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From: Shalley, Nicolle M.
Sent: Wednesday, May 22, 2019 2:17 PM
To: Arreola, David I; Warren, Helen K.; Simmons, Gigi G; Hayes-Santos, Adrian
Cc: Carpus, Amy M; Look, Jeffrey S.; Murry, Fredrick J.
Subject: Responses to questions raised at the Rental Housing Subcommittee Meeting on May 15th

Hello Members of the Rental Housing Subcommittee - This email responds to two questions (that involve legal issues) that were raised at your May 15th meeting. I am sending an email response because I will not be able to attend your final meeting next Tuesday, May 28th and I will not be sending an attorney to the meeting in my absence, as it would be difficult for an attorney who has not been present for all of your discussions to provide legal guidance on the very specific questions you have been asking. To the extent further legal issues arise at your final meeting, I will address those when your recommendations move forward to the City Commission.

My notes of the May 15th meeting reflect that the two questions raised were:

1) Can the City use a portion of the regulatory fees collected under the Rental Housing Code to fund a forgivable loan program that would be open to rental property owners to obtain a loan to pay for some/all of the required minimum housing, energy efficiency and life/safety standards required by the Rental Housing Code, in exchange for the property owner maintaining the rental unit as an "affordable" rental unit for some specified period of time.

Staff response: No, staff does not believe that using regulatory fees to support an affordable housing program would be legally defensible. Section 166.221, Florida Statutes, limits the amount of regulatory fees that may be charged as follows: "A municipality may levy reasonable business, professional, and occupational regulatory fees, commensurate with the cost of the regulatory activity, including consumer protection, on such classes of businesses, professions, and occupations, the regulation of which has not been preempted by the state or a county pursuant to a county charter." This has been explained by the Florida Supreme Court as follows "It is, of course, well settled that the power to regulate includes the power to license as a means of regulating, and that a reasonable license fee may be charged in an amount sufficient to bear 'the expense of issuing the license and the cost of necessary inspection or police surveillance connected with the business or calling licensed, and all the incidental expenses that are likely to be imposed upon the public in consequence of the business licensed.'" Tamiami Trail Tours, Inc. v. City of Orlando, 120 So. 2d 170 (1960) citing State ex rel. Harkow v. McCarthy, 171 So. 314 (1936).

2) To avoid the State preemption contained in Chapter 509, Part I, Florida Statutes, could the City regulate "public lodging establishments" (which include apartment buildings and transient rentals) by requiring them to pay a fee, obtain a permit and require that they either: (a) provide prospective tenants a written document that states something similar to "because this rental unit was not required to be inspected under the City's Rental Housing Code, it may not meet the minimum housing, energy efficiency and life/safety standards set forth in that Code", or (b) voluntarily submit to inspections under the Rental Housing Code?

Staff response: No, staff does not believe that would be a legally defensible regulatory program or regulatory fee, as it would impose a fee with no actual regulatory conditions and again, the City cannot impose regulatory conditions because of the State preemption. The 4th District Court of Appeals in Broward County v. Janis Development Corp., 311 So. 2d 371 (1975) considered a similar fee/permit requirement and held it to be an improper tax, because it did not meet the requirements of a regulatory fee. In doing so, the 4th DCA cited the Florida Supreme Court decision in Bateman v. City of Winter Park, 37 So.2d 362 (1948), "The difference between a liquor license fee and a tax may be thus stated: Where the fee is imposed for the purpose of regulation, and the statute requires compliance with certain conditions in addition to the payment of the prescribed sum, such sum is a license proper, imposed by virtue of the

police power; But where the fee is exacted solely for revenue purposes, and payment of such fee gives the right to carry on the business without the performance of any other conditions, it is a tax.'

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