NOT FINAL UNTIL TIME EXPIRES
TO FILE RE-HEARING MOTION,
AND, IF FILED, DISPOSED OF.

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT,
IN AND FOR MIAMI-DADE
COUNTY, FLORIDA

APPELLATE CASE NO.:2020-227-AP-01

FLORIDA WOOD RECYCLING, INC.,

LOWER TRIBUNAL NO: ECC2017-0089

Appellant,

v.

TOWN OF MEDLEY, FLORIDA,

Appellee,

_____/

Opinion filed: March 9, 2022

Appeal from an Order of a Special Magistrate of the Town of Medley, Code Compliance.

Carter N. McDowell, Esq., Brian S. Adler, Esq., Elise H. Gerson, Esq., and Kenneth Duvall, Esq., Bilzin, Sumberg, Baena, Price & Axelrod, LLP, for Appellants.

Laura K. Wendell, Esq., and Jose L. Arango, Esq., Weiss, Serota, Helfman, Cole & Bierman, P.L., for Appellees.

Before: TRAWICK, WALSH and SANTOVENIA, JJ.

TRAWICK, J.

Appellant comes before this Court on an appeal of a final order issued by a Special Magistrate for Code Compliance, Town of Medley. On April 18, 2017, Appellant received a Notice of Violation for several alleged code violations. These violations, as well as the Medley Code ("Code") provisions at issue, included: (1) airborne sediment and dust §62-86; (2) sediment, pollutants and pavement requirements §14-155; (3) vehicles on the Property §14-156; and (4) emission of dirt and smoke §14-158. Appellant was given until May 18, 2017, to bring the Property into compliance. Upon re-inspection, a Code Compliance Officer found the Property was still in violation of certain provisions of the Town Code. Accordingly, a hearing ("First Hearing") was set for March 13, 2018, before a Special Magistrate.

After the First Hearing, a final order ("First Order")[1] was issued April 3, 2018, that included a compliance schedule to complete the following tasks by specific dates:

1. Attain a professional consultant, engineer, or architect on or before April 12, 2018.
2. Meet with the Town's Development Review Committee on or before April 26, 2018.
3. Obtain a topographic survey for Property on or before June 25, 2018.
4. Develop plans for submittal on or before September 23, 2018.
5. Obtain a Town Permit on or before November 22, 2018.

[1] As there were two "Final Orders", they will be denoted "First Order" and "Second Order."

6. Obtain a County permit on or before January 21, 2019.
7. Commence on-site construction on or before February 20, 2019.
8. Contact the Town Engineer for construction verification on or before February 27, 2019.
9. Complete construction and obtain final approval from the Town on or before August 26, 2019.

This First Order required that completion of corrective construction be completed by August 26, 2019, or a $200/day fine would be imposed commencing September 2, 2019.

Appellant contends that it diligently pursued completion of these tasks, but due to the difficulties inherent in meeting the required deadlines, the cooperation of Appellee was required. Indeed, it appears that the Appellee did extend various deadlines.

Sometime on or before October 3, 2020, a Code Compliance Officer posted a violation notice on the front gate of the Property. The notice asserted that the Appellant was still in violation of various Code provisions, and that there would be a hearing before a Special Magistrate on October 13, 2020.

On October 13, 2020, a second code enforcement hearing ("Second Hearing") was held before a Special Magistrate to determine whether the deadline for completion of construction of August 29, 2019, had been met and the violations corrected. At the start of the hearing, Appellant's counsel requested that the hearing be continued. He told the Special Magistrate that he believed that the

service of notice on Appellant may have been improper and that he wanted proof of the posting of an affidavit or proof of certified mailing before proceeding with the hearing. The Special Magistrate, referring to the exhibits, concluded that there were affidavits of posting and there was a certified notice of mailing.

Appellant's counsel also asked that the hearing be continued due to health concerns of his client, Appellant's owner (Owner) who was at high risk for contracting COVID-19, as was a member of the Owner's family. He asked that the hearing be continued and that it be conducted virtually. He proffered that the Owner would be able to present plans and a timeline of events that would show why the final deadline had not been met. Appellant's counsel also hoped that the Owner and the Town could meet virtually to resolve this matter. Appellee's counsel opposed the requested continuance, maintaining that the hearing was not required by either state law or the Code, and that the case had been going on for two to three years.[2] He contended that the only relevant issue for the hearing was the certification of fines. Testimony regarding extensions of the timeline was, in his opinion, not relevant. Instead, Appellee's counsel argued, any evidence regarding why the final deadline had not been met could be presented at a later

[2] While Appellee contends that the requested continuance was for an indefinite period and would thus delay a resolution of this longstanding matter, a review of the hearing transcript indicates that Appellant was not asking for a lengthy continuance. Indeed, Appellant's counsel appears to say that the hearing could be continued to later in the month or in the following month when he said: "I'm respectfully requesting – if it goes to next month, what we have is the ability to have dialogue . . ."

hearing, at which time Appellant could present the Special Magistrate with mitigating circumstances and perhaps have the certified fines reduced accordingly.

At first, the Special Magistrate seemed inclined to grant the continuance and allow a virtual hearing, stating:

> But if due to health concerns, the witness or something (sic) wants to appear virtually, I personally understand that and I would have no objection, but that's – I would like to hear from the Town.

After hearing from Appellee's counsel and the Appellant's response, the Special Magistrate stated, "I understand but the Town is – I appreciate what you're saying. I've been listening, ***but the Town is not agreeing to a continuance.***" *Emphasis added.* He went on to adopt the rationale of Appellee's counsel, explaining that the First Order had been entered 2 ½ years before, and that the hearing was not an original hearing on violations but rather, a hearing to certify fines. No mention was made of the health concerns raised by Appellant. Thus, in denying the continuance, it appears that the Special Magistrate was delegating his authority and deferring to Appellee's counsel. It is greatly concerning that a supposedly fair and independent Special Magistrate, tasked by the Town Code to hear code compliance matters, would seemingly cede that independence to a representative of the Code Compliance Department.

At the start of the hearing, Appellant's counsel attempted to introduce into evidence a timeline to help explain that various interim deadlines established in the

First Order had been extended by the Appellee, which, in their belief, should have resulted in an extension of the final deadline. Appellee's counsel objected, again contending that the hearing was only for the certification of fines. He repeated his argument that any evidence regarding the failure to meet the final deadline could be presented at a third hearing to mitigate fines. The Special Magistrate subsequently refused to admit the exhibit, saying that it would be accepted for "informational purposes" as there was "no predicate as to who prepared it and why."

In response to the arguments made by Appellant's counsel regarding extensions of the timeline, the Special Magistrate called the Town's consulting engineer to testify. While conceding that certain benchmark items on the schedule had been extended, the engineer stated that the final deadline had not been. He also confirmed that the construction was not completed by the August 26, 2019, deadline as required. He concluded that the final deadline gave the Appellant a reasonable amount of time to complete the required construction and bring the Property into compliance. During cross-examination by Appellant's counsel, the engineer was asked whether extensions of interim benchmarks granted by the Town should have resulted in a shift in the entire schedule. Appellee's counsel objected, arguing once again that such testimony would only be relevant at a hearing to mitigate fines. Appellant's counsel retorted that "frustration of purpose"

and "inability to comply" were relevant in determining whether fines should be imposed. The Special Magistrate responded by cutting off questioning by Appellant's counsel, ruling that the questions counsel was asking amounted to a rehearing of matters properly addressed in the First Hearing. The Special Magistrate then concluded the hearing by issuing the Second Order.

Appellant raises four primary issues, contending that 1) they it was denied procedural due process because it was not given proper notice of the Second Hearing as required by §162.12, Fla. Stat; 2) it was denied procedural due process and the Special Magistrate failed to follow the essential requirements of law when he denied Appellant a continuance of the Second Hearing; 3) it was denied procedural due process and the Special Magistrate failed to follow the essential requirements of law by failing to admit Appellant's proffered timeline as a formal exhibit; and 4) it was denied procedural due process and the Special Magistrate failed to follow the essential requirements of law when he elicited testimony from Appellee's consulting engineer as to whether the final deadline for completion of the corrective construction work had been met, but failed to allow Appellant to present evidence in response to this testimony.

Appellate review of quasi-judicial proceedings in the circuit court is governed by well-established standards: (1) whether due process was afforded; (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. *Miami Dade County v. Omnipoint Holdings,* 863 So. 2d 195, 198 (Fla. 2003).[3]

We first address the issue of whether the denial of Appellant's request for a continuance was a departure from the essential requirements of law and amounted to a denial of procedural due process.

As a result of the devastating threat presented by the COVID-19 pandemic, on March 20, 2020, Governor DeSantis issued Executive Order No 20-69. Section 2 of the Order reads: "[l]ocal government bodies may utilize communications media technology, such as telephonic and video conferencing, as provided in section 120.54(5)(b)(2), Florida Statutes." App. 5. In an apparent attempt to implement that Order, Appellee's website included the following statement: "[a]ll Town of Medley public meetings, committee meetings and hearings are being conducted virtually until further notice." App. 74 [4]

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[3] Appellant has not argued that there was a lack of competent substantial evidence to support the Second Order. This issue has thus been waived. "It is well settled that, in order to obtain appellate review, alleged errors relied upon for reversal must be raised clearly, concisely and separately as points on appeal." *Singer v. Borbua,* 497 So. 2d 279, 281 (Fla. 3d DCA 1986).

[4] While it is not entirely clear that this statement was on the website on the date of the Second Hearing, a screenshot of the website included in the appendix to Appellant's brief, App. 74, includes a date at the top of the screenshot of October 19, 2020, well after the Governor's Order. It thus appears that this directive from the Appellee was in effect at the time of the Second Hearing on October 13, 2020.

When Appellant's counsel requested a continuance, he informed the Special Magistrate that the Owner was at high risk for contracting COVID-19 and that a member of the Owner's household was also at high risk. For these reasons, counsel asked that a virtual hearing be held since Appellant had legitimate defenses. While the Special Magistrate seemed to agree that health concerns might justify a virtual hearing, he questioned whether a virtual hearing was authorized.[5] After hearing Appellee's arguments that the case had been going on for too long

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[5] Appellee contends that the Special Magistrate lacked the authority to conduct a virtual hearing, arguing that the Governor's Executive Order did not reach code compliance hearings; that the Appellee's Emergency Order No. 1 merely adopted the parameters of the Governor's Order; and that nothing in the Town Code authorized virtual code enforcement hearings conducted by a Special Magistrate. Further, Appellee posits that Appellant acknowledged this lack of authority and waived this issue. First, contrary to Appellee's arguments, we find no support in the record for the assertion that this issue was waived. In fact, Appellant's counsel argued this point extensively. As to applicability of the Governor's Order, Section 2 of the Order refers to "local government bodies" utilizing telephonic and video conferencing. Arguably, this may be interpreted as being limited to legislative bodies such as the Town Council of Medley. *See* §162.01 (1), Fla. Stat., referencing Chapter 162 as the "Local Government Code Enforcement Boards Act" and §162.04 (1), Fla. Stat., defining a local governing body as "the governing body of the county or municipality." However, within Appellee's Emergency Order No. 1, which we assume is what is referenced in the screen shot of the Town's website at App. 74, the language is much broader, specifically stating that "[a]ll Town of Medley public meetings, committee meetings and ***hearings*** are being conducted virtually until further notice." *Emphasis added.* This language would seemingly have permitted a virtual hearing by the Special Magistrate. Finally, as to Town Code §2-84(a)(2) and (a)(5), Appellee references the following language in arguing that virtual code compliance hearings are not authorized:

> (2) At the time and place set for the hearing, the Special Magistrate shall hear and consider all testimony offered, and shall examine and consider all the evidence presented . . . .
>
> (5) All hearings of the Special Magistrate shall be open to the public . . . .

Nothing in this language prohibits virtual hearings. In fact, virtual hearings would allow the Special Magistrate to comply with each of these Code provisions. We interpret Emergency Order No. 1 and the Town Code to permit virtual code compliance hearings.

and that the arguments being raised by Appellant could be made at a subsequent fine mitigation hearing, the Special Magistrate denied the continuance.

In *A.P.D. Holdings, Inc., v. Reidel*, 865 So.2d 682 (Fla. 4th DCA 2004), citing *Flemming v. Flemming,* 710 So.2d 601, 603 (Fla. 4th DCA 1998), the court listed three factors that should be considered in determining whether a trial court abused its discretion in denying a motion for a continuance. As these factors involve considerations consistent with procedural due process, they are likewise applicable to an administrative proceeding. They are: (1) whether the denial of the continuance would create an injustice for the movant; (2) whether the cause of the request for continuance was unforeseeable by the movant and not the result of dilatory practice; and (3) whether the opposing party would suffer any prejudice or inconvenience as a result of a continuance. *Id.* at 684. In considering these factors, the *A.P.D. Holdings* court found that since the appellant's president had personal knowledge of the issues, and since his testimony was relevant, the denial of a continuance created an obvious injustice. *Id.* at 684.

In *Voltimorer v. Key Development Properties,* 966 So. 2d 1022, 1029 (Fla. 2d DCA 2007) the court held that "[I]t is generally reversible error to refuse to grant a motion for continuance when a party or his counsel is unavailable for physical or mental reasons, which unavailability prevents fair and adequate presentation of the party's case." Finally, in *Pares v. Soriano,* 306 So. 3d 236 (Fla.

3d DCA 2020), the court found that the trial court should have granted a continuance to consider a motion for rehearing where the appellant could not attend the hearing due to her hospitalization and illness, and she had submitted supporting documentation. *Id.* at 237.

The risks to individuals and family members at high risk for COVID-19 has become a matter of common knowledge given the intensity of this pernicious pandemic. Appellant's counsel raised this as a concern for the Owner and asked for a short continuance so that the hearing could be conducted virtually. Counsel informed the Special Magistrate that the Owner had relevant testimony to present, telling him that the timeline for completion of construction on the Property was established in the First Order. Any failure to comply with the deadlines imposed in that order, including the final deadline, was at issue. As Appellant's counsel pointed out, extensions agreed to by Appellee may have resulted in "frustration of purpose" and "inability to comply" with the First Order. Countering Appellant's arguments, the Appellee's consulting engineer testified that while there were extensions, the final deadline was not extended since completion of construction by the final deadline was still reasonable. Thus, a factual issue was forged that the Owner could have attempted to rebut by testifying. On these facts, the Special Magistrate's denial of a continuance resulted in an injustice for Appellant as his testimony, like that of the appellant's president in *A.P.D. Holdings* was relevant;

the reasons for the continuance were not foreseeable given the length, scope and intensity of the pandemic, and not the result of any dilatory practice by Appellant;[6] and finally, the requested continuance was for a relatively short period of time to allow the hearing to be conducted virtually which would not have prejudiced or inconvenienced Appellee. As a result, the essential requirements of law were not followed when the Special Magistrate denied the requested continuance. This denial also resulted in a denial of procedural due process.

The denial of a continuance directly impacted two of the remaining issues – the failure of the Special Magistrate to admit the Appellant's proffered timeline as a formal exhibit and the Special Magistrate's failure to allow Appellant to fully cross-examine the Appellee's consulting engineer and present evidence regarding extensions of the interim and final deadlines for the completion of the corrective construction work. The decisions made by the Special Magistrate in both instances resulted in both a departure from the essential requirements of law and a denial of procedural due process.

The Special Magistrate declined to admit the timeline which included Appellant's efforts to meet deadlines, the frustration of those efforts due to inaction

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[6] Appellant contends that efforts were made prior to the hearing to obtain a continuance. A copy of a letter to Appellee's counsel requesting a continuance was transmitted to Appellee's counsel twice. App. 72. Appellant's counsel also told the Special Magistrate that he had also attempted to contact a representative of Appellee the morning of the hearing to ask for a continuance, but received no response until that afternoon.

by the Appellee, and the Appellee's extensions of interim deadlines. The Special Magistrate ruled that there was "no predicate as to who prepared it and how and why." Yet, this predicate could not be tendered since a continuance to allow the Owner to appear virtually was denied. As a result, Appellant was placed between the proverbial "rock and a hard place." The Special Magistrate's exclusion of the timeline and his reason for doing so further supports our conclusion that the "injustice element" of the *A.P.D. Holdings* case was met here. While the exclusion of evidence which could not be authenticated is not, in and of itself a departure from the essential requirements of law or a due process violation, had the continuance been granted and the appellant permitted to testify, the exhibit would have been admitted and the cross-examination perfected.

After hearing Appellant's counsel's arguments regarding the timeline, the Special Magistrate called the Appellee's consulting engineer, who testified that while interim deadlines were extended, the final deadline was not. When Appellant's counsel attempted to cross examine him regarding the reasonableness of completion of construction by the final deadline, Appellee's counsel objected, arguing that the only issue was whether compliance was achieved, and that the proper forum for whether extensions would prevent completion by the final deadline would be at a mitigation hearing once the Property was brought into compliance. The Special Magistrate determined that the cross-examination was an

attempt to relitigate the first hearing, at which point he cut-off the cross-examination. This puzzling decision was error. The First Order, which established the schedule of dates for completion of the required construction, included the following language at paragraph 6(j):

> If the violations are not corrected before that date(s), ***after considering*** the gravity of the violations, ***any actions taken by the owner***, and any previous violations of the owner as evidenced by the record in this case, a fine will be imposed in the amount of $200 per day for every day that the violation continues to exist after September 2, 2019 until compliance is achieved.

Emphasis added. This language granted the Owner the opportunity to explain why he had been unable to complete construction in a timely manner **prior to the imposition of fines.** This flies directly in the face of the assertions of the Appellee that the hearing was not the proper forum for Appellant's failure to meet the required deadlines. Further, procedural due process dictates that Appellant be given the opportunity to show why it was either impractical or impossible to complete the construction by the final deadline before fines were imposed and a cloud placed on Appellant's title by the imposition of a lien on the Property. Thus, the Special Magistrate's rulings departed from the essential requirements of the applicable law, in this case the First Order, and were a denial of due process. [7]

[7] Appellee has consistently maintained that the only issue at the subject hearing was the certification of fines. It contends that any issue regarding the reasonableness of completion of

Given our findings on the issues discussed above, we need not address the issue of whether statutory notice requirements were met.

The decision of the Special Magistrate is hereby **REVERSED.**[8]

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construction by the final deadline could be addressed at a later fine mitigation hearing. In addition to the previously discussed reasons as to why this position is erroneous, we foresee the following at a subsequent mitigation hearing: Appellant attempts to present evidence to show that fines should not have been imposed because of the impossibility of meeting the final deadline due in part to the actions (or inaction) of Appellee. Appellee objects, arguing that while fines can be reduced, the issue of whether fines should have been imposed in the first instance cannot be reconsidered. Thus, taking Appellee's position to its logical conclusion, Appellant would not be permitted to contest the imposition of fines at any stage of the proceedings. Both the First Order and procedural due process dictate otherwise.

[8] We believe that we have the authority to remand this matter for proceedings consistent with this opinion. However, in *Snapp Industries, Inc., v. Miami-Dade Cty,* 319 So.3d 739 (Fla. 3d DCA 2021), the Third District indicated, without explanation, that this Court lacked the authority to remand a matter in a similar posture as this case. We believe that the Third District may have overlooked the fact that the *Snapp Industries* case was an appeal from a decision of a hearing officer rather than a petition for writ of certiorari. "As an appellate court ***granting a petition for certiorari***, the circuit court could only quash the special magistrate's findings, conclusions, and order. A direction to the administrative agency to dismiss the enforcement action exceeds that authority. *Monroe Cnty. v. Carter*, 41 So.3d 954, 958 n. 6 (Fla 3d DCA 2010). *Id.* at 741." *Emphasis added.* No reason was given by the court as to why an appeal, specifically authorized by Section 162.11, Fla, Stat., was treated in the same manner as a petition for writ of certiorari. As the Third District has previously recognized, this Court may remand a matter brought before it on an appeal specifically authorized by law. For example, in *Dougherty ex rel. Eisenberg v. City of Miami*, 23 So. 3d 156, 158 (Fla. 3d DCA 2009), this Court, on an appeal provided for by the city code, reversed and remanded a decision of the city commission. After further proceedings, the Third District, in granting a second-tier petition for writ of certiorari, specifically directed the city to comply with the initial decision of this Court. As Judge Wells stated in her concurring opinion, the city commission was obligated to comply with this Court's determinations on remand. *Id.* at 163. We see no substantive factual or legal distinction between *Snapp and Eisenberg.* While both cases are binding on this Court, we believe we are obligated to follow *Snapp* as the more recent case, despite our belief that the Third District may have misconstrued the nature and posture of that case. In the subject case, we point to both §162.11, Fla. Stat. (Appeals from county or municipal code enforcement), and the Town of Medley Code, §2-85(d)(1) ("Every enforcement order of the Special Magistrate shall be final, subject to the right of any aggrieved party, including the town or the violator, to appeal a final administrative order of the Special Magistrate to the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida. An appeal shall be filed within 30 days of the rendition of the order to be appealed") for the proposition that matters brought before this court such as the

WALSH and SANTOVENIA, J.J. concur.

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subject case are not petitions for writ of certiorari, but appeals, which, by their nature, would allow this Court to both reverse and remand as appropriate. It is our hope that the Third District will re-address and clarify the precedent set by *Snapp*.