Vacation rentals, municipalities, grandfather provision

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Subject:
Vacation rentals, municipalities, grandfather provision

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RE: VACATION RENTALS – MUNICIPALITIES – LOCAL GOVERNMENT – preserving grandfathered status under preemption provision when changing zoning district. § 509.032(7)(b), Fla. Stat.

Dear Ms. Rey:

This office has received your letter on behalf of the of the Crystal River City Council requesting an opinion regarding the effect of an amendment to the City's zoning laws in the area of vacation rentals.

May a City change its table of permitted uses for zoning districts to allow vacation rentals within districts in which they were not allowed under the City's pre-2011 ordinance, and still preserve the "grandfathered" status of its pre-2011 ordinance under section 509.032(7)(b), Florida Statutes (2018)?

In sum:

Amending an ordinance that was enacted prior to June 1, 2011, will not invalidate the grandfathering protection for those provisions that are reenacted, but new provisions would be preempted if they revise such language in a manner that would regulate the duration or frequency of rental of vacation rentals, even when such regulation would be considered "less restrictive" than the prior local law.

You indicate that the table of permitted uses in the City's Land Development Code enacted in 2005 permits resort housing units only in the City's Commercial Waterfront zoning district.[1] "Resort housing units" are defined in section 1.07.00 as dwelling units that are made available for occupancy for less than three months. Section 5.05.13 describes the permitted use as follows:

A. Resort housing units are permissible in the CW 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.

D. Resort housing units may be managed by the individual unit owner or by a property management company. An occupational license is required for the manager, whether an individual owner with a single unit, or a property management company.

Section 509.032(7)(b), Florida Statutes, 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.

Section 509.032(7)(b) allows the City to regulate vacation rentals so long as such regulation does not prohibit them or limit the duration or frequency of rental.[2] You ask, however, whether enactment of a less restrictive ordinance that would permit vacation rentals where they are now prohibited, by allowing resort housing units in other zoning districts, would eliminate the grandfathered protection of remaining ordinances that deal with vacation rentals.

When 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. “The provisions of the original act or section reenacted by amendment are the law since they were first enacted, and provisions introduced by the amendment are considered to have been enacted at the time the amendment took effect. Thus, rights and liabilities accrued under the original act which are reenacted are not affected by amendment.”[3] As stated by the Florida Supreme Court, this general rule “‘sometimes becomes important, where rights had accrued before the revision or amendment took place.’”[4]

[W]here a statute has been repealed and substantially re-enacted by a statute which contains additions to or changes in the original statute, 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 statute goes into effect.[5]

This principle was operative in a recent case involving vacation rentals, City of Miami v. Airbnb. In the course of deciding the case, the Third District observed that a 2017 resolution interpreting zoning ordinances that prohibited short-term rentals in a suburban/residential zone was not preempted, because it was “identical in its material provisions” to the zoning code the City had enacted in 2009. In contrast, “to the extent the City’s 2015 Zoning Interpretation goes beyond the restrictions in [the 2009 ordinance], the Interpretation is preempted under section 509.032(7)(b).”[6]

Provisions in your amended ordinances that are essentially unchanged from the prior ordinances are deemed to have been in operation since 2005 and, thus, continue to be exempt from the preemption provision of section 509.032(7)(b), Florida Statutes. New provisions that act to prohibit vacation rentals that were not previously prohibited, or that “regulate”[7] the duration and frequency of vacation rentals, even if such provisions are less restrictive than the earlier provisions, are preempted by the statute. Changing the table of permitted uses to reflect that “resort housing units” would also be permitted in other zoning districts would conceivably expand the areas in which vacation rentals could be operated. But the duration and frequency restrictions in section 5.05.13(B), which would then apply to those zoning districts, would

“regulate” resort housing units operated as vacation rentals.[8] Because the “resort housing unit” land use classification expressly regulates, and restricts, the duration or frequency of rentals of residential property that could be considered “vacation rentals,” amending the City’s table of permitted uses to permit resort housing units in other zoning districts would violate section 509.032(7)(b).

Sincerely,

Ashley Moody
Attorney General

[1] Section 2.03.02, Code of Ordinances, City of Crystal River, Florida, Appendix A – Land Development Code.

[2] See Att’y Gen. Op. Fla. 2016-12 (quoting from House of Representatives Final Bill Analysis, CS/CS/CS/HB 883, dated June 28, 2011).

[3] Norman Singer, 1A Sutherland Statutory Construction §22:33 (7th ed. Nov. 2018 update).

[4] Perry v. Consolidated Special Tax School Dist. No 4, 89 Fla. 271, 276, 103 So. 639, 641 (1925) (quoting Cooley’s Const. Lim., at 96-97 (7th ed.)). Accord Orange County v. Robinson, 111 Fla. 402, 405, 149 So. 604, 605 (1933).

[5] McKibben v. Mallory, 293 So. 2d 48, 53 (Fla. 1974). Accord Venice HMA, LLC v. Sarasota Cty., 228 So. 3d 76, 83 (Fla. 2017).

[6]City of Miami v. Airbnb, 260 So. 3d 478, 482 (Fla. 3d DCA 2018).

[7] Black’s Law Dictionary defines the word “regulate” to mean, in pertinent part: “To control (an activity or process) esp. through the implementation of rules.” BLACK’S LAW DICTIONARY (11th ed. 2019).

[8] I note that section 5.05.13(A) of the City’s Land Development Code also expressly restricts resort housing units to the CW zoning district.