

BEFORE THE SPECIAL MAGISTRATE  
OF THE CITY OF ORMOND BEACH, FLORIDA

CITY OF ORMOND BEACH, FLORIDA

Petitioner,

vs

CASE NOS: 22-112237

22-112246

22-112247

MICHAEL and KATHERINE HENRY,

Respondents.

PARCEL NO: 4223-02-06-0130

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**Henrys' Response to 5/20/24 Hearing Request**

COME NOW RESPONDENTS MICHAEL HENRY and KATHERINE HENRY [hereinafter, "Henrys"], appearing on their own behalf, and file this Response.<sup>1</sup>

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<sup>1</sup> Per FRAP 9.100(b), Henrys were required to serve the circuit court judge with the Petition and Appendix, which they did. Thus, to make references to the record clear for all parties and the courts, Henrys reference pages within those documents filed 4/11/24 herein, naming them "Petition" and "App," with "App2" from 4/30/24 also referenced.

As the Florida Supreme Court has stated, “[t]he Constitution extends *special* safeguards to the privacy of the home.”<sup>2</sup>

Property rights are among the basic substantive rights expressly protected by the Florida Constitution. Those property rights are particularly sensitive where residential property is at stake, because individuals unquestionably have constitutional privacy rights to be free from governmental intrusion in the sanctity of their homes and the maintenance of their personal lives. Additionally, Floridians have substantive rights to be free from excessive punishments, . . . and to have meaningful access to the courts. All of these substantive rights necessarily must be protected by procedural safeguards including notice and an opportunity to be heard.<sup>3</sup>

We must keep these *special* safeguards in mind in holding this hearing on fines. Thus, we must realize the fines in this case are limited by FS 162.09, case precedent and prior circuit court orders. We must also remember FS 162.09 *requires* certain factors to be considered in setting fines. But as “meaningful access to the courts” is also important, we must acknowledge that court rule, cases, and the constitution *require* Henrys’ pending Motion for Appellate Costs to be granted at this upcoming hearing.

## **I. Fines Here Limited by FS 162.09, Case Precedent & Prior Court Orders**

FS 162.09, case precedent, and prior circuit court orders in this matter severely limit the fines that may be set in this case. First, FS 162.09 only allows *one* order imposing fines/liens per order finding violation. Likewise, FS 162.09 only allows *one* fine to be imposed per finding of violation. Most of the days for which OB seeks a fine are off-limits per a prior Order for Stay by the circuit court. Also, OB must prove the appropriateness of the requested fines by clear and convincing evidence of harm. Finally, as the 2023 Orders *imposing fines/liens* were entered unlawfully, they cannot be used as the basis for setting *new* orders imposing fines/liens.

### **A. FS 162.09 Only Allows for 1 Order of Fines/Liens Per Finding of Violation**

FS 162.09 only allows *one* Order Imposing Fines/Liens per Order Finding Violation. “If the violator fails to comply with the section 162.07 order, *a* second **order** may be

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<sup>2</sup> *Dolan v City of Tigard*, 512 US 374 (1994) (cleaned up).

<sup>3</sup> *Department v Real Property*, 588 So. 2d 957, 964 (Fla: 1991) (citations omitted).

entered under section 162.09 imposing a continuing fine. This order, upon recording in the public records, becomes a lien on the property.”<sup>4</sup> Magistrate’s 2023 Orders impose fines/liens on Henrys: a one-time fine of \$100 and a daily accruing fine. OB now seeks *another* order to impose yet another fine of \$31,425. Thus, if a new order for fines/liens is going to be entered, that order *must* set aside the fines/liens provisions of the 2023 Orders.

### **B. FS 162.09 Only Allows for 1 Fine Per Finding of Violation**

FS 162.09 only allows for **one** order of fines/liens per finding of violation. FS 162.09(1) states that Magistrate “may order the violator to pay **a fine**,” and discusses the procedures for “imposing **the fine**.” Section (2)(a) sets limits for “**a fine** imposed pursuant to this section,” while (2)(b) sets parameters for “determining the amount of **the fine**, if any.” However, OB stated they plan to enforce the 2023 Orders for Fines/Liens, which contain a one-time fine of \$100 **and** a daily accruing fine. They now seek an order to impose *yet another fine* of \$31,425. But this is *not* allowed under FS 162.09. Rather, only *one* fine may be imposed.

### **C. OB Seeks Fines for Days Imposition of Fines was Stayed by Circuit Court**

OB currently seeks an order imposing fines of \$75 per day for 419 days, from March 28, 2023 to May 19, 2024. In doing so, OB seeks to include dates specifically *excluded* for imposition of fines by the circuit court’s order for stay. The 3/4/24 circuit court order states “[t]he Stay of the Orders of Violation as to the imposition of the daily fine is hereby **VACATED** upon issuance of this Order.”<sup>5</sup> Being stayed from 4/6/23 to 3/4/24, the imposition of the daily fines was specifically stayed for 334 days of the 419 days between 3/28/23 and 5/19/24. Thus, Henrys could only be fined for the remaining 85 days.

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<sup>4</sup> *City of Tampa v WA Brown*, 711 So. 2d 1188, 1188 (Fla. 2DCA 1998); *see also*, *Hardin v Monroe County*, 64 So. 3d 707, 709-710 (Fla. 3DCA 2011), *City of Plantation v Vermut*, 583 So. 2d 393, 393-394 (Fla. 4DCA 1991), *Massey v Charlotte County*, 842 So.2d 142, 143-146 (Fla. 2DCA 2003) and *Jones v Seminole County*, 670 So. 2d 95, 96 (Fla. 5DCA 1996) acknowledging two stages: a hearing finding “violation” and a subsequent “hearing to consider imposition of fines.”

<sup>5</sup> App 264.

#### **D. OB Must Prove Appropriateness of Fines by Clear & Convincing Evidence**

OB is attempting to use this hearing to formalize a straight mathematical calculation, as “[t]he fine to be imposed on each order is the accrued per day fine of \$25.00 from the date the property was to be brought into compliance, March 28, 2023 to the date of this hearing, May 20, [2024]” where “the magistrate will hear testimony regarding the number of days out of compliance of the previous orders and enter fine totals accordingly.” However, FS 162.09 requires the Magistrate to make an individualized determination on the issue of fines, considering “[t]he gravity of the violation, [a]ny actions taken by the violator to correct the violation; and [a]ny previous violations committed by the violator.”<sup>6</sup> Further, in reviewing these statutorily-mandated factors, Henrys’ constitutionally protected property rights “may not be impinged [by fines or liens] with a showing of less than clear and convincing evidence.”<sup>7</sup> And applying “the wrong burden of proof” is tantamount to “appl[ying] the incorrect law.”<sup>8</sup> Thus, in order to impose large fines, or fines creating liens on Henrys’ property, OB *must prove*<sup>9</sup> by clear and convincing evidence that each of the “factors required by section 162.09(2)(b)” support a fine to be ordered, and that the amount of the fine is necessary.<sup>10</sup>

#### **E. 2023 Orders for Fines/Liens Entered Unlawfully**

OB is seeking these new orders for fines/liens to be entered against Henrys, but is still wanting to enforce the prior orders for fines/liens. However, those orders for fines/liens were entered prematurely, without proper notice and an opportunity to be heard, and without consideration of the FS 162.09 *required* factors. Consequently, to the extent they imposed fines/liens, they were entered unlawfully, and must be set aside - and cannot serve as a basis for imposing these new fines.

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<sup>6</sup> The gravity of the violation was discussed in depth in Henrys’ Petition at p 30-31, 63-69, and in the Great Harm to Henrys section below. Henrys have not taken steps to “correct” the “violations” at this point because they are not lawful violation determinations, and “correcting” them would actually place Henrys in noncompliance of the LDC, as discussed in Henrys’ Petition p 69-74. Lastly, Henrys have no other violations.

<sup>7</sup> *Department v Real Property*, 588 So. 2d 957, 967-968 (Fla: 1991).

<sup>8</sup> *Martin County v City of Stuart*, 736 So.2d 1264, 1267 (Fla. 4DCA 1999).

<sup>9</sup> *Massey v Charlotte County*, 842 So.2d 142, 146 (Fla. 2DCA 2003).

<sup>10</sup> *Massey v Charlotte County*, 842 So.2d 142, 146 (Fla. 2DCA 2003).

## 1. 2023 Orders for Fines/Liens Entered Prematurely

OB claimed Magistrate's orders merely "included a notice . . . that a fine may be imposed,"<sup>11</sup> like the notice stated in FS162.07 orders finding violation. Yet OB admits elsewhere those very orders "contain monetary fines . . . of \$100 [and] a fine of \$25 a day for each violation . . . beginning on March 28, 2023,"<sup>12</sup> attempting to improperly serve as the FS162.09 orders for fines/liens. Indeed, Chapter 162 and case precedent unequivocally *require* an order imposing fines to be *subsequent to* an order finding violation.<sup>13</sup> "If the violator fails to comply with the section 162.07 order, a second order may be entered under section 162.09 imposing a continuing fine. This order, upon recording in the public records, becomes a lien on the property."<sup>14</sup> Indeed, 162.09(1) and OB Code of Ordinances [hereinafter, "CO"] 2-258(a) provide "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."<sup>15</sup> Magistrate skipped these procedures, ordering fines/liens within the *same order* as finding violations.

## 2. 2023 Fines/Liens Ordered without Notice & Opportunity to be Heard

Although Henrys' received notice of the magistrate hearing, they received **no** notice that *fines* would be addressed at *that* hearing. Further, while 162.09 does not require another hearing before the order for fines/liens is issued, "it is necessary to fill the procedural gaps in [chapter 162] by the common-sense application of basic principles of due process."<sup>16</sup> So, OB "must provide the property owner with notice and an

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<sup>11</sup> OB response p17 in 5DCA 2004 case.

<sup>12</sup> OB response p6 in 5DCA 2004 case.

<sup>13</sup> 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 . . . if the order is not complied with by said date."

<sup>14</sup> *City of Tampa v WA Brown*, 711 So. 2d 1188, 1188 (Fla. 2DCA 1998); *see also*, *Hardin v Monroe County*, 64 So. 3d 707, 709-710 (Fla. 3DCA 2011), *City of Plantation v Vermut*, 583 So. 2d 393, 393-394 (Fla. 4DCA 1991), *Massey v Charlotte County*, 842 So.2d 142, 143-146 (Fla. 2DCA 2003) and *Jones v Seminole County*, 670 So. 2d 95, 96 (Fla. 5DCA 1996) acknowledging two stages: a hearing finding "violation" and a subsequent "hearing to consider imposition of fines."

<sup>15</sup> That is why FS 162.08 allows Magistrate "to command" Henrys to take necessary steps, but does *not* yet allow for fines to be ordered.

<sup>16</sup> *Massey v Charlotte County*, 842 So.2d 142, 145 (Fla. 2DCA 2003), citing *City of Tampa v WA Brown*, 711 So. 2d 1188, 1189 (Fla. 2DCA 1998), and *Jones v Seminole*

opportunity to be heard concerning any factual determination necessary to impose a fine or create a lien.”<sup>17</sup> Here, it was not made clear Magistrate was going to issue the orders imposing fines at *that* hearing until he stated such orders at the end of the hearing, at which time Henrys were not given any opportunity to object to the prematurely issued fines (or anything else) and the hearing was concluded.<sup>18</sup>

### 3. 2023 Orders Entered without Consideration of 162.09(2)(b) Factors

FS 162.09(2)(b) **requires** Magistrate, in determining the amount of the fine, **if any**, to consider “the gravity of the violation” and other factors.<sup>19</sup> Further, Henrys’ constitutionally protected property rights “may not be impinged with a showing of less than clear and convincing evidence.”<sup>20</sup> But, as in *Massey*, Magistrate here “did not consider the factors required by section 162.09(2)(b) in determining the amount of the fine imposed, and indeed there was no evidence presented to [him] regarding those factors,” *Id* at 146, let alone clear and convincing evidence.

## II. FS 162.09 Requires Factors to be Considered in Setting Fines

The text of our Florida Constitution begins with a Declaration of Rights—a series of rights so basic that the framers of our Constitution accorded them a place of special privilege. . . . Each right operates in favor of the individual, against government.... It is significant that our Constitution thus commences by specifying those things which the state government must not do, before specifying certain things that it may do.<sup>21</sup>

As such, one of these basic rights specifically included by the Florida Constitution is protection against excessive fines, cruel and unusual punishment, and forfeiture of estate.<sup>22</sup> Accordingly, the legislature built in three important aspects when Magistrates set fines for LDC violations. First, it is important to acknowledge that the legislature

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*County*, 670 So. 2d 95, 96 (Fla. 5DCA 1996) (stating “Although boards can assert a lien against real or personal property, presumably section 162.09 would be interpreted to permit the presentment of defenses prior to enforcement of any lien.”)

<sup>17</sup> *Massey v Charlotte County*, 842 So.2d 142, 147 (Fla. 2DCA 2003).

<sup>18</sup> App:396-401.

<sup>19</sup> *Massey v Charlotte County*, 842 So.2d 142, 145 (Fla. 2DCA 2003).

<sup>20</sup> *Department v Real Property*, 588 So. 2d 957, 967-968 (Fla: 1991).

<sup>21</sup> *North Fla. Women’s Health Services v State*, 866 So.2d 612, 618-619 (Fla. 2003).

<sup>22</sup> Fl. Const. Art I, §17.

allowed fines, but did *not require* them. Second, the legislature required 3 specific factors to be considered before a Magistrate can set fines. Third, once a Magistrate sets fines, the legislature included a provision allowing the Magistrate to reduce those fines.

#### **A. FS 162.09 Does *Not* Require Fines for Violations**

FS 162.09(2)(b) **requires** Magistrate to make an individualized determination in setting the amount of the fine.<sup>23</sup> Also, FS 162.09(1) states that Magistrate “*may* order the violator to pay a fine.” Accordingly, once a violation has been found, Magistrate must determine ***if any*** fine should even be imposed.<sup>24</sup> This is because the law does *not require* a fine to be imposed merely because a violation has been found, but only if such a fine is necessary. Therefore, since the three statutory factors of FS 162.09(2)(b) are in favor of *not* fining Henrys for the 3 violations (see below), Magistrate’s individualized determination should set Henrys’ fines to \$0.

#### **B. FS 162.09 Requires 3 Factors to be Considered in Setting Fines**

##### **1. Gravity of the Violation**

OB seeks a new order for fines to punish Henrys for placing on their own homestead:

- a backyard privacy fence,
- 2 pervious brick paver driveway extensions, installed per LDC specifications, and
- 2 small ocean travel certified conexas for personal property storage.

In order to impose a fine, 162.09(2)(b) requires Magistrate to consider the “gravity of the violation.” We, therefore, must look at the “wrong,” or “harm caused by the [Henrys].”<sup>25</sup> It is undisputed Henrys did this to preserve and protect their real and personal property in a manner causing no harm to neighboring properties.

But, ***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

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<sup>23</sup> *Massey v Charlotte County*, 842 So.2d 142, 145 (Fla. 2DCA 2003).

<sup>24</sup> *Massey v Charlotte County*, 842 So.2d 142, 145 (Fla. 2DCA 2003).

<sup>25</sup> *State v Jones*, 180 So. 3d 1085, 1089 (Fla. 4DCA 2015), *citing Gordon v State*, 139 So.3d 958, 960 (Fla. 2DCA 2014).

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 neighbor who complained 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, and provide a place for Henrys' kids and neighbors to gather for a leisurely game of basketball, etc. Nor was it alleged that Henrys' use of their property infringes upon others' use of their property.

OB never alleged Henrys PFCs harm *anyone*. Henrys PFCs do *not* encroach on neighboring properties, do *not* increase water runoff, are in good repair, and provide a [whole host of benefits](#) for the neighborhood. Indeed, Henrys were able to obtain the signature of hundreds of neighbors in just a few days who all agree "**The Henrys' parking pavers, privacy fence & 2 backyard conexes don't harm me, my property or the community, so the Henrys should not be fined for those improvements.**"<sup>26</sup> There's nothing inherently wrong with Henrys' PFCs. Rather, the "wrong" is only that Henrys didn't get OB's permission before installing their PFCs. That's it. There is not even an "injury suffered by the Government," let alone "actual damages sustained by society," which is the lowest bar for asserting harm in the context of the 8th Amendment.<sup>27</sup>

In Florida, a statutory fine is unconstitutional if it is in "excess of any reasonable requirements for redressing the wrong."<sup>28</sup> Thus, we must understand the statutory fine structure established by the legislature, which may be done by looking to other statutory offenses and their legislatively prescribed penalties. Henrys' offense is merely *malum prohibitum*.<sup>29</sup> But what of the *malum in se* offenses? The **highest** fine for the **worst**

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<sup>26</sup> See attached Neighborhood Petition Sheets.

<sup>27</sup> See, *Bajakajian* at 339 and *Austin v US*, 509 US 602 (1993), respectively.

<sup>28</sup> *Jones* at 1088, citing *Amos v Gunn*, 84 Fla. 285, 94 So. 615, 641 (1922).

<sup>29</sup> ***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

typical ***malum in se*** offenses are \$15,000 (for murder and rape) and \$10,000 (for arson), and for many crimes, an offender “may be sentenced to pay [only] a fine in lieu of any [other] punishment.”<sup>30</sup> Indeed, fines in general may not exceed:<sup>31</sup>

- \$15,000 for a life felony
- \$10,000 for a first/second degree felony
- \$5,000 for a third degree felony
- \$1,000 for a first degree misdemeanor
- \$500 for a second degree misdemeanor/ noncriminal violation

Certainly, the gravity of ***malum in se*** offenses like murder, arson and rape is far greater than that of Henrys’ ***malum prohibitum*** offense which harms no one. Yet, OB’s requested fine amount (\$100 one-time fine + \$31,425 total daily fines) is *more than* the **maximum** fine for each type of *criminal* offense **combined!** Therefore, such a fine is undoubtedly grossly disproportionate to the gravity of their offense, and, thus, unconstitutionally excessive. Moreover, under FS 162.09, Magistrate’s “powers are narrow, . . . and the punishments are minimal.”<sup>32</sup> Thus, a Magistrate’s power to set fines for an LDC violation are *not greater than* a judge’s power to punish a violent criminal offender. Additionally, in order for OB to obtain a fine for Henrys in the thousands of dollars, they would have to prove by [clear and convincing evidence](#) that such an amount is necessary to “redress the wrong.” This means, in seeing the bigger picture of the state’s statutory fine scheme, that the “wrong” is more egregious than the *criminal* violations having *lesser* maximum fines.

Moreover, fines imposed through real estate liens and levies on personal property are

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prohibited by statute.” Black’s Law Dictionary, Deluxe Eighth Edition, p 978. In other words, ***malum in se*** offenses result in direct harm caused to another.

<sup>30</sup> FS 775.083(1), FS 782.04(1)(a) and (b), FS 794.011(3), FS 806.01(1).

<sup>31</sup> FS 775.083(1); *see also* FS 775.02, fines for common law offenses shall not exceed \$500.

<sup>32</sup> Other than the Supreme Court, and thus not binding on this state court case. See Georgetown Law’s Handout on *Which Court is Binding?*, available at <https://www.law.georgetown.edu/wp-content/uploads/2018/07/Which-Court-is-Binding-HandoutFinal.pdf>, last accessed on 5/10/24. Moreover, *Lindbloom* is a non-binding federal court case, and is *unpublished*.

akin to *in personam* forfeitures.<sup>33</sup> This is because these fines can be imposed as a lien on Henrys' homestead (encumbering their ability to mortgage the property, putting them in default of their current mortgage, etc.) and as levies on all of their personal property.<sup>34</sup> "Such forfeitures have historically been treated as punitive, being part of the punishment imposed **for felonies and treason** in the Middle Ages and at common law. Although *in personam* criminal forfeitures were well established in England at the time of the founding, they were **rejected altogether** in the laws of this country until very recently."<sup>35</sup> "It was only in 1970 that Congress resurrected the English common law of punitive forfeiture to combat organized crime and major drug trafficking."<sup>36</sup> Indeed, that is why the Florida Supreme Court has more recently held that "forfeitures are considered harsh exactions, and as a general rule they are not favored either in law or equity."<sup>37</sup> This is because **the Florida Constitution expressly forbids excessive fines, cruel and unusual punishment, and forfeiture of estate**.<sup>38</sup>

Also, to understand the gravity of Henrys' offenses, we must understand the purpose of OB requiring Henrys to have a permit for their PFCs. 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.<sup>39</sup> But how effective are design and aesthetic requirements if they are not equally enforced? Clearly, they are not. That is why the LDC itself states its regulations "shall be applied uniformly throughout the district."<sup>40</sup>

Henrys proved that far more than a mere few city residents have similar "violations" of the LDC. Rather, Henrys pointed to an astounding 810 Permit, Paver, Accessory Structure & Fence LDC "violations" 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

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<sup>33</sup> although the seized property usually has no relation to the code offense.

<sup>34</sup> With an estate so modest (especially with Katherine Henry's years of pro bono work), Henrys receive need-based assistance just to receive basic medical care.

<sup>35</sup> *Bajakajian* at 332, citation omitted.

<sup>36</sup> *Id* at FN7.

<sup>37</sup> *Department of Law Enf. v Real Property*, 588 So. 2d 957, 961 (Fla. 1991).

<sup>38</sup> Art I, §17.

<sup>39</sup> See, e.g., LDC 2-17, providing regulations to ensure a "highly aesthetic setting."

<sup>40</sup> LDC 2-01(b)(2).

41 App 38.  
42 App 39-55.  
43 App 56-76.

[illegible]

This teal star map clearly shows *far more properties than not* with one or more of *these very kinds* of violations visible. This is not akin to an officer pulling over only 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 show it undeniably. By Henrys pointing out these 810 total “violations” in plain view exist in just 0.28 mi<sup>2</sup> (or 0.7%) of the entire city, it represents approximately 115,714 similar “violations” currently happening in OB.

Likewise, Henrys’ PFCs being installed without a permit causes no harm to the community when an astounding 42% of neighboring properties have constructed fences, parking areas or sheds/structures, or completed extensive renovations *without a permit*. (Keeping in mind, these only include those visible between November 2021 and February 2023.)

|            | <b>Summary of Equal Protection Documents Submitted</b>                              | <b>App1<br/>Page #</b> |
|------------|-------------------------------------------------------------------------------------|------------------------|
| 11         | Extensive Remodeling w/o Permit                                                     | 39                     |
| 6          | Fences Recently Erected w/o Permit                                                  | 40                     |
| 2          | Fences with Inverted Frames w/o Permit                                              | 40                     |
| 12         | Fences with Wrong Height or Opacity w/o Permit                                      | 40                     |
| 92         | Parking Areas Made of Grass w/o Permit                                              | 40-42                  |
| 60         | Parking Areas Made of Stone w/o Permit                                              | 46-47                  |
| 4          | Parking Areas Made of Mulch w/o Permit                                              | 42                     |
| 5          | Sheds/Structures Erected w/o Permit                                                 | 50                     |
| <b>192</b> | <b>Fences, Pavers/Parking Areas, Sheds/Structures w/o Permit</b>                    |                        |
| <b>461</b> | <b>Total Properties in this Area</b>                                                |                        |
|            | <b>192 / 461 = 42% of Properties in this Area</b>                                   |                        |
|            | Plus:                                                                               |                        |
|            | (most of these have no permit & no variance for structure/parking area in question) |                        |
| 80         | Sheds/Structures Erected on Property Line (unable to permit per Bruce/Cushing)      | 50-51                  |
| 183        | Sheds/Structures Erected within 7.5' of Property Line (unable to permit per Bruce)  | 52-55                  |
| 162        | Parking Areas Paved to Side Property Line (unable to permit per Bruce)              | 42-46                  |
| 139        | Parking Areas Paved within 7.5' of Side Property Line (unable to permit per Bruce)  | 47-50                  |

Similarly, there is no harm to the community by Henrys' PFCs when *more properties than not* have the same kind of "violations." Indeed, the uncontested facts show of neighboring properties:

- 99% have paver/parking permitting and/or setback "violations"
- 61% have shed/structure permitting and/or setback "violations"
- 15% have similar fence "violations"

|                          |            | Summary of Equal Protection Documents Submitted -<br>By Type               | App Page # |
|--------------------------|------------|----------------------------------------------------------------------------|------------|
| Fences                   | 6          | Fences Recently Erected w/o Permit                                         | 40         |
|                          | 2          | Fences with Inverted Frames w/o Permit                                     | 40         |
|                          | 12         | Fences with Wrong Height or Opacity w/o Permit                             | 40         |
|                          | <b>20</b>  | <b>Total Fences Erected w/o Permit</b>                                     | -          |
|                          | 49         | Fences Violating LDC's Prohibition Against Dilapidation                    | 39-40      |
|                          | <b>69</b>  | <b>Total Fences out of 461 Properties in this Area = 15%</b>               | -          |
| Pavers/<br>Parking Areas | 92         | Parking Areas Made of Grass w/o Permit                                     | 40-42      |
|                          | 60         | Parking Areas Made of Stone w/o Permit                                     | 46-47      |
|                          | 4          | Parking Areas Made of Mulch w/o Permit                                     | 42         |
|                          | <b>156</b> | <b>Total Pavers/Parking Areas Erected w/o Permit</b>                       | -          |
|                          | 162        | Paved to Side Property Line (unable to permit per Bruce)                   | 42-46      |
|                          | 139        | Paved w/i 7.5' of Side Property Line (unable to permit per Bruce)          | 47-50      |
|                          | <b>457</b> | <b>Total Pavers/Parking Areas out of 461 Properties in this Area = 99%</b> |            |
| Sheds/<br>Structures     | 5          | Recently Erected w/o Permit                                                | 50         |
|                          | 11         | Extensive Recent Remodeling w/o Permit                                     | 39         |
|                          | <b>16</b>  | <b>Total Sheds/Structures Recently Erected w/o Permit</b>                  | -          |
|                          | 80         | Erected on Property Line (unable to permit per Bruce/Cushing)              | 50-51      |
|                          | 183        | Erected within 7.5' of Property Line (unable to permit per Bruce)          | 52-55      |
|                          | <b>279</b> | <b>Total Pavers/Parking Areas out of 461 Properties in this Area = 61%</b> |            |

Indeed, these stars 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. Henrys 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.<sup>44</sup> 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?

Thus, the uncontested facts show Henrys' PFCs harm *no one*, and the requirements OB imposes upon Henrys' PFCs are to satisfy design and aesthetic<sup>45</sup> preferences, which are wholly ineffective with such selective enforcement. Further, this is for a ***malum prohibitum*** offense where *there is no harm*, and the fees imposed have no correlation to any actual damages sustained by society or to the cost of the proceedings.<sup>46</sup> .

## **2. Actions Taken to Correct Violation**

In order to impose a fine, 162.09(2)(b) requires Magistrate to consider "any actions taken by the violator to correct the violation." The only violation found for the PFCs was that they were installed without a permit.<sup>47</sup> However, OB testified to many *illegal* reasons why they *won't* issue a permit. Further, it is unreasonable and virtually impossible for Henrys to satisfy all the requirements for applying for the permits. And removing the PFCs would not *correct* violations at the Henrys' home - it would actually *create* violations.

### **a. OB's Stated Denial of Henrys' Permits is Unsupported by Law**

OB testified they will withhold permits for Henrys' PFCs: unless Henrys remove the pavers so OB can look underneath (App:373); because they create too much impervious area (App:338); because a 3' paver setback (App:367-377) and a 20'

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<sup>44</sup> App:11, 13, 14.

<sup>45</sup> OB even cites cases that recognize precedent has long held "design restriction ordinance[s] invalid where the principal purpose of the ordinance was to achieve a particular aesthetic appearance instead of [a] legitimate function of the police power." *See, e.g., Kuvin v Coral Gables*, 62 So.3d 625, 641 (Fla. App. 2010)(concurrence).

<sup>46</sup> *Austin v US*, 509 US 602 (1993). There are *no* actual damages sustained by society from Henrys' PFCs, and Henrys have already been forced to bear the burden of paying the costs of these proceedings - thousands in court filing and transcript preparation fees.

<sup>47</sup> App 85, et al.

inflexible conexus setback is being applied (App:319, 342); and because they don't meet OB's subjective aesthetic requirements.<sup>48</sup> However, denying Henrys' PFCs permits for these reasons is unfounded in, and even contradictory to, the law.

## PAVERS

Bruce testified that before issuing a permit, OB would require Henrys to pull up their pavers so OB could see what was "underneath."<sup>49</sup> But there is no authorization in the law for such a requirement. Indeed, a "suitable subbase" is only required for *non* single family homes.<sup>50</sup> Despite its history, Henrys' home has been a single family home for years (with only one family living there, having only 1 FPL connection and breaker box, etc.).

Also, Emery argued a permit would not be issued for Henrys pavers without "modification" regarding having "too much impervious area,"<sup>51</sup> meaning pavers would have to be removed. However, pavers *are* a pervious/permeable surface, as recognized by LDC 3-27(b)(3) "*Brick pavers or similar permeable materials*," and by LDC 2-57(54)(b) in requiring "a stabilized pervious surface, such as grass, shell or paver brick" to be used in "actual parking areas."

Emery also argued a permit would not be issued for Henrys pavers without "modification" regarding "setback[s]."<sup>52</sup> Bruce likewise claimed that pavers can't go to the property line,<sup>53</sup> and they must be at least 7.5' from the property line.<sup>54</sup> Then, Cushing testified pavers had to be 3' from the side property lines, according to LDC 3-25(c).<sup>55</sup> But LDC 3-25(c)(1) actually says "No point of access on any lot shall be closer than three feet (3') to the property line at the right-of-way line." Here, the pavers installed as driveway extensions do not border the right of way line, meaning the pavers

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<sup>48</sup> Henry Petition p31-41.

<sup>49</sup> App 373.

<sup>50</sup> LDC 3-28(a)(1), which makes no mention of zoning classification.

<sup>51</sup> App 338.

<sup>52</sup> App 338.

<sup>53</sup> App 373.

<sup>54</sup> App 27.

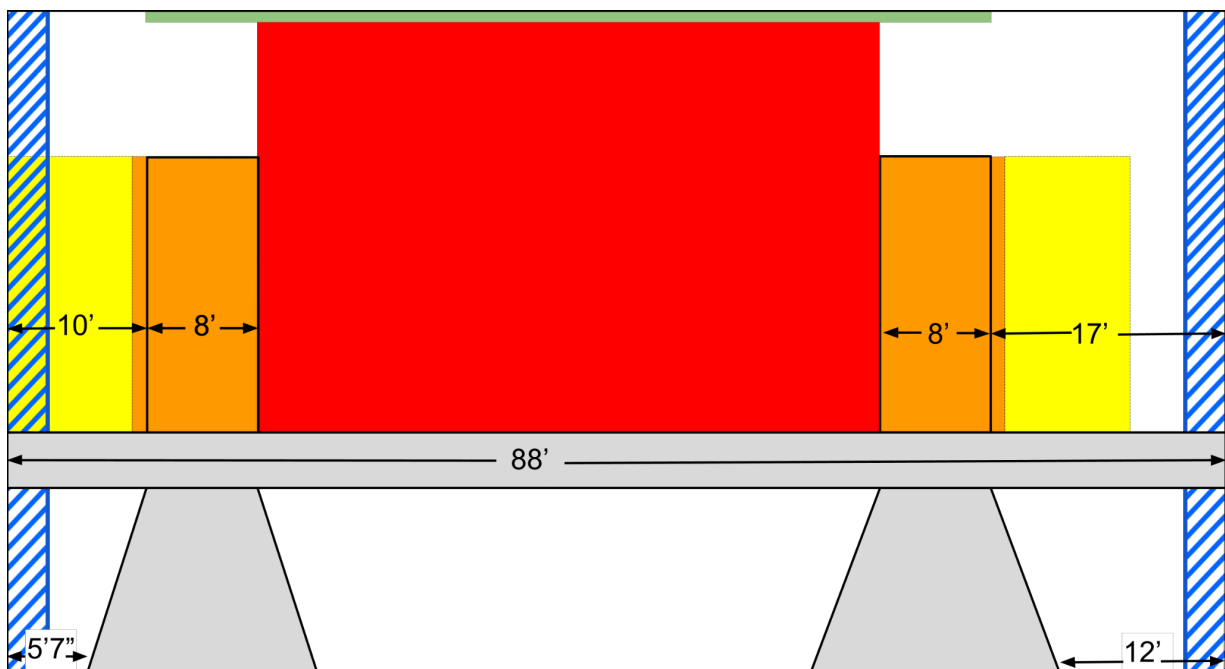
<sup>55</sup> App 376-377.

did not change the points of access, both of which meet the 3' requirement.

### Pavers with Original Driveways



### LDC Parking Dimension Requirements & Alleged Setbacks



This diagram depicts the exact measurements of the Henrys' property. The 8' areas show how the width of the original cement driveways. The 10' and 17' areas on the side of each driveway show the areas where the pavers were installed. The yellow and orange show the minimum parking stall width ([described later](#)) and red shows the area prohibited for pavers by the LDC, also [described later](#). And the gray trapezoids show the points of access (which have remained unchanged by Henrys), each being far more than the minimum 3' from the side property line, at 5'7" and 12', respectively.

LDC 3-25(c)(6) does state "no paved driveway shall be closer than three feet (3') to any property line," but that is expressly limited to "single-family residential zoning districts." There are 13 total residential zoning districts.<sup>56</sup> Three allow *dwelling*s other than single family homes,<sup>57</sup> like Henrys' R4 district which allows duplexes, triplexes, and single family dwellings. The remaining 10 residential zoning districts only allow *single family dwelling*s. If LDC 3-25(c)(6) applied to *all* residential zoning districts, it wouldn't start the sentence with "For single-family residential zoning districts," which, by definition, only includes those 10 zoning districts expressly limited to *single family dwelling*s.

Further, Henrys' R4 "zoning district attempts to establish an optimum living environment between indoor and *outdoor living*, to encourage the establishment of on-site *recreation areas and open space*."<sup>58</sup> Likewise, the LDC in general requires "[t]he landscaping and architecture shall be coordinated to establish an optimum environment with regard to compatibility of materials, scale and access and utility of open spaces."<sup>59</sup> Henrys pavers were installed not only to provide [adequate off-street parking](#), but to allow the Henrys adequate "outdoor living, recreation areas and open space," seen here with how the North pavers area also used to play basketball.

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<sup>56</sup> LDC 2-07(6).

<sup>57</sup> (R4, R5, R6).

<sup>58</sup> LDC 2-17A.

<sup>59</sup> LDC 2-57(22)(i).



Thus, forcing removal of any of Henrys' pavers not only prohibits legal parking, but also denies Henrys the very "outdoor living, recreation areas and open spaces" the LDC expressly calls for.

Remember, 162 out of 461 properties in Henry's immediate neighborhood are paved to the side property line, with another 139 paved within 7.5' of the side property line, which, again, violate the LDC per Bruce. That's  $162+139=301/461=65\%$  of neighboring homes.

## CONEXES

Bruce testified Henrys could *not* obtain a permit for the conexes because "The shed/storage containers are currently on the property line, not meeting setbacks."<sup>60</sup> Cushing then testified<sup>61</sup> OB applies the "duplex" setbacks for Henrys' conexes because their home was previously a duplex, although nowhere in its R4 zoning district does the LDC allow setbacks to be determined based on a prior use of a dwelling. Moreover, Henrys' home does *not* even meet the minimum dimensions to be a duplex per the LDC.<sup>62</sup>

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<sup>60</sup> App 319.

<sup>61</sup> App 342.

<sup>62</sup> LDC 2-17B requires a lot to have a minimum width of 100' to be a duplex, but Henrys' homestead is only 88' wide.

Additionally, the CPA (the state law authorizing and controlling municipal LDCs) does *not* allow OB to impose setbacks on Henrys' conexes, which Magistrate found to be a garage. "Land development regulations relating to building design elements may not be applied to a single family or two family dwelling," and this includes "the location or orientation of the garage."<sup>63</sup> Indeed, even to the extent OB even denied Henrys' conexes to be used due to *single family setbacks*, this part of the CPA still controls. "Where this act may be in conflict with any other provision or provisions of law relating to local governments having authority to regulate the development of land, the provisions of this act shall govern. . ."<sup>64</sup>

The LDC requires "[m]aximum possible privacy shall be provided for each dwelling unit through the use of structural screening and landscaping and building orientation."<sup>65</sup> Also, Henrys' R4 "zoning district attempts to establish an optimum living environment between indoor and *outdoor living*, to encourage the establishment of on-site *recreation areas and open space*, . . . while maintaining the *maximum possible privacy* for each unit."<sup>66</sup> Forcing Henrys' conexes to be moved into the center 30.25% (if duplex setbacks are imposed, as shown at App519) or even 46% (if single family home setbacks are imposed, shown at App520) of their property does not use "building orientation" to give Henrys the "maximum possible privacy." Placing the conexes along the neighbor's fence line was the only way to use building orientation to give Henrys maximum possible privacy.

Perhaps this is why "Setbacks that are less restrictive than the standards listed above are acceptable, provided that . . . a less restrictive standard was in place at the time of recording the original plat."<sup>67</sup> Regardless, the original LDC was adopted 12/3/91,<sup>68</sup> while the original setback ordinance was adopted in 1978.<sup>69</sup> Either way, neither existed (nor did *any* setbacks) at the time Henrys' 1949 home had its original plat recorded. Thus,

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<sup>63</sup> FS 163.3202(5)(a) & (b)(1).

<sup>64</sup> FS 163.3211.

<sup>65</sup> LDC 2-57(22)(h).

<sup>66</sup> LDC 2-17A.

<sup>67</sup> LDC 2-17H.

<sup>68</sup> See, OB Ordinance 1991-54 and 2019-41.

<sup>69</sup> OB Ordinance 1978-35.

Henrys' conexes near the property line are acceptable, based on standards in existence in 1949. This is not wholly incompatible with OB's LDC, which expressly allows "zero lot line" properties.<sup>70</sup> Moreover, Henrys' conexes near the property line are certainly compatible with the [80 properties](#) with sheds/structures erected on the property line, and [183](#) with sheds/structures erected within 7.5' of the property line in Henrys' immediate neighborhood.

Similarly, OB has claimed they will not issue a permit for Henrys' conexes because they can't be permitted due to *not* being regulated by the FBC.<sup>71</sup> As discussed in that section, it is dumbfounding in our constitutional republic to claim we could *not have* something because it was *not regulated* by the government. However, the FBC actually addresses buildings like conexes, but without requiring permits or extensive regulations. Thus, this is *not* a lawful reason to deny Henrys' PFCs 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."<sup>72</sup> 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."<sup>73</sup> However, these code portions are exactly what are being used to regulate Henrys' conexes, given the only violation Magistrate found for the conexes was that they were erected on Henrys' homestead without a permit.<sup>74</sup> 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."<sup>75</sup> Thus, as building official Cushing testified that *the FBC does not regulate conexes*, OB is **statutorily** prohibited from

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<sup>70</sup> "Zero lot line means a development concept that permits the principal structure to abut one (1) side lot line." LDC 1-22.

<sup>71</sup> App:357.

<sup>72</sup> FS 553.79(20)(a).

<sup>73</sup> See, FS 553.72(1) and 553.73(1).

<sup>74</sup> Paragraph 2 at App 93.

<sup>75</sup> FS 553.73(4)(b)(3).

regulating them!<sup>76</sup> Consequently, the order purports to penalize Henrys for their “failure” to receive a permit for the conexes which OB illegally required.

## FENCE

Bruce testified Henrys’ fence would not be permitted as it stands because it does not meet aesthetic requirements.<sup>77</sup> In other words, 3 small lateral posts run across the fence panels facing backyards of 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 majority of their fence before a permit would be issued.<sup>78</sup> Indeed, the LDC attempts to regulate the “aesthetic” value of a homeowner’s use of their property. Uses not deemed “aesthetically acceptable,” such

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<sup>76</sup> 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).

<sup>77</sup> “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.” App 293.

<sup>78</sup> 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 the ultra vires acts, OB is most likely to disqualify Henrys’ fence and pavers on this basis alone, if for none other.

as in LDC 1-15(e)(7), are withheld “approval” by OB.

However, the 1st Amendment and FL Const Art I Sec 4 guarantee Henrys’ right to free expression. Because of this, the state law controlling LDCs expressly states “Land development regulations relating to building design elements may not be applied to a single-family or two-family dwelling. . .”<sup>79</sup> So, we must keep in mind this is a matter of subjective aesthetics only, and nothing prohibits 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).



And, OB has knowingly allowed **at least 2 other fences** with the same external lateral posts to remain up in Henrys’ immediate neighborhood.

Again, Henrys not only have the *inalienable right* to “acquire, possess and protect [their] property,”<sup>80</sup> but also have an *express right to privacy*.<sup>81</sup> Consistent with both of those rights, FS 810.115 makes it a crime for anyone to “cause[] to be broken down, marred, injured, defaced, or cut any fence belonging to or enclosing land not his or her own.” Therefore, the LDC requires “Maximum possible privacy [to] be provided for each dwelling unit through the use of structural screening,” like privacy fences.<sup>82</sup> Thus, OB is attempting to use the aesthetic lateral post requirement to subvert the clear constitutional and statutory protections for Henrys’ privacy and their right to protect their own property. These are, therefore, impermissible reasons to deny the permits.

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<sup>79</sup> FS 163.3202(5)(a).

<sup>80</sup> FL Const Art I Sec 2.

<sup>81</sup> FL Const Art I Sec 23.

<sup>82</sup> LDC 2-57(22)(h); LDC 2-17A.

Consequently, since Henrys' only violation is installing their PFCs without a permit, and OB has testified about several illegal reasons why they *won't issue a permit*, Henrys should not be fined when OB was thwarting Henrys from taking the action requested of them.

**b. Virtually Impossible for Henrys to Satisfy All Requirements for Applying for Permits**

Among *many* other requirements, Henrys would be required to get the following *just to apply for a permit*:

- a recent survey of the lot *specifically certified to the city* (a cost of \$750 or more),<sup>83</sup>
- expensive and time-consuming variance approval regarding the garage requirement,<sup>84</sup>
- a development order,<sup>85</sup>
- engineer/architect final site plan being approved.<sup>86</sup>

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<sup>83</sup> LDC 1-14(6)(b).

<sup>84</sup> 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.” LDC 1-14(6)(a)(4)(iv). In other words, if Henrys applied for a permit, they would *not* be issued one *unless* their property otherwise met *all* LDC requirements. Henrys' 1949 home was built without a garage, and is thus [noncompliant \(without the conexes\)](#). Thus, they *cannot* apply for *any* permits without first doing 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 testified (App 358-362) 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).

<sup>85</sup> OB argues per LDC 1-14, prior to Henrys installing their PFCs, “the city shall have issued an approved development order and building permit.”

<sup>86</sup> 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. Indeed, applying for the 3 permits would cost the Henrys thousands of dollars.

Henrys are a family of modest means, and don't have the resources to spend the thousands of dollars to obtain each of these.

### **c. Henrys Actively Working to Decrease LDC Noncompliance**

Without Henrys' pavers, which provide the required "paved off-street parking," Henrys' home would be a "noncomplying structure or site." According to LDC 3-24(c)(3), the parking areas of "single dwelling and duplex uses" "shall be governed according to standards within section 3-26," which specifies "off-street parking requirements. Accordingly, LDC 3-26(c) requires Henrys' home to have a minimum of "2 parking spaces per dwelling unit," or 2 spaces minimum if being held to single family standards or 4 minimum spaces if being held to duplex standards. Indeed, each of Henrys' 4 "[v]ehicles shall be parked on a paved surface"<sup>87</sup> such as asphalt, brick, or pavers.<sup>88</sup> Further, these paved parking spaces are *required* to be a minimum width of 9' for a single family home like Henrys'.<sup>89</sup> But the two original driveways at Henrys' home are only 8' wide. Thus, Henrys were *required* to expand their paved areas in order to park *any* of their vehicles. However, pavers cannot be installed toward the center of the property, but must start "from the existing driveway [and extend] toward the side lot line away from the front of the house,"<sup>90</sup> exactly as Henrys did here. As the [red area indicates](#), this severely limits where pavers may be installed, and thus, vehicles parked. In fact, the paver extension on the South driveway brings the total width to 18', which is the bare minimum needed for the Henrys' two vehicles that regularly park on that side of the property.

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<sup>87</sup> LDC 3-24(c)(4); *see also*, LDC 2-50(x)(4) there "shall be no parking of vehicles . . . [on] 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.

<sup>88</sup> See LDC 3-24(c)(4), 2-50(x)(4)(d) and 1-22.

<sup>89</sup> LDC 3-28(a)(4). Paved parking spaces for duplexes are required to be 12' wide with a 5' shoulder. LDC 3-25(c)(5).

<sup>90</sup> LDC 2-50(x)(4)(c).



Thus, without these paved “off-street parking requirements,” Henrys’ home would be a “noncomplying structure or site”.<sup>91</sup> 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 2 of their vehicles would be parked on the sand/weeds, and two would be parked on spaces less than the required width, making it a “noncompliant structure.”

Further, Henrys *cannot* remove their conexes, as they are legally required to remain on their property. LDC 2-50(o) requires all residential properties, like Henrys’ homestead, to have a garage. And with Magistrate finding Henrys’ conexes constitute a garage, “**such garage or carport shall not be removed or altered in any way.**”<sup>92</sup> Also, 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.”<sup>93</sup>

Additionally, Henrys’ fence is required to screen the noise of their kids’ play areas from neighboring properties.<sup>94</sup>

All in all, when Henrys purchased their homestead, being a typical beachside home built in 1949, it was in violation of several aspects of the LDC. It did not have the required parking spaces, a garage, or proper fencing for outdoor play activities. This made it a

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<sup>91</sup> per LDC 1-22.

<sup>92</sup> Henry Petition p70-71, discussing LDC 2-42(d)(2).

<sup>93</sup> LDC 2-50(o).

<sup>94</sup> LDC 2-57(57)(b), 2-57(66)(a)(2).

“nonconforming structure.” LDC 2-63(b) thus allowed Henrys to install their pavers, conexes and privacy fence as their nonconforming structure “may be altered as to **decrease** its nonconformity.” However, Henrys cannot remove their pavers, conexes or privacy fence, thus *increasing* their home’s nonconformity, as that would force Henrys’ property into noncompliance with *several* aspects of the LDC. So, with Henrys doing everything they can to *decrease* their home’s nonconformity, they should not be punished with fines.

### **3. No Previous Code Violations**

In order to impose a fine, 162.09(2)(b) requires Magistrate to consider “any previous violations committed by the violator.” Henrys have **no** previous violations. Furthermore, as aforementioned, Henrys are doing everything they can to *decrease* their home’s LDC nonconformity. Consequently, this factor supports *no* fine being assessed against Henrys.

#### **C. FS 162.09 Allows Reductions in Fines Already Set**

FS 162.09(2)(c) allows a Magistrate to “reduce a fine imposed pursuant to this section.” So, even if Magistrate was inclined to order Henrys to pay a fine of \$75 per day because it was done in the 2023 Orders, Magistrate would not be bound by that amount. Rather, given all the aforementioned factors, the statute contemplates a situation just like this one, where Magistrate should set the final fine to \$0.

### **III. Court Rule, Cases & Constitution *Require* Motion for Appellate Costs to be Granted**

The OB Magistrate tribunal has no established court filing system, so filing and service must be accomplished by email.<sup>95</sup> As such, Henrys expressly requested the city clerk (acting as the Magistrate’s court clerk) and the Magistrate to confirm receipt of documents they have filed in this manner.<sup>96</sup> For Henrys’ 3/24/23 Motion for Relief from Order and Motion for Stay Pending Appeal *and* Henrys’ 4/17/24 Motion for Costs, both the clerk and Magistrate refused to acknowledge Henrys’ filings (or otherwise respond in any way). This is despite Henrys’ email program showing they each opened the filing

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<sup>95</sup> FRGP 2.516(b)(1) and (e) and 2.525(a).

<sup>96</sup> App:124, App2:35.

emails each time.<sup>97</sup> However, when OB requested the upcoming Magistrate hearing, they were scheduled without delay. So, the Magistrate tribunal refuses to acknowledge receipt of *Henrys*' filings; and only acknowledges, schedules hearings and enters orders on *OB*'s requests. But this must not continue because *Henrys* "have substantive rights to . . . have meaningful access to the courts."<sup>98</sup>

Indeed, "Under Florida Rule of Appellate Procedure 9.400(a), the prevailing party in [an appeal] is **automatically entitled to taxation of certain enumerated costs** unless otherwise directed by the respective courts of appeal."<sup>99</sup> Therefore, the "trial court has the duty to assess appellate costs."<sup>100</sup>

The court rule and case precedent mandate that "the specified costs . . . are taxable in favor of the prevailing party 'unless the court orders otherwise.' . . . Thus, in subsection (a) of the rule on Costs and Attorneys Fees, where the rule states that costs shall be taxed in favor of the prevailing party unless the court orders otherwise, it means that costs falling in the named categories shall be taxed in favor of the prevailing party unless the court where the appeal was pending orders otherwise."<sup>101</sup> The circuit court did *not* order otherwise, thus *Henrys* are entitled to an award of costs.

"The 'prevailing party' under rule 9.400(a) is the party who prevailed in the appellate proceeding that was the subject of the motion to tax costs, and not necessarily the party who ultimately prevails after the completion of all of the litigation."<sup>102</sup> While *Henrys* didn't prevail on the issue of fines, the circuit court nonetheless held "that the Orders of Violation which direct Appellee/COOB to enter the property to take the action necessary to bring the property into compliance departs from the essential requirements of the law.

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<sup>97</sup> App:124-127, App2:35.

<sup>98</sup> Fl. Const. Art I, §21; *Department v Real Property*, 588 So. 2d 957, 964 (Fla: 1991).

<sup>99</sup> *Di Teodoro v Lazy Dolphin Development*, 432 So.2d 625, 626 (Fla. 3rd DCA: 1983), citing *Yost v Congress International Development*, 383 So.2d 732, 732 (Fla. 3rd DCA: 1980).

<sup>100</sup> *Tomorrow's Choice v Bassing*, 364 So.2d 530, 532 (Fla. 3rd DCA: 1978), internal citations omitted.

<sup>101</sup> *American Medical International v Scheller*, 484 So.2d 593, 594 (Fla. 4th DCA: 1985).

<sup>102</sup> *Stringer v Katzell*, 695 So.2d 369, 369 (Fla. 4th DCA: 1997), internal citations omitted.

Those portions of the Orders of Violation are hereby stricken.” Undoubtedly, stopping OB from illegally coming onto Henrys’ property to destroy it is success on a significant issue in the Henrys’ appeal. So, though Henrys did not prevail in every issue raised on appeal, they are still considered the prevailing party.<sup>103</sup>

Rule 9.400(a)(1) & (2) require Henrys to be awarded the costs they paid for court filing fees and transcript/court reporter services. Henrys paid the standard filing fee of \$310.50 on 4/3/23, and \$1,759.80 in transcript/court reporter services, totaling \$2,070.30 for their appeal to the circuit court. This total would have been the same whether Henrys only raised the one ultimately prevailing issue or all those raised on appeal, as the filing fee and transcripts were required either way.<sup>104</sup>

Moreover, FRAP 9.300(a) allowed OB to file a response “within 15 days of service of [this] motion,” which would have been 5/2/24. However, it has been an entire month and they have not filed a response.

Therefore, since rule “9.400(a) clearly entitles the appellant to an immediate award of such costs without stay of execution thereon,”<sup>105</sup> the 5th DCA has held the lower tribunal would “err[] in not making the order a cost judgment subject to execution.”<sup>106</sup> Consequently, Henrys ask Magistrate to issue “an immediate award of such costs” in the total amount of \$2,070.30 as “a cost judgment subject to execution.”

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<sup>103</sup> *Moritz v Hoyt Enterprises*, 604 So. 2d 807, 809-810 (Fla. Supreme Court 1992), citing *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir.1978)). See also, *Hensley* at 435; *Peter Marich & Associates v Powell*, 365 So.2d 754, 756 (Fla. 2nd DCA: 1978), internal citations to the 2nd DCA, 3rd DCA, and 4th DCA omitted. (“This is true despite the fact that the judgment is for less than initially sought in the complaint.”)

<sup>104</sup> “Nor can it be said that the costs were ‘unnecessarily incurred’ under ‘unusual circumstances.’” *Department of Labor v American Building Maintenance*, 449 So.2d 932, 933 (Fla. 1st DCA: 1984).

<sup>105</sup> *Yost v Congress International Development*, 383 So.2d 732, 732 (Fla. 3rd DCA: 1980); see also, *Di Teodoro v Lazy Dolphin Development*, 432 So.2d 625, 626 (Fla. 3rd DCA: 1983).

<sup>106</sup> *Swan v Wisdom*, 392 So.2d 987, 987 (Fla. 5th DCA: 1981), citing FRAP 9.400(a), and *Yost v Congress International Development*, 383 So.2d 732, 732 (Fla. 3rd DCA: 1980).

Respectfully Submitted:  
May 15, 2024

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### **Certificate of Service**

I certify that the foregoing document has been furnished to Ann Margret Emery (A.Emery@ormondbeach.org), Chris Mason (Chris.Mason@ormondbeach.org), Barbara Radcliff (Barbara.Radcliffe@ormondbeach.org), H. Pope Hamrick, Jr. (phamrickjr@cfl.rr.com), *as the clerk and magistrate in the lower tribunal* via email on May 15, 2024.

Respectfully Submitted:  
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