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

RUSSELL L. HALL,

CASE NO.: CVA1 07-07
LOWER COURT CASE NO.:
CEB 2007-614622

Appellant,

v.

ORANGE COUNTY, FLORIDA**,**

Appellee.
_____/

Appeal from the Code Enforcement Board
in and for Orange County, Florida.

Charlie S. Martin, Esq.;
for Appellant.

George L. Dorsett, Esq.;
for Appellee.

Before ROCHE, KOMANSKI, and LATIMORE

FINAL ORDER AFFIRMING
ORANGE COUNTY CODE ENFORCEMENT BOARD

Petitioner Russell L. Hall timely filed his Notice of Appeal of the Orange County Code Enforcement Board's (CEB) January 17, 2007, Order. This Court has jurisdiction pursuant to section 162.11, Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(1)(C).

By virtue of a warranty deed, Russell Hall is the owner of certain property located in the City of Orlando, Orange County, Florida (subject property). On September 26, 2006, Code Enforcement Officer Michael Hauserman performed an initial inspection of the subject property. On September 27, 2006, Orange County, through its Code Enforcement Division (the County),

provided a notice of violation which alleged, among other things, that Russell Hall is violating sections 38-3, 38-74, 38-77 and 38-79(42) of the Orange County Code by storing a dual rear wheeled vehicle in a residential area. Follow up inspections were performed on October 17, 2006, November 18, 2006, and January 8, 2006.

On October 20, 2006, the County's agents posted the Statement of Violation and Notice of Hearing at the Orange County Courthouse. On January 17, 2007, a hearing was held before the CEB where Russell Hall was present and represented by counsel. The evidence submitted consisted of photographs of the property and vehicle in question, a permit for a recreational vehicle, sections of the Orange County Code, and various supporting documents related to the subject property. At the conclusion of the hearing, the CEB found Russell Hall to be in violation of sections 38-3, 38-74, 38-77 and 38-79(42) of the Orange County Code by storing a dual rear wheeled vehicle in a residential area. The corrective action required was the removal of the dual rear wheeled vehicle from the property.

The CEB issued its "Findings of Fact, Conclusions of Law and Order" (Order) on January 17, 2007. The order provided that, "[f]ailure to comply will result in a fine of $250.00 for each day the violation continues past the above-stated compliance date." The compliance date was on or before February 16, 2007. In addition, "Respondent is further ordered to contact the Code Enforcement Officer bringing this violation to arrange for an inspection of the property to verify compliance with this Order." On February 14, 2007, Russell Hall filed his Notice of Appeal. On February 22, 2007, the code inspector swore out an Affidavit of Non-compliance that a re-inspection was performed on February 19, 2007, and that re-inspection revealed that the corrective action ordered by the CEB had not been taken.

On February 28, 2007, the Order Imposing Administrative Fine/Lien was executed. On May 22, 2007, a Notice of Lien was sent to Russell Hall. Finally on May 10, 2007, Russell Hall filed his Initial Brief. He brings this appeal seeking a determination by this court as to whether the code enforcement scheme violated his due process rights, whether the correct law was applied, and whether the fines imposed are constitutionally valid.

A circuit court review of an administrative agency's decision is governed by a three part standard of review: (1) whether procedural due process is accorded; (2) whether the essential requirements of law have been observed; and (3) whether the administrative findings and judgments are supported by competent substantial evidence. *Haines City Comm. Development v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995); *Kelly v. Dep't of Health & Rehabilitative Serv.*, 617 So. 2d 756 (Fla. 1st DCA 1993); §120.68(7)(b), Fla. Stat. (2000).

The Appellant's appeal raises the issue of whether: 1) the CEB failed to observe the essential requirements of law by not following the correct law; 2) sections 162.07 and 162.09, Florida Statutes, are facially unconstitutional and unconstitutional as applied to the Appellant by imposing the fine and lien without notice or hearing; and 3) the fine imposed is disproportionate to the offense alleged.

The Appellant first argues that the CEB used the incorrect law to determine that he was in violation of the Orange County Code. The thrust of his argument is that "the Code provides an exception for dual rear wheel recreational vehicles when a property owner obtains a permit from Orange County." The first section the Appellant was found to have violated provides that:

> (a) Land use and/or building permits. No building or structure shall be erected and no existing building shall be moved, altered, added to or enlarged, nor shall any land, building, structure or premises be used or designed to be used for any purpose or in any manner other than a use designated in this chapter, or amendments thereto, as permitted in the district in which such land, building, structure or premises is located, without obtaining the necessary land use and/or building permits.

Orange County, Fla., Code § 38-3(a) (2007). The Appellant argues that there is no evidence to demonstrate that his land is being used in any manner other than a use designated in this chapter. Since he has obtained a permit for a recreational vehicle to be parked on his property, the Appellant argues that he is in compliance with section 38-3. The permit in question was presented to the CEB at the hearing on January 17, 2007. It indicates that the permit holder is authorized to park a recreational vehicle on the subject property. From an inspection of the permit, it appears that the appellant applied for and was issued his permit on the same day as the hearing, January 17, 2007. The Appellant's attorney admits as much in the transcript of the hearing. There is no evidence in the record to demonstrate that this particular dual rear wheeled vehicle qualifies as a recreational vehicle and therefore the application and issuance of the permit does not alter the decision of this Court.

"The general rule is, that as in court proceedings, the burden of proof, apart from statute, is on the party asserting the affirmative of an issue before an administrative tribunal." *Balino v. Dep't of Health & Rehabilitative Serv.*, 348 So. 2d 349 (Fla. 1st DCA 1977) (citations omitted). Officer Hauserman presented his testimony and the photographs he had taken at each inspection date to support his claim that the subject property was in fact in violation of the Code. From the transcript of the hearing, it is apparent that the CEB considered this evidence and did not believe that the dual rear wheeled vehicle was a recreational vehicle. The burden then shifted onto the Appellant to demonstrate that the vehicle in question was, in fact, a recreational vehicle. The Appellant's attorney did not offer any evidence to show that the vehicle was a recreational vehicle. As such, it appears that the CEB received no evidence to refute the findings of Officer Hauserman and made a proper decision from the evidence at hand.

Next, the Appellant contends that sections 62.07 and 162.09, Florida Statutes, are facially unconstitutional and unconstitutional as applied to his situation. In his initial brief, Appellant identifies possible areas where he was denied due process. Each area essentially relates to the two orders that have been issued in this case: the "Findings of Fact, Conclusions of Law and Order" and the "Order Imposing Administrative Fine/Lien." The lien order that the Appellant argues about is not properly before this Court. Pursuant to Florida Rule of Appellate Procedure 9.100(h) the Lien Order is outside the Court's scope of review. The rule states: "The court may review any ruling or matter occurring before filing of the notice. Multiple final orders may be reviewed by a single notice, if the notice is timely filed as to each such order." Fla. R. App. P. 9.110(h). The Notice of Appeal was filed on February 14, 2007. According to the rule, only orders entered prior to this date may be reviewed. The Lien Order was entered February 28, 2007, six days after the Notice of Appeal was filed. Consequently, this Court must not review any arguments or evidence that pertains to the Lien Order.

The order that is properly before this Court was not thoroughly addressed by the Appellant. With regards to the "Findings of Fact, Conclusions of Law and Order," this Court concludes that the Appellant was not denied his constitutionally granted due process rights. As previously noted, the Appellant was given notice and an opportunity to be heard at the hearing held on January 17, 2007. The notice was mailed to his home address and posted publicly at the Orange County Courthouse. The reasons the Appellant did not present any testimony on his behalf are not before this Court, but neither are they necessary for a determination that the Appellant was provided with due process. The decision to not take advantage of these due process rights is not congruent with the notion that due process was not afforded. "Due process requires only that a person be afforded the opportunity to be heard. It does not require more than

one opportunity where a party declines to take advantage of that opportunity, absent extraordinary circumstances not present in this case." *Monts v. Washington*, 764 So.2d 831, 833 (Fla. 5th DCA 2000).

The essence of the Appellant's due process argument is that once an Affidavit of Non-Compliance is filed by the Code Enforcement Officer (after the CEB's time period for correction has expired), the lack of a hearing on this non-compliance violates constitutional guarantees of due process. The Appellant expresses amazement that the statute actually provides that a hearing is not necessary for an order to issue following an Affidavit of Non-Compliance. Section 162.09(1), Florida Statutes, provides: "If a finding of violation or a repeat violation has been made as provided in this part, a hearing shall not be necessary for issuance of the order imposing the fine." Furthermore, under this section, an appellant may come to the CEB and request a hearing on the issue of his compliance. The Appellant had the burden of contacting the code officer and requesting an inspection for purposes of showing compliance, as detailed in the January 17, 2007, Order. The record before this Court does not show any evidence of a request for a compliance inspection made by the Appellant.

Finally, the Appellant argues that the fine is not proportionate to the offense and is therefore excessive, violating the Federal and state constitutions. The Supreme Court of Florida has addressed this issue in *Florida Real Estate Commission v. Webb*, 367 So. 2d 201 (Fla. 1978). There the Court was presented with a real estate license suspension imposed by the Florida Real Estate Commission. *Id.* The suspended party sought to have the penalty reduced to a written reprimand. *Id.* The Court held "so long as the penalty imposed is within the permissible range of statutory law, the appellate court has no authority to review the penalty unless agency findings are in part reversed." *Id.* at 203. Here, the amount fined, $250.00 per day, is within the range.

See § 162.09(2)(a), Fla. Stat. (2007). Under chapter 162, Florida Statutes, and section 11, Orange County Code, plaintiffs are possessed with ample opportunity to challenge the imposition, validity, and amount of the fine assessed. *See Apopka Wheel and Tire v. Orange County Code Enforcement*, 10 Fla. L. Weekly 762a (Fla. 9th Cir. Ct. May 27, 2003).

The Appellant had numerous options to seek a remedy of the CEB's ruling, including requesting from the CEB that the fine be reduced. *See* § 162.09(c), Fla. Stat. (2007). The Appellant chose not to take advantage this remedy but instead filed "Appellant's Motion to Stay Fine Pending Appeal" on May 29, 2007. The Appellant stated that the lower tribunal orally denied his motion to stay the fine pending appeal at a hearing on May 16, 2007. Despite an order from this Court requesting that the Appellant file a written transcript of the hearing on this motion, no transcript was filed. As such, there is no evidence in the appellate record upon which this Court can base an opinion as to the denial of the motion before the CEB.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that the Code Enforcement Board's "Findings of Fact, Conclusions of Law, and Order," from January 17, 2007, is **AFFIRMED**.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this _1__day of _____October_____, 2009.

_____/s/_____
RENEE A. ROCHE
Circuit Judge

_____/s/_____
WALTER KOMANSKI
Circuit Judge

_____/s/_____
ALICIA L. LATIMORE
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., Post Office Drawer 950, Apopka, FL 32704-0950; and,

George L. Dorsett, Esq., Orange County Attorney's Office, Post Office Box 1393, Orlando, FL 32802-1393.

_____/s/_____
Judicial Assistant