City pilot program for vacation rentals

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Subject:
City pilot program for vacation rentals

April 27, 2020

A. Kurt Ardaman
City Attorney, City of Belle Isle
1947 Lee Road
Winter Park, Florida 32789-1834

Dear Mr. Ardaman:

This office has received your letter on behalf of the Belle Isle City Council requesting an opinion regarding the effect of a proposed amendment to the City's zoning laws in the area of vacation rentals. I have rephrased your questions as follows:

> 1. May the City of Belle Isle enact an ordinance establishing a pilot program to allow certain owner-occupied vacation rentals and upon expiration of the program, revert to its 2008 blanket prohibition of vacation rentals?
> 2. If the City were to adopt an ordinance that allows certain owner-occupied vacation rentals without a trial period or pilot program, would the prohibition of vacation rentals under the City's 2008 ordinance remain in effect as to all properties that are not allowed to be vacation rentals in the new ordinance?

In sum:

> 1. Any provisions under a pilot program ordinance that would regulate the duration or frequency of vacation rentals would be expressly preempted by section 509.032(7)(b), Florida Statutes.
> 2. Amending an existing ordinance enacted prior to June 1, 2011, will not invalidate its protection under the grandfather clause with regard to provisions that are reenacted, but any new provisions that would regulate the duration or frequency of vacation rentals would be barred.

Section 7-30 of the Belle Isle Code of Ordinances provides, in full: "Short-term rentals, i.e., rentals for a term of less than seven months, are prohibited." The provision was enacted March 4, 2008, and is therefore protected from state preemption under section 509.032(7)(b), Florida Statutes, which 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 City is currently considering whether to adopt an ordinance creating a temporary pilot program to determine the feasibility of allowing certain vacation rentals. The program would allow "owner-occupied rentals," meaning that the homeowner could rent out one or two bedrooms in his or her home for periods of 30 days or less, so long as at least one of the primary residents would be living on-site throughout the visitor's stay.1

The proposed ordinance establishes a licensing, inspection, and enforcement regime for authorized vacation rentals, along with safety and operational standards. The ordinance would be in effect for one year. The City would then have the option of taking several actions, including enacting a permanent ordinance or allowing the ordinance creating the pilot program to sunset. The City is concerned that if it wished to resume the total prohibition found in the existing section 7-30, it would be precluded from doing so under the preemption provision of section 509.032(7)(b).

Municipalities have home-rule authority to exercise any power for municipal purposes unless prohibited by law.2 Section 166.021(3)(c), Florida Statutes, grants each municipal governing body the power to enact legislation on any subject the state could also legislate, except, among other things, "[a]ny subject expressly preempted to state or county government by the constitution or by general law." Because section 509.032(7)(b) expressly preempts the power to prohibit altogether or to regulate the duration or frequency of vacation rentals, the City may not include any such provision in its pilot program ordinance. If the City were to allow vacation rentals by ordinance in the pilot program, it would be precluded from reverting to its pre-2011 prohibition ordinance, in part or in total. Accordingly, any ordinance provision sunsetting the pilot program or giving the City the ability to re-institute its prohibition on vacation rentals would run afoul of section 509.032(7)(b).

Regarding your second question, generally, when a civil statute or ordinance is amended, provisions of the original law that are essentially and materially unchanged are considered to be a continuation of the original law. "The provisions of the original act or section reenacted by amendment are the law since they were first enacted, and provisions introduced by the amendment are considered to have been enacted at the time the amendment took effect. Thus, rights and liabilities accrued under the original act which are reenacted are not affected by amendment."3

As stated by the Florida Supreme Court, this general rule "'sometimes becomes important, where rights had accrued before the revision or amendment took place.'"4

It is my opinion that an ordinance amending the existing prohibition to allow certain vacation rentals would not violate section 509.032(7)(b), Florida Statutes, as long as it does not "regulate" 5 the duration or frequency of such rentals. The pre-2011 portion of the ordinance would remain

in effect as to properties unaffected by the amendment.

Sincerely,

Ashley Moody
Attorney General

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1 City of Belle Isle Ordinance 18-10, proposed sections 7-50, 7-57, 7-67 & 7-69. The number of bedrooms that could be rented in a dwelling would be capped at two, with a maximum of two occupants per bedroom. If there is more than one dwelling on a lot, the maximum number of occupants for all dwellings combined would be capped at six.

2 Art. VIII, §2(b), Fla. Const.; §166.021(1), Fla. Stat.

3 Norman Singer, 1A *Sutherland Statutory Construction* §22:33 (7th ed., Nov. 2018 update).

4 *Perry v. Consolidated Special Tax School Dist. No 4*, 89 Fla. 271, 276, 103 So. 639, 641 (1925) (quoting *Cooley's Const. Lim.*, at 96-97 (7th ed.)). *Accord Orange County v. Robinson*, 111 Fla. 402, 405, 149 So. 604, 605 (1933). *See also City of Miami v. Airbnb*, 260 So. 3d 478, 482 (Fla. 3d DCA 2018) (concluding that a 2017 resolution prohibiting short-term rentals in a suburban zone was not preempted because it was "identical in its material provisions" to the City's 2009 zoning code, whereas provisions in a 2015 Zoning Interpretation that exceeded the restrictions in the 2009 ordinance were preempted).

5 Black's Law Dictionary defines the word "regulate" to mean, in pertinent part: "To control (an activity or process) esp. through the implementation of rules." Black's Law Dictionary (11th ed. 2019).