prior to interconnection requirements must have a minimum of one smoke alarm installed on every floor of the structure and in the areas adjacent to all sleeping room and when activated, be audible in all sleeping rooms, and 3) all smoke alarms and carbon monoxide detectors have been inspected within the last 12 months, and are in good working order.

22. The new smoke alarm rules, however, conflict with state laws as written and delegated by the Virginia General Assembly in Chapter 81 of the 2018 Acts of the General Assembly. It follows that the City Council exceeded its statutory authority by adopting an ordinance in which those rules in conflict with the plain language of the Virginia Code and the applicable implementing regulations.

23. Va. Code § 15.2-922 provides that “[a]ny locality [. . .], may by ordinance require that smoke alarms be installed in the following structures or buildings **if smoke alarms have not been installed in accordance with the Uniform Statewide Building Code** (§ 36-97 et seq.): (i) any building containing one or more dwelling units: (ii) any hotel or motel regularly used, offered for, or intended to be used to provide overnight sleeping accommodations for one or more persons, and (iii) any rooming houses regularly used, offered for, or intended to be used to provide overnight

sleeping accommodations.” (Emphasis added). One of the purposes of the enactment of Chapter 81 of the 2018 Acts of the General Assembly was to provide consistency of placement and regulation of smoke alarms throughout the Commonwealth.

24. Furthermore, “[s]moke alarms installed pursuant to this section shall be installed **only** in conformance with the provisions of the Uniform Statewide Building Code **and shall be permitted to be either battery operated or AC powered.** Such **installation shall not require new or additional wiring** and shall be maintained in accordance with the Statewide Fire Prevention Code (§ 27-94 et seq.) and subdivision C 6 of § 36-105, Part III of the Uniform Statewide Building Code.” Va. Code § 15.2-922(A) (emphasis added).

25. In enacting that law, the Virginia General Assembly stated “[t]hat any locality that has adopted an ordinance pursuant to § 15.2-922 of the Code of Virginia shall amend the ordinance to conform to the provisions of the first enactment of this act on or before July 1, 2019.”

26. Indeed, the September 7 Ordinance does not define the term “interconnected” and it is likely that such a term conflicts with Va. Code § 15.2-922 which plainly permits “either battery operated or AC powered” smoke alarms and prohibits localities from requiring “new or additional wiring.”

27. Va. Code § 15.2-922 is clear and unambiguous – a locality may require that smoke alarms be installed “only in conformance with the provisions of the Uniform Statewide Building Code” and may be “either battery operated or AC powered.” § 15.2-922(A). Further, the locality may not require “new or additional wiring.” *Id.* The purpose of such language (added to the state code in 2018) was to promote public safety while not imposing an unnecessary burden on property owners to rewire the house. The September 7 Ordinance, however, imposes the burden that the state legislature said a locality may not impose.

28. In addition, the September 7 Ordinance establishes that “[u]nits constructed prior to interconnection requirements must have a minimum of one smoke alarm installed on every floor of the structure and in the areas adjacent to all sleeping room [sic] and when activated, by audible in all sleeping rooms . . . .” As noted above, the City Council did not define the term “interconnected” or “interconnection.” STR owners and operators, such as the Plaintiffs, should not and cannot be tasked with having to interpret vague and ambiguous language in the STR Ordinance. For that same reason, the City Council’s failure to include the date “prior to interconnection requirements” impermissibly leaves STR owners in a lurch about which set of rules and regulations apply to them.<sup>1</sup> Finally, there is no authority in state law for “[u]nits constructed prior to interconnection requirements,” STR Ordinance, § 241.2(13), to have smoke alarms installed other than in conformity with the Uniform Statewide Building Code or the Statewide Fire Prevention Code.

29. For those reasons, the September 7 Ordinance is in direct conflict with the laws of the Commonwealth of Virginia, as written and delegated by the Virginia General Assembly, and the City Council exceeded their delegated authority by adopting the September 7 Ordinance in express violation of those laws.

### **CLAIMS FOR RELIEF**

#### **COUNT I**

#### **Unreasonable, Arbitrary and Capricious Zoning Action**

30. Plaintiffs incorporate the preceding paragraphs herein by reference.

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<sup>1</sup> The inclusion of a reference to 1989 on the City’s Life Safety Inspection Report form does not cure the defects in the ordinance, as both the interconnection requirement and the lack of conformity with state regulations are fatal to Sec. 241.2(13).



31. The City Council's acts and omissions in adopting the September 7 Ordinance were unreasonable, arbitrary, and capricious, as evidenced by the following facts, incidents, circumstances, and events (which are not intended to be wholly inclusive):

a. The City Council's adoption of the September 7 Ordinance exceeded the City Council's statutory authority granted to it by the Virginia General Assembly;

b. The City Council's adoption of the September 7 Ordinance exceeded its statutory land use and zoning authority granted to it by the Virginia General Assembly;

c. The City Council's adoption of the September Ordinance limiting STRs in the Oceanfront area to being permitted only by conditional use in a major resort area of the City substantially destroys the private property rights of hundreds and most likely thousands of property owners who either own or planned to own STRs in that area;

d. The City Council's acts and omissions were not in compliance and in contravention of the plain language of Virginia laws regulating the configuration of smoke alarms in STRs;

e. The City Council's acts and omissions are preempted by state statute, as written and delegated by the Virginia General Assembly; and

f. The City Council's acts and omissions are factually unsupported, impermissibly vague, and place an unreasonable burden on STR owners and operators, such as the Plaintiffs, to comply with local laws.

32. As a consequence of the unreasonable, unlawful, arbitrary, and capricious acts and omissions of the City Council in adopting the September 7 Ordinance, this Court should set aside the City Council's September 7, 2021 action adopting that Ordinance together with the September 7 Ordinance itself.

**COUNT II**  
**The City Council Exceeded its Statutory Powers when it**  
**Adopted the September 7 Ordinance**

33. Plaintiffs incorporate the preceding paragraphs herein by reference.

34. In Virginia, localities do not have authority, express or implied, to enact ordinances that conflict with statutes and laws, as written and delegated by the General Assembly.

35. The City Council abdicated its express and/or implied authority, as granted by statute, when it adopted the September 7 Ordinance which conflicts with the plain language of the laws of Virginia.

36. As such, the September 7 Ordinance is an invalid, unlawful, and void governmental regulation and should be overturned by this Court.

**COUNT III**  
**The September 7 Ordinance is in Violation of Va. Code § 15.2-922**

37. Plaintiffs incorporate the preceding paragraphs herein by reference.

38. The mandates set forth and adopted by the City Council in the September 7 Ordinance are not in compliance and in contravention of the plain language of Virginia laws, including, but not limited to, Va. Code § 15.2-922, the Uniform Statewide Building Code, and the Statewide Fire Prevention Code, which regulate the configuration of smoke alarms in STRs.

39. Accordingly, the September 7 Ordinance should be set aside, or modified to comply with all applicable governing laws and regulations in the Commonwealth.

**COUNT IV**  
**The September 7 Ordinance is in Violation of Va. Code § 15.2-983**

40. Plaintiffs incorporate the preceding paragraphs herein by reference.

41. The mandates in the City Council's September 7 Ordinance conflict with Virginia law, as written and delegated by the Virginia General Assembly.

42. The City Council is not entitled to regulate STRs by means which exceed the City Council's statutory land use and zoning authority. *See* Va. Code § 15.2-983.

43. Accordingly, the September 7 Ordinance, which plainly conflicts with Virginia laws governing land use and zoning, is an invalid, unlawful, and void governmental regulation and should be overturned by this Court.

WHEREFORE, Plaintiffs respectfully request the following relief pursuant to Va. Code § 8.04-184:

A. Declare that the September 7 Ordinance is an unreasonable, arbitrary, and capricious zoning action, and is therefore, illegal, null and void;

B. Declare that the City Council illegally exceeded their express and/or implied statutory powers by adopting the September 7 Ordinance and, therefore, declare the September 7 Ordinance illegal, null and void;

C. Declare that the September 7 Ordinance is impermissibly vague, and places an unreasonable burden on STR owners and operators to interpret and apply the laws as written by the City Council;

D. Declare that the September 7 Ordinance violates the plain language of Va. Code § 15.2-922;

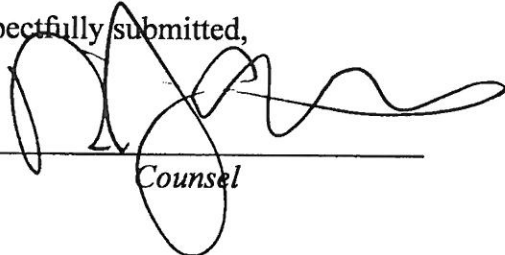
E. Declare that the September 7 Ordinance violates the authority delegated to the City Council by the General Assembly as set forth in Va. Code § 15.2-983;

F. Order that the September 7 Ordinance is stricken from the governmental regulations of the City of Virginia Beach;

G. Award Plaintiffs their costs pursuant to Va. Code § 8.01-190; and

H. Award Plaintiffs such other and further relief as this Court deems just and appropriate.

Respectfully submitted,



Counsel

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*The Virginia Association of REALTORS,  
the Hampton Roads REALTORS Association,  
Red Lion Properties, LLC, and Diane Ong*

ORD-3674

AN ORDINANCE TO AMEND SECTION 241.2 OF THE CITY ZONING ORDINANCE, PERTAINING TO SHORT TERM RENTALS AND ESTABLISHING ADDITIONAL SAFETY REQUIREMENTS

Section Amended: City Zoning Ordinance Section 241.2

FILED  
CITY CLERK

21 OCT -7 PM 1:45

CITY CLERK  
*[Signature]*

WHEREAS, the public necessity, convenience, general welfare and good zoning practice so require;

NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF VIRGINIA BEACH, VIRGINIA:

**Sec. 241.2. - Short term rental.**

Short term rentals shall be subject to the following conditions unless specifically modified by action of the city council in granting a conditional use permit or creating a short term rental overlay district:

(1) Any property utilized as a short term rental shall provide adequate off street parking for its guests. A minimum of one parking space per bedroom is required. If such parking cannot be provided on-site, the owner must submit a parking plan indicating how the parking requirement will be met. Such plan shall be reviewed and approved by the zoning administrator. Stacking of vehicles shall be allowed and no on-street parking shall be part of the plan;

(2) No events with more than fifty (50) people present, shall be held absent a special events permit. Events with more than fifty (50) people are limited to no more than three (3) events in a calendar year. No more than one hundred (100) people shall be present at any event held on the property;

(3) The owner or operator must provide the name and telephone number of a responsible person, who may be the owner, operator or an agent of the owner or operator, who is available to be contacted and to address conditions occurring at the short term rental within thirty (30) minutes. Physical response to the site of the short term rental is not required;

(4) No signage shall be on site, except that each short term rental shall have one (1), four-square foot sign, posted on the building, or other permanent structure or location approved by the zoning administrator, visible from the public street, that which identifies the property as a short term rental and provides the telephone number for the Short Term Rental Hotline in text large enough to be read from the public street. Architectural signs naming the structure are excluded; ~~from this limitation;~~



- 44  
45 (5) To the extent permitted by state law, each short term rental must maintain registration  
46 with the Commissioner of Revenue's office and pay all applicable taxes;  
47  
48 (6) There shall be posted in a conspicuous place within the dwelling a summary provided  
49 by the zoning administrator of City Code sections 23-69 through 23-71 (noise), 31-26, 31-  
50 27 and 31-28 (solid waste collection), 12-5 (fires on the beach), 12-43.2 (fireworks), and  
51 a copy of any approved parking plan;  
52  
53 (7) All refuse shall be placed in automated refuse receptacles, where provided, and  
54 comply with the requirements of City Code sections 31-26, 31-27 and 31-28;  
55  
56 (8) A short term rental shall have no more than two (2) rental contracts during any  
57 consecutive seven (7) day period;  
58  
59 (9) The owner or operator shall provide proof of liability insurance applicable to the rental  
60 activity at registration and renewal of at least one million dollars (\$1,000,000.00)  
61 underwritten by insurers acceptable to the city;  
62  
63 (10) There shall be no outdoor amplified sound after 10:00 p.m. or before 10:00 a.m.;
- 64  
65 (11) The maximum number of persons on the property after 11:00 p.m. and before 7:00  
66 a.m. ("Overnight Lodgers") shall be three (3) individuals per bedroom;  
67  
68 (12) Any short term rental that has registered and paid transient occupancy taxes to the  
69 Commissioner of the Revenue prior to July 1, 2018 shall be considered grandfathered  
70 and shall not be required to obtain a conditional use permit, but must meet the conditions  
71 of section 241.2. Any expansion of the footprint of the dwelling housing the short term  
72 rental that expands the overall square footage by more than twenty-five (25) percent or  
73 one thousand (1,000) square feet, whichever is less, shall have its grandfathered status  
74 revoked and must immediately come into compliance with the Zoning Ordinance obtain  
75 a conditional use permit to continue such use. Grandfathered status shall run with the  
76 land. However, any grandfathered short term rental that continuously remains vacant, or  
77 not used as a short term rental, for a period of two (2) years or more, starting from the  
78 date of adoption of this ordinance, shall lose its "grandfathered" designation;  
79  
80 (12.1) Any short term rental that received a conditional use permit between November 1,  
81 2019 and September 7, 2021 and that is located within a zoning district where short term  
82 rentals are not a permitted or conditional use, shall be considered grandfathered and shall  
83 be permitted to continue subject to the conditions of section 241.2 (1) through (15) and  
84 (17) as modified by the terms of the conditional use permit;  
85  
86 ~~(13) To the extent permissible under state law, interconnected smoke detectors (which~~  
87 ~~may be wireless), a fire extinguisher and, where natural gas or propane is present, carbon~~  
88 ~~monoxide detectors shall be installed in each short term rental; The property owner or~~  
89 ~~their representative shall provide to the City Planning Department permission for zoning~~



90 inspectors to inspect the short term rental property annually. Such inspection shall  
91 include: 1) at least one fire extinguisher has been installed inside the unit, in plain sight,  
92 and where it is located, 2) all smoke alarms and carbon monoxide detectors are installed  
93 in accordance with the building code in affect at the time of construction and  
94 interconnected. Units constructed prior to interconnection requirements must have a  
95 minimum of one smoke alarm installed on every floor of the structure and in the areas  
96 adjacent to all sleeping room and when activated, be audible in all sleeping rooms, and  
97 3) all smoke alarms and carbon monoxide detectors have been inspected within the last  
98 12 months, and are in good working order.

99  
100 Properties managed by Short Term Rental Management Companies certified by the  
101 Department of Planning shall only be required to be inspected every three years. The  
102 inspection for compliance with the requirements above shall be performed by the Short  
103 Term Rental Management Company and be documented on a form prescribed by the  
104 Planning Department and shall be provided during the yearly permitting process.

105  
106 Properties may be inspected annually for compliance with the requirements above by  
107 certified Short Term Rental Management Companies or certified Home Inspectors. The  
108 compliance inspection shall be documented on a form prescribed by the Planning  
109 Department and shall be provided during the yearly permit process.

110  
111 (14) Accessory structures shall not be used or occupied as short term rentals;

112  
113 (15) In addition to other remedies available for violations of the city zoning ordinance,  
114 upon the occurrence of a violation of the provisions of this section; a violation of any local,  
115 state or federal law or regulation; a violation of a condition imposed in a conditional use  
116 permit; or if the conditions for grandfathered status are no longer satisfied, the city council  
117 may revoke the conditional use permit or grandfathered status of a property after notice  
118 and hearing as provided in Code of Virginia § 15.2-2204; provided, however, that written  
119 notice as prescribed therein shall be given at least fifteen (15) days prior to the hearing.  
120

121 (16) All conditional use permits issued for short term rentals shall expire five (5) years  
122 from the date of adoption. The renewal process of the conditional use permit will be  
123 administrative and performed by the planning department; however, the planning  
124 department shall notify the city council in writing prior to the renewal of any conditional  
125 use permit for a STR, where the STR has been the subject of neighborhood complaints,  
126 violations of its conditions or violations of any building, housing, zoning, fire or other  
127 similar codes; and

128  
129 (17) A structural safety inspection report shall be provided to the city annually every three  
130 (3) years indicating all exterior stairways, decks, porches and balconies have been  
131 inspected by a licensed design professional, qualified to perform such inspection, and are  
132 safe for use. The report must indicate the maximum number of occupants permitted on  
133 each level of these structures and placards indicating the maximum number of occupants  
134 of all exterior stairways, decks, porches and balconies must be posted on each level of  
135 these structures;

Adopted by the City Council of the City of Virginia Beach, Virginia, on this 7<sup>th</sup> day of September, 2021.