Owner-builder exemption – townhouse units

Number: AGO 2023-01

Mr. D. Andrew Smith, III

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Dear Mr. Smith:

This office received your letter requesting a legal opinion on behalf of the Town of Ponce Inlet ("Town"). In it, and in information you provided subsequent to submitting the request, you ask substantially the following question:

Does the owner-builder exemption from requirements of chapter 489, part I, which is codified at section 489.103(7)(a)(1), Florida Statutes, apply where a single unit owner seeks to make improvements to an individual dwelling unit in a building containing four such interconnected units?

In sum:

Unless and until judicially or legislatively clarified, I conclude that the exemption provided to persons building or improving "farm outbuildings or one-family or two-family residences" owned by such persons and not offered for sale or lease when "acting as their own contractor and providing direct, onsite supervision themselves of all work not performed by licensed contractors" does not apply to owners of individual dwelling units that are part of a single building comprised of four such units.

Background

The Town has received applications from property owners living in buildings that consist of four dwelling units per building. Each applicant seeks an owner-builder exemption that would allow the owner to make improvements to a single unit in the building. Such units are arranged in a row lengthwise across the building (i.e. the front doors all face the same direction); each unit is owned in fee simple ownership; each unit has a private front door, back door, and garage; each unit shares at least one common wall with another unit (interior units have two common walls); and the building has a common roof (i.e., one roof for the whole building). Thus, each residential building contains four individual units, each of which has a separate owner who lives in his or her own unit.[1]

Analysis

Deeming it "necessary in the interest of the public health, safety, and welfare to regulate the construction industry," the Legislature enacted part I of chapter 489, Florida Statutes.[2] Various sections throughout chapter 489 refer to types of dwellings and non-residential buildings. Among these are one-family (or single-family) residence; two-family residence (or duplex); three-family residence; quadruplex housing; townhome; townhouse; condominium unit or cooperative unit; and farm outbuilding.[3]

Section 489.103(7)(a)(1), Florida Statutes, provides an exemption from licensing requirements codified in part I of chapter 489 for property owners acting as their own contractors in building or improving "farm outbuildings or one-family or two-family residences." In pertinent part, it provides:

This part does not apply to:

(7)(a) Owners of property when acting as their own contractor and providing direct, onsite supervision themselves of all work not performed by licensed contractors:

1. When building or improving farm outbuildings or one-family or two-family residences on such property for the occupancy or use of such owners and not offered for sale or lease, or building or improving commercial buildings, at a cost not to exceed $75,000, on such property for the occupancy or use of such owners and not offered for sale or lease. In an action brought under this part, proof of the sale or lease, or offering for sale or lease, of any such structure by the owner-builder within 1 year after completion of same creates a presumption that the construction was undertaken for purposes of sale or lease.

The statute also includes a lengthy disclosure statement that the local permitting agency is required to provide to each applicant in connection with an owner's application for an exemption. It reflects that the applicant understands the scope of the exemption and that, if the applicant violates any limitation of the exemption, "the law will presume that [the applicant] built or substantially improved" the residence or farm outbuilding in violation of the exemption. § 489.103(7)(c), Fla. Stat. (2022).

To qualify for the exemption, section 489.103(7)(a)(1) requires that the owner of the subject residence occupy or use, and not offer for sale or lease, the entire one-family or two-family building. The exemption's inapplicability to owners of duplexes where one of the units is leased indicates that the Legislature intended the exemption to apply to a single owner rather than two separate owners of units in a two-unit building.[4]

The Town's question appears to involve applicants who own residential townhomes or townhouse units. A "townhouse" ("[a]lso termed townhome") is defined in Black's Law Dictionary as a "dwelling unit having [usually] two or three stories and often connected to a similar structure by a common wall and (particularly in a planned-unit development) sharing and owning in common the surrounding grounds." Thus, the Town appears to be asking whether a townhouse or townhome unit is included in the Legislature's designation of one-family residence, for purposes of the exemption provided by section 489.103(7)(a)(1). For the following reasons, I conclude that they are not.

Throughout chapter 489, the Legislature opted to refer to different types of structures.[5] In one instance where the Legislature intended its reference to a "single-family" residence to also mean a townhouse, it specifically signaled such intent by adding the expansion word, "including."[6] Section 489.117(4)(d) allows certain persons to undertake the "construction, remodeling, repair, or improvement of single-family residences, including a townhouse as defined in the Florida Building Code . . . ." (Emphasis added.) By using the phrase "including a townhouse," the Legislature indicated it intended to expand the meaning of "single-family residence" in that particular provision to include townhouse dwelling units. In addition, this office has confirmed that "single-family dwelling" did not mean "townhouse" in a statute that provided an exception to certain sprinkler system requirements.[7]

In another instance in which the Legislature intended to include townhomes in addition to one-family and two-family residences, it specifically stated such: in contrast to section (7)(a)(1), section (7)(a)(4) provides criteria for an exemption for completing the requirements of a building permit that applies to owners of "a one-family or two-family residence, townhome, or an accessory structure of a one-family or two-family residence or townhome or an individual residential condominium unit or cooperative unit." (Emphasis added.) Section (7)(a)(4) further distinguishes itself from section (7)(a)(1) by providing that an owner who qualifies for the exemption under section (7)(a)(4) need not occupy the dwelling or unit for at least 1 year after completion of the project.

Lastly, the Legislature has explicitly expanded the meaning of "residence" where it has intended to do so. In section 489.1402(i), Florida Statutes ("Homeowners' Construction Recovery Fund; definitions"), the Legislature created a unique definition for "residence," specifying that the definition applies to sections 489.140 through 489.144, Florida Statutes. The statute defines "residence" as "a single-family residence, an individual residential condominium or cooperative unit, or a residential building containing not more than two residential units in which the owner contracting for the improvement is residing or will reside 6 months or more each calendar year upon completion of the improvement." In contrast, the Legislature has not, in section 489.103(7)(a)(1), included language similar to that used in sections 489.103(7)(a)(4), 489.117(4)(d), or 489.1402(i) to explicitly include townhome structures.

Conclusion

Based on the foregoing, unless and until judicially or legislatively clarified, I conclude that the owner-builder exemption provided in section 489.103(7)(a)(1) does not apply to owners of individual dwelling units that are part of a single building comprised of multiple units, each of which is owned by a different owner.

Sincerely,

Ashley Moody

Attorney General

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[1] This background information was provided in the original opinion request and in a subsequent email from D. Andrew Smith, III to Teresa L. Mussetto dated March 9, 2023 (on file with the Office of the Attorney General).

[2] § 489.101, Fla. Stat. (2022).

[3] See §§ 489.103, 489.105, 489.113, 489.115, 489.117, 489.503, 489.505, Fla. Stat. (2022).

[4] The interpretation this office set forth in Florida Attorney General Opinion 89-68 (1989) supports this observation. At the time, the statute only applied the exemption to each one- or two-family residence that the owner did not offer "for sale." On that basis, this office opined that the exemption set forth in section 489.103(7), Florida Statutes (1988 Supp.), applied to the "owner of property who builds or improves a two-family residence on such property and lives in one of the units while leasing the other unit." Following the date of that opinion, the Legislature amended the statute to prohibit the owner from offering the qualifying residences for either "sale or lease." (Emphasis added.)

[5] See note 3, supra.

[6] See generally White v. Mederi Caretenders Visiting Servs. of Se. Fla., LLC, 226 So. 3d 774, 781 (Fla. 2017) (observing the "conventional rule in Florida that the Legislature uses the word 'including' in a statute as a word of expansion, not one of limitation").

[7] Op. Att'y Gen. Fla. 97-89 (1997) ("While a townhouse unit may be used as a single-family dwelling, the structure is that of multiple attached units."); cf. § 481.203, Fla. Stat. (2022) (defining—for purposes of part I of chapter 481 only—a "townhouse" as a "single-family dwelling unit not exceeding three stories in height which is constructed in a series or group of attached units with property lines separating such units," and specifying that each "townhouse shall be considered a separate building . . . .").