IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

W. LANE NEILSON and
TRISTA S. NEILSON,

Appellants,

v.

CITY OF ORLANDO, FLORIDA,

Appellee.
_____/

CASE NO.: CVA1 06-26
LOWER COURT CASE NO.:
CEB 2006-47123Z

Appeal from the Code Enforcement Board
of the City of Orlando, Florida.

William A. Mariah, Esq.,
Neilson and Associates, P.A.;
for Appellants.

Victoria Cecil, Esq.,
Assistant City Attorney; for Appellee.

Before O'KANE, KOMANSKI, and THORPE

FINAL ORDER AFFIRMING CODE ENFORCEMENT BOARD'S RULING

Petitioners W. Lane Nielson and Trista S. Neilson timely filed a Notice of Appeal from the City of Orlando Code Enforcement Board's "Findings of Fact, Conclusions of Law, and Order," dated March 8, 2006, which found them in violation of certain sections of the Code of the City of Orlando. This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(1)(A). We dispense with oral argument. Fla. R. App. P. 9.320.

W. Lane Neilson and Trista S. Neilson, ("Appellants") own property on West Colonial Drive in Orlando, Florida. Acting on a citizen's complaint, Code Enforcement Officer Lorene Johnson initially inspected the Appellants' property on November 29, 2005. The subject of the complaint was a large shed in the parking lot of the Appellants' law firm. The Code Enforcement Officer filed her "Statement of Violation and Notice of Hearing," on January 17, 2006. This notice was not mailed to the Appellants' office until March 1, 2006. The CEB hearing was scheduled for March 8, 2006. The Appellants' office manager received the notice by certified mail on March 2, 2006.

Appellants admit not "personally" reading the notice until March 7, 2006, at which time Mr. Neilson instructed his assistant to contact the CEB in order to reschedule the hearing due to a conflicting doctor's appointment. Conflicting affidavits from both parties disagree as to whether or not the Appellants' employee was told by someone in the CEB office that their hearing could be rescheduled or if they were merely informed of the next CEB hearing date. Despite the attempt to reschedule, the CEB held the hearing on the scheduled date of March 8, 2006, without the attendance of the Appellants or a representative. The Appellants allege in this appeal that they were told that their hearing had been rescheduled for April 12, 2006.

After receiving the CEB's order, Appellants filed their "Request for Rehearing," which was denied by the CEB on May 10, 2006. This appeal ensued.

The single question that must be answered on this appeal is whether procedural due process has been accorded to the Appellants. Nothing from the limited record before this Court indicates that the CEB committed errors under either the second or third prong

by departing from the essential requirements of law or not supporting its decision with competent substantial evidence.

Long-held precedent informs the Court that "[p]rocedural due process requires both fair notice and a real opportunity to be heard at a meaningful time and in a meaningful manner." *Massey v. Charlotte County*, 842 So. 2d 142, 146 (Fla. 2d DCA 2003) (citations omitted). "The specific parameters of the notice and opportunity to be heard required by procedural due process are not evaluated by fixed rules of law, but rather by the requirements of the particular proceeding." *Id.*

The circumstances of this particular proceeding do not demonstrate an excessive burden for the Appellants. The location of the hearing, the timing of the notice, the nature of the proceedings, and even the identity of the parties all combine to make this a manageable situation. The instant case can be distinguished from other Florida precedents where procedural due process was not afforded. *See Legal Experts, PL v. Tryzbiak*, 970 So. 2d 893 (Fla. 5th DCA 2007) (time between notice and hearing too short); *P & L Florida Inv., Inc. v. Ferro*, 545 So. 2d 448 (Fla. 3d DCA 1989) (distance too great); *DiMauro v. Econo-Ads Publications, Inc.*, 13 Fla. L. Weekly Supp. 965b (Fla. 15th Cir. Ct. 2006) (hearing to complex to have adequate time to prepare). None of these aggravating factors are present in the instant case. Unlike the parties in *Ferro*, where the hearing was held in Miami but the respondent counsel's office was located in West Palm Beach and notice was only received one day in advance, here the Appellants are in close proximity to the hearing location. Four days notice appears reasonable especially for an initial hearing. Additionally, this case would not involve the complexity found in the *DiMauro* case, where Mr. DiMauro was given approximately five business days to

"review, analyze, study, digest, investigate, interview the witnesses, research the law and facts and, otherwise properly prepare to meet the myriad of issues presented in the ten (10) [police] reports." *DiMauro*, 13 Fla. L. Weekly Supp. 965b. Under the particular circumstances in the instant case, a four day notice for a simple initial hearing at the CEB is not overly burdensome on the Appellants.

Contrary to this Court's finding that the Appellants had four business days to prepare for the hearing, the Appellants argue that they actually had only one day to prepare because Mr. Neilson did not personally review the notice until March 7, 2006. This Court finds no merit in that argument as the Florida Rules of Civil Procedure clearly state that "service by mail shall be complete upon mailing." Fla. R. Civ. P. 1.080(b). *See generally Scott v. Johnson*, 386 So. 2d 67 (Fla. 3d DCA 1980). No exception exists where the service of a notice of hearing does not become effective until the letter is opened and read by the addressee.

Additionally the Appellants argue that Rule 1.090(e) applies in this case and as such, "at a minimum, five (5) days notice should be required for any hearing to be scheduled…in order for the timely delivery of notice to be reasonable." With regards to Rule 1.090(e), "[a] party is entitled to an additional five days only if the time period in question is measured from service of the document that marks the beginning of the time period." 5 Philip J. Padovano, J., Florida Civil Practice §7.4 (2006). The scheduled date of the hearing was fixed and not some specific amount of time after the notice had been served on the Appellants. This Court has previously noted that for notice of a hearing to be acceptable there are no hard and fast rules for determining how many days constitute "reasonable time." *Massey*, 842 So. 2d at 146.

At the CEB hearing, the Appellants would have had the opportunity to present their case to the CEB. No penalty had to be imposed; only a notice of violation was present in this particular file. The sole determination at this hearing was whether a violation had occurred and what compliance conditions were needed to rectify the violation. On March 9, 2006, Appellants were mailed the "Findings of Fact, Conclusions of Law, and Order," from the CEB hearing. Along with this order, Appellants were notified that the date for compliance was set for April 7, 2006. Additionally, Appellants were informed of their option to appeal the CEB's decision to the Circuit Court within thirty days of the order.

Courts have considered the possibility of an erroneous deprivation of property or property rights in their analysis of procedural due process questions. *Massey*, 842 So. 2d at 146 (citing *Keys Citizens for Responsible Gov't v. Fla. Keys Aqueduct Auth.*, 746 So. 2d 940, 948-49 (Fla. 2001)); *County of Pasco v. Riehl*, 620 So. 2d 229 (Fla. 2d DCA 1993). Since such property rights are so fundamental to citizens of this state, losing such rights without notice and an opportunity to be heard would be a serious violation of procedural due process. *Id*. at 146 (citing *Dep't of Law Enforcement v. Real Prop.*, 588 So. 2d 957, 964 (Fla. 1991)). In *Massey*, although the Second District Court of Appeal ultimately ruled that the Masseys did not receive procedural due process following their initial hearing before the Charlotte County CEB, the court noted that "[t]he risk of a completely erroneous deprivation in this case is probably low given the process provided to the Masseys prior to the July 11 order finding them in violation of the building code." *Id*. at 147. Just as in the *Massey* case, Appellants were afforded procedural due process for the initial hearing stage before the CEB. As the Appellee has noted, and unlike the

facts presented in *Massey*, the Appellants have not appealed the "Statutory Order Imposing Penalty/Lien," dated April 20, 2006.

As the facts demonstrate Appellants were not in any danger of losing any property rights or interests at this initial stage of the proceedings. Failing to appear at the hearing prevented Appellants only from stating their case and arguing that the violations were not present. If the Appellants had been in danger of losing any property rights at this initial hearing, then the decision of this Court may have been different. As the facts stand now, this Court finds no error with the actions by the Code Enforcement Board. Appellants were provided fair notice and a real opportunity to be heard and as such the decision of the CEB should be affirmed.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that the Code Enforcement Board's "Findings of Fact, Conclusions of Law, and Order" is **AFFIRMED**.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this _27__day of ____May_____, 2009.

____/s/_____
JULIE H. O'KANE
Circuit Judge

_____/s/_____
WALTER KOMANSKI
Circuit Judge

_____/s/_____
JANET C. THORPE
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished via U.S. mail to:

WILLIAM A. MARIAH, ESQ. and RALPH B. LEEMIS, ESQ., Neilson and Associates, P.A., 1332 West Colonial Drive, P.O. Box 547638, Orlando, FL 32854-7638

VICTORIA CECIL, ESQ., Assistant City Attorney, Orlando City Hall, 400 S. Orange Avenue, Orlando, FL 32801.

/s/
Judicial Assistant