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

FRANK FERNANDEZ and SALVATORE SCARITO,

Appellants,

v.

CASE NO.: CVA1 07-26
Lower Ct. Case No.: CEB 05-40625COMM

CITY OF ORLANDO,

Appellee.
_____/

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

William G. Osborne, Esquire,
for Appellant.

Victoria Cecil, Esquire
For Appellee.

Before WHITEHEAD, MUNYON, and McDONALD, JJ.

PER CURIAM.

FINAL ORDER AND OPINION REVERSING CODE ENFORCEMENT BOARD'S ORDER DENYING REQUEST FOR RECONSIDATION OF PENALTY

Appellants Frank Fernandez and Salvatore Scarito (Appellants) timely appeal from an Order Denying Request for Reconsideration of the Penalty by the City of Orlando (City) Code Enforcement Board (Board), dated March 13, 2007. This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(1)(C) and section 162.11, Florida Statutes. We dispense with oral argument per Florida Rule of Appellate Procedure 9.320.

Appellants own a commercial warehouse located at 5876 Precision Drive, Orlando, Florida. Appellants' property suffered roof, wall, electrical, mechanical, and structural damage from a string of hurricanes that struck the Orlando area during August of 2004.

On November 24, 2004, City Code Inspector, Severo Berrios, inspected Appellants' property in response to a citizen's complaint and issued numerous citations for various commercial violations. On or about February 21, 2005, Appellants received a Statement of Violation and Notice of Hearing from the City, which included a Compliance Schedule listing eight violations of the Orlando Code of Ordinances (Code) and the required corrective action to be taken by Appellants for each violation.[1]

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[1] The Compliance Schedule provides in pertinent part:

Section 30A	* Requirements not covered by minimum code. See Standard Building Code: Section 104.1.1 Permit-when required. All work is to be performed by a Certified Licensed General Contractor, under city permit, with all final inspections and documentation provided for correction of these violations for entire structure.
Section 30A.36(D)	* All store fronts and wall exposed to public view shall be kept in good repair and shall be substantially weathertight. Repair/replace and paint all exterior walls that show deterioration, cracks, peeling paint on front, right side, left side and rear of structure.
Section 30A.36(D)	* All store fronts and wall exposed to public view shall be kept in good repair and shall be substantially weathertight. Repair/replace and paint all exterior walls that show deterioration, cracks, peeling paint on front, left side, right side and rear of structure.
Section 30A.36(A)(5)	* Walls and ceilings shall be considered to be in good repair when clean, free from cracks, breaks, loose plaster and similar conditions. Repair/replace and paint damaged ceilings and walls from hurricane for entire structure.
Section 30A.36(A)(6)	* All roofs shall have a suitable covering free of holes, cracks or excessively worn surfaces, which will prevent the entrance of moisture into the structure and provide reasonable durability. Repair/replace damaged roof, soffit, etc., for entire structure. Note: All work must be done by licensed contractor, under city permit with all necessary inspections.

Following a hearing on April 13, 2005, the Board entered an Order containing its findings of fact and conclusions of law stating that on or between November 24, 2004, and April 11, 2005, Appellants' property was in violation of Code Chapter 30A. Appellants were ordered to secure permits by May 13, 2005, and bring the building into compliance by August 11, 2005.

On August 12, 2005, City Code Inspector, Severo Berrios, filed an Affidavit of Non-Compliance based upon his re-inspection of Appellants' property. Consequently, the Board entered a Statutory Order Imposing Penalty/Lien on or about September 6, 2005, ordering Appellants to pay the City a fine in the amount of $250 per day for each day the violation existed and continued to exist after May 13, 2005, the date previously set by the Board for compliance. City Code Inspector, Michelle Bach, issued an Affidavit of Compliance on January 25, 2007,

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Section 30A.36(A)(8)	* Supporting structural members are to be kept structurally sound, free of deterioration and capable of bearing imposed loads safely. Have a structural engineer certify in writing, under company letterhead that roof support is safe and capable to withhold loads for roof or repair/replace according to his/her written recommendation, under city permit with all necessary inspections.
Section 30A.36(A)(11)	* All wiring and equipment shall be installed and maintained in accordance with the requirements of the authority having jurisdiction. Have a Licensed Electrical Contractor, certify in writing that all wiring, fixtures, receptacles, etc., is safe and in good working condition or repair/replace according to his/her written recommendation, under city permit with all necessary inspections. Have Licensed Mechanical Contractor certify in writing, under company letterhead that A/C is in good working condition or repair/replace according to his/her written recommendation, under city permit with final inspections.
Section 30A.36(A)(17)	* Operating chimneys and all flue and vent attachments thereto shall be maintained structurally sound, free from defects and so maintained as to capably perform at all times the function for which they were designed. Have a Licensed Mechanical Contractor, certify in writing under company letterhead that A/C unit and duct is in good working condition or repair/replace according to his/her written recommendation, under city permit with all necessary inspections.

stating that another re-inspection of Appellants' property was performed on January 24, 2007, and it revealed that the corrective actions ordered by the Board had been taken. On February 23, 2007, the City acknowledged receipt of the Affidavit of Compliance and notified Appellants that a penalty in the amount of $132,750 accrued during the period of non-compliance and a lien would be filed if the penalty was not paid within 90 days.

On or about February 28, 2007, Appellants submitted a Request for Reduction of Penalty along with supporting documentation stating that financial hardship and other extenuating circumstances precluded compliance within the prescribed time period. Specifically, Appellants stated that the hurricanes created an emergency situation which put a tremendous strain on available resources and as a result of the damage caused by the hurricanes, Appellants suffered $140,600 in loss of rental income. Moreover, Appellants stated that they were continually making efforts to bring the property into compliance but delays arose during initial negotiations with the insurance company and throughout the design and permitting phases. The penalty amount at issue was $132,750, or $250 per day from August 11, 2005, the compliance date on the original order, to January 24, 2007, the date compliance was achieved. The Board entered an order denying Appellants' request for reconsideration of the accrued penalties following a hearing on March 14, 2007. 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, an enforcement board has the power to: adopt rules for the conduct of its hearings; subpoena alleged violators and witnesses to its hearings; subpoena evidence to its hearings; take testimony under oath; and issue orders having the force of law to command whatever steps are necessary to bring a violation into compliance. §162.08, Fla. Stat. (2007). This appeal concerns the conduct of a board enforcement hearing and the issuance of an order denying a request to reduce a previously imposed administrative fine for failure to bring Code violations into compliance.

Appellants argue that the Board's ruling on the request for reduction should be reversed because it violated Appellants' due process rights. In particular, Appellants assert that the order was prematurely entered and the Board failed to fully review the evidence and consider the factors listed in section 162.09(2)(b), Florida Statutes (2007), prior to voting on the issue. On the other hand, the City contends that the order should be affirmed because the record shows that the Board's consideration of Appellants' request was within the parameters of due process and the Board did not depart from the essential requirements of law.

Order Predating the Hearing

Appellants argue that they were denied due process because the Board's order denying Appellants' request for reduction is dated March 13, 2007, one day before the actual hearing on March 14, 2007. However, the City contends that any discrepancy between the hand-written date on the order and the actual hearing date was merely human clerical error.

Section 162.07, Florida Statutes, provides that after an enforcement board has heard the cases on the agenda for that day, it "shall issue findings of fact . . . and shall issue an order affording the property relief."

Upon reviewing the hearing transcript, it is clear that the Board voted on the motion at the hearing and entered an order accordingly. Although the order is predated, the language indicates that it was entered after the Board heard and reviewed the evidence. Given that Appellants received notice, submitted evidence prior to the hearing, and were present for the hearing, this Court finds that there was no denial of due process.

Failure to Observe the Essential Requirements of Law

Appellants further assert that the Board failed to adhere to the essential requirements of law by failing to consider the factors listed in section 162.09(2)(b), Florida Statutes, and by not providing Appellants with a meaningful opportunity to be heard on their penalty reduction request. Appellants do not argue that there was improper notice or no opportunity to submit evidence for consideration but rather that the Board failed to consider the documents submitted and failed to address the statutorily required factors in determining the amount of the fine.

Alternatively, the City maintains that not only is the hearing transcript not indicative of the Board's actual review of Appellants' request and documentation but also that Appellants were not automatically entitled to a reduction of the penalty because the Board's authority to reduce a fine is discretionary under section 162.09(c), Florida Statutes. The City also maintains that the Board did not depart from the essential requirements of law because the factors listed in section 162.09(2)(b), Florida Statutes, are not applicable to the Board's consideration of Appellants' request for reduction.

"Procedural 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)(citing Keys Citizens for Responsible Gov't, Inc. v. Fla. Keys Aqueduct Auth., 795 So. 2d 940, 948 (Fla. 2001). Moreover, "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. It is undisputed that Appellants were given fair notice and afforded an opportunity to be heard but it is disputed as to whether the Board fully and properly considered Appellants' request.

While Chapter 162, Florida Statutes, authorizes the board to reduce a fine, it does not set forth procedure for the Board to follow when considering a request for reduction. §162.09(c), Fla. Stat. (2007). However, under section 162.08, Florida Statutes, the Board is allowed to adopt and implement its own rules for the conduct of its hearings. Section IX of the Board's Rules of Procedure requires the property owner to submit the appropriate request for reduction form along with any information detailing the financial, health, or other extenuating circumstances that precluded compliance within the prescribed time period to the recording secretary at least ten days prior to the next scheduled meeting. The Board is supposed to receive the completed request and documentation in advance of the hearing so it may grant, deny, or approve a modification of the requested relief at the hearing. The rules further direct the Board to makes its determination based solely upon the written record and not on substantive issues involving the case itself. The record indicates that although Appellants were given fair notice and an opportunity to be heard, such opportunity was not in a meaningful manner. Neither the hearing transcript nor the subject order demonstrate that the Board considered Appellants' supporting documents prior to denying the request for reconsideration of the penalty. Accordingly, this

Court finds that the events that took place at the hearing evidence a lack of review or meaningful consideration by the Board of the documents submitted by Appellants.

Section 162.09, Florida Statutes, states that "[i]n determining the amount of the fine, if any, the enforcement board shall consider the following factors: 1. the gravity of the violation; 2. any actions taken by the violator to correct the violation; and 3. any previous violations committed by the violator." Based upon a plain reading of the statute, an enforcement board is not required to reconsider these factors when deciding whether or not to grant a reduction because as previously stated, a penalty reduction is discretionary. The amount of the penalty at issue is the result of the Board's issuance of a lien due to Appellants' failure to bring the property into timely compliance as required by its prior orders, neither of which are the subject of this appeal.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the Board's Order Denying Request for Reconsideration of the Penalty is **REVERSED** and the case is **REMANDED** to the Board for further proceedings consistent with this opinion**.**

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this __1___ day of ____December_____, 2008.

_/S/_____
REGINALD WHITEHEAD
Circuit Court Judge

_/S/_____
LISA T. MUNYON
Circuit Court Judge

__/S/_____
ROGER J. MCDONALD
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 **William G. Osborne, Esquire**, 538 E. Washington Street, Orlando, Florida 32801 and **Victoria Cecil, Esquire**, Assistant City Attorney, Orlando City Hall, 400 S. Orange Avenue, Orlando, Florida 32801 on this ___1___ day of ___December_____, 2008.

_____/S/_____
Judicial Assistant