8-24

THE SUPREME COURT OF FLORIDA

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

Petitioner,

vs.

CITY OF TAMPA,

Respondent.

District Court of Appeal Case No.: 97-01376

Supreme Court Case No. 93-470

PETITIONER'S BRIEF ON JURISDICTION SEEKING DISCRETIONARY REVIEW OF A DECISION OF THE SECOND DISTRICT COURT OF APPEAL

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STATEMENT OF JURISDICTIONAL FACTS

This matter concerns Ch. 162, Florida Statutes. **(App. 1)** The underlying action was a quiet title suit. Respondent, a defendant below, asserted as an affirmative defense a number of code enforcement board orders entered in its favor under Ch. 162.[1] These orders were recorded as liens against the subject parcel, and Respondent claimed that they were superior to Petitioner's claim of ownership. The trial court entered summary judgment in favor of Petitioner on this affirmative defense, and declared the subject code enforcement liens void *ab initio*. **(App. 2)** The trial court's reasoning was that (i) each order contains a notice that said order must be complied with by a specified date; and (ii) such notice is a "required notice" under §162.12; and (iii) service of the order (and the notice contained therein) by regular mail violates §162.12; and (iv) service of the order by regular mail violates procedural and fundamental due process, particularly since the order is penal in nature; and (v) if Ch. 162 does not require service of the order by the methods enumerated in §162.12, then Ch. 162 is unconstitutional on its face. **(App. 2)**

In *City of Tampa v. Brown,* -- So.2d --, 23 Fla. L. Weekly D1061 (Fla. 2d DCA 1998), the Second District Court of Appeal reversed. **(App. 3) In the last paragraph of its decision, the Second District held that "We acknowledge apparent conflict with *Personal Rep. of Estate of Jacobson v. Attorneys Title Ins. Fund,* 685 So.2d 519 (Fla. 3d DCA 1996)." (emphasis added)**

This petition seeks a resolution of this express conflict between the Second District and the Third District over the requirements of Ch. 162. Additionally, it seeks a resolution of a direct conflict concerning the proper statutory construction to be employed regarding Ch. 162, which conflict exists between the Second District and the Third District, and within the Second District itself.

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[1] Each of these orders was entered in a separate case; only one order was entered in each case.

SUMMARY OF JURISDICTIONAL ARGUMENT

This petition is filed pursuant to Rule 9.120 and Rule 9.030 of the Florida Rules of Appellate Procedure. Specifically, this petition is filed pursuant to Rule 9.030(a)(2)(iv) which provides that the discretionary review of the supreme court may be sought to review decisions of the District Courts of Appeal that "expressly and directly conflict with a decision of another District Court of Appeal..."

As indicated in §162.02, the purpose of Ch. 162 is to "enforce compliance" with codes and ordinances. In that regard, §162.12 is very strict concerning the manner of service of notice. As shown herein, the Second District holds that an order of a code enforcement board -- despite its provisions advising the landowner of his deadline to comply with the order prior to imposition of fines or liens -- need not be provided to that landowner. The appellate courts are divided over the notice requirements of Ch. 162, which conflict must be resolved.

Under Ch. 162, a lien cannot be imposed until the enforcement board has made an adjudication of guilt. Specifically, under §162.09(1), a fine and lien cannot arise until the board has advised the landowner **in its order** of his "date set for compliance." This notice advises the landowner that absent compliance with the order by a set time, compliance will be enforced through daily fines and a lien. Despite the dictates of §162.09(1), the Second District holds that this order (and the notice of lien contained therein) need not be provided to the landowner at all, much less by the methods listed in §162.12. This holding is in direct conflict with the Third District, and should be resolved.

As mandated under §162.07(3), fundamental due process shall govern all code enforcement proceedings. This requirement does not cease when a code enforcement hearing commences. Under §162.07(4), subsequent to each board hearing, the board must issue a written order. If the landowner

has been adjudicated innocent, there is no need for notice of a compliance deadline, since compliance is no longer an issue. [2] However, under §162.09(1), if the landowner has been found guilty, as a condition precedent to imposing a fine or lien, the board must give the landowner notice of his "date set for compliance." This compliance deadline is therefore a "required notice", and service of this notice by regular mail violates §162.12. The appellate courts disagree on this issue, which requires resolution by this Court.

JURISDICTIONAL ARGUMENT

This petition is filed pursuant to Rule 9.120 and Rule 9.030 of the Florida Rules of Appellate Procedure. Specifically, this petition is filed pursuant to Rule 9.030(a)(2)(iv) which provides that the discretionary review of the supreme court may be sought to review decisions of the District Courts of Appeal that "expressly and directly conflict with a decision of another District Court of Appeal..."

As suggested by the comment to Rule 9.120, Florida Rules of Appellate Procedure, a short statement reflecting the sound reasons why this Court should accept jurisdiction is appropriate. This statement is given below.

A. This Court should accept jurisdiction because the Second District is in conflict with the Third District concerning the requirements of Ch. 162.

The instant facts are virtually identical to those in *Jacobson.* In *Jacobson,* a code enforcement board made an adjudication of guilt and entered its order. 689 So.2d at 519. In conformity with §162.09(1), and in keeping with the "enforcement of compliance" intent set forth in §162.02, the *Jacobson* board then sought to enforce compliance through a notice of lien. However, that notice was served by regular mail. The Third District held that "where a [Ch. 162] lien is given **on compliance**

[2] Section 162.07(4) recognizes this fact, by providing that the order issued after the hearing "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." Not all adjudications require further action.

with stated requirements, absent language to the contrary, a lien is not acquired unless the **applicable notice requirements** are **strictly complied with**." 689 So.2d at 520 (emphasis added) Citing §162.12, that Court held that "in view of the county's facially apparent failure to notice ... the lien in compliance with the statute, we hold that ... there was never a valid lien in the first instance." Id. The fact that title to the property had been transferred did not vitiate the fatal notice defect. Moreover, the fact that the notice of lien was not listed as a "required notice" under §162.12 did not obviate the need for strict compliance with that section.

In the instant case, an adjudication of guilt was entered by a code enforcement board after a hearing. The board then entered a written order, which contained the landowner's compliance deadline, i.e., his notice of lien. This order was served by regular mail, and the property changed ownership. Although unaware of the *Jacobson* ruling at the time of judgment, the trial court declared the regular-mail liens void.[3]

Notwithstanding *Jacobson,* the Second District reversed the trial court, and held that because there is "no statutory requirement" that a copy of the board order be provided to the violator, it cannot be a "required notice" under §162.12. **(App. 3)** The resulting conflict created by this ruling, as acknowledged by the Second District, should be resolved by this Court.

B. This Court should accept jurisdiction because the Second District is in direct conflict with the Third District, and with itself, concerning proper statutory construction of Ch. 162.

In *Brown,* the Second District acknowledged that Ch. 162 contains "procedural gaps." **(App. 3)** By holding that the enforcement board order (and the compliance deadline contained therein) need not be provided to the landowner at all, the Second District filled this "gap" in a

[3] The *Jacobson* decision was rendered one week before the trial court's ruling.

manner in favor of the party *imposing* the penalty. As shown below, this ruling creates a direct conflict of another sort -- a conflict concerning the proper statutory construction to be employed in the interpretation of Ch. 162.

First, the form of statutory construction utilized in *Brown* conflicts with the Second District's prior precedent that requires a "strict construction" of Ch. 162. In *City of Tampa v. Braxton,* 616 So.2d 554 (Fla. 2d DCA 1993), the City of Tampa argued for "liberal construction of Ch. 162 on the ground that the statute was enacted for the public benefit." Id. at 555. The Second District rejected this argument, and held that Ch. 162 is "**punitive**" and therefore "'must be **strictly construed in favor of the one against whom** a penalty is to be imposed.'" Id. (emphasis added) The trial Court in the instant case relied on *Braxton* by its reference to the "penal nature" of the code enforcement orders. **(App. 2)** The Second District in *Brown* conflicts with these principles.

Second, the form of statutory construction employed in *Brown* conflicts with *Jacobson.* In that decision, the Third District held that the notice requirements of Ch. 162 must be "strictly complied with." 685 So.2d at 20.

As a result of *Brown,* Florida courts now employ divergent and irreconcilable forms of statutory construction regarding Ch. 162. For a landowner whose property is located in the Third District, the courts will employ a strict construction of Ch. 162. For a landowner whose property is located within the Second District, the converse is true. The validity of *Braxton* subsequent to the *Brown* decision is a mystery. This conflict between the higher courts warrants resolution.

C. Public policy mandates this Court's acceptance of jurisdiction.

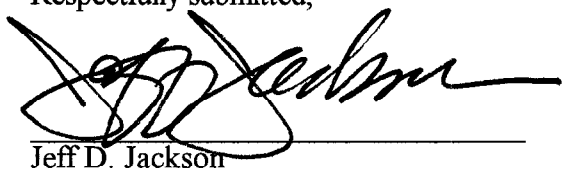
Property rights are the core upon which this country was founded. Possibly no other Florida statute impinges on this fundamental right more than Ch. 162. As indicated in §162.02, the statute is

designed as a tool for enforcing compliance with codes and ordinances. It was not intended to be a tool for governmental landbanking and revenue collection. Yet, thousands of acres of property have been acquired by Florida governments through imposition and/or foreclosure of code enforcement liens. Similarly, millions of dollars have been collected through the imposition of fines which can accumulate at the rate of $250 per day for "violations" as ministerial as peeling paint. Given such penal sanctions, notice to the landowner under Ch. 162 must be of paramount concern, and should be strictly observed. Respectfully, the Third District recognizes this principle; the Second District does not. To hold that a board order directing compliance need not be served on the landowner is violative of public policy, not to mention the intent of Ch. 162. Moreover, to sanction the collection of revenue and the acquisition of property through fines and liens imposed by regular mail is unjust. The conflict between the higher courts must be resolved.

CONCLUSION

Brown has thrown the state of the law on Ch. 162 into disarray. Landowners in Florida are presently afforded different levels of notice under Ch. 162, depending on the jurisdiction in which their property is located. Also, the Second District overrode its precedent concerning strict construction of Ch. 162, and created another conflict with the Third District in the process. Simply stated, Ch. 162 is presently not uniformly applied in this state. As acknowledged by the Second District, a conflict exists in the appellate courts on Ch. 162. If conflict jurisdiction has a mission, it is to resolve such a circumstance. Respectfully, this Court should exercise its harmonizing function to rectify the uncertainty which has been created.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been served upon Jorge I. Martin, Assistant City Attorney, 315 E. Kennedy Blvd., 5th Floor, Tampa, FL 33602-5298, by regular U.S. mail, this 27th day of July, 1998.

Attorney