

October 21, 2009

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Re: Law and Policy Regarding Floating Homes (MASGP 09-008-12)

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Dear Lewis,

Please find attached our analysis of the regulation of floating homes. The attached information is intended as advisory research only and does not constitute legal representation of the Middle Peninsula Planning District Commission or its constituents. It represents our interpretations of the relevant laws and regulations. As we understand it, the Commission would like information on how other states and localities regulate and manage floating homes within their respective jurisdictions in order to evaluate how local governments in Virginia might regulate floating homes.

State Definitions

First, I performed a search of other state laws and regulations regarding floating homes. Several states have “floating home” definitions. Some states use the term “floating home,” while others use “floating house.”

California defines “floating home” as a structure which is all of the following:

- (1) It is designed and built to be used, or is modified to be used, as a stationary waterborne residential dwelling.*
- (2) It has no mode of power of its own.*
- (3) It is dependent for utilities upon a continuous utility linkage to a source originating on shore.*
- (4) It has a permanent continuous hookup to a shoreside sewage system. (CAL. HEALTH & SAFETY CODE § 18075.55.)*

In Georgia, “live-aboard” means a floating vessel or other water craft which is moored to a dock, tree, or piling or anchored in the estuarine waters of the state and is utilized as a human or animal abode. Live-aboards include but are not limited to monohulls, multihulls, houseboats, floating homes, and other floating structures which are used for human or animal habitation. (GA. CODE ANN. § 12-5-282)

In Idaho, “floating home” is defined as

[A] floating structure which is designed and built to be used, or is modified to be used, as a stationary waterborne residential dwelling, has no mode or power of its own, is dependent for utilities upon a continuous utility linkage to a source originating on shore, and has a permanent continuous connection to a sewage system on shore. (IDAHO CODE ANN. § 55-2704; see also IDAHO ADMIN. CODE r. 20.03.04.010)

Maryland defines “floating home” as

[A]ny vessel, whether self-propelled or not, that: (i) Is used, designated, or occupied as a dwelling unit or place of business or for any private or social club; and (ii) Has a volume coefficient that is greater than 3,000 square feet, which is based on the ratio of the habitable space of the vessel measured in cubic feet and the draft of the vessel measured in feet of depth” and includes “ a structure that: (i) [i]s constructed on a barge that is primarily immobile and out of navigation; or (ii) [f]unctions substantially as a land structure while the vessel is moored or docked in the State. (MD. ANN. CODE art. 25, § 234A)

The New Jersey Department of Environmental Protection defines floating home as “any waterborne structure designed and intended primarily as a permanent or seasonal dwelling, not for use as a recreational vessel, which will remain stationary for more than 10 days.” (N.J. ADMIN. CODE 7:7-1.3)

Oregon defines “floating home” as “a moored structure that is secured to a pier or pilings and is used primarily as a domicile and not as a boat.” (OR. REV. STAT. § 830.700; *See also* OR. ADMIN. R. 250-010-0300). In a section describing permitting rules for structures on state-owned submerged land, “floating home means a moored floating structure that is secured and stationary and is used primarily as a dwelling and not as a boat or floating recreational cabin.” (OR. ADMIN. R. 141-082-0020)

The Department of Natural Resources in Washington has defined “floating house” as:

any floating structure that is designed, or has been substantially and structurally remodeled or redesigned, to serve primarily as a residence. 'Floating houses' include house boats, house barges, or any floating structures that serve primarily as a residence and do not qualify as a vessel as provided in subsection (74) of this section. A floating structure that is used as a residence and is capable of navigation, but is not designed primarily for navigation, nor normally is capable of self propulsion and use as a means of transportation is a floating house, not a vessel. (WASH. ADMIN. CODE § 332-30-106).

Washington D.C.'s Code of Municipal Regulations defines floating home as:

[a] sailboat, motorboat, or other floating structure that is designed and built to be used, or is modified to be used, as a waterborne residential dwelling, is dependent for utilities upon a utility linkage to a source originating on shore, and in which the tenant or owner sleeps overnight and average of fifteen (15) days per month. (D.C. CODE MUN. REGS. 199.1)

It is also noteworthy that under §10 of the Rivers and Harbors Act, any work or construction on floating homes in navigable waters of the U.S. requires a permit from the U.S. Army Corps of Engineers. In an advisory notice from the Sacramento Division of the Corps, floating home is defined as “any barge, boat, or building containing living quarters or recreation rooms, designed to float but not reasonably capable of navigating under its own power ...”¹

Residency Laws

To address landlord-tenant issues that might arise between the owner of the floating home and floating home marina owners, some states have enacted residency laws. California has the “Floating Home Residency Law,” which, among other issues, governs rental agreements, tenancy terminations, and the sale or transfer of a floating home. (CAL. CIV CODE §§ 800-800.306). Idaho also has the “Floating Homes Residency Act.” (IDAHO CODE ANN. § 55-2712). And, in its regulations governing landlord and tenants, Oregon includes regulations specifically for manufactured dwelling and floating home spaces. (OR. REV. STAT. § 90.510)

Taxation

Generally, real property is “land and anything growing on, attached to, or erected on it, excluding anything that may be severed without injury to the land.” (Black’s Law Dictionary, 2nd pocket edition, 564.) While personal property is “any movable or intangible thing that is subject to ownership and not classified as real property.” (*Id.*) Some state statutes specifically classify floating homes as real property, while other states categorize them as personal property.

When floating homes are treated as real property, floating home owners are required to pay real estate taxes, which may be used to support municipal services, and may be required to pay taxes upon transfer of the property. In contrast, when floating homes are treated as personal property, owners would not be required to pay annual real estate taxes, but may have to pay personal property taxes.

¹ Advisory Notice, U.S. Army Corps of Engineers, Sacramento District, Construction of Floating Homes in Navigable Waters of the United States (Apr. 2004) (on file with author).

In jurisdictions that do not specifically define whether a floating home is real or personal property for tax purposes, a state may look at whether the personal property has become a fixture to the land and, therefore, real property. (35A Am Jur 2d Fixtures § 70 (2008)). In looking at whether mobile homes are fixtures, courts have considered several factors, including the home's attachment to a foundation and connection to utility services. (*Id.*) Courts looking at whether a floating home is real property may consider similar factors.

The following are examples of state statutes specifically addressing the taxation of floating homes:

In California, floating homes are treated as real property for tax purposes. (CAL. REV. & TAX. CODE § 229).

For tax purposes, Idaho defines floating home as “a floating structure that is designed and built to be used, or is modified to be used, as a stationary waterborne residential dwelling.” (IDAHO CODE ANN. § 63-201). However, the state does not specifically state whether the floating home is real or personal property. In an example of a court looking at whether a mobile home was real or personal property, the court noted “[u]pon manufacture, a mobile home is a movable chattel and characterized as personal property. Once a mobile home is affixed to land it is converted to real property. Accordingly, a mobile home may be considered either real property or personal property under Idaho law.” (*Spencer v. Jameson*, 211 P.3d 106, 110 (Idaho 2009)).

In Oregon, floating homes are subject to personal property taxation. (OR. REV. STAT. § 307.190(2)(c)). However, floating homes are levied and sold in the same manner as real property if the real property upon which the home is located is sold. (OR. REV. STAT. § 18.986).

Washington treats floating homes as personal property. (WASH. ADMIN. CODE § 458-20-178) For purposes of real estate sales, Washington treats floating homes as real property: “Real estate or real property means any interest, estate, or beneficial interest in land or anything affixed to land, including the ownership interest or beneficial interest in any entity which itself owns land or anything affixed to land. The term includes used mobile homes, used park model trailers, used floating homes, and improvements constructed upon leased land.” (WASH. REV. CODE § 82.45.032) Floating homes are subject to real estate excise tax when transferred if the structure meets the definition for floating home and is listed on the real property tax rolls of the county in which it is located. (WASH. REV. CODE § 82.32.300, 82.01.060(2) and 82.45.150; WASH. ADMIN. CODE 458-61A-105).

Whether floating homes are treated as personal or real property for tax purposes, it does not appear to affect local authority to regulate floating homes. For example, Oregon classifies floating homes as personal property for tax purposes, yet the city of Portland has ordinances regarding the construction, location, and maintenance of floating homes. (PORTLAND, OR., CITY CODE ch. 28.01, *available at*

<https://www.portlandonline.com/auditor/index.cfm?c=28192>).

Registration/Permit requirements:

Some states have registration and titling laws specifically for floating homes. For example, California has registration and titling laws for mobile homes, which includes floating homes. (CAL. CODE REGS. tit.25, § 5510; CAL. HEALTH & SAFETY CODE § 18080.2) And, New Jersey requires a permit for the mooring of a floating home for more than 10 consecutive days. Floating homes in use within the waters of the state prior to June 1, 1984 do not require a permit. (N.J. ADMIN. CODE 7:7-2.3).

Local government authority:

Some states have specifically provided state agencies with authority to regulate floating homes. For example, in Florida the Board of Trustees of the Internal Improvement Trust Fund is authorized to adopt rules governing all uses of sovereignty submerged lands by vessels, floating homes, or any other watercraft, which shall be limited to regulations for anchoring, mooring, or otherwise attaching to the bottom; the establishment of anchorages; and the discharge of sewage, pumpout requirements, and facilities associated with anchorages. (FLA. STAT. § 253.03). And, in Idaho the State Board of Land Commissioners has authority to regulate and control the use or disposition of lands in the beds of navigable lakes, rivers and streams. Washington, D.C. has specific zoning regulations for floating homes in marinas and yacht clubs. Floating homes are allowed within a permitted marina provided that the maximum density of floating home berths does not exceed fifty percent (50%) of the total number of berths in the marina or yacht club, but may be increased by special exception. (D.C. CODE §§ 11-922, 11-923).

However, state constitutions or statutes may grant local governments authority to enact local planning and land use regulations to protect the public health, safety, and welfare of their residents. This authority is often referred to as the locality's "police power." The police power provides cities with the right to adopt and enforce regulations, as long as they do not conflict with state laws. For example, the California constitution and its state statutes authorize its local governments to enact regulations. (CAL. CONST. ART. XI, § 7; CAL. GOV. CODE § 65850(a)).

Virginia is a "Dillon's Rule" state. Dillon's rule "dictat[es] strict construction of municipal powers, by requiring that all local powers must be clearly traceable to some unequivocal and specific delegation from the state."² Virginia courts have held that local governments "have only those powers which are expressly granted by the state legislature, those powers fairly or necessarily implied from expressly granted powers, and those powers which are essential and indispensable. Where the state legislature grants a local government the power to do something but does not specifically direct the method of implementing that power, the choice made by the local government as to how to implement the conferred power will be upheld as long as the method selected is reasonable. Any doubt in the reasonableness of the method selected is resolved in favor of the locality."³ (Only 10 states have explicitly rejected Dillon's rule: Alaska,

² Louis V. Csoka, *The Dream of Greater Municipal Autonomy: Should the Legislature or the Courts Modify Dillon's Rule, a Common Law Restraint on Municipal Power*, 29 N.C. CENT. L.J. 194, 195 (2007).

³ *City of Virginia Beach v. Hay*, 518 S.E.2d 314, 316 (Va. 1999).

Iowa, Massachusetts, Montana, New Jersey, New Mexico, Ohio, Oregon, South Carolina, and Utah.)

The following are examples of express authority for local governments to regulate and restrict the mooring and docking of floating homes:

In Maryland, “[t]he County Commissioners of Calvert County, Charles County, and St. Mary’s County are authorized to adopt and to amend from time to time a code to regulate and restrict the mooring, docking, anchoring, and installing in the waters of the respective county of any floating home, to provide for the enforcement of that code, and to provide for penalties for violations of that code.” (MD. ANN. CODE art. 25, § 234A).

North Carolina specifically includes floating homes in its authorization for counties to adopt zoning ordinances. (N.C. GEN. STAT. § 153A-340).

Washington’s Shoreline Management Act authorizes local governments to adopt Shoreline Master Programs (SMPs). Floating homes must comply with local SMPs. For example, Seattle has rules governing the construction and use of floating homes in its SMP. (Seattle Municipal Code Chapter 23.60). The Washington Department of Natural Resources (WDNR) developed SMP guidelines to assist local governments in drafting their master programs for shoreline uses. The guidelines note, “[n]ew over-water residences, including floating homes, are not a preferred use and should be prohibited. It is recognized that certain existing communities of floating and/or over-water homes exist and should be reasonably accommodated to allow improvements associated with life safety matters and property rights to be addressed provided that any expansion of existing communities is the minimum necessary to assure consistency with constitutional and other legal limitations that protect private property.” (WASH. ADMIN. CODE § 173-26-241). The WDNR has also developed rules on the residential use of state-owned aquatic lands. The rules limit the number of slips in the marina dedicated for residential use, unless specified otherwise by a local government. If floating homes are not grandfathered, local SMPs must reflect this. The rules also establish ways in which local governments can establish and manage open water anchorage and moorage areas for residential use. (WASH. ADMIN. CODE 332-30-171). Floating houses are not permitted in harbor areas. (*Id.* § 332-30-109). In addition to its SMP, has used its authority to establish rates for water and utility regulation (*See* Seattle Municipal Code §§ 21.33, 21.04).

The Virginia Constitution grants counties and incorporated cities general powers. VA. CONST. ART. VII, § 1. State statutes authorize cities and counties to adopt comprehensive plans. (VA. CODE ANN. §§ 15.2-2210, 15.2-2219, 15.2-2223). Cities are also authorized to enact zoning ordinances for incorporated areas and counties may enact zoning ordinances for unincorporated areas. (VA. CODE ANN. §§ 15.2-2280, 15.2-2281, 15.2-2286). It seems clear that Virginia would have authority to adopt and enforce regulations regarding floating homes through their zoning regulations, as long as they do not conflict with state laws.

State/Local Conflict

The Middle Peninsula Planning District Commission specifically asked whether the state or locality’s treatment of a “floating home” as a vessel for tax purposes would conflict with a

locality's treatment of a floating home as a residence for zoning purposes. There does not appear to be a conflict between a state or locality's treatment of the floating home as a "vessel" for tax purposes and local zoning of "floating homes."

The local zoning of mobile homes provides an analogous example. Although states may classify mobile homes as personal property for tax purposes (see "Taxation" section above), and even vehicles in some instances, local governments retain the authority to regulate mobile homes. Courts generally have upheld local government regulation of the placement of mobile homes. (42 A.L.R.3d 598, 2a (2008)). In one New Jersey case regarding local regulation of a mobile home park, a court noted that "[t]he power to license and regulate under the police power, and the power to raise revenue under the general power to tax, may be 'unitedly exercised.'" (*Monmouth Junction Mobile Home Park, Inc. v. South Brunswick Township*, 107 N.J. Super. 18, 26-27 (App.Div. 1969)).

Virginia includes "manufactured homes" as tangible personal property (VA. CODE ANN. § 58.1-3503). However, the state's "Manufactured Housing Construction and Safety Standards Law" specifically provides, "[l]ocal zoning ordinances and other land use controls that do not affect the manner of construction or installation of manufactured homes shall remain in full force and effect." VA. CODE ANN. § 36-85.11. And, a statute regarding the zoning powers of local government provides:

[a]ny locality may designate by ordinance the areas within its jurisdiction in which manufactured homes may be located or manufactured home parks may be established, notwithstanding the absence of a zoning ordinance in such locality. Such ordinance may also apply to any of the provisions of §§ 15.2-2241 through 15.2-2245 in the regulation and governing of the location, establishment, and operation of manufactured homes or manufactured home parks... In the event of irreconcilable conflict between the ordinance and state law, the state law shall supersede the ordinance. (VA. CODE ANN. § 15.2-2247).

It seems clear that regardless of how state and a local government may classify mobile homes for tax purposes, the local government retains zoning authority.

Conclusion

Local governments in Virginia do have zoning authority, which they may exercise as long as they do not conflict with state laws. As long as vessels met a state or local definition of "floating home," the vessel would be subject to all rules and regulations that would apply to floating houses. I hope you find this information useful. Please contact me at anytime if you have additional questions.

Sincerely,

Terra Bowling
Research Counsel
National Sea Grant Law Center

