Municipalities - vacation rentals - dwelling unit

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Subject:
Municipalities - vacation rentals - dwelling unit

Mr. Nicholas Beninate
City Attorney, City of Mexico Beach
Hand Arendall Harrison Sale LLC
16901 Panama City Beach Parkway
Suite 300
Panama City Beach, Florida 32413

RE: DWELLING UNIT – VACATION RENTALS -- MUNICIPALITIES –
§ 509.032(7) does not prohibit a municipality from allowing an accessory building to be used only as a sleeping facility, because such building does not constitute a “dwelling unit,” which is a building where people can live and can thus be used as a vacation rental. Accordingly, an ordinance allowing an accessory structure located on the premises of a house or dwelling unit to be used for sleeping, but prohibiting it from being independently rented out, would not be barred by § 509.032(7), Fla. Stat. (2018), because that provision bars local laws that prohibit “vacation rentals.” §§ 509.032(7) and 509.242(1)(c), Fla. Stat. (2018).

Dear Mr. Beninate:

We have received your letter on behalf of the City Council of the City of Mexico Beach, requesting an opinion on the following questions:

1. Does a structure where people are permitted to sleep that is not a “dwelling unit” or “house” pursuant to local law, meet the definition of a “vacation rental” under state law, entitling it to a vacation-rental license?

2. If the answer is “no,” and if a vacation-rental license has been granted for a house or dwelling unit, is it permissible under that license to conduct transient rentals of an accessory structure independent from the house or dwelling unit?

In sum:

A “sleeping facility” is not a “house or dwelling unit,” and thus is not a “vacation rental” under section 509.242(1)(c), Florida Statutes (2018). Accordingly, an ordinance allowing an accessory structure located on the premises of a house or dwelling unit to be used for sleeping, but prohibiting it from being independently rented out, would not be barred by section 509.032(7), Florida Statutes (2018), because that provision bars local laws that prohibit “vacation rentals.”

Factual Background:

In the Land Development Regulations for Mexico Beach, section 2.04.00 regulates “the installation, configuration, and use of accessory structures” on property, “to ensure that they are not harmful either aesthetically or physically to residents and surrounding areas.” The principal structure on a lot is “the dwelling unit, house, or commercial use located on the lot,” and an “accessory structure” on the same lot is “of a nature customarily incidental and subordinate to the principal structure.”[1] In residential areas, allowable accessory structures include buildings used as toolsheds, garages, storage sheds, gazebos, doghouses, bathhouses, etc.

You report that the City is considering changing the ordinances to allow accessory structures that include plumbing but prohibit kitchen facilities to be used as bedrooms or sleeping quarters. The City is not certain whether such sleeping quarters would be classified as “vacation rentals,” which are regulated under chapter 509, Florida Statutes. More specifically, the City questions whether it could enact an ordinance “that would allow [an] accessory structure to be used for sleeping quarters but prohibit that accessory structure from being a stand-alone rental unit.” An answer will enable the City to make an informed policy decision as to whether to change the local law.

Applicable Statutes:

Under section 509.241(1), Florida Statutes (2018), each public lodging establishment must be licensed by the Division of Hotels and Restaurants of the Department of Business and Professional Regulation. The regulation of public lodging establishments has been preempted to the state since 1993 under section 509.032(7), Florida Statutes.[2] A public lodging establishment is classified and defined within section 509.242, as a hotel, motel, vacation rental, nontransient apartment, transient apartment, bed and breakfast inn, and timeshare project. Your concern is whether an accessory structure used as sleeping quarters could be classified as a “vacation rental.”

Until 2011, residential properties rented typically to tourists on vacation were classified as “resort condominiums” and “resort dwellings,” defined in section 509.242(1)(c) and (g), Florida Statutes (1993) as follows:

“*Resort condominium*. – A resort condominium is any unit or group of units in a condominium, cooperative, or time-share plan which is rented more than three times in a calendar year for periods of less than 30 days or 1
calendar month, whichever is less, or which is advertised or held out to the public as a place regularly rented for periods of less than 30 days or 1 calendar month, whichever is less.

* * *

Resort dwelling.—A resort dwelling is any individually or collectively owned one-family, two-family, three-family, or four-family dwelling house or dwelling unit which is rented more than three times in a calendar year for periods of less than 30 days or 1 calendar month, whichever is less, or which is advertised or held out to the public as a place regularly rented for periods of less than 30 days or 1 calendar month, whichever is less.”

Before June 1, 2011, local governments were enacting local laws and ordinances that restricted

or prohibited the rental of residential properties as resort dwellings.[3] In Chapter 2011-119, the Legislature did two things that are pertinent to this discussion. First, they combined the terms and definitions of “resort condominium” and “resort dwelling” under the new term “vacation rental.”[4] Section 509.242(1)(c) now provides:

“A vacation rental is any unit or group of units in a condominium or cooperative or any individually or collectively owned single-family, two-family, three-family, or four-family house or dwelling unit that is also a transient public lodging establishment but that is not a timeshare project.”

“Transient public lodging establishment” is defined in section 509.013(4)(a)1. as “any unit, group of units, dwelling, building, or group of buildings within a single complex of buildings which is rented to guests more than three times in a calendar year for periods of less than 30 days or 1 calendar month, whichever is less, or which is advertised or held out to the public as a place regularly rented to guests.”

Second, the Legislature expanded the preemption provision of section 509.032(7) by adding subsection (7)(b), which provided:

“A local law, ordinance, or regulation may not restrict the use of vacation rentals, prohibit vacation rentals, or regulate vacation rentals based solely on their classification, use, or occupancy. This paragraph does not apply to any local law, ordinance, or regulation adopted on or before June 1, 2011.”

The Legislature subsequently determined that this provision was inhibiting local governments from amending existing regulations on vacation rentals for fear of invalidating them altogether. The Legislature therefore amended section 509.032(7)(b), in Chapter 2014-71, so that it now provides:

“A local law, ordinance, or regulation may not prohibit vacation rentals or regulate the duration or frequency of rental of vacation rentals. This paragraph does not apply to any local law, ordinance, or regulation adopted on or before June 1, 2011.”

The Staff Analysis indicates that under this provision as amended, local regulations or ordinances enacted prior to June 1, 2011, that prohibited or restricted vacation rentals would continue to be enforced, but that after that date, new ordinances may only address regulatory matters, such as “noise, parking, registration, and signage requirements for vacation rentals,” but cannot prohibit vacation rentals or restrict the duration or frequency of such rentals.[5]

Question 1:

Because an accessory structure used only for sleeping is neither a “unit or group of units in a condominium or cooperative,” nor a “single-family, two-family, three-family, or four-family house,” the question is whether sleeping quarters could be considered a “dwelling unit” under section 509.242(1)(c). If so, an accessory structure used only for sleeping would constitute a “vacation rental,” and the City would be barred from prohibiting a property owner from renting the structure out to guests as a house or dwelling unit independent from the principal structure on the

property.[6]

There is no separate definition of “dwelling unit” as used in the definition of “vacation rental.” When the meaning of a statutory term is uncertain, it should be given its plain and ordinary meaning, based upon construction of the term found in other statutory provisions, case law, and dictionary definitions.[7] As has been observed, “[t]he meaning of the word ‘dwelling’ may vary with the context of its usage.”[8]

Dictionary

The term “dwelling house” or “dwelling” in the civil context is defined in *Black’s Law Dictionary* as: “1. The house or other structure in which one or more people live; a residence or abode. 2. Real estate. The house and all buildings attached to or connected with the house.”[9]

Mexico Beach Code

The Land Development Regulations of the City of Mexico Beach, section 2.00.01, define “dwelling unit” as: “A single housing unit providing complete, independent living facilities for one housekeeping unit, including permanent provisions for living, sleeping, eating, cooking, and sanitation.”

Case Law

Florida courts have addressed the meaning of “dwelling” or “dwelling unit” in a limited number of cases. In *State ex rel. Lacedonia v. Harvey*,[10] the Florida Supreme Court was asked to decide an appeal in which a property owner argued that an addition to her apartment house was not a dwelling required to have a five-foot setback pursuant to a zoning ordinance, because the addition would be used for a business. Observing that the ordinary dictionary definition of “dwelling” was “a building used for human habitation,” the Court concluded that it was plain that the municipal authorities intended that the term “should apply to all buildings ‘used for human habitation’ or living quarters, without regard to the number or nature of units in a particular structure, including apartment houses[.]”[11] The Court concluded that the setback requirement applied to the apartment building addition.

In *Bay County v. Harrison*,[12] Bay County approved a resort condominium development that would consist of 279 living/rental units on two acres. A nearby resident challenged the approval as violative of the Comprehensive Plan, which limited density in the area to only 15 “dwelling units” per acre. The circuit court found for the plaintiff, but the First District reversed, concluding that the density restriction for dwelling units in the Comprehensive Plan did not apply to a resort condominium. The court observed that “resort condominium” was defined in the 2007 version of section 509.242(1)(c) as a unit or group of units in a condominium rented to members of the public more than three times per year for a month or less. Based upon this definition, as well as evidence in the case, the court stated that the resort condominium was “the substantial equivalent” of a hotel, which, unlike a residence or dwelling, which one lives in, is a “permanent structure that accommodates temporary visitors.”[13]

The court concluded that the density limitation of 15 dwelling units per acre was a “housing”

restriction, that resort condominium units were not “dwelling units,” and thus the density restriction did not apply.

“The term ‘housing’ carries a dimension of permanence: ‘housing’ is ‘shelter; lodging; dwellings provided for people.’ *Webster’s New Collegiate Dictionary* 550 (5th ed. 1973). ‘Dwelling’ is ‘a building or other shelter in which people live: house.’ *Id.* at 352…. Both the terms ‘dwelling’ and ‘housing’ in the Plan evoke a sense of permanency – they are places where ‘people live’ – that could not reasonably be ascribed to a class of temporary or transient accommodations…secured by tourists on their Gulf beach vacations.”[14]

In *Miami County Day School v. Bakst*,[15] the circuit court concluded, and the Third District agreed, that the houseboat of a couple who owed tuition to a school, constituted a “dwelling house,” and thus was a homestead, and therefore exempt from forced sale to pay the debt. The court characterized houseboats as “self-contained living environments, designed for use as residences rather than transportation.”[16] This particular houseboat was the owner’s exclusive residence, had four bedrooms and three bathrooms, and was “fully equipped for occupancy and supplied with utilities via dock connections,” including water and electric hookups.[17]

In these cases,[18] a dwelling is a place where people could live semi-permanently, rather than a room that people stay in temporarily. A “house or dwelling unit” is complete unto itself as a habitation and thus is suited to be rented out to guests as a vacation rental, unlike sleeping quarters.[19] Separate sleeping quarters, standing alone, may enhance the value of the principal dwelling to either a homeowner or a renter by increasing the occupancy capacity of the principal dwelling, but without more, such as a permanent area for food preparation, sleeping quarters are not a “dwelling unit” sufficient to constitute an independent “vacation rental” under section 509.242(1)(c).

It is therefore my opinion that the City of Mexico Beach may enact an ordinance allowing an accessory structure to be used as sleeping quarters but not rented out independently, without violating the preemption provision of section 509.032(7).

Question 2:

You also inquire whether the license that permits a primary dwelling to be rented out as a vacation rental could be applied instead to permit rental of an accessory sleeping structure. The language of the licensing provision, section 509.241(1), Florida Statutes (2018), and implementing rule 61C-1.002, authorize licensing of a dwelling, which as shown above, cannot be a stand-alone sleeping facility.

Section 509.241(1), provides, in pertinent part: “Each public lodging establishment … shall obtain a license from the division. Such license may not be transferred from one place or individual to another.”

Florida Administrative Code rule 61C-1.002, Licensing and Inspection Requirements, provides, in pertinent part:

“(4) Public lodging establishments as defined in section 509.013(4), F.S., are licensed in

accordance with the classifications in section 509.242, F.S., and:
(a) Transient establishments – are licensed as hotels, motels, transient apartments, bed and breakfast inns, vacation rentals and timeshare projects. Vacation rentals are further classified as condominiums or dwellings. A vacation rental condominium license will be issued for a unit or group of units in a condominium or cooperative. *A vacation rental dwelling license will be issued for a single-family house*, a townhouse, or a unit or group of units in a duplex, triplex, quadruplex, or other dwelling unit that has four or less units collectively." (Emphasis added.)

Accordingly, when the Division of Hotels and Restaurants licenses a house or dwelling unit as a vacation rental, an accessory structure that only provides sleeping quarters may be included with the principal dwelling, but the dwelling license cannot be used to independently rent the accessory structure.

Sincerely,

Pam Bondi
Attorney General

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[1] City of Mexico Beach, Land Development Regulations, amended Aug. 12, 2014, section 2.04.00, at 34-36. An attached structure is considered part of the principal structure rather than an accessory structure.

[2] Ch. 93-53, §1, Laws of Fla. (1993). Until 2011, the provision stated, with regard to preemption of lodging regulation: "The regulation and inspection of public lodging establishments and public food service establishments … are preempted to the state."

[3] *See* House of Representatives Final Bill Analysis, Local & Federal Affairs Committee, CS/HB 307, p. 2, dated June 19, 2014.
[4] *See* House of Representatives Final Bill Analysis, CS/CS/CS/HB 883, pp. 3 and 5, dated June 28, 2011 ("Vacation rentals are properties generally designed for residential purposes, such as single- and -multi-family homes which are rented out to tourists on vacation. In Florida, they are divided into two main categories: resort condominiums and resort dwellings and are regulated as transient public lodging establishments. … The bill reclassifies resort condominiums and resort dwellings as 'vacation rentals,' a new classification combining the two previous classes.").

[5] *See* House of Representatives Final Bill Analysis, Local & Federal Affairs Committee, CS/HB 307, p. 3, dated June 19, 2014.

[6] *See* Op. Att'y Gen. Fla. 16-12 (2016) (an ordinance that "could have the effect of prohibiting a statutorily eligible housing unit from being used as a vacation rental" would exceed the municipality's regulatory authority).

[7] *See, e.g., Reform Party of Fla. v. Black*, 885 So. 2d 303, 312 (Fla. 2004); *JPG Enters., Inc. v.*

McLellan, 31 So. 3d 821, 824 (Fla. 4th DCA 2010).

[8] *State ex rel. Lacedonia v. Harvey*, 68 So. 2d 817, 818 (Fla. 1953) (citing *Michaels v. Township Comm. of Pemberton Tp.*, 67 A.2d 324, 327 (N.J. Sup. Ct.) ("The term 'dwelling' is one of multiple meanings. It does not always have the same sense in all cases, for it may mean one thing under an indictment for burglary or arson, another under the homestead law, another under the pauper law and another in a contract or devise.")).

[9] *Black's Law Dictionary* (10th ed. 2014). "Habitation," in turn, is defined as "[a] dwelling place; a domicile."

[10] *State ex rel. Lacedonia v. Harvey*, 68 So. 2d 817 (Fla. 1953).

[11] *Id.* at 818.

[12] 13 So. 3d 115 (Fla. 1st DCA 2009).

[13] *Id.* at 119.

[14] *Id.* at 119-20.

[15] 641 So. 2d 467 (Fla. 3d DCA 1994).

[16] *Id.* at 469.

[17] *Id.*

[18] *See also Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1214-15 (11th Cir. 2008) (concluding that a drug- and alcohol-treatment halfway house was a "dwelling" and thus covered by the Fair Housing Act, wherein the pertinent statute defined "dwelling" as "a residence," observing that "the more occupants treat a building like their home – e.g., cook their own meals, clean their own rooms and maintain the premises, do their own laundry, and spend free time together in common areas – the more likely it is a 'dwelling.'"); *Cochran v. Bentley*, 251 S.W.3d 253, 260-61 (Ark. 2007) (concluding that a two-story building, which was heated and cooled and contained an office with a telephone line, two restrooms, and a hot-water heater, was not a "dwelling," which is "a place to live in." The structure did not contain "a kitchen, shower, or living area of some sort," and thus could not "serve as a place in which to live." Instead, the owner lived in a home on the adjacent lot. The structure was therefore barred by the subdivision's restrictive covenant that allowed one dwelling per lot plus a garage and outbuildings that are "incidental to residential use of the lot.").

[19] An Internet search for short-term vacation rentals shows that there is a market for "sleeping-room only" rentals, such as a studio with a full bathroom and no kitchen. As discussed in this opinion, however, such units are not encompassed by Florida's existing definition of "vacation rental."