

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT  
IN AND FOR PALM BEACH COUNTY FLORIDA

PALM BEACH POLO, INC.,  
Appellant,

CIVIL APPELLATE DIVISION: AY  
CASE NO.: 502016CA005700XXXXMB

v.

VILLAGE OF WELLINGTON  
Appellee.

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Opinion filed: MAY 15 2017

Appeal from "Order Imposing Penalty/Lien" by Village of Wellington  
Special Magistrate Michael J. Posner

For Appellant:     • Alexander L. Domb, Esq.  
11199 Polo Club Road, Suite 1  
Wellington, FL 33414  
alec@aldlaw.org

For Appellee:       Laurie Stillwell Cohen, Esq. & Aaron C. Dunlap, Esq.  
12300 Forest Hill Blvd.  
Wellington, FL 33414  
lcohen@wellingtonfl.gov; adunlap@wellingtonfl.gov

Appellant Palm Beach Polo, Inc. ("Polo") is appealing an Order Imposing Penalty/Lien entered by Appellee Village of Wellington's ("Wellington") Special Magistrate, contending that the Special Magistrate departed from the essential requirements of the law by (1) not abating or

dismissing the fine certification hearing pursuant to section 162.13, Florida Statutes, and (2) assessing a fine after Polo introduced evidence suggesting that it was impossible to comply with the Order Finding Violation, in violation of section 162.09(2)(b). We affirm as to the first issue without further comment, but reverse as to the second issue.

Polo owns a tract of land, which includes a 92.4-acre parcel of wetland and cypress trees known as “Big Blue Natural Reserve” (“Big Blue”), in Wellington. This parcel of land has been the subject of several years of litigation. On or about May 29, 2014, Wellington’s Code Compliance Officer filed a Notice of Violation/Notice of Hearing (“Notice”), alleging that Polo had conducted unauthorized alteration of Big Blue by conducting “unauthorized fill activity exceeding 1500 square feet which alters upland vegetation and/or wetland.” The Notice further alleged Polo had violated two provisions of Wellington’s Land Development Regulations and Code of Ordinances (“Code”), section 5.1.14 and section 7.4.9(B).

The case was referred to a Special Magistrate, who conducted a hearing on the matter on July 17, 2014. After hearing testimony and receiving evidence, the Special Magistrate entered an Order Finding Violation(s) and Correcting Scrivener’s Error (“Order Finding Violation”) and found that Polo had in fact altered Big Blue and in doing so had committed 130 violations of the Code. The Order Finding Violation required Polo to submit a restoration plan in order to correct the violation or otherwise face a daily fine of \$62.50 per violation (a total of \$8,125.00 per day). The Order Finding Violation also scheduled a fine certification hearing if the Wellington’s Code Compliance Division was not contacted to inspect the property after compliance was achieved, and/or if the violations were not corrected. Polo appealed the Special Magistrate’s decision on September 24, 2014, which this Court affirmed without opinion on November 16, 2015. *See Palm Beach Polo, Inc. v. Village of Wellington*, 2014CA011710 (Fla. 15th Cir. Ct. Nov. 16, 2015). Polo

also filed a Petition for Writ of Certiorari with the Fourth District Court of Appeal, which was summarily denied on February 18, 2016.

Wellington then brought the underlying code enforcement proceeding, alleging that Polo had failed to comply with Wellington's March 19, 2015 Order Finding Violation. On April 21, 2016, the Special Magistrate held a fine certification hearing to determine (1) whether Polo had complied with the March 19, 2015 Order Finding Violation and corrected the violations, and (2) whether the daily fine discussed in the Order Finding Violation should be imposed. During this hearing, Polo introduced testimony that it was unsure of the exact location of the area that was in violation, and that environmentalists attempting to inspect the suspected area several times over the last two years had been prevented from doing so because the area was under water.

After evidence had been presented and closing arguments made, the Special Magistrate made his final determination and entered the Order Imposing Penalty/Lien. In making this final determination, the Special Magistrate indicated that the evidence presented by Polo was "nice" but "irrelevant" to the fine certification hearing because (1) the violation had already been found and (2) such evidence goes to hardship, which would be determined via a separate proceeding.

Section 162.09, Florida Statutes states in pertinent part:

(1) An enforcement board, upon notification by the code inspector that an order of the enforcement board has not been complied with by the set time or upon finding that a repeat violation has been committed, may order 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 enforcement board for compliance. . .

(2)(a) A fine imposed pursuant to this section shall not exceed \$250 per day for a first violation and shall not exceed \$500 per day for a repeat violation, and, in addition, may include all costs of repairs pursuant to subsection (1). . . .

(b) In determining the amount of the fine, if any, the enforcement board shall consider the following factors:

1. The gravity of the violation;

2. Any actions taken by the violator to correct the violation; and
3. Any previous violations committed by the violator.

In reviewing this section, we find that the Special Magistrate was permitted to impose the fine discussed in the Order Finding Violation. However, in imposing this fine against Polo, the Special Magistrate was required to consider the evidence presented by Polo within the context of the factors enumerated in section 162.09(2)(b) and make findings of fact accordingly.

Based on the statements made by the Special Magistrate at the April 21, 2016 hearing, we find that the Special Magistrate did not consider or make findings of fact about any of the following factors enumerated in subsection (2)(b): “the gravity of the violations,” whether Polo had taken any actions to correct the violation, and whether “[a]ny previous violations” had been committed by Polo. Further, none of these factors are noted throughout the rest of the record and Order Imposing Penalty/Lien. Thus, based on the record before this Court, we find that the Special Magistrate departed from the essential requirements of the law in failing to consider the factors enumerated in section 162.09(2)(b), Florida Statutes. Furthermore, we note that while the Special Magistrate repeatedly referred to a “hardship” proceeding that Polo could request after the imposition of the fine, a review of Wellington’s ordinances did not reveal such a procedure. Even if such an ordinance exists, it would be preempted by section 162.09(2)’s specific delineation of what a special magistrate must consider at the fine hearing itself, rather than at a subsequent mitigation hearing.

Accordingly, we REVERSE the Order Imposing Penalty/Lien and REMAND this matter back to Wellington’s Special Magistrate to evaluate and make findings of fact on the factors enumerated in section 162.09(2)(b), Florida Statutes.

ARTAU, FRENCH, J. MARX, JJ., concur.

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Appellant,

APPELLATE DIVISION (CIVIL): AY  
CASE NO: 2016CA005700

v.

Appeal from "Order Imposing Penalty/Lien"  
by Village of Wellington Special Magistrate  
Michael J. Posner

VILLAGE OF WELLINGTON,  
Appellee.

Appealed: May 19, 2016

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DATE OF PANEL: MARCH 20, 2017

PANEL JUDGES: ARTAU, FRENCH, J. MARX

AFFIRM/REVERSE/OTHER: REVERSE & REMAND

PER CURIAM OPINION/DECISION BY: PER CURIAM

DATE CONCURRING:

) DISSENTING:

) CONCURRING SPECIALLY:

) With/Without Opinion

) With/Without Opinion

*Charles R. Artau* 5/9/17

) J.

) J.

) J.

*Joseph Marx* 5/9/17

) J.

) J.

) J.

*Paul S. French* 5/15/17

) J.

) J.

) J.