Residential Rental Registration Fee -- Municipalities

Number: INFORMAL

Date: August 30, 2012

Mr. Paul J. Marino
City Attorney
City of Belleair Beach
Post Office Box 344
Indian Rocks Beach, Florida 33785

Dear Mr. Marino:

On behalf of the City of Belleair Beach, you ask whether a municipality may impose a residential rental registration fee pursuant to section 166.221, Florida Statutes. You also ask whether a municipality may establish a new business license tax to regulate residential rentals pursuant to sections 205.042 and 205.0535, Florida Statutes, and, if so, must an equity study commission be established before imposing the tax and must creation or amendment of the tax wait until October 1st.

You state that the City of Belleair Beach enacted a residential rental registration fee ordinance in 2003 applicable to all residential properties within the city[1] and recently increased the amount of the registration from $100.00 to $300.00.[2] Section 54-62, Belleair Beach City Code, states:

"Residential rental registration fee.

(a) Rental property registration. Every property within Residential Medium District I, and Residential Low District II that is rented in accordance with the provisions of section 94-213 of the City Code, shall be properly registered with city hall, and property owners shall pay an annual registration fee in the amount of $300.00 for each year or part thereof the property is rented, which fee shall be paid no later than October 1 of each year. Failure on the part of a property owner to register the property or pay the annual fee before October 31 shall result in an additional assessment of $100.00. It shall be the responsibility of each property owner offering residential property for rent to register the name of each and every lessee and such other information as may be required by the city for each lease on the property.
(b) Amendments to registration fee. The city council may make future amendments to the annual rental registration fee by resolution.
(c) Penalty. Any person who violates the provision of this section shall be guilty of a civil infraction subject to a civil penalty and costs as set forth in section 2-317 of the City Code."[3]

Initially, I would note that this office must presume the validity of a duly enacted ordinance. A legal opinion will not be issued when an official or agency has already acted and seeks to justify such action.[4] In light of the fact that the city has enacted an ordinance imposing a residential rental registration fee, this office will not render a legal opinion on the matter. The following general observations, however, are offered in order to be of assistance.

Section 166.221, Florida Statutes, authorizes a city to levy "reasonable business, professional, and occupational regulatory fees" commensurate with the cost of the regulatory activity, if there is no state or county charter preemption of such regulation. Thus, to the extent the regulation of a business, profession, or occupation is not preempted to the state or a charter county, a municipality may impose regulatory fees on the activity.

Chapter 2011-119, Laws of Florida,[5] preempts local regulations of vacation rentals based solely on classification, use, or occupancy enacted after June 1, 2011. Section 509.032(7)(b), Florida Statutes, as amended by Chapter 2011-119, Laws of Florida, provides:

"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.)

The act classifies public lodging establishments and includes "vacation rental" as one such classification. A "[v]acation rental" is classified to include "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."[6] It would appear, therefore, that after June 1, 2011, a local government may not regulate vacation rentals based upon their classification as single family homes, their use as transient rental property, or their occupancy by someone other than the owner of record.

There are several court cases involving the validity of local ordinances which restrict or regulate the short-term or transient rental of single family homes.[7] While none of the cases appear to involve the imposition of a regulatory fee, there is clearly an acknowledgement that local governments were previously authorized to enact such ordinances.[8] Moreover, it has been determined that a municipality may impose a regulatory fee when the fee is used to defray the costs of regulating the business upon which it is imposed.[9] With the enactment of section 509.032(7)(b), Florida Statutes, however, the ability of a local government to regulate vacation rentals by enactment of an ordinance after June 1, 2011, has been preempted to the state. I am aware of press reports of a case involving a ban on short-term rentals that an amendment to a pre-existing ordinance regulating short-term rentals might be precluded by the state statute.[10] Whether such an amendment is substantial enough to constitute a new ordinance subject to the preemption is a determination which would be more appropriately made by a court.

You have discussed the distinction between a regulatory fee, which may be imposed pursuant to the police powers of a municipality, and a tax, which must be based upon statutory or constitutional authority. I would note that in the cases you have mentioned, it is clear that a regulatory fee must have a reasonable relationship to defraying the cost of enforcing regulations relating to a particular business or profession. You indicate that the regulatory fees imposed by the City of Belleair Beach primarily are necessary to make sure the fees imposed by the ordinance have been paid. It is not clear whether the city has enacted regulations, other than the imposition of a fee, governing short-term rentals within the city.

Chapter 205, Florida Statutes, is the "Local Business Tax Act."[11] Section 205.042, Florida Statutes, authorizes the governing body of a municipality to levy, by appropriate resolution or

ordinance, a local business tax (formerly referred to as an occupational license tax) for the privilege of engaging in or managing any business, profession, or occupation within its jurisdiction. Any such tax must be based upon reasonable classifications and must be uniform throughout any class.[12] The statute provides that the business tax may be levied on:

"(1) Any person who maintains a permanent business location or branch office within the municipality, for the privilege of engaging in or managing any business within its jurisdiction.

(2) Any person who maintains a permanent business location or branch office within the municipality, for the privilege of engaging in or managing any profession or occupation within its jurisdiction.

(3) Any person who does not qualify under subsection (1) or subsection (2) and who transacts any business or engages in any occupation or profession in interstate commerce, if the business tax is not prohibited by s. 8, Art. I of the United States Constitution."[13]

Adoption of a business tax ordinance or resolution requires public notice and such notice must contain "the proposed classifications and rates applicable to the business tax."[14]

As defined in the statute, the term "[l]ocal business tax" refers to

"the fees charged and the method by which a local governing authority grants the privilege of engaging in or managing any business, profession, or occupation within its jurisdiction. It does not mean any fees or licenses paid to any board, commission, or officer for permits, registration, examination, or inspection. Unless otherwise provided by law, these are deemed to be regulatory and in addition to, but not in lieu of, any local business tax imposed under the provisions of this chapter."[15]

This definition clearly distinguishes the "local business tax" from fees or licenses which may be regulatory and which may be levied in addition to the local business tax imposed pursuant to Chapter 205, Florida Statutes.

For purposes of the statute, a "[p]erson" means "any individual, firm, partnership, joint adventure, syndicate, or other group or combination acting as a unit, association, corporation, estate, trust, business trust, trustee, executor, administrator, receiver, or other fiduciary, and includes the plural as well as the singular."[16] Thus, the local business tax law applies to and operates on any person, engaged in any business, profession, or occupation who exercises the taxable privilege within a municipality's jurisdiction and is not excepted or exempted from the license tax by the terms of Chapter 205, Florida Statutes, or other applicable general law.

Section 205.0535(1), Florida Statutes, states that "[b]y October 1, 2008, any municipality that has adopted by ordinance a local business tax after October 1, 1995, may by ordinance reclassify businesses, professions, and occupations and may establish new rate structures, if the conditions specified in subsections (2) and (3) are met." Subsection (2) requires the establishment of an equity study commission to recommend a classification system and rate structure for local occupational license taxes prior to adoption of the ordinance. Subsection (3) sets parameters for the new license tax in terms of the amount that may be imposed and the

maximum amount of revenue that may be generated. Subsection (4) authorizes municipalities and counties every other year after enactment of a business tax ordinance to increase or decrease by ordinance the rates of business taxes by up to 5 percent and recognizes the authority of local governments to repeal any business tax. The intention of the Legislature in adopting section 205.0535, Florida Statutes, was to provide local governments with an opportunity to revise their occupational license tax ordinances and the continued opportunity to undertake a limited revision every other year thereafter.[17]

Thus, the plain language of section 205.0535, Florida Statues, limits a municipality's authority to reclassify businesses, professions, and occupations on or before October 1, 2008. Subsequent biennial reviews are only available to increase or decrease such business taxes after certain conditions are met. Nothing in the statute authorizes a municipality which has enacted a business tax ordinance after October 1, 1995, to reclassify the businesses subject to the tax after October 1, 2008.[18]

A municipality's taxing power is limited to that which is expressly or by necessary implication conferred.[19] Moreover, where the Legislature has prescribed the manner in which something is to be accomplished, it operates as a prohibition against its being done in any other way.[20]

This office has previously concluded that the procedures in section 205.0535, Florida Statutes, are the means by which a municipality may reclassify businesses and occupations and restructure its occupational tax rates, when the municipality has adopted its occupational license tax ordinance or resolution by October 1, 1995.[21] A review of Chapter 205, Florida Statutes, does not reveal any other manner in which local governments with existing occupational license tax ordinances are authorized to restructure their occupational license tax rates.

I trust that these informal comments will be of assistance to you in resolving the issues you have raised.

Sincerely,

Lagran Saunders
Assistant Attorney General

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[1] *See* City of Belleair Beach Ord. No. 03-12, s. 1, 8-18-2003.

[2] *See* City of Belleair Beach Ord. No. 11-05, s. 1, 9-8-2011.

[3] Section 94-213, Belleair Beach City Code. - Rentals.

"(a) Within RL district II, residential homes may be rented, leased or otherwise occupied through a rental agreement with the registered owner(s) on a periodic basis from time to time for not less than a three-month occupancy period. An individual portion of a single-family home shall not be rented, leased, or otherwise occupied by a rental agreement with the registered owner(s) on a

periodic basis as a separate part of the family unit.
(b) When owner(s) of residential property enters into a rental agreement, whether once or on a continuing basis, the owner(s) shall register the home at city hall. Each new tenant shall be registered at the start of the rental term and termination thereof. Not more than one family unit shall occupy one dwelling unit at a time.
(c) For the purpose of this section, the definition of rental agreement shall mean any agreement whereby a person is entitled to occupy a residential property for a specified period of time. Without limiting the foregoing, such agreements may take the form of an oral or written lease between an owner and another party, or among multiple owners. Any person(s) engaged by a property owner for the purpose of house sitting or pet sitting shall not constitute a rental agreement. Consideration is not a requisite for an agreement to constitute a rental occupancy."

[4] *See* Frequently Asked Questions About Attorney General Opinions, Statement Concerning Attorney General Opinions, http://myfloridalegal.com.

[5] *See* CS/CS/CS/HB 883, 2011 Legislative Session.

[6] Section 509.242(1)(c), Fla. Stat.

[7] *See City of Venice v. Gwynn*, 76 So. 3d 401 (Fla. 2d DCA 2011); *Allen v. City of Key West*, 59 So. 3d 316 (Fla. 3d DCA 2011); *Allbritton v. City of Clearwater*, Case No. 03-004365-CI-20 (Cir. Ct. Sixth Judicial Circuit, April 20, 2007); *Rollison v. City of Key West*, 875 So. 2d 659 (Fla. 3d DCA 2004).

[8] *See Rollison, supra* (property owner entitled to have her lawful nonconforming use "grandfathered in" since property use lawfully existed before the existing restrictions on short-term rental became effective).

[9] *City of Key West v. Marrone*, 555 So. 2d 439 (Fla. 3d DCA 1990); *Flores v. City of Miami*, 681 So. 2d 803 (Fla. 3d DCA 1996).

[10] *See* Tampa Bay Times, "Clearwater council tackles short-term rental ban minefield," 6/16/2011, http://www.tampabay.com/news/localgovernment/clearwater-council-tackles-short-term-rental-ban-minefield/1175510.

[11] Section 205.013, Fla. Stat.

[12] Section 205.043(1)(a), Fla. Stat.

[13] Section 205.042, Fla. Stat.

[14] *Id.*

[15] Section 205.022(5), Fla. Stat.

[16] Section 205.022(7), Fla. Stat.

[17] *See* Senate Staff Analysis and Economic Impact Statement on SB 364, dated March 4, 1993, Florida Senate. *Cf.* Op. Att'y Gen Fla. 95-46 (1995), discussing the amendment of municipal occupational license tax ordinances; Op. Att'y Gen. Fla. 96-83 (1996). See also Senate Staff Analysis and Economic Impact Statement on CS/SB 656, dated March 23, 2007, Florida Senate, explaining that the bill (incorporated into CS/SB 1178 [Ch. 2007-97, Laws of Fla.]) amends s. 205.0535, Fla. Stat., to allow municipalities which had adopted a local business tax ordinance on or after October 1, 1995, to reclassify businesses, professions, and occupations and to establish new rate structures before October 1, 2008, if certain conditions are met.

[18] *See* Op. Att'y Gen. Fla. 10-23 (2010). *Cf.* Ops. Att'y Gen. Fla. 03-51 (2003) and 02-81 (2002).

[19] *See, e.g.,* Ops. Att'y Gen. Fla. 90-23 (1990) (city may not provide for the rebate of ad valorem taxes collected on newly annexed property, absent constitutional or statutory authority allowing such action); 80-87 (1980); and 79-26 (1979) (municipality has no home rule powers with respect to the levy of excise or non-ad valorem taxes and exemptions therefrom, as all such taxing power must be authorized by general law).

[20] *See, e.g., Alsop v. Pierce*, 19 So. 2d 799, 805-806 (Fla. 1944); *Dobbs v. Sea Isle Hotel*, 56 So. 2d 341, 342 (Fla. 1952); *Thayer v. State*, 335 So. 2d 815, 817 (Fla. 1976).

[21] *See* Op. Att'y Gen. Fla. 95-46 (1995). Cf. Op. Att'y Gen. Fla. 96-83 (1996) (county not authorized to enact a new occupational license tax ordinance under s. 205.0315, Fla. Stat., but is limited to increasing taxes levied on occupational licensees to amount based on rates adopted in existing ordinance).