

**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**

D. SCOTT BOGGS a/k/a SCOTT  
BOGGS and AMY BOGGS,  
Appellants,

vs.

Ref. No.: 17-0060AP-88B  
UCN:

522017AP000060XXXXCI  
CITY OF ST. PETE BEACH,  
Appellee.

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**ORDER AND OPINION**

Appellants challenge the Findings of Fact and Order (“final order”) of the City of St. Pete Beach Code Enforcement Special Magistrate (“Special Magistrate”) finding them in violation of the City’s Land Development Code (“Development Code”). For the reasons set forth below, the final order is reversed and remanded.

**Facts and Procedural History**

Appellants own residential property in St. Pete Beach’s Pass-a-Grille Overlay District. The property consists of three dwelling units and an unimproved area. On August 7, 2017, Appellants were sent a Notice of Violation stating their property was being used in violation of two sections of the Development Code: Section 20.03(b), which limits transient rentals, and Section 23.4(e), which prohibits parking on unimproved land. On October 9, 2017, a hearing was held before the Special Magistrate. After hearing arguments and taking evidence from the parties, the Special Magistrate scheduled another hearing and allowed the parties to submit memoranda in the interim. The final hearing was held on November 13,

2017. On November 17, the Special Magistrate entered the final order finding Appellants in violation of both Development Code sections and giving them until December 13, 2017, to come into compliance. If the property was not brought into compliance, the final order provided that the matter would be referred back to the Special Magistrate for imposition of a fine. On December 15, 2017, Appellants filed the instant appeal.

### **Standard of Review**

“Where a party is entitled as a matter of right to seek review in the circuit court from administrative action, the circuit court must determine whether procedural due process is accorded, whether the essential requirements of the law have been observed, and whether the administrative findings and judgment are supported by competent substantial evidence.” *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982).

### **Discussion**

Appellants raise various issues concerning the Special Magistrate’s final order. This Court has carefully considered all of those arguments, but we write only to address those that require reversal. Appellants correctly contend that the Special Magistrate departed from the essential requirements of law by not requiring Appellee to prove abandonment of the nonconforming use and by failing to make findings of fact concerning the parking violation.

#### **Abandonment of the nonconforming use**

At a code enforcement hearing, “the burden of proof shall be upon the code enforcement division to show by a preponderance of the evidence that a violation exists.” St. Pete Beach, Code of Ordinances § 22-277(c). Here, the Special Magistrate found that

Appellee proved the violation existed by presenting “substantial, competent evidence”<sup>1</sup> that the property was rented out more than three times in a twelve-month period and was “currently advertised for availability on a short term basis.” *See* St. Pete Beach, Land Development Code § 20.03(b) (“Transient occupancy [is permitted] . . . so long as any such transient occupancy of less than thirty (30) days does not occur more than three times in any 12-month period on any parcel.”).

Once the code enforcement division has proven a violation, the burden shifts to the alleged violator to establish any defenses. *See Nat'l Indus., Inc. v. Comm'n on Human Relations*, 527 So. 2d 894, 896 (Fla. 5th DCA 1988) (opining that “[i]t is well established that the burden of proof is upon the party asserting the affirmative of an issue before an administrative tribunal”). Appellants argued that the property was not in violation because it has been used for transient rentals since the 1980s, and that, thus, they have a vested right to continue the nonconforming use of transient rentals. *See Allen v. City of Key W.*, 59 So. 3d 316, 318 (Fla. 3d DCA 2011) (holding that a property owner is “entitled to have [a] lawful nonconforming use ‘grandfathered in’ [when] the property use lawfully existed before the existing restrictions of short-term rentals became effective” (citation omitted)). The Special Magistrate found that Appellants presented no evidence of a vested right to a nonconforming use. While this is true, our analysis does not end there because Appellee conceded that Appellants had a vested right in the nonconforming use prior to the year 2000.

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<sup>1</sup> Appellants contend the Special Magistrate’s use of this phrase indicates that she considered the evidence using the appellate standard of review (competent, substantial evidence) instead of the proper standard of proof (preponderance of the evidence). Because the final order is being reversed and remanded on other grounds, the Court need not decide if the Special Magistrate, by that language, was actually applying a standard other than preponderance of the evidence.

A party is bound by admissions under oath. *Dicus v. Dist. Bd. of Trustees for Valencia*, 734 So. 2d 563, 564 (Fla. 5th DCA 1999). At the code enforcement hearing, Jennifer Bryla, Appellee's Director of Community Development (who oversees code enforcement and zoning), testified that but for a two-year gap in 2000 and 2001 when no business tax receipts were issued for the property, Appellants would have been "grandfathered" and therefore able to continue with transient rentals as a nonconforming use.<sup>2</sup> Accordingly, the Special Magistrate should have held that Appellants had a vested right in the nonconforming use, shifting the burden to Appellee to prove abandonment. *See* St. Pete Beach, Land Development Code § 3.10 ("It is the intent of this Code to permit legally nonconforming uses and structures to continue in existence until they are removed or abandoned.").

Thus, the final order must be reversed and the matter remanded to allow the Special Magistrate to determine if Appellants abandoned the nonconforming use.<sup>3</sup>

#### Findings of fact

Section 162.07(4), Florida Statutes, dictates that "[a]t the conclusion of the hearing, the [Special Magistrate] shall issue findings of fact, based on evidence of record." Here, the Special Magistrate made no findings of fact concerning the alleged parking violation. In the

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<sup>2</sup> In the Answer Brief, Appellee's counsel also admits that the "property was used for transient occupancy prior to the enactment of the current [Development Code]," which occurred in 2003. Parties are bound by their pleadings. *Holub v. Holub*, 54 So. 3d 585, 587 (Fla. 1st DCA 2011) (citations omitted).

<sup>3</sup> The Special Magistrate should first determine if Appellee can prove that transient rentals were prohibited prior to the enactment of the 2003 Development Code. If transient rentals were not prohibited prior to 2003, such use of the property before 2003 could not have been nonconforming. *See* St. Pete Beach, Land Development Code § 2.1 ("Nonconforming means a use . . . that was lawful when commenced, but that fails by reason of an amendment or revision to conform to the present requirements of these regulations."). If the use was *not* nonconforming (i.e., transient rentals were permitted) prior to 2003, then the use could not have been abandoned in 2000. It is axiomatic that a conforming use cannot be abandoned.

final order, the only mention of the parking violation was that Appellants did not present “evidence that the vacant portion of the lot was ever utilized as a parking lot prior to the enactment of Section 23.4 of the Code.” As discussed above, the Special Magistrate needs to find that Appellee proved the violation by a preponderance of the evidence before requiring Appellants to establish any defenses. Accordingly, the issue of the parking violation must be reversed and remanded for factual findings.

### **Conclusion**

Because the Special Magistrate’s final order departed from the essential requirements of law, it is

#### **ORDERED AND ADJUDGED** that:

1. The final order is **REVERSED** and **REMANDED**.
2. Appellee’s Motion for Attorney’s Fees and Costs is **DENIED**.

**DONE AND ORDERED** in Chambers at St. Petersburg, Pinellas County, Florida, this \_\_\_\_ day of \_\_\_\_\_, 2018.

Original Order entered on December 17, 2018, by Circuit Judges Jack Day, Pamela A.M. Campbell, and Amy M. Williams.

#### Copies furnished to:

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