Vacation rental: municipal regulation by zoning overlay

Number: AGO 2022-01

Date: November 30, 2022

Mr. Robert Jagger
Daytona Beach City Attorney
P.O. Box 2451
Daytona Beach, FL 32115

Dear Mr. Jagger:

On behalf of the City of Daytona Beach, Florida ("City"), you asked for an opinion addressing the following rephrased question:

> Consistent with section 509.032(7)(b), Florida Statutes, which prohibits any "local law, ordinance, or regulation" that regulates the frequency of rental of vacation rentals, may the City superimpose an overlay zoning district in a designated area over only certain portions of one or more underlying base zoning districts, thereby authorizing vacation rentals not otherwise currently allowed?

As described by the City, the proposed zoning overlay ordinance would authorize a limited number, proportion, or percentage of vacation rentals to be located within a subset of properties that comprise neither "Tourist zoning districts" nor specifically designated "Redevelopment zoning districts," which are the only zoning classifications in which vacation rentals are currently allowed.1 All other properties located within the larger set of similarly designated base zoning districts, however, would continue to be subject to existing vacation rental prohibitions.
In sum:

By creating a limited geographical exception to the otherwise comprehensive base zoning district vacation rental prohibition, the proposed zoning overlay ordinance would "regulate the . . . frequency of rental" of vacation rentals in the underlying base zoning districts. Therefore, the City may not implement the proposed zoning overlay ordinance consistent with the constraints of section 509.032(7)(b), Florida Statutes.

Background

Section 509.032(7)(b), Florida Statutes, states: "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." Consistent with the City's request, for purposes of this opinion, I assume that housing units within the City that meet the statutory definition of vacation rentals but are not currently authorized for such use are subject to local restrictions grandfathered under section 509.032(7)(b), and you have cited an opinion from the circuit court for the Seventh Judicial Circuit2 to support that premise.

The City identified a portion of its beachside area "commonly considered to be a core Tourism area" in which many "residential neighborhoods . . . have suffered from economic stagnation when compared to other traditionally residential areas of the City." 3 The City proposes to "encourage residential redevelopment and enhance residential property values in this area" 4

Under the City's New Land Development Code ("LDC") as it currently exists, the "other accommodations" designation allows for vacation rentals. Currently, this designation occurs in Tourist zoning districts. Adopting the BTO District would provide for "other accommodations" uses on residential properties within the District, thereby authorizing rental of vacation rentals in the area.5

As further explained by the City, under the subject proposal, "[i]nstead of assigning 'other accommodations' as a permitted use for one or more zoning districts in the New LDC Use Tables[,] the City's Planning Staff proposes to amend the LDC to create a new overlay zoning district to authorize 'other accommodations' as a permitted use for any property subject to the overlay zoning designation." 6 Thus, the proposed overlay zoning district would be superimposed over portions of one or more underlying base zoning districts and "modify or supersede standards applied by the underlying base zoning district(s)" 7 *See generally* City of Daytona Beach, Fla., Code of Ordinances § 4.9.A. by permitting vacation rentals where they would otherwise be prohibited by existing base zoning restrictions for uses outside the overlay district.

Analysis

Section 509.242(1)(c) defines a vacation rental as "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." A "transient public lodging establishment," in turn, is defined 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." 8
Because no other qualifications or limitations are included in the statutory definition, it appears that, absent operation of a viable grandfathered local prohibition, "any unit, group of units, or house as enumerated in section 509.242(1)(c), Florida Statutes, is eligible to be used as a transient public lodging establishment and, hence, a vacation rental." 9

Section 509.032(7)(b), Florida Statutes, prohibits local governments from enacting any law, ordinance, or regulation that regulates the "duration or *frequency of rental*" of vacation rentals.10 This office has interpreted section 509.032(7)(b) to allow some regulation of vacation rentals as long as the regulation does not contravene the statute's terms.

In 2014, the City of Wilton Manors asked this office whether it could use zoning ordinances to regulate the location of vacation rentals. This office concluded:

> [W]hile a local government may regulate vacation rentals, it may not enact a local law, ordinance, or regulation which would operate to prohibit vacation rentals. To the extent a zoning ordinance addresses vacation rentals in an attempt to prohibit them in a particular area where residences are otherwise allowed, it would appear that a local government would have exceeded the regulatory authority granted in section 509.032(7)(b), Florida Statutes.11

Later, in Attorney General Opinion 2016-12 (2016), this office considered that same city's proposed municipal zoning ordinance that, as relevant here, "would set distance separation requirements between vacation rentals . . on city streets or in city neighborhoods." In essence, such an ordinance would allow any eligible unit situated within an identified base zoning designation to be used as a vacation rental *unless such unit is located next to an existing vacation rental*. The Attorney General concluded that such an ordinance would be inconsistent with section 509.032(7)(b), reasoning:

> An ordinance requiring certain distances between vacation rentals . . . could result in a prohibition against using eligible units as vacation rentals when other existing units have already satisfied the spacing . . . formulae. Although the proposed ordinance would not absolutely forbid vacation rentals in the City of Wilton Manors, a distance separation requirement . . . [has] the express purpose of prohibiting units above a certain threshold from being used as vacation rentals, which is contrary to section 509.032(7)(b), Florida Statutes. When there is any doubt as to whether a municipal ordinance may impair the operation of a statute, the doubt must be resolved in favor of the statute and against the ordinance.12

The plain and ordinary meaning of the statutory phrase to "regulate the duration or frequency of rental" would include an ordinance that permits vacation rental uses in some areas while prohibiting vacation rentals in others for properties with the same base land use classifications. When the effect of a proposed ordinance is to limit the frequency of vacation rentals in a set of properties in designated base zoning districts containing units that, but for previously grandfathered prohibitions, would be eligible for vacation rental use, the proposed local government action is not consistent with section 509.032(7)(b).

Here, the City may not, consistent with section 509.032(7)(b), impose piecemeal zoning regulations that carve out a percentage of areas having the same underlying zoning district designations for relief from its grandfathered prohibition on vacation rentals, while leaving all other such areas subject to the preexisting use restrictions. The proposed ordinance would have the practical effect of allowing any eligible unit located in areas having the same base zoning district designations to be used as a vacation rental *unless such unit is located outside the zoning overlay area*. It makes no difference whether the proposed regulatory restriction on frequency is accomplished by imposing a spacing formula in a local law of citywide application or by designating a limited geographical area of the City in which vacation rentals would be newly allowed across included base zoning district designations, while continuing to prohibit vacation rentals in all other areas having the same base zoning district designations. Although (as with the proposed Wilton Manors ordinance) the proposed City zoning ordinance would allow a greater percentage of residential units within the City to be used as vacation rentals, it would do so in a disparate and limited manner, using differentiating criteria that the applicable statutory

provisions do not authorize.

Conclusion

Accordingly, unless and until judicially or legislatively determined otherwise, it is my opinion that, because the proposed ordinance would have the effect of regulating the "frequency" of vacation rentals by exempting only a percentage of otherwise eligible housing units in the base zoning district designation categories from the preexisting, overarching prohibition against vacation rentals currently imposed by grandfathered base zoning district provisions, the City's proposed zoning overlay ordinance would exceed the regulatory authority granted in section 509.032(7)(b).

Sincerely,

Ashley Moody
Attorney General

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1 Letter from Robert Jagger to Ashley Moody dated April 7, 2022, at 2 (on file with the Office of the Florida Attorney General).

2 *Mary L. Synk v. City of Daytona Beach*, No. 2017-31231-CICI (Fla. 7th Cir. Ct. May 14, 2019), *aff'd*, 300 So. 3d 657 (Fla. 5th DCA 2020) (table).

3 Letter from Robert Jagger to Teresa L. Mussetto dated May 19, 2022, at 3-4 (on file with the Office of the Florida Attorney General).

4 *Id.* at 4.

5 *Id.* at 3-4.

6 *Id.* at 3.

7 *See generally* City of Daytona Beach, Fla., Code of Ordinances § 4.9.A.

8 § 509.013(4)(a)(1), Fla. Stat. (2022).

9 Op. Att'y Gen. Fla. 2016-12 (2016).

10 *See* Webster's Third New International Dictionary of the English Language Unabridged 909 (1993) (defining "frequency" as the "number of individuals falling within a single class when objects are classified according to variations in a set of one or more specified attributes"); *see generally Seagrave v. State*, 802 So. 2d 281, 286 (Fla. 2001) ("When necessary, the plain and ordinary meaning of words can be ascertained by reference to a dictionary.").

11 Op. Att'y Gen. Fla. 2014-09 (2014).

12 Op. Att'y Gen. Fla. 2016-12 (2016), citing *Metropolitan Dade County v. Chase Federal Housing Corp.*, 737 So. 2d 494, 504 (Fla. 1999) (quoting *Rinzler v. Carson*, 262 So. 2d 661, 668 (Fla. 1972) (additional citations omitted)).