IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT IN AND FOR
MIAMI-DADE COUNTY, FLORIDA
STATE OF FLORIDA

GENERAL CIVIL DIVISION

CASE NO. 2018-021933-CA-01

NATALIE NICHOLS,

Plaintiff,

vs.

CITY OF MIAMI BEACH, FLORIDA,

Defendants.

_____/

PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT ON COUNT III OF THE SECOND AMENDED COMPLAINT; AND RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Florida Rule of Civil Procedure 1.510(a), Plaintiff Natalie Nichols moves for partial summary judgment on Count III of her Second Amended Complaint, which asserts that Miami Beach's home-sharing fines—which apply regardless of whether guests cause nuisances and range from $20,000 to $100,000 *per violation*—are invalid because they are preempted by state law—specifically, the statutory cap on municipal fines in Fla. Stat. 162.09(2).

INTRODUCTION

Article I, Section 18 of the Florida Constitution limits all administrative fines to those authorized by the Florida Legislature. This includes fines for municipal property code violations. Defendant City of Miami Beach does not dispute this. Instead, it argues that a statute, Fla. Stat. Section 162.03, grants Florida cities unlimited authority to impose civil

penalties for code-enforcement violations, thereby completely exempting them from any statutory maximums. The City argues that it is unshackled to such an extent that $100,000 property code fines—or even, by the City's reasoning, $1 billion fines—are perfectly legal and constitutional.[1] As shown below, the City's radical theory ignores the statutory structure and language of Section 162, glosses over the existing caselaw, and misreads attorney general opinions addressing the question.

RELEVANT FACTS AND PROCEDURAL HISTORY

Plaintiff Natalie Nichols challenges the legality and constitutionality of Miami Beach City Code § 142-905, et seq; and § 142-1111, et seq, which outlaw short-term rentals in most parts of Miami Beach, and impose fines ranging from $20,000 to $100,000 on property owners who merely conduct short-term rentals in areas where those rentals are banned—even if they do so peacefully and without creating a single nuisance. Specifically for purposes of this motion for summary judgment, Nichols alleges, in Count III of the Second Amended Complaint, that the fines imposed by Miami Beach have not been authorized by the Florida legislature and are preempted by Fla. Stat. 162.09.

At the hearing on the City's motion to dismiss on January 9, 2019, this Court ordered the parties to bifurcate the legal issues in the case and submit summary judgment briefing on the statutory preemption issue (Count III), which is a pure question of law. Accordingly, discovery and briefing on the constitutional questions have been postponed until after the Court has had an opportunity to rule on the preemption question presented here.

[1] If the City's theory is correct it would, to Plaintiff's knowledge, be the only such grant of unlimited fining authority given to a governmental entity anywhere in Florida statutes.

The parties agreed to a briefing schedule for cross-motions for summary judgment on the question of whether Florida state law preempts the City's fines. The City submitted its motion for summary judgment on March 28, 2019. Herein, Nichols submits her cross-motion for summary judgment, as well as her response to the City's motion.

STANDARD OF REVIEW

"[S]ummary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to judgment as a matter of law." *Fayad v. Clarendon Nat'l Ins. Co.*, 899 So. 2d 1082, 1085 (Fla. 2005). Summary judgment "allows a trial court to decide a case where the undisputed facts show that a party is entitled to judgment as a matter of law." *Acosta, Inc. v. Nat'l Union Fire Ins. Co.*, 39 So. 3d 565, 575 (Fla. 1st DCA 2010).

ARGUMENT

The question on summary judgment is: from where does Miami Beach derive its alleged authority to impose $20,000 to $100,000 fines? Article I, Section 18 of the Florida Constitution only allows cities, which are creatures of the state, to impose fines as authorized by the state legislature. Thus, the City may not adopt any fines that the legislature has not authorized it to adopt. The City's fining authority is vested in Fla. Stat. Section 162.09, which limits municipal fines to $1,000 for the first offense and $5,000 for subsequent offenses. Yet the City asserts that it may exempt itself from this statutory limitation, arguing that the phrase "assess fines," in Section 162.03(2) grants cities unlimited fining authority if they so desire. As shown below, this interpretation of the fine is unsupported by law or logic. Rather, Nichols' interpretation of the statute—whereby state law preempts the City's actions—is strongly supported by both the statutory scheme and the weight of the relevant authority.

I. The maximum fine that any city can impose for a reversible property code violation is $1,000 for the first offense and $5,000 for subsequent offenses.

Does Section 162.03 give cities the power to exempt themselves from the maximum fines that the Florida Legislature has authorized? No. Section 162.03 says only that a Florida city may "adopt an alternate code enforcement system." Under that system, a board or special magistrate has the "authority to hold hearings and assess fines against violators" of the city's property code ordinances—not to ignore state law and impose limitless fines on its citizens. Yet the City argues just that, hanging its entire argument on two words in the statute: "assess fines." But these are not magic words, and they do not constitute a legislative exemption from Section 162.09 or a grant of unlimited fining authority. Those words—"assess fines"—are no different than laws empowering a police officer to "issue speeding tickets." A grant of authority to *issue* the tickets says nothing of the *dollar amount* for which those tickets can be issued.

Fla. Stat. 162.09 establishes a bifurcated schedule of code-enforcement fines that cities may impose. Fla. Stat. 162.09(2)(a) establishes the default fines for all cities:

> A fine imposed pursuant to this section shall not exceed $250 per day for a first violation and shall not exceed $500 per day for a repeat violation, and, in addition, may include all costs of repairs pursuant to subsection (1). However, if a code enforcement board finds the violation to be irreparable or irreversible in nature, it may impose a fine not to exceed $5,000 per violation.

Sec. 162.09(2)(d) provides alternative, higher fines for certain larger cities that choose to adopt them:

> A county or a municipality having a population equal to or greater than 50,000 may adopt, by a vote of at least a majority plus one of the entire governing body of the county or municipality, an ordinance that gives code enforcement boards or special magistrates, or both, authority to impose fines in excess of the limits set forth in paragraph (a). Such fines shall not exceed $1,000 per day per violation for a first violation, $5,000 per day per violation for a repeat violation, and up to $15,000 per violation if the code enforcement board or special magistrate finds the violation to be irreparable or irreversible in nature.

The resulting system looks like this:

	Default fines	**Pop. 50,000+ and adopted by popular vote**
Initial Violation	$250 per day	$1,000 per day
Subsequent Violations	$500 per day	$5,000 per day
Irreversible Violation	$5,000 max	$15,000 max
	Sec. 162.09(2)(a)	*Sec. 162.09(2)(d)*

Thus, certain home-rule cities—if their population is greater than 50,000 and they vote to do so—may impose code-enforcement fines of up to $1,000 for the first offense; $5,000 for subsequent offenses; and $15,000 for offenses deemed irreversible. By statute, these are the highest fines that any city may impose for property code violations. And Miami Beach has, indeed, availed itself of this statutory option (which it would not have done if it truly believed that Section 162.03 allowed it to disregard Chapter 162). City Code Sec. 30-74(d), which addresses property code violations in the City, closely tracks the language of Section 162.09(2)(d). The City's ordinance provides that "A fine imposed pursuant to this section shall not exceed $1,000.00 per day for a first violation and shall not exceed $5,000.00 per day for a repeat violation. ... However, if the special master finds the violation to be irreparable or irreversible in nature, he may impose a fine not to exceed $15,000.00 per violation."

This shows that the City is aware of the statutory limitations on the fines it can impose. In fact, the City has not authorized itself to exceed the statutory fines for any other kind of property code violation. Short-term rentals have been singled out for this special treatment. In the ordinance authorizing the short-term rental fines, and only in that ordinance, the City asserts that it "recognized 'the need for more substantial penalties'" than those authorized by statute. City's Mot. at 6. One can create a genuine public nuisance—like piling garbage on a property or

hosting all-night parties—and still only be subject to fines between $1,000 and $15,000. But if *and only if* that person simply rents a home for the night, that person is subject to fines exceeding the statutorily prescribed limitation, even if he or she *doesn't* cause a nuisance. And those fines are astoundingly high. They start at $20,000 and quickly escalate from there.[2] Miami Beach offers no defense for this disparity, other than its claim that Section 162.03 grants cities a blank check to opt out of the fining scheme approved by the Florida Legislature.

It is true that Miami Beach has adopted the "alternate code enforcement system" that Section 162 contemplates, *see* Miami Beach City Code Sec. 30-2, but none of these alternative *methods* of enforcement have anything to do with the statutory *penalties* that may be imposed. Indeed, Section 162.03 does not speak to fines at all. Instead, fining authority is found in 162.09, which is why one must read Sections 162.03 and 162.09 together in order to obtain a full picture of the statutory scheme. Indeed, if the City is correct that Section 162.03 provides unlimited fining authority, Section 162.09's strict statutory caps are rendered meaningless.[3] It is a matter of black-letter statutory interpretation that statutes should be read in a way that gives effect to every part of the law. *Am. Home Assurance Co. v. Plaza Materials Corp.*, 908 So. 2d 360, 366 (Fla. 2005). The City's proffered interpretation of 162.03 contradicts this.

[2] By way of comparison, state law imposes only a $2,000-$5,000 fine for a *third offense* of drunk driving, Fla. Stat. § 316.193(2)(b)(2), and only a $5,000 fine for practicing medicine without a license. Fla. Stat. § 456.065(2)(b).

[3] The Florida Legislature has, since 2011, chosen to preempt municipal attempts to outlaw short-term rentals. *See* Fla. Stat. 509.032(7)(b) ("A local law, ordinance, or regulation may not prohibit vacation rentals or regulate the duration or frequency of rental of vacation rentals."). Although certain cities, like Miami Beach, were grandfathered in under the statute, it is nevertheless the policy of the state of Florida to *allow* short-term rentals. Therefore, municipal authority to prohibit such rentals—or fine them into oblivion—should be viewed skeptically.

Article I, Section 18 of the Florida Constitution requires statutory authorization for all administrative fines, and the legislature has adopted a specific schedule of fines that municipalities may levy. The City contends that it should be exempt from this clear limitation on its fining authority, arguing that its Section 162.03 power to "assess fines" really means it can "assess *unlimited* fines" or "the fines of the City's choosing." But nothing in the statute supports this interpretation and, as shown below, Florida courts and the Attorney General have accordingly found otherwise.

II. Florida courts have affirmed the statutory limits on municipal fines.

Plaintiff knows of only one published decision that squarely addresses the question of whether cities may exceed the statutory maximum fines: *Stratton v. Sarasota Cnty.*, 983 So. 2d 51 (Fla. 2d DCA 2008), which is discussed below. While the case presents different facts than those at issue here, it supports Nichols' position on the preemption question.

Stratton involved the denial of zoning variances for beachfront property. The owner sought the variances in order to make needed repairs, but by the time she sought them, the property had, due to shoreline erosion, begun "literally crumbling into the Gulf of Mexico. At that point, because the house constituted a hazard to beachgoers, the County declared the house to be an imminent threat to public safety." *Id*. at 53. The County then obtained an emergency demolition order, had the structure demolished, and placed a $129,315 lien on the property. Subsequently, an additional $91,072 lien was obtained for demolition of another part of the property. *Id.* at 53–54.

The question in the case was whether the liens were permitted under Florida law. The property owner argued—as Nichols does here—that Chapter 162 controlled which fines, costs, and expenses that a city or county can recover as part of a code-enforcement action. *Id*. at 54-55.

Since that chapter does not allow for the recovery of a county's payroll costs related to a demolition, the property owner in *Stratton* argued that the County could not recover $24,248 worth of payroll costs. *Id*. at 55-57. In response, the County argued—as Miami Beach does here—that it was "relying on its local code provisions rather than the provisions of chapter 162 to collect these payroll expenses." *Id.* at 55.

Citing the Florida Constitution, the *Stratton* court held that "the County has no authority to impose penalties that are not authorized by law." *Id*. at 55. Further, "the County cannot rely on local code provisions to collect these expenses in contravention of the authorized penalties set forth in chapter 162." *Id*.

In its motion for summary judgment, the City attempts to distinguish *Stratton* by arguing that it "did not address the question of whether the county had adopted an alternative code enforcement system pursuant to Chapter 162," and claiming that *Miami-Dade County v. Brown*, 814 So. 2d 518 (Fla. 3d DCA 2002), controls instead. City's Mot. at 10. But both of these claims are incorrect. *Stratton* addressed—and rejected—precisely the argument that Miami Beach makes in this case. To wit, "the County argues that it is relying on its local code provisions *rather than the provisions of chapter 162* to collect these payroll expenses from Stratton. However, the County has no authority to impose penalties that are not authorized by law. *See* Art. V, § 1, Fla. Const." *Stratton,* 983 So. 2d at 55 (emphasis added).

Furthermore, *Brown* is wholly distinguishable from both *Stratton* and the case at bar because *Brown* was a case about municipal code enforcement *procedures*, whereas *Stratton* was—and this case is—about *penalties*. In *Brown*, the questions were whether the county "acted outside the scope of its authority by failing to provide for a warning or opportunity to cure period prior to the issuance of [a $250] citation[,]" and whether "the hearing officer abused his authority

by imposing a fine after the violative condition had been cured." 814 So. 2d at 519. The case thus had nothing to do with whether the *amount* of the fine was illegal and was, instead, about whether the county was legally allowed to follow different *procedures* than those authorized by Section 162—which, of course, it was. Far from being a controlling opinion in this case, *Brown* is a simple, two-page assertion of a legal proposition that Nichols does not even dispute.[4]

III. The Attorney General's opinions support Nichols' interpretation.

Because of the statute's importance, the Florida Attorney General has had frequent occasion to opine on Chapter 162 and the various ways that cities may conduct code-enforcement operations. The opinions show that cities enjoy broad authority to organize their code-enforcement *procedures*. "A municipality has numerous options for enforcement of municipal code violations: the code enforcement board/special master mechanisms in Parts I and II, Chapter 162, Florida Statutes; interlocal agreements; direct enforcement through the county courts, and combinations of these methods." Fla. A.G.O. 2004-50. However, *no* opinion has *ever* concluded that a city may exceed the statutory caps on fines imposed by state law. To the contrary, every opinion addressing lawful amounts of fines holds that they must be imposed within the statutory boundaries established by the legislature.

Perhaps the most instructive attorney general opinion is AGO 2000-53, wherein the attorney general was asked whether the City of Fernandina Beach was "authorized to adopt and enforce an ordinance … prohibiting the removal of trees without a permit with a penalty of

[4] The City's other case on this question is *Goodman v. County Court in Broward County, Florida*, 711 So. 2d 587 (Fla. 4th DCA 1998), which is similarly inapposite. *Goodman* had to do with whether a "county court lacked jurisdiction to hear the charges because violations of the municipal housing code were within the exclusive jurisdiction of the local government code enforcement board." *Id*. at 588. The case therefore had nothing to do with whether certain fines were authorized by the Florida Legislature, and therefore does not speak to the legal issues presented here.

$12,500 or more for violation of that ordinance?" Unlike Miami Beach, Fernandina Beach employed the default code-enforcement procedures found in Section 162.21 and, as the opinion noted, "the maximum civil penalty authorized to be imposed under section 162.21 … is $500." However, the opinion then notes that the city is free to adopt other *methods* of enforcing its codes. And when a City does *that*—as Miami Beach has done—"section 162.09(2) … provides for administrative fines." This range "currently authorizes municipalities to assess fines of up to $15,000 for [irreparable or irreversible] code violations" like the removal of a tree. Therefore, the opinion concludes, "I cannot say that a court would determine that a fine of $12,500 [for unauthorized tree removal] would be clearly unreasonable."

This opinion is important because the attorney general suggests that Fernandina Beach can do exactly what Miami Beach has done—adopt an alternative procedure for code *enforcement* and adopt the alternative, higher, statutory fining scheme. But the opinion then goes on to examine whether *fines* under that kind of system are permissible, and does this within the context of the $1,000/$5,000/$15,000 scheme established by Section 169.02(d). In other words, that opinion recognizes the fundamental difference between *methods* of enforcement, which cities are free to establish, and the *amounts of fines,* which cities must still comply with. If Miami Beach's interpretation were correct, then the opinion would merely have said that once a city adopts alternative procedures for code enforcement, it may adopt whatever fine amounts it pleases. It did not do that, because while cities may adopt alternative procedures for enforcement, they cannot disregard or override the statutory caps on fines.

In AGO 2001-77, the City of Sanibel asked the attorney general, in part, whether a special master may "impose fines upon a finding … that a violation was proven and remained unabated subsequent to the time given in the code enforcement officer's initial Notice of

Violation." In response to this question, the opinion notes that "under the [Florida] Constitution, an administrative agency may impose only those penalties authorized by *state* law." (Emphasis added.) While a city may "prescribe penalties for violations of its ordinances, a state law must authorize an administrative agency to impose such penalties." No state law authorizes Miami Beach to impose $20,000 to $100,000 penalties for peaceably renting one's home for the night. Once again, this attorney general opinion makes clear that the statutory provision allowing cities to establish their own methods of enforcement does not allow them to disregard the state-law limits on fines.

Not only are these opinions consistent with one another, the City has been unable to cite—and Plaintiff has been unable to find—any opinions to contrary. The Florida legislature has given cities increasingly expansive authority to conduct code-enforcement operations, and dozens of attorney general opinions have been written to sort out the contours of this authority. But not one of them supports the radical theory of unlimited municipal fining authority that the City urges this court to adopt.

RESPONSE TO THE CITY'S MOTION FOR SUMMARY JUDGMENT

Nichols incorporates the arguments made in her cross-motion for summary judgment, above, into the following response to the City's motion for summary judgment. However, the City's motion addresses certain topics that are not addressed in Nichols' motion. Those topics are addressed in detail below.

I. The City's fines are not consistent with 162.09(2).

As an alternative basis for summary judgment, the City argues that its fines actually "do not conflict" with Section 162.09(2)(d) because the $20,000 to $100,000 fines are imposed per *violation*, whereas the statutory fines accrue per *day*. To begin, this argument should be rejected

because it contradicts the City's own factual findings, cited earlier in its brief, that "the City recognized 'the need for more substantial penalties'" than the statutory amounts. City's Mot. at 6. The City's penalties cannot simultaneously be "more substantial" than the statutory penalties and "not conflict" with those penalties.

Furthermore, the City's argument fails because it contemplates a world in which every short-term rental violation is left unaddressed for weeks at a time, such that the $1,000 daily statutory fines always "catch up" to, and exceed, the City's $20,000 per-incident fines. But that is not typically the case. On the contrary, under the Miami Beach ordinance, if a homeowner is cited for a first infraction, the City's fines initially exceed the statutory fines *twenty-fold*. It is not until the twentieth day that the fine amounts become equal. So for the first 19 days of the violation, the City's fines absolutely conflict with the statute. And it is improbable that a homeowner will simply leave the matter unaddressed while accruing $1,000 daily fines. The City's theory is simply a false equivalence, and should be summarily rejected.

II. Nichols has standing.

Finally, the City attempts to argue that Nichols lacks standing to maintain this suit. But this argument, too, should be rejected. The gist of the City's argument is that Nichols cannot challenge the fine structure until the ordinance is enforced against her. City's Mot. at 11–12. This is incorrect. Neither party disputes that the challenged ordinances do apply to Nichols; that she is currently prohibited under them from renting her property for a period of less than six months and one day; or that she is subject to $20,000 to $100,000 fines for violating the law. Defs.' Second Mot. to Dismiss at 6 n. 3, 10, 14.

The Florida declaratory judgment statute should be "liberally construed." *Higgins v. State Farm Fire & Cas. Co.*, 894 So. 2d 5, 12 (Fla. 2004). And property owners whose interests

are affected by an ordinance are routinely found to have standing to challenge that ordinance. *See, e.g., Lambert v. Justus*, 335 So. 2d 818, 819 (Fla. 1976) (property owners had standing to bring "complaint seeking declaratory judgment as to the validity of certain restrictions on the use of their property"); *Combs v. City of Naples*, 834 So. 2d 194, 197 (Fla. 2d DCA 2002) (adjacent property owners had standing to challenge validity of development agreement between city and golf club). As with these cases, there is no dispute that Nichols is currently prohibited from using her property for short-term rentals—the restrictions exist and she risks $20,000 penalties for violating them. Defs.' Second Mot. to Dismiss at 6 n. 3, 10, 14. That is sufficient to seek the declaratory and injunctive relief requested in this case.

CONCLUSION

For the foregoing reasons, Plaintiff Natalie Nichols respectfully requests that this Court grant summary judgment in her favor on Count III.

DATED this 26th day of April, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was served through the Florida Courts E-Filing Portal on April 26, 2019 to all counsel of record including:

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