

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

CITY OF ORMOND BEACH, FLORIDA  
Petitioner,

CASE NOS: 22-112237  
22-112246  
22-112247

vs

MICHAEL and KATHERINE HENRY,  
Respondents.

PARCEL NO: 4223-02-06-0130

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**RESPONDENT'S MOTION FOR RELIEF FROM ORDER & MOTION FOR STAY**

COME NOW RESPONDENTS MICHAEL HENRY and KATHERINE HENRY [hereinafter, "Henrys"], appearing on their own behalf, and file this Motion, and in support thereof state:

JURISDICTION

1. On 2/27/23, this matter was before Special Magistrate Hamrick [hereinafter, "Magistrate"] after being set for an LDC violation hearing [hereinafter, "Hearing"] by Petitioner City of Ormond Beach, Florida [hereinafter, "OB"].
2. Magistrate issued an Order dated 3/1/23, which was sent out on 3/3/23, with service by Certified Mail completed on 3/8/23, thus the Order was rendered on 3/3/23, per Florida Rules of Court Procedure [hereinafter, "FRCP"] 9.020(h).
3. Henrys contemporaneously file and serve upon OB their Notice of Appeal pursuant to FRCP 9.110(c), well within the 30 days from rendition, as required by law and court rule.
4. This tribunal has jurisdiction to render Relief from its Order pursuant to FRCP 1.540(b)(4), and jurisdiction to issue a Stay under FRCP 9.190(e)(3). See also FRCP 9.600.

MOTION FOR RELIEF FROM ORDER

5. Per FRCP 1.540(b), Henrys may be relieved from the Order because it is void. Per Black's Law Dictionary, Eighth Edition, p 1604, "void" means "of no legal effect." The Order here is void as it was issued with no subject matter jurisdiction, and its terms deny

Henrys due process of law, as required by the US and Florida Constitutions. To allow such an order to stand would be the epitome of a miscarriage of justice.

6. At the hearing, the Magistrate stated the Henrys' legal arguments based on state law were "without merit" because she did not cite a direct example of case precedent for each point. However, all courts and administrative and judicial proceedings in this state are bound to follow all constitutional laws, regardless of whether case precedent can be found. Our state's statutes do not derive their authority from case precedent based thereon, but instead have their own intrinsic value. Case precedent is only valuable to help interpret how a particular law applies to a case if the law contains ambiguity, and is therefore needing judicial interpretation. After all, OB cited not a single case on point to support any of the statutes or ordinances they raised. And what's good for the goose is good for the gander. Further, "The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means." *Ham v. Portfolio Recovery Assocs., LLC*, 308 So.3d 942, 946 (Fla. 2020).

#### SUBJECT MATTER JURISDICTION

7. Subject matter jurisdiction may be raised at any time (per FRCP 1.140(h)(2)), and is required in order for a judgment or order to have legal effect. See *Wheeler v. State*, 296 So.3d 895 (Fla. 2020). Nowhere in any relevant law is Magistrate given authority to grant OB authority to enter Henrys' property, remove Henrys' property, dispose of Henrys' property, charge Henrys for such removal, impose a lien for an amount including those removal charges, or absolve OB from liability for damages they cause in so doing.
8. OB Ordinance 2016-44 Section 5 states that "[u]nless another penalty is **expressly** provided," punishments may only include "a fine of not more than five hundred dollars (\$500.00) or . . . imprisonment not exceeding sixty (60) days, or both."<sup>1</sup> See *a/so*, FS 162.22. Indeed, if the Henrys had simply failed to appear at the Hearing, Magistrate only had the authority to impose a *fine*. OB Code of Ordinances [hereinafter, "CO"] 2-25(c); CO 2-256(c)(10) and (11); FS 162.21(3)(d)(10).

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<sup>1</sup> Jail time does not apply here, though, as Land Development Code [hereinafter, "LDC"] violations may only be civil infractions per FS 162.21(5)(a).

9. Moreover, by definition, Magistrate only has “authority to hold hearings and assess fines” pursuant to CO 2-251 and FS 162.03(2). This limited jurisdiction is also reiterated expressly in CO 2-254(a). As Magistrate points out in his Orders, FS 162.08(5), and CO 2-254(a) allow him to “[i]ssue orders having the force of law to command whatever steps are necessary to bring a violation into compliance with city codes or ordinances.” Further, “The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means.” *Ham v. Portfolio Recovery Assocs., LLC*, 308 So.3d 942, 946 (Fla. 2020). The word “command” is not defined in CO or LDC, thus we must turn to Webster’s New Collegiate Dictionary. LDC 1-21(b). According to Webster’s (last accessed 3/24/23), “command” means to “order” or “exercise a dominating influence over.” So, in its plain sense, Magistrate may order Henrys to pay fines or remove the pavers, etc from their property. But, that cannot legally be stretched to mean Magistrate may also provide OB with authority to take Henrys’ property. In fact, Magistrate recognizes he cannot “command” OB here, and instead implies he can “authorize” OB to act. (If Henry’s do not remove the fence, pavers and shipping containers, “THE CITY WILL BE AUTHORIZED TO ENTER ONTO THE PROPERTY . . . TO REMOVE AND DISPOSE OF” them, per Orders.) Authorizing is to allow or permit OB to do something, while commanding means they *must* do it. So, FS 162.08(5), and CO 2-254(a) allow Magistrate to order Henrys to pay fines or remove the pavers, etc, but NOT to authorize OB to go onto Henrys’ property or take it.
10. FS 162.09(1) and CO 2-258(a) allow for OB to make repairs, but *only* for a “serious threat to the public health, safety and welfare,” as identified in FS 162.06(4) and CO 2-255(e). Henrys’ fence, pavers and shipping containers are *not* such serious threats, nor has OB even alleged such.
11. Even then, only “repairs” are authorized to be made.<sup>2</sup> With Webster’s defining “repair” as fixing “what is torn or broken,” it makes sense for repairs to be limited to “serious threats to the public health, safety, and welfare” since dilapidated or compromised

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<sup>2</sup> “Repair” is not defined in Florida statutes (i.e., 163.3164, etc.), Ormond Beach Code of Ordinances, Ormond Beach Land Development Code, or Black’s Law Dictionary.

structures might create such a serious threat. In fact, it is only for unsafe structures that OB has that authorization to enter a property. CO 8-4(3)(a). Moreover, Magistrate “shall issue an order affording the proper relief consistent with powers granted herein,” FS 162.07(4), and no powers are granted for Magistrate to authorize OB to “repair” anything on Henrys’ property.

12. Furthermore, there is no other lawful authority to take the Henrys’ fence, pavers, or shipping containers. Black’s Law Dictionary, Eighth Edition, p 1493, defines “taking” as “the act of seizing an article” or “the government’s actual or effective acquisition of private property either by ousting the owner or by destroying the property or by severely impairing its utility.” Here, the Orders meet both categories of a “taking.” Whether stopping us from using our own property or physically taking our property, each must be done under the strict requirements and procedures of the US and Florida Constitutions and state law. Physically taking the Henry’s pavers, fence and shipping containers without just compensation clearly violates US Const Am V and FL Const Art X Sec 6 (“No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner.”) But even stopping us from using our own property must be done in a legal manner. For example, FS 553.83 and LDC 1-11 only allow municipalities to seek such injunctive relief relating to use of private property from a court of competent jurisdiction.

13. Procedures to take property are governed by Eminent Domain in Chapter 73 of the Florida Statutes, not Chapter 162. Further, the powers to take *real or personal* property (see FS 166.401(4)), are heavily restricted by Chapters 127, 163 and 166, per FS 730.13(4).<sup>3</sup>

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<sup>3</sup> For example, see FS 163.3161(10) “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, and property owners must be free from actions by others which would harm their property or which would constitute an inordinate burden on

14. But more pointedly, FS 73.014 and 163.335(7) expressly prohibit taking property in ordinance violation situations, even for “nuisance, slum, or blight conditions,” as it is “not a valid public purpose or use for which private property may be taken” as required by the Florida Constitution. Furthermore, the alleged ordinance violations for the Henry’s pavers, fence and shipping containers don’t even come close to arising to the level of public concern that exists for public nuisances, slum or blight. Indeed, Henrys’ alleged violations (of simply not having a permit for their fence, pavers and shipping containers), qualify as NONE of the permissible purposes for which private property may be taken, such as drainage, streets, public parks, water & sewer lines, laying wires & conduits, or city buildings, pursuant to FS 166.411.
15. Even *if* the Orders purporting to give OB authorization to remove the pavers, etc., qualified as a “repair” under FS 162.09(1) or a taking for public use under FS 166.401, only the city commission is vested with authority to take action, *not* the Magistrate. (CO 2-258(a) stating that “*magistrate shall notify the city commission, which may authorize and make all reasonable repairs;*” FS 162.09(1) stating that *Magistrate “shall notify the local governing body, which may make all reasonable repairs;*” FS 166.401(3) stating “the local governing body of a municipality may not exercise its power of eminent domain **unless the governing body adopts a resolution authorizing** the acquisition of a property, real or personal.”) While those provisions indicate the authority of the city commission to make *repairs* or file petitions for eminent domain, likewise, only circuit court judges have subject matter jurisdiction to authorize a city to *take* property. See FS 73.021 and LDC 1-11, as opposed to the limited jurisdiction of Magistrate to “hold hearings and assess fines” pursuant to CO 2-251, FS 162.03(2) and CO 2-254(a).
16. Moreover, no subject matter jurisdiction exists to authorize a literal taking of private property without just compensation, per US Const Am V and FL Const Art X Sec 6. Specifically, payment must be made to Henrys before OB takes possession of their

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property rights as those terms are defined in s. 70.001(3)(e) and (f). Full and just compensation or other appropriate relief must be provided to any property owner for a governmental action that is determined to be an invalid exercise of the police power which constitutes a taking, as provided by law.”

private property. FS 73.071, 73.015, 73.081. OB is also required to pay Henrys' attorneys fees per FS 73.091. Most importantly, if OB doesn't pay Henrys in full within 20 days of rendition of a judgment granting eminent domain authority, "the proceedings shall be null and void." FS 73.111.

17. Magistrate also holds no subject matter jurisdiction to order removal of Henrys' shipping containers, as they are legally required to remain on Henrys' property. The Order asserts Henrys' shipping containers constitute a garage, as defined by LDC 2-50(dd)(3)(a), and "must meet the regulations pertaining to a garage." First, LDC 2-50(o) *requires* all residential properties, like Henrys' homestead, to have a garage. Regardless of when or how the garage was built or placed on the property, Henrys' are bound to leave it on the property "unless an additional garage or carport is constructed or presently exists on the subject property."
18. Second, "the regulations pertaining to a garage" from a state law perspective are comprised of standards primarily for "public health and lifesafety" and "protection of property" (FS 553.72(1)) "relative to structural, mechanical, electrical, plumbing, energy, and gas systems" (FS 553.73(2)), and standards for building design elements (See FS 163.3202(5)). The only violation regarding the shipping containers that Magistrate found was that a permit had not been obtained prior to them being placed on Henrys' property. However, the Henry's long-standing communication with OB clearly demonstrated that OB would never issue Henrys a permit for the shipping containers. Indeed, testimony by Janet Bruce and Sarah Cushing included claims that the shipping containers were "not capable of receiving a permit." Specifically, without quoting any portion of the code or state law, Sarah Cushing said the Florida Building Code [hereinafter, "FBC"] does not regulate shipping containers, therefore, they are not able to be permitted. While it is dumbfounding in our constitutional republic to claim that we could *not have* something because it was *not regulated* by the government, the law actually does address this point. In FS 553.79(20)(a), the FBC mandates that for "structures moved into or within a county or municipality [that] do not or cannot comply with the code . . . such buildings or

structures shall not be required to be brought into compliance with the building code." As the shipping containers fit the definition of such structures as defined there, they cannot be required to be brought into compliance with code portions regulating their "construction, erection, alteration, modification, [or] repair." (See FS 553.72(1) and 553.73(1).) That only leaves standards for building design elements. However, "Land development regulations relating to building design elements may not be applied to a single family or two family dwelling," which includes "the location or orientation of the garage." FS 163.3202(5)(b)(1). Also, although local governments may make amendments to FBC, "such additional requirements may not introduce a new subject not addressed in the Florida Building Code." FS 553.73(4)(b)(3). Thus, as Ormond Beach building official Sarah Cushing testified that the "Florida Building Code does not regulate shipping containers," OB is statutorily prohibited from regulating them. Further, Sarah Cushing testified the shipping containers are not tested for wind-borne-debris-impact standards; however, "storage sheds that are not designed for human habitation and that have a floor area of 720 square feet or less are not required to comply with the mandatory wind-borne-debris-impact standards of the Florida Building Code." FS 553.73(10)(h). Consequently, the order purports to authorize taking the shipping containers for the Henrys' failure to receive a permit for which OB illegally required *and* illegally withheld.

19. Magistrate also holds no subject matter jurisdiction to order removal of Henrys' pavers, as they are legally required to remain on the Henrys' property. Per LDC 2-50(x)(4), there "shall be no parking of vehicles . . . in the front yard of any residential property" except on "asphalt, bituminous brick, concrete, turf block, brick pavers or pervious concrete." Indeed, "driveways" are "paved areas" of "asphaltic concrete, concrete, brick or similar material." LDC 1-22 "driveway" and "paved area". Parking on grass, stone gravel or mulch is prohibited. In fact, without these paved "off-street parking requirements," Henrys' home would be a "noncomplying structure or site" per LDC 1-22. As the 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 extensions, removing Henrys' pavers would mean their vehicles would be parked on the grass/sand/weeds, making it a "noncompliant structure." Magistrate lacks authority to force the Henrys into noncompliance.

20. Further, Magistrate lacks subject matter jurisdiction to prevent the Henrys' use of or to authorize OB's removal of Henrys' pavers under state law. The pavers, undisputed as fitting the definition of "Florida-friendly landscaping," serve "a compelling public interest" "to conserve or protect the state's water resources," per FS 166.048 and 720.3075. 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." FS 166.048. Thus, there is no jurisdiction to enforce such a provision, especially with the Henrys' beachside property, which only sustains weeds and sand, having no extensive irrigation system that would be needed to sustain grass.
21. Likewise, Magistrate lacks subject matter jurisdiction to authorize OB to remove the Henrys' fence. In addition to other numerous constitutional and statutory provisions, FL Const Art I Sec 23 guarantees the Henrys' "right of privacy." Consistent with that privacy, FS 810.115 clearly states that "whoever causes to be broken down, marred, injured, defaced, or cut any fence belonging to or enclosing land not his or her own, commits a misdemeanor in the first degree." Thus, being an explicit violation of state criminal law, Magistrate cannot create authorization for OB to remove the Henrys' fence.
22. Likewise, Magistrates has no subject matter jurisdiction to authorize OB to enter onto Henrys' property, remove any of Henrys' property, dispose of any of Henrys' property or absolve OB from liability for damages or loss sustained by us in OB doing such. Not only would such actions by OB violate US Const Am IV and FL Const Art I Sec 12 protections against searches and seizures without warrants, it would also directly violate a right of privacy guaranteed under FL Const Art I Sec 23. Furthermore, it constitutes unlawful entry under FS 82.01, 82.03(1), 810.08, and 810.12; burglary in dwelling curtilage under FS 810.015, 810.02, and 810.011; criminal and civil trespass under FS 810.08 et al,

felony theft under FS 812.014 et al, obstructing justice (taking private property under color of law) under FS 843.0855. Thus, the provisions of the orders purporting to allow OB to enter Henrys' property, remove Henrys' property, dispose of Henrys' property, and absolve OB from damage or loss to us by doing such, must be removed as legally void.

23. In addition to the foregoing reasons, Magistrate also lacks authorization to provide criminal and civil immunity here. It is only in relation to unsafe structure abatement or nuisances that OB has attempted to provide itself with immunity from civil or criminal prosecution. CO 8-4(3)(a) and 14-100. Even so, that purported immunity is provided directly by the city commission, not authority stemming from the Magistrate.

#### ULTRA VIRES ACTS DEPRIVED HENRY'S OF DUE PROCESS

24. The Orders are void as stemming from ultra vires acts depriving the Henrys of constitutionally and statutorily required due process.

25. On 10/19/22, OB served Henrys with written Notices of Violation for the pavers, fence and shipping containers. On 11/8/22, Henrys served OB with a response, containing a Notice to Cease & Desist and a Notice of Proposed Litigation under FS 70.45. Under FS 70.45, upon receiving the written notice, OB "shall review the notice of claim and respond in writing to the property owner by identifying the basis for the exaction and explaining why the governmental entity maintains that the exaction is proportionate to the harm created by the proposed use of real property, or by proposing to remove all or a portion of the exaction." To-date, OB has failed to comply with this statutory requirement, instead moving forward with the exaction. OB served the Henrys with Notice of the Hearing, which took place 2/27/23. At the onset of the Hearing, the Henrys moved for dismissal, among other reasons, because of OB's failure to comply with FS 70.45. OB simply stated FS 70.45 didn't apply, and that the Henrys were supposed to have filed a claim under FS 70.45 in circuit court to have those issues addressed. Without providing legal reasoning, Magistrate denied Henrys' motion for dismissal.

26. Chapter 70 of Florida Statutes is entitled "Relief from Burdens on Real Property Rights" - *relief from burdens not compensation after exactions*. The provisions of this chapter are

designed to STOP the city from burdening private property rights. OB argued that meant the Henrys were required to file a case in circuit court under FS 70.45 *prior* to the 2/27/23 Hearing if they wanted that relief. However, OB first took their official action in burdening the Henrys' property rights in serving the Henrys with the Notices of Violation on 10/19/22, to which Henrys promptly supplied the FS 70.45 Notice by 11/8/22. Under FS 70.45(3), the Henrys were required to serve the notice no later than 180 days after imposition of the prohibited exaction, but must then wait at least 90 days from that point before filing an action in circuit court (presumably meaning the city has 90 days to respond to the notice). Ninety days from 11/8/22 is 2/6/23. However, by that point, OB had already served Henrys with the Notice of the Hearing. In fact, OB had attempted to hold the hearing without the proper and legally required notice a month earlier, on 1/23/23. Indeed, although Henrys were not legally served until several weeks later, OB provided documents showing they had already been scheduling the matter for special magistrate hearing by December 2022. Thus, OB not only illegally failed to respond under FS 70.45, but *commenced the special magistrate proceedings against the Henrys several weeks before Henrys were even able to file a suit under FS 70.45*. Since FS 70.45 accounts for "damages" which include not only financial compensation but also "the right to injunctive relief," it is absurd for OB to manipulate the laws involved so as to prevent Henrys from seeking relief from the circuit court *before* the 2/27/23 Hearing, but also preclude Henrys from receiving injunctive relief at the 2/27/23 Hearing.

27. In other words, OB cannot properly initiate special magistrate proceedings during the 90 days they are statutorily required to respond under FS 70.45. And because OB did such, which ultimately resulted in the Hearing being held on 2/27/23, Magistrate lacked subject matter jurisdiction to hold the hearing then, and was required to dismiss or postpone said hearing. If Henrys' 90 days of waiting had expired with no special magistrate hearings scheduled yet, and Henrys, after a reasonable time, had sat on their rights and failed to pursue the FS 70.45 litigation, the magistrate hearings could have *then* been scheduled. But holding otherwise, Magistrate rewarded OB's ultra vires acts

violating the Henrys' due process rights, depriving them of the preventive injunctive relief found in FS 70.45. Now, Henrys are overburdened with commencing the 70.45 litigation *while* appealing these Orders - which contain provisions for OB to unconstitutionally and literally *take* the Henrys' property, the *clearest example of where relief from burdens on real property rights is needed*. (Fittingly, Webster's defines "relief" as "a removal or lightening of something oppressive, painful, or distressing.")

28. Denial of due process may void an otherwise permissible court order. The Florida Supreme Court "has explained that the essence of due process is that fair notice and a reasonable opportunity to be heard must be given to interested parties before judgment is rendered." *Jennings v. State*, 265 So.3d 460 (Fla. 2018), citing *Scull v. State*, 569 So.2d 1251, 1252 (Fla. 1990); and *Huff v. State*, 622 So.2d 982, 983 (Fla. 1993). (Cleaned up). Despite the Henrys' communication via phone and email with OB regarding the pavers, fence and shipping containers going back to 9/2/22, the Henrys received absolutely *no* notice, and an extremely inadequate opportunity to be heard, on the portions of the Orders purporting to authorize OB to enter onto their property, remove their property, dispose of their property, charge them for such removal, use such charges to create a lien against their real and personal property, and be immune from liability for damage or loss sustained by the Henrys from OB's said removal. Aside from all of the aforementioned legal procedures that OB failed to follow, NONE of the documents served on Henrys (either by certified mail, USPS, or email) even referenced the entering, removing, disposing, charging, charges creating liens, or immunity from liability for OB. NOT ONE. In fact, in looking at the Notices of Hearing and Code Enforcement Citations, submitted into evidence over Henrys' objections, the ONLY potential penalty mentioned is that of a fine - even if the Henrys failed to appear.

29. Shockingly, the FIRST time the Henrys were notified of these provisions being sought by OB was when Janet Bruce handed the Henrys several large stacks of pages at 9:58AM, only two minutes before the 10AM Hearing (despite Henrys arrival 30 minutes early, and the fact these documents would have been ready for the Hearing a month prior as

originally scheduled). Certainly, when a city seeks to take someone's private property, proper notice must be given so that person "may file his or her written defenses to the petition, *as a matter of right.*" FS 73.051. Indeed, in order to take private property, OB *must* not only provide notice of the intended taking, but must do so "prelitigation." FS 73.0511. Moreover, such prelitigation notice must not only provide basic details on the intent to take the private property, but must specifically "notify the fee owners of statutory rights under s. 73.091." FS 73.0511. Further, this notice is required to be provided by *personal* service under FS 73.031, whereas OB struggled to comply with the less stringent requirements of ordinance violation hearings of service by certified mail, etc. (as described in prior filings). Given notice and opportunity to be heard are hallmarks of constitutionally guaranteed due process, and create grounds for *per se* reversible error rules (*see Mills v State*, 620 So.2d 1006 (Fla. 1993)), such blatant failure to provide notice *and* reasonable opportunity to be heard by itself creates reason why such portions of the Orders are void.

30. Additional due process violations occurred in OB's ultra vires acts regarding pre-filing negotiations. OB is statutorily required to participate in good-faith negotiations *meeting specified statutory requirements before* filing an action in court to take Henrys' property, including providing an offer to pay the Henrys, even "where less than the entire property is sought." FS 73.015(1).
31. Likewise, in filing the action, OB *must* file a *petition for eminent domain* in circuit court, per FS 73.021(1), which OB failed to do in substance and form. In said petition, OB *must* identify 1) the authority under which the property is to be taken, 2) the public use or purpose for which the property is to be taken, and 3) that the property is necessary for that public use or purpose. Clearly, OB's attempt to take the Henry's pavers, fence and shipping containers through a special magistrate hearing, which fails to meet *any* of these statutory requirements, is ultra vires action resulting in severe due process deprivation for the Henrys. Consequently, all parts of the Orders relating to the *taking* of

the Henry's property (the entering, removing, disposing, charging, charges creating liens, or immunity from liability for OB) are void.

32. Additionally, any writ or order imposing fines or purporting to authorize OB to take action on the Henrys' property, *must* be *subsequent* to, and distinct from, the initial order commanding the Henrys to take action. FS 162.07(4) states that orders issued at the conclusion of the special magistrate hearings "may include **a notice that** it must be complied with by a specified date **and that** a fine may be imposed and, *under the conditions specified in s. 162.09(1)*, the cost of repairs may be included along with the fine if the order is not complied with by said date." Indeed, FS 162.09(1) and CO 2-258(a) provide that "upon notification by the code inspector that an [already existing] order of the [Magistrate] has not been complied with," the Magistrate "may order the violator to pay a fine," and shall notify the city commission regarding the need to make repairs. That is why FS 162.08 allows Magistrate "to command" the Henrys to take necessary steps, but does *not* yet allow for fines or repairs to be ordered. FS 73.121 provides that the judge may grant writs of possession if the defendant is still in possession *after* the judgment has been rendered for, and compensation has been paid by, the city. Likewise, under FRCP 1.570(b), (c) and (e), the taking of property must be done in a subsequent proceeding. Thus, the portions of these initial Orders that purport to authorize the charging of fees or for OB to take action on Henrys property are void.

33. Lastly, buried in OB's codes is the provision that OB's burden of proof at ordinance violation hearings is merely by a preponderance of the evidence. Such a low standard is hardly acceptable to use when OB is attempting to literally *take* private property. As such, Orders based on such deficient proof standards are void on their face.

#### MOTION FOR STAY PENDING APPEAL

34. Per FRCP 9.190(e)(3), Henrys may request Magistrate to enter an order to stay the Orders discussed herein. For all of the aforementioned reasons, the fees Henrys are ordered to pay are void. At the very least, this means the charging of said fees must be stayed pending appeal, as the interests of justice require. Likewise, all parts of the

Orders relating to the taking of the Henry's property (the entering, removing, disposing, charging, charges creating liens, or immunity from liability for OB) are void. Thus, the interests of justice require at the very least that such portions be stayed pending appeal. If the fees and takings portions are *all* removed from the Orders pursuant to the aforementioned Motion for Relief from the Orders, the request for a stay regarding such would no longer be needed. However, in that event, the Henrys still ask the court to stay the remaining portions of the Orders (the commands on Henrys to remove the shipping containers, and to either remove the fence and pavers or obtain permits for such (which legally cannot be done, as outlined in the Henry's prior filings).

35. To avoid being unduly cumulative, Henrys refer to their prior filings for the description of why they cannot legally obtain permits for the fence and pavers. So, just to summarize, Henrys cannot apply for permits because their property does not currently meet all LDC regulations, such as having a garage. Sarah Cushing testified that OB "wouldn't enforce" that part of the LDC on the Henrys, but her statement regarding such cherry-picking doesn't guarantee to the Henrys OB would actually and intentionally ignore such requirements when determining whether to process an application for a permit (of any kind). Furthermore, according to the LDC, no permit can be issued without 1) a full variance approved regarding a garage, 2) a development order, 3) engineer/architect final site plan being approved, 4) a recent survey of the lot *specifically certified to the city*, and 5) an application that includes incredibly overburdensome requirements, as listed on page 4 of Henrys' February 2022 Response.
36. Additionally, Janet Bruce testified that OB would require the Henrys to pull up their pavers to "check to see if they were installed properly," which is not permissible under the law (nor was any alleged legal justification or authorization even offered by OB for requiring such).
37. Janet Bruce also testified that the Henrys' fence would not be permitted as it stands because it does not meet aesthetic requirements. In other words, 3 small lateral posts run across the fence panels that face the backyards of the 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. Janet Bruce testified that this does not meet the aesthetic requirements of the LDC, and the Henrys would, therefore, be required to tear down the vast majority of their fence before a permit would be issued. We must keep in mind, however, that this is a matter of subjective aesthetics only, and that nothing would prohibit 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). Moreover, "Land development regulations relating to building design elements may not be applied to a single family or two family dwelling," which includes "the location or architectural styling of windows or doors." FS 163.3202(5)(b)(1). The Henrys' fence is constructed entirely of solid wood doors, as demonstrated by Exhibit A of the Orders. Thus, OB *cannot* regulate the location or architectural styling of the Henrys' solid wood door fence.

38. Further, Janet Bruce testified that OB may refuse to issue a permit for the fence and pavers if, in the sole discretion of the code inspector, they do not have enough aesthetic value - or simply put, they just don't like how they look. Considering the attitude OB has expressed toward the Henrys thus far, and the extent of the ultra vires acts, OB is most likely to disqualify Henrys' fence and pavers on this basis alone, if for none other.
39. As described in detail above, removing the Henrys' pavers and shipping containers would actually put them in violation of that very LDC regarding parking (LDC 2-50(x)(4)), outdoor personal storage (CO 14-94 through 14-96, and LDC 2-50(x)(1)), and needing a garage (LDC 2-50(o)).
40. Removing the Henrys' fence and pavers would irreparably harm them and compromise their structural integrity. Then, should Henrys prevail on appeal, Henrys would not be able to simply put them back.
41. The Henrys spent thousands of hours bringing the pavers and fence materials home, preparing them for installation, and installing them. It would literally take the Henrys an entire year or more to reinstall them after winning on appeal. That's precious time they

could not get back to spend with their kids once they prevail on appeal. Moreover, the Henrys literally put blood, sweat and tears into the pavers and fence, and should not, in the interests of justice, be required to triple that effort and endure that physical pain again until all appeals are exhausted.

42. The Henrys have no other property in Florida, with no family nearby, and thus have no place to even temporarily put their shipping containers, other than their own homestead. This would force the Henrys to rent land for this purpose, which would cost thousands of dollars, and is not something the Henrys have the ability to do. Furthermore, the actual moving of the shipping containers is quite expensive, and estimates put it in the thousands, too, which the Henrys simply cannot come up with, certainly not on short order. (The delivery was included with their purchase of these new shipping containers.) Also, moving the shipping containers requires special equipment, and they are likely to be damaged in moving them, especially if someone attempts to move them with insufficient equipment.
43. Removing the fence will cause irreparable harm by destroying the Henrys' right to privacy, especially considering the neighbor living to our West who admitted in her testimony to continuously watching and taking stacks of pictures of the Henry family. Indeed, FS 163.3177(6)(i)(1)(3) requires OB to respect "constitutionally protected private property rights," including "the right of the property owner to privacy and to exclude others from the property to protect the owner's possessions and property."
44. Removing the shipping containers will irreparably harm all of the personal property around and in them (as it is properly secured for storage, but not for transport). Depending on when or how the shipping containers would be moved, either the Henrys' personal property would still be inside unsecured for transport, or sitting outside in the elements getting destroyed. This includes Katherine Henry's wedding dress and momentos, family heirlooms, paper records, medical equipment, tools, and more.
45. Removing the fence, pavers and shipping containers will inevitably harm the real and personal property constituting the Henrys' homestead, as indicated by the Orders'

provisions attempting to shield OB from liability in causing such harm. But in addition to OB's expectations and the Magistrate's that OB would inevitably cause harm to the Henrys' homestead by removing their fence, pavers and shipping containers, even the state legislature foresaw that kind of damage being made to the residual property when a taking like this happens. As such, FS 73.015, 73.071 and 73.081 all account for the money OB would be required to pay the Henrys for damages to the remaining property caused by the taking of the fence, pavers and shipping containers. However, under the current Orders, OB is purportedly allowed to cause such damage without making such reparations.

46. Furthermore, the state legislature understood the urgency of such matters, as identified in FS 73.071(1). Consequently, the Henrys urge the Magistrate to issue the Relief from Orders and Stay Pending Appeal immediately.

#### CONCLUSION AND PRAYER FOR RELIEF

47. Magistrate issued Orders following the 2/27/23 Hearing that violate many statutory and constitutional provisions. The Henrys will be irreparably harmed by such void Orders being enforced. Thus, Henrys respectfully requests Magistrate to issue an order:

- a. Providing the Henrys complete relief from the 3 current Orders on the basis of being legally void.
- b. In the alternative, granting the Henrys at least partial relief from the Orders on the basis of being legally void, along with providing for a Stay of enforcement of the Orders for the remaining parts, pending the Henrys' appeal of said remaining portions.
- c. In the alternative, granting the Henrys a Stay on all portions of the Orders pending their appeal of said Orders.

Respectfully Submitted: March 24, 2023

/s/ Katherine & Michael Henry  
Respondents, Pro Se

I certify that the foregoing document has been furnished to Ann Margret Emery, Deputy City Attorney and Chris Mason, Neighborhood Improvement Division Manager by email today.

/s/ Katherine Henry

Attorney Admitted in the United States Supreme Court and four Additional Jurisdictions