STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

EDWIN HANDTE AND JANICE HANDTE,

Appellants,

vs.

Case No. 19-5645

MONROE COUNTY PLANNING COMMISSION,

Appellee.
_____/

FINAL ORDER

In this administrative appeal to the Division of Administrative Hearings (DOAH), Appellants, Edwin Handte and Janice Handte (Appellants), seek review of Resolution No. P35-19 rendered by Appellee, Monroe County Planning Commission (Commission), on September 25, 2019. The Resolution upheld the Letter of Understanding (LOU) dated August 13, 2018, in which the Senior Director of the Monroe County Planning and Environmental Resources Department (Planning Department) notified Appellants that she was unable to recognize the lawful establishment of a non-conforming vacation rental use of the two existing dwelling units (duplex) at 1791 Narcissus Avenue, Big Pine Key, Florida.

A two-volume Record of the underlying proceeding before the Commission was filed with DOAH by its Clerk on October 22, 2019. Briefs were filed by the parties and oral argument was held by video teleconference at sites in Marathon, Key West, and Tallahassee, Florida, on February 24, 2020.

APPEARANCES

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For Appellee: Peter H. Morris, Esquire
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BACKGROUND

The property and its duplex structure are located on Big Pine Key. Appellants applied for building permits for both 1547 Narcissus and 1791 Narcissus only two days apart, and began operation of 1791 Narcissus as a short-term rental within one year of 1547 Narcissus.[1] The history of the construction of the two duplexes and the length of time each duplex has been continuously operating as a short-term rental were nearly identical.

Appellants submitted the LOU application to the Planning Department on August 15, 2017. A circuit court opinion was referenced in the application. *See Opinion, Edwin Handte and Janice E. Handte v. Monroe Cty.*, No. 2016-AP-4-K (Fla. 16th Cir. Ct. May 2, 2017). The circuit court concluded that with regard to the duplex at 1547 Narcissus, Appellants "had a pre-existing non-conforming use which was 'grandfathered in.'" *Id.* In the LOU application, Appellants argued that "[s]ince the duplex at 1791 Narcissus has the same history as 1547 Narcissus, the County is requested to recognize the lawful non-conformity status of 1791."

[1] 1547 Narcissus was the subject of DOAH Case No. 19-5649 in which the undersigned issued a Final Order on July 6, 2020. The Final Order upheld a Planning Department LOU that recognized the lawful establishment of a non-conforming vacation rental use of the duplex at 1547 Narcissus Avenue, Big Pine Key.

The LOU for 1791 Narcissus was issued on August 13, 2018. The Senior Planning Director determined that the duplex was lawfully established on the subject property, but the evidence submitted did not support the establishment of a non-conforming vacation rental use prior to September 15, 1986. Appellants elected to appeal the Senior Planning Director's decision to the Commission in August 2018.

The appeal hearing was held before the Commission on July 31, 2019. At the hearing, the County presented the expert testimony of Devin Rains. Appellant Edwin Handte also testified.

Appellants' position was that Ordinance 004-1997, for the first time, defined, regulated, and prohibited in certain residential zoning districts, "vacation rental use." Appellants basically argued that their "grandfathered in" use was recognized by the circuit court opinion regarding 1547 Narcissus, and should be similarly applied to 1791 Narcissus. In addition, Appellants argued that the use was not prohibited by the pre-1986 and post-1986 Land Development Code (LDC), and could continue unfettered by the 1997 regulation and its 2016 counterpart governing "vacation rental use." *See* § 134-1, Monroe Cty. Code.

The County's position was that Ordinance 004-1997 clarified the existing prohibition on short-term rental, i.e., less than 28 days, of single-family homes within residential districts. The County acknowledged the circuit court's decision and recognized a lawfully-established non-conforming vacation rental use for the duplex structure at 1547 Narcissus. In addition, for 1547 Narcissus, the Monroe County LDC required that an annual special vacation rental permit and a vacation rental manager's license must be obtained and maintained to lawfully continue the duplex's vacation rental use. *Id.*

In the proceeding below, however, the County's expert, Mr. Rains, testified that he specifically disagreed with the circuit court's opinion where it stated that vacation rentals were not allowed or disallowed by 1970 zoning, i.e., pre-1986 LDC. *See Opinion, Edwin Handte.*

By motion that passed, the Commission voted to uphold the Senior Planning Director's decision. On September 25, 2019, the Commission adopted Resolution No. P35-19, denying the Appellants' appeal request. Resolution No. P35-19 set forth that the Commission considered the full record before it and concurred with the August 13, 2018, LOU. This appeal ensued.

STATEMENT OF THE ISSUES

Appellants raised several issues on appeal, including: (1) whether Appellee retroactively applied the LDC to Appellants' lawfully-established non-conforming vacation rental use; (2) whether Appellee violated Appellants' right to due process by applying Ordinance 004-1997, and its 2016 counterpart, retroactively to events which occurred and were established as a matter of record prior to 1997; (3) whether Appellants acquired vested rights when Ordinance 004-1997 was enacted, and the circuit court opinion judicially recognized those vested rights; (4) whether the Appellee erred by requiring compliance with Ordinance 004-1997, and its 2016 counterpart, in light of the doctrine of laches and equitable estoppel; and (5) whether Appellee erred, under the doctrine of collateral estoppel, by not applying the circuit court opinion.

LEGAL DISCUSSION

Standard of Review

Pursuant to a contract, DOAH has jurisdiction to consider this appeal under section 102-213 of the Monroe County LDC. The hearing officer "may

affirm, reverse or modify the order of the planning commission." § 102-218(b), Monroe Cty. Code. The hearing officer's order is subject to the following limitations:

> The hearing officer's order may reject or modify any conclusion of law or interpretation of the 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 upon 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 the law.

Id. Thus, the undersigned must determine whether the findings in Resolution No. P35-19 are based on competent substantial evidence, and whether the proceeding on which the findings were based complied with the essential requirements of the law.

The issue of whether the Commission complied with the essential requirements of the law is synonymous with whether the Commission "applied the correct law." *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995). When used as an appellate standard of review, competent evidence has been construed to be "legally sufficient evidence" or evidence that is "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957). Substantial evidence is evidence that provides a factual basis from which a fact at issue may reasonably be inferred. *Id.*

Procedural Due Process Violations

Unlike the three-tier judicial review of final administrative actions by a circuit court, procedural or due process violations may not be considered. *See, e.g., Osborn v. Monroe Cty. Planning Comm'n*, Case No. 03-4720 (Fla. DOAH Nov. 1, 2004)("the review criteria are limited and do not include consideration of whether procedural due process was afforded by the Commission"). Therefore, Appellants' argument that procedural due process violations occurred during the appeal hearing in front of the Commission, is not within the scope of this appeal.

Constitutional Issues

Judicial review of final administrative actions by a circuit court is the proper forum to address constitutional claims. *See Wilson v. Cty. of Orange*, 881 So. 2d 625, 631-32 (Fla. 5th DCA 2004); *see also Holiday Isle Resort & Marina Assoc. v. Monroe Cty.*, 582 So. 2d 721, 722 (Fla. 3d DCA 1991). Therefore, Appellants' arguments that the County's and Commission's actions violated various constitutional provisions were not within the scope of this appeal.

Vested Rights

Appellants argued that when the duplex became a lawful non-conforming use, it acquired the vested rights to be exempt from the retroactive application of substantive legislation, such as Ordinance 004-1997 and its 2016 counterpart. *See* Ordinance 004-1997; §§ 101-4(d) and 134-1, Monroe Cty. Code. Appellants argued that they acquired vested rights when Ordinance 004-1997 was enacted, and the circuit court opinion was a judicial declaration and recognition of those rights.

The record reflects that Appellants did not apply for a vested rights determination under the LDC. This administrative remedy has been

available since the 1986 Monroe County LDC. This circuit has recognized that this administrative remedy should first be exhausted before bringing a challenge on vested rights grounds. *See Opinion, Oceanside 104, LLC v. Scott French and Teresa Stafford,* No. 2016-CA-0376-K (Fla. 16th Jud. Cir. Jan. 25, 2019)(Garcia, J.).

Contrary to Appellants' arguments, the circuit court opinion did not judicially declare and recognize their acquisition of a vested right to be exempt from the Monroe County LDC vacation rental permit and license requirements. *See Dougherty ex rel. Eisenberg v. City of Miami*, 23 So. 3d 156 (Fla. 3d DCA 2009)(reflecting that questions of law actually decided by the circuit court appellate decision must govern the case).

Laches and Equitable Estoppel

Appellants did not argue to the Commission that it should or could overturn the LOU using the doctrines of laches or equitable estoppel. In addition, these doctrines are recognized as equitable affirmative defenses and not as standalone affirmative grounds for relief. *See McCray v. State,* 699 So. 2d 1366, 1368 (Fla. 1997)("[L]aches is a doctrine asserted as a defense[.]"). "Laches acts as a shield to an action, therefore, it has no application to" the case at bar where Appellants seek to use it as a sword. *Corona Props. of Fla., Inc. v. Monroe Cty.*, 485 So. 2d 1314, 1318 (Fla. 3d DCA 1986).

The case law cited by Appellants arose from code enforcement actions where the doctrines were pled as affirmative defenses. *Cf. Corkery v. Anchorage,* 426 P.3d 1078 (Alaska 2018). Appellants did not preserve this argument before the Commission, and the case law dictates against use of these doctrines in this type of administrative appeal.

Correct Application of the Law

The issue of whether the Commission complied with the essential requirements of the law is synonymous with whether the Commission "applied the correct law." *Haines City Cmty. Dev.,* 658 So. 2d at 530. One of the first rules of statutory construction is that the plain meaning of the statute (ordinance) is controlling. *See, e.g., Beshore v. Dep't of Fin. Servs.*, 928 So. 2d 411, 412 (Fla. 1st DCA 2006). If the language is clear and unambiguous, as it is here, there is no need to engage in statutory construction. *Id.* at 412.

The circuit court opinion stated that Appellants sought to continue using their property as a short-term rental, which was now prohibited in the zoning district in which the duplex was located. *See Opinion, Edwin Handte.* Ordinance 004-1997 defined the use and required that "[a]ll vacation rental uses shall obtain annual special vacation rental permits regardless of when the use was first established." The circuit court opinion determined the status of the duplex at 1547 Narcissus Avenue as "a pre-existing non-conforming use which was grandfathered in." The County acknowledged the circuit court's decision for 1547 Narcissus and recognized a lawfully established non-conforming vacation rental use for that duplex structure.

The circuit court decided a question of law. *See Dougherty ex rel. Eisenberg,* 23 So. 3d at 156 (reflecting that questions of law actually decided by the circuit court appellate decision must govern the case). The circuit court set forth the property's zoning history and concluded that vacation rentals were not allowed or disallowed by 1970 zoning. The circuit court also applied the holdings in *Allen v. City of Key West,* 59 So. 3d 316 (Fla. 3d DCA 2011), and *Rollison v. City of Key West,* 875 So. 2d 659 (Fla. 3d DCA 2004).

In *Allen,* the owners of properties being used for short-term rentals were entitled to grandfather status because the properties had been devoted to that use, in compliance with then-existing laws, prior to zoning restrictions prohibiting such rentals. In *Rollison*, the court reiterated its prior interpretation of the "then-existing laws" to a similar set of facts and held that the facts established a lawful non-conforming use. The use was "grandfathered in" because it existed lawfully before the current restrictions on short-term rentals. *See Rollison,* 875 So. 2d at 663.

The circuit court opinion interpreted the "then-existing" zoning laws and decided that vacation rentals were not allowed or disallowed by 1970 zoning. As such, Appellants "had a pre-existing non-conforming use which was 'grandfathered in.'" *See Opinion, Edwin Handte.* The record showed that the history of the construction of the two duplexes at 1547 and 1791 Narcissus Avenue and the length of time each duplex has been continuously operating as a short-term rental were nearly identical. The Commission's Resolution No. P35-19 is contrary to law in view of the prior decision of the circuit court. Thus, the County did not apply the correct law. *See, e.g., Cusick ex rel Cusick v. City of Neptune Beach,* 765 So. 2d 175, 177 (Fla. 1st DCA 2000)(reflecting that the doctrine of stare decisis applies a rule of law established in an earlier case only to a later case that involves a similar factual situation).

Compliance with Ordinance 004-1997 and its 2016 counterpart

Contrary to Appellants' arguments, the circuit court opinion did not decide the question of whether the duplex was exempt from the vacation rental permit and license requirements of the LDC. *See Dougherty,* 23 So. 3d 156 (reflecting that questions of law actually decided by the circuit court appellate decision must govern the case). In this appeal, Appellants have not produced any case law that stands for the proposition that Appellants can conduct their vacation rental use unfettered by the County's

substantive regulations for vacation rental businesses. The plain language of the LDC requires that an annual special vacation rental permit and a vacation rental manager's license must be obtained and maintained to lawfully continue the duplex's vacation rental use. *See* Ordinance 004-1997; §§ 101-4(d) and 134-1, Monroe Cty. Code.

DECISION

Based on the foregoing, the Commission's Resolution No. P35-19 is reversed and remanded for entry of a decision consistent with this Final Order.

DONE AND ORDERED this 12th day of August, 2020, in Tallahassee, Leon County, Florida.

FRANCINE M. FFOLKES
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Filed with the Clerk of the
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NOTICE OF RIGHT TO JUDICIAL REVIEW

Pursuant to article VI, section 102-218(c), Monroe County Code, this Final Order is the final administrative action of the county. It is subject to judicial review by common law petition for writ of certiorari to the circuit court in and for Monroe County, Florida.