STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

EDWIN HANDTE AND JANICE HANDTE,

Appellants,

vs. Case No. 19-5649

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. P34-19 (Resolution) rendered by Appellee, Monroe County Planning Commission (Commission), on September 25, 2019. The Resolution upheld the Letter of Understanding (LOU) dated April 16, 2018, in which the Senior Director of the Monroe County Planning and Environmental Resources Department (Planning Department) recognized the lawful establishment of a non-conforming vacation rental use of the two existing dwelling units (duplex) at 1547 Narcissus Avenue, Big Pine Key. The LOU referenced Monroe County Land Development Code (LDC) provisions regarding certain requirements to maintain a lawfully-established non-conforming vacation rental use. The requirements were to obtain and maintain annual special vacation rental permits and vacation rental manager licenses under section 134-1 of the LDC.

APPEARANCES

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For Respondent: Ilze Aguila, Senior Coordinator
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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.

BACKGROUND

The property and its duplex structure are located on Big Pine Key. Appellants submitted the LOU application to the Planning Department on August 17, 2017. A circuit court opinion accompanied the application. *See 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 Appellants "had a pre-existing non-conforming use which was 'grandfathered in.'" *Id.* The LOU was issued on April 16, 2018, wherein the Senior Planning Director: (a) recognized a lawfully established non-conforming duplex structure containing two dwelling units on the subject property, and that their replacement would be thereby exempt from Monroe County's Rate of Growth Ordinance permit

allocation system; (b) recognized a lawfully established non-conforming vacation rental use for the duplex structure; and (c) concluded that 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. 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 and Reynaldo Ortiz. 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 not prohibited by the pre-1986 and post-1986 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 rentals, 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. In addition, 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.*

By motion that passed, the Commission voted to uphold the Senior Planning Director's decision. On September 25, 2019, the Commission adopted Resolution No. P34-19, denying the Appellants' appeal request. The

Resolution set forth that the Commission considered the full record before it and concurred with the April 16, 2018, LOU. This appeal ensued.

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 the Appellee erred by requiring compliance with Ordinance 004-1997, and its 2016 counterpart, in light of the doctrine of laches and equitable estoppel; (4) whether Appellants acquired vested rights when Ordinance 004-1997 was enacted, and the circuit court opinion judicially recognized those vested rights; and (5) whether Appellants' compliance with Ordinance 004-1997 and its 2016 counterpart, would be unduly burdensome.

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 the Resolution 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." *DeGroot 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 or 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.

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 McGray 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.

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 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).

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 Edwin Handte and Janice E. Handte v. Monroe Cty.*, No. 2016-AP-4-K (Fla. 16th Cir. Ct. May 2, 2017). 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 and the LOU recognized a lawfully established non-conforming vacation rental use for the duplex structure.

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.

Appellants argued that it would be burdensome to obtain a County permit and license, that requiring an on-site vacation rental manager was a hardship, and that having to do so would in effect nullify the recognition of a lawful non-conforming vacation rental use. The record reflects that one half of the duplex at 1547 Narcissus has been continuously occupied by an on-site

resident manager. In addition, Mr. Rains testified that it would be possible for Appellants to obtain a special vacation rental permit and license from the County if they submitted applications for them, and that a potential buyer of the property would have the same ability to do so.

The record did not establish any alleged hardship. Also, an alleged hardship is not unconstitutional. *Cf. Legal Tender Cases*, 79 U. S. 457, 552 (1870) ("[I]t is not every hardship that is unjust, much less that is unconstitutional; and certainly it would be an anomaly for us to hold an act of Congress invalid merely because we might think its provisions harsh and unjust.").

DECISION

Based on the foregoing, the Commission's denial of Appellants' appeal request is affirmed.

DONE AND ORDERED this 6th day of July, 2020, in Tallahassee, Leon County, Florida.

FRANCINE M. FFOLKES
Administrative Law Judge
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Filed with the Clerk of the
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this 6th day of July, 2020.

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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.