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

CASE NO.: 2023 30711 CICI
LOWER CASE NO: 22-00112237
22-00112246
22-00112247
DIVISION: 32-Mary G. Jolley

MICHAEL HENRY AND KATHERINE HENRY,

Appellants,

v.

CITY OF ORMOND BEACH, FLORIDA

Appellee.
_____/

ANSWER BRIEF OF APPELLEE

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REFERENCES TO THE RECORD

Reference to the Record on Appeal will be referred to as: "R-__" followed by the appropriate page number. Reference to the Continuation of the Record on Appeal will be referred to as T-__" followed by the appropriate page number of the transcript of the proceedings before the Special Magistrate on February 27, 2023. Reference to the items submitted by the Appellee to be included in the Record on Appeal will be referred to as: “Supp. R. Exhibit __”.

STATEMENT OF THE CASE AND FACTS

This is appeal from the entry of three (3) Orders, entered on March 1, 2023 by the Special Magistrate for the Ormond Beach Code Enforcement Board, finding violations against the Appellants in Case Nos: 22-112246 (R-92), 22-112237 (R-85) and 22-112247 (R-100), which determined the Appellants were in violation of the City of Ormond Beach Land Development Code (hereinafter referred to as LDC) for having constructed, erected and maintained on their residence a fence, two (2) paver driveways and accessory structures consisting of two (2) 8' x 20' (160 sq. ft.) industrial steel shipping containers without a having obtained required permits and inspections thereof.

Under Chapter 163, Florida Statutes, local governments are required to adopt a comprehensive land use plan and are required to adopt, amend and enforce land development regulations that are consistent with its comprehensive plan. Under this statutory mandate, the City of Ormond Beach, (City) adopted the Ormond Beach Land Development Code (LDC) which implements the City's comprehensive plan.

The Appellants are the owners of a residential duplex located at 33 Cypress Circle, Ormond Beach, Florida. In response to complaints from neighbors, the City of Ormond Beach inspected the Appellants' premises

on September 2, 2022. As a result of the inspection, the City discovered that the Appellants were in the process of constructing a perimeter fence; two (2) paver driveways and had two (2) 8' x 20' (160 sq. ft.) industrial steel shipping containers located in their yard which the Appellants were using for storage.

Chapter 2, Article III, Section 2-50(n)(1)(a) of the Ormond Beach Land Development Code provides:

> *All fences shall require a permit prior to installation or erection. It shall be unlawful for any person to erect, alter or locate a fence within the city without first having made application for and having been issued a permit.*

Chapter 1, Article II, Section 1-14(6)(a)(1) of the Ormond Beach Land Development Code provides:

> *No land shall be cleared, excavated, or filled and no structure shall be erected, repaired, moved, added to, structurally altered or demolished without the payment of fees and a building permit therefor issued by the chief building official.*

Chapter 2, Article III, Section 2-50(a)(9) of the Ormond Beach Land Development Code provides:

> *All accessory structures require the issuance of building permits by the city building and code division, as specified in section 1-14(6).*

The Appellants did not apply for building permits with the City of Ormond Beach to construct the fence, paver driveways or to use the industrial steel shipping containers as accessory structures as required under the City's LDC. On September 2, 2022 the City posted, on the property of the Appellants, a Stop Work Notice instructing the Appellants to immediately cease constructing the fence, paver driveways and use of the industrial steel shipping containers without obtaining a building permit from the City of Ormond Beach (Supp. R. Exhibit 2, Case No: 22-00112237). On October 18, 2022, the City issued the Appellants three Notices of Violation for constructing the fence (Supp. R. Exhibit 2, Case No: 22-00112237), paver driveways (Supp. R. Exhibit 2, Case No: 22-00112247) and use of the two industrial steel shipping containers (Supp. R. Exhibit 2, Case No: 22-00112246) without a required permit in violation of the City of Ormond Beach Land Development Code. The Appellants received the Notices of Violation issued by the City by certified mail on October 20, 2022 (Supp. R. Exhibit 1). The Notices of Violation specifically informed the Appellants that their property must be brought into compliance by obtaining from the City after the fact building permits or removing the structures from their property. Notwithstanding the issuance of the Stop Work Order and Notices of Violation, Appellants continued

construction of the fence, paver driveways and use of the steel shipping containers for storage without seeking permits from the City of Ormond Beach.

On January 31, 2023, the City issued the Appellants Notices of Hearing to be conducted on February 27, 2023 before the Special Magistrate for the violations of the City of Ormond Beach Land Development Code. The Notices of Hearing issued by the City were received by the Appellants by certified mail on February 9, 2023 (Supp. R. Exhibit 1).

At the hearing on February 27, 2023 before the Honorable Pope Hamrick, acting as Special Magistrate for the Ormond Beach Code Enforcement Board, the Appellants appeared, submitted documents, testified before the Special Magistrate and cross examined witnesses. The City presented witness' testimony from the City Neighborhood Improvement Officer, Janet Bruce, Senior Planner for Ormond Beach, Sarah Cushing, and an adjoining property owner, Ms. Joan Conway. The City presented documentary evidence of the issuance of the Notices of Violation, Notices of Hearing, and posted Stop Work Order issued to the Appellants. The City also presented photographic evidence depicting the construction of the fence and paver driveways by the Appellants and their

continued use of the two industrial steel shipping containers on the property.

Following the hearing the Special Magistrate for the Ormond Beach Code Enforcement Board, entered three (3) Orders on March 1, 2023 in Case Nos: 22-112246, 22-112237 and 22-112247, finding violations by the Appellants of the Ormond Beach Land Development Code for having constructed, erected and maintained on their residence the fence, the paver driveways and the accessory structures consisting of the two (2) 8’ x 20’ (160 sq. ft.) industrial steel shipping containers without a having obtained required permits from the City of Ormond Beach (R-92-106).

The Orders contain monetary fines against the Appellants of $100.00, awarded costs to the City in the amount of $70.68 ($23.56 for each case), and provide that should the Appellants not bring the property into compliance by March 27, 2023, then a fine of $25 a day for each violation shall accrue beginning on March 28, 2023. The Orders further authorize the City to take steps necessary to bring the violations into compliance; specifically, to remove and dispose of the unpermitted fence, paver driveways and steel shipping containers pursuant to Chapter 162.08(5), Florida Statutes.

APPLICABLE LAW AND STANDARD OF REVIEW:

Florida's Local Government Code Enforcement Boards Act was created to promote the health and safety of state citizens by creating administrative boards to impose administrative fines and other noncriminal penalties to provide an effective and inexpensive method of enforcing county and municipal codes and ordinances where a pending or repeated violation persists. Fla. Stat. § 162.02. Under the Act the special magistrate has the same status as an enforcement board. Id. § 162.03(2). 162.07(3). The Act allows code enforcement boards to "[i]ssue orders having the force of law to command whatever steps are necessary to bring a violation into code compliance," Fla. Stat. § 162.08(5), as well as "the issuance of a citation, a summons, or a notice to appear in county court or arrest for violation of municipal ordinances," id. § 162.22, *Lindbloom v. Manatee Cnty.,* 808 Fed. Appx. 745, 752 (11th Cir. 2020). At the conclusion of the hearing, the special magistrate shall issue findings of fact and conclusions of law based on the evidence of record, and shall issue an order affording the proper relief consistent with the powers granted herein. The order may include a notice that it must be complied with by a specified date and that a fine may be imposed for noncompliance if the order is not complied with by the prescribed date. § 2-258 LDC.

Under § 162.11, an appeal of the code enforcement board's order to the circuit court "shall not be a hearing de novo but shall be limited to appellate review of the record created before the enforcement board." The circuit court is not permitted to go further and reweigh the evidence presented to the administrative agency. See *Lee County v. Sunbelt Equities, II, Ltd. P'ship,* 619 So.2d 996, 1003 (Fla. 2d DCA 1993); *Davis Islands Civic Ass'n v. City of Tampa*, 05-05809, 2006 WL 408058, at *2 (Fla. Cir. Ct. Jan. 25, 2006). *Sarasota Cnty. v. Bow Point on Gulf Condo. Developers, LLC*, 974 So. 2d 431, 433 (Fla. 2d DCA 2007).

I. The record shows that the Appellants received due process.

The basic due process guarantee of the Florida Constitution provides that "[n]o person shall be deprived of life, liberty or property without due process of law." Art. I, § 9, Fla. Const. The Fifth Amendment to the United States Constitution guarantees the same. As the Supreme Court explained in *Department of Law Enforcement v. Real Property*, 588 So.2d 957, 960 (Fla.1991), "[p]rocedural due process serves as a vehicle to ensure fair treatment through the proper administration of justice where substantive rights are at issue." Procedural due process requires both fair notice and a real opportunity to be heard. See id. As the United States Supreme Court explained, the notice must be "reasonably calculated, under all the

circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections". *Keys Citizens for Responsible Gov't, Inc. v. Florida Keys Aqueduct Auth*., 795 So. 2d 940, 948 (Fla. 2001).

Here, the record reflects that the Appellants received actual notice of the hearing on February 7, 2023, appeared at the hearing, submitted documents, presented their objections, testified before the Special Magistrate and cross examined witnesses (T-1-138). The Appellants, therefore, received fair notice and a real opportunity to be heard.

II. The Special Master correctly applied the City's Land Development Code.

The purpose of the City's Land Development Code is to provide land development regulations that implement the City's comprehensive plan. The comprehensive plan and the Land Development Code are tools that the city uses to protect and maintain the quality of life for the citizenry of the City. A local comprehensive land use plan is a statutorily mandated legislative plan to control and direct the use and development of property within a county or municipality. §163.3167(1), Fla. Stat. (2005); *Machado v. Musgrove*, 519 So.2d 629, 631–32 (Fla. 3d DCA 1987). The comprehensive plan is similar to a constitution for all future development within the governmental boundary. *Machado*, 519 So.2d at 632. Zoning,

or, a local government's Land Development Code, is the means by which the Plan is implemented. See *City of Jacksonville v. Grubbs*, 461 So.2d 160 (Fla. 1st DCA 1984); *Citrus Cnty. v. Halls River Dev*., Inc., 8 So. 3d 413, 420–21 (Fla. 5th DCA 2009). Chapter 163 also requires that comprehensive plans be implemented by the "adoption and enforcement" of local regulations or land development codes. §163.3201, Fla. Stat. (2007) ("It is the intent of this act that the adoption and enforcement by a governing body of regulations for the development of land or the adoption and enforcement by a governing body of a land development code for an area shall be based on, be related to, and be a means of implementation for an adopted comprehensive plan as required by this act.") (emphasis added); § 163.3202(1), Fla. Stat. (2007) ("[E]ach municipality... shall adopt or amend and enforce land development regulations that are consistent with and implement their adopted comprehensive plan.") (emphasis added); see also *Board of County Com'rs of Brevard County v. Snyder*, 627 So.2d 469, 473 (Fla.1993) ("The local plan must be implemented through the adoption of land development regulations that are consistent with the plan.") (citing § 163.3202, Fla. Stat. (1991)). § 163.3202, Florida Statutes, further provides:

> Local land development regulations shall contain specific and detailed provisions necessary or desirable to implement the

> adopted comprehensive plan and shall as a minimum ... [r]egulate the use of land and water for those land use categories included in the land use element....

§ 163.3202(2)(b), Fla. Stat. (2007)

Hence, the Land Development Code was enacted to provide specific legislative standards that must be applied to the general provisions of the Plan and enforced to regulate the various land use categories in the Plan. *Keene v. Zoning Bd. of Adjustment*, 22 So. 3d 665, 668 (Fla. 5th DCA 2009).

The Special Master correctly applied the LDC in determining that the Appellants violated the LDC for having constructed, erected and maintained on their residence the fence, the paver driveways and the accessory structures consisting of the two (2) 8’ x 20’ (160 sq. ft.) industrial steel shipping containers without a having obtained required permits from the City.

Section 2-50(n)(1)(a) provides that all fences shall require a permit prior to installation or erection. It shall be unlawful for any person to erect, alter or locate a fence within the city without first having made application for and having been issued a permit. The undisputed testimonial and photographic evidence clearly show the construction of a fence by the Appellants on their property. (Supp. R. Exhibit 2, Case No: 22-00112237).

Section 1-14(6)(a)(1), of the Ormond Beach Land Development Code, provides that no land shall be cleared, excavated, or filled and no structure shall be erected, repaired, moved, added to, structurally altered or demolished without the payment of fees and a building permit therefor issued by the chief building official. The testimonial and photographic evidence clearly show the Appellants' construction of the paver driveways on their property. (Supp. R. Exhibit 2, Case No: 22-00112247).

Section 2-50(a)(9) requires all accessory structures to obtain a building permit and the structure must meet the applicable Land Development Code and Florida Building Code requirements.

Accessory structures are defined under Section 1-22 of the LDC as any use or detached structure customarily incidental and subordinate to the principal use or structure and located on the same lot containing such principal use or structure. Accessory uses or structures contribute to the comfort, convenience or necessity of the principal use or structure. The term "accessory use and structure" includes, but is not limited to, detached patios, swimming pools, tennis courts, barbecue pits, fireplaces, decorative or ornamental structures, air conditioner compressors, fuel storage tanks, utility buildings, fences, walls and the like. Accessory uses or structures are not allowed except in conjunction with an existing principal use.

The testimonial evidence clearly show that the industrial shipping containers the Appellants placed upon their property are being used by the Appellants for storage incidental to their residence. (Supp. R. Exhibit 2, Case No: 22-00112246.

Section 2-50(dd)(3)(a) provides that, “any utility structure/shed over one hundred fifty (150) square feet shall be considered a garage and must meet the principal setbacks for the zoning district in which the property is located.” Appellant, Katherine Henry, testified that the industrial shipping containers are sized 8’ x 20’ each (160 sq. ft.) (T-70); therefore, the accessory structures are considered garages under the Code.

As accessory structures under the LDC the Appellants were required to obtain a building permit and the structure must meet the applicable Land Development Code and Florida Building Code requirements.

III. The Special Master’s findings are supported by competent and substantial evidence.

“Competent substantial evidence is evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred .... [S]uch relevant evidence as a reasonable mind would accept as adequate to support a conclusion.” *Sch. Dist. of Indian River Cnty. v. Fla. Pub. Employees Relations Com'n*, 64 So. 3d 723, 727 (Fla. 4th DCA

2011) (quoting *J.S. v. Fla. Dep't of Children & Families*, 18 So. 3d 1170, 1175 (Fla. 1st DCA 2009)) (internal quotation marks omitted). The "competent substantial evidence" standard of review applied to this first-tier review "is tantamount to legally sufficient evidence." *Fla. Power & Light v. City of Dania*, 761 So.2d 1089, 1092 (Fla. 2000); *Town of Manalapan v. Gyongyosi*, 828 So. 2d 1029, 1032 (Fla. 4th DCA 2002).

The undisputed testimonial and photographic evidence submitted at the hearing show that, without seeking any permit from the City, Appellants constructed a perimeter fence; two (2) paver driveways and have two (2) 8' x 20' (160 sq. ft.) industrial steel shipping containers located in their yard which the Appellants use for storage.

IV. Enforcement of its Land Development Code is a valid exercise of the City's police powers.

The judicial lens through which this Court must examine the City's exercise of its police power is governed by well-established law, beginning with the premise that rational basis scrutiny "is the most relaxed and tolerant form of judicial scrutiny," *City of Dallas v. Stanglin*, 490 U.S. 19, 26 (1989) (emphasis added), and municipal zoning and land development ordinances, which are legislative enactments, are presumed to be valid and constitutional. See *Orange County v. Costco Wholesale Corp*., 823 So.2d 732, 737 (Fla.2002) (specifying that ordinances reflecting legislative

action are entitled to a presumption of validity); *State v. Hanna*, 901 So.2d 201, 204 (Fla. 5th DCA 2005) (holding that statutes and ordinances are presumed to be constitutional and all reasonable doubts must be resolved in favor of constitutionality).

Statutes and ordinances in Florida not only enjoy a presumption in favor of constitutionality, the Florida Supreme Court and this Court have repeatedly held that zoning and land use restrictions must be upheld unless they bear no substantial relation to legitimate societal policies or it can be clearly shown that the regulations are a mere arbitrary exercise of the municipality's police power. See *Dep't of Cmty. Affairs v. Moorman*, 664 So.2d 930, 933 (Fla.1995) ("[W]e have repeatedly held that zoning restrictions must be upheld unless they bear no substantial relationship to legitimate societal policies."); *Harrell's Candy Kitchen, Inc. v. Sarasota–Manatee Airport Auth*., 111 So.2d 439, 443 (Fla.1959) (holding that zoning regulations are presumptively valid, "and the burden is upon him who attacks such regulation to carry the extraordinary burden of both alleging and proving that it is unreasonable and bears no substantial relation to public health, safety, morals or general welfare"); *City of Coral Gables v. Wood*, 305 So.2d 261, 263 (Fla. 3d DCA 1974) ("A zoning ordinance will be upheld unless it is clearly shown that it has no foundation in reason and

is a mere arbitrary exercise of power without reference to public health, morals, safety or welfare.").

Zoning and land development regulations must be upheld if reasonable persons could differ as to its propriety. In other words, "[i]f the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." *Vill. of Euclid, Ohio v. Ambler Realty Co*., 272 U.S. 365, 388, 47 S.Ct. 114, 71 L.Ed. 303 (1926); *Bd. of County Comm'rs of Brevard County v. Snyder*, 627 So.2d 469, 472 (Fla.1993); *City of Miami Beach v. Ocean & Inland Co*., 147 Fla. 480, 3 So.2d 364 (1941).

The fairly debatable rule has its basis in the deference that the judicial power owes the legislative function under the separation of powers doctrine inherent in our form of government and expressly embodied in our state and federal constitutions. *Albright v. Hensley*, 492 So.2d 852, 856 (Fla. 5th DCA 1986) (Cowart, J., dissenting). Thus, "[t]he fairly debatable standard of review is a highly deferential standard requiring approval of a planning action if reasonable persons could differ as to its propriety." *Martin County v. Yusem*, 690 So.2d 1288, 1295 (Fla.1997).

Chapter 2, Article III, Section 2-50(n)(1)(a), Chapter 1, Article II, Section 1-14(6)(a)(1) and Chapter 2, Article III, Section 2-50(a)(9) of the

LDC are therefore a proper exercise of the City's police power and serve a legitimate public purpose by implementing the City's comprehensive plan as required under § 163.3202(1), Fla. Stat. (2007). *Kuvin v. City of Coral Gables*, 62 So. 3d 625, 632–33 (Fla. 3d DCA 2010).

V. The Special Master properly rejected Appellants' claim of selective enforcement.

Appellants argue that the failure of the City to prosecute other residents of Ormond Beach for various alleged LDC violation constitutes selective and discriminatory enforcement against the Appellants in violation of their equal protection as guaranteed by the United States Constitution.

In order to constitute a denial of equal protection, the selective enforcement, however, must be deliberately based on an unjustifiable or arbitrary classification. *Oyler v. Boles*, 368 U.S. 448, 456, 82 S.Ct. 501, 506, 7 L.Ed.2d 446, 453 (1962). Mere failure to prosecute other offenders is no basis for a finding of denial of equal protection. See *United States v. Rickenbacker*, 309 F.2d 462 (2 Cir. 1962). To show that unequal administration of a government regulation offends the equal protection clause, one must show an intentional or purposeful discrimination. *Snowden v. Hughes*, 321 U.S. 1, 8, 64 S.Ct. 397 (1944) *Moss v. Hornig*,

314 F.2d 89, 92 (2d Cir. 1963); *Bell v. State*, 369 So. 2d 932, 934 (Fla. 1979).

In *Oyler v. Boles*, 368 U.S. 448, 456, 82 S.Ct. 501, 505, 7 L.Ed.2d 446 (1962), the Supreme Court rejected a petitioner's contention of selective enforcement holding:

"The conscious exercise of some selectivity in enforcement is not in itself a constitutional violation. Even though the statistics in this case might imply a policy of selective enforcement, it was not stated that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." Id at 456.

Here, there was no evidence that the City engaged in intentional or purposeful discrimination against the Appellants based upon an unjustifiable standard such as race, religion, or other arbitrary classification. Instead, the undisputed evidence before the Special Master was that the complaint leading to the investigation of the Appellants' property came from an adjoining property owner. (T-99).

VI. The City's Code enforcement does not amount to any violation of the Appellants' substantive due process rights.

In *Eisenberg v. City of Miami Beach*, 54 F.Supp.3d 1312 (S.D. Fla. 2014), the plaintiff alleged that City code enforcement officials, including some of the same allegedly corrupt officials at issue in this case, embarked

on a scheme to shut down the plaintiff's hotel using a series of code violation citations. Id. at 1316-19. The court, in *Eisenberg,* concluded that plaintiff's substantive due process claim for constitutional deprivation of their liberty and/or property interests did not survive. Id. at 1325-27. That conclusion is consistent with the Federal and Florida state courts that have considered and rejected substantive due process claims based on the enforcement or application of a host of land use, zoning, and other similar regulations. See, e.g., *DeKalb Stone v. County of DeKalb*, 106 F.3d 956, 960 (11th Cir. 1997) (rejecting a challenge to denial of nonconforming use exemption to local zoning laws); *Boatman v. Town of Oakland, Florida*, 76 F.3d 341, 346 (11th Cir. 1996) (rejecting a claim that town executives arbitrarily and capriciously refused to issue certificate of occupancy); *Nantucket Enterprises, Inc. v. City of Palm Beach Gardens*, No. 10-81549-CIV, 2013 WL 3927834, at *2, *7-9 (S.D. Fla. July 29, 2013) (finding no cognizable substantive due process claim for a corporate entity's eviction from a commercial leasehold based on allegations that the city improperly "red tagged" plaintiff for failing to obtain a certificate of occupancy, and that the city forced plaintiff out of the leasehold without a court order at the request of the purported owners and landlords of the property); *Reserve, Ltd. v. Town of Longboat Key*, 933 F.Supp. 1040, 1044 (M.D. Fla. 1996)

(finding plaintiffs did not possess a cognizable substantive due process claim for their state-created property interest in a revoked building permit where “both the issuance and revocation of the building permit constitute ‘executive’ and not ‘legislative’ acts.”); *City of Pompano Beach v. Yardarm Restaurant, Inc*., 834 So.2d 861, 866-70 (Fla. 4th DCA 2003) (rejecting a substantive due process claim based on allegations that the city, as part of attempt to “kill” a restaurant's development project, improperly delayed issuing building permits, improperly revoked building permits, improperly delayed permitting reviews, and attempted to repeal an existing special exemption); *Ammons v. Okeechobee County*, 710 So.2d 641, 645 (Fla. 4th DCA 1998) (rejecting a substantive due process claim based on revocation of commercial occupational license that had been improperly issued under existing zoning regulations); *Jacobi* v. City of Miami Beach, 678 So.2d at 1366-68 (Fla. 3d DCA 1996) (rejecting a substantive due process claim based on the city's refusal to allow reconfiguration of lots under municipal zoning regulations). *Chakra 5, Inc. v. City of Miami Beach*, 254 So. 3d 1056, 1069–70 (Fla. 3d DCA 2018).

Appellants, therefore, have no valid claim that the City violated any of the Appellants’ substantive due process rights.

VII. Under Florida law Appellants have no protectable property interest in the unpermitted structures which could be violated by the City.

Appellants argue in their brief that the removal of the unpermitted fence, driveways and accessory structures amount to an unlawful taking. Under Florida law however, the Appellants have no protectable property interest because they never applied for a permit for the fence, paver driveways or accessory structures.

In *Dep't of Transp. v. Durden*, 471 So. 2d 1271, 1272 (Fla. 1985), the Florida Supreme Court held that there is no property right involved when the government seeks to remove a structure erected in disregard of the established scheme of securing permits for such structures. In *Durden*, the Appellee constructed an outdoor sign without first obtaining permits from the Department of Transportation as required by law. The Court held that "Appellees never applied for a permit nor did they comply with the statutory requirements to have a permit issued. Rather, appellees simply erected the signs and knowingly violated the law. A protectable property interest does not arise in this case from a knowing violation of the law. Consequently, we find it unnecessary to discuss the requirements of procedural due process when the appellees do not have a protectable property interest in the first place." Id.

As was the case in *Durden*, the City here has a clear and established scheme under its LDC for citizens to secure permits for fences, driveways and accessory structures. Having knowingly disregarded that permit process, the Appellants, therefore, have no protectable property interest in the fence, paver driveways or accessory structures which could be taken by the City.

VIII. Chapter 70, Florida Statutes, does not enjoin the enforcement of the LDC against the Appellants.

Contrary to the assertions of the Appellants, Chapter 70, Florida Statutes, does not prohibit or enjoin enforcement of LDC.

Chapter 70.001, Florida Statutes, also referred to as the "Bert J. Harris, Jr., Private Property Rights Protection Act", provides a statutory cause action for payment of compensation, when a new law, rule, regulation, or ordinance of the state or a political entity in the state, as applied, inordinately burdens an existing use of real property or a vested right to a specific use of real property. In such case, the property owner of real property is entitled to compensation for the actual loss to the fair market value of the real property caused by the action of government.

Prior to filing suit in the Circuit Court seeking compensation under the Bert Harris Act the claimant must, not fewer than 90 days before filing

an action against a governmental entity, present the claim in writing to the head of the governmental entity. The property owner must submit, along with the claim, a written appraisal report as defined in § 475.611(1)(e) that supports the claim and demonstrates the loss in fair market value to the real property. § 70.001(4)(a).

During the 90-day-notice period, unless a settlement offer is accepted by the property owner, the governmental entity provided notice shall issue a written statement of allowable uses identifying the allowable uses to which the subject property may be put. The failure of the governmental entity to issue a statement of allowable uses during the 90-day-notice period shall be deemed a denial for purposes of allowing a property owner to file an action in the Circuit Court. If a written statement of allowable uses is issued, it constitutes the last prerequisite to judicial review for the purposes of the judicial proceeding created by the Act. §70.001(5)(a).

Here, the record shows that there was no pre-suit claim in writing presented by the Appellants to the City along with a written appraisal that supports the claim and demonstrates a loss in fair market value to the Appellants' real property. Even if the Appellants had submitted an appropriate pre-suit written claim, § 70.001 does not enjoin any action of

the City, including enforcement of the preexisting LDC, against the Appellants. Instead, any claimed failure by City to issue a statement of allowable uses during the 90-day-notice period is treated under the statute as a denial of the claim, thereby allowing a property owner to file an action in the Circuit Court. § 70.001(5)(a).

Furthermore, any action asserted under § 70.001 to determine whether an existing use of the real property or a vested right to a specific use of the real property exists must be filed in Circuit Court.

If an action is filed, § 70.001(6)(a) provides that the Circuit Court shall determine whether an existing use of the real property or a vested right to a specific use of the real property existed and, if so, whether, considering the settlement offer and statement of allowable uses, the governmental entity or entities have inordinately burdened the real property.

The Special Master therefore, would have no jurisdiction to adjudicate such a claim.

Appellants make a similar misreading of § 70.45 describing the potential removal of their unpermitted structures as a “government exaction”.

Chapter 70.45, Florida Statutes, provides that a property owner may bring an action in a court of competent jurisdiction to declare a prohibited

exaction invalid and recover damages caused by a prohibited exaction. Such action may be brought by a property owner at the property owner's discretion when a prohibited exaction is actually imposed or when it is required, in writing, as a final condition of approval for the requested use of real property. § 70.45(2).

An ‘exaction’, is defined as a condition sought by a governmental entity in exchange for its authorization to allow some use of land that the government has otherwise restricted.” *St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So. 3d 1220, 1223 (Fla. 2011) (quoting *St. Johns River Water Mgmt. Dist. v. Koontz*, 5 So. 3d 8, 9 (Fla. 5th DCA 2009)), *rev'd on other grounds*, 570 U.S. 595, 133 S.Ct. 2586, 186 L.Ed.2d 697 (2013); *see also City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702, 119 S.Ct. 1624, 143 L.Ed.2d 882 (1999) (describing exactions as “land-use decisions conditioning approval of development on the dedication of property to public use”).

Here, the record clearly shows that Appellants never sought approval from the City to construct and maintain the fence, paver driveways or accessory structures and the City never conditioned the approval of any permit. See *TR Inv'r, LLC v. Manatee Cnty.*, 355 So. 3d 1004, 1012 (Fla. 2d DCA 2023).

CONCLUSION

The Appellee respectfully requests the Court to uphold the Special Masters' Orders issued March 1, 2023 in Case Nos: 22-112246, 22-112237 and 22-112247, finding violations by the Appellants of the Ormond Beach Land Development Code for having constructed, erected and maintained on their residence the fence, the paver driveways and the accessory structures consisting of the two (2) 8' x 20' (160 sq. ft.) industrial steel shipping containers without a having obtained required permits from the City of Ormond Beach (R-92-106).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that June 30, 2023, I electronically filed the foregoing with the Clerk of the Court by using the E-portal system which will send a notice of electronic filing to Michael and Katherine Henry at katherine@restorefreedomkh.com and mike@restorefreedomkh.com.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Answer Brief complies with the applicable font and word count limit requirements in compliance with Rule 9.045 and Rule 9.210(a)(2), of the Florida Rules of Appellate Procedure.

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