

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

APPELLATE DIVISION

SEVEN EIGHT INVESTMENTS LLC,

Appellant,

Case No.: 24-AP-0010-K

L.T. Case No.: CE23090025

MONROE COUNTY, FLORIDA,

Appellee.

/

**APPELLATE OPINION**

**THIS CAUSE** comes before the Court upon the Appellant's Notice of Appeal of two Notice of Violations issued by the Monroe County ("County") Compliance Hearing Officer on October 10, 2023. The Court, having considered the Appellant's Initial Brief, the Appellee's Answer Brief, Appellant's Reply, the record, pertinent legal authority, and having heard from the parties at oral argument held February 20, 2025, finds and orders as follows:

**I. BACKGROUND**

Seven Eight Investments LLC (Appellant) owns a parcel of real property ("subject lot") located at 30561 5th Avenue in Big Pine Key, Florida, that is the subject of this appeal. The lot is adjacent to another parcel the appellant owns, which is vacant ("vacant lot"), which is the subject of a related case (24-AP-09-K). Prior to the Appellant's ownership of the lots, a portable toilet rental business known as "Bee's Honey Pots Inc." had operated on both the subject and vacant lots.

On February 16, 2022, Bee's Honey Pots was dissolved, and Appellant purchased both parcels of property to open another portable toilet rental business on April 6, 2022. Over time, Appellant opened and operated a business known as "Dan's Cans and Porta Pottys" on both properties. The property also consisted of a dwelling, but it was demolished in the Fall of 2023 to comply with an unrelated code violation. On May 16, 2023, Senior Code Inspector for Monroe County, Janice Hall, began a series of inspections of Appellant's properties, which entailed photographs and review of both the subject and vacant lots. A referral was made from the Monroe County Code (MCC) Compliance Office to the Monroe County Planning Department, and a report was provided by Planner Elizabeth Lustberg on September 28, 2023.

On October 10, 2023, the County issued a formal Notice of Violation/Notice of Hearing ("NOV") to the Appellant, citing violations of Monroe County Code (MCC) Section 110-140(d), and Section 130-74(a) on the Subject Lot. (Appellant App. 002).

At the code compliance hearing on January 25, 2024, Monroe County Planning and Development Review Manager, Devin Tolpin, testified that the established use on the lot was a "residential use" and that the Appellant had not sought or obtained a Conditional Use Permit or an alternative Letter of Determinative Rights for the lots. (Transcript of January 25, 2024, Code Enforcement Hearing at P. 16). Ms. Tolpin further testified that a "historic conditional use" may be designated to the lot pursuant to MCC Section 101-4 if there is documentation to prove that a business was in use on the properties before September 1986. (*Id.* at 22-23). In response, Appellant argued that violations should not have applied to the properties because it is zoned as "suburban commercial" and not residential. (Tr. at 7). The

Appellant further proffered evidence of tax receipts and pictures that commercial use on the properties had been in existence since at least 2004. (Tr. at 33-36).

On February 12, 2024, the Special Magistrate entered a “Final Order” affirming the decision of the Code Compliance Officer and finding Appellant in violation of MCC Sections 110-140(d) and 130-74(a). (Appellant App. 125). The violations had a termination date of August 9, 2024, but an aggregate fine of \$100 would be assessed per day until compliance was attained. (*Id.*). The appeal of the Special Magistrate’s Order followed on March 1, 2024.

## **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. *Cent. Fla. Invs. 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.” 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.* “[O]n appeal, all errors below may be corrected; jurisdictional, procedural, and substantive. *Cent. Fla. Invs.* at 295 (quoting *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 526 n. 3 (Fla. 1995)).

When reviewing local government administrative action, the Court engages in a three-part standard of review to determine: (1) whether due process was accorded; (2) whether the essential requirements of the law have been observed; and (3) whether the administrative findings and

judgment are supported by competent substantial evidence.” *Haines*, 658 So. 2d at 530.

### **III. DISCUSSION**

Appellant seeks review of the Final Order based on the following arguments: (1) Appellant had a vested right to be free from prosecution of the violation of MCC Section 110-140(d) because the Statute of Limitations already had run; and (2) that the use of the lot is for “primary use” and therefore the violation of MCC Section 130-74(a) should not have applied to the subject lot.

#### **A. Monroe County Code Section 110-140(d)**

Appellant asserts that the Special Magistrate erred in finding a violation of MCC Section 110-140(d) because the Appellant’s rights were properly vested in the subject lot and that a conditional use permit was never required.

Review of any code violation begins with an examination of the language of the violation and this analysis includes the plain reading of the ordinance. *Hayes v. Monroe Cnty.*, 337 So. 3d 442, 446 (Fla. 3d DCA 2022).

A review of the NOV the County cited Appellant for states: “A conditional use permit is required for nonresidential use on this property.” (Appellant App. 002). The violation is predicated on County code section 110-140, which reads: “Building Permit Required. “A building permit is required prior to the following: (d) Any development authorized by conditional use approval.” MCC Section 110-65 governs approved conditional uses, which pertains to any uses authorized in MCC Section 130, which includes suburban commercial zoning districts.

The Appellant claims that the rights were properly vested because the statute of limitations - based on former MCC Section 8-37 - should have

applied. Section 8-37 stipulated that: “[A]ll 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.” Appellant further cites *Stone v. Monroe County*, Case No. 21-AP-8-P (Fla. 16th Cir. 2022, Koenig, J.), where the Appellant in that case was determined to be immune from code prosecution due to Section 8-37’s four-year statute of limitations accrual. Section 8-37 was repealed in 2023, but the Appellant asserts that the County should have been barred from prosecuting the violation because the County would have had notice of the violation at the time the statute was in force, dating back to at least 2004. (Tr. at 34). The Appellant further reasons that the statute of limitations and existing case law bars prosecution because Section 8-37’s repeal could only apply prospectively.

The Court disagrees with Appellant and finds that the Special Magistrate’s analysis on retroactivity and vested rights was proper in that the repeal was essentially a *procedural* change rather than *substantive* change in the law. Section 8-37’s repeal conferred no changes to Appellant’s substantive rights and duties since the unpermitted use without a permit was already illegal when Section 8-37 was in force and continues to remain illegal today. *See Walsh on behalf of A.K.P. v. Dep’t of Children & Families*, 393 So. 3d 718, 723 (Fla. 4th DCA 2024) (Remedial statutes or statutes relating to remedies or modes of procedure, which do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of rights already existing, do not come within the legal conception of a retrospective law, or the general rule against retrospective operation of statutes.).

Moreover, Florida law has long held that the statute of limitations begins to run when the last element of the cause of action occurs. *Margolis v. Andromides*, 732 So. 2d 507 (Fla. 4th DCA 1999). The Special Magistrate accurately distinguished *Stone* by demonstrating that the violation in that case was a one-time event for starting construction on a lot without a building permit per requirement of MCC Section 110-140(a). *See Stone*, Case No. 21-AP-8-P at 8. Here, the Special Magistrate found that the business continuing its operation on the subject lot was an ongoing one, instead of a one-time event as in *Stone*. The evidence demonstrates that there was continual unpermitted nonresidential usage of the lot since the business was established in 2022, which entails the increase in intensity of storage items including portable toilets and accessory uses. (Appellant App. 74-82). Based on Florida law, even if Section 8-37 never was repealed, the statute of limitations would have never been able to run because the last element of the cause of action never happened since the violation of operating on the land without a permit continued to happen.

Lastly, the Appellant also argues that a conditional permit was not required because the business was an existing prior use pursuant to MCC Section 101-4(c). That section reads:

**Existing uses prior to September 15, 1986.** All land uses existing on September 15, 1986, which are permitted as a conditional use under the terms of this Land Development Code but were not granted conditional use permit prior to the requirement shall be deemed to have a conditional use permit.

Appellant reasons that the prior business, Bee's Honey Pots, was in existence before September 15, 1986, and because the current business took over Bee's Honey Pots, the current business tacked on the years the

previous business was in use to qualify it as an existing prior use. To prove this, Appellant proffers evidence that Bee's Honey Pots existed in January 1986. (Appellant App. 049). The evidence proffered includes tax receipts of the previous business (Appellant App. 027-31) also shows that the business was in operation through aerial photographs from 2004 until 2024. (Appellant App. 32-45).

Yet, proof that the previous business existed in 1986 rests on a document from the Monroe County Tax Collector's Office that only lists the date that the previous business started but does not specifically corroborate the type of use or where and how the business was operated at that time.

Above all else, Ms. Tolpin testified that a Letter of Development Rights Determination (LDRD) was required to make this review about whether there was an existing use, but that Appellant had not requested a review. (Tr. at 16, 23). The Special Magistrate correctly points out that the Monroe County Land Development Code provides that all matters regarding conditional use permits are decided by the Monroe County Planning and Environmental Resources Department Commission. *See* MCC Section 102-2. Therefore, any review pertaining to existing prior use or current use regarding conditional permits would have to be made by the Commission or alternatively, an LDRD could be obtained to correct the violation.

In sum, the Special Magistrate applied the correct law, and substantial evidence supports his finding that Appellant was required to obtain a conditional use permit. Because the Appellant did not have a permit or, alternatively, an LDRD, the business is in violation of Section 110-140(d).

**B. Monroe County Code Section 130-74(a)**

The Special Magistrate found the Appellant in violation of MCC Section 130-74(a) for an “accessory use without a principal use or structure on the subject lot.” The County testified that it cited Appellant for the violation of Section 130-74(a) after a dwelling on the lot was demolished and subsequently argued that the use for this parcel is “residential” and therefore an “accessory use” instead of a “primary use.” (Appellant App. 129). However, Appellant argues that this section should not have applied.

The Notice of Violation cited the following: **Sec. 130-74(a)**: The storage of portable toilets, dumpsters, storage containers/shed, cargo trailers, boats, canopies, building supplies and other miscellaneous items are prohibited without a principal structure.

The NOV is based on County code section 130-74:

**Sec. 130-74. - General.**

- (a) No structure or land in the county shall hereafter be developed, used or occupied unless expressly authorized in a land use district in this article.
- (b) Notwithstanding any provision of this article, all development listed as a conditional use within a master planned community of 100 or more acres in area shall be reviewed and processed as a use permitted as of right. In such cases, a pre-application conference shall be required prior to the submittal of a permit application for development approval.
- (c) Accessory uses as permitted within each land use district shall be consistent with the definition of accessory uses as set forth in section 101-1.

The Special Magistrate found the Appellant in violation for “accessory use without a principal use or structure on the subject lot.” Definition of an “accessory use,” is derived from MCC Section 101-1:

**MCC Section 101-1: Definitions**

*Accessory use or accessory structure* means a use or structure that:

- (1) Is subordinate to and serves an existing principal use or principal structure; and



- (2) Each individual accessory use or accessory structure as well as in total/combined, is subordinate in area (for this definition docks, pools, pool decks, driveways are excluded from the total area), extent and purpose to an existing principal use or principal structure served; and
- (3) Contributes to the comfort, convenience or necessity of occupants of the principal use or principal structure served; and
- (4) Is located on the same lot/parcel or on a lot/parcel that is under the same ownership as the lot/parcel on which the principal use or principal structure is located; and
- (5) Is located on the same lot/parcel or on a contiguous lot/parcel as an existing principal use or principal structure, excluding accessory docking facilities that may be permitted on adjacent lots/parcels pursuant to section 118-12; and
- (6) Is located in the same land use (zoning) district as the principal use or principal structure, excluding off-site parking facilities pursuant to section 114-67.

Appellant further argues that the business use was not an accessory use because it was a primary or principal use, but there is no record or evidence of any building permit that established this specified use in the first place. Section 101-1 defines “Principal use” as a “primary land use established on a parcel.” Per Ms. Tolpin’s testimony, to officially establish a primary use on a property requires a building permit pursuant to Section 140-110 through a determination by the Planning Commission. (Tr. at 16). Nothing in the record shows that the Appellant obtained a permit to establish a use throughout the business’ operation. On the contrary, the use on the subject lot was an accessory to the principal structure on the contiguous subject lot based on Section 101’s definitions.

Moreover, the Court disagrees with Appellant that there was not enough time given to cure the violation after the demolition on the property. Based on the record, demolition of the structure was completed as of September 19, 2023, nearly one month before the NOV was formally issued on October 10, 2023. (Tr. at 10). Further, Appellant never made an attempt to apply for a permit; the only permit Appellant successfully

obtained was the demolition permit (Appellant App. B. 85-86).

Nevertheless, the Court finds Appellant was afforded appropriate due process to apply for a permit to establish a permitted primary use to the Planning Commission.

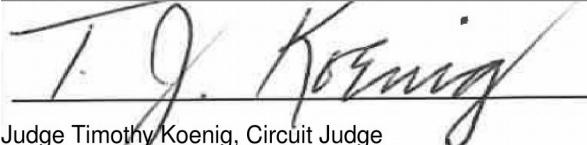
Because there was never an established use, the Special Magistrate's finding that Appellant was in violation of Section 130-74(a) is affirmed.

#### **IV. CONCLUSION**

Appellant was afforded due process, The Magistrate applied the correct law, and the Magistrate's findings are supported by competent substantial evidence. The decision of the Magistrate is **AFFIRMED**.

**DONE AND ORDERED** in Key West, Monroe County, Florida this

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Judge Timothy Koenig, Circuit Judge

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