

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

MARCOS H. ZARATE,

CASE NO.: CVA1 06-48

Appellant,

v.

ORANGE COUNTY,

Appellee.

Appeal from a decision of the
Code Enforcement Board,
Orange County, Florida.

Charles S. Martin, Esquire,
for Appellant.

George L. Dorsett, Esquire, Assistant County Attorney,
for Appellee.

Before TURNER, FLEMING, and GRINCEWICZ, J.J.

PER CURIAM.

FINAL ORDER AND OPINION AFFIRMING FINAL JUDGMENT

Petitioner seeks review of the Special Master's final order dated June 5, 2006, which found the Petitioner in violation of multiple sections of the Orange County Code of Ordinances (the "Code"). This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(1)(c); section 162.11, Florida Statutes; and section 11-40 of the Code.

Appellant is the owner of property located at 7232 Overland Road in Orlando, Florida. On November 10, 2005, Frank Gibbs, a code enforcement officer, notified Appellant that the

property violated nine Code sections by operating his used car dealership on the property. Appellant was given until November 25, 2005 to take corrective action.

On June 5, 2006, a Special Master Hearing Officer (Special Master) conducted a public hearing regarding the violations on the property. The nine Code violations were: 1) sections 38-3, 1476 Failure to provide required parking per development standards; 2) sections 38-3, 1479 Vehicle(s) parked on an unimproved surface; 3) sections 38-3, 1479 Failure to maintain required parking surface; 4) sections 38-3, 38-74, 38-77 Land use erected or used without obtaining building permit(s) and/or land use permit; 5) sections 38-3, 38-74, 38-77, 38-79 Use does not meet performance standards (section 38-1008, enclosed); 6) sections 38-3, 1356(f) Solid waste refuse receptacles not meeting setbacks and/or not property screened; 7) sections 38-3, 1356(f) Solid waste refuse receptacles not meeting setbacks and/or not property screened; 8) sections 38-3, 38-74, 38-77, 38-79 (137,138) Outdoor display of merchandise/vehicles within required parking spaces or vehicle use areas; and 9) sections 38-3, 38-74, 38-77, 38-79 (137,138) Outdoor display of merchandise or vehicles within the right-of-way.

Appellant had two cases scheduled for hearing at 9 a.m that morning, one regarding the subject of this appeal, a property at 7232 Overland Road, and one regarding an adjacent property at 7230 Overland Road, the subject of a different appeal. Appellant and his attorney, Mr. Charles Martin, were both present at the first hearing regarding the violations on the 7230 Overland Road property. Mr. Martin presented his arguments against the violations regarding the 7230 Overland Road property; however, both Mr. Martin and Appellant failed to attend the hearing regarding the 7232 Overland Road property, the subject of this appeal. As evident from the record and explained in the Order, due to time constraints and the number of cases on the docket, the Special Master scheduled the hearing on the 7232 property for 1:30 p.m. on June 5,

2006. Appellant's attorney requested a continuance advising the Special Master that he would not be able to attend the 1:30 p.m. hearing, and the Special Master denied the continuance. As a result, the hearing on the 7232 Overland Road property was held at 1:30 p.m. and both Mr. Martin and Appellant were not present. Thus, Appellant did not present any argument or evidence against the violations on the property located at 7232 Overland Road. Based upon the hearing, the Special Master entered an order finding Appellant in violation of the Code for the nine violations charged against him. The order required Appellant to cure the violations by September 6, 2006, or pay a fine of \$1,000.00 per day. This appeal followed.

When reviewing a decision by a code enforcement board, the circuit court must determine: (1) whether procedural due process was accorded; (2) whether the essential requirements of the law were observed; and (3) whether the administrative findings and judgment are supported by competent substantial evidence. *City of Deland v. Benline Process Color Co., Inc.*, 493 So. 2d 26, 28 (Fla. 5th DCA 1986) (quoting *City of Deerfield Beach v. Valliant*, 419 So. 2d 624 (Fla. 1982)). Also, according to Florida Statute section 162.11 a circuit court reviewing a final administrative order of an enforcement board cannot engage in de novo review, and it shall limit its review to "the record created before the enforcement board."

On appeal, Appellant argues that the Special Master's order is not supported by competent, substantial evidence and the essential requirements of the law have been violated because the Special Master misapplied the Code. Second, Appellant argues that it was denied due process of law by the Special Master's rescheduling of the hearing. Third, Appellant argues that sections 162.07 and 162.09, Florida Statutes are patently and facially unconstitutional. Last, Appellant argues that the fine imposed by the Special Master constitutes an excessive fine in violation of the state and federal constitutions.

Conversely, Appellee argues that the order is supported by competent substantial evidence and the essential requirements of the law have been observed because the Code was not misapplied. Appellee also argues that the Special Master's denial of a continuance was not an abuse of discretion. Additionally, Appellee argues that it is moot whether sections 162.07 and 162.09 are unconstitutional as they are not applied in the order in this case. Last, Appellee argues that the Special Master's fine was not excessive because it did not go beyond the range set forth in the statute.

A motion for continuance is granted in the "sound judicial discretion of the trial court and the ruling of the court will not be disturbed unless abuse of discretion is clearly shown." *Buckley Towers Condo., Inc.*, 340 So. 2d 1206, 1208 (Fla. 3d DCA 1976) (citing *In re Gregory*, 313 So. 2d 735 (Fla. 1972)). The motion for continuance "must be left to the tribunal which has the parties before it, and who must determine from a variety of circumstances occurring in its presence" whether the motion was made in good faith. *Hall v. S.D.L. Co.*, 103 So. 828, 830 (Fla. 1925). "If reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion." *J.W. v. Dep't of Children & Families*, 835 So. 2d 316, 318 (Fla. 5th DCA 2002) (quoting *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980)).

Appellant argues that he was denied due process when the Special Master rescheduled the hearing for 1:30 p.m. However, the proper inquiry is whether the Special Master abused her discretion by denying Appellant's motion for a continuance. Appellant was present at the 9:00 a.m. hearing for an adjacent piece of property, and the Special Master, concerned about time, asked the Appellant how long the second hearing would take. Appellant did not respond to that question, and instead requested that the Special Master continue the matter to the next month

based on confusion about an address. The Special Master and the code enforcement officer resolved the address problem, and the Special Master rescheduled the hearing for 1:30 p.m., that afternoon. Only then did Appellant indicate that he could not be present at 1:30 p.m., but he gave no reason for his inability to appear.

Appellant offered no grounds to support his motion for a continuance made at the hearing. He simply stated that he could not attend the hearing at 1:30 p.m. Additionally, the Statement of Violation and Notice of Hearing provides that the hearing will start at 9:00 a.m. on June, 5, 2006; however, it does not indicate the length of the hearing or when exactly the particular case will be called. The Special Master also notes in her order that the hearings are “scheduled for a date certain, but no time certain unless requested in advance.” (R. at 22 fn. 1.) There is no indication in the record that Appellant requested a time certain in advance. Thus, Appellant had notice of the hearing and the opportunity to be heard, he attended the hearing for one of his properties, and gave no reason as to why he could not be present at the rescheduled time. It appears that reasonable men could differ as to the propriety of the Special Master’s denial of Appellant’s motion for continuance. Accordingly, the Special Master did not abuse her discretion in denying Appellant’s motion for a continuance.

It is well established that an issue not presented at the trial level will not be considered for the first time on appeal. *Jackson v. Whitmire Constr. Co.*, 202 So. 2d 861, 862 (Fla. 2d DCA 1967). *See also Augustin v. State Unemployment Appeals Comm’n*, 906 So. 2d 1238, 1239 (Fla. 4th DCA 2005); *Sparta State Bank v. Pape*, 477 So. 2d 3, 4 (Fla. 5th DCA 1985) (citing *Dober v. Worrell*, 401 So. 2d 1322 (Fla. 1981)).

Appellant’s hearing for the property was scheduled by the Special Master for 1:30 p.m. on June 5, 2006. Neither Appellant nor his attorney attended the hearing. The County was

present at the hearing and Code Enforcement Officer Frank Gibbs testified regarding the code violations. The County submitted pictures of the alleged violations into evidence. Upon a careful review of the record below, Appellant did not present to the Special Master any of the issues that he now raises on appeal, as applied to the 7232 Overland Road property. Specifically, Appellant did not present any evidence or make any arguments at the hearing. Consequently, all of Appellant's arguments are being raised for the first time on appeal. As a result, the Court cannot properly consider these issues.

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

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this 6 day of April, 2009.

/S/
THOMAS W. TURNER
Circuit Judge

/S/
JEFFREY M. FLEMING
Circuit Judge

/S/
DONALD E. GRINCEWICZ
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 **Charlie S. Martin, Esq., McLeod, McLeod, McLeod, P.A., 48 East Main St., P.O. Drawer 950, Apopka, FL 32704-0950** and **George L. Dorsett, Esq., Assistant County Attorney, Orange County Attorney's Office, P.O. Box 1393, Orlando, FL 32802-1393** on the 6 day of April , 2009.

_____/S/_____
Judicial Assistant