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MEMO

DATE: February 15, 2011

TO: Carolyn Walker
Shawn D. Smith

FROM: Larry R. Erskine, Chief Assistant City Attorney

RE: Santa Maria / Transient rentals

MEMO: As I explained to Carolyn earlier today, the purpose of this memo is to document Carolyn's files in the event something transpires after one or more of us are no longer employed by the City.

I am attaching the proposed complaint John Allison faxed me yesterday. He called me to discuss the City's response to it. Shawn and I approved Carolyn's June 3, 2010 letter, which is attached to the Complaint. Incredibly, during our conversation, John took the position that the purchaser of the business tax receipts in question has the right to conduct transient rentals on the receiver site without obtaining city approval pursuant to the transient license transfer ordinance. This was the precise position he advanced on behalf of his client in the Wilson matter, which position was rejected by the court. I read John several passages from Judge Audlin's opinion which clearly state that Carolyn can not refuse to transfer a business tax receipt, but that possession of the receipt does not entitle the holder to conduct transient rental on site unless and until same is approved pursuant to chapter 122 of the Code. Carolyn, please place a copy of the attached opinion from Judge Audlin in your file.

Given the court's ruling, I believe we had an obligation to place the purchaser of the subject receipts on notice that possession of the receipts confers no right to conduct transient rentals. I indicated to John that I believe if the city removes the limiting language from the receipts, the owner will immediately begin to conduct transient rentals on site. When the city moves to enjoin the action, the owner will respond that nothing on the face of the receipts prevents the use. John admitted this.

Shawn, unless you direct otherwise, I don't recommend that we change our position based on the threatened litigation. If he is serious about filing the complaint, I believe this is a situation wherein we will end up in court either way.

IN THE CIRCUIT COURT OF THE 16TH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR MONROE COUNTY

CASE NO: 2008-CA-1307-K

DAVID C. WILSON,

Petitioner

Vs.

CAROLYN WALKER, as Licensing Officer, CITY OF KEY WEST,

Respondent

_____/

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ORDER GRANTING IN PART AND DENYING IN PART WRIT OF MANDAMUS

Petitioner, DAVID C. WILSON, seeks review of the Respondent, CAROLYN WALKER'S failure to transfer to the Petitioner a business tax receipt which originated and was associated with transient rental use at the former Hampton Inn, Key West, located at 2801 North Roosevelt Boulevard, on the island of Key West.

Petitioner seeks the transfer of the business tax receipt from the Hampton Inn to the Petitioner, and also to a different location, to wit, a property located at 1075 Duval Street, R-24, Key West, Florida.

Upon initial review of the Petition for Mandamus, the Court provisionally determined that mandamus was inappropriate, and therefore treated the Petition as seeking certiorari, and full briefing and oral argument proceeded on that basis.

Having the benefit of full briefing and the oral argument, the Court now determines that mandamus was, in fact, the appropriate remedy under the circumstances presented.

The issue before the Court is whether the transfer of the business tax license associated with transient rental is simply a ministerial act by the City of Key West licensing officer, under the authority of the Key West Building Department, or whether such action implicates broader land use regulation and is therefore subject to substantive review by the Planning Board and other city department which regulate land use.

After careful consideration of the record in this case, the Court finds that the business tax receipt shall be transferred to a new owner. Transfer of the business tax license is ministerial, and subject to mandamus. However, any attempt to "transfer" the attendant capacity to rent on a transient basis to a new location, is subject to full land use review by the City of Key West, pursuant to the City's Comprehensive Plan, applicable portions of Florida Statutes, and the designation of the City of Key West as an area of critical state concern.

Sec. 66-103(c) of the Key West Code specifically requires the written authorization of the City Manager to transfer a business license from one person to another, or from one location to another. It is apparently in the exercise of the latter authority (control of transfer from location to location) that the City enforces substantive land use control over transient rentals. Presumably, the

City Manager's consent would only be granted in a case of this sort where all substantive land use regulations, including Planning Board review, have been complied with. The City's determination regarding compliance with substantive land use requirements has apparently been normally announced by Ms. Walker, by her either approving or disapproving the business tax license transfer, which has led to the incorrect assumption that the licensing official has regulatory authority in this area. However, the licensing official may not withhold the transfer of the business tax license as a means of enforcing the substantive land use regulations of the City. See Section 205.043, Fla. Stats. The business tax license may be transferred to a new owner, at a new location. (Section 205-043(2),(3).) However, the transfer of the business tax license to a new location does not carry with it any substantive approval of the proposed land use at the new location. The business tax license is essentially a receipt for tax paid, and is not evidence of land use authorization.

As this Court has previously discussed,[1] transfer of transient units, which is a determination regarding transient use of property, is regulated by Section 122-1336 through 122-1339 of the Key West City Code, as well as other portions of the Code, Florida Statutes, and the City's Comprehensive Plan which may be relevant to transient use of property within the City of Key West. Any transfers effected under Section 122-1338 et seq., are subject to the substantive requirements of those ordinances, including but not limited to review by the

[1] See Last Stand et. al., v. Board of Adjustment for the City of Key West, etc., 2007-CA-244-K, Order on Certiorari issued June 18, 2007.

Planning Board, with appellate or administrative review of Planning Board determinations as set forth in the Code.

Any suggestion that the licensing official of the City of Key West has either the authority, or the obligation, to approve the transient use of property at a new location, in the context of the sale of a business tax receipt, is incorrect. Petitioner's claim that the licensing official has an obligation to transfer a business tax receipt from one seller to one purchaser, and that such a transfer is ministerial, is true, but Petitioner's suggestion that the licensing official has authority to approve a "transfer" which includes a change of use at the new location, violates the Key West City Code and the interpretations of the Code previously announced by this Court.

Considered in its entirety, the City's regulation and licensing of transient rentals has both an occupational license tax component and a regulatory component. Cf. City of Key West v. Marrone, 555 So.2d 438 (3rd DCA 1990). Section 122-1338 controls the transfer of transient units, while Section 122-1339(b), makes the transfer of "the license alone" (apparently referring to transfer of the business tax receipt, without the transient unit), subject to Planning Board review. Section 122-1339 therefore attempts to regulate transient use, in conjunction with the transfer of "the license alone."

Thus, if a "license alone" is transferred, then Planning Board review as to the proposed use is automatically initiated, and is legally required. If Ms. Walker approves the transfer of the business tax receipt, which she is obliged to do

under Florida law, such a transfer carries with it absolutely no regulatory approval of the transient use at the proposed new location.

Accordingly, the Court holds that the licensing official has a legal duty to transfer the business tax receipt from the seller of the receipt to the Petitioner, David C. Wilson. However, the transient use of land at a new, proposed location at which the purchaser wishes to use it, may not be granted by Ms. Walker alone.

Such determination must be made by the proper administrative officials of the City of Key West that regulate land use planning.

Mandamus is granted in part, and denied in part, as set forth above and the matter is remanded to the City of Key West, and its administrative officials, for further action in compliance with this Order.

DONE and ORDERED at Key West, Monroe County, Florida, this 29th day of January, 2009.

David J. Audlin, Jr.

DAVID J. AUDLIN, JR.
CIRCUIT JUDGE

cc: Joseph Albury, Esq.
Shawn D. Smith, Esq.
Robert C. Apgar, Esq.