IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CENTRAL FLORIDA INVESTMENTS, INC.,

Petitioner,

v. Case No. 5D19-943

ORANGE COUNTY, FLORIDA,

Respondent.

_____/

Opinion filed November 7, 2019

Petition for Certiorari Review of Decision from the Circuit Court for Orange County Acting in its Appellate Capacity.

Michael E. Marder, and Thu Pham, of Greenspoon Marder LLP, Orlando, and John H. Pelzer, Of Greenspoon Marder LLP, Fort Lauderdale, For Petitioner.

Elaine Marquardt Asad, and William C. Turner, Jr., of Orange County Attorney's Office, Orlando, for Respondent.

EDWARDS, J.

Central Florida Investments, Inc., Petitioner ("CFI"), argues that the circuit court, acting in its appellate capacity, departed from the essential requirements of the law by treating CFI's appeal as though it were instead a petition for a writ of certiorari and then dismissing the petition. We agree with CFI that section 162.11, Florida Statutes (2017), provides for a plenary appeal to the circuit court as a matter of right from a final

administrative order of an enforcement board. However, the record reveals that CFI requested a more limited review, which the circuit court may have conducted. Because it is unclear whether the circuit court indeed employed the scope of review requested by CFI, we remand for further proceedings.

Our review of the circuit court's appellate decision is by way of second-tier certiorari, which limits our consideration to whether the circuit court: (1) afforded CFI procedural due process and (2) applied the correct law. *See Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995); *DMB Inv. Tr. v. Islamorada, Vill. of Islands*, 225 So. 3d 312, 316 (Fla. 3d DCA 2017).

CFI was cited for a violation of the building code by Orange County Code Enforcement Division with regard to what were deemed to be unsafe conditions in a structure that had been partially demolished during certain activities engaged in by CFI. Because CFI contested the violation and ownership of the building in question, an evidentiary hearing was held before the Orange County Special Magistrate who entered a final administrative order against CFI and in favor of Orange County, Respondent.

CFI took an appeal, ostensibly pursuant to section 162.11, requesting the circuit court to reverse the final order entered by the magistrate. That section provides:

> 162.11 Appeals. An aggrieved party, including the local governing body, 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. An appeal shall be filed within 30 days of the execution of the order to be appealed.

§ 162.11, Fla. Stat. (2017).

As CFI correctly argues, that statutory section clearly provides for an appeal as a matter of right to the circuit court. *See City of Ocala v. Gard*, 988 So. 2d 1281, 1282–83 (Fla. 5th DCA 2008). This Court has described the nature of such an appeal as plenary. *Id.* at 1283. There is nothing in the statute to suggest otherwise. "[W]here the language of a statute is plain and unambiguous there is no occasion for judicial interpretation." *DMB Inv. Tr.*, 225 So. 3d at 317 (quoting *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 454 (Fla. 1992)). Accordingly, if CFI had pursued a plenary appeal, the circuit court would have departed from the essential requirements of the law if it provided a more limited review, such as that afforded by first-tier certiorari review.

When CFI appealed the magistrate's order to the circuit court, it did not request a plenary appeal. Instead, CFI specifically requested the circuit court to conduct a first-tier review of the magistrate's order, governed by a three-prong standard of review, to determine whether: (1) procedural due process was afforded; (2) the essential requirements of law were observed; and (3) the magistrate's final order was supported by competent substantial evidence. It is understandable that CFI requested the circuit court to follow that procedure, as there are several Florida Supreme Court cases suggesting that the three-pronged first-tier review is the appropriate scope for a circuit court's appellate review of an agency or board decision; however, none of those cases discuss, concern, or cite section 162.11. *See, e.g.*, *Dusseau v. Metro. Dade Cty. Bd. of Cty. Comm'rs*, 794 So. 2d 1270, 1273–74 (Fla. 2001); *Fla. Power & Light Co. v. City of Dania*, 761 So. 2d 1089, 1092 (Fla. 2000); *Haines City Cmty. Dev.*, 658 So. 2d at 530; *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982). Indeed, section 166.061, Florida Statutes (1980), the predecessor to section 162.11, originally provided that "[a]n

aggrieved party may appeal a ruling or order of the enforcement board by **certiorari** in circuit court." (emphasis added). However, in 1982 the Legislature amended section 166.061 by deleting the word "certiorari." Ch. 82-37, § 10, Laws of Fla. The Legislature then renumbered that section, and in 1985 amended the statute further by using only the unmodified word "appeal" repeatedly. Ch. 85-150, § 3, Laws of Fla. Section 162.11 is the current and controlling grant of appellate review, by appeal and not by certiorari, from an enforcement board to circuit court, as further authorized by the Florida Constitution. *See* Art. V, § 5(b), Fla. Const.

In the case at hand, the circuit court's initial appellate decision stated: "We treat this appeal as a petition for writ of certiorari, *see Orange County v. Lewis*, 859 So. 2d 526, 528 n.1 (Fla. 5th DCA 2003), and deny certiorari." Indeed, this Court in *Lewis* stated that a circuit court's review of an administrative body's decision was by certiorari and was limited to a consideration of the three-prong test mentioned above. 859 So. 2d at 528 n.1. However, as in the above-cited supreme court cases, *Lewis* does not discuss or cite section 162.11. In a more recent case, this Court noted that "[s]ection 162.11 . . . specifically authorizes appeals of final administrative orders of enforcement boards to the circuit court." *City of Palm Bay v. Palm Bay Greens, LLC*, 969 So. 2d 1187, 1189 (Fla. 5th DCA 2007).

Review by certiorari is not the same as review by appeal. "The difference between certiorari review and appellate review is important." *M.M. v. Dep't of Child. & Fams.*, 189 So. 3d 134, 138 (Fla. 2016). "[O]n appeal, all errors below may be corrected: jurisdictional, procedural, and substantive." *Haines City Cmty. Dev.*, 658 So. 2d at 526 n.3. "Certiorari review is 'intended to fill the interstices between direct appeal and the

other prerogative writs' and allow a court to reach down and halt a miscarriage of justice where no other remedy exists.'" *Williams v. Oken*, 62 So. 3d 1129, 1133 (Fla. 2011) (quoting *Broward Cty. v. G.B.V. Int'l, Ltd.*, 787 So. 2d 838, 842 (Fla. 2001)). "The writ [of certiorari] never was intended to redress mere legal error." *Broward Cty.*, 787 So. 2d at 842. Certiorari review considers whether the correct law was applied; review by appeal goes further to also consider whether the law was correctly applied. It makes sense that where two levels of appellate review are provided, at least one reviewing court would consider whether the enforcement board correctly applied the law. It has been said that the three-pronged first-tier certiorari review is "akin in many respects to a plenary appeal." *Fla. Power & Light Co.*, 761 So. 2d at 1092. However, section 162.11 provides for an actual appeal, not something similar to an appeal. The Legislature has the power to provide a wider scope of review than is available through certiorari by providing for appeals. *Haines City Cmty. Dev.*, 658 So. 2d at 526 n.3. "Moreover, where the Legislature has directed how a thing shall be done, it is, in effect, a prohibition against it being done in any other way." Op. Att'y Gen. Fla. 81-25 (1981) (citing *Alsop v. Pierce*, 19 So. 2d 799, 805–06 (Fla. 1944)). If a court uses the inappropriate standard of review, that may be considered to be a departure from the essential requirements of the law. *City of W. Palm Beach Zoning Bd. of Appeals v. Educ. Dev. Ctr., Inc.*, 504 So. 2d 1385, 1385–86 (Fla. 4th DCA 1987). Because CFI requested the circuit court, sitting in its appellate capacity, to employ the three-pronged first-tier standard, rather than requesting a plenary appeal, the concept of invited error forecloses CFI's entitlement to relief on that basis. *See Pope v. State*, 441 So. 2d 1073, 1076 (Fla. 1983).

However, it is not clear whether the circuit court actually employed the three-pronged test as it entertained CFI's appeal. As noted above, the circuit court's initial order clearly said that it treated CFI's appeal as though it were a petition for certiorari, which is not what CFI requested. However, in response to CFI's motion for rehearing, the circuit court noted its agreement with CFI that it was required to determine whether: (1) procedural due process was afforded; (2) the essential requirements of the law were observed; and (3) the administrative body's findings were supported by competent substantial evidence. Rather than confirming that it followed that invited scope of review, when denying CFI's motion for rehearing, the circuit court said only that "there is nothing on the face of the Court's opinion to indicate that the Court did not apply this three part test for first tier review." Nor, we note, is there anything on the face of the circuit court's order to indicate that it *did* apply the three-pronged test, as invited by CFI, which would be the only permissible reason for treating CFI's section 162.11 appeal as a petition for first-tier certiorari review, and which would otherwise explain what currently appears to be a clear departure from the essential requirement of the law. Accordingly, we remand this matter to the circuit court, sitting in its appellate capacity, with instructions to state whether it applied the three-pronged first-tier scope of review, as invited by CFI, leading it to reject CFI's appeal and affirm the magistrate's final order.

PETITION FOR CERTIORARI GRANTED, REMANDED WITH INSTRUCTIONS.

JACOBUS, B.W., Senior Judge, concurs.
GROSSHANS, J., concurs in result only.