I N T H E S U P R E M E C O U R T O F F L O R I D A

W.A. BROWN,

Petitioner,

Supreme Ct. Case No. 93,470

District Court of Appeal,
2nd District Case No. 97-01376

vs.

Lower Court Case No. 96-5184(C)
Hillsborough Circuit Civil

CITY OF TAMPA,

Respondent.
_____/

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, W.A. BROWN, Appellee below, will be hereinafter referred to as "Brown." [1/]

Respondent, THE CITY OF TAMPA, Appellant below, will be hereinafter referred to as "The City."

References to the Record on Appeal will be designated ® __).

[1/] City incorrectly designated two appellees in this matter. There was only one.

STATEMENT OF THE CASE AND THE FACTS

This Court has accepted for review City of Tampa v. W.A. Brown, as Trustee of The One Hundred Eleven On Hundred Thirteenth Street Trust, 711 So. 2d 1188 (Fla. 2d DCA 1998), based on direct conflict with In Re Rep. Of Estate of Jacobson v. Ins. Fund, 685 So. 2d 19 (Fla. 3d DCA 1996). Jurisdiction is proper pursuant to article V, section 3(b)(3) of the Florida Constitution.

This matter involves statutory construction of Chapter 162, Florida Statutes (1987), entitled "County or Municipal Code Enforcement." Particularly, it concerns the notice that must be given to a violator, after a code enforcement board hearing, as a predicate to that board's imposition of a fine, lien, and lien foreclosure. [2/]

In Jacobson, the court reviewed a notice of lien that was sent by regular mail. 685 So.2d at 20. The court found that:

> Section 162.12, **which authorizes the lien** in this case, requires that the alleged violator be sent notice by certified mail, or by hand delivery, or by leaving the notice at the violator's place of residence. The record in this case shows that **the required notice was sent only by regular mail.**

Id. (emphasis added) Under these facts, the Jacobson court held that "the administrative lien was **never valid** because the [board]

[2/] The Second District cited the issue on appeal as "whether a code enforcement board order ... must be provided to the property owner by certified mail." 711 So.2d at 1188.

was not in compliance with statutory requirements." 685 So.2d at 20. (emphasis added) [3/]

The Brown court also reviewed a board order containing a notice of lien, which order was served on the violator by regular mail. 711 So.2d at 1188. Contrary to the Jacobson court, however, the Brown court ruled that the board's order need not be provided to the violator **at all**. 711 So.2d at 1188. The court's rationale was that "[b]ecause there is no [stated] statutory requirement that a copy of the order be provided to the violator, it cannot be a 'required notice' under Section 162.12." 711 So.2d at 1189. The Second District noted apparent conflict with Jacobson. Id. The instant petition ensued. The facts are as follows.

Brown filed a quiet title action against the City in August of 1996, seeking to remove all clouds against title on a parcel of real property owned by him. (R 1-45) The City pled only one affirmative defense. That defense alleged that an order issued by City's board, which was served by regular mail and recorded as a lien ("the subject order"), survived Brown's action. (R 49-51) [4/]

[3/] Specifically, the court ruled that "**there never was a valid lien in the first instance**." Id.(emphasis added)

[4/] The City actually asserted nine board orders, which arose out of nine separate code enforcement cases. Each order is identical, other than the respective dates and case numbers. Also, each was issued, served and recorded in the same fashion. For brevity purposes, only one order shall be referenced herein. An exemplar of the subject order is attached hereto as **App. A** for reference.

Brown asserted that the subject order was void ab initio. Particularly, he argued that the subject order contained notice that a lien would be imposed absent compliance by a certain deadline provided therein. (R 103-104) As such, he contended that the subject order contained **at least one** "required notice" under Section 162.12, and that service of the subject order by regular mail violated the statute and its stated requirement of fundamental due process. (R 105-106) Overall, Brown argued that service of this order must be effectuated pursuant to Section 162.12 to comply with the statute's express requirement of fundamental due process.

The City admitted below that the subject order was served by regular mail. The City also agreed that the subject order contained a notice. However, it argued that it was not a "required notice" under Section 162.12, and that service by regular mail was proper. City asserted that due process was satisfied via the notice of hearing.

The trial court ruled in favor of Brown. It found that the subject order contained several notices, and that **each notice** was a "required notice" under Section 162.12. (R 188) Moreover, it found that service of this order by regular mail violated Section 162.12 and fundamental due process, particularly since the statute is punitive in nature. (R 188) The trial court also held that if the statute does not require that the subject order be served according to Section 162.12, then Chapter 162 is unconstitutional

on its face. (R 188) For these reasons, it declared the subject order (and the lien resulting therefrom) void ab initio. [5/] (R 188)

[5/] The lower court judgment, **attached as App. B**, held that:

1. The City of Tampa Code Enforcement Board issued and subsequently recorded nine (9) separate documents entitled "Findings of Fact, Conclusions of Law, Order And/Or Order Imposing Lien" ("the Orders") and asserted the same as an Affirmative Defense in the instant action.
2. The City of Tampa has admitted that each of the Orders was served upon the violator by regular (U.S.) mail only.
3. The Court finds that each of the Orders contains notices that:
   (i) the Order must be complied with by a specified date; and
   (ii) the violator has a right to a rehearing; and
   iii) the violator has a right to an appeal; and
   (iv) penalties will be imposed if the Order is not complied with by the specified date, including **fines per day, imposition of a lien against any and all other real property or personal property owned by the violator**, except homestead property, and **foreclosure of said lien against such real or personal property**.
4. The Court finds that **each notice** referenced in paragraph three, above, is a "required notice" under Section 162.12, Florida Statutes.
5. The Court thus finds that **service of such notice by the City of Tampa via regular (U.S.) mail is a violation of Chapter 162.12, Florida Statutes**.
6. The Court further finds that **service of such notice by the City of Tampa via regular (U.S.) mail is a violation of procedural and fundamental due process, particularly since the Orders are penal in nature**.
7. The Court finds that **if Chapter 162, Florida Statutes, does not require service of the notices referenced in paragraph three, above, by the methods enumerated in Section 162.12, Florida Statutes, then Chapter 162 is unconstitutional on its face**.

(R.187-188) (emphasis added)

The City appealed, contending that the subject order did not contain a "required notice" and that due process had been served by virtue of the notice of hearing. Brown argued that Section 162.09 indicates otherwise. [6] Moreover, he argued that the board order (and the notice contained therein) are more than "required notice," they are the most critical notice of all, since they provide the benchmark by which compliance is determined. [7]

The Second District construed Section 162.09 as requiring a board to enter **two** orders on each case adjudicated at a hearing, ruling that: "if the violator fails to comply with the [first] order, a second order may be entered [which] upon recording in the public records, becomes a lien on the property." 711 So.2d at 1188. Despite this ruling, the court held that "the statute does not require that [the first order] be provided to the violator at all.

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[6] Section 162.09 states that:

> An enforcement board, upon notification by the code inspector that an **order of the enforcement board** has not been complied with by the set time ... may order the violator to pay a fine ... for each day the violation continues past the date set **by the enforcement board** for compliance[.]

(emphasis added)

[7] Brown also emphasized on appeal that the trial court had found that **each notice** referenced in the summary judgment was a required notice. Thus, he urged that to affirm the trial court, the Second District need only deem **one** of those notices as a "required notice," since such a finding would implicate Section 162.12.

Id. The Second District noted apparent conflict with Jacobson. Id. at 1189. This petition ensued, and this brief is timely filed.

SUMMARY OF LEGAL ARGUMENT

The **sole purpose** of Chapter 162 is to ensure compliance with city or county codes. The statute is penal in nature, and must be strictly construed so that statutory and due process rights of property owners who have been adjudicated guilty are respected before the imposition of fines, liens, and lien foreclosure. Any ambiguity under the statute must be resolved in favor of the one against whom the penalty is to be imposed. The Second District in Brown found an ambiguity under Chapter 162, but resolved it in favor of the municipality. In so doing, the Second District violated its own precedent regarding strict construction, overlooked the plain language of the statute, and created a conflict with another Florida appellate court. Moreover, it established precedent that allows a municipality to violate due process and to effect an unconstitutional taking of property. Brown must be overturned.

LEGAL ARGUMENT

I. THE SECOND DISTRICT COURT OF APPEAL IN BROWN INCORRECTLY HELD THAT A BOARD ORDER NEED NOT BE PROVIDED TO THE VIOLATOR

Chapter 162 serves to provide the sovereign with an effective means to regulate privately-owned real property, for the health, safety and welfare of the citizenry. It is an incredibly powerful

statute, which allows for the creation of an administrative board empowered to impose **fines, liens and lien foreclosures** to enforce compliance with local codes. [8/] Left unchecked, it is a very dangerous statute, since the ultimate power of a code enforcement board is to "take" property from a violator for violations as ministerial as peeling paint. Adherence to strict construction, therefore, is sacrosanct.

Prior to Brown, the Second District firmly held that Chapter 162 was punitive and must be strictly construed. In City of Tampa v. Braxton, 616 So.2d 554 (Fla. 2d DCA 1993), the court ruled:

> **[The] argument that [Chapter 162] should be liberally construed as having been enacted for the public benefit is offset by the argument that the statute is punitive**. See 1 Fla. Jur. 2d Actions Section 27 (1977)(where a particular remedy is conferred by statute, it can be invoked only to the extent and in the manner prescribed, and must ordinarily be pursued to the exclusion of any other remedy); Trotter v. State, 576 So.2d 691, at 694 (Fla. 1990)("**[p]enal statutes must be strictly construed in favor of the one against whom the penalty is to be imposed**"). Further, statutes

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[8/] Section 162.02 provides as follows:

> It is the intent of this part to promote, protect, and improve the health, safety, and welfare of the citizens of the counties and municipalities of this state by authorizing the creation of administrative boards with authority to impose administrative fines and other noncriminal penalties to provide an equitable, expeditious, effective, and inexpensive **method of enforcing** any codes and ordinances in force in counties and municipalities, where a pending or repeated violation **continues to exist**.

(emphasis added)

> in derogation of common law are to be strictly construed. *Kraemer v. General Motors Acceptance Corp.*, 613 So.2d 483 (Fla. 2d DCA 1992).

616 So.2d at 555. (citations in original) (emphasis added) As shown below, the Second District in Brown totally disregarded its own precedent. In fact, it failed to even acknowledge its existence, despite that one particular justice sat on both panels.

The terms used under Section 162.02 are not by accident. This section provides for enforcing compliance, not for raising revenue and acquiring property. This is why the section references enforcement of a code "violation," not an "alleged violation." And the only method by which a "violation" arises is for a board to adjudicate the same after a hearing. Finally, as proof that the statute exists only to enforce compliance with a board's order, Section 162.02 states that enforcement is allowed where a violation "continues to exist." These principles are significant, but were overlooked by the Second District.

In cases where a board has adjudicated an alleged violator as guilty, its order contains a notice that a fine and lien will be imposed if the violation is not cured by the date specified therein. **Cf, App. A.** The Third District correctly characterized such an order as a notice of lien, and ruled that service of the same by regular mail violates Ch. 162. The Second District found just the opposite. Its error must be corrected.

The procedural aspects of Chapter 162 are not complex. Under Chapter 162, if an inspector discovers a suspected code violation, the property owner is advised of the same. If the suspected violation is not cured, the alleged violator must receive a notice of a hearing. At that hearing, the board receives evidence and adjudicates the guilt or innocence of the alleged violator regarding the alleged violation. As such, a violation does not arise until the board has held its hearing and entered an adjudication of guilt. Critically, only the board can enter this adjudication of guilt. It cannot be done by an inspector. [9/]

The Second District's analysis in Brown is not totally without merit. The Second District correctly interpreted Section 162.09 as requiring entry of two orders for each case adjudicated. As stated above, the "first order" is the one entered by a board subsequent to its hearing. That order gives the violator notice that a violation has been found, and notifies the violator that absent compliance by a date certain, significant penalties will be imposed. [10/] The "second order" under this section is the one

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[9/] The Second District apparently believes otherwise. In its opinion, the court ruled that "when a **code violation** is discovered, the **violator** must receive a notice of hearing ..." 711 So.2d at 1188. (emphasis added) This statement intimates that a property owner is a violator as soon as an inspector reaches this determination. This rationale violates the basic principle of presumption of innocence. A property owner is not a "violator" until adjudicated as such by a board after a hearing.

[10/] Cf, Jacobson, supra (referencing notice of lien).

entered by the board after it has been determined that the violation was not cured by the "set time" provided in the first order.

This analysis effectuates the statute's sole purpose -- to enforce compliance with local codes. The Second District's opinion in this regard was correct, and is in keeping with opinions of Florida's Attorney General. See, e.g., Fla. Atty. Gen. Op. 97-26 (May 16, 1997). In this opinion, the Florida Attorney General determined that while a code enforcement board, at its hearing to determine non-compliance, may establish a specified deadline for compliance and notify the violator of the amount of the fine that may be imposed for non-compliance, a second order is required to impose a fine. [11/]

This is not a difficult concept. Before the board can enter an order imposing a fine and record that order as a lien, it must determine that the violator failed to meet the compliance deadline provided in the first order. For this reason, the first order serves as a predicate for entry of the second order. In other words, if there is no first order, and no determination that its compliance deadline has not been met, there can be no second order.

[11/] Accord, Fla. Atty. Gen. Op. 85-33 (April 30, 1985) (board lacks authority to delegate to a code inspector the power to assess a fine, but may levy a fine only under Section 162.09, which authorizes the board to impose a fine for each day a violation continues past the date set for compliance only where previous order of board has not been complied with).

However, it defies logic to acknowledge that the first order is a condition precedent of the second order, while simultaneously maintaining that the first order need not be provided to the violator.[12] Stated yet another way, if the second order may be entered only upon a finding that the first order was violated, i.e., that the compliance deadline provided in the first order was not met, how can the first order be anything other than a "required notice?" As argued by Brown, this notice of lien contained in the first order is not only "required" under the statute, it is the most important notice of all. This is the critical point missed by the Second District.

The document under review in Brown is the same document that was reviewed by the Jacobson court in its ruling that the board failed to "notice ... the lien in compliance with the statute." 685 So. 2d at 20. The City's arguments to the contrary are not persuasive, and were disregarded by the Second District. [13]

In Jacobson, the Court held that:

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[12] If this analysis were true, by analogy, it could be argued that while a default cannot be entered against a defendant absent a valid return of service and failure to comply with the summons, service of the summons on the defendant is not necessary.

[13] The City maintains that the notice of lien referenced in Jacobson is not necessarily the subject order that was at issue in Brown. This argument failed at the appellate level, and should be disregarded herein. The only body empowered to notice a lien a code enforcement board, and it can act only by way of an order. The Second District acknowledged a conflict with Jacobson, and the conflict must be resolved.

> Where a statutory lien is given on compliance with stated requirements, absent language stating otherwise, a lien is not acquired unless the applicable notice requirements are **strictly complied with**. Section 162.12(1), Florida Statutes (1989), **which authorizes the lien** in this case, requires that the alleged violator be sent notice by certified mail, by hand delivery, or by leaving the notice at the violator's place of residence. The record in this case shows that the required notice was sent only by regular mail. ... **In view of the county's facially apparent failure to notice ... the lien in compliance with the statute, we hold that it did not even substantially comply with the statutory requirements for obtaining a lien. Consequently, there was never a valid lien in the first instance.**

Id. at 20. (emphasis supplied.)

Jacobson is squarely on point with Brown. As in the instant case, the party challenging the propriety of the lien was not the original owner of the parcel, but a company that paid off the lien after the parcel was conveyed several times. 685 So.3d at 20. [14/] Also, despite City's argument that the Jacobson court invalidated a "lien" and not an "order", there is no dispute that the subject order in the instant case is the very document later recorded by City as a lien. [15/] Also, the Jacobson court invalidated a code

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[14/] As recognized by the Jacobson court and the trial court herein, if the subject lien was not properly noticed, it was never valid, and its defects were not vitiated by subsequent conveyance.

[15/] As indicated in **App. A**, the City also failed to issue two (first and second) orders. To the contrary, the subject order states that it is "self-executing," and places upon the violator the burden to provide proof of compliance within the time frame allotted in the order. It further provides that the burden of proving compliance is that of the violator, and that failure of such proof will automatically result in a fine and a lien and authorized foreclosure, without any further board finding. This is another reason why the subject order is void, because it

enforcement lien because of "the county's facially apparent failure to notice ... the lien in compliance with the statute" and because "[this] required notice was sent only by regular mail." 685 So.2d at 20. In the instant case, the lower court struck down the subject order for the identical reason -- because it was served by regular mail.

The thrust of City's argument is that its board could have imposed a fine and a lien **at** the hearing, without further action. As indicated above, the State Attorney General feels otherwise. The City is wrong. An order must be served. It is a required notice.

II. THE EFFECT OF THE BROWN DECISION IS THAT CITIES AND COUNTIES IN FLORIDA ARE NOW FREE TO TAKE PROPERTY IN AN UNCONSTITUTIONAL MANNER, BY VIOLATING CHAPTER 162 AND ITS STATED REQUIREMENT OF FUNDAMENTAL DUE PROCESS

Contrary to the City's assertions and the Brown court's analysis, due process under Chapter 162 does **not** end when a code enforcement hearing commences. To the contrary, the phrase "enforce compliance" indicates that there must be something directing compliance, and some instrument by which compliance is measured. These functions are served by the board order. And this order does not arise until **after** the board hearing, which necessitates post-

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improperly shifts the burden of proof regarding compliance from the board to the violator and requires no further board action. The Second District missed these points altogether. In similar fashion, the court mischaracterized the order under review as being the second order. The order at issue in Brown was the first order.

hearing notice. The Second District opinion in Brown totally overlooked this principle.

In reaching its decision that a board order need not be served on the violator at all, the Brown court appears to have relied heavily on the term "may" under Section 162.07(4). [16/] The Brown court italicized this term, which suggests that it believes a board to have discretion to include a deadline for compliance at its leisure. This analysis is incorrect.

The term "may" in Section 162.07(4) envisions that not every alleged violator will be adjudicated guilty after hearing. It would be illogical to include the term "shall" in Section 162.07(4), since such a directive would mandate a compliance deadline to an alleged violator whom the board had adjudicated innocent. Applying strict construction, which requires resolving any ambiguity in favor of the property owner, the term "may" in this section means "may, if guilt is adjudicated" -- not "may, if a board feels like it." This interpretation honors the statute's intent.

The Brown court's construction of the term "may" under Section 162.07(4) is also not supported by Florida law. As held in Comcoa, Inc. v. Coe, 587 So.2d 474 (Fla. 3d DCA), rhg. denied (1991):

[16/] Section 162.07(4) states that:

> The order may include a notice that it must be complied with by a specified date and that a fine may be imposed if the order is not complied with by said date.

> It is a familiar rule that, when a statute directs the doing of a thing for the sake of justice, the word "may" means the same as "shall." Mitchell v. Duncan, 7 Fla. [13] 14. Again, permissive words in a statute respecting courts or officers are imperative in those cases where individuals have a right that the power conferred be exercised.

Id. at 478. Accord, Woodland v. Lindsey, 586 So.2d 1255, 1256 (Fla. 4th DCA), rhg. denied (1991) ("Words of permission shall in certain cases be obligatory [and] [w]here a statute directs the doing of a thing for the sake of justice, the word may means the same as shall.") (emphasis in original) It is “for the sake of justice” that violators be notified prior to forfeiture of property. The level of notice given under Chapter 162 should not depend upon the jurisdiction in which property is located. Brown must be reversed.

CONCLUSION

Chapter 162 is truly penal, allowing forfeiture of real property for even minor code violations. Under this statute, only a board can adjudicate guilt, levy a fine, or impose a lien. Prior to imposing these penalties, however, the board must first determine that the violator failed to heed the **board’s** notice. In the instant case, the City served such a notice, but only by regular mail. After Brown, it need not serve this notice at all. The right to own property in Florida is worth more than the price of a postage stamp. After Brown, it is not worth even that. Brown has provided municipalities with a vehicle to take away property in an unconstitutional manner. This injustice must be corrected.

Dated December 11, 1998.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished via U.S. mail this _____ day of December, 1998, upon Jorge I. Martin, Esq., Assistant City Attorney, City of Tampa, 315 E. Kennedy Blvd., Fifth Floor, City Hall, Tampa, FL 33602, and that the typeface used herein is Courier New 14 point.

_____

Attorney

APPENDIX