

**IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR SARASOTA COUNTY, FLORIDA**

MARTHA L. GWYNN,

Appellant,

vs.

Case No.: 2009 CA 17007 NC

**CITY OF VENICE CODE ENFORCEMENT
BOARD,**

Appellee.

**OPINION & ORDER REVERSING ORDER OF THE CITY OF VENICE CODE
ENFORCEMENT BOARD**

THIS CAUSE is before the Court on Appellant's Appeal of an Order of the City of Venice Code Enforcement Board (the "Appeal"). The Court has carefully reviewed the Appeal, the response filed by Appellee, and the reply filed by Appellant, and is otherwise duly advised in the premises.

Standard of Review

Section 162.11, Florida Statutes, provides: "[a]n aggrieved party...may appeal a final administrative order of an enforcement board to the circuit court. Such an appeal shall not be a hearing de novo but shall be limited to appellate review of the record created before the enforcement board."

Facts

Appellant owns real property located at 409 Darling Drive in the City of Venice (the "property") in a RSF (residential single family) zoning district. Appellant purchased the property in 2004. The instant appeal concerns findings of fact, conclusions of law

and Order the City of Venice Code Enforcement Board (the "Board") entered on October 2, 2009 (the "Order").

On July 14, 2009, the City Council of the City of Venice adopted Ordinance 2009-06 (the "Ordinance"). The Ordinance became effective that date. See Ordinance 2009-06, Sec. 86-570. The Ordinance defines an existing legal non-conforming resort dwelling, in pertinent part, as follows:

Existing legal non-conforming resort dwelling means any one, two, three or four family dwelling unit located in the RE or RSF zoning district which is rented to guests more than three times in a calendar year for periods of less than 30 days or one calendar month, whichever is less, or which is advertised or held out to the public as a place regularly rented to guests for periods of less than 30 days or one calendar month, whichever is less...

City of Venice Land Development Code Section 86-570

Based on complaints, Code Enforcement conducted an inspection of the property. Based on the inspection, on August 3, 2009, the Building and Code Enforcement Department sent Appellant a notice of violation of Chapter 86, Land Development Code, Article V, Use Regulations, Division 3, Residential Zoning Districts, of the City of Venice Code of Ordinances. A hearing was held before the Board on October 1, 2009. Appellant was present and represented by counsel. At the hearing, witnesses testified under oath and Appellant was afforded the opportunity to ask questions and present testimony. Appellant admitted there had been three or more rentals for periods of less than thirty days after the effective date of the ordinance, July 14, 2009. TR 54. Following the hearing, the Board entered the following Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

1. The Defendant owns the property located at 409 Darling Drive, Venice, Florida, which is a single family residence in an RSF district.
2. The Defendant has rented the property more than three times since July 14, 2009, for periods of less than thirty (30) days.
3. Since July 14, 2009, the Defendant has advertised or held out to the public that 409 Darling Drive is regularly rented to guests for periods of less than thirty (30) days.
4. That prior to July 14, 2009, Defendant did not have all applicable state and local registrations, licenses and permits, including, but not limited to, all necessary tax registration and occupational licenses necessary for operation of a resort dwelling.

CONCLUSIONS OF LAW

5. The property at 409 Darling Drive has been operating as a resort dwelling under the terms of City Code Section 86-570.
6. The property at 409 Darling Drive is not a legal non-conforming resort dwelling under City Code Section 86-570.
7. The Defendant is guilty of violating City Code Section 86-151.

ORDER

1. The Defendant shall come into compliance by not renting 409 Darling Drive for periods of less than (30) days for the remainder of 2009;
2. Upon the failure of the Defendant to comply with the terms of this Order, a fine shall be imposed in the amount of up to \$250.00 per day for each day of violation.

Venice Code Enforcement Board, case no. 2009-1091, Order, dated October 2, 2009.

No fine was imposed.

Appellant's Argument

Appellant contends that the Board violated section 162.01, Florida Statutes (2009), and section 2-327 of the City Code, which provide for code enforcement. Specifically, Appellant contends that she was cited with one violation of the Ordinance: advertising a resort dwelling. Appellant argues at the hearing an additional charge of renting as a resort dwelling was added, with no notice.

Next, Appellant raises two arguments that the Ordinance is unconstitutional.¹ First, Appellant argues the Ordinance is unrelated to any legitimate objective of the City. Second, Appellant argues the Ordinance fails to recognize the owner's vested right to continue a nonconforming use.

Appellant also contends the enforcement of prohibition of short term rentals is unconstitutional. In support, Appellant raises three sub-issues. First, she argues that the Ordinance's prohibition of rentals of less than 30 days is a violation of the due process clause of the federal and state constitution because it does not serve a legitimate governmental purpose. Second, Appellant argues that the Ordinance constitutes a regulatory taking that restricts her freedom in use of the property and enjoyment of the proceeds. Third, Appellant argues that the Ordinance and its enforcement discriminates against persons who rent their property on a month to month basis, a less than thirty (30) day basis, a yearly basis and those who rent without restriction; and discriminates against persons and corporations who advertise for the rentals of property.

Appellee's Argument

Appellee argues Appellant received adequate notice of the violation to afford her due process. Appellee also contends any technical deficiency in the notice was waived by Appellant's participation at the hearing on this issue without objection. Further, Appellee notes Appellant was not fined but was ordered to not rent the property for periods of less than thirty (30) days for the remainder of 2009. In effect, Appellee argues Appellant was given the opportunity to correct or avoid further violations.

¹ Constitutional claims are properly cognizable on an appeal to the Circuit Court from a final order of an enforcement board, brought pursuant to section 162.11, Florida Statutes. See Holiday Isle Resort & Marina Associates v. Monroe County, 582 So. 2d 721 (Fla. 3d DCA 1991).

Appellee contends the resort dwelling ordinance is related to a legitimate objective of the City as the ordinance references policies in the City's comprehensive plan evidencing the City's commitment to, among other things, protecting the character, safety and appearance of existing neighborhoods.

Appellee argues the ordinance does not violate Appellant's equal protection and due process rights, noting that ordinances regulating short-term rentals have been upheld against constitutional challenges. Appellee argues Appellant's arguments about her nonconforming use status are not supported by the facts and are legally incorrect as the Ordinance prohibited only new resort dwellings and included express conditions under which existing resort dwellings could continue to operate.

Analysis

The Court first addresses Appellant's arguments that the Ordinance is facially unconstitutional. The City of Venice Planning and Zoning Director, Tom Slaughter, testified that the purpose of the Ordinance is to regulate the commercial activity of renting homes within a residential neighborhood. See TR 6, L 12 to 19. The United States Supreme Court has recognized that the protection of character of a residential neighborhood is a legitimate objective of a land use ordinance. See Village of Belle Terre v. Boraas, 416 U.S. 1, 94 S.Ct. 1536 (1974).

As to Appellant's non-conforming use argument, the Ordinance prohibited only new resort dwellings and included express conditions under which existing resort dwellings could continue to operate. It is possible, under the Ordinance, for owners of existing resort dwellings to comply with the requirements. In Lewis v. City of Atlantic Beach, 467 So. 2d 751, 754 (Fla. 1st DCA 1985), the First District held:

The application of zoning regulations to restrict an existing use of property...may constitute a taking by the governmental agency which requires the payment of compensation To avoid these consequences, zoning regulations generally “grandfather” the continuation of existing nonconforming uses...

Accordingly, while a governmental entity may choose to allow nonconforming use of property to continue so as to avoid a takings claim, there is no mandate that they do so.

The Court rejects Appellant’s claim that the Ordinance discriminates against certain persons who rent property. Courts in Florida and elsewhere have upheld, against constitutional challenges, numerous ordinances regulating short-term rentals. See Neumont v. Monroe County, 280 F.Supp.2d. 1367 (S.D. Fla. 2003); Schwarz v. City of Treasure Island, 521 F.Supp.2d 1307 (M.D. Fla. 2007), aff’d in pertinent part, 544 F.3d 1201 (11th Circ. 2008); Ewing v. City of Carmel-by-the-Sea, 234 Cal. App. 3d 1579, 1592 (Cal. App. 6th Dist. 1991). Thus, the Court rejects all of Appellant’s facial constitutional challenges.

Next, this Court addresses Appellant’s as-applied takings claim. Regulatory takings claims are governed by Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978). Penn Central identified several factors-including the regulation’s economic impact on the claimant, the extent to which it interferes with distinct investment-backed expectations, and the character of the government action-that are particularly significant in determining whether a regulation effects a taking. See Penn Central at 124. This test was affirmed by the United States Supreme Court in Lingle v. Chevron USA, Inc. 544 U.S. 528 (2005).

At the hearing, John Patek, Code Enforcement Officer, stated: “We are not saying that the Defendant can not rent her property. She certainly can. But she can not

rent it as a resort dwelling short term the way that it has been....” TR 27-28. Mr. Patek continued, when referencing Appellant’s advertising: “[a]nd then you can see for yourself all the weekly rentals that were being advertised...” TR 28. Appellant also testified regarding prior bookings for weekly rentals at the property. TR 54. Additionally, a next-door neighbor, Rolin Becker, testified: “Since the ordinance was passed July the 14th there has been five short term rentals in there. August 1st through August 8th, seven days. August 8th through the 15th, seven days. August the 22nd through 28th, seven days. August the 28th through September 12, fourteen days. And last one September the 18th through the 25th, seven days....” Mr. Becker continued: “...I have got records for 2008 and 2009 by week, and then there was – I think it was 23 rentals under 30 days or 23 top rentals in 2008, and there has been, I think, 18 so far this year....” TR 62.

The testimony presented at the hearing shows Appellant had routinely advertised and rented the property on a short-term basis prior to the Ordinance’s adoption. The Ordinance provides provisions for some rental of the property. However, the Court finds that the Ordinance has a significant economic impact on Appellant, by restricting the duration and frequency of rental periods. Additionally, the Court finds that the Ordinance interferes with Appellant’s expectation that she could rent the property to seasonal visitors. The Court finds that Appellant’s takings claim is meritorious because she owned the property prior to the Ordinance’s adoption. For this reason, the Court finds that the Ordinance is unconstitutional as-applied to Appellant. Accordingly, Appellee cannot enforce the Ordinance as written against Appellant.

The Court rejects Appellant's claim that she was denied procedural due process. A review of the transcript shows that Appellant had sufficient notice of the charges against her.

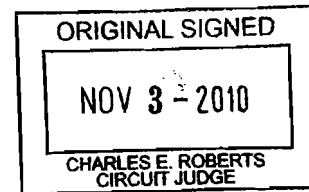
Any other arguments raised by Appellant are without merit.

For the above reasons, the Order is reversed and remanded to Appellee for entry of an Order consistent with this Order.

It is, therefore,

ORDERED and **ADJUDGED** that the Order of the Venice Code Enforcement Board, entered on October 2, 2009 is **REVERSED**. This matter is remanded to Appellee for entry of an Order consistent with this Order.

DONE and **ORDERED** in Chambers, in Sarasota, Sarasota County, Florida on this _____ day of _____, 2010.



Charles E. Roberts, Circuit Judge

CERTIFICATE OF SERVICE

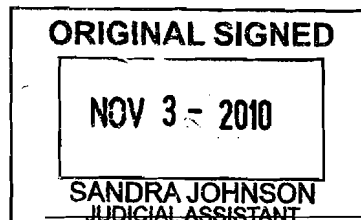
I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by U.S. Mail as follows on this ____ day of _____, 2010.

Valerie A. Fernandez, Esq.
1411 Mantua Ave.
Coral Gables, Florida 33146

William Grady Huie, Esq.
143 Miami Ave. E
Venice, Florida 34285

Wayne C. Hall, Esq.
Hall & Anderson, P.A.
1314 East Venice Avenue
Suite E
Venice, Florida 34285

Andrea Zelman, Esq.
Fowler White Boggs, P.A.
501 East Kennedy Boulevard
Suite 1700
Tampa, Florida 33602



Anita Brass, Judicial Assistant