IN THE CIRCUIT COURT OF THE 16TH JUDICIAL CIRCUIT OF
THE STATE OF FLORIDA, IN AND FOR MONROE COUNTY

Case No: 44-2022-AP-0005-P
L.T. Case No: CE17100022

WILLIAM G. GUY, III,
Appellant,
vs.
MONROE COUNTY, FLORIDA,
Appellee.
_____/

OPINION

THIS CAUSE comes before the Court upon the Appellant's Notice of Appeal of Final Order on Remand rendered by the Code Enforcement Special Magistrate on July 27, 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 oral argument held on October 2, 2023, pertinent legal authority, and being otherwise fully advised in the premises, finds and orders as follows:

I. Factual and Procedural Background

Appellant, William Guy III, is the owner of a vacant lot in Key Largo, Florida that he purchased in 2015. (Appellee Exs. 4; 8). On October 18, 2017, Tim Douma, Senior Biologist for Monroe County, conducted a site

inspection of Appellant's lot and took several photographs. (Appellee Ex. 2). Mr. Douma summarized his site inspection in a memorandum to the Code Compliance Department dated January 21, 2018. (Appellee Ex. 4-the "Memo"). In the Memo, Mr. Douma notes that the vacant parcel contains tropical hardwood hammock and "[i]t appears that vegetation, including native vegetation, was cut without the benefit of a permit." (Id.). Mr. Douma recommended that a notice of violation be issued. (Id.).

On October 20, 2017, the Code Compliance Department received a complaint about the subject lot. (Tr. p. 3). Senior Code Inspector Diane Link visited the subject property, found potential land clearing violations, took photos, and posted a stop work order on the property. (Id.; Appellee Ex. 3)

On December 20, 2018, the Monroe County Code Enforcement Department issued a Notice of Violation/Notice of Hearing alleging the following violations of the Monroe County Code (hereafter "MCC"):

- Count I: MCC § 110-140(a): Requiring a building permit, approval, and final inspection for land cleared without benefit of a permit.
- Count II: MCC § 118-13 Endangered Species.
- Count III: MCC § 118-7 General Environmental Design Criteria.
- Count IV: MCC § 122-8(d)(3) FWS Permit Referral Process; Land Clearing in Violation of the Federally Threatened or Endangered Species Act.

On January 31, 2019, the code compliance hearing was held before a code compliance Special Magistrate. Neither the Appellant, nor any person on his behalf, appeared at the code compliance hearing. Inspector Link was the only witness to testify at the hearing. She testified that a chainsaw was used to clear the land and that it was "total devastation." (Tr. p. 4). She described the photos she took of the property and testified that the owner was trying to clear storm damaged trees. (Tr. p. 5). At the conclusion of the hearing, the Special Magistrate stated "[y]eah, that's pretty bad. All right. Well, I'll receive the County's exhibits in evidence and make a finding of violation with respect to the multiple forms in the notice." (Tr. p. 6). The Special Magistrate admitted the County's twelve exhibits into evidence. (Id.).

On January 31, 2019, the Special Magistrate entered a Corrected Final Order "finding 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)." Appellant filed a Notice to Appeal the Corrected Final Order on March 1, 2019. After reviewing the briefs and holding oral argument, the Court issued its Opinion on February 9, 2022, reversing and remanding the Corrected Final Order to the Special Magistrate to make legally sufficient findings of fact and conclusions of law. *William G. Guy III v. Monroe County Florida*, 19-AP-3-P (Fla. 16th Cir. 2022) (Koenig, T.).

On July 27, 2022, the Special Magistrate issued the Final Order on Remand finding the Appellant in violation of the Monroe County Code as set

forth in the Notice of Violation and including additional findings of fact and conclusions of law. (Appellant's Tab A). The Final Order required Appellant to apply for and obtain a restoration permit and pass all required inspections on or before September 6, 2022, and imposed a $250 daily fine per count for noncompliance. (Id.). This appeal of the Final Order on Remand followed.

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." § 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. *Id.* "[O]n appeal, all errors below may be corrected; jurisdictional, procedural, and substantive. *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 526 n. 3 (Fla. 1995)).

III. Discussion

A. Competent Substantial Evidence

In code enforcement cases, a magistrate's findings will not be disturbed if they are based on competent substantial evidence. *Monroe County v.*

Carter, 41 So. 3d 954, 957 (Fla. 3d DCA 2010). Competent substantial evidence is evidence that "will establish a substantial basis of fact from which the fact at issue can be reasonably inferred [and] such relevant evidence as a reasonable mind would accept as adequate to support a conclusion." *DeGroot v. L.S. Sheffield*, 95 So.2d 912, 916 (Fla. 1957).

In this case, The Appellant property owner did not attend the code enforcement hearing after being properly noticed, and he cannot challenge the evidence presented or argue evidence that he did not present and that is not part of the record.

The Special Magistrate found violations of MCC sections 110-140(a), 118-13, 118-7, and 122-8(d)(3). The Court will review the record to determine if the Special Magistrate's findings of violation are supported by competent substantial evidence.

i. Count I: MCC § 110-140(a)

MCC § 110-140(a) provides that "a building permit is required prior to any work specified in Chapter 6 of the Monroe County Code of Ordinances." MCC Section 6-100 requires permits for certain types of work including the following: "site preparation including: land clearing, placements of fill, excavation, and blasting…"; "removal of invasive exotic vegetation"; and "pruning, trimming, or removal of trees."

In this case, the Special Magistrate found that the subject property was cleared, and that it was cleared without a permit. The County's

evidence of the clearing admitted at the hearing included three (3) aerial photographs of the subject lot. The aerial photographs from 2015 and 2017 showed the subject lot fully vegetated. The aerial photograph from 2018 showed visible clearing of an extensive portion of this vegetation. (Appellee Exs. 2; 5). The hearing testimony of Inspector Link also established that the land was cleared, and a permit had not been obtained. (Tr. p. 3). There were no additional arguments that the land clearing was justified, or that the County was without authority to regulate it.

The Appellant suggests that someone other than himself may have cleared the subject property, and he argues that there is no evidence that he did so, and therefore, he should not be held responsible for the land clearing violation. However, code violations "run with the land." *Monroe County v. Whispering Pines Associates*, 697 So. 2d 873, 875 (Fla. 3d DCA 1997). "By necessity and logic, there is nothing unconstitutional in holding that as the party who has the power to bring the land into code compliance, the current owner should be charged with that responsibility." *Id.* At the code enforcement hearing, Inspector Link testified that the Appellant property owner had the power to bring the property into compliance by obtaining a restoration permit and following the approved restoration plan. (Tr. p. 4). Thus, the property owner is charged with this responsibility.

The Special Magistrate's factual findings, along with the record evidence, support the finding of violation as to Count I.

ii. Remaining counts (II-IV)

The remaining four violations (counts II-IV) are all essentially for the same violation: illegal land clearing as set forth in the first listed violation of MCC section 110-140(a). The violations listed in counts II (MCC § 118-13), III (MCC § 118-7), and IV (MCC § 122-8(d)(3)) are not additional violations but are instead permitting requirements for land clearing.

MCC section 118-13 states in pertinent part that "[o]n parcels that the U.S. Fish and Wildlife Service has determined are within critical habitat or designated potentially suitable habitat for federally listed threatened or endangered species, no development shall occur without full compliance with the terms of this chapter in addition to other applicable regulations, including, but not limited to, Section 122-8."

MCC section 118-7, "General Environmental Design Criteria" lays out general criteria for land development and states that no land shall be developed except in accordance with the criteria the section provides. It states that "no habitat of protected species shall be disturbed without prior notification and approval of the County biologist." MCC §118-7(c).

MCC section 122-8(d)(3) is titled "Provision for flood hazard reduction and avoiding impacts on federally listed (threatened or endangered) species enforcement." This section requires that "all proposed development shall meet the conditions established on the floodplain development permit and/or notice to proceed which includes FWS technical assistance

requirements included as conditions on the Monroe County development permits, to avoid possible impacts on federally species (threatened or endangered).”

The provisions of MCC sections 118-13, 118-7, and 122-8(d)(3) must be followed when obtaining a permit. In this case, the violation is for land clearing without a permit. Therefore, Appellant will have to comply with the permitting requirements of these provisions after-the-fact, but the evidence does not support a separate finding of violation of these sections in this case.

Further, the Notice of Violation for count II and count III uses identical language and is duplicative.

The findings of violation for counts II, III, and IV are reversed and the accompanying fines are stricken.

B. Resolution 220-2017

Appellant claims that any land clearing of the subject lot was exempt from the requirement to obtain a permit pursuant to Resolution 220-2017 (the “Resolution”). The Monroe County Board of County Commissioners (BOCC) passed the Resolution on September 27th, 2017, two weeks after Hurricane Irma made landfall in the Florida Keys. Section 1 of the Resolution states as follows:

Monroe County is enacting a 60-day temporary suspension of the requirement for a permit for the major pruning or removal of native

vegetation where imminent danger to life or safety exists or to prevent further property damage caused by Hurricane Irma. Property owners may prune or remove native vegetation to the minimum extent necessary without a permit; however, photographs should be taken before and after the necessary pruning or removal. This exemption from permitting requirements of Chapters 6-100 of the Monroe County Code of Ordinances and Chapters 114-103 and 118-8 of the Monroe County Land Development Code shall be for a period of 60 days. The temporary suspension begins on September 5, 2017 and ends on November 4, 2017.

Appellant's reliance on Resolution No. 220-2017 is unavailing. First, Appellant did not raise the applicability of the Resolution below and therefore the argument is waived. "It is well-established that for an issue to be preserved for appeal, it must be raised in the administrative proceeding of the alleged error. [A] party cannot argue on appeal matters which were not properly excepted to or challenged in the administrative tribunal." *Heart of Live Oak Inc., v. State*, 196 So. 3d 1290-91 (Fla. 1st DCA 2016) (internal citations omitted). Section 162.11, Fla. Stat. expressly provides that appellate review of the Final Order is limited to the record created before the Special Magistrate. In the Final Order on Remand, the Special Magistrate notes that since the Appellant did not present any evidence or argument as to potential permit exceptions, none were considered. (Appellant Tab A).

Further, even if the Resolution were to be considered as a permit exception, it would be inapplicable to the present case. Resolution No. 220-2017 only suspended the requirement to obtain a permit for clearing native vegetation "to the minimum extent necessary" in order to address

"imminent danger to life or safety" or "to prevent further property damage caused by Hurricane Irma." Here, the record evidence establishes that there was no imminent danger to life or property because the subject lot was in fact vacant at the time of clearing.

C. Jurisdiction to Order Restoration

The Final Order on Remand requires the Appellant to apply for and obtain a restoration permit. The Appellant argues that the Magistrate does not have jurisdiction to order restoration. However, pursuant to Florida Statute section 162.08(5), code enforcement boards (and special magistrates pursuant to section 162.03) have the power to "[i]ssue orders having the force of law to command whatever steps are necessary to bring a violation into compliance." Monroe County grants this same power to the Special Magistrate in MCC Section 8-30(5). The requirement for an after-the fact restoration permit is intended to restore the impacts of a clearing violation and falls squarely within the Special Magistrate's lawful authority to order a violation into compliance.

D. Standards/Unfettered Discretion

Appellant argues that even if the Special Magistrate had authority to order restoration, the Special Magistrate failed to proscribe definite standards for restoration in the Final Order which gives the County Biologist unfettered discretion to dictate the restoration standards and ultimately the fine.

The Final Order on Remand requires the Appellant to apply for and obtain an after-the-fact permit for restoration pursuant to MCC § 118-11. Section 118-11(b) provides that a land clearing violation is corrected by a restoration plan approved by the County Biologist, and further provides standards of such a plan. The details of the restoration plan are separately approved by the County Biologist following an application for an after-the fact-permit. There is a separate review process whereby the Appellant will have the opportunity to contest the requirements of a restoration plan that has yet to be developed at this time. Therefore, there are restoration standards, and the County Biologist does not have unfettered discretion.

E. Compliance Hearing

Appellant argues that the Final Order is ultra vires as it empowers the building department to determine whether and when compliance has been achieved and ultimately the amount of the fine. Appellant argues this procedure contravenes the two-step "compliance hearing" process outlined in Chapter 162 and in *Massey v. Charlotte County,* 842 So. 2d 142 (Fla. 2d DCA 2003).

In this case, the Final Order only imposes fines if compliance is not achieved by the compliance date. Since the factual record ends with the entry of the Final Order on Remand, there is nothing in the record to establish that there was an allegation of noncompliance or imposition of a fine. Therefore, the "compliance hearing" argument is premature as there

is insufficient information before the Court to determine if there has been compliance with Chapter 162 and the *Massey* case in assessing a fine that has yet to be imposed.

F. Excessive Fine

The Special Magistrate imposed four separate fines for four violations each in the amount of $250.00 per day for a total fine of $1,000 for each day that the Appellant remains in violation beginning on the day after the compliance date. Appellant argues that a fine in the amount of $1,000 per day is "patently and unreasonably harsh and oppressive" and violates the "excessive fine" provisions in Art. I. §17, of the Florida Constitution and the 8th Amendment to the U.S. Constitution.

Section 162.09(2)(a), Fla. Stat., provides that $250.00 is the default daily limit for a violation. However, section 162.09(2)(d), Fla. Stat., provides that a county having a population greater than 50,000, such as Monroe County, may adopt an ordinance that gives code enforcement boards or special magistrates authority to impose fines up to $1,000.00 per violation for a first violation. Monroe County adopted such an ordinance which authorizes the Special Magistrate to impose fines up to $1,000.00 per violation for a first violation. There is a strong presumption that a fine is not unconstitutionally excessive if the daily amount is within the range of the statutory limit. *Locklear v. Fla. Fish & Wildlife Conservation Comm'n,* 886 So. 2d 326, 329 (Fla. 5th DCA 2004). The fines imposed in this case are well

below the limits authorized by section 162.09(2)(a), Fla. Stat. and MCC section 8-31. Further, "[w]ell-settled Florida decisional authority provides that a statutorily authorized civil fine will not be deemed so excessive as to be cruel or unusual unless it is so great as to shock the conscience of reasonable men or is patently and unreasonably hard or oppressive." *Id.* In this case, the fine is not "patently and unreasonably harsh or oppressive."

Nevertheless, the fine will be reduced in this case to reflect the Court's decision to strike three of the four violations and the associated fines.

IV. Conclusion

For the foregoing reasons, the Final Order on Remand of the Special Magistrate is **AFFIRMED in part** and **REVERSED in part**.

1. The finding of violation as to count (I) "land clearing" is **AFFIRMED**.
2. The finding of violation as to count (II) "endangered species" is **REVERSED**.
3. The finding of violation as to count (III) "general design criteria" is **REVERSED**.
4. The finding of violation as to count (IV) "FWS permit referral process" is **REVERSED**.

Done and Ordered in Key West, Monroe County, Florida on this Thursday, November 16, 2023

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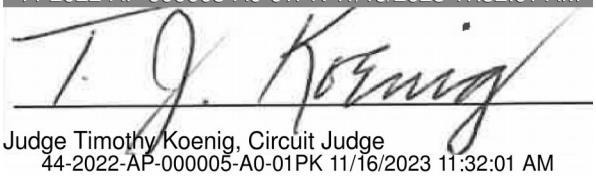

Judge Timothy Koenig, Circuit Judge
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