

IN THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT
IN AND FOR MONROE COUNTY, FLORIDA
APPELLATE DIVISION

KELLY BARNES AND PETER ZIELINSKI,

Appellants,

Case No.: 22-AP-0003-P

L.T. Case No.:
CEBDGC20190000273

vs.

ISLAMORADA, VILLAGE OF ISLANDS,

Appellee.

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OPINION

THIS CAUSE comes before the Court upon Kelly Barnes' and Peter Zielinski's ("Appellants") Notice of Appeal of a Final Order entered by the Code Compliance Hearing Officer on March 22, 2022. The Court, having considered the Appellants' Initial Brief, Islamorada, Village of Islands ("Appellee's") Answer Brief, the Appellants' Reply Brief, the record, the argument of counsel at the hearing held before this Court on September 7, 2023, pertinent legal authority, and being otherwise fully advised in the premises, finds and orders as follows:

I. BACKGROUND

Appellants own the subject property located at 136 Stromboli Drive, Islamorada, Florida. (Appellants' App. A-Final Order). On September 13, 2019, a Code Compliance Officer ("Compliance Officer") for the Village of Islamorada ("Village") documented work that required permits at the subject property and issued Appellants a "Notice of Violation" for violating

Village Code Section 6-61(b)(1) which provides an exemption to the building permit requirement for minor repairs with a fair market value less than \$2,500.00. (Appellants' Exhibit B-Notice of Violation). In addition, the Compliance Officer issued a stop work order and the Appellants were given until October 3, 2019, to resolve the violation. (*Id.*, Appellants' App. B-Notice of Hearing). On October 3, 2019, the Compliance Officer issued a citation alleging violations of Village Code Section 6-61(b)(1)(a) and Village Code Section 6-69 which provides a fine for work performed after the issuance of a stop work order. (Appellants' Exhibit G-October 20, 2020, Hearing Summary). On October 21, 2019, the Appellants paid a \$2,000.00 fine for working through a stop work order and remained in violation of Village Code Section 6-61(b)(1)(a) for failing to acquire the required permits. *Id.*

On October 24, 2019, the Compliance Officer mailed Appellants a "Notice of Hearing" for a November 18, 2019, hearing. *Id.* However, on October 31, 2019, the Village cancelled the hearing because the Appellants applied for a building permit. *Id.* On November 18, 2019, the Village returned the Appellants' permit application for corrections. *Id.* On May 7, 2020, the permit application entered "Abandoned" status. *Id.* The Compliance Officer mailed a "Notice of Hearing" to the Appellants on October 1, 2020, for a hearing on October 20th. (Appellants' App. B-Notice of Hearing).

The Code Compliance Hearing Officer ("Hearing Officer") conducted a hearing on October 20, 2020, and issued an "Order Imposing Civil Penalties Upon Default" ("October Order") affirming the decision of the Compliance Officer and finding the Appellants in violation of Sections 6-61(b)(1) and 6-69 of the Village Code. (Appellants' App. C-Order Imposing Civil Penalties

Upon Default). The Hearing Officer ordered the Appellants to comply and provided that a fine of \$250.00 per day would be imposed if the Appellants failed to correct their violations on or before December 11, 2020. *Id.*

On April 01, 2021, the Compliance Officer performed a re-inspection of the subject property and signed an “Affidavit of Non-Compliance” alleging that the Appellants did not comply with the October Order. (Appellants’ App. D-Affidavit of Noncompliance). Upon notification of the Compliance Officer’s affidavit, the Hearing Officer conducted a hearing on April 20, 2021. (Appellants’ App. E-Order Imposing Civil Penalties). The Appellants were not given notice of this hearing and did not attend. (Appellants’ Initial Brief, uncontested by Appellee). On April 26, 2021, the Hearing Officer issued an “Order Imposing Civil Penalties” (“April Order”) affirming that the Appellants failed to take corrective action by December 11, 2020, and were in violation of the October Order. (Appellants’ App. E-Order Imposing Civil Penalties). In doing so, the Hearing Officer fined the Appellants \$250.00 for each day the violation continued past the compliance date of December 11, 2020. *Id.* Additionally, the Hearing Officer ordered the fines to accrue until the Appellants brought the subject property into compliance and that the Appellants were responsible for arranging a re-inspection to determine compliance. *Id.* Appellants obtained a building permit on July 2, 2021, and scheduled a final inspection for September 3, 2021. (Appellee’s SA. F-Village Council Meeting).

During the fine reduction hearing on November 16, 2021, the Village established that the subject property passed a final inspection on September 3, 2021. (Appellee’s SA. D-Tr. of Fine Reduction Hearing). After considering testimony presented by the Appellants and the Village, the Hearing Officer made a finding of good cause and stated he would reduce

the Appellants' fine by 75% pursuant to Section 2-120(m) of the Village Code. *Id.* The Hearing Officer explained that the deadline to pay the reduced fine would be tolled if the Appellants requested a reconsideration by the Village Council. *Id.*

On November 29, 2021, the Hearing Officer issued an "Order Reducing Fines" affirming that the Appellants became compliant on September 3, 2021, which amounted to 266 days of noncompliance and a \$66,500.00 fine. (Appellants' App. F-Order Reducing Fines). Based upon a finding of good cause, the Hearing Officer reduced the Appellants' fine to \$16,625.00 and ordered payment to be made to the Village within 60 days of the date of the order. *Id.* The Order Reducing Fines provided that if Appellants failed to pay the reduced fine within the prescribed period, the full amount of the accrued fine (\$66,500.00) would reinstate automatically. *Id.* Additionally, the Order Reducing Fines did not state that Appellants' request for reconsideration by the Village Council would stay the deadline to pay the reduced fine. *Id.*

The Appellants submitted a request for reconsideration to the Village Council on December 15, 2021. (Appellants' App. G-Counsel's Letter to Islamorada). The Village Council conducted a reconsideration hearing on February 17, 2022, and did not find good cause to reduce the fine below \$16,625.00. (Appellants' App. I-Resolution 22-02-16). In addition, the Village Council recommended that the fine not be reduced and that the full accrued fine of \$66,500.00 be reimposed. *Id.* On March 04, 2022, the Appellants offered to settle with the Village for \$16,625.00 and the Village refused. (Appellants' Exhibit N-Settlement Offer).

On March 22, 2022, the Hearing Officer issued a "Final Order" finding the Appellants failed to pay the reduced fine within 60 days of the Order

Reducing Fines. (Appellants' App. A-Order). In doing so, the Hearing Officer reimposed the full amount of the accrued fine and ordered Appellants to pay \$66,500.00 to the Village. *Id.* This appeal of the Hearing Officer's Final Order followed.

II. STANDARD OF REVIEW

Pursuant to Fla. Stat. § 162.11, the Circuit Court sitting in its appellate capacity has jurisdiction to review code enforcement final orders. *Central Florida Investors v. Orange County*, 295 So. 3d 292 (Fla. 5th DCA 2019). "Such an appeal shall not be a hearing de novo but shall be limited to appellate review of the record created before the enforcement board." Fla. Stat. § 162.11. When an appeal is taken from the final administrative order of a local enforcement board, the circuit court has plenary appellate review of the record before the enforcement board. *Id.* at 294; § 162.11 Fla. Stat. This includes the jurisdiction to consider and resolve constitutional issues as part of a code enforcement appeal. *Key Haven Associated Enterprises, Inc. v. Board of Trustees of Internal Improvement Trust Fund*, 427 So. 2d 153, 157 (Fla. 1982). "[O]n appeal, all errors below may be corrected; jurisdictional, procedural, and substantive. *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 526 n. 3 (Fla. 1995)). The Court engages in a three-part standard of review to determine: (1) whether due process was accorded; (2) whether the essential requirements of the law have been observed; and (3) whether the administrative findings and judgment are supported by competent substantial evidence." *Id.* at 530.

III. DISCUSSION

Appellants seek review of the Hearing Officer's Final Order based on the following arguments: 1) the underlying October Order is invalid because it lacks sufficient findings of fact and conclusions of law; 2) the underlying

April Order is invalid because the Appellants were not afforded a compliance hearing; 3) the Final Order is invalid because Section 2-120(m) of the Village Code is unconstitutional; and 4) the Final Order is invalid because Appellants' request for reconsideration by the Village Council stayed the deadline to pay the reduced fine. The Court addresses the Appellants' arguments in turn.

A. The October Order

Appellants seek review of the Hearing Officer's October Order arguing it failed to include sufficient findings of fact and conclusions of law. Appellee, however, contends that the October Order is not before this Court for review and relies on *City of Miami v. Cortes*, 995 So. 2d 604 (Fla. 3d DCA 2008) in support of its position.

In *Cortes*, the appellate court held that the circuit court could not review an underlying enforcement order where the property owners did not timely appeal it. *Id.* at 606. There, the Code Enforcement Board entered an enforcement order (which the property owners did not appeal) two years prior to issuing a mitigation order. *Id.* at 605. However, the property owners timely appealed the mitigation order and the circuit court vacated both the mitigation order and the enforcement order. *Id.* at 605-606. The appellate court noted that section 162.11, Florida Statutes provides that an appeal from the final order of a code enforcement board shall be filed within 30 days of the execution of the order to be appealed. *Id.* at 606. In doing so, the appellate court held the underlying enforcement order was outside the scope of the circuit court's review because the property owners did not appeal it within 30 days of its execution. *Id.*

In this case, the Court agrees that the October Order is not before this Court for review because the Appellants did not appeal the October Order

within 30 days of its execution as required by Fla. Stat. § 162.11. The appellate court held in *Cortes* that a circuit court cannot review an underlying order that is not timely appealed. *Id.* at 606. Therefore, the underlying October Order is beyond the scope of this Court's review.

B. The April Order

Appellants argue that the April Order should be vacated because Appellants were not afforded a compliance hearing to contest the Compliance Officer's affidavit of non-compliance. In support of their position, Appellants rely on *Massey v. Charlotte County*, 842 So. 2d 142 (Fla. 2d DCA 2003).

In *Massey*, the appellate court held that a lien order based solely upon an affidavit of noncompliance violates due process when the property owner is not afforded an opportunity to contest the assertion of noncompliance. *Id.* at 146. There, the Code Enforcement Board did not serve the Masseys with the code inspector's affidavit and thus failed to provide an opportunity for the Masseys to challenge the facts upon which the lien order was based. *Id.* In doing so, the Masseys timely appealed the lien order arguing that it violated due process. *Id.* at 145. The appellate court held that due process requires an enforcement board to provide a property owner with the opportunity to contest an affidavit of non-compliance which serves as the factual basis for the imposition of a fine or lien. *Id.* at 147.

Although the Appellants were not provided notice of the Compliance Officer's affidavit and the subsequent hearing, *Massey* is distinguishable from this case since the Appellants did not timely appeal the April Order. Contrary to the requirement of Fla. Stat. § 162.11, the Appellants did not appeal the April Order within 30 days of its execution. In accordance with *Cortes*, the April Order is beyond the scope of this Court's review since a

circuit court cannot review an underlying order that is not timely appealed. *Cortes*, 995 So. 2d at 606.

C. Section 2-120(m)

Appellants challenge the constitutionality of Section 2-120(m) on the following grounds: (1) it unconstitutionally amends Chapter 162, Fla. Stat. (2021); (2) it is arbitrary or unreasonable; and (3) it constitutes an unlawful exercise of quasi-judicial powers. Appellants contend that the “fundamental error” rule brings these claims within the scope of review in this appeal. The Court disagrees.

The “fundamental error” rule is an exception to the general rule that errors must first be raised in the proceedings below. Thus, in the absence of an objection below, the appellate courts “will not consider issues for the first time on appeal except in cases of fundamental error.” (*Millen v. Millen*, 122 So. 3d 496, 498 (Fla. 3d DCA 2013). “Fundamental error” is error that goes to the foundation of the case or to the merits of the cause of action and that would result in a miscarriage of justice if not considered by the appellate court. *Sanford v. Rubin*, 237 So. 2d 134, 137 (Fla. 1970). The Florida Supreme Court held in *Trushin v. State*, 425 So. 2d 1126, 1129, 1130 (Fla. 1982), that “the facial validity of a statute...can be raised for the first time on appeal[.]” Further, the appellate court in *Lawrence v. State*, 918 So. 2d 368, 369 (Fla. 3d DCA 2005), held that “application of a facially unconstitutional statute is fundamental error which may be raised at any time.” *Id.* at 369 (*quoting Bell v. State*, 585 So. 2d 1125, 1126-27 (Fla. 2d DCA 1991)). However, the “fundamental error” rule does not give this Court jurisdiction to review constitutional challenges to an underlying order that is not timely appealed. It merely authorizes the appellate court, in certain

circumstances, to consider constitutional issues raised for the first time on appeal where fundamental error is present.

The Hearing Officer only applied Section 2-120(m) in the Order Reducing Fines, which Appellants did not timely appeal, and thus Appellants' constitutional challenges are beyond the scope of this Court's review. Contrary to the requirement of Fla. Stat. § 162.11, the Appellants did not appeal the Order Reducing Fines within 30 days of its execution. Rather than filing an appeal, Appellants sought relief from the Village Council by submitting a request for reconsideration. In accordance with *Cortes*, the Order Reducing Fines is beyond the scope of this Court's review since a circuit court cannot review an underlying order that is not timely appealed. *Cortes*, 995 So. 2d at 606. Therefore, Appellants' constitutional challenges are outside the scope of review in this appeal because they apply solely to the Hearing Officer's application of Section 2-120(m) in the Order Reducing Fines, which Appellants did not timely appeal.

D. Reduced Fine Deadline

Appellants argue that the Final Order is invalid because Appellants' request for reconsideration by the Village Council stayed the deadline to pay the reduced fine. Appellants rely on the fact that during the fine reduction hearing, the Hearing Officer stated that the deadline to pay the reduced fine "would stay during the reconsideration period." (Appellee's SA. D-Tr. of Fine Reduction Hearing).

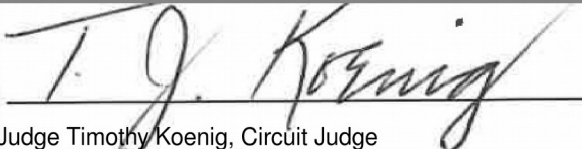
However, the Court finds that Appellants' request for reconsideration by the Village Council did not stay the 60-day deadline set forth in the Order Reducing Fines. Although the Hearing Officer mentioned the deadline to pay the reduced fine would be stayed during the reconsideration period, the Order Reducing Fines did not provide that the deadline would be stayed if

Appellants requested reconsideration. Additionally, Section 2-120(s) of the Village Code provides: “Any deadline in the order of the code compliance hearing officer for payment of the reduced fine shall not be tolled by the filing of a request for reconsideration; however, the village council may extend the deadline.” Thus, a Hearing Officer does not have the authority to issue an order that stays the deadline to pay a reduced fine. The process outlined in Section 2-120(s) mandates that a request must be made to the Village Council to extend the deadline to pay a reduced fine. Since Appellants never requested an extension, the 60-day deadline to pay the reduced fine remained in effect when Appellants requested a reconsideration on December 15, 2021. The Order Reducing Fines became final on November 29, 2021, and the Appellants did not pay the reduced fine within the prescribed 60-day period. As a result, the full amount of the accrued fine (\$66,500.00) automatically reinstated on January 28, 2022.

IV. CONCLUSION

The Final Order of the Hearing Officer is **AFFIRMED**.

DONE AND ORDERED in Key West, Monroe County, Florida.
Thursday, November 9, 2023

44-2022-AP-000003-A0-01PK 11/09/2023 11:05:39 AM

Judge Timothy Koenig, Circuit Judge
44-2022-AP-000003-A0-01PK 11/09/2023 11:05:39 AM

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