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

LEONA (LEE) HARR,

Appellant,

v. **CASE NO.: CVA1 06-72**

CITY OF ORLANDO,

Appellee.
_____/

An appeal from a decision of the
Code Enforcement Board,
City of Orlando, Florida.

Leona (Lee) Harr, Pro Se,
for Appellant.

Victoria Cecil, Esquire
For Appellee.

Before G. ADAMS, STRICKLAND, and DAWSON, JJ.

PER CURIAM.

FINAL ORDER AND OPINION AFFIRMING CODE ENFORCEMENT BOARD'S ORDER DATED OCOTBER 11, 2006

Appellant Leona Harr (Appellant) timely appeals from the Findings of Fact, Conclusions of Law, and Order by the City of Orlando (City) Code Enforcement Board (Board), dated October 11, 2006. This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(1)(C) and section 162.11, Florida Statutes.

Appellant owns residential property located at 4621 Lenmore Street, Orlando, Florida. On April 4, 2006, City Code Enforcement Officer, Norma Viserto, inspected Appellant's property in response to a citizen's complaint and advised Appellant that her property was in

violation of section 58.200 of the Orlando Code of Ordinances (Code).[1] A few months later, on or about July 14, 2006, Appellant was sent a Statement of Violation and Notice of Hearing from the City, which included a Compliance Schedule listing Code violations and the required corrective action to be taken by Appellant.[2]

Appellant's property was inspected again on October 5, 2006, and another Statement of Violation and Notice of Hearing were delivered to Appellant and her attorney, along with a Compliance Schedule as to Code section 58.200 only. The public hearing was originally scheduled for September 13, 2006, but it was continued at the request of Appellant's counsel and rescheduled for October 11, 2006. At the hearing, Appellant requested that the Board continue the matter again because she no longer had an attorney, needed additional time to prepare her

[1] Appellant's property was previously inspected on or about September 16, 2005, and determined to be in violation of Code sections 58.103 and 58.200. After granting Appellant an extension of time to complete the required corrective actions, Appellant corrected the code violations.

[2] The Compliance Schedule provides in pertinent part:

Section 58.103	*Structure erected without Zoning Approval and Building Permits. Obtain Zoning Approval and Building Permits for structure, or completely remove structure from property. (New PVC 6' Fence on property, no permits).
Section 58.200	*Building, structure, land or water used or occupied not in conformity with regulations specified in Figure 1, Table of Zoning District Regulations, Figure 2, Table of Allowable uses in Zoning Districts, Figure 3, Land Use Intensity Table. Obtain Zoning Approval and necessary permits to utilize building, structure, land, or water in conformity with specified regulations, or revert to previous legally existing land use or configuration. (Single Family Dwelling used as a Wildlife Refuge Rehab. Center for injured wildlife, prohibited in residential district). NOTE: IF APPROVED BY CITY, ALSO OBTAIN A CITY OF ORLANDO, OCCUPATIONAL LICENSE FOR BUSINESS USE. Storage of cages with animals in rear yard.

defense, and had to get home to care for the animals. After hearing arguments from Appellant and the City, the Board denied Appellant's request for continuance.

Following the hearing on October 11, 2006, the Board entered an Order containing its findings of fact and conclusions of law stating that on or between April 4, 2006, and October 9, 2006, Appellant's property was in violation of Code Chapter 58. Appellant's use of the residential property was considered a public benefit use for which a conditional use permit was required. The Board ordered Appellant to obtain a conditional use permit by February 8, 2007, and if Appellant did not bring the property into compliance, a daily penalty of $25.00 would be imposed. This appeal followed.

Pursuant to section 162.11, Florida Statutes, a circuit court's review of a quasi-judicial decision of an enforcement board is not a hearing de novo, but is limited to a review of the record before the Board. City of Deland v. Benline Process Color Co., Inc., 493 So. 2d 26, 27 (Fla. 5th DCA 1986). An appeal from the Board is governed by a three part standard of review: (1) whether procedural due process was accorded; (2) whether the essential requirements of law have been observed; and (3) whether the administrative agency's findings and judgment are supported by competent, substantial evidence. City of Deerfield Beach v. Vaillant, 419 So. 2d 624, 626 (Fla. 1982). The circuit court is not entitled to make separate findings of fact or to reweigh the evidence. Haines City Cmty. Dev. v. Heffs, 658 So. 2d 523, 529 (Fla. 1995).

Pursuant to the Local Government Code Enforcement Boards Act in Chapter 162, Florida Statutes, it is the duty of the code inspector to initiate enforcement proceedings. §162.06(1), Fla. Stat. (2006). Upon finding a code violation, the code inspector must notify the violator and give him or her a reasonable time to correct the violation. §162.06(2), Fla. Stat. (2006). Should the violation continue beyond the time specified for correction, the code inspector should notify the

enforcement board and request a hearing. Id. However, if a repeat violation is found, the code inspector is not required to give the violator a reasonable to time to correct the violation before requesting a hearing with the enforcement board. §162.06(3), Fla. Stat. (2006). During the hearing, the enforcement board shall take testimony from the code inspector and alleged violator. §162.07(3), Fla. Stat. (2006). At the conclusion of the hearing, the enforcement board shall issue findings of fact, based on evidence of record and conclusions of law, and shall issue an order affording the proper relief. §162.07(4), Fla. Stat. (2006).

This appeal concerns the Board's determination that Appellant's use of her residential property as a wildlife rehabilitation facility qualifies as a public benefit use which requires a conditional use permit due to Appellant's R-1A zoning. While not succinctly framed, the issues raised focus on whether Appellant's due process rights were violated, whether there is competent substantial evidence to support the Board's order, and whether Code section 58.200 is constitutional.

Denial of Request for Continuance

The first issue raised by Appellant is whether the Board's denial of her request for continuance was a violation of her due process rights. Appellant asserts that the Board erred in denying her request for continuance because Appellant had a constitutional right to counsel and she was not prepared to defend herself as the City did not provide her with certain requested documents. In response, the City contends that there is no constitutional right to attorney representation in administrative matters and all of Appellant's requested documents were provided to her attorney prior to his withdrawal.

Code enforcement proceedings are quasi-judicial proceedings which are not controlled by strict rules of evidence and procedure; however, certain standards of basic fairness must be

adhered to in order to afford due process. Jennings v. Dade County, 589 So. 2d 1337, 1340 (Fla. 3d DCA 1991). A quasi-judicial proceeding generally meets the basic due process requirement if the parties are provided notice of the hearing and an opportunity to be heard. Id. The parties must also be able to present evidence, cross-examine witnesses, and be informed of all the facts upon which the board acts. Kupke v. Orange County, 838 So. 2d 598, 599 (Fla. 5th DCA 2003).

The granting or denial of a motion for continuance is within the trial court's discretion and such a decision should not be reversed by an appellate court unless there has been an abuse of discretion that clearly appears in the record. Eisaman v. Orange County, 13 Fla. L. Weekly Supp 672a (Fla. 9th Cir. Ct. Oct. 20, 2005). It is not enough that an appellate court, or another fact-finder might have made a different factual interpretation. Id.

"The Sixth Amendment guarantees that '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.'" U.S. v. Gouveia, 467 U.S. 180, 187 (1984). An action before a code enforcement board is not a criminal matter, but rather an administrative matter in which fines and other civil penalties are imposed. See Thomas v. State, 614 So. 2d 468, 472 (Fla. 1993). Therefore, Appellant does not have a constitutional right to attorney representation in this matter.

This Court finds that Appellant was not denied due process by the Board's decision to deny her request for continuance. The record establishes that Appellant was first advised of the violation on or about April 4, 2006, and the hearing was already continued from September 13, 2006, to October 11, 2006, so Appellant had ample notice to prepare for the hearing. The record also shows that the requested documents were made available to Appellant and Appellant was given an opportunity to present her entire case to the Board at the hearing with the assistance of two acquaintances.

Competent Substantial Evidence

The second issue raise by Appellant is whether the Board's findings are supported by competent substantial evidence. Appellant argues that there can be no finding of a violation of section 58.200 because the City failed to meet its burden of proof. On the other hand, the City maintains that the record clearly supports the Board's finding that Appellant was in violation of section 58.200.

If there is any competent substantial evidence in the record to support the Board's decision, it must be sustained. Eisaman, 13 Fla. L. Weekly Supp. 672a (Fla. 9th Cir. Ct. Oct. 20, 2005)(citing Orange County v. Lust, 602 So. 2d 568, 570 (Fla. 5th DCA 1992)). "Competent substantial evidence is 'such evidence as will establish a substantial basis of fact from which the fact at issue can reasonably be inferred (or) . . . such relevant evidence as a reasonable mind would accept as adequate to support a conclusion.'" Duval Utility Co. v. Florida Public Service Commission, 380 So. 2d 1028, 1031 (Fla. 1980)(quoting De Groot v. Sheffield, 95 So. 2d 912, 196 (Fla. 1957)).

Code section 58.200 provides that "[n]o building, structure, land or water shall be used or occupied and no building, structure or part thereof shall be erected, constructed, reconstructed, located, moved or structurally altered except in conformity with the regulations specified" in the applicable Code figures and tables. Section 58.200 further provides that:

> In the event of uncertainty or where there is not a particular land use category listed anywhere in this Chapter that corresponds with a use in question, then the use in the Chapter having the most similar characteristics, as determined by the Zoning Official, to the use in question shall apply.

This Court finds that the Board's order is supported by competent substantial evidence. The Board relied upon the City's findings that the violations were present and continuing, the

zoning officials' determination as to the land use, and the testimony of various city officials, Appellant, and local residents regarding the activities occurring on Appellant's property. It is undisputed that Appellant rehabilitates wild animals at her home which is inside the Traditional City and is zoned as an R-1A, single-family residential zone. It is also undisputed that several of the surrounding residents have expressed concern over Appellant's property use, especially as it relates to problems with rodents, traffic, and declining property values. Given Appellant's acknowledgement of the use of her property, the Board recognized that the real issue was whether Appellant needed to obtain a conditional use permit, not whether Appellant was using her property in conformity with its current zoning. The record on appeal establishes that the acting Zoning Official, Jason Burton, determined that Appellant's use of the property was a public benefit use which required a conditional use permit due the location of property. The record further shows that Burton explained that his determination was based on a similar non-residential land use category listing in the Code's Table of Allowable Uses as allowed by Code section 58.200. Burton further explained that the purpose of a conditional use permit is to ensure that appropriate conditions are in place to mitigate potential nuisances.

Constitutionality of Section 58.200

The third issue raised by Appellant is whether Code section 58.200 is constitutional, specifically with regards to the equal protection clause. Appellant asserts that because a conditional use permit would result in over-burdening government control, the Board was required to apply certain constitutional tests. Appellant further asserts that section 58.200 violates the equal protection clause because the City is selectively enforcing the Code against residents in her neighborhood. Alternatively, the City contends that Appellant's reliance on

certain constitutional tests is misplaced and Appellant failed to establish an equal protection claim.

In order to constitute a denial of equal protection, the alleged selective enforcement must be deliberately based on an unjustifiable standard such as race, religion, or other arbitrary classification. Thomas v. State, 583 So. 2d 336, 340 (Fla. 5th DCA 1991). The mere failure to prosecute all offenders is not grounds for a claim of denial of equal protection. Id. Appellant puts forth nothing more than a conclusory statement. Appellant failed to provide support showing that the City is selectively enforcing the Code; therefore, this Court finds that Appellant's equal protection argument has no merit. Additionally, Appellant's application of the three-prong test in Dolan v. City of Tigard, 512 U.S. 374 (1994), and St. Johns River Water Management District v. Koontz, 2009 WL 47009 (Fla. 5th DCA 2009), is misplaced as those cases deal with governmental takings and exactions, not violations of city ordinances.

Equitable Estoppel

The fourth issue raised by Appellant is whether the doctrine of equitable estoppel precludes the Board from finding Appellant in violation of Code section 58.200. Appellant asserts the affirmative defense of equitable estoppel and argues that the Board is precluded from finding her in violation of Code section 58.200 because the City closed a previous case against Appellant for violating the same Code provision. The City contends that Appellant is misapplying the doctrine of equitable estoppel.

The elements of equitable estoppel are: (1) a representation as to a material fact that is contrary to a later-asserted position; (2) reliance on that representation; and (3) a change in position detrimental to the party claiming estoppel, caused by the representation and reliance thereon. State Dept. of Revenue v. Anderson, 403 So. 2d 397, 400 (Fla. 1981). If a party is

seeking estoppel against a governmental agency, then two additional elements are also required: (1) conduct by the government that goes beyond mere negligence and that will cause a serious injustice and (2) a showing that the application of estoppel will not unduly harm the public interest. Alachua County v. Cheshire, 603 So. 2d 1334, 1337 (Fla. 1st DCA 1992). Equitable estoppel is most frequently invoked against government agencies in cases in which the government has either made affirmative representations or knowingly acquiesced in plaintiff's conduct. Associated Insurance Co., Inc. v. Dept. of Labor & Employment Security, 923 So. 2d 1252, 1255 (Fla. 1st DCA 2006).

According to the record, the previous case against Appellant filed in September of 2005 was closed because Appellant brought her property into compliance pursuant to the City's verbal agreement with Appellant's attorney. Moreover, Chapter 162, Florida Statutes, provides that the City can cite a property owner on more than one occasion for the same violation. §162.06(3), Fla. Stat. (2006). This Court finds that Appellant's reliance on the doctrine of equitable estoppel is misplaced and without merit.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the Board's Findings of Fact, Conclusions of Law, and Order is **AFFIRMED.**

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this 27_____ day of _February_____, 2009.

___/S/_____
GAIL A. ADAMS
Circuit Court Judge

_/S/_____
STAN STRICKLAND
Circuit Court Judge

__/S/_____
DANIEL P. DAWSON
Circuit Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. mail or hand delivery to **Leona Harr**, 4621 Lenmore Street, Orlando, Florida 32812 and **Victoria Cecil, Esquire**, Assistant City Attorney, Orlando City Hall, 400 S. Orange Avenue, Orlando, Florida 32801 on this ___27___ day of __February_____, 2009.

_____/S/_____
Judicial Assistant