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' Fourth 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:
February 14, 2025

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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. Realizing the court is not able to read all appendices pages, Henrys **ask the court to focus on App1:512-517, 519-520** (filed 4/11/24) & **App3:54-63** (filed 6/5/24). Being ordered to modify the petition again, the 3rd (and now 4th) Amended Petitions were filed.

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Basis for Jurisdiction

Henrys file this Petition under FRAP 9.030(b)(2)(B), where certiorari jurisdiction exists to review final orders of circuit courts acting in their review capacity. *See also,* FRAP 9.100(b). The final order here 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, OB cherry-picked their enforcement of the LDC regarding permit requirements, resulting in an equal protection violation and significant monetary damages to Henrys.[1] Henrys consequently decided to purchase their homestead on Cypress that November. The property already had pavers in the front and back yards (many covered by weeds), and there was a dilapidated privacy fence. Henrys replaced the 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

[1] Henrys also brought this issue up at the hearing and in the 11/8/22 Notice. *See,* App1:12,13,19,20.

[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 US military has

(Janet Bruce) called Henrys about their pavers, fence, and conexes [hereinafter, PFCs]. On 10/20/22, OB served Henrys with Notices of Violation for the PFCs.[3]

Henrys' PFCs are entirely 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 obtained hundreds of neighbors' signatures 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."[4] 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 Henrys' use of their property infringes upon others' use of their own property.

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used these containers for storage since the 1950s. https://search.brave.com/search?q=what+is+a+conex&source=desktop

[3] App1:3, et al.

[4] *See* signature sheets App3:54-63, admitted by Magistrate May 2024.

So, on 11/8/22, Henrys served OB with a Notice to Cease & Desist.[5] However, OB held a magistrate hearing on 2/27/23. At the Hearing, Henrys moved for dismissal due to several legal issues. Without providing legal reasoning, Magistrate denied Henrys' motion for dismissal.[6]

Henrys also objected to the cherry-picked manner in which these LDC provisions are enforced.[7] Henrys started by pointing to OB's different treatment of 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?**
>
> 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.
>
> **No, I'm asking you about this particular property. Did you know you needed a permit --**
>
> 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.
>
> **Was there a new fence installation on Rollins?**
>
> There was an entire gut job done on that property. Dumpsters kept being pulled up and the sellers were supposed to have

[5] Starting on App1:17.
[6] App1:283.
[7] *See, e.g.,* App1:297-302,310-312,331-333,390-392.

> 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.
>
> **Well, you're a lawyer. You didn't think to call the city to find out --**
>
> We did.
>
> **Did you call the city to find out if you needed a pens[sic] permit for the property we're here talking about today?**
>
> I would not call somebody when a answer was already provided to me in the same year.
>
> **On a different property?**
>
> 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. (App1:309-312.)

Magistrate overruled Henrys' objections with no legal reason provided and rendered 3 Orders in favor of OB on 3/3/23.[8] 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.[9] On 4/3/23, Henrys filed a Motion for

[8] App1:85-106.
[9] App1:107.

Stay in circuit court,[10] which was granted on 4/6/23.[11] The circuit court rendered the order on appeal on 3/7/24.[12]

Magistrate's 2023 orders purport to authorize OB to enter Henrys' homestead, remove and dispose of their property, and charge Henrys for and have no liability for damage from OB's said removal. Finding these portions "depart[ed] from the essential requirements of the law," the circuit judge struck them from the orders. However, the court allowed the rest of the orders to stand, including costs, a one-time fine and a never-ending daily fine.[13]

Nature of Relief Sought

Henrys ask this court to find the lower tribunals committed harmful errors, violating Henrys' right to Equal Protection, issuing orders violating state and local laws, and issuing orders forcing Henrys into LDC noncompliance.

[10] App1:128.
[11] App1:150.
[12] FRAP 9.420(b)(2) requires all orders to be served upon parties when e-filed. Judge signed it at 4:59pm 3/4/24; although entered into the e-filing/e-service system (and rendered) on 3/7/24 (App1:252), the clerk backdated the entry to 4:59pm 3/4/24. However, "For purposes of determining the date of rendition, . . . 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* at 280–81 (Fla.4DCA 2018)." FRAP 9.020 Committee Notes, 2020 Amendment.
[13] Additional Magistrate orders were rendered 5/30/24. *See* Notice of Related Case or Issue filed 6/5/24 and App3.

Henrys also ask this court to hold some legal provisions an unconstitutional regulatory taking violating the 5th Amendment, and another provision as an excessive fine in violation of the 8th Amendment. These harmful errors and unconstitutional laws have adversely affected Henrys' substantial rights, resulting in a miscarriage of justice, which can only be remedied through granting this Petition and overturning the entirety of Magistrate's orders (and circuit court order portions upholding 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.[14]

Standard of Review

All issues here are legal, not factual (no relevant facts are disputed). As such, this court must review the legal and constitutional issues *de novo*, without deference to lower tribunals' rulings on such 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

[14] *State v Jones* at FN2 (Fla.4DCA 2015), citing*, Theophile* 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).

law."[15] The harmful errors and unconstitutional laws involved here adversely affect Henrys' substantial rights 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."[16]

Argument

It is to secure our inalienable rights that "Governments are instituted among Men,"[17] meaning the purpose of government is to secure our individual, God-given liberties, so that in my exercise of my rights, I am not impeding upon your exercise of your rights. So, the *purpose* of government, and it's laws, is to *protect our rights*, not to regulate and punish us. Hence why the Fourteenth Amendment guarantees 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.[18] Indeed, "[t]he great end for which men entered into society was to

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[15] *Hardin v Monroe County,* at 709-710 (Fla.3DCA 2011), *citing* ***Custer v United*** (Fla:2010).
[16] *Byars,* 273 US at 32 (1927), citing *Boyd v US* at 635.
[17] Declaration of Independence.
[18] *See, Boyd* (US:1886), supra.

secure their property." *Id* at 627*.*

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 of their personal lives. Additionally, Floridians have substantive rights to be free from excessive punishments."[19]

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."[20] 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

[19] *Real Property* at 964 (Fla:1991).
[20] *Id* at 963, *citing* Art. I, Sec 9, Fla. Const; *see also, Massey v Charlotte County*, at 147 (Fla.2DCA 2003).

> unconstitutionality of the agency's action in implementing a constitutional statute or rule.[21]

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

In evaluating Henrys' 3 types of challenges, let's remember Henrys "have a compelling interest in retaining their real and personal property free of undue interference or improper clouds of title,"[22] and if *reasonable doubt* should arise as to whether the municipality possesses a specific power, such ***doubt will be resolved against the City***.[23]

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

Under the Equal Protection Clause, government may not selectively enforce laws against one individual while ignoring similarly situated individuals. However, that's exactly what OB did. One year before *this* case began, when Henrys moved to Florida, a permit/LDC situation arose where

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[21] *Key Haven v Board* at 157 (Fla.1983), *superseded by statute on other grounds as noted in Bowen v Florida DEP* (Fla.2DCA 1984).
[22] *Massey* at 146, *citing Real Property* at 964.
[23] *City of Miami* at 803 (Fla:1972), citing *Liberis v Harper* (Fla:1925).

OB denied Henrys equal *protection* of the law.[24] It was undisputed at the magistrate hearing, and remains 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' specific performance action was pending. In September 2021, OB was called to ascertain why they were refusing Henrys equal *protection* of the law by not enforcing the LDC to stop the sellers' unpermitted work while the case was litigated. Not only did OB Attorney Emery say OB would *not* do anything to enforce the LDC *as against sellers*, but she referred to Henrys as "squatters"! This is despite OB receiving copies of Henrys' CounterComplaint and exhibits.[25] Although *this* equal protection denial was briefed in the lower tribunals (App1:13,163-165), Henrys don't raise it here - merely mentioning it to show OB's pattern of singling Henrys out for selective enforcement. Instead, Henrys focus now on OB's *current* equal protection violations.

[24] OB raised no factual disputes on this issue, even when specifically stated by Henrys. *See, e.g.,* App1:309-312.
[25] Sellers eventually returned some of Henrys' funds.

This equal protection issue is purely a legal dispute. OB disputed no facts at trial, even amidst Henrys' testimony,[26] nor in any pleadings. Similarly, Magistrate denied Henry's equal protection claim on legal grounds.[27] However, Magistrate did not apply the correct legal standard (no rational basis for OB intentionally treating Henrys differently from others similarly situated). And although the circuit court correctly stated this legal standard (App1:257), it wrongly applied it, holding 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.[28] Thus, "others similarly situated" would include those similarly preserving/repairing their property without a permit. It's uncontested 42% of properties in Henrys' immediate neighborhood met that qualification![29]

Further, this appeal stems from three *separate cases* in front of Magistrate, thus Henrys need not identify a *single* property with all three violations.[30]

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[26] *See, e.g.,* App1:297-302,331-333.
[27] Magistrate states Henrys will have to cite more caselaw to prevail on this issue. App1:302-304.
[28] *See* paragraph 2 of each order, App1:86,93,101.
[29] *See* summary, App1:513; and App1:39 et al.
[30] Although those exist. *See,* App1:39-55.

Certainly, none of the three underlying cases are contingent upon another. Nor does 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.[31] 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. In looking through that lens, in Henrys' neighborhood, 99% of properties have *pavers/parking* area permit/LDC issues, 61% have *shed/structure* permit/LDC issues, and 15% have *fence* permit/LDC issues. App1:514. Undeniably, this shows *many* others similarly situated (but treated differently) 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,[32] which OB never disputed. OB's enforcement of the LDC *as against Henrys* at the Rollins property, outright refusal to enforce the

[31] *See, e.g.,* App1:298,331-333,390-392.
[32] I.e., the 9/2/22 phone call with Bruce and the Notice at App1:19, et al.

LDC *as against sellers* **at the same property**,[33] 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. Moreover, one neighbor made a complaint against Henrys, which 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[34] 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.[35]

Furthermore, the numbers speak for themselves. Enforcement of permits and/or setbacks for Henrys while not enforcing them for *pavers/parking areas* in 99% of properties, for *sheds/structures* in 61% of properties, for *fences* in 15% of properties, or just for *improvements without permits* in

[33] especially throughout August and September 2021.
[34] City Park's LDC Violation re Pods Container, City Attorney's LDC Violation re Parking Surface, City Attorney's LDC Violation re Utility Struct.
[35] The games OB played with service upon Henrys and other matters were also outlined for the Magistrate, as summarized on App1:12, parts 6 and 7.

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."[36] 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, the LDC's purpose is to "protect and maintain a high quality of life for the citizenry."[37] And the alleged *permit* requirements here for fences, pavers, and accessory structures (like conexes) are to ensure compliance with the design and aesthetic requirements of the LDC.[38] But how effective are design and aesthetic requirements if not equally enforced? They are

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[36] Black's Law Dictionary, Deluxe Eighth Edition, p978.
[37] LDC 1-03.
[38] *See, e.g.,* LDC 2-17, providing regulations to ensure a "highly aesthetic setting."

not. That's why the LDC declares its regulations "shall be applied uniformly throughout the district."[39]

Henrys aren't alleging a mere few city residents have similar LDC violations. Rather, Henrys pointed to an astounding 810 Permit, Paver, Accessory Structure & Fence LDC violations plainly 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,[40] along with a categorized spreadsheet showing the exact address and details of such similar violations,[41] and photos of several of said violations.[42] This teal star map 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 (and pictures) show how completely ineffective the cherry-picked enforcement of these LDC provisions is at maintaining the aesthetics of the entire neighborhood. There's no rational basis for this selectivity. Further, these 810 violations in just 0.28mi² (or 0.7% of the entire city) represent 115,714 similar violations *across OB*.

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[39] LDC 2-01(b)(2).
[40] App1:38.
[41] App1:39-55.
[42] App1:56-76.

Likewise, there's 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's 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 openly visible between November 2021 and February 2023.)

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.[43] If *these* LDC provisions were so important for city-wide beautification, wouldn't our government officials be held to the highest standard of compliance with these provisions?

OB repeatedly deny Henrys equal protection of the law. Thus, even *if* the language of the specified LDC provisions is otherwise enforceable, OB's actions are nonetheless invalid. The lower tribunals didn't correctly apply

[43] App1:11,13,14.

the appropriate legal standard,[44] thereby committing harmful errors adversely affecting Henrys' substantial rights. Therefore, this court must overturn Magistrate's orders in their entirety.

II. OB Broke State and Local Law

The lower tribunals committed harmful errors in issuing orders despite several requisite state and local laws being broken. The orders for fines were issued prematurely. Also, Magistrate ordered Henrys to 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 lower tribunal addressed these legal deficiencies despite Henrys raising such issues. Therefore, as these harmful errors adversely affect Henrys' substantial rights regarding their homestead, with the lower tribunals materially departing from the essential requirements of the law, this court must step in to stop this miscarriage of justice by overturning all the Magistrate orders.

[44] 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* 528 US at 564.

A. Order for Fines/Fees Issued Prematurely

Any order imposing fines *must* be *subsequent* to, and distinct from, the initial order commanding Henrys to take action.[45] "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."[46] Indeed, 162.09(1) and OB Code of Ordinances [hereinafter, "CO"] 2-258(a) provide "upon notification by the code inspector that an [already existing] order of [Magistrate] has not been complied with," Magistrate "*may* order the violator to pay a fine."[47] 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.[48] Further, Henrys' constitutionally protected property rights "may

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[45] FS 162.07(4) states orders finding violation "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."

[46] *City of Tampa* at 1188 (Fla.2DCA 1998); *see also, Hardin* at 709-710 (Fla.3DCA 2011), *City of Plantation* at 393-394 (Fla.4DCA 1991), *Massey* 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."

[47] That's why FS 162.08 allows Magistrate "to command" Henrys to take necessary steps, but does *not* yet allow for fines to be ordered.

[48] *Massey* at 145 (Fla.2DCA 2003).

not be impinged with a showing of less than clear and convincing evidence."[49] 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, 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."[50] Similarly, "162.09 would be interpreted to permit the presentment of defenses."[51] Here, it was not made clear Magistrate was going to issue 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 nor object to the prematurely issued fines and the hearing was concluded.[52] Thus, Magistrate's orders imposing fines/liens are void.

Henrys raised this issue with Magistrate in their Motion for Relief filed 3/24/23,[53] which he never ruled on, and in circuit court[54] which failed to

[49] *Real Property*, at 967-968 (Fla:1991).
[50] *Massey* at 147, and *Real Property* at 964.
[51] *Jones v Seminole County* at 96 (Fla.5DCA 1996).
[52] App1:396-401.
[53] App1:107.
[54] App1:193-194,251.

address it. This a clear departure from the essential requirements of the law by the lower tribunals.

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.[55] They *also* impose fines without consideration of the FS 162.09 *required* factors. But 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."[56] 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).

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[55] App3:4-19.

[56] *City of Tampa* at 1188; *see also, Hardin* at 709-710, *City of Plantation* at 393-394, *Massey* at 143-146 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."

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 fines by the 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."[57] 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 Denial of Henrys' Permits Unsupported by Law

The ***only*** violation Magistrate found is Henrys did not obtain permits for their PFCs.[58] But, OB made it clear from the beginning they would never issue those permits, with many of their stated reasons for doing so not found in 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."[59] Henrys pointed out these permit denial reasons unfounded in law to both lower tribunals, which they ignored, thus giving Henrys no viable option to keep their PFCs.

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[57] App1:264. 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."
[58] App1:85, et al.
[59] *Boyd v US*, 116 US at 627.

PAVERS

Bruce testified that before issuing a permit, OB would require Henrys to pull up their pavers so OB could see what was "underneath."[60] But there's no legal authorization for such a requirement. Indeed, a "suitable subbase" is only required for *non* single family homes.[61] 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 because they created "too much impervious area."[62] However, pavers *are* a pervious/permeable surface, as recognized by LDC 3-27(b)(3) "*Brick pavers or similar permeable materials,*" and by LDC 2-57(54)(b) in requiring "a stabilized pervious surface, such as . . . paver brick" to be used in "parking areas."

Emery also argued a permit would not be issued for Henrys' pavers without "modification" regarding "setback[s]."[63] Bruce likewise claimed pavers can't go to the property line,[64] and must be at least 7.5' from the property line.[65]

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[60] App1:373.
[61] LDC 3-28(a)(1), which makes no mention of zoning classification.
[62] App1:338.
[63] App1:338.
[64] App1:373.
[65] App1:27.

Then, Cushing testified pavers had to be 3' from the side property lines, according to LDC 3-25(c).[66] 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 do not border the right of way line, meaning the pavers did not change the points of access, which meets the 3' requirement. App1:515, also described later.

LDC 3-25(c)**(6)** states "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.[67] Three allow *dwellings* other than single family homes,[68] 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.*

Remember, 162 of 461 properties in Henry's neighborhood have

[66] App1:376-377.
[67] LDC 2-07(6).
[68] R4, R5, R6.

pavers/driveways *to the side property line*, with another 139 *within 7.5'*. That's 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."[69] Cushing then testified[70] 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* meet the minimum dimensions to be a duplex per the LDC.[71]

Additionally, the CPA (state law authorizing municipal LDCs) does *not* allow OB to impose setbacks on Henrys' conexes, which Magistrate found to be a garage. "Land development regulations relating to building design elements may not be applied to a single family or two family dwelling," and this includes "the location or orientation of the garage."[72] Even *if* OB's LDC expressly disallowed permits for these setback reasons, "[w]here this act may be in conflict with any other provision or provisions of law relating to

[69] App1:319.
[70] App1:342.
[71] LDC 2-17B requires duplex lots to be 100' wide, but Henrys' homestead is only 88'.
[72] FS 163.3202(5)(a) & (b)(1).

local governments having authority to regulate the development of land, the provisions of *this act* shall govern. . .”[73]

Furthermore, not only do Henrys’ have the *inalienable right* to “acquire, possess and protect [their] property,”[74] they also have an *express right to privacy*.[75] Indeed, “[t]he Constitution extends *special* safeguards to the privacy of the home.”[76] The LDC provisions are supposed to be enforced with this constitutionally-protected right in mind. “Maximum possible privacy shall be provided for each dwelling unit through the use of structural screening and landscaping and building orientation.”[77] Also, Henrys’ R4 “zoning district attempts to establish . . . the *maximum possible privacy* for each unit.”[78] Forcing Henrys’ conexes to be moved into the center 30.25% (App1:519) or even 46% (App1:520) of their property does <u>not</u> use “building orientation” to give Henrys and their neighbors 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.

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[73] FS 163.3211.
[74] FL Const Art I Sec 2.
[75] FL Const Art I Sec 23.
[76] *Dolan v City of Tigard*, 512 US at 393 (cleaned up).
[77] LDC 2-57(22)(h).
[78] LDC 2-17A.

Moreover, "[s]etbacks 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."[79] As the original setback ordinance was adopted in 1978,[80] setbacks did *not* exist when Henrys' 1949 home's original plat was recorded. Thus, 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.[81] Moreover, Henrys' conexes near the property line are certainly compatible with the 80 properties (App1:514) with sheds/structures erected on the property line, and 183 (App1:514) with sheds/structures erected within 7.5' of the property line in Henrys' immediate neighborhood.

Similarly, OB claimed they will not issue a permit for Henrys' conexes because they can't be permitted due to *not* being regulated by the Florida Building Code (FBC). As discussed there, 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

[79] LDC 2-17H.
[80] OB Ordinance 1978-35.
[81] "Zero lot line means a development concept that permits the principal structure to abut one (1) side lot line." LDC 1-22.

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 does not meet aesthetic requirements.[82] 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. App1:517.

Bruce testified this does not meet the LDC's aesthetic requirements, and Henrys would, therefore, be required to tear down the majority of their fence before a permit would be issued. 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'

[82] "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." App1:293.

right to free expression. Because of this, the state law controlling LDCs expressly states "Land development regulations relating to building design elements may not be applied to a single-family or two-family dwelling. . ."[83] Also, nothing prohibits the neighbors to the south and west from putting up their own fences. Indeed, the neighbor to the north already has their own privacy fence (installed without a permit, and now in bad repair since Hurricane Ian). App1:518.

Moreover, OB has knowingly allowed at least 2 other fences (App1:514) 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,"[84] but also have an *express right to privacy*.[85] Therefore, the LDC requires "Maximum possible privacy [to] be provided for each dwelling unit through the use of structural screening," like privacy fences.[86] Thus, OB is attempting to use the aesthetic lateral post requirement to subvert the clear constitutional and statutory protections for Henrys' privacy and their right to protect their own property. These are,

[83] FS 163.3202(5)(a).
[84] FL Const Art I Sec 2.
[85] FL Const Art I Sec 23.
[86] LDC 2-57(22)(h); LDC 2-17A.

therefore, impermissible reasons to deny the permits.

In the end, OB testified they will withhold permits for Henrys' PFCs: unless Henrys remove the pavers so OB can look underneath; because they create too much impervious area; because a 3' paver setback and a 20' 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. Consequently, the lower tribunals departed from the essential requirements of the law in allowing such permit hurdles to stand. As such, these are harmful errors adversely affecting Henrys' substantive rights which only can be fixed by overturning the Magistrate's orders.

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

Remember, the Florida Supreme Court explained if *reasonable doubt* should arise as to whether the municipality possesses a specific power, such ***doubt will be resolved against the City***.[87] Certainly reasonable doubt exists where the LDC, the FBC, and the Community Planning Act

[87] *City of Miami* at 803 (Fla:1972), citing *Liberis v Harper* (Fla:1925).

(CPA) don't actually require a permit for Henrys' PFCs.

Interestingly, Cushing testified the FBC does *not* regulate conexes, thus they cannot be permitted.[88] It's dumbfounding in our constitutional republic to claim we could *not have* something because it was *not regulated* by the government. Moreover, the FBC states "structures moved into or within a county or municipality [that] do not or cannot comply with the code . . . shall not be required to be brought into compliance with the building code."[89] As the conexes undisputedly fit the definition of structures as defined there, they cannot be required to comply with city codes regulating their "construction, erection, alteration, modification, [or] repair."[90] Yet, these codes (erection permits) are the ***only*** violation Magistrate found for the conexes.[91] 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."[92] Thus, as building official Cushing testified *the FBC does* ***not regulate*** *conexes* (*see also* FS553.79(20)(a)), OB is statutorily prohibited from regulating them.

[88] App1:357.
[89] FS 553.79(20)(a).
[90] *See,* FS 553.72(1) and 553.73(1).
[91] Paragraph 2 at App1:93.
[92] FS 553.73(4)(b)(3).

Consequently, the order purports to penalize Henrys for their "failure" to receive a conex permit which OB cannot legally require.

State law also prohibits OB from preventing Henrys' use of their pavers. Henrys' pavers preserve the contour of the land in a water-conservative manner. The pavers, undisputed as "Florida-friendly landscaping," serve "a compelling public interest" "to conserve or protect the state's water resources."[93] It's undisputed Henrys' small beachside home has no irrigation system and before the pavers, their yard had only 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."[94] Thus, OB may not use permitting requirements to force Henrys to remove their pavers.

As for the LDC's requirements, 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

[93] per FS 166.048 and 720.3075.
[94] FS 166.048.

"Construction, start of."[95] "Construction, start of" is 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. And since the "words of a governing text are of paramount concern, and what they convey, in their context, is what the text means",[96] 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.

Likewise, in applying the land *development* code, we must acknowledge the *authorizing statute's* 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."[97]

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[95] LDC 1-22.
[96] *Ham v Portfolio Recovery* at 946 (Fla.2020).
[97] 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."

Consequently, as securing a homestead, storing personal property, and landscaping and parking are customarily incidental uses to enjoyment of a dwelling, Henrys' PFCs are *not,* by state law, "development" that can be prohibited/punished through the land *development* code.

OB and the lower tribunals ignored this plain language of the law in taking punitive action against a homeowner, thereby departing from the essential requirements of the law. And even if the lower tribunals ignored these laws because of perceived legal conflicts, it's even more essential for ***all doubt to be resolved against the city.***[98]

1. Conexes Not Banned by LDC

OB testified "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."[99] OB argued this LDC provision prohibits Henrys' conexes.[100] Magistrate agreed,[101] and the circuit court failed to address this issue. However, "personal onsite storage structures" are not defined. With OB's broad interpretation, it would also include standard sheds and detached garages,

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[98] *City of Miami* at 803 (Fla:1972).
[99] App1:339, discussing LDC 2-50(x)(3).
[100] App1:339.
[101] Paragraph 4 of his order at App1:93.

because both are used for personal onsite storage. Moreoever, there's no legal authority to interpret 2-50(x)(3) to *include* Henrys' conexes, but *exclude* all other sheds and detached garages. Indeed, OB's ordinances actually *require permanent* personal storage structures (like conexes, sheds or detached garages) to be used for outdoor items.[102]

Now, 2-50(x)(3) prohibits long-term uses of onsite temporary or "moving-related" storage structures like PODS or U-Boxes, which makes sense since they're not designed to withstand extreme weather, like hurricanes. Permanent structures like sheds or conexes (which travel across oceans) are not included in this type of storm-mitigation provision. 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").

Remember, 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."[103] So, with the LDC ***not*** mentioning "shipping containers" or "conexes," OB cannot stretch the LDC to cover that which is not clearly and unequivocally articulated as being covered by such. And, regarding any

[102] OB's LDC 2-50(x)(1) and Code of Ordinances 14-94 through 14-96.
[103] *Boyd v US*, 116 US at 627.

uncertainty on municipal power like this, ***doubt will be resolved against the City***.[104]

III. LDC Portions are Unconstitutional

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

A. LDC Portions are a Regulatory Taking

"The plain spirit and purpose of the constitutional prohibitions [are] intended to secure the people against unauthorized official action."[105] 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

[104] *City of Miami* at 803 (Fla:1972).
[105] *Byars*, 273 US at 33.

offence . . . is the invasion of his indefeasible right of personal security, personal liberty and private property."[106]

This "indefeasible right of personal security, personal liberty and private property" is exactly what Henrys are fighting for. 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 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 properly storing personal property; not shielded enough from blunt-force hurricane winds; not able to adequately handle excessive rains coming with each hurricane season. So, 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 applying a land use

[106] *Boyd,* 116 US at 630.

regulation effects a taking if the *ordinance does not substantially advance legitimate state interests*.[107] Or, in other words, land "use restriction may constitute a 'taking' if not **reasonably necessary to the effectuation of a substantial government purpose**."[108]

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

- 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
- keep their pavers 3' away from side property lines
- provide a recent survey of the lot *specifically certified to the city* (costing $750 or more),[109]
- obtain expensive and time-consuming variance approval regarding the garage requirement,[110]
- obtain engineer/architect final site plan approval,[111]

[107] *See, Nectow v Cambridge* at 188 (US:1928).
[108] *Penn Central v New York* at 127 (US:1978).
[109] LDC 1-14(6)(b).
[110] No applicant may receive *any* permit 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). So, Henrys would *not* be issued a permit *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 permits without first doing the time-consuming and expensive process of applying for - and receiving - a variance under LDC 1-16. App1:358-362. This is unreasonable for a family simply trying to preserve their homestead for customary uses.
[111] LDC 1-14 not only requires an approved development order and building permit, but also the "development order shall be issued only in conjunction

- meet a multitude of unidentified requirements (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."***[112] Keeping in mind that this is literally the LDC Section entitled "Submittal Requirements," you can see that numerous unidentified requirements are placed upon residents. That alone defies all notions of due process.[113] However incredulous this may seem, OB confirmed[114] 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![115]

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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.

[112] 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."

[113] Basic requirements of due process prohibit land use regulations from being unreasonable or impossible to comply with.

[114] Through their Attorney and Planning Department Supervisor.

[115] App1:357, line 11-25.

Let's get a better understanding of the impact of the unnecessary setbacks. OB claims Henrys' home is a duplex,[116] 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.[117] App1:519. Thus, enforcing these duplex setbacks against Henrys' *conexes*, etc. reduces their usable area to just 30.25% of their homestead! This is a significant impact.

Indeed, 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*."[118] 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

[116] App1:207.
[117] As seen in OB's testimony on App1:340,342,343; LDC 2-17B. It's important to note Henrys' 88' wide property doesn't meet minimum 100' width to qualify as a duplex per LDC 2-17B.
[118] LDC 2-17A.

placement would put the conexes in the middle of their soccer and volleyball areas, and greatly reduce visibility for the Henrys to watch their kids playing in their own yard.

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 total setback for both sides is 20'). App1:520. 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 (App1:514) 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.[119] Indeed, these parking areas must have a minimum width of 9'[120] and depth of 20'.[121] 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 own 4 vehicles. Thus, in order to lawfully park any of these 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

[119] *Also* LDC 3-24(c)(4).
[120] LDC 3-28(a)(4); or 12' wide per LDC 3-25(c)(5) for duplexes.
[121] LDC 3-28(a)(5).

extend] toward the side lot line away from the front of the house."[122] As the red area indicates (App1:515), 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,[123] stating that a 7.5' setback applied.[124] Cushing testified that Henrys pavers must be 3' from the side property lines.[125] The blue lines on the diagram (App1:515) 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, App1:515). 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

[122] LDC 2-50(x)(4)(c).
[123] App1:373.
[124] I.e., on the 9/2/22 call, confirmed at App1:27.
[125] App1:376-377.

government purpose"[126] in *any* of these land use regulations.[127] OB has never denied this, and never offered *one* substantial government purpose for even *one* of these land use restrictions.[128] Indeed, even Magistrate simply stated Henrys' takings argument is "without merit" - *without explaining how the binding case precedent is not applicable here.*[129]

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 they are.* With this case precedent being around for decades, and these

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[126] Henrys' 11/8/22 Notice, App1:27,28,30; Henrys' 2/27/23 Hearing Response Filed, App1:11,15; Katherine's Testimony, App1:275,277,325,386,387.

[127] Including the confusing and contradictory relevant setback requirements, the aesthetic requirements, unidentified "additional" requirements by OB (*see* App1:30,372-373), 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.

[128] OB implies "implementing the City's comprehensive plan" is a "legitimate public purpose," citing to *Kuvin* (App1:222); 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.

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

precise issues being raised by Henrys for more than 27 months, it would be a little “late in the game” for OB 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...[130]

Certainly, prohibiting the functional use of 69.75% (or even 54%)[131] of Henrys’ property is “unduly restrictive.” The same is true for requiring Henrys’ fence to have certain decorative qualities, effectively prohibiting the parking of their 4 vehicles, and the 5 unreasonable requirements imposed just to apply for a permit for customary use of their homestead.[132]

Lastly, we must remember the main purpose of government - to make sure that in my exercise of my rights, I’m not interfering with your exercise of your rights. The Supreme Court kept this in mind in regulatory taking jurisprudence, requiring local governments to “make some sort of

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[130] FS 163.3161.
[131] Only 30.25% remains usable with duplex setbacks (App1:519), and only 46% remains usable with single family setbacks applied (App1:520).
[132] The last 5 of the requirements listed earlier.

individualized determination" as to the "nature and extent" of the "impact" of the proposed use of property.[133] 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." *Id* at 391. OB has failed to *even allege* Henrys' PFCs as they now sit impact the city or the neighborhood *in any negative way*. 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."[134] Completely prohibiting Henrys' conexes, or restricting their placement to only 30.25% (App1:519) or 46% (App1:520) of the Henrys' modest homestead undoubtedly denies them all economically reasonable use of their land! The same is true for setbacks combined with other LDC parking provisions (App1:515) that

[133] *See, e.g., Dolan v City of Tigard*, 512 US 374, supra.
[134] *Key Haven* at 157 (Fla.1983), *superseded on other grounds as noted in Bowen* (Fla.2DCA 1984); *see also, Nollan* 483 US at 834, citing *Agins v Tiburon*, 447 US 255, 260 (1980).

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 5 unreasonable, onerous, and expensive requirements[135] 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 these reasons, all 7 of these requirements must be stricken as unconstitutional takings, therefore voiding Magistrate's orders.

B. Henrys' Fines/Fees Violate 8th Amendment

The Magistrate's orders imposing 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."[136] 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 8th Amendment analysis, but fails to acknowledge the important point made in *Wilson* in that

[135] The last 5 of the requirements listed earlier.
[136] App1:260.

> 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.[137]

Thus, the circuit court committed harmful error by holding Henrys waived their 8th Amendment claim.[138] However, this court need not remand as to this issue because it is in "a good position to make a determination" on the merits of this issue.[139] 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

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[137] *Wilson*, at 631-632 (Fla.5DCA 2004); *Wilson* at 633, citing *Key Haven* at 157 (Fla.1983), *superseded on other grounds as noted in Bowen* (Fla.2DCA 1984); *see also, Kirby v Archer* (Fla.1DCA 2001); *DJB Rentals v Largo* at 413-414 (Fla.2DCA 2023).

[138] 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.

[139] *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* 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.

grossly disproportional to the gravity of the defendant's offense, it is unconstitutional."[140]

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."[141] 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,"[142] it also declared that "[h]aving said all that, it is also true that when the legislature oversteps its authority, 'the Constitution requires judicial engagement, not judicial abdication.'"[143]

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**."[144] We, therefore, must look at the "wrong," or "harm caused

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[140] *Bajakajian* at 327 (US:1998); *see also, Jones*, at 1088 (Fla.4DCA 2015).
[141] *Jones* at 1090, *citing* *Solem v Helm,* 463 US 277, 290 (1983).
[142] *Jones* at 1088, *citing Bajakajian,* 524 US at 336.
[143] *Jones* at 1088, *citing Florida v Dep't.,* 648 F.3d at 1284 (11th Cir.2011).
[144] *Jones* at 1088, *citing Amos v Gunn,* 94 So. 615, 641 (Fla:1922).

by the [Henrys]."[145] As aforementioned, OB never alleged Henrys PFCs harm *anyone*. They do not encroach on neighboring properties, do not increase water runoff, 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 them. 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.[146] Indeed, hundreds of Henrys' 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."[147]

Also, civil fines cannot be so excessive as to be "cruel,"[148] or "so great . . . as to shock the conscience of reasonable men."[149] 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

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[145] *Jones* at 1089, *citing Gordon v State,* 139 So.3d 958, 960 (Fla.2DCA 2014).
[146] *See, Bajakajian* at 339 and *Austin,* 509 US at 621 (1993), respectively.
[147] *See* signature sheets App3: 54-63, admitted by Magistrate May 2024.
[148] *Jones* at 1088, *citing State v Champe,* 373 So.2d 874, 879 (Fla.1978).
[149] *Jones* at 1089, *citing Amos* at 641.

their “forever home,” 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)![150] (Indeed, Magistrate’s 5/30/24 orders declare Henrys already owe $31,425 as of 5/19/24.)[151] Having been a public defender in two different states, I’ve never heard of *any* fine coming anywhere close to that! 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. 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.[152] Since having all their property liened and levied would never satisfy the ongoing fines, this is certainly a cruel punishment.

Further, *Jones* and *Amos* explain that fines are unconstitutionally excessive

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[150] Of course, the fines do not cease simply because the Henrys have passed away. *See, DJB Rentals* at 413-414, 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.

[151] App3:4-19.

[152] 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.

when they are patently and unreasonably harsh.[153] 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."[154] 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.

> Such forfeitures have historically been treated as punitive, being part of the punishment imposed **for felonies and treason** in the Middle Ages and at common law. Although *in personam* criminal forfeitures were well established in England at the time of the founding, they were **rejected altogether** in the laws of this country until very recently."[155]
>
> "It was only in 1970 that Congress resurrected the English common law of punitive forfeiture to combat organized crime and major drug trafficking."[156]

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."[157]

So, while the lack of actual harm, the harshness of the nature of the liens

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[153] *Jones* at 1089, *citing Amos* at 641.
[154] *Bajakajian* at 335.
[155] *Bajakajian* at 332.
[156] *Id* at FN7.
[157] *Real Property* at 961 (Fla.1991).

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.[158] 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 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.[159] Indeed, fines in general may not exceed:[160]

- $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

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[158] 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.
[159] FS 775.083(1), FS 782.04(1)(a) and (b), FS 794.011(3), FS 806.01(1).
[160] FS 775.083(1); *see also* FS 775.02, fines for common law offenses shall not exceed $500.

no one. Yet, will total more than **100 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 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 the lower tribunals, both completely ignored this essential aspect of due process. Thus, as these harmful errors adversely affect Henrys' substantial rights to use their homestead, this court must not presume correctness of the lower tribunals. Rather, the lower tribunals materially departed from the essential requirements of the law, so this court must step in to stop this miscarriage of justice by overturning the Magistrate's 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 4 spaces if held to duplex standards. Indeed, each of Henrys' 4 "[v]ehicles shall be parked on a paved surface"[161] such as asphalt, brick, or pavers.[162] Further, these paved parking spaces are *required* to be 9' wide.[163] 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 (App1:515), the LDC requires those driveway extensions to be installed toward the side property lines, which Henrys did. In fact, the paver extension on the South driveway brings the total width to 18', which is the minimum required for the Henrys' two vehicles that regularly park on that side of the property. App1:512.

In fact, without these paved "off-street parking requirements," Henrys' home would be a "noncomplying structure or site".[164] As Henrys own four vehicles, with one parked on the south driveway, one parked on the north driveway, and one parked on each of the two driveway paver extensions,

[161] LDC 3-24(c)(4).
[162] LDC 2-50(x)(4) and LDC 1-22 "driveway" and "paved area". Parking on grass, stone gravel or mulch is prohibited.
[163] LDC 3-28(a)(4).
[164] LDC 1-22.

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's true single family residences will not be required to *add* a garage, as Cushing testified,[165] once they have a garage, "*such garage* or carport *shall not be removed* or altered in any way."[166] Further, it's undisputed Henrys' conexes store personal property normally stored in a garage,[167] which Henrys are required to do for such personal property.[168] Accordingly, regardless of when or how the garage was built or placed on the property, Henrys' are bound to leave it on the property "unless an additional garage

[165] App1:359,361; LDC 2-59, 2-60, 2-42(d).
[166] LDC 2-42(d)(2).
[167] App1:314 (Bruce), 325 (Henrys), 336 (OB Attorney), 3 (Notice of Violation), 94 (Order).
[168] *See,* LDC 1-22 *Storage Area, Enclosed*; CO 14-94 through 14-96; and LDC 2-50(x)(1).

or carport is constructed or presently exists on the subject property."[169] 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."[170] 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."[171] 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 requiring Henrys' fence to remain, they cannot be ordered to remove it. App1:515.

[169] LDC 2-50(o).
[170] LDC 2-57(57)(b).
[171] 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. Thus, the lower tribunals committed harmful errors departing from the essential requirements of the law resulting in adverse affects to Henrys' substantial rights to use and protect their property.[172] Magistrate's orders must be overturned.

Conclusion

"A fundamental task of the judiciary is to safeguard the constitutional rights of the citizenry."[173] Here, both lower tribunals committed harmful errors by materially departing from the essential requirements of the law. Moreover,

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[172] 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."

[173] *Sarmiento*, 397 So.2d at 645 (Fla:1981).

the 7 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 Henrys' substantive rights.

Respectfully Submitted: /s/ Katherine & Michael Henry
February 14, 2025 Petitioners, Pro Se

Certificate of Service

I certify that the foregoing document has been furnished to Abraham C McKinnon (lynn@mckinnonandmckinnonpa.com, amckinnon@mckinnonandmckinnonpa.com), Noah McKinnon (nmckinnon@mckinnonandmckinnonpa.com), H. Pope Hamrick, Jr. (phamrickjr@cfl.rr.com), Circuit Court Judge Mary G. Jolley (kmccoy@circuit7.org, Division32@circuit7.org), Florida State Attorney General (oag.civil.eserve@myfloridalegal.com), via the electronic filing portal on February 14, 2025.

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