Municipalities - Vacation Rentals - Preemption - Zoning

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Mr. Kerry L. Ezrol, City Attorney
Ms. Farah L. Nerette, Assistant City Attorney
Goren Cherof Doody & Ezrol P.A.
3099 East Commercial Boulevard, Suite 200
Fort Lauderdale, Florida 33308

RE: MUNICIPALITIES – VACATION RENTALS – PREEMPTION – ZONING – whether the city could limit vacation rentals through a proposed ordinance (1) imposing distance separation requirements or (2) limiting the percentage or number of vacation rentals, in light of the preemption language regarding vacation rentals in s. 509.032(7), Fla. Stat.

Dear Mr. Ezrol and Ms. Nerette:

On behalf of the City Commission of the City of Wilton Manors, you have asked for an opinion on the following question:

Does section 509.032(7), Florida Statutes, prohibit the city from: (A) Implementing distance separation requirements between vacation rentals; or (B) Limiting the percentage or number of vacation rentals on city streets or in city neighborhoods?

In sum:

Section 509.032(7)(b), Florida Statutes, allows some regulation of vacation rentals, but prevents local government from enacting a law, ordinance, or regulation that prohibits vacation rentals. Therefore, the city may not impose spacing or proportional regulations that would have the effect of preventing eligible housing as defined in section 509.242, Florida Statutes, from being used as a vacation rental.

You state that Wilton Manors is considering enacting a zoning ordinance that would set distance separation requirements between vacation rentals or would limit the percentage or number of vacation rentals on city streets or in city neighborhoods. You represent that the ordinance would implement various health, safety, and welfare goals, such as reducing vehicle traffic; reducing the need for additional parking; reducing noise detrimental to surrounding residential uses; reducing the need for additional police, fire, emergency services, utilities, and neighborhood watch programs; and maintaining the residential character of neighborhoods. Although municipalities are permitted to enact zoning ordinances to accomplish such legitimate goals, an ordinance may not conflict with a controlling provision of state law.[1] You believe that the proposed ordinance would not forbid vacation rentals and thus would not run afoul of section 509.032(7)(b), Florida Statutes, which states that a local government may not enact an ordinance that “prohibit[s] vacation rentals.” You have not provided this office with the language of your proposed ordinance (nor would this office interpret such an ordinance if you had), thus, my comments must be general in nature.

To answer your question, it is necessary to review the Legislature's treatment of preemption in relation to vacation rentals in section 509.032, Florida Statutes.[2] Part I of Chapter 509, Florida Statutes, contains laws affecting public lodging and public food service establishments. In 1993, the Legislature amended section 509.032, Florida Statutes, adding paragraph (7) to preempt all regulation of public lodging[3] and public food service establishments to the state. The provision stated, in pertinent part: "The regulation and inspection of public lodging establishments and public food service establishments … are preempted to the state."[4]

In 2011, the Legislature combined two types of public lodgings – "resort condominiums" and "resort dwellings" – under the new term "vacation rentals," and added a provision to specifically address an issue regarding vacation-rental regulation. According to the final staff analysis:

"The regulation of public lodging establishments is preempted to the state. Local governments can conduct inspections of public lodging establishments for compliance with the Florida Building Code and the Florida Fire Prevention Code.[5] However, some local governments have been prohibiting or restricting transient resort condominiums and dwellings by ordinance."[6]

To address this issue, the Legislature added a new provision, (7)(b), which stated:

"(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."[7]

In 2014, the Legislature amended paragraph (7)(b), "revising the permitted scope of local laws, ordinances, and regulations regarding vacation rentals."[8] The provision now allows limited new regulation subject to the following limitations:

"(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."

The final staff analysis for the legislation stated: "The bill removes the total preemption to the state for the regulation of vacation rentals, and permits local governments to regulate vacation rentals, provided those regulations do not prohibit vacation rentals or restrict the duration or frequency of vacation rentals."[9]

That same year, the City of Wilton Manors asked this office whether the 2014 amendment permitted the city to use zoning ordinances to regulate the location of vacation rentals. In Attorney General Opinion 2014-09, 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." (e.s.)

Section 509.242(1)(c), Florida Statutes, defines “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.” Section 509.013(4)(a)1., Florida Statutes, defines “transient public lodging establishment” 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.”

It appears from these definitions that 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. There are no statutory provisions that impose restrictions against owners from offering eligible housing as vacation rentals. Nor have you identified any municipal law, ordinance, or regulation enacted prior to the grandfathering date in the statute, June 1, 2011, that restricted any such housing from being offered as a vacation rental in Wilton Manors.[10] An ordinance requiring certain distances between vacation rentals or limiting their numbers in areas within the city could result in a prohibition against using eligible units as vacation rentals when other existing units have already satisfied the spacing or percentage formulae. Although the proposed ordinance would not absolutely forbid vacation rentals in the City of Wilton Manors, a distance separation requirement and a numerical or percentage limitation have 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.[11] 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]

In *Moore v. Thompson*,[13] the Florida Supreme Court discussed the propriety of legislation that prohibited a class of businesses from operating, in the guise of regulating it. A blue law made it unlawful for businesses to sell motor vehicles on Sunday and legal holidays. Although the Court acknowledged that the Legislature had clear statutory authority to regulate automobile dealerships, this law exceeded such authority.

“While the act is one purporting to regulate this particular business, it is much more than a regulation. Chapter 318, 319 and 320, Florida Statutes, F.S.A., are illustrations of regulations of a particular industry while the object of this act is—not to regulate—but to prohibit such business on designated days.

The power to regulate does not encompass the power to prohibit.”[14] (e.s.)

The Court concluded that the state had failed to provide a valid and substantial reason to single out automobile dealerships, and ruled that the law was unconstitutional. The Court cited an earlier case involving legislation in 1938 requiring all persons conducting auctions to post a bond of $2,000.00 and pay a license tax of $1,000.00 every fifteen days, regardless of the character or amount of the sale.[15] The Court had concluded in that case that the law was improper because the unreasonably high fees made it prohibitive rather than regulative. “Such an imposition amounts to a prohibition of large numbers from engaging in a legitimate business and is beyond all the necessities for the legislation.”[16] Similarly, the proposed Wilton Manors ordinance might prohibit certain vacation rentals, when section 509.032(7) only permits local governments to

regulate them.

The two circuit court orders you provided to this office do not support the proposed Wilton Manors ordinance. In one case, the Flagler County Circuit Court was asked to consider an ordinance prescribing the documentation that must be provided to the county for short-term vacation rentals, and a maximum occupancy limit for all vacation rentals.[17] In the other, the Manatee County Circuit Court considered an ordinance setting a maximum occupancy limit for each vacation rental unit in the City of Ana Maria.[18] The court in each case determined that the ordinance at issue did not prohibit vacation rentals or regulate their duration or frequency in violation of section 509.032(7)(b), Florida Statutes. Those ordinances are distinguishable from what Wilton Manors proposes, because they merely added regulatory requirements for existing and new vacation rentals and did not limit the number of vacation rentals that would be allowed in a geographic area.

Indeed, in the final staff analysis of the 2014 legislation, the section entitled “Effect of the Bill” stated:

“The bill permits local governments to create regulation that distinguishes vacation rentals from other residential property. In the past [prior to June 1, 2011], local government regulations have included noise, parking, registration, and signage requirements for vacation rentals.”[19]

These matters and those addressed in the circuit court cases you cited are the kinds of regulations that are now permitted under the 2014 amendment to paragraph (7)(b) as exceptions to state preemption.

Accordingly, to the extent that the ordinance you are considering could have the effect of prohibiting a statutorily eligible housing unit from being used as a vacation rental, it is my opinion that the City of Wilton Manors would be exceeding the regulatory authority granted in section 509.032(7)(b), Florida Statutes.

Sincerely,

Pam Bondi
Attorney General

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[1] *See City of Hollywood v. Mulligan*, 934 So. 2d 1238, 1246-47 (Fla. 2006); *City of Casselberry v. Orange County Police Benevolent Ass’n*, 482 So. 2d 336, 340 (Fla. 1986).

[2] *See Massey v. David*, 979 So. 2d 931, 942 (Fla. 2008) (legislative history can be an “invaluable tool” in determining the meaning of statutory language); *Kasischke v. State*, 991, So. 2d 803, 810 (Fla. 2008) (although staff analyses do not determine legislative intent, they provide “one touchstone of the collective legislative will”).

[3] Public lodging establishments included hotels, motels, resort condominiums, nontransient

and transient apartments, rooming houses, resort dwellings, and bed and breakfast inns. Section 509.242, Fla. Stat. (2010).

[4] Section 2, Ch. 93-53, Laws of Fla.

[5] The Legislature had amended s. 509.032, Fla. Stat., in 2000, and added to paragraph (7): "This subsection does not preempt the authority of a local government or local enforcement district to conduct inspections of public lodging and public food service establishments for compliance with the Florida Building Code and the Florida Fire Prevention Code, pursuant to ss. 553.80 and 633.022." Section 47, Ch. 2000-141, Laws of Fla.

[6] House of Representatives Final Bill Analysis, CS/CS/CS/HB 883, dated June 28, 2011.

[7] *See* s. 2, Ch. 2011-119, Laws of Fla.

[8] *See* Preamble, Ch. 2014-71, Laws of Fla.

[9] House of Representatives Final Bill Analysis, Local & Federal Affairs Committee, CS/HB 307, dated June 19, 2014.

[10] *See* Inf. Op. to County Attorney Albert J. Hadeed, Flagler County, dated October 22, 2013 (concluding under the plain language of s. 509.242(1)(c) that a single-family house could be used as a vacation rental, subject to regulation by the state, when there were no zoning ordinances in effect prior to June 1, 2011, that would have prevented such use).
[11] The definitions of "prohibit" in Black's Law Dictionary (10th ed. 2014), are: "1. To forbid by law[,]" and, "2. To prevent, preclude, or severely hinder."

[12] *See Metropolitan Dade County v. Chase Federal Housing Corp.*, 737 So. 2d 494, 504 (Fla. 1999).

[13] 126 So. 2d 543 (Fla. 1960).

[14] *Id.* at 550.

[15] *Id.* at 551 (citing *State ex rel. James v. Gerell*, 188 So. 812 (Fla. 1938).

[16] *Gerell*, 188 So. at 814.

[17] *30 Cinnamon Beach Way, LLC v. Flagler County*, 2015-CA-167 (Fla. 7th Cir. Ct. June 1, 2015), *aff'd*, 183 So. 3d 373 (Fla. 5th DCA 2016) (per curiam).

[18] *Fla. Gulf Coast Vacation Homes, LLC v. City of Anna Maria*, 2016-CA-629 (Fla. 12th Cir. Ct. April 11, 2016).

[19] *See supra* n. 9.