

**TO:** Village Council

**CC:** Steve Sarkozy, Village Manager  
Burt Saunders, Village Attorney  
Mary Gibbs, Director of Community Development

**FROM:** Derek P. Rooney, Assistant Village Attorney

**DATE:** March 27, 2019

**SUBJECT:** Overview of Code Enforcement Processes

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At the last meeting, the Council requested additional information and recommendations regarding the Village's code enforcement processes. In response to the Council's directive, a resolution directing enhanced enforcement procedures has been prepared for Council consideration. This memorandum is intended to serve as background information.

#### Current Process

The Village, pursuant to Ordinance 2015-14, fully adopted the Local Government Code Enforcement Boards Act found at Chapter 162, Florida Statutes. The Act provides three principal methods of enforcement: (1) Code Enforcement Boards (or Special Magistrate); (2) Citation; or (3) Civil Action. Of the three enforcement processes, the Village currently employs the Special Magistrate process but it retains the option of utilizing the remaining options where appropriate.

As described by Ms. Gibbs and the Village's current Special Magistrate Joseph Faerber at the last meeting, code violations are heard by the Special Magistrate who has the authority to order corrective action and impose fines, including daily fines that accrue until the violation is remedied. If the violation is not corrected, a lien for the amount of the fine, including any costs borne by the Village, may be recorded against the property. As a refresher to last meeting, the process generally goes as follows:

1. Issuance of a Courtesy Notice (not required).
2. Notice of Violation; must detail the nature of the violation, the corrective actions to be taken, and a reasonable period of time to correct.
3. Notice of Hearing; restates the violation and corrective action, sets forth the time and date of the hearing as to the determination of violation.
4. Hearing; at which the Village's code inspector establishes the factual basis for the violation; at the conclusion the Special Magistrate makes findings of fact and conclusions of law as to whether a violation occurred.

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5. Order; if a violation is found to occur, the Order will detail the potential fines, costs, and potential mitigation options of the Village, as well as provide the violator a reasonable time to correct the violation (typically 30 days).
6. Affidavit of Non-Compliance; if the violation is not corrected, the Village's code inspector 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.
7. Imposition Hearing; pursuant to Massey v. Charlotte County, 842 So. 2d 142 (2d DCA 2003), there must be some due process to challenge accrual of fine before imposing a lien.
8. Imposition Order; becomes a lien upon filing of a certified copy with the Clerk of Courts.

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). In determining the amount of the fine, the Special Magistrate must consider (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.

It was noted by the Council that to the greatest extent possible the Village's code enforcement efforts should pay for themselves. Cost recovery is indeed an element of the enforcement process, however the administrative costs authorized for recovery under Section 162.09, F.S., of the Act limit recovery to the costs of prosecution of a case and not the costs of administration (salaries and other continuing costs). Stratton v. Sarasota County, 983 So.2d 51 (2d DCA 2008).

Once imposed, code enforcement liens may be extended to other properties owned by the violator, including personal property, in the same manner as a court judgement. The Village's liens are subject to a 5-year statute of limitations pursuant to 95.281(1), F.S., for recordation. Once recorded, liens are retained for a period of 20 years pursuant to 162.10, F.S. In addition, the Village, if expressly authorized to initiate suit by the Council, may initiate foreclosure proceedings against any non-homesteaded real property.

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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). Similar to the cost of prosecution vs. costs of administration discussed above, the purpose of foreclosure is to recoup money that is owed. Foreclosure does not promote better code compliance, as the outcome of the action is that the landowner loses title. The foreclosing government typically incurs hard costs to pursue even uncontested foreclosure actions. A successful foreclosure results in a court-ordered auction of the property with the government possibly recouping its costs of foreclosure and the amount owed under the lien or liens. Often these properties are not desirable to begin with, and any buyer at an auction has to conclude that the land value sufficiently exceeds the opening bid amount (the governments liens and costs to date) to justify bidding on the property. If no one bids at the auction, the government becomes the owner of the property with its only option to sell the property on the open market and hope to recoup all or a portion of its out-of-pocket foreclosure expenses and out-of-pocket remediation expenses.

In practice, foreclosure by local governments is an exceptionally rare occurrence and is typically exercised where the local government has expended considerable funds in remediation of the property and generally only for properties without privately-held tax certificates or other pre-existing mortgages, liens, or encumbrances on the property (though applying for tax deeds can be a successful strategy as well, despite its up-front costs). Nevertheless, it is often the threat of foreclosure and the initiation of proceedings that spur some property owners and other interest holders to take corrective action.

#### Lien Mitigation

Effective code enforcement requires a variety of mechanisms to achieve compliance. There are always circumstances and landowners who for a variety of reasons have abandoned their properties or are so underwater to other lienholders that additional liens alone will not suffice. In such circumstances the Village's options are significantly curtailed until the property changes hands. The Village may still choose to mitigate violations but such efforts effectively result in a zero-interest loan to the violator or subsequent owner since recovery of costs may be unavailable.

For a lien program to be effective, it must contain both a carrot and stick or risk becoming unenforceable as a practicable matter. Excessively high lien amounts that exceed the market value of a parcel will never be paid in full. Properties so burdened cannot be returned to beneficial use because potential new owners do not want to go to the trouble of working out the problems. Similarly, as the recent financial crisis revealed, lenders may also be unwilling to foreclose in order to avoid inheriting a troubled property and the hard costs of remediation. Because such fines can become a double-edged sword, it is in the Village's best interests to set the proper limit for the accrual of daily fines while providing an avenue for current and future owners to reduce accrued liens in exchange for immediate compliance.

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It is for this reason Village staff has recommended the adoption of a mitigation program. Mitigation would mean determining on a case-by-case basis a reduced fine sufficient to act as both a deterrent and cost-recovery while providing a path to compliance. Mitigation requests would be subject to the entry of a cease and desist order for a period of time to ensure compliance is maintained or risk the re-entry of the full prior lien amount. Additionally, the Village currently has a backlog of requests by existing and subsequent property owners who have come into compliance but still have large fines accrued against their property. The Village has some interest in avoiding recidivism by these owners who have seen no relief as a result of their compliance.

#### Alternative Strategies for Compliance

While the Code Enforcement Board/Special Magistrate process is overwhelmingly favored by local governments, as previously noted, the Local Government Code Enforcement Boards Act does provide for two additional means of achieving enforcement; citation and civil actions. Enforcement through citation involves the issuance of a summons (notice to appear in county court) and carries with it an infraction tantamount to a second-degree misdemeanor punishable by a fine of up to \$500 and jail time of up to 60 days. Generally, citations are best served for one-time and personal violations such as noise violations, environmental violations, or parking violations rather than continuing property issues. Additionally, the Act allows local governments to seek enforcement through civil actions such as the seeking of an injunction to abate particular nuisances.

The selection of an appropriate method of enforcement is done on a case-by-case basis as there are certain limitations placed on governments to prevent procedural due process or other “forum-shopping” issues. The Second District Court of Appeal has held that once a local government had opted to utilize its local government code enforcement board, it was prohibited from enforcing its ordinances through any other means. Tampa v. Braxton, 616 So. 2d 554 (2d DCA 1993).