

MINUTES
FORT MYERS BEACH
Special Magistrate Hearings
Town Hall Council Chambers
2731 Oak Street
Fort Myers Beach, FL 33931
Tuesday, August 6, 2024

Special Magistrate Monica Schmucker presiding.

I. CALL TO ORDER

Special Magistrate Schumucker called the meeting to order.

II. APPROVAL OF MINUTES February 2, 2024

Special Magistrate Schumucker approved the minutes of February 2, 2024.

III. NEW CASES TO BE HEARD

Special Magistrate Schmucker swore in the individuals who were present and intended to provide testimony in the noticed cases.

144 Gulf Island Dr., Andrews, David & Mardina

Case Number: 20220371

Subject: Work without Permit - Stairs

Code Section: LDC Sec. 6-111 - Adoption; amendments 105.1 - Permits required

Code Officer: D. Batt

Officer Batt stated that the property owner requested a continuance to September 4, 2024, because they were out of the country. The Town agreed with the property owner's request. Special Magistrate Schmucker granted the continuance.

5740 Lauder St., McCarthy, Wendy L. + Unknown Heirs of McCarthy, Janet

Case Number: 20240316

Subject: Maintaining of a property in need of repair and/or demolition

Code Section: LDC Sec. 6-111 - Adoption; amendments 103.5 Unsafe buildings or systems

Code Officer: D. Batt

Officer Batt indicated that the property owner requested a continuance to September 4, 2024 and the Town agreed with the request. The Town stated that the case would be reviewed to determine if it was appropriate to transfer the case to the Building Official for a determination if the building

should be demolished. Copies of emails were submitted for the record. Special Magistrate Schmucker granted the continuance.

1661 Estero Blvd., Key Estero Shops, LLC

Case Number: 20240249

Subject: Operation of a shared parking lot to the public for a fee per vehicle space without first obtaining the required Use Permit.

Code Section: LDC Sec. 34-3203 - Illegal buildings, uses and lots.

Officer Batt presented the case on behalf of the Town. She requested that all documents that were in the agenda materials be submitted into evidence in the case. The Special Magistrate so ordered. Officer Batt testified that on March 18, 2024, she observed the operation of a shared parking lot on property owned by Key Estero Shops by charging a fee per vehicle without obtaining the required use permit on the property. Officer Batt took photos of the violation. Copies of her photos are included in Exhibit B. Officer Batt described her observation of the violation as reflected in the photos

A notice of violation was sent to the property owner and registered agent by certified mail and posted at the property on March 21, 2024. Copies of the notices were included in Exhibit C. Key Estero Stops, LLC was given 30 days to comply on or before April 27, 2024.

Officer Batt inspected the property three times (inaudible) since she issued the Notice of Violation. She testified that this is a repeat violation of a violation in 2019. The fine in the 2019 case was became a lien on September 2, 2020 (See Exhibit F) and thereafter went into foreclosure. She described the exhibit's contents, which included a notice of violation from July 20, 2024. (The audio is not working.) The foreclosure case resulted in a settlement of approximately \$188,000 dollars.

Based on the evidence presented, the Town requested that an order be issued finding a repeat violation and the imposition of a fine of \$250 for administrative costs a fine not to exceed \$500.00 per day until the property owner came into compliance. As of the day of the hearing, 141 days have lapsed for a total fine of \$70,500.00. To become in compliant, the property owner had to cease activity or obtain the appropriate permit to allow operation of a shared parking lot. Jason Smalley, a senior planner with the Town, testified later in the hearing that the appropriate permit was a special exception, which would require review by the Local Planning Agency and the Town Council. He described the permit process and noted it usually took 60-90 days to complete.

Attorney Amy Thibaut from Roetzel & Andress represented the property owner. She reviewed the history of the property with a PowerPoint presentation and made several arguments. She claimed: the property was used for paid parking since 1980 and that this use was permitted by right as a legal nonconforming use. Any delay in prosecution of the matter was not the fault of the property owner. She questioned whether a special exception

requirement could apply retroactively and argued that Florida law requires interpretation of zoning ordinances in favor of property owners. She argued that her client's use was permitted by Florida law related to nonconforming uses and asserted equitable estoppel, laches, and the violation of Section 715.075 as defenses to the alleged violation.

Town Attorney Stuparich stated that the town was unaware that the property owner was asserting a right to a legal nonconforming use in this case and it was inappropriate to assert it now without previously communicating with staff. Attorney Thibaut noted that the nonconforming use defense was raised in the 2019 case; however, on appeal that case was dismissed on procedural grounds so there was no adjudication of the merits of the claim. Town Attorney Stuparich requested time to review the legal issues that were raised by Attorney Thibaut. Attorney Thibaut asked the town to consider this a lawful nonconforming use that has continued.

Special Magistrate Schmucker stated that if the property owner continued to be in violation, fines would accrue from the March violation date. The fact that an application was submitted did not prevent the fines from accruing. Town Attorney Stuparich suggested that Attorney Thibaut submit a brief that the Town could address her specific defenses. Special Magistrate Schmucker agreed. Special Magistrate Schmucker stated she would give Attorney Thibaut 10 days to submit a brief and continue the hearing to the September meeting.

IV. ADMINISTRATIVE AGENDA

Case CE20-0239, 215 Flamingo St., Oceanic Blue Retreats, LLC

Public Notice for Order of Compliance Issued

Town Attorney Stuparich spoke but was inaudible.

Signature: _____

- End of document