

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN
AND FOR, ORANGE COUNTY,
FLORIDA

GREGORY P. BIRKETT and,
RUSSELL A. BIRKETT

CASE NO.: 2021-CV-000012-A-O
2021-CV-000013-A-O
2021-CV-000014-A-O

Appellants,

v.

ORANGE COUNTY, FLORIDA

Appellee.

_____ /

Appeal from the Order of Code Enforcement
Special Master Yvette Rodriguez Brown,
Orange County, Florida.

Jimmy D. Crawford, Esq. and
Lindsay C. Holt, Esq.,
Crawford, Modica & Holt,
Chartered Attorneys at Law,
for Appellant.

Shonda D. White, Esq.,
Assistant County Attorney,
Orange County, FL
for Appellee.

Before BEAMER, CHIU, and WEISS, JJ.

PER CURIAM.

Appellants in this case seek review pursuant to Section 162.11, Florida Statutes and Article V, § (5)(b), of the Florida Constitution, to review final orders of an Orange County Code Enforcement Special Magistrate rendered on November 18, 2021 and based hearings conducted on May 10, 2021 and November 8, 2021.

The Court has jurisdiction based on Section 162.11, Florida Statutes and Article V, § (5)(b), of the Florida Constitution. The Court, having reviewed the record and filings of the parties, finds as follows:

Relevant Facts

The Birketts own a family farm in Orange County in Christmas, FL. In 2019, the Birketts developed what they refer to as the “Farm Plan” which involves expansion of agritourism business and other changes on their property. Part of this plan required “significant earthmoving and recontouring” and “substantial excavations for a 15-acre farm pond.” Accordingly, “it was necessary to remove much of the excavated material from the Farm.” The Birketts began excavating and removing this material in 2019 and 2020.

In March of 2020, an initial complaint was made by the Seminole County Government to the Environmental Protection Division (“EPD”) of Orange County regarding “increased water turbidity in Jacks Branch Creek, a body of water that flows north into Seminole County.” This complaint was verified by EPD which visited the creek and confirmed that the turbidity exceeded State standards for water quality. Additional complaints were received by EPD in April and May of 2020 from both Seminole County, as well as a citizen who resides along the creek.

On or about September 30, 2020, EPD, in conjunction with Orange County Public Works and Code Enforcement executed an inspection warrant on the Birketts property with respect to the water turbidity complaints. This inspection revealed multiple environmental and code violations on the property and resulted in three separate notices of violation and notices of hearing.

In the first Notice of Violation dated October 2, 2020 (“EPD Notice”), EPD alleged a violation of Chapter 15, Article X, Section 15-376, Orange County Code (“OCC”) for “conducting activities within or immediately adjacent to a wetland without first obtaining a permit.” In addition, the EPD Notice alleged violations of Article IV, Sections 115(a) and (b) regarding illicit discharge into specified County waters and discharge on ground surface “as may cause or tend to cause water pollution.”

A second Notice of Violation dated November 11, 2020 was issued by Orange County Public Works (“PW Notice”). The PW Notice alleged violations of Sections 16-8(a)(2), 16-8(a)(6), 16-8(b)(2) and 16-21(f), OCC, for “excavating borrow pits on the property and hauling fill material offsite without a permit.”

The Third Notice of Violation was issued by Orange County Code Enforcement. This Notice alleged a violation of Sections 38-3, 38-74, 38-77, and 38-79(57) “for operating a borrow pit and excavating without meeting the requirements of Chapter 16, OCC.” Each of these Notices were followed by separate Notices of Hearing and a consolidated hearing was held on May 10 and November 8, 2021. These hearings resulted in three separate Findings of Fact and Conclusions of Law which found the underlying violations to exist and ordered remedial action with the possibility of fines. This appeal ensued.

Standard of Review

On review of administrative action, the circuit court “must determine whether procedural due process was accorded, whether the essential requirements of the law have been observed, and whether the administrative findings and judgment are supported by competent, substantial evidence.” *City of Deerfield Beach v. Valiant*, 419 So. 2d 624, 626 (Fla. 1982). Further, where review is authorized by statute such as section 162.11, Fla. Stat., such review is a “plenary appeal to the circuit court as a matter of right from the final administrative order of an enforcement board” and “all errors below may be corrected.” *Central Fla. Investments Inc., v. Orange County*, 295 So. 3d 292-95 (Fla 5th DCA 2019).

Analysis

Procedural Due Process

The parties agree on the basic facts of the case regarding the actions taken by the Birketts on their property, the results of the County investigations, as well as the procedural history regarding the notices of violation and hearing, and the continued hearings in May and November of 2021. The Birketts do not allege that there was any problem with respect to notice; however, they do allege a few procedural due process claims.

First, the Birketts allege that their procedural due process rights were violated by the decision of the Special Magistrate to allow the County to re-present its entire case anew at the November 8, 2021 hearing, despite the fact that the County had concluded its presentation at the May 10, 2021 hearing which was continued due to scheduling conflicts for approximately five months. The Birketts allege that by allowing the County to present its case again, with the benefit of having heard their cross examination of the County witnesses, and the beginning of their case, the Special Magistrate deprived the Birketts of basic fairness in the

proceeding. Second, the Birketts allege that the Special Magistrate erred by failing to rule on their motion to qualify Appellant Gregory Birkett as an expert in agriculture for the purposes of his testimony.

Code enforcement hearings presided over by a Special Magistrate are quasi-judicial in nature. Accordingly, “the quality of due process required in a quasi-judicial hearing is not the same as that to which a party to a full judicial hearing is entitled.” *Jennings v. Dade County*, 589 So. 2d 1337, 1340 (Fla. 3d DCA 1991). These hearings are not governed by strict rules of evidence and procedure but do require a certain standard of basic fairness. *Id.* at 1340. Basic fairness generally requires notice of the hearing and an opportunity to be heard. *Id.*

Although there are some faint fairness concerns regarding the Magistrate’s decision to essentially restart the case at the November hearing, it is hard to see how the Birketts were deprived an opportunity to be heard. The Birketts cite to examples where the County at the November hearing provided new photographs of the road where alleged damaged existed which had been taken since the May hearing, as well as an example in the testimony of Orange County witness Mr. Tamayo regarding estimates for when the road would need repairs. However, the Birketts were afforded the same opportunity to cross-examine the County’s witnesses and to present their own case in full. The Special Magistrate’s comments in response to counsel’s objections at the November hearing indicate merely that she wanted to have a full picture of the case given the five months since the previous hearing. Further, the case involved an ongoing investigation into violations on the Birketts property and additional pictures of damage to the road in question and analysis of the longevity of that road were relevant to the case.

The Birketts cite to *Register v. State*, 718 So. 2d 350, 352 (Fla 5th DCA 1988), where the Fifth DCA held that “reopening of a rested case is reviewed solely for abuse of discretion” and listed the factors at play in those cases. However, this case did not involve a quasi-judicial hearing and instead involved a criminal case and, as described above, the due process requirements are quite different. In this case, the Special Magistrate’s decision regarding restarting the presentation of the case did not impede on the Birketts procedural due process rights as afforded in the context of a quasi-judicial hearing.

Similarly, the Birketts’ argument regarding the alleged failure of the Special Magistrate to certify Mr. Birkett as an expert in agriculture does not rise to the level of a violation of due process. As discussed above, strict rules of evidence, which in full judicial hearings involves the certification of expert witnesses and

expert testimony, does not apply in a quasi-judicial hearing. Basic fairness and procedural due process were satisfied merely by allowing Mr. Birkett to present his testimony.

Finally, the Birketts allege that they were deprived procedural due process because the Special Magistrate failed to consider the factors outlined in Section 162.09(2)(b) prior to imposing a fine amount. This issue is not yet ripe for review as the orders appealed from have not imposed any fine. This Court has previously ruled in *James D. Shelley and Barbara E. Shelley v. Orange County, Florida* (2020-CV-000023-A-O) that where fines had not yet been imposed the matter was not ripe for review. An order imposing fines and/or a lien is a separate order which is generally not issued until after an appeal such as this one on a Findings of Fact/Conclusions of Law has been completed.

Essential Requirements of the Law

The remaining arguments presented by the Birketts allege that the Special Magistrate failed to follow the essential requirements of the law by refusing to consider how Orange County's regulatory actions were preempted by either the Florida Right to Farm Act or the Florida Agritourism Act. This Court concludes that neither law preempts the enforcement actions undertaken by the County in this case for the reasons described below.

The Florida Right to Farm Act, Section 823.14, Florida Statutes, exists to "prevent local governments from adopting an ordinance, regulation, rule, or policy to prohibit, restrict, regulate or otherwise limit an activity of a bona fide farm operation or land classified as agricultural land pursuant to Section 193.461, Fla. Stat., where such activity is regulated through implemented best management practices ("BMP")...." Essentially the purpose of this law is to prevent duplicative regulation of activity on farms.

The property in question is undisputed agricultural land per tax classification. The Birketts argue that they have enrolled in all applicable BMPs offered by the Florida Department of Environmental Protection ("DEP") and the Florida Department of Agriculture and Consumer Services ("FDACS") and as such any additional regulation of activity on their property is preempted by the law. The County argues that despite the Birkett's enrollment in the BMPs the fact remains that no such BMPs exist regarding the activities underlying the alleged violations, namely, excavating and hauling fill material, and allowing this material to enter the adjacent waterways. The County argues that given the amount of specificity in the

conduct regulated through the Florida Farm Act and the associated BMPs, the statute should not be construed as to provide protection from regulation by the County of unspecified activities, particularly where the activities have been alleged to damage County roads and waterways. *See D'Agastino v. City of Miami*, 220 So. 3d 410 (Fla. 2017) quoting *Lowe v. Broward Cty.*, 766 So. 2d 1199, 1206-07 (Fla. 4th DCA 2000).

The Birketts argue that due to their enrollment in all available BMPs they are entitled to a blanket exemption from local regulation. However, the belief that the Florida Right to Farm act provides, or is intended to provide, a blanket exemption from any local regulation is misguided. The Birketts themselves note that the Act's stated purpose is to "eliminate duplication of regulatory authority over farm operations." The County's regulation in this case is over the excavation of fill and hauling of that fill over County roads, as well as effects on a local waterway due to these activities. This activity, although being undertaken, in part, on agricultural land as part of the Birkett's Farm Plan is not regulated by the Florida Farm Act – as admitted by the Birketts who acknowledge that no BMP exists regarding these activities. Accordingly, Orange County's regulatory action with respect to these activities is clearly not duplicative of any State regulation and is not preempted.

Similarly, the Birketts argue for an exemption from local regulation pursuant to the Florida Agritourism Act which is far too broad. Section 570.85(1) states that the intent of the legislature is to "eliminate duplication of regulatory authority over agritourism." The law continues by stating that "a local government may not adopt or enforce a local ordinance, regulation, rule, or policy that prohibits, restricts, regulates, or otherwise limits an agritourism activity on land classified as agricultural land." However, the Birketts offer no evidence or case law in support of their claim that the specific activities of excavating and hauling fill material from their property, while spilling some of it into a nearby waterway constitute "agritourism activity." However, even if that definition is granted the act itself explicitly "does not limit the powers and duties of a local government to address substantial offsite impacts of agritourism activities."

The County unsurprisingly argues that the activities subjected to the instant violations are not among those listed as "agritourism activity" in Section 570.86(1), Fla. Stat. The Court agrees. Once again there is no indication that the County's proposed regulatory actions are duplicative of anything covered by the Florida Agritourism Act. The mere fact that certain agritourism activities have and continue to take place on the Birkett's farm does not prevent preempt any local


government regulation of any activity, only of a specified list which does not include the activities alleged by the underlying Notices of Violation and found by the Magistrate to exist in the underlying Findings of Fact and Conclusions of Law. Accordingly, the Special Magistrate did not depart from the essential requirements of the law by refusing to apply a preemption from either the Florida Right to Farm Act or the Florida Agritourism Act.

Request and Motion for Attorneys' Fees

The Court denies the Birketts' request and motion for Attorneys fees pursuant to Section 57.112(2), Florida Statutes. This section involves a provision for attorneys' fees where a party files a civil action against a local government related to the adoption or enforcement of a local ordinance on the grounds it is preempted by state law. However, in this case, no such civil action has been filed and that provision does not apply. Instead, the Birkett's have filed an appeal of local government action pursuant to section 162.11, Fla. Stat.

Based on the foregoing, the Orders of the Special Magistrate appealed in consolidated cases 2021-CV-000012, 2021-CV-000013, and 2021-CV-000014, are hereby AFFIRMED. Motion for Attorneys' Fees is DENIED. The Clerk is hereby directed to close the referenced cases.

DONE AND ORDERED in chambers at Orlando, Orange County, Florida on the date shown on the electronic signature.


signed by Denise Beamer 03/28/2023 10:27:07 T:\EGG\A-D
DENISE KIM BEAMER
Presiding Circuit Judge

CHIU and WEISS, JJ., concur.

CERTIFICATE OF SERVICE

I CERTIFY that the foregoing was filed with the Clerk of the Court on the date shown on the electronic signature, by using the Florida Courts E-Filing Portal System. Accordingly, a copy of the foregoing is being served on this day to all attorney(s)/interested parties identified on the ePortal Electronic Service List via transmission of Notices of Electronic Filing generated by the ePortal System.



Approved by the Florida Judicial System

Judicial Assistant