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TO: Village Council
FROM: Robert Eschenfelder—Village Attorney
DATE: 26 December 2023
SUBJECT: Council Workshop on Code Enforcement Process

The Village Council recently requested a workshop from Village staff regarding the code enforcement process in the Village. This memorandum has been developed to provide some initial background information to Council Members in advance of the workshop.

The Statutes and Code

Code enforcement in Florida is governed by Florida Statutes Chapter 162. That Chapter has two parts. Part I establishes a process whereby local governments may use a code enforcement board or a special magistrate to enforce codes where a Notice of Violation has been issued by the code enforcement officer.

Part II establishes a process whereby a code enforcement officer issues a citation to a violator, and the violator is then issued a notice to appear in county court, where a county judge can enter orders enforcing the code.

The Village has adopted these options in Article II of Chapter 1 of the Village Code. While the Village has the additional option of filing a civil action seeking enforcement of its codes, which would include injunctive relief not available in the normal process, the current Village Code does not provide for that option.

Current Process Used by the Village

The law allows a local government to designate one or more persons as a Code Enforcement Officer. Stanley Knight is currently designated as the Village's Code Enforcement Officer.

The Village does not use a code enforcement board. Rather, it has elected to use a Code Enforcement Special Magistrate to hear code cases. Currently, the Village has contracts with Joseph Faerber and Robert Pritt to serve as Special Magistrates. It is important to keep at least

two persons under contract as Magistrate, both to accommodate schedule conflicts, as well as to ensure a Magistrate is available should a conflict of interest arise.

The typical code enforcement process includes the following steps:

1. *Violation is detected or reported.* The Code Enforcement Officer (CEO) may, while patrolling the Village, see for him/herself a violation, and may then open a case. Alternatively, the CEO may receive a complaint from a citizen, which would then be investigated. Pursuant to Florida Statutes § 162.06(1)(b), a complaint may not be anonymous. Rather, the citizen must provide her or his name when making the complaint.
2. *Issuance of a Courtesy Notice.* While not strictly required, and so long as imminent danger to life or safety is not at issue, it is an almost universal practice for a CEO to give a courtesy notice to the violator since voluntary compliance is always the goal.
3. *Notice of Violation.* If, after being given a reasonable time to correct the violation, the CEO determines the violation still exists, he or she will issue a Notice of Violation (NOV). The NOV must detail the nature of the violation, the corrective actions to be taken, set forth the period of time compliance is expected by, and note that failure to comply will result in the matter being set for hearing before the Special Magistrate.
4. *Notice of Hearing.* If the violator has not resolved the violation by the deadline given, the CEO will then issue a Notice of Hearing (NOH). The NOH will restate the violation and corrective action required, will note that compliance was not achieved within the time afforded, and will give notice of the time and date set for the Special Magistrate hearing.
5. *Magistrate Hearing.* The Special Magistrate hearing is quasi-judicial in nature and testimony is provided under oath. The hearing clerk is charged with keeping the official records of the hearing. At the hearing, the CEO establishes the factual basis for the violation and reviews the attempts to gain voluntary compliance. The CEO will also make a recommendation as to the daily fine to be imposed.
6. *Order Finding Violation.* The Magistrate will usually announce at the hearing if he/she finds a violation to have occurred. However, a written order making findings of fact and conclusions of law will subsequently be issued. If a violation is found to have occurred, the Order will set forth a reasonable time in which the violator must correct the violation, and will detail the daily fines and enforcement costs which may be imposed if compliance is not achieved.
7. *Affidavit of Compliance or Non-Compliance.* The CEO is responsible for monitoring compliance with the Order. If the CEO finds the violation was corrected, he/she will file an affidavit of compliance, and the case will be closed. If the CEO finds the violation is not corrected, he/she will file an affidavit of non-compliance and request the Magistrate hold a second hearing to determine whether the fines and costs should be imposed.

8. *Imposition Hearing*. The case of ***Massey v. Charlotte County*, 842 So. 2d 142 (2d DCA 2003)** found that, to satisfy due process, the local government must conduct a second hearing before actual imposition of a daily fine which can become a lien. At the Imposition Hearing, the violator has the opportunity to challenge the CEO's affidavit of non-compliance.
9. *Imposition Order*. If, at the conclusion of the Imposition Hearing, the Magistrate finds that the violator did not resolve the violation within the mandated period, he/she will then issue an Imposition Order actually imposing the daily fine (which would date back to the date of the original Order), and also imposing the Village's documented costs of enforcement. A daily fine imposed shall continue to accrue until the violator comes into compliance, which would be documented by the CEO's certificate of compliance. Pursuant to Florida Statutes § 162.09(3), a certified copy of the order imposing fine may be recorded in the public records and thereafter shall constitute a lien against the land on which the violation exists and upon any other real or personal property owned by the violator.
10. *Lien Foreclosure*. The statute provides that after 3 months from the filing of the Imposition Order, which becomes a lien, if the lien remains unpaid, the Magistrate or Council may authorize the Village Attorney to foreclose on the lien or to sue to recover a money judgment for the amount of the lien plus accrued interest. However, no lien created pursuant to the provisions of this part may be foreclosed on real property which is a homestead. Pursuant to Florida Statutes § 162.10, a code enforcement lien has a 20 year limitations period.

It should be noted that the goal of code enforcement under the Act is to obtain compliance. To that end, the Special Magistrate is empowered to impose fines of up to \$250 per day per violation, up to \$500 per day for repeat violations, and up to \$5,000 per violation if irreparable or irreversible (irreparable or irreversible violations consist of such as cutting trees, environmental damage, or injury or death to animals).

While there has been some historical belief that a flat, maximum daily fine could be imposed as to all cases, the statute provides that, in determining the amount of the fine, the Special Magistrate must consider, as to each case:

- (1) the gravity of the violation;
- (2) actions taken by the violator to correct the violation; and
- (3) any previous violations committed by the violator.

In addition to fines, the Special Magistrate may recommend the Village enter upon a property to make repairs or take corrective actions itself if public health or safety are impacted.

As noted, the Special Magistrate can authorize recovery of enforcement costs. Pursuant to Florida Statutes § 162.09, the administrative costs authorized for recovery are limited to recovery of the costs of prosecution of a case, but not the costs of administration of the code enforcement program (salaries and other continuing costs). ***Stratton v. Sarasota County*, 983 So.2d 51 (2d DCA 2008)**.

Code enforcement liens are not super-priority liens co-equal with taxes, but are instead inferior to existing liens of record. *City of Palm Bay v. Wells Fargo Bank*, So.3d 114 So.3d 924 (Fla. 2013). So, when making the decision to foreclose, the local government will normally conduct a lien search to see if the property is subject to any earlier-filed mortgages or tax liens. However, since the lien relates not just to the property, but also to the violator's assets, if the violator has any other significant assets, those could be foreclosed in lieu of seeking to foreclose encumbered land.

Lien Mitigation

At times, a violator who/which is subject to a recorded code lien may request from the Village that lien be waived or compromised. Requests for relief will usually come to Council when an owner seeks to sell or refinance the land because the lien would then come up when the title company does a review of title issues.

Florida Statutes § 162.09(3) provides, in relevant part, that “a lien arising from a fine imposed pursuant to this section runs in favor of the local governing body, and the local governing body may execute a satisfaction or release of lien.”

Therefore, when such request come in, the Village's CEO will assess the justifications set forth in the request, and will produce a staff report reviewing the history of the case and summarizing the request. A recommendation may or may not be made given the unique aspects of the case. It is solely within Council's discretion as to whether to compromise a lien, or whether to foreclose a lien.

HOA Rules Enforcement

Finally, I wanted to address the intersection of HOA rule enforcement related to the Village's code enforcement processes. In sum, the Village's practice has been to defer to the various HOAs operating in the various communities in the Village which have that form of self-governance. While at times a resident may ask the Village's code enforcement staff to intervene in such matters, Florida law does not provide local governments with any enforcement authority regarding HOA rules or other private deed restrictions.

Rather, Florida law provides that both HOAs and individual property owners in an HOA are obligated to follow the HOA deed restrictions. If an HOA board for whatever reason declines to enforce its own rules, an owner has the statutory right to enforce her or his rights as an owner, and to recover her or his attorney fees if successful, pursuant to subsection (1) of Florida Statutes § 720.305, which provides:

Obligations of members; remedies at law or in equity; levy of fines and suspension of use rights.—

- (1) Each member and the member's tenants, guests, and invitees, and each association, are governed by, and must comply with, this chapter, the governing documents of the community, and the rules of the association. Actions at law or in equity, or both, to redress

alleged failure or refusal to comply with these provisions may be brought by the association or by any member against:

- (a) The association;
- (b) A member;
- (c) Any director or officer of an association who willfully and knowingly fails to comply with these provisions; and
- (d) Any tenants, guests, or invitees occupying a parcel or using the common areas.

The prevailing party in any such litigation is entitled to recover reasonable attorney fees and costs as provided in paragraph (2)(e). A member prevailing in an action between the association and the member under this section, in addition to recovering his or her reasonable attorney fees, may recover additional amounts as determined by the court to be necessary to reimburse the member for his or her share of assessments levied by the association to fund its expenses of the litigation. This relief does not exclude other remedies provided by law. This section does not deprive any person of any other available right or remedy.

Therefore, while the Village does have jurisdiction within a community controlled by an HOA to enforce Village Code, since many of the most common violations are also covered by HOA deed restrictions, the Village staff have historically deferred to the HOAs to enforce those rules.

c: Steve Sarkozy, Village Manager
Mary Gibbs, Director of Community Development