

1 CITY OF ORMOND BEACH
2 SPECIAL MAGISTRATE HEARING

3 CASE NUMBERS:

4 22-112237

5 22-112246

6 22-112247

7 IN RE: MICHAEL HENRY AND KATHERINE HENRY

8
9 LOCATION OF VIOLATION:

10 33 CYPRESS CIRCLE, ORMOND BEACH, FLORIDA, 32176

11
12
13 DATE OF SPECIAL MAGISTRATE HEARING:

14 MAY 20, 2024

15
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17 SPECIAL MAGISTRATE: THOMAS UPCHURCH

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P R O C E E D I N G S

1
2 THE COURT: Okay. Next year -- or case
3 will be case number -- is it -- we're moving
4 on to case number six. Okay. And case
5 number 22-00112237. This is going to be
6 Michael Henry and Katherine Henry. We also
7 have case number 22-00112246. Also Michael
8 Henry and Katherine Henry. And then we also
9 have case number 22-00112247, also Michael
10 Henry and Katherine Henry.

11 MS. HENRY: Your Honor, can you give me
12 just a moment, because I was handed about a
13 thousand pages and I'm almost done reviewing
14 them? I just need a moment.

15 THE COURT: How long do you need?

16 MS. HENRY: Five minutes.

17 THE COURT: Sure. Okay. We'll go back
18 on the record at 10:30.

19 MS. HENRY: Thank you.

20 THE COURT: About eight minutes.

21 (Recess.)

22 THE COURT: Okay. Good morning. We're
23 back on the record in case number
24 22-00112237, case number 22-00112246 and case
25 number 22-00112247. This is Ormond Beach

1 versus Michael Henry and Katherine Henry for
2 the subject property of 33 Cypress Circle,
3 Ormond Beach, Florida.

4 Sir, please state your name and who you're
5 with.

6 MR. FIACCO: Good morning, Special
7 Magistrate Upchurch. My name is Nick Fiacco,
8 NID officer for the City of Ormond Beach.
9 The case before you is case number
10 22-00112237. The respondents are Michael
11 Henry and Katherine Henry. The violation
12 address is 33 Cypress Circle, Ormond Beach,
13 Florida.

14 THE COURT: Mr. Fiacco, before I --
15 before we get started, I apologize, I just
16 want to make sure that Ms. Henry and
17 Mr. Henry, do you plan on addressing the
18 hearing this morning?

19 MR. HENRY: Possibly.

20 THE COURT: Potentially. Okay. Before
21 we get started, I'm going to need both of you
22 to stand and raise your right hand and be
23 sworn in.

24 (The parties were sworn.)

25 THE COURT: Okay. And, Mr. Fiacco,

1 you've already been sworn in previously,
2 correct?

3 MR. FIACCO: Yes.

4 THE COURT: Okay. Thank you. You may
5 proceed.

6 MR. FIACCO: Violations at address 33
7 Cypress Circle, Ormond Beach, Florida. The
8 violation is no building permit issued as
9 stated in the Land Development Code, chapter
10 two, article three, section 2-50N1A, fence
11 installed without obtaining a permit.

12 I'd like to submit into evidence a packet.
13 In the packet is a copy of the Notice of
14 Hearing with proof of good service; copy of
15 February 27, 2023, Magistrate Order with the
16 proof of good service; February 27, 2023,
17 special magistrate hearing minutes; the land
18 development code that identifies the code
19 requirements that are -- that are at issue in
20 the case; property appraisal record verifying
21 property ownership and information;
22 Respondents' Appeal to the Circuit Court
23 Order of Appeal; Respondents' appeal to Fifth
24 District Court; Henrys response to 5/20/24
25 hearing request.

1 Sir, I'd like to also add additional
2 information that came over the weekend. A
3 copy of all of the packets that have been
4 given to both Mr. and Mrs. Henry.

5 THE COURT: Mr. Fiacco, before we --
6 before we proceed any further, just to be
7 clear, we're -- we're here on a -- this is --
8 this is the three cases that were cited
9 previously that are back on remand? In other
10 words, these cases had already been
11 litigated, there's nothing -- this isn't a
12 new violation, per se?

13 MS. HENRY: Correct.

14 MR. FIACCO: That's correct, yes.

15 THE COURT: And these are the -- these
16 are the same three cases that have already
17 been ruled on by Judge Hamrick in these
18 chambers. Subsequent to that, it went up on
19 appeal to the Seventh Judicial Circuit which
20 was -- it was affirmed in part, denied in
21 part, correct?

22 MS. EMERY: Correct.

23 THE COURT: And then subsequent to that,
24 that was -- went up to the Fifth District
25 Court of Appeals, and I guess they -- they

1 denied the --

2 MS. HENRY: No, Your Honor, it's still
3 pending right now. In fact, the City was
4 just ordered to file an appropriate response
5 with appendix due this Friday the 24th. And
6 I can provide Your Honor a copy with that --
7 of that Order, if you'd like.

8 THE COURT: Okay. Well, I appreciate
9 that information because I -- I -- in the
10 paperwork that I was reading, I was under the
11 impression that, what was it, like, May 8th
12 that they had entered an Order affirming the
13 Seventh Judicial Circuit.

14 MS. HENRY: No, Your Honor. All they
15 did was deny my Motion for Immediate Stay
16 that I was --

17 THE COURT: Right.

18 MS. HENRY: I'm sorry.

19 THE COURT: No, that's okay. Please
20 proceed. I didn't mean to cut you off.

21 MS. HENRY: They denied my motion, which
22 I just wanted to clarify as part of the
23 packet he gave you, neither of our appeal
24 documents are in there. What he included was
25 the Order on Appeal from the circuit court,

1 which I have no problem with you seeing, of
2 course, and our Petition for Writ of Cert.
3 And none of our documents to the Fifth
4 District Court of Appeals are in there. What
5 -- the only thing that was in there was the
6 Order denying my emergency -- my motion for a
7 stay.

8 But it is -- it was not sent back down.
9 In fact, the Orders for Fines, as it stands
10 in my communication with Ormond Beach City
11 Council was that those Orders for Fines
12 are -- their position is they're still in
13 effect, and we're here to seek additional
14 Orders for Fines on the same exact Orders for
15 Violation.

16 THE COURT: Okay. Before we -- okay.
17 Let's -- let me -- let me hear from the City
18 in terms of the -- the purpose of today's
19 hearing is as such.

20 MS. EMERY: To determine the number of
21 days that the property has been out of
22 compliance per the previous Order. She had
23 so much time to bring the property into
24 compliance on each Order, and since then the
25 property has not been brought into compliance

1 so we'll be taking testimony on that. And
2 then asking the magistrate to enter an Order
3 based on the -- on the Orders that are --
4 have been found to be valid and enforceable
5 at the circuit court level to calculate what
6 those line amounts would be up to the hearing
7 today.

8 THE COURT: Gotcha.

9 MS. EMERY: And as, you know, the Henrys
10 have pointed out, she did file a motion for a
11 stay of enforcement proceedings, but that was
12 denied by the Fifth District Court of Appeal.

13 THE COURT: Okay. All right. Thank
14 you. I just need to figure out what -- what
15 -- procedurally where we are, so okay.

16 All right. Mr. Fiacco, you may proceed.

17 MR. FIACCO: Okay.

18 MS. HENRY: I'm sorry. I have an
19 objection to the admittance of those. I
20 didn't catch if we were -- I don't want to
21 pass my opportunity.

22 THE COURT: I was going to -- he -- he
23 had one other packet that he was -- that he
24 was discussing, and he had given me the first
25 packet, and I believe he was -- he was

1 requesting the admission of a second packet.

2 MR. FIACCO: (Unintelligible).

3 THE COURT: Okay. Well, is this
4 everything that you planned on --

5 MR. FIACCO: No, I have one more,
6 photos.

7 THE COURT: I tell you what, let's do
8 this: Before we jump, let's go -- I'm going
9 to go back to the first packet of
10 information, which you provided me. Have you
11 provided a copy of this to Ms. Henry?

12 MR. FIACCO: Yes.

13 THE COURT: Okay. Ms. Henry, have you
14 had an opportunity to review the packet of
15 information that Mr. Fiacco just provided me?

16 MS. HENRY: Quite honestly, a very --

17 THE COURT: The -- the first exhibit, I
18 should say.

19 MS. HENRY: Quite honestly, a very
20 cursory view because it was handed to me at
21 10 o'clock this morning, but I did review it
22 enough to see that there are some objections
23 I would like to make.

24 THE COURT: Okay. You may make your
25 first objection.

1 MS. HENRY: And I just want to clarify
2 that this is the file for the fence ending in
3 37. I just want to make sure --

4 THE COURT: That is correct, yes. That
5 is the --

6 Is this for all three cases or just the
7 first case?

8 MR. FIACCO: That's the first case.

9 THE COURT: Okay. So we're on -- this
10 is for case number 22-00112237, which is
11 listed on the first page of the -- of the
12 exhibit.

13 MS. HENRY: Okay. So my first
14 objection, Your Honor, is to the inclusion of
15 the minutes. Quite frankly, I've never had
16 an opportunity to review the minutes. I
17 think it's inappropriate to rely on minutes
18 at this point because given the fact that it
19 was brought up on appeal, and a subsequent
20 Petition for Writ of Cert, it was required
21 that I obtain the transcript for -- the
22 official transcript for the proceedings,
23 which was entered into the record in the
24 appeal, and the City has a copy of that.
25 They were served, of course, with all of that

1 as part of the record on in that appeal.

2 And I have never even had an opportunity
3 to review the minutes to see if I have any
4 issue. I mean, it's -- it's quite -- it's 31
5 pages long. There's no way I could review
6 that in about three-minutes' time to see if
7 there's anything in there you might be
8 referring to that would be objectionable or
9 not accurate.

10 So to the -- I'm not even sure that it's
11 necessary, but to the extent that you need to
12 review a more complete record, I would ask
13 that we review, or refer to, the official
14 transcript in the case.

15 And just to save you time, Your Honor, I'm
16 going to have the same objection to the
17 minutes being presented in all three cases.
18 And --

19 MS. EMERY: I don't have any objection
20 to not considering the minutes and we can
21 rely on the previous Orders. I don't have
22 any objection to that.

23 THE COURT: I was going to say, I don't
24 have any intention on relying on the previous
25 minutes. I'm not sure that we're going to

1 get into the previous minutes here this
2 morning. That wouldn't be something that
3 I -- that I -- so I -- I will grant your
4 objection, and we will remove the minutes
5 from all three cases. You can still provide
6 them to me, we'll just pull them out.

7 MR. FIACCO: Okay.

8 MS. HENRY: And then as far as my other
9 objections, they're actually -- this big --
10 this first big packet, that was the only
11 objection in there. I also, just for sake of
12 clarity, I have no objection to the second
13 small packet he handed you already. My only
14 other objections in this particular case
15 would be in the one he has not handed you
16 yet.

17 THE COURT: Okay. We'll hold off on
18 that then.

19 Okay. Mr. Fiacco, will you please
20 proceed? We've addressed the first two
21 exhibits you've provided. You may move on to
22 the third at this point.

23 MR. FIACCO: Yes, sir. I'd like to put
24 into evidence a packet of the photos. So the
25 first page is of 33 Cypress Circle, pictures

1 of the fence and the house. Same on the
2 second page. Third page is the
3 recommendation. Fourth page is Cost Recovery
4 Notice. Fifth page is the Case Cause Sheet.
5 And the case -- the last page is Case Cause
6 Sheet Failure to Comply with the -- the
7 amount.

8 THE COURT: Ms. Henry, do you have any
9 objection to the introduction of the third
10 packet that Mr. Fiacco has provided us?

11 MS. HENRY: Yes. Not every page in it,
12 so let me clarify. I -- and this would be an
13 objection, I guess just to save time,
14 Your Honor, for all three he has similar
15 third packets with pictures and whatnot, and
16 I would object to the inclusion of any -- I
17 haven't had a chance to, given the late hour
18 they were sent to me, to really review and
19 see what all is in there and if, you know, my
20 kids are in any of these pictures or anything
21 that just -- I have a variety of reasons to
22 object.

23 What I can say is that I don't -- we
24 certainly would stipulate to the fact that
25 for the fence case, the fence is still there.

1 For the paver case, the pavers are still
2 there. For the containers, the containers
3 are still there. So I have no problem in
4 stipulating to that, and I think that would
5 be given the short notice that I had to
6 receive and review these photos, a fair
7 resolution to -- in lieu of introducing these
8 or --

9 THE COURT: Fair enough. Mr. Fiacco,
10 what was the purpose of introducing these
11 photographs? To show that the pavers are
12 still there, the fence is still there and the
13 containers are still there?

14 MS. EMERY: Yes.

15 THE COURT: Okay. And, Ms. Henry, just
16 to be clear, you're -- you're -- you're --
17 you're stipulating that they're all still
18 there?

19 MS. HENRY: Yes, Your Honor.

20 THE COURT: Okay. Then I'm -- then
21 these aren't necessary.

22 MS. EMERY: Okay.

23 THE COURT: Fair enough?

24 MS. EMERY: Um-hum.

25 MS. HENRY: And just one last objection,

1 Your Honor, on this particular -- actually, I
2 think this one is in all three as well. But
3 this Cost Recovery Notice, I'm -- perhaps my
4 objection is more legal in nature, but
5 because it's worded in a conclusory fashion
6 about what our level of responsibility would
7 be, I think it's an inappropriate thing.
8 It's not worded as a request from the City to
9 the magistrate, but rather a conclusion.

10 So, to that extent -- and I'm sorry if
11 didn't -- if I wasn't clear. It's just the
12 one page I'm talking about, Cost Recovery
13 Notice. I obviously don't object to the fact
14 that there's wording in the code that they're
15 quoting, but the conclusory statements at the
16 end of that is what I am objecting to.

17 As far as their costs of 936 that they
18 reference, that's also on a Case Cost Sheet
19 that is presented next in the packet, so I
20 have no objection to that page. But to the
21 extent that it has a legal conclusion in
22 there, and essentially if I don't object now,
23 I am -- it seems inappropriate to be a legal
24 conclusion of what my responsibility is at
25 this stage of the proceedings, Your Honor.

1 THE COURT: Okay. Okay. I'm going to
2 overrule the objection, and simply that this
3 is a demonstrative exhibit, and is more for
4 the purpose of calculating fees and costs in
5 the event that the City is successful in
6 their -- their petition. And I'll just leave
7 it at that.

8 Mr. Fiacco, you may proceed. Before -- is
9 that -- these are all of the exhibits that
10 you have?

11 MR. FIACCO: Yes, sir.

12 THE COURT: Okay. So in exhibit -- the
13 first exhibit that you provided me, I will
14 admit that into evidence absent the minutes.
15 You've removed the minutes? Okay. The
16 minutes have been removed, so I am going to
17 grant the objection -- or deny. As far as
18 the second exhibit there was no -- no
19 objection, correct, Ms. Henry?

20 MS. HENRY: Yes, Your Honor.

21 THE COURT: Okay. And then the third
22 exhibit there was an objection to the
23 photographs that -- that objection was
24 granted at the stipulation that the -- that
25 the pavers, the fence and the containers are

1 still on property. And in addition to --
2 then as far as the objection to the
3 conclusory objection as to a matter of law,
4 that is overruled.

5 So, Mr. Fiacco, you may proceed.

6 MR. FIACCO: I have a question. So if I
7 go with the slides, the pictures are going to
8 be there. Do I just go right through them
9 since there was an objection --

10 THE COURT: Just skip through the
11 slides.

12 MR. FIACCO: Okay. Everybody's going to
13 see them. Okay. On this recommendation
14 slide, I recommend finding that the
15 respondents have filed to comply with the
16 Magistrate Order on February 27, 2023. A
17 violation of land development code, chapter
18 two, article three, section 2-50N1A continues
19 to exist. And as per the February 27, 2023,
20 Order, a fine of \$25 per day shall accrue
21 beginning on March 28, 2023. Please see the
22 Cost Failure to Comply slide. It should
23 be -- this is a Cost Recovery Notice. That
24 cost to the date is 9.36 on May 20th, 2024,
25 here.

1 Cost -- the Case Cost Sheet, certified
2 letters at \$7.36 -- 7 -- 7.36. There is one
3 of them. Photographs of (unintelligible),
4 total cost 9.36. There was a citation
5 amount, a hundred dollars, it was waived.

6 Case Cost Failure to Comply, February
7 27th, 2023, Order was \$23.56. May 20th, 20
8 -- 2024 Order, \$9.36. Daily accrued fine of
9 \$25 per day, 419 days from March 28, 2023, to
10 May 19, 2024, which accrued to \$10,475.
11 Citation costs were waived. The total due at
12 May 20th, 2024, hearing, \$10,507.92.

13 MS. EMERY: Let me ask you a quick
14 question. Did the respondents obtain a
15 permit? I know it's still there.

16 MR. FIACCO: Not at this time. And that
17 would conclude.

18 THE COURT: Nothing further?

19 MR. FIACCO: No, sir.

20 THE COURT: Okay. All right.

21 Ms. Henry?

22 MS. HENRY: Is it okay if I stay here,
23 or do you want me go up there?

24 THE COURT: I have no issue with that.
25 Yeah. Feel free.

1 MS. HENRY: Okay. And, Your Honor, I'm
2 not sure the best way to handle this. I have
3 essentially what amount to some legal
4 objections, and then some factual evidence to
5 present to you so -- but the -- I guess the
6 first thing I should ask, because I was
7 thrown off, I thought it was going to be the
8 same magistrate. I would like to clarify if
9 -- if you guys had -- you have just been
10 handed my response and third packet -- second
11 packet was my -- the additional signature
12 pages that I'm going to reference, so I know
13 you have them in your hands now. But I
14 wanted to clarify that the response that I
15 sent to the City was -- if you've had a
16 chance to review my response, I guess,
17 because I'm going to hammer on certain
18 aspects if you have not had a chance to
19 review it versus if you have.

20 THE COURT: Are we referring to your --
21 the email?

22 MS. HENRY: The -- well, I sent to --
23 one was last Wednesday. My main response was
24 emailed last Wednesday. And then I submitted
25 on -- yesterday I realized I hadn't submitted

1 the attachment, essentially, that I meant to
2 include with that so I sent that.

3 MS. EMERY: Everything that the
4 respondent has provided to the City in
5 preparation of this hearing was provided to
6 you in your packet, and I believe that it was
7 handed to him today, the additional --

8 MS. HENRY: Yes, it --

9 MS. EMERY: -- that you emailed over the
10 weekend.

11 MS. HENRY: Yes. You have been
12 physically handed it. I guess I'm just
13 wondering if you had received it, because I
14 sent it, according to the court rules,
15 because there's no court filing system in
16 this tribunal, I had sent it ahead of time to
17 the city clerk and who I thought the
18 magistrate was going to be.

19 THE COURT: Yes, I have received that.
20 Yes.

21 MS. HENRY: Okay.

22 THE COURT: Yes. I apologize. I
23 thought -- I misunderstood that. I thought
24 you were saying that there was something
25 missing. But I do have what you -- you sent

1 over the weekend as well on -- or, what,
2 yesterday, I guess.

3 MS. HENRY: Okay. I'm not going to --
4 given the chance you've had that to review,
5 I'm not going to necessarily waste your time
6 going through everything. I do reiterate the
7 points that I made in there, but I do want to
8 highlight, essentially, on some of them. My
9 first concern is that Florida Statute 162.09,
10 which of course this is the statute that
11 would apply here, it only allows for one
12 Order for fines per finding of violation.

13 The statute is, I think, very clear about
14 that. There's several places where the
15 statute specifically talks about an Order for
16 Fines, or The Order. The cases talk about an
17 Order entered under section 162.09.
18 Essentially what should have happened is that
19 the hearing that was held last year that had
20 the Orders for Violation in it, it should
21 have, essentially, concluded with Orders
22 finding violation, and then this hearing
23 should have happened to be an Order Imposing
24 Fines. A 162.07 Order Finding Violation is
25 supposed to come first, and then it's

1 supposed to be a completely distinct
2 subsequent Order under 162.09 imposing fines.

3 However, the Order for the -- last year's
4 Orders for the magistrate in all three of
5 these cases were a combined Order finding
6 violation and an Order imposing fines, and
7 the wording was even in there that those
8 Orders can be recorded in and of themselves
9 with the county to create liens and all of
10 the rest, so the law clearly does not allow
11 multiple Orders imposing fines. It's one
12 thing to have, as this one was ordered a
13 daily fine, but it's another scenario
14 completely to have multiple Orders being
15 entered for the same Order finding violation.

16 Similarly, the statute, 162.09, only
17 allows for one fine per finding of violation.
18 So there actually -- the City is essentially
19 seeking three because what they're calling a
20 citation is not allowed for by itself in the
21 statute, it is a fine, and they refer to it
22 in a lot of the appellate pleadings as such.
23 But it is a fine. And then the daily fine
24 that was imposed in the 2023 Orders is a
25 fine. So to then have this Order be a fine,

1 the only way we can have any Orders entered
2 today on any of these three files that would
3 impose fines is if we're setting aside the
4 portion imposing fines and liens from the
5 prior Orders. I'm not saying that you
6 should, in this proceeding, set aside the
7 Order Finding Violation. I just want to make
8 that clear. I'm just talking about Order
9 Imposing Fines. The other aspect is that
10 they are --

11 THE COURT: So let me -- before we move
12 on to another aspect, do you have any case
13 law on that specifically?

14 MS. HENRY: Yes. And I have that
15 quoted -- I'm sorry, that's why I was trying
16 to only do a cursory overview. As far as --
17 depending on which part you're talking about,
18 but the -- for example, there -- I quoted in
19 my response -- let's see, which one is that?
20 On footnote four, which is a direct quote
21 from City v. Tampa versus W.A. Brown, which
22 is Second District Court of Appeals. But
23 there is similar or exact language also in
24 the Harden v. Monroe County case, Third
25 District Court of Appeals; City of Plantation

1 versus Vermutt (phonetic), Fourth District
2 Court of Appeals; Massey v. Charlotte County,
3 Second District Court of Appeals; Jones v.
4 Seminole County, Fifth District Court of
5 Appeals.

6 So in there it talks about that the -- if
7 a violator -- I'm sorry, Your Honor. If a
8 violator fails to comply with the section
9 162.07 Order, a second Order may be entered
10 under section 162.09 imposing a fine. This
11 Order, upon recording in the public records,
12 becomes a lien on the property.

13 And then as far as the Jones v. Seminole
14 County, which was the Fifth District Court of
15 Appeals, it is expressly acknowledged two
16 stages, a hearing finding violation, and a
17 subsequent hearing to consider imposition of
18 fines. So if we're going to -- and that
19 point is actually important in number of
20 ways, too, because my understanding of their
21 request, and I'm -- is that the \$25 a day for
22 all of those days is based on the date being
23 set at that magistrate hearing, but that part
24 of that Order was entered prematurely. And
25 -- and that's essentially another point that

1 I was making, but I --

2 THE COURT: How so?

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

4 THE COURT: How -- okay. So, Ms. Henry,
5 we're kind of getting into -- we're going
6 into issues here that were -- I mean,
7 these -- these -- these Orders have been
8 entered at this point. They were entered
9 quite some time ago, all three of them --

10 MS. HENRY: Yes, Your Honor.

11 THE COURT: -- on the three separate
12 cases.

13 MS. HENRY: Yes, Your Honor.

14 THE COURT: And this case obviously has
15 gone up on appeal to the Seventh Judicial
16 Circuit, and that would have been an issue
17 that would have been subject to -- that --
18 these arguments that you're making now should
19 have been litigated on appeal, not -- not at
20 this point. This isn't the time to -- or the
21 place. We're here on a calculation basis on
22 the three separate -- three separate cases.

23 So I understand where you're coming from,
24 but this is -- you know, that is, in effect,
25 res judicata in the sense that it's already

1 been --

2 MS. HENRY: It hasn't been --

3 THE COURT: -- adjudicated.

4 MS. HENRY: The only -- and I'm sorry if
5 I cut you off, Your Honor.

6 THE COURT: No, you're good.

7 MS. HENRY: I should say I'm hard of
8 hearing and I read lips, so sometimes I don't
9 catch up. If I do that, I apologize.

10 THE COURT: Um-hum.

11 MS. HENRY: The -- that issue I raised
12 on appeal. I actually raised it in a motion
13 in front of that magistrate after --
14 afterwards, and I also raised it on the
15 appeal to the circuit court. The circuit
16 court judge did not address those issues, and
17 actually Ormond Beach did not brief on those
18 issues. That's part of the basis for my
19 Petition for Certiorari to the Fifth District
20 Court of Appeals, and -- which they have been
21 ordered to address now twice by the Fifth
22 District Court of Appeals.

23 The problem is here that any Court, you
24 know, Magistrate or Circuit Court or any
25 Court, has to determine whether it has

1 jurisdiction. And I guess my point goes to
2 jurisdiction that where there has already
3 been an Order issued imposing fines, there
4 cannot be another Order issued imposing fines
5 for the same finding of violation. So to the
6 extent that the City wants to follow up on,
7 enforce, the prior Orders for fines, that's
8 one thing, which I am properly addressing in
9 the Fifth District Court of Appeals.

10 However, they are attempting to get a
11 second round of Orders imposing fines right
12 now, which the statute does not allow. And
13 no case allows for them to have a second bite
14 at the apple to get another set of Orders
15 imposing fines.

16 So to the extent that Your Honor is going
17 to order additional fines at this point, or
18 make any other additional Order regarding the
19 imposition of fines, then the prior Orders,
20 the part of those Orders that impose fines
21 would need to be set aside because you can
22 only have one Order imposing fines on any
23 particular finding of violation.

24 THE COURT: These are -- you really --
25 you kind of hit on it. I mean, this is the

1 imposition of the fines that -- from the
2 previous Order. This isn't a subsequent
3 Order finding you in violation yet again.
4 This is -- it's an ongoing -- this is for the
5 (unintelligible) sense -- an Order to, in
6 effect, tell you the calculated amount that
7 is owed due.

8 MS. HENRY: Your Honor, I would say
9 that's not what's going on here because the
10 -- if we could look to the circuit court
11 judge's --

12 THE COURT: Judge Jolley's?

13 MS. HENRY: Yes. The last page. And I
14 did quote this in -- in my response for
15 today. But the last page, page 11, of her
16 Order, says --

17 THE COURT: Which Order?

18 MS. HENRY: She -- the Order on --

19 THE COURT: Oh, I -- yeah, yeah, yeah.
20 Okay.

21 MS. HENRY: -- March 7th. It says
22 that -- I'm sorry. Give me a second. I --
23 this is a different copy. Okay.

24 THE COURT: Give me a minute just to
25 find it because this is --

1 THE WITNESS: Yes.

2 THE COURT: I've got to make sure --

3 MS. HENRY: Page 11.

4 THE COURT: Let me make sure I've got
5 it. Do you know what --

6 MS. HENRY: The first -- the first one I
7 handed you. It was towards the middle, I
8 believe.

9 THE COURT: I think I've got it. Page
10 seven, you said?

11 MS. HENRY: Eleven. Two sentences above
12 her signature.

13 THE COURT: Okay. Page -- so the final
14 page of her Order?

15 MS. HENRY: Yes. It says the stay -- so
16 she had entered a stay in the beginning of
17 April of last year. The stay of Orders of
18 violation as to the imposition of the daily
19 fines is hereby vacated upon issuance of this
20 Order. Because the Orders --

21 THE COURT: Hold on. Let me -- because
22 I'm not -- I'm looking at page 11. Are you
23 looking on her signature page?

24 MS. HENRY: Yes, two sentences above her
25 signature.

1 THE COURT: Okay. So she vacated the
2 stay?

3 MS. HENRY: Correct. But I'm -- I'm
4 pointing us to the language of what she's
5 getting at, that --

6 THE COURT: Okay.

7 MS. HENRY: -- there was an Order -- the
8 prior Orders were -- they are being deemed as
9 an imposition of daily fines. And so she had
10 stayed the imposition of the daily fines in
11 that Order, and then that stay was vacated on
12 March 4th. So the two parts to that would be
13 that that Order, the -- on each case, but
14 those three Orders finding violation, the
15 City is treating those as also having imposed
16 the daily fines.

17 They were not written as a notice. In
18 fact, the wording of the magistrate's Orders
19 finding violation clearly say that this --
20 this Order -- a certified copy of this Order
21 shall constitute a lien on the subject
22 property and any other real and personal
23 property. So this is, in every sense of the
24 word, these magistrate Orders are an Order
25 imposing violation. So we cannot have two

1 Orders that can create liens so they each can
2 be recorded and used for the imposition of
3 liens, et cetera, and for collections
4 purposes and all of the rest. There can only
5 be one, per the statute.

6 So that's my biggest concern is if we're
7 going to move forward today, then those parts
8 of those Orders have to be set aside unless
9 Your Honor is going to treat those as a
10 notice, or convert the wording of them so
11 that they're the notice that the statute
12 talks about in 162.07 that fines may be
13 imposed, but the current wording is clearly
14 imposing the fines.

15 And when it comes down to that, one of the
16 other important aspects is that the dollar
17 amount that they're looking at is for 419
18 days when 334 of those days were explicitly
19 stayed by the Circuit Court. So I don't see
20 how this Court would have subject matter
21 jurisdiction over imposing days for fines on
22 days that were expressly prohibited for
23 imposition of daily fines by the Circuit
24 Court.

25 So, I mean, I have other points, but I

1 just want to pause because I don't know if
2 you want me to address anything on that
3 first.

4 THE COURT: You may proceed. Go ahead.
5 So we have the issue of your -- your position
6 is is that there can't be three separate
7 Orders that are imposing fines. Your
8 second -- your second position is that --

9 MS. HENRY: No, they -- all three are
10 separate files. I'm fine with them being
11 separate files. I'm just saying only one
12 per -- so each one is an Order Finding
13 Violation.

14 THE COURT: Yes.

15 MS. HENRY: So for each Order Finding
16 Violation there can be only one Order
17 imposing a fine.

18 THE COURT: Okay. All right. And --
19 and I'm going to -- I'm going to overrule
20 that objection on -- on the grounds that
21 that's already been litigated, and has
22 already been up on appeal. It's actually on
23 appeal right now.

24 MS. HENRY: No, it's this issue of us
25 imposing -- I just want to -- I'm sorry. I

1 just want to be clear that my objection is
2 that the Order -- I'm not asking you to
3 determine that those two Orders should not
4 have been a part of the same Order.

5 THE COURT: I understand.

6 MS. HENRY: What I'm asking you -- but
7 so the issue --

8 THE COURT: I'm overruling -- I'm
9 overruling on that objection.

10 MS. HENRY: Okay.

11 THE COURT: So we're going to move on to
12 the next -- the next issue as far as the
13 Order you're contending that the judges
14 judge's Order lift -- that there was a --
15 that there was stay put in place by Judge
16 Jolley, and obviously in her -- her Order in
17 April -- was it May that she heard it?

18 MS. HENRY: March, Your Honor.

19 THE COURT: March. Okay. In March of
20 this year when she lifted it, so there's 400
21 and some odd days that should be reduced by
22 in terms of the calculation period should be
23 reduced by specifically those days that were,
24 according to the stay, was in place. Any --

25 And what was your next argument?

1 MS. HENRY: Yes, Your Honor, the -- an
2 important point I think we need to consider,
3 too, is that 162.09 does not require the
4 imposition of fines. The statute is worded
5 that when you are -- the magistrate must
6 determine if any fines should be imposed.
7 And I would ask that we consider that as not
8 superfluous language in the statute because
9 that is there for a reason tied to Eighth
10 Amendment protections.

11 In fact, the statute goes on to require
12 three factors to be considered that the City
13 has presented no evidence on. Not only that,
14 it has to be clear and convincing evidence,
15 which I addressed and gave you the cases for
16 in my response. But the statute talks about
17 the gravity of the violation, the actions
18 taken by us, and whether we've had any
19 previous code violations. That's the easiest
20 one. I don't think there's any objection
21 that we have no previous code violations.

22 The gravity of the violation is a very
23 important one because that's the one that
24 most closely tracks with, or shall I say the
25 language was put in there because of the

1 Eighth Amendment protections, and the cases
2 require that clear and convincing standard to
3 be met, but it's kind of a complicated
4 question, which is why I put together a
5 response in writing that goes over all of
6 these issues. One of the issues as part of
7 that is that there has to be actual damages
8 sustained by a society, and there are no
9 damages.

10 Another way of wording it that the
11 court -- the courts have held is that we must
12 look at the wrong or, quote, the harm caused
13 by us, and we have caused no harm. There is
14 no allegation that we have caused any harm.

15 What we're talking about in these three
16 cases is we put up a back yard privacy fence,
17 we have two pervious brick paver driveway
18 extensions, we have the two small ocean
19 certified for travel Conexes for personal
20 property storage. I don't think any of that
21 is contested. In fact, I think those were --
22 those factors were originally put into
23 testimony by the City in the original
24 hearing. But there has to be some sort of
25 harm that we have caused, and we have caused

1 no harm.

2 THE COURT: Okay. Again, Ms. Henry,
3 you're asking me to, in effect, strike Judge
4 Hamrick's previous Order as it relates to all
5 three cases, is my understanding, and I'm --
6 that -- that is a -- that is a matter that
7 would go up on appeal. There is -- there is
8 other remedies for that. This is not the
9 proper forum for the purposes of objecting to
10 the Order, that Judge Hamrick Order, in that
11 regard so I'm not -- I'm not going to -- I'm
12 going to overrule the objection as it relates
13 to the amounts of the fines that were
14 previously entered.

15 MS. HENRY: I -- okay. I just -- I want
16 to clarify that my objection in that regard
17 is that I was not given any opportunity to
18 present any evidence on these at the prior
19 hearing, and the City attorney assured me at
20 this hearing I would be given the opportunity
21 to present my -- my evidence to that effect,
22 so that's why I obtained the signatures,
23 that's why I put together this response. I
24 have literally been --

25 THE COURT: In terms of what, mitigating

1 factors?

2 MS. HENRY: I have been denied any
3 opportunity to present any legal or factual
4 evidence on the issue of fines.

5 THE COURT: Okay.

6 MS. HENRY: And I have been -- I'm
7 required to have that as part of due process,
8 and I have the cases and the statute cited in
9 my response if you need me to -- to refer to
10 that.

11 THE COURT: Okay. So you may proceed,
12 then, under -- in terms of mitigating factors
13 that you would like me to hear.

14 MS. HENRY: Yes. As far as the harm,
15 the first thing I -- I want you to consider,
16 Your Honor, I think -- was it -- packet two
17 that the City introduced. That was the
18 attachment I had forgotten to attach
19 initially with last Wednesday's response.
20 That is the signatures of hundreds of our
21 neighbors, including, off the top of my head,
22 I know we're 33 Cypress, so 31 Cypress, 33 --
23 or 35 Cypress, the two houses on either side,
24 both sets of neighbors, and one of the
25 homeowners themselves who doesn't live on the

1 property are on there, and I can point to
2 those if you would like. And the neighbors
3 across the street, the neighbors that are
4 kitty-corner from us, the neighbors that are
5 all around our neighborhood that have signed
6 the statement that we have not harmed them,
7 their property, or the community in any way
8 and, therefore, we shouldn't be fined for
9 that.

10 I don't know if I should pause on that
11 before I -- because I -- my next point is not
12 exactly connected to that.

13 THE COURT: That's okay. I see here --
14 and this is -- I see the signature package,
15 or packet, that was submitted. And you may
16 proceed.

17 MS. HENRY: I would also ask for you to
18 consider that the -- the courts have said
19 that a magistrate's powers are narrow and the
20 punishments are minimal. And as far as the
21 punishments go, in -- in Florida Statutes,
22 fines are -- there's maximum fines set in a
23 variety of ways. So even for a life felony
24 like murder or rape, it's a maximum fine of
25 \$15,000, even if it's fines in lieu of a

1 sentence of imprisonment. And even for
2 something like arson, it's a maximum of
3 \$10,000. And for all non-criminal
4 violations, maximum of \$500. And I would ask
5 you to consider that because the -- with us
6 having caused no harm, and the City not even
7 having alleged the harm, let alone
8 establishing it by clear and convincing
9 evidence, it doesn't seem appropriate under
10 Eighth Amendment protections to provide a
11 total between the three just shy of \$35,000
12 of fines when there's no harm being caused.

13 So I would ask -- I would ask you to
14 consider that, especially given that this is
15 not just a fine, that this would also be
16 liens imposed on our real and personal
17 property, and the Florida Constitution
18 expressly forbids forfeiture of a state. So
19 this -- we're talking about obviously amounts
20 we have no ability to even begin to pay, so
21 it would definitely constitute a forfeiture
22 of a state.

23 But I would ask you to consider as far as
24 the second, I think it was -- I think it's
25 number two in 162B -- 2B, the second factor

1 that we --

2 THE COURT: 172.09B?

3 MS. HENRY: 162.09. Yes. I'm sorry,
4 Your Honor. The actions taken by us that we
5 have been actively working to decrease LDC
6 noncompliance. So our home when we purchased
7 it, and some of this testimony came out with
8 Sarah Cushing at the last hearing, but our
9 house was built in 1949. It didn't have a
10 garage, it didn't have ample parking space
11 requirements, it didn't have several things
12 that the code requires it to have.

13 THE COURT: And so what --

14 What actions have you taken to try to be
15 in compliance?

16 MS. HENRY: We have been trying to
17 reduce noncompliance in such that that's the
18 reason that the pavers were put in because
19 the pavers -- the code requires us to park on
20 improved surface such as concrete, asphalt or
21 these brick pavers. So we put in the brick
22 pavers. Our concrete driveways built in
23 1949, or poured in 1949, aren't even wide
24 enough per the code. You have to have at
25 least nine feet wide just to park, and we

1 have to have off-street parking. So just to
2 park our vehicles at our property, we would
3 be in noncompliance just to park on the --
4 the poured concrete itself. We had to be
5 able to expand that just to have one vehicle,
6 let alone the multiple vehicles that we have.

7 And the -- there are multiple parts of the
8 code that I put into here. We've had --
9 actually, it was the one crabby neighbor that
10 complained to the City in the first place for
11 this case complaining about the sound and the
12 light and whatever, the distractions of,
13 like, when our kids are playing in the back
14 yard. She has complained to us. I don't
15 know if she's ever complained to the City
16 about that, but she has complained to us.
17 And we looked up at the time what the
18 regulations were, and it requires that we
19 have fencing around our outdoor play areas.

20 So for -- I can cite those parts of the
21 code if you'd like me to. I have them in my
22 response. I would just have to have a moment
23 to find them.

24 THE COURT: That's okay.

25 MS. HENRY: So there are several places

1 that that is required, so that's what we were
2 doing because it tells us to enclose those
3 when there's a neighboring residential use,
4 which those are all neighboring residential
5 uses.

6 So, I mean, we still have kids. They
7 still have play areas. So to the extent that
8 we would tear those down, especially while
9 we're still in the appeals stages of this
10 case, it would put us in direct violation of
11 the LDC with having those areas screened and
12 fenced.

13 So there's also the section as far as
14 having our two small Conexes taken out, the
15 prior magistrate's Order determined those, or
16 found those, to be a garage. Once those were
17 determined to be a garage that -- we were not
18 asking for that determination, that was the
19 City. But once they were determined, the
20 City Code expressly requires that we leave
21 those on the property. We -- the wording,
22 I'd have to find it in here, but it literally
23 says we are not allowed to take them off the
24 property. So although the City testified
25 that we would not have been required to put

1 them on our property at this point unless
2 something else was needed to change about the
3 property that would require a permit, once
4 they are on the property, we are not allowed
5 to take them off the property. And if we
6 did, we would be in direct violation of that
7 code which, again, I can cite for you if I
8 have a moment to look in my response.

9 So if we take any of these out at this
10 point, especially while we're still in the
11 stages of litigating this on the legal
12 aspects, we would be in direct violation of
13 several City Codes. And what the Code
14 specifically allows, I forget the exact
15 number here, but the City Codes allows us to
16 do things to specifically decrease our
17 property's nonconformity, but it does not
18 allow us to increase the property's
19 nonconformity. So we are doing everything we
20 can to decrease the nonconformity in our
21 property and trying not to do anything to
22 increase it. But if we're removing this,
23 we're going to be increasing, and there's
24 multiple sections we would be violating by
25 removing these.

1 I think that's it. If I can have just a
2 moment to review, Your Honor. I just want to
3 make sure.

4 THE COURT: Sure. Certainly.

5 MS. HENRY: Just two last points. One
6 is 162.09, I believe it's C, specifically
7 allows for a fines -- excuse me.
8 Specifically allows for a reduction in fines
9 already set. So to the extent that you're
10 viewing those Orders from last year imposing
11 fines as something that you otherwise cannot
12 change, the statute that allows the fines to
13 be set specifically allows for reductions in
14 fines. And --

15 THE COURT: What -- give me the cite.
16 162.09 or --

17 MS. HENRY: 162.09. I believe it's C.
18 I didn't print the statute itself. It's page
19 26 of my response, Your Honor.

20 THE COURT: Okay.

21 MS. HENRY: I'm sorry. It's 169.092C,
22 consider.

23 THE COURT: Give me a minute. Okay.
24 Got it.

25 MS. HENRY: So to the extent that

1 Your Honor is wanting to essentially start
2 with the magistrate's initial imposition of
3 fine Orders, I would ask you to look at this
4 part of the statute that specifically allows
5 that reduction of fines, because I think if
6 any case, this is a case where that would be
7 appropriate.

8 The last thing I would ask you to
9 consider, Your Honor, is that we are
10 expressly allowed a right of access to the
11 courts, and as this appeal, as you have noted
12 already, the -- the Circuit Court's Order
13 that -- excuse me, that we previously
14 discussed essentially set aside part of the
15 magistrate's Order, and upheld the rest of
16 the Order -- the Orders. And to the extent
17 that part of that Order was stricken, I guess
18 was her wording, under the court rules I had
19 filed well over a month ago a Motion for
20 Appellate Costs that had to be filed with
21 this tribunal as the lower court in that
22 appeal context. And I have had no one
23 acknowledge that pleading, no one respond to
24 it. The City only had 15 days under the
25 court rules to file a response to that. But

1 the --

2 THE COURT: That was filed with the
3 circuit court or --

4 MS. HENRY: No, I had to file it with
5 this magistrate court. So I did not realize
6 it would be a new magistrate. I filed it
7 with the City Clerk serving as the clerk of
8 this tribunal, as well as Judge Hamrick, and
9 served upon the two individuals sitting here
10 for the City. Not Nick, I didn't know he was
11 involved.

12 Actually, I apologize. I didn't serve
13 these two individuals. I served the
14 attorneys that they had hired to represent
15 them in the appeal because it was a Motion
16 for Appellate Costs. So I served the --

17 THE COURT: Normally that would be --
18 that would be considered by the appellate
19 court.

20 MS. HENRY: It cannot, Your Honor, if I
21 could point you exactly to the court rule.

22 THE COURT: Do you have a copy of the --
23 of what you filed?

24 MS. HENRY: Yes, I do.

25 THE COURT: Thank you. So, Ms. Henry,

1 typical -- I think the onus -- I'll have to
2 review this. And typically the onus would be
3 on you to set this for hearing and send a
4 Notice of Hearing.

5 MS. HENRY: I communicated over a month
6 ago, Your Honor, and I -- I requested a
7 response from everyone that I sent it to,
8 including the City Clerk as the clerk of the
9 tribunal, and I have gotten zero response.

10 THE COURT: Well, I'll take a look at
11 it. And certainly I think the appropriate
12 forum for this to be heard would be at a
13 future hearing. I don't think that -- for
14 purposes of today this has not been properly
15 noticed. It doesn't mean that you can't
16 pursue this down the -- you know, further --
17 furthermore, but I will certainly take a look
18 at it and address it in our Order for today's
19 hearing. In other words, I'll provide
20 direction in terms of how you are to proceed
21 with this.

22 MS. EMERY: And if I may, Your Honor, in
23 order to be entitled to costs, she had to be
24 found to be a prevailing party. And I agree
25 that that would have to be done at the

1 Circuit Court level to determine that you are
2 prevailing party, and then have an Order on
3 that and a judgment for those costs.

4 THE COURT: Right.

5 MS. HENRY: That's not how the -- that's
6 not how the cases read, Your Honor, so I
7 would ask that we do take a look at what I
8 actually filed because it's very clear that
9 I'm --

10 THE COURT: Can I have a copy of it? Do
11 you have -- can I have that copy?

12 MS. HENRY: Sure, I can print another.

13 THE COURT: Because I haven't seen that
14 before. And I'll keep that.

15 MS. HENRY: And I apologize, Your Honor,
16 I did not realize that it would be a
17 different magistrate. I should have made
18 sure that you would have gotten a copy ahead
19 of time. I don't mean to spring that on you.

20 THE COURT: No problem.

21 MS. HENRY: So, Your Honor, that's --
22 the only reason why -- well, I bring that up
23 for two reasons. One, in and of itself, but
24 also if the -- if Your Honor was going to
25 consider that as also in part as what's

1 appropriate in terms of context of fines
2 being set in -- in this context, but I guess
3 I would just -- I just want to close it out
4 by reminding the Court that clear and
5 convincing evidence has to be presented by
6 the City on all of the factors necessary, the
7 statutory factors for the appropriateness of
8 fines to be established. The City has that
9 burden of proof, and the City has not -- they
10 didn't at the last hearing or today argue
11 that there is an appropriateness, they just
12 asked for an amount to be set, and then asked
13 for it to be a straight mathematical
14 calculation. And the statute does not allow,
15 162.09 specifically, does not allow this to
16 be a straight mathematical calculation
17 anyway. It has to be an individualized
18 determination based on the statutory factors.
19 And, again, the statutory factors are created
20 because that's the minimal requirements
21 imposed pursuant to the Eighth Amendment
22 protections. So I would ask that Your Honor
23 really consider all of those elements before
24 issuing the Order today.

25 THE COURT: Okay.

1 MS. EMERY: May I respond?

2 THE COURT: Please.

3 MS. EMERY: She mentioned the fines, and
4 the amounts, and Judge Jolley and her ruling
5 specifically found that the citation and the
6 daily fines and (unintelligible) set within
7 the Orders are valid and enforceable, and,
8 you know, issues of the gravity of the fine,
9 the actions that have been taken, clear and
10 convincing evidence. Those all go back to
11 issues raised at the Circuit Court level, or
12 should have been raised if they were not.
13 And this fine was only \$25 per day, which she
14 was given an opportunity, and it didn't start
15 on the day of the Order, she was given an
16 opportunity to -- perhaps I should say the
17 respondents had the opportunity to bring that
18 into compliance. And over this long time
19 period, no permits have been sought, they
20 haven't gone into, you know, talked to anyone
21 anytime planning department how to resolve
22 this. You know, they chose to dig their
23 heels in, and that's their choice, but here
24 we are.

25 On her position that we can't come here

1 today and seek this Order of the amount of
2 fine that has been accrued, the City is
3 actually required by law to do that. And the
4 purpose of that is that we cannot on our own,
5 say, okay, it's been so many days she's been
6 out of compliance and we're going to have an
7 Order executed on that. And the case laws
8 that she pointed to, even -- I believe that's
9 really supporting that position, that you
10 really do have to come back and you have to
11 prove that there has been noncompliance
12 during the time that the property was
13 supposed to be in compliance, and that's the
14 purpose of this hearing.

15 Ms. Henry mentioned that, you know, I told
16 her she would have an opportunity to, you
17 know, present her issues. I told her she had
18 an opportunity to be heard at this hearing,
19 and she certainly has and she has done that.
20 I don't make determinations on relevancy. I
21 don't know what kind of argument she's going
22 to make.

23 As far as reduction in fine and
24 (unintelligible), I agree that that is
25 provided for in the statute. However,

1 generally when we have people come and ask
2 for a reduction in fines, and that has been
3 done in the past, they brought the property
4 into compliance. And there is something that
5 has prevented them from reasonably being able
6 to comply within a certain amount of time.
7 For instance, you know, I was given 30 days,
8 but the last two weeks I was in the hospital.
9 We have a case right now where we ordered
10 demolition to be done for a portion of the
11 property within a certain amount of time.
12 They -- as -- as the demolition was
13 proceeding, they found asbestos and so they
14 had to stop, bring in another specialty
15 contractor to remove that asbestos. When
16 that demolition is complete, I expect that
17 they'll come back and ask for a reduction in
18 fine because there was a period of time
19 that -- you know, reasonably it did take
20 longer. This is quite a different case here.
21 There's been no attempt to bring this
22 property into compliance. And, you know, had
23 there been and there was a reasonable
24 justification for the delay, then, you know,
25 that -- that would be a different story.

1 She believes that the fine during the
2 period of the stay should not have continued
3 to be told. I believe Judge Jolley would
4 have put that in her Order if she intended it
5 to be that way. She said it was vacated.
6 Doesn't mean that, you know, those days get
7 subtracted. And I believe that was her
8 intent. She would have expressly stated in
9 that, and what she did say is imposition of
10 the daily fine is as set forth is -- she's
11 not going to disturb that, and -- and she
12 affirmed all three Orders on that -- on that
13 point. That's it. Thank you.

14 THE COURT: Okay. All right.
15 Mr. Fiacco, did you have anything further
16 before we -- before we adjourn?

17 MR. FIACCO: No, sir.

18 THE COURT: Okay. I'm going to -- I'm
19 going to take this under advisement. There's
20 a few things that I want to -- I wanted to
21 research specifically as it relates to the
22 tolling with the stay and the Order entered
23 by Judge Jolley. I want to look into that a
24 little bit further in terms of doing my case
25 law research, et cetera. And -- and then

1 once I've -- I had a chance to do that, I
2 will issue my Order.

3 MS. HENRY: Thank you, Your Honor. And
4 can I ask for clarification on what you
5 wanted me to do as far as the -- my motion
6 that was pending before the Court?

7 THE COURT: I'm sorry, which motion are
8 we talking about?

9 MS. HENRY: The costs. For the
10 appellate costs.

11 THE COURT: Okay. I am going to address
12 that in my Order as well, but that is -- that
13 is not a -- that is not on the -- the docket
14 here today. It's not something that's been
15 noticed, and it's not something that -- that
16 the City, I believe, is prepared to argue
17 today, so that's something that will need to
18 be brought up at a later date. But I will
19 address that in my Order.

20 MS. HENRY: As to what I need to do? I
21 just want to make sure I'm not missing any
22 steps you're telling me to do.

23 THE COURT: Well, I'm not -- I can't
24 provide you legal advice, but I can tell that
25 I'm not -- that we're not pulling it -- we're

1 not going to hear it today. That's something
2 that you need to -- to set for hearing at a
3 later -- at a later date.

4 In other words, I -- I mean, as far as the
5 City should set it for a hearing. You need
6 to work with the City to get that set for a
7 hearing at a later date.

8 MS. HENRY: They haven't responded, so
9 what do I --

10 MS. EMERY: I'll clarify, we won't set
11 that for hearing because it's not within the
12 jurisdiction of the --

13 THE COURT: Like I said initially, that
14 should have been something that the Court --
15 the Circuit Court would say that the -- that
16 you're entitled to appellate fees.

17 MS. HENRY: That's -- Your Honor, that's
18 not what the Court rule or the cases that
19 clarify the Court rules say. And I'm being
20 denied access to this tribunal because I am
21 required -- it's one thing if you guys are
22 going to deny -- or Your Honor is going to
23 deny it, then I can appeal it appropriately,
24 but to take no action on it and deny me a
25 hearing on it is not the appropriate course.

1 THE COURT: Okay. Like -- like I said,
2 Ms. Henry, I'll take -- I'll take a look at
3 it and if I feel it's appropriate to address
4 it in my Order, I certainly will.

5 MS. HENRY: Thank you, Your Honor.

6 THE COURT: All right. This court is
7 adjourned.

8 MS. HENRY: Thank you, Your Honor.

9 MS. EMERY: We have the other two.

10 THE COURT: Oh, I apologize. That
11 concludes that hearing. Court is not
12 adjourned.

13 Okay. Mr. Fiacco, do you want to proceed?

14 MR. FIACCO: Yes, Your Honor. My name
15 is Nick Fiacco, and I am the officer for the
16 City of Ormond Beach. Case before you is
17 case 22-00112246. The respondents are
18 Henry -- Michael Henry and Katherine Henry.
19 The violation address is 33 Cypress Circle,
20 Ormond Beach, Florida. Violation is no
21 building permit issued as stated in the Land
22 Development Code, chapter two, article three,
23 section 2-5089, storage containers placed on
24 the property without obtaining a permit.

25 I would like to put this packet into

1 evidence, submit it into evidence. In this
2 packet you'll see copies of Notice of Hearing
3 with Proof of Good Service; a copy of
4 February 27, 2023, magistrate Order for proof
5 of good service; February 27, 2023, Special
6 Magistrate Hearing Minutes; Land Development
7 Code that identifies the code requirements
8 that are at issue in the -- in this case;
9 property appraiser record verifying property
10 ownership information; Respondents' Appeal to
11 Circuit Court Order of appeal; Respondents'
12 Appeal to the Fifth District Court; Henrys
13 response to 5/20/24 hearing request.

14 I would also like to add additional
15 information that came in over the weekend.
16 Packet.

17 THE COURT: Thank you. Before we go --
18 move on, Ms. Henry, I assume you have the
19 same objection as last time in terms of the
20 first packet in regards to the minutes. Is
21 there anything in addition to that?

22 MS. HENRY: Yes. With the first packet
23 my only objection is to the minutes, that is
24 correct.

25 THE COURT: Okay. And under the -- and,

1 again, you stipulate that the pavers, the
2 fence and the storage units or storage
3 containers are still present?

4 MS. HENRY: For packet three that he
5 just presented to you, yes. And no objection
6 on the second packet he handed you.

7 THE COURT: Okay. I'm sorry. I was
8 talking about the first packet.

9 MS. HENRY: The -- yeah, the pictures
10 that are inside of the first packet are
11 actually part of the magistrate's Order. I
12 do not object to those.

13 THE COURT: Okay.

14 MS. HENRY: The pictures that I am
15 objecting to are the most recent ones that I
16 have not had the opportunity to thoroughly
17 review. That's in the third packet he was --
18 I think you just referenced.

19 THE COURT: I haven't seen the third
20 packet.

21 MR. FIACCO: I'm just handing it out
22 now.

23 MS. HENRY: Okay. And so it's the
24 pictures -- the short answer is, yes, I'm
25 reiterating all of my objections in this case

1 as well to the -- what's being offered into
2 evidence.

3 THE COURT: Okay. Again, we'll remove
4 the pictures from the third packet. The
5 second packet that was provided, obviously
6 (unintelligible) objection. Packet number
7 one, same -- same objection to the minutes,
8 correct?

9 MS. HENRY: Yes. And I'm sorry, I did
10 want to clarify. I had one additional
11 objection that is in packet three of his for
12 this case that does not occur in the other
13 two, and it's just to the extent that in the
14 Case Costs/Failure to Comply slide I think is
15 what we're calling it, the other two, the
16 hundred dollar file was separated out as the
17 second to last line, but in this it appears
18 that the hundred dollar fine was included in
19 as part of costs, which I think would be
20 inappropriate. I would just ask that you
21 consider those separately.

22 I don't think they would disagree that the
23 actual costs ordered in that -- in this file
24 were just the \$23.55 -- or 56 cents.

25 THE COURT: I'm sorry. Which -- I'm

1 looking at -- which -- which slide are we
2 talking about? Case Costs and Future Failure
3 to Comply, right?

4 MS. HENRY: The very last one, I
5 believe. At least in the packet that I
6 was --

7 THE COURT: Okay. And we're talking
8 about the line one for \$123.56?

9 MS. HENRY: Yes. That's not the costs
10 that were -- so that's the 20 -- it was
11 \$23.56 that were the costs that were ordered
12 in the last -- in the magistrate's Order, and
13 they included the \$100 fine as part of that
14 total that you see there. I would just ask
15 that there be some acknowledgment, or
16 clarification, or something and to the effect
17 that the costs themselves were only the
18 23.56.

19 THE COURT: Okay. I'm going to admit
20 this, but I will certainly keep that in --
21 keep that as a point of argument and that's
22 something I'll certainly consider.

23 MS. HENRY: That was my only other
24 objection to this packet, Your Honor.

25 THE COURT: All right. I'm going to go

1 ahead and admit all three aside from the
2 minutes in Exhibit Number 1. And we've taken
3 the pictures away from Exhibit Number 3.

4 (Unintelligible.)

5 MR. FIACCO: Yes, sir. I just want to
6 notify that all of three of these packets
7 were given to Mr. and Mrs. Henry.

8 Do you want me to go through the pictures
9 again, sir?

10 THE COURT: Yes. No. (Unintelligible.)

11 MR. FIACCO: Okay. Next slide is the
12 recommendation slide. I recommend finding
13 that the respondents have failed to comply
14 with the Special Magistrate Order on February
15 27, 2023. A violation of the Land
16 Development Code, chapter two, article three,
17 section 2-5089, continues to exist. And as
18 per the February 22nd, 2023, Order, a fine of
19 \$25 per day shall accrue beginning on March
20 28th, 2023.

21 Let's see on the next line. Cost Recovery
22 Notice. Costs to the date is \$9.36 for
23 today, May 20th, 2024, hearing only. Case
24 Cost Sheet, certified letters, \$7.36. There
25 was one of them. Photographs, \$1, two

1 photographs, total case cost \$9.36 cents.
2 Case Cost Failure to Comply, February 27,
3 2023, Order, citation included, \$123.56. May
4 20th, 2024, Order, \$9.36. Daily accruing
5 fine of \$25 per day for 419 days from March
6 28th, 2023, to May 19, 2024, \$10,475. Total
7 due on May 20th, 2024, hearing, \$10,607.92.

8 MS. EMERY: May I ask a quick question?

9 THE COURT: Yes.

10 MS. EMERY: I believe the respondents
11 stipulated the Conex containers are still
12 there. Have they applied for a permit for
13 those containers?

14 MR. FIACCO: No, they have not.

15 THE COURT: Mr. Fiacco, do you have
16 anything further?

17 MR. FIACCO: No, sir.

18 THE COURT: So just to -- Ms. Henry had
19 mentioned earlier, said the \$123, that's
20 actually -- is a hundred dollars fine and
21 \$23.06 cents for the costs, correct?

22 MR. FIACCO: That's correct.

23 THE COURT: Got it. Do you have
24 anything further?

25 MR. FIACCO: No, Your Honor.

1 THE COURT: Okay. Ms. Henry?

2 MS. HENRY: Yes, Your Honor, the -- of
3 course I'm going to reiterate in general all
4 of the arguments and objections I raised in
5 the first hearing -- or on the first case.

6 The only thing I would like to point out
7 additionally that -- it is in my response,
8 but I don't think we really touched on this
9 point before, is the question being asked if
10 we have applied for a permit. Since you've
11 already indicated you're taking this under
12 advisement, I would ask you to consider, and
13 I can provide you a copy of the -- the
14 transcripts if you'd like in doing so, but I
15 would ask you to consider the City's
16 testimony and arguments that were made at the
17 hearing because there were several statements
18 actually applying to all three cases before
19 you today where they indicated they would not
20 be issuing a permit at all, and they were for
21 a variety of reasons that are actually
22 unfounded in the LDC or State Statute.

23 And so I explained what each of those
24 were, I explained where you can find those in
25 the transcript. Now, the page numbers

1 references are to the -- to the appendix
2 because the -- I had served the City the
3 appendix for the current Petition for Writ of
4 Cert, and so I was trying to keep page
5 numbers the same for all levels or stages of
6 the case, I guess, at this point. But, at
7 any rate, I would ask you to consider that
8 because it would be an empty exercise for me
9 to merely -- or either of us to merely apply
10 when the City testified that there is a whole
11 litany of reasons why they will never issue a
12 permit, and those reasons are not tied to or
13 substantiated by what the code actually
14 allows or requires. So I would just, instead
15 of going into all of those details now,
16 Your Honor, excuse me, that starts on page 14
17 of my response to you. I would just ask that
18 you consider the arguments that I have put
19 forth there as well as the portions of the
20 trial transcript that would support that.

21 MS. EMERY: May I ask a question?

22 THE COURT: Yes.

23 MS. EMERY: So when you apply for a
24 permit, the City Planners, you know, they can
25 sit down with you and, for instance on the

1 pavers, say, well, maybe you could just
2 reduce the -- the area of coverage on your
3 property, those sorts of things.

4 Have you gone in and asked the assistance
5 of anyone in the building department or in
6 the planning department to help you with --
7 through that process and how you can bring
8 this in -- property into compliance?

9 MS. HENRY: I have not because I was
10 told explicit reasons during their testimony
11 in the last hearing of reasons why they would
12 not issue the permits so I'm not going to
13 waste anybody's time in doing that.

14 MS. EMERY: Maybe not as -- as it stands
15 today, but could assist you if you didn't
16 have it all the way to the property line, for
17 instance, and you skim the back a little bit.
18 Did you --

19 MS. HENRY: But the code actually allows
20 me to have them to the property line, for
21 example, so that's what I'm talking about.
22 I'm not -- I have no obligation to conform to
23 requirements that the code itself does not
24 require me to do. The setback that Sarah
25 Cushing testified about, the three-foot

1 setback from the side property line, does not
2 apply anywhere except for single-family zoned
3 residential districts, and I am in R4, so
4 that does not apply. That setback does not
5 apply to my property. So I'm not going to
6 waste the City's time going and talking to
7 their officials to apply for things when they
8 have told me that they are going to deny my
9 permits for a litany of reasons that are not
10 based on what the LDC actually requires.

11 I mean, I have no problem working with
12 people, but when I'm told that I'm going to
13 be denied in a way that denies me the due
14 process according to what the code actually
15 says, I'm not going to run in circles doing
16 that.

17 MS. EMERY: Okay.

18 THE COURT: Anything further, Ms. Henry?

19 MS. HENRY: No, Your Honor.

20 THE COURT: Okay. So we'll move on to
21 -- to the last case, which is case number
22 22-00112247.

23 Mr. Fiacco?

24 MR. FIACCO: Good morning, again. My
25 name is Nick Fiacco, NID officer for the

1 City of Ormond Beach. This case before you
2 is case number 22-00112247. The respondents
3 are Michael Henry and Katherine Henry.
4 Violations address is 33 Cypress Circle,
5 Ormond Beach, Florida. Violation is no
6 building permit issued as stated in the Land
7 Development Code, chapter one, article two,
8 section 1-146A1. Pavers installed without
9 obtaining a permit. I'd like to submit this
10 packet into evidence.

11 In the packet is a copy of the Notice of
12 Hearing with Proof of Good Service; a copy of
13 February 27, 2023, magistrate Order for Proof
14 of Good Service; February 27, 2023, special
15 magistrate hearing minutes; Land Development
16 Code that identifies the code requirements
17 that are at issue in this case; property
18 appraiser record verifying property ownership
19 and information; respondents' appeal to
20 Circuit Court Order of appeal; respondents'
21 Appeal to Fifth District Court; Henrys
22 response to 5/20/24 hearing request.

23 I'd like to also add in additional
24 information that came over during this
25 weekend.

1 THE COURT: Okay. Before we move on to
2 that, let's do this in order.

3 Ms. Henry, any additional objections aside
4 from the minutes that were included in the
5 last -- these packets?

6 MS. HENRY: I just want to reiterate my
7 objections and the clarifications regarding
8 what documents are in there. It's more for
9 the record. It's not going to change your
10 action in admitting it, but I just want to
11 clarify that it's my clarifications of his
12 description of what's in there that I'm
13 renewing as well for this packet about the --
14 he identified that --

15 THE COURT: (Unintelligible) specific?

16 MS. HENRY: Yes. He identified that had
17 our appeal was included. The only thing from
18 our appeal was the Circuit Court's Order. He
19 identified that our appeal to the Fifth
20 District Court of Appeals is part of that.
21 Our Petition for Writ of Cert is not
22 included, none of the documents we've
23 submitted, or that the City has submitted, is
24 included. None of the Orders except for the
25 Order Denying Stay is included, so I just

1 wanted to clarify that's all that you've been
2 receiving as part of this.

3 THE COURT: Okay. So noted. We will --
4 we're going to go ahead and admit Exhibit
5 Number 1 with the exception of the minutes
6 that were objected to. I certainly think
7 that the documents speak for themselves.

8 Go ahead, Mr. Fiacco, you may begin --
9 address Exhibit Number 2, please.

10 MR. FIACCO: Yes, sir.

11 THE COURT: Okay. And Ms. Henry, again,
12 obviously you've been provided a copy of
13 Exhibit Number 2. Do you have any objection
14 to Exhibit Number 2 being introduced? This
15 is, I guess, your email along with the
16 signatures in support of your -- your
17 position.

18 MS. HENRY: Correct, Your Honor. I do
19 not have any objection to that.

20 THE COURT: Okay. Hearing no objection,
21 we will admit Exhibit Number 2.

22 MR. FIACCO: Your Honor, I'd like to
23 also submit another packet with pictures.

24 THE COURT: Okay. Exhibit Number 3,
25 Ms. Henry, I assume you're still objecting to

1 the pictures, correct?

2 MS. HENRY: Yes. And I realize you
3 already ruled in the other file, but I want
4 to reiterate that my objection would be for
5 all three of these files about the Cost
6 Recovery Notice and the conclusory statements
7 there. So I recognize what your ruling is,
8 I'm just reiterating that would also be my
9 objection besides the photos.

10 THE COURT: I'm going to overrule the
11 objection, but with the understanding that
12 certainly these are -- you know, in terms of
13 these being conclusory, certainly these are
14 -- I'm taking these in in terms of a
15 demonstrative exhibit in the sense that it's
16 used for argument purposes.

17 Mr. Fiacco, you may proceed.

18 MS. HENRY: Your --

19 MR. FIACCO: I'll move to the
20 PowerPoint --

21 THE COURT: I'm sorry. Ms. Henry, did
22 you have something --

23 MS. HENRY: I just wanted to clarify.
24 Did -- is packet three admitted minus the
25 pictures?

1 THE COURT: Yes.

2 MS. HENRY: Okay. Thank you,

3 Your Honor.

4 MR. FIACCO: I'll move to the

5 PowerPoint.

6 THE COURT: Mr. Fiacco, you may proceed.

7 MR. FIACCO: Thank you, sir. I'm going

8 to the PowerPoint, and fast forward through

9 the pictures again?

10 THE COURT: Yes, please.

11 MR. FIACCO: We get to the slide, the

12 recommendation slide, I recommend finding

13 that the respondents have failed to comply

14 with the Special Magistrate Order on February

15 27, 2023, a violation of Land Development

16 Code, chapter one, article two, section

17 1-146A1 continues to exist. And as per the

18 February 27, 2023, Order, a fine of \$25 per

19 day shall accrue beginning on March 28, 2023.

20 Go to the next slide. Cost Recovery Notice.

21 The cost to date is \$9.36 for May 20th of

22 2024. Case Cost Sheet, certified letters, we

23 have one at \$7.36. Photographs, we have two

24 at a dollar. Total case cost \$9.36.

25 Citation amount waived. Case cost, failure

1 to comply, February 27, 2024, Order, 23 --
2 \$23.56. May 20th, 2024, Order, \$9.36.

3 Daily accrued fine of \$25 per day for 419
4 days from March 28, 2023, to May 19, 2024,
5 \$10,475. Citation cost waived. Total due on
6 May 20th, 2024, \$10,507.92.

7 THE COURT: Anything further,
8 Mr. Fiacco?

9 MS. EMERY: Just, again, did the
10 respondents apply for a permit?

11 MR. FIACCO: No, they didn't. And that
12 would conclude.

13 THE COURT: And before we -- we proceed
14 any further, I just want to, for purposes of
15 this case, case number 22-00112247,
16 Ms. Henry, again, we took the pictures out.
17 Again, that's with the stipulation that the
18 pavers and the fence and the containers are
19 still on the property; is that correct?

20 MS. HENRY: Yes, Your Honor.

21 THE COURT: Okay. Mr. Fiacco, you
22 stated you have nothing further?

23 MR. FIACCO: Yes, Your Honor.

24 THE COURT: Ms. Henry?

25 MS. HENRY: Yes, Your Honor, I just ask

1 you to consider all of my prior objections,
2 legal arguments, et cetera, that I have
3 raised in the prior two cases. But I also
4 wanted to point you out to an issue, the
5 initial Order at the time of the initial
6 hearing with the magistrate there was a
7 finding, a violation, of 1-14 subsection 6,
8 and that's referenced in his Order.

9 I would ask that as part of your Order
10 that there be a clarification that it looks
11 like on October 4th, 2023, the City has
12 modified the code. I don't know why they
13 would have renumbered this part. It seems to
14 serve no purpose other than confusion.

15 But that particular part of the code was
16 changed, and it is now 1-14, subdivision 8.
17 And so for purposes of this hearing, as well
18 as going forth, it seems prudent that we
19 perhaps should refer to that in some way,
20 shape or form because otherwise it looks like
21 I am violating something about a variance,
22 and this case has nothing to do with that,
23 Your Honor.

24 THE COURT: Okay. Fair enough.
25 Anything else you wish to address?

1 MS. HENRY: Nothing new. Just the same
2 objections, Your Honor.

3 THE COURT: The previous objections from
4 the previous two cases?

5 MS. HENRY: Yes, Your Honor.

6 THE COURT: Okay. Mr. Fiacco, anything
7 else?

8 MR. FIACCO: No, Your Honor.

9 THE COURT: Ms. Emery?

10 MS. EMERY: No, thank you.

11 THE COURT: Okay. Is there anything
12 further to be addressed besides --

13 MS. EMERY: No.

14 MR. FIACCO: No, sir.

15 THE COURT: All right. With that we
16 will adjourn for the day. Thank you.

17 MS. HENRY: Thank you, Your Honor.

18 (THEREUPON, the foregoing proceedings
19 were concluded.)

20

21

22

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25

1 C E R T I F I C A T E O F R E P O R T E R

2 STATE OF FLORIDA)

3 COUNTY OF VOLUSIA)

4
5
6 I, Shannon Green, Registered Professional
7 Reporter, DO HEREBY CERTIFY that I was
8 authorized to and did stenographically report the
9 foregoing proceedings; and that the transcript is a
10 true record of my stenographic notes.

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

17 Dated this 17th day of June, 2024.

18
19 

20 _____
21 Shannon Green, RPR
22 Registered Professional Reporter
23
24
25

<p>MR. FIACCO: [36] 3/5 4/2 4/5 5/13 8/16 9/1 9/4 9/11 10/7 12/6 12/22 16/10 17/5 17/11</p>	<p>72/8 74/9 74/12 MS. HENRY: [103] THE COURT: [142] THE WITNESS: [1] 28/25</p>	<p>\$25 [8] 17/20 18/9 24/21 50/13 61/19 62/5 71/18 72/3 \$35,000 [1] 39/11 \$500 [1] 39/4</p>
<p>18/15 18/18 53/16 56/13 58/20 61/4 61/10 62/13 62/16 62/21 62/24 66/23 69/9 69/21 70/18 71/3 71/6 71/10 72/10 72/22 74/7 74/13</p>	<p>\$ \$1 [1] 61/25 \$10,000 [1] 39/3 \$10,475 [3] 18/10 62/6 72/5 \$10,507.92 [2] 18/12 72/6 \$10,607.92 [1] 62/7</p>	<p>\$7.36 [3] 18/2 61/24 71/23 \$9.36 [7] 18/8 61/22 62/1 62/4 71/21 71/24 72/2</p>
<p>MR. HENRY: [1] 3/18 MS. EMERY: [24] 5/21 7/19 8/8 11/18 14/13 14/21 14/23 18/12 20/2 20/8 47/21 49/25 50/2 55/9 56/8 62/7 62/9 64/20 64/22 65/13 66/16</p>	<p>\$100 [1] 60/13 \$123 [1] 62/19 \$123.56 [2] 60/8 62/3 \$15,000 [1] 38/25 \$23.06 [1] 62/21 \$23.55 [1] 59/24 \$23.56 [3] 18/7 60/11 72/2</p>	<p>0 00112237 [4] 2/5 2/24 3/10 10/10 00112246 [3] 2/7 2/24 56/17 00112247 [5] 2/9 2/25 66/22 67/2 72/15 1 1-14 [2] 73/7 73/16 1-146A1 [2] 67/8 71/17 10 [1] 9/21 10:30 [1] 2/18 11 [3] 28/15</p>

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162.07 [3]	18/9 22/24	1/3
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169.092C [1]	61/23 62/4	24th [1] 6/5
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172.09B [1]	71/22 72/1	27 [13] 4/15
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action... [2] 75/15 75/16	3/12 4/6 26/16 26/21 32/2	53/19 63/12 affirmed [2]
actions [4] 34/17 40/4 40/14 50/9	47/18 54/11 54/19 56/3 56/19 67/4	5/20 53/12 affirming [1] 6/12
actively [1] 40/5	69/9 73/25 addressed [3]	after [1] 26/13
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