NOTICE
Decision filed 12/03/15. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2015 IL App (5th) 140197-U

NO. 5-14-0197

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

MICHAEL WOODY,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Madison County.
	)	
v.	)	No. 11-MR-277
	)	
STEVE WILLAREDT, City of Granite	)	
City Building and Zoning Department,	)	
SCOTT GRIFFITH, City of Granite City	)	
Illinois Department of Local Ordinance	)	
Enforcement Hearing Officer, CITY OF	)	
GRANITE CITY DEPARTMENT OF	)	
LOCAL ORDINANCE ENFORCEMENT,	)	
and CITY OF GRANITE CITY BUILDING	)	
AND ZONING DEPARTMENT,	)	Honorable
	)	Donald M. Flack,
Defendants-Appellees.	)	Judge, presiding.

JUSTICE STEWART delivered the judgment of the court.
Presiding Justice Schwarm and Justice Cates concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court's judgment on administrative review affirming the hearing officer's decision finding that the appellant violated a city ordinance was reversed where the administrative body failed to submit a record of the administrative proceedings as required by the Administrative Review Law. The hearing officer's decision was also reversed and the cause was remanded to the administrative body for a new ordinance violation hearing, which was to be recorded or transcribed to permit judicial review. The appellees' motion to dismiss the appeal for failure to exhaust administrative

remedies, which was taken with the case, was denied because exhaustion of administrative remedies is an affirmative defense, which the appellees waived by failing to raise the issue in the circuit court.

¶ 2 The plaintiff, Michael Woody, appeals the judgment of the circuit court of Madison County affirming the decision of defendant Scott Griffith, a hearing officer with defendant City of Granite City department of local ordinance enforcement, finding him liable for violating a city ordinance and fining him $100. Because the department of local ordinance enforcement failed to submit a record of the administrative proceedings to be reviewed, as required by the Administrative Review Law (735 ILCS 5/3-101 *et seq.* (West 2014)), we reverse the judgment of the circuit court, reverse the decision of the hearing officer, and remand for a new ordinance violation hearing, which is to be recorded or transcribed to permit judicial review.

¶ 3 BACKGROUND

¶ 4 On September 8, 2011, the plaintiff was issued a citation for keeping farm animals within the city limits in violation of Granite City Municipal Code § 6.24.070 (eff. 1989). He contested the alleged violation at an administrative hearing on October 24, 2011. The record on appeal does not include a transcript of the administrative hearing, but the plaintiff apparently argued that federal statutory and constitutional law permitted him, a Native American, to maintain the chickens at his residence as part of his *Midewiwin* religious practice, notwithstanding the city ordinance. Following the hearing, the hearing officer found the plaintiff "liable" and fined him $100.

¶ 5 On November 11, 2011, the plaintiff filed a complaint for administrative review in the circuit court of Madison County. In his complaint, he named as defendants only the City of Granite City (the City) and Madison County.

¶ 6 On January 3, 2012, the City filed a motion to dismiss the plaintiff's complaint, arguing that (1) the complaint was not timely filed; (2) summons did not issue within the requisite time period; and (3) the plaintiff failed to name as defendants the hearing officer and the City's ordinance enforcement department. On February 10, 2012, the matter came before the court for a hearing on the City's motion to dismiss. Following the hearing, the court entered an order, granting the City's motion to dismiss, finding that the plaintiff's complaint was timely filed but that summons did not timely issue and that the plaintiff failed to name necessary parties.

¶ 7 The plaintiff appealed to this court, and, on August 28, 2013, we reversed the judgment of the circuit court and remanded with directions to grant the plaintiff 35 days in which to name the necessary defendants and secure the service of summons upon them. *Woody v. City of Granite City*, 2013 IL App (5th) 120125-U.

¶ 8 On September 30, 2013, the plaintiff filed an amended complaint for administrative review, naming as defendants Steve Willaredt, of the City's building and zoning department; Officer Donaley, of the City's police department; and Griffith, the hearing officer. He alleged that the defendants conducted a warrantless search of his property in violation of the fourth amendment (U.S. Const., amend. IV). He also alleged violations of his civil rights under 42 U.S.C. §§ 1983 and 1988; his religious rights under the American Indian Religious Freedom Act, 42 U.S.C. § 1996; and his rights to practice

his religion under the first and fourteenth amendments (U.S. Const., amends. I, XIV). He also alleged that the municipal code is unconstitutional as applied to him.

¶ 9 On November 22, 2013, the defendants filed an answer to the plaintiff's amended complaint. In their answer, the defendants stated that the complaint contained numerous factual errors and statements of opinion. The defendants specifically denied the plaintiff's allegations that there was an unlawful entry onto his property, that there was an unlawful search of his property, that he was deprived of his right to practice his religion, and that the municipal code is unconstitutional as applied to him.

¶ 10 On January 22, 2014, an attorney entered her appearance on the plaintiff's behalf. Up until that time, the plaintiff proceeded *pro se*.

¶ 11 On March 5, 2014, the plaintiff filed a motion to amend the pleadings to add all necessary parties and a motion to amend pleadings to encompass all causes of action. In the motions, the plaintiff sought to add the City's local ordinance enforcement department as a defendant and to add causes of action under the Illinois Religious Freedom Restoration Act (775 ILCS 35/1 *et seq.* (West 2012)) and the Illinois Constitution.

¶ 12 That same day, the plaintiff also filed a motion for the defendants to supply a copy of the transcript or recording of the ordinance violation hearing to him and the court *instanter*. He alleged that he believed the ordinance violation hearing was recorded and that no copy of the transcript or recording had been supplied to him or the court.

¶ 13 The matter came before the court for a hearing on all pending motions on March 14, 2014. Following the hearing, the court entered an order, allowing the plaintiff to file

a second amended complaint and ordering the City to produce a transcript or recording of the ordinance violation hearing within 28 days if such transcript or recording exists.

¶ 14 In his second amended complaint, the plaintiff named as defendants Willaredt, of the City's building and zoning department; Griffith, the hearing officer; the City's department of local ordinance enforcement; and the City's building and zoning department. He incorporated and adopted without reiteration all of his previous complaints, including attachments. He also alleged that the hearing officer and the department of local ordinance enforcement maintained a record of the entire proceedings in this cause, which should be filed with the court for review. He argued that the hearing officer's decision should be reversed for the following reasons: (1) it is contrary to the Illinois Constitution; (2) it is contrary to the Illinois Religious Freedom Restoration Act (775 ILCS 35/1 *et seq.* (West 2012)); (3) his property was searched without a proper search warrant; (4) it violates his right to practice his religious beliefs freely as a member of the Sault Ste. Marie Chippewa tribe through the use of sacred objects, such as *agaashiinyin Manitou*, in his home pursuant to the American Indian Religious Freedom Act, 42 U.S.C. § 1996; (5) it is contrary to his right to free exercise of his religious beliefs under the first amendment as applied by the fourteenth amendment; and (6) the ordinance prohibiting the keeping of farm animals is unconstitutional, as applied to him, because it impacts his rights to free exercise of his religious beliefs.

¶ 15 The record includes a March 27, 2014, letter from assistant city attorney Laura R. Andrews to the circuit court advising the court that there was no transcript or recording of

the ordinance violation hearing. The letter also states that, in December 2011, the City had begun recording some of the hearings if requested by either party.

¶ 16 On April 29, 2014, the matter came before the court for a hearing on the plaintiff's second amended complaint for administrative review. Following arguments of counsel, the court entered an order, affirming the hearing officer's decision finding the plaintiff "liable" and fining him $100. The plaintiff filed a timely notice of appeal.

¶ 17 ANALYSIS

¶ 18 Initially, we will address the defendants' motion to dismiss for failure to exhaust administrative remedies and the plaintiff's response thereto, which were taken with the case. In the motion, the defendants argue that the plaintiff's appeal should be dismissed for failure to exhaust administrative remedies. More specifically, they argue that the Granite City Zoning Code provides an administrative remedy in section 7-800 allowing parties who require relief from provisions of the code to apply for a special exemption permit; that the plaintiff did not apply for a special exemption permit; and, therefore, that the plaintiff has not exhausted his administrative remedies. However, the defendants did not raise this issue as a basis for challenging the plaintiff's complaint when this matter was pending in the circuit court. "Failure to exhaust administrative remedies is an affirmative defense that is waived if not raised in the trial court." *Hawthorne v. Village of Olympia Fields*, 204 Ill. 2d 243, 254 (2003). The defendants have, therefore, waived the affirmative defense of failure to exhaust administrative remedies in this case, and their motion to dismiss the appeal on that basis is denied.

¶ 19 We will next address the deficiency of the record. Section 3-108 of the Administrative Review Law (735 ILCS 5/3-108(a), (b) (West 2014)) contains the following pertinent provisions with regard to the pleadings and the record on review:

> "(a) *** The complaint shall contain a statement of the decision or part of the decision sought to be reviewed. It shall specify whether the transcript of evidence, if any, or what portion thereof, shall be filed by the agency as part of the record. ***
>
> (b) *** Except as herein otherwise provided, the administrative agency shall file an answer which shall consist of the original or a certified copy of the entire record of proceedings under review, including such evidence as may have been heard by it and the findings and decisions made by it. By order of court or by stipulation of all parties to the review, the record may be shortened by the elimination of any portion thereof. *** No pleadings other than as herein enumerated shall be filed by any party unless requested by the court."

¶ 20 The foregoing section has been implemented by Supreme Court Rule 291(e) (Ill. S. Ct. R. 291(e) (eff. May 30, 2008)), which provides: "The original copy of the answer of the administrative agency, consisting of the record of proceedings (including the evidence and exhibits, if any) had before the administrative agency, shall be incorporated in the record on appeal unless the parties stipulate to less, or the trial court after notice and hearing, or the reviewing court, orders less."

¶ 21 The scope of the judicial review of a final administrative decision is set forth in section 3-110 of the Administrative Review Law (735 ILCS 5/3-110 (West 2014)), which provides as follows:

> "Every action to review any final administrative decision shall be heard and determined by the court with all convenient speed. The hearing and determination shall extend to all questions of law and fact presented by the entire record before the court. No new or additional evidence in support of or in opposition to any finding, order, determination or decision of the administrative agency shall be heard by the court. The findings and conclusions of the administrative agency on questions of fact shall be held to be prima facie true and correct."

¶ 22 The pleadings filed in the circuit court and the procedure followed in this case do not conform to the foregoing legislative directions. Although the plaintiff in his complaint requested that the defendants file a complete record of the administrative proceedings under review, all that was filed was an answer, which denied various allegations of the complaint and prayed that the court affirm the decision of the hearing officer and deny the relief requested by the plaintiff. The defendants made no attempt to incorporate the record of proceedings required by the Administrative Review Law.

¶ 23 The plaintiff then filed a motion, asking that the defendants be ordered to supply a transcript or recording of the ordinance violation hearing. After a hearing, the court granted the motion, ordering the defendants to produce a transcript or recording of the ordinance violation hearing within 28 days if such transcript or recording exists. In response, counsel for the defendants filed a letter, stating that no transcript or recording

of the hearing exists. The letter further states that, in December 2011, the City had begun recording some of the hearings if requested by either party.

¶ 24 The record on appeal, therefore, contains no transcript or report of proceedings for the ordinance violation hearing, no bystander's report, and no agreed statement of facts. See Ill. S. Ct. R. 323(a), (c), (d) (eff. Dec. 13, 2005) (parties may provide a bystander's report or agreed statement of facts in lieu of a report of proceedings).

¶ 25 Ordinarily, the absence of such evidence in the record would be construed against the appellant, in this case, the plaintiff. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984) (explaining that any doubts that might arise from the incompleteness of the record would be resolved against the appellant). However, in the present case, it would not be appropriate to construe the incomplete record against the plaintiff because the defendants had the burden of presenting the court with the record of proceedings. See *Lambert v. Downers Grove Fire Department Pension Board*, 2013 IL App (2d) 110824, ¶ 35 (holding the lack of a complete record against the board even where the board was the appellee, not the appellant). The administrative agency is required to provide the entire record of proceedings under review so that the reviewing court may properly perform its judicial review function. *Mueller v. Board of Fire & Police Commissioners of the Village of Lake Zurich*, 267 Ill. App. 3d 726, 733 (1994).

¶ 26 When called upon to conduct a judicial review of an administrative body's findings of fact, a court must determine whether they are against the manifest weight of the evidence. *Bono v. Chicago Transit Authority*, 379 Ill. App. 3d 134, 143 (2008). The court cannot perform this function, however, when it cannot compare the evidence

against the findings of fact because there is no record of the evidence presented. The circuit court in the present case was asked to judicially review an administrative proceeding, but it did not have before it a record of the administrative proceeding or a transcript or stipulation of the evidence upon which the administrative decision was based. Without the record before it and unable to go outside the record, the circuit court had nothing on which to base its decision. The circuit court, therefore, could not properly perform its judicial review function. As the court succinctly noted in *Pisano v. Giordano*, 106 Ill. App. 3d 138, 139 (1982):

> "Can either the trial court or a reviewing court re-examine an administrative agency's actions without a record before it?
>
> No.
>
> No court–trial or appellate–can function in a vacuum.
>
> Administrative review presupposes a record of the proceedings before the agency."

¶ 27 Section 3-111 of the Administrative Review Law (735 ILCS 5/3-111 (West 2014)), which delineates the circuit court's powers, provides in pertinent part as follows:

> "(a) The Circuit Court has power:
>
> ***
>
> (2) to make any order that it deems proper for the amendment, completion or filing of the record of proceedings of the administrative agency;
>
> * * *

(5) to affirm or reverse the decision in whole or in part;

***

(7) where a hearing has been held by the agency, to remand for the purpose of taking additional evidence when from the state of the record of the administrative agency or otherwise it shall appear that such action is just."

¶ 28 Our supreme court was faced with a similar situation in *Strohl v. Macon County Zoning Board of Appeals*, 411 Ill. 559 (1952). There, a complaint for administrative review was filed in the circuit court of Macon County to review an order entered by the zoning board of that county. *Id.* at 560. Although the complaint requested that the defendants file a complete record of the proceedings under review, all that was filed was an answer, which merely admitted or denied the various allegations of the complaint and prayed that judicial review be denied. *Id.* at 562-63. No attempt was made to incorporate the record of proceedings required by statute; nor did there appear to have been any stipulation to a shortened record. *Id.* at 563. The circuit court was asked to judicially review an administrative decision, but it did not have before it a record of the administrative proceedings, a statement of the decision appealed from, or a transcript or stipulation of the evidence upon which the administrative decision was based. *Id.* The supreme court reversed the judgment of the circuit court and remanded the matter to that court to determine if a record of the administrative proceedings was kept. *Id.* at 565. The supreme court directed that, if the circuit court determined that no record of the administrative proceedings was kept, it was to reverse the board's decision. *Id.* If, on the

other hand, the circuit court determined that a record of the administrative proceedings existed, it was to remand the cause to the board with directions to complete and file the record in the case, and judicial review was then to be completed. *Id.*

¶ 29 The appellate court was also presented with a similar case in *Wauconda Township High School District No. 118 in Lake & McHenry Counties v. County Board of School Trustees of McHenry County*, 13 Ill. App. 2d 136 (1957). There, the plaintiff school district brought a complaint for administrative review of a decision of the County Board of School Trustees of McHenry County ordering the detachment of certain territory from the plaintiff's district and annexing it to another district. *Id.* at 137. The circuit court reversed the decision of the county board on the ground that no evidence was taken or preserved by the board at its hearing. *Id.* Relying on the supreme court's opinion in *Strohl*, the appellate court affirmed the circuit court's reversal of the board's decision. *Id.* at 140-43. The court concluded its opinion with the following question: "How can this court determine whether the findings have a substantial foundation in the evidence unless the evidence appears in the record?" *Id.* at 143.

¶ 30 In the present case, the defendants' counsel has already filed a letter with the circuit court stating that no record of the ordinance violation hearing exists. The lack of any record of the ordinance violation hearing deprives us of any knowledge of the evidence presented at the hearing. In addition, in his decision, the hearing officer did not make any findings of fact or conclusions of law other than that the plaintiff was "liable." Absent a transcript, report of proceedings, stipulation, or agreed statement of facts, it is impossible for this court, or the circuit court, to conduct a meaningful judicial review.

¶ 31 Under these circumstances, we believe that justice will be best served by reversing the hearing officer's decision and remanding this case to the City's department of local ordinance enforcement for a new ordinance violation hearing, which is to be recorded or transcribed to permit judicial review. See *Armour v. Mueller*, 36 Ill. App. 3d 23, 31 (1976) (remanding the case to the board for another hearing where the board failed to make the necessary findings of fact in support of its decision).

¶ 32 CONCLUSION

¶ 33 For the foregoing reasons, the defendants' motion to dismiss for failure to exhaust administrative remedies, which was taken with the case, is denied; the judgment of the circuit court of Madison County is reversed; the decision of the hearing officer is reversed; and the matter is remanded to the City of Granite City department of local ordinance enforcement for a new ordinance violation hearing, which is to be recorded or transcribed to permit judicial review.

¶ 34 Reversed and remanded with directions.