THE SUPREME COURT OF FLORIDA

CASE NO. 93,470

W. A. BROWN, as Trustee of THE ONE HUNDRED ELEVEN ON HUNDRED THIRTEENTH STREET TRUST,

Petitioner,

v.

CITY OF TAMPA,

Respondent.

Florida Second District Court of Appeal, Case No. 97-01376

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

The Supreme Court has accepted discretionary jurisdiction pursuant to Florida Rule of Appellate Procedure 9.320 to review an apparent conflict between the Second and Third District Courts of Appeal reflected in *City of Tampa v. W.A. Brown, Trustee of the One Hundred Eleven on Hundred Thirteenth Street Trust*, 711 So. 2d 1188 (Fla. 2d DCA 1998) and *Personal Representative of the Estate of Jacobson v. Attorneys' Title Insurance Fund*, 685 So. 2d 19 (Fla. 3d DCA 1996).

The issue on review is whether service of a Code Enforcement Board ("CEB") Order by regular mail violates the provisions of Chapter 162, Florida Statutes, and, if not, whether that manner of service violates due process. Procedurally, the case has its origins in a Quiet Title action filed by Petitioner in the Thirteenth Judicial Circuit Court, Hillsborough County, Florida. [R at 1-45] Petitioner acquired title to real property in Hillsborough County by way of Tax Deed upon payment of delinquent *ad valorem* taxes. The City of Tampa ("City") was named as a Defendant by virtue of nine CEB Orders Imposing Lien which encumbered the subject property.

The CEB Orders were entered against Petitioner's predecessor in title after duly noticed hearings. Each Order contained a finding that the owner had violated City code provisions, established a deadline for correcting the violations and set the amount of a fine which would commence to accrue upon the failure of the violator to comply with the CEB Order. [R at 116; Copy of one Order attached as Appendix for illustrative purposes] The violator failed to comply with the order by not taking corrective action by the ordered deadline. The recorded certified Orders became liens on the subject property. The CEB Orders were served on the violator by regular mail. [R at 103-104]

In Petitioner's Quiet Title action, City raised as an affirmative defense §197.552, F.S., [R at 49-51] which states, in pertinent part, that a "lien of record held by a municipal or county governmental unit, when such lien is not satisfied as of the disbursement of proceeds of sale under the provisions of §197.582, shall survive the issuance of a tax deed." Petitioner moved for Summary Judgment arguing that the CEB Orders were not valid because they contained "required notices" and had to be

served pursuant to §162.12, F.S; that is, by certified mail-return receipt requested or hand delivery. [R at 105-106] The Circuit Court Judge entered Summary Judgment in favor of the Petitioner finding that the CEB Orders contained numerous "required" notices. The Court went on to rule that service of the CEB orders by regular mail violated §162.12, F.S. and due process. [R at 187-189] City appealed to the Second District Court of Appeals ("2d DCA"). [R at 190] In *City of Tampa v. Brown, Etc., supra*, the 2d DCA reversed the Summary Judgment in favor of Petitioner. The Court held that CEB orders, whatever their content, are not "required" notices for purposes of §162.12, F.S. That Court went on to hold that Chapter 162 does not require service of CEB orders in any particular manner and that service by regular mail met basic principles of due process. The opinion noted an apparent conflict with the *Jacobson* case out of the Third District Court of Appeals ("3d DCA").

In *Jacobson*, the 3d DCA invalidated a Monroe County CEB lien order holding that "the required notice was sent only by regular mail", *supra at* 20. It is not evident from the text of the opinion whether the Court was

actually referring to the CEB order in stating that the required notice was sent only by regular mail. An additional ground for invalidating the Monroe County CEB order was the failure of the County to record a certified copy of the order in the Public Records as required by §162.09(3), F.S.

SUMMARY OF THE ARGUMENT

Service of CEB orders by regular mail does not violate Chapter 162, F.S., in any way. The 2d DCA in *Brown*, *supra*, reasoned that §162.07 and §162.09, F.S. control the creation of CEB orders and liens. Both these sections are silent on the manner in which such orders are to be served and, in fact, do not require service of the order at all. Accordingly, the 2d DCA has concluded that CEB orders, whatever their content, cannot be "required" notices for purposes of §162.12, F.S. Although this is a correct analysis of the statute, there are additional grounds supporting the 2d DCA's conclusion.

Section 162.12, F.S., governs service of required notices that are due under Chapter 162 to an *alleged* violator. By the time a CEB order is issued, there must

be a duly noticed hearing and a finding by the Board that a violation has been committed. At that point, the subject of the order is a violator, not an alleged violator. As such, applying the strict statutory construction that Respondent invites, §162.12 cannot apply to service of CEB orders by its very language.

The 3d DCA appears to have reached a different conclusion in *Jacobson*. The conflict is only an apparent one because the 3d DCA did not specify what documents in the record constituted a "required notice". It is not evident from the opinion that it was a CEB order. But even if the two district courts of appeal opinions could be reconciled, the *Jacobson* opinion requires reversal. The 3d DCA reached its conclusion in that case upon the premise that it is §162.12(1) which authorizes CEB liens. That premise is incorrect. Nothing in §162.12 authorizes a lien. Nothing in that section mentions a CEB order or lien. CEB liens arise under §162.09(3) which is silent on the mode of service of orders as the 2d DCA correctly held. Therefore, the whole analytical framework in *Jacobson* is flawed.

If service of CEB orders by regular mail does not violate Chapter 162, the next issue for consideration is whether that manner of service violates due process. The law on this issue is well settled. Due process, both in the administrative and judicial setting, requires notice of the charges raised against one and an opportunity to be heard in defense. Petitioner's predecessor in title received notices of violation, notices of hearing, and had an opportunity to defend at hearing. Those facts are not an issue in this appeal, only the manner in which the CEB served its order. Where an affected party receives notice, has an opportunity to be heard, and is provided a copy of a final order from which to appeal, the requirements of due process are met. So concluded the 2d DCA. Petitioner has not provided any authority, legal or factual, to support a contrary result.

ARGUMENT

I. CODE ENFORCEMENT BOARD ORDERS MAY BE SERVED BY REGULAR MAIL

Chapter 162, *Florida Statutes*, governs the operation of CEBs by municipalities and counties in the state. It is silent on the question of service of

of CEB orders. Section 162.07(3), F.S. describes what must be included in an order. Section 162.09(3), F.S. sets forth the manner in which an order may become a lien on property. Service of a CEB order is not mentioned in either section.

The Circuit Court Judge and Respondent herein argue that CEB orders contain required notices and, therefore, service of the orders is governed by §162.12(1), F.S. The 3d DCA's opinion in *Personal Rep. of the Estate of Jacobson v. Attorneys' Title Insurance Fund*, 685 So. 2d 19 (Fla. 3d DCA 1996), seems to support that position. That argument, however, fails on two bases.

First, as the 2d DCA correctly analyzed, neither of the statutory sections pertinent to the creation of CEB orders and liens requires that a copy be provided to a violator. Accordingly, whatever the content of the order, it cannot be a "required notice" for purposes of §162.12, F.S. Second, the very language of §162.12 precludes its application to CEB orders entered after a hearing. The section states, in pertinent part, "All notices required by this part shall be provided to the

alleged[1] violator by...." §162.12(1), F.S. (1994). By the time a CEB issues its order, it has either exonerated the alleged violator or found that a violation has occurred, i.e, has found him to be a violator. Therefore, whether an order contains notices or not, strict construction of the phrase "alleged violator" in §162.12, places CEB orders beyond the purview of the section.

Respondent argues that Chapter 162 must be strictly construed. Strict construction will not further his argument. A strict construction of §162.12, F.S. leads to the inescapable conclusion that it applies only to required notices which must be given prior to a CEB hearing and a finding of violation. The 2d DCA correctly interpreted the whole statute in a way that achieves its objects in accordance with reason and common sense. *Alderman v. Unemployment Appeals Commission*, 664 So. 2d 1160, 1161 (Fla. 1995).

It should be noted that not once in the many subsections which make up §162.12 is the word "order" mentioned. The section provides that required notices prior to hearing, that is, notices of violation and

[1]**Emphasis Ours.**

hearing under §162.06(2), F.S. shall be provided to an alleged violator by certified mail-return receipt requested, hand delivery (actual or constructive) and, in conjunction therewith, publication or posting. It also provides for proof of service by way of return receipt or affidavit. It is obvious that the section creates an analogous administrative procedure to initial process in a judicial setting. It would take a tortured interpretation of the phrase "alleged violator" to extend the language of the section to cover the manner of service of papers in a CEB case after a finding of violation has been made.

That the legislature intended the phrase "alleged violator" to be read literally is reflected in the language of §162.07, F.S. That section refers to an "alleged violator" at the stages of the proceedings which precede a finding of violation and entry of an order. At all subsequent stages, the section refers to a "violator." That distinction is also reflected in §162.09, F.S. In conclusion, a CEB order entered after a duly noticed hearing does not fall within the

definition of "required notices" in §162.12, F.S. and may be served by regular mail.

The 3d DCA employed a flawed analysis of the statute in the *Jacobson* case. That Court's analysis is based on the premise that §162.12 is the section which authorizes CEB liens. Citing *Stresscon v. Madiedo*, 581 So. 2d 158 (Fla. 1991), to support strict construction of Chapter 162, the 3d DCA concluded that Monroe County had not properly noticed its lien. The problem with the Court's analysis is that it is §162.09(3), rather than §162.12, that authorizes the imposition of liens by CEBs. Section 162.09(3), however, does not require that a CEB order be served in any particular manner. By focusing on the language of §162.12 as the Section which enables a lien, the 3d DCA omitted the verbal distinction between an "alleged violator" (to whom §162.12 applies) and a "violator." City submits *Jacobson* should be overruled because it is essentially flawed.

II. SERVICE OF CODE ENFORCEMENT BOARD ORDERS BY REGULAR MAIL DOES NOT VIOLATE DUE PROCESS

The requirements of due process are the same in quasi judicial, administrative settings and in judicial

proceedings. Due process requires that a party be given notice of the charges raised against it and an opportunity to defend against the same. See *Deel Motors, Inc. v. Dept. of Commerce*, 252 So. 2d 389, 394 (Fla. 1st DCA 1971). In the instant case, the record is devoid of any facts showing that Petitioner's predecessor did not have notice of violation and notice of hearing such as to allow an opportunity to be heard. The undersigned has found no case law (and Petitioner cites none) to support the proposition that mailing an order which imposes a lien or other penalty by regular mail violates due process. The 2d DCA correctly held that due process requires no more than notice of a violation, an opportunity to be heard and a copy of the order from which to take an appeal.

A CEB lien is analogous to a Court's order of contempt. Before a fine and lien are imposed, a violator is directed to take corrective action. It is a violator's failure to comply with that order which causes a fine to accrue and a lien securing the same to arise[2].

[2]Respondent argues at pp. 13-14 that §162.09, F.S. requires two separate orders for each case adjudicated. That argument, however, does not support the position that one, two or more orders must be served by means other than regular mail. The

Similarly, a contempt order requires prior disobedience of court's order before a penalty (which may include a loss of liberty) is imposed. The rules of procedure allow contempt orders to be served by regular mail. City submits that the same due process considerations that apply to a court order of contempt likewise apply to a CEB order. Therefore, there is no reason why service of CEB orders cannot be made by regular mail, especially where the consequences of a contempt order to individual liberty and property generally greatly exceed those of a CEB lien.

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argument attempts to inject an issue outside this appeal.

Nevertheless, City submits that Chapter 162 does not require the recording of two papers to impose a lien. Section 162.07 provides that a certified copy of an order setting a compliance deadline and establishing the amount of a fine may be recorded in the public records to serve as notice to third parties. If a violator complies with the order in a timely fashion, a second order acknowledging compliance must be filed.

Section 162.09(3) does not state that a second order must be recorded or that a CEB may not combine two orders in one paper, such as was done in this case. There is nothing to suggest that the section requires duplication of a previously recorded, uncomplied order which sets forth all essential elements to a lien; i.e., the date of compliance and the amount of the fine.

Section 162.02, F.S. states the intent of the statute as being the creation of an "equitable, expeditious, effective and inexpensive" forum to enforce local codes and ordinances. To require duplicative filings and expense would not promote those legislative ends.

The Petitioner argues in his Brief on the Merits that a CEB lien order amounts to a taking of property. In fact, all that a CEB acquires by an order imposing lien is just that, a lien. That lien can only be foreclosed judicially. Liens against homestead property are unenforceable. In addition, a violator may appeal a CEB order as a matter of right pursuant to §162.11, F.S. Therefore, rather than possessing unlimited powers and great capacity for abuse, CEBs have very circumscribed remedies to enforce their orders, all of which are subject to judicial review. The Respondent's own ability to challenge these liens entered against his predecessor in a quiet title action is testament to the safeguards in the statutory framework. That argument fails to support the position that serving a CEB by regular mail violates Chapter 162 or due process.

CONCLUSION

The City properly served copies of its CEB orders by regular mail. Neither Chapter 162, Florida Statutes nor due process require that CEB orders imposing a lien be served by certified mail or the other methods outlined in

§162.12, F.S. Therefore, the Supreme Court should affirm the 2d DCA's opinion in *City of Tampa v. Brown, Etc.*, supra, and overrule *Jacobson*.

Respectfully submitted on this ___ day of December, 1998.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail on Jeff D. Jackson, Esq., 412 East Madison Street, Suite 900 Tampa, FL. 33602, on this _____ day of December, 1998. I FURTHER CERTIFY that the size and style of type used in this Brief is 14 points proportional CG Times Roman.

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