



**CITY OF BELLE SLE, FLORIDA
CITY COUNCIL AGENDA ITEM COVER SHEET**

Meeting Date: March 5, 2019

To: Honorable Mayor and City Council Members

From: B. Francis, City Manager

Subject: Draft Letters to State Attorney General regarding Short Term Rentals

Background: The Council directed the City Attorney to write a letter to the Attorney General regarding vacation rental prohibitions, state preemptions, and grandfather status.

Staff Recommendation: None Needed

Suggested Motion: None Needed

Alternatives: None

Fiscal Impact: None

Attachments: Letter to AG
Memorandum outlining the issues

February 26, 2019

Via U.S. Mail

The Honorable Ashley Moody
Attorney General of Florida
c/o Department of Legal Affairs
The Capital PL01
Tallahassee, Florida 32399-1050

Re: Vacation Rental Prohibitions, State Preemption, and Grandfather Status

Dear Madam Attorney General:

In my capacity as City Attorney of the City of Belle Isle, Florida (“City”), and in accordance with section 16.01(3), Florida Statutes, I hereby request an advisory opinion as to the legal questions enumerated in the enclosed Memorandum of Law. This request arises out of the ambiguity in the law regarding the authority of local governments to prohibit vacation rentals by ordinance that predates the legislative deadline set forth in section 509.032(7)(b), Florida Statutes. City officials need to understand whether modifications to such grandfathered ordinances either by allowing certain vacation rentals on a trial or pilot program period or allowing certain owner-occupied vacation rentals permanently would cause the City to lose the ability to continue to prohibit vacation rentals not expressly allowed and after the expiration of any trial period or pilot program.

Please find enclosed a Memorandum of Law, which sets forth specific legal questions and provides legal analysis for each. Also enclosed is a proposed ordinance regarding a temporary trial or pilot program for allowance of certain owner-occupied vacation rentals. We recognize that previous opinions by the Attorney General’s Office have addressed issues relating to the extent to which municipalities may lawfully regulate vacation rentals; however, for the reasons discussed in the memorandum, the City needs further clarification regarding whether the City’s prohibition against vacation rentals must remain frozen so as to avoid the loss of grandfathering under section 509.032(7)(b), Florida Statutes.

Very truly yours,

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Enclosures

MEMORANDUM OF LAW

TO: Florida Attorney General's Office

FROM: A. Kurt Ardaman, City Attorney, City of Belle Isle, Florida

DATE: February 20, 2019

RE: Advisory Opinion re: Vacation Rental Prohibition and Pilot Program

ISSUES:

1. May the City of Belle Isle, Florida ("City") enact an ordinance establishing a pilot program for the allowance of certain owner-occupied vacation rentals and upon the expiration of such pilot program revert back to the lawfully enacted prohibition against vacation rentals within the City in light of section 509.032(7)(b), Florida Statutes?
2. In the event that the City adopted an ordinance that allowed only certain owner-occupied vacation rentals without a trial period or pilot program period, would the prohibition under the City's lawfully enacted prior ordinance remain in effect as to all vacation rentals that were not allowed pursuant to the new ordinance?

DISCUSSION:

Issue 1. May the City of Belle Isle, Florida ("City") enact an ordinance establishing a pilot program for the allowance of certain owner-occupied vacation rentals and upon the expiration of such pilot program revert back to the lawfully enacted prohibition against vacation rentals within the City in light of section 509.032(7)(b), Florida Statutes?

Section 509.032(7)(b), Florida Statutes, relating to preemption authority, 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 passed Ordinance No. 08-03 on or about March 4, 2008, which is codified in Chapter 7, Article II, Section 7-30, City Code of Ordinances ("City Code"), relating to regulation of

residential rental property. Section 7-30, City Code, states: "Short-term rentals, i.e., rentals for a term of less than seven months, are prohibited." Accordingly, the existing City prohibition against vacation rentals was duly adopted on or before June 1, 2011.

At this time, the City is considering allowing owner-occupied vacation rentals as part of a temporary pilot program allowing a feasibility and experimental trial of same. The City is concerned that such a pilot program may subject the City to potentially not being able to enforce existing Section 7-30, City Code, upon the expiration of the pilot program. Stated differently, would the enactment of a pilot program allowing certain owner-occupied vacation rentals in accordance with the terms and conditions of such pilot program cause the City to forever lose its authority to prohibit vacation rentals in the future upon expiration of the pilot program in accordance with the preemption provisions of Section 509.032(7)(b), Florida Statutes. A copy of the proposed City Ordinance establishing the pilot program is attached as Exhibit "A."

The City Ordinance states the following relevant provisions regarding the pilot program and the effect of the sunset of same:

Sec. 7-78. Sunset.

- a. This ordinance shall Sunset 364 days after it becomes effective unless it is extended by an ordinance adopted by the City Council prior to the Sunset period.
- b. The City Staff will present a report to the City Council three (3) months prior to the date this Ordinance is to Sunset. The report will provide data on the affects that this Ordinance has on the City.
- c. After the presentation of the report, the City Council may adopt a permanent ordinance, allow this Ordinance to Sunset, adopt modifications to this Ordinance or take other actions relating to the matters referenced in this Ordinance. If the ordinance is allowed to Sunset, Vacation Rentals will be prohibited in the City of Belle Isle, including, without limitation, those Vacation Rentals for which a Vacation Rental License was issued under this Ordinance.

* * *

Section 5. PRESERVATION OF CODE SECTION 7-30. This Ordinance and the City Code amendments effected hereby shall not be construed to override, repeal, waive, eliminate, suspend, recede from, or in any way invalidate or make

ineffective the prohibition on short-term rentals provided for in Ordinance No. 08-03 creating Section 7-30 of the City Code, and such provision remains in full force and effect and shall continue to apply without interruption to the extent that a vacation rental or short-term rental is not allowed under the new Article III, Chapter 7 of the City Code created by this Ordinance. Without in any way limiting or restricting or in any way compromising the foregoing prohibition, the issuance of Vacation Rental Licenses and the opening, operation and use of any Vacation Rental during or pursuant to this Ordinance, and any other actions carried out in furtherance of Vacation Rentals, do not constitute any basis for the continuation of the operation, or use of such after this Ordinance Sunsets, and the prohibition on short-term rentals provided for in Ordinance No. 08-03 creating Section 7-30 shall continue in full force and effect for all Vacation Rentals and short-term rentals.

The Florida Attorney General, citing the Florida Supreme Court, has observed that “[w]hen 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.” Fla. Att’y Gen. Op. 2016-12 (citing *Metro. Dade County v. Chase Fed. Hous. Corp.*, 737 So. 2d 494, 504 (Fla. 1999)). However, such rule should not apply where, as here, a municipality has a regulation that is grandfathered under a preemption statute, but the municipality desires to allow a probationary and pilot program to determine if a repeal of the otherwise lawful prohibition should occur. To find otherwise would eviscerate the municipality’s clear legislative intention that the allowance for certain owner-occupied vacation rentals be temporary. Further, it appears that Congress has placed in legislation sunset provisions that allow specific provisions to revert back to the pre-amendment status. *See In re Loving*, 269 B.R. 655, 660 (Ind. Southern Bankr. Ct. 2001); *see also In re: Pedro T.*, 8 Cal. 4th 1041,1056-57 (Cal. 1994).

Issue 2. In the event that the City adopted an ordinance that allowed only certain owner-occupied vacation rentals without a trial period or pilot program period, would the prohibition under the City’s lawfully enacted prior ordinance remain in effect as to all vacation rentals that were not allowed pursuant to the new ordinance?

Section 509.032(7)(b), Florida Statutes, allows for the complete prohibition of vacation rentals so long as such grandfathered prohibition was passed pursuant to any local law, ordinance, or regulation adopted on or before June 1, 2011. *See Fla. Att’y Gen. Op. 2014-09.* Notwithstanding the preceding, would a municipality lose the ability to prohibit vacation rentals generally if certain owner-occupied vacation rentals were subsequently allowed by the municipality while the bulk of vacation rentals would still be prohibited under the previous grandfathered prohibition. In Florida Attorney General Opinion 2014-09, the office of the

Florida Attorney General 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.” Here, the question becomes whether the grandfathered prohibition would be lost simply upon allowing some vacation rentals for homes that are owner-occupied and otherwise meet other certain regulations relating to vacation rentals that does not prohibit such vacation rentals outright or regulate the frequency of rental of vacation rentals in contravention of section 509.032(7)(b), Florida Statutes.

The allowance of certain owner-occupied vacation rentals does not necessarily repeal or lead to a conclusion that the existing prohibition is unenforceable. Ordinances are police regulations, and “it is elementary that the failure to enforce a valid police regulation in one case, or in many cases, does not affect the power to enforce it in other cases.” *See Miami Beach v. State*, 145 Fla. 716, 726 (Fla. 1941). Otherwise, Florida municipalities with valid vacation rental prohibitions would appear to have prohibition ordinances that are “frozen” and any future amendments to same would cause a loss of the “grandfather” protection. *See Florida League of Cities, Inc., 2018 Legislative Issue Briefs, Short-Term Rentals*, available at https://www.floridaleagueofcities.com/docs/default-source/advocacy/issue-briefs-talking-points/2018-ib---short-term-rentals5584b5c41a9e6c4e8be5ff0000e8da5f.pdf?sfvrsn=821dd9d5_6 (last visited February 21, 2019).

