



1 APPEARANCES:

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On Behalf of the Plaintiffs

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## P R O C E E D I N G S

1  
2 THE COURT: All right. We're here on  
3 2023-30711-CICI, Henry versus the City  
4 Ormond Beach. We're here for the appeal from  
5 the Special Magistrate's Order, so this is an  
6 appellate oral argument. I issued the Order  
7 yesterday. Just to clarify, so it's 20  
8 minutes aside. And, Ms. Henry, whenever  
9 you're ready, you can either stand -- I  
10 prefer the podium for purposes of argument.  
11 Thank you. And then do you want to reserve  
12 some of your 20 minutes for rebuttal time?

13 MS. HENRY: If I have any left. I'm not  
14 sure that I will.

15 THE COURT: You can reserve five minutes  
16 now, and I can stop you at 15, or do you want  
17 to --

18 MS. HENRY: I don't know. I can get  
19 everything to you in 20 minutes probably.

20 THE COURT: Okay. All right. Whenever  
21 you're ready.

22 MS. HENRY: Thank you, Your Honor.  
23 There are a few key matters at issue here.  
24 The City literally coming onto our homestead  
25 to physically take and rip out our pavers,

1 privacy fence and two small Conexes, or PFCs.  
2 The City illegally interfering with our  
3 ability to use, preserve and protect our  
4 property. The City imposing never-ending  
5 fines that total \$21,320 as of today's date.  
6 The City violated many aspects of procedural  
7 due process, and the law simply does not  
8 allow the City to do any of that.

9 To make matters worse, there's misleading  
10 to this Court about facts of the case, or  
11 elements of a legal analysis, statutes and  
12 cases involved, and even what is being  
13 challenged in this appeal.

14 THE COURT: So you are mindful of what  
15 my standard of review is. So my job is to,  
16 on appeal, not my job, though the standard of  
17 review is really whether you were denied  
18 procedural due process, and you've indicated  
19 that there -- there -- you've raised those  
20 issues. Whether the findings of a Special  
21 Magistrate are inconsistent with the stated  
22 -- the violations. Those are -- my standard  
23 of review is pretty straightforward. You  
24 would agree with that, so I have to stay in  
25 my lane. So I just want to make sure your

1 argument's tailored to what our standard of  
2 review is which is, you know, those -- those  
3 three -- essentially whether you're afforded  
4 due process, whether the law was correctly  
5 applied, and whether the findings of Special  
6 Magistrate Hamrick are supported by  
7 substantial evidence. Those are the three  
8 prongs. So I just want to stay in our lane,  
9 because that's really how I have to -- that's  
10 the lens upon which I'm going to look at the  
11 arguments on appeal.

12 MS. HENRY: Yes, Your Honor, and that's  
13 exactly what I'm asking you to do.

14 THE COURT: Um-hum.

15 MS. HENRY: So most of the binding  
16 authority that we recited, whether a state  
17 statute in this constitution, et cetera, was  
18 completely ignored by them. Not  
19 differentiated, not explained differently,  
20 completely ignored. And blatantly ignoring  
21 binding authority is misleading to a Court.

22 In their argument they also raise cases  
23 and statutes often removing key words or  
24 inserting completely different words which  
25 skews the meaning of the laws cited. Several

1 times they cite cases to support their  
2 points, but those points are not even  
3 discussed anywhere in those cases. But  
4 perhaps more telling is that most, or 23 of  
5 the cases that they're citing are dissenting  
6 arguments, unpolished opinions, cases from  
7 other jurisdictions, trial court decisions  
8 and the like. So they're nonbinding  
9 authority in this case.

10 They even mislead us towards being  
11 challenged in this appeal. For example, they  
12 state we're challenging zoning regulations,  
13 devoting much of their argument to zoning  
14 cases for the statutes, but no zoning issues  
15 have been raised. They then suggest we're  
16 challenging land development regulations, but  
17 the Community Planning Act, or CPA, is the  
18 state statute that controls here.

19 THE COURT: Well, no, the Magistrate  
20 made finding under -- under the Ormond Beach  
21 Land Development Code, correct? So that's  
22 what the -- that's what was before them.  
23 That's what the scope of their -- their --  
24 their position was they did the violation and  
25 that's what was brought before the Special

1           Magistrate, so that is what I have to  
2           determine whether it was appropriately  
3           applied under -- that's -- I can't -- I've  
4           got to look, again, through the lens of what  
5           the Special Magistrate did. So you and I may  
6           disagree on that, but ultimately it was  
7           brought forth as a violation of the local  
8           code and that's what the hearing was about.  
9           So that -- so I need you to tell me what --  
10          what -- how they misapplied that local code  
11          to the facts of your case.

12                 MS. HENRY: Well, I'm saying that state  
13                 statutes are involved that are binding  
14                 authority in the case, and have direct impact  
15                 and they have been completely --

16                 THE COURT: What state statute applies?

17                 MS. HENRY: There are several that I  
18                 cited throughout --

19                 THE COURT: Well, I know you cite the  
20                 Bert Harris Act.

21                 MS. HENRY: I cited that not in the way  
22                 that they talk about. They talk about it as  
23                 though 70.001, as though that's the private  
24                 suit that I have, you know, complained in  
25                 circuit court about --

1           THE COURT: Let me ask it a different  
2 way. Is it your position that a valid Bert  
3 Harris claim would be a defense to it? I  
4 mean, I'm just trying to --

5           MS. HENRY: That's not what I said at  
6 all in my briefs. What I talked about is --

7           THE COURT: Well, I'm trying to get a  
8 way for it to apply here. That's what I'm --  
9 that's why I'm driving at.

10          MS. HENRY: Right. And I only cited  
11 that -- I cited that only to talk about the  
12 intents of legislature to protect our  
13 property from inordinate burdens even if they  
14 don't rise to the level of taking.

15          THE COURT: Okay. So, again, is it your  
16 position that -- then that the Land  
17 Development Code violates certain statutes?  
18 Is that what I'm hearing, that the -- that  
19 the provisions that they say that you -- with  
20 the fence and that -- what you violated under  
21 their local code, what -- what is -- how is  
22 that contrary to state law?

23          MS. HENRY: In many different ways.

24          THE COURT: What -- what are they?

25          MS. HENRY: No, you had different

1 question --

2 THE COURT: That's fine. Just let's  
3 move on. What -- in many different ways it  
4 violates state law, so what state laws are  
5 violated?

6 MS. HENRY: Well, for example, 70.45.  
7 That particular statute is -- the way that it  
8 works, once I issue the -- there is --

9 THE COURT: Again, that's Bert -- Bert  
10 Harris.

11 MS. HENRY: Well, that -- there's a  
12 separate covered action under 70.00(1) that's  
13 distinct from 70.45.

14 THE COURT: So are you saying that the  
15 -- that Chapter 70 -- in the provisions you  
16 cite in chapter 70 violate the Land  
17 Development Code? I'm just trying to stay  
18 within my lane, so for me to make a  
19 determination that the Special Magistrate  
20 made an error, and you're telling me they  
21 violated many state statutes, I'm just trying  
22 to understand because your argument was a  
23 little, you know, it hit a lot of things that  
24 I've got, again, the standard of review, it's  
25 very narrow. So if there's several laws that

1 they violated that the provisional Land  
2 Development Code -- that's my very specific  
3 question.

4 MS. HENRY: Right. But there's -- okay.  
5 There's also, as you mentioned, the  
6 procedural aspects. But 70.45 doesn't say --  
7 I'm not saying that the Land Development Code  
8 itself violates 70.45. What I'm saying is  
9 the way that they were applying it to me  
10 violated my property rights, and so under  
11 70.45 I filed written notice according to the  
12 statute, the statute prohibits me from taking  
13 any action on filing the lawsuit in Circuit  
14 Court as an original action for 90 days to  
15 allow them time to respond. They never  
16 responded, as the statute required them to  
17 do. In fact --

18 THE COURT: The statute doesn't -- the  
19 Land Development Code in a code violation  
20 doesn't require them to do anything under  
21 Chapter 70. That's where -- that's where the  
22 disconnect is. They may -- they -- they --  
23 if you're saying there's a procedural due  
24 process violation, I really want to hear  
25 that. Substantively they're applying the

1 Land Development Code, which is what is their  
2 job and their -- the scope of what they are  
3 to do. If they erred in that regard, it  
4 would have to be under the confines of  
5 procedural due process or they misapplied  
6 their own development code.

7 How -- so chapter 70 doesn't -- what you  
8 do independently, but this is within that  
9 tunnel, let's say, if we're driving down the  
10 road, that's in our lane. So I want to know  
11 how they misapplied that law.

12 MS. HENRY: Okay. To me I don't  
13 understand what the purpose of 70.45 would be  
14 in obtaining (unintelligible) injunctive  
15 relief if I'm not allowed to utilize that  
16 statute while they're imposing the exemptions  
17 that the statute -- that's precisely what it  
18 covers.

19 THE COURT: Did you raise that to the  
20 Special Magistrate?

21 MS. HENRY: Yes, I did Your Honor.

22 THE COURT: And he denied it.

23 MS. HENRY: He didn't say why. He just  
24 denied it.

25 THE COURT: Because he had to review --

1           what his job was to review was what was  
2           brought before him, which was an allegation  
3           of a violation of the Land Develop Code and  
4           the improper construction of the fence,  
5           right?

6           MS. HENRY: I would disagree,  
7           Your Honor. I think the statute says that  
8           procedurally they brought it too early. They  
9           had a statutory duty to respond --

10          THE COURT: Where in the -- where in  
11          your -- so 162, that's where we come --  
12          that's the pipeline to every review, Chapter  
13          162. That's the pipeline upon which this  
14          Court reviews local government agencies and  
15          their decision-making under their certain  
16          land -- their zoning procedures, variances,  
17          all -- that's where we are. It's not a  
18          Chapter 70 case.

19          And you're -- I think what my concern is,  
20          Ms. -- and I'm trying to understand it, is  
21          there's an attempt to raise a separate cause  
22          of action. The Special Magistrate couldn't  
23          address that. He had to stay within his  
24          lane, which was --

25          MS. HENRY: I wasn't trying to raise

1 that with him. They statutorily -- I was  
2 statutorily prohibited from filing the  
3 original action for the 90 days from the date  
4 I sent the notice. And when --

5 THE COURT: By whom and based upon what?

6 MS. HENRY: I'm sorry. Say that --

7 THE COURT: By whom and based upon what?

8 MS. HENRY: The statute stops me from  
9 filing the lawsuit in Circuit Court as an  
10 original action for 90 days to await their  
11 written response.

12 THE COURT: No one is disagreeing with  
13 that. But how is that impactful -- I mean,  
14 how -- tell me the interplay then between the  
15 Land Code violation and that independent  
16 cause of action.

17 MS. HENRY: Because in 70.45 the entire  
18 point of it is to stop the exemption, which  
19 is an interference in my use of my own  
20 property, and once I complied with all of the  
21 elements of that statute, then they had to  
22 supply a written response indicating why they  
23 thought it was, in fact, an inappropriate  
24 exemption, and what harm -- specific harm I  
25 was causing by my use, and what the proposed

1 exemption or requirements, how that was  
2 proportionate to the harm that I was causing.

3 So during at that period of time I was  
4 not -- during the 90 days they had to  
5 respond, I'm statutorily prohibited from  
6 filing the cause of action to allow them that  
7 time. Meanwhile they are not allowed to  
8 continue --

9 THE COURT: Again, let me ask it a  
10 different way.

11 How is the finding of the Special  
12 Magistrate -- I mean, I have to -- I have to  
13 make a determination on whether he applied  
14 the correct law.

15 MS. HENRY: Right.

16 THE COURT: And your position is he  
17 missed -- he didn't apply the correct law by  
18 denying you your rights under Chapter 70; is  
19 that correct.

20 MS. HENRY: That's one, but I was just  
21 trying to answer your latest questions, Your  
22 Honor. So --

23 THE COURT: Okay. You can go ahead.  
24 You can continue.

25 MS. HENRY: The -- there's several

1 things, like I mentioned. One is the  
2 physical taking of our property. The Special  
3 Magistrate Orders literally account for them  
4 to come onto -- physically come onto our  
5 property, remove our property, dispose of it,  
6 charge us for all of those actions, be immune  
7 from all damages that they have. They can't  
8 do that under any statute, any constitution  
9 whatsoever. That is not acceptable.

10 Even if it was slum, blight or nuisance,  
11 Your Honor, state statute says they can't  
12 come and take our property. Nowhere in -- in  
13 anywhere of 162, or 163, or any other  
14 statute, the code ordinances, or the LDC does  
15 it allow them to come onto our property and  
16 take property or destroy it. In fact, the  
17 only time they would be allowed to come onto  
18 our property and do anything would be if a  
19 repair was needed.

20 THE COURT: Let me -- let me ask you a  
21 question then. And I -- I don't know I -- if  
22 I agree with you entirely under nuisance law  
23 because I think that there is certain --  
24 that's -- that's kind of a whole different  
25 animal because there's criminal -- criminal

1 nuisance laws and there's civil nuisance  
2 laws. So you don't disagree that -- well,  
3 maybe you do, that the City's code -- so the  
4 City's code of ordinance has given them  
5 certain remedies for folks. They have a --  
6 they have certain regulations, they have  
7 zoning regulations. You can even take it out  
8 of this context. For example, if something  
9 is zoned for -- I mean, let's make it  
10 something really kind of extreme, right? If  
11 something is zoned residential and -- and  
12 someone wants to put a gas station in the  
13 middle of the neighborhood, and I know this  
14 is -- this is a really -- just using it for  
15 purpose of example, what do you believe,  
16 then, the City's remedy is? Should this gas  
17 station be constructed plainly in violation  
18 of the sitting -- a zoning ordinance, right,  
19 what's their remedy, then, if the gas station  
20 owner says, I don't care what the local law  
21 is, I'm going to do it anyway, I don't care  
22 what the Special Magistrate says, I don't  
23 care what a Circuit Judge says, I don't care  
24 what the appellate courts say, you can go  
25 higher up than me? What's their remedy,

1           then, if they install tanks, if they build  
2           this gas station right in someone's back  
3           yard? And I know this is an extreme kind of  
4           example, but I'm just -- your position is the  
5           City can't do anything.

6           MS. HENRY: No.

7           THE COURT: What can they do? Well,  
8           that's -- you just said they can't come on  
9           your property, they can't make -- the only  
10          thing they can do is make repairs.

11          MS. HENRY: And that's not even -- they  
12          can't even do that. They can only -- their  
13          own code, okay, if you want to prevent the  
14          state statutes --

15          THE COURT: Tell me what the code says.

16          MS. HENRY: The code itself, 2.258 only  
17          allows them to make repairs if there's a  
18          serious threat to public health safety or  
19          welfare, that's it. And its only repairs.  
20          It's not removals, it's not destruction.

21          THE COURT: So what if -- so if there is  
22          a violation of an ordinance their remedy,  
23          then, is the imposition of a fine, correct?

24          MS. HENRY: Yes.

25          THE COURT: You don't disagree with

1 that. So if they -- if -- if -- if in the  
2 gas station example, I'll use that, that they  
3 say, look, this plainly violates this -- what  
4 this area -- what this lot is zoned for,  
5 we're going to continue to fine them until  
6 they come into compliance. Do you disagree  
7 with that?

8 MS. HENRY: I do disagree with that,  
9 Your Honor.

10 THE COURT: Isn't that plain -- how else  
11 are they supposed to enforce it if that  
12 plainly delineated in the Land Development  
13 Code that there's going to be an imposition  
14 of the fine until the -- until the violation  
15 is cured or eradicated? How else are they  
16 supposed to enforce their own Land  
17 Development Code if that's what it provides  
18 for?

19 MS. HENRY: Well, Your Honor, the -- as  
20 far as the code goes, we need to remember  
21 that the constitution and state law always  
22 will supersede that. The code cannot  
23 supersede either of those. And to the extent  
24 that it arises to any constitutional  
25 violation, and cruel and unusual punishment,

1 sets of fines, unreasonable seizure. I have  
2 briefed all of those issues extensively, and  
3 it 100 percent falls into the US Supreme  
4 Court, and also a Florida Supreme Court that  
5 they are not allowed to come onto our  
6 property and take it. And they're also not  
7 allowed to have never-ending fines and fees  
8 in a case because any particular fine has to  
9 be specifically tied to a specific damage  
10 that has occurred or the actual costs of --  
11 court filing costs, et cetera, pursuing the  
12 action. That's what the binding precedent  
13 says. And I have actually borne all of the  
14 costs for the court action. I paid the  
15 thousand -- thousands of dollars in court  
16 fine and fees and transferred the  
17 appropriation fees, et cetera. The City has  
18 not done that.

19 So the only thing remains is that case  
20 precedent would say their fine has to be  
21 structured to be specifically tied to actual  
22 damages sustained. And there are no damages  
23 sustained. This is not a situation where my  
24 property is negligently --

25 THE COURT: So -- so your position is

1           that if someone violates the local ordinance,  
2           and that local ordinance provides for a fine  
3           until it comes into compliance, they can't do  
4           that?

5           MS. HENRY: They can't have a  
6           never-ending fine, no, Your Honor.

7           THE COURT: Did you make that argument  
8           below?

9           MS. HENRY: Yes, I did.

10          THE COURT: And it was rejected?

11          MS. HENRY: No. There was no legal  
12          analysis provided for any of my arguments  
13          other than -- it literally was a  
14          conclusionary statement just to say it's  
15          without merit. Nothing as to what the issue  
16          was.

17          THE COURT: Well, I would suspect that  
18          -- that the Special Magistrate is relying on  
19          the Land Development Code, and it provides  
20          for the impositions of fines, and he rejected  
21          the argument because you're saying they can't  
22          impose it unless there's damages, and that's  
23          not what the Land Development Code says. It  
24          says --

25          MS. HENRY: That's what the finding in

1 the Supreme Court says.

2 THE COURT: And no one is -- I mean, so  
3 you want me to, essentially, fine the Ormond  
4 Beach Land Development Code on  
5 constitutional, is that --

6 MS. HENRY: That's not what I said.

7 THE COURT: That's exactly what you're  
8 asking me to do. You're telling me that they  
9 can't impose a fine because someone violated  
10 the code, that they can't do it because it's  
11 unconstitutional, so then I have to make a  
12 determination that the provision upon which  
13 you were found to be in violation is  
14 unconstitutional. That's exactly what you're  
15 asking me to do.

16 MS. HENRY: No, I didn't say it was  
17 facially unconstitutional.

18 THE COURT: Well, it's  
19 unconstitutionally applied to your case.

20 MS. HENRY: Yes.

21 THE COURT: So you are asking me to make  
22 a constitutional argument that it's being --  
23 it's constitutionally impermissibly applied  
24 in your case.

25 MS. HENRY: Just as they're interpreting

1           it, yes, Your Honor.

2           THE COURT: Okay.

3           MS. HENRY: As far as the -- the fees  
4           go, Your Honor -- and I'm not even sure  
5           what -- what questions I might not have  
6           answered yet, but one of the biggest things  
7           procedurally that you did ask about that we  
8           didn't touch on was the admission of evidence  
9           that was clearly inadmissible.

10          When the City, Janet Bruce, I forget her  
11          title, when she came onto my property on  
12          September 2nd unannounced and illegally  
13          trespassed onto my property, took photos of  
14          the property and then used those -- I  
15          actually, after finding out through security  
16          cam footage that they had been there, because  
17          they didn't announce when they were there.  
18          But after finding out later and seeing that  
19          they had been carrying a camera around, part  
20          of my notice I served them in November of  
21          2022 stated that any photos or evidence that  
22          they had supposedly collected from illegally  
23          being on my property, not on the street, not  
24          just on the sidewalk, illegally on my  
25          property needed to be relinquished to me

1           because it was fruit of the poisonous tree,  
2           and it clearly violated my Fourth Amendment  
3           rights aside from a whole myriad of other  
4           statutes.

5           They did not say anything about that.

6           They did not indicate anything about having  
7           photos or wanting to use them until literally  
8           two minutes before the hearing started. They  
9           handed me stacks of pages which included the  
10          photos, among other things. And they -- it  
11          clearly violated my Fourth Amendment rights  
12          to have those introduced, and I raised that  
13          objection. And, again, there was nothing as  
14          far as legal analysis as far as why the City  
15          claimed it would be okay or admissible.

16          In fact, Janet Bruce testified that she  
17          had been trained that she can go onto  
18          anybody's property to take photos of any  
19          potential violations at any time without a  
20          warrant, which is simply not the case.  
21          Otherwise, what would the point of having a  
22          Fourth Amendment be?

23                 THE COURT: Well, the Fourth Amendment  
24                 is -- protects against illegal -- illegal  
25                 searches and seizures. Generally speaking,

1 we see it in a criminal context.

2 MS. HENRY: Yeah, but it definitely has  
3 been applied in --

4 THE COURT: I understood that. So, I  
5 mean, to the extent that if she -- I  
6 understand your position on that. I'm not  
7 sure I follow it all the way through on this  
8 -- this matter so I'd like to hear -- I'll  
9 hear Mr. McKinnon's position of if there was  
10 an improper entry onto your property or not,  
11 and what -- upon which phases they believe  
12 that that was lawful, if it, in fact,  
13 occurred. So I just --

14 MS. HENRY: Well --

15 THE COURT: I'm pretty well-versed in  
16 Fourth Amendment law. I was a criminal  
17 lawyer for quite a long time, so I -- I -- I  
18 understand your argument. I'm going to have  
19 to sort how through how it would be  
20 applicable here.

21 MS. HENRY: Well, and what the problem  
22 is is that I was also denied the ability to  
23 introduce my security cam footage about that  
24 as well in the course of the hearing as it  
25 came up. When I objected to it, I said that

1 I had security cam footage, and I -- and I  
2 would be able to prove that they were  
3 illegally on my property, and I was denied  
4 the ability at any time to go get that.  
5 Because, again, I wasn't given any notice  
6 until, literally, two minutes before the  
7 hearing at 9:58.

8 I also wasn't given notice, which this is  
9 a huge piece of notice and opportunity to be  
10 heard. That they were going to attempt to --  
11 have any attempt to come onto my property and  
12 take and destroy any of my property. Even if  
13 they think they had the right to do that from  
14 the very beginning, all of the notices, all  
15 of the emails, all of the phone calls, every  
16 piece of communication that came from them  
17 said nothing about physically coming onto my  
18 property to take and destroy my property.  
19 The only thing they ever mentioned is that  
20 even if we failed to appear for the hearing,  
21 all that they could have done was issue a  
22 fine, and that's what the code ordinance  
23 clearly states, that's what the statutes that  
24 control pretty much state. The Magistrate  
25 only has the authority, as far as punishments

1 go, to issue a fine or to order us to do  
2 something different. He has absolutely zero  
3 authority in the statute or in the code of  
4 ordinances to come onto our property or allow  
5 them to come onto our property.

6 So if by the very definition of notice and  
7 opportunity to be heard, if they're going to  
8 try and come and take our property in any  
9 way, shape or form, every single statute,  
10 every single local law, every single  
11 (unintelligible) provision and constitutional  
12 provision required them to give us written  
13 notice ahead of time that they intended to  
14 come and physically take our property. We  
15 never got that notice until 9:58, right  
16 before the 10 o'clock hearing. I said I  
17 didn't have enough time to read through all  
18 of those papers in the two minutes before the  
19 hearing started at that point. So I was not  
20 given opportunity to be heard on that issue  
21 at the trial court level, so I merely  
22 objected to all of that being introduced at  
23 such a late hour, Your Honor.

24 THE COURT: You can continue. I'll give  
25 you a couple extra minutes because I did ask

1           you some questions.

2           MS. HENRY: Can I drink some water?

3           THE COURT: Of course.

4           MS. HENRY: Your Honor, I also think  
5           it's important, even in a situation where you  
6           would otherwise determine that everything  
7           that they did is legitimate, there is a  
8           serious equal protection element. I'm not  
9           talking about where you have people speeding  
10          on a busy road and a cop pulls over one of  
11          them and that's -- you know, it's reasonable,  
12          that's what he was doing, he can't obviously  
13          pull over every single car. That's not at  
14          all the case here. And they point to a case,  
15          Oiler, William Oiler, I think versus  
16          Washington was the name of the case, for the  
17          point that the conscious exercise of some  
18          selectivity enforcement is not in itself a  
19          constitutional violation. I would agree.  
20          But that's where there's a distinction. Some  
21          selectivity versus much selectivity.

22          With William Oiler, he raised the issue of  
23          selectivity and enforcement where 904 men  
24          were similarly situated in a population of  
25          1.9 million people. But here that's a stark

1 contrast to the 115 thousand violation that  
2 came out of the documentation I submitted for  
3 the equal protection violation for the very  
4 code provision. I'm talking about all of the  
5 code provisions everywhere. I'm talking  
6 about the very ones that effect my pavers,  
7 fence and shipping containers. 115 thousand  
8 similar violations within Ormond Beach, a  
9 city that has only 43,517 people.

10 THE COURT: So these are 115 thousand  
11 non -- you're saying violations that weren't  
12 cited by the City?

13 MS. HENRY: Correct.

14 THE COURT: Based upon what? Based upon  
15 -- no, how -- how -- I don't understand that.  
16 How is that valid evidence before a  
17 Magistrate or an argument? There's, I mean,  
18 a hundred -- there's no evidence in the  
19 record there's just --

20 MS. HENRY: I did have evidence.

21 THE COURT: No. No, you provided a map  
22 where you're claiming that these are -- in  
23 order for me to make a -- to do an equal  
24 protection -- I mean, I don't understand your  
25 argument. You're -- you're basically

1 saying -- you're making yourself the code  
2 enforcement officer, and you're making  
3 yourself -- putting yourself in the shoes of  
4 the State agency, and you're making an  
5 allegation of 115 thousand violators. Do you  
6 understand how -- how difficult that is for  
7 me to digest, and how in any way, again,  
8 going right back to where I started, how that  
9 falls within my standard of review? I  
10 can't -- I mean, you want me to say that he  
11 applied -- how did -- how did the special  
12 Magistrate incorrectly apply correctable law?

13 You want to make a equal protection  
14 argument --

15 MS. HENRY: Yes.

16 THE COURT: -- under a code violation  
17 based upon what you believe are 115 thousand  
18 violators. How in any way can a Special  
19 Magistrate, or even, I mean, me on appeal of  
20 his ruling get there? Because that I'm  
21 really struggling with.

22 MS. HENRY: Your Honor, I just submitted  
23 810 violations that are within just a quarter  
24 mile radius of our --

25 THE COURT: 810 violations based upon

1           who? Your subjective decision making.

2           You're not a code enforcement officer.

3           MS. HENRY: No, Your Honor. I have an  
4           answer your question, I promise, so please  
5           let me answer it.

6           810 violations, I had the map to start  
7           with to show where they were. I had --

8           THE COURT: Again, I can't get to --  
9           you're -- who made the decision that they're  
10          violations?

11          MS. HENRY: Your Honor, I --

12          THE COURT: Who made the decision that  
13          they're violations?

14          MS. HENRY: Your Honor, I'm trying to  
15          answer you.

16          THE COURT: Answer. Who?

17          MS. HENRY: I was asking for him to make  
18          the determination because how can I possibly  
19          raise an equal protection argument if I'm not  
20          allowed to raise it? I gave them the facts.  
21          I gave them the photos.

22          THE COURT: No, you gave him allegations  
23          of -- of a subjective view of 810 what you  
24          believe are violations, correct?

25          MS. HENRY: No, they are -- what the law

1 is --

2 THE COURT: Did you present Special  
3 Magistrate Hamrick with 810 Notices Of  
4 violation?

5 MS. HENRY: I -- Notices of Violation.

6 (Cross-talking)

7 THE COURT: This is -- my point is a  
8 violation is based upon what you believe them  
9 to be.

10 MS. HENRY: But I didn't just ask him to  
11 take my word for it. I literally supplied  
12 photo -- photographic evidence.

13 THE COURT: So you wanted him to accept  
14 what you believe are 810 violations based  
15 upon your own investigation, fair?

16 MS. HENRY: Evidence. With the evidence  
17 I submitted, not just my testimony.

18 THE COURT: Okay. Again, that was well  
19 beyond the scope of anything he can do for  
20 the purposes of him making a determination as  
21 to your violation.

22 MS. HENRY: At some point someone should  
23 be able to have the scope of authority to be  
24 able to look at an equal protection  
25 violation. Otherwise, when I come up, I'll

1           just raise it at the lower tribunal.  When  
2           would I be allowed to raise it?

3           THE COURT:  You could make -- well, let  
4           me tell you how.  I mean, again, that's an  
5           independent cause of action under -- that --  
6           that's the -- if you believe it's an equal  
7           protection argument and constitutional  
8           violation, how you raise an equal protection  
9           argument is that you make the claim, and you  
10          raise that equal protection argument whether  
11          it be in State or Federal court, and that's  
12          how you demonstrate it.

13          It's not -- you can't make an equal -- so  
14          that's why I go back to when you raise  
15          Chapter 70 and you raise equal protection.  
16          If you're raising them as defenses, that's  
17          what essentially you've tried -- you're doing  
18          in this case.  If you believe you have an  
19          equal protection claim, that stands on its  
20          own, but it can't be raised in this context.

21          MS. HENRY:  But it a hundred percent is,  
22          Your Honor.  Every case out there, all of the  
23          case precedent --

24          THE COURT:  There is a --

25          MS. HENRY:  -- there's not a single --

1           THE COURT: Yes, ma'am. They come from  
2 independent causes of action where an equal  
3 protection claim is made.

4           MS. HENRY: If it's a 42 USC, section  
5 1983, Your Honor, but in all of the cases  
6 that make it to case law with precedent, the  
7 US Supreme Court, Florida Supreme Court, if  
8 the ability to raise equal protection,  
9 procedural due process, substantive due  
10 process denials are in a context of a defense  
11 that a defendant has raised whether it's a  
12 criminal case or whether it's more of a civil  
13 nature like this --

14          THE COURT: I'm not disagreeing with you  
15 with that. But I'll go back to you. You  
16 raised 800 -- you say you have 810 claims  
17 based upon your own investigation, fair?

18          MS. HENRY: Yes. That the City had  
19 notice of in November of 2022, so it's not  
20 like the conversation just started when I  
21 walked in on February 27th, 2023 -- or, yeah,  
22 2023, Your Honor.

23          THE COURT: So -- okay. I'll let you --  
24 I think it's -- we're well over time, but  
25 I'll let you go ahead and finish up.

1 MS. HENRY: Your Honor, I guess I would  
2 say the biggest thing to consider is that a  
3 wide variety of procedural due process was  
4 involved. For example, even on the issue of  
5 repairs. I -- I a hundred percent believe  
6 that the word repair, and the allowance of  
7 making repairs, is in both the City code as  
8 well as State statute but it's only in those  
9 certain situations that I mentioned that  
10 don't apply here. Excuse me, Your Honor.

11 THE COURT: Chapter 162 does provide --  
12 you don't disagree that it gives the local  
13 agency the authority to take action to bring  
14 the property into compliance.

15 MS. HENRY: No. No, Your Honor. 162  
16 and code 2-258, the statutory language is  
17 that they have the right to command that we  
18 bring it into compliance. Command that we  
19 bring is totally different than authorizing  
20 the City to come onto our property and take,  
21 and ruin, and destroy our property. Those  
22 are two totally different things. and --

23 THE COURT: Well, it doesn't -- I mean,  
24 I'm reading -- I'm going to read when you say  
25 it commands you. It says -- 162.08(5) gives

1 the code -- the enforcement board, the local  
2 agency, issues orders having to force a law  
3 to command whatever steps are necessary to  
4 bring a lot violation into compliance.  
5 You're reading into they can only direct you  
6 to do it.

7 MS. HENRY: Yes, Your Honor, a hundred  
8 percent. Because --

9 THE COURT: What case says that? What  
10 case applies 172.08 and says it can only be  
11 the property owner commanded not the local  
12 agency?

13 MS. HENRY: There is no case out there  
14 that says they can do it. And that's the  
15 thing, the constitution is very clear that --

16 THE COURT: Okay. If there's -- if  
17 there's no case that says they can -- can do  
18 it, and I read -- my job, right, is to read  
19 the statute and apply it plainly. And you  
20 want me to read it to mean that it can only  
21 command the property owner. And I'm not  
22 arguing with you. That's how you would like  
23 me to read 162.

24 MS. HENRY: Yes, Your Honor.

25 THE COURT: I just want to understand

1           what -- because I have to read it plainly,  
2           and -- and you want me to read it and that it  
3           means it can only command the owner, make  
4           their own property come into compliance.

5           MS. HENRY: Yes. Command and authorize  
6           are two totally different things. And the  
7           statute does not talk about authorizing the  
8           City to do anything. And if -- if the --

9           THE COURT: I think -- I think I -- you  
10          want me to read subsection five to say the  
11          only way the property can come into  
12          compliance is if the local enforcement board  
13          enters an order commanding the property owner  
14          to do it, not someone else, not the agency,  
15          or not a third party to come in and clean up  
16          what would other be a hoarding or a nuisance,  
17          or -- and I see those cases, not a lot, but  
18          occasionally.

19          MS. HENRY: To your point that you asked  
20          earlier, the gas station is just an example,  
21          but the reason why I brought up the statute  
22          was that -- talking about the nuisance,  
23          blight and slum, Your Honor, is because even  
24          in those situations where it does impact --  
25          desperately impacting the neighboring

1 properties, even in those situations the  
2 statutes are very clear, and the cases are  
3 very clear, that the State or any  
4 municipality has literally zero authority to  
5 come onto someone's property and take and  
6 remove any of their property. It's plainly  
7 stated in the statutes that it is not  
8 considered a permissible purpose for taking  
9 private property.

10 THE COURT: Has that been applied under  
11 162.08? I mean, you're talking about  
12 different other statutes, but under 162.08,  
13 and I'll be candid with you, Ms. Henry, I had  
14 the City of Daytona Beach in here less than a  
15 year ago with someone that was hoarding  
16 property and they -- no one made the argument  
17 that the City could not go on and clear off  
18 what was on that property. No one said it  
19 because they all said they had the ability,  
20 and that the statute permitted it in order to  
21 bring it into compliance if the property  
22 owner was not going to do so.

23 Do you understand my concern? It leaves  
24 the City with no remedy in that -- in that --  
25 if the City can't go on and -- and clear off

1           what has -- what has caused the violation,  
2           then the City has no ability to keep any kind  
3           of property in compliance. That's -- that's  
4           the -- that's -- that's the argument that  
5           you're making to me. They can't -- they can  
6           impose the fine, but it can't be endless, and  
7           no one can come on and correct the violation.  
8           So my gas station builder, according to  
9           your --

10           MS. HENRY: (Unintelligible.)

11           THE COURT: No. According to your  
12           argument, my gas station builder can build  
13           tanks, and pump gas on his property, and the  
14           only person that can make him stop is  
15           himself.

16           MS. HENRY: No, Your Honor, because  
17           actual use and development are quite  
18           different, and there are literally different  
19           procedures in the law.

20           THE COURT: I've called it a zoning  
21           violation. That's not development or use. I  
22           called it a zoning violation. I was very  
23           careful.

24           MS. HENRY: And, listen, I know. I'm  
25           saying to you zoning use and development are

1 each treated differently under the law.

2 There are different provisions --

3 THE COURT: Okay. Fair enough. All  
4 right. I think I've given you an ample  
5 amount of time. I think 30 minutes -- I  
6 think I've given you 30 minutes.

7 Mr. McKinnon, whenever you're ready.

8 MR. MCKINNON: Thank you, Your Honor.

9 THE COURT: Can you respond to, first  
10 and foremost, Ms. -- Ms. Henry's argument is  
11 that -- well, not -- it's -- her position is  
12 that, A, the Special Magistrate did not  
13 allow -- did not consider or -- the evidence  
14 of, first, a trespass. Can you start there?  
15 And that she was excluded from -- or her  
16 evidence to demonstrate that was not  
17 considered or improperly excluded by the  
18 Special Magistrate, and can you address that  
19 portion of her argument so I understand the  
20 City's response to her claim that -- that you  
21 couldn't go on the property, and you  
22 certainly -- and the pictures were  
23 impermissible so the whole basis for the  
24 violation was unlawful?

25 MR. MCKINNON: Yes. Thank you,

1 Your Honor. The -- under the City's Land  
2 Development Code, specifically as it relates  
3 to enforcement, it requires the code  
4 enforcement officer to inspect the premises.

5 THE COURT: And that inspection  
6 permission -- provision allows entry onto the  
7 property?

8 MR. MCKINNON: Well, it allows them to  
9 inspect. In this particular case, just so  
10 the Court is clear, and the photographs I  
11 think reflect that, that they're taken from  
12 the street level, from the sidewalk level.  
13 So the items that we're referring to are a  
14 fence, which I think Ms. Henry acknowledged.

15 A paver driveway, which, again, they  
16 acknowledged they built. And the existence  
17 of two industrial shipping containers, which  
18 can be seen from the street. And, again, she  
19 acknowledged before the Special Master they  
20 existed there.

21 So even if the Special Master was to, for  
22 instance, to disregard the photographic  
23 evidence, they acknowledge that, yes, they  
24 built them and, yes, they did so --

25 THE COURT: So what impact would it have

1 had, if any, if there was surveillance of --  
2 demonstrative of some type of trespass? Not  
3 -- not lawful under the code? Or would that  
4 be lawful under the code?

5 If -- let's just -- I'm going to rephrase  
6 the -- assuming arguendo there was -- there  
7 is video evidence or surveillance that the  
8 code enforcement officer -- I'm sorry.

9 That's the wrong term for Ms. Bruce. But  
10 that the -- that the code -- the person, the  
11 code person, code inspector, actually did go  
12 on the property, what impact would that have,  
13 if any?

14 MR. MCKINNON: Well, it wouldn't have  
15 had any impact in this proceeding, I would  
16 argue. If she thought that she violated  
17 their property, they may have some separate  
18 cause of action against Ms. Bruce saying that  
19 she trespassed upon the premises.

20 But in this case, again, these particular  
21 items were all admitted to in the  
22 proceedings. So, again, the Court wasn't --  
23 the Special Magistrate, I'm sorry, was not  
24 confined to simply photographs. There was --  
25 they represented what they did, they did so

1 from the street level, which I submit is not  
2 a trespass onto the premises. But, more  
3 importantly, it was simply stated that there  
4 was -- it's undisputed that these matters,  
5 these items were constructed or installed on  
6 the premises.

7 THE COURT: Okay. So from the property  
8 owner's perspective, if they feel that there  
9 was a trespass, I mean, it's I think a little  
10 hard for a property owner to digest that,  
11 well, it's -- okay, it doesn't matter because  
12 we can still see it anyway. From their  
13 perspective they're feeling an infringement,  
14 right, a Fourth Amendment violation, right,  
15 because it's an -- assuming -- again,  
16 assuming the surveillance shows what it is  
17 purported to show. We have to assume that.  
18 So is that -- I guess your answer is, well,  
19 it doesn't matter, it can't undo what -- what  
20 they have admitted to, that they've put up  
21 some structures and put -- put -- made some  
22 improvements that violate -- and I don't --  
23 I'm not using quotes to be de minimis or --  
24 I'm just trying -- I'm calling them  
25 improvements, because that's what we would

1 call when we put something on our property.  
2 I wasn't saying it any way to be facetious.  
3 But that's what -- generally what we call  
4 something when we put pavers down, we're  
5 trying to make it better so it's an  
6 improvement.

7 All of that is if it violates the Land  
8 Development Code, then it doesn't matter how  
9 you find that out. I mean, I guess, is that  
10 your argument? And I'm not -- and I struggle  
11 with that from the property owner's  
12 perspective.

13 MR. MCKINNON: Certainly. I can  
14 understand particularly if this was  
15 something, for instance, inside  
16 (unintelligible) as it relates to the  
17 curtilage --

18 THE COURT: Right.

19 MR. MCKINNON: -- and the rights inside  
20 the home. This is all exterior matters. But  
21 to the extent that it could be proven  
22 otherwise, I think that might be some type of  
23 conversation we could have. But from the  
24 Special Master's position, Judge Hamrick  
25 heard them admit that, yes, they're here,

1           what would the surveillance video do for him,  
2           and I think he did extend that he felt it  
3           wasn't necessary at that point. All of these  
4           matters were admitted, they existed, they  
5           were there.

6           I think from his perspective he had  
7           competent substantial evidence that, in fact,  
8           the paving installation was done, the fence  
9           was constructed, and the storage containers  
10          were there. I think from his perspective he  
11          felt like he had competent substantial  
12          evidence. Again, the allegation that somehow  
13          that they were only discovered as a result of  
14          photographs isn't what the record represents  
15          because all along they acknowledged that,  
16          yes, we have them, they're there. It's not  
17          as if they didn't exist.

18          For instance, you have those -- an  
19          unlawful search inside a home, they discover,  
20          you know, criminal circumstances, drugs.  
21          Absent that, there's no evidence. Since,  
22          hence, you lack the evidence to support a  
23          crime or what have you. But here --

24                 THE COURT: So this fruit of the  
25                 poisonous tree argument is sort of nullified

1 by the fact that, well, quite frankly, it's  
2 almost a plain view. Why use the Fourth  
3 Amendment. These improvements that the City  
4 believe were in violation of your Land  
5 Development Code were essentially in plain  
6 view, so it's not the fruit of the poisonous  
7 tree. It certainly would -- and I understand  
8 that argument pretty well that, no, but for  
9 an alleged trespass this would not have  
10 been -- that's fruit of the poisonous tree.  
11 I understand.

12 Can you talk to me about what -- what the  
13 City's -- under the Land Development Code, or  
14 even under -- under the State Statute in  
15 terms of what -- what the enforcement board's  
16 power is? Ms. Henry has raised two concerns  
17 or arguments on appeal that, one, it can't be  
18 an infinite fine imposition. And, B, the  
19 City cannot go on the property to correct the  
20 violations. So those are two questions, so  
21 if you could address the fine first.

22 MR. MCKINNON: Sure. The fines are set  
23 forth, Your Honor, per the Land Development  
24 Code. They mirror -- to a large degree they  
25 mirror Chapter 162 that describes -- it's

1 actually 162.09, but it describes the maximum  
2 amount of fine per day. But there is no  
3 limitation. In other words, there's not --  
4 for instance, if the -- either statute nor  
5 the ordinance create a -- a -- a limitation  
6 on how long that fine can go, it effectively  
7 continues so long as the violation continues.  
8 And so both -- the statute, Chapter 162.09,  
9 which mirrors, effectively, Chapter 2-258 of  
10 the ordinances of the City, they are written  
11 basically mirror images. Obviously the fine  
12 that was imposed does not exceed the  
13 statutory limitations as per day. And  
14 neither the statute nor the ordinance have a  
15 definitive time period.

16 So that's in relation to the fine. In  
17 regards to the other ordinance, as the Court  
18 noted and read, Chapter 162.08, provides the  
19 enforcement board, and it uses that language,  
20 to issue orders having the force of law to  
21 command whatever steps are necessary to bring  
22 a violation into compliance. That is the  
23 identical language contained in Section 2-254  
24 of Ormond's Code of Ordinances related to the  
25 Special Master.

1           So those two, again, mirror each other to  
2           an extent. And I would submit to the Court  
3           that that language, having the -- to command  
4           whatever steps, was certainly applied either,  
5           in this case to the property owner, or to the  
6           City, or to a third party to the extent that  
7           a third party is required to take whatever  
8           actions are necessary. So that is a very  
9           broad delegation of authority for the reasons  
10          that I think the Court articulated earlier,  
11          and that is what remedy would the City  
12          otherwise have.

13          I think if you accepted Ms. Henry's  
14          decision that effectively what the Court  
15          would say is, you have to correct the  
16          violation, in which case they say, well,  
17          we're not going to do that.

18          THE COURT: So in -- certainly in code  
19          enforcement cases -- I'm sorry. I thought  
20          that was a camera. I think it's just a water  
21          bottle, right? Okay. Am I -- what is that?

22          UNIDENTIFIED SPEAKER: This is a camera  
23          and this is a --

24          THE COURT: You are not permitted to  
25          record in this courtroom. Are you recording

1           this proceeding? Can you go check, please?  
2           You have to get permission from court  
3           administration and the Court to record, or --  
4           record any of this. So I'd like the  
5           bailiff -- can you present your video camera  
6           to him, please?

7           I'm sorry, Mr. McKinnon.

8           Because all of those devices were up, and  
9           now all of a sudden they're down. He can  
10          turn it on for you, Deputy.

11          UNIDENTIFIED SPEAKER: I'm turning it  
12          back on.

13          THE BAILIFF: It's pretty warm, so --

14          THE COURT: So it has been -- has it  
15          been recording, sir, yes or no?

16          COURT DEPUTY: Yes or no?

17          THE COURT: Have you been recording this  
18          proceeding?

19          UNIDENTIFIED SPEAKER: Yes.

20          THE COURT: Without any permission from  
21          this Court. So I'm going to ask you to --  
22          I'm going to have the deputy -- I'm a little  
23          bit stunned. And were you recording both  
24          video and audio?

25          UNIDENTIFIED SPEAKER: Yes, sir {sic}.

1           THE COURT: That needs to be deleted in  
2 front of the bailiff. What about the two  
3 devices that are on the bench?

4           UNIDENTIFIED SPEAKER: They're not  
5 recording.

6           THE COURT: All right. Once they're  
7 deleted, you'll be excused from this  
8 courtroom, sir. With all due respect of me,  
9 there is a procedure in place if you wish to  
10 have it, and it goes through court  
11 administration, and that's to protect  
12 everyone in this courtroom. And permission  
13 is required to record any proceeding, audio  
14 or video.

15          Ms. Henry, are you -- were you aware that  
16 this was going on?

17          MS. HENRY: I'm sorry, Your Honor?

18          THE COURT: Were you aware that this was  
19 being recorded?

20          MS. HENRY: I wasn't aware that it was  
21 being recorded. I know that --

22          THE COURT: The proceedings are open to  
23 the public, and that's exactly what the -- I  
24 just want everybody to be clear. Our court  
25 administration has a very firm policy that

1 any additional audio or video recording I am  
2 to be notified ahead of time and I approve  
3 that or not. I've had Court TV in here, I've  
4 had all of those things happen, but it's  
5 usually through approval, not an independent  
6 person doing it on their own without letting  
7 the Court know. So I'm very disappointed.  
8 You're excused, sir. Thank you. Have a good  
9 rest of your day. Deputy, if you could  
10 escort the gentleman out and make sure  
11 that -- thank you.

12 Mr. McKinnon?

13 MR. MCKINNON: Yes, Your Honor. I think  
14 I was discussing the -- as it relates to the  
15 Chapter 162.08 that authority that's  
16 authorized by statute to those enforcement  
17 boards, the -- that language, I submit,  
18 Your Honor, is to both encompass the property  
19 owner, but most certainly to the --

20 THE COURT: So from the property owner's  
21 perspective, they are in violation, and it's  
22 their position they feel that they're -- that  
23 the -- that there has been impermissible  
24 action taken by the agency, right? So they  
25 feel that they -- whatever they did, they

1           were entitled to do under the Land  
2           Development Code, okay? And the Land  
3           Development -- and then the violation is  
4           filed, we have the hearing, there is a  
5           violation found. Their position is that  
6           still doesn't enable the agency or a third  
7           party to come on the property and essentially  
8           what they believe then damage that or -- or  
9           make the -- to put it in compliance.

10           So what I'm -- I'm struggling -- what  
11           would be their remedy, then, if they felt  
12           that it was either, A, impermissible --  
13           unlawfully done or, B, arguably done within  
14           the confines of 162, but the property was,  
15           you know, damaged? Do they have an  
16           independent cause of action for that  
17           potentially?

18           MR. MCKINNON: Right. So under that  
19           particular hypothetical, Your Honor, in the  
20           event that the Court determined that a  
21           violation did, in fact, exist, for instance  
22           there was an illegal construction, then --  
23           and if that was the case, they wouldn't have  
24           a remedy.

25           And I cite for the Court in our case the

1 Supreme Court, Department of Transportation  
2 versus Cecil Darden. And that case is  
3 important, Your Honor, because it's at  
4 Supreme Court case, and in that case it was  
5 an erection of a sign on a property adjacent  
6 to the interstate. And under that scenario  
7 the agency, which was the Department of  
8 Transportation, did not issue a permit. And  
9 so without the issuance of a permit, they  
10 found it in violation and they went to  
11 destroy the sign. The Circuit Court in that  
12 particular case on appeal found that that was  
13 unconstitutional.

14 Very similar argument. And you can't  
15 destroy the sign because that would amount to  
16 some type of (unintelligible.) The Supreme  
17 Court, though, stated that -- and here's what  
18 they said, they said in this case there is no  
19 property right involved. When a government  
20 seeks to remove an unlawful outdoor sign  
21 erected in disregard of the established  
22 scheme of securing permits for such  
23 structures. It goes on to say the appellee  
24 never applied for the permit, nor did they  
25 apply for the statutory requirements to have

1 the permit issued. Rather, they simply  
2 erected the signs and knowingly violated the  
3 law. A protectable property interest does  
4 not arise this case from a knowingly --  
5 knowing violation of the law. Consequently  
6 find it unnecessary to discuss the  
7 requirements of procedural due process when  
8 the appellants do not have a protectable  
9 property interest in the first place.

10 If you build something in violation of the  
11 law and a Court determines that, in fact,  
12 that is a violation, you don't have a  
13 property right. There can't be a taking of  
14 that particular right that you build.

15 And the Citrus County case is an excellent  
16 -- Allzer (phonetic) versus Citrus County is  
17 a very sort of -- it's a very important case  
18 out of the Fifth District. In that case, a  
19 developer actually built an entire condo  
20 with -- by issuance of a permit from the --  
21 from Citrus County. It was later determined  
22 that that condominium was in violation of the  
23 comprehensive land use plan. They had to  
24 tear down the entire condominium. They had  
25 to tear it all down because it was in

1 violation of the comprehensive land use plan  
2 which --

3 THE COURT: There are cases out there.  
4 I think we -- I think we are faced with that  
5 and in terms of what that remedy is, so I  
6 understand the analogous point.

7 How is Ms. Henry to make an appropriate  
8 equal protection claim in front of the  
9 Special Magistrate?

10 MR. MCKINNON: I think she made her  
11 claim and the Special Master -- Magistrate  
12 rejected it. Basically what I heard from --  
13 and when I read the record, I wasn't there.  
14 But I read the record. He had the same  
15 concerns I think that this Court did. He  
16 didn't find that this was. And even if you  
17 made a special what you call a sort of  
18 selective prosecution, you have to show a  
19 actual discriminatory intent. There has to  
20 be something beyond the fact that -- beyond  
21 the general argument, well, we did this, but  
22 other people didn't. That is not legally  
23 sufficient so you don't have a case for that.  
24 You actually have to show some discriminatory  
25 intent. And certainly none of that was

1           alleged before the Special Magistrate. In  
2           fact, I think it was the property owner that  
3           -- which -- which actually started this  
4           particular matter. Even if -- it sounds like  
5           she made it, and the Special Magistrate just  
6           simply did not accept it and he rejected it.

7           And based on the evidence, they didn't  
8           submit, under the Special Magistrate,  
9           particular evidence that would be necessary  
10          for the Magistrate to even rule on that.

11          THE COURT: So the -- I saw the map, and  
12          I think it was in Ms. Henry's papers in her  
13          brief where she identified these properties  
14          that she -- so what could have been done  
15          better for -- I mean, I guess really that --  
16          that wasn't sufficient evidence in front of  
17          the Special Magistrate for him to be able to  
18          even reach the merits of that equal  
19          protection claim?

20          MR. MCKINNON: I think that's -- I think  
21          that's what he believed. And he had the same  
22          concerns that you do. What -- what evidence.  
23          This is effectively a hearsay document. The  
24          document was prepared by one of the --  
25          accusing the neighbors of having these

1 things. How do I determine that those are,  
2 in fact, valid? Judge Hamrick had the same  
3 concerns. He wrestled with that and  
4 determined that that simply wasn't sufficient  
5 for him to find for selective enforcement.

6 THE COURT: So I think the  
7 constitutional arguments that were made, I  
8 think that we got to it that their -- that  
9 the laws being unconstitutionally applied in  
10 this matter, that -- that's the -- the -- I  
11 think that's where we landed on this in terms  
12 of that. So can you, if there are cases that  
13 have -- could you find any cases that have  
14 attacked this type of Land Development Code  
15 provision or something analogous to it, not  
16 necessarily ours, where there has been a  
17 successful or an equal protection argument  
18 made in this context?

19 MR. MCKINNON: Well --

20 THE COURT: I guess -- let me ask a  
21 better question. I apologize, Mr. McKinnon.

22 An equal protection claim under, say, a  
23 municipal ordinance violation, it's a little  
24 bit more broad.

25 MR. MCKINNON: I didn't find one related

1 to the evidence that we have here. What --  
2 what I cited in the brief, Your Honor, is the  
3 cases that talk about the validity of the --  
4 the Code and the comprehensive language by  
5 this establishment as well as the  
6 requirements of the City to create a Land  
7 Development Code. There have been many cases  
8 that have challenged land development codes  
9 as being unconstitutional, in other words.  
10 And I cite to the Court several cases that  
11 hold that land development codes are valid  
12 exercises of a city and they preserve and  
13 they provide a legitimate --

14 THE COURT: If you're -- just one  
15 moment. If you're on Zoom, if you could  
16 please mute your devices, please. I have  
17 hearings coming up, but -- so people are  
18 logging on for those.

19 MR. MCKINNON: I understand, Your Honor.  
20 The -- the -- and I don't need to take up  
21 much more of your time. I think the brief  
22 sets it out.

23 But I think that the standard is, in  
24 relation to the challenging the validity of a  
25 land development code is whether or not if

1 serves a legitimate government interest. And  
2 here it is actually a statutory mandate that  
3 needs to be applied and they have to be  
4 applied so that we can confirm that  
5 development and construction is being done in  
6 accordance with that mandated development.

7 THE COURT: And last thing on the  
8 remedy, Mr. McKinnon, so I'm clear. So the  
9 fine -- your -- under the statute, the fine  
10 -- the fines can be -- they can accrue until  
11 there is compliance. So then when you read  
12 163.09 with 162.08, if the -- if a third  
13 party of the -- if the code enforcement  
14 officer directs someone to take action,  
15 whether it be the property owner, as  
16 Ms. Henry would like me to read it to be, or  
17 the City itself, or a third party to correct  
18 the action, it then will eradicate an  
19 accruing fine.

20 MR. MCKINNON: That's correct. At some  
21 point, when either the property owner, or in  
22 this case, if necessary, the City, once they  
23 take action to bring the property into  
24 compliance, then there should be no --

25 THE COURT: And -- and is not the City

1 codes, the Volusia County Code of Ordinances,  
2 or any municipal ordinance, before we even  
3 get to a hearing, does not the notice of  
4 violation, unless it's an irreversible or  
5 irreparable alleged injury, provide for a  
6 cure at the outset to then no fine would  
7 accrue, no hearing, here, you have 15 days or  
8 seven days to bring it into compliance, if  
9 not, then we're going to have a hearing?

10 MR. MCKINNON: Yeah. Actually, in this  
11 case, on September 2nd of '22 they were  
12 provided a stop work notice informing them to  
13 stop work, seek a permit. There was no fine.  
14 Then it went on to October 18th when they  
15 went ahead and just finished construction.  
16 Disregarded it. They got a notice of  
17 violation. Again, there's not a fine at that  
18 point. That's notifying them, you have a  
19 violation, go seek what they called at that  
20 time an after-the-fact-permit.

21 It's not until you get to the actual  
22 hearing that you get a fine imposed and  
23 that's only after a determination of  
24 violation. So you have significant time --  
25 but you don't have a fine. So you've got

1 from September 2nd all the way through -- so  
2 this is February 27 to arrest this without  
3 having suffered a fine.

4 THE COURT: And we've abated it pending  
5 this appeal.

6 MR. MCKINNON: We abated the fine  
7 pending the appeal, Your Honor. So that  
8 is -- so there is significant time there to  
9 avoid that if that's what -- if that's what  
10 she chooses.

11 THE COURT: All right. I -- again, I  
12 apologize. I appreciate you both -- both  
13 going over time. I went longer than I  
14 anticipated. I appreciate the arguments on  
15 both sides. I'll take the matter under  
16 advisement. I appreciate everyone's respect  
17 of me, and have a good rest of the day,  
18 everyone. Thank you.

19 MS. HENRY: Thank you, Your Honor.

20 MR. MCKINNON: Thank you.

21 (Thereupon, the foregoing proceedings were  
22 concluded at 9:59 a.m.)

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2           C E R T I F I C A T E     O F   R E P O R T E R  
3        S T A T E   O F   F L O R I D A   )  
4        C O U N T Y   O F   V O L U S I A   )

5  
6  
7           I, Shannon Green, Registered Professional  
8 Reporter, DO HEREBY CERTIFY that I was  
9 authorized to and did stenographically report the  
10 foregoing proceedings; and that the transcript is a  
11 true record of my stenographic notes.

12           I further certify that I am not a  
13 relative, employee, attorney, or counsel of any of  
14 the parties, nor am I a relative or employee of  
15 any of the parties' attorney or counsel connected  
16 with the action, nor am I financially interested in  
17 the action.

18           Dated this 26th day of January, 2024.

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22           \_\_\_\_\_  
Shannon Green, RPR  
Registered Professional Reporter

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