

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

MICHAEL and KATHERINE HENRY,
Respondents/Appellants,

CIRCUIT CASE NO: 2023-30711 CICI

vs

CITY OF ORMOND BEACH, FLORIDA
Petitioner/Appellee.

Lower Court CASE NOS: 22-112237
 22-112246
 22-112247

APPELLANTS' BRIEF ON APPEAL

This brief is submitted by the Henrys in support of their appeal of the Special Magistrate Orders rendered on 3/3/23. Said Orders are the result of alleged Land Development Code (LDC) violations, prosecution of which was brought by the City of Ormond Beach (OB).

Respectfully Submitted: June 2, 2023

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Statement of Case & Facts

While purchasing a prior residence at 924 Rollins Ave, Ormond Beach in Summer 2021, Henrys had in-depth communication with OB regarding the LDC. As described below,¹ OB cherry-picked their enforcement of the LDC, resulting in an equal protection violation and significant monetary damages to Henrys. Henrys consequently decided to purchase their homestead on Cypress in November 2021. Various portions of the property already had pavers in both the front and back yards,² and there was a dilapidated privacy fence already on the property. Henrys replaced the dilapidated fence with a sturdy one, and uncovered the pavers and placed new ones. On 9/2/22, OB (Janet Bruce) called Henrys about their driveway pavers, privacy fence, and two small conexes [hereinafter, PFCs].³ OB hasn't differentiated which pavers they were specifically objecting to,⁴ but stated the conexes must be removed,⁵ and the fence and pavers must be installed differently and with a permit. OB's statements were contradictory. Henrys voiced several concerns.

After that call, Bruce and another unidentified OB employee came to Henrys' home *unannounced*. Bruce came onto Henrys' property, on and near the north driveway, walking in between two vehicles parked on Henrys' property in that area. So, Bruce not only came onto Henrys' property, but went past barriers Henrys had put into place to keep a nosy neighbor out. Upon being in that intimate curtilage of Henrys' home, Bruce took pictures of Henrys' property. Since Bruce failed to announce her presence, Henrys did not know she was there until reviewing security camera footage later.

On 10/20/22, OB served Henrys with Notices of Violation for the PFCs.⁶ On 11/8/22, Henrys served OB with a response, containing a Notice to Cease & Desist and Notice of Proposed Litigation under FS 70.45.⁷ Under FS 70.45, upon receiving the notice, OB "shall review the

¹ Henrys also brought this issue up at the hearing and in the 11/8/22 Notice. See App 12, 13, 19, 20.

² Many of which had a layer of weeds grown over them.

³ A Conex box, also known as a shipping container or intermodal container, is a type of large metal, weather-resistant container used to store or ship goods. It has two standard lengths - 20 and 40 feet, but other sizes and high cube formats are available. The term "Conex" is a blend of "container" and "express," indicating that the box can travel easily by all means of transport, cutting short on travel time. These boxes evolved into modular units that could be stacked efficiently to store more cargo in one location. The United States military has used these containers for storage and transportation of goods since the 1950s. The logistics method associated here was referred to as Container Express and later became a single term: Conex. <https://search.brave.com/search?q=what+is+a+conex&source=desktop>

⁴ The pavers that were already on the property or ones that Henrys brought to the property.

⁵ and that no permit could be obtained for them.

⁶ App 003, et al.

⁷ Exhibit 4, starting on App 017

notice of claim and respond in writing to the property owner by identifying the basis for the exaction and explaining why the governmental entity maintains that the exaction is proportionate to the harm created by the proposed use of real property, or by proposing to remove all or a portion of the exaction.” As FS 70.45 prohibits Henrys from filing a lawsuit against OB during the 90 days OB has to submit the written response,⁸ Henrys patiently awaited the written response from OB. To-date however, OB has failed to comply with this statutory requirement, instead moving forward with the exaction. Indeed, on 12/29/22, OB drafted three Notices of Hearing, failing to properly serve Henrys for a 1/23/23 Special Magistrate Hearing date. OB finally served Henrys with the Notice of Hearing, rescheduled for 2/27/23.

In the 11/8/22 Notice, Henrys informed OB that Bruce’s criminal trespass onto Henrys’ property violated many laws, including Henrys’ rights against unreasonable searches and seizures, and that all photos and/or other “evidence” obtained in the course of that trespass must be forfeited to Henrys as fruit of the poisonous tree. Henrys explained they had video footage showing Bruce illegally entering onto Henrys’ property. OB never relinquished the illegally obtained photos, but appeared to have no interest in using them either. In fact, throughout all communication with OB prior to the 2/27/23 Hearing, OB never mentioned having photos, nor their intention to introduce them. In fact, it wasn’t until 9:58AM on 2/27/23 that Bruce handed Henrys several large stacks of papers she was going to introduce at the hearing, including the illegally obtained photos.⁹

Likewise, in *none* of the communication from OB prior to the 2/27/23 hearing did OB ever mention they were seeking an order allowing them to physically come onto Henrys’ property, tear up and destroy/remove Henrys’ property, and be absolved of any responsibility for damages

⁸ which would have ended 2/6/23.

⁹ During the hearing, Henrys objected to the hundreds of pages being introduced by OB. They objected on the grounds the documents were served on them at 9:58 for a 10:00AM hearing, and doing so violated their right to Notice and Opportunity to be Heard, especially since OB knew since 11/8/22 that Henrys had video evidence to contradict and even exclude the claims OB made about the photos in question. This due process denial was raised several times by Henrys (i.e., Tr p 3, 25, 53, etc.). Henrys also objected on the grounds the photos were fruit of the poisonous tree, with OB illegally trespassing onto Henrys’ homestead (and two neighboring properties) without permission or a warrant. Bruce said OB employees are trained that they are “permitted” to go onto private residential property to take photos of potential violations without needing a warrant. See e.g., Tr p 54. Without allowing Henrys the opportunity to present their video evidence contradicting the statements made by Bruce, and without much explanation or legal analysis, Magistrate overruled Henrys’ objections and allowed the photos into evidence.

caused to any of Henrys' remaining property.¹⁰ Thus, Henrys were denied Notice and Opportunity to be Heard on these requests made by OB.

At the onset of the 2/27/23 Hearing, Henrys moved for dismissal, among other reasons, because of OB's failure to comply with FS 70.45. OB Attorney Emery simply stated she hadn't "had the opportunity to review the full statute"¹¹ Despite the clear FS 70.45 90-day waiting period, Emery argued that Henrys were required to file a FS 70.45 claim in circuit court prior to the 2/27/23 Hearing to have those issues addressed. Without providing legal reasoning, Magistrate denied Henrys' motion for dismissal.¹²

Henrys also objected to the cherry-picked manner in which these LDC provisions are enforced. Henrys specifically pointed to 810 other "violations" of the same Permit, Pavers, Sheds & Fences portions of the LDC that are openly visible within just a 0.25-mile radius of their home - all of which receive a "free pass" from OB.

Magistrate overruled Henrys' objections with no legal reason provided and rendered 3 Orders in favor of OB on 3/3/23.¹³

On 3/24/23, Henrys filed their Notice of Appeal and filed with Magistrate their Motion for Relief from Order and Motion for Stay Pending Appeal.¹⁴ In Henrys' original lower tribunal filings, both the lower tribunal and OB have failed to respond or acknowledge Henrys' pleadings, despite being expressly requested by Henrys for them to do so.¹⁵ So, on 3/24/23, Henrys expressly requested the lower tribunal and OB to acknowledge receipt of the pleadings being filed/served.¹⁶ Despite each of the 5 recipients¹⁷ each opening the email on 3/24/23,¹⁸ for a total of 38 times between then and 4/2/23, NONE responded to the email, or acknowledged receipt of the pleadings.

¹⁰ See communications, App 003-10 and 078-84.

¹¹ Transcript p 15. For the court's reference, FS 70.45 is **only one page long**, and was explicitly cited to OB in several portions of the 11/8/22 Notice of Proposed Action (NPA), meaning Emery was stating she "hadn't had the time" to read a one-page statute in the course of the 3.5 months before the 2/27/23 Hearing.

¹² See Tr p 19; The Magistrate seemed to place no inherent value in statutes themselves to be enforced, rather concluding that only those statutes with established case precedent to support it should be followed. See, e.g., Tr 6 and 14.

¹³ Exhibit 5, App 085-106.

¹⁴ Exhibit 6, App 107.

¹⁵ Especially since there is no established court filing system for the tribunal.

¹⁶ See Exhibit 7, App 124.

¹⁷ Clerk, Magistrate, Deputy City Attorney, Neighborhood Improvement Division Manager, and Neighborhood Improvement Division Code Inspector.

¹⁸ see exhibit 7.

Summary of Argument

This case exemplifies unconstitutional municipal cherry-picking in every sense. OB illegally commenced this action, violating FS 70.45. The underlying restrictions against Henrys' PFCs do *not* substantially advance legitimate interests, *and* violate many constitutional and statutory protections of Henrys' right to use our their home freely. Henrys' use of their own property harms *no* other properties, and OB is allowing 810 of these very "violations" in the same immediate neighborhood, totaling over 115,000 citywide. These 810 documented violations result in a free pass for OBPD officers, VC Sheriff deputies, city employees, county council & city commission members, state law enforcement officers, official city properties and even the City Attorney's own office!¹⁹ Procedural laws have been violated by OB, who *all* took an oath of office. But this is all a farce anyway, since these permits can't even be issued according to the LDC, nor are they required under the letter of the law. All in all, magistrate's orders are legally void, and thus *must* be set aside on appeal.

Standard of Review

All issues in this appeal are legal, not factual. As such, this court is to review the legal and constitutional issues de novo. OB has employed tactics to transfer the legal burden that is properly due upon them. As the discussion on this point is best explored in the body of this brief, Henrys defer to their section on [Burden of Proof](#).

Argument

In this appeal, the Court is tasked with determining if the three Special Magistrate Orders violate the law. Upon finding they do violate the law, the Court is then tasked with determining the appropriate legal remedy. The more laws the orders violate, and/or the more egregious the violations are, the stronger the legal relief *must* be.

OB and Magistrate violated countless laws throughout these proceedings, some procedural and others substantive. Here, OB is attempting to 1) interfere with Henrys use of their property, 2) physically come and take Henrys' property, and 3) assess fines and fees on Henrys for both.

To determine the severity of OB's law violations, we must begin with an understanding of the source of our rights, and the source of the government's authority to act.

I. Our Rights Come From God, Not The Government

¹⁹ App 11, 13, 14.

With OB's approach to land use regulations being one of "you can't use your property for any purpose without prior written permission from OB, including payment of a fee," it seems remiss not to remind you that we get our rights from God, not the government. In fact, OB acts as though they are our landlords or homeowner's association board (when, in reality, we have neither).²⁰

II. The Purpose of Government

Indeed, it is "to secure these [unalienable] rights [that] Governments are instituted among Men."²¹ And, the purpose of government is to secure our individual, God-given liberties, so that in my exercise of my rights, I am not impeding upon your exercise of your rights. Yes - the *purpose* of government, and of its laws, is to *protect our rights*, not to regulate and punish us. Indeed, that is why the Fourteenth Amendment is worded to guarantee no State shall "deny to any person within its jurisdiction the equal **protection** of the laws." Moreover, the right to have and protect private property is even more sacred than some other rights, as explained by the US Supreme Court. "The great end for which *men entered into society was to secure their property*."²²

III. The Source of Authority in Government²³

"Governments . . . deriv[e] their just powers from the consent of the governed."²⁴ Moreover, "*We, the people* of the State of Florida, being grateful to Almighty God for our constitutional

²⁰ Certainly, we are "endowed by [our] Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." Declaration of Independence. The Florida Constitution clearly states "We, the people of the State of Florida, being grateful to Almighty God for our constitutional liberty," established our constitution. Preamble. See also US Const Preamble, "We the People of the United States in Order to . . . secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America." It also explains that "[a]ll natural persons, female and male alike, are equal before the law and have **inalienable rights**, among which are the right to **enjoy and defend** life and liberty . . ." FL Const Art I Sec 2 *Basic Rights*. See also, Declaration of Independence. In fact, although the entire first article of the state constitution is focused on explaining our individual liberties (and is hence called "Declaration of Rights"), FL Const Art I Sec 1 reminds government officials that the "enunciation herein of certain rights shall not be construed to deny or impair others **retained** by the people." See also, US Const Am IX.

²¹ Declaration of Independence.

²² *Boyd v United States*, 116 US 616 (1886).

²³ OB claims its land use regulations are necessary to protect "the public health, safety, welfare and quality of life" for its residents. However, the text of the Florida and US Constitutions do not provide OB authority for this purpose, let alone allow OB to regulate how we use our own property. See NPA, App 033-34.

²⁴ Declaration of Independence.

liberty” were the ones to “ordain and establish this constitution.” The Florida Senate explains that the Florida Constitution is an “organized system of fundamental principles for the government of the state. It is of a permanent and general nature and *originates from the people* rather than from the legislature.”²⁵ Indeed, not only are we guaranteed a Republican Form of Government,²⁶ but the Tenth Amendment reminds government officials that all the powers We The People have *not delegated* to the federal or state governments are *reserved to the people*.²⁷ That is why the state constitution not only explains that “[a]ll political power is inherent in the people,”²⁸ but that a “public office is a public trust. The people shall have the right to secure and sustain that trust against abuse.”²⁹

In other words, we must start with the presumption that we have the right to act or use our own property as we see fit, and the government may not interfere with that right, unless our actions or use of our property causes harm to someone else.

IV. OB Has No Authority to Interfere with Henrys Use of Their Homestead

This whole case originated when OB began interfering with Henrys use of their own property. So, the first thing we must address is whether OB has the authority to do that.

A. OB May Not Deny Henrys Equal Protection of the Law

Even *if* the language of the specified LDC provisions were enforceable, OB’s actions are nonetheless invalid if they are done in a manner to deprive Henrys of equal protection of the law.

1. OB Violates Equal Protection By Enforcing Permitting Procedures As Against Henrys When OB *Wouldn’t* Enforce Permitting Procedures To Protect Henrys’ Interests At Rollins Property

Under the Equal Protection Clause of the Fourteenth Amendment, government may not selectively enforce laws against one individual while ignoring identically situated individuals. However, that is exactly what OB has done. Less than 2 years ago, when Henrys moved to Florida, a permit/LDC situation arose where OB denied Henrys equal *protection* of the law.

²⁵ See <https://www.flsenate.gov/laws>.

²⁶ by US Const Art IV, § 4, where we elect mere representatives, but we retain the ultimate control and authority.

²⁷ Meaning, we kept the powers with which we started.

²⁸ FL Const Art I Sec 1.

²⁹ FL Const Art II Sec 8.

In July 2021, Henrys entered into a contract to purchase the home at 924 Rollins Avenue. The contract sellers drafted clearly stated *sellers* were responsible for obtaining and finalizing all building permits. After Henrys informed sellers they wanted to purchase the home, sellers began extensive demo / remodeling of the home, filling up two 20' dumpsters. The contract said Henrys could have their property on site and receive mail at 924 Rollins while they were completing the renovations before closing. Acting as a general contractor,³⁰ sellers appeared onsite several times before the closing date, as well as monitored the process via constant text and phone communication.

A few days before closing, OB posted a Stop Work Order at the property, and explained to Henrys the work that must be stopped immediately. Henrys went that day to City Hall to obtain the paperwork to apply for permits. However, later that day, as Henrys were picking up another \$10,000 in windows and building supplies they had previously purchased for the property, sellers called to tell Henrys that they were canceling the contract and changing the locks immediately - with *no* reason stated.

Seller, in fact, came first thing the next morning with a locksmith and attempted to change the locks to the property with Katherine and daughter inside! Sellers then began a harassment and terror campaign, threatening the lives of Henrys and violating 26 different criminal statutes in Florida!³¹ The day *before* closing, sellers filed a lawsuit against Henrys, claiming Henrys failed to go to closing, while simultaneously telling Henrys the *sellers refused* to close on the sale. Henrys hired legal counsel and filed a counterclaim for specific performance of the contract, among other things. However, in the midst of this court battle, Henrys' attorney died in a scuba diving accident, and a fill-in judge was assigned to hold the pending hearings.³² While the case was pending, sellers continued stalking Henrys, and illegally threw all of their personal belongings and approximately \$60,000 in remodeling materials out of the house, resulting in thousands of dollars in damage to Henrys.

As this was all unfolding, Henrys called OBPD several times to have them take legal action on the threats with firearms and other crimes being committed by sellers toward Henrys. Each time, officers refused to take a report or make any arrests, saying that since a civil lawsuit was pending, they wouldn't get involved. Even as sellers brought another dumpster to the property

³⁰ Sellers told Henrys they are, in fact, general contractors who regularly flip homes like this one.

³¹ All facts recited herein are on the record in 2021-11223-CIDL, were shared again with OB on 11/8/22 as attachments to the Notice, and are available in direct links below.

³² The assigned judge was close with Henrys' attorney and was too upset to continue hearings that week.

and had several handymen onsite working on the home (while the lawsuit was pending), OB building officials refused to take action against sellers for working on the home without a single permit! (Sellers had even canceled the 1 permit Henrys had been able to secure!) OB neighborhood improvement, police and building officials were asked by Henrys to take action to stop the sellers from working on the home, as Henrys still had a vested interest in the home and the contract did NOT allow the sellers to remodel or work on the property once Henrys had taken possession in July, but they each refused. This was also despite the Lis Pendens Henrys filed with the county records office.³³

Every attorney (of dozens) Henrys contacted agreed that everything sellers were doing was illegal, and that Henrys would ultimately win in court, but most attorneys were unable to help on such a short notice.³⁴ One of these attorneys was particularly upset by the facts of the case, and even called OB to ascertain why they were refusing Henrys equal *protection* of the law by enforcing the LDC, and stop the sellers from working on the home while the case was being litigated. Not only did OB inform the attorney OB would *not* do anything to enforce the LDC *as against sellers*, but OB also referred to Henrys as “squatters”! This is despite OB receiving copies of Henrys’ CounterComplaint, exhibits, and court orders.³⁵

OB’s enforcement of the LDC *as against Henrys* at the Rollins property, outright refusal to enforce the LDC *as against sellers* at the same property,³⁶ and current attempts to enforce the LDC *as against Henrys* for their current property establishes a ***clear violation of the Henry’s right to equal protection of the law***. Accordingly, OB’s attempts to enforce permitting “requirements” upon Henrys now is a blatantly unconstitutional act by OB.³⁷

2. OB Violates Equal Protection When Giving a “Free Pass” to Similarly Situated Neighbors

Again, under the Equal Protection Clause, government may not selectively enforce laws against one individual while ignoring identically situated individuals. However, OB has done just that, but in yet another context.

³³ Shared with OB as Exhibit A to the 11/8/22 Notice, but also available at <https://wp.me/aecX6i-2uw>.

³⁴ Henrys were given no time to secure replacement counsel after their attorney died.

³⁵ Henrys ultimately decided to purchase the home on Cypress, and subsequently reached a settlement with the sellers regarding the return of at least some of their funds for the Rollins property.

³⁶ especially throughout August and September 2021.

³⁷ Shared with OB as Exhibit B, C & D to the 11/8/22 Notice, Henry Response to Kelly Emergency Motion for Temporary Injunction is also available at <https://wp.me/aecX6i-2uu> ; Henry Answer to Kelly Complaint & Henry CounterComplaint is also available at <https://wp.me/aecX6i-2ut> ; Henry’s Response and Motion for Protective Order is also available at <https://wp.me/aecX6i-2uv>

One way to understand the intersection of our inherent property rights and our right to equal protection of the law is to understand the difference between ***malum in se*** and ***malum prohibitum***. As explained in Black's Law Dictionary, Deluxe Eighth Edition, p 978, ***malum in se*** is "a crime or an act that is inherently immoral, such as murder, arson, or rape," whereas ***malum prohibitum*** is "an act that is a crime merely because it is prohibited by statute." In other words, ***malum in se*** results in direct harm caused to another. No one is alleging Henrys have directly harmed *anyone* by using their PFCs.

What does Equal Protection have to do with the distinction between ***malum in se*** and ***malum prohibitum***? When you commit a ***malum in se*** offense, such as murder, arson or rape, there is harm to a victim that must be accounted for, even if another arsonist or rapist goes free. But the "harm" of a ***malum prohibitum*** offense is to society in general. Indeed, land use regulations are in place to "protect and maintain a high quality of life for the citizenry."³⁸ Certainly, the alleged *permit* requirements of the LDC for fences, pavers, and accessory structures (like conexes) are to ensure compliance with the design and aesthetic requirements of the LDC. But how effective are design and aesthetic requirements if they are not equally enforced?

Henrys are not merely alleging that a few city residents here and there have similar "violations" of the LDC. Rather, Henrys pointed to an astounding 810 Permit, Paver, Accessory Structure & Fence LDC "violations" that are visible within just a 0.25-mile radius of their home - all of which receive a "free pass" from OB. Henrys included a map indicating with a teal star all of said properties,³⁹ along with a categorized spreadsheet showing the exact address and details of such similar "violations,"⁴⁰ and photos of several of said "violations."⁴¹

³⁸ LDC 1-03.

³⁹ App 038.

⁴⁰ App 039-55.

⁴¹ App 056-76.

Teal Stars Indicate Permit, Paver / Parking, Shipping Container / Shed / Structure, or Fence Violations



Included again herein for quick reference, this teal star map clearly shows that *far more properties than not* have one or more of *these very kinds* of violations visible. This is not akin to an officer only pulling over one of two people speeding on a busy road. No, this map shows how completely ineffective the cherry-picked enforcement of these LDC provisions is at maintaining the aesthetics of the entire neighborhood. If any doubt could exist after seeing such a clear representation, the dozens of pictures included by Henrys show it undeniably. But, Henrys pointed out that these 810 “violations” in plain view exist in just 0.28 mi² (or 0.7%) of the

entire city, meaning that it's just representative of the 115,714 similar "violations" currently happening in OB.

Henrys further pointed out these documented neighborhood violations result in a free pass for OBPD officers, VC Sheriff deputies, city employees, county council & city commission members, state law enforcement officers, official city properties and even the City Attorney's own office.⁴² If *these LDC provisions* were so important to the beautification of the community as a whole, wouldn't our own government officials be held to the highest standard of compliance with these provisions?

Singling out Henrys since their arrival in OB, OB repeatedly deny Henrys equal protection of the law. These documented equal protection violations include work without permits, fences failing to meet LDC requirements, accessory structures & pavers installed without setbacks, parking areas without the required material (pavers, concrete, etc.), and other similar provisions. Thus, even *if* the language of the specified LDC provisions is otherwise enforceable, OB's actions are nonetheless invalid.

B. OB May Not Deny Henrys Substantive Due Process

As explained earlier, the purpose of government is to secure our individual, God-given liberties, so that in my exercise of my rights, I am not impeding upon your exercise of your rights. Indeed, Henrys' PFCs impact neighboring properties in *no* negative ways, but do reduce the amount of sandspurs and water runoff transferring to neighboring properties, help contain sound within their own property, keep soccer balls out of neighbor's yards, significantly help to reduce the amount of damaging winds ripping through, and provide a place for neighbors to gather for a leisurely game of basketball. In other words, *Henrys' use of their property does not infringe upon others' use of their property*, so the government has no business interfering.

This interference is exactly what substantive due process protections prohibit. Substantive due process "forbids the government to infringe certain 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is *narrowly tailored* to serve a *compelling state interest*."⁴³ It also guarantees regulations will not deprive a person of life, ***liberty, or property*** for arbitrary reasons.⁴⁴ Land use regulations start off well intentioned, but

⁴² App 11, 13, 14.

⁴³ *Reno v Flores*, 507 US 292, 302 (1993) (emphasis added); see also *Zinerman v Burch*, 494 US 113, 125 (1990), citing *Daniels v Williams*, 474 US 327, 331 (1986).

⁴⁴ *West Coast Hotel Co v Parrish*, 300 US 379 (1937).

can often find themselves in the arena of arbitrary regulation of liberty or property. Thankfully, LDC 1-15(e)(4) correctly identifies the proper use of land development regulations⁴⁵:

The proposed use will not substantially or permanently depreciate the value of surrounding property; create a nuisance; or deprive adjoining properties of adequate light and air; create excessive noise, odor, glare or visual impacts on the neighborhood and adjoining properties.

Do OB's actions in this case stick to those permissible purposes for land regulations? Unfortunately not.

1. OB's Actions Violate Regulatory Taking Case Precedent

Whether stopping us from using our own property or physically taking our property, each must be done under the strict requirements and procedures of the US and Florida Constitutions and state law. Certainly, "the plain spirit and purpose of the constitutional prohibitions [are] intended to secure the people against unauthorized official action."⁴⁶ Hence, why the US Supreme Court has held since 1886 "the principles . . . of constitutional liberty and security . . . apply to all invasions on the part of the government and its employés of the sanctity of a man's home and the privacies of life. [T]he essence of the offence . . . is the invasion of his indefeasible right of personal security, personal liberty and private property."⁴⁷

Indeed, "[t]he Constitution extends *special* safeguards to the privacy of the home."⁴⁸ This "indefeasible right of personal security, personal liberty and private property" is exactly what Henrys are fighting for here. Before their current privacy fence was erected and conexes arrived, strangers would often walk through their backyard at all hours; a couple of nosy neighbors admittedly spied on Henrys constantly, threatening their personal security. Before the pavers, the unforgiving sand throughout the front and backyards welcomed only weeds, sandspurs and flooding issues. Without the PFCs *where Henrys have placed them*, Henrys' property was not capable of parking more than two vehicles; not amenable to typical Florida outdoor living; not capable of safely and properly storing necessities and items of personal property; not shielded enough from blunt force hurricane winds; not able to adequately handle the excessive rains that come with each hurricane season. In other words, prohibiting these

⁴⁵ Although it includes many others that go far beyond this acceptable use by OB.

⁴⁶ *Byars v United States*, 273 US 28 (1927).

⁴⁷ *Boyd v United States*, 116 US 616 (1886).

⁴⁸ *Dolan v City of Tigard*, 512 US 374 (1994) (cleaned up).

simple changes made by Henrys to their own property indeed serves to defeat their “right of personal security, personal liberty and private property.”

Moreover, the US Supreme Court has been consistent in identifying regulatory takings prohibited by the US Constitution. The Court held the application of a land use regulation to particular property effects a taking if the *ordinance does not substantially advance legitimate state interests*.⁴⁹ The Court also explained it (perhaps more clearly) that a land “use restriction may constitute a ‘taking’ if not **reasonably necessary to the effectuation of a substantial government purpose**.”⁵⁰ Logically, we must first determine if OB’s land use restrictions in question involve a substantial government purpose. Henrys have repeatedly raised this, pointing out OB does *not* have a “legitimate state interest” or “substantial government purpose”⁵¹ in *any* of the land use regulations being imposed here.⁵² OB has never denied this, and never offered *one* substantial government purpose for even *one* of the involved land use restrictions. Indeed, even Magistrate simply stated Henrys’ argument is “without merit” - *without explaining how this binding case precedent is not applicable to OB*. All these individuals employed by OB seem to think the Constitution, state law and binding Supreme Court precedent are “without merit.” That clearly erroneous philosophy has no bearing on the truth, though.

But, for the sake of argument, even *if* OB had substantial government purposes for each of the land use restrictions at issue here, OB would still have to prove these restrictions are “**reasonably necessary to the effectuation** of [those] substantial government purpose[s].” Since there is no substantial government purpose, these land use restrictions are *not* reasonably necessary to the effectuation of such a purpose, *nor has OB ever claimed they are*. With this case precedent being around for decades, and these precise issues being raised by Henrys for more than 7 months, it would be a little “late in the game” for OB to start trying to fabricate such necessity now.

As applied to Henrys’ PFCs, there is no “substantial advancement of a legitimate state interest” by requiring Henrys to

⁴⁹ See *Nectow v Cambridge*, 277 US 183, 188 (1928).

⁵⁰ *Penn Central Transportation Co v New York City*, 438 US 104, 127 (1978).

⁵¹ Henrys’ 11/8/22 Notice, App 27, 28, 30; Henrys’ 2/27/23 Hearing Response Filed, App 11, 15; Katherine Henry’s Oral Argument and 2/27/23 Testimony, Tr 11, 13, 61, 122, 123.

⁵² Including the confusing and contradictory relevant setback requirements, the aesthetic requirements, the yet to be identified “additional” requirements by OB (see App 030; Tr 108, 109), the alleged complete prohibitions of conexes, or the need to obtain a permit to install a PFCs on privately owned property that does *not* change the type of use of the property, nor negatively impact neighboring properties.

- pay the city and obtain permission before using their homestead for normal residential purposes
- install their fence with certain decorative qualities
- keep their conexas or pavers at least 7.5 (or more) feet away from all side and rear property lines, or completely remove their conexas (which are in much better condition than many of the homes and sheds in this area)
- submit the existing use of buildings on the lot, the number of families the building is designed to accommodate, the location and number of required off-street parking and off-street loading spaces, landscaped buffer areas, a recent survey of the lot *specifically certified to the city* (a cost of \$750 or more), accessory uses of the property, driveway and access standards, impact fees, utility installation fees, sign regulations, etc.

Lastly, we must remember the main purpose of government - to make sure that in my exercise of my rights, I'm not interfering with your exercise of your rights. The US Supreme Court kept this in mind in the regulatory taking jurisprudence, requiring local governments to "make some sort of individualized determination" as to the "nature and extent" of the "impact" of the proposed use of property.⁵³ Even more so, the US Supreme Court held "No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required [conditions are] related both in nature and extent to the impact of the proposed development." *Ibid.* OB has failed to *even allege* Henrys' PFCs as they now sit impact the city or the neighborhood *in any way*, let alone in any negative way that must be countered. Certainly, OB has failed to make *any individualized determination* about the nature and extent of the impact of Henrys' PFCs; let alone how their requirements upon Henrys are "related both in nature and extent to the impact."

2. OB's Actions Violate Laws Protecting Private Property

Aside from cases and constitutional provisions, many state laws also protect private property rights.⁵⁴ In FS 70.001, the legislature recognized "that some laws, regulations, and ordinances of the state and political entities in the state, as applied, may inordinately burden, restrict, or limit private property rights without" a court declaring it "a taking under the State Constitution or the United States Constitution. The Legislature determines that there is an important state interest in protecting the interests of private property owners from such inordinate burdens." These

⁵³ See, e.g., *Dolan v City of Tigard*, 512 US 374 (1994), *supra*.

⁵⁴ In fact, the Bert J. Harris, Jr., Private Property Rights Protection Act specifically protects private property rights in this very context. The legislature even mandated that "the State Comprehensive Plan shall be . . . consistent with the protection of private property rights." FS 187.101.

private property interests are so important that the legislature created a “separate and distinct cause of action from the law of takings” in FS 70.001. Additionally, FS 163.3177(6)(i) requires local governments to consider “constitutionally protected private property rights” in local decision-making. Even, FS 70.002 acknowledges specific protections exist for our rights to:

- *acquire, possess, and protect our property*
- *use and enjoy our property*
- *exclude others from our property*
- *due process*
- *just compensation for property taken for a public purpose.*

Further, as seen in FS 163.3161, it

is the intent of the Legislature that **all governmental entities in this state recognize and respect judicially acknowledged or constitutionally protected private property rights**. It is the intent of the Legislature that all rules, ordinances, regulations, comprehensive plans and amendments thereto, and programs adopted under the authority of this act must be developed, promulgated, implemented, and applied with sensitivity for private property rights and not be unduly restrictive, and property owners must be free from actions by others which would harm their property or which would constitute an inordinate burden on property rights as those terms are defined in s. 70.001(3)(e) and (f). Full and just compensation or other appropriate relief must be provided to any property owner for a governmental action that is determined to be an invalid exercise of the police power which constitutes a taking.

But OB’s restrictions on Henrys’ use of their property are not “consistent with the protection of private property rights,” nor do they protect Henrys from inordinate burdens, restrictions, or limitations on their private property rights (even those that don’t rise to the level of a “taking”). What’s worse is that OB not only fails to “respect” Henrys’ private property rights, but completely fails to “recognize” those rights.⁵⁵

FS 70.45 *Government Exactions* was enacted to provide specific protections.. “In addition to other remedies available in law or equity, a property owner may bring an action in a court of

⁵⁵ Indeed, FS 163.3177(6)(i)(1)(3) requires OB to respect “constitutionally protected private property rights,” including “the right of the property owner to privacy and to exclude others from the property to protect the owner’s possessions and property.” Certainly, forcing Henrys to remove their privacy fence will cause irreparable harm by destroying Henrys’ right to privacy, especially considering the neighbor living to the West who admitted in her testimony to continuously watching and taking stacks of pictures of the Henry family. This in no way respects Henrys’ right to privacy or to exclude others from their property.

competent jurisdiction under this section to declare a prohibited exaction invalid and recover damages caused by a prohibited exaction.” Here, “‘Prohibited exaction’ means any condition imposed by a governmental entity on a property owner’s proposed use of real property that lacks an essential nexus to a legitimate public purpose and is not roughly proportionate to the impacts of the proposed use that the governmental entity seeks to avoid, minimize, or mitigate.” Thus, Henrys’ 11/8/22 NPA explained why OB’s exaction is prohibited, as required under FS 70.45(3). The law then required OB to not only respond in writing explaining why OB maintains the exaction is proportionate, but also to ***identify the specific harm created by Henrys’ use of their real property***. Of course, state law allowed OB to remove the exaction, so no further action by either party would be needed. But OB was prohibited from continuing with its exaction during the time it was given to respond to Henrys’ Notice, as FS 70.45 prohibited Henrys from filing for these statutory protections in that 90-day period.⁵⁶

Or, simply put, **FS 70.45**, taking its cues from the 1994 US Supreme Court ***Dolan*** case, required OB to halt all action until providing Henrys with a written response identifying

- the harm caused by Henrys’ use (their PFCs) of their own property AND
- how the permit requirements & other imposed regulations
 - have an essential nexus to a legitimate public purpose
 - would mitigate the “harm” caused by Henrys’ use AND
 - how the severity of OB’s restriction on Henrys’ use is proportionate to the “harm” caused by Henrys’ use

So, ***let’s be clear***. Henrys’ PFCs are all on Henrys’ property. They are all in fully functioning order, *all* having survived the sustained 70+mph winds of Hurricane Ian (and Nicole). Not a single part came off and flew around in the hurricanes, despite many neighbor’s fences and sheds being decimated. Except the ONE nasty neighbor who complained that Henrys “have ruined the neighborhood since they got here,” *most* neighbors genuinely appreciate the PFCs. Indeed, they impact neighboring properties in *no* negative ways, but do reduce the amount of sandspurs and water runoff transferring to neighboring properties, help contain sound within their own property, keep soccer balls out of neighbor’s yards, significantly mitigate wind and flood damage, etc.

⁵⁶ Keep in mind that OB “has the burden of proving that the challenged exaction has an essential nexus to a legitimate public purpose and is roughly proportionate to the impacts of the proposed use that the governmental entity is seeking to avoid, minimize, or mitigate.”

3. OB Cannot Force Henrys into NonCompliance

Neither OB nor Magistrate can force Henrys to do something that would put them into noncompliance with the LDC. First, Magistrate holds no subject matter jurisdiction (SMJ) to order removal of Henrys' conexas, as they are legally required to remain on Henrys' property. The Order asserts Henrys' conexas constitute a garage, as defined by LDC 2-50(bb)(3)(a), and "must meet the regulations pertaining to a garage." Accordingly, LDC 2-50(o) *requires* all residential properties, like Henrys' homestead, to have a garage. Regardless of when or how the garage was built or placed on the property, Henrys' are bound to leave it on the property "unless an additional garage or carport is constructed or presently exists on the subject property." However, Henrys have no additional garage or carport.

Magistrate also holds no SMJ to order removal of Henrys' pavers, as they are legally required to remain on Henrys' property. Per LDC 2-50(x)(4), there "shall be no parking of vehicles . . . in the front yard of any residential property" except on "asphalt, bituminous brick, concrete, turf block, brick pavers or pervious concrete." Indeed, "driveways" are "paved areas" of "asphaltic concrete, concrete, brick or similar material." LDC 1-22 "driveway" and "paved area". Parking on grass, stone gravel or mulch is prohibited. In fact, without these paved "off-street parking requirements," Henrys' home would be a "noncomplying structure or site".⁵⁷ As Henrys own four vehicles, with one parked on the south driveway, one parked on the north driveway, and one parked on each of the two driveway paver extensions, removing Henrys' pavers would mean their vehicles would be parked on the sand/weeds, making it a "noncompliant structure." Magistrate lacks authority to force Henrys into such noncompliance.

So, removing Henrys' pavers and conexas would actually put them in violation of the LDC regarding parking,⁵⁸ as well as the regulations against outdoor personal storage,⁵⁹ and for needing a garage.⁶⁰ It makes no sense for OB to fight so hard against Henrys' alleged LDC violations in such a manner to force LDC noncompliance. (Nor do OB or magistrate have authority to do so.)

⁵⁷ per LDC 1-22.

⁵⁸ LDC 2-50(x)(4).

⁵⁹ OB Code of Ordinances [hereinafter, "CO"] 14-94 through 14-96, and LDC 2-50(x)(1).

⁶⁰ LDC 2-50(o).

4. Terms of the LDC Render Henrys' Full Compliance Unreasonable and/or Impossible

Terms of the LDC itself render Henrys' full compliance with the LDC unreasonable and/or impossible. Basic requirements of due process prohibit land use regulations from being unreasonable or impossible to comply with. The absurdity, unreasonableness and impossibility of compliance is seen in several relevant LDC provisions.

First, OB argues that according to LDC 1-14, prior to Henrys installing their PFCs, "the city shall have issued an approved development order *and* building permit." But LDC 1-14 not only requires an approved development order and building permit, but also the "development order shall be issued only in conjunction with the approval of . . . a final site plan," which triggers extensive engineering fees and other expenses of site plans. So, for a family living on modest means simply trying to mitigate ongoing flood and wind damage, and stay in compliance with parking and personal storage requirements, the costs are already overwhelming.

Additionally, no applicant may receive a building permit of any kind without "[a]ll requirements of this [LDC being] met unless a variance is granted by the Board of Adjustment and Appeals."⁶¹ In other words, if Henrys wanted to apply for a permit for their PFCs, they would *not* be issued one *unless* their property otherwise met *all* LDC requirements. Henrys' home is a modest 1350 ft², with no garage, carport or basement. Indeed, this is why Henrys placed two small conexes on their property. LDC 2-50(o) *Garages* states "All single-family residences are required to have a garage or carport structure."⁶² The vast majority of homes in Henrys' neighborhood built in 1949, let alone the general OB beachside community, do *not* have garages. So, no garage? You can't get a building permit for anything purporting to require one, unless you first go through the time-consuming and expensive process of applying for - and actually receiving - a variance under LDC 1-16. This is certainly an insurmountable hurdle for Henrys to obtain a permit for their PFCs. Sarah Cushing testified⁶³ that OB "wouldn't enforce" that part of the LDC on Henrys, but her statement regarding such cherry-picking doesn't guarantee to Henrys OB would actually and intentionally ignore such requirements when determining whether to process an application for a permit (of any kind).

The impracticality, unreasonableness, and often impossibility of complying with the "submittal

⁶¹ LDC 1-14(6)(a)(4)(iv).

⁶² There are no "grandfathering" exemptions.

⁶³ Tr 94-98.

requirements” for building permits per LDC 1-14(6)(b) is likewise astounding. First, the submittal requirements include items *not even specified* in the LDC. “Building permit applications . . . shall include *the items as required by the building and code division, building permit application checklist, the state building code, and both local and state regulations.*”⁶⁴ Keeping in mind that this is literally the LDC Section entitled “Submittal Requirements,” you can see that numerous unidentified requirements are placed upon residents. That alone defies all notions of due process. However incredulous this may seem, OB confirmed⁶⁵ that you have to apply for a building permit in order to be given the information about what you can put on your own property!⁶⁶

11 ANN-MARGARET EMERY: And one last
12 question. The respondent mentioned whether
13 or not there was a mechanism for a homeowner
14 to know whether or not a structure would be
15 permitted on the property. Wouldn't the
16 mechanism be the application -- wouldn't it
17 be the application of the permit to review
18 that before they spend the time and money to
19 put something on their property?
20 SARAH CUSHING: That's correct. Yeah.
21 So there's a number of different submittal
22 requirements when a permit comes in. One of
23 which is a site plan that shows the proposed
24 location of the structure, the size of the
25 structure and the setbacks to the applicable

But, it gets even more impractical and unreasonable. OB claims 1-14(6)(b) applies to Henrys' PFCs. But let's look at it another way. Want to put up a swingset for your child? Get a gazebo from Sam's Club as an anniversary gift? Want to set up a bonfire area to make s'mores with

⁶⁴ As if the staggering amount and complexity of land use regulations in OB wasn't enough, provisions of the LDC like sections 1-18(f)(1) claims the "city commission may include additional reasonable and appropriate conditions not specifically provided for in this Land Development Code."

⁶⁵ Through their Attorney and Planning Department Supervisor.

⁶⁶ Tr 93.

your kids this holiday season? Not only are you required to meet the aforementioned absurd requirements, but your building permit application *must* also contain information including:

- the actual shape and dimensions of the lot,
- the existing use of buildings on the lot,
- the number of families the building is designed to accommodate,
- the location and number of required off-street parking and off-street loading spaces,
- landscaped buffer areas,
- a recent survey of the lot *specifically certified to the city*,
- accessory uses of the property,
- driveway and access standards,
- impact fees,
- utility installation fees,
- sign regulations.

While some items within LDC 1-14(6)(b) are marked as being required only “if applicable,” many of the items - including *all* of those listed here - do not contain that modifier. Again, for a family of modest means simply trying to use and preserve their property for their continued use as a homestead, these requirements for even applying for a permit are unreasonable and overreaching.

OB’s LDC is unreasonable in its subjective “aesthetic” requirements., too The LDC attempts to regulate the “aesthetic” value of a homeowner’s use of their property. Uses not deemed “aesthetically acceptable,” such as in LDC 1-15(e)(7), are withheld “approval” by OB. Bruce testified Henrys’ fence would not be permitted as it stands because it does not meet aesthetic requirements.⁶⁷ In other words, 3 small lateral posts run across the fence panels that face the backyards of the neighbors to the north, south, and west. However, at the front of the property, the fence panels themselves face the road, with the 3 small lateral posts on the inside of the fence. Bruce further testified this does not meet the aesthetic requirements of the LDC, and Henrys would, therefore, be required to tear down the vast majority of their fence before a permit would be issued.⁶⁸ We must keep in mind, however, that this is a matter of subjective

⁶⁷ “Other than fact that they did not obtain a permit, what’s wrong with the fence, anything? . . . The good side is on the inside rather than the outside.” Tr 29.

⁶⁸ Further, Bruce testified that OB may refuse to issue a permit for the fence and pavers if, in the sole discretion of the code inspector, they do not have enough aesthetic value - or simply put, they just don’t like how they look. Considering the attitude OB has expressed toward Henrys thus far, and the extent of

aesthetics only, and that nothing would prohibit the neighbors to the south and west from putting up their own fences. Indeed, the neighbor to the north already has their own privacy fence (installed without a permit, and now in bad repair since Hurricane Ian).



Moreover, "Land development regulations relating to building design elements may not be applied to a single family or two family dwelling," which includes "the location or architectural styling of windows or doors."⁶⁹ Henrys' fence is constructed entirely of solid wood doors.⁷⁰ Thus, OB *cannot* regulate the location, aesthetics, or architectural styling of Henrys' solid wood door fence.



As for these beauty requirements, OB fails to even attempt to claim a legitimate state interest is involved, let alone these provisions of the LDC provide a "substantial advancement" of such.

The impracticality, unreasonableness, and often impossibility can also be seen in the LDC setbacks. Specifically, OB has onerous setbacks for pools, garages, sheds, play structures, gazebos, and all other typical Florida outdoor features, which means that even with a decent-sized parcel over 10,000 square feet, it is literally impossible to meet all the setbacks, and still enjoy these features (some of which are required by the LDC!).

the ultra vires acts, OB is most likely to disqualify Henrys' fence and pavers on this basis alone, if for none other.

⁶⁹ FS 163.3202(5)(b)(1).

⁷⁰ as demonstrated by "Exhibit A" of the Orders.

OB's regulation of setbacks for pavers, etc. is also quite contradictory and confusing.⁷¹ According to LDC 2-50(x)(4)(f), the setback for pavers is 3 feet, while Bruce claims the required setback for pavers is 7.5 feet.⁷² But Cushing testified that the setback for pavers is 8 feet,⁷³ or instead 7.5 feet,⁷⁴ only to turn around and say that since Henrys' home used to be a duplex, the setback is 20 feet!⁷⁵ Not only is it impossible to know which setback Henrys would ultimately be held to, but any of them (certainly the 20 foot setback) are an unreasonable prohibition on using one's own property given that most of these lots don't exceed 88 feet from side to side. In other words, with a 20 foot setback on the south and north side, Henrys would be prohibited from using 40 feet or almost **half of their 88 foot wide property!** What's more is that the US Supreme Court recognized in *Nollan* that land use regulations effect a taking when they "den[y] an owner economically viable use of his land."⁷⁶ Enforcing setbacks of nearly half of Henrys' modest homestead undoubtedly denies them economically viable use of their land!

Yet the unreasonableness continues. Bruce testified that before issuing a permit, OB would require Henrys to pull up their pavers to "check to see if they were installed properly,"⁷⁷ which is not permissible under the law.⁷⁸ Further, there are thousands of pavers on Henrys' property. Removing and replacing them would be back-breaking work for Henrys. And as mentioned earlier, there were already some pavers in both the front and back yards when Henrys purchased the home. Without identifying which pavers OB is requiring to be permitted or removed,⁷⁹ Bruce loosely referenced pavers in the backyard as possibly being involved,⁸⁰ and the Orders don't specify, either.

Many of the requirements OB is trying to enforce upon Henrys' PFCs are confusing, contradictory and unreasonable. But the LDC's requirements for merely *applying* for a permit for the PFCs are impractical, unreasonable and often impossible. As discussed above, according to OB's LDC, no permit can be issued without

⁷¹ This might explain why many properties in OB have pavers or concrete or stone going right up to the property line, with no setbacks.

⁷² See, App 027.

⁷³ Tr 078.

⁷⁴ Tr 76, 80

⁷⁵ Tr 76, 79

⁷⁶ *Nollan v California Coastal Comm'n*, 483 US 825 (1987), citing *Agins v Tiburon*, 447 US 255, 260 (1980).

⁷⁷ Tr 109, etc.

⁷⁸ Nor was any alleged legal justification or authorization even offered by OB for requiring such.

⁷⁹ Henrys are unaware of when the prior pavers were put on their property or if a permit was required or obtained for them.

⁸⁰ Tr 108.

- expensive and time-consuming variance approval regarding the garage requirement,
- a development order,
- engineer/architect final site plan being approved,
- a recent survey of the lot *specifically certified to the city*,
- the aforementioned multitude of unidentified requirements being met,
- subjective aesthetic requirements,
- onerous setbacks consuming *half* of Henrys' property, and
- an application that includes the aforementioned incredibly overburdensome requirements.

5. Henrys' Pavers, Fence & Conexes Don't Require a Permit Per LDC & Community Planning Act

Henrys' PFCs don't actually require a permit per the LDC, the Florida Building Code (FBC), and the Community Planning Act (CPA). In examining this, we must note the Florida Supreme Court explained the powers of a municipality are to be interpreted and construed in reference to the *purposes* of the municipality and if *reasonable doubt* should arise as to whether the municipality possesses a specific power, such ***doubt will be resolved against the City***.⁸¹

First, we must examine the FBC to explore how conexes are *not* regulated, nor needing a permit under Henrys' circumstances. The "regulations pertaining to a garage" from a state law perspective are comprised of standards primarily for "public health and lifesafety" and "protection of property"⁸² **"relative to structural, mechanical, electrical, plumbing, energy, and gas systems"**,⁸³ and **standards for building design elements**.⁸⁴ *The only violation regarding the conexes Magistrate found was that a permit had not been obtained prior to being placed on Henrys' property. However, the Henry's long-standing communication with OB clearly*

⁸¹ City of Miami Beach v Fleetwood Hotel, Inc., 261 So. 2d 801 (Fla. 1972), citing Liberis v Harper (Fla. 1925) 89 Fla. 477, 104 So. 853. Indeed, the purpose of the "formation of municipalities" as seen in FS 165.021, is to provide "municipal services so as to: (1) Allow orderly patterns of urban growth and land use. (2) Assure adequate quality and quantity of local public services. (3) Ensure financial integrity of municipalities. (4) Eliminate or reduce avoidable and undesirable differentials in fiscal capacity among neighboring local governmental jurisdictions. (5) Promote equity in the financing of municipal services." Clearly, (2) - (5) do not apply to the municipal action here. And (1) addresses common sense land use issues, such as prohibiting tobacco shops or strip clubs from being next door to an elementary or middle school. But micromanagement of landscaping, storage, and securing of private property (both real and personal) is not covered here. With this in mind, we must examine how the PFCs involved here don't require a permit per the LDC, FBC, or the CPA.

⁸² FS 553.72(1)

⁸³ FS 553.73(2)

⁸⁴ See FS 163.3202(5)

demonstrated OB would never issue Henrys a permit for the conexes. Indeed, testimony by Bruce and Cushing included claims the conexes were "not capable of receiving a permit."⁸⁵

Specifically, without quoting any portion of the code or state law, Cushing said the FBC does not regulate conexes, therefore, they are not able to be permitted.⁸⁶ While it is dumbfounding in our constitutional republic to claim we could *not have* something because it was *not regulated* by the government, the law actually addresses this point (without extensive regulations or requiring permits). The FBC states "structures moved into or within a county or municipality [that] do not or cannot comply with the code . . . shall not be required to be brought into compliance with the building code."⁸⁷ As the conexes fit the definition of structures as defined there, they cannot be required to be brought into compliance with code portions regulating their "construction, erection, alteration, modification, [or] repair."⁸⁸ That only leaves standards for **building design elements**. However, "Land development regulations relating to building design elements may not be applied to a single family or two family dwelling," which includes "the location or orientation of the garage."⁸⁹ Also, although local governments may make amendments to the FBC, "such additional requirements may not introduce a new subject not addressed in the Florida Building Code."⁹⁰ Thus, as building official Cushing testified that *the FBC does not regulate conexes*, OB is statutorily prohibited from regulating them.⁹¹ Consequently, the order purports to penalize Henrys for their "failure" to receive a permit for the conexes which OB illegally required *and* illegally withheld.

Magistrate also lacks SMJ to prevent Henrys' use of Henrys' pavers under state law. The pavers, undisputed as fitting the definition of "Florida-friendly landscaping," serve "a compelling public interest" "to conserve or protect the state's water resources."⁹² As such, the LDC "may not prohibit or be enforced so as to prohibit any property owner from implementing Florida-friendly landscaping on his or her land."⁹³ Thus, there is no jurisdiction to enforce such a

⁸⁵ Tr 74.

⁸⁶ Tr 93.

⁸⁷ FS 553.79(20)(a).

⁸⁸ See FS 553.72(1) and 553.73(1).

⁸⁹ FS 163.3202(5)(b)(1).

⁹⁰ FS 553.73(4)(b)(3).

⁹¹ Further, Cushing testified the conexes are not tested for wind-borne-debris-impact standards, and therefore, cannot be used by Henrys. However, "storage sheds that are not designed for human habitation and that have a floor area of 720 square feet or less are not required to comply with the mandatory wind-borne-debris-impact standards of the Florida Building Code." FS 553.73(10)(h).

⁹² per FS 166.048 and 720.3075.

⁹³ FS 166.048.

provision, especially with Henrys' beachside property, which only sustains weeds and sand, having no extensive irrigation system that would be needed to sustain grass.

As for what's required by the LDC, OB's October Notice claims the conexes "being used as sheds installed without" a permit violates LDC 2-50(a)(9). However, LDC 2-50(bb)(1) entitled *Sheds, utility structures, playhouses and gazebos*, states a "**building permit shall be issued** prior to the erection of any accessory structure," and the LDC defines "erected" the same as it defines "Construction, start of."⁹⁴ "Construction, start of" is then defined where the "actual start of construction means . . . **the first placement of permanent construction** of a building (including a manufactured home) on a site," **where "[p]ermanent construction does not include . . . the installation of accessory buildings such as garages or sheds not occupied as dwelling units** or not part of the main buildings." Thus, by the very text of the LDC itself, whether the conexes are determined to be garages or sheds, "the installation of [these] accessory buildings" do not trigger the need for a permit to be obtained. And since the "words of a governing text are of paramount concern, and what they convey, in their context, is what the text means."),⁹⁵ OB is bound by the terms as *they* have chosen to define them within the LDC, even if it doesn't fit *their* agenda in this matter.

Further, as to the LDC requirement for building permits to be issued for erection of structures, the CPA, the statute which governs all LDCs, declares that "structure"⁹⁶ only includes movable structures "which can be used for housing, business, commercial, agricultural, or office purposes either temporarily or permanently." These conexes are not capable of such uses, as they do not have plumbing, windows, two methods of egress, etc. Therefore, these conexes, being used as storage, are excluded from the statute's definition of "structure," and thus are not required to receive a permit. Likewise, in applying the land *development* code, authorized by and governed by the CPA, it is important to acknowledge the statutory definition of "development." "Development" does **not** include "the use of any structure or land devoted to dwelling uses for any purpose customarily incidental to enjoyment of the dwelling," or a "change in use of land or structure from a use within a class specified in an ordinance or rule to another use in the same class."⁹⁷ Consequently, as securing private property, storage of personal property, and landscaping and parking are customarily incidental uses to enjoyment of a dwelling, the PFCs involved cannot, by state law, be considered "development" for purposes of

⁹⁴ LDC 1-22.

⁹⁵ *Ham v Portfolio Recovery Assocs., LLC*, 308 So.3d 942, 946 (Fla. 2020).

⁹⁶ Is defined by FS 380.031(19), per FS 163.3164(45).

⁹⁷ FS 163.3164(14) and 380.04.

enforcing the land *development* code.⁹⁸ Or, in other words, since Henrys are simply making normal and customary uses of their homestead, and *not* undertaking significant changes in types of uses, the LDC's authorizing state statute does *not* allow the LDC to be used as a method of regulation against Henrys and their customary uses.

Further, OB claims LDC 2-50 on "accessory uses and structures" requires a fence permit. However, fences are not covered by "use" as defined in LDC 1-22, and they are expressly *excluded* from the definition of "structure" ("structure . . . shall not include fences or signs"). So, without a specific law or code provision actually requiring Henrys to obtain a permit for their fence, no such permit is required.⁹⁹

OB likely does not appreciate this outcome, but they have been unable to come up with *any* viable reason why the plain language of state law (and even the LDC's very own definitions) would not apply here (despite being alerted to this very issue in the 11/8/22 Notice). But in reality, if OB doesn't like the plain language of the law, they cannot simply ignore it. That is just another example of the unconstitutional cherry-picking by OB in their overregulation of the Henrys. With all the conflicting legal provisions, and blatant violations of the law by OB, it's even more essential for ***all doubt to be resolved against the city.***

a. Conexes Not Against LDC, Not Even Mentioned in LDC

OB offered testimony about LDC 2-50(x)(3) that "personal on-site storage structures shall be limited to situations where a person or business is moving to a new location" and that "the storage unit shall not be placed on a period for over 30 days."¹⁰⁰ OB then argued this part of the LDC prohibited Henrys from having their conexes.¹⁰¹ However, "personal onsite storage structures" are not defined. With the broad interpretation OB would like us to use, that term would also include standard sheds and detached garages, because both are used for personal onsite storage. Indeed, OB's ordinances actually *require* personal storage structures to be used for outdoor items.¹⁰² In fact, OB has no legal authority allowing them to interpret 2-50(x)(3) in

⁹⁸ Per FS 163.3164(26), "'Land *development* regulations' means ordinances enacted by governing bodies for the regulation of any aspect of *development* and includes any local government zoning, rezoning, subdivision, building construction, or sign regulations or any other regulations controlling the development of land."

⁹⁹ Remembering any doubt, ambiguity, or confusion must "be resolved against the city."

¹⁰⁰ Tr 75.

¹⁰¹ Tr 75.

¹⁰² OB's LDC 2-50(x)(1) and Code of Ordinances 14-94 through 14-96.

such a manner to *include* Henrys' conexes, but *exclude* all other personal onsite storage structures.¹⁰³

It's interesting that Cushing specifically testified about PODS Containers not being allowed for more than 30 days, and *only* being allowed when a person or business is moving, considering that The Maverick Resort just 3 blocks away on AIA has had *several* PODS containers onsite since September 2022, **and** OB's own park at 54 Seton Trail has had a PODS container onsite since February 2021. And neither organization is "moving." In fact, an official LDC complaint was made two months ago about the Seton Trail PODS container, and when asked about its status just last week, Neighborhood Improvement Supervisor Chris Mason stated it had been removed. However, it is *still* there, and video footage of Mason's statement and the current status of the PODS container can be seen at <https://youtu.be/7rRipPNIHEw>.



Now, LDC 2-50(x)(3) prohibits onsite moving related storage structures like PODS or U-Boxes to be used long-term, which makes sense since they are not designed to withstand extreme weather, like hurricanes. Obviously, permanent structures like sheds or conexes are not included in this type of storm-mitigation provision. And for how many conexes are used long-term all across OB, they cannot be assumed to be called something else, or to all of a sudden be deemed temporary in nature. As demonstrated throughout this response, the LDC is full of conflicting information, and not a single provision clearly covers regulations for conexes. On that point, Henrys were told on the phone the conexes had to be removed, and while the October Notice doesn't state they must be removed, it also does *not* indicate which permitting provisions and/or requirements supposedly apply (other than simply "needing a permit"). So, with the LDC not mentioning "shipping containers" or "conexes," the OB phone call conflicting with the written notice, and the written notice actually providing no notice whatsoever as to which conditions supposedly must be satisfied before a permit is granted, OB cannot stretch the

¹⁰³ Especially since the conexes are not considered "structures" per the authorizing statute, as discussed above.

LDC to cover that which is not clearly and unequivocally articulated as being covered by such. We must remember that regarding uncertainty on municipal power like this, ***doubt will be resolved against the City.***

C. OB May Not Deny Henrys Procedural Due Process of Law

Even *if* this language of the LDC was otherwise enforceable, OB's actions are nonetheless invalid if they are done in a manner to deprive Henrys of due process of law. OB officials seem to think the Constitution doesn't apply to them. However, in FS 112.311(6), it was "declared to be the policy of the state that public officers and employees, state and local, are agents of the people and hold their positions for the benefit of the public. They are bound to uphold the Constitution of the United States and the State Constitution." So, where an LDC provision (or a certain application of it) contradicts the protections guaranteed by the Constitution, OB employees and officials ***must*** protect and defend the Constitution and the rights it guarantees.

1. Evidence Admitted in Violation of the Fourth Amendment

Not only does the Fourth Amendment protect us against unreasonable searches and seizures by the government, but our state constitution and state law does, too. However, on 9/2/22, OB officials came, unannounced, to Henrys' home. As later seen on security footage, OB officials not only came onto Henrys' property, but they went past barriers Henrys had put into place to keep a nosy neighbor out. Upon being in that intimate curtilage of Henrys' home, OB officials looked around and took pictures. Although OB knew Katherine Henry (and daughter) were home, as they had just gotten off a long phone conversation with Katherine, they did not announce themselves, instead choosing to sneak around Henrys' property.

Further, "[t]he right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. . . . [wherein] ***Articles or information obtained in violation of this right shall not be admissible in evidence.***"¹⁰⁴

Thus, all pictures and other documentation OB took of Henrys' property that day must be immediately forfeited to Henrys, as OB is prohibited from keeping that which they illegally obtained. In other words, any potential "evidence" OB obtained that day is fruit of the poisonous tree, and OB is barred from keeping or benefiting from such.

Numerous US Supreme Court cases have explained that "except in certain carefully defined

¹⁰⁴ FL Const Art I Sec 12 Searches and Seizures.

classes of cases, a search of private property without proper consent is ‘unreasonable’ unless it has been authorized by a valid search warrant,” which OB clearly did *not* have.¹⁰⁵ And Justice Scalia explained that “With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no.”¹⁰⁶ Further, FL Const Art I Sec 23 *Right of Privacy* further declares that “[e]very natural person has the *right to be let alone and free from governmental intrusion* into the person’s private life.” How much clearer could it be for OB?

In addition to these constitutional protections, state law also prohibits this type of behavior by OB officials. FS 82.01 and 82.03(1) make it a crime for a person to obtain possession of private property by unlawful entry, as was done here.¹⁰⁷

Further, FS 810.08 indicates that when “whoever, without being authorized, licensed, or invited, willfully enters or remains in any structure,” that person “commits the offense of trespass in a structure.”¹⁰⁸ This portion of state law acknowledges that a person is not “authorized” merely by virtue of being a government official, but must fall within certain exceptions to be “authorized.”¹⁰⁹ As the OB officials at the Henry property were not “law enforcement officer[s] whose department has received written authorization from the owner,” nor where they “registered engineers and surveyors and mappers authorized to enter lands,” this action by OB also constituted an illegal entry upon land under FS 810.12.¹¹⁰ Moreover, even FS 166.0415(4) states “[n]othing in this section shall be construed to authorize any person designated as a code inspector to perform any function or duties of a law enforcement officer.” But even so, a law enforcement officer would have to have a warrant in order to come into Henrys’ dwelling (or curtilage thereof).

Consequently, with OB’s actions in obtaining photos of Henrys’ private homestead violating both civil and criminal laws, let alone explicit constitutional protections, OB’s said photos are fruit of

¹⁰⁵ *Camara v Municipal Court of City and County of San Francisco*, 387 US 523, 528-529 (1967).

¹⁰⁶ *Kyllo v United States*, 533 US 27 (2001).

¹⁰⁷ The legislative findings of FS 810.015 “that in order for a burglary to occur, it is not necessary for the licensed or invited person to remain in the dwelling, structure, or conveyance surreptitiously,” are also of importance here. Indeed, under FS 810.02 and 810.011, a burglary occurs upon a person “entering a dwelling [or] structure” including the curtilage thereof, as OB officials did here. Indeed, with Katherine and daughter both in the home when OB officials came onto the property that day, the “burglary is a felony of the second degree” per FS 810.02(3).

¹⁰⁸ Indeed, as “there is a human being in the structure or conveyance at the time the offender trespassed,” this “trespass in a structure” “is a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.”

¹⁰⁹ FS 810.09(3).

¹¹⁰ See also FS 810.12(5), 471.027, and 472.029.

the poisonous tree, and inadmissible in any proceeding. Certainly, magistrate shall admit only evidence that would be admissible in court.¹¹¹ Magistrate not only allowed such illegally obtained photos into evidence, but also incorporated some of them right into his Orders. Magistrate did not make a finding that the photos were legally obtained; he simply “overruled” Henrys’ objections and allowed the photos into evidence. It is important to note, though, that the well-established “exclusionary rule” does *not* allow illegally obtained photos like this into evidence, even if the photos could have possibly been obtained in another, *legal* way. No, the Fourth Amendment simply forbids such “evidence” from being used in the proceedings. And, without such “evidence,” OB would have undoubtedly failed to meet their burden of proof on any of the three alleged violations.

2. Due Process of FS 70.45 Denied

The manner in which OB completely subverted the requirements of FS 70.45, and robbed Henrys of the statutory protections for their property contained therein is nothing short of a stealthy attempt to deny Henrys due process of law. But “Constitutional provisions for the security of person and property are to be liberally construed, and “it is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.”¹¹²

Chapter 70 of Florida Statutes is entitled “Relief from Burdens on Real Property Rights” - *relief from burdens not compensation after exactions*. The provisions of this chapter are designed to STOP the city from burdening private property rights. OB argued that meant Henrys were required to file a FS 70.45 case in circuit court *prior* to the 2/27/23 Hearing if they wanted that relief. However, OB first took their official action in burdening Henrys’ property rights in serving Henrys with the Notices of Violation on 10/20/22, to which Henrys promptly supplied the FS 70.45 Notice by 11/8/22. Under FS 70.45(3), Henrys were required to serve the notice no later than 180 days after imposition of the prohibited exaction, but must then wait at least 90 days from that point before filing an action in circuit court (meaning the city has 90 days to respond to the notice). Ninety days from 11/8/22 is 2/6/23. However, by that point, OB had already served Henrys with the Notice of the Hearing. In fact, OB had attempted to hold the hearing without proper notice a month earlier, on 1/23/23. Indeed, although Henrys were not legally served until several weeks later, OB had already been scheduling the matter for hearing by December

¹¹¹ FRCP 1.490(g).

¹¹² Byars v United States, 273 US 28 (1927), citing Boyd v US, 116 US 616, 635 (1886).

2022.¹¹³ Thus, OB not only illegally failed to respond under FS 70.45, but *commenced the special magistrate proceedings against Henrys several weeks before Henrys were even able to file a suit under FS 70.45*. Since FS 70.45 accounts for “damages” which include not only financial compensation but also “the right to injunctive relief,” it is absurd for OB to manipulate the laws involved so as to prevent Henrys from seeking relief from the circuit court *before* the 2/27/23 Hearing, but also preclude Henrys from receiving injunctive relief *at* the 2/27/23 Hearing.

In other words, OB cannot properly initiate special magistrate proceedings during the 90 days they are statutorily required to respond under FS 70.45. And because OB did such, which ultimately resulted in the Hearing being held on 2/27/23, Magistrate lacked SMJ to hold the hearing then, and was required to dismiss the matters before him.¹¹⁴ Instead of following FS 70.45, Magistrate rewarded OB’s ultra vires acts violating Henrys’ due process rights, depriving them of the *preventive* injunctive relief found in FS 70.45. Now, Henrys are overburdened with commencing the 70.45 litigation *while* appealing these Orders - which contain provisions for OB to unconstitutionally and literally *take* Henrys’ property, the *clearest example of where relief from burdens on real property rights is needed*. (Fittingly, Webster’s defines “relief” as “a removal or lightening of something oppressive, painful, or distressing.”)

Burden of Proof

Keep in mind that under FS 70.45, **OB “has the burden** of proving that the challenged exaction has an essential nexus to a legitimate public purpose and is roughly proportionate to the impacts of the proposed use that the governmental entity is seeking to avoid, minimize, or mitigate.” By illegally pursuing their exactions, and obtaining the 3 subject orders, OB is attempting to shift the burden of proof over to Henrys. Certainly, OB may not modify who has the burden of proof, or what it is, simply by failing to respond to the 11/8/22 Notice as *required* by state law. We must also consider that the 11/8/22 Notice also informed OB of Henrys’ intent to pursue a Petition for Prohibition under FS 81.011 against OB. Prohibition is only available to *prohibit* or *prevent* action from being taken, and is not available after OB has taken the action. Therefore, OB rebuffed Henrys’ rights to seek preventative relief under FS 81.011 as well. If these are not the very stealthy encroachments upon Henrys’ rights that this court has the duty to

¹¹³ Exhibit 2.

¹¹⁴ If Henrys’ 90 days of waiting had expired with no magistrate hearings scheduled yet, and Henrys, after a reasonable time, had sat on their rights and failed to pursue the FS 70.45 litigation, the magistrate hearings could have *then* been scheduled.

be watchful for, then I don't know what would be.¹¹⁵ Thus, magistrate's orders must be recognized as legally void.

V. OB Has No Authority to Physically Take Henrys' Pavers, Fence & Conexes

Magistrate's orders **purport to authorize OB to enter onto Henrys' homestead, remove their property, dispose of their property, charge them for such removal, use such charges to create a lien against their real and personal property, and be immune from liability for damage or loss sustained by Henrys from OB's said removal.** These orders not only lack SMJ, but also *completely* deprive Henrys of due process of law. While the laws broken by Magistrate and OB are many in number, the issue is actually quite simple - OB is expressly prohibited by the US and Florida Constitutions, and state law, from **literally taking and destroying portions of Henrys' homestead!**

Full and just compensation or **other appropriate relief must be provided to any property owner for a governmental action** that is determined to be an invalid exercise of the police power **which constitutes a taking.** FS 163.3161.

A. Fifth Amendment Prohibits OB from Physically Taking Henrys' Property

The US and Florida Constitutions expressly prohibit OB from literally taking Henrys' property. FL Const Art X Sec 6 *Eminent domain* explains "No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner," which goes hand-in-hand with US Constitution Am V stating "nor shall private property be taken for public use, without just compensation." OB has paid Henrys **no** compensation, nor are they taking their property for a legitimate public purpose.

In deliberating a takings issue, the US Supreme Court held that "If it is law, it will be found in our books; if it is not to be found there, it is not law."¹¹⁶ But here, nowhere in any law is Magistrate given authority to grant OB authority to enter Henrys' property, remove and dispose of Henrys' property, charge Henrys for such removal, impose a lien for those removal charges, or absolve OB from liability for damages they cause in so doing.

But what *is* found in the law is FS 73.014 and 163.335(7), which expressly prohibit taking property in ordinance violation situations, even for "nuisance, slum, or blight conditions," as it is

¹¹⁵ Byars v United States, 273 US 28 (1927).

¹¹⁶ Boyd v US, 116 US 616 (1886).

“not a valid public purpose or use for which private property may be taken” as required by the Florida Constitution. Furthermore, the alleged ordinance violations for Henrys’ PFCs don’t even come close to arising to the level of public concern that exists for public nuisances, slum or blight. Indeed, Henrys’ alleged violations (of simply not having a permit for their PFCs), qualify as NONE of the permissible purposes for which private property may be taken.¹¹⁷

Thus, in paying *no just compensation* and failing to take Henrys’ PFCs *for a legitimate public purpose*, the US and Florida Constitutions expressly prohibit OB from doing what the 3 orders purport to authorize them to do.

B. Due Process Denials Invalidate Otherwise Possibly Permissible Action

As discussed, due process denials invalidate otherwise permissible action. OB’s attempt to physically take Henrys’ property failed to follow *any* required legal process, and thus invalidates magistrate’s orders even if otherwise valid. On point, FS 163.3194(4) mandates that “private property shall not be taken *without due process of law* and the payment of just compensation.” To avoid being unduly cumulative, Henrys rely on the statutes they cited in their Motion for Relief & for Stay,¹¹⁸ as all of the averments made by Henrys therein were admitted by OB.¹¹⁹ Thus, Henrys simply reiterate that OB’s fatal procedural flaws in attempting to take Henrys’ property include: filing the action under the wrong statute, filing prematurely, filing without the requisite statutory pre-lawsuit conditions met, notice and opportunity to be heard on the issue of taking was denied to Henrys, service was not made *personally*, filing without good-faith pre-filing negotiations with Henrys, filing without the statutory requirements for eminent domain petitions, etc. Many of these are *per se* reversible errors, and as such, by themselves invalidate magistrate’s orders.

C. OB’s Physical Taking of Henrys’ Property Constitutes Fourth Amendment Unreasonable Seizure

OB’s physical taking of Henrys’ property violates the prohibitions against unreasonable seizures under the Fourth Amendment and FL Const Art I Sec 12. As the US Supreme Court held in *Boyd*, “suits for penalties and forfeitures incurred by the commission of offences . . . are of this quasi-criminal nature, [and so] they are within the reason of criminal proceedings for all the

¹¹⁷ Such as drainage, streets, public parks, water & sewer lines, laying wires & conduits, or city buildings, pursuant to FS 166.411.

¹¹⁸ Paragraphs 16, 18, 19, and 31-34. FRCP 1.110(f) states “a paragraph may be referred to by number in all subsequent pleadings.”

¹¹⁹ Court rules discussed in full in Henrys’ Response to OB Motion to Strike, paragraphs 5-9.

purposes of the Fourth Amendment of the Constitution.”¹²⁰ In discussing a magistrate’s order purporting to authorize the taking of private property, just like the orders here, the *Boyd* court continued by stating “every invasion of private property, be it ever so minute, is a trespass. . . . According to this reasoning, it is now incumbent upon the defendants to show the law by which this seizure is warranted. If that cannot be done, it is a trespass. . . . Where is the written law that gives any magistrate such a power? I can safely answer, there is none; and, therefore, it is too much for us, without such authority, to pronounce a practice legal which would be subversive of all the comforts of society.” So, just as it was in *Boyd*, magistrate’s orders here are invalid as unreasonable seizures.

Along the same lines, FS 162.09(1) and CO 2-258(a) allow for OB to make repairs, but *only* for a “serious threat to the public health, safety and welfare.”¹²¹ Henrys’ PFCs are *not* such serious threats, nor has OB even alleged such. Even then, only “repairs” are authorized to be made.¹²² Moreover, Magistrate “shall issue an order affording the proper relief consistent with powers granted herein,” FS 162.07(4), and no powers are granted for Magistrate to authorize OB to “repair” anything on Henrys’ property. Thus, the orders constitute an unreasonable seizure prohibited by the Fourth Amendment.

More pointedly, FS 73.014 and 163.335(7) expressly prohibit taking property in ordinance violation situations, even for “nuisance, slum, or blight conditions,” as it is “not a valid public purpose or use for which private property may be taken” as required by the Florida Constitution. Furthermore, the alleged ordinance violations for Henry’s PFCs don’t even come close to arising to the level of public concern that exists for public nuisances, slum or blight. Indeed, Henrys’ alleged violations (of simply not having a permit for their PFCs), qualify as NONE of the permissible purposes for which private property may be taken.¹²³ Thus, the orders constitute an unreasonable seizure under the Fourth Amendment.

Likewise, FL Const Art I Sec 23 guarantees Henrys’ “right of privacy.” Consistent with that privacy, FS 810.115 clearly states that “whoever causes to be broken down, marred, injured,

¹²⁰ *Boyd v United States*, 116 US 616 (1886).

¹²¹ as identified in FS 162.06(4) and CO 2-255(e).

¹²² “Repair” is not defined in Florida statutes (i.e., 163.3164, etc.), Ormond Beach Code of Ordinances, Ormond Beach Land Development Code, or Black’s Law Dictionary. With Webster’s defining “repair” as fixing “what is torn or broken,” it makes sense for repairs to be limited to “serious threats to the public health, safety, and welfare” since dilapidated or compromised structures might create a serious threat. In fact, it is only for unsafe structures that OB has that authorization to enter a property. CO 8-4(3)(a).

¹²³ Such as drainage, streets, public parks, water & sewer lines, laying wires & conduits, or city buildings, pursuant to FS 166.411.

defaced, or cut any fence belonging to or enclosing land not his or her own, commits a misdemeanor in the first degree.” Thus, being an explicit violation of state criminal law, Magistrate cannot create authorization for OB to remove Henrys’ fence.

Similarly, Magistrate has no authority to permit OB to enter onto Henrys’ property, remove or destroy any of Henrys’ property or absolve OB from liability for damages or loss sustained by Henrys in OB doing such. Not only would such actions by OB violate US Const Am IV and FL Const Art I Sec 12 protections against searches and seizures without warrants, it would also directly violate a right of privacy guaranteed under FL Const Art I Sec 23. Furthermore, it constitutes unlawful entry under FS 82.01, 82.03(1), 810.08, and 810.12; burglary in dwelling curtilage under FS 810.015, 810.02, and 810.011; criminal and civil trespass under FS 810.08 et al; felony theft under FS 812.014 et al; and obstructing justice (taking private property under color of law) under FS 843.0855. Thus, the provisions of the orders purporting to allow OB to enter Henrys’ property, remove and destroy Henrys’ property, and absolve OB from damage or loss to Henrys by doing such, are invalid as unreasonable seizures under the Fourth Amendment.

D. OB’s Physical Taking of Henrys’ Property Constitutes an Eighth Amendment Cruel & Unusual Punishment

The Eighth Amendment prohibits cruel and unusual punishments from being inflicted. The many statutes, ordinances, etc discussed herein explain how magistrate completely lacks authority to allow OB to enter onto Henrys’ homestead and remove and destroy their property. With *no* statute allowing such orders to be entered by magistrate, the orders - which rob Henrys of their basic rights to private property - are cruel and unusual punishments prohibited by the Eighth Amendment.

In the *Boyd* case, the US Supreme Court held that “If it is law, it will be found in our books; if it is not to be found there, it is not law.” With this in mind, we must examine additional laws involved, all of which limit penalties imposed by magistrate to fines, *never* allowing for confiscation and destruction of private property or for trespassing onto a homestead.

OB Ordinance 2016-44 Section 5 states that “[u]nless another penalty is **expressly** provided,” punishments may only include “a fine of not more than five hundred dollars (\$500.00) or . . .

imprisonment not exceeding sixty (60) days, or both.¹²⁴ Indeed, if Henrys had simply failed to appear at the Hearing, Magistrate only had the authority to impose a *fine*.¹²⁵

Moreover, by definition, Magistrate only has “authority to hold hearings and assess fines.”¹²⁶ As Magistrate points out in his Orders, FS 162.08(5), and CO 2-254(a) allow him to “[i]ssue orders having the force of law to command whatever steps are necessary to bring a violation into compliance with city codes or ordinances.” Further, “The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means.”¹²⁷ The word “command” is not defined in CO or LDC, thus we must turn to Webster’s New Collegiate Dictionary¹²⁸. According to Websters’ (last accessed 3/24/23), “command” means to “order” or “exercise a dominating influence over.” So, in it’s plain sense, Magistrate may order Henrys to pay fines or remove the pavers, etc from their property. But, that cannot legally be stretched to mean Magistrate may also provide OB with authority to take Henrys’ property. In fact, Magistrate recognizes he cannot “command” OB here, and instead implies he can “authorize” OB to act.¹²⁹ Authorizing is to allow or permit OB to do something, while commanding means they *must* do it. So, FS 162.08(5), and CO 2-254(a) allow Magistrate to order Henrys to pay fines or remove the pavers, etc, but NOT to authorize OB to go onto Henrys’ property or take it.

So, whether reading these laws, or the many cited earlier in this brief, it’s clear to see no magistrate has the authority to permit a city to physically take and destroy someone’s property. Thus, magistrate orders in this case constitute cruel and unusual punishment prohibited by the Eighth Amendment.

VI. OB Exceeded Its Authority to Assess Fees & Fines on Henrys

OB exceeded its authority to assess fees and fines on Henrys. Although there are Eighth Amendment issues, first we must address the premature assessment of the fees.

Any writ or order imposing fines or purporting to authorize OB to take action on Henrys’ property, *must* be *subsequent* to, and distinct from, the initial order commanding Henrys to take

¹²⁴ Jail time does not apply here, though, as LDC violations may only be civil infractions per FS 162.21(5)(a); *See also*, FS 162.22.

¹²⁵ CO 2-25(c); CO 2-256(c)(10) and (11); FS 162.21(3)(d)(10).

¹²⁶ CO 2-251 and FS 162.03(2). This limited jurisdiction is also reiterated expressly in CO 2-254(a).

¹²⁷ *Ham v Portfolio Recovery Assocs., LLC*, 308 So.3d 942, 946 (Fla. 2020).

¹²⁸ per LDC 1-21(b).

¹²⁹ If Henrys do not remove the PFCs, “THE CITY WILL BE AUTHORIZED TO ENTER ONTO THE PROPERTY . . . TO REMOVE AND DISPOSE OF” them, per Orders.

action. FS 162.07(4) states that orders issued at the conclusion of the special magistrate hearings “may include **a notice that** it must be complied with by a specified date **and that** a fine may be imposed and, *under the conditions specified in s. 162.09(1)*, the cost of repairs may be included along with the fine if the order is not complied with by said date.” Indeed, FS 162.09(1) and CO 2-258(a) provide that “upon notification by the code inspector that an [already existing] order of [Magistrate] has not been complied with,” Magistrate “may order the violator to pay a fine,” and shall notify the city commission regarding the need to make repairs. That is why FS 162.08 allows Magistrate “to command” Henrys to take necessary steps, but does *not* yet allow for fines or repairs to be ordered. FS 73.121 provides that the judge may grant writs of possession if the defendant is still in possession *after* the judgment has been rendered for, and compensation has been paid by, the city. Likewise, under FRCP 1.570(b), (c) and (e), the taking of property must be done in a subsequent proceeding. Thus, the portions of these initial Orders that purport to authorize the charging of fees or for OB to take action on Henrys property are void.

A. OB’s Proposed Fines Violate the Eighth Amendment

OB’s proposed fines violate the Eighth Amendment’s prohibition against excessive fines. According to their “Response,” they are imposing fines of nearly \$14,000 that exponentially grow EVERY DAY with NO end date. Even the “option” given by magistrate to apply for the permits would have cost Henrys thousands of dollars (as explained above). But, the US Supreme Court has long held that “The power to tax the exercise of a privilege is the power to control or suppress its enjoyment. Those who can tax the exercise of [a constitutionally protected right like that of using one’s own property] can make its exercise so costly as to deprive it of the resources necessary for its maintenance.”¹³⁰ The US Supreme Court further held that fees and fines like those imposed here by OB are like “a license tax¹³¹ — a flat tax imposed on the exercise of a privilege granted by the Bill of Rights. A state may not impose a charge for the enjoyment of a right granted by the Federal Constitution.” *Ibid.* The Court reiterated that “a person cannot be compelled “to purchase, through a license fee or a license tax, the privilege freely granted by the constitution.” *Id.*

¹³⁰ *Murdock v Pennsylvania*, 319 US 105 US (1943).

¹³¹ The Court also pointed out that “It is claimed, however, that the ultimate question in determining the constitutionality of this license tax is whether the state has given something for which it can ask a return. That principle has wide applicability. [*State Tax Commission v Aldrich*, 316 U.S. 174](#), and cases cited. But it is quite irrelevant here. This tax is not a charge for the enjoyment of a privilege or benefit bestowed by the state. **The privilege in question exists apart from state authority. It is guaranteed the people by the Federal Constitution.**”

Further, the US Supreme Court held in *Austin* that forfeiture of property or funds, such as this, violates the Eighth Amendment where there is no correlation to any actual damages sustained by society or to the cost of the proceedings.¹³² That is certainly the case here. There are *no* actual damages sustained by society by Henrys' PFCs, and Henrys have already been forced to bear the burden of paying the costs of these proceedings - the thousands of dollars in court filing and transcript preparation fees. And all just to defend against action that OB and magistrate never had the authority to take in the first place.

Conclusion

1. OB's actions and the magistrate Orders violate the fundamental procedural safeguards of subject matter jurisdiction, due process of law, unreasonable seizures, unlawful per se takings, excessive fines and equal protection of the law.
2. They violate protections provided by case precedent, court rules, OB's very own codes and ordinances, and state statutes.
3. They ignore state statutes on
 - a. Eminent domain
 - b. municipal code enforcement
 - c. real property rights
 - d. land development regulation
 - e. destroying fences
 - f. unlawful entry
 - g. burglary in dwelling curtilage
 - h. trespassing
 - i. theft
 - j. and taking of private property under color of law
4. They even ignore City Code provisions
 - a. prohibiting us from even applying for *any* permits
 - b. requiring our pavers to remain, as sufficient paved, off-street parking is required
 - c. requiring our 2 shipping containers to remain on our property, as city officials & the magistrate deemed them to be "garages," which are required on every residential property, with no exceptions, and our property has no other garages.

¹³² *Austin v US* (509 US 602, 1993)

5. "A fundamental task of the judiciary is to safeguard the constitutional rights of the citizenry."¹³³ Further, it is now uncontested that Henrys will be irreparably harmed by such void Orders being enforced. Indeed, allowing such void Orders to stand would be the epitome of a miscarriage of justice. Thus, Henrys respectfully request this court to issue an order:
- a. Providing us complete relief from the 3 current Orders on the basis of being legally void. *A proposed Order was attached as prior Exhibit 8.*
 - b. Ordering Ormond Beach to immediately reimburse Henrys all the costs of this appeal (court filing fees, transcript preparation fees, FOIA fees, etc.) totaling \$1,750 to-date.

Respectfully Submitted: June 2, 2023

/s/ Katherine & Michael Henry
Respondents, Pro Se

Certificate of Service

I certify that the foregoing document has been furnished to Abraham C McKinnon (lynn@mckinnonandmckinnonpa.com, amckinnon@mckinnonandmckinnonpa.com), Noah McKinnon (nmckinnon@mckinnonandmckinnonpa.com), Barbara Radcliff (Barbara.Radcliffe@ormondbeach.org), H. Pope Hamrick, Jr. (phamrickjr@cfl.rr.com), Ann Margret Emery (A.Emery@ormondbeach.org), Chris Mason (Chris.Mason@ormondbeach.org), Janet Bruce (Janet.Bruce@ormondbeach.org), via the electronic filing portal on June 2, 2023.

Respectfully Submitted: June 2, 2023

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Certificate of Compliance

I certify that the foregoing document has been checked for conformity with FRAP 9.045(e) with the use of word processing software, and that it complies with the applicable font and word count limit requirements to the best of my knowledge.

Respectfully Submitted: June 2, 2023

/s/ Katherine Henry

¹³³ *State of Florida v Sarmiento*, 397 So.2d 643 (Fla. 1981).

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