IN THE SUPREME COURT OF FLORIDA

W. A. BROWN,

Petitioner,

Case No. 93,470
District Court of Appeal, 2nd District - No. 97-01376

vs.

CITY OF TAMPA,

Respondent.
_____/

PETITIONER'S REPLY BRIEF

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STATEMENT OF THE CASE AND ISSUES

This case concerns statutory construction of Part I of Ch. 162, Florida Statutes (1993), entitled "Local Government Code Enforcement Boards." [1] This Court 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) (**"Brown"**), based on conflict with Estate of Jacobson v. Ins. Fund, 685 So.2d 19 (Fla. 3d DCA 1996)(**"Jacobson"**).

Section 162.09(1) requires a code enforcement board to provide its order to the violator, since the compliance deadline contained in that order is a required notice. Service of this order must conform to Section 162.12(1). Service by regular mail violates the

[1] Petitioner's Initial Brief on the Merits cited the 1987 version of Ch. 162. The version of Ch. 162 relevant to this case is actually the 1993 edition. Concerning the portions of the statute at issue in this matter, the text is identical in both versions. For the Court's reference, a copy of the 1993 version of Ch. 162 is attached as **Exhibit A**.

statute and due process. For the reasons stated herein, Petitioner requests that Brown be reversed.

REPLY

1. Respondent has made this matter unduly complex.

Respondent's Answer Brief makes Ch. 162 unduly complex. Its steps are quite simple, and bear repeating.

If a code inspector suspects a violation, he provides the alleged violator with notice of the alleged violation. If the alleged violator does not comply with this notice, the inspector contacts the code enforcement board, which issues and serves a notice of hearing.

At the hearing, the board decides whether a violation exists, and issues a written order **("the board's order")**. In the board's order, if a violation has been found, the board gives the violator an opportunity to cure by directing him to correct the violation by a certain deadline **("the post-hearing**

opportunity to cure”). The board’s order further notifies the violator that if the violation is not cured by the stated deadline, upon notification by a code inspector of the continued violation, the board will impose fines and a lien. It further notifies the violator that foreclosure may ensue.

2. Respondent has misused Ch. 162 and has ignored binding precedent in the process.

Florida courts recognize that code enforcement boards can take “unbridled and arbitrary actions, and may well deserve being characterized as ‘kangaroo courts’". Jones v. Seminole County, 670 So.2d 95, cite (Fla. 5th DCA 1996). Respondent fits this characterization.

In City of Tampa Code Enforcement Board v. Braxton, 616 So.2d 554 (Fla. 2d DCA 1993) (**“Braxton”**), Respondent sued to foreclose a code enforcement lien and for a personal money judgment. Id. at 555. The foreclosure count was dismissed because Respondent

violated the statute's prohibition against foreclosing on homestead. Id. The count seeking a monetary judgment was dismissed because collection of fines is not a statutory remedy. Id. These rulings were upheld on appeal. Id. at 556.

Braxton is not cited simply for historical entertainment. As shown herein, Braxton is critical to the instant matter. Yet, Respondent has not even mentioned it. Instead, it has chosen to disregard this precedent and create yet another statutory exception.

3. Respondent has cherry-picked favorable statutory language from Ch. 162 to support its position.

Section 162.12(1), entitled "Notices," provides:

> All notices required by this part shall be provided to the **alleged violator** by certified mail, return receipt requested; by hand delivery by the sheriff or other law enforcement officer, code inspector, or other person designated by the local governing body; or by leaving the notice at the **violator's** usual place of residence . . .

(emphasis added)

Respondent requests a literal reading of the term “alleged violator” in this section. (AB 7) This, it claims, will lead to the “inescapable conclusion” that the legislature intended that this section apply solely to notices sent prior to a hearing. (AB 7) Respondent further asserts that a literal reading of this phrase proves that a board’s order cannot fall within “the purview” of Section 162.12, regardless of its content. (AB 7,8) Respondent asserts boldly that it would take a “tortured interpretation” of this section to bring a violator within its protective scope.(AB 7) Strong words.

It is hardly a “tortured interpretation” to relate Section 162.12 to a violator, since the phrase “violator” is referenced therein. If the drafters intended the phrase “alleged violator” in section 162.12(1) to exclude notice to a violator, one must wonder why they included the term “violator” **in the same paragraph**.

By its express language, Section 162.12(1) contemplates service of notice to a violator. At a minimum, this section is ambiguous. Under Braxton, resolution of this ambiguity requires a ruling that a board's order be served pursuant to Section 162.12(1). [2] Regular mail is not on the list, and the Brown decision is incorrect. It conflicts with Jacobson, and should respectfully be reversed.

4. Respondent's request for a "literal reading" only highlights ambiguities within Ch. 162.

The phrases "violator" and "alleged violator" are interchanged without distinction or definition throughout Ch. 162. For example, Section 162.06 ("Enforcement Procedure") is the section that dictates the steps to be followed **prior** to a code enforcement

[2] The Braxton court held that: "[City of Tampa's] argument that [Ch. 162] should be liberally construed as having been enacted for the public benefit is offset by the argument that the statute is punitive . . . "[p]enal statutes must be strictly construed in favor of the one against whom the penalty is to be imposed". 616 So.2d at 555 (citing Trotter v. State, 576 So.2d 691, 694 (Fla.1990)).

board hearing. Yet, the phrases "violator" and "violation" appear in this section **12 times**. Applying the "literal reading" that Respondent requests, the result is that there is no real difference between the phrases "violator" and "alleged violator," and any inferred distinction has no logical explanation. Respondent's argument is merely after-fact rationalization, in an effort to change the statute.

Respondent suggests that legislative intent can be divined from a literal reading of "alleged violator." If this is true, it is relevant that Ch. 162 only employs the phrase "alleged violator" **4 times** and the phrase "alleged violation" **0 times**. Yet, Ch. 162 employs the phrase "violator" **12 times** and the phrase "violation" **17 times**. [3] Indeed, Ch. 162 is directed more to a "violator" than to an "alleged violator."

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[3] These figures exclude statutory references to "repeat" violators or violations, which are not at issue in this matter.

Respectfully, it is Respondent's interpretation that is "tortured."

5. Respondent misapplies strict construction.

Strict construction is not literalism. To the contrary, as applied to a penal statute such as Chapter 162, strict construction is an analytical tool employed **to resolve ambiguities** within that statute.

As this Court recently held in White v. State, 1998 WL 309060 (Fla. 1998), such penal statutes must be construed in favor of an accused. Further, as held by this Court in City of Miami Beach v. Galbut, 626 So.2d 192 (Fla. 1993): "if a [penal] statute is ambiguous, **any doubt as to its meaning** must be resolved in favor of . . . those covered by the statute[.]" Id. (emphasis added)

Respondent raises doubts as to whether a violator is protected by Section 162.12. The Brown court found "procedural gaps", but resolved them incorrectly.

Service of a board's order must comply with Section 162.12. Brown is incorrect, and should be reversed.

6. Respondent agrees that a violator has a post-hearing opportunity to cure under Ch. 162.

As stated by Respondent in its Answer Brief:

> **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**.

(AB 9,10) (emphasis added) This is the violator's post-hearing opportunity to cure. On this point, the parties seem to be in agreement. Jurisprudence reveals the reasoning behind this post-hearing opportunity to cure.

a. <u>Florida cases</u>.

As stated, a violator's post-hearing opportunity to cure comes via the compliance deadline contained in the board's order. Florida decisions are in agreement. Cf, <u>Monroe County v. Whispering Pines Associates</u>, 697 So.2d 873 (Fla. 3rd DCA 1998) (**after hearing**, owner was given time to comply; after owner failed to comply, he was then properly fined for each day of non-compliance);

Holiday Inns, Inc. v. City of Jacksonville, 678 So.2d 528 (Fla. 1st DCA 1996) (**following board hearing**, owner was ordered to correct violation before penalty imposed); Jones v. Seminole County, 670 So.2d 95 (Fla. 5th DCA 1996)(though boards can assert a lien against real property, "presumably section 162.09 would be interpreted to permit the presentment of defenses **prior to enforcement of any lien**"). (emphasis added) Respondent does not disagree.

b. Other code enforcement statutes allow this right.

Other states recognize a post-hearing opportunity to cure as a condition precedent to imposition of code enforcement penalties. See, e.g., Borough of Harveys Lake v. Heck, 719 A.2d 378, 379 (Pa. Cmwlth. 1998) (owner advised that he had two months to complete compliance with the notice before penalty of permit revocation); Bosecker v. Westfield Ins. Co., 699 N.E.2d 769 (Ind. App. 1998) (property owner advised by board that failure to comply with the notice within sixty

days would result in imposition of fines under state statute).

c. A Notice of Levy must precede a federal tax lien.

26 U.S.C. Section 6331 is the Federal Tax Lien statute. This statute recognizes an opportunity to cure prior to imposition of a lien. It is called a "Notice of Levy." This statute provides:

> If a person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand . . . the Secretary may collect by levy upon property . . . **levy may be made under subsection (a) only after the Secretary has notified such person in writing of his intention to make such levy** . . . notice must be served in person or by certified mail, and must be issued no less than 30 days prior to levy.

Id. at 6331 (a) and (d) (emphasis added) Accord, Markham v. Fay, 74 F.3d 1347 (1st Cir. 1996) (IRS may collect unpaid taxes only after notifying taxpayer in writing of its intention to levy). Chapter 162 is analogous.

7. Respondent ignores the fact that due process under Ch. 162 continues past a hearing.

Respondent attempts to evade its due process

obligations by discrediting Petitioner. (AB 9) Arguably, Petitioner's claim might have more **emotional appeal** if it were brought by one who learned years after the fact that a lien had been imposed on his property without his knowledge. However, the illegality of Respondent's acts would be no greater. A, as ruled by the lower court and by the Jacobson court, a lien arising from a code enforcement order that was improperly served is void ab initio. Such a lien never "becomes valid" -- no matter how many conveyances. Cf, Jacobsen, supra, (parcel was sold after lien was imposed, but since it was improperly noticed, the lien was never valid in the first instance).

Respondent tries to avoid due process by emphasizing that it gave the owner notice of hearing. Contrary to Respondent's assertion and the holding in Brown, the requirement of due process under Chapter 162 does not cease when a hearing commences. Section 162.07(3) mandates that "fundamental due process shall be

observed and shall govern **all stages** of the proceedings." (emphasis added) These "proceedings" continue past the hearing, and include service of the board's order and the board's determination whether the compliance deadline contained in that order was met. Otherwise, a board could impose penalties **at the hearing**. This cannot be done.

Other courts agree. Proof of compliance with due process **after** a hearing is often the basis upon which other states' code enforcement statutes withstand constitutional challenge. Cf, 4M Holding Co., Inc. v. Diamante, 625 N.Y.S.2d 644 (N.Y.A.D. 1995) (town did not violate property owner's due process rights by entry of lien and fine in light of town's **prior notice** that such penalties would be imposed absent compliance by a date certain)(emphasis added); Wade v. City of Oklahoma City, 873 P.2d 1057 (Okla. App. Div. 3 1994) (code enforcement statute that asserts lien in favor of municipality is constitutional in light of **due process**

protection afforded property owners) (emphasis added). This post-hearing compliance with due process is also required under Ch. 162. Brown is contrary, and must be overturned.

Applying Respondent's own case law, for a violator's post-hearing opportunity to cure to have any meaning, the violator must be reasonably apprised of it. If a violator is entitled under Ch. 162 to receive the board's order at all, which he is, he is protected by the safeguards regarding service of notice as provided by Ch. 162. [4]

[4] Respondent cites no provision of Ch. 162 that allows for service of an order by regular mail. Also, Respondent fails to distinguish the legal authority stating that a municipality may not deviate from Ch. 162. In fact, Respondent ignores this issue altogether. Respondent's analogy of a board order to a civil contempt order is inapposite, and ignores the statute's express statutory requirements concerning service of notice. Petitioner declines to engage in a debate about the virtues of service by regular mail, although the case law on this subject is ample and not favorable to Respondent. The bottom line is that the penal statute at issue does not allow for any exceptions. In similar fashion, Petitioner disagrees but declines to debate whether a code enforcement lien is of the same import as a municipal lien; this assertion by Respondent is

Chapter 162's requirement of fundamental due process must be honored through all stages of the proceedings. Any doubt as to the level of due process to be afforded must be resolved in favor of the violator. Cf, Perkins v. State, 576 So.2d 1310, 1312 (Fla. 1991) (in application to penal statutes, due process is of special importance, and if definiteness is lacking, a statute must be construed most favorable to the accused). A Ch. 162 violator is entitled to such due process after a hearing.

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another red herring.

CONCLUSION

Jacobson correctly held that notice of a board's lien cannot be served by regular mail. Brown holds just the opposite. The phrase "violator" appears in Section 162.12, and any ambiguity as to whether a board's order is a required notice under this section must be resolved in favor of the violator.

Ch. 162 provides for a post-hearing opportunity to cure. Yet, under Brown, the order notifying the violator of that opportunity need not be provided to him at all. Thus, the opportunity to cure (and the compliance deadline) are nothing more than a sham.

As correctly held by the trial court, the order of a board contains at least one "required notice" under that section, thus invoking its safeguards. If it does not, Ch. 162 is unconstitutional.

To uphold Brown, this Court must ignore or reverse numerous Florida appellate decisions, including Jacobson and Braxton. Preservation of property rights

in Florida is at least worth the cost of certified mail. Respectfully, Brown must be overturned.

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 January, 1999, upon Jorge I. Martin, Esq., Assistant City Attorney, City of Tampa, 315 E. Kennedy Blvd., Fifth Floor, City Hall, Tampa, FL 33602. **I FURTHER CERTIFY** that the typeface used herein is Courier New 14 point.

_____

Attorney