BOARD OF COUNTY COMMISSIONERS

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Inter-Office Memo

TO: Commissioner Tobia, District 3 Commissioner

FROM: Alex Esseesse, Assistant County Attorney AE

THRU: Eden Bentley, County Attorney

SUBJECT: Removing restrictions on resort dwellings

DATE: November 7, 2019

Issue: The Florida Legislature adopted Section 509.032(7)(b), Fla. Stat., in order to limit the ability of local governments to regulate vacation rentals. Specifically, this statute provides that "[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." It has been asked whether the County has the ability to amend its regulations that pertain to resort dwellings in certain zoning classifications to reduce/remove existing conditions.

Question: Can the County amend certain zoning restrictions where resort dwellings are permitted with conditions, allowed based on a conditional use, or not permitted?

Short Answer: It is possible, but certain steps must be taken to avoid running afoul of the State's preemption language. Specifically, in order to make changes to the existing zoning regulations pertaining to resort dwellings, it will be necessary for the County to adopt the State's definition of vacation rental to avoid a conflict between the State's definition of "vacation rental" and the County's definition of "resort dwelling." Any new zoning classification(s) that would allow vacation rentals would need to be permitted without any restrictions or conditions.

Analysis

First it is important to outline whether the unchanged provisions of the County's zoning regulations will remain in place. In short, the Florida Supreme Court has generally addressed the issue of whether laws, or portions thereof, can remain in effect even if they are changed,

amended, or repealed and substantially re-enacted. In *McKibben v. Mallory*, 293 So.2d 48, 53 (Fla. 1974), the Court stated that

> where a [law] has been repealed and substantially re-enacted by a statute which contains additions to or changes in the original [law], the re-enacted provisions are deemed to have been in operation continuously from the original enactment whereas the additions or changes are treated as amendments effective from the time the new [law] goes into effect.

See also, *Venice HMA, LLC v. Sarasota County*, 228 So.3d 76, 83 (Fla. 2017) (where the Court reaffirmed its earlier ruling in *McKibben* by stating "when a [law] is 'repealed and substantially re-enacted,' . . . it is 'deemed to have been in operation continuously from the original enactment.'" (quoting *McKibben*, at 53)). As a result, based on this language, it would appear possible for the County to completely remove specific conditions that limit resort dwellings without causing the County to lose the remaining restrictions that are currently in place. A possible way of addressing this concern is to incorporate WHEREAS clauses that identify the Board's intent to keep in place the unaltered provisions dating back to before June 2011 and limit the changes to specifically identified Code sections.

Competing Definitions

With that being said, an issue that exists is the disparity between the State's definition of vacation rentals and the County's definition of resort dwellings. The State has in place a specific definition for vacation rentals. The State defines a 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 509.242(1)(c), Fla. Stat. A public lodging establishment is defined to include transient public lodging establishments, which means

> 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.

Section 509.013(4)(a)1., Fla. Stat. Meanwhile, the County defines resort dwelling as

> any single family dwelling or multifamily dwelling unit which is rented for periods of less than 90 days or three calendar months, whichever is less, or which is

> advertised or held out to the public as a place rented for periods of less than 90 days or three calendar months, whichever is less. For the purposes of this chapter, a resort dwelling is a commercial use. For the purposes of this definition, subleases for less than 90 days are to be considered separate rental periods. This definition does not include month-to-month hold-over leases from a previous lease longer than 90 days.

Section 62-1102, Brevard County Code. The main difference is that the State looks at the number of times the property is being rented out over a 30-day period, which is three (3) times during that one-month period. While the County looks at *any* rental activity for less than 90 days. The differing definitions is likely going to provide legal grounds for a challenge to the ordinance change as the preemption language regulates duration and frequency of rentals.

The Florida Attorney General's Office addressed the issue of "grandfathering in" short-term rental zoning regulations and found that incompatible definitions of vacation rentals, or similarly defined terms, could be grounds to invalidate any new ordinance change(s). Specifically, in AGO 2019-07, the City of Crystal River requested an interpretation on the application of Section 509.032(7)(b), Fla. Stat., and how it impacts a local government's ability to adopt new zoning ordinances on vacation rentals, even when the new regulation would be "less restrictive." The Attorney General's Office found that "[w]hen a law is amended, provisions of the original law that are essentially and materially unchanged are considered to be a continuation of the original law." *Op. Att'y Gen. Fla. 2019-07* (2019). However, the Attorney General's Office noted concern over Crystal River's existing definition of resort housing units in its code and how it was incompatible with the preemption language. The opinion noted that the city's definition[1] would regulate the duration and frequency of vacation rentals, which is expressly prohibited under Section 509.032(7)(b), Fla. Stat. Therefore, it appears that if the County wants to put in place new zoning regulations related to "resort dwellings," the State's definition (and other associated regulations) would need to be utilized and applied in those specific instances rather than "resort dwellings." In so doing, the County should avoid any preemption issues as there would not be a conflict with the State's definition of vacation rentals.

[1]The city's zoning regulation at issue allowed for resort housing units in a specific zoning classification as long as certain requirements were followed: "**A.** Resort housing units are permissible in the [Commercial Waterfront] zoning district, subject to the district standards and the supplemental standards set forth below. **B.** *Nightly rentals or rentals of less than a one-week period are not permitted*. **C.** Density for resort housing units shall not exceed twelve (12) units per acre. Resort housing units may be managed by the individual unit owner or by a property management company. **D.** An occupational license is required for the manager, whether an individual owner with a single unit, or a property management company." Because **B.** regulates the duration or frequency of rentals, allowing resort housing units as defined by the city in once prohibited zoning classifications would violate Section 509.032(7)(b), Fla. Stat.

In *City of Miami v. AIRBNB, Inc.*, 260 So.3d 478 (Fla. 3rd DCA 2018), the Third District Court of Appeal was tasked with determining whether: (1) the City of Miami's short-term rental zoning regulation for a specific zoning classification was invalid under State law; and (2) a more restrictive interpretation of said zoning regulation by the city violated the preemption language. Essentially, the city had in place an ordinance that was to be used for residential purposes, which included "land use functions *predominantly of permanent housing*." (*emphasis added*). The Third District found that, despite being updated in 2016, the city's ordinance was still enforceable because it was "identical in its material provisions to the zoning code in effect in 2009 [before the preemption language was adopted]." *Id*., at 482. With respect to the city's zoning interpretation, the court determined that imposing a complete ban on the existence of rentals in such a zoning classification was overly broad and violated the preemption language. As stated above, the ordinance refers to functions *predominantly* of permanent housing being permitted within the zoning classification. The court stated a complete ban on rentals was not permitted because the ordinance allowed for *incidental* uses to take place, which the court determined would permit short-term rentals based on the facts and circumstances of each case. As a result, the court ruled that the city's more restrictive zoning interpretation barring rentals in the specific zoning classification was improper because it violated the preemption language.

Conclusion

The County can amend its zoning regulations to allow for certain zoning classifications to permit resort dwellings or remove conditions that restrict where a resort dwelling can exist. However, that would require the term "resort dwelling" to be modified to mirror State law in order to avoid running afoul of the preemption language which prohibits local governments from adopting regulations that prohibit vacation rentals or that regulate the duration or frequency rental of such properties. As a result, any new zoning classification(s) that would allow vacation rentals would need to be permitted without any restrictions or conditions. The ordinances pertaining to resort dwellings that have been in place since before June 1, 2011, and that are not amended will continue in operation.