IN THE SUPREME COURT OF FLORIDA

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CASE NO. 93,470

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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

AMICUS BRIEF OF HILLSBOROUGH COUNTY

HILLSBOROUGH COUNTY ATTORNEY'S OFFICE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

DECISIONAL AUTHORITY

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

For purposes of this Brief, Hillsborough County adopts the Statement of the Case and Facts contained in the Respondent, City of Tampa's Answer Brief.

SUMMARY OF ARGUMENT

The Second District Court of Appeal correctly found that the City of Tampa was not required to send it's Code Enforcement Board Orders by Certified Mail. The Second District also correctly found that the sole issue for determination was whether a Code Enforcement Board Order entered pursuant to Sections 162.07 and 162.09, Florida Statutes (1995) must be provided to the property owner by Certified Mail. The trial court in 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) had determined that Certified Mail delivery was required because the Orders contained "notices" which require compliance with Section 162.12, Florida Statutes (1995). The Second District correctly concluded that the final Orders imposing liens in the case sub judice did not contain "required notice" as referenced in Section 162.12, Florida Statutes. Chapter 162, Florida Statutes, observes fundamental due process by requiring that the alleged violator receive notice of hearing pursuant to Section 162.06, Florida Statutes and an opportunity to be heard and defend in an orderly proceeding. See e.g. Burton v. Walker, 231 So.2d 20 (2d DCA 1970). If this Court were to superimpose a requirement that all Code Enforcement Board Orders, as opposed to notices of hearing, must be sent by Certified Mail, it would be reading something into the existing statutory scheme that simply is not there.

LEGAL ARGUMENT

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

The Florida Legislature has made the primary policy decision to authorize county and municipal Enforcement Boards. Chapter 162, Florida Statutes, sets forth the minimum standards and guidelines for the administration of the program. Section 162.02, Florida Statutes, defines the Legislative intention of the Local Code Enforcement Boards Act as "authorizing the creation of administrative boards 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." Chapter 162, Florida Statutes, is remedial in nature and should be liberally construed to empower local governments to serve the general welfare by enforcing local codes. The fact that a remedial statute allows sanctions to enforce it does not render the statute penal in nature. Board of Public Instruction of Broward County v. Doran, 224 So.2d 693 (Fla. 1969); City of Miami Beach v. Berns, 245 So.2d 38, 40 (Fla. 1971).

The minimum constitutional requirements for notice were laid out in the United States Supreme Court case, Mullane v. Central Hanover Bank and Trust Company, 339 U.S. 306 (1950). In Mullane, the Court ruled that due process requires:

> "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Id. at 314.

The "required notices" contained in Section 162.12 refers to the notice of hearing which is mandated by Section 162.06, Florida Statutes. In reviewing the language in Section 162.12, the Legislature addresses "required notices" due to an alleged violator. Once there is an Order being issued imposing a fine or a lien, it is axiomatic

that a violation of the codes has been found and the violator at that time ceases to be "an alleged violator." Accordingly, a strict reading of the language of Section 162.12 does not allow for the interpretation that Orders imposing fines and/or liens should be construed as "required notices."

Hillsborough County complies with Section 162.12 with regard to all notices of hearing. If the Respondent appears at the hearing, however, all subsequent Orders are sent by regular mail. If the Respondent does not appear at the hearing, then subsequent Orders are sent initially by Certified Mail and if the Certified Mail is returned unclaimed, then the Order is resent by regular mail. However, sending all Orders by regular mail would satisfy the statutory requirements of Chapter 162 and the requirements of due process generally.

The extent of procedural due process protections varies with the character of the interest and the nature of the proceeding involved. Hadley v. Department of Administration, 411 So.2d 184, 187 (Fla. 1982); In the Interest of D.B. and D.S., 385 So.2d 83, 89 (Fla. 1980). The Florida Supreme Court has stated that there is no

> "unchanging test which may be applied to determine whether the requirements of procedural due process have been met. We must instead consider the facts of the particular case to determine whether the parties have been accorded that which the state and the federal Constitutions demand." Hadley v. Department of Administration, Id. at 187.

With regard to evaluating the constitutional sufficiency of due process procedures provided, the 11th Circuit has stated:

> "We must consider (1) the interest at stake for the individual, (2) the risk of an erroneous deprivation of the interest through the procedures used

> and the probable value of additional procedural safeguards, and (3) the government's interest in avoiding the potential burdens that the additional or substitute procedures would entail." Haitian Refugee Center, Inc. v. Nelson, 872 F.2d 1555, 1562 (11th Cir. 1989)(citing Mathews v. Eldridge, 424 U.S. 319, 335 (1996)).

In the case at bar, the issue of whether the alleged code violator is entitled to notice of hearing by Certified Mail or other means set out in Section 162.12 is not in dispute. It is fundamental that the alleged violator be provided with notice of the initial hearing and charges being brought against him and Section 162.12 sets out the legal methods by which notice is achieved. The issue in this case is whether Orders issued subsequent to a hearing finding a violation and/or imposing a fine need to be sent via Certified Mail as opposed to regular mail. Once it is understood that the Respondent must initially receive notice of the hearing pursuant to Chapter 162.12 prior to any Orders being issued, then the risk of an erroneous deprivation of a property interest as a result of not requiring subsequent Orders to be sent via Certified Mail is slight. However, the Government's interest in avoiding the extra burden and expense of having to issue every Order via Certified Mail is high. This matter can be easily analogized to judicial proceedings in State or Federal Court where the initial complaint must be served on the Defendant, however, subsequent Orders from the Court are routinely sent via regular mail as opposed to Certified Mail. Given the Legislature's mandate in Section 162.02 that it's intent was to provide an "inexpensive method of enforcing codes" it would be contrary to the Legislative intent to require that every Order issued by a Code Enforcement Board be sent via Certified Mail. In sum, the Orders at issue in the case at bar do not contain any

"required notices" as set out in Section 162.12, Florida Statutes. The Second District correctly concluded that the City of Tampa was not required to use Certified Mail in serving final Orders imposing liens.

The Florida Supreme Court has often stated the principal that when interpreting a statute under constitutional challenge, the Court has a responsibility to:

> "avoid declaring a statutes unconstitutional if such statute can be fairly construed in a constitutional manner." State ex rel Pittman v. Stanjeski, 562 So.2d 673, 677 (Fla. 1990).

The Third District's opinion in In Re Pers. Rep. Jacobson v. Attorneys' Title Ins. Fund, Inc., 685 So.2d 19 (Fla. 3d DCA 1996) erroneously concluded that Section 162. 12(1) authorized the Code Enforcement lien at issue in that case. Code Enforcement liens are authorized by Section 162.09(3) and the contents and procedures for the entry of an Order are governed by Section 162.07, Florida Statutes. This Court should disapprove of the Third District's conclusion that Section 162.12(1) authorizes Code Enforcement Board liens and should find that Chapter 162, Florida Statutes, is facially constitutional in that it provides sufficient procedural due process.

Chapter 162, Florida Statutes is silent on the issue of service of Code Enforcement Board Orders imposing fines or liens. If the Legislature deems it necessary to impose a new Legislative requirement that mandates service of Code Enforcement Board Orders via Certified Mail, then the Legislature can amend Chapter 162. However, in the interim, judicial restraint should be exercised, and the Judiciary should not create new Legislative mandates. Further, notice via Certified

Mail is not always superior to notice via regular mail. Service via Certified Mail potentially adds additional burdens to the receiver by having to travel to the post office to pick up the mail. In addition, requiring Certified Mail potentially allows a violator to undermine the validity of an Order by deliberate ignorance of the contents of the mailing. The Court's ruling on this issue will have statewide impact on counties and municipalities, both financially and procedurally. Providing notice of hearing in the manner set out in section 162.12, Florida Statutes, sufficiently satisfies due process concerns. A requirement that all subsequent orders be sent by Certified Mail is not contemplated in Chapter 162 and such a requirement should not be judicially mandated.

CONCLUSION

The Second District Court of Appeal's decision in City of Tampa v. Brown, supra, should be upheld, and to the extent that the Third District's decision in In Re Pers. Rep. Jacobson v. Attorneys' Title Ins. Fund, Inc., supra, conflicts with that decision, it should be quashed.

Respectfully submitted this ___ day of December, 1998.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Amicus Brief has been furnished by and mail to **Jeff D. Jackson, Esquire,** Jeff D. Jackson, P.A., 412 E. Madison St., Suite 900, Tampa, Florida, 33602 and **Jorge I. Martin, Esquire**, Assistant City Attorney, City of Tampa, 315 E. Kennedy Blvd., 5th Floor,

City Hall, Tampa, Fl 33602, on this _____ day of December, 1998 and that the typeface used herein is Times New Roman 14 point.

Christine M. Beck, Esquire
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