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' Third Amended[1] Petition for Writ of Certiorari

This Petition 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, which ruled on the Henrys' appeal of the Special Magistrate Orders rendered on 3/3/23.

Respectfully Submitted: /s/ Katherine Henry /s/ Michael Henry
December 29, 2024

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[1] Initial 4/7/24 petition was filed with two appendix files and a transcript file, each separately paginated. Combining these into one PDF upon request of the Court, now paginated sequentially, the 1st amended petition was filed 4/8/24 to update the references to those appendix page numbers. Ordered 4/11/24 to remove all pictures, diagrams, etc from the Petition (to include them only in the appendix), the 2nd amended petition was filed. Henrys thus ask the court to consider the growing practice of placing graphics "in the body text rather than in an appendix," as discussed in the Michigan Bar Journal, June 2022, App1:504, and also May 2022, App1:508, and realizing the court is not able to read all appendices pages, **ask the court to focus on App:512-517, 519-520** (filed 4/11/24) & **App3:54-63** (filed 6/5/24). On 12/5/24, despite Henrys' 2nd amended petition being only 12,984 words, they were ordered to shorten it, thus this 3rd amended petition is now filed.

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Basis for Jurisdiction

Henrys file this Petition under FRAP 9.030(b)(2)(B), where certiorari jurisdiction may be sought to review final orders of circuit courts acting in their review capacity. Thus, by the filing of this Petition, Henrys have invoked this court's jurisdiction. FRAP 9.100(b). Henrys timely filed the original Petition within 30 days of rendition of the final order (which was 3/7/24), which largely affirmed three Magistrate orders finding LDC violations for Henrys' fence, pavers and 2 small conexes, and issuing fines/liens.

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 regarding permit requirements, 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 (many of which were covered by weeds), and there was a

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

dilapidated privacy fence already on the property. Henrys replaced the dilapidated fence with a sturdy one, and uncovered the pavers and placed new ones. In early 2022, two small conexes were set in the backyard.[2] On 9/2/22, OB (Janet Bruce) called Henrys about their driveway pavers, privacy fence, and conexes [hereinafter, PFCs]. Bruce didn't specify *which* pavers weren't allowed (frontyard new ones only or backyard previously-installed pavers, too).[3] Bruce stated the conexes will never be permitted and must be removed, and the fence and pavers must be installed differently and with a permit.[4] OB's statements were contradictory. Henrys voiced several concerns.

On 10/20/22, OB served Henrys with Notices of Violation for the PFCs.[5] So, ***let's be clear.*** Henrys' PFCs are all on Henrys' property. Except the ONE neighbor who complained Henrys "have ruined the neighborhood since they got here," *most* neighbors genuinely appreciate the PFCs. Consequently, Henrys were able to obtain the signature of hundreds of

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[2] A Conex is a metal, weather-resistant container used to store or ship goods. It has two standard lengths - 20 and 40 feet. The United States military has used these containers for storage and transportation of goods since the 1950s.
https://search.brave.com/search?q=what+is+a+conex&source=desktop

[3] Magistrate's order doesn't specify either.

[4] App 512.

[5] App 3, et al.

neighbors in just a few days who all agree “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.”[6] 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 has it been alleged that Henrys’ use of their property infringes upon others’ use of their property.

So, 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] To-date however, OB failed to comply with their statutory requirement to respond, instead instituting proceedings against Henrys, holding a magistrate hearing on 2/27/23.

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

[6] *See* signature sheets App3: 54-63, admitted by Magistrate May 2024.
[7] Starting on App 017.

absolved of any responsibility for damages caused to any of Henrys' remaining property.[8] Instead, OB waited until 9:58AM to hand Henrys hundreds of pages being introduced by OB, which included these requests.[9]

At the onset of the 2/27/23 Hearing, Henrys moved for dismissal for several legal issues. Without providing legal reasoning, Magistrate denied Henrys' motion for dismissal.[10]

Henrys also objected to the cherry-picked manner in which these LDC provisions are enforced.[11] Henrys first raised this equal protection issue relating to OB's treatment of the Henrys regarding permits at 924 Rollins, a property that increased in value from $307,900 in June 2021 to $485,000 in December 2021 through extensive unpermitted remodeling:

> ANN-MARGARET EMERY: Okay. Did you know you needed to get a permit to install a fence on your property?

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[8] See communications, App 3-10, 78-84.

[9] Henrys 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 the claims OB made about the photos included. This due process denial was raised several times by Henrys (i.e., App 267, 289, 317, etc).

[10] App 283.

[11] *See, e.g.,* App 297-302, 310-312, 331-333, 390-392.

KATHERINE HENRY: I knew that we didn't need to have permits because of the interaction we specifically had with the city in July and August and September and October about 924 Rollins Avenue.

ANN-MARGARET EMERY: No, I'm asking you about this particular property. Did you know you needed a permit --

KATHERINE HENRY: I'm answering about this property because if it's not required for 924 Rollins Avenue, then it's not required for 33 Cypress Circle either.

ANN-MARGARET EMERY: Was there a new fence installation on Rollins?

KATHERINE HENRY: There was an entire gut job done on that property. Dumpsters kept being pulled up and the sellers were supposed to have pulled the permits, and we were told days before closing that they never did. They actually then went and prohibited us from getting whatever permits that they should have gotten, and they canceled the permits that we had been able to obtain to that point, and then when they temporarily got possession of the property as we were litigating this issue and trying to sue them for specific performance, they brought up one dumpster after another to completely tear out and gut the house and the city refused to do anything about it whatsoever.

ANN-MARGARET EMERY: Well, you're a lawyer. You didn't think to call the city to find out --

KATHERINE HENRY: We did.

ANN-MARGARET EMERY: Did you call the city to find out if you needed a pens[sic] permit for the property we're here talking about today?

KATHERINE HENRY: I would not call somebody when a answer was already provided to me in the same year.

ANN-MARGARET EMERY: On a different property?

KATHERINE HENRY: Like I said, equal protection applies, so I wouldn't assume we're going to cherry-pick and say we're not going to enforce the statutes or the Land Development Code

> when it would benefit us at 924 Rollins, but we are going to try to enforce some sort of regulations on a different property when it would not benefit us or harm us. So, no, I wouldn't think that there would have been something in the books saying that you could do that.
>
> ANN-MARGARET EMERY: Okay. At some point you did realize there was a stop-work order on the property in regards to the fence?
>
> KATHERINE HENRY: When our fence was done, yes. (App 309-312.)

Then, Henrys specifically pointed to 810 other "violations" of the same Permit, Pavers, Accessory Buildings & 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. 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.[12]

Magistrate overruled Henrys' objections with no legal reason provided and rendered 3 Orders in favor of OB on 3/3/23.[13] 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

[12] App 11, 13, 14.
[13] App 85-106.

not given any opportunity to object to the prematurely issued fines (or anything else) and the hearing was concluded.[14]

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.[15] There is no established court filing system for the tribunal. 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 recipients[17] 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.

On 4/3/23, Henrys filed requests for emergency relief in circuit court.[19] On 4/5/23, the circuit court issued an order for OB to file a response,[20] amending it on 4/6/23 and also staying Magistrate's orders.[21] The circuit court held a hearing on those issues, subsequently allowing the stay to

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[14] App 396-401.
[15] App 107.
[16] *See,* App 124.
[17] Clerk, Magistrate, Deputy City Attorney, Neighborhood Improvement Division Manager, and Neighborhood Improvement Division Code Inspector.
[18] *See,* App 124.
[19] App 128.
[20] App 148.
[21] App 150.

remain in effect. Oral argument on the appeal was held 1/4/24. The judge signed the order on appeal on 3/4/24, which was filed, rendered and served on the parties on 3/7/24.[22] As FRAP 9.420(b)(2) requires a "copy of all orders and decisions must be transmitted . . . by the clerk of court to all parties *at the time of entry of the order* or decision," the parties were all served with the order when it was entered into the court's e-filing/e-service system on 3/7/24.

Magistrate's 2023 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. Finding these portions of the orders "depart[ed] from the essential requirements of the law," the circuit judge struck these portions from the orders. However, the court allowed the

[22] App 253 shows the order; App 252 shows when it was filed, rendered and served by the court clerk. Judge signed it at 4:59pm 3/4/24, and despite the clerk actually entering it into their e-filing/e-service system on 3/7/24, they backdated the entry to 4:59pm 3/4/24. However, "For purposes of determining the date of rendition, it is important that electronically and paper-filed orders and judgments include accurate date stamps. Thus, absent extraordinary circumstances, documents should be date stamped for the day on which they are filed with the clerk. Backdating to the date on which the order or judgment was signed is not permitted. *See, e.g., Guy v Plaza Home Mortg., Inc.,* 260 So. 3d 280, 280–81 (Fla. 4th DCA 2018)." FRAP 9.020 Committee Notes, 2020 Amendment.

rest of the orders to stand, and removed the stay as to those remaining portions. Those portions include costs, a one-time fine and a never-ending daily fine on each of the three cases.[23]

Nature of Relief Sought

Henrys ask this court to find the lower tribunals committed harmful errors, including violating Henrys' right to Equal Protection, issuing orders despite OB and Magistrate violating several *requisite* state and local laws, and issuing orders that force Henrys into LDC noncompliance. Henrys also ask this court to hold some portions of the law unconstitutional as a regulatory taking in violation of the 5th Amendment and another portion as an excessive fine in violation of the 8th Amendment. These harmful errors and unconstitutional laws have adversely affected the Henrys' substantial rights, resulting in a miscarriage of justice, which can only be remedied through the granting of this Petition and subsequent overturning of the entirety of Magistrate's orders (and overturning the portions of the circuit court order that uphold Magistrate's orders). Moreover, this court need not remand on these purely legal issues because it is in "a good position to make a determination" on the merits of the issues.[24]

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[23] Additional Magistrate orders were rendered 5/30/24. *See* Notice of Related Case or Issue filed 6/5/24 and App3.

[24] *State v Jones*, 180 So. 3d 1085, FN2 (Fla. 4DCA 2015), citing*, Theophile*

Standard of Review

All issues in this appeal are legal, not factual. And none of the relevant facts are disputed. As such, this court is to review the legal and constitutional issues *de novo*, without deference to the lower tribunals' rulings on such legal issues. On second-tier certiorari review, the district court's inquiry is limited to whether procedural due process was accorded and whether the circuit court applied the correct law, "or, as otherwise stated, departed from the essential requirements of law."[25] The harmful errors and unconstitutional laws involved here adversely affect the substantial rights of the Henrys relating to their homestead, so this court must not presume correctness of the lower tribunals. Indeed, "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."[26] Therefore, since the lower tribunals here have materially departed from the essential requirements of the law, this court must step in to stop this miscarriage of justice by granting the Petition and setting aside

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v State, 78 So.3d 574, 578 (Fla. 4th DCA 2011) (recognizing an appellate court is in an "equal position with the trial court" where a de novo standard of review applies and the issue is purely a question of law).

[25] *Hardin v Monroe County,* at 709-710 (Fla. 3DCA 2011), *citing* *Custer v United* (Fla. 2010).

[26] *Byars v US*, 273 US 28 (1927), citing *Boyd v US*, at 635 (1886).

all Magistrate orders (and the portions of the circuit court order that affirms the Magistrate orders).

Argument

It is to secure our inalienable rights that "Governments are instituted among Men."[27] And, the very 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 it's laws, is to *protect our rights*, not to regulate and punish us. This 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.[28] Indeed, "[t]he great end for which *men* entered into society was to *secure their property*." ***Id.***

Consequently, "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

[27] Declaration of Independence.
[28] *See, Boyd v US*, 116 US 616 (1886).

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."[29]

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."[30] This Petition details how OB failed to do that. Inasmuch, we must recognize

> Three types of constitutional challenges may be raised in the context of the administrative decision-making process of an executive agency. An affected party may seek to challenge: (1) the facial constitutionality of a statute authorizing an agency action; (2) the facial constitutionality of an agency rule adopted to implement a constitutional provision or a statute, or (3) the unconstitutionality of the agency's action in implementing a constitutional statute or rule.[31]

Henrys make a Type 1 and Type 2 challenge in arguing the fines/liens are unconstitutionally excessive. Henrys' regulatory taking claim is a Type 2 challenge. Henrys make both a Type 2 and 3 challenge regarding forced

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[29] *Department v Real Property*, at 964 (Fla:1991) (citations omitted).
[30] *Id* at 963, *citing* Art. I, Sec 9, Fla. Const; *see also, Massey v Charlotte County*, at 147 (Fla. 2DCA 2003).
[31] *Key Haven v Board of Trustees,* at 157 (Fla.1983), *superseded by statute on other grounds as noted in Bowen v Florida DEP,* 448 So.2d 566 (Fla. 2DCA 1984).

noncompliance. Henrys raise Type 3 challenges relating to equal protection and the laws OB and Magistrate violated.

In evaluating Henrys' 3 types of challenges, they ask this court to remember "the [Henrys] have a compelling interest in retaining their real and personal property free of undue interference or improper clouds of title,"[32] and if *reasonable doubt* should arise as to whether the municipality possesses a specific power, such ***doubt will be resolved against the City***.[33]

I. OB Denied Henrys Equal Protection When Giving a "Free Pass" to Similarly Situated Neighbors

Even *if* the language of the specified LDC provisions were enforceable, the subsequent orders are nonetheless invalid if those provisions are enforced in a manner that deprives Henrys of equal protection of the law. Magistrate summarily denied Henrys' equal protection claim, without applying any legal standard. The circuit court denied Henrys' equal protection claim by

[32] *Massey* at 146, *citing Real Property* at 964.
[33] *City of Miami v Fleetwood*, 261 So. 2d 801 (Fla: 1972), citing *Liberis v Harper* (Fla: 1925).

misapplying the applicable legal standard.[34] Thus, Henrys ask this court to hold the denial of equal protection for the Henrys in the issuance of the lower tribunals' orders is a harmful error that adversely affects the Henrys' substantial rights, thereby voiding the orders of violation in their entirety (and the portions of the circuit court order affirming the orders of violation).

Under the Equal Protection Clause of the Fourteenth Amendment, government may not selectively enforce laws against one individual while ignoring similarly situated individuals. However, that is exactly what OB has done. One year before *this* case began, when Henrys moved to Florida, a permit/LDC situation arose where OB denied Henrys equal *protection* of the law.[35] It was undisputed at the magistrate hearing, and the facts remained undisputed in all circuit court and 5DCA filings to-date, that OB's selective enforcement of the permitting requirements at 924 Rollins cost Henrys over $60,000 by enforcing permits against Henrys (as buyers in possession) but not enforcing permit requirements against the sellers when they began the demolition, or when they retook possession while Henrys'

[34] The US Supreme Court expressly acknowledges a "class of one," where a party "alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment," just as Henrys did. *Willowbrook v Olech*, 528 US at 564 (2000).

[35] OB raised no factual disputes on this issue, even when specifically stated by Henrys. *See, e.g.,* App 309-312.

specific performance action was pending. In September 2021, OB was called to ascertain why they were refusing Henrys equal *protection* of the law by enforcing the LDC, by stopping the sellers from working on the home while the case was being litigated. Not only did OB Atty Emery say 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.[36] Although this original equal protection denial was briefed in the lower tribunals (App:13,163-165), Henrys don't raise it here - but merely mention it to show OB's pattern of singling Henrys out for selective enforcement. Instead, Henrys focus now on OB's *current* equal protection violations.

It's important to note this equal protection issue is purely a legal dispute.[37] OB raised no factual disputes on this issue, even when specifically stated by Henrys.[38] Similarly, Magistrate denied Henry's equal protection claim on

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[36] 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.

[37] All facts discussed as to this equal protection issue were discussed with Bruce on 9/2/22, in writing to OB in Henrys' Notice to Cease & Desist on 11/8/22 (App 19-25), and were raised in Henrys pleadings filed with Magistrate prior to the hearing, which he acknowledged and "thoroughly looked through." App 282.

[38] *See, e.g.,* App 297-302, 331-333. Further, OB's pleadings have never challenged the truthfulness of the facts alleged in Henrys' equal protection claim, even the 810 same or similar "violations."

legal grounds.[39] However, Magistrate did not apply the correct legal standard (no rational basis for OB intentionally treating Henrys differently from others similarly situated), as stated by circuit court (App:257). Indeed, the circuit court understood this legal standard, but wrongly applied it, holding that Henrys did not identify "another nonconforming property . . . with the same three distinct violations under the []LDC."

This appeal stems from three Magistrate orders, each concluding work had been done without a permit in violation of the LDC.[40] Thus, "others similarly situated," even with the *strictest reading of Magistrate's orders*, would include those similarly improving their property without a permit. Henrys presented to Magistrate (and OB did not argue) that 42% of properties in their immediate neighborhood met that qualification![41]

Further, this appeal stems from three separate cases in front of Magistrate, thus Henrys need not identify a single property with all three violations. Certainly, none of the three underlying cases are contingent upon another.

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[39] Magistrate states Henrys will have to cite more caselaw to prevail on this issue. App 302-304.

[40] *See* paragraph 2 of each order, App 86, 93, 101.

[41] *See* summary, App 513. Original submission starting at App 39; All facts discussed as to this equal protection issue were discussed with Bruce on 9/2/22, in writing to OB in Henrys' Notice to Cease & Desist on 11/8/22 (App 19-25), and were raised in Henrys pleadings filed with Magistrate prior to the hearing, which he acknowledged and "thoroughly looked through." App 282.

Nor does any caselaw support the notion that the three cases can be combined for the purposes of redefining the class of those similarly situated. Indeed, Henrys raised this equal protection claim as to each separate case.[42] So, even under the *strictest classification of those similarly situated*, Henrys must only show properties with the same or similar fence issues as it relates to the fence case, properties with same or similar paver/parking area issues as it relates to the paver case, or properties with same or similar shed/structure issues as it relates to the conex case. So, in looking at the same information through that lens, we still see in Henrys' neighborhood 15% of properties have fence permit/LDC issues, 99% of pavers/parking areas have permit/LDC issues, and 61% of properties have shed/structure permit/LDC issues. App514. Undeniably, this shows *many* others similarly situated for each of the three underlying cases.

The next step is to determine if the different treatment from those similarly situated was intentional. Henrys claimed all along this selective treatment was intentional,[43] and OB has never refuted that claim. Magistrate made no finding on this point, but the undisputed facts speak for themselves.

[42] *See, e.g.,* App 298, 331-333, 390-392.
[43] I.e., the 9/2/22 phone call with Bruce and the Notice at App 19, et al.

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**,[44] and current attempts to enforce the LDC *as against Henrys* for their current property undoubtedly shows OB intentionally treating Henrys differently (enforcing vs not enforcing permit requirements) from others similarly situated (doing work on their property without a permit) with no rational basis for the difference in treatment. One neighbor made a complaint against Henrys, that OB immediately followed up on and responded to. However, as discussed in prior pleadings, when Henrys made complaints to OB regarding the Rollins property, and OB's own LDC violations[45] at 54 Seton and the city attorney's office, OB failed to take *any* action, or even respond to Henrys. Especially considering their undisputed thorough follow-up with the neighbor who complained *against* the Henrys, this undoubtedly shows intentional different treatment.[46]

But the numbers speak for themselves. Enforcement of permit and/or setbacks for Henrys while not enforcing them for pavers/parking areas in

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[44] especially throughout August and September 2021.

[45] City Park's LDC Violation re Pods Container, City Attorney's LDC Violation re Parking Surface, City Attorney's LDC Violation re Utility Structure, City Attorney's LDC Violation re Repairs Without a Permit

[46] The games OB played with service upon Henrys and other matters were also outlined for the Magistrate, as summarized on App 12, parts 6 and 7.

99% of properties, for sheds/structures in 61% of properties, for fences in 15% of properties, or just for improvements without permits in 42% of properties in Henrys' immediate neighborhood shows the intentionality.

So, is there a rational basis for this selectivity? 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***. ***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."[47] 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."[48] Certainly, the alleged *permit* requirements of the LDC for

[47] Black's Law Dictionary, Deluxe Eighth Edition, p 978.
[48] LDC 1-03.

fences, pavers, and accessory structures (like conexes) are to ensure compliance with the design and aesthetic requirements of the LDC.[49] 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."[50]

Henrys are not merely alleging 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" 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,[51] along with a categorized spreadsheet showing the exact address and details of such similar "violations,"[52] and photos of several of said "violations."[53]

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

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[49] *See, e.g.,* LDC 2-17, providing regulations to ensure a "highly aesthetic setting."
[50] LDC 2-01(b)(2).
[51] App 38.
[52] App 39-55.
[53] App 56-76.

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 mi² (or 0.7%) of the entire city, it represents approximately 115,714 similar "violations" currently happening in OB. Likewise, there is no rational basis to enforce permitting and/or setback rules against Henrys when not enforcing those same paver/parking provisions on 99%, shed/structure provisions on 61%, or fence provisions on 15% of other properties in Henrys' immediate neighborhood. There is also no rational basis for selective enforcement 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.)

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.[54] If *these*

[54] App 11, 13, 14.

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.

II. OB Broke State and Local Law

The Magistrate and circuit court committed harmful errors in issuing orders despite several requisite state and local laws being broken. The orders for fines were requested *and issued* prematurely. Magistrate ordered Henrys apply for permits, but OB's stated reasons for denying such permits are unsupported by law. More pointedly, Henrys' were fined indefinitely for not obtaining permits, yet their PFCs don't even require permits per the LDC and state law. Neither Magistrate nor the circuit court even addressed these legal deficiencies despite Henrys raising such issues in front of both.

Therefore, as these harmful errors adversely affect the substantial rights of the Henrys as it relates to their use of their homestead, this court must not presume correctness of the lower tribunals. Instead, with the lower tribunals here having materially departed from the essential requirements of the law, this court must step in to stop this miscarriage of justice by granting the Petition and issuing subsequent orders setting aside all three Magistrate orders (and the portions of the circuit court order that affirms the Magistrate orders).

A. Order for Fines/Fees was Requested & Issued Prematurely

Although there are Eighth Amendment issues, first we must address the premature assessment of the fines. Any order imposing fines *must* be *subsequent* to, and distinct from, the initial order commanding Henrys to take action.[55] "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."[56] Indeed, 162.09(1) and OB Code of Ordinances [hereinafter,

[55] 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."

[56] *City of Tampa v WA Brown*, at 1188 (Fla. 2DCA 1998); *see also, Hardin v Monroe County,* at 709-710 (Fla. 3DCA 2011), *City of Plantation v Vermut*, at 393-394 (Fla. 4DCA 1991), *Massey v Charlotte County*, at 143-146 (Fla.

"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."[57] Magistrate skipped these procedures, ordering fines/liens within the *same order* as finding violations.

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.[58] Further, Henrys' constitutionally protected property rights "may not be impinged with a showing of less than clear and convincing evidence."[59] 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.

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

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2DCA 2003) and *Jones v Seminole County*, at 96 (Fla. 5DCA 1996) acknowledging two stages: a hearing finding "violation" and a subsequent "hearing to consider imposition of fines."

[57] 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.

[58] *Massey v Charlotte County*, at 145 (Fla. 2DCA 2003).

[59] *Department v Real Property*, at 967-968 (Fla: 1991).

process."[60] So, OB "must provide the property owner with notice and an opportunity to be heard concerning any factual determination necessary to impose a fine or create a lien."[61] 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 present defenses or object to the prematurely issued fines and the hearing was concluded.[62] Thus, Magistrate's orders imposing fines/liens are void.

Henrys *did* raise this issue with Magistrate in their Motion for Relief filed 3/24/23,[63] which he never ruled on. Further, the circuit court failed to address this issue at all, despite Henrys raising it on appeal.[64] These actions demonstrate a clear departure from the essential requirements of the law by Magistrate and the circuit court.

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[60] *Massey v Charlotte County*, at 145 (Fla. 2DCA 2003), citing *City of Tampa v WA Brown*, at 1189 (Fla. 2DCA 1998), and *Jones v Seminole County*, at 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.")
[61] *Massey v Charlotte County*, at 147 (Fla. 2DCA 2003).
[62] App 396-401.
[63] App 107.
[64] App 193-194, 251.

After Henrys initially filed this Petition, based on Magistrate's 2023 orders each including findings of violation *and* imposition of fines, OB held *another* magistrate hearing, again offering *no* evidence on the gravity of the offense. These new magistrate orders imposing fines (rendered 5/30/24) are based on the findings of violation and the daily fine amounts in the 2023 orders. They impose additional fines without any additional findings of fact or consideration of the FS 162.09 *required* factors. But 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 entered under section 162.09 imposing a continuing fine. This order, upon recording in the public records, becomes a lien on the property."[65] Magistrate's 2023 Orders impose fines/liens on Henrys: a one-time fine of $100 and a daily accruing fine. OB may ***not*** continue to seek orders imposing fines for the ***same*** finding of violation (that they can then file as ***multiple*** liens on Henrys' home and use for levying Henrys' property).

The 5/30/24 orders also impose fines of $75 per day for 419 days (3/28/23-5/19/24) by including dates specifically *excluded* for imposition of

[65] *City of Tampa v WA Brown*, at 1188 (Fla. 2DCA 1998); *see also, Hardin v Monroe County,* at 709-710 (Fla. 3DCA 2011), *City of Plantation v Vermut*, at 393-394 (Fla. 4DCA 1991), *Massey v Charlotte County*, at 143-146 (Fla. 2DCA 2003) and *Jones v Seminole County*, at 96 (Fla. 5DCA 1996) acknowledging two stages: a hearing finding "violation" and a subsequent "hearing to consider imposition of fines."

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."[66] 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, at most.

B. OB's Stated Denial of Henrys' Permits is Unsupported by Law

The notices of violation only required Henrys to obtain permits for the PFCs.[67] Indeed, the *only* violation Magistrate found is Henrys did not obtain permits for them.[68] That is it. But, OB made it clear from the beginning they would never issue permits for Henrys' PFCs. What's worse is how many of their stated reasons for doing so are not supported by the law.

In deliberating a takings issue, the US Supreme Court held "If it is law, it will be found in our books; if it is not to be found there, it is not law."[69] Henrys

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[66] App 264. FN2 of the 3/4/24 circuit court order also says "Accrual of the daily fines and the remedial action directed in the Orders of Violation have been stayed pending this appeal."
[67] "The property must be brought into compliance in the following manner: Obtain a building permit for the large metal containers . . ." App 3.
[68] App 85, et al.
[69] *Boyd v US*, 116 US 616 (1886).

raised these issues to the Magistrate before, during and after the hearing, yet he ignored each of them, allowing OB to deny Henrys' PFCs permits based on such lawless reasons, therefore giving Henrys no viable option of keeping their PFCs under his orders. The circuit court likewise ignored these issues, thus departing from the essential requirements of the law, and thus committing harmful errors to Henrys' rights. So, let's look at some of the reasons OB gave for denying Henrys' PFCs permits - reasons that are not based on 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."[70] But there is no authorization in the law for such a requirement. Indeed, a "suitable subbase" is only required for *non* single family homes.[71] 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,"[72] meaning pavers would have to be removed. However, pavers *are* a

[70] App 373.
[71] LDC 3-28(a)(1), which makes no mention of zoning classification.
[72] App 338.

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]."[73] Bruce likewise claimed that pavers can't go to the property line,[74] and they must be at least 7.5' from the property line.[75] Then, Cushing testified pavers had to be 3' from the side property lines, according to LDC 3-25(c).[76] 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 did not change the points of access, both of which meet the 3' requirement. App515, also described later:

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.[77]

[73] App 338.
[74] App 373.
[75] App 27.
[76] App 376-377.
[77] LDC 2-07(6).

Three allow *dwellings* other than single family homes,[78] like Henrys' R4 district which allows duplexes, triplexes, and single family dwellings. The remaining 10 residential zoning districts only allow *single family dwellings*. 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 dwellings.*

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*."[79] 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."[80] Henrys pavers were installed not only to provide adequate off-street parking,[81] 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. App516.

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[78] (R4, R5, R6).
[79] LDC 2-17A.
[80] LDC 2-57(22)(i).
[81] *See* additional parking requirements discussed here.

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."[82] Cushing then testified[83] 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.[84]

Additionally, the CPA (the state law authorizing and controlling municipal LDCs) does *not* allow OB to impose setbacks on Henrys' conexes, which

[82] App 319.
[83] App 342.
[84] LDC 2-17B requires a lot to have a minimum width of 100' to be a duplex, but Henrys' homestead is only 88' wide.

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."[85] 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. . ."[86]

Furthermore, not only do Henrys' have the *inalienable right* to "acquire, possess and protect [their] property,"[87] they also have an *express right to privacy*.[88] It is with this constitutionally protected right in mind that the LDC provisions are supposed to be enforced. "Maximum possible privacy shall be provided for each dwelling unit through the use of structural screening and landscaping and building orientation."[89] While 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*

[85] FS 163.3202(5)(a) & (b)(1).
[86] FS 163.3211.
[87] FL Const Art I Sec 2.
[88] FL Const Art I Sec 23.
[89] LDC 2-57(22)(h).

privacy for each unit."[90] Forcing Henrys' conexes to be moved into the center 30.25% (App519) or even 46% (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. Plus, placing the conexes in that middle area of the property does not "establish an optimum living environment between indoor and *outdoor living*." It also directly impedes Henrys' "on-site *recreation areas and open space*." Such placement would put the conexes in the middle of the soccer and volleyball areas, and greatly reduce visibility for the Henrys to watch their kids playing in their own yard.

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."[91] Regardless, the original LDC was adopted 12/3/91,[92] while the original setback ordinance was adopted in 1978.[93] Either way, neither existed (nor did *any* setbacks) at the time Henrys' 1949 home had its original plat recorded. Thus,

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[90] LDC 2-17A.
[91] LDC 2-17H.
[92] *See*, OB Ordinance 1991-54 and 2019-41.
[93] 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.[94] Moreover, Henrys' conexes near the property line are certainly compatible with the 80 properties (App514) with sheds/structures erected on the property line, and 183 (App514) 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. 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.

FENCE

Bruce testified Henrys' fence would not be permitted as it stands because it

[94] "Zero lot line means a development concept that permits the principal structure to abut one (1) side lot line." LDC 1-22.

does not meet aesthetic requirements.[95] 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. App517.

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.[96] Indeed, 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.

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

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[95] "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.

[96] 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.

elements may not be applied to a single-family or two-family dwelling. . .”[97] So, we must keep in mind this is a matter of subjective aesthetics only, and nothingd 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). App518.

And, OB has knowingly allowed at least 2 other fences (App514) 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,”[98] but also have an *express right to privacy*.[99] 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.[100] Thus, OB is attempting to use the aesthetic lateral post requirement to subvert

[97] FS 163.3202(5)(a).
[98] FL Const Art I Sec 2.
[99] FL Const Art I Sec 23.
[100] LDC 2-57(22)(h); LDC 2-17A.

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.

Henrys were ordered to obtain permits in lieu of removing their privacy fence. Consequently, Magistrate and the circuit court departed from the essential requirements of the law in allowing such portions of the orders to stand.

In the end, OB testified that 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' inflexible conex setback is being applied; and because they don't meet OB's subjective aesthetic requirements. However, as we have seen, denying Henrys' PFCs permits for these reasons are unfounded in, and even contradictory to, the law - namely, the Constitutions, controlling state statutes, and even the LDC. Therefore, when Magistrate issued orders giving Henrys the ultimatum to either follow these unlawful requirements or remove their PFCs completely, he departed from the essential requirements of the law. In failing to address *any* of these legal issues properly raised by Henrys, instead affirming these parts of Magistrate's orders, the circuit court likewise departed from the essential requirements

of the law. As such, these are harmful errors adversely affecting Henrys' substantive rights which only can be fixed by overturning the 3 Magistrate orders.

C. Henry's PFCs Don't Require Permits Per LDC & State Law

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***.[101]

[101] *City of Miami v Fleetwood*, 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 parking, 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.

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"[102] "**relative to structural, mechanical, electrical, plumbing, energy, and gas systems.**"[103] *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 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."[104]

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.[105] 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

[102] FS 553.72(1).
[103] FS 553.73(2).
[104] App 338.
[105] App 357.

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."[106] 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."[107] 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.[108] 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."[109] Thus, as building official Cushing testified that *the FBC does **not regulate** conexes*, OB is statutorily prohibited from regulating them.[110] Consequently, the order purports to penalize Henrys for their "failure" to receive a permit for the conexes which OB illegally required.

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[106] FS 553.79(20)(a).
[107] *See,* FS 553.72(1) and 553.73(1).
[108] Paragraph 2 at App 93.
[109] FS 553.73(4)(b)(3).
[110] 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).

State law also prohibits OB from preventing Henrys' use of their pavers. Aside from providing a stable parking surface, Henrys' pavers also preserve the contour of the land in a water-conservative manner. 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."[111] It is undisputed that Henrys' small beachside home has no irrigation system (needed to sustain grass) and before the pavers, their yard only had sand, sandspurs and weeds, flooding and eroding with every big storm. 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."[112] Thus, OB may not use permitting requirements to force Henrys to remove their pavers.

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."[113] "Construction, start of" is then defined

[111] per FS 166.048 and 720.3075.
[112] FS 166.048.
[113] LDC 1-22.

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 <u>not</u> include . . . the installation of accessory buildings such as <u>garages or sheds</u> 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."),[114] 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, the CPA (which governs all LDCs) declares that “structure”[115] 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

[114] *Ham v Portfolio Recovery* at 946 (Fla. 2020).
[115] Is defined by FS 380.031(19), per FS 163.3164(45).

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.”[116] 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 enforcing the land *development* code.[117] 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.

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[116] FS 163.3164(14) and 380.04; and as seen in these statutory provisions, Development also does *not* include 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.”

[117] 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.”

OB cannot simply ignore the plain language of the law. Magistrate and the circuit court also ignored these legal definitions. However, when courts and magistrates ignore the plain reading of the law in order to approve of punitive action taken against a homeowner, that departs from the essential requirements of the law. And if Magistrate and/or the circuit court ignored these laws because they perceived a conflict with other legal provisions, it's even more essential for ***all doubt to be resolved against the city.***[118]

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

OB testified 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."[119] OB then argued this part of the LDC prohibited Henrys from having their conexes.[120] Magistrate agreed with this argument,[121] and the circuit court failed to address this issue. 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

[118] *City of Miami v Fleetwood*, 261 So. 2d 801 (Fla. 1972).
[119] App 339, discussing LDC 2-50(x)(3).
[120] App 339.
[121] Paragraph 4 of his order at App 93.

actually *require* personal storage structures to be used for outdoor items.[122] In fact, OB has no legal authority allowing them to interpret 2-50(x)(3) in such a manner to *include* Henrys' conexes, but *exclude* all other personal onsite storage structures - especially since the conexes are not considered "structures" per the authorizing statute, as discussed above.

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.[123] As demonstrated throughout this Petition, 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

[122] OB's LDC 2-50(x)(1) and Code of Ordinances 14-94 through 14-96.
[123] Even the US Government has been using conexes for long-term storage since the 1950's. And their long-term sturdiness is the reason many people are now making homes out of these conexes ("container homes").

(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 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***.[124]

III. LDC Portions are Unconstitutional

Relevant LDC portions are unconstitutional - some as a regulatory taking, and others as an excessive fine. Both Magistrate and the circuit court completely ignored the regulatory taking issues. Further, the circuit court dismissed the 8th Amendment violations based on gross misapplication of the law. Thus, as the unconstitutional laws involved here adversely affect the substantial rights of Henrys to use their homestead, this court must not presume correctness of the lower tribunals. Rather, where the lower tribunals here have materially departed from the essential requirements of the law, this court must step in to stop this miscarriage of justice by granting

[124] *City of Miami Beach v Fleetwood Hotel, Inc.*, 261 So. 2d 801 (Fla. 1972).

the Petition and setting aside all three Magistrate orders (and the portions of the circuit court order affirming the Magistrate orders).

A. LDC Portions are a Regulatory Taking

Certainly, "the plain spirit and purpose of the constitutional prohibitions [are] intended to secure the people against unauthorized official action."[125] Hence the Supreme Court held since 1886 "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."[126]

Indeed, "[t]he Constitution extends *special* safeguards to the privacy of the home."[127] 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 old pavers were uncovered and the new pavers installed, the unforgiving sand throughout the front and backyards welcomed only

[125] *Byars v US*, 273 US 28 (1927).
[126] *Boyd v US,* 116 US 616 (1886).
[127] *Dolan v City of Tigard*, 512 US 374 (1994) (cleaned up).

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 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 Supreme Court has been consistent in identifying regulatory takings prohibited by the 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*.[128] 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**."[129]

So, how is OB effectively taking Henrys' property through regulation? By requiring Henrys to:

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[128] *See, Nectow v Cambridge*, 277 US 183, 188 (1928).
[129] *Penn Central v New York City*, 438 US 104, 127 (1978).

- install their fence with certain decorative qualities
- keep their conexes 20' away from all side property lines and 25' from rear property lines, or completely remove their conexes (in much better condition than many of the homes and sheds in this area)
- keep their pavers 3' away from side property lines
- submit the existing use of buildings on the lot, the location and number of required off-street parking and off-street loading spaces, landscaped buffer areas, accessory uses of the property, driveway and access standards, impact fees, utility installation fees, sign regulations, etc.[130]
- a recent survey of the lot *specifically certified to the city* (a cost of $750 or more),[131]
- expensive and time-consuming variance approval regarding the garage requirement,[132]

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[130] LDC 1-14(6)(b). 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. In other words, if you want to setup a swingset, gazebo, or bonfire area, your building permit application must contain all this information (and more). For a family of modest means simply trying to use and preserve their homestead, these requirements to even apply for a permit are unreasonable and overreaching.

[131] LDC 1-14(6)(b).

[132] 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

- a development order,[133]
- engineer/architect final site plan being approved,[134]
- a multitude of unidentified requirements being met (see below)

The impracticality, unreasonableness, and often impossibility of complying with the "submittal requirements" for building permits per LDC 1-14(6)(b) is astounding. 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."***[135] Keeping in mind that this is literally the LDC Section entitled "Submittal Requirements," you can see that numerous unidentified requirements are

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OB would actually and intentionally ignore such requirements when determining whether to process an application for a permit (of any kind).

[133] OB argues per LDC 1-14, prior to Henrys installing their PFCs, "the city shall have issued an approved development order and building permit."

[134] 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.

[135] 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."

placed upon residents. That alone defies all notions of due process.[136] However incredulous this may seem, OB confirmed[137] 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![138]

Let's get a better understanding of the impact of these unnecessary setbacks. OB claims Henrys' home is a duplex,[139] despite it being a single family home. Despite zoning for Henrys' property permitting duplexes *and* single family homes, no testimony was elicited regarding the home's current status. Built in 1949, the home has surely seen many changes throughout the years. OB argues *having been* a duplex, Henrys' homestead must abide by a 30' East frontage, 20' North side, 25' West rear, and 20' South side setback in using their 88' by 123' property.[140] App519.

Thus, enforcing these duplex setbacks against Henrys' *conexes*, etc. reduces their usable area to just 30.25% of their homestead! This is a

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[136] Basic requirements of due process prohibit land use regulations from being unreasonable or impossible to comply with.
[137] Through their Attorney and Planning Department Supervisor.
[138] App 357, line 11-25.
[139] OB Answer Brief, App 207.
[140] As seen in OB's testimony on App 340, 342, 343; LDC 2-17B. It's important to note that Henrys' 88' wide property doesn't meet the minimum 100' width to qualify as a duplex per LDC 2-17B.

significant impact. The LDC even imposes upon a single family home setbacks of 25' front, 25' rear, and 8'/20' side (one side may be 8' as long as the total setback for both sides is 20'). App520.

Thus, even applying the single family setbacks on Henrys' lot reduces their usable area to just 46% of their entire homestead! This, too, is a significant burden - especially when 61% of neighboring homes (App514) are not held to these setbacks, etc.

The restrictions on Henrys' *pavers* are likewise unduly restrictive. LDC 2-50(x)(4)(d) states you can't park on the grass, but must park on concrete, asphalt, or pavers.[141] Indeed, these parking areas must have a minimum width of 9'[142] and depth of 20'.[143] But Henrys' two original 1949 driveways are only 8' by 20'. Thus, Henrys' home had no parking spaces large enough to legally use. Yet, Henrys have owned 4 vehicles at a time. Thus, in order to lawfully park any of these 4 vehicles on their property, they must expand the paved parking area. 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."[144]

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[141] *Also* LDC 3-24(c)(4).
[142] LDC 3-28(a)(4); or 12' minimum width per LDC 3-25(c)(5) for duplexes, as OB claims Henrys' home is.
[143] LDC 3-28(a)(5).
[144] LDC 2-50(x)(4)(c).

As the red area indicates (App515), this severely limits where pavers may be installed, and thus, vehicles parked.

Additionally, Bruce testified that OB would not issue a permit for Henrys' *pavers* because they went to the property line,[145] stating many times earlier than a 7.5' setback applied.[146] Cushing testified that Henrys pavers must be 3' from the side property lines.[147] The blue lines on the diagram (App515) show how a 3' setback makes it impossible to physically park the Henrys' 4 vehicles, let alone in the minimum required stall widths (shown in yellow and orange, App515). Thus, imposing <u>any</u> setbacks for Henrys' pavers unreasonably restricts the Henrys' customary use for their homestead.

Logically, we must first determine if these land use restrictions involve a substantial government purpose. Henrys have repeatedly raised this, pointing out OB does *not* have a "legitimate state interest" or "substantial

[145] App 373.
[146] She stated this on the 9/2/22 phone call, and at App 27, etc.
[147] App 376-377.

government purpose"[148] in *any* of these land use regulations.[149] OB has never denied this, and never offered *one* substantial government purpose for even *one* of these land use restrictions.[150] Indeed, even Magistrate simply stated Henrys' argument is "without merit" - *without explaining how this binding case precedent is not applicable to OB.*[151]

But, for the sake of argument, even *if* OB had substantial government purposes for each of these land use restrictions, 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*

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[148] 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, App 275, 277, 325, 386, 387.

[149] Including the confusing and contradictory relevant setback requirements, the aesthetic requirements, the yet to be identified "additional" requirements by OB (*see* App 30; App 372-373), 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.

[150] OB implies "implementing the City's comprehensive plan" is a "legitimate public purpose," citing to *Kuvin* (OB Answer Brief, App 222); 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. Moreover, OB offers *no* legitimate public purpose for *any* of the actions in question.

[151] The court's 3/4/24 order ignores this issue completely.

they are. With this case precedent being around for decades, and these precise issues being raised by Henrys for more than 17 months, it would be a little "late in the game" for OB to start trying to fabricate such necessity now.

Further, per the CPA (the *controlling* statute for LDCs), 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...[152]

Certainly, prohibiting the functional use of 69.75% (or even 54%)[153] of Henrys' property is "unduly restrictive." The same is true for requiring Henrys' fence to have certain decorative qualities, effectively prohibiting the paring of their 4 vehicles, and the 6 unreasonable requirements imposed just to apply for a permit for customary use of their homestead.[154]

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

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[152] FS 163.3161.
[153] Where only 30.25% remains usable with duplex setbacks applied (App519), and only 46% remains usable with single family setbacks applied (App520).
[154] The last 6 of the requirements listed earlier herein.

your rights. The Supreme Court kept this in mind in 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.[155] Even more so, the 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."

Moreover, land use regulations effect a taking when they "preclude[] all economically reasonable use of the property."[156] Completely prohibiting Henrys' conexes, or restricting their (and possible future items') placement to only 30.25% (App519) or 46% (App520) of the Henrys' modest

[155] *See, e.g., Dolan v City of Tigard*, 512 US 374 (1994), supra.
[156] *Key Haven v Board of Trustees,* at 157 (Fla.1983), *superseded by statute on other grounds as noted in Bowen v Florida DER,* 448 So.2d 566 (Fla. 2DCA 1984); *see also, Nollan v California*, 483 US 825 (1987), citing *Agins v Tiburon*, 447 US 255, 260 (1980).

homestead undoubtedly denies them all economically reasonable use of their land! The same is true for setbacks combined with other LDC parking provisions (App515) that prohibit the Henrys from parking their 4 vehicles on their own ¼ acre (10,868 sq.ft.) sized property! This is also true for the 6 unreasonable, onerous, and expensive requirements[157] that make it virtually impossible for a family with modest means just to apply for a permit for *any* customary use of their land.

For all of the aforementioned reasons, all 9 of these requirements must be stricken as unconstitutional takings.

B. Henrys' Fines/Fees Violate 8th Amendment

The orders of violation, which impose the accrual of daily fines, are excessive in violation of the 8th Amendment. The circuit court held Henrys did not raise this issue with Magistrate, thus "appellate review of this constitutional claim has been waived."[158] However, that holding departs from the essential requirements of the law in two respects. First, the order for fines was prematurely issued, and issued without notice and opportunity to be heard as to the fines. Second, the circuit court cites to *Wilson* in its

[157] The last 6 of the requirements listed earlier herein.
[158] App 260.

8th Amendment analysis, but fails to acknowledge the important point made in *Wilson* in that

> We do not mean to imply that the Wilsons could not have raised their facial challenges in an appeal to the circuit court of the order imposing fines. Section 162.11, Florida Statutes, provides for an appeal of CEB final orders, which has been held to be the proper forum to address constitutional claims. *See Holiday Isle Resort & Marina Associates v Monroe County,* 582 So.2d 721, 721 (Fla. 3d DCA 1991) (holding that appeal under section 162.11 was proper forum to raise both facial and as applied constitutional challenges to code enforcement procedure). Accordingly, the Wilsons could have raised their constitutional challenges on appeal to the circuit court.[159]

Thus, the circuit court committed harmful error by holding Henrys waived their 8th Amendment claim.[160] However, this court need not remand as to this issue because it is in "a good position to make a determination" on the

[159] *Wilson v County of Orange*, at 631-632 (Fla. 5DCA 2004); *Wilson* at 633, citing *Key Haven v Board of Trustees,* at 157 (Fla.1983), *superseded by statute on other grounds as noted in Bowen v Florida DER,* 448 So.2d 566 (Fla. 2DCA 1984); *see also, Kirby v City of Archer*, 790 So. 2d 1214 (Fla. 1DCA 2001); *DJB Rentals v City of Largo*, at 413-414 (2023).

[160] The circuit court also erred in relying heavily on the **unpublished** *Moustakis* 11th Circuit case which bases its analysis on an erroneous interpretation of the *Riopelle* Fla. 1DCA case.

merits of this issue.[161] Inasmuch, “the courts of appeals, reviewing the proportionality determination de novo, must compare the amount of the [fine] to the gravity of the defendant's offense. If the amount of the [fine] is grossly disproportional to the gravity of the defendant's offense, it is unconstitutional.”[162]

First, “[r]eviewing courts ... should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes."[163] Note it doesn’t say “limits, *if any*” or “limits, *or lack thereof*.” And, while deference should be shown for legislative decisions on limits for fines, there are *no* limits set for these fines in FS 162.09. Additionally, while *Jones* further recognizes that “judgments about the appropriate punishment for an offense belong in the first instance to the legislature,”[164] it also declared that “[h]aving said all that, it is also

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[161] *State v Jones*, FN2 (Fla. 4DCA 2015) “We need not remand to the county court to consider these factors since this court is in as good a position to make a determination, and regardless, the result would be the same. *See, e.g., Theophile v State,* at 578 (Fla. 4DCA 2011) (recognizing an appellate court is in an "equal position with the trial court" where a de novo standard of review applies and the issue is purely a question of law).” Moreover, despite the circuit court’s holding on waiver, it continued to analyze the issue, albeit on additional erroneous legal standards.

[162] *US v Bajakajian*, 524 US 321, 327 (1998); *see also, State v Jones*, at 1088 (Fla. 4DCA 2015).

[163] *State v Jones*, at 1090 (Fla. 4DCA 2015), *citing* *Solem v Helm,* 463 US 277, 290 (1983).”

[164] *Jones* at 1088, *citing Bajakajian,* 524 US at 336.

true that when the legislature oversteps its authority, 'the Constitution requires judicial engagement, not judicial abdication.'"[165]

Given that, we observe "the courts will not declare a statutory fine to be excessive in violation of the Constitution unless it is plainly and undoubtedly in excess of any **reasonable requirements for redressing the wrong**."[166] We, therefore, must look at the "wrong," or "harm caused by the [Henrys]."[167] As aforementioned, OB never alleged Henrys PFCs harm *anyone*. They do not encroach on neighboring properties, do not increase water runoff, have withstood 2 massive hurricanes and several other large storms (with no damage), are in good repair, and actually provide a whole host of benefits for the neighborhood. 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.[168] Indeed, hundreds of Henrys'

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[165] *Jones* at 1088, *citing Florida v Dep't.,* 648 F.3d at 1284 (11th Cir.2011).
[166] *Jones* at 1088, *citing Amos v Gunn,* 94 So. 615, 641 (Fla:1922).
[167] *Jones* at 1089, *citing Gordon v State,* 139 So.3d 958, 960 (Fla. 2DCA 2014).
[168] *See, Bajakajian* at 339 and *Austin v US,* 509 US 602 (1993), respectively.

neighbors, in just a matter of days, signed a petition declaring that "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."[169]

Also, civil fines cannot be so excessive as to be "cruel,"[170] or "so great . . . as to shock the conscience of reasonable men."[171] While the wrong done by the Henrys was merely installing their PFCs without a permit, the fine is set to $75 per day for all eternity. This is the house the Henrys bought for their "forever home," the home they will eventually retire in, and where they will spend the rest of their lives. Being only in their 40's, Henrys will likely live another 40 years, and 40 years of fines would be $1,095,000 ($75 x 365 x 40)![172] (Indeed, Magistrate's 5/30/24 orders declare Henrys already owe $31,425 as of 5/19/24.)[173] Having been a public defender in two different states, I've never heard of *any* fine coming anywhere close to

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[169] *See* signature sheets App3: 54-63, admitted by Magistrate May 2024.
[170] *Jones* at 1088, *citing State v Champe,* 373 So.2d 874, 879 (Fla.1978).
[171] *Jones* at 1089, *citing Amos* at 641.
[172] Of course, the fines do not cease simply because the Henrys have passed away. *See, DJB Rentals v City of Largo*, at 413-414 (2023), where the 2DCA recently held that property owners can challenge the ultimate size of the fine (8th Amendment challenge) or the related enforcement procedures as long as the owner raises such claims in an appeal within 30 days of the original code enforcement order, per Chapter 162.
[173] App3:4-19.

that![174] The totality of the Henrys' assets have never, nor will ever, equal even half of that amount. Such a fine certainly shocks the conscience of reasonable men. But since these fines can - in as soon as 3 months from the circuit court order - be imposed as a lien on their homestead (encumbering their ability to mortgage the property, etc.) and as levies on all of their personal property,[175] and even with all of their property liened and levied, it would never satisfy the ongoing fines, this is certainly a cruel punishment.

Further, *Jones* and *Amos* explain that fines are unconstitutionally excessive when they are patently and unreasonably harsh.[176] Historically, "the Clause was taken verbatim from the English Bill of Rights of 1689," which "required only that [fines] should be proportioned to the offense and that they should not deprive a wrongdoer of his livelihood."[177] A fine large enough to wipe out the Henrys' entire net worth certainly deprives them of their livelihood.

Moreover, fines imposed through real estate liens and levies on personal property are akin to *in personam* forfeitures.[178] "Such forfeitures have

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[174] Minnesota and Michigan.
[175] 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.
[176] *Jones* at 1089, *citing Amos* at 641.
[177] *Bajakajian* at 335, citation omitted.
[178] although the seized property usually has no relation to the code offense.

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."[179] "It was only in 1970 that Congress resurrected the English common law of punitive forfeiture to combat organized crime and major drug trafficking."[180] 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."[181]

So, while the lack of actual harm, the harshness of the nature of the liens and levies, and the cruelty of these fines demonstrate the gross disproportionality of the fine to the Henrys' offense, we must consider the *gravity* of their offense.[182] To do this, we must look to other crimes and their legislatively prescribed penalties. Henrys' offense is merely ***malum prohibitum***. But what of the ***malum in se*** offenses? The **highest** fine for

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[179] *Bajakajian* at 332, citation omitted.
[180] *Id* at FN7.
[181] *Department v Real Property*, at 961 (Fla.1991).
[182] In addition to the requirement put forth in *Bajakajian*, FS 162.09(2)(b) requires this consideration, as well. However, as discussed earlier, Magistrate did not do this.

the **worst** 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.[183] Indeed, fines in general may not exceed:[184]

- $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, will total more than 10 times the amount of the **maximum** fine for those heinous offenses. Therefore, Henrys' fine is undoubtedly grossly disproportionate to the gravity of their offense, and, thus, unconstitutionally excessive.

IV. Henrys Cannot be Forced into LDC Noncompliance

Magistrate and the circuit court committed harmful errors, including issuing

[183] FS 775.083(1), FS 782.04(1)(a) and (b), FS 794.011(3), FS 806.01(1).
[184] FS 775.083(1); *see also* FS 775.02, fines for common law offenses shall not exceed $500.

orders that force Henrys into LDC noncompliance. Neither OB nor Magistrate can force Henrys to do something that would put them into noncompliance with the LDC. However, despite these issues being raised with both Magistrate and the circuit court, both completely ignored this essential aspect of due process. Thus, as these harmful errors adversely affect the substantial rights of the Henrys as it relates to their use of their homestead, this court must not presume correctness of the lower tribunals. Rather, the lower tribunals here have materially departed from the essential requirements of the law, so this court must step in to stop this miscarriage of justice by granting the Petition and issuing subsequent orders setting aside all three Magistrate orders (and the portions of the circuit court order that affirms the Magistrate orders).

First, Magistrate holds no subject matter jurisdiction (SMJ) to order removal of Henrys' pavers, as they are legally required to remain on Henrys' property. 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"[185] such as asphalt, brick, or pavers.[186] Further, these paved parking spaces are *required* to be a minimum width of 9' for a single family home like Henrys'.[187] 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. And as described earlier and shown in the diagram (App515), the LDC requires those driveway extensions to be installed toward the side property lines, exactly as Henrys did here. 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. App512.

In fact, without these paved "off-street parking requirements," Henrys' home would be a "noncomplying structure or site".[188] As Henrys own four vehicles, with one parked on the south driveway, one parked on the north

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[185] 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.
[186] *See* aforementioned LDC 2-50(x)(4) and LDC 1-22.
[187] 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).
[188] per LDC 1-22.

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." Magistrate lacks authority to force Henrys into such noncompliance.

Magistrate also holds no SMJ to order removal of Henrys' conexes, as they are legally required to remain on Henrys' property. LDC 2-50(o) *requires* all residential properties, like Henrys' homestead, to have a garage. Magistrate found Henrys' conexes constitute a garage, as defined by LDC 2-50(bb)(3)(a), and "must meet the regulations pertaining to a garage." While it is true that single family residences will not be required to *add* a garage, as Cushing testified,[189] once they have a garage, "*such garage* or carport *shall not be removed* or altered in any way."[190] Further, it is undisputed that Henrys' conexes store personal property that is normally stored in a garage,[191] which Henrys are required to do for such personal property.[192] Accordingly, regardless of when or how the garage was built or

[189] App 359, 361; LDC 2-59, 2-60, 2-42(d).
[190] LDC 2-42(d)(2).
[191] App 314 (Bruce), 325 (Henrys), 336 (Emery, OB Attorney), etc.; App 3 (Notice of Violation), 94 (Magistrate Order).
[192] *See,* LDC 1-22 *Storage Area, Enclosed*; CO 14-94 through 14-96; and LDC 2-50(x)(1).

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."[193] However, Henrys' modest 1,350sq.ft. home has no additional garage or carport. Thus, the LDC *requires* the conexes to stay on Henrys' homestead.

The LDC also requires Henrys to maintain a fence around their yard. In discussing private residential recreation areas, the LDC states "[a]ny structures, playground, and active play areas and lights shall be located and screened in a manner which will minimize noise and glare impacts on adjoining properties to the maximum extent feasible."[194] Additionally, in covering outdoor recreation areas, LDC 2-57(66)(a)(2) states they "shall be so located, walled, fenced or screened as to minimize noise and glare impacts to neighboring residential uses."[195] The Henry kids' soccer and volleyball areas and general play areas are located in their backyard, as is typical for most homes. Their 6' tall privacy fence serves not only to keep soccer balls out of neighbors' yards, but also to minimize the sound of their children playing in their backyard. So, with the LDC requirements for Henrys fence to be in place, they cannot be ordered to remove it! App515.

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[193] LDC 2-50(o).
[194] LDC 2-57(57)(b).
[195] Similar language appears in LDC 2-57(66)(b)(2).

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 "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, nothing in the LDC, nor under the notions of due process, allows Magistrate to order Henrys to remove their pavers, conexes or privacy fence, thus *increasing* their home's nonconformity. Magistrate's and the circuit court's ignoring of these LDC provisions and the resulting nonconformity from Magistrate's orders constitute a harmful error departing from the essential requirements of the law that resulted in adverse affects to Henrys' substantial rights to use and protect their property.[196] Thus, Magistrate's orders must be overturned.

Conclusion

"A fundamental task of the judiciary is to safeguard the constitutional rights of the citizenry."[197] Here, both lower tribunals committed harmful errors by

[196] The Florida Constitution Art 1 Sec 2 guarantees that each of us have "inalienable rights . . . to enjoy and defend life and liberty . . . and to acquire, possess and protect property."
[197] *State of Florida v Sarmiento*, 397 So.2d 643 (Fla. 1981).

materially departing from the essential requirements of the law. Moreover, the 9 listed LDC 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 the Henrys' substantive rights.

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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 December 29, 2024.

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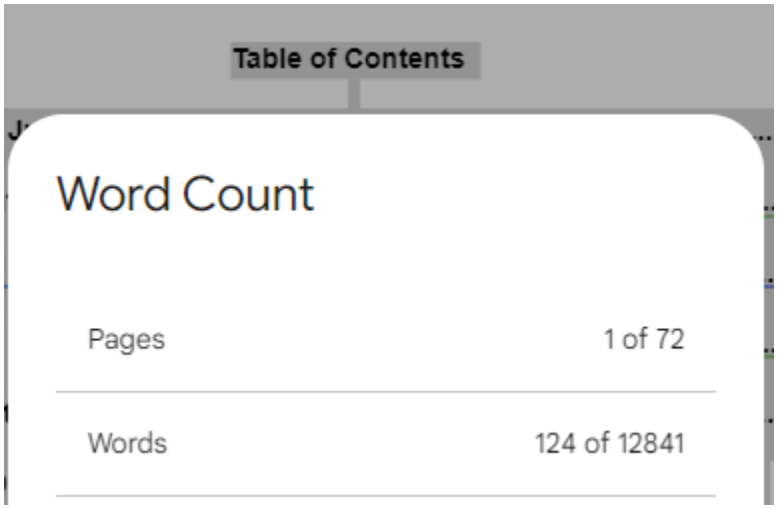

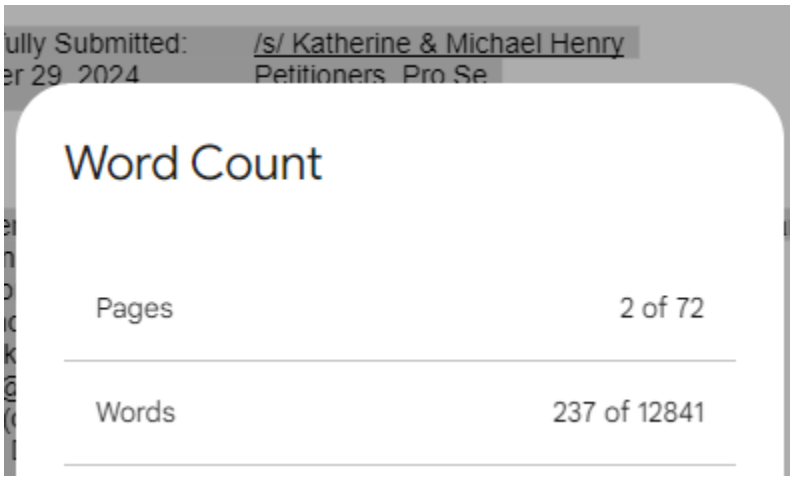

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