STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

EDWIN HANDTE AND JANICE HANDTE,

Appellants,

vs. Case No. 20-2787

MONROE COUNTY PLANNING COMMISSION,

Appellee.
_____/

FINAL ORDER

In this administrative appeal to the Division of Administrative Hearings (DOAH), Appellants, Edwin Handte and Janice E. Handte (Appellants), seek review of Resolution No. P06-20 rendered by Appellee, Monroe County Planning Commission (Commission), on May 22, 2020. The Resolution upheld the Letter of Understanding (LOU) dated June 20, 2019, in which the Acting Senior Director of the Monroe County Planning and Environmental Resources Department (Planning Department) notified Appellants that the Planning Department recognized the lawful establishment of 936 square feet of floor area of non-residential office use as exempt from Monroe County's Rate of Growth Ordinance (ROGO), and three apartments as exempt from the ROGO at 103365 Overseas Highway, Key Largo , Florida (Property). However, the LOU also notified Appellants that the Planning Department was unable to recognize the lawful establishment of a non-conforming vacation rental use of three existing apartments at the Property.

A three-volume Record of the underlying proceeding before the Commission was filed with DOAH by its Clerk on July 19, 2020. Briefs were filed by the parties and oral argument was held by Zoom videoconference on December 1, 2020.

APPEARANCES

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For Appellee: Peter H. Morris, Esquire
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BACKGROUND

The Property and its three dwelling units are located on Key Largo. Appellants obtained the Property's building permit on November 6, 1985. The three dwelling units are efficiency apartments of approximately 300 square feet each. The Property began operation and was continuously operated as short-term rentals since June 1987. It is undisputed that when the Property was granted a building permit on November 6, 1985, it was ten months prior to enactment of the 1986 Monroe County Land Development Code (LDC). The Certificate of Occupancy (CO) was granted on June 17, 1987.

Although the Property has been zoned Improved Subdivision-Masonry (IS-M) since September 1986, the Property was previously zoned Business Use (BU-1) when the building was planned and approved before the September 15, 1986, change in zoning based on enactment of the 1986 LDC. The Property was purchased and permitted under the BU-1 designation. The BU-1 district allowed uses that included apartments as an accessory use to a commercial principal use. The floor plans in the building permit reflect commercial square footage and the three efficiency apartments. At that time, the LDC did not specify or limit the duration of use for the accessory apartments.

The permitting and rental operation history of the Property are almost identical to the permitting and rental operation history of Appellants' properties on Big Pine Key at 1547 Narcissus Avenue and 1791 Narcissus Avenue. The 1547 Narcissus Avenue property was the subject of DOAH Case No. 19-5649 in which the undersigned issued a Final Order on July 6, 2020. That Final Order affirmed Commission Resolution No. P34-19 that recognized the lawful establishment of a non-conforming vacation rental use of the two existing dwelling units at 1547 Narcissus Avenue. That Final Order also affirmed the Commission's determination that 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 vacation rental use. *See* §§ 101-4(d) and 134-1, Monroe Cty. Code.

The 1791 Narcissus Avenue property was the subject of DOAH Case No. 19-5645 in which the undersigned issued a Final Order on August 12, 2020. That Final Order reversed and remanded Commission Resolution No. P35-19. Resolution No. P35-19 did not recognize the lawful establishment of a non-conforming vacation rental use of the two existing dwelling units at 1791 Narcissus Avenue. The Final Order also reiterated the conclusion that 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 a vacation rental use. *See* §§ 101-4(d) and 134-1, Monroe Cty. Code.

Appellants submitted the instant LOU application to the Planning Department on August 13, 2017. As with the prior applications for the properties on Big Pine Key, 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 regarding the duplex at 1547 Narcissus, Appellants "had a pre-existing non-conforming use which was 'grandfathered in.'" *Id.* In the LOU application, Appellants essentially argued that Monroe County (County) should recognize the lawful non-conformity status of the Property based on the similarities with the properties on Big Pine Key.

The LOU for the Property was issued on June 20, 2019. The Planning Department determined that the building 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 Planning Department's decision to the Commission in July 2019.

The appeal hearing was held before the Commission on February 26, 2020. 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 the Property. In addition, Appellants argued that the 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 rental, i.e., less than 28 days, of single-family homes within residential districts. In the proceeding below, 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 the 1970's zoning, i.e., pre-1986 LDC. *See Opinion, Edwin Handte.*

By motion that passed unanimously, the Commission voted to uphold the Planning Department's LOU. On May 22, 2020, the Commission adopted Resolution No. P06-20, denying the Appellants' appeal request. Resolution No. P06-20 set forth that the Commission considered the full record before it and concurred with the June 20, 2019, LOU. This appeal ensued.

STATEMENT OF THE ISSUES

Appellants raised two issues for resolution in this appeal. First, Appellants seek reversal of the LOU and Resolution No. 06-20, and recognition of a lawful non-conforming vacation rental use of the Property. Second, Appellants seek clarification that they are not subject to any provisions of section 134-1, Monroe County LDC, regarding the Property.

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. P06-20 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 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 proceeding in front of the Commission, is not within the scope of this 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." In DOAH Case No. 19-5649, 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 v. City of Miami,* 23 So. 3d 156, 157 (Fla. 3d DCA 2009) (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 the 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 the 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 on Big Pine Key, and the length of time each duplex has been continuously operating as a short-term rental, were nearly identical to the history of the Property on Key Largo. The Commission's Resolution No. P06-20 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

at 157 (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 Property'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. P06-20 is reversed and remanded for entry of a decision consistent with this Final Order.

DONE AND ORDERED this 6th day of May, 2021, 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 May, 2021.

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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.