

received
12-10-2010

IN THE CIRCUIT COURT, FIRST JUDICIAL CIRCUIT
IN AND FOR WALTON COUNTY, FLORIDA
APPELLATE DIVISION

**NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED**

**T. REPPARD BENNETT and
KAREN BOX BENNETT,**

CASE NO. 10-AP-000007

Appellants,

vs.

Lower Tribunal Case No.
10-1078 (*Walton County Code
Enforcement Board*)

WALTON COUNTY, FLORIDA,

Appellee.

_____/

An appeal from the County Code Enforcement Board, Walton County, Florida.
Robert Nelson, Chairman.

Patrick K. McCarthy, Esq., of Matthews & Hawkins, P.A., Destin, Florida, for
Appellants.

Gregory T. Stewart, Esq., and Carly J. Schrader, Esq., of Nabors, Giblin &
Nickerson, P.A., Tallahassee, Florida, for Appelllee.

OPINION:

LaPORTE, Judge.

This appeal is from the Walton County Code Enforcement Board's
(WCCEB) final order rendered on June 3, 2010, after a hearing held on May 20,

2010. On June 14, 2010, appellants filed their notice of appeal in the circuit court pursuant to s.162.11, Fla. Stat. (2010).

Review of a code enforcement board's final order is by appeal to the circuit court. *See s. 26.012(1), Fla. Stat. (2010); Fla. R. App. P. 9.030(c)(1)(C); Kirby v. City of Archer*, 790 So. 2d 1214, 1215 (Fla. 1st DCA 2001); *Sarasota County v. Bow Point on The Gulf Condominium Developers, LLC*, 974 So. 2d 431, 432-33 n. 2 & n. 3 (Fla. 2d DCA 2007) (citing in part, *Kirby*); and *Victoria L. Cecil, Esq., The Appealing Nature of Local Code Enforcement Board Decisions*, 82 Fla. Bar J. 42 (May 2008) (it is clear from the plain language of Fla. R. App. P. 9.190(b) and the Florida Statutes that judicial review of code enforcement board decisions are commenced by direct appeal and not by petition for writ of certiorari).

On August 23, 2010, appellants' filed their initial brief and a request for oral argument. By prior order (after initial consideration of the record on appeal and all briefs), the Court dispensed with oral argument under *Fla. R. App. P. 9.320*. On **October 13, 2010**, Appellee filed its answer brief. On **October 29, 2010**, appellants filed their reply brief.

Having considered the record on appeal (including the WCCEB's Final Order), the initial brief, the answer brief, and reply brief, and any appendix or appendices thereto), having considered the applicable laws and rules, and being

otherwise fully advised in the premises, the Court finds and concludes that appellants are not entitled to relief.

Issues on appeal

Appellants raise three issues on appeal (1) whether competent **substantial** evidence exists in the record to support the county code enforcement **board's** finding of a violation; (2) whether section 02.01.03L(3)(a)(iii) of the Walton County Land Development Code (LDC) is unconstitutionally vague and unenforceable against the property owner appellants; and (3) whether the **county** code enforcement board erred in admitting certain evidence in the form of exhibits.

Appellants, T. Reppard Bennett and Karen Box Bennett ("the Bennetts") seek review of a Final Order of the Walton County, Florida Code Enforcement Board ("WCCEB"), pursuant to section 162.11, Florida Statutes. WCCEB found the Bennetts were in violation of section 2.01.03(L)(3)(a)(iii) of the Walton County **Land** Development Code ("the LDC"), because they were using their property which is located in the Residential Preservation Area land use district for a non-residential activity by conducting weddings and other special events on the property. Such use is prohibited by the LDC.

The Bennetts' property is located in Dana Beach Drive Subdivision in

Walton County, between 30A and the Gulf of Mexico (Tr. at 13, 83). The subdivision contains primarily multi-family residences (Tr. at 59). The Bennetts' property includes a triplex purchased in 2002, which the Bennetts call "Triple Crown" (Tr. at 56, 83). In 2008, the Bennetts acquired the neighboring duplex, which they refer to as "Above It All", and a Gulf front lot contiguous to their property (Tr. at 83, 85). The Bennetts did not build on this lot, but instead used it as a green space, referred to as "the Lawn" (Tr. at 56, 59, 84).

It is undisputed that the Bennetts rent their property for short-term vacation rentals, as do many of the other properties in the area, and have been doing so since acquiring and renovating the property (Tr. at 56, 84-85). The vacation rental business is profitable primarily in the summer and on holidays (Tr. at 84). Admittedly, in 2008, the Bennetts began promoting their property as a venue for weddings and other special events off season, during the Spring and Fall (Tr. at 84, 100). Specifically, Ms. Bennett testified that she advertises and promotes her property as a wedding venue (Tr. at 100). In fact, the Bennetts' "wedding business" was featured in a May 10, 2008, article published in the Walton Sun (App. Vol. II at 220; Tr. at 17).

The Bennetts marketed their property through their business, Pearly White

Properties, LLC (App. Vol. II at 268-69; Tr. at 97-99). A rental sign is located in front of the property advertising "weddings and special events" (App. Vol. II at 219; Tr. at 16). In addition, the website for pearlywhiteproperties.com invites renters to have a wedding on the beach and use "the Lawn" for the reception (App. Vol. II at 268-69). The Bennetts have even published a brochure for a **Bridal Faire** held on the property in February 2009, advertising "the Lawn on the Beach" as a wedding venue (App. Vol. II at 221-23; Tr. at 18, 93).

The Walton County LDC provides for a Residential Preservation Area **land** use district. Pursuant to section 2.01.03(L)(3)(a)(iii) of the LDC, "[n]onresidential uses are not allowed in this district, unless part of a previously approved plat or development order." On January 21, 2010, Walton County received a code enforcement complaint that a commercial business was being operated on the Bennetts' property (Tr. at 8). The case proceeded, and a Notice of Violation/Notice of Code Enforcement Board Hearing was mailed via Certified Mail on February 23, 2010, to the Bennetts, scheduling a hearing on March 18, 2010 (App. Vol. II at 195-99). The notice provided that it had been determined that a commercial business was being operated on the parcel in violation of the Walton County Land Development Code and the Walton County Comprehensive Plan, and that the

Bennetts must cease all commercial activity before March 18, 2010 (App. Vol. II at 195-99).

The meeting was rescheduled and renoticed several times, and was ultimately noticed by letter on April 16, 2010, for hearing held on May 20, 2010 (App. Vol. II at 200-15; Tr. at 9-11). The Bennetts were present at the hearing and represented by counsel.

Among the evidence that was entered during the code enforcement hearing, the Code Enforcement officer, J.C. Alford, admitted a log from the Sheriffs Office of all the calls regarding the Bennetts' property, with attached letter dated May 18, 2010, by Lt. Keith A. Chamblee of the Walton County Sheriffs Office, identifying the document as "a list of Loud Noise/ Loud Music complaints compiled by me from our Call History data base. This list was for the area of: approx. 4000 block of County Highway 30 A, Seagrove Beach, Florida, 32459, described to me as Dana Beach" (Tr. at 13-14; App. Vol. II at 217-18). Upon its identification at the hearing by Alford, counsel for the Bennetts, objected to the introduction of the letter and attached chart on the grounds that it was not authenticated and that it contained hearsay (Tr. at 14-15). The objection was noted, but the evidence was allowed into the record (Tr. at 15). A total of 29 calls were logged, mostly for loud

music or noise on the property associated with wedding events. (App. Vol. II at 218).

In addition to the log of Sheriff's Office calls, several neighbors testified of complaints they had made regarding the Bennetts' use of the property for wedding events (Tr. at 31-55). These neighbors testified that wedding events were held on a regular basis at the property, sometimes two in one day, and there would be as many as 150 people on the property for these events (Tr. at 31-32, 35, 41). One neighbor even testified she had difficulty accessing her property because of the weddings, and was currently trying to sell her house because of this activity (Tr. at 48, 50). The Planning Director for the County was questioned regarding his interpretation of "non-residential" with reference to this specific case. He testified that he considered the frequency of the activity and the advertising of the property as a wedding venue in making the decision to go forward with this case (Tr. at 77-80). Karen Bennett acknowledged that she and her husband have advertised and promoted their property as a wedding venue, and that they rent the property for weddings and special events in the off season (Tr. at 84, 100). Although she initially testified that they did not derive any additional income from weddings, (Tr. at 85), she later testified that someone would have to pay a higher price to

reserve "the Lawn" and that the Bennetts would have prior knowledge of the event taking place (Tr. at 95, 100-04). Ultimately, the Code Enforcement Board determined that the Bennetts were in violation of the Land Development Code, and ordered that they cease and desist from all non-residential activities on the property by August 31, 2010 (App. Vol II. at 313-17).

Based on the testimony and the evidence presented, the WCCEB determined that appellants violated the County's Land Development Code by conducting non-residential activities on the property.

Standard of Review

Pursuant to section 162.11, Florida Statutes, an appeal of a code enforcement board's decision comes to the circuit court in its appellate capacity and is limited to appellate review of the record created before the code enforcement board. A three-prong appellate standard of review applies and is limited to determinations whether (1) procedural due process was accorded in the **administrative proceeding**; (2) the essential requirements of law were observed in the administrative proceeding; and (3) the administrative findings and judgment are support by competent substantial evidence. *See Clay County v. Kendale Land Development, Inc.*, 969 So. 2d 1177, 1180 (Fla. 1st DCA 2007) (citing *Broward County v. G.B.V. Int'l, Ltd.*, 787 So. 2d 838, 843 (Fla. 2001)); *see also City of*

Deerfield Beach v. Vaillant, 419 So. 2d 624, 626 (Fla. 1982); *Dusseau v. Metropolitan Dade County Board of County Commissioners*, 794 So. 2d 1270 (Fla. 2001).

It is a “clearly established principle of law” that, when considering an appeal, a circuit court has only two options—it may either affirm or reverse the code enforcement board.

The circuit court sitting in its appellate capacity has no authority to reweigh the evidence presented to the administrative board. *See G.B.V. Int'l*, 787 So. 2d at 845.

Discussion / Analysis

(1) Due process of law.

The record established that appellants were afforded adequate time to present testimony and evidence which was considered by WCCEB. The hearing was rescheduled and noticed several times, and was ultimately noticed on April 16, 2010, for hearing held on May 20, 2010. The appellants were present at the hearing and represented by counsel. Witnesses were sworn and cross-examined by counsel. Evidence was accepted in the form of testimony and exhibits. The record indicates ample notice was provided.

Once a local board's decision-making event has been identified as quasi-judicial, triggering an appellant's right to procedural due process, "the question remains what process is due." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). The familiar triad of notice, opportunity to be heard and an impartial **decision** maker will, of course, be present, but the degree of each that is due will **vary with** the competing interest involved. *See, e.g., Cleveland Bd. of Educ. v. Lauderhill*, 470 U.S. 532, 542-45 (1985).

Applying the foregoing law to the facts of the instant case, the **record** demonstrates that the requirement of procedure due process, notice and opportunity to be heard, was met.

The WCCEB **did not** violate due process.

(2) **The essential requirements of the law.**

"A ruling constitutes a departure from 'the essential requirements of law' when it amounts to 'a violation of a clearly established principle of law resulting in **a miscarriage of justice.**'" *See Clay County, 969 So. 2d at 1180 (Fla. 1st DCA 2007)* (citing *Combs v. State*, 436 So. 2d 93, 96 (Fla. 1983)). It is an error that is so fundamental in character, such as the incorrect application of law, as to fatally infect the judgment and render it void. *See Haines City Dev. v. Heggs*, 658 So. 2d 523 (Fla. 1995).

The record evidence established sufficient evidence for the WCCEB to find Appellants were marketing their beachfront property as a wedding venue in Walton County, and that weddings were frequently held on the property.

The term “non-residential uses” in the Land Development Code, even though undefined, is not unconstitutionally vague, as the Code gives a person of ordinary intelligence fair notice of what conduct is forbidden.

Appellants' argue that Exhibits 7-B and 11 were improperly admitted because they were not authenticated, and were inadmissible hearsay, under sections 90.801 and 90.901, Florida Statutes, part of the Florida Evidence Code. This hearing in front of the Code Enforcement Board is quasi-judicial, and the formal rules of evidence do not apply. § 162.07(3), Fla. Stat. ("Formal rules of evidence shall not apply"); *Carillon Cmty. Residential v. Seminole County*, 35 Fla. L. Weekly D1467 (Fla. 5th DCA July 2, 2010) (providing quasi-judicial hearings are not controlled by strict rules of evidence or procedure); *Seminole Entm't, Inc. v. City of Casselberry*, 811 So. 2d 693 (Fla. 5th DCA 2001) (same).

WCCEB made no error in admitting these exhibits. This is especially true, where Appellants acknowledged the determinative facts were not in dispute.

Even if it was error to admit this evidence, the error was harmless. The fact that neighbors had made complaints regarding the noise from the property related

to wedding events was not in dispute (Tr. at 31-55). For example, Mr. Stanko, who prepared Exhibit 11, also introduced many pictures of wedding events and testified regarding different wedding events he had observed and complained about on the property (App. II at 243-56; Tr. at 34-46). Likewise, the fact that wedding events occurred frequently on the property was not contested. Accordingly, **this** argument is without merit.

A review of the WCCEB's ruling cannot be found to be a "miscarriage of justice" or an "incorrect application of the law, as to fatally infect the **judgment and** render it void."

The WCCEB **did not** depart from the essential requirements of the law.

(3) **Competent Substantial Evidence.**

The decision must be supported by competent substantial evidence in the record before the board. *See City of Deerfield Beach v. Vaillant*, 419 So. 2d 624 (Fla. 1982). Under this Court's limited scope of review, it must be determined **whether the record contains any competent substantial evidence to support the** county's decision determining the appellants violated the LDC and imposing penalties. It matters not whether there is also – or even more – evidence to support a different conclusion, for "[t]he point is that when the facts are such as to give the County Commission a choice between alternatives, it is up to the County

Commission to make that choice – not the circuit court.” *Metropolitan Dade County v. Blumenthal*, 675 So.2d 598, 606 (Fla. 3d DCA 1995).

It is not for the reviewing court “to re-weigh or evaluate the evidence presented before the tribunal or agency whose order is under examination. The ...court merely examines the record made below to determine whether the lower tribunal had before it competent substantial evidence to support **its findings and judgment....**” *DeGroot v. Sheffield*, 95 So.2d 912, 916 (Fla. 1957).

As explained by the Florida Supreme Court in the seminal *DeGroot* case,

Substantial evidence has been described as such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred. We have stated it to be such relevant evidence as a reasonable mind would accept as adequate to support a conclusion.... In employing the adjective “competent” to modify the word “substantial” we are aware of the familiar rule that in administrative proceedings the formalities in the introduction of testimony common to the courts of justice are not strictly employed.... We are of the view, however, that the evidence relied upon [to] sustain the ultimate finding should be sufficiently **relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached.** To this extent the “substantial” evidence should also be “competent.”

In this case the court is not allowed to “re-weigh or evaluate the evidence before the agency.” The court merely examines the record made below the

agency.” The court merely examines the record made below to determine if competent substantial evidence existed to support the findings.

A review of the evidence presented before the WCCEB indicates there was competent substantial evidence which supports WCCEB’s decision.

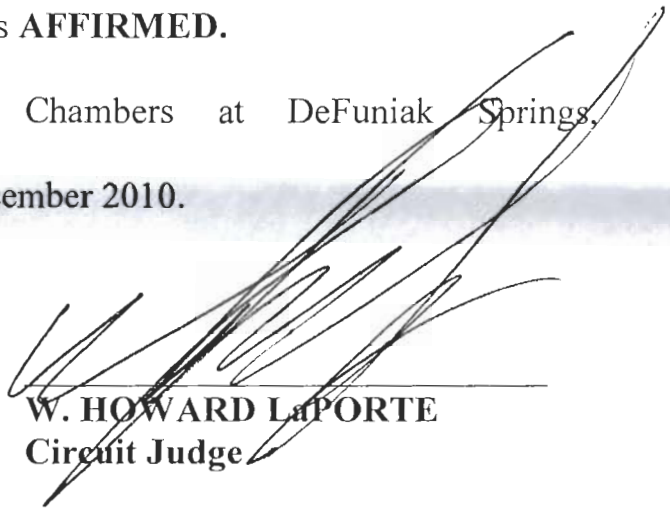
The WCCEB’s decision is supported by competent substantial evidence.

Conclusion

The court considered the three issues on appeal and concludes Appellants failed to demonstrate a basis for relief. The record indicates Appellants were afforded procedural due process. Appellee observed the essential requirements of the law in the quasi-judicial hearing and issued its ruling based upon competent substantial evidence.

The Court finds no reversible error. Accordingly, the final order of the Walton County Code Enforcement Board is **AFFIRMED**.

DONE AND ORDERED in Chambers at DeFuniak Springs,
Walton County, Florida, this 8th day of December 2010.



W. HOWARD LaPORTE
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing **Opinion** has been furnished by regular U.S. Mail (*unless otherwise indicated*) to:

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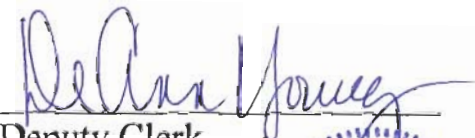
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(*County Attorney for Appellee*)

this 8 day of December 2010.

MARTHA INGLE

Clerk of Court

BY: 

Deputy Clerk

