

IN THE THIRTEENTH JUDICIAL CIRCUIT FOR THE STATE OF FLORIDA
CIVIL APPELLATE DIVISION

R. GALE PORTER, JR.,
Appellant,

Case no.: 23-CA-12340

Division: I

v.

Code Enf. Case No.: COD-22-0003651

CITY OF TAMPA,
Appellee.

On review of a decision of the Code Enforcement
Special Magistrate for the City of Tampa, Florida.

On rehearing: The Court withdraws its original opinion rendered February 27, 2024, and substitutes the opinion below. The result is unchanged. No further motions for rehearing will be considered by the Court.

APPELLATE OPINION

This case is before the court to review an order of the code enforcement special magistrate finding Appellants R. Gale Porter, Jr. and Mary Ann Porter in violation of the city code for having failed to obtain a permit for the improvement to the driveway on their property in violation of section 5-105.1, Tampa, Fla. Code. The Porters contend that the City of Tampa Building Department lacks the authority to require building permits for pavers and other “site related work” because language regarding the regulation of site-related work is not included in the Florida Building Code and its absence creates a conflict that makes the City’s ordinance unenforceable. Because the City is empowered to add to its building code if it does not conflict with the Florida Building Code, and because the Porters were cited with and found to have violated other provisions of section 5-105.1, Tampa, Fla. Code, the decision below is affirmed.

FACTUAL BACKGROUND

Richard Gale Porter and Mary Ann Porter (“the Porters”) own the subject property located at 3916 W. Bay Villa Street in Tampa. Sometime in August or September of 2022, they began construction on or around the driveway in the front yard of the property without obtaining a permit. The construction included laying down pavers around the driveway and landscaping of the property. City of Tampa Code Enforcement posted a Notice of Violation and Stop Work Order on September 19, 2022. The Notice of Violation informed the Porters that because they failed to obtain the necessary permit, the work violated section 5-105.1, Tampa, Fla. Code. As a remedy, the notice directs the Porters to “stop all work in driveway area and obtain a permit for the paver installation outlining driveway and change of driveway footprint.” A Stop Work Order attached to the notice reiterated those directions.

The combination notice directed the Porters to comply by October 10, 2022. The Porters, however, refused to obtain the necessary permit. Subsequently, the matter was scheduled for a hearing before the code enforcement special magistrate on April 12, 2023. The special magistrate found that the Porters were in violation of the Code and imposed fines accruing until compliance. This timely appeal followed.

JURISDICTION AND STANDARD OF REVIEW

This Court has appellate jurisdiction to review code enforcement orders under sections 162.11 and 26.012, Florida Statutes. Code enforcement orders are reviewed to determine whether due process was accorded, whether the decision comports with the essential requirements of law, and whether competent, substantial evidence supports the decision. *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982).

DISCUSSION

The activity for which the Porters were cited and how to bring the property into compliance were clearly laid out in the combination Notice of Violation and Stop Work Order. Specifically, the Porters were directed to obtain a permit for the installation of driveway pavers. The Porters contend that the action taken against them is invalid because state law “prohibits code enforcement actions with respect to land use regulations unrelated to building construction.” The state law is section 553.73(13), Florida Statutes, which says:

The Florida Building Code does not apply to, and no code enforcement action shall be brought with respect to, *zoning requirements, land use requirements*, and owner specifications or programmatic requirements which do not pertain to and govern the design, construction, erection, alteration, modification, repair, or demolition of public or private buildings, structures, or facilities or to programmatic requirements that do not pertain to enforcement of the Florida Building Code.

The City of Tampa Building Code contains a similar limitation. Sec. 5-102.1.1, Tampa, Fla. Code.

The Porters mischaracterize the state law’s application. First, the underlying proceeding was not a code enforcement proceeding to enforce a land use or zoning matter. Second, The Porters’ activity, which relates to the alteration or modification of a driveway¹ located *on* the property, need not relate solely to the construction of a “building” to be enforceable under the City’s or state’s building code. Both encompass and regulate “structures,” and “facilities” other than buildings. To the extent the Porters allege the state’s building code does not address or govern their situation, the state’s building code cannot then be in conflict with the city code on that point.

¹Under section 22-58, Tampa, Fla. Code, a driveway permit is required for installing or relocating driveway aprons and/or curbs *between private property line and street pavement*. (Emphasis added.) The work referred to herein does not relate solely to work in the right-of-way.

Regarding the type of construction activity for which a permit is required locally, the city code section under which the Porters were cited states:

SECTION 5-105. - PERMITS

5-105.1. - When required.

Any owner or authorized agent who intends to construct, enlarge, alter, repair move, demolish, or change the occupancy of a building or structure, or to erect, install, enlarge, alter, repair, remove, convert or replace any required impact-resistant coverings, electrical, gas, mechanical or plumbing system, the installation of which is regulated by this code, or to cause any such work to be done, or to do any site related work, shall first make application to the building official and obtain the required permit. (Emphasis added).

In contrast, the Florida Building Code states:

[A]105.1 Required.

Any owner or owner's authorized agent who intends to construct, enlarge, alter, repair, move, demolish or change the occupancy of a building or structure, or to erect, install, enlarge, alter, repair, remove, convert or replace any impact-resistant coverings, electrical, gas, mechanical or plumbing system, the installation of which is regulated by this code, or to cause any such work to be performed, [...] shall first make application to the building official and obtain the required permit. (Emphasis added).

In the hearing below, but not in the Notice of Violation, city staff repeatedly referred to the activity as “site related work” that requires a permit under section 5-105.1, Tampa, Fla. Code. In response, the Porters argue at length that the city code’s reference to “site related work” does not appear in the state code, suggesting that this omission from the state code precludes the City from regulating the Porters’ driveway project.

Although the Porters are correct that the state building code does not govern site related work, it is not clear how the state building code came to be an issue. Neither the Notice of Violation nor Stop Work Order make any reference to “site related work” except when reciting the text of the ordinance. Rather, both specifically describe the need for a permit as being related to the installation of pavers. Even assuming for the sake of argument that the Porters are correct

that that the state building code does not apply to the scope of the work on their property, the state law's inapplicability to their situation does not necessarily preclude the City from regulating this work. As the City maintains, the state code establishes the *minimum* building standards local governments in Florida are required to adopt. Local governments are not precluded from adopting additional standards if they are more rigorous. §553.73(4)(a), Fla. Stat. (Local governments may adopt amendments to the administrative provisions of the Florida Building Code... local amendments shall be *more stringent* than the minimum standards provided [by state law].) Moreover, the City may impose additional regulations as long as they do not conflict with the Florida Building Code and are not pre-empted. *Phantom of Clearwater, Inc. v. Sarasota County*, 894 So. 2d 1011, 1013 (Fla. 2d DCA 2005); *Lowe v. Broward Cnty.*, 766 So. 2d 1199, 1207-08 (a local ordinance may be found to be inconsistent with state law only if there is an express conflict with a state statute or if the legislature has preempted a particular subject area). Here, the Porters have shown no express conflict between the state and city building codes. At best, the Porters have shown only that the *state's* building code is silent as to site related work. For reasons that will become apparent, even if there were a conflict created by the City's regulation of site-related work,² it would not preclude the action taken in this case because the Porters' activity is regulated under other provisions of the city code.

² The Court notes that the term "site-related" is not defined in the city code; only the term "site" is defined. The term "site" is defined as "[t]he physical clearing of the site in preparation for foundation work including, but not limited to, site clearing, excavation, dewatering, pilings and soil testing activities." See section 5-102.9, Tampa, Fla. Code: DEFINITIONS. With regard to undefined terms, the city code provides in its section 5-102.10.1: "Words not defined herein shall have the meaning stated in the Florida Building Code or other nationally recognized codes, or other documents, manuals or standards adopted elsewhere in this chapter. Words not defined in those documents shall have the meaning stated in the Webster's Ninth New Collegiate Dictionary, as revised." The Court was unable to locate a definition for "site-related." Using the City's definition of "site" in conjunction with the common usage of "related," because the Porters' activity on the property was not in preparation for foundation work, the Porters' argument that it was not "site-related" has some basis. This is not intended to be and should not be read as a determination that the work is not site related.

Whether or not the Porters' activity constitutes "site related work," or relates to a "building," it is safe to say that the activity at issue does alter, construct, or repair a "structure" as that term is defined in the city code. §5-105.1, Tampa, Fla. Code. The terms "structure" and "building" are not interchangeable. The city code does not define the term "building." It defines terms such as "building shell," "building component," and "building system," but not "building." See §5-102.9 DEFINITIONS, Tampa, Fla. Code. *Webster's Ninth New Collegiate Dictionary* defines "building" as "a usually roofed and walled structure built for permanent use (as for a dwelling)." Unlike the Porters' driveway project, "building" suggests a vertical structure. There is no dispute that the City is not regulating work on any building.

In contrast, the city code defines the term "structure" as "[t]hat which is built or constructed." §5-102.9 DEFINITIONS, Tampa, Fla. Code. Because "construct" encompasses terms such as "assemble," "erect," "build," and "put together," it is clear that the City's definition of, and intent to regulate, work on structures was intended to be as broad as possible and includes the work the Porters undertook on their property. Such work requires the Porters to obtain a permit. The requirement that a property owner obtain a permit does not appear intended to punish a homeowner or enrich the City. Rather, the requirement ensures that a property owner's activities do not lead to unforeseen negative consequences to immediate neighbors and the public.

On rehearing,³ the Porters argued that the Court overlooked the fact that the City's "design standards" for driveways are not stricter or more rigorous than those in the Florida Building Code, they are nonexistent. The Porters, however, were not cited for violating a *design* standard, they were cited for failing to obtain a permit. The need for the permit is to allow the City to determine whether the driveway, or any construction on real property, creates a situation

³ The Court would like to commend the Porters for the apology in their motion for rehearing. It is appreciated.

in which more than 50 percent of the property's surface area is rendered impervious. This is an objective standard. The adoption of the City of Tampa Stormwater Technical Standards Manual by Section 21-116 of the City Code incorporates this standard into the city code by reference. It cannot, therefore, be said that the Code lacks standards regarding the proposed driveway improvement. The standards adopted simply do not appear to mandate any particular design if it conforms to area requirements.

The Court finds that the Porters' remaining issues are without merit.

CONCLUSION

Because the work on the Porters' property falls under activities for which Tampa's city code requires a permit, the order on appeal must be affirmed. Based on the Court's conclusion on this issue, it is unnecessary to discuss the Porters' remaining issues.

It is therefore **ORDERED** that the decision of the code enforcement special magistrate is **AFFIRMED**.

ORDERED in Tampa, Hillsborough County, Florida, on the date imprinted with the Judge's signature.

Electronically Conformed 3/27/2024
Paul Huey
By: _____
PAUL L. HUEY, Circuit Judge

Electronic copies provided through JAWS to all parties so registered.