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

MARCOS H. ZARATE,

Appellant,

v.

ORANGE COUNTY,

Appellee.

_____/

CASE NO.: CVA1 06-49

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 22, 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 7230 Overland Road in Orlando, Florida. On October 20, 2005, Frank Gibbs, a code enforcement officer, notified Appellant that the

property violated seven Code sections by operating his used car dealership on the property. Appellant was given until November 4, 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 seven Code violations were: 1) sections 38-3, 1476 Failure to provide required parking per development standards; 2) sections 38-3, 1479 Failure to maintain required parking surface; 3) sections 38-3, 38-74, 38-77 Building, structure, or land use erected or used without obtaining building permit(s) and/or land use permit (Junk yard, automotive repair, automotive storage); 4) sections 38-3, 38-74, 38-77, 38-79 Accessory building/structure and or use does not meet performance standards (section 38-1008, enclosed); 5) sections 38-3, 1356(f) Solid waste refuse receptacles not meeting setbacks and/or not properly screened; 6) 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 7) sections 38-3, 38-74, 38-77, 38-79 (137,138) Outdoor display of merchandise or vehicles within the right-of-way.

Mr. Martin represented Appellant at the hearing, and Appellant was also present. Frank Gibbs, a code enforcement officer, testified and presented evidence of the violations at the hearing. Appellant, although present, chose not to testify in his defense, and no additional witnesses were called on behalf of Appellant. Based upon the hearing, the Special Master entered an order finding Appellant in violation of the Code for the seven violations charged against him. The order required Appellant to cure the violations by September 5, 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. 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.

Appellant's main argument at both the hearing and on appeal involves Appellant's contention that he is not required to comply with the current Code provisions because he has a valid non-conforming use. Thus, argues Appellant, the County failed to offer competent substantial evidence of a change in use which would trigger application of current Code provisions to the Appellant. Appellant is mistaken in his characterization of the burden and order of proof required for the County to prove a Code violation. At the hearing, the County must present its evidence of the existing Code violations. Here, the County presented photographic evidence of the violations and the testimony of Officer Gibbs. After this initial offer of evidence, Appellant was entitled to present evidence disproving the Code violations or to present evidence of a valid non-conforming use. Here, Appellant admits that he has never established a valid, non-conforming use pursuant to section 38-55 of the Code. Because Appellant never established a non-conforming use as a defense to the Code violations, the

County was not required to present evidence of a change in use which would overcome a non-conforming use defense. Additionally, the essential requirements of the law were not violated because the current Code provisions were correctly applied to Appellant. The County correctly applied existing Code provisions absent Appellant's proof of a valid, non-conforming use. Thus, the Court finds that the County met its burden of proving the existing Code violations through the photographic evidence and the testimony of Officer Gibbs. The Special Master had competent substantial evidence to support the findings of Code violations. Additionally, Appellant argues that there is no provision in the Code that authorizes a special magistrate to conduct code enforcement hearings. The Court finds there is no merit to this argument as the right of a special master to conduct code enforcement hearings is established in the Code. *See* Orange County, FL, Code § 11-28, 11-35 (2006).

Appellant argues that he was denied due process as a result of the Special Master's conduct at the hearing. Specifically, Appellant argues that the Special Master interrupted Appellant's questioning of witnesses, denied him the opportunity to cross-examine witnesses, and denied him the opportunity to present evidence. Appellee argues that the Special Master's conduct did not rise to the level necessary to deny Appellant's due process rights.

The amount of due process required in a quasi-judicial hearing "is not the same as that to which a party to a full judicial hearing is entitled, and such hearings are not controlled by strict rules of evidence and procedure." *Seminole Entm't, Inc. v. City of Casselberry*, 811 So. 2d 693, 696 (Fla. 5th DCA 2001) (citing *Lee County v. Sunbelt Equities, II, Ltd. Partnership*, 619 So. 2d 996, 1002 (Fla. 2d DCA 1993)). In fact, evidence that is "irrelevant, immaterial, or unduly repetitious" shall be excluded by the special master at the code enforcement hearing. Orange County, FL, Code § 11-35(d) (2006). In general, a quasi-judicial hearing meets "basic due

process requirements if parties are provided notice of hearing and opportunity to be heard." *Jennings v. Dade County*, 589 So. 2d 1337, 1340 (Fla. 3d DCA 1991). The parties "must be able to present evidence, cross-examine witnesses, and be informed of all the facts upon which the commission acts." *Id.* (citing *Coral Reef Nurseries, Inc. v. Babcock Co.*, 410 So. 2d 648, 652 (Fla. 3d DCA 1982).

Here, Appellant does not contest that he was given notice of the hearing; however, he contends that he was not given a meaningful opportunity to be heard. As evident from the hearing transcript, Appellant cross-examined the witnesses throughout the proceeding. Additionally, Appellant was specifically asked if he was going to be calling witnesses, and he answered that he would not. The Special Master also asked if the Appellant would like to answer some questions in his defense, and he also declined this opportunity. Thus, Appellant's failure to present evidence was not due to the conduct of the Special Master. Furthermore, on the occasions were Appellant was interrupted or instructed to move on, the Special Master was exercising her duty to exclude evidence that was "irrelevant, immaterial, or unduly repetitious". The transcript of the hearing reveals that the Special Master was constantly trying to keep the hearing on track. The Appellant continually wanted to discuss non-conforming use issues which were not relevant, as discussed above. Based on the record, the conduct of the Special Master did not deprive Appellant of due process. The Special Master was simply acting in a manner to move the case along and exclude irrelevant evidence. Thus, the Court finds that Appellant was not denied due process of law as a result of the Special Master's conduct of the hearing.

Appellant argues that sections 162.07 and 162.09, Florida Statutes, are patently and facially unconstitutional for purporting to provide for the imposition of fines and liens on property owners with no notice or hearing. Additionally, Appellant argues that the sections

create an irrefutable presumption that, once a violation has been established, the violation continues uncorrected until receipt of an affidavit of compliance from the code inspector. Conversely, Appellee argues that this issue is moot because the order at issue in this case was not recorded against the property pursuant to the statutes at issue. Additionally, Appellee argues that the Code provides the opportunity for a hearing on an order to impose a fine where Appellant could challenge the code inspector's affidavit.

Appellee is correct that the statutes in question do not apply to the Order being appealed in this case. Appellant is appealing the June 22, 2006 Order finding the Appellant in violation of the Code. Appellant's due process arguments refer to the Order Imposing a lien on the property which is issued after the code inspector inspects the property and finds that it is not in compliance with the June 22, 2006 Order. Thus, Appellants arguments about the constitutionality of the statutes do not apply to the Order being appealed. Furthermore, Appellant overlooks section 11-37(a)(2) of the Code which provides that a violator may request a hearing on an order imposing a fine. If the violator chooses not to request a hearing, then the order is recorded in the public records and a lien is recorded against the land. Orange County, FL, Code § 11-37(a)(2) (2006). Thus, not only do the challenged statues not apply to the Order on appeal, there is a procedure in place to request a hearing before a lien in recorded against the property. Therefore, the Court finds that Appellant's argument is without merit.

Appellant argues that the fine imposed by the Special Master is not proportionate to the minor offenses alleged and thus is an excessive fine in violation of the state and federal constitutions. Appellee argues that the court does not have authority to set aside a fine set by a special master unless the fine goes beyond the range set forth in the statute.

In this case, the amount of the fine is within the statutory range found in section 162.09, Florida Statutes. As indicated in the hearing transcript, the Special Master considers the factors for imposition of a fine found in chapter 162. The Special Master noted that the Appellant did not testify or offer any evidence which would encourage her to impose a lesser fine. Additionally, Chapter 162, Florida Statutes, and Chapter 11, Orange County Code, provide a violator with procedures to challenge the imposition, validity, and amount of the fine assessed. *See* §162.09, Fla. Stat. (2006); Orange County, FL, Code § 11-37 (2006). Last, Florida Rule of Appellate Procedure 9.310 provides that an appellant can request a stay of the fine pending review. Thus, Appellant's argument that the fees prevent a barrier to appeal is without merit. Accordingly, the Court finds that the fine imposed by the Special Master did not constitute an excessive fine in violation of the state and federal constitutions.

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 _20_ 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 __21___ day of __April_____, 2009.

____/S/_____
Judicial Assistant