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IN THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT
IN AND FOR MONROE COUNTY, FLORIDA
APPELLATE DIVISION

STEVEN STONE,

Appellant,

Case No.: 21-AP-08-P

L.T. Case No.: CE20070012

vs.

MONROE COUNTY, FLORIDA,

Appellee.
_______________________________/

OPINION

THIS CAUSE comes before the Court upon the Appellant, Steven Stone's Notice of Appeal of the Final Order of the Code Enforcement Special Magistrate rendered on August 5, 2021. The Court conducted oral argument on July 25, 2022, and reserved ruling. The Court, having considered the Appellant's Initial Brief, the Appellee's Answer Brief, the Appellant's Reply Brief, argument of counsel, the record, pertinent legal authority, and being otherwise fully advised in the premises, finds and orders as follows:

I. BACKGROUND

Appellant owns a home located at 174 Dove Creek Drive, Tavernier, Florida (hereafter "subject property"). In 2020, the subject property became the focus of a code compliance investigation. On May 24, 2021, the Code Compliance Department issued a Notice of Violation/Notice of Hearing

alleging the following violation of the Monroe County Code (hereafter "MCC"):

MCC § 110-140(a)-BUILDING PERMIT REQ/CH6
PERMIT(S). APPROVAL(S) AND ALL FINAL INSPECTION(S) ARE REQUIRED FOR THE CONSTRUCTION:

1) ALL LOWER LEVEL ENCLOSED AREAS OTHER THAN UTILITY ROOM PERMITTED PER PERMIT #4123;
2) ENCLOSED EXTERIOR STAIRWAY;
3) REPAIR TO UPPER REAR DECK TO INCLUDE RAILING AND SCREENING;
4) CONVERSION OF SCREENED PORCH AREA ON UPPER LEVEL TO SOLID WALLS

Corrective Action Required:
Contact the Monroe County Building and Planning Department and obtain an after the fact permit or demolition permit.

On July 29, 2021, a hearing took place before a Code Compliance Special Magistrate. At the hearing, Cynthia McPherson, Director of the Code Compliance Department (hereafter "Director McPherson"), testified on behalf of the County and presented the County's exhibits. Director McPherson testified that the subject property was originally permitted in 1962 pursuant to Permit No. 4123 (Appellant Ex. E) as a single-story elevated structure with a small utility room about 120 square feet beneath it, with exposed exterior stairs, an open balcony, and screened porch area. (Tr. 7; 11-13). She testified that since Permit 4123 issued, the square foot ground level enclosure has been expanded to 475 square feet and County staff have no records authorizing this expansion. (Tr. 7-8). Director McPherson testified that Permit C20747 (Appellant Ex. F) was issued in 1986 for an upper wooden deck on the back of the property. (Tr. 13-14;22). She testified that since Permit C20747 issued, the deck has been repaired

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with a new railing and screen replacement. (Tr. 25). Director McPherson testified regarding photographs taken on February 10, 2021 and entered as Exhibit 2 (Appellee's Ex. B) which show the stairs enclosed, the downstairs enclosed, and the screened porch enclosed. (Tr. 23-25). McPherson testified that she does not have any knowledge as to when the alleged additional unpermitted construction took place. (Tr. 16).

At the hearing, Appellant introduced a 1965 and 1977 photograph from the Property Appraisers Office (Appellant Ex. I) and testified "[w]hen I bought the house in 1997 it looked like it does in that picture in 1977. Except the front lattice enclosure wasn't there in 1977, that was there in 1997." (Tr. 35). Appellant testified that the downstairs enclosure had been there "for sure prior to 1997 when I purchased it." (Tr. 36). He testified that the enclosed exterior stairway and solid walls in the porch area also existed when he purchased the home in 1997. (Tr. 36-37). Appellant testified that he replaced the windows in the home in 2010, including the windows in the former screened in porch, and the County issued an after-the-fact permit for this work. (Tr. 37-38). Appellant testified that "[t]he upstairs railing was replaced on January 15th of 2018, right after Hurricane Irma." (Tr. 41). Appellant admitted that he did not obtain a permit for the railing because "permits were not necessarily required for bringing a home back to a safe living conditions and the fact that it was under $2,500." (Tr. 41). Appellant's attorney moved to dismiss based on the statute of limitations, arguing the four-year statute of limitations in MCC Section 8-37

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prevented prosecution. (Tr. 17). The Special Magistrate denied the motion. (Tr. 20). At the conclusion of the hearing the Special Magistrate took the matter under advisement.

A Final Order was entered on August 5, 2021. The Final Order finds Appellant in violation of the Monroe County Code(s) as fully set forth in the Notice of Violation. The Special Magistrate found that the statute of limitations has not expired because unpermitted work is a continuing violation that can be prosecuted until an after the fact permit is obtained. Appellant was ordered to comply with the codes referenced in the Notice of Violation by a future date or face fines for non-compliance. This appeal of the Special Magistrate's Final Order followed.

II. STANDARD OF REVIEW

Pursuant to Florida Statute § 162.11, the Circuit Court sitting in its appellate capacity has jurisdiction to review code enforcement final orders. *Central Fla. Investments, Inc. v. Orange County*, 295 So. 3d 292 (Fla. 5th DCA 2019). "Such an appeal shall not be a hearing de novo but shall be limited to appellate review of the record created before the enforcement board." § 162.11 Fla. Stat. When an appeal is taken from the final administrative order of a local enforcement board, the circuit court has plenary appellate review of the record before the enforcement board. *Central Fla. Investments* at 294. "[O]n appeal, all errors below may be corrected; jurisdictional, procedural, and substantive. *Id*. at 295 (*quoting Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 526 n. 3 (Fla. 1995)). On

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appeal, the Court still engages in the three-prong certiorari standard of review which involves determining (1) whether due process was accorded; (2) whether the correct law was applied; and (3) whether the decision is supported by "competent substantial evidence." *Dusseau v. Metropolitan Dade County Board of County Commissioners*, 794 So. 2d 1270, 1274 (Fla. 2001). However, Section 162.11 expands the Circuit Court's appellate jurisdiction. "Certiorari review considers whether the correct law was applied; review by appeal goes further to also consider whether the law was correctly applied." *Central Florida Investors*, 295 So. 3d at 295.

The Circuit Court also has jurisdiction to consider and resolve constitutional issues as part of a code enforcement appeal. *Key Haven Associated Enterprises, Inc. v. Board of Trustees of Internal Improvement Trust Fund*, 427 So. 2d 153, 157 (Fla. 1982).

III. DISCUSSION

Appellant seeks review of the Special Magistrate's Final Order based on the following arguments: (1) the Special Magistrate erred by failing to apply the four year bar to prosecution; (2) the Special Magistrate erred by failing to exclude the County's inadmissible hearsay records; (3) there is a lack of clear and convincing evidence to support the finding of violation; (4) the Final Order violates due process because it was entered without affording Appellant a compliance hearing, fails to include clear and definite standards, and it gives the County unfettered discretion to determine

compliance and ultimately the amount of the fine; and (5); the fine is unconstitutionally excessive.

A. <u>Four-year statute of limitations</u>

The Notice of Violation states that Appellant violated MCC Section 110-140(a) by failing to obtain a building permit before: (1) enclosing the lower level, (2) enclosing an exterior stairway, (3) repairing an upper rear deck, and (4) converting a screened porch to solid walls.

MCC § 110-140 states as follows:

Sec. 110-140. - Building Permit Required.

A building permit is required prior to the following:
(a) Any work specified in Chapter 6 of the Monroe County Code of Ordinances;
(b) Any change in the land use intensity, density, or use of land authorized as a permitted as-of-right use under this Land Development Code;
(c) Any change in the use of land or structure from a permitted as-of-right use within a land use district to another listed permitted as-of-right use; and
(d) Any development authorized by conditional use approval.

Therefore, pursuant to subsection (a), as is charged in the Notice of Violation, a permit was required prior to commencing work specified in Chapter 6 of the Monroe County Code of Ordinances, and such permits were not obtained prior to performing the work alleged. Appellant argues that the four-year statute of limitations bars prosecution of these alleged violations since more than four years have passed since the work was performed. The code provision establishing the statute of limitations is contained in MCC Sec. 8-37 and states in relevant part as follows:

Sec. 8-37. - Passage of four years a bar to prosecutions.

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> (a) All prosecutions before the code compliance special magistrate shall be initiated within four years of the occurrence of the event complained of or be forever barred. For the purpose of this section, the term "initiated" means the filing of a notice of violation, issuance of a notice to appear, or issuance of a civil citation by the code compliance department.

The plain language of MCC Sec. 8-37(a) requires all prosecutions before the special magistrate *shall be initiated within four years of the occurrence of the event complained*. Appellant argues that the statute of limitations bars prosecution because the occurrence of the event complained of in this case is the failure to obtain a building permit prior to doing the work alleged, and that would have occurred prior to his purchase of the home in 1997. The County adopts the Special Magistrate's conclusion outlined in the Final Order, that the subject violation is not barred by MCC Section 8-37(a) because the violation is for outstanding unpermitted work, which is not a one-time occurrence, but an ongoing event that occurs continuously until the work is permitted.

In the Final Order, the Special Magistrate notes "this proceeding was 'initiated' on May 24, 2021," and thus, "if the 'event' complained of 'occurred' before May 24, 2017, this enforcement proceeding would be time barred. (Final Order at P. 1). The Special Magistrate concludes that the event complained of is "Respondent's (or his predecessor's) having caused work to be done without a building permit" which "constitutes a continuing violation that starts upon the commencement of construction and does not end until an after-the-fact permit is closed." (Final Order at P. 2). The Special Magistrate relies on *Rapf v. Suffolk Cnty. of New York*, 755 F.2d 282, 290 (2d Cir. 1985) to support his finding that under Section 8-37(a), the limitations period is measured from the alleged violator's failure to satisfy a continuing duty. The Special Magistrate also supports his

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interpretation of the statute of limitations from a policy standpoint "that it would be a terrible result" to "give the owner of unpermitted work basically a vested right to maintain such work indefinitely, even though the nonconforming structure or improvement was never legal." (Final Order at P.2).

The Court finds that the Special Magistrate incorrectly applied the law in determining that the statute of limitations period "must be measured from the alleged violator's failure to satisfy a continuing duty" when this interpretation is contrary to the plain language of MCC Section 8-37(a). Under a plain reading of Section 8-37(a), all prosecutions before the code compliance magistrate shall be initiated within four years of the event complained of, which as it applies to violations of MCC Section 110-140(a), is the event of not obtaining a building permit prior to commencing work specified in Chapter 6 of the Monroe County Code of Ordinances. The plain language supports the assertion that the violation is a one-time event, not an ongoing daily offense.

The Special Magistrate's reliance on *Rapf v. Suffolk Cnty. of New York*, is not binding on this Court. That case is distinguishable because it involved a claim of a continuing tort (nuisance) against a municipality that was analyzed under New York law. 755 F. 2d at 284. Further, the "continuing duty" or "continuing tort" doctrine is not settled law in that jurisdiction. Historically, New York's statute of limitations generally began to run at the time of injury, but over the years, a "narrow common-law exception evolved to ameliorate the harshness of this accrual rule with respect to some particular continuous wrongs." *Jensen v. General Elec. Co.,* 82 N.Y.2d 77, 85 (N.Y. 1993). However, many New York courts continued to adhere to the rule that the statute of limitations begins running on the

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date of injury and declined to apply the "continuing tort doctrine." *Syms v. Olin Corp.,* 408 F.3d 95, 109 (2d Cir. 2005). In many instances, the perceived need for the continuous tort doctrine has been eliminated by the enactment of discovery statutes that "carefully balances plaintiffs' interest in recovering damages for undiscovered latent injuries against defendants' interest in repose." *Id*. at 110.

Under applicable Florida law, the question of when, and under what circumstances, a local government can seek enforcement for continuing code violations of long-standing duration under Chapter 162 remains unresolved. See *Sarasota Cnty. v. National City Bank of Cleveland, Ohio*, 902 So. 2d 233, 235 (Fla. 2d DCA 2005) ("Thus, the difficult legal issue that remains unresolved by this opinion is when, and under what circumstances, may a local government seek administrative enforcement for code violations of long-standing duration."). Therefore, the plain language of the statute dictates the result in this case. When the language of the statute is clear and unambiguous and conveys a clear and definite meaning…the statute must be given its plain and obvious meaning. *English v. State*, 191 So. 3d 448, 450 (Fla. 2016). The failure of a lower tribunal to follow the plain language of the statute may form the basis for appellate review. *14269 BT LLC v. Vill. of Wellington,* 240 So. 3d 1, 3 (Fla. 4th DCA 2018) Here, the Special Magistrate exceeded his authority and applied the wrong law by not following the plain language of the statute, and this constitutes reversible error.

Based on the Court's ruling that the Special Magistrate applied the wrong law in finding that the enforcement action was timely, the Court must next determine whether the findings of violation can be maintained under the plain language of Section 8-37(a). The parties agree that Section

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8-37(a) creates an affirmative defense. Therefore, the burden is on the pleader to prove the defense of statute of limitations. *Town of Miami Springs v. Lawrence,* 102 So. 2d 143, 146 (Fla. 1958). Appellant provided testimony and evidence that most of the work complained of was in place when Appellant purchased the property in 1997, and the County was on actual notice of the work based on the 1997 Elevation Certificate (Appellant Ex. D) and the Building Department's inspection of the installation of all the windows in 2010 (Appellant Ex. G). Director McPherson testified that she did not know when the unpermitted construction took place. (Tr.16). Therefore, the undisputed evidence establishing the commencement date of the statute of limitations is as follows:

1. Lower Level Enclosed Areas

Mr. Stone testified that the lower-level enclosure existed when he purchased the property in 1997. (Tr. 36). The elevation certificate from 1997 shows there was a 475 +/- square foot ground level enclosure at the property. (Appellant Ex. D). Thus, the statute of limitations commenced no later than 1997, and the enforcement action initiated in 2021 is time-barred.

2. Enclosed Exterior Stairway

Mr. Stone testified that the exterior stairway was enclosed when he purchased the property in 1997. (Tr. 36-37). The enclosed stairway is depicted in the 1977 photograph (Appellant Ex. I), and in the 1986 porch plans (Appellant Ex. F). The undisputed evidence establishes the enforcement action is time-barred.

3. Repair to Upper Rear Deck- Railing and Screens

Director McPherson testified that on February 10, 2021, "I was invited to the property to do an inspection regarding this case. And Mr.

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Stone as you saw in the photos showed me around the property and indicated that the railing and the screening was new, and it definitely appeared new as well." (Tr. 25). Mr. Stone testified that the repairs were made after Hurricane Irma- specifically on January 15, 2018. (Tr. 41).

The undisputed evidence shows that this violation occurred when Appellant failed to obtain a permit before commencing work on the railing and screening on January 15th, 2018. The Code Compliance Department initiated its proceeding against Appellant for this activity on May 24, 2021. Thus, the evidence supports the finding that prosecution for this violation is not precluded by the four-year statute of limitations.

4. Conversion of Screened Porch to Solid Walls

Mr. Stone testified that the solid side walls to the porch were there when he purchased the property in 1997. (Tr. 36-37). Mr. Stone testified that he replaced the windows in the home in 2010, including the windows in the former screened in porch, and the County issued an after-the-fact permit for this work. (Tr. 37-38). Therefore, the evidence shows that the enforcement action is time-barred.

The Court finds Appellant presented sufficient evidence to establish that prosecution for three of the four violations is barred by the statute of limitations in this case.

B. Evidentiary rulings

Appellant argues that the Special Magistrate erred in overruling his hearsay objections to County exhibits 4 (e-mail between the Code Compliance and Building Departments) and 8 (property information record maintained by the Building and Code Compliance Department).

Florida Statute Section 162.07(3) and MCC Section 8-29(b) provide that the formal rules of evidence "shall not apply" to code compliance

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proceedings, but due process shall be observed and shall govern the proceedings. The standard of review for evidentiary rulings is abuse of discretion. *Holt v. Calchas*, LLC, 155 So. 3d 499, 503 (Fla. 4th DCA 2015). The Court cannot say that the Special Magistrate abused his discretion in overruling the hearsay objections, or that fundamental due process was not accorded due to these evidentiary rulings.

C. <u>Competent substantial evidence</u>

Appellant argues there is no clear and convincing evidence that he failed to apply for building permits "prior to the work" that required a permit, or that a permit was required for some of the work at issue in this case.

The Court notes that pursuant to the analysis in subsection A *supra*, the only violation for which prosecution is not barred by the statute of limitations is violation #3—Repair to Upper Rear Deck—Railing and Screens, and this is the only violation the Court will consider when analyzing whether the finding of violation is supported by competent substantial evidence. "Competent substantial evidence is tantamount to legally sufficient evidence." *School Board of Hillsborough County v. Tenney*, 210 So. 3d 130, 134 (Fla. 2d DCA 2016) (internal citation and quotation omitted). Thus, "[a] circuit court's review of an agency decision for competent substantial evidence is limited to determining whether the evidence before the agency was legally sufficient to support the agency's decision." *Id.*

The Special Magistrate thoroughly discusses the issue of the applicability of the statute of limitations in the Final Order, but he does not

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make detailed findings of fact regarding the work that was allegedly performed without a permit. Rather, the Final Order simply states that the "Respondent(s) is/are in violation of the Monroe County Code(s) as fully set forth in the Notice of Violation/Notice of Hearing served upon the Respondent(s)." (Final Order at P. 1).

The Notice of Violation in this case states in relevant part that Appellant violated MCC § 110-140(a) by failing to obtain a building permit for "repair to upper rear deck to include railing and screening." As previously explained *supra*, MCC Section 110-140(a) requires that a permit be obtained prior to commencing work specified in Chapter 6 of the Monroe County Code of Ordinances.

Chapter 6 of the MCC, is titled "Buildings and Construction" and Division 3 of Chapter 6 deals with permits, inspection, and certificates of occupancy. Section 6-100 is titled "Permits required" and subsection (a) states "a permit shall be required for all work shown in the following table, except where specifically exempted this section (sic)." The table lists numerous examples of work that requires a permit including the following: site preparation, removal of invasive exotic vegetation, demolition, signs, fences, sheds, Chickees not constructed by Miccosukee or Seminole Indians, any new construction and remodeling work of principal and accessory structures, all work in the electrical mechanical, and plumbing trades, all work subject to the floodplain management requirements, resource extraction activities, and any work involving life safety. The table also lists residential exceptions to the permit requirement.

One of the exceptions to the permit requirement for "any new construction and remodeling work of principal and accessory structures" is "[n]ormal maintenance or ordinary minor repairs where the fair market

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value of such work is less than $2,500.00." MCC §6-100. In this case, Appellant argues that the repairs to the upper rear deck were exempt from permitting because they were made after Hurricane Irma, and they were less than $2,500. While there is no evidence in the record establishing a basis for exemptions due to Hurricane Irma, there is evidence that a permit was not required for the repairs to the upper rear deck because the cost of the project fell below the $2,500 threshold amount listed in the Chapter 6 permit and exceptions table.

At the code enforcement hearing, Appellant testified he did not apply for a permit for the repairs to the upper rear deck because the contractor he hired to perform the work, All Keys Gutter, told him that a permit was not necessary because the repairs were less than $2,500. (Tr. 41; 39). Appellant testified to a receipt for the repairs in the amount of $2,389 which was not broken down between screening and railing. (Tr. 38). Regarding the upper rear deck repairs, Director McPherson testified that the screening probably would not need a permit, but the railing is a safety issue and that would require a permit. (Tr. 29). However, the County did not present any evidence to rebut the Appellant's argument and evidence that the work to the railing was an ordinary minor repair where the fair market value was less than $2500 and thus exempt from the permit requirement.

The County did not present sufficient evidence to establish that the Appellant was required to obtain a permit for the work that is the subject of this violation. Therefore, the Special Magistrate's finding of violation for failing to obtain a permit for repairing the upper rear deck railing and screen is not supported by competent substantial evidence.

IV. CONCLUSION

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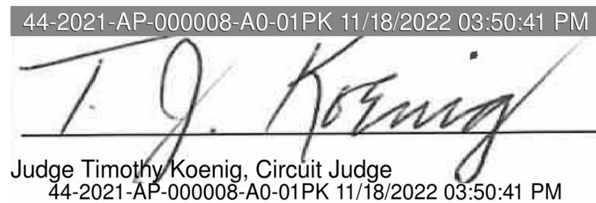
The Court finds that prosecution for violations, #1, #2, and #4, is time-barred, and the finding of violation as to violation #3 is not supported by competent substantial evidence. Therefore, it is unnecessary to reach the remaining due process arguments. Likewise, the Court need not address the argument that the “forever” fine is unconstitutionally excessive as assessed to Appellant.

For the foregoing reasons, the Final Order of the Special Magistrate is **REVERSED**.

DONE AND ORDERED at Key West, Monroe County, Florida this Friday, November 18, 2022



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