NOT FINAL UNTIL TIME EXPIRES FOR REHEARING, AND IF FILED, DETERMINED

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
APPELLATE DIVISION

SARNAGO & SONS PROPERTIES, INC.,
Appellant,

v.

Ref. No.: 16-0048AP-88B
UCN: 522016AP000048XXXXCI

PINELLAS COUNTY,
Appellee.
_____/

Day and Ramsberger, JJ.
Williams, J., Dissenting

ORDER AND OPINION

Appellant challenges the order of the Pinellas County Code Enforcement Special Magistrate ("Special Magistrate") finding it in violation of a noise ordinance and imposing an administrative fine. For the reasons set forth below, the order is affirmed in part, reversed in part, and remanded.

Facts and Procedural History

Appellant owns industrial-zoned property in the unincorporated area of Pinellas County where it operates both an excavating/paving business and a recycling business. Appellant has only operated a business at the location since 1989, but the property has always been industrial. Three residential homes were constructed in the early 1970's that abut Appellant's property on one side.

During the time period in question, Appellant was constructing a new building for recycling. Under Pinellas County's Code of Ordinances ("Code"), "[t]he maximum permitted noise level emanating from [an] industrially zoned district . . . between 11:00 p.m. and 7:00 a.m. . . . [is] 55 dBA." § 58-450(a), Code. After noise complaints from one of the abutting residential homes, a Code Enforcement Officer went to that neighboring property and took a noise reading of 65.6 dBA at a time before 7 a.m. On March 11, 2016, Appellant was allegedly sent a notice of violation, via regular mail, asking that noise and construction activity prior to 7 a.m. cease, and giving Appellant until March 26 to comply. The Code Enforcement Officer visited the property on March 30, and at that time no violation was noted. On April 29, the Pinellas County

Sheriff's Office responded to a noise violation call and generated a report ("PCSO report") that stated that one of Appellant's owners was advised to cease construction activities prior to 7 a.m. After learning of this, the Code Enforcement Officer inspected again on June 22, and at that time determined that the violation was still occurring. An "Affidavit of Violation and Request for Hearing" was then completed by the Code Enforcement Officer and a notice of hearing was sent both via certified mail and hand delivered to Appellant. On August 8, 2016, a hearing was held before the Special Magistrate, and on August 10, the Special Magistrate entered an order finding Appellant in violation of Code section 58-450(a) and assessing a fine of $1,000, plus costs. That order is the subject of the instant appeal.

Standard of Review

When reviewing local government administrative action, the circuit court asks three questions: "whether due process was afforded, whether the administrative body applied the correct law, and whether its findings are supported by competent substantial evidence." *Lee Cnty. v. Sunbelt Equities, II, Ltd. P'ship*, 619 So. 2d 996, 1003 (Fla. 2d DCA 1993).

Discussion

Notice

Appellant contends that the Special Magistrate violated the essential requirements of law by finding that Appellee had complied with Florida Statutes section 162.06(2), which states:

> [I]f a violation of the codes is found, the code inspector **shall notify the violator and give him or her a reasonable time to correct the violation**. Should the violation continue beyond the time specified for correction, the code inspector shall notify an enforcement board and request a hearing. The code enforcement board, through its clerical staff, shall schedule a hearing, and written **notice** of such hearing shall be hand delivered or mailed **as provided in s. 162.12** to said violator.

Section 162.12 states:

> (1) **All notices required by this part** must be provided to the alleged violator by:
> (a) Certified mail . . . ;
> (b) Hand delivery . . . ;
> (c) Leaving the notice at the violator's usual place of residence . . . ; or
> (d) In the case of commercial premises, leaving the notice with the manager or other person in charge.

(Emphasis added). Appellant contends that because section 162.06(2) states the code inspector *shall* notify, notice must be delivered by one of the means listed in section 162.12. Appellant

cites to *City of Tampa v. Brown*, which declared that "[i]f a notice is 'required,' section 162.12 governs its delivery." 711 So. 2d 1188, 1188-89 (Fla. 2d DCA 1998) (construing section 162.09 and holding that because the statute said the "order *may* include a deadline for compliance and notice," the notice was not required, so the city did not have to follow the procedures set forth in 162.12) (emphasis in original). Appellee counters that the delivery methods required by section 162.12 are not required when the Code Enforcement Officer first finds a violation, and that the third sentence in section 162.06(2) clearly indicates formal notice is only required when the Code Enforcement Officer requests a hearing based on a continuing violation.

The plain language of section 162.06(2) states "the code inspector shall notify." To notify is "[t]o inform (a person or group) in writing or by any method that is understood." *Black's Law Dictionary* (10th ed. 2014). Notice, on the other hand, is the "[l]egal notification required by law or agreement." *Id.* "It is an elementary principle of statutory construction that significance and effect must be given to every word, phrase, sentence, and part of the statute if possible, and words in a statute should not be construed as mere surplusage." *Hechtman v. Nations Title Ins. of New York*, 840 So. 2d 993, 996 (Fla. 2003). Accordingly, reading the beginning of section 162.06(2) to require the formal notice of section 162.12 would render the final portion of section 162.06(2) mere surplusage. We conclude that Appellee was not required to use one of the methods listed in section 162.12 to notify Appellant of the violation.

Next, Appellant contends there is no competent substantial evidence to support a finding that Appellant received *any* notification of a violation prior to the notice of hearing. In determining if competent substantial evidence supports the Special Magistrate's finding that Appellant was notified, this Court "is not permitted to go farther and reweigh that evidence . . . or substitute its judgment about what should be done." *Lee Cnty.*, 619 So. 2d at 1003. "It involves a purely legal question: whether the record contains the necessary quantum of evidence." *Id.* Although this Court must only look for evidence that supports the decision below, that evidence must be substantial. *See Dep't of Highway Safety & Motor Vehicles v. Trimble*, 821 So. 2d 1084, 1087 (Fla. 1st DCA 2002). Substantial evidence must "be such relevant evidence as a reasonable mind would accept as adequate to support a conclusion." *Id.* (quoting *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957)). Substantial evidence is not "evidence which merely creates a suspicion or which gives equal support to inconsistent inferences." *Id.* (quoting *Fla. Rate Conference v. Fla. R.R. & Pub. Utils. Comm'n*, 108 So. 2d 601, 607 (Fla.1959)).

Here, the Special Magistrate was presented with the following evidence that Appellant was notified: a copy of the March 11 Notice of Violation, an acknowledged but unsworn "Affidavit of Violation and Request for Hearing," testimony from a Code Enforcement Officer, and testimony from one of Appellant's owners. The Notice of Violation does not indicate that it was delivered, and the "Affidavit of Violation and Request for Hearing" form merely states in conclusory fashion that Appellant was "notified of the below listed violation(s) and [was] given a reasonable time to correct the violation(s)." The following is an excerpt of Appellant's counsel questioning the Code Enforcement Officer[1]:

> Q: How was notice provided to [Appellant]?
> A: A notice of violation was mailed to the address of record.
> Q: Was it mailed certified?
> A: I believe not.
> Q: Do you have any proof of mailing?
> A: Other than the fact that a telephone call took place with [one of the owners], no. I don't have personal knowledge. Clerical does our mailing.
> Q: And so you don't know what address they used or —
> A: I know what address they used: Post Office Box 303, Dunedin, Florida 34697-0303. The state statute requires us to use the address from the property appraiser or tax collector, which has been provided by the property owner.
> Q: Do you have any proof that it was mailed?
> A: No, I don't. I don't have personal knowledge.

The following is an excerpt from the Code Enforcement Officer's cross-examination of one of Appellant's owners:

> Q: When you received the notice of violation in March, did you call Mrs. Locklear prior to going on vacation?
> A: I didn't go on vacation. My father had open heart surgery.
> Q: Okay. Well, prior to leaving —
> A: I never received that violation, and I told [the investigating Officer], "I've never received it. I would have taken care of it."
> Q: So you didn't call her in March, stating that you had received the notice of violation?
> A: [The investigating Officer] stated that — she said I called her, but I was in Miami in a hospital room, so I find it doubtful that I called, but I have no record of ever receiving any violation.

[1] Apparently, Appellee has one Code Enforcement Officer who testifies at the hearings, while the others do the field work. Therefore, the individual who allegedly notified Appellant of the violation and signed the "Affidavit of Violation and Request for Hearing" was not present at the hearing.

The only other mention of the first notice is in the Code Enforcement Officer's closing, in which she stated that "[t]he warning notice was mailed to the address of record for the property owner at the time of the violation being observed by the officer."

Appellant disputes the admission of the unsworn "Affidavit" and the hearsay testimony provided by the Code Enforcement Officer who had no personal knowledge of the events. However, Florida Statutes section 162.07, which governs the conduct at code enforcement board hearings, establishes that the "[f]ormal rules of evidence shall not apply, but fundamental due process shall be observed and shall govern the proceedings." This is restated in the Code, which also provides that evidence "may be received in written form" and can be "of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs." § 2-623(d), Code. Furthermore, the notice of continuing violation and request for hearing is not required to be an affidavit. §162.06, Fla. Stat. ("Should the violation continue beyond the time specified for correction, the code inspector shall notify an enforcement board and request a hearing.") Therefore, the Special Magistrate was allowed to rely on the unsworn "Affidavit" and the hearsay testimony of the Code Enforcement Officer.

Finally, Appellant contends that the Special Magistrate improperly relied on the PCSO report to establish notice. We agree that the Special Magistrate cannot rely on the Sheriff's Office to provide notice to a violator, but we cannot discern from the transcript whether the Special Magistrate actually considered the PCSO report as notification. The only proper evidence of notification was an unsworn statement indicating that Appellant was notified, but not specifying the means, and testimony of a Code Enforcement Officer who knew only that the City's clerical department typically mails the notifications to the address of record, but had no personal knowledge of the notification in this case. In any event, competent substantial evidence was not presented below to support the Special Magistrate's finding that Appellant was notified of the violation as required under Florida Statutes section 162.06(2).

Zoning Exception

Appellant next contends that the Special Magistrate departed from the essential requirements of law by not finding Appellant was entitled to a zoning exception that would allow higher noise levels to emanate from its property. Code section 58-450(c)(2) states that an exception to the noise levels:

> shall be permitted in instances where an industry or commercial business had in prior years established its place of business in an area away from a residential zone, and subsequently, through the encroachment of residential development or rezoning, now finds itself adjoining a residential zone.

Because the neighboring homes were built next to property that has always been industrial, Appellant argues this exception applies, and therefore, none of the noise level readings constituted a violation. "[A] court interpreting local ordinances must first look to the plain and ordinary meaning of the words in the ordinance." *Town of Longboat Key v. Islandside Prop. Owners Coal.*, LLC, 95 So. 3d 1037, 1041 (Fla. 2d DCA 2012). Appellee correctly maintains that the plain language of the ordinance indicates that the business seeking the exception must have been established before the residences — it does not matter that the area has always been industrial. The ordinance clearly states "**an** industry or commercial business [that] had in prior years established **its** place of business in an area away from a residential zone," which suggests a specific business operating on the property. § 58-450(c)(2), Code (emphasis added). Appellant's business did not begin to operate at this location until after the homes had been there for almost twenty years. Accordingly, the Special Magistrate's order did not violate the essential requirements of law by finding that the zoning exception did not apply to Appellant.

Bias and Costs

Appellant's final argument alleges its due process rights were violated because the Special Magistrate was biased in favor of Appellee, asserting that the Special Magistrate "was irritated" and "threaten[ed]" Appellant's counsel with additional costs if she did not wrap up her argument. Furthermore, Appellant also takes issue with the Special Magistrate's discussion of lunch plans with the Code Enforcement Officer at the conclusion of the hearing. These issues are without merit. However, the Court writes to address the tangential, but deeply concerning, issue of hearing costs imposed upon Appellant. The Special Magistrate assessed fees for "magistrate expenses" ($175 an hour for four hours) and "officer time" ($92.80) and imposed such costs upon Appellant as the losing party. Florida Statutes section 162.07(2) provides that "[i]f the local governing body prevails in prosecuting a case before the enforcement board, it shall be entitled to recover all costs incurred in prosecuting the case before the board." The Second District Court of Appeal addressed code enforcement costs in 2008:

> Chapter 162, Florida Statutes, which deals with county or municipal code enforcement, limits the County to imposing fines and collecting the repair costs it actually incurs in correcting code violation. . . . Nothing in [the Chapter] permits the County to directly pass through the payroll expenses for the time spent by its code enforcement employees to an individual property owner in a code enforcement proceeding.
>
> . . .
>
> Second, the term 'costs' is not generally construed to include the costs of doing business. . . . [T]he County's operating costs for its code enforcement department are a constant overhead, and no one particular portion can be considered a separate cost actually incurred by the County in prosecuting a particular code violation.

Stratton v. Sarasota County, 983 So. 2d 51, 54–56 (Fla. 2d DCA 2008).

Appellee concedes that that the imposition of costs for "officer time" is not appropriate under *Stratton*. However, Appellee contends Appellant failed to preserve the costs issue for appeal because counsel explicitly stated she had no objection to the costs at the hearing. Appellee further asserts the "magistrate expenses" are appropriate because the Special Magistrate is not an employee of the Appellee's so he cannot be a payroll expense or part of operating costs. Appellee maintains that because the Special Magistrate only becomes involved in the event of a violation, his expenses can be passed on to the violator. *See Stratton*, 983 So. 2d at 57 (holding that fire department and sheriff expenses are allowed because they "are not part of the County's code enforcement overhead and were incurred only in connection with curing [a] specific code violation"). However, this argument is without merit. *See* Fla. Att'y Gen. Op. 2014-04 (2014) ("The provisions of section 162.07(2), Florida Statutes, which authorize the recovery of all costs incurred by a municipality in prosecuting a violator before a code enforcement board or special magistrate, do not authorize the award of compensation or fees as 'costs' to the special master for his or her services incurred in such a prosecution."); *Gibson v. Troxel*, 453 So.2d 1160, 1163 (Fla. 4th DCA 1984) (disallowing an award of time for the clerk, judge, and jury after a mistrial because "[t]here is no authority to assess costs to reimburse the system"), *disapproved of on other grounds Keene Bros. Trucking, Inc. v. Pennell*, 614 So.2d 1083, 1085–86 (Fla. 1993).

Because Appellant stated it had no objection to the costs at the hearing, the issue was not preserved for appellate review; therefore, the Court may only review the issue for fundamental error. *See Aills v. Boemi*, 29 So. 3d 1105, 1109 (Fla. 2010). Despite Appellee's concession that it

acted improperly, the Special Magistrate unconstitutionally applying a constitutional statute is not fundamental error. *See Emiddio v. Florida Office of Fin. Regulation*, 147 So. 3d 587, 592 (Fla. 4th DCA 2014) (holding that the "application of an unconstitutional statute constitutes fundamental error, whereas unconstitutional application of an otherwise constitutional statute does not."). However, since the order is reversed and remanded on other grounds, Appellee is hereby invited to rectify its improper imposition of costs.

Conclusion

Although the Special Magistrate's order did not violate the essential requirements of law and Appellant was afforded due process, competent substantial evidence does not support the finding that Appellant was notified of the violation. Accordingly, the order must be reversed and the issue remanded for further proceedings.

Williams, J., Concurring in part and dissenting in part.

I concur in part and dissent in part. I agree with the conclusion reached by the majority on every issue except notice. Because competent substantial evidence supports the Special Magistrate's determination that Appellant was notified of the violation, I must dissent.

The majority maintains that the only evidence that Appellant was notified of the violation was the unsworn "Affidavit" and the testimony of the Code Enforcement Officer. While the majority correctly asserts that the Special Magistrate cannot rely on the Sheriff's Office to provide notice to a violator, the majority improperly disregards the PCSO report evidence entirely. The Special Magistrate did not base his decision that Appellant was notified on the PCSO report, but rather used it to determine witness credibility. At the end of the hearing, the Special Magistrate states:

> So — okay. That was — that went to credibility, is all for the testimony, it seems like when I'm hearing notice, at least in April, April 29, [the PCSO report] is not the key point but it is certainly one of the compelling points, is that the deputy . . . spoke with [one of the owners]. . . . And then [the owner] stated he would comply. So — and that's just by way of example. So that's the reason I'm — or those are the reasons I'm finding that the violation did occur.

A careful reading of the transcript indicates that the Special Magistrate determined that the PCSO report undermined Appellant's credibility because it confirmed that Appellant was aware of the violation prior to the June inspection (Appellant's owner testified that she "would

have handled it immediately" if she had been aware of the noise violation). "When the trial court's decision is based on live testimony, the appellate court defers to the trial court's determination as to the credibility of witnesses." *Evans v. Thornton*, 898 So. 2d 151, 152 (Fla. 4th DCA 2005). Whether Appellant was provided notice is an issue of fact to be determined by the Special Magistrate. *See Ciolli v. City of Palm Bay*, 59 So. 3d 295, 297 (Fla. 5th DCA 2011); *see also Davidian v. JP Morgan Chase Bank*, 178 So. 3d 45, 48–49 (Fla. 4th DCA 2015) (holding that a dispute over whether service of process was proper "presented a factual issue for the trial court to determine, including an issue of credibility of witnesses"). "Ordinarily such determinations are not disturbed on appeal." *Davidian*, 178 So. 3d at 49. The Special Magistrate "is in the best position 'to evaluate and weigh the testimony and evidence based upon its observation of the bearing, demeanor, and credibility of the witnesses.'" *In re Estate of Sterile*, 902 So. 2d 915, 923 (quoting *Shaw v. Shaw*, 334 So.2d 13, 16 (Fla.1976)). Accordingly, I would affirm on all issues.

It is therefore,

ORDERED AND ADJUDGED that the order of the Municipal Code Enforcement Board of the City of Clearwater is AFFIRMED in part, REVERSED in part, and remanded.

DONE AND ORDERED in Chambers at St. Petersburg, Pinellas County, Florida, this 25 day of July, 2017.

Original Order entered on July 25, 2017, by Circuit Judges Jack Day, Thomas M. Ramsberger, and Amy M. Williams.

Copies furnished to:

ANITA C. BRANNON, ESQ.
DAVID A. TOWNSEND, ESQ.
TOWNSEND & BRANNON
608 W. HORATIO STREET
TAMPA, FL 33606

ASHLEY N. DONNELL, ESQ.
PINELLAS COUNTY ATTORNEY'S OFFICE
315 COURT STREET
CLEARWATER, FL 33756