IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR FLAGLER COUNTY, FLORIDA

CASE NO.: 2015 CA 167
DIVISION: 49

30 CINNAMON BEACH WAY, LLC, a Florida limited liability company, and VACATION RENTAL PROS PROPERTY MANAGEMENT, LLC, a Florida limited liability company,

Plaintiffs,

vs.

FLAGLER COUNTY, a political subdivision of the State of Florida,

Defendant.
_____/

ORDER ON PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

THIS CAUSE came on for hearing before the Court on May 27, 2015 on Plaintiffs, 30 CINNAMON BEACH WAY, LLC and VACATION RENTAL PROS PROPERTY MANAGEMENT, LLC's, Emergency Motion for Preliminary Injunction. The Court has heard the testimony of witnesses, received documents in evidence, heard the argument of counsel, reviewed the Motion and court file, and is otherwise duly advised in the premises. As explained below, the Court finds that with one limited exception, Plaintiffs have failed to establish that they are entitled to preliminary injunctive relief, and subject to that one exception, their Motion for Preliminary Injunction must be denied.

Plaintiffs in this case challenge the validity of an ordinance enacted by Defendant FLAGLER COUNTY ("the County") relating to short-term vacation rentals. The ordinance in question is Ordinance No. 2015-02, adopted on February 19, 2015 ("the Ordinance"), as amended by Ordinance No. 2015-05, adopted on April 6, 2015 ("the Amended Ordinance"). Plaintiff 30 CINNAMON BEACH WAY, LLC ("30 Cinnamon") is a Florida limited liability company that owns an 11 bedroom house at the address from which it derives its name. 30 Cinnamon uses this house, located in the Ocean Hammock subdivision of unincorporated Flagler County, as a short-term vacation rental property. Plaintiff VACATION RENTAL PROS PROPERTY MANAGEMENT, LLC ("VRP") is a Florida limited liability company that manages various short-term vacation rental properties as agents for their owners, including the one owned by 30 Cinnamon. Stephen Milo is the managing member of VRP, and a member of 30 Cinnamon. VRP manages between 70 and 80 single family homes as short-term vacation rentals in Flagler County.

The subject properties that Plaintiffs either own or manage are "transient public lodging establishments", which Florida law defines as:

> [A]ny 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.

Fla. Stat. §509.013(4)(a)(1). As such, they are regulated by the Division of Hotels and Restaurants of the Florida Department of Business and Professional Regulation. The first issue in this case is whether and to what extent to which the County can also regulate those establishments. Assuming the County has the authority to regulate

short-term vacation rentals at all, the next issue is whether it has exceeded that authority by enacting the Ordinance.

THE ORDINANCE

The Ordinance constitutes an attempt by the County to regulate certain short-term vacation rental properties, specifically properties constructed as single-family or duplex dwellings. The recitals in the Ordinance are adopted as factual findings, only a handful of which are set out here. The County's findings of fact set forth that since 2011, it "has experienced a large increase in the construction of new, oversized structures for the primary purpose of serving as mini-hotels for short-term vacation rentals for up to as many as twenty-four (24) individuals". The County noted that according to the 2010 U.S. Census, the average household size in the County was 2.82 persons, and that the operation of some short-term vacation rental properties with occupancy of some nine times the household average was incompatible with established neighborhoods. The County found that in the absence of some mitigating standards, short-term vacation rentals "can create disproportionate impacts related to their size, excessive occupancy, and the lack of proper facilities if left unregulated". It also found that "the presence of short-term vacation rentals within single-family dwelling units in established residential neighborhoods can create negative compatibility impacts, among which include, but are not limited to, excessive noise, on-street parking, accumulation of trash, and diminished public safety". As such, the County found that "short-term vacation rentals locating within established neighborhoods can disturb the quiet enjoyment of the neighborhood, lower property values, and burden the design layout of a typical neighborhood".

Reduced to its bare essentials, the Ordinance requires that any property owner wishing to operate a non-owner occupied single or two-family residence located east of U.S. Highway 1 as a short-term vacation rental must apply for and obtain a short-term rental certificate from the County, as well as a County business tax receipt. The Ordinance sets forth the process for applying for a certificate, which includes payment of a fee, submittal of scale interior and exterior drawings, proof of septic capacity (if applicable), a draft rental agreement that conforms to the Ordinance, and required safety postings. The Ordinance further requires the installation of hard-wired interconnected smoke and carbon monoxide detectors, the installation of fire extinguishers on each floor, and requires that each sleeping room meet the single- and two-family dwelling minimum requirements of the Florida Building Code. The Ordinance requires an inspection of the property prior to the County issuing a short-term vacation rental certificate, and requires annual inspections thereafter.

The Ordinance also requires that each short-term vacation rental property owner designate a "short-term vacation rental responsible party". The responsible party must be an individual over 18 years of age, be available 24 hours a day, seven days a week, and be able to come to the property upon two hours' notice to respond to issues related to the property. He or she must also monitor the property at least once weekly to assure compliance with the Ordinance.[1]

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[1] By contrast, if the owner of a short-term vacation rental also lives on the property as his or her permanent residence, then the property is wholly exempt from the Ordinance. This is so because of the County's finding of fact that an on-site owner "will likely manage any vacation rental more restrictively than any local regulation because the owner has a direct, vested interest in how the property the owner resides in is used and maintained."

Of key importance to the Plaintiffs is the maximum occupancy limits established in the Ordinance. In areas zoned for multi-family housing, occupancy is capped at 16 persons. In those areas zoned as single-family residential, the maximum occupancy is ten. This is so regardless of whether the structure in question will physically accommodate more people.

The County included in the Ordinance certain provisions for "vesting", which allow property owners time to come into compliance with the requirements of the Ordinance. Certain rights are automatically "vested" so long as the owner submits an application for a short-term vacation rental certificate no later than June 1, 2015. Assuming the owner timely submits the application, the following rights become vested:

a. Rental agreements entered into prior to February 19, 2015 for the period up to February 28, 2016 are vested and unaffected (although maximum occupancy may be capped at 14 people).

b. Rental agreements entered into prior to February 19, 2015 for the period after March 1, 2016 must be submitted to the County for verification and go through a vesting hearing process for a final determination. Rental agreements entered into after February 19, 2015 and for any rental period beyond January 1, 2017 must comply with the Ordinance.

c. Properties are given until December 1, 2015 to come into compliance with the minimum life safety standards of the Ordinance.

d. Maximum occupancy limits are phased in by capping occupancy at 14 persons (as opposed to ten) through February 28, 2018. Maximum occupancy is then reduced to 12 until February 28, 2021, and reduced to ten thereafter.

The Ordinance also provides for a separate vesting mechanism for owners desiring a higher vesting occupancy or different vesting schedule. This mechanism requires a specific vesting application, along with the provision of financial information

related to the property. The decision regarding vesting is made by a special master, whose decision is final.

Vested rights are not transferrable to another owner or another property. If a property is sold or transferred by operation of law (such as by the death of the owner), vested rights are lost and the new owner becomes subject to all terms of the Ordinance.

STANDARD FOR ENTERING A PRELIMINARY INJUNCTION

A preliminary injunction is an extraordinary remedy, and as such should be granted sparingly. See, e.g., Shands at Lake Shore, Inc. v. Ferrero, 898 So. 2d 1037, 1038 (Fla. 1st DCA 2005). "A temporary injunction may be entered only where the party seeking the injunction establishes: (1) the likelihood of irreparable harm; (2) the unavailability of an adequate remedy at law; (3) a substantial likelihood of success on the merits; and (4) considerations of public interest support entry of the injunction." Blue Earth Solutions v. Florida Consolidated Properties, LLC, 113 So. 3d 991. 993 (Fla. 5th DCA 2013). It is against this legal backdrop that the Court must measure the relief Plaintiffs seek.

PREEMPTION

Plaintiffs claim that the regulation of short-term vacation rentals is the exclusive province of the State. They base this contention on Fla. Stat. §509.032(7) (2014), which states in material part as follows:

> (7) PREEMPTION AUTHORITY. –
>
> (a) The regulation of public lodging establishments .... including, but not limited to, sanitation standards, inspections, training and testing of personnel .... is preempted to the state. This paragraph does not preempt the authority of a local government or local enforcement district to conduct

> inspections of public lodging .... for compliance with the Florida Building Code and the Florida Fire Prevention Code.....
>
> (b) 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.

Plaintiffs reason from this statutory language that with the exceptions of inspections for compliance with the Building and Fire Codes that the County is powerless to regulate vacation rentals. This Court does not agree.

"Florida law recognizes two types of preemption: express and implied. Express preemption requires a specific legislative statement; it cannot be implied or inferred." Sarasota Alliance for Fair Elections, Inc. v. Browning, 28 So. 3d 880, 886 (Fla. 2010). "Implied preemption is found where the state legislative scheme of regulation is pervasive and the local legislation would present the danger of conflict with that pervasive regulatory scheme." Id. (internal quotation marks and citations omitted). Determining whether implied preemption exists requires the Court to look to the provisions of the entire law, as well as to its object and policy. Id.

Plaintiffs argue that section 509.032(7)(a) contains an express statement by the Legislature of its intent to preempt the entire regulatory field for residential lodging establishments, thus ending the Court's inquiry. Accepting that reasoning would make whatever regulation the State chooses to impose on vacation rentals both the minimum and maximum permissible regulation. Alternatively, Plaintiffs contend that the statutory scheme in Chapter 509 and the rules promulgated thereunder demonstrate implied preemption under the test set forth above in Sarasota Alliance. Statutory history, however, does not support either position.

The phrase "preempted to the state" appears in section 509.032(7) prior to its amendment in 2011. Immediately prior to June 1, 2011, section 509.032(7) provided as follows:

> ***The regulation of public lodging establishments and public food service establishments***, including, but not limited to, the inspection of public lodging establishments and public food service establishments for compliance with the sanitation standards adopted under this section, and the regulation of food safety protection standards for required training and testing of food service establishment personnel ***are preempted to the state***. This subsection does not preempt the authority of a local government or local enforcement district to conduct inspections of public lodging and public food service establishments for compliance with the Florida Building Code and the Florida Fire Prevention Code, pursuant to ss. 553.80 and 633.022. (emphasis added)

In 2011, however, the Legislature enacted Chapter 2011-119, Laws of Florida, effective June 2, 2011. The short title of this law, which substantially amended section 509.032(7), identifies one of its purposes as

> ***prohibiting local governments from regulating, restricting, or prohibiting vacation rentals based solely on their classification, use, or occupancy***; providing exceptions; revising authority preempted to the state with regard to regulation of public lodging establishments... (emphasis added).

Chapter 2011-119 both amended the language of the existing statute[2] and added an entirely new subsection (b), as shown below:[3]

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[2] Additions to the statutory language are shown in underline, while deleted language is shown by ~~strikeout~~.

[3] Chapter 2011-119 also added section 509.032(c), but that subsection is not germane to the issues before the Court.

(7) PREEMPTION AUTHORITY.—

(a) The regulation of public lodging establishments and public food service establishments, including, but not limited to, ~~the inspection of public lodging establishments and public food service establishments for compliance with the~~ sanitation standards, inspections, ~~adopted under this section, and the regulation of food safety protection standards for required~~ training and testing of ~~food service establishment~~ personnel, and matters related to the nutritional content and marketing of foods offered in such establishments, is ~~are~~ preempted to the state. This paragraph ~~subsection does~~ not preempt the authority of a local government or local enforcement district to conduct inspections of public lodging and public food service establishments for compliance with the Florida Building Code and the Florida Fire Prevention Code, pursuant to ss. 553.80 and 633.022.

(b) 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.

As noted above, the statement that regulation of public lodging establishments is preempted to the state is in both the pre- and post-June 2011 versions of section 509.032. Yet, in enacting Chapter 2011-119, the Legislature went even further, specifically stating that local governments were prohibited from regulating, restricting, or prohibiting vacation rentals.

The Legislature amended section 509.032 yet again in Chapter 2014-071. The short title of this law identifies its purpose as "revising the permitted scope of local laws, ordinances, and regulations regarding vacation rentals..." This enactment, effective July 1, 2014, left section 509.032(a) intact, and amended section 509.032(b) into its current form as follows:

(b) A local law, ordinance, or regulation may not ~~restrict the use of vacation rentals,~~ prohibit vacation rentals or regulate the duration or

frequency of rental of 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.

The Legislature is presumed to know the existing law when it enacts a statute. See, e.g., Williams v. Jones, 326 So. 2d 425, 435 (Fla. 1976); Opperman v. Nationwide Mut. Fire Ins. Co., 515 So. 2d 263, 266 (Fla. 5th DCA 1987). Despite the language of preemption in the pre-June 2011 version of section 509.032(7), the Legislature saw fit to amend the statute to prohibit local governments from regulating or restricting vacation rentals. If the preemption language of the then-existing statute already prohibited local regulation, then it would have been unnecessary for the Legislature to add section 509.032(7)(b). The Court cannot conclude that the Legislature amended the statute for nothing; it clearly meant for the amendment to accomplish something the original statute did not. Likewise, the 2014 amendment to section 509.032(7)(b) was obviously undertaken with knowledge of what the statute then said. The Legislature removed the language prohibiting local governments from restricting the use of vacation rentals or regulating vacation rentals. It instead substituted a prohibition only against regulating the duration or frequency of rental of vacation rentals.

Based on the foregoing, the Court cannot conclude that the State has by virtue of section 509.032(7)(a) completely preempted the field of regulating short-term vacation rentals, their inclusion in the definition of "transient public lodging establishments" notwithstanding. The 2014 amendment of section 509.032(7)(b) allows local governments to regulate short-term vacation rentals, so long as they do not prohibit them, regulate the duration of rentals, or regulate the frequency of rental. Were the County to attempt overriding the State's regulatory efforts by imposing lesser standards

on short-term vacation rentals, such an attempt would be preempted by the terms of section 509.032(7)(a). To read section 509.032(7) any differently would render the Legislature's actions in amending the statute in 2011 and 2014 meaningless surplusage.

Likewise, the Court does not believe that the Legislature has impliedly preempted the Ordinance. As stated above, concurrent local legislation may not conflict with state law. Masone v. City of Aventura, 147 So. 3d 492, 495 (Fla. 2014). "'Such 'conflict preemption' comes into play 'where the local enactment irreconcilably conflicts with or stands as an obstacle to the execution of the full purposes of the statute.'" Id. (quoting Thomas v. State, 614 So. 2d 468, 470 (Fla. 1993)).

No such conflict preemption exists in the instant case. The evidence and argument presented at the hearing fails to show that the Ordinance irreconcilably conflicts with state law. The Ordinance does not stand as an obstacle to executing the full purposes of Chapter 509. In no way does it frustrate state law by lessening the requirements of the statute. The Ordinance imposes some additional requirements that supplement, but do not contradict, state law, which may affect approximately 150 properties. Moreover, as the County found, many of these properties were built as mini-hotels after the 2011 amendment to section 509.032(7), which expressly prohibited the County from restricting or regulating vacation rentals. The removal of that express prohibition has allowed the County to address a situation that the 2011 statutory amendment arguably exacerbated. The Court finds that it does so without infringing upon the regulatory rights and duties of the State.

In sum, the Court finds that the Ordinance is not preempted by state law.

IMPAIRMENT OF CONTRACT

"No ... law impairing the obligation of contracts shall be passed." Art. I, §10, Fla. Const. As Plaintiffs point out, "An impairment ... occurs when a contract is made worse or diminished in quantity, value, excellence or strength." See Motion for Temporary Injunction at 14 (quoting Lawnwood Medical Center, Inc. v. Seeger, 959 So. 2d 1222 (Fla. 1st DCA 2007). The risk of unconstitutionally impairing contract rights comes into play when a statute or ordinance is given retroactive effect to contracts already in place. See, e.g., Cenvill Investors, Inc. v. Condominium Owners Org. of Century Village East, Inc., 556 So. 2d 1197, 1200 (Fla. 4th DCA 1990). There exists a presumption that parties who enter into a contract do so in contemplation of existing law. Id. As a result, the issue of impairment of contract does not apply to rental agreements entered into after the effective date of the Ordinance. As to contracts in existence at the time a law is enacted, however, Florida law follows the principle that "virtually no degree of contract impairment is tolerable". Pomponio v. Claridge of Pompano Condominium, Inc., 378 So. 2d 774, 780 (Fla. 1979); Yamaha Parts Distributors, Inc. v. Ehrman, 316 So. 2d 557, 559 (Fla. 1975).

The vesting provisions of the Ordinance constitute an attempt to mitigate the effects the Ordinance may have on rental agreements entered into prior to February 19, 2015. Assuming such a contract specifies a rental period ending no later than February 28, 2016, the contract is vested and unaffected so long as the owner submits an application for a short-term vacation rental certificate. If the rental period will extend

beyond February 28, 2016, then the contract must go through a vesting hearing process. Thus, those owners who do not timely apply for a certificate, who apply but do not receive a certificate for whatever reason, or who entered into rental agreements before February 19, 2015 for a rental period after February 28, 2016 have no way to know at present whether they can fulfill their contractual obligations or reap their contractual rights. VRP introduced into evidence nine rental agreements it entered into prior to February 19, 2015[4] with occupancy dates ranging from the summer of 2015 to as late as August 2016.

Even if the Ordinance is otherwise valid, the Court finds that the County cannot constitutionally apply the Ordinance to rental agreements already in existence at the time the Ordinance was enacted. The most straightforward example deals with maximum levels of occupancy. If prior to February 19th the owner of a short-term vacation rental has entered into a rental agreement for a house with a maximum occupancy of 20, and the parties contemplated that 20 people would occupy it during the term of the lease,[5] then the owner cannot fulfill the contract if the Ordinance immediately caps occupancy at 14. Similarly, the owner of a short-term vacation rental may decide that he or she does not wish to apply for a short-term vacation rental

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[4] VRP placed ten rental contracts into evidence; however, one of the contracts in Plaintiffs' Composite Exhibit 8 was entered into on February 20, 2015, one day after the cutoff described in the Ordinance. See Plaintiffs' Exhibits 8 and 11.

[5] VRP's rental agreements require that the "Guest" list the names, ages, and dates of occupancy of each person staying in a unit, and further limit permissible occupants to those listed on the rental agreement. VRP's rental agreements also require disclosure of the license tag numbers of each vehicle to be parked at the property. See Plaintiffs' Exhibits 8 and 11. Interestingly, VRP requires all this information in its rental agreements while simultaneously arguing to this Court that the Ordinance should not require VRP to do so because compliance is "virtually impossible". See Motion for Preliminary Injunction at 23-24.

certificate or otherwise comply with the Ordinance. While this may keep the owner from continuing in business by accepting new rental agreements, whatever rental agreements the owner entered into before February 19, 2015 were legal when made (at least so far as the Ordinance is concerned), and the County cannot use the Ordinance to prevent the owner from fulfilling those agreements.

EQUAL PROTECTION

Plaintiffs next argue that the Ordinance violates the Equal Protection Clause of the Florida Constitution. Art. I, §2, Fla. Const. Plaintiffs correctly recognize that because no suspect classes or fundamental rights are involved, the constitutionality of the Ordinance for equal protection is measured under the "rational basis" test. The rational basis is a very deferential standard indeed. It requires only that the Ordinance must be rationally related to a legitimate governmental objective, and must not be arbitrarily or capriciously imposed. E.g., Department of Corrections v. Florida Nurses Ass'n, 508 So. 2d 317, 319 (Fla. 1987). As the Fifth District Court of Appeal has observed,

> The legislation must be sustained if there is any conceivable basis for the legislature to believe that the means they have selected will tend to accomplish the desired end. Even if the court is convinced that the political branch has made an improvident, ill-advised, or unnecessary decision, it must uphold the act if it hears a rational relation to a legitimate governmental purpose.

Zurla v. City of Daytona Beach, 876 So. 2d 34, 35 (Fla. 5th DCA 2004) (quoting Cash Inn of Dade, Inc. v. Metropolitan Dade County, 938 F.2d 1239, 1241 (11th Cir. 1991)). Further, it is unnecessary to engage in courtroom fact-finding to determine whether a

rational basis exists; it "may be based on rational speculation unsupported by evidence or empirical data." Zurla, 876 So. 2d at 35 (internal quotations and citations omitted).

Plaintiffs claim that the Ordinance irrationally distinguishes between two classes of short-term vacation rentals: (1) non-owner occupied single-family and duplex dwellings located east of U.S. Highway 1, and (2) all other short-term vacation rentals, such as condominiums, those located West of U.S. Highway 1, and those which are owner-occupied. The Court disagrees, and finds that the County has drawn a rational distinction between these two classes.

The County set forth extensive factual findings in the Ordinance. Among them were that the vast majority of short-term vacation rentals in Flagler County are located east of U.S. Highway 1, and that the ones situated west of U.S. Highway 1 were primarily hunting camps, owner-occupied, or located on larger lots in a more rural setting. The County also found that it was not necessary (at least at present) to regulate owner-occupied short-term vacation rentals, because the owner would out of self-interest regulate the property more restrictively than the County could by Ordinance. The County also found that it was not necessary to apply the Ordinance to vacation rentals such as condominiums because multi-family housing is typically built to a more stringent standard, and because condominiums are required to be governed by an association which can itself provide the necessary regulation. In applying the "rational basis" standard of review, it is not the province of the Court to second-guess these factual findings.

Plaintiffs further contend that the deadline in the ordinance for applying for a short-term vacation rental certificate is arbitrary and capricious. Plaintiffs note that the

Ordinance originally required applications to be submitted by April 15, 2015, and that the County had not even developed the application at the time it enacted the Ordinance. The County addressed this issue by enacting the Amended Ordinance, which changed the application deadline from April 15 to June 1, 2015. Plaintiffs now complain that the June 1st deadline is "purely arbitrary and capricious". What this argument ignores, however, is that to some degree the selection of any date will always be subject to a claim that it was selected arbitrarily or capriciously. It would be no more or less "arbitrary" to select a date a day, week, month, or six months later. Unless Plaintiffs can show that the County selected a date it knew applicants could not physically meet, they cannot establish that the June 1st date is arbitrary or capricious.

The evidence Plaintiffs introduced at the hearing establishes that it is not impossible for them to comply with the June 1st application deadline. Plaintiffs' consultant, Craig Meek, testified that although Plaintiffs had filed no applications as of the date of the hearing, they had 47 ready to file at that time. Meek said that there were about 22 more that VRP needed to file, but it could not do so because it could not access the properties to take the appropriate measurements for scale drawings. This fact does not, however, render the June 1, 2015 deadline arbitrary. Plaintiffs have been on notice of the need to assemble information for the applications since at least February 19, 2015. While these 22 properties may be heavily rented, there is down time between tenants when the property is being readied for the next guests. If Plaintiffs need to take interior measurements or photographs, they could have done so at that time. That the application forms may not have been ready until sometime in April does not change the fact that the Ordinance specifically calls for scale drawings, which

Meek testified would require interior access. In other words, if Plaintiffs needed to gain interior access to their properties in order to prepare drawings, they knew that fact regardless of whether they had a blank application in hand.[6] The June 1, 2015 application deadline is neither arbitrary nor capricious.

Based upon all the foregoing, the Court must determine Plaintiffs' entitlement to a preliminary injunction by considering rental agreements they entered into after February 19, 2015 separately from those entered into before February 19, 2015.

POST FEBRUARY 19, 2015 CONTRACTS

Both parties appear to equate irreparable injury with the absence of an adequate remedy at law. See Motion for Preliminary Injunction at 24-25; Response in Opposition at 13. As the County states in its response, "irreparable harm can be shown by demonstrating either that the injury cannot be redressed in a court of law or that there is no adequate legal remedy." See Response in Opposition at 13 (citing K.G. v. Florida Dept. of Children and Families, 66 So. 3d 366, 368 (Fla. 1st DCA 2011)). "For injunctive relief purposes, irreparable harm is not established where the potential loss can be adequately compensated for by a monetary award." B.G.H. Ins. Syndicate, Inc. v. Presidential Fire & Cas. Co., 549 So. 2d 197, 198 (Fla. 3rd DCA 1989). "Irreparable injury will never be found where the injury complained of is doubtful, eventual, or contingent". Yachting Promotions, Inc. v. Broward Yachts, Inc., 792 So. 2d 660, 663 (Fla. 4th DCA 2001) (internal quotations omitted). Plaintiffs have failed to establish that

[6] As an aside, the Court notes that paragraph 13 of VRP's rental agreements, titled "Management Access to Property During Your Stay", allows VRP or its vendors to arrive unannounced "to conduct regularly scheduled services", which "will require entry into the property for a brief period of time, even if you are away during their arrival." See Plaintiffs' Exhibits 8 and 11.

they will suffer irreparable harm if the Ordinance is enforced against them prospectively, i.e., as to any rental agreements entered into after February 19, 2015. The Ordinance imposes certain requirements on Plaintiffs that will no doubt entail economic cost, but continued compliance with the law is but one of many costs of doing business. If the maximum occupancy requirements of the Ordinance adversely affect Plaintiffs, it will do so because of lower rental income (or in the case of VRP, lower management fees) or perhaps diminished property values (although no evidence was presented on this point). These are all issues that can be addressed in a court of law in an action for money damages.[7] Accordingly, Plaintiffs fail to satisfy the first two elements of their claim for preliminary injunctive relief.

Plaintiffs have further failed to demonstrate a substantial likelihood of success on the merits. For all the reasons set forth above, the Court finds that the Ordinance is neither expressly nor impliedly preempted by state law. The Court further finds that the Ordinance is rationally related to a legitimate governmental objective, has not been arbitrarily or capriciously applied, and therefore passes muster under the Equal Protection Clause of the Florida Constitution.

Finally, considerations of the public interest do not require the entry of a preliminary injunction. It is true, as Stephen Milo testified, that tourism is an important component of Flagler County's economy, and he testified without contradiction that the short-term vacation rental industry employs many people in Flagler County. On the other hand, however, the County has made a number of factual findings in the

[7] Plaintiffs also indicate in their Verified Complaint that they reserve the right to later assert a claim under Chapter 70, Florida Statutes, commonly known as the "Bert Harris, Jr. Act." See Verified Complaint, ¶179.

Ordinance setting forth the public interests that will be met by enforcing the Ordinance. The Court will not substitute the County's factual findings or policy determinations for its own.

PRE-FEBRUARY 19, 2015 CONTRACTS

The Court must make one exception to the foregoing analysis. Plaintiffs' claims stand on a different footing with respect to rental agreements entered into prior to February 19, 2015. These contracts were not subject to the Ordinance when they were entered into because the Ordinance did not exist. The fact that the County created a vesting schedule in the Ordinance is itself evidence that the County recognized the potential for the Ordinance to impair pre-existing rental agreements. As it currently stands, some rental agreements entered into before February 19th will be automatically vested if the owner applies for a certificate, and some will have to go through a separate vesting process before a special master. Those owners who do not apply for a certificate will presumably be prohibited from using their properties as short-term vacation rentals. The Court finds that to apply the Ordinance to rental agreements in existence before February 19, 2015 amounts to an unconstitutional impairment of contract, regardless of the date on which the vacation rental is to be occupied. Plaintiffs have thus established a substantial likelihood of success on the merits of their impairment of contract claim.

As to this discrete set of contracts, the Court also finds that Plaintiffs have established the likelihood of irreparable harm and the lack of an adequate remedy at law. The only way Plaintiffs can fulfill these pre-existing rental agreements is to apply for short term vacation rental certificates and otherwise comply with the Ordinance. While

there is no reason to suspect that the County would not issue the necessary certificates, there is of course no assurance that it will.[8] Plaintiffs are therefore left in the untenable position of either not complying with the ordinance and thus anticipatorily breaching their rental agreements, or attempting to comply with the Ordinance and hope they will be able to fulfill those agreements. The Court finds that by being put to this "Hobson's choice", Plaintiffs have satisfied the "irreparable injury" and "inadequate remedy at law" elements.

Finally, as to this limited number of rentals, the public interest will not be harmed by entry of a preliminary injunction. As the Court has already stated, the public policy reasons and factual findings the county articulates as support for the Ordinance are both sound and rational. By enacting the Ordinance, the County is responding to an issue it finds was created or exacerbated in part by the 2011 amendment to Fla. Stat. §509.032(7), and particularly the addition of section 509.032(7)(b). Yet the evidence shows that tourism is an important component of Flagler County's economy. There is a public interest to be served in protecting the guests under these pre-existing rental agreements (who may be new or returning visitors to Flagler County) from being "left in the lurch". There is likewise an interest to be served by not disturbing the economic expectations of those who work in the short-term vacation rental industry, or those of its vendors and suppliers with respect to rental agreements already in existence when the Ordinance was adopted. While these interests are not sufficient to prevent prospective

[8] This is not to suggest that the County would arbitrarily deny issuance of a certificate. To the contrary, there may be myriad reasons why an applicant would ultimately not qualify for or receive the certificate it seeks.

application of the Ordinance, they are sufficient to support Plaintiffs' claim for preliminary injunctive relief as to the pre-February 19th rental agreements.

Based upon all the foregoing, it is hereby ORDERED AND ADJUDGED as follows:

1. This Court has jurisdiction over the subject matter of this action and the parties hereto.

2. Plaintiffs' Motion for Preliminary Injunction is hereby GRANTED in part and DENIED in part.

3. The Ordinance is not preempted, either expressly or impliedly, by state law.

4. The Ordinance does not violate the Equal Protection Clause of the Florida Constitution.

5. The Ordinance is unconstitutional as applied to short-term vacation rental contracts entered into prior to February 19, 2015.

6. Defendant FLAGLER COUNTY, its agents, representatives, and assigns are hereby preliminarily enjoined from enforcing Flagler County Ordinance 2015-002, as amended by Flagler County Ordinance 2015-005, against Plaintiffs 30 CINNAMON BEACH WAY, LLC and VACATION RENTAL PROS PROPERTY MANAGEMENT, LLC, with respect to any short-term vacation rental agreements entered into prior to February 19, 2015.

7. The foregoing injunction shall take effect immediately upon entry of this Order; however, it shall automatically dissolve and become void unless Plaintiffs post with the Clerk of this Court a cash or surety injunction bond in favor of the County in the

amount of $5,000.00 no later than 4:30 p.m. on June 4, 2015. Any party may move this Court either to increase or decrease the amount of said bond.

8. In all other respects, Plaintiffs' Motion for Preliminary Injunction shall be, and the same is hereby DENIED.

DONE AND ORDERED in Chambers at Bunnell, Flagler County, Florida this 1st day of June, 2015.

Michael S. Orfinger, Circuit Judge

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