

IN THE CIRCUIT COURT OF THE 16<sup>TH</sup> JUDICIAL CIRCUIT OF  
THE STATE OF FLORIDA, IN AND FOR MONROE COUNTY

Case No.: 44-2022-AP-01-M

L.T. Case No.: 22-000283

RICHARD HARPER,  
Appellant,

vs.

CITY OF KEY COLONY BEACH,  
Appellee.

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**OPINION**

**THIS CAUSE** comes before the Court upon the Appellant, Richard Harper's, Appeal of a Final Order entered by the Code Enforcement Board of the City of Key Colony Beach on May 12, 2022. The Court, having considered the Appellant's Initial Brief, the Appellee's Answer Brief, the Appellant's Reply, the record, the argument of counsel at the hearing held before this Court on May 31, 2023, pertinent legal authority, and being otherwise fully advised in the premises, finds and orders as follows:

**I. BACKGROUND**

Appellant owns property in the City of Key Colony Beach (KCB), Florida. In September 2019, Appellant was issued Permit No. 11261 for renovations to his property, including but not limited to the elevation of the residence from ground floor to above base flood requirements. The KCB City Code requires that all work under the permit be completed within fifteen (15) months of the start of construction. Construction commenced

on Appellant's property on October 1, 2019. Shortly after work started, the COVID-19 pandemic hit, and a state of emergency was declared by the State of Florida which tolled the expiration of any building permits during the state of emergency and for six months afterward.

After the state of emergency was lifted, Appellant submitted a request for an extension of the deadline from the KCB City Commission, and that relief was granted. Appellant secured extensions of the original 15-month deadline until April 28, 2022, when the permit expired, and Appellant was cited for violations of the City's Code of Ordinances section 6-7(d) and section 6-7(e) for failing to complete his residential construction project within 15 months of the start date.

On May 11, 2022, a hearing took place before the KCB Code Enforcement Board (the "Board"). The Appellant appeared at this hearing along with counsel. The Appellant testified that he had not completed the project. (Tr. at 17). Appellant requested more time to complete the project and requested that the remedy be an "equitable" application of the City Code. (Tr. at 7;29). At the conclusion of the hearing, the Board found a violation of the City Code (Tr. at 38).

On May 12, 2022, the Board entered "Findings of Fact and Conclusions of Law, and Order" (the "Final Order") finding the Appellant in violation of section 6-7(d) for failing to complete construction as required by the City Code. The Final Order also ordered the Appellant to apply for a Continuation of Construction Permit in accordance with City Code section 6-7(e) which would extend the time to complete the project to December 30, 2022. The Appellant was ordered to pay 15 percent of the original permit fee prior to the issuance of the Continuation Permit. No additional fine would be imposed if the Appellant timely secured the continuation permit.

Finally, the Final Order stated that any fines that may accrue shall be waived in the event all work under Permit No. 11261 and the Continuation of Construction Permit was completed on or before December 30, 2022.

On June 7, 2022, Appellant filed a Notice of Appeal appealing the Final Order.

## **II. STANDARD OF REVIEW**

Pursuant to Fla. Stat. § 162.11, the Circuit Court sitting in its appellate capacity has jurisdiction to review code enforcement final orders. *Central Florida Investors 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.” Fla. Stat. § 162.11. 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. *Id.* at 294; § 162.11 Fla. Stat. “[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)). 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 Final Order based on the following arguments: 1) the Code Enforcement Board did not have subject matter jurisdiction; 2) the Final Order is arbitrary and capricious and violates due process because it fails to define the terms “work” and “incomplete”; 3) the

monthly fee for a continuation permit is an unconstitutional penalty; and 4) the “automatic” fine imposed is arbitrary, capricious, and excessive and was imposed without a hearing to determine the amount of the fine. The Appellee, the City of KCB (the “City”), argues that none of these issues were raised in the code enforcement proceedings and Appellant is not entitled to challenge the validity of the relief he requested. The City also argues that the Board had jurisdiction, and that Appellant does not make any valid challenges to the Final Order.

### **A. Jurisdiction**

Appellant claims that the Board did not have subject matter jurisdiction because the expiration of a building permit is not a violation per se. A challenge to subject matter jurisdiction can be raised at any time. *MCR Funding v. CMG Funding Corp.*, 771 So. 2d 32, 35 (Fla. 4th DCA 2000). Appellant contends that Code section 6-7(d) does not require an “act”, nor does it proscribe the failure to act, and thus, the Board expanded its jurisdiction by finding that Appellant violated section 6-7(d) merely because the permit expired.

The pertinent sections of the KCB Code state as follows:

#### **Sec. 6-7. - New construction: required performance and permit expiration.**

(d) *Deadline for completing new construction.* Unless otherwise specified by the city commission, every building or structure on which new construction is started must be completed within fifteen (15) months from the date of the start of construction, and any building or structure which is not completed within said fifteen (15) months shall be considered in violation of this article and the owner thereof shall be subject to penalties for violation of this article; provided, however, that the city commission may grant extensions not to exceed one (1) year in the aggregate for the completion of said construction. Said extension shall not be considered unless requested by the property owner or owner's agent prior to thirty (30) days of the date of expiration of the permit, unless the applicant shows good cause to the commission that he was unable to present his request for an extension

prior to thirty (30) days of the date of expiration of the permit. Unless otherwise directed by the city commission, the monthly fee payable in advance for the extension shall be ten (10) per cent of the original building fees including impact fees and sewer connection fees for issuance of the permit. After the extension has expired, the permit shall be null and void.

(e) *Continuation of construction permit.* When a permit becomes null and void because of permit expiration, and the property owner has not requested an extension, the property owner must then apply to the building department for a continuation permit to complete the construction. The monthly fee payable in advance for the continuation permit shall be fifteen (15) per cent of the original building fees including impact fees and sewer connection fees applicable when the original building permit was issued. The time frame for the continuation permit shall be the decision of the city commission and the property owner.

The above quoted text of Code section 6-7 makes Appellant's conduct unlawful. Specifically, section 6-7(d) states that "any building or structure which is not completed within said fifteen (15) months shall be considered in violation of this article and the owner thereof shall be subject to penalties for violation of this article." This language gives the Board subject matter jurisdiction over cases where work is not completed within the allowable timeframe and authorizes the Board to impose penalties in those cases. In this case, the Board had subject matter jurisdiction to enforce 6-7(d) when Appellant admitted that his project remained incomplete after April 28, 2022, that he needed more time to complete his project, and that his permit had expired. (Tr. at 15-21).

#### **B. Failure to define terms**

Paragraph 14 of the Final Order states, "[s]tarting May 11, 2022, Respondent shall be assessed a daily fine of twenty-five (\$25.00) per day for each day that *work* under Permit 11261 and the Continuation of Construction Permit remains *incomplete*." (Appellant's Appendix Tab A)

(emphasis added). Appellant argues that the Final Order is arbitrary and capricious and violates due process to the extent that it fails to define the terms “work” and “incomplete”.

Although the Final Order does not explicitly define “work” and “incomplete”, that does not mean that it is arbitrary and capricious. The Appellant has notice of the “work” to be performed because he obtained the original permit, Permit No. 11261, which identifies the “work” to be performed. The project is “incomplete” until the work under the permit has been performed.

The process for determining whether a project is complete can be found in the KCB Code. Under the Code, the City’s Building Official is the City’s executive charged with the discretionary authority to determine whether and when work has been completed. Code Sec. 6-11(b) provides that “[i]t shall be the duty of the building official to issue a certificate of occupancy after a final inspection at which it has been determined that the building has been constructed in accordance with the provisions of the building permit...” If there is an issue at some future date in determining if the work is complete, that issue can be raised at that time, but that issue is not currently before the Court.

The cases cited by the Appellant do not support his argument that the Final Order is unconstitutional due to undefined terms because the cited cases involve challenges to municipal ordinances that have imprecise standards as opposed to Final Orders with imprecise language. See *Pinellas County v. Jasmine Plaza, Inc.*, 334 So. 2d 639, 640 (Fla. 2d DCA 1976) (finding *ordinance* standards to be applied by county administrator in deciding whether to approve issuance of a tree permit was “overly broad,

imprecise and too loose”); *North Bay Village v. Blackwell*, 88 So. 2d 524, 526 (Fla. 1956) (holding invalid *municipal ordinance* without providing standards on location of automobile service stations); *Drexel v. City of Miami Beach*, 64 So. 2d 317, 319 (Fla. 1953) (invalidating *ordinance* regulating construction of multi-level parking garages without sufficient rules and conditions for guidance of authorities).

Finally, Appellant argues that the daily fine (from May 11, 2022) is also arbitrary and capricious and violates due process because the “work” was substantially complete on December 30, 2022. However, the record does not include any evidence establishing substantial completion of the project at the time the Final Order was entered, which is the relevant time frame before the Court. At the code enforcement hearing the Appellant conceded that the project was not complete and an additional seven months would be needed to complete the project. (Tr. at 20). Anything that occurred after the Final Order was entered is beyond the scope of this appeal. See §162.11, Flat Stat. (appeal limited to appellate review of the record created before the enforcement board).

### **C. Constitutionality of monthly fees**

Appellant challenges the 10% and 15% monthly “user fees” as an unconstitutional penalty. The “10% fee” is 10 percent of the original building fee that must be paid in advance for the City Commission to grant a permit extension. Code sec. 6-7(d). While the Appellant may have paid this fee on a prior occasion, the 10% fee is not an obligation imposed in the

Final Order, which is the basis for this appeal, and thus, no appellate relief is available for that fee.

The “15% fee” is 15 per cent of the original building fees that are imposed when a permit becomes null and void because of permit expiration and a continuation permit is sought. Code sec. 6-7(e). Here, the Final Order requires Appellant “to pay to the City Building Department, prior to issuance of the continuation of construction permit, the required permit fee of \$7,856.66, comprised of 15 percent of the original permit fee payable monthly for the seven-month duration of the continuation of construction permit.” (Appellant’s Appendix Tab A at ¶ 12). Appellant argues that “the math supports Appellant’s argument” that a 15% per month fee of \$1,123 is clearly an unconstitutional penalty.” (Appellant’s Reply at Pp. 7-8).

Appellant failed to develop the record with respect to this penalty argument before the Code Enforcement Board. In fact, Appellant did not contest, and seemingly agreed to, the imposition of the 15 percent fee at the code enforcement hearing. At the hearing, when arguing against an additional administrative fee, Appellant’s counsel argued to the Board, “I don’t think you need teeth, you know, to force Mr. Harper to get a permit. The teeth is the \$1,200 a month and the fact that he does, he wants to get back into his house.” (Tr. at 29: 5-8). The Appellant waived any challenge to the 15 percent fee by failing to object, and in fact requesting that it be the sole “teeth” employed by the board.



While the Appellant attempts to characterize the 15 percent fee for obtaining the continuation permit as an “unconstitutional penalty,” the “penalty” argument is inconsistent with the text of section 6-7(e) of the Code. The Code simply imposes a specific fee for a specific kind of permit. The Code states: “[w]hen a permit becomes null and void because of permit expiration, and the property owner has not requested an extension, the property owner must then apply to the building department for a continuation permit to complete the construction. The monthly fee payable in advance for the continuation permit shall be fifteen (15) per cent of the original building fees.” § 6-7(e).

**D. Constitutionality of “automatic” fine**

Appellant argues the Final Order is arbitrary, capricious, unconstitutional and unlawful to the extent that it imposes an “automatic” fine of \$25 per day from May 11, 2022. The Final Order states:

Starting May 11, 2022, Respondent shall be assessed a daily fine of twenty-five (\$25.00) per day for each day that work under Permit No. 11261 and the Continuation of Construction Permit remains incomplete. Any fines that may accrue pursuant to the terms of this paragraph shall be waived in the event that Respondent has completed all work under Permit No. 11261 and the Continuation of Construction Permit on or before December 30, 2022.  
(Appellant’s Appendix Tab A at ¶ 14).

Appellant claims that this automatic fine is unlawful because it continues to accrue each day regardless of the fact that Appellant was in substantial compliance with the Final Order. However, as previously noted, there is no evidence in the record to support the assertion that Appellant was in substantial compliance when the fine was authorized at the code

enforcement hearing, or when the Final Order was entered the following day.

Next, Appellant argues the fine is unlawful because the Board failed to conduct a hearing pursuant to § 162.09, Fla. Stat. to determine the amount of the fine. Appellant argues that Florida Statute Section 162.09 requires the Board to conduct two hearings: a hearing to consider evidence of a violation and a separate hearing to impose an appropriate fine. Appellant contends the failure to comply with this two-step process violates due process. In support, Appellant relies on *Massey v. Charlotte County*, 842 So. 2d 142 (Fla. 2d DCA 2003), but that case is distinguishable. In *Massey*, it was not the final order finding the Masseys in violation of the building code that was scrutinized, but rather, the lien order that was entered based solely upon a code inspector's affidavit, that was not served on the Masseys, and that did not give the Masseys an opportunity to challenge the facts upon which the lien order was based that was problematic. *Id.* at 146. In other words, it was the process whereby the property owner was denied the opportunity to contest the assertion of non-compliance that was found to violate due process. This is not an issue in every code enforcement proceeding, and it is not an issue in this matter at this stage in the proceedings.

In this case, the Final Order states that a daily fine of \$25 would be assessed in the future during the extending period for completing the project. The Final Order also confirmed that this future fine would be

waived upon Appellant's timely completion of the project. As a result, no final determination was ever made imposing a specific fine, and Appellant's argument is premature.

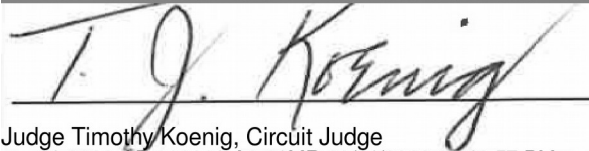
Finally, Appellant argues that on March 2, 2023, the City issued a new Notice of Violation which imposes additional conditions on the Appellant thereby preventing him from completing the work. However, the scope of appellate review is limited to the record created before the Board. §162.11, Fla. Stat. The Court cannot address matters that occurred after entry of the Final Order in this case.

#### **IV. CONCLUSION**

For the foregoing reasons, the Final Order of the Code Enforcement Board is **AFFIRMED**.

**DONE AND ORDERED** in Key West, Monroe County, Florida this Monday, August 14, 2023

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Judge Timothy Koenig, Circuit Judge  
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