IN THE THIRTEENTH JUDICIAL CIRCUIT FOR THE STATE OF FLORIDA
CIVIL APPELLATE DIVISION

MILLER & SONS, LLC,
Appellant,

v.

CITY OF TAMPA,
Appellee.

Case no.: 20-CA-8741;
20-CA-8742 (Consolidated)
Division: X
Code Enf. Case Nos.: COD-19-3317
COD-19-3586

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On review of a final order of the Code Enforcement Special Magistrate for the City of Tampa, Florida.

APPELLATE OPINION

This consolidated case is before the court to review two decisions of the Code Enforcement Special Magistrate for City of Tampa code enforcement ("magistrate"). The magistrate found that Appellant Miller & Sons, LLC violated the city code's proscription against unpermitted tree removal on two properties. Appellant argues that section 163.045, Florida Statutes (2019), which affords owners of residential property the ability to remove trees from their property under certain circumstances without local government approval, preempts enforcement by the City because both properties were residential property. Because one of the properties, zoned residential, would be considered residential under the applicable version of the statute despite the absence of a residence, the magistrate's decision is set aside as to that property. Because the other property is neither zoned residential nor qualifies as a legal, nonconforming residential use under the city code, however, it is not considered residential under the statute. Accordingly, the magistrate's decision as to that property must be affirmed.

This court has appellate jurisdiction to review the magistrate's decision under section 162.11, Florida Statutes. Review is limited to the record created before the lower tribunal. *Id.* Appeals of final orders of code enforcement boards or magistrates are reviewed to determine whether Appellant received due process, whether the decision observes the essential requirements of law, and whether competent, substantial evidence supports the decision. *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982). There is no dispute that Appellant received adequate due process. There is also no dispute that Appellant removed the trees from both properties or, as the entity who allegedly committed the violation, was subject to citation by the City. This case centers on whether the decision comports with the essential requirements of law, specifically, whether the properties were, pursuant to section 163.045, Florida Statutes (2019),[1] residential and exempt from local enforcement.

[1] Section 163.045 has been substantially revised since the subject properties were cited. All references to the statute are to the 2019 version.

This consolidated case involves two properties cited for improper tree removal. The first property is located at 3011 W. Gandy Boulevard in Tampa (the Gandy property). The second is located at 3105 Schiller Street in Tampa (the Schiller property). A code enforcement magistrate found both properties to have violated the provisions of the code and state law, and Appellant appealed. The properties were consolidated below and for the appeal.

FACTS PERTAINING TO THE GANDY PROPERTY

In July 2019, Jonathan Lee, an International Society of Arboriculture (ISA)-certified arborist and partner in Appellant Miller & Sons, LLC, opined that a large number of trees presented a danger to persons and property. Thereafter, Miller and Sons, LLC was retained to remove trees at the Gandy property, and, in August 2019, Miller and Sons removed 27 trees without a permit. One of the trees was not even located on the property. Appellant and the property owner, Life O'Reilly MHP, LLC, were cited for unpermitted tree removal under the city code. The owner admitted the violation and settled with the City. Only Appellant appeared before the magistrate. Appellant is a proper party pursuant to sections 27-284.21, 27-284.2.4, and 27-284.2.5, Tampa, Fla. Code.

Appellant did not dispute that it had cut down the trees, only that it was illegal to do so without a permit given the adoption of section 163.045, Florida Statutes (2019). The statute allows an owner of residential property to remove a tree that, in the opinion of an ISA-certified arborist or a Florida licensed landscape architect, presents a danger to person or property.

The Gandy property had historically operated as a mobile home park, but at the time the trees were removed, it was disputed as to whether anyone was *legally* residing on the property. Regardless of whether anyone was living on the property, it was zoned for commercial, not residential, use. In addition, the property's purported use as a trailer park was not on record as a legal, nonconforming use, and it lacked the necessary certification by the State Department of Health for use as a mobile home park. In addition to its contention that the Gandy property was not residential, the City also argued that the trees did not pose a danger to person or property, rather, they were considered by the owners to be obstacles to development.

FACTS PERTAINING TO THE SCHILLER PROPERTY

Located in an area in the single-family residential zoning classification, in the summer of 2019, the Schiller property was vacant land, so no one lived on it. There was a house located on the adjacent property. As it happens it was the neighboring house that the tree was alleged to pose a danger to, but it, too, was unoccupied and owned by the same entity that owns the Schiller property. After several inspections wherein a city arborist determined the subject tree posed little risk to person or property, the property

owner nonetheless sought a variance to remove it, because most agreed the tree would be impacted by the contemplated development.

Before the variance process could be completed, however, section 163.045 became law. Thereafter, in August 2019, arborist Jonathan Lee of Miller & Sons determined that the tree was a "moderate danger" and provided the documentation necessary to remove the tree. After the tree's removal, the City issued a notice of violation to Miller & Sons. The property owner, S Tile and Marble, was also cited, but it defaulted when it failed to appear or challenge the notice. That finding is not at issue.

On October 7, 2020, the magistrate issued an order finding Miller and Sons in violation of the code and imposed a fine for unpermitted tree removal on the Schiller property. In so doing, the hearing officer determined that, although zoned residential, the vacant lot was not in residential use at the relevant time. The magistrate determined the tree's removal did not fall under the auspices of the statute.

This appeal followed. Appellant maintains that both properties are residential and enjoy the protection of section 163.045, Florida Statutes. The City argues that neither property is residential and that the magistrate's decision should be affirmed.

LEGAL ANALYSIS

The applicable version (now amended) of section 163.045, Florida Statutes reads:

> A local governmental may not require a notice, application, approval, permit, fee, or mitigation for the pruning, trimming, or removal of a tree[2] on residential property if the property owner obtains documentation from an arborist certified by the International Society of Arboriculture or a Florida licensed landscape architect that the tree presents a danger to person or property.

"Residential," as it modifies "property," is not defined. The applicable statute also includes no standards an arborist or landscape architect must follow to determine whether a tree poses a danger to person or property.

Despite Appellant's argument to the contrary, nothing in either the applicable version or newly enacted statute prevents a local government from ensuring compliance with state law. *Vickery City of Pensacola,* 2022 WL 480742 *3 (Fla. 1st DCA Feb. 16, 2022) (stating that there is no impediment to a municipality asking for the documentation required by section 163.045(1)). If *state* law is complied with, however, the City may do nothing else. *Id.* Here, of course, the City determined that the properties

[2] The statute's reference to "a tree" presents an interesting view here. Whether one can draw any conclusions as to the legislature's intent to limit removals to a single tree, it at least suggests that mass removal of trees was not intended by the statute.

were, among other things, not residential. Based on this, the City initiated code enforcement proceedings.

Appellant urges this court to find that the statute is not vague and that the ordinary dictionary definition should govern. In contrast, the City urges that either a property's legal status *or* presence of a home on the property should control. Under the controlling version of the statute and the only judicial decision interpreting that version of the statute, they're both wrong.[3]

With regard to the Gandy property, the zoning classification or legal status of the property is controlling under the 2019 version of the statute. *Vickery,* 2022 WL 480742 *4 (construing the 2019 statute, stating that "'[r]esidential property' is property *zoned for residential use or, in areas that have no zoning, property used for the same purposes as property zoned for residential use*. To hold otherwise would ignore the term's common use and improperly limit section 163.045(1).") (Emphasis added).[4] Here, the Gandy property was not zoned residential, and it was not on record as a legal, nonconforming use. Under *Vickery,* the Gandy property is not residential property. Accordingly, the magistrate's decision as to the Gandy property is affirmed.

In contrast, under *Vickery*, the Schiller property would be considered residential because it is zoned residential, even though the owners were not living on the property at the time the tree was removed. *Vickery*, 2022 WL 480742 *4 (rejecting City's contention that the statute was inapplicable where the owners did not yet reside on their land). This requires the court to set aside the judgment as to the Schiller property.

It is therefore ORDERED that the magistrate's order as to the Gandy property is AFFIRMED, and the order as to the Schiller property is REVERSED in Tampa, Hillsborough County, Florida, on the date imprinted with the Judge's signature.

Electronically Conformed 8/23/2022
Melissa Polo

MELISSA POLO, Circuit Court Judge

POLO, MOODY, BARBAS, JJ., Concur.

Electronic copies provided through JAWS to all parties so registered.

[3] It must be noted that no one had the benefit of the *Vickery* decision at the time of the underlying hearing.

[4] In *Vickery,* the property was zoned residential, but the owners didn't yet live on the property.