STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GREG STERYOU and ALICE STERYOU,	)	
	)	
Appellants,	)	
	)	
vs.	)	Case No. 02-4118F
	)	
MONROE COUNTY PLANNING COMMISSION,	)	
	)	
Appellee.	)	
	)	

FINAL ORDER

Appellants, Greg and Alice Steryou (Steryous), filed a Motion and Memorandum of Law, requesting an award of attorney's fees and costs pursuant to Section 57.111, Florida Statutes. This request arises from a successful appeal brought by the Steryous, seeking review of Monroe County Planning Commission (Commission) Resolution No. P 04-02, denying their application for an amendment to a minor conditional use to construct a 3,658 square foot restaurant to replace a restaurant (Knuckleheads) destroyed in 1998 by Hurricane Georges. The Commission filed a Response opposing the Motion.

BACKGROUND

On September 3, 2002, a Final Order was entered, reversing the Commission's decision, concluding that there was no competent substantial evidence to support the Commission's Findings of Fact

related to the Commission's denial of the Steryous' application requesting an amendment to a minor conditional use. As a result, the Steryous prevailed on appeal. Greg Steryou and Alice Steryou v. Monroe County Planning Commission, Case No. 02-1578 (DOAH Final Order Sept. 3, 2002).

The Steryous own Lots 1 and 2 located on 3100 Overseas Highway, in Saddlebunch Keys, Monroe County, Florida. The Steryous purchased these lots in 1996. The lots are vacant because the original restaurant built in 1956 was destroyed by Hurricane Georges in 1998, and demolished and removed in 2000, after Monroe County determined that the restaurant could be rebuilt.

It was not disputed that the Steryous may build a restaurant on the lots as a minor conditional use. However, the size and nature of the proposed restaurant were at issue in the proceeding before the Commission and on appeal. The Steryous proposed to construct a 3,658 square foot, enclosed seating area restaurant on the two lots.

In order to accommodate the planned design of the restaurant on the two lots, the Steryous needed a variance from the required number of off-street parking spaces (reduced from 55 to 34) and approval of an amendment to a minor conditional use, which included a request for a waiver of the yard setback requirements.

The Steryous filed two separate, but related, applications with the Monroe County Planning Department.

The Commission approved the application for a parking variance during the January 2002 meeting. However, the Commission denied the application for an amendment to a minor conditional use during the February 2002 meeting, which was the subject of the underlying appeal in Case No. 02-1578.

LEGAL DISCUSSION

"Unless otherwise provided by law, an award of attorney's fees and costs shall be made to a prevailing small business party in any adjudicatory proceeding or administrative proceeding pursuant to chapter 120 initiated by a state agency, unless the actions of the agency were substantially justified or special circumstances exist which would make award unjust." Section 57.111(4)(a), Florida Statutes.

The Steryous request an award for the attorney's fees and costs incurred by them largely as a result of the appeal, not incurred prior to and during the hearing before the Commission. (The Steryous request, in part, reimbursement for the costs for the court reporter, transcript of the hearings before the Commission, two videos, and the filing fee for the appeal.)

By contract, the Division of Administrative Hearings had jurisdiction over the subject matter of the appeal and of the parties pursuant to Article XIV, Section 9.5-535, Monroe County

Code (M.C.C. or Code). On appeal, the hearing officer, here, an administrative law judge, "may affirm, reverse or modify the order of the planning commission." Article XIV, Section 9.5-540(b), M.C.C. The scope of the review under Article XIV, Section 9.5-540(b), M.C.C., is:

> The hearing officer's order may reject or modify any conclusion of law or interpretation of the Monroe County land development regulations or comprehensive plan in the planning commission's order, whether stated in the order or necessarily implicit in the Planning Commission's determination, but he may not reject or modify any findings of fact unless he first determines from a review of the complete record and states with particularity in his order, that the findings of fact were not based on competent substantial evidence or that the proceeding before the planning commission on which the findings were based did not comply with the essential requirements of law.

"The hearing officer's final order shall be the final administrative action of Monroe County." Article XIV, Section 9.5-540(c), M.C.C. See also Article XII, Section 9.5-521(e) and (f), M.C.C., and Article III, Section 9.5-68(f), M.C.C.

As a threshold issue, the Steryous contend that "[p]ursuant to section 57.111(3)(b)3., Fla. Stat., the County was required by ordinance to advise the Steryous of a clear point of entry after the Planning Commission denied, subsequent to a quasi-judicial hearing, the conditional use application." (The Commission is established pursuant to Article II, Section 9.5.22(a), M.C.C.,

and has several "powers and duties" including the power and duty "[t]o serve as the local planning agency (LPA), required by section 163.3174, Florida Statutes" and "[t]o hear, review and approve or disapprove applications for minor and major conditional use permits." Article II, Section 9.5-22(a),(b)(1) and (4), M.C.C. Applications for conditional uses are considered pursuant to Article III, Division 3, M.C.C.)

Material here, "[t]he term 'initiated by a state agency' means that the state agency. . .[w]as required by law or rule to advise a small business party of a clear point of entry after some recognizable event in the investigatory or other free-form proceeding of the agency." Section 57.111(3)(b)3., Florida Statutes. The Steryous do not cite to any law or rule, including any provision of the Code, which required the Commission or Monroe County to provide the Steryous with a "clear point of entry" after the Commission denied the Steryous' application.

The right to appeal the decision of the Commission is afforded solely pursuant to the Code. (The Commission's decision regarding a minor conditional use is final unless appealed.) The appellate review procedures, including the standard of review, are set forth in Article XIV, Section 9.5-535, et seq., M.C.C. The review is based on the record made before the Commission. It is not a de novo evidentiary proceeding and is not conducted

pursuant to Chapter 120, Florida Statutes (the Administrative Procedure Act (APA)).

The decision rendered by the Commission is not "some recognizable event in the investigatory or other free-form proceeding of the" Commission, or Monroe County, nor is the appellate review proceeding conducted by the hearing officer. Stated otherwise, the proceedings before the Commission and the hearing officer are not administrative proceedings conducted pursuant to the APA.

The requirement that a state agency give a person "a clear point of entry" is cardinal principle of the APA and has been much discussed in case law. The language, which appears after "small business party of" in Section 57.111(3)(b)3., is derived almost verbatim from Capeletti Brothers, Inc. v. State, Department of Transportation, 362 So. 2d 346, 348 (Fla. 1st DCA 1978)("In other words, an agency must grant affected parties a clear point of entry, within a specified time after some recognizable event in investigatory or other free-form proceedings, to formal or informal proceedings under Section 120.57.")

In using the "clear point of entry" terminology, it appears the Legislature intended "to provide a link between" the APA and Section 57.111, Florida Statutes.[1] This view is buttressed in part because of the requirement in Section 57.111 that "[t]he

court, or the administrative law judge in the case of a proceeding under chapter 120, shall promptly conduct an evidentiary hearing on the application for an award of attorney's fees and shall issue a judgment, or a final order in the case of an administrative law judge." Section 57.111(4)(d), Florida Statutes. (Emphasis added.) See also Section 57.111(4)(b)1., Florida Statutes.

Based upon the foregoing, the appellate review proceeding conducted by a hearing officer, here an administrative law judge (by contract), pursuant to the Code is not an administrative proceeding conducted pursuant to the APA; and as a result, Monroe County and the Commission were not required under the APA to give the Steryous "a clear point of entry," as contemplated in Section 57.111(3)(b)3., Florida Statutes, after the Commission denied the Steryous' application for a minor conditional use. (The undersigned is mindful that for the purpose of applying Section 57.111, it is not relevant who conducts the proceeding as long as the proceeding is conducted under the APA. See, e.g., Hitchcock & River Enterprise, Inc. v. Department of Labor and Employment Security, 652 So. 2d 970 (Fla. 1st DCA 1995)(holding that attorney's fees and costs could be considered pursuant to Section 57.111, Florida Statutes, because the procedural requirements of Section 120.57(1) applied to a hearing conducted in an unemployment compensation proceeding regardless of who conducted

the hearing.)) Thus, the appellate review proceeding was not an "administrative proceeding pursuant to chapter 120 initiated" by Monroe County or the Commission.[2]

DISPOSITION

Based upon the foregoing, the Steryous' Motion for an award of attorney's fees and costs pursuant to Section 57.111, Florida Statutes, is denied.

DONE AND ORDERED this 8th day of November, 2002, in Tallahassee, Leon County, Florida.

CHARLES A. STAMPELOS
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of November, 2002.

ENDNOTES

[1]/ See Steven Wisotsky, Practice and Procedure Under the FEAJA, 70 Fla. B. J. 24, 30 n.43 (1996)(citing Mary W. Chaisson, Florida's Equal Access to Justice Act: How the Courts and DOAH Have Interpreted It, 19 Fla. St. U. L. Rev. 901, 908 (1992)). See also Seann M. Frazier, Award of Attorneys' Fess in Administrative Litigation, 69 Fla. B. J. 74 (1995).

[2]/ Given the nature of the disposition of the Motion, it is unnecessary to determine whether the Commission or Monroe County are state agencies under Section 57.111, Florida Statutes, when

acting in the capacity described herein. See, e.g., Booker Creek Preservation, Inc. v. Pinnellas Planning Council, 433 So. 2d 1306 (Fla. 2d DCA 1983)(concluding that the Pinellas Planning Council was not subject to the APA under a prior version of the APA). Also, it is not necessary to decide if the Commission's decision was "substantially justified" or supported by "special circumstances," or whether the Steryous are a "small business party."

COPIES FURNISHED:

Karen K. Cabanas, Esquire
Morgan & Hendrick
317 Whitehead Street
Key West, Florida 33040

Lee R. Rohe, Esquire
Post Office Box 420259
Summerland Key, Florida 33042

Judith Chambers
Planning Commission Coordinator
Monroe County Planning Department
2798 Overseas Highway, Suite 410
Marathon, Florida 33050-2227

NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of appeal with the Clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.