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N12 – Defining Predominant Use

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There is an implied term of habitability in a residential lease. This would in turn mean a residential space must be fit to be lived in, and so shouldn't it be obvious that an office, workshop, or hobby space is not habitable?

Furthermore, the verbiage in the *Act*[1] itself provides the following:

> **Notice, landlord personally, etc., requires unit**
>
> **48** (1) A landlord may, by notice, terminate a tenancy if the landlord in good faith requires possession of the rental unit for the purpose of residential occupation for a period of at least one year by,
>
> (a) the landlord;
> (b) the landlord's spouse;
> (c) a child or parent of the landlord or the landlord's spouse; or
> (d) a person who provides or will provide care services to the landlord, the landlord's spouse, or a child or parent of the landlord or the landlord's spouse, if the person receiving the care services resides or will reside in the building, related group of buildings, mobile home park or land lease community in which the rental unit is located. 2006, c. 17, s. 48 (1); 2017, c. 13, s. 7 (1). [emphasis added]

When viewed in combined with Interpretation Guideline G12[2] which confirms:

> Section 48(1) of the RTA permits the landlord to give notice of termination to a tenant if the landlord, in good faith, requires the unit for residential occupation

[1] *Residential Tenancies Act*, 2006, S.O. 2006, c. 17 s.48(1)
[2] Eviction for Personal Use, Demolition, Repairs and Conversion, 2

> for a period of at least one year by the landlord, a family member or a caregiver. This notice is often referred to as a "Form N12". [emphasis added]

this should be relatively straight-forward. However, residential occupancy is not defined in the *Act*, or in the Interpretation Guidelines, so it has been left open to the interpretation of the courts. This interpretation has been clouded by the predominant use of the property.

Predominant Use

There are really two lines of thinking on the predominant use of a rental space. The first, in *Fleming v. Dileandro*[3] where it was held that "residential occupation" is satisfied where the predominant use of the complex, as a whole, is not for scholarly, professional, business, or other such purposes. Which is to say that a landlord residing in a home wishing to re-take possession for the purposes of storage, office, or business should be entitled to do so as the primary use of the house remains residential. This line of thinking was upheld in matters such as TSL-72600 (Re)[4] where it was stated:

> In the instant case, the proposed use of the rental unit as a home office/study is consistent with residential occupation, as it will not constitute the predominant use of the rental complex as a whole by the Landlord and his spouse. Therefore, I find that the Landlord in good faith requires possession of the rental unit for purposes of residential occupation,

The other line of thinking is demonstrated in *EAL-07954*[5] which referenced *Fleming*, but ultimately determined that predominant use of the rental unit should be considered, not the use of the complex or house. In this instance, a landlord who lived on the top two floors applied to the Board for permission to re-take possession of the basement rental unit for the purposes of operating his business. The Board dismissed the application.

In more recent years, the Divisional Court has determined in the matter of *Sertic v Mergarten*[6]:

> I also do not find any basis to interfere with the Vice-Chair's conclusion as to the proper meaning of the term "residential occupation". In my view, the Vice-Chair's interpretation, that requiring the premises for the purposes of storage and other uses directly related to the landlord's otherwise personal occupation of other portions of the premises meets the requirement of residential occupation, is a reasonable one.

It appears to now stand that the residential occupation of a rental unit is determined not by the use of the rental unit, but by the use of the full property.

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[3] *Fleming v. Dileandro*, [2005] O.R.H.T.D. No. 34 (O.R.H.T.)
[4] *TSL-72600 (Re),* 2005 CanLII 91265 (ON LTB) at para 2 and 12
[5] *EAL-07954*, 2008 LNONLTB 10 (L.T.B.)
[6] *Sertic v Mergarten*, 2017 ONSC 263 (CanLII) at para 8

While this provides a brief overview, the law can be very complex, and many aspects are case specific. If you have an issue, call a paralegal at Cochrane Moore LLP in Oshawa for a free consultation.

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