Vacation Rentals -- Municipalities -- Land Use

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Subject:
Vacation Rentals -- Municipalities -- Land Use

Mr. Kerry L. Ezrol
City Attorney
City of Wilton Manors
3099 East Commercial Boulevard
Suite 200
Fort Lauderdale, Florida 33308

RE: VACATION RENTALS – MUNICIPALITIES – LOCAL GOVERNMENTS – LAND USE – regulation of vacation rentals by municipalities. s. 509.032, Fla. Stat.

Dear Mr. Ezrol:

You ask the following questions:

1. Does section 509.032(7)(b), Florida Statutes, permit the city to regulate the location of vacation rentals through zoning?

2. May the city prohibit vacation rentals which fail to comply with the registration and licensing requirements in section 509.241, Florida Statutes?

In sum:

1. Section 509.032(7)(b), Florida Statutes, as amended by Chapter 2014-71, Laws of Florida, allows a local government to regulate vacation rentals, but continues to preclude any local law, ordinance or regulation which would prohibit vacation rentals or restrict the duration or frequency of vacation rentals.[1] It would appear therefore, that zoning may not be used to prohibit vacation rentals in a particular area where residential use is otherwise allowed.

2. Section 509.032(1), Florida Statutes, makes the Division of Hotels and Restaurants of the Department of Business and Professional Regulation the regulatory agency for transient lodging facilities. Section 509.241(1), Florida Statutes, makes operation of such facilities without a license a misdemeanor of the second degree. The statute specifically recognizes that local law enforcement may provide immediate assistance in pursuing an illegally operating facility, but does not otherwise authorize a local government to prohibit the operation of a vacation rental without proper licensure by the state.

Question One

Section 509.032(7), Florida Statutes, as amended by Ch. 2014-71, Laws of Florida, provides:

"(a) The regulation of public lodging establishments and public food service establishments, including, but not limited to, sanitation standards, inspections, training and testing of personnel, and matters related to the nutritional content and marketing of foods offered in such establishments, is preempted to the state. This paragraph does not preempt the authority of a local government or local enforcement district to conduct inspections of public lodgings and public food service establishments for compliance with the Florida Building Code and the Florida Fire Prevention Code, pursuant to ss. 553.80 and 633.206.
(b) 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.
(c) Paragraph (b) does not apply to any local law, ordinance, or regulation exclusively relating to property valuation as a criterion for vacation rental if the local law, ordinance, or regulation is required to be approved by the state land planning agency pursuant to an area of critical state concern designation."

Prior to its amendment, the statute, in relevant part, provided:

"(b) 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." (e.s.)

This earlier provision was interpreted by this office to preempt local regulation of the rental of vacation homes. This office also advised that a local zoning ordinance for single-family homes adopted prior to June 1, 2011, could not now be interpreted to restrict the rental of such homes as vacation rentals, when the ordinance did not restrict the rental of such property and the county had no regulations governing vacation rentals prior to June 1, 2011.[2]

As originally introduced, Senate Bill 356, repealed the provisions in paragraphs (b) and (c) of section 509.032(7), Florida Statutes (2013), prohibiting local laws, ordinances, or regulations affecting vacation rentals.[3] The bill was amended, however, to reinstate the prohibition against local action which would prohibit vacation rentals or regulate the duration or frequency of vacation rentals.[4] The legislative analysis attendant to the amendment states that the amendment "maintains the current prohibition against local laws, ordinances, or regulations that prohibit vacation rentals."[5] Finally, the staff analysis prepared for an identical bill proposed in the House of Representatives, for which Senate Bill 356 was substituted, reflects that the bill "removes the preemption to the state for the regulation of vacation rentals" and recognizes that "[l]ocal governments may regulate vacation rentals, provided those regulations do not prohibit vacation rentals or restrict the duration or frequency of vacation rentals."[6]

It is clear that municipalities may zone land to pursue a number of legitimate objectives related to the health, safety, morals, or general welfare of the community.[7] Municipalities have the power to regulate the use of land and buildings within prescribed districts through zoning.[8] Zoning is generally defined as the legislative division of a region into districts with different regulations within the districts for land use, building size, and the like.[9] While a municipality may enact

zoning ordinances and regulations, a legislative enactment on the same subject matter controls.[10] Therefore, to the extent a municipal ordinance conflicts with a state statute in regard to the prohibition against any local act which seeks to prohibit vacation rentals, the municipal ordinance must fail.[11]

Thus, while 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.

Question Two

A municipality has home rule powers to enact legislation on any subject upon which the State Legislature may act, except, among other things, any subject that is expressly prohibited by the Constitution or any subject that is expressly preempted to state or county government by the Constitution or by general law.[12]

Section 509.261(1), Florida Statutes, provides:

"Any public lodging establishment or public food service establishment that has operated or is operating in violation of this chapter or the rules of the division, *operating without a license*, or operating with a suspended or revoked license may be subject by the division to:
(a) Fines not to exceed $1,000 per offense;
(b) Mandatory completion, at personal expense, of a remedial educational program administered by a food safety training program provider approved by the division, as provided in s. 509.049; and
(c) The suspension, revocation, or refusal of a license issued pursuant to this chapter." (e.s.)

Moreover, section 509.241(1), Florida Statutes, makes it a misdemeanor of the second degree to operate a public lodging establishment without a license. The statute further provides that local law enforcement shall provide immediate assistance in pursuing an illegally operating establishment. Where the Legislature has prescribed the manner in which something is to be accomplished, there is an implied prohibition against its being done any other way.[13]

This office has recognized that a municipality has the authority to prescribe penalties for violations of its ordinances, but derives no authority from its home rule powers to exceed penalties prescribed by law.[14] Section 509.271, Florida Statutes, provides that "[a] municipality or county may not issue an occupational license to any business coming under the provisions of this chapter until a license has been procured for such business from the [D]ivision [of Hotels and Restaurants]." Clearly, therefore, a municipality may require through its licensing tax ordinance that a vacation rental obtain a license in order to conduct business within the municipality.[15] This would appear to be an appropriate regulation which the city could impose upon vacation rentals within its jurisdiction.

Section 205.053, Florida Statutes, provides the manner in which business tax receipts are to be sold, penalties which may be imposed for delinquent taxes, and penalties which may be imposed

for failure to obtain a local business tax receipt. The section further provides that any person who engages in any business covered by the chapter who does not pay the required tax within 150 days after the initial notice of tax due "is subject to civil actions and penalties, including court costs, reasonable attorneys' fees, additional administrative costs incurred as a result of collection efforts, and a penalty of up to $250."16 Where the Legislature has prescribed a penalty for violation of a particular act, a city may not impose more severe sanctions.

When discussing the effect of the amendment to section 509.032, Florida Statutes, an example of how such regulation might be implemented was a local ordinance requiring that the name and contact information for a local representative be posted in a vacation rental owned by out-of-state individuals.[17] The sponsor of the amendment addressed the committee and emphasized that the changes would remove the preemption on local government regulation of vacation rentals and allow local ordinances to address local concerns.[18]

Accordingly, while the amendment of section 509.032(7), Florida Statutes, by Chapter 2014-71, Laws of Florida, allows a local government to regulate vacation rentals, such regulations may not impose penalties which conflict with those prescribed by law.

Sincerely,

Pam Bondi
Attorney General

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[1] The statute continues to grandfather in any local law, ordinance, or regulation adopted on or before June 1, 2014.

[2] *See* Inf. Op. to Mr. Albert J. Hadeed, Flagler County Attorney, dated October 22, 2013.

[3] *See* SB 356, filed November 5, 2013.

[4] *See* 486775 - Strike All Amendment by Rep. Hutson, adopted April 29, 2014.

[5] *See* The Florida Senate House Message Summary, SB 356, 1st Eng., House Amendment 1 – 486775, dated April 30, 2014.

[6] *See* House of Representatives Staff Analysis, Local & Federal Affairs Committee, CS/HB 307, dated April 11, 2014.

[7] *See Scurlock v. City of Lynn Haven, Florida,* 858 F.2d 1521, 1525 (11th Cir. 1988). *And see Gulf & Eastern Development Corporation v. City of Fort Lauderdale*, 354 So. 2d 57 (Fla. 1978) (zoning is a legislative function which reposes ultimately in the governing authority of a municipality).

[8] *See* s. 2(b), Art. VIII, Fla. Const., granting municipalities the authority to exercise any power for municipal purposes except as otherwise provided by law.

[9] Black's Law Dictionary (8th ed.), "zoning," p. 1649.

[10*] See Rinzler v. Carson*, 262 So. 2d 661 (Fla. 1972) (municipality may not forbid what the Legislature has expressly authorized, nor may it authorize what the Legislature has expressly forbidden).

[11] *See City of Miami Beach v. Rocio Corp.*, 404 So. 2d 1066, 1069 (Fla. 3d DCA 1981) (municipal ordinances are inferior to state law and must fail when conflict arises).

[12] *See* s. 166.021, Fla. Stat.

[13] *See Alsop v. Pierce*, 19 So. 2d 799 (Fla. 1944) (express statutory direction as to how a thing is to be done is implied prohibition of its being done in any contrary manner).

[14] *See* Op. Att'y Gen. Fla. 81-76 (1981) (exercise of municipal home rule power in setting severity of penalties is limited by those prescribed by statute).

[15] *See* s. 205.042, Fla. Stat., authorizing a municipality to levy, by appropriate resolution or ordinance, a business tax for the privilege of engaging in or managing a business, profession, or occupation within its jurisdiction.

[16] Section 205.053(3), Fla. Stat.

[17] *See* Senate Committee on Community Affairs, discussion of SB 356, dated February 4, 2014. Other discussion included parking controls and limitation on the number of unrelated persons occupying a house.

[18] *Id.* Sen. John Thrasher discussing circumstances in Flagler County which gave rise to need for amendment and return home rule power to local governments.