IN THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT
IN AND FOR MONROE COUNTY, FLORIDA
APPELLATE DIVISION

BRUGMAN HOLDINGS, LLC, a Florida limited liability company,

Petitioner/Appellant,

vs.

THE CITY OF KEY WEST, by and through the Board of Adjustment,

Respondent/Appellee.

_____/

Case No.: 20-CA-734-K

ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

THIS CAUSE comes before the Court upon the Petitioner's Petition for Writ of Certiorari (the "Petition"), challenging Final Resolution No. 20-025 of the Board of Adjustment of the City of Key West, Florida, ("BOA") rendered October 15, 2020. The Court, having considered the Petition, Respondent's Response Brief, Petitioner's Reply, the record, pertinent legal authority, and being otherwise fully advised in the premises, finds and orders as follows:

I. Factual and Procedural Background

Petitioner is the owner of real property located at 9, 9-A, 9-B, 9-C, 9-D, 10-A, 10-B, and 10-B2 Hilton Haven Drive, Key West, Florida 33040 ("Subject Property"). Six (6) units in the Subject Property have been previously recognized by the City of Key West as lawful non-transient units. On October 7, 2019, Petitioner applied for a Lawful Unit Determination ("LUD") seeking recognition and exemption from the City's Building Permit Allocation System ("BPAS") for the additional six (6) non-transient units. The six (6) additional units that Petitioner seeks to be recognized by the City are: (1) one non-transient Lockout Studio at 9-D Hilton Haven Drive; (2) one non-transient Lockout Studio on 10-B2 Hilton Haven Drive; (3) one non-transient Recreational Vehicle ("RV"); and (4) three slips for non-transient Liveaboards on 10-C Hilton Haven Drive.

On December 11, 2019, the Planning Director reviewed the application in accordance with the criteria outlined in Key West Code of Ordinances §108-991(3) and denied the application partly based on an erroneous belief that the Petitioner was seeking transient use recognition. That decision was withdrawn, and on December 20, 2019, the Planning Director issued an Amended decision denying the application and removing the reference to "transient units." In the Amended Decision, the Planning Director states in relevant part:

> "[m]y determination on the new submittals for six (6) additional non-transient units is that they do not meet the definition of 'dwelling units' under our Code as follows: 'Dwelling unit and living unit means a single unit providing complete independent living facilities for one or more persons, including permanent provisions for living, sleeping, eating, cooking and sanitation.' Evidence submitted is not convincing

> that these units existed on or about April 1, 2010 and they met the definition of dwelling units."
>
> "In addition, Section 108-681 of the Land Development Regulations states that all trailers and the like occupied for living quarters shall be parked in a regularly licensed trailer park. Liveaboards are not a legally permissible use under current and previous zoning requirements in this district (current MDR and previous R2 zoning)."

Petitioners timely appealed the Planning Director's decision to the Board of Adjustment for the City of Key West. On January 22, 2020, the BOA considered the appeal at a quasi-judicial hearing. At the conclusion of the hearing, the BOA voted to deny the appeal based upon a finding that the appellant "failed to meet the criteria laid out in the ordinance and the Land Development Regulations and the Comprehensive Plan." (Pet. App. 022 Tr. 19:6-9). On October 15, 2020, the BOA filed Resolution No. 20-025, formally denying the appeal of the Planning Director's Determination based on the finding "that the Planning Director's determination was in accordance with procedural and substantive land development regulations as well as the comprehensive plan." (Res. No. 20-025 Sec. 1). This Petition to review BOA Resolution No. 20-025 followed.

II. Standard of Review

First-tier certiorari review is limited to reviewing 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).

Here, Petitioners do not dispute that they were afforded procedural due process. However, Petitioners argue that the BOA's decision to deny its appeal of the Planning Director's decision must be quashed because it is not supported by competent substantial evidence in the record, and the BOA failed to follow the essential requirements of law by failing to consider the threshold requirements of §108-991, City of Key West, Florida, Municipal Code (the "Code").

III. Discussion

The criteria that an applicant must satisfy to demonstrate that a unit is exempt from the City of Key West's Building Permit Allocation System ("BPAS") is found in §108-991 of the Code. Code §108-991 (3) provides that "[u]nits determined to be in existence at the time the April 1, 2010, census was prepared are presumed not to be affected by the BPAS." This section goes on to detail the records that may be submitted to the city planner to review along with a site visit to determine if "a body of evidence exists to support the existence of units on or about April 1, 2010." Pursuant to the Code, "[u]nits which are determined not to be affected by the building permit allocation system per this subsection but which have not been previously acknowledged by the city planner are presumed to be lawfully established per chapter 122, article II, nonconformities if the additional following requirements are met." The Code goes on to list the additional requirements of satisfying the building department that the unit meets the

Florida Building Code, payment of back fees, and updating occupational licenses.

Here, Petitioner argues that it conclusively established that the six requested units met the threshold criteria set forth in the LUD Ordinance and there is not competent substantial evidence to support the Planning Director's denial of its LUD application. "Competent substantial evidence is tantamount to legally sufficient evidence." *School Board of Hillsborough County v. Tenney*, 210 So. 3d 130, 134 (Fla. 2d DCA 2016) (internal citation and quotation omitted). Thus, "[a] circuit court's review of an agency decision for competent substantial evidence is limited to determining whether the evidence before the agency was legally sufficient to support the agency's decision." *Id.*

In this case, Petitioner submitted an application along with supporting documentation to establish that the six units existed prior to 2010. The documentation includes affidavits, photographs, structural age reports, an arborist report, a city directory, occupation licenses, a code enforcement case, along with other records. The Planning Director indicated that he reviewed the application and the supporting documentation, and he conducted a site visit, but he does not detail how he reached the conclusion that the "evidence is not convincing that these units existed on or about April 1, 2010." At the hearing on Petitioner's appeal of the LUD, the Planning Director never states that the six units were not in existence in 2010. In fact, he concedes that there appeared to be some

habitation in these units. (Pet. App. 014 Tr. 11:17-18). Vice Mayor Kaufman stated that he would like to make a motion to grant the appeal "based on the fact that it appears that there were people living—residing in these units prior and up to April 1, 2010." (Pet. App. 018 Tr. 15:1-7) The motion failed, and shortly thereafter there was a motion to deny the appeal which passed.

Petitioner argues that the Planning Director and the BOA based their decision to deny the LUD on their belief that the six units could not be recognized because they are not habitable dwelling units. Petitioners argue that habitability is not a criterion for determining whether the units existed prior to 2010, but rather, something for the Building Department to consider after the units have already been found to be exempt from the Building Permit Allocation System. Petitioner argues the BOA departed from the essential requirements of law by basing its determination on habitability rather than addressing the evidence presented that showed the record requirements under Code §108-991 (3). "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." *Miami-Dade County v. Omnipoint Holdings, Inc.*, 863 So. 2d 195, 199 (Fla. 2003) (internal quotation and citation omitted).

In this case, the Planning Director and the BOA considered and emphasized the habitability of the six units at issue. The Planning Director testified at the hearing that none of the units could qualify as a dwelling

unit and stated his interpretation that the ordinance clearly deals with dwelling units. (Pet. App. 012 Tr. 9:13-14;6-7). He testified that the units are not dwelling units because they do not have permanent provisions for cooking or bathing. (Pet. App. 012 Tr. 9:15-19). There was discussion among the Commissioners and counsel whether units without kitchen facilities have previously been recognized under the LUD process. (Pet. App. 016 Tr. 13:1-23). Commissioner Weekley expressed his concern that if the LUD application were approved it would be "a hard chore" for these units to meet the Florida Building Code. (Pet. App. 019 Tr. 16:3-11).

After Commissioner Wardlow made a motion to deny the appeal, City Attorney Smith asked, "is that based upon your finding that the appellant fails to meet the criteria laid out in the ordinance and the Land Development Regulations and the Comprehensive Plan?" To which Commissioner Wardlow responds, "yes." (Pet. App. 022 Tr. 19:6-10). It is unclear from the record before the Court whether the BOA voted to deny the appeal based on a failure to meet the threshold requirements of Code §108-991 (3), or on a failure to establish that the units are habitable dwelling units as the planning Director argued is required. Resolution No. 20-025 does not provide clarification. It simply states, "the appeal is hereby denied, based upon the following finding: that the Planning Director's determination was in accordance with procedural and substantive land development regulations as well as the comprehensive plan." (Res. No. 20-025 Sec. 1).

IV. Conclusion

The record does not establish the criteria that the Planning Director and the BOA considered in reaching the decision to deny the LUD. Petitioner provided evidence to support the existence of the units in 2010, and the record does not establish what evidence the Planning Director and the BOA considered in rejecting the LUD for each unit. Without this information, the Court cannot assess whether the BOA's findings and judgment are supported by competent substantial evidence and whether the essential requirements of the law have been observed.

Therefore, the Court **GRANTS** the Petition for Writ of Certiorari, **QUASHES** Resolution No. 20-025, and **REMANDS** for proceedings consistent with this opinion.

DONE AND ORDERED at Key West, Monroe County, Florida this Tuesday, March 22, 2022

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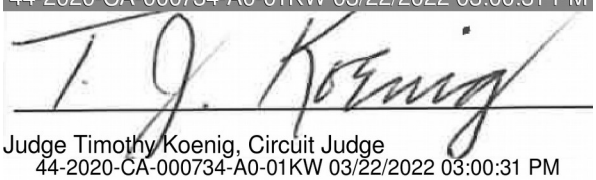

Judge Timothy Koenig, Circuit Judge
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