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

JACQUELYN LEA BELLO,

Appellant,

Case No.: 21-AP-03-P

L.T. Case No.: CE 19070076

v.

MONROE COUNTY, FLORIDA,

Appellee.
_____/

OPINION

THIS CAUSE comes before the Court upon the Appellant, Jacquelyn Bello's Notice of Appeal of the Final Order of the Code Enforcement Special Magistrate rendered on April 6, 2021. The Court, having considered the Appellant's Initial Brief, the Appellee's Answer Brief, the Appellant's Reply Brief, the record, pertinent legal authority, and being otherwise fully advised in the premises, finds and orders as follows:

I. BACKGROUND

Appellant purchased the subject property located at 57 Snapper Avenue, Key Largo, Florida in 2006. Prior to purchasing the property, Appellant had been living on the property as a tenant since around 2000. The subject property includes a main residence as well as a utility/storage shed; the latter is the subject of the code enforcement violation underpinning this appeal. The shed was permitted in 1969 as a

utility/storage building and consists of approximately 140 square feet. The shed is on its own lot adjacent to the lot with the main residence. The Appellant testified that they have always called the structure a "casita" and have used it as a "mother-in-law quarters, guest house, just an extra bedroom, a kind of art studio." (Tr. 10-11).

On August 1, 2019, the Monroe County Code Compliance Department issued a Courtesy Notice of Code Violation notifying Appellant that the "Utility Storage Shed Converted into Living Quarters" had been identified as a violation. (Pet. Ex. 6). The Courtesy Notice directed Appellant to "take necessary steps to revert your utility storage shed into its original state as approved by original permit." (Id.) It further provided that "corrective action measure must be taken within 15 days from the date of hand delivery, posting or postmark of this communication. Failure to comply within allotted time will result in a Notice of Violation/Notice of Hearing being issued to you." (Id.).

On January 25, 2021, the Code Enforcement 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 CONVERSION OF A STORAGE ROOM/UTILITY BUILDING INTO A GUEST HOUSE.
Corrective Action Required:
Contact the Monroe County Building and Planning Department and obtain an after the fact permit or demolition permit.

On April 1, 2021, a hearing took place before a Code Compliance Special Magistrate. At the hearing, Code Inspector Andre Garcia testified on behalf of the County and presented the County's exhibits which included the following: the Notice of Violation/Notice of Hearing; code compliance complaints alleging use of the structure for short-term vacation rentals; property photographs and Google maps imagery; the 2019 Courtesy Notice of Violation; the 1969 building permit that described the project as a "storage shed"; permit no. 053005676 for fencing in 2005; a Facebook Tiny House Alliance of Southwest Florida post advertising a storage shed for rental; the permit for the conversion to a guest house applied for on February 18, 2020 (after the Courtesy Notice of Violation issued) for the conversion to a guest house; and the Monroe County Property Appraiser's record showing Appellant as the property owner. The County did not call any other witnesses and the Appellant was the only witness who testified on her behalf. At the conclusion of the hearing, the Special Magistrate stated that he would take the matter under advisement.

On April 6, 2021, the Special Magistrate entered the Final Order finding a "violation of the Monroe County Code(s) as fully set forth in the Notice of Violation/Notice of Hearing served upon the Respondent(s)." The Final Order goes on to state:

> There is no dispute that Respondent's guest house, which was originally permitted in 1969 as a utility shed, is now being used for purposes of habitation, as a bedroom with a bathroom, but without a kitchen. Respondent's unrebutted testimony establishes that the building has been so used for at least 21 years. The County has established, however, that no permit was ever issued authorizing the

> conversion of the utility shed into a standalone bedroom unit. Thus, Respondent is guilty of violating Monroe County Code section 110-140(a), as charged.

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 Fla. Stat. § 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)). 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). It also may be necessary to fill the procedural gaps in [Chapter 162] by the common-sense application of basic

principles of due process. *Ciolli v. Palm Bay,* 59 So. 3d 295, 298 n.5 (Fla. 5th DCA 2011) (internal citation omitted).

III. DISCUSSION

Appellant seeks review of the Special Magistrate's Final Order based on the following arguments: 1) the County failed to prove Ms. Bello is required to obtain a building permit; 2) the Magistrate erred by failing to apply the 4-year bar to code enforcement prosecutions; 3) the Magistrate erred by failing to recognize the structure as lawful non-conforming; 4) the Final Order violates due process by delegating judicial authority to the planning department; 5) the daily fine is void for failure to comply with the "two-step process" set forth in § 162.09(1); and 6) the "forever" fine is unconstitutionally excessive. The Court will focus on the primary issue in this case which is the Appellant's allegation that the County failed to present evidence "that Ms. Bello (or anyone else) violated 110-140 by failing to obtain a building permit prior to converting the structure to a habitable structure." (Initial Brief at Pp. 14-15).

The Notice of Violation states that Ms. Bello violated MCC § 110-140(a) by failing to obtain a building permit for the conversion of a storage room/utility building into a guest house. 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, Appellant allegedly needed a building permit for work specified in Chapter 6 of the Monroe County Code of Ordinances, and she failed to obtain such permit prior to performing that work. The County argues that § 110-140(a) "clearly encompasses the conversion of the utility/storage shed to a living space" (Answer at P. 21) but it doesn't specify the "work" in Chapter 6 that triggered the permit requirement in this case.

Chapter 6 of the MCC, is titled "Buildings and Construction" and Article II contains the "building code." Sec. 6-24 states that "the purpose of this chapter is to govern the administration and enforcement of the Florida Building Code and associated technical construction standards and regulations within the unincorporated limits of the county." Division 3 of Chapter 6 deals with permits, inspection, and certificates of occupancy. Sec. 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.

Here, the Notice of Violation does not advise the Appellant of the specific violation being alleged, but rather only generally references non-compliance with the permit requirements of Chapter 6, which leads to the failure of proof in this case. Presumably, the failure to obtain a permit for the conversion of a storage room/utility building into a guest house allegedly falls into one of the categories of work requiring a permit under Sec. 6-100. However, the Notice does not state which category, and the County failed to establish the category that required a permit in this case. At the code enforcement hearing, the Assistant County Attorney stated that the violation was "for the conversion of a utility building into habitable space", but never specified the section of Chapter 6 that was allegedly violated or when the violation occurred. (Tr. 13). In the Answer Brief of Monroe County, Appellee states, "the charge is not based on use, but later physical conversion of the building with work that was not part of the 1969 permit or any later permit, including the installation of a bathroom." (Answer at P. 24). If the allegation is that the Appellant converted the shed to habitable space in violation of the floodplain regulations, or that the Appellant installed a bathroom without a permit, the County must provide notice of the section in Chapter 6 that requires a permit for these actions, and then prove that a permit was not obtained.

The County did not present sufficient evidence to establish that the Appellant was required to obtain a permit in this case. The testimony and the exhibits submitted by the County do not establish that Appellant did something to trigger the permit requirement under section 6-100. At the hearing, Appellant's attorney stated in opening statement that the property has a bathroom, "and it's always had a bathroom." (Tr. 9). When Appellant was asked if she made any repairs or renovations or improvements to the "casita" the Appellant testified that "we've some couple minor things." (Tr. 11). She testified that they changed out the front door and added a canopy over the front for shade. (Tr. 11). There was no additional testimony about the bathroom or these other improvements and therefore it is unknown when these actions occurred and if a permit was required or if an exception applied.

Without establishing the work undertaken by the Appellant that required a permit under Chapter 6 of the MCC, the Special Magistrate's finding that MCC § 110-140(a) was violated is not supported by competent substantial evidence. The Magistrate found that the County established that "no permit was ever issued authorizing the conversion of a utility shed into a standalone bedroom," but did not cite to a portion of Chapter 6 that requires a permit for conversion to a standalone bedroom. The Special Magistrate's finding that the Appellant attempted to obtain an after-the-fact permit but failed because "the structure, admittedly, is below base flood elevation and thus does not meet the current requirements of the floodplain

provisions of the Land Development Code" is immaterial to the allegation charged which is failing to obtain a building permit prior to any work specified in Chapter 6 of the MCC. Since the County failed to establish what part of the "conversion of a storage room/utility building into a guest house" required a permit under what provision of Chapter 6, the Special Magistrate cannot cite to evidence that Appellant did something under Chapter 6 that required a permit. The record evidence does not establish the work that was done, when it was done, and whether an exception to the permit requirement may apply. Therefore, Appellant is correct in the assertion that there is insufficient evidence that Ms. Bello (or anyone else) violated 110-140 by failing to obtain a building permit prior to converting the structure to a habitable structure.

Appellant argues that the Magistrate also erred "by failing to apply the 4-year absolute bar to code enforcement prosecutions as set forth in § 8-37 and/or by finding the four year bar to prosecution does not apply because the structure is now below BFE-9." (Initial Brief at P. 16). MCC Sec. 8-37 states as follows:

> **Sec. 8-37. - Passage of four years a bar to prosecutions.**
>
> (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. Except, however, that this section shall not bar the initiation of a prosecution before the code compliance special magistrate based on the following:

> (1) The unlawful construction of a structure below the base flood elevation level or the minimum standards of use of a below base flood elevation structure as outlined in 44 CFR.

The Final Order states that the statute of limitations is not a bar to this prosecution pursuant to MCC 8-37(a)(1) because the structure is below the base flood elevation and does not meet the current requirements of the floodplain management provisions of the Land Development Code. However, the charge in this case is the failure to obtain a permit, not use below base flood elevation. Appellant and Appellee agree that "Appellant was not cited or found guilty for violating any floodplain human habitation restriction." (Answer at P. 21; Reply at P. 6). To the extent that the Final Order references the flood plain restrictions, those references appear erroneous because they are not involved in the violation charged by the Notice of Violation. The four-year bar would apply to prosecutions for failing to obtain a permit, but the argument is not developed in the record or in the briefs in this case so the Court will not address it here. The Appellant develops an argument about the four-year bar, but only as it relates to floodplain restrictions and the subject property being grandfathered from those restrictions. But again, the floodplain restrictions are not referenced in the Notice of Violation and there is no evidence of a violation of the floodplain restrictions established in any sense.

Given the Court's ruling that there was no evidence presented as to the specific portion of Chapter 6 Appellant engaged in that required a permit, it is unnecessary to reach the remaining due process delegation

argument and the failure to recognize that non-conformities may continue argument. Likewise, the Court need not address the argument that the Order imposing fines is void or that the "forever" fine is unconstitutionally excessive as assessed to Appellant.

IV. CONCLUSION

For the foregoing reasons, the matter is **REVERSED** and **REMANDED** for the Magistrate to enter an order consistent with this opinion.

DONE AND ORDERED at Key West, Monroe County, Florida this Tuesday, September 13, 2022.

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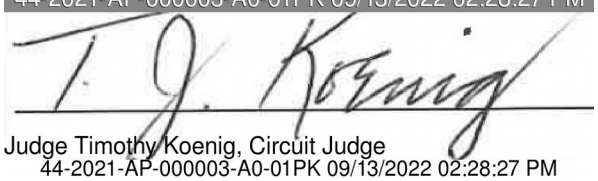

Judge Timothy Koenig, Circuit Judge
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