IN THE CIRCUIT COURT OF THE 16th JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR MONROE COUNTY,
APPELLATE DIVISION

Case No.: 24-AP-0002-M

RICHARD HARPER,

Appellant,

v.

CITY OF KEY COLONY BEACH,

Appellee.

APPELLATE OPINION

THIS CAUSE comes before the Court upon Richard Harper's ("Appellant's"), Appeal of Special Magistrate's Code Enforcement Final Order Imposing Fine ("Final Fine Order") entered on December 1, 2023. The Court, having considered the Appellant's Initial Brief, the Appellee's Answer Brief, Appellant's Reply Brief, pertinent legal authority, and being otherwise fully advised in the premises, finds and orders as follows:

BACKGROUND

Appellant is the owner of real property located 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 permit No. 11261 expired, and Appellant was cited for violations of KCB City's Code of Ordinances section 6-7(d) and section 6-7(e) for failing to complete the 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 the original permit had expired, and he had not completed the project. (Transcript of May 11, 2022, Code Enforcement Hearing at P. 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 "Enforcement Order") finding Permit

No. 11261 remained expired and finding Appellant in violation of section 6-7(d) for failing to complete construction as required by the City Code (Appellant's Exhibit 1). The Enforcement Order granted the Appellant's request for additional time, and directed 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.

On June 7, 2022, Appellant appealed the Enforcement Order in appellate case number 22-AP-1-M. The Defendant filed two motions within the Enforcement Order Appeal seeking reinstatement of Permit No. 11261, both of which were denied by the Court. On August 14, 2023, the Court issued an Appellate Opinion affirming the Enforcement Order. The Appellant challenged the Appellate Opinion by filing a petition for a writ of certiorari in the Third District Court of Appeal which was denied. *Harper v. City of Key Colony Beach*, 394 So.3d 205 (Fla. 3d DCA 2024).

On December 29, 2022, while the Enforcement Order Appeal was pending, The City's Building Official conducted an inspection of the Appellant's property to determine if all the work under the Continuation of Construction Permit was completed before its expiration date on December 30, 2022. Work was determined to be incomplete, and the City initiated new code violation proceedings. The Amended Notice of Violation alleged

the following: (i) that the Appellant failed to complete work by the December 30, 2022, deadline; (ii) that the Appellant thereafter continued to perform work without a permit; and (iii) that the Appellant performed work after the City issued a stop work order on January 10, 2023.

A public code enforcement compliance hearing was held on October 11, 2023. The City's Building Official, Lenny Leggett, testified that he conducted an inspection of the Appellant's property and determined that there were multiple unfinished elements, and that Appellant had not completed the work by the December 30, 2022, deadline. (Transcript of October 11, 2023, code enforcement hearing Pp. 88-90;133).

KCB Code Enforcement Officer Barry Goldman testified that Appellant had not completed the work by the December 30, 2022, deadline and that Appellant was continuing to work without a valid permit and in violation of the Stop Work Order posted by the City on the property in January 2023. Goldman testified that he personally observed the Appellant performing work after December 30, 2022. (Transcript of October 11, 2023, code enforcement hearing at P. 31). He testified that he observed the Appellant using table saws on the second-floor balcony on two occasions after the Stop Work Order was posted. (Tr. at 31;33). Goldman testified he also received multiple complaints from Appellant's neighbors that construction activities were taking place at the property after the expiration of Appellant's permit on December 30, 2022. (Tr. at 38). Barbara Baran-Cisma, whose residence is located immediately next-door to Appellant's

property, testified that she often heard construction noise emanating from Appellant's property after December 30, 2022. (Tr. at 138). The testimony of these witnesses was supported by several exhibits, including photographs, and the Appellant's own February 11, 2023, post on social media discussing work he had performed after the Continuation Permit expired. (Tr. at 39-40). The Appellant did not testify at the code enforcement compliance hearing.

On December 1, 2023, the Special Magistrate entered the Final Order Imposing Fine (Appellant's Exhibit 1-A) making the following findings of fact and conclusions of law:

- That the Appellant failed to complete construction of the Appellant's residence by the December 30, 2022, deadline and subjecting the Appellant to a \$25 daily fine for the time period from May 12, 2023, through the date of the final hearing (October 11, 2023).
- 2. That the Appellant violated section 6-6 of the City's Code of Ordinances by performing construction activities without a building permit during the period from January 1, 2023, through at least February 8, 2023, thus subjecting the Appellant to an additional fine totaling \$9,338.
- 3. That the Appellant violated section 101-98 of the City's Code of Ordinances by performing construction activities after a stop work order had been issued, thus subjecting the Appellant to a third fine totaling \$9,338.

The Appellant filed his Notice of Appeal of the Final Order Imposing Fine on January 9, 2024.

STANDARD OF REVIEW

Pursuant to section 162.11, Florida Statutes, the Circuit Court sitting in its appellate capacity has jurisdiction to review code enforcement final orders. Cent. Fla. Invest., Inc. v. Orange Cty., 295 So. 3d 292, 294 (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. *Cent.* Fla. Invest., 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).

DISCUSSION

Generally, an appellate court is called upon to determine: (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). In this case, these requirements are not directly challenged. Rather, the Appellant makes the following arguments: (1) by operation of law, the prior and current executive orders tolled the expiration of the original permit; (2) the Magistrate did not have jurisdiction to require Appellant to employ a building contractor; (3) the retroactive fine is unconstitutional as applied; (4) there is not clear and convincing evidence supporting a violation of City Code section 6-6.; and (5) City Code section 101-98 is not applicable. Each argument will be addressed below.

A. Tolling of Permit No. 11261

At the code enforcement compliance hearing held on October 11, 2023, Appellant argued that he was entitled to work continuously because Permit No. 11261 never expired. In the Final Order Imposing Fine, the Magistrate rejected this argument finding that Permit No. 11261 expired and the Continuation of Construction Permit had expired, and Appellant continued to work in violation of City Code.

The Magistrate's finding that Permit No. 11261 expired is in line with previous decisions of the code enforcement board and this Court. In the May 12, 2022, Enforcement Order, the code enforcement board found that building Permit No. 11261 expired on April 28, 2022. (Appellant's Exhibit 1). In the Appellate Opinion in case number 22-AP-1-M, the Court affirmed the Enforcement Order and noted that "Appellant secured extensions of the original 15-month deadline until April 28, 2022, when the permit expired..." (Opinion at P. 2). The Third District Court of Appeal denied Appellant's writ

of certiorari challenging the Court's Opinion. Therefore, at the time of the Fine Hearing on October 11, 2023, the record established that Permit No. 11261 expired on April 28, 2022, and that Appellant needed to secure a Continuation Permit to continue any work.

At the code enforcement compliance hearing held on October 11, 2023, Appellant did not specifically raise the defense that the Continuation Permit was independently subject to statutory tolling, and thus the Special Magistrate did not address this argument in the Final Order Imposing Fine. Although the Appellant raised the concept of statutory tolling as a general matter, his presentation was limited to the issues framed in the May 5, 2023, Writ Motion directed to Permit No. 11261. "As a general rule, it is not appropriate for a party to raise an issue for the first time on appeal." Sunset Harbour Condo. Assoc. v. Robbins, 914 So. 2d 925, 928 (Fla. 2005). "In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved." Id. (quoting Tillman v. State, 471 So.2d 32, 35 (Fla.1985)). Since the separate matter of whether the Continuation Permit may have been subject to tolling was not specifically raised and evidence was not presented in support of this argument it cannot be addressed in this appeal.

B. Improper obligation

In the Final Order Imposing Fine, the Magistrate directs the Appellant to retain a Florida licensed general contractor should he continue construction on the non-compliant structure. Appellant argues this is contrary to Florida Statutes section 553.79(f), which states: "a local government may not require a contract between a builder and an owner for the issuance of a building permit or as a requirement for the submission of a building permit application."

The Final Order Imposing Fine does not impose an improper obligation contrary to section 553.79(f). The Fine Order requires the Appellant to retain a Florida licensed general contractor to review the building plans and to be present for an onsite inspection. For work performed after expiration of the permit that does not meet building code standards, the Fine Order requires the Appellant to have a licensed general contractor apply for a demolition permit to conduct a reversal of work performed which is not built to code. After all of the non-compliant work is reversed, the Appellant "may then have a licensed general contractor submit a new application" (Fine Order at ¶ 7) (emphasis added), or alternatively, "may apply for an 'after-the-fact building permit." (Fine Order at ¶ 8) (emphasis added). These directives do not "require a contract between the Appellant and a builder for the issuance of a building permit or as a requirement for the submission of a building permit application" in contravention of section 553.79(f), Florida Statutes.

The Fine Order is consistent with Florida Statutes section 162.08(5) which gives enforcement boards power to "issue orders having the force of law to command whatever steps are necessary to bring a violation into compliance." The Magistrate's instructions in the Final Order Imposing Fine are within the Magistrate's enforcement powers contained in Florida Statutes section 162.08(5).

C. Constitutionality of fines imposed

Appellant argues that the fines imposed in the Final Fine Order are unconstitutional because: 1) the City did not have a schedule of required inspections as mandated by the City Code; 2) the City did not conduct monthly inspections as required by the City Code; 3) the City did not identify the alleged deficiencies with specificity in a timely manner; 4) the remaining work was primarily "cosmetic"; and 5) the City refuses to recognize the tolling orders.

The Appellant is not challenging the fine, but rather the process of imposing the fine that has already been litigated. The evidence presented at the code enforcement compliance hearing held on October 11, 2023, established that Appellant had not completed all the work by December 30, 2022. The record does not show that the remaining work was cosmetic. The Appellant did not identify deficiencies with specificity, and did not challenge the alleged failure to conduct inspections in the code enforcement hearing. Appellant received fair notice and had an opportunity to be heard.

Appellant elected not to offer any opposing evidence and raised no

procedural due process objection or lack of notice objection. The Final Order Imposing Fine includes all the information needed to calculate the amount of daily fine through the date of the Fine hearing. The daily fine is neither indefinite nor unconstitutional.

D. Standard of proof

Appellant argues that the clear and convincing standard of proof applies, and there is no clear and convincing evidence that he conducted work that required a building permit that would support a violation of City Code section 6-6.

At the code enforcement compliance hearing held on October 11, 2023, the Appellant offered no legal argument or case law to support his assertion that the preponderance of the evidence standard was inapplicable, and the clear and convincing standard applied. Nevertheless, the evidence supporting the violations in this case meets both standards of proof. The evidence was undisputed that the Appellant did not complete all work by the deadline and that he continued to perform work after the permit expired. The record confirms that the Appellant received fair notice and an opportunity to be heard but decided not to contest the violations. The record demonstrates that the evidence was sufficient to support the Magistrate's decision under any of the standards of proof suggested. *Peden v. State Board of Funeral Directors & Embalmers*, 189 So. 2d 526, 528 (Fla. 3d DCA 1966) (Carroll, J., specially concurring).

The appellate court merely examines the record made below to determine whether the lower tribunal has before it competent substantial evidence to support its findings and judgment. *DeGroot v. L.S. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957). 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." *Id.* In this case, there is competent substantial evidence supporting the Special Magistrate's findings and conclusions of law.

E. Applicability of City Code section 101-98

Appellant argues that KCB City Code section 101-98 is a flood plain regulation that is not applicable and cannot support the fine for violation of the Stop Work Order in this case. This argument was not presented to the Special Magistrate for consideration, and therefore, it is not preserved on appeal. *Eaton v. Eaton*, 293 So. 3d 567, 568 (Fla. 1st DCA 2020) (explaining the key to issue preservation is giving the tribunal an opportunity to correct the purported error).

Further, the Appellant's effort to limit the scope of City Code 101-98 exclusively to flood plain regulation cases relies upon no testimony, cites no facts, and is not supported by any authority. The unrebutted testimony at the Code Enforcement hearing was that issuing a stop work order under section 6-9 and issuing a fine for noncompliance under section 101-98(3) is the recourse to put a stop to illegal work.

CONCLUSION

The Final Order Imposing Fine is supported by competent substantial evidence, due process was accorded, and the correct law was applied.

For the foregoing reasons, the Special Magistrate's Final Order Imposing Fine is **AFFIRMED**.

DONE AND ORDERED at Key West, Monroe County, Florida this Friday, January 3, 2025

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Judge Timothy Koenig, Circuit Judge 44-2024-AP-00002-A0-01MR 01/03/2025 03:06:26 PM

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