

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
VOLUSIA COUNTY, FLORIDA

CASE NO.: 2023 30711 CICI
DIVISION: 32

MICHAEL AND KATHERINE HENRY,

Appellants,

v.

CITY OF ORMOND BEACH,

Appellee.

ON APPEAL FROM THE
CITY OF ORMOND BEACH SPECIAL MAGISTRATE

This is an appeal brought pursuant to section 162.11 of the Florida Statutes (2023) of three Orders Finding Violation entered against Appellants Michael and Katherine Henry (“Appellants”) by the Special Magistrate of the City of Ormond Beach (“Appellee/COOB”). Upon review of the appellate court file and having heard oral argument on January 4, 2024, the Court finds as follows:

Appellants timely challenge three Orders Finding Violation, entered on February 27, 2023, each for a separate violation of the City of Ormond Beach Land Development Code (“OBLDC”) for property located at 33 Cypress Drive, Ormond Beach, Volusia County, Florida.

In Case No. 22-112237, the Special Magistrate found Appellants in violation of chapter 2, article III, section 2-50(n)(1)(a) of the OBLDC for installation of a fence without applying for or obtaining a permit, and imposed a fine of \$25 per day until the property is brought into compliance. (Dckt. No. 12 at 85-88, Dckt. No. 13 at Tr. 132-133).

In Case No. 22-112246, the Special Magistrate found Appellants in violation of chapter 2, article III, section 2-50(a)(9) of the OBLDC for installation of accessory structures, to wit: two

large steel shipping containers, without a permit, and imposed a fine of \$25 per day until the property is brought into compliance. (Dckt. No. 12 at 93-96, Dckt. No. 13 at Tr. 134).

In Case No. 22-112247, the Special Magistrate found Appellants in violation of chapter 1, article II, section 1-14(6)(a)(1) of the OBLDC for the installation of pavers without a permit, and imposed a fine of \$25 per day until the property is brought into compliance. (Dckt. No. 12 at 100-103, Dckt. No. 13 at Tr. 135).¹

Each Order of Violation further states if the Respondents fail to bring the property into compliance, “The City will be authorized to enter the property on or after April 10, 2023 to remove and dispose of the [fence, shipping containers, and pavers] with all costs thereof to be assessed against the Respondents.” (Dckt. No. 12 at 87-88, 95, 102, and Dckt. No. 13 at Tr. 133, 135, and 136).²

Section 162.11 of the Florida Statutes (2023) provides for a plenary appeal to the circuit court as a matter of right from a final administrative order of an enforcement board. *Central Florida Investments, Inc. v. Orange County*, 295 So. 3d 292, 293 (Fla. 5th DCA 2019).

Appellants raise six points on appeal which are restated and reordered as follows: (i) the denial of equal protection based upon a disparity of treatment; (ii) the denial of substantive due process through the code enforcement process, the findings of violation, and the penalties; (iii) the denial of procedural due process based upon a Fourth Amendment violation; (iv) violation of the Eighth Amendment; and (v) an improper taking.

¹ The Special Magistrate ordered Appellants to pay \$100 for all three citations, waiving imposition in two of the cases thus requiring Appellants to pay \$100. The Special Magistrate also imposed costs in all three cases. *See* Dckt. No. 12 at 88, 96, and 102-103, Dckt. No. 13 at Tr. 133, 134, and 136.

² Accrual of the daily fines and the remedial action directed in the Orders of Violation have been stayed pending this appeal. (Dckt. No. 24).

In reviewing each issue on appeal, this Court notes that appellate review of a local governmental administrative action encompasses “. . . whether due process was afforded, whether the administrative body applied the correct law, and whether its findings are supported competent substantial evidence.” *Sarasota County. v. Bow Point on Gulf Condo. Developers, LLC*, 974 So. 2d 431, 433 (Fla. 2d DCA 2007) (citing *Lee County v. Sunbelt Equities, II, Ltd. Partnership*, 619 So.2d 996, 1003 (Fla. 2d DCA 1993)). “The last requirement involves a purely legal question: whether the record contains the necessary quantum of evidence. The circuit court is not permitted to go farther and reweigh that evidence.” *Sunbelt Equities*, 619 So. 2d at 1003.

Section 162.11 of the Florida Statutes (2023) provides that an appeal of a final administrative order is limited to the record created before the enforcement board. From that record, this Court finds that Appellants were afforded due process in the proceedings below, as they were lawfully provided notices of the violations, given an opportunity to correct the violations, issued citations, provided notice of the hearing, and had an opportunity to be heard at the hearing. The Court finds that Appellants were not denied procedural due process and therefore shall address each point on appeal only as to whether the law was properly applied and that the findings are supported by competent substantial evidence.

Appellants first contend that the Orders of Violation are violative of their right of equal protection afforded under the Fourteenth Amendment of the United States Constitution. Appellants contend that Appellee/COOB have selectively enforced the OBLDC, engaging in “cherry picking” of their property in contrast to a multitude of other properties which they contend are also in violation of the OBLDC.

Equal protection claims generally concern governmental classification and treatment that impacts an identifiable group of people differently than another group of people. *Foley v. Orange*

Cnty., 638 F. App'x 941, 944 (11th Cir.) (citing *Corey Airport Servs., Inc. v. Clear Channel Outdoor, Inc.*, 682 F.3d 1293, 1296 (11th Cir. 2012)), *cert. denied*, 580 U.S. 961 (2016). To establish a “class of one” equal protection violation, a plaintiff must show that he or she have “been intentionally treated different from others similarly situated and that there is no rational basis for the difference in treatment.” *Id.* (quoting *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000)). “To be similarly situated, the comparators must be *prima facie identical in all relevant respects*.” *Id.* (quoting *Grider v. City of Auburn*, 618 F.3d 1240, 1263–64 (11th Cir. 2010)) (emphasis in original).

During the hearing, Appellants presented the Special Magistrate with “63 examples” of properties they asserted to be in violation of the OBLDC, and they argued that they were the subject of “cherry picking” by Appellees/COOB. The Special Magistrate summarily rejected this equal protection claim. *See* Dckt. No. 13, Tr. at 33-40, 132.

A review of the record reveals that Appellants did not identify with particularity to the Special Magistrate another nonconforming property that was “*prima facie identical in all relevant respects*” to its own, i.e., with the same three distinct violations under the OBLDC. Only upon that initial showing could then the Special Magistrate assess whether another similarly situated property owner was intentionally treated differently by Appellee/COOB, and if there were a rational basis for the purported unequal treatment. With that, the Special Magistrate properly applied the law, his findings are supported by competent substantial evidence, and there is no basis to disturb his ruling. *Cf. Foley*, 638 F. App'x at 944 (11th Cir. 2016) (plaintiffs failed to establish equal protection violation in enforcement of ordinance requiring property owner to obtain a permit for an accessory building on their property).

Next, Appellants present a lengthy point on appeal identified as substantive due process, which cites varying propositions of law that are disjointed and lack clarity but from which this Court extracts an unavailing argument.

As a threshold point, the Court notes that the constitutional right to substantive due process is one that protects against arbitrary legislative action, *not* arbitrary executive action. *City of Pompano Beach v. Yardarm Rest., Inc.*, 834 So. 2d 861, 869 (Fla. 4th DCA 2002) (citing *McKinney v. Pate*, 20 F.3d 1550 (11th Cir.1994), *cert. denied*, 513 U.S. 1110 (1995)). Executive acts characteristically apply to a limited number of persons—often to just one person—and typically arise from the ministerial or administrative activities of members of the executive branch, whereas “legislative acts” generally apply to a larger segment of society, if not to the entire society. *Id.* The issuance and revocation of building permits constitute “executive” and not “legislative” acts. *Id.* (quoting *Reserve, Ltd. v. Town of Longboat Key*, 933 F.Supp. 1040, 1043-44 (M.D. Fla. 1996)).

Here, Appellants challenge Appellee/COOB’s executive action in the enforcement of its building code specific to them, but they make no cogent argument upon which this Court can find that the Special Magistrate misapplied the law in this regard or that he rejected their argument in the face of competent substantial evidence to the contrary. In sum, this strained substantive due process challenge is without any legal merit. *See id.* and also *DeKalb Stone, Inc. v. County of DeKalb, Georgia*, 106 F.3d 956, 960 (11th Cir.) (rejecting a substantive due process challenge to denial of nonconforming use exemption to local zoning laws), *cert. denied*, 522 U.S. 861 (1997); *Boatman v. Town of Oakland, Florida*, 76 F.3d 341, 346 (11th Cir. 1996) (rejecting a claim that town executives arbitrarily and capriciously refused to issue certificate of occupancy); *Reserve II*, 933 F. Supp. at 1044 (no cognizable substantive due process claim for revoked building permit); and *Jacobi v. City of Miami Beach*, 678 So.2d 1365, 1366-68 (Fla. 3d DCA 1996) (rejecting a

substantive due process claim based on the city's refusal to allow reconfiguration of lots under municipal zoning regulations).

Moreover, Florida law authorizes counties and local government to regulate local land development and promulgate zoning regulations. *Bennett v. Walton Cnty*, 174 So. 3d 386, 387-88 (Fla. 1st DCA 2015). Again, assuming arguendo that Appellants cogently identified an offending legislative act below, the Special Magistrate would then have had to examine that act under the rational basis test, analyzing whether the regulation was rationally related to a legitimate governmental purpose. *Id.* at 388 (citations omitted). The rational basis standard “is highly deferential . . . If the question is at least debatable, there is no substantive due process violation.” *Id.* (quoting *WCI Communities, Inc. v. City of Coral Springs*, 885 So.2d 912, 914 (Fla. 4th DCA 2004)). *See also Pinellas Cnty. v. Richman Grp. of Fla., Inc.*, 253 So. 3d 662, 669 (Fla. 2d DCA 2017) (substantive due process challenges are analyzed under the rational basis test; that is, a legislative act of the government will not be considered arbitrary and capricious if it has a rational relationship with a legitimate general welfare concern), *rev. denied*, 2018 WL 6264578 (Fla. 2018), *cert. denied*, ___ U.S. ___, 139 S.Ct. 1401 (2019). Appellants would be hard-pressed to overcome this standard. Appellants’ substantive due process attack on the proceedings below is without legal and factual merit.³

³ Included in their substantive due process argument both below and on appeal, Appellants challenge the authority of Appellee/COOB under chapter 70 of the Florida Statutes (2023), also known as the Bert J. Harris, Jr., Private Property Rights Protection Act. This entire argument is legally misplaced as a claim under chapter 70 must be raised in accordance with the specific procedural and substantive requirements contained therein, which are separate and distinct from that considered in chapter 162 proceedings. *See e.g., Wendler v. City of St. Augustine*, 108 So. 3d 1141, 1142 (Fla. 5th DCA) (chapter 70 claim was distinct from administrative proceeding before City’s Historic Architectural Review Board which had included review of board action by the City Commission and then certiorari review in circuit court), *rev. denied*, 122 So.3d 867 (Fla. 2013), and *Russo Assocs., Inc. v. City of Dania Beach Code Enft Bd.*, 920 So. 2d 716, 717 (Fla. 4th DCA 2006) (property owner filed written claim under chapter 70 following zoning violation findings by

Next, Appellants contend that photographs taken by city officials, which were admitted as evidence of violations of the OBLDC, were the product of a Fourth Amendment violation.⁴ This argument is unsupported by the record as the city official testified that she took the photographs from the sidewalk without entry on Appellants' property. Dckt. No. 13 at Tr. 25, 54- 55. Appellants' challenge under the Fourth Amendment is without legal and factual merit.

Next, Appellants contend that the Orders of Violation, which impose the accrual of daily fines, are excessive in violation of the Eighth Amendment. A careful review of the transcript of the hearing reveals that Appellants did not make a specific argument regarding an Eighth Amendment violation. Accordingly, the Court finds appellate review of this constitutional claim has been waived.

Waiver notwithstanding, the Court notes that "[t]here is a strong presumption that the amount of a fine is not unconstitutionally excessive if it lies within the range of fines prescribed by the legislature." *Moustakis v. City of Fort Lauderdale*, 338 F. App'x 820, 821 (11th Cir. 2009). *Cf. United States v. Bajakajian*, 524 U.S. 321, 336 (1998) (holding substantial deference should be given to legislature in determining whether fine is excessive in violation of Eighth Amendment of United States Constitution) and *Riopelle v. Dep't of Fin. Servs., Div. of Workers' Comp.*, 907

code enforcement board and court addressed the statute of limitations for the separate cause of action under chapter 70).

⁴ Appellants also contend that their own video evidence shows improper entry on their property. Yet, in support of a request for dismissal at the outset of the hearing, Appellants alluded to video surveillance, but they stated they could not offer it as evidence because they were unaware that these photographs would be presented by Appellee/COOB at the hearing, and therefore they did not bring the videos. *See* Dckt. No. 13 at Tr. 25-27, 53. The request for dismissal was denied. *Id.* The transcript of the hearing establishes that Appellants had notice of the violations alleged against them, and they vociferously defended themselves at the hearing. Any argument regarding a Fourth Amendment violation based upon video evidence, which could have and was not offered below, has been waived.

So. 2d 1220, 1223 (Fla. 1st DCA 2005) (holding substantial deference should be given to legislature in determining whether fine is excessive in violation of Florida Constitution).

Here, the fines imposed and accrued are within the range of fines prescribed by section 162.09(2)(a) of the Florida Statutes (2023), which provides that a local government may impose a fine for each day a property is in violation of a local code, so long as the fine does not exceed \$250 per day for a first violation, and \$500 per day for a repeat violation. The statute does not delineate a cap on reparable violations. *Moustakis*, 338 F. App'x at 821 (“Section 162.09(2)(a) of the Florida Statutes clearly provides a cap on the amount of fines that can accrue from daily code violations, but limits the application of the cap to irreparable code violations. Under the statutory construction principle of *inclusio unius est exclusion alterius* (“the inclusion of one is the exclusion of another”), the 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”).

In *Moustakis*, the Eleventh Circuit United States Court of Appeals determined, “The \$150 per day fine that has accrued for 14 years and now totals \$700,000 is within the range of fines prescribed by the Florida Legislature and accordingly is due our substantial deference.” *Id.* at 822. The same holds true here. Finally, and despite waiver, to the extent that Appellants’ Eighth Amendment challenge can be liberally construed as constituting a facial challenge to section 162.09, the facial constitutionality of a statute may not be raised in an administrative proceeding. *See Wilson v. Cnty. of Orange*, 881 So. 2d 625, 631 (Fla. 5th DCA 2004). This claim fails in all respects.

Finally, Appellants contest the legality of the remedial action in the Orders of Violation, which directs Appellee/COOB to enter the property and remove the offending fence, shipping containers, and pavers if the property was not brought into compliance by a date certain identified

in each of the Orders of Violation. Appellants identify this as an unlawful taking or seizure of their property. Though inartful in its presentation to the Special Magistrate below and here on appeal, Appellants have properly contested the legal scope of the sanctions in the Orders of Violation.

This Court does not disagree with the proposition, as cited by Appellee/COOB, that a protectible property interest does not arise in this case from a knowing violation of the law. *Dep't of Transp. v. Durden*, 471 So. 2d 1271, 1272 (Fla. 1985) and that section 162.08(5) of the Florida Statutes (2023) allows a code enforcement board to “[i]ssue orders having force of law to command whatever steps are necessary to bring a violation into compliance.”

However, section 162.09(1) empowers an enforcement board to impose a daily fine on a violator, and further provides:

In addition, if the violation is a violation described in s. 162.06(4), *the enforcement board shall notify the local governing body, which may make all reasonable repairs which are required to bring the property into compliance and charge the violator with the reasonable cost of the repairs along with the fine imposed pursuant to this section.* Making such repairs does not create a continuing obligation on the part of the local governing body to make further repairs or to maintain the property and does not create any liability against the local governing body for any damages to the property if such repairs were completed in good faith.

(Emphasis added).

Section 162.06(4) states:

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.⁵

⁵ Article VII, Division 2, Sections 2-255 and 2-258 of the City of Ormond Beach, Code of Ordinances, mirror these statutory provisions.

Here, in all three cases, the code inspector issued Notices of Violation and gave Appellants twenty (20) days to correct the violations, following the procedures set forth in section 162.06(2). *See* Dckt. No. 16 at 11, Dckt. No. 18, at 11, and Dckt. No. 20 at 11. The code inspector did not institute these code enforcement proceedings against Appellants under section 162.06(4) on the emergent grounds that the permit violations presented “a serious threat to the public health, safety, and welfare” or that the violations “were irreparable or irreversible in nature.” Only upon such a showing, may the local governing body enter the property to make all reasonable repairs or take action to bring the property into compliance. *See* section 162.09(1). In other words, under section 162.09(1), “having determined that a violation presents a serious threat to the public health, safety, and welfare or is irreparable or irreversible in nature,” the enforcement board must notify the local governmental body and then the governmental body enforcing the code is authorized to make all reasonable repairs required to bring the property into compliance. *See* Op. Att’y Gen. Fla. 2009-37 (2009).

A review of the transcript of the hearing reveals that no evidence was presented, and no argument was made by Appellee/COOB, that Appellants’ violations posed a serious threat to the public health, safety or welfare or that these violations were irreparable or irreversible in nature. The record is devoid of any such facts, and thus, there is no evidence, let alone competent substantial evidence, to support the portion of each Order of Violation which directs Appellee/COOB to enter Appellants’ property (following the time period provided for Appellants to bring the property into compliance), and remove the violating fence, shipping containers or pavers, as a sanction under its chapter 162 proceedings. The Orders of Violation do, however, lawfully impose monetary sanctions in the form of citations, associated costs, and the accrual of a daily fine.

Accordingly, this Court finds that the Orders of Violation which direct Appellee/COOB to enter the property to take the action necessary to bring the property into compliance departs from the essential requirements of the law. Those portions of the Orders of Violation are hereby stricken. This ruling in no manner disturbs the proper imposition of the one-time citation fine and the costs associated therewith, and the imposition of the daily fine and its accrual as set forth in the Orders of Violation.

WHEREFORE, based upon the foregoing, the Orders of Violation are **AFFIRMED** in part and **REVERSED** in part. The Stay of the Orders of Violation as to the imposition of the daily fine is hereby **VACATED** upon issuance of this Order.

DONE AND ORDERED in Chambers at Daytona Beach, Volusia County, Florida, on 04 day of March, 2024.

3/4/2024 4:59 PM 2023 30711

CICI



e-Signed 3/4/2024 4:59 PM 2023 30711 CICI

Mary G. Jolley
Circuit Judge

Copies furnished via *eService* to all parties of record