THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT, STATE OF FLORIDA

———————♦———————

DAVID W. FOLEY, JR., and
JENNIFER T. FOLEY,

Appellants,

v.

ORANGE COUNTY,
a political subdivision of the State of Florida,
and,
ASIMA AZAM, TIM BOLDIG, FRED BRUMMER, RICHARD CROTTY, FRANK DETOMA, MILDRED FERNANDEZ, MITCH GORDON, TARA GOULD, CAROL HOSSFIELD, TERESA JACOBS, RODERICK LOVE, ROCCO RELVINI, SCOTT RICHMAN, JOE ROBERTS, MARCUS ROBINSON, TIFFANY RUSSELL, BILL SEGAL, PHIL SMITH, and LINDA STEWART,
individually and together, in their personal capacities,

Appellees.

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APPEAL NO.: 5D21-0233

Lower Case No.: 2016-CA-007634-O

———————♦———————

ON APPEAL FROM THE NINTH JUDICIAL CIRCUIT COURT
IN AND FOR ORANGE COUNTY, FLORIDA

———————♦———————

APPELLANTS' INITIAL BRIEF

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STATEMENT OF THE CASE

This is an appeal from the dismissal with prejudice of the Foleys' amended verified complaint as to Orange County for failure to state a claim for declaratory and injunctive relief, negligence, unjust enrichment, conversion, takings, or in the alternative pursuant Title 42 U.S. Code Section 1983, *Record pages 1420-1423*.

This Court in case 5D 19-2635 affirmed without opinion the trial court's dismissal of the same amended verified complaint as to the individual defendants per **Section 768.28(9)(a), Florida Statutes**.

STANDARD OF REVIEW

This Court reviews de novo the trial court's dismissal for failure to state a claim because it is an issue of law. In determining the merits of the trial court's order on Orange County's motion to dismiss this Court must limit its consideration to the complaint's four corners, accept all allegations as true, and draw all inferences in the Foleys' favor. ***Verdon v. Song*, 251 So.3d 256, 258 (5th Dist. 2018)**.

SUMMARY OF ARGUMENT

The Foleys' argument, as summarized by its headings, assumes the Court will accept paragraph 52 of their amended verified complaint as an ultimate fact for the jury, *Record page 278*. That paragraph justifies the

Foleys' pursuit of damages by alleging that no court intervention or review could remedy their injury. The Foleys' support this ultimate fact in the paragraphs preceding it, in particular: *paragraph 41*, which alleges Orange County had no ordinance that prohibited *aviaries* as *accessory structure* or *aviculture* as a *home occupation*; *paragraphs 40 and 47*, which allege Orange County did not prosecute the Foleys for violating any regulation of *aviaries* or *aviculture* pursuant Chapter 11, Orange County Code; *paragraphs 48-51*, which allege Orange County asserted that its authority over *land use* allowed it to regulate *aviaries* and *aviculture*; and, *paragraphs 42-45*, which allege that Orange County improperly prosecuted the Foleys for alleged violations of un-codified prohibitions of *aviaries* and *aviculture* at the permitting counter in the administrative process of Chapter 30, Orange County Code. On these alleged facts, paragraph 52 is correct. On the issue of *aviaries* and *aviculture* there was no available: (1) facial challenge in declaratory or injunctive relief; (2) appeal from a code enforcement board order; (3) extraordinary writ to interrupt the administrative process; or, (4) protection on certiorari review from the erroneous deprivation consequent to Orange County's violation of **Article IV, Section 9,** and **Article VIII, Section 1(j), Florida Constitution**. This assumption of paragraph 52 is what Orange County will most contest.

ARGUMENT

I. Article IV, Section 9, Florida Constitution, prohibits local regulation of possession, breeding or sale of toucans.

"The [Florida Fish and Wildlife Conservation] commission shall exercise the regulatory and executive powers of the state with respect to wild animal life," **Article IV, Section 9, Florida Constitution**.

A. Judicial decisions.

"[W]here the Constitution expressly provides the manner of doing a thing, it impliedly forbids its being done in a substantially different manner," ***Weinberger v. Bd. of Pub. Instruction,*** **112 So.253 (Fla. 1927)**. Article IV, Section 9, vests the Florida Fish and Wildlife Conservation Commission (the Commission) with "the" – meaning all – regulatory powers of the state with respect to wild animal life, *Caribbean Conservation Corporation, Inc. v. Florida Fish and Wildlife Conservation Commission*, 838 So.2d 492, 501 (Fla. 2003). As used in Article IV, Section 9, "wild animal life" includes non-native, captive wildlife, ***Haddock & Greyhound Breeders Assn. of Fla. v. Florida Game and Fresh Water Fish Commission*****, DOAH Case No. 86-3341RP (decided May 19, 1987)**. Article IV, Section 9, authorizes the Commission to make "rules and regulations which may over-ride, and, in effect, repeal statutes in conflict therewith," *Sylvester v. Tindall*, 18

So.2d 892 (Fla. 1944). Any regulation is invalid that infringes on the Commission's constitutional authority, ***Bell v. Vaughn*****, 21 So.2d 31 (Fla. 1945)**. A regulation infringes on the Commission's constitutional authority where it effectively restricts or prohibits what the Commission expressly or by silence permits, ***Whitehead v. Rogers,*** **223 So.2d 330 (Fla. 1969)**. The Court may look beyond what an ordinance claims to regulate to determine if it infringes upon the Commission's constitutional authority, ***Beck v. Game and Fresh Water Fish Commission,*** **33 So.2d 594 (Fla. 1948)**. Local regulation may nevertheless indirectly affect compliance with Commission rules, *Miramar v. Bain*, 429 So.2d 40 (4th DCA 1983). The Commission however has no authority to require compliance with local codes, *Charles River Laboratories, Inc. v. Florida Game and Fresh Water Fish Commission*, DOAH Case No. 96-2017, affirmed at 717 So.2d 1003 (Fla. 1st DCA 1998)). No one can "in good faith" base a claim of innocence upon a local regulation that is invalid for conflict with Commission jurisdiction, ***State ex rel. Griffin v. Sullivan,*** **30 So.2d 919 (Fla. 1947).** Older constitutional provisions – like Article VIII, Section 1(g), Florida Constitution – must yield to the newer Article IV, Section 9, because it is

the “latest expression of the will of the people,” *Sylvester v. Tindall*, 18 So.2d 892 (Fla. 1944).

B. Commission rules.

The Rules of the Florida Fish and Wildlife Conservation Commission – held to be “law” in *United States v. Howard*, 352 US 212 (1957) – establish an extensive regulatory framework that encompasses all police power concerns for public health and welfare with respect to wildlife, in particular, the safety, sanitation, noxious odors, pests, disease and parasite transmission, and morality of humane treatment of wildlife. Rule 68A-1.002, makes privately owned wildlife subject to the Commission’s regulation, *Record page 451*. Rule 68A-1.004 (13) & (92), define toucans as wildlife, *Id*. Rule 68A-6.0022(2)(r), requires no permit to possess pet toucans, *Record page 452*. Rule 68A-6.006, requires a license (permit) to sell any bird, *Id*. Rule 68A-6.0022(1), makes the license (permit), required by 68A-6.006, location-specific, and that location must have Commission approval, *Id*. Rule 68A-6.0024(1) requires any person permitted to possess wildlife per Section 379.3761, Florida Statutes, to “demonstrate consistent and sustained commercial activity,” *Record page 453*. Rule 68A-6.0022(4), requires permit applicant meet age and experience qualifications, provide proper caging, ensure conditions are

safe and sanitary for the public and the animals, and in particular, that conditions prevent injury, noxious odors, pests, and the transmission of disease or parasites, *Record pages 454-457*. Rule 68A-6.0023, requires every person maintain wildlife in proper caging, ensure conditions are safe and sanitary for the public and the animals, and in particular, that conditions prevent injury, noxious odors, pests, and the transmission of disease or parasites, *Id*. Rule 68-1.010(3)(c), requires any location specified in a license (permit) be open to the Commission's inspection, *Record pages 457-459*. Rule 68-1.010(4), makes failure to comply with any condition of a permit/license grounds for revocation, *Id*. Rule 68-1.001, permits any party unsatisfied with Commission rules (including Orange County) to seek their amendment pursuant the Uniform Rules of Procedure, Chapter 28, Florida Administrative Code adopted by the Commission as its procedural rules, *Record page 459*.

C. Florida statutes.

Florida's Legislature has, *in aid* of the Commission, enabled and facilitated the Commission's constitutional subject matter jurisdiction over wild animal life. Section 379.1025, Florida Statutes, gives the Commission's constitutional powers supplemental enabling effect, *Record page 459*. Section 379.303, Florida Statutes, requires the Commission to

establish rules to ensure wildlife are maintained in sanitary surroundings and appropriate neighborhoods, *Id.*; the Commission determines the neighborhoods appropriate for wild animal life. Section 379.304, Florida Statutes, authorizes the Commission to enter any place wildlife are kept to enforce its rules and to protect public health and welfare, *Record page 460*. Section 379.3761, Florida Statutes, requires any person who would sell or exhibit wildlife to secure a permit from the Commission, *Record page 461*.

D. Opinions of the Attorney General.

In the Opinion of the Attorney General of Florida 1972-72, the decisions of the Commission are described as the law of the state:

> It is apparent, then, that by retaining all nonjudicial powers the commission retained all administrative and legislative powers inherent in the operation of government. It should be noted we are not talking about mere ‘‘legislative-type" or “administrative-type” powers of an administrative agency. We are talking about all the nonjudicial powers of the state.
>
> This constitutional agency has, within its specified area, replaced the legislature as the representative of the people. The legislative branch is powerless to mandate policy to this commission contrary to its wishes save in the two specific areas excepted in the Constitution: the amount of license fees and the penalties for violating regulations.
>
> In all other matters having to do with “wild animal life and fresh water aquatic life" in this state, the commission’s decisions are the law, the legislature notwithstanding. See Beck v. Game and Fresh Water Fish Comm., Fla. 1918, 33 So.2d 594; State ex rel. Griffin v. Sullivan, Fla. 1947, 30 So.2d 919.

In the Opinion of the Attorney General of Florida 1980-04, the Attorney General said local government cannot regulate or prohibit the possession of wild animal life:

> Section 9, Art. IV, State Const., vests in the Game and Fresh Water Fish Commission the exclusive authority to exercise all of the state's regulatory power over all wild animal life (except for penalties and license fees); therefore, a municipality is precluded from regulating or prohibiting the possession of wild animal life within its corporate limits.

In the **Opinion of the Attorney General of Florida 2002-23**, the Attorney General specifically said local government cannot enjoin "the possession, breeding or sale of non-indigenous exotic birds":

> [A local government] is prohibited by Article IV, section 9, Florida Constitution, and the statutes and administrative rules promulgated thereunder, from enjoining the possession, breeding or sale of non-indigenous exotic birds. The authority to determine initially whether such use constitutes a public nuisance or a threat to the public is vested exclusively in the Florida Fish and Wildlife Conservation Commission. However, the county is authorized to regulate the abatement of public nuisances such as sanitation or noise that may be associated with the keeping of wildlife.

E. Opinion of Federal Judge Roy B. "Skip" Dalton, Jr.

Judge Dalton, in ***Foley v. Orange County*, 2013 WL 4110414 (M.D. Fla. Aug. 13, 2013)**, synthesized the law presented in the preceding paragraphs, and concluded that Orange County cannot prohibit the Foleys from selling birds raised at their Solandra homestead because doing so is

permitted by the Florida Fish and Wildlife Conservation Commission, *Record pages 248-249*:

> Florida law provides that the state legislative power over captive wildlife was transferred to the Florida Fish and Wildlife Conservation Commission. Art. IV, §9, Fla. Const.; *see also Sylvester v. Tindall,* 18 So.2d 892, 900 (Fla. 1944).
> …
>
> The commission therefore assumed the regulatory authority that the legislature had prior to the transfer. *Caribbean Conservation* [*Corporation, Inc. v. Florida Fish and Wildlife Conservation Commission*,]*,* 838 So.2d [492] at 497 [(Fla. 2003)]. As such, the rules adopted by the commission are tantamount to legislative acts, *Airboat Ass'n of Florida, Inc.* [*v. Florida Game and Freshwater Fish Commission*]*,* 498 So.2d [629] at 630 [(3rd DCA 1986)], and become the governing law of the state, [*State ex rel.*] *Griffin* [*v. Sullivan,*]*,* 30 So.2d [919] at 920 (Fla. 1947**)**. Any and all laws in conflict with the commission's rules are consequently void.
> …
>
> Applying these principles, the Court concludes that Orange County cannot use its land use ordinances to regulate the possession or sale of captive wildlife.
> …
>
> In *Whitehead* [*v. Rogers,* 223 So.2d 330 (Fla. 1968)]*,* the Florida Supreme Court held that a statute prohibiting shooting on Sunday was void to the extent it prohibited an activity that was specifically authorized by the Game Commission. *Id.* at 330-31. Like the hunter in *Whitehead,* who was issued a permit by the Game Commission that authorized him to hunt on Sunday, Plaintiffs were issued a permit by the commission authorizing them to possess and sell class III birds from their residence. *See id.* Thus, like the statute in *Whitehead,* Orange County's ordinances are void to the extent such ordinances prohibit Plaintiffs from possessing and selling class III birds from their residence. *See id.*

F. Memorandum of the Commission.

In 2017, ten years after issuing the memorandum referenced in paragraph 49 of the amended verified complaint, *Record page 277*, the Florida Fish and Wildlife Conservation Commission issued a second Memorandum regarding **Local Ordinances and the Regulation of Captive Wildlife** in which it adopted the opinion of Judge Dalton in ***Foley v. Orange County***, *Record pages 1064-1065.*

II. Counts One and Two for declaratory and injunctive relief should be granted because the Foleys properly allege actual, ongoing violations of Article IV, Section 9, Florida Constitution.

The trial court dismissed Counts One and Two on the authority of *Apthorp v. Detzner*, 162 So.3d 236, 242 (1st DCA 2015), and *Rhea v. District Board of Trustees of Santa Fe College*, 109 So.3d 851 (1st DCA 2013), reasoning that Orange County's adoption of Ordinance 2016-19 *per se* "rendered these counts moot," *Record page 1421*. This was error because the Foleys allege actual, ongoing violations of **Article IV, Section 9, Florida Constitution**.

A. Building permit continues violation.

Contrary to the trial court's conclusion, the building permit, *Record pages 741-742,* challenged in Count One is entirely unaffected by Orange County's amended definition of *home occupation* in Ordinance 2016-19.

The building permit applies to the Foleys' Solandra property and includes the exaction "Pet birds only – No Commercial Activities Permitted," as stated in paragraph 40(d) of the Foleys' amended verified complaint, *Record page 276*. Ordinance 2016-19 did not revoke this exaction, *Record pages 529-657*. David Foley has a site-specific Class III license issued by the Florida Fish and Wildlife Conservation Commission that permits him to sell birds kept at the Solandra property, *Record page 275, paragraphs 35 and 37*. Count One's prayer requests relief from the exaction on grounds of conflict with **Article IV, Section 9, Florida Constitution**, *Record page 281*. Orange County made no objection to this request in the trial court, *Record pages 315-326, 1019-1031, 1321-1330, 1345-1347*.

In sum, contrary to the trial court's order, Ordinance 2016-19 did not render Count One moot. The Foleys request this Court declare void and enjoin enforcement of the building permit's exaction "Pet birds only – No Commercial Activities Permitted."

B. BCC order continues violation.

Contrary to the trial court's conclusion, the Board of County Commissioners' order (BCC order), *Record page 735*, challenged in Count One is entirely unaffected by Orange County's amended definition of *home occupation* in Ordinance 2016-19. The BCC order applies to the Foleys'

Solandra property and prohibits "*aviculture* and/or associated *aviaries* as an *accessory use* or *home occupation*," *Record page 276, paragraph 40(e)*. Ordinance 2016-19 did not revoke the BCC order, *Record pages 529-657*. David Foley has a site-specific Class III license issued by the Florida Fish and Wildlife Conservation Commission that permits him to sell birds kept at the Solandra property, *Record page 275, paragraphs 35 and 37*. Count One's prayer requests relief from the BCC order on grounds of conflict with **Article IV, Section 9, Florida Constitution**, *Record page 281*. Orange County made no objection to this request in the trial court, *Record pages 315-326, 1019-1031, 1321-1330, 1345-1347*.

In sum, contrary to the trial court's order, Ordinance 2016-19 did not render Count One moot. The Foleys request this Court declare void and enjoin enforcement of the BCC order to the extent it prohibits "*aviculture* and/or associated *aviaries* as an *accessory use* or *home occupation*."

C. SIC 0279 continues violation.

Contrary to the trial court's conclusion, the Standard Industrial Classification code 0279 (SIC 0279) challenged in Count Two remains a feature of Ordinance 2016-19. It can be found in the "SIC Group" column of the amended Use Table, in Section 38-77, Orange County Code, *Record page 650*. Ordinance 2016-19 retained "0279" but struck its associated

description “Commercial aviculture, aviaries” (*Cf.* SIC 025, which was stricken *with* its use descriptor, *Record*, *page 649*.) Orange County has not removed SIC 0279 by subsequent amendment, nor ever argued that its retention was inadvertent or irrelevant. David Foley has a site-specific Class III license issued by the Florida Fish and Wildlife Conservation Commission, that permits him to sell birds kept at the Cupid property, *Record page 275, paragraphs 36 and 38*. Count Two’s prayer requests relief from any application of SIC 0279 to the Foleys’ A-2 zoned Cupid property on grounds of conflict with **Article IV, Section 9, Florida Constitution**, *Record page 282*. Orange County made no specific objection to this request in the trial court, *Record pages 315-326, 1019-1031, 1321-1330, 1345-1347*.

The function of SIC Group numbers in Orange County’s zoning code is explained in Section 38-74(c)(1), Orange County Code, *Record page 495*. Orange County incorporates SIC group numbers into its Use Table “to determine the classification of primary uses when reference is made in the use table” to an SIC Group number.

The application of SIC group 0279 to the Foleys’ Cupid property is explained by Section 38-74(b), Orange County Code, *Record pages 538 and 539*. The absence of both “P” and “S” at the intersection of the column

headed “A-2” and row containing “0279“ means that SIC 0279 is *entirely prohibited throughout Orange County*, and in particular at the Foleys’ A-2 zoned Cupid property, as a primary use.

The definition given SIC 0279 by the Standard Industrial Classification Manual is “Animal Specialties, Not Elsewhere Classified,” and includes “Aviaries (e.g., parakeet, canary, lovebirds).” This definition is verified, as stated in Section 38-74(c)(1), Orange County Code, by referring to “the 1987 edition of the Standard Industrial Classification Manual (the ‘SIC Manual’) prepared by the Statistical Policy Division for the United States Office of Management and Budget, as it may be amended from time to time,” *Record page 495*. This manual, as stated in Section 38-74(c)(3), Orange County Code, is “kept on file with the clerk to the board of county commissioners, the county planning department, the county zoning department and the downtown branch of the county library,” *Record page 495*. The 1987 edition is also available at https://archive.org/details/standardindustri00unit/page/28/mode/2up (last visited May 28, 2021). The current edition is maintained by the United States Department of Labor and can be found at https://www.osha.gov/sic-manual/0279 (last visited May 28, 2021). This Court can take judicial notice of these online manuals pursuant Section 90.202(5) and (12), Florida Statutes.

In sum, whether Orange County's retention of SIC Group 0279 was deliberate or inadvertent, its threatening presence in Ordinance 2016-19, and its universal ban *throughout Orange County* of "Aviaries (e.g., parakeet, canary, lovebirds)," or what was formerly described as "Commercial aviculture, aviaries," confirms that Count Two presents an actual case and controversy. The Foleys request this Court declare the Use Table, in Section 38-77, Orange County Code, invalid and enjoin its enforcement to the extent that the prohibition of SIC 0279 "Aviaries (e.g., parakeet, canary, lovebirds)" at the Foleys' A-2 zoned Cupid property conflicts with **Article IV, Section 9, Florida Constitution**, and the Foleys' Class III license issued by the Florida Fish and Wildlife Conservation Commission to sell toucans kept and raised there.

D. Ordinance 2016-19 ratifies permit and order.

Ordinance 2016-19, *Record pages 529-657*, amends the definition of *home occupation*. *Home occupation* is a permitted use at the Foleys' Solandra and Cupid properties, as shown by the amended Use Table, *Record page 648*. As stated on pages 11-12, *supra*, the challenged BCC order prohibits *aviculture*, or "raising birds to sell," at the Foleys' Solandra property as a *home occupation*.

Ordinance 2016-19, by underscore and ~~strike-through~~, shows respectively what has been added to and stricken from the definition of *home occupation*, in Section 38-1 and Section 38-79(101), Orange County Code, *Record pages 532-533 and 570-571*, *respectively*.

Count One's prayer requests declaratory and injunctive relief from this amended definition of *home occupation* to the extent that it includes *aviculture* or *aviaries* or includes *wild* or *non-domestic birds* in its prohibition of "commercial retail sales of animals," on grounds of conflict with **Article IV, Section 9, Florida Constitution**, *Record page 281*. This relief is justified as argued on pages 20-22, *infra*, because Ordinance 2016-19 ratifies the prohibitions in the challenged building permit and BCC order. This ratification can be demonstrated historically.

In 2007, when Orange County began its prosecution of the Foleys, the definition of *home occupation* broadly permitted any use that could be conducted at a home without changing its character as a dwelling. The definition did, however, include a finite list of ten uses expressly prohibited as *home occupations*. None of those was *aviculture*. It was not until February 2008 in the BCC order in the Foleys' case that Orange County expressly prohibited *aviculture* as a *home occupation, Record page 735*. Three months later, in May of 2008, Orange County amended the fifty-year-

old definition of *home occupation* for the first time in Ordinance 2008-06, *Record pages 667-668*. In Ordinance 2008-06, Orange County prepended the list of ten expressly prohibited uses with the phrase “uses such as.” This converted what was previously a finite list of the only uses expressly prohibited as a *home occupation*, to an open-ended list of examples that could be expanded by interpretation. This amendment effectively ratified the BCC’s decision in the Foleys’ case to interpret *home occupation* broadly and to add *aviculture* to what was otherwise a finite list of the only ten uses prohibited as a *home occupation*.

Ordinance 2016-19 further amended *home occupation* September 13, 2016, three weeks after the Foleys filed suit August 25, 2016. The amended definition of *home occupation* adds a dramatic array of new restrictions and conditions, adds a host of new exemplars to the list of expressly prohibited *home occupations*, and, for the first time, appears to make fee-based pre-approval by Zoning Manager Determination a requisite (Fee $638, Fee Directory, 2020-2021, https://www.orangecountyfl.net/Portals/0/resource%20library/Open%20Government/FeeDirectory.pdf#page=53 (Lasted visited June 8, 2021)). One of the new, expressly prohibited *home occupations* is “commercial retail sale of animals.” Nothing in the amendment suggests that *aviculture* or *aviaries* or *wild* or *non-indigenous*

birds are excluded from the broad, all-encompassing prohibition of "commercial retail sales of animals." Indeed, the amendment retains the invitation of Ordinance 2008-06 to interpret "uses such as" to include *aviculture* in "commercial retail sales of animals." Finally, there is nothing in Ordinance 2016-19 that suggests it revokes the prohibitions in the challenged building permit or BCC order. Absent such express exclusions or revocations, Orange County's history of increasing rather than decreasing restrictions upon *home occupation* justifies the conclusion that the prohibition of all "commercial retail sale of animals" in Ordinance 2016-19 clarifies, confirms, and ratifies the challenged building permit and BCC order, and conflicts with **Article IV, Section 9, Florida Constitution**.

Ordinance 2016-19 attempts to legitimize its regulation of the *sale of birds* by calling it a regulation of the *sale of animals*. This is what was prohibited in ***Beck v. Game and Fresh Water Fish Commission,* 33 So.2d 594 (Fla. 1948)**. In ***Beck*** the Florida Supreme Court rejected the Legislature's transparent attempt to usurp the Commission's control over fresh water fishing with a "legislative finding" that the sweet waters of Lake Okeechobee and the St. Johns River were instead salt waters! Orange County simply cannot prohibit what the Commission permits the Foleys to do, ***Whitehead v. Rogers,* 223 So.2d 330 (Fla. 1969).**

E. *Apthorp* and *Rhea* do not bar relief.

The trial court relied upon *Apthorp v. Detzner*, 162 So.3d 236, 242 (1st DCA 2015), and *Rhea v. District Board of Trustees of Santa Fe College*, 109 So.3d 851 (1st DCA 2013), to support its conclusion that Ordinance 2016-19 *per se* made all the Foleys' claims speculative and hypothetical. *Apthorp* and *Rhea* do not support this conclusion.

Apthorp asked the court to require Detzner to refuse filings from election candidates that included qualified blind trusts. Apthorp, however, could show no injury or that any candidate had made such filings. Rhea asked the court to declare his rights as a teacher pursuant college rules. Rhea however was no longer a teacher at the college and a declaration would not serve to reinstate him. *Apthorp* or *Rhea* were decided on the absence of actual or remediable injury, not amendment of previously enforced regulation.

The Foleys, on the other hand, clearly allege actual, ongoing injury caused by Orange County that can be remedied prospectively by declaratory and injunctive relief. The Foleys allege that they began selling birds kept at their Solandra property in 2000, and that David Foley is licensed by the Florida Fish and Wildlife Conservation Commission to do so, but that Orange County has prevented them from doing so since 2008

by a building permit and BCC order which prohibit *aviculture*, or "raising birds to sell" at their Solandra property.

Ordinance 2016-19 did not moot these claims. Instead, it ratified the challenged building permit and BCC order. It continues the Foleys' preexisting injuries.

F. Weight of authority grants relief.

Contrary to the trial court's conclusion, amendment does not *per se* moot a claim of relief. Declaratory and injunctive relief are appropriate after amendment when as in this case (1) the original prohibition has been enforced upon the plaintiff, (2) amendment occurs *after* suit is initiated against the original prohibition, and (3) the amendment clarifies, confirms, or ratifies the earlier challenged prohibition.

In the declaratory and injunctive relief action of ***City of Pompano Beach v. Haggerty,*** **530 So.2d 1023, 1026 (4th DCA 1988)** the court said "a mere change of language in a statute does not necessarily indicate an intent to change the law for the intent may be to clarify what was doubtful and to safeguard against misapprehension as to existing law," quoting 49 Fla. Jur.2d Statutes Section 134 (1984). The court in ***Pompano*** further emphasized that if the amendment "in question did not change the existing law, but simply confirmed the city's interpretation of the ordinance and

clarified its language, the amended ordinance should be applied." This ***Pompano*** found was in accord with *Tsavaras v. Lelekis*, 246 So.2d 789, 790 (2nd DCA 1971), which also resolved a similar action by saying, "[t]he amendatory ordinance, adopted while this case was on appeal and with particular reference to this case, did not change the zoning ordinance, but merely confirmed and ratified the administrative interpretation." The court in ***Pompano*** also cited *State ex rel. Szabo Food Services, Inc. v. Dickinson*, 286 So.2d 529 (Fla. 1973), which likewise did not dismiss as moot an action against an amended statute because it found "[t]he language of the amendment … was intended to make the statute correspond to what had previously been supposed or assumed to be the law" and was "merely intended to clarify the original intention rather than change the law."

The Foleys made this same argument even more forcefully in their response to Orange County's motion to dismiss, *Record pages 339 through 344*. There the Foleys relied upon ***Coral Springs Street Systems v. City of Sunrise*, 371 F.3d 1320 (11th Cir. 2004)**, to argue that Orange County had the burden of proof, yet had not met it; Orange County did not prove or even argue the new language did not disadvantage the Foleys, or that enforcement of the original prohibition had ended or would not resume.

In sum, contrary to the trial court's conclusion, the weight of authority favors granting the requested relief as to Ordinance 2016-19. The Foleys request this Court declare Ordinance 2016-19 void and unenforceable for conflict with **Article IV, Section 9, Florida Constitution**, to the extent it ratifies the challenged building permit and BCC order, to the extent it includes the *sale of birds* in its prohibition of "commercial retail sale of animals" as a *home occupation*, and to the extent it retains SIC 0279 in the Use Table, in Section 38-77, Orange County Code.

III. Count Three must be answered because the Foleys properly allege neglect of a duty of reasonable care established by law.

Contrary to the trial court's opinion, the Foleys' amended verified complaint does allege negligence, *Record pages 282-283, paragraphs 61 and 62(a)*, as defined in **§282 Restatement (Second) of Torts (1965)**: "negligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm."

A. Allegations of negligent *prosecution*.

The actions by Orange County to sanction the Foleys for "raising birds to sell" are properly called a ***prosecution***. This conclusion is consistent with the definition of ***prosecute*: "*[t]o commence and carry out a legal action*,"** Black's Law Dictionary (7th Ed. 1999), page 1237. It is

consistent with the definition of ***punishment***: **"*[a] sanction - such as a fine, penalty, confinement, or loss of property, right, or privilege - assessed against a person who has violated the law*,"** *Id,* page 1247. It is also consistent with ***Florida State Board of Architecture v. Seymour*, 62 So.2d 1, 3 (Fla. 1952)**, which affirmed that revocation of Seymour's right to practice architecture was a punishment resulting from a prosecution.

The Foleys were ***prosecuted*** and ***punished*** for "raising birds to sell." They allege that between 2000 and 2008 they had a small home business raising toucans and selling them, *Record pages 274-275, paragraphs 32-35, and 37*. The Foleys allege Orange County knew Article IV, Section 9, Florida Constitution, removed the possession and sale of their toucans from its regulatory control, *Record pages 274 and 277, paragraphs 28, 44, 48, and 49*. The Foleys allege Orange County knew it did not have an ordinance that expressly prohibited their *aviaries* as an *accessory structure*, or their *aviculture* home business as an *accessory use* or *home occupation*, *Record page 277, paragraph 41*. The Foleys allege that in 2007 Orange County nevertheless initiated an enforcement action against them after receiving a complaint that they were "raising birds to sell," *Record page 275, paragraph 40(a)*. The Foleys allege that Orange County knew that if it chose to administratively prosecute the Foleys for "raising birds to sell" it

had a duty to do so pursuant Chapter 11, Orange County Code, *Record: page 277, paragraph 47; paragraph 62(a)*. The Foleys allege Orange County neglected that duty and instead used the permit procedures of Chapter 30, Orange County Code, to prosecute them for "raising birds to sell," *Record pages 275-276, paragraphs 40 and 42*. The Foleys allege that Orange County knew that prosecuting them in this way was not authorized and would sanction the Foleys by divesting them of their rights in their *aviary*, their rights in their *aviculture* home business, and their right to adequate state court intervention or review, *Record pages 276-278, paragraphs 43, 45, and 52*. The Foleys also allege that Orange County, despite its doubts about its authority to enjoin the Foleys' possession and sale of their toucans in this way, falsely asserted and deliberately misrepresented its authority to do so, *Record pages 277 and 278, paragraphs 46, 50, and 51*. Finally, the Foleys allege Orange County's actions caused them a long list of injuries, *Record pages 279 and 280, paragraph 56*.

These ultimate facts allege the three basic elements of negligence – duty, neglect, injury. Orange County had a duty it neglected to ensure that its dispute with the Foleys had the full appellate review provided by Chapter 11, Orange County Code, and Orange County's neglect of that duty

created a foreseeable risk of erroneous injury to the Foleys' bird business that full appellate review would have removed.

B. Florida's legal standard for *prosecution*.

At the broadest level of generality, the duty of reasonable care Orange County owed in its ***prosecution*** of the Foleys is defined by the due process clauses of Article I, Section 9, Florida Constitution, and Amendment Fourteen, United States Constitution. At the narrowest level, that duty is defined by **Chapter 11, Orange County Code**. Orange County's duty in Chapter 11, is established by Article I, Section 18, and Article VIII, Section 1(j), Florida Constitution, and Chapter 162, Florida Statutes.

Article I, Section 18, Florida Constitution, guarantees the Foleys will not suffer any **penalty** (**"*[p]unishment imposed on wrongdoer*,"** Black's Law Dictionary page 1153 (7th Ed. 1999)) except as provided by statute; it states, "No administrative agency… shall impose … any [] penalty except as provided by law." A county "administrative agency" cannot do what this provision prohibits, *Broward County v. La Rosa*, 484 So.2d 1374, 1377 (4th DCA 1986). **Article VIII, Section 1(j), Florida Constitution**, prohibits Orange County from ***prosecuting*** and ***punishing*** code violations except as provided by statute; it states, "Persons violating county ordinances shall be prosecuted and punished as provided by law."

The phrase “as provided by law” in both provisions means as provided by an act of the Legislature, not the County, *Broward at †3*, *Crary v. Tri-Par Estates Park*, 267 So.3d 530, 533 (2nd DCA 2019).

The Legislature gave effect to both constitutional provisions in **Chapter 162, Florida Statutes**, the “Local Government Code Enforcement Boards Act.” Chapter 162, was incorporated into Orange County’s code as **Chapter 11**, in 1965. Chapter 11, is the only administrative procedure adopted by Orange County pursuant statute for the ***prosecution*** and ***punishment*** of code violations. Since 1965, Chapter 11 (and Chapter 162, Florida Statutes) has been tested and occasionally corrected by the court so as to provide all the requisites of due process – including the full appellate review that Orange County denied the Foleys in this case.

Ultimately, the duty in **Chapter 11**, alleged in the Foleys’ amended verified complaint at paragraph 47, is a non-delegable, constitutional, and statutory duty. It is owed the Foleys as an individual right pursuant **Article I, Section 18, Florida Constitution**. It is also owed the Foleys personally because the Foleys are “persons” within the meaning of **Article VIII, Section 1(j), Florida Constitution**. And too it is owed the Foleys because Chapter 11 – to which Orange County is bound by **Article VIII, Section 1(j)**, and by its adoption of **Chapter 162, Florida Statutes** – was originally

drafted by the Legislature to provide all "persons" like the Foleys with the safeguards necessary to protect them from the foreseeable risk of an erroneous deprivation as required by Article I, Section 9, Florida Constitution, and Amendment Fourteen, United States Constitution.

Chapter 11, Orange County Code, adopted pursuant **Chapter 162, Florida Statutes**, and **Article VIII, Section 1(j), Florida Constitution**, defines "the standard of conduct of a reasonable man … (a) to protect a class of persons which includes the one whose interest is invaded, and (b) to protect the particular interest which is invaded, and (c) to protect that interest against the kind of harm which has resulted, and (d) to protect that interest against the particular hazard from which the harm results," **§286. When Standard of Conduct Defined by Legislation or Regulation Will Be Adopted. Restatement (Second) of Torts Section (1978)**.

Within this legal framework, its was unreasonable for Orange County to adjudicate the Foleys' contested right to their *aviary* and *aviculture* business at the permitting counter in an administrative prosecution that did not safeguard the Foleys' interests with full appellate review.

C. Florida recognizes government liability for neglect.

Contrary to the trial court's opinion, Florida negligence law does recognize that once the government has exercised its discretion and made

the decision to act – as here when Orange County made its decision to ***prosecute*** the Foleys for "raising birds to sell" – the government – here Orange County – assumes the common-law duty to act with reasonable care, *see* *Hargrove v. Town of Cocoa Beach*, 96 So.2d 130 (Fla. 1957) (if city incarcerates, it must protect from smoke asphyxiation), *Henderson v. City of St. Petersburg*, 247 So.2d 23 (2nd DCA 1971) (if city relies on police informant, it must protect informant from known danger), cert. denied, 250 So.2d 643 (Fla. 1971), *Bellavance v. State*, 390 So.2d 422 (1st DCA 1980) (if state releases mental patient, it must do so with reasonable care), *White v. Palm Beach County*, 404 So.2d 123 (4th DCA 1981) (if county incarcerates, it must protect from violence and sexual abuse), *Walston v. Florida Highway Patrol*, 429 So.2d 1322 (5th DCA 1983) (if officer makes roadside stop, officer must do so with reasonable care), *Department of Highway Safety and Motor Vehicles v. Kropff*, 491 So.2d 1252 (3rd DCA 1986) (if officer makes roadside stop, officer must do so with reasonable care), *Avallone v. Board of County Commissioners of Citrus County*, 493 So.2d 1002, 1005 (Fla. 1986) (if county operates swimming pool, it must do so safely), *City of Milton v. Broxson*, 514 So.2d 1116, 1119 (1st DCA 1987) (if city operates softball field, it must do so safely), *Comuntzis v. Pinellas County School Bd.*, 508 So.2d 750, 752 (2nd DCA 1987) (if school board

operates school, it must do so safely), *Kaisner v. Kolb*, 543 So.2d 732 (Fla. 1989) (if officer makes roadside stop, officer must do so with reasonable care), *Collazos v. City of West Miami*, 683 So.2d 1161, 1163 (3rd DCA 1996) (if city provides adult supervision of children, it must do so with reasonable care), *Wallace v. Dean*, 3 So.3d 1035 (Fla. 2009) (if police officer performs "safety check," officer must do so with reasonable care).

D. *Trianon Park* on its facts is irrelevant.

Contrary to the trial court's opinion, *Trianon Park Condominium v. City of Hialeah*, 468 So.2d 912, 914 (Fla. 1985), did not say Orange County owes "no duty of care in how it carries out its government functions."

The question in *Trianon Park at 914*, was whether the City of Hialeah could be held "liable to condominium owners for damage to condominium units caused by severe roof leakage and other building defects on the basis that the city building inspectors were negligent in their inspections during the construction of the condominiums." In other words, the court asked – Did Hialeah have a duty to protect condo owners from roof leaks caused by lousy contractors? That is a question of third-party liability. *Trianon Park at 917 and †2*, adopted §315 Restatement (Second) of Torts, regarding the absence of third-party liability, and supported its express reliance upon §315 by a string citation of seven federal and thirteen state third-party

cases in which a government defendant was held blameless for failing to enforce a regulation upon a third party who subsequently injured the plaintiff. *Trianon Park* held that at common-law no defendant – government or private citizen – has a duty to prevent a third party from injuring a plaintiff unless a special relationship exists between the defendant and the third party or between the defendant and the plaintiff. In other words, the dispositive question in *Trianon Park* had nothing to do with whether the defendant was a government actor or a private person – the question was simply whether at common law one person has a duty to protect another from injury caused by a third party.

Trianon Park was decided on the absence of duty for third party conduct, not the absence of duty for "government functions." Stripped of its "guidance" on the question of "government functions" – "guidance" that was not dispositive or required, that Justice Shaw in dissent called "confusing" (*Trianon at 928*), and that the Supreme Court has since repeatedly sought to "clarify"[1] – the only binding fact-based rule in *Trianon Park* is simply that

[1] *Carter v. City of Stuart*, 468 So.2d 955 (Fla. 1985) (Justice Shaw in dissent complains the Court confuses the separate duty and immunity analyses, and states repeal of "discretionary function" exception in §768.15, F.S., means legislature "chose not to reenact the exemption" in §768.28, F.S.); *Everton v. Willard*, 468 So.2d 936 †8 (Fla. 1985) (Justice Shaw in dissent catalogs confusion in District Courts, and reiterates that

narrow rule defined in §315 of the Restatement – "There is no duty so to control the conduct of a third person as to prevent him from causing [] harm to another…"

But in this case there is ***NO*** third person. The Foleys do not seek to hold Orange County liable for failing to enforce a regulation on some third person who then as a consequence injured the Foleys. The Foleys seek to hold Orange County liable for injuring them by a ***prosecution*** that was not authorized by law either procedurally or substantively. The facts of this case have no parallel in *Trianon Park*. In this case Orange County, not a third party, broke the law. And it was Orange County's violation of the law, not the violation of a third party, that directly injured the Foleys. *Trianon Park*, on its facts and its rule, is no bar to the Foleys' claim.

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repeal of "discretionary function" exception in §768.15, F.S., means "legislature did not intend a discretionary exception" in §768.28, F.S.); *Henderson v. Bowden*, 737 So.2d 532, 538 (Fla. 1999) (judicial intervention is only prohibited when it entangles court in legislative or executive policy or planning decisions); *Pollock v. Florida Dept. of Highway Patrol*, 882 So.2d 928, 938 (Fla. 2004) (Court repeats Shaw's observation in *Carter* that absence of duty and presence of immunity are separate inquiries); *Dept. of Health & Rehab. Servs. v. Yamuni*, 529 So.2d 258, 261 (Fla. 1988) (Shaw) (*Trainon* offers only "rough guide" to what is and is not immune; only "basic policy making decisions" are immune)); *Wallace v. Dean*, 3 So.3d 1035, 1044 (Fla. 2009) (Again clarifies distinction between absence of duty and presence of immunity).

E. *Trianon Park* on its law is irrelevant.

"Sovereign immunity does not exempt the [County] from a challenge based on violation of the federal or state constitutions," ***Department of Revenue v. Kuhnlein*, 646 So.2d 717, 721 (Fla. 1994)**.

For the purposes of this case – where liability is based on neglect and violation of constitutional standards – *Kuhnlein* provides the most direct path through the quagmire of *Trianon*'s "guidance" on the question of "government functions" immunity. Per *Kuhnlein* the question of immunity does not even arise when a challenge is based on a constitutional violation because that violation forfeits immunity. Consequently, the immunity waiver, recovery caps, and other restrictions of Section 768.28, Florida Statutes, are irrelevant. It is unnecessary to step through each element of *Trianon*'s several tests to reach the conclusion elegantly simplified, for this case, by *Kuhnlein* – *there is no immunity for constitutional violations*.

In fact, what *Kuhnlein* says explicitly *Trianon Park at 918* says indirectly, "[U]nder the constitutional doctrine of separation of powers, the judicial branch must not interfere with the discretionary functions of the legislative or executive branches of government *absent a violation of constitutional or statutory rights*," (*emphasis* added), and a second time *at 919*, "The judicial branch has no authority to interfere with the conduct of

[legislative or executive] functions *unless they violate a constitutional or statutory provision*," (*emphasis* added).

The Supreme Court in *Department of Health & Rehabilitation Services v. Yamuni*, 529 So.2d 258, 260 (Fla. 1988), three years after its decision in *Trianon Park*, removed any doubt that the conclusion it later reached in *Kuhnlein* can also be reached by proper application of the tests it adopted in *Trianon Park*, "If the answer to any of the [four] questions [in the *Commercial Carrier* test] is no, the activity is probably operational level which is not immune." Question four in the *Commercial Carrier* test is: "Does the governmental agency involved possess *the requisite constitutional, statutory, or lawful authority* [] to do [] the challenged act []?" (*emphasis* added)

Here, the "challenged act" is the enforcement of an un-codified regulation that violates **Article IV, Section 9, Florida Constitution**, in an unauthorized ***prosecution*** that violates **Article I, Section 18,** and **Article VIII, Section 1(j), Florida Constitution**. So, the answer to *Commercial Carrier*'s question four is, "No. And No." Orange County did not "possess the requisite constitutional, statutory, or lawful authority" to enforce an unlawful regulation in an unlawful manner. By the terms of either *Trianon* or

Kuhnlein there is no immunity for Orange County's neglect and violation of its non-delegable constitutional duties in due process.

The Foleys request this Court reverse the trial court's erroneous ruling and remand for an answer and for trial on the claim of negligence.

IV. Count Three must be answered because the Foleys properly ground their claim of unjustified enrichment on allegations of an illegal process with illegal purpose.

The trial court ruled that the Foleys "fail to state a claim for unjust enrichment, as the fees at issue were paid by Plaintiffs in 2008 and were all connected with a process that Plaintiffs themselves initiated," *Record page 1421*. This ruling makes two errors. First, it improperly rules on a disputed question of fact – who initiated the ***prosecution***. Second, it incorrectly holds this factual ruling dispositive of the only disputed element of the Foleys' claim – the equity element.

The trial court's ruling is a restatement of a counter-allegation made by Orange County in its motion to dismiss, *Record page 319*. But this counter-allegation is not undisputed fact. It is an allegation Orange County made to counter and dispute the Foleys' opposing allegation, i.e., that Orange County initiated the process and coerced the payment of fees by falsely asserting authority to enjoin bird possession and sale by means of

land use regulation, *Record pages 275-278, paragraphs 39-52; pages 285-288, paragraphs 68-72*.

On a motion to dismiss the Foleys' allegations prevail, ***Verdon v. Song*, 251 So.3d 256, 258 (5th Dist. 2018)**. It was error for the trial court to decide this factual dispute in Orange County's favor on an unproven, contested counter-allegation in a motion to dismiss, *Id.* ("A motion to dismiss is designed to test the legal sufficiency of the complaint, not to determine factual issues").

More importantly, who initiated the process is not dispositive of the equity element of unjust enrichment. In this case, the legality of Orange County's purpose and the legality of its process determine the claim.

The Foleys' amended verified complaint alleges that Orange County's purpose was the regulation of the Foleys' possession and sale of toucans, and that this purpose is clearly prohibited by **Article IV, Section 9, Florida Constitution**. This purpose is admitted, or otherwise proven, by the challenged building permit and the challenged BCC order, *Record pages 741 and 742, and page 735*.

The Foleys' also allege the process the County used to coerce the destruction of their aviary and the abandonment of their aviculture business was not authorized by the county code. Further, the Foleys, *if permitted to*

amend their complaint, can allege, as they have consistently argued, that the challenged process was a prosecution and punishment prohibited by **Article I, Section 18,** and **Article VIII, Section 1(j), Florida Constitution**.

Either of these allegations satisfy the equity element of the Foleys' claim in unjust enrichment – each, independently, goes directly to the inequity of allowing Orange County to retain fees collected in an unjust process and/or for an unjust purpose.

The Foleys ask the Court to rule that the "practice and proceeding" alleged in paragraph 40 of the amended verified complaint, when proven, conflicts with **Article I, Section 18,** and **Article VIII, Section 1(j), Florida Constitution**, and/or rule that Orange County's admitted purpose conflicts with **Article IV, Section 9, Florida Constitution**, and on either ruling remand for an answer and for trial on the claim of unjust enrichment.

V. Count Three must be answered because the Foleys properly allege conversion by *constructive possession*.

The trial court dismissed the Foleys' conversion claim on the authority of *DePrince v. Starboard Cruise Svs.,* 163 So.3d 586 (3rd DCA 2015), finding the Foleys "fail to plead that Defendant ever took possession of items belonging to them," *Record pages 1421-1422*. *DePrince*, however,

favors the allegations of *constructive possession* that support the Foley's conversion claim, *Record pages 282-283, paragraphs 61 and 62(c)*.

DePrince found *constructive possession* sufficient to make a claim in conversion. ***Constructive possession*** **is the "control or dominion over a property without actual possession or custody of it,"** Black's Law Dictionary, p.1183, (7th Ed. 1999).

DePrince involved a dispute over a diamond: DePrince paid Starboard $235,000 for a diamond; after accepting payment, but before delivery, Starboard learned its true value was $4,850,400; Starboard refused to deliver the diamond; and, DePrince sued in conversion to recover the $4,850,400 value acquired with $235,000 cash. *DePrince at 598* found that appellee Starboard had ***constructive possession*** of the diamond that DePrince sought to recover. Absent any evidence of actual possession, *DePrince* based its finding of ***constructive possession*** on a single written consignment agreement between Starboard and its supplier which legally transferred ownership of the diamond from the supplier to Starboard upon payment by DePrince, without reference or regard to the physical location of the diamond. In other words, it was Deprince's *right* to the diamond, that Starboard acquired by accepting payment, that created liability in conversion for the diamond purchase.

Here, it is the Foleys' *right* in their *aviary*, in their birds, and in their *aviculture* home business, that Orange County acquired by its prosecution, its building permit, and its BCC order, that creates liability in conversion.

DePrince found conversion by wrongful interference with a possessory right, not by interference with actual possession. The Foleys' amended verified complaint makes such a claim in conversion; it alleges Orange County, by an unlawful prosecution, dispossessed the Foleys of property rights placed outside County authority by **Article IV, Section 9, Florida Constitution**.

The Foleys ask the Court to rule that the "practice and proceeding" alleged in paragraph 40 of the amended verified complaint was a wrongful exercise of dominion and control over their *aviary*, toucans, and *aviculture* home business, because it conflicts with **Article I, Section 18,** and **Article VIII, Section 1(j), Florida Constitution**. The Foleys ask the Court on that basis to remand for an answer and for trial on the claim of conversion.

The Foleys ask the Court to rule that Orange County's interference with the Foleys' rights in their *aviary*, toucans, and *aviculture* home business, was a wrongful exercise of dominion and control because it conflicts with **Article IV, Section 9, Florida Constitution**. The Foleys ask the Court on that basis to remand for an answer and for trial in conversion.

VI. Count Four must be answered because it makes a valid claim in Article X, Section 6, Florida Constitution.

The trial court dismissed Count Four on the authority of *Pinellas County v. Ashley*, 464 So.2d 176 (2nd DCA 1985), *Hernandez v. Dept. of State, Div. of Licensing*, 629 So.2d 205, 206 (3rd DCA 1993), and *Sys. Component Corp. v. Fla. Dept. of Transp.*, 14 So.3d 967, 975-76 (Fla. 2009), reasoning there was either no property at issue or no alleged loss of "all beneficial use," and even if there were the Foleys' only remedy was declaratory and injunctive relief, but because Orange County adopted Ordinance No. 2016-19, "this remedy is not available to Plaintiffs either."

A. ***Pinellas County*** **is bad law.**

Like *Pinellas County*, and at roughly the same time, "the California Court of Appeal held that a landowner who claims that his property has been 'taken' by a land-use regulation may not recover damages for the time before it is finally determined that the regulation constitutes a 'taking' of his property," ***First English Evangelical Lutheran Church of Glendale v. Los Angeles County*****, 482 US 304, 306-307 (1987)**. *First English* reversed the California Court of Appeal and held that damages can be recovered because, "Invalidation of the ordinance or its successor ordinance after this period of time, though converting the taking into a

'temporary' one, is not a sufficient remedy to meet the demands of the Just Compensation Clause." Consequently, to the extent it can be read to deny compensation, *Pinellas County* conflicts with *First English* and is bad law.

B. Lack of *public purpose* grounds claim.

The Foleys allege that Orange County's "taking was deprived police power, *id est* public purpose, by Art. IV, §9, Fla. Const., as stated in paragraph 28," *Record page 284, paragraph 65.* Paragraph 28 alleges: "Article IV, section 9, of Florida's Constitution has for seventy-two years been consistently construed, by the doctrine *expressio unius est exclusio alterius,* to clearly establish that the regulatory subject matter jurisdiction of wild animal life, including captive exotic birds, belongs exclusively to Florida's Fish and Wildlife Conservation Commission (FWC); DEFENDANTS are without police power to place preconditions specific to the nuisance associated with animals on the FOLEYS' possession or sale of captive exotic birds," *Record page 274.*

Florida recognizes lack of *public purpose* as grounds for the Foleys' claim in Article X, Section 6, Florida Constitution, see: ***Kirkpatrick v. City of Jacksonville*, 312 So.2d 487, 489 (1st DCA 1975)** ("unwarranted governmental action" is basis for taking); *Flatt v. City of Brooksville*, 368 So.2d 631, 632 (2nd DCA 1979) (concurs with *Kirkpatrick* in water damage

takings claim); and, *City of West Palm Beach v. Roberts*, 72 So.3d 294, 297 (4th DCA 2011) (concurs with *Kirkpatrick* on demolition without notice).

C. Lack of *due process* grounds claim.

The Foleys allege that Orange County's "taking was without due process for the following reasons: (a) Orange County did not codify, memorialize, or in any way give the Foleys notice of the aviary/aviculture prohibition (custom) prior to its enforcement; (b) Orange County had no substantive authority over the Foleys' aviary or aviculture business, as stated in paragraphs 28 and 65; (c) Orange County improperly denied the Foleys the adversarial pre-deprivation remedy available in Ch. 11, OCC, for the violation alleged in the citizen complaint as stated in paragraph 40(a)–(b); (d) Orange County improperly exacted compliance and divested and impaired the Foleys legal rights in a proceeding pursuant Ch. 30, OCC, that is not given quasi-judicial jurisdiction by that provision to divest or impair any legal right; and, (e) The practice and proceeding described in paragraphs 39–52, could not be enjoined or corrected by state court intervention or review," *Record pages 284, 285.*

Florida recognizes lack of *due process* as solid ground for the Foleys' claim in Article X, Section 6, Florida Constitution, see: *State Plant Board v. Smith*, 110 So.2d 401 (Fla. 1959) (due process denied by summary

destruction of trees and by statute setting cap on compensation), ***Kirkpatrick v. City of Jacksonville*, 312 So.2d 487, 489 (1st DCA 1975)** (demolition without notice); and, *City of West Palm Beach v. Roberts*, 72 So.3d 294, 297 (4th DCA 2011) (demolition without notice).

D. Claim alleges taking of all value in personal and intangible property, fees and costs, and business income.

Contrary to the trial court's conclusion, the Foleys do allege a taking of all value in a range of property interests: "The practice and proceeding described in paragraphs 39–52, effected a taking of all value in the property described in paragraphs 56(a)–(h)," *Record page 284, paragraph 64*.

The Foleys' amended verified complaint carefully itemizes the property at issue, *Record pages 279, 280, paragraphs 56(a)–(h)*:

(a) Property right in their demolished *aviary* ($400);

(b) Property right in fees paid for the administrative proceeding, including determination, appeal to the BZA, and appeal to the BCC ($651);

(c) Property right in the continuing expenses and court costs incurred in the vindication of their rights ($6,800);

(d) Property right in lost value of the twenty-two toucans the FOLEYS had February 19, 2008 (approx. $39,600);

(e) Property right in costs associated with maintenance of DAVID FOLEY's Class III FWC licenses from February 19, 2008, to the present day ($500);

(f) Property right to sell birds kept at the Solandra and Cupid properties associated with the FOLEYS' birds, and DAVID FOLEY's Class III FWC licenses;

(g) Property right in lost income from birds sales ($342,000);

(h) Property right in the reputation and goodwill of the FOLEYS' bird business;

Whether or not the Foleys are correct in alleging that *all* value in these property rights was taken by the regulatory actions of Orange County is a question of fact for the jury, not the court.

E. Taking of all beneficial use is not required.

Contrary to the trial court's conclusion, the Foleys do not, as a matter of law, have to allege or prove *all* beneficial use and value was taken: *State Road Department of Florida v. Tharp*, 1 So.2d 868 (Fla. 1941) (decreasing mill capacity by fifty percent sufficient to allege taking), *United States v. Causby*, 328 US 256 (1946) (government action occurring outside property causing direct and immediate interference with enjoyment of property sufficient to allege taking), *City of Jacksonville v. Schumann*, 167 So.2d 95 (1st DCA 1964) (taking of only airspace above home sufficient to allege taking), *Kendry v. State Road Department*, 213 So.2d 23 (4th DCA 1968) (complete appropriation of only riparian rights sufficient to allege taking), ***Askew v. Gables-By-The-Sea, Inc.*, 333 So.2d 56 (1st DCA 1976)** (delay in granting use caused by protracted litigation sufficient to establish taking), *Young v. Palm Beach County*, 443 So.2d 450 (4th DCA 1984) (steady increase in airplane flight noise over 14 years substantially interfered with

the beneficial use and enjoyment whether they continued or not), *Foster v. City of Gainesville*, 579 So.2d 774 (1st DCA 1991) (accord *Causby*), *City of Ft. Lauderdale v. Hinton*, 276 So.3d 319 (4th DCA 2019) (all need not be taken, only *substantially* all).

F. Property rights alleged are recoverable.

Personal property. The Foleys assert a taking of personal property; i.e., a demolished *aviary* and the value of twenty-two toucans. Florida does recognize taking of personal property, *see*: ***Flatt v. City of Brooksville*, 368 So.2d 631 (2nd DCA 1979)** (personal property is "private property" protected from taking); *In re Forfeiture of 1976 Kenworth Tractor-Trailer Truck*, 576 So.2d 261 (Fla. 1990) (concurs with *Flatt*); and, *Williams v. American Optical Corp.*, 985 So.2d 23 †5 (4th DCA 2008) (restates *Kenworth*'s concurrence with *Flatt*).

Intangible property. The Foleys assert a taking of intangible property rights; i.e., right in reputation and goodwill, and David Foley's right to sell birds associated with his Class III licenses issued by the Florida Fish and Wildlife Conservation Commission. Florida does recognize takings of intangible property, *see*: ***Williams v. American Optical Corp.*, 985 So.2d 23 (4th DCA 2008)** (recognizing a cause of action as intangible property subject to takings).

Contrary to the trial court's conclusion, *Hernandez v. Dept. of State, Div. of Licensing* is no bar to recovery of the value of the rights or the maintenance costs associated with David Foley's Class III licenses. Hernandez claimed an entitlement to a license against the issuing authority, the Division of Licensing. In this case the issuing authority is the Florida Fish and Wildlife Conservation Commission. Foley does not claim an entitlement to the licenses against the Commission. Foley's claim is against Orange County and its decision to take from him what the Commission by license gave him, i.e., the right to sell toucans.

Fees and costs. The Foleys assert a taking of certain fees and costs; i.e., fees for an unauthorized administrative hearing with an unauthorized purpose, continuing expense and cost of vindicating rights, and cost of maintaining Class III licenses. Florida does recognize that "full compensation" includes costs occasioned by the taking, *see*: *Jacksonville Express. Auth. v. Henry G. Du Pree Co.*, 108 So.2d 289, 292 (Fla. 1958) (reasonable compensation for the cost of *moving* personal property and attorney's fees); *State Road Department v. Bender*, 2 So.2d 298 (Fla. 1941) (pre-judgment interest); *City of Miami Beach v. Cummings*, 266 So.2d 122 (3rd DCA 1972) (award of court and attorneys' fees).

Business damages. Article X, Section 6, Florida Constitution, guarantees *full compensation*. Consequently, neither the Legislature per Section 73.071(3)(b), Florida Statutes, nor the Judiciary per *Sys. Component Corp. v. Fla. Dept. of Transp.*, 14 So.3d 967, 975–76 (Fla. 2009), can deny business damages if such damages are required to satisfy that constitutional guarantee. Moreover, *Sys. Component Corp.* does not deny business damages as an element of full compensation; *Sys. Component Corp.* relies on *Jamesson v. Downtown Dev. Auth. of Fort Lauderdale*, 322 So.2d 510, 511 (Fla. 1975), which itself relies on ***Backus v. Fort Street Union Depot Co.*, 169 US 557, 575 (1898)**, and in *Backus* Justice Brewer explained that business damages are guaranteed if the business, as here, is destroyed entirely and is prohibited from restarting anywhere in Orange County:

> [T]he profits of a business are not destroyed unless the business is not only there stopped, but also one which in its nature cannot be carried on elsewhere. If it can be transferred to a new place and there prosecuted successfully, then the total profits are not appropriated, and the injury is that which flows from the change of location.

Finally, in ***Consumer Serv. v. Mid-Florida Growers, Inc.*, 570 So.2d 892, 895-899 (Fla. 1990)**, Florida recognized a farmer could recover business income as "probable yield and value of the crop when harvested."

In sum, the Foleys ask the Court to remand for an answer on their claim in **Article X, Section 6, Florida Constitution**, of taking, without public purpose, and without due process, of substantially all value in personal and intangible property, fees and costs, and business income.

VII. Counts Five and Six were not dismissed and should proceed against Orange County on amendment.

The trial court denied leave to amend. For the following reasons, the Foleys ask the Court to rule that on remand the Foleys may amend their complaint to ask Orange County to answer Counts Five and Six.

A. Section 768.28(9)(a), Florida Statutes, is no bar.

Counts Five and Six allege the essential elements of *abuse of process, invasion of privacy and rightful activity*, and *civil theft*, *Record pages 285-289, paragraphs 68-75*. Counts Five and Six were originally brought against the appellees named in their personal capacity. These appellees were dismissed by separate order that found, *Record page 1417*:

> "There are no allegations in the Amended Complaint that the named Defendants acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. As such, all the individual Defendants in this cause are afforded absolute immunity, and therefore cannot be sued … This does not preclude the Plaintiffs from seeking redress against Orange County."

The Court may take notice that it affirmed this finding without opinion in case 5D 19-2635 (filed October 13, 2020), *Straitiff v. State*, 228 So.3d 1173 †2 (5th DCA 2017) (court may notice its own records). Orange County did not object to this finding in the trial or appellate courts. The order now on review (filed November 10, 2020) made no ruling on Counts Five or Six, *Record pages 1420-1423*. Consequently, Counts Five and Six have not been adjudicated but have been found to be free of any allegations of malice, bad faith, or wanton and willful disregard that would "preclude the Plaintiffs from seeking redress against Orange County."

B. Section 772.19, Florida Statutes, is no bar.

Article I, Section 18, and **Article VIII, Section 1(j), Florida Constitution**, establish the procedural standard for the Foleys' *abuse of process* claim. **Article IV, Section 9, Florida Constitution**, grounds the rights the Foleys claim Orange County infringed by *invasion of privacy and rightful activity*, and *civil theft*. Orange County's violation of these constitutional provisions forfeits any sovereign immunity defense, ***Kuhnlein*** *supra* pages 32-34. Consequently, Orange County cannot claim the exemption from civil theft in Section 772.19, Florida Statutes, because it is a sovereign immunity defense, ***Smith v. State*****, 701 So.2d 348, 350 (1st**

DCA 1997) ("Section 772.19 preserves sovereign immunity from damages caused by [acts done maliciously or in bad faith].").

C. Section 1.01(3), Florida Statutes, is no bar.

The First District in *Smith v. State* *suggested* a state entity may not be a "person" liable in Section 812.014, Florida Statutes. However, that court *en banc* in ***Childers v. State*, 936 So.2d 585, 596-59 (1st DCA 2006)** (quoting *South Florida Water Mgmt. Dist. v. Layton,* 402 So.2d 597 (2nd DCA 1981)) *held* that absent an exclusion in the applicable statute the general definition given "person" in Section 1.01(3), Florida Statutes, includes state entities, particularly when not including state entities would "insulate from criminal responsibility those persons who victimize Florida counties." Here, Chapters 772 and 812, Florida Statutes, have no definition of "person," and Section 812.035(7), specifically authorizes treble damages to state entities victimized as "persons" by civil theft (Section 812.012(5), Florida Statutes, defines the object of civil theft – "property of another" – as property of a "person"). So, Orange County is a "person."

VIII. Count Seven is properly pled in the alternative and must be answered if there is no remedy at common law, in civil theft, or per Article X, Section 6, Florida Constitution.

Consistent with its erroneous conclusion in Counts Three and Four that the Foleys asserted no property right recognized in Florida law, the trial

court found no reason to consider the alternative remedies asserted in Count Seven, and denied that relief in both Article I, Section 9, Florida Constitution, on the authority of *Fernez v. Calabrese*, 760 So.2d 1144 (5th DCA 2000), and *Garcia v. Reyes*, 697 So.2d 549 (4th DCA 1997), and in Title 42 U.S. Code Section 1983.

Count Seven is pled in the alternative should the Court find a wrong but not a remedy. If this Court determines that the Foleys have properly alleged injury but that the injury has no adequate remedy in negligence, unjust enrichment, conversion, takings, abuse of process, invasion of rightful activity, or civil theft, then Article I, Section 9, Florida Constitution, requires the Court to create a remedy in, or based upon that constitutional provision, or to grant relief in Title 42 U.S. Code Section 1983 for denial of the adequate pre-deprivation remedy guaranteed by Amendment Fourteen, United States Constitution.

CONCLUSION

WHEREFORE plaintiffs David and Jennifer Foley request this Court reverse the trial court's dismissal with prejudice of the Foleys' amended verified complaint as to Orange County, and remand for amendment, answer, and trial.

CERTIFICATE OF SERVICE

Appellants certify that on June 16, 2021, the foregoing was electronically filed with the Clerk of the Court and served to the following:

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CERTIFICATE OF COMPLIANCE

Appellants certify that this document complies with the applicable font and word count limit requirements.

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