

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR THE STATE OF FLORIDA
GENERAL CIVIL DIVISION

JOSEPH L. FONTANA,
Petitioner,

CASE NO.: 21-CA-1314

v.

DIVISION: A

CITY OF TAMPA,
Respondent.

ORDER DISMISSING PETITION FOR LACK OF JURISDICTION

THIS MATTER is before the Court on Petition for Writ of Certiorari filed February 15, 2021. Having reviewed the petition, response and reply, and supplemental briefs on jurisdiction, the court finds that the underlying action was unauthorized; therefore, the court lacks jurisdiction to review the petition.

Under the city code, a property owner who has been aggrieved by any ruling, determination, decision, or order of administrative staff pertaining to the interpretation of [the building code] may appeal the decision to the building official by filing a *written* notice of appeal to the building official within 30 calendar days after the decision to be reviewed. §5-112.1, Tampa, Fla. Code. In turn, a property owner aggrieved by a decision of the building official may then make an appeal to the Board by filing a written notice within 30 calendar days after the official renders or issues a ruling. §5-112.2, Tampa, Fla. Code.¹ Finally, a property owner aggrieved by the Board's decision may ultimately seek review in circuit court. §5-112.4, Tampa, Fla. Code.² Whether review by the circuit court is proper depends on whether the proceeding below was authorized.

Reconstructing the entire chronological history of the case is unnecessary; only facts and dates essential to the court's decision on jurisdiction are recounted. On July 2, 2018, David Jennings, a city staff person, locked Petitioner's construction permit with an order to elevate the property or remove the improvements to conform to flood control regulations required by Federal Emergency Management Agency (also known colloquially as FEMA). Circumstantial evidence that Petitioner was aggrieved by the decision is an October 23, 2018 email from city councilman Mike Suarez to the City's Director of Planning and Development Thomas Snelling. Petitioner's attorney was copied

¹ The Board refers to the Hillsborough County Building Board of Adjustment. §5-102.9, Tampa Fla. Code.

² It is noted that the code cites to another code provision that the court was unable to locate for further guidance on seeking review in circuit court. Regardless, the time in which to seek review of final agency action in certiorari is 30 days. See Rule 9.100(c), 9.190(b)(3), Fla. R. App. P.

on the email. As the Director of Planning and Development, Mr. Snelling was, presumably, the building official to whom an appeal from staff's decision would be taken under section 5-112.1, Tampa, Fla. Code. Among other things, the email requested that Mr. Snelling follow up and communicate with Mr. Fontana and his counsel. It is not clear whether this communication reflects the initiation of an appeal to a building official as provided in the code.³ Petitioner has not shown that he provided a *written* request to appeal the decision. Whether the appeal was valid or not, however, on January 30, 2019, Mr. Snelling issued a formal denial on the merits of Petitioner's request for relief.

On June 1, 2020, almost a year and a half after Mr. Snelling's denial of Petitioner's appeal of the original staff decision, Petitioner appealed to the Board. An appeal is allowed by section 5-112.2 Tampa, Fla. Code, if filed in writing within 30 days of the decision to be reviewed. See Petitioner's appx. 49.⁴ Obviously, Petitioner's was not filed within 30 days. At the December 17, 2020 hearing, attorneys for the City argued that the Board lacked subject matter jurisdiction because the appeal was untimely. Although the Board, comprised of members who are not lawyers, declined to dismiss the appeal on what it deemed a technicality, the appeal was denied in writing on February 1, 2021. The petition seeking review in circuit court pursuant to section 5-112.4, Tampa, Fla. Code, was filed February 15, 2021.

Although the petition to circuit court was filed well within 30 days of the Board's denial, the City argues in its response that this court lacked jurisdiction to review it because the appeal of Director Snelling's decision to the Board was taken over a year later. This Court requested supplemental briefing solely on the issue of the court's jurisdiction to review the petition. Contrary to Petitioner's assertion that the jurisdictional issue is a question of fact reviewed for abuse of discretion, an administrative tribunal's subject matter jurisdiction is a question of law that is reviewed de novo. *Dep't. of Revenue v. Vanamburg*, 174 So.3d 640, 642 (Fla. 1st DCA 2015). Subject matter jurisdiction may not be waived by the parties' consent, acquiescence or waiver, and the issue may be raised for the first time on appeal. *Id.* Because subject matter jurisdiction is so vital to a court's power to adjudicate the rights of parties, this Court is obligated to consider the issue. *84 Lumber Co. v. Cooper*, 656 So.2d 1297, 1298 (Fla. 2d DCA 1994).

Although Petitioner's every request for review, except the petition, appear untimely in this matter, the Court concerns itself only with the authority to appeal Director Snelling's January 30, 2019 denial of relief to the Board,⁵ and its effect on the subsequent petition to the circuit court.⁶ The underlying administrative appeal, taken more than a year after

³ The validity of the intermediate "appeal" from the building official (Mr. Jennings) to Director Snelling does not affect the outcome in this case.

⁴ A written notice of appeal is not included in Petitioner's appendix. Only a receipt for the filing fee dated June 1, 2020, appears in the file. It bears mentioning that Petitioner's counsel asserted a date of June 9, 2020 as the date the appeal was filed. Based on the evidence in the file, this Court accepts the earlier date as the date of filing.

⁵ Section 5-112.2, Tampa, Fla. Code.

Director Snelling’s denial of relief on January 30, 2019, is untimely under the code, which requires a *written* request for an appeal to be filed within 30 calendar days of the decision to be reviewed. §5-112.2. A tribunal’s authority to modify, amend, or vacate a decision is limited to the time and manner provided by its governing rules. *Francisco v. Victoria Marine Shipping, Inc.*, 486 So.2d 1386, 1388-89 (Fla. 3d DCA 1986), *review denied* 494 So.2d 1153. The code does not authorize the tolling of a building official’s decision. Under certain circumstances, the code allows a building official to *limit* the time in which to appeal its decision to the Board. §112.3, Tampa, Fla. Code. But there is no authority to *expand* the time in which to do so. *Vanamburg*, 174 So.3d at 642 (an administrative agency may not expand its own jurisdiction); *also see, e.g., Sys. Mgmt. Assocs., Inc. v. State, Dept. of Health & Rehabilitative Servs.*, 391 So. 2d 688, 690 (Fla. 1st DCA 1981) (noting that a view similar to that espoused by Petitioner creates the potential to leave administrative orders open indefinitely); *Clara P. Diamond, Inc. v. Tam-Bay Realty, Inc.*, 462 So. 2d 1168, 1168-69 (Fla. 2d DCA 1984) (dismissing appeal of order denying rehearing where trial court had erroneously extended the time to seek rehearing). “If [review] is not triggered by the service of a timely [notice or request for administrative appeal], the [lower tribunal] loses jurisdiction.” *Franklin v. Bank of Am. N.A.*, 202 So. 3d 923, 926 (Fla 1st DCA 2016) citing *Pruitt v. Brock*, 437 So. 2d 768, 772-73 (Fla. 1st DCA 1983). Here, although the Board denied the requested relief (purportedly on the merits), it lacked jurisdiction to do anything else; any order granting relief would be a nullity.⁷ *Bank of Am., N.A.*, 202 So. 3d at 927. Mr. Snelling’s January 30, 2019 decision became final March 1, 2019, and the appeal of that decision in June, 2020 was untimely. Where the Board’s review of the underlying decision was unauthorized, this Court, in turn, lacks jurisdiction to consider the petition—even though the petition was filed within 30 days of the Board’s decision. *Id.*

Based on the foregoing, it is ORDERED that the petition is DISMISSED on the date imprinted with the Judge’s signature.

Electronically Conformed 8/5/2022
Cheryl Thomas

Cheryl Thomas, Circuit Court Judge

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⁶ Section 5-112.4, Tampa, Fla. Code.

⁷ One might wonder what the court would do had the Board *granted* Petitioner’s relief and the City sought relief in circuit court when the court lacks jurisdiction. Fortunately, *84 Lumber Co. v. Cooper* provides the answer, stating that “[the court] would still have been compelled under the law to vacate any order rendered by the [lower tribunal] and dismiss the case.” 656 So.2d at 1299-300.