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

SUPER HOST, LLC,
Appellant,

v.

CITY OF TAMPA,
Appellee.

Case no.: 20-CA-5743
Division: X
Code Enf. Case No.: COD-20-0001288

_____/

APPELLATE OPINION

This case is before the court to review an order of the code enforcement special magistrate finding Appellant Super Host, LLC in violation of the city code for improper use of property within its zoning designation. The subject South Tampa property had been used as a vacation or short-term rental for a university lacrosse team in a residential area zoned RS-60. In the RS-60 zoning classification, the city code prohibits rentals for fewer than seven days or to more than four unrelated persons (the single-family requirement). The property was found to have violated the code's zoning classification on both grounds in a single transaction. In support of its appeal, Appellant contends that no competent, substantial evidence supports the order finding violation, where an alleged contract provides that the rental was for the minimum seven days and for occupancy by one family. In addition, Appellant argues that it was denied due process for myriad reasons, including 1) that Appellant was not given an opportunity to cure the violations, 2) it was denied a hearing by a neutral fact-finder, and 3) because it was assessed an excessive fine. Witness testimony provided competent, substantial evidence that the term of the rental was for fewer than seven days and to more than four unrelated persons. Additionally, Appellant was afforded due process in that it was provided adequate notice and opportunity to be heard by a neutral fact-finder. The City's refusal to provide Appellant an opportunity to cure did not deny Appellant due process because the violations, being transient, were not curable. Appellant is correct, however, that the special magistrate departed from the essential requirements of law when he imposed a fine in an amount reserved for irreparable violations, where the code did not consider the subject violations to be irreparable. Accordingly, the decision is affirmed in part and reversed in part, and the matter remanded for further proceedings.

FACTUAL BACKGROUND

On January 20, 2020, Gail Wallach, the coach for the University of Alabama (Huntsville) women's lacrosse team, used *homeaway.com* to rent the subject property for the team's lodging in advance of an upcoming match with University of Tampa. As reflected by documents the investigator obtained from *homeaway.com*, the reservation

was scheduled for two nights beginning Friday, February 7, and ending Sunday, February 9, 2020, for which the sum of $4,896.00 was paid. The investigator also received photographs taken during the team's occupancy. They showed a number of team members at the property, additional staff, and the large coach-style bus that transported the group. Because the rental allegedly violated the city code on two bases, specifically that the rental term was less than the seven-day minimum and also ran afoul of the "single-family" requirement,[1] the City issued a combination notice of violation and notice of hearing several months later.[2]

THE CASE

On May 29, 2020, Appellant Super Host, LLC was served with a notice of violation and notice of hearing. As required by section 9-3(a), Tampa, Fla., Code, the notice of violation named Appellant as the violator and advised Appellant that its property at 4209 W. Vasconia Street in Tampa violated sections 27-43 (defining "dwelling unit"), and 27-156 (setting forth zoning districts and their permitted uses) from February 7 through February 9, 2020. It went on to advise that the property was zoned RS-60, residential single family, and permitted for owner occupancy or rental on a weekly or longer basis. The notice directed Appellant to "cease illegal use of subject property as a short-term rental." Although the notice explained that a dwelling unit is a "habitable unit for occupancy by one family only; for owner occupancy or for rental, lease or other occupancy on a weekly or longer basis," it did not set forth specific facts indicating a violation of the single-family requirement. The notice did not offer an opportunity to cure the violation. A notice of hearing accompanied the notice of violation.

Appellant appeared for the hearing and was represented by counsel. At the conclusion of the hearing, the special magistrate found Appellant's property to have violated the code because it 1) was rented for less than a week—the minimum time provided for dwelling units in the code—and 2) was rented to more than four unrelated persons in violation of the single-family occupancy requirement. Concluding that the violation was irreparable, the special magistrate imposed a $10,000.00 fine. This timely appeal followed.

JURISDICTION AND STANDARD OF REVIEW

This court has appellate jurisdiction to review code enforcement orders pursuant to sections 162.11 and 26.012, Florida Statutes. Code enforcement orders are reviewed to determine whether Appellant was afforded due process, 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).

[1] The "single-family" violation appears in the notice as part of the definition of "dwelling unit."
[2] The COVID pandemic was cited as the reason for the delay in issuing the citation and notice of hearing.

DEPARTURE FROM THE ESSENTIAL REQUIREMENTS OF LAW / COMPETENT, SUBSTANTIAL EVIDENCE

Appellant argues that no competent, substantial evidence supports the special magistrate's decision finding a code violation. If competent, substantial evidence supports the local government's decision, the decision is presumed to adhere to the essential requirements of law. *State v. Wiggins*, 151 So. 3d 457, 464 (Fla. 1st DCA 2014) (*citing Dusseau v. Metro. Dade Cnty. Bd. of Cnty. Comm'rs*, 794 So. 2d 1270, 1276 (Fla. 2001)). As noted in the facts, Appellant was found to have violated the proper use of zone on two grounds—the length of the rental term and because it was rented to more than four unrelated persons.

The short-term rental violation.

Regarding the length of the rental term, the City argues that a two-day rental is a violation of sections 27-43, 27-156, and 27-156 Table 4-1, Tampa, Fla., Code. In the property's zoning classification, which is RS-60, residential dwellings are the most common use. The code defines "dwelling unit" as:

> Dwelling unit: A room or group of rooms forming a single independent habitable unit used for or intended to be used for living, sleeping, sanitation, cooking and eating purposes by one (1) family only; for owner occupancy or for rental, lease or other occupancy on a weekly or longer basis; and containing independent kitchen, sanitary and sleeping facilities.

Tampa, Fla., Code §27-43 (emphasis added).

The definition of dwelling unit incorporates a proscription against short-term rentals by requiring that rental terms be for a week or longer. From there, the code's section 27-156, and its Table 4-1, address *allowable* uses in the specific zones. They contain the official schedule of district regulations.[3] The code's section 27-156 provides in pertinent part:

Sec. 27-156. - Official schedule of district regulations.

> (a) Schedule of statements of purpose and intent. The following array presents for the several districts the statements of purpose and intent applicable to each district.
>
> (1) Single-family residential districts. Single-family districts provide for detached residential housing development on a variety of lot sizes in accordance with the Tampa Comprehensive Plan. Accessory uses, compatible related support uses for residential development and special uses are also permitted or permissible.[4]

[3] https://library.municode.com/fl/tampa/codes/code_of_ordinances?nodeId=COOR_CH27ZOLADE_ARTIIIESZODIDIRE_DIV1GEZODI_S27-156OFSCDIRE

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d. RS-60 residential single-family. This district provides areas for primarily low density single-family detached dwellings similar to those provided for in the RS-150, RS-100 and RS-75 single-family districts, but with smaller minimum lot size requirements.

Table 4-1 contains the schedule, in table form, of permitted, accessory, and special uses by zoning district.[5] It prohibits the use of land or structures "that are not expressly listed in the schedule of permitted uses by district as permitted principal uses or permitted accessory uses…in that district." Tampa, Fla. Code, § 27-156.

The list of permitted uses (no administrative approval required) is limited to single family detached dwellings, day care and nurseries,[6] golf courses, public use facilities,[7] and temporary film production. Uses listed as permitted special uses may be established in that district only after approval of an application for a special use permit in accordance with the procedures and requirements in Article II, Division 5. Accessory structures and living facilities, as well as some commercial uses and home businesses fall in this category. Congregate living facilities and bed-and-breakfasts are prohibited uses in the zone, as are hotels and motels. Vacation or short-term rentals are not even a listed category, and, therefore, are prohibited. Where the code limits the permitted uses in the zone primarily to dwellings, defines dwellings to include minimum tenancies and limits occupancy to a single family, and omits short-term rentals of any kind as a permitted use in the zoning classification, it makes clear that short-term rentals in residential areas are prohibited.

Competent, substantial evidence supports that the lacrosse team occupied the space for only two days. Several neighbors testified to it. The transaction details from *homeaway.com* confirmed that the reservation was from February 7-9, 2020. The coach signed a sworn affidavit that she rented the property for only two days. Appellant's representative, Ryan Slate, attempted to rebut the foregoing evidence by propounding what purported to be a contract signed by the coach reserving the property for seven days and limiting the rental to a single family. Appellant argued that the two-night stay or *occupancy* does not negate a seven-day *lease*. In a sworn affidavit, however, the coach denied signing any such document. Appellant did not subpoena the coach and was,

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[4] In RS-60, the only permitted accessory use relates to parking. Tampa, Fla., Code § 27-156, Table 4. Special uses require administrative approval. *Id.*

[5] See link in footnote 3.

[6] Day care facilities and nurseries require no administrative approval if limited to five persons or fewer. Tampa, Fla. Code, § 27-156, Table 4.

[7] Public use facility is defined as "[t]he use of land, buildings or structures by a municipal or other governmental agency to provide protective, administrative, social and recreational services directly to the general public, including police and fire stations, municipal buildings, community centers, public parks and any other public facility providing the above services, but not including public land or buildings devoted solely to the storage and maintenance of equipment and materials and not including public cultural facilities or public service facilities." Tampa, Fla., Code § 27-43.

therefore, unable to authenticate the coach's signature. As a result, the special magistrate gave it little, if any, weight. It is the province of the special magistrate, as fact-finder, to consider, weigh, and resolve conflicts in evidence. *Naples Estates Ltd. P'ship v. Glasby,* 331 So. 3d 863, 866 (Fla. 2d DCA 2021) (internal citations omitted). Moreover, this court is not permitted to reweigh the evidence presented even if it might reach a different conclusion. *City of Deland v. Benline Process Color Co., Inc.*, 493 So. 2d 26, 28 (Fla. 5th DCA 1986), *citing Bd. of Cnty. Comm'rs of Pinellas Cnty. v. City of Clearwater*, 440 So. 2d 497, 499 (Fla. 2d DCA 1983).

Thus, the City met its burden with regard to the short-term rental violation. Tampa, Fla., Code § 9-108(l).

The "single-family" violation.

The second basis for concluding that a violation occurred was that the rental ran afoul of the zone's single-family occupancy requirement. Under the code, a family can be any number of related persons,[8] but no more than four unrelated persons may share a dwelling in residential areas. Tampa, Fla., Code § 27-43 (defining "family" and "dwelling"). There was no meaningful dispute that the 20 or so teammates and staff were not related. Appellant again argued that the above-mentioned lease between Appellant and the tenant expressly provided that "vacation rental is for a 'family' rental, which means only 1 family[,]" and further defined the term "family" as it is in the code. But other evidence presented showed that Appellant's representative Ryan Slate met the tenants at the property upon their arrival and was aware a university lacrosse team would be staying there. Appellant did not object to this evidence. [9]

As noted above, this Court is not free to reweigh the evidence. Whether or not the contract was authentic, competent evidence supports that Appellant's representative met the tenants and provided access to the property—after the contract was purportedly signed. Thus, Appellant's intent to pass the responsibility to the tenant does not negate Appellant's knowledge that a violation occurred or its responsibility for it. *See* Tampa, Fla., Code § 1-6(b). If the facts support that a violation occurred, the reviewing court will not disturb the decision. *Orange Cnty. v. Butler*, 877 So. 2d 810, 813 (Fla. 5th DCA 2004); *see also Dorian v. Davis*, 874 So. 2d 661, 663 (Fla. 5th DCA 2004). Here, again, the City met its burden to prove that the occupancy was not by a family as defined by the code.

[8] Related by blood, marriage, adoption, or legal guardianship.

[9] Because Appellant affirmatively defended against the allegation that he violated the single family requirement, attempted to introduce evidence in support of that defense, and did not object to evidence that he personally met the party at the premises, this single-family aspect of the violation, although not clearly noticed as a violation, is deemed to have been tried by consent. *Federal Home Loan Mrtg. Corp. v. Beekman,* 174 So. 3d 472, 475 (Fla. 4th DCA 2015) (when there is no objection to the introduction of evidence on that issue, it is tried by consent).

DUE PROCESS

State law and the city code recognize that the formal rules of evidence do not apply to code enforcement hearings, "but fundamental due process shall be observed and shall govern the proceedings." § 162.07(3), Fla. Stat.; Tampa, Fla., Code § 9-108(i). The fundamentals of the process due in administrative proceedings are fair notice and an opportunity to be heard in a meaningful manner. *Keys Citizens for Responsible Gov't, Inc. v. Fla. Keys Aqueduct Auth*., 795 So. 2d 940, 948 (Fla. 2001). Although Appellant appeared, was represented by counsel, and participated in the hearing, it now contends its due process rights were violated on several grounds, including that Appellant was not given an opportunity to cure the violations, it was assessed an excessive fine, and it was denied a hearing by a neutral fact-finder.

Adequacy of Notice/Inability to cure.

Consistent with the requirements of section 9-3(b) and (c), and section 9-107(e), the city's notice advised Appellant of the date, location, and facts giving rise to the violation, as well as the date and location of the scheduled hearing. Hearings are scheduled only if a previous opportunity to cure is not exercised, or when, as here, a violation cannot be cured. Appellant contends that it was denied due process because neither the notice of violation nor notice of hearing afforded Appellant the opportunity to cure the alleged violations. The question is whether omitting an express statement that the violations were not curable from the notice of hearing violated Appellant's due process rights. The short answer to this question is no.

Although subject to conditions, the code often, but not always, affords the opportunity to cure code violations. Tampa, Fla., Code § 9-3(c). Violations for which the opportunity to cure is not provided include repeat violations, threats to public health, violations deemed irreparable or irreversible, and those that are transient and itinerant. Tampa, Fla., Code §§ 9-3(c), 9-107(b-e).

During the course of the hearing, the assistant city attorney, when asked why Appellant was not given an opportunity to cure the violation before requiring it to appear for hearing, said that the violation, being "irreparable," could not be cured. *See e.g.,* Tampa, Fla., Code § 9-2 (definition of "irreparable" or "irreversible"), § 9-3(c) (notice of *violation* not required for specific types of code violations, including those that are irreparable). The notice did not specifically advise Appellant that the violation was considered irreparable or otherwise incurable, it simply omitted a time to cure and scheduled the matter for a hearing.

"Irreparable" is defined as "unable to return to the original condition." Tampa, Fla. Code § 9-2. When a violation is not curable, giving the violator an opportunity to cure is obviously an exercise in futility, and the code recognizes its futility by withholding time to correct such violations. Tampa, Fla., Code § 9-3(c). A survey of the city code, however, revealed that certain violations are *expressly* characterized as irreparable or irreversible. Some examples include the unpermitted removal of protected trees in

violation of § 27-284.2.4; retail sale of nitrogen-containing fertilizer in violation of § 21-148; destruction of upland habitat in violation of § 27-287.22; and dumping in storm drains in violation of § 21-9, Tampa, Fla., Code. Large fines accompany those violations, and specific code sections alert the public to that possibility.[10] The violation alleged here—improper use of zone—is not deemed irreparable under the code, and the assistant city attorney's characterization of the violation as irreparable was mistaken.

In addition to irreparable violations, other classes of violations allow the city to proceed directly to a hearing. These include those that are "transient" or "itinerant." *See* Tampa, Fla., Code § 9-2, (defining "transient" or "itinerant" violations).[11] Because they are temporary and cannot be undone, transient violations, like irreparable or irreversible violations, are not curable. Tampa, Fla., Code § 9-3(c).[12] The code's procedure for handling transient violations are similar to those provided for irreparable ones in that the code allows inspectors to determine that a violation is transient and issue an immediate citation without giving the violator an opportunity to correct the violation. *See* Tampa, Fla., Code § 9-3(c)(1), (3). Section 9-3(c)(1) allows the inspector to issue a notice of hearing in accordance with section 9-107, Tampa, Fla., Code. In turn, section 9-107 (c-e) sets forth notice procedures for those situations for which no opportunity to cure is provided. Subsection (c) addresses notices for repeat violations, subsection (d) addresses notices for health and safety violations, and subsection (e) addresses notices for irreparable violations. But section 9-107 does not mention transient violations. Because of its omission, "[i]t is necessary to fill the procedural gaps…by the common-sense application of basic principles of due process." *City of Tampa v. Brown*, 711 So.2d 1188, 1188 (Fla. 2d DCA 1998).

In *all* instances in which a code enforcement officer has reason to believe that a violation is either a threat to public health and safety or is otherwise not correctible, the officer must attempt to notify the violator and schedule a hearing, which the code enforcement officer did. §9-107 (c-e), Tampa, Fla., Code. Appellant was provided ample notice of the violation and hearing, as well as an opportunity to be heard and defend

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[10] *See e.g.* Tampa, Fla., Code § 21-9, which states:

> (a) It shall be unlawful for any individual to introduce any foreign matter (including, but not limited to, trash, leaves, grass clippings, debris, garbage, fill, construction materials, organic or inorganic pollutants, acids, and petroleum products), whether by action or inaction, to any public drainage system including but not limited to streets. It is a public nuisance for any person to damage, obstruct or interfere with the operation of any public drainage system, whether by action or inaction.
>
> (c) A violation of paragraph (a) is deemed an *irreparable and irreversible* violation (emphasis added.)

[11] Although the nature of the subject violations as transient were not argued in the proceeding below, it is axiomatic that an appellate court will uphold a lower tribunal's ruling where, as here, an alternative theory *supports* it. *Robertson v. State*, 829 So. 2d 901, 906 (Fla. 2002). A court may not rely on unpreserved argument to reverse a judgment, however.

[12] Transient violations cannot be cured, only punished. Were that not the case, local governments would have no enforcement mechanism against transient violations.

against the allegations. *Massey v. Charlotte Cnty*., 842 So. 2d 142, 146 (Fla. 2d DCA 2003). Appellant was represented by counsel, and indicated his understanding of the elements of the violation. Although the special magistrate was misinformed as to why the violation was incurable (irreparable as opposed to transient), the assistant city attorney's misstatement did not change the fact that the violation was incurable, and Appellant presented no authority to suggest that the notice was rendered ineffective by the City's omission of a specific statement to that effect. The notice was, therefore, adequate for the proceeding, and Appellant was not denied due process because he was not provided an opportunity to cure the violation.

Departure from the Essential Requirements of Law / Amount of Fine

Although the mischaracterization of the violation as irreparable does not affect the *adequacy* of the notice in this case, it was not without consequences. When a violation is determined to be irreparable, it is subject to a significant fine—up to $15,000. *See* Tampa, Fla. Code § 9-110(e). Transient violations, unlike irreparable ones, do not appear to be subject to such enhanced penalties. Therefore, the special magistrate departed from the essential requirements of law and denied Appellant due process when he treated the violation as irreparable and assessed a $10,000 fine. *See e.g. Maple Manor, Inc. v. City of Sarasota,* 813 So. 2d 204, 206-07 (Fla. 2d DCA 2002) (petitioner denied fair notice when penalties imposed exceeded board's authority). In light of the imposition of a fine reserved for the most serious violations, this cause must be remanded to allow the special magistrate to reconsider its amount under appropriate provisions of the code. In so doing, the Court does not suggest a specific amount to be imposed.

Right to an Impartial Fact-finder and Form of Judgment

Appellant also contends that his due process right to an impartial fact-finder was violated when the special magistrate recalled a previous proceeding involving the same Appellant and subject matter. The special magistrate went on to inquire why the matter was not being handled as a repeat violation.[13] Appellant suggests also that the special magistrate gave more consideration to the coach's sworn affidavit than the contract the coach denied signing. It is the province of the special magistrate to resolve conflicts in the evidence. *Glasby,* 331 So. 3d at 866. Moreover, nothing about the special magistrate's inquiry into a past proceeding appears to have negatively reflected on his ability to remain impartial and neutral. *Cf. Turner v. State*, 745 So. 2d 456, 458 (Fla. 4th DCA 1999) (it was not improper for court to raise questions regarding case status without compromising neutrality), *citing McFadden v. State,* 732 So. 2d 1180, 1185 (Fla. 4th DCA 1999).

[13] The special magistrate's recall was accurate in that Appellant was previously the subject of a code enforcement proceeding on the same property. It was, however, dismissed for unknown reasons. Because no violation had been found in the earlier proceeding, the underlying matter could not be, and was not, handled as a repeat violation.

Finally, the Court agrees with Appellant that the order finding violation is defective because it fails to set forth facts as required by the code, together with any legal conclusions. Tampa, Fla., Code § 9-108(n). Mere recitation of the code provisions allegedly violated does not comply with the requirement to set forth findings of fact.

CONCLUSION

Where neighbors testified as to the two-day rental between February 7-9, 2020, the tenant admitted to renting the property for only two days, and transaction details confirmed the two-day reservation, competent, substantial evidence supports the magistrate's conclusion that Appellant violated the seven-day minimum rental requirement in the RS-60 zoning classification. Similarly, where the evidence showed that Appellant knew that approximately 20 team members and university staff occupied the property during the subject rental term, and provided no rebuttal evidence suggesting that they were related, the special magistrate's conclusion that more than four unrelated persons stayed on the property is supported, and a violation of the single-family requirement is sustained.

But where the City conflated *transient* violations with those that are *irreparable*, both of which are not afforded an opportunity to cure under the code, the Court agrees with Appellant that the $10,000.00 fine must be re-evaluated. Accordingly, the matter is remanded for the special magistrate to reconsider the amount of the fine under the code provisions applicable to improper uses of zone.

It is therefore ORDERED that the decision of the code enforcement special magistrate is AFFIRMED with regard to the finding of code violations. It is FURTHER ORDERED that the $10,000.00 fine is QUASHED and the cause is REMANDED for the special magistrate to conduct further proceedings consistent with this opinion.

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

Electronically Conformed 10/24/2022
Emily A. Peacock
By:_____
EMILY PEACOCK, Circuit Judge

BARBAS, J., Concurs.

MOE, J., Dissenting.

I would reverse in its entirety the special magistrate's order finding an irreparable violation. I would do so with instructions to (1) conduct a properly noticed hearing and (2) if a violation is found, determine the proper amount of the fine.

I.

Procedural due process requires fair notice and an opportunity to be heard and defend. *State ex rel. Gore v. Chillingworth*, 171 So. 649, 654 (Fla. 1936). A general notification that some aspect of the case will be called up will not pass muster; fair notice means the specific matter to be adjudicated must be identified. *See, e.g.*, *Haeberli v. Haeberli*, 157 So. 3d 489, 490 (Fla. 5th DCA 2015) (reversing on due process grounds when one motion was noticed for hearing but two other motions not included in the notice were adjudicated); *Brill v. Brill*, 905 So. 2d 948 (Fla. 4th DCA 2005) ("It is generally a due process violation for a trial court to determine matters not noticed for hearing."); *Epic Metals Corp. v. Samari Lake E. Condo. Ass'n, Inc.*, 547 So. 2d 198, 199 (Fla. 3d DCA 1989) ("A trial court violates a litigant's due process rights when it expands the scope of a hearing to address and determine matters not noticed for hearing.").

The opportunity to be heard and defend oneself is, in a case like this, bound up with notice. The word "defend" in the context of a court proceeding means "to deny or oppose the right of a plaintiff in regard to a wrong charged." Webster's Third New International Dictionary (Unabridged) 590 (2002). To have a meaningful opportunity to defend, the "wrong charged" needs to be known to the one mounting the defense.

Under the Code, when a property owner receives a notice of violation the notice should in most instances give the owner an opportunity to cure. *See* Tampa, Fla. Code § 9-107(b) (2022) ("Except as provided in subsections (c), (d), and (e), if a violation of the City Code or city ordinances is observed, the code enforcement officer shall notify the violator and give time to correct the violation."). No opportunity to cure need be given for violations that are repeated, considered by the code enforcement officer to be irreparable or irreversible, or believed by the code enforcement officer to present a serious threat to public health, safety, and welfare. *Id.* But when the code enforcement officer relies on one of those exceptions and does not give an opportunity to cure, the Code requires that the property owner be notified that the exception applies. The use of the word "shall" in the Code means this is not optional. *Izaguirre v. Beach Walk Resort/Travelers Ins.*, 272 So. 3d 819, 820 (Fla. 1st DCA 2019) ("Based on its plain and ordinary meaning, the word 'shall' in a statute usually has a mandatory connotation."); *Persaud Props. FL Invs., LLC v. Town of Ft. Myers Beach*, 310 So. 3d 493, 496 (Fla. 2d DCA 2020) (Black, J.) (municipal ordinances are subject to the same rules of construction as statutes).

For example, Section 9-107(c) provides that the owner has no opportunity to cure if the violation is perceived to be a repeated one. Tampa, Fla., Code § 9-107(c) (2022). However, the City must say so in the notice. Section 9-107(c) states that the code enforcement officer "shall notify the violator of the finding" and the secretary is to be notified to schedule the hearing only "upon notifying the violator of a repeat violation." *Id.*

The Code provision relied upon by the City in this case—Section 9-107(e)—is similar to Section 9-107(c). The property owner is not entitled to cure the perceived violation if the code enforcement officer "has reason to believe the violation is irreparable or irreversible." Tampa, Fla., Code § 9-107(e) (2022). Where the opportunity to cure is denied based on a code enforcement officer's belief that the violation is "irreparable or irreversible," Section 9-107(e) mandates that the code enforcement officer make a reasonable effort to notify the owner that the infraction is considered irreparable "and the notice shall so state." *Id.* Reading Section 9-107(e) in the context of the preceding subsections and considering the plain meaning of the words "and the notice shall so state," it is clear that the notice itself should state that the code enforcement officer had reason to believe that the violation is irreparable or irreversible, for the purpose of explaining why an opportunity to cure was not provided pursuant to Section 9-107(b).

A larger fine is attached to violations under Section 9-107(c) or (e). *See* Tampa, Fla., Code § 9-110 (2022). In contrast with a fine of up to $1,000 per day for a standard first violation, the fine for a repeat violation is up to $5,000 per day. *Id.* For an irreparable or irreversible violation, the fine is up to $15,000 per day. *Id.*

This is where the opportunity to defend is important to the due process analysis. It is not that Super Host was given no notice at all. In fact, Super Host received both a Notice of Violation and a Notice of Public Hearing. The issue is that neither of the notices contained the language required by the Code. Because the notices did not say that the code enforcement officer considered the violation to be irreparable, Super Host's counsel came prepared to argue a type of violation that requires an opportunity to cure and carries a fine of no more than $1,000 per day. When Super Host pointed out that the type of notice given required an opportunity to cure, the City announced for the first time that the violation was considered irreparable.

Notably, the idea of the violation being irreparable came from the City Attorney, not the code enforcement officer. After being sworn in and asked why he did not give an opportunity to cure, the code enforcement officer never said that he had a reason to believe the violation was irreparable or irreversible. Instead, he refused to answer and deferred to "the legal department," and the City Attorney stepped in.

Lack of notice deprived Super Host of the opportunity to mount a persuasive defense. For a municipal code violation that carries a fine of no more than $1,000 per day and requires an opportunity to cure, what reasonable lawyer would go out and subpoena the lacrosse coach in Alabama to authenticate her signature on the lease? However, if the City had noticed an irreparable violation, the situation is entirely different. That violation carries a financial penalty up to fifteen times higher for each day that the property was in violation, and there was no argument to be made that the client deserved the opportunity to cure. In that situation, the need for a more forceful evidentiary presentation would be expected and the more costly preparation justified.

In a similar vein, while I appreciate the acknowledgment that the single-family violation was "not clearly noticed as a violation," *see* n.9, *supra*, I disagree with the conclusion that the issue was tried by consent. Failure to object is not a consent to try an unpled theory when the evidence presented was relevant to other issues. *Derouin v. Universal Am. Mortgage Co., LLC*, 254 So. 3d 595, 603 (Fla. 2d DCA 2018). In the context of a proceeding that itself was a due process violation because of deficiencies in the notice, I would not find that Super Host consented to try the single-family violation. Just like the City Attorney's argument that the violation was irreparable, neither the notice of violation nor the notice of hearing mentioned a single-family violation.

II.

After concluding that Super Host was not given fair notice that the violation was considered irreparable—and recognizing that the Code requires this—the majority still upholds the violation. The twist is that the majority finds that the violation was not irreparable; rather, it was "transient."

There are a few problems with this. The most glaring one is that no one has advanced this argument. The City never asserted that the violation was transient. Super Host certainly didn't either. The special magistrate did not find a transient violation. The idea of a transient violation appears for the first time in the majority's analysis. The trouble is that "[a]n appellate court is 'not at liberty to address issues that were not raised by the parties.' Nor may an appellate court 'depart from its dispassionate role and become an advocate by second guessing counsel and advancing for him theories and defenses which counsel either intentionally or unintentionally has chosen not to mention." *Rosier v. State*, 276 So. 3d 403, 406 (Fla. 1st DCA 2019). "'Basic principles of due process'—to say nothing of professionalism and a long appellate tradition—'suggest that courts . . . ought not consider arguments outside the scope of the briefing process.'" *Bainter v. League of Women Voters of Fla.*, 150 So. 3d 1115, 1126 (Fla. 2014).

Raised only in a footnote, the majority justifies its approach under the tipsy coachman doctrine. *See* n.11, *supra*. But this case is a poor candidate for application of that doctrine and even the opinion cited for the proposition—*Robertson v. State*—counsels against its application here. The underlying issue is the deprivation of a constitutional right to due process because Super Host received inadequate notice. Inadequacy in the notice deprived Super Host of a meaningful opportunity to be heard and to defend. *Robertson* disapproved of the application of the tipsy coachman doctrine in a case where inadequate notice of an issue deprived a party of a meaningful opportunity to be heard and defend and prevented the fulsome development of a record. *Robertson*, 829 So. 2d at 906. Specifically, it found that the intermediate appellate court "improperly relied upon the 'tipsy coachman' doctrine where no notice was provided and as a result the defendant never had an opportunity to present evidence or make argument as to the new theory. *Id*. Moreover, the majority does not apply the tipsy coachman doctrine in a manner that actually leads to an affirmance. This case is going back to the special magistrate, because the majority's new theory

relating to transient violations still requires reversal. The reason the entire case cannot be affirmed is that the special magistrate did not find—because the City did not argue—that this violation was transient. The special magistrate found that the violation was irreparable and assessed a fine that the special magistrate found appropriate for an irreparable violation.[14]

One of the first principles of American justice is that our system is adversarial in nature. *See generally United States v. Campbell*, 26 F.4th 860, 910 (11th Cir. 2022) (Newsom, J., dissenting) (discussing the differences between adversarial and inquisitorial systems of justice). Lawyers make arguments, judges make decisions. While from time a superior argument may appear to—for whatever reason—have been left on the table, respect for the lawyers as the masters of the case counsels against a judicial assist. And this case to me represents the easiest situation to justify deciding the case merely on the arguments presented. The beneficiary of the assist is the one who is beyond doubt the most powerful and experienced franchise player on the field—at least as it relates to proceedings on alleged violations of the City of Tampa Code. *Id.* A taxpayer-funded litigant who levied excessive fines on a party that was denied due process because of a sloppy notice is, in my view, a poor candidate for a handout. But in any event, the inherent problem with deciding a case on an issue not briefed or argued by the parties is that it "disort[s] the litigation process." *Id.*

A second problem—which in my view is a predictable consequence of deciding a case on an argument no one made—is that the analysis is incomplete. For example, the majority does not really reconcile Section 9-107 with Section 9-2 or Section 9-3. When interpreting a statute, "it is axiomatic that all parts of a statute must be read together in order to achieve a consistent whole. Where possible, courts must give full effect to all statutory provisions and construe related statutory provisions in harmony with each other." *Brittany's Place Condo. Ass'n v. U.S. Bank, N.A.*, 205 So. 3d 794, 798 (Fla. 2d DCA 2016) (quoting *Knowles v. Beverly Enters.-Fla., Inc.*, 898 So. 2d 1, 5 (Fla. 2004)).

Section 9-107 is the provision of the Code that establishes code enforcement procedures and requires that the property owner be given an opportunity to cure at the time the owner is notified of the violation, unless an enumerated exception applies. And Section 9-107 requires that if an enumerated exception is believed to apply, the notice of violation should say so. Section 9-107 contains no enumerated exception for transient violations.

The majority also fails to reconcile Sections 9-2 and 9-3 with Section 9-110, which sets out the administrative fines available for each type of violation. Tampa, Fla., Code § 9-110 (2022). Section 9-110(d) states that "[a] fine imposed pursuant to this

[14] The majority articulates that this case was not handled as a repeat violation, but I find that more difficult to conclude. For a two-night reservation, the fine was $10,000. A simple first-time violation can be only up to $1,000 per day under the Code. An irreparable violation is up to $15,000 per day. A repeat violation is assessed at up to $5,000 per day. Perhaps the math is coincidental (2 nights x $5,000), but the fine is not clearly consistent with an irreparable violation (2 nights x $15,000).

section shall not exceed one thousand dollars ($1,000) per day per violation for a first violation and shall not exceed five thousand dollars ($5,000) per day per violation for a repeat violation." *Id.* Section 9-110(e) states that if an irreversible violation is found, "a fine not to exceed fifteen thousand dollars ($15,000) per violation may be imposed. *Id.* When the violation is found to "present[] a serious threat to the public health, safety, and welfare" Section 9-110(g) provides that the appropriate city department may make the repairs to bring the property into compliance and charge the violator with the cost of the repairs along with the fine imposed." *Id.* Section 9-110 makes no reference to a transient violation and provides no penalty for it.

The canons of statutory construction are helpful here. The omitted-case canon reflects "[t]he principle that a matter not covered is not covered." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 93 (2012). In other words, "the statute means what it literally says" and if the drafter of the statute "intended to provide additional exceptions, it would have done so in clear language." *Petteys v. Butler*, 367 F.2d 528, 538 (8th Cir. 1966) (Blackmun, J.) ("My own reaction is that either the statute means what it literally says or that it does not; that if the Congress intended to provide additional exceptions, it would have done so in clear language; and that the recognized purpose and aim of the statute are more consistently and protectively to be served if the statute is construed literally and objectively rather than non-literally and subjectively on a case-by-case application. The latter inevitably is a weakening process.").

Applying the omitted-case canon, the fact that a transient violation is not listed as an enumerated category of violations in Section 9-107 or Section 9-110 is strong evidence that a transient violation is not itself a category of violation. *See* Tampa, Fla., Code § 9-107 (2022). A plausible, plain reading of Sections 9-2 and 9-3 together with Section 9-107 is that the word "transient" does not refer to what the violation *was*; rather, it describes the *way that the violation occurred*.

A first-time code violation could be a transient violation if it "moved from place to place or [stayed] in place for a short time." Tampa, Fla., Code § 9-2 (2022) ("Itinerant or transient in nature violation means that a [sic] violation which may be moved from place to place or which stays in place for a short time."). Likewise, a violation that is repeated, considered by the code enforcement officer to be irreparable or irreversible, or believed by the code enforcement officer to present a serious threat to public health, safety, and welfare could be transient, if the violation moved from place to place or stayed in place for only a short time.

When a violation occurs in a transient manner, Section 9-3 gives the code enforcement officer discretion to determine that, as a practical matter, a violation that already occurred cannot be cured because of the way the violation occurred—meaning that the violation occurred for only a short time or moved from place to place. If the code enforcement officer considered the violation transient, either the civil citation or the notice of hearing must say so. With awareness of the issue, the property owner can be prepared to defend by addressing whether the violation was in fact transient. This

reading is consistent with police power held in check by the Constitution's guarantee of due process.

I cannot join in the conclusion that transient violations are never capable of being cured and can only be punished. *See* n.12, *supra*. It seems to depend on what causes the violation. If the violation is caused by an act or omission of the property owner that the property owner is able and willing to change, then it seems as though even a transient violation could be cured. Operation of an impermissible short-term rental may be an example of this. Assume the short-term rental is the result of the property owner listing the home online as available for rental for periods of time shorter than what is permitted by the Code. And assume the code inspector learns of this through a neighbor who complains that a renter stayed less than the minimum time, and then the inspector goes online and finds the home listing. The code inspector posts the notice of violation, but the renter by that point is gone. The violation occurred in a transient way, but the property owner could decide to cure the violation by altering the listing so that the home is no longer available for a short-term rental. If the owner chooses to allow a second short-term rental and the scenario repeats itself, then the code inspector could issue a notice of repeat violation. The fine is higher, and the Code does not require an opportunity to cure. Both the first and second violations in that example were transient, but the second occurred because the owner chose not to cure.

Now, the purpose of pointing this out is not to state that this is the law as it relates to a transient violation under the Code; there are perhaps other constructions and arguments to consider. Had the City argued in the hearing that the violation was transient and the special magistrate found in its favor on that basis, the briefing on this would surely be well-enough developed that we could make a fair and well-considered judgment as it then would be our role to do. The point is that, relating back to what I view as the due process violation, this concept of a transient violation has no place in today's decision because Super Host did not have fair notice and an opportunity to be heard and defend on that argument any more than it did an irreparable or single-family violation. This is part and parcel of why I would have reversed the special magistrate's order in its entirety, with the instructions previously noted and without any mention of a transient violation.

This case presents an example of varying approaches to statutory construction. For the majority, the Code-drafter's omission of transient violations is viewed as a mistake that the Court can easily rectify by "filling in the procedural gaps" with judicial spackle. I see it differently. First, the matter at hand is substantive and not procedural. The question is whether Super Host has committed a civil wrong and, if so, which wrong was committed. Inventing a new category of wrongs is substantive. Second, I return to the fact that transient violations are not an enumerated type of violation in the Code and the absence of this type of violation in the Code does not create a "gap" that requires filling. As explained above, when I consider the plain and ordinary meaning of the words used in the Code and the various provisions read in relation to one another, the word transient seems to have been chosen by the drafters of the Code as a description of a way a violation can occur, rather than creating a separate category of violations.

Whatever it is that “filling in the procedural gaps” means, fixing or adding to Code provisions and statutes is a role constitutionally denied to judges. Art. 1, § 3, Fla. Const. (“The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.”) Although I have the greatest respect for my colleagues in the majority, I cannot join them and for that reason I dissent.

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