

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR LEE COUNTY, FLORIDA
APPELLATE DIVISION

Case No.: 22-CA-004411
Code Case No.: COD2009-12416

CHANDLER M. LUCAS and
SHIRLEY K. LUCAS,

Appellants,

v.

THE CITY OF FORT MYERS,

Appellee.

_____ /

RESPONSE TO THE INITIAL BRIEF OF APPELLANTS

Respectfully Submitted,
Counsel for Respondent, City of Fort Myers

By: /s/ G. Travis Cary
Grant W. Alley, City Attorney
Florida Bar No. 0967386
G. Travis Cary, Assistant City Attorney
Florida Bar No. 0104933
City of Fort Myers
Post Office Drawer 2217
Fort Myers, Florida 33902
Tel: (239) 321-7640
Fax (239) 344-0050
Email: galley@cityftmyers.com
Email: tcary@cityftmyers.com
Email: swinn@cityftmyers.com
Email: LegalService@cityftmyers.com

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RESPONSE TO APPELLANTS' BRIEF

This is an appeal brought by Appellant, Chandler M. Lucas and Shirley K. Lucas (hereinafter "Appellant") seeking review of the decision of the Appellee's Code Enforcement Board of the City of Fort Myers (hereinafter "Board") finding the Appellant has not complied with prior orders of the Board concerning Appellant's property. As this was a "noncompliance hearing" the finding made by the Board is that Appellant is not in compliance with prior orders concerning the correction of numerous code violations and therefore the City may abate by any lawful means.

Appellant has submitted an Appendix with their Appeal. References to the Appellant's Appendix will be designated with "A.App. ____" with the pertinent exhibit designation. References to the Appellant's Brief will be designated by "App.Brief ____." with the relevant page number. There are five transcripts and will be referenced by "Tr. [date of hearing] P;____:[page] _____ [line]."

I. JURISDICTION

Appellee concedes this Court has jurisdiction to entertain the Appeal pursuant to Fla. Stat. §162.11 and Fla. R. App. P. 9.110(c).

II. STATEMENT OF THE CASE

Appellant is the owner of a residential home located within the City of Ft. Myers and commonly known as 3771 Edgewood Avenue, Fort Myers, Florida. *App.Brief p.5*. On December 14, 2009, the Appellee initiated the instant code enforcement claim against the previous owner of the residence. *App.Brief. p.1*. On March 11, 2010, a hearing was held before the Board at which time the Board found the property in violation of City of Fort Myers Code of Ordinances Sections 54-156 through 54-157. *Tr. March 11, 2010, p.6:5-9; Exhibit 1 to Appellee's Brief*. The Board further ordered certain actions must be taken in order to correct the violations or the owner would be subject to a daily fine. *Tr. March 11, 2010, p.6:10-17*.

More than four years had passed with no compliance and on April 10, 2014 this matter was again brought before the Board. *Tr. April 10, 2014*. This was brought before the Board for a conditional release of lien to allow for purchase of the property. *Tr. April 10, 2014; p.4:6-9*. This was brought at the request of the current Appellant, who was trying to negotiate a sale of the property and a representative of Suntrust Bank. *Tr. April 10, 2014; p.5:9-22*. The Board voted to allow a conditional release of the lien, so long as an amount of \$2,500.00 was paid and the violations of the home were brought into compliance by June 2015. *Tr. April 10, 2014; p.15-16:6-3*.

On September 10, 2015, this matter was again brought before the Board at the request of Appellant, who was now the owner of the property. *Tr. September*

10, 2015; p.5:8-16. The Appellant was seeking more time from the Board to correct the violations, as the home was still not in compliance with the previous order. *Tr. April 10, 2014; p.5-6:17-11.* The Board granted the request of the Appellant and the property to come into compliance by July 14, 2016. *Tr. April 10, 2014; p.7-8:22-1.*

By February of 2021, after approximately 11 years, the property had still not come into compliance with Board's original order. *Tr. February 11, 2021.* On February 11, 2021, this matter was brought back before the Board at the request of the Appellant seeking a revised abatement order. *Tr. February 11, 2021; p.5:18-21.* At this time, Appellant and Appellee were seeking a revised abatement order to again give Appellant more time to complete the needed repairs. *Tr. February 11, 2021; p.7-8:2-15.* The Board then approved the revised abatement order as laid out by the Appellee's code enforcement officer. *Tr. February 11, 2021; p.10-11:16-4; Tr. February 11, 2021; p. 7:8; 2-11.* Appellant agreed with all the conditions placed upon her and had no questions for the Board as to what was needed for compliance. *Tr. February 11, 2021; p.8:6-15; p.10:20-22.*

Finally, on September 8, 2022, this matter was once again brought before the Board for a noncompliance hearing, as the Appellant had not corrected the violations on the property and had otherwise failed to abide by previous orders of the Board for compliance. *Tr. September 8, 2022.* It was at this hearing Appellant gave a lengthy history of the property, the efforts made to bring the property into compliance, and again seeking more time. *Tr. September 8, 2022; p. 6-9.* The Board moved to find the home in noncompliance and further gave the Appellant

and the Appellee could abate the violations by any lawful means. *Tr. September 8, 2022; p. 30-31; 22-14*. Appellant then filed the instant appeal.

III. STANDARD OF REVIEW

The Court's review in this appeal is limited to reviewing three specific narrow inquiries: 1) Was procedural due process afforded; 2) Does the decision depart from the essential requirements of the law; 3) Is the decision supported by competent, substantial evidence. *Powell v. City of Sarasota*, 953 So.2d 5, 6 (Fla. 2d DCA 2006); *See also Metropolitan Dade County v. Mingo*, 339 So.2d 302, 304 (Fla. 3d DCA 1976)(*Circuit Court cannot take new evidence, determine weight of evidence or credibility of witnesses, substitute its judgment for that of the municipal agency, or reweigh conflicting evidence*). As such, the review is not de novo and the Court is limited to reviewing the record for the sole purpose of determining whether or not the three inquiries have been satisfied. *Id.*

IV. ARGUMENT

To begin, the only matter for this Court to review is the hearing held on September 8, 2022. All other prior hearings, though relevant to the history of this case, cannot be reviewed as they were not timely appealed. The property was properly found to be in violation, the Appellant knew of the violations of which must be rectified and otherwise complied with, and the instant matter before this Court for review is whether or not the Board properly found the Appellant to be in noncompliance of its prior orders. This is demonstrated by the fact that Appellant requested to have additional time, listed the steps she had already taken to come into compliance, and further stated multiple times that she understood what needed to be completed. *Tr. September 8, 2022; p. 30-31; 22-14*. Lastly, this Court may only take into account those matters or records properly brought before the Board and placed into the official record. *Fla. Stat. § 162.11*. Many of the documents placed into the Appellant's Appendix were not part of the record created before the enforcement board. As such, this Court should disregard any email chains, letters, ex-parte motions, engineering reports, or other matters not properly placed before the Board as reflected in the transcript from the September 8, 2022 hearing.

A. The City afforded procedural due process prior to the quasi-judicial decision being made.

Procedural due process in the quasi-judicial context is much less stringent than in the judicial context. *Carillon Cmty. Residential v. Seminole Cnty.*, 45 So.

3d 7, 9 (Fla. 5th DCA 2010). The proceeding need only be “essentially fair.” *Carillon*, 45 So. 3d at 9. Furthermore, procedural due process in the quasi-judicial proceeding must allow a party to present evidence, cross examine witnesses, and be informed of all facts on which the agency acts. *Id.* at 10. Essentially, this means affording fair notice of the quasi-judicial hearing and a meaningful opportunity to be heard. *Id.* “Meaningful opportunity” encompasses the ability to appear at the hearing through counsel, present evidence, and cross-examine witnesses before an impartial adjudicator. *Id.*; *Miami- Dade Cnty. v. Reyes*, 772 So. 2d 24, 29 (Fla. 3d DCA 2000); *Cherry Comms., Inc. v. Deason*, 652 So. 2d 803, 804 (Fla. 1995).

In the matter at bar, Appellant clearly had notice of the hearing as she appeared for such and was able to speak. *Tr. September 8, 2022*. Further, the testimony of the Appellant clearly demonstrates she knew of the violations and the actions that needed to be taken to correct such violations. *Tr. September 8, 2022*; *p. 6-9*. The original order of noncompliance clearly states the violations of which the property needed to come into compliance with. *A. App.16*. Appellant never once questioned throughout the proceedings what needed to be corrected, how she could come into compliance, or otherwise was confused in any manner about what needed to be completed for the home to be in compliance. *Tr. September 8, 2022*; *p. 6-9*. Rather, Appellant spent the majority of her time seeking more time, though approximately twelve years has passed with no compliance being obtained.

As to Appellant's argument, the ex-parte motion was denied and/or not considered, this matter was never brought before the Board, as reflected in the transcript from September 8, 2022. Appellant's statements in the brief are not supported by the record on appeal before this Court. Rather, Appellant is providing nothing more than self-serving hearsay statements to somehow argue that her motion was denied. This is simply not true. The Appellant never once mentioned to the Board her request for a continuance, nor did the Board consider such a motion based upon Appellant's failure to request such. Appellant has appeared before the Board four times, prior to the September 2022 and could have at any point hired an attorney or requested that she be given more time. In fact, for twelve years that is exactly what the Board did, allowed Appellant more time to correct the violations. Appellant's failure to bring the motion for continuance before the Board, or otherwise notify the board of a request to obtain counsel if fatal to her claim.

As to Appellant's argument that she was prevented from providing witness testimony, this again is refuted by the record before the Board on September 8, 2022. Appellant never once requested to present a witness, nor informed the Board of her desire to have any witness testify on her behalf. Again, Appellant provides nothing more than self-serving hearsay statements that are uncorroborated by any written record, much less any record before the Board. Appellant could have at any point requested to have witnesses speak on her behalf and could have even brought

any witness she wanted to the hearing. However, Appellant decided to appear at the hearing without any such witnesses.

Appellant did in fact appear at the hearing on September 8, 2022. Appellant had a chance to present evidence, cross examine witnesses, be informed of all facts of which the City acted on, and otherwise was not prevented any meaningful opportunity to be heard. This is evidenced by her lengthy statements provided to the Board on what actions had been taken in an attempt to correct the violations of which the property was cited. Appellant was never once prevented from questioning or having her side of the argument presented. Accordingly, it has been shown, and Appellant is not disputing it had notice of the hearing and the opportunity to be heard.

Appellant was given the opportunity to present evidence, did present evidence, cross examine and/or ask questions of any witnesses, and present the Appellant's arguments to the Board prior to any decision being rendered. Lastly, Appellant's testimony provides no inference or evidence that Appellant was somehow confused of the violations. Rather, Appellant made lengthy arguments of all attempts to comply. Even if the Appellant does not agree with the violations cited, the time to appeal that matter has passed as the property was found in violation in 2009. Appellant cannot now raise arguments as to the validity of the violations already decided and found in violation of. Rather, the hearing of

September 8, 2022 was limited solely to the issue of whether or not the property has come into compliance.

Lastly, Appellant asserts that her lack of ability to comment on the complaints from neighbors somehow violated her rights in the hearing. This is simply not true. The Board did not base its decision on any evidence regarding the neighbors or complaints that had been made. Rather, the Board found the house to be in noncompliance based upon the testimony provided by Appellee's employees. The Board reviewed the lengthy history of the matter, allowed Appellant to comment on her efforts, and based upon the evidence found the home to be in noncompliance.

Therefore, all elements of providing procedural due process have been met. Petitioner made no objections prior to, or during the hearing concerning notice, ability to call witnesses, present evidence, or otherwise meaningfully participate in the hearing. The City asserts that it has complied with all requirements for providing Petitioner the appropriate due process.

B. The City's decision does not depart from the essential requirements of the law.

Departure from the essential requirements of the law requires a finding that the decision rendered was "an inherent illegality or irregularity, an abuse of judicial power, an act of judicial tyranny perpetrated with disregard of procedural requirements, resulting in a gross miscarriage of justice." *Haines City Cmty. Dev.*

v. Heggs, 658 So. 2d 523, 525 (Fla. 1995). A finding the City departed from the essential requirements of law requires more than the decision maker making a legal error or interpreting the law different than how this Court may interpret it. *Combs v. State*, 436 So.2d 93, 95 (Fla. 1983); *Ivey v. Allstate Ins. Co.*, 774 So.2d 679, 683 (Fla. 2000). Departure from the essential requirements of law means either applying the wrong law, refusing to apply binding law, or gross incompetence by applying law that is not relevant to the dispute. *Haines City*, 658 So.2d 530; *Progressive Exp. Ins. Co. v. Devitis*, 924 So.2d 878, 880 (Fla. 4th DCA 2006).

During the hearing the Board was to determine if the home had been brought into compliance pursuant to previous orders issued by the Board. Testimony was heard from members of the Appellee's staff and Appellant as to whether or not the home was in compliance. Appellant never once contended the home was in compliance, rather Appellant's focus was on what had been completed and the need for more time to comply despite having roughly twelve years to comply. The dispute between Appellant and the Board was not IF the home was in compliance, but rather what more was needed to bring the home into compliance. Appellant at no time questioned the violations or legality thereof, but even if that had been presented, again the time for appeal of that has long since passed, as the decision on being in violation of City Ordinances was rendered in 2010. The Board is under no legal obligation, and Appellant can provide none that would require it to grant the request of Appellant for more time.

Appellant contends the Board did not depart from the essential requirements of law as the wrong law was not applied, the Board did not refuse to follow binding law, and there was no gross incompetence by applying law that is not relevant to the dispute. *See Haines City*, 658 So.2d 530; *Progressive Exp. Ins. Co. v. Devitis*, 924 So.2d 878, 880 (Fla. 4th DCA 2006). Furthermore, even if this court finds the correct law was applied, but was otherwise applied incorrectly, this still does not rise to the level of departure from the essential requirements of law. *Progressive Exp. Ins. Co.*, 924 So.2d at 880; *See also Department of Highway Safety and Motor Vehicles v. Robinson*, 93 So.3d 1090, 1091 (Fla. 2d DCA 2012). In summation, the Board's actions did not depart from the essential requirements of law. The Board heard all relevant testimony, concluded the home was not compliance (which again the Appellant did not dispute), and rendered their decision based on noncompliance.

C. The decision is supported by competent, substantial evidence.

This Court's inquiry is limited to determining whether competent, substantial evidence exists in the record to support the city's decision. *Dusseau v. Metro Dade Cnty Bd. of Cnty Comm'rs*, 794 So. 2d 1270, 1275–76 (Fla. 2001). More succinctly, is the decision supported by any evidence in the record. *Lee Cnty. v. Sunbelt Equities, II, Ltd. P'ship*, 619 So. 2d at 1003. If it is, then the circuit court must deny the appeal. *Dusseau*, 794 So. 2d at 1275–76.

This court cannot take new evidence, reweigh the evidence in the record, draw different inferences from the record evidence, re-evaluate witnesses' credibility, or otherwise substitute its factual determination for the City's. *St. Johns Cnty. v. Smith*, 766 So. 2d 1097, 1099 (Fla. 5th DCA 2000) at 1100; *Metro Dade Cnty. v. Mingo*, 339 So. 2d 302, 304 (Fla. 3d DCA 1976).

Again, Appellant's main contention was that more time was needed to correct the violations. Appellant made no arguments, nor presented any evidence that would otherwise show the home was in compliance with the violations that were cited. Testimony as to the nature of the violations was presented by Appellee's code enforcement staff. Appellant stated with particularity the phases and steps and that would need to be taken to bring the home into compliance based upon conversations that were previously had. Appellant's purpose in this endeavor was to obtain more time. The finding of noncompliance by the Board was clearly supported by competent and substantial evidence, of which the Appellant provided no evidence to refute.

"The term 'competent substantial evidence' does not relate to the quality, character, convincing power, probative value, or weight of the evidence but refers to the existence of some evidence (quantity) as to each essential element..." *Scholastic Book Fairs, Inc. Great Am. Div. v. Unemployment Appeals Comm'n*, 671 So.2d 287, 289 n.3 (Fla. 5th DCA 1996). The City asserts the decision reached

by the Board was based on competent substantial evidence provided by both Appellant and Appellee.

V. CONCLUSION

In view of the record in this case and the applicable legal authority, the Appellant has failed to establish the quasi-judicial proceeding departed from the essential requirements of law.

Appellant has not met the exacting standard of a violation of a “clearly established principle of law resulting in a miscarriage of justice.” *Custer Medical Center v. United Automobile Ins. Co.*, 62 So.2d at 1092. The Appellant has not offered any compelling authority for this Court to disturb the prior ruling. The appeal should be denied and the decision of the Board should be left undisturbed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, pursuant to Fla. R. Jud. Admin. 2.516(b)(1), I electronically filed this document with the Clerk of the Court using the Florida Courts E-Filing Portal which sent a Notice of Electronic Filing and an electronic copy of this document to **Colleen J. MacAlister, Esq.** at colleen@cjmaclaw.com on this 8th day of February, 2023.

Respectfully Submitted,
Counsel for Respondent, City of Fort Myers

By: /s/ G. Travis Cary
Grant W. Alley, City Attorney
Florida Bar No. 0967386
G. Travis Cary, Assistant City Attorney
Florida Bar No. 0104933
City of Fort Myers
Post Office Drawer 2217
Fort Myers, Florida 33902
Tel: (239) 321-7640
Fax (239) 344-0050
Email: galley@cityftmyers.com
Email: tcary@cityftmyers.com
Email: swinn@cityftmyers.com
Email: LegalService@cityftmyers.com