IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

Case No. 5D21-0233
L.T. Case No. 2016-CA-007634-O

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

Appellants,

v.

ORANGE COUNTY, a political subdivision of the State of Florida, ASIMA AZAM, TIM BOLDIG, FRED BRUMMER, RICHARD CROTTY, FRANK DETOMA, 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,

Appellees.

APPELLEE, ORANGE COUNTY, FLORIDA'S ANSWER BRIEF
On Appeal from the Circuit Court of the
Ninth Judicial Circuit in and for Orange County, Florida

LINDA S. BREHMER LANOSA
Assistant County Attorney
Florida Bar No. 901296
Linda.Lanosa@ocfl.net; Judith.Catt@ocfl.net
ORANGE COUNTY ATTORNEY'S OFFICE
201 S. Rosalind Avenue, Third Floor
Orlando, Florida 32802-1393
Telephone: (407) 836-7320
Counsel for Orange County, Florida

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PRELIMINARY STATEMENT AND ACRONYMS

References to the Record on Appeal will be made as (R[page number]).

Appellants and Plaintiffs below, David W. Foley, Jr. and Jennifer T. Foley, will be referred to as the "Foleys."

The eighteen (18) individual defendants will be referred to as the "Individual Defendants."

For ease of reference, this Brief includes the acronyms defined below.

BCC	Orange County Board of County Commissioners
BZA	Orange County Board of Zoning Adjustment
CEB	Orange County Code Enforcement Board
FWC	Florida Fish and Wildlife Conservation Commission
OCC	Orange County Code

STATEMENT OF THE CASE AND FACTS

1. Nature of the Case: Appeal of the Zoning Manager's Determination to the Orange County Board of County Commissioners

This is a case about the operation of a commercial aviculture business out of a residentially-zoned property at 1015 North Solandra Drive, Orlando, Florida. R337 (Plaintiffs' Response to Motions to Dismiss); R735 (BCC Decision).

The Amended Complaint alleges that "[t]he defendants, incidents and injuries at issue in 6:12-cv-00269-RBDKRS, as in this amended complaint, involve an Orange County administrative proceeding that began February 23, 2007, became final February 19, 2008 . . . ." R270-R271, Amended Complaint ("AC"), ¶2(d).

According to the Amended Complaint, February 23, 2007, was the date the proceeding "was initiated . . . by a private complaint which alleged the Foleys were 'raising birds to sell.'" R275, AC ¶40(a).

According to the Amended Complaint, February 19, 2008, is the date the "incidents and injuries . . . became final." February 19, 2008 is the date of the hearing before the BCC on the Foleys' appeal of the

Zoning Manager's determination.[1] R735. The BCC's decision is in the record and states:

> On February 19, 2008, the Board of County Commissioners sat as a Board of Appeals to consider the following matter:
> . . . .
> Applicants: David and Jennifer Foley
> Case: Board of Zoning Adjustment Item ZM-07-10-010
> Consideration: Appeal of the Recommendation of the Board of Zoning Adjustment, dated November 1, 2007, on the Zoning Manager's Determination that:
> 1) aviculture with associated aviaries is not permitted as a principal use or accessory use in the R-1A (single-family 7,500 sq. ft. lots) zone district; and
> 2) aviculture with associated aviaries is not permitted as a home occupation in the R-1A (single-family-7,500 sq. ft. lots) zone district.
> Location: . . . . 1015 N. Solandra Drive . . . .
>
> Upon a Motion, the Board of County Commissioners upheld the Zoning Manager's determination consistent with the Board of Zoning Adjustment recommendation . . . . .

[1] The zoning manager's determination was appealed to the BZA. R735. The powers and duties of the BZA are described in Section 30-43 of the OCC. R485. Section 30-45(a) allows a person aggrieved by a decision of the BZA to file a notice of appeal to the BCC per Section 30-45(d) of the OCC. R487. The aggrieved party may seek judicial review of the BCC's appellate decision. R1472, *Foley v. Orange County,* Case No. 08-CA-005227-O, Writ No. 08-20 (Fla. 9th Jud. Cir. Oct. 21, 2009).

R735 (BCC's Decision).

The BCC's Decision was unsuccessfully appealed to the Florida Ninth Judicial Circuit (R1472-R1475) and unsuccessfully appealed to the Fifth District Court of Appeal (R1470). In *Foley v. Orange County,* Case No. 08-CA-005227-O, Writ No. 08-20 (Fla. 9th Jud. Cir. Oct. 21, 2009) (R1472-R1475), the Foleys filed a Petition for Writ of Certiorari appealing the BCC's Decision. The Florida Ninth Judicial Circuit denied the Foley's Petition and stated:

> The facts, as illustrated by the parties' written submissions, are that the Petitioners have been breeding and raising exotic birds (Toucans) on their single family residential property, which is zoned R-1A. **The Petitioners have also been selling the exotic birds commercially via the internet.** After obtaining **a determination** from the County Zoning Manager, and following **a public hearing** by the County Board of Zoning Adjustment (BZA), which unanimously approved the Zoning Staff's determination, the Board of County Commissioners (BCC) conducted **a public hearing** and unanimously approved the Zoning Manager's determination and the BZA decision. The BCC determined that: (1) the Petitioners were engaged in aviculture; (2) aviculture with associated aviaries is not permitted as a principal use or accessory use within an R-1 A zoning district; and (3) aviculture with associated aviaries is not permitted as a home occupation in an R-1 A zoning district.

R1473, Ninth Judicial Circuit's Zoning Order, page 2 (emphasis

added). The Ninth Judicial Circuit's Zoning Order describes the BCC's Decision as follows:

> The BCC determined that: (1) the [Plaintiffs] were engaged in aviculture; (2) aviculture with associated aviaries is not permitted as a principal use or accessory use within an R-1A zoning district; and (3) aviculture with associated aviaries is not permitted as a home occupation in an R-1A zoning district.

R1473. As to the merits, the Ninth Judicial Circuit's Zoning Order found:

> We conclude that the governing Code sections were properly interpreted by the County Zoning Manager, the BZA, and the BCC. Moreover, we find that the BCC observed the essential requirements of law.

R1474.

Based upon the above, the Amended Complaint alleges that "[t]he Defendants . . . divested the Foleys of their *aviary* and/or their right to sell birds kept at their Solandra homestead, pursuant [to] . . . an Orange County administrative practice and proceeding that: . . . concluded February 19, 2008, with the final order of the BCC in the Foleys' case ZM-07-10-010, prohibiting *aviculture* (i.e., advertising or keeping birds for sale) as *primary use, accessory use* and as *home occupation* in the 'the R-1A . . . zone district' throughout Orange County." R275-R276.

Additionally, and prior to the BCC's Decision, there was a code enforcement proceeding[2] "ordering the Foleys pursuant [to] Ch. 11, OCC, to secure a building permit or destroy the 'structure.'" Orange County "ultimately approved a site-plan and approved a site-plan and building permit . . . ." R276, AC ¶ 40(c)-(d). The CEB Order, dated April 18, 2007, found the Foleys "in violation of Code sections 38-3, 38-74, and 38-77 by erecting structures on their residential property without the proper building or use permits." R1466.

The CEB Order (R1463-1464) was unsuccessfully appealed to the Florida Ninth Judicial Circuit in *Foley v. Orange County,* Case No. CVA1 07-37 (Fla. 9th Jud. Cir. Sept. 24, 2009). R1466-R1469. The Florida Ninth Judicial Circuit the Foleys' appeal of the CEB Order dated April 18, 2007,[3] and found that "there was clear and convincing evidence presented to the CEB to support its decision that

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[2] Chapter 11 of the OCC was enacted pursuant to Chapter 162 of the Florida Statutes. R468. The CEB was created by Section 11-30 of the OCC. R469. Its organization, jurisdiction, enforcement procedures, conduct of hearing, powers, fines liens, and so on as described in Chapter 11. R468-R481. Chapter 11 provides for judicial review per Section 11-40 which states that "[a]n aggrieved party . . . may appeal a final administrative order of the code enforcement board . . . to circuit court." R480.

[3] R1463-R1464.

[the Foleys] had violated the Code sections under which they were charged." R1467-R1468. More specifically, the Foleys were found in violation of OCC "sections 38-3, 38-74, and 38-77, by erecting structures on their residential property with the proper building or use permits." R1466-R1469.

The Foleys then unsuccessfully appealed the Florida Ninth Judicial Circuit's Zoning Order and the Ninth Judicial Circuit's CEB Order to this Court in *Foley v. Orange County, Florida*, Case Nos. 5D09-4195 and 5D09-4021 (for Lower Tribunal Case Nos. 08-CA-5227-O, Writ No. 08-20 and CVA1 07-37, respectively. R1470.

2. Course of Proceedings in the Lower Tribunal

On August 25, 2016, the Foleys filed a Verified Complaint against Orange County and eighteen (18) Individual Defendants consisting of members of the BCC, the BZA, and Orange County staff. R31-34. Motions to Dismiss were filed. R201-268.

On February 15, 2017, the Foleys filed an Amended Verified Complaint. R269. Motions to Dismiss were filed (R292-R327) and the trial court entered a Final Judgment in favor of the Individual Defendants on or about November 13, 2017. R1078. The Plaintiff's appealed (R1086) and this Court reversed and remanded. R1158-

R1166.

In April and May 2019, the Individual Defendants filed Motions to Dismiss with Prejudice. R1177; R1184; R1197.

On October 25, 2016, Orange County filed a Motion to Dismiss Plaintiffs' Complaint. R201-R213. On March 7, 2017, Orange County filed a Motion to Dismiss Plaintiffs' Amended Complaint. R315-R327. On November 20, 2017, Orange County filed an Amended Motion to Dismiss. R1019-R1032.

3. Disposition in the Lower Tribunal as to the Individual Defendants

By Amended Order dated October 11, 2019, the trial court entered a Final Judgment in favor of the Individual Defendants. R1416-R1419.

4. Disposition by this Court as to the Individual Defendants

The Foleys appealed the Final Judgment in favor of the Individual Defendants to this Court. This Court affirmed, per curiam, in *Foley v. Orange County, Florida, et al,* Case No. 5D19-2635.

5. Subsequent Proceedings as to Defendant, Orange County, Florida.

The Foleys then sought review before the Florida Supreme Court

in Case No. SC21-80. The Florida Supreme Court dismissed the case.

Next, the Foleys filed a Motion for Extension of Time to a Motion for Reinstatement before the Florida Supreme Court in Case No. SC21-199, which was denied.

Following that, the Foleys filed a Petition for Writ of Certiorari with the United States Supreme Court, Case No. 21-95, which petition is currently pending.

6. Disposition in the Lower Tribunal as to Defendant, Orange County, Florida

By Order dated November 10, 2020, the trial court addressed the issues raised in Orange County's Amended Motion to Dismiss in its well-reasoned decision, dismissed the Amended Complaint with Prejudice as to Orange County, and entered a Final Judgment in favor of Orange County. R1420-R1423. The Final Judgment states that the trial court "has carefully reviewed and considered each Count lodged against Defendant, Orange County, in the Amended Complaint, and finds each of them must be dismissed for failure to state a cause of action." R1422. Further, the trial court held "each attempted cause of action could not be cured by filing another

amended complaint"; therefore, the trial court dismissed the Foleys' Amended Complaint with prejudice. R1422.

On November 25, 2020, the Foleys moved for rehearing and leave to amend. R1426. Orange County filed a Response in Opposition. R1458.

By Order dated December 18, 2020, the trial court denied the Foleys' Motion for Rehearing and Leave to Amend. R1476.

SUMMARY OF THE ARGUMENT

The trial court properly dismissed the Amended Complaint against Orange County with prejudice because each and every count failed to state a cause of action. Counts 1 and 2 seeking facial declaratory relief as to outdated version of the OCC is moot. Counts 1 and 2 seeking facial declaratory relief as to current version of the OCC are not ripe.

Count 3 for negligence, unjust enrichment, and conversion fail to state a cause of action. Orange County owes no duty to the Foleys in how it carries out its governmental functions. There is no cause of action for the manner in which a county exercises its governmental functions, including the enforcement of its codes or the issuance of permits. Similarly, the purported claim for unjust

enrichment fails since the Foley's availed themselves of the available administrative and judicial processes and received value of participation. The Foleys do not allege that Orange County ever took actual, physical possession of items belonging to them.

Count 4 for a taking was properly dismissed with prejudice. There was no physical taking or invasion of the Solandra or Cupid properties by Orange County. The Foleys have not and cannot allege that Orange County deprived the Foleys of all beneficial uses of their properties.

Counts 5 and 6 were not asserted against Orange County and no response was required from the trial court.

Count 7, which was pled in the alternative, was addressed in the Final Judgment by the trial court, although the Initial Brief suggests otherwise. The trial court properly dismissed for failure to state a cause of action.

The trial court properly denied leave to amend because any amendment would be futile.

Respectfully, this Court should affirm.

ARGUMENT

I. STANDARD OF REVIEW

"A trial court's order granting a motion to dismiss with prejudice is reviewed de novo." *Jordan v. Nienhuis*, 203 So. 3d 974, 976 (Fla. 5th DCA 2016). "[T]he factual allegations in the complaint as true and draw all reasonable inferences in favor of the pleader. . . . However, general, vague and conclusory statements are insufficient to satisfy the requirement that a pleader allege 'a short and plain statement of the ultimate facts showing the pleader is entitled to relief . . . .'" *Id.* (citing Fla. R. Civ. P. 1.110(b); *Beckler v. Hoffman*, 550 So. 2d 68, 70 (Fla. 5th DCA 1989)).

II. REFERENCED FEDERAL CASE

A. Federal Lawsuit filed in the United States District Court in and for the Middle District of Florida in *Foley v. Orange County and the Individual Defendants,* Case No. 12-CV-269-ORL-37KRS.

The Amended Complaint in paragraph 2 expressly references the Foley's federal lawsuit filed in the United States District Court in the Middle District of Florida as Case No. 6:12-CV-00269-RBD-KRS and states that the court dismissed without prejudice all state and federal claims for lack of federal subject matter jurisdiction. R270.

B. Appeal to the Eleventh Circuit in *Foley v. Orange County and the Individual Defendants*, 638 Fed. App'x 941, Case No. 14-10936 (11th Cir. 2016).

In *David and Jennifer Foley v. Orange County, Phil Smith, et al.*, 638 Fed. App'x 941, Case No. 14-10936 (11th Cir. 2016), the Eleventh Circuit held that the Foleys' federal claims were frivolous and that the federal court was without subject matter jurisdiction to consider the state-law claims presented by the Foleys. R256-R259.

III. THIS COURT SHOULD AFFIRM THE DISMISSAL OF THE AMENDED COMPLAINT AGAINST ORANGE COUNTY WITH PREJUDICE.

A. Overview of Amended Complaint as to Orange County

The Foleys' Amended Complaint against Orange County and various the Individual Defendants purports to state six counts, only four of which are raised against Orange County. An additional count was pleaded in the alternative. The counts against the Individual Defendants have been dismissed with prejudice as affirmed on appeal.

Counts 1 and 2 purport to be facial claims for declaratory judgment and injunctive relief concerning the validity of Orange County's zoning ordinances. Count 3 is entitled "Tort" and seeks

compensation from Orange County for "Negligence, Unjust Enrichment, and Conversion." Count 4 is entitled "Taking." Count 5 is not directed against Orange County, and is entitled "Acting in Concert." Count 6 seems to allege civil theft against Individual Defendants, not Orange County. Count 7 is pleaded in the alternative and is titled "Due Process."

The Amended Complaint makes allegations concerning events in 2007 and 2008, centering on a license David Foley purportedly obtained from the FWC to exhibit and sell exotic birds at the Foleys' Solandra Drive residence in Orange County, Florida. R275-R276, AC ¶¶35-38, 40. In 2007 and 2008, Orange County's zoning regulations did not permit commercial aviculture as a principal use, accessory use, or home occupation in the R-1A (residential) zoning district. The Foleys claimed in 2007 that Orange County could not regulate away, at the county level, a license they had obtained from the FWC. Litigation ensued between the Foleys and Orange County in state and federal courts.

The Foleys' Amended Complaint also makes reference to more recent events, including Ordinance No. 2016-19, effective September 23, 2016, amending the Orange County Zoning Code. R278-R279,

AC ¶¶54-55; R215. The amendments included the deletion of the definition of "Aviculture (Commercial)" (R215-R216; R529-R530); a revision to the definition of "Home occupation" (R217-R218; R532-R533); the deletion of condition 48 pertaining to commercial aviculture (R219-R220; R556-R557); the creation of condition 101 pertaining to home occupation (R570-R571) and the corresponding modification to the Use Table (R648); the modification of the Use Table to remove commercial aviculture (R221; R650); among other changes as reflected in the Ordinance. R529-R657.

B. The Dismissal with Prejudice of Counts 1 and 2 for facial declaratory and injunctive relief should be Affirmed.

This Court should affirm the trial court's dismissal of Counts 1 and 2 with prejudice. Count 1 pertains to the Foleys' "Solandra homestead" zoned R-1A (residential). R272, AC ¶30. Count 2, per its title, pertains to the Foleys' "Cupid property", which is zoned A-2 (agricultural). R272, AC ¶31. Count 1 requested facial declaratory and injunctive relief as to, essentially, any prohibition on the advertising or sale of birds in the R-1A zone, any prohibition on aviculture and/or associated aviaries as an accessory use or home occupation, or the inclusion of wild birds in any prohibition on the

commercial retail sale of animals as a home occupation. Count 2 requests facial declaratory and injunctive relief to the extent an Orange County ordinance includes the possession or sale of birds in "Animal Specialties, Not Elsewhere Classified" in the A-2 zone or makes special exception fees and procedures a condition to commercial aviculture, aviaries.

With the approval of Ordinance No. 2016-19, the Orange County Zoning Code, codified in Chapter 38 of the OCC, was amended. R278, AC ¶54; R215. The amendments included the following: (a) deletion of the definition of "Aviculture (Commercial)" (R215-R216; R529-R530); (b) a revision to the definition of "Home occupation" (R217-R218; R532-R533); (c) the deletion of condition 48 pertaining to commercial aviculture (R219-R220; R556-R557); (d) the creation of condition 101 pertaining to home occupation (R570-R571) and the corresponding modification to the Use Table (R648); (e) the modification of the Use Table to remove commercial aviculture (R221; R650); (f) the modification of the Use Table to remove the reference to the "breeding, keeping, or raising of exotic animals" (R193); among other changes as reflected in the Ordinance. R529-R657.

To reiterate, Ordinance No. 2016-19 deleted or amended the

defined terms in Section 38-1 (R529) for "Aviculture (Commercial)" and "Home occupation" (R532).

Further, Ordinance No. 2016-19 amended the Use Table. For context, buildings, structures, lands, and premises must be used in accordance with the uses and conditions set forth in the OCC. The Zoning Code describes permitted uses in Sections 38-74 (R538) and the Use Table codified in Section 38-77 (R540; R648-R656). Section 38-74(a) provides, in part, "buildings, structures, lands and premises shall be used only in accordance with the uses and conditions contained in the 'Use Table' set forth in section 38-77, the 'Special Exception Criteria' set forth in section 38-78, and the 'Conditions for Permitted Uses and Special Exceptions set forth in section 38-79, subject to compliance with all other applicable laws, ordinances and regulations." R494.

The Use Table is a table with the columns representing the zoning districts, including the Foley's R-1A property (R274, AC ¶30) and the Foley's A-2 property (R274, AC ¶31) and the rows representing different uses. R650. The Use Table indicates the permitted uses with a "P" and the special exceptions with an "S." R494, OCC § 38-74(b)(1); R650. Specified conditions are set forth in

Section 38-79 and "correlate with the number which may appear within the cell of the use table for that permitted use." R494, OCC § 37-74(b)(2).

An examination of the amended Use Table in Ordinance No. 2016-19 indicates that the "Commercial aviculture, aviaries" use was removed as shown by the strikeouts. R650. Prior to the adoption of Ordinance No. 2016-19, "Commercial aviculture, aviaries" was allowed in the A-2 Farmland Rural District as a special exception as denoted by the letter "S" under the column with the heading of A-2 subject to Condition 48. R650. Note that "Commercial aviculture, aviaries" was not a permitted use in the R-1A Single-Family Dwelling District as shown by the blank underneath the column with the heading of R-1A. R650.

Further, the amended Use Table in Ordinance No. 2016-19 reflects changes to the use referred to as Home Occupations. Home Occupations are a permitted use in A-2 and R-1A zoning districts as shown by the "P" in the row for Home Occupation under those zoning districts. R648. Those cells also include Condition "101" in Section 38-79, which condition was added as part of Ordinance No. 2016-19. R648. Condition 101 in Ordinance No. 2016-19 enumerates the

"conditions, restrictions, and prohibitions," such as "[t]he home occupation shall be an incidental use, and shall be limited to twenty-five percent (25%) of the home, but not exceed eight hundred (800) square feet;" "[c]ustomers shall not be allowed at the home;" and so on. R570.

A court has jurisdiction over a declaratory judgment claim only where there is a valid and existing case or controversy between the litigants. *See Rhea v. Dist. Bd. of Trustees of Santa Fe College,* 109 So. 3d 851, 859 (Fla. 1st DCA 2013) (granting motion to dismiss where alleged controversy is moot); *State ex rel. Tallahassee Corporate Ctr., LLC v. Fla. Dep't of Mgmt. Servs.*, 291 So. 3d 199 (Fla. 1st DCA 2020) (affirming dismissal of counts for declaratory and injunctive relief because there is no longer a present, justiciable controversy or practical need for a declaration); *State Dept. of Environmental Protection v. Garcia,* 99 So. 3d 539, 545 (Fla. 3d DCA 2011) (there must exist some justiciable controversy that needs to be resolved for a court to exercise its jurisdiction under the Declaratory Judgment Act).

Orange County's amended zoning ordinance applicable to this case removed the definition of "Commercial aviculture, aviaries"

(R529-R530) and amended the definition of Home Occupation (R532-R533) referenced in the BCC's Decision (R735) and challenged by the Foleys in prior federal litigation (R236). Therefore, to the extent the Foleys continue to seek a declaratory judgment as to Orange County's earlier, pre-amendment zoning ordinance, there is no case or controversy because the issue is now moot.

The Foleys also attack Orange County's amended zoning ordinance on its face. R281-R282, Amended Complaint, ad damnum clauses. However, with respect to the amended zoning ordinance, there is no ripe dispute between the Foleys and Orange County. "A court will not issue a declaratory judgment that is in essence an advisory opinion based on hypothetical facts that may arise in the future." *Apthorp v. Detzner*, 162 So. 3d 236, 242 (Fla. 1st DCA 2015) (quoting *Dr. Phillips, Inc. v. L&W Supply Corp.*, 790 So. 2d 539, 544 (Fla. 5th DCA 2011)).

The Foleys have not alleged that they have sought to exercise any rights they may have since Orange County adopted the amended zoning ordinance, with the approval of Ordinance 2016-19, effective of September 23, 2016. R269-R282. The Initial Brief alleges that the Building Permit issued on November 30, 2007 (R742) and the BCC's

February 19, 2008 Decision affirming the Zoning Manager's determination (R735) are unaffected by the changes to the Zoning Code. Initial Brief, p. 11. Clearly, the November 2007 Building Permit, the Zoning Manager's Determination, and the February 2008 Decision of the BCC occurred prior to the 2016 amendment to the Zoning Code. Due to the subsequent amendments, the Zoning Code, as it existed in 2007 and early 2008, including the provisions challenged by the Foleys, are no longer in effect.

Because the Foleys have not alleged any factual basis to show that Orange County has in any way thwarted any rights the Foleys may have since the adoption of Ordinance 2016-19, the Foleys do not state a claim for declaratory judgment. Florida is a fact-pleading jurisdiction, which is different from a notice-pleading jurisdiction. *See Continental Baking Co. v. Vincent*, 634 So. 2d 242, 244 (Fla. 5th DCA 1994). "Florida's pleading rule forces counsel to recognize the elements of their cause of action and determine whether they have or can develop the facts necessary to support it, which avoids a great deal of wasted expense to the litigants and unnecessary judicial effort." *Id.* at 244. Thus, there is no case or controversy existing under the new Ordinance 2016-19, and any issue raised by them as

to the new ordinance is not ripe. *See Agripost, Inc. v. Miami-Dade Cty, ex rel. Manager*, 195 F.3d 1225, 1229-30 (11th Cir. 1999). The Foleys fail to state a claim, and the trial court lacked subject matter jurisdiction.

Therefore, Counts 1 and 2 of the Amended Complaint, seeking declaratory judgment and injunctive relief, were properly dismissed.

C. The Dismissal with Prejudice of Count 3 for Negligence, Unjust Enrichment, and Conversion should be Affirmed.

Count 3 of Foleys' Amended Complaint is titled "Tort - Negligence, Unjust Enrichment and Conversion." Count 3 was properly dismissed with prejudice because the Foleys have failed to state a claim upon which relief can be granted.

The trial court properly dismissed with prejudice the Foleys' claim for negligence. The trial court's final judgment holds that the Foleys "fail to allege any duty recognized under Florida negligence law on the part of Orange County, as well as the breach of such duty. More importantly, . . . [Orange County] owes [the Foleys] no duty of care in how it carries out its governmental functions." R1421.

Florida law is clear that the existence of a duty in negligence is a pure question of law. *See Goldberg v. Florida Power and Light*

Company, 899 So. 2d 1105, 1110 (Fla. 2005). The only negligence "duty" alleged by Foleys is that Orange County:

> Neglected the duty of reasonable care it owed the Foleys either to decline regulatory and quasi-judicial jurisdiction placed in reasonable doubt by Art. IV, §9, Fla. Const., or to remove the unreasonable risk of injury from the erroneous exercise of jurisdiction by means of adequate and available adversarial proceedings, pursuant to Ch. 11, OCC, or otherwise.

R283, AC ¶62(a). Florida law does not impose any such duty upon Orange County or, alternatively, to the extent any such duty can be construed, it is a duty the exercise of which falls under the protections of sovereign immunity. *In Trianon Park Condominium Ass'n v. City of Hialeah*, 468 So. 2d 912, 919 (Fla. 1985), the Florida Supreme Court said:

> Clearly, the legislature, commissions, boards, city councils, and executive officers, by their enactment of, or failure to enact, laws or regulations, or by their issuance of, or refusal to issue, licenses, permits, variances or directives, are acting pursuant to basic governmental functions performed by the legislative or executive branches of government. The judicial branch has no authority to interfere with the conduct of those functions unless they violate the constitutional or statutory provision. There has never been a common law duty establishing a duty of care with regard to how these various governmental bodies or officials

> should carry out these functions. These actions are inherent in the act of governing.

Id.

In response to the "negligent prosecution" theory raised in the Foleys' Initial Brief (Initial Brief, pp. 22-28, 31), there is no cause of action for the manner in which a county exercises its governmental functions, including the enforcement of its codes or the issuance of permits. *City of Cape Coral v. Landahl, Brown & Weed Assocs., Inc.*, 470 So. 2d 25, 27 (Fla. 2d DCA 1985) (no cause of action exists for the manner in which a municipality exercises its governmental function of issuing or refusing to issue permits, thus those actions are immune from an action for damages). Enforcement of building codes or other codes are discretionary functions of government inherent in the act of governing. *Detournay v. City of Coral Gables*, 127 So. 3d 869 (Fla. 3d DCA 2013), *rev. denied,* 153 So. 3d 903 (Fla. 2014) (holding that city's discretion to enforce building and zoning ordinances against property owner was an executive function that could not be supervised by the courts and therefore the trial court lacks jurisdiction to hear declaratory judgment action by nearby property owners against city seeking enforcement of zoning code).

The Foleys' argument ignores their unsuccessful appeals of the code enforcement issue (R1466-1469) and the BCC's decision affirming the Zoning Manager's Determination (R1472-R1475) to the Florida Ninth Judicial Circuit. As to the code enforcement issue, Section 162.11, Florida Statutes, authorizes an aggrieved party to appeal a final administrative order to the circuit court. The nature of the appeal is plenary. *Central Florida Investments, Inc., v. Orange County, Florida,* 295 So. 3d 292, 293-294 (Fla. 5th DCA 2019). The Florida Ninth Judicial Circuit found that "there was clear and convincing evidence present to the CEB in support of its decision that [the Foleys] had violated the Code sections under which they were charged." R1468. A plenary appeal is a full and complete appeal in which the appellate court may review all aspects of an entire case. *Brevard Cty. v. Obloy*, 301 So. 3d 1114 (Fla. 5th DCA 2020) (A plenary appeal is considered to be an adequate remedy at law with respect to injunctive relief). *See also, Holiday Isle Resort & Marina Assoc. v. Monroe County*, 582 So. 2d 721, 721-722 (Fla. 3d DCA 1991).

As to the zoning case, the Florida Ninth Judicial Circuit concluded, after reviewing the Foleys' Petition for Writ of Certiorari, that "the governing Code sections were properly interpreted" by

Orange County and "that the BCC observed the essential requirements of law." R1474.

The Foleys' claim for unjust enrichment fails and was properly dismissed with prejudice. As to Foleys' "unjust enrichment claim," apparently found at paragraph 62(b) of the Amended Complaint (R283), the fees paid by the Foleys in the 2008 time period were all connected to a process begun by the Foleys themselves when they applied to Orange County for a determination of whether the Foleys could display and sell exotic birds commercially in Orange County. R275-R276, AC ¶40. The Foleys received the value of participating in these proceedings. In response to the argument in the Foleys' Initial Brief that their unjust enrichment claim is grounded on "allegations of an illegal process with an illegal purpose," the argument is without merit in light of the Foleys' unsuccessful appeals.

Regarding the conversion claim, this Court should affirm the trial court's dismissal with prejudice. An essential element of any conversion claim is that the defendant must have taken possession of the item the plaintiff has the right to possess. *See DePrince v. Starboard Cruise Services,* 163 So. 3d 586, 598 (Fla. 3d DCA 2015).

The Foleys do not allege that Orange County ever took possession of items belonging to them. R279-R280, AC ¶56.

In response to the argument in their Initial Brief that the County took constructive possession of the aviary, the birds, and toucan business by "its prosecution, its building permit, and its BCC Order" (Initial Brief, p. 38), none of these allegations are sufficient to state a cause of action for conversion. The CEB Order and the BCC's Decision were both affirmed by the Florida Ninth Judicial Circuit. R1466; R1472. There is no cause action for the manner in which a county exercises its governmental functions, including the enforcement of its codes or the issuance of permits. *City of Cape Coral v. Landahl, Brown & Weed Assocs., Inc.*, 470 So. 2d 25, 27 (Fla. 2d DCA 1985).

Thus, this Court should affirm the trial court's dismissal of Count 3 with prejudice.

D. This Court should Affirm the Dismissal with Prejudice of Count 4 for a Taking.

In Count 4 of the Amended Complaint, the Foleys seek monetary damages for a "taking without public purpose, due process or just compensation." R285, AC, ad damnum clause. This theory

purports to allege an inverse condemnation claim. The Foleys seek damages including: (a) the "property right" in the aviary that was demolished; (b) fees paid for the zoning determination, the appeal to the BZA, and the appeal to the BCC; (c) court costs; (d) the "property right" in the value of toucans; (e) cost of FWC licenses; (f) the property right to sell birds at either property; (g) purported lost business income; etc. The basis of the takings claim arises from either the code enforcement action for construction of aviaries without a permit, which permit was issued, or the zoning determination issued at the request of Mr. Foley. R735.

Here, there has been no physical taking or invasion of either the Solandra property[4] or the Cupid property by Orange County. There has there been no actual, physical taking by Orange County of the aviary or any of the toucans. Instead of a physical taking or invasion, the Foleys' takings claim essentially relates to the FWC license to possess and sell toucans and the zoning determination as to whether commercial aviculture is permitted in the R-1A (residential) zone as a principal use, an accessory use, or a home occupation. No zoning

[4] In fact, the Solandra property is listed as the Foleys' address in the Certificate of Service.

determination or special exception was sought for the Cupid property with an A-2 (agricultural) zone.

Neither the CEB Order nor the Zoning Manager's Decision, followed by unsuccessful appeals to the BZA, BCC, Florida Ninth Judicial Circuit, and this Court, rise to the level of a taking. As to the CEB Order, the Florida Ninth Judicial Circuit held that the Foleys had violated the Code sections under which they were charges by erecting structures on their residential property without the proper building or use permits. R1466-R1468. The cost to bring the unpermitted structure into compliance to correct a code violation does not rise to the level of a taking.

Regarding the zoning determination, the Foleys have not alleged and cannot allege that Orange County's action deprived the Foleys of all beneficial uses of their property. *See Pinellas County v. Ashley,* 464 So. 2d 176 (Fla. 2d DCA 1983), *rev. denied,* 475 So. 2d 693 (Fla. 1985) (denial of a building permit did not rise to a taking). *See also, Alachua Land Investors, LLC v. City of Gainesville*, 107 So. 3d 1154, 1158 (Fla. 1st DCA 2013) (Where a developer pursued only one course and failed to address other options, the court held that the case was not ripe for litigation); *Tinnerman v. Palm Beach County*, 641

So. 2d 523 (Fla. 4th DCA 1994) (the claim was not ripe and that the owner failed to establish a taking because the landowners made no effort to ascertain other permitted uses). Simply put, the BCC Decision does not rise to the level of a taking.

Regarding the voluntary payment of fees for a zoning determination, fees to appeal to the BZA or BCC, costs associated with litigation, and costs associated with maintaining FWC licenses, do not rise to the level of a constitutional taking. The voluntary exercise of one's right to administrative and judicial review, and payment of the fees and costs to do so, is not a taking by Orange County. Similarly, the voluntary payment of license fees to maintain an FWC license is not a taking by Orange County.

The "right" the Foleys claim is a "property right" stems from FWC licenses. Florida law is clear that permits and licenses do not create property rights. *See Hernandez v. Dept. of State, Division of Licensing,* 629 So. 2d 205, 206 (Fla. 3d DCA 1993).

In response to the argument that the "taking was without due process," the argument is flawed because there was no taking as a matter of law. The extensive appellate record, including both administrative and judicial review, shows that the Foleys had ample

opportunities to be heard both administratively and judicially. R1462-R1475.

In sum, the trial court properly dismissed with prejudice the Foleys' takings claim.

E. This Court Affirmed the Dismissal with Prejudice of Counts 5 and 6 against the Individual Defendants.

Counts 5 and 6, alleging conversion and civil theft, were directed at the Individual Defendants and are based upon scandalous allegations such as the Individual Defendants "intentionally injured the Foleys" in "bad faith", "to defraud" "without legal justification," and with malice. R286-R287, AC ¶¶71-72. The trial court entered a Final Judgment as to all of the claims against the Individual Defendants (R1416) and found "no allegations in the Amended Complaint that the named [Individual] Defendants acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property." R1416. This Court affirmed on appeal. Since the Foleys' appeal of Counts 5 and 6 to this Court and the Florida Supreme Court have concluded, no additional ruling was required from the trial court as to these counts.

F. Count 7, entitled "Due Process in the alternative," was properly Dismissed with Prejudice.

In Count 7 of the Amended Complaint, the Foleys allege an alternative theory of "Due Process." The Foleys' Initial Brief states that "the trial court found no reason to consider the alternative remedies asserted in Count 7." Initial Brief, pp. 49-50.

Yet, a review of the trial court's Final Judgment shows that Count 7 was considered and denied. The Final Judgment includes citations to *Garcia v. Reyes,* 697 So. 2d 549 (Fla. 4th DCA 1997)[5] and *Fernez v. Calabrese,* 760 So. 2d 1144 (Fla. 5th DCA 2000).[6] In addition, the trial court's Final Judgment rejected Count 7's

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[5] The Court in *Garcia v. Reyes,* 697 So. 2d 549 (Fla. 4th DCA 1997) held that there is no support for the availability of an action for money damages based on a violation of the right to due process as guaranteed by the Florida Constitution. *Id.* at 551 (quoting *Corn v. City of Lauderdale Lakes,* 816 F.2d 1514, 1518 (11th Cir. 1987), *rejected on other grounds, Greenbriar Ltd. v. City of Alabaster,* 881 F.2d 1570, 1574 (11th Cir. 1989)).

[6] In *Fernez v. Calabrese,* 760 So. 2d 1144 (Fla. 5th DCA 2000), the Court found that "the state courts have not recognized a cause of action for violation of procedural due process rights . . . founded *solely* on the Florida Constitution . . . . Unlike the parallel United States constitutional provisions, there are no implementing state statutes like 42 U.S.A.(sic) § 1983 to breath life into the state constitutional provisions." *Id.* at 1146 (concurring opinion Justice Sharp).

alternative Section 1983 claim in a footnote.[7]

Since the Initial Brief does not address the merits of the trial court's dismissal of Count 7, Orange County cannot respond to any argument on their merits. Thus, the Foleys have waived any error in the trial court's ruling as to Count 7.

Hence, this Court should affirm the dismissal with prejudice of Count 7.

IV. THIS COURT SHOULD AFFIRM THE TRIAL COURT'S DENIAL OF LEAVE TO AMEND.

In the Final Judgment, the trial court properly held that "each attempted cause of action could not be cured by filing another

[7] Courts have held that Section 1983 is not available to remedy violations of local land use regulations, particularly where the alleged violation is based on the denial of zoning approvals or a building permit. *Hynes v. Pasco County*, 801 F.2d 1269 (11th Cir. 1986) (dismissing a Section 1983 claim related to the revocation of building permit to construct a kennel because "Hynes has suffered no constitutionally prohibited deprivation of property without due process."); *Foxy Lady*, *Inc. v. City of Atlanta,* 347 F.3d 1232 (11th Cir. 2003) (because an adequate post-deprivation process is in place under state law, no federal procedural due process claim exists); *Lindbloom v. Manatee Cty.*, 808 Fed. Appx. 745, 746 (11th Cir. 2019) (affirming dismissal of Section 1983 claims because "[a]n appeal of a final administrative order to the Florida State Circuit Court satisfies due process because the circuit court has the power to remedy any procedural defects and cure due process violations.").

amended complaint." R1422. "A lower court's decision to permit or deny amendment to pleadings will not be disturbed on appeal in the absent of an abuse of discretion." *Yun Enters. v. Graziani*, 840 So. 2d 420, 422 (Fla. 5th DCA 2003). Here, after careful consideration, the trial court properly determined that amendment would be futile.

CONCLUSION

Orange County, Florida respectfully request that this Court affirm the trial court's dismissal with prejudice of the Amended Complaint against Orange County.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 9, 2021, the foregoing was filed through the eDCA system and served via electronic mail to David W. Foley, Jr. at david@pocketprogram.org; Jennifer T. Foley at jtfoley60@hotmail.com; Ronald Harrop, Esquire, atRHarrop@oconlaw.com, eservice@oconlaw.com, NDeeb@oconlaw.com; and Gail C. Bradford, Esq., at GBradford@drml-law.com; Suzanne@drml-law.com.

/s/ Linda S. Brehmer Lanosa
LINDA S. BREHMER LANOSA
Assistant County Attorney
Florida Bar No. 901296
Linda.Lanosa@ocfl.net
Judith.Catt@ocfl.net
JEFFREY J. NEWTON
County Attorney
ORANGE COUNTY ATTORNEY'S OFFICE
Orange County Administration Center
201 S. Rosalind Avenue, Third Floor
P.O. Box 1393
Orlando, Florida 32802-1393
Telephone: (407) 836-7320
Counsel for Orange County, Florida

CERTIFICATE OF COMPLIANCE WITH RULE 9.210(a)(2)

I hereby certify that this Answer Brief complies with the applicable font and word count limit requirements of Rules 9.045 and 9.210(a)(2) of the Florida Rules of Appellate Procedure

as amended effective January 1, 2021. It is submitted in Bookman Old Style Arial 14-point font. The footnotes are also submitted in Book Old Style 14-pont font.

/s/ Linda S. Brehmer Lanosa
LINDA S. BREHMER LANOSA
Assistant County Attorney
Florida Bar No. 901296
Linda.Lanosa@ocfl.net
Judith.Catt@ocfl.net
Counsel for Orange County, Florida