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

MICHAEL and KATHERINE HENRY,
Respondents/Appellants,

vs

CITY OF ORMOND BEACH, FLORIDA
Petitioner/Appellee.

CIRCUIT CASE NO: 2023-30711 CICI

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

APPELLANTS' REPLY BRIEF ON APPEAL

This brief is submitted by the Henrys in support of their appeal of the Special Magistrate Orders rendered on 3/3/23. Said Orders are the result of alleged Land Development Code (LDC) violations, prosecution of which was brought by the City of Ormond Beach (OB). Henrys' Initial Brief was filed on 6/3/23, with OB's Answer Brief being filed on 6/30/23.

Respectfully Submitted: July 27, 2023

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Argument

OB and Magistrate violated countless laws here, some procedural and others substantive. OB's Answer Brief ignores most of these laws, having no sound legal argument to address OB's said violations. Instead, OB misleads this Court - about the facts of the case, origins of OB's legal analysis, the statutes and cases involved, and even what is being challenged in this appeal.

Despite the misleading, the fact remains OB is attempting to 1) interfere with Henrys' use of their property, 2) physically come and take Henrys' property, and 3) assess fines on Henrys for both. However, the law does *not* allow OB to do this.

A. OB Misleads the Court About the Facts of the Case

OB starts their brief by claiming they commenced the cases against Henrys due to "complaints from neighbors,"[1] insinuating *multiple* neighbors complained. However, it's uncontested only one neighbor made a complaint (Ms. Conway), which was largely unfounded,[2] and fueled by personal animus.[3]

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[1] OB Answer Brief, p 2.
[2] such as complaining of Henrys violating "HOA rules" for an HOA that does not exist, Henrys interfering with easements that don't exist, etc.
[3] Such as when stating things like "Henrys have been ruining the neighborhood since they got here" and "Henrys are the laughing stock of entire neighborhood." This person animus was also demonstrated by the huge stack of pictures she brought to the Magistrate hearing to continue complaining about Henrys. OB also claims Conway is an adjoining property *owner* (OB Answer Brief, p 5), but she owns no property here. She *rents* property owned by Erin Macinnis adjoining Henrys' property, as seen on Volusia County official records https://vcpa.vcgov.org/parcel/summary/?altkey=3084501#gsc.tab=0, last accessed July 21, 2023.

OB then claims Henrys' home is a duplex,[4] despite it being a single family home. Despite zoning for Henrys' property permitting duplexes *and* single family homes, no testimony was elicited regarding the home's current status. Built in 1949, the home has surely seen many changes throughout the years. OB argues *having been* a duplex, Henrys' homestead must abide by a 20 foot North side, 20 foot West rear, and 20 foot South side setback in using their 88 by 123 foot property.[5]

OB then claims they posted "a Stop Work Notice" on *Henrys'* property.[6] However, Janet Bruce only testified to "issuing" the Stop Work Order (Tr. 29), *not* posting it. Furthermore, Henrys testified *no* such documents were posted on Henrys' property[7], nor did Bruce mention *anything* about a Stop Work Order to Henry in their hour-long phone conversation that day, nor in her follow up email to Henry on the same date.[8] This testimony was unrefuted.[9]

OB then claims the Notice of Violation, including the one for the conexes, "*<u>specifically</u> informed* the Appellants [they must obtain] after the fact building permits *or remov[e] the structures* from their property.*"*[10] However, the Notice[11] said *nothing* about removing the conexes from the property. Rather, they only instructed Henrys to obtain a permit for them, which OB later argued would never be issued by OB as they were not "permittable structures."[12]

Finally, OB claims "Katherine Henry testified that the industrial shipping containers are sized 8' x 20' each (160 sq. ft.),[13] but that is misleading. Henry's "wild guess" from "the top of her head," where she "had no idea" wasn't proof of a certain size.[14] But, OB's uses this to support their conclusion the conexes constitute a "garage" per the LDC.

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[4] OB Answer Brief, p 2.
[5] As seen in OB's testimony on Tr 76, 78, 79.
[6] OB Answer Brief, p 4, 5.
[7] Rather, these documents were only posted on adjoining property, facing *away* from the Henrys' property, and only secured on a stake with a single staple each, and had come off in that day's storms. So, the Henrys did not discover the content of the posting until much after the storm, when they found 1 of the laminated sheets on the far side of their yard buried in some of their property.
[8] Tr 32-33, 48-49.
[9] nor was it disputed when it was brought up to show the context of the intentional denial of equal protection to the Henrys. This issue was first raised in Henrys' 11/8/22 Notice to OB, then in their Responsive Pleadings filed prior to the Magistrate Hearing.
[10] OB Answer Brief, p 4.
[11] App 003, which states "The property must be brought into compliance in the following manner: Obtain a building permit for the large metal containers being used as sheds on the property."
[12] *See, e.g.,* Tr 74.
[13] OB Answer Brief, p 13.
[14] Tr 70.

OB also completely *ignores* that

- ➔ Bruce unlawfully came onto Henrys' property on 9/2/22 without a warrant.
- ➔ Bruce took photos of Henrys' property while there.
- ➔ Henrys later found out by reviewing home-security video footage, and served Bruce, her supervisor, and City Attorney with a Notice to Cease and Desist on 11/8/22, demanding return of those illegally-obtained photos,[15] and noting well-settled law that such photos, as fruit of the poisonous tree, cannot be used as evidence in court proceedings.
- ➔ OB failed to return the illegally-obtained photos, or respond to the 11/8/22 Notice.
- ➔ OB failed to notify Henrys of intent to use such photos as evidence (until literally 2 minutes before the 10AM hearing).

Regardless of OB's *reasoning* for this misleading, it is not helping to arrive at a just and fair determination.

B. OB Misleads the Court as to Their Argument via Plagiarism

Every good attorney cites relevant cases and statutes. However, attorneys have an ethical duty to cite their sources, instead of plagiarizing. OB has 18 pages of argument, 14 of which have word-for-word copying from cases (often from a dissent, trial court, another jurisdiction, an unpublished case, etc.) *without* proper citing to their original authors,[16] or explaining how those case portions are relevant.

C. OB Misleads the Court About the Law

OB's misleading gets more serious regarding the *law*. First, OB cites[17] to FS 162.22 to say Magistrate has massive powers, even that of "arrest," in cases like this. However, OB leaves off

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[15] App 025.

[16] Such as how the 2nd half of p 14, all of p 15, and through the end of p 16 is copied and pasted from the *Kuvin* case, which is from *another jurisdiction*, and thus *not* binding precedent for *this* case. And when OB finally cites to *Kuvin*, later on p 17, the point OB claims is made by *Kuvin* at 632-33 *isn't even the point being discussed!* Likewise, with the exception of the very last sentence, OB's entire section VI (p 18-20) is copied word for word from yet another case from *another jurisdiction*, the *Chakra* case, with only one small reference to the case at the bottom of p 20. Similarly, the majority of the argument made on p 25 is copied and pasted from the *TR Inv'r* case, but *TR Inv'r* is *not* cited for that entire large paragraph; rather, it is cited as supporting OB's claim in the last small paragraph on p 25; however, nothing there supports *that point* made by OB. Also, the *TR Inv'r* case is from *another jurisdiction*, and does *not* involve FS 70.45 *at all*, which is the issue OB claims *TR Inv'r* discusses.

[17] OB Answer Brief, p 7.

the rest of that sentence, which reads "as provided for in chapter 901," which is Criminal Procedure - *not* relevant here. OB cites *Lindbloom* for support, when in reality, *that* sentence in *Lindbloom* makes the opposite point on Magistrate's powers, saying "'***these powers are narrow***, see Op. Att'y Gen. Fla. 2009-37, ***and the punishments are minimal.***" Moreover, *Lindbloom* is a non-binding federal court case,[18] and is *unpublished*.

OB next addresses the authority of this Court,[19] citing two appellate cases from other jurisdictions, *Lee County* and *Sarasota Cnty*, as well as *Davis Islands* from another circuit court. Although none are binding, we must note *Lee County* (and the very part of *Sarasota Cnty* OB cites) emphasizes the three questions that must be asked here: "whether due process was afforded, whether the administrative body applied the correct law, and whether its findings are supported by competent substantial evidence."[20] Indeed, OB downplays this Court's role in answering these first two questions, merely stating Henrys "received due process" without addressing Henrys' *specific* allegations of the *several* ways their *substantive*[21] and *procedural* due process[22] rights were denied. Additionally, since *Davis Islands* is an old trial court case, the entire file was destroyed 5+ years ago per FRCP 2.430.[23]

OB then misleads about US Supreme Court precedent, claiming such a case stood for a particular point, but then only cited the *Keys Citizens* state court case.[24]

Next, OB claims FS 163.3167(1) states a city's comprehensive plan is statutorily mandated "to control and direct the use and development of property" in the city.[25] However, that portion of law does not mention the words "control" or "direct," instead stating the plan is "to guide." Similarly, it does not cover land "use" (as "use" is not mentioned at all), instead covering "*future*

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[18] other than the Supreme Court, and thus not binding on this state court case. *See* Georgetown Law's Handout on *Which Court is Binding?*, available at https://www.law.georgetown.edu/wp-content/uploads/2018/07/Which-Court-is-Binding-HandoutFinal.pdf, last accessed on 7/21/23.
[19] OB Answer Brief, p 8.
[20] Likewise, in OB's first full sentence on p 14, they copy and paste the words of the *Town of Manalapan* case to discuss the standard for "competent evidence," but fail to acknowledge the sentence in *Town* immediately before their copied words, which again reiterates this "court must review the record" to answer these three questions. *Town* clarifies the second question is actually "whether the essential requirements of the law have been observed."
[21] Henrys' Initial Brief, p 11-27.
[22] Henrys' Initial Brief, p 28-31.
[23] When citing to WestLaw, one is supposed to attach a copy of the case, as other parties may not have access to a case not publicly available; this was not done here.
[24] OB Answer Brief, p 9.
[25] OB Answer Brief, p 9.

development."[26] Even the nonbinding *Machado* case OB cites here reiterates the plan covers *future development*.[27]

OB also claims precedent requires all reasonable doubts regarding their LDC to be resolved in their favor.[28] However, to the extent their court of appeals case is even relevant, the *City of Miami Beach* Florida Supreme Court case[29] mandates such ***doubt will be resolved against the City*.**[30] And why wouldn't it? We live in a Constitutional Republic, where our rights to life, liberty and property are given to us by God, and not created or "gifted" by OB. Conversely, OB has *no* authority to act except that which was expressly provided by state constitution, state law or city charter.

OB suggests this Court owes OB deference, and cites a dissent for support. However, the US Supreme Court made it clear "deference does not imply abandonment or abdication of judicial review."[31] Further, in discussing which municipal action should be upheld,[32] OB repeatedly cites cases about "zoning" regulations, but inserts "and land development" and "and land use restrictions" into the words copied and pasted from these "zoning" and "planning" cases. Henrys do not challenge *zoning* or *land development* regulations *here*, as such, cases discussing deference to *them* are misleading.

OB next implies "implementing the City's comprehensive plan" is a "legitimate public purpose," citing to *Kuvin*;[33] however, *Kuvin* does *not* state nor imply implementing the plan constitutes a legitimate public purpose by itself. In fact, *no* cases support such an allegation. Moreover, OB offers *no* legitimate public purpose for *any* of the actions in question.

Misleading on Equal Protection

OB then essentially claims *no* equal protection claim could *ever* succeed because as long as there's at least *some* others being prosecuted for the same offense, such selectivity is

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[26] Per the Community Planning Act (CPA), being discussed here, Henrys' pavers, fence and conexes (PFCs) are ***not*** classified as 'development" either, as discussed in detail at Henrys' Initial Brief, p 25-26. Indeed, OB goes on for the next two pages with quotes about regulating *development.*

[27] OB Answer Brief, p 9.

[28] OB Answer Brief, p 15.

[29] Henry Initial Brief, p 23.

[30] Further, the cases cited by OB reference presumptions for statutes and ordinances, *not* a city's interpretation of those laws.

[31] *Students for Fair Admissions v Harvard College*, 600 US __ (2023), slip opinion p 26.

[32] OB Answer Brief, p 14-16.

[33] OB Answer Brief, p 17.

constitutional.[34] But that's not what the case precedent states. OB cites *Oyler* for stating "The conscious exercise of ***some selectivity*** in enforcement is not in itself a constitutional violation." But that's the distinction - ***some*** selectivity versus ***much*** selectivity in enforcement. William Oyler raised the issue of selectivity in enforcement where 904 men were similarly situated in the entire state[35] of 1,880,000 people[36] - so, 904 out of 1,880,000. That is a stark contrast to the 115,714 current similar violations within OB (a city of only 43,517 people).[37] So, while 904 out of 1,880,000 might not be unconstitutionally selective, 115,714 out of 43,517 certainly is! Moreover, William Oyler was charged with *murder* - a ***malum in se*** offense as opposed to Henrys' alleged ***malum prohibitum*** offense. And, when you commit a ***malum in se*** offense, such as murder, arson or rape, there is harm to a victim that must be accounted for, even if another arsonist or rapist goes free.[38] However, Henrys' PFCs harm *no one*, and the requirements OB imposes upon Henrys' PFCs are to satisfy design and aesthetic[39] preferences, which are wholly ineffective with such selective enforcement.

OB also suggests Henrys must be part of a predefined class to receive equal protection of the law. However, the US Supreme Court[40] expressly acknowledges a "class of one," where a party "alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment," just as Henrys did.[41] One neighbor made a complaint against Henrys. That complaint was immediately followed up on and responded to. However, as discussed in prior pleadings, when Henrys made complaints to OB regarding the Rollins property, and OB's own LDC violations[42] at 54 Seton and the city attorney's office, OB failed to take *any* action, or even respond to Henrys. Especially

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[34] OB Answer Brief, p 17-18.
[35] *Oyler v Boles*, 368 US 448, 455 (1962).
[36] Oyler brought his case in 1955, and the population of West Virginia in 1955 was 1,880,000. https://www.google.com/search?q=how+many+people+lived+in+west+virginia+in+1955&rlz=1C1CHBF_enUS912US912&oq=how+many+people+lived+in+west+virginia+in+1955&aqs=chrome..69i57.7893j1j7&sourceid=chrome&ie=UTF-8
[37] Henry Initial Brief, p 10-11.
[38] Discussed more fully on p 8-11 of Henry Initial Brief.
[39] Even OB's own cases cited recognize cases have long held "design restriction ordinance[s] invalid where the principal purpose of the ordinance was to achieve a particular aesthetic appearance instead of protecting property values or other legitimate function of the police power." *See, e.g., Kuvin v Coral Gables,* 62 So.3d 625, 641 (Fla. App. 2010)(concurrence).
[40] *Willowbrook v Olech*, 528 US 562, 564 (2000).
[41] Henry Initial Brief, p 6-11.
[42] City Park's LDC Violation re Pods Container, City Attorney's LDC Violation re Parking Surface, City Attorney's LDC Violation re Utility Structure, City Attorney's LDC Violation re Repairs Without a Permit

considering their undisputed thorough follow-up with the neighbor who complained *against* the Henrys, this undoubtedly shows intentional different treatment.[43]

OB then cites a long list of cases from other jurisdictions to "prove" Henrys' substantive due process rights weren't violated.[44] However, those cases only relate here in the most general sense, discussing situations of "state-created property interest[s][45]," which aren't at issue here.[46] Further, the various substantive due process violations discussed by Henrys[47] are not rebutted - *or even addressed* - by OB.[48]

OB claims[49] "a protectable property interest does not arise in this case from a knowing violation of the law." But, it is *not* alleged Henrys obtained ownership of their property through robbery, theft or other unlawful means. Further, Henrys' property rights in their home and attached PFCs are *not* created by the LDC, OB itself, nor the state.[50] Indeed, the Florida Constitution acknowledges Henrys "have *inalienable* rights . . . to acquire, possess and protect property."[51] But, even if state law and the US Constitution were at odds here, the court has "an obligation to ensure that state court interpretations of that law do not evade federal law." In other words, as the US Supreme Court held last month

> State law, for example, "is **one** important source" for defining property rights. *Tyler v. Hennepin County,* 598 U.S. ___, ___ (2023) (slip op., at 5); [but at] the same time, the Federal Constitution provides that "private property" shall not "be taken for public use, without just compensation." Amdt. 5. As a result, **States "may not sidestep the Takings Clause by disavowing traditional property interests**." *Phillips v. Washington Legal Foundation*, 524 U. S. 156, 164 (1998); see also *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U. S. 155, 164

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[43] The games OB played with service upon Henrys and other matters were also outlined for the Magistrate, as summarized on App 012, parts 6 and 7.
[44] OB Answer Brief, p 18-20.
[45] OB Answer Brief, p 20.
[46] See following paragraph herein. Also, the manner in which this plagiarized material is used brings up several important questions. Where *substantive due process* claims of a multitude of other circumstances have failed for a variety of unspecified reasons, does this necessarily mean that *none* of Henrys' claims are valid? How are the facts of these cases the same? How does the law in those cases control here?
[47] Henry Initial Brief, p 11-27.
[48] And as the Answer Brief is a required pleading, OB is now deemed to have admitted these due process violations. *See* Henry's Response to OB's Motion to Strike, p 2-4, discussing the Florida court rules on point.
[49] OB Answer Brief, p 21-22.
[50] Henry Initial Brief, p 5.
[51] FL Const Art I Sec 2.

(1980) (holding that **States may not, "by ipse dixit, . . . transform private property into public property without compensation**").

Further, OB's analysis on this issue heavily relies upon *Durden*, which is grossly misleading since the appellees in *Durden* "illegally constructed outdoor advertising signs ***adjacent to Interstate 10***"[52] - substantially different from Henrys' use of their PFCs *on their own property* that *in no way* impacts any easements or any other property interests of record. So, OB may not use *Durden*,[53] nor another case, to "sidestep the Takings Clause by disavowing traditional property interests," nor may OB "by ipse dixit transform [Henrys'] private property into public property without compensation."

OB then discusses how property owners may file suit against municipalities under FS 70.001, detailing all pre-suit requirements, ultimately concluding Henrys did not follow all the steps for such a lawsuit.[54] However, that is misleading, as Henrys have *not sued under FS 70.001*, only citing FS 70.001 to show our legislature's recognition "that some laws, regulations, and ordinances of the state and political entities in the state, as applied, may inordinately burden, restrict, or limit private property rights without" a court declaring it "a taking under the State Constitution or the United States Constitution. The Legislature determines that there is an important state interest in protecting the interests of private property owners from such inordinate burdens."[55] Thus, the importance "in protecting the interests of private property owners" is certainly valid here, while the specifics of a lawsuit under FS 70.001 is not.

OB then claims Henrys "misread" the meaning of "exaction" in FS 70.45.[56] OB "supports" this claim by plagiarizing *TR Inv'r*.[57] Aside from being from another jurisdiction, and thus nonbinding, *TR Inv'r* does ***not*** provide a definition of "exaction" that undercuts Henrys' claims. Indeed, when copying and pasting onto p 25 the entire paragraph about "exactions," OB failed to include the beginning of the first sentence, stating the definition provided is one "In the most

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[52] *Dep't of Transp v Durden*, 471 So.2d 1271, 1272 (1985).
[53] OB also claims on p 22 of their Answer Brief that OB "has a clear and established scheme under its LDC for citizens to secure permits for fences, driveways and accessory structures." In making this statement, OB does *not* deny that OB's permit scheme includes requirements that are *not* even disclosed until *after* an application for a permit is submitted, and includes impractical, unreasonable and often impossible provisions, as discussed by Henrys on p 18-23 of their Initial Brief, and as shown in OB's own testimony (as detailed on p 19 of Initial Brief). ***How could the Henrys' possibly "knowingly disregard" requirements that have not even been disclosed?***
[54] OB Answer Brief, p 22-24.
[55] Henry Initial Brief, p 14-15.
[56] OB Answer Brief, p 24.
[57] *See* footnote 15 herein.

general sense,"[58] and is not speaking to exactions under FS 70.45. In fact, FS 70.45 is *not even mentioned* in *TR Inv'r.* However, case precedent is *not* needed to ascertain the definition of "exaction" under FS 70.45, as that definition is provided by FS 70.45 itself.[59] And as OB's "conditions imposed" upon Henrys' "use of real property . . . lack an essential nexus to a legitimate public purpose and [are] not roughly proportionate to the impacts of the proposed use," those conditions by OB are "exactions" within the meaning of FS 70.45, and the protections within FS 70.45 thus apply.[60]

Overall, OB's argument is misleading on the law because *most* of the *binding* authority cited by Henrys (state statutes, US Constitution, state Constitution, binding case precedent, OB's LDC, etc) is completely *ignored* by OB; not differentiated, or explained differently, but simply ignored. Blatantly ignoring binding authority is outright misleading. Additionally, many of OB's statutes and cases cited are not on point to the issues of this appeal, and *most* (23 out of 43) of OB's cited cases are dissenting opinions, unpublished opinions, cases from other jurisdictions, trial court decisions, etc. - *none* of which are binding authority in this case. OB also misstates the law in several places, completely ignoring the actual words of the relevant statutes.

D. OB Misleads the Court About What is Being Challenged in This Appeal

OB misleads even as to what is being challenged in this appeal. As discussed, OB suggests Henrys challenge *zoning* or *land development* regulations, but no *zoning* issues have been raised, and per the CPA (the controlling statute), Henrys' PFCs are *not* classified as "development."[61] Indeed, as discussed, OB includes many general points of law not litigated here. But OB also misleads in claiming[62] Henrys ask this Court to "reweigh the evidence." That is *not* what Henrys seek in this appeal.

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[58] *Tr Inv'r v Manatee Cnty*, No. 2D21-2061 (Fla. App. Feb 3, 2023). OB cites to this case as 355 So.3d 1004, 1012 (Fla. 2d DCA 2023); however, this case citation does not exist. Henrys even searched in two different case databases (Fastcase, as made available through her outstate attorney licensure, and Google Scholar, which is publicly available), and double checked that there is no other case under this name from 2023 other than the one cited by Henrys in this footnote.

[59] *See* Henry Initial Brief, p 16, quoting FS 70.45. "'Prohibited exaction' means any condition imposed by a governmental entity on a property owner's proposed use of real property that lacks an essential nexus to a legitimate public purpose and is not roughly proportionate to the impacts of the proposed use that the governmental entity seeks to avoid, minimize, or mitigate."

[60] It is also important to note that OB does *not* allege Henrys failed to comply with the presuit requirements of FS 70.45 (as they did not fail to comply).

[61] Per the CPA, Henrys' PFCs are ***not*** classified as 'development," as discussed in detail at Henrys' Initial Brief, p 25-26.

[62] OB Answer Brief, p 8.

Magistrate's orders **purport to authorize OB to enter onto Henrys' homestead, remove their property, dispose of their property, charge them for such removal, use such charges to create a lien against their real and personal property, and be immune from liability for damage or loss sustained** by Henrys from OB's said removal. OB fails to point to *any* law that purports to give OB authority to do this. Further, it is a blatant violation of the takings clauses of the US and Florida Constitutions, and many state laws. Henrys are challenging this clearly unlawful action by OB.

The only other points at issue are OB's ordering Henrys to

- ➔ remove their conexes
- ➔ remove their fence and pavers,[63] and
- ➔ pay never-ending extensive fines

So, the necessary questions are

- ➔ does OB have authority to order Henrys to remove PFCs?
- ➔ does the *procedure* used deny Henrys' rights?
- ➔ does OB have authority to impose vast, never-ending fines?

1. OB Has NO Authority to Order Henrys to Remove PFCs

OB has *no* authority to order Henrys to remove their PFCs. First, none of them are classified as "development" in the controlling statute(s).[64] Also, OB is prohibited from denying Henrys economically viable use of their modestly-sized homestead. But this occurs when Henrys are told their conexes must be removed, and their pavers must abide by setbacks that prohibit use of nearly *half* their property,[65] especially when these setbacks contradict the LDC's requirement that the pavers be "contiguous to the existing driveway extend[ing] from the existing driveway

[63] At times, OB suggests simply getting a permit would suffice, but OB won't issue a permit for the fence and pavers because of subjective aesthetic "requirements," nor without removing and completely redesigning them. Henry Initial Brief, p 20. Further, it is unreasonable and virtually impossible for Henrys to satisfy all the requirements for applying for the permits. Henry Initial Brief, p 18-23.
[64] Per the CPA, Henrys' PFCs are ***not*** classified as 'development," as discussed in detail at Henrys' Initial Brief, p 25-26.
[65] Henry Initial Brief, p 22.

toward the side lot line."[66] Relatedly, OB cannot require Henrys to remove their pavers or conexes when doing so will force the Henrys into noncompliance with the LDC.[67]

Further, OB has no authority to force Henrys to remove their pavers, as they are undisputedly Florida-friendly landscaping protected under state law.[68] Similarly, state laws on fences and privacy[69] *and* the Florida Building Code's provisions on regulating "design"[70] prevent OB from forcing Henrys to remove their privacy fence. Moreover, under the CPA, Henrys' conexes are not "structures" which require permits.[71] Henrys' conexes are not against the LDC, and are not even mentioned in the LDC.[72] Even more telling is that the Florida Building Code does *not* allow OB to control the location of Henrys' conexes, apply typical building requirements to them, or even to regulate them at all![73]

In addition to this (and other[74]) statutory authority on point, *regulatory taking case precedent* also prohibits OB from forcing the removal of Henrys' PFCs from their own property.[75] The US Supreme Court made it clear "[t]he Constitution extends *special* safeguards to the privacy of the home."[76] The Court explained this is because "the principles . . . of constitutional liberty and security . . . apply to all invasions on the part of the government and its employés of the sanctity of a man's home and the privacies of life. [T]he essence of the offence . . . is the invasion of his ***indefeasible right of personal security, personal liberty and private property.***"[77] Thus, it makes sense that a land "use restriction may constitute a 'taking' if not reasonably ***necessary*** to the effectuation of a ***substantial*** government purpose."[78] OB has failed to identify *any* legitimate government purpose, let alone a ***substantial*** one, instead claiming the purpose of forcing the removal of Henrys' PFCs from their own property is merely to "implement [OB's] comprehensive plan."[79] There was no finding, nor even an allegation, that Henrys' PFCs harm

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[66] LDC 2-50(x)(4)(c).
[67] Henry Initial Brief, p 17.
[68] Henry Initial Brief, p 24-25.
[69] Henry Initial Brief, p 15 at footnote 55; p 34-35.
[70] Henry Initial Brief, p 21.
[71] Henry Initial Brief, p 25.
[72] Henry Initial Brief, p 26-28.
[73] Henry Initial Brief, p 23-24.
[74] Henry Initial Brief, p 14-16.
[75] This issue is explained in more detail in Henry Initial Brief, p 12-14.
[76] *Dolan v City of Tigard*, 512 US 374 (1994) (cleaned up).
[77] *Boyd v United States,* 116 US 616 (1886).
[78] *Penn Central Transportation Co v New York City*, 438 US 104, 127 (1978). *See* Henry Initial Brief, p 13.
[79] OB Answer Brief, p 17. OB also states that in general, the LDC was adopted to "regulate the various land use categories in [OB's comprehensive] Plan." *Ibid* at 11. But, this is irrelevant

any person or property; nor was there a finding (or allegation) that removing Henrys' PFCs was ***necessary*** to prevent such harm. Certainly, even ***if*** general aesthetics or implementing the comprehensive plan was a substantial government purpose, removing *Henrys'* PFCs is *not* necessary to meet those goals while 115,714 like LDC violations currently exist within OB.

For the PFCs, the *only* violation Magistrate found is that Henrys did not obtain permits for them.[80] That is it. Magistrate (and OB) completely ignored the plethora of laws, LDC provisions, cases and constitutional provisions that prohibit OB from including some of the conditions for the permits or that prohibit OB from requiring a permit for them at all. Further, it is uncontested Henrys' PFCs harm no one, and in fact, bring several benefits to Henrys' property and others nearby.[81]

2. The Procedures Used Have Denied Henrys' Rights

The *procedures* used by OB have denied Henrys' rights. As discussed, due process denials invalidate otherwise permissible action. Magistrate admitted evidence (and subsequently used some as exhibits in his orders) illegally obtained by OB without a warrant, which is clearly prohibited by the 4th Amendment and other laws.[82] OB failed to follow the law in serving Henrys with Notices in this matter.[83] And the manner in which OB completely subverted the requirements of FS 70.45, and robbed Henrys of the statutory protections for their property contained therein, is nothing short of a stealthy attempt to deny Henrys due process of law.[84] Thus, the due process denials invalidate the entire action taken against Henrys.

OB's attempt to physically take Henrys' property failed to follow *any* required legal process, and thus invalidates Magistrate's orders even if otherwise valid. On point, FS 163.3194(4) mandates "private property shall not be taken *without due process of law* and the payment of just compensation." To avoid being unduly cumulative, Henrys rely on the statutes cited in their Motion for Relief & for Stay,[85] as all of the averments made by Henrys therein were admitted by

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since *land use categories* are not being challenged here, nor is there a dispute that Henrys are using their *residentially-zoned* homestead property for normal *residential* purposes.
[80] App. 85, et al.
[81] Henry Initial Brief, p 5,16.
[82] Henry Initial Brief, p 28-30.
[83] As described by Henrys in various places, including part 6 and 7 of App 012.
[84] Henry Initial Brief, p 30-32.
[85] Paragraphs 16, 18, 19, and 31-34. FRCP 1.110(f) states "a paragraph may be referred to by number in all subsequent pleadings."

OB.[86] Thus, Henrys simply reiterate OB's fatal procedural flaws in attempting to take Henrys' property include: filing the action under the wrong statute, filing prematurely, filing without the requisite statutory pre-lawsuit conditions met, notice and opportunity to be heard on the issue of taking was denied to Henrys, service was not made *personally*, filing without good-faith pre-filing negotiations with Henrys, filing without the statutory requirements for eminent domain petitions, etc. Many of these are *per se* reversible errors, and as such, by themselves invalidate Magistrate's orders.

Moreover, although Henrys' eventually received notice of the magistrate hearing, they received ***no*** notice before the hearing OB intended to physically remove Henrys' PFCs from their own property.[87] Consequently, Henrys did *not* receive a meaningful opportunity to be heard on these issues. Although OB ignores these facts, that does not change the law on point - which requires the results to be overturned for violation of procedural due process (as they are not harmless errors).

Equal protection violations have the same result.[88] OB's enforcement of the LDC *as against Henrys* at the Rollins property, outright refusal to enforce the LDC *as against sellers* at the same property, and current attempts to enforce the LDC *as against Henrys* for their current property establishes a ***clear violation of Henrys' right to equal protection of the law.***[89] Especially where Henrys' alleged LDC violations are not ***malum in se*** but merely ***malum prohibitum***, the obvious, *uncontroverted*, and astounding number of like violations getting a "free pass" is the epitome of an equal protection violation.

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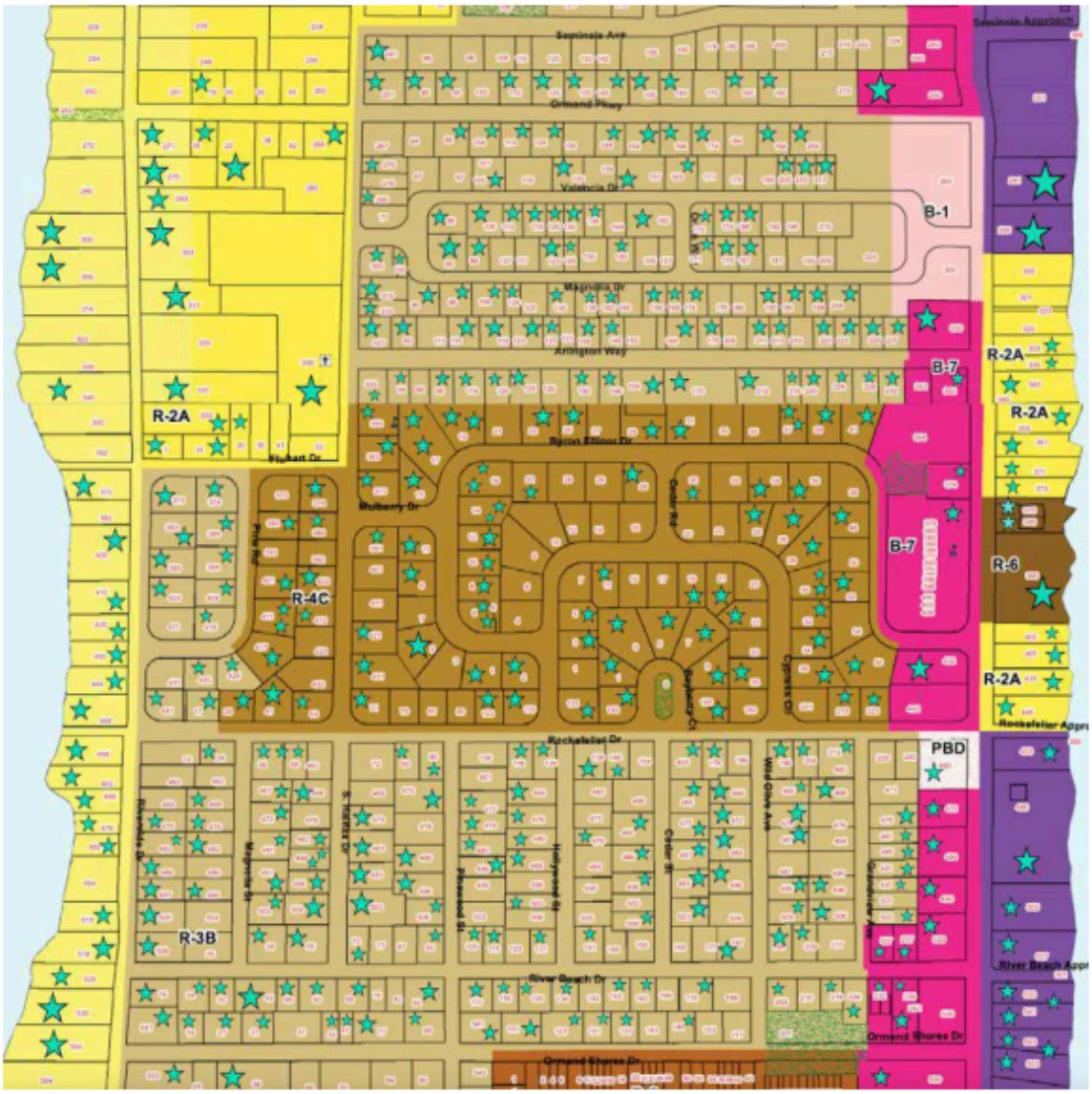
[86] Court rules discussed in full in Henrys' Response to OB Motion to Strike, paragraphs 5-9.

[87] Henry Motion for Relief from Order and for Stay, paragraphs 31 and 32. *See, e.g.,* "NONE of the documents served on Henrys (either by certified mail, USPS, or email) even referenced the entering, removing, disposing, charging, charges creating liens, or immunity from liability for OB. NOT ONE. In fact, in looking at the Notices of Hearing and Code Enforcement Citations, submitted into evidence over Henrys' objections, the ONLY potential penalty mentioned is that of a fine - even if the Henrys failed to appear. Shockingly, the FIRST time the Henrys were notified of these provisions being sought by OB was when Janet Bruce handed the Henrys several large stacks of pages at 9:58AM, only two minutes before the 10AM Hearing (despite Henrys arrival 30 minutes early, and the fact these documents would have been ready for the Hearing a month prior as originally scheduled)."

[88] *See* section herein on Misleading on Equal Protection.

[89] Henry Initial Brief, p 6-8.

Teal Stars Indicate Permit, Paver / Parking, Shipping Container / Shed / Structure, or Fence Violations



Indeed, these stars include work without permits, fences failing to meet LDC requirements, accessory structures & pavers installed without setbacks, parking areas without the required material (pavers, concrete, etc.), and other similar provisions. Undeniably, these "free passes" have been handed out to OBPD officers, VC Sheriff deputies, city employees, county council & city commission members, state law enforcement officers, official city properties and even the City Attorney's office.[90] If *these LDC provisions* were so important to the beautification of the

[90] App 11, 13, 14.

community, wouldn't our own government officials be held to the highest standard of compliance with these provisions?[91] Thus, even *if* OB's commands to remove Henrys' PFCs were otherwise lawful, OB's ***undisputed*** selectivity of enforcement invalidates their action.

3. OB Has NO Authority to Impose Never-Ending Fees

OB also has *no* authority to impose fees *as they have done here*. First, the orders imposing the fees are invalid as legally premature.[92] But regardless of timing, the fees imposed upon Henrys by OB are unconstitutional in their entirety, let alone unconstitutionally *excessive*.[93] Certainly, fines that already total $14,000 and grow *every day* with *no* end date are excessive for ANY offense, let alone a ***malum prohibitum*** offense where there is no harm. Further, the fees imposed here have no correlation to any actual damages sustained by society or to the cost of the proceedings.[94] There are *no* actual damages sustained by society from Henrys' PFCs, and Henrys have already been forced to bear the burden of paying the costs of these proceedings - thousands in court filing and transcript preparation fees.

Conclusion

Magistrate's orders purport to authorize OB to literally take and destroy portions of Henrys' homestead, force Henrys to remove their PFCs from their own property, and charge Henrys extensive fines and fees. However, *no* law provides this authority, *and* many laws and the Constitution expressly prohibit such government action. Moreover, the equal protection and due process violations further invalidate OB's actions. Henrys simply ask their God-given, Constitutionally-protected rights be defended from OB's illegal actions.

Respectfully Submitted: July 27, 2023

/s/ Katherine & Michael Henry
Respondents, Pro Se

Certificate of Service

[91] Furthermore, OB seemingly insinuates OB's LDC was implemented for the "public health, morals, safety or welfare" of our community. OB Answer Brief, p 16. However, if OB's actions against the Henrys were truly about the public health, morals, safety or welfare, why are there so many of the same "violations" in such a small area?
[92] Henry Initial Brief, p 36-37.
[93] Henry Initial Brief, p 37-38.
[94] Austin v US (509 US 602, 1993)

I certify that the foregoing document has been furnished to Abraham C McKinnon (lynn@mckinnonandmckinnonpa.com, amckinnon@mckinnonandmckinnonpa.com), Noah McKinnon (nmckinnon@mckinnonandmckinnonpa.com), Barbara Radcliff (Barbara.Radcliffe@ormondbeach.org), H. Pope Hamrick, Jr. (phamrickjr@cfl.rr.com), Ann Margret Emery (A.Emery@ormondbeach.org), Chris Mason (Chris.Mason@ormondbeach.org), Janet Bruce (Janet.Bruce@ormondbeach.org), via the electronic filing portal on July 27, 2023.

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Certificate of Compliance

I certify that the foregoing document has been checked for conformity with FRAP 9.045(e) with the use of word processing software, and that it complies with the applicable font and word count limit requirements to the best of my knowledge.

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