

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

**DAVID W. FOLEY, JR., and
JENNIFER T. FOLEY,**

CASE NO.: CVA1 07-37

Appellants,

v.

ORANGE COUNTY, FLORIDA,

Appellee.

Appeal from a decision of the
Orange County Code Enforcement Board.

David W. Foley, Jr., and
Jennifer T. Foley, Pro Se,
for Appellants.

George W. Dorsett, Assistant County Attorney,
for Appellee.

Before POWELL, DAWSON, M. SMITH, J.J.

PER CURIAM.

FINAL ORDER AFFIRMING LOWER COURT

Appellants David W. Foley, Jr. and Jennifer T. Foley (Appellants), timely appeal from an order of the Orange County Code Enforcement Board (CEB), dated April 18, 2007, finding Appellants in violation of Code sections 38-3, 38-74, and 38-77, by erecting structures on their residential property without the proper building or use permits.¹ The structures at issue are

¹ The order appealed from was entered after a hearing pursuant to section 162.07(4), Florida Statutes. It is a final appealable order. However, it is customary in most cases to file a notice of appeal to this order and then amend the notice to include the subsequent order issued pursuant to section 162.09, Florida Statutes. It appears that a second order has not been issued in this case, the possible reason being the Appellants have filed another case challenging the Orange County Board of County Commissioners action upholding the County Zoning Manager's determination that aviculture with associated aviaries is not a permitted principal or accessory use or a home occupation in Appellants R-1A zoning district. See pending Case No. 08-CA-005227-O.

several large bird cages used by Appellants to raise and maintain exotic birds. This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(1)(C). We dispense with oral argument per Florida Rule of Appellate Procedure 9.320.

Appellants argue that they were denied due process by certain actions of the CEB and that the evidence at the hearing did not support the CEB's decision and order. After careful review of Appellants' Amended Initial Brief, Appellee's Answer Brief, Appellants' Reply Brief, the record on appeal, the transcript of the hearing, and governing legal authorities, the Court finds as follows:

First, contrary to Appellants' argument, the hearing notice, which Appellants admitted to receiving, did contain, among other things, the Code sections allegedly violated and the facts constituting the alleged violation. Contrary to Appellants contention, the notice was not required to place Appellants on notice that fines would be "discussed, calculated and imposed at the hearing." The Court finds that the notice met the due process requirement of adequate notice.

Second, Appellants are correct that a fine and its amount were mentioned at the hearing; however, a fine was *not imposed*, either verbally at the hearing or in the order appealed from. Section 162.07(4), Florida Statutes, states that such an order "may include a notice that it must be complied with by a specified date and that a fine *may* be imposed." (emphasis added). The CEB order says "[f]ailure to comply *will* result in a fine of \$500.00 for each day the violation continues past the above-stated compliance date." (emphasis added). The Court reads this phrase to simply be a notice that unless there was compliance, a fine would be imposed in the future and that \$500.00 is the maximum amount which could be imposed. It is not, as Appellants

contend, the actual imposition of a fine. That has yet to be done, if it is to be done, by a separate subsequent order of the CEB.²

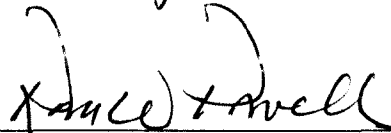
Third, contrary to Appellants' argument, the Court finds that there was clear and convincing evidence presented to the CEB in support of its decision that Appellants had violated the Code sections under which they were charged.³

All other arguments made by Appellants were considered and found to be without merit. Consequently, based upon the foregoing reasons, the order appealed from is **AFFIRMED** and the case is **REMANDED** to the CEB for further proceedings in accordance with Chapter 162, Florida Statutes.

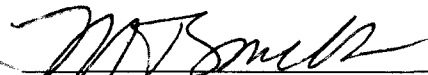
AFFIRMED and REMANDED.

DONE and ORDERED at Orlando, Florida this 24 day Sept.,

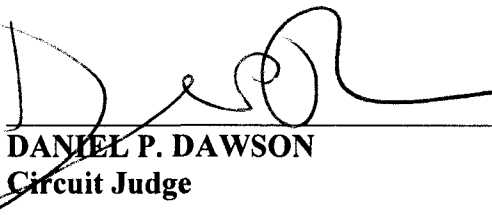
2009.



ROM W. POWELL
Senior Judge



MAURA T. SMITH
Circuit Judge



DANIEL P. DAWSON
Circuit Judge

² For future guidance of the parties, we note that the Second District Court of Appeal indicated in Massey v. Charlotte County, 842 So. 2d 142 (Fla. 2d DCA 2003), that due process requires that a property owner be afforded an opportunity to challenge a fine, the amount thereof, and the resulting lien. It further suggested that the property owner could be given notice that it could request a second hearing before a fine and lien could actually be imposed by subsequent order. Id.

³ We need not address Appellants' request that we construe the Code to require "clear and convincing" evidence, not the lower degree of "preponderance," as Code section 11-35(d) provides, in order to sustain the decision of the CEB. The evidence at the hearing actually met the higher standard of clear and convincing. Without needing to recite a summary of the testimony of the code inspector, a reading of Appellants' testimony shows that Appellants knew what they were charged with, they did not challenge their guilt or innocence (thereby tacitly admitting guilt), they stated that they were in the process of obtaining the necessary permits from the Zoning Division, and they requested additional time to bring the structures into compliance.