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

RAY REY AND YAMILE REY,

Appellants, Case No: 22-AP-2-P

L.T. Case No: CE11110056

vs.

MONROE COUNTY, FLORIDA

Appellee.

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OPINION

THIS CAUSE comes before the Court upon Ray Rey's and Yamile Rey's ("Appellants") Notice of Appeal of a Final Order entered by the Monroe County Code Compliance Special Magistrate on February 1, 2022. The Court, having considered the Appellants' Initial Brief, Monroe County, Florida ("Appellee's") Answer Brief, the Appellants' Reply Brief, the record, the argument of counsel, pertinent legal authority, and being otherwise fully advised in the premises, finds and orders as follows:

I. BACKGROUND

Appellants own the subject property located at 221 Planter Drive, Tavernier, Florida. (Appellants' App. at 89). Constructed in 1980, the subject property is a single-story house elevated on columns. *Id*. at 81. The original permit for the subject property authorized a lower enclosure with a convenience bathroom, laundry room, and water heater. *Id*. at 1, 64.

In 2011, the previous owners requested Monroe County ("County") to perform an inspection of the subject property to renew their flood insurance. (Appellants' App. at 63). During the inspection on November 14, 2011, the Floodplain Coordinator observed the lower enclosure and documented deficiencies. *Id*. On November 29, 2011, the County issued a letter to the previous owners explaining that the bathroom, laundry room, and partitions located inside the lower enclosure made it fit for habitation in violation of sections 122-4(b)(7) and 122-4(b)(1) of the Monroe County Land Development Code ("LDC"). *Id*. at 63-64. Despite these violations, the County did not require the removal of the bathroom, laundry room, or partitions because they were authorized by the original permit for the subject property. *Id*. Although the County did not require the violations to be corrected, it noted that the lower enclosure could not be improved or repaired from damages of any origin under section 122-4(9) of the LDC and that any improvements or repairs would trigger the requirement to bring the lower enclosure into compliance with current regulations. *Id*. at 64-66.

Subsequently, Appellants acquired title to the subject property on June 5, 2017. (Appellants' App. at 85). Shortly thereafter on June 26, 2017, the County approved a permit for interior remodeling which constituted a non-substantial improvement with a value of $4,000. *Id*. at 76. The approved permit stated that the issuance of the permit did not constitute approval of any floodplain violations that may exist or any unpermitted work to be done on the subject property. *Id*. On November 15, 2017, the County approved a revision of the permit to update the plumbing on the subject property. *Id*. The revised permit stated that all previous conditions applied to the revision. *Id*.

On June 18, 2019, the County reinspected the subject property for the National Flood Insurance Program to determine its compliance with the LDC and to close the outstanding flood insurance inspection permit. (Appellants' App. at 63, 69). The County issued a letter to Appellants on June 27, 2019, explaining the violations that were observed upon reinspection. *Id*. at 69. Based on a comparison of photos from the reinspection with those taken during the initial inspection, the County found that the nonconforming lower enclosure had been improved in violation of section 122-4(a)(9) of the LDC because no building permits were approved for the new flooring, sink, toilet, shower, and wall finish. *Id*. at 69-70. The County further explained that the revised permit only authorized renovations for the upstairs plumbing and that the lower enclosure must be made compliant. *Id*. at 70. To close the outstanding flood insurance inspection permit, Appellants were instructed to make the lower enclosure compliant by having their contractor apply for a demolition permit with a "Before" and "After" floor plan of the entire area under the elevated home. *Id*. at 70-71. Appellants were instructed to demolish all partitions, walls, plumbing, pipes, waterlines, and any air conditioning servicing the lower enclosure. *Id*. In addition, all appliances needed to be removed, flood venting needed to be installed and the "After" floor plan needed to be an open carport with a 144-square-foot AE Zone vented storage enclosure. *Id*. Appellants were given 60 days to obtain a demolition permit before the unpermitted improvements would be reported to the Code Compliance Department. *Id*. at 71.

On September 9, 2021, the Code Compliance Department issued Appellants a "Notice of Violation/Notice of Hearing" for making improvements to their nonconforming lower enclosure in violation of section

122-4(a)(9) of the LDC which prohibited improvements or repairs from damages of any origin to nonconforming structures and uses below elevated post-FIRM buildings. (Appellants' App. at 52); Monroe County, Fla., Land Development Code § 122-4(a)(9) (2019). Additionally, the Notice of Violation/Notice of Hearing instructed Appellants to achieve compliance by obtaining a demolition permit for:

1. ALL PARTITIONS INCLUDING CLOSETS AND STUD WALLS;
2. ALL PLUMBING, PIPES, WATERLINES, FIXTURES AND REPAIR/CONCRETE OVER EXPOSED AREAS;
3. ALL CABINETS AND COUNTERS;
4. ANY ELECTRIC SERVICING WASHER/DRYER AND ALL BUT ONE GFCI OUTLET AND NECESSARY LIGHT SWITCH;
5. ALL WALL FINISHES ON INTERIOR OR EXTERIOR WALLS TO DESIGN FLOOD ELEVATION;
6. ALL SHEET OR VINYL FLOORING;
7. ANY AIR CONDITIONING SERVICING THE ENCLOSURE AND AREA REPAIRED
8. ANY SOLID, LATTICE, LOUVERED OR SCREENED WALLS UNDER THE HOME. LATTICE, LOUVERED OR SCREENED WALLS MAY BE ALLOWED IF MEET CURRENT CRITERIA;
9. REMOVAL OF ALL APPLIANCES AND FURNITURE IS REQUIRED (WASHERS, DRYER, REFRIGERATORS, ETC);
10. SHOW ADEQUATE VENTING AND PLACEMENT.

On January 27, 2022, a hearing took place before the Code Compliance Special Magistrate. (Hearing Transcript at 7). During the hearing, the Director of Code Compliance ("Director") testified that a comparison of the photographs from the initial inspection with those taken during the reinspection revealed that Appellants improved the lower enclosure because the reinspection photos depicted a new floor, sink, shower, and toilet. *Id*. at 23. Appellants contested the violation during the hearing by testifying that they did not expand the structure or any

preexisting use because they didn't enlarge it or create a new use in the lower enclosure. *Id*. at 30-31. Also, Appellants argued that they replaced the toilet, sink, and floor tile in the lower enclosure because they were no longer functional. *Id.* at 34. At the conclusion of the hearing, the Special Magistrate took the matter under advisement. *Id*. at 47.

On February 1, 2022, the Special Magistrate entered a Final Order affirming the Code Compliance Department's Notice of Violation/Notice of Hearing and finding Appellants made improvements to the lower enclosure in violation of section 122-4(a)(9) of the LDC. (Appellants' App. at 1-2). Appellants were ordered to bring the subject property into compliance by making the corrections required in the Notice of Violation/Notice of Hearing. *Id*. at 1. This appeal of the Special Magistrate's Final Order followed.

II. STANDARD OF REVIEW

Pursuant to Fla. Stat. § 162.11, the Circuit Court sitting in its appellate capacity has jurisdiction to review code enforcement final orders. *Central Florida Investors v. Orange County*, 295 So. 3d 292 (Fla. 5th DCA 2019). "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." Fla. Stat. § 162.11. When an appeal is taken from the final administrative order of a local enforcement board, the circuit court has plenary appellate review of the record before the enforcement board. *Id.* at 294; § 162.11 Fla. Stat. This includes the jurisdiction to consider and resolve constitutional issues as part of a code enforcement appeal. *Key Haven Associated Enterprises, Inc. v. Board of Trustees of Internal Improvement Trust Fund*, 427 So. 2d 153, 157 (Fla. 1982). "[O]n appeal, all errors below may be corrected; jurisdictional, procedural, and substantive. *Haines City Cmty. Dev. v.*

Heggs, 658 So. 2d 523, 526 n. 3 (Fla. 1995)). The Court engages in a three-part standard of review to determine: (1) whether due process was accorded; (2) whether the essential requirements of the law have been observed; and (3) whether the administrative findings and judgment are supported by competent substantial evidence." *Id.* at 530.

III. DISCUSSION

Appellants seek review of the Special Magistrate's Final Order based on the following arguments: 1) the Final Order is invalid because Section 122-4(a)(9), as applied to Appellants' property, constitutes a taking requiring the payment of just compensation; and 2) the Final Order is invalid because Section 122-4(a)(9) is unconstitutional as applied to Appellants' property. The Court addresses the Appellants' arguments in turn.

A. Section 122-4(a)(9): A Compensable Taking

Appellants argue that LDC Section 122-4(a)(9), as applied to Appellants' property, terminates their nonconforming lower enclosure and thus constitutes a compensable taking under the Florida Constitution. Appellee, however, contends that Appellants' as-applied takings claim is not within the scope of this Court's review because: 1) Appellants did not file applications with the County for either an after-the-fact permit, demolition permit, or a Beneficial Use Determination; and 2) Appellants did not properly preserve the claim for appeal.

The Court disagrees with Appellee's first argument and finds that Appellants were not required to file any applications with the County before making an as-applied takings claim in their appeal of the Special Magistrate's Final Order. A circuit court acting in its appellate capacity under section 162.11, Florida Statutes, is the proper forum to address

constitutional claims and thus Appellants' as-applied takings claim is a constitutional challenge which this Court has the power to consider. *Key Haven Associated Enterprises, Inc*, 427 So. 2d at 157. Additionally, Section 162.11, Florida Statutes, authorizes an aggrieved party to appeal a final administrative order to the circuit court and Appellants were aggrieved by the Final Order because it ordered them to permanently remove the bathroom and laundry room in the lower enclosure. Thus, Appellants' takings claim is within the scope of this Court's review.

The Court also finds Appellee's second argument to be without merit. Appellants made their takings argument during the hearing before the Special Magistrate and thus Appellants properly preserved this claim for appeal. (Hearing Transcript at 44-46). The Court will now address the substance of Appellants' claim.

The law regarding the constitutionality of local ordinances designed to phase out nonconforming uses and structures is well settled in Florida. The general principle is that zoning ordinances do not generally operate to limit the right of a landowner to continue such uses of land and structures as were in existence at the time of the adoption of the regulation because "it would be an injustice and unreasonable hardship to compel the immediate removal or suppression of an otherwise lawful . . . use already established." *Fortunato v. City of Coral Gables*, 47 So. 2d 321, 322 (Fla. 1950). In order to avoid these consequences, local governments "grandfather" the continuation of existing nonconforming uses on property subject to zoning classification. *Lewis v. City of Atlantic Beach*, 467 So. 2d 751, 754 (Fla. 1 DCA 1985). Therefore, the termination of a "grandfather" nonconforming use can constitute a compensable taking. *Id.* However, it is expected that such uses will gradually be eliminated over the course of time through

attrition (amortization), abandonment, destruction, and obsolescence. *Lewis*, 467 So. 2d at 755; *3M Nat'l Adver. Co. v. City of Tampa Code Enforcement Bd.*, 587 So. 2d 640, 641 (Fla. 2d DCA 1991) (citing *San Diego County v. McClurken*, 37 Cal. 2d 683, 686 (1951)). These methods by which nonconforming uses may be gradually eliminated over the course of time guard against their indefinite continuation. *San Diego County v. McClurken*, 37 Cal. 2d 683, 686 (1951) The replacement of a nonconforming structure with a new one would permit the perpetuation of the nonconforming structure. *Bixler v. Pierson*, 188 So. 2d 681, 682 (Fla. 4 DCA 1966). "If it is proper to do this once it will be proper to do it again and thus the life of the nonconforming structure will be indefinitely prolonged, and the whole purpose of the zoning ordinance will be defeated." *Id*. at 683 n.1.

In this case, the Court finds that Section 122-4(a)(9), as applied to Appellants' property, does not constitute a compensable taking under the Florida Constitution. Contrary to Appellants' contentions, Section 122-4(a)(9) did not immediately terminate Appellants' nonconforming lower enclosure upon its enactment. Section 122-4(a)(9) provides that:

> Illegal or nonconforming uses, structures, and construction below elevated post-FIRM buildings shall not be expanded or improved or repaired from damages of any origin and no building permit shall be issued for any improvements to below base flood enclosures, other than for demolition or a permit to remedy a life safety hazard, unless the structure is brought into compliance with this chapter.

Although intended to achieve the eventual elimination of nonconforming structures and uses such as that of Appellants', Section 122-4(a)(9) permitted the nonconforming lower enclosure to continue until it became unusable. However, during the hearing before the Special Magistrate, Appellants admitted to replacing the toilet, sink, and flooring in their

nonconforming lower enclosure because they were no longer functional. In doing so, Appellants extended the normal life of their nonconforming lower enclosure in violation of Section 122-4(a)(9). Monroe County has the power under Florida Law to gradually eliminate nonconforming structures and uses by prohibiting any repairs or improvements which would allow them to perpetuate and thus defeat the whole purpose of its zoning ordinances. Therefore, Section 122-4(a)(9), as applied to Appellants' property, does not constitute a compensable taking under the Florida Constitution.

B. Section 122-4(a)(9): Unconstitutional As Applied

Appellants argue that Section 122-4(a)(9), is unconstitutional as applied to their property under the Florida Constitution's equal protection clause. Appellee, however, contends that Appellants did not properly preserve their as-applied challenge to Section 122-4(a)(9) for appeal. The Court agrees.

In the absence of an objection below, the appellate courts "will not consider issues for the first time on appeal except in cases of fundamental error." (*Millen v. Millen*, 122 So. 3d 496, 498 (Fla. 3d DCA 2013). "Fundamental error" is error that goes to the foundation of the case or to the merits of the cause of action and that would result in a miscarriage of justice if not considered by the appellate court. *Sanford v. Rubin*, 237 So. 2d 134, 137 (Fla. 1970). The Florida Supreme Court held in *Trushin v. State*, 425 So. 2d 1126, 1129, 1130 (Fla. 1982), that although "the facial validity of a statute…can be raised for the first time on appeal[,] the constitutional application of a statute to a particular set of facts is another matter and must be raised at the trial level."

In this case, Appellants did not raise any argument before the Special Magistrate that Section 122-4(a)(9) is unconstitutional as applied to their

property under the Florida Constitution's equal protection clause. Thus, Appellants cannot raise their constitutional as-applied challenge for the first time on appeal because as-applied challenges must be raised during trial. See *B.C. v. Dep't of Child. & Fams.*, 864 So. 2d 486, 491 (Fla. 5th DCA 2004) ("A distinction is drawn between challenges to the facial unconstitutionality of a statute and the unconstitutionality of the application of the statute to the facts of a particular case. The former may be raised for the first time on appeal; the latter must first have been raised at the trial level.").

IV. CONCLUSION

The Final Order of the Special Magistrate is **AFFIRMED**.

DONE AND ORDERED in Key West, Monroe County, Florida. Tuesday, April 16, 2024

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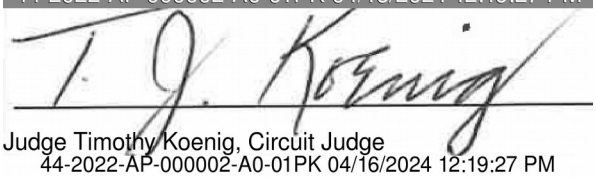

Judge Timothy Koenig, Circuit Judge
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