IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

APPELLATE DIVISION: AY
CASE NO.: 50-2020-CA-010473-XXXX-MB

WELLINGTON RESIDENTIAL, LLC,
WELLINGTON RESIDENTIAL II, LLC,
Appellants,

v.

VILLAGE OF WELLINGTON,
Appellee.
_____/

Opinion filed: October 1, 2021

Appeal from the Village of Wellington Code Compliance Division;
Special Magistrate Alan S. Zangen

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PER CURIAM.

Appellants Wellington Residential, LLC and Wellington Residential II, LLC (collectively "the Appellants" or "Residential") appeal, pursuant to section 162.11, Florida Statutes (2020), an order rendered by a special magistrate designating certain "Java Plum trees" on Residential's

property as a "nuisance." Residential alleges that the Village of Wellington's nuisance ordinance is unconstitutionally vague on its face and that the special magistrate's decision was predicated on factual and legal errors. Upon review, the Court holds that the Village's nuisance ordinance is constitutional and affirms the special magistrate's order.

Factual Background

Residential is the owner of "Solara," a community of residential apartments located in the Village. Residential maintains sixty-four (64) Java Plum trees located on Solara's border with "Lakepoint," a development of single-family homes. Although Java Plum trees are now considered an invasive species by both the Village and Palm Beach County, the trees located in Solara were planted prior to the species being declared invasive and are thus considered "legal non-conforming trees."

On November 1, 2019, the Village served Residential with a courtesy notice stating that the trees were a nuisance in violation of section 30-54(4) of the Village's Code of Ordinances. The Village specifically alleged that the trees constituted a nuisance because they served as a feeding and breeding ground for vermin and that the trees adversely affected the aesthetic appearance of the surrounding neighborhood. Residential refused to remove the trees from their property, and so the Village issued a formal notice of violation. At a violation hearing before the special magistrate, Residential argued that the trees were well maintained and did not meet the definition of a "nuisance" as provided in the ordinance. On August 27, 2020, the special magistrate issued a written final order concluding that the trees qualified as a nuisance for three reasons: 1) the trees provided a nesting, breeding, or feeding area for pests and vermin, 2) the trees posed a danger to the community because of the threat of falling branches and limbs, and 3) the trees adversely affected the aesthetic appearance of the homes in Lakepoint.

Standard of Review

Residential seeks review of the special magistrate's decision under section 162.11, Florida Statutes, which grants the circuit court appellate jurisdiction to consider the final administrative order of a municipality's code enforcement proceedings. § 162.11, Fla. Stat. (2020); Fla. R. App. P. 9.030(c)(1)(A). Although the language of section 162.11 does not specifically demand certiorari review, this Court, and other circuit courts throughout Florida, have previously reviewed appeals under section 162.11 using the three-pronged first-tier certiorari standard of review from *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624 (Fla. 1982) which generally applies to appeals from local administrative decisions. *See, e.g.*, *Sims v. Miami Shores Vill.*, 22 Fla. L. Weekly Supp. 885a (Fla. 11th Cir. Ct. Feb. 20, 2015); *Byrd Family Trust v. Town of Jupiter*, 20 Fla. L. Weekly Suup. 545b (Fla. 15th Cir. Ct. Apr. 17, 2013).

However, our previous usage of first-tier certiorari review for section 162.11 has been abrogated by the Fifth District Court of Appeal's decision in *Central Florida Investments, Inc. v. Orange County*, 295 So. 3d 292 (Fla. 5th DCA 2019). In *Central Florida Investments*, the district court explicitly held that "[r]eview by certiorari is not the same as review by appeal," and that section 162.11 "provides for an actual appeal, not something similar to an appeal." *Id.* at 294–95. The holding of *Central Florida Investments* is unmistakable, section 162.11 provides for the Court to correct any legal error before it, be it jurisdictional, procedural, or substantive, and does not require an appellate court to utilize the more restrictive first-tier certiorari review. *Id.* at 295 (quoting *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 526 n.3 (Fla. 1995)); *accord Ficken v. City of Dunedin, Fla.*, No. 19-cv-1210, 2021 WL 1610408, at *18 (M.D. Fla. Apr. 26, 2021). This does not mean that the Court's standard of review is unlimited. Section 162.11 specifically limits our review to "the record created before the enforcement board," meaning that this Court should

not reweigh or reconsider the factual findings of the special magistrate unless those findings were not supported by competent, substantial evidence. § 162.11, Fla. Stat.; *see also M.T. v. Agency for Persons with Disabilities*, 212 So. 3d 413, 415 (Fla. 3d DCA 2016) (applying deferential standard of review to factual findings in a plenary review of an administrative decision).

Legal Analysis

Residential raises three arguments on appeal to attack the special magistrate's final order. First, Residential contends that the Village's nuisance ordinance regarding vegetation, section 30-53(4), is unconstitutionally vague on its face. Second, Residential argues that the special magistrate improperly expanded the scope of the ordinance by finding that the trees were a nuisance for a reason not explicitly enumerated in the ordinance. Finally, Residential claims that the special magistrate lacked competent substantial evidence to find that the trees were a breeding and/or feeding ground for pests and vermin. Although the Court agrees with Residential that the special magistrate incorrectly declared the trees a nuisance for a reason not provided in the ordinance, the Court holds that Residential's other arguments are meritless and that the special magistrate's order should be affirmed.

A. Section 30-53(4) is Constitutional

All legislative acts are "clothed with a presumption of constitutionality," and that presumption can only be overcome if the aggrieved party demonstrates that the statute or ordinance is unconstitutional beyond a reasonable doubt. *Crist v. Fla. Ass'n of Criminal Defense Lawyers, Inc.*, 978 So. 2d 134, 139–40 (Fla. 2008). When challenging the facial constitutionality of a legislative act, the court considers the text of the statute to determine if there are "no set of circumstances" in which the statute can be constitutionally valid. *Fraternal Order of Police, Miami Lodge 20 v. City of Miami*, 243 So. 3d 894, 897 (Fla. 2018). Although Residential did not raise a

facial challenge below, the argument is properly preserved since the facial constitutionality of an ordinance cannot be raised in an administrative hearing. *See Wilson v. Cnty. of Orange*, 881 So. 2d 625, 631 (Fla. 5th DCA 2004); *Acosta v. Cnty. of Palm Beach*, 22 Fla. L. Weekly Supp. 332a (Fla. 15th Cir. Ct. Sept. 22, 2014).

Section 30-53 of the Village of Wellington's Code of Ordinances lists what the Village considers to be nuisances. Subsection (4) specifically concerns when vegetation in the Village rises to the level of a nuisance:

> It is hereby declared and determined by the village council that the following shall individually, or in any combination, be considered nuisances when they exist upon a lot, an occupied structure, or an unoccupied structure in the village:
>
> [. . .]
>
> (4) Vegetation on developed or undeveloped property that creates a danger to public health, safety and welfare by creating a fire hazard; by providing a nesting, breeding or feeding area for sandflies, mosquitos, rodents, snakes or other species of pests and vermin, or disease-bearing organisms; by impairing the vision of motorists or bicyclists or impeding pedestrians; or by adversely affecting the aesthetic appearance of the property upon which the vegetation is found and adjacent properties.

Village of Wellington, Fla., Code of Ordinances ("Village Code") § 30-53(4) (2020) (emphasis added). Section 30-53(4) plainly enumerates four ways in which vegetation can be classified as a nuisance: 1) the vegetation is a fire hazard, 2) the vegetation is a nesting, breeding, or feeding ground for pests and vermin, 3) the vegetation impairs the vision of motorists, bicyclists, or pedestrians, and/or 4) the vegetation adversely affects the aesthetic appearance of nearby property. *Id.* Appellants argue that the language of the fourth clause, and its use of the term "adversely affecting the aesthetic appearance of the property," contains unconstitutionally vague language.

A statute or ordinance violates due process, and is therefore unconstitutional, if it is impermissibly "vague." *See Liner v. Workers Temporary Staffing, Inc.*, 962 So. 2d 344, 346–47

(Fla. 4th DCA 2007), *rev'd on other grounds*, 990 So. 2d 473 (Fla. 2008). Legislation is considered vague if it "fails to provide a person of ordinary intelligence with a reasonable opportunity to know what is prohibited, and is written in a manner that encourages or permits arbitrary or discriminatory enforcement." *Cashatt v. State*, 873 So. 2d 430, 435 (Fla. 1st DCA 2004); *see also D'Alemberte v. Anderson*, 349 So. 2d 164, 166 (Fla. 1977) (holding that a vagueness challenge will succeed if the statute "does not convey definite warnings of the proscribed conduct when measured by common understanding and practice"). However, "a less stringent standard as to vagueness is used in examining non-criminal statutes, though minimal constitutional standards for definiteness must still be met." *Zerweck v. Comm'n on Ethics*, 409 So. 2d 57, 60 (Fla. 4th DCA 1982) (citing *D'Alemberte*, 349 So. 2d at 168). When a party asserts a facial vagueness challenge against an ordinance, the party must prove that the statute is impermissibly vague in all of its applications. *See Brown v. State*, 629 So. 2d 841, 843 (Fla. 1994).

Residential argues that the ordinance's use of the term "adversely affecting the aesthetic appearance of the property" is impermissibly vague because the aesthetic appearance of an object is inherently subjective. Residential notes that the ordinance's text does not provide any definite examples of what causes vegetation to "adversely affect" the aesthetic appearance of neighboring property, and so the ordinance's language allows for decisions based on the arbitrary whims and tastes of the special magistrate. We reject Residential's contention that the ordinance's reliance on aesthetic appearances renders the ordinance itself unconstitutionally vague. Nuisance regulations, by their nature, contain less stringent standards and definitions when compared to other regulations because the legal concept of a nuisance encompasses a "nearly infinite variety of ways in which one may be annoyed or impeded in the enjoyment of his rights." *Windward Marina, LLC v. City of Destin*, 743 So. 2d 635, 639 (Fla. 1st DCA 1999) (quoting *Orlando Sports Stadium, Inc. v. State*

ex rel. Powell, 262 So. 2d 881, 884 (Fla. 1972)). Florida law recognizes that overgrown or unkempt vegetation is considered a nuisance and can be regulated by local governments. *See, e.g., Gallo v. Heller*, 512 So. 2d 215, 216 (Fla. 3d DCA 1987); *City of Jacksonville v. Sohn*, 616 So. 2d 1173, 1173 (Fla. 1st DCA 1993); *Cosio v. State*, 227 So. 3d 209, 212 n.2 (Fla. 2d DCA 2017).

Relatedly, regulations based on aesthetics have been routinely upheld as constitutional. *See City of Lake Wales v. Lamar Advert. Ass'n of Lakeland, Fla.*, 414 So. 2d 1030, 1031–32 (Fla. 1982); *see also Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 533–34 (1981) (Brennan, J., concurring) (noting that municipalities can demonstrate a substantial interest in preserving aesthetics). The dictionary definition of "aesthetic" is a term that can be clearly understood by an ordinary person to refer to objects that are beautiful or pleasant in appearance.[1] While aesthetic beauty may sometimes be in the eye of the beholder, courts have held that a statute or ordinance's reliance on terms that have subjective components does not render the ordinance unconstitutionally vague. *See Flesch v. Metro. Dade Cnty.*, 240 So. 3d 504, 506 (Fla. 3d DCA 1970) (upholding an ordinance allowing the county to declare vegetation a nuisance if it "adversely affects and impairs the economic welfare of adjacent property"); *Watson v. City of St. Petersburg*, 489 So. 2d 138, 139 n.2 (Fla. 2d DCA 1986) (affirming the constitutionality of an ordinance that used "aesthetic degradation" as a criteria to deny tree removal permits); *Clary v. City of Crescent City*, 217 Cal. Rptr. 3d 629, 644 (Cal. Ct. App. 2017) (holding that the term "unsightly appearance" as applied to declaring vegetation a nuisance was not unconstitutionally vague); *Wilbros, LLC v. State*, 755 S.E.2d 145, 151 (Ga. 2014) (holding that the use of the term "offensive" did not render a nuisance statute unconstitutionally vague because it has a "well established common law meaning" and can

[1] *See, e.g.*, *Aesthetic*, Merriam-Webster Dictionary (Online ed.), https://www.merriam-webster.com/dictionary/aesthetic; *Aesthetic*, Oxford Advanced American Dictionary (Online ed.), https://www.oxfordlearnersdictionaries.com/us/definition/american_english/aesthetic_1.

be understood in the context of the statute).

In the alternative, even if the Court were to determine that the ordinance's reliance on aesthetic appearances rendered it unconstitutional, that portion of the ordinance would be severable. When a portion of a statute or ordinance is found to be unconstitutional, the reviewing court must only strike the unconstitutional portions unless, by doing so, the legislative intent behind the provision is completely defeated. *See Fla. Dep't of State, Div. of Elections v. Martin*, 916 So. 2d 763, 773 (Fla. 2005). Here, the intent of the ordinance is clear: to declare vegetation that threatens public safety and health a nuisance. The ordinance lists four separate instances in which vegetation can be declared a nuisance; three of them are unrelated to the language challenged by Residential. *See* Village Code, § 30-53(4). Therefore, even if the Court was inclined to find that the term "adversely affecting the aesthetic appearance of the property" is unconstitutionally vague, it would still find that the provision could be severed from the rest of section 30-53(4).

B. The Special Magistrate Erred in Expanding the Scope of Section 30-53(4)

Next, Residential alleges that the special magistrate erred in finding that the trees constituted a nuisance because its falling branches and limbs constituted a hazard to public safety and health. The Court agrees that the special magistrate erred by expanding the scope of the ordinance beyond its plain language by declaring the trees a nuisance for a reason not provided for in the ordinance. *See Borden v. East-European Ins. Co.*, 921 So. 2d 587, 595 (Fla. 2006). The "public health and safety" provisions of the ordinance are specifically limited in scope to fire hazards and impairing the vision of motorists, bicyclists, and pedestrians. *See* Village Code, § 30-53(4). Nevertheless, this error by the magistrate is immaterial since the final order contained other, valid bases for declaring the trees a nuisance. *Id.*

C. Competent Substantial Evidence to Supports the Special Magistrate's Order

Residential's final argument is that the special magistrate lacked competent substantial evidence to determine that the trees were a feeding and breeding ground for various pests and vermin. The Court cannot second-guess the factual findings of the special magistrate unless they were not supported by competent substantial evidence. *See Sch. Bd. of Hillsborough Cnty. v. Tenney*, 210 So. 3d 130, 134 (Fla. 2d DCA 2016). Competent substantial evidence is "tantamount to legally sufficient evidence" and exists where "the evidence relied upon to sustain the ultimate finding [is] sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." *Fla. Power & Light Co v. City of Dania*, 761 So. 2d 1089, 1092 (Fla. 2000); *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957).

In support of this argument, Residential argues that many of the Village's own witnesses admitted to not seeing evidence of vermin in and around the trees. In contrast, the Village notes that all of its expert witnesses testified that the trees were conducive to providing a food supply and space to breed for various pests and vermin.[2] While the evidence relied upon by the special magistrate may not be unimpeachable, it was undoubtedly sufficient to support the final order. *See City of Fort Lauderdale v. Multidyne Med. Waste Mgmt., Inc.*, 567 So. 2d 955, 957 (Fla. 4th DCA 1990) ("the test is not whether one side produced more experts than the other, but rather whether there was any substantial competent evidence upon which to base the commission's conclusion."). Even if the Court agrees with Residential that its evidence is more convincing, the Court cannot substitute its judgment for that of the special magistrate unless no other reasonable person could have come to the same conclusion. *See Dusseau v. Metro. Dade Cnty. Bd. of Cnty. Comm'rs*, 794

[2] Contrary to Residential's assertions, the actual presence of vermin is not required to declare vegetation a nuisance since the text of the ordinance only requires that the it "provid[e] a nesting, breeding or feeding area." Village Code, § 30-53(4). Regardless, a resident of Lakepoint testified at the hearing that she had previously seen rats amongst the trees.

So. 2d 1270, 1276 (Fla. 2001); *De Groot*, 95 So. 2d at 916. Since there was ample evidence in the record showing that Java Plum trees are an ideal feeding and breeding ground for pests and vermin, we affirm the special magistrate's order on that basis.

Conclusion

After reviewing proceedings below, we hold that the special magistrate properly designated the Java Plum trees on Residential's property to be a nuisance. Even though it was error for the special magistrate to consider the risk to public safety that falling branches and limbs may impose, the final order still provides two valid bases under the Village's Code of Ordinances to declare the trees a nuisance. *See* Village Code, § 30-53 ("the following shall individually, or in any combination, be considered nuisances") (emphasis added); *Dade Cnty. Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 644 (Fla. 1999) (holding the decision of a lower tribunal will be upheld if "there is any basis which would support the judgment in the record"). We also hold that section 30-53(4) is constitutional because it does not contain any impermissibly vague language and that, even if it did, the remainder of the ordinance supporting the special magistrate's decision can be severed from it. Accordingly, we **AFFIRM** the special magistrate's final order.

WEISS, GARRISON, and HAFELE, JJ., concur.