NOT FINAL UNTIL TIME EXPIRES FOR REHEARING, AND IF FILED, DETERMINED

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
APPELLATE DIVISION

CEDAR HOUSE, LLC,
Appellant,

v.

Ref. No.: 16-000042-AP-88B
UCN: 522016AP000042XXXXCI

CITY OF CLEARWATER, FLORIDA
CODE ENFORCEMENT BOARD,
Appellee.
_______________________________________/

ORDER AND OPINION

Appellant appeals the order of the Municipal Code Enforcement Board of the City of Clearwater ("Board") finding it in violation of sections 1-103.B., 3-919, and 8-102 of the City of Clearwater's Community Development Code ("Code"), relating to short-term rentals. For the reasons set forth below, the order is affirmed in part, reversed in part, and remanded.

Facts and Procedural History

Appellant owns a house in Clearwater that is zoned for residential use. Under the Code, the property cannot be rented for a period of less than 31 days or one month, whichever is less. On March 10, 2016, Appellant received a Notice of Repeat Violation[1] asserting that the property was being rented in violation of three sections of the Code: section 1-104.B. ("No building, structure, water or land shall be used or occupied . . . unless in conformity with all of the provisions of the zoning district."); section 3-919 ("Prima facie evidence of certain uses located in any residential zoning district"); and section 8-102 (defining residential use). The Notice alleged that the property was rented for periods of less than one month on thirteen different occasions, which totaled 93 days, between February and November 2015. The property was subject to a long-term lease during this time. On July 27, 2016, a hearing was held before the Board. On August 4, 2016, the Board entered an order finding Appellant in violation of the three Code sections and assessing a fine of $500 a day for each of the 93 days that a repeat violation occurred, totaling $46,500. Appellant then filed the instant appeal.

[1] Appellant was previously found in violation of the same three Code sections in 2013, 2014, and 2015.

Standard of Review

When reviewing local government administrative action at the circuit level, the court asks three questions: "whether due process was afforded, whether the administrative body applied the correct law, and whether its findings are supported by competent substantial evidence." *Lee Cnty. v. Sunbelt Equities, II, Ltd. P'ship*, 619 So. 2d 996, 1003 (Fla. 2d DCA 1993).

Discussion

Competent Substantial Evidence

Appellant contends that the Board's order was not supported by competent substantial evidence because it was based almost entirely on the hearsay testimony[2] of a neighbor, Ms. Blackstone. In determining if competent substantial evidence exists, this Court may only decide "whether the record contains the necessary quantum of evidence." *Lee Cnty.*, 619 So. 2d at 1003. A court "is not permitted to go farther and reweigh that evidence . . . or to substitute its judgment about what should be done." *Id.* Florida Statutes section 162.07, which governs the conduct at code enforcement board hearings, establishes that the "[f]ormal rules of evidence shall not apply, but fundamental due process shall be observed and shall govern the proceedings." This is also restated in the Code. *See* § 7-102.F.3., Code. Because the rules of evidence do not apply, Ms. Blackstone's testimony could properly be considered by the Board even if it was primarily hearsay.

A review of the hearing transcript indicates that the majority of Ms. Blackstone's testimony was hearsay. She mostly testified to what Appellant's short-term renters told her. However, Ms. Blackstone's nonhearsay testimony indicated that she observed and interacted with thirteen separate groups of people on thirteen different occasions between February and November 2015. At the end of her testimony, she stated that in each of the thirteen instances she "confirmed that renters left the premises as stated above and did not return by observing the absence of vehicles and activity at the residence. When renters left, I always observed the cleaning lady and the pool cleaning person coming on the property."

To corroborate Ms. Blackstone's testimony, the code compliance manager entered utility bills into evidence that indicated an unusually high amount of water being used in the months that the alleged short-term rentals occurred. Appellant offered proof of a plumbing problem that

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[2] Ms. Blackstone's testimony at the hearing was based on her affidavit, which was also submitted into evidence.

was repaired, which Appellant alleged explained the high usage. According to the logs, however, unusually high water usage continued in the months after the repair. This Court cannot reweigh the evidence, and it was well within the Board's purview to determine that the bills were persuasive to support the violations. Finally, the Board considered the lease between Appellant and its tenant, which stated that the tenant "may use existing listings" for the property on two vacation rental websites, several emails and notes from Ms. Blackstone to the City concerning the short-term renters, an affidavit from one of the City's investigators who was with Ms. Blackstone when she spoke to one short-term renter, a police call log with two calls that coincided with the alleged rentals, and website printouts that indicated that the house was still being offered for short-term rentals on the day of the hearing. Although each piece of evidence standing alone would not rise to the level of being competent and substantial, the totality of the evidence constitutes competent substantial evidence that thirteen separate violations occurred.

However, the evidence is not competent and substantial to support the entire *length* of each of those violations for the purpose of assessing fines. While the strict rules of evidence do not govern these types of quasi-judicial proceedings, the evidence relied on by the Board must still be competent and substantial. *See Agner v. Smith*, 167 So. 2d 86, 91 (Fla. 1st DCA 1964). Even without the formal rules of evidence, the concept of fundamental fairness will not allow the imposition of a fine of $500 a day, when each day is not proven by competent substantial evidence. *See Jones v. City of Hialeah*, 294 So. 2d 686, 688 (Fla. 3d DCA 1974) (opining that "while in our state technical rules of evidence clearly do not apply in the same sense before administrative tribunals as they do in courts, we do not think the hearsay rule ought to be totally discarded"); *Massey v. Charlotte Cnty.*, 842 So. 2d 142, 146–47 (Fla. 2d DCA 2003) (holding that code enforcement orders that impose a lien on real property implicate constitutional concerns because people "have a compelling interest in retaining their real and personal property free of undue interference or improper clouds of title"). The only evidence concerning the violation lengths is Ms. Blackstone's testimony as based on her affidavit, which is primarily hearsay.[3] Accordingly, the only competent substantial evidence that the Board received regarding the length of the violations was Ms. Blackstone's observations of the short-term renters on the day that she spoke with each of them. Therefore, competent substantial evidence

[3] The Court notes that on one occasion a private investigator for the city was with Ms. Blackstone and also allegedly heard the short-term renters state how long they would be staying; however, this is also hearsay.

supports a one day violation for each of the thirteen separate occasions during which the property was in a short-term rental.

Essential Requirements of Law

Appellant also asserts that the Board departed from the essential requirements of law because: 1) Appellant is not the alleged "violator" as defined by the Code, and 2) no prima facie evidence of a short-term rental violation was presented as required by Code section 3-919.

First, Appellant contends that it cannot be the violator because the property was leased to a third party, who was responsible for renting it out. Violator is defined as "a person alleged to or who has been found to have violated a provision of the City Code through a code enforcement board, or any other quasi-judicial or judicial process." § 8-102, Code. Florida courts have held that code violations run with the land because "fines, if left unpaid, 'may be recorded in the public records and thereafter shall constitute a lien against the land on which the violation exists and upon any other real or personal property owned by the violator.'" *Henley v. MacDonald*, 971 So. 2d 998, 1000 (Fla. 4th DCA 2008) (quoting § 162.09(3), Fla. Stat.). "By necessity and logic, there is nothing unconstitutional in holding that as the party who has the power to bring the land into code compliance, the current owner should be charged with that responsibility." *Monroe Cnty. v. Whispering Pines Assocs.*, 697 So. 2d 873, 875 (Fla. 3d DCA 1997) (holding that "because the penalty for non-compliance was 'a lien against the land,' the [mobile home] park was properly deemed to be the violator," not the mobile home owner). Accordingly, the Board did not violate the essential requirements of law in determining that Appellant, as the property owner, was the violator.

Next, Appellant asserts that the required prima facie evidence was not established as defined in section 3-919 of the Code. Section 3-919 states that prima facie evidence of short-term rentals "shall include but not be limited to . . . [a]dvertising or holding out a dwelling unit for tourist housing or vacation rental use . . . [or] . . .[u]se of an agent or other third person to make reservations or booking arrangements." The Board asserts that this burden was met because the lease states that the tenant can use the existing listings at two vacation rental websites, which indicates both that Appellant was using the tenant to make the booking arrangements and that the house was being advertised for vacation rental use. The statement in the lease and the printouts from the vacation rental website are adequate evidence that the

residence was being advertised for vacation rental use. Accordingly, the Board did not violate the essential requirements of law because the required prima facie evidence existed.

Due Process

Appellant's third argument is that the Board did not afford it due process because: 1) one member of the Board made comments constituting a pre-determination of the case before it was heard but refused to disqualify himself, 2) the Board heard evidence that was irrelevant and not disclosed to Appellant until the day before the hearing, and 3) Appellant was not afforded an opportunity to cross-examine witnesses.

"Generally, due process requirements are met in a quasi-judicial proceeding if the parties are provided notice of the hearing and an opportunity to be heard." *Seiden v. Adams*, 150 So. 3d 1215, 1219 (Fla. 4th DCA 2014) (internal citations omitted). "The specific parameters of the notice and opportunity to be heard required by procedural due process are not evaluated by fixed rules of law, but rather by the requirements of the particular proceeding." *Massey*, 842 So. 2d at 146. Here, the Code provides that the "municipal code enforcement board shall not be bound by formal rules of evidence; but, it shall act to ensure fundamental due process." § 7-102.F.3., Code.

Appellant first asserts that it was not afforded due process because one Board member refused to disqualify himself after making statements that indicated that he had prejudged the merits of Appellant's case. However, nothing in Florida state law provides for the disqualification of municipal code enforcement board members from the consideration of matters coming before the board. *See* Fla. Op. Atty. Gen., 2011 WL 2429105, at *2 (Fla. A.G. June 9, 2011); *see also* Fla. Op. Atty. Gen., 1988 WL 407019 (Fla. A.G. Dec. 30, 1988) (advising that no provision "provides for the disqualification of a member or members of the code enforcement board from consideration of matters coming before the board, including section 38.02, Florida Statutes, which applies to disqualification of judges); § 286.012, Fla. Stat. ("A member of a . . . municipal governmental board . . . who is present at a meeting of any such body at which an official decision, ruling, or other official act is to be taken . . . may not abstain from voting . . . unless, with respect to any such member, there is, or appears to be, a possible conflict of interest.). Likewise, the Code does not provide for a Board member's disqualification. *See* § 7-102, Code. Thus, this argument is without merit.

Appellant's other due process arguments are based on evidentiary issues. Appellant essentially argues that the Board deprived it of due process by considering irrelevant evidence,

considering evidence not disclosed to Appellant until the day before the hearing, and not allowing Appellant to cross-examine witnesses. However, Appellant's arguments are meritless since the formal rules of evidence do not apply and Appellant was given both notice and an opportunity to be heard.

Conclusion

Although the Board's order did not violate the essential requirements of law and Appellant was afforded due process, the order is only supported by competent substantial evidence establishing 13 days of short-term rentals. Therefore, this Court affirms finding Appellant in violation for 13 days and imposing a fine of $6,500 ($500 per day). The finding of violation and imposition of fines for the remaining 80 days is reversed, and the issue is remanded for further proceedings. Accordingly, it is

ORDERED AND ADJUDGED that the order of the Municipal Code Enforcement Board of the City of Clearwater is AFFIRMED in part, REVERSED in part, and remanded.

DONE AND ORDERED in Chambers at St. Petersburg, Pinellas County, Florida, this 5th day of ~~May~~ June, 2017.

Original Order entered on June 5, 2017, by Circuit Judges Pamela A.M. Campbell, Amy M. Williams, and Thomas M. Ramsberger.

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