MEMORANDUM

Office of the City Attorney

TO: **Members of the Community Development Committee** **DATE:** **October 14, 2009**

FROM: **City Attorney**

SUBJECT: **State Law Preemption of Landlord Permit Regulations**

INTRODUCTION AND BRIEF ANSWER

At its meeting of July 13, 2009, the Community Development Committee was scheduled to discuss Referral #061025 concerning a request by Saul Silber of Saul Silber Properties, LLC, to exempt multiple-family structures located in single family residential zoning districts from the City's landlord permit requirements set forth in Article I of Chapter 14.5 of the City Code of Ordinances. Due to the absence of necessary code enforcement staff, the discussion was continued; however, a letter dated July 10, 2009 from the North Central Florida Apartment Association (the "NCFAA") to Commissioner Thomas Hawkins was distributed at the meeting and staff was requested to provide a response to the letter. In short, the letter asserts that state law "restrict[s] the City from enacting an ordinance with the purpose of independently regulating multifamily rental units." In addition, a subsequent letter was received by City Manager Russ Blackburn dated July 14, 2009 from Saul Silber Properties, LLC, "request[ing] that the City of Gainesville accept the position taken by the NCFAA and exempt these locations [certain properties owned by Mr. Silber] from the Landlord Permit." A copy of each letter is attached to this memorandum for your ease of reference.

Upon review of the facts and the legal issues raised in the letters, it is the opinion of this Office, that the City is not preempted from enacting and enforcing its landlord permit regulations.

FACTS AND LAW

The City's Landlord Permit Regulations

Since at least 1981, with the adoption of Ordinance No. 2650, the City has been utilizing landlord permits to regulate residential rental tenancies in certain zoning districts. The City's landlord permit regulations have been revised over time, the most recent version having been adopted June 25, 2007 as Ordinance No. 070107 and codified in Article I of Chapter 14.5, of the City Code of Ordinances. The legislative history of these regulations reflect that they were adopted to preserve and protect single-family zoning districts from the decline in residential quality-of-life that may be caused by repeated city code violations by tenants, such as over-occupancy, noise, trash and yard parking, that rise to the level of a public nuisance. It was recognized that some enforcement mechanism, beyond citing the tenant for the violation, was necessary to significantly decrease violations and abate such

nuisances. Instituting the landlord permit process was an innovative approach to enforcement by notifying the landlord of tenant code offenses and placing some compliance responsibility on the landlord, who has the authority to evict offending tenants or take such other action as the landlord deems necessary to remedy the nuisance. In short, the landlord permit is simply another tool in the City's code enforcement and nuisance abatement program.

The landlord permit regulations have been challenged in legal proceedings on various grounds throughout the years and have been consistently upheld. In a 1996 challenge, the plaintiffs alleged the ordinance imposed an unconstitutional restriction on property and privacy rights, violated the City's fair housing code, and was void for vagueness. The Circuit Court did not find merit to the claims and ordered final judgment in favor of the City, stating that "[t]he landlord permit does not impose an inordinate burden upon landlords such as the Plaintiffs. It is a legitimate part of valid regulations governing the use of land in residential districts. Landowners' rights to use property can be restricted by regulations, like the landlord permit requirement, that are rationally related to legitimate governmental interests." See Partial Final Judgment in Hamilton v. City of Gainesville, Case No: 96-1019-CA, Eighth Judicial Circuit, Alachua County, Florida. In a 2007 challenge, the plaintiff alleged the ordinance was preempted by or in conflict with the Florida Residential Landlord/Tenant Act and failed to provide adequate due process. The Circuit Court Judge found that "the City of Gainesville has clearly demonstrated that the subject ordinances are those which the City of Gainesville is empowered to enact and that these ordinances are clearly consistent with any arguably applicable constitutional provisions." See Final Summary Declaratory Judgment in Daly v. City of Gainesville, Case No. 01-2007-CA-4328, Eighth Judicial Circuit, Alachua County, Florida. The plaintiff appealed the decision, and the First District Court of Appeal affirmed the Circuit Court decision upholding the landlord permit regulations. See Opinion filed February 24, 2009, Daly v. City of Gainesville, Case No. 1D08-2923, First District Court of Appeal.

The State's Regulation of Public Lodging and Food Service Establishments

The State, through its Division of Hotels and Restaurants of the Department of Business and Professional Regulation, regulates public lodging establishments under Part I of Chapter 509, Florida Statutes and Chapter 61C-1 and 61C-3, Florida Administrative Code. The term public lodging establishment includes both transient (rented to guests for less than 1 month) and non-transient establishments (more than four units and rented to guests for at least 1 month). As relevant to this memorandum, the State regulations require non-transient establishments to obtain a license from the State and to submit to inspections by the State at least once per year to ensure compliance with State law requirements in the areas of sanitation and safety and consumer protection.

In its letter to Commissioner Hawkins, the NCFAA asserts that the state regulation of non-transient establishments restricts the City from enacting and enforcing its landlord permit regulations. The NCFAA cites Section 509.032(7), Florida Statutes, "PREEMPTION AUTHORITY.--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."

LEGAL ANALYSIS

As a general matter, under Article VIII, Section (b) POWERS., of the Florida Constitution, "[m]unicipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes *except as otherwise provided by law*." (emphasis added). The latter phrase recognizes that a municipal ordinance cannot (1) regulate in an area that has been preempted by state law, and (2) cannot conflict or be inconsistent with a state law.

Preemption by State Law

Florida law recognizes two types of preemption: express and implied. Under the City's broad municipal home rule powers, the City may "enact legislation concerning any subject matter upon which the state Legislature may act, except . . . [a]ny subject ***expressly preempted*** to state . . . government . . ." See Fla. Stat. § 166.021(3)(c) (2007) (emphasis added). "***Implied preemption*** is actually a decision by the courts to create preemption in the absence of an explicit legislative directive." Phantom of Clearwater, Inc. v. Pinellas County, 894 So.2d 1011, 1019 (Fla. 2d DCA 2005) (emphasis added).

To find a subject matter expressly preempted to the state, the express preemption must be a specific statement; express preemption cannot be implied or inferred. This means the legislature must state with specificity the precise matter that it intends to preempt, and any words of general import must be colored by the more particular words accompanying them. See Hillsborough County v. Florida Restaurant Association, Inc., 603 So.2d 587, 590 (Fla. 2d DCA 1992). In that case, the court dissected the express preemption language contained in a statute and found that some of the preemption language (i.e., "required training and testing of food service establishment personnel is hereby preempted to the state") was written narrowly to provide a specific preemption in those areas of regulation; while the remaining language "[t]he regulation and inspection of food service establishments licensed by chapter 509 . . . are preempted to the state" must be read as a mere generalized statement of the narrower and valid express preemption language. To do otherwise, the Court noted, would render the narrow language redundant and useless. Therefore, the court found the County was not expressly preempted from adopting a local ordinance to require that certain food service establishments post health warning signs on the premises. This is very similar to the preemption language cited by the NCFAA, part of the language is narrow (i.e., the inspection of public lodging establishments for compliance with the sanitation standards adopted by statute) and part of it is general (i.e., the regulation of public lodging establishments are preempted to the state). The narrow, express preemption cannot; however, be read to preempt the City from enacting or enforcing landlord permit regulations, as the landlord permit process does not operate to ensure compliance with the sanitation, safety or consumer protection standards set forth in state law, but rather operates to enforce City codes and abate public nuisances in the City.

Even if no clear express preemption is stated, an implied preemption may exist. To find an implied preemption, the legislative scheme in the subject area must be so pervasive as to evidence an intent to preempt this particular area, and strong public policy reasons must exist to find an area preempted by the State. See Browning v. Sarasota Alliance for Fair Elections, Inc., 968 So. 2d 637, 645 (Fla. 2d DCA 2007). Specifically, the State does not regulate landlord permitting, enforce city codes, or abate local public nuisances, nor are there public policy reasons to find state preemption in this area.

Conflict with State Law

Even if no express or implied preemption exists, courts have recognized that a local ordinance cannot conflict with a State law. According to the Florida Supreme Court, an ordinance cannot conflict with State law in the sense that "[a] municipality cannot forbid what the legislature has expressly licensed, authorized or required, nor may it authorize what the legislature has expressly forbidden." See Rinzler v. Carson, 262 So.2d 661, 668 (Fla. 1972). In other words, the following analysis is required:

> If there is no issue of preemption, then the question is whether an ordinance passed by a municipality or county with Home Rule powers, "conflicts" with the state statute. "Conflict" for this purpose is given a very strict and limited meaning. . . [T]hey must contradict each other in the sense that both legislative provisions (the ordinance and the statute) cannot co-exist. They are in "conflict" if, in order to comply with one, a violation of the other is required. The question is, does compliance with the ordinance violate the state law, or make compliance with state law impossible? It is not a conflict if the ordinance is more stringent than the statute. F.Y.I. Adventures, Inc. v. City of Ocala, 698 So. 2d 583, 584 (Fla. 5th DCA 1997) (internal citations omitted).

In the case cited by the NCFAA, Metropolitan Dade County v. Chase Federal Housing Corporation, 737 So. 2d 494 (Fla. 1999), a state statute provided that property owners were immune from lawsuits for environmental contamination resulting from dry cleaning solvents, while the Dade County Code provided that property owners were strictly liable for environmental pollution. The court found that the county code provision imposing liability was in direct conflict with the state statute that relieved the property owner of liability, and therefore the county code could not be relied on to bring a lawsuit against a property owner for dry cleaning solvent contamination.

The City's landlord permit ordinance requires landlords to obtain a permit from the City, to allow inspections by the City to ensure compliance with City Codes and to take action to deal with a tenant violator, if enough code violations occur on the property such that constitute a public nuisance. Such regulation does not in any manner "conflict" with the State regulations which are aimed at ensuring compliance with the sanitation, safety and consumer protection requirements imposed by State law. While the City ordinance does regulate non-transient public lodging establishments that are also regulated by the State law, the City ordinance does not require a property owner to violate the State law or seek to enforce the state law, the City ordinance regulates to ensure compliance with City code. Such regulations, although broader

than the State law regulation, are well within the City's home rule powers. See F.Y.I. Adventures, 698 So. 2d at 585 (upholding ordinance that goes further and regulates the conduct and play of bingo in ways not dealt with by the statute). Furthermore, municipal efforts to address repeated code enforcement violations that rise to the level of public nuisances – which is essentially all that the City's landlord permit does – have been upheld as valid uses of municipal authority.

CONCLUSION

Based on the above analysis of the facts and law, it is our opinion that the City's landlord permit regulations are not expressly or impliedly preempted by State law regulating non-transient public lodging establishments. In addition, since the ordinance and the statute serve separate regulatory ends, there is no conflict rendering the landlord permit ordinance invalid. Therefore, the City, under its municipal home rule powers, validly enacted and may continue to enforce its landlord permit regulations.

Prepared by: Nicolle M. Shalley
Nicolle M. Shalley
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Submitted by:
Marion J. Radson
City Attorney

cc: Fredrick Murry, Assistant City Manager
Erik Bredfeldt, Planning and Development Services Director
Chris Cooper, Interim Code Enforcement Manager

handout at 7/13/09 CDC Meeting

"The mission of the NCFAA is to serve and support professional owners, managers and providers of multifamily housing through governmental advocacy, education and service through professional networking, volunteer leadership development, timely information and participation in our state and national associations to advance quality housing."

www.ncfaa.net

July 10, 2009

Commissioner Thomas Hawkins
City of Gainesville
200 East University Ave.
Gainesville, FL 32602

Re: The letter dated June 15, 2009 to the Community Development Committee pertaining to Mr. Silber's Request to review landlord permits for nonconforming uses (Item #061025) from James L. Garrett Sr., Code Enforcement Manager for the City of Gainesville.

Commissioner Hawkins,

I reviewed the above referenced letter where Mr. Garrett recommended "expanding LLP requirements to include all rentals which would include multifamily zoning districts." I would like to thank him for pointing out that "the financial impact of this action would more than likely come at a time when neither the City nor the rental industry could absorb the cost without serious implication." **Many local governments have considered the local regulation of various types of multifamily rental properties without considering that this activity is pre-empted to the State of Florida.** I would like to take this opportunity to help you with information relevant to Mr. Garrett's recommendation.

The Division of Hotels and Restaurants, within the Florida Department of Business and Professional Regulation, has been responsible for the licensing and inspection of transient and non-transient public lodging, including multifamily rental properties with state regulation dating back to 1927. Section 509.032(7) provides the following preemption for public lodging regulation:

> (7) **PREEMPTION AUTHORITY**.--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.

This preemption limits the powers of the City under the Florida Constitution, Article VIII, Section 2, subsection (b), "Municipalities shall have governmental,

corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law."

The authority to carry out the regulatory responsibility in Chapter 509, Florida Statutes, and "all other applicable laws and rules relating to the inspection or regulation of public lodging establishments and public food service establishments for the purpose of safeguarding the public health, safety, and welfare" **is placed with the Division of Hotels and Restaurants.** Chapter 509, Florida Statutes, public lodging definitions include transient and non-transient lodging establishments. **Additionally, Section 166.221, Florida Statutes, restricts municipal authority to levy regulatory fees to regulations not preempted to the state.**

The laws cited above restrict the City from enacting an ordinance with the purpose of independently regulating multifamily rental units. It is my understanding that ordinances passed by the City may not impose an additional fee beyond that statutorily authorized or require dual regulation on rental properties already regulated by the Division of Hotels and Restaurants. Instances of conflict between an ordinance and state law were clarified in Metropolitan Dade County v. Chase Federal Housing Corporation, et al. 737 So2d 494 (S. Ct. 1999). In that case, the Supreme Court of Florida affirmed that the conflicted statute shall be granted favor over the conflicting ordinance.

Based on the foregoing, the North Central Florida Apartment Association respectfully requests that the ordinance the City of Gainesville has enacted, or may be in the process of amending comply with state law.

We recognize the importance of the City of Gainesville to protect the health, safety, and welfare of our citizens; it is our desire to encourage harmony and cooperation in the regulation of multifamily rentals. I hope you have found this information to be helpful. Please do not hesitate to contact me at 352-333-0333 if you have any questions or if I may otherwise assist you.

Sincerely,

Richard J. Ashbrook
Treasurer, Legislative Chairperson

Cc: Commissioner Scherwin Henry
Commissioner Craig Lowe

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July 14, 2009

Russ Blackburn, City Manager
The City of Gainesville
City Hall, Station 6
PO Box 490
Gainesville, Florida 32602-0490

JUL 16 2009

Re: 400 NE 11th Street, 401 NE 10th Street and 410 NE 11th Street

Dear Mr. Blackburn:

As you may recall, I have been dealing with the Landlord Permit issue on the above for about twenty-five (25) years. One of the avenues that I have tried was the rezoning of the property. During the rezoning meetings, the Plan Board and the City Commission passed a resolution or at least made mention to the fact that the City of Gainesville should not impose Landlord Permit Fees on the twenty (20) apartments referenced in this letter and asked that, in an effort to find a way to reduce the burden of these charges on the tenant, that the issue be looked into further.

Since our last discussion on this issue (over one (1) year ago), I have been negotiating the breakdown of these charges with Jim Garrett, which led to the issue again being brought up at a Community Development Committee meeting, yesterday.

Unbeknownst to me, the North Central Florida Apartment Association had picked up on the issue and about fifteen (15) minutes before the meeting, I was informed that they would be representing me at the meeting. During the meeting, the attached letter was circulated by the Association.

Since the letter makes a lot of since and since the City Commission and Plan Board requested that we look for a way to legally excuse these properties from the fee and since the situation only happens in very few other sites, (Hotel and Restaurant Commission permitting) I request that the City of Gainesville accept the position taken by the North Central Florida Apartment Association and exempt these locations from the Landlord Permit.

If you have any questions, please call me at (352) 318-4870.

Yours truly,

Saul Silber
Saul Silber Properties, LLC

SS/cb
Attach.

Doc.400401410LandlordPermit7-14-09

From the Office of Russ Blackburn

To: Fred Murry Box: RB

Please:

___ Respond via my signature to the Commission
___ Draft letter for my signature
___ Review and comment
X Please reply and copy me
___ Meet with me
___ Informational only

CITY OF GAINESVILLE every path starts with passion FLORIDA

Date: 7-16-09

coordinate with legal.