

LEE R. ROHE
ATTORNEY AT LAW

P.O. BOX 420259
25000 OVERSEAS HWY
SUMMERLAND KEY, FL 33042

TELEPHONE (305) 745-2254
FAX: (305) 745-4075
E-MAIL lrrlaw@bellsouth.net

TO: Tom Tuell
292-3008

IN THE CIRCUIT COURT OF THE 16TH
JUDICIAL CIRCUIT OF THE STATE OF
FLORIDA IN AND FOR MONROE COUNTY

APPELLATE DIVISION

CASE NO: 2007-CA-882-K

SANDRA L. CARTER,

Appellant

Vs.

MONROE COUNTY CODE
ENFORCEMENT DIVISION,

Appellee

OPINION OF SEPTEMBER 25, 2008

An Appeal from the Code Enforcement Special Magistrate, Larry Sartin.

✓ Lee Robert Rohe, Esq., Counsel for Petitioner.

Christine Limbert-Barrows, Esq., Assistant County Attorney, Counsel for Respondent.

PER CURIAM:

Appellant, SANDRA CARTER, challenges the decision of Magistrate Larry Sartin finding her in violation of six specified sections of the Monroe County Code, as set forth in Exhibit A to Magistrate Sartin's Order dated June 5, 2007.

Appellant owns property located on Big Pine Key, Monroe County, Florida, which she purchased for value from her uncle in August, 2001. The house itself was built in 1975-76, and the evidence before Magistrate Sartin showed that the downstairs enclosure which was the object of the County's enforcement action, has existed since at least 1983. The real property record card with an attached photograph from the

1970's shows that the downstairs has already been enclosed, and the tax assessor's records show the enclosure was known to the government no later than 1983.

Although a variety of issues have been presented by Appellant, a fundamental issue of pleading and proof is dispositive of this case. The County failed to comply with its own ordinances, and with §162.21(c)3, Florida Statutes, both of which require that a code enforcement citation indicate the date of the violation. The citation is, in fact, the operative pleading in code enforcement cases, and the failure to include a required element, such as the date of the offense, means that no cause of action was properly stated by Monroe County before Magistrate Sartin, and the citation should have been dismissed with leave to amend.

The importance of the County's obligation to allege the date of the offense cannot be minimized. In this case, there was evidence before the Magistrate that the downstairs enclosure existed at least since 1983, perhaps longer, and it is undisputed that the County's notice of violation was issued on or about June 8, 2007. Regardless of whether a statute of limitations applies¹, the failure by the County to allege, and prove, the date of the offense has created an enforcement situation where the County is belatedly taking action against a property owner, at least twenty-four years after the violation was apparently known to the County. Under these circumstances, it is entirely possible that the doctrine of laches would properly preclude such a belated enforcement. In fact, evidence in the record shows that witnesses have either died or moved away, and by bringing this belated enforcement, the County has effectively put

¹ It would appear that the four year statute of limitations in Section 6.3-14, Monroe County Code, bars the violations alleged in Counts 2-5, but this will become clear when the County properly alleges the date of the offense.

the homeowner in an impossible situation, where she is obliged to try to prove the County's knowledge of the alleged violation as a basis for laches, decades after the fact.

This procedure is not consistent with fundamental fairness, nor is it in compliance with the law above cited. Reading the County's administrative code in para materia, and harmonizing the various provisions so that sense is made of the entirety as well as individual portions, this Court finds, and holds, that the County is obliged to allege, and to prove, the date of the purported violation as part of its prima facie case.²

This point becomes more acute in light of the fact that the primary alleged violation, that is, construction in areas of special flood hazard, (Section 9.5-317, Monroe County Code) only applies to "new construction", which is defined as "those structures for which the 'start of construction' commenced on or after the effective date of the flood plain management regulation adopted by the community which is January 1, 1975," (Sec. 9.5-316.2(f).), thereby excluding from its purview any construction not falling within this definition. Only by requiring the County to allege and prove the date of the alleged violation, i.e., the date of the alleged unlawful construction, can the Magistrate (or the Court), determine whether a cause of action has been stated under Section 9.5-317, of the Monroe County Code.

Accordingly, the Order of Magistrate Larry Sartin is hereby VACATED, and this matter is remanded to Magistrate Sartin, or other presiding Special Magistrate, with directions to dismiss the underlying citation without prejudice. The County shall be permitted, if it is able, to plead and prove violations in conformity with this Opinion.

² This ruling does not affect the County's authority to seek appropriate injunctive relief regarding public nuisances, or dangerous situations in which the protection of the public requires abatement of a situation which is demonstrated to be an immediate hazard to the public.

The Court declines to rule on all remaining issues, such as laches, equitable estoppel, and the balance of arguments made by Appellant, until on remand, a legally sufficient charging document has been filed by the County, with all pleading requirements and the burden of proof properly enforced by the Special Magistrate. If, upon compliance with this procedure, violations are found to exist by the Special Magistrate, Appellant may renew on appeal her previously made arguments regarding laches and equitable estoppel before this Court. On the other hand, if the Special Magistrate finds that the County has failed to either properly plead or prove the alleged violations, these issues will become moot.

REVERSED AND REMANDED for further proceedings in compliance with this Opinion.

DONE and ORDERED in Chambers at Key West, Monroe County, Florida, this 25th day of September, 2008.

David J. Audlin, Jr.

DAVID J. AUDLIN, JR.
CIRCUIT JUDGE