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.

———————♦———————

APPEAL NO.: 5D21-0233

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

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

———————♦———————

APPELLANTS' REPLY BRIEF

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ARGUMENT

I. Counts One and Two: the County's defense of the trial court is unreasonable.

Can a reasonable person read paragraphs 1-8, 27-30, 32-35, 37, 39, 40, 50, and 53-56, of the Foleys' amended verified complaint (complaint), *Record (R.) pp.270-275, and 278-282*, and find a (1) bona fide dispute, (2) justiciable question, (3) doubt, and (4) present need for declaratory relief?

If the Court finds all four elements, it must reverse and grant relief, *May v. Holley*, 59 So.2d 636, 639 (Fla.1952).

A. There is a bona fide dispute.

Orange County concedes that the Foleys' dispute with the challenged permit and order relates back to what County employees and officials decided to prohibit by interpretation of the code in 2008, and not to what the code expressly prohibited at the time, *Answer pp.4-5, 25-26 quoting R. pp.1473-1474*. But the County argues that this dispute ended, and no new dispute began, with the adoption of Ordinance 2016-19. However, the County's concession defeats its argument; that is, no reasonable person would believe that the deletion of references to "aviculture" from Sections 38-1, 38-77, and 38-79, prohibits an identical interpretation of (1) the retained prohibition of "SIC 0279," or "Animal Specialties, Not Elsewhere Classified," in §38-77, and formerly associated with "Commercial

aviculture," *R. pp.193, 221*, or (2) the new prohibition of "commercial retail sale of animals" in "Condition (101)," of §38-79, applicable to the amended definition of "home occupation," in §38-1, *R. pp.113-114*, *570-571, Initial brief pp.15-18.* There was and there remains a bona fide dispute.

B. There is a justiciable question.

The parties agree there is a justiciable question, but disagree on what it is. The Foleys allege the question is whether their liberty and property rights are infringed by, "ORANGE COUNTY's trespass of the regulatory jurisdiction granted exclusively to FWC by Art. IV, §9, Fla. Const." *Complaint ¶¶ 58, 60, R. pp.281, 282*. The County, relying on *Hernandez v. Dept. of State, Div. of Licensing*, 629 So.2d 205, 206 (3rd DCA 1993), argues the question is instead whether or not David Foley's FWC licenses are property at all, or ever gave the Foleys a property right to sell toucans, *Answer p.30; County motion to dismiss, R. pp.205, 208, 211, 320, 322, 1025, 1028; Court's order, R. p.1422*. The Foleys have already made their rebuttal to this position, *Initial brief pp.44, 45, R. pp.346, 1450, 1453, 1454.*

C. There is doubt.

Orange County does not candidly confess, as it should, that (1) "SIC 0279," or "Animal Specialties, Not Elsewhere Classified," formerly associated with *commercial aviculture*, remains in §38-77, as a prohibited

use throughout the County, *R. pp.193, 221*, and, (2) the amended definition of *home occupation* now broadly prohibits "commercial retail sale of animals," *R. pp.114*, *571.* The Foleys' Counts One and Two specifically request these provisions be tested for conflict with Art. IV, §9, Fla. Const., *R. pp.279-282*. In other words, the County has *again*, as it did in its motion to dismiss, *R. pp.216-217*, deliberately avoided any reference to, or discussion of, the very allegations that specifically identify the broad language that creates doubt as to the Foleys' liberty to do in Orange County what David Foley's FWC licenses otherwise permit/require at the Solandra and Cupid properties.

Also, Orange County ignores Fla. Admin. Code R. 68A-6.0024(1). It requires every person, like David Foley, with an FWC license, per §379.3761, Fla. Stat., to "demonstrate consistent and sustained commercial activity," *Initial brief p.5; R. p,247, 434, 453*. Obedience to this rule may mean disobedience to Ordinance 2016-19, if it includes exotic birds in its prohibitions of "SIC 0279" or "commercial retail sale of animals."

D. There is a bona fide, actual, present need.

Orange County argues, without supporting authority, that only an allegation of an enforcement action after adoption of Ordinance 2016-19 can establish a present need, *Answer pp.20- 21*.

But that was not true in *Dade County v. Benenson*, 326 So.2d 74, 75 (3rd DCA 1976). In that case Dade County by resolution adopted a plan to expand its airport. The resolution authorized implementation of the plan. Benenson had property at the end of a proposed runway and believed the plan would impact development plans he made in reliance upon the preexisting zoning code. Benenson brought his complaint prior to the plan's implementation. Like Orange County, Dade argued Benenson's complaint "relates exclusively to matters which had not yet taken place." But the court found that Benenson's alleged development plans and the county's adoption of the resolution were enough. A similar fact pattern was successfully alleged in *S. Riverwalk Inv. v. City of Ft. Lauderdale*, 934 So.2d 620 (4th DCA 2006): investment backed plans by plaintiff based on existing local regulation; a change in regulation by defendant; and, a reasonable belief the plans and the regulation were in conflict.

Even if Ordinance 2016-19 moots the challenged permit and order and returns the Foleys to the *status quo ante*, the Foleys' allegations satisfy *Benenson* and *Riverwalk*. In paragraphs 32-38 of their complaint the Foleys allege investment backed plans at their Solandra and Cupid properties. The Record demonstrates these plans were consistent with the code at the time; *home occupation* prohibited *commercial kennel* but not *commercial*

aviculture at the Solandra property, *R. pp.667-668*; and, at the Cupid property *commercial kennel* and *commercial aviculture* were both permitted by special exception, *R. pp.192, 193, 649, 650*. As alleged in paragraph 28 of their complaint, the Foleys' plans were consistent with Art. IV, §9, Fla. Const., and seventy-two years of judicial decisions construing that provision. And finally, as alleged in paragraph 40, 41, 54, and 55, of their complaint, County administrators later by permit and order interpreted *home occupation* to prohibit *aviculture* at the Solandra property, and the County by Ordinance 2016-19, now expressly prohibits "commercial retail sale of animals" as *home occupation*, and entirely prohibits "SIC 0279" or "Animal Specialties, Not Elsewhere Classified" throughout the County.

But the Foleys' allegations and argument go beyond *Benenson* and *Riverwalk*. As argued in their initial brief, *pp.15-20*, and on rehearing, *R. pp.1432*-1433, relying upon of *City of Pompano Beach v. Haggerty,* 530 So.2d 1023, 1026 (4th DCA 1988), and as argued below, *R. pp.339-344*, relying upon *Coral Springs Street Systems v. City of Sunrise*, 371 F.3d 1320 (11th Cir. 2004), Ordinance 2016-19 did not wash away the injury of the enforcement action that concluded with the challenged permit and order – Ordinance 2016-19 doubled down and effectively ratified that permit and

order with a countywide prohibition of "SIC 0279" as a primary use and "commercial retail sale of animals" as a "home occupation."

II. The Foleys seek compensatory relief for injuries resulting from County administrators' denial of adequate judicial review.

Orange County mischaracterizes the Foleys as simply unhappy about the result of two separate, unrelated proceedings – a code enforcement proceeding, and a permit/determination proceeding. Two hypotheticals illustrate that the Foleys' complaint, instead, seeks compensation from Orange County because its employees and officials merged enforcement and permitting to create an appellate blind spot they exploited to avoid, and to deny the Foleys, adequate judicial review of the merger's objective.

In the *first hypothetical* the Foleys build an aviary without a building permit, stock it with breeding toucans, and sell the offspring for a few years. Then one-day conscience compels them to apply for a building permit. Permitting denies their application because it has evidence the Foleys are doing what it *believes* violates the *spirit*, if not the *letter*, of its Code, i.e., "raising birds to sell." But permitting shares no evidence of this alleged wrongdoing with code enforcement. So, even if the permit denial is improperly based on an unproven, un-codified code violation – without

enforcement – it takes nothing. The Foleys still have their aviaries, their birds, and their customers. No harm done.

The *second hypothetical* is the same as the first except that the Foleys do not apply for a building permit. Instead, code enforcement prosecutes them for that oversight, and the Code Enforcement Board (CEB) orders them either (1) to get the permit, (2) to destroy the structure, or (3) to pay a $500/day fine until they comply. Now, getting the permit is not voluntary; it is compelled by sanctions. But code enforcement shares no evidence with permitting of any other alleged wrongdoing. So, when the Foleys apply, they meet no objection, and get the permit. No problem! Another happy ending.

In the *first* and *second hypothetical* the enforcement and permit proceedings are *truly* separate; they share no evidence or allegations with each other.

Paragraph 40 of the Foleys' complaint tells a different story, a story of two entangled proceedings with a single purpose – the prosecution of the alleged code violation "raising birds to sell," *R. pp.275-276.*

The Foleys' story follows the course of the *second hypothetical* with one difference. Code enforcement collected evidence of a second alleged violation, the one that initiated its investigation – "raising birds to sell."

Then, instead of prosecuting that violation before the CEB as it did the permit violation, code enforcement shared its evidence of "raising birds" with permitting. In this way code enforcement actively encouraged permitting to refuse the permit, and effectively, and surreptitiously, removed the "get a permit" option from the CEB order, and made "destroy the structure," and the ultimate injunction of "raising birds to sell," *fait accompli*.

In the Foleys' case, code enforcement and permitting were *not* two separate, unrelated proceedings, but were entangled, and collaborated in a single purpose – prosecution of the Foleys for "raising birds to sell. This violated Chs. 11 and 30, Orange County Code (OCC), as alleged, *R. p.276, 277, ¶¶ 43, 47*. It also violated Ch. 162, Fla. Stat., and Art. I, §§ 9 and 18, and Art. VIII, §1(j), Fla. Const.[1] Worse, this collaboration evaded, and denied the Foleys, the full appellate review guaranteed by those statutory and constitutional provisions.

A. *Volume* of process is no substitute for *adequacy* of process.

The County claims the Foleys have forgotten "their unsuccessful appeals of the code enforcement issue [R1466-1467] and the BCC's decision affirming the Zoning Manager's Determination [R1472-1475]," *Answer p.25*. The County argues these "unsuccessful appeals" preclude

[1] Art. VIII, §1(j), Fla. Const. *Violation of ordinances*. Persons violating county ordinances shall be prosecuted and punished as provided by law.

any remedy in negligence, *Id.*, unjust enrichment, *Id. 26*, conversion, *Id. 27*, or takings, *Id. 29-31*.

The County overemphasizes the *volume* of administrative and judicial process because it cannot argue the process was *adequate* to redress the entangled, unauthorized collaboration of enforcement and permitting.

For example, the County cannot argue the Foleys could have made any constitutional challenge to the County's regulation of "raising birds to sell" on appeal of the Code Enforcement Board (CEB) order, *CEB order, R. pp.1463, 1464, Ninth Circuit order, R. pp.1466-1469*. That is because the County knows that "raising birds to sell" was never at issue before the CEB; even though code enforcement's investigation was initiated by an allegation the Foleys were "raising birds to sell," the only issue before the CEB was an "accessory structure" without a permit, *Complaint ¶ 40(a)-(b), R. p.275.* Consequently, the County's violation of Art. IV, §9, could not be challenged on appeal of the CEB order, *Complaint ¶ 52, R. p.278, Response to County's motion to dismiss, R. p.364 †22 and related text*, *Response to individual defendants' motions to dismiss, R. p.1226 †1 and related text*.

Nor can the County argue the Foleys could have interrupted its employees' prosecution of "raising birds to sell" at the permitting counter. That is because the County knows that any petition for intervention by

extraordinary writ – whether mandamus, prohibition, or quo warranto – even one grounded in Art. IV, §9, or Art. VIII, §1(j), Fla. Const., and urging the "futility" exception to the "exhaustion of administrative remedies" doctrine – would have failed without a final administrative order by the Board of County Commissioners (BCC). Indeed, such an argument would have required reversal of *Key Haven Assoc. Enter. v. Bd. of Trustees of Internal Imp.Trust Fund*, 427 So.2d 153,158 (Fla.1982), which still insists, "The executive branch has the duty, and must be given the opportunity, to correct its own errors in drafting a facially unconstitutional rule." Consequently, the County employees' prosecution of "raising birds to sell" at the permitting counter could not have been interrupted by extraordinary writ, *Complaint ¶ 52, R. p.278, Response to County's motion to dismiss, R. p. 348 †3, p.363 †20, and related text*, *Response to individual defendants' motions to dismiss, R. p.1226 †3, p.1261 †74, p.1262 †75, and related text.*

Likewise, the County cannot argue the Foleys could have defended their property rights on certiorari of the BCC order, *BCC order, R. p.1471, Ninth Circuit order, R. pp.1472-1475*. That is because the County knows certiorari does not permit a full defense of disputed property rights – all such rights are grounded in and protected by the constitution, and constitutional questions are not heard on certiorari of local administrative

action. The County employees' permit exaction "Pet Birds Only – No Commercial Activity," *R. p.741-742,* and the County officials' orders upholding that exaction, *R. p.1471*, could not be challenged on certiorari as violating Art. IV, §9, Fla. Const. Nor could the proceeding be challenged as violating Art. VIII, §1(j), Fla. Const. To argue otherwise would require reversal of a host of cases in the shadow of *Key Haven* that prohibit consideration of facial or as-applied constitutional questions on certiorari review of local administrative action,[2] *Response to motions to dismiss, R. p.406 †67*. This is precisely what the Ninth Circuit said on certiorari of the BCC order: "Petitioners assertion that sections of the Orange County Zoning Code are unconstitutional is one which can only be made in a separate legal action, not on certiorari review. See *Miami-Dade County v. Omnipoint Holdings, Inc.*, 863 So.2d 195 (Fla. 2003)," *Foley v. Orange County*, 08-CA-5227-0 (Fla. Ninth Circuit 2009), *R. p.1474*. Consequently, as paragraph 52 of the Foleys' complaint alleges, and the County

[2] *Nannie Lee's Strawberry Mansion, Etc. v. Melbourne*, 877 So.2d 793 (5th DCA 2004); *Wilson v. County of Orange*, 881 So.2d 625 (5th DCA 2004), citing *Key Haven Assoc. v. Bd. of Trustees of Internal Imp.Trust Fund*, 427 So.2d 153,158 (Fla.1982); *Miami-Dade County v. Omnipoint Holdings, Inc.,* 863 So.2d 375 (3rd DCA 2003); *First Baptist Church of Perrine v. Miami-Dade County,* 768 So.2d 1114, 1115 †1 (3rd DCA 2000), rev. den., 790 So.2d 1103 (2001); *Nostimo, Inc. v. Clearwater,* 594 So.2d 779 (2nd DCA 1992); *Indialantic v. Nance*, 400 So.2d 37 (5th DCA 1981); approved, 419 So.2d 1041 (Fla.1982); *Sun Ray Homes, Inc. v. County of Dade*, 166 So.2d 827, 829 (3rd DCA 1964).

employees and officials well knew, their violation of Art. IV, §9, could not have been challenged on certiorari of the BCC order, *see also Response to County's motion to dismiss, R. p.363 †19 and associated text, Response to individual defendants motions to dismiss, R. p.1226 †2 and associated text.*

In sum, affirmance of the CEB and BCC orders does not mean the Foleys' have already received *adequate* process for the interests they seek to vindicate by their claims in negligence, conversion, unjust enrichment, and takings. Absent an opportunity to challenge the defendants' violation of Art. IV, §9, on appeal of the CEB order, or to interrupt the administrative process by extraordinary writ, or to assert constitutional challenges on certiorari review, the *volume* of process did not provide *adequate* process. Indeed, the suffocating *volume* of process that Orange County's employees and officials abused, smothered the Foleys' challenge, and is the very evidence that proves their deliberate, continuing evasion of judicial review.

The remedy is now in damages.

B. Violation of a constitutional or statutory duty, constraint, or right is not a "governmental function" immune from suit.

Orange County argues that – even if it did violate the constitutional restraints of Art. IV, §9, and Art. VIII, §1(j), and the rights guaranteed the Foleys in Art. I, §§ 2, 9, 18, and 23 – it owes "no duty of care in how it carries out its governmental functions," like "the enforcement of its codes or

the issuance of permits," *Answer pp.22 and 24*, and the County further argues that "to the extent any such duty can be construed, it is a duty the exercise of which falls under` the protections of sovereign immunity," *Answer p.23*.

However, the County cannot support this conclusion with a Florida precedent that makes violation of the state constitution a "governmental function," or otherwise immune. That is because, as the Foleys argue, *Initial brief pp.32-34*, Florida courts have reached the opposite, more rational, and more defensible conclusion – "Sovereign immunity does not exempt the [County] from a challenge based on violation of the federal or state constitutions, because any other rule self-evidently would make constitutional law subservient to the [County's] will." *Department of Revenue v. Kuhnlein*, 646 So.2d 717, 721 (Fla. 1994). Consequently, the merged enforcement/permitting prosecution alleged in this case is not an immune "governmental function," because it was an unauthorized prosecution that violated Art. VIII, §1(j), Fla. Const., and an unauthorized regulation of "wild animal life" that violated Art. IV, §9, Fla. Const., and consequently an invasion of rights guaranteed by Art. I, §§ 2, 9, 18, and 23, Fla. Const.

Furthermore, Art. I, §18, and Art. VIII, §1(j), Fla. Const., command a statutory standard of conduct the Foleys allege Orange County permitted its employees and officials to ignore. These constitutional provisions require the Court to measure the conduct of Orange County, and its employees and officials, by the standard established in Ch. 162, Fla. Stat., and Ch. 11, OCC. This standard, as the Foleys allege, *R. 277,* ¶*47*, and argue, *Initial brief p.27*, defines "the standard of conduct of a reasonable man" for the purposes of negligence because its purpose is to protect the rights invaded, §286 When Standard of Conduct Defined by Legislation or Regulation Will Be Adopted, §874A Tort Liability for Violation of Legislative Provisions (*R. pp.290, 1242 †45*),[3,4] Restatement (Second) of Torts (1979).

III. The Foleys' initial brief presents counter-argument to all disputed points in the County's answer brief.

The Foleys specifically pinpoint where the Court will find evidence or argument to resolve the following disputed points: (1) in 2007, the Code,

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[3] §874A: When a legislative provision protects a class of persons by proscribing or requiring certain conduct but does not provide a civil remedy for the violation, the court may if it determines that the remedy is appropriate in furtherance of the purpose of the legislation and needed to assure the effectiveness of the provision, accord to an injured member of the class a right of action, using a suitable existing tort action or a new cause of action analogous to an existing tort action.

[4] "[T]he authors [of the Restatement] adopted section 874A … to supplement the approach previously suggested by section 286 of the Restatement … " *Dept. of Corr. v. Abril*, 969 So.2d 201, 217 (Fla. 2007).

per §38-74(b)(1), only expressly prohibited *commercial aviculture* as a primary use, *R. pp.539, 670*; (2) Count 6 for civil theft can be brought against the County because it was noticed and pled, *Id. p.272, ¶ 6*, *and p.283, ¶ 62(c)*, the individual defendants were dismissed, not the count, *Id. 1418*, and the County has forfeit immunity, *Initial brief pp.47-49*; (3) Costs and fees for vindicating rights are recoverable in unjust enrichment and/or takings where due process is denied by an improper proceeding with improper purpose, *Id. pp.34-36, 45*; (4) Constructive dispossession is conversion, and conversion of *substantially* all beneficial use is a takings, *Id. 36-47*; and, (5) Should there be no other remedy, the Foleys have properly urged reversal of the trial court's ruling on Count Seven, *Id. pp.49-50*, *R. pp.372-382.*

CONCLUSION

WHEREFORE plaintiffs renew the request for relief in their initial brief.

CERTIFICATE OF SERVICE

Appellants certify that on August 30, 2021, the foregoing was electronically filed with the Clerk of the Court and served to the following:

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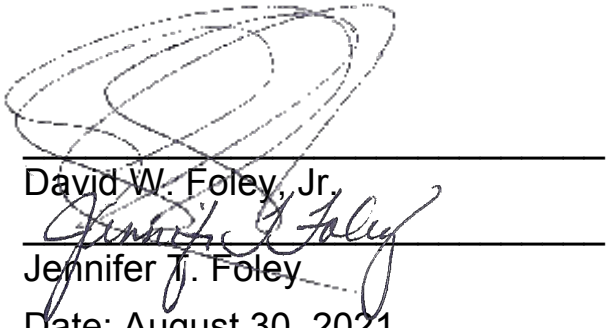
CERTIFICATE OF COMPLIANCE

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



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