

Roger H. Staley

Real Property Seminar

November 1, 2019

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Real Estate and Government

- Legislation
- Hearing Process
- Liens and Fines
- Settlement and Mitigation

House Bill 447

- Effective July 1, 2019
- Chapter 2019-75, Laws of Florida
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House Bill 447

- A County or Municipality may only a person one (1) search fee for identifying building permits.
- Payment of surcharges or similar fees not directly related to enforcement of the Florida Building Code prohibited.

House Bill 447

- Amends Section 553.79, which allows a property owner, to close an open permit, when the work is substantially complete by:
 - Retaining the original contractor;
 - Hiring a Licensed Contractor;
 - Takes on the permit as an owner builder.
- A new permit is not required.
- Does not affect work done without a permit.

House Bill 447

- A local enforcement agency may not:
 - Issue a notice of violation;
 - Fine;
 - Penalize;
 - Sanction; or,
 - Assess fees against an arms-length purchaser of a property for value **solely** because a building permit was applied for by a previous owner of the property was not closed.

House Bill 91

- A local enforcement agency may not:
 - Effective Date: June 7, 2019
 - Chapter 2019-67, Laws of Florida

House Bill 91

- Adds “Lien” to Section 48.23
- Removes any ambiguity as to the filings of liens after the recordation of a lis pendens.
- Codified *Ober v. Town of Lauderdale-by-the-sea*, 218 So. 3d 952, 953 (Fla. 4th DCA 2017)

Code Enforcement Board and Special Magistrates

- Local governments may adopt an alternate code enforcement system:
 - Create code enforcement boards; or
 - Appoint special magistrates.
- Both have authority to hold hearings and assess fines against violators of the respective county or municipal codes and ordinances.

Enforcement Procedures

- Code Inspector:
 - SHALL notify the violator
 - Allow a reasonable time to correct the violation*
 - If the violation is timely complied, then no hearing or fine.
 - If complied after comply by date, but before hearing:
 - Board or Special Master can issue Finding of Fact
 - Unless: Repeat Violation
 - If not complied by hearing date, Board or Special Master may:
 - Continue the hearing;
 - Extend the compliance date;
 - Set a final compliance date and assesses a daily fine.

Repeat Violations

1991 Op. Att'y Gen. Fla. 15 (1991)

- **MUST** have an Order or Finding*
- **MUST** be same provision of the Code.
- Violation **may** be presented even if repeat violation has been corrected – Please note this **MUST** be in the Notice.
- The Code Enforcement Board **RETAINS** the right to schedule a hearing to determine costs and impose reasonable enforcement fees.

Enforcement Procedure

- If a repeat violation:
 - The code inspector shall notify the violator; but
 - Reasonable time to correct the violation is **NOT** required.
 - The code inspector, upon notifying the violator of a repeat violation, **shall** notify an enforcement board and request a hearing.
- *The case may be presented to the enforcement board even if the repeat violation has been corrected prior to the board hearing, and the notice shall so state.*
- If the repeat violation has been corrected, the code enforcement board retains the right to schedule a hearing to determine costs and impose the payment of reasonable enforcement fees upon the repeat violator.

Enforcement Procedures

- Conduct of Hearing
 - The enforcement board shall issue findings of fact, based on evidence of record and conclusions of law.
 - If the violation is a health or safety concern, the local government may:
 - Make all reasonable repairs;
 - Charge the violator with the reasonable cost of the repairs;
 - Impose a fine.

Notice

- Certified mail, and at the **option of the local government return receipt requested**, to the address listed in the tax collector's office for tax notices or to the address listed in the county property appraiser's database.
- Notice by publication or posting may run concurrently with, or may follow, an attempt or attempts to provide notice by hand delivery or by mail as required under subsection

Notice

- Evidence that an attempt has been made to hand deliver or mail notice together with proof of publication or posting shall be sufficient to show that the notice requirements have been met, without regard to whether or not the alleged violator actually received such notice.

Health and Safety Violations

- If the code inspector has reason to believe a violation or the condition causing the violation presents a serious threat to the public health, safety, and welfare or if the violation is irreparable or irreversible in nature, the code inspector shall make a reasonable effort to notify the violator and may immediately notify the enforcement board and request a hearing.

Notice

- *Little v. D'Aloia*, 759 So. 2d 17, 18 (Fla. 2d DCA 2000)
- *Ciolfi v. City of Palm Bay*, 59 So. 3d 295, 296 (Fla. 5th DCA 2011)

Code Enforcement Hearings

- Quasi Judicial Hearings
 - Witnesses are sworn.
 - Cross Examination permitted.
 - No strict rules of evidence.
- Due Process
 - Local Governments must provide statutory notice and opportunity to be heard.

Code Enforcement Hearings

- Right to cross examine witnesses
- Present testimony and evidence
 - Hearsay admissible, but cannot be sole basis of ruling.
- Review City Code and Quasi-Judicial Procedures

Evidentiary Standard

- Substantial evidence has been described as such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred
- The evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached. **To this extent the ‘substantial’ evidence should also be ‘competent.’**

De Groot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957)

Lien Certification

- Is the second hearing after Order finding violation has been entered.
- City was not required to use certified mail in serving final orders.
- Lien Certification – Special Magistrate seeks information only to the compliance. Additional time may be requested.

Compliance Dates

- Careful review of Orders and compliance dates are MANDATORY!
 - Orders will state which code violations carry fines:
 - Each code violation may carry its own fine and compliance date.
 - Continuances may have different meanings:
 - Compliance Date
 - Hearings

Code Enforcement Liens

- A **certified copy** of an order imposing a fine, or a fine plus repair costs, may be recorded in the public records.
- The lien shall attach to the land on which the violation exists and upon any other real or personal property owned by the violator.
- Upon petition to the circuit court, such order shall be enforceable in the same manner as a court judgment.
- A fine imposed pursuant to this part shall continue to accrue until the violator comes into compliance or until judgment is rendered in a suit filed pursuant to this section.

Moustakis v. City of Fort Lauderdale, 338 Fed. Appx. 820 (11th Cir. 2009)

- \$150.00 per diem fine for each day the violation existed.
- Fine ran for 14 years
- Total: \$700,000.00+
- The respondent sought to have the lien and underlying fines abolished or reduced on the grounds that the lien and fines were excessive under the Florida Constitution and the United States Constitution.

Moustakis v. City of Fort Lauderdale, 338 Fed. Appx. 820 (11th Cir. 2009)

- Section 162.09 provides daily limits to fines and limits for irreparable violations.
- Florida Legislature's provision for a cap on irreparable code violations is a clear indication that it intentionally omitted a cap for reparable code violations.
- **Fine was directly proportional to the violation.**

Code Enforcement

- §162.09, Florida Statutes allow counties and municipalities with a population of 50,000+ to:
 - Pass an ordinance with a supermajority that allows code enforcement boards and special magistrates to levy the following fines:
 - First violation: Not to exceed a daily fine of \$1,000.00.
 - Repeat violation: Not to exceed a daily fine of \$5,000.00.
 - Irreparable or irreversible: \$15,000.00.

Transfer of Ownership

- If ownership of a property is transferred between the time the initial pleading was served and the time of the hearing, the Owner SHALL:
 - Disclose, in writing, the existence and the nature of the proceeding to the prospective transferee.
 - Provide the transferee copy of the pleadings, notices, and other materials relating to the code enforcement proceeding received by the transferor.
 - Disclose, in writing, to the prospective transferee that the new owner will be responsible for compliance with the applicable code and with orders issued in the code enforcement proceeding.
 - **File a notice with the code enforcement official of the transfer of the property, with the identity and address of the new owner and copies of the disclosures made to the new owner, within 5 days after the date of the transfer.**

Transfer of Ownership

- A failure to make these disclosures described in before the transfer creates a rebuttable presumption of fraud.
- If the property is transferred before the hearing, the proceeding shall not be dismissed, but the new owner shall be provided a reasonable period of time to correct the violation before the hearing is held.

Inspections

- Local government code inspectors are **not authorized** to enter onto any private, commercial or residential property to assure compliance with or to enforce the various technical codes or to conduct any administrative inspections or searches without the consent of the owner or the operator or occupant of such premises, or without a duly issued search or administrative inspection warrant.
- Must obtain an inspection warrant

Fla. Att'y Gen. Op. 2002-27 (2002)

Appeal and Mitigation of Code Enforcement Fines

- The property owners in this matter appealed the Code Enforcement Order finding the violations.
- Appeals must be filed within 30 days of the execution of the order to be appealed.
- Therefore, the enforcement order was outside the scope of the circuit court's review.

City of Miami v. Cortes, 995 So. 2d 604 (Fla. 3d DCA 2008)

Appeal and Mitigation of Code Enforcement Fines

- *Kirby v. City of Archer*, 790 So. 2d 1214, 1215 (Fla. 1st DCA 2001)
- If [Kirby] contested the facts raised by the Code Enforcement Board, he was obligated to present his evidence to the Board at that time. If he then disputed the final order of the Board, his remedy was to file an appeal in the circuit court pursuant to section 162.11, Florida Statutes (1997).
- Having failed to challenge the Board's action, Kirby cannot raise factual disputes with the Board's findings in the foreclosure action. "Matters determined in an order which has become final without appeal are not later subject to appellate review..."

Appeal and Mitigation of Code Enforcement Fines

- *No right to mitigate code enforcement fines*
- § 162.09, Fla. Stat. - An enforcement board may reduce a fine imposed pursuant to this section.

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