IN THE FIFTH DISTRICT COURT OF APPEAL,
IN AND FOR VOLUSIA COUNTY, FLORIDA

MICHAEL and KATHERINE HENRY, Petitioners,	5DCA CASE NO: 24-0915
	CIRCUIT CASE NO: 2023-30711 CICI
vs	
	Lower Court CASE NOS: 22-112237
CITY OF ORMOND BEACH, FLORIDA	22-112246
Respondents.	22-112247

Henrys' Reply

This Reply is submitted by the Henrys in support of their request for Writ of Certiorari from a final circuit court order rendered on 3/7/24. That order ruled on the Henrys' timely appeal of the Special Magistrate Orders rendered on 3/3/23. Henrys were ordered to file a 3rd Amended Petition, to which OB filed a Response on 1/30/25. However, on 2/5/25, the court ordered Henrys to file a 4th Amended Petition *without* striking OB's 1/30/25 Response. Henrys had this Reply completed, but needed to update references to page numbers in the newly filed 4th Amended Petition (filed 2/14/25). Thus, Henrys now file this Reply.

Respectfully Submitted: /s/ Katherine Henry /s/ Michael Henry
February 16, 2025

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Argument

The parties agree this court must determine if there was a lack of procedural due process or a departure from the essential requirements of the law. Henrys' Petition meticulously lays out due process denials *and* how the lower tribunals materially departed from the essential requirements of the law. These harmful errors adversely affected Henrys' substantive rights, resulting in a miscarriage of justice, which can only be remedied by granting this Petition and quashing Magistrate's orders.

OB ignores these harmful legal errors and due process deprivations.[1] Instead, OB misleads this Court - about the facts, the law, and what Henrys are challenging.

A. OB Misleads About the Facts

OB's response is replete with *untrue statements,* skewing the issues before this court. First, OB claims they commenced these cases due to "complaints from *neighbors*,"[2] but only *one* neighbor complained, while *hundreds* signed Henrys' petition supporting their pavers, fence, and conexes (PFCs).[3]

Next, OB claims they posted "a Stop Work Notice" on *Henrys'* property.[4] However, Bruce only testified to "issuing" the Stop Work Order,[5] *not* posting it. Henrys testified *no* such documents were posted on Henrys' property[6],

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[1] OB's response ignores Equal Protection issues, laws broken by OB and Magistrate, 8th Amendment issues, and that Henrys cannot be forced into noncompliance. OB ***only*** addresses the regulatory taking, but grossly misstates the law.
[2] Response p3.
[3] *See* signature sheets App3:54-63, admitted by Magistrate May 2024.
[4] Response p4,6.
[5] App1:293.
[6] Rather, these documents were only posted on adjoining property, facing *away* from Henrys' property, and had come off in that day's storms. So, Henrys did not discover the Stop Work Notice until much after the storm, when they found 1 of the laminated sheets buried in debris on the far side of their yard. App1:296-297.

nor did Bruce mention *anything* about a Stop Work Order to Henry in their hour-long 9/2/22 phone conversation, nor in her 9/2/22 follow up email to Henry.[7] This testimony by Henrys was unrefuted.

Later, OB claimed Magistrate's orders merely "included a notice . . . that a fine may be imposed,"[8] per FS162.07. Yet OB admits elsewhere those very orders "contain monetary fines . . . of $25 a day for each violation . . . beginning on March 28, 2023,"[9] attempting to improperly serve as the FS162.09 orders for fines/liens.

B. OB Misleads About the Law

OB seriously misleads this court about the required level of judicial scrutiny, then about other legal aspects.

1. OB Misleads on Required Level of Judicial Scrutiny

OB claims this entire case involves "the most relaxed and tolerant form of judicial scrutiny,"[10] rational basis. As Henrys' fundamental rights are at stake, and the lower tribunals made several material departures from the essential requirements of the law, multiple levels of judicial scrutiny are involved. However, *all* issues involved necessitate a *heightened* level of

[7] App1:296-297,312-313.
[8] Response p17.
[9] Response p6.
[10] Response p19.

judicial scrutiny, with the sole exception of equal protection (being rational basis review).

This case involves Henrys' "indefeasible right of personal security, personal liberty and private property."[11] The right to have and protect private property is even more sacred than some other rights.[12] Thus, the US Supreme Court consistently identifies regulatory takings prohibited by the Constitution. So, a land "use restriction may constitute a 'taking' if not **reasonably necessary to the effectuation of a substantial government purpose**."[13] OB has not identified any *substantial* government purpose, merely claiming removing Henrys' PFCs is to "implement [OB's] comprehensive plan."[14] OB also fails to demonstrate their actions are *reasonably necessary* to achieve a substantial purpose.

In stark contrast, though, Henrys "have a *compelling interest* in retaining their real and personal property free of undue interference or improper clouds of title."[15] And even Henrys' pavers, undisputed as "Florida-friendly

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[11] *Boyd,* 116 US at 630.
[12] *See, Boyd* (US:1886), supra.
[13] *Penn Central* 438 US at 127.
[14] Response p21, citing to *Kuvin*; however, *Kuvin* does *not* state nor imply implementing the plan constitutes a legitimate public purpose by itself. In fact, *no* cases support such an allegation.
[15] *Massey* at 146, *citing Real Property* at 964, such as what occurs with FS162.09 liens.

landscaping," serve "a *compelling public interest*" "to conserve or protect the state's water resources."[16]

Further, "[t]he Constitution extends *special* safeguards to the privacy of the home."[17]

> 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.[18]

As such, "the means by which the state can protect its interests must be narrowly tailored to achieve its objective through the least restrictive alternative where such basic rights are at stake."[19] Henrys' Petition details how OB failed to do that.

Magistrate's orders punish Henrys for placing on their own homestead:

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

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[16] per FS 166.048 and 720.3075, discussed at Petition p91.
[17] *Dolan*, 512 US at 393 (cleaned up).
[18] *Real Property* at 964 (Fla:1991).
[19] *Id* at 963, *citing* Fla. Const Art. I §9; *see also, Massey* at 147.

It's undisputed Henrys did this to preserve and protect their real and personal property, harming no neighboring properties. Further, Henrys' Petition explains how the lower tribunals' legal errors seriously impair Henrys' rights to:

- ➔ equal protection[20]
- ➔ due process[21]
- ➔ possess and protect property[22]
- ➔ protection against excessive fines, cruel and unusual punishment, and forfeiture of estate[23]
- ➔ privacy[24]
- ➔ freedom of expression[25]

These are all found within our Declaration of Rights. Inasmuch, "it is settled in Florida that each of the personal liberties enumerated in the Declaration of Rights is a fundamental right. Legislation intruding on a fundamental right is presumptively invalid."[26] Thus, this court's review must begin with the presumption these intrusions onto Henry's fundamental rights are invalid.

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[20] Fl. Const. Art I, §2; Petition p19-17.
[21] Fl. Const. Art I, §9; Petition p17-34,45-56.
[22] Fl. Const. Art I, §2; Petition p7-9,21-50.
[23] Fl. Const. Art I, §17; Petition p45-52.
[24] Fl. Const. Art I, §23; Petition p25,28,35-36.
[25] Fl. Const. Art I, §4; Petition p27.
[26] *North Fla.* at 635 (Fla. 2003).

Moreover, “Florida's right of privacy is a fundamental right warranting ‘strict’ scrutiny,” which “shifts the burden of proof to the state to justify an intrusion on privacy. This is [] settled law.”[27] Consequently, OB’s “burden can [only] be met by demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means.”[28] Again, OB asserted no *compelling* interest, nor argued they are using the least intrusive means to accomplish it.

Also, §23 “embraces more privacy interests, and extends more protection to the individual in those interests, than does the federal Constitution,”[29] and “was intentionally phrased in strong terms. The drafters of the amendment rejected the use of the words ‘unreasonable’ or ‘unwarranted’ before the phrase ‘governmental intrusion’ in order to make the privacy right as strong as possible.”[30]

Thus, all but one of the issues here require a heightened level of scrutiny, a far cry from OB’s claimed overall “relaxed and tolerant” standard.

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[27] *Id* at 626. Also, “Florida courts consistently have applied the ‘strict’ scrutiny standard whenever the Right of Privacy Clause was implicated, regardless of the nature of the activity.” *Id* at 635.
[28] *Id* at 620.
[29] *Id* at 619,635.
[30] *Id* at 620.

2. OB Misleads on Other Aspects of Law

OB claims FS163.3167(1) mandates a city's comprehensive plan "to control and direct the use and development of property" in the city.[31] However, FS163.3167(1) does not mention the words "control" or "direct," instead stating the plan is "to guide." Similarly, it does not cover land "use" ("use" is not mentioned at all), rather "*future development.*" And, Henrys' PFCs are *not* development per the CPA.[32] Therefore, FS163.3167(1) does *not* require OB to regulate Henrys' PFCs this way.

OB also claims precedent requires all reasonable doubts regarding their LDC to be resolved in their favor.[33] However, the Supreme Court mandated such ***doubt will be resolved against the City.***[34] And why wouldn't it? In this Constitutional Republic, our rights to life, liberty and property are given to us by God, not created or "gifted" by OB. Conversely, OB has *no* authority to act except that which was expressly provided by state constitution, state law or city charter.[35]

OB suggests this Court owes OB deference, and cites a dissent for support. However, the US Supreme Court made it clear "deference does

[31] Response p12.
[32] Petition p32-33.
[33] Response p19, citing an irrelevant Court of Appeals case.
[34] *City of Miami* at 803 (Fla:1972).
[35] *North Fla* at 619.

not imply abandonment or abdication of judicial review."[36] Further, in discussing which municipal action should be upheld,[37] OB repeatedly cites cases about "zoning," and misleads by inserting "land development" and "land use restrictions" into the quotes from these "zoning" cases. Henrys do not challenge *zoning*, so cases discussing deference to *zoning* are misleading. Henrys challenge OB's restrictions of Henrys' normal and customary *use* of their homestead.

OB then cites a long list of cases from other jurisdictions to "prove" Henrys' due process rights weren't violated.[38] However, those cases only relate in the most general sense, discussing situations of "state-created property interest[s][39]," which aren't at issue here.[40] Further, the due process violations discussed by Henrys[41] are not rebutted by OB.

OB claims[42] "a protectable property interest does not arise in this case from a knowing violation of the law." But, it's *not* alleged Henrys obtained ownership of their property through unlawful means. Further, Henrys' property rights in their home and PFCs were *not* created by the LDC, OB,

[36] *Students for Fair Admissions*, 600 US at slip opinion p26.
[37] Response p19-20.
[38] Response p22-24.
[39] Response p23.
[40] See following paragraph herein.
[41] Petition p17-34,45-56.
[42] Response p24-25.

nor the state. Indeed, the Florida Constitution acknowledges Henrys "have *inalienable* rights . . . to acquire, possess and protect property."[43] But, even if state law and the US Constitution were at odds here, the court has "an obligation to ensure state court interpretations of that law do not evade federal law."[44] Thus, "**States 'may not sidestep the Takings Clause by disavowing traditional property interests**.'"[45]

Further, OB's argument heavily relies upon *Durden*, which is grossly misleading since the *Durden* appellees "illegally constructed outdoor advertising signs ***adjacent to Interstate 10***"[46] - in stark contrast to Henrys' PFCs *on their own property* that *in no way* impacts any easements or other property interests. So, OB may not use *Durden*,[47] to "sidestep the Takings Clause by disavowing [Henrys'] traditional property interests."

OB also claims enforcing their LDC is a valid exercise of police powers.

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[43] FL Const Art I Sec 2.
[44] *Moore* 143 S.Ct. at 2073.
[45] *Moore* at 2088.
[46] *Durden* at 1272 (Fla:1985).
[47] OB also claims on p25 of their response that OB "has a clear and established scheme under its LDC for citizens to secure permits for fences, driveways and accessory structures." In making this statement, OB does *not* deny that OB's permit scheme includes requirements that are *not* even disclosed until *after* an application for a permit is submitted, and includes impractical, unreasonable and often impossible provisions, as discussed at Petition p38-41, and shown in OB's testimony (detailed at Petition p38). ***How could the Henrys' possibly "knowingly disregard" requirements that have not even been disclosed?***

However, being "a legitimate exercise of the police power does not, of course, insulate it from a takings challenge, for when 'regulation goes too far it will be recognized as a taking.'"[48]

Furthermore, *most* of Henry's cited *binding* authority[49] is entirely *ignored* by OB, while many of OB's cited statutes and cases are not relevant here, and *most* (22/42) of OB's cases are dissenting opinions, unpublished opinions, cases from other jurisdictions, trial court decisions, etc. - *none* of which are binding authority.

C. OB Misleads About What is Being Challenged Here

OB misleads about what is being challenged. OB suggests Henrys challenge *zoning* or *land development* regulations, but *zoning* isn't challenged, and Henrys' PFCs are *not* classified as "development."[50] OB also claims[51] Henrys ask this Court to "reweigh the evidence." That's *not* what Henrys seek. Rather, it's the lower tribunals' harmful errors of *law* for which Henrys seek redress. And it's undeniable that purely *legal* reviews

[48] *Nollan* 483 US at 853.
[49] statutes, Constitution, binding case precedent, LDC
[50] Petition p32-33.
[51] Response p12,17.

are done *de novo,* as this court does not give deference to lower tribunals in their interpretations of the law.[52]

The only points at issue are OB ordering Henrys to

➔ remove their PFCs,[53] and

➔ pay never-ending extensive fines

So, the necessary questions are

➔ does OB have authority to order Henrys to remove PFCs?

➔ does the *procedure* used deny Henrys' rights?

➔ does OB have authority to impose vast, never-ending fines?

1. No Authority to Order Henrys to Remove PFCs

OB has *no* authority to order Henrys to remove their PFCs. The constitution prohibits OB from taking Henrys' homestead through over-regulation. A unanimous US Supreme Court recently held "[t]he Fifth Amendment is violated when land-use regulation does not substantially advance legitimate state interests *or* denies an owner economically viable

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[52] It is only "findings of fact" that "come to the appellate court with a presumption of correctness." *Stone* at 412. This is because "question[s] of law [are] reviewed de novo." *Brevard* at 1117 (Fla.5DCA 2020). *See also, North Fla.* at 626-627,631 (Fla. 2003); *Bajakajian* 524 US at 327; *State v Jones* at 1088.

[53] At times, OB suggests simply getting a permit would suffice, but OB stated many *illegal* reasons why they *won't* issue a permit for the fence and pavers. Petition p21-29. Further, it is unreasonable and virtually impossible for Henrys to satisfy all the requirements for applying for the permits. Petition p37-38.

use of his land."[54] Henrys' Petition explains how *none* of the challenged land use regulations substantially advance legitimate state interests.[55] Moreover, imposed setbacks deny economically viable use of 69.75% of Henrys' homestead,[56] while removing Henrys' pavers would prohibit the parking[57] of their 4 vehicles *on their homestead*.

Certainly, prohibiting the functional use of 69.75% of Henrys' property is "unduly restrictive," in violation of FS163.3161.[58] The same is true for requiring Henrys' fence to have certain decorative qualities,[59] effectively prohibiting the parking of their 4 vehicles, and the 5 unreasonable requirements imposed just to apply for a permit for customary use of their homestead.[60]

OB also has no authority to force Henrys into LDC noncompliance. Without Henrys' pavers, which provide the required "paved off-street parking," Henrys' home would be a "noncomplying structure or site."[61] And with Magistrate finding Henrys' conexes constitute a garage, "*such garage* or

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[54] *Sheetz* 601 US Slip Opinion at 5.
[55] Petition p36,41-43.
[56] App1:519; Petition p43.
[57] App1:515.
[58] Petition p43.
[59] Petition p27-28.
[60] The last 5 of the requirements listed at Petition p37-38.
[61] Petition p53-54.

carport *shall not be removed* or altered in any way."[62] Further, Henrys' fence is required to screen the noise of their kids' play areas from neighboring properties.[63] So, while Henrys may not be ordered to remove their PFCs, thus *increasing* their 1949 property's nonconformity with current regulations, LDC 2-63(b) allowed Henrys to install their PFCs "to *decrease* its nonconformity."[64]

OB also has no authority to require Henrys to obtain permits then illegally deny such permits. OB testified they will withhold permits for Henrys' PFCs: unless Henrys remove the pavers so OB can look underneath; because they create too much impervious area; because a 3' paver setback and a 20' conex setback is being applied; and because they don't meet OB's subjective aesthetic requirements.[65] However, as discussed, denying Henrys' PFCs permits for these reasons are unfounded in, and even contradictory to, the law.

OB also has no authority to order Henrys to remove their PFCs "because they did not obtain a permit" when the language of the LDC, the Florida Building Code (FBC), and the Community Planning Act (CPA) *don't even*

[62] Petition p54-55, discussing LDC 2-42(d)(2).
[63] Petition p55.
[64] Petition p56.
[65] Petition p21-29.

require a permit for them.[66] First, none of them are classified as "development" in the CPA,[67] especially since "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."[68] Henrys' conexes are not banned by the LDC, nor even mentioned in the LDC.[69] And the FBC does *not* allow OB to control the location of Henrys' conexes, apply typical building requirements to them, or even regulate them at all.[70]

In ignoring the plain language of these laws, the lower tribunals departed from the essential requirements of the law.

2. Procedures Have Denied Henrys' Rights

OB claims Henrys have not raised procedural due process issues.[71] However, Henrys' Petition, Motion for Stay, and Motion to Strike *all* identify procedural due process issues, as the procedures used *have* denied

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[66] Petition p29-33.
[67] Petition p32-33.
[68] FS163.3164(14) and 380.04. 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 enforcing the land *development* code.
[69] Petition p33-35.
[70] Petition p24-27.
[71] Response p10.

Henrys' rights. Due process denials invalidate otherwise permissible action.

Although Henrys' received notice of the 2/27/23 hearing, they received ***no*** notice *fines* would be addressed at *that* hearing.[72] And it was not made clear Magistrate was going to order 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 and the hearing was concluded.[73] Indeed, Chapter 162 and caselaw unequivocally *require* an order imposing fines to be *subsequent to* an order finding violation.[74] Chapter 162 and caselaw also only allow *one* Order Imposing Fines/Liens per Order Finding Violation, yet Magistrate issued *additional* orders for fines in this case in May 2024.[75]

Additionally, 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.[76] Further, Henrys' constitutionally protected property rights "may not be impinged with a showing of less than clear and convincing

[72] Petition p19.
[73] App1:396-401.
[74] Petition p18.
[75] Petition p20.
[76] *Massey* at 145.

evidence."[77] But here, as in *Massey,* Magistrate "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,"[78] let alone clear and convincing evidence.[79]

Consequently, Henrys did *not* receive a meaningful opportunity to be heard on these issues. Although OB ignores these issues, these procedural due process violations nonetheless require the orders to be overturned (as they are not harmless errors).

Likewise, Magistrate did not utilize 8th Amendment-required standards to impose fines,[80] thus violating additional procedural safeguards.

Equal protection violations have the same result. And, where Henrys' alleged LDC violations are not ***malum in se*** but merely ***malum prohibitum***, the obvious, *uncontroverted*, and astounding number of like violations getting a "free pass" (810!) is the epitome of an equal protection violation.

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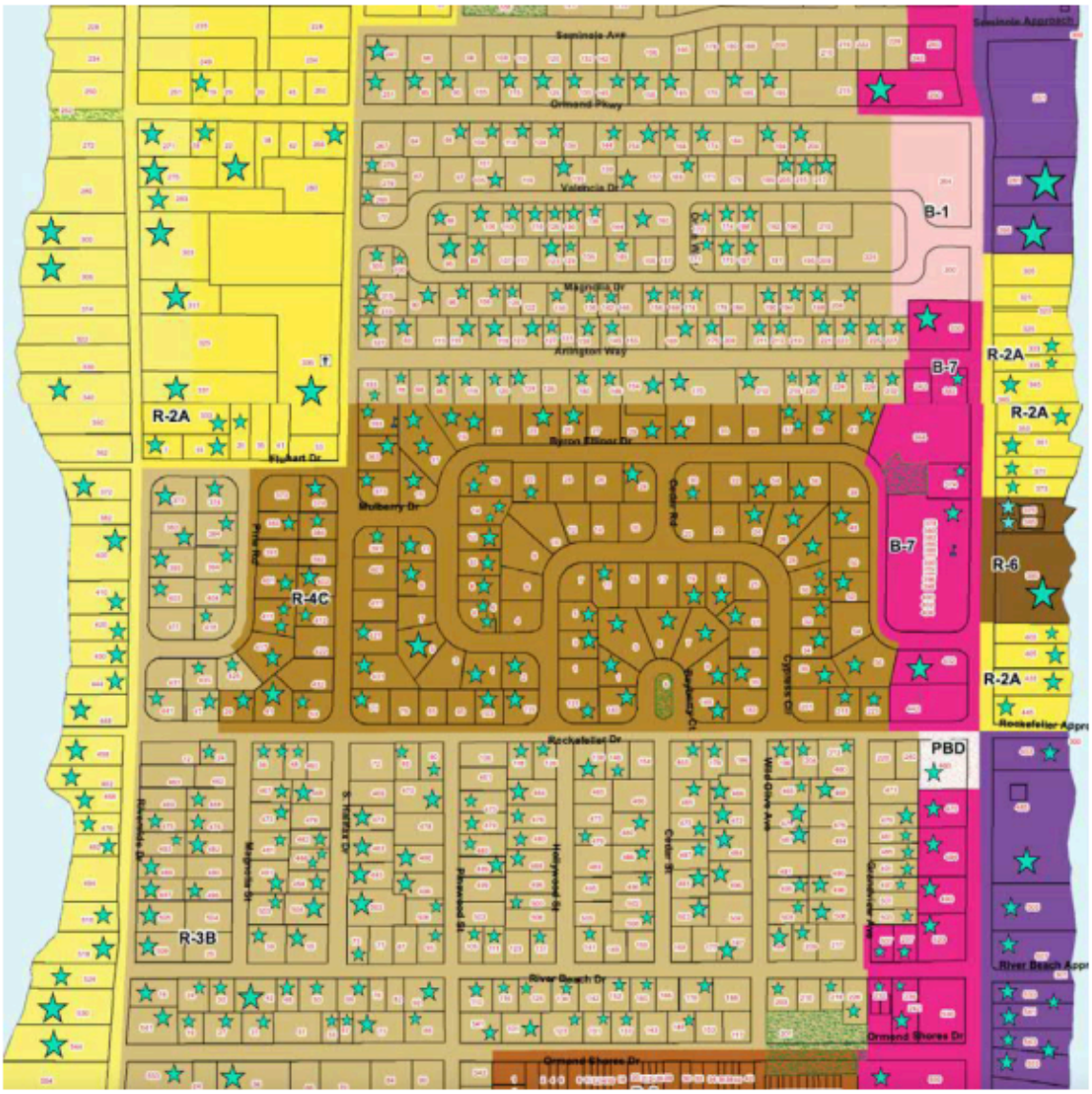
[77] *Real Property* at 967-968 (Fla:1991).
[78] *Id* at 146.
[79] Petition p18-19 for *2023* Orders for Fines, p20 for *2024* Orders for Fines.
[80] Petition p45-52.

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



And, OB hasn't denied the selectivity in enforcement, where 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"

Uncontested facts also show Henrys' PFCs harm *no one*, and the requirements OB imposes upon Henrys' PFCs are to satisfy design and aesthetic[81] preferences, which are wholly ineffective with such selective enforcement. Thus, there's no rational basis for this selectivity in LDC enforcement. Consequently, even *if* OB's commands to remove Henrys' PFCs were otherwise lawful, OB's ***undisputed*** selectivity of enforcement invalidates their action.

3. No Authority to Impose Vast Fines

OB also has *no* authority to impose fees *as they have done here*. The Florida Constitution expressly forbids excessive fines, cruel and unusual punishment, and forfeiture of estate.[82]

Magistrate's orders impose daily accruing fines with *no* end date. These fines already total $31,425 as of 5/19/24[83], and grow every day. This is for a ***malum prohibitum*** offense where *there is no harm,* and the fees

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[81] 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* at 641 (concurrence).
[82] Art I, §17.
[83] App3:4-19.

imposed have no correlation to any actual damages sustained by society or to the cost of the proceedings.[84]

Yet, for the **worst** typical ***malum in se*** offenses, fines (even when in lieu of incarceration) can be no more than $15,000 (for murder and rape) and $10,000 (for arson)![85] Fines for noncriminal violations under the same statute can be no more than $500.

Moreover, FS162.09 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.[86]

Consequently, the fines imposed are not only unconstitutionally excessive, but also cruel and unusual, and disproportionate to the gravity of the offense. And, their lien aspect also results in an unconstitutional forfeiture of estate.

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[84] *Austin,* 509 US at 621 (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.

[85] FS 775.083(1), 782.04(1)(a) and (b), 794.011(3), 806.01(1).

[86] 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.

Conclusion

OB literally ignored the vast majority of the legal issues raised in Henrys' Petition. Instead, they chose to mislead this court in several ways. However, Henrys' constitutionally-protected rights cannot simply be trampled and ignored. Rather, "A fundamental task of the judiciary is to safeguard the constitutional rights of the citizenry."[87] This is why "a court with jurisdiction has a virtually unflagging obligation to hear and resolve questions properly before it."[88]

Here, both lower tribunals committed harmful errors by denying due process *and* materially departing from the essential requirements of the law. The challenged provisions constitute a regulatory taking. And the fines/liens imposed are unconstitutionally excessive. Thus, this court's action is *needed* to stop this miscarriage of justice and safeguard Henrys' substantive rights. Therefore, Henrys ask this court to grant their Petition and quash Magistrate's orders.

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[87] *Sarmiento*, at 645 (Fla:1981).
[88] *FBI v Fikre* 601 US Slip Opinion at 5.

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), H. Pope Hamrick, Jr. (phamrickjr@cfl.rr.com), Circuit Court Judge Mary G. Jolley (kmccoy@circuit7.org, Division32@circuit7.org), Florida State Attorney General (oag.civil.eserve@myfloridalegal.com), via the electronic filing portal on February 16, 2025.

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