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MEMORANDUM

DATE: May 3, 2016

TO: R.B. Johnson, Mayor/Commissioner
Terry Hamilton-Wollin, Vice-Mayor/Commissioner
Phil Hanna, Commissioner
Joanne "Cookie" Kennedy, Commissioner
Edward Hoofnagle, Commissioner

CC: Gregg Mims, City Manager

FROM: Randy Mora, City Attorney 

RE: Short Term Rental Regulations in the City of Indian Rocks Beach

Below is a memorandum analyzing the City of Indian Rocks Beach's (the "City's") ordinances regulating short term rentals, their enforceability, and potential courses of action available to the City to address this issue in the future.

I. EXECUTIVE SUMMARY

Local government regulation of short term rentals, especially in beach communities, has changed a great deal in the past five years. In 2011, the Florida Legislature (the "Legislature") first preempted local governments' ability to prohibit or restrict the use, classification or occupancy of short term rentals. Later, in 2014, the Legislature again amended the preemption statute, replacing the broader language from 2011 with a prohibition on local government regulation of the frequency or duration of short term rentals.

As a consequence of legislative action by the City following the Legislature's preemption of the matter, the City's existing restrictions on the operation, duration or frequency of short term rentals are presently unenforceable. If the City desires to regulate short term rentals in the future, it must do so in a manner that does not regulate their duration or frequency. Though the City is unable to prohibit short term rentals, there are alternative regulations the City may consider to address this issue.

The alternative and admittedly more difficult course of action would be for the City to advocate before the Legislature to repeal the preemption statute. This would restore local governments' home rule powers and allow them to address issues in their communities directly.

This remains a dynamic area of law throughout Florida, and any restrictions the City adopts may be met by a legal challenge.

II. BACKGROUND INFORMATION

A. HOME RULE AND PREEMPTION GENERALLY

A municipality has home rule powers to enact legislation on any subject upon which the 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.¹ In determining whether local laws and the actions of local government are in contravention of a state statute, courts look to whether the statute expressly preempts that area.²

B. LEGISLATIVE PREEMPTION RELATIVE TO SHORT TERM RENTALS

In 2011, the Florida Legislature passed House Bill 883 (“HB 883”) explicitly preempting the authority of local governments to pass a law, ordinance or regulation restricting the use of vacation rentals based solely on their **classification, use, or occupancy**.³ The Legislature restricted the preemptive effect of the statute to any law, ordinance, or regulation adopted on or after June 1, 2011.⁴

In 2014, the Legislature again amended Fla. Stat. § 509.032, this time through the passage of Senate Bill 356 (“SB 356”). SB 356 provides that local governments cannot “prohibit vacation rentals or regulate the **duration or frequency** of rental of vacation rentals.”⁵ The law also prevents local governments from adopting ordinances or regulations prohibiting vacation rentals, through zoning or otherwise.⁶ Even so, SB 356 returned some power to local governments by rescinding the preemption over the regulation of the classification, use or occupancy of short term rentals. SB 356 preserved the grandfathered status of municipal regulations adopted on or before June 1, 2011.⁷

A copy of the 2010, 2011, and 2014 versions of the Fla. Stat. § 509.032 (7) are attached here as **Composite Exhibit 1**.

¹ Fla. Stat. § 166.021

² *Eisenberg v. City of Miami Beach*, 1 F. Supp. 3d 1327, 1348 (S.D. Fla. 2014)

³ Fla. Stat. § 509.032 (7) (b) (2011)

⁴ Fla. Stat. § 509.032 (7) (b) (2011)

⁵ Fla. Stat. § 509.032 (7) (b) (2014)

⁶ Fla. Stat. § 509.032 (7) (b) (2014); see also Fla. Att’y Gen. Op. 2014-09

⁷ Fla. Stat. § 509.032 (7) (b) (2014)

C. LOCAL REGULATIONS

i. County Ordinances

Though the County has an ordinance regulating temporary lodging, that Ordinance does not preempt or otherwise supplement the City's regulation of short term rentals. On October 16, 2007, the County adopted ordinance 07-50, modifying ordinance 89-4.⁸ This Ordinance amended the Rules Concerning the Administration of the Countywide Future Land Use Plan, with several provisions concerning the classification of "temporary lodging."

The passage of this ordinance led to an extensive dialogue between the Pinellas Planning Council and the City, and ultimately the passage of broad changes to the City's regulation of transient or temporary lodging.

ii. City Ordinances Concerning Short Term Rentals

In 2010, the County recommended the City amend its code to align with the County's land use plan. This meant adopting definitions and regulations modifying the City's previous use of the "transient living accommodations" classification, to the "temporary lodging use" classification. The City began the process of incorporating these revisions in 2011.

On or about July 12, 2011, weeks after HB 883 took effect, the City adopted Ordinance 2011-03 (the "2011 Ordinance"), implementing these changes. A copy of the 2011 Ordinance is attached here as **Exhibit 2**. This modernization of the City's land development code included a change both to the name and substantive definition of these properties. Specifically, the City changed the definition to apply to properties offering, advertising or operating under a lease of less than one month, more than three times in a single year. The previous definition for "transient living accommodations" included leases for less than three months and was less detailed. The new definition for "temporary lodging use" was more restrictive. This amendment represented a substantive change to the classification and use of transient or temporary lodging within the City. This change invalidated any restrictions on short term rentals, following the Legislature's 2011 preemption of the matter.

On September 19, 2012, the City adopted Ordinance 2012-08 (the "2012 Ordinance"), further amending its restrictions regarding short term rentals. A copy of the 2012 Ordinance is attached here as **Exhibit 3**. The 2012 Ordinance included affirmative prohibitions on the classification, use and duration of short term rentals. Most notably, the 2012 Ordinance again amended the definition of a "temporary lodging use" and reverted back to a definition concerning occupancy of less than three months. These restrictions concerning the classification, use, and duration of short term rentals were invalid upon their adoption in 2012 or invalidated by the Legislature's 2014 amendments to Fla. Stat. § 509.032.

⁸ Pinellas County Ordinance 07-50 (2007)

As a result of the City's 2011 and 2012 Ordinances, the prohibitions and restrictions in the City's code are presently unenforceable.

III. RECENT LEGAL DEVELOPMENTS CONCERNING SHORT TERM RENTALS

A. FLAGLER COUNTY

In February 2015, Flagler County passed a robust ordinance attempting to regulate those elements of short term rentals that remain subject to local regulation (the "Flagler Ordinance").⁹ A copy of the Flagler Ordinance is attached here as **Exhibit 4**. Flagler County, fully aware of the Legislature's preemption of the matter, attempted to enact a series of creative regulations targeted at short term rentals and the common problems associated therewith without regulating duration and frequency. The "WHEREAS" clauses of the Flagler Ordinance, wherein the legislative body explains and justifies its action, span nearly ten pages by themselves. The Flagler Ordinance, for example, requires a short term rental certificate from the county, a business tax receipt, a Florida Department of Revenue certificate of registration, and a Florida Department of Business and Professional Business Regulation license. In addition to registration requirements the Flagler Ordinance goes on to include minimum requirements governing safety, occupancy, parking standards, solid waste management, and advertising for short term rental properties.

Two rental home companies in Flagler County sued seeking declaratory and injunctive relief from the Flagler Ordinance for its alleged derogation of the Legislature's preemption.¹⁰ In June 2015, the Flagler County Court ruled against the Plaintiff, allowing most of the restrictions in the Flagler Ordinance to remain in place. The ruling did find the Flagler Ordinance unconstitutional to the extent it applied to vacation rental contracts that pre-dated its effective date.

The Plaintiffs appealed the court's ruling to the Fifth District Court of Appeals.¹¹ The Fifth DCA affirmed the lower court's opinion on January 12, 2016. Within 24 hours of the Fifth DCA's order, the Flagler County Commission passed an amended version of the ordinance regulating vacation rentals.

B. CURRENT LEGAL LANDSCAPE

There is an ongoing effort to lobby the legislature to abandon or limit the scope of its preemption. In the most recent legislative session several legislators introduced bills attempting to broaden the power of local governments to regulate short term rentals. None of these bills were passed or signed into law.

The Flagler Ordinance and subsequent litigation are being used as a template for the viability of short term rental restrictions in the current statutory regime. Many other local governments have modeled their own ordinances after Flagler's. Indeed, another municipality in

⁹ Flagler County Ordinance 2015-02.

¹⁰ See 30 Cinnamon Beach Way, LLC, et al. v. Flagler County, Case No. 2015-CA-000167

¹¹ See 30 Cinnamon Beach Way, LLC, et al. v. Flagler County, Case No. 5D15-2296

Pinellas County recently incorporated registration requirements similar to those implemented in Flagler County.

Regardless of Flagler County's success, any effort to implement and enforce new restrictions is likely to be met with litigation. The same city in Pinellas County that adopted the registration restrictions has already been sued seeking a declaration that those restrictions are invalid.

IV. CONCLUSION

The City's current restrictions concerning short term rentals have been preempted by the Legislature, owing to passage of the City's 2011 and 2012 Ordinances.

The City's best legal remedy to this problem is in Tallahassee, not in its City Hall. The most effective solution would be for the City, and other similarly situated local governments to seek the legislative repeal of the preemption statute. Local governments need the ability to regulate the duration and frequency of these tenancies. Without the repeal of the preemption statute, local ordinances governing the attendant problems caused by short term rentals will only serve as a band-aide on a more chronic issue. As the elected representatives of your City, it is up to you to determine whether and how to best implement the changes your community needs.

Presently, the City cannot prohibit short term rentals, through zoning restrictions or otherwise. The City can still regulate short term rentals, but must do so in a manner that does not restrict their duration or frequency. If the City chooses to regulate or restrict short term rentals in any manner it should do so in a manner consistent with those restrictions it finds desirable from the Flagler Ordinance. It remains likely that whatever restrictions the City adopts, however meritorious or legitimate, are likely to be challenged in court.

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