

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LAKE COUNTY,)
)
 Petitioner,)
)
 vs.) Case No. 11-2448
)
 DONALD P. AND CHRISTINE H.)
 WATSON,)
)
 Respondents.)
 _____)

FINAL ORDER

This cause came before the Division of Administrative Hearings and Administrative Law Judge Bram D. E. Canter on the appeal of the Order of Fine issued on May 10, 2010. The final hearing was held on September 16, 2011, in Tavares, Florida, and on December 29, 2011, and April 19, 2012, by video teleconference at sites in Tallahassee and Orlando, Florida.

APPEARANCES

For Petitioner: Henry W. Jewett II, Esquire
Jeremy T. Palma, Esquire
Joshua T. Frick, Esquire
Rissman, Barrett, Hurt, Donahue
and McLain, P.A.
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For Respondents: Dennis Wells, Esquire
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STATEMENT OF THE ISSUE

Whether the Order of Fine was properly imposed.

PRELIMINARY STATEMENT

On May 12, 2008, a Lake County Code Enforcement Special Master issued an Order of Enforcement, determining that the Watsons had violated Lake County Land Development Regulations Section 14.00.02 by engaging in unauthorized development activity when they placed a large pile of fill dirt on their property without a permit. The Order of Enforcement provided that the Watsons shall:

Have fourteen (14) days to comply by obtaining the proper permit, or removing the fill from the property and pay the associated fine in the amount of \$500.00, and if respondent fails to comply, than an additional fine of \$50.00 per day to begin on the fifteenth (15th) day.

The Watsons filed an appeal of the Order of Enforcement in the circuit court for Lake County, which ultimately affirmed the ruling of the Special Master.

Lake County Code Enforcement staff later determined that the Watsons had not complied with the Order of Enforcement. The matter was referred to the Special Master who issued an Order of Fine on May 10, 2010, which ordered the Watsons to pay a fine of \$35,250.

The Watsons filed an appeal of the Order of Fine. An appeal of an order of fine is usually heard by a Lake County Code

Enforcement Special Master. However, the parties were unable to agree on the selection of a Special Master to hear the appeal. Therefore, Lake County entered into a contract with the Division of Administrative Hearings (DOAH) to have an Administrative Law Judge act as Special Master for the appeal.

The hearing on the appeal was completed over the course of three days. At the September 16, 2011 hearing, Lake County presented the testimony of Donald Watson, Jessica Jorge and Melanie Marsh. Lake County Exhibits 6, 7, and 11 were admitted into evidence. The Watsons presented the testimony of Alison Strange and Special Master Charles Johnson. The Watsons' Exhibits 1c, 1d, 1e, 1f, 1g, and 4 were admitted into evidence. The hearing was continued to December 29, 2011, when the Watsons presented the testimony of Donald Watson. The hearing was continued again to April 19, 2012, when the Watsons presented the testimony of Darren Lacoste, Melanie Marsh, Carmen Carroll, Jim Stivender, Ross Pluta, and Donald Watson. Lake County Exhibit 14 was admitted into evidence. The Watsons' Exhibits 5, 6, 8, and 9 were admitted into evidence.

The transcript of the hearing was filed on May 14, 2012. At the request of the parties, they were given 45 days from that date to file their proposed orders. The parties submitted proposed orders that were duly considered.

FINDINGS OF FACT

1. The Watsons admit that they placed a large amount of fill dirt on their property. The property upon which the fill was placed is a vacant lot (Lot 13) that is contiguous to the property upon which the Watsons reside. The Watsons also admit that they did not obtain a permit from Lake County that authorized them to place the fill dirt on Lot 13.

2. Lake County Code Enforcement Special Master Charles Johnson issued an Order of Enforcement on September 14, 2007, which required the Watsons to remove the fill dirt or to obtain a "proper permit" within 14 days. The Watsons appealed the Order of Enforcement to the circuit court, which remanded the case to the Special Master to allow the parties an opportunity to file written memoranda in support of their positions. Following the remanded an identical Order of Enforcement was issued by the Special Master on May 10, 2008.

3. The Watsons did not want to remove the fill dirt. Therefore, after the 2007 Order of Enforcement was issued, Mr. Watson contacted Lake County staff to obtain a permit.

4. Mr. Watson said he spoke to Jennifer Meyers, the development processing coordinator in the Public Works Department to obtain a permit for lot grading, but she told him that department only issued development orders for subdivisions.

5. Mr. Watson spoke to Carmen Carroll in the Building Services Division about obtaining a building permit for lot grading. She told him the County did not issue building permits for lot grading. Ms. Carroll stated at the hearing that her division had never issued a building permit for lot grading, alone. Lot grading is often involved in a building permit, but only as a part of a proposal to construct a building.

6. Mr. Watson said he arranged in September 2007 to meet on site with an engineer from the Public Works Department, but the engineer cancelled the meeting without an explanation.

7. Mr. Watson claims that Lake County thwarted his efforts to obtain the proper permit for the fill dirt through the failure of its employees to tell him what permit to get. Lake County bears some responsibility for the confusion that existed about the "proper permit" that was needed. However, the Watsons' efforts to obtain a permit fell short of reasonable.

8. Mr. Watson says he told the Lake County employees he needed a permit to satisfy the Order of Enforcement, but his testimony on this point was vague. It was not made clear that all of these County employees understood the circumstances of the Order of Enforcement and the daily fine the Watsons were facing.

9. There is no evidence that Mr. Watson, when confronted with the responses from Ms. Meyers and Ms. Carroll, requested to

speak to their supervisors or asked them to contact the County Attorney's office so that the issue could be resolved.

10. There is no evidence that the Watsons sought information about the proper permit from the code enforcement staff of the County.

11. There is no evidence that Mr. Watson contacted the Lake County Attorney's office until many months later.

12. Mr. Watson said that after the 2008 Order of Enforcement was issued, he saw no purpose in speaking again with Lake County staff about obtaining a permit because he thought it would be a waste of time. That was not reasonable behavior. It was not reasonable for the Watsons to let daily fines accumulate for months because they were frustrated by the statements made by some County employees.

13. Furthermore, the Watsons' attorney, Allison Strange, immediately began settlement negotiations with the County's legal staff in which the parties contemplated Lake County's issuance of a permit in a couple of weeks.

14. The Watsons put an end to those discussions when they refused to provide engineering support for their lot grading proposal. The County was concerned about a steep slope on the northwest part of Lot 13 and fill dirt in the drainage easement. The Watsons proposed to install a retaining wall called a "Sierra Slope System." Mr. Watson claimed that the proposal was

"rejected" by the County, but the County simply told the Watsons that the proposal would have to be submitted by a licensed engineer in order to be evaluated. That was a reasonable request, but Mr. Watson did not want to spend the money for an engineer.

15. The Watsons never applied for a permit for the fill dirt before the Order of Fine was issued.

16. Taking all of the relevant evidence into account, it is found that the Watsons were not prevented by Lake County from obtaining a permit for the fill dirt.

17. A claim not raised by the Watsons until the hearing in this appeal is that they do not owe any fines because Lake County abated the daily fines during settlement negotiations in May 2008 and the abatement was never lifted. On May 22, 2008, Ms. Strange sent a letter to Assistant County Attorney LeChea Parsons indicating their agreement about abating the fines:

I appreciate your agreement to abate the issuance of any fines against Mr. and Mrs. Watson until Lake County has had adequate time to perform its inspections and issue the development order or permit, as ordered by the Special Master. Per our discussion this morning, it seems that Tuesday, June 10, 2008 would provide sufficient time and that no fine would accrue prior to then.

18. The parties agree that one purpose of the May 2008 letter was to try to resolve the matter before the Watsons' deadline for filing an appeal of the Order of Enforcement. A

Lake County employee made an inspection of Lot 13 and the County told the Watsons, through their attorney, Ms. Strange, of the County's concerns about the existing grading. The Watsons responded with their proposal for the Sierra Slope System. However, when the Watsons refused to submit their proposal through an engineer the negotiations broke down and the Watsons filed the appeal.

19. The County contends that it only agreed to abate the fines until June 10, 2008.

20. The fact that the Watsons did not raise the issue of the abatement until the hearing in this case suggests that at the time of the settlement negotiations in 2008, the Watsons did not think the fines had been abated beyond June 10, 2008.

21. Taking all the relevant record evidence into account, the most reasonable meaning to ascribe to the parties' representations and actions is that the abatement of fines was to last until June 10, 2008, because that was considered sufficient time to get a permit and was the last day to settle the dispute before an appeal was filed. When the Watsons refused to submit engineering plans and filed the appeal, the negotiations were terminated and so was the abatement of fines.

22. The County claims that because the Watsons never came into compliance with the Order of Enforcement, the offer of the abatement of fines had no effect. However, just because the

negotiations were unsuccessful does not void the period of abatement. The fines were abated from May 27, 2008 (the deadline for compliance set out in the Order of Enforcement) through June 10, 2008, a period of 15 days.

23. It does not appear from the record that the Watsons had further contact with Lake County officials about obtaining a permit until October 2009. During this period, the parties were in litigation over the Order of Enforcement.

24. In an email dated October 15, 2009, Mr. Watson asked Ms. Marsh to tell him what "proper permit" he needed. Ms. Marsh replied that the proper permit would be a building permit. Even after being so informed, Mr. Watson still did not apply for a building permit.

25. On September 14, 2009, the Watsons' property was inspected by Lake County Code Enforcement Inspector Jessica Jorge who observed that the fill had not been removed. An Affidavit of Non-Compliance was prepared, but it does not appear from the record that it was referred to the Special Master.

26. On April 22, 2010, Ms. Jorge inspected the property again and she observed that the fill had still not been removed. Ms. Jorge checked the records of the County and determined that no permit had been issued for the fill. Ms. Jorge executed an Affidavit of Non-Compliance, which was presented to Special Master Johnson.

27. On May 12, 2010, Special Master Johnson, without a hearing, entered the Order of Fine. He ordered the Watsons to pay a fine for non-compliance during the period from May 27, 2008 (the deadline for compliance) through April 22, 2010 (the date of inspection), which is 695 days, at the rate of \$50.00 per day, plus the \$500 fine assessed in the Order of Enforcement. The total fine imposed was \$35,250.

28. Lake County Code of Ordinances Section 8-10(a)(2) sets out factors the Special Master is to consider in determining the amount of the daily fine:

In determining the amount of the fine, if any, the special master shall consider the following factors:

- a. The gravity of the violation;
- b. Any actions taken by the violator to correct the violation;
- c. Any previous violations committed by the violator.

29. Special Master Johnson could not remember whether he applied these factors before issuing the Order of Fine. The factors will be considered now.

30. The gravity of the violation is not great. There was no evidence presented of actual harm done to neighboring properties and no evidence that there were complaints from neighbors. The potential for erosion and drainage issues

existed, but the County did not show that actual problems occurred or that the potential for harm was significant.

31. The actions taken by the Watsons to correct the noncompliance have been discussed above. The Watsons made efforts to comply, but stopped short of reasonable efforts because they did not submit any kind of permit application and were not willing to employ an engineer to produce a grading plan.

32. The Watsons claim they could have complied with the Order of Enforcement by getting approval for a lot grading plan under an new ordinance, but Lake County prevented them from doing so. In September 2008, the Lake County Code was amended to add procedures for approving lot grading plans. The Watsons were not aware of the new ordinance when it was adopted. The County did not inform them that about the new ordinance. Ms. Marsh said she did not inform Mr. Watson because she was unaware of the new ordinance. The record does not show when the Watsons learned about the new ordinance, but it was after the Order of Fine was issued.

33. When the Watsons learned about the new ordinance, they submitted a Lot Grading Plan in October 2011. The plan was prepared by a licensed engineer. The Watsons' Lot Grading Plan was approved by the County on January 10, 2012. On that date, the Watsons finally came into compliance with the Order of Enforcement.

34. Although the County's failure to inform the Watsons is relevant to the mitigation of fines, it does not excuse the Watsons' failure to apply for a permit for the fill dirt. If they had applied for a permit, the new ordinance would likely have been used by the County.

35. The Watsons also claim they were misled by the County to believe that they did not need to obtain a permit for the fill until they were ready to build a house on the property. However, that representation was part of a settlement proposal which would have required the Watsons to terminate their lawsuits. The Watsons did not terminate their lawsuits, so it is unreasonable for the Watsons to rely on the County's representation.

36. It appears that the Watsons, convinced that the Order of Enforcement was wrong, were not willing to expend the money necessary to get a permit. In addition, obtaining a permit would have undermined their argument in the ongoing litigation over the Order of Enforcement that no permit was needed.

37. There was no evidence presented regarding previous code violations by the Watsons.

38. Section 8-10(a)(2) allows for as daily fine up to \$1,000.00 per day. Special Master Johnson set the daily fine at the very low end of this range. Taking the factors into account, \$50.00 a day is a reasonable daily fine amount.^{1/}

CONCLUSIONS OF LAW

39. The jurisdiction of DOAH to hear this appeal of the Order of Fine exists under a contract between DOAH and Lake County.

40. The Ordinance governing this appeal is Section 8-10, entitled "Order of Fine," which states:

(a) The special master, upon notification by the code enforcement manager or designee that an order of enforcement has not been complied with by the time set out in the order, or upon finding that a repeat violation has been committed, may enter an order of fine ordering the violator to pay a fine in an amount specified in this section for each day the violation continues past the date set by the special master in the order of enforcement for compliance, or, in the case of a repeat violation, for each day the repeat violation continues past the date of notice to the violator of the repeat violation which has been provided by the code enforcement manager or designee. If a finding of a violation or a repeat violation has been made by the special master pursuant to this chapter, a hearing shall not be necessary for issuance of the order of fine.

(1) A fine imposed pursuant to this section shall not exceed one thousand dollars (\$1,000.00) per day for a first violation, and shall not exceed five thousand dollars (\$5,000.00) per day for a repeat violation. However, if the special master finds the violation to be irreparable or irreversible in nature, the special master may impose a fine not to exceed fifteen thousand dollars (\$15,000.00) per violation.

(2) In determining the amount of the fine, if any, the special master shall consider the following factors:

- a. The gravity of the violation;
- b. Any actions taken by the violator to correct the violation;
- c. Any previous violations committed by the violator.

(b) The violator shall have the right to request a hearing in front of the special master to challenge the order of fine, provided such hearing is requested within twenty (20) days of the date of issuance of the order of fine. If the hearing is timely requested, it shall be scheduled as soon as practicable in front of the special master. The hearing shall be limited to consideration of only those new findings necessary to imposing the order of fine, and shall in no event be a complete re-hearing of the case. If the violator fails to make a timely request for hearing on the order of fine, the order shall be recorded in the public records of Lake County, Florida. Requesting a hearing on the order of fine shall not toll the time for appeal to the Circuit Court sitting in Lake County, Florida.

41. Although this proceeding is referred to as an appeal, it cannot be an appellate-type proceeding because Section 8-10(b) requires the Special Master to make "new findings." Furthermore, there was no hearing before the Order of Fine was issued, so there is no record to review. An assessment of penalties for a code violation without a hearing is a denial of due process of law. Massey v. Charlotte Cnty., 842 So. 2d 142, 174 (Fla. 2nd DCA 2003). Therefore, the term "appeal" in this context has to mean a de novo review.

42. The issues necessary to imposing the Order of Fine are (1) whether the Watsons came into compliance with the Order of Enforcement, (2) whether the Watsons attempted to come into compliance, but were prevented by Lake County, and (3) what is the appropriate fine, if any, that should be imposed.

43. Not subject to review in this proceeding is the determination made in the Order of Enforcement that the Watsons are liable for violating Lake County Land Development Regulations Section 14.00.02, or the issue of whether the Special Master acted correctly in ordering the Watsons to obtain a "proper permit."

44. The burden of proof is on Lake County to show the Watsons failed to comply with the Order of Enforcement and should pay a fine because that is the affirmative issue being asserted in this case. See Young v. Dep't of Cmty. Affairs 625 So. 2d 831, 833 (Fla. 1993) (The general rule is that the burden of proof is on the party asserting the affirmative of an issue in the administrative tribunal.) The Watsons bear the burden of proof to show that their noncompliance was due to the actions of Lake County.

45. The Order of Fine was correct in determining that the Watsons had failed to comply with the Order of Enforcement. The fill dirt had not been removed and a permit for the fill dirt had not been obtained.

46. The Watsons claim that Lake County deprived them of procedural due process by entering the Order of Fine without considering the three factors enumerated in Section 8-10(a)(2). However, this appeal afforded the Watsons a de novo hearing to present evidence addressing the factors listed in Section 8-10(a)(2) and the factors have been considered by the undersigned. Therefore, the Watsons have been afforded due process.

47. The Watsons claim that the Special Master erred in imposing the \$500 non-daily fine because he had made no determination that the violation was "irreparable or irreversible in nature," as required by Section 8-10(a)(1). That claim is well-founded.

48. The fines were also computed improperly in the Order of Fine because the total fines failed to account for the 15 days when Lake County had agreed to abate the fines.

49. Correction of these two errors would reduce the fine by \$1,250.

50. The fines should be further reduced to account for Lake County's failure to provide clearer direction to the Watsons about how to get a permit for the fill dirt. The reduction for this factor shall be \$4,000.

51. Applying the foregoing reductions results in total fines of \$30,000.

DISPOSITION

Based on the foregoing findings of fact and conclusions of law, it is

ORDERED that the Watsons shall pay to Lake County within 60 days a fine in the amount of \$30,000.

DONE AND ORDERED this 13th day of July, 2012, in Tallahassee, Leon County, Florida.



BRAM D. E. CANTER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of July, 2012.

ENDNOTE

1/ The County agreed not to seek additional fines for the almost two years that have passed since the Order of Fine was issued.

COPIES FURNISHED:

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