IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

CASE NO: 2016-CA-007634-O
DCA NO: 5D21-233

DAVID W FOLEY, JR, ET AL.,

-VS-

ORANGE COUNTY, ET AL.,
_____/

RECORD ON APPEAL

Certificate of Compliance
This document is in conformity with all font and word count requirements per F.R.A.P. 9.045

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Total Volumes: <_ApplTotalVolumes_>

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CIVIL CASE SUMMARY

CASE SUMMARY

CASE NO. 2016-CA-007634-O

FOLEY, DAVID W, JR et al.vs.ORANGE COUNTY et al.

§ Location: **Div 35**
§ Judicial Officer: **Weiss, Kevin B.**
§ Filed on: **08/25/2016**
§ Case Number History:
§ DCA Number: **5D21-233**
§ Uniform Case Number: **482016CA007634A001OX**

CASE INFORMATION

Case Type: **CA - Constitutional Challenge - statute or ordinance**

DATE — CASE ASSIGNMENT

Current Case Assignment

Case Number	2016-CA-007634-O
Court	Div 35
Date Assigned	02/15/2021
Judicial Officer	Weiss, Kevin B.

PARTY INFORMATION

		Lead Attorneys
Plaintiff	**FOLEY, DAVID W, JR**	
	FOLEY, JENNIFER T	
Defendant	**AZAM, ASIMA** fj	
	BOLDIG, TIM fj	**NETCHER, ERIC J, Esquire** *Retained* 407-789-1830(W)
	BRUMMER, FRED fj	
	CROTTY, RICHARD fj	
	DETOMA, FRANK fj	
	FERNANDEZ, MILDRED fj	
	GORDON, MITCH fj	**NETCHER, ERIC J, Esquire** *Retained* 407-789-1830(W)
	GOULD, TARA fj	**NETCHER, ERIC J, Esquire** *Retained* 407-789-1830(W)
	HOSSFIELD, CAROL fj	**NETCHER, ERIC J, Esquire** *Retained* 407-789-1830(W)
	JACOBS, TERESA fj	
	LOVE, RODERICK fj	

CASE SUMMARY

CASE NO. 2016-CA-007634-O

ORANGE COUNTY
od

BREHMER-LANOSA, LINDA SUE, Esquire
Retained
407-836-7320(W)

RELVINI, ROCCO
fj

NETCHER, ERIC J, Esquire
Retained
407-789-1830(W)

RICHMAN, SCOTT
fj

ROBERTS, JOE
fj

ROBINSON, MARCUS
fj

RUSSELL, TIFFANY MOORE
fj

SEGAL, BILL
fj

SMITH, PHIL
fj

NETCHER, ERIC J, Esquire
Retained
407-789-1830(W)

STEWART, LINDA
fj

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02/15/2021	Mandate Affirmed *5D19-2635*	
02/09/2021	Amended Directions to the Clerk	
02/09/2021	Invoice *$248.50 - AMENDED (EMAILED APPELLANT)*	
02/05/2021	Directions to Clerk	
01/28/2021	Directions to Clerk	
01/26/2021	Invoice *$73.50 (EMAILED APPELLANT)*	
01/20/2021	Acknowledgment of Appeal *5D21-233*	
01/19/2021	Notice of Change Party: Defendant SMITH, PHIL; Defendant HOSSFIELD, CAROL; Defendant GORDON, MITCH; Defendant RELVINI, ROCCO; Defendant GOULD, TARA; Defendant BOLDIG, TIM *OF ATTORNEY OF RECORD - AMENDED*	
01/18/2021	Notice of Appeal	
01/15/2021	Notice of Change	

	OF ATTORNEY OF RECORD FOR DEFENDANT	
01/13/2021	Notice Appearance of Counsel Party: Defendant ORANGE COUNTY; Defendant SMITH, PHIL; Defendant HOSSFIELD, CAROL; Defendant GORDON, MITCH; Defendant RELVINI, ROCCO; Defendant GOULD, TARA; Defendant BOLDIG, TIM *DESIGNATION OF EMAIL ADDRESS*	
12/23/2020	Amended Notice of Hearing *05/04/2021 at 9:30 am*	
12/23/2020	Notice of Hearing *on Tuesday, May 4, 2020, at 9:30 a.m.*	
12/18/2020	Order Denying *Motion for Rehearing & Motion to Amend*	
12/14/2020	Response *IN OPPOSITION TO PLAINTIFFS' MOTION FOR REHEARING AND LEAVE TO AMEND*	
12/10/2020	Motion to Tax Costs *by Orange County, Florida*	
11/25/2020	Motion for Rehearing *and leave to amend*	
11/18/2020	Notice Appearance of Counsel Party: Defendant ORANGE COUNTY *AND DESIGNATION OF E-MAIL ADDRESSES*	
11/10/2020	**Order of Dismissal** (Judicial Officer: Strowbridge, Patricia L) Party (ORANGE COUNTY) and FJ in favor of deft; plaintiffs shall take nothing by this action and deft shall go hence without day sent to e-recording	
11/10/2020	Order of Dismissal Party: Defendant ORANGE COUNTY *and FJ in favor of defendant*	*Instrument# 20200594239*
05/15/2020	Copies of Appeal Index Mailed *19-2635 - SUPPLEMENTAL RECORD*	
04/28/2020	Invoice *$35.00 - SUPPLEMENTAL*	
04/28/2020	Directions to Clerk	
04/27/2020	Notice Appearance of Counsel Party: Defendant SMITH, PHIL; Defendant HOSSFIELD, CAROL; Defendant GORDON, MITCH; Defendant RELVINI, ROCCO; Defendant GOULD, TARA; Defendant BOLDIG, TIM *and DESIGNATION OF ELECTRONIC MAIL ADDRESSES*	

04/27/2020	Order to Supplement the Record on Appeal *GRANTED AND DUE BY 5/18*	
10/17/2019	Copies of Appeal Index Mailed *19-2635 - RECORD*	
10/15/2019	Amended Directions to the Clerk *and STATEMENT OF THE JUDICIAL ACTS TO BE REVIEWED per RULE 9.200(a)(2)*	
10/11/2019	**Amended Final Judgment** (Judicial Officer: Strowbridge, Patricia L) Comment (in favor of defendants; pltf takes nothing sent to e-rec) Party (SMITH, PHIL; HOSSFIELD, CAROL; GORDON, MITCH; RELVINI, ROCCO; GOULD, TARA; BOLDIG, TIM; DETOMA, FRANK; AZAM, ASIMA; LOVE, RODERICK; RICHMAN, SCOTT; ROBERTS, JOE; ROBINSON, MARCUS; CROTTY, RICHARD; JACOBS, TERESA; BRUMMER, FRED; FERNANDEZ, MILDRED; STEWART, LINDA; SEGAL, BILL; RUSSELL, TIFFANY MOORE)	
10/11/2019	Amended Final Judgment Party: Defendant SMITH, PHIL; Defendant HOSSFIELD, CAROL; Defendant GORDON, MITCH; Defendant RELVINI, ROCCO; Defendant GOULD, TARA; Defendant BOLDIG, TIM; Defendant DETOMA, FRANK; Defendant AZAM, ASIMA; Defendant LOVE, RODERICK; Defendant RICHMAN, SCOTT; Defendant ROBERTS, JOE; Defendant ROBINSON, MARCUS; Defendant CROTTY, RICHARD; Defendant JACOBS, TERESA; Defendant BRUMMER, FRED; Defendant FERNANDEZ, MILDRED; Defendant STEWART, LINDA; Defendant SEGAL, BILL; Defendant RUSSELL, TIFFANY MOORE	*Instrument# 20190658648*
10/11/2019	Order Denying *Pltfs Motion for Rehearing*	
10/08/2019	Receipt *$147.00*	
10/07/2019	Transcript of Proceedings *5/28/19*	
09/24/2019	Reporter's Acknowledgment of Designation	
09/23/2019	Designation to Court Reporter *AMENDED*	
09/17/2019	Reporter's Acknowledgment of Designation	
09/17/2019	Invoice *$147.00 - AMENDED PER DIRECTIONS*	
09/16/2019	Transcript Filed *12/11/17*	
09/12/2019	Designation to Court Reporter	
09/12/2019	Designation to Court Reporter	

09/12/2019	Directions to Clerk
09/09/2019	Invoice *$252.00*
09/09/2019	Acknowledgment of Appeal *5D19-2635*
09/06/2019	Motion for Order *TACING ADDITIONAL APPELLATE COSTS*
09/06/2019	Order *supplemental order on appellate costs in case*
09/03/2019	Motion to Tax Costs *by Phil Smith, Rocco Relvini, Carol Hossfield*
09/03/2019	Motion to Tax Costs *by ORANGE COUNTY*
09/03/2019	Notice of Appeal
08/21/2019	Notice
08/16/2019	Motion to Tax Costs *FOR ORDER ADDITIONAL APPELLATE COSTS*
08/12/2019	Motion for Rehearing
08/02/2019	Motion for Sanctions *Phil Smith, Rocco Relvini, Carol Hossfield Tara Gould, Tim Boldig, and Mitch Gordon*
08/02/2019	Final Judgment Party: Plaintiff FOLEY, DAVID W, JR; Plaintiff FOLEY, JENNIFER T
07/24/2019	DCA Order *AMENDED MOTION IS DENIED*
06/10/2019	Final Order *on appellate costs in case 5D18-145*
05/30/2019	Court Minutes
05/28/2019	**Motion** (2:15 PM) (Judicial Officer: Strowbridge, Patricia L ;Location: Hearing Room 20-B)
05/28/2019	**Motion** (11:30 AM) (Judicial Officer: Strowbridge, Patricia L ;Location: Hearing Room 20-B)
05/20/2019	Response *The Employee Defendants Motion to Strike the Amended Complaint, Request for Judicial Notice, and Motion to Dismiss This Action With Prejudice and The Official Defendants Amended Motion to Dismiss*

05/20/2019	Notice *OF JOINDER IN THE OFFICIAL DEFENDANTS RESPONSE TO THE FOLEYS MOTION TO TAX APPELLATE COSTS*
05/17/2019	Response *TO THE FOLEYS MOTION TO TAX APPELLATE COSTS*
05/09/2019	Notice of Hearing *May 28, 2019 at 2:15 p.m.*
05/09/2019	Notice of Hearing *May 28, 2019 at 11:30 a.m.*
05/08/2019	Motion to Dismiss *(AMENDED) WITH PREJUDICE THE OFFICIAL DEFENDANTS*
05/07/2019	**Ex Parte** (8:30 AM) (Judicial Officer: Strowbridge, Patricia L ;Location: Hearing Room 20-B)
05/07/2019	Order *on Hearing Scheduled for 4/4/18*
05/07/2019	Court Minutes
05/03/2019	Motion to Dismiss *the amended complaint, request for judicial notice, and motion to dismiss this action with prejudice*
04/29/2019	Amended Notice of Hearing *Tuesday, May 7, 2019, at 8:30 a.m*
04/19/2019	Notice of Hearing *May 7, 2019, at 8:30 a.m.*
04/18/2019	Petition or Motion to Strike *the Amended Complaint Renewed Request for Judicial Notice and Motion to Dismiss this Action with Prejudice*
04/08/2019	Motion to Tax Costs *(amended) by DAVID AND JENNIFER FOLEY*
04/08/2019	Motion *FOR RELIEF FROM JUDGEMENT AND FOR OTHER RELIEF by DAVID AND JENNIFER FOLEY*
04/08/2019	Notice Appearance of Counsel Party: Defendant SMITH, PHIL; Defendant HOSSFIELD, CAROL; Defendant GORDON, MITCH; Defendant RELVINI, ROCCO; Defendant GOULD, TARA; Defendant BOLDIG, TIM
03/28/2019	Mandate Reversed & Remanded *5D18-145. C/ JA AND CIVIL*

01/25/2019	DCA Order *APPELLEE'S MOTION TO RECALL MANDATE IS GRANTED AND MANDATE ISSUED 12/17/18 IS WITHDRAWN PENDING SUPREME COURT'S DISPOSTION*
01/23/2019	Motion *(AMENDED) FOR RELIEF FROM JUDGMENT*
01/21/2019	Motion *FOR RELIEF FROM JUDGEMENT - PLAINTIFFS DAVID AND JENNIFER FOLEY*
01/16/2019	Motion to Tax Costs
12/17/2018	Mandate Reversed & Remanded *5D18-0145 cc to civ and ja*
04/04/2018	**Motion** (10:00 AM) (Judicial Officer: Higbee, Heather L ;Location: Hearing Room 20-B)
04/04/2018	Court Minutes
03/27/2018	Response *to the official defendants' motion for $57.105 sanctions filed january 4, 2017*
03/19/2018	Amended Notice of Hearing *April 4, 2018, at 10:00 a.m.*
03/19/2018	Motion to Tax Costs
03/16/2018	Initial Brief *COPY FROM DCA*
02/28/2018	Copies of Appeal Index Mailed
02/28/2018	5DCA Record on Appeal *18-145-RECORD*
02/19/2018	Transcript of Proceedings *09/06/2017*
01/25/2018	Receipt *$168.00*
01/18/2018	Notice of Hearing *on 4/4/18 at 10am*
01/18/2018	Invoice *$168.00*
01/17/2018	Acknowledgment of Appeal *5D18-145*
01/15/2018	Designation to Court Reporter

CASE SUMMARY

CASE NO. 2016-CA-007634-O

01/11/2018	Designation to Court Reporter	
01/11/2018	Directions to Clerk	
01/08/2018	Notice of Appeal	
12/12/2017	Notice of Change of Address	
12/12/2017	Order on Plaintiff's Motion *for rehearing/reconsideration*	
12/11/2017	**Motion** (3:00 PM) (Judicial Officer: Higbee, Heather L ;Location: Hearing Room 20-B)	
12/11/2017	Court Minutes *Amended Court Minutes*	
12/11/2017	Court Minutes	
12/10/2017	Motion *PLAINTIFFS MOTION FOR JUDICIAL NOTICE OF MAY 24, 2017 FWC MEMORANDUM*	
12/07/2017	Amended Notice of Hearing *on 12/11/17 at 3pm*	
12/07/2017	Order Denying *Pltfs Motion for Rehearing*	
12/06/2017	Notice Cancellation of Hearing *12/11/2017 3:00pm*	
12/05/2017	Response *PLAINTIFFS RESPONSE TO THE LIMITATIONS DEFENSE IN ORANGE COUNTY'S AMENDED MOTION TO DISMISS*	
11/20/2017	Motion to Dismiss *PLAINTIFFS AMENDED COMPLAINT PURSUANT TO FLORIDA RULES OF CIVIL PROCEURE 1.140(b)(1) and (6), AMENDED SO AS TO RAISE STATUTE OF LIMITATIONS DEFENSE - Orange County, Florida*	
11/17/2017	Motion for Rehearing	
11/13/2017	**Final Judgment** (Judicial Officer: Higbee, Heather L) Party (SMITH, PHIL; HOSSFIELD, CAROL; GORDON, MITCH; RELVINI, ROCCO; GOULD, TARA; BOLDIG, TIM) in favor of deft's; pltf's shall take nothing by this action and deft's shall go hence without day sent to e-recording	
11/13/2017	Final Judgment	*Instrument# 20170626107*
11/09/2017	Motion for Reconsideration	

	BY DAVID AND JENNIFER FOLEY
11/09/2017	Motion for Rehearing *BY DAVID AND JENNIFER FOLEY*
11/09/2017	Motion to Tax Costs
11/03/2017	Motion for Final Judgment
10/25/2017	Order Granting *"The Official defts' Motion to Strike The Amended Complaint, Renewed Request for Judicial Notice, And Motion to Dismis This Action With Prejudice" and Order Granting "defts Phil Smith, Rocco Relvini,*
09/15/2017	Notice of Hearing *December 11 2017 @ 3:00pm*
09/06/2017	**Motion** (4:00 PM) (Judicial Officer: Higbee, Heather L ;Location: Hearing Room 20-B)
08/30/2017	Motion *FOR JUDICIAL NOTICE OF ORANGE COUNTY SITE-PLAN AND BUILDING PERMIT ISSUED NOVEMBER 30, 2007 by DAVID AND JENNIFER FOLEY*
08/30/2017	Motion *for JUDICIAL NOTICE OF THE ORDER OF ORANGE COUNTY S BOARD OF COUNTY COMMISSIONERS FEBRUARY 19, 2008, IN CASE ZM-07-10-010 by DAVID AND JENNIFER FOLEY*
08/22/2017	*CANCELED* **Motion** (1:30 PM) (Judicial Officer: Higbee, Heather L ;Location: Hearing Room 20-B) *Cancelled*
08/22/2017	Notice of Hearing *on 9/6/2017 at 4pm*
07/14/2017	Notice *DEFENDANT CAROL HOSSFIELD n/k/a CAROL KNOX s NOTICE OF INCORPORATION*
07/03/2017	Notice of Hearing *8/22/2017 AT 130PM RM 20B*
06/30/2017	Notice of Designation of Email Address
05/25/2017	Motion *PLAINTIFFS MOTION FOR JUDICIAL NOTICE OF ORD. No. 2008-06*
05/25/2017	Motion *PLAINTIFFS response in objection to orange county's motion for judicial notice, and plaintiff's motion for judicial notice of ord No 2016-19*
05/24/2017	Response *to defendants motions to dismiss*

05/22/2017	Notice of Hearing *AUGUST 1 2017 @ 9:30AM*
05/22/2017	Motion *plaintiffs' motion for judicial notice*
05/22/2017	Response *PLAINTIFFS RESPONSE IN OBJECTION TO OFFICIALS AND EMPLOYEES MOTIONS FOR JUDICIAL NOTICE*
04/19/2017	*CANCELED* **Motion** (11:00 AM) (Judicial Officer: Higbee, Heather L ;Location: Hearing Room 20-B) *Cancelled*
04/19/2017	Motion *TO CANCEL 4/19 HEARING AND TO COMPEL DEREK ANGELL TO COMPLY WITH FLA R CIV P 1.270 ADMIN ORDER 2012-03 (6) & FLA R JUD ADMIN 2.505(E)- David and Jennifer Foley*
04/17/2017	Notice Cancellation of Hearing *4/19/17 @ 11:00 Am*
04/16/2017	Motion *(Pltfs) to Cancel Hearing & to Compel*
04/12/2017	Notice of Hearing *APRIL 19 2017 @ 11:00AM*
03/08/2017	Notice of Filing *THE OFFICIAL DEFENDANTS MOTION FOR 57.105 SANCTIONS*
03/07/2017	Motion to Dismiss *defandant Orange County FL*
03/07/2017	Motion to Dismiss */MOTION TO STRIKE*
03/06/2017	Motion to Dismiss *THE OFFICIAL DEFENDANTS' MOTION TO STRIKE THE AMENDED COMPLAINT, RENEWED REQUEST FOR JUDICIAL NOTICE AND MOTION TO DISMISS ACTION*
02/15/2017	Amended Complaint *for Declaratory and Injunctive Relief, Constitutional and Common Law Tort, Civil Theft, and Demand for Jury Trial*
01/27/2017	Notice *OF INCORPORATION*
01/25/2017	Summons Returned Served *Upon Marcus Robinson*
01/25/2017	Summons Returned Served *Upon Mitch Gordon*

01/25/2017	Summons Returned Served *Upon Frank Detoma*
12/28/2016	Affidavit of Service *ROCCO RELVINI*
12/20/2016	Affidavit of Service *as to Richard Crotty*
12/20/2016	Affidavit of Service *as to Phil Smith*
12/20/2016	Affidavit of Service *as to Bill Segal*
12/20/2016	Affidavit of Service *as to Roderick Love*
12/20/2016	Affidavit of Service *as to Carol Hossfield*
12/20/2016	Affidavit of Service *as to Fred Brummer*
12/20/2016	Notice of Designation of Email Address
12/20/2016	Motion to Dismiss *by defts Phil Smith, Rocco Relvini, Tara Gould and Tim Boldig*
12/19/2016	Exhibit(s)
12/19/2016	Exhibit(s)
12/19/2016	Exhibit(s)
12/19/2016	Exhibit(s)
12/19/2016	Motion to Dismiss *MOTION TO STRIKE, AND REQUEST FOR JUDICIAL NOTICE*
12/19/2016	Motion for Enlargement/Extension of Time
12/08/2016	Summons Returned Served *LINDA STEWART*
12/08/2016	Summons Returned Served *TIFFANY RUSSELL*
12/08/2016	Summons Returned Served

	MARCUS ROBINSON
12/08/2016	Summons Returned Served *JOE ROBERTS*
12/08/2016	Summons Returned Served *SCOTT RICHMAN*
12/08/2016	Summons Returned Served *TERESA JACOBS*
12/08/2016	Summons Returned Served *TARA GOULD*
12/08/2016	Summons Returned Served *MILDRED FERNANDEZ*
12/08/2016	Summons Returned Served *TIM BOLDIG*
12/08/2016	Summons Returned Served *ASIMA AZAM*
12/02/2016	Answer Party Filed: Defendant ROBINSON, MARCUS
11/23/2016	Summons Issued Electronically as to Party: Defendant SEGAL, BILL *E Mail Attorney*
11/23/2016	Summons Issued Electronically as to Party: Defendant BRUMMER, FRED *E Mail Attorney*
11/18/2016	Correspondence
11/18/2016	Alias Summons Issued Party: Defendant BOLDIG, TIM
11/18/2016	Alias Summons Issued Party: Defendant DETOMA, FRANK
11/18/2016	Alias Summons Issued Party: Defendant GORDON, MITCH
11/14/2016	Correspondence
11/14/2016	Alias Summons Issued Party: Defendant AZAM, ASIMA
11/14/2016	Alias Summons Issued Party: Defendant CROTTY, RICHARD

11/14/2016	Alias Summons Issued Party: Defendant FERNANDEZ, MILDRED
11/14/2016	Alias Summons Issued Party: Defendant HOSSFIELD, CAROL
11/14/2016	Alias Summons Issued Party: Defendant JACOBS, TERESA
11/14/2016	Alias Summons Issued Party: Defendant LOVE, RODERICK
11/14/2016	Alias Summons Issued Party: Defendant RELVINI, ROCCO
11/14/2016	Alias Summons Issued Party: Defendant RICHMAN, SCOTT
11/14/2016	Alias Summons Issued Party: Defendant ROBERTS, JOE
11/14/2016	Alias Summons Issued Party: Defendant ROBINSON, MARCUS
11/14/2016	Alias Summons Issued Party: Defendant RUSSELL, TIFFANY MOORE
11/14/2016	Alias Summons Issued Party: Defendant SMITH, PHIL
11/14/2016	Alias Summons Issued Party: Defendant STEWART, LINDA
11/14/2016	Alias Summons Issued Party: Defendant GOULD, TARA
11/10/2016	Correspondence *can't issue need payment*
11/07/2016	Summons Returned Unserved *LINDA STEWART*
11/07/2016	Summons Returned Unserved *PHIL SMITH*
11/07/2016	Summons Returned Unserved *BILL SEGAL*
11/07/2016	Summons Returned Unserved *MARCUS ROBINSON*

11/07/2016	Summons Returned Unserved *TIFFANY RUSSELL*
11/07/2016	Summons Returned Unserved *JOE ROBERTS*
11/07/2016	Summons Returned Unserved *SCOTT RICHMAN*
11/07/2016	Summons Returned Unserved *ROCCO RELVINI*
11/07/2016	Summons Returned Unserved *RODERICK LOVE*
11/07/2016	Summons Returned Unserved *TERESA JACOBS*
11/07/2016	Summons Returned Unserved *CAROL HOSSFIELD*
11/07/2016	Summons Returned Unserved *TARA GOULD*
11/07/2016	Summons Returned Unserved *MITCH GORDON*
11/07/2016	Summons Returned Unserved *MILDRED FERNANDEZ*
11/07/2016	Summons Returned Unserved *FRANK DETOMA*
11/07/2016	Summons Returned Unserved *RICHARD CROTTY*
11/07/2016	Summons Returned Unserved *FRED BRUMMER*
11/07/2016	Summons Returned Unserved *TIM BOLDIG*
11/07/2016	Summons Returned Unserved *ASIMA AZAM*
10/25/2016	Motion to Dismiss *(Orange County, Florida)*
10/25/2016	Motion *FOR JUDICIAL NOTICE (Orange County, Florida)*

09/13/2016	Waiver *of service of process*
08/30/2016	Summons Issued Electronically as to Party: Defendant STEWART, LINDA
08/30/2016	Summons Issued Electronically as to Party: Defendant SMITH, PHIL
08/30/2016	Summons Issued Electronically as to Party: Defendant SEGAL, BILL
08/30/2016	Summons Issued Electronically as to Party: Defendant RUSSELL, TIFFANY MOORE
08/30/2016	Summons Issued Electronically as to Party: Defendant ROBINSON, MARCUS
08/30/2016	Summons Issued Electronically as to Party: Defendant ROBERTS, JOE
08/30/2016	Summons Issued Electronically as to Party: Defendant RICHMAN, SCOTT
08/30/2016	Summons Issued Electronically as to Party: Defendant RELVINI, ROCCO
08/30/2016	Summons Issued Electronically as to Party: Defendant ORANGE COUNTY
08/30/2016	Summons Issued Electronically as to Party: Defendant LOVE, RODERICK
08/30/2016	Summons Issued Electronically as to Party: Defendant JACOBS, TERESA
08/30/2016	Summons Issued Electronically as to Party: Defendant HOSSFIELD, CAROL
08/30/2016	Summons Issued Electronically as to Party: Defendant GOULD, TARA
08/30/2016	Summons Issued Electronically as to Party: Defendant GORDON, MITCH
08/30/2016	Summons Issued Electronically as to Party: Defendant FERNANDEZ, MILDRED
08/30/2016	Summons Issued Electronically as to Party: Defendant DETOMA, FRANK

08/30/2016	Summons Issued Electronically as to Party: Defendant CROTTY, RICHARD
08/30/2016	Summons Issued Electronically as to Party: Defendant BRUMMER, FRED
08/30/2016	Summons Issued Electronically as to Party: Defendant BOLDIG, TIM
08/30/2016	Summons Issued Electronically as to Party: Defendant AZAM, ASIMA
08/25/2016	Complaint
08/25/2016	Civil Cover Sheet
08/25/2016	Case Initiated

DATE	FINANCIAL INFORMATION	
	Defendant ROBINSON, MARCUS	
	Total Charges	1.00
	Total Payments and Credits	1.00
	Balance Due as of 3/9/2021	**0.00**
	Defendant SMITH, PHIL	
	Total Charges	35.00
	Total Payments and Credits	35.00
	Balance Due as of 3/9/2021	**0.00**
	Plaintiff FOLEY, DAVID W, JR	
	Total Charges	1,702.00
	Total Payments and Credits	1,702.00
	Balance Due as of 3/9/2021	**0.00**

FORM 1.997. CIVIL COVER SHEET

The civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law. This form shall be filed by the plaintiff or petitioner for the use of the Clerk of the Court for the purpose of reporting judicial workload data pursuant to Florida Statutes section 25.075.

I. CASE STYLE

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, FLORIDA

Case No.:_____
Judge: _____

David W Foley Jr, Jennifer T Foley
Plaintiff

vs.

Orange County, Phil Smith, Carol Hossfield, Mitch Gordon, Rocco Relvini, Tara Gould, Tim Boldig, Frank DeToma, Asima Azam, Roderick Love, Scott Richman, Joe Roberts, Marcus Robinson, Richard Crotty, Teresa Jacobs, Fred Brummer, Mildred Fernandez, Linda Stewart, Bill Segal, Tiffany Moore Russell
Defendant

II. TYPE OF CASE

- ☐ Condominium
- ☐ Contracts and indebtedness
- ☐ Eminent domain
- ☐ Auto negligence
- ☐ Negligence – other
  - ☐ Business governance
  - ☐ Business torts
  - ☐ Environmental/Toxic tort
  - ☐ Third party indemnification
  - ☐ Construction defect
  - ☐ Mass tort
  - ☐ Negligent security
  - ☐ Nursing home negligence
  - ☐ Premises liability – commercial
  - ☐ Premises liability – residential
- ☐ Products liability
- ☐ Real Property/Mortgage foreclosure
  - ☐ Commercial foreclosure $0 - $50,000
  - ☐ Commercial foreclosure $50,001 - $249,999
  - ☐ Commercial foreclosure $250,000 or more
  - ☐ Homestead residential foreclosure $0 – 50,000
  - ☐ Homestead residential foreclosure $50,001 - $249,999
  - ☐ Homestead residential foreclosure $250,000 or more
  - ☐ Non-homestead residential foreclosure $0 - $50,000
  - ☐ Non-homestead residential foreclosure $50,001 - $249,999
  - ☐ Non-homestead residential foreclosure $250,00 or more
  - ☐ Other real property actions $0 - $50,000
  - ☐ Other real property actions $50,001 - $249,999
  - ☐ Other real property actions $250,000 or more
- ☐ Professional malpractice
  - ☐ Malpractice – business
  - ☐ Malpractice – medical
  - ☐ Malpractice – other professional
- ☒ Other
  - ☐ Antitrust/Trade Regulation
  - ☐ Business Transaction
  - ☐ Circuit Civil - Not Applicable
  - ☒ Constitutional challenge-statute or ordinance
  - ☐ Constitutional challenge-proposed amendment
  - ☐ Corporate Trusts
  - ☐ Discrimination-employment or other
  - ☐ Insurance claims
  - ☐ Intellectual property
  - ☐ Libel/Slander
  - ☐ Shareholder derivative action
  - ☐ Securities litigation
  - ☐ Trade secrets
  - ☐ Trust litigation

COMPLEX BUSINESS COURT

This action is appropriate for assignment to Complex Business Court as delineated and mandated by the Administrative Order. Yes ☐ No ☒

III. REMEDIES SOUGHT (check all that apply):

- ☒ Monetary;
- ☐ Non-monetary
- ☒ Non-monetary declaratory or injunctive relief;
- ☒ Punitive

IV. NUMBER OF CAUSES OF ACTION: ( )
(Specify)

7

V. IS THIS CASE A CLASS ACTION LAWSUIT?

- ☐ Yes
- ☒ No

VI. HAS NOTICE OF ANY KNOWN RELATED CASE BEEN FILED?

- ☒ No
- ☐ Yes – If "yes" list all related cases by name, case number and court:

US MD FL 6:12-cv-00269-RBD-KRS

VII. IS JURY TRIAL DEMANDED IN COMPLAINT?

- ☒ Yes
- ☐ No

I CERTIFY that the information I have provided in this cover sheet is accurate to the best of my knowledge and belief.

Signature s/ David Wash Foley Jr. FL Bar No.:
Attorney or party (Bar number, if attorney)

David Wash Foley Jr. 08/26/2016
(Type or print name) Date

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

Plaintiffs DAVID W. FOLEY, JR., and JENNIFER T. FOLEY *v.* ***Defendants*** ORANGE COUNTY, *a political subdivision of the State of Florida, and,* PHIL SMITH, CAROL HOSSFIELD, MITCH GORDON, ROCCO RELVINI, TARA GOULD, TIM BOLDIG, FRANK DETOMA, ASIMA AZAM, RODERICK LOVE, SCOTT RICHMAN, JOE ROBERTS, MARCUS ROBINSON, RICHARD CROTTY, TERESA JACOBS, FRED BRUMMER, MILDRED FERNANDEZ, LINDA STEWART, BILL SEGAL,TIFFANY RUSSELL, *individually and together, in their official and personal capacities.*	**VERIFIED COMPLAINT FOR DECLARATORY & INJUNCTIVE RELIEF, CONSTITUTIONAL TORT, CIVIL THEFT AND OTHER RELIEF**

Plaintiffs David and Jennifer Foley bring this civil action against the above named defendants for their enforcement of a custom prohibiting *aviculture* at the Foleys' home, a custom that was not commanded by the Orange County code and is prohibited Art.IV,§9,Fla.Const., and allege:

I. JURISDICTION

1. This Court has jurisdiction per Art.V,§5(b),Fla.Const., §26.012 (2)(a),(c),(3),(5),Fla.Stat., and §86.01,Fla.Stat.; the Foleys seek declaratory and injunctive relief and compensatory relief in excess of $15,000, the jurisdictional limit of county court.

2. No limitation bars this complaint.

a. July 27, 2016, the U.S. District Court for the Middle District of Florida dismissed without prejudice all federal and state claims brought against the above named defendants in case 6:12-cv-00269-RBD-KRS.

b. Chapter 28 USC §1367(d), tolls limitations for thirty days after dismissal of any supplemental claims related to those asserted to be within the original jurisdiction of the federal district court.

c. August 26, 2016, is thirty days after dismissal of 6:12-cv-00269-RBD-KRS, and the last day of the tolling period provided by 28 USC §1367(d); this complaint is timely as to the defendants, incidents and injuries at issue in 6:12-cv-00269-RBD-KRS.

d. February 21, 2012, is the date 6:12-cv-00269-RBD-KRS, was originally filed.

e. The defendants, incidents and injuries at issue in 6:12-cv-00269-RBD-KRS, as in this complaint, involve county administrative proceedings that began February 23, 2007, became final February 19, 2008, and continue to injury the Foleys to the present day.

f. February 21, 2012, the Tuesday after the three-day holiday weekend of Washington's Birthday**,** was the last possible filing date for any claims subject to a four-year limitation accruing on February 18, 2008, at the end of the county administrative proceedings, and two days before expiration of any five-year limitation on claims accruing February 23, 2007, at the beginning of those proceedings; the civil theft claims with a five-year limitation are timely, and the tort claims accruing on or after February 18, 2008, subject to a four-year limitation are timely.

3. This court has jurisdiction per Art.V,§5(b),Fla.Const., §26.012 (2)(a),(c),(5),Fla.Stat., and §86.01,Fla.Stat., to construe, to declare and to adjudicate rights arising from the following constitutional provisions:

FLORIDA CONSTITUTION

a. Article I, Section 2, which in pertinent part states:

All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property…

b. Article I, Section 4, which in pertinent part states:

Every person may speak, write and publish sentiments on all subjects but shall be responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press…

c. Article I, Section 9, which in pertinent part states:

No person shall be deprived of life, liberty or property without due process of law ... or be compelled in any criminal matter to be a witness against oneself.

d. Article I, Section 12, which in pertinent part states:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated…

e. Article I, Section 21, which in pertinent part states:

…justice shall be administered without sale, denial or delay.

f. Article I, Section 23, which in pertinent part states:

Every natural person has the right to be let alone and free from governmental intrusion into the person's private life…

g. Article II, Section 3, which in pertinent part states:

No person belonging to one branch [of state government] shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

h. Article IV, Section 9, which in pertinent part states:

Fish and wildlife conservation commission … The commission shall exercise the regulatory and executive powers of the state with respect to wild animal life and fresh water aquatic life, and shall also exercise regulatory and executive powers of the state with respect to marine life …

i. Article VIII, Section 1 (g), which in pertinent part states:

Counties operating under county charters shall have all powers of local self-government not inconsistent with general law, or with special law approved by vote of the electors. The governing body of a county operating under a charter may enact county ordinances not inconsistent with general law. The charter shall provide which shall prevail in the event of conflict between county and municipal ordinances.

j. Article X, Section 6 (a), which in pertinent part states:

No private property shall be taken except for a public purpose and with full compensation therefor paid to each

owner or secured by deposit in the registry of the court and available to the owner.

UNITED STATES CONSTITUTION

k. Amendment I, in pertinent part states:

> Congress shall make no law … abridging the freedom of speech, or of the press…

l. Amendment IV, in pertinent part states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated…

m. Amendment V, in pertinent part states:

> No person … shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

n. Amendment XIV, Section 1, in pertinent part states:

> … nor shall any State deprive any person of life, liberty, or property, without due process of law…

II. VENUE

4. Venue is with this court per §47.011,Fla.Stat., as all parties reside, all actions accrued, and all property in litigation is located in Orange County, Florida.

III. NOTIFICATION REQUIREMENTS

5. Pursuant §86.091,Fla.Stat.**,** Orange County was made a party to case 6:12-cv-00269-RBD-KRS, and as that case sought to invalidate Orange County ordinances and practices prohibited by Art.IV,§9,Fla.Const.**,** the Attorney General was served a copy of the complaint filed in 6:12-cv-00269-RBD-KRS, February 21, 2012. The Attorney General was also served a copy of this complaint, August 26, 2016.

6. Pursuant §768.28,Fla.Stat., February 8, 2011, the Foleys sent Orange County, the Department of Financial Services, and the Attorney General notification of their intent to file suit against Orange County and all other defendants named in this complaint. The Department of Financial Services did respond.

7. Pursuant §772.11,Fla.Stat., December 19, 2011, the Foleys provided Jeffrey Newton, Orange County Attorney, a written demand for treble damages. All defendants, in their official and personal capacity, were named

in the written demand. In addition, the Foleys have provided all defendants a separate written demand for treble damages with the complaint filed in 6:12-cv-00269-RBD-KRS, February 21, 2012.

IV. PARTIES

DEFENDANTS

8. Orange County, a political subdivision of the state of Florida, 201 S. Rosalind Avenue, P.O. Box 2687, Orlando, FL 32802-2687.

9. Phil Smith, Code Enforcement Inspector, Orange County Code Enforcement Division, 2450 33rd Street, Orlando, FL 32839.

10. Carol Hossfield, Permitting Chief Planner, Orange County Zoning Division, 201 S. Rosalind Avenue, P.O. Box 2687, Orlando, FL 32802-2687.

11. Mitch Gordon, Zoning Manager, Orange County Zoning Division, 201 S. Rosalind Avenue, P.O. Box 2687, Orlando, FL 32802-2687.

12. Rocco Relvini, BZA Coordination Chief Planner, Orange County Zoning Division, 201 S. Rosalind Avenue, P.O. Box 2687, Orlando, FL 32802-2687.

13. Tara Gould, Assistant County Attorney, Orange County Attorney's Office, 2007-2008, Fla. Bar ID # 498300, 662 Selkirk Dr. Winter Park FL 32792-4640.

14. Tim Boldig, Chief of Operations, Orange County Zoning Division, 201 S. Rosalind Avenue, P.O. Box 2687, Orlando, FL 32802-2687.

15. Frank DeToma, Orange County Board of Zoning Adjustment, November 1, 2007, c/o Orange County Attorney's Office, 201 S. Rosalind Avenue, P.O. Box 2687, Orlando, FL 32802-2687.

16. Asima Azam, Orange County Board of Zoning Adjustment, November 1, 2007, Fla. Bar ID # 671304, 4317 New Broad St. Orlando FL 32814-6045.

17. Roderick Love, Orange County Board of Zoning Adjustment, November 1, 2007, c/o Orange County Attorney's Office, 201 S. Rosalind Avenue, P.O. Box 2687, Orlando, FL 32802-2687.

18. Scott Richman, Orange County Board of Zoning Adjustment, November 1, 2007, Fla. Bar ID # 182753, 11 N. Magnolia Av. Ste 1200 Orlando FL 32801-2370.

19. Joe Roberts, Orange County Board of Zoning Adjustment, November 1, 2007, 622 Pinar Dr., Orlando, FL, 32825.

20. Marcus Robinson, Orange County Board of Zoning Adjustment, November 1, 2007, c/o Orange County Attorney's Office, 201 S. Rosalind Avenue, P.O. Box 2687, Orlando, FL 32802-2687.

21. Richard Crotty, Orange County Mayor, 2000-2010, 6642 The Landings Dr., Belle Isle, FL 32812.

22. Teresa Jacobs, Orange County Commissioner, District 1, 2000-2008, 8652 Sugar Palm Court, Orlando, FL 32835.

23. Fred Brummer, Orange County Commissioner, District 2, 2006-2014, 191 E Ponkan Rd Apopka FL 32703.

24. Mildred Fernandez, Orange County Commissioner, District 3, 2004-2010, 6029 Lake Pointe Dr Unit 203 Orlando FL 32822.

25. Linda Stewart, Orange County Commissioner, District 4, 2002-2010, 4206 Inwood Landing Dr., Orlando, FL 32812.

26. Bill Segal, Orange County Commissioner, District 5, 2004-2011, c/o Orange County Attorney's Office, 201 S. Rosalind Avenue, P.O. Box 2687, Orlando, FL 32802-2687.

27. Tiffany Russell, Orange County Commissioner, District 6, 2006-2014, Fla. Bar # 182125, 425 N. Orange Av. Rm 2110 Orlando FL 32801-1516.

PLAINTIFFS

28. David W. Foley, Jr.:

a. Is a citizen of the United States;

b. Is a resident of Orange County;

c. Owns, with his wife Jennifer, three properties which are in Orange County: 1) their homestead at 1015 N. Solandra Dr., Orlando, FL, 32807, zoned R-1A (Solandra property); 2) a duplex at 5593/5597 Lehigh Ave., Orlando, FL, 32807, zoned R-3 (Lehigh property); and, 3) a manufactured home on one acre at 1349 Cupid Rd., Christmas, FL, 32709, zoned A-2 (Cupid property);

d. Has, with his wife Jennifer, since 2000, kept a small breeding flock of toucans (Collared aracari, *Pteroglossus torquatus torquatus*), at the Solandra property;

e. Did, with his wife Jennifer, advertise the Foleys' birds for sale in the national magazine BirdTalk, and on the Foleys' website diostede.com;

f. Did, with his wife Jennifer, sell approximately 46 toucans for $750 to $900 each from 2002 through 2007, all of which were raised at the Solandra property, and, with the exception of one pair, were sold and shipped air-freight to buyers outside of Florida;

g. Did, with his wife Jennifer, continue to advertise and sell toucans kept and raised at the Solandra property until enjoined February 19, 2008, by the Orange County Board of County Commissioners (BCC) in order ZM-07-10-010;

h. Did, with his wife Jennifer, February 19, 2008, have twenty-two toucans at the Solandra property;

i. Has since 2007, held a Class III license issued by the Florida Fish and Wildlife Conservation Commission (FWC) to sell toucans kept and raised at the Solandra property;

j. Has since 2010, held a Class III license issued by FWC to sell toucans kept and raised at the Cupid property; and,

k. Intends to sell birds that are or will be kept and raised at the Solandra and Cupid property;

29. Jennifer T. Foley:

a. Is a citizen of the United States;

b. Is a resident of Orange County;

c. Alleges and restates paragraphs 28.c through 28.h.

d. Intends to make the Foleys' birds available for sale which are or will be kept and raised at the Solandra and Cupid property.

COUNT ONE – DECLARATORY AND INJUNCTIVE RELIEF

PLAINTIFFS ALLEGE:

30. And restate paragraphs 28 through 29.

31. In 1968, Article VIII, Section 1 (g), of the Constitution of the State of Florida, was amended to grant charter counties the powers they have today, namely: "all powers of local self-government not inconsistent with general law, or with special law approved by vote of the electors."

32. Orange County is a charter county.

33. In 1974, Article IV, Section 9, of the Constitution of the State of Florida, was amended to grant the Fish and Wildlife Conservation Commission (FWC) the powers it has today, namely: "the executive and regulatory powers of the state with respect to wild animal life."

34. The Foleys are required by FWC to obey its extensive regulation of captive exotic wild animal life.

a. The Foleys' toucans are defined as wildlife by FWC, and the Foleys are subject to FWC regulation, and must comply with FWC regulation to keep their birds.

b. Though the Foleys require no permit to keep toucans for personal use, at least one of them must have a permit in order to sell their toucans.

c. David Foley's permits are location-specific, and FWC approved the Foleys' Solandra and Cupid properties before granting David Foley permits for those locations.

d. In addition to satisfying FWC's location requirements, David Foley had to 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.

e. To get and keep his permit David Foley agreed to allow FWC to inspect his birds, *aviaries*, and records, at any time, so that FWC could ensure that he is in compliance with FWC regulation.

f. If David Foley fails to comply with any condition of his permit/license it may be revoked by FWC.

35. Orange County prohibits *aviculture (commercial)* [advertising or selling birds] at the Foleys' Solandra property and only permits *aviculture (commercial)* at the Foleys' Cupid property by special exception.

36. Orange County places distinct prophylactic restrictions on *aviculture (commercial)* that are greater than those placed on any other form of commerce or husbandry, restrictions that are specific to the nuisance associated with exotic birds, rather than the nuisance generally associated with commerce or husbandry.

37. Orange County's prophylactic restrictions on *aviculture (commercial)* are specific to birds; they are, in other words, direct regulation of exotic birds.

38. February 19, 2008, in case ZM-07-10-010, the Orange County Board of County Commissioners (BCC) sitting as a board of appeals, considered David and Jennifer Foley's appeal of the Board of Zoning Adjustment (BZA) recommendation, dated November 1, 2007, to uphold the Zoning Manager's Determination that *aviculture (commercial)* is prohibited as a

primary use, *accessory use*, and as a *home occupation* in R-1A zoned districts. The BCC upheld the Zoning Manager's Determination.

39. The February 19, 2008, BCC order in the Foleys' case ZM-07-10-010, as stated in paragraph 28.g, did effectively enjoin the Foleys from continuing to advertise and sell toucans kept at the Solandra property as they had done since 2002.

40. October 21, 2009, on certiorari review of the BCC order in case ZM-07-10-010, the Ninth Circuit Court of Florida, in case 08-CA-5227-O, made clear that state judicial policy prohibited the Foleys from challenging the constitutionality of the County code on certiorari review of the BCC order.

41. The Foleys seek to renew the advertising and sale of birds kept at their Solandra property as permitted by David Foley's FWC license, but the Foleys cannot do so because Orange County has usurped authority granted exclusively to FWC by Art.IV,§9, Fla.Const., and enjoined the Foleys from advertising or selling birds kept at their Solandra property.

42. The Foleys seek to keep and raise birds at their Cupid property that will be sold as permitted by David Foley's FWC license, but the Foleys cannot do so because Orange County has usurped authority granted exclusively to FWC by Art.IV,§9,Fla.Const., and placed pre-conditions on,

and specific to, the possession and sale of exotic birds at their Cupid property.

43. The Foleys have no plain, adequate, or complete remedy at law to redress the continuing injury of defendants' unlawful regulation of the possession and sale of exotic birds.

WHEREFORE, the Foleys request this court:

1. **FIND** that Art.IV,§9, Fla.Const., is self-executing and FWC's authority is autonomous and without peer;
2. **FIND** Art.IV,§9, Fla.Const., was adopted more recently than Art.VIII,§1(g),Fla. Const., and as the most recent expression of the people's will is the superior expression;
3. **FIND** that Art.IV,§9, Fla.Const., combines in FWC all the state's executive and legislative authority with the respect to wild animal life, and excludes all other subdivisions, agencies or branches of state government from that regulatory jurisdiction;
4. **FIND** that FWC's constitutional authority as expressed in its regulation of captive exotic birds encompasses all police power concerns of public health, safety, and welfare;

5. **FIND** that Orange County's regulation of *aviculture (commercial)*, when compared to the County's other regulation of commerce or husbandry, is clearly directed at the nuisance specific to captive exotic birds rather than the nuisance generally associated with commerce or husbandry, and is therefore not general land use regulation, but is instead exotic bird regulation that trespasses the regulatory subject matter jurisdiction of "wild animal life" granted exclusively to Florida's Fish and Wildlife Conservation Commission by Art.IV,§9,Fla.Const; and, finally,
6. **DECLARE,** that all Florida's regulatory authority over the possession and sale of wild animal life, including captive exotic birds, is vested exclusively in the Florida Fish and Wildlife Conservation Commission pursuant Art.IV,§9,Fla. Const., and therefore Chapter 38, Art. I, §38-1, Art. IV, §§ 38-71, 38-74, 38-77, 38-79, Art. V, §§ 38-301, 38-302, 38-136, 38-137, 38-138, of the Orange County Code of Ordinances, and the February 19, 2008, order ZM-07-10-010, of the Orange County Board of County Commissioners are without police power and public purpose and are void to the extent that they: 1) prohibit *aviculture*

(commercial) as *accessory use* and *home occupation* in R-1A zoned districts; and, 2) make *special exception* fees and procedures, not required of all commercial or agricultural land uses, a precondition to *aviculture (commercial)* in A-2 zoned districts; and,

7. **ENJOIN,** all defendants from the enforcement of Chapter 38, Art. I, §38-1, Art. IV, §§ 38-71, 38-74, 38-77, 38-79, Art. V, §§ 38-301, 38-302, 38-136, 38-137, 38-138, of the Orange County Code of Ordinances, and the February 19, 2008, order ZM-07-10-010, of the Orange County Board of County Commissioners: 1) to prohibit *aviculture (commercial)* as *accessory use* and *home occupation* in R-1A zoned districts; and, 2) to require *special exception* fees or procedures as a precondition to *aviculture (commercial)* in A-2 zoned districts.

COUNT TWO – CONSTITUTIONAL TORT
DENIAL OF FUNDMENTAL RIGHTS &
CONSPIRACY TO DENY FUNDMENTAL RIGHTS,
PURSUANT ART. I, §9, FLA. CONST.,
or in the alternative
PURSUANT 42 USC ¶1983
or in the alternative
TAKING WITHOUT PUBLIC PURPOSE, DUE PROCESS OR JUST COMPENSATION
PURSUANT ART. X, §6 (A), FLA. CONST.,
AMEND. V, U.S. CONST., &
COMMON LAW

PLAINTIFFS ALLEGE:

44. And restate paragraphs 28 through 40.

45. The proceedings initiated February 23, 2007, and concluding with the February 19, 2008, Board of County Commissioners (BCC) order ZM-07-10-010, involved all the individual defendants named in this complaint.

46. Throughout the proceedings initiated February 23, 2007, and concluding with the February 19, 2008, BCC order ZM-07-10-010, in every contact with either David or Jennifer Foley each of the individual defendants acted under the color of authority and official right identified respectively in paragraphs 9 through 27, and used the coercive force of their respective offices to fraudulently misrepresent their authority to enjoin the Foleys advertising and sale of birds.

47. Throughout the proceedings initiated February 23, 2007, and concluding with the February 19, 2008, BCC order ZM-07-10-010, the Foleys repeatedly reminded each defendant that the Foleys did not have to ask Orange County for the right to keep birds at the Solandra property or the right to sell the birds kept at the Solandra property because the Foleys' rights to do so are created and governed exclusively by Florida's Fish and Wildlife Conservation Commission pursuant Art.IV,§9,Fla.Const. The Foleys amply supported this claim by referring defendants to state court opinions and opinions of the state's attorney general.

48. Throughout the proceedings initiated February 23, 2007, and concluding with the February 19, 2008, BCC order ZM-07-10-010, the Foleys explained to each defendant how the code could be interpreted to avoid conflict with Art.IV,§9,Fla.Const.

49. At no time during the proceedings initiated February 23, 2007, and concluding with the February 19, 2008, BCC order ZM-07-10-010, did any of the defendants offer the Foleys any justification or reason for prohibiting the Foleys from advertising or selling birds kept at their Solandra property except: their interpretation of the County code; their authority to interpret the

County code; and, the County's home rule authority, in particular, the County's authority to regulate the use of land.

50. Prior to the issuance of the Zoning Manager's Determination, Florida's Fish and Wildlife Conservation Commission (FWC) contacted the Foleys, Zoning Manager Mitch Gordon and Orange County Attorney Tara Gould and provided them with an FWC memorandum that surveyed Florida law and concluded, by reference to state court opinions and opinions of the state's attorney general, that counties are without authority to directly regulate the possession and sale of captive exotic wildlife.

51. Prior to their respective hearings, either the Orange County Attorney's office or the Foleys gave each defendant member of the BZA and BCC a copy of the FWC memorandum that surveyed Florida law and concluded, by reference to state court opinions and opinions of the state's attorney general, that counties are without authority to directly regulate the possession and sale of captive exotic wildlife.

52. As stated in paragraphs 45-51, all defendants, knew or should have known the Foleys and FWC alleged the laws of Florida clearly establish Orange County is without authority to regulate or prohibit the personal or

commercial possession or the sale of birds kept at David and Jennifer Foley's homestead.

53. County Mayor Richard Crotty, or any of the County Commissioners could have, but did not, contact Florida's Attorney General, nor did they or any other defendant urge that Orange County contact Florida's Attorney General, pursuant §16.01(3),Fla.Stat., to ask whether the authority to regulate the possession and sale of captive exotic birds is included in the County's authority to regulate the use of land.

54. Zoning Manager Mitch Gordon, County Mayor Richard Crotty, the individual members of the Board of Zoning Adjustment (BZA), or the individual members of the BCC could have, but did not, seek, nor did they or any other defendant urge that Orange County seek, declaratory relief in state court pursuant Ch86,Fla.Stat., for a judicial declaration as to whether the authority to regulate the possession and sale of captive exotic birds is included in the County's authority to regulate the use of land.

55. From February 23, 2007, forward, Orange County, Code Enforcement Inspector Phil Smith, and Zoning Manager Mitch Gordon, had the evidence to initiate a code enforcement action against the Foleys pursuant Ch162,Fla.Stat., or Ch11,OCC, to enforce the alleged *aviculture* regulations

before the Orange County Code Enforcement Board, or in Orange County Court, but did not do so.

56. Orange County, the BZA, the County Mayor, and the BCC had the authority to reverse the Zoning Manager's Determination and to require the Zoning Manager to initiate a code enforcement action against the Foleys pursuant Ch162,Fla. Stat., or Ch11,OCC, to enforce the alleged *aviculture* regulations before the Orange County Code Enforcement Board, or in Orange County Court, but did not do so.

57. None of the defendants used the evidence made available to the county February 23, 2007, to initiate a code enforcement action against the Foleys as required by Ch162,Fla.Stat., or Ch11,OCC, to enforce the alleged *aviculture* regulations before the Orange County Code Enforcement Board, or in Orange County Court.

58. None of the defendants offered the Foleys a stay of enforcement of the alleged *aviculture* regulations during or after the proceedings initiated February 23, 2007, and concluding with the February 19, 2008, BCC order ZM-07-10-010.

59. As stated in paragraph 38, the February 19, 2008, BCC order ZM-07-10-010, approved a code interpretation that prohibits *aviculture (commercial),* as a *primary use*, *accessory use* or *home occupation*.

60. The February 19, 2008, BCC order ZM-07-10-010, does not find or conclude that the interpreted provisions expressly prohibit *aviculture (commercial),* as an *accessory use* or *home occupation*

61. The February 19, 2008, BCC order ZM-07-10-010, does not find or conclude that the BCC, or any of the other defendant, had a ministerial duty to prohibit *aviculture (commercial),* as an *accessory use* or *home occupation*.

62. The February 19, 2008, BCC order ZM-07-10-010, is now County policy.

63. As stated in paragraph 39, the February 19, 2008, BCC order ZM-07-10-010, did effectively stop the Foleys from continuing to advertise and sell toucans kept at the Solandra property as they had done since 2002.

64. A resident of Orange County who was not a member of Orange County government alerted defendants February 23, 2007, to the Foleys bird advertising and sales, and by insisting defendants stop the Foleys bird advertising and sales initiated the administrative proceedings that ultimately

lead to the February 19, 2008, BCC order ZM-07-10-010, enjoining the Foleys from further bird advertising or sales.

65. During the proceedings leading to the February 19, 2008, BCC order ZM-07-10-010, other residents of Orange County who were not members of Orange County government urged defendants to reach the result of that order.

66. Orange County and all individual defendants were instrumental in moving the administrative proceeding forward that lead to the February 19, 2008, BCC order ZM-07-10-010, and urged each other to reach the result of that order.

67. The February 19, 2008, BCC order ZM-07-10-010, and the administrative procedure leading to that order, deprived the Foleys of:

a. the fees paid Orange County for the Determination ($38), appeal to the BZA ($341), and appeal to the BCC ($651),

b. the continuing expenses and court costs incurred in the vindication of their rights (aprox. $6,800);

c. complete loss of the economic value in, and legal benefit of, David Foley's Class III FWC licenses to sell birds kept at the Solandra property (approx. $400);

d. complete loss of economic value in the 22 birds the Foleys had February 2008 (current replacement value approx. $39,600);

e. loss of the service, use, and benefit of the 22 birds the Foleys had February 2008;

f. the continuing loss of income from bird sales (approx. $342,000, to date);

g. the continuing injury to reputation;

h. the continuing shame;

i. the continuing humiliation;

j. the continuing mental and emotional harm, pain, anguish, distress, and suffering;

k. the continuing inconvenience; and,

l. the continuing loss of enjoyment of life.

WHEREFORE, the Foleys request this court:

1. **DECLARE** that in their official capacities all defendants, pursuant those judicial precedents surveyed in Op.Att'yGen.Fla 072-298, and common law, had a duty to determine, prior to taking any action to regulate the possession and sale of captive exotic birds, whether that authority is included in the County's authority to regulate the use of land; **FIND** that no defendant did so, but all did instead, beginning February 23, 2007 and continuing today, fraudulently misrepresent their authority and did enjoin the advertising and sale of birds; and, **GRANT JUDGMENT** against all defendants for negligence in an amount to be determined at trial.
2. **DECLARE** that in their official capacity Mitch Gordon, pursuant §30-41(b),OCC, and Phil Smith, pursuant §11-34(a) and (b), had a duty to prosecute the Foleys for a violation of the alleged *aviculture* regulations, and an official and individual duty, pursuant those provisions and the requisites of Art.I, §9,Fla. Const., Art.I.,§23,Fla. Const., and Amend.XIV,U.S.Const., to prosecute the Foleys before the Orange County Code Enforcement Board, or in county court, or otherwise to provide the Foleys a pre-

deprivation remedy permitting them to challenge the validity of the alleged *aviculture* regulation enforced prior to its enforcement, in particular, prior to any injunction of the Foleys' *aviculture* business; **FIND** that neither fulfilled their official duties, that both in their official and individual capacities denied the Foleys procedural due process, and that both did, beginning on or about February 23, 2007, in their individual capacities fraudulently misrepresent both the procedure due and their authority to enjoin the advertising and sale of birds; and, **GRANT JUDGMENT**, against Mitch Gordon and Phil Smith for negligence, abuse of process, denial of due process, and denial and delay in the administration of justice, in an amount to be determined at trial.

3. **DECLARE** that in their official capacities Frank Detoma, Asima Azam, Roderick Love, Scott Richman, Joe Roberts, Marcus Robinson, Richard Crotty, Teresa Jacobs, Fred Brummer, Mildred Fernandez, Linda Stewart, Bill Segal, and Tiffany Russell, had discretion to require Mitch Gordon fulfill his duty pursuant §30-41(b),OCC, and prosecute the Foleys for violation of the alleged *aviculture* regulations before the Orange County Code

Enforcement Board, or in county court; **FIND** that none did so in their official capacity, but all did instead in their individual capacity fraudulently misrepresent their authority to enjoin the Foleys' advertising and sale of birds; and, **GRANT JUDGMENT**, against them for negligence, in an amount to be determined at trial.

4. **DECLARE** that the plain language of Art.IV,§9,Fla.Const., seventy-two years of judicial precedent construing the lineage of that provision, and in particular Op.Att'yGen.Fla 2002-23, which specifically applied state court precedent to local regulations identical to those at issue, *clearly establish* that direct regulation of the advertising, the possession, or the sale of captive exotic birds by a charter county is absent police power and void of public purpose, and otherwise, by violation of Art.II,§3,Fla.Const., Art.VIII,§1(g), Fla.Const., and §379.1025,Fla.Stat., is a denial of Florida's fundamental due process, pursuant *Seminole County Bd. of County Com'rs v. Long,* 422 So.2d 938,941 (Fla.5thDCA1982); **FIND** that defendants' injunction of the Foleys' advertising birds for sale and their sale of birds is in absence of police power and without public purpose, and that defendants, under color of law,

used the coercive force of their office, and their fraudulent misrepresentation of authority, to press this injunction upon the Foleys; and, **GRANT JUDGMENT**, pursuant Art.I,§9,Fla. Const., for denial of Florida's fundamental substantive due process, pursuant Art.I,§4,Fla. Const., for restraint of the Foleys' bird sales advertising, pursuant Art.I,§23,Fla. Const., for defendants' unjustified intrusion into the Foleys private life, pursuant Art.I,§12,Fla. Const., for defendants' unreasonable seizure of the Foleys' possessory interest in the sale of their toucans, and/or for defendants' conspiracy to do all the above, against Orange County and all individual defendants in their individual and official capacities, for compensatory relief, appropriate to the deprivation of these rights and the consequent injuries, in an amount to be determined at trial; or, in the alternative,

5. **FIND**, in addition to those findings made in the immediately preceding paragraph 4, that Florida has yet no such constitutional torts, and should this court be reluctant to exercise its authority to create one,

a. **GRANT JUDGMENT**, pursuant Art.X,§6(a),Fla.Const., and Amend.V,U.S.Const. for a taking without due process of all value in the personal property of the Foleys' twenty-two toucans, against Orange County for just compensation in an amount to be determined at trial, and

b. **GRANT JUDGMENT** in abuse of process, money had and received, trespass, trespass to chattels, conversion, lost profits, and intentional infliction of emotional distress, against the individual defendants in their official capacity, in an amount to be determined at trial, or in the alternative,

c. **GRANT JUDGMENT**, pursuant 42 USC ¶1983, against Orange County and all individual defendants in their individual and official capacities, for compensatory relief, appropriate to the deprivation of the right and the consequent injuries, in an amount to be determined at trial, for the denial of, and conspiracy to deny: the right to the procedural and substantive due process, and the equal protection guaranteed by Amend.XIV,U.S.Const.; the right to be free of unreasonable restraint upon commercial speech

guaranteed by Amend.I,U.S.Const.; and, the right to be free of unreasonable seizure guaranteed by Amend.IV,U.S.Const.

COUNT THREE – CIVIL THEFT PER §722.11,FLA.STAT., PLAINTIFFS ALLEGE:

68. And restate paragraphs 28, 29, 38, 45-51, 64-66, 67.

69. Defendants Code Enforcement Inspector Phil Smith, and Permitting Chief Planner Carol Hossfield, with actual and legal malice, intended, conspired, and devised a scheme to defraud the Foleys of the honest services of their county government – namely, a hearing before the Code Enforcement Board on the alleged violation of county code – and of their state government – namely, their rights to have an *aviary* and to advertise and sell birds – and, with the intent to do so, did permanently take the right to, the control of, and the benefit from the Foleys' *aviaries* and the Foleys' bird business, by means of extortion under the color and coercive force of official right:

a. Code Enforcement Inspector Phil Smith had the authority and the duty to prosecute before Orange County's Code Enforcement Board any code violation that he found.

b. As stated in paragraph 64, a county resident reported to Orange County that the Foleys were advertising and selling birds allegedly in violation of the County's code, and demanded enforcement.

c. This report was made February 23, 2007, and it specifically identified where the Foleys' advertising could be found – the Foleys' website diostede.com, and the national magazine BirdTalk.

d. This report was assigned to Smith who investigated by collecting information from the website disosted.com, by going to the Foleys' home, by talking with David Foley, and by taking pictures of the Foleys' toucans.

e. All of the evidence collected, and Smith's report of his visits to the Foleys' home, were stored in Orange County intra-net database and were later accessed and referenced by Carol Hossfield in her contacts with the Foleys, and were accessed and referenced by Mitch Gordon in his ultimate Determination.

f. Smith's investigation provided him with all the evidence required to prosecute the Foleys before the Code Enforcement Board for advertising and selling birds, but he did not use it to do so.

g. Smith conferred with Carol Hossfield to decide what to do.

h. Defendant Permitting Chief Planner Carol Hossfield is in charge of that portion of Zoning Division that grants or denies approval of site plans, building permits, or use permits. Hossfield's immediate superior is Zoning Manager Mitch Gordon.

i. After conferring with Hossfield, Smith decided not to prosecute the Foleys before the Code Enforcement Board for advertising and selling birds.

j. After conferring with Hossfield, Smith decided to prosecute the Foleys' for building their toucan *aviaries* without a building permit, then to let the Code Enforcement Board force the Foleys to get a building permit for their *aviaries*, and then to let Hossfield force the Foleys to stop advertising or selling birds when the Foleys went to her for the permit.

k. Smith prosecuted the Foleys before the Code Enforcement Board and urged the Board to force the Foleys to get a permit, destroy their *aviaries*, or pay a fine.

l. April 18, 2007, the Orange County Code Enforcement Board (CEB) issued an order requiring the Foleys on or before June 18, 2007, to either destroy their existing *aviaries*, get a building permit for

them, or pay a $500/day fine until compliance with the order was proven.

m. The Code Enforcement Board did issue the order Smith wanted them to issue, and Hossfield did force the Foleys to destroy their *aviaries* and to abandon their bird business.

n. It was Carol Hossfield, by reference to the evidence Phil Smith had collected, who first told the Foleys, indirectly through a member of her staff, and later directly, that the Foleys were in violation of the alleged *aviculture* regulations, and that the Foleys would have to stop advertising and selling birds before a building permit for their *aviaries* would be considered.

o. Even when the Foleys agreed to stop advertising and selling birds, Hossfield deliberately and without justification refused to issue the permit.

p. The Foleys were ultimately forced to destroy their *aviaries* June 18, 2007, to comply with the CEB order.

q. Hossfield ultimately issued the permit November 30, 2007, after Mitch Gordon agreed in his Determination that an *aviary* was permitted at the Solandra property, and after the BZA had upheld that

Determination, and after securing a written agreement from the Foleys' that they would abandon their bird business in exchange for the permit.

r. Carol Hossfield delayed issuing the building permit to the Foleys to force the Foleys to destroy their aviaries, and to force the Foleys to abandon their bird business.

s. The cost and injury to the Foleys of the unnecessary demolition and reconstruction of their *aviaries* was approximately $2,632.

70. Defendant Zoning Manager Mitch Gordon with legal malice intended to, attempted to and did take the Foleys' right to, control of, and benefit from David Foley's FWC licenses and the Foleys' bird business at the Solandra property, permanently, by means of extortion under the color and coercive force of official right:

a. June 25, 2007, Gordon issued his Determination, in which he interpreted Orange County's Code to prohibit *aviculture (commercial)* as an *accessory use* and a *home occupation* at the Foleys' Solandra property specifically, and in R-1A zones generally.

b. In his Determination, by reference to the evidence Smith had collected, Gordon determined the Foleys were in violation of the alleged *aviculture* regulations.

c. Gordon's Determination was final and binding on the Foleys unless appealed to and reversed by the Board of Zoning Adjustment.

d. The cost and injury to the Foleys of Gordon's custom of prohibiting *aviculture (commercial)* as *accessory use* and *home occupation* is the sum total of damages identified in paragraph 67.

71. Defendant Board of Zoning Adjustment (BZA) Coordination Chief Planner Rocco Relvini with legal malice did conspire and attempt to take the Foleys' right to, control of, and benefit from David Foley's FWC licenses and the Foleys' bird business at the Solandra property, permanently, by means of extortion under the color and coercive force of official right:

a. Relvini, without cause, postponed the Foley's first BZA hearing, and interposed himself as gate-keeper to the BZA.

b. Relvini, in collusion with Zoning Manager Mitch Gordon, threatened to postpone the next available BZA hearing, until the Foleys accepted that he, Relvini, and not the Foleys would chose the wording of the public notice used to announce the purpose of the Foleys'

hearing before the BZA. In particular, Relvini refused to separate the issues of *aviary* and *aviculture,* and insisted on making them one and the same in the public notice. Too, Relvini would not allow mention of FWC or Art.IV,§9,Fla.Const., in the public notice.

c. In email correspondence with Carol Hossfield, Relvini makes clear that he wanted to take the Foleys' right to, control of, and benefit from their *aviary* as well as their bird business.

d. Relvini twice required the Foleys to post a sign in their front yard that effectively endorsed Gordon's opinion that Gordon could stop the Foleys from advertising or selling birds at their homestead. The sign also invited the public to attend the BZA hearing and to offer their opinion, suggesting the public could have some influence over the Foleys' right to advertise or sell birds kept at their homestead.

e. Relvini used the US MAIL to send three separate notices to every home owner within three hundred yards of the Foleys' homestead, at least two of which served as both an official endorsement of Gordon's opinion that Gordon could stop the Foleys from advertising or selling birds, and an invitation to the public to offer their

opinion, suggesting the public could have some influence over the Foleys' right to advertise or sell birds kept at their homestead.

f. Relvini privately and personally solicited defendant Commissioner Teresa Jacobs to conspire with him and with Gordon to stop the Foleys from advertising and selling birds raised at their home.

g. Relvini at the BZA hearing publicly solicited the BZA to conspire with Gordon to stop the Foleys from advertising and selling birds raised at their home.

h. Relvini at the BZA hearing publicly solicited the BZA to conspire with Gordon to disregard the Foleys' claim that the County had no authority to directly regulate advertising or selling birds.

i. Relvini at the BZA hearing publicly solicited the BZA to conspire with Gordon to disregard the Foleys' claim that only Florida's Fish and Wildlife Commission had authority to directly regulate advertising or selling birds.

j. The cost and injury to the Foleys of Relvini's efforts to prohibit *aviculture (commercial)* as *accessory use* and *home occupation* is the sum total of damages identified in paragraph 67.

72. Defendant Assistant County Attorney Tara Gould with legal malice intended to, attempted to and did take the Foleys' right to, control of, and benefit from David Foley's FWC licenses and the Foleys' bird business at the Solandra property, permanently, by means of extortion under the color and coercive force of official right:

a. Gould wrote a legal memorandum regarding whether the Foleys should be allowed to advertise and sell toucans kept at their home.

b. Gould's memorandum endorsed Zoning Manager Mitch Gordon's opinion that the Foleys were prohibited from advertising or selling birds kept at their home.

c. Gould's memorandum misrepresented the position of the Attorney General in **Op. Att'y Gen. Fla. 2002-23** to generally argue that the County could directly regulate the nuisance specifically associated with birds and bird business by simply calling the regulation land use regulation.

d. Gould provided a copy to Zoning Manager Mitch Gordon.

e. Gould at the BZA hearing publicly solicited the BZA to conspire with Gordon to disregard the Foleys' claim that the County had no authority to directly regulate advertising or selling birds.

f. Gould at the BZA hearing publicly solicited the BZA to conspire with Gordon to disregard the Foleys' claim that only Florida's Fish and Wildlife Commission had authority to directly regulate advertising or selling birds.

g. The cost and injury to the Foleys of Gould's efforts to prohibit *aviculture (commercial)* as *accessory use* and *home occupation* is the sum total of damages identified in paragraph 67.

73. Defendant members of the Board of Zoning Adjustment (BZA) intended to take, and did take the Foleys' right to, control of, and benefit from David Foley's FWC licenses and the Foleys' bird business at the Solandra property, permanently, by means of extortion under the color and coercive force of official right:

a. November 1, 2007, the BZA upheld Gordon's Determination.

b. The BZA's decision to uphold Gordon's Determination was final and binding on the Foleys unless appealed to the Board of County Commissioners.

c. The cost and injury to the Foleys of the BZA's decision to prohibit *aviculture (commercial)* as *accessory use* and *home occupation* is the sum total of damages identified in paragraph 67.

74. Defendant Zoning Division Chief of Operations Tim Bolding with legal malice intended to, attempted to and did take the Foleys' right to, control of, and benefit from David Foley's FWC licenses and the Foleys' bird business at the Solandra property, permanently, by means of extortion under the color and coercive force of official right:

a. Prior to the BCC hearing, at a private meeting with David Foley and defendant Commissioner Mildred Fernandez, Bolding encouraged Fernandez in her mistaken belief that the County code would permit the Foleys to keep their birds at the commercial property behind their home, or at some other commercial location.

b. At the BCC hearing, Boldig deliberately and publicly lied to the BCC and misrepresented the code's definition of *home occupation* as limiting the commercial use of a home to *home office*.

c. At the BCC hearing, Boldig publicly solicited the BCC to conspire with Gordon to stop the Foleys from advertising and selling birds raised at their home.

d. The cost and injury to the Foleys of Boldig's efforts to prohibit *aviculture (commercial)* as *accessory use* and *home occupation* is the sum total of damages identified in paragraph 67.

75. Defendant members of the Board of County Commissioners (BCC) intended to take, and did take the Foleys' right to, control of, and benefit from David Foley's FWC licenses and the Foleys' bird business at the Solandra property, permanently, by means of extortion under the color and coercive force of official right:

a. February 19, 2009, the BCC upheld Gordon's Determination.

b. The BCC's decision to uphold Gordon's Determination was final and binding on the Foleys.

c. The cost and injury to the Foleys of the BCC decision to prohibit *aviculture (commercial)* as *accessory use* and *home occupation* is the sum total of damages identified in paragraph 67.

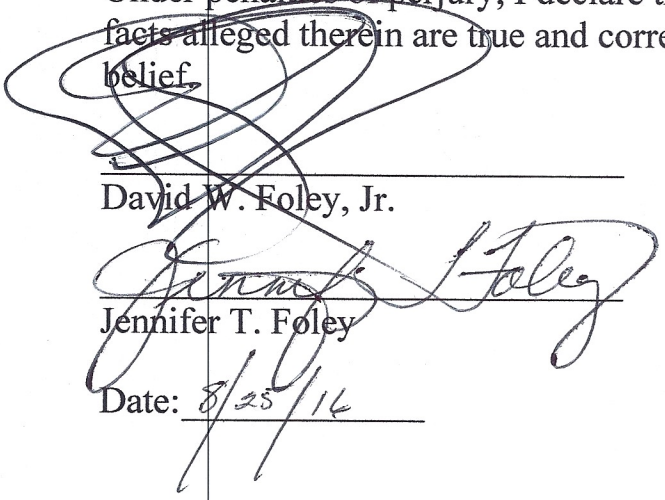
WHEREFORE, the Foleys request this court:

1. **DECLARE** *that because* all authority in police power and public purpose to directly regulate *aviaries* or the advertising or the sale of captive exotic birds is vested exclusively in Florida's Fish and Wildlife Conservation Commission, pursuant Art.IV,§9,Fla.Const., *and because* Orange County therefore has no such authority, and can confer no such authority upon the defendants, *and because* Orange County has no ordinance that expressly prohibits *aviaries*

or the advertising or the sale of captive exotic birds at the Foleys' home, *then* every action taken by defendants to do so was an act of legal malice, outside the scope of their ministerial duty or employment, and without privilege, *and therefore was an act of civil theft*, that is, an individual, rather than an official, act, and an act of extortion under the color and coercive force of official right, to attempt to take, and to take, to take control of, and to take the benefit of the Foleys' *aviaries*, bird advertising, and bird sales, permanently; **FIND** that defendants Phil Smith, Carol Hossfield, Mitch Gordon, Rocco Relvini, Tara Gould, Tim Boldig, Frank Detoma, Asima Azam, Roderick Love, Scott Richman, Joe Roberts, Marcus Robinson, Richard Crotty, Teresa Jacobs, Fred Brummer, Mildred Fernandez, Linda Stewart, Bill Segal, and Tiffany Russell, conspired, and attempted, and did, directly regulate the Foleys' *aviary* and their advertising and their sale of birds, and are jointly and severally liable in civil theft; and, **GRANT JUDGMENT**, pursuant §722.11,Fla.Stat., against defendants for treble damages to be determined at trial.

VERIFICATION

Under penalties of perjury, I declare that I have read the foregoing, and the facts alleged therein are true and correct to the best of my knowledge and belief.



David W. Foley, Jr.

Jennifer T. Foley

Date: 8/25/16

Plaintiffs
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Orlando FL 32807-1931
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e-mail: david@pocketprogram.org
e-mail: jtfoley60@hotmail.com

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, FLORIDA

CASE NO.: 2016-CA-007634-O
DIVISION: 35

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

Plaintiffs,

v.

ORANGE COUNTY, FLORIDA, et al.,

Defendants.
_____/

ORANGE COUNTY'S MOTION FOR JUDICIAL NOTICE PURSUANT TO FLORIDA RULE OF EVIDENCE 90.202(10) and 90.203

Defendant, Orange County, Florida ("Orange County"), pursuant to Florida Rules of Evidence 9.202(10) and 90.203, hereby moves this Court to take judicial notice of Orange County Ordinance No. 2016-19, entitled "An Ordinance Affecting the Use of Land in Orange County, Florida, by Amending Chapter 38 ('Zoning') of the Orange County Code; and Providing an Effective Date." A copy of Ordinance No. 2016-19 is attached.

Florida Rule of Evidence 90.202(10) provides, in relevant part, that a court may take judicial notice of "[d]uly enacted ordinances and resolutions of municipalities and counties located in Florida, provided such ordinances and resolutions are available in printed copies or in certified copies." *See Florida Rule of Evidence* 90.202(10). Florida Rule of Evidence 90.203 states that a court shall take judicial notice of any matter in Section 90.202 when a party requests and has given adverse parties timely written notice of the request, proof of which is filed with the court, to enable the adverse party to prepare to meet the request, and furnishes the court with

sufficient information to enable it state judicial notice of the matter. *See Florida Rule of Evidence* 90.203.

WHEREFORE, Orange County moves this Court to take judicial notice of Orange County Ordinance No. 2016-19.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 25, 2016 the foregoing was electronically filed with the Clerk of the Court using the Florida Courts eFiling Portal, which will send notice of filing and a service copy of the foregoing to the following:

David W. Foley, Jr.
1015 N. Solandra Drive
Orlando, FL 32807-1931
david@pocketprogram.org

Jennifer T. Foley
1015 N. Solandra Drive
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/s/ William C. Turner, Jr.
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JEFFREY J. NEWTON
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Counsel for Orange County, Florida

APPROVED BY ORANGE
COUNTY BOARD OF COUNTY
COMMISSIONERS

BCC Mtg. Date: September 13, 2016

EFFECTIVE DATE: September 23, 2016

ORDINANCE NO. 2016-19

AN ORDINANCE AFFECTING THE USE OF LAND IN ORANGE COUNTY, FLORIDA, BY AMENDING CHAPTER 38 ("ZONING") OF THE ORANGE COUNTY CODE; AND PROVIDING AN EFFECTIVE DATE

BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF ORANGE COUNTY, FLORIDA:

Section 1. Amendments; In General. Chapter 38 of the Orange County Code is amended as set forth in Section 2 through Section 48. New language shall be indicated by underlines, and deleted language shall be shown by strike-throughs.

Section 2. Amendments to Section 38-1 ("Definitions"). Section 38-1 is amended to read as follows:

Sec. 38-1. Definitions.

* * *

Assisted living facility shall mean any building or buildings, section or distinct part of a building, private home, boarding home, home for the aged, excluding a "nursing home" as defined in this section, or other residential facility, whether operated for profit or not, which is licensed by the State of Florida and undertakes through its ownership or management to provide housing, meals, and one or more personal services for a period exceeding 24 hours to one or more adults who are not relatives of the owner or administrator.

* * *

~~*Aviculture (commercial)* shall mean the raising, breeding and/or selling of exotic birds, excluding poultry, for commercial purposes. Any one (1) or more of the following shall be used to determine whether a commercial operation exists:~~

~~(1) The operation exists with the intent and for the purpose of financial gain.~~

STATE OF FLORIDA, COUNTY OF ORANGE
I HEREBY CERTIFY this is a copy of a document approved by the BCC on SEP 13 2016
MARTHA O. HAYNIE, COMPTROLLER
By: J. Climer Deputy Clerk
OCT 25 2016 Date
Seal

~~(2) Statements of income or deductions relating to the operation are included with routine income tax reporting to the Internal Revenue Service;~~

~~(3) A state sales tax identification number is used to obtain feed, supplies or birds;~~

~~(4) An occupational license has been obtained for the operation;~~

~~(5) Sales are conducted at the subject location;~~

~~(6) The operation involves birds or supplies which were purchased or traded for the purposes of resale;~~

~~(7) The operation involves a flea market or commercial auction, excluding auctions conducted by not-for-profit private clubs;~~

~~(8) The operation or activities related thereto are advertised, including, but not limited to, newspaper advertisements or signs, or~~

~~(9) The operation has directly or indirectly created traffic.~~

* * *

Boardinghouse, lodging house or *rooming house* shall mean a dwelling used for the purpose of providing meals or lodging or both to five (5) or more persons other than members of the family occupying such dwelling, or any unit designed, constructed and marketed where the individual bedrooms are leased separately and have shared common facilities. This definition shall not include a nursing home or community residential home. (For four (4) or less persons, see "family" definition in this section.)

* * *

Community residential home shall mean a dwelling unit licensed to serve clients of the ~~s~~State of Florida pursuant to Chapter 419, Florida Statutes, ~~department of health and rehabilitative services,~~ which provides a living environment ~~to~~ for 7 to 14 unrelated ~~"~~residents~~"~~ who operate as the functional

equivalent of a family, including such supervision and care by support staff as may be necessary to meet the physical, emotional, and social needs of the "residents." The term "resident" as used in relation to community residential homes shall have the same meaning as stated in section 419.001(1)(~~d~~e), F. S., as may be amended or replaced.

* * *

~~*Day care home, family* (also known as "family day care home") shall mean a residence in which child care is regularly provided for no more than ten (10) children. This shall include a maximum number of five (5) preschool children plus the elementary school siblings of the preschool children including the caregiver's own.~~

* * *

Dormitory shall mean a ~~room, apartment or~~ building containing sleeping accommodations in closely associated rooms for persons not members of the same family that ~~which~~ is operated for the use of students enrolled in an educational institution, as in a college dormitory.

* * *

Dwelling, four-family (quadraplex), shall mean a building with four (4) dwelling units which has four (4) kitchens and is designed for or occupied exclusively by four (4) families. Each unit of a quadraplex must be connected by a common wall.

Dwelling, multiple, shall mean a building located on a single lot or parcel designed for or occupied exclusively by three (3) or more families.

Dwelling, single-family, shall mean a detached dwelling containing one (1) kitchen and complete housekeeping facilities for one (1) family only, designed for or occupied exclusively by one (1) family for usual domestic purposes, and having no enclosed space or cooking or sanitary facilities in common with any other dwelling. All rooms shall connect to a common area within the dwelling and there shall be one main front door entry.

* * *

Dwelling, three-family (triplex), shall mean a building with three (3) dwelling units which has three (3) kitchens and is designed for or occupied exclusively by three (3) families. Each unit of a triplex must be connected by a common wall.

Dwelling, two-family (duplex), shall mean a building with two (2) dwelling units which has two (2) kitchens and is designed for or occupied exclusively by two (2) families. Each unit of a duplex must be connected by a common wall.

* * *

Family shall mean an individual; or two (2) or more persons related by blood, marriage or adoption, exclusive of household servants, occupying a dwelling and living as a single ~~nonprofit~~ housekeeping unit; or four (4) or fewer persons, not related by blood, marriage or adoption, exclusive of household servants, occupying a dwelling and living as a single ~~nonprofit~~ housekeeping unit, in either case as distinguished from persons occupying a boardinghouse, lodging house, rooming house, nursing home, community residential home, or hotel, as herein defined.

* * *

Family day care home shall mean as defined in F.S. § 402.302~~(5)~~, as it may be amended from time to time.

* * *

Fence shall mean a structure that functions as a boundary or barrier for the purpose of safety, to prevent entrance, to confine, or to mark a boundary.

* * *

Home occupation shall mean any use conducted entirely within a dwelling or accessory building and carried on by a resident ~~an occupant~~ or residents thereof~~, which~~ that is clearly incidental and secondary to the use of the dwelling for dwelling purposes and does not change the character thereof, subject to Section 38-79(101). ~~provided that all of the following conditions are met:~~

~~Only such commodities as are made on the premises may be sold on the premises. However, all such sales of home~~

~~occupation work or products shall be conducted within a building and there shall be no outdoor display of merchandise or products, nor shall there be any display visible from the outside of the building. No person shall be engaged in any such home occupation other than two (2) members of the immediate family residing on the premises. No mechanical equipment shall be used or stored on the premises in connection with the home occupation, except such that is normally used for purely domestic or household purposes. Not over twenty-five (25) percent of the floor area of any one (1) story shall be used for home occupation purposes. Fabrication of articles such as commonly classified under the terms "arts and handicrafts" may be deemed a home occupation, subject to the other terms and conditions of this definition. Also, a "cottage food operation" as defined and regulated by Chapter 500, Florida Statutes, shall be deemed a home occupation.~~ ~~Home occupation shall not be construed to include uses such as barber shops, beauty parlors, plant nurseries, tearooms, food processing (with the exception of a cottage food occupation), restaurants, sale of antiques, commercial kennels, real estate offices, insurance offices, or pain management clinics.~~

* * *

Living area shall mean the total air conditioned or heated floor area of all dwelling units measured to the interior surfaces of exterior walls, but excluding exterior halls and stairways.

* * *

Mobile home shall mean a structure transportable in one (1) or more sections, which structure is eight (8) feet or more in width and over thirty-five (35) feet in length, and which structure is built on an integral chassis and designed to be used as a dwelling when connected to required utilities, and includes the plumbing, heating, air conditioning, and electrical systems contained therein. A mobile home shall be constructed to United States Department of Housing and Urban Development standards.

* * *

Poultry shall mean domestic fowl, including chickens, roosters, turkeys, ducks, geese, pigeons, ~~etc.~~ but excluding wild or non-domestic birds regulated by the Fish and Wildlife Conservation Commission.

* * *

Recreational vehicle shall mean as defined at Section 38-1527.

* * *

Recreational vehicle park shall mean as defined at Section 38-1527.

* * *

Structure shall mean and include all permanent or temporary, fixed or movable construction, ~~comprising~~ including buildings, stands, poles, signs and billboards, erected independently or affixed to exterior walls or roofs; provided, however, that utility owned poles and lines ~~and poles~~ shall not be considered a structure~~s for the purposes of this chapter.~~

Student housing shall mean any multi-family development or portion thereof where the dwelling units are designed and constructed as three (3) or more bedrooms with three (3) or more bathrooms which is marketed and/or rented to students attending a local college, university, ~~or~~ community college, or private school, or any multi-family development or portion thereof comprised of dwelling units consisting of three (3) or more bedrooms and less than three (3) bathrooms where the bedrooms are leased separately.

* * *

Temporary portable storage container shall mean a structure temporarily used for storage that is not attached to a dwelling and does not have any water or electrical fixtures.

* * *

Yard, front, shall mean a yard extending across the front of a lot between the side lot lines, and being a minimum horizontal distance between the street line and the principal building or any projections thereof other than the projections of uncovered steps, uncovered balconies, or uncovered porches. ~~On corner lots, the front yard shall be considered as abutting the street upon which the lot has its least dimension.~~

* * *

In all other respects, Section 38-1 shall remain unchanged.

Section 3. Amendments to Section 38-3 ("General restrictions on land use").

Section 38-3 is amended to read as follows:

Sec. 38-3. General restrictions on land use.

(a) *Land use and/or building permits.* No building or structure shall be erected and no existing building shall be moved, altered, added to or enlarged, nor shall any land, building, structure or premises be used or designed to be used for any purpose or in any manner other than a use designated in this chapter, or amendment thereto, as permitted in the district in which such land, building, structure or premises is located, without obtaining the necessary land use and/or building permits.

(b) *Height limitation.* No structure or building shall be erected, nor shall any existing building be moved, reconditioned or structurally altered so as to exceed in height the limit established in this chapter; or amendments thereto, for the district in which such building or structure is located.

(c) *Site and building requirements.* No building or structure shall be erected, nor shall any existing building or structure be moved, altered, enlarged or rebuilt, nor shall any open space surrounding any building or structure be encroached upon or reduced in any manner, in size or area, except in conformity with the site and building requirements, established by this chapter, or amendments thereto, for the district in which such building or structure is located.

(d) *Density limitation.* No building, structure, or premises shall be erected, occupied or used so as to provide a greater density of population than is allowed under the terms of this chapter for the district in which such building, structure or premises is located.

(e) *Open space limitation.* No yard or other open space provided about any building or structure for the purpose of complying with the regulations of this chapter, or amendments thereto, shall be considered as providing a yard or open space for any other building or structure.

(f) *Lot and occupancy requirements.* Every building or structure hereafter erected shall be located on a lot or tract as defined herein, and in no case shall there be more than one (1)

principal building or use on one (1) lot except as hereinafter provided.

(g) *Minimum lot size and setback requirements.* Any single-family dwelling, regardless of the form of ownership of land (whether designated as a unit, parcel, lot, tract or other similar term) upon which the single-family dwelling is to be located, shall not be permitted unless the net lot area of the lot upon which hit is to be located can comply with the minimum lot size required by the applicable zoning district and such dwelling can comply with setback requirements of the applicable zoning district. The applicable zoning district shall be the one in which the lot and the dwelling area are located. Reference to a deed, plat book, condominium plat or other similar document shall constitute the division of land from which the county shall discern the lot dimensions for determining minimum lot size and setback requirements. Any interest such lot may have in common areas shall not be counted towards meeting the minimum lot size.

(h) *Leasing of bedrooms.* In a single-family dwelling, the leasing of bedrooms is prohibited unless the single-family dwelling is owner occupied.

(i) *Parking space requirements.* No building or structure shall be erected, nor shall any existing building or structure be moved, reconditioned or structurally altered so as to encroach upon or reduce in any manner, in size or area, the parking space requirements, established by this chapter, or amendments thereto, for the district in which such building or structure is located.

(j) *Distance requirements.* No structure or building shall be erected, nor shall any existing building be moved, reconditioned or structurally altered so as to infringe upon any applicable distance requirements. An applicant seeking a permit shall be responsible for ensuring that all applicable distance requirements are met. Approval of a land use and/or building permit does not constitute, or in any way imply, a waiver of the applicant's obligations to meet all applicable distance requirements.

(k) *Applicable law and ordinances.* Nothing in this chapter shall be construed to exempt any person from having to comply with all other applicable federal, state, or county laws or regulations.

(l) *Site plan*. A fully dimensionalized site plan shall be required for any proposed (i) building, structure, sign or mobile home, (ii) accessory building or structure, or (iii) fence, boat dock, or boat ramp. The site plan shall show:

(1) all property lines;

(2) all road rights-of-way;

(3) all easements;

(4) the location of any existing and proposed building, structure, mobile home, accessory building or structure, or fence, boat dock, or boat ramp, including all dimensions to property lines and existing structures;

(5) the location of the Normal High Water Elevation (NHWE) contour of all adjacent natural surface water bodies;

(6) the lot grading plan; and

(7) the location of any septic tank and drain field.

The above-mentioned items shall be depicted on the site plan so that Orange County may determine whether the proposed improvements comply with zoning and land development regulations.

(m) *Site plan; special requirements.*

(1) A site plan for (A) a proposed building, structure and sign, (B) a mobile home (new or relocated), (C) a moved structure, (D) an addition to an existing building or structure, or (E) an accessory building or structure, shall be prepared by an architect, engineer, or surveyor or by a general, building, or residential contractor registered or certified with the State of Florida. Such plan shall comply with the requirements set forth in (l)1. through 7. above. Additionally, should such plan not be prepared by a surveyor registered with the State of Florida, the plan shall contain a clear statement that it does not constitute a survey and the preparer shall sign and date the plan.

(2) Notwithstanding subsection (m)(1) above, a site plan for a proposed addition to an existing building, structure, or mobile home may be prepared by the property owner, with the

following conditions: (A) the plan must comply with the requirements set forth in the above (1) through (7); (B) the plan must be superimposed on a copy of a survey previously prepared by a registered surveyor that shows all existing improvements; and (C) the plan must contain a clear statement that it does not constitute a survey and the preparer shall sign and date the plan.

(3) Notwithstanding subsection (m)(1) above, a site plan for a proposed (A) fence, boat ramp, or boat dock; (B) accessory building; (C) structure no larger than one hundred twenty (100) square feet; or (D) structure required to be removed within a certain time, may be prepared by the property owner and the plan must be superimposed on a copy of a survey previously prepared by a registered surveyor that shows all existing improvements; and (C) the plan must contain a clear statement that it does not constitute a survey and the preparer shall sign and date the plan.

Section 4. Repeal of Section 38-56 ("U-R, UR-1, and UR-3 zoned lands"). Section 38-56 is repealed, and reserved for future use. (Sections 38-501, 38-502, 38-503, 38-504, and 38-505 relating to the UR-3 University Residential District shall remain in effect.)

Sec. 38-56. ~~U-R, UR1, and UR-3 zoned lands.~~ Reserved.

~~(a) Permitted uses, special exceptions, and performance standards of the U-R and UR-1 zoning districts shall be the same as those specified in the R-2 zoning district.~~

~~(b) Permitted uses, special exceptions, and performance standards of the UR-3 zoning district shall be the same as those specified in the R-3 zoning district.~~

Section 5. Amendments to Section 38-74 ("Permitted uses, special exceptions and prohibited uses"). Section 38-74(b) is amended to read as follows:

Sec. 38-74. Permitted uses, special exceptions and prohibited uses.

* * *

(b) *Use table.*

(1) The permitted uses and special exceptions allowed in the zoning districts identified in the use table set forth in section 38-77 are respectively indicated by the letters "P" and "S" in the cells of the use table. No primary use shall be permitted in a district unless the letter "P" or the letter "S" appears for that use in the appropriate cell.

(2) When a use is a permitted use in a particular zoning district, it is permitted in that district subject to:

a. Compliance with all applicable requirements of chapter 38 and elsewhere in the Orange County Code; and

b. Compliance with all requirements specified in the conditions for permitted uses and special exceptions" set forth in section 38-79 which correlate with the number which may appear within the cell of the use table for that permitted use.

c. A use variance from section 38-77 (Use table) and section 38-79 (Conditions for permitted uses and special exceptions) shall be prohibited.

(3) When a use is permitted as a special exception in a particular zoning district, it is permitted in that zoning district subject to:

a. Obtaining the special exception;

b. Compliance with all applicable requirements of chapter 38 and elsewhere in the Orange County Code; and

c. Compliance with all requirements specified in 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 which correlate with the number which may appear within the cell of the use table for that special exception.

(4) Land uses on properties zoned P-D (Planned Development) shall be subject to the requirements of the P-D district as outlined in Chapter 38, Article VIII of the Orange County Code.

* * *

In all other respects, Section 38-74 shall remain unchanged.

Section 6. Amendments to Section 38-75 ("Vested Uses"). Section 38-75 is amended to read as follows:

> **Sec. 38-75. Vested uses.**
>
> * * *
>
> (b) (1) Any vested use may expand on a lot or parcel in a manner consistent with the applicable performance standards.
>
> (2) Furthermore, any vested use may expand onto an adjacent lot or parcel, provided that use is consistent with the future land use map (and the remainder of the Ceomprehensive ~~policy~~ Pplan) for that adjacent lot or parcel, and the adjacent lot or parcel has the appropriate commercial or industrial zoning designation as of July 20, 1995.
>
> * * *

In all other respects, Section 38-75 shall remain unchanged.

Section 7. Amendments to Section 38-77 ("Use Table"). Section 38-77, the Use Table, is amended to read as shown on **Appendix "A,"** attached hereto and incorporated herein by this reference, including revising the vertical "Cluster" column to read "RCE Cluster" throughout. Except as specifically stated here and as shown in the attached Use Table, Section 38-77 shall remain unchanged.

Section 8. Amendments to Section 38-78 ("Special exception criteria"). Section 38-78 is amended to read as follows:

> **Sec. 38-78. Special exception criteria.**
>
> Subject to ~~section 38-43 and~~ section 30-43 of this Code, in reviewing any request for a special exception, the following criteria shall be met:

(1) The use shall be consistent with the ~~c~~Comprehensive ~~policy p~~Plan.

(2) The use shall be similar and compatible with the surrounding area and shall be consistent with the pattern of surrounding development.

(3) The use shall not act as a detrimental intrusion into a surrounding area.

(4) The use shall meet the performance standards of the district in which the use is permitted.

(5) The use shall be similar in noise, vibration, dust, odor, glare, heat producing and other characteristics that are associated with the majority of uses currently permitted in the zoning district.

(6) Landscape buffer yards shall be in accordance with section 24-5 of the Orange County Code. Buffer yard types shall track the district in which the use is permitted.

In addition to demonstrating compliance with the above criteria, any applicable conditions set forth in section 38-79 shall be met. Furthermore, the board of zoning adjustment ("BZA") shall prescribe a time limit, subject to the approval of the board of county commissioners ("BCC"), within which the action for which the special exception is required shall be begun or completed, or both. Failure to start or complete such action within the time limits shall void the special exception. An automatic ~~one~~two-year time limit to obtain a building permit shall apply if the BZA fails to prescribe a time limit. A request to extend the time limit shall be made in writing to the zoning manager. The zoning manager may extend the time limit if the applicant provides proper justification for such an extension. Examples of proper justification include, but are not limited to: the project is proceeding in good faith; there is a delay in contract negotiations not attributable to the applicant; and unexpected financial hardships which were not known and could not have been reasonably foreseen by the applicant when the special exception was granted. The zoning manager's determination on a request for an extension of time may be appealed to the BZA and then the BCC.

Special exception approvals shall be in accordance with the applicant's site plan dated "Received [date]," and all other applicable statutes, ordinances, laws, regulations, and rules. Any

proposed deviation, change or modification to the site plan or question of interpretation about the site plan is subject, at the outset, to the zoning manager's review. The zoning manager shall do one of the following after reviewing the matter: (a) give his/her prior written approval regarding any non-substantial or insignificant proposed deviation or make a determination concerning any minor question of interpretation; or (b) refer the proposed deviation or question of interpretation to the BZA for a discussion between the zoning manager and the BZA as to the BZA's original intent or position; or (c) require the applicant to apply for a special exception request and schedule and advertise a public hearing before the BZA in accordance with sections 30-42 through 30-44 of this Code.

The zoning manager shall have the authority and discretion to require an application for a special exception or a variance to be reviewed by the development review committee prior to review by the BZA to properly assess and address its impacts and to make a recommendation and recommend conditions (if any). In making such a determination, the zoning manager shall consider relevant factors, including the size of the project, land use intensity, land use density, traffic impacts, and school impacts.

Section 9. Amendments to Section 38-79 ("Conditions for permitted uses and special exceptions"). Section 38-79 is amended to read as follows:

Sec. 38-79. Conditions for permitted uses and special exceptions.

The following numbered conditions shall correlate with the numbers listed in the use table set forth in section 38-77:

(1) A modular home shall be permitted, provided it is licensed by the ~~department of community affairs~~State of Florida. No parcel shall have more than one (1) single-family unit or modular unit unless otherwise permitted by Chapter 38.

* * *

(4) a. [*Mobile home~~/recreation vehicle~~ provisions in A-1, A-2, and A-R*] Mobile homes ~~and recreational vehicles~~ may be permitted on individual lots in agricultural A-1, A-2, and A-R districts, subject to the following:

1. A mobile home may be used for residential purposes provided that the property contains a

minimum of two (2) acres in the A-2 and A-2 districts. Minimum lot width and setbacks shall be per article XII. Minimum lot size in the A-R district shall be two and one-half (2½) acres. Other site and building requirements shall be per article XIII. Such mobile home use shall require, before the mobile home is located on the property in question, a permit which shall be issued to the recorded property owner by the zoning ~~department~~ division.

2. Setbacks from lot lines shall be not less than is required for a site-built dwelling in the district in which it is located.

3. Building height shall be limited to thirty-five (35) feet.

(5)

* * *

b. ~~Temporary structures, including mobile homes and travel trailers, may be used as sales offices for a subdivision in a residential district~~ A single-family home or building may be used as a model home or sales center for an overall development (such as residential sales within a Planned Development) or a specified subdivision; or ~~T~~temporary structures, including mobile homes and travel trailers, may be used as sales offices for a subdivision in a residential district, subject to the following criteria:

1. Such a sales office~~s~~ shall not include sales of real estate outside the subdivision or overall development.

2. Approval shall be for a period of two (2) years or when ninety (90) percent of the subdivision or development is complete, whichever comes first. Extension of these time frames will require approval from the Zoning Division Manager.

3. Mulch parking shall be allowed.

4. The subdivision plat must be recorded before the sales trailer permit is issued or before a certificate of occupancy is issued for the model home or sales center.

5. Resale of existing residential units only, within the specified subdivision or overall development, will be permitted during the time frame specified in condition 2.

6. A model home or sales center shall be subject to the provisions outlined in Section 30-83 and Section 38-79(125).

c. Temporary structures, including mobile homes and travel trailers, may be used as construction office trailers for road improvement and/or utility development projects in any zoning district subject to the following:

1. The use of limited to the placement of construction/office trailers only.

2. No accessory or storage buildings shall be permitted.

3. Only the parking of passenger vehicles/trucks shall be permitted.

4. Any outdoor staging areas and storage of products and equipment shall require written authorization which may be issued by the zoning manager as part of the temporary structure permit, with or without conditions.

5. All temporary structures shall be removed no later than one hundred eighty (180) days from the date the permit is issued or within ten (10) days after completion of the project, whichever comes first.

6. Permits for temporary structures shall be obtained from the zoning manager. The zoning manager may require a notarized statement of no objection from abutting property owners. When such permits expire, they may be renewed by the zoning manager for a period not to exceed an additional ninety (90) days.

d. Mobile homes used as offices shall be permitted as a permanent use when accessory to a mobile home sales lot.

e. A mobile home or recreational vehicle may be used as quarters for a night watchman or on-site security on property zoned commercial, or industrial~~, subject to obtaining~~

~~special exception approval. Special exception approval is also required for the same use in planned developments approved for commercial and/or industrial uses (unless previously approved by the P-D) and in agricultural districts when used in conjunction with another use approved by a special exception or in conjunction with a nonresidential use~~. Night watchman quarters shall not be allowed on properties where a tenant dwelling exists.

f. Subject to prior approval by the zoning manager, who may impose appropriate conditions (such as a time period not to exceed eighteen (18) months), a recreational vehicle may be occupied as a temporary shelter where a single-family residence is located on-site but is uninhabitable and undergoing repairs. For purposes of this provision, the term "uninhabitable" means the on-site single-family residence cannot be occupied because it has been damaged as a result of a natural disaster or accident, such as a hurricane, storm or fire, not that it cannot be occupied for some other reason, including because it is being renovated or enlarged.

g. Mobile homes and recreational vehicles may be located, for an indefinite period of time, at a hunting camp of one hundred (100) acres or more; subject to obtaining all appropriate permits and licenses.

h. Recreational vehicles may be parked in residential and agricultural districts as provided in subsection 38-79(45).

i. Mobile homes and recreational vehicles may be permitted on individual lots in commercial or industrial districts, subject to the following: A mobile home or recreational vehicle may be temporarily parked and occupied on a specified tract of land in commercial or industrial districts, to be used for offices, storage or security purposes, during the construction of permanent building on the tract of land. The mobile home or recreational vehicle shall be removed after the certificate of occupancy is issued.

(6) Outdoor display of operative agricultural equipment is permitted, subject to the following conditions.

a. The equipment may be stored outdoors on parcels adjacent to the parcels containing the agricultural uses provided they are commonly owned or leased;

b. The owner or lessee of the equipment and the owner or lessee of the site must be one and the same; and

c. The equipment must be used in conjunction with active agricultural operations/uses on-site.

d. Landscaping/lawn service business and storage of equipment associated with such use shall be subject to SIC 0782.

(7) Chimneys, water and fire towers, church spires, cupolas, stage towers and scenery lofts, cooling towers, elevator bulkheads, smokestacks flagpoles, parapet walls, and similar structures and their necessary mechanical appurtenances shall be permitted, subject to Chapter 38-1506 of the Orange County Code.

* * *

(9) ~~Such a use shall not commence without a land use permit.~~ Such a use shall meet the following standards:

a. A land use permit shall be obtained;

b. A comprehensive groundwater monitoring program, as determined by the Environmental Protection Division Manager, shall be required, and such program shall entail a minimum of two (2) wells dug to the confining layer, to be tested and sampled at least every six (6) months, except that the property owner may be exempted from this groundwater monitoring requirement if the owner establishes that no potable water supply wells are located within five hundred (500) foot of the boundary of the junkyard site and the EPD Manager determines that no other environmental problems are associated with the junkyard;

c. By January 1, 1996, all junkyards that are not otherwise presently subject to screening requirements shall be required to have an eight-foot (8') high masonry wall, eight-foot (8') high maintained fence, or other screening acceptable to the Zoning Manager; and

* * *

(11) Reserved. ~~Subject to federal, state and local licensing and permitting requirements.~~

(12) A home of six or fewer residents which otherwise meets the definition of a community residential home ~~with six (6)~~

~~or fewer clients~~ shall be deemed a single-family unit and a noncommercial, residential use. Such a home shall be allowed in single-family or multifamily zoning without approval by the County, provided that such a home ~~in a single-family residential district~~ shall not be located within a radius of one thousand (1,000) feet of another ~~-~~existing such home with six or fewer residents or within a radius of one thousand two hundred (1,200) feet of another existing community residential home. Distance requirements shall be documented by the applicant and submitted to the Zoning Division with the application. All distance requirements pertaining to such a home with six or fewer residents ~~community residential homes~~ shall be measured from the nearest point of the existing such home with six or fewer residents or existing community residential home ~~or area of single-family zoning~~ to the nearest point of the proposed home. (Notwithstanding the foregoing provisions, any application for a community residential home which has been submitted to the Zoning Division for distance separation review on or prior to June 18, 1991, shall be deemed consistent with this section, provided such application could have met the distance separation requirements in effect upon the date of submission of such application.

* * *

(14) A community residential home ~~with more than six (6) clients~~ shall not be located within a radius of one thousand two hundred (1,200) feet of another existing community residential home and shall not be located within five hundred (500) feet of any single-family residential district. Distance requirements shall be documented by the applicant and submitted to the Zoning Division with the application. All distance requirements pertaining to community residential homes shall be measured from the nearest point of the existing community residential home or area of single-family zoning to the nearest point of the proposed home. (Notwithstanding the foregoing provisions, any application for a community residential home which has been submitted to the Zoning Division for distance separation review on or prior to June 18, 1991, shall be deemed consistent with this section, provided such application could have met the distance separation requirements in effect upon the date of submission of such application.)

(15) A bed and breakfast homestay, bed and breakfast inn, or country inn ~~may be permitted, subject to~~shall be subject to the requirements outlined in section 38-1425.

(16) A permanent emergency generator for emergency use only shall be permitted as an ancillary use during an emergency period in all zoning districts, subject to the noise control ordinance and the following requirements:

a. Except as provided in subsection g., below, the generator shall be located in the rear yard or the rear one-half of the lot or parcel;

b. Maximum height—5 feet;

c. Rear setback—5 feet;

d. Side street setback—15 feet;

e. There are no spacing requirements between the principal building and the generator;

f. In residentially zoned districts, the generator shall be screened from view by a wall, fence or hedge. In non-residentially zoned districts, the generator shall meet commercial site plan requirements; and

g. A generator may be installed in the side yard of a lot, subject to the following:

1. Minimum five (5) foot setback when the generator is located in the rear yard of a residential lot;

2. Minimum ~~thirty (30)~~ ten (10) foot setback when the generator is located along the side of the principal residence on a residential lot; or

3. Side yard setback shall comply with the applicable zoning district requirements when the generator is located on a nonresidential zoned lot.

* * *

(18) A screen room shall be permitted with the following limitations: with respect to a Planned Development~~s~~, a screen room may extend up to fifty percent (50%) into the required rear yard;~~,~~ ~~provided that the rear yard is at least twenty (20) feet and the applicant provides a notarized statement from the abutting property owner indicating that he/she does not object to the encroachment.~~ and ~~W~~with respect to property outside ~~of~~ a Planned Development~~s~~, a screen room may extend up to thirteen (13) feet into the required rear yard. Notwithstanding the foregoing, where an alley is present, the screen room shall not be located closer than five (5)

feet to the edge of the alley, and shall not be located within any easement.

* * *

(20) A townhouse project or a triplex project or a quadraplex project which is designed, arranged and constructed so that each dwelling unit may be owned by a separate and different owner, shall be a permitted use, subject to the following requirements:

* * *

e. Off-street parking shall be provided at the rate of two (2) spaces per unit. Parking lots, driveways, and streets within the project shall be designed to discourage through traffic. ~~Driveways shall be located at least ten (10) feet from the buildings.~~

* * *

(26) a. An adult or child day care home shall comply with the following requirements:

1. *Hours of operation*. A day care home may operate twenty-four (24) hours per day.

2. *Fence*. A fence at least four (4) feet in height shall be placed around all outdoor recreation/play areas or outdoor use areas.

3. *Parking spaces*. At least three (3) paved parking spaces shall be provided.

4. *Recreation*. Indoor and ~~O~~outdoor recreation/play areas or outdoor use areas shall be provided as required by the State of Florida.

5. *Separation*. A day care home located in a residential zoning district shall not be located within seven hundred (700) feet of another day care home or one thousand two hundred (1,200) feet of a day care center located in a residential zoning district. Distance requirements shall be documented by the applicant and submitted to the Zoning Division with the application. Distance shall be measured by following the shortest route of ordinary pedestrian travel along the public thoroughfare

from the closest property boundary of a day care home to the closest property boundary of another day care home or shelter.

6. A Type D opaque buffer shall be provided where outdoor recreation areas are adjacent to single-family zoning districts or single-family uses.

b. An adult or child day care center shall comply with the following requirements:

1. *Hours of operation*. A day care center may operate twenty-four (24) hours per day in nonresidential and R-3 zoning districts. In all other residential zoning districts, a day care center shall open no earlier than 6:00 a.m., and close no later than 7:00 p.m.

2. *Location*. A day care center shall be a permitted use in the R-3, U-V (town center), and any professional office, commercial or industrial zoned district, and shall be a special exception in all other districts except R-T, R-T-1, and-R-T 2.

3. *Parking spaces*. Permanent parking shall be provided in accordance with article XI of Chapter 38, except for centers where there is no pick-up or drop-off area available on the property. In these types of centers, one (1) off-street parking space for each five (5) children shall be required.

4. *Recreation*. Indoor and ~~O~~outdoor recreation/play areas or outdoor use areas shall be provided as required by the State of Florida.

5. *Fence*. A fence at least four (4) feet in height shall be placed around all outdoor recreation/play areas or outdoor use areas.

6. *Buffer*. A ten (10) foot wide buffer shall be provided to separate this use from any adjoining residential zoned district. This buffer shall consist of intermittently placed screening at least three (3) feet in height that constitutes thirty (30) percent of the buffer length. The buffer shall consist elsewhere of berms, planted and/or existing vegetation.

7. *Ancillary use*. A day care center may be permitted as a special exception in conjunction with and as an ancillary use to institutional uses which are permitted uses or are

allowed as a special exception, such as, but not limited to, religious institutions, schools, and nonprofit institutional uses.

* * *

(31) Mechanical garage shall mean buildings and premises where the functions and services rendered relate to the maintenance, service, and repair of automobiles, buses, taxi cabs and trucks. However, a mechanical garage does not include buildings and premises where the functions and services rendered are:

~~a. Bodywork;~~

~~b. Painting of automobilies or other vehicles;~~

~~c~~a. Storage of vehicles for the purpose of using parts of such vehicles for sale or repair; or

b~~d~~. Any condition which may be classified as a junkyard.

(32) A special exception is required for agriculturally and residentially zoned lands located in a Rural Settlement (RS) designated on the CP~~P~~ Future Land Use Element Map.

* * *

(36) Except as set forth in subsections 38-79(36)h. and i. below, the raising or keeping of poultry shall comply with the following requirements:

a. no commercial on-site slaughtering in agricultural and residential zoned districts;

b. an agriculturally zoned parcel up to five (5) acres shall be limited to not more than thirty (30) poultry; an amount of poultry in excess of this limit shall require a special exception;

c. an agriculturally zoned parcel more than five (5) acres and less than ten (10) acres shall be limited to not more than one hundred (100) poultry; an amount of poultry in excess of this limit shall require a special exception;

d. an agriculturally zoned parcel ten (10) acres or greater shall have no limit on the number of poultry;

e. the following requirements shall apply in the RCE, RCE-2 and RCE-5 zoning districts:

1. roosters shall be prohibited;

2. all poultry shall be for domestic use only;

3. not more than twelve (12) poultry; an amount of poultry in excess of this limit shall require a special exception;

f. any cage, pen, covered enclosure, barn, or other holding area shall be setback at least thirty feet (30) feet from all property lines and at least thirty (30) feet from the normal high water elevation of any lakes or natural water bodies;

g. excrement and waste shall not be piled or stored within one hundred (100) feet of any residentially zoned district;

h. A bona fide agricultural business or use that is exempt from local government zoning regulations under the Florida Statutes shall not be subject to the requirements of this subsection 38-79(36);

i. The keeping of poultry for an approved 4H or Future Farmers of America (FFA) educational program shall be exempt from the requirements of this subsection 38-79(36), provided the number of poultry does not exceed twelve (12) and the duration of the program does not exceed six (6) months.

~~Poultry raising or keeping shall be a permitted use, provided that it is limited to one hundred (100) birds or less, and the lot is located a minimum of one hundred (100) feet from all residential-zoned districts. All pens, enclosures, or waste disposal activities shall not be located any closer than fifty (50) feet from the property line or one hundred (100) feet from a residential dwelling unit and shall not be located any closer than fifty (50) feet from the normal high water elevation of any natural water body. ("Poultry" shall mean domestic fowl such as chickens, roosters, turkeys, ducks, geese, pigeons, hens, quails, pheasants, and squabs.)~~

(37) Reserved. ~~The raising or keeping of poultry for domestic purposes shall be a permitted use, provided that it is~~

~~limited to thirty (30) birds or less, and the lot is located at minimum of one hundred (100) feet from all residential-zoned districts. All pens, enclosures, or waste disposal activities shall not be located any closer than fifty (50) feet from the property line or one hundred (100) feet from a residential dwelling unit and shall not be located any closer than fifty (50) feet from the normal high water elevation of any natural water body. ("Poultry" shall mean domestic fowl, such as chickens, roosters, turkeys, ducks, geese, pigeons, hens, quails, pheasants and squabs.)~~

* * *

(40) Reserved. ~~The raising or keeping of poultry shall be a permitted use, provided that: I~~it is limited to twelve (12) birds or less, and the lot is located a minimum of one hundred (100) feet from all residential zoned districts, ~~except R-CE-5, R-CE-2, and R-CE zoned districts. All pens, enclosures and waste disposal activities shall be located not closer than fifty (50) feet from the rear or side property line, shall not be located in front of the front setback line, shall not be located any closer than fifty (50) feet from the normal high water elevation of any natural water body, and it shall be located a minimum of one hundred (100) feet from a residential zoned district. ("Poultry" shall mean domestic fowl such as chickens, roosters, turkeys, ducks, geese, pigeons, hens, quails, pheasants and squabs.)~~

(41) Except as set forth in subsections 38-79(41)i. and j. below, the raising or keeping of horses, ponies, donkeys and mules shall comply with the following requirements:

a. no on-site slaughtering, commercial or otherwise;

b. in A-1, A-2, A-R, RCE, RCE-2 and RCE-5 zoning districts not more than one animal per acre for grazing purposes only (not kept in holding areas too); more than one animal per acre for grazing only requires a special exception;

c. in A-1, A-2, A-R, RCE, RCE-2 and RCE-5 zoning districts not more than one animal per acre for grazing purposes; if animals are permanently kept in holding areas such as a barn, paddock, stall, or corral, no more than four (4) animals per conforming lot or parcel, and if more than four (4) animals are kept in holding areas, a special exception shall be required; the requirements for property where animals only graze and where animals are kept in holding areas shall be mutually exclusive;

d. any barn, paddock, stall, or corral shall be setback at least fifteen (15) feet from all property lines and at least thirty (30) feet from the normal high water elevation of any lakes or natural water bodies;

e. manure and compost shall not be piled or stored within thirty (30) feet of any property line;

f. boarding of animals for commercial purposes in agricultural and residential zoned districts requires a special exception, and is subject to the requirements in subsections 38-79(41)b. through e.;

g. boarding of animals for commercial purposes in commercial and industrial zoned districts is permitted, subject to the requirements in subsections 38-79(41)e. and f.;

h. a bona fide agricultural business or use that is exempt from local government zoning regulations under the Florida Statutes shall not be subject to the requirements of this subsection 38-79(41);

i. the keeping of animals for an approved 4H or FFA educational program shall be exempt from the requirements of this subsection 38-79(41), provided that the number of animals does not exceed six (6) and the duration of the program does not exceed six (6) months.

~~The raising or keeping of cows, horses, goats and/or ponies for domestic purposes shall be a permitted use, provided that the total number of animals shall not exceed one (1) animal per acre. The raising of more animals than permitted herein shall require special exception approval. All stables, pens, or corrals shall be no closer than thirty (30) feet from the rear or side property line, shall not be located in front of the front setback line and shall not be located any closer than fifty (50) feet from the normal high water elevation of any natural water body.~~

* * *

(45) Except as provided in subsections (45)a. through f. for boats and subsections (45)g. through j. for recreational vehicles, no boat, regardless of its length, and no recreational vehicle, may be parked, stored, or otherwise kept on a lot or parcel. For purposes of this subsection (45), a "boat" shall not include a canoe sixteen (16) feet or less in length, a sailboat sixteen (16) feet

(16') or less in length with the mast down, a jon boat sixteen (16) feet or less in length, or a personal watercraft (e.g., a jet ski). Also for purposes of this subsection, the length of a boat shall be measured from the front of the bow to the back of the stern, excluding the motor or propeller.

a. The maximum number of boats permitted to be parked, stored or kept on the lot or parcel shall be calculated as follows depending on the size of the lot or parcel:

1. For a lot or parcel less than or equal to one-quarter acre, the maximum total number is two (2) boats, with a maximum number of one (1) boat in the front yard;

2. For a lot or parcel greater than one-quarter acre and less than or equal to one-half acre, the maximum total number is three (3) boats, with maximum number of one (1) boat in the front yard; and

3. For a lot or parcel greater than one-half acre, the maximum total number is four (4) boats, with a maximum number of one (1) boat in the front yard.

b. The registered owner of the boat~~(s)~~ and/or boat trailer~~(s)~~ shall be the owner or lessee of the principal structure at the lot or parcel.

c. No boat or boat trailer may be parked, stored, or kept wholly or partially within the public or private right-of-way, including the sidewalk.

d. No boat may be occupied or used for storage purposes.

e. A boat less than or equal to twenty-four (24) feet in length may be parked, stored, or kept inside a garage, under a carport, in the driveway, in the front yard on an approved surface, in the side yard, or in the rear half of the lot or parcel. An approved surface situated in the front half of the lot or parcel shall be placed immediately contiguous to the driveway, and not anywhere else in the front yard or side yard. Such a boat on the rear half of the lot or parcel shall be screened from view from the right of way when it is parked or stored behind the principal structure, and shall be at least ten (10) feet from the side lot lines and at least five (5) feet from the rear lot line. Setbacks may be reduced to zero (0) feet if a six-foot high fence, wall, or vegetative

buffer, exists along the lot line. (For purposes of this subsection (45), an "approved surface" shall mean a surface consisting of asphalt, gravel, pavers, or concrete.)

f. A boat greater than twenty-four (24) feet in length may be parked, stored or kept inside a garage, under a carport, or in the rear half of the lot or parcel, but not in the driveway or in the front yard. Such a boat on the rear half of the lot or parcel shall be screened from view from the right of way when it is parked or stored behind the principal structure, and shall be at least ten (10) feet from the side lot lines and at least five (5) feet from the rear lot line. Setbacks may be reduced to zero (0) if a six-foot high fence, wall, or vegetative buffer, exists along the lot line. Furthermore, the owner of such a boat shall obtain a permit from the zoning division in order to park, store or keep the boat at the lot or parcel.

g. Not more than one (1) recreational vehicle may be parked, stored or kept on the lot or parcel.

h. The owner of the recreational vehicle shall be the owner or lessee of the principal structure at the lot or parcel.

i. No recreational vehicle may be occupied while it is parked, stored or kept on the parcel.

j. A recreational vehicle may be parked, stored or kept only on an approved surface in the front half of the lot or parcel (behind the front yard setback) or on an unimproved surface in the rear half of the lot or parcel. The recreational vehicle shall not obscure the view of the principal structure from the right-of-way adjoining the front of the subject property, and shall be at least ten (10) feet from the side lot lines and at least five (5) feet from the rear lot line. Setbacks may be reduced to zero (0) feet if a six-foot high fence, wall, or vegetative buffer, exists along the lot line. Furthermore, the owner of such a recreational vehicle shall obtain a permit from the zoning division in order to park, store or keep the recreational vehicle at the lot or parcel.

* * *

(48) Reserved. ~~Commercial aviculture or any aviary shall be as defined in section 38-1 of this chapter and may be permitted as a special exception subject to the following requirements. Each application shall include a site plan and~~

~~corresponding narrative which shall contain the following information:~~

~~a. A dimensionalized site plan (drawn to scale) indicating the location, height and intended use of all existing and proposed structures.~~

~~b. The location, nature and height of proposed security fences, berms, landscaping and other security and noise alleviation structures.~~

~~c. A description of the facility outlining the intended method of operation, including the number, types and characteristics of the birds.~~

(49) Except as set forth in subsections 38-79(49)e. and f. below, the raising or keeping of goats, sheep, lambs, and pigs shall comply with the following requirements:

a. no commercial on-site slaughtering in agricultural and residential zoned districts;

b. not more than eight (8) animals per acre; more than that amount requires a special exception;

c. any barn, paddock, stall, pen, or corral shall be setback at least fifteen (15) feet from all property lines and at least thirty (30) feet from the normal high water elevation of any lakes or natural water bodies;

d. manure and compost shall not be piled or stored within thirty (30) feet of any property line;

e. a bona fide agricultural business or use that is exempt from local government zoning regulations under the Florida Statutes shall not be subject to the requirements of this subsection 38-79(49);

f. the keeping of animals for an approved 4H or FFA educational program shall be exempt from the requirements of this subsection 38-79(49), provided the number of animals does not exceed six (6) and the duration of the program does not exceed six (6) months.

~~The raising or keeping of six (6) or less farm animals such as swine or goats for domestic purposes only shall be a permitted use.~~

(50) To the extent not inconsistent or in conflict with any applicable federal or state law, including Section 163.04, Florida Statutes, solar panels, wind turbines, and other energy devices based on renewable resources may be permitted, provided they comply with the following requirements:

a. Solar panels, wind turbines and other energy devices shall be located at least two hundred (200) feet from any residential use or district or P-D with residential land use approval;

b. Solar panels, wind turbines and other energy devices shall comply with all other applicable laws and regulations.

~~Poultry raising or keeping in excess of one hundred (100) birds, and/or keeping or raising in excess of six (6) swine may be permitted as a special exception, subject to comoplying with the following additional requirements:~~

~~a. All pens, birds, swine, manure and waste disposal activities shall be located at l east one thousand (1,000) feet from any residential zoned lands.~~

~~b. The minimum lot size for poultry and swine operations shall be nine (9) acres.~~

~~c. All pens, birds, swine, manure and waste disposal activities shall be located at least one hundred fifty (150) feet from abutting property and shall be located at least two hundred (200) feet from a public street.~~

~~d. Dead birds and swine shall be disposed of in accordance with applicable health regulations.~~

~~e. Manure and other wastes shall be disposed of in accordance with applicable health regulations.~~

~~f. Flies and insects shall be controlled in accordance with applicable health department regulations.~~

~~g. Poultry shall mean domestic fowl such as chickens, roosters, turkeys, ducks, geese, pigeons, hens, quails, pheasants and squabs.~~

* * *

(51) a. In an A-1, A-2, I-2/I-3, or I-4 zoned district, the location depicted on the approved commercial site plan for this type of use or operation that will have equipment or machines, including a crusher, stockpiles, or loading/unloading activity, but excluding a truck or other motor vehicle or an internal access road, shall be at least one thousand (1,000) feet from the nearest property line of any residential zoned district, residential use, or school.

b. Effective January 30, 2015, this type of use or operation shall be prohibited in the I-1/I-5 zoning district, except as follows:

1. Any application for such use that was submitted but not approved prior to September 26, 2014, may be resubmitted by not later than December 31, 2015, and permitted, provided the parcel or tract that was the subject of the pre-September 26, 2014, application is adjacent to an I-1/I-5 parcel or tract permitted for such use prior to September 26, 2014, and is no closer to the nearest residential zoned district or residential use; or

2. Any application submitted between January 30, 2015, and December 31, 2015, may be permitted, provided the parcel or tract that is the subject of such an application was under common ownership as of September 26, 2014, with the parcel or tract that was permitted for such use prior to September 26, 2014, and is adjacent to the previously permitted parcel or tract, and such non-permitted parcel or tract is no closer to the nearest residential zoned district or residential use.

If an applicant under subsection 38-79(~~77~~51)b. is unable to meet the 1,000 foot distance separation requirement described in subsection 38-79(~~77~~51)a., a site specific noise study may be required indicating that a reduced setback, including any operational and/or engineering controls, will enable the use or operation to comply with the County's noise control ordinance at the closest residential or noise sensitive area property line. Such noise study shall be signed by a licensed professional engineer with experience in sound abatement. If the application is approved, a confirmation study shall be conducted by the owner during the

initial two weeks of full operations at the site. Measurements shall be taken at the nearest residential and noise sensitive area property lines and a report shall be submitted to the County within forty-five (45) days after initiation of the sampling. If the report shows that the measurements exceed permissible limits, the use or operation shall be deemed in violation of subsection 38-79(~~77~~51).

c. The type of use or operation allowed under subsection 38-79(~~77~~51)a. shall meet the following location, design and operational criteria:

1. The use or operation shall be subject to an approved commercial site plan, and shall comply with all applicable laws, ordinances, rules, and regulations, including the air quality rules codified at Article III, Chapter 15, Orange County Code, the noise control ordinance codified at Article V, Chapter 15, Orange County Code, and the vibration requirements in Section 38-1454, Orange County Code.

2. Unconfined or uncontrolled emissions of particulate matter from any crushing activity, screening activity, conveying activity, stockpiling, loading/unloading activity, or vehicular traffic shall be controlled using water suppression systems, dust suppressants, or other engineering controls acceptable to the County.

3. Buffer requirements at any abutting residential or institutional use property line shall be Type A opaque with landscaping, consistent with the landscaping and buffering ordinance codified at Article I, Chapter 24, Orange County Code.

4. Stockpile heights shall not exceed thirty five feet (35') above the finished grade elevation in A-1 and A-2 zoned districts, and shall not exceed fifty feet (50') above the finished grade elevation in I-2/I-3 and I-4 zoned districts.

5. Building heights shall not exceed fifty (50) feet, or thirty-five (35) feet when located within one hundred (100) feet of a residential zoning district or residential designation on the future land use map, or one hundred (100) feet when located more than five hundred (500) feet of a residential zoning district or residential designation on the future land use map, whichever is applicable.

6. Hours of operation shall be limited to 7:00 a.m. to 7:00 p.m. Monday through Friday and 8:00 a.m. to 3:00 p.m. on Saturday at a plant or facility in an A-1, A-2, I-2/I-3, or I-4 zoned district. No such plant or facility may operate on Sunday.

d. The type of use or operation allowed under subsection 38-79(~~77~~51)b. shall meet the criteria described in subsection 38-79(~~77~~51)c.1, 2 and 5, and the following additional criteria:

1. Any portion of the combined parcels or tracts that abuts residential or institutional use property line shall have the following buffer: an eight foot (8') high precast concrete wall with stucco finish, with Textilis Gracilis (slender weaver) or multiplex Silverstripe clumping bamboo planted every four feet (4') along the length of the wall, within three feet (3') of the wall face. Such planted bamboo shall be from seven (7) to ten (10) gallon pots, and the bamboo plants shall be at least ten feet (10') in height at the time of planting.

2. Stockpile heights shall not exceed thirty five feet (35') above the finished grade elevation.

3. Hours of operation shall be limited to 7:00 a.m. to 5:00 p.m. Monday through Friday and 8:00 a.m. to 3:00 p.m. on Saturday. No such plant or facility may operate on Sunday. No such plant or facility may operate a concrete crusher on Saturday. However, the sale of aggregate materials shall be permitted on Saturday.

4. The equipment or machines, including a crusher but excluding a truck or other motor vehicle or an internal access road, shall be located on the parcel or tract that is furthest away from the nearest residential zoned district or residential use, and such equipment shall be located as far away from the nearest residential zoned district or residential use as practical or feasible.

5. No more than one concrete crusher shall be permitted at the plant or facility.

6. The concrete crusher shall incorporate sound attenuation devices as depicted in the approved commercial site plan. The sound attenuation devices shall consist of buffering walls or engineered structures/components along three

(3) sides of the crusher, including sides that face residential and institutional property lines. The fourth side may remain open for access to operate the crusher equipment and accompanying processes. The sound attenuation walls shall be at least three feet (3') higher than the top of the crusher equipment, excluding the conveyors.

e. Notwithstanding anything that may or seem to be contrary in Section 38-77 or this subsection 38-79(~~77~~51), excavation pits shall be a permitted use in the I-1/I-5, I-2/I-3, I-4, A-1, and A-2 zoned districts, subject to complying with all applicable laws, ordinances, rules, and regulations, including the excavation and fill ordinance codified at Chapter 16, Orange County Code. Any crushing activity or crushing equipment at an excavation pit shall comply with the 1,000 foot distance separation requirement described in subsection 38-79(~~77~~51)a.

* * *

(55) Temporary portable storage containers (TPSC) are permitted in a manner that is safe and compatible with adjacent surrounding uses and activities and in compliance with this subsection. A TPSC to be placed on property for less than one hundred eighty (180) days requires a zoning permit. A TPSC to be placed on property for one hundred eighty (180) days or more requires a zoning permit and a building permit. Once a TPSC is removed from property, it may not be replaced for a period of at least one hundred eighty (180) days.

a. *Duration.* A TPSC may be placed on residential property for the following periods of time, but the Zoning Manager may authorize a time extension of the applicable duration period if the property owner demonstrates that extenuating circumstances exist to justify the extension. Upon completion of the work permitted, the PTSC shall be removed within seven (7) days.

1. A TPSC placed in conjunction with moving activities may be permitted for a maximum of fourteen (14) days.

2. A TPSC placed for reconstruction and/or remodeling may be permitted for a maximum of thirty (30) days.

3. A TPSC placed for new construction may be permitted for a maximum of 180 days.

4. Once a permit for a TPSC has expired, or has utilized its maximum duration, or has been removed from the site, no additional permits for a TPSC may be issued until after a period of 180 days has transpired.

b. *Location and size.*

1. A TPSC shall be located a minimum of five (5) feet from any property line. The TPSC shall be placed on an improved area only, not on grassed or landscaped areas.

2. The maximum allowable size for a TPSC on a residential lot is an aggregate sum of one hundred sixty (160) square feet.

3. A TPSC shall not be located in a manner that impairs a motor vehicle operator's view of other vehicles, bicycles or pedestrians utilizing, entering or exiting a right-of-way; or in a manner that obstructs the flow of pedestrian or vehicular traffic.

4. A TPSC shall not be placed within a required landscape or buffer area or areas that are considered environmentally sensitive.

* * *

(59) Reserved. ~~Riding stables, may be permitted as a special exception, provided that no structure, barn, pen or corral housing animals shall be located closer than fifty (50) feet from any property line, and provided that the density shall not exceed one (1) animal per acre of lot area. This restriction shall not apply to grazing areas.~~

* * *

(61) ~~Public and private utilities. Structures, buildings, or uses required for public or private utilities, including but not limited to g~~Gas substations, ~~electric substations,~~ telephone dial exchange buildings, and radio and television substations and towers shall be permitted in industrial districts. Such structures may be permitted in any other district only as a special exception. Security fences, minimum of six (6) feet in height, shall be required around any ~~gas or electric~~ substation. (Electric

substations, also known as distribution electric substations, are addressed under subsection 38-79(81).)

* * *

(63) ~~Such use is subject to the requirements set forth in Ordinance No. 94-26.~~With respect to animal slaughtering, and the confinement of animals for finishing and preparation for slaughter, all storage and processing activities shall be enclosed within a wall or structure constructed and maintained in a manner such that storage, slaughtering, or processing activity is not visible from any public or private street or any point on abutting property lines.

* * *

(68) An automobile service station shall be a permitted use, subject to the following standards:

a. All pump islands shall be set back at least fifteen (15) feet from the right-of-way line, or, where a major street setback distance has been established under article XV of chapter 38, pump islands shall not encroach into the setback distance more than fifteen (15) feet.

b. The overhang of a pump island canopy not attached to the service station structure shall be set back at least five (5) feet from the right-of-way line, or, where a major street setback distance has been established, such overhang shall not encroach into the setback distance more than twenty-five (25) feet.

c. The overhang of a pump island canopy attached to the service station structure shall be deemed part of the structure and subject to building setback requirements.

d. When the service station abuts a residential district, ~~it shall be separated therefrom by a concrete block or solid masonry wall at least six (6) feet in height~~buffers shall comply with the requirements in Section 24-5 of the Orange County Code.

e. Automobile towing may be permitted as an accessory use. However, towed vehicles shall not be stored on site.

(69) ~~A transient rental, single-family dwelling shall be a permitted use.~~ The keeping of animals for an approved 4H or FFA educational program shall be exempt from the requirements of this subsection 38-79(69), provided the number of animals does not

exceed six (6) and the duration of the program does not exceed six (6) months.

(70) Pump islands for dispensation of motor fuel shall be a permitted ancillary use in conjunction with convenience stores. All pump islands shall comply with the requirements of subsection 38-79(68).

* * *

(77) ~~Valet parking service shall be a permitted use, provided that a parking lot associated therewith shall not be permitted.~~ Reserved.

* * *

(81) Distribution electric substations, as that term is defined in Section 163.3208(2), Florida Statutes, shall be permitted in all zoning districts, except in those areas designated as preservation, conservation, or historic preservation on the future land use map or duly adopted ordinance. Security fencing, a minimum of six (6) feet in height, shall be required around the substation. In addition, applicants for such uses shall be required to implement reasonable setback, landscaping, buffering, screening, lighting, and other aesthetic compatibility standards. Vegetated buffers or screening beneath aerial access points to the substation equipment shall not be required to have a mature height in excess of fourteen (14) feet. Unless and until the County adopts reasonable standards for substation siting in accordance with Section 163.3208(3), the standards set forth in Section 163.3208(4), shall apply. Prior to submitting an application for the location of a new distribution electric substation in a residential area, the utility shall consult with the County regarding the selection of the site, and both the utility and the County shall comply with Section 163.3208(6). If the County adopts standards for the siting of new distribution electric substations, the County shall be subject to the timeframes set forth in Section 163.3208(8) for granting or denying a properly completed application for a permit and for notifying the permit applicant as to whether the application is, for administrative purposes only, properly completed and has been properly submitted. ~~A parking lot or parking garage which is accessory to an adjacent office, industrial or commercial use may be permitted as a special exception, provided that such parking facility does not materially interfere with nearby residential uses.~~

* * *

(83) ~~Reserved.~~ To the extent this subsection, or any portion thereof, may not be consistent with or may conflict with an applicable federal or state law, including Section 163.04, Florida Statutes, the applicable federal or state law shall control. Solar panels, wind turbines, and other energy devices based on renewable resources may be permitted as an accessory structure or use. Solar panels that are not free-standing or ground-mounted shall be located on the roof or top of a building or structure, provided they do not exceed the maximum building height requirement. Wind turbines may be only free-standing or ground-mounted. Free-standing and ground-mounted wind turbines and solar panels shall comply with the following additional requirements:

a. The maximum height of wind turbines shall be fifteen (15) feet, and the maximum height of solar panels shall be eight (8) feet;

b. Maximum of one wind turbine per parcel;

c. Free-standing or ground-mounted solar panels shall be shielded by an opaque fence or wall between six (6) feet and eight (8) feet in height;

d. Minimum building setback shall be five (5) feet from side and rear property lines;

e. In a residential area, the square footage of solar panels shall not exceed twenty-five percent (25%) of the living area of the principal structure, and such square footage shall not count towards the allowed square footage for other accessory structures.

f. Wind turbines and solar panels shall be located only in a side or rear yard; and

g. Wind turbines, solar panels and other energy devices shall comply with all other applicable laws and regulations.

* * *

(86) ~~Reserved.~~ Outdoor seating is permitted subject to the following conditions:

a. All lighting at outdoor seating areas shall be directed away from all residential uses or residential zoning districts;

~~a.~~b. Activity at outdoor seating areas shall comply with Chapter 15, Article V (Noise Pollution Control) Orange County Code; and

c. All outdoor seating shall be depicted on site plans.

(87) A single portable food vendor, including a food truck or vehicle, shall be a permitted use on a parcel or lot, subject to the ~~standards~~ requirements in subsections a. through ~~f.~~i., or it may be permitted as a special exception in a C-1 zoned district pursuant to subsection j~~g~~., subject to the ~~standards~~ requirements in subsections ~~g. and~~ a. through ~~e.~~h. and j.:

~~a. No overnight stay;~~

a. Hours of operation shall be limited to between 7:00 a.m. and 12:00 a.m.;

b. Outdoor seating shall be prohibited;

c. Audio equipment and video equipment shall be prohibited;

d. Overnight stay shall be prohibited unless the use is located in a zoning district that permits outdoor storage, in which case the vehicle, truck and any other equipment stored overnight shall be placed in an area that is not visible from a public right-of-way.

~~b.~~e The operation shall not be located within a public right-of-way, and if it abuts a public right-of-way the operator shall first obtain a right-of-way utilization permit for construction of a driveway to provide access to the site, as required by Section 21-239 of the Orange County Code, and the operation ~~it~~ shall be setback a minimum of ten (10) feet from any such public right-of-way;

~~e~~f. Pursuant to Section 31.5-144(a), ~~No s~~ignage is prohibited.

~~d~~g. The operation shall not be located within any driveway, driving aisle or on any parking spaces required pursuant to Article XI of Chapter 38 of the Orange County Code;

~~e~~h. The operation shall not be permitted on any property not containing a licensed and approved business or on any vacant property or vacant building;

i. The vendor shall provide the County with a notarized affidavit from the property owner approving a food vending operation.

~~f~~j. In the C-1 zoning district, the operation shall be located under the canopy of the principal building on-site, except as may be permitted as a special exception under subsection ~~g~~i;

~~g~~k. In the C-1 zoned district, an operation may be permitted as a special exception in an area that is not located under the canopy of the principal building on-site, provided the length and width of the mobile trailer are equal to or greater than seven (7) feet by fourteen (14) feet, such an operation satisfies the standards in subsections a. through ~~e.~~ i., and such an operation is situated at least 1,000 feet from any other such operation (the distance being measured from property line to property line).

If more than one portable food vendor is proposed on a lot or parcel, it shall be deemed an open air market, and may be allowed only if approved by special exception.

* * *

(95) ~~Reserved.~~ Docks shall be permitted, subject to the following standards:

a. Dock construction shall comply with Article IX, Chapter 15, Orange County Code;

b. Any part of the dock that is landward of the normal high water elevation shall have a minimum side yard setback of five feet (5');

c. The dock shall be located on the parcel with the dock owner's residence or it may be located on an abutting parcel that is aggregated with the parcel with the dock owner's residence;

d. An uncovered boardwalk may connect the dock to a principal or accessory structure on the parcel;

e. Any accessory structure attached to an uncovered boardwalk shall meet the required setback from the normal high water elevation; and

f. A covered boardwalk shall constitute an accessory structure that is subject to all applicable laws and regulations, including height and setback requirements.

(96) Wood chipping, wood mulching and composting for commercial purposes shall require special exception approval in the A-1 or A-2 zoning districts. However, when not operated for commercial purposes, wood chipping, wood mulching and composting is permitted provided that no machinery is operated within a one hundred-foot setback from all property lines and within a two hundred-foot setback from any residentially-zoned property. Within all required setbacks, landscaping shall be provided consistent with subsection 24-31(2), as it may be amended from time to time, notwithstanding any references to paved areas. Furthermore, the site shall meet the requirements of chapter 30, article VIII (pertaining to site plans), as it may be amended from time to time, and the performance standards regarding smoke and particulate matter, odor, vibration, glare and heat, and industrial sewage and water as found in article X of this chapter, and the requirements set forth in chapter 15, article V (pertaining to noise), as it may be amended from time to time.

The following minimum yard requirements shall apply for buildings, structures, and materials stored outdoors.

a. Front yards: Fifty (50) feet (except as required by article XV).

b. Side yards: Fifty (50) feet.

c. Rear yards: Fifty (50) feet.

d. Maximum building height: Fifty (50) feet.

* * *

(97) Reserved. ~~Beekeeping shall be a permitted use, provided that beehives are located not less than one hundred (100) feet from any property line.~~

* * *

(101) Home occupation shall be a permitted use, subject to the following conditions, restrictions, and prohibitions:

a. Only the residents of the home may engage in the home occupation. No employees shall be allowed.

b. The 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. Customers shall not be allowed at the home.

d. No signage shall be allowed.

e. The use of commercial vehicles for the home occupation shall be prohibited. Also, no auxiliary trailers or other equipment shall be kept on site unless enclosed in the home or garage.

f. Equipment that is not typically found or used for domestic household use shall be prohibited. No equipment, material, or process shall be used for a home occupation that produces or emits any noise or vibration felt outside the home, lighting or glare visible outside the home, smoke, dust, or other particulate matter; excessive heat or humidity; blight or unsightliness; gas, fumes, or odor, electrical interference; or any nuisance, hazard, or other objectionable conditions detectable at the boundary of the lot, if the home occupation is conducted in the principal or accessory dwelling unit, or outside the dwelling unit. Explosives, highly flammable materials, and toxic or hazardous wastes shall be prohibited. Typical residential utility usages, including trash and recycle quantities, shall not be materially exceeded. The home occupation shall not adversely impact any neighbor's enjoyment of his or her residence.

g. Fabrication of articles or products, such as commonly classified under the term "arts and handicrafts," may be deemed a home occupation, subject to the definition of "home occupation."

h. A cottage food operation, as defined and regulated by Chapter 500, Florida Statutes, shall be deemed a home occupation.

i. Home occupation shall not be construed to include uses such as barber shops, beauty parlors, plant nurseries, tearooms, food processing (with the exception of a cottage food operation, as defined and regulated by Chapter 500, Florida Statutes), restaurants, sale of antiques, commercial kennels, real estate offices, insurance offices, pain management clinics, massage businesses, retail sales, labor pools, employment agencies, dispatch facilities, warehousing, manufacturing, wineries, micro-breweries, commercial retail sale of animals, or any other use not consistent with the home occupation definition, as determined by the Zoning Manager.

* * *

(114) Location and size requirements of accessory buildings and uses in residential and agricultural areas:

a. When an accessory building is used solely as living space (i.e., dens, bedrooms, family rooms, studies) it may be attached to a principal structure by a ~~fully enclosed~~ passageway, provided the accessory building and the passageway comply with the following standards:

* * *

h. A detached accessory building or structure shall be limited to one (1) story with a maximum overall height of fifteen (15) feet above grade. However, an accessory building or structure with a roof slope greater than 2:12 shall not exceed twenty (20) feet of overall height.

* * *

k. Decorative water fountains and flag poles less than thirty-five (35) feet in height shall be permitted in all zoning districts, provided they are located a minimum of five (5) feet from all property lines.

l. A detached structure used for unenclosed covered parking in an office, commercial, or industrial project shall be located a minimum of ten (10) feet from rear property lines and five (5) feet from side property lines. Also, setbacks shall be subject to landscape requirements.

* * *

(118) Only a convenience or grocery store (not ~~a supermarket~~shopping center) shall be a permitted use~~d~~.

* * *

(120) A solid waste management facility, including a landfill, shall comply with chapter 32 of the Orange County Code. In accordance with section 32-216(a)(10) of the Orange County Code, permits shall not be issued for solid waste disposal facilities after July 7, 1992, within the I-2/I-3 industrial districts. A solid waste management facility, including a landfill, transfer station, or incinerator, may be permitted only by special exception. An applicant seeking a special exception for a solid waste management facility shall receive a recommendation for issuance of a solid waste management permit by the environmental protection officer and the development review committee ("DRC") prior to consideration of the special exception by the board of zoning adjustment ("BZA"). Furthermore, an applicant seeking a special exception for a solid waste management facility, must receive a solid waste management permit approval by the board of county commissioners ("BCC") prior to or at the same public hearing at which the special exception is considered.

However, yard trash processing activities that are associated with onsite permitted land clearing, or with onsite normal farming operations that meet the permit exemption requirements in subsection 32-214(c)(9)ii., are exempt from the requirements of this section 38-79(120). Yard trash processing facilities that store no more than twelve thousand (12,000) cubic yards of a total combined volume of yard trash and yard trash derived materials, shall be subject to all of the following alternate requirements:

a. General requirements:

i. The site shall meet the permit exemption requirements in subsection 32-214(c)(9)iii. or iv.

ii. The site shall meet the requirements of chapter 30, article VIII, the Orange County Site Development Ordinance (pertaining to site plans);

iii. Landscaping, including, screening of open storage areas of yard trash and yard trash derived materials, shall be installed in accordance with chapter 24, Orange County Code.

iv. Machinery, when used for yard trash processing related activities, shall not be operated within any required yard, open storage setbacks, or within a two hundred (200) foot setback from any residence or residentially-zoned property. In addition, processing equipment shall be set back from property boundaries a sufficient distance to prevent potential thrown/falling objects from leaving the site.

v. Meet the noise and sound requirements of chapter 15, article V, the Noise Pollution Control Ordinance of Orange County, Florida.

vi. Pile height shall not exceed twenty-five (25) feet in overall height from natural grade.

vii. Burning is prohibited.

viii. Firewood sales and storage as an ancillary use to a yard trash processing facility shall be subject to the requirements of 38-79(120) and not section 38-79(43) (conditions for permitted uses and special exceptions).

ix. Wood chipping, wood mulching, and wood composting operations that store no more than two hundred (200) cubic yards of a total combined volume of yard trash or yard trash derived materials are subject to the requirements set forth in section 38-79(96) and not the requirements set forth in section 38-79(120).

b. In A-1 and A-2 zoned districts:

i. A special exception is required for the processing and open storage of yard trash and yard trash derived materials. The processing and open storage of yard trash and yard trash derived materials is subject to a setback of one hundred fifty (150) feet of any property boundary line. ~~The applicant may request a variance, as provided in section 30-43, to reduce this setback, but in no case shall be less than one hundred (100) feet from any property boundary line;~~

~~iiii~~ii. Commercial parking, for yard trash processing related activities, shall not be located within twenty-five (25) feet of any property boundary line; and

~~iv~~iii. The hours of operation for yard trash processing related activities shall be limited to between 7:00 a.m. and 7:00 p.m.;

~~v~~iv. In addition to any other landscaping requirements, outer perimeter buffering shall be Type C, opaque buffer, as outlined in section 24-5, Orange County Code;

c. For yard trash processing related activities located on sites within I-1/I-5, I-2/I-3, and I-4 zoned districts, with all abutting property being located within I-1/I-5, I-2/I-3, I-4, or C-3 zoned districts, the use shall be permitted. The processing and open storage of yard trash and yard trash derived materials is allowed, but not within fifty (50) feet of any property boundary line.

d. For yard trash processing related activities located on sites within I-1/I-5, I-2/I-3, and I-4 zoned districts, with any abutting property not being located within I-1/I-5, I-2/I-3, I-4, or C-3 zoned districts, a special exception is required. The processing and open storage of yard trash and yard trash derived materials is allowed, but not within fifty (50) feet of any property boundary line of an abutting property within the I-1/I-5, I-2/I-3, I-4, or C-3 zoned districts, nor within one hundred fifty (150) feet of all other property boundary lines.

(121) A single-family dwelling unit in conjunction with a commercial use which is accessory ~~and attached~~ to a principal building shall only be occupied by the owner, operator, or employee of the business.

* * *

(123) With regard to retention/detention ponds (SIC Group #1629), this use pertains to stormwater ponds on R-2 and R-3 and agricultural-zoned property to be used in conjunction with adjacent ~~commercial~~ nonresidential developments. Retention ponds are permitted in all other zoning districts in conjunction with on-site development.

* * *

(125) Model homes may be permitted, subject to the requirements of Section 30-83, including the following: model homes may be permitted on not more than twenty percent (20%) of the lots in a single family residential development with an

approved preliminary subdivision plan, or phase thereof, but in no event may the number of model homes exceed five (5) in the subdivision, or phase thereof; model homes shall be situated on contiguous lots or clustered within a readily identified area; and, subject to the requirements of subsection 38-79(5), not more than one model home may be used as a sales offices/center. ~~Model homes shall be permitted in accordance with Resolution No. 95-M-20 and shall only be in conjunction with an approved preliminary subdivision plan.~~

* * *

(132) A ~~P~~parks~~s~~ and recreation area~~s~~ owned ~~and~~ or operated by a nonprofit organization~~s~~, may be permitted only by special exception, except for parks and recreations areas (i) approved in conjunction with a preliminary subdivision plan (Chapter 34, Orange County Code), or (ii) located inside a platted residential subdivision and notarized letters of no objection are submitted by the President of the Homeowner's Association (if applicable) and all abutting property owners.

* * *

(140) Permitted by right or by special exception pursuant to Future Land Use Element Policies ~~3.2.21~~FLU8.7.5 and ~~3.2.21.1~~FLU8.7.6 and as identified in chapter 38, article XVII, public school siting regulations.

(141) Future Land Use Element Policy ~~3.2.21.2~~FLU8.7.7 ~~prohibits~~ restricts public schools in an area designated rural/agricultural on the Future Land Use Map.

* * *

(145) a. The site development standards for a UR-3 district shall be the same as those for the R-3 residential district, except for student housing developments.

b. The student housing development shall satisfy the following site development standards:

* * *

3. For purposes of density calculation to determine consistency with the Comprehensive ~~Policy~~ Plan, four ~~one~~ bedrooms shall count as one ~~one-half~~ dwelling unit (4 ~~1~~ bedrooms = 1 ~~½~~ dwelling unit).

* * *

(176) A car rental agency shall be a permitted use in conjunction with hotels, motels, and time shares only, provided that parking spaces required for the principal use shall not be used by the car rental agency, the number of parking spaces used by the car rental agency shall not exceed ten percent (10%) of the required number for the principal use, and the rental vehicles shall not be parked in the front of the property or in front of the principal structure.

In all other respects, Section 38-79 shall remain unchanged.

Section 10. Amendments to Section 38-160 ("Site and building requirements [for the A-R District"). Section 38-160 is amended to read as follows:

Sec. 38-160. Site and building requirements.

(a) The following are the minimum site and building requirements for the A-R district:

(1) Minimum lot area: Two and one-half (2½) acres or one hundred and eight thousand, nine hundred (108,900) square feet.

(2) Dwelling floor area:

a. Conventional dwelling: Nine hundred fifty (950) square feet minimum living area.

b. ~~Tenant dwelling: Minimum of five hundred (500) square feet of living area.~~

c. Mobile home: See the definition of "mobile home" at Section 38-1. ~~article VI, division 13~~.

Section 11. Repeal of Section 38-576 ("Definitions [for Mobile Home Districts]").

Section 38-576 is repealed, and reserved for future use:

Sec. 38-576. ~~Definitions.~~ Reserved.

~~The following words, terms and phrases, when used in this division, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:~~

~~*Mobile home* shall mean a structure transportation in one (1) or more sections, which structure is eight (8) body feet or more in width and over thirty five (35) feet in length, and which structure is built on an integral chassis and designed to be used as a dwelling when connected to the required utilities, and includes the plumbing, heating, air conditioning, and electrical systems contained therein. A mobile home shall be constructed to the United States Department of Housing and Urban Development standards.~~

~~*Recreational vehicles, see* article XIII.~~

Section 12. Amendments to Section 38-601 ("Intent and Purposes of [R-L-D Residential Low-Density] District"). Section 38-601 is amended to read as follows:

Sec. 38-601. Intent and purpose of district.

The intent and purpose of the R-L-D residential low-density district are as follows:

* * *

(3) To implement policies in the housing element of the C~~c~~omprehensive ~~policy~~ P~~p~~lan which include provisions for innovative housing designs and a mixture of dwelling types to provide the consumer with alternative housing opportunities.

* * *

In all other respects, Section 38-601 shall remain unchanged.

Section 13. Amendments to Section 38-806 ("[P-O Professional Office District] Site Development Standards"). Section 38-806 is amended to read as follows:

Sec. 38-806. Site development standards.

Site development standards are hereby established in order to insure adequate levels of light, air, coverage and density; to maintain and enhance locally recognized values of community appearance and design particularly through the combination of smaller parcels into functional sites; to promote functional compatibility of uses; to promote the safe and efficient circulation of pedestrian and vehicular traffic; and to otherwise provide for orderly site development and protect the public health, safety, and general welfare:

* * *

(12) Refuse or solid waste ~~disposal~~ areas shall ~~be provided and shall not be located in any required front yard or in any required side yard adjacent to a district wherein residential uses are permitted. Such storage areas shall be shielded by a landscaped screen or fencing at least six (6) feet in height which shall be at least fifty (50) percent opaque when viewed from any point along the district boundary.~~ comply with the following:

a. Shall not be located within any front yard;

b. Shall not be located within any landscape buffer;

c. Shall be located at least five (5) feet from any side or rear property line;

d. Shall be located at least fifteen (15) feet from any side street; and

e. Disposal areas shall be screened in accordance with and otherwise comply with Sections 9-560 and 24-4(f), Orange County Code.

* * *

In all other respects, Section 38-806 shall remain unchanged.

Section 14. Amendments to Section 38-826 ("Intent and Purpose [of C-1 Retail Commercial District]"). Section 38-826 is amended to read as follows:

Sec. 38-826. Intent and purpose.

The intent and purpose of this C-1 retail commercial district are as follows: this district is composed of lands and structures used primarily for the furnishing of selected commodities and services at retail. This district will be encouraged:

* * *

(3) Where adequate public facilities and services are available, as defined in the C~~c~~omprehensive ~~policy~~ P~~p~~lan;

* * *

(5) To a limited extent in rural settlements throughout the county to meet the needs of an identified community, or in growth centers as defined in the Cecomprehensive ~~policy~~ Pplan.

In all other respects, Section 38-826 shall remain unchanged.

Section 15. Amendments to Section 38-830 ("Performance Standards [for C-1 Retail Commercial District]"). Section 38-830 is amended to read as follows:

Sec. 38-830. Performance standards.

Performance standards are hereby established in order to assure adequate levels of light, air, building space, lot coverage, and density; to maintain and enhance locally recognized values of community appearance and design; to encourage the combination of smaller parcels into functional sites; to accommodate multiple ownership of land and improvements within the development; to provide for collective ownership of common areas; to promote functional compatibility of uses; to provide the safe and efficient circulation of pedestrian and vehicular traffic; and to otherwise provide for orderly site development standards in order to protect the public health, safety and general welfare.

* * *

(10) Maximum building height: Fifty (50) feet, except thirty-five (35) feet within one hundred (100) feet of any ~~all~~ residential use or districts.

* * *

(12) Refuse or solid waste ~~disposal~~ areas shall ~~not be located within any front yard setback and shall be located at least (5) feet from the side or rear property line. A six foot high masonry wall shall be provided around any refuse or solid wate areas located in any required yard adjacent to any residential districts.~~ comply with the following:

a. Shall not be located within any front yard;

b. Shall not be located within any landscape buffer;

c. Shall be located at least five (5) feet from any side or rear property line;

d. Shall be located at least fifteen (15) feet from any side street; and

e. Disposal areas shall be screened in accordance with and otherwise comply with Sections 9-560 and 24-4(f), Orange County Code.

* * *

In all other respects, Section 38-830 shall remain unchanged.

Section 16. Amendments to Section 38-855 ("Performance Standards [for C-2 General Commercial District]"). Section 38-855 is amended to read as follows:

Sec. 38-855. Performance standards.

Performance standards are hereby established in order to assure adequate levels of light, air, building space, lot coverage, and density; to maintain and enhance locally recognized values of community appearance and design; to encourage the combination of smaller parcels into functional sites; to accommodate multiple ownership of land and improvements within the development; to provide for collective ownership of common areas; to promote functional compatibility of uses; to provide the safe and efficient circulation of pedestrian and vehicular traffic; and to otherwise provide for orderly site development standards in order to protect the public health, safety and general welfare.

* * *

(9) Maximum building height: Fifty (50) feet, ~~generally;~~ except thirty-five (35) feet within one hundred (100) feet of any ~~all~~ residential use or district~~s~~.

* * *

(11) Refuse or solid waste areas shall ~~not be located within any front yard setback and shall be located at least five (5) feet from the side or rear property line.~~ comply with the following:

a. Shall not be located within any front yard;

b. Shall not be located within any landscape buffer;

c. Shall be located at least five (5) feet from any side or rear property line;

d. Shall be located at least fifteen (15) feet from any side street; and

e. Disposal areas shall be screened in accordance with and otherwise comply with Sections 9-560 and 24-4(f), Orange County Code.

* * *

In all other respects, Section 38-855 shall remain unchanged.

Section 17. Amendments to Section 38-880 ("Performance standards [for C-3 Wholesale Commercial District]"). Section 38-880 is amended to read as follows:

Sec. 38-880. Performance standards.

Performance standards are hereby established in order to assure adequate levels of light, air, building space, lot coverage, and density; to maintain and enhance locally recognized values of community appearance and design; to encourage the combination of smaller parcels into functional sites; to accommodate multiple ownership of land and improvements within the development; to provide for collective ownership of common areas; to promote functional compatibility of uses; to provide the safe and efficient circulation of pedestrian and vehicular traffic.

* * *

(9) Maximum building height: Seventy-five (75) feet, except thirty-five (35) feet within one hundred (100) feet of any ~~all~~ residential use or district~~s~~.

(10) Refuse and solid waste areas shall ~~not be located within any front yard setback and shall be located at least five (5) feet from the side or rear property line, ten (10) feet from adjacent residential district.~~ comply with the following:

a. Shall not be located within any front yard;

b. Shall not be located within any landscape buffer;

c. Shall be located at least five (5) feet from any side or rear property line;

d. Shall be located at least fifteen (15) feet from any side street; and

e. Disposal areas shall be screened in accordance with and otherwise comply with Sections 9-560 and 24-4(f), Orange County Code.

* * *

In all other respects, Section 38-880 shall remain unchanged.

Section 18. Repeal of Sections 38-904, 38-929, 38-979, and 38-1005 regarding Support Free-Standing Retail Uses in I-1A, I-1/I-5, I-2/I-3, and I-4 Zoned Districts. Sections 38-904, 38-929, 38-979, and 38-1005 are repealed, and reserved for future use:

Sec. 38-904. ~~Support free-standing retail uses.~~ Reserved.

~~The following uses shall be permitted as free-standing structures or within structures to provide support retail services to the employees and/or customers of the I-1A district. Performances standards for these uses shall be in accordance with sections 38-1007 and 38-1008.~~

~~(1) Convenience stores.~~

~~(2) Gas stations.~~

~~(3) Hotels/motels.~~

~~(4) Restaurants, including drive-thru restaurants.~~

* * *

Sec. 38-929. ~~Support free-standing retail uses.~~ Reserved.

~~The following uses shall be permitted as free-standing structures or within structures to provide support retail services to the employees and/or customers of the I-1/I-5 district. Performances standards for these uses shall be in accordance with sections 38-931 and 38-932.~~

~~(1) Convenience stores.~~

~~(2) Gas stations.~~

~~(3) Hotel/motels.~~

~~(4) Restaurants, including drive-thru restaurants.~~

* * *

Sec. 38-979. ~~Support free-standing retail uses~~. Reserved.

~~The following uses shall be permitted as free-standing structures or within structures to provide support retail services to the employees and/or customers of the I-2/I-3 district. Performances standards for these uses shall be in accordance with sections 38-1007 and 38-1008.~~

~~(1) Convenience stores.~~

~~(2) Gas stations.~~

~~(3) Hotels/motels.~~

~~(4) Restaurants, including drive-thru restaurants.~~

* * *

Sec. 38-1005. ~~Support free-standing retail uses.~~ Reserved.

~~The following uses shall be permitted as free-standing structures or within structures to provide support retail services to the employees and/or customers of the I-4 district. Performance standards for these uses shall be in accordance with sections 38-1007 and 38-1008.~~

~~(1) Convenience stores.~~

~~(2) Gas stations.~~

~~(3) Hotels/motels.~~

~~(4) Restaurants, including drive-thru restaurants.~~

Section 19. Amendments to Sections 38-907, 38-932, 38-981, and 38-1008 regarding Performance Standards in I-1A, I-1/I-5, I-2/I-3, and I-4 Zoned Districts. Sections 38-907, 38-932, 38-981, and 38-1008 are amended to respectively read as follows:

Sec. 38-907. Performance standards.

(a) Within each I-1A industrial district, the ~~minimum yard~~ requirements for each lot are established as follows:

(1) Floor area ratio (FAR) shall not exceed ~~0.50~~0.75.

* * *

(7) Maximum building height: Fifty (50) feet~~,~~; except ~~but~~ thirty-five (35) feet ~~when~~ within one hundred (100) feet of any residential use or ~~zoning~~ district. ~~or residential designation on the future land use map, and one hundred (100) feet when five hundred (500) feet or more from a residential zoning district or residential designation on the future land use map~~

* * *

Sec. 38-932. Performance standards.

(a) Within each I-1/I-5 industrial district, the ~~minimum yard~~ requirements for each lot are established as follows:

(1) Floor area ratio (FAR) shall not exceed ~~0.50~~0.75.

* * *

(6) Maximum building height: Fifty (50) feet~~,~~; except ~~but~~ thirty-five (35) feet ~~when~~ within one hundred (100) feet of any residential use or ~~zoning~~ district. ~~or residential designation on the future land use map, and one hundred (100) feet when five hundred (500) feet or more from a residential zoning district or residential designation on the future land use map.~~

* * *

Sec. 38-981. Performance standards.

Within each I-2/I-3 industrial district, the ~~minimum yard~~ requirements for each lot are established as follows:

(1) Floor area ratio (FAR) shall not exceed ~~0.50~~0.75.

* * *

(7) Maximum building height: Fifty (50) feet,~~;~~ except ~~but~~ thirty-five (35) feet ~~when~~ within one hundred (100) feet of any residential use or ~~zoning~~ district. ~~or residential designation on the future land use map, and one hundred (100) feet when five hundred (500) feet or more from a residential zoning district or residential designation on the future land use map.~~

* * *

Sec. 38-1008. Performance standards.

(a) Within each I-4 industrial district, the ~~minimum yard~~ requirements for each lot/parcel are established as follows:

(1) Floor area ratio (FAR) shall not exceed ~~0.50~~0.75.

* * *

(6) Maximum building height: Fifty (50) feet,~~;~~ except ~~but~~ thirty-five (35) feet ~~when~~ within one hundred (100) feet of any residential use or ~~zoning~~ district. ~~or residential designation on the future land use map, and one hundred (100) feet when five hundred (500) feet or more from a residential zoning district or residential designation on the future land use map.~~

* * *

Section 20. Amendments to Section 38-1026 ("In General [West State Road 50 Corridor Overlay District]"). Section 38-1026 is amended to read as follows:

Sec. 38-1026. In general.

(a) *Intent and purpose.* This division provides specific design standards for the West State Road 50 Corridor Overlay

District with the purpose of promoting and facilitating intergovernmental coordination along west State Road 50.

* * *

(6) The overlay district created by this division is consistent with the economic element of the ~~county~~ Ccomprehensive ~~policy~~ Pplan, which is designed to accommodate and promote economic growth, and which specifically calls for the use of such special zoning districts.

* * *

In all other respects, Section 38-1026 shall remain unchanged.

Section 21. Amendments to Section 38-1051 ("Intent and Purpose [of South Orange Avenue Corridor Overlay District]"). Section 38-1051 is amended to read as follows:

Sec. 38-1051. Intent and purpose.

This division creates a zoning overlay district to be known as the "South Orange Avenue Corridor Overlay District" for the purpose of promoting and facilitating an enhanced corridor along designated segments of South Orange Avenue and Hanzel Avenue with certain zoning prohibitions and restrictions to ensure compatibility of land uses within and outside the district, especially as between areas within and outside of municipal boundaries.

* * *

(4) The overlay district created by this division is consistent with the Orange County Comprehensive ~~Policy~~ Plan, including but not limited to its economic element, which is designated to accommodate and promote economic growth, and which specifically calls for the use of such special zoning districts, and its intergovernmental coordination element, which require or encourage the coordination of land uses between the county and municipalities.

* * *

In all other respects, Section 38-1051 shall remain unchanged.

Section 22. Amendments to Sections 38-1059, 38-1060 and 38-1061 regarding the Conway Road/Hoffner Avenue Corridor Overlay District. Sections 38-1059, 38-1060 and 38-1061 are amended to respectively read as follows:

Sec. 38-1059. Intent and purpose.

This division creates a zoning overlay district to be known as the "Conway Road/Hoffner Avenue Corridor Overlay District" for the purpose of promoting and facilitating an enhanced corridor along designated segments with certain zoning prohibitions and restrictions to ensure compatibility of land uses within and outside the district, especially as between areas within and outside of municipal boundaries.

* * *

(4) The overlay district created by this division is consistent with the Orange County Comprehensive ~~Policy~~ Plan, including but not limited to its economic element, which is designed to accommodate and promote economic growth, and which specifically calls for the use of such special zoning districts, and its intergovernmental coordination element, which require or encourage the coordination of land uses between the county and municipalities.

* * *

Sec. 38-1060. Location and area.

A special land-use overlay district is hereby established, to be known as the Conway Road/Hoffner Avenue Corridor Overlay District (the "district"). The district shall be comprised of all unincorporated parcels or lots lying in whole or in part within five hundred (500) feet of either edge of the right-of-way for Conway Road, all between the northern boundary of the intersection of Conway Road and Curry Ford Road on the north and the northern boundary of the intersection of Conway Road and S.R. 528 (the Beeline Expressway) on the south; and all unincorporated parcels or lots lying in whole or in part within five hundred (500) feet of either edge of the right-of-way of Hoffner Avenue, all between the eastern boundary of the intersection of Hoffner Avenue and Conway Road on the west and the western boundary of the intersection of Hoffner Avenue and Semoran Boulevard on the east. A map depicting the boundaries of the district is attached as

Exhibit "A" to Ordinance No. ~~2015-19~~ 2016-19, and shall be available for inspection in the office of the clerk to the board of county commissioners.

Sec. 38-1061. Applicability; conflicts; responsibility of applicant.

* * *

(d) *Responsibility of applicant for development permit.* Everyone who applies for a development permit to construct, reconstruct, renovate, alter, or enlarge a land use, building or structure shall print on the front page of the application or plans the following in capital letters that are at least two inches high: "THIS APPLICATION [OR THESE PLANS] RELATE TO THE CONWAY ROAD/HOFFNER AVENUE CORRIDOR OVERLAY DISTRICT, WHICH IS CODIFIED AT SECTION 38-1059 THROUGH SECTION 38-1065 OF THE ORANGE COUNTY CODE. ~~WAS ESTABLISHED UNDER AND IS SUBJECT TO ORDINANCE NO. 2003-20, ADOPTED BY THE BOARD OF COUNTY COMMISSIONERS ON DECEMBER 9, 2003, AS AMENDED BY ORDINANCE NO. 2015-19, ADOPTED BY THE BOARD ON OCTOBER 20, 2015.~~

Section 23. Amendments to Section 38-1080 ("Intent and Purpose [of State Road 436/State Road 50 Corridor Overlay District]"). Section 38-1080 is amended to read as follows:

Sec. 38-1080. Intent and purpose.

This division creates a zoning overlay district to be known as the "State Road 436/State Road 50 Corridor Overlay District" for the purpose of promoting and facilitating an enhanced corridor along designated segments with certain zoning prohibitions and restrictions to ensure compatibility of land uses within and outside the district, especially as between areas within and outside of municipal boundaries.

* * *

(d) The overlay district created by this division is consistent with the Orange County Comprehensive ~~Policy~~ Plan, including, but not limited to its economic element, which is designed to accommodate and promote economic growth, and which specifically calls for the use of such special zoning districts,

and its intergovernmental coordination element, which require or encourage the coordination of land uses between the county and municipalities.

* * *

In all other respects, Section 38-1080 shall remain unchanged.

Section 24. Amendments to Section 38-1085 ("Intent, purpose, area, standards, and consistency [of Transit Oriented Development (TOD) Overlay Zone]"). Section 38-1085 is amended to read as follows:

Sec. 38-1085. Intent, purpose, area, standards, and consistency.

(1) *Intent and purpose.* The transit oriented development (TOD) overlay zone is hereby established with the purpose of establishing an area located within one-half (½) mile of commuter rail stations in unincorporated Orange County within which mixed-use, pedestrian-friendly development is encouraged. The intent of the TOD overlay zone is to reduce reliance on the automobile and to promote lively, pedestrian-friendly development that will serve as an attractive place to live, work, shop and recreate. <u>These TOD overlay zone regulations shall be administered by the county zoning division, except that any non-zoning aspects of these regulations shall be administered by the appropriate county department or division.</u>

* * *

In all other respects, Section 38-1085 shall remain unchanged.

Section 25. Amendments to Sections 38-1091, 38-1093 and 38-1097 regarding the Lake Avalon Rural Settlement Commercial Design Overlay District. Sections 38-1091, 38-1093 and 38-1097 are amended to respectively read as follows:

Sec. 38-1091. Purpose and intent.

This division provides specific development standards for the LARS Overlay District. These development standards are consistent with the Orange County Comprehensive ~~Policy~~ Plan. As directed by Future Land Use Element Policy ~~2.4.7~~<u>FLU6.3.7</u>, these

development standards are meant to supplement the criteria established in Policy ~~2.1.7~~FLU6.2.4 which ensure that new development within the Lake Avalon Rural Settlement ("LARS") reinforces that community's rural character. These LARS Overlay District regulations shall be administered by the county zoning division except that any non-zoning aspects of these regulations shall be administered by the appropriate department or division.

* * *

Sec. 38-1093. Acceptable commercial uses.

The intent of the Lake Avalon Rural Settlement Commercial Design Overlay District is to preserve the unique rural quality of life the residents presently enjoy. Therefore, only small offices and commercial development consistent with policies contained within the future land use element of the Orange County Comprehensive ~~Policy~~ Plan relating to commercial development within a rural settlement, shall be permitted, except as may be prohibited by section 38-1094.

* * *

Sec. 38-1097. Development within the LARS district*;* allowable intensities~~,~~; planned development (PD) required.

(a) *Development intensity.* Allowable intensities within the LARS Overlay District shall be consistent with the Future Land Use Element Policy ~~2.4.5~~FLU6.3.5. Any new commercial/office development shall have a maximum 0.15 ~~0.14~~ floor area ratio (FAR) per parcel, consistent with FLU6.2.9.

* * *

Section 26. Amendments to Section 38-1227 ("Variances [P-D Planned Development District]"). Section 38-1227 is amended to read as follows:

Sec. 38-1227. ~~Variances~~. Waivers.

(a) ~~Variances~~ For good cause shown, waivers from the minimum standards set forth in this section may be granted by the board of county commissioners. However, such ~~variances~~ waivers must be specified in conjunction with the land use plan, otherwise all

standards shall apply. ~~Variance~~ Waiver requests shall be identified in the public hearing notice.

(b) ~~Variances~~ Waivers requested after approval of the land use plan must be approved by the board of county commissioners at a public hearing, after notification of abutting property owners.

Section 27. Amendments to Section 38-1236 ("Communication towers in planned developments"). Section 38-1236 is amended to read as follows:

Sec. 38-1236. Communication towers in planned developments.

* * *

(d) A communications tower located within a planned development shall be processed pursuant to the PD approval process and as described in subsections (a), (b) and (c) above. If any standard of subsection 38-1427(d)(2)d or (d)(3) cannot be met, the applicant must request a waiver. The DRC shall review the waiver request and make a recommendation to the Board of County Commissioners.

Section 28. Amendments to Sections 38-1340 and 38-1344 regarding Community Village Centers, in General. Sections 38-1340 and 38-1344 are amended to respectively read as follows:

Sec. 38-1340. Intent and purpose.

The intent and purpose of this division are as follows:

(1) To implement the community village center policies of the future land use element of the county ~~e~~Comprehensive ~~policy p~~Plan by authorizing the board of county commissioners to designate an area or areas from time to time as "community village centers" and to apply thereto the procedures, guidelines and standards set forth in this division.

(2) To provide for an integrated, unified pattern of development that takes into account the unique qualities and characteristics of the designated area.

(3) To ensure that development occurs in the

designated area according to the use, design, density, coverage and phasing as stipulated on an approved development plan.

(4) To preserve natural amenities and environmental assets in the designated area.

(5) To encourage an increase in the amount and use of open space areas in the designated area by permitting a more economical and concentrated use of building areas than would be possible through conventional zoning districts.

(6) To provide maximum opportunity in the designated area for application of innovative concepts of site planning in the creation of aesthetic living, shopping and working environments and civic facilities on properties of adequate size, shape and location.

(7) To establish development guidelines, design guidelines and site development standards for the designated area which promote the physical and functional integration of a mixture of land uses as required by the community village center policies of the ~~c~~Comprehensive ~~policy p~~Plan.

(8) To provide that these community village center regulations shall be administered by the county zoning division, except that any non-zoning aspects of these regulations shall be administered by the appropriate department or division.

Sec. 38-1344. Approval procedure.

Except to the extent a developer has complied with the procedure set forth below, the procedure for obtaining approval of a CVC planned development shall be as follows:

* * *

(3) *Development plan.*

a. After payment of an application fee to the zoning department, the applicant shall submit to the engineering division fourteen (14) copies of a development plan and support data and information, all of which is consistent with section 38-1347. The development plan may cover all or a portion of the approved land use plan. If the applicant proposes to create a subdivision, a preliminary subdivision plan shall be processed concurrently with the development plan. The engineering division shall review the development plan to determine whether all necessary and appropriate data and information has been provided.

b. The applicant shall then submit fourteen (14) copies of the development plan to the engineering department. The development shall then be scheduled for review by the DRC.

c. The DRC shall review the development plan to determine whether:

1. It is consistent with the approved land use plan;

2. It is consistent with applicable laws, ordinances, rules and regulations;

3. The development, and any phase thereof, can exist as a stable independent unit; and

4. Existing or proposed utility services and transportation systems are adequate for the uses proposed.

5. It is consistent with CVC provisions requiring a single, unified and integrated development plan.

~~d. After review by the DRC, the development plan shall be scheduled for a public hearing before the BCC. The BCC shall approve the development plan, approve it subject to conditions, or disapprove it.~~

Section 29. Amendments to Section 38-1370 ("Intent and purpose [of Four Corners Community Village Center guidelines and Standards]"). Section 38-1370 is amended to read as follows:

Sec. 38-1370. Intent and purpose.

The intent and purpose of these guidelines are as follows:

(1) To implement the "Four Corners Community Village Center" special area study~~, consistent with future land use element policy 3.1.42 of the comprehensive policy plan~~.

(2) To supplement and complement the CVC guidelines and standards set forth in division 6, article VIII, of this chapter.

(3) To ensure that the Four Corners CVC, which was located within the Windermere Rural Settlement with a residential density of only one (1) unit per acre prior to the adoption of the community village center objectives and policies, is developed

with nonresidential and residential uses in a responsible and careful manner.

(4) To preserve the major visual amenity in the area of the Four Corners CVC, Lake Down.

(5) To protect the environmental integrity of Lake Down, an Outstanding Florida Water.

(6) To create a pedestrian-friendly, mixed-use, village center.

(7) To ensure that each development in the village center reflects an architectural character that is harmonious with development in the Four Corners CVC area.

(8) To create a village with a pedestrian scale and sense of place.

(9) To create a pedestrian-friendly village center through the use of sidewalks, shade trees, mini-parks, and careful design of vehicular parking areas.

(10) To design streetscapes that are pedestrian in scale, safe, secure, and offer protection from climatic elements.

(11) To develop an effective, design-criteria framework to guide, develop, and control signage lighting and architectural character.

(12) To provide open space as a social gathering place for residents, visitors, and workers.

(13) To create a distinct streetscape with a defined edge along the major roads.

(14) To maintain a pedestrian scale in terms of building height.

(15) To provide that these four corners (CVC) regulations shall be administered by the county zoning division, except that any non-zoning aspects of these regulations shall be administered by the appropriate department or division.

Section 30. Amendments to Sections 38-1380, 38-1381, 38-1382, 38-1383, 38-1388 and 38-1389 regarding the Village Planned Development Code. Sections 38-1380, 38-1381, 38-1382, 38-1383, 38-1388 and 38-1389 are amended to respectively read as follows:

Sec. 38-1380. Intent and purpose.

The intent and purpose of this division are as follows:

(1) To implement the goals, objectives and policies of the village land use classification of the Orange County Comprehensive Plan, future land use element;

(2) To ensure development in accordance with the adopted specific area plan (SAP) for any particular village;

(3) To promote the development of neighborhoods, villages and community centers that reflect the characteristics of a traditional southern town; where streets are convenient and pedestrian-friendly, and where parks, open space and civic facilities are a focus for public activity;

(4) To provide for development that has a variety of land uses and housing types in a compact integrated community pattern which creates opportunities for pedestrian, bike and transit use;

(5) To promote development that utilizes a neighborhood focus as a building block to provide a sense of place and community;

(6) To provide a system of fully connected streets and paths which provide interesting routes and encourage pedestrian and bicycle use by being spatially defined by buildings, trees, and lighting;

(7) To provide a system of public open space in the form of accessible squares, greens and parks whose frequent use is encouraged through placement and design;

(8) To enhance the character of the neighborhoods through the use of building massing, building placement, materials and architectural features which create interesting spaces and pedestrian scaled street frontages.

(9) To provide that these Village PD Code regulations shall be administered by the zoning division, except that any non-zoning aspects of these regulations shall be administered by the appropriate department or division.

Sec. 38-1381. Applicability.

* * *

(b) This village development code shall complement all applicable laws, ordinances, rules and regulations, including the guidelines and standards for planned developments. In case of conflict with this village development code and article II, chapter 18 (the Fire Prevention Code), the fire prevention code shall govern and control. However, to the extent this village development code may conflict with or may not be consistent with other applicable laws, ordinances, rules or regulations, including the guidelines and standards for planned developments, this village development code shall govern and control (and waivers from chapter 38, articles VII and VIII shall not be required for those provisions in conflict with the village P-D code). For the purposes of this village development code, the words "shall" or "must" are mandatory; the word "should" is directive but not necessarily mandatory; the word "may" is permissive. The word "includes" shall not limit a term to the specific examples, but is intended to extend its meaning to all other instances and circumstances of like kind or character. For purposes of SAP and Village Code consistency, the Planning Manager or his/her designee shall review architectural and/or project design content and guidelines.

* * *

Sec. 38-1382. General development guidelines and standards.

(a) *Consistency with the village specific area plan (SAP).* The adopted SAP for any particular village established the land uses for all property within the village. The SAP shall also establish the public facilities lands required by each neighborhood and the village center. Development within any specific neighborhood may be initiated only when the adequate public facilities requirements in accordance with chapter 30, article XIV, division 2, have been met. Any proposed amendments to the land uses as established by the SAP are subject to the following conditions:

(1) Any amendment to the village planned development land use plan shall be subject to approval by the board of county commissioners in accordance with this division and Future Land Use Element Policy ~~6.1.6VI~~ 4.1.7. Waivers from the general development guidelines and standards within this Division may also be considered and approved at a public hearing before the board of county commissioners at the time of

Preliminary Subdivision Plan or development Plan, and processed as a nonsubstantial change to the planned development land use plan

* * *

(5) Public school sites must be consistent with the size and locations designated on the approved village SAP. School site locations and configurations, other than those indicated on the village SAP, may be considered provided they are consistent with the provisions of Future Land Use Element P~~p~~olicy FLU4.1.5.1~~6.1.4~~ of the ~~Orange County~~ Comprehensive Plan~~, future land use element~~.

* * *

(c) *Village upland greenbelt.* In accordance with the adopted SAP for any particular village, a village upland greenbelt area has been provided consistent with requirements of the village land use classification of the Comprehensive Plan, future land use element. Transfer of development rights may be applied to property designated as the village upland greenbelt in accordance with chapter 30, article XIV, division 3, of this Code. Development within the upland greenbelt area shall be limited to a density of one (1) residential dwelling unit per ten (10) acres and may include road crossings, parks, golf courses, stormwater management areas and passive recreational uses such as bike/pedestrian and equestrian trails. In order to accomplish the purpose of the upland greenbelt, development may be clustered at an overall gross density of one (1) unit per ten (10) acres on lots no smaller than one-fourth (1/4) acquire, subject to the requirements of chapter 37, article XVII, of this Code regarding individual on-site sewage disposal. Such clustering shall only be permitted on upland areas within the upland greenbelt subject to dedication of development rights for the balance of the property and rezoning to planned development. Development rights shall be dedicated to Orange County at the time of platting. Dedication of the development rights will limit the use of the property to agriculture as permitted in the county A-1 zoning district. A twenty-five-foot setback at the village perimeter is required for any PD located along the perimeter of a village except where the boundary of the PD is adjacent to a village greenbelt in which case no setback shall be required.

* * *

(h) *Streets.* Standards for the streets within any particular village shall be consistent with the intent as set forth in the transportation section of an adopted SAP. Variations to these standards may be considered, on a case-by-case basis, by the development review committee (DRC) as part of the land use plan or preliminary subdivision plan/development plant approval.

* * *

(2) All streets, alleys, and pedestrian pathways shall connect to other streets within the village and to existing or planned streets outside the village in accordance with the approved village SAP. Cul-de-sacs, T-turnarounds, or dead end streets are not permitted unless otherwise approved by the county or where their use is in connection with preserving wetlands, specimen trees, or ecologically significant vegetative communities. To encourage the development of connected and integrated communities within each neighborhood and village center, the twenty-five-foot setback on the perimeter of the PD is not required for those PDs that are internal to a neighborhood or village center. The twenty-five-foot setback is required for only that portion of the perimeter of the PD that is located on a perimeter of a ~~neighborhood or~~ village ~~center~~.

* * *

Sec. 38-1383. Aquifer recharge.

* * *

(1) *Water quality.* In accordance with ~~f~~Future ~~l~~Land ~~u~~Use ~~e~~Element ~~p~~Policy FLU4.2.1 ~~6.1.7~~, and subsection 38-1382(d) of this division, all village planned developments shall be required to hookup to central sewer service. In addition, the village classification limits high risk land uses, such as heavy industrial and those uses which store chemicals requiring technical containment, except those uses otherwise allowed in the neighborhood center or village center.

* * *

Sec. 38-1388. Neighborhood center district.

* * *

(e) *Development standards.* The following standards shall apply to all development within the neighborhood center district. General design standards shall be submitted as part of the PD land use plan for all development within the neighborhood

center. Specific design standards and architectural details shall be submitted with the preliminary subdivision plan/development plan for development within the neighborhood center. The design standards shall include site-specific requirements for all building facades including maintenance, ancillary structures, and out-parcel structures. The standards shall outline architectural requirement for pedestrian-scaled trim and detailing, exterior wall materials, building entry prominence, articulation of facades, fenestration, bays, roof styles (no flat roofs), roof materials, and massing. Architectural elements, including colonnades, pergolas, columns, awnings, gables, dormers, porches, balconies, balustrades, and wall plane projections, shall be addressed. Prominent, formalized, and shaded pedestrian connections between adjacent commercial uses shall be emphasized as well as pedestrian scaled and uninterrupted visual interest along the street face.

Modifications to these ~~guidelines~~ standards may be permitted where alternative development practices will reinforce the planning and urban design principles established by the goals, objectives and policies of the village land use classification, the adopted SAP and this village development code. Any such modifications to these ~~guidelines~~ standards shall be identified separately in bold on the village PD land use plan, PSP or development plan for approval by the board of county commissioners at a public hearing.

* * *

(14) *Distance separation from religious institutions and schools for alcoholic beverages in neighborhood centers.* Notwithstanding the provisions of section 38-1415(a), in order to promote a mixed use in neighborhood centers, the distance separation requirements for establishments selling alcoholic beverages for on-site consumption only, as specified in section 38-1415~~(s)~~, shall be reduced to one-hundred (100) feet for restaurants with on-premises consumption only for those establishments possessing a 1COP, ~~or~~ 2COP, or 4COP SRX state liquor license~~,~~. ~~and pursuant to F.S. § 562.45, are licensed as restaurants, and derive at least fifty-one (51) percent of their gross revenues from the sale of food and nonalcoholic beverages pursuant to F.S. ch. 509.~~ Such establishments may sell ~~only~~ beer, ~~and/or~~ wine and liquor ~~and only~~ for consumption in the restaurant only after the hour of 4:00 p.m. on days school is in session. The method of measurement shall be as provided in section 38-1415(~~b~~c). A proposed religious use or school ~~church proposing to locate in or around the neighborhood center~~ may voluntarily waive the distance

separation requirement for establishments selling alcoholic beverages for on-site consumption (that otherwise meet the requirements of this subsection) by executing a waiver. Such waiver must be acceptable to the county in form and substance and shall be kept on file in the Zoning Division. All other provisions under section 38-1415 shall apply. The county may place other restrictions related to signage, outdoor seating, and outdoor amplification as part of the PD approval process to ensure compatibility with schools.

(15) *Subsequent establishment of a religious institution ~~church~~ or school.* Whenever a vendor ~~or alcoholic beverage has procured a license permitting the same~~ of alcoholic beverages has procured a license permitting the sale of alcoholic beverages and, thereafter, a ~~church~~ religious institution or school is ~~shall be~~ established within one hundred (100) feet of the vendor of alcoholic beverages located within a neighborhood center, the establishment of such ~~church~~ religious institution or school shall not cause the previously licensed site to discontinue use as a vendor of alcoholic beverages.

Sec. 38-1389. Village center district.

* * *

(c) *Development standards.* The following development standards shall apply to all development within the village center district.

* * *

(2) *Permitted uses*:

* * *

a. The following criteria shall be used in determining whether to approve or deny a substantial change:

1. The change shall be consistent with the ~~c~~Comprehensive ~~policy p~~Plan and/or specific area plan.

2. The change shall be similar and compatible with the surrounding area and shall be consistent with the pattern of surrounding development.

3. The change shall not act as a detrimental intrusion into the surrounding area.

4. The use shall be similar in noise, vibration, dust, odor, glare, heat producing and other characteristics that are associated with the majority of uses currently permitted in the zoning district.

* * *

Section 31. Amendments to Sections 38-1390.18, 38-1390.28 and 38-1390.29 regarding the Horizon West Town Center Planned Development Code. Sections 38-1390.18, 38-1390.28 and 38-1390.29 are amended to respectively read as follows:

Sec. 38-1390.18. Preliminary Subdivision Plan Review.

Except for mass grading, ~~P~~preliminary Subdivision Plan (PSP) review shall be required only for single family residential and other developments ~~lands~~ within the Town Center where the PD/UNP elements described in Section 38-1390.15 have been deferred. Procedural requirements and specifications for PSPs shall be as set forth in chapter 34, articles III and IV, and modified through the provisions and additional requirements identified below. The Development Review Committee (DRC) shall review all PSPs for consistency with the approved PD/UNP, Town Center PD Code and other applicable County Code requirements not otherwise contained herein.

* * *

Sec. 38-1390.28. Bonus for unified neighborhood plan.

Within each Neighborhood Planning Area, the maximum number of residential dwelling units permitted by the Town Center SAP and Comprehensive Plan may not be exceeded, except as may be permitted through PD/UNP review and the provision of density and intensity bonuses as specified herein. Density and intensity bonuses may be acquired in accordance to the conditions prescribed below. A density bonus program is hereby establish, which will allow district development programs to exceed thresholds established through the Comprehensive Plan. A "bonus bank" was established with the adoption of the Town Center SAP,

which includes a total of one thousand five hundred forty (1,540) dwelling units. This bonus may be earned by completing the PD/UNP review and approval process.

(a) *Bonus for PD/UNP Review and Approval.* An applicant may request an increase to the PD/UNP development program by a pro rata share of the number of dwelling units reserved in the bonus bank. The share shall be determined by the ratio of the percentage of net developable land area included in the applicable PD/UNP, to the net developable area included in the Town Center SAP. This ratio is applied to the total number of units reserved in the "bank" to determine the number of bonus units that may be awarded. The approval of the PD/UNP with the bonus units shall confirm the bonus. In addition, the bonus units may be assigned to any district included in the PD/UNP, and may be converted to nonresidential floor area created through a conversion/equivalency table. However, nonresidential floor area created through a conversion of bonus units shall not be assigned to any Urban Residential district in which nonresidential uses are not permitted.

(b) *Density-Intensity Equivalency Rates*. Earned bonuses may be used to increase development entitlements based on land use equivalency rates determined from the ~~8~~th-most current edition of ~~Edition~~ the Institute of Transportation Engineers (ITE) Manual.

Sec. 38-1390.29. Transfer criteria.

(a) As part of the approval of an PD/UNP, subsequent substantial amendment to the PD/UNP, or PSP approval, development units and the required seven (7) percent open space may be transferred from any district within the UNP to another land use district within the same PD/UNP under the following conditions:

(1) The use is allowable in the receiving district;

(2) The transfer is consistent with the Principles and Goals, Objectives and Policies of the Town Center and Comprehensive Plan;

(3) The transfer will contribute to fulfilling the desired characteristics of the applicable NPA; and

(4) The transfer does not exceed the adopted PD/UNP Development Program Element.

(b) Transfer of development units or the open space requirements from one (1) approved PD/UNP to another PD/UNP is allowed under the following conditions:

(1) The transfer occurs as part of a simultaneous approval (or amendment) of both affected PD/UNPs; and

(2) The transfer represents a simultaneous decrease and increase in the development programs of the respective PD/UNPs, such that the PD/UNPs pro-rata share of the overall development program for the Town Center SAP is not increased or decreased.

(c) Simultaneous increases and decreases may allow for the exchange of residential uses for an equivalency of office and/or retail use based upon ~~the~~ an equivalency ~~rates set forth herein~~ matrix as approved on the approved PD/UNP.

(d) To facilitate the creation of an interconnected open space network throughout the Town Center comprised of linear parks, trails, wildlife corridors, etc., open space transfers shall be permitted as a non-substantial change. Non-substantial changes are limited to: no more than twenty (20) percent of the seven (7) percent open space set aside in each district; and, the transfer must be to another district within the same PD/UNP. Proposed open space transfers that exceed twenty (20) percent of the standard set aside or that would effect a transfer to a site external to the PD/UNP are classified as a substantial change request requiring approval of the Board of County Commissioners. Such transfers are not justification for an increase in the number of dwelling units or nonresidential uses on sending parcels. Receiving parcels are not required to be located adjacent to sending parcels.

(e) Transfer credits for upland greenbelts and wetlands internal to the Town Center are available at the following rates:

- One (1) acre of upland greenbelt:

  Residential - 5.8 dwelling units.

  Nonresidential - 8,700 square feet.

- One (1) acre of wetland:

Residential - 0.3 dwelling units.

Nonresidential - Not applicable.

Section 32. Amendments to Sections 38-1391, 38-1391.1 and 38-1391.2 regarding the Buena Vista North District Standards. Sections 38-1391, 38-1391.1 and 38-1391.2 are amended to respectively read as follows:

Sec. 38-1391. In general<u>; purpose and intent</u>.

(a) *BVN district established.* A special design overlay district is hereby established to be known as the Buena Vista North District ("BVN district"). Generally speaking, the BVN district is located in southwest Orange County in the area situated east of Apopka-Vineland Road and Amy Road, north of Lake Street, south of Fenton Street, and west of Interstate 4, inclusive of those rights-of-way (except for I-4). The BVN district's boundaries are identified on the map, which is incorporated herein by reference as Appendix A [available for inspection in the office of the county clerk].

(b) *Purpose and intent.* This Division 9 is intended to provide specific design standards for the BVN district with the purpose of promoting a diverse mixed-use community that applies imagination, innovation, and variety, by focusing on unique design principles and encouraging creative solutions that accomplish the following:

(1) Foster higher quality developments through unique design elements, including building materials, signs, and landscaping, etc.

(2) Guide future developments as a transition area between higher intensity non-residential development and the lower density single-family residential homes north of the BVN district.

(3) Encourage unified developments where small individual parcels of land can be collectively planned for infrastructure improvements, coherent land use mix and unified physical appearance.

(4) Minimize incompatible surroundings and visual clutter, which prevent orderly community development and reduce community property values.

(5) Sustain the comfort, health, tranquility, and contentment of residents with a desirable environment.

(6) Balance the man-made system with the natural environment, through mitigation and enhancement of impacted natural resources.

(7) To provide that these BVN district regulations shall be administered by the zoning division, except that any non-zoning aspects of these regulations shall be administered by the appropriate department or division.

Sec. 38-1391.1. Development within BVN District.

(a) *Planned development required.* In order to ensure quality development and maintain the desired characteristics of the BVN district, all new development and redevelopment within the BVN district shall be designated as planned development (PD), except as noted in subsection (b) below. The PD development plans shall follow the criteria and procedures set forth in divisions 1 through 5, article VIII, chapter 38, unless otherwise specified herein.

In addition, all projects occurring in the BVN district, but outside of an activity center land use classification, shall establish a building architectural design concept or set of design guidelines as part of the planned development process. Architectural design concept (for a single building) or design guidelines (for a multiple building complex) shall address, at a minimum, the following mass, facades (primary and secondary as defined by the Orange County Commercial Building Architectural Standards and Guidelines for Commercial Buildings and Projects), finish material, colors, roof forms, and signs. The Planning Manager or his/her designee shall review for architectural and/or project design content and guidelines.

* * *

Sec. 38-1391.2. Development density and intensity; conversion.

(a) *Compliance with future land use map designation.* Permitted land uses and allowable densities/intensities within the BVN district shall be consistent with the future land use map designation in the ~~c~~Comprehensive ~~policy p~~Plan. Any proposed changes to the future land use map designation shall follow the comprehensive plan amendment procedures for application, review and approval.

* * *

Section 33. Amendments to Section 38-1400 ("Intent and purpose [of Lake Willis Neighborhood Buffering and Design Guidelines]"). Section 38-1400 is amended to read as follows:

Sec. 38-1400. Intent and purpose.

The Lake Willis Neighborhood Buffering and Design Guidelines are intended to protect and shield the Lake Willis single-family residential enclave from the impacts of approved residential and non-residential developments within the international drive activity center. These buffering and designs guidelines are in accordance with International Drive Activity Center Element ~~p~~Policy ID5.1.3 of the ~~international drive activity center element of the 2000-2020~~ 2010-2030 ~~c~~Comprehensive ~~policy p~~Plan. These Lake Willis regulations shall be administered by the county zoning division, except that any non-zoning aspects of these regulations shall be administered by the appropriate department or division.

Section 34. Amendments to Section 38-1408 ("Fences and walls"). Section 38-1408 is amended to read as follows:

Sec. 38-1408. Fences and walls.

(a) A fence shall be uniform in construction, design, material, color and pattern, and the fence material shall be a standard material conventionally used by the fence industry. No fence or wall shall be erected so as to encroach into the fifteen (15)-foot for residentially and agriculturally zoned property, or twenty-five (25) foot for commercially and industrially zoned property corner triangle at a street intersection unless otherwise approved by the county engineer.

(b) A fence of any style or material shall maintain a clear view triangle from the right-of-way line for visibility from driveways on the lot or on an adjacent lot. The clear view triangle area for a driveway is formed on each side of a driveway by measuring a distance of fifteen (15) feet along the right-of-way and fifteen (15) feet along the edge of the driveway.

(~~b~~c) Pillars, columns, and posts may extend up to twenty-four (24) inches above the height limitations provided such pillars and posts are no less than ten (10) feet apart.

(~~c~~d) No barbed wire, razor wire or electrically charged fence shall be erected in any location on any building site in residential or office districts except for security of public utilities, provided such use is limited to three (3) strands and eighteen (18) inches, a minimum of six (6) feet above the ground. In addition, walls and fences erected in any office or residential district shall not contain any substance such as broken glass, spikes, nails, barbs, or similar materials designed to inflict pain or injury to any person or animal.

(~~d~~e) (1) Barbed wire or razor wire may be incorporated into or as an extension of the height of permitted walls and fences in commercial and industrial districts provided such use is limited to three (3) strands and eighteen (18) inches, a minimum of six (6) feet above the ground. The maximum height of the wall or fence with the barbed wire or razor wire shall be ten (10) feet.

(2) Barbed wire may be permitted by special exception in residential and office districts as an extension of the height of permitted walls and fences along the property line separating the residential or office district from a commercial or industrial district where it is documented by substantial competent evidence that such an additional security measure is warranted or appropriate. The barbed wire fencing shall be subject to the criteria and dimensions set forth in subsection (~~d~~e)(1).

(3) Barbed wire and similar field fencing shall be allowed on agriculturally zoned properties only when used for agricultural purposes; i.e., groves, grazing and boarding of animals.

(~~e~~f) In no event shall barbed wire or razor wire be placed so as to project outward over any sidewalk, street or other public way, or over property or an adjacent owner.

(~~f~~g) Except in R-CE, R-CE-2, and R-CE-5, fences and walls in residential and office districts may be created as follows:

(1) Limited to a maximum height of four (4) feet in the front yard setback. However, fences or walls located on

arterial and collector roadways are limited to a maximum height of six (6) feet in the front yard setback.

(2) Limited to a maximum height of eight (8) feet in the side and rear yards.

(3) May be increased in height when the property is contiguous to a commercially or industrially zoned property along the common property lines pursuant to the height regulations for commercial and industrial districts.

(4) May be permitted on vacant property, subject to less than fifty-percent (50%) opacity.

(~~g~~h) Fences and walls in agricultural, R-CE, R-CE-2, and R-CE-5 districts may be erected as follows:

(1) Limited to a maximum height of six (6) feet within the front yard setback. However, for chain link type fences on agricultural zoned properties, the maximum height is ten (10) feet;

(2) Limited to a maximum height of eight (8) feet in the side and rear yards. However, on agriculturally zoned properties, the maximum height is ten (10) feet;

(3) In agricultural districts, these regulations shall not apply to agricultural property used for bona fide agricultural purposes.

(~~h~~i) Fences and walls in commercial and industrial districts may be erected as follows:

(1) Limited to a maximum height of ~~six (6)~~eight (8) feet within the front yard setback.

(2) Limited to a maximum height of eight (8) feet in the side and rear yards.

(3) When a lot or parcel abuts two (2) intersecting streets and the rear property line of the lot or parcel abuts the side property line of another lot or parcel, no fence of wall in excess of four (4) feet high along the rear property line shall be allowed within twenty-five (25) feet abutting the street right-of-way line unless the adjacent property owner sharing the

common lot line submits a notarized letter stating that he has no objection and there are no site distance visibility concerns.

(~~i~~j) On any reversed corner lot (corner lot where the rear yard abuts the side of another lot) ~~abutting the side of another lot,~~ no part of any fence greater than four (4) feet in height shall be located within the required front yard setback of the adjacent lot as measured from the common corner of each lot. ~~twenty-five (25) feet of the common lot line shall be nearer the side street lot line than the required front yard of such abutting lot unless the adjacent property owner sharing the common lot line submits a notarized letter staing that he has no objection and there are no site visibility concerns.~~ A maximum eight (8) foot high fence may be permitted along the hypotenuse of the triangle formed from the common corner. Fencing greater than four (4) feet in height but less than eight (8) feet in height within the visual triangle may be installed, provided there is no adjacent driveway.

(~~j~~k) On a lakefront lot, a fence or wall within the ~~rear yard~~ lake setback area shall be limited to a maximum height of four (4) feet., ~~unless notarized letters from adjacent property owners are submitted stating that they have no objections to an increased fence height. However, the increased fence height is still subject to other applicable fence height limitations in the Orange County Code.~~

(l) Where grade elevations along adjoining properties differ, fence/wall height shall be measured from the finished ground floor elevation of the property having the higher ground floor elevation.

(m) In all zoning districts, a fence may be permitted on a vacant parcel, provided the fence has less than fifty percent (50%) opacity (except for a construction fence).

Section 35. Amendments to Section 38-1414 ("Prohibited areas for sale of alcoholic beverages—Generally"). Section 38-1414 is amended to read as follows:

Sec. 38-1414. Prohibited areas for sale of alcoholic beverages—Generally.

(a) *Definition.* In this section, unless the context requires otherwise, "package sale vendor" means a person licensed pursuant to The Beverage Law [F.S. chs. 561-568] to sell alcoholic beverages regardless of alcoholic content; however, a package sale

vendor does not include: (i) a business operation, in regards to beer and malt beverages (as defined by F.S. § 563.01) and wine (as defined by F.S. § 564.01) for consumption off premises; or (ii) any bona fide hotel, motel or motor court in possession of a special license issued in accordance with F.S § 561.20(2)(a)1.

(b) *County package sale vendor distance requirements established.* For all of those certain areas of land in the county not part of any municipality which lie within five thousand (5,000) feet of a package sale vendor's place of business as established, located and licensed, regardless of whether such established place of business is located within or outside of any municipality, no other new or relocated package sale vendor shall be permitted to open and/or start the business of package sales within that distance.

(c) *Package sales within distance requirements restricted.* The purpose of creating the distance requirements mentioned in subsection (b) of this section is to provide and require that no package sale vendor which is located or proposes to locate in the unincorporated portion of the county outside of any municipality shall be permitted to operate at a new location within a distance of five thousand (5,000) feet of the location of any package sale vendor which is both preexisting at the time of the package sale vendor's application to operate at the new location and is located in any area of the county either unincorporated or within a municipality in the county.

(d) *Criteria.* The following criteria shall be met in order for a package sale vendor to obtain county zoning approval or commence package sales at a new location:

The County shall be satisfied that the new location is not within five thousand (5,000) feet of any establishment located and/or licensed package sale vendor's place of business. However, if all established located and/or licensed package sale vendors within five thousand (5,000) feet of the new location relinquish or commit to relinquish, in writing with a notarized statement, the right to carry out package sales at the respective location, the County may issue zoning approval contingent upon such other location(s) ceasing package sales prior to the commencement of package sales at the new location. The land use and zoning of the proposed location shall allow package sales. Once County zoning approval to allow package sales at the new location is issued, failure to commence the package sales business shall not be a basis for the County to terminate or revoke zoning approval for package sales, provided the applicant undertakes and continue to make

good-faith efforts necessary to construct and/or open the applicant's new location for package sales.

(~~d~~e) *Distance requirements not applied to renewal, change in name or ownership, or change in certain licenses.* The distance requirements set forth above in subsections (b) and (c) shall not be applied to the location of an existing package sale vendor when there is:

~~(i)~~ (1) A renewal of an existing license;

~~(ii)~~ (2) A transfer in ownership of an existing license;

~~(iii)~~ (3) A change in business name; or

~~(iv)~~ (4) A change in a state issued 4COP license for an existing package and lounge business, which did not choose to forego package sales, to a 3PS license, and any decrease in the numerical designation of a state issued license which is of the same series (type); provided the physical location of the package sale vendor establishment does not change. No increase in the numerical designation of a series (type) of state issued license which is of the same series (type) shall be permitted at or for a location (new or existing) except in compliance with the provision of sections 38-1414 and 38-1415.

(~~e~~f) *Measurement of distances.* The distances provided in this section shall be measured by following the shortest route of ordinary pedestrian travel along the public thoroughfare from the proposed main entrance of a package sale vendor who proposes to operate his place of business and is licensed under The Beverage Law [F.S. chs. 561-568] to the main entrance of any other package sale vendor who is operating such a business.

(g) *Exemption for on-premises consumption only.*

(1) In those situations in which the holder of an alcoholic beverage license pursuant to the Beverage Law [F.S., Chapters 561-568] has the ability to use such license for both on-premises and off-premises consumption sales, such licensee may choose to forego off-premises consumption sales for the location of business requested; such licensee would not be deemed a package sale vendor under this section for such a location and would not be subject to the distance requirements cited in subsections (b) and (c) above. To ensure that the public, safety and

welfare are preserved, any licensee choosing to forego package sales for off-premises consumption, and thereupon not be deemed a package sale vendor, shall agree in writing with a notarized statement, as a condition of obtaining zoning approval, to prominently display at all times within the establishment in the vicinity of the main cash register a sign with letters no smaller than three (3) inches and printed in a legible style, stating "No Package Sales."

(2) Upon any relocation of such licensee's business in which the distance requirements of subsection (b) above are met, such licensee may resume package sales for off-premises consumption and would not be required to display the aforementioned sign.

Section 36. Amendments to Section 38-1415 ("Same—Distance from churches, schools and/or adult entertainment establishments). Section 38-1415 is amended to read as follows:

Sec. 38-1415. Same—Distances from religious institutions, ~~churches,~~ schools and/or adult entertainment establishments.

(a) Places of business for the sale of alcoholic beverages containing more than three and two-tenths (3.2) percent of alcohol by weight for consumption on or off the premises may be located in the unincorporated areas of the county in accordance with and subject to this chapter and specifically those zoning regulations regulating the location of places of business selling alcoholic beverages containing fourteen (14) percent or more alcohol by weight. No such place of business shall be established within one thousand (1,000) feet of an established ~~church~~ religious institution or school; except as follows:

(1) such a place of business that is licensed as a restaurant and derives at least 51 percent of its gross revenues from the sale of food and nonalcoholic beverages, pursuant to Chapter 509, Florida Statutes, and the sale of alcoholic beverages is for on-premises consumption only, may be established no closer than five hundred (500) feet of the school, except that such a place of business that is located on property designated as Activity Center Mixed Use in the County's comprehensive plan may be established no closer than three hundred (300) feet of the school; or

(2) such a place of business that is located on property designated as Activity Center Mixed Use, does *not* derive at least 51 percent of its gross revenues from the sale of food and nonalcoholic beverages, and is licensed for the sale of alcoholic beverages for on-premises consumption only, may be established no closer than five hundred (500) feet from the school, except that such a place of business may be established no closer than three hundred (300) feet from the school, provided that the County, pursuant to Section 562.45(2)(a), Florida Statutes, approves the location as promoting the public health, safety, and general welfare of the community under proceedings as provided in Section 125.66(4), Florida Statutes.

These distance separations ~~provided this prohibition~~ shall not apply to vendors of beer and wine containing alcohol of more than one (1) percent by weight for consumption off the premises only.

(b) No ~~commercial establishment~~ place of business that in any manner sells or dispenses alcohol for on-premises consumption shall be established within two hundred (200) feet of an adult entertainment establishment, as defined in section 38-1.

(~~b~~c) Distance ~~from~~ from such a place of business to a religious institution, ~~church or~~ school, or adult entertainment establishment shall be measured by following the shortest route of ordinary pedestrian travel along the public thoroughfare from the main entrance of the place of business to the main entrance door of the religious institution,~~church,~~ ~~and, in the case of a~~ the main entrance door of the school (except as may be otherwise provided by applicable state law), ~~to the nearest point of the school grounds in use as part of the school facilities,~~ or the main entrance door of the adult entertainment establishment.

(~~c~~d) The location of all existing places of business subject to this section shall not in any manner be impaired by this section, and the distance limitation provided in this section shall not impair any existing licensed location heretofore issued to and held by any such vendor nor shall such vendor's right of renewal be impaired by this section; provided, however, that the location of any such existing license shall not be transferred to a new location in violation of this section.

(~~d~~e) *Distance requirements not applied to renewal, change in name or ownership, or change in certain licenses.* The distance requirements set forth above in subsections (a) and (b)

shall not be applied to the location of an existing vendor when there is:

~~(i)~~ (1) A renewal of an existing license;

~~(ii)~~ (2) A transfer in ownership of an existing license;

~~(iii)~~ (3) A change in business name; or

~~(iv)~~ (4) A change in a state issued 4COP license for an existing package and lounge business that did not choose to forego package sales, to a 3PS license, and any decrease in the numerical designation of a state issued license which is of the same series (type);

provided that the physical location of the vendor establishment does not change. No increase in the series (type) of state issued license shall be permitted at or for a location (new or existing) except in compliance with the provisions of sections 38-1414 and 38-1415.

(~~e~~f) *Subsequent establishment of ~~church~~ religious institution or school.* Whenever a vendor of alcoholic beverages has procured a license ~~certificate~~ permitting the sale of alcoholic beverages and, thereafter, a ~~church~~ religious institution or school is established within the applicable distance separation requirement set forth in subsection (a)~~one thousand (1,000) feet of the vendor of alcoholic beverages~~, the establishment of such ~~church~~ religious institution or school shall not be cause for the discontinuance or classification as a nonconforming use of the business as a vendor of alcoholic beverages. ~~Furthermore, i~~In such a situation, an existing vendor licensed for on-site consumption may only increase a 1 COP license (on-site beer consumption) to a 2 COP (on-site beer and wine consumption). Also, in the event a vendor for on-site consumption only ceases to operate at the location after the religious institution or school is established within the applicable distance separation requirement set forth in subsection (a), a new vendor with an equal or lesser series license for on-site consumption only may be established at the same location within five years of the date when the previous vendor ceased to operate at the location. The burden of proving that the requirements for opening a new establishment have been met rests with the new vendor for on-site consumption.

(g) *Proposed location prior to building permit/construction.* When a location for an alcoholic beverage license is submitted to the Zoning Division for review and there is no building permit for the use at the location, the applicant shall stake the location of the main entrance and submit a certified survey demonstrating the distances to all established religious institutions, schools and adult entertainment establishments. A construction sign as defined in Chapter 31.5 which includes reference to the sale and consumption of alcoholic beverages shall be erected on the site within thirty (30) days of zoning approval and shall not be removed until permanent on site signage is erected.

Section 37. Repeal of Section 38-1416 ("Permits for paving of parking lots"). Section 38-1416 is repealed and reserved:

Sec. 38-1416. ~~Permits for paving of parking lots.~~ Reserved.

~~Permits shall be required for paving of parking lots of fifteen hundred (1500) square feet or over in size, in any commercial or industrial district.~~

Section 38. Amendments to Section 38-1425 ("Bed and breakfast homestays, bed and breakfast inns and country inns"). Section 38-1425 is amended to read as follows:

Sec. 38-1425. Bed and breakfast homestays, bed and breakfast inns and country inns.

Bed and breakfast homestays, bed and breakfast inns and country inns may be allowed to operate in the unincorporated area of the county as permitted uses and/or as special exceptions in the zoning districts specified below, provided that they comply with the performance standards and conditions specified in this section. (Any structure designated as a local historic landmark by the Orange County Historical Museum, under present or any future criteria established by the county for such purpose, or as listed on the National Register of Historic Places, shall be given special consideration to operate as a bed and breakfast homestay or inn as a permitted use and/or a special exception.) In addition, no bed and breakfast homestay, bed and breakfast inn, or country inn shall be located in any platted residentially zoned subdivision unless the subject site is designated commercial or industrial on the Future

Land Use Map of the County's Comprehensive ~~Policy~~ Plan or if approved as part of a Planned Development (P-D) Land Use Plan.

* * *

In all other respects, Section 38-1425 shall remain unchanged.

Section 39. Amendments to Section 38-1426 ("Accessory dwelling units"). Section 38-1426 is amended to read as follows:

Sec. 38-1426. Accessory dwelling units.

(a) The intent and purpose of this section is to allow accessory dwelling units (ADUs) to encourage infill development and to facilitate affordable housing, ~~The intent and purpose of this section is to allow a relative who wishes to reside in close proximity to his or her family an opportunity to do so by providing authorization to seek and obtain a special exception for an accessory dwelling unit,~~ while maintaining the single-family character of the primary single-family dwelling unit and the neighborhood.

(b) An accessory dwelling unit may be allowed on a lot or parcel as a special exception in any residential or agricultural zoning district (including a residential lot or parcel on an existing planned development). The accessory dwelling unit shall be an accessory use to the primary single-family dwelling unit and the primary single-family dwelling unit shall qualify as homestead property. Only one (1) accessory dwelling unit may be permitted per lot or parcel. The accessory dwelling unit shall not be constructed prior to the construction and occupation of the primary dwelling unit.

~~(c) (1) An accessory dwelling unit shall be occupied initially only by a relative. For purposes of this section, the term "relative" shall mean a sister, brother, lineal ascendant or lineal descendant of the owner of the lot or parcel on which the primary single family dwelling unit is located (or the owner's spouse).~~

~~(2) Subject to subsection (c)(3), an accessory dwelling unit may be occupied by a nonrelative, provided:~~

~~a. The accessory dwelling unit was occupied initially only by a relative and at least three (3) years~~

~~have passed since the issuance of the certificate of occupancy for the accessory dwelling unit; or~~

~~b. The accessory dwelling unit was occupied initially only by a relative, and the relative has died.~~

(c) ~~(3)~~ The BZA/BCC may impose ~~a~~ conditions addressing compatibility, which may include prohibiting the accessory dwelling unit from being initially leased, rented or otherwise used or occupied by ~~a nonrelative.~~ someone other than a relative. For purposes of this section, a "relative" is a lineal ascendant or lineal descendant of the owner of the lot or parcel where the primary single family dwelling is located (or of the owner's spouse). In the event a condition is imposed requiring that the accessory dwelling unit be initially occupied by a relative, the accessory dwelling unit may be occupied by a nonrelative three years after being initially occupied by a relative or after the relative has died, whichever occurs first.

(d) In addition to what is normally required for an application for a special exception, an application for a special exception for an accessory dwelling unit shall contain or be accompanied by the following information and documentation:

~~(1) An affidavit attesting that the owner of the lot or parcel understands and agrees that the provisions of this section shall be complied with, that he shall be responsible to the county for ensuring that the provisions are complied with, and that he shall be responsible for any failure to comply with the provisions;~~

~~(2) Documentation evidencing that the person who is to inhabit the accessory dwelling unit is a relative;~~

(~~3~~1) A site plan prepared in compliance with Section 106.1.2 of the Florida Building Code, as amended by Section 9-33 of the Orange County Code;

(~~4~~2) An exterior elevation drawing of the proposed accessory dwelling unit, regardless of whether it is proposed to be attached or detached; and

(~~5~~3) A photograph ~~and~~ or exterior elevation drawing of the primary single-family dwelling unit.~~; and~~

(e) In order to approve a special exception for an accessory dwelling unit, the county shall determine that the

proposed accessory dwelling unit is designed to be similar and compatible with the primary single-family dwelling unit and that it will be compatible with the character of the neighborhood. A manufactured home constructed pursuant to United States Department of Housing and Urban Development standards or a mobile home may not be used as an accessory dwelling unit in any single family residential zoned district.

(f) After an application for a special exception for an accessory dwelling unit is approved, the accessory dwelling unit shall be subject to the following performance standards and requirements:

(1) *Ownership*. The primary single-family dwelling unit and the accessory dwelling unit shall be under single ownership at all times. Also, ~~either~~ the primary dwelling unit or the accessory dwelling unit shall be occupied by the owner at all times. Approval of an accessory dwelling unit shall not and does not constitute approval for separate ownership or the division of the lot or parcel. Any request to divide the lot or parcel shall comply with and be subject to applicable laws, ordinances and regulations, including zoning regulations and access requirements.

~~(2) *Change in occupancy*. The owner shall notify the zoning department in writing whenever there is a change in occupancy of the accessory dwelling unit and inform the zoning department whether the new occupant is a relative or a non relative.~~

(~~3~~2) *Living area*. The minimum living area of an accessory dwelling unit shall be ~~four hundred (400)~~ five hundred (500) square feet. However, the maximum living area of an accessory dwelling unit shall not exceed forty-five (45) percent of the living area of the primary dwelling unit or one thousand (1,000) square feet, whichever is less, and shall not contain more than two (2) bedrooms. For lots/parcels equal to or greater than two (2) acres, the maximum living area shall be one thousand five hundred (1,500) square feet.

(~~4~~3) *Lot or parcel size*. The size of the lot or parcel shall be equal to or greater than the minimum lot area required for a single-family dwelling unit in the zoning district. An attached accessory dwelling unit may only be constructed on a lot or parcel whose area is equal to or greater than the minimum lot area required in the zoning district. A detached accessory dwelling unit may only be constructed on a lot or parcel whose area is at

least one and one half (1½) times the minimum lot area required in the zoning district.

(54) *Open space*. An accessory dwelling unit shall be treated as part of the impervious surface area of a lot or parcel. The open space requirements for a single-family lot or parcel shall be met notwithstanding the construction of an accessory dwelling unit.

(65) *Setbacks*. The setbacks for an attached accessory dwelling unit shall be the same as those required for the primary dwelling unit. In addition, a detached accessory dwelling unit shall be located only to the side or rear of the primary dwelling unit and shall be separated from the primary dwelling unit by at least ten (10) feet, and the distance separation shall not be less than the distance required under Section 610 ("Buildings Located on the Same Lot") and Table 600 of the 1991 edition of the Standard Building Code, as it may be amended from time to time. Moreover, a one-story detached accessory dwelling unit shall be setback a minimum of ten (10) feet from the rear property line and shall meet the minimum side setbacks for a primary structure in the zoning district. A two-story detached accessory dwelling unit located above a detached garage shall ~~meet the setbacks for the primary structure in the zoning district.~~ have ten (10) foot side and ten (10) foot rear setbacks.

(76) *Entrance*. An attached accessory dwelling unit may either share a common entrance with the primary dwelling unit or use a separate entrance. However, a separate entrance shall be located only ~~to~~ on the side or rear of the structure.

(87) *Parking*. One (1) additional off-street parking space shall be required for an accessory dwelling unit. The additional space requirement may be met by using the garage, carport or driveway of the primary dwelling unit.

(98) *Water and sewer*. Adequate water and wastewater capacity shall exist for an accessory dwelling unit. Approval of a special exception for an accessory dwelling unit shall not constitute approval for use of a septic system and/or a well. If a septic system and/or a well must be utilized, applicable laws, ordinances and regulations shall control. ~~The owner of a~~An attached accessory dwelling unit ~~may~~ shall not apply for and obtain a separate water meter. ~~subject to the unit connecting to Orange County's water system.~~

(~~10~~9) *Electrical.* ~~The owner of an~~ A detached accessory dwelling unit may apply for and obtain a separate power meter, subject to the approval of the utility company and complying with all applicable laws, ordinances and regulations. An attached accessory dwelling unit shall not have or obtain a separate power meter.

(~~11~~10) *Impact fees and capital fees.* The impact fees for an accessory dwelling unit shall be accessed at the multi-family rate. Water and wastewater capital fees for the accessory dwelling unit shall be assessed at the multi-family rate.

(~~12~~11) *Other laws, ordinances, and regulations.* All other applicable laws, ordinances and regulations shall apply to the primary dwelling unit and the accessory dwelling unit.

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(g) After [**insert the effective date of this ordinance**], accessory dwelling units may be permitted in a Planned Development without the need for a special exception, subject to the following requirements:

(1) Unless the PD Land Use Plan (LUP) and/or PSP identifies ADUs as a permitted use, a change determination or an amendment to the PD/PSP shall be required, or if the property is platted as separate lot or parcel, a special exception shall be required;

(2) The ADUs shall meet the performance standards in Section 38-1426(f)(1) through (11), except for the need for a special exception (unless it is platted as a separate lot or parcel); and

(3) The property shall be platted with covenants and restrictions for all the lots in the plat identifying that ADUs are a permitted use.

Section 40. Amendments to Section 38-1427 ("Communication towers"). Section 38-1427 is amended to read as follows:

Sec. 38-1427. Communication towers.

* * *

(c) *Variances.* Except as provided otherwise for communication towers in planned developments (see Section 38-1236), a deviation ~~Any request to deviate~~ from any of the

requirements of this section shall require variance review and approval by the board of zoning adjustment and the board of county commissioners.

* * *

(n) *Standards and criteria for review of special exception requests on communication tower facilities.*

* * *

(6) *Separation distance reduction for camouflaged facilities*. In the event the BZA, or the BCC if the property is zoned PD, using the standards set forth in subsection (n)(5) above, determines the camouflaging agent is compatible with the surrounding area, then the distance separation requirements set forth in subsections 38-1427(d)(2)d and (d)(3) for the proposed communication tower as a camouflaged facility shall be reduced by one half (1/2) of the applicable monopole height requirement. The reduction should only be applicable to the placement of the camouflaged tower and the measurement of distance separation from other towers to the camouflaged tower shall not be reduced.

* * *

(o) *Utilization of existing pole-type structures.* A communication antenna which is attached to an existing pole-type structure or the existing pole-type structure is replaced with a monopole tower to accommodate both its prior function and a communication antenna shall be a permitted ancillary use provided each of the following criteria are met:

(1) The communication antenna attached to the existing pole-type structure or replacement monopole shall not extend above the highest point of the pole-type structure or replacement monopole more than twenty (20) feet, as measured from the height of the pre-existing pole-type structure.

(2) a. If the resulting structure/tower adds additional height over the pre-existing pole-type structure, the closest residential structure shall be away from the base of the pole-type structure or replacement tower a distance of at least one hundred ten (110) percent the height of the entire structure/tower.

b. If no additional height over the height of the pre-existing pole-type structure is added by either (i)

the attachment of the communication antenna to the existing pole-type structure, or (ii) the replacement tower including the communication antenna, then the structure/tower is permitted with no additional distance separation to residential structures over that which was provided by the pre-existing pole-type structure.

(3) The communication antenna and support structure comply with all applicable FCC and FAA regulations.

(4) The communication antenna, pole-type structure, and/or replacement monopole tower comply with all applicable building codes.

(5) Pole-type structure ~~(i) within public road rights-of-way, or (ii)~~ (i) within side yard or rear yard residential subdivision easements, or ~~(iii)~~(ii) if used for power distribution of fourteen (14) kilovolt service or less, shall not be eligible for use under this subsection (o). ~~Notwithstanding the foregoing sentence,~~However, other pole-type structures within public road rights-of-way and within limited access road system rights-of-way are eligible for use under this subsection (o), provided the antenna shall be canister-type.

(6) The utilization of an existing pole-type structure for placement of a communication antenna in compliance with the requirements of this subsection (o) shall supersede the separation requirements contained in subsections (d)(2)d. and (d)(3)a.

(7) In the event that the utility pole or structure is abandoned for its initial/primary use as a utility pole, the secondary use as a communication tower shall also cease to operate and the structure and communication antenna removed.

In all other respects, Section 38-1427 shall remain unchanged.

Section 41. Amendments to Sections 38-1476 and 38-1479 regarding Off-Street Parking. Sections 38-1476 and 38-1479 are amended to respectively read as follows:

Sec. 38-1476. Quantity of off-street parking.

(a) Off-street parking spaces shall be provided for any use hereafter established or at the time of the erection of any main building or structure or at the time any main building, structure or occupational use is enlarged or increased in capacity by adding

dwelling units, guest rooms, floor area, seats, or by increasing employment, according to the following minimum requirements: If the use is not listed below, the parking requirements shall be determined by the Zoning Manager by adopting or utilizing the parking requirements for the listed use that the Zoning Manager determines is most similar.

* * *

Auto dealerships	1 space per every three hundred (300) square feet of gross floor area including showroom, sales offices and general offices.

* * *

Day care centers and kindergartens	1 space for each 10 children, plus with a pickup and drop-off area ~~equal to 1~~ one space for each 10 children or without a pick-up or drop-off area one space for each 5 children.

* * *

Boardinghouses, lodging houses, and rooming- houses and assisted living facilities (such as senior living facilities), including nursing homes	1 space for each 2 bedrooms

* * *

Mechanical garages	1 space for every employee, plus 1 space per bay or 1 space for each one thousand (1,000) square feet if no bays

* * *

Hospitals, sanitariums ~~rest and convalescent homes~~, foster group homes, and ~~all~~ similar institutions	2 spaces for each bedroom and office building criteria.

* * *

General business establishments, such as hardware, furniture, appliance, jewelry, apparel stores,~~ etc~~.and all other general retail establishments	1 spaces for each 300 square feet of gross floor area; provided, however, that no use shall have less than 3 spaces.

of fifteen thousand (15,000) square feet gross floor area or less	
* * *	
Restaurants, grills, bars, lounges, similar dining and/or drinking establishments	1 space for each 4 ~~fixed~~ seats provided for patron use, plus 1 space for each 75 square feet of floor area provided for patron use which does not contain ~~fixed~~ seats; provided that no use shall have less than 4 spaces
* * *	
Schools, public and private, including elementary, middle, high schools and academies (not including colleges, universities, or similar institutions)	1 space for each 4 seats in assembly hall; or~~, if no assembly hall,~~ 4 spaces per each instructional room, plus 1 space for each 3 high school students; whichever is higher.
Shopping centers ~~up to~~ between fifteen thousand and one (15,001) and fifty thousand (50,000) square feet gross floor area, food stores, supermarkets, and drugstores	5½ spaces for each 1,000 square feet of gross floor area; provided, however, no use shall have less than 5 spaces.
Student housing	~~1.25~~ 1 space~~s~~ per bedroom.
* * *	

Sec. 38-1479 Off-street parking lot requirements.

(a) All parking areas shall have durable all-weather surfaces for vehicle use areas, shall be properly drained and shall be designed with regard to pedestrian safety. For purposes of this article, a durable, all-weather surface shall consist of an improved surface, including concrete, asphalt, stone and other permanent surfaces, but not including gravel, wood chips, mulch or other materials subject to decay. Residential conversions to professional office use, churches, bed and breakfast homestays, bed and breakfast inns and overflow parking on unimproved property used in conjunction with special events and/or holiday parking demands may be exempt from this condition subject to approval by the

zoning manager or when approved by the board of zoning adjustment ("BZA") and the board of county commissioners ("BCC").

(b) Regular parking space sizes shall be a minimum of 180 square feet (either 9' x 20' or 10' x 18'). Off-street parallel parking stalls shall be 8' x 22'. Spaces within parking garages may be a minimum of 8 1/2' x 18'. Off-street turning and maneuvering space shall be provided for each lot so that no vehicle shall be required to back onto or from any public street. Suggested parking lot design standards are contained in Exhibit I on file and available for reference in the office of the county engineer.

Section 42. Amendments to Sections 38-1501, 38-1502 and 38-1506 regarding Site and Building Requirements. Sections 38-1501, 38-1502 and 38-1506 are amended to respectively read as follows:

Sec. 38-1501. Basic requirements.

The basic site and building requirements for each agricultural, residential and commercial zoning districts are established as follows (and industrial site and building requirements are set forth elsewhere in this chapter:

TABLE INSERT:

District	*Min. lot area (sq. ft.)-###m*	*Min. living area (sq. ft.)*	*Min. lot width (ft.)*	**a Min. front yard (ft.)*	**a Min. rear yard (ft.)*	*a Min. side yard (ft.)*	*Max. building height (ft.)*	*Lake setback (ft.)*
A-1	SFR 21,780 (½ acre)	850	100	35	50	10	35	*a
	Mobile home 2 acres	850	100	35	50	10	35	a
A-2	SFR 21,780 (½ acre)	850	100	35	50	10	35	*a
	Mobile home 2 acres	850	100	35	50	10	35	a
A-R	108,900 (2½ acres)	1,000	270	35	50	25	35	*a
R-CE	43,560 (1 acre)	1,500	130	35	50	10	35	*a
R-CE-2	2 acres	1,200	250	45	50	30	35	*a

District	*Min. lot area (sq. ft.)-###m*	*Min. living area (sq. ft.)*	*Min. lot width (ft.)*	**a Min. front yard (ft.)*	**a Min. rear yard (ft.)*	*a Min. side yard (ft.)*	*Max. building height (ft.)*	*Lake setback (ft.)*
R-CE-5	5 acres	1,200	185	50	50	45	35	*a
R-1AAAA	21,780 (½ acre)	1,500	110	30	35	10	35	*a
R-1AAA	14,520(1/3 acre)	1,500	95	30	35	10	35	*a
R-1AA	10,000	1,200	85	25‡h	30‡h	7.5	35	*a
R-1A	7,500	1,200	75	20+h	25+h	7.5	35	*a
R-1	5,000	1,000	50	20+h	20+h	5+h	35	*a
R-2	One-family dwelling, 4,500	1,000	45*****c	20+h	20+h	5+h	35	*a
	Two dwelling units, 8,000/9,000	500/1,000 per dwelling unit	80/90******d	20+h	30	5+h	35	*a
	Three dwelling units, 11,250	500 per dwelling unit	85+j	20+h	30	10	35** ***	*a
	Four or more dwelling units, 15,000	500 per dwelling unit	85+j	20+h	30	10****b	35** ***	*a
R-3	One-family dwelling, 4,500	1,000	45*****c	20‡h	20‡h	5	35	*a
	Two dwelling units, 8,000/9,000	500/1,000 per dwelling unit	80/90******d	20‡h	20‡h	5‡h	35	*a
	Three dwelling units, 11,250	500 per dwelling unit	85+j	20‡h	30	10	35** ***	*a
	Four or more dwelling units, 15,000	500 per dwelling unit	85+j	20‡h	30	10****b	35** ***	*a
R-L-D	N/A	N/A	N/A	10 for side entry garage, 20 for front entry garage	15	0 to 10	35***	*a
R-T	7 spaces per gross acre	Park size min. 5 acres ~~Min. mobile home size 8 ft. x 35 ft.~~	Min. mobile home size 8 ft. x 35 ft.~~Park size min. 5 acres~~	7.5	7.5	7.5	~~N/A~~35	*a

District	*Min. lot area (sq. ft.)* ~~###~~ *m*	*Min. living area (sq. ft.)*	*Min. lot width (ft.)*	~~*~~*a Min. front yard (ft.)*	~~*~~*a Min. rear yard (ft.)*	*a Min. side yard (ft.)*	*Max. building height (ft.)*	*Lake setback (ft.)*
R-T-1 SFR	4,500~~*****~~c	~~45*****~~1,000	~~1000~~ 45	25/20~~††~~k	25/20~~††~~k	5	35	~~*~~a
Mobile Home	4,500~~*****~~c	~~45*****~~Min. mobile home size 8 ft. x 35 ft.	~~Min. mobile home size 8 ft. x 35 ft.~~ 45	25/20~~††~~k	25/20~~††~~k	5	35	~~*~~a
R-T-2 (prior to 1/29/73)	6,000	~~60~~SFR 500 Min. mobile home size 8 ft. x 35 ft	60~~SFR 500 Min. mobile home size 8 ft. x 35 ft~~	25	25	6	~~N/A~~35	~~*~~a
(after 1/29/73)	21,780 1/2 acre	~~100~~SFR 600 Min. mobile home size 8 ft. x 35 ft.	100~~SFR 600 Min. mobile home size 8 ft. x 35 ft~~	35	50	10	~~N/A~~35	~~*~~a
NR	One family dwelling, 4,500	1,000	45~~*****~~c	20	20	5	35/3 stories ~~††~~k	~~*~~a
	Two dwelling units, 8,000	500 per dwelling unit	80/90~~******~~d	20	20	5	35/3 stories ~~††~~k	~~*~~a
	Three dwelling units, 11,250	500 per dwelling unit	85	20	20	10	35/3 stories ~~††~~k	~~*~~a
	Four or more dwelling units, 1,000 plus, 2,000 per dwelling unit	500 per dwelling unit	85	20	20	10	50/4 stories ~~††~~k	~~*~~a
	Townhouse, 1,800	750 per dwelling unit	20	25, 15 for rear entry driveway	20, 15 for rear entry garage	0, 10 for end units	40/3 stories ~~††~~k	~~*~~a
NAC	Non-residential and mixed use development, 6,000	500	50	0/10 maximum, 60% of building frontage must conform to maximum setback	15, 20 adjacent to single-family zoning district	10, 0 if buildings are adjoining	50 feet ~~††~~k	~~*~~a
	One-family dwelling, 4,5000	1,000	45~~*****~~c	20	20	5	35/3 stories ~~††~~k	~~*~~a
	Two dwelling units, 11,250	500 per dwelling unit	80~~******~~d	20	20	5	35/3 stories ~~††~~k	~~*~~a
	Three dwelling units, 11,250	500 per dwelling unit	85	20	20	10	35/3 stories ~~††~~k	~~*~~a
	Four or more dwelling units, 1,000 plus 2,000 per dwelling unit	500 per dwelling unit	85	20	20	10	50 feet/4 stories, 65 feet with ground floor retail ~~††~~k	~~*~~a
	Townhouse, 1,800	750 per dwelling unit	20	25, 15 for rear entry driveway	20, 15 for rear entry garage	0, 10 for end unit	40/3 stories ~~††~~k	~~*~~a

District	*Min. lot area (sq. ft.)* ~~###~~ *m*	*Min. living area (sq. ft.)*	*Min. lot width (ft.)*	~~*~~ *a Min. front yard (ft.)*	~~*~~ *a Min. rear yard (ft.)*	*a Min. side yard (ft.)*	*Max. building height (ft.)*	*Lake setback (ft.)*
NC	Non-residential and mixed use development, 8,000	500	50	0/10 maximum, 60% of building frontage must conform to maximum setback	15, 20 adjacent to single-family zoning district	10, 0 if buildings are adjoining	65 feet ~~++~~ k	~~*~~ a
	One-family dwelling, 4,500	1,000	45~~*****~~ c	20	20	5	35/3 stories ~~++~~ k	~~*~~ a
	Two dwelling units, 8, 000	500 per dwelling unit	80~~******~~ d	20	20	5	35/3 stories ~~++~~ k	~~*~~ a
	Three dwelling units, 11,250	500 per dwelling unit	85	20	20	10	35/3 stories ~~++~~ k	~~*~~ a
	Four or more dwelling units, 1,000 plus 2,000 per dwelling unit	500 per dwelling unit 750 per dwelling unit	85	20	20	10	65 feet, 80 feet with ground floor retail ~~++~~ k	~~*~~ a
	Townhouse		20	25, 15 for rear entry driveway	20, 15 for rear entry garage	0, 10 for end units	40/3 stories ~~++~~ k	~~*~~ a
P-O	10,000	500	85	25	30	10 for one- and two-story bldgs., plus 2 feet for each add. story	35~~**~~ ~~***~~	~~*~~ a
C-1	6,000	500	80 on major streets (see Art. XV); 60 for all other streets ~~#~~ e; 100 ft. for corner lots on major streets (see Art. XV)	25	20	0; or 15 ft when abutting residential district; side street, 15 ft.	50; or 35 within 100 ft of all residential districts	~~*~~ a
C-2	8,000	500	100 on major streets (see Art. XV); 80 for all other streets ##f	25, except on major streets as provided in Art. XV	15; or ~~20~~ 25 when abutting residential district	5; or 25 when abutting residential district; 15 for any side street	50; or 35 within 100 feet of all residential districts	~~*~~ a
C-3	12,000	500	125 on major streets (see Art. XV); 100 for all other streets ###g	25, except on major streets as provided in Art. XV	15; or 20 when abutting residential district	5; or 25 when abutting residential district; 15 for any side street	75; or 35 within 100 feet of all residential districts	~~*~~ a

~~*~~ a	Setbacks shall be a minimum of 50 feet from the normal high water elevation contour on any adjacent natural surface water body and any natural or artificial extension of such water body, for any building or other principal structure. Subject to the lakeshore protection ordinance and the conservation ordinance, the minimum setbacks from the normal high water elevation contour on any adjacent natural surface water body, and any natural or artificial extension of such water body, for an accessory building, a swimming pool, swimming pool deck, a covered patio, a wood deck attached to the principal structure or accessory structure, a parking lot, or any other

District	*Min. lot area (sq. ft.)* ~~###~~ *m*	*Min. living area (sq. ft.)*	*Min. lot width (ft.)*	~~*~~*a Min. front yard (ft.)*	~~*~~*a Min. rear yard (ft.)*	*a Min. side yard (ft.)*	*Max. building height (ft.)*	*Lake setback (ft.)*
	accessory use, shall be the same distance as the setbacks which are used per the respective zoning district requirements as measured from the normal high water elevation contour.							
~~**~~	~~Building in excess of 35 feet in height may be permitted as a special exception.~~							
~~***~~	~~Buildings in excess of 1 story in height within 100 feet of the property line of any single-family residential district may be permitted as a special exception.~~							
~~****~~b	Side setback is 30 feet where adjacent to single-family district.							
~~*****~~c	For lots platted between 4/27/93 and 3/3/97 that are less than 45 feet wide or contain less than 4,500 sq. ft. of lot area, or contain less than 1,000 square feet of living area shall be vested pursuant to Article III of this chapter and shall be considered to be conforming lots for width and/or size and/or living area.							
~~******~~d	For attached units (common fire wall and zero separation between units) the minimum duplex lot width is 80 feet and the duplex lot size is 9,000 square feet with a minimum separation between units of 10 feet. Fee simple interest in each half of a duplex lot may be sold, devised or transferred independently from the other half. For duplex lots that: (i) are either platted or lots of record existing prior to 3/3/97, and (ii) are 75 feet in width or greater, but are less than 90 feet, and (iii) have a lot size of 7,500 square feet or greater, but less than 9,000 square feet are deemed to be vested and shall be considered as conforming lots for width and/or size.							
~~#~~e	Corner lots shall be 100 [feet] on major streets (see Art. XV), 80 [feet] for all other streets.							
~~##~~f	Corner lots shall be 125 [feet] on major streets (see Art. XV), 100 [feet] for all other streets.							
~~###~~g	Corner lots shall be 150 [feet] on major streets (see Art. XV), 125 [feet] for all other streets.							
~~‡~~h	For lots platted on or after 3/3/97, or unplatted parcels. For lots platted prior to 3/3/97, the following setbacks shall apply: R-1AA, 30 feet front, 35 feet rear; R-1A, 25 feet front, 30 feet rear; R-1, 25 feet front, 25 feet rear, 6 feet side; R-2, 25 feet front, 25 feet rear, 6 feet side for one (10 and two (2) dwelling units; R-3, 25 feet front, 25 feet rear, 6 feet side for two (2) dwelling units. Setbacks not listed in this footnote shall apply as listed in the main text of this section.							
~~†~~j	Attached units only. If units are detached, each unit shall be placed on the equivalent of a lot 45 feet in width and each unit must contain at least 1,000 square feet of living area. Each detached unit must have a separation from any other unit on site of at least 10 feet.							
~~† †~~k	Maximum impervious surface ratio shall be 70%, except for townhouses, nonresidential, and mixed use development, which shall have a maximum impervious surface ratio of 80%.							
~~† † †~~m	Based on gross square feet.							

[***Editorial note: Throughout the Table Insert above, symbols are being deleted (shown by strike-throughs that may appear in certain places as underlines) and replaced with the following lower case letters (shown by underlines): a, b, c, d, e, f, g, h, j, k and m. (The lower case letters i and l are not being used.)***]

Sec. 38-1502. Location of dwellings in residential districts.

* * *

(b) No dwelling shall be erected on a lot which does not abut on a street for a distance of at least fifteen (15) feet. Any divisions or splits of land, lots or parcels shall have a minimum of twenty (20) feet of fee simple access to a roadway, except to the extent that requirement is inconsistent or conflicts with the requirements of the subdivision regulations.

(c) On any corner lot abutting the side of another lot, no part of any structure, excluding fences (see subsection 38-1408(i)), shall be located within the twenty ~~five~~ (~~25~~20) ~~feet~~ foot corner visibility triangle along ~~of~~ the common lot line; and no structure shall be nearer the side street lot line than the required front yard of such abutting lot.

* * *

Sec. 38-1506. Height extensions for appurtenances.

The zoning manager may grant height extensions not to exceed ten (10) feet above the maximum height limits established under section 38-1501, site and building requirements, and planned developments, for appurtenances and architectural features only. Examples of such features include, but are not limited to, chimneys, cupolas, church spires, and air conditioning equipment. Portions of the roof are not considered an appurtenance. The top of all roof-lines shall comply with the maximum height limit of the underlying zoning district. This provision is only applicable to properties platted after December 15, 1998, and unplatted lands.

Section 43. Amendments to Sections 38-1602 and 38-1603 regarding Major Street Setbacks. Sections 38-1602 and 38-1603 are amended to respectively read as follows:

Sec. 38-1602. Definitions.

For the purposes of this article, the following definitions shall apply:

Arterial road shall mean a signalized roadway that primarily services through traffic with an average signalized intersection spacing of 2.0 miles or less. As used here, signalized intersections refer to all fixed causes of interruption to the traffic stream and may occasionally include STOP signs or other types of traffic control. Class I arterials have a posted speed of 40 miles per hour or greater. Class II arterials have a posted speed of 35 miles per hour or less.~~route providing service which is relatively continuous and of relatively high traffic volume, long average trip length, high operating speed, and high mobility importance. In addition, every United States numbered highway is an arterial road. For purposes of this article, the term "arterial" includes "principal arterial," "minor arterial," an "extension" of a principal arterial or minor arterial, and an "intra-urban arterial." (This article contains separate definitions for the terms "principal arterial" and "minor arterial" due to the different setback distances for each.)~~

Collector road shall mean a roadway providing land access and traffic circulation within residential, commercial, and industrial areas and that~~route providing service which is of relatively moderate average volume, moderately average trip length, and moderately average operating speed. Such a route also~~ collects and distributes traffic between local roads or arterial roads ~~and serves~~ as a linkage between land access and mobility needs.

For purposes of this article, the term "collector" includes "major urban collector," "minor urban collector," and any "extension" of a major or minor urban collector., and an "intra-urban collector."

Functional classification shall mean the assignment of roads into systems according to the standards provided in the Highway Classification Manual and the Florida Department of Transportation Quality/Level of Service Handbook.character of service they provide in relation to the total highway network. Basic functional classifications include arterial roads, collector roads, and local roads. These basic classifications may be divided into principal, major, or minor subclassifications. Those subclassifications may be additionally divided into rural and urban categories.

Major street shall mean a road functionally classified according to the standards provided in the Highway classification Manual and the Florida Department of Transportation Quality/Leval of Service Handbook as determined by the County Engineer.and listed as a major street in section 38-1603 of this article.

Minor arterial shall mean a route which generally interconnects with and augments principal arterial routes and provides service to trips of shorter length and a lower level of travel mobility. Such a route includes any arterial not classified as a "principal arterial" and contains facilities that place more emphasis on land access than the higher system.

Principal arterial shall mean a route which generally serves the major centers of activity of an area, the highest traffic volume corridors, and the longest trip purpose and carries a high proportion of the total area travel on a minimum of mileage.

Rural functionality-classified roads shall mean roadways within the rural area not designated as urbanized, urban, or transitioning by the Florida Department of Transportation, the Federal Highway Administration, and MetroPlan Orlando based on U.S. Census data, as updated from time to time.

Setback distance shall mean a horizontal distance which correlates with the functional classification of the major street described in section 38-1603. The distance is measured by a straight line extending perpendicular from the centerline of the major street.

Transitioning area shall mean an area designated by the Florida Department of Transportation and MetroPlan Orlando (without Federal Highway Administration involvement), based on U.S. Census data, as updated from time to time. Transitioning areas are fringe areas exhibiting characteristics between rural and urbanized/urban. Transitioning areas are intended to include areas that, based on their growth characteristics, are anticipated to become urbanized or urban in the next 20 years and where designated, associated roadways shall use urbanized area setbacks.

Urban functionally-classified roads shall mean roadways within the urban/urbanized area designated by the Florida Department of Transportation, the Federal Highway Administration, and MetroPlan Orlando based on U.S. Census data, as updated from time to time.

Sec. 38-1603. Functional classification and setback distances.

Buildings, structures (except signs and billboards), and parking areas adjacent to major streets shall be set back in all zoning districts according to the respective setback distances set forth in the following table. In the event of a conflict between the setback distances set forth in the following table and the requirements for setbacks as established through yard requirements in any zoning district, the greater of the setback distances shall prevail. This section shall not apply within Horizon West.

* * *

Functional Classification of Major Street	Setback Distance from Centerline for Buildings and Structures (feet)	Setback Distance from Centerline for Parking Areas (feet)
Principal arterial, urban (Class I)	70	65
Principal arterial, urban (Class II)	60	55
Principal arterial, rural	150	100
Minor arterial, urban	60	55
Minor arterial, rural	120	70
Collector, major and minor urban	55	50
Collector, rural	100	50

Section 44. Amendments to Sections 38-1725 and 38-1727 regarding Neighborhood Districts, in General. Sections 38-1725 and 38-1727 are amended to respectively read as follows:

Sec. 38-1725. Intent and purpose <u>of districts</u>.

This article provides specific zoning standards to implement the future land use map designations of neighborhood center, neighborhood activity corridor, and neighborhood residential.

(1) These zoning standards are intended to facilitate the redevelopment of historic and/or established communities in Orange County with housing types and homeownership opportunities, as well as neighborhood-serving commercial and other residential support services, including office uses, civic uses, parks, and recreation.

(2) These zoning standards promote a mix of land uses using a development pattern with various densities and intensities within a parcel, block, and/or district to recognize the urban nature of these areas and to preserve and enhance their unique character and sense of place.

(3) Orange County has made investments in public services and infrastructure that will be protected by these zoning standards. These zoning standards address public health, safety, and welfare in the districts and enhance the function and appearance of development.

(4) These zoning standards are consistent with the Economic Element of the Orange County Comprehensive ~~Policy~~ Plan, which has been adopted by the county to accommodate and promote economic growth and which specifies that zoning may be used to achieve these ends.

(5) The Constitution and laws of the State of Florida grant authority to the board of county commissioners to adopt and enforce land development regulations within the unincorporated area of Orange County.

<u>(6) These neighborhood districts regulations shall be administered by the county zoning division, except that any non-</u>

zoning aspects of these regulations shall be administered by the appropriate department or division.

* * *

Sec. 38-1727. Nonconforming uses.

Except as provided in this section, uses and structures made nonconforming as a result of a rezoning of property to NC, NAC or NR are subject to the provisions of article III of Chapter 38.

~~(1) Building or development sites which do not meet the minimum residential density requirements of the district in which they are located shall be deemed to be conforming but underdeveloped. Any expansion or enlargement which increases the density on the building or development site, but is less than the amount needed to meet minimum density requirements shall be permitted and considered to be consistent with the intent and purpose of the minimum density requirements of the district.~~

~~(2)~~ Destruction of nonconforming signs and the ability to rebuild such signs shall be subject to the nonconforming use provisions of section 38-53 (b). Nonconforming signage, excluding billboards, on properties that are vacant for one hundred eighty (180) days or more, as determined by a vacant structure on the property and sign face copy that is blank or does not advertise current business activity for that period, shall lose its nonconforming status. A vacant building shall be the primary factor for determining the expiration of nonconforming status of a sign. This subsection shall apply to single tenant structures and to multi-tenant structures where the entire multi-tenant structure is vacant. Upon occupancy of the structure by a business, signage that has lost its nonconforming status must come into compliance with this article. Any new signage on the property must be consistent with the signage requirements of this article.

Section 45. Amendments to Sections 38-1730, 38-1731 and 38-1734 regarding the NC Neighborhood Center District. Sections 38-1730, 38-1731 and 38-1734 are amended to respectively read as follows:

Sec. 38-1730. Intent and purpose of district.

The NC neighborhood center district is intended to provide a neighborhood-serving, mixed-use, and pedestrian-scale environment where residents of urban communities in need of

redevelopment can comfortably shop for their daily needs. A mixture of retail shops, restaurants, offices, civic uses, and residential units will characterize the NC district, complemented by an active and pleasant streetscape, tree-shaded sidewalks, and other pedestrian amenities. This intent and purpose are consistent with Future Land Use Element Policy FLU8.3.1~~3.4.4~~ of the Orange County ~~2000-2020~~2010-2030 Comprehensive Policy Plan. These NC neighborhood district regulations shall be administered by the county zoning division, except that any non-zoning aspects of these regulations shall be administered by the appropriate department or division.

Sec. 38-1731. Permitted uses.

A use shall be permitted in the NC district if the use is identified by the letter "P" in the use table set forth in section 38-77. For master-planned redevelopment areas, defined as areas where lot assembly has taken place and a single site plan has been submitted for an area no less than five acres, in the NC district, permitted uses shall be consistent with ~~minimum and maximum land area specified in~~ Future Land Use Element Policy FLU 1.1.4C~~3.4.7~~ of the Orange County ~~2000-2020~~ Comprehensive ~~Policy~~ Plan.

* * *

Sec. 38-1734. Site development standards.

Except as otherwise provided in this section, the site and building requirements shown in article XII of this chapter shall apply to all development within the NC district.

* * *

(2) *Density and intensity standards.* The following density and intensity standards shall apply to all development within the NC district.

a. Floor area ratio shall not exceed 2.0.

b. The maximum residential density shall not exceed forty (40) units per acre.

~~c. The minimum residential density shall be no less than four (4) units per acre.~~

~~d. Densities less than four (4) units per acre shall be allowed for the protection of natural resources.~~

* * *

Section 46. Amendments to Sections 38-1737, 38-1738 and 38-1741 regarding the NAC Neighborhood Center District. Sections 38-1737, 38-1738 and 38-1741 are amended to respectively read as follows:

Sec. 38-1737. Intent and purpose of district.

The intent of the NAC neighborhood activity corridor district is to provide a mixture of land uses along the main roadways serving an urban community in need of redevelopment. The NAC district is intended as a vital, pedestrian-oriented district that can support a variety of residential and support uses at an intensity greater than the surrounding neighborhoods, but less intense than the NC district. The NAC district should contain a variety of multi-family units, including townhouses, apartments above offices and retail, and loft options, complemented by offices, commercial and residential support services, residential, and limited retail space. This intent and purpose are consistent with Future Land Use Element Policy FLU8.3.1~~3.4.4~~ of the Orange County ~~2000-2020~~2010-2030 Comprehensive ~~Policy~~ Plan. These NAC neighborhood activity corridor district regulations shall be administered by the county zoning division, except that any non-zoning aspects of these regulations shall be administered by the appropriate department or division.

Sec. 38-1738. Permitted uses.

A use shall be permitted in the NAC district if the use is identified by the letter "P" in the use table set forth in section 38-77. For master-planned redevelopment areas, defined as areas where lot assembly has taken place and a single site plan has been submitted for an area no less than five acres, in the NAC district, permitted uses shall be consistent with ~~minimum and maximum land area specified in~~ Future Land Use Element Policy FLU 1.1.4C~~3.4.7~~ of the Orange County ~~2000-2020~~ Comprehensive ~~Policy~~ Plan.

* * *

Sec. 38-1741. Site development standards.

Except as otherwise provided in this section, the site and building requirements shown in article XII of this chapter shall apply to all development within the NAC district.

* * *

(2) *Density and intensity standards.* The following density and intensity standards shall apply to all development within the NAC district.

a. Floor area ratio shall not exceed 1.0.

b. The maximum residential density shall not exceed twenty-five (25) units per acre.

~~a. The minimum residential density shall be no less than four (4) units per acre. Densities less than four (4) units per acre shall be allowed for the protection of natural resources.~~

* * *

Section 47. Amendments to Sections 38-1744, 38-1745 and 38-1748 regarding the NR Neighborhood Residential District. Sections 38-1744, 38-1745 and 38-1748 are amended to respectively read as follows:

Sec. 38-1744. Intent and purpose of district.

The purpose of the NR neighborhood residential district is to provide a transition from mixed-use areas to lower-density residential areas to promote the redevelopment of urban communities. The NR district will provide a diversity of housing types at densities higher than surrounding neighborhoods, complemented by parks, recreation areas and civic uses essential to community gathering. The district will be pedestrian in nature, with sidewalk-lined, tree-shaded streets naturally clamed by on-street parking and an active environment. This intent and purpose are consistent with Future Land Use Element Policy FLU8.3.1~~3.4.4~~ of the Orange County ~~2000-2020~~ Comprehensive ~~Policy~~ Plan. These NR neighborhood residential district regulations shall be administered by the county zoning division, except that any non-zoning aspects of these regulations shall be administered by the appropriate department or division.

Sec. 38-1745. Permitted uses.

A use shall be permitted in the NR district if the use is identified by the letter "P" in the use table set forth in section 38-77. For master-planned redevelopment areas, defined as areas where lot assembly has taken place and a single site plan has been submitted for an area no less than five acres, in the NR district, permitted uses shall be consistent with ~~minimum and maximum land area specified in~~ Future Land Use Element Policy FLU 1.1.4C ~~3.4.7~~ of the Orange County ~~2000-2020~~ Comprehensive ~~Policy~~ Plan.

* * *

Sec. 38-1748. Site development standards.

Except as otherwise provided in this section, the site and building requirements shown in article XII of this chapter shall apply to all development within the NR district.

* * *

(2) *Density and intensity standards.* The following density and intensity standards shall apply to all development within the NR district.

a. Floor area ratio shall not exceed .40.

b. The maximum residential density shall not exceed twenty (20) units per acre.

~~c. The minimum residential density shall be no less than four (4) units per acre. Densities less than four (4) units per acre shall be allowed for the protection of natural resources.~~

* * *

Section 48. Amendments to Article XVIII regarding Donation Bins. Article XVIII of Chapter 38 is amended to read as follows:

ARTICLE XVIII. ~~DONATION~~ COLLECTION BINS

Sec. 38-1765. Intent.

The intent of this Article is to regulate the placement of ~~donation~~ collection bins within the unincorporated area of Orange County to promote the health, safety, and general welfare of citizens of the County.

Sec. 38-1766. Definitions.

As used in this Article, the following words or phrases shall have the meaning ascribed to them below unless the context clearly indicates otherwise:

(a) *~~Donation~~ Collection bin* shall mean any stationary or free-standing container, receptacle or similar device that is located outdoors on any property within the County and is used for the ~~solicitation and~~ collection of donated items, such as clothing, books, shoes or other non-perishable personal property. This term does not include any of the following: (1) a bin used for the ~~solicitation and~~ collection of donated items associated with a special event, provided the bin is removed when the special event ends, but in no event later than forty-eight (48) hours after being placed at the special event site**;** (2) a mobile trailer used for the ~~solicitation and~~ collection of donated items, provided it complies with all applicable ordinances and regulations, including those relating to special events; and (3) a container ~~bin~~, for the collection of recyclable materials associated with the Orange County Solid Waste Division.

(b) *Permit* shall mean a permit issued by the zoning manager or designee to operate a ~~donation~~ collection bin pursuant to this Article.

(c) *Permittee* shall mean the person or entity that owns the ~~donation~~ collection bin and in whose name a permit to operate a ~~donation~~ collection bin has been issued under the terms and provisions of this Article.

(d) *Property owner* shall mean the owner of fee simple title of record or the owner's authorized agent.

~~(e) *Solicitation* shall mean as defined by Section 496.404, Florida Statutes, as may be amended.~~

Sec. 38-1767. Permit required.

No person shall place, use or operate a ~~donation~~ collection bin in the unincorporated area without obtaining a permit pursuant to this Article. The operator of a ~~donation~~ collection bin in existence as of June 24, 2014, the date of adoption of this ordinance, shall have until September 1, 2014, to either apply for and obtain a permit under this Article or remove the ~~donation~~ collection bin.

Sec. 38-1768. Permit application.

(a) An application for a permit shall be made to the zoning manager or designee on a form prescribed by the zoning manager. The applicant shall pay an application fee, established by the Board of County Commissioners and found in the fee schedule. Such application shall include~~, at a minimum,~~ all of the following information:

(1) A map or sketch showing the location where the ~~donation~~ collection bin will be situated.

(2) A drawing or manufacturer's specification of the ~~donation~~ collection bin and information regarding the size and color of the ~~donation~~ collection bin.

(3) The name, address and telephone number of the applicant.

~~(4) A copy of the Florida Department of Environmental Protection (FDEP) permit as a Certified Recovered Materials Dealers, issued pursuant to Section 403.7046, Florida Statutes, unless the applicant shows that an FDEP rule exempts it from Section 403.7046.~~

(~~5~~4) If the applicant is not the owner of the property, the applicant shall sign and produce a notarized statement attesting that the owner of the property has approved of or consented to the application for a permit ~~Written consent from the property owner~~ to place the ~~donation~~ collection bin on the property.

(~~6~~5) Written authorization from a non-profit

organization to display affiliation with the non-profit organization.

(6) Evidence of any business permits or registrations required pursuant to State and/or local law, such as a Florida Department of Environmental Protection (FDEP) permit as a Certified Recovered Materials Dealers, issued pursuant to Section 403.7046, Florida Statutes, unless the applicant is exempt from Section 403.7046.

(b) Within fourteen (14) days of receipt of a completed application, the zoning manager or designee shall issue a letter to the applicant approving or denying the permit application~~, with or without conditions, or denying the application~~.

(c) Upon approval of a permit application, the zoning manager, or his authorized designee, shall issue the permittee a tag which shall include the permit number and expiration date. A separate tag shall be issued for each collection bin which shall be displayed in accordance with section 38-1770 of this Article.

(d) In the event the original tag is damaged or otherwise inadvertently removed from the collection bin, the permittee may request a replacement tag from the zoning manager for a nominal fee. This shall not apply to any collection bin wherein the original tag has been removed due to expiration or other violation of this Ordinance.

Sec. 38-1769. Standards and criteria.

(a) A ~~donation~~ collection bin shall be limited to a maximum floor area of twenty-five (25) square feet and a maximum of ~~-~~seven feet (7') in height.

(b) A ~~donation~~ collection bin shall be limited to one bin per parcel or lot**,** except that one additional ~~donation~~ collection bin may be permitted if the parcel or lot has more than three hundred feet (300') of road frontage.

(c) A ~~donation~~ collection bin shall be maintained in good condition and appearance with no structural damage, holes, or visible rust, and shall be ~~free of graffiti~~ repaired or repainted in the event it is damaged or vandalized.

(d) In addition to the information that is required to be posted pursuant to Section 38-1770, ~~S~~signage shall be ~~required~~

permitted on ~~at least~~ not more than two sides of a ~~donation~~ collection bin, provided that at least one sign shall be located on the front or depositing side of the receptacle, and the total copy area of all signage does not exceed thirty-two (32) square feet. Signage shall only advertise the ~~donation~~ collection bin's: (1) permittee, and (2) ~~—~~if applicable, benefitting foundation or organization. A ~~donation~~ collection bin operated by a person or entity other than a non-profit permittee shall include the following statement on the depositing side of the bin~~, not less than two inches (2") below the bin chute, in conspicuous and clear lettering at least two inches (2") high~~: "[Permittee name] is not a charitable organization. The materials deposited in this bin are recycled and sold for profit, and are not tax deductible contributions." The sign shall be located not less than two inches (2") below the bin chute with the conspicuous and clear lettering that is not less than three inches (3") high and one-half inches (1/2") in width with an ink color that contrasts with the color of the collection bin. A ~~permittee's donation~~ collection bin operated by a person or entity other than a non-profit permittee with a benefitting foundation or organization may also state: "A portion of the proceeds of the sale of the materials deposited in this bin benefits [name of benefitting foundation or organization]."

(e) A ~~donation~~ collection bin shall not be located on an unimproved parcel or lot.

(f) The permittee shall maintain or cause to be maintained the area surrounding a ~~donation~~ collection bin free of junk, garbage, trash, debris or other refuse material. In addition, a ~~donation~~ collection bin shall be emptied at least every seventy-two (72) hours.

(g) A ~~donation~~ collection bin shall have a security or safety chute and tamper proof lock to prevent or deter intrusion and vandalism.

(h) The permittee and property owner shall be individually and jointly responsible for abating and removing all junk, garbage, trash, debris and other refuse material in the area surrounding a ~~donation~~ collection bin within seventy-two (72) hours of written or verbal notice from the County.

(i) The permittee and property owner shall be individually and severally responsible for all costs related to abating and removing any junk, garbage, trash, debris and other refuse materials from the area surrounding a ~~donation~~ collection

bin.

(j) A ~~donation~~ collection bin shall be located on an improved impervious surface and shall be anchored to such surface.

(k) A ~~donation~~ collection bin shall only be allowed as an accessory use in the ~~C~~commercial and ~~I~~industrial zoning districts. Also, until October 1, 2019, a collection bin shall be allowed as an accessory use in a multi-family zoning district where the multi-family development is gated and has at least one hundred (100) units, provided that the collection bin shall be located interior to the multi-family development and not clearly visible from the public right-of-way. On October 1, 2019, the portion of this subsection allowing collection bins in a multi-family district shall automatically expire.

(l) A ~~donation~~ collection bin shall not be located in any of the following areas:

(1) Required parking spaces;

(2) Public or private right-of-way;

(3) Drive aisles;

(4) Required landscaped areas;

(5) Sight triangle;

(6) Pedestrian circulation areas;

(7) Within one hundred feet (100') from a single-family residentially zoned district; or

(8) Within the setback of the applicable zoning district.

(m) A collection bin shall not be placed on the site in a manner that impedes vehicular or pedestrian traffic flow.

Sec. 38-1770. Display of permit.

The following information shall be clearly and prominently displayed on the exterior of the ~~donation~~ collection bin:

(~~1~~a) The approved permit tag, which shall be placed on the front or depositing side of the receptacle; and

(~~2~~b) On each side of the receptacle, ~~T~~the name of the permittee~~, and~~ the permittee's~~,~~ logo, trademark or service mark, local physical address, telephone number, e-mail address (if any), and for-profit or non-profit status.

Sec. 38-1771. Issuance; forms and conditions of permit.

(a) The permit shall be issued on a form prescribed by the zoning manager. The permit shall identify the exact location of the ~~donation~~ collection bin on the property.

(b) The permit shall not be transferable.

(c) The permit shall be effective for one (1) year~~,~~ from the date of issuance and be subject to annual renewal.

(d) The permittee shall advise the zoning manager of any material changes in the information or documentation submitted with the original permit application.

Sec. 38-1772. Permit fee.

The permittee shall pay an annual permit fee, established by the Board of County Commissioners and found in the fee schedule. No prorations may be allowed for permits less than one (1) year in duration or for permits suspended or revoked pursuant to this Article.

Sec. 38-1773. Revocation or suspension of permit.

The zoning manager shall have the authority to suspend or revoke a ~~donation~~ collection bin permit for the following reasons:

(a) A necessary business permit or state registration has been suspended, revoked or cancelled.

(b) Failure to correct a violation of this Article ~~or any condition of the permit~~ within three (3) days of receipt of a code enforcement notice of violation.

(c) The permittee provided false or misleading information on the application which was material to the approval of the permit.

The zoning manager or designee shall notify the permittee in writing whether the permit is being suspended or revoked, and the reason therefore. If the action of the zoning manager is based on subsection (a) or (c), the action shall be effective upon permittee's receipt of the notice. If the action is based on subsection (b), the action shall become effective ten (10) days following permittee's receipt of the notice, unless such action is appealed to the Board of Zoning Adjustment pursuant to this Article.

Nothing in this section shall be construed to otherwise limit the County's police powers.

Sec. 38-1774. Appeals.

(a) The zoning manager's decision to deny a permit application or to suspend or revoke a donation bin permit may be appealed to the Board of Zoning Adjustment. The permittee shall submit a written notice of appeal to the zoning manager within ten (10) days of receipt of the zoning manager's decision. The Zoning Division shall schedule a hearing before the Board of Zoning Adjustment within thirty (30) days of receiving the notice.

(b) The Board of Zoning Adjustment shall conduct a hearing on the appeal within sixty (60) days after the filing of the notice of appeal, or as soon thereafter as its calendar reasonably permits. The recommendation of the Board of Zoning Adjustment shall be forwarded to the Board of County Commissioners for a final decision.

(c) The filing of a notice of appeal by a permittee shall not stay an order of the zoning manager to remove the ~~donation~~ collection bin. The ~~donation~~ collection bin shall be removed as required by the zoning manager pending disposition of the appeal and final decision of the Board of County Commissioners.

Sec. 38-1775. Penalties.

Any person who operates or causes to be operated a ~~donation~~ collection bin without a valid permit or any person or permittee who violates any provision of this Article, regardless of whether the ~~donation~~ collection bin is permitted under this Article, shall be subject to any one or more of the following penalties and/or remedies:

(a) A violation of any provision of this Article may be enforced through the code enforcement process as described in Chapter 11 of the Orange County Code and Chapter 162 of the Florida Statutes;

(b) Orange County may bring a lawsuit in a court of competent jurisdiction to pursue temporary or permanent injunctive relief or any other legal or equitable remedy authorized by law to cure, remove, prevent, or end a violation of any provision of this Article, and furthermore, in the event Orange County removes a ~~donation~~ collection bin from the public right-of-way, the owner of the ~~donation~~ collection bin shall be responsible for the cost of removal; and

(c) A violation of any provision of this Article may be punished as provided in Section 1-9 of the Orange County Code.

Sec. 38-1776. Responsibility and liability of owner of donation bin, permittee, and property owner.

The owner of the donation bin, the permittee, and the owner of any private property upon which a violation of this Article occurs may be held individually and severally responsible and liable for such violation.

Secs. 38-1777 – 38-1779. Reserved.

[THE REMAINDER OF THIS PAGE HAS BEEN INTENTIONALLY LEFT BLANK.]

Section 49. ***Effective date.*** This ordinance shall become effective pursuant to general law.

ADOPTED THIS ___ DAY OF SEP 13 2016, 2016.

ORANGE COUNTY, FLORIDA
By: Board of County Commissioners

By: _____
Teresa Jacobs,
Orange County Mayor

ATTEST: Martha O. Haynie, County Comptroller
As Clerk of the Board of County Commissioners

By: _____
Deputy Clerk

s:\jprinsell\ordres\zoning - chapter 38 amendments - 09-14-16 - final.rtf

REVISIONS TO SEC. 38-77 USE TABLE

APPENDIX "A"

Sec. 38-77. Use Table

Uses Per Zoning Code	*SIC Group*	*Land Use*	*A-1*	*A-2*	*A-R*	*RCE-5*	*RCE-2*	*RCE*	*R-1AAAA*	*R-1AAA*	*R-1AA*	*R-1A*	*R-1*	*R-2*	*R-3*	*RCE Cluster*	*RT*	*RT-1*	*RT-2*	*P-O*	*C-1*	*C-2*	*C-3*	*I-1A*	*I-1, I-5*	*I-2, I-3*	*I-4*	*U-V (see 29)*	*R-L-D*	*UR-3*	*NC*	*NAC*	*NR*	*Conditions*
		RESIDENTIAL																																
Single-family and modular homes with customary accessory uses		Single-family and modular homes with customary accessory uses	1 P	1 P	1 P	1 P	1 P	1 P	1 P	1 P	1 P	1 P	1 P	1 P	1 P	1 P		1 P	1 P	~~1 P~~											~~147~~ 1 P	~~147~~ 1 P	~~147~~ P	*
* * *																																		
Home occupation			101 P	101 P	101 P	101 P	101 P	101 P	101 P	101 P	101 P	101 P	101 P	101 P	101 P	101 P	101 P	101 P	101 P													101 P	101 P	
* * *																																		
Fee simple duplex and patio homes		Fee simple duplex and patio homes												2 P	2 P	~~116~~ P													124 P	~~P~~			P	
* * *																																		
Chimneys, water & fire towers, church spires, domes, cupolas, stage towers, scenery lofts, cooling towers, elevator bulkheads, smokestacks, flagpoles, and parapet walls		Chimneys, water & fire towers, church spires, domes, cupolas, stage towers, scenery lofts, cooling towers, elevator bulkheads, smokestacks, flagpoles, and parapet walls	7 P ~~S~~	7 P ~~S~~	7 P ~~S~~	7 P ~~S~~	7 P ~~S~~	7 P ~~S~~	7 P ~~S~~	7 P ~~S~~	7 P ~~S~~	7 P ~~S~~	7 P ~~S~~	7 P ~~S~~	7 P ~~S~~	7 P ~~S~~	7 P ~~S~~	7 P ~~S~~	7 P ~~S~~	7 P ~~S~~	7 P ~~S~~	7 P ~~S~~	7 P ~~S~~	7 P ~~S~~	7 P ~~S~~	7 P ~~S~~	7 P ~~S~~	7 P ~~S~~	7 P ~~S~~		7 P ~~S~~	7 P ~~S~~	7 P ~~S~~	*
* * *																																		
~~Transient rental units~~		~~Transient rental units~~																~~P~~																
* * *																																		
Accessory dwelling unit		Accessory dwelling unit	108 S	108 S	108 S	108 S	108 S	108 S	108 S	108 S	108 S	108 S	108 S	108 S	108 S	108 S		108 S	108 S												108 S	108 S	108 ~~P~~S	*
* * *																																		
Emergency generators (permanent)		Emergency generators (permanent)	16 P	16 P	16 P	16 P	16 P	16 P	16 P	16 P	16 P	16 P	16 P	16 P	16 P	16 P	16 P	16 P	16 P	16 P	16 P	16 P	16 P	16 P	16 P	16 P	16 P	16 P	16 P		16 P	16 P	16 P	
* * *																																		
Home with 6 or fewer residents that otherwise meets definition of ~~C~~community ~~R~~residential ~~H~~homes ~~(max 6 clients)~~		Home with 6 or fewer residents that otherwise meets definition of ~~C~~community ~~R~~residential ~~H~~homes ~~(max 6 clients)~~	12 P	12 P	12 P	12 P	12 P	12 P	12 P	12 P	12 P	12 P	12 P	12 P	12 P	12 P				P	P	P	P		P	P	P	12 13 P	124 12 P		P	12 P	12 P	*
Community ~~R~~residential ~~H~~homes (7 to 14 ~~client~~ residents)		Community ~~R~~residential ~~H~~homes (7 to 14 ~~clients~~residents)												14 S	14 P	14 ~~119~~ S				P	P	P	P		P	P	P	13 14 S			P	P	14 S	
* * *																																		

REVISIONS TO SEC. 38-77 USE TABLE

APPENDIX "A"

Sec. 38-77. Use Table

Uses Per Zoning Code	*SIC Group*	*Land Use*	*A-1*	*A-2*	*A-R*	*RCE-5*	*RCE-2*	*RCE*	*R-1AAAA*	*R-1AAA*	*R-1AA*	*R-1A*	*R-1*	*R-2*	*R-3*	*RCE Cluster*	*RT*	*RT-1*	*RT-2*	*P-O*	*C-1*	*C-2*	*C-3*	*I-1A*	*I-1, I-5*	*I-2, I-3*	*I-4*	*U-V (see 29)*	*R-L-D*	*UR-3*	*NC*	*NAC*	*NR*	*Conditions*
~~Community Residential Homes (greater than 14 clients)~~		~~Community residential homes (greater than 14 clients)~~													~~P~~					~~P~~	~~P~~	~~P~~	~~P~~		~~P~~	~~P~~	~~P~~			~~S~~	~~P~~	~~P~~	~~14~~ S	
													* * *																					
Transient rental and ~~S~~single-family transient rental		~~Single-family t~~Transient rental													~~69~~ P																			
													* * *																					
Adult/child day care centers		Adult/child day care centers	26 S	26 S	26 S	26 S	26 S	26 S	26 S	26 S	26 S	26 S	26 S	26 S	26 P	26 S				26 P	26 P	26 P	26 P	~~107~~ 26 PS	26 P	26 P	26 P	13 26 S 26 27 P	26 S		26 P	26 P	26 S	*
													* * *																					
Docks		Docks	95 P	95 P	95 P	95 P	95 P	95 P	95 P	95 P	95 P	95 P	95 P	95 P	95 P	95 P	95 P	95 P	95 P	95 P	95 P	95 P	95 P	95 P	95 P	95 P	95 P	95 P	95 P		95 P	95 P	95 P	
													* * *																					
	02	**AGRICULTURAL PRODUCTION (livestock)**	P	P																														
Commercial kennels		Commercial kennels	~~78~~ S	~~78~~ S																		~~78~~ P	~~78~~ P		~~78~~ P	~~78~~ P	~~78~~ P							*
													* * *																					
~~Boarding of horses and ponies and riding stables for commercial purposes; raising of horses and ponies for commercial purposes~~		~~Boarding of horses and ponies and riding stables for commercial purposes; raising of horses and ponies for commercial purposes~~	~~59~~ S	~~59~~ S																		~~P~~	~~P~~		~~P~~	~~P~~	~~P~~							
~~Animal~~ Cattle stock grazing, stock yards	0211	Beef cattle (grazing)	P	P																														
Dairy farms	0241	Dairy Farms	P	P																														
~~Poultry raising or keeping~~	~~025~~	~~Poultry & Eggs~~	~~50~~ S ~~36~~ P	~~50~~ S ~~36~~ P	~~37~~ P	~~40~~ P	~~40~~ P	~~40~~ P																											
Raising or keeping of poultry	025	Raising or keeping of poultry	36 SP	36 SP	36 SP	36 SP	36 SP	36 SP																											

REVISIONS TO SEC. 38-77 USE TABLE

APPENDIX "A"

Sec. 38-77. Use Table

Uses Per Zoning Code	*SIC Group*	*Land Use*	*A-1*	*A-2*	*A-R*	*RCE-5*	*RCE-2*	*RCE*	*R-1AAAA*	*R-1AAA*	*R-1AA*	*R-1A*	*R-1*	*R-2*	*R-3*	*RCE Cluster*	*RT*	*RT-1*	*RT-2*	*P-O*	*C-1*	*C-2*	*C-3*	*I-1A*	*I-1, I-5*	*I-2, I-3*	*I-4*	*U-V (see 29)*	*R-L-D*	*UR-3*	*NC*	*NAC*	*NR*	*Conditions*
													* * *																					
Raising or keeping of ~~cows and~~ horses, ~~&~~ ponies, donkeys, and mules ~~for domestic purposes;~~ boarding of horses, ponies, etc.	0272	Raising or keeping of horses, ponies, etc., boarding of horses ponies, etc. ~~Horses & equines~~	41 SP	41 SP	41 SP	41 SP	41 SP	41 SP													41 P	41 P			41 P	41 P	41 P						
~~Commercial aviculture, aviaries~~	0279	~~Commercial aviculture~~	~~48 S~~	~~48 S~~	~~48 S~~																	~~P~~	~~P~~		~~P~~	~~P~~	~~P~~						*
~~Bee Keeping~~		~~Bee Keeping~~	~~P~~	~~P~~	~~97 P~~																												
Raising or keeping of goats, sheep, lambs, pigs, or swine		Raising or keeping of goats, sheep, lambs, pigs or swine	49 S P	49 S P	49 S P	52 P 69 P	69 P	69 P																									
~~Breeding, keeping and raising of farm animals (ex goats, swine, pot-bellied pigs, etc.) for sale or profit (not for domestic purposes)~~		~~Breeding, keeping and raising of farm animals (ex., goats, swine, pot-bellied pigs, etc.) for sale or profit (not for domestic purposes)~~	~~50 S~~	~~50 S~~																											
~~Breeding, keeping and raising of farm animals (ex. goats, swine, pot bellied pigs, etc.) for domestic purposes only~~		~~Breeding, keeping and raising of farm animals (ex Goats, swine, pot-bellied pigs, etc.) for domestic purposes only~~	~~49 P~~	~~49 P~~	~~52 P~~	~~52 P~~																											
~~Breeding, keeping and raising of exotic animals~~		~~Breeding, keeping and raising of exotic animals~~	~~11 P~~	~~11 P~~																													
													* * *																					
	07	**AGRICULTURAL SERVICES**	P	P																														
Veterinary service with no outdoor runs or compound	0742	Veterinary services	S	S															54 P	54 ~~112~~ P	54 ~~112~~ P	54 ~~112~~ P		P	P	P	54 P							*

REVISIONS TO SEC. 38-77 USE TABLE

APPENDIX "A"

Sec. 38-77. Use Table

Uses Per Zoning Code	*SIC Group*	*Land Use*	*A-1*	*A-2*	*A-R*	*RCE-5*	*RCE-2*	*RCE*	*R-1AAAA*	*R-1AAA*	*R-1AA*	*R-1A*	*R-1*	*R-2*	*R-3*	*RCE Cluster*	*RT*	*RT-1*	*RT-2*	*P-O*	*C-1*	*C-2*	*C-3*	*I-1A*	*I-1, I-5*	*I-2, I-3*	*I-4*	*U-V (see 29)*	*R-L-D*	*UR-3*	*NC*	*NAC*	*NR*	*Conditions*
													* * *																					
		CONSTRUCTION																																
Retention, detention, drainage ponds (in conjunction with ~~commercial~~ nonresidential development)	1629	Retention/detention	123 S	123 S										123 S	123 S					P	P	P	P	P	P	P	P						*
													* * *																				
~~Trade shops, and contractors shops with outdoor storage on site~~	17	**SPECIAL TRADE CONTRACTORS**																				~~58~~ P	~~58~~ P	~~107~~ ~~58~~ P	~~58~~ P	~~58~~ P	~~58~~ P							*
Trade shops, contractor shops with outdoor storage Contractors storage, equipment yards, and offices with outdoor storage	17																					58 P	58 P	107 58 P	58 P	58 P	58 P							*
													* * *																				
		MANUFACTURING																																
Meat storage, cutting & distribution, animal slaughtering	2011	Meat Packing plants/Animal slaughtering	63 S	63 S																					63 P	63 P	63 P							
													* * *																				
		STONE, CLAY, GLASS PRODUCTS																																
Concrete block and brick manufacturing	3271	Concrete ~~b~~Block & Brick																							51 ~~P~~	51 P	51 P							
													* * *																				

REVISIONS TO SEC. 38-77 USE TABLE

APPENDIX "A"

Sec. 38-77. Use Table

Uses Per Zoning Code	*SIC Group*	*Land Use*	*A-1*	*A-2*	*A-R*	*RCE-5*	*RCE-2*	*RCE*	*R-1AAAA*	*R-1AAA*	*R-1AA*	*R-1A*	*R-1*	*R-2*	*R-3*	*RCE Cluster*	*RT*	*RT-1*	*RT-2*	*P-O*	*C-1*	*C-2*	*C-3*	*I-1A*	*I-1, I-5*	*I-2, I-3*	*I-4*	*U-V (see 29)*	*R-L-D*	*UR-3*	*NC*	*NAC*	*NR*	*Conditions*
		INDUSTRIAL & COMMERCIAL MACHINERY																															
Concrete manufacturing, paving & mixing, temporary asphalt plants	353	Mining machinery, construction																							51 P	51 P	51 P						
													* * *																				
		LOCAL & INTERURBAN PASSENGER TRANSIT																															
Limousine service, home-based	4119		32 146 P S	32 146 P S	32 146 P S	32 146 P S	32 146 P S	32 146 P S	146 P S	146 P S	146 P S	146 P S	146 P S	146 P S	146 P S	32 146 P S	146 P S	146 P S	146 P S										146 P S			146 P S	146 P S	
													* * *																				
Truck terminals, truck stop, bus, cab, truck repair, storage and terminals, parking and/or storage of trucks	4231	Trucking Terminal Facilities																							82 P	82 P	82 P						
													* * *																				
Lattice (Ord. No. 95-25, §2, 8-29-95)	48	**COMMUNICATIONS**	S S	S S	S S	S S	S S	S	S	S	S	S	S	S	S 134 S	S S	S S	S S	S S	S S	S 135 P/S	P 135 P/S	P 135 P/S	107 P S 107 135 142 P/S	P 135 142 P/S	P 135 142 P/S	P 135 142 P/S	S	S		133 S 134 S	133 S 134 S	133 S	* ~~133~~ *
Guyed (Ord. No. 95-25, §2, 8-29-95)			S	S	S	S	S	S	S	S	S	S	S	S	S	S	S	S	S	S	135 P/S	135 P/S	135 P/S	107 135 142 P/S	135 142 P/S	135 142 P/S	135 142 P/S	S	S		S	S	S	~~133~~ *
Monopole (Ord. No. 95-25, §2, 8-29-95)			32 143 P/S	32 143 P/S	32 143 P/S	32 143 P/S	32 143 P/S	32 143 P/S	143 P/S	143 P/S	143 P/S	143 P/S	143 P/S	143 P/S	143 P/S	32 143 P/S	143 P/S	143 P/S	143 P/S	143 P/S S	143 135 P/S	143 135 P/S	143 135 P/S	107 135 142 P/S	135 142 P/S	135 142 P/S	135 142 P/S	143 P/S	143 P/S		143 P/S	143 P/S	143 P/S	*
													* * *																				
	49	**ELECTRIC, GAS, SANITARY SERVICES**	S	S	S	S	S	S	S	S	S	S	S	S	S	S	S	S	S	S	S	S	S	107 S		S	S	S	S		S	S	S	*

REVISIONS TO SEC. 38-77 USE TABLE

APPENDIX "A"

Sec. 38-77. Use Table

Uses Per Zoning Code	*SIC Group*	*Land Use*	*A-1*	*A-2*	*A-R*	*RCE-5*	*RCE-2*	*RCE*	*R-1AAAA*	*R-1AAA*	*R-1AA*	*R-1A*	*R-1*	*R-2*	*R-3*	*RCE Cluster*	*RT*	*RT-1*	*RT-2*	*P-O*	*C-1*	*C-2*	*C-3*	*I-1A*	*I-1, I-5*	*I-2, I-3*	*I-4*	*U-V (see 29)*	*R-L-D*	*UR-3*	*NC*	*NAC*	*NR*	*Conditions*
													* * *																					
Commercial solar farms	49	Commercial solar farms	50 P	50 P																					50 P	50 P	50 P							
													* * *																					
~~Substations, telephone switching stations~~Gas substations, TV substations, radio substations, telephone substations		~~Substations, telephone switching stations~~Gas substations, TV substations, radio substations, telephone substations	61 S	61 S	61 S	61 S	61 S	61 S	61 S	61 S	61 S	61 S	61 S	61 S	61 S	61 S	61 S	61 S	61 S	61 S	61 S	61 S	61 S	61 S	61 P	61 P	61 P	61 S	61 S		61 S	61 S	61 S	*
													* * *																					
Distribution electric substation	49	Distribution electric substation	81 P	81 P	81 P	81 P	81 P	81 P	81 P	81 P	81 P	81 P	81 P	81 P	81 P	81 P	81 P	81 P	81 P	81 P	81 P	81 P	81 P	81 P	81 P	81 P	81 P	81 P	81 P		81 P	81 P	81 P	*
Alternative energy devices as an accessory structure or use (wind turbines, solar panels, etc.)			83 P	83 P	83 P	83 P	83 P	83 P	83 P	83 P	83 P	83 P	83 P	83 P	83 P	83 P	83 P	83 P	83 P	83 P	P	P	P	P	P	P	P	83 P	83 P		83 P	83 P	83 P	*
													* * *																					
~~Donation~~ Collection bins		~~Donation~~ Collection bins												115 P	115 P					115 P	115 P	115 P	115 P	115 P	115 P	115 P								
													* * *																					
		WHOLESALE TRADE																																
~~Wholesale bakeries~~	50	Wholesale distribution of durable and nondurable goods																				P	P		P	P	P							*
Wholesale bakeries	50, 51	Groceries and related products																				P	P		P	P	P							*
													* * *																					
Junk, salvage or wrecking yards, sales and storage of wrecked ~~car~~or inoperable vehicles	5093	Junk yards (scrap and waste)																									9 ~~63~~ P							*
													* * *																					

REVISIONS TO SEC. 38-77 USE TABLE

APPENDIX "A"

Sec. 38-77. Use Table

Uses Per Zoning Code	*SIC Group*	*Land Use*	*A-1*	*A-2*	*A-R*	*RCE-5*	*RCE-2*	*RCE*	*R-1AAAA*	*R-1AAA*	*R-1AA*	*R-1A*	*R-1*	*R-2*	*R-3*	*RCE Cluster*	*RT*	*RT-1*	*RT-2*	*P-O*	*C-1*	*C-2*	*C-3*	*I-1A*	*I-1, I-5*	*I-2, I-3*	*I-4*	*U-V (see 29)*	*R-L-D*	*UR-3*	*NC*	*NAC*	*NR*	*Conditions*
Wholesale florists	5193	Flowers, nursery stock and florist supplies																				P	P		P	P	P							
		* * *																																
		RETAIL TRADE																																
Storage yards for operable automobiles, trucks, boats, and commercial vehicles (regardless if for sale, lease or not). For storage of wrecked or inoperable vehicles, see SIC Group 5093.		Storage yards for operable automobiles, trucks, boats, and commercial vehicles (regardless if for sale, lease or not). For storage of wrecked or inoperable vehicles, see SIC Group 5093.																					130 P S		130 P	130 P	130 P							
		* * *																																
	52	**BUILDING MATERIALS & GARDEN SUPPLIES**																			P	P	P					56 P							
Lumber and other building materials, building materials storage and sales	521	Lumber and other building materials																			64 P	99 P	99 P		99 P	99 P	99 P				64 P	64 P		*
		* * *																																
Hardware stores	5251	Hardware stores																			64 P	P	P					56 P			64 P	64 P		
		* * *																																
	54	**FOOD STORES**																			P	P	P					56 P						
Retail bakery shops	5461	Retail bakeries																			66 P	66 P	66 P					66 P			66 P	66 P		*
		* * *																																
	58	**EATING & DRINKING PLACES**																			P	P	P											
Restaurants with outdoor seating	5812	Eating places																		86 P	86 P	86 P	86 P	86 P	86 P	86 P					86 P			
		* * *																																

REVISIONS TO SEC. 38-77 USE TABLE

APPENDIX "A"

Sec. 38-77. Use Table

Uses Per Zoning Code	SIC Group	Land Use	A-1	A-2	A-R	RCE-5	RCE-2	RCE	R-1AAAA	R-1AAA	R-1AA	R-1A	R-1	R-2	R-3	RCE Cluster	RT	RT-1	RT-2	P-O	C-1	C-2	C-3	I-1A	I-1, I-5	I-2, I-3	I-4	U-V (see 29)	R-L-D	UR-3	NC	NAC	NR	Conditions
	59	**MISCELLANEOUS RETAIL**																			P	P	P					P						*
													* * *																					
~~Bicycle stores,~~ sSporting goods, bicycle stores, firearms sales and rental	5941	Sporting goods & bicycle shops																			~~136~~ P	~~136~~ P	~~136~~ P					~~136~~ P			~~136~~ P	~~136~~ P		*
													* * *																					
Indoor markets		Indoor markets																			P	P	P		P	P	P				P	P		
													* * *																					
		PERSONAL SERVICES																			P	P	P		P	P	P							
Funeral homes, funeral directors, funeral chapter	7261	Funeral service, except crematories and embalming	S	S	S										131 S					131 S	P	P	P		P	P	P				P	P		
													* * *																					
Costume rental, dating services, escort services, tanning salons, tattoo parlors, valet parking	7299																			~~77~~ S	P	P	P					P						
													* * *																					
	75	**AUTO REPAIR SERVICES & PARKING**																			P	P		P	P	P								
Car rental and leasing	7514	Passenger car rental																			176 138 P	176 138 P	176 138 P		176 138 P	176 138 P	176 138 P							
													* * *																					
Parking lots & parking garages for office, commercial or industrial uses	7521	Automobile parking											~~81~~ S	~~81~~ S	~~81~~ S					~~81~~ S p	P	P	P	P	P	P	P	~~81~~ P			150 S	150 S	150 S	*
													* * *																					
Automobile towing service (does not include the storage, sales or dismantling of wrecked/inoperative vehicles); ~~window tinting~~	7549	Towing services																					130 S		130 P	130 P	130 P							
													* * *																					

REVISIONS TO SEC. 38-77 USE TABLE

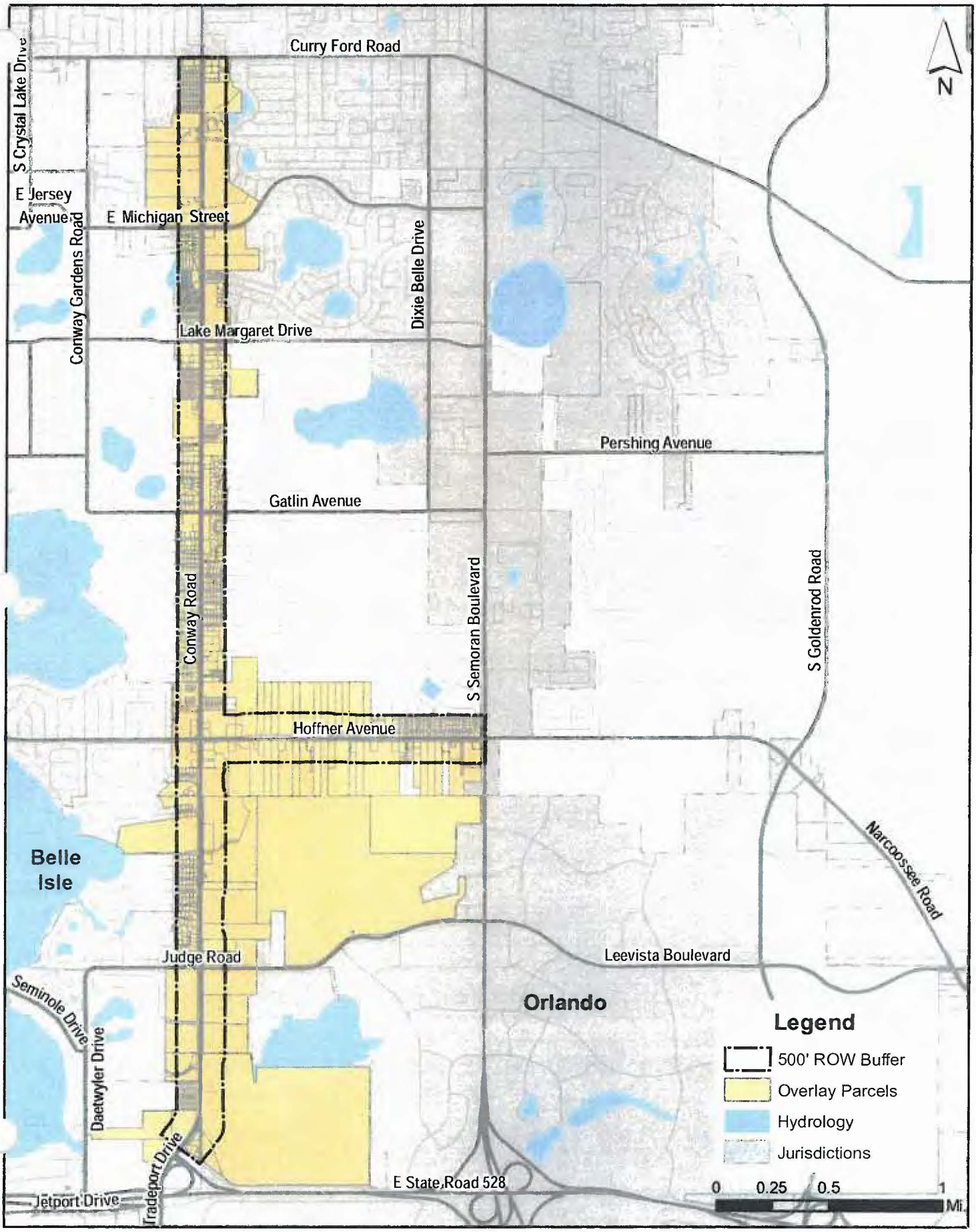
APPENDIX "A"

Sec. 38-77. Use Table

Uses Per Zoning Code	*SIC Group*	*Land Use*	*A-1*	*A-2*	*A-R*	*RCE-5*	*RCE-2*	*RCE*	*R-1AAAA*	*R-1AAA*	*R-1AA*	*R-1A*	*R-1*	*R-2*	*R-3*	*RCE Cluster*	*RT*	*RT-1*	*RT-2*	*P-O*	*C-1*	*C-2*	*C-3*	*I-1A*	*I-1, I-5*	*I-2, I-3*	*I-4*	*U-V (see 29)*	*R-L-D*	*UR-3*	*NC*	*NAC*	*NR*	*Conditions*
Window tinting	7549	Window tinting																				P	P		P	P	P						
													* * *																				
		HEALTH SERVICES																															
Assisted living facility	805														S						P	P	P		P	P	P						
													* * *																				
	82	**EDUCATIONAL SERVICES**	S	S	S	S	S	S	S	S	S	S	S	S	S	S	S	S	S	S									S		S	S		
Private kindergarten, elementary, junior high, middle and high schools, including those with dormitories or boarding facilities	8211	Elementary & middle schools	S	S	S	S	S	S	S	S	S	S	S	S	S	S	S	S	S	S	P	P	P	P	P	P	P	S	S		S	S	S	*
Schools (public) kindergarten (see conditions #139, 140 and 141)	8211	Elementary (see condition #139)																															
Schools (public) (see conditions #139, 140 and 141)	8211	Middle schools (see condition #139)																															
Schools (public) (see conditions #139, 140 and 141)	8211	High schools (see condition #139)																															
Colleges & universities	8221	College, universities & ~~high schools~~																		S	S	P S	P S	107 P	P	P	P	~~S~~			S	S	S	
													* * *																				
Seminaries	8221	Seminaries																			P	P	P	P	P	P	P	P			P	P		
													* * *																				
	83	**SOCIAL SERVICES**																			P	P	P	P	P	P	P						
Juvenile justice rehabilitation schools or facilities	8331	Job training & related services																			S	P	P		P	P	P						
													* * *																				
Uses of national defense	971	National security	94 S	94 S	94 S	94 S	94 S	94 S	94 S	94 S	94 S	94 S	94 S	94 S	94 S	94 S	94 S	94 S	94 S	94 S	94 S	94 S	94 S	107 94 S	94 S	94 S	94 S	94 S	94 S		94 S	94 S	94 S	*
													* * *																				

Conway Road/Hoffner Avenue Corridor Overlay District

Exhibit "A"



IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, FLORIDA

CASE NO.: 2016-CA-007634-O
DIVISION: 35

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

Plaintiffs,

v.

ORANGE COUNTY, FLORIDA, et al.,

Defendants.
_____/

ORANGE COUNTY'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT PURSUANT TO FLORIDA RULES OF CIVIL PROCEURE 1.140(b)(1) and (6)

Defendant, Orange County, Florida ("Orange County"), hereby moves this Court to dismiss the Complaint filed by David W. Foley, Jr. and Jennifer T. Foley ("Foleys"), pursuant to Florida Rules of Civil Procedure 1.140(b)(1) and (6), for lack of subject matter jurisdiction and for failure to state a cause of action.

The Foleys' Complaint against Orange County and various third party individuals purports to state three counts, only two of which appear to be raised against Orange County. Count I purports to be a claim for a declaratory judgment and injunctive relief concerning the validity of Orange County's Land Use Ordinances[1] dealing with aviculture, i.e., the raising,

[1] The Foleys cite to several Orange County Ordinance Chapter 38 Sections: 38.71(establishment of districts), 38-74(permitted uses, special exceptions and prohibited uses), 38-77(use table), 38-79 (conditions for permitted uses and special exceptions).

breeding and/or selling of exotic birds[2] and the imposition of special exception fees.[3] Count II purports to seek compensation from Orange County under three alternative theories, i.e. 1) Constitutional Tort Denial of Fundamental Rights and Conspiracy to Deny Fundamental Rights; 2) Cause of Action pursuant to 42 U.S.C. Sec. 1983; or 3) Taking without Public Purpose, Due Process or Just Compensation. Count III seems to allege civil theft against individuals, not Orange County.

The Foleys' Complaint makes allegations concerning events in 2007-2008, centering on a license the Foleys obtained from the State of Florida Fish & Wildlife Conservation Commission to exhibit and sell exotic birds at the Foleys' Solandra Drive residence in Orange County, Florida. Orange County's zoning regulations did not permit aviculture or the exhibiting and selling of exotic birds as a home occupation. The Foleys claimed in 2007 that Orange County could not regulate away, at the county level, a license they had obtained from the state. Orange County disagreed. Litigation ensued between the Foleys and Orange County, Florida in administrative proceedings, and state and federal courts.

1. Count I Should be Dismissed Because Orange County has Amended its Ordinance to be Consistent with the Foleys' Position, So There is No Longer a Case or Controversy, and the Court Lacks Subject Matter Jurisdiction.

Count I should be dismissed for lack of subject matter jurisdiction. In considering a motion to dismiss based upon lack of subject matter jurisdiction, a trial court may properly go

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[2] Orange County Ordinance Section 38-1. Definitions. Aviculture (commercial) shall mean the raising, breeding and/or selling of exotic birds, excluding poultry, for commercial purposes. . . .

[3] Orange County Ordinance Section 38-79. Conditions for permitted uses and special exceptions. Subsection (48) Reserved. Commercial aviculture or any aviary shall be as defined in section 38-1 of this chapter and may be permitted as a special exception subject to the following requirements. . . .

beyond the four corners of a complaint and consider other evidence.[4] Orange County's amended zoning ordinance applicable to this case[5] has removed the language that is being challenged by the Foleys in Count I.[6] Therefore, there is no longer any case or controversy between the parties and no issue for which the Court may declare judgment or grant injunction relief.

In order for a Plaintiff to bring a cause of action for declaratory judgment, the plaintiff must show that a case or controversy exists between the plaintiff and defendant; and that such case or controversy continues from the commencement through the existence of the litigation. *See Godwin v. State,* 593 So.2d 211, 212 (Fla. 1992). An issue is moot when the controversy has been so fully resolved that a judicial determination can have no actual effect. *See Ahearn v. Mayo Clinic, et al.,* 180 So.3d 165, 169 (Fla. 5th DCA 2015) quoting *Godwin v. State,* 593 So.2d

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[4] Chapter 90, Florida Statutes (2016) Sec. 90.201 Matters which **must** be judicially noticed. (a) Decisional, constitutional, and public statutory law and resolutions of the Florida Legislature. . .

Chapter 90, Florida Statutes (2016) Sec. 90.202 Matters which **may** be judicially noticed. – A court may take judicial notice of the following matters, to the extent they are not embraced within sec. 90.201: (10) Duly enacted ordinances and resolutions of municipalities and counties located in Florida, provided such ordinances and resolutions are available in printed copies or as certified copies.

Chapter 90, Florida Statutes (2016) Sec. 90.203 **Compulsory** judicial notice upon request. A court **shall** take judicial notice of any matter in s. 90.202 when a party requests it and: (1) give each adverse party timely written notice of the request, proof of which is filed with the court, to enable the adverse party to prepare to meet the request. (2) furnishes the court with sufficient information to enable it to take judicial notice of the matter.

Orange County has filed its Motion for Judicial Notice of the Ordinance at issue pursuant to Sec. 90.202, *F.S.* (2016).

[5] See Orange County Ordinance No. 2016-19 "An Ordinance affecting the use of land in Orange County, Florida, by amending Chapter 38 ("Zoning") of the Orange County Code; and providing effective date," adopted at Orange County Board of Commissioners' September 13, 2016 Meeting with an effective date September 23, 2016.

[6] See Exhibit A (attached) of specific Ordinance provisions removing the language being challenged by the Foleys.

211, 212 (Fla.1992) (citing *DeHoff v. Imeson,* 153 Fla. 553, 15 So.2d 258 (1943). Therefore,"[a] moot case generally will be dismissed." *Ahearn,* 180 So.3d at 169, quoting *Godwin,* 593 So.2d at 212; *see also Schweickert v. Citrus County Florida Bd,* 193 So.3d 1075, 1078 (Fla. 5th DCA 2016).

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 Dept. of Environmental Protection v Garcia,* 99 So. 3d 539, 545 (Fla. 3rd 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).

Due to the Orange County Board of County Commissioners adoption of Ordinance 2016-19 with an effective date of September 23, 2016, removing the language for which the Foleys seek relief, the alleged case or controversy which existed between the parties at the commencement of this action (August 25, 2016) does not continue through the existence of the action. There is no current controversy between the parties, the alleged controversy is moot, and the controversy has been so fully resolved that a judicial determination can have no actual effect. The Court lacks subject matter jurisdiction and therefore, Count I of the complaint, seeking declaratory judgment and injunctive relief, should be dismissed.

2. <u>Count II should be dismissed for Plaintiffs Failure to State a Cause of Action Upon Which Relief Can Be Granted</u>.

Defendant Orange County seeks dismissal of Counts II and III of the complaint for failure to state a cause of action as to each count. The court in *Sobi v. Fairfield Resorts, Inc*., 846 So.2d 1204 (Fla. 5th DCA 2003) stated "[t]he primary purpose of a motion to dismiss is to

request the trial court to determine whether the complaint properly states a cause of action upon which relief can be granted and, if it does not, to enter an order of dismissal." *Provence v. Palm Beach Taverns, Inc.*, 676 So.2d 1022 (Fla. 4th DCA 1996). In making this determination, the trial court must confine its review to the four corners of the complaint, draw all inferences in favor of the pleader, and accept as true all well-pleaded allegations. *City of Gainesville v. State, Dept. of Transp.*, 778 So.2d 519 (Fla. 1st DCA 2001); *Cintron v. Osmose Wood Preserving, Inc.*, 681 So.2d 859, 860-61 (Fla. 5th DCA 1996)." *Id*. at 1206.

Count II fails because the Foleys were not deprived of any property; at most, they lost the rights associated with a permit, which does not create property rights. The only thing the Foleys were ever deprived of under the allegations of their Complaint were the alleged rights associated with the permit they obtained from Florida Fish & Wildlife Conservation Commission to exhibit and sell exotic birds at the Foleys' Solandra Drive residence in Orange County. However, Florida law is clear that permits and business licenses do not create property rights. *See Hernandez v. Dept. of State, Division of Licensing,* 629 So. 2d 205, 206 (Fla. 3rd DCA 1993). The Foleys themselves allege that their permit was revocable. *See* Complaint, ¶ 34(f). As will be shown, every theory the Foleys try to allege in Count II require the impairment or deprivation of a property right. Because the Foleys as a matter of law do not allege damage to a property right, Count II should be dismissed.

In Count II of Plaintiffs' Complaint, they seek compensation under three alternative theories, i.e. A) Constitutional Tort Denial of Fundamental Rights and Conspiracy to Deny Fundamental Rights; B) Cause of Action pursuant to 42 U.S.C. Sec. 1983; or C) Taking without Public Purpose, Due Process or Just Compensation. Each theory fails to state a cause of action as set forth below:

A) Plaintiffs Do Not State a Viable Cause of Action For a Constitutional Tort Denial of Fundamental Rights and Conspiracy to Deny Fundamental Rights Under Florida Law

In Count II of Plaintiffs' Complaint, under the first alternative theory of liability, Plaintiffs seek monetary damages for an alleged denial of their fundamental rights and conspiracy to deny their fundamental rights as guaranteed under the Article I, Sec. 9, Florida Constitution.[7] No such cause of action for money damages exists under Florida law for violation of a state constitutional right. Specifically, the Court in *Garcia v. Reyes*, 697 So.2d 549 (Fla. 4th DCA 1997) spoke to this issue. In *Garcia*, the Court 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).

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) Sec. 1983 to breath life into the state constitutional provisions." *Id*. at 1146 (concurring opinion Justice Sharp).

Since there is no recognizable cause of action under state law for money damages based on a constitutional tort of violation of fundamental rights, this portion of Plaintiffs' complaint must be dismissed for failure to state a cause of action. Even Plaintiffs recognize there is no

[7] Article I-Declaration of Rights, Sec 9 – Due Process, Florida Constitution - No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against oneself.

such cause of action when they concede "that Florida has yet no such [cause of action for] constitutional torts." See Complaint, P.31, Paragraph 5.

B) <u>Plaintiffs Do Not State a Federal Cause of Action Under 42 U.S.C. Sec. 1983</u>

In Count II of Plaintiffs' Complaint, under the second theory of liability, Plaintiffs' seek monetary damages for an alleged violation of their rights under 42 U.S.C. Sec. 1983. Plaintiffs' Complaint should be dismissed because the substance of Plaintiffs' grievances do not state a cause of action under federal law.

The Due Process Clause of the Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The Supreme Court has interpreted this clause to provide for two different kinds of constitutional protection: substantive due process and procedural due process. *McKinney v. Pate*, 20 F. 3d 1550, 1555 (11th Cir. 1994) (en banc). Plaintiffs bring only substantive due process claims, which this Court must carefully analyze to determine the nature of the rights of which Plaintiffs have been deprived. *DeKalb Stone, Inc. v. County of DeKalb*, 106 F.3d 956, 959 (11th Cir. 1997).

Plaintiffs at best assert two possible bases for their claims. They contend first that Orange County's zoning ordinances are *ultra vires* and, therefore, are arbitrary and irrational. Plaintiffs also contend that Orange County's decision to uphold the zoning manager's determinations that a commercial aviary is not a permissible use of a residential-only zoned property, and that a commercial aviculture operation also cannot be a home occupation, are substantive due process violations.

In order to address these claims, the Court should first review the law applicable to substantive due process claims. The Court should then apply that law to the two possible bases for Plaintiffs claims to see if they can state a claim under federal law.

The substantive component of the Due Process Clause protects those rights that are fundamental—that is, rights that are "implicit in the concept of ordered liberty." *McKinney*, 20 F.3d at 1556. Fundamental rights are those protected by the U.S. Constitution. *Id.* Substantive rights that are created by state law are generally not subject to substantive due process protection. *Id.* Land use regulations like those at issue in this case are state-created rights that are not protected by substantive due process. *Greenbriar Village, L.L.C. v. Mountain Brook*, 345 F.3d 1258, 1262 (11th Cir. 2003). Moreover, the Foleys were deprived at most of their rights under a permit, which does not constitute a property right. *See Hernandez*, 629 So. 2d at 206. Thus, the Foleys were not deprived of life, liberty or property.

Count II also fails because the Foleys complain about Orange County's executive acts, i.e. applying an allegedly invalid ordinance to the particular facts of the Foleys' request for a determination that the Foleys were permitted to exhibit and sell birds at their home. The Eleventh Circuit Court of Appeals describes executive acts as those acts that "apply to a limited number of persons (and often only one person)" and which "typically arise from the ministerial or administrative activities of members of the executive branch." *McKinney*, 20 F.3d at 1557 n.9. An example of an executive act that is not subject to substantive due process is the enforcement of existing zoning regulations. *DeKalb Stone, Inc.*, 106 F.3d at 959. Legislative acts, in contrast, "generally apply to larger segments of—if not all—society." *Id.* The Eleventh Circuit cites "laws and broad-ranging executive regulations" as common examples of legislative acts. *Id.*

Plaintiffs challenge Orange County's decision to uphold the determinations of the county zoning manager that a commercial aviary is not an authorized use in the residential zoning category applicable to Plaintiffs' residence, and that operation of a commercial aviary is not an authorized home occupation under the zoning regulations. The chain of events began when Plaintiffs requested an official determination from the zoning manager as to whether the operation of a commercial aviary at their residence was permitted by the zoning code. The zoning manager concluded that a commercial aviary was not permitted in residential-only zoned areas. Plaintiffs appealed to the Board of Zoning Adjustment, ("BZA") an advisory body to the Orange County Board of County Commissioners, which upheld the zoning manager's interpretation of the zoning ordinances. Plaintiffs then appealed part of the BZA's decision to the Board of County Commissioners.

Plaintiffs' substantive due process claim is a dispute over how Orange County interprets its existing zoning ordinances. Plaintiffs sought to persuade the county that a commercial aviary would be a permissible use of their residentially zoned property or that a home occupation (as that term was used in the zoning ordinances) could encompass the operation of a commercial aviary. They were unsuccessful. The county zoning manager, the Board of Zoning Adjustment, and the Board of County Commissioners all decided that Plaintiffs' interpretation of the existing zoning ordinances was incorrect. The interpretation of existing laws is not a legislative function; it is an executive act usually intertwined with an enforcement action.[8] While Plaintiffs asked the county directly for an interpretation in this case, the nature of the action is the same—the county

[8] The ordinance that created Board of Zoning Adjustment tasked it with, among other things, hearing and deciding "appeals taken from the requirement, decision or determination made by the planning or zoning department manager where it is alleged that there is an error in the requirement, decision or determination made by said department manager in the *enforcement of zoning regulations."* Art. V, § 502, Orange County Charter (emphasis added).

was interpreting the existing law.[9] That is an executive act that cannot serve as the basis for a substantive due process claim.[10]

C) Taking without Public Purpose, Due Process or Just Compensation

In Count II of Plaintiffs' Complaint, under the third theory of liability, Plaintiffs seek monetary damages for a taking without public purpose, due process or just compensation pursuant to Article X, Section 6, Florida Constitution (eminent domain)[11]. This theory purports to allege an inverse condemnation claim. But, at most, Plaintiffs allege that Orange County, in interpreting its earlier land use ordinances, somehow deprived the Foleys of constitutionally protected property rights. The Foleys seek damages including purported lost business income.

The exercise of the power of eminent domain and the constitutional limitations on that power are vested in the legislature. The right to exercise the eminent domain power is delegated by the legislature to the agencies of government and implemented by legislative enactment. The

---

[9] The Eleventh Circuit reached a similar conclusion in *Boatman v. Town of Oakland*, 76 F.3d 341 (11th Cir. 1996), when it rejected a property owner's assertion that he had a substantive due process "right to a correct decision from a government official." In that case, a building inspector decided that the property owner's building was a mobile home that was prohibited by the applicable zoning ordinance. *Id*. At 345. The inspector therefore refused to inspect the property and issue a certificate of occupancy. *Id.* The property owner, who was also a member of the town zoning board, disagreed with the building inspector's interpretation of the zoning ordinance. *Id.* When the town council agreed with the inspector's interpretation of the ordinance. *Id.* When the town council agreed with the inspector's interpretation of the ordinance, the property owner sued, arguing that the town's refusal to perform the inspection was arbitrary in violation of their federal due process rights. *Id.* The Eleventh Circuit concluded that such a "claim is not cognizable under the substantive component" of the Due Process Clause. *Id.*

[10] The County would add that this Circuit Court denied the Foleys' Petition for Writ of Certiorari seeking to overturn the Board of County Commissioners' decision upholding the BZA's recommendation concerning the zoning manager's determination. *See* Plaintiffs' Complaint Paragraph 40.

[11] Article X, Section 6, Florida Constitution, provides that "[n]o private property shall be taken except for a public purpose and with full compensation therefor . . . "

right of a county to exercise the power of eminent domain is granted pursuant to Florida Statute Sec. 127.01 (2016)[12] See also *Systems Components Corp v. Florida Department of Transportation*, 14 So.3d 967, 975-76 (Fla. 2009). [T]he "full compensation" mandated by article X, Section 6 of the Florida Constitution is restricted to (1) the value of the condemned land, (2) the value of associated appurtenances and improvements, and (3) damages to the remaining land (i.e., severance damages). *See, e.g., State Road Dep't v. Bramlett,* 189 So. 2d 481, 484 (Fla. 1966); *cf. United States v. Bodcaw Co*., 440 U.S. 202, 204 (1979). Nowhere in Florida's constitution, Florida Statutes, or in case law does property mean or include a permit or license to sell, breed or raise wildlife (Toucans). The Florida Constitution under its eminent domain power specifically limits "property" to land, associated appurtenances and improvements and damages to the remaining land.

The only right the Foleys arguably ever had was a right granted by a state-issued permit or license, not a property right. 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. 3rd DCA 1993)

Finally, the Foleys are not entitled to business damages under their takings claim. *See*, Complaint, paragraph 67(f). Under Florida law, business damages in a takings context are not damages that are constitutionally created, but instead are statutorily based. *See Systems Components Corp,* 14 So. 3d at 978. Furthermore, business damages are statutorily limited to

[12] Chapter 127, Florida Statutes (2016) - Section127.01-Counties delegated power of eminent domain; recreational purposes, issue of necessity of taking; compliance with limitations.— (1)(a) Each county of the state is delegated authority to exercise the right and power of eminent domain; that is, the right to appropriate property, except state or federal, for any county purpose. The absolute fee simple title to all property so taken and acquired shall vest in such county unless the county seeks to condemn a particular right or estate in such property.

certain types of takings by governmental entities, none of which are involved here. *Id.* According to Florida's Supreme Court:

> In more informal terms, the business-damages portion of the statute has been suggested to generally *apply if, and only if:*
>
> (1) A partial taking occurs;
> (2) The condemnor is a state or local "public body";
> (3) The land is taken to construct or expand a right-of-way;
> (4) The taking damages or destroys an established business, which has existed on the parent tract for the specified number of years;
> (5) The business owner owns the condemned and adjoining land (lessees may qualify)
> (6) The business was conducted on the condemned land and the adjoining remainder; and
> (7) The condemnee specifically pleads and proves (1)-(6).

See Sec. 73.071(3)(b), Fla. Stat. (2004). *Id.*
See also 73.071(3)(b), Fla. Stat. (2016).

The Foleys did not plead these statutorily required elements. Consequently, the Foleys are not entitled to business damages, Count II does not state a cause of action upon which relief can be granted, and as such, Count II should be dismissed.

3. <u>To the Extent Count III is Directed Against Orange County, It Should be Dismissed.</u>

The Foleys do not explicitly allege Count III against Orange County. However, to the extent the Foleys might attempt to do so, Count III should be dismissed for failure to state a cause of action. Count III purports to state a claim for civil theft under Florida Statutes, Section 772.11. A predicate act under the civil theft statute is conduct that constitutes criminal theft. Orange County, as a political subdivision of Florida, is not capable of conducting any crime of theft. Therefore, to the extent Count III might be interpreted to be brought against Orange County, Count III should be dismissed for failure to state a cause of action.

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that on October 25, 2016 the foregoing was electronically filed with the Clerk of the Court using the Florida Courts eFiling Portal, which will send notice of filing and a service copy of the foregoing to the following:

David W. Foley, Jr.
1015 N. Solandra Drive
Orlando, FL 32807-1931
david@pocketprogram.org

Jennifer T. Foley
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/s/ William C. Turner, Jr.
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Counsel for Orange County, Florida

EXHIBIT A

APPROVED BY ORANGE
COUNTY BOARD OF COUNTY
COMMISSIONERS

BCC Mtg. Date: September 13, 2016

EFFECTIVE DATE: September 23, 2016

ORDINANCE NO. 2016-19

AN ORDINANCE AFFECTING THE USE OF LAND IN ORANGE COUNTY, FLORIDA, BY AMENDING CHAPTER 38 ("ZONING") OF THE ORANGE COUNTY CODE; AND PROVIDING AN EFFECTIVE DATE

BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF ORANGE COUNTY, FLORIDA:

Section 1. Amendments; In General. Chapter 38 of the Orange County Code is amended as set forth in Section 2 through Section 48. New language shall be indicated by underlines, and deleted language shall be shown by strike-throughs.

Section 2. Amendments to Section 38-1 ("Definitions"). Section 38-1 is amended to read as follows:

Sec. 38-1. Definitions.

* * *

Assisted living facility shall mean any building or buildings, section or distinct part of a building, private home, boarding home, home for the aged, excluding a "nursing home" as defined in this section, or other residential facility, whether operated for profit or not, which is licensed by the State of Florida and undertakes through its ownership or management to provide housing, meals, and one or more personal services for a period exceeding 24 hours to one or more adults who are not relatives of the owner or administrator.

* * *

~~*Aviculture (commercial)* shall mean the raising, breeding and/or selling of exotic birds, excluding poultry, for commercial purposes. Any one (1) or more of the following shall be used to determine whether a commercial operation exists:~~

~~(1) The operation exists with the intent and for the purpose of financial gain.~~

~~(2) Statements of income or deductions relating to the operation are included with routine income tax reporting to the Internal Revenue Service;~~

~~(3) A state sales tax identification number is used to obtain feed, supplies or birds;~~

~~(4) An occupational license has been obtained for the operation;~~

~~(5) Sales are conducted at the subject location;~~

~~(6) The operation involves birds or supplies which were purchased or traded for the purposes of resale;~~

~~(7) The operation involves a flea market or commercial auction, excluding auctions conducted by not-for-profit private clubs;~~

~~(8) The operation or activities related thereto are advertised, including, but not limited to, newspaper advertisements or signs, or~~

~~(9) The operation has directly or indirectly created traffic.~~

* * *

Boardinghouse, lodging house or *rooming house* shall mean a dwelling used for the purpose of providing meals or lodging or both to five (5) or more persons other than members of the family occupying such dwelling, or any unit designed, constructed and marketed where the individual bedrooms are leased separately and have shared common facilities. This definition shall not include a nursing home or community residential home. (For four (4) or less persons, see "family" definition in this section.)

* * *

Community residential home shall mean a dwelling unit licensed to serve clients of the ~~s~~State of Florida pursuant to Chapter 419, Florida Statutes, ~~department of health and rehabilitative services,~~ which provides a living environment ~~to~~ for 7 to 14 unrelated ~~"~~residents~~"~~ who operate as the functional

Dwelling, three-family (triplex), shall mean a building with three (3) dwelling units which has three (3) kitchens and is designed for or occupied exclusively by three (3) families. Each unit of a triplex must be connected by a common wall.

Dwelling, two-family (duplex), shall mean a building with two (2) dwelling units which has two (2) kitchens and is designed for or occupied exclusively by two (2) families. Each unit of a duplex must be connected by a common wall.

* * *

Family shall mean an individual; or two (2) or more persons related by blood, marriage or adoption, exclusive of household servants, occupying a dwelling and living as a single ~~nonprofit~~ housekeeping unit; or four (4) or fewer persons, not related by blood, marriage or adoption, exclusive of household servants, occupying a dwelling and living as a single ~~nonprofit~~ housekeeping unit, in either case as distinguished from persons occupying a boardinghouse, lodging house, rooming house, nursing home, community residential home, or hotel, as herein defined.

* * *

Family day care home shall mean as defined in F.S. § 402.302~~(5)~~, as it may be amended from time to time.

* * *

Fence shall mean a structure that functions as a boundary or barrier for the purpose of safety, to prevent entrance, to confine, or to mark a boundary.

* * *

Home occupation shall mean any use conducted entirely within a dwelling or accessory building and carried on by a resident ~~an occupant~~ or residents thereof~~, which~~ that is clearly incidental and secondary to the use of the dwelling for dwelling purposes and does not change the character thereof, subject to Section 38-79(101). ~~provided that all of the following conditions are met:~~

~~Only such commodities as are made on the premises may be sold on the premises. However, all such sales of home~~

~~occupation work or products shall be conducted within a building and there shall be no outdoor display of merchandise or products, nor shall there be any display visible from the outside of the building. No person shall be engaged in any such home occupation other than two (2) members of the immediate family residing on the premises. No mechanical equipment shall be used or stored on the premises in connection with the home occupation, except such that is normally used for purely domestic or household purposes. Not over twenty-five (25) percent of the floor area of any one (1) story shall be used for home occupation purposes. Fabrication of articles such as commonly classified under the terms "arts and handicrafts" may be deemed a home occupation, subject to the other terms and conditions of this definition. Also, a "cottage food operation" as defined and regulated by Chapter 500, Florida Statutes, shall be deemed a home occupation.~~ ~~Home occupation shall not be construed to include uses such as barber shops, beauty parlors, plant nurseries, tearooms, food processing (with the exception of a cottage food occupation), restaurants, sale of antiques, commercial kennels, real estate offices, insurance offices, or pain management clinics.~~

* * *

Living area shall mean the total air conditioned or heated floor area of all dwelling units measured to the interior surfaces of exterior walls, but excluding exterior halls and stairways.

* * *

Mobile home shall mean a structure transportable in one (1) or more sections, which structure is eight (8) feet or more in width and over thirty-five (35) feet in length, and which structure is built on an integral chassis and designed to be used as a dwelling when connected to required utilities, and includes the plumbing, heating, air conditioning, and electrical systems contained therein. A mobile home shall be constructed to United States Department of Housing and Urban Development standards.

* * *

Poultry shall mean domestic fowl, including chickens, roosters, turkeys, ducks, geese, pigeons, ~~etc.~~ but excluding wild or non-domestic birds regulated by the Fish and Wildlife Conservation Commission.

* * *

buffer, exists along the lot line. (For purposes of this subsection (45), an "approved surface" shall mean a surface consisting of asphalt, gravel, pavers, or concrete.)

f. A boat greater than twenty-four (24) feet in length may be parked, stored or kept inside a garage, under a carport, or in the rear half of the lot or parcel, but not in the driveway or in the front yard. Such a boat on the rear half of the lot or parcel shall be screened from view from the right of way when it is parked or stored behind the principal structure, and shall be at least ten (10) feet from the side lot lines and at least five (5) feet from the rear lot line. Setbacks may be reduced to zero (0) if a six-foot high fence, wall, or vegetative buffer, exists along the lot line. Furthermore, the owner of such a boat shall obtain a permit from the zoning division in order to park, store or keep the boat at the lot or parcel.

g. Not more than one (1) recreational vehicle may be parked, stored or kept on the lot or parcel.

h. The owner of the recreational vehicle shall be the owner or lessee of the principal structure at the lot or parcel.

i. No recreational vehicle may be occupied while it is parked, stored or kept on the parcel.

j. A recreational vehicle may be parked, stored or kept only on an approved surface in the front half of the lot or parcel (behind the front yard setback) or on an unimproved surface in the rear half of the lot or parcel. The recreational vehicle shall not obscure the view of the principal structure from the right-of-way adjoining the front of the subject property, and shall be at least ten (10) feet from the side lot lines and at least five (5) feet from the rear lot line. Setbacks may be reduced to zero (0) feet if a six-foot high fence, wall, or vegetative buffer, exists along the lot line. Furthermore, the owner of such a recreational vehicle shall obtain a permit from the zoning division in order to park, store or keep the recreational vehicle at the lot or parcel.

* * *

(48) Reserved. ~~Commercial aviculture or any aviary shall be as defined in section 38-1 of this chapter and may be permitted as a special exception subject to the following requirements. Each application shall include a site plan and~~

~~corresponding narrative which shall contain the following information:~~

~~a. A dimensionalized site plan (drawn to scale) indicating the location, height and intended use of all existing and proposed structures.~~

~~b. The location, nature and height of proposed security fences, berms, landscaping and other security and noise alleviation structures.~~

~~c. A description of the facility outlining the intended method of operation, including the number, types and characteristics of the birds.~~

(49) Except as set forth in subsections 38-79(49)e. and f. below, the raising or keeping of goats, sheep, lambs, and pigs shall comply with the following requirements:

a. no commercial on-site slaughtering in agricultural and residential zoned districts;

b. not more than eight (8) animals per acre; more than that amount requires a special exception;

c. any barn, paddock, stall, pen, or corral shall be setback at least fifteen (15) feet from all property lines and at least thirty (30) feet from the normal high water elevation of any lakes or natural water bodies;

d. manure and compost shall not be piled or stored within thirty (30) feet of any property line;

e. a bona fide agricultural business or use that is exempt from local government zoning regulations under the Florida Statutes shall not be subject to the requirements of this subsection 38-79(49);

f. the keeping of animals for an approved 4H or FFA educational program shall be exempt from the requirements of this subsection 38-79(49), provided the number of animals does not exceed six (6) and the duration of the program does not exceed six (6) months.

REVISIONS TO SEC. 38-77 USE TABLE

APPENDIX "A"

Sec. 38-77. Use Table

Uses Per Zoning Code	*SIC Group*	*Land Use*	*A-1*	*A-2*	*A-R*	*RCE-5*	*RCE-2*	*RCE*	*R-1AAAA*	*R-1AAA*	*R-1AA*	*R-1A*	*R-1*	*R-2*	*R-3*	*RCE Cluster*	*RT*	*RT-1*	*RT-2*	*P-O*	*C-1*	*C-2*	*C-3*	*I-1A*	*I-1, I-5*	*I-2, I-3*	*I-4*	*U-V (see 29)*	*R-L-D*	*UR-3*	*NC*	*NAC*	*NR*	*Conditions*
													* * *																					
Raising or keeping of ~~cows and~~ horses, ~~&~~ ponies, donkeys, and mules ~~for domestic purposes;~~ boarding of horses, ponies, etc.	0272	Raising or keeping of horses, ponies, etc., boarding of horses ponies, etc. ~~Horses & equines~~	41 SP	41 SP	41 SP	41 SP	41 SP	41 SP													41 P	41 P			41 P	41 P	41 P						
~~Commercial aviculture, aviaries~~	0279	~~Commercial aviculture~~	~~48 S~~	~~48 S~~	~~48 S~~																	~~P~~	~~P~~		~~P~~	~~P~~	~~P~~						~~*~~
~~Bee Keeping~~		~~Bee Keeping~~	~~P~~	~~P~~	~~97 P~~																												
Raising or keeping of goats, sheep, lambs, pigs, or swine		Raising or keeping of goats, sheep, lambs, pigs or swine	49 S P	49 S P	49 S P	52 P 69 P	69 P	69 P																									
~~Breeding, keeping and raising of farm animals (ex goats, swine, pot-bellied pigs, etc.) for sale or profit (not for domestic purposes)~~		~~Breeding, keeping and raising of farm animals (ex., goats, swine, pot-bellied pigs, etc.) for sale or profit (not for domestic purposes)~~	~~50 S~~	~~50 S~~																													
~~Breeding, keeping and raising of farm animals (ex. goats, swine, pot bellied pigs, etc.) for domestic purposes only~~		~~Breeding, keeping and raising of farm animals (ex Goats, swine, pot-bellied pigs, etc.) for domestic purposes only~~	~~49 P~~	~~49 P~~	~~52 P~~	~~52 P~~																													
~~Breeding, keeping and raising of exotic animals~~		~~Breeding, keeping and raising of exotic animals~~	~~11 P~~	~~11 P~~																													
													* * *																					
	07	**AGRICULTURAL SERVICES**	P	P																														
Veterinary service with no outdoor runs or compound	0742	Veterinary services	S	S															54 P	54 ~~112~~ P	54 ~~112~~ P	54 ~~112~~ P		P	P	P	54 P						~~*~~

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

DAVID W. FOLEY and JENNIFER T. FOLEY,

Plaintiffs,

vs.

ORANGE COUNTY, PHIL SMITH, CAROL HOSSFIELD, MITCH GORDON, ROCCO RELVINI, TARA GOULD, TIM BOLDIG, FRANK DETOMA, ASIMA AZAM, RODERICK LOVE, SCOTT RICHMAN, JOE ROBERTS, MARCUS ROBINSON, RICHARD CROTTY, TERESA JACOBS, FRED BRUMMER, MILDRED FERNANDEZ, LINDA STEWART, BILL SEGAL, and TIFFANY RUSSELL,

Defendants.
_____/

Case No. 2016-CA-007634-O

THE OFFICIAL DEFENDANTS' MOTION TO DISMISS, MOTION TO STRIKE, AND REQUEST FOR JUDICIAL NOTICE

COME NOW, current and former ORANGE COUNTY (the "County") Officials named in their individual and official capacities serving on the Board of Zoning Adjustment ("BZA") or Board of County Commissioners ("BCC"), ASIMA AZAM, FRED BRUMMER, RICHARD CROTTY, FRANK DETOMA, MILDRED FERNANDEZ, TERESA JACOBS, RODERICK LOVE, SCOTT RICHMAN, JOE ROBERTS, MARCUS ROBINSON, TIFFANY RUSSELL, BILL SEGAL, and LINDA STEWART (together, the "Officials"), by and through their undersigned counsel, hereby file these, their Motion to Dismiss, Motion to Strike, and Request for Judicial Notice, and state as follows:

Background and Overview

This is the latest and hopefully last proceeding in protracted litigation that has already reached the United States Supreme Court. Plaintiffs DAVID W. FOLEY and JENNIFER T. FOLEY (the "Foleys") are commercial toucan farmers. (Compl. ¶ 28.) Orange County Code regulates commercial aviculture. (*Id.* ¶¶ 35-37.) A citizen complained about the Foleys' toucans, and a code enforcement investigation began. (*Id.* ¶¶ 38-40.) The Zoning Manager, a non-Official County employee who is separately represented here, determined that the Foleys were in violation of the Code. (*Id.* ¶ 38.) In their words, the Foleys "appeal[ed]" to the BZA and argued that the County's regulation of aviculture is unconstitutional under the Florida Constitution because, according to them, only the Florida Fish and Wildlife Commission ("FWC") has authority to regulate wildlife. (*Id.* ¶¶ 38-40.)

The BZA held a public hearing, and the board voted that the Foleys were indeed violating the local ordinance. (*Id.*) The Foleys appealed the BZA's decision to the BCC. (*Id.*) The BCC voted to affirm the BZA's conclusion. (*Id.*) The Foleys continued with a petition for a writ of certiorari to the Ninth Judicial Circuit in Case No. 08-CA-005227-O. (*Id.* ¶ 40.) That proceeded allegedly concluded with a finding that the Foleys were "prohibited … from challenging the constitutionality of the County code on certiorari review of the BCC order." (*Id.*)

Undeterred, the Foleys filed a pro se federal action against the County, the Officials, the BZA members, and other County employees in the Middle District of Florida. (*Id.* ¶¶ 2, 5.)[1] The Foleys alleged a plethora of legal theories, only a few of which are restated in this new State Court Complaint. The District Court ultimately entered two significant orders for present

[1] The existence of the federal action was expressly pled and therefore within the "four corners" for motion to dismiss purposes, *e.g.*, *Federal Nat'l Mortg. Ass'n v. Legacy Parc Condo. Ass'n, Inc.*, 177 So. 3d 92, 94 (Fla. 5th DCA 2015), but the entirety of the federal filings are also properly considered pursuant to the judicial notice rule as explained below.

purposes, one on December 4, 2012 (the "First Order"), and another on August 13, 2013 (the "Second Order"). Those orders are attached here for reference, and they can also be found at 2012 WL 6021459 and 2013 WL 4110414, respectively.[2]

The First Order began that naming the Officials in their official capacities, which the Foleys have again done here, is "duplicative of the claims brought against Orange County." *First Order* at *3 (citing *Busby v. City of Orlando*, 931 F.2d 764, 776 (11th Cir. 1991). All related claims were dismissed. *Id.* That order continued that all Officials were "absolutely immune from suit" because "the conduct that is the basis for the Foley's claims falls within the scope of the zoning board members' and commissioners' legislative functions." *Id.* at *4 (citing *Espanola Way Corp. v. Meyerson*, 690 F.2d 827 (11th Cir. 1982); *Hernandez v. City of Lafayette*, 643 F.2d 1188 (5th Cir. 1981); *S. Gwinnett Venture v. Pruitt*, 491 F.2d 5 (5th Cir. 1974); *Fla. Land Co. v. City of Winter Springs*, 427 So. 2d 170 (Fla. 1983); and *Schauer v. City of Miami Beach*, 112 So. 2d 838 (Fla. 1959)).

Accordingly, the First Order concluded that all claims against the Officials were dismissed with prejudice. The claims against the County were dismissed without prejudice, and litigation continued against it.[3] *First Order* at *8. The Second Order ended the material District Court activity. It concluded that (1) the relevant Code was unconstitutional under the Florida Constitution, but that (2) the Foleys had nonetheless failed to show due process violations, equal protection violations, compelled speech, restraints on commercial speech, or unreasonable searches or seizures. *Second Order* at *9-14. The Code provisions were declared void and

[2] Other filings in the Middle District will be filed under separate cover due to their sheer voluminosity.

[3] The Foleys actually restated claims against the Officials and BZA members anyway, which the District Court sua sponte dismissed. (M.D. Fla. Case No. 6:12-cv-269 Doc. 168 (Jan. 24, 2013)).

unenforceable, and the Foleys were denied any further relief, including the denial of any monetary relief. *Id.* at 14-15.[4]

The Foleys appealed to the Eleventh Circuit. *See Foley v. Orange County*, 638 Fed.Appx. 941 (11th Cir. 2016) (attached hereto). The appellate court concluded, "All of the Foleys' federal claims either have no plausible foundation, or are clearly foreclosed by a prior Supreme Court decision." *Id.* at 945-46 (citations omitted). It therefore affirmed the District Court's interpretation of federal law, but it vacated for lack of subject matter jurisdiction the separate finding that the Code was unconstitutional under the Florida Constitution. *Id.* at 946.

The Eleventh Circuit also recognized that "it would be theoretically possible for the Foleys to bring a regulatory takings claim under 42 U.S.C. § 1983 … [but] the Foleys have refused to characterize their challenge as a regulatory takings claims." *Id.* at 945 n.4 (citation omitted). The Eleventh Circuit did not expound on the dismissal of any of the individual defendants, other than to note, "The District Court subsequently struck the Foleys' amended complaint in its order dismissing the federal and state law claims against the County Officials and County Employees." *Id.* at 943 n.2.

The Foleys then filed a petition for writ of certiorari in the United States Supreme Court that was summarily denied. *See Foley v. Orange County, Fla.*, 137 S.Ct. 378 (2016).

The Foleys have now restated all relevant claims against the same series of defendants in this action. In short, and as best as the Officials can discern, those claims are:

- Count I – Seeking declaratory and injunctive relief proscribing the enforcement of the Code sections; this Count pertains solely to the County;

[4] The Foleys' state law claims against the County were expressly left open in the Second Order, but the ultimate final judgment was entered in favor of the County on all of the Foleys' claims against it. (M.D. Fla. Case No. 6:12-cv-269 Doc. 318 (Dec. 30, 2013)).

- Count II – Constitutional torts under Art. I § 9, Fla. Const., "or in the alternative" under 42 U.S.C. § 1983, "or in the alternative" a takings without public purpose, due process, or just compensation under Art. X § 6, Fla. Const., Amend. V, U.S. Const., and common law; and

- Count III – Civil Theft under § 772.11, Fla. Stats. against all individuals.

These claims are frivolous as stated against the Officials. They have been frivolous at every stage in this lengthy process. The Officials are entitled to dismissal for at least four reasons; (1) the statute of limitations; (2) res judicata; (3) quasi-judicial immunity; (4) qualified immunity; and (5) the failure to state a cognizable claim.

And whatever excusable ignorance we may afford a pro se litigant in the normal course, the Foleys are acutely aware of the frivolity of their lawsuit. Respectfully, the Officials should be dismissed with prejudice.

Request for Judicial Notice on Motion to Dismiss

Florida courts are normally confined to review the sufficiency of complaints within the four corners. *See, e.g.*, *Federal Nat'l Mortg.*, *supra* n.1. However, where a trial court takes judicial notice of a fact not within the four corners, that fact appropriately comes before it for dismissal purposes. *See All Pro Sports Camp, Inc. v. Walt Disney Co.*, 727 So. 2d 363, 366 (Fla. 5th DCA 1999). As the Fifth District explained in *All Pro Sports Camp*:

> All Pro's complaint contains no allegations regarding the prior federal lawsuit. However, the trial court took judicial notice of the federal judgment. Res judicata has been held a proper basis for dismissal where, though the defense was not evident from the complaint, the court took judicial notice of the record in prior proceedings.

Id. (citing *City of Clearwater v. U.S. Steel Corp.*, 469 So. 2d 915 (Fla. 2d DCA 1985)).

Section 90.201, Fla. Stats., requires state courts to take judicial notice of Florida and federal common law, constitutional law, legislative acts, and rules of court. Section 90.202 provides a list of discretionary topics that a court may take notice of. Subsection 90.202(6)

allows a court to take notice of "Records of any court of this state or of any court of record in the United States or of any state, territory, or jurisdiction of the United States."

It is appropriate to take notice of the Middle District, Eleventh Circuit, and United States Supreme Court's records in this case. Those filings will assist the Court in determining the extent issues were litigated for res judicata purposes, as well as provide the Court with background as explained in the foregoing section. There could be no prejudice to the Foleys, who were of course parties to those actions. Finally, judicial economy would be served by resolving the case at the dismissal phase as opposed to waiting for summary judgment. Not only has the Fifth District expressly approved this procedure in *All Pro Sports Camp*, but the public interest is heightened where two of the individual defendants are Mayor TERESA JACOBS and Clerk of Court TIFFANY RUSSELL.

That said, judicial notice is not required to resolve the questions of limitations, immunity, or whether a claim has been stated. It would nonetheless be helpful to those analyses as well.

Statute of Limitations

It is well settled that the statute of limitations is appropriately raised at the dismissal phase where the key timeline is apparent from the face of the complaint itself. *See*, *e.g.*, *Pines Props., Inc. v. Talins*, 12 So. 3d 888, 889 (Fla. 3d DCA 2009) ("A motion to dismiss a complaint based on the expiration of the statute of limitations should only be granted in extraordinary circumstances where the facts constituting the defense affirmatively appear on the face of the complaint and establish conclusively that the statute of limitations bars the action as a matter of law.") (internal and string citations omitted). The Foleys' Complaint expressly acknowledges that their alleged causes of action accrued on February 18, 2008. (Compl. ¶ 2.)

The civil theft statute includes a specific five year limitations section. *See* § 772.17, Fla. Stats. The Foleys have also raised a series of federal and state constitutional torts against the Officials. All are governed by the four year statute of limitations codified in § 95.11(3), Fla. Stats. *See* §§ 95.11(3)(f) ("An action founded on a statutory liability"); 95.11(3)(h) ("An action for taking, detaining, or injuring personal property"); 95.11(3)(o) (intentional torts); 95.11(3)(p) ("Any action not specifically provided for in these statutes"); *see also McRae v. Douglas*, 644 So. 1368, 1372 n.3 (Fla. 5th DCA 1994) ("a four year statute of limitations applies to 42 U.S.C. § 1983 claim"). Accordingly, a five year limitations period governs the civil theft claims, and a four year limitations period governs the rest.

The Foleys are keenly aware of the limitations issue; Paragraph 2 of the complaint actually explains why they believe the claim is *not* barred. They believe that 28 U.S.C. § 1367(d) "tolls limitations for thirty days after dismissal of any supplemental claims related to those asserted to be within the original jurisdiction of the federal court." (Compl. ¶ 2.) They are incorrect.

Section 1367(d) only applies where a federal court indeed enjoyed original jurisdiction over a case. *See Ovadia v. Bloom*, 756 So. 2d 137, 139 (Fla. 3d DCA 2000). But where an initial assertion of federal jurisdiction is shown to be insufficient, § 1367(d) does not apply and no tolling occurs. *See id.* ("Any arguable jurisdiction was based on diversity, and the presence of non-diverse defendants in the action destroyed jurisdiction on that basis."). More colorfully, "[a] voluntary but improvident foray into the federal arena does not toll the statute of limitations." *Id.* (citation omitted). In other words, § 1367(d) only applies where a properly filed federal action fails on the merits and a district court, in its discretion, declines to retain supplemental state law

claims. Conversely, where underlying federal claims are improper ab initio, § 1367(d) does not save a plaintiff for their "improvident foray into the federal arena."

The Eleventh Circuit has now held that all of the Foleys' federal claims were frivolous. *See generally Foley*, *supra*. The case should never have been brought in federal court, and § 1367(d) does not apply. The result might be different if a non-frivolous federal claim had been brought and later lost on summary judgment, but that clearly is not our posture. A frivolous foray into the federal forum does not toll otherwise expired limitations periods.

Finally, the Foleys have expressly pled that their alleged causes of action accrued no later than February 18, 2008. (Compl. ¶ 2.) This case was filed over eight years later, well beyond the four and five year statutes applicable to the claims asserted. It is untimely and should be dismissed with prejudice.

All Federal Claims Are Res Judicata

This lawsuit is brought on the exact same theories and facts as the federal action was. "The doctrine of res judicata bars relitigation in a subsequent cause of action not only of claims raised, but also claims that could have been raised." *Topps v. State*, 865 So. 2d 1253, 1255 (Fla. 2004). All federal claims that were or could have been raised in the federal proceedings are therefore clearly barred here.

The Foleys allege that the Middle District "dismissed without prejudice all federal and state claims brought against the above named defendants" on July 27, 2016. (Compl. ¶ 2.) They misconstrue the posture of the case. Rather, the Eleventh Circuit *affirmed* the dismissal of the federal constitutional claims, and it went further to observe that those claims were frivolous. *Foley*, 638 Fed.Appx. at 942 ("we find that these federal claims on which the District Court's federal-question jurisdiction was based are frivolous", etc.). It then *vacated* the judgments

entered on the state law theories because no federal supplemental jurisdiction lies where the underlying federal claims are frivolous. *Id.* at 946.

All federal claims that have been reasserted in this action are therefore res judicata as to all parties and should be dismissed with prejudice. The remaining analysis is only necessary if the Court determines that the entirety of the case against the Officials is not procedurally barred.

The Officials Cannot Be Separately Sued in Their Official Capacities

Claims against a government official in their official capacity are duplicative of claims against the governmental body itself and subject to dismissal. *Brandon v. Holt*, 469 U.S. 464, 471-72 (1985); *Busby v. City of Orlando*, 931 F.3d 764, 776 (11th Cir. 1991). This is well-settled, black letter law. The Middle District was correct to dismiss the claims against the Officials in their official capacities, and it is equally appropriate to do so here.

The Officials Enjoy Absolute Immunity from this Action

"We have repeatedly stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Furtado v. Yun Chung Law*, 51 So. 3d 1269, 1275 (Fla. 4th DCA 2011) (citing *Saucier v. Katz*, 533 U.S. 194, 200-01 (2001)).

The non-scandalous allegations boil down to the Foleys' disagreement with how the Officials voted in an official public proceeding. Although the Middle District granted the Officials absolute legislative immunity, the Officials argued to the Eleventh Circuit that they actually sat quasi-judicially on the BZA or BCC, and they will maintain that position here.[5]

> It is the character of the hearing that determines whether or not board action is legislative or quasi-judicial. Generally speaking, legislative action results in the formulation of a general rule of policy, whereas judicial action results in the application of a general rule of policy.

[5] If the Court should disagree and find that the Officials were acting quasi-legislatively, then immunity clearly applies under the authorities cited in the First Order and listed in the "Background and Overview" section, *supra*.

Bd. of Cnty. Com'rs of Brevard Cnty. v. Snyder, 627 So. 2d 469, 474 (Fla. 1993) (citation omitted) (emphasis in original).

In other words, the question is framed as whether the governmental body is enacting or modifying an ordinance (legislative) or enforcing one (quasi-judicial). *See also Hirt v. Polk Cnty. Bd. of Cnty. Com'rs*, 578 So. 2d 415, 417 (Fla. 2d DCA 1991). The enforcement of existing code is quasi-judicial. *Michael D. Jones, P.A. v. Seminole Cnty.*, 670 So. 2d 95, 96 (Fla. 5th DCA 1996).

The Foleys specifically plead that the Officials were "sitting as a board of appeals" when they committed their allegedly illegal acts. (Compl. ¶ 38.)[6] The Zoning Manager under review was unquestionably enforcing the Code, and the BZA was then called upon to review his findings. The BCC reviewed those findings in due course. This activity was paradigmatically quasi-judicial.

The limits of judicial immunity and quasi-judicial immunity are coextensive in Florida. *Office of the State Attorney, Fourth Judicial Circuit of Fla. v. Parrotino*, 628 So. 2d 1097, 1099 (Fla. 1993). Not surprisingly, the reach of judicial immunity, and therefore also of quasi-judicial immunity, is expansive. As explained in *Andrews v. Florida Parole Commission*, 768 So. 2d 1257, 1263 (Fla. 1st DCA 2000) (citation omitted), "judges are not liable in civil actions for their judicial acts, even when such acts are in excess of their jurisdiction." This bedrock principle of American jurisprudence forecloses the Foleys' claims against the Officials.

The Officials were acting within their charge and duties in voting to either uphold or vacate the Zoning Manager's determination that the Foleys were violating Orange County Code.

[6] The Foleys have conceded that the BZA and BCC are prohibited to address an ordinance's constitutionality. (M.D. Fla. Case No. 6:12-cv-269 Doc. 1, ¶ 27-28 n.26). Nor could they argue to the contrary here.

They were acting quasi-judicially and are entitled to absolute immunity from suit. Prejudicial dismissals are warranted.

The Officials Enjoy Qualified Immunity from this Action

The civil theft claims against the Officials are, to put it mildly, frivolous. Regardless, § 768.28(9)(a), Fla. Stats., affords immunity both from tort liability and from suit to officers, employees, and agents of the state. The immunity does not apply only if the agent was acting "in bad faith or with malicious purpose." *Id.* "Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Corn v. City of Lauderdale Lakes*, 997 F.2d 1369, 1393 (11th Cir. 1993) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). The Foleys have merely alleged that the Officials exercised official votes in an official forum. They are entitled to qualified immunity.

The Foleys Have Not Stated a Claim for Civil Theft

To establish a civil theft violation, a plaintiff must allege that they have been victimized by the violation of the theft statutes, §§ 812.012-812.037 and 825.103(1), Fla. Stats. § 772.11. But an element of any theft claim requires the defendant to "obtain[] or use[]" the property of another with criminal intent. § 812.014. The Complaint is woefully bereft of any allegation that the BCC members, by exercising a public vote, "obtained or used" the Foleys' toucans. The theory is utter nonsense, no matter how verbose the Complaint or in how many different fora the Foleys recast their misguided allegations. In fact, the theory is so frivolous that neither the Middle District nor the Eleventh Circuit expressly referenced the term "civil theft." Rather, those courts benignly lumped the civil theft allegations in among the other "state-law claims."

The Foleys' claim is precisely the sort that is "not supported by the material facts necessary to establish the claim" *and* "would not be supported by the application of then-existing law to those material facts." *See* § 57.105(1). Therefore, even if the Court determines that (1) the claim is timely, (2) the claim is not res judicata, (3) the Officials do not enjoy quasi-legislative or quasi-judicial immunity, *and* (4) the Officials do not enjoy qualified immunity; our elected officials should not be subject to the burdens of discovery on such outlandish propositions as the Foleys have alleged. The Officials should be dismissed with prejudice.

Motion to Strike Scandalous Pleadings

The Foleys' Complaint contains a number of vitriolic, fanciful, and downright scandalous allegations. They allege that the governmental efforts to enforce aviculture regulations constituted "extortion," that now-Mayor TERESA JACOBS "conspire[d]" with County employee ROCCO RELVINI, that Assistant County Attorney TARA GOULD acted "with legal malice" by writing opinion memoranda, and that "every action taken by defendants [in relation to the code enforcement] … was an act of civil theft." (Compl. ¶¶ 69, 71, 72, *ad damnum* clause on p. 44). These conclusory and misguided allegations should be stricken from this record as defamatory to our public officials.

Conclusion

The Foleys' "improvident foray" into federal court has left them with time-barred claims against the Officials. Regardless, the causes of action are and always have been frivolous given the obvious and necessary immunities afforded to public officials merely exercising official votes. Yet the Foleys persist, and nearly two dozen County employees and officials continue to endure years of baseless legal chicanery. Enough is enough.

WHEREFORE, Defendants ASIMA AZAM, FRED BRUMMER, RICHARD CROTTY, FRANK DETOMA, MILDRED FERNANDEZ, TERESA JACOBS, RODERICK LOVE, SCOTT RICHMAN, JOE ROBERTS, MARCUS ROBINSON, TIFFANY RUSSELL, BILL SEGAL, and LINDA STEWART hereby respectfully request this Honorable Court to dismiss them from this action, with prejudice, and for the award of costs, interest, and all other relief deemed just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was electronically filed with the Clerk of the Court using the Florida Courts eFiling Portal, which will send notice of filing and a service copy of the foregoing to the following: **David W. Foley, Jr.** and **Jennifer T. Foley**, david@pocketprogram.org, jtfoley60@hotmail.com; and **William C. Turner, Esq.**, **Elaine Marquardt Asad, Esq.**, and **Jeffrey J. Newton, Esq.**, williamchip.turner@ocfl.net, Judith.catt@ocfl.net, elaine.asad@ocfl.net, gail.stanford@ocfl.net; on this **19th** day of December, 2016.

/s Derek J. Angell
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Only the Westlaw citation is currently available.
United States District Court, M.D. Florida,
Orlando Division.

David W. FOLEY, Jr.; and
Jennifer T. Foley, Plaintiffs,
v.
ORANGE COUNTY, FLORIDA; Phil Smith; Carol Hossfield; Mitch Gordon; Rocco Relvini; Tara Gould; Tim Boldig; Frank Detoma; Asima Azam; Roderick Love; Scott Richman; Joe Roberts; Marcus Robinson; Richard Crotty; Teresa Jacobs; Fred Brummer; Mildred Fernandez; Linda Stewart; Bill Segal; and Tiffany Russell, Defendants.

No. 6:12–cv–269–Orl–37KRS.
|
Dec. 4, 2012.

Attorneys and Law Firms

David W. Foley, Jr., Orlando, FL, pro se.

Jennifer T. Foley, Orlando, FL, pro se.

Linda Brehmer Lanosa, Orlando, FL, for Defendants.

ORDER

ROY B. DALTON JR., District Judge.

***1** This cause is before the Court on the following:

1. Defendants' Dispositive Motion to Dismiss the Amended Complaint with Prejudice or, Alternatively, Motion for Summary Judgment (Doc. 93), filed June 15, 2012;

2. Plaintiffs' Response to Defendants' Motion to Dismiss, or Motion for Summary Judgment and Plaintiffs' Cross–Motion for Partial Summary Judgment on Causes I, II, and III (Doc. 100), filed July 20, 2012;

3. Plaintiffs' Request for Judicial Notice (Doc. 101), filed July 31, 2012;

4. Defendants' Response in Opposition to Plaintiffs' Request for Judicial Notice (Doc. 102), filed August 14, 2012;

5. Defendants' Response in Opposition to Plaintiffs' Cross–Motion for Partial Summary Judgment as to Counts I, II, and III (Doc. 106), filed August 17, 2012;

6. Plaintiffs' Reply to Defendants' Response in Opposition to Plaintiffs' Cross–Motion for Partial Summary Judgment as to Counts I, II, and III (Doc. 113), filed August 31, 2012;

7. Declaration of David W. Foley, Jr. (Doc. 114), filed August 31, 2012;

8. Plaintiffs' Motion to Strike Portions of Affidavit of the Orange County Zoning Manager (Doc. 115), filed August 31, 2012);

9. Plaintiffs' Request for Judicial Notice (Doc. 116), filed August 31, 2012; and

10. Defendants' Response in Opposition to Plaintiffs' Motion to Strike Portions of Affidavit of the Orange County Zoning Manager (Doc. 120), filed September 14, 2012.

The Court held a hearing on November 8, 2012, at which the parties presented argument on the issues raised in these motions. (Doc. 147.)

BACKGROUND [1]

Plaintiffs David W. Foley, Jr. and Jennifer T. Foley live in Orange County, Florida, and raise toucans. (Doc. 85, ¶ 19.) They are licensed by the State of Florida to possess, exhibit, and sell toucans from their residence and a second property in Christmas, Florida, which is located in unincorporated Orange County (the "Christmas Property"). (*Id.* ¶ 42.) The conflict giving rise to this lawsuit began as a code enforcement matter. The Foleys then initiated proceedings before the county zoning board and later before the Orange County Board of Commissioners.

In February 2007, Defendant Orange County received a complaint that the Foleys were selling birds from their residence. (*Id.* ¶¶ 85, 95, 196.) Defendant Phil Smith,

an inspector employed by the county's code enforcement division, investigated the complaint and cited the Foleys for building aviaries in the backyard of their residence without a proper permit. (*Id.* ¶¶ 23, 92.) The Foleys received written notice of the violation. (*Id.* ¶ 103.) About three weeks after his initial investigation, Smith inspected the residence a second time, found the aviaries still standing, and initiated code enforcement proceedings. (*Id.* ¶¶ 104–06.) The county's code enforcement board held a hearing regarding the permit violation on April 18, 2007. (*Id.* ¶ 114.) The board found that the Foleys did not comply with the permit requirement when they built the aviaries and ordered the Foleys to obtain a building permit or to remove the aviaries. (*Id.*)

***2** The Foleys then began the process of obtaining a building permit for the aviaries built at their residence. (*Id.* ¶ 108.) The Foleys created a property site plan that they understood to comply with the set-back requirements applicable to their residence. (*Id.*) However, Defendant Carol Hossfield, a county employee charged with approving building permits, refused to issue a building permit to the Foleys because aviaries were not permitted under the applicable zoning regulation. (*Id.* ¶¶ 108–09.)

On April 23, 2007, the Foleys asked the county's zoning manager, Defendant Mitch Gordon, for the county's official interpretation of its zoning regulations as they relate to the building of aviaries and the selling of wildlife as a "home occupation." (*Id.* ¶ 123.) The Foleys also asked Defendant Mildred Fernandez, who at the time was a county commissioner, for assistance with resolving their dispute with the zoning division. (*Id.* ¶ 122.) Commissioner Fernandez asked the county attorney to draft a memorandum concerning the issue, to which an assistant county attorney, Defendant Tara Gould, responded. (*Id.* ¶¶ 122, 126.)

Zoning Manager Gordon responded to the Foleys' request on July 2, 2007. (*Id.* ¶ 130.) He informed the Foleys that the zoning regulations applicable to their residence prohibited commercial aviculture. (*Id.*) Chapter 38 of the Orange County Code ("OCC" or "the Code") establishes a comprehensive zoning scheme that divides the county into districts and sets forth the restrictions that apply to each district. The Foleys' residence is located in a residential district zoned R–1 A. (*See, e.g.,* Doc. 85 ¶ 101.) For properties in residential R–1 A districts, the Code permits single-family homes, accessory buildings, home occupations, model homes, and family daycare homes. OCC § 38–77. Commercial aviaries are prohibited from operating in residential R–1A districts.[2] *Id.* The Code defines commercial aviaries as "the raising, breeding and/or selling of exotic birds, excluding poultry, for commercial purposes." *Id.* § 38–1. Poultry is defined by the Code to mean "domestic fowl such as chickens, roosters, turkeys, ducks, geese, pigeons, hens, quails, pheasants and squabs." *See, e.g., Id.* § 38–79(40).

The Foleys appealed Gordon's determination that the zoning ordinances prohibited them from operating a commercial aviary at their residence to the county's Board of Zoning Adjustment. (*Id.* ¶ 131.) The zoning board heard the Foleys' appeal on November 1, 2007. (*Id.* ¶ 140.) The board voted unanimously to uphold the zoning manager's determination. (*Id.*)

The Foleys then appealed the zoning board's decision to the Board of County Commissioners. (*Id.* ¶ 145.) The Board of County Commissioners held a public hearing on the Foleys' appeal on February 19, 2008. (*Id.* ¶ 158.) The commissioners voted to uphold the decisions of the zoning board and the zoning manager. (*Id.* ¶ 165.)

***3** In this lawsuit, the Foleys bring claims against the county, several county employees, members of the board of zoning adjustment, and members of the county commission (referred to in this Order collectively as the "Individual Defendants").[3] The Foleys filed this lawsuit on February 21, 2012. (Doc. 1.) The Amended Complaint organizes the Foleys' claims into twenty-six separate counts,[4] all of which Defendants seek to dismiss.

STANDARDS

"A pleading that states a claim for relief must contain ... a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2). The federal rules do not require "detailed factual allegations," but a "pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do." *Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)) (internal quotation marks omitted).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Id.* (quoting *Twombly,* 550 U.S. at 570); *see also Randall v. Scott,* 610 F.3d 701, 708–09 (11th Cir.2010) ("After *Iqbal* it is clear that there is no 'heightened pleading standard' as it relates to cases governed by Rule 8(a)(2), including civil rights complaints.").

In considering a motion to dismiss brought under Federal Rule of Civil Procedure 12(b)(6), a court limits its "consideration to the well-pleaded factual allegations, documents central to or referenced in the complaint, and matters judicially noticed." *La Grasta v. First Union Sec., Inc.,* 358 F.3d 840, 845 (11th Cir.2004) (citations omitted). The facts alleged in the complaint must be accepted as true and construed in the light most favorable to the non-movant. *Castro v. Sec'y of Homeland Sec.,* 472 F.3d 1334, 1336 (11th Cir.2006). Dismissal is warranted if, assuming the truth of the factual allegations of the plaintiffs' complaint, there is a dispositive legal issue which precludes relief. *Neitzke v. Williams,* 490 U.S. 319, 326, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989).

ANALYSIS

In this Order, the Court addresses first those claims brought against the Individual Defendants in their official capacity. The Court will then address the individual capacity claims brought against the county employees, board members, and commissioners. Finally, the Court will discuss the Foleys' remaining claims.

I. *Official Capacity Claims Brought Against the Individual Defendants*

The Foleys bring claims against the Individual Defendants in their official capacity as employees, board members, and commissioners of Orange County. These claims are duplicative of the claims brought against Orange County. When a plaintiff names a government official in his official capacity, the plaintiff is seeking to recover compensatory damages from the government body itself. *See Brandon v. Holt,* 469 U.S. 464, 471–72, 105 S.Ct. 873, 83 L.Ed.2d 878 (1985). Thus, naming a government official in his or her official capacity is the equivalent of naming the government entity itself as the defendant. *See Busby v. City of Orlando,* 931 F.2d 764, 776 (11 th Cir.1991) (noting that "[t]o keep both the City and the officers sued in their official capacity as defendants in this case would have been redundant and possibly confusing to the jury" and affirming the district court's decision to grant a directed verdict in favor of the officers because the city remained as a defendant). Accordingly, all of the claims brought against the Individual Defendants in their official capacity are due to be dismissed.

II. *Individual Capacity Claims Brought Against the County Employees, Board Members, and Commissioners*

***4** The Foleys bring a number of federal and state law claims against the county employees, zoning board members, and commissioners in their individual capacity.

A. *The Federal and State Law Claims Brought Against the Zoning Board Members and Commissioners*

The federal and state law claims brought against the commissioners and members of the board of zoning adjustment are due to be dismissed. Under federal and Florida law, zoning and land use decisions, such as those presented in this case, are legislative acts. *See, e.g., Hernandez v. City of Lafayette,* 643 F.2d 1188, 1193–94 (5th Cir.1981) (holding that local legislators are entitled to absolute immunity from suit under Section 1983 for conduct in the furtherance of their duties); *S. Gwinnett Venture v. Pruitt,* 491 F.2d 5, 7 (5th Cir.1974) (en banc) (holding that local zoning is quasilegislative act not subject to federal juridical consideration absent arbitrary action); *Florida Land Co. v. City of Winter Springs,* 427 So.2d 170, 174 (Fla.1983) (finding that a zoning ordinance which effected a change in zoning for a specific parcel of land was a legislative act); *Schauer v. City of Miami Beach,* 112 So.2d 838, 839 (Fla.1959) (concluding that amending zoning ordinance was legislative function). Legislative decision-makers are immune from suit once a court determines that a decision-maker's conduct furthers his legislative duties. *Espanola Way Corp. v. Meyerson,* 690 F.2d 827, 829 (11th Cir.1982).

Here, the conduct that is the basis for the Foley's claims falls within the scope of the zoning board members' and commissioners' legislative functions. Therefore, they are absolutely immune from suit. The federal and state claims against the board members and commissioners must be dismissed.

B. *The Federal Claims Brought Against the County Employees*

As for federal claims brought against the county employees, all are subject to a four-year statute of limitations. *Agency Holding Corp. v. Malley–Duff & Assocs., Inc.,* 483 U.S. 143, 156, 107 S.Ct. 2759, 97 L.Ed.2d 121 (1987) (civil RICO claims); *Burton v. City of Belle Glade,* 178 F.3d 1175, 1188 (11th Cir.1999) (Section 1983 claim); *Rozar v. Mullis,* 85 F.3d 556, 561 (11th Cir.1996) (Section 1983 and Section 1985 claims). The time of accrual of a federal cause of action is governed by federal law. *White v. Mercury Marine, Div. of Brunswick, Inc.,* 129 F.3d 1428, 1435 (11th Cir.1997). "The general federal rule is that the statute [of limitations] does not begin to run until the facts which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights." *Rozar,* 85 F.3d at 561–62 (citation and internal quotation marks omitted) (alteration in original). "Plaintiffs must know or have reason to know that they were injured, and must be aware or should be aware of who inflicted the injury." *Id.* at 562.

In this case, as alleged in the Amended Complaint and accepted as true, the facts necessary to support a claim against the county employees were apparent or should have been apparent no later than the board of zoning adjustment hearing held on November 1, 2007, and certainly prior to the meeting of the county commissioners held on February 19, 2012. Thus, the time to bring federal claims against the county employees expired prior to the initiation of this lawsuit. The Foleys' federal claims are therefore barred by the applicable statutes of limitations. [5]

C. *The State Law Claims Brought Against the County Employees*

***5** As to the state law claims against the county employees, Section 768.28(9)(a) of the Florida Statutes grants them qualified immunity. The statute provides, in pertinent part:

> No officer, employee, or agent of the state or of any of its subdivisions shall be held personally liable in tort or named as a party defendant in any action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of her or his employment or function, unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property ....

Fla. Stat. § 768.28(9)(a). "The purpose of qualified immunity ... is to 'immunize public employees from liability for ordinary negligence, while providing injured claimants a remedy against governmental entities through the waiver of sovereign immunity.' " *Lemay v. Kondrk,* 860 So.2d 1022, 1023 (Fla. 5th DCA 2003) (quoting *Rupp v. Bryant,* 417 So.2d 658, 671 (Fla.1982) (Boyd, J ., dissenting)).

As applied to this case, Section 768.28(9)(a) immunizes the county employees from suit and liability in tort as long as they acted within the scope of their employment and did not act in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights. *See* Fla. Stat. § 768.28(9)(a); *see also Willingham v. City of Orlando,* 929 So.2d 43, 48 (Fla. 5th DCA 2006) ("Importantly, the immunity provided by section 768.28(9)(a) is both an immunity from liability and an immunity from suit...."). The factual allegations in this case demonstrate that the county employees were acting within the scope of their employment. Nothing alleged suggests that the county employees acted in bad faith, with malicious purpose, or in wanton and willful disregard of human rights. Thus, the state law claims against the county employees are due to be dismissed.

III. *The Claims Brought Against Orange County*

The claims that remain have been brought against Orange County. The basis of those claims and their current status, however, is murky. The Amended Complaint is exceedingly long and contains many footnotes, paragraphs, and extraneous explanations of legal theories and authorities. There are 203 paragraphs prior to the first assertion of a claim. The claims are grouped as "causes of actions" and then grouped again as "counts." The first paragraph in each "cause of action" asserts that it is incorporating by reference all of the first 203 paragraphs of the Amended Complaint. The "counts" attempt to incorporate by reference this incorporation by reference by stating "for the reasons provided in this cause of action." All in all, there are at least twenty-six separate "counts." Almost all of the counts assert multiple legal

bases for relief in one or two conclusory paragraphs. There are no further references to the previous allegations of the complaint.

***6** The Federal Rules of Civil Procedure require pleadings to be simple, concise, and direct. Litigants need only provide "a short and plain statement" of the grounds for the court's jurisdiction, a demand for relief, and a factual basis showing that they are entitled to the relief. Fed.R.Civ.P. 8(a). Federal Rule of Civil Procedure 10(b) further requires that each claim be set out separately "in numbered paragraphs, each limited as far as practicable to a single set of circumstances."

The Amended Complaint does not conform to those standards. Besides verbosity, the central problem of the Amended Complaint is that the particularity set forth in its first 203 paragraphs is unconnected to the Foleys' otherwise generally pled claims in any meaningful way. *See, e.g., Wagner v. First Horizon Pharm. Corp.,* 464 F.3d 1273, 1279–80 (11th Cir.2006). This lack of connection between the substantive legal basis and the factual predicate for each claim severely restricts this Court's ability to analyze the claims that the Foleys seek to bring in this lawsuit. Rather than guessing what facts relate to which claims, the Court finds it appropriate to strike the Amended Complaint and permit Plaintiffs to replead their claims against Orange County. When doing so, Plaintiffs shall conform to the following guidelines.

First, the Court provides the following observation to the litigants in this case. Many litigants, whether represented by counsel or appearing *pro se,* believe that they must throw every conceivable claim or defense against the opposing party, file every conceivable motion, and seek relief for every conceivable slight. This is not a winning strategy. Issues end up not being framed properly, precisely, or at all. Claims and defenses with real merit get lost in the jumble. Multiple motions on peripheral matters bog down the Court and prevent it from expeditiously resolving issues that matter to the litigants. Further, spurious or weakly supported claims, defenses, and motions inevitably detract from the overall credibility of the offering party. The Court suggests to all litigants that a more effective strategy would be to focus their case on a few strong points.

Turning to the Foleys' claims, the Court notes it is abundantly clear that the central thrust of the Foleys' complaint against Orange County involves an alleged conflict in Florida law between the authority of the Florida Fish and Wildlife Conservation Commission to regulate captive wildlife and the authority of home-rule counties to enact uniform land use regulations. Article IV, Section 9 of the Florida Constitution provides for the formation of the Florida Game and Fresh Water Fish Commission. *See City of Miramar v. Bain,* 429 So.2d 40, 42 (Fla. 4th DCA 1983). The Commission has exclusive authority to enact rules and regulations governing wildlife. *Id.* The Commission issues rules that regulate conduct falling within its authority. *Id.* Under Florida law, a legislative enactment or municipal ordinance must give way to a rule promulgated by the Commission if the enactment or ordinance is in conflict with the rule. *Id.* (citing *Whitehead v. Rogers,* 223 So.2d 330 (Fla.1969)).

***7** With this in mind, the Court understands one of the Foleys' complaints to be that three Code provisions [6] that regulate where "exotic birds" may be raised commercially in Orange County conflict with the rules promulgated by the Commission, which regard the possession, exhibition, and sale of captive wildlife and the regulation captive wildlife facilities. The Foleys contend that the aviculture regulations are invalid and therefore cannot be used by Orange County to prevent them from selling the toucans that they raise at their residence.

Upon consideration, the Court notes that it is possible for a plaintiff to bring such a claim under 42 U.S.C. § 1983 as an as-applied takings claim. [7] As-applied challenges to land use regulations are more properly understood to be takings claims, not substantive due process claims. *See Villas of Lake Jackson, Ltd. v. Leon Cnty.,* 121 F.3d 610, 613 (11th Cir.1997); *Bickerstaff Clay Prods. Co. v. Harris Cnty.,* 89 F.3d 1481, 1490–91 (11th Cir.1996). Here, the aviculture regulations appear on their face to be directed at the regulation of captive wildlife. Accordingly, they would appear to conflict with the Commission's rules regulating the possession, exhibition, and sale of captive wildlife. [8] The application of an invalid land use regulation may form the basis of a regulatory takings claim. Thus, it is possible that the Foleys could state a regulatory takings claim against Orange County. [9]

Third, it would be helpful to the Court if Plaintiffs set forth their claims in the Amended Complaint against Orange

County in separate counts. Each count should indicate the nature of the claim being asserted for example, by setting out the elements of the claim-and allege "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Iqbal,* 556 U.S. at 678 (quoting *Twombly,* 550 U.S. at 570). For example, with regard to the as-applied takings claim discussed above, the Foleys need only identify the aviculture regulations, the conflicting state rules, the fact that the conflict renders the aviculture regulations invalid and unenforceable, and those facts showing that the county applied the aviculture regulations to the Foleys' residence. Each count should similarly set forth the elements of *one* substantive claim and sufficient factual matter in support of that claim. [10]

Fourth, there is no need to set out a separate count for punitive damages. Punitive damages are a form of relief, not a freestanding cause of action. Such a claim for damages must be linked to a substantive claim for relief. Further, in *City of Newport v. Fact Concerts, Inc.,* 453 U.S. 247, 271, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981), the Court held that a municipality is immune from punitive damages under Section 1983. Thus, the Amended Complaint should not seek to recover punitive damages for any claim under Section 1983. Plaintiffs may seek punitive damages, however, if they assert a substantive claim that forms a basis for such relief.

***8** Fifth, Counts I, II, and III purport to raise claims under the Declaratory Judgment Act. That statute, however, does not provide an independent cause of action or theory of recovery. *See* 28 U.S.C. §§ 2201–02; *see also Cok v. Forte,* 877 F.Supp. 797, 802 (D.R.I.1995) (explaining that the Declaratory Judgment Act "simply provides a remedy for disputes already within the realm of federal jurisdiction"). The Act merely provides the Court with the authority to resolve the disputes brought before it. Plaintiffs must still identify a substantive basis for their claims.

Sixth, the parties appear to agree that some disputes raised in the Amended Complaint are no longer an issue in this case. For instance, the Court construes at least one of the Foleys' claims to be based on Orange County's refusal to issue a building permit for the enclosures at the residence. However, at the hearing held in this case on November 8, 2012, the parties suggested that the permits were subsequently issued and the enclosures built. If that is the case, then it would appear that any claim based on Orange County's refusal to issue a permit would be moot. Moot claims do not raise active "cases or controversies," which are the only type of claims that this Court may decide. Thus, the Amended Complaint should include only those claims in which the parties have an active controversy.

CONCLUSION

Accordingly, it is **ORDERED AND ADJUDGED** as follows:

1. Defendants' Dispositive Motion to Dismiss the Amended Complaint with Prejudice or, Alternatively, Motion for Summary Judgment (Doc. 93) is **GRANTED IN PART and DENIED IN PART.** The Amended Complaint (Doc. 85) is **STRICKEN.** The claims brought against Defendants Fred Brummer, Richard Crotty, Teresa Jacobs, Linda Stewart, Bill Segal, and Tiffany Russel, Frank Detoma, Asima Azam, Roderick Love, Scott Richman, Joe Roberts, and Marcus Robinson, Tim Boldig, Mitch Gordon, Tara Gould, Carol Hossfield, Rocco Retini, and Phil Smith are **DISMISSED WITH PREJUDICE.** The claims brought against Orange County are **DISMISSED WITHOUT PREJUDICE.** Plaintiffs shall file a second amended complaint that is consistent with this Order on or before January 4, 2013. Orange County shall answer on or before January 25, 2013.

2. Plaintiffs' Cross–Motion for Partial Summary Judgment on Causes I, II & III (Doc. 100) is **DENIED WITHOUT PREJUDICE.**

3. Plaintiffs' Motion to Strike (Doc. 115) is **DENIED.**

4. Plaintiffs' Rule 60 Motion for Relief (Doc. 146) and Amended Rule 60 Motion for Relief (Doc. 149) are **DENIED.**

5. Discovery in this action is **STAYED** until such a time as the pleadings are closed. The Magistrate Judge may, in her discretion, adjudicate the pending discovery motions or hold their consideration in abeyance until discovery resumes.

6. The Court finds good cause to amend the Case Management and Scheduling Order (Doc. 83) as follows.

This case is hereby referred the Honorable David A. Baker for a mediation conference. The mediation conference shall be conducted on or before **February 15, 2013.** The parties shall contact Magistrate Judge Baker's office to schedule a mutually agreeable time.

***9 DONE AND ORDERED.**

All Citations

Not Reported in F.Supp.2d, 2012 WL 6021459

Footnotes

1 The facts presented in this Order are derived from the allegations of the Amended Complaint. These facts are included only to provide context and should not be construed as findings of fact.

2 Commercial aviaries may operate in an agricultural district so long as the landowner applies for and is granted a special exception to the zoning ordinance. OCC §§ 38–77, 38–78, 38–79(48).

3 The Individual Defendants are members of the Orange County Board of Commissioners (Fred Brummer, Richard Crotty, Teresa Jacobs, Linda Stewart, Bill Segal, and Tiffany Russel), members of the county Board of Zoning Adjustment (Frank Detoma, Asima Azam, Roderick Love, Scott Richman, Joe Roberts, and Marcus Robinson), and county employees (Tim Boldig, Mitch Gordon, Tara Gould, Carol Hossfield, Rocco Retini, and Phil Smith). The Court will sometimes refer to these defendants respectively as “commissioners,” “board members,” and “county employees.”

4 In Count I of their Amended Complaint, the Foleys ask for a declaratory judgment that certain provisions of the Orange County Code relating to the regulation of commercial aviculture (the “aviculture regulations”) violate state and federal law as applied to the Foleys' use of the Christmas Property. Count II of the Amended Complaint seeks a declaratory judgment that the aviculture regulations violate state and federal law as applied to the Foleys' use of their residence. Count III seeks to enjoin the enforcement of the aviculture regulations under 22 U.S.C. § 2202.

In Count IV, the Foleys bring a claim pursuant to 42 U.S.C. § 1983 against all Defendants for damages and injunctive relief for violations of their substantive due process and equal protection rights. Count V sets forth a claim pursuant to Section 1983 for violating the Foleys' “court access rights.” In Count VI, the Foleys seek damages under Section 1983 for the unlawful seizure of funds they used to pay certain fees in the course of obtaining a decision in the zoning proceedings. In Count VII, the Foleys seek damages under Section 1983 for the effect the aviculture regulations had on their commercial speech. In Count VIII, the Foleys bring a Section 1983 claim under the Fifth Amendment's Takings Clause for the economic loss they suffered.

In Count IX, the Foleys bring a claim under 42 U.S.C. § 1985(3), alleging that the Defendants conspired to deprive them of equal protection of the law. The Foleys claim that the Defendants violated 18 U.S.C. § 1964(a) in Counts X through XVI. The Foleys claim that the Defendants violated Section 772.104(1) of the Florida Statutes in Counts XVII through XXII of the Amended Complaint. In Counts XXIII, XXIV, and XXV, the Foleys assert that Defendants violated Section 772.11 of the Florida Statutes. Lastly, in Count XXVI, the Foleys seek punitive damages under Section 768.72 of the Florida Statutes.

5 The Court has considered whether it should equitably toll the limitations period and concludes that equity should not be used to preserve the federal claims raised in this case. The only circumstances present in this case that may support the tolling of the limitations period are the Foleys' request to the state court to review the code enforcement and zoning decisions. State court administrative proceedings do not, however, form a sufficient basis to invoke the power of equity. Federal law is clear that a plaintiff need not exhaust state administrative remedies before bringing such claims in federal court. *See, e.g., Fetner v. City of Roanoke,* 813 F.2d 1183, 1185 (11th Cir.1987) (“The Supreme Court repeatedly has made clear that the right to bring an action under § 1983 need not depend on the exhaustion of state judicial or administrative procedures.”).

6 The Foleys challenge Section 38–1 of the Orange County Code to the extent it defines “aviculture (commercial),” Section 38–77 as it relates to “commercial aviculture,” and Section 38–79(48), which provides for conditions relating to the issuance of special exceptions to the county land use table. In this Order, the Court refers to these portions of the Code as the “aviculture regulations .”

7 Section 1983 provides every person with the right to sue those acting under color of state law for violations of federal constitutional and statutory provisions. *See* 42 U.S.C. § 1983. Section 1983 is merely a vehicle by which to bring these suits; it does not create any substantive federal rights. Thus, every Section 1983 claim must identify the federal constitutional or statutory provision that is alleged to have been violated by the defendant.

To prevail on a claim under Section 1983, a plaintiff must demonstrate both (1) that the defendant deprived him of a right secured under the federal Constitution or federal law and (2) that such a deprivation occurred under color of state law. *Arrington v. Cobb Cnty.,* 139 F.3d 865, 872 (11th Cir.1998). In doing so, a plaintiff must also show "an affirmative causal connection between the official's acts or omissions and the alleged constitutional deprivation." *Swint v. City of Wadley,* 51 F.3d 988, 999 (11th Cir.1995).

8 In view of the state of the pleadings, the Court will not decide at this point whether an actual conflict exists such that the aviculture regulations are invalid. The Court will also not consider the ripeness of such a claim because it is not clear what additional claims are being brought against the County. *See, e.g., Eide v. Sarasota Cnty.,* 908 F.2d 716, 720 (11th Cir.1990) (holding that for a takings claim to be ripe, a plaintiff must demonstrate that he unsuccessfully "pursued the available state procedures to obtain just compensation" before bringing his federal claim).

9 The Foleys may be able to bring other claims as well. However, the state of pleadings makes it impossible for the Court to determine the precise nature of all of the Foley's claims.

10 A claim for the denial of equal protection, for example, must allege facts from which the Court can infer that (1) a plaintiff was treated differently than similarly-situated persons, and (2) a defendant did not apply evenly a facially neutral statute for the purpose of discriminating against the plaintiff. *See, e.g., Crystal Dunes Owners Ass'n Inc. v. City of Destin,* 476 F. App'x 180, 185 (11th Cir.2012).

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2013 WL 4110414
Only the Westlaw citation is currently available.
United States District Court,
M.D. Florida.

David W. FOLEY, Jr.; and
Jennifer T. Foley, Plaintiffs,
v.
ORANGE COUNTY, Defendant.

No. 6:12–cv–269–Orl–37KRS.
|
Aug. 13, 2013.

Attorneys and Law Firms

David W. Foley, Jr., Orlando, FL, pro se.

Jennifer T. Foley, Orlando, FL, pro se.

Linda Brehmer Lanosa, Orlando, FL, for Defendant.

ORDER

ROY B. DALTON JR., District Judge.

***1** This cause is before the Court on the following:

1. Defendant Orange County's Motion to Dismiss (Doc. 175), filed January 31, 2013;

2. Plaintiffs' Response to County's Motion to Dismiss (Doc. 182), filed February 14, 2013;

3. Defendant Orange County's Dispositive Motion for Final Summary Judgment (Doc. 261), filed June 14, 2013;

4. Plaintiffs' Motion for Summary Judgment (Doc. 269), filed June 14, 2013;

5. Plaintiffs' Response to Defendant Orange County's Motion for Summary Judgment (Doc. 277), filed June 28, 2013;

6. Defendant Orange County's Response in Opposition to Plaintiffs' Motion for Summary Judgment (Doc. 282), filed July 15, 2013;

7. Plaintiffs' Supplemental Response in Opposition to Orange County's Motion for Summary Judgment (Doc. 285), filed July 22, 2013;

8. Plaintiff's Reply to Defendant Orange County's Response in Opposition to Plaintiffs' Motion for Summary Judgment (Doc. 286), filed July 31, 2013;

9. Defendant Orange County's Reply in Support of Summary Judgment (Doc. 287), filed August 5, 2013.

BACKGROUND

Plaintiffs are residents of Orange County, Florida, who own and raise toucans. (Decl.¶¶ 10, 20.)[1] They bring several claims against Orange County based on their efforts to operate a commercial aviary out of their residence, which is located in a residential-only zoned area of the county, and another parcel of property that is located in rural-use zoned area of the county. (*Id.* ¶¶ 12–19.) Plaintiffs contend, writ large, that portions of Orange County's land use ordinances, which prohibit the operation of a commercial aviary at the residence altogether and at the second property absent a special use permit, conflict with a provision of the Florida Constitution that provides the Florida Fish and Wildlife Commission with all of the "regulatory and executive powers of the state with respect to wild animal life and fresh water aquatic life." Art. IV, § 9, Fla. Const.

The dispute arose after Orange County received a citizen's complaint regarding Plaintiffs' business. (Decl.¶ 39.) County code enforcement officers investigated the complaint and cited Plaintiffs for building accessory buildings at their residence without the necessary permits. (*Id.* ¶¶ 41, 51.) During the pendency of the ensuing code enforcement proceedings, Plaintiffs requested the county zoning manager provide them with an official determination as to whether they were authorized to operate a commercial aviary at their residence. (*Id.* ¶ 69.) The manager determined that the operation of a commercial aviary at the residence was not authorized as a primary or secondary use under Orange County's land use ordinances, and he determined further that a commercial

aviary was not an authorized home occupation. (Doc. 163, Ex. 10.) Plaintiffs appealed the manager's determination to the board of zoning adjustment and then the board of county commissioners, but failed to convince either body to overturn the manager's interpretation of the ordinances. (Decl.¶ ¶ 83, 98, 101, 121.) Plaintiffs filed actions in state court for reviews of the code enforcement proceedings and the determination proceedings; however, in both cases, the courts determined that Orange County did not err. (*Id.* ¶¶ 123–124.) Plaintiff then filed this action.

***2** Plaintiffs' initial 67–page complaint brought numerous federal and state claims against Defendant Orange County and a number of individual defendants. Plaintiffs sought, and were granted leave to amend their initial complaint. (Doc. 88.) They filed a 92–page Amended Complaint on May 14, 2012, which once again brought numerous federal and state claims against Defendant Orange County and a number of individual defendants. (Doc. 85.) The Court dismissed all claims in Plaintiff's amended complaint and struck it as improper on December 4, 2012. (Doc. 150.) The Court dismissed the claims against all of the individual defendants with prejudice, and dismissed without prejudice those brought against Orange County. (*Id.*) The Court directed Plaintiffs to file a Second Amended Complaint that set forth only claims against Orange County. (*Id.*)

The Second Amended Complaint—like its predecessors—is verbose, filled with irrelevant discussions of legal issues, and attempts to bring federal and state claims against Defendant Orange County and a number of individual defendants. (Doc. 162.) While the Second Amended Complaint sets forth its federal and state law claims in just 39 pages, it also incorporates by reference three appendices totaling over 200 pages of material. Such incorporation by reference violates Local Rule 4.01. Rather than dismissing the complaint yet again, the Court will treat the declaration that is part of Appendix B (Doc. 164, Exhibit 14) as setting forth Plaintiffs' allegations of fact.

The Court construes the Second Amended Complaint as presenting a state-law claim that seeks a declaration that portions of Orange County's land use ordinances are void. [2] The Court also construes the Second Amended Complaint as raising five federal claims. The first federal claim is a substantive due process challenge to Orange County's land use ordinances. [3] Plaintiffs' second federal claim is a "class of one" equal protection claim. Their third federal claim is one for "compelled speech" in violation of the First Amendment, and their fourth federal claim alleges Orange County's ordinances act as prior restraints to Plaintiffs' commercial speech rights. Plaintiffs' final federal claim is that Orange County's land use proceedings are searches and seizures that violate Plaintiffs' Fourth Amendment rights. [4]

The parties have conducted discovery and filed cross motions for summary judgment. These motions are now ripe for adjudication. The relevant facts are not disputed. [5]

STANDARDS

Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a). A genuine dispute of material fact exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). To defeat a motion for summary judgment, the nonmoving party must "go beyond the pleadings, and present affirmative evidence to show that a genuine issue of material fact exists." *Porter v. Ray,* 461 F.3d 1315, 1320 (11th Cir.2006). The Court must "draw all justifiable inferences in favor of the nonmoving party, including questions of credibility and of the weight to be accorded particular evidence." *Masson v. New Yorker Magazine, Inc.,* 501 U.S. 496, 520, 111 S.Ct. 2419, 115 L.Ed.2d 447 (1991).

***3** "Cross motions for summary judgment do not change the standard." *Perez–Santiago v. Volusia Cnty.,* No. 6:08–cv–1868–Orl–28KRS, 2010 WL 917872, at *2 (M.D.Fla. Mar.11, 2010) (quoting *Latin Am. Music Co. v. Archdiocese of San Juan of the Roman Catholic & Apostolic Church,* 499 F.3d 32, 38 (1st Cir.2007)) (internal quotation marks omitted); *see also Taft Broadcasting Co. v. United States,* 929 F.2d 240, 248 (6th Cir.1991). "Cross motions for summary judgment are to be treated separately; the denial of one does not require the grant of another." *Santiago,* 2010 WL 917872 at *2 (citations and internal quotation marks omitted). When considering cross-motions for summary judgment, the Court must "consider and rule upon each party's motion separately

and determine whether summary judgment is appropriate as to each under the Rule 56 standard." *Monumental Paving3 & Excavating, Inc. v. Pa. Mfrs.' Ass'n Ins.11 Co.,* 176 F.3d 794, 797 (4th Cir.1999) (citations omitted).

DISCUSSION

Plaintiffs' core dispute with Orange County—that the county has no authority to regulate their toucan breeding business—is encapsulated in their state-law claim. The Court will therefore discuss that claim first. The Court then addresses the merits of Plaintiffs' federal claims.

I. State Law Claims

The Court construes Plaintiffs' Second Amended Complaint as seeking a declaration that certain portions of Orange County's land use ordinances are void under Florida law. To address this claim, the Court must first review the county's land use ordinances and then describe in detail the ordinances challenged by Plaintiffs. The Court then reviews Florida's legislative and regulatory scheme for the possession and sale of captive wildlife. The parties dispute how these two regulatory schemes interact.

A. Orange County's Land Use Ordinances

Orange County is a charter county that possesses in accordance with Article 8, section 1(g) of the Florida Constitution, "all powers of local self-government not inconsistent with general law, or with special law approved by vote of the electors." As such, it "may enact county ordinances not inconsistent with general law." *Seminole Cty. v. City of Winter Springs,* 935 So.2d 521, 523 (Fla. 5th DCA 2006). This is a direct constitutional grant of broad powers of self-government. *Id.* It is pursuant to this constitutional delegation of the state's police power that Orange County enacted a comprehensive set of land use regulations. *See* Fla. Stat. § 125.66.

Orange County divides the land within its boundaries into land use districts. Ch. 38, Art. IV, § 38–71, Orange County Code ("OCC"). These districts are designated, among other things, for commercial use, agricultural use, and residential use. *Id.* § 38–77. The ordinances identify land uses—those that are permitted, those that are prohibited, and those that may be allowed if a special exception is granted by the county—by reference to a use table. *Id.* §§ 38–74, 38–77. The use table's rows and columns denote different land use districts and land uses. *Id.*

***4** Plaintiffs' residence is located in the R–1A zone, which is "intended to be single-family residential areas with large lots and low population densities" Ch. 38, Art. VI, § 38–301, OCC. The county's ordinances permit Plaintiffs to use their residence for only those categories of land uses that are designated *P* in the land use table and, if they apply for and are granted a special exception, those categories of land uses designated *S. Id.* § 38–302, 38–303. If the table contains a number, then another section of the zoning ordinances imposes certain conditions with which a property owner must comply in order to engage in that land use. *Id.* § 38–79. If the land use table is blank for a particular land use category, then that use is prohibited in that district. *Id.* § 38–304. The ordinances define some of the categories listed in the land use table. The land use table designates "commercial aviculture, aviaries" as a category of land use. An aviary is defined as "an enclosure for holding birds, excluding poultry, in confinement." Ch. 38, Art. I., § 38–1, OCC. *"Aviculture (commercial)"* is defined as "the raising, breeding and/or selling of exotic birds, excluding poultry, for commercial purposes." *Id.* The definition also directs that a commercial purpose is present if any one of the following conditions are satisfied:

(1) The operation exists with the intent and for the purpose of financial gain;

(2) Statements of income or deductions relating to the operation are included with routine income tax reporting to the Internal Revenue Service;

(3) A state sales tax identification number is used to obtain feed, supplies or birds;

(4) An occupational license has been obtained for the operation;

(5) Sales are conducted at the subject location;

(6) The operation involves birds or supplies which were purchased or traded for the purpose of resale;

(7) The operation involves a flea market or commercial auction, excluding auctions conducted by not-for-profit private clubs;

(8) The operation or activities related thereto are advertised, including, but not limited to, newspaper advertisements or signs; or

(9) The operation has directly or indirectly created traffic.

Id. The ordinances define poultry as "domestic fowl such as chickens, roosters, turkeys, ducks, geese, pigeons, etc." *Id.* No definition is supplied for non-commercial aviculture, nor is any such category listed in the land use table. *Id.* The land use table designates instead the "breeding, keeping, and raising of exotic animals" as another category of land use. Ch. 38, Art. IV, § 38–78, OCC. This category is left undefined. The land use table is blank in reference to an R–1A district for the "commercial aviculture, aviaries" and "breeding, keeping, and raising of exotic animals" categories. *Id.* Land uses falling within these categories are therefore prohibited. Ch. 38, Art. VI, § 38–304, OCC.

B. The Possession and Sale of Captive Wildlife in Florida

***5** All wildlife in Florida is controlled and regulated by a state agency called the Florida Fish and Wildlife Conservation Commission. The commission was created by the Florida Constitution and given "the regulatory and executive powers of the state with respect to wild animal life and fresh water aquatic life," Art. IV, § 9, Fla. Const.

The current incarnation of the commission was formed after voters adopted a proposal of the 1998 Constitutional Revision Commission to merge the former Game and Fresh Water Fish Commission "GAME Commission"), which was a constitutional agency, and the Marine Fisheries Commission, which was an agency created by statute. *Caribbean Conservation Corp. v. Florida Fish & Wildlife Conservation Comm'n,* 838 So.2d 492, 497–99 (Fla.2003). While the Game Commission was created in 1942, it did not have the power to regulate captive wildlife until the Florida Constitution was revised in the late 1960s. *Compare Barrow v. Holland,* 125 So.2d 749, 751 (Fla.1960) (concluding that Art. IV, § 30 of the Florida Constitution of 1885, which authorizes the creation of the Game Commission, did not provide the commission with the power to regulate captive wildlife) *with* Art. IV, § 9, Fla. Const. (authorizing the Game Commission to carry out "the regulatory and executive powers of the state with respect to wild animal life and fresh water aquatic life.").

The commission has exercised the powers given to it by promulgating rules regulating the possession and sale of captive wildlife, which are found in chapter 68A of the *Florida Administrative Code.* Rule 68A–1.002 of the Code declares that "[a]ll wild animal life within the jurisdiction of the State of Florida, whether such wild animal life is privately owned or otherwise, is subject to the regulation of the Commission." The regulations require all persons, except in limited circumstances not relevant here, to obtain a permit from the commission in order to lawfully "possess any native or nonnative wildlife in captivity." Fla. Admin. Code R. 68A–6.0011.

Such permits are issued in three classes. A class I permit is required to possess animals such as lions, tigers, and bears. *Id.* 68A–6.002(1)(a), 68A–6.0022(1). A class II permit is required to possess animals such as monkeys, the smaller members of taxonomic family *Felidae,* and some members of the family *Canidae. Id.* 68A6.002(1)(b), 68A–0022(1). If a category of wildlife is not listed as class I or class II, and it is not identified as an enumerated exception, then a person must obtain a class III permit to possess and sell the animals. *Id.* 68A–6.002(1)(c), 68A–6.0022. Permits issued by the commission are labeled as "Licenses to Sell or Exhibit" and specifically identify the animals that the licensee is authorized to possess. (*See, e.g .,* Doc. 264–1.)

The commission requires persons possessing wildlife to obtain documentation regarding the source and supplier of every animal, as well as document the birth, death, and sale of every animal. *Id.; see also id.* 68A–6.006. A permit holder is obligated under the Code to maintain these records, make them available upon request, and allow the inspection of the facility housing the wildlife. *Id .* 68A–4.006. The commission specifically requires any person engaged in the business of breeding exotic birds to obtain a permit from the commission. [6] *Id.* 68A–6.006(1).

***6** The commission has forbidden the possession of class I wildlife for personal use, *id.* 68A–6.0021(1), which the Court construes to mean wildlife maintained in captivity as a personal pet, *see id .* 68A–1.004(55) (defining the term "personal pet"). Indeed, the commission presumes that "the possession of wildlife ... is commercial in nature," and (unless one qualifies as a "hobbyist possessor" of class III wildlife) requires every permit holder to "demonstrate consistent and sustained commercial activity in the form

of exhibition or sale" of the wildlife the holder is authorized to possess. *Id.* 68A–6.0024(1).

The commission also regulates the size and composition of the facility that must be used to house captive wildlife. *Id.* 68A–6 .0023; *see also id.* 68A–6.003–68A–6.004. The rules specifically regulate the size and construction of cages for exotic birds. *Id.* 68A–6.004(4)(r). The commission also considers, prior to issuance of a permit, the location and character of the property where captive wildlife will be housed. The way in which the commission has done so has changed over the years, however. Prior to 2008, the commission required applicants for class I and class II permits to show that the wildlife would be kept in "appropriate neighborhoods," which is also the term used in the commission's enabling statute. [7] *See id.* 68A–6.0022(5)(b) (2000); Fla. Stat. § 379.303(1) (2012). In 2008, the commission modified Rule 68A–6.003 entitled "Facility and Structural Caging Requirements of Class I, II and III Wildlife" to include certain requirements for properties housing captive wildlife. Among other things, this rule required applicants seeking permits for class I and class II wildlife to demonstrate the required cages and enclosures were not prohibited by any county or municipal ordinance. Fla. Admin. Code R. 68A–6.003(2) (2008). The rule also specifically prohibited certain class I wildlife from being housed on "property within an area zoned solely for residential use." *Id.* 68A–6.003(2)(c) (2008).

The current version of Rule 68A–6.003 requires facilities for the housing of Class I and Class II wildlife to meet certain ownership requirements, be of a certain size, contain an appropriate buffer zone, and be enclosed by a perimeter fence. *Id.* 68A6.003(2) (2010). While the commission has imposed additional requirements for facilities housing class III mammals, it does not impose any additional requirements for facilities housing class III birds. *Id.* 68A–6.003(2) (2010). Further, and in contrast to the requirements imposed on class I and class II wildlife in the past, the rule does not require applicants to show that the required cages and enclosures would not be prohibited by a county of municipal ordinance. *Id.* In place of such a requirement, the rule directs the commission's staff to provide notice of a permit application to the county or municipality in which a proposed Class I or Class II wildlife facility is located. [8] *Id.* Under the commission's rules, once it issues by a permit, the licensee is authorized to possess wildlife at the location identified in the permit. *Id.* 68A–6.0022(1).

C. Intersection of the Regulation of Land Use and Captive Wildlife

***7** Plaintiffs' main legal theory is that the portions of Orange County's zoning ordinances that regulate commercial aviculture conflict with the Florida Constitution's grant of regulatory and executive authority over captive wildlife to the Fish and Wildlife Conservation Commission. Orange County, in contrast, casts this as a question of preemption. That is not the correct legal analysis, however. Under the correct analysis, the Court must ask first whether the commission is provided with constitutional authority over the subject matter of the challenged ordinance. If it is, then the ordinance is invalid. If not, then the Court must determine whether the scope of the statute is limited to subjects that fall outside of the commission's constitutional authority.

In *Whitehead v. Rogers,* 223 So.2d 330 (Fla.1968), the Supreme Court of Florida considered a conflict between the constitutional grant of power given to the Game Commission by the Florida Constitution of 1885 to regulate hunting seasons and a state statute of general application. A hunter was arrested for violating a statute that prohibited the discharge of firearms on Sundays. *Id.* at 331. The hunter possessed a valid hunting license issued by the Game Commission that authorized the licensee to hunt from a certain date to a certain date. *Id.* 330. One of the authorized dates was a Sunday. *Id.* Because the state legislature could enact only "laws in aid of, but not inconsistent with," the Game Commission's constitutional grant of authority, the court reasoned that the statute was void to the extent it prohibited an activity that was expressly authorized by the Game Commission. *Id.* at 330–31.

In *Askew v. Game and Fresh Water Fish Commission,* 336 So.2d 556 (Fla.1976), the Court was asked to void statutes which purported to allow a state agency to introduce non-native fresh water fish into Florida's waters without first obtaining a permit from the Game Commission. In reaching its decision, the court first construed the Game Commission's constitutional grant of authority, which provided that the "commission shall exercise the nonjudicial powers of the state with respect to wild animal life and fresh water aquatic life." *Id.* at 559 (construing Art. IV, § 9 of the Florida Constitution of 1968). The

court noted that, "standing alone,.... Article IV, Section 9 of the Florida Constitution would require that the challenged statutes be held unconstitutional." *Id.* at 560. Nevertheless, the court noted that another constitutional provision provided the legislature with the power protect the state's natural resources. *Id.* Reasoning that the constitution should be read as a whole and that each of its parts should be given meaning, the court concluded that the challenged statutes were a valid exercise of legislative authority granted by the second constitutional provision. *Id.*

The scope of authority granted to the Game Commission was challenged again in *Airboat Association of Florida, Inc. v. Florida Game and Fresh Water Fish Commission,* 498 So.2d 629 (Fla.1986). In that case, the Game Commission had promulgated rules that restricted the use of dogs and all-terrain vehicles for hunting wildlife in the Big Cypress Wildlife Management Area. *Id.* at 630. The petitioners challenged the rules under the state administrative procedure act; however, the court noted that the Game Commission, as a constitutional body, was not an agency within the meaning of the administrative procedure act. *Id.* at 631. The court also noted that the rules promulgated by the Game Commission were not rules but rather were "in the nature of legislative acts." *Id.* at 632.

***8** Most recently, the Supreme Court of Florida construed the scope of the current commission's authority over all marine wildlife in *Caribbean Conservation Corp. v. Florida Fish & Wildlife Conservation Comm'n,* 838 So.2d 492, 497–99 (Fla.2003). In that case, a conservation group challenged certain statutes that purportedly usurped the commission's constitutional authority. *Id* . at 494. The court explained that, to determine whether a challenged statute is constitutional, a court must first determine whether the Florida Constitution provides the commission with constitutional authority over the subject matter of the statute. *Id.* at 500–01. If not, then the court should consider whether the scope of the statute is limited to subjects that fall outside of the commission's constitutional authority. *Id.* Using this framework, the court looked to the language used in the Florida Constitution and construed it "consistent with the intent of the framers and the voters." *Id.* at 501. The court also endeavored to read multiple constitutional provisions *in pari materia* to ensure that each is given a consistent and logical meaning. *Id.*

In sum, 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,* 154 Fla. 663, 18 So.2d 892, 900 (Fla.1944). The effect of the transfer of that portion of the state's legislative power was to divest the state legislature of authority to regulate the possession and sale of captive wildlife, *Beck v. Game and Fresh Water Fish Commission,* 160 Fla. 1, 33 So.2d 594, 595 (Fla.1948), and vest that power in the commission, *State ex rel. Griffin v. Sullivan,* 158 Fla. 870, 30 So.2d 919, 920 (Fla.1947). [9] The commission therefore assumed the regulatory authority that the legislature had prior to the transfer. *Caribbean Conservation,* 838 So.2d at 497. As such, the rules adopted by the commission are tantamount to legislative acts, *Airboat Ass'n of Florida, Inc.,* 498 So.2d at 630, and become the governing law of the state, *Griffin,* 30 So.2d at 920. Any and all laws in conflict with the commission's rules are consequently void. *Whitehead,* 223 So.2d at 330–31.

Applying these principles, the Court concludes that Orange County cannot use its land use ordinances to regulate the possession or sale of captive wildlife. Those ordinances specifically seek to prohibit the use of Plaintiffs' residence for "commercial aviculture, aviaries" and the "breeding, keeping, and raising of exotic animals." Ch. 38, Art. IV, § 38–78, OCC; *Id.* Art. VI, § 38–304, OCC. [10] Those land uses specifically target activities that fall within the exclusive authority of the commission, [11] whose rules on the topic are the governing law of the state. Orange County's prohibitions against land uses such as "commercial aviculture, aviaries" and "breeding, keeping, and raising of exotic animals" are in direct conflict with the commission's rules, which impose an obligation on the breeders of exotic birds to maintain a commercial enterprise. For this reason, Orange County's ordinances, to the extent that they regulate captive wildlife, and more specifically commercial aviculture, are inconsistent with general law and are therefore void. [12] *See, e.g., Grant,* 935 So.2d at 523 (holding a charter county in Florida may only "enact county ordinances not inconsistent with general law").

***9** Even if the Court were to accept Orange County's characterization of its ordinances as generally applicable —which it does not because the ordinances are not

crafted in that way—Orange County still could not enforce its ordinances banning commercial aviculture against Plaintiffs. *See Whitehead,* 223 So.2d at 330–31. In *Whitehead,* 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.*

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For these reasons, the Court concludes that Plaintiffs are entitled to summary judgment on their state law declaratory judgment claims that Orange County's ordinances are void.

II. Plaintiffs' Federal Claims

The Court construes the amended complaint as bringing five federal claims, each of which is discussed below.

A. Due Process

The Due Process Clause of the Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The Supreme Court has interpreted this clause to provide for two different kinds of constitutional protection: substantive due process and procedural due process. *McKinney v. Pate,* 20 F.3d 1550, 1555 (11th Cir.1994) (en banc). Plaintiffs bring only substantive due process claims, which this Court must carefully analyze to determine the nature of the rights of which Plaintiffs have been deprived. *DeKalb Stone, Inc. v. County of DeKalb,* 106 F.3d 956, 959 (11th Cir.1997).

Plaintiffs assert two possible bases for their claims. [13] They contend first that Orange County's zoning ordinances are *ultra vires* and, therefore, are arbitrary and irrational. (Doc. 162, ¶ 57.) Plaintiffs also contend that Orange County's decision to uphold the zoning manager's determinations that a commercial aviary is not a permissible use of a residential-only zoned property, and that a commercial aviculture operation also cannot be a home occupation are substantive due process violations. (*Id.* ¶ 94.)

In order to address these claims, the Court will first review the law applicable to substantive due process claims. The Court will then apply that law to the two possible bases for Plaintiffs claims to see if they can state a claim under federal law. Then, the Court will discuss whether Plaintiffs' chief complaint—that Orange County's zoning ordinances are *ultra vires*—may state a substantive due process claim.

1. Applicable Law

***10** The substantive component of the Due Process Clause protects those rights that are fundamental—that is, rights that are "implicit in the concept of ordered liberty." *McKinney,* 20 F.3d at 1556. Fundamental rights are those protected by the U.S. Constitution. *Id.* Substantive rights that are created by state law are generally not subject to substantive due process protection. *Id.* Land use regulations like those at issue in this case are state-created rights that are not protected by substantive due process. *Greenbriar Village, L.L.C. v. Mountain Brook,* 345 F.3d 1258, 1262 (11th Cir.2003). There is an exception to this general rule, however. [14]

If a person's state-created rights are infringed by a "legislative act," the substantive component of the Due Process Clause will protect that person from a government's arbitrary and irrational action. *Lewis v. Brown,* 409 F.3d 1271, 1273 (11th Cir.2005). The availability of this type of claim turns on the legislative nature of the government's action. If the action is executive in nature, then violations of state-created rights cannot support a substantive due process claim, even if the plaintiff alleges that the government acted arbitrarily and irrationally. *Greenbriar Village,* 345 F.3d at 1263.

The Eleventh Circuit describes executive acts as those acts that "apply to a limited number of persons (and often only one person)" and which "typically arise from the ministerial or administrative activities of members of the executive branch." *McKinney,* 20 F.3d at 1557 n. 9. An example of an executive act that is not subject to substantive due process is the enforcement of existing zoning regulations. *DeKalb Stone, Inc.,* 106 F.3d at 959. Legislative acts, in contrast, "generally apply to larger

segments of—if not all—society." *Id.* The Eleventh Circuit cites "laws and broad-ranging executive regulations" as common examples of legislative acts. *Id.*

2. Can Plaintiffs State a Claim?

In this case, the first basis for Plaintiffs' substantive due process claim can be construed as a challenge of a legislative act. It is a claim that Orange County has attempted to regulate land use in a manner that it could not under the organic law of Florida. The zoning ordinances challenged by Plaintiffs apply to all the real property located in the county. They are broad-ranging and applicable to a large portion of county residents.

The second basis for Plaintiffs' claim, however, requires closer scrutiny. Plaintiffs challenge Orange County's decision to uphold the determinations of the county zoning manager that a commercial aviary is not an authorized use in the residential zoning category applicable to Plaintiffs' residence, and that operation of a commercial aviary is not an authorized home occupation under the zoning regulations. The chain of events began when Plaintiffs requested an "official determination" from the zoning manager as to whether the operation of a commercial aviary at their residence was permitted by the zoning code. (Decl. ¶¶ 67–69.) The zoning manager concluded that a commercial aviary was not permitted in the residential-only zoned areas. (*Id.*¶ 81.) Plaintiffs appealed to the Board of Zoning Adjustment, which upheld the zoning manager's interpretation of the zoning ordinances. (*Id.*¶¶ 85, 92.) Plaintiffs then appealed part of the board's decision to the Board of County Commissioners. (Decl.¶ 101.)

***11** At bottom, the second factual basis for Plaintiffs' substantive due process claim is a dispute over how Orange County interprets its existing zoning ordinances. Plaintiffs sought to persuade the county that a commercial aviary would be a permissible use of their residentially zoned property or that a home occupation (as that term is used in the zoning ordinances) could encompass the operation of a commercial aviary. They were unsuccessful. The county zoning manager, the country Board of Zoning Adjustments, and the Board of County Commissioners all decided that Plaintiffs' interpretation of the existing zoning ordinances was incorrect. The interpretation of existing laws is not a legislative function; it is an executive act usually intertwined with an enforcement action. [15] While Plaintiffs asked the county directly for an interpretation in this case, the nature of the action is the same—the county was interpreting the existing law. [16] That is an executive act that cannot serve as the basis for a substantive due process claim.

Thus, to the extent Plaintiffs can bring a substantive due process claim, such claim must be based on the contention that the enactment of Orange County's land use ordinances was an arbitrary and irrational legislative act.

3. Do Plaintiffs Support Such a Claim?

As discussed above, the provisions of Orange County's land use ordinances that regulate captive wildlife are void. The ordinances are also unenforceable against the holders of permits issued by the commission that authorize the possession and sale of captive wildlife at a particular facility. These ordinances do not, however, implicate fundamental rights protected by the substantive component of the Due Process Clause. The ordinances implicate only property rights, which are the creature of state law.

Where a person's state-created rights are infringed by a legislative act, the Due Process Clause protects that person from arbitrary and irrational governmental action. *Lewis,* 409 F.3d at 1273. As there is no evidence in the record that enactment of Orange County's land use ordinances targeted a protected class, the Court must apply the rational basis test. *See Schwarz v. Kogan,* 132 F.3d 1387, 1390 (11th Cir.1998) (holding substantive due process claims that do not involve a person's fundamental rights are reviewed under the highly deferential rational basis standard). "In order to survive this minimal scrutiny, the challenged provision need only be rationally related to a legitimate government purpose." *Id.* at 1390–91. The Court must first identify "a legitimate government purpose ... which the enacting government body could have been pursuing." *Bannum, Inc. v. City of Fort Lauderdale,* 157 F.3d 819, 822 (11th Cir.1998) (internal quotations omitted) (emphasis in original). The Court must then determine "whether a rational basis exists for the enacting government body to believe the legislation would further the hypothesized purpose." *Id.* So long as there is a "plausible, arguably legitimate purpose" for the enactment of Orange County's land use ordinances, summary judgment is appropriate unless Plaintiffs can

demonstrate that the county could not possibly have relied on that purpose. *Restigouche, Inc. v. Town of Jupiter,* 59 F.3d 1208, 1214–15 (11th Cir.1995).

***12** Orange County advances a plausible, reasonable, and sound purpose—to promote the health, safety, and welfare of its citizens—to support its land use ordinances. Plaintiffs fail to demonstrate that the county could not possibly have relied on that purpose—indeed, they advance no evidence whatsoever that Orange County was not motivated to protect the health, safety, and welfare of its citizens when the land use ordinances were enacted.

Accordingly, the Court finds it appropriate to grant summary judgment in favor of Orange County and against Plaintiffs on their substantive due process claims. [17]

B. Equal Protection

To prevail on their class of one equal protection claim, Plaintiffs must show evidence that they were intentionally treated differently from others who were "similarly situated" and that there was no rational basis for the difference in treatment. *Grider v. City of Auburn,* 618 F.3d 1240, 1263–64 (11th Cir.2010). A similarly situated comparator must be defined and identified precisely; a plaintiff cannot rely upon "broad generalities" to establish his claim. *Id.*

In this case, Plaintiffs suggest that the proper comparator is commercial businesses that are authorized land uses in residential zoned areas. The Court disagrees. The similarly situated requirement must be rigorously applied in the context of a class of one claim. *Lieb v. Hillsborough Cnty. Public Transp. Comm'n,* 558 F.3d 1307, 1307 (11th Cir.2009). Here, the comparison is not between commercial aviaries and all other businesses. The proper comparator is a person who the county allows to possess and sell captive wildlife from a property that is zoned residential only. Plaintiffs do not identify, and advance no evidence of, any such similarly situated comparator.

Therefore, the Court finds summary judgment is due to be granted in favor of Orange County and against Plaintiffs on their equal protection claims.

C. Compelled Speech

Plaintiffs claim that Orange County's land use special exception requirement and determination procedure violate their rights under the First Amendment. [18] The Court understands this claim to be that, by requiring Plaintiffs to submit to the special exception procedure, the ordinances force Plaintiffs to engage in speech—that is, the engagement of land use proceedings—that they prefer not to participate in. The Court also understands Plaintiffs to claim that they were compelled to request a determination from the zoning manager to challenge the validity of the ordinances. Neither of these arguments can form the basis for a claim under the compelled speech doctrine.

It has long been held that the First Amendment prohibits the government from compelling citizens to express *beliefs* that they do not hold, *see, e.g., West Virginia State Bd. of Ed. v. Barnett,* 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) (holding that school children could not be forced to recite the pledge of allegiance), and prevent the stifling of "speech on account of its message," *Turner Broadcasting Sys., Inc. v. FCC,* 512 U.S. 622, 642, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994). Zoning regulations that are content-neutral are not compelled speech. *See, e.g., Demarest v. City of Leavenworth,* 876 F.Supp.2d 1186, 1197 (E.D.Wash.2012) (concluding zoning restrictions on signage do not compel land owners to engage in speech). Orange County's land use procedures are content-neutral in that they do not direct the content of such speech, nor do they compel any land owner to engage in speech. The special exception requirement is the process that a land owner must engage if he wishes to be authorized to use his property in a particular manner. Likewise, Plaintiffs were not required to seek a determination from the zoning manager to challenge the validity of the ordinances. Plaintiffs fail to state a compelled speech claim.

***13** The Court therefore finds summary judgment is due to be granted in favor of Orange County and against Plaintiffs on their compelled speech claims.

D. Commercial Speech

Plaintiffs also claim that section 38–1 of the Orange County Code is an impermissible prior restraint of their commercial speech rights. Orange County argues that the zoning manager's determination that Plaintiff could not maintain a commercial aviary at their residence did not "censor" Plaintiffs' commercial speech. (*See, e.g.,* Doc. 261, p. 23.) Despite Orange County's failure to squarely

address Plaintiffs' commercial speech claim, [19] the Court must consider whether there is a legal basis for such claim.

The First Amendment, as applied to the States through the Fourteenth Amendment, protects commercial speech from unwarranted governmental regulation. *See, e.g., Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council,* 425 U.S. 748, 761–62, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976). Commercial speech, however, "enjoys a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, and is subject to modes of regulation that might be impermissible in the realm of noncommercial speech." *Florida Bar v. Went For It, Inc.,* 515 U.S. 618, 623, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995). Indeed, the seminal case in this area, *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York,* 447 U.S. 557, 571 n. 13, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), observed "that commercial speech is such a sturdy brand of expression that traditional prior restraint doctrine may not apply to it."

The Court need not reach that far, however, because it concludes that section 38–1 of the Orange County Code does not regulate commercial speech. That provision of the Code contains the definition that Orange County uses to determine when real property is being used for the purposes of commercial aviculture. It is this activity that is regulated by the Code, not commercial speech. As a result the First Amendment is not implicated. *See ABC Home Furnishings, Inc. v. Town of E. Hampton,* 947 F.Supp. 635, 643 (E.D.N.Y.1996) (holding that a town's revocation of an event permit did not give rise to a commercial free speech claim because, while the town did receive complaints about the event advertising, the town's revocation was an effort to regulate the event, "i.e., the activity underlying the speech, not the speech itself"); *see also Jim Gall Auctioneers, Inc. v. City of Coral Gables,* 210 F.3d 1331, 1333 (11 th Cir.2000) (noting that the "right to hold an auction" is arguably not protected commercial speech). Plaintiffs fail to state a commercial speech claim.

Therefore, the Court finds summary judgment is due to be granted in favor of Orange County and against Plaintiffs on their commercial speech claims.

E. Search and Seizure

Lastly, Plaintiffs claim that they were subjected to an unreasonable search and seizure that violated their rights under the Fourth Amendment. They contend that the special exception requirement subjects them to "search by public hearing" and the "seizure of fees." They also contend that the county's zoning determination procedure is an unreasonable search and seizure.

***14** First, Plaintiffs cannot establish that the hearing procedures for a special exception and a zoning determination are protected by the Fourth Amendment. Plaintiffs have no expectation of privacy in relation to such hearings. Indeed, "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz v. United States,* 389 U.S. 347, 351, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). Plaintiffs knowing and voluntary engagement of these proceedings take them outside the protections of the Fourth Amendment.

Second, the voluntary payment of governmental fees is not subject to protection under the Fourth Amendment. *See, e.g., Fox v. District of Columbia,* No. 10–2118, 2013 WL 563640, at *3 (D.C.D.C. Feb. 15, 2013) (holding that the voluntary payment of a fee in a procedure that allows a arrestee to pay and forfeit the fee for immediate release from jail without prosecution is not protected under the Fourth Amendment). To establish an unlawful seizure, Plaintiffs must demonstrate that the payment of the fees constitutes a seizure that is unreasonable. *Soldal v. Cook Cnty.,* 506 U.S. 56, 61–62, 113 S.Ct. 538, 121 L.Ed.2d 450 (1992). "A seizure is not unreasonable if it occurs with the non-coercive, voluntary consent of the owner." *Fox,* 2013 WL 563640, at *3 (citing *Schneckloth v. Bustamonte,* 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973)). Here, both the special exception and the zoning determination procedures used by Orange County are proceedings that a land owner must voluntarily initiate. The payment of fees associated with such proceedings is likewise voluntary and therefore outside the protections of the Fourth Amendment. Plaintiffs do not state a claim for the violations of their rights under the Fourth Amendment.

The Court therefore finds summary judgment is due to be granted in favor of Orange County and against Plaintiffs on their search and seizure claims.

CONCLUSION

Accordingly, it is hereby **ORDERED AND ADJUDGED:**

1. Orange County's Motion to Dismiss (Doc. 175) is **DENIED AS MOOT.**

2. Orange County's Dispositive Motion for Summary Judgment (Doc. 261) is **GRANTED IN PART** and **DENIED IN PART.**

3. Plaintiffs' Motion for Summary Judgment and Partial Summary Judgment (Doc. 269) is **GRANTED IN PART** and **DENIED IN PART.**

4. The Court grants summary judgment in favor of Plaintiffs and against Defendant Orange County on Plaintiff's state-law declaratory judgment claims that Orange County's land use regulations are unlawful. As discussed in this Order, the portions of Orange County's land use regulations that prohibit "commercial aviculture, aviaries" and "breeding, keeping, and raising of exotic animals" are inconsistent with general law of Florida and are therefore void. The Court grants summary judgment in favor of Orange County and against Plaintiffs on all of the remaining claims.

5. The sole remaining issue in this action is the remedy available pursuant to Plaintiffs' state law declaratory judgment claim. The parties are directed to confer and advise the Court on or before September 6, 2013, of the remedies available to Plaintiffs under state law.

***15** 6. The trial and pretrial hearing dates are vacated, as are all deadlines except those imposed in this Order. The clerk is directed to terminate any motion that remains pending after entry of this Order.

DONE AND ORDERED.

All Citations

Not Reported in F.Supp.2d, 2013 WL 4110414

Footnotes

1 Plaintiffs, in violation of the Local Rules, attempt to incorporate by reference over 200 pages of materials to the Amended Complaint. While Plaintiffs' complaint and attachments are voluminous, most of the relevant facts are set forth in an attached declaration. (Doc. 164, Exhibit 14.) The Court will construe the declaration as alleging the factual support for the complaint and in this Order will refer to the allegations it contains as "Decl."

2 This claim is not subject to res judicata or estopped by Plaintiffs' state court actions, which were in nature of an administrative review of an executive action. Indeed, in those proceedings, the state court notified Plaintiffs of the need to file an independent civil action to challenge the constitutionality of the land use ordinances. (*See* Doc. 26, Ex. A; Doc. 66, Ex. 1; Doc. 67, Ex. 2.)

3 The Court construes this claim as a facial substantive due process claim to three provisions—Section 38–1, Section 38–77, and Section 38–79(48)—of Orange County's zoning ordinance as well as a challenge to Orange County's application of those provisions to Plaintiffs' residence. *See Eide v. Sarasota Cty.,* 908 F.2d 716, 721–22 (11th Cir.1990). Plaintiffs cannot bring an as applied substantive due process challenge in connection with their second property because they have not shown that Orange County has applied the ordinances to that property. *See id.* at 724–25; *see also Williamson County Regional Planning Comm'n v. Hamilton Bank,* 473 U.S. 172, 197–oC 200 (1985) (refusing to adjudicate the plaintiff's due process claims in a dispute concerning lad use regulations because the plaintiff "failed to apply for variances from the regulations"). In other words, the claim that relates to the rural property is not ripe.

4 The Second Amended Complaint purports to bring claims against Defendants other than Orange County without leave. Because the Court had previously dismissed those claims with prejudice (Doc. 150), the Court issued an Order informing those parties that they need not respond to the Second Amended Complaint and directing the clerk to terminate them as parties to this action (Doc. 168). In this Order, the Court considers only those claims in the Second Amended Complaint that Plaintiffs assert against Defendant Orange County. To the extent Plaintiffs intend to bring claims against any other defendant, such claims are hereby dismissed because Plaintiffs' were not granted leave to assert such claims in their amended pleading. As an additional basis for dismissal, if one is needed, the Court also dismisses those claims as a sanction for Plaintiffs' failure to abide the Court's Order to comply with the Rule 8 and Rule 10 of the Federal Rules of Civil Procedure.

5 Plaintiffs' residence is classified as R–1A by the county's land use ordinances. Plaintiffs own or have an interest in a toucan breeding business. Mr. Foley and his business were issued permits that authorized the possession and sale of

the birds at the residential property. And Orange County has prohibited Plaintiffs from operating their toucan breeding business at their residence.

6 The rules regarding the sale of captive exotic birds are murky, but are not central to the resolution of the dispute between the parties because there is no dispute that Plaintiffs' business is intended to be a commercial breeding operation.

7 Referring to the relevant Florida Statutes as “enabling” is a misnomer as the state legislature can only “enact laws in aid of the commission.” Art. IV, § 9, Fla. Const.

8 The rules do not provide for such notice when the application is to possess class III wildlife.

9 As the Florida Attorney General concluded shortly after the adoption of the Constitution of 1968, the commission has “replaced the legislature as the representative of the people.” Op. Att'y Gen. Fla. 72–41 (1972). “The commission's decisions are the law” when its regulations concern “wild animal life and fresh water aquatic life” in Florida. *Id.*

10 Moreover, in its papers, Orange County admits that its ordinances specifically prohibit Plaintiffs from keeping, breeding, and raising exotic animals at their residence in addition to commercial aviculture. (Doc. 287, pp. 2–3.)

11 Thus, the case of *City of Miramar v. Bain,* 429 So.2d 40, (Fla. 4th DCA 1983), is inapposite because the ordinances in that case did not specifically seek to regulate the possession of captive wildlife.

12 Indeed, Florida's Attorney General came to the same conclusion when he was asked to opine whether a non-charter county could enjoin “the possession, breeding or sale of non-indigenous exotic birds” using the county's land use ordinances. Op. Att'y Gen. Fla.2002–23 (2002). Tellingly, Orange County has made no attempt in any of the papers filed in this case to distinguish its ordinances from those analyzed in the Attorney General's opinion, nor has Orange County attempted to explain why this Court should not be persuaded by the Attorney General's interpretation of Florida law. An opinion's arguments need not be compulsory in order to be compelling. While all too common, this ostrich-like tactic is generally not considered persuasive advocacy. *See, e.g., Gonzalez–Servin v. Ford Motor Co.,* 662 F.3d 931, 934 (7th Cir.2011) (noting that the “ostrich is a noble animal, but not a proper model for an ... advocate.”).

13 The Court concludes without further analysis that a third possible basis-the actions of the county code enforcement personnel and the outcome of the code enforcement board proceeding—cannot support a substantive due process claim. Furthermore, because Plaintiffs have refused to characterize their challenge as a regulatory takings claim, the Court declines to analyze their substantive due process challenge as a regulatory taking claim.

14 Plaintiffs recognize and raise this exception to the general legal principle. Orange County, however, failed to address the legislative act exception in its papers, relying instead on the general principle that state-created rights cannot form the basis of a substantive due process claim.

15 The ordinance that created Board of Zoning Adjustment tasked it with, among other things, hearing and deciding “appeals taken from the requirement, decision or determination made by the planning or zoning department manager where it is alleged that there is an error in the requirement, decision or determination made by said department manager in the *enforcement of zoning regulations.”* Art. V, § 502, Orange County Charter (emphasis added).

16 The Eleventh Circuit reached a similar conclusion in *Boatman v. Town of Oakland,* 76 F.3d 341 (11th Cir.1996), when it rejected a property owner's assertion that he had a substantive due process “right to a correct decision from a government official.” In that case, a building inspector decided that the property owner's building was a mobile home that was prohibited by the applicable zoning ordinance. *Id.* at 345. The inspector therefore refused to inspect the property and issue a certificate of occupancy. *Id.* The property owner, who was also a member of the town zoning board, disagreed with the building inspector's interpretation of the zoning ordinance. *Id.* When the town council agreed with the inspector's interpretation of the ordinance, the property owner sued, arguing that the town's refusal to perform the inspection was arbitrary in violation of their federal due process rights. *Id.* The Eleventh Circuit concluded that such a “claim is not cognizable under the substantive component” of the Due Process Clause. *Id.*

17 It may seem incongruent to conclude that an ordinance is void under state law while at the same time finding that the substantive component of the Due Process Clause are not violated by the void ordinance. The fact is, however, that the only substantive due process claim that is viable here—a claim that a legislative act violated due process—does not rise or fall on the lawfulness of the state legislation. In other words, this type of substantive due process claim is not a challenge to the ordinance qua ordinance. Rather the claim is based upon the arbitrary and capricious action of the government in *enacting* the ordinance. *See, e.g., Villas of Lake Jackson, Ltd. v. Leon Cnty.,* 121 F.3d 610, 615 (11th Cir.1997) (holding that a “substantive due process claim based upon the arbitrary and capricious action of the government in adopting the regulation” is one of only four causes of actions for violations of an individual's constitutional rights arising in the context of “zoning regulations governing a specific use of real property”).

18 The Court assumes that Plaintiffs' compelled speech, commercial speech, and search and seizure claims are ripe and sufficiently defined to permit adjudication because Orange County's ripeness arguments address only the substantive due

process claims. There is some doubt whether all of Plaintiffs' other federal claims are justiciable, however, because some claims are based on Plaintiffs' objections to the special exception requirement of Orange County land use regulations. Under the Code, that procedure can be used only in connection with Plaintiffs' rural property. The Court will consider Plaintiffs' claim on the merits nonetheless.

19 The briefing in this action is particularly troubling. Plaintiffs, who do not have the benefit of counsel, have framed their clams to avoid most common pitfalls and have raised some valid arguments in response to Orange County's legal positions (such as the legislative act exception to the prohibition on substantive due process claims for state-created rights). Orange County, which is represented by counsel, by contrast repeatedly fails to address the exact claims raised by Plaintiffs or the legal authorities identified by Plaintiffs that are adverse to Orange County's positions. Portions of Orange County's briefs are supported by no legal authority whatsoever. The Court will not speculate as to why Orange County chose to brief the case in this manner. The Court does note, however, that the county's choice has caused this action to consume more judicial resources than are typically required to adjudicate *pro se* actions.

End of Document

638 Fed.Appx. 941
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial
decisions issued on or after Jan. 1, 2007.
See also U.S. Ct. of App. 11th Cir. Rule 36-2.
United States Court of Appeals,
Eleventh Circuit.

David W. FOLEY, Jr., Jennifer T. Foley,
Plaintiffs–Appellants, Cross Appellants,
v.
ORANGE COUNTY, a political
subdivision of the State of Florida,
Defendant–Appellee, Cross Appellee,
Phil Smith, Carol Hossfield, Mitch
Gordon, Rocco Relvini, Tara Gould, Tim
Boldig, et al., Defendants–Appellees.

No. 14–10936.
|
Jan. 29, 2016.

Synopsis

Background: Property owners brought action against county and county employees, asserting claims under the Due Process Clause, Equal Protection Clause, First Amendment, Fourth Amendment, and state law, based on county investigating and citing owners for having accessory buildings on their residentially zoned property without the necessary permits. The United States District Court for the Middle District of Florida, Roy B. Dalton, Jr., J., 2013 WL 4110414, granted partial summary judgment in favor of owners on state-law claims and granted summary judgment on federal claims in county's favor. Owners appealed.

Holdings: The Court of Appeals held that:

[1] county's upholding of zoning manager's determination regarding ordinance's interpretation did not support substantive due process claim;

[2] owners could not assert class of one equal protection claim;

[3] owners' voluntary actions did not constitute compelled or commercial speech; and

[4] owners' voluntary request for zoning manager's determination and fees paid to appeal that decision did not amount to an illegal seizure.

Vacated and remanded.

Attorneys and Law Firms

***942** David W. Foley, Jr., Orlando, FL, pro se.

Jennifer T. Foley, Orlando, FL, pro se.

Joel David Prinsell, Orange County Attorney's Office, Orlando, FL, for Defendant–Appellee, Cross Appellee.

Derek J. Angell, Dennis R. O'Connor, O'Connor & O'Connor, LLC, Winter Park, FL, Lamar D. Oxford, Dean Ringers Morgan & Lawton, PA, Orlando, FL, for Defendants–Appellees.

Appeals from the United States District Court for the Middle District of Florida. D.C. Docket No. 6:12–cv–00269–RBD–KRS.

Before TJOFLAT, ROSENBAUM, and ANDERSON, Circuit Judges.

Opinion

PER CURIAM:

David Foley and his wife Jennifer Foley (the "Foleys"), proceeding *pro se,* appeal from the District Court's order granting partial summary judgment in favor of defendant Orange County, Florida (the "County") in a civil action on their federal claims for violations of the Due Process Clause, U.S. Const. amend. XIV, § 1, the Equal Protection Clause, *id.*, the First Amendment, U.S. Const. amend. I, and the Fourth Amendment, U.S. Const. amend. IV. [1] Because we find that these federal claims on which the District Court's federal-question jurisdiction was based are frivolous under *Bell v. Hood,* 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946), we vacate the District Court's orders.

I.

The relevant facts and procedural history of this case are fairly straightforward. This case arose from a citizen complaint filed with the county against the Foleys for breeding and selling toucans from their residentially zoned property. In response to the complaint, county employees investigated and cited the Foleys for having accessory buildings on their property without the necessary permits. These were the buildings the Foleys used to house the toucans.

The Foleys then requested a determination from the county zoning manager as to whether the ordinance under which the Foleys were cited was interpreted properly. ***943** The zoning manager determined that the ordinance was interpreted properly—that the Foleys were required under the ordinance to obtain permits for the accessory buildings on their property. This determination was affirmed by the Board of Zoning Adjustment, the Board of County Commissioners, the Florida Ninth Judicial Circuit Court in and for Orange County, and the Fifth District Court of Appeal.

The Foleys then filed this action in federal court. Their complaint, which they later amended,[2] made various state and federal law claims against the County and 19 individual County employees in their official and individual capacities. Under state law, the Foleys again challenged the ordinance requiring permits for the accessory buildings on their property, mainly contending that that ordinance was preempted by Article IV, § 9 of the Florida Constitution, which grants the Florida Fish and Wildlife Conservation Commission executive and regulatory authority over captive wildlife. *See* Fla. Const. art. IV, § 9. Under federal law, the Foleys sought damages pursuant to 42 U.S.C. § 1983 for violations of their federal constitutional rights. These federal claims were the basis for federal-question jurisdiction in the District Court.[3] 28 U.S.C. § 1331.

After both parties moved for summary judgment, the District Court granted partial summary judgment in favor of the Foleys on one of their state-law claims and granted partial summary judgment to the County on the Foleys' remaining claims. The District Court also made various immunity rulings in relation to the suits against the County employees. Most relevant here, the Foleys appeal the grant of summary judgment against their four federal Constitutional claims based on (1) substantive due process; (2) equal protection; (3) compelled and commercial speech; and (4) illegal search and seizure.

II.

" 'We review *de novo* questions concerning jurisdiction.' We are 'obligated to inquire into subject matter jurisdiction *sua sponte* whenever it may be lacking.' " *Weatherly v. Ala. State Univ.,* 728 F.3d 1263, 1269 (11th Cir.2013) (citation omitted) (quoting *Williams v. Chatman,* 510 F.3d 1290, 1293 (11th Cir.2007) (per curiam) and *Bochese v. Town of Ponce Inlet,* 405 F.3d 964, 975 (11th Cir.2005)). Where a District Court's jurisdiction is based on a federal question, "a suit may sometimes be dismissed ... where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction *or where such a claim is wholly insubstantial and frivolous.*" *Bell,* 327 U.S. at 682–83, 66 S.Ct. at 776 (emphasis added). "Under the latter *Bell* exception, subject matter jurisdiction is lacking only 'if the claim has no plausible foundation, or if the court concludes that a prior Supreme Court decision clearly forecloses the claim.' " *Blue Cross & Blue Shield of Ala. v. Sanders,* 138 F.3d 1347, 1352 (11th Cir.1998) (quoting *Barnett v. Bailey,* 956 F.2d 1036, 1041 (11th Cir.1992)).

We will review each of the Foleys' federal claims in turn. We "review questions of constitutional law *de novo.*" *Kentner v. City of Sanibel,* 750 F.3d 1274, 1278 (11th Cir.2014), *cert. denied,* – ***944** — U.S. ——, 135 S.Ct. 950, 190 L.Ed.2d 831 (2015) (citing *United States v. Duboc,* 694 F.3d 1223, 1228 n. 5 (11th Cir.2012) (per curiam)).

[1] The Foleys first allege violation of their substantive due process rights. The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of the law." U.S. Const. amend. XIV, § 1. Substantive due process protects the rights that are fundamental and "implicit in the concept of ordered liberty." *Greenbriar Vill., L.L.C. v. Mountain Brook, City,* 345 F.3d 1258, 1262 (11th Cir.2003) (per curiam) (quotation omitted) (quoting *McKinney v. Pate,* 20 F.3d 1550, 1556 (11th Cir.1994) (en banc)). Because property rights are not created by the Constitution, they are not

fundamental rights. *See id.* "Substantive due process challenges that do not implicate fundamental rights are reviewed under the 'rational basis' standard." *Kentner,* 750 F.3d at 1280–81 (applying rational basis standard to non-fundamental rights). The rational basis test is highly deferential. *Id.* at 1281. "In order to survive this minimal scrutiny, the challenged provision need only be rationally related to a legitimate government purpose." *Schwarz v. Kogan,* 132 F.3d 1387, 1390–91 (11th Cir.1998) (citing *TRM, Inc. v. United States,* 52 F.3d 941, 945 (11th Cir.1995)). Additionally, while substantive due process rights may protect against arbitrary and irrational legislative acts, *see Lewis v. Brown,* 409 F.3d 1271, 1273 (11th Cir.2005) (per curiam), there is no similar protection for non-legislative acts. *DeKalb Stone, Inc. v. Cty. of DeKalb,* 106 F.3d 956, 959–60 (11th Cir.1997) (per curiam).

Here, the Foleys vaguely allege a substantive due process violation—the County's upholding of the zoning manager's final determination of the interpretation of the ordinance. This is unavailing for either of two reasons: First, because it implicated only property rights and was rationally related to a legitimate government purpose. *See Bannum, Inc. v. City of Fort Lauderdale,* 157 F.3d 819, 822 (11th Cir.1998); *see also Restigouche, Inc. v. Town of Jupiter,* 59 F.3d 1208, 1214–15 (11th Cir.1995). Or, second, because enforcement of a valid zoning ordinance is an executive—or non-legislative—act, which is not subject to substantive due process protections. *See DeKalb Stone, Inc.,* 106 F.3d at 959–60. Thus, this claim lacks merit.

[2] The Foleys next bring an equal-protection claim. Equal-protection claims generally concern governmental classification and treatment that impacts an identifiable group of people differently than another group of people. *Corey Airport Servs., Inc. v. Clear Channel Outdoor, Inc.,* 682 F.3d 1293, 1296 (11th Cir.2012) (per curiam). To establish a "class of one" equal protection claim, the plaintiff must show that "[he] has been intentionally treated different from others similarly situated and that there is no rational basis for the difference in treatment." *Vill. of Willowbrook v. Olech,* 528 U.S. 562, 564, 120 S.Ct. 1073, 1074, 145 L.Ed.2d 1060 (2000) (per curiam); *see also Grider v. City of Auburn,* 618 F.3d 1240, 1263–64 (11th Cir.2010). "To be similarly situated, the comparators must be *prima facie identical in all relevant respects.*" *Grider,* 618 F.3d at 1264 (quotations omitted).

The District Court properly granted summary judgment in favor of the County because the Foleys cannot establish a "class of one" equal protection claim, as they have failed to identify a similarly situated comparator that was intentionally treated differently. *Id.; Vill. of Willowbrook,* 528 U.S. at 564, 120 S.Ct. at 1074. Thus, this claim lacks merit.

***945** **[3]** The Foleys also bring a First Amendment claim styled as compelled and commercial speech. The Speech Clause of the First Amendment provides that "Congress shall make no law ... abridging the freedom of speech." U.S. Const. amend. I. The First Amendment applies to state and local governments by its incorporation through the Due Process Clause of the Fourteenth Amendment. *Holloman ex rel. Holloman v. Harland,* 370 F.3d 1252, 1268 (11th Cir.2004). The First Amendment protects an individual against being compelled to express a message in which he does not agree. *Johanns v. Livestock Mktg. Ass'n,* 544 U.S. 550, 557, 125 S.Ct. 2055, 2060, 161 L.Ed.2d 896 (2005). It also protects commercial speech from unwarranted governmental regulation. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N. Y.,* 447 U.S. 557, 561, 100 S.Ct. 2343, 2349, 65 L.Ed.2d 341 (1980). The Supreme Court has defined commercial speech as "expression related solely to the economic interests of the speaker and its audience," and noted that commercial speech is entitled to less constitutional protection than other forms of speech. *Id.* at 561–63, 100 S.Ct. at 2349–50.

The Foleys allege that their request for the zoning manager's final determination and their various appeals amount to compelled and commercial speech. The Foleys' voluntary actions do not constitute compelled or commercial speech because neither do they amount to a government regulation that compelled them to express a message in which they did not agree, *see Johanns,* 544 U.S. at 557, 125 S.Ct. at 2060, nor are they commercial in nature. *Cent. Hudson Gas & Elec. Corp.,* 447 U.S. at 561, 100 S.Ct. at 2349. Thus, this claim lacks merit.

[4] Finally, the Foleys bring an illegal search and seizure claim. The Fourth Amendment provides that individuals have the right "to be secure in their persons, houses, papers, and effects, [and] against unreasonable searches and seizures." U.S. Const. amend. IV. "A seizure occurs when there is some meaningful interference with an

individual's possessory interests in the property seized." *Maryland v. Macon,* 472 U.S. 463, 469, 105 S.Ct. 2778, 2782, 86 L.Ed.2d 370 (1985) (quotations omitted). The Supreme Court has indicated that the voluntary transfer of a possessory interest does not constitute a seizure under the Fourth Amendment. *See id.* (concluding that the seller of magazines transferred his possessory interest in the magazines upon voluntarily selling them).

The Foleys allege that their voluntary request for a determination from the zoning manager, subsequent fees paid to appeal that decision, and a potential application for a special exception amount to an illegal seizure. These voluntary actions plainly do not constitute a seizure under the Fourth Amendment. *See id.* Thus, this claim lacks merit.

All of the Foleys' federal claims[4] either " 'ha[ve] no plausible foundation, or ... ***946** [are clearly foreclosed by] a prior Supreme Court decision.' " *Blue Cross & Blue Shield of Ala.,* 138 F.3d at 1352 (quoting *Barnett,* 956 F.2d at 1041). The District Court therefore lacked federal-question jurisdiction. *Bell,* 327 U.S. at 682–83, 66 S.Ct. at 776. Without federal-question jurisdiction, the District Court did not have jurisdiction to determine the state-law claims presented by the Foleys. *See* 28 U.S.C. § 1331; 28 U.S.C. § 1332(a)(1).

The District Court's judgment is vacated and the case is remanded to the District Court with instructions that the court dismiss this case without prejudice for lack of subject matter jurisdiction.

VACATED and REMANDED.

All Citations

638 Fed.Appx. 941

Footnotes

1 The Foleys also alleged errors of state law and also appeal the grant of partial summary judgment in favor of the County on those issues. The County also filed a cross-appeal concerning the grant of partial summary judgment on one of the Foleys' state-law claims. Because we decide that the District Court did not have jurisdiction to consider the state-law claims, we need not decide either the Foleys' state-law appeal or the County's cross-appeal.

2 The District Court subsequently struck the Foleys' amended complaint in its order dismissing the federal and state law claims against the County Officials and County Employees.

3 The District Court did not have diversity jurisdiction because all parties are Florida residents. *See* 28 U.S.C. § 1332(a)(1).

4 As the District Court noted, it would be theoretically possible for the Foleys to bring a regulatory takings claim under 42 U.S.C. § 1983. "The application of an invalid land use regulation may form the basis of a regulatory takings claim." *Foley v. Orange Cty.,* No. 6:12–cv–269–Orl–37KRS, 2012 WL 6021459, at *7 (M.D.Fla. Dec. 4, 2012). Although the District Court order explained how the Foleys could properly make such a claim, *see id.,* they did not make such a claim in their second amended complaint. *See Foley v. Orange Cty.,* No. 6:12–cv–269–Orl–37KRS, 2013 WL 4110414, at *9 n. 13 (M.D.Fla. Aug. 13, 2013) (noting that the Foleys "have refused to characterize their challenge as a regulatory takings claim"). At any rate, even positing such a claim, the claim would likely not be ripe because the Foleys do not appear to have pursued a permit, retroactively or otherwise, for the accessory structure. *See Agripost, Inc. v. Miami–Dade Cty. ex rel. Manager,* 195 F.3d 1225, 1229–30 (11th Cir.1999) (requiring parties to pursue administrative remedies before bringing a regulatory takings claim). The Foleys have instead challenged the interpretation and application of the zoning ordinances.

137 S.Ct. 378
Supreme Court of the United States

David W. FOLEY, Jr., et ux., petitioners,
v.
ORANGE COUNTY, FLORIDA, et al.

No. 16–260.
|
Oct. 31, 2016.

Case below, 638 Fed.Appx. 941.

Opinion

Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit denied.

All Citations

137 S.Ct. 378 (Mem), 85 USLW 3207, 85 USLW 3209

**IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT IN AND FOR
ORANGE COUNTY, FLORIDA**

**DAVID W. FOLEY, JR., and
JENNIFER T. FOLEY,,** **CASE NO: 2016-CA-007634-O**

Plaintiffs,

vs.

**ORANGE COUNTY; PHIL SMITH;
CAROL HOSSFIELD; MITCH GORDON;
ROCCO RELVINI; TARA GOULD;
TIM BOLDIG; FRANK DETOMA;
ASIMA AZAM; RODERICK LOVE;
SCOTT RICHMAN; JOE ROBERTS;
MARCUS ROBINSON; RICHARD CROTTY;
TERESA JACOBS; FRED BRUMMER;
MILDRED FERNANDEZ; LINDA STEWART;
BILL SEGAL; and TIFFANY RUSSELL,**

Defendants.
_____/

**DEFENDANTS PHIL SMITH, ROCCO RELVINI, TARA GOULD,
AND TIM BOLDIG'S MOTION TO DISMISS**

PHIL SMITH, ROCCO RELVINI, TARA GOULD and TIM BOLDIG, by and through undersigned counsel, respectfully request this Honorable Court dismiss the Complaint filed against them by Plaintiffs herein, with prejudice, for the following grounds and reasons.

1. Failure to state a valid cause of action under Florida Law.

2. The expiration of the statute of limitations prior to Plaintiffs filing this Complaint.

3. The doctrine of Res Judicata bars some or all of Plaintiffs' claims.

4. The Defendants are entitled to immunity from the claims made herein per Fla. Stat. 768.28, et al.

MEMORANDUM OF LAW IN SUPPORT OF DISMISSAL

These claims have been previously brought by the same Plaintiffs against these same Defendants in Federal Court. This Honorable Court may take judicial notice of that action, which was ultimately dismissed by the U.S. District Court for the Middle District of Florida. The Dismissal was affirmed by the Eleventh Circuit Court of Appeals, and the Plaintiffs' Petition for Review of the Eleventh Circuit's Opinion to the U.S. Supreme Court was ultimately denied.

The Foleys sued all these same Defendants in Federal Court for alleged violations of the Florida and U.S. Constitutions, as a result of the Defendants' enforcement of the Orange County Code on Plaintiffs' commercial toucan aviary in a residential neighborhood. These Defendants are Orange County Building Department or Zoning/Adjustment officials. They are sued along with the County, the County Commissioners, the County Clerk and the County Mayor. The Plaintiffs' appeal of the code enforcement and zoning decisions against them actually included a Petition to this Honorable Court, which was also denied.

All pertinent Orders from the multiple Courts that have previously reviewed these claims by the same Plaintiffs against the same Defendants and denied them are being or will be filed with this Honorable Court, which may take judicial notice of them. The U.S. District's first Order of Dismissal in December 2012 found that the Plaintiffs' attempt to sue the individual Defendants in their official capacities was duplicative of their claims brought against the County, and therefore subject to dismissal. The Order also held that the individual Defendants were fully immune from this suit, because their relevant conduct fell within their official and/or legislative functions.

Thus the claims against the individual County officials and employees were dismissed with prejudice in Federal Court, but the claims against the County were dismissed without

prejudice. But a second U.S. District Court Order in August 2013 dismissed the case against the County too, with prejudice, because the Plaintiffs had failed to show any constitutional violations.

On Plaintiffs' Appeal to the Federal Court of Appeals, the Eleventh Circuit Court's Opinion held that the Foley's federal claims had no factual or legal foundation, or were foreclosed by U.S. Supreme Court decisions. *Foley v. Orange County*, 638 Fed. Appx. 941 (11th Cir. 2016). Plaintiffs then filed a Petition for Writ of Certiorari in the United States Supreme Court from the Eleventh Circuit Court's Opinion. That too was summarily denied. *Foley v. Orange County*, 137 S. Ct. 378 (2016).

Nevertheless, these pro se Plaintiffs are back at it again on the same claims, this time filing a State Court Complaint against the same Defendants on the same claims in this Honorable Court. They seek declaratory and injunctive relief against the County, regarding the enforcement of the pertinent Code Sections. They sue all Defendants for alleged violations of the Florida and U.S. Constitutions (again); and they again sue the individual Defendants for Civil Theft. For multiple reasons, these claims should be dismissed with prejudice, and found to be frivolous.

I. Request for Judicial Notice

These Defendants respectfully request this Honorable Court take judicial notice of the filings by the same Plaintiffs against the same Defendants on the same claims in the U.S. District Court for the Middle District of Florida, the Eleventh Circuit Court of Appeals, and the United States Supreme Court. Pertinent pleadings and Orders/Opinions from those Courts in those prior cases will be filed with this Honorable Court for review and consideration. Those filings will be particularly relevant to the Defendants' argument for dismissal pursuant to the Res Judicata arguments. *See, e.g., All Pro Sports Camp, Inc. v. Walt Disney Co.*, 727 So. 2d 363 (Fla. 5th

DCA 1999).

II. Statute of Limitations

The Foley's Complaint demonstrates that their claims accrued in February 2008. Plaintiffs' claims based upon alleged constitutional torts or violations against the individual Defendants are governed by the four-year statute of limitations period in Fla. Stat. 95.11(3). The Civil Theft claims are subject to the five-year statute limitations period set forth in Fla. Stat. 772.17. A four-year statute of limitations also applies to the claims alleged under 42 USC § 1983.

The Plaintiffs' attempt to rely upon 28 USC § 1367(d) in their pending Complaint for tolling of their claims also fails. That statute only applies where the Federal Court had original jurisdiction over their claims. But in this case, the Eleventh Circuit Court held that the Foley's federal claims against the individual Defendants were frivolous.

Since this case was filed more than eight years after it accrued in February 2008, the four-and-five-year limitations periods apply. This cause should thus be dismissed with prejudice.

III. Res Judicata

As a review of the Plaintiffs' federal claims previously adjudicated to a final conclusion demonstrates, these are the same claims and theories alleged by the same Plaintiffs against the same Defendants. The Res Judicata doctrine bars litigation in a subsequent case not only of claims previously raised against the same Defendants, but also of claims that could have been raised. These Defendants are entitled to dismissal with prejudice of this plainly repetitive case.

IV. Immunity from Suit

While the arguments stated above entitle these Defendants to a full dismissal with prejudice, there are still other absolute defenses to these allegations. Claims against government

officials or employees for their actions within the scope of their employment are duplicative of claims against the governmental body which employs them, thus subject to dismissal. Fla. Stat. 768.28; *Busby v. City of Orlando*, 931 F. 3d 764 (11th Cir. 1991). The U.S. District Court properly dismissed the claims against the individuals on these grounds before, and that was affirmed. Dismissal with prejudice here is again proper.

And to the extent these Defendants were enforcing County laws or ordinances, they acted in a quasi-judicial capacity and thus are further immune from these claims. The enforcement of the existing Codes was a quasi-judicial action. *Michael D. Jones, P.A. v. Seminole County*, 670 So. 2d 95 (Fla. 5th DCA 1996).

As to the claim for Civil Theft, Fla. Stat. 768.28(9) gives immunity from tort liability to officials **and employees** of a governmental body such as Orange County. The only exception is if it is alleged the employee was acting in bad faith or with a malicious purpose. No such allegation in made here by these Plaintiffs, so these Defendants are entitled to immunity from this suit and its dismissal with prejudice.

V. Civil Theft

Plaintiffs' Complaint clearly fails to meet the requirements for allegations of Civil Theft under Fla. Stat. 812.012-.037 and 825.103, and Fla. Stat. 772.11. A basic element of such claim is that the defendant obtained or used the plaintiff's property with criminal intent. There is no such allegation here.

VI. Conclusion

Defendants PHIL SMITH, ROCCO RELVINI, TARA GOULD and TIM BOLDIG respectfully submit that the same pro se Plaintiffs, at great length and over a long period of time, have pursued the same claims against them based on the same allegations and theories. Those

claims have been previously dismissed at every turn. The U.S. District Court and the Eleventh Circuit Court of Appeals painstakingly analyzed all of Plaintiffs' claims against these Defendants and the other individual Defendants, and found them clearly wanting under the law and factual allegations made.

Despite those ultimate legal conclusions, and a denial of the Plaintiffs' Petition to the U.S. Supreme Court, the same claims have been brought again by the same Plaintiffs against the same Defendants in this new State Court Complaint. These claims are also time-barred, the Defendants are subject to immunity from the claims, and ultimately these claims are frivolous. Thus these Defendants respectfully request this Honorable Court enter an Order dismissing the claims against them herein with prejudice, and find that the claims are so plainly frivolous that the Defendants are entitled to an award of costs, interest, attorney's fees, and any other relief that the Court deems just and proper.

I HEREBY CERTIFY that on December 20, 2016, the foregoing was e-mailed to David W. Foley, Jr., 1015 North Solandra Drive, Orlando, FL 32807; Jennifer T. Foley, 1015 N. Solandra Drive, Orlando, FL 32807; Dennis R. O'Connor, Esquire, O'Connor & O'Connor, LLC, 840 S. Denning Drive, Suite 200, Winter Park, FL 32789.

/s/ Lamar D. Oxford

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**IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT IN AND FOR
ORANGE COUNTY, FLORIDA**

**DAVID W. FOLEY, JR., and
JENNIFER T. FOLEY,** **CASE NO: 2016-CA-007634-O**

Plaintiffs,

vs.

**ORANGE COUNTY; PHIL SMITH;
CAROL HOSSFIELD; MITCH GORDON;
ROCCO RELVINI; TARA GOULD;
TIM BOLDIG; FRANK DETOMA;
ASIMA AZAM; RODERICK LOVE;
SCOTT RICHMAN; JOE ROBERTS;
MARCUS ROBINSON; RICHARD CROTTY;
TERESA JACOBS; FRED BRUMMER;
MILDRED FERNANDEZ; LINDA STEWART;
BILL SEGAL; and TIFFANY RUSSELL,**

Defendants.
_____/

**DEFENDANT MITCH GORDON'S
NOTICE OF INCORPORATION**

Defendant, MITCH GORDON, by and through undersigned counsel hereby respectfully notifies this Honorable Court and all parties hereto of his Incorporation, as if fully set out herein, of the Motion to Dismiss previously filed by Co-Defendants PHIL SMITH, ROCCO RELVINI, TARA GOULD AND TIM BOLDIG, filed herein on or about December 20, 2016.

All parties hereto take notice hereof.

I HEREBY CERTIFY that on January 27, 2017, the foregoing was filed through the Florida Courts E-Filing Portal which will send a notice of electronic filing to Dennis R. O'Connor, Esquire, David J. Angell, Esquire, O'Connor & O'Connor, LLC, 840 S. Denning Drive, Suite 200, Winter Park, FL 32789 as well as provided electronically to David W. Foley,

Jr., 1015 North Solandra Drive, Orlando, FL 32807; Jennifer T. Foley, 1015 N. Solandra Drive, Orlando, FL 32807.

/s/ Lamar D. Oxford

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IN THE CIRCUIT COURT OF
THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

Plaintiffs
DAVID W. FOLEY, JR., and
JENNIFER T. FOLEY
v.
Defendants
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.*

Case: 2016-CA-007634-O

AMENDED VERIFIED COMPLAINT FOR DECLARATORY & INJUNCTIVE RELIEF, CONSTITUTIONAL AND COMMON LAW TORT, CIVIL THEFT, AND DEMAND FOR JURY TRIAL

PLAINTIFFS DAVID AND JENNIFER FOLEY bring this civil action against the above named DEFENDANTS for injuries resulting from DEFENDANTS' joint and deliberate enforcement upon the FOLEYS of an *aviculture* custom: *1)* DEFENDANTS knew, or should have known, was void for conflict with Art. IV, §9, Fla. Const.; and, *2)* by means of an enforcement practice and procedure DEFENDANTS knew, or should have known, denied the FOLEYS any meaningful pre-deprivation challenge to the validity of the *aviculture* custom or the means of DEFENDANTS' enforcement.

Pursuant Fla. R. Civ. P. 1.190, the FOLEYS amend their complaint filed in this court August 25, 2016, and further allege:

I. JURISDICTION

1. This Court has jurisdiction per Art. V, §5 (b), Fla. Const., §§26.012 (2) (a) and (c), (3), and (5), and 86.011, Fla. Stat.; the FOLEYS seek declaratory and injunctive relief and compensatory relief in excess of $15,000.

2. This amended complaint is timely as to the defendants, incidents and injuries at issue in 6:12-cv-00269-RBD-KRS:

(a) July 27, 2016, the U.S. District Court for the Middle District of Florida dismissed without prejudice for lack of federal subject matter jurisdiction all federal and state claims asserted against the above named defendants in case 6:12-cv-00269-RBD-KRS;

(b) Chapter 28 USC §1367(d), tolls for thirty days after such dismissal all limitations on supplemental claims related to those asserted to be within the original jurisdiction of the federal district court;

(c) August 25, 2016, the FOLEYS filed their original complaint in this court; the complaint was timely as to the defendants, incidents and injuries at issue in 6:12-cv-00269-RBD-KRS;

(d) The defendants, incidents and injuries at issue in 6:12-cv-00269-RBD-KRS, as in this amended complaint, involve an ORANGE COUNTY administrative

proceeding that began February 23, 2007, became final February 19, 2008, and concluded with an order that continues to injure the FOLEYS to the present day; and,

(e) February 21, 2012, is the date the FOLEYS' complaint in 6:12-cv-00269-RBD-KRS, was originally filed, and it was timely for any claims subject to a four-year limitation accruing February 19, 2008, at the end of the ORANGE COUNTY administrative proceeding, and was timely for any claims subject to a five-year limitation accruing February 23, 2007, at the beginning of that proceeding.

II. VENUE

3. Venue is with this court per §47.011, Fla. Stat., as all actions accrue, or all property in litigation is located in Orange County, Florida.

III. NOTIFICATION REQUIREMENTS

4. Pursuant §86.091, Fla. Stat., ORANGE COUNTY was made a party to case 6:12-cv-00269-RBD-KRS, and as that case sought to invalidate ORANGE COUNTY regulations and practices prohibited by Art. IV, §9, Fla. Const., the Attorney General was served a copy of the complaint filed in 6:12-cv-00269-RBD-KRS, February 21, 2012. The Attorney General was also served a copy of the original complaint filed in this court August 26, 2016.

5. Pursuant §768.28, Fla. Stat., February 8, 2011, the FOLEYS sent ORANGE COUNTY, the Department of Financial Services, and the Attorney General

notification of their intent to file suit against all DEFENDANTS named in this complaint. The Department of Financial Services did respond.

6. Pursuant §772.11, Fla. Stat., December 19, 2011, the FOLEYS provided Jeffrey Newton, ORANGE COUNTY Attorney, a written demand for treble damages. All DEFENDANTS were named in the written demand. In addition, the FOLEYS provided all DEFENDANTS a separate written demand for treble damages with the complaint filed in 6:12-cv-00269-RBD-KRS, February 21, 2012.

IV. PARTIES

7. Plaintiffs DAVID and JENNIFER FOLEY, married residents of Orange County.

8. Defendant ORANGE COUNTY, a political subdivision of Florida.

9. Defendant PHIL SMITH, ORANGE COUNTY Code Enforcement Inspector.

10. Defendant CAROL HOSSFIELD, ORANGE COUNTY Permitting Chief Planner.

11. Defendant MITCH GORDON, former ORANGE COUNTY Zoning Manager.

12. Defendant TARA GOULD, former Assistant ORANGE COUNTY Attorney.

13. Defendant ROCCO RELVINI, ORANGE COUNTY Board of Zoning Adjustment (BZA) Chief Planner.

14. Defendant FRANK DETOMA, BZA, November 1, 2007.

15. Defendant RODERICK LOVE, BZA, November 1, 2007.

16. Defendant SCOTT RICHMAN (*Attorney*), BZA, November 1, 2007.

17. Defendant JOE ROBERTS, BZA, November 1, 2007.

18. Defendant MARCUS ROBINSON, BZA, November 1, 2007.

19. Defendant TIM BOLDIG, ORANGE COUNTY Zoning Division Chief of Operations.

20. Defendant FRED BRUMMER, ORANGE COUNTY Board of County Commissioners (BCC), February 19, 2008.

21. Defendant RICHARD CROTTY, BCC, County Mayor, February 19, 2008.

22. Defendant MILDRED FERNANDEZ, BCC, February 19, 2008.

23. Defendant TERESA JACOBS (*President, Florida Association of Counties (FAC), 2007-2008*), BCC, February 19, 2008.

24. Defendant TIFFANY RUSSELL (*Attorney*), BCC, February 19, 2008.

25. Defendant BILL SEGAL, BCC, February 19, 2008.

26. Defendant LINDA STEWART, BCC, February 19, 2008.

V. FACTS

Liberty interest

27. DAVID and JENNIFER FOLEY (FOLEYS) have a right "to be let alone and free" of unauthorized regulation, per Art. I, §23, Fla. Const., a right that is given shape by the substantive restraints and jurisdictional elements of due process (i.e., the separation of powers) promised by Art. II, §3, Fla. Const., effectuated in this case by Art. IV, §9, Fla. Const., and guaranteed by Art. I, §9, Fla. Const., and Amend. XIV, U.S. Const.

28. 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.

Property interest

29. The FOLEYS have a right "to acquire, possess and protect property," per Art. I, §2, Fla. Const., guaranteed by Art. I, §9, Fla. Const., and Amend. XIV, U.S. Const.

30. The FOLEYS have since December 20, 1990, owned a homestead at 1015 N. Solandra Dr., Orlando, FL, zoned R-1A (Solandra homestead).

31. The FOLEYS have since April 26, 2010, owned a manufactured home on one acre at 1349 Cupid Rd., Christmas, FL, zoned A-2 (Cupid property).

32. The FOLEYS have since 2000, owned and kept a small breeding flock of toucans (Collared aracari, *Pteroglossus torquatus*), at their Solandra homestead.

33. Between 2002 and 2008, the FOLEYS advertised and sold 46 offspring of these toucans in interstate commerce for approximately $900 each.

34. February 19, 2008, the FOLEYS had twenty-two toucans at their Solandra homestead.

35. DAVID FOLEY has since 2007, held a site-specific Class III license issued by FWC that permits him to sell toucans kept and raised at the Solandra homestead.

36. DAVID FOLEY has since 2010, held a site-specific Class III license issued by FWC that permits him to sell toucans kept and raised at the Cupid property.

37. The FOLEYS established their breeding flock at the Solandra homestead, and DAVID FOLEY secured a site-specific FWC Class III licence, in order to sell the birds they raise at their Solandra homestead.

38. The FOLEYS bought the Cupid property, and DAVID FOLEY secured a site-specific FWC Class III licence, in order to move and/or expand the FOLEYS' bird business to the Cupid property.

Controversy

39. The DEFENDANTS identified in paragraphs 8–26, acting in concert either as tortfeasors, knowing assistants of a tortfeasor, or with common design to effect the ultimate harm:

40. Divested the FOLEYS of their *aviary* and/or their right to sell birds kept at their Solandra homestead, pursuant the *colore* and coercive force of an ORANGE COUNTY administrative practice and proceeding that: *(a)* was initiated February 23, 2007, by a private citizen complaint which alleged the FOLEYS were "raising birds to sell;" *(b)* denied the FOLEYS any pre-deprivation remedy in Ch. 11, OCC, for the allegation in that citizen complaint; *(c)* forced the destruction of the FOLEYS'

"*accessory structure*" (i.e., *aviary*) June 18, 2007, by *(1)* ordering the FOLEYS pursuant Ch. 11, OCC, to secure a building permit or destroy the "*structure*", and then *(2)* denying site-plan and permit approval pursuant Ch. 30, OCC, because, per the citizen allegation, the "*structure*" was an *aviary* and/or used for *aviculture*; *(d)* ultimately approved a site-plan and building permit to re-construct the FOLEYS' "*aviary*" November 30, 2007, with the exaction "Pet birds only – No Commercial Activities Permitted" on their face; and *(e)* 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 R-1A … zone district" throughout ORANGE COUNTY;

41. Knew that prior to the proceeding described in paragraph 40 there was no ordinance, or published order or rule that: *(a)* expressly prohibited *aviaries* as an *accessory structure*, or *aviculture* as an *accessory use* or *home occupation* at the FOLEYS' Solandra homestead; or *(b)* put the FOLEYS on notice of such prohibitions;

42. Claimed that their actions in the proceeding against the FOLEYS' *aviary* and bird sales, described in paragraph 40*(c)(2)-(e),* were pursuant Chs. 30 and/or 38, OCC;

43. Knew that Chs. 30 and 38, OCC, did not authorize any of the DEFENDANTS to divest or impair an otherwise vested right;

44. Knew that the FOLEYS claimed that their right to keep birds in an *aviary*, or *accessory structure*, at the Solandra homestead, and their right to sell the birds kept there, are rights vested pursuant Art. IV, §9, Fla. Const., and the rules of FWC;

45. Knew their actions would either destroy the FOLEYS' *aviary* and/or bird business, assist in that destruction, or be in common design to effect that destruction;

46. Expressed or demonstrated reasonable doubt regarding ORANGE COUNTY's power to use the *land use* regulations of Ch. 38, OCC, to directly and specifically enjoin bird possession, advertising, and/or sale;

47. Had the authority, duty, experience, evidence, and specific opportunities to remove any doubt regarding their authority to enjoin bird possession, advertising, or sale, and/or to counsel or recommend the removal of any such doubt, by means of an adequately adversarial proceeding, pursuant Ch. 11, OCC, or otherwise, but neglected the duty of reasonable care they owed the FOLEYS, and did not do so;

48. Rejected the FOLEYS' claims that Art. IV, §9, Fla. Const., removed *aviaries* and *aviculture* from ORANGE COUNTY's regulatory authority;

49. Rejected the legal memorandum by FWC provided to all DEFENDANTS [except PHIL SMITH] that: *(a)* was written in response to contemporaneous legislative initiatives of the *FAC* to increase regulation of exotic animals; and *(b)* presents an exhaustive survey of Florida law to clearly established Art. IV, §9, Fla. Const., gives FWC exclusive regulatory jurisdiction over captive exotic birds;

50. Orally, in writing, or by action, falsely asserted that ORANGE COUNTY had lawful jurisdiction to directly and specifically enjoin bird possession, advertising, and/or sale by means of *land use* regulation; and,

51. Deliberately misrepresented the ultimate fact of the subject matter of the proceeding to enforce the unpublished *aviary/aviculture* prohibition (custom) alternately as a *structure*, *accessory structure*, *use*, *land use*, *permitted use*, *prohibited use*, *principal use*, *accessory use*, *commercial use*, *commercial operation*, and/or *commercial purpose* when the subject matter and/or nuisance at issue was always *exotic birds*.

52. DEFENDANTS' practice and proceeding described in paragraphs 39-51 could not be prevented from injuring the FOLEYS by state court intervention or review.

53. ORANGE COUNTY by ordinance impaired and impairs the FOLEYS' right to move and/or expand their bird business to the Cupid property by making bird-specific *special exception* fees and procedures a precondition to "*Commercial aviculture, aviaries SIC 0279*" and/or prohibiting "*SIC 0279*" in A-2 zones.

Ordinance No. 2016-19

54. ORANGE COUNTY, by the adoption September 23, 2016, of Ordinance No. 2016-19, continues to divest the FOLEYS' of their right to sell birds raised at their Solandra homestead and to impair the FOLEYS' right to move and/or expand their bird business to the Cupid property.

55. Ordinance No. 2016-19: *(a)* amends the definition of *home occupation* at §38-1, applicable to the FOLEYS' Solandra and Cupid properties; *(b)* subjects *home occupation* to condition (101), §38-79; *(c)* expressly prohibits "*commercial retail sale of animals*" as a *home occupation*, per condition (101); *(d)* does not define "*commercial retail sale of animals*;" *(e)* does not exempt "wild or non-domestic birds" from the common understanding of "*commercial retail sale of animals*;" *(f)* yet expressly exempts "wild or non-domestic birds" from the definition of "*poultry*" in §38-1; *(g)* removes all reference to "*aviary*" and "*aviculture (commercial)*" in §§38-1, 38-79; *(h)* removes all reference to "*commercial aviculture, aviaries*" in §38-77; *(i)* yet continues to reference the Standard Industrial Classification code for "Animal Specialties, Not Elsewhere Classified," "*SIC 0279*" in §38-77, which includes both *aviculture* and *aviaries*; and, *(j)* entirely prohibits "*SIC 0279*" throughout ORANGE COUNTY.

Damages

56. DEFENDANTS' actions as described herein deprived the FOLEYS, and their result continues to deprive the FOLEYS, of their:

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

(b) Property right in fees paid for the administrative proceeding, including determination ($38), appeal to the BZA ($341), and appeal to the BCC ($651);

(c) Property right in the continuing expenses and court costs incurred in the vindication of their rights (approx. $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 (approx. $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 (approx. $342,000);

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

(i) Liberty interest in being "let alone and free" of unauthorized regulation;

(j) Interests in mental and emotional well-being;

(k) Interests in self-esteem; and,

(l) Interests in the enjoyment of life.

COUNT ONE – DECLARATORY AND INJUNCTIVE RELIEF
Solandra homestead

PLAINTIFFS ALLEGE:

57. And restate, paragraphs 1–8, 27–30, 32–35, 37, 39, 40, 50, and 54–56, including subparagraphs, and referenced paragraphs.

58. The FOLEYS have no plain, adequate, or complete remedy at law to redress the continuing injury of ORANGE COUNTY's trespass of the regulatory jurisdiction granted exclusively to FWC by Art. IV, §9, Fla. Const.

WHEREFORE, the FOLEYS request this court,

> **DECLARE** void on its face as a violation of Art. II, §3, Fla. Const., and Art. I, §9, Fla. Const., for conflict with Art. IV, §9, Fla. Const., and **ENJOIN** the enforcement of, any custom, permit, order, policy, or ordinance to the extent that it: *1)* prohibits the advertising or sale of birds kept at the FOLEYS' R-1A zoned Solandra homestead; *2)* demands "Pet birds only – No Commercial Activities Permitted" as an exaction or condition to the construction or use of the FOLEYS' *aviaries* at their Solandra homestead; *3)* prohibits *aviculture* and/or associated *aviaries* as an *accessory use* or *home occupation*; or, *4)* includes "wild or non-domestic birds" in any prohibition of *commercial retail sale of animals* as a *home occupation*.

COUNT TWO – DECLARATORY AND INJUNCTIVE RELIEF
Cupid property

PLAINTIFFS ALLEGE:

59. And restate, paragraphs 1–8, 27–38, 53–55, and 56(c), (e)–(l), including subparagraphs, and referenced paragraphs.

60. The FOLEYS have no plain, adequate, or complete remedy at law to redress the continuing injury of ORANGE COUNTY's trespass of the regulatory jurisdiction granted exclusively to FWC by Art. IV, §9, Fla. Const.

WHEREFORE, the FOLEYS request this court,

> **DECLARE** void on its face as a violation of Art. II, §3, Fla. Const., and Art. I, §9, Fla. Const., for conflict with Art. IV, §9, Fla. Const., and **ENJOIN** the enforcement of, any ORANGE COUNTY ordinance to the extent that it: *1)* includes the possession or sale of birds in its regulation of the Standard Industrial Classification (SIC) group 0279, "Animal Specialties, Not Elsewhere Classified," in A-2 zoned districts; or, 2) prohibits, or makes *special exception* fees and procedures a precondition to *Commercial aviculture, aviaries SIC 0279*, in A-2 zoned districts.

COUNT THREE – TORT

Negligence, Unjust Enrichment, and Conversion

PLAINTIFFS ALLEGE:

61. And restate, paragraphs 1–8, 27–30, 32–35, 37, 39–52, and 56, including subparagraphs, and referenced paragraphs.

62. ORANGE COUNTY, by and through *(a)* its final order in the FOLEYS' case ZM-07-10-010, *(b)* the administrative practice and proceeding described in paragraphs 39–52,

and/or *(c)* the tortious acts of its employees/servants/agents acting within their scope of employment or function:

(a) 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 Ch. 11, OCC, or otherwise; and,

(1) Invaded and denied the FOLEYS' privacy, or liberty; and,

(2) Invaded and denied the FOLEYS' right to engage in an activity (advertising and sale of toucans) entirely immune to ORANGE COUNTY regulation, per Art. IV, §9, Fla. Const; and,

(3) As a direct and proximate result injured the FOLEYS' interests identified in paragraph 56, including subparagraphs;

(b) Was unjustly enriched with the fees identified in paragraph 56(b), which the FOLEYS paid for the improper administrative practice and proceeding described in paragraphs 39–52; and,

(c) Dispossessed, and converted, the FOLEYS' property interests in their *aviary*, toucans, and bird business asserted in paragraphs 56(a), and (d)–(h), by endeavouring to obtain, and by obtaining, control and dominion of all essential advantages of

possession, despite the fact that the demolished *aviary* was ultimately permitted and rebuilt, and the toucans remained with the FOLEYS.

WHEREFORE, the FOLEYS request this court,

GRANT JUDGMENT, against ORANGE COUNTY, in an amount to be determined at trial by jury, for negligent invasion of privacy and rightful activity, unjust enrichment, and conversion.

COUNT FOUR – TAKING

PLAINTIFFS ALLEGE:

63. And restate, paragraphs 1–8, 27–30, 32–35, 37, 39–52, 54, 55, and 56(a)–(h), including subparagraphs, and referenced paragraphs.

64. The practice and proceeding described in paragraphs 39–52, effected a taking of all value in the property described in paragraphs 56(a)–(h).

65. The taking was deprived police power, *id est* public purpose, by Art. IV, §9, Fla. Const., as stated in paragraph 28.

66. The 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.

67. The taking was without compensation.

WHEREFORE, the FOLEYS request this court,

GRANT JUDGMENT, against ORANGE COUNTY, in an amount to be determined at trial by jury, **PURSUANT** Art. X, §6 (a), Fla. Const., for taking without public purpose, due process or just compensation.

COUNT FIVE – ACTING IN CONCERT

Abuse of Process to Invade Privacy and Rightful Activity, and Conversion

PLAINTIFFS ALLEGE:

68. And restate, paragraphs 1–7, 9–30, 32–35, 37, 39–52, and 56, including subparagraphs, and referenced paragraphs.

69. The individual DEFENDANTS, identified in paragraphs 9–26, at all times relevant, acted *colore officii*, but not *virtute officii*; that is, they acted with the *color* and

coercive force of official right, but *in absence* of subject matter jurisdiction, pursuant Art. IV, §9, Fla. Const., as stated in paragraph 28, and consequently *in absence* of executive or quasi-judicial jurisdiction as stated in paragraphs 42–45.

70. The executive order of the BCC February 19, 2008, in the FOLEYS' case ZM-07-10-010, described at paragraph 40*(e)*, accomplished the objective of a conspiracy to enforce the unpublished prohibition of *aviaries* as *accessory structure*, and *aviculture* as an *accessory use* or *home occupation*: *(a)* enforcement was solicited by a private citizen as stated in paragraph 40*(a)*; and, *(b)* enforcement was prosecuted by all individual DEFENDANTS, identified in paragraphs 9–26, acting in concert either as tortfeasors, knowing assistants of a tortfeasor, or with common design to effect the ultimate harm described in paragraph 56, including subparagraphs.

71. In concert the individual DEFENDANTS, identified in paragraphs 9–26, intentionally injured the FOLEYS by an abuse of process; that is,

(a) In bad faith, DEFENDANTS misrepresented the subject matter of the unpublished *aviary/aviculture* prohibition (custom) as stated in paragraph 51;

(1) To color their actions with the coercive force of official right;

(2) To misuse Chs. 30 and 38, OCC, to effect a prosecution beyond the scope of those provisions and their employment or office, as stated in paragraphs 42–45;

(3) To invade and deny the FOLEYS liberty (i.e., due process) interests asserted at paragraphs 27 and 28; and,

(4) To defraud the FOLEYS of any meaningful pre-deprivation challenge to DEFENDANTS' misrepresentations, as stated in paragraphs 40*(b),* and 42–47; and,

(b) They did so verbally and/or in printed communication, with the intent:

(1) To compel the FOLEYS against their will to destroy their *aviary*; and/or,

(2) To abandon their right to engage in an activity (advertising and sale of toucans) immune to ORANGE COUNTY regulation, per Art. IV, §9, Fla. Const; and,

(c) As a direct and proximate result injured the FOLEYS' interests described in paragraph 56, including subparagraphs.

72. In concert the individual DEFENDANTS, identified in paragraphs 9–26, intentionally injured the FOLEYS by dispossession and conversion; that is,

(a) Without legal justification, or regard for clearly established law, as stated in paragraphs 28, 48, and 49, and *in absence* of executive or quasi-judicial jurisdiction, as stated in paragraphs 40*(b),* and 42–47, DEFENDANTS invaded the FOLEYS' right to engage in an activity (advertising and sale of toucans) entirely immune to ORANGE COUNTY regulation, per Art. IV, §9, Fla. Const., and beyond the scope of DEFENDANTS' employment or office; and consequently,

(b) With legal malice *per se*, they deprived or endeavoured to deprive the FOLEYS of their right to, their control of, their dominion over, and all essential

advantages of possession in, their *aviary*, toucans, and/or *aviculture* business, despite the fact that the demolished *aviary* was ultimately permitted and rebuilt, and the toucans remained with the FOLEYS; and,

(c) As a direct and proximate result injured the FOLEYS' interests described in paragraph 56, including subparagraphs.

WHEREFORE, the FOLEYS request this court,

GRANT JUDGMENT, against the individual DEFENDANTS, in their personal capacity, jointly and severally, in an amount to be determined at trial by jury, **PURSUANT** common law for acting in concert to accomplish an abuse of process to invade privacy and rightful activity, and conversion.

COUNT SIX – §§772.11, and 812.014, Fla. Stat.
Civil theft

PLAINTIFFS ALLEGE:

73. And restate, paragraphs 1–7, 9–30, 32–35, 37, 39–52, 56, and 69–72, including subparagraphs, and referenced paragraphs.

74. The individual DEFENDANTS, identified in paragraphs 9–26, injured the FOLEYS by violation of §812.014, Fla. Stat., as stated in paragraphs 69–72, including subparagraphs, and referenced paragraphs; that is,

(a) They did, under the *colore* and coercive force of official right, defraud the FOLEYS of their liberty interest in a meaningful pre-deprivation remedy, and did so in bad faith to extort the destruction of the FOLEYS' *aviaries* and/or bird business; and,

(b) They did, without legal justification, and consequently with legal malice *per se*, knowingly endeavour to extort, to take, and to exercise control over the FOLEYS' property identified in paragraphs 56(a), (b), and (d)–(h); and,

(c) They did so with the intent to, temporarily or permanently:

(1) Deprive the FOLEYS of their rights to, the benefits from, and the services of that property; and/or

(2) Appropriate the use of, or right to, that property to ORANGE COUNTY who was not entitled to that use or right.

75. The individual DEFENDANTS by violation of §812.014, Fla. Stat., are jointly and severally liable in their personal capacity for injuring the FOLEYS' interests described in paragraphs 56, including subparagraphs.

WHEREFORE, the FOLEYS request this court,

GRANT JUDGMENT, against the individual DEFENDANTS, in their personal capacity, jointly and severally, for treble damages to be determined at trial by jury, **PURSUANT** §§772.11 and 812.014, Fla. Stat.

COUNT SEVEN – DUE PROCESS
in the alternative

PLAINTIFFS ALLEGE:

76. And restate, paragraphs 1–56, 66, and 70, including subparagraphs.

77. Should there be no complete or adequate compensatory remedy in Counts Three, Four, Five, or Six, or otherwise, this court can provide the FOLEYS a civil remedy in due process pursuant Art. I, §9, Fla. Const., for violation of Art. I, §§2 and 23, Art. II, §3, and Art. IV, §9, Fla. Const., should it find such remedy appropriate to further the purpose of those provisions and needed to assure their effectiveness [Restatement (Second) of Torts: §874A cmt. a (1965), *Bennett v. Walton County*, 174 So. 3d 386, 396-397 (1st DCA 2015) (Makar, J., concurring in part, dissenting in part)].

78. Should Florida also deny remedy in Art. I, §9, Fla. Const., this court must provide remedy in 42 USC §1983, for conspiracy to deny, and denial of, adequate pre-deprivation remedy guaranteed by Amend. XIV, U.S. Const.

WHEREFORE, the FOLEYS request this court, should it find no complete or adequate remedy in Counts Three, Four, Five, or Six, or otherwise,

GRANT JUDGMENT, against all DEFENDANTS, jointly and severally, in an amount to be determined at trial by jury: **PURSUANT** Art. I, §9, Fla. Const., for conspiring to deprive and for depriving the FOLEYS of property and liberty

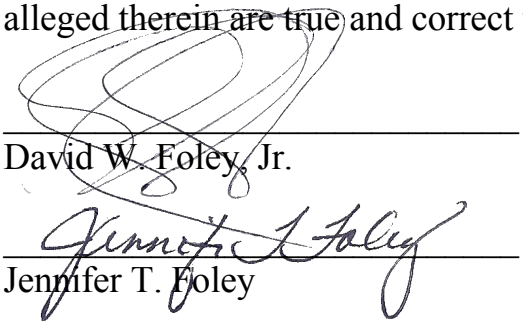
without proper jurisdiction or adequate pre-deprivation remedy; or, in the alternative, **PURSUANT** 42 USC §1983, for conspiring to deprive and for depriving the FOLEYS of property and liberty without the adequate pre-deprivation remedy guaranteed by Amend. XIV, U.S. Const.

DEMAND FOR JURY TRIAL

The FOLEYS demand a trial by jury on all issues so triable.

VERIFICATION

Under penalties of perjury, I declare that I have read the foregoing, and the facts alleged therein are true and correct to the best of my knowledge and belief



David W. Foley, Jr.

Jennifer T. Foley

Date: February 15, 2017

Plaintiffs
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IN THE NINTH JUDICIAL CIRCUIT COURT
IN AND FOR ORANGE COUNTY, FLORIDA

DAVID W. FOLEY and JENNIFER T. FOLEY,

Plaintiffs,

vs.

ORANGE COUNTY, PHIL SMITH, CAROL HOSSFIELD, MITCH GORDON, ROCCO RELVINI, TARA GOULD, TIM BOLDIG, FRANK DETOMA, ASIMA AZAM, RODERICK LOVE, SCOTT RICHMAN, JOE ROBERTS, MARCUS ROBINSON, RICHARD CROTTY, TERESA JACOBS, FRED BRUMMER, MILDRED FERNANDEZ, LINDA STEWART, BILL SEGAL, and TIFFANY RUSSELL,

Defendants.
_____/

Case No. 2016-CA-007634-O

THE OFFICIAL DEFENDANTS' MOTION TO STRIKE THE AMENDED COMPLAINT, RENEWED REQUEST FOR JUDICIAL NOTICE, AND MOTION TO DISMISS THIS ACTION WITH PREJUDICE

COME NOW, current and former ORANGE COUNTY (the "County") Officials named in their individual and official capacities serving on the Board of Zoning Adjustment ("BZA") or Board of County Commissioners ("BCC"), ASIMA AZAM, FRED BRUMMER, RICHARD CROTTY, FRANK DETOMA, MILDRED FERNANDEZ, TERESA JACOBS, RODERICK LOVE, SCOTT RICHMAN, JOE ROBERTS, MARCUS ROBINSON, TIFFANY RUSSELL, BILL SEGAL, and LINDA STEWART (together, the "Officials"), by and through their undersigned counsel, hereby file these, their Motion to Strike the Amended Complaint, Renewed Requests for Judicial Notice, and Motion to Dismiss this Action with Prejudice, and state as follows:

Postural Background & Adoption of Prior Motion to Dismiss

This case arises from the enforcement of a local ordinance which prohibited aviculture. The Foleys commercially bred toucans in violation of the ordinance. Administrative and judicial actions through county, state court, and federal court ranks commenced years ago, leading to this new lawsuit filed in 2016.

A more detailed history of this case is articulated in the Officials' initial Motion to Dismiss, which is incorporated as Exhibit A. After that motion was filed, a good faith conference was held among all counsel and the pro se Foleys. The Foleys requested leave to amend their complaint as opposed to proceeding to hearing, and the Defendants did not object. *See, e.g., Unrue v. Wells Fargo Bank, N.A.*, 161 So. 3d 536, 538 (Fla. 5th DCA 2014) ("Plaintiffs have an automatic right to amend the complaint once before a responsive pleadings is served."). The Amended Complaint was then filed.

However, the Amended Complaint does not add any new facts or otherwise remedy improperly-stated causes of action. Rather, it *deletes* details of the various individual defendants' roles in the underlying saga, lumping them all together as "Defendants." This would normally constitute grounds for dismissal on its own for failing to state separate counts against separate defendants. *See K.R. Exchange Servs., Inc. v. Fuerst, Humphrey, Ittleman, PL*, 48 So. 3d 889, 893 (Fla. 3d DCA 2010); *see also Pratus v. City of Naples*, 807 So. 2d 795, 797 (Fla. 2d DCA 2002) (where plaintiffs had three independent causes of action, "each claim should be pleaded in a separate count instead of lumping all defendants together"). But that is not necessary here because the original Complaint indeed parsed out the roles of the individual defendants.

Instead, the Amended Complaint is a sham because it avoids facts alleged by the Foleys themselves merely to avoid dismissal. A similar question was asked 66 years ago in *Schaal v. Race*, 135 So. 2d 252, 253 (Fla. 2d DCA 1961):

> We shall consider first the decision of the lower court in dismissing the amended complaint as a sham since it was apparent from the record that the amended complaint deleted from the original complaint all reference to an election, which showed in the original complaint an illegal contract.

After considering several treatises and rules from other jurisdictions, the court reached the following conclusion:

> We hold that the lower court was justified in dismissing the amended complaint as a sham in view of the record in the case before him.
>
> When questioned by the court, the attorney for the appellant-plaintiff answered frankly that it would serve no purpose to overrule the lower court on dismissing the amended complaint as the data eliminated from the original complaint would necessarily be brought out in a trial of the case and that the real question with which they were concerned was whether or not the court erred in dismissing the original complaint because the indebtedness incurred violated the corrupt practice provisions of Florida election code.

Id. at 254-55; *see also Inter-Continental Promotions, Inc. v. MacDonald*, 367 F.2d 293, 302 (5th Cir. 1966) (summarizing *Schaal*'s facts as "The amended complaint, in effect, was a direct contradiction of the very facts alleged in the original complaint that had made the contract unenforceable").

Here, the motion to dismiss identified the frivolity of the Foleys' claims given the specific roles of government the Officials held during the municipal proceedings giving rise to this lawsuit. The motion walked through the Officials' immunities, the statute of limitations and res judicata issues, and the Foleys' failure to state a cognizable cause of action. None of this was news to the Foleys; the initial federal lawsuit made it up to the federal Supreme Court and back, and the same topics have been addressed multiple times. The basic facts "would necessarily be

brought out in a trial of the case." *Schaal*. By deleting them, the Foleys rendered their Amended Complaint a sham, and it should be stricken.

The Newly Added Theories in Count Five Are Frivolous

The Foleys seem to state their claims against the "individual Defendants" in counts five through seven. Count five is titled "Acting in Concert; Abuse of Process to Invade Privacy and Rightful Activity, and Conversion." The phrase "abuse of process to invade privacy and rightful activity" is absent from the body of Florida decisional law. But even liberally construing these newly added theories for abuse of process and conversion, the Amended Complaint fails to state a cause of action.

"Abuse of process involves the use of criminal or civil legal process against another primarily to accomplish a purpose for which it was not designed." *Bothmann v. Harrington*, 458 So. 2d 1163, 1169 (Fla. 3d DCA 1984). "[T]he usual case of abuse of process involves some form of extortion." *Id.* Ulterior motives, and even subjective malice of the alleged tortfeasor, are irrelevant so long as "the process is used to accomplish the result for which it was created." *Id.*

As the initial Complaint (and hundreds of pages of federal filings) makes clear, the claim against the Officials arises from their *official votes* taken during *official, public hearings*. In other words, the Officials were carrying out their duties as elected government officials. Voting on local matters, here, the propriety of a zoning interpretation, is precisely what is expected of our local government administrators. No claim for abuse of process can exist on these allegations.

Nor have the Foleys stated a cause of action in conversion. "The essence of the tort of conversion is the exercise of wrongful dominion or control over property to the detriment of the

rights of the actual owner." *DePrince v. Starboard Cruise Servs., Inc.*, 163 So. 3d 586 (Fla. 3d DCA 2015). The Foleys have never alleged that any of the Officials actually exercised dominion or control over their toucans. They have merely alleged that the Officials *voted* to uphold the zoning manager's determination that the Foleys' toucan farm violated an ordinance. If the Foleys could state a claim against the Officials in their individual capacities here, then local board members could be dragged into litigation every time a government agency repossesses property, enforces building codes, or even enforces a parking ticket. Public votes do not constitute "dominion or control" over private property. This is not conversion.

The Theories in Count Six and Seven Were Addressed in the Motion to Dismiss

Count six realleges civil theft claims against the Officials. The Officials would refer the Court to their initial motion to dismiss, which adequately addresses the issue. Suffice to say count six does not state a cause of action.

Finally, count seven contains an alleged due process violation under 42 U.S.C. § 1983. This precise claim was deemed frivolous by the Eleventh Circuit. *See Foley v. Orange Cnty.*, 638 Fed.Appx. 941, 944 (11th Cir. 2016). It is also barred by res judicata since the question has been litigated to finality in the federal forum. This was discussed in the initial motion to dismiss as well.

Conclusion

The Foleys have attempted to avoid dismissal by eliminating allegations that demonstrate the frivolity of their claims against the individual Officials. That is prohibited by the rules of procedure, and the Amended Complaint should be stricken. Further attempts at pleading should be denied given that the facts are well-known to all parties in light of the years of federal litigation that preceded this case.

And as explained in the Officials' first motion to dismiss, the Officials are entitled to dismissal because (1) the statute of limitations bars the claims; (2) the Officials enjoy absolute immunity from suit on these allegations; (3) the Officials enjoy qualified immunity from suit; (4) res judicata bars the federal claim(s); and (4) the theories of liability are frivolous on the merits.

WHEREFORE, respectfully, the Official Defendants hereby request that this Honorable Court takes judicial notice of the federal records in this litigation, that the Amended Complaint is stricken as a sham, and that they all be dismissed with prejudice from this action..

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was electronically filed with the Clerk of the Court using the Florida Courts eFiling Portal, which will send notice of filing and a service copy of the foregoing to the following: **David W. Foley, Jr.** and **Jennifer T. Foley**, david@pocketprogram.org, jtfoley60@hotmail.com; and **William C. Turner, Esq.**, **Elaine Marquardt Asad, Esq.**, and **Jeffrey J. Newton, Esq.**, williamchip.turner@ocfl.net, Judith.catt@ocfl.net, elaine.asad@ocfl.net, gail.stanford@ocfl.net; on this **6th** day of March, 2017.

/s Derek J. Angell
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IN THE NINTH JUDICIAL CIRCUIT COURT
IN AND FOR ORANGE COUNTY, FLORIDA

DAVID W. FOLEY and JENNIFER T. FOLEY,

Plaintiffs,

vs.

ORANGE COUNTY, PHIL SMITH, CAROL HOSSFIELD, MITCH GORDON, ROCCO RELVINI, TARA GOULD, TIM BOLDIG, FRANK DETOMA, ASIMA AZAM, RODERICK LOVE, SCOTT RICHMAN, JOE ROBERTS, MARCUS ROBINSON, RICHARD CROTTY, TERESA JACOBS, FRED BRUMMER, MILDRED FERNANDEZ, LINDA STEWART, BILL SEGAL, and TIFFANY RUSSELL,

Defendants.
_____/

Case No. 2016-CA-007634-O

THE OFFICIAL DEFENDANTS' MOTION TO DISMISS, MOTION TO STRIKE, AND REQUEST FOR JUDICIAL NOTICE

COME NOW, current and former ORANGE COUNTY (the "County") Officials named in their individual and official capacities serving on the Board of Zoning Adjustment ("BZA") or Board of County Commissioners ("BCC"), ASIMA AZAM, FRED BRUMMER, RICHARD CROTTY, FRANK DETOMA, MILDRED FERNANDEZ, TERESA JACOBS, RODERICK LOVE, SCOTT RICHMAN, JOE ROBERTS, MARCUS ROBINSON, TIFFANY RUSSELL, BILL SEGAL, and LINDA STEWART (together, the "Officials"), by and through their undersigned counsel, hereby file these, their Motion to Dismiss, Motion to Strike, and Request for Judicial Notice, and state as follows:

EXHIBIT
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Background and Overview

This is the latest and hopefully last proceeding in protracted litigation that has already reached the United States Supreme Court. Plaintiffs DAVID W. FOLEY and JENNIFER T. FOLEY (the "Foleys") are commercial toucan farmers. (Compl. ¶ 28.) Orange County Code regulates commercial aviculture. (*Id.* ¶¶ 35-37.) A citizen complained about the Foleys' toucans, and a code enforcement investigation began. (*Id.* ¶¶ 38-40.) The Zoning Manager, a non-Official County employee who is separately represented here, determined that the Foleys were in violation of the Code. (*Id.* ¶ 38.) In their words, the Foleys "appeal[ed]" to the BZA and argued that the County's regulation of aviculture is unconstitutional under the Florida Constitution because, according to them, only the Florida Fish and Wildlife Commission ("FWC") has authority to regulate wildlife. (*Id.* ¶¶ 38-40.)

The BZA held a public hearing, and the board voted that the Foleys were indeed violating the local ordinance. (*Id.*) The Foleys appealed the BZA's decision to the BCC. (*Id.*) The BCC voted to affirm the BZA's conclusion. (*Id.*) The Foleys continued with a petition for a writ of certiorari to the Ninth Judicial Circuit in Case No. 08-CA-005227-O. (*Id.* ¶ 40.) That proceeded allegedly concluded with a finding that the Foleys were "prohibited … from challenging the constitutionality of the County code on certiorari review of the BCC order." (*Id.*)

Undeterred, the Foleys filed a pro se federal action against the County, the Officials, the BZA members, and other County employees in the Middle District of Florida. (*Id.* ¶¶ 2, 5.)[1] The Foleys alleged a plethora of legal theories, only a few of which are restated in this new State Court Complaint. The District Court ultimately entered two significant orders for present

[1] The existence of the federal action was expressly pled and therefore within the "four corners" for motion to dismiss purposes, *e.g.*, *Federal Nat'l Mortg. Ass'n v. Legacy Parc Condo. Ass'n, Inc.*, 177 So. 3d 92, 94 (Fla. 5th DCA 2015), but the entirety of the federal filings are also properly considered pursuant to the judicial notice rule as explained below.

purposes, one on December 4, 2012 (the "First Order"), and another on August 13, 2013 (the "Second Order"). Those orders are attached here for reference, and they can also be found at 2012 WL 6021459 and 2013 WL 4110414, respectively.[2]

The First Order began that naming the Officials in their official capacities, which the Foleys have again done here, is "duplicative of the claims brought against Orange County." *First Order* at *3 (citing *Busby v. City of Orlando*, 931 F.2d 764, 776 (11th Cir. 1991). All related claims were dismissed. *Id.* That order continued that all Officials were "absolutely immune from suit" because "the conduct that is the basis for the Foley's claims falls within the scope of the zoning board members' and commissioners' legislative functions." *Id.* at *4 (citing *Espanola Way Corp. v. Meyerson*, 690 F.2d 827 (11th Cir. 1982); *Hernandez v. City of Lafayette*, 643 F.2d 1188 (5th Cir. 1981); *S. Gwinnett Venture v. Pruitt*, 491 F.2d 5 (5th Cir. 1974); *Fla. Land Co. v. City of Winter Springs*, 427 So. 2d 170 (Fla. 1983); and *Schauer v. City of Miami Beach*, 112 So. 2d 838 (Fla. 1959)).

Accordingly, the First Order concluded that all claims against the Officials were dismissed with prejudice. The claims against the County were dismissed without prejudice, and litigation continued against it.[3] *First Order* at *8. The Second Order ended the material District Court activity. It concluded that (1) the relevant Code was unconstitutional under the Florida Constitution, but that (2) the Foleys had nonetheless failed to show due process violations, equal protection violations, compelled speech, restraints on commercial speech, or unreasonable searches or seizures. *Second Order* at *9-14. The Code provisions were declared void and

[2] Other filings in the Middle District will be filed under separate cover due to their sheer voluminosity.

[3] The Foleys actually restated claims against the Officials and BZA members anyway, which the District Court sua sponte dismissed. (M.D. Fla. Case No. 6:12-cv-269 Doc. 168 (Jan. 24, 2013)).

unenforceable, and the Foleys were denied any further relief, including the denial of any monetary relief. *Id.* at 14-15.[4]

The Foleys appealed to the Eleventh Circuit. *See Foley v. Orange County*, 638 Fed.Appx. 941 (11th Cir. 2016) (attached hereto). The appellate court concluded, "All of the Foleys' federal claims either have no plausible foundation, or are clearly foreclosed by a prior Supreme Court decision." *Id.* at 945-46 (citations omitted). It therefore affirmed the District Court's interpretation of federal law, but it vacated for lack of subject matter jurisdiction the separate finding that the Code was unconstitutional under the Florida Constitution. *Id.* at 946.

The Eleventh Circuit also recognized that "it would be theoretically possible for the Foleys to bring a regulatory takings claim under 42 U.S.C. § 1983 ... [but] the Foleys have refused to characterize their challenge as a regulatory takings claims." *Id.* at 945 n.4 (citation omitted). The Eleventh Circuit did not expound on the dismissal of any of the individual defendants, other than to note, "The District Court subsequently struck the Foleys' amended complaint in its order dismissing the federal and state law claims against the County Officials and County Employees." *Id.* at 943 n.2.

The Foleys then filed a petition for writ of certiorari in the United States Supreme Court that was summarily denied. *See Foley v. Orange County, Fla.*, 137 S.Ct. 378 (2016).

The Foleys have now restated all relevant claims against the same series of defendants in this action. In short, and as best as the Officials can discern, those claims are:

- Count I – Seeking declaratory and injunctive relief proscribing the enforcement of the Code sections; this Count pertains solely to the County;

[4] The Foleys' state law claims against the County were expressly left open in the Second Order, but the ultimate final judgment was entered in favor of the County on all of the Foleys' claims against it. (M.D. Fla. Case No. 6:12-cv-269 Doc. 318 (Dec. 30, 2013)).

- Count II – Constitutional torts under Art. I § 9, Fla. Const., "or in the alternative" under 42 U.S.C. § 1983, "or in the alternative" a takings without public purpose, due process, or just compensation under Art. X § 6, Fla. Const., Amend. V, U.S. Const., and common law; and

- Count III – Civil Theft under § 772.11, Fla. Stats. against all individuals.

These claims are frivolous as stated against the Officials. They have been frivolous at every stage in this lengthy process. The Officials are entitled to dismissal for at least four reasons; (1) the statute of limitations; (2) res judicata; (3) quasi-judicial immunity; (4) qualified immunity; and (5) the failure to state a cognizable claim.

And whatever excusable ignorance we may afford a pro se litigant in the normal course, the Foleys are acutely aware of the frivolity of their lawsuit. Respectfully, the Officials should be dismissed with prejudice.

Request for Judicial Notice on Motion to Dismiss

Florida courts are normally confined to review the sufficiency of complaints within the four corners. *See, e.g., Federal Nat'l Mortg., supra* n.1. However, where a trial court takes judicial notice of a fact not within the four corners, that fact appropriately comes before it for dismissal purposes. *See All Pro Sports Camp, Inc. v. Walt Disney Co.*, 727 So. 2d 363, 366 (Fla. 5th DCA 1999). As the Fifth District explained in *All Pro Sports Camp*:

> All Pro's complaint contains no allegations regarding the prior federal lawsuit. However, the trial court took judicial notice of the federal judgment. Res judicata has been held a proper basis for dismissal where, though the defense was not evident from the complaint, the court took judicial notice of the record in prior proceedings.

Id. (citing *City of Clearwater v. U.S. Steel Corp.*, 469 So. 2d 915 (Fla. 2d DCA 1985)).

Section 90.201, Fla. Stats., requires state courts to take judicial notice of Florida and federal common law, constitutional law, legislative acts, and rules of court. Section 90.202 provides a list of discretionary topics that a court may take notice of. Subsection 90.202(6)

allows a court to take notice of "Records of any court of this state or of any court of record in the United States or of any state, territory, or jurisdiction of the United States."

It is appropriate to take notice of the Middle District, Eleventh Circuit, and United States Supreme Court's records in this case. Those filings will assist the Court in determining the extent issues were litigated for res judicata purposes, as well as provide the Court with background as explained in the foregoing section. There could be no prejudice to the Foleys, who were of course parties to those actions. Finally, judicial economy would be served by resolving the case at the dismissal phase as opposed to waiting for summary judgment. Not only has the Fifth District expressly approved this procedure in *All Pro Sports Camp*, but the public interest is heightened where two of the individual defendants are Mayor TERESA JACOBS and Clerk of Court TIFFANY RUSSELL.

That said, judicial notice is not required to resolve the questions of limitations, immunity, or whether a claim has been stated. It would nonetheless be helpful to those analyses as well.

Statute of Limitations

It is well settled that the statute of limitations is appropriately raised at the dismissal phase where the key timeline is apparent from the face of the complaint itself. *See, e.g., Pines Props., Inc. v. Talins*, 12 So. 3d 888, 889 (Fla. 3d DCA 2009) ("A motion to dismiss a complaint based on the expiration of the statute of limitations should only be granted in extraordinary circumstances where the facts constituting the defense affirmatively appear on the face of the complaint and establish conclusively that the statute of limitations bars the action as a matter of law.") (internal and string citations omitted). The Foleys' Complaint expressly acknowledges that their alleged causes of action accrued on February 18, 2008. (Compl. ¶ 2.)

The civil theft statute includes a specific five year limitations section. *See* § 772.17, Fla. Stats. The Foleys have also raised a series of federal and state constitutional torts against the Officials. All are governed by the four year statute of limitations codified in § 95.11(3), Fla. Stats. *See* §§ 95.11(3)(f) ("An action founded on a statutory liability"); 95.11(3)(h) ("An action for taking, detaining, or injuring personal property"); 95.11(3)(o) (intentional torts); 95.11(3)(p) ("Any action not specifically provided for in these statutes"); *see also McRae v. Douglas*, 644 So. 1368, 1372 n.3 (Fla. 5th DCA 1994) ("a four year statute of limitations applies to 42 U.S.C. § 1983 claim"). Accordingly, a five year limitations period governs the civil theft claims, and a four year limitations period governs the rest.

The Foleys are keenly aware of the limitations issue; Paragraph 2 of the complaint actually explains why they believe the claim is *not* barred. They believe that 28 U.S.C. § 1367(d) "tolls limitations for thirty days after dismissal of any supplemental claims related to those asserted to be within the original jurisdiction of the federal court." (Compl. ¶ 2.) They are incorrect.

Section 1367(d) only applies where a federal court indeed enjoyed original jurisdiction over a case. *See Ovadia v. Bloom*, 756 So. 2d 137, 139 (Fla. 3d DCA 2000). But where an initial assertion of federal jurisdiction is shown to be insufficient, § 1367(d) does not apply and no tolling occurs. *See id.* ("Any arguable jurisdiction was based on diversity, and the presence of non-diverse defendants in the action destroyed jurisdiction on that basis."). More colorfully, "[a] voluntary but improvident foray into the federal arena does not toll the statute of limitations." *Id.* (citation omitted). In other words, § 1367(d) only applies where a properly filed federal action fails on the merits and a district court, in its discretion, declines to retain supplemental state law

claims. Conversely, where underlying federal claims are improper ab initio, § 1367(d) does not save a plaintiff for their "improvident foray into the federal arena."

The Eleventh Circuit has now held that all of the Foleys' federal claims were frivolous. *See generally Foley, supra.* The case should never have been brought in federal court, and § 1367(d) does not apply. The result might be different if a non-frivolous federal claim had been brought and later lost on summary judgment, but that clearly is not our posture. A frivolous foray into the federal forum does not toll otherwise expired limitations periods.

Finally, the Foleys have expressly pled that their alleged causes of action accrued no later than February 18, 2008. (Compl. ¶ 2.) This case was filed over eight years later, well beyond the four and five year statutes applicable to the claims asserted. It is untimely and should be dismissed with prejudice.

All Federal Claims Are Res Judicata

This lawsuit is brought on the exact same theories and facts as the federal action was. "The doctrine of res judicata bars relitigation in a subsequent cause of action not only of claims raised, but also claims that could have been raised." *Topps v. State*, 865 So. 2d 1253, 1255 (Fla. 2004). All federal claims that were or could have been raised in the federal proceedings are therefore clearly barred here.

The Foleys allege that the Middle District "dismissed without prejudice all federal and state claims brought against the above named defendants" on July 27, 2016. (Compl. ¶ 2.) They misconstrue the posture of the case. Rather, the Eleventh Circuit *affirmed* the dismissal of the federal constitutional claims, and it went further to observe that those claims were frivolous. *Foley*, 638 Fed.Appx. at 942 ("we find that these federal claims on which the District Court's federal-question jurisdiction was based are frivolous", etc.). It then *vacated* the judgments

entered on the state law theories because no federal supplemental jurisdiction lies where the underlying federal claims are frivolous. *Id.* at 946.

All federal claims that have been reasserted in this action are therefore res judicata as to all parties and should be dismissed with prejudice. The remaining analysis is only necessary if the Court determines that the entirety of the case against the Officials is not procedurally barred.

The Officials Cannot Be Separately Sued in Their Official Capacities

Claims against a government official in their official capacity are duplicative of claims against the governmental body itself and subject to dismissal. *Brandon v. Holt*, 469 U.S. 464, 471-72 (1985); *Busby v. City of Orlando*, 931 F.3d 764, 776 (11th Cir. 1991). This is well-settled, black letter law. The Middle District was correct to dismiss the claims against the Officials in their official capacities, and it is equally appropriate to do so here.

The Officials Enjoy Absolute Immunity from this Action

"We have repeatedly stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Furtado v. Yun Chung Law*, 51 So. 3d 1269, 1275 (Fla. 4th DCA 2011) (citing *Saucier v. Katz*, 533 U.S. 194, 200-01 (2001)).

The non-scandalous allegations boil down to the Foleys' disagreement with how the Officials voted in an official public proceeding. Although the Middle District granted the Officials absolute legislative immunity, the Officials argued to the Eleventh Circuit that they actually sat quasi-judicially on the BZA or BCC, and they will maintain that position here.[5]

> It is the character of the hearing that determines whether or not board action is legislative or quasi-judicial. Generally speaking, legislative action results in the formulation of a general rule of policy, whereas judicial action results in the application of a general rule of policy.

[5] If the Court should disagree and find that the Officials were acting quasi-legislatively, then immunity clearly applies under the authorities cited in the First Order and listed in the "Background and Overview" section, *supra*.

Bd. of Cnty. Com'rs of Brevard Cnty. v. Snyder, 627 So. 2d 469, 474 (Fla. 1993) (citation omitted) (emphasis in original).

In other words, the question is framed as whether the governmental body is enacting or modifying an ordinance (legislative) or enforcing one (quasi-judicial). *See also Hirt v. Polk Cnty. Bd. of Cnty. Com'rs*, 578 So. 2d 415, 417 (Fla. 2d DCA 1991). The enforcement of existing code is quasi-judicial. *Michael D. Jones, P.A. v. Seminole Cnty.*, 670 So. 2d 95, 96 (Fla. 5th DCA 1996).

The Foleys specifically plead that the Officials were "sitting as a board of appeals" when they committed their allegedly illegal acts. (Compl. ¶ 38.)[6] The Zoning Manager under review was unquestionably enforcing the Code, and the BZA was then called upon to review his findings. The BCC reviewed those findings in due course. This activity was paradigmatically quasi-judicial.

The limits of judicial immunity and quasi-judicial immunity are coextensive in Florida. *Office of the State Attorney, Fourth Judicial Circuit of Fla. v. Parrotino*, 628 So. 2d 1097, 1099 (Fla. 1993). Not surprisingly, the reach of judicial immunity, and therefore also of quasi-judicial immunity, is expansive. As explained in *Andrews v. Florida Parole Commission*, 768 So. 2d 1257, 1263 (Fla. 1st DCA 2000) (citation omitted), "judges are not liable in civil actions for their judicial acts, even when such acts are in excess of their jurisdiction." This bedrock principle of American jurisprudence forecloses the Foleys' claims against the Officials.

The Officials were acting within their charge and duties in voting to either uphold or vacate the Zoning Manager's determination that the Foleys were violating Orange County Code.

[6] The Foleys have conceded that the BZA and BCC are prohibited to address an ordinance's constitutionality. (M.D. Fla. Case No. 6:12-cv-269 Doc. 1, ¶ 27-28 n.26). Nor could they argue to the contrary here.

They were acting quasi-judicially and are entitled to absolute immunity from suit. Prejudicial dismissals are warranted.

The Officials Enjoy Qualified Immunity from this Action

The civil theft claims against the Officials are, to put it mildly, frivolous. Regardless, § 768.28(9)(a), Fla. Stats., affords immunity both from tort liability and from suit to officers, employees, and agents of the state. The immunity does not apply only if the agent was acting "in bad faith or with malicious purpose." *Id.* "Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Corn v. City of Lauderdale Lakes*, 997 F.2d 1369, 1393 (11th Cir. 1993) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). The Foleys have merely alleged that the Officials exercised official votes in an official forum. They are entitled to qualified immunity.

The Foleys Have Not Stated a Claim for Civil Theft

To establish a civil theft violation, a plaintiff must allege that they have been victimized by the violation of the theft statutes, §§ 812.012-812.037 and 825.103(1), Fla. Stats. § 772.11. But an element of any theft claim requires the defendant to "obtain[] or use[]" the property of another with criminal intent. § 812.014. The Complaint is woefully bereft of any allegation that the BCC members, by exercising a public vote, "obtained or used" the Foleys' toucans. The theory is utter nonsense, no matter how verbose the Complaint or in how many different fora the Foleys recast their misguided allegations. In fact, the theory is so frivolous that neither the Middle District nor the Eleventh Circuit expressly referenced the term "civil theft." Rather, those courts benignly lumped the civil theft allegations in among the other "state-law claims."

The Foleys' claim is precisely the sort that is "not supported by the material facts necessary to establish the claim" *and* "would not be supported by the application of then-existing law to those material facts." *See* § 57.105(1). Therefore, even if the Court determines that (1) the claim is timely, (2) the claim is not res judicata, (3) the Officials do not enjoy quasi-legislative or quasi-judicial immunity, *and* (4) the Officials do not enjoy qualified immunity; our elected officials should not be subject to the burdens of discovery on such outlandish propositions as the Foleys have alleged. The Officials should be dismissed with prejudice.

Motion to Strike Scandalous Pleadings

The Foleys' Complaint contains a number of vitriolic, fanciful, and downright scandalous allegations. They allege that the governmental efforts to enforce aviculture regulations constituted "extortion," that now-Mayor TERESA JACOBS "conspire[d]" with County employee ROCCO RELVINI, that Assistant County Attorney TARA GOULD acted "with legal malice" by writing opinion memoranda, and that "every action taken by defendants [in relation to the code enforcement] … was an act of civil theft." (Compl. ¶¶ 69, 71, 72, *ad dammum* clause on p. 44). These conclusory and misguided allegations should be stricken from this record as defamatory to our public officials.

Conclusion

The Foleys' "improvident foray" into federal court has left them with time-barred claims against the Officials. Regardless, the causes of action are and always have been frivolous given the obvious and necessary immunities afforded to public officials merely exercising official votes. Yet the Foleys persist, and nearly two dozen County employees and officials continue to endure years of baseless legal chicanery. Enough is enough.

WHEREFORE, Defendants ASIMA AZAM, FRED BRUMMER, RICHARD CROTTY, FRANK DETOMA, MILDRED FERNANDEZ, TERESA JACOBS, RODERICK LOVE, SCOTT RICHMAN, JOE ROBERTS, MARCUS ROBINSON, TIFFANY RUSSELL, BILL SEGAL, and LINDA STEWART hereby respectfully request this Honorable Court to dismiss them from this action, with prejudice, and for the award of costs, interest, and all other relief deemed just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was electronically filed with the Clerk of the Court using the Florida Courts eFiling Portal, which will send notice of filing and a service copy of the foregoing to the following: **David W. Foley, Jr.** and **Jennifer T. Foley**, david@pocketprogram.org, jtfoley60@hotmail.com; and **William C. Turner, Esq.**, **Elaine Marquardt Asad, Esq.**, and **Jeffrey J. Newton, Esq.**, williamchip.turner@ocfl.net, Judith.catt@ocfl.net, elaine.asad@ocfl.net, gail.stanford@ocfl.net; on this **19th** day of December, 2016.

/s Derek J. Angell
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**IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT IN AND FOR
ORANGE COUNTY, FLORIDA**

**DAVID W. FOLEY, JR., and
JENNIFER T. FOLEY,** **CASE NO: 2016-CA-007634-O**

Plaintiffs,

vs.

**ORANGE COUNTY; PHIL SMITH;
CAROL HOSSFIELD; MITCH GORDON;
ROCCO RELVINI; TARA GOULD;
TIM BOLDIG; FRANK DETOMA;
ASIMA AZAM; RODERICK LOVE;
SCOTT RICHMAN; JOE ROBERTS;
MARCUS ROBINSON; RICHARD CROTTY;
TERESA JACOBS; FRED BRUMMER;
MILDRED FERNANDEZ; LINDA STEWART;
BILL SEGAL; and TIFFANY RUSSELL,**

Defendants.
_____/

DEFENDANTS PHIL SMITH, ROCCO RELVINI, TARA GOULD, TIM BOLDIG and MITCH GORDON'S MOTION TO DISMISS/MOTION TO STRIKE

Defendants PHIL SMITH, ROCCO RELVINI, TARA GOULD, TIM BODIG and MITCH GORDON, by and through undersigned counsel, respectfully request this Honorable Court dismiss the Amended Complaint filed against them herein by Plaintiffs, with prejudice, for the following grounds and reasons:

1. Failure to state a valid cause of action under Florida Law.

2. The expiration of the statute of limitations prior to Plaintiffs filing this Complaint.

3. The doctrine of Res Judicata bars some or all of Plaintiffs' claims.

4. The Defendants are entitled to immunity from the claims made herein per Fla. Stat. 768.28, et al.

5. Plaintiffs voluntarily agreed to dismissal of their original Complaint, after these Defendants and the other individual (government officials) Defendants filed their initial Motions to Dismiss With Prejudice. In their Amended Complaint, the Plaintiffs have done nothing to address the fatal elements in their original Complaint, nor added additional allegations to complete the required elements of their attempted claims. Instead, they have merely deleted certain allegations, and now improperly lumped together all of the individual Defendants in the same claims – plainly improper under the Rules.

6. Thus this Honorable Court may review Plaintiffs' original Complaint and the Motions to Dismiss With Prejudice filed on behalf of all individual Defendants, then compare same to the allegations in the Amended Complaint to determine that it is a sham pleading – and thus should be dismissed with prejudice.

7. Therefore, in the interest of brevity, these individual Defendants hereby respectfully reincorporate as if fully set out herein the contents of their Motion to Dismiss Plaintiffs' original Complaint, filed on or about December 20, 2016. Because the same claims are made against all of the individual Defendants and the defenses thereto are mostly parallel, these Defendants also incorporate the Motions to Dismiss Plaintiffs' original and Amended Complaint filed on behalf of the "Official Defendants" herein.

8. As stated by the Official Defendants, the now-combined claims made by the Plaintiffs against all individual Defendants – despite their clearly different roles in the underlying sequence of events – are attempted to be set forth in Counts V – VII of the Amended Complaint. As stated, the titled claim of "Abuse of Process to Invade Privacy and Rightful Activity" is a legal misnomer, for which there is no basis or authority under Florida law.

9. As to any attempted claim for Abuse of Process, the claims against these

individual Defendants are for their alleged wrongful enforcement of the Orange County Code on Plaintiffs operating a business in a residential neighborhood. All of these claims have previously been made against the County and all of the individual Defendants on multiple occasions in Federal Court, and the Plaintiffs have met with defeat in every Federal forum – e.g. the claims made against Defendants while acting in their official capacities are duplicative of Plaintiffs' claims brought against Defendant Orange County, and thus subject to dismissal with prejudice. For some or all of the claims against these individual Defendants, the Federal Courts have previously held all the way up to the U.S. Supreme Court that the Defendants are immune from these claims because their alleged conduct fell within their official and/or legislative functions. Thus, no claim for abuse of process is properly based here, and the attempt should be dismissed.

10. Similarly, the attempt by the Plaintiffs to sue these Defendants for conversion, plainly fails. A basic element is that the Defendant exercised dominion or control over the Plaintiffs' property. As the Plaintiffs' Complaints concede, the Defendants were simply attempting to enforce the Orange County Zoning Code and Regulations. Thus, the conversion claim also fails.

11. Finally, the allegations of civil theft and violations of Plaintiffs' rights to due process attempted in Counts VI and VII plainly also fail. Again, in the interest of brevity, these Defendants reincorporate the arguments made in their Motion to Dismiss Plaintiffs' original Complaint filed in this Court, the arguments set forth in the individual Co-Defendants' Motion to Dismiss, and in this Honorable Court's taking of Judicial Notice of the many pleadings and Orders entered against the same Plaintiffs on the same claims in the Federal Courts.

12. Simply put, the U.S. District Court, the Eleventh Circuit Court of Appeals and even the U.S. Supreme Court in denying Plaintiffs' Petition for Certiorari, all ruled against these

or similar claims made by the Plaintiffs against the same Defendants, arising from the same factual allegations. Florida law is plainly against these now-attempted claims by the Plaintiffs in their Amended Complaint. The doctrines of Res Judicata, the statute of limitations and the immunity available to these government officials for their attempts to enforce local laws, all are in opposition to Plaintiffs' attempted claims. In this context, these individual Defendants respectfully request that Plaintiffs' Amended Complaint be, finally, dismissed with prejudice.

WHEREFORE, Defendants PHIL SMITH, ROCCO RELVINI, TARA GOULD, TIM BODIG and MITCH GORDON respectfully request that this Court enter an Order granting their MOTION TO DISMISS/MOTION TO STRIKE and for such other and further relief as the Court deems just and proper.

I HEREBY CERTIFY that on March 7, 2017, the foregoing was electronically filed through the Florida Courts E-Filing Portal which will send a notice of electronic filing to David W. Foley, Jr., 1015 North Solandra Drive, Orlando, FL 32807; Jennifer T. Foley, 1015 N. Solandra Drive, Orlando, FL 32807; Dennis R. O'Connor, Esquire, O'Connor & O'Connor, LLC, 840 S. Denning Drive, Suite 200, Winter Park, FL 32789.

Respectfully submitted,

/s/ Lamar D. Oxford

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IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, FLORIDA

CASE NO.: 2016-CA-007634-O
DIVISION: 35

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

Plaintiffs,

v.

ORANGE COUNTY, FLORIDA, et al.,

Defendants.
_____/

ORANGE COUNTY'S MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT PURSUANT TO FLORIDA RULES OF CIVIL PROCEURE 1.140(b)(1) and (6)

Defendant, Orange County, Florida ("Orange County"), hereby moves this Court to dismiss the Amended Complaint filed by David W. Foley, Jr. and Jennifer T. Foley ("Foleys"), pursuant to Florida Rules of Civil Procedure 1.140(b)(1) and (6), for lack of subject matter jurisdiction and for failure to state a cause of action.

The Foleys' Amended Complaint against Orange County and various third party individuals and officials purports to state six counts, only four of which appear to be raised against Orange County. Counts 1 and 2 purport to be claims for a 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

individuals, not Orange County. Count 7 is pleaded in the alternative, and is titled "Due Process."

The Foleys' Amended Complaint makes allegations concerning events in 2007-2008, centering on a license David Foley purportedly obtained from the State of Florida Fish & Wildlife Conservation Commission to exhibit and sell exotic birds at the Foleys' Solandra Drive residence in Orange County, Florida. Orange County's zoning regulations did not permit aviculture or the exhibiting and selling of exotic birds as a home occupation. The Foleys claimed in 2007 that Orange County could not regulate away, at the county level, a license they had obtained from the state. Orange County disagreed. Litigation ensued between the Foleys and Orange County in state and federal courts.

The Foleys' Amended Complaint also makes allegations concerning more recent events. The Foleys allege that Orange County's recently amended zoning ordinance is invalid, and also allege problems with a separate property owned by the Foleys, called the "Cupid Property."

1. Counts 1 and 2 Should be Dismissed Because Plaintiffs Fail to Allege a Ripe Justiciable Controversy under Florida's Declaratory Judgment Act.

Counts 1 and 2 should be dismissed for failure to state a claim. 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 Dept. of Environmental Protection v Garcia,* 99 So. 3d 539, 545 (Fla. 3rd 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 language that had been challenged by the Foleys in prior litigation. 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 newly amended zoning ordinance. 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, known as Ordinance 2016-19, with an effective date of September 23, 2016. The Foleys do not allege that Orange County has deprived them of any right they may have since the amendment. Because the Foleys have not alleged 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. 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 Court lacks subject matter jurisdiction. Therefore, Counts 1 and 2 of the Amended Complaint, seeking declaratory judgment and injunctive relief, should be dismissed.

2. Count 3 Should be Dismissed Because Plaintiffs Failed to State a Cause of Action Upon Which Relief can be Granted.

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

The Foleys' claims for negligence, unjust enrichment, and conversion fail and should be dismissed with prejudice. As to the claim for negligence, their complaint does not allege any duty recognized under Florida negligence law on the part of Orange County, nor does it allege a breach of any such duty. Florida law is clear that the existence of a duty in negligence is a pure question of law. *See Williams v. Davis,* 974 So. 2d 1052, 1057 n. 2 (Fla. 2007); *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.

See Amended Complaint, 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.

As to Foleys' "unjust enrichment claim," apparently found at paragraph 62(b), 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. *See* Amended Complaint, paragraph 40. The Foleys received the value of participating in these proceedings.

Nor do the Foleys state a claim for conversion. 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.

Count 3 fails to state a cause of action and should be dismissed.

3. <u>Count 4 should be Dismissed for Plaintiffs' Failure to State a Cause of Action Upon Which Relief Can Be Granted</u>.

In Count 4 of the Foleys' Amended Complaint, they seek monetary damages for a taking without public purpose, due process or just compensation pursuant to Article X, Section 6, Florida Constitution (eminent domain)[1]. This theory purports to allege an inverse condemnation claim. The Foleys seek damages including purported lost business income.

The exercise of the power of eminent domain and the constitutional limitations on that power are vested in the legislature. The right to exercise the eminent domain power is delegated by the legislature to the agencies of government and implemented by legislative enactment. The

[1] Article X, Section 6, Florida Constitution, provides that "[n]o private property shall be taken except for a public purpose and with full compensation therefor . . . "

right of a county to exercise the power of eminent domain is granted pursuant to Florida Statute Sec. 127.01 (2016)[2] See also *Systems Components Corp v. Florida Department of Transportation*, 14 So.3d 967, 975-76 (Fla. 2009). [T]he "full compensation" mandated by article X, Section 6 of the Florida Constitution is restricted to (1) the value of the condemned land, (2) the value of associated appurtenances and improvements, and (3) damages to the remaining land (i.e., severance damages). *See, e.g., State Road Dep't v. Bramlett*, 189 So. 2d 481, 484 (Fla. 1966); *cf. United States v. Bodcaw Co*., 440 U.S. 202, 204 (1979). Nowhere in Florida's constitution, Florida Statutes, or in case law does property mean or include a permit or license to sell, breed or raise wildlife (Toucans).

The Foleys cannot state a claim for inverse condemnation because 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 1985). Moreover, even if Orange County's interpretation of its Zoning Ordinance could somehow be deemed as confiscatory, inverse condemnation would still not be a viable cause of action; instead, the relief available would be a judicial determination that the ordinance or resolution is unenforceable and must be stricken. *Id.; see also* Section 6, *Infra.*

The only "right" the Foleys arguably ever had was a "right" granted to Mr. Foley alone by a state-issued permit or license, not a property right. 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. 3rd DCA 1993).

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[2] Chapter 127, Florida Statutes (2016) - Section127.01-Counties delegated power of eminent domain; recreational purposes, issue of necessity of taking; compliance with limitations.— (1)(a) Each county of the state is delegated authority to exercise the right and power of eminent domain; that is, the right to appropriate property, except state or federal, for any county purpose. The absolute fee simple title to all property so taken and acquired shall vest in such county unless the county seeks to condemn a particular right or estate in such property.

Finally, the Foleys are not entitled to business damages under their takings claim. Under Florida law, business damages in a takings context are not damages that are constitutionally created, but instead are statutorily based. *See Systems Components Corp,* 14 So. 3d at 978. Furthermore, business damages are statutorily limited to certain types of takings by governmental entities, none of which are involved here. *Id.* According to Florida's Supreme Court:

> In more informal terms, the business-damages portion of the statute has been suggested to generally *apply if, and only if:*
>
> (1) A partial taking occurs;
> (2) The condemnor is a state or local "public body";
> (3) The land is taken to construct or expand a right-of-way;
> (4) The taking damages or destroys an established business, which has existed on the parent tract for the specified number of years;
> (5) The business owner owns the condemned and adjoining land (lessees may qualify)
> (6) The business was conducted on the condemned land and the adjoining remainder; and
> (7) The condemnee specifically pleads and proves (1)-(6).

Id.

The Foleys did not plead these statutorily required elements. Consequently, the Foleys are not entitled to business damages, Count 4 does not state a cause of action upon which relief can be granted, and as such, Count 4 should be dismissed.

4. <u>Plaintiffs Do Not State a Viable Cause of Action For a Constitutional Tort Denial of Fundamental Rights and Conspiracy to Deny Fundamental Rights Under Florida Law</u>

In Count 7 of the Foleys' Amended Complaint, they allege an alternative theory of "Due Process." However, no cause of action for money damages exists under Florida law for violation of a state constitutional right. Specifically, 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).

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) Sec. 1983 to breath life into the state constitutional provisions." *Id*. at 1146 (concurring opinion Justice Sharp).

Since there is no recognizable cause of action under state law for money damages based on a constitutional tort of violation of fundamental rights, this portion of the Foleys' Amended Complaint must be dismissed for failure to state a cause of action.

5. <u>Plaintiffs Do Not State a Federal Cause of Action Under 42 U.S.C. Sec. 1983</u>

To the extent the Foleys' Amended Complaint seeks monetary damages for an alleged violation of their rights under 42 U.S.C. Sec. 1983, the Amended Complaint should be dismissed because the substance of their grievances do not state a cause of action under federal law.

The Due Process Clause of the Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The Supreme Court has interpreted this clause to provide for two different kinds of constitutional protection: substantive due process and procedural due process. *McKinney v. Pate*, 20 F. 3d 1550, 1555 (11th Cir. 1994) (en banc). The Foleys bring only substantive due process claims, which this Court must carefully analyze to determine the nature

of the Foleys' rights that allegedly have been deprived. *DeKalb Stone, Inc. v. County of DeKalb*, 106 F.3d 956, 959 (11th Cir. 1997).

The Foleys at best assert two possible bases for their claims. They contend first that Orange County's zoning ordinances are *ultra vires* and, therefore, are arbitrary and irrational. They also contend that Orange County's decision to uphold the zoning manager's determinations that a commercial aviary is not a permissible use of a residential-only zoned property, and that a commercial aviculture operation also cannot be a home occupation, are substantive due process violations.

In order to address these claims, the Court should first review the law applicable to substantive due process claims. The Court should then apply that law to the two possible bases for the Foleys' claims to see if they state a claim under federal law.

The substantive component of the Due Process Clause protects those rights that are fundamental—that is, rights that are "implicit in the concept of ordered liberty." *McKinney*, 20 F.3d at 1556. Fundamental rights are those protected by the U.S. Constitution. *Id.* Substantive rights that are created by state law are generally not subject to substantive due process protection. *Id.* Land use regulations like those at issue in this case are state-created rights that are not protected by substantive due process. *Greenbriar Village, L.L.C. v. Mountain Brook*, 345 F.3d 1258, 1262 (11th Cir. 2003). Moreover, the Foleys were deprived at most of their rights under a permit, which does not constitute a property right. *See Hernandez*, 629 So. 2d at 206. Thus, the Foleys were not deprived of life, liberty or property.

The Foleys' theory also fails because the Foleys complain about Orange County's executive acts, i.e. applying an allegedly invalid ordinance to the particular facts of the Foleys' request for a determination that the Foleys were permitted to exhibit and sell birds at their home.

The Eleventh Circuit Court of Appeals describes executive acts as those acts that "apply to a limited number of persons (and often only one person)" and which "typically arise from the ministerial or administrative activities of members of the executive branch." *McKinney,* 20 F.3d at 1557 n.9. An example of an executive act that is not subject to substantive due process is the enforcement of existing zoning regulations. *DeKalb Stone, Inc.*, 106 F.3d at 959. Legislative acts, in contrast, "generally apply to larger segments of—if not all—society." *Id.* The Eleventh Circuit cites "laws and broad-ranging executive regulations" as common examples of legislative acts. *Id.*

The Foleys challenge Orange County's decision to uphold the determinations of the county zoning manager that a commercial aviary is not an authorized use in the residential zoning category applicable to their residence, and that operation of a commercial aviary is not an authorized home occupation under the zoning regulations. The chain of events began about ten years ago when the Foleys requested an official determination from the zoning manager as to whether the operation of a commercial aviary at their residence was permitted by the zoning code. The zoning manager concluded that a commercial aviary was not permitted in residential-only zoned areas. They appealed to the Board of Zoning Adjustment, ("BZA") an advisory body to the Orange County Board of County Commissioners, which upheld the zoning manager's interpretation of the zoning ordinances. Plaintiffs then appealed the BZA's recommendation to the Board of County Commissioners ("BCC") and the BCC upheld the BZA's recommendation.

The Foleys' substantive due process claim is a dispute over how Orange County interprets its existing zoning ordinances. They sought to persuade Orange County that a commercial aviary would be a permissible use of their residentially zoned property or that a home occupation (as that term was used in the zoning ordinances) could encompass the operation

of a commercial aviary. They were unsuccessful. The county zoning manager, the Board of Zoning Adjustment, and the Board of County Commissioners all decided that Plaintiffs' interpretation of the existing zoning ordinances was incorrect. The interpretation of existing laws is not a legislative function; it is an executive act usually intertwined with an enforcement action.[3] While the Foleys asked Orange County directly for an interpretation in this case, the nature of the action is the same—Orange County was interpreting the existing law.[4] That is an executive act that cannot serve as the basis for a substantive due process claim.

6. Plaintiffs' Allegation that they could not have Prevented Any Alleged Injury by State Court Intervention or Review is Legally Incorrect and Should be Stricken.

In their Amended Complaint, the Foleys now allege that the wrongs allegedly perpetrated by the Defendants could not have been prevented by state court intervention or review. *See,* Amended Complaint, ¶52 ("Defendants' practice and proceeding described in paragraphs 39 – 51 could not be prevented from injuring the Foleys by state court intervention or review") and

[3] The ordinance that created Board of Zoning Adjustment tasked it with, among other things, hearing and deciding "appeals taken from the requirement, decision or determination made by the planning or zoning department manager where it is alleged that there is an error in the requirement, decision or determination made by said department manager in the *enforcement of zoning regulations."* Art. V, § 502, Orange County Charter (emphasis added).

[4] The Eleventh Circuit reached a similar conclusion in *Boatman v. Town of Oakland*, 76 F.3d 341 (11th Cir. 1996), when it rejected a property owner's assertion that he had a substantive due process "right to a correct decision from a government official." In that case, a building inspector decided that the property owner's building was a mobile home that was prohibited by the applicable zoning ordinance. *Id*. At 345. The inspector therefore refused to inspect the property and issue a certificate of occupancy. *Id.* The property owner, who was also a member of the town zoning board, disagreed with the building inspector's interpretation of the zoning ordinance. *Id.* When the town council agreed with the inspector's interpretation of the ordinance, the property owner sued, arguing that the town's refusal to perform the inspection was arbitrary in violation of their federal due process rights. *Id.* The Eleventh Circuit concluded that such a "claim is not cognizable under the substantive component" of the Due Process Clause. *Id.*

66(e). However, the Foleys could have challenged the validity or enforceability of the Orange County Zoning Code that the Foleys challenged in a declaratory judgment action filed at the time. *See Nannie Leave's Strawberry Mansion v. City of Melbourne*, 877 So. 2d 793, 794 (Fla. 5th DCA 2004); *see also Pinellas County*, 464 So. 2d at 176. They could have contemporaneously brought a declaratory judgment action seeking to have Orange County's Land Use Code declared unconstitutional or otherwise invalid, and could have, through the declaratory judgment statute, sought equitable relief, including injunctive relief, both temporary and permanent. The fact that they failed to take such action at the time does not mean they could not have taken such action.

7. Conclusion.

For the foregoing reasons, the Foleys' Amended Complaint should be dismissed.

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that on March 7, 2017 the foregoing was electronically filed with the Clerk of the Court using the Florida Courts eFiling Portal, which will send notice of filing and a service copy of the foregoing to the following:

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IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

Plaintiffs DAVID W. FOLEY, JR., and JENNIFER T. FOLEY *v.* ***Defendants*** 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.*	2016-CA-007634-O **PLAINTIFFS' RESPONSE** **IN OBJECTION TO** **OFFICIALS' AND EMPLOYEES' MOTIONS FOR JUDICIAL NOTICE**

PLAINTIFFS DAVID AND JENNIFER FOLEY make this response IN OBJECTION to the judicial notice requested in: *1)* "The Official Defendants' Motion to Dismiss, Motion to Strike, and Request for Judicial Notice," filed December 19, 2016, as e-file # 50285273; *2)* renewed in "The Official Defendants' Motion to Strike the Amended Complaint, Renewed Request for Judicial Notice, and Motion to Dismiss this Action with Prejudice" filed March 3, 2017, as e-file #53349478; *3)* joined by

"Defendants Phil Smith, Rocco Relvini, Tara Gould, And Tim Boldig's Motion To Dismiss," filed December, 20, 2016, as e-file #50321893; and, *4)* renewed by "Defendants Phil Smith, Rocco Relvini, Tara Gould, Tim Boldig And Mitch Gordon's Motion To Dismiss/Motion To Strike," filed March 7, 2017, as e-file #53363907.

ARGUMENT

The Foleys do not object to judicial notice of the decisions, or judgments, the *officials* have filled with the court: 137 S.Ct. 378, 638 Fed.Appx. 941, 2013 WL 4110414, and 2012 WL 6021459. The Fifth District took judicial notice of judgments in *All Pro Sports Camp, Inc. v. Walt Disney*, 727 So.2d 363 (5th DCA 1999). But it did not go further.

The Foleys do object to defense's suggestion that the court may take indiscriminate judicial notice of "the entirety of the federal filings," *see* e-file # 53349478, Ex A, p.2, †1. In as much as no such filings were submitted with its motion, defense appears to be suggesting the Court should without further notice login to PACER and peruse the federal filings itself at its convenience whether before hearing on the defendants' motions to dismiss,

or after. Defense is wrong to claim the Fifth District "expressly approved this procedure in *All Pro Sports Camp*." It did not.

If defense wants to prove that something is in the *record* relied upon in the federal *judgment*, there is a procedure it can follow. The court in *Bergeron Land Devel., Inc. v. Knight*, 307 So.2d 240 (4th Dist 1975), reversed the lower court's decision to take "judicial notice of the pleadings, issues, and adjudication in another case," that the lower court failed to make part of the record in the case before it. *Bergeron* held that when a party seeks to "prove some matter contained in the record of a case other than the one being litigated, a party must offer the other court file or certified copies of portions thereof into evidence in the case being litigated." The Fifth District quotes *Bergeron* to make this very point in *TD BANK, NA v. Graubard*, Case No. 5D14-1505 †4 (5th DCA 2015).

A *record* must be made in this case – one that establishes the basis of this court's decisions. Despite defense's seductive assurances to the contrary, this court would prejudice the Foleys in any appeal of this case if it took judicial notice of *filings* in another case that defense fails to make part of the record in this case. If it did so, there would be "no way for [the appellate court] to determine the propriety of the trial court's conclusion as

to the effect of prior litigation on the rights of the parties in the present controversy," *Bergeron at 241*.

Finally, in *All Pro Sports Camp* the Fifth District relied on *City of Clearwater v. U.S. Steel Corp*., 469 So.2d 915 (2nd DCA 1985). In *U.S. Steel Corp* "[a]t the hearing on the motion to dismiss the complaint, the parties agreed that the court could take judicial notice of the record in all other proceedings between the parties." In other words, where the Fifth District says in *All Pro Sports Camp* that "the court [in *U.S. Steel Corp*] took judicial notice of the record in prior proceedings," it only meant that the court can do so by *stipulation of the parties*. The Foleys do not so stipulate.

CONCLUSION

The Foleys agree to judicial notice of the judgments the *officials* have filled with the court, but object to judicial notice of any filings in any other case between the parties not made part of the record in this case.

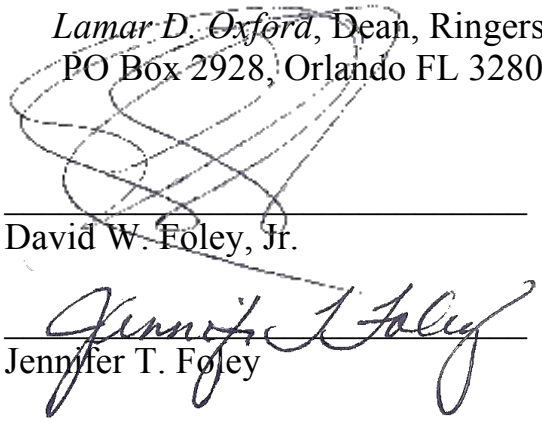
CERTIFICATE OF SERVICE

Plaintiffs certify that on May 22, 2017, the foregoing was electronically filed with the Clerk of the Court using the Florida Courts' eFiling Portal, which will send notice of filing and a service copy of the foregoing to the following:

William C. Turner, Jr., Assistant County Attorney,
P.O. Box 2687, Orlando FL, 32801, williamchip.turner@ocfl.net;

Derek Angell, O'Connor & O'Connor LLC,
840 S. Denning Dr. 200, Winter Park FL, 32789,
dangell@oconlaw.com;

Lamar D. Oxford, Dean, Ringers, Morgan & Lawton PA,
PO Box 2928, Orlando FL 32802-2928, loxford@drml-law.com.



David W. Foley, Jr.

Jennifer T. Foley

Date: May 22, 2017

Plaintiffs
1015 N. Solandra Dr.
Orlando FL 32807-1931
PH: 407 671-6132
e-mail: david@pocketprogram.org
e-mail: jtfoley60@hotmail.com

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT COURT, IN AND FOR ORANGE COUNTY, FLORIDA

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

Plaintiffs,

v. CASE NUMBER: 2016-CA-007634-O

ORANGE COUNTY, PHIL SMITH, CAROL HOSSFIELD, MITCH GORDON, ROCCO RELVINI, TARA GOULD, TIM BOLDIG, FRANK DETOMA, ASIMA AZAM, RODERICK LOVE, SCOTT RICHMAN, JOE ROBERTS, MARCUS ROBINSON, RICHARD CROTTY, TERESA JACOBS, FRED BRUMMER, MILDRED FERNANDEZ, LINDA STEWART, BILL SEGAL, and TIFFANY RUSSELL,

Defendants.
_____/

RE-NOTICE OF HEARING
30 Minutes
Confirmation No. 889811

PLEASE TAKE NOTICE that the Defendants, FRANK DETOMA, ASIMA AZAM, RODERICK LOVE, SCOTT RICHMAN, JOE ROBERTS, MARCUS ROBINSON, RICHARD CROTTY, TERESA JACOBS, FRED BRUMMER, MILDRED FERNANDEZ, LINDA STEWART, BILL SEGAL, and TIFFANY RUSSELL, by and through their undersigned counsel, will bring on for hearing on Tuesday, August 1, 2017, at 9:30 a.m., before The Honorable Heather L. Higbee, Orange County Courthouse, Hearing Room 20-B, 425 North Orange Avenue, Orlando, FL 3280 the following motions:

1. The Official Defendants' Motion to Strike the Amended Complaint, Renewed Request for Judicial Notice, and Motion To Dismiss/Motion To Strike

2. Defendants PHIL SMITH, ROCCO RELVINI, TARA GOULD, TIM BODIG AND MITCH GORDON's Motion to Dismiss/Motion to Strike.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that a lawyer in my firm with full authority to resolve this matter attempted in good faith to contact *pro se* Plaintiffs via email on:

1. May 3, 2017 at 3:06 p.m.
2. May 11, 2017 at 11:48 a.m.
3. May 15, 2017 at 9:42 a.m.

to discuss resolution of the motions without a hearing. Plaintiffs indicated in e-mail exchanges they will be recording the conference call. Defendants would not agree, and viewed Plaintiffs' representations as a refusal to participate in a good faith conference.

Derek J. Angell

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by Electronic Mail via the Florida E-Portal System to William C. Turner, Esquire, Elaine Marquardt Asad, Esquire and Jeffrey J. Newton, Esquire, williamchip.turner@ocfl.net, judith.catt@ocfl.net, elaine.asad@ocfl.net, gail.stanford@ocfl.net; and Lamar D. Oxford, Esquire, loxford@drml-law.com, katietillotson@drml-law.com and via U.S. mail/email to David W. Foley and Jennifer T. Foley, *pro se*, 1015 N. Solandra Drive, Orlando, FL 32807, David W. Foley, Jr. and Jennifer T. Foley, david@pocketprogram.org, jtfoley60@hotmail.com on this 22nd day of May, 2017.

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Copy of Notice/Motions
The Honorable Hweather L. Higbee
cc: info@orangelegal.com

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

Plaintiffs DAVID W. FOLEY, JR., and JENNIFER T. FOLEY *v.* ***Defendants*** 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.*	2016-CA-007634-O **PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTIONS TO DISMISS**

Plaintiffs David and Jennifer Foley make this response to: *1)* "Orange County's Motion to Dismiss Plaintiffs' Amended Complaint Pursuant to Florida Rules of Civil Proceure (*sic*) 1.140(b)(1) and (6)," filed March 7, 2017; *2)* "The Official Defendants' Motion to Strike the Amended Complaint, Renewed Request for Judicial Notice, and Motion to Dismiss this Action with Prejudice," filed March 6, 2017; and, *3)* "Defendants Phil Smith, Rocco Relvini, Tara Gould, Tim Boldig and Mitch Gordon's Motion To Dismiss/Motion To Strike," filed March 7, 2017.

§1 OVERVIEW OF THE CASE AND CONTROVERSY

This case is not about whether defendants were doing what they normally do – they were. This case is about whether doing what they normally do was made tortious by Art. IV, §9, Fla. Const. – it was.

The underlying case involves a dispute over how Florida defines the Foleys' property interests in their toucans [Amended Complaint (AC), ¶¶27-29, 32-38], and how Florida protects those interests from defendants' erroneous deprivation [AC ¶¶40(b), 42-43, 46-47, 52].

The definition of the Foleys' property interests in their toucans begins and ends with the way Florida separates its police powers, its *legitimate public purpose*. Florida gives specific powers exclusively to its Fish and Wildlife Conservation Commission (FWC), per Art. IV, §9, Fla. Const. Florida gives general powers conditionally to its counties, per Art. VIII, §1(g), Fla. Const. In particular, Florida vests all police power over the possession and sale of exotic birds in FWC [AC ¶28]; the Foleys' property interests in their toucans are created and governed exclusively by FWC. Or, as put by former, four-term Attorney General Bob "Tobacco Buster" Butterworth:

> "The authority to determine initially whether [*commercial aviculture*] constitutes a public nuisance or a threat to the public is vested exclusively in the Florida Fish and Wildlife Conservation Commission." Op. Att'y Gen. 2002-23

This controversy arises because defendants shut down the Foleys' legitimate and established bird business claiming Florida grants Orange County power to regulate *aviculture (commercial)* – i.e., the advertising or sale of birds – as a land use classification [AC ¶¶39-40, 45].

However, as stated in Op. Att'y Gen. 2002-23, and confirmed by the Middle District of Florida [*Foley v. Orange Cty.*, No. 6:12-cv-269-Orl-37KRS, 2013 WL 4110414 **4-9 (M.D. Fla. Aug. 13, 2013)], the law in Florida has clearly established the County's land use authority does not extend to the regulation of *aviculture (commercial)*; as argued herein at Appendix I, (Memorandum of Law: FWC Jurisdiction), Art. IV, §9, Fla. Const., deprives defendants of the *legitimate public purpose* essential to any defense for their destruction of the Foleys' bird business.

Worse, defendants deliberately exacted the destruction of the Foleys' *aviculture* business by means of a practice and procedure that made them judge of their own constitutional authority and denied the Foleys the adversarial pre-deprivation remedy Florida makes available pursuant Ch. 162, Fla. Stat., and which Orange County makes available pursuant Ch. 11, OCC [AC ¶¶40(b), 45]; ironically, the remedy that would have immunized their error from this suit –

Ch. 162, Fla. Stat. – is the remedy defendants deliberately denied the Foleys in order to leverage the exaction.

§2 RESPONSE TO ORANGE COUNTY

In this section, §2, the Foleys respond to "Orange County's Motion to Dismiss Plaintiffs' Amended Complaint Pursuant to Florida Rules of Civil Proceure (sic) 1.140(b)(1) and (6)," filed March 7, 2017 [*Abbreviated here*: OC-MtD].

§2.1 Counts One and Two – *Declaratory and Injunctive Relief*

Defense argues there are two reasons the Foleys' requests for declaratory and injunctive relief in Counts 1 and 2 are either moot or unripe: *1)* the County has amended the "zoning ordinance" at issue and "removed the language that had been challenged;" and, *2)* the Foleys have not "sought to exercise any rights they may have since Orange County adopted the amended zoning ordinance."

This argument fails for two reasons. First, defense fails to prove the amendment will end the injury of the original enforcement action at the Solandra homestead; the County has not repudiated the *aviculture custom*, permit, and standing BCC order the Foleys challenge in Count 1. Second, the amendment clearly perpetuates the facially invalid prohibition of SIC 0279 at

the Cupid property challenged in Count 2. The County must answer the amended complaint.

§2.1.1 Standard for evaluating a change in statutory language.

The two primary questions this court asks in analyzing a change in statutory language are authoritatively outlined in *Coral Springs Street Systems v. City of Sunrise*, 371 F. 3d 1320 (11th Cir. 2004): *1)* Does the new language still disadvantage the Foleys?; and, *2)* Is there a reasonable expectation the challenged practice will resume? The burden of proof in both questions is upon the County. And the County has not carried that burden.

§2.1.2 Does the new language still disadvantage the Foleys? ***Yes*.**

The Foleys concede that after nine years of legal wrangling in multiple forums, after the Foleys petitioned the US Supreme Court for relief (Cert. denied, 10/31/16), and a month after the Foleys filed this action, Orange County did make the amendments alleged in AC ¶55. However, these changes *do not* permit the Foleys to restart their bird business at the Solandra homestead, or to expand it to the Cupid property.

The injuries the Foleys seek to redress in Count 1 are the result of a *custom*, or an interpretation of ordinances, not the ordinances themselves; the

defendants interpreted Orange County's definition of *primary use, accessory use* and *home occupation* to prohibit *aviculture (commercial)* at the Foleys' Solandra property [AC ¶40-41]. The amended complaint makes this clear. The Foleys allege their injuries result from: *1)* "an *aviculture* custom" [AC p.1]; *2)* an "unpublished *aviary/aviculture* prohibition (custom)" [AC ¶51]; *3)* the site-plan and building permit for the Foleys' *aviaries* "with the exaction 'Pet birds only – No Commercial Activities Permitted' on their face," an exaction grounded in, and evidence of the unpublished *custom* [AC ¶40(d)]; and, *4)* the "final order of the BCC" effectively affirming the site-plan and permit exaction and codifying the unpublished *custom* [AC ¶40(e)]. Indeed, the Foleys specifically allege that the defendants knew "there was no ordinance" that put the Foleys on notice that the sale of birds raised at the Solandra homestead was prohibited [AC ¶41]. Moreover, the Foleys' prayer specifically requests relief from "any custom, permit, order, policy, or ordinance" that conflicts with Art. IV, §9, Fla. Const., and would prohibit them from selling birds raised at the Solandra property [AC pp.12-13].

Defense has done nothing to prove the amendments identified at AC ¶55, reverse, enjoin, repudiate or prevent continued enforcement of the challenged *custom*, permit, and BCC order. It cannot. The amended ordinance as alleged at

AC ¶55(c), now expressly prohibits "*commercial retail sale of animals*" as a *home occupation*; the amendment in fact broadens and codifies the prohibition in the challenged *custom*, permit, and order. Ordinance 2016-19 does strike the definition of *aviculture (commercial)*, and its regulation of that defined activity. But it then amends the code to subsume and regulate the possession and sale of birds as a *home occupation* [*see* §38-1, OCC] within the broadly defined categories of "*commercial retail sale of animals*" [*see* §38-79(101), OCC]. This is exactly like calling *fresh* water, *salt* water to usurp FWC jurisdiction over *fresh* water as Florida's legislature attempted to do in the late '40's. That attempt was reversed in *Beck v. Game and Fresh Water Fish Commission,* 33 So.2d 594 (Fla. 1948) [*See* Appendix I, Memorandum of Law: FWC Jurisdiction, pp. 15-16]. This court is bound by that decision to do the same.

Furthermore, as alleged in AC ¶55(h)-(j), Orange County did not strike the Standard Industrial Classification (SIC) Group code 0279, (Animal Specialties, Not Elsewhere Classified), from that row of the Use Table at §38-78, where it did strike the use description *Commercial aviculture, aviaries.* Defense has not explained this. If the continued inclusion of SIC code 0279 is taken at face value, as it must be, Orange County intends to entirely prohibit SIC Group 0279 – a group that includes other use descriptions the County has

stricken from the Use Table, namely, *exotic animals* [e.g., rattlesnake farms], and *bee keeping*. In fact, amendments elsewhere in the Use Table, §38-78, of ordinance 2016-19, suggest additions and deletions of SIC codes were quite deliberate: the SIC code associated with the use description *Poultry raising or keeping* has been moved and maintained; and, SIC codes have been added with new associated use descriptions (e.g., *Distribution electric substation, Wholesale bakeries, Wholesale florists, Restaurants with outdoor seating, Seminaries, Juvenile justice rehabilitation schools or facilities*) [*See* Ordinance 2016-19, pp. 120-128]. The court cannot assume Orange County has left SIC code 0279 in the amended Use Table, §38-78, of ordinance 2016-19, for no reason, or as the result of clerical error; defense must prove either conclusion, but has not.

The new language still disadvantages the Foleys: the likelihood is great that defendants will continue to interpret *accessory use* and *home occupation* to prohibit the sale of birds kept at the Foleys' R-1A zoned Solandra property; and, the likelihood is great that defendants will continue to interpret the unchanged SIC Group code 0279 in the Use Table at §38-78, to regulate or prohibit *aviculture (commercial)*, i.e., the advertising or sale of birds, at the Foleys' A-2 zoned Cupid property.

Counts 1 and 2 are not moot or unripe and the County must answer the amended complaint.

§2.1.3 Is there a reasonable expectation the challenged practice will resume? ***Yes. It never stopped*.**

Coral Springs divides its second primary question into two sub-questions: *1)* Has defendant publicly announced or disavowed an intent to re-enact?; and, *2)* Did defendant promptly strike the challenged language, or wait until well after it was sued for that relief?

Orange County has not publicly announced or disavowed an intent to re-enact. In fact, defense conspicuously avoids addressing the keystone of the Foleys' amended complaint – Art. IV, §9, Fla. Const. [*See* Appendix I, Memorandum of Law: FWC Jurisdiction, pp.3-5]. This suggests the County has not yet accepted the conclusion of Florida's Attorney General in Op. Att'y Gen. 2002-23, regarding local regulation of the possession, breeding or sale of non-indigenous 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."

As to the second sub-question – if *Coral Springs*, by reference to *National Advertising Company v. City of Ft. Lauderdale*, 934 F.2d 283 (11th

Cir.1991), found fault with a defendant who waited six weeks after suit was filed to amend its ordinance, surely a wait of *nine years* provides this court sufficient cause to suspect defendant's sincerity, and good reason to proceed on Counts 1 and 2 in full.

The County must answer the amended complaint.

§2.2 Count Three – *Negligence, Unjust Enrichment, and Conversion*

The County argues there are six reasons the Foleys' tort claims in Count 3 should be dismissed: *1)* The Foleys have no interest to defend; *2)* The Foleys could have prevented their own injury; *3)* The County owed no duty of care; *4)* Even if a duty was owed, sovereign immunity shields it from liability; *5)* The Foleys cannot recover fees in unjust enrichment for proceedings they requested; and, *6)* the Foleys' conversion claim fails because it does not allege actual dispossession.

§2.2.1 Whether or not an FWC license is or creates a right is irrelevant; Art. IV, §9, Fla. Const., removes regulation of the Foleys' birds from the County's *public purpose*.

Defense argues the Foleys have no interest to defend [OC-MtD p.6]. Defense develops this argument in three steps. First, defense simply ignores the many interests alleged at AC ¶¶27, 28, 32 -34, 37, 38, and 56(a)-(l). Next, to further eclipse what is ignored, defense fixates on only one interest – David

Foley's Class III FWC license to sell exotic birds,[1] alleged at AC ¶¶35, 36, and 56(e). Then, defense declares, by reference to *Hernandez v. Dept. of State, Division of Licensing,* 629 So. 2d 205 (Fla. 3rd DCA 1993), that Foley's license is not property and does not create any defensible interest.

This argument is not only wrong, it is a "straw man." The license is not the issue; the issue is the absence of any right in the County to regulate the possession or sale of birds. Whatever property or privilege Foley's license may be, whatever rights or interests it may create, the Foleys' birds and bird business are placed outside the sphere of county *public purpose* by Art. IV, §9, Fla. Const., and wholly beyond the County's regulatory jurisdiction – the County has *no right* to interfere with those property interests, license or not.

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[1] "The Foleys' Amended Complaint makes allegations concerning events in 2007-2008, centering on a license David Foley purportedly obtained from [FWC]." OC-MtD p. 2.

"The Foleys claimed in 2007 that Orange County could not regulate away, at the county level, a license they had obtained from the state." *Id.*

"Nowhere in Florida's constitution, Florida Statutes, or in case law does property mean or include a permit or license to sell, breed or raise wildlife (Toucans)." *Id.* p.6.

"The only "right" the Foleys arguably ever had was a "right" granted to Mr. Foley alone by a state-issued permit or license, not a property right. 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. 3rd DCA 1993)." *Id.* p.6. (Emphasis added.)

Hernandez serves only to embarrass defense; the ultimate question in that case was not what defense asserts. The ultimate question in *Hernandez* was not whether a license is a thing of value, or "legitimate claim of entitlement,"[2] due adequate process – the *Hernandez* court, by reference to *Crane v. Department of State*, 547 So. 2d 266, 267 (3rd DCA 1989), assumed that it was a thing of value guaranteed due process. The ultimate question in *Hernandez* was whether that thing of value, that interest, was *vested* in Hernandez by prior law, because if it was *vested*, then per *State Dep't of Transp. v. Knowles*, 402 So.2d 1155, 1158 (Fla. 1981), the state was without authority to take it retroactively. The *Hernandez* court found that the right/privilege/interest was not *vested* and therefore was due no more process than had been given. The ultimate question in *Hernandez* was a question of due process – did the state have the authority to abrogate the right in the manner it did so.

The question here is the same – Does Orange County have the right to regulate as it did the advertising and sale of the Foleys' birds? No. It does not [*See* Appendix I, Memorandum of Law: FWC Jurisdiction]. Defense conspicuously avoids this question. Defense must answer.

---

[2] *Board of Regents of State Colleges v. Roth* 408 U.S. 564, 577 (1972): "To have a property interest in a benefit, a person clearly must have … a legitimate claim of entitlement to it."

§2.2.2 The Foleys had no duty to prevent the County's erroneous exercise of jurisdiction.

Defense claims the Foleys could have prevented any injury they suffered by "contemporaneously" seeking declaratory and injunctive relief [OC-MtD pp.11-12]. Put more broadly, defense claims it was the Foleys' duty to prevent the County's erroneous exercise of jurisdiction. It was not. The Foleys clearly allege they did not have the duty defense claims, or any other duty to prevent the County's erroneous exercise of jurisdiction.

There was no ordinance to challenge. As stated at AC ¶41, "there was no ordinance, or published order or rule that… expressly prohibited *aviaries* as *accessory structure*, or *aviculture* as *accessory use* or *home occupation* at the Foleys' Solandra homestead." In other words, the Foleys were not on notice of such a prohibition. Consequently, the Foleys had no duty to prosecute a "contemporaneous" facial challenge in state court.

Administrative remedies had to be exhausted. As made clear herein at §2.1.2, by reference to AC p.1, and ¶¶51, and 40(d) and (e), the Foleys were confronted with an unpublished *custom* affecting *aviculture with associated aviaries* as an *accessory use* or *home occupation* at their R-1A Solandra homestead. Per *Miramar v. Bain,* 429 So.2d 40 (4th DCA 1983), and Op. Att'y Gen. Fla. 2002-23, [*See* Appendix I, Memorandum of Law: FWC Jurisdiction,

pp.17-20], the Foleys were required to submit to any proceeding that might indirectly affect their compliance with FWC rules [*See* Appendix I, Memorandum of Law: FWC Jurisdiction, pp.6-7, ‡‡1-11], or their right to advertise, possess, or sell birds. In other words, the Foleys' duty was to do precisely what they did do – exhaust administrative remedies before repairing to court.[3]

The Foleys were not required to obtain any local permit before raising birds to sell. As stated at AC ¶28, "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." In other words, per Art. IV, §9, Fla. Const., as construed in *Bell v. Vaughn, Whitehead v. Rogers*, and *Charles River Laboratories* [*See* Appendix I, Memorandum of Law: FWC Jurisdiction, pp. 13-15, 16-17], the County cannot make a use, building, or occupational[4] permit a pre-condition to the possession, advertising, or sale of

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[3] As a rule no court will entertain an as-applied challenge prior to a final administrative decision. *De Carlo v. West Miami*, 49 So.2d 596 (1950), involving injunction; *Menendez v. Hialeah*, 143 So.3d 1136 (Fla.3rdDCA 2014), applying *De Carlo* to declaratory relief; *Vanderbilt Shores Condo. v. Collier County*, 891 So.2d 583 (Fla.4thDCA 2004), applying *DeCarlo* to mandamus.

[4] Additionally, per §205.064(1), Fla.Stat., agriculture, including *aviculture*, is exempt from any occupational license tax. *See McLendon v. Nikolits,* No.

birds. Consequently, the Foleys had no duty to request such a permit or otherwise put defendants on notice of their intent to possess and sell birds prior to defendants' enforcement action.

Defendants were repeatedly told they could not regulate captive exotic birds. As made clear at AC ¶¶44, 48, 49, defendants were on notice of, and rejected, the Foleys' claims, and the claims of FWC, that "their right to sell the birds kept [at the Solandra homestead], are rights vested pursuant Art. IV, §9, Fla. Const., and the rules of FWC," and that "Art. IV, §9, Fla. Const., removed *aviaries* and *aviculture* from Orange County's regulatory authority." In other words, the Foleys fulfilled any duty owed defendants to put them on notice that their constitutional jurisdiction was a question they could not avoid.[5]

In sum, the Foleys fulfilled any duty owed the County to prevent its agents from erroneous exercise of jurisdiction. The County must answer.

4D15-4003 (4th DCA Jan. 25, 2017), holding that *aviculture* is an "agricultural purpose" per §193.461(5), Fla.Stat., and a "farm product" per §823.14(3)(c), Fla.Stat.

[5] *Farish v. Smoot*, 58 So. 2d 534, 537 (Fla. 1952): "If facts with respect to his jurisdiction are brought to the attention of a judicial officer about which he can have no doubt, and he knows or *is bound to know* that on these facts the court over which he presides has no jurisdiction of the controversy, or of the person of the accused, he may well be held to proceed at his peril."

§2.2.3.1 Florida does recognize a duty to decline jurisdiction or to otherwise remove the risk of its erroneous exercise where it is in reasonable doubt – *its called due process*.

Defense claims the County does not owe the Foleys the special duty alleged at AC ¶62(a) – a duty to decline jurisdiction, or to otherwise remove the risk of erroneous exercise of jurisdiction, where its exercise is placed in reasonable doubt as alleged at AC ¶¶41–49 [OC-MtD pp.4-5]. Put another way, defense claims the County can without consequence disregard due process.

There is a great cloud of witnesses that say otherwise. Florida, in fact, removes the County's discretion to exercise jurisdiction subject to reasonable doubt, and places upon the County an imperative duty not to exercise questionable jurisdiction. The judicial precedents cited below and by the Attorney General establish and outline the applicable standard of conduct.[6]

> "The authorities in Florida are unanimous in holding that administrative agencies should not exercise a power which is subject to reasonable doubt," Op. Att'y Gen. 72-298.
>
> "If there is a reasonable doubt as to the lawful existence of a particular power that is being exercised, the further exercise of the

[6] *Pate v. Threlkel*, 661 So. 2d 278 †3 (Fla. 1995): "The facts of a particular case are not the only source that may give rise to a duty to avoid negligent acts. We have also recognized that a duty may arise from: (1) legislative enactments or administrative regulations; (2) judicial interpretations of such enactments or regulations; and (3) other judicial precedent. McCain, 593 So.2d at 503 n. 2 (citing Restatement (Second) of Torts § 285 (1965))."

> power should be arrested," Edgerton v. International Company, 89 So. 2d 488, 490 (Fla. 1956).
>
> "County commissioners can exercise such authority only as is prescribed by law; and, where there are doubts as to the existence of authority, it should not be assumed," Santa Rosa County v. Gulf Power Co., 635 So. 2d 96, 102 (1st DCA 1994), quoting Hopkins v. Special Road & Bridge Dist. No. 4, 73 Fla. 247, 251, 74 So. 310, 311 (1917).

The abstention commanded by these authorities is made all the more critical by the due process considerations discussed herein at §2.2.2 and §3.3 *in toto*.

In sum, Florida does recognize that a quasi-judicial, executive agent, with no jurisdiction to determine any question of its constitutional authority,[7] has an imperative duty in due process to decline jurisdiction or to otherwise remove the risk of its erroneous exercise where it is in reasonable doubt. Disregard of that duty by the County's agents – particularly as a matter of local practice and procedure [AC p.1, and ¶¶39-52, 62, 64, 66, *including subparagraphs*] – makes the County liable in negligence to the Foleys because the Foleys "sustain special damage resulting from the negligent performance of [County] officer's

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[7] Gulf Pines Memorial Park, Inc. v. Oaklawn Memorial Park, Inc., 361 So. 2d 695, 699 (1978): "[A]dministrative hearing officer lacks jurisdiction to consider constitutional issues." *See also* Maxfield's Lessee v. Levy, 4 US 330 (1797), Justice Iredell: "The Court is not to fix the bounds of its own jurisdiction, according to its own discretion. A jurisdiction assumed without authority, would be equally an usurpation, whether exercised wisely, or unwisely." *See also* †5, p.15.

imperative or ministerial duties," Rupp v. Bryant, 417 So. 2d 658, 663 (Fla.1982),[8] also First National Bank v. Filer, 107 Fla. 526, 532, 533 (1933). Moreover, as discussed herein at §§2.2.4.1 and 2.2.4.2, Trianon Park makes the County generally liable for its agents when they "enforce compliance with the law," particularly when they have flouted the separation of powers established by Art. IV, §9, Fla. Const. [*See* Appendix I, Memorandum of Law: FWC Jurisdiction].

§2.2.3.2 The County's invasion of the Foleys' common law rights to *privacy* and *rightful activity* is negligence *per se*.

Defense erroneously fixates on only one of three duties of care alleged – that alleged at AC ¶62(a). Defense ignores the negligence alleged in subparagraphs (1) and (2) of ¶62(a). These subparagraphs allege liability in negligence irrespective of the duty of care alleged at ¶62(a).

Paragraph 62(a)(1) reads: " [Orange County] Invaded and denied the Foleys' privacy, or liberty…" The Restatement (Second) of Torts §652B (1965),

[8] Rupp v. Bryant *at 665*, recognizes that *ministerial* acts may require *judgment*. Here, the mandatory requirement to abstain, like the requirement in Rupp to supervise, is *ministerial*, while the measure of "reasonable doubt" here, like the "decision of how to teach gymnastic exercise" in Rupp, is a matter of *judgment*.

defines this as negligence.[9] Therefore, where Art. IV, §9, Fla. Const., removes the subject matter of exotic birds from the County's regulatory justification, it also gives shape to the Foleys right *privacy* at common law and "to be let alone" per Art. I, §23, Fla. Const. [AC ¶27]. And when the County agents nevertheless enforce a *custom* prohibiting the Foleys' bird business, their inquiry into, intrusion upon, and invasion of the Foleys' bird business, or "private affair," are "highly offensive" and negligence *per se*. Comment b, of the Restatement clarifies the intrinsic nature of this liability by stating: "The [intentional] intrusion itself makes the defendant subject to liability" whether or not made public as it was in this case. The County must answer for its agents in negligence.

Paragraph 62(a)(2) reads: " [Orange County] Invaded and denied the Foleys' right to engage in an activity (advertising and sale of toucans) entirely immune to Orange County regulation, per Art. IV, §9, Fla. Const…" The

[9] Restatement (Second) of Torts §652B (1965): *Intrusion upon Seclusion*. One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for an invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

Restatement (Second) of Torts §309(a)(i) (1965), defines this as negligence.[10] This definition of negligence appears in the Restatement within Topic 4 "Types of Negligent Acts." The introduction of the Topic offers a worthwhile explanation of the inherent liability in the negligent acts it surveys:

> If the act, or the failure, involves such [an unreasonable] risk [of harm to an interest of another, which is protected against unintended invasion], it is negligent irrespective of whether, either in itself or in the manner in which it is done or omitted it constitutes or results in a breach of a contractual or other duty which the actor owes either to the other or to a third person.

In other words, the County's agents' invasion of the Foleys' clearly established right to engage in an activity (advertising and sale of toucans) entirely immune to County regulation, per Art. IV, §9, Fla. Const., is negligence *per se*, irrespective of any other duty of care alleged in AC ¶62(a). The County must answer for its agents in negligence.

§2.2.4.1 ***Trianon Park*** **does recognize an executive duty when *enforcing* compliance with the law.**

Defense either did not closely read *Trianon Park Condominium Ass'n v. City of Hialeah*, 468 So.2d 912 (Fla.1985), or intentionally misuses it [OC-MtD

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[10] Restatement (Second) of Torts §309(a)(i) (1965): *Right of Other to be at Place or Engage in Activity*. An act may be negligent toward another who is in a place or engaged in an activity

(a) in which he is entitled to be or to engage

(i) irrespective of the actor's consent, or…

pp.4-5]; contrary to defense's claim, *Trianon Park at 920,* clearly makes the County liable for its agents when they "enforce compliance with the law."

The Court in *Trianon Park* was concerned with a question not presented by this case. The Court in *Trianon Park* asked whether there was a duty *to enforce* a valid ordinance – whether there was liability for injury resulting from a *failure to enforce* a valid ordinance. And it refused to recognize such a duty.

But the Foleys do not allege injury resulting from *failure to enforce* a valid ordinance. The Foleys allege injury resulting from *enforcement* of an invalid *custom* in a proceeding with no adversarial safeguards adequate to the constitutional question of its validity – a constitutional question the County, through its agents, effectively decided in its own favor by enforcing the invalid *custom* pursuant Ch. 30, OCC, rather than Ch. 11, OCC.

Quoting *Trianon Park*, the 1st DCA in *Andrews v. Florida Parole Com'n*, 768 So. 2d 1257, 1268 (1st DCA 2000), made clear that a *special duty* attaches to *enforcement* of the law:

> In deciding not to arrest, a police officer exercises agency discretion for which, under the doctrine of sovereign immunity, the police agency cannot be called to account in a suit for damages. [footnote omitted] *See Everton v. Willard,* 468 So.2d 936, 938-39 (Fla. 1985). But the… lack of a common law duty for exercising a discretionary police power function must ... be distinguished from existing common law duties ... applicable to the same officials or employees ... during the course of their employment to enforce

> compliance with the law ... [T]he waiver of sovereign immunity now allows actions against all governmental entities for violations of those duties.... See, e.g., *Crawford v. Department of Military Affairs*, 412 So.2d 449 (Fla. 5th DCA), review denied, 419 So.2d 1196 (Fla.1982)

In sum, Orange County is liable to the Foleys for the enforcement actions of its agents and "does not enjoy immunity from suit when its employees act on its behalf wholly outside boundaries the Legislature and the courts have laid down," *Andrews*, *at 1269*. Here, the County's agents have acted on its behalf trespassed boundaries set by §379.1025, Fla. Stat.,[11] and seventy-two years of state court precedent construing Art. IV, §9, Fla. Const. [*See* Appendix I, Memorandum of Law: FWC Jurisdiction, pp.8-19].

§2.2.4.2 *Trianon Park* does not immunize the County from a violation of the separation of powers.

Had defense read the passage it quotes from *Trianon Park Condominium Ass'n v. City of Hialeah*, 468 So.2d 912 (Fla.1985), it would find there an

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[11] §379.1025, Fla. Stat., *Powers, duties, and authority of commission; rules, regulations, and orders*. The Fish and Wildlife Conservation Commission may exercise the powers, duties, and authority granted by s. 9, Art. IV of the Constitution of Florida, and as otherwise authorized by the Legislature by the adoption of rules, regulations, and orders in accordance with chapter 120.

History. ss. 4, 5, ch. 21945, 1943; s. 7, ch. 69-216; ss. 10, 35, ch. 69-106; s. 103, ch. 73-333; s. 16, ch. 78-95; s. 17, ch. 2000-197; s. 5, ch. 2008-247.

Note. Former s. 372.82; s. 372.021.

express exception to immunity even for discretionary "basic governmental function" – *violation of constitutional provisions*.

> [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*. Trianon Park *at 918*. [*Emphasis* added.]

Defense cannot doubt the Foleys allege violation of constitutional provisions. Indeed, the critical provisions violated – Art. IV, §9, and Art. II, §3, Fla. Const. – are intended to establish and guarantee Florida's *separation of powers*,[12] which is the basis for all individual common law and constitutional rights[13] claimed. The County's violation of Florida's separation of powers compels this court's intervention even if – *absent that violation* – the actions at issue could be construed as "basic governmental" or "discretionary" functions.

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[12] In Seminole County Bd. of County Com'rs v. Long, 422 So.2d 938,941 (5thDCA1982), Judge Cowart identifies the substantive "doctrine of separation of powers" as fundamental to the protection of individual liberty: "As a constitutional principle for the protection of individual liberty against arbitrary actions of governmental officials, *the doctrine of separation of powers of government ranks equal to the guarantees* in sections 9 and 10 of article I of the Constitution of the United States, *in the first nine amendments thereto and in their state constitutional counterparts*. [*Emphasis* added.]

[13] AC ¶¶27, 29: Right "to acquire, possess and protect property," per Art. I, §2, Fla. Const.; Right "to be let alone and free" of unauthorized regulation, per Art. I, §23, Fla. Const.; Right to "due process of law" Art. I, §9, Fla. Const.

§2.2.5.1 Unjust Enrichment.

The Foleys allege at AC ¶62(b), that Orange County "[w]as unjustly enriched with the fees identified in paragraph [AC] 56(b), which the Foleys paid for the improper administrative practice and proceeding described in paragraphs [AC] 39-52."

Defense argues that the Foleys' claim for unjust enrichment fails because: *1)* "the fees paid … were all connected to a process begun by the Foleys;" and *2)* the Foleys received a "value of participating in these proceedings."

The County's arguments again evade the keystone to the Foleys' case – Art IV, §9, Fla. Const. First, the final order of the BCC alone [AC ¶40(e)] makes the County's enrichment unjust; its prohibition of "*aviculture*" as a *primary use*, *accessory use*, or a *home occupation* in "the R-1A… zone district," is in direct conflict with Art. IV, §9, Fla. Const. [AC ¶¶27,28,44,48, 49; and, Appendix I, Memorandum of Law: FWC Jurisdiction]. It is inequitable to permit the County to retain fees collected for the proceedings concluding in an order void for lack of subject matter jurisdiction. Second, the County's agents deliberately chose to prosecute the Foleys' alleged violation of the invalid *aviculture custom* [AC ¶¶28, 40(a), 41, 44, 48, 49] pursuant the

procedures of Chs. 30 & 38, OCC, rather than the procedure of Ch 11, OCC, [AC ¶¶40(b)-(c), 42, 43]. It is inequitable to permit the County to retain fees collected for a proceeding that would necessarily enrich the County but could not resolve the constitutional question, when the County deliberately chose to avoid proceedings that could not enrich the County but would definitively resolve the constitutional question.[14]

§2.2.5.2 The elements of unjust enrichment.

In the absence of a contract, the four questions this court asks in analyzing the Foleys' claim for unjust enrichment[15] are the following: *1)* Did the Foleys confer any benefit on Orange County?; *2)* Does Orange County have knowledge of the benefit?; *3)* Has Orange County accepted or retained the benefit?; and, *4)* Is it inequitable for Orange County to retain the benefit (fees) when the benefit was acquired by: *a)* Orange County's trespass of the subject matter jurisdiction given FWC by Art. IV, §9, Fla. Const.?; and, *b)* Orange

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[14] *Marsh v. Fulton County*, 77 US 676, 684 (1871): "The obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation."

[15] *Goldberg v. Lyn Chong*, No. 07-20931-CIV-HUCK (S.D. Fla. July 11, 2007). For the elements of unjust enrichment see therein §III,B – Unjust Enrichment. On the irrelevance of adequate alternative remedies see therein §III,B,1 – Adequate Remedies at Law.

County's prosecution of the reported *aviculture* violation pursuant the *prospective*[16] permit proceedings of Ch. 30, OCC, that would enrich the County but would not resolve the constitutional question, rather than the *retrospective*[17] enforcement procedure of Ch 11, OCC, that would not enrich but would resolve the constitutional question.

§2.2.5.3 It is inequitable for Orange County to retain any fees collected that relate to its unauthorized regulation of wild animal life.

The Foleys' amended complaint alleges that Orange County is "without police power to place preconditions specific to the nuisance associated with animals on the Foleys' possession or sale of captive exotic birds," AC ¶28. This allegation summarizes the effect of Art. IV, §9, Fla. Const., on the County's *aviculture custom* [*See* Appendix I, Memorandum of Law: FWC Jurisdiction]; the County cannot prohibit the Foleys from doing what FWC

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[16] *prospective*, adj. 1. Effective or operative in the future <prospective application of the new statute>. Cf. RETROACTIVE. 2. Anticipated or expected; likely to come about <prospective clients>. Black's Law Dictionary, p.1238, (7th Ed. 1999).

[17] *retrospective*, ad). See RETROACTIVE.

retroactive, adj. (Of a statute, ruling, etc.) extending in scope or effect to matters that have occurred in the past. - Also termed retrospective. Cf. PROSPECTIVE (1). - retroactivity, n. Black's Law Dictionary, p.1319, (7th Ed. 1999).

expressly, or by silence, permits the Foleys to do [*Whitehead v. Rogers,* 223 So.2d 330 (Fla. 1969); Appendix I, pp.14-15.].

The Foleys' amended complaint alleges that FWC permits the Foleys to sell birds kept at their Solandra homestead [AC ¶35].

The Foleys' amended complaint alleges that the end result of Orange County's prosecution of the citizen complaint [AC ¶40(a)] that claimed the Foleys were "raising birds to sell," was: *1)* a site plan and a building permit with the exaction "Pet birds only – No Commercial Activities Permitted," on their face [AC ¶40(d)]; and, *2)* a BCC order, upholding that exaction, by prohibiting "*aviculture*" (i.e., advertising or keeping birds for sale) as *primary use*, *accessory use*, or a *home occupation* in "the R-1A… zone district," [AC ¶40(e)].

Orange County's BCC order prohibits the Foleys from doing what FWC permits the Foleys to do and consequently is in direct conflict with Art. IV, §9, Fla. Const. It is inequitable to permit the County to retain fees collected for the proceedings concluding in an order void for lack of subject matter jurisdiction. County must return the fees to the Foleys.

§2.2.5.4 It is inequitable to permit the County to retain fees collected during its prosecution of the Foleys pursuant procedures that would necessarily enrich the County but could not resolve the constitutional question, rather than procedures that would not enrich the County and would resolve the constitutional question.

The Foleys' amended complaint alleges that Orange County initiated enforcement of its *aviculture custom* when the County received a citizen complaint that claimed the Foleys were "raising birds to sell," [AC ¶40(a)]. The Foleys' also allege that as a matter of "administrative practice" [AC ¶40] the County chose to use the procedures of Ch. 11, OCC, to prosecute them for a *discovered* building permit violation [AC ¶40(c)(1)], but chose to use the procedures of Ch. 30, OCC, to prosecute them for the *reported* violation of the *aviculture custom* [AC ¶40(c)(2)]. The Foleys' further allege that Orange County proceeded in this manner despite being put on notice that prosecution of the *aviculture custom* necessarily involved a question of the County's constitutional authority [AC ¶¶44, 48, 49].

Orange County's practice of bifurcating prosecution between Code Enforcement per Ch. 11, OCC, and Zoning (Permitting) Division per Ch. 30, OCC, is unjust and unreasonable; using Ch. 11, OCC, as a "hammer," to require a building permit, and then using the permit process of Chs. 30 & 38, OCC, as an "anvil," to adjudicate *reported*, or otherwise known, land use violations

without hearing or notice as a precondition to that permit,[18] assumes the landowner has no right to make use of land not granted by the County, assumes the landowner's right can have no independent statutory or constitutional source. Worse, this assumption cannot be challenged on state court review of the permitting decision.[19] Nor can it be challenged in an original action without first paying for and exhausting administrative remedies.[20] So, here where that assumption is precisely what the Foleys challenged [AC ¶¶44, 48, 49], the

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[18] Compare this "hammer & anvil" *practice* with the actual requirements of §162.06(2), Fla.Stat. [§11.34(b), OCC,] – "[I]f a violation of the codes [or ordinances] is found, the code [officer/]inspector shall notify the violator and give him or her a reasonable time to correct the violation. Should the violation continue beyond [past] the time specified for correction, the code [officer/]inspector shall notify an [the code] enforcement board [or special magistrate] and request a hearing."

[19] *Miami-Dade County v. Omnipoint Holdings, Inc.*, 863 So.2d 195, 199 (Fla.2003): "[A] petition seeking certiorari review is not the proper procedural vehicle to challenge the constitutionality of a statute or ordinance."

Foley v. Orange County, 08-CA-5227-0 (Fla. 9th Cir. 2009): "Petitioners' assertion that sections of the Orange County Code are unconstitutional is one that can only be made in a separate legal action, not on certiorari. See *Miami-Dade County v. Omnipoint Holdings*, 863 So.2d 195 (Fla.2003)."

[20] As a rule no court will entertain an as-applied challenge prior to a final administrative decision. *De Carlo v. West Miami*, 49 So.2d 596 (1950), involving injunction; *Menendez v. Hialeah*, 143 So.3d 1136 (Fla.3rdDCA 2014), applying *De Carlo* to declaratory relief; *Vanderbilt Shores Condo. v. Collier County*, 891 So.2d 583 (Fla.4thDCA 2004), applying *DeCarlo* to mandamus.

County's "hammer & anvil" prosecution is inequitable.[21] It is inequitable to permit the County to retain fees collected for a proceeding pursuant Chs. 30 and 38, OCC, that could not resolve the constitutional question, when the County deliberately chose to avoid proceedings pursuant Ch. 162, Fla. Stat., and Ch. 11, OCC, that could resolve the constitutional question [AC ¶40 *in toto*].[22] Orange County must return the fees with interest.

§2.2.6 The County took *constructive* possession of the Foleys property and can be held liable for conversion.

Defense claims, "The Foleys do not allege that Orange County ever took possession of items belonging to them," and insists conversion requires *actual* possession [OC-MtD p.5]. *Actual* possession, however, is not required.

The Foleys clearly allege defendants destroyed the Foleys' *aviaries* and/or bird business [AC ¶45], and endeavoured to obtain, and did obtain

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[21] Leonard W. Levy, Origins of the Fifth Amendment: The Right Against Self-Incrimination (1968), pp 23-24. Levy's description of the inquisitorial "hammer & anvil" procedure of interrogating a suspect before giving notice of the charge is comparable to the *prospective* permit procedure used here for *retrospective* enforcement purpose.

[22] *Holiday Isle Resort & Marina Associates v. Monroe County*, 582 So. 2d 721,722 (Fla.3d DCA 1991): "[C]onstitutional claims such as those [facial and as-applied] raised by the petitioners herein are properly cognizable on an appeal to the circuit court from a final order of an enforcement board taken pursuant to Section 162.11, Florida Statutes (1989), see *Key Haven Assoc. Enters. v. Board of Trustees of the Internal Improvement Trust Fund,* 427 So. 2d 153, 156-58 (Fla. 1983)"

"control and dominion" of the property identified in ¶56(a) and (d)-(h) [AC ¶62(c)]. This allegation of *constructive possession*[23] satisfies the definition of *conversion* in the Restatement (Second) of Torts §222A(1) (1965):

> Conversion is an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel.

The Restatement (Second) of Torts §221 (1965),[24] further refines *dispossession*. The Comments on clauses (a), (b), and (e),[25] make clear that *actual* possession is not required for a claim of *conversion*.

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[23] *constructive possession.* Control or dominion over a property without actual possession or custody of it. - Also termed *effective possession*; *possessio fictitia*. Black's Law Dictionary, p.1183, (7th Ed. 1999)

[24] §221. Dispossesion

A dispossession may be committed by intentionally

(a) taking a chattel from the possession of another without the other's counsel, or
(b) obtaining possession of a chattel from another by fraud or duress, or
(c) barring the possessor's access to a chattel, or
(d) destroying a chattel while it is in another's possession, or
(e) taking the chattel into the custody of the law.

[25] Comment on Clause (a)

c. A dispossession may consist of an assumption of complete control and dominion over the chattel without an actual taking or carrying away. If the assumption of control effectively deprives the other of all the essential advantages of possession, the dispossession is complete, although the physical position of the chattel may remain unchanged. Thus a sheriff or other officer may levy upon goods, and thereby dispossess another of them without actually coming into contact with or touching the goods.

The claim sounds in conversion; the County must answer.

§2.3 Count Four – *Taking*

The County claims there are three reasons the Foleys' Count 4 fails to state a claim "for a taking without public purpose, due process or just compensation pursuant to Article X, Section 6, Florida Constitution:" *1)* the only "right" at issue is in a state-issued license which Florida does not recognize as property; *2)* Orange County has not "deprived the Foleys of all beneficial uses of their [real] property;" and, *3)* "business damages" are not recoverable per Art. X, §6, Fla. Const.

Comment on Clause (b)

d. One who by fraudulent representations induces another to surrender the possession of a chattel to him has dispossessed the other of the chattel. Assent to the actor's taking possession of the chattel given under such circumstances is ineffectual to constitute a consent to the taking.

Comment on Clause (e):

Taking a chattel into the custody of the law, as by levy of execution or attachment, impounding, and the like, is a dispossession, even though the chattel is not touched, and is not removed from the possession of the one who had it. The chattel is regarded as having passed into the possession of the officers of the law.

§2.3.1 Whether or not an FWC license is property or creates rights is irrelevant; Art. IV, §9, Fla. Const., removes regulation of the Foleys' birds from the County's *public purpose*.

The Foleys restate the argument made herein at §2.2.1 *in toto*, and at Appendix I.

§2.3.2 Orange County by enforcement of its invalid *aviculture custom* took personal, intangible, and business property, but no real property.

Defense attempts to redefine the Foleys' taking claim as an "inverse condemnation" claim to recover value in real property, or "land." There are two problems with this characterization. First, an "inverse condemnation" claim assumes the validity of the regulation enforced. The Foleys specifically challenge the validity of the County's *aviculture custom* and claim the taking that results from its enforcement is without *due process* or *public purpose*. Second, the Foleys identify the object of their claim and the relief they seek at AC ¶64, as the property described in AC ¶56(a)-(h), all of which is either personal, intangible, or business property, but none of which is real property, or "land."

Florida does recognize taking without public purpose: Kirkpatrick v. City of Jacksonville, 312 So. 2d 487, 489 (1st DCA 1975), "[A]n aggrieved property owner whose real or personal property has been destroyed by

unwarranted governmental action may institute a proceeding to compel the governmental body to exercise its power of eminent domain and award just compensation to the owner;" *Flatt v. City of Brooksville*, 368 So. 2d 631, 632 (2nd DCA 1979), quoting *Kirkpatrick*; *City of West Palm Beach v. Roberts*, 72 So. 3d 294, 297 (4th DCA 2011), "[A] 'taking' may consist of an entirely negative act, such as destruction. *Kirkpatrick v. City of Jacksonville,* 312 So.2d 487, 490 (1st DCA 1975);" *Patchen v. Florida Dept. of Agriculture*, 906 So. 2d 1005 †2 (Fla. 2005), "A taking has been defined as the "entering upon private property for more than a momentary period and 'under the warrant or color of legal authority,' devoting it to public use or otherwise informally appropriating or injuriously affecting it in such a way substantially to oust the owner and deprive him of all beneficial enjoyment thereof." *Kirkpatrick v. City of Jacksonville*, 312 So.2d 487, 489 (1st DCA 1975) (quoting 12 Fla. Jur. 48, Eminent Domain § 68). A taking may consist of a negative act, such as destruction. See id. at 490."

Florida does recognize taking of personal property [AC 56(a),(d)]: *State Road Department of Florida v. Tharp*, 146 Fla. 745, 749 (1941), "[W]e place the emphasis on the individual and protect him in his personal property rights against the State;" *Flatt v. City of Brooksville*, 368 So. 2d 631 (2nd DCA

1979), "Article X, § 6(a), Fla. Const. provides, 'No private property shall be taken except for a public purpose and with full compensation therefor... .'[*sic*]" Thus, no apparent distinction is made between real and personal property. This constitutional provision does not require enabling legislation to be effective, *Jacksonville Expressway Authority v. Henry G. DuPree Co.*, 108 So.2d 289, 294 (Fla. 1958), so it is immaterial that there is no statute specifically authorizing recovery for loss of personal property. Only by allowing such recovery can a property owner receive his constitutional entitlement to 'full compensation' for his loss."

Florida does recognize takings of intangible property [AC ¶56(h)]: Williams v. American Optical Corp., 985 So. 2d 23 (4th DCA 2008), Regarding a "cause of action" as a form of property, the court said, "There are various forms of property in which a person may have rights. For most forms, real or personal, tangible or intangible, the government may not take these rights through legislation unless it has a public purpose for such property and pays the owner fair compensation."

Florida does recognize that "full compensation" includes costs occasioned by the taking [AC ¶56(b),(c),(e)]: Jacksonville Express. Auth. v. Henry G. Du Pree Co., 108 So. 2d 289, 292 (1958), "reasonable compensation

for the cost of *moving* its personal property," and *attorney's* fees [*Emphasis* added];" *Consumer Serv. v. Mid-Florida Growers, Inc.*, 570 So. 2d 892, 895-899 (Fla. 1990), "*probable yield* and value of the crop when harvested;" *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* associated with proceeding.

§2.3.3 Florida does recognize that "full compensation" includes all the damages to business property identified at AC ¶56(a),(d)-(h), per *Backus v. Fort Street Union Depot Co.*, 169 US 557, 575 (1898).

Defense correctly cites *Systems Components Corp v. Florida Department of Transportation*, 14 So.3d 967, 976 (Fla. 2009), for the proposition that the right to recover business damages is normally a creation of statute not constitution. This proposition in *Systems Components* has its Florida origin in *Jamesson v. Downtown Dev. Auth. of Fort Lauderdale*, 322 So.2d 510, 511 (Fla.1975). In fact, *Systems Components* quotes the following portion of *Jamesson*, a portion quoted or referenced by approximately twenty-two other Florida appellate court decisions:

> The right to business damages is a matter of legislative grace, not constitutional imperative. Lost profits and business damages are intangibles which generally do not constitute 'property' in the constitutional sense.

Jamesson alone follows these words with their authority in Federal precedent – *Backus v. Fort Street Union Depot Co.*, 169 US 557, 575 (1898). In that Supreme Court opinion Justice Brewer explains that business damages are not regularly granted because they are rarely destroyed *entirely*:

> [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.

The obvious implication is that where the business is destroyed *entirely*, the constitution requires recovery of lost profits as a component of "full compensation." For this reason, the Foleys say that *Jamesson* and *Systems Components* are no obstacle to recovery of all damages alleged at AC ¶56(a)-(h). The Foleys' bird business at the Solandra property was destroyed *entirely*, without *public purpose*, or *compensation*. Consequently, if destruction without *public purpose*, or *compensation* does not remove the question of *relocation* as a matter of law, that question is a mixed question of law and fact for the jury; i.e., Did the County's enforcement of the invalid *aviculture* regulation, and the County's failure to compensate the Foleys, prohibit the Foleys from moving

their business anywhere at all? The County must answer the Foleys' claim of business damage in takings.

§2.4 Count Seven – This court can create a cause of action pursuant Art. I, §9, Fla. Const., should it find such remedy appropriate to further the purpose of that provision and needed to assure its effectiveness.

The County at OC-MtD p.7, claims the Court should dismiss the Foleys' Count 7 request in the alternative for relief pursuant Art. I, §9, Fla. Const., because "no cause of action for money damages exists under Florida law for violation of a state constitutional right." The *officials* and *employees* fail to timely respond to the state constitutional tort claim in Count Seven, Fla. R. Civ. P 1.140(a)(1).

Below the Foleys argue that the court's consideration of a compensatory state constitutional tort must balance the following: *1)* the existence or non-existence of an alternate remedy against Orange County for injury resulting from its violation of Florida's separation of powers; *2)* the personal capacity liability placed on the County *officials* and *employees* should neither constitutional or common law remedy be available against Orange County; and, *3)* Florida's liability in substantive due process should there be no remedy for the Foleys' clearly established right to be free of County regulation that usurps

the authority Art. IV, §9, Fla. Const., grants exclusively to FWC. In sum, the court should not dismiss the Foleys' state constitutional tort claim until it has determined there is a remedy for the right infringed.[26]

§2.4.1 Historical development of constitutional remedies.

Things change. Prior to the establishment of judicial immunity by the creation of the appellate process as an alternative to judicial liability, a party injured by a judicial decision could "forsake the doom" and challenge the judge, or the judge's champion (assistants?) in *physical combat*,[27] *See* J. Randolph Block, "Stump v. Sparkman and the History of Judicial Immunity," *1980 Duke Law Journal 879-925, 881* (1980).

Things change. Prior to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), there was no cause of action – other than "takings" – based directly on the United States Constitution.

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[26] *First National Bank v. Filer,* 107 Fla. 526, 532 (1933): "Whenever there is a wrong there is a remedy. And the general test to determine whether there is a liability in an action of tort, is the question whether the defendant has by act or omission disregarded his duty. This applies to public officers who may become liable on common law principles to individuals who sustain special damages from the negligent or wrongful failure to perform imperative or ministerial duties. Dillon on Municipal Corporations (5th Ed.), Vol. 1, page 762; 22 R. G. S. par. 160-162, pages 483-484)."

[27] The male to female ratio of judge's "champions" or assistants was unquestionably higher than young men enjoy today in the Ninth Circuit.

Things change. There was even a day near forgot when the only "takings" cause of action based directly on Amend. V, U.S. Const., or its state corollaries, began with a common law action for trespass directed against the responsible official *in their personal capacity*, and not against the government. *See* Robert Brauneis, "The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law," *52 Vand. L. Rev. 57, 64-65* (1999).

The historic remedial process for just compensation surveyed by Brauneis is instructive here where the Foleys seek damages and allege Orange County, and consequently the County *officials* and *employees*, acted *without* authority in the state's constitution when they destroyed the Foleys' personal property rights in their *toucans*. Brauneis explains:

> An antebellum court did not ask whether a legislatively authorized act amounted to a taking of private property, and enter a judgment for just compensation if it did. Rather, the court asked whether the act purportedly authorized by the legislation amounted to a taking, and if so, whether the legislation itself provided for just compensation. If not, the legislation was void: the legislature had exceeded its competence, which the Constitution limited to the authorization of "taking-with-just-compensation." [*Id.* p.60]
>
> Owner initiated just compensation litigation before the Civil War typically proceeded in three stages, with the constitutional issue entering only at the third stage. First, a property owner would bring a common law action of trespass or trespass on case against a

> government official or corporation. Second, the defendant would seek to justify acts otherwise remediable at common law by invoking a statute that authorized him to do those acts. Third, the plaintiff would argue that the statute, if it indeed purported to authorize the defendant's acts, was unconstitutional, because the authorized acts amounted to a taking and the statute did not provide for just compensation. [*Id*. pp.67,68]
>
> When the public principal was not subject to *respondeat superior* liability for the acts of its agents – a status enjoyed by the United States, the states, and municipal corporations with respect to agents exercising government functions – the individual agent was liable both for nonfeasance and the misfeasance or positive wrongs. For Justice Story, this was not merely a coincidence; rather, the imperative of providing a remedy to an injured party led to the expansion of the agent's liability as the principal's liability waned:
>
> > [T]he very consideration, that the public superiors are not responsible for the acts and omissions of their subordinates in their official conduct, distinguishes the case from that of mere private agencies, and lets in the doctrine, that, under such circumstances, [the subordinates] shall be held personally responsible therefor to third persons who are injured thereby. [*Id*. p.78]

Similarly, here, the Foleys bring claims against a host of County *officials* and *employees*. They must show their acts were authorized. But they cannot. And, consequently, they will be personally liable, unless this court finds

acceptable one of the remedies the Foleys present against Orange County, or, the court pursuant its raw power, creates one.[28]

§2.4.2 Substantive Due Process in Florida.

An advocate of the above approach is found in former Florida Solicitor General, Judge Scott Makar of Florida's First District Court of Appeals. In an opinion appended to *Bennett v. Walton County*, 174 So. 3d 386 (1st DCA 2015), concurring in part and dissenting in part, after recognizing the absence of any state constitutional tort, Judge Makar, *at 396-397*, explains lower court confusion [and defendants'] regarding the difference between federal and state substantive due process claims against executive action, and the role of a state substantive due process claim in the absence of other remedy:

> [A] rationale against federal review of local regulatory decisions, such as zoning matters, under a federal substantive due process theory is the avoidance of federal court intrusion on Fourteenth Amendment grounds into state executive matters better suited for review in state tribunals… Likewise, federal substantive due process claims asserted in Florida courts have met a similar fate based on application of the same federal precedents limiting the federal substantive due process right… But these federal limitations on the federal right have not been extended to a Florida substantive due process claim brought in a Florida state court. As such, entry of summary judgment on [the Bennett's] state law as-

[28] It is possible the absence of a constitutional tort is a purposeful judicial policy designed to give individual legislators and executives personal liability for usurping the court's function as defendants did here.

> applied substantive due process claim on the basis of federal court cases interpreting the reach of the federal due process clause was unwarranted; the trial court should have addressed the merits of the as-applied state constitutional claim, but did not… Because article I, section 9, is branch neutral, because as-applied claims are already allowed to challenge legislative enactments, and because no binding Florida case prohibits substantive due process claims against executive action, it naturally follows that an as-applied substantive due process clam is actionable as to executive action, subject to whatever our supreme court might say on the matter.

Defense for Orange County does not share with the court the logic of the cases it cites for the proposition there is no *federal* substantive due process remedy against *local* executive action.[29] But, as Judge Makar suggests in Bennett v. Walton County, it is straightforward – for reasons of comity.[30] As in just compensation claims, federal court will not review local executive action before state court review is final,[31] and then review is in the U.S. Supreme Court, and the substantive due process question is whether the state has failed to provide a remedy for an existing right.

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[29] McKinney v. Pate, 20 F. 3d 1550 (11th Cir. 1994); Greenbriar, Ltd. v. City of Alabaster, 881 F. 2d 1570 (11th Cir. 1989); DeKalb Stone, Inc. v. County of DeKalb, Ga., 106 F. 3d 956 (11th Cir. 1997).

[30] Dekalb *at 960*: "Federal courts must not usurp the roles of agencies, review boards, and state courts in reviewing the wisdom of [state] executive actions."

[31] Boatman v. Town of Oakland, Fla., 76 F. 3d 341 (11th Cir. 1996): "If the claim falls under the procedural component, it is meritless because the state provided the Boatmans all the process they were due."

§2.4.3 The nature of substantive due process.

Substantive Due Process is no high magic. It is the simplest, most fundamental element of judicial process; it is *the role of the court*; it is the court's promise that it will provide a remedy, a "process," where there is a right.[32] A claim that what is substantive in due process has been violated is a claim that the defendant has interfered with the court's role in determining cases and controversies, the defendant has interfered with the court's ability to say what the law is – a case – or to determine the rights of the parties – a controversy. The court recognizes that its role is at risk, that an individual's right to a judicial remedy is at risk, that what is "substantive" in due process is at risk, when the legislature or executive acts arbitrarily or capriciously (i.e., without legitimate government/state/public interest/purpose). If the legislature or executive is permitted to do what it wants, when it wants, to whom it wants, it rules by decree, not by law. So, there is no law for the court to construe; there is no case.[33] Rule by decree makes the legislature or executive judge of its own

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[32] *Angle v. Chicago, St. P., M. & OR Co.*, 151 US 1, 21 (1894): "[W]here there is a wrong, there is a remedy."

[33] *Marbury v. Madison*, 5 US 137, 177 (1803): "It is emphatically the province and duty of the judicial department to say what the law is."

case; it may itself construe its first decree by a second.[34] If the legislature or executive is permitted to do what it wants, when it wants, to whom it wants, no one is innocent because no one has rights to claim against the government. So, there can be no controversy to resolve; there is no role for the court. The Court is what is substantive in due process. This Court, in the name of Florida, would deny the Foleys substantive due process, if it should find a right trespassed, as alleged, and then deny an available remedy, or otherwise fail to use its raw power to create an adequate remedy. *See generally,* Michael McConnell and Nathan Chapman, "Due Process as Separation of Powers," *121 Yale L.J. 1672-1807* (2012).[35]

Judge Makar's justification for a Florida substantive due process remedy pursuant Art. I, §9, Fla. Const., unencumbered by federalist comity concerns, and former Federal Circuit Judge Michael McConnell's treatise on substantive due process as the role of the court, serve to explain an established trend in federal courts of treating *original* federal substantive due process claims seeking damages against local government action as takings, or just

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[34] *Fletcher v. Peck*, 10 US 87, 133 (1810): The legislature may not "claim to itself the power of judging in its own case."

[35] *Also* †12, p.23. Judge Cowart on separation of powers as fundamental to individual liberty.

compensation claims, and dismissing them, often like a takings claim per *Williamson County v. Hamilton Bank*, 473 US 172 (1985), for failure to first pursue and exhaust a state compensatory remedy – even where no such remedy exists and the advocate must persuade the court to use its raw judicial power and create one! *See, Downing/Salt Pond Partners, LP v. Rhode Island,* 643 F.3d 16, 26-26 (1st Cir. 2011), and *for an analytical survey of such cases see* Nader Khorassani, "Must Substantive Due Process Land Use Claims Be So Exhausting?" *81 Fordham L. Rev. 409* (2012).

In sum, the court must not dismiss the Foleys' state constitutional tort claim until it has determined there is a remedy for the rights infringed.

§2.5 Count Seven – *in the alternative* – for conspiracy to deny, and denial of, adequate pre-deprivation remedy.

The County at OC-MtD pp.8-11, claims there are two reasons the Court should dismiss the Foleys' Count 7 request in the alternative for relief pursuant 42 USC §1983: *1)* federal substantive due process jurisprudence provides no protection from the erroneous deprivation of state-created rights; and *2)* federal substantive due process jurisprudence provides no protection from erroneous state executive action.

The *officials* at CO-MtD p.5, Ex.A, pp.6-9, and the *employees* at CE-MtD ¶7,11,[36] claim limitations and *res judicata* affirmatively defend them from the federal portion of the Foleys' Count Seven. The Foleys address these defenses herein at §§3.1 and 3.2.

The County's arguments fail because the Foleys at AC ¶78, do not seek a remedy in *substantive due process* per 42 USC §1983 – they seek remedy per 42 USC §1983, in *procedural due process*, IF Florida provides no other adequate remedy. Specifically, the Foleys seek remedy in 42 USC §1983, for conspiracy to deny, and denial of, the adequate pre-deprivation remedy in Ch. 162, Fla. Stat., and Ch. 11, OCC. To be clear, the Foleys' prayer concluding Count Seven seeks state remedy in *substantive and procedural due process* in Art.I, §9, Fla.Const., OR in the alternative federal remedy in *procedural due*

[36] In his motion to dismiss, filing #53363907, counsel for the *employees* "adopts by reference" the motion to dismiss he previously filed and those filed by the *officials*. However, counsel does not attach the referenced motions in filing #53363907, nor clearly explain which arguments are adopted, or how they are to be applied. Moreover, Florida's rules of procedure do not provide for a motion to "adopt by reference" anything but a pleading or its attachments, Fla. R. Civ. P. 1.130. Therefore, the Foleys ask the Court to consider waived any defense not expressly argued in *employees*' filings #53363907 and #50321893, or provide some equitable remedy to protect the Foleys (and *employees*) from counsel's careless motion practice.

process per 42 USC §1983. In sum, Orange County has failed to timely respond to the Foleys' request for federal remedy in *procedural due process*.

§2.6 Declaratory and injunctive relief were not available to prevent any injury the Foleys suffered.

The County claims the Foleys could have prevented any injury they suffered by "contemporaneously" seeking declaratory and injunctive relief [OC-MtD pp.11-12].

The Foleys restate §2.2.2, herein.

§3 RESPONSE TO COUNTY OFFICIALS AND EMPLOYEES

In this section, §3, the Foleys respond to "The Official Defendants' Motion to Strike the Amended Complaint, Renewed Request for Judicial Notice, and Motion to Dismiss this Action with Prejudice," filed March 6, 2017 [*abbreviated herein as* CO-MtD], on behalf of the defendant members of the Board of Zoning Adjustment (BZA) and Board of County Commissioners (BCC) identified cumulatively herein as the *officials*, and identified individually at AC ¶¶13-26.

In this section, §3, the Foleys also respond to "Defendants Phil Smith, Rocco Relvini, Tara Gould, Tim Boldig and Mitch Gordon's Motion To Dismiss/Motion To Strike," filed March 7, 2017 [*abbreviated herein as* CE-

MtD], on behalf of the defendant Orange County employees identified cumulatively herein as the *employees*, and identified individually at AC ¶¶9-12.

§3.1 LIMITATIONS – Florida's Supreme Court recognizes that limitations are tolled per 28 USC §1367 where dismissal without prejudice is based on lack of subject matter jurisdiction.

The *officials* per CO-MtD Ex. A, pp.6-8, and the *employees* per CE-MtD ¶7,[37] insist the Foleys' claims are time barred because 28 USC §1367(d), does not toll limitations on the Foleys' state claims.

Below the Foleys argue that there is no conclusive applicability of any affirmative defense in limitations,[38] and otherwise argue as follows: *1)* This limitations challenge is settled in the Foleys' favour by the decision of Florida's Supreme Court in Krause; and, *2)* Defense contradicts itself by arguing first that limitations apply to the Foleys' state claims because they were presented to the Middle District which never had jurisdiction over the Foleys' related federal claims, but then arguing that *res judicata* bars the Foleys' federal claim in Count 7 because the Middle District ruled on the merits of the Foleys' federal claims.

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[37] *See* †36, *herein* p.47.

[38] Jackson v. BellSouth Telecommunications, 372 F. 3d 1250, 1277 (11th Cir. 2004); also Evans v. Parker, 440 So. 2d 640, 641 (1st DCA 1983): states that affirmative defenses "cannot properly be raised by a motion to dismiss unless the complaint affirmatively and clearly shows the conclusive applicability of such defense to bar the action. Rule 1.110(d), Florida Rules of Civil Procedure."

§3.1.1 *Krause v. Textron Fin. Corp.*, 59 So.3d 1085 (Fla. 2011)

Florida's Supreme Court in *Krause v. Textron Financial Corp.*, 59 So. 3d 1085, 1091 (Fla. 2011), stated: "[T]he plain language of [28 USC §1367] leads us to conclude that the dismissal of a claim in federal court … for lack of *subject matter jurisdiction*, does not bar the applicability of the federal tolling provision in the subsequent state court action." The Eleventh Circuit in *Foley v. Orange County*, 638 Fed.Appx. 941 (11th Cir. 2016), at 946, ordered the District Court to dismiss without prejudice for lack of *subject matter jurisdiction*. Therefore, per *Krause*, the Foleys' state law claims against the County *officials* and *employees* in their personal capacity are timely.

Defense argues that the Third DCA reached a different result in *Ovadia v. Bloom*, 756 So. 2d 137, 139 (3d DCA 2000). It did not. The only basis for federal jurisdiction in *Ovadia* was diversity. Diversity jurisdiction in federal court per 28 U.S.C. §1332, must be *complete* – a non-diverse defendant destroys jurisdiction. On its face Ovadia's complaint included a non-diverse defendant. Limitations were not tolled per 28 USC §1367(d), on the state claims against the non-diverse defendant because "claims against a non-diverse defendant cannot be considered supplemental jurisdiction," *Ovadia at 139*. *Ovadia*'s rule applies only to diversity jurisdiction and not federal question

jurisdiction. The Foleys presented the federal courts with a federal question per 28 U.S.C. §1331, and those courts went well beyond the face of the Foleys' federal complaint to determine they lacked *subject matter jurisdiction*.

In *Foleys v. Orange County, et al* 638 Fed.Appx. 941, 943 (11th Cir. 2016), the Eleventh Circuit drew the words "insubstantial," "frivolous" from *Bell v. Hood*, 327 US 678, 681-683 (1946).

> [W]here the complaint, as here, is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court, but for two possible exceptions, must entertain the suit. … The previously carved out exceptions are that a suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly *insubstantial* and *frivolous*. The accuracy of calling these dismissals jurisdictional has been questioned. [*Emphasis* added.]

In other words, per *Bell v. Hood*, it can be said that the Eleventh Circuit found the Foleys' complaint was "so drawn as to seek recovery directly under the Constitution of the United States or laws of the United States," but was nevertheless "insubstantial and frivolous" – or, as the Eleventh Circuit put it *at 946*, "clearly foreclosed by a prior Supreme Court decision." Judge Tjoflat – the longest serving federal appeals judge still in active service – at oral argument put it this way :

> **TJOFLAT:** Dismissal without prejudice doesn't hurt you at all… There's no injury at all; you're back at square one with a remedy in the state court is what I'm trying to say.[39]

§3.1.2 *Limitation argument at odds with Res Judicata argument*

Finally, defense's limitations argument is contradicted by its *res judicata* argument; in its limitations argument defense insists federal court never had original jurisdiction, but in its *res judicata* argument defense insists "the Eleventh Circuit *affirmed* the [Middle District's] dismissal of the federal constitutional claims [on the merits], and it went further to observe that those claims were frivolous." With these words defense fits the Eleventh Circuit's disposition of the Foleys' case squarely into the second exception of Bell v. Hood – a properly drawn federal claim nevertheless dismissed for lack of *subject matter jurisdiction*. So, defense must accept our Supreme Court's conclusion in Krause – dismissal for lack of "*subject matter jurisdiction*, does not bar the applicability of the federal tolling provision in the subsequent state court action."

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[39] Foley et. ux. v. Orange County, et. al. 137 S. Ct. 378 (2016), Petition for a Writ of Certiorari, Appendix, p. 30a, lines 1-2, 5-7. Plaintiffs' Motion for Judicial Notice, e-filing # 56758653, App. B, and *herein* App. III.

§3.2 *RES JUDICATA* – No claims that were raised or could have been raised were ripe for federal adjudication.

The *officials* per CO-MtD pp. 5-6, Ex. A, pp.8-9, and the *employees* per CE-MtD ¶7,[40] insist the Foleys' federal claim in Count Seven either were raised or could have been raised in federal court and are therefore *res judicata*.

There is no conclusive applicability of any affirmative defense in *res judicata*,[41] and the County *officials*' and *employees*' *res judicata* defense otherwise fails because the Foleys' federal claims were not ripe for adjudication[42] by the Eleventh Circuit and were therefore dismissed for lack of subject matter jurisdiction.[43]

The Eleventh Circuit did not factor Art.IV,§9,Fla.Const., into its analysis of any of the Foleys' federal claims as the Foleys requested. The Eleventh Circuit did not do so because *comity* demands state court first resolve any

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[40] *See* †36, *herein* p.47.

[41] *See* †38, *herein* p.49.

[42] Cromwell v. County of Sac, 94 US 351, 365 (1877): "Unless the court, in rendering the former judgment, was called upon to determine the merits, the judgment is never a complete bar."

[43] *See* †30, *herein* p.43.

See also Bennett v. Walton County, 174 So. 3d 386, 396-397 (1st DCA 2015): "[A] rationale against federal review of local regulatory decisions, such as zoning matters, under a federal substantive due process theory is the avoidance of federal court intrusion on Fourteenth Amendment grounds into state executive matters better suited for review in state tribunals."

claims based upon Art. IV, §9, Fla. Const. Judge Tjoflat at oral argument put it this way:

> **TJOFLAT**: Generally, the federal courts in these kinds of things, involving local ordinances and the like, there's an old doctrine in the law which says because of comity our respect for the state governments and local governments the federal court stays its hand and it doesn't act… and gets an answer to the question out of the state courts… You follow me? Then, if they're wrong, we have a constitutional argument in this court.[44]

In other words, federal court has no jurisdiction over the claims until state court denies relief. The Eleventh Circuit has in essence treated the Foleys' federal claims as it would a takings claim per *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 US 172, 186 (1985), or a due process case per *McKinney v. Pate*, 20 F.3d 1550, 1560 (11th Cir. 1994) – unripe without state resolution. At bottom the Eleventh Circuit simply decided the Foleys federal claims were not ripe for federal adjudication.[45]

Supreme Court precedent construes the Fourteenth Amendment to make the state, not local government, the guarantor of federal constitutional rights. When a subdivision of the state, or its agent, acts to deprive a person of

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[44] *Foley et. ux. v. Orange County, et. al.* 137 S.Ct. 378 (2016), Petition for a Writ of Certiorari, Appendix, p. 29a, lines 15–25. Plaintiffs' Motion for Judicial Notice, e-filing # 56758653, App. B, and *herein* at App. III.

[45] *See* †30, *herein* p.43.

property or liberty, the state must ensure the person is provided an adequate remedy. Then, as Judge Tjoflat said, "[I]f they're wrong, we have a constitutional argument in [federal] court."

It is in this spirit the Foleys properly assert their federal claim "in the alternative;" should this court find no state or common law remedy, as explained *herein* §§2.4-2.5, it can provide one pursuant 42 USC §1983 and the Fourteenth Amendment.

§3.3 ABSOLUTE IMMUNITY – The *officials* and *employees* fail to establish grounds for immunity; defense does not answer the Foleys' allegations that the *officials* enforced a *custom* of their own making, acted *in absence* of authority, and violated the *separation of powers*.

The *officials* per CO-MtD p.6, Ex. A, pp.9-12, and the *employees* per CE-MtD ¶7,[46] claim they enjoy absolute immunity for the execution of ministerial and quasi-judicial duties. The *officials* and *employees* claim they are due ministerial immunity for the enforcement of an *ordinance* and quasi-judicial immunity for their prosecution and review of the Foleys' case.

The Foleys argue below that there is no conclusive applicability of any affirmative defense in absolute immunity,[47] and defense otherwise has not met

[46] *See* †36, *herein* p.47.
[47] *See* †38, *herein* p.49.

its burden of proof.[48] Defense must meet the Foleys' allegations: *1)* the *officials* and *employees* were in fact enforcing a *custom* [AC p.1, ¶51] not an *ordinance* [AC ¶41] and consequently have no ministerial immunity; and, *2)* the *officials* and *employees* violated Florida's separation of powers [AC ¶¶27, 28, 40 *in toto*, 42, 43, 45, 47, 52] and consequently have no quasi-judicial (or quasi-legislative) immunity.

§3.3.1 Defendants enforced a *custom* of their own making, not an ordinance, and in so doing forfeit immunity by making themselves judges of their own cause.

The County,[49] the *officials*,[50] and the *employees*[51] claim they were enforcing an *ordinance* – though none identify it. Counsel for the *officials*

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[48] *Harlow v. Fitzgerald*, 457 US 800, 812 (1982): "The burden of justifying absolute immunity rests on the official asserting the claim."

[49] *Orange County's* motion to dismiss (Filing #53377215) ignores the Foleys' allegation in Count 1 that *custom* not *ordinance* was enforced.

[50] *Officials'* motion to dismiss (Filing #53349478) never uses the word *custom*, and expressly, though falsely, alleges an *ordinance* was enforced (*Emphasis* added.):

1) "This case arises from the enforcement of a local *ordinance* which prohibited aviculture. The Foleys commercially bred toucans in violation of the *ordinance*." p. 2;

2) "[T]he Foleys' toucan farm violated an *ordinance*." p. 5;

3) "The BZA held a public hearing, and the board voted that the Foleys were indeed violating the local *ordinance*." Ex. A, p. 2; and,

further claims that the *officials* had a (ministerial) duty to enforce the unidentified *ordinance*.[52] Defense concludes that even if the mystery *ordinance*

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4) "In other words, the question is framed as whether the governmental body is enacting or modifying an *ordinance* (legislative) or enforcing one (quasi-judicial)." Ex. A, p. 10.

Officials' motion for sanctions (Filing #53472010) never uses the word *custom*, and expressly, though falsely, alleges an *ordinance* was enforced:

1) "Our clients made statements and undertook investigative measures to analyze the concern that you were violating the aviculture *ordinance*; During this time, you argued that the *ordinance* was unconstitutional under the Florida Constitution; Our clients nonetheless voted in official, public hearings to uphold findings that you had violated the *ordinance*." Ex. B, p. 1; and,

2) "Mr. Foley, despite the foregoing, I emphasize that you have proven a worthy adversary who has convinced at least one federal jurist that a local *ordinance* was invalid, despite His Honor's lack of authority to rule on the question." Ex. B, p. 3.

[51] *Employees*' motion to dismiss (Filing #53363907) never uses the word *custom*, and alleges instead that codes, regulations, and laws were enforced:

1) "[T]he claims against these individual Defendants are for their alleged wrongful enforcement of the Orange County *Code*." p. 3;

2) "[T]he Defendants were simply attempting to enforce the Orange County Zoning *Code and Regulations*." p. 3; and,

3) [T]he immunity available to these government officials for their attempts to enforce *local laws*, all are in opposition to Plaintiffs' attempted claims. p. 4.

[52] *Officials'* motion for sanctions, Ex. B, p. 2., (Filing #53472010): "Executive branch members "are charged to enforce *laws* until and unless they are declared unconstitutional." *Michigan v. DeFillippo*, 443 U.S. 31, 38 (1979); see also *Cooper v. Dillon*, 403 F.3d 1208, 1220 (11th Cir. 2005) … In fact, it may have been an abrogation of our clients' duties not to enforce the presumptively valid *ordinance* throughout the proceedings. See *DeFillippo*,

proves to be unconstitutional the *officials* are guaranteed immunity because they had no duty to question its validity.[53] The problem with this argument is that the Foleys emphatically allege there was no such *ordinance* [AC ¶41] and that defendants instead enforced a *custom* [AC p.1, ¶51] [*also* §§2.1.2 and 2.2.2, *herein*]. Counsel for the County, the *officials*, and the *employees* have failed to prove an *ordinance* was enforced, and have deliberately refused to answer the Foleys' allegation that defendants enforced a *custom* not an *ordinance*. They cannot meet their burden of proof without doing so.

Defendants enforced a *custom* and not an *ordinance*, and in particular a *custom* challenged by the Foleys [AC ¶¶44, 48], questioned by FWC [AC ¶49], and in clear conflict with Op. Att'y Gen. 2002-23 [*herein* p.2, and Appendix I, p.20] and seventy-two years of Florida law [AC ¶28, and Appendix I, pp.8-19]. The defendants were not privileged to assume the constitutional validity of their *unpublished custom* for the reasons stated herein at §2.2.3.1 – Florida and due

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443 U.S. at 38 ("The enactment of a law forecloses speculation by enforcement officers concerning its constitutionality." (emphasis added)).

[53] *Officials'* motion for sanctions, Ex. B, p. 2., (Filing #53472010): "Implicit in your Complaint, if I read it correctly, is that the officials should have known that the *ordinance* was unconstitutional … Even if an appropriate court later determines that the *ordinance* was unconstitutional, that does not bear on our clients' lack of personal liability for its enforcement."

process[54] recognize a duty to decline jurisdiction or to otherwise remove the risk of its erroneous exercise where it is in reasonable doubt. One logical, long acknowledged, reason for this is that to enforce an *unpublished custom*, that is in reasonable constitutional doubt, in a proceeding that has no appellate review able to resolve that doubt prior to injury, is to rule by decree [*herein* §2.4.3] as it necessarily makes the defendants judge of their own case – "*aliquis non debet esse Judex in propria causa*."[55]

As will be discussed in the following sections §3.3.2.1 through §3.3.2.5, the *officials* and *employees retrospectively* enforced an *unpublished custom* that clearly raised the constitutional question of their jurisdiction over the Foleys' contested right to advertise and sell toucans. Moreover, they did so in a proceeding that removed that very question and the resulting injury from state court review. The County *officials* and *employees* effectively did what their counsels concede they cannot do [CO-MtD Ex.A,†6] – they usurped the role of the court and resolved the question of their *custom's* constitutionality in their

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[54] *See herein* †5, p.15; *and* †7, p.17.

[55] *Dr. Bonham's* Case, 8 Co. Rep. 114a, 77 Eng. Rep. 646 (C.P. 1610): "No one ought to be a judge in his own cause."

own favor.[56] In sum, the *officials* and *employees* themselves removed any bar immunity presented this suit; they must answer.

§3.3.2.1 Defense has not met the primary allegation: the *officials* and *employees* forfeit immunity by their double violation of the "separation of powers" – they exercised substantive quasi-judicial powers and trespassed Art. IV, §9, Fla. Const.

The Foleys make three additional allegations the *officials* and *employees* must meet to carry their burden of proof. First, the Foleys clearly allege that defendants destroyed the Foleys' *aviary* and/or bird business [AC ¶45] by means of an executive practice and proceeding [AC ¶40 *in toto*] that, *1)* had no jurisdiction per Chs 30, or 38, OCC, to adjudicate, divest, or impair a contested right [AC ¶¶42-43], and, *2)* had no adequate remedy for the contested right on state court review [AC ¶52]. These ultimate facts effectively allege that the defendants violated Florida's separation of powers by usurping the role of the Court, and defendants consequently forfeit immunity. Defense ignores these allegations. Second, the Foleys clearly allege that defendants: *1)* enforced upon the Foleys a *custom* prohibiting *aviaries* and/or *aviculture* [AC ¶41]; and, *2)*

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[56] *Central Florida Investments, Inc. v. Orange County Code Enforcement Board*, 790 So.2d 593, 597 (Fla. 5th DCA 2001), citing *Gulf Pines Memorial Park, Inc. v. Oaklawn Memorial Park, Inc.*, 361 So.2d 695 (Fla.1978) (administrative hearing officer lacks jurisdiction to consider constitutional issues). *See also* †7 *herein*.

that *custom* was in irreconcilable conflict with Art.IV §9, Fla.Const. [AC ¶¶27, 28, 44, 48, 49]. These ultimate facts effectively allege that the defendants violated Florida's separation of powers by usurping the subject matter jurisdiction [*public purpose*, i.e., *police power*][57] of FWC, and defendants consequently forfeit immunity. Defense ignores these allegations. Third, the Foleys clearly allege that defendants did so when it was within their power to provide an adequate, adversarial (i.e., fair) pre-deprivation challenge to the validity of their *aviculture custom*, per Ch 11, OCC, §§30-49(b), or 38-29(b), OCC or otherwise [AC ¶47]. This ultimate fact effectively alleges defendants deliberately denied *themselves* the procedure that would have guaranteed their immunity. Defense ignores this allegation.

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[57] *Grubstein v. Urban Renewal Agency of City of Tampa*, 115 So. 2d 745, 749 (Fla. 1959): "[I]n those [eminent domain] decisions no distinction was made between 'public purpose' and 'public use.'"

Hawaii Housing Authority v. Midkiff, 467 US 229, 240 (1984) "[T]he public use requirement is ... coterminous with the scope of a sovereign's police powers."

Herein, per the above, the Foleys conflate and use as synonyms "public purpose" and "police power."

§3.3.2.2 The exception to immunity is *absence* of jurisdiction.

Defense for the *officials* at CO-MtD Ex.A, pp.9-10, and the *employees*[58] argues: *1)* Florida extends absolute judicial immunity to quasi-judicial action; *2)* the *officials* and *employees* review of the County's enforcement action was "paradigmatically quasi-judicial," CO-MtD Ex.A, p.10; and, *3)* the *officials* and *employees*, therefore, are due absolute immunity.[59]

The Foleys agree that absolute judicial immunity extends to quasi-judicial action. The Foleys also agree that the *officials*' and *employees*' actions were "paradigmatically quasi-judicial." The Foleys, however, do not agree the *officials* and *employees* are therefore due absolute immunity. The Foleys' argument is very simple – the *officials* and *employees* had no jurisdiction to take action that was "paradigmatically" (*i.e.*, substantively) quasi-judicial, no authority to adjudicate a contested right, or to divest or impair legal rights

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[58] The *employees* seek absolute quasi-judicial immunity per; CE-MtD ¶7; and in "Defendants Phil Smith, Rocco Relvini, Tara Gould, And Tim Boldig's Motion To Dismiss," §IV Immunity from Suit, pp. 4-5, filing #50321893, dated 12/20/2016.

[59] Defense's immunity argument relies on a *non sequitur*. Defense fails to connect claims 1 and 2 by identifying a single authority that grants absolute quasi-judicial immunity to county boards like the BZA and BCC. There are none. And there are none because such boards are not and were never intended to be "paradigmatically quasi-judicial." They are instead, as argued herein, only procedurally quasi-judicial, but otherwise substantively either quasi-legislative – or as in this case – quasi-executive, State ex rel. Williams v. Whitman, 116 Fla. 196, 201 (1934).

vested in the Foleys, and when they nevertheless did so, they did so not *in excess* of jurisdiction but *in absence* of jurisdiction, and they, therefore, abandoned immunity.

This distinction between forgivable acts *in excess* of jurisdiction and unforgiveable acts *in absence* of jurisdiction was made by Justice Field in Bradley v. Fisher, 80 US 335,351 (1871):

> A distinction must be here observed between *excess* of jurisdiction and the clear *absence* of all jurisdiction over the subject-matter. Where there is clearly no jurisdiction over the subject-matter any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible.
>
> Thus, if a probate court, invested only with authority over wills and the settlement of estates of deceased persons, should proceed to try parties for public offences, jurisdiction over the subject of offences being entirely wanting in the court, and this being necessarily known to its judge, his commission would afford no protection to him in the exercise of the usurped authority. [*Emphasis* added.]

But centuries before Bradley challenged his disbarment by Judge Fisher during the Lincoln assassination trials, the exception to absolute immunity was put this way by Lord Coke in The Case of the Marshalsea, 77 Eng. Rep. 1027 (1612):

> When a court has jurisdiction of the cause, and proceeds *inverso ordine* or erroneously, no action lies against the party who sues, or the officer or minister of the Court, who executes the precept or process of the court; but when the court has not jurisdiction of the

> cause, the whole proceeding is *coram non judice*, and an action will lie against them, without any regard of the precept or process.

In sum, to be entitled to absolute immunity the *employees* must show their actions, the BZA must show that its recommendation, and the BCC must show that its order, were only *in excess* and not *in absence* of jurisdiction. Defense for the *officials*, in particular, must show that the recommendation of the BZA, and the order of the BCC, were merely *voidable* and not *void per se*, that they had "the power to adjudge concerning the general question involved."[60]

The following inquiry into the BZA's and BCC's "power to adjudge concerning the general question involved," is consistent with the "function test" employed in Florida and federal courts.[61]

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[60] Malone v. Meres, 91 Fla. 709, 747 (1926).

[61] Zoba v. City of Coral Springs, (4th DCA 2016), "Absolute quasi-judicial immunity for nonjudicial officials is determined by a functional analysis of their actions in relation to the judicial process." Quoting Fuller v. Truncale, 50 So. 3d 25, 28 (1st DCA 2010).

Department of Hwy. Safety v. Marks, 898 So. 2d 1063 (5th DCA 2005): "[T]he doctrine of judicial immunity embraces persons who exercise a judicial or quasi-judicial function."

Andrews v. Florida Parole Com'n, 768 So. 2d 1263 (1st DCA 2000), rev. dismissed, 791 So.2d 1093 (Fla. 2001): "Immunity, as stated in Forrester v. White, 484 U.S. 219, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988) 'is justified and defined by the *functions* it protects and serves, not by the person to whom it attaches.' Id. at 227, 108 S.Ct. at 544 (emphasis added)."

Roland v. Phillips, 19 F. 3d 552, 555 (11th Circ. 1994), "[W]e determine the absolute quasi-judicial immunity of a nonjudicial official through a

§3.3.2.3 The *officials* ordained jurisdiction is quasi-executive and solely prospective.

Defense at CO-MtD Ex.A, p.10, presents two authorities to establish that the BZA and BCC acted properly within their quasi-judicial jurisdiction. The two authorities involve two very different boards – the first a Board of County Commissioners,[62] the second a Code Enforcement Board.[63] The difference between the functions of these two boards illustrates what is and is not "paradigmatically quasi-judicial."

In Orange County the functions of these two boards are distinguished by their respective ordained powers. Though both issue orders after noticed hearings and are therefore procedurally quasi-judicial, the substantive powers of the BCC are quasi-legislative and quasi-executive [*See* Ch. 30, OCC; Appendix II, pp.20-33], while the substantive powers of a Code Enforcement Board are "paradigmatically" quasi-judicial [*See* Ch. 11, OCC; Appendix II, pp.6-19]; the BCC may declare rights and duties, but only a Code Enforcement Board may take the further step to impair a right and to exact penalties.

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functional analysis of the action taken by the official in relation to the judicial process."

62 *Hirt v. Polk County Bd. of County Comm'rs*, 578 So.2d 415, 417 (2nd DCA 1991).

63 *Michael D. Jones, P.A. v. Seminole County*, 670 So.2d 95, 96 (5th DCA 1996).

A closer look at the ordained jurisdictions of the BZA and BCC [the *officials*] confirms that they are functionally and exclusively executive in nature. Neither board is like a Code Enforcement Board. Neither board has the categorical power reserved to the judiciary – the power to divest or impair a legal right,[64] particularly one placed beyond County authority by Art. IV, §9, Fla. Const.

What is the jurisdiction of the BZA? The BZA has the power to create rules for its hearings, and to compel the attendance of witnesses, per §30-42(g), OCC. The BZA has the power to "hear and make recommendations to the board of county commissioners from … [a] determination made by the zoning manager," per §30-43(1), OCC. To that end the BZA also has the executive "powers of the [zoning manager] from whom the appeal is taken," per §30-43(4), OCC: *1)* the power to interpret the zoning ordinance, per §38-74(d)(1), OCC; *2)* the power to order the discontinuance of any land use prohibited by the zoning ordinance, per §30-41(b), OCC; and, *3)* "the right to apply to the circuit court of the county to enjoin and restrain" a violation of the zoning ordinance, per §§30-49(b), and 38-29(b), OCC. In sum, the jurisdiction of the BZA is exclusively executive; to divest or impair a contested right the BZA

[64] *Williams v. Whitman,* 116 Fla. 196, 201 (1934).

must "apply to the circuit court," like any other "aggrieved or interested person;" its quasi-judicial procedural obligations give it no more substantive ["paradigmatic"] quasi-judicial power to divest or impair a contested right than any other person aggrieved.

What is the jurisdiction of the BCC? The BCC has the power to "determine its own rules," per §209(A), OC Charter, to "conduct a trial de novo" of the BZA's recommendations, to compel the attendance of witnesses, per §30-45(d), OCC, and to "adopt, reject or modify [BZA] recommendations," per §30-43(4), OCC. It has the right of the executive "to apply to the circuit court of the county to enjoin and restrain" a violation of the zoning ordinance, per §§30-49(b), and 38-29(b), OCC. And it has the executive power to seek "such remedies in law and equity as may be necessary to insure compliance with" the zoning ordinance, per §30-80, OCC. Just as the BZA, the jurisdiction of the BCC is exclusively executive; to divest or impair a contested right the BCC must "apply to the circuit court," like any other "aggrieved or interested person;" its quasi-judicial procedural obligations give it no substantive ["paradigmatic"] quasi-judicial power.

Significantly, the BZA and BCC do not have the "paradigmatically" quasi-judicial "authority to impose fines" or to levy a lien that Florida has given

to local code enforcement boards per §162.09, Fla. Stat., and Orange County has given its code enforcement board per §11-37, OCC. Absent such authority, there is no need for, and Florida has not legislated, any right to appeal the decisions of the BZA or BCC, as it has the decisions of local code enforcement boards per §162.11, Fla. Stat. [*See herein* §3.3.2.5]. In sum, the *officials* took *retrospective,* or "paradigmatically," quasi-judicial action, but only had *prospective*, procedural quasi-judicial jurisdiction; they acted without jurisdiction. Consequently they have no immunity for the "paradigmatically" quasi-judicial action they took to divest the Foleys of their right to continue their legitimate toucan business [AC ¶45].

§3.3.2.4 Florida recognizes this difference between *prospective* and *retrospective* quasi-judicial "function."

Florida's Supreme Court in West Flagler Amusement Co. v. State Racing Commission, 165 So. 64, 65 (1935), articulated the difference between *prospective* [†16] and *retrospective* [†17] quasi-judicial functions in this way:

> [A] quasi-legislative or administrative order prescribes what the rule or requirement of administratively determined duty shall be with respect to transactions to be executed in the future, in order that same shall be considered lawful.
>
> A judicial or quasi-judicial act determines the rules of law applicable, and the rights affected by them, in relation to past transactions.

Put another way, substantive quasi-legislative or executive jurisdiction is *prospective* and declares rights or duties to be exercised in the future, while substantive quasi-judicial jurisdiction is *retrospective* and may divest or impair a right.

In the context of an administrative review of a permit proceeding, as in this case, *Bay National Bank and Trust Company v. Dickinson*, 229 So. 2d 302 (1st DCA 1969), describes the jurisdictional limits the BZA and BCC *should have observed*:

> [C]onsideration of the application [should] not constitute an adjudication of rights vested in any person or corporation, but [should be] an administrative determination as to whether a requested right shall be granted.

In contrast, *Williams v. Whitman*, 116 Fla. 196, 201 (1934), describes the judicial character of the "paradigmatically" quasi-judicial jurisdiction the BZA and BCC *improperly usurped*:

> [T]he function and prerogative of deciding finally the law and the facts of an actual controversy bearing upon a vested legal right sought to be divested or impaired in a proceeding … before an administrative tribunal is, in its last analysis, a pure judicial power...

In sum, Florida courts have established a functional distinction between administrative action that is procedurally quasi-judicial but substantively quasi-

legislative or executive, and administrative action that is wholly judicial in character, or "paradigmatically quasi-judicial." As a result, in this case absolute immunity is due, if at all, only the procedural elements of the proceedings. No immunity is due the "paradigmatically" *retrospective* quasi-judicial conclusion of the proceeding; in this case the BZA and BCC have violated their executive privilege and divested and impaired a vested legal right *in absence* of jurisdiction to do so [AC ¶45]. Such a violation is "subject to direct or collateral attack."[65]

§3.3.2.5 Absence of substantive appellate review confirms the officials' "function" *should have been* quasi-executive and solely prospective.

This "functional" analysis is given additional weight by the difference in the way state courts review the three separate components (legislative, executive, judicial) of local administrative actions that are procedurally quasi-judicial but substantively quasi-legislative or executive.

As the First District says in Bloomfield v. Mayo, 119 So. 2d 417 (1st DCA 1960), erroneous action that is substantively executive – like that of the *officials* and *employees* – could not be reached by writ of certiorari *except* that Orange

[65] Broward County v. Administration Commission, 321 So. 2d 605, 609 (1st DCA 1975).

County provides for a quasi-judicial, noticed hearing before the BZA and BCC, §§30-43(1), 30-44, 30-45, OCC:

> Where an order of an administrative board or commission is purely administrative or quasi-legislative or quasi-executive in character and quality, such an order is not capable of being reached or affected by the writ of certiorari unless, as an incident to the arriving at or making of such order by the promulgating authority, a notice and hearing, judicial in nature, is required by law to be observed as a condition precedent to the commission's or board's exercise of the administrative, quasi-legislative or quasi-executive power comprehended in the terms of the order it attempts to enunciate.

Bloomfield,[66] recognizes that permit review proceedings, like those of the BZA and BCC in this case, are indeed quasi-judicial, *but only to the extent* that they provide notice and hearing as required by ordinance. They are otherwise quasi-legislative or executive.

This trifurcation of the procedural and substantive components of the proceeding into quasi-legislative, executive, and judicial, is validated and reiterated in defense's own case – *Hirt v. Polk County Bd. of County Comm'rs.*, 578 So.2d 415, 416 (Fla. 2d DCA 1991) – which holds, as do Florida's other

[66] Cited with favor by Florida's Supreme Court in: *Dade County v. MARCA, SA,* 326 So. 2d 183 (1976); *Scholastic Systems, Inc. v. Leloup,* 307 So. 2d 166 (1974); *In re Estate of Kant*, 272 So. 2d 153 (1972); *Buchman v. State Board of Accountancy,* 262 So. 2d 198 (1972); *Modlin v. City of Miami Beach,* 201 So. 2d 70 (1967); *Carol City Utilities, Inc. v. Dade County,* 152 So. 2d 462 (1963); *Teston v. City of Tampa,* 143 So. 2d 473 (1962).

courts,[67] that certiorari review of local administrative action may only properly consider the procedural quasi-judicial component of the board's decision, while declaratory and injunctive suits are the proper means to attack the substantive quasi-legislative component of the board's decision. The quasi-executive component, as stated earlier, is "subject to direct or collateral attack."[68] Here the *officials* and the *employees* violated their executive privilege and divested and impaired a vested legal right *in absence* of jurisdiction [AC ¶45]; they can answer in damages.

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[67] *Foley v. Orange County*, 08-CA-5227-0 (Fla. 9th Cir. 2009); *Nannie Lee's Strawberry Mansion, Etc. v. City of Melbourne*, 877 So. 2d 793 (5th DCA 2004); *Wilson v. County of Orange*, 881 So. 2d 625 (5th DCA 2004), citing *Key Haven Assoc. Enters. v. Board of Trustees of the Internal Improvement Trust Fund,* 427 So. 2d 153 (Fla. 1983); *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. City of Clearwater,* 594 So. 2d 779 (2nd DCA 1992); *Town of 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).

[68] *See* †65, *herein* p.70.

§3.4 Immunity per §768.28(9) – The *officials* forfeited immunity by acting outside the scope of their employment or function in bad faith and with legal malice.

The *officials* in CO-MtD Ex. A, pp.11, claim they enjoy qualified immunity per §768.28(9), Fla. Stat., because "[t]he Foleys have merely alleged that the Officials exercised official votes in an official forum."

The *employees* in CE-MtD ¶7,[69] claim they enjoy qualified immunity per §768.28(9), Fla. Stat., because the Foleys make no allegations that the *employees* acted "in bad faith or with a malicious purpose."

In fact, the Foleys have carefully alleged the *officials* and the *employees* acted outside the scope of their employment or function, in bad faith, and with legal malice. While bad faith, or actual malice, remains a question of fact for the jury, the questions of scope of employment and legal malice are resolved against the *officials* or *employees* as matters of law in §§3.4.1 and 3.4.3.4. Consequently, there is no conclusive applicability of any affirmative defense in §768.28(9), Fla. Stat. for the *officials* or *employees*.[70]

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[69] *Specifically* "Defendants Phil Smith, Rocco Relvini, Tara Gould, And Tim Boldig's Motion To Dismiss," p.5, filing #50321893, dated 12/20/2016. *See* also †36, *herein* p.47.

[70] *See* †38, *herein* p.49.

§3.4.1 The Foleys' allegations of *usurpation of power* remove the conclusive applicability of "scope of employment" as an affirmative defense in *absolute immunity* and *immunity* per §768.28.

McGhee v. Volusia County, 679 So.2d 729, 733 (Fla.1996), makes clear that §768.28(9)(a), Fla.Stat. (1989), did not "change the traditional law defining 'scope of employment.'" By reference to *Swenson v. Cahoon*, 111 Fla. 789, 792-793 (Fla. 1933), *McGhee at 731*, simplifies the line between tortious conduct *within* and tortious conduct *not within* the scope of employment or function – the former is an *abuse of power* and the later is a *usurpation of power*:

> To abuse power is to use it in an extravagant manner, to employ it contrary to the law of its use, or to use it improperly and to excess.
>
> The usurpation of power has reference to the unlawful assumption, or seizure and exercise of power not vested in one, or where one *interrupts* another in the exercise of a right belonging to him. [*Emphasis* added.]

McGhee, further holds that §768.28,Fla.Stat., makes the "master" liable for any *abuse of power* the "servant" possessed *virtute officii*, or "by virtue of office," but makes the "servant" liable for any *usurpation of power* the "master" did not

possess but which the "servant" asserts *colore officii*, or "by color of office" [*See also* Malone v. Howell [71]].

In this case, the Foleys align their allegations with *Swenson*'s distinction between *abuse* and *usurpation* of power. The Foleys allege the *officials* and *employees* had no authority to *"interrupt"* their right to possess and sell toucans, but nevertheless in concert did so [AC ¶¶28, 41, 44, 45, 48, 49, 69, 70, 72 *in toto*, 74 *in toto*,] – the *officials* and *employees* usurped the power Art. IV, §9, Fla.Const., grants only FWC. In adddition, the Foleys' allege that the *officials* and *employees* did *"interrupt"* their right to possess and sell toucans deliberately by means of a procedure that denied the Foleys' contested right direct judicial review [AC ¶¶40 *in toto*, 42, 43, 46, 47, 50, 51, 52] – the *officials* and *employees* usurped the power of the courts. These allegations not only remove the conclusive applicability of any affirmative defense in §768.28,Fla.

[71] Malone v. Howell, 140 Fla. 693, 702, 192 So. 224, 227 (Fla. 1939): "The distinction is that acts are done *'virtute officii'* when they are within the authority of the officer, but done in an improper exercise of his authority or in abuse of the law, while acts are done *'colore officii'* where they are of such nature the office gives him no authority to do them." Held Sheriff Howell had no liability *respondeat superior* for the actions of deputy who bushwacked the bootlegger Malone with no warrant or just cause.

Stat., from the face of the amended complaint,[72] they remove the shields of sovereign immunity and absolute immunity altogether as a matter of law.

§3.4.2 The Foleys' allegations of *legal malice* remove the conclusive applicability of §768.28(9)(a), Fla. Stat., as an affirmative defense.

If they act "with malicious purpose," §768.28(9)(a), Fla.Stat., makes the *officials* and *employees* liable for the Foleys injuries – even if they where acting within the scope of their employment or function.

The Foleys at AC ¶72(a), clearly allege the *officials* and *employees* acted *without legal justification*, and at AC ¶72(b), that the *officials* and *employees* acted with *legal malice*.[73] The Foleys support those allegations in ¶72 by references to AC ¶¶28, 40(b), 42-49. The Foleys explain below that allegations of *legal malice* are equivalent to allegations of *malicious purpose*.

Judge Farmer in *Seese v. State*, 955 So. 2d 1145, 1149 (4th DCA 2007), defined *legal malice* by comparison to *actual malice*, as follows:

> In law the term malice and its adverbial form maliciously have two meanings: "legal malice" (also known as "malice in law"), and "actual malice" (also known as "malice in fact"). Reed v. State, 837 So.2d 366, 368 (Fla.2002). Legal malice means "wrongfully,

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[72] *See* †38, *herein* p.49.

[73] *implied malice*. Malice inferred from a person's conduct. - Also termed *constructive malice; legal malice; malice in law*. Cf. *actual malice* (1). Black's Law Dictionary, p.969, (7th Ed. 1999).

> intentionally, without legal justification or excuse," while actual malice means "ill will, hatred, spite, an evil intent."

Although Florida courts have found that *legal malice* satisfies the *malice* or *malicious purpose* prerequisite in §§784.048(4),[74] 827.03,[75] and 836.05,[76] Fla.Stat., no Florida appellate court has done so with respect to §768.28(9)(a), Fla.Stat. Nevertheless, because Florida courts clearly define *bad faith* in §768.28, as *actual malice*,[77] it would be impermissibly redundant and absurd[78] to construe "bad faith or with malicious purpose" to mean only *actual malice*, rather than both *actual* and *legal malice*; unless *malicious purpose* in §768.28, is superfluous it must mean *legal malice*. Consequently, the Foleys' allegation

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74 *Seese v. State*, 955 So. 2d 1145 (4th DCA 2007).

75 *Reed v. State*, 837 So.2d 366, 368 (Fla. 2002).

76 *Alfonso v. State,* 447 So.2d 1029 (Fla. 1984).

77 Parker v. State of Florida Bd. of Regents, 724 So. 2d 163, 167 (1st DCA 1998): "[A]s a matter of law the element of bad faith is inherent in any action for fraudulent misrepresentation." Ford v. Rowland, 562 So. 2d 731, 734 (5th DCA 1990): "Bad faith has been equated with the actual malice standard."

78 Johnson v. Feder, 485 So. 2d 409, 411 (Fla.1986): "Statutory interpretations that render statutory provisions superfluous 'are, and should be, disfavored.' Patagonia Corporation v. Board of Governors of the Federal Reserve System, 517 F.2d 803, 813 (9th Cir.1975). See also Smith v. Piezo Technology and Professional Administrators, 427 So.2d 182, 184 (Fla. 1983) (courts must assume that statutory provisions are intended to have some useful purpose). Courts are not to presume that a given statute employs 'useless language.' Times Publishing Company v. Williams, 222 So.2d 470, 476 (Fla. 2d DCA 1969)."

that the *officials* and *employees* acted *without legal justification* and/or *legal malice* effectively removes the conclusive applicability of any affirmative defense in §768.28,Fla.Stat., from the face of the amended complaint.[79]

§3.4.3.1 The Foleys' allegations of *abuse of process, fraud,* and *extortion* remove the conclusive applicability of §768.28(9)(a), Fla. Stat., as an affirmative defense.

If they act in "bad faith," §768.28(9)(a), Fla.Stat., makes the *officials* and *employees* liable for the Foleys' injuries – even if they where acting within the scope of their employment or function.

The Foleys clearly allege that in concert the *officials* and *employees* intentionally injured the Foleys by an *abuse of process to invade privacy and rightful activity*: that is, despite their knowledge, belief, and doubts [AC ¶¶41, 46, 48, 49], the *officials* and *employees* used the coercive force of their office [AC ¶69], to execute an order enforcing on the Foleys an unpublished prohibition of *aviaries* and *aviculture* solicited by a private citizen [AC ¶70]; and, by a bad faith *misrepresentation* of the subject matter of their prosecution of the Foleys as stated in AC ¶51 [AC ¶71(a)], the *officials* and *employees* colored their action with official right to coerce the Foleys [AC ¶71(a)(1)], and to misuse the procedures of Chs. 30 and 38, OCC [AC ¶71(a)(2)], in order to

[79] *See* †38, *herein* p.49.

deny the Foleys liberty interests asserted at AC ¶¶27-28 [AC ¶71(a)(3)], and to deny the Foleys meaningful remedy as stated at AC ¶¶40(b), and 42-47 [AC ¶71(a)(4)], and they did so verbally and/or by printed communication to compel the Foleys to destroy their *aviaries* [AC ¶71(b)(1)], and to abandon their bird business [AC ¶71(b)(2) and at AC ¶72(b)], and in this way injured the Foleys' interests described at AC ¶56. The Foleys explain below why these allegations of *abuse of process*, *fraud*, and *extortion* establish *bad faith* and remove the conclusive applicability of §768.28(9)(a), Fla. Stat., as an affirmative defense.[80]

§3.4.3.2 *Abuse of process* implies *legal malice*.

"Legal malice is presumed to exist if the plaintiff establishes that the process has been used for an improper purpose," Bothmann v. Harrington, 458 So. 2d 1163, †7 (3rd DCA 1984). Consequently, allegations of *abuse of process* sufficient to withstand a motion to dismiss also remove the conclusive applicability of §768.28(9)(a), Fla. Stat., as an affirmative defense.[80]

"One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process," Restatement (Second) of Torts §682 (1965).

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[80] *See* †38, *herein* p.49.

As outlined above at §3.4.3.1, the Foleys' Count Five does allege ultimate facts to satisfy the Restatement §682. These allegations remove the conclusive applicability of §768.28,Fla.Stat., as an affirmative defense from the face of the amended complaint.[81]

§3.4.3.3 *Fraud* implies *actual malice*.

"[F]raudulent misrepresentation *per se* contains the element of bad faith," *Parker v. State of Florida Bd. of Regents*, 724 So. 2d 163, 169 (1st DCA 1998), citing *First Interstate Dev. Corp. v. Ablanedo*, 511 So.2d 536, 539 (Fla.1987).

"A misrepresentation is fraudulent if the maker (a) know or believes that the matter is not as he represents it to be, (b) does not have the confidence in the accuracy of his representation that he states or implies, or (c) knows that he does not have the basis for his representation that he states or implies." Restatement (Second) of Torts §526 (1965).

As outlined above at §3.4.3, the Foleys' Count Five does allege ultimate facts to satisfy the Restatement §526. These allegations remove §768.28(9)(a), Fla. Stat., as an affirmative defense from the face of the amended complaint.

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[81] *See* †38, *herein* p.49.

§3.4.3.4 *Extortion* or *intentional harm to a property interest* implies *legal* and/or *actual malice*.

The usual case of abuse of process involves some form of extortion.[82] Extortion generally means obtaining something or compelling some act by unlawful oral, written, or actual threat.[83] This is what the Foleys allege at AC ¶71(b)(1) and (2). The Foleys' allegation of extortion describes what is defined in tort as *intentional harm to a property interest*.[84] The tort of *intentional harm*

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[82] Bothmann v. Harrington, 458 So. 2d 1163, 1169 (3rd DCA 1984): "[T]he usual case of abuse of process involves some form of extortion. Restatement (Second) of Torts § 682 comment b (1977)."

[83] *extort*, vb. 1. To compel or coerce (a confession, etc.) by means that overcome one's power to resist. 2. To gain by wrongful methods; to obtain in an unlawful manner; to exact wrongfully by threat or intimidation. - extortive, adj. Black's Law Dictionary, p.605, (7th Ed. 1999).

extortion, n. 1. The offense committed by a public official who illegally obtains property under the color of office; esp., an official's collection of an unlawful fee. - Also termed common- law extortion. [Quote omitted.] 2. The act or practice of obtaining something or compelling some action by illegal means, as by force or coercion. - Also termed statutory extortion. - extortionate, adj. Black's Law Dictionary, p.605, (7th Ed. 1999).

[84] Restatement (Second) of Torts § 871 (1965). *Intentional Harm To A Property Interest*: One who intentionally deprives another of his legally protected property interest or causes injury to the interest is subject to liability to the other if his conduct is generally culpable and not justifiable under the circumstances.

Comment:

f. Duress. The rule stated in this Section applies when a person uses duress; the liabilities and remedies are the same as those when his conduct is fraudulent… [T]here is a tort under this Section when the duress results in an invasion of a possessory or proprietary interest.

to a property interest generally involves conduct that is not "justifiable under the circumstances," which is to say *legal malice*.[85] The Foleys in AC ¶¶39-52, also allege *actual malice*; that is, the Foleys allege there ultimate facts demonstrating the reckless indifference of the *officials* or *employees* to the Foleys' substantive and procedural rights, and those of others. Consequently, the Foleys' allegations remove the conclusive applicability of any affirmative

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> Duress means a threat of unlawful conduct that is intended to prevent and does prevent another from exercising free will and judgment in his conduct. It is commonly committed by an oral or written threat but may be accomplished by acts. It may be by … threats of any unlawful conduct directed against the other … that in fact … deprives the other of a freedom of choice. (See Illustrations 4 and 5)
>
> **Illustrations:**
>
> 4. A wrongfully seizes possession of B's chattel needed by B in his business and refuses to return it unless B transfers the title of certain land to C. In response to this coercion B transfers the land to C, who later sells the property to a bona fide purchaser. A is subject to liability to B for the value of the property so transferred.
>
> 5. A, who in fact has no claim against B, in bad faith threatens B, who is about to present a dramatic performance, that he will obtain an injunction against the performance unless B pays A $1,000. B makes the payment, since the performance has been advertised and a considerable sum has been spent on its preparation. A is subject to liability to B for the amount so paid him.

[85] Reed v. State, 837 So. 2d 366, 369 (Fla. 2002): "[L]egal malice merely requires proof of an intentional act performed without legal justification or excuse. Legal malice may be inferred from one's acts, and does not require proof of evil intent or motive."

defense in §768.28(9), Fla. Stat. for the *officials* or *employees* from the face of their amended complaint.[86]

§3.5 Lumping defendants – Lumping is appropriate here where defendants are accused of "acting in concert" for tortious purpose, and for "endeavoring" to commit theft.

The *officials* at CO-MtD p.2, and the *employees* at CE-MtD ¶5, claim the Foley's amended complaint *could be dismissed* per KR Exchange Services, Inc. v. FHI, PL, 48 So.3d 889 (3rd DCA 2010), because it lumps all defendants together, but *need not be dismissed* because "the original Complaint indeed parsed out the roles of the individual defendants." In fact, lumping was not the only, nor the biggest, problem with the complaint in KR Exchange; defense overstates and oversimplifies the issue of lumping.

Lumping works no prejudice in Count 5. The Foleys' allegation is that the *officials* and *employees* acted "in concert" for a tortious purpose.[87] More precisely, at AC ¶¶69 and 70, the Foleys allege the *officials* and *employees* acted in concert to prosecute the alleged violation of the unconstitutional *aviculture custom* per Chs. 30 and 38, OCC. [*Persons Acting In Concert* is

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[86] *See* †38, *herein* p.49.

[87] Florida courts recognize the "acting in concert" basis for joint and several liability; e.g., Acadia Partners, L.P. v. Tompkins, 759 So.2d 732, 736-37 (5th DCA 2000), which quotes Restatement (Second) of Torts §876.

outlined in the Restatement (Second) of Torts §876 (1965).[88]] The *officials* and *employees* can answer without more. They either participated in the prosecution, or they did not. They either owed the Foleys a duty in the course of that prosecution, or they did not. The incidental or ultimate results of the prosecution were tortious, or they were not.

Likewise, in Count 6, which restates the allegations of Count 5, to allege as ultimate fact that all defendants did "endeavour" [§812.14(1), Fla. Stat.] to commit civil theft better serves the "short and plain statement" rule of Fla. R. Civ. P. 1.110(b)(2), than to allege the same for nineteen County *officials* and *employees*.

Too, Count Seven's claim in "conspiracy" [which includes the requisite non-corporate conspirator at AC 40(a)] should require no more detailed allegations than given.

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[88] Restatement (Second) of Torts §876 (1965): *Persons Acting In Concert*

For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he

a) does a tortious act in concert with the other or pursuant to a common design with him, or

b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so conduct himself, or

c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

Nevertheless, should the court prefer a longer more detailed complaint, the Foleys request it grant them leave to amend for that purpose.

§3.6 Deleted facts – There is no change in the ultimate facts.

The *officials* at CO-MtD p.3, and the *employees* at CE-MtD ¶7,[89] claim the Foley's amended complaint should be dismissed because it does not allege all facts alleged in the Foleys' original complaint. By reference to *Inter-Continental Promotions, Inc. v. MacDonald*, 367 F.2d 293, 302 (5th Cir. 1966), defense claims the facts alleged in the amended complaint contradict facts alleged in the original. However, defense fails to specify which facts have been omitted from the amended complaint, or which contradict the original complaint. The Foleys cannot respond without more. Though the court may permit the Foleys to amend their complaint,[90] the Foleys ask the court – should it find merit, instead of mystery, in defense's objection – to permit defense first to amend its motion to specifically identify what it now only vaguely alleges.

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[89] *See* †36, *herein* p.47.

[90] *Aspsoft, Inc. v. WebClay*, 983 So.2d 761, 768 (5thDCA 2008): "A claim should not be dismissed with prejudice "without giving the plaintiff an opportunity to amend the defective pleading, unless it is apparent that the pleading cannot be amended to state a cause of action." Kairalla v. John D. and Catherine T. MacArthur Found., 534 So.2d 774, 775 (Fla. 4th DCA 1988)."

§3.7 Count Five – Acting In Concert; *Abuse of Process to Invade Privacy and Rightful Activity, and Conversion*

The *officials* and *employees* claim there are three reasons the Foleys' compensatory tort claims in Count 5 should be dismissed: *1)* Florida recognizes no claim in "Abuse of Process to Invade Privacy and Rightful Activity" [CE-MtD ¶¶7,8[91]]; *2)* "official" votes and hearings cannot be the basis for a claim in abuse of process [CO-MtD pp.4-5]; and, *3)* there can be no claim in conversion without an allegation "the Officials actually exercised dominion or control over their toucans," [CO-MtD p.5].

These arguments fail for the following reasons: *1)* the Foleys allege sufficient ultimate facts to claim the *officials* and *employees* did in concert use a county practice and proceeding "primarily to accomplish a purpose for which it was not designed"; and, *2)* the Foleys' allegations of unjustified *constructive* dominion or control support a claim of conversion.

§3.7.1 The *officials* and *employees* did in concert use a county practice and proceeding "primarily to accomplish a purpose for which it was not designed."

"Abuse of process involves the use of criminal or civil legal process against another primarily to accomplish a purpose for which it was not

[91] *See* †36, *herein* p.47.

designed," Bothmann v. Harrington, 458 So. 2d 1163, 1169 (3rd DCA 1984).[92] So, it is irrelevant whether *abuse of process to invade privacy and rightful activity* is so nominated by Florida case law. The practice and proceeding to enforce the unconstitutional *aviculture custom* was abused, if it was not authorized to *invade privacy*[93] or *rightful activity*.[94] The Foleys allege it was not. Defense must answer.

"[I]t is immaterial that the process was properly issued, that it was obtained in the course of proceedings that were brought with probable cause and for a proper purpose, or even that the proceedings terminated in favour of the person instituting or initiating them," Restatement (Second) of Torts §682 Comment a (1965). So, it is likewise immaterial that a "vote" or a "hearing" is, or is not, "official." The critical question is – was the process used "primarily to accomplish a purpose for which it was not designed?" And for this response to

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[92] Restatement (Second) of Torts §682 (1965): *Abuse of Process: General principle*. One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process.

[93] *See* †9, p.19, and associated text in §2.2.3.2.

[94] *See* †10, p.20, and associated text in §2.2.3.2.

defendants' motions to dismiss,[95] the more important question is – do the Foleys allege sufficient ultimate facts to claim the *officials* and *employees in concert*[96] used the process "primarily to accomplish a purpose for which it was not designed?"[97]

The Foleys do make the essential allegations. At AC ¶40, the Foleys outline the "practice and procedure" abused to enforce the *aviculture custom* violating Art. IV, §9, Fla. Const. At AC ¶70, the Foleys identify the procedural objective of the enforcement action, and allege the *officials* and *employees* acted *in concert* to prosecute the *aviculture custom*. At AC ¶¶42, the Foleys identify the procedural authority claimed by the *officials* and *employees*. At AC ¶¶50, 51, and 69, the Foleys identify the substantive authority claimed by the *officials* and *employees*. At AC ¶¶43 and 27-28, the Foleys identify the purposes prohibited that claimed procedural and substantive authority. At AC ¶¶44, 45, and 48-51, the Foleys identify the intent to accomplish the prohibited

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95 Connolly v. Sebeco, Inc., 89 So. 2d 482, 484 (Fla.1956): "The function of a motion to dismiss a complaint is to raise as a question of law the sufficiency of the facts alleged to state a cause of action."

96 *See* †87, p.83; and, †88, p.84.

97 Morowitz v. Marvel, 423 A.2d 196, 198 (D.C. 1980): "The critical concern in abuse of process cases is whether process was used to accomplish an end unintended by law, and whether the suit was instituted to achieve a result not regularly or legally obtainable."

purposes. At AC ¶56, the Foleys identify the injury consequent to the accomplishment of those prohibited purposes.

The *officials* and *employees* must now answer.

§3.7.2 Acting in concert to effect conversion requires no more than *constructive* exercise of dominion or control.

As to the *officials* and *employees* the Foleys restate §2.2.6.

§3.8 Count Six – Civil Theft

The *officials* at CO-MtD p.5, and the *employees* at CE-MtD ¶¶7 and 11,[98] argue the Foleys' civil theft claim in Count 6 should be dismissed because the Foleys fail to allege defendants "'obtained or used' the Foleys' toucans." This is defendants' sole argument.

This single argument fails for the following reasons: *1)* an allegation that defendants "obtained or used" is not an essential element of civil theft; and, *2)* the statutory definition of "obtain or use" has been sufficiently alleged. The *officials* and *employees* did, and did endeavored to, "obtain or use."

[98] *See* †36, *herein* p.47.

§3.8.1 Civil theft requires only an allegation that defendants *endeavored* to obtain or use.

As outlined below, the theft statute – §812.014(1), Fla.Stat. – does not require an allegation that defendants *obtained or used*, if it is alleged defendants *endeavoured* to obtain or use:

> (1) A person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently:
> (a) Deprive the other person of a right to the property or a benefit from the property.
> (b) Appropriate the property to his or her own use or to the use of any person not entitled to the use of the property.

"Endeavor" means to attempt or try.[99] The Foleys' amended complaint at ¶74(b), alleges defendants did "knowingly endeavour to extort, to take, and to exercise control over the Foleys' property identified in paragraphs 56(a), (b), and (d)-(h)." This allegation is not challenged by the defendants and is sufficient to withstand their motion to dismiss; they must answer.

§3.8.2 "Obtain or use" is alleged in several ways.

As outlined below, the phrase "obtains or uses" is statutorily defined by §812.013(3), Fla.Stat.:

> (3) "Obtains or uses" means any manner of:
> (a) Taking or exercising control over property.

[99] *IN RE STD. JURY INSTRS. REPORT NO. 2015-04*, 190 So.3d 614, 622 (Fla. 2016).

(b) Making any unauthorized use, disposition, or transfer of property.
(c) Obtaining property by fraud, willful misrepresentation of a future act, or false promise.
(d) 1. Conduct previously known as stealing; larceny; purloining; abstracting; embezzlement; misapplication; misappropriation; conversion; or obtaining money or property by false pretenses, fraud, or deception; or
2. Other conduct similar in nature.

"Exercising control" satisfies the definition of "obtains or uses" at §812.013(3)(a), Fla.Stat. "Control" is broadly defined[100] – to exercise power or influence over, to regulate or govern. The Foleys allege in their amended complaint at ¶74(b) – "[Defendants]… did… knowingly endeavour… to exercise control…" This allegation – that defendants *endeavored* to obtain or use – was supported by ultimate facts demonstrating "control" at AC ¶¶39-52.

"Unauthorized disposition" satisfies the definition of "obtains or uses" at §812.013(3)(b), Fla.Stat. The Foleys allege defendants acted "under the colore and coercive force of official right" at AC ¶74(a). The Foleys allege defendants acted "without legal justification" at AC ¶74(b). Indeed, the defendants' lack of

[100] *control*, vb. 1. To exercise power or influence over <the judge controlled the proceedings>. 2. To regulate or govern <by law, the budget office controls expenditures>. 3. To have a controlling interest in <the five shareholders controlled the company> Black's Law Dictionary, p.330, (7th Ed. 1999).

police power, i.e., *public purpose*,[101] is the keystone of the case against them as stated in Count Six by reference to AC ¶¶27, 28, 41-43, and 52. Consequently, defendants' *disposition* or *attempted* disposition of the Foleys' interests, alleged in AC ¶¶39-52, was *unauthorized*. Unauthorized disposition is well pled to satisfy theft's definition of "obtains or uses."

"Fraud" satisfies the definition of "obtains or uses" at §812.013(3)(c), Fla.Stat. "False pretenses, fraud, or deception" also satisfy the definition of "obtains or uses" at §812.013(3)(d)(1), Fla.Stat. The Foleys allege fraud and misrepresentation at AC ¶74(a), and by reference to ¶¶42, 43, 50, 51, and 69-71. Fraud and deception are well pled to satisfy theft's definition of "obtains or uses."

"Conversion" satisfies the definition of "obtains or uses" at §812.013(3)(d)(1), Fla.Stat. The Foleys allege conversion in Count Six at ¶74, by reference to ¶¶69-72. As explained in §§3.7.2 and 2.2.6 herein, conversion is well pled to satisfy theft's definition of "obtains or uses."

"Other conduct similar in nature" satisfies the definition of "obtains or uses" at §812.013(3)(d)(2), Fla.Stat. The Foleys allege "to extort, to take" in

[101] *See* †57, p.61.

Count Six at ¶74(b). "Other conduct" is generally pled at AC ¶¶39-52. Other conduct is well pled to satisfy theft's definition of "obtains or uses."

The *officials* and *employees* must answer in civil theft. Whether defendants *obtained or used* or *endeavoured* to obtain or use is for the jury.

§3.8 Count Seven – Due Process

For the *officials* and *employees* the Foleys restate §§2.4 through 2.5.

§4 CONCLUSION

The Foleys' amended complaint should not be dismissed. The defendants have found no fatal flaw in the causes asserted, nor have they found any affirmative defense conclusively applicable. The case should proceed to discovery and trial. Nevertheless, should the Court itself identify any deficiency in the amended complaint, the Foleys request leave to amend.

CERTIFICATE OF SERVICE

Plaintiffs certify that on May 24, 2017, the foregoing was electronically filed with the Clerk of the Court using the Florida Courts' eFiling Portal, which will send notice of filing and a service copy of the foregoing to the following:

William C. Turner, Jr., Assistant County Attorney,
P.O. Box 2687, Orlando FL, 32801, williamchip.turner@ocfl.net;
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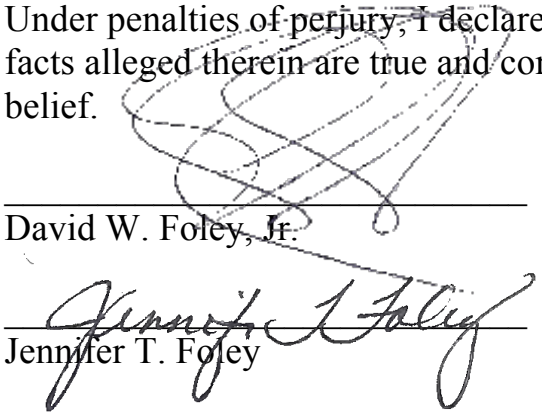
VERIFICATION

Under penalties of perjury, I declare that I have read the foregoing, and the facts alleged therein are true and correct to the best of my knowledge and belief.



_____
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_____
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IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

Plaintiffs DAVID W. FOLEY, JR., and JENNIFER T. FOLEY *v.* ***Defendants*** 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.*	2016-CA-007634-O **APPENDIX I** **MEMORANDUM OF LAW** **FWC's SUBJECT MATER JURISDICTION & COUNTY AVICULTURE REGULATION**

ART. IV, §9, FLA. CONST. – FLORIDA'S CLEARLY ESTABLISHED LAW

Florida law has clearly established that Art. IV, §9, Fla. Const., is a game changer in the field of local nuisance regulation; no presumption of correctness is given a local regulation that touches upon wildlife. Any local ordinance, custom, or policy, is invalid as constitutionally pre-empted by Art. IV, §9, Fla. Const., if it is not wildlife neutral – a local ordinance,

custom, or policy is invalid if it expressly or effectively restricts or prohibits what FWC permits. A local ordinance, custom, or policy is invalid if it expressly or effectively restricts or prohibits the personal or commercial possession of wildlife at a location licensed by FWC, or if it expressly or effectively restricts or prohibits the sale of wildlife at a location where sales are otherwise permitted with less restriction.

Op. Att'y Gen. Fla. 2002-23 is the persuasive authority specifically tied to county ordinances regulating aviculture – like the ordinances, custom and policy at issue in this case. It concludes that such ordinances are invalid; in the unique legal context created by Art. IV, §9, Fla. Const., no Florida county ordinance affecting wild animal life enjoys a presumption of constitutionality, because it has no legitimate interest in that field of regulation. Local regulation cannot prophylactically mitigate nuisance caused by the possession or sale of birds, or other wild animals, by regulating the possession or sale of *all* animals; it cannot attack bird possession or sale *a priori* as a potential cause of nuisance but can only attack nuisance actually caused by bird possession or sale *ex post facto*. That conclusion is based on a legacy of Florida law – as the paragraphs to follow will show.

FLORIDA CONSTITUTION

Florida's constitution[i] clearly establishes that Art. IV, §9, Fla. Const., gives specific, autonomous, self-executing powers exclusively to its Fish and Wildlife Conservation Commission (FWC), while the general powers granted Orange County by Art. VIII, §1(g), Fla. Const., are entirely subordinate to general law.

• • •

Art. II, §3, Fla. Const., permits executive and legislative authority to be combined in and reserved to one agency.

> **Art. II, §3, Fla. Const., Branches of government.**
> The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

• • •

Art. IV, §9, Fla. Const., (1998): *1)* combines in and reserves to FWC exclusively all Florida's executive and legislative authority with respect to wild animal life; *2)* is self-executing and makes FWC authority with respect to wild animal life autonomous; *3)* authorizes the legislature only to enact

[i] The cited provisions can be verified at www.flsenate.gov/laws/constitution.

laws "in aid" of FWC, and only when not inconsistent with FWC autonomy; and, *4)* makes no exception for charter counties that would allow FWC to delegate to Orange County, or allow Orange County to assume, the authority to enact any regulation, coexisting regulation, or regulation "in aid" of FWC, that infringes upon the authority of FWC to determine David Foley is qualified – or that his property is appropriate – for a license to possess, breed, and raise exotic birds for sale.

> **Art. IV, §9, Fla. Const., Fish and wildlife conservation commission.**
> There shall be a fish and wildlife conservation commission, composed of seven members appointed by the governor, subject to confirmation by the senate for staggered terms of five years. The commission shall exercise the regulatory and executive powers of the state with respect to wild animal life and fresh water aquatic life, and shall also exercise regulatory and executive powers of the state with respect to marine life, except that all license fees for taking wild animal life, fresh water aquatic life, and marine life and penalties for violating regulations of the commission shall be prescribed by general law. The commission shall establish procedures to ensure adequate due process in the exercise of its regulatory and executive functions. The legislature may enact laws in aid of the commission, not inconsistent with this section, except that there shall be no special law or general law of local application pertaining to hunting or fishing. The commission's exercise of executive powers in the area of planning, budgeting, personnel management, and purchasing shall be as provided by law. Revenue derived from license fees for the taking of wild animal life and fresh water aquatic life shall be appropriated to the commission by the legislature for the purposes of management, protection, and conservation of wild animal life and fresh water

> aquatic life. Revenue derived from license fees relating to marine life shall be appropriated by the legislature for the purposes of management, protection, and conservation of marine life as provided by law. The commission shall not be a unit of any other state agency and shall have its own staff, which includes management, research, and enforcement. Unless provided by general law, the commission shall have no authority to regulate matters relating to air and water pollution. **History.** – Am. C.S. for H.J.R. 637, 1973; adopted 1974; Am. proposed by Constitution Revision Commission, Revision No. 5, 1998, filed with the Secretary of State May 5, 1998; adopted 1998.

• • •

Art. VIII, §1(g), Fla. Const. (1968): *1)* is the source of county authority; *2)* makes county authority subordinate to general law (by general law the legislature can withdraw any constitutional powers of self-government the county may possess); *3)* does not expressly or impliedly permit county ordinances to infringe upon the constitutional authority of FWC; and, *4)* as the older constitutional amendment, must yield where it conflicts with Art. IV, §9, Fla. Const. (1998), [Sylvester v. Tindall, 18 So.2d 892 (Fla. 1944)].

> **Art. VIII, §1(g), Fla. Const., Charter government.**
> Counties operating under county charters shall have all powers of local self-government not inconsistent with general law, or with special law approved by vote of the electors. The governing body of a county operating under a charter may enact county ordinances not inconsistent with general law. The charter shall provide which shall prevail in the event of conflict between county and municipal ordinances.

FLORIDA FISH AND WILDLIFE CONSERVATION COMMISSION RULES

Florida Fish and Wildlife Conservation Commission Rules[ii] – held by the U.S. Supreme Court to be "law" [*United States v. Howard*, 352 US 212 (1957)] – clearly 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. FWC's pervasive regulatory scheme implies "statutory" preemption of the field already reserved exclusively to FWC by Art. IV, §9, Fla. Const.

Rule 68A-1.002, makes privately owned wildlife subject to FWC regulation.[1] **Rule 68A-1.004 (13) & (92)**, define toucans as wildlife.[2] **Rule 68A-6.0022(2)(r),** requires no permit to possess pet toucans.[3] **Rule 68A-6.006,** requires a license (permit) to sell any bird.[4] **Rule 68A-6.0022(1),** makes the license (permit) required by 68A-6.006 location-specific, and that location must have FWC approval.[5] **Rule 68A-6.0024(1)** requires any person permitted to possess wildlife per §379.3761, Fla.Stat., to "demonstrate

[ii] Select portions of the cited rules appear in the endnotes of this memorandum. The cited rules can be verified at: www.flrules.org/gateway/ruleno.asp?id= "specific rule #"

consistent and sustained commercial activity." [6] **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.[7] **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.[8] **Rule 68-1.010(3)(c)**, requires any location specified in a license (permit) be open to FWC inspection.[9] **Rule 68-1.010(4)**, makes failure to comply with any condition of a permit/license grounds for revocation.[10] **Rule 68-1.001**, permits any party unsatisfied with FWC rules (including defendants) to seek their amendment pursuant the Uniform Rules of Procedure, Ch. 28, Fla. Admin. Code adopted by FWC as its procedural rules.[11]

FLORIDA STATUTES

Florida's Legislature[iii] has, "in aid" of FWC, clearly enabled and facilitated FWC's constitutional subject matter jurisdiction over "wild animal life;" by constitutional law and by "general law" Orange County's powers are subordinated to those of FWC.

Section 379.1025, Fla. Stat., gives FWC's constitutional powers supplemental enabling effect.[12] **Section 379.303, Fla. Stat.,** requires FWC to establish rules to ensure wildlife are maintained in sanitary surroundings and appropriate neighborhoods; FWC determines the neighborhoods appropriate for wild animal life.[13] **Section 379.304, Fla. Stat.,** authorizes FWC to enter any place wildlife are kept to enforce its rules and to protect public health and welfare.[14] **Section 379.3761, Fla. Stat.,** requires any person who would sell or exhibit wildlife to secure a permit from FWC.[15]

FLORIDA JUDICIAL DECISIONS

***Sylvester v. Tindall*, 18 So.2d 892 (Fla. 1944)**. There is in Florida an historically proven need for a constitutional agency with exclusive and autonomous state-wide authority to safeguard and conserve the

[iii] Select portions of the cited statutes appear in the endnotes of this memorandum. The statutes can be verified at www.flsenate.gov/laws/statutes.

state's natural resources for the common good – including, as in this case, the need to safeguard the state's natural resources from any threat posed by exotic birds or their husbandry.

Sylvester v. Tindall makes four points relevant to this action: *1)* executive and legislative power are combined in FWC; *2)* Florida needs a statewide agency with executive and legislative power to protect its natural resources; *3)* no other regulation, like Orange County's ordinances, may touch on the subject matter of Art. IV, §9, Fla. Const.; and *4)* earlier, older constitutional provisions, like Art. VIII, §1(g), Fla. Const., must yield to the newer more recent Art. IV, §9, Fla. Const.

In a lengthy opinion, that remains the basis for all judicial decisions regarding FWC, after reviewing the history of the constitutional amendment of 1942 creating FWC's predecessor, the Game and Fresh Water Fish Commission (GFC), the court upheld the combination of executive and legislative power in the newly created constitutional agency. The court held too that the constitutional amendment creating GFC, had "the effect of repealing any and all statutes relating to the subject matter which are in conflict with the purpose and intent of the constitutional amendment and with the rules and regulations adopted pursuant thereto." The court also

addressed the likelihood of conflict between the new amendment and earlier provisions of the constitution by saying, "If there is a real inconsistency, the amendment must prevail because it is the latest expression of the will of the people." The court made special note of the need for an agency with such power.

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***Caribbean Conservation Corporation, Inc. v. Florida Fish and Wildlife Conservation*, 838 So.2d 492 (Fla. 2003)**. FWC is vested with all "the" regulatory and executive powers of the state with respect to wild animal life; defendants are without authority to enact or enforce the ordinances, custom and policy at issue.

Caribbean v. FWC, focuses on the word "the" in Art. IV, §9, Fla. Const., to reiterate what was first announced in ***Sylvester v. Tindall*** – FWC is vested with "the" State's executive and regulatory authority with respect to wild animal life, meaning all the State's executive and regulatory authority with respect to wild animal life. Here the law makes clear, for the purposes of this the Foleys' amended complaint, Orange County has none of

the State's executive and regulatory authority with respect to wild animal life.

To reach the issue in ***Caribbean v. FWC*** the Supreme Court had to decide if FWC had the same "regulatory and executive powers" over "marine life" that it had over "wild animal and fresh water aquatic life." The Court decided FWC's power was not the same in both areas. Because the word "the" precedes the phrase "regulatory and executive powers of the state with respect to wild animal life and fresh water aquatic life" FWC's power is complete and exclusive in the field of "wild animal life and fresh water aquatic life." Because the word "the" does not precede the phrase "regulatory and executive powers of the state with respect to marine life" FWC shares power with the legislature in the field of marine life regulation.

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Weinberger v. Bd. of Pub. Instruction**, 93 Fla. 470, 112 So. 253 (Fla. 1927).** "[W]here the Constitution expressly provides the manner of doing a thing, it impliedly forbids its being done in a substantially different manner;" defendants have no defence for the enactment, adoption, or enforcement of any ordinance, custom, or policy regulating aviculture.

Weinberger clearly established the general principle that where the State Constitution prescribes the manner in which a thing is to be done, the manner prescribed is exclusive, and legislation – statute or ordinance – in the same field is preempted.

In this case Art. IV, §9, Fla. Const., prescribes the exclusive manner in which wild animal life is to be regulated – wild animal life is to be regulated, and those regulations are to be enforced, by FWC. Orange County, therefore, is without authority to in any way regulate wild animal life.

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Haddock & Greyhound Breeders Assn. of Fla. v. Florida Game and Fresh Water Fish Commission**, DOAH Case No. 86-3341RP (decided May 19, 1987).** FWC authority over non-native, captive wildlife is constitutional in origin and exclusive in nature.

Haddock v. FWC, was decided after the constitution was revised in 1974 to vest GFC with "the regulatory and executive powers of the state with respect to wild animal life." The administrative judge found GFC's

authority over non-native, captive wildlife – black-tailed jackrabbits – was constitutional in origin, and exclusive in nature.

Haddock v. FWC, involved the annual importation of 50,000 black-tailed jackrabbits to train racing greyhounds. The legislature that year enacted §828.122, Fla. Stat., which still specifically prohibits "animal baiting" to train racing hounds. GFC that year, in cooperation with the legislature, enacted a rule to specifically prohibit the importation of jackrabbits to train racing hounds. The administrative judge in ***Haddock*** denied relief under the Administrative Procedure Act (APA) for lack of jurisdiction to determine the validity of a GFC rule enacted under constitutional authority and not statutory authority. Significantly, the judge found GFC rule-making authority with respect to non-native, captive wild animal life constitutional in origin, and exclusive in nature. Because GFC rule-making authority is constitutional in origin, the judge also found the rule-making authority granted, and guidelines suggested, by §379.1025, Fla. Stat., completely optional, and in no way subjected GFC to the APA.

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Bell v. Vaughn, **155 Fla. 551, 21 So.2d 31 (Fla. 1945).** Any regulation is invalid that enters the regulatory field reserved to FWC;

defendants' ordinance, custom, and policy regulating aviculture trespass FWC subject matter jurisdiction and are invalid.

Bell v. Vaughn, made clear that any ordinance (or statute) is invalid that enters the field of regulation reserved exclusively by the constitution's plain language to FWC.

The court ruled invalid a St. Petersburg ordinance which regulated the "method of taking" fish within city limits, and the Special Act of the legislature authorizing the St. Petersburg ordinance, because Florida's Constitution of 1942 specifically reserved regulation of the "method of taking" fresh water fish to GFC, FWC's predecessor, and the "method of taking" saltwater fish to a separate distinct commission created by the legislature (not GFC); local regulation of the "method of taking" fish in fresh or salt water is constitutionally pre-empted.

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***Whitehead v. Rogers*, 223 So.2d 330 (Fla. 1969).** A regulation infringes on FWC authority where it effectively restricts or prohibits what FWC expressly or by silence permits; defendants' regulation of aviculture restricts or prohibits what FWC permits.

Whitehead v. Rogers, makes clear defendants cannot prohibit or restrict plaintiffs David and Jennifer Foley from using their real property, nor prohibit or restrict plaintiff David Foley from using his FWC licensee, to keep, raise, and sell exotic birds, when FWC permits them to do so, or when FWC fails to prohibit them from doing so.

Sec. 855.04, Fla. Stat., a "Sunday Law" that prohibited shooting on Sunday, was found inconsistent with GFC rules. The court decided that because GFC rules did not specifically prohibit hunting on Sunday, GFC permitted Sunday hunting, and the statute prohibiting shooting on Sunday could no longer remain in force. *Whitehead v. Rogers* still stands for the proposition that FWC authority is exclusive; what FWC permits cannot be prohibited, and, most importantly, where FWC regulation is silent, no prohibition can exist.

In Op. Att'y Gen. Fla. 1980-04, Florida's Attorney General reinforced the holding in *Whitehead* and declared it "directly on point" in an affirmative response to a question like the question central to this case – "Does the permit procedure by the Game and Fresh Water Fish Commission as provided by s. 372.922, F.S., preclude a municipality from regulating or prohibiting the possession of wildlife within the municipal boundaries?" –

Yes, GFC permit procedure precludes municipal regulation of wildlife possession because as in *Whitehead* "the Legislature attempted to prohibit the doing of a thing which the commission by rule allowed."

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***Beck v. Game and Fresh Water Fish Commission*, 33 So.2d 594 (Fla. 1948).** The Court may look beyond what an ordinance claims to regulate to determine if it infringes upon the authority of FWC; defendants have usurped FWC jurisdiction by misnomer, by calling a wildlife regulation a "zoning," "land use," or "development" regulation, and by subsuming exotic birds within the broader categories of *commercial retail sale of animals* and SIC 0279.

Beck v. GFC, like ***State v. Sullivan***, makes clear the County cannot change the character of, or legitimize, its unauthorized *aviculture* ordinances, policy, and custom by baptizing them with the misnomer "zoning," "land use," or "development" regulation, or by subsuming exotic birds within the broader categories of *commercial retail sale of animals* and SIC 0279 – not when their effect is to take from FWC its

regulatory control over exotic birds and their husbandry, or to deny plaintiffs rights FWC alone may grant.

The court upheld GFC's rules regarding fishing the fresh waters of the St. Johns River and Lake Okeechobee, and overturned certain statutes declaring those *sweet* waters to be *salt* because the court reasoned that the purpose of the legislation was solely to re-take regulatory control over fishing those waters lost by the legislature with the adoption of the Florida Constitution of 1942 and the creation of GFC.

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***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).** FWC has no authority to require compliance with local building or zoning codes.

The question in ***Charles River Laboratories v. FWC***, was whether Charles River Laboratories should be granted renewal of its GFC permits for primate facilities on Racoon Key, Key Lois, and Summerland Key, and what conditions GFC should place on permit renewal to address complaints by state and local authorities of escape monkeys, degradation of habitat for the

endemic and endangered silver rice rat, and declining water conditions around the Keys. The final order recommended renewal with conditions specified in the order. Significantly, the administrative judge accepted as settled points of law GFC's authority to regulate captive exotic wildlife, its power to issue or renew permits with unique conditions, and its lack of authority to require compliance with local building or zoning codes.

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***Miramar v. Bain*, 429 So.2d 40 (4th DCA 1983).** Local regulation may indirectly effect compliance with FWC rules.

Miramar v. Bain, focused on the question of alleged conflict between a GFC rule and a county ordinance. The Broward County Circuit Court invalidated an ordinance prohibiting a front-yard fence. It reasoned the ordinance conflicted with a GFC rule that required a fence "around the cage or curtilage." Florida's 4th DCA reversed. The 4th DCA found no subject matter conflict between the fencing ordinance and wildlife rule. It reasoned that while the City's ordinance prohibited fencing the entire curtilage, it did not prohibit fencing around the cage. The wildlife rule's use of the disjunctive "or" permitted Bain to fence the cage and not the curtilage –

observance of the wildlife rule did not require disobedience to the fencing ordinance.

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State ex rel. Griffin v. Sullivan, **30 So.2d 919 (Fla. 1947).** No one can "in good faith" base a claim of innocence upon a local regulation that is invalid for conflict with FWC jurisdiction; defendants have no defence for the adoption or enforcement of a custom or policy regulating aviculture.

State v. Sullivan, makes clear that the County cannot "in good faith reliance" upon Art. VIII, §1(g), Fla. Const., enter the field of wildlife regulation reserved to FWC by Art. IV, §9, Fla. Const., and legitimize as "valid until held to be otherwise" the unauthorized wildlife regulations at issue in this case by broadly naming them "animal" or "land use" regulations.

Sullivan was arrested for violating a GFC rule regarding the taking, sale, or transportation of fish from the fresh waters of the St. Johns River and Lake Okeechobee. Sullivan claimed he had acted in good faith reliance upon statutes that declared the St. Johns River and Lake Okeechobee to be

salt waters and permitted fishing there. The court ruled that Sullivan could not, even in good faith, rely upon invalid statutes that were inconsistent with the governing rules of GFC.

FLORIDA ATTORNEY GENERAL

Florida's Attorney General has clearly established defendants have no authority to prophylactically mitigate nuisance caused by the possession or sale of birds by prohibiting or restricting the possession or sale of birds, but may only regulate the nuisance itself.

Op. Att'y Gen. Fla. 1972-72

> 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.

Op. Att'y Gen. Fla. 1980-04

> 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.

Op. Att'y Gen. Fla. 2002-23

> [Orange] County 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.

CONCLUSION

The ultimate question presented the Court for declaratory and injunctive relief in Count One, and presented the Court as the basis for defendants' liability in Counts Three through Seven, is straightforward. The Foleys allege at AC ¶§39-52, 56, that defendants enforced upon them an unpublished prohibition of *aviculture* and a BCC order prohibiting *aviculture* (i.e., the advertising and keeping of birds for sale) as a *primary*

use, *accessory use* and/or *home occupation* at their Solandra homestead. The question then is, did defendants do precisely what ***Whitehead v. Rogers*, 223 So.2d 330 (Fla. 1969)**, says they cannot do – did they prohibit what FWC permits? Or, posed another way, did they do what **Op. Att'y Gen. Fla. 2002-23**, says they cannot do – did they "enjoin the possession, breeding or sale of non-indigenous exotic birds?" Yes. They did. This court is bound by ***Whitehead v. Rogers*** to permit the Foleys to proceed against defendants.

The question presented the Court for declaratory and injunctive relief in Count Two is different. Orange County's recently enacted Ordinance 2016-19, as alleged at AC ¶55, strikes its definition of *aviculture (commercial)*, and its regulation of that defined activity, and amends the code to subsume and regulate the possession and sale of birds as a *home occupation* [*see* §38-1, OCC] within the broadly defined categories of *commercial retail sale of animals* [*see* §38-79(101), OCC] and *SIC 0279* [*see* Use Table, §38-77, OCC], [AC, ¶¶54,55; Plaintiffs' Response to Defendants' Motion to Dismiss, §§2.1–2.1.3]. So, the question for the Court is this – isn't subsuming *aviculture* within the broader category of *commercial retail sale of animals* or SIC 0279 (or a failure to expressly exclude wild animal life from those categories) exactly like calling *fresh*

water *salt* water to usurp FWC jurisdiction over *fresh* water just as Florida's legislature attempted to do in the late '40's? That attempt was reversed in ***Beck v. Game and Fresh Water Fish Commission*, 33 So.2d 594 (Fla. 1948)**. This court is bound by that decision to do the same.

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[1] **68A-1.002 Regulation of Wild Animal Life and Freshwater Aquatic Life in the State.**
All freshwater aquatic life in the waters within the jurisdiction of the State of Florida, whether such waters or the lands upon which such waters occur are privately owned or otherwise, is subject to the regulation of the Commission. All wild animal life within the jurisdiction of the State of Florida, whether such wild animal life is privately owned or otherwise, is subject to the regulation of the Commission. The Commission shall regulate migratory birds consistent with the laws of the United States governing the conservation and protection of all migratory birds.
Specific Authority Art. IV, Sec. 9, Fla. Const. Law Implemented Art. IV, Sec. 9, Fla. Const. History–New 8-1-79, Amended 6-21-82, Formerly 39-1.02, Amended 4-12-98, Formerly 39-1.002.

[2] **68A-1.004 Definitions.** – The following definitions are for the purpose of carrying out the provisions of the rules of the Fish and Wildlife Conservation Commission relating to wild animal life and freshwater aquatic life. As used herein, the singular includes the plural. The following shall be construed respectively to mean:
(1) – (12) omitted.
(13) Birds – The various forms of wildlife belonging to the class Aves, having both feathers and wings.
(14) – (89) omitted.
(90) Wildlife – All wild or non-domestic birds, mammals, fur-bearing animals, reptiles and amphibians.
(91) – (93) omitted.
Rulemaking Authority Art. IV, Sec. 9, Fla. Const. Law Implemented Art. IV, Sec. 9, Fla. Const. History–New 8-1-79 ...

Formerly 39-1.04, Amended 6-1-86 ... Formerly 39-1.004, Amended 7-1-00 ...5-11-16. [Emphasis added.]

[3] **68A-6.0022 Possession of Class I, II, or III Wildlife in Captivity: Permit Requirements.**

(1) omitted.

(2) No permit shall be required to possess the following wildlife for personal use, unless possession of a species is otherwise regulated by other rules of the Commission:

(a) – (q) omitted.

(r) Toucans

(s) – (v) omitted.

(4) – (7) omitted.

Rulemaking Authority Art. IV, Sec. 9, Fla. Const. Law Implemented Art. IV, Sec. 9, Fla. Const., 379.3761, 379.3762 FS. History–New 7-1-90 ... Formerly 39-6.0022, Amended ... 7-8-10. [Emphasis added.]

[4] **68A-6.006 Dealing in Exotic or Pet Birds: Records.**

(1) Any person engaging in the business of breeding or the purchase or sale of exotic birds or birds customarily kept as pets shall be licensed as provided in Section 379.3761, F.S.

(2) – (3) omitted.

Rulemaking Authority Art. IV, Sec. 9, Fla. Const. Law Implemented 379.303, 379.304, 379.3762 FS. History–New 6-21-82, Formerly 39-6.06, 39-6.006. [Emphasis added.]

[5] **68A-6.0022 Possession of Class I, II, or III Wildlife in Captivity: Permit Requirements.**

(1) Permits to possess wildlife in captivity, issued pursuant to Section 379.3761 or 379.3762, F.S., and the provisions of this chapter, shall authorize the keeping of captive wildlife, of the type and number specified in applications approved by the Commission, in accordance with law and Commission rules. Captive wildlife maintained under permit shall, unless otherwise authorized, be

maintained only at the facility specified in the permit application and approved by the Commission.

Rulemaking Authority Art. IV, Sec. 9, Fla. Const. Law Implemented Art. IV, Sec. 9, Fla. Const., 379.3761, 379.3762 FS. History–New 7-1-90 ... Formerly 39-6.0022, Amended ... 7-8-10. [Emphasis added.]

[6] **68A-6.0024 Commercialization of Wildlife; Bonding or Financial Responsibility Guarantee.**

(1) Because the possession of wildlife in accordance with Section 379.3761, F.S., is commercial in nature any person permitted to possess wildlife per Section 379.3761, F.S., except hobbyist possessors of Class III wildlife, shall demonstrate consistent and sustained commercial activity in the form of exhibition or sale of such authorized wildlife. For the purposes of this section a "hobbyist" is defined as one whose primary purpose for possession of such Class III wildlife is personal enjoyment but may occasionally exhibit or sell such wildlife. Consistent and sustained commercial activity may be demonstrated by the following examples of business procedures including, but not limited to:

(a) A regular media advertising campaign, or Internet Web site;

(b) Signs, billboards or flyers advertising commercial wildlife services or operations;

(c) Regular business hours during which the premises is open for commercial activity.

(d) Written business is conducted on printed letterhead, indicating the name of the company or business;

(e) Documented exhibition of wildlife to the public, with or without a charge;

(f) Sale of wildlife including any lesser acts thereof as defined in Rule 68A-1.004, F.A.C.

(2) – (3) omitted.

Rulemaking Authority Art. IV, Sec. 9, Fla. Const. Law Implemented Art. IV, Sec. 9, Fla. Const., 379.303, 379.304, 379.305, 379.373, 379.374 FS. History–New 2-1-08, Amended 8-27-09, 6-7-10, 12-6-10. [Emphasis added.]

[7] Error! Main Document Only.**68A-6.0022 Possession of Class I, II, or III Wildlife in Captivity: Permit Requirements.**

(1) – (3) omitted.

(4) No permit shall be issued to any person to possess Class III wildlife for exhibition, sale or personal use unless such person can meet the following requirements:

(a) Be 16 years of age or older.

(b) Application for permits to possess Class III wildlife for personal use shall include the satisfactory completion of a questionnaire developed by the Commission that assesses the applicant's knowledge of general husbandry, nutritional, and behavioral characteristics. Such information shall be documented on the Personal Use Application and Questionnaire form FWCDLE_621 (01/07), which is adopted and incorporated herein by reference. Forms may be obtained by submitting a request to: Florida Fish and Wildlife Conservation Commission, Division of Law Enforcement, 620 South Meridian Street, Tallahassee, Florida 32399-1600, or at www.myfwc.com/permits.

(c) Omitted.

(d) Be able to provide satisfactory caging facilities as required in the standard caging requirements, Rule 68A-6.004, F.A.C., within 30 days of notification of tentative approval for a permit.

(e) Ensure that the conditions under which the wildlife will be held shall not constitute a threat to the public or to the animal.

(5) – (7) omitted.

Rulemaking Authority Art. IV, Sec. 9, Fla. Const. Law Implemented Art. IV, Sec. 9, Fla. Const., 379.3761, 379.3762 FS. History–New 7-1-90, Amended 7-1-90, 7-1-91, 2-1-98, Formerly 39-6.0022, Amended 4-30-00, 1-1-08, 8-27-09, 7-8-10. [Emphasis added.]

[8] **68A-6.0023 General Regulations Governing Possession of Captive Wildlife; Public Contact; Transfer of Wildlife and Record Keeping Requirements.**

(1) No person shall maintain captive wildlife in any unsafe or unsanitary condition, or in a manner which results in threats to the public safety, or the maltreatment or neglect of such wildlife.

(2) Caging Requirements:

(a) All wildlife possessed in captivity shall, except when supervised and controlled in accordance with subsection (3) hereof, be maintained in cages or enclosures constructed and maintained in compliance with the provisions of Rules 68A-6.003, 68A-6.004 and 68A-6.007, F.A.C.

(b) Cages or enclosures housing captive wildlife shall be sufficiently strong to prevent escape and to protect the caged animal from injury, and shall be equipped with structural safety barriers to prevent any physical contact with the caged animal by the public, except for contacts as authorized under subsection (3) of this rule. Structural barriers may be constructed from materials such as fencing, moats, landscaping, or close-mesh wire, provided that materials used are safe and effective in preventing public contact.

(c) omitted

(d) Caging considered unsafe or otherwise not in compliance herewith shall be reconstructed or repaired within 30 days after notification of such condition. In the event such condition results in a threat to human safety or the safety of the wildlife maintained therein, the wildlife maintained therein shall, at the direction of the Commission, be immediately placed in an approved facility, at the expense of the permittee, owner, or possessor, until such time as the unsafe condition is remedied. In instances where wildlife is seized or taken into custody by the Commission, said permittee, owner, or possessor of such wildlife shall be responsible for payment of all expenses relative to the animal's capture, transport, boarding, veterinary care, or other costs associated with or incurred due to such seizures or custody. Such expenses shall be paid by said permittee, owner, or possessor upon any conviction or finding of guilt of a criminal or noncriminal violation, regardless of adjudication or plea entered, of any provision of Chapter 379 or 828, F.S., or rules of the Commission, or if such violation is disposed of under Section 921.187, F.S. Failure to pay such expenses shall be grounds for revocation or denial of permits to such individuals to possess wildlife.

(3) omitted.

(4) Any condition which results in wildlife escaping from its enclosure, cage, leash, or other constraint, or which results in injury to any person, shall be considered a violation of subsection 68A-6.0023(1), F.A.C., hereof.

(5) Sanitation and Nutritional Requirements:

(a) Sanitation, water disposal, and waste disposal shall be in accordance with all applicable local, state, and federal regulations.

(b) Water: Clean drinking water shall be provided daily. Any water containers used shall be clean. Reptiles and amphibians that do not drink water from containers and those in an inactive season or period shall be provided water in a manner and at such intervals as to ensure their health and welfare. All pools, tanks, water areas and water containers provided for swimming, wading or drinking shall be clean. Enclosures shall provide drainage for surface water and runoff.

(c) Food: Food shall be of a type and quantity that meets the nutritional requirements for the particular species, and shall be provided in an unspoiled and uncontaminated condition. Clean containers shall be used for feeding.

(d) Waste: Fecal and food waste shall be removed daily from inside, under, and around cages and stored or disposed of in a manner which prevents noxious odors or pests. Cages and enclosures shall be ventilated to prevent noxious odors.

(e) Cleaning and maintenance: Hard floors within cages or enclosures shall be cleaned a minimum of once weekly. Walls of cages and enclosures shall be spot cleaned daily. The surfaces of housing facilities, including perches, shelves and any furniture-type fixtures within the facility, shall be cleaned weekly, and shall be constructed in a manner and made of materials that permits thorough cleaning. Cages or enclosures with dirt floors shall be raked a minimum of once every three days and all waste material shall be removed. Any surface of cages or enclosures that may come into contact with animal(s) shall be free of excessive rust that prevents the required cleaning or that affects the structural strength. Any painted surface that may come into contact with wildlife shall be free of peeling or flaking paint.

(6) – (7) omitted.

Rulemaking Authority Art. IV. Sec. 9, Fla. Const. Law Implemented Art. IV, Sec. 9, Fla. Const., 379.1025, 379.303, 379.304 FS. History–New 7-1-90, Amended 2-1-98, Formerly 39-6.0023, Amended 8-27-09. [Emphasis added.]

[9] **68-1.010 General Regulations Relating to Licenses, Permits and Other Authorizations.**

(1) – (2) omitted.

(3) Those persons issued any license, permit or other authorization by the Commission shall:

(a) – (b) omitted.

(c) Open records and facilities of operation under the license, permit, or other authorization, to inspection by an authorized representative of the Commission.

(d) – (e) omitted.

(4) – (6) omitted.

Rulemaking Authority Art. IV, Sec. 9, Fla. Const., 379.1025 FS. Law Implemented Art. IV, Sec. 9, Fla. Const., 379.408 FS. History–New 3-24-13. [Emphasis added.]

[10] **68-1.010 General Regulations Relating to Licenses, Permits and Other Authorizations.**

(1) – (2) omitted.

(3) Those persons issued any license, permit or other authorization by the Commission shall:

(a) Maintain complete and correct written records as required by Commission license, permit, other authorization or regulations.

(b) Submit complete and correct reports as required by Commission license, permit, other authorization or regulations.

(c) Open records and facilities of operation under the license, permit, or other authorization, to inspection by an authorized representative of the Commission.

(d) Fully comply with the conditions set forth for operations under a license, permit or other authorization.

(e) Fully comply with Chapter 379, F.S., and rules of the Commission.

(4) When a person issued any license, permit or other authorization by the Commission fails to comply with any of the provisions of subsection (3), the Commission shall suspend, revoke, or deny a request for renewal of any license, permit or other authorization based on the factors in subsection (5) below. In addition, the Commission shall subject to consideration of the factors listed in subsection (5) hereof, suspend, revoke, or deny renewal of any license, permit or other authorization issued by the Commission if the licensee or permittee defaults on his appearance bond, or receives a disposition other than dismissal or acquittal of a violation of Chapter 379, F.S., or the rules of the Commission, or if such violation is disposed of under Section 921.187, F.S., regardless of adjudication. A plea of nolo contendere shall be considered a violation for purposes of disciplinary action imposed under Chapter 379, F.S., and the rules of the Commission.

(5) Except for the denial of an application pursuant to subsection (1), the following factors shall be considered by the Commission in determining whether to deny, suspend, revoke or deny renewal of any license, permit or other authorization:

(a) The severity of the conduct;

(b) The danger to the public created or occasioned by the conduct;

(c) The existence of prior violations of Chapter 379, F.S., or the rules of the Commission;

(d) The length of time a licensee or permittee has been licensed or permitted;

(e) The effect of denial, suspension, revocation or non-renewal upon the applicant, licensee, or permittee's existing livelihood;

(f) Attempts by the applicant, licensee or permittee to correct or prevent violations, or the refusal or failure of the applicant, licensee or permittee to take reasonable measures to correct or prevent violations;

(g) Related violations by an applicant, licensee or permittee in another jurisdiction;

(h) The deterrent effect of denial, suspension, revocation or non-renewal;

(i) Any other mitigating or aggravating factors that reasonably relate to public safety and welfare or the management and protection of natural resources for which the Commission is responsible.
(6) omitted.
Rulemaking Authority Art. IV, Sec. 9, Fla. Const., 379.1025 FS. Law Implemented Art. IV, Sec. 9, Fla. Const., 379.408 FS. History–New 3-24-13. [Emphasis added.]

[11] **68-1.001 Adoption of Uniform Rules of Procedure; Subject Matter Index; Official Reporter.**
(1) The Uniform Rules of Procedure, Chapter 28, F.A.C., shall be the procedural rules of the Fish and Wildlife Conservation Commission.
(2) omitted.
Specific Authority Art. IV, Sec. 9, Fla. Const. Law Implemented Art. IV, Sec. 9, Fla.Const., 20.331(9) FS. History–New 7-19-06, Amended 1-8-08.

[12] **379.1025 – Powers, duties, and authority of commission; rules, regulations, and orders.**
The Fish and Wildlife Conservation Commission may exercise the powers, duties, and authority granted by s. 9, Art. IV of the Constitution of Florida, and as otherwise authorized by the Legislature by the adoption of rules, regulations, and orders in accordance with chapter 120.
History.—ss. 4, 5, ch. 21945, 1943; s. 7, ch. 69-216; ss. 10, 35, ch. 69-106; s. 103, ch. 73-333; s. 16, ch. 78-95; s. 17, ch. 2000-197; s. 5, ch. 2008-247. Note.—Former s. 372.82; s. 372.021.

[13] **379.303 – Classification of wildlife; seizure of captive wildlife.**
(1) The commission shall promulgate rules defining Class I, Class II, and Class III types of wildlife. The commission shall also establish rules and requirements necessary to ensure that permits are granted only to persons qualified to possess and care properly for wildlife and that permitted wildlife possessed as personal pets

will be maintained in sanitary surroundings and appropriate neighborhoods.
(2) Omitted.
History.—s. 1, ch. 74-309; s. 6, ch. 98-333; s. 34, ch. 2002-46; s. 106, ch. 2008-247. Note.—Former s. 372.922(3), (4).

[14] **379.304 – Exhibition or sale of wildlife.**
(1) Permits issued pursuant to s. **379.3761** and places where wildlife is kept or held in captivity shall be subject to inspection by officers of the commission at all times. The commission shall have the power to release or confiscate any specimens of any wildlife, specifically birds, mammals, amphibians, or reptiles, whether native to the state or not, when it is found that conditions under which they are being confined are unsanitary, or unsafe to the public in any manner, or that the species of wildlife are being maltreated, mistreated, or neglected or kept in any manner contrary to the provisions of chapter 828, any such permit to the contrary notwithstanding. Before any such wildlife is confiscated or released under the authority of this section, the owner thereof shall have been advised in writing of the existence of such unsatisfactory conditions; the owner shall have been given 30 days in which to correct such conditions; the owner shall have failed to correct such conditions; the owner shall have had an opportunity for a proceeding pursuant to chapter 120; and the commission shall have ordered such confiscation or release after careful consideration of all evidence in the particular case in question. The final order of the commission shall constitute final agency action.
(2) – (4) omitted.
(5) A violation of this section is punishable as provided by s. **379.4015**.
History.—s. 1, ch. 67-290; s. 16, ch. 78-95; s. 32, ch. 83-218; s. 8, ch. 91-134; s. 5, ch. 98-333; s. 173, ch. 99-245; s. 33, ch. 2002-46; s. 9, ch. 2003-151; s. 107, ch. 2008-247; s. 33, ch. 2009-86; s. 11, ch. 2010-185. Note.—Former s. 372.921(4)-(6), (9), (10).

[15] **379.3761 – Exhibition or sale of wildlife; fees; classifications.**

(1) In order to provide humane treatment and sanitary surroundings for wild animals kept in captivity, no person, party, firm, association, or corporation shall have, or be in possession of, in captivity for the purpose of public display with or without charge or for public sale any wildlife, specifically birds, mammals, amphibians, and reptiles, whether native to Florida or not, without having first secured a permit from the commission authorizing such person, party, firm, association, or corporation to have in its possession in captivity the species and number of wildlife specified within such permit; however, this section does not apply to any wildlife not protected by law and the rules of the commission. No person, party, firm, association, or corporation may sell any wild animal life designated by commission rule as a conditional or prohibited species, Class I or Class II wildlife, reptile of concern, or venomous reptile in this state, including a sale with delivery made in this state, regardless of the origin of the sale or the location of the initial transaction, unless authorized by the commission.

(2) – (5) Omitted.

(6) A person who violates this section is punishable as provided in s. **379.4015**.

History.—s. 1, ch. 67-290; s. 84, ch. 79-164; s. 2, ch. 93-223; s. 590, ch. 95-148; s. 173, ch. 99-245; s. 33, ch. 2002-46; s. 9, ch. 2003-151; s. 2, ch. 2005-210; s. 164, ch. 2008-247; s. 39, ch. 2009-86; s. 4, ch. 2010-185. Note.—Former s. 372.921(1)-(3), (7), (8).

CERTIFICATE OF SERVICE

Plaintiffs certify that on May 24, 2017, the foregoing was electronically filed with the Clerk of the Court using the Florida Courts' eFiling Portal, which will send notice of filing and a service copy of the foregoing to the following:

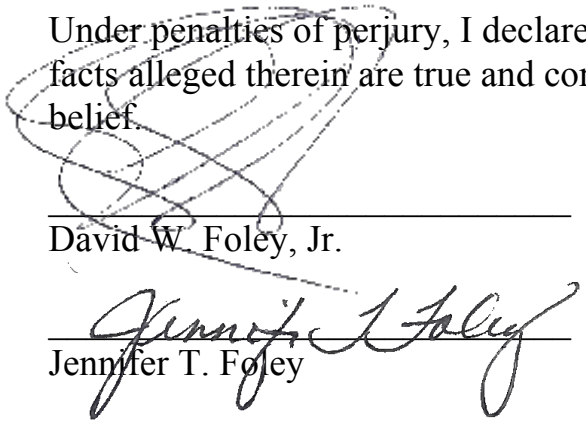
William C. Turner, Jr., Assistant County Attorney,
P.O. Box 2687, Orlando FL, 32801, williamchip.turner@ocfl.net;

Derek Angell, O'Connor & O'Connor LLC,
840 S. Denning Dr. 200, Winter Park FL, 32789,
dangell@oconlaw.com;

Lamar D. Oxford, Dean, Ringers, Morgan & Lawton PA,
PO Box 2928, Orlando FL 32802-2928, loxford@drml-law.com.

VERIFICATION

Under penalties of perjury, I declare that I have read the foregoing, and the facts alleged therein are true and correct to the best of my knowledge and belief.



David W. Foley, Jr.

Jennifer T. Foley

Date: May 24, 2017

Plaintiffs
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IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

Plaintiffs DAVID W. FOLEY, JR., and JENNIFER T. FOLEY *v.* ***Defendants*** 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.*	2016-CA-007634-O **APPENDIX II** **ORANGE COUTY CODE** **Select Provisions from Chapters 1, 11, 30 and 38**

The selected provisions of the Orange County Code appearing below may be verified at the following web address:

www.municode.com/library/fl/orange_county/codes/code_of_ordinances.

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Sec. 1-9. - General penalty; continuing violations; cessation of building and other land use permits.

(a) In this section "violation of this Code" means:

(1) Doing an act that is prohibited or made or declared unlawful, an offense or a misdemeanor by ordinance or by rule or regulation authorized by ordinance;

(2) Failure to perform an act that is required to be performed by ordinance or by rule or regulation authorized by ordinance; or

(3) Failure to perform an act if the failure is declared a misdemeanor or an offense or unlawful by ordinance or by rule or regulation authorized by ordinance.

(b) In this section "violation of this Code" does not include the failure of a county officer or county employee to perform an official duty unless it is provided that failure to perform the duty is to be punished as provided in this section.

(c) Except as otherwise provided by law or ordinance, a person convicted of a violation of this Code shall be punished by a fine not to exceed five hundred dollars ($500.00) or by imprisonment in the county jail for a term not exceeding sixty (60) days, or by both such fine and imprisonment. With respect to violations of this Code that are continuous with respect to time, each day the violation continues is a separate offense.

(d) The imposition of a penalty does not prevent revocation or suspension of a license, permit or franchise, the imposition of civil fines or other administrative actions.

(e) Violations of this Code that are continuous with respect to time may be abated by injunctive or other equitable relief. The imposition of a penalty does not prevent equitable relief.

(f) The county chairman may order the county administrator and applicable county employees to cease, and thereupon the county administrator and applicable county employees shall cease, issuance of any building permits or renewals or extensions thereof, and all review of applications for, and issuance of, land use permits for any location in unincorporated Orange County to any person, or anyone acting on behalf of, for the benefit of or in concert with such person, who, on or after February 7, 1992, has been found by the code enforcement board or a court of competent jurisdiction to have two (2) or more violations of this Code pertaining to the use of land, or one (1) violation of this Code pertaining to the use of land which violation poses an imminent threat to the public health, safety and welfare, unless such building or land use permit is required in order to cure the violation. Issuance

of permits may resume once the violation has been cured or the person has provided a letter of credit to the county in an amount that, in the judgment of the county administrator, would be sufficient for the county to perform the work necessary to cure the violation in the event that the person fails to cure it.

(Ord. No. 92-3, § 2, 1-28-92)
Cross reference— Gain time for county prisoners, § 26-2.
State Law reference— Penalty for ordinance violations, F.S. § 125.69.

CHAPTER 11 - *Code Enforcement*

State Law reference— Code enforcement, F.S. ch. 162.

Article I. - In General

Secs. 11-1—11-25. - Reserved.

ARTICLE II. - CODE ENFORCEMENT BOARD

Cross reference— Boards, commissions, authorities, etc., § 2-136 et seq.

Sec. 11-26. - Short title.

This article may be cited as the "Orange County Code Enforcement Board Ordinance."

(Code 1965, § 10-1; Ord. No. 82-19, § 1, 9-21-82; Ord. No. 87-37, § 1, 10-19-87; Ord. No. 89-16, § 3, 11-20-89)

Sec. 11-27. - Statutory authority.

This article is enacted pursuant to F.S. ch. 162, as amended.

(Code 1965, § 10-2; Ord. No. 82-19, § 2, 9-21-82; Ord. No. 87-37, § 2, 10-19-87; Ord. No. 89-16, § 4, 11-20-89)

Sec. 11-28. - Definitions.

The following words, terms and phrases, when used in this article, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

Code enforcement board shall mean the county code enforcement board.

Code inspector shall mean any authorized agent or employee of the county whose duty it is to assure code compliance.

County attorney shall mean the legal counselor for the county.

Repeat violation shall mean a violation of a provision of a code or ordinance by a person who has been previously found through a code enforcement board or any other quasi-judicial or judicial process, to have violated or has admitted violating the same provision within five (5) years prior to the violation, notwithstanding that the violations occur at different locations.

Special magistrate (also known as special master or hearing officer) means a person authorized to hold hearings and assess fines against violators of the county codes and ordinances.

(Code 1965, § 10-5; Ord. No. 82-19, § 5, 9-21-82; Ord. No. 87-37, § 5, 10-19-87; Ord. No. 89-16, § 6, 11-20-89; Ord. No. 2002-10, § 1, 8-13-02; Ord. No. 2002-14, § 1, 9-24-02; Ord. No. 2016-13 , § 2, 6-28-16)

Cross reference— Definitions and rules of construction generally, § 1-2.
State Law reference— Similar provisions, F.S. § 162.04.

Sec. 11-29. - Intent.

It is the intent of this article to promote, protect, and improve the health, safety, and welfare of the citizens of the county by creating an administrative board with authority to impose administrative fines and other noncriminal penalties to provide an equitable, expeditious, effective, and inexpensive method of enforcing any codes and ordinances in force in the county, where a pending or repeated violation continues to exist.

(Code 1965, § 10-3; Ord. No. 82-19, § 3, 9-21-82; Ord. No. 87-37, § 3, 10-19-87; Ord. No. 89-16, § 5, 11-20-89)

State Law reference— Similar provisions, F.S. § 162.02.

Sec. 11-30. - Board created; manner of abolishment.

There is hereby created a Code Enforcement Board of Orange County, Florida, and the office of special magistrate, as provided in this article. The code enforcement board and special magistrate may be abolished by ordinance.

(Code 1965, § 10-4; Ord. No. 82-19, § 4, 9-21-82; Ord. No. 87-37, § 4, 10-19-87; Ord. No. 2002-14, § 2, 9-24-02; Ord. No. 2016-13 , § 2, 6-28-16)

State Law reference— Authority to create or abolish code enforcement board, F.S. § 162.03(1).

Sec. 11-31. - Organization.

(a) Composition . The code enforcement board shall consist of seven (7) members appointed by the board of county commissioners. Members of the code enforcement board shall be residents of the county.

(b) Appointments . Appointments to the code enforcement board shall be made in accordance with applicable law and ordinances on the basis of experience or interest in the subject matter jurisdiction of the code enforcement board and in the sole discretion of the board of county commissioners. The membership of the code enforcement board shall, whenever possible, include:

(1) An architect.

(2) A businessperson.

(3) An engineer/surveyor.

(4) A general contractor.

(5) A subcontractor.

(6) A licensed real estate broker or licensed real estate salesperson.

Subject to the preceding requirements for inclusion of certain professional specialties on the code enforcement board, each district of the county shall be represented by at least one (1) member.

(c) Terms. Appointments to the code enforcement board shall be made for a term of three (3) years. A member may be reappointed by the board of county commissioners. An appointment to fill any vacancy on the code enforcement board shall be for the remainder of the unexpired term of office.

(d) Vacancies; removal. If any member fails to attend two (2) of three (3) successive meetings without cause and without prior approval of the chair, the code enforcement board shall declare the member's office vacant, and the board of county commissioners shall promptly fill such vacancy. The members of the code enforcement board shall serve in accordance with the ordinances of the county and may be suspended and removed for cause as provided in such ordinances for removal of members of boards.

(e) Officers; quorum; compensation. The members of the code enforcement board shall elect a chair and a vice-chair, who shall be voting members, from among the members of the code enforcement board. The presence of four (4) or more members shall constitute a quorum of the code enforcement

board. Members of the code enforcement board shall serve without compensation, but may be reimbursed for such travel, mileage, and per diem expenses as may be authorized by the board of county commissioners or as are otherwise provided by law.

(f) The board of county commissioners is authorized and hereby provides for the designation of one (1) or more county code enforcement special magistrates for the purposes of conducting administrative hearings regarding code violation cases brought by code enforcement officers, by resolution.

(g) Members of the code enforcement board and the special magistrate shall avoid ex parte communications, when identifiable, with any person who is a party to a code enforcement proceeding. The foregoing however does not prohibit discussions between members of the code enforcement board or the special magistrate and county staff that pertain solely to scheduling and other administrative matters unrelated to the merits of the proceeding. If an ex parte communication occurs between a party and a member of the code enforcement board or the special magistrate, the member or the special magistrate shall disclose, and make a part of the record, the subject of the communication and the identity of the person, group, or entity with whom the communication took place, before final action on the matter. Any written communication received by a member of the code enforcement board or special magistrate that relates to a pending code enforcement proceeding shall be made a part of the record before final action on the matter.

(Code 1965, § 10-6; Ord. No. 82-19, § 6, 9-21-82; Ord. No. 87-37, § 6, 10-19-87; Ord. No. 93-06, § 1, 3-9-93; Ord. No. 94-24, § 1, 12-6-94; Ord. No. 98-16, § 1, 8-4-98; Ord. No. 2002-14, § 3, 9-24-02; Ord. No. 2016-13 , § 2, 6-28-16)

State Law reference— Similar provisions, F.S. § 162.05(1)—(3).

Sec. 11-32. - Legal counsel and case presentation.

(a) An attorney may be appointed by the board of county commissioners in accordance with applicable law and ordinances to be counsel to the code enforcement board.

(b) A Code enforcement officer inspector and/or a member of the county attorney's staff, shall represent the county by presenting cases before the code enforcement board or a special magistrate. If the county prevails in prosecuting a case before the enforcement board or a special magistrate, it shall be entitled to recover all costs incurred by prosecuting the case before the board or before the special magistrate, including, but not limited to, any fees paid to the special magistrate.

(c) In no instance may the county attorney or a member of his or her staff serve in both capacities.

(Code 1965, § 10-7; Ord. No. 82-19, § 7, 9-21-82; Ord. No. 87-37, § 7, 10-19-87; ; Ord. No. 92-14, § 1, 4-14-92; Ord. No. 98-16, § 2, 8-4-98; Ord. No. 2002-10, § 2, 8-13-02; Ord. No. 2002-14, § 4, 9-24-02; Ord. No. 2016-13 , § 2, 6-28-16)

State Law reference— Legal counsel, etc. for code enforcement board, F.S. § 162.05(4).

Sec. 11-33. - Jurisdiction.

(a) The code enforcement board and special magistrate shall have jurisdiction to hear and decide alleged violations of the codes and ordinances in force in the county, including any amendments to such codes thereto.

(b) The jurisdiction of the code enforcement board or special magistrate shall not be exclusive. It is the legislative intent of this article to provide an additional or supplemental means of obtaining compliance with the codes and ordinances of the county. Nothing contained in this article shall prohibit the board of county commissioners from enforcing such codes and ordinances by any other means. The board of county commissioners may appoint one (1) or more special magistrates to hear any, or all code violations in accordance with the procedure shown herein. Any alleged violation of county codes and ordinances may be pursued by appropriate remedy in court, or as may otherwise be provided by law.

(Code 1965, § 10-8; Ord. No. 82-19, § 8, 9-21-82; Ord. No. 84-14, § 3, 7-16-84; Ord. No. 87-37, § 8, 10-19-87; Ord. No. 2002-14, § 5, 9-24-02; Ord. No. 2016-13 , § 2, 6-28-16)

Sec. 11-34. - Enforcement procedure.

(a) It shall be the duty of the code enforcement officer/inspector to initiate enforcement proceedings of the various codes and ordinances. No member of the code enforcement board or the special magistrate shall have the power to initiate such enforcement proceedings.

(b) Except as provided in subsections (c) and (d), if a violation of the codes or ordinances is found, the code enforcement officer/inspector shall notify the violator and give him a reasonable time to correct the violation. Should the violation continue past the time specified for correction, the code enforcement officer/inspector shall notify the code enforcement board or special magistrate and request a hearing. The code enforcement board or special magistrate, through its clerical staff, shall schedule a hearing, and written notice of such hearing shall be hand delivered or mailed as provided

in section 11-41 to such violator. At the option of the code enforcement board or special magistrate, notice may also be served by publication or posting as provided in section 11-41. If the violation is corrected and then recurs or if the violation is not corrected by the time specified for correction by the code enforcement officer/inspector, the case may be presented to the code enforcement board or special magistrate even if the violation has been corrected prior to the board hearing, and the notice shall so state.

(c) If a repeat violation is found, the code enforcement officer/inspector shall notify the violator but is not required to give the violator a reasonable time to correct the violation. The code enforcement officer/inspector, upon notifying the violator of a repeat violation, shall notify the code enforcement board or special magistrate and request a hearing. The code enforcement board, or special magistrate through its clerical staff, shall schedule a hearing and shall provide notice pursuant to section 11-41. The case may be presented to the enforcement board or special magistrate even if the repeat violation has been corrected prior to the board or special magistrate's hearing, and the notice shall so state

(d) If the code enforcement officer/inspector has reason to believe a violation or the condition causing the violation presents a serious threat to the public health, safety and welfare or if the violation is irreparable or irreversible in nature, the code enforcement officer/inspector shall make a reasonable effort to notify the violator and may immediately notify the code enforcement board or special magistrate and request a hearing.

(e) If the owner of property which is subject to an enforcement proceeding before an enforcement board, special magistrate, or court transfers ownership of such property between the time the initial pleading was served and the time of the hearing, such owner shall:

(1) Disclose, in writing, the existence and the nature of the proceeding to the prospective transferee.

(2) Deliver to the prospective transferee a copy of the pleadings, notices, and other materials relating to the code enforcement proceeding received by the transferor.

(3) Disclose, in writing, to the prospective transferee that the new owner will be responsible for compliance with the applicable code and with orders issued in the code enforcement proceeding.

(4) File a notice with the code enforcement official of the transfer of the property, with the identity and address of the new owner and copies of the disclosures made to the new owner, within five (5) days after the date of the transfer.

A failure to make the disclosures described in paragraphs (a), (b), and (c) before the transfer creates a rebuttable presumption of fraud. If the property is transferred before the hearing, the proceeding shall not be dismissed, but the new owner shall be provided a reasonable period of time to correct the violation before the hearing is held.

(Code 1965, § 10-9; Ord. No. 82-19, § 9, 9-21-82; Ord. No. 87-37, § 9, 10-19-87; Ord. No. 89-16, § 7, 11-20-89; Ord. No. 94-24, § 2, 12-6-94; Ord. No. 98-16, § 3, 8-4-98; Ord. No. 2002-10, § 3, 8-13-02; Ord. No. 2002-14, § 6, 9-24-02; Ord. No. 2016-13 , § 2, 6-28-16)

State Law reference— Similar provisions, F.S. § 162.06.

Sec. 11-35. - Conduct of hearing.

(a) Upon request of the code enforcement officer/inspector, or at such other times as may be necessary, the chairman of the code enforcement board or special magistrate may call a hearing of the code enforcement board or special magistrate. A hearing also may be called by written notice signed by at least three (3) members of the code enforcement board or, in a proper case, by the special magistrate.

(b) Minutes shall be kept of all hearings by the code enforcement board or special magistrate, and all hearings and proceedings shall be open to the public. The board of county commissioners shall provide clerical and administrative personnel as may be reasonably required by the code enforcement board or special magistrate for the proper performance of its duties.

(c) The code enforcement board or special magistrate shall proceed to hear the cases on the agenda for that day. All testimony shall be under oath and shall be recorded. The code enforcement board or special magistrate shall take testimony from the code inspector, alleged violator and any witnesses. Formal rules of evidence shall not apply, but fundamental due process shall be observed and shall govern the proceedings.

(d) Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in a trial in the courts of this state. The burden of proof shall be upon the code inspector to show, by a preponderance of the evidence, that a violation exists.

(e) Any member of the code enforcement board, or special magistrate, or the counsel to the code enforcement board, or to the special magistrate, may

inquire of any witness before the code enforcement board or before the special magistrate. The alleged violator or his attorney, the code enforcement officer/inspector, or member of the County Attorney's staff shall be permitted to inquire of any witness before the code enforcement board or before the special magistrate and present brief opening and closing statements.

(f) At the conclusion of the hearing, the code enforcement board or special magistrate shall issue findings of fact, based on evidence of record and conclusions of law, and shall issue an order affording the proper relief consistent with powers granted by this chapter. The finding by the code enforcement board shall be by motion approved by a majority of those members present and voting, except that at least four (4) members of the code enforcement board must vote in order for the action to be official. The order by the code enforcement board or special magistrate may include a notice that it must be complied with by a specified date, and that a fine may be imposed, as provided and under the conditions specified in section 11-34(d), the cost of repairs may be included along with the fine if the order is not complied with by such date, and include a statement that any person aggrieved by the order who was a party below may appeal in accordance with the procedures shown in this chapter. A certified copy of such order may be recorded in the public records of the county and shall constitute notice to any subsequent purchasers, successors and assigns if the violation concerns real property, and the findings therein shall be binding upon the violator and, if the violation concerns real property, any subsequent purchasers, successors and assigns. If an order is recorded in the public records pursuant to this subsection and the order is complied with by the date specified in the order, the enforcement board or special magistrate shall issue an order acknowledging compliance that shall be recorded in the public records. A hearing is not required to issue such an order acknowledging compliance.

(g) If the county prevails in prosecuting a case before the code enforcement board, the county shall be entitled to recover all costs incurred in prosecuting the case before the code enforcement board, and such costs may be included in the lien authorized under subsection 11-37(c).

(Code 1965, § 10-10; Ord. No. 82-19, § 10, 9-21-82; Ord. No. 87-37, § 10, 10-19-87; Ord. No. 89-16, § 8, 11-20-89; Ord. No. 94-24, § 3, 12-6-94; Ord. No. 98-16, § 4, 8-4-98; Ord. No. 2002-10, § 4, 8-13-02; Ord. No. 2002-14, § 7, 9-24-02; Ord. No. 2016-13 , § 2, 6-28-16)

State Law reference— Conduct of hearing, F.S. § 162.07.

Sec. 11-36. - Powers of the board.

The code enforcement board and special magistrate shall have the power to:

(1) Adopt rules for the conduct of its hearings.

(2) Subpoena alleged violators and witnesses to its hearings. Subpoenas may be served by the sheriff or any deputy sheriff of the county.

(3) Subpoenas may be served by the sheriff or any deputy sheriff of the county.

(4) Take testimony under oath.

(5) Issue orders having the force of law to command whatever steps are necessary to bring a violation into compliance.

(Code 1965, § 10-11; Ord. No. 82-19, § 11, 9-21-82; Ord. No. 87-37, § 11, 10-19-87; Ord. No. 2002-14, § 8, 9-24-02; Ord. No. 2016-13 , § 2, 6-28-16)

State Law reference— Similar provisions, F.S. § 162.08.

Sec. 11-37. - Administrative fines; costs of repair; liens.

(a) (1) The code enforcement board or special magistrate, upon notification by the code enforcement officer/inspector that an order of the code enforcement board or special magistrate has not been complied with by the date set in that order or, upon notification that a repeat violation has been committed, may issue an order against the violator finding that a violation has been committed and imposing a fine in an amount specified in subsection 11-37(b) for each day the violation continues past the date set by the code enforcement board or special magistrate for compliance or, in the case of a repeat violation, for each day the repeat violation continues, beginning with the date the repeat violation is found to have occurred by the code enforcement officer/inspector. A copy of such order shall be promptly mailed to the violator. In addition, if the violation is a violation described in subsection 11-34(d), the code enforcement board or special magistrate shall notify the county, which may make all reasonable repairs (or in the appropriate circumstances, demolish such structures or buildings, or do such other cleanup or hauling away of objects creating such a violation, as prescribed in sections 9-277 through 9-279 of the Orange County Code), which are required to bring the property into compliance and charge the violator with the reasonable cost of such repairs or other abatement along with the fine imposed pursuant to this section. Making such repairs or engaging in such demolition or cleanup does not create a continuing obligation on the part of the local governing body for any damages to the

property if such repairs/demolition/cleanup were completed in good faith. In addition, if after due notice and hearing, the code enforcement board or special magistrate finds a violation to be irreparable or irreversible in nature, it may order the violator to pay a fine as specified in subsection 11-37(b).

(2) If the violator desires a hearing on an order imposing a fine entered pursuant to subsection 11-37(a)(1), the violator shall file a request for such a hearing with the clerk of the code enforcement board or special magistrate not later than twenty (20) days from the date of such order. Notice of the procedure for requesting such a hearing shall be placed in the order imposing the fine. Such notice shall explain that the order will be recorded in the public records and thereafter shall constitute a lien against the land on which the violation exists and upon any other real or personal property owned by the violator if the violator does not timely request a hearing or if he timely requests a hearing and the code enforcement board or the special magistrate reaffirms the finding that a violation has been committed. When a request for such a hearing is timely filed by the violator, the order imposing the fine shall be automatically stayed until after the hearing is held. Such a hearing shall be limited to a consideration of those new findings necessary to impose an appropriate fine. If after such a hearing the code enforcement board or the special magistrate reaffirms the finding that a violation has been committed, the fine shall begin accruing retroactive to the date when the violation began as indicated in the order imposing the fine. Conversely, if after such a hearing the code enforcement board or special magistrate finds that a violation has not been committed, the code enforcement board or special magistrate shall rescind or vacate the order imposing the fine.

(b) A fine imposed pursuant to this section shall not exceed one thousand dollars ($1,000.00) per day for a first violation and shall not exceed five thousand dollars ($5,000.00) per day for a repeat violation and, in addition, the code enforcement board or special magistrate may impose additional fines to cover all costs incurred by the county in enforcing its codes and include all costs of repairs pursuant to subsection 11-37(a). However, if the code enforcement board or special magistrate finds the violation to be irreparable or irreversible in nature, it may impose a fine not to exceed fifteen thousand dollars ($15,000.00) per violation. In determining the amount of the fine, if any, the code enforcement board or special magistrate shall consider the following factors:

(1) The gravity of the violation;

(2) Any actions taken by the violator to correct the violation; and

(3) Any previous violations committed by the violator.

The code enforcement board or special magistrate may reduce a fine imposed pursuant to this section.

(c) (1) A certified copy of an order imposing a fine or a fine plus repair/demolition/cleanup costs may be recorded in the public records of the county and thereafter shall constitute a lien against the land on which the violation exists and upon any other real or personal property owned by the violator, but only after the time frame set forth in subsection 11-37(a)(2) has expired without the violator having requested a hearing on the order imposing the fine or, if a hearing on the order was timely requested and held, only after the code enforcement board or special magistrate has reaffirmed the finding that a violation was committed. Upon petition to the circuit court, such order shall be enforceable in the same manner as a court judgment by the sheriffs of this state, including execution and levy against the personal property of the violator, but such order shall not be deemed to be a court judgment except for enforcement purposes. Repair/demolition/cleanup costs may additionally be assessed against the violator, under such circumstances as are appropriate and fall into the category and type of repair/demolition/cleanup which is provided for and defined in sections 9-277 through 9-279 of the Orange County Code. A fine imposed pursuant to this article shall continue to accrue until the violator comes into compliance or until the judgment is rendered in a suit to foreclose on a lien filed pursuant to this section, whichever occurs first. A lien arising from a fine imposed pursuant to this section runs in favor of the county, and the county may execute a satisfaction or release of a lien pursuant to this section. After three (3) months from the filing of any such lien which remains unpaid, the code enforcement board may authorize the county attorney to foreclose on the lien. After the suit for foreclosure has been filed, any offer of settlement must be forwarded to the division manager of the division for which the original code enforcement case was brought. The division manager may accept or reject an offer of settlement. If however the amount of the lien, in the suit for foreclosure, is more than one hundred thousand dollars ($100,000.00) approval by the board of county commissioners must be obtained prior to acceptance of an offer of settlement. A proposed settlement shall be final upon the court's signature of the final judgment. No lien created pursuant to the provision of this article may be foreclosed on real property which is a homestead under Fla. Const., Art. X, § 4.

(2) Unless a lien foreclosure suit has been filed by the county, an interested party may request a reduction in a lien imposed by an administrative order of the code enforcement board or special magistrate. The request must be submitted in writing, on a form prescribed by the county, to the Orange County Code Enforcement Division. The board of county commissioners hereby delegates to the manager of code enforcement the authority to approve such requests in accordance with the provisions

of this article, when the amount of the lien is one hundred thousand dollars ($100,000.00) or less. When the amount of the lien is more than one hundred thousand dollars ($100,000.00), approval by the code enforcement board or special magistrate that issued the original order imposing the lien must be obtained. In deciding whether to approve a lien reduction, the code enforcement board, special magistrate, or manager of code enforcement, as applicable, shall review the written submission and listen to any corresponding oral presentation by the requesting party. Lien amounts may be reduced in cases in which a violator has come into compliance but due to hardship is unable to pay the full amount necessary to satisfy and release the lien. Lien amounts may also be reduced in cases in which the violator has not come into compliance but there is a contract to sell the property to a purchaser who intends to bring the property into compliance. Any decision to reduce a lien for the benefit of a prospective purchaser must include a timetable for the property to come into compliance and a stipulation acknowledging that liens are not released until all violations are cured and the property is in compliance. In determining a new amount to satisfy a lien, the code enforcement board, special magistrate, or manager of code enforcement, as applicable, must, at a minimum, recover costs incurred by the county. Code enforcement liens are an asset of the county. Accordingly, any decision to reduce a lien is a discretionary decision and does not constitute a final administrative order for purposes of appeal.

(Code 1965, § 10-12; Ord. No. 82-19, § 12, 9-21-82; Ord. No. 87-37, § 12, 10-19-87; Ord. No. 89-12, § 1, 8-7-89; Ord. No. 89-16, § 9, 11-20-89; Ord. No. 94-24, § 4, 12-6-94; Ord. No. 98-16, § 5, 8-4-98; Ord. No. 2002-10, § 5, 8-13-02; Ord. No. 2002-14, § 9, 9-24-02; Ord. No. 2006-12 , § 1, 7-11-06; Ord. No. 2016-13 , § 2, 6-28-16)

State Law reference— Administrative fines; liens, F.S. § 162.09.

Sec. 11-38. - Duration of lien.

No lien provided under this article shall continue for a period longer than twenty (20) years after the certified copy of an order imposing a fine has been recorded, unless within that time an action to foreclose on the lien is commenced in a court of competent jurisdiction. In an action to foreclose on a lien, the prevailing party is entitled to recover all costs, including a reasonable attorney's fees incurred in the foreclosure. The county shall be entitled to all costs incurred in recording and satisfying a valid lien. The continuation of the lien effected by the commencement of the action shall not be good against creditors or subsequent purchasers for valuable consideration without notice, unless a notice of lis pendens is recorded.

(Code 1965, § 10-13; Ord. No. 82-19, § 13, 9-21-82; Ord. No. 87-37, § 13, 10-19-87; Ord. No. 89-16, § 10, 11-20-89; Ord. No. 94-24, § 5, 12-6-94; Ord. No. 2016-13 , § 2, 6-28-16)

State Law reference— Similar provisions, F.S. § 162.10.

Sec. 11-39. - Code enforcement fines account.

All administrative fines and liens collected pursuant to this article shall be deposited in a separate revenue account, which is hereby created and designated as the "code enforcement fines account."

(Code 1965, § 10-14; Ord. No. 82-19, § 14, 9-21-82; Ord. No. 87-37, § 14, 10-19-87)

Sec. 11-40. - Appeals.

An aggrieved party, including the board of county commissioners, may appeal a final administrative order of the code enforcement board or special magistrate to the circuit court. Such an appeal shall not be a hearing de novo, but shall be limited to appellate review of the record created before the code enforcement board or special magistrate. An appeal shall be foiled within thirty (30) days of the execution of the order to be appealed.

(Code 1965, § 10-15; Ord. No. 82-19, § 15, 9-21-82; Ord. No. 87-37, § 15, 10-19-87; Ord. No. 2002-14, § 10, 9-24-02; Ord. No. 2016-13 , § 2, 6-28-16)

State Law reference— Similar provisions, F.S. § 162.11.

Sec. 11-41. - Notices.

(a) All notices required by this article shall be provided to the alleged violator by certified mail, return receipt requested, provided if such notice is sent under this paragraph to such violators in question at the address listed in the tax collector's office for tax notices, and at any other address provided to the county by such entities and is returned as unclaimed or refused, notice may be provided by posting as described in subparagraphs (b)(2) and by first class mail directed to the addresses furnished to the local government with a properly executed proof of mailing or affidavit confirming the first class mailing; or by hand delivery by the sheriff or other law enforcement officer, code inspector or other person designated by the board of county

commissioners, or by leaving the notice at the violator's usual place of residence with any person residing therein who is above fifteen (15) years of age and informing such person of the contents of the notice or in the case of commercial premises, leaving the notice with the manager or other person in charge.

(b) In addition to providing notice as set forth in subsection (a), at the option of the code enforcement board, notice may also be served by publication or posting as follows:

(1) Such notice shall be published once during each week for four (4) consecutive weeks (four (4) publications being sufficient) in a newspaper of general circulation in the county. The newspaper shall meet such requirements as are prescribed under F.S. ch. 50, for legal and official advertisements. Proof of publication shall be made as provided in F.S. §§ 50.041 and 50.051.

(2) In lieu of publication as described in subparagraph (1) above, such notice may be posted for at least ten (10) days prior to the hearing, or prior to the expiration or any deadline contained in the notice in at least two (2) locations, one (1) of which shall be the property upon which the violation is alleged to exist and the other of which shall be at the front door of the courthouse in the county. Proof of posting shall be by affidavit of the person posting the notice, which affidavit shall include a copy of the notice posted and the date and places of its posting.

(c) Notice by publication or posting may run concurrently with, or may follow, an attempt or attempts to provide notice by hand delivery or by mail as required under subsection (a). Evidence that an attempt has been made to hand deliver or mail notice as provided in subsection (a), together with proof of publication or posting as provided in subsection (b), shall be sufficient to show that the notice requirements of this article have been met, without regard to whether or not the alleged violator actually received such notice.

(Code 1965, § 10-16; Ord. No. 82-19, § 16, 9-21-82; Ord. No. 87-37, § 16, 10-19-87; Ord. No. 89-16, § 11, 11-20-89; Ord. No. 94-24, § 6, 12-6-94; Ord. No. 2002-10, § 6, 8-13-02; Ord. No. 2016-13 , § 2, 6-28-16)

State Law reference— Similar provisions, F.S. § 162.12.

(Ord. No. 94-09, § 7, 5-10-94; Ord. No. 2016-13 , § 2, 6-28-16)

CHAPTER 30 – *Select portions*

Sec. 30-34. - Planning and zoning commission—Establishment, composition, etc.

(a) (h) Omitted.

(i) *Departments, officials.* If only one (1) administrative official is designated to supervise all planning and zoning functions, his or her duties shall include all of the functions set forth in section 30-41. However, the board of county commissioners may establish separate planning and zoning divisions to carry out all planning and zoning functions and procedures provided for by this article. In such event, a zoning manager and a planning manager may be designated to supervise the respective divisions. Duties and responsibilities of such officials shall be as set forth in section 30-41, and any and all references in this article to the title "planning and zoning director" shall then refer to and include only the zoning manager. Furthermore, wherever in this Code, particularly in chapters 38, 30 and 31.5, the terms "manager of the zoning, division," "manager of the zoning department," and "zoning director" are referenced, those terms shall be deemed to be the term "zoning manager." [Emphasis. Added.]

(Code 1965, § 37-4; Laws of Fla. ch. 63-1716, § 4; Laws of Fla. ch. 65-1999, § 2; Laws of Fla. ch. 67-1831, § 2; Laws of Fla. ch. 71-795, § 1; Ord. No. 91-11, §§ 2—4, 4-29-91; Ord. No. 91-21, § 14, 10-1-91; Ord. No. 93-09, § 1, 4-20-93; Ord. No. 94-3, § 1, 2-1-94; Ord. No. 2003-17, § 2, 11-11-03; Ord. No. 2009-03 , § 1, 2-17-09; Ord. No. 2015-05 , § 4, 6-2-15)

Charter reference— Planning and zoning commission, § 501.
Cross reference— Boards, commissions, authorities, etc., § 2-136 et seq.; planning and zoning commission designated local land planning agency, § 30-1.

Sec. 30-41. - Administration and enforcement.

(a) An administrative official, to be known as the zoning director and employed by the board of county commissioners, shall administer and enforce the zoning ordinance and rules and regulations adopted under the authority of this article. The office of the zoning director shall be known as the zoning department.

(b) If the zoning director shall find that any of the provisions of the zoning ordinance and rules and regulations adopted under this article are being violated, he shall notify in writing the person responsible for such violations, indicating the nature of the violation and ordering the action necessary to correct it. He shall order discontinuance of illegal use of land, buildings, or structures; removal of illegal buildings or structures or of additions, alterations, or structural changes thereto; discontinuance of illegal work being done; or shall take any other action authorized by the zoning ordinance or this article to insure compliance with or to prevent violation of its provisions. When a stay order is issued by the zoning director because of a violation of this article or regulations adopted under this article, work or construction on the premises affected by the stay order shall cease until the violation has been corrected and the stay order removed.

(c) An administrative official to be known as the "planning director" and employed by the board of county commissioners shall report to the board of county commissioners and shall assist the board in the development of long-range plans for facilities and services. He shall assist the planning and zoning commission in discharging its responsibilities as spelled out in section 30-35. He shall also assist other governmental agencies in the development of plans as directed by the board of county commissioners. He may be provided with the assistance of such other persons as the board of county commissioners may employ. The office of the planning director shall be known as the planning department. The planning director shall have the following minimum qualifications: he shall be a graduate of an accredited college or university with a degree in one (1) of the following fields: architecture, political science, planning, economics, business administration, engineering or law. He shall either have a master's degree in the field of urban planning or shall have at least four (4) years' experience in the field of urban planning.

(Code 1965, § 37-11; Laws of Fla. ch. 63-1716, § 11; Laws of Fla. ch. 67-1831, § 3; Laws of Fla. ch. 72-630, § 1)

Sec. 30-42. - Board of zoning adjustment—Establishment, composition, etc.

(a) – (f) Omitted.

(g) *Rules of procedure.* The board of zoning adjustment shall adopt rules for the transaction of its business, and shall keep a record of its resolutions, transactions, findings and determinations, which record shall be a public record. The rules of procedure shall provide that meetings shall be held at the call of the chairman and at such times as the board of zoning adjustment may determine. The chairman, or in his absence the vice-chairman, may administer oaths and compel the attendance of witnesses. All meetings of the board of zoning adjustment shall be open to the public. The board of zoning adjustment shall keep minutes of its meetings, showing the vote of each member on each question, or if absent or failing to vote, indicating such fact, and shall keep records of its examinations and other official actions, all of which shall be immediately filed in the office of the board of zoning adjustment and shall be a public record.

(h) *Staff.* The employed staff of the planning and zoning commission shall serve as the employed staff of the board of zoning adjustment.

(i) Omitted.

(Code 1965, § 37-12; Laws of Fla. ch. 63-1716, § 12; Laws of Fla. ch. 74-550, § 1; Ord. No. 91-10, §§ 2, 3, 4-29-91; Ord. No. 92-21, § 15, 10-1-91; Ord. No. 93-09, § 2, 4-20-93; Ord. No. 98-02, § 4, 1-27-98; Ord. No. 2003-17, § 3, 11-11-03; Ord. No. 2009-03 , § 1, 2-17-09; Ord. No. 2015-05 , § 5, 6-2-15)

Charter reference— Board of zoning adjustment, § 502.

Cross reference— Boards, commissions, authorities, etc., § 2-136 et seq.

Sec. 30-43. - Same—Powers and duties.

The board of zoning adjustment shall have the following powers and duties:

(1) *Appeals.* To hear and make recommendations to the board of county commissioners from an order, requirement, decision or other determination made by the zoning manager, charged with the enforcement of the zoning ordinance adopted pursuant to this article, where it is alleged by a written appeal by an aggrieved party that there is error in such an order, requirement or decision of the zoning manager. The appeal shall specify the grounds thereof and shall be filed with the office of the zoning manager not later than thirty (30) calendar days from the date of the zoning manager's determination. The zoning manager, shall, upon the timely filing of an appeal, forthwith transmit to the clerk of the board of zoning adjustment all documents, plans and papers constituting the record and the action from which an appeal was taken. [Emphasis. Added.]

(2) – (3) Omitted.

(4) *Decisions of the board of zoning adjustment.* In exercising the above-mentioned powers, the board of zoning adjustment may, so long as such action is in conformity with the terms of the zoning regulations, reverse or affirm, wholly or partly, or may modify the order, requirement, decision, or determination as ought to be made, and to that end shall have powers of the planning and/or zoning director(s) [*see §30-34(j)*] from whom the appeal is taken. [Emphasis. Added.]

Four (4) members of the board of zoning adjustment must be present in order for a quorum to exist. A majority vote of the board of zoning adjustment shall be necessary to recommend reversal of any order, requirement, decision or determination of the planning and/or zoning director(s), or to recommend in favor of the applicant on any matter upon which it is required to pass under the zoning regulations, or to recommend any variation in the application of the zoning regulations.

The board of zoning adjustment shall submit its recommendations to the board of county commissioners for official action. The board of county commissioners shall then at any regular or special meeting review the recommendations of the board of zoning adjustment and either adopt, reject or modify the recommendations, or schedule a public hearing on any one (1) or more of them; provided, however, that no recommendation shall be rejected or modified unless the board of county commissioners shall first hold a public hearing thereon. No change or amendment shall become effective until fifteen (15) days after the action

of the board of county commissioners is filed with the clerk of the board of county commissioners.

(Code 1965, § 37-13; Laws of Fla. ch. 63-1716, § 13; Laws of Fla. ch. 71-795, § 4; Laws of Fla. ch. 74-550, § 2; Ord. No. 91-10, § 4, 4-29-91; Ord. No. 91-29, § 2(Exh. A), 12-10-91; Ord. No. 94-4, § 2, 2-8-94; Ord. No. 97-05, § 13, 4-29-97; Ord. No. 98-02, § 5, 1-27-98; Ord. No. 2003-17, § 4, 11-11-03; Ord. No. 2008-06 , § 2, 5-13-08)

Sec. 30-45. - Review of planning and zoning commission's and board of zoning adjustment's decisions.

(a) – (c) Omitted.

(d) The board of county commissioners shall conduct a trial de novo hearing upon the appeal taken from the ruling of the planning and zoning commission or board of zoning adjustment and hear the testimony of witnesses and other evidence offered by the aggrieved person and interested parties to the appeal and may in conformity with this article and the zoning regulations, rules and regulations adopted thereunder, reverse, or affirm, wholly or partly, or may modify the order, requirement, decision or determination of the board of zoning adjustment or recommendation of the planning and zoning commission.

(e) – (f) Omitted.

(Code 1965, § 37-15; Laws of Fla. ch. 63-1716, § 15; Laws of Fla. ch. 67-1831, § 4; Laws of Fla. ch. 71-795, § 5; Laws of Fla. ch. 72-626, § 3; Ord. No. 89-09, § 1(3), 7-10-89; Ord. No. 91-29, § 2(Exh. A), 12-10-91; Ord. No. 98-02, § 7, 1-27-98; Ord. No. 98-37, § 34, 12-15-98; Ord. No. 2003-17, § 5, 11-11-03)

Sec. 30-47. - Use permits.

No building or other structure shall be constructed, altered, erected, moved, added to or structurally altered without a use permit therefor issued by the zoning director or his/her duly authorized representative. No building permit, electrical permit, plumbing permit or septic tank permit shall be issued unless and until a use permit has been issued. Furthermore, no state or county occupational or retail license shall be issued until after a use permit has been issued; provided, however, that such requirement shall not apply to the renewal of existing state and county occupational or retail license. An application for a use permit shall be submitted on a form to be prescribed by the board of county commissioners to the zoning department.

(Code 1965, § 37-17; Laws of Fla. ch. 63-1716, § 17; Laws of Fla. ch. 67-1831, § 5; Ord. No. 91-29, § 2(Exh. A), 12-10-91)

Sec. 30-49. - Enforcement of zoning resolutions, regulations; penalties.

(a) An administrative official, to be known as the zoning director, and employed by the board of county commissioners, shall be vested with the authority to administer and enforce such rules and regulations as may from time to time be adopted by the board of county commissioners under the authority of this article. The zoning director is hereby authorized and directed to take any action authorized by this article, to insure compliance with or prevent violation of its provisions, and he shall have authority to issue administrative stay orders on such behalf.

(b) The board of county commissioners, the zoning director, or any aggrieved or interested person may have the right to apply to the circuit court of the county to enjoin and restrain any person violating the provisions of this article, of the comprehensive plan, zoning ordinance and rules and regulations adopted under the article, and the court shall upon proof of the violation of same have the duty to forthwith issue such temporary and permanent injunctions as are necessary to prevent the violation of same.

(c) Any person violating any of the provisions of this article or who shall fail to abide by and obey all orders and ordinances promulgated as herein provided shall be punished as provided in section 1-9. Each day that the violation continues shall constitute a separate violation.

[Emphasis. Added.]

(Code 1965, § 37-19; Laws of Fla. ch. 63-1716, § 19; Laws of Fla. ch. 67-1831, § 7; Laws of Fla. ch. 72-626, § 4)

Sec. 30-80. - Enforcement and penalty.

(a) The board of county commissioners or any aggrieved person may have recourse to such remedies in law and equity as may be necessary to insure compliance with the provisions of this article, including injunctive relief to enjoin and restrain any person violating the provisions of this article, and any rules and regulations adopted under this article, and the court shall, upon proof of the violation of the article, have the duty to forthwith issue such temporary and permanent injunctions as are necessary to prevent the violation of the article.

(b) Any person violating the provisions of this article or who shall fail to abide by and obey all regulations and orders adopted under this article shall be punished as provided in section 1-9. Each day that the violation shall continue shall constitute a separate violation.

(c) A purchaser of land sold in violation of this article or any regulation or order adopted under this article shall be entitled to the same remedies provided to purchasers by law; provided that failure to comply with the provisions of this article shall not impair the title of land so transferred.

[Emphasis. Added.]

(Code 1965, § 32-43; Laws of Fla. ch. 65-2015, § 13; Laws of Fla. ch. 83-481, § 1)

Sec. 30-87. - Land use permits and building permits.

No land use permit or building permit shall be issued by any department of the county if the use and development of the lot, parcel or tract of land for which the permit is requested is in violation of this article. No street shall be joined or connected to an existing public street if the land on which it is located has not been approved as a subdivision or platted under the provisions of this article.

(Code 1965, § 32-39; Laws of Fla. ch. 65-2015, § 9)

CHAPTER 38 – *Select portions*

Sec. 38-3. - General restrictions on land use.

(a) *Land use and/or building permits.* No building or structure shall be erected and no existing building shall be moved, altered, added to or enlarged, nor shall any land, building, structure or premises be used or designed to be used for any purpose or in any manner other than a use designated in this chapter, or amendments thereto, as permitted in the district in which such land, building, structure or premises is located, without obtaining the necessary land use and/or building permits.

(b) – (j) Omitted.

(k) *Applicable law and ordinances.* Nothing in this chapter shall be construed to exempt any person from having to comply with all other applicable federal, state, or county laws or regulations.

(Ord. No. 95-20, § 3, 7-25-95; Ord. No. 2000-08, § 3, 4-11-00; Ord. No. 2004-01, § 3, 2-10-04)

(P & Z Res., art. III, § 4(a))

Sec. 38-29. - Enforcement officer, procedures, penalty.

(a) An administrative official, to be known as the zoning director, and employed by the board of county commissioners, shall administer and enforce the provisions of this chapter and the zoning resolutions and rules and regulations adopted under the authority of chapter 30, article II. The zoning director is hereby authorized and directed to take any action authorized by chapter 30, article II to insure compliance with or prevent violation of its provisions.

(b) The board of county commissioners, the zoning director, or any aggrieved or interested person, shall have the right to apply to the circuit court of the county to enjoin and restrain any person violating the provisions of this chapter, of the comprehensive plan, zoning resolutions and rules and regulations adopted under this chapter, and the court shall, upon proof of the violation of same, have the duty to forthwith issue such temporary and permanent injunctions as are necessary to prevent the violation of same.

(c) Any person violating any of the provisions of this chapter, or who shall fail to abide by and obey all orders and resolutions promulgated as herein provided, shall be punished as provided in section 1-9. Each day that the violation continues shall constitute a separate violation.

[Emphasis. Added.]

(P & Z Res., art. XXVI, § 11)

Sec. 38-74. - Permitted uses, special exceptions and prohibited uses.

(a) *Use of buildings, structures, lands and premises.* Except as may be provided otherwise, 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.

(b) *Use table.*

(1) The permitted uses and special exceptions allowed in the zoning districts identified in the use table set forth in section 38-77 are respectively indicated by the letters "P" and "S" in the cells of the use table. No primary use shall be permitted in a district unless the letter "P" or the letter "S" appears for that use in the appropriate cell.

(2) When a use is a permitted use in a particular zoning district, it is permitted in that district subject to:

a. Compliance with all applicable requirements of chapter 38 and elsewhere in the Orange County Code; and

b. Compliance with all requirements specified in the conditions for permitted uses and special exceptions" set forth in section 38-79 which correlate with the number which may appear within the cell of the use table for that permitted use.

c. A use variance from section 38-77 (Use table) and section 38-79 (Conditions for permitted uses and special exceptions) shall be prohibited.

(3) When a use is permitted as a special exception in a particular zoning district, it is permitted in that zoning district subject to:

a. Obtaining the special exception;

b. Compliance with all applicable requirements of chapter 38 and elsewhere in the Orange County Code; and

c. Compliance with all requirements specified in 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 which correlate with the number which may appear within the cell of the use table for that special exception.

(Ord. No. 2008-06 , § 8, 5-13-08)

(c) *Standard Industrial Classification Manual and Standard Industrial Classification (SIC) group numbers.*

(1) The group descriptions in 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, shall be used to determine the classification of primary uses when reference is made in the use table to a designated Standard Industrial Classification (SIC) group number.

(2) In the SIC group number column of the use table, a four (4) digit SIC group number shall control and override a three (3) digit SIC group number, and a three (3) digit SIC group number shall control and override a two (2) digit SIC group number.

(3) Copies of the SIC Manual shall be 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. The SIC Manual shall be available for inspection at those locations during normal business hours.

(Ord. No. 97-05, § 2, 4-29-97)

(d) *Interpretation of Sections 38-77, 38-78 and 38-79.*

(1) When the need arises, the zoning manager shall be the person responsible for interpreting Chapter 38 of this Code. However, the zoning manager shall not have the authority to make any interpretations under Chapter 3; the zoning manager's authority under Chapter 3 shall be limited as specifically set forth therein.

(2) In interpreting any of those sections, or in considering an appeal of the interpretation of any of those sections, consideration shall be given to the following:

a. The functional and locational requirements of the use;

b. Whether the interpretation is consistent with the intent, purpose and description of the particular zoning district;

c. Whether the interpretation is compatible with the permitted uses in the district; and

d. Whether the interpretation ensures that the use is similar in traffic-generating capacity, noise, vibration, dust, odor, glare, heat producing and any other noxious characteristics.

(Ord. No. 95-16, § 2, 6-27-95; Ord. No. 98-37, § 4, 12-15-98; Ord. No. 2004-01, § 4, 2-10-04)

CERTIFICATE OF SERVICE

Plaintiffs certify that on May 24, 2017, the foregoing was electronically filed with the Clerk of the Court using the Florida Courts' eFiling Portal, which will send notice of filing and a service copy of the foregoing to the following:

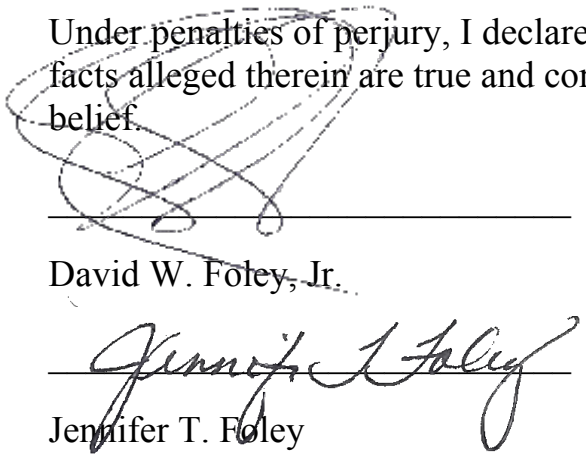
William C. Turner, Jr., Assistant County Attorney,
P.O. Box 2687, Orlando FL, 32801, williamchip.turner@ocfl.net;

Derek Angell, O'Connor & O'Connor LLC,
840 S. Denning Dr. 200, Winter Park FL, 32789, dangell@oconlaw.com;

Lamar D. Oxford, Dean, Ringers, Morgan & Lawton PA,
PO Box 2928, Orlando FL 32802-2928, loxford@drml-law.com.

VERIFICATION

Under penalties of perjury, I declare that I have read the foregoing, and the facts alleged therein are true and correct to the best of my knowledge and belief.



David W. Foley, Jr.

Jennifer T. Foley

Date: May 24, 2017

Plaintiffs

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IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

Plaintiffs DAVID W. FOLEY, JR., and JENNIFER T. FOLEY *v.* ***Defendants*** 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.*	2016-CA-007634-O **APPENDIX III** **TRANSCRIPT OF ORAL ARGUMENT BEFORE THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

The excerpted printed transcript of the Eleventh Circuit recording of Foleys v. Orange Cty. et. al., is on file with the Supreme Court of the United States, in *Foley, et ux. v. Orange County, Fl, et al.* 137 S. Ct. 378 (2016), and therefore satisfies Fla. R. Jud. Admin. 2.420(b)(1)(A), as the "contents of the court file."

TRANSCRIPT OF ORAL ARGUMENT BEFORE THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CASE NO.: 14-10936-EE

DATE: January 26, 2016

LOCATION: Jacksonville, Florida

PRESIDING:

Hon. Gerald Bard Tjoflat
Hon. R. Lanier Anderson
Hon. Robin S. Rosenbaum

PRESENT:

David W. & Jennifer T. Foley, Plaintiffs-Appellants, Cross-Appellees

Derek J. Angell for Defendants-Appellees, Teresa Jacobs, Fred Brummer, Frank Detoma, Asima M. Azam, Roderick Love, Scott Alan Richman, Joe Roberts, Marcus Robinson, Richard Crotty, Linda Stewart, Bill Segal, Mildred Fernandez and Tiffany Russell,

Lamar D. Oxford for Defendants-Appellees, Phil Smith, Carol Hossfield, Mitch Gordon, Rocco Relvini, Tara Gould and Tim Boldig

William Carlton Turner, Jr. for Defendants-Appellee-Cross Appellant Orange County.

TRANSCRIPT OF PROCEEDINGS

FOLEY: May it please the Court. Judge Tjoflat, Judge Anderson, Judge Rosenbaum. I'm David. And uh with me is Jennifer. We're the Foleys. We're the toucan farmers from Orange County. And we're here to ask the court for a rule. And that rule, that four part rule, is this. That the defendants are liable in suit, not simply because they have deprived us of vested property and liberty interests, but because; one – the deprivation was deliberate, it was retrospective, and continuous, two – the deprivation was not commanded by County Code, three – the deprivation was prohibited by clearly established state laws, indeed, the state's fundamental laws, its constitutional separation of powers established in article four, section nine, of Florida's constitution, but, more importantly, the long history of judicial decisions that have construed that decision to mean only FWC, the Florida Fish and Wildlife Conservation Commission, has the legislative authority and the executive authority to regulate the possession and sale of our toucans, and four – the deprivation was effected by a hammer and anvil procedure that for… and there was no pre-deprivation remedy

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/s/ David W. Foley, Jr., Petitioner

in the extraordinary writs uh no direct state court review that that prevented us to A – uh challenge the validity of the Defendant's actions or B – to continue to exercise the rights that we claim. So this is a rule that we think fairly represents the relief that we seek, and the three points that I want to make this morning.

First, uh the limitations should be tolled, and immunity should be denied because the defendants were enforcing an aviculture custom of their own making, not an ordinance. Their conversion of the custom into policy was not commanded by the code and violated the state's separation of powers. Second, they destroyed our bird business and they destroyed our remedy by enforcing that aviculture custom retrospectively using a hammer and anvil procedure that effectively locked the court house door, it denied us extraordinary writs, adequate state court review, and, unless we pierce the shield immunity, we don't have compensatory relief. And Third, we're here in federal court because the defendants are flouting the state constitution and their manipulating its fundamental process making what should have been our remedies into a punishment. We say their aviculture custom is void.

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/s/ David W. Foley, Jr., Petitioner

They say it's valid. Basically that's our case and controversy and Florida has a perfect remedy for that. It's chapter 162 of the Florida Statutes and it says to defendants – when you found the Foleys in violation of your aviculture custom, February twenty third two thousand and seven, there were three thing you could do. You can choose door number one – prosecute the Foleys directly in State Court. You can choose door number two – you can prosecute the Foleys before your own Code Enforcement Board, and the Foleys can appeal that decision directly to State Court. Or you can choose door number three, and this is the important one – you can prosecute them any way you want, and let the Foleys figure out whether they have a remedy. They chose door number three, they bifurcated prosecution. They prosecuted a building permit violation before their Code Enforcement Board and they prosecuted the aviculture custom in Zoning Division's permit procedure. They created a hammer and an anvil. The Code Enforcement Board ordered us to destroy the accessory structures where we keep our toucans or get a permit for them – that is the hammer. And zoning division refused to grant the permit – the anvil. The hammer came down

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on the anvil on June seventeenth two thousand seven and we had to destroy our aviaries. The state court review of the hammer, the code enforcement board order, couldn't reach the aviculture custom because the Defendants didn't prosecute it there and the State Court review of the anvil, permitting… uh the zoning divisions permit refusal that we appealed by Determination to the BZA and the BCC, it couldn't reach the aviculture custom because of the uh state judicial policy that says Defendants are assumed to know the limits of their subject matter jurisdiction and therefore they have a right to draft a facially constitutional policy without judicial interference. So, Defendants didn't simply usurp FWC's jurisdiction, they shielded that decision from direct state court review by using this hammer and anvil procedure to destroy our bird business. Um and there was no pre-enforcement remedy in the extraordinary writs, against the decision to usurp FWC authority or against the hammer and anvil for two reasons. First – they were enforcing a custom and not an ordinance and because state law permits the defendents regulation to indirectly effect the possession and sale of our toucans we didn't, we couldn't

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establish an irreparable injury in their trespass of FWC authority before the BCC made its final policy decision. And Second – because uh chapter 162 of Florida's statutes provides them adequate pre-enforcement remedy we didn't have a, we couldn't establish an irreparable due process injury in the hammer and anvil when, per our theory, um defendants forfeit immunity when they usurp FWC authority and our remedy is against them individually. It's not until the BCC issues its final order that we're faced with a defendant, it's not until they convert this custom into policy that we're faced with a defendant – Orange County – against whom we have no compensatory remedy. So, we say that defendants have done that thing that Bradley v Fisher says has no excuse, has no immunity. They're acting in absence of authority. They're flouting the state's constitution, they're flouting its fundamental process. They attacked. They're not simply thumbing their nose at article four section nine of the constitution but they're thumbing their nose at Florida courts. They attacked our bird business when Florida courts have clearly established they can't do that and they manipulated uh a judicial policy that

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restricts review of BCC orders to devise the procedural protections that could have saved our bird business. So, we say - denied a judge, a court, a judge, a proceeding, that had subject matter over the procession and sale of our toucans we were denied all the right that are fundamental in due process and we do bring a claim in first, fourth, and fourteenth amendment against their so called legislative acts and their so called acceptable acts. So, we pray you will give us the relief that we request in our briefs for the reasons we stated there and here today. Thank you.

TJOFLAT: You've saved some rebuttal time. Mr. Turner.

TURNER: Yes your honor. May it please the court my name is William Turner. I represent Orange County. Also here today on behalf of other appellees are Mr. Derek and Mr. Oxford, they represent some of the individual defendants, But I am here on behalf of Orange County only. First of all or… First of all your honors I'd like to address one of these, it sounds like an underlining assertion made by Mr. Foley and his argument, which is that they had no remedy in state court and somehow the court house doors were barred to them.

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That is simply not the case. As the Florida court, state court, sitting in an applet capacity having heard the Foley's petition for writ of certiorari, and having denied that petition for writ of certiorari, the Florida court specifically stated "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." And then the court cites to Miami Dade Coumty v. omnipoint Holdings Inc. 863 southern 2nd 193 Florida Supreme Court 2003. So your honor under state law there was an open avenue for plaintiffs to pursue to challenge the substantive validity of the Orange County Code as compared to the authority of the Florida Wildlife Commission. It was right there for them and it was never barred by anybody, in fact the Florida government, through its judiciary arm, pointed them to that door and let them know how, you know, what essentially they needed to do to…

ANDERSON: But you do not contend that they are barred by res judicata.

TURNER: No your honor I do not contend that.

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ANDERSON: Alright, I'd like to turn you, if you don't mind, to the validity of the challenged ordinances and, in order to give you your whole time, my tentative thinking is that the district courts should be reversed on that. Number one, I thought his analysis was wrong when he relied upon the Caribbean case, which had the unusual feature that… it was crucial there to determine whether all wildlife was within the jurisdiction of the wildlife agency or whether only some and it turned out, the Supreme Court of Florida held, that the endangered species where not subject to the jurisdiction of the wildlife commission and that's why the analysis there determined whether the challenged statutory… it says the court must first determine whether the Florida constitution provides the wildlife commission with constitutional regulatory authority over all marine life. So that simply doesn't, that analysis, doesn't apply in a case like this and I don't see anything in Carribean that suggests that the usual preemption analysis should not apply in the usual pre-emption type cases. So that's the first point. And then second, applying the pre-emption analysis it seems to me that there is neither expressed nor implied pre-emption,

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even if there was exclusive delegation to the wildlife commission of regulatory authority that did not say that this should not be of the general laws which would incidentally impact on wildlife. And that's exactly what we have here, we don't have an ordinance which prohibits the raising of these toucans or any other wildlife, it simply directs them to an appropriate district and it seems to me the position of the district court here, which must have been your position, would say that the Florida fraud laws would not even apply. Ya know. And that simply doesn't make any sense. So. tell me where I'm wrong.

TURNER: Well your honor, I agree with your honor that the district court was incorrect in so broadly holding Orange County's ordinances void. Even if one could, and ultimately supposition State court should be unwinding, unraveling the conflict between the Florid Game commission , Wildlife Commission, and local zoning laws. But even if one… assuming for the sake of argument that even if one where to assume that Orange County's Code, when applied to the Foley's permit from State law, was in conflict. Even if one assumes that that doesn't, that wouldn't justify voiding the ordinance because it could be that next

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week the Wildlife commissions could change its regulations to be consistent.

ANDERSON: Actually I just made a strong argument for you didn't I.

TURNER: Yes you did your honor.

ANDERSON: I should have been asking that to the other side but it just doesn't make any sense to me what the district court did. I mean, if what the district court said was true then there wouldn't even be jurisdiction to hold a business responsible for fraudulent activities, for example, or any other general law that might have an incidental impact on wildlife activities.

TURNER: I would not like to see that state of affairs…

ANDERSON: Which is exactly would happen if the District court decision stands. Would it not?

TURNER: To the extent their holding the code provisions voidable yes your honor.

ANDERSON: So you agree with me I'm sure that the district court was wrong in holding these challenge statues invalid.

TURNER: Frankly your honor I think the analysis is one that should have been left to the state courts to unwind.

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ANDERSON: Well you mean that the district courts should have declined to take pendent jurisdiction.

TURNER: Yes your honor.

TJOFLAT: It's an old Pullman doctrine issue. I have a problem of whether there is a non-frivolous constitutional claim in this case. I have serious question whether the district court should have, if there is no non-frivolous federal claim the court had no jurisdiction on these other issues.

TURNER: Yes your honor.

TJOFLAT: And I can't find one

TURNER: Yes your honor. That's what…. First of all I didn't, I wasn't involved in at trail level. I picked this case up for oral argument…

TJOFLAT: Well I realize that's not the way it played out but I don't see a non-frivolous federal claim…constitutional claim.

TURNER: When I looked at the order for the first time I was surprised that the judge jumped right to the state law claim. State law analysis rather than Federal analysis.

TJOFLAT: Because if there is no non – frivolous federal claim he should have dismissed the case without prejudice. That

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would have allowed the Foley's to do the very thing that the Certiorari judge said they ought to do.

TURNER: Yes your honor.

ANDERSON: So would the statute of limitations have run now or is it tolled by these proceedings.

TURNER: Honestly I don't know the answer to that.

TJOFLAT: Well they could trigger it… they could get the statute of limitations running again by simply say we're going to build.. . a place. An out building. So that start all over again.

TURNER: Right and the ordinance is still on Orange County's books.

ANDERSON: So what you'd like us to do is vacate the district courts judgement and hold that he should not have exercised pendent jurisdiction over the state law claims.

TURNER: Well I don't want to have my cake and eat it too. I'd like your… I'd like the court to just reverse all together but that would be somewhat inconsistent with, I think the true argument.

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TJOFLAT: Well if it's reversed on the merits then that's the end of the day for the Foley's. If it's not reversed on the merits but on jurisdictional grounds it puts them back where they were in the first place.

TURNER: Correct. Correct.

TJOFLAT: But with a remedy.

TURNER: Correct. Correct. So selfishly on behalf of Orange County we'd like you to absolutely reverse on _____ but that would be disingenuous….

ANDERSON: So you'd like my first take on the case.

TURNER: I'd like you first take. Yes, your honor.

TJOFLAT: When a lawyer likes a first take it's a good time to wrap up the argument.

TURNER: Well that's what I'm going to do your honor. Thank you.

ANGELL: May we very quickly your honor.

TURNER: Ya.

ANGELL: Good morning my name in Derek Angell. I represent the Orange County officials and seeing that we are out of time for the defense, if there are any questions that the court has about the immunities.

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TJOFLAT: They are all entitled to qualified immunities. They, in there official capacity, where sued.

ANGELL: Exactly your honor. Whether it's absolute judicial quasi…

TJOFLAT: Well they want an injunctive relief. Which would allow them to proceed.

ANGELL: The Foley's sought injunctive relief from the county but also on any damages from the officials in their personal capacities. I believe there's no question there's immunity for…

ROSENBAUM: Do you represent Mr. Boldig?

ANGELL: I do not I represent the… that would be Mr. Oxford's. I'll sit down and let him answer your questions. Thank you.

TJOFLAT: Mr. Oxford

OXFORD: May it please this court my name is Lamar Oxford. I represent the six individuals who are collectively known as the County Employees. And there are at least five good reasons why they were properly dismissed from this case.

ROSENBAUM: Can I ask you about Mr. Boldig in particular. I think you are probably right with respect to the other ones with regard to the statute of

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limitations, but with respect to Mr. Boldig the last thing that he did and the thing that is really contested occurred at that hearing in 2008. And so I don't think that there is a statute of limitations problem with regard to him. But the district court did not make an inquiry, or did not make any finding, on either absolute or qualified immunity. Why shouldn't we send it back to the district court to evaluate those defenses in the first instance.

OXFORD: Because I think there is enough in this record for the court to recognize that Mr. Boldig, while testifying at the Board of County Commissioners hearing, was performing whatever you want to call it, a legislative or a judicial function, for which he is automatically entitled to the immunity. I don't think the court needs to send the case back to the district court for it to point out the obvious fact that he would be entitled to immunity under those circumstances.

ANDERSON: Actually with respect to the statute of limitations is not the same thing true with Boldig as are not the members of the Board of County Commissioners in the same position.

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OXFORD: Well I wouldn't want to speak for them, Mr. Angell would, but yes that is possible.

ANDERSON: And they too would be entitled however to qualified immunity.

OXFORD: Exactly. Reason after reason for the individuals not to be in this case, and I hesitate to say this especially with our time almost gone, but Mr. Foley, who we have immense respect for, gave a compassionate closing argument type speech here for you. But he didn't talk about the law. And this court, and the district court, all give deference to pro say litigils. They're not trained in the law. But they have to apply their facts to the law.

TJOFLAT: We understand that.

OXFORD: Thank you very much.

TJOFLAT: Mr. Foley

FOLEY: I do see what your concerns are and where you're headed.

TJOFLAT: It's not about where we're headed. What I suggested was that if there was not a non-frivolous claim then the district court didn't have any jurisdiction.

FOLEY: Yes.

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TJOFLAT: In which event it should not have entered a judgment against you. You understand?

FOLEY: I believe I do.

TJOFLAT: Alright. No. In which event then there are no statute of limitations problems. You have a remedy in the state courts. There isn't any doubt in my mind that you do. I speak for myself.

FOLEY: And when you're talking about remedies you are talking about declaratory relief…

TJOFLAT: I'm talking about the whole … The Florida circuit court is a common law court.

Foley: Okay

TJOFLAT: They have… They have more power than we do, as a matter of fact, in the sense that they can fashion any kind of remedy which is necessary to cure the problem that they find, if they find an illegality.

FOLEY: Alright well…

TJOFLAT: Declaratory relief. Injunctive relief. Whatever.

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FOLEY: I hear you. I would hate for you to say they were all frivolous claims, I mean, we do…

TJOFLAT: No. Your claims are not frivolous claims. The federal constitutional claims … I'm looking to see whether it is a non-frivolous claim.

FOLEY: Right, right.

TJOFLAT: You have to dance through a lot of hoops to make out a federal constitutional claim out of these facts. You follow me?

FOLEY: Well, ah I hear you say that…

TJOFLAT: Let me put it this way.

FOLEY: Sure.

TJOFLAT: Generally, the federal courts in these kinds of things, involving local ordinances and the like, there's an old doctrine in the law which says because of comity our respect for the state governments and local governments the federal court stays its hand and it doesn't act… and gets an answer to the question out of the state courts… You follow me? Then, if they're wrong, we have a constitutional argument in this court.

FOLEY: Alright, alright…

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TJOFLAT: I mean a dismissal without prejudice doesn't hurt you at all.

FOLEY: It doesn't hurt me as badly as other conclusions would hurt us, certainly.

TJOFLAT: There's no injury at all; you're back at square one with a remedy in the state court is what I'm trying to say.

FOLEY: Yes, yes. Of course we were in square one when the code enforcement.

TJOFLAT: Well you were in a different position when you were seeking certiorari review.

FOLEY: Yes

TJOFLAT: I'm not talking about that.

FOLEY: Right, Right. Alright, well we did try to make our Federal Claim out.

TJOFLAT: I know I realize that. And the judge entertained it.

FOLEY: And Well I appreciate that. And I did take time to read Tenny v. Shores which was an opinion of yours in which you had laid out that… I think a couple of sheriffs had taken somebody's property and even though they had not followed the State procedures there wasn't a due process remedy because there was some relief on

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the other side. And of course that a State relief___ But, um, alright. Again our position is simply they're without authority, they had limited jurisdiction to begin with, they knew, or should have known, and certainly we told them, they didn't have authority to do what they were going to do, they did it anyway. And our reading of the due process clause, our reading of immunity policy, is that we do have a Federal Claim in the fourteenth amendment. Thank you.

TJOFLAT: Thank you.

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/s/ David W. Foley, Jr., Petitioner

CERTIFICATE OF SERVICE

Plaintiffs certify that on May 24, 2017, the foregoing was electronically filed with the Clerk of the Court using the Florida Courts' eFiling Portal, which will send notice of filing and a service copy of the foregoing to the following:

William C. Turner, Jr., Assistant County Attorney,
P.O. Box 2687, Orlando FL, 32801, williamchip.turner@ocfl.net;

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Lamar D. Oxford, Dean, Ringers, Morgan & Lawton PA,
PO Box 2928, Orlando FL 32802-2928, loxford@drml-law.com.

VERIFICATION

Under penalties of perjury, I declare that I have read the foregoing, and the facts alleged therein are true and correct to the best of my knowledge and belief.

_____
David W. Foley, Jr.

_____
Jennifer T. Foley

Date: May 24, 2017

Plaintiffs
1015 N. Solandra Dr.
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IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

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

Defendants
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.

2016-CA-007634-O

PLAINTIFFS' RESPONSE

IN OBJECTION TO

ORANGE COUNTY'S MOTION FOR JUDICIAL NOTICE, AND

PLAINTIFFS' MOTION FOR JUDICIAL NOTICE OF ORD. No. 2016-19

PLAINTIFFS DAVID AND JENNIFER FOLEY OBJECT to "Orange County's Motion for Judicial Notice Pursuant to Florida Rule of Evidence 90.202(10) and 90.203," filed October 25, 2016, as e-file #48082823, AND otherwise MOVE THE COURT pursuant §§90.202(10) and 90.203, Fla. Stat. TO TAKE JUDICIAL NOTICE OF ORANGE COUNTY ORDINANCE NO. 2016-19, attached hereto.

SUMMARY

All parties should be on notice of any decision the Court is asked to make that will ultimately bear upon the question at the heart of this case – Does Art. IV, §9, Fla. Const., prohibit Orange County, and consequently its agents, from "enjoining the possession, breeding or sale of non-indigenous birds?" *See* Op. Att'y Gen. 2002-23. Judicial notice of Ordinance No. 2016-19, is such a decision. The Foleys here attempt to correct Orange County's failure to place all parties on notice.

BACKGROUND

1. August 25, 2016, the Foleys initiated and filed their complaint in the present suit against the above named defendants.

2. September 13, 2016, the Orange County Board of County Commissioners adopted Orange County Ordinance No. 2016-19.

3. September 23, 2016, Ordinance No. 2016-19, became effective.

4. October 25, 2016, Orange County filed "Orange County's Motion for Judicial Notice Pursuant to Florida Rule of Evidence 90.202(10) and 90.203."

   a. A copy of Ordinance No. 2016-19, is attached to that motion.

   b. The motion does not identify the source of the copy of Ordinance No. 2016-19, attached to the motion.

c. The motion requests judicial notice of Ordinance No. 2016-19, by quoting portions of "Florida Rules of Evidence 9.202(10) and 90.203."

d. The motion provides no argument in support of judicial notice.

e. The motion certifies that David and Jennifer Foley were served notice of the motion.

f. The motion does not certify that all other above named defendants share the County's interest in Ordinance No. 2016-19.

g. The motion does not certify that all other above named defendants have been given timely written notice of the motion.

5. February 15, 2017, the Foleys filed their amended complaint.

a. In Counts 1 and 2 of that amended complaint the Foleys – in part – seek declaratory and injunctive relief alleging Ordinance No. 2016-19, conflicts with Art. IV, §9, Fla. Const.

b. The Foleys did not attach a copy Ordinance No. 2016-19, to the amended complaint.

c. The amended complaint certifies that service was made on all the above named defendants.

6. March 7, 2017, the County filed "Orange County's Motion to Dismiss Plaintiffs' Amended Complaint Pursuant Florida Rules of Civil Proceure (sic) 1.140(b)(1) and (6)."

a. The motion makes repeated reference to Ordinance No. 2016-19.

b. No copy of Ordinance No. 2016-19, is attached to the motion.

c. The motion certifies only that plaintiffs were served notice of the motion.

d. The motion does not certify that any of the above named defendants were given timely written notice of the motion.

7. The Foleys attach a copy of Orange County Ordinance No. 2016-19, to this their "Plaintiffs' Response In Objection to Orange County's Motion for Judicial Notice, and Plaintiffs' Motion for Judicial Notice of Ord. No. 2016-19."

8. The copy of Ordinance No. 2016-19, attached to this the Foleys' motion for judicial notice was downloaded March 25, 2016, from MuniCode at:

> https://www.municode.com/library/fl/orange_county/ordinances/code_of_ordinances?nodeId=791343

9. Below the Foleys certify that all parties to this case are on notice of this request that the Court take judicial notice of the attached copy of Orange County Ordinance No. 2016-19.

ARGUMENT

10. The Foleys agree with Orange County that Ordinance No. 2016-19, is critical to any analysis of their rights in this case. The Foleys, however, argue that analysis of Ordinance No. 2016-19, necessarily implicates analysis of Art. IV, §9, Fla. Const., and consequently the degree of liability of each of the above named defendants.

11. All parties should be permitted to determine their own interests in the County's adoption and defense of Ordinance No. 2016-19, and should otherwise be put on notice that the Court has been, and/or will be, asked:

a. to take judicial notice of the ordinance; and,

b. to determine the rights of all parties with respect to Orange County's authority to adopt or enforce any custom and/or ordinance in conflict with Art. IV, §9, Fla. Const.

12. In its October 25th motion for judicial notice, Orange County correctly argues that per §§90.202(10) and 90.203, Fla. Stat., this Court must take

judicial notice of Ordinance No. 2016-19 – if "adverse" parties are properly noticed.

13. Section 90.203(2), Fla. Stat., makes the County's failure to certify service to the other defendants fatal to its motion for judicial notion; the other defendants are and/or may be "adverse" parties.

a. Orange County's adoption of Ordinance No. 2016-19 effectively codifies the enforcement decisions made by the other defendants in the Foleys' case. The ordinance now per §38-79(101), OCC, [Ordinance No. 2016-19, pp.4, 42], expressly prohibits *commercial retail sale of animals* as a *home occupation*. The category *commercial retail sale of animals* is in no way limited by the ordinance and must be read to include *toucans* and/or *aviculture*. At the time of defendants' actions against the Foleys [and even immediately prior to this most recent amendment per Ordinance No. 2016-19] there was no such express prohibition in the definition of *home occupation*. Defendants, nevertheless, interpreted *home occupation* to prohibit "*aviculture* (i.e., advertising and keeping birds for sale) as … a *home occupation*," *see* amended complaint ¶40(e).

b. Because Ordinance No. 2016-19 effectively codifies the enforcement decisions made by the other defendants in the Foleys' case, the other defendants have an "adverse," and/or a substantial, interest in any decision the Court makes with respect to Ordinance No. 2016-19; e.g., if the Court decides Art. IV, §9, Fla. Const., denies the County authority to include toucans in the Ordinance's prohibition of *commercial retail sale of animals*, the County [per §768.28(9), Fla. Stat., and *McGhee v. Volusia County*, 679 So.2d 729, 733 (Fla.1996)] is no longer necessarily liable for the injuries caused by the individual defendants when they decided to prohibit *aviculture* as a *home occupation* even in absence of any such express prohibition.

14. The Foleys, like Orange County, argue that §§90.202(10) and 90.203, Fla. Stat., require this Court take judicial notice of Orange County Ordinance No. 2016-19, if the Foleys give their adverse parties notice of the request, provide the court proof of that notice, and furnish the Court with sufficient information to enable it to take judicial notice.

15. All defendants are clearly "adverse" to the Foleys.

16. By this motion all parties are on notice the Court has been asked to take judicial notice of the attached copy of Orange County Ordinance No. 2016-19.

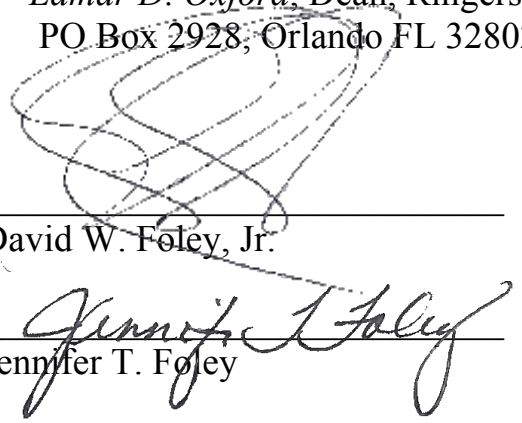
CONCLUSION

WHEREFORE, pursuant §90.203, Fla. Stat., the Foleys furnish the Court with sufficient information to enable it to take judicial notice of Orange County Ordinance No. 2016-19, pursuant §90.202(10) Fla. Stat., including certification below that all parties are on notice that THE FOLEYS HERE MOVE THE COURT TO TAKE JUDICIAL NOTICE OF ORANGE COUNTY ORDINANCE NO. 2016-19.

CERTIFICATE OF SERVICE

Plaintiffs certify that on May 25, 2017, the foregoing was electronically filed with the Clerk of the Court using the Florida Courts' eFiling Portal, which will send notice of filing and a service copy of the foregoing to the following:

William C. Turner, Jr., Assistant County Attorney,
P.O. Box 2687, Orlando FL, 32801, williamchip.turner@ocfl.net;
Derek Angell, O'Connor & O'Connor LLC,
840 S. Denning Dr. 200, Winter Park FL, 32789, dangell@oconlaw.com;
Lamar D. Oxford, Dean, Ringers, Morgan & Lawton PA,
PO Box 2928, Orlando FL 32802-2928, loxford@drml-law.com.



David W. Foley, Jr.

Jennifer T. Foley

Date: May 25, 2017

Plaintiffs
1015 N. Solandra Dr.
Orlando FL 32807-1931
PH: 407 671-6132
e-mail: david@pocketprogram.org
e-mail: jtfoley60@hotmail.com

APPROVED BY ORANGE
COUNTY BOARD OF COUNTY
COMMISSIONERS

BCC Mtg. Date: September 13, 2016

EFFECTIVE DATE: September 23, 2016

ORDINANCE NO. 2016-19

AN ORDINANCE AFFECTING THE USE OF LAND IN ORANGE COUNTY, FLORIDA, BY AMENDING CHAPTER 38 ("ZONING") OF THE ORANGE COUNTY CODE; AND PROVIDING AN EFFECTIVE DATE

BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF ORANGE COUNTY, FLORIDA:

Section 1. Amendments; In General. Chapter 38 of the Orange County Code is amended as set forth in Section 2 through Section 48. New language shall be indicated by underlines, and deleted language shall be shown by strike-throughs.

Section 2. Amendments to Section 38-1 ("Definitions"). Section 38-1 is amended to read as follows:

Sec. 38-1. Definitions.

* * *

Assisted living facility shall mean any building or buildings, section or distinct part of a building, private home, boarding home, home for the aged, excluding a "nursing home" as defined in this section, or other residential facility, whether operated for profit or not, which is licensed by the State of Florida and undertakes through its ownership or management to provide housing, meals, and one or more personal services for a period exceeding 24 hours to one or more adults who are not relatives of the owner or administrator.

* * *

~~*Aviculture (commercial)* shall mean the raising, breeding and/or selling of exotic birds, excluding poultry, for commercial purposes. Any one (1) or more of the following shall be used to determine whether a commercial operation exists:~~

~~(1) The operation exists with the intent and for the purpose of financial gain.~~

~~(2) Statements of income or deductions relating to the operation are included with routine income tax reporting to the Internal Revenue Service;~~

~~(3) A state sales tax identification number is used to obtain feed, supplies or birds;~~

~~(4) An occupational license has been obtained for the operation;~~

~~(5) Sales are conducted at the subject location;~~

~~(6) The operation involves birds or supplies which were purchased or traded for the purposes of resale;~~

~~(7) The operation involves a flea market or commercial auction, excluding auctions conducted by not-for-profit private clubs;~~

~~(8) The operation or activities related thereto are advertised, including, but not limited to, newspaper advertisements or signs, or~~

~~(9) The operation has directly or indirectly created traffic.~~

* * *

Boardinghouse, lodging house or *rooming house* shall mean a dwelling used for the purpose of providing meals or lodging or both to five (5) or more persons other than members of the family occupying such dwelling, or any unit designed, constructed and marketed where the individual bedrooms are leased separately and have shared common facilities. This definition shall not include a nursing home or community residential home. (For four (4) or less persons, see "family" definition in this section.)

* * *

Community residential home shall mean a dwelling unit licensed to serve clients of the ~~s~~State of Florida pursuant to Chapter 419, Florida Statutes, ~~department of health and rehabilitative services,~~ which provides a living environment ~~to~~ for 7 to 14 unrelated ~~"~~residents~~"~~ who operate as the functional

equivalent of a family, including such supervision and care by support staff as may be necessary to meet the physical, emotional, and social needs of the "residents." The term "resident" as used in relation to community residential homes shall have the same meaning as stated in section 419.001(1)(~~d~~e), F. S., as may be amended or replaced.

* * *

~~*Day care home, family* (also known as "family day care home") shall mean a residence in which child care is regularly provided for no more than ten (10) children. This shall include a maximum number of five (5) preschool children plus the elementary school siblings of the preschool children including the caregiver's own.~~

* * *

Dormitory shall mean a ~~room, apartment or~~ building containing sleeping accommodations in closely associated rooms for persons not members of the same family that ~~which~~ is operated for the use of students enrolled in an educational institution, as in a college dormitory.

* * *

Dwelling, four-family (quadraplex), shall mean a building with four (4) dwelling units which has four (4) kitchens and is designed for or occupied exclusively by four (4) families. Each unit of a quadraplex must be connected by a common wall.

Dwelling, multiple, shall mean a building located on a single lot or parcel designed for or occupied exclusively by three (3) or more families.

Dwelling, single-family, shall mean a detached dwelling containing one (1) kitchen and complete housekeeping facilities for one (1) family only, designed for or occupied exclusively by one (1) family for usual domestic purposes, and having no enclosed space or cooking or sanitary facilities in common with any other dwelling. All rooms shall connect to a common area within the dwelling and there shall be one main front door entry.

* * *

Dwelling, three-family (triplex), shall mean a building with three (3) dwelling units which has three (3) kitchens and is designed for or occupied exclusively by three (3) families. Each unit of a triplex must be connected by a common wall.

Dwelling, two-family (duplex), shall mean a building with two (2) dwelling units which has two (2) kitchens and is designed for or occupied exclusively by two (2) families. Each unit of a duplex must be connected by a common wall.

* * *

Family shall mean an individual; or two (2) or more persons related by blood, marriage or adoption, exclusive of household servants, occupying a dwelling and living as a single ~~nonprofit~~ housekeeping unit; or four (4) or fewer persons, not related by blood, marriage or adoption, exclusive of household servants, occupying a dwelling and living as a single ~~nonprofit~~ housekeeping unit, in either case as distinguished from persons occupying a boardinghouse, lodging house, rooming house, nursing home, community residential home, or hotel, as herein defined.

* * *

Family day care home shall mean as defined in F.S. § 402.302~~(5)~~, as it may be amended from time to time.

* * *

Fence shall mean a structure that functions as a boundary or barrier for the purpose of safety, to prevent entrance, to confine, or to mark a boundary.

* * *

Home occupation shall mean any use conducted entirely within a dwelling or accessory building and carried on by a resident ~~an occupant~~ or residents thereof~~, which~~ that is clearly incidental and secondary to the use of the dwelling for dwelling purposes and does not change the character thereof, subject to Section 38-79(101). ~~provided that all of the following conditions are met:~~

~~Only such commodities as are made on the premises may be sold on the premises. However, all such sales of home~~

~~occupation work or products shall be conducted within a building and there shall be no outdoor display of merchandise or products, nor shall there be any display visible from the outside of the building. No person shall be engaged in any such home occupation other than two (2) members of the immediate family residing on the premises. No mechanical equipment shall be used or stored on the premises in connection with the home occupation, except such that is normally used for purely domestic or household purposes. Not over twenty-five (25) percent of the floor area of any one (1) story shall be used for home occupation purposes. Fabrication of articles such as commonly classified under the terms "arts and handicrafts" may be deemed a home occupation, subject to the other terms and conditions of this definition. Also, a "cottage food operation" as defined and regulated by Chapter 500, Florida Statutes, shall be deemed a home occupation.~~ ~~Home occupation shall not be construed to include uses such as barber shops, beauty parlors, plant nurseries, tearooms, food processing (with the exception of a cottage food occupation), restaurants, sale of antiques, commercial kennels, real estate offices, insurance offices, or pain management clinics.~~

* * *

Living area shall mean the total air conditioned or heated floor area of all dwelling units measured to the interior surfaces of exterior walls, but excluding exterior halls and stairways.

* * *

Mobile home shall mean a structure transportable in one (1) or more sections, which structure is eight (8) feet or more in width and over thirty-five (35) feet in length, and which structure is built on an integral chassis and designed to be used as a dwelling when connected to required utilities, and includes the plumbing, heating, air conditioning, and electrical systems contained therein. A mobile home shall be constructed to United States Department of Housing and Urban Development standards.

* * *

Poultry shall mean domestic fowl, including chickens, roosters, turkeys, ducks, geese, pigeons, ~~etc.~~ but excluding wild or non-domestic birds regulated by the Fish and Wildlife Conservation Commission.

* * *

Recreational vehicle shall mean as defined at Section 38-1527.

* * *

Recreational vehicle park shall mean as defined at Section 38-1527.

* * *

Structure shall mean and include all permanent or temporary, fixed or movable construction, ~~comprising~~ including buildings, stands, poles, signs and billboards, erected independently or affixed to exterior walls or roofs; provided, however, that utility owned poles and lines ~~and poles~~ shall not be considered a structure~~s for the purposes of this chapter.~~

Student housing shall mean any multi-family development or portion thereof where the dwelling units are designed and constructed as three (3) or more bedrooms with three (3) or more bathrooms which is marketed and/or rented to students attending a local college, university, ~~or~~ community college, or private school, or any multi-family development or portion thereof comprised of dwelling units consisting of three (3) or more bedrooms and less than three (3) bathrooms where the bedrooms are leased separately.

* * *

Temporary portable storage container shall mean a structure temporarily used for storage that is not attached to a dwelling and does not have any water or electrical fixtures.

* * *

Yard, front, shall mean a yard extending across the front of a lot between the side lot lines, and being a minimum horizontal distance between the street line and the principal building or any projections thereof other than the projections of uncovered steps, uncovered balconies, or uncovered porches. ~~On corner lots, the front yard shall be considered as abutting the street upon which the lot has its least dimension.~~

* * *

In all other respects, Section 38-1 shall remain unchanged.

Section 3. Amendments to Section 38-3 ("General restrictions on land use").

Section 38-3 is amended to read as follows:

Sec. 38-3. General restrictions on land use.

(a) *Land use and/or building permits.* No building or structure shall be erected and no existing building shall be moved, altered, added to or enlarged, nor shall any land, building, structure or premises be used or designed to be used for any purpose or in any manner other than a use designated in this chapter, or amendment thereto, as permitted in the district in which such land, building, structure or premises is located, without obtaining the necessary land use and/or building permits.

(b) *Height limitation.* No structure or building shall be erected, nor shall any existing building be moved, reconditioned or structurally altered so as to exceed in height the limit established in this chapter; or amendments thereto, for the district in which such building or structure is located.

(c) *Site and building requirements.* No building or structure shall be erected, nor shall any existing building or structure be moved, altered, enlarged or rebuilt, nor shall any open space surrounding any building or structure be encroached upon or reduced in any manner, in size or area, except in conformity with the site and building requirements, established by this chapter, or amendments thereto, for the district in which such building or structure is located.

(d) *Density limitation.* No building, structure, or premises shall be erected, occupied or used so as to provide a greater density of population than is allowed under the terms of this chapter for the district in which such building, structure or premises is located.

(e) *Open space limitation.* No yard or other open space provided about any building or structure for the purpose of complying with the regulations of this chapter, or amendments thereto, shall be considered as providing a yard or open space for any other building or structure.

(f) *Lot and occupancy requirements.* Every building or structure hereafter erected shall be located on a lot or tract as defined herein, and in no case shall there be more than one (1)

principal building or use on one (1) lot except as hereinafter provided.

(g) *Minimum lot size and setback requirements.* Any single-family dwelling, regardless of the form of ownership of land (whether designated as a unit, parcel, lot, tract or other similar term) upon which the single-family dwelling is to be located, shall not be permitted unless the net lot area of the lot upon which hit is to be located can comply with the minimum lot size required by the applicable zoning district and such dwelling can comply with setback requirements of the applicable zoning district. The applicable zoning district shall be the one in which the lot and the dwelling area are located. Reference to a deed, plat book, condominium plat or other similar document shall constitute the division of land from which the county shall discern the lot dimensions for determining minimum lot size and setback requirements. Any interest such lot may have in common areas shall not be counted towards meeting the minimum lot size.

(h) *Leasing of bedrooms.* In a single-family dwelling, the leasing of bedrooms is prohibited unless the single-family dwelling is owner occupied.

(i) *Parking space requirements.* No building or structure shall be erected, nor shall any existing building or structure be moved, reconditioned or structurally altered so as to encroach upon or reduce in any manner, in size or area, the parking space requirements, established by this chapter, or amendments thereto, for the district in which such building or structure is located.

(j) *Distance requirements.* No structure or building shall be erected, nor shall any existing building be moved, reconditioned or structurally altered so as to infringe upon any applicable distance requirements. An applicant seeking a permit shall be responsible for ensuring that all applicable distance requirements are met. Approval of a land use and/or building permit does not constitute, or in any way imply, a waiver of the applicant's obligations to meet all applicable distance requirements.

(k) *Applicable law and ordinances.* Nothing in this chapter shall be construed to exempt any person from having to comply with all other applicable federal, state, or county laws or regulations.

(l) *Site plan*. A fully dimensionalized site plan shall be required for any proposed (i) building, structure, sign or mobile home, (ii) accessory building or structure, or (iii) fence, boat dock, or boat ramp. The site plan shall show:

(1) all property lines;

(2) all road rights-of-way;

(3) all easements;

(4) the location of any existing and proposed building, structure, mobile home, accessory building or structure, or fence, boat dock, or boat ramp, including all dimensions to property lines and existing structures;

(5) the location of the Normal High Water Elevation (NHWE) contour of all adjacent natural surface water bodies;

(6) the lot grading plan; and

(7) the location of any septic tank and drain field.

The above-mentioned items shall be depicted on the site plan so that Orange County may determine whether the proposed improvements comply with zoning and land development regulations.

(m) *Site plan; special requirements.*

(1) A site plan for (A) a proposed building, structure and sign, (B) a mobile home (new or relocated), (C) a moved structure, (D) an addition to an existing building or structure, or (E) an accessory building or structure, shall be prepared by an architect, engineer, or surveyor or by a general, building, or residential contractor registered or certified with the State of Florida. Such plan shall comply with the requirements set forth in (l)1. through 7. above. Additionally, should such plan not be prepared by a surveyor registered with the State of Florida, the plan shall contain a clear statement that it does not constitute a survey and the preparer shall sign and date the plan.

(2) Notwithstanding subsection (m)(1) above, a site plan for a proposed addition to an existing building, structure, or mobile home may be prepared by the property owner, with the

following conditions: (A) the plan must comply with the requirements set forth in the above (1) through (7); (B) the plan must be superimposed on a copy of a survey previously prepared by a registered surveyor that shows all existing improvements; and (C) the plan must contain a clear statement that it does not constitute a survey and the preparer shall sign and date the plan.

(3) Notwithstanding subsection (m)(1) above, a site plan for a proposed (A) fence, boat ramp, or boat dock; (B) accessory building; (C) structure no larger than one hundred twenty (100) square feet; or (D) structure required to be removed within a certain time, may be prepared by the property owner and the plan must be superimposed on a copy of a survey previously prepared by a registered surveyor that shows all existing improvements; and (C) the plan must contain a clear statement that it does not constitute a survey and the preparer shall sign and date the plan.

Section 4. Repeal of Section 38-56 ("U-R, UR-1, and UR-3 zoned lands"). Section 38-56 is repealed, and reserved for future use. (Sections 38-501, 38-502, 38-503, 38-504, and 38-505 relating to the UR-3 University Residential District shall remain in effect.)

Sec. 38-56. ~~U-R, UR1, and UR-3 zoned lands.~~ Reserved.

~~(a) Permitted uses, special exceptions, and performance standards of the U-R and UR-1 zoning districts shall be the same as those specified in the R-2 zoning district.~~

~~(b) Permitted uses, special exceptions, and performance standards of the UR-3 zoning district shall be the same as those specified in the R-3 zoning district.~~

Section 5. Amendments to Section 38-74 ("Permitted uses, special exceptions and prohibited uses"). Section 38-74(b) is amended to read as follows:

Sec. 38-74. Permitted uses, special exceptions and prohibited uses.

* * *

(b) *Use table.*

(1) The permitted uses and special exceptions allowed in the zoning districts identified in the use table set forth in section 38-77 are respectively indicated by the letters "P" and "S" in the cells of the use table. No primary use shall be permitted in a district unless the letter "P" or the letter "S" appears for that use in the appropriate cell.

(2) When a use is a permitted use in a particular zoning district, it is permitted in that district subject to:

a. Compliance with all applicable requirements of chapter 38 and elsewhere in the Orange County Code; and

b. Compliance with all requirements specified in the conditions for permitted uses and special exceptions" set forth in section 38-79 which correlate with the number which may appear within the cell of the use table for that permitted use.

c. A use variance from section 38-77 (Use table) and section 38-79 (Conditions for permitted uses and special exceptions) shall be prohibited.

(3) When a use is permitted as a special exception in a particular zoning district, it is permitted in that zoning district subject to:

a. Obtaining the special exception;

b. Compliance with all applicable requirements of chapter 38 and elsewhere in the Orange County Code; and

c. Compliance with all requirements specified in 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 which correlate with the number which may appear within the cell of the use table for that special exception.

(4) Land uses on properties zoned P-D (Planned Development) shall be subject to the requirements of the P-D district as outlined in Chapter 38, Article VIII of the Orange County Code.

* * *

In all other respects, Section 38-74 shall remain unchanged.

Section 6. Amendments to Section 38-75 ("Vested Uses"). Section 38-75 is amended to read as follows:

Sec. 38-75. Vested uses.

* * *

(b) (1) Any vested use may expand on a lot or parcel in a manner consistent with the applicable performance standards.

(2) Furthermore, any vested use may expand onto an adjacent lot or parcel, provided that use is consistent with the future land use map (and the remainder of the Ceomprehensive ~~policy~~ Pplan) for that adjacent lot or parcel, and the adjacent lot or parcel has the appropriate commercial or industrial zoning designation as of July 20, 1995.

* * *

In all other respects, Section 38-75 shall remain unchanged.

Section 7. Amendments to Section 38-77 ("Use Table"). Section 38-77, the Use Table, is amended to read as shown on **Appendix "A,"** attached hereto and incorporated herein by this reference, including revising the vertical "Cluster" column to read "RCE Cluster" throughout. Except as specifically stated here and as shown in the attached Use Table, Section 38-77 shall remain unchanged.

Section 8. Amendments to Section 38-78 ("Special exception criteria"). Section 38-78 is amended to read as follows:

Sec. 38-78. Special exception criteria.

Subject to ~~section 38-43 and~~ section 30-43 of this Code, in reviewing any request for a special exception, the following criteria shall be met:

(1) The use shall be consistent with the ~~c~~Comprehensive ~~policy p~~Plan.

(2) The use shall be similar and compatible with the surrounding area and shall be consistent with the pattern of surrounding development.

(3) The use shall not act as a detrimental intrusion into a surrounding area.

(4) The use shall meet the performance standards of the district in which the use is permitted.

(5) The use shall be similar in noise, vibration, dust, odor, glare, heat producing and other characteristics that are associated with the majority of uses currently permitted in the zoning district.

(6) Landscape buffer yards shall be in accordance with section 24-5 of the Orange County Code. Buffer yard types shall track the district in which the use is permitted.

In addition to demonstrating compliance with the above criteria, any applicable conditions set forth in section 38-79 shall be met. Furthermore, the board of zoning adjustment ("BZA") shall prescribe a time limit, subject to the approval of the board of county commissioners ("BCC"), within which the action for which the special exception is required shall be begun or completed, or both. Failure to start or complete such action within the time limits shall void the special exception. An automatic ~~one~~two-year time limit to obtain a building permit shall apply if the BZA fails to prescribe a time limit. A request to extend the time limit shall be made in writing to the zoning manager. The zoning manager may extend the time limit if the applicant provides proper justification for such an extension. Examples of proper justification include, but are not limited to: the project is proceeding in good faith; there is a delay in contract negotiations not attributable to the applicant; and unexpected financial hardships which were not known and could not have been reasonably foreseen by the applicant when the special exception was granted. The zoning manager's determination on a request for an extension of time may be appealed to the BZA and then the BCC.

Special exception approvals shall be in accordance with the applicant's site plan dated "Received [date]," and all other applicable statutes, ordinances, laws, regulations, and rules. Any

proposed deviation, change or modification to the site plan or question of interpretation about the site plan is subject, at the outset, to the zoning manager's review. The zoning manager shall do one of the following after reviewing the matter: (a) give his/her prior written approval regarding any non-substantial or insignificant proposed deviation or make a determination concerning any minor question of interpretation; or (b) refer the proposed deviation or question of interpretation to the BZA for a discussion between the zoning manager and the BZA as to the BZA's original intent or position; or (c) require the applicant to apply for a special exception request and schedule and advertise a public hearing before the BZA in accordance with sections 30-42 through 30-44 of this Code.

The zoning manager shall have the authority and discretion to require an application for a special exception or a variance to be reviewed by the development review committee prior to review by the BZA to properly assess and address its impacts and to make a recommendation and recommend conditions (if any). In making such a determination, the zoning manager shall consider relevant factors, including the size of the project, land use intensity, land use density, traffic impacts, and school impacts.

Section 9. Amendments to Section 38-79 ("Conditions for permitted uses and special exceptions"). Section 38-79 is amended to read as follows:

Sec. 38-79. Conditions for permitted uses and special exceptions.

The following numbered conditions shall correlate with the numbers listed in the use table set forth in section 38-77:

(1) A modular home shall be permitted, provided it is licensed by the ~~department of community affairs~~State of Florida. No parcel shall have more than one (1) single-family unit or modular unit unless otherwise permitted by Chapter 38.

* * *

(4) a. [*Mobile home~~/recreation vehicle~~ provisions in A-1, A-2, and A-R*] Mobile homes ~~and recreational vehicles~~ may be permitted on individual lots in agricultural A-1, A-2, and A-R districts, subject to the following:

1. A mobile home may be used for residential purposes provided that the property contains a

minimum of two (2) acres in the A-2 and A-2 districts. Minimum lot width and setbacks shall be per article XII. Minimum lot size in the A-R district shall be two and one-half (2½) acres. Other site and building requirements shall be per article XIII. Such mobile home use shall require, before the mobile home is located on the property in question, a permit which shall be issued to the recorded property owner by the zoning ~~department~~ division.

2. Setbacks from lot lines shall be not less than is required for a site-built dwelling in the district in which it is located.

3. Building height shall be limited to thirty-five (35) feet.

(5)

* * *

b. ~~Temporary structures, including mobile homes and travel trailers, may be used as sales offices for a subdivision in a residential district~~ A single-family home or building may be used as a model home or sales center for an overall development (such as residential sales within a Planned Development) or a specified subdivision; or ~~T~~temporary structures, including mobile homes and travel trailers, may be used as sales offices for a subdivision in a residential district, subject to the following criteria:

1. Such a sales office~~s~~ shall not include sales of real estate outside the subdivision or overall development.

2. Approval shall be for a period of two (2) years or when ninety (90) percent of the subdivision or development is complete, whichever comes first. Extension of these time frames will require approval from the Zoning Division Manager.

3. Mulch parking shall be allowed.

4. The subdivision plat must be recorded before the sales trailer permit is issued or before a certificate of occupancy is issued for the model home or sales center.

5. Resale of existing residential units only, within the specified subdivision or overall development, will be permitted during the time frame specified in condition 2.

6. A model home or sales center shall be subject to the provisions outlined in Section 30-83 and Section 38-79(125).

c. Temporary structures, including mobile homes and travel trailers, may be used as construction office trailers for road improvement and/or utility development projects in any zoning district subject to the following:

1. The use of limited to the placement of construction/office trailers only.

2. No accessory or storage buildings shall be permitted.

3. Only the parking of passenger vehicles/trucks shall be permitted.

4. Any outdoor staging areas and storage of products and equipment shall require written authorization which may be issued by the zoning manager as part of the temporary structure permit, with or without conditions.

5. All temporary structures shall be removed no later than one hundred eighty (180) days from the date the permit is issued or within ten (10) days after completion of the project, whichever comes first.

6. Permits for temporary structures shall be obtained from the zoning manager. The zoning manager may require a notarized statement of no objection from abutting property owners. When such permits expire, they may be renewed by the zoning manager for a period not to exceed an additional ninety (90) days.

d. Mobile homes used as offices shall be permitted as a permanent use when accessory to a mobile home sales lot.

e. A mobile home or recreational vehicle may be used as quarters for a night watchman or on-site security on property zoned commercial, or industrial~~, subject to obtaining~~

~~special exception approval. Special exception approval is also required for the same use in planned developments approved for commercial and/or industrial uses (unless previously approved by the P-D) and in agricultural districts when used in conjunction with another use approved by a special exception or in conjunction with a nonresidential use~~. Night watchman quarters shall not be allowed on properties where a tenant dwelling exists.

f. Subject to prior approval by the zoning manager, who may impose appropriate conditions (such as a time period not to exceed eighteen (18) months), a recreational vehicle may be occupied as a temporary shelter where a single-family residence is located on-site but is uninhabitable and undergoing repairs. For purposes of this provision, the term "uninhabitable" means the on-site single-family residence cannot be occupied because it has been damaged as a result of a natural disaster or accident, such as a hurricane, storm or fire, not that it cannot be occupied for some other reason, including because it is being renovated or enlarged.

g. Mobile homes and recreational vehicles may be located, for an indefinite period of time, at a hunting camp of one hundred (100) acres or more; subject to obtaining all appropriate permits and licenses.

h. Recreational vehicles may be parked in residential and agricultural districts as provided in subsection 38-79(45).

i. Mobile homes and recreational vehicles may be permitted on individual lots in commercial or industrial districts, subject to the following: A mobile home or recreational vehicle may be temporarily parked and occupied on a specified tract of land in commercial or industrial districts, to be used for offices, storage or security purposes, during the construction of permanent building on the tract of land. The mobile home or recreational vehicle shall be removed after the certificate of occupancy is issued.

(6) Outdoor display of operative agricultural equipment is permitted, subject to the following conditions.

a. The equipment may be stored outdoors on parcels adjacent to the parcels containing the agricultural uses provided they are commonly owned or leased;

b. The owner or lessee of the equipment and the owner or lessee of the site must be one and the same; and

c. The equipment must be used in conjunction with active agricultural operations/uses on-site.

d. Landscaping/lawn service business and storage of equipment associated with such use shall be subject to SIC 0782.

(7) Chimneys, water and fire towers, church spires, cupolas, stage towers and scenery lofts, cooling towers, elevator bulkheads, smokestacks flagpoles, parapet walls, and similar structures and their necessary mechanical appurtenances shall be permitted, subject to Chapter 38-1506 of the Orange County Code.

* * *

(9) ~~Such a use shall not commence without a land use permit.~~ Such a use shall meet the following standards:

a. A land use permit shall be obtained;

b. A comprehensive groundwater monitoring program, as determined by the Environmental Protection Division Manager, shall be required, and such program shall entail a minimum of two (2) wells dug to the confining layer, to be tested and sampled at least every six (6) months, except that the property owner may be exempted from this groundwater monitoring requirement if the owner establishes that no potable water supply wells are located within five hundred (500) foot of the boundary of the junkyard site and the EPD Manager determines that no other environmental problems are associated with the junkyard;

c. By January 1, 1996, all junkyards that are not otherwise presently subject to screening requirements shall be required to have an eight-foot (8') high masonry wall, eight-foot (8') high maintained fence, or other screening acceptable to the Zoning Manager; and

* * *

(11) Reserved. ~~Subject to federal, state and local licensing and permitting requirements.~~

(12) A home of six or fewer residents which otherwise meets the definition of a community residential home ~~with six (6)~~

~~or fewer clients~~ shall be deemed a single-family unit and a noncommercial, residential use. Such a home shall be allowed in single-family or multifamily zoning without approval by the County, provided that such a home ~~in a single-family residential district~~ shall not be located within a radius of one thousand (1,000) feet of another ~~existing~~ such home with six or fewer residents or within a radius of one thousand two hundred (1,200) feet of another existing community residential home. Distance requirements shall be documented by the applicant and submitted to the Zoning Division with the application. All distance requirements pertaining to such a home with six or fewer residents ~~community residential homes~~ shall be measured from the nearest point of the existing such home with six or fewer residents or existing community residential home ~~or area of single-family zoning~~ to the nearest point of the proposed home. (Notwithstanding the foregoing provisions, any application for a community residential home which has been submitted to the Zoning Division for distance separation review on or prior to June 18, 1991, shall be deemed consistent with this section, provided such application could have met the distance separation requirements in effect upon the date of submission of such application.

* * *

(14) A community residential home ~~with more than six (6) clients~~ shall not be located within a radius of one thousand two hundred (1,200) feet of another existing community residential home and shall not be located within five hundred (500) feet of any single-family residential district. Distance requirements shall be documented by the applicant and submitted to the Zoning Division with the application. All distance requirements pertaining to community residential homes shall be measured from the nearest point of the existing community residential home or area of single-family zoning to the nearest point of the proposed home. (Notwithstanding the foregoing provisions, any application for a community residential home which has been submitted to the Zoning Division for distance separation review on or prior to June 18, 1991, shall be deemed consistent with this section, provided such application could have met the distance separation requirements in effect upon the date of submission of such application.)

(15) A bed and breakfast homestay, bed and breakfast inn, or country inn ~~may be permitted, subject to~~shall be subject to the requirements outlined in section 38-1425.

(16) A permanent emergency generator for emergency use only shall be permitted as an ancillary use during an emergency period in all zoning districts, subject to the noise control ordinance and the following requirements:

a. Except as provided in subsection g., below, the generator shall be located in the rear yard or the rear one-half of the lot or parcel;

b. Maximum height—5 feet;

c. Rear setback—5 feet;

d. Side street setback—15 feet;

e. There are no spacing requirements between the principal building and the generator;

f. In residentially zoned districts, the generator shall be screened from view by a wall, fence or hedge. In non-residentially zoned districts, the generator shall meet commercial site plan requirements; and

g. A generator may be installed in the side yard of a lot, subject to the following:

1. Minimum five (5) foot setback when the generator is located in the rear yard of a residential lot;

2. Minimum ~~thirty (30)~~ ten (10) foot setback when the generator is located along the side of the principal residence on a residential lot; or

3. Side yard setback shall comply with the applicable zoning district requirements when the generator is located on a nonresidential zoned lot.

* * *

(18) A screen room shall be permitted with the following limitations: with respect to a Planned Development~~s~~, a screen room may extend up to fifty percent (50%) into the required rear yard;~~,~~ ~~provided that the rear yard is at least twenty (20) feet and the applicant provides a notarized statement from the abutting property owner indicating that he/she does not object to the encroachment.~~ and ~~W~~with respect to property outside ~~of~~ a Planned Development~~s~~, a screen room may extend up to thirteen (13) feet into the required rear yard. Notwithstanding the foregoing, where an alley is present, the screen room shall not be located closer than five (5)

feet to the edge of the alley, and shall not be located within any easement.

* * *

(20) A townhouse project or a triplex project or a quadraplex project which is designed, arranged and constructed so that each dwelling unit may be owned by a separate and different owner, shall be a permitted use, subject to the following requirements:

* * *

e. Off-street parking shall be provided at the rate of two (2) spaces per unit. Parking lots, driveways, and streets within the project shall be designed to discourage through traffic. ~~Driveways shall be located at least ten (10) feet from the buildings.~~

* * *

(26) a. An adult or child day care home shall comply with the following requirements:

1. *Hours of operation*. A day care home may operate twenty-four (24) hours per day.

2. *Fence*. A fence at least four (4) feet in height shall be placed around all outdoor recreation/play areas or outdoor use areas.

3. *Parking spaces*. At least three (3) paved parking spaces shall be provided.

4. *Recreation*. Indoor and ~~O~~outdoor recreation/play areas or outdoor use areas shall be provided as required by the State of Florida.

5. *Separation*. A day care home located in a residential zoning district shall not be located within seven hundred (700) feet of another day care home or one thousand two hundred (1,200) feet of a day care center located in a residential zoning district. Distance requirements shall be documented by the applicant and submitted to the Zoning Division with the application. Distance shall be measured by following the shortest route of ordinary pedestrian travel along the public thoroughfare

from the closest property boundary of a day care home to the closest property boundary of another day care home or shelter.

6. A Type D opaque buffer shall be provided where outdoor recreation areas are adjacent to single-family zoning districts or single-family uses.

b. An adult or child day care center shall comply with the following requirements:

1. *Hours of operation*. A day care center may operate twenty-four (24) hours per day in nonresidential and R-3 zoning districts. In all other residential zoning districts, a day care center shall open no earlier than 6:00 a.m., and close no later than 7:00 p.m.

2. *Location*. A day care center shall be a permitted use in the R-3, U-V (town center), and any professional office, commercial or industrial zoned district, and shall be a special exception in all other districts except R-T, R-T-1, and-R-T 2.

3. *Parking spaces*. Permanent parking shall be provided in accordance with article XI of Chapter 38, except for centers where there is no pick-up or drop-off area available on the property. In these types of centers, one (1) off-street parking space for each five (5) children shall be required.

4. *Recreation*. Indoor and ~~O~~outdoor recreation/play areas or outdoor use areas shall be provided as required by the State of Florida.

5. *Fence*. A fence at least four (4) feet in height shall be placed around all outdoor recreation/play areas or outdoor use areas.

6. *Buffer*. A ten (10) foot wide buffer shall be provided to separate this use from any adjoining residential zoned district. This buffer shall consist of intermittently placed screening at least three (3) feet in height that constitutes thirty (30) percent of the buffer length. The buffer shall consist elsewhere of berms, planted and/or existing vegetation.

7. *Ancillary use*. A day care center may be permitted as a special exception in conjunction with and as an ancillary use to institutional uses which are permitted uses or are

allowed as a special exception, such as, but not limited to, religious institutions, schools, and nonprofit institutional uses.

* * *

(31) Mechanical garage shall mean buildings and premises where the functions and services rendered relate to the maintenance, service, and repair of automobiles, buses, taxi cabs and trucks. However, a mechanical garage does not include buildings and premises where the functions and services rendered are:

~~a. Bodywork;~~

~~b. Painting of automobiles or other vehicles;~~

~~c~~a. Storage of vehicles for the purpose of using parts of such vehicles for sale or repair; or

b~~d~~. Any condition which may be classified as a junkyard.

(32) A special exception is required for agriculturally and residentially zoned lands located in a Rural Settlement (RS) designated on the CP~~P~~ Future Land Use Element Map.

* * *

(36) Except as set forth in subsections 38-79(36)h. and i. below, the raising or keeping of poultry shall comply with the following requirements:

a. no commercial on-site slaughtering in agricultural and residential zoned districts;

b. an agriculturally zoned parcel up to five (5) acres shall be limited to not more than thirty (30) poultry; an amount of poultry in excess of this limit shall require a special exception;

c. an agriculturally zoned parcel more than five (5) acres and less than ten (10) acres shall be limited to not more than one hundred (100) poultry; an amount of poultry in excess of this limit shall require a special exception;

d. an agriculturally zoned parcel ten (10) acres or greater shall have no limit on the number of poultry;

e. the following requirements shall apply in the RCE, RCE-2 and RCE-5 zoning districts:

1. roosters shall be prohibited;

2. all poultry shall be for domestic use only;

3. not more than twelve (12) poultry; an amount of poultry in excess of this limit shall require a special exception;

f. any cage, pen, covered enclosure, barn, or other holding area shall be setback at least thirty feet (30) feet from all property lines and at least thirty (30) feet from the normal high water elevation of any lakes or natural water bodies;

g. excrement and waste shall not be piled or stored within one hundred (100) feet of any residentially zoned district;

h. A bona fide agricultural business or use that is exempt from local government zoning regulations under the Florida Statutes shall not be subject to the requirements of this subsection 38-79(36);

i. The keeping of poultry for an approved 4H or Future Farmers of America (FFA) educational program shall be exempt from the requirements of this subsection 38-79(36), provided the number of poultry does not exceed twelve (12) and the duration of the program does not exceed six (6) months.

~~Poultry raising or keeping shall be a permitted use, provided that it is limited to one hundred (100) birds or less, and the lot is located a minimum of one hundred (100) feet from all residential-zoned districts. All pens, enclosures, or waste disposal activities shall not be located any closer than fifty (50) feet from the property line or one hundred (100) feet from a residential dwelling unit and shall not be located any closer than fifty (50) feet from the normal high water elevation of any natural water body. ("Poultry" shall mean domestic fowl such as chickens, roosters, turkeys, ducks, geese, pigeons, hens, quails, pheasants, and squabs.)~~

(37) Reserved. ~~The raising or keeping of poultry for domestic purposes shall be a permitted use, provided that it is~~

~~limited to thirty (30) birds or less, and the lot is located at minimum of one hundred (100) feet from all residential-zoned districts. All pens, enclosures, or waste disposal activities shall not be located any closer than fifty (50) feet from the property line or one hundred (100) feet from a residential dwelling unit and shall not be located any closer than fifty (50) feet from the normal high water elevation of any natural water body. ("Poultry" shall mean domestic fowl, such as chickens, roosters, turkeys, ducks, geese, pigeons, hens, quails, pheasants and squabs.)~~

* * *

(40) Reserved. ~~The raising or keeping of poultry shall be a permitted use, provided that: I~~it is limited to twelve (12) birds or less, and the lot is located a minimum of one hundred (100) feet from all residential zoned districts, ~~except R-CE-5, R-CE-2, and R-CE zoned districts. All pens, enclosures and waste disposal activities shall be located not closer than fifty (50) feet from the rear or side property line, shall not be located in front of the front setback line, shall not be located any closer than fifty (50) feet from the normal high water elevation of any natural water body, and it shall be located a minimum of one hundred (100) feet from a residential zoned district. ("Poultry" shall mean domestic fowl such as chickens, roosters, turkeys, ducks, geese, pigeons, hens, quails, pheasants and squabs.)~~

(41) Except as set forth in subsections 38-79(41)i. and j. below, the raising or keeping of horses, ponies, donkeys and mules shall comply with the following requirements:

a. no on-site slaughtering, commercial or otherwise;

b. in A-1, A-2, A-R, RCE, RCE-2 and RCE-5 zoning districts not more than one animal per acre for grazing purposes only (not kept in holding areas too); more than one animal per acre for grazing only requires a special exception;

c. in A-1, A-2, A-R, RCE, RCE-2 and RCE-5 zoning districts not more than one animal per acre for grazing purposes; if animals are permanently kept in holding areas such as a barn, paddock, stall, or corral, no more than four (4) animals per conforming lot or parcel, and if more than four (4) animals are kept in holding areas, a special exception shall be required; the requirements for property where animals only graze and where animals are kept in holding areas shall be mutually exclusive;

d. any barn, paddock, stall, or corral shall be setback at least fifteen (15) feet from all property lines and at least thirty (30) feet from the normal high water elevation of any lakes or natural water bodies;

e. manure and compost shall not be piled or stored within thirty (30) feet of any property line;

f. boarding of animals for commercial purposes in agricultural and residential zoned districts requires a special exception, and is subject to the requirements in subsections 38-79(41)b. through e.;

g. boarding of animals for commercial purposes in commercial and industrial zoned districts is permitted, subject to the requirements in subsections 38-79(41)e. and f.;

h. a bona fide agricultural business or use that is exempt from local government zoning regulations under the Florida Statutes shall not be subject to the requirements of this subsection 38-79(41);

i. the keeping of animals for an approved 4H or FFA educational program shall be exempt from the requirements of this subsection 38-79(41), provided that the number of animals does not exceed six (6) and the duration of the program does not exceed six (6) months.

~~The raising or keeping of cows, horses, goats and/or ponies for domestic purposes shall be a permitted use, provided that the total number of animals shall not exceed one (1) animal per acre. The raising of more animals than permitted herein shall require special exception approval. All stables, pens, or corrals shall be no closer than thirty (30) feet from the rear or side property line, shall not be located in front of the front setback line and shall not be located any closer than fifty (50) feet from the normal high water elevation of any natural water body.~~

* * *

(45) Except as provided in subsections (45)a. through f. for boats and subsections (45)g. through j. for recreational vehicles, no boat, regardless of its length, and no recreational vehicle, may be parked, stored, or otherwise kept on a lot or parcel. For purposes of this subsection (45), a "boat" shall not include a canoe sixteen (16) feet or less in length, a sailboat sixteen (16) feet

(16') or less in length with the mast down, a jon boat sixteen (16) feet or less in length, or a personal watercraft (e.g., a jet ski). Also for purposes of this subsection, the length of a boat shall be measured from the front of the bow to the back of the stern, excluding the motor or propeller.

a. The maximum number of boats permitted to be parked, stored or kept on the lot or parcel shall be calculated as follows depending on the size of the lot or parcel:

1. For a lot or parcel less than or equal to one-quarter acre, the maximum total number is two (2) boats, with a maximum number of one (1) boat in the front yard;

2. For a lot or parcel greater than one-quarter acre and less than or equal to one-half acre, the maximum total number is three (3) boats, with maximum number of one (1) boat in the front yard; and

3. For a lot or parcel greater than one-half acre, the maximum total number is four (4) boats, with a maximum number of one (1) boat in the front yard.

b. The registered owner of the boat~~(s)~~ and/or boat trailer~~(s)~~ shall be the owner or lessee of the principal structure at the lot or parcel.

c. No boat or boat trailer may be parked, stored, or kept wholly or partially within the public or private right-of-way, including the sidewalk.

d. No boat may be occupied or used for storage purposes.

e. A boat less than or equal to twenty-four (24) feet in length may be parked, stored, or kept inside a garage, under a carport, in the driveway, in the front yard on an approved surface, in the side yard, or in the rear half of the lot or parcel. An approved surface situated in the front half of the lot or parcel shall be placed immediately contiguous to the driveway, and not anywhere else in the front yard or side yard. Such a boat on the rear half of the lot or parcel shall be screened from view from the right of way when it is parked or stored behind the principal structure, and shall be at least ten (10) feet from the side lot lines and at least five (5) feet from the rear lot line. Setbacks may be reduced to zero (0) feet if a six-foot high fence, wall, or vegetative

buffer, exists along the lot line. (For purposes of this subsection (45), an "approved surface" shall mean a surface consisting of asphalt, gravel, pavers, or concrete.)

f. A boat greater than twenty-four (24) feet in length may be parked, stored or kept inside a garage, under a carport, or in the rear half of the lot or parcel, but not in the driveway or in the front yard. Such a boat on the rear half of the lot or parcel shall be screened from view from the right of way when it is parked or stored behind the principal structure, and shall be at least ten (10) feet from the side lot lines and at least five (5) feet from the rear lot line. Setbacks may be reduced to zero (0) if a six-foot high fence, wall, or vegetative buffer, exists along the lot line. Furthermore, the owner of such a boat shall obtain a permit from the zoning division in order to park, store or keep the boat at the lot or parcel.

g. Not more than one (1) recreational vehicle may be parked, stored or kept on the lot or parcel.

h. The owner of the recreational vehicle shall be the owner or lessee of the principal structure at the lot or parcel.

i. No recreational vehicle may be occupied while it is parked, stored or kept on the parcel.

j. A recreational vehicle may be parked, stored or kept only on an approved surface in the front half of the lot or parcel (behind the front yard setback) or on an unimproved surface in the rear half of the lot or parcel. The recreational vehicle shall not obscure the view of the principal structure from the right-of-way adjoining the front of the subject property, and shall be at least ten (10) feet from the side lot lines and at least five (5) feet from the rear lot line. Setbacks may be reduced to zero (0) feet if a six-foot high fence, wall, or vegetative buffer, exists along the lot line. Furthermore, the owner of such a recreational vehicle shall obtain a permit from the zoning division in order to park, store or keep the recreational vehicle at the lot or parcel.

* * *

(48) Reserved. ~~Commercial aviculture or any aviary shall be as defined in section 38-1 of this chapter and may be permitted as a special exception subject to the following requirements. Each application shall include a site plan and~~

~~corresponding narrative which shall contain the following information:~~

~~a. A dimensionalized site plan (drawn to scale) indicating the location, height and intended use of all existing and proposed structures.~~

~~b. The location, nature and height of proposed security fences, berms, landscaping and other security and noise alleviation structures.~~

~~c. A description of the facility outlining the intended method of operation, including the number, types and characteristics of the birds.~~

(49) Except as set forth in subsections 38-79(49)e. and f. below, the raising or keeping of goats, sheep, lambs, and pigs shall comply with the following requirements:

a. no commercial on-site slaughtering in agricultural and residential zoned districts;

b. not more than eight (8) animals per acre; more than that amount requires a special exception;

c. any barn, paddock, stall, pen, or corral shall be setback at least fifteen (15) feet from all property lines and at least thirty (30) feet from the normal high water elevation of any lakes or natural water bodies;

d. manure and compost shall not be piled or stored within thirty (30) feet of any property line;

e. a bona fide agricultural business or use that is exempt from local government zoning regulations under the Florida Statutes shall not be subject to the requirements of this subsection 38-79(49);

f. the keeping of animals for an approved 4H or FFA educational program shall be exempt from the requirements of this subsection 38-79(49), provided the number of animals does not exceed six (6) and the duration of the program does not exceed six (6) months.

~~The raising or keeping of six (6) or less farm animals such as swine or goats for domestic purposes only shall be a permitted use.~~

(50) To the extent not inconsistent or in conflict with any applicable federal or state law, including Section 163.04, Florida Statutes, solar panels, wind turbines, and other energy devices based on renewable resources may be permitted, provided they comply with the following requirements:

a. Solar panels, wind turbines and other energy devices shall be located at least two hundred (200) feet from any residential use or district or P-D with residential land use approval;

b. Solar panels, wind turbines and other energy devices shall comply with all other applicable laws and regulations.

~~Poultry raising or keeping in excess of one hundred (100) birds, and/or keeping or raising in excess of six (6) swine may be permitted as a special exception, subject to comoplying with the following additional requirements:~~

~~a. All pens, birds, swine, manure and waste disposal activities shall be located at l east one thousand (1,000) feet from any residential zoned lands.~~

~~b. The minimum lot size for poultry and swine operations shall be nine (9) acres.~~

~~c. All pens, birds, swine, manure and waste disposal activities shall be located at least one hundred fifty (150) feet from abutting property and shall be located at least two hundred (200) feet from a public street.~~

~~d. Dead birds and swine shall be disposed of in accordance with applicable health regulations.~~

~~e. Manure and other wastes shall be disposed of in accordance with applicable health regulations.~~

~~f. Flies and insects shall be controlled in accordance with applicable health department regulations.~~

~~g. Poultry shall mean domestic fowl such as chickens, roosters, turkeys, ducks, geese, pigeons, hens, quails, pheasants and squabs.~~

* * *

(51) a. In an A-1, A-2, I-2/I-3, or I-4 zoned district, the location depicted on the approved commercial site plan for this type of use or operation that will have equipment or machines, including a crusher, stockpiles, or loading/unloading activity, but excluding a truck or other motor vehicle or an internal access road, shall be at least one thousand (1,000) feet from the nearest property line of any residential zoned district, residential use, or school.

b. Effective January 30, 2015, this type of use or operation shall be prohibited in the I-1/I-5 zoning district, except as follows:

1. Any application for such use that was submitted but not approved prior to September 26, 2014, may be resubmitted by not later than December 31, 2015, and permitted, provided the parcel or tract that was the subject of the pre-September 26, 2014, application is adjacent to an I-1/I-5 parcel or tract permitted for such use prior to September 26, 2014, and is no closer to the nearest residential zoned district or residential use; or

2. Any application submitted between January 30, 2015, and December 31, 2015, may be permitted, provided the parcel or tract that is the subject of such an application was under common ownership as of September 26, 2014, with the parcel or tract that was permitted for such use prior to September 26, 2014, and is adjacent to the previously permitted parcel or tract, and such non-permitted parcel or tract is no closer to the nearest residential zoned district or residential use.

If an applicant under subsection 38-79(~~77~~51)b. is unable to meet the 1,000 foot distance separation requirement described in subsection 38-79(~~77~~51)a., a site specific noise study may be required indicating that a reduced setback, including any operational and/or engineering controls, will enable the use or operation to comply with the County's noise control ordinance at the closest residential or noise sensitive area property line. Such noise study shall be signed by a licensed professional engineer with experience in sound abatement. If the application is approved, a confirmation study shall be conducted by the owner during the

initial two weeks of full operations at the site. Measurements shall be taken at the nearest residential and noise sensitive area property lines and a report shall be submitted to the County within forty-five (45) days after initiation of the sampling. If the report shows that the measurements exceed permissible limits, the use or operation shall be deemed in violation of subsection 38-79(~~77~~51).

c. The type of use or operation allowed under subsection 38-79(~~77~~51)a. shall meet the following location, design and operational criteria:

1. The use or operation shall be subject to an approved commercial site plan, and shall comply with all applicable laws, ordinances, rules, and regulations, including the air quality rules codified at Article III, Chapter 15, Orange County Code, the noise control ordinance codified at Article V, Chapter 15, Orange County Code, and the vibration requirements in Section 38-1454, Orange County Code.

2. Unconfined or uncontrolled emissions of particulate matter from any crushing activity, screening activity, conveying activity, stockpiling, loading/unloading activity, or vehicular traffic shall be controlled using water suppression systems, dust suppressants, or other engineering controls acceptable to the County.

3. Buffer requirements at any abutting residential or institutional use property line shall be Type A opaque with landscaping, consistent with the landscaping and buffering ordinance codified at Article I, Chapter 24, Orange County Code.

4. Stockpile heights shall not exceed thirty five feet (35') above the finished grade elevation in A-1 and A-2 zoned districts, and shall not exceed fifty feet (50') above the finished grade elevation in I-2/I-3 and I-4 zoned districts.

5. Building heights shall not exceed fifty (50) feet, or thirty-five (35) feet when located within one hundred (100) feet of a residential zoning district or residential designation on the future land use map, or one hundred (100) feet when located more than five hundred (500) feet of a residential zoning district or residential designation on the future land use map, whichever is applicable.

6. Hours of operation shall be limited to 7:00 a.m. to 7:00 p.m. Monday through Friday and 8:00 a.m. to 3:00 p.m. on Saturday at a plant or facility in an A-1, A-2, I-2/I-3, or I-4 zoned district. No such plant or facility may operate on Sunday.

d. The type of use or operation allowed under subsection 38-79(~~77~~51)b. shall meet the criteria described in subsection 38-79(~~77~~51)c.1, 2 and 5, and the following additional criteria:

1. Any portion of the combined parcels or tracts that abuts residential or institutional use property line shall have the following buffer: an eight foot (8') high precast concrete wall with stucco finish, with Textilis Gracilis (slender weaver) or multiplex Silverstripe clumping bamboo planted every four feet (4') along the length of the wall, within three feet (3') of the wall face. Such planted bamboo shall be from seven (7) to ten (10) gallon pots, and the bamboo plants shall be at least ten feet (10') in height at the time of planting.

2. Stockpile heights shall not exceed thirty five feet (35') above the finished grade elevation.

3. Hours of operation shall be limited to 7:00 a.m. to 5:00 p.m. Monday through Friday and 8:00 a.m. to 3:00 p.m. on Saturday. No such plant or facility may operate on Sunday. No such plant or facility may operate a concrete crusher on Saturday. However, the sale of aggregate materials shall be permitted on Saturday.

4. The equipment or machines, including a crusher but excluding a truck or other motor vehicle or an internal access road, shall be located on the parcel or tract that is furthest away from the nearest residential zoned district or residential use, and such equipment shall be located as far away from the nearest residential zoned district or residential use as practical or feasible.

5. No more than one concrete crusher shall be permitted at the plant or facility.

6. The concrete crusher shall incorporate sound attenuation devices as depicted in the approved commercial site plan. The sound attenuation devices shall consist of buffering walls or engineered structures/components along three

(3) sides of the crusher, including sides that face residential and institutional property lines. The fourth side may remain open for access to operate the crusher equipment and accompanying processes. The sound attenuation walls shall be at least three feet (3') higher than the top of the crusher equipment, excluding the conveyors.

e. Notwithstanding anything that may or seem to be contrary in Section 38-77 or this subsection 38-79(~~77~~51), excavation pits shall be a permitted use in the I-1/I-5, I-2/I-3, I-4, A-1, and A-2 zoned districts, subject to complying with all applicable laws, ordinances, rules, and regulations, including the excavation and fill ordinance codified at Chapter 16, Orange County Code. Any crushing activity or crushing equipment at an excavation pit shall comply with the 1,000 foot distance separation requirement described in subsection 38-79(~~77~~51)a.

* * *

(55) Temporary portable storage containers (TPSC) are permitted in a manner that is safe and compatible with adjacent surrounding uses and activities and in compliance with this subsection. A TPSC to be placed on property for less than one hundred eighty (180) days requires a zoning permit. A TPSC to be placed on property for one hundred eighty (180) days or more requires a zoning permit and a building permit. Once a TPSC is removed from property, it may not be replaced for a period of at least one hundred eighty (180) days.

a. *Duration.* A TPSC may be placed on residential property for the following periods of time, but the Zoning Manager may authorize a time extension of the applicable duration period if the property owner demonstrates that extenuating circumstances exist to justify the extension. Upon completion of the work permitted, the PTSC shall be removed within seven (7) days.

1. A TPSC placed in conjunction with moving activities may be permitted for a maximum of fourteen (14) days.

2. A TPSC placed for reconstruction and/or remodeling may be permitted for a maximum of thirty (30) days.

3. A TPSC placed for new construction may be permitted for a maximum of 180 days.

4. Once a permit for a TPSC has expired, or has utilized its maximum duration, or has been removed from the site, no additional permits for a TPSC may be issued until after a period of 180 days has transpired.

b. *Location and size.*

1. A TPSC shall be located a minimum of five (5) feet from any property line. The TPSC shall be placed on an improved area only, not on grassed or landscaped areas.

2. The maximum allowable size for a TPSC on a residential lot is an aggregate sum of one hundred sixty (160) square feet.

3. A TPSC shall not be located in a manner that impairs a motor vehicle operator's view of other vehicles, bicycles or pedestrians utilizing, entering or exiting a right-of-way; or in a manner that obstructs the flow of pedestrian or vehicular traffic.

4. A TPSC shall not be placed within a required landscape or buffer area or areas that are considered environmentally sensitive.

* * *

(59) Reserved. ~~Riding stables, may be permitted as a special exception, provided that no structure, barn, pen or corral housing animals shall be located closer than fifty (50) feet from any property line, and provided that the density shall not exceed one (1) animal per acre of lot area. This restriction shall not apply to grazing areas.~~

* * *

(61) ~~Public and private utilities. Structures, buildings, or uses required for public or private utilities, including but not limited to g~~Gas substations, ~~electric substations,~~ telephone dial exchange buildings, and radio and television substations and towers shall be permitted in industrial districts. Such structures may be permitted in any other district only as a special exception. Security fences, minimum of six (6) feet in height, shall be required around any ~~gas or electric~~ substation. (Electric

substations, also known as distribution electric substations, are addressed under subsection 38-79(81).)

* * *

(63) ~~Such use is subject to the requirements set forth in Ordinance No. 94-26.~~With respect to animal slaughtering, and the confinement of animals for finishing and preparation for slaughter, all storage and processing activities shall be enclosed within a wall or structure constructed and maintained in a manner such that storage, slaughtering, or processing activity is not visible from any public or private street or any point on abutting property lines.

* * *

(68) An automobile service station shall be a permitted use, subject to the following standards:

a. All pump islands shall be set back at least fifteen (15) feet from the right-of-way line, or, where a major street setback distance has been established under article XV of chapter 38, pump islands shall not encroach into the setback distance more than fifteen (15) feet.

b. The overhang of a pump island canopy not attached to the service station structure shall be set back at least five (5) feet from the right-of-way line, or, where a major street setback distance has been established, such overhang shall not encroach into the setback distance more than twenty-five (25) feet.

c. The overhang of a pump island canopy attached to the service station structure shall be deemed part of the structure and subject to building setback requirements.

d. When the service station abuts a residential district, ~~it shall be separated therefrom by a concrete block or solid masonry wall at least six (6) feet in height~~buffers shall comply with the requirements in Section 24-5 of the Orange County Code.

e. Automobile towing may be permitted as an accessory use. However, towed vehicles shall not be stored on site.

(69) ~~A transient rental, single-family dwelling shall be a permitted use.~~ The keeping of animals for an approved 4H or FFA educational program shall be exempt from the requirements of this subsection 38-79(69), provided the number of animals does not

exceed six (6) and the duration of the program does not exceed six (6) months.

(70) Pump islands for dispensation of motor fuel shall be a permitted ancillary use in conjunction with convenience stores. All pump islands shall comply with the requirements of subsection 38-79(68).

* * *

(77) ~~Valet parking service shall be a permitted use, provided that a parking lot associated therewith shall not be permitted.~~ Reserved.

* * *

(81) Distribution electric substations, as that term is defined in Section 163.3208(2), Florida Statutes, shall be permitted in all zoning districts, except in those areas designated as preservation, conservation, or historic preservation on the future land use map or duly adopted ordinance. Security fencing, a minimum of six (6) feet in height, shall be required around the substation. In addition, applicants for such uses shall be required to implement reasonable setback, landscaping, buffering, screening, lighting, and other aesthetic compatibility standards. Vegetated buffers or screening beneath aerial access points to the substation equipment shall not be required to have a mature height in excess of fourteen (14) feet. Unless and until the County adopts reasonable standards for substation siting in accordance with Section 163.3208(3), the standards set forth in Section 163.3208(4), shall apply. Prior to submitting an application for the location of a new distribution electric substation in a residential area, the utility shall consult with the County regarding the selection of the site, and both the utility and the County shall comply with Section 163.3208(6). If the County adopts standards for the siting of new distribution electric substations, the County shall be subject to the timeframes set forth in Section 163.3208(8) for granting or denying a properly completed application for a permit and for notifying the permit applicant as to whether the application is, for administrative purposes only, properly completed and has been properly submitted. ~~A parking lot or parking garage which is accessory to an adjacent office, industrial or commercial use may be permitted as a special exception, provided that such parking facility does not materially interfere with nearby residential uses.~~

* * *

(83) ~~Reserved.~~ To the extent this subsection, or any portion thereof, may not be consistent with or may conflict with an applicable federal or state law, including Section 163.04, Florida Statutes, the applicable federal or state law shall control. Solar panels, wind turbines, and other energy devices based on renewable resources may be permitted as an accessory structure or use. Solar panels that are not free-standing or ground-mounted shall be located on the roof or top of a building or structure, provided they do not exceed the maximum building height requirement. Wind turbines may be only free-standing or ground-mounted. Free-standing and ground-mounted wind turbines and solar panels shall comply with the following additional requirements:

a. The maximum height of wind turbines shall be fifteen (15) feet, and the maximum height of solar panels shall be eight (8) feet;

b. Maximum of one wind turbine per parcel;

c. Free-standing or ground-mounted solar panels shall be shielded by an opaque fence or wall between six (6) feet and eight (8) feet in height;

d. Minimum building setback shall be five (5) feet from side and rear property lines;

e. In a residential area, the square footage of solar panels shall not exceed twenty-five percent (25%) of the living area of the principal structure, and such square footage shall not count towards the allowed square footage for other accessory structures.

f. Wind turbines and solar panels shall be located only in a side or rear yard; and

g. Wind turbines, solar panels and other energy devices shall comply with all other applicable laws and regulations.

* * *

(86) ~~Reserved.~~ Outdoor seating is permitted subject to the following conditions:

a. All lighting at outdoor seating areas shall be directed away from all residential uses or residential zoning districts;

~~a.~~b. Activity at outdoor seating areas shall comply with Chapter 15, Article V (Noise Pollution Control) Orange County Code; and

c. All outdoor seating shall be depicted on site plans.

(87) A single portable food vendor, including a food truck or vehicle, shall be a permitted use on a parcel or lot, subject to the ~~standards~~ requirements in subsections a. through ~~f.~~i., or it may be permitted as a special exception in a C-1 zoned district pursuant to subsection j~~g~~., subject to the ~~standards~~ requirements in subsections ~~g. and~~ a. through ~~e.~~h. and j.:

~~a. No overnight stay;~~

a. Hours of operation shall be limited to between 7:00 a.m. and 12:00 a.m.;

b. Outdoor seating shall be prohibited;

c. Audio equipment and video equipment shall be prohibited;

d. Overnight stay shall be prohibited unless the use is located in a zoning district that permits outdoor storage, in which case the vehicle, truck and any other equipment stored overnight shall be placed in an area that is not visible from a public right-of-way.

~~b.~~e The operation shall not be located within a public right-of-way, and if it abuts a public right-of-way the operator shall first obtain a right-of-way utilization permit for construction of a driveway to provide access to the site, as required by Section 21-239 of the Orange County Code, and the operation ~~it~~ shall be setback a minimum of ten (10) feet from any such public right-of-way;

~~e~~f. Pursuant to Section 31.5-144(a), ~~No s~~ignage is prohibited.

~~d~~g. The operation shall not be located within any driveway, driving aisle or on any parking spaces required pursuant to Article XI of Chapter 38 of the Orange County Code;

~~e~~h. The operation shall not be permitted on any property not containing a licensed and approved business or on any vacant property or vacant building;

i. The vendor shall provide the County with a notarized affidavit from the property owner approving a food vending operation.

~~f~~j. In the C-1 zoning district, the operation shall be located under the canopy of the principal building on-site, except as may be permitted as a special exception under subsection ~~g~~i;

~~g~~k. In the C-1 zoned district, an operation may be permitted as a special exception in an area that is not located under the canopy of the principal building on-site, provided the length and width of the mobile trailer are equal to or greater than seven (7) feet by fourteen (14) feet, such an operation satisfies the standards in subsections a. through ~~e.~~ i., and such an operation is situated at least 1,000 feet from any other such operation (the distance being measured from property line to property line).

If more than one portable food vendor is proposed on a lot or parcel, it shall be deemed an open air market, and may be allowed only if approved by special exception.

* * *

(95) ~~Reserved.~~ Docks shall be permitted, subject to the following standards:

a. Dock construction shall comply with Article IX, Chapter 15, Orange County Code;

b. Any part of the dock that is landward of the normal high water elevation shall have a minimum side yard setback of five feet (5');

c. The dock shall be located on the parcel with the dock owner's residence or it may be located on an abutting parcel that is aggregated with the parcel with the dock owner's residence;

d. An uncovered boardwalk may connect the dock to a principal or accessory structure on the parcel;

e. Any accessory structure attached to an uncovered boardwalk shall meet the required setback from the normal high water elevation; and

f. A covered boardwalk shall constitute an accessory structure that is subject to all applicable laws and regulations, including height and setback requirements.

(96) Wood chipping, wood mulching and composting for commercial purposes shall require special exception approval in the A-1 or A-2 zoning districts. However, when not operated for commercial purposes, wood chipping, wood mulching and composting is permitted provided that no machinery is operated within a one hundred-foot setback from all property lines and within a two hundred-foot setback from any residentially-zoned property. Within all required setbacks, landscaping shall be provided consistent with subsection 24-31(2), as it may be amended from time to time, notwithstanding any references to paved areas. Furthermore, the site shall meet the requirements of chapter 30, article VIII (pertaining to site plans), as it may be amended from time to time, and the performance standards regarding smoke and particulate matter, odor, vibration, glare and heat, and industrial sewage and water as found in article X of this chapter, and the requirements set forth in chapter 15, article V (pertaining to noise), as it may be amended from time to time.

The following minimum yard requirements shall apply for buildings, structures, and materials stored outdoors.

a. Front yards: Fifty (50) feet (except as required by article XV).

b. Side yards: Fifty (50) feet.

c. Rear yards: Fifty (50) feet.

d. Maximum building height: Fifty (50) feet.

* * *

(97) Reserved. ~~Beekeeping shall be a permitted use, provided that beehives are located not less than one hundred (100) feet from any property line.~~

* * *

(101) Home occupation shall be a permitted use, subject to the following conditions, restrictions, and prohibitions:

a. Only the residents of the home may engage in the home occupation. No employees shall be allowed.

b. The 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. Customers shall not be allowed at the home.

d. No signage shall be allowed.

e. The use of commercial vehicles for the home occupation shall be prohibited. Also, no auxiliary trailers or other equipment shall be kept on site unless enclosed in the home or garage.

f. Equipment that is not typically found or used for domestic household use shall be prohibited. No equipment, material, or process shall be used for a home occupation that produces or emits any noise or vibration felt outside the home, lighting or glare visible outside the home, smoke, dust, or other particulate matter; excessive heat or humidity; blight or unsightliness; gas, fumes, or odor, electrical interference; or any nuisance, hazard, or other objectionable conditions detectable at the boundary of the lot, if the home occupation is conducted in the principal or accessory dwelling unit, or outside the dwelling unit. Explosives, highly flammable materials, and toxic or hazardous wastes shall be prohibited. Typical residential utility usages, including trash and recycle quantities, shall not be materially exceeded. The home occupation shall not adversely impact any neighbor's enjoyment of his or her residence.

g. Fabrication of articles or products, such as commonly classified under the term "arts and handicrafts," may be deemed a home occupation, subject to the definition of "home occupation."

h. A cottage food operation, as defined and regulated by Chapter 500, Florida Statutes, shall be deemed a home occupation.

i. Home occupation shall not be construed to include uses such as barber shops, beauty parlors, plant nurseries, tearooms, food processing (with the exception of a cottage food operation, as defined and regulated by Chapter 500, Florida Statutes), restaurants, sale of antiques, commercial kennels, real estate offices, insurance offices, pain management clinics, massage businesses, retail sales, labor pools, employment agencies, dispatch facilities, warehousing, manufacturing, wineries, micro-breweries, commercial retail sale of animals, or any other use not consistent with the home occupation definition, as determined by the Zoning Manager.

* * *

(114) Location and size requirements of accessory buildings and uses in residential and agricultural areas:

a. When an accessory building is used solely as living space (i.e., dens, bedrooms, family rooms, studies) it may be attached to a principal structure by a ~~fully enclosed~~ passageway, provided the accessory building and the passageway comply with the following standards:

* * *

h. A detached accessory building or structure shall be limited to one (1) story with a maximum overall height of fifteen (15) feet above grade. However, an accessory building or structure with a roof slope greater than 2:12 shall not exceed twenty (20) feet of overall height.

* * *

k. Decorative water fountains and flag poles less than thirty-five (35) feet in height shall be permitted in all zoning districts, provided they are located a minimum of five (5) feet from all property lines.

l. A detached structure used for unenclosed covered parking in an office, commercial, or industrial project shall be located a minimum of ten (10) feet from rear property lines and five (5) feet from side property lines. Also, setbacks shall be subject to landscape requirements.

* * *

(118) Only a convenience or grocery store (not ~~a supermarket~~shopping center) shall be a permitted use~~d~~.

* * *

(120) A solid waste management facility, including a landfill, shall comply with chapter 32 of the Orange County Code. In accordance with section 32-216(a)(10) of the Orange County Code, permits shall not be issued for solid waste disposal facilities after July 7, 1992, within the I-2/I-3 industrial districts. A solid waste management facility, including a landfill, transfer station, or incinerator, may be permitted only by special exception. An applicant seeking a special exception for a solid waste management facility shall receive a recommendation for issuance of a solid waste management permit by the environmental protection officer and the development review committee ("DRC") prior to consideration of the special exception by the board of zoning adjustment ("BZA"). Furthermore, an applicant seeking a special exception for a solid waste management facility, must receive a solid waste management permit approval by the board of county commissioners ("BCC") prior to or at the same public hearing at which the special exception is considered.

However, yard trash processing activities that are associated with onsite permitted land clearing, or with onsite normal farming operations that meet the permit exemption requirements in subsection 32-214(c)(9)ii., are exempt from the requirements of this section 38-79(120). Yard trash processing facilities that store no more than twelve thousand (12,000) cubic yards of a total combined volume of yard trash and yard trash derived materials, shall be subject to all of the following alternate requirements:

a. General requirements:

i. The site shall meet the permit exemption requirements in subsection 32-214(c)(9)iii. or iv.

ii. The site shall meet the requirements of chapter 30, article VIII, the Orange County Site Development Ordinance (pertaining to site plans);

iii. Landscaping, including, screening of open storage areas of yard trash and yard trash derived materials, shall be installed in accordance with chapter 24, Orange County Code.

iv. Machinery, when used for yard trash processing related activities, shall not be operated within any required yard, open storage setbacks, or within a two hundred (200) foot setback from any residence or residentially-zoned property. In addition, processing equipment shall be set back from property boundaries a sufficient distance to prevent potential thrown/falling objects from leaving the site.

v. Meet the noise and sound requirements of chapter 15, article V, the Noise Pollution Control Ordinance of Orange County, Florida.

vi. Pile height shall not exceed twenty-five (25) feet in overall height from natural grade.

vii. Burning is prohibited.

viii. Firewood sales and storage as an ancillary use to a yard trash processing facility shall be subject to the requirements of 38-79(120) and not section 38-79(43) (conditions for permitted uses and special exceptions).

ix. Wood chipping, wood mulching, and wood composting operations that store no more than two hundred (200) cubic yards of a total combined volume of yard trash or yard trash derived materials are subject to the requirements set forth in section 38-79(96) and not the requirements set forth in section 38-79(120).

b. In A-1 and A-2 zoned districts:

i. A special exception is required for the processing and open storage of yard trash and yard trash derived materials. The processing and open storage of yard trash and yard trash derived materials is subject to a setback of one hundred fifty (150) feet of any property boundary line. ~~The applicant may request a variance, as provided in section 30-43, to reduce this setback, but in no case shall be less than one hundred (100) feet from any property boundary line;~~

~~iii~~ii. Commercial parking, for yard trash processing related activities, shall not be located within twenty-five (25) feet of any property boundary line; and

~~iv~~iii. The hours of operation for yard trash processing related activities shall be limited to between 7:00 a.m. and 7:00 p.m.;

~~v~~iv. In addition to any other landscaping requirements, outer perimeter buffering shall be Type C, opaque buffer, as outlined in section 24-5, Orange County Code;

c. For yard trash processing related activities located on sites within I-1/I-5, I-2/I-3, and I-4 zoned districts, with all abutting property being located within I-1/I-5, I-2/I-3, I-4, or C-3 zoned districts, the use shall be permitted. The processing and open storage of yard trash and yard trash derived materials is allowed, but not within fifty (50) feet of any property boundary line.

d. For yard trash processing related activities located on sites within I-1/I-5, I-2/I-3, and I-4 zoned districts, with any abutting property not being located within I-1/I-5, I-2/I-3, I-4, or C-3 zoned districts, a special exception is required. The processing and open storage of yard trash and yard trash derived materials is allowed, but not within fifty (50) feet of any property boundary line of an abutting property within the I-1/I-5, I-2/I-3, I-4, or C-3 zoned districts, nor within one hundred fifty (150) feet of all other property boundary lines.

(121) A single-family dwelling unit in conjunction with a commercial use which is accessory ~~and attached~~ to a principal building shall only be occupied by the owner, operator, or employee of the business.

* * *

(123) With regard to retention/detention ponds (SIC Group #1629), this use pertains to stormwater ponds on R-2 and R-3 and agricultural-zoned property to be used in conjunction with adjacent ~~commercial~~ nonresidential developments. Retention ponds are permitted in all other zoning districts in conjunction with on-site development.

* * *

(125) Model homes may be permitted, subject to the requirements of Section 30-83, including the following: model homes may be permitted on not more than twenty percent (20%) of the lots in a single family residential development with an

approved preliminary subdivision plan, or phase thereof, but in no event may the number of model homes exceed five (5) in the subdivision, or phase thereof; model homes shall be situated on contiguous lots or clustered within a readily identified area; and, subject to the requirements of subsection 38-79(5), not more than one model home may be used as a sales offices/center. ~~Model homes shall be permitted in accordance with Resolution No. 95-M-20 and shall only be in conjunction with an approved preliminary subdivision plan.~~

* * *

(132) A ~~P~~parks~~s~~ and recreation area~~s~~ owned ~~and~~ or operated by a nonprofit organization~~s~~, may be permitted only by special exception, except for parks and recreations areas (i) approved in conjunction with a preliminary subdivision plan (Chapter 34, Orange County Code), or (ii) located inside a platted residential subdivision and notarized letters of no objection are submitted by the President of the Homeowner's Association (if applicable) and all abutting property owners.

* * *

(140) Permitted by right or by special exception pursuant to Future Land Use Element Policies ~~3.2.21~~FLU8.7.5 and ~~3.2.21.1~~FLU8.7.6 and as identified in chapter 38, article XVII, public school siting regulations.

(141) Future Land Use Element Policy ~~3.2.21.2~~FLU8.7.7 ~~prohibits~~ restricts public schools in an area designated rural/agricultural on the Future Land Use Map.

* * *

(145) a. The site development standards for a UR-3 district shall be the same as those for the R-3 residential district, except for student housing developments.

b. The student housing development shall satisfy the following site development standards:

* * *

3. For purposes of density calculation to determine consistency with the Comprehensive ~~Policy~~ Plan, four ~~one~~ bedrooms shall count as one ~~one-half~~ dwelling unit (4 ~~1~~ bedrooms = 1 ~~½~~ dwelling unit).

* * *

(176) A car rental agency shall be a permitted use in conjunction with hotels, motels, and time shares only, provided that parking spaces required for the principal use shall not be used by the car rental agency, the number of parking spaces used by the car rental agency shall not exceed ten percent (10%) of the required number for the principal use, and the rental vehicles shall not be parked in the front of the property or in front of the principal structure.

In all other respects, Section 38-79 shall remain unchanged.

Section 10. Amendments to Section 38-160 ("Site and building requirements [for the A-R District"). Section 38-160 is amended to read as follows:

Sec. 38-160. Site and building requirements.

(a) The following are the minimum site and building requirements for the A-R district:

(1) Minimum lot area: Two and one-half (2½) acres or one hundred and eight thousand, nine hundred (108,900) square feet.

(2) Dwelling floor area:

a. Conventional dwelling: Nine hundred fifty (950) square feet minimum living area.

b. ~~Tenant dwelling: Minimum of five hundred (500) square feet of living area.~~

c. Mobile home: See the definition of "mobile home" at Section 38-1. ~~article VI, division 13~~.

Section 11. Repeal of Section 38-576 ("Definitions [for Mobile Home Districts]").

Section 38-576 is repealed, and reserved for future use:

Sec. 38-576. ~~Definitions.~~ Reserved.

~~The following words, terms and phrases, when used in this division, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:~~

~~*Mobile home* shall mean a structure transportation in one (1) or more sections, which structure is eight (8) body feet or more in width and over thirty five (35) feet in length, and which structure is built on an integral chassis and designed to be used as a dwelling when connected to the required utilities, and includes the plumbing, heating, air conditioning, and electrical systems contained therein. A mobile home shall be constructed to the United States Department of Housing and Urban Development standards.~~

~~*Recreational vehicles, see* article XIII.~~

Section 12. Amendments to Section 38-601 ("Intent and Purposes of [R-L-D Residential Low-Density] District"). Section 38-601 is amended to read as follows:

Sec. 38-601. Intent and purpose of district.

The intent and purpose of the R-L-D residential low-density district are as follows:

* * *

(3) To implement policies in the housing element of the C~~c~~omprehensive ~~policy~~ P~~p~~lan which include provisions for innovative housing designs and a mixture of dwelling types to provide the consumer with alternative housing opportunities.

* * *

In all other respects, Section 38-601 shall remain unchanged.

Section 13. Amendments to Section 38-806 ("[P-O Professional Office District] Site Development Standards"). Section 38-806 is amended to read as follows:

Sec. 38-806. Site development standards.

Site development standards are hereby established in order to insure adequate levels of light, air, coverage and density; to maintain and enhance locally recognized values of community appearance and design particularly through the combination of smaller parcels into functional sites; to promote functional compatibility of uses; to promote the safe and efficient circulation of pedestrian and vehicular traffic; and to otherwise provide for orderly site development and protect the public health, safety, and general welfare:

* * *

(12) Refuse or solid waste ~~disposal~~ areas shall ~~be provided and shall not be located in any required front yard or in any required side yard adjacent to a district wherein residential uses are permitted. Such storage areas shall be shielded by a landscaped screen or fencing at least six (6) feet in height which shall be at least fifty (50) percent opaque when viewed from any point along the district boundary.~~ comply with the following:

a. Shall not be located within any front yard;

b. Shall not be located within any landscape buffer;

c. Shall be located at least five (5) feet from any side or rear property line;

d. Shall be located at least fifteen (15) feet from any side street; and

e. Disposal areas shall be screened in accordance with and otherwise comply with Sections 9-560 and 24-4(f), Orange County Code.

* * *

In all other respects, Section 38-806 shall remain unchanged.

Section 14. Amendments to Section 38-826 ("Intent and Purpose [of C-1 Retail Commercial District]"). Section 38-826 is amended to read as follows:

Sec. 38-826. Intent and purpose.

The intent and purpose of this C-1 retail commercial district are as follows: this district is composed of lands and structures used primarily for the furnishing of selected commodities and services at retail. This district will be encouraged:

* * *

(3) Where adequate public facilities and services are available, as defined in the C~~c~~omprehensive ~~policy~~ P~~p~~lan;

* * *

(5) To a limited extent in rural settlements throughout the county to meet the needs of an identified community, or in growth centers as defined in the Cecomprehensive ~~policy~~ Pplan.

In all other respects, Section 38-826 shall remain unchanged.

Section 15. Amendments to Section 38-830 ("Performance Standards [for C-1 Retail Commercial District]"). Section 38-830 is amended to read as follows:

Sec. 38-830. Performance standards.

Performance standards are hereby established in order to assure adequate levels of light, air, building space, lot coverage, and density; to maintain and enhance locally recognized values of community appearance and design; to encourage the combination of smaller parcels into functional sites; to accommodate multiple ownership of land and improvements within the development; to provide for collective ownership of common areas; to promote functional compatibility of uses; to provide the safe and efficient circulation of pedestrian and vehicular traffic; and to otherwise provide for orderly site development standards in order to protect the public health, safety and general welfare.

* * *

(10) Maximum building height: Fifty (50) feet, except thirty-five (35) feet within one hundred (100) feet of any ~~all~~ residential use or district~~s~~.

* * *

(12) Refuse or solid waste ~~disposal~~ areas shall ~~not be located within any front yard setback and shall be located at least (5) feet from the side or rear property line. A six foot high masonry wall shall be provided around any refuse or solid wate areas located in any required yard adjacent to any residential districts.~~ comply with the following:

a. Shall not be located within any front yard;

b. Shall not be located within any landscape buffer;

c. Shall be located at least five (5) feet from any side or rear property line;

d. Shall be located at least fifteen (15) feet from any side street; and

e. Disposal areas shall be screened in accordance with and otherwise comply with Sections 9-560 and 24-4(f), Orange County Code.

* * *

In all other respects, Section 38-830 shall remain unchanged.

Section 16. Amendments to Section 38-855 ("Performance Standards [for C-2 General Commercial District]"). Section 38-855 is amended to read as follows:

Sec. 38-855. Performance standards.

Performance standards are hereby established in order to assure adequate levels of light, air, building space, lot coverage, and density; to maintain and enhance locally recognized values of community appearance and design; to encourage the combination of smaller parcels into functional sites; to accommodate multiple ownership of land and improvements within the development; to provide for collective ownership of common areas; to promote functional compatibility of uses; to provide the safe and efficient circulation of pedestrian and vehicular traffic; and to otherwise provide for orderly site development standards in order to protect the public health, safety and general welfare.

* * *

(9) Maximum building height: Fifty (50) feet, ~~generally;~~ except thirty-five (35) feet within one hundred (100) feet of any ~~all~~ residential use or district~~s~~.

* * *

(11) Refuse or solid waste areas shall ~~not be located within any front yard setback and shall be located at least five (5) feet from the side or rear property line.~~ comply with the following:

a. Shall not be located within any front yard;

b. Shall not be located within any landscape buffer;

c. Shall be located at least five (5) feet from any side or rear property line;

d. Shall be located at least fifteen (15) feet from any side street; and

e. Disposal areas shall be screened in accordance with and otherwise comply with Sections 9-560 and 24-4(f), Orange County Code.

* * *

In all other respects, Section 38-855 shall remain unchanged.

Section 17. Amendments to Section 38-880 ("Performance standards [for C-3 Wholesale Commercial District]"). Section 38-880 is amended to read as follows:

Sec. 38-880. Performance standards.

Performance standards are hereby established in order to assure adequate levels of light, air, building space, lot coverage, and density; to maintain and enhance locally recognized values of community appearance and design; to encourage the combination of smaller parcels into functional sites; to accommodate multiple ownership of land and improvements within the development; to provide for collective ownership of common areas; to promote functional compatibility of uses; to provide the safe and efficient circulation of pedestrian and vehicular traffic.

* * *

(9) Maximum building height: Seventy-five (75) feet, except thirty-five (35) feet within one hundred (100) feet of any ~~all~~ residential use or district~~s~~.

(10) Refuse and solid waste areas shall ~~not be located within any front yard setback and shall be located at least five (5) feet from the side or rear property line, ten (10) feet from adjacent residential district.~~ comply with the following:

a. Shall not be located within any front yard;

b. Shall not be located within any landscape buffer;

c. Shall be located at least five (5) feet from any side or rear property line;

d. Shall be located at least fifteen (15) feet from any side street; and

e. Disposal areas shall be screened in accordance with and otherwise comply with Sections 9-560 and 24-4(f), Orange County Code.

* * *

In all other respects, Section 38-880 shall remain unchanged.

Section 18. Repeal of Sections 38-904, 38-929, 38-979, and 38-1005 regarding Support Free-Standing Retail Uses in I-1A, I-1/I-5, I-2/I-3, and I-4 Zoned Districts. Sections 38-904, 38-929, 38-979, and 38-1005 are repealed, and reserved for future use:

Sec. 38-904. ~~Support free-standing retail uses.~~ Reserved.

~~The following uses shall be permitted as free-standing structures or within structures to provide support retail services to the employees and/or customers of the I-1A district. Performances standards for these uses shall be in accordance with sections 38-1007 and 38-1008.~~

~~(1) Convenience stores.~~

~~(2) Gas stations.~~

~~(3) Hotels/motels.~~

~~(4) Restaurants, including drive-thru restaurants.~~

* * *

Sec. 38-929. ~~Support free-standing retail uses.~~ Reserved.

~~The following uses shall be permitted as free-standing structures or within structures to provide support retail services to the employees and/or customers of the I-1/I-5 district. Performances standards for these uses shall be in accordance with sections 38-931 and 38-932.~~

~~(1) Convenience stores.~~

~~(2) Gas stations.~~

~~(3) Hotel/motels.~~

~~(4) Restaurants, including drive-thru restaurants.~~

* * *

Sec. 38-979. ~~Support free-standing retail uses~~. Reserved.

~~The following uses shall be permitted as free-standing structures or within structures to provide support retail services to the employees and/or customers of the I-2/I-3 district. Performances standards for these uses shall be in accordance with sections 38-1007 and 38-1008.~~

~~(1) Convenience stores.~~

~~(2) Gas stations.~~

~~(3) Hotels/motels.~~

~~(4) Restaurants, including drive-thru restaurants.~~

* * *

Sec. 38-1005. ~~Support free-standing retail uses.~~ Reserved.

~~The following uses shall be permitted as free-standing structures or within structures to provide support retail services to the employees and/or customers of the I-4 district. Performance standards for these uses shall be in accordance with sections 38-1007 and 38-1008.~~

~~(1) Convenience stores.~~

~~(2) Gas stations.~~

~~(3) Hotels/motels.~~

~~(4) Restaurants, including drive-thru restaurants.~~

Section 19. Amendments to Sections 38-907, 38-932, 38-981, and 38-1008 regarding Performance Standards in I-1A, I-1/I-5, I-2/I-3, and I-4 Zoned Districts. Sections 38-907, 38-932, 38-981, and 38-1008 are amended to respectively read as follows:

Sec. 38-907. Performance standards.

(a) Within each I-1A industrial district, the ~~minimum yard~~ requirements for each lot are established as follows:

(1) Floor area ratio (FAR) shall not exceed ~~0.50~~0.75.

* * *

(7) Maximum building height: Fifty (50) feet~~,~~; except ~~but~~ thirty-five (35) feet ~~when~~ within one hundred (100) feet of any residential use or ~~zoning~~ district. ~~or residential designation on the future land use map, and one hundred (100) feet when five hundred (500) feet or more from a residential zoning district or residential designation on the future land use map~~

* * *

Sec. 38-932. Performance standards.

(a) Within each I-1/I-5 industrial district, the ~~minimum yard~~ requirements for each lot are established as follows:

(1) Floor area ratio (FAR) shall not exceed ~~0.50~~0.75.

* * *

(6) Maximum building height: Fifty (50) feet~~,~~; except ~~but~~ thirty-five (35) feet ~~when~~ within one hundred (100) feet of any residential use or ~~zoning~~ district. ~~or residential designation on the future land use map, and one hundred (100) feet when five hundred (500) feet or more from a residential zoning district or residential designation on the future land use map.~~

* * *

Sec. 38-981. Performance standards.

Within each I-2/I-3 industrial district, the ~~minimum yard~~ requirements for each lot are established as follows:

(1) Floor area ratio (FAR) shall not exceed ~~0.50~~0.75.

* * *

(7) Maximum building height: Fifty (50) feet~~,~~; except ~~but~~ thirty-five (35) feet ~~when~~ within one hundred (100) feet of any residential use or ~~zoning~~ district. ~~or residential designation on the future land use map, and one hundred (100) feet when five hundred (500) feet or more from a residential zoning district or residential designation on the future land use map.~~

* * *

Sec. 38-1008. Performance standards.

(a) Within each I-4 industrial district, the ~~minimum yard~~ requirements for each lot/parcel are established as follows:

(1) Floor area ratio (FAR) shall not exceed ~~0.50~~0.75.

* * *

(6) Maximum building height: Fifty (50) feet~~,~~; except ~~but~~ thirty-five (35) feet ~~when~~ within one hundred (100) feet of any residential use or ~~zoning~~ district. ~~or residential designation on the future land use map, and one hundred (100) feet when five hundred (500) feet or more from a residential zoning district or residential designation on the future land use map.~~

* * *

Section 20. Amendments to Section 38-1026 ("In General [West State Road 50 Corridor Overlay District]"). Section 38-1026 is amended to read as follows:

Sec. 38-1026. In general.

(a) *Intent and purpose.* This division provides specific design standards for the West State Road 50 Corridor Overlay

District with the purpose of promoting and facilitating intergovernmental coordination along west State Road 50.

* * *

(6) The overlay district created by this division is consistent with the economic element of the ~~county~~ Ceomprehensive ~~policy~~ Pplan, which is designed to accommodate and promote economic growth, and which specifically calls for the use of such special zoning districts.

* * *

In all other respects, Section 38-1026 shall remain unchanged.

Section 21. Amendments to Section 38-1051 ("Intent and Purpose [of South Orange Avenue Corridor Overlay District]"). Section 38-1051 is amended to read as follows:

Sec. 38-1051. Intent and purpose.

This division creates a zoning overlay district to be known as the "South Orange Avenue Corridor Overlay District" for the purpose of promoting and facilitating an enhanced corridor along designated segments of South Orange Avenue and Hanzel Avenue with certain zoning prohibitions and restrictions to ensure compatibility of land uses within and outside the district, especially as between areas within and outside of municipal boundaries.

* * *

(4) The overlay district created by this division is consistent with the Orange County Comprehensive ~~Policy~~ Plan, including but not limited to its economic element, which is designated to accommodate and promote economic growth, and which specifically calls for the use of such special zoning districts, and its intergovernmental coordination element, which require or encourage the coordination of land uses between the county and municipalities.

* * *

In all other respects, Section 38-1051 shall remain unchanged.

Section 22. Amendments to Sections 38-1059, 38-1060 and 38-1061 regarding the Conway Road/Hoffner Avenue Corridor Overlay District. Sections 38-1059, 38-1060 and 38-1061 are amended to respectively read as follows:

Sec. 38-1059. Intent and purpose.

This division creates a zoning overlay district to be known as the "Conway Road/Hoffner Avenue Corridor Overlay District" for the purpose of promoting and facilitating an enhanced corridor along designated segments with certain zoning prohibitions and restrictions to ensure compatibility of land uses within and outside the district, especially as between areas within and outside of municipal boundaries.

* * *

(4) The overlay district created by this division is consistent with the Orange County Comprehensive ~~Policy~~ Plan, including but not limited to its economic element, which is designed to accommodate and promote economic growth, and which specifically calls for the use of such special zoning districts, and its intergovernmental coordination element, which require or encourage the coordination of land uses between the county and municipalities.

* * *

Sec. 38-1060. Location and area.

A special land-use overlay district is hereby established, to be known as the Conway Road/Hoffner Avenue Corridor Overlay District (the "district"). The district shall be comprised of all unincorporated parcels or lots lying in whole or in part within five hundred (500) feet of either edge of the right-of-way for Conway Road, all between the northern boundary of the intersection of Conway Road and Curry Ford Road on the north and the northern boundary of the intersection of Conway Road and S.R. 528 (the Beeline Expressway) on the south; and all unincorporated parcels or lots lying in whole or in part within five hundred (500) feet of either edge of the right-of-way of Hoffner Avenue, all between the eastern boundary of the intersection of Hoffner Avenue and Conway Road on the west and the western boundary of the intersection of Hoffner Avenue and Semoran Boulevard on the east. A map depicting the boundaries of the district is attached as

Exhibit "A" to Ordinance No. ~~2015-19~~ 2016-19, and shall be available for inspection in the office of the clerk to the board of county commissioners.

Sec. 38-1061. Applicability; conflicts; responsibility of applicant.

* * *

(d) *Responsibility of applicant for development permit.* Everyone who applies for a development permit to construct, reconstruct, renovate, alter, or enlarge a land use, building or structure shall print on the front page of the application or plans the following in capital letters that are at least two inches high: "THIS APPLICATION [OR THESE PLANS] RELATE TO THE CONWAY ROAD/HOFFNER AVENUE CORRIDOR OVERLAY DISTRICT, WHICH IS CODIFIED AT SECTION 38-1059 THROUGH SECTION 38-1065 OF THE ORANGE COUNTY CODE. ~~WAS ESTABLISHED UNDER AND IS SUBJECT TO ORDINANCE NO. 2003-20, ADOPTED BY THE BOARD OF COUNTY COMMISSIONERS ON DECEMBER 9, 2003, AS AMENDED BY ORDINANCE NO. 2015-19, ADOPTED BY THE BOARD ON OCTOBER 20, 2015.~~

Section 23. Amendments to Section 38-1080 ("Intent and Purpose [of State Road 436/State Road 50 Corridor Overlay District]"). Section 38-1080 is amended to read as follows:

Sec. 38-1080. Intent and purpose.

This division creates a zoning overlay district to be known as the "State Road 436/State Road 50 Corridor Overlay District" for the purpose of promoting and facilitating an enhanced corridor along designated segments with certain zoning prohibitions and restrictions to ensure compatibility of land uses within and outside the district, especially as between areas within and outside of municipal boundaries.

* * *

(d) The overlay district created by this division is consistent with the Orange County Comprehensive ~~Policy~~ Plan, including, but not limited to its economic element, which is designed to accommodate and promote economic growth, and which specifically calls for the use of such special zoning districts,

and its intergovernmental coordination element, which require or encourage the coordination of land uses between the county and municipalities.

* * *

In all other respects, Section 38-1080 shall remain unchanged.

Section 24. Amendments to Section 38-1085 ("Intent, purpose, area, standards, and consistency [of Transit Oriented Development (TOD) Overlay Zone]"). Section 38-1085 is amended to read as follows:

Sec. 38-1085. Intent, purpose, area, standards, and consistency.

(1) *Intent and purpose.* The transit oriented development (TOD) overlay zone is hereby established with the purpose of establishing an area located within one-half (½) mile of commuter rail stations in unincorporated Orange County within which mixed-use, pedestrian-friendly development is encouraged. The intent of the TOD overlay zone is to reduce reliance on the automobile and to promote lively, pedestrian-friendly development that will serve as an attractive place to live, work, shop and recreate. <u>These TOD overlay zone regulations shall be administered by the county zoning division, except that any non-zoning aspects of these regulations shall be administered by the appropriate county department or division.</u>

* * *

In all other respects, Section 38-1085 shall remain unchanged.

Section 25. Amendments to Sections 38-1091, 38-1093 and 38-1097 regarding the Lake Avalon Rural Settlement Commercial Design Overlay District. Sections 38-1091, 38-1093 and 38-1097 are amended to respectively read as follows:

Sec. 38-1091. Purpose and intent.

This division provides specific development standards for the LARS Overlay District. These development standards are consistent with the Orange County Comprehensive ~~Policy~~ Plan. As directed by Future Land Use Element Policy ~~2.4.7~~<u>FLU6.3.7</u>, these

development standards are meant to supplement the criteria established in Policy ~~2.1.7~~FLU6.2.4 which ensure that new development within the Lake Avalon Rural Settlement ("LARS") reinforces that community's rural character. These LARS Overlay District regulations shall be administered by the county zoning division except that any non-zoning aspects of these regulations shall be administered by the appropriate department or division.

* * *

Sec. 38-1093. Acceptable commercial uses.

The intent of the Lake Avalon Rural Settlement Commercial Design Overlay District is to preserve the unique rural quality of life the residents presently enjoy. Therefore, only small offices and commercial development consistent with policies contained within the future land use element of the Orange County Comprehensive ~~Policy~~ Plan relating to commercial development within a rural settlement, shall be permitted, except as may be prohibited by section 38-1094.

* * *

Sec. 38-1097. Development within the LARS district*;* allowable intensities~~,~~; planned development (PD) required.

(a) *Development intensity.* Allowable intensities within the LARS Overlay District shall be consistent with the Future Land Use Element Policy ~~2.4.5~~FLU6.3.5. Any new commercial/office development shall have a maximum 0.15 ~~0.14~~ floor area ratio (FAR) per parcel, consistent with FLU6.2.9.

* * *

Section 26. Amendments to Section 38-1227 ("Variances [P-D Planned Development District]"). Section 38-1227 is amended to read as follows:

Sec. 38-1227. ~~Variances~~. Waivers.

(a) ~~Variances~~ For good cause shown, waivers from the minimum standards set forth in this section may be granted by the board of county commissioners. However, such ~~variances~~ waivers must be specified in conjunction with the land use plan, otherwise all

standards shall apply. ~~Variance~~ Waiver requests shall be identified in the public hearing notice.

(b) ~~Variances~~ Waivers requested after approval of the land use plan must be approved by the board of county commissioners at a public hearing, after notification of abutting property owners.

Section 27. Amendments to Section 38-1236 ("Communication towers in planned developments"). Section 38-1236 is amended to read as follows:

Sec. 38-1236. Communication towers in planned developments.

* * *

(d) A communications tower located within a planned development shall be processed pursuant to the PD approval process and as described in subsections (a), (b) and (c) above. If any standard of subsection 38-1427(d)(2)d or (d)(3) cannot be met, the applicant must request a waiver. The DRC shall review the waiver request and make a recommendation to the Board of County Commissioners.

Section 28. Amendments to Sections 38-1340 and 38-1344 regarding Community Village Centers, in General. Sections 38-1340 and 38-1344 are amended to respectively read as follows:

Sec. 38-1340. Intent and purpose.

The intent and purpose of this division are as follows:

(1) To implement the community village center policies of the future land use element of the county ~~e~~Comprehensive ~~policy p~~Plan by authorizing the board of county commissioners to designate an area or areas from time to time as "community village centers" and to apply thereto the procedures, guidelines and standards set forth in this division.

(2) To provide for an integrated, unified pattern of development that takes into account the unique qualities and characteristics of the designated area.

(3) To ensure that development occurs in the

designated area according to the use, design, density, coverage and phasing as stipulated on an approved development plan.

(4) To preserve natural amenities and environmental assets in the designated area.

(5) To encourage an increase in the amount and use of open space areas in the designated area by permitting a more economical and concentrated use of building areas than would be possible through conventional zoning districts.

(6) To provide maximum opportunity in the designated area for application of innovative concepts of site planning in the creation of aesthetic living, shopping and working environments and civic facilities on properties of adequate size, shape and location.

(7) To establish development guidelines, design guidelines and site development standards for the designated area which promote the physical and functional integration of a mixture of land uses as required by the community village center policies of the ~~c~~Comprehensive ~~policy p~~Plan.

(8) To provide that these community village center regulations shall be administered by the county zoning division, except that any non-zoning aspects of these regulations shall be administered by the appropriate department or division.

Sec. 38-1344. Approval procedure.

Except to the extent a developer has complied with the procedure set forth below, the procedure for obtaining approval of a CVC planned development shall be as follows:

* * *

(3) *Development plan.*

a. After payment of an application fee to the zoning department, the applicant shall submit to the engineering division fourteen (14) copies of a development plan and support data and information, all of which is consistent with section 38-1347. The development plan may cover all or a portion of the approved land use plan. If the applicant proposes to create a subdivision, a preliminary subdivision plan shall be processed concurrently with the development plan. The engineering division shall review the development plan to determine whether all necessary and appropriate data and information has been provided.

b. The applicant shall then submit fourteen (14) copies of the development plan to the engineering department. The development shall then be scheduled for review by the DRC.

c. The DRC shall review the development plan to determine whether:

1. It is consistent with the approved land use plan;

2. It is consistent with applicable laws, ordinances, rules and regulations;

3. The development, and any phase thereof, can exist as a stable independent unit; and

4. Existing or proposed utility services and transportation systems are adequate for the uses proposed.

5. It is consistent with CVC provisions requiring a single, unified and integrated development plan.

~~d. After review by the DRC, the development plan shall be scheduled for a public hearing before the BCC. The BCC shall approve the development plan, approve it subject to conditions, or disapprove it.~~

Section 29. Amendments to Section 38-1370 ("Intent and purpose [of Four Corners Community Village Center guidelines and Standards]"). Section 38-1370 is amended to read as follows:

Sec. 38-1370. Intent and purpose.

The intent and purpose of these guidelines are as follows:

(1) To implement the "Four Corners Community Village Center" special area study~~, consistent with future land use element policy 3.1.42 of the comprehensive policy plan~~.

(2) To supplement and complement the CVC guidelines and standards set forth in division 6, article VIII, of this chapter.

(3) To ensure that the Four Corners CVC, which was located within the Windermere Rural Settlement with a residential density of only one (1) unit per acre prior to the adoption of the community village center objectives and policies, is developed

with nonresidential and residential uses in a responsible and careful manner.

(4) To preserve the major visual amenity in the area of the Four Corners CVC, Lake Down.

(5) To protect the environmental integrity of Lake Down, an Outstanding Florida Water.

(6) To create a pedestrian-friendly, mixed-use, village center.

(7) To ensure that each development in the village center reflects an architectural character that is harmonious with development in the Four Corners CVC area.

(8) To create a village with a pedestrian scale and sense of place.

(9) To create a pedestrian-friendly village center through the use of sidewalks, shade trees, mini-parks, and careful design of vehicular parking areas.

(10) To design streetscapes that are pedestrian in scale, safe, secure, and offer protection from climatic elements.

(11) To develop an effective, design-criteria framework to guide, develop, and control signage lighting and architectural character.

(12) To provide open space as a social gathering place for residents, visitors, and workers.

(13) To create a distinct streetscape with a defined edge along the major roads.

(14) To maintain a pedestrian scale in terms of building height.

(15) To provide that these four corners (CVC) regulations shall be administered by the county zoning division, except that any non-zoning aspects of these regulations shall be administered by the appropriate department or division.

Section 30. Amendments to Sections 38-1380, 38-1381, 38-1382, 38-1383, 38-1388 and 38-1389 regarding the Village Planned Development Code. Sections 38-1380, 38-1381, 38-1382, 38-1383, 38-1388 and 38-1389 are amended to respectively read as follows:

Sec. 38-1380. Intent and purpose.

The intent and purpose of this division are as follows:

(1) To implement the goals, objectives and policies of the village land use classification of the Orange County Comprehensive Plan, future land use element;

(2) To ensure development in accordance with the adopted specific area plan (SAP) for any particular village;

(3) To promote the development of neighborhoods, villages and community centers that reflect the characteristics of a traditional southern town; where streets are convenient and pedestrian-friendly, and where parks, open space and civic facilities are a focus for public activity;

(4) To provide for development that has a variety of land uses and housing types in a compact integrated community pattern which creates opportunities for pedestrian, bike and transit use;

(5) To promote development that utilizes a neighborhood focus as a building block to provide a sense of place and community;

(6) To provide a system of fully connected streets and paths which provide interesting routes and encourage pedestrian and bicycle use by being spatially defined by buildings, trees, and lighting;

(7) To provide a system of public open space in the form of accessible squares, greens and parks whose frequent use is encouraged through placement and design;

(8) To enhance the character of the neighborhoods through the use of building massing, building placement, materials and architectural features which create interesting spaces and pedestrian scaled street frontages.

(9) To provide that these Village PD Code regulations shall be administered by the zoning division, except that any non-zoning aspects of these regulations shall be administered by the appropriate department or division.

Sec. 38-1381. Applicability.

* * *

(b) This village development code shall complement all applicable laws, ordinances, rules and regulations, including the guidelines and standards for planned developments. In case of conflict with this village development code and article II, chapter 18 (the Fire Prevention Code), the fire prevention code shall govern and control. However, to the extent this village development code may conflict with or may not be consistent with other applicable laws, ordinances, rules or regulations, including the guidelines and standards for planned developments, this village development code shall govern and control (and waivers from chapter 38, articles VII and VIII shall not be required for those provisions in conflict with the village P-D code). For the purposes of this village development code, the words "shall" or "must" are mandatory; the word "should" is directive but not necessarily mandatory; the word "may" is permissive. The word "includes" shall not limit a term to the specific examples, but is intended to extend its meaning to all other instances and circumstances of like kind or character. For purposes of SAP and Village Code consistency, the Planning Manager or his/her designee shall review architectural and/or project design content and guidelines.

* * *

Sec. 38-1382. General development guidelines and standards.

(a) *Consistency with the village specific area plan (SAP).* The adopted SAP for any particular village established the land uses for all property within the village. The SAP shall also establish the public facilities lands required by each neighborhood and the village center. Development within any specific neighborhood may be initiated only when the adequate public facilities requirements in accordance with chapter 30, article XIV, division 2, have been met. Any proposed amendments to the land uses as established by the SAP are subject to the following conditions:

(1) Any amendment to the village planned development land use plan shall be subject to approval by the board of county commissioners in accordance with this division and Future Land Use Element Policy ~~6.1.6VI~~ 4.1.7. Waivers from the general development guidelines and standards within this Division may also be considered and approved at a public hearing before the board of county commissioners at the time of

Preliminary Subdivision Plan or development Plan, and processed as a nonsubstantial change to the planned development land use plan

* * *

(5) Public school sites must be consistent with the size and locations designated on the approved village SAP. School site locations and configurations, other than those indicated on the village SAP, may be considered provided they are consistent with the provisions of Future Land Use Element P~~p~~olicy FLU4.1.5.1~~6.1.4~~ of the ~~Orange County~~ Comprehensive Plan~~, future land use element~~.

* * *

(c) *Village upland greenbelt.* In accordance with the adopted SAP for any particular village, a village upland greenbelt area has been provided consistent with requirements of the village land use classification of the Comprehensive Plan, future land use element. Transfer of development rights may be applied to property designated as the village upland greenbelt in accordance with chapter 30, article XIV, division 3, of this Code. Development within the upland greenbelt area shall be limited to a density of one (1) residential dwelling unit per ten (10) acres and may include road crossings, parks, golf courses, stormwater management areas and passive recreational uses such as bike/pedestrian and equestrian trails. In order to accomplish the purpose of the upland greenbelt, development may be clustered at an overall gross density of one (1) unit per ten (10) acres on lots no smaller than one-fourth (1/4) acquire, subject to the requirements of chapter 37, article XVII, of this Code regarding individual on-site sewage disposal. Such clustering shall only be permitted on upland areas within the upland greenbelt subject to dedication of development rights for the balance of the property and rezoning to planned development. Development rights shall be dedicated to Orange County at the time of platting. Dedication of the development rights will limit the use of the property to agriculture as permitted in the county A-1 zoning district. A twenty-five-foot setback at the village perimeter is required for any PD located along the perimeter of a village except where the boundary of the PD is adjacent to a village greenbelt in which case no setback shall be required.

* * *

(h) *Streets.* Standards for the streets within any particular village shall be consistent with the intent as set forth in the transportation section of an adopted SAP. Variations to these standards may be considered, on a case-by-case basis, by the development review committee (DRC) as part of the land use plan or preliminary subdivision plan/development plant approval.

* * *

(2) All streets, alleys, and pedestrian pathways shall connect to other streets within the village and to existing or planned streets outside the village in accordance with the approved village SAP. Cul-de-sacs, T-turnarounds, or dead end streets are not permitted unless otherwise approved by the county or where their use is in connection with preserving wetlands, specimen trees, or ecologically significant vegetative communities. To encourage the development of connected and integrated communities within each neighborhood and village center, the twenty-five-foot setback on the perimeter of the PD is not required for those PDs that are internal to a neighborhood or village center. The twenty-five-foot setback is required for only that portion of the perimeter of the PD that is located on a perimeter of a ~~neighborhood or~~ village ~~center~~.

* * *

Sec. 38-1383. Aquifer recharge.

* * *

(1) *Water quality.* In accordance with ~~f~~Future ~~l~~Land ~~u~~Use ~~e~~Element ~~p~~Policy FLU4.2.1 ~~6.1.7~~, and subsection 38-1382(d) of this division, all village planned developments shall be required to hookup to central sewer service. In addition, the village classification limits high risk land uses, such as heavy industrial and those uses which store chemicals requiring technical containment, except those uses otherwise allowed in the neighborhood center or village center.

* * *

Sec. 38-1388. Neighborhood center district.

* * *

(e) *Development standards.* The following standards shall apply to all development within the neighborhood center district. General design standards shall be submitted as part of the PD land use plan for all development within the neighborhood

center. Specific design standards and architectural details shall be submitted with the preliminary subdivision plan/development plan for development within the neighborhood center. The design standards shall include site-specific requirements for all building facades including maintenance, ancillary structures, and out-parcel structures. The standards shall outline architectural requirement for pedestrian-scaled trim and detailing, exterior wall materials, building entry prominence, articulation of facades, fenestration, bays, roof styles (no flat roofs), roof materials, and massing. Architectural elements, including colonnades, pergolas, columns, awnings, gables, dormers, porches, balconies, balustrades, and wall plane projections, shall be addressed. Prominent, formalized, and shaded pedestrian connections between adjacent commercial uses shall be emphasized as well as pedestrian scaled and uninterrupted visual interest along the street face.

Modifications to these ~~guidelines~~ standards may be permitted where alternative development practices will reinforce the planning and urban design principles established by the goals, objectives and policies of the village land use classification, the adopted SAP and this village development code. Any such modifications to these ~~guidelines~~ standards shall be identified separately in bold on the village PD land use plan, PSP or development plan for approval by the board of county commissioners at a public hearing.

* * *

(14) *Distance separation from religious institutions and schools for alcoholic beverages in neighborhood centers.* Notwithstanding the provisions of section 38-1415(a), in order to promote a mixed use in neighborhood centers, the distance separation requirements for establishments selling alcoholic beverages for on-site consumption only, as specified in section 38-1415~~(s)~~, shall be reduced to one-hundred (100) feet for restaurants with on-premises consumption only for those establishments possessing a 1COP, ~~or~~ 2COP, or 4COP SRX state liquor license~~,~~. ~~and pursuant to F.S. § 562.45, are licensed as restaurants, and derive at least fifty-one (51) percent of their gross revenues from the sale of food and nonalcoholic beverages pursuant to F.S. ch. 509.~~ Such establishments may sell ~~only~~ beer, ~~and/or~~ wine and liquor ~~and only~~ for consumption in the restaurant only after the hour of 4:00 p.m. on days school is in session. The method of measurement shall be as provided in section 38-1415(~~b~~c). A proposed religious use or school ~~church proposing to locate in or around the neighborhood center~~ may voluntarily waive the distance

separation requirement for establishments selling alcoholic beverages for on-site consumption (that otherwise meet the requirements of this subsection) by executing a waiver. Such waiver must be acceptable to the county in form and substance and shall be kept on file in the Zoning Division. All other provisions under section 38-1415 shall apply. The county may place other restrictions related to signage, outdoor seating, and outdoor amplification as part of the PD approval process to ensure compatibility with schools.

(15) *Subsequent establishment of a religious institution ~~church~~ or school.* Whenever a vendor ~~or alcoholic beverage has procured a license permitting the same~~ of alcoholic beverages has procured a license permitting the sale of alcoholic beverages and, thereafter, a ~~church~~ religious institution or school is ~~shall be~~ established within one hundred (100) feet of the vendor of alcoholic beverages located within a neighborhood center, the establishment of such ~~church~~ religious institution or school shall not cause the previously licensed site to discontinue use as a vendor of alcoholic beverages.

Sec. 38-1389. Village center district.

* * *

(c) *Development standards.* The following development standards shall apply to all development within the village center district.

* * *

(2) *Permitted uses*:

* * *

a. The following criteria shall be used in determining whether to approve or deny a substantial change:

1. The change shall be consistent with the ~~c~~Comprehensive ~~policy p~~Plan and/or specific area plan.

2. The change shall be similar and compatible with the surrounding area and shall be consistent with the pattern of surrounding development.

3. The change shall not act as a detrimental intrusion into the surrounding area.

4. The use shall be similar in noise, vibration, dust, odor, glare, heat producing and other characteristics that are associated with the majority of uses currently permitted in the zoning district.

* * *

Section 31. Amendments to Sections 38-1390.18, 38-1390.28 and 38-1390.29 regarding the Horizon West Town Center Planned Development Code. Sections 38-1390.18, 38-1390.28 and 38-1390.29 are amended to respectively read as follows:

Sec. 38-1390.18. Preliminary Subdivision Plan Review.

Except for mass grading, ~~P~~preliminary Subdivision Plan (PSP) review shall be required only for single family residential and other developments ~~lands~~ within the Town Center where the PD/UNP elements described in Section 38-1390.15 have been deferred. Procedural requirements and specifications for PSPs shall be as set forth in chapter 34, articles III and IV, and modified through the provisions and additional requirements identified below. The Development Review Committee (DRC) shall review all PSPs for consistency with the approved PD/UNP, Town Center PD Code and other applicable County Code requirements not otherwise contained herein.

* * *

Sec. 38-1390.28. Bonus for unified neighborhood plan.

Within each Neighborhood Planning Area, the maximum number of residential dwelling units permitted by the Town Center SAP and Comprehensive Plan may not be exceeded, except as may be permitted through PD/UNP review and the provision of density and intensity bonuses as specified herein. Density and intensity bonuses may be acquired in accordance to the conditions prescribed below. A density bonus program is hereby establish, which will allow district development programs to exceed thresholds established through the Comprehensive Plan. A "bonus bank" was established with the adoption of the Town Center SAP,

which includes a total of one thousand five hundred forty (1,540) dwelling units. This bonus may be earned by completing the PD/UNP review and approval process.

(a) *Bonus for PD/UNP Review and Approval.* An applicant may request an increase to the PD/UNP development program by a pro rata share of the number of dwelling units reserved in the bonus bank. The share shall be determined by the ratio of the percentage of net developable land area included in the applicable PD/UNP, to the net developable area included in the Town Center SAP. This ratio is applied to the total number of units reserved in the "bank" to determine the number of bonus units that may be awarded. The approval of the PD/UNP with the bonus units shall confirm the bonus. In addition, the bonus units may be assigned to any district included in the PD/UNP, and may be converted to nonresidential floor area created through a conversion/equivalency table. However, nonresidential floor area created through a conversion of bonus units shall not be assigned to any Urban Residential district in which nonresidential uses are not permitted.

(b) *Density-Intensity Equivalency Rates*. Earned bonuses may be used to increase development entitlements based on land use equivalency rates determined from the ~~8~~th-most current edition of ~~Edition~~ the Institute of Transportation Engineers (ITE) Manual.

Sec. 38-1390.29. Transfer criteria.

(a) As part of the approval of an PD/UNP, subsequent substantial amendment to the PD/UNP, or PSP approval, development units and the required seven (7) percent open space may be transferred from any district within the UNP to another land use district within the same PD/UNP under the following conditions:

(1) The use is allowable in the receiving district;

(2) The transfer is consistent with the Principles and Goals, Objectives and Policies of the Town Center and Comprehensive Plan;

(3) The transfer will contribute to fulfilling the desired characteristics of the applicable NPA; and

(4) The transfer does not exceed the adopted PD/UNP Development Program Element.

(b) Transfer of development units or the open space requirements from one (1) approved PD/UNP to another PD/UNP is allowed under the following conditions:

(1) The transfer occurs as part of a simultaneous approval (or amendment) of both affected PD/UNPs; and

(2) The transfer represents a simultaneous decrease and increase in the development programs of the respective PD/UNPs, such that the PD/UNPs pro-rata share of the overall development program for the Town Center SAP is not increased or decreased.

(c) Simultaneous increases and decreases may allow for the exchange of residential uses for an equivalency of office and/or retail use based upon ~~the~~ an equivalency ~~rates set forth herein~~ matrix as approved on the approved PD/UNP.

(d) To facilitate the creation of an interconnected open space network throughout the Town Center comprised of linear parks, trails, wildlife corridors, etc., open space transfers shall be permitted as a non-substantial change. Non-substantial changes are limited to: no more than twenty (20) percent of the seven (7) percent open space set aside in each district; and, the transfer must be to another district within the same PD/UNP. Proposed open space transfers that exceed twenty (20) percent of the standard set aside or that would effect a transfer to a site external to the PD/UNP are classified as a substantial change request requiring approval of the Board of County Commissioners. Such transfers are not justification for an increase in the number of dwelling units or nonresidential uses on sending parcels. Receiving parcels are not required to be located adjacent to sending parcels.

(e) Transfer credits for upland greenbelts and wetlands internal to the Town Center are available at the following rates:

- One (1) acre of upland greenbelt:

  Residential - 5.8 dwelling units.

  Nonresidential - 8,700 square feet.

- One (1) acre of wetland:

Residential - 0.3 dwelling units.

Nonresidential - Not applicable.

Section 32. Amendments to Sections 38-1391, 38-1391.1 and 38-1391.2 regarding the Buena Vista North District Standards. Sections 38-1391, 38-1391.1 and 38-1391.2 are amended to respectively read as follows:

Sec. 38-1391. In general<u>; purpose and intent</u>.

(a) *BVN district established.* A special design overlay district is hereby established to be known as the Buena Vista North District ("BVN district"). Generally speaking, the BVN district is located in southwest Orange County in the area situated east of Apopka-Vineland Road and Amy Road, north of Lake Street, south of Fenton Street, and west of Interstate 4, inclusive of those rights-of-way (except for I-4). The BVN district's boundaries are identified on the map, which is incorporated herein by reference as Appendix A [available for inspection in the office of the county clerk].

(b) *Purpose and intent.* This Division 9 is intended to provide specific design standards for the BVN district with the purpose of promoting a diverse mixed-use community that applies imagination, innovation, and variety, by focusing on unique design principles and encouraging creative solutions that accomplish the following:

(1) Foster higher quality developments through unique design elements, including building materials, signs, and landscaping, etc.

(2) Guide future developments as a transition area between higher intensity non-residential development and the lower density single-family residential homes north of the BVN district.

(3) Encourage unified developments where small individual parcels of land can be collectively planned for infrastructure improvements, coherent land use mix and unified physical appearance.

(4) Minimize incompatible surroundings and visual clutter, which prevent orderly community development and reduce community property values.

(5) Sustain the comfort, health, tranquility, and contentment of residents with a desirable environment.

(6) Balance the man-made system with the natural environment, through mitigation and enhancement of impacted natural resources.

(7) To provide that these BVN district regulations shall be administered by the zoning division, except that any non-zoning aspects of these regulations shall be administered by the appropriate department or division.

Sec. 38-1391.1. Development within BVN District.

(a) *Planned development required.* In order to ensure quality development and maintain the desired characteristics of the BVN district, all new development and redevelopment within the BVN district shall be designated as planned development (PD), except as noted in subsection (b) below. The PD development plans shall follow the criteria and procedures set forth in divisions 1 through 5, article VIII, chapter 38, unless otherwise specified herein.

In addition, all projects occurring in the BVN district, but outside of an activity center land use classification, shall establish a building architectural design concept or set of design guidelines as part of the planned development process. Architectural design concept (for a single building) or design guidelines (for a multiple building complex) shall address, at a minimum, the following mass, facades (primary and secondary as defined by the Orange County Commercial Building Architectural Standards and Guidelines for Commercial Buildings and Projects), finish material, colors, roof forms, and signs. The Planning Manager or his/her designee shall review for architectural and/or project design content and guidelines.

* * *

Sec. 38-1391.2. Development density and intensity; conversion.

(a) *Compliance with future land use map designation.* Permitted land uses and allowable densities/intensities within the BVN district shall be consistent with the future land use map designation in the ~~c~~Comprehensive ~~policy p~~Plan. Any proposed changes to the future land use map designation shall follow the comprehensive plan amendment procedures for application, review and approval.

* * *

Section 33. Amendments to Section 38-1400 ("Intent and purpose [of Lake Willis Neighborhood Buffering and Design Guidelines]"). Section 38-1400 is amended to read as follows:

Sec. 38-1400. Intent and purpose.

The Lake Willis Neighborhood Buffering and Design Guidelines are intended to protect and shield the Lake Willis single-family residential enclave from the impacts of approved residential and non-residential developments within the international drive activity center. These buffering and designs guidelines are in accordance with International Drive Activity Center Element ~~p~~Policy ID5.1.3 of the ~~international drive activity center element of the 2000-2020~~ 2010-2030 ~~c~~Comprehensive ~~policy p~~Plan. These Lake Willis regulations shall be administered by the county zoning division, except that any non-zoning aspects of these regulations shall be administered by the appropriate department or division.

Section 34. Amendments to Section 38-1408 ("Fences and walls"). Section 38-1408 is amended to read as follows:

Sec. 38-1408. Fences and walls.

(a) A fence shall be uniform in construction, design, material, color and pattern, and the fence material shall be a standard material conventionally used by the fence industry. No fence or wall shall be erected so as to encroach into the fifteen (15)-foot for residentially and agriculturally zoned property, or twenty-five (25) foot for commercially and industrially zoned property corner triangle at a street intersection unless otherwise approved by the county engineer.

(b) A fence of any style or material shall maintain a clear view triangle from the right-of-way line for visibility from driveways on the lot or on an adjacent lot. The clear view triangle area for a driveway is formed on each side of a driveway by measuring a distance of fifteen (15) feet along the right-of-way and fifteen (15) feet along the edge of the driveway.

(~~b~~c) Pillars, columns, and posts may extend up to twenty-four (24) inches above the height limitations provided such pillars and posts are no less than ten (10) feet apart.

(~~c~~d) No barbed wire, razor wire or electrically charged fence shall be erected in any location on any building site in residential or office districts except for security of public utilities, provided such use is limited to three (3) strands and eighteen (18) inches, a minimum of six (6) feet above the ground. In addition, walls and fences erected in any office or residential district shall not contain any substance such as broken glass, spikes, nails, barbs, or similar materials designed to inflict pain or injury to any person or animal.

(~~d~~e) (1) Barbed wire or razor wire may be incorporated into or as an extension of the height of permitted walls and fences in commercial and industrial districts provided such use is limited to three (3) strands and eighteen (18) inches, a minimum of six (6) feet above the ground. The maximum height of the wall or fence with the barbed wire or razor wire shall be ten (10) feet.

(2) Barbed wire may be permitted by special exception in residential and office districts as an extension of the height of permitted walls and fences along the property line separating the residential or office district from a commercial or industrial district where it is documented by substantial competent evidence that such an additional security measure is warranted or appropriate. The barbed wire fencing shall be subject to the criteria and dimensions set forth in subsection (~~d~~e)(1).

(3) Barbed wire and similar field fencing shall be allowed on agriculturally zoned properties only when used for agricultural purposes; i.e., groves, grazing and boarding of animals.

(~~e~~f) In no event shall barbed wire or razor wire be placed so as to project outward over any sidewalk, street or other public way, or over property or an adjacent owner.

(~~f~~g) Except in R-CE, R-CE-2, and R-CE-5, fences and walls in residential and office districts may be created as follows:

(1) Limited to a maximum height of four (4) feet in the front yard setback. However, fences or walls located on

arterial and collector roadways are limited to a maximum height of six (6) feet in the front yard setback.

(2) Limited to a maximum height of eight (8) feet in the side and rear yards.

(3) May be increased in height when the property is contiguous to a commercially or industrially zoned property along the common property lines pursuant to the height regulations for commercial and industrial districts.

(4) May be permitted on vacant property, subject to less than fifty-percent (50%) opacity.

(~~g~~h) Fences and walls in agricultural, R-CE, R-CE-2, and R-CE-5 districts may be erected as follows:

(1) Limited to a maximum height of six (6) feet within the front yard setback. However, for chain link type fences on agricultural zoned properties, the maximum height is ten (10) feet;

(2) Limited to a maximum height of eight (8) feet in the side and rear yards. However, on agriculturally zoned properties, the maximum height is ten (10) feet;

(3) In agricultural districts, these regulations shall not apply to agricultural property used for bona fide agricultural purposes.

(~~h~~i) Fences and walls in commercial and industrial districts may be erected as follows:

(1) Limited to a maximum height of ~~six (6)~~eight (8) feet within the front yard setback.

(2) Limited to a maximum height of eight (8) feet in the side and rear yards.

(3) When a lot or parcel abuts two (2) intersecting streets and the rear property line of the lot or parcel abuts the side property line of another lot or parcel, no fence of wall in excess of four (4) feet high along the rear property line shall be allowed within twenty-five (25) feet abutting the street right-of-way line unless the adjacent property owner sharing the

common lot line submits a notarized letter stating that he has no objection and there are no site distance visibility concerns.

(~~i~~j) On any reversed corner lot (corner lot where the rear yard abuts the side of another lot) ~~abutting the side of another lot,~~ no part of any fence greater than four (4) feet in height shall be located within the required front yard setback of the adjacent lot as measured from the common corner of each lot. ~~twenty-five (25) feet of the common lot line shall be nearer the side street lot line than the required front yard of such abutting lot unless the adjacent property owner sharing the common lot line submits a notarized letter staing that he has no objection and there are no site visibility concerns.~~ A maximum eight (8) foot high fence may be permitted along the hypotenuse of the triangle formed from the common corner. Fencing greater than four (4) feet in height but less than eight (8) feet in height within the visual triangle may be installed, provided there is no adjacent driveway.

(~~j~~k) On a lakefront lot, a fence or wall within the ~~rear yard~~ lake setback area shall be limited to a maximum height of four (4) feet., ~~unless notarized letters from adjacent property owners are submitted stating that they have no objections to an increased fence height. However, the increased fence height is still subject to other applicable fence height limitations in the Orange County Code.~~

(l) Where grade elevations along adjoining properties differ, fence/wall height shall be measured from the finished ground floor elevation of the property having the higher ground floor elevation.

(m) In all zoning districts, a fence may be permitted on a vacant parcel, provided the fence has less than fifty percent (50%) opacity (except for a construction fence).

Section 35. Amendments to Section 38-1414 ("Prohibited areas for sale of alcoholic beverages—Generally"). Section 38-1414 is amended to read as follows:

Sec. 38-1414. Prohibited areas for sale of alcoholic beverages—Generally.

(a) *Definition.* In this section, unless the context requires otherwise, "package sale vendor" means a person licensed pursuant to The Beverage Law [F.S. chs. 561-568] to sell alcoholic beverages regardless of alcoholic content; however, a package sale

vendor does not include: (i) a business operation, in regards to beer and malt beverages (as defined by F.S. § 563.01) and wine (as defined by F.S. § 564.01) for consumption off premises; or (ii) any bona fide hotel, motel or motor court in possession of a special license issued in accordance with F.S § 561.20(2)(a)1.

(b) *County package sale vendor distance requirements established.* For all of those certain areas of land in the county not part of any municipality which lie within five thousand (5,000) feet of a package sale vendor's place of business as established, located and licensed, regardless of whether such established place of business is located within or outside of any municipality, no other new or relocated package sale vendor shall be permitted to open and/or start the business of package sales within that distance.

(c) *Package sales within distance requirements restricted.* The purpose of creating the distance requirements mentioned in subsection (b) of this section is to provide and require that no package sale vendor which is located or proposes to locate in the unincorporated portion of the county outside of any municipality shall be permitted to operate at a new location within a distance of five thousand (5,000) feet of the location of any package sale vendor which is both preexisting at the time of the package sale vendor's application to operate at the new location and is located in any area of the county either unincorporated or within a municipality in the county.

(d) *Criteria.* The following criteria shall be met in order for a package sale vendor to obtain county zoning approval or commence package sales at a new location:

The County shall be satisfied that the new location is not within five thousand (5,000) feet of any establishment located and/or licensed package sale vendor's place of business. However, if all established located and/or licensed package sale vendors within five thousand (5,000) feet of the new location relinquish or commit to relinquish, in writing with a notarized statement, the right to carry out package sales at the respective location, the County may issue zoning approval contingent upon such other location(s) ceasing package sales prior to the commencement of package sales at the new location. The land use and zoning of the proposed location shall allow package sales. Once County zoning approval to allow package sales at the new location is issued, failure to commence the package sales business shall not be a basis for the County to terminate or revoke zoning approval for package sales, provided the applicant undertakes and continue to make

good-faith efforts necessary to construct and/or open the applicant's new location for package sales.

(~~d~~e) *Distance requirements not applied to renewal, change in name or ownership, or change in certain licenses.* The distance requirements set forth above in subsections (b) and (c) shall not be applied to the location of an existing package sale vendor when there is:

~~(i)~~ (1) A renewal of an existing license;

~~(ii)~~ (2) A transfer in ownership of an existing license;

~~(iii)~~ (3) A change in business name; or

~~(iv)~~ (4) A change in a state issued 4COP license for an existing package and lounge business, which did not choose to forego package sales, to a 3PS license, and any decrease in the numerical designation of a state issued license which is of the same series (type); provided the physical location of the package sale vendor establishment does not change. No increase in the numerical designation of a series (type) of state issued license which is of the same series (type) shall be permitted at or for a location (new or existing) except in compliance with the provision of sections 38-1414 and 38-1415.

(~~e~~f) *Measurement of distances.* The distances provided in this section shall be measured by following the shortest route of ordinary pedestrian travel along the public thoroughfare from the proposed main entrance of a package sale vendor who proposes to operate his place of business and is licensed under The Beverage Law [F.S. chs. 561-568] to the main entrance of any other package sale vendor who is operating such a business.

(g) *Exemption for on-premises consumption only.*

(1) In those situations in which the holder of an alcoholic beverage license pursuant to the Beverage Law [F.S., Chapters 561-568] has the ability to use such license for both on-premises and off-premises consumption sales, such licensee may choose to forego off-premises consumption sales for the location of business requested; such licensee would not be deemed a package sale vendor under this section for such a location and would not be subject to the distance requirements cited in subsections (b) and (c) above. To ensure that the public, safety and

welfare are preserved, any licensee choosing to forego package sales for off-premises consumption, and thereupon not be deemed a package sale vendor, shall agree in writing with a notarized statement, as a condition of obtaining zoning approval, to prominently display at all times within the establishment in the vicinity of the main cash register a sign with letters no smaller than three (3) inches and printed in a legible style, stating "No Package Sales."

(2) Upon any relocation of such licensee's business in which the distance requirements of subsection (b) above are met, such licensee may resume package sales for off-premises consumption and would not be required to display the aforementioned sign.

Section 36. Amendments to Section 38-1415 ("Same—Distance from churches, schools and/or adult entertainment establishments). Section 38-1415 is amended to read as follows:

Sec. 38-1415. Same—Distances from religious institutions, ~~churches,~~ schools and/or adult entertainment establishments.

(a) Places of business for the sale of alcoholic beverages containing more than three and two-tenths (3.2) percent of alcohol by weight for consumption on or off the premises may be located in the unincorporated areas of the county in accordance with and subject to this chapter and specifically those zoning regulations regulating the location of places of business selling alcoholic beverages containing fourteen (14) percent or more alcohol by weight. No such place of business shall be established within one thousand (1,000) feet of an established ~~church~~ religious institution or school; except as follows:

(1) such a place of business that is licensed as a restaurant and derives at least 51 percent of its gross revenues from the sale of food and nonalcoholic beverages, pursuant to Chapter 509, Florida Statutes, and the sale of alcoholic beverages is for on-premises consumption only, may be established no closer than five hundred (500) feet of the school, except that such a place of business that is located on property designated as Activity Center Mixed Use in the County's comprehensive plan may be established no closer than three hundred (300) feet of the school; or

(2) such a place of business that is located on property designated as Activity Center Mixed Use, does *not* derive at least 51 percent of its gross revenues from the sale of food and nonalcoholic beverages, and is licensed for the sale of alcoholic beverages for on-premises consumption only, may be established no closer than five hundred (500) feet from the school, except that such a place of business may be established no closer than three hundred (300) feet from the school, provided that the County, pursuant to Section 562.45(2)(a), Florida Statutes, approves the location as promoting the public health, safety, and general welfare of the community under proceedings as provided in Section 125.66(4), Florida Statutes.

These distance separations ~~provided this prohibition~~ shall not apply to vendors of beer and wine containing alcohol of more than one (1) percent by weight for consumption off the premises only.

(b) No ~~commercial establishment~~ place of business that in any manner sells or dispenses alcohol for on-premises consumption shall be established within two hundred (200) feet of an adult entertainment establishment, as defined in section 38-1.

(~~b~~c) Distance ~~from~~ from such a place of business to a religious institution, ~~church or~~ school, or adult entertainment establishment shall be measured by following the shortest route of ordinary pedestrian travel along the public thoroughfare from the main entrance of the place of business to the main entrance door of the religious institution,~~church,~~ ~~and, in the case of a~~ the main entrance door of the school (except as may be otherwise provided by applicable state law), ~~to the nearest point of the school grounds in use as part of the school facilities,~~ or the main entrance door of the adult entertainment establishment.

(~~c~~d) The location of all existing places of business subject to this section shall not in any manner be impaired by this section, and the distance limitation provided in this section shall not impair any existing licensed location heretofore issued to and held by any such vendor nor shall such vendor's right of renewal be impaired by this section; provided, however, that the location of any such existing license shall not be transferred to a new location in violation of this section.

(~~d~~e) *Distance requirements not applied to renewal, change in name or ownership, or change in certain licenses.* The distance requirements set forth above in subsections (a) and (b)

shall not be applied to the location of an existing vendor when there is:

~~(i)~~ (1) A renewal of an existing license;

~~(ii)~~ (2) A transfer in ownership of an existing license;

~~(iii)~~ (3) A change in business name; or

~~(iv)~~ (4) A change in a state issued 4COP license for an existing package and lounge business that did not choose to forego package sales, to a 3PS license, and any decrease in the numerical designation of a state issued license which is of the same series (type);

provided that the physical location of the vendor establishment does not change. No increase in the series (type) of state issued license shall be permitted at or for a location (new or existing) except in compliance with the provisions of sections 38-1414 and 38-1415.

(~~e~~f) *Subsequent establishment of ~~church~~ religious institution or school.* Whenever a vendor of alcoholic beverages has procured a license ~~certificate~~ permitting the sale of alcoholic beverages and, thereafter, a ~~church~~ religious institution or school is established within the applicable distance separation requirement set forth in subsection (a)~~one thousand (1,000) feet of the vendor of alcoholic beverages~~, the establishment of such ~~church~~ religious institution or school shall not be cause for the discontinuance or classification as a nonconforming use of the business as a vendor of alcoholic beverages. ~~Furthermore, i~~In such a situation, an existing vendor licensed for on-site consumption may only increase a 1 COP license (on-site beer consumption) to a 2 COP (on-site beer and wine consumption). Also, in the event a vendor for on-site consumption only ceases to operate at the location after the religious institution or school is established within the applicable distance separation requirement set forth in subsection (a), a new vendor with an equal or lesser series license for on-site consumption only may be established at the same location within five years of the date when the previous vendor ceased to operate at the location. The burden of proving that the requirements for opening a new establishment have been met rests with the new vendor for on-site consumption.

(g) *Proposed location prior to building permit/construction.* When a location for an alcoholic beverage license is submitted to the Zoning Division for review and there is no building permit for the use at the location, the applicant shall stake the location of the main entrance and submit a certified survey demonstrating the distances to all established religious institutions, schools and adult entertainment establishments. A construction sign as defined in Chapter 31.5 which includes reference to the sale and consumption of alcoholic beverages shall be erected on the site within thirty (30) days of zoning approval and shall not be removed until permanent on site signage is erected.

Section 37. Repeal of Section 38-1416 ("Permits for paving of parking lots"). Section 38-1416 is repealed and reserved:

Sec. 38-1416. ~~Permits for paving of parking lots.~~ Reserved.

~~Permits shall be required for paving of parking lots of fifteen hundred (1500) square feet or over in size, in any commercial or industrial district.~~

Section 38. Amendments to Section 38-1425 ("Bed and breakfast homestays, bed and breakfast inns and country inns"). Section 38-1425 is amended to read as follows:

Sec. 38-1425. Bed and breakfast homestays, bed and breakfast inns and country inns.

Bed and breakfast homestays, bed and breakfast inns and country inns may be allowed to operate in the unincorporated area of the county as permitted uses and/or as special exceptions in the zoning districts specified below, provided that they comply with the performance standards and conditions specified in this section. (Any structure designated as a local historic landmark by the Orange County Historical Museum, under present or any future criteria established by the county for such purpose, or as listed on the National Register of Historic Places, shall be given special consideration to operate as a bed and breakfast homestay or inn as a permitted use and/or a special exception.) In addition, no bed and breakfast homestay, bed and breakfast inn, or country inn shall be located in any platted residentially zoned subdivision unless the subject site is designated commercial or industrial on the Future

Land Use Map of the County's Comprehensive ~~Policy~~ Plan or if approved as part of a Planned Development (P-D) Land Use Plan.

* * *

In all other respects, Section 38-1425 shall remain unchanged.

Section 39. Amendments to Section 38-1426 ("Accessory dwelling units"). Section 38-1426 is amended to read as follows:

Sec. 38-1426. Accessory dwelling units.

(a) The intent and purpose of this section is to allow accessory dwelling units (ADUs) to encourage infill development and to facilitate affordable housing, ~~The intent and purpose of this section is to allow a relative who wishes to reside in close proximity to his or her family an opportunity to do so by providing authorization to seek and obtain a special exception for an accessory dwelling unit,~~ while maintaining the single-family character of the primary single-family dwelling unit and the neighborhood.

(b) An accessory dwelling unit may be allowed on a lot or parcel as a special exception in any residential or agricultural zoning district (including a residential lot or parcel on an existing planned development). The accessory dwelling unit shall be an accessory use to the primary single-family dwelling unit and the primary single-family dwelling unit shall qualify as homestead property. Only one (1) accessory dwelling unit may be permitted per lot or parcel. The accessory dwelling unit shall not be constructed prior to the construction and occupation of the primary dwelling unit.

~~(c) (1) An accessory dwelling unit shall be occupied initially only by a relative. For purposes of this section, the term "relative" shall mean a sister, brother, lineal ascendant or lineal descendant of the owner of the lot or parcel on which the primary single family dwelling unit is located (or the owner's spouse).~~

~~(2) Subject to subsection (c)(3), an accessory dwelling unit may be occupied by a nonrelative, provided:~~

~~a. The accessory dwelling unit was occupied initially only by a relative and at least three (3) years~~

~~have passed since the issuance of the certificate of occupancy for the accessory dwelling unit; or~~

~~b. The accessory dwelling unit was occupied initially only by a relative, and the relative has died.~~

(c) ~~(3)~~ The BZA/BCC may impose ~~a~~ conditions addressing compatibility, which may include prohibiting the accessory dwelling unit from being initially leased, rented or otherwise used or occupied by ~~a nonrelative.~~ someone other than a relative. For purposes of this section, a "relative" is a lineal ascendant or lineal descendant of the owner of the lot or parcel where the primary single family dwelling is located (or of the owner's spouse). In the event a condition is imposed requiring that the accessory dwelling unit be initially occupied by a relative, the accessory dwelling unit may be occupied by a nonrelative three years after being initially occupied by a relative or after the relative has died, whichever occurs first.

(d) In addition to what is normally required for an application for a special exception, an application for a special exception for an accessory dwelling unit shall contain or be accompanied by the following information and documentation:

~~(1) An affidavit attesting that the owner of the lot or parcel understands and agrees that the provisions of this section shall be complied with, that he shall be responsible to the county for ensuring that the provisions are complied with, and that he shall be responsible for any failure to comply with the provisions;~~

~~(2) Documentation evidencing that the person who is to inhabit the accessory dwelling unit is a relative;~~

~~(3~~1) A site plan prepared in compliance with Section 106.1.2 of the Florida Building Code, as amended by Section 9-33 of the Orange County Code;

~~(4~~2) An exterior elevation drawing of the proposed accessory dwelling unit, regardless of whether it is proposed to be attached or detached; and

~~(5~~3) A photograph ~~and~~ or exterior elevation drawing of the primary single-family dwelling unit.~~; and~~

(e) In order to approve a special exception for an accessory dwelling unit, the county shall determine that the

proposed accessory dwelling unit is designed to be similar and compatible with the primary single-family dwelling unit and that it will be compatible with the character of the neighborhood. A manufactured home constructed pursuant to United States Department of Housing and Urban Development standards or a mobile home may not be used as an accessory dwelling unit in any single family residential zoned district.

(f) After an application for a special exception for an accessory dwelling unit is approved, the accessory dwelling unit shall be subject to the following performance standards and requirements:

(1) *Ownership*. The primary single-family dwelling unit and the accessory dwelling unit shall be under single ownership at all times. Also, ~~either~~ the primary dwelling unit or the accessory dwelling unit shall be occupied by the owner at all times. Approval of an accessory dwelling unit shall not and does not constitute approval for separate ownership or the division of the lot or parcel. Any request to divide the lot or parcel shall comply with and be subject to applicable laws, ordinances and regulations, including zoning regulations and access requirements.

~~(2) *Change in occupancy*. The owner shall notify the zoning department in writing whenever there is a change in occupancy of the accessory dwelling unit and inform the zoning department whether the new occupant is a relative or a non relative.~~

(~~3~~2) *Living area*. The minimum living area of an accessory dwelling unit shall be ~~four hundred (400)~~ five hundred (500) square feet. However, the maximum living area of an accessory dwelling unit shall not exceed forty-five (45) percent of the living area of the primary dwelling unit or one thousand (1,000) square feet, whichever is less, and shall not contain more than two (2) bedrooms. For lots/parcels equal to or greater than two (2) acres, the maximum living area shall be one thousand five hundred (1,500) square feet.

(~~4~~3) *Lot or parcel size*. The size of the lot or parcel shall be equal to or greater than the minimum lot area required for a single-family dwelling unit in the zoning district. An attached accessory dwelling unit may only be constructed on a lot or parcel whose area is equal to or greater than the minimum lot area required in the zoning district. A detached accessory dwelling unit may only be constructed on a lot or parcel whose area is at

least one and one half (1½) times the minimum lot area required in the zoning district.

~~(~~5~~4~~) *Open space*. An accessory dwelling unit shall be treated as part of the impervious surface area of a lot or parcel. The open space requirements for a single-family lot or parcel shall be met notwithstanding the construction of an accessory dwelling unit.

~~(~~6~~5~~) *Setbacks*. The setbacks for an attached accessory dwelling unit shall be the same as those required for the primary dwelling unit. In addition, a detached accessory dwelling unit shall be located only to the side or rear of the primary dwelling unit and shall be separated from the primary dwelling unit by at least ten (10) feet, and the distance separation shall not be less than the distance required under Section 610 ("Buildings Located on the Same Lot") and Table 600 of the 1991 edition of the Standard Building Code, as it may be amended from time to time. Moreover, a one-story detached accessory dwelling unit shall be setback a minimum of ten (10) feet from the rear property line and shall meet the minimum side setbacks for a primary structure in the zoning district. A two-story detached accessory dwelling unit located above a detached garage shall ~~meet the setbacks for the primary structure in the zoning district.~~ have ten (10) foot side and ten (10) foot rear setbacks.

~~(~~7~~6~~) *Entrance*. An attached accessory dwelling unit may either share a common entrance with the primary dwelling unit or use a separate entrance. However, a separate entrance shall be located only ~~to~~ on the side or rear of the structure.

~~(~~8~~7~~) *Parking*. One (1) additional off-street parking space shall be required for an accessory dwelling unit. The additional space requirement may be met by using the garage, carport or driveway of the primary dwelling unit.

~~(~~9~~8~~) *Water and sewer*. Adequate water and wastewater capacity shall exist for an accessory dwelling unit. Approval of a special exception for an accessory dwelling unit shall not constitute approval for use of a septic system and/or a well. If a septic system and/or a well must be utilized, applicable laws, ordinances and regulations shall control. ~~The owner of a~~An attached accessory dwelling unit ~~may~~ shall not apply for and obtain a separate water meter. ~~subject to the unit connecting to Orange County's water system.~~

(~~10~~9) *Electrical.* ~~The owner of an~~ A detached accessory dwelling unit may apply for and obtain a separate power meter, subject to the approval of the utility company and complying with all applicable laws, ordinances and regulations. An attached accessory dwelling unit shall not have or obtain a separate power meter.

(~~11~~10) *Impact fees and capital fees.* The impact fees for an accessory dwelling unit shall be accessed at the multi-family rate. Water and wastewater capital fees for the accessory dwelling unit shall be assessed at the multi-family rate.

(~~12~~11) *Other laws, ordinances, and regulations.* All other applicable laws, ordinances and regulations shall apply to the primary dwelling unit and the accessory dwelling unit.

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(g) After [**insert the effective date of this ordinance**], accessory dwelling units may be permitted in a Planned Development without the need for a special exception, subject to the following requirements:

(1) Unless the PD Land Use Plan (LUP) and/or PSP identifies ADUs as a permitted use, a change determination or an amendment to the PD/PSP shall be required, or if the property is platted as separate lot or parcel, a special exception shall be required;

(2) The ADUs shall meet the performance standards in Section 38-1426(f)(1) through (11), except for the need for a special exception (unless it is platted as a separate lot or parcel); and

(3) The property shall be platted with covenants and restrictions for all the lots in the plat identifying that ADUs are a permitted use.

Section 40. Amendments to Section 38-1427 ("Communication towers"). Section 38-1427 is amended to read as follows:

Sec. 38-1427. Communication towers.

* * *

(c) *Variances.* Except as provided otherwise for communication towers in planned developments (see Section 38-1236), a deviation ~~Any request to deviate~~ from any of the

requirements of this section shall require variance review and approval by the board of zoning adjustment and the board of county commissioners.

* * *

(n) *Standards and criteria for review of special exception requests on communication tower facilities.*

* * *

(6) *Separation distance reduction for camouflaged facilities*. In the event the BZA, or the BCC if the property is zoned PD, using the standards set forth in subsection (n)(5) above, determines the camouflaging agent is compatible with the surrounding area, then the distance separation requirements set forth in subsections 38-1427(d)(2)d and (d)(3) for the proposed communication tower as a camouflaged facility shall be reduced by one half (1/2) of the applicable monopole height requirement. The reduction should only be applicable to the placement of the camouflaged tower and the measurement of distance separation from other towers to the camouflaged tower shall not be reduced.

* * *

(o) *Utilization of existing pole-type structures.* A communication antenna which is attached to an existing pole-type structure or the existing pole-type structure is replaced with a monopole tower to accommodate both its prior function and a communication antenna shall be a permitted ancillary use provided each of the following criteria are met:

(1) The communication antenna attached to the existing pole-type structure or replacement monopole shall not extend above the highest point of the pole-type structure or replacement monopole more than twenty (20) feet, as measured from the height of the pre-existing pole-type structure.

(2) a. If the resulting structure/tower adds additional height over the pre-existing pole-type structure, the closest residential structure shall be away from the base of the pole-type structure or replacement tower a distance of at least one hundred ten (110) percent the height of the entire structure/tower.

b. If no additional height over the height of the pre-existing pole-type structure is added by either (i)

the attachment of the communication antenna to the existing pole-type structure, or (ii) the replacement tower including the communication antenna, then the structure/tower is permitted with no additional distance separation to residential structures over that which was provided by the pre-existing pole-type structure.

(3) The communication antenna and support structure comply with all applicable FCC and FAA regulations.

(4) The communication antenna, pole-type structure, and/or replacement monopole tower comply with all applicable building codes.

(5) Pole-type structure ~~(i) within public road rights-of-way, or (ii)~~ (i) within side yard or rear yard residential subdivision easements, or ~~(iii)~~(ii) if used for power distribution of fourteen (14) kilovolt service or less, shall not be eligible for use under this subsection (o). ~~Notwithstanding the foregoing sentence,~~However, other pole-type structures within public road rights-of-way and within limited access road system rights-of-way are eligible for use under this subsection (o), provided the antenna shall be canister-type.

(6) The utilization of an existing pole-type structure for placement of a communication antenna in compliance with the requirements of this subsection (o) shall supersede the separation requirements contained in subsections (d)(2)d. and (d)(3)a.

(7) In the event that the utility pole or structure is abandoned for its initial/primary use as a utility pole, the secondary use as a communication tower shall also cease to operate and the structure and communication antenna removed.

In all other respects, Section 38-1427 shall remain unchanged.

Section 41. Amendments to Sections 38-1476 and 38-1479 regarding Off-Street Parking. Sections 38-1476 and 38-1479 are amended to respectively read as follows:

Sec. 38-1476. Quantity of off-street parking.

(a) Off-street parking spaces shall be provided for any use hereafter established or at the time of the erection of any main building or structure or at the time any main building, structure or occupational use is enlarged or increased in capacity by adding

dwelling units, guest rooms, floor area, seats, or by increasing employment, according to the following minimum requirements: If the use is not listed below, the parking requirements shall be determined by the Zoning Manager by adopting or utilizing the parking requirements for the listed use that the Zoning Manager determines is most similar.

* * *

Auto dealerships	1 space per every three hundred (300) square feet of gross floor area including showroom, sales offices and general offices.

* * *

Day care centers and kindergartens	1 space for each 10 children, plus with a pickup and drop-off area ~~equal to 1~~ one space for each 10 children or without a pick-up or drop-off area one space for each 5 children.

* * *

Boardinghouses, lodging houses, and rooming- houses and assisted living facilities (such as senior living facilities), including nursing homes	1 space for each 2 bedrooms

* * *

Mechanical garages	1 space for every employee, plus 1 space per bay or 1 space for each one thousand (1,000) square feet if no bays

* * *

Hospitals, sanitariums ~~rest and convalescent homes~~, foster group homes, and ~~all~~ similar institutions	2 spaces for each bedroom and office building criteria.

* * *

General business establishments, such as hardware, furniture, appliance, jewelry, apparel stores,~~ etc~~.and all other general retail establishments	1 spaces for each 300 square feet of gross floor area; provided, however, that no use shall have less than 3 spaces.

of fifteen thousand (15,000) square feet gross floor area or less	
* * *	
Restaurants, grills, bars, lounges, similar dining and/or drinking establishments	1 space for each 4 ~~fixed~~ seats provided for patron use, plus 1 space for each 75 square feet of floor area provided for patron use which does not contain ~~fixed~~ seats; provided that no use shall have less than 4 spaces
* * *	
Schools, public and private, including elementary, middle, high schools and academies (not including colleges, universities, or similar institutions)	1 space for each 4 seats in assembly hall; or~~, if no assembly hall,~~ 4 spaces per each instructional room, plus 1 space for each 3 high school students; whichever is higher.
Shopping centers ~~up to~~ between fifteen thousand and one (15,001) and fifty thousand (50,000) square feet gross floor area, food stores, supermarkets, and drugstores	5½ spaces for each 1,000 square feet of gross floor area; provided, however, no use shall have less than 5 spaces.
Student housing	~~1.25~~ 1 space~~s~~ per bedroom.

* * *

Sec. 38-1479 Off-street parking lot requirements.

(a) All parking areas shall have durable all-weather surfaces for vehicle use areas, shall be properly drained and shall be designed with regard to pedestrian safety. For purposes of this article, a durable, all-weather surface shall consist of an improved surface, including concrete, asphalt, stone and other permanent surfaces, but not including gravel, wood chips, mulch or other materials subject to decay. Residential conversions to professional office use, churches, bed and breakfast homestays, bed and breakfast inns and overflow parking on unimproved property used in conjunction with special events and/or holiday parking demands may be exempt from this condition subject to approval by the

zoning manager or when approved by the board of zoning adjustment ("BZA") and the board of county commissioners ("BCC").

(b) Regular parking space sizes shall be a minimum of 180 square feet (either 9' x 20' or 10' x 18'). Off-street parallel parking stalls shall be 8' x 22'. Spaces within parking garages may be a minimum of 8 1/2' x 18'. Off-street turning and maneuvering space shall be provided for each lot so that no vehicle shall be required to back onto or from any public street. Suggested parking lot design standards are contained in Exhibit I on file and available for reference in the office of the county engineer.

Section 42. Amendments to Sections 38-1501, 38-1502 and 38-1506 regarding Site and Building Requirements. Sections 38-1501, 38-1502 and 38-1506 are amended to respectively read as follows:

Sec. 38-1501. Basic requirements.

The basic site and building requirements for each agricultural, residential and commercial zoning districts are established as follows (and industrial site and building requirements are set forth elsewhere in this chapter:

TABLE INSERT:

District	*Min. lot area (sq. ft.)-###m*	*Min. living area (sq. ft.)*	*Min. lot width (ft.)*	**a Min. front yard (ft.)*	**a Min. rear yard (ft.)*	*a Min. side yard (ft.)*	*Max. building height (ft.)*	*Lake setback (ft.)*
A-1	SFR 21,780 (½ acre)	850	100	35	50	10	35	*a
	Mobile home 2 acres	850	100	35	50	10	35	a
A-2	SFR 21,780 (½ acre)	850	100	35	50	10	35	*a
	Mobile home 2 acres	850	100	35	50	10	35	a
A-R	108,900 (2½ acres)	1,000	270	35	50	25	35	*a
R-CE	43,560 (1 acre)	1,500	130	35	50	10	35	*a
R-CE-2	2 acres	1,200	250	45	50	30	35	*a

District	*Min. lot area (sq. ft.)-###m*	*Min. living area (sq. ft.)*	*Min. lot width (ft.)*	**a Min. front yard (ft.)*	**a Min. rear yard (ft.)*	*a Min. side yard (ft.)*	*Max. building height (ft.)*	*Lake setback (ft.)*
R-CE-5	5 acres	1,200	185	50	50	45	35	*a
R-1AAAA	21,780 (½ acre)	1,500	110	30	35	10	35	*a
R-1AAA	14,520(1/3 acre)	1,500	95	30	35	10	35	*a
R-1AA	10,000	1,200	85	25‡h	30‡h	7.5	35	*a
R-1A	7,500	1,200	75	20+h	25+h	7.5	35	*a
R-1	5,000	1,000	50	20+h	20+h	5+h	35	*a
R-2	One-family dwelling, 4,500	1,000	45*****c	20+h	20+h	5+h	35	*a
	Two dwelling units, 8,000/9,000	500/1,000 per dwelling unit	80/90******d	20+h	30	5+h	35	*a
	Three dwelling units, 11,250	500 per dwelling unit	85+j	20+h	30	10	35** ***	*a
	Four or more dwelling units, 15,000	500 per dwelling unit	85+j	20+h	30	10****b	35** ***	*a
R-3	One-family dwelling, 4,500	1,000	45*****c	20‡h	20‡h	5	35	*a
	Two dwelling units, 8,000/9,000	500/1,000 per dwelling unit	80/90******d	20‡h	20‡h	5‡h	35	*a
	Three dwelling units, 11,250	500 per dwelling unit	85+j	20‡h	30	10	35** ***	*a
	Four or more dwelling units, 15,000	500 per dwelling unit	85+j	20‡h	30	10****b	35** ***	*a
R-L-D	N/A	N/A	N/A	10 for side entry garage, 20 for front entry garage	15	0 to 10	35***	*a
R-T	7 spaces per gross acre	Park size min. 5 acres ~~Min. mobile home size 8 ft. x 35 ft.~~	Min. mobile home size 8 ft. x 35 ft.~~Park size min. 5 acres~~	7.5	7.5	7.5	~~N/A~~35	*a

District	*Min. lot area (sq. ft.)* ~~###~~ *m*	*Min. living area (sq. ft.)*	*Min. lot width (ft.)*	~~*~~*a Min. front yard (ft.)*	~~*~~*a Min. rear yard (ft.)*	*a Min. side yard (ft.)*	*Max. building height (ft.)*	*Lake setback (ft.)*
R-T-1 SFR	4,500~~*****~~c	~~45*****~~1,000	~~1000~~ 45	25/20~~††~~k	25/20~~††~~k	5	35	*a
Mobile Home	4,500~~*****~~c	~~45*****~~Min. mobile home size 8 ft. x 35 ft.	~~Min. mobile home size 8 ft. x 35 ft.~~ 45	25/20~~††~~k	25/20~~††~~k	5	35	*a
R-T-2 (prior to 1/29/73)	6,000	~~60~~SFR 500 Min. mobile home size 8 ft. x 35 ft	~~60SFR 500 Min. mobile home size 8 ft. x 35 ft~~	25	25	6	~~N/A~~35	*a
(after 1/29/73)	21,780 1/2 acre	~~100~~SFR 600 Min. mobile home size 8 ft. x 35 ft.	~~100SFR 600 Min. mobile home size 8 ft. x 35 ft~~	35	50	10	~~N/A~~35	*a
NR	One family dwelling, 4,500	1,000	45~~*****~~c	20	20	5	35/3 stories ~~††~~k	*a
	Two dwelling units, 8,000	500 per dwelling unit	80/90~~******~~d	20	20	5	35/3 stories ~~††~~k	*a
	Three dwelling units, 11,250	500 per dwelling unit	85	20	20	10	35/3 stories ~~††~~k	*a
	Four or more dwelling units, 1,000 plus, 2,000 per dwelling unit	500 per dwelling unit	85	20	20	10	50/4 stories ~~††~~k	*a
	Townhouse, 1,800	750 per dwelling unit	20	25, 15 for rear entry driveway	20, 15 for rear entry garage	0, 10 for end units	40/3 stories ~~††~~k	*a
NAC	Non-residential and mixed use development, 6,000	500	50	0/10 maximum, 60% of building frontage must conform to maximum setback	15, 20 adjacent to single-family zoning district	10, 0 if buildings are adjoining	50 feet ~~††~~k	*a
	One-family dwelling, 4,5000	1,000	45~~*****~~c	20	20	5	35/3 stories ~~††~~k	*a
	Two dwelling units, 11,250	500 per dwelling unit	80~~******~~d	20	20	5	35/3 stories ~~††~~k	*a
	Three dwelling units, 11,250	500 per dwelling unit	85	20	20	10	35/3 stories ~~††~~k	*a
	Four or more dwelling units, 1,000 plus 2,000 per dwelling unit	500 per dwelling unit	85	20	20	10	50 feet/4 stories, 65 feet with ground floor retail ~~††~~k	*a
	Townhouse, 1,800	750 per dwelling unit	20	25, 15 for rear entry driveway	20, 15 for rear entry garage	0, 10 for end unit	40/3 stories ~~††~~k	*a

District	*Min. lot area (sq. ft.)* ~~###~~ *m*	*Min. living area (sq. ft.)*	*Min. lot width (ft.)*	~~*~~ *a Min. front yard (ft.)*	~~*~~ *a Min. rear yard (ft.)*	*a Min. side yard (ft.)*	*Max. building height (ft.)*	*Lake setback (ft.)*
NC	Non-residential and mixed use development, 8,000	500	50	0/10 maximum, 60% of building frontage must conform to maximum setback	15, 20 adjacent to single-family zoning district	10, 0 if buildings are adjoining	65 feet ~~++~~ k	~~*~~ a
	One-family dwelling, 4,500	1,000	45~~*****~~ c	20	20	5	35/3 stories ~~++~~ k	~~*~~ a
	Two dwelling units, 8, 000	500 per dwelling unit	80~~******~~ d	20	20	5	35/3 stories ~~++~~ k	~~*~~ a
	Three dwelling units, 11,250	500 per dwelling unit	85	20	20	10	35/3 stories ~~++~~ k	~~*~~ a
	Four or more dwelling units, 1,000 plus 2,000 per dwelling unit	500 per dwelling unit 750 per dwelling unit	85	20	20	10	65 feet, 80 feet with ground floor retail ~~++~~ k	~~*~~ a
	Townhouse		20	25, 15 for rear entry driveway	20, 15 for rear entry garage	0, 10 for end units	40/3 stories ~~++~~ k	~~*~~ a
P-O	10,000	500	85	25	30	10 for one- and two-story bldgs., plus 2 feet for each add. story	35~~**~~ ~~***~~	~~*~~ a
C-1	6,000	500	80 on major streets (see Art. XV); 60 for all other streets ~~#~~ e; 100 ft. for corner lots on major streets (see Art. XV)	25	20	0; or 15 ft when abutting residential district; side street, 15 ft.	50; or 35 within 100 ft of all residential districts	~~*~~ a
C-2	8,000	500	100 on major streets (see Art. XV); 80 for all other streets ##f	25, except on major streets as provided in Art. XV	15; or ~~20~~ 25 when abutting residential district	5; or 25 when abutting residential district; 15 for any side street	50; or 35 within 100 feet of all residential districts	~~*~~ a
C-3	12,000	500	125 on major streets (see Art. XV); 100 for all other streets ###g	25, except on major streets as provided in Art. XV	15; or 20 when abutting residential district	5; or 25 when abutting residential district; 15 for any side street	75; or 35 within 100 feet of all residential districts	*a

~~*~~ a	Setbacks shall be a minimum of 50 feet from the normal high water elevation contour on any adjacent natural surface water body and any natural or artificial extension of such water body, for any building or other principal structure. Subject to the lakeshore protection ordinance and the conservation ordinance, the minimum setbacks from the normal high water elevation contour on any adjacent natural surface water body, and any natural or artificial extension of such water body, for an accessory building, a swimming pool, swimming pool deck, a covered patio, a wood deck attached to the principal structure or accessory structure, a parking lot, or any other

District	*Min. lot area (sq. ft.)* ~~###~~*m*	*Min. living area (sq. ft.)*	*Min. lot width (ft.)*	~~*~~*a Min. front yard (ft.)*	~~*~~*a Min. rear yard (ft.)*	*a Min. side yard (ft.)*	*Max. building height (ft.)*	*Lake setback (ft.)*
	accessory use, shall be the same distance as the setbacks which are used per the respective zoning district requirements as measured from the normal high water elevation contour.							
~~**~~	~~Building in excess of 35 feet in height may be permitted as a special exception.~~							
~~***~~	~~Buildings in excess of 1 story in height within 100 feet of the property line of any single-family residential district may be permitted as a special exception.~~							
~~****~~b	Side setback is 30 feet where adjacent to single-family district.							
~~*****~~c	For lots platted between 4/27/93 and 3/3/97 that are less than 45 feet wide or contain less than 4,500 sq. ft. of lot area, or contain less than 1,000 square feet of living area shall be vested pursuant to Article III of this chapter and shall be considered to be conforming lots for width and/or size and/or living area.							
~~******~~d	For attached units (common fire wall and zero separation between units) the minimum duplex lot width is 80 feet and the duplex lot size is 9,000 square feet with a minimum separation between units of 10 feet. Fee simple interest in each half of a duplex lot may be sold, devised or transferred independently from the other half. For duplex lots that: (i) are either platted or lots of record existing prior to 3/3/97, and (ii) are 75 feet in width or greater, but are less than 90 feet, and (iii) have a lot size of 7,500 square feet or greater, but less than 9,000 square feet are deemed to be vested and shall be considered as conforming lots for width and/or size.							
~~#~~e	Corner lots shall be 100 [feet] on major streets (see Art. XV), 80 [feet] for all other streets.							
~~##~~f	Corner lots shall be 125 [feet] on major streets (see Art. XV), 100 [feet] for all other streets.							
~~###~~g	Corner lots shall be 150 [feet] on major streets (see Art. XV), 125 [feet] for all other streets.							
~~‡~~h	For lots platted on or after 3/3/97, or unplatted parcels. For lots platted prior to 3/3/97, the following setbacks shall apply: R-1AA, 30 feet front, 35 feet rear; R-1A, 25 feet front, 30 feet rear; R-1, 25 feet front, 25 feet rear, 6 feet side; R-2, 25 feet front, 25 feet rear, 6 feet side for one (10 and two (2) dwelling units; R-3, 25 feet front, 25 feet rear, 6 feet side for two (2) dwelling units. Setbacks not listed in this footnote shall apply as listed in the main text of this section.							
~~†~~j	Attached units only. If units are detached, each unit shall be placed on the equivalent of a lot 45 feet in width and each unit must contain at least 1,000 square feet of living area. Each detached unit must have a separation from any other unit on site of at least 10 feet.							
~~† †~~k	Maximum impervious surface ratio shall be 70%, except for townhouses, nonresidential, and mixed use development, which shall have a maximum impervious surface ratio of 80%.							
~~† † †~~m	Based on gross square feet.							

[***Editorial note: Throughout the Table Insert above, symbols are being deleted (shown by strike-throughs that may appear in certain places as underlines) and replaced with the following lower case letters (shown by underlines): a, b, c, d, e, f, g, h, j, k and m. (The lower case letters i and l are not being used.)***]

Sec. 38-1502. Location of dwellings in residential districts.

* * *

(b) No dwelling shall be erected on a lot which does not abut on a street for a distance of at least fifteen (15) feet. Any divisions or splits of land, lots or parcels shall have a minimum of twenty (20) feet of fee simple access to a roadway, except to the extent that requirement is inconsistent or conflicts with the requirements of the subdivision regulations.

(c) On any corner lot abutting the side of another lot, no part of any structure, excluding fences (see subsection 38-1408(i)), shall be located within the twenty ~~five~~ (~~25~~20) ~~feet~~ foot corner visibility triangle along ~~of~~ the common lot line; and no structure shall be nearer the side street lot line than the required front yard of such abutting lot.

* * *

Sec. 38-1506. Height extensions for appurtenances.

The zoning manager may grant height extensions not to exceed ten (10) feet above the maximum height limits established under section 38-1501, site and building requirements, and planned developments, for appurtenances and architectural features only. Examples of such features include, but are not limited to, chimneys, cupolas, church spires, and air conditioning equipment. Portions of the roof are not considered an appurtenance. The top of all roof-lines shall comply with the maximum height limit of the underlying zoning district. This provision is only applicable to properties platted after December 15, 1998, and unplatted lands.

Section 43. Amendments to Sections 38-1602 and 38-1603 regarding Major Street Setbacks. Sections 38-1602 and 38-1603 are amended to respectively read as follows:

Sec. 38-1602. Definitions.

For the purposes of this article, the following definitions shall apply:

Arterial road shall mean a signalized roadway that primarily services through traffic with an average signalized intersection spacing of 2.0 miles or less. As used here, signalized intersections refer to all fixed causes of interruption to the traffic stream and may occasionally include STOP signs or other types of traffic control. Class I arterials have a posted speed of 40 miles per hour or greater. Class II arterials have a posted speed of 35 miles per hour or less.~~route providing service which is relatively continuous and of relatively high traffic volume, long average trip length, high operating speed, and high mobility importance. In addition, every United States numbered highway is an arterial road. For purposes of this article, the term "arterial" includes "principal arterial," "minor arterial," an "extension" of a principal arterial or minor arterial, and an "intra-urban arterial." (This article contains separate definitions for the terms "principal arterial" and "minor arterial" due to the different setback distances for each.)~~

Collector road shall mean a roadway providing land access and traffic circulation within residential, commercial, and industrial areas and that~~route providing service which is of relatively moderate average volume, moderately average trip length, and moderately average operating speed. Such a route also~~ collects and distributes traffic between local roads or arterial roads ~~and serves~~ as a linkage between land access and mobility needs.

For purposes of this article, the term "collector" includes "major urban collector," "minor urban collector," and any ~~"~~extension~~"~~ of a major or minor urban collector.~~, and an "intra-urban collector."~~

Functional classification shall mean the assignment of roads into systems according to the standards provided in the Highway Classification Manual and the Florida Department of Transportation Quality/Level of Service Handbook.~~character of service they provide in relation to the total highway network. Basic functional classifications include arterial roads, collector roads, and local roads. These basic classifications may be divided into principal, major, or minor subclassifications. Those subclassifications may be additionally divided into rural and urban categories.~~

Major street shall mean a road functionally classified according to the standards provided in the Highway classification Manual and the Florida Department of Transportation Quality/Leval of Service Handbook as determined by the County Engineer.~~and listed as a major street in section 38-1603 of this article.~~

Minor arterial shall mean a route which generally interconnects with and augments principal arterial routes and provides service to trips of shorter length and a lower level of travel mobility. Such a route includes any arterial not classified as a "principal arterial" and contains facilities that place more emphasis on land access than the higher system.

Principal arterial shall mean a route which generally serves the major centers of activity of an area, the highest traffic volume corridors, and the longest trip purpose and carries a high proportion of the total area travel on a minimum of mileage.

Rural functionality-classified roads shall mean roadways within the rural area not designated as urbanized, urban, or transitioning by the Florida Department of Transportation, the Federal Highway Administration, and MetroPlan Orlando based on U.S. Census data, as updated from time to time.

Setback distance shall mean a horizontal distance which correlates with the functional classification of the major street described in section 38-1603. The distance is measured by a straight line extending perpendicular from the centerline of the major street.

Transitioning area shall mean an area designated by the Florida Department of Transportation and MetroPlan Orlando (without Federal Highway Administration involvement), based on U.S. Census data, as updated from time to time. Transitioning areas are fringe areas exhibiting characteristics between rural and urbanized/urban. Transitioning areas are intended to include areas that, based on their growth characteristics, are anticipated to become urbanized or urban in the next 20 years and where designated, associated roadways shall use urbanized area setbacks.

Urban functionally-classified roads shall mean roadways within the urban/urbanized area designated by the Florida Department of Transportation, the Federal Highway Administration, and MetroPlan Orlando based on U.S. Census data, as updated from time to time.

Sec. 38-1603. Functional classification and setback distances.

Buildings, structures (except signs and billboards), and parking areas adjacent to major streets shall be set back in all zoning districts according to the respective setback distances set forth in the following table. In the event of a conflict between the setback distances set forth in the following table and the requirements for setbacks as established through yard requirements in any zoning district, the greater of the setback distances shall prevail. This section shall not apply within Horizon West.

* * *

Functional Classification of Major Street	Setback Distance from Centerline for Buildings and Structures (feet)	Setback Distance from Centerline for Parking Areas (feet)
Principal arterial, urban (Class I)	70	65
Principal arterial, urban (Class II)	60	55
Principal arterial, rural	150	100
Minor arterial, urban	60	55
Minor arterial, rural	120	70
Collector, major and minor urban	55	50
Collector, rural	100	50

Section 44. Amendments to Sections 38-1725 and 38-1727 regarding Neighborhood Districts, in General. Sections 38-1725 and 38-1727 are amended to respectively read as follows:

Sec. 38-1725. Intent and purpose <u>of districts</u>.

This article provides specific zoning standards to implement the future land use map designations of neighborhood center, neighborhood activity corridor, and neighborhood residential.

(1) These zoning standards are intended to facilitate the redevelopment of historic and/or established communities in Orange County with housing types and homeownership opportunities, as well as neighborhood-serving commercial and other residential support services, including office uses, civic uses, parks, and recreation.

(2) These zoning standards promote a mix of land uses using a development pattern with various densities and intensities within a parcel, block, and/or district to recognize the urban nature of these areas and to preserve and enhance their unique character and sense of place.

(3) Orange County has made investments in public services and infrastructure that will be protected by these zoning standards. These zoning standards address public health, safety, and welfare in the districts and enhance the function and appearance of development.

(4) These zoning standards are consistent with the Economic Element of the Orange County Comprehensive ~~Policy~~ Plan, which has been adopted by the county to accommodate and promote economic growth and which specifies that zoning may be used to achieve these ends.

(5) The Constitution and laws of the State of Florida grant authority to the board of county commissioners to adopt and enforce land development regulations within the unincorporated area of Orange County.

<u>(6) These neighborhood districts regulations shall be administered by the county zoning division, except that any non-</u>

zoning aspects of these regulations shall be administered by the appropriate department or division.

* * *

Sec. 38-1727. Nonconforming uses.

Except as provided in this section, uses and structures made nonconforming as a result of a rezoning of property to NC, NAC or NR are subject to the provisions of article III of Chapter 38.

~~(1) Building or development sites which do not meet the minimum residential density requirements of the district in which they are located shall be deemed to be conforming but underdeveloped. Any expansion or enlargement which increases the density on the building or development site, but is less than the amount needed to meet minimum density requirements shall be permitted and considered to be consistent with the intent and purpose of the minimum density requirements of the district.~~

~~(2)~~ Destruction of nonconforming signs and the ability to rebuild such signs shall be subject to the nonconforming use provisions of section 38-53 (b). Nonconforming signage, excluding billboards, on properties that are vacant for one hundred eighty (180) days or more, as determined by a vacant structure on the property and sign face copy that is blank or does not advertise current business activity for that period, shall lose its nonconforming status. A vacant building shall be the primary factor for determining the expiration of nonconforming status of a sign. This subsection shall apply to single tenant structures and to multi-tenant structures where the entire multi-tenant structure is vacant. Upon occupancy of the structure by a business, signage that has lost its nonconforming status must come into compliance with this article. Any new signage on the property must be consistent with the signage requirements of this article.

Section 45. Amendments to Sections 38-1730, 38-1731 and 38-1734 regarding the NC Neighborhood Center District. Sections 38-1730, 38-1731 and 38-1734 are amended to respectively read as follows:

Sec. 38-1730. Intent and purpose of district.

The NC neighborhood center district is intended to provide a neighborhood-serving, mixed-use, and pedestrian-scale environment where residents of urban communities in need of

redevelopment can comfortably shop for their daily needs. A mixture of retail shops, restaurants, offices, civic uses, and residential units will characterize the NC district, complemented by an active and pleasant streetscape, tree-shaded sidewalks, and other pedestrian amenities. This intent and purpose are consistent with Future Land Use Element Policy FLU8.3.1~~3.4.4~~ of the Orange County ~~2000-2020~~2010-2030 Comprehensive Policy Plan. These NC neighborhood district regulations shall be administered by the county zoning division, except that any non-zoning aspects of these regulations shall be administered by the appropriate department or division.

Sec. 38-1731. Permitted uses.

A use shall be permitted in the NC district if the use is identified by the letter "P" in the use table set forth in section 38-77. For master-planned redevelopment areas, defined as areas where lot assembly has taken place and a single site plan has been submitted for an area no less than five acres, in the NC district, permitted uses shall be consistent with ~~minimum and maximum land area specified in~~ Future Land Use Element Policy FLU 1.1.4C~~3.4.7~~ of the Orange County ~~2000-2020~~ Comprehensive ~~Policy~~ Plan.

* * *

Sec. 38-1734. Site development standards.

Except as otherwise provided in this section, the site and building requirements shown in article XII of this chapter shall apply to all development within the NC district.

* * *

(2) *Density and intensity standards.* The following density and intensity standards shall apply to all development within the NC district.

a. Floor area ratio shall not exceed 2.0.

b. The maximum residential density shall not exceed forty (40) units per acre.

~~c. The minimum residential density shall be no less than four (4) units per acre.~~

~~d. Densities less than four (4) units per acre shall be allowed for the protection of natural resources.~~

* * *

Section 46. Amendments to Sections 38-1737, 38-1738 and 38-1741 regarding the NAC Neighborhood Center District. Sections 38-1737, 38-1738 and 38-1741 are amended to respectively read as follows:

Sec. 38-1737. Intent and purpose of district.

The intent of the NAC neighborhood activity corridor district is to provide a mixture of land uses along the main roadways serving an urban community in need of redevelopment. The NAC district is intended as a vital, pedestrian-oriented district that can support a variety of residential and support uses at an intensity greater than the surrounding neighborhoods, but less intense than the NC district. The NAC district should contain a variety of multi-family units, including townhouses, apartments above offices and retail, and loft options, complemented by offices, commercial and residential support services, residential, and limited retail space. This intent and purpose are consistent with Future Land Use Element Policy FLU8.3.1~~3.4.4~~ of the Orange County ~~2000-2020~~2010-2030 Comprehensive ~~Policy~~ Plan. These NAC neighborhood activity corridor district regulations shall be administered by the county zoning division, except that any non-zoning aspects of these regulations shall be administered by the appropriate department or division.

Sec. 38-1738. Permitted uses.

A use shall be permitted in the NAC district if the use is identified by the letter "P" in the use table set forth in section 38-77. For master-planned redevelopment areas, defined as areas where lot assembly has taken place and a single site plan has been submitted for an area no less than five acres, in the NAC district, permitted uses shall be consistent with ~~minimum and maximum land area specified in~~ Future Land Use Element Policy FLU 1.1.4C~~3.4.7~~ of the Orange County ~~2000-2020~~ Comprehensive ~~Policy~~ Plan.

* * *

Sec. 38-1741. Site development standards.

Except as otherwise provided in this section, the site and building requirements shown in article XII of this chapter shall apply to all development within the NAC district.

* * *

(2) *Density and intensity standards.* The following density and intensity standards shall apply to all development within the NAC district.

a. Floor area ratio shall not exceed 1.0.

b. The maximum residential density shall not exceed twenty-five (25) units per acre.

~~a. The minimum residential density shall be no less than four (4) units per acre. Densities less than four (4) units per acre shall be allowed for the protection of natural resources.~~

* * *

Section 47. Amendments to Sections 38-1744, 38-1745 and 38-1748 regarding the NR Neighborhood Residential District. Sections 38-1744, 38-1745 and 38-1748 are amended to respectively read as follows:

Sec. 38-1744. Intent and purpose of district.

The purpose of the NR neighborhood residential district is to provide a transition from mixed-use areas to lower-density residential areas to promote the redevelopment of urban communities. The NR district will provide a diversity of housing types at densities higher than surrounding neighborhoods, complemented by parks, recreation areas and civic uses essential to community gathering. The district will be pedestrian in nature, with sidewalk-lined, tree-shaded streets naturally clamed by on-street parking and an active environment. This intent and purpose are consistent with Future Land Use Element Policy FLU8.3.1~~3.4.4~~ of the Orange County ~~2000-2020~~ Comprehensive ~~Policy~~ Plan. These NR neighborhood residential district regulations shall be administered by the county zoning division, except that any non-zoning aspects of these regulations shall be administered by the appropriate department or division.

Sec. 38-1745. Permitted uses.

A use shall be permitted in the NR district if the use is identified by the letter "P" in the use table set forth in section 38-77. For master-planned redevelopment areas, defined as areas where lot assembly has taken place and a single site plan has been submitted for an area no less than five acres, in the NR district, permitted uses shall be consistent with ~~minimum and maximum land area specified in~~ Future Land Use Element Policy FLU 1.1.4C ~~3.4.7~~ of the Orange County ~~2000-2020~~ Comprehensive ~~Policy~~ Plan.

* * *

Sec. 38-1748. Site development standards.

Except as otherwise provided in this section, the site and building requirements shown in article XII of this chapter shall apply to all development within the NR district.

* * *

(2) *Density and intensity standards.* The following density and intensity standards shall apply to all development within the NR district.

a. Floor area ratio shall not exceed .40.

b. The maximum residential density shall not exceed twenty (20) units per acre.

~~c. The minimum residential density shall be no less than four (4) units per acre. Densities less than four (4) units per acre shall be allowed for the protection of natural resources.~~

* * *

Section 48. Amendments to Article XVIII regarding Donation Bins. Article XVIII of Chapter 38 is amended to read as follows:

ARTICLE XVIII. ~~DONATION~~ COLLECTION BINS

Sec. 38-1765. Intent.

The intent of this Article is to regulate the placement of ~~donation~~ collection bins within the unincorporated area of Orange County to promote the health, safety, and general welfare of citizens of the County.

Sec. 38-1766. Definitions.

As used in this Article, the following words or phrases shall have the meaning ascribed to them below unless the context clearly indicates otherwise:

(a) *~~Donation~~ Collection bin* shall mean any stationary or free-standing container, receptacle or similar device that is located outdoors on any property within the County and is used for the ~~solicitation and~~ collection of donated items, such as clothing, books, shoes or other non-perishable personal property. This term does not include any of the following: (1) a bin used for the ~~solicitation and~~ collection of donated items associated with a special event, provided the bin is removed when the special event ends, but in no event later than forty-eight (48) hours after being placed at the special event site**;** (2) a mobile trailer used for the ~~solicitation and~~ collection of donated items, provided it complies with all applicable ordinances and regulations, including those relating to special events; and (3) a container ~~bin~~, for the collection of recyclable materials associated with the Orange County Solid Waste Division.

(b) *Permit* shall mean a permit issued by the zoning manager or designee to operate a ~~donation~~ collection bin pursuant to this Article.

(c) *Permittee* shall mean the person or entity that owns the ~~donation~~ collection bin and in whose name a permit to operate a ~~donation~~ collection bin has been issued under the terms and provisions of this Article.

(d) *Property owner* shall mean the owner of fee simple title of record or the owner's authorized agent.

~~(e) *Solicitation* shall mean as defined by Section 496.404, Florida Statutes, as may be amended.~~

Sec. 38-1767. Permit required.

No person shall place, use or operate a ~~donation~~ collection bin in the unincorporated area without obtaining a permit pursuant to this Article. The operator of a ~~donation~~ collection bin in existence as of June 24, 2014, the date of adoption of this ordinance, shall have until September 1, 2014, to either apply for and obtain a permit under this Article or remove the ~~donation~~ collection bin.

Sec. 38-1768. Permit application.

(a) An application for a permit shall be made to the zoning manager or designee on a form prescribed by the zoning manager. The applicant shall pay an application fee, established by the Board of County Commissioners and found in the fee schedule. Such application shall include~~, at a minimum,~~ all of the following information:

(1) A map or sketch showing the location where the ~~donation~~ collection bin will be situated.

(2) A drawing or manufacturer's specification of the ~~donation~~ collection bin and information regarding the size and color of the ~~donation~~ collection bin.

(3) The name, address and telephone number of the applicant.

~~(4) A copy of the Florida Department of Environmental Protection (FDEP) permit as a Certified Recovered Materials Dealers, issued pursuant to Section 403.7046, Florida Statutes, unless the applicant shows that an FDEP rule exempts it from Section 403.7046.~~

(~~5~~4) If the applicant is not the owner of the property, the applicant shall sign and produce a notarized statement attesting that the owner of the property has approved of or consented to the application for a permit ~~Written consent from the property owner~~ to place the ~~donation~~ collection bin on the property.

(~~6~~5) Written authorization from a non-profit

organization to display affiliation with the non-profit organization.

(6) Evidence of any business permits or registrations required pursuant to State and/or local law, such as a Florida Department of Environmental Protection (FDEP) permit as a Certified Recovered Materials Dealers, issued pursuant to Section 403.7046, Florida Statutes, unless the applicant is exempt from Section 403.7046.

(b) Within fourteen (14) days of receipt of a completed application, the zoning manager or designee shall issue a letter to the applicant approving or denying the permit application~~, with or without conditions, or denying the application~~.

(c) Upon approval of a permit application, the zoning manager, or his authorized designee, shall issue the permittee a tag which shall include the permit number and expiration date. A separate tag shall be issued for each collection bin which shall be displayed in accordance with section 38-1770 of this Article.

(d) In the event the original tag is damaged or otherwise inadvertently removed from the collection bin, the permittee may request a replacement tag from the zoning manager for a nominal fee. This shall not apply to any collection bin wherein the original tag has been removed due to expiration or other violation of this Ordinance.

Sec. 38-1769. Standards and criteria.

(a) A ~~donation~~ collection bin shall be limited to a maximum floor area of twenty-five (25) square feet and a maximum of ~~-~~seven feet (7') in height.

(b) A ~~donation~~ collection bin shall be limited to one bin per parcel or lot**,** except that one additional ~~donation~~ collection bin may be permitted if the parcel or lot has more than three hundred feet (300') of road frontage.

(c) A ~~donation~~ collection bin shall be maintained in good condition and appearance with no structural damage, holes, or visible rust, and shall be ~~free of graffiti~~ repaired or repainted in the event it is damaged or vandalized.

(d) In addition to the information that is required to be posted pursuant to Section 38-1770, ~~S~~signage shall be ~~required~~

permitted on ~~at least~~ not more than two sides of a ~~donation~~ collection bin, provided that at least one sign shall be located on the front or depositing side of the receptacle, and the total copy area of all signage does not exceed thirty-two (32) square feet. Signage shall only advertise the ~~donation~~ collection bin's: (1) permittee, and (2) ~~—~~if applicable, benefitting foundation or organization. A ~~donation~~ collection bin operated by a person or entity other than a non-profit permittee shall include the following statement on the depositing side of the bin~~, not less than two inches (2") below the bin chute, in conspicuous and clear lettering at least two inches (2") high~~: "[Permittee name] is not a charitable organization. The materials deposited in this bin are recycled and sold for profit, and are not tax deductible contributions." The sign shall be located not less than two inches (2") below the bin chute with the conspicuous and clear lettering that is not less than three inches (3") high and one-half inches (1/2") in width with an ink color that contrasts with the color of the collection bin. A ~~permittee's donation~~ collection bin operated by a person or entity other than a non-profit permittee with a benefitting foundation or organization may also state: "A portion of the proceeds of the sale of the materials deposited in this bin benefits [name of benefitting foundation or organization]."

(e) A ~~donation~~ collection bin shall not be located on an unimproved parcel or lot.

(f) The permittee shall maintain or cause to be maintained the area surrounding a ~~donation~~ collection bin free of junk, garbage, trash, debris or other refuse material. In addition, a ~~donation~~ collection bin shall be emptied at least every seventy-two (72) hours.

(g) A ~~donation~~ collection bin shall have a security or safety chute and tamper proof lock to prevent or deter intrusion and vandalism.

(h) The permittee and property owner shall be individually and jointly responsible for abating and removing all junk, garbage, trash, debris and other refuse material in the area surrounding a ~~donation~~ collection bin within seventy-two (72) hours of written or verbal notice from the County.

(i) The permittee and property owner shall be individually and severally responsible for all costs related to abating and removing any junk, garbage, trash, debris and other refuse materials from the area surrounding a ~~donation~~ collection

bin.

(j) A ~~donation~~ collection bin shall be located on an improved impervious surface and shall be anchored to such surface.

(k) A ~~donation~~ collection bin shall only be allowed as an accessory use in the ~~C~~commercial and ~~I~~industrial zoning districts. Also, until October 1, 2019, a collection bin shall be allowed as an accessory use in a multi-family zoning district where the multi-family development is gated and has at least one hundred (100) units, provided that the collection bin shall be located interior to the multi-family development and not clearly visible from the public right-of-way. On October 1, 2019, the portion of this subsection allowing collection bins in a multi-family district shall automatically expire.

(l) A ~~donation~~ collection bin shall not be located in any of the following areas:

(1) Required parking spaces;

(2) Public or private right-of-way;

(3) Drive aisles;

(4) Required landscaped areas;

(5) Sight triangle;

(6) Pedestrian circulation areas;

(7) Within one hundred feet (100') from a single-family residentially zoned district; or

(8) Within the setback of the applicable zoning district.

(m) A collection bin shall not be placed on the site in a manner that impedes vehicular or pedestrian traffic flow.

Sec. 38-1770. Display of permit.

The following information shall be clearly and prominently displayed on the exterior of the ~~donation~~ collection bin:

(~~1~~a) The approved permit tag, which shall be placed on the front or depositing side of the receptacle; and

(~~2~~b) On each side of the receptacle, ~~T~~the name of the permittee~~, and~~ the permittee's~~,~~ logo, trademark or service mark, local physical address, telephone number, e-mail address (if any), and for-profit or non-profit status.

Sec. 38-1771. Issuance; forms and conditions of permit.

(a) The permit shall be issued on a form prescribed by the zoning manager. The permit shall identify the exact location of the ~~donation~~ collection bin on the property.

(b) The permit shall not be transferable.

(c) The permit shall be effective for one (1) year~~,~~ from the date of issuance and be subject to annual renewal.

(d) The permittee shall advise the zoning manager of any material changes in the information or documentation submitted with the original permit application.

Sec. 38-1772. Permit fee.

The permittee shall pay an annual permit fee, established by the Board of County Commissioners and found in the fee schedule. No prorations may be allowed for permits less than one (1) year in duration or for permits suspended or revoked pursuant to this Article.

Sec. 38-1773. Revocation or suspension of permit.

The zoning manager shall have the authority to suspend or revoke a ~~donation~~ collection bin permit for the following reasons:

(a) A necessary business permit or state registration has been suspended, revoked or cancelled.

(b) Failure to correct a violation of this Article ~~or any condition of the permit~~ within three (3) days of receipt of a code enforcement notice of violation.

(c) The permittee provided false or misleading information on the application which was material to the approval of the permit.

The zoning manager or designee shall notify the permittee in writing whether the permit is being suspended or revoked, and the reason therefore. If the action of the zoning manager is based on subsection (a) or (c), the action shall be effective upon permittee's receipt of the notice. If the action is based on subsection (b), the action shall become effective ten (10) days following permittee's receipt of the notice, unless such action is appealed to the Board of Zoning Adjustment pursuant to this Article.

Nothing in this section shall be construed to otherwise limit the County's police powers.

Sec. 38-1774. Appeals.

(a) The zoning manager's decision to deny a permit application or to suspend or revoke a donation bin permit may be appealed to the Board of Zoning Adjustment. The permittee shall submit a written notice of appeal to the zoning manager within ten (10) days of receipt of the zoning manager's decision. The Zoning Division shall schedule a hearing before the Board of Zoning Adjustment within thirty (30) days of receiving the notice.

(b) The Board of Zoning Adjustment shall conduct a hearing on the appeal within sixty (60) days after the filing of the notice of appeal, or as soon thereafter as its calendar reasonably permits. The recommendation of the Board of Zoning Adjustment shall be forwarded to the Board of County Commissioners for a final decision.

(c) The filing of a notice of appeal by a permittee shall not stay an order of the zoning manager to remove the ~~donation~~ collection bin. The ~~donation~~ collection bin shall be removed as required by the zoning manager pending disposition of the appeal and final decision of the Board of County Commissioners.

Sec. 38-1775. Penalties.

Any person who operates or causes to be operated a ~~donation~~ collection bin without a valid permit or any person or permittee who violates any provision of this Article, regardless of whether the ~~donation~~ collection bin is permitted under this Article, shall be subject to any one or more of the following penalties and/or remedies:

(a) A violation of any provision of this Article may be enforced through the code enforcement process as described in Chapter 11 of the Orange County Code and Chapter 162 of the Florida Statutes;

(b) Orange County may bring a lawsuit in a court of competent jurisdiction to pursue temporary or permanent injunctive relief or any other legal or equitable remedy authorized by law to cure, remove, prevent, or end a violation of any provision of this Article, and furthermore, in the event Orange County removes a ~~donation~~ collection bin from the public right-of-way, the owner of the ~~donation~~ collection bin shall be responsible for the cost of removal; and

(c) A violation of any provision of this Article may be punished as provided in Section 1-9 of the Orange County Code.

Sec. 38-1776. Responsibility and liability of owner of donation bin, permittee, and property owner.

The owner of the donation bin, the permittee, and the owner of any private property upon which a violation of this Article occurs may be held individually and severally responsible and liable for such violation.

Secs. 38-1777 – 38-1779. Reserved.

[THE REMAINDER OF THIS PAGE HAS BEEN INTENTIONALLY LEFT BLANK.]

Section 49. ***Effective date.*** This ordinance shall become effective pursuant to general law.

ADOPTED THIS ___ DAY OF SEP 13 2016, 2016.

ORANGE COUNTY, FLORIDA
By: Board of County Commissioners

By: _____
Teresa Jacobs,
Orange County Mayor

ATTEST: Martha O. Haynie, County Comptroller
As Clerk of the Board of County Commissioners

By: _____
Deputy Clerk

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REVISIONS TO SEC. 38-77 USE TABLE

APPENDIX "A"

Sec. 38-77. Use Table

Uses Per Zoning Code	*SIC Group*	*Land Use*	*A-1*	*A-2*	*A-R*	*RCE-5*	*RCE-2*	*RCE*	*R-1AAAA*	*R-1AAA*	*R-1AA*	*R-1A*	*R-1*	*R-2*	*R-3*	*RCE Cluster*	*RT*	*RT-1*	*RT-2*	*P-O*	*C-1*	*C-2*	*C-3*	*I-1A*	*I-1, I-5*	*I-2, I-3*	*I-4*	*U-V (see 29)*	*R-L-D*	*UR-3*	*NC*	*NAC*	*NR*	*Conditions*
		RESIDENTIAL																																
Single-family and modular homes with customary accessory uses		Single-family and modular homes with customary accessory uses	1 P	1 P	1 P	1 P	1 P	1 P	1 P	1 P	1 P	1 P	1 P	1 P	1 P	1 P		1 P	1 P	~~1~~ ~~P~~											~~147~~ 1 P	~~147~~ 1 P	~~147~~ P	*
													* * *																					
Home occupation			101 P	101 P	101 P	101 P	101 P	101 P	101 P	101 P	101 P	101 P	101 P	101 P	101 P	101 P	101 P	101 P	101 P													101 P	101 P	
													* * *																					
Fee simple duplex and patio homes		Fee simple duplex and patio homes												2 P	2 P	~~116~~ P													124 P	~~P~~			P	
													* * *																					
Chimneys, water & fire towers, church spires, domes, cupolas, stage towers, scenery lofts, cooling towers, elevator bulkheads, smokestacks, flagpoles, and parapet walls		Chimneys, water & fire towers, church spires, domes, cupolas, stage towers, scenery lofts, cooling towers, elevator bulkheads, smokestacks, flagpoles, and parapet walls	7 P ~~S~~	7 P ~~S~~	7 P ~~S~~	7 P ~~S~~	7 P ~~S~~	7 P ~~S~~	7 P ~~S~~	7 P ~~S~~	7 P ~~S~~	7 P ~~S~~	7 P ~~S~~	7 P ~~S~~	7 P ~~S~~	7 P ~~S~~	7 P ~~S~~	7 P ~~S~~	7 P ~~S~~	7 P ~~S~~	7 P ~~S~~	7 P ~~S~~	7 P ~~S~~	7 P ~~S~~	7 P ~~S~~	7 P ~~S~~	7 P ~~S~~	7 P ~~S~~	7 P ~~S~~		7 P ~~S~~	7 P ~~S~~	7 P ~~S~~	*
													* * *																					
~~Transient rental units~~		~~Transient rental units~~																~~P~~																
													* * *																					
Accessory dwelling unit		Accessory dwelling unit	108 S	108 S	108 S	108 S	108 S	108 S	108 S	108 S	108 S	108 S	108 S	108 S	108 S	108 S		108 S	108 S												108 S	108 S	108 ~~P~~S	*
													* * *																					
Emergency generators (permanent)		Emergency generators (permanent)	16 P	16 P	16 P	16 P	16 P	16 P	16 P	16 P	16 P	16 P	16 P	16 P	16 P	16 P	16 P	16 P	16 P	16 P	16 P	16 P	16 P	16 P	16 P	16 P	16 P	16 P	16 P		16 P	16 P	16 P	
													* * *																					
Home with 6 or fewer residents that otherwise meets definition of ~~C~~community ~~R~~residential ~~H~~homes ~~(max 6 clients)~~		Home with 6 or fewer residents that otherwise meets definition of ~~C~~community ~~R~~residential ~~H~~homes ~~(max 6 clients)~~	12 P	12 P	12 P	12 P	12 P	12 P	12 P	12 P	12 P	12 P	12 P	12 P	12 P	12 P				P	P	P	P		P	P	P	12 13 P	124 12 P		P	12 P	12 P	*
Community ~~R~~residential ~~H~~homes (7 to 14 ~~clients~~residents)		Community ~~R~~residential ~~H~~homes (7 to 14 ~~clients~~residents)												14 S	14 P	14 ~~119~~ S				P	P	P	P		P	P	P	13 14 S			P	P	14 S	
													* * *																					

REVISIONS TO SEC. 38-77 USE TABLE

APPENDIX "A"

Sec. 38-77. Use Table

Uses Per Zoning Code	*SIC Group*	*Land Use*	*A-1*	*A-2*	*A-R*	*RCE-5*	*RCE-2*	*RCE*	*R-1AAAA*	*R-1AAA*	*R-1AA*	*R-1A*	*R-1*	*R-2*	*R-3*	*RCE Cluster*	*RT*	*RT-1*	*RT-2*	*P-O*	*C-1*	*C-2*	*C-3*	*I-1A*	*I-1, I-5*	*I-2, I-3*	*I-4*	*U-V (see 29)*	*R-L-D*	*UR-3*	*NC*	*NAC*	*NR*	*Conditions*
~~Community Residential Homes (greater than 14 clients)~~		~~Community residential homes (greater than 14 clients)~~													~~P~~					~~P~~	~~P~~	~~P~~	~~P~~		~~P~~	~~P~~	~~P~~			~~S~~	~~P~~	~~P~~	~~14~~ S	
													* * *																					
Transient rental and ~~S~~single-family transient rental		~~Single-family t~~Transient rental													~~69~~ P																			
													* * *																					
Adult/child day care centers		Adult/child day care centers	26 S	26 S	26 S	26 S	26 S	26 S	26 S	26 S	26 S	26 S	26 S	26 S	26 P	26 S				26 P	26 P	26 P	26 P	~~107~~ 26 PS	26 P	26 P	26 P	13 26 S 26 27 P	26 S		26 P	26 P	26 S	*
													* * *																					
Docks		Docks	95 P	95 P	95 P	95 P	95 P	95 P	95 P	95 P	95 P	95 P	95 P	95 P	95 P	95 P	95 P	95 P	95 P	95 P	95 P	95 P	95 P	95 P	95 P	95 P	95 P	95 P	95 P		95 P	95 P	95 P	
													* * *																					
	02	**AGRICULTURAL PRODUCTION (livestock)**	P	P																														
Commercial kennels		Commercial kennels	~~78~~ S	~~78~~ S																		~~78~~ P	~~78~~ P		~~78~~ P	~~78~~ P	~~78~~ P							*
													* * *																					
~~Boarding of horses and ponies and riding stables for commercial purposes; raising of horses and ponies for commercial purposes~~		~~Boarding of horses and ponies and riding stables for commercial purposes; raising of horses and ponies for commercial purposes~~	~~59~~ S	~~59~~ S																		~~P~~	~~P~~		~~P~~	~~P~~	~~P~~							
~~Animal~~ Cattle stock grazing, stock yards	0211	Beef cattle (grazing)	P	P																														
Dairy farms	0241	Dairy Farms	P	P																														
~~Poultry raising or keeping~~	~~025~~	~~Poultry & Eggs~~	~~50~~ S ~~36~~ P	~~50~~ S ~~36~~ P	~~37~~ P	~~40~~ P	~~40~~ P	~~40~~ P																											
Raising or keeping of poultry	025	Raising or keeping of poultry	36 SP	36 SP	36 SP	36 SP	36 SP	36 SP																										

REVISIONS TO SEC. 38-77 USE TABLE

APPENDIX "A"

Sec. 38-77. Use Table

Uses Per Zoning Code	*SIC Group*	*Land Use*	*A-1*	*A-2*	*A-R*	*RCE-5*	*RCE-2*	*RCE*	*R-1AAAA*	*R-1AAA*	*R-1A1*	*R-1A*	*R-1*	*R-2*	*R-3*	*RCE Cluster*	*RT*	*RT-1*	*RT-2*	*P-O*	*C-1*	*C-2*	*C-3*	*I-1A*	*I-1, I-5*	*I-2, I-3*	*I-4*	*U-V (see 29)*	*R-L-D*	*UR-3*	*NC*	*NAC*	*NR*	*Conditions*
													* * *																					
Raising or keeping of ~~cows and~~ horses, ~~&~~ ponies, donkeys, and mules ~~for domestic purposes,~~ boarding of horses, ponies, etc.	0272	Raising or keeping of horses, ponies, etc., boarding of horses ponies, etc. ~~Horses & equines~~	41 SP	41 SP	41 SP	41 SP	41 SP	41 SP													41 P	41 P			41 P	41 P	41 P						
~~Commercial aviculture, aviaries~~	0279	~~Commercial aviculture~~	~~48 S~~	~~48 S~~	~~48 S~~																	~~P~~	~~P~~		~~P~~	~~P~~	~~P~~						*
~~Bee Keeping~~		~~Bee Keeping~~	~~P~~	~~P~~	~~97 P~~																												
Raising or keeping of goats, sheep, lambs, pigs, or swine		Raising or keeping of goats, sheep, lambs, pigs or swine	49 S P	49 S P	49 S P	52 P 69 P	69 P	69 P																									
~~Breeding, keeping and raising of farm animals (ex goats, swine, pot-bellied pigs, etc.) for sale or profit (not for domestic purposes)~~		~~Breeding, keeping and raising of farm animals (ex., goats, swine, pot-bellied pigs, etc.) for sale or profit (not for domestic purposes)~~	~~50 S~~	~~50 S~~																											
~~Breeding, keeping and raising of farm animals (ex. goats, swine, pot bellied pigs, etc.) for domestic purposes only~~		~~Breeding, keeping and raising of farm animals (ex Goats, swine, pot-bellied pigs, etc.) for domestic purposes only~~	~~49 P~~	~~49 P~~	~~52 P~~	~~52 P~~																											
~~Breeding, keeping and raising of exotic animals~~		~~Breeding, keeping and raising of exotic animals~~	~~11 P~~	~~11 P~~																													
													* * *																				
	07	**AGRICULTURAL SERVICES**	P	P																													
Veterinary service with no outdoor runs or compound	0742	Veterinary services	S	S															54 P	54 ~~112~~ P	54 ~~112~~ P	54 ~~112~~ P		P	P	P	54 P						*

REVISIONS TO SEC. 38-77 USE TABLE

APPENDIX "A"

Sec. 38-77. Use Table

Uses Per Zoning Code	*SIC Group*	*Land Use*	*A-1*	*A-2*	*A-R*	*RCE-5*	*RCE-2*	*RCE*	*R-1AAAA*	*R-1AAA*	*R-1AA*	*R-1A*	*R-1*	*R-2*	*R-3*	*RCE Cluster*	*RT*	*RT-1*	*RT-2*	*P-O*	*C-1*	*C-2*	*C-3*	*I-1A*	*I-1, I-5*	*I-2, I-3*	*I-4*	*U-V (see 29)*	*R-L-D*	*UR-3*	*NC*	*NAC*	*NR*	*Conditions*
													* * *																					
		CONSTRUCTION																																
Retention, detention, drainage ponds (in conjunction with ~~commercial~~ nonresidential development)	1629	Retention/detention	123 S	123 S										123 S	123 S					P	P	P	P	P	P	P	P						*
													* * *																				
~~Trade shops, and contractors shops with outdoor storage on site~~	17	**SPECIAL TRADE CONTRACTORS**																				~~58~~ P	~~58~~ P	~~107~~ 58 P	~~58~~ P	~~58~~ P	~~58~~ P							*
Trade shops, contractor shops with outdoor storage Contractors storage, equipment yards, and offices with outdoor storage	17																					58 P	58 P	107 58 P	58 P	58 P	58 P							*
													* * *																				
		MANUFACTURING																																
Meat storage, cutting & distribution, animal slaughtering	2011	Meat Packing plants/Animal slaughtering	63 S	63 S																					63 P	63 P	63 P							
													* * *																				
		STONE, CLAY, GLASS PRODUCTS																																
Concrete block and brick manufacturing	3271	Concrete ~~b~~Block & Brick																							51 ~~P~~	51 P	51 P							
													* * *																				

REVISIONS TO SEC. 38-77 USE TABLE

APPENDIX "A"

Sec. 38-77. Use Table

Uses Per Zoning Code	*SIC Group*	*Land Use*	*A-1*	*A-2*	*A-R*	*RCE-5*	*RCE-2*	*RCE*	*R-1AAAA*	*R-1AAA*	*R-1AA*	*R-1A*	*R-1*	*R-2*	*R-3*	*RCE Cluster*	*RT*	*RT-1*	*RT-2*	*P-O*	*C-1*	*C-2*	*C-3*	*I-1A*	*I-1, I-5*	*I-2, I-3*	*I-4*	*U-V (see 29)*	*R-L-D*	*UR-3*	*NC*	*NAC*	*NR*	*Conditions*
		INDUSTRIAL & COMMERCIAL MACHINERY																															
Concrete manufacturing, paving & mixing, temporary asphalt plants	353	Mining machinery, construction																							51 P	51 P	51 P						
													* * *																				
		LOCAL & INTERURBAN PASSENGER TRANSIT																															
Limousine service, home-based	4119		32 146 P S	32 146 P S	32 146 P S	32 146 P S	32 146 P S	32 146 P S	146 P S	146 P S	146 P S	146 P S	146 P S	146 P S	146 P S	32 146 P S	146 P S	146 P S	146 P S										146 P S			146 P S	146 P S	
													* * *																				
Truck terminals, truck stop, bus, cab, truck repair, storage and terminals, parking and/or storage of trucks	4231	Trucking Terminal Facilities																							82 P	82 P	82 P						
													* * *																				
Lattice (Ord. No. 95-25, §2, 8-29-95)	48	**COMMUNICATIONS**	S S	S S	S S	S S	S S	S	S	S	S	S	S	S	S 134 S	S S	S S	S S	S S	S S	S 135 P/S	P 135 P/S	P 135 P/S	107 P S 107 135 142 P/S	P 135 142 P/S	P 135 142 P/S	P 135 142 P/S	S	S		133 S 134 S	133 S 134 S	133 S	* ~~133~~ *
Guyed (Ord. No. 95-25, §2, 8-29-95)			S	S	S	S	S	S	S	S	S	S	S	S	S	S	S	S	S	S	135 P/S	135 P/S	135 P/S	107 135 142 P/S	135 142 P/S	135 142 P/S	135 142 P/S	S	S		S	S	S	~~133~~ *
Monopole (Ord. No. 95-25, §2, 8-29-95)			32 143 P/S	32 143 P/S	32 143 P/S	32 143 P/S	32 143 P/S	32 143 P/S	143 P/S	143 P/S	143 P/S	143 P/S	143 P/S	143 P/S	143 P/S	32 143 P/S	143 P/S	143 P/S	143 P/S	143 P/S S	143 135 P/S	143 135 P/S	143 135 P/S	107 135 142 P/S	135 142 P/S	135 142 P/S	135 142 P/S	143 P/S	143 P/S		143 P/S	143 P/S	143 P/S	*
													* * *																				
	49	**ELECTRIC, GAS, SANITARY SERVICES**	S	S	S	S	S	S	S	S	S	S	S	S	S	S	S	S	S	S	S	S	S	107 S		S	S	S	S		S	S	S	*

REVISIONS TO SEC. 38-77 USE TABLE

APPENDIX "A"

Sec. 38-77. Use Table

Uses Per Zoning Code	*SIC Group*	*Land Use*	*A-1*	*A-2*	*A-R*	*RCE-5*	*RCE-2*	*RCE*	*R-1AAAA*	*R-1AAA*	*R-1AA*	*R-1A*	*R-1*	*R-2*	*R-3*	*RCE Cluster*	*RT*	*RT-1*	*RT-2*	*P-O*	*C-1*	*C-2*	*C-3*	*I-1A*	*I-1, I-5*	*I-2, I-3*	*I-4*	*U-V (see 29)*	*R-L-D*	*UR-3*	*NC*	*NAC*	*NR*	*Conditions*
													* * *																					
Commercial solar farms	49	Commercial solar farms	50 P	50 P																					50 P	50 P	50 P							
													* * *																					
~~Substations, telephone switching stations~~Gas substations, TV substations, radio substations, telephone substations		~~Substations, telephone switching stations~~Gas substations, TV substations, radio substations, telephone substations	61 S	61 S	61 S	61 S	61 S	61 S	61 S	61 S	61 S	61 S	61 S	61 S	61 S	61 S	61 S	61 S	61 S	61 S	61 S	61 S	61 S	61 P	61 P	61 P	61 S	61 S		61 S	61 S	61 S	*
													* * *																					
Distribution electric substation	49	Distribution electric substation	81 P	81 P	81 P	81 P	81 P	81 P	81 P	81 P	81 P	81 P	81 P	81 P	81 P	81 P	81 P	81 P	81 P	81 P	81 P	81 P	81 P	81 P	81 P	81 P	81 P	81 P	81 P		81 P	81 P	81 P	*
Alternative energy devices as an accessory structure or use (wind turbines, solar panels, etc.)			83 P	83 P	83 P	83 P	83 P	83 P	83 P	83 P	83 P	83 P	83 P	83 P	83 P	83 P	83 P	83 P	83 P	83 P	P	P	P	P	P	P	P	83 P	83 P		83 P	83 P	83 P	*
													* * *																					
~~Donation~~ Collection bins		~~Donation~~ Collection bins												115 P	115 P					115 P	115 P	115 P	115 P	115 P	115 P	115 P								
													* * *																					
		WHOLESALE TRADE																																
~~Wholesale bakeries~~	50	Wholesale distribution of durable and nondurable goods																				P	P		P	P	P							*
Wholesale bakeries	50, 51	Groceries and related products																				P	P		P	P	P							*
													* * *																					
Junk, salvage or wrecking yards, sales and storage of wrecked ~~car~~or inoperable vehicles	5093	Junk yards (scrap and waste)																									9 ~~63~~ P							*
													* * *																					

REVISIONS TO SEC. 38-77 USE TABLE

APPENDIX "A"

Sec. 38-77. Use Table

Uses Per Zoning Code	*SIC Group*	*Land Use*	*A-1*	*A-2*	*A-R*	*RCE-5*	*RCE-2*	*RCE*	*R-1AAAA*	*R-1AAA*	*R-1AA*	*R-1A*	*R-1*	*R-2*	*R-3*	*RCE Cluster*	*RT*	*RT-1*	*RT-2*	*P-O*	*C-1*	*C-2*	*C-3*	*I-1A*	*I-1, I-5*	*I-2, I-3*	*I-4*	*U-V (see 29)*	*R-L-D*	*UR-3*	*NC*	*NAC*	*NR*	*Conditions*
Wholesale florists	5193	Flowers, nursery stock and florist supplies																				P	P		P	P	P							
		* * *																																
		RETAIL TRADE																																
Storage yards for operable automobiles, trucks, boats, and commercial vehicles (regardless if for sale, lease or not). For storage of wrecked or inoperable vehicles, see SIC Group 5093.		Storage yards for operable automobiles, trucks, boats, and commercial vehicles (regardless if for sale, lease or not). For storage of wrecked or inoperable vehicles, see SIC Group 5093.																					130 P S		130 P	130 P	130 P							
		* * *																																
	52	**BUILDING MATERIALS & GARDEN SUPPLIES**																			P	P	P					56 P							
Lumber and other building materials, building materials storage and sales	521	Lumber and other building materials																			64 P	99 P	99 P		99 P	99 P	99 P				64 P	64 P		*
		* * *																																
Hardware stores	5251	Hardware stores																			64 P	P	P					56 P			64 P	64 P		
		* * *																																
	54	**FOOD STORES**																			P	P	P					56 P						
Retail bakery shops	5461	Retail bakeries																			66 P	66 P	66 P					66 P			66 P	66 P		*
		* * *																																
	58	**EATING & DRINKING PLACES**																			P	P	P											
Restaurants with outdoor seating	5812	Eating places																		86 P	86 P	86 P	86 P	86 P	86 P	86 P					86 P			
		* * *																																

REVISIONS TO SEC. 38-77 USE TABLE

APPENDIX "A"

Sec. 38-77. Use Table

Uses Per Zoning Code	*SIC Group*	*Land Use*	*A-1*	*A-2*	*A-R*	*RCE-5*	*RCE-2*	*RCE*	*R-1AAAA*	*R-1AAA*	*R-1AA*	*R-1A*	*R-1*	*R-2*	*R-3*	*RCE Cluster*	*RT*	*RT-1*	*RT-2*	*P-O*	*C-1*	*C-2*	*C-3*	*I-1A*	*I-1, I-5*	*I-2, I-3*	*I-4*	*U-V (see 29)*	*R-L-D*	*UR-3*	*NC*	*NAC*	*NR*	*Conditions*
	59	**MISCELLANEOUS RETAIL**																			P	P	P					P						*
													* * *																				
~~Bicycle stores,~~ sSporting goods, bicycle stores, firearms sales and rental	5941	Sporting goods & bicycle shops																			~~136~~ P	~~136~~ P	~~136~~ P					~~136~~ P			~~136~~ P	~~136~~ P		*
													* * *																				
Indoor markets		Indoor markets																			P	P	P		P	P	P				P	P		
													* * *																				
		PERSONAL SERVICES																			P	P	P		P	P	P							
Funeral homes, funeral directors, funeral chapter	7261	Funeral service, except crematories and embalming	S	S	S										131 S					131 S	P	P	P		P	P	P				P	P		
													* * *																				
Costume rental, dating services, escort services, tanning salons, tattoo parlors, valet parking	7299																			~~77~~ S	P	P	P					P						
													* * *																				
	75	**AUTO REPAIR SERVICES & PARKING**																			P	P		P	P	P								
Car rental and leasing	7514	Passenger car rental																			176 138 P	176 138 P	176 138 P		176 138 P	176 138 P	176 138 P							
													* * *																				
Parking lots & parking garages for office, commercial or industrial uses	7521	Automobile parking											~~81~~ S	~~81~~ S	~~81~~ S					~~81~~ S P	P	P	P	P	P	P	P	~~81~~ P			150 S	150 S	150 S	*
													* * *																				
Automobile towing service (does not include the storage, sales or dismantling of wrecked/inoperative vehicles); ~~window tinting~~	7549	Towing services																					130 S		130 P	130 P	130 P							
													* * *																				

REVISIONS TO SEC. 38-77 USE TABLE

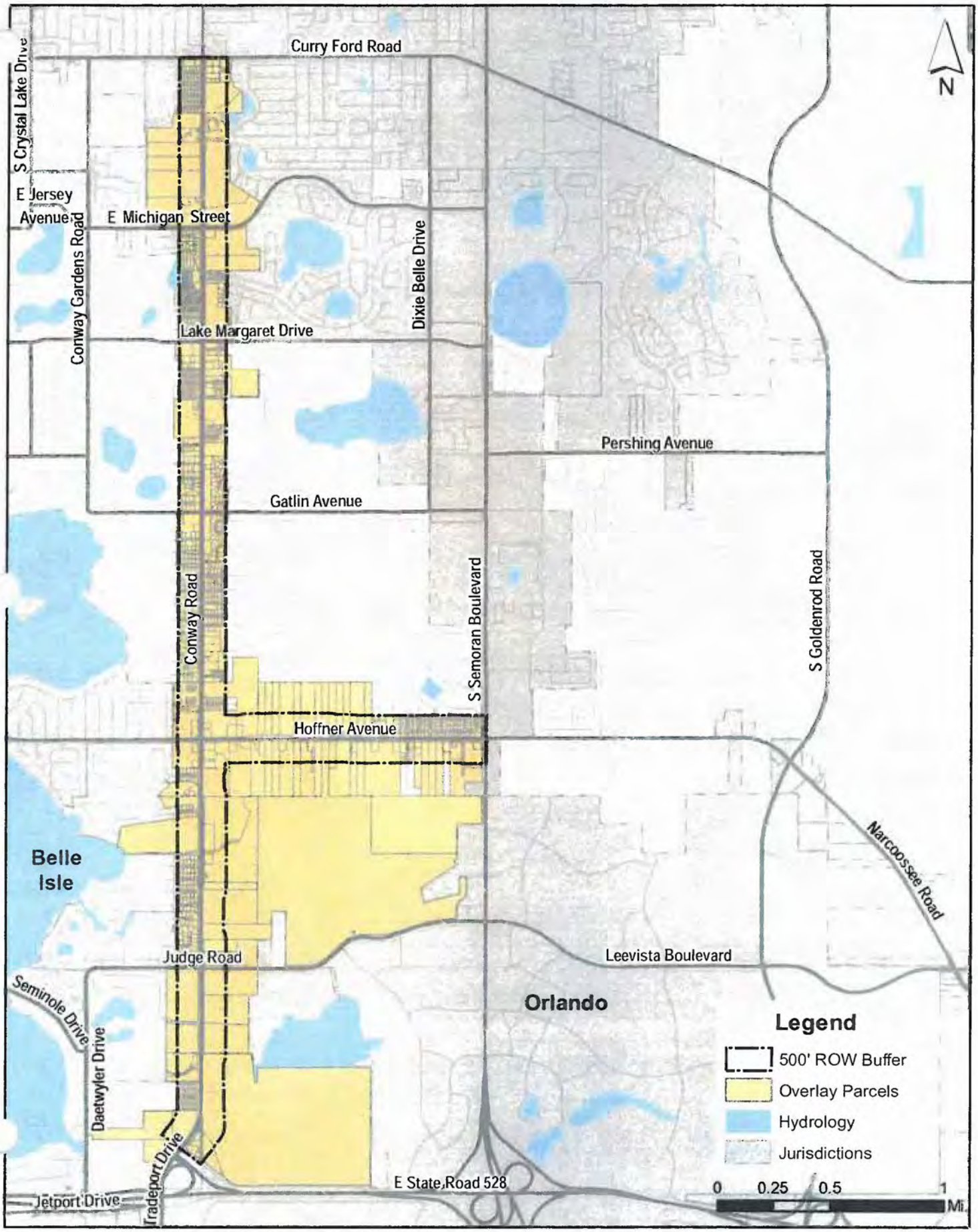
APPENDIX "A"

Sec. 38-77. Use Table

Uses Per Zoning Code	*SIC Group*	*Land Use*	*A-1*	*A-2*	*A-R*	*RCE-5*	*RCE-2*	*RCE*	*R-1AAAA*	*R-1AAA*	*R-1AA*	*R-1A*	*R-1*	*R-2*	*R-3*	*RCE Cluster*	*RT*	*RT-1*	*RT-2*	*P-O*	*C-1*	*C-2*	*C-3*	*I-1A*	*I-1, I-5*	*I-2, I-3*	*I-4*	*U-V (see 29)*	*R-L-D*	*UR-3*	*NC*	*NAC*	*NR*	*Conditions*
Window tinting	7549	Window tinting																				P	P		P	P	P						
													* * *																				
		HEALTH SERVICES																															
Assisted living facility	805														S						P	P	P		P	P	P						
													* * *																				
	82	**EDUCATIONAL SERVICES**	S	S	S	S	S	S	S	S	S	S	S	S	S	S	S	S	S	S									S		S	S		
Private kindergarten, elementary, junior high, middle and high schools, including those with dormitories or boarding facilities	8211	Elementary & middle schools	S	S	S	S	S	S	S	S	S	S	S	S	S	S	S	S	S	S	P	P	P	P	P	P	P	S	S		S	S	S	*
Schools (public) kindergarten (see conditions #139, 140 and 141)	8211	Elementary (see condition #139)																															
Schools (public) (see conditions #139, 140 and 141)	8211	Middle schools (see condition #139)																															
Schools (public) (see conditions #139, 140 and 141)	8211	High schools (see condition #139)																															
Colleges & universities	8221	College, universities & ~~high schools~~																		S	S	P S	P S	107 P	P	P	P	~~S~~			S	S	S	
													* * *																				
Seminaries	8221	Seminaries																			P	P	P	P	P	P	P	P			P	P		
													* * *																				
	83	**SOCIAL SERVICES**																			P	P	P	P	P	P	P						
Juvenile justice rehabilitation schools or facilities	8331	Job training & related services																			S	P	P		P	P	P						
													* * *																				
Uses of national defense	971	National security	94 S	94 S	94 S	94 S	94 S	94 S	94 S	94 S	94 S	94 S	94 S	94 S	94 S	94 S	94 S	94 S	94 S	94 S	94 S	94 S	94 S	107 94 S	94 S	94 S	94 S	94 S	94 S		94 S	94 S	94 S	*
													* * *																				

Conway Road/Hoffner Avenue Corridor Overlay District

Exhibit "A"



IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

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

Defendants
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.

2016-CA-007634-O

PLAINTIFFS' MOTION FOR JUDICIAL NOTICE OF ORD. No. 2008-06

PLAINTIFFS DAVID AND JENNIFER FOLEY MOVE THE COURT pursuant §§90.202(10) and 90.203, Fla. Stat. TO TAKE JUDICIAL NOTICE OF ORANGE COUNTY ORDINANCE NO. 2008-06, attached hereto.

SUMMARY

The adoption May 13, 2008, of Ordinance No. 2008-06, represents the first amendment to the definition of *home occupation* after the Foleys' hearing before the Board of County Commissioners, February 19, 2008 [*See* amended complaint, e-filing #52564910, ¶40(e)]. The Ordinance reveals the definition of *home occupation* applicable February 19, 2008, and by amendment represents the policy direction taken by Orange County after the Foleys' case. Consequently, it is critical to an understanding of the issues in the case.

BACKGROUND

1. The Foleys attach a copy of Orange County Ordinance No. 2008-06, to this their "Plaintiffs' Motion for Judicial Notice of Ord. No. 2008-06."

2. The attached copy of Ordinance No. 2008-06, was downloaded March 25, 2016, from MuniCode at:

> https://www.municode.com/library/fl/orange_county/ordinances/code_of_ordinances?nodeId=302916

3. Below the Foleys certify that all parties to this case are on notice of this request that the Court take judicial notice of the attached copy of Orange County Ordinance No. 2008-06.

4. February 15, 2017, the Foleys filed their amended complaint, e-filing #52564910.

5. All Counts in the amended complaint, to some degree, involve the County Code's definition of *home occupation* between February 23, 2007, and February 19, 2008 [*See* amended complaint, e-filing #52564910, ¶40(a) and (e)].

6. No other party to this case has yet asked the Court to take judicial notice of Ordinance No. 2008-06, or otherwise put the ordinance before the Court.

ARGUMENT

7. Sections 90.202(10) and 90.203, Fla. Stat., require this Court take judicial notice of Orange County Ordinance No. 2008-06, if the Foleys give all parties notice of the request, provide the court proof of that notice, and furnish the Court with sufficient information to enable it to take judicial notice.

8. By this motion all parties are on notice the Court has been asked to take judicial notice of the attached copy of Orange County Ordinance No. 2008-06; certification provides the Court with the required proof.

9. The above **SUMMARY** and **BACKGROUND** provide the Court "with sufficient information to enable it to take judicial notice."

CONCLUSION

WHEREFORE, pursuant §§90.202(10) and 90.203, Fla. Stat., THE FOLEYS HERE MOVE THE COURT TO TAKE JUDICIAL NOTICE OF ORANGE COUNTY ORDINANCE NO. 2008-06.

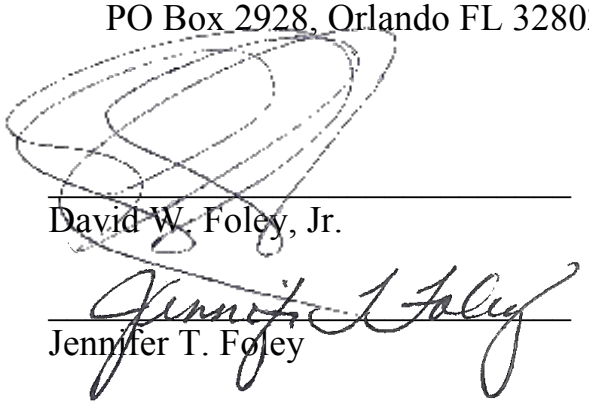
CERTIFICATE OF SERVICE

Plaintiffs certify that on May 25, 2017, the foregoing was electronically filed with the Clerk of the Court using the Florida Courts' eFiling Portal, which will send notice of filing and a service copy of the foregoing to the following:

William C. Turner, Jr., Assistant County Attorney,
P.O. Box 2687, Orlando FL, 32801, williamchip.turner@ocfl.net;

Derek Angell, O'Connor & O'Connor LLC,
840 S. Denning Dr. 200, Winter Park FL, 32789, dangell@oconlaw.com;

Lamar D. Oxford, Dean, Ringers, Morgan & Lawton PA,
PO Box 2928, Orlando FL 32802-2928, loxford@drml-law.com.



David W. Foley, Jr.

Jennifer T. Foley

Date: May 25, 2017

Plaintiffs
1015 N. Solandra Dr.
Orlando FL 32807-1931
PH: 407 671-6132
e-mail: david@pocketprogram.org
e-mail: jtfoley60@hotmail.

APPROVED
BY ORANGE COUNTY BOARD
OF COUNTY COMMISSIONERS

MAY 1 3 2008 JN/SG/BS

EFFECTIVE DATE

MAY 1 9 2008

ORDINANCE NO. 2008-06

AN ORDINANCE AFFECTING THE USE OF LAND IN ORANGE COUNTY, FLORIDA, BY AMENDING CHAPTER 30 ("PLANNING AND DEVELOPMENT") AND CHAPTER 38 ("ZONING"); AMENDING SECTION 30-43 ("[BOARD OF ZONING ADJUSTMENT] – POWERS AND DUTIES"); AMENDING SECTION 38-1 ("DEFINITIONS"); AMENDING SECTION 38-46 ("INTENT [REGARDING NONCONFORMING USE PROVISIONS]"); AMENDING SECTION 38-49 ("ALTERATION [OF NONCONFORMING USES]; MAINTENANCE"); AMENDING SECTION 38-51 ("ABANDONMENT [OF NONCONFORMING USES]"); AMENDING SECTION 38-74 ("PERMITTED USES, SPECIAL EXCEPTIONS AND PROHIBITED USES"); AMENDING SECTION 38-77 ("USE TABLE"); AMENDING SECTION 38-78 ("SPECIAL EXCEPTION CRITERIA"); AMENDING SECTION 38-79 ("CONDITIONS FOR PERMITTED USES AND SPECIAL EXCEPTIONS"); REPEALING SECTION 38-482; AMENDING SECTION 38-581 ("R-T-2 COMBINATION MOBILE HOME AND SINGLE FAMILY DWELLING DISTRICT"); AMENDING SECTION 38-932 ("[I-1/I-5] PERFORMANCE STANDARDS"); AMENDING SECTION 38-1208 ("CONTROL OF DEVELOPMENT FOLLOWING APPROVAL [OF DEVELOPMENT PLAN]; AMENDING SECTION 38-1254 ("[PLANNED DEVELOPMENT RESIDENTIAL DEVELOPMENT] SETBACKS"); AMENDING SECTION 38-1258 ("[PLANNED DEVELOPMENT] MULTI-FAMILY DEVELOPMENT COMPATIBILITY"); AMENDING SECTION 38-1289 ("[TOURIST COMMERCIAL PLANNED DEVELOPMENT] PARKING"); AMENDING SECTION 38-1301 ("[TOURIST COMMERCIAL PLANNED DEVELOPMENT] SITE DEVELOPMENT STANDARDS"); AMENDING SECTION 38-1344 ("[CVC] APPROVAL PROCEDURE"); AMENDING SECTION 38-1401 ("SUBSTANDARD LOTS OF RECORD"); AMENDING SECTION 38-1408 ("FENCES AND WALLS"); AMENDING SECTION 38-1415 ("[PROHIBITED AREAS FOR SALE OF ALCOHOLIC BEVERAGES] – DISTANCES FROM CHURCHES, SCHOOLS AND/OR ADULT ENTERTAINMENT ESTABLISHMENTS"); AMENDING SECTION 38-1426 ("ACCESSORY DWELLING UNITS"); AMENDING SECTION 38-1476 ("QUANTITY OF OFF-STREET PARKING"); AMENDING SECTION 38-1477

("LOCATION OF OFF-STREET PARKING"); AMENDING SECTION 38-1478 ("JOINT USE OF OFF-STREET PARKING SPACE"); AMENDING SECTION 38-1479 ("OFF-STREET PARKING LOT REQUIREMENTS"); AMENDING SECTION 38-1501 ("BASIC [SITE AND] BUILDING REQUIREMENTS"); AMENDING SECTION 38-1508 ("ADMINISTRATIVE WAIVERS FROM PERFORMANCE STANDARDS"); AND PROVIDING AN EFFECTIVE DATE

BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF ORANGE COUNTY, FLORIDA:

Section 1. Amendments; In General. Chapter 30 and Chapter 38 of the Orange County Code are hereby amended as set forth in Section 2 through Section 30 of this ordinance, with new wording being indicated by underlines and deleted wording being shown by strike-throughs.

Section 2. Amendment to Section 30-43 ("[Board of Zoning Adjustment] - Powers and duties"). Section 30-43 is amended to read as follows:

Sec. 30-43. Same -- Powers and duties.

The board of zoning adjustment shall have the following powers and duties:

* * *

(3) *Variances.* To recommend to the board of county commissioners upon appeal in specific cases such variance from the zoning ordinance as will not be contrary to the public interest where, owing to special conditions, a literal enforcement of the provisions of the zoning ordinances would result in unnecessary hardship. A variance from the terms of the zoning ordinance shall not be recommended by the board of zoning adjustment unless and until:

a. A written application <u>and site plan</u> for a variance is submitted demonstrating that special conditions and circumstances exist which are peculiar to the land, structure or

building involved and which are not applicable to other lands, structures or buildings in the same district.

b. Literal interpretation of the provisions of the resolutions would deprive the applicant of rights commonly enjoyed by other properties in the same district under the terms of the zoning ordinance.

c. The special conditions and circumstances do not result from the actions of the applicant.

d. Recommending granting the variance requested will not confer on the applicant any special privilege that it denied by the zoning ordinance to other lands, structures or buildings in the same district. No nonconforming use of neighboring lands, structures, or buildings in the same district, and no permitted use of lands, structures or buildings in other districts shall be considered grounds for the issuance of a variance.

e. Notice of public hearing shall be given as required by this act for hearing before the board of zoning adjustment.

f. The public hearing shall be held. Any party may appear in person or by agent or by attorney.

g. The board of zoning adjustment shall make findings that the requirements of subsection (3) have been met by the applicant for a variance.

h. The board of zoning adjustment shall further make a finding that the reasons set forth in the application justify the granting of the variance, and that the variance is the minimum variance that will make possible the reasonable use of the land, building or structure.

i. The board of zoning adjustment shall further make a finding that the granting of the variance shall be in harmony with the general purpose and intent of the zoning ordinance, will not be injurious to the neighborhood, or otherwise detrimental to the public welfare.

In recommending the granting of any variance, the board of zoning adjustment may prescribe appropriate conditions and safeguards in conformity with the zoning regulations. Violation of such conditions and safeguards, when made a part of the terms

under which the variance is granted and adopted by the board of county commissioners, shall be deemed a violation of this article and punishable under section 30-49. Further, variance approvals shall be in accordance with the application and site plan submitted by the applicant, as may be amended or conditioned by the BZA/BCC.

The board of zoning adjustment may prescribe a reasonable time limit within which the action for which the variance is required shall be begun or completed, or both. Under no circumstances except as permitted above shall the board of zoning adjustment recommend granting a variance to permit a use not generally or by special exception permitted in the zoning district involved, or any use expressly or by implication prohibited by the terms of the zoning regulations in the zoning district. No nonconforming use of neighboring lands, structures or buildings in the same zoning district, and no permitted use of lands, structures or buildings in other zoning district shall be considered grounds for the authorization of a variance.

A requested variance from the requirements of section 38-1501 which complies with each of the following three (3) criteria shall be processed in accordance with section 34-27 and shall not be heard by the board of zoning adjustment:

a. The requested variance is from a provision of chapter 38, zoning, which is either specifically listed in section 38-1501, site and building requirements, or from the type of standards listed in section 38-1501 as applicable to those properties located in the UR, RCE-2 and RCE-5 districts; and

b. The variance request is made either in combination with the initial preliminary subdivision plan review or as a change to the preliminary subdivision plan conducted in compliance with chapter 34, subdivision regulations, Orange County Code; and

c. The requested variance affects more than one (1) lot and may have an effect on the overall site development of the subdivision.

(4) *Decisions of the board of zoning adjustment.* In exercising the above-mentioned powers, the board of zoning adjustment may, so long as such action is in conformity with the terms of the zoning regulations, reverse or affirm, wholly or partly, or may modify the order, requirement, decision, or determination

as ought to be made, and to that end shall have powers of the planning and/or zoning director(s) from whom the appeal is taken.

Four (4) members of the board of zoning adjustment must be present in order for a quorum to exist. ~~The concurring~~ A majority vote of ~~four (4) members of~~ the board of zoning adjustment shall be necessary to recommend reversal of any order, requirement, decision or determination of the planning and/or zoning director(s), or to recommend in favor of the applicant on any matter upon which it is required to pass under the zoning regulations, or to recommend any variation in the application of the zoning regulations.

The board of zoning adjustment shall submit its recommendations to the board of county commissioners for official action. The board of county commissioners shall then at any regular or special meeting review the recommendations of the board of zoning adjustment and either adopt, reject or modify the recommendations, or schedule a public hearing on any one (1) or more of them; provided, however, that no recommendation shall be rejected or modified unless the board of county commissioners shall first hold a public hearing thereon. No change or amendment shall become effective until fifteen (15) days after the action of the board of county commissioners is filed with the clerk of the board of county commissioners.

In all other respects, Section 30-43 shall remain unchanged.

Section 4. Amendment to Section 38-1 ("Definitions"). Section 38-1 is amended by adding definitions for the terms "dead storage yard," "short-term rental," "use variance" and "Zoning Manager," and revising the definitions of the terms "family day care home," "guest cottages," "home occupation," and "religious institution," to respectively read as follows:

Sec. 38-1. Definitions.

* * *

Dead storage yard shall mean a site or yard used for the storage of operable materials, vehicles, and equipment. It is not a site or yard with anything that is inoperable or would normally be found in a junkyard or landfill. A site or yard where material, vehicles or equipment are moved on and off site on a daily or frequent basis may be classified under "contractor's storage yard."

* * *

Family day care home.— shall mean as defined in ~~F.S.~~ §Section 402.302(5), ~~shall mean a residence in which child care is regularly provided for no more than ten (10) children. This shall include a maximum number of five (5) preschool children plus the elementary school siblings of the preschool children including the caregiver's own~~Florida Statutes, as it may be amended from time to time.

* * *

Guest ~~cottages~~ house shall mean living quarters without kitchen facilities within a detached accessory building located on the same lot or parcel of land as the principal building, and ~~to be~~ used exclusively for housing members of the family occupying the principal building ~~and~~ or their nonpaying guests. ~~Such quarters shall have no kitchen facilities and shall not be rented or otherwise used as a separate dwelling~~.

* * *

Home occupation shall mean any use conducted entirely within a dwelling or accessory building and carried on by an occupant thereof, which use is clearly incidental and secondary to the use of the dwelling for dwelling purposes and does not change the character thereof; ~~and~~ provided~~,~~ that all of the following conditions are met:

Only such commodities as are made on the premises may be sold on the premises. However, all such sales of home occupation work or products shall be conducted within a building and there shall be no outdoor display of merchandise or products, nor ~~shal~~shall there be any display visible from the outside of the building. No person shall be engaged in any such home occupation other than two (2) members of the immediate family residing on the premises. No mechanical equipment shall be used or stored on the premises in connection with the home occupation, except such that is normally used for purely domestic or household purposes. Not over twenty-five (25) percent of the floor area of any one (1) story shall be used for home occupation purposes. Fabrication of articles such as commonly classified under the terms "arts and handicrafts" may be deemed a home occupation, subject to the other terms and conditions of this definition. Home occupations shall not be construed to include uses such as barber shops, beauty parlors, plant nurseries, tearooms, food processing, restaurants, sale of

antiques, commercial kennels, real estate offices, or insurance offices.

* * *

Religious institution shall mean a premises or site which is used primarily or exclusively for religious worship and may include related or attendant religious oriented activities, such as education, recreation, or outreach. A religious institution includes, but is not limited to, a church, mosque, synagogue, or temple.

* * *

Short-term rental shall mean where the length of stay under the rental or lease arrangement is 179 days or less. Examples of non-residential uses requiring "short term rental" include hotels, motels, time-shares, condominium hotels, resort rental, resort residential, resort villa, and transient rental.

* * *

Use variance shall mean a variance granted for a use, building, or structure that is not permitted or that is prohibited in the particular zoning district.

* * *

Zoning Manager, or *Zoning Division Manager*, shall mean the Manager of the Zoning Division, or his or her authorized designee.

In all other respects, Section 38-1 shall remain unchanged.

Section 5. Amendment to Section 38-46 ("Intent [regarding nonconforming use provisions]"). Section 38-46 is amended to read as follows:

Sec. 38-46. Intent.

(a) It is the intent of this article that the lawful use of any building, structure or land existing at the time of adoption of this chapter or amendments to this chapter may be continued although such use, building or structure does not conform with the provisions of this chapter or amendments thereto, provided the following conditions in the subsequent sections of this article are met.

(b) A nonconforming use determination shall be made by the Zoning Manager in accordance with this article and other regulations as may be applicable. It shall be the applicant's responsibility to submit and provide the Zoning Manager with all documentation and records for such determination to be made.

Section 6. Amendment to Section 38-49 ("Alteration [of nonconforming uses]; maintenance"). Section 38-49 is amended to read as follows:

Sec. 38-49. Alteration; maintenance.

A nonconforming building or structure may be maintained, and repairs and alterations may be made, provided that:

(1) In a building which is nonconforming as to use regulations, no structural alterations shall be made except those required by law; and

(2) The degree of nonconformity is not increased.

(3) Additions to non-conforming residential structures are permitted, provided that:

a. Such additions comply with current building setbacks;

b. The proposed use is permitted by the zoning district;

c. Administrative waivers outlined in Section 38-1508 may apply.

Repairs such as plumbing or the changing of partitions or other interior alterations are permitted.

Section 7. Amendment to Section 38-51 ("Abandonment [of nonconforming uses]"). Section 38-51 is amended to read as follows:

Sec. 38-51. Abandonment.

When a nonconforming use of land, a building or a structure has been discontinued for one hundred eighty (180) days or more, the land, building or structure shall thereafter not be used except in compliance with the regulations of the district in which it

is located. However, for a commercial or industrial building or structure or use only, upon application the nonconforming use may be extended up to an additional ninety (90) days subject to approval by the zoning manager. The applicant for the ~~90-day~~ extension shall submit documentation to the zoning manager which clearly demonstrates that the nonconforming commercial or industrial building or structure has been actively marketed for the nonconforming use or has been undergoing repairs during the majority of the above-referenced 180-day period.

Section 8. Amendment to Section 38-74 ("Permitted uses, special exceptions and prohibited uses"). Section 38-74(b) is amended to read as follows:

Sec. 38-74. Permitted uses, special exceptions and prohibited uses.

* * *

(b) *Use table.*

(1) The permitted uses and special exceptions allowed in the zoning districts identified in the use table set forth in section 38-77 are respectively indicated by the letters "P" and "S" in the cells of the use table. No primary use shall be permitted in a district unless the letter "P" or the letter "S" appears for that use in the appropriate cell.

(2) When a use is a permitted use in a particular zoning district, it is permitted in that district subject to:

a. Compliance with all applicable requirements of chapter 38 and elsewhere in the Orange County Code; and

b. Compliance with all requirements specified in the conditions for permitted uses and special exceptions" set forth in section 38-79 which correlate with the number which may appear within the cell of the use table for that permitted use.

c. A use variance from Section 38-77 (Use Table) and Section 38-79 (Conditions for permitted uses and special exceptions) shall be prohibited.

(3) When a use is permitted as a special exception in a particular zoning district, it is permitted in that zoning district subject to:

a. Obtaining the special exception;

b. Compliance with all applicable requirements of chapter 38 and elsewhere in the Orange County Code; and

c. Compliance with all requirements specified in 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 which correlate with the number which may appear within the cell of the use table for that special exception.

In all other respects, Section 38-74 shall remain unchanged.

Section 9. Amendments to Section 38-77 ("Use Table"). Section 38-77 is amended to read as shown on **Appendix "A,"** attached hereto and incorporated herein by this reference. Except as specifically shown thereon, Section 38-77 shall remain unchanged.

Section 10. Amendment to Section 38-78 ("Special exception criteria"). Section 38-78 is amended to read as follows:

Sec. 38-78. Special exception criteria.

Subject to section 38-43 and section 30-43 of this Code, in reviewing any request for a special exception, the following criteria shall be met:

(1) The use shall be consistent with the comprehensive policy plan.

(2) The use shall be similar and compatible with the surrounding area and shall be consistent with the pattern of surrounding development.

(3) The use shall not act as a detrimental intrusion into a surrounding area.

(4) The use shall meet the performance standards of the district in which the use is permitted.

(5) The use shall be similar in noise, vibration, dust, odor, glare, heat producing and other characteristics that are associated with the majority of uses currently permitted in the zoning district.

(6) Landscape buffer yards shall be in accordance with section 24-5 of the Orange County Code. Buffer yard types shall track the district in which the use is permitted.

In addition to demonstrating compliance with the above criteria, any applicable conditions set forth in section 38-79 shall be met. Furthermore, the board of zoning adjustment ("BZA") shall prescribe a time limit, subject to the approval of the board of county commissioners ("BCC"), within which the action for which the special exception is required shall be begun or completed, or both. Failure to start or complete such action within the time limits shall void the special exception. An automatic one-year time limit to obtain a building permit shall apply if the BZA fails to prescribe a time limit. A request to extend the time limit shall be made in writing to the zoning manager. The zoning manager may extend the time limit if the applicant provides proper justification for such an extension. Examples of proper justification include, but are not limited to: the project is proceeding in good faith; there is a delay in contract negotiations not attributable to the applicant; and unexpected financial hardships which were not known and could not have been reasonably foreseen by the applicant when the special exception was granted. The zoning manager's determination on a request for an extension of time may be appealed to the BZA and then the BCC.

Special exception approvals shall be in accordance with the applicant's site plan dated "Received [date]," and all other applicable statutes, ordinances, laws, regulations, and rules. Any proposed deviation, change or modification to the site plan or question of interpretation about the site plan is subject, at the outset, to the zoning manager's review. The zoning manager shall do one of the following after reviewing the matter: (a) give his/her prior written approval regarding any nonsubstantial or insignificant proposed deviation or make a determination concerning any minor question of interpretation; or (b) refer the proposed deviation or question of interpretation to the BZA for a discussion between the zoning manager and the BZA as to the BZA's original intent or position; or (c) require the applicant to apply for a special exception request and schedule and advertise a public hearing before the BZA in accordance with sections 30-42 through 30-44 of this Code.

The Zoning Manager shall have the authority and discretion to require an application for a special exception or a variance to be reviewed by the Development Review Committee prior to review by the BZA to properly assess and address its impacts and to make

a recommendation and recommend conditions (if any). In making such a determination, the Zoning Manager shall consider relevant factors, including the size of the project, land use intensity, land use density, traffic impacts, and school impacts.

Section 11. Amendments to Section 38-79 ("Conditions for permitted uses and special exceptions"). Section 38-79 is amended to read as follows:

Sec. 38-79. Conditions for permitted uses and special exceptions.

The following numbered conditions shall correlate with the numbers listed in the use table set forth in section 38-77:

* * *

(4) a. *[Mobile home/recreation vehicle provisions in A-1, A-2, and A-R]* Mobile homes and recreational vehicles may be permitted on individual lots in agricultural A-1, A-2, and A-R districts, subject to the following:

1. A mobile home may be used for residential purposes provided that the property contains a minimum of two (2) acres in the A-1 and A-2 districts. Minimum lot width and setbacks shall be per article XII. Minimum lot size in the A-R district shall be two and one-half (2 1/2) acres. Other site and building requirements shall be per article XIII. Such mobile home use shall require, before the mobile home is located on the property in question, a permit which shall be issued to the recorded property owner by the zoning department.

2. Setbacks from lot lines shall be not less than is required for a site-built dwelling in the district in which it is located.

3. Building height shall be limited to thirty-five (35) feet.

b. *[R-T mobile home park district regulations.]* The following regulations shall apply within the R-T mobile home park district:

1. A use shall be permitted in the R-T district if the use is identified by the letter "P" in the use table set forth in section 38-77. A use shall be prohibited in the R-T district

if the space for that use is blank in the use table set forth in section 38-77. A customary accessory use may include, among other things, the sale of mobile homes on the following conditions:

(i) The mobile home must have all of the facilities and utility connections for use as a dwelling.

(ii) The buyer of a new mobile home which is purchased from a mobile home park owner or operator must be offered a six-month lease with an option to renew for six (6) months for the mobile home space on which the mobile home is located at the time of purchase.

(iii) The seller and buyer of a new mobile home must intend that the buyer live in the mobile home on the space where it is situated at the time of the sale.

(iv) The number of mobile homes for sale shall not exceed ten (10) percent of the total number of approved mobile home spaces in a mobile home park at any one (1) time.

(v) Mobile homes for sale shall be located only on mobile home spaces in the mobile home park and subject to the same setbacks and yard requirements as occupied mobile homes.

2. A land use permit shall be required to establish a mobile home park before building permits are issued. A land use permit application shall include a site plan drawn to scale showing property lines, rights-of-way, locations of buildings, parking areas, curb cuts, driveways, cross section of pavement, a landscape plan, streetlights, fire hydrants and fire extinguishers.

3. The following design standards shall apply to mobile home parks:

(i) Each mobile home park shall contain at least five (5) acres, shall be limited to seven (7) mobile home spaces per gross acre, and shall have not less than ten (10) mobile home spaces completed and available at first occupancy. The park shall have unobstructed access to a publicly-maintained street or road.

(ii) No mobile home space shall contain less than three thousand (3,000) square feet in area.

(iii) Minimum separation between mobile homes shall be fifteen (15) feet. Certain additions to mobile homes are permitted, provided minimum separation between the addition and any other mobile home, or addition thereto, shall be ten (10) feet. Such additions are limited to screened rooms, carports, accessory buildings to store personal items and gardening equipment. Any other addition shall provide a minimum of fifteen (15) feet separation.

(iv) Landscaping, buffering and open space requirements shall be as provided for in chapter 24 of this Code, as it may be amended.

(v) All porches, rooms and additions to a mobile home shall comply with these regulations and the county building department's codes and regulations.

(vi) A recreation area shall be provided equivalent to two hundred (200) square feet of area for each mobile home space; however, in no case shall such recreation area be less than ten thousand (10,000) square feet in area. Such recreation area shall be no longer than twice its width. This area shall remain in a clean and presentable condition, and shall be adequately lighted. Such recreation area shall not be located in an area where such use will adversely affect surrounding property.

(vii) Each mobile home space shall have a minimum of fifteen (15) feet of frontage on a street or lane within the boundary of the park. Such streets or lanes shall have an unobstructed right-of-way thirty (30) feet in width and a hard surface of not less than twenty (20) feet in width for two-way drives, or twenty (20) feet in width and a hard surface of not less than twelve (12) feet in width for one-way drives. Hard surfacing shall consist of a base at least six (6) inches thick of lime rock or soil cement or an equivalent material and a top of at least one (1) inch thick made of asphaltic concrete or an equivalent material. Such streets shall be lighted by a system which consists of a one-hundred-watt mercury light for every one hundred twenty (120) linear feet of roadway or a two-hundred-watt incandescent light for every one hundred twenty (120) linear feet of roadway or shall with some other system supply two-tenths lumen per square foot of roadway.

(viii) There shall be a minimum of two (2) off-street parking spaces for each mobile home space. Each

mobile home space shall be equipped with at least one (1) paved parked space; the remainder of the required spaces may be located either on mobile home spaces or in common parking lots.

(ix) Paved driveways shall be provided to each parking space on each individual mobile home space. Driveways shall be at least nine (9) feet wide. Common driveway may be used to serve more than one (1) mobile home space, but shall serve no more than four (4) mobile home spaces.

(x) Common walks shall be provided around recreation, management, and service areas. Common walks shall be at least four (4) feet wide except where such walks are adjacent to an arterial street, ~~then~~ in which case such walks shall be at least five (5) feet wide. No walk required herein shall be used as a drainage way.

(xi) Each mobile home space shall be provided with a concrete patio at least eight (8) feet wide and ten (10) feet long. Such patio shall conform to the setback provisions outlined in subsection 3.(iii) above. Double-wide mobile homes need not have a patio. Each mobile home space shall be landscaped with turf, shrubs, trees, or other plantings.

(xii) Each mobile home space shall be connected with a water system and sewage treatment and disposal system approved by the county and state health department.

(xiii) It shall be unlawful for any person to maintain or operate a mobile home park within the county without the appropriate permits and licenses.

c. *Dimensions.* Lot size and setback requirements in the R-T-1 district shall be the same as those established for the R-2 single-family dwelling districts.

d. *Site and building requirements.* Site and building requirements for the R-T-2 district are as follows:

1. Minimum lot area shall be twenty-one thousand seven hundred eighty (21,780) square feet (one-half acre).

2. Minimum lot width shall be one hundred (100) feet.

3. Minimum front yard setback shall be thirty-five (35) feet.

4. Minimum rear yard setback shall be fifty (50) feet.

5. Minimum side yard setback shall be ten (10) feet.

6. Single-family dwelling units shall contain a minimum of six hundred (600) square feet of living area.

(5) a. Subject to the following regulations, temporary structures, including mobile homes and travel trailers, may be used as construction field offices and tool sheds when accessory to the development of a subdivision:

1. Such use shall be temporary and shall expire when ninety (90) percent of the buildings within the subdivision are completed or within one (1) year from the date the temporary structure permit is issued, whichever comes first.

2. In the case of temporary and permanent structures being erected on the same parcel of land, such temporary structures shall be removed not later than one hundred eighty (180) days following erection of the temporary structure or not later than ten (10) days after completion of the permanent structure, whichever comes first.

3. Permits for temporary structures shall be obtained from the zoning director. When such permits expire, they may be renewed by the zoning director for a period not to exceed an additional ninety (90) days. Upon expiration of any permit for a temporary structure, such structure shall be removed from the premises.

4. A mobile home or recreational vehicle may be temporarily parked and occupied on a lot or specified tract of land in A-1, A-2, and A-R districts during the construction of a permanent residence or building on such lot or tract of land. A temporary permit for such use will be issued by the county only after a building permit has been secured for the permanent residence or building. The mobile home or recreational vehicle shall be removed within three hundred sixty-five (365) days or ten (10) days after completion of the permanent residence or building, whichever comes first.

b. Temporary structures, including mobile homes and travel trailers, may be used as sales offices for a subdivision in a residential district subject to the following criteria:

1. Such sales offices shall not include sales of real estate outside of the subdivision.

2. Approval shall be for a period of two (2) years or when ninety (90) percent of the subdivision is complete, whichever comes first.

3. Mulch parking shall be allowed.

4. The subdivision plat must be recorded before the sales trailer permit is issued.

c. Temporary structures, including mobile homes and travel trailers, may be used as construction office trailers for road improvement and/or utility development projects in any zoning district subject to the following:

1. The use is limited to the placement of construction/office trailers only.

2. No accessory or storage buildings shall be permitted.

3. Only the parking of passenger vehicles/trucks shall be permitted.

4. Any outdoor staging areas and storage of products and equipment shall require written authorization which may be issued by the zoning manager as part of the temporary structure permit, with or without conditions.

5. All temporary structures shall be removed no later than one hundred eighty (180) days from the date the permit is issued or within ten (10) days after completion of the project, whichever comes first.

6. Permits for temporary structures shall be obtained from the zoning manager. The zoning manager may require a notarized statement of no objection from abutting property owners. When such permits expire, they may be renewed

by the zoning manager for a period not to exceed an additional ninety (90) days.

d. Mobile homes used as offices shall be permitted as a permanent use when accessory to a mobile home sales lot.

e. A mobile home or recreational vehicle may be used as quarters for a night watchman or on-site security on property zoned commercial, or industrial, subject to obtaining special exception approval ~~from the board of zoning adjustment (BZA)~~. Special exception approval is also required for the same use in planned developments approved for commercial and/or industrial uses (unless previously approved by the P-D) and in agricultural districts when used in conjunction with another use approved by a special exception or in conjunction with a non-residential use. Night watchman quarters ~~units~~ shall not be allowed on properties where a tenant dwelling exists.

f. Subject to prior approval by the Zoning Manager, who may impose appropriate conditions (such as a time period not to exceed 18 months), ~~A~~ a recreational vehicle may be occupied as a temporary shelter ~~when approved by special exception~~ where a single-family residence is located on-site but is uninhabitable and undergoing repairs. For purposes of this provision, the term "uninhabitable" means the on-site single-family residence cannot be occupied because it has been damaged as a result of a natural disaster or accident, such as a hurricane, storm or fire, not that it cannot be occupied for some other reason, including because it is being renovated or enlarged.

g. Mobile homes and recreational vehicles may be located, for an indefinite period of time, at a hunting camp of one hundred (100) acres or more; subject to obtaining all appropriate permits and licenses.

h. Recreational vehicles may be parked in residential and agricultural districts as provided in subsection 38-79(45).

i. Mobile homes and recreational vehicles may be permitted on individual lots in commercial or industrial districts, subject to the following: A mobile home or recreational vehicle may be temporarily parked and occupied on a specified tract of land in commercial or industrial districts, to be used for offices, storage or security purposes, during the construction of permanent building on the tract of land. The mobile home or

recreational vehicle shall be removed after the certificate of occupancy is issued.

* * *

(9) ~~Reserved.~~ Such a use shall not commence without a land use permit.

* * *

(12) A community residential home with six (6) or fewer clients in a single-family residential districts shall not be located within a radius of one thousand (1,000) feet of another community residential home. Distance requirements shall be documented by the applicant and submitted to the Zoning Division with the application. All distance requirements pertaining to community residential homes shall be measured from the nearest point of the existing community residential home or area of single-family zoning to the nearest point of the proposed home. (Notwithstanding the foregoing provisions, any application for a community residential home which has been submitted to the zoning division for distance separation review on or prior to June 18, 1991, shall be deemed consistent with this section provided such application could have met the distance separation requirements in effect upon the date of submission of such application.)

* * *

(14) A community residential home with more than six (6) clients shall not be located within a radius of one thousand two hundred (1,200) feet of another community residential home and shall not be located within five hundred (500) feet of any single-family residential district. Distance requirements shall be documented by the applicant and submitted to the Zoning Division with the application. All distance requirements pertaining to community residential homes shall be from the nearest point of the existing community residential home or area of single-family zoning to the nearest point of the proposed home. (Notwithstanding the foregoing provisions, any application for a community residential home which has been submitted to the zoning division for distance separation review on or prior to June 18, 1991, shall be deemed consistent with this section provided such application could have met the distance separation requirements in effect upon the date of submission of such application.)

* * *

(16) ~~Reserved.~~ A permanent generator shall be permitted as an ancillary use in all zoning districts, subject to the noise control ordinance and the following requirements:

a. Except as provided in subsection g below, the generator shall be located in the rear yard or the rear one-half of the lot or parcel;

b. Maximum height – 5 feet;

c. Rear setback – 5 feet;

d. Side street setback – 15 feet;

e. There are no spacing requirements between the principal building and the generator;

f. In residentially zoned districts, the generator shall be screened from view by a wall, fence or hedge. In non-residentially zoned districts, the generator shall meet commercial site plan requirements; and

g. A generator may be installed in the side yard of a lot, subject to the following:

1. minimum five (5) foot setback when the generator is located in the rear yard of a residential lot;

2. minimum thirty (30) foot setback when the generator is located along the side of the principal residence on a residential lot; or

3. side yard setback shall comply with the applicable zoning district requirements when the generator is located on a non-residential zoned lot.

(17) The construction of more than one (1) dwelling unit on a parcel of land and thereafter the subdivision of such parcel may be permitted as a special exception in the A-1, A-2, A-R, R-CE, R-CE-2, and R-CE-5 zoned districts in rural designated areas, provided the following requirements are met:

a. The parcel is designated rural/agricultural (one (1) unit per ten (10) acres) on the future land use map;

b. The parcel was legally created according to zoning division records as of May 21, 1991, and the applicant was the official owner of record as of the date of the adoption of the County's comprehensive plan on July 1, 1991;

c. Subject to the exceptions specified below, the dwelling unit(s) shall only be for the primary residence of an immediate family member of the fee simple parcel owner, which immediate family member must be living at the time the building permit for such dwelling unit(s) is issued (the phrase "immediate family member" is defined in this subsection as a spouse, sister, brother, lineal ascendant or lineal descendant of the parcel owner or spouse);

d. Adequate documentation must be furnished to the board of county commissioners ("BCC") or its designee evidencing the relationship between the parcel owner and the immediate family member whose primary residence is to be placed or constructed upon the parcel and the intent of the immediate family member to actually construct such residence and reside therein;

e. The density approved shall not exceed one (1) unit per two (2) acres (excluding conservation areas and natural water bodies);

f. In addition to the other special exception requirements, the required site plan shall take into account future subdivision of the parcel consistent with the subdivision regulations;

g. Subject to the exceptions listed below, the parcel which is the subject of the special exception shall only be subsequently subdivided if:

1. A future land use designation is adopted by the board of county commissioners ("BCC") which would permit development at the current residential density of the entire parcel; or

2. A mortgage lender, or its assignee, holding a mortgage on the parcel, or such portion thereof as is the subject matter of the special exception, acquires the portion so encumbered through foreclosure or by deed in lieu of foreclosure

and, thereafter, such lender or its assignee or successor-in-interest and/or title applies for a subdivision of the parcel; or

3. The owner of the portion of the parcel which has been so improved by the construction of a dwelling unit thereon either (a) acquired title thereto by devise or inheritance from the immediate family member for whom the special exception was granted and who has since died or (b) is a bona fide purchaser for value from the estate of such deceased immediate family member; or

4. The subdivision of the property is necessary to secure financing from a mortgage lender or its assignee.

h. Building permits may only be issued to (i) the immediate family member, or the agent of the immediate family member, specified at the time of approval of the special exception, or (ii) such other person or entity which acquires title to the land as provided for in subparagraph g. above.

* * *

(19) A guest ~~cottage~~ house ~~(incidental to principal residence only) with a maximum of one thousand (1000) square feet~~ may be permitted as a special exception, provided that it shall not exceed one thousand (1,000) square feet, and that it~~. A guest cottage shall mean living quarters within a detached accessory building located on the same lot or parcel of land as the principal building, to be used exclusively for housing members of the family occupying the principal building and their nonpaying guests. Such quarters shall have no kitchen facilities and~~ shall not be rented or otherwise used as a separate permanent dwelling.

(20) A townhouse project or a triplex project or a quadraplex project which is designed, arranged and constructed so that each dwelling unit may be owned by a separate and different owner, shall be a permitted use, subject to the following requirements:

a. Complete plans shall be submitted along with the application for the project. Such plans shall include a subdivision plan which satisfies all of the county subdivision and platting requirements. Furthermore, a site plan shall be submitted indicating the location of buildings, parking spaces, driveways, street, service areas, walkways, and areas which are to be retained

in common ownership. The floor area of the units, the number of parking spaces, the total area of the project, and other pertinent data shall be indicated on the plan.

b. The project shall be in single ownership at the time the application is presented.

c. The maximum density of each project shall be no greater than one (1) dwelling unit for each twenty-seven hundred (2700) square feet of the total project area.

d. The minimum yard requirements of the R-3 residential district may not apply to each individual lot with the project. For the purpose of interpretation, the minimum yard requirements shall apply to the perimeter of the tract on which the project is located.

e. Off-street parking shall be provided at the rate of two (2) spaces per unit. Parking lots, driveways, and streets within the project shall be designed to discourage through traffic. Driveways shall be located at least ten (10) feet from the buildings.

f. Each buildings shall contain not less than three (3) (except for a quadraplex, which shall contain not less than four (4)) nor more than ten (10) dwelling units. For projects equal to or greater than one (1) acre in size, at least seventy-five percent (75%) of the units shall be in buildings containing five (5) or more units. The maximum height of a building shall be two (2) stories or thirty-five (35) feet, whichever is less. Each unit shall contain at least five hundred (500) square feet for one-bedroom units, seven hundred fifty (750) square feet for two-bedroom units, and one thousand (1,000) square feet for three-bedroom units.

g. Each unit shall be self-contained with respect to utilities, heating and air conditioning. Each unit shall have independent entrances, and common stairwells shall be prohibited. Units shall be separated by a two-hour firewall which extends to the roof.

h. Swimming pools, tennis courts, playgrounds and other recreational uses may be permitted within such projects, provided such uses are located in areas retained in common ownership. Adequate provisions shall be made to eliminate problems of noise and lights with respect to dwelling units within the project and with respect to adjacent property. All land within

the projects shall be developed and maintained in a neat and orderly condition.

i. Deed covenants shall be developed to ensure the maintenance and upkeep of areas and facilities retained in common ownership in order to provide a safe, healthful and attractive living environment within these types of projects and to prevent the occurrence of blight and deterioration of the individual units.

j. Minimum distance between buildings, front to front or rear to rear: Sixty (60) feet.

k. Minimum distance between the sides of buildings: Twenty (20) feet.

l. Minimum width of dwelling units: Twenty (20) feet.

m. Outside storage areas for boats, travels trailers and similar equipment should be screened from view of the dwellings within the project and should be screened from adjacent property.

n. When driveways and parking spaces are located adjacent to the perimeter of the project, consideration should be given to the provision of walls or other screening material to avoid the adverse effects of noise and light to adjacent property.

o. Side and rear porches may be installed with a zero (0) foot side setback where the principal building has a zero (0) foot side setback.

p. Front and rear yard building setbacks shall be a minimum of twenty (20) ft.

* * *

(26) a. An adult or child day care home shall comply with the following requirements:

1. *Hours of operation.* A day care home may operate twenty-four (24) hours per day.

2. *Fence.* A fence at least four (4) feet in height shall be placed around all outdoor recreation/play areas or outdoor use areas.

3. *Parking spaces.* At least three (3) paved parking spaces shall be provided.

4. *Recreation.* Outdoor recreation/play areas or outdoor use areas shall be provided.

5. *Separation.* A day care home located in a residential zoning district shall not be located within seven hundred (700) feet of another day care home or one thousand two hundred (1,200) feet of a day care center located in a residential zoning district. Distance requirements shall be documented by the applicant and submitted to the Zoning Division with the application. Distance shall be measured by following the shortest route of ordinary pedestrian travel along the public thoroughfare from the closest property boundary of a day care home to the closest property boundary of another day care home or shelter.

b. An adult or child day care center shall comply with the following requirements:

1. *Hours of operation.* A day care center may operate twenty-four (24) hours per day in nonresidential and R-3 zoning districts. In all other residential zoning districts, a day care center shall open no earlier than 6:00 a.m., and close no later than 7:00 p.m.

2. *Location.* A day care center shall be a permitted use in the R-3, U-V (town center), and any professional office, commercial or industrial zoned district, and shall be a special exception in all other districts except R-T, R-T-1, and-R-T 2.

3. *Parking spaces.* Permanent parking shall be provided in accordance with article XI of Chapter 38, except for centers where there is no pick-up or drop-off area available on the property. In these types of centers, one (1) off-street parking space for each five (5) children shall be required.

4. *Recreation.* Outdoor recreation/play areas or outdoor use areas shall be provided.

5. *Fence*. A fence at least four (4) feet in height shall be placed around all outdoor recreation/play areas or outdoor use areas.

6. *Buffer*. A ten (10) foot wide buffer shall be provided to separate this use from any adjoining residential zoned district. This buffer shall consist of intermittently placed screening at least three (3) feet in height that constitutes thirty (30) percent of the buffer length. The buffer shall consist elsewhere of berms, planted and/or existing vegetation.

7. *Ancillary use*. A day care center may be permitted as a special exception in conjunction with and as an ancillary use to institutional uses which are permitted uses or are allowed as a special exception, such as, but not limited to, religious institutions, schools, and nonprofit institutional uses.

~~8. *Separation*. A day care center located in a residential zoned district shall not be located within a radius of one thousand two hundred (1,200) feet of another day care center or day care home located within a residential zoning district. Distance shall be measured by following the shortest route of ordinary pedestrian travel along the public thoroughfare from the closest property boundary of a child day care center to the closest property boundary of another day care home or center.~~

* * *

(30) ~~Reserved.~~ At warehouse and self-storage facilities, plumbing shall not be provided to individual storage spaces, and plumbing fixtures such as sinks, toilets, and the like shall not be installed.

* * *

(32) ~~Reserved.~~ A special exception is required for agriculturally and residentially zoned lands located in a Rural Settlement (RS) designated on the CPP Future Land Use Element Map.

* * *

(38) ~~Poultry raising or keeping shall be a permitted use, provided that it is limited to no more than twelve (12) birds, and the lot is located a minimum of one hundred (100) feet from all residential zoned districts, except R-CE-5, R-CE-2, and R-CE~~

~~zoned districts. All pens, enclosures, or waste disposal activities shall not be located any closer than fifty (50) feet from the property line or one hundred (100) feet from a residential dwelling unit. Furthermore, such activity shall not be located in any front yard and shall not be located any closer than fifty (50) feet from the normal high water elevation of any natural water body. ("Poultry" shall mean domestic fowl such as chickens, roosters, turkeys, ducks, geese, pigeons, hens, quails, pheasants and squabs.)~~ A free-standing carwash is a permitted use if all of the following requirements can be met, but if any of the following requirements cannot be met, a special exception is required:

a. Hours of operation shall be limited from 6 a.m. to 10 p.m.;

b. The equipment shall be on timers and shall be shut down before and after the hours of operation listed above;

c. A six (6) foot high masonry wall or PVC fence shall be constructed along any property lines abutting single family residential uses or zoning; and

d. A security system shall be installed to include electronic cameras, with signs posted notifying patrons of the security cameras.

(39) ~~The raising or keeping of poultry shall be a permitted use, provided that it is limited to twelve (12) birds or less, and the lot is located one hundred (100) feet from all residential zoned districts, except R-CE-5, R-CE-2, and R-CE zoned districts. All pens, enclosures and waste disposal activities shall be located no closer than fifty (50) feet from rear or side property line, shall not be located in front of the front setback line, and shall not be located any closer than fifty (50) feet from the normal high water elevation of any natural water body. ("Poultry" shall mean domestic fowl such as chickens, roosters, turkeys, ducks, geese, pigeons, hens, quails, pheasants and squabs.)~~ Residential and agriculturally zoned parcels greater than two acres in size may exceed the size requirements outlined in Section 38-79(114) regarding accessory buildings, subject to obtaining a special exception and complying with all of the following standards:

a. The roofline height of the principal residence shall not exceed 50 feet Roofline appurtenances shall not exceed 10 feet above the roofline;

b. The principal residence and all detached accessory buildings shall have the same or similar architectural style or design;

c. No detached accessory building shall exceed 5,000 square feet in gross floor area and 35 feet in overall height;

d. All detached accessory buildings shall be setback as follows:

i. front – 50 feet

ii. side – 25 feet

iii. rear – 35 feet

iv. normal high water elevation – 50 feet; and

e. a detached accessory building shall not exceed the size of the principal residence.

(40) The raising or keeping of poultry shall be a permitted use, provided that: It is limited to twelve (12) birds or less, and the lot is located a minimum of one hundred (100) feet from all residential zoned districts, except R-CE-5, R-CE-2, and R-CE zoned districts. All ~~animals and livestock~~ pens, enclosures and waste disposal activities shall be located not closer than fifty (50) feet from the rear or side property line, shall not be located in front of the front setback line, shall not be located any closer than fifty (50) feet from the normal high water elevation of any natural water body, and it shall be located a minimum of one hundred (100) feet from a residential zoned district. ("Poultry" shall mean domestic fowl such as chickens, roosters, turkeys, ducks, geese, pigeons, hens, quails, pheasants and squabs.)

* * *

(44) Plant nurseries and greenhouses shall be permitted, provided there is no retailing of products on site. Plant nurseries shall include the production, wholesaling, and distribution of plant materials grown or cultivated on site. Seedlings may be transported to the site. However, ~~all other~~ the majority of plant materials shall be grown on site.

(45) Except as provided in subsections (45)a. through f. for boats and subsections (45)g. through j. for recreational vehicles, no boat, regardless of its length, and no recreational vehicle, may be parked, stored, or otherwise kept on a lot or parcel. For purposes of this subsection (45), a "boat" shall not include a canoe sixteen (16) feet or less in length, a sailboat sixteen (16) feet (16') or less in length with the mast down, a jon boat sixteen (16) feet or less in length, or a personal watercraft (e.g., a jet ski). Also for purposes of this subsection, the length of a boat shall be measured from the front of the bow to the back of the stern, excluding the motor or propeller.

a. The maximum number of boats permitted to be parked, stored or kept on the lot or parcel shall be calculated as follows depending on the size of the lot or parcel:

1. For a lot or parcel less than or equal to one-quarter acre, the maximum total number is two (2) boats, with a maximum number of one (1) boat in the front yard;

2. For a lot or parcel greater than one-quarter acre and less than or equal to one-half acre, the maximum total number is three (3) boats, with maximum number of one (1) boat in the front yard; and

3. For a lot or parcel greater than one-half acre, the maximum total number is four (4) boats, with a maximum number of one (1) boat in the front yard.

b. The owner of the boat(s) and/or boat trailer(s) shall be the owner or lessee of the principal structure at the lot or parcel.

c. No boat or boat trailer may be parked, stored, or kept wholly or partially within the public or private right-of-way, including the sidewalk.

d. No boat may be occupied or used for storage purposes.

e. A boat less than or equal to twenty-four (24) feet in length may be parked, stored, or kept inside a garage, under a carport, in the driveway, in the front yard on an approved surface, in the side yard, or in the rear half of the lot or parcel. An approved surface situated in the front half of the lot or parcel shall be placed immediately contiguous to the driveway, and not

anywhere else in the front yard or side yard. Such a boat on the rear half of the lot or parcel shall be screened from view from the right of way when it is parked or stored behind the principal structure, and shall be at least ten (10) feet from the side lot lines and at least five (5) feet from the rear lot line. Setbacks may be reduced to zero (0) feet if a six-foot high fence, wall, or vegetative buffer, exists along the lot line. (For purposes of this subsection (45), an "approved surface" shall mean a surface consisting of asphalt, gravel, pavers, or concrete.)

f. A boat greater than twenty-four (24) feet in length may be parked, stored or kept inside a garage, under a carport, or in the rear half of the lot or parcel, but not in the driveway or in the front yard. Such a boat on the rear half of the lot or parcel shall be screened from view from the right of way when it is parked or stored behind the principal structure, and shall be at least ten (10) feet from the side lot lines and at least five (5) feet from the rear lot line. Setbacks may be reduced to zero (0) if a six-foot high fence, wall, or vegetative buffer, exists along the lot line. Furthermore, the owner of such a boat shall obtain a permit from the zoning division in order to park, store or keep the boat at the lot or parcel.

g. Not more than one (1) recreational vehicle may be parked, stored or kept on the lot or parcel.

h. The owner of the recreational vehicle shall be the owner or lessee of the principal structure at the lot or parcel.

i. No recreational vehicle may be occupied while it is parked, stored or kept on the parcel.

j. A recreational vehicle may be parked, stored or kept only on an approved surface in the front half of the lot or parcel (behind the front yard setback) or on an unimproved surface in the rear half of the lot or parcel. The recreational vehicle shall not ~~be visible from the right-of-way in front~~ obscure the view of the principal structure from the right-of-way adjoining the front of the subject property, and shall be at least ten (10) feet from the side lot lines and at least five (5) feet from the rear lot line. Setbacks may be reduced to zero (0) feet if a six-foot high fence, wall, or vegetative buffer, exists along the lot line. Furthermore, the owner of such a recreational vehicle shall obtain a permit from the zoning division in order to park, store or keep the recreational vehicle at the lot or parcel.

* * *

(54) Veterinary hospitals or dog and cat grooming may be permitted in a completely enclosed, soundproofed building. No outdoor animal runs may be permitted and no animal containment facilities may be located except in a completely enclosed, soundproof structure. ~~All structures and accessory buildings and uses shall be located at least fifty (50) feet from any abutting, residentially zoned property, and a solid concrete block or masonry wall may be required to be erected along those boundary lines upon the property being requested for special exception.~~

(55) Temporary Portable Storage Containers (TPSC) are permitted in a manner that is safe and compatible with adjacent surrounding uses and activities and in compliance with this subsection. A TPSC to be placed on property for less than 180 days requires a zoning permit. A TPSC to be placed on property for 180 days or more requires a zoning permit and a building permit. ~~Veterinary hospitals in a completely enclosed, soundproofed building shall be a permitted use, provided that no outdoor animal runs may be permitted and no animal containment facilities may be located except in a completely enclosed, soundproofed bottom structure. Furthermore, all structures and accessory buildings and uses shall be located at least fifty (50) feet from any abutting residentially zoned property.~~

a. *Duration.* A TPSC may be placed on residential property for the following periods of time, but the Zoning Manager may authorize a time extension of the applicable duration period if the property owner demonstrates that extenuating circumstances exist to justify the extension. Upon completion of the work permitted, the PTSC shall be removed within seven (7) days.

1. A TPSC placed in conjunction with moving activities may be permitted for a maximum of fourteen (14) days.

2. A TPSC placed for reconstruction and/or remodeling may be permitted for a maximum of thirty (30) days.

3. A TPSC placed for new construction may be permitted for a maximum of 180 days.

b. *Location and size.*

1. A TPSC shall be located a minimum of five (5) feet from any property line. The TPSC shall be placed on an improved area only, not on grassed or landscaped areas.

2. The maximum allowable size for a TPSC on a residential lot is an aggregate sum or 160 square feet.

3. A TPSC shall not be located in a manner that impairs a motor vehicle operator's view of other vehicles, bicycles or pedestrians utilizing, entering or exiting a right-of-way; or in a manner that obstructs the flow of pedestrian or vehicular traffic.

4. A TPSC shall not be placed within a required landscape or buffer area or areas that are considered environmentally sensitive.

* * *

(58) Materials, vehicles and equipment stored at a dead storage yard and any other ~~The~~ outdoor storage of equipment or commodities shall be screened from public rights-of-way, ~~and~~ single-family residential zoned districts and single-family residences. When such use is located adjacent to residential zoned districts or homes, a Type B opaque buffer as outlined in Chapter 24 ("Landscaping, Buffering and Open Space") of the Orange County Code shall be required. In addition, paved parking is required and all other parking requirements shall be met. All materials, vehicles and equipment stored at a dead storage yard shall be removed from the site at least once every six months, and shall not be bought, sold or maintained there. Also, daily or frequent business activity shall not be conducted at a dead storage yard.

(59) Riding stables, may be permitted as a special exception, provided that no structure, barn, pen or corral housing animals shall be located closer than ~~one hundred (100)~~ fifty (50) feet from any property line, and provided that the density shall not exceed one (1) animal per acre of lot area. This restriction shall not apply to grazing areas.

* * *

(63) ~~Reserved.~~ Such use is subject to the requirements set forth in Ordinance #94-26.

* * *

(75) A barbershop or beauty shop may be permitted, provided that retail sales of beauty or barber products shall be permitted only if ancillary to the beauty or barber shop, and that ~~said~~ such retail sales ~~are permitted~~ occur only within the interior of the shop structure or tenant lease space. ~~When approving a special exception for a barbershop or beauty shop limits on hours of operation may be imposed.~~

* * *

(83) Reserved. ~~A freestanding car wash enclosed on two (2) sides may be permitted as a special exception provided that is operated as a principal use. However, it shall be a permitted use provided that it is ancillary to a convenience store, gas, or automobile service station.~~

* * *

(87) A portable food vendor shall be a permitted use, subject to the ~~following~~ standards in subsections a through f, or it may be permitted as a special exception in a C-1 zoned district pursuant to subsection g, subject to the standards in subsections g and a through e;

a. No overnight stay;

b. The operation shall not be located within a public right-of-way, and it shall be setback a minimum of ten (10) feet from any such public right-of-way;

c. No signage;

d. The operation shall not be located within any driveway, driving aisle or on any parking spaces required pursuant to Article XI of Chapter 38 of the Orange County Code;

e. The operation shall not be permitted on any property not containing a licensed and approved business or on any vacant property or vacant building;

f. In the C-1 zoning district, the operation shall be located under the canopy of the principal ~~use~~ building on-site,

except as may be permitted as a special exception under subsection g;

g. In the C-1 zoned district, an operation may be permitted as a special exception in an area that is not located under the canopy of the principal building on-site, provided the length and width of the mobile trailer are equal to or greater than 7 feet by 14 feet, such an operation satisfies the standards in subsections a through e, and such an operation is situated at least 1,000 feet from any other such operation (the distance being measured from property line to line).

* * *

(114) Location and size requirements of accessory buildings and uses in residential and agricultural areas:

a. When an accessory building is used solely as living space (i.e., dens, bedrooms, family rooms, studies) it may be attached to a principal structure by a fully enclosed passageway, provided the accessory building and the passageway comply with the following standards:

1. A principal structure shall exist onsite;

2. The accessory building and the passageway shall have the same architectural design as the principal structure, including the roof, exterior finish and color;

3. Access via doorways shall be provided at both ends of the passageway;

4. The passageway shall not exceed ~~fifteen (15)~~ twenty (20) feet in length. However, the passageway may exceed twenty (20) feet in length if the addition complies with the size requirements for detached accessory buildings;

5. The accessory building and the passageway shall comply with the principal structure setbacks;

6. Neither the height of the accessory building nor the height of the passageway shall exceed the height of the principal structure;

7. No kitchen facilities shall be allowed in the accessory building; and

8. The accessory building shall be heated and ventilated pursuant to all applicable building codes.

b. If an accessory building used as living space is not attached to the principal structure, then it shall be considered a detached accessory building, and it shall be subject to the size requirements listed in sections g and h below.

c. An accessory building used for nonliving purposes (i.e., storage space, workshops, sheds, enclosed carports, etc.) may be attached to a principal structure by a fully-enclosed or open-sided passageway, provided the accessory building and the passageway comply with the standards set forth in subsections a.1. through a.7. above and the accessory use structure does not exceed five hundred (500) square feet or twenty-five percent (25%) of the living area of the principal structure not to exceed one thousand (1,000) square feet.

d. A detached accessory building shall ~~not~~ be neither closer than five (5) feet to a lot line, nor closer than ten (10) feet to any other detached structure on the same lot.

e. No detached accessory building shall be located in front of the principal building unless it is located in the rear one-half of the lot.

f. No accessory building may be constructed prior to construction of the principal building. However, an existing accessory building may remain on a lot/parcel provided a principal use is erected on the lot/parcel within 12 months (1 year).

g. The cumulative square footage of all detached accessory buildings shall be limited to a maximum of five hundred (500) gross square feet of floor area or to twenty-five percent (25%) of the living area of the principal residence on the property, whichever is greater, but in no event larger than one thousand (1,000) square feet. On agricultural zoned parcels (A-1, A-2, and A-R), equal to or less than one (1) acre in size, the square footage of detached accessory buildings shall be limited to one thousand (1,000) square feet or twenty-five percent (25%) of the size of the principal residence, whichever is greater. Agricultural zoned parcels and the R-CE, R-CE-2, and R-CE-5 zoned parcels greater than one (1) acre but less than or equal to five (5) acres in

size may have detached accessory buildings up to two thousand (2,000) square feet or twenty-five percent (25%) of the size of the principal residence, whichever is greater. Agricultural zoned parcels and R-CE, R-CE-2, and R-CE-5 zoned parcels greater than five(5) acres in size may have detached accessory buildings up to three thousand (3,000) square feet or twenty-five percent (25%) of the size of the principal residence, whichever is greater. Accessory buildings used for agricultural purposes may be located in the front yard provided the minimum tract size is ten (10) acres or greater and the accessory building complies with the principal building setbacks. If the predominant use of the accessory building is to support the agricultural use on the property, then there is no size limitation on the accessory building. If the predominant use of the accessory building is to support the residence on-site, then the size limitation set forth above shall apply. Documentation and evidence may be required to qualify the agricultural use of the accessory building. The square footages referenced herein shall be cumulative square footages.

h. A detached accessory building shall be limited to one (1) story with a maximum overall height of fifteen (15) feet above grade. However, an accessory building with a roof slope greater than 2:12 shall not exceed 20 ft. of overall height.

i. In R-1, R-1A, R-1AA, R-1AAA, R-1AAAA, R-CE, R-CE-2, R-CE-5, R-2, R-3, R-T-1, and R-T-2 zoned districts, an accessory building or structure greater than 150 square feet or greater than ten feet (10') in height (as measured from the finished grade to the top of the structure), shall comply with the following architectural standards: the exterior and roof (if any) shall be comprised of materials commonly used throughout Orange County in single family residential construction, such as stucco, brick, vinyl, aluminum or wood for the siding or walls, and shingles, tiles or corrugated metal for the roof.

j. A detached structure used for unenclosed covered parking in a multi-family project shall be considered a residential accessory use and shall be located a minimum of 5 feet from side and rear property lines.

* * *

(120) A solid waste management facility, including a landfill, shall comply with Chapter 32 of the Orange County Code. A solid waste management facility, including a landfill, transfer station, or incinerator, may be permitted only by special exception.

An applicant seeking a special exception for a solid waste management facility shall receive a recommendation for issuance of a solid waste management permit by the Environmental Protection Officer and the Development Review Committee (DRC) prior to consideration of the special exception by the board of zoning adjustment ("BZA"). Furthermore, an applicant seeking a special exception for a solid waste management facility, must receive a solid waste management permit approval by the board of county commissioners ("BCC") prior to or at the same public hearing at which the special exception is considered.

* * *

(132) Parks and recreation areas owned and operated by nonprofit organizations, may be permitted only by special exception, except for parks and recreation areas (i) approved in conjunction with a preliminary subdivision plan (Chapter 34, Orange County Code), or (ii) located inside a platted residential subdivision and notarized letters of no objection are submitted by the President of the Homeowner's Association (if applicable) and all ~~surrounding~~ abutting property owners.

* * *

In all other respects, Section 38-79 shall remain unchanged.

Section 12. Repeal of Section 38-482 ("Site plan for apartment [R-3] projects").

Section 38-482 is repealed.

Section 13. Amendment to Section 38-581 ("R-T-2 combination mobile home and single family dwelling district"). Section 38-581 is amended to read as follows:

Sec. 38-581. R-T-2 combination mobile home and single family dwelling district.

(a) *Intent and purpose of district.* The intent and purposes of this district are as follows:

(1) To provide areas for the low density development of conventional single-family dwelling units.

(2) To provide areas for the low density development of mobile homes used as single-family dwelling units.

(3) To provide for the combination of two (2) modes of residential living within the same zoning district.

(b) *Uses permitted.* A use shall be permitted in the R-T-2 district if the use is identified by the letter "P" in the use table set forth in section 38-77.

(c) *Special exceptions.* A use shall be permitted as a special exception in the R-T-2 district if the use is identified by the letter "S" in the use table set forth in section 38-77.

(d) *Site and building requirements.* ~~Site requirements for this district are as follows:~~ See Sec. 38-1501.

~~(1) Minimum lot area shall be twenty-one thousand seven hundred eighty (21,780) square feet (one-half acre).~~

~~(2) Minimum lot width shall be one hundred (100) feet.~~

~~(3) Minimum front yard setback shall be thirty-five (35) feet.~~

~~(4) Minimum rear yard setback shall be fifty (50) feet.~~

~~(5) Minimum side yard setback shall be ten (10) feet.~~

~~(e) *Building requirements.* The building requirements for this district are as follows:~~

~~(1) Single-family dwelling units shall contain a minimum of six hundred (600) square feet of living area.~~

~~(2) Mobile homes shall be per sections 38-296 and 38-297.~~

(~~f~~e) *[Prohibited uses.]* A use shall be prohibited in the R-T-2 district if the space for that use is blank in the use table set forth in section 38-77.

Section 14. Amendments to Section 38-932 ("[I-1/I-5] performance standards").

Section 38-932 is amended to read as follows:

Sec. 38-932. Performance standards.

(a) Within each I-1/I-5 industrial district, the minimum yard requirements for each lot are established as follows:

(1) Floor area ratio (FAR) shall not exceed 0.5.

(2) Front yards: Thirty-five (35) feet.

(3) Side yards: Twenty-five (25) feet.

(4) Rear yards: Twenty-five (25) feet.

(5) The minimum front yards for lots which abut a major street shall be in accordance with article XV (Major Street Setbacks) of chapter 38 of the Orange County Code.

(6) Maximum building height: Fifty (50) feet; but thirty-five (35) feet when within one hundred (100) feet of a residential zoning district or residential designation on the future land use map, and one hundred (100) feet when five hundred (500) feet or more from a residential zoning district or residential designation on the future land use map.

(7) Rear yards and side yards may be reduced to zero (0) feet when the rear or side property lines abut an improved railroad right-of-way, but only in those cases where an adjacent wall or walls of a building or structure are provided with railroad loading and unloading capabilities.

(8) One (1) of the side yards may be reduced to zero (0) feet, provided the other side yard on the lot shall be increased to a minimum building setback of ~~twenty-five (25)~~ fifty (50) feet. This provision cannot be used if the side yard that is reduced is contiguous to a residential district.

(9) An increased setback buffer yard of not less than fifty (50) feet in width shall be provided along each I-1/I-5 district line which abuts any residential zoning district. Specific landscaping within the setback area shall be in accordance with chapter 24 of the Orange County Code. That portion of the setback area that is not required to be landscaped shall not be used for processing activities, buildings or structures other than fences, walls, or off-street parking.

(10) Setbacks shall be a minimum of fifty (50) feet from the normal high water elevation on every natural surface water body.

(11) Driveways, streets, and facilities for routing traffic shall be designed in such a manner that entrances and exits to public streets are not hazardous and that traffic congestion is minimized. Furthermore, no entrances or exits shall direct traffic into adjacent residential areas.

(12) The open storage of equipment or commodities may be permitted, provided such storage shall not be located within any required front buffer yard, as required by chapter 24 of this Code.

(13) The parking of commercial and passenger vehicles may be permitted in any required yard except the front fifty (50) percent of required yard.

(14) Driveways, streets, and facilities for routing traffic shall be designed in such a manner that entrances and exits to public streets are not hazardous and that traffic congestion is minimized. Furthermore, no entrance or exits shall direct traffic into adjacent residential districts.

Section 15. Amendments to Section 38-1208 ("Control of development following approval [of development plan]"). Section 38-1208(a) is amended to read as follows:

Sec. 38-1208. Control of development following approval.

(a) Upon the approval of the development plan or any phase thereof, the use of land and the construction or modification of any buildings or structures within the P-D shall be in accordance with the development plan~~, rather than with the other provisions of this chapter~~. However, all other county codes, ordinances, policies and resolutions shall apply.

In all other respects, Section 38-1208 shall remain unchanged.

Section 16. Amendments to Section 38-1254 ("[Planned Development residential development] setbacks"). Section 38-1254 is amended to read as follows:

Sec. 38-1254. Setbacks.

Setbacks from side and rear property lines shall relate to the design height of the structures. The following guidelines shall be utilized to review projects; however, they may vary depending upon conditions and design considerations:

(1) All one- and two-story units should provide a minimum twenty-five-foot setback from all boundaries of the P-D. Structures in excess of two (2) stories should increase this setback to reflect the additional structural height.

(2) Setbacks from street rights-of-way shall meet the following minimum requirements, unless more restrictive requirements are specified in article XV of this chapter.

a. Collector street . . . 25 feet

b. Major collector street . . . 35 feet

c. Arterial street . . . 50 feet

d. Expressways . . . 75 feet

e. All other rights-of-way . . . 20 feet

~~(3) Where doors, windows or other openings in the building wall of a living unit back up to a wall of another building with doors, windows or other openings, there shall be a minimum separation of thirty (30) feet for two-story buildings, and forty (40) feet for buildings three (3) stories plus. Separations should increase in proportion to additional structural height. There shall be a minimum of twenty (20) feet between all multifamily, office, commercial and industrial structures for fire protection purposes.~~

Section 17. Amendments to Section 38-1258 ("[Planned Development] multi-family development compatibility"). Section 38-1258 is amended to read as follows:

Sec. 38-1258. Multi-family development compatibility.

A multi-family development in a PD shall satisfy the following criteria for the benefit of any single-family zoned property located inside or outside the PD, except that, in the event of a conflict in height requirements between this section and any other section in Chapter 38, such other section shall control:

(a) Multi-family buildings located within one hundred (100) feet of single-family zoned property, as measured from the property line of the proposed multi-family development to the nearest property line of the single-family zoned property, shall be restricted to single story in height.

(b) Multi-family buildings located between one hundred plus (100+) feet to one hundred and fifty (150) feet of single-family zoned property shall vary in building height with a maximum of fifty (50) percent of the buildings being three (3) stories (not to exceed forty (40) feet) in height with the remaining buildings being one (1) story or two (2) stories in height.

(c) Multi-family buildings located within one hundred and fifty (150) feet of single-family zoned property shall not exceed three (3) stories (forty (40) feet) in height, except as provided in (d) below.

(d) Multi-family buildings in excess of three (3) stories or forty (40) feet in height may be permitted, subject to approval by the board of county commissioners ("BCC"). The application for these buildings shall include justification for the requested height. A compatibility plan shall be submitted for approval, which includes greater setbacks and increased buffers to protect adjacent properties.

(e) Parking and other paved areas for multi-family development shall be located at least twenty-five (25) feet from any single-family zoned property. A twenty-five (25)-foot landscape buffer shall be provided consistent with Type C landscape buffer requirements, as set forth in Chapter 24 of the Orange County Code.

(f) A six (6)-foot high masonry, brick, or block wall shall be constructed whenever a multi-family development is located adjacent to single-family zoned property. The wall height shall be measured from the finished elevation of the side of the wall which is highest. However, if a right-of-way is located between the multi-family development and the single-family zoned property, such a wall is not required.

(g) A multi-family development shall not directly access any right-of-way serving platted single-family residential development. Access to collector or arterial roads shall be permitted.

(h) Active recreation areas shall be provided within a multi-family development to serve the needs of the residents of the multi-family buildings whenever single-family zoned property is located inside the PD or adjacent to the multi-family development. The recreation areas shall be provided at the ratio of two and one-half (2 1/2) acres per one thousand (1,000) residents (calculated at a rate of two and one-half (2 1/2) residents per unit). The recreation areas shall be located internally away from any single-family zoned property. The multi-family residential population shall not be included in the calculation for determining the recreation requirements for the balance of the PD.

(i) A multi-family development located adjacent to a right-of-way shall be fenced (chain link fences shall not be permitted) and landscaped whenever single-family zoned property is located across the right-of-way.

(j) Where doors, windows or other openings in the wall of a living unit back up to a wall of another building with doors, windows or other openings, there shall be a minimum separation of thirty (30) feet for two-story buildings, and forty (40) feet for buildings three (3) stories. Separations shall increase in proportion to additional structural height. There shall be a minimum of twenty (20) feet between all multifamily, office, commercial and industrial structures for fire protection purposes.

Section 19. Amendments to Section 38-1289. ("[Tourist Commercial Planned Development] Parking"). Section 38-1289 is amended to read as follows:

Sec. 38-1289. Parking.

(a) Parking facilities shall be provided for each phase or unit of development in a tourist commercial development in accordance with the standards established in article XI of this chapter.

(b) Consideration will be given to incorporating up to twenty-five (25) percent of the required spaces with parking for compact cars. Such spaces should contain at least one hundred twenty (120) square feet in the configuration of eight (8) feet by ~~fifteen (15)~~ sixteen (16) feet. The placement and distribution of such spaces should not limit the availability of standard parking spaces in high demand areas and should be adequately identified in order to notify patrons of the reduced size.

(c) Major theme parks or attraction-type developments which experience holiday or special event parking demands may, subject to the approval of the zoning manager, use unpaved parking areas to meet those demands.

Section 19. Amendments to Section 38-1301 ("[Tourist Commercial Planned Development] Site development standards"). Section 38-1301 is amended to read as follows:

Sec. 38-1301. Site development standards.

Office development shall comply with the requirements of PD General Commercial standards or Tourist Commercial standards, when applicable. ~~Section 38-806.~~

Section 20. Amendments to Section 38-1344 ("[CVC] approval procedure"). Section 38-1344(3) is amended to read as follows:

Sec. 38-1344. Approval procedure.

* * *

(3) *Development plan.*

a. After payment of an application fee to the zoning department, the applicant shall submit to the ~~zoning department~~ engineering division fourteen (14) copies of a development plan and support data and information, all of which is consistent with section 38-1347. The development plan may cover all or a portion of the approved land use plan. If the applicant proposes to create a subdivision, a preliminary subdivision plan shall be processed concurrently with the development plan. The ~~zoning department~~ engineering division shall review the development plan to determine whether all necessary and appropriate data and information has been provided.

b. The applicant shall then submit fourteen (14) copies of the development plan to the engineering department. The development shall then be scheduled for review by the DRC.

c. The DRC shall review the development plan to determine whether:

1. It is consistent with the approved land use plan;

2. It is consistent with all applicable laws, ordinances, rules and regulations;

3. The development, and any phase thereof, can exist as a stable independent unit; and

4. Existing or proposed utility services and transportation systems are adequate for the uses proposed.

5. It is consistent with CVC provisions requiring a single, unified and integrated development plan.

d. After review by the DRC, the development plan shall be scheduled for a public hearing before the BCC. The BCC shall approve the development plan, approve it subject to conditions, or disapprove it.

In all other respects, Section 38-1344 shall remain unchanged.

Section 21. Amendments to Section 38-1401 ("Substandard lots of record"). Section 38-1401 is amended to read as follows:

Sec. 38-1401. Substandard lots of record.

(a) If two (2) or more adjoining lots with continuous frontage were under single ownership on or after October 7, 1957, and one (1) or more of such adjoining lots has a frontage or lot area less than what is required by the zoning district in which such lot or lots are located, such substandard lot or lots shall be aggregated so as to create one (1) or more new lots, each of which shall conform to the minimum frontage and minimum lot area requirements of the zoning district in which the substandard lot or lots are located, and the lots so aggregated shall be considered one (1) tract.

(b) If a lot or parcel has a frontage or lot area less than what is required by the zoning district in which it is located, but was a lot of record in Orange County, Florida, prior to October 7, 1957, then a principal or accessory use consistent with Section 38-77 may be constructed on such lot, provided the construction of the dwelling and customary accessory structure(s) will not violate the minimum yard requirements, minimum floor area requirements, or height requirements for the zoning district in which the lot is located.

(c) No development permits may be issued for any lot or parcel which has a size or width less than what is required by the zoning district in which such lot or parcel is located, unless the lot or parcel is aggregated with adjacent property so that the required size or width complies with the zoning requirements.

(d) A lot or parcel which contains less than the minimum lot width and lot area required by the zoning district and was not approved by Orange County Subdivision Regulations or is not a lawful nonconforming lot or parcel, shall not be grounds for granting a variance pursuant to Section 30-43, O.C. Code.

Section 22. Amendments to Section 38-1408 ("Fences and walls"). Section 38-1408 is amended to read as follows:

Sec. 38-1408. Fences and walls.

(a) No fence or wall shall be erected so as to encroach into the fifteen (15)-foot for residentially and agriculturally zoned property, or twenty-five (25)-foot for commercially and industrially zoned

property corner triangle at a street intersection unless otherwise approved by the county engineer.

(b) Pillars, columns, and posts may extend up to twenty-four (24) inches above the height limitations provided such pillars and posts are no less than ten (10) feet apart.

(c) No barbed wire, razor wire or electrically charged fence shall be erected in any location on any building site in residential or office districts except for security of public utilities, provided such use is limited to three (3) strands and eighteen (18) inches, a minimum of six (6) feet above the ground. In addition, walls and fences erected in any office or residential district shall not contain any substance such as broken glass, spikes, nails, barbs, or similar materials designed to inflict pain or injury to any person or animal.

(d) (1) ~~Only b~~Barbed wire or razor wire may be incorporated into or as an extension of the height of permitted walls and fences in commercial and industrial districts provided such use is limited to three (3) strands and eighteen (18) inches, a minimum of six (6) feet above the ground. The maximum height of the wall or fence with the barbed wire or razor wire shall be ten (10) feet.

(2) Barbed wire may be permitted by special exception in residential and office districts as an extension of the height of permitted walls and fences along the property line separating the residential or office district from a commercial or industrial district where it is documented by substantial competent evidence that such an additional security measure is warranted or appropriate. The barbed wire fencing shall be subject to the criteria and dimensions set forth in subsection (d)(1).

(~~2~~3) Barbed wire and similar field fencing shall be allowed on agriculturally zoned properties only when used for agricultural purposes; i.e., groves, grazing and boarding of animals.

(e) In no event shall barbed wire or razor wire be placed so as to project outward over any sidewalk, street or other public way, or over property of an adjacent owner.

(f) Except in R-CE, R-CE-2, and R-CE-5, fences and walls in residential and office districts may be erected as follows:

(1) Limited to a maximum height of four (4) feet in the front yard setback. However, fences or walls located on arterial and collector roadways are limited to a maximum height of 6 ft. in the front yard setback.

(2) Limited to a maximum height of eight (8) feet in the side and rear yards.

(3) May be increased in height when the property is contiguous to a commercially or industrially zoned property along the common property lines pursuant to the height regulations for commercial and industrial districts.

(g) Fences and walls in agricultural, R-CE, R-CE-2, and R-CE-5 districts may be erected as follows:

(1) Limited to a maximum height of six (6) feet within the front yard setback. However, for chain link type fences on agricultural zoned properties, the maximum height is ten (10) feet;

(2) Limited to a maximum height of eight (8) feet in the side and rear yards. However, on agriculturally zoned properties, the maximum height is ten (10) feet;

(3) In agricultural districts, these regulations shall not apply to agricultural property used for bona fide agricultural purposes.

(h) Fences and walls in commercial and industrial districts may be erected as follows:

(1) Limited to a maximum height of six (6) feet within the front yard setback.

(2) Limited to a maximum height of eight (8) feet in the side and rear yards.

(3) When a lot or parcel abuts two (2) intersecting streets and the rear property line of the lot or parcel abuts the side property line of another lot or parcel, no fence of wall in excess of four (4) feet high along the rear property line shall be allowed within twenty-five (25) feet abutting the street right-of-way line unless the adjacent property owner sharing the common lot line submits a notarized letter stating that he has no objection and there are no site distance visibility concerns.

(i) On any corner lot abutting the side of another lot, no part of any fence located within twenty-five (25) feet of the common lot line shall be nearer the side street lot line than the required front yard of such abutting lot unless the adjacent property owner sharing the common lot line submits a notarized letter stating that he has no objection and there are no site visibility concerns.

(j) On a lakefront lot, a fence or wall within the rear yard setback area shall be limited to a maximum height of four (4) feet, unless notarized letters from adjacent property owners are submitted stating that they have no objections to an increased fence height. However, the increased fence height is still subject to other applicable fence height limitations in the Orange County Code.

Section 23. Amendments to Section 38-1415 ("[Prohibited areas for sale of alcoholic beverages] – Distances from churches, schools and/or adult entertainment establishments").

Section 38-1415 is amended to read as follows:

Sec. 38-1415. Same--Distances from churches, schools and/or adult entertainment establishments.

(a) Places of business for the sale of alcoholic beverages containing more than three and two-tenths (3.2) percent of alcohol by weight for consumption on or off the premises may be located in the unincorporated areas of the county in accordance with and subject to this chapter and specifically those zoning regulations regulating the location of places of business selling alcoholic beverages containing fourteen (14) percent or more alcohol by weight. No such place of business shall be established within one thousand (1,000) feet of an established church or school; provided this prohibition shall not apply to vendors of beer and wine containing alcohol of more than one (1) percent by weight for consumption off the premises only. No commercial establishment that in any manner sells or dispenses alcohol for on-premises consumption shall be established within two hundred (200) feet of an adult entertainment establishment, as defined in section 38-1.

(b) Distance from a church or school or adult entertainment establishment shall be measured by following the shortest route of ordinary pedestrian travel along the public thoroughfare from the main entrance of the place of business to the main entrance of the church, and, in the case of a school, to the nearest point of the school grounds in use as part of the school facilities.

(c) The location of all existing places of business subject to this section shall not in any manner be impaired by this section, and the distance limitation provided in this section shall not impair any existing licensed location heretofore issued to and held by any such vendor nor shall such vendor's right of renewal be impaired by this section; provided, however, that the location of any such existing license shall not be transferred to a new location in violation of this section.

(d) Distance requirements not applied to renewal, change in name or ownership, or change in certain licenses. The distance requirements set forth above in subsections (a) and (b) shall not be applied to the location of an existing vendor when there is:

(i) A renewal of an existing license;

(ii) A transfer in ownership;

(iii) A change in business name; or

(iv) A change in a state issued 4COP license for an existing package and lounge business to a 3PS license, and any decrease in the numerical designation of a state issued license which is of the same series (type);

provided the physical location of the vendor establishment does not change. No increase in the series (type) of state issued license shall be permitted at or for a location (new or existing) except in compliance with the provisions of sections 38-1414 and 38-1415.

(e) *Subsequent establishment of church or school.* Whenever a vendor of alcoholic beverages has procured a license certificate permitting the sale of alcoholic beverages and, thereafter, a church or school is established within one thousand (1,000) feet of the vendor of alcoholic beverages, the establishment of such church or school shall not be cause for the discontinuance or classification as a nonconforming use of the business as a vendor of alcoholic beverages. Furthermore, in such a situation, an existing vendor licensed for on-site consumption may only increase a 1 COP license (on-site beer consumption) to a 2 COP (on-site beer and wine consumption).

Section 24. Amendments to Section 38-1426 ("Accessory dwelling units"). Section 38-1426 is amended to read as follows:

Sec. 38-1426. Accessory dwelling units.

(a) The intent and purpose of this section is to allow a relative who wishes to reside in close proximity to his or her family an opportunity to do so by providing authorization to seek and obtain a special exception for an accessory dwelling unit, while maintaining the single-family character of the primary single-family dwelling unit and the neighborhood.

(b) An accessory dwelling unit may be allowed on a lot or parcel as a special exception in any residential or agricultural zoning district (including a residential lot or parcel on an existing planned development). The accessory dwelling unit shall be an accessory use to the primary single-family dwelling unit. Only one (1) accessory dwelling unit may be permitted per lot or parcel. The accessory dwelling unit shall not be constructed prior to the construction and occupation of the primary dwelling unit.

(c) (1) An accessory dwelling unit shall be occupied initially only by a relative. For purposes of this section, the term "relative" shall mean a sister, brother, lineal ascendant or lineal descendant of the owner of the lot or parcel on which the primary single-family dwelling unit is located (or the owner's spouse).

(2) Subject to subsection (c)(3), ~~A~~an accessory dwelling unit may be occupied by a non-relative, provided:

a. The accessory dwelling unit was occupied initially only by a relative and at least three (3) years have passed since the issuance of the certificate of occupancy for the accessory dwelling unit; or

b. The accessory dwelling unit was occupied initially only by a relative, and the relative has died.

(3) The BZA/BCC may impose a condition prohibiting the accessory dwelling unit from being leased, rented or otherwise used or occupied by a non-relative.

(d) In addition to what is normally required for an application for a special exception, an application for a special exception for

an accessory dwelling unit shall contain or be accompanied by the following information and documentation:

(1) An affidavit attesting that the owner of the lot or parcel understands and agrees that the provisions of this section shall be complied with, that he shall be responsible to the county for ensuring that the provisions are complied with, and that he shall be responsible for any failure to comply with the provisions;

(2) Documentation evidencing that the person who is to inhabit the accessory dwelling unit is a relative;

(3) A site plan prepared in compliance with Section ~~103.2.5~~106.1.2 of the ~~1991 edition of the Standard~~Florida Building Code, as amended by ~~s~~Section ~~9-103~~9-33 of the Orange County Code;

(4) An exterior elevation drawing of the proposed accessory dwelling unit, regardless of whether it is proposed to be attached or detached;

(5) A photograph and exterior elevation drawing of the primary single-family dwelling unit; and

(e) In order to approve a special exception for an accessory dwelling unit, the county shall determine that the proposed accessory dwelling unit is designed to be similar and compatible with the primary single-family dwelling unit and that it will be compatible with the character of the neighborhood. A manufactured home constructed pursuant to United States Department of Housing and Urban Development standards or a mobile home may not be used as an accessory dwelling unit in any single family residential zoned district.

(f) After an application for a special exception for an accessory dwelling unit is approved, the accessory dwelling unit shall be subject to the following performance standards and requirements:

(1) *Ownership.* The primary single-family dwelling unit and the accessory dwelling unit shall be under single ownership at all times. Also, either the primary dwelling unit or the accessory dwelling unit shall be occupied by the owner at all times. Approval of an accessory dwelling unit shall not constitute approval for separate ownership or the division of the lot or parcel. Any request to divide the lot or parcel shall comply with and be

subject to applicable laws, ordinances and regulations, including zoning regulations and access requirements.

(2) *Change in occupancy.* The owner shall notify the zoning department in writing whenever there is a change in occupancy of the accessory dwelling unit and inform the zoning department whether the new occupant is a relative or a non-relative.

(3) *Living area.* The minimum living area of an accessory dwelling unit shall be four hundred (400) square feet. However, the maximum living area of an accessory dwelling unit shall not exceed forty-five (45) percent of the living area of the primary dwelling unit or one thousand (1,000) square feet, whichever is less, and shall not contain more than two (2) bedrooms. For lots/parcels equal to or greater than two (2) acres, the maximum living area shall be 1,500 sq. ft.

(4) *Lot or parcel size.* The size of the lot or parcel shall be equal to or greater than the minimum lot area required for a single-family dwelling unit in the zoning district. An attached accessory dwelling unit may only be constructed on a lot or parcel whose area is equal to or greater than the minimum lot area required in the zoning district. A detached accessory dwelling unit may only be constructed on a lot or parcel whose area is at least one-and-one-half (1 1/2) times the minimum lot area required in the zoning district.

(5) *Open space.* An accessory dwelling unit shall be treated as part of the impervious surface area of a lot or parcel. The open space requirements for a single-family lot or parcel shall be met notwithstanding the construction of an accessory dwelling unit.

(6) *Setbacks.* The setbacks for an attached accessory dwelling unit shall be the same as those required for the primary dwelling unit. In addition, a detached accessory dwelling unit shall be located only to the side or rear of the primary dwelling unit and shall be separated from the primary dwelling unit by at least ten (10) feet, and the distance separation shall not be less than the distance required under Section 610 ("Buildings Located on the Same Lot") and Table 600 of the 1991 edition of the Standard Building Code, as it may be amended from time to time. Moreover, a one-story detached accessory dwelling unit shall be setback a minimum of ten (10) feet from the rear property line and shall meet the minimum side setbacks for a primary structure in the zoning

district. A two-story detached accessory dwelling unit located above a detached garage shall meet the setbacks for the primary structure in the zoning district.

(7) *Entrance.* An attached accessory dwelling unit may either share a common entrance with the primary dwelling unit or use a separate entrance. However, a separate entrance shall be located only to the side or rear of the structure.

(8) *Parking.* One (1) additional off-street parking space shall be required for an accessory dwelling unit. The additional space requirement may be met by using the garage, carport or driveway of the primary dwelling unit.

(9) *Water and sewer.* Adequate water and wastewater capacity shall exist for an accessory dwelling unit. Approval of a special exception for an accessory dwelling unit shall not constitute approval for use of a septic system and/or a well. If a septic system and/or a well must be utilized, applicable laws, ordinances and regulations shall control. The owner of an accessory dwelling unit may apply for and obtain a separate water meter subject to the unit connecting to Orange County's water system.

(10) *Electrical.* The owner of an accessory dwelling unit may apply for and obtain a separate power meter subject to the approval of the utility company and complying with all applicable laws, ordinances and regulations.

(11) *Impact fees and capital fees.* The impact fees for an accessory dwelling unit shall be accessed at the multi-family rate. Water and wastewater capital fees for the accessory dwelling unit shall be assessed at the multi-family rate.

(12) *Other laws, ordinances, and regulations.* All other applicable laws, ordinances and regulations shall apply to the primary dwelling unit and the accessory dwelling unit.

~~(g) After an application for a special exception for an accessory dwelling unit is approved, but before any development permits to construct the accessory dwelling unit are issued, the affidavit required under subsection (d)(1) of this section shall be recorded in the Official Records of Orange County at the owner's expense.~~

Section 25. Amendments to Section 38-1476 ("Quantity of off-street parking").

Section 38-1476 is amended to read as follows:

Sec. 38-1476. Quantity of off-street parking.

(a) Off-street parking spaces shall be provided for any use hereafter established or at the time of the erection of any main building or structure or at the time any main building, structure or occupational use is enlarged or increased in capacity by adding dwelling units, guest rooms, floor area, seats, or by increasing employment, according to the following minimum requirements: <u>If the use is not listed below, the parking requirements shall be determined by the Zoning Manager by adopting or utilizing the parking requirements for the listed use that the Zoning Manager determines is most similar.</u>

* * *

In all other respects, Section 38-1476 shall remain unchanged.

Section 26. Amendments to Section 38-1477 ("Location of off-street parking").

Section 38-1477 is amended to read as follows:

Sec. 38-1477. Location of off-street parking.

The parking spaces provided for herein shall be provided on the same lot where the principal use is located or within three hundred (300) feet from the principal entrance as measured along the most direct pedestrian route. <u>For purposes of this section, a unified development (for example, a shopping center) shall be considered "on the same lot."</u>

Section 27. Amendments to Section 38-1478 ("Joint use of off-street parking").

Section 38-1478 is amended to read as follows:

Sec. 38-1478. Joint use of off-street parking.

No part of an off-street parking area required for any building or use for the purpose of complying with the provisions of this chapter shall be included as part off an off-street parking area similarly required for another building or use, except in the case where the parking demands of different uses occur at different

times or where the uses are part of a unified development (for example, a shopping center). The following requirements must be satisfied in order to comply with this exception:

* * *

In all other respects, Section 38-1478 shall remain unchanged.

Section 28. Amendments to Section 38-1479 ("Off-street parking lot requirements").

Section 38-1479(b) is amended to read as follows:

Sec. 38-1479. Off-street parking lot requirements.

* * *

(b) ~~Each off-street parking area shall include one hundred eighty (180) square feet, in addition to parking space, for access drives and aisles. The minimum width of each space shall be nine (9) feet.~~Regular parking space sizes shall be a minimum of 180 square feet (either 9' x 20' or 10' x 18'). Spaces within parking garages may be a minimum of 8½' x 18'. Off-street turning and maneuvering space shall be provided for each lot so that no vehicle shall be required to back onto or from any public street. Suggested parking lot design standards are contained in Exhibit I on file and available for reference in the office of the county engineer.

In all other respects, Section 38-1479 shall remain unchanged.

Section 29. Amendments to Section 38-1501 ("Basic [site and building] requirements"). Section 38-1501 is amended to read as follows:

Sec. 38-1501. Basic requirements.

The basic site and building requirements for each agricultural, residential and commercial zoning districts are established as follows (and industrial site and building requirements are set forth elsewhere in this chapter:

TABLE INSET:

District	*Min. lot area (sq. ft.)[ttt]*	*Min. living area (sq. ft.)*	*Min. lot width (ft.)*	**Min. front yard (ft.)*	**Min. rear yard (ft.)*	*Min. side yard (ft.)*	*Max. building height (ft.)*	*Lake setback (ft.)*
* * *								

R-L-D	N/A	N/A	N/A	10 for side entry garage, 20 for front entry garage	15	0 to 10	35***	*
R-T	7 spaces per gross acre	Park size min. 5 acres	Min. mobile home size 8 ft. x 35 ft.	7.5	7.5	7.5	N/A	*
R-T-1 SFR	4,500*****	45*****	1,000	25/20††	25/20††	5	35	*
Mobile home	4,500*****	45*****	Min. mobile home size 8 ft. x 35 ft.	25/20††	25/20††	5	35	*
R-T-2 (prior to 1/29/73)	6,000	60	SFR 500 Min. mobile home size 8 ft. x 35 ft.	25	25	6	N/A	*
(after 1/29/73)	21,780 1/2 acre	100	SFR 600 Min. mobile home size 8 ft. x 35 ft.	35	50	10	N/A	*

* * *

† Attached units only. If units are detached, each unit shall be placed on the equivalent of a lot 45 feet in width and each unit must contain at least 1,000 square feet of living area. Each detached unit must have a separation from any other unit on site of at least 10 feet.

†† Maximum impervious surface ratio shall be 70%, except for townhouses, nonresidential, and mixed use development, which shall have a maximum impervious surface ratio of 80%.

††† Based on gross square feet.

In all other respects, Section 38-1501 shall remain unchanged.

Section 30. Amendments to Section 38-1508 ("Administrative waivers from performance standards"). Section 38-1508 is amended to read as follows:

Sec. 38-1508. Administrative waivers from performance standards for existing improvements.

(a) Except as provided in subsection (b), the zoning manager shall have the authority to grant administrative waivers from the performance standards set forth in Section 38-1501 and the performance standards for industrial zoning districts, provided that no such administrative waiver shall exceed three percent (3%) of the applicable requirement for the side yards and six percent (6%) for the front or rear yards for existing improvements.

(b) The zoning manager shall not have the authority to grant administrative waivers from lake setbacks or for vacant land.

Section 31. Effective date. This ordinance shall become effective pursuant to general law.

ADOPTED THIS 13th DAY OF MAY, 2008.

ORANGE COUNTY, FLORIDA
By: Board of County Commissioners

By: _____
Richard T. Crotty
County Mayor

ATTEST: Martha O. Haynie, County Comptroller
As Clerk of the Board of County Commissioners

By: _____
Deputy Clerk

BOARD OF COUNTY COMMISSIONERS • ORANGE COUNTY FLORIDA

S:\JPrinsell\ORDRES\Chapters 30 and 38 -- 05-13-2008.rtf

USE TABLE

Uses Per Zoning Code	SIC Group	Land Use	A-1	A-2	A-R	RCE-5	RCE-2	RCE	R-1AAAA	R-1AAA	R-1AA	R-1A	R-1	R-2	R-3	Cluster	RT	RT-1	RT-2	P-O	C-1	C-2	C-3	I-1A	I-1, I-5	I-2, I-3	I-4	U-V (see 29)	R-L-D	UR-3	NC	NAC	NR	Conditions
		RESIDENTIAL																																
Single family and modular homes with customary accessory uses		Single family and modular homes with customary accessory uses	1 P	1 P	1 P	1 P	1 P	1 P	1 P	1 P	1 P	1 P	1 P	1 P	1 P	1 P		1 P	1 P												147 1 P	147 1 P	147 P	*
Residential storage as a principal use (in an enclosed structure only)		Residential storage as a principal use (in an enclosed structure only)																			P	P	P		P	P	P							
Principal residence and accessory buildings in excess of size requirements outlined in Condition #114		Principal residence and accessory buildings in excess of size requirements outlined in Condition #114	39 P	39 P	39 P	39 P	39 P	39 P	39 P	39 P	39 P	39 P	39 P																						
Fences and walls (except subdivision fences and walls) SEE Section 38-1408		Fences and walls (except subdivision fences and walls) SEE Section 38-1408																																
Community Residential Homes (max. 6 clients)		Community Residential Homes (max. 6 clients)	12 P	12 P	12 P	12 P	12 P	12 P	12 P	12 P	12 P	12 P	12 P	12 P	12 P	12 P				12 P	P	P	P		P	P	P	12 13 P	124 12 P			12 P	12 P	12 P	*
Community Residential Homes (7 to 14 clients)		Community Residential Homes (7 to 14 clients)				S	S	S	S	S	S	S	S	14 S	14 P	14 119 S				P	P	P	P		P	P	P	13 14 S			P	P	14 S	*
Community Residential Homes (greater than 14 clients)		Community Residential Homes (greater than 14 clients)													P 14 S					P S	P	P	P		P	P	P			S	P S	P S	14 S	
Guest cottage house		Guest cottage house	19 S	19 S	19 S	19 S	19 S	19 S	19 S	19 S	19 S	19 S	19 S			19 S													19 S					*
Short term rental, resort residential, resort villa		Hotel, motel, timeshare or similar uses																			P	P	P	P	P	P	P							
Multifamily w/customary accessory uses		Multifamily w/customary accessory uses												24 P	16 P														124 P	P	P	P	P	*
Commercial plant nurseries and, green- houses (no retailing)	0181	Ornamental nursery products	44 S P	44 S P	44 S P	44 S P	44 S P	44 S P														107 PS	P	P	P	P	P					*		
Outdoor display storage of operative agriculturally related equipment		Outdoor display storage of operative agriculturally related equipment	6 P	6 P																														

Appendix "A"

Uses Per Zoning Code	SIC Group	Land Use	A-1	A-2	A-R	RCE-5	RCE-2	RCE	R-1AAAA	R-1AAA	R-1AA	R-1A	R-1	R-2	R-3	Cluster	RT	RT-1	RT-2	P-O	C-1	C-2	C-3	I-1A	I-1, I-5	I-2, I-3	I-4	U-V (see 29)	R-L-D	UR-3	NC	NAC	NR	Conditions
Poultry raising or keeping	025	Poultry & Eggs	50 S 36 P	50 S 36 P	37 P	40 ~~38~~ P	40 ~~38~~ P	40 P																									•		
Breeding, keeping and raising of farm animals (ex. goats, swine, potbellied pigs, etc.) for domestic purposes only		Breeding, keeping and raising of farm animals (ex. goats, swine, potbellied pigs, etc.) for domestic purposes only	49 P	49 P	52 P	52 P																													
Veterinary service with no outdoor runs or compound	0742	Veterinary services	S	S																P	54 112 P	54 112 P	54 112 P		P	P	P	54 55 P						•
Indoor Storage of products, furniture, household & commercial goods, machinery, equipment storage of building materials	42	WAREHOUSING	~~P~~	~~P~~																	30 111 P	30 111 P	30 111 P		30 111 P	30 111 P	30 111 P							•
Warehousing	422	Warehousing & storage																					30 111 P	107 111 58 P S	30 P	30 P	30 P							•
Dead storage yard		Dead storage yard																							P	P	P							
Self-storage facility	4225	General warehousing & storage																			30 60 P	30 111 P	30 111 P		P	P	P							
~~Metal and/or commercial~~ Temporary portable storage containers			55 P	55 P	55 P	55 P	55 P	55 P	55 P	55 P	55 P	55 P	55 P	55 P	55 P	55 P	55 P	55 P	55 P	55 P	55 P	55 P	55 P	55 P	55 P	55 P	55 P	55 P	55 P	55 P	55 P	55 P	55 P	*
Power plants, ~~household waste~~ transfer stations refuse storage sites, wastewater and water plants, septic disposal sites, lime stabilization and dewater, septage and wastewater sludges	49	Power plants, ~~household waste~~ transfer stations, refuse storage sites, wastewater and water plants, septic disposal sites, lime stabilization and dewater, septage and wastewater sludges	S	S																					S	S	S							
Transfer stations ~~other than household waste transfer station~~	4953	Transfer stations ~~Refuse systems (Incinerators)~~	113 S	113 S																			~~113~~ ~~S~~		113 S	113 S	113 S							

Uses Per Zoning Code	SIC Group	Land Use	A-1	A-2	A-R	RCE-5	RCE-2	RCE	R-1AAAA	R-1AAA	R-1AA	R-1A	R-1	R-2	R-3	Cluster	RT	RT-1	RT-2	P-O	C-1	C-2	C-3	I-1A	I-1, I-5	I-2, I-3	I-4	U-V (see 29)	R-L-D	UR-3	NC	NAC	NR	Conditions
~~Testing and research of incinerators~~		~~Testing and research of incinerators~~																							~~S~~	~~S~~	~~S~~							
Aluminum recycling collection drop-off sites		Aluminum recycling collection drop-off sites	113 S	113 S																			S	~~P/S~~	P	P	P							*
Junk, salvage or wrecking yards, sales & storage of wrecked cars	5093	Junk yards (scrap & waste)																									9 63 P							*
Portable food and drink vendors (including hot dog stands)		Portable food and drink vendors (including hot dog stands)																			87 P S	87 P	87 P	87 P	87 P	87 P	87 P							*
~~Bottle clubs~~	~~5813~~	~~Drinking places~~																				~~S~~	~~S~~		~~S~~	~~S~~	~~S~~							
Beauty shops, beauty salons	7231	Beauty shops, beauty salons																		75 P ~~S~~	P	P	P		P	P	P	75 P			P	P		*
Barber shops, hair styl- ists	7241	Barber shops																		75 P ~~S~~	P	P	P		P	P	P	75 P			P	P		*
Carwashes	7542	Carwashes																			~~83~~ 38 S/P	P	P		P	P	P							*
Indoor clubs, bowling clubs, private indoor clubs, bridge clubs, indoor recreational uses	7997	Membership Sports & Recreation Clubs (Indoor uses)	S	S	S	S	S	S	S	S	S	S	S	S	S	S	S	S	S	P ~~S~~	P	P	P	107 P/S	P	P	P				P	P		*
Outdoor clubs, golf and country clubs, private outdoor clubs, tennis clubs, swimming clubs, non-profit parks and recreation areas, outdoor recreation uses, private recreation areas for a single family development	7997	Membership Sports & Recreation Clubs (Outdoor uses)	132 S	132 S	132 S	132 S	132 S	132 S	132 S	132 S	132 S	132 S	132 S	132 S	132 S	132 S	132 S	132 S	132 S	132 S	132 S	132 P ~~S~~	132 P ~~S~~	107 P/S	P	P	P				132 S	132 S	132 S	*
Outdoor gun ranges/ private clubs, shooting galleries and ranges	7997	Membership Sports & Recreation Clubs (Outdoor uses)	136 S	136 S																					136 P	136 P	136 P							*

Uses Per Zoning Code	SIC Group	Land Use	A-1	A-2	A-R	RCE-5	RCE-2	RCE	R-1AAAA	R-1AAA	R-1AA	R-1A	R-1	R-2	R-3	Cluster	RT	RT-1	RT-2	P-O	C-1	C-2	C-3	I-1A	I-1, I-5	I-2, I-3	I-4	U-V (see 29)	R-L-D	UR-3	NC	NAC	NR	Conditions
Golf driving ranges, Golf cart rentals, ski instruction, swimming pools, tennis courts, little league and softball fields, outdoor skating rinks, amusement rides, paintball operations, day camps, rodeos, and go-cart raceway	7999	Amusement & Recreation (Outdoor Uses)	S	S	S	S	S	S	S	S	S	S	S	S	S	S	S	S	S		85 S	85 P S	85 P S	P	P	P	P	P	S		S	S		•
Crisis center, Juvenile correction home, training schools for delinquents, drug rehab center and juvenile group homes, childrens homes, alcohol rehab centers, halfway homes for delinquents	8361	Residential Care																			S P	S P	S P		P	P	P							•
Churches, mosques, synagogues, temples and other religious ~~use-organizations~~ institutions with or without attendant schools, educational buildings and/or recreational facilities	8661	Religious ~~organizations~~ institutions	32 S P	32 S P	S	S	S	S	S	S	S	S	S	S	~~S~~ P	S	S	S	S	S	P	P	P	~~S~~ P	P	P	P	32 S P	S		P	P	S	•

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

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

Plaintiffs,

v. CASE NUMBER: 2016-CA-007634-O

ORANGE COUNTY, PHIL SMITH, CAROL HOSSFIELD, MITCH GORDON, ROCCO RELVINI, TARA GOULD, TIM BOLDIG, FRANK DETOMA, ASIMA AZAM, RODERICK LOVE, SCOTT RICHMAN, JOE ROBERTS, MARCUS ROBINSON, RICHARD CROTTY, TERESA JACOBS, FRED BRUMMER, MILDRED FERNANDEZ, LINDA STEWART, BILL SEGAL, and TIFFANY RUSSELL,

Defendant.
_____/

NOTICE OF HEARING
(1 Hour Reserved)

PLEASE TAKE NOTICE that the Defendant, ORANGE COUNTY (the "County") Officials named in their individual and official capacities serving on the Board of Zoning Adjustment ("BZA") or Board of County Commissioners ("BCC"), ASIMA AZAM, FRED BRUMMER, RICHARD CROTTY, FRANK DETOMA, MILDRED FERNANDEZ, TERESA JACOBS, RODERICK LOVE, SCOTT RICHMAN, JOE ROBERTS, MARCUS ROBINSON, TIFFANY RUSSELL, BILL SEGAL, and LINDA STEWART (together, the "Officials"), by and through its undersigned counsel, will call up for hearing before The Honorable Heather L. Higbee, 425 North Orange Avenue, Orlando, FL, Hearing Room 20-B, on, **August 22, 2017, at 1:30 p.m.**, the following matters:

1. The Official Defendants' Motion to Strike the Amended Complaint, Renewed Request for Judicial Notice, and Motion To Dismiss this Action with Prejudice *(e-filed 3/6/2017)*

2. Defendants PHIL SMITH, ROCCO RELVINI, TARA GOULD, TIM BODIG AND MITCH GORDON's Motion to Dismiss/Motion to Strike *(e-filed 3/6/2017)*

3. Plaintiffs' Motion for Judicial Notice *(e-filed 5/22/2017)*

4. Plaintiffs' Response in Objection to Orange County's Motion for Judicial Notice, and Plaintiffs' Motion for Judicial Notice of Ord. No. 2016-19 *(e-filed 5/25/17)*

5. Plaintiffs' Motion for Judicial Notice of Ord. No. 2008-06 *(e-filed 5/25/2017)*

6. Orange County's Motion to Dismiss Plaintiff's Amended Complaint Pursuant to Florida Rules of Civil Procedure 1.140(b)(1) and (6) *(e-filed 3/7/2017)*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by Electronic Mail via the Florida E-Portal System to David W. Foley, Jr. and Jennifer T. Foley, david@pocketprogram.org, jtfoley60@hotmail.com; William C. Turner, Esquire, Elaine Marquardt Asad, Esquire and Jeffrey J. Newton, Esquire, williamchip.turner@ocfl.net, judith.catt@ocfl.net, elaine.asad@ocfl.net, gail.stanford@ocfl.net; and Lamar D. Oxford, Esquire, loxford@drml-law.com, katietillotson@drml-law.com on this 3rd day of July, 2017.

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**IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT IN AND FOR
ORANGE COUNTY, FLORIDA**

**DAVID W. FOLEY, JR., and
JENNIFER T. FOLEY,** **CASE NO: 2016-CA-007634-O**

Plaintiffs,

vs.

**ORANGE COUNTY; PHIL SMITH;
CAROL HOSSFIELD; MITCH GORDON;
ROCCO RELVINI; TARA GOULD;
TIM BOLDIG; FRANK DETOMA;
ASIMA AZAM; RODERICK LOVE;
SCOTT RICHMAN; JOE ROBERTS;
MARCUS ROBINSON; RICHARD CROTTY;
TERESA JACOBS; FRED BRUMMER;
MILDRED FERNANDEZ; LINDA STEWART;
BILL SEGAL; and TIFFANY RUSSELL,**

Defendants.
_____/

DEFENDANT CAROL HOSSFIELD n/k/a CAROL KNOX's
NOTICE OF INCORPORATION

Defendant, CAROL HOSSFIELD n/k/a CAROL KNOX, by and through undersigned counsel hereby respectfully notifies this Honorable Court and all parties hereto of her Incorporation, as if fully set out herein, of the Motion to Dismiss/Motion to Strike previously filed by Co-Defendants PHIL SMITH, ROCCO RELVINI, TARA GOULD, MITCH GORDON, AND TIM BOLDIG, filed herein on or about March 7, 2017, and the Defendants' Motion to Dismiss filed December 20, 2016.

All parties hereto take notice hereof.

I HEREBY CERTIFY that on July 14, 2017, the foregoing was filed through the Florida Courts E-Filing Portal which will send a notice of electronic filing to Dennis R. O'Connor, Esquire, David J. Angell, Esquire, O'Connor & O'Connor, LLC, 840 S. Denning Drive, Suite 200, Winter Park, FL 32789 as well as provided electronically to David W. Foley, Jr., 1015 North Solandra Drive, Orlando, FL 32807; Jennifer T. Foley, 1015 N. Solandra Drive, Orlando, FL 32807.

/s/ Lamar D. Oxford

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Attorneys for Defendants

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

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

Plaintiffs,

v. CASE NUMBER: 2016-CA-007634-O

ORANGE COUNTY, PHIL SMITH, CAROL HOSSFIELD, MITCH GORDON, ROCCO RELVINI, TARA GOULD, TIM BOLDIG, FRANK DETOMA, ASIMA AZAM, RODERICK LOVE, SCOTT RICHMAN, JOE ROBERTS, MARCUS ROBINSON, RICHARD CROTTY, TERESA JACOBS, FRED BRUMMER, MILDRED FERNANDEZ, LINDA STEWART, BILL SEGAL, and TIFFANY RUSSELL,

Defendant.
_____/

NOTICE OF HEARING
(1 Hour Reserved)

PLEASE TAKE NOTICE that the Defendant, ORANGE COUNTY (the "County") Officials named in their individual and official capacities serving on the Board of Zoning Adjustment ("BZA") or Board of County Commissioners ("BCC"), ASIMA AZAM, FRED BRUMMER, RICHARD CROTTY, FRANK DETOMA, MILDRED FERNANDEZ, TERESA JACOBS, RODERICK LOVE, SCOTT RICHMAN, JOE ROBERTS, MARCUS ROBINSON, TIFFANY RUSSELL, BILL SEGAL, and LINDA STEWART (together, the "Officials"), by and through its undersigned counsel, will call up for hearing before The Honorable Heather L. Higbee, 425 North Orange Avenue, Orlando, FL, Hearing Room 20-B, on, **September 6, 2017, at 4:00 p.m.**, the following matters:

1. The Official Defendants' Motion to Strike the Amended Complaint, Renewed Request for Judicial Notice, and Motion To Dismiss this Action with Prejudice *(e-filed 3/6/2017)*

2. Defendants PHIL SMITH, ROCCO RELVINI, TARA GOULD, TIM BODIG AND MITCH GORDON's Motion to Dismiss/Motion to Strike *(e-filed 3/6/2017)*

3. Plaintiffs' Motion for Judicial Notice *(e-filed 5/22/2017)*

4. Plaintiffs' Response in Objection to Orange County's Motion for Judicial Notice, and Plaintiffs' Motion for Judicial Notice of Ord. No. 2016-19 *(e-filed 5/25/17)*

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6. Orange County's Motion to Dismiss Plaintiff's Amended Complaint Pursuant to Florida Rules of Civil Procedure 1.140(b)(1) and (6) *(e-filed 3/7/2017)*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by Electronic Mail via the Florida E-Portal System to David W. Foley, Jr. and Jennifer T. Foley, david@pocketprogram.org, jtfoley60@hotmail.com; William C. Turner, Esquire, Elaine Marquardt Asad, Esquire and Jeffrey J. Newton, Esquire, williamchip.turner@ocfl.net, judith.catt@ocfl.net, elaine.asad@ocfl.net, gail.stanford@ocfl.net; and Lamar D. Oxford, Esquire, loxford@drml-law.com, katietillotson@drml-law.com on this 22nd day of August, 2017.

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Attorneys for Defendant Orange County Board of County Commissioners

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

Plaintiffs DAVID W. FOLEY, JR., and JENNIFER T. FOLEY *v.* ***Defendants*** 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.*	2016-CA-007634-O **PLAINTIFFS' MOTION FOR JUDICIAL NOTICE OF THE ORDER OF ORANGE COUNTY'S BOARD OF COUNTY COMMISSIONERS FEBRUARY 19, 2008, IN CASE ZM-07-10-010**

PLAINTIFFS DAVID AND JENNIFER FOLEY MOVE THE COURT pursuant §§90.202(12) and 90.203, Fla. Stat., to take judicial notice of the order of Orange County's Board of County Commissioners February 19, 2008, in case ZM-07-10-010, attached hereto.

SUMMARY

The attached order of Orange County's Board of County Commissioners February 19, 2008, in case ZM-07-10-010, is the final decision of the Board

of County Commissioners in the Foleys' case ZM-07-10-010, referenced in the Foleys' Amended Complaint, e-filing #52564910, ¶40(e). The order confirms the allegation of ¶40(e), establishes its relationship to prior actions of the Board of Zoning Adjustment and the Zoning Manager, and provides the Court with an official copy of the exact language challenged by the Foleys' Amended Complaint. Judicial notice of the order is essential to a final resolution of the Amended Complaint's Count One.

BACKGROUND

1. February 15, 2017, the Foleys filed their amended complaint, e-filing #52564910.

2. All Counts in the amended complaint, to some degree, involve the order of Orange County's Board of County Commissioners February 19, 2008, in case ZM-07-10-010.

3. No other party to this case has yet asked the Court to take judicial notice of the order in case ZM-07-10-010, or otherwise put the order before the Court.

4. The Foleys attach a copy of the order of Orange County's Board of County Commissioners February 19, 2008, in case ZM-07-10-010, to this

"Plaintiffs' Motion for Judicial Notice of the order of Orange County's Board of County Commissioners February 19, 2008, in case ZM-07-10-010."

5. The attached copy of the order in case ZM-07-10-010, is a copy of the certified order the Foleys acquired August 30, 2017, from the office of the Orange County Comptroller, at 201 S. Rosalind Avenue, 4th Floor, Orlando Florida, 32801.

6. The order in case ZM-07-10-010, represented by the attached copy of that order, is available to any member of the public from the office of the Orange County Comptroller, at 201 S. Rosalind Avenue, 4th Floor, Orlando Florida, 32801.

7. Below the Foleys certify that all parties to this case are on notice of this request that the Court take judicial notice of the attached copy of the certified order of Orange County's Board of County Commissioners February 19, 2008, in case ZM-07-10-010.

ARGUMENT

8. Section 90.202(12), Fla. Stat., permits this Court to take judicial notice of "facts that are not subject to dispute because they are capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned."

9. As stated in above paragraphs 5 and 6, the order of Orange County's Board of County Commissioners February 19, 2008, in case ZM-07-10-010, is publicly available and as such is a fact "not subject to dispute."

10. Section 90.203, Fla. Stat., requires this Court take judicial notice of the order of Orange County's Board of County Commissioners February 19, 2008, in case ZM-07-10-010, if the Foleys give all parties notice of the request, provide the court proof of that notice, and furnish the Court with sufficient information to enable it to take judicial notice.

11. By this motion all parties are on notice the Court has been asked to take judicial notice of the attached copy of the order of Orange County's Board of County Commissioners February 19, 2008, in case ZM-07-10-010; the certification of service below provides the Court with the proof required by §90.203, Fla. Stat.

12. The above **SUMMARY** and **BACKGROUND** provide the Court "with sufficient information to enable it to take judicial notice."

CONCLUSION

WHEREFORE, pursuant §§90.202(12) and 90.203, Fla. Stat., the Foleys here move the Court to take judicial notice of the order of Orange County's Board of County Commissioners February 19, 2008, in case ZM-07-10-010.

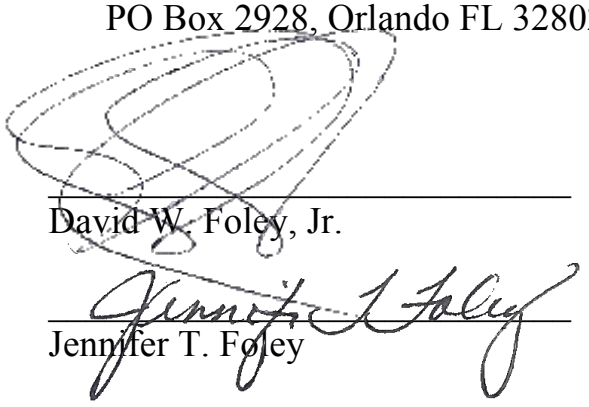
CERTIFICATE OF SERVICE

Plaintiffs certify that on August 30, 2017, the foregoing was electronically filed with the Clerk of the Court using the Florida Courts' eFiling Portal, which will send notice of filing and a service copy of the foregoing to the following:

William C. Turner, Jr., Assistant County Attorney,
P.O. Box 2687, Orlando FL, 32801, williamchip.turner@ocfl.net;

Derek Angell, O'Connor & O'Connor LLC,
840 S. Denning Dr. 200, Winter Park FL, 32789,
eservice@oconlaw.com, dangell@oconlaw.com;

Lamar D. Oxford, Dean, Ringers, Morgan & Lawton PA,
PO Box 2928, Orlando FL 32802-2928, loxford@drml-law.com.



David W. Foley, Jr.

Jennifer T. Foley

Date: August 30, 2017

Plaintiffs
1015 N. Solandra Dr.
Orlando FL 32807-1931
PH: 407 721-6132
e-mail: david@pocketprogram.org
e-mail: jtfoley60@hotmail

DECISION OF THE BOARD OF COUNTY COMMISSIONERS
ORANGE COUNTY, FLORIDA

ON FEBRUARY 19, 2008, THE BOARD OF COUNTY COMMISSIONERS SAT AS A BOARD OF APPEALS TO CONSIDER THE FOLLOWING MATTER:

APPELLANTS:
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;
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: DISTRICT 3; PROPERTY GENERALLY LOCATED ON THE EAST SIDE OF NORTH SOLANDRA DRIVE, SOUTH OF OLD CHENEY HIGHWAY, WEST OF SEMORAN BOULEVARD OR 1015 NORTH SOLANDRA DRIVE; PARCEL ID 21-22-30-5044-02-010; SECTION 21, TOWNSHIP 22, RANGE 30; ORANGE COUNTY, FLORIDA (LEGAL PROPERTY DESCRIPTION ON FILE)

UPON A MOTION, THE BOARD OF COUNTY COMMISSIONERS UPHELD THE ZONING MANAGER'S DETERMINATION, CONSISTENT WITH THE BOARD OF ZONING ADJUSTMENT RECOMMENDATION; IN R-1A ZONE 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; ON THE DESCRIBED PROPERTY.

BOARD OF COUNTY COMMISSIONERS · ORANGE COUNTY FLORIDA

THE FOREGOING DECISION HAS BEEN FILED WITH ME THIS 29TH DAY OF FEBRUARY 2008.

DEPUTY CLERK
BOARD OF COUNTY COMMISSIONERS
ORANGE COUNTY, FLORIDA

Note: This document constitutes the final decision of the Board of County Commissioners on this matter. If, upon the Board's subsequent review and approval of its minutes, an error affecting this final decision is discovered, a corrected final decision will be prepared, filed, and distributed.
ldh

COUNTY COMPTROLLER SEAL ORANGE COUNTY FLORIDA

STATE OF FLORIDA, COUNTY OF ORANGE
I HEREBY CERTIFY that this is a true and accurate copy of a document from the Public Records of the Comptroller
PHIL DIAMOND, COUNTY COMPTROLLER
BY: for D.C.
DATED: AUG 29 2017

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

Plaintiffs DAVID W. FOLEY, JR., and JENNIFER T. FOLEY *v.* ***Defendants*** 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.*	2016-CA-007634-O **PLAINTIFFS' MOTION FOR JUDICIAL NOTICE OF ORANGE COUNTY SITE-PLAN AND BUILDING PERMIT ISSUED NOVEMBER 30, 2007**

PLAINTIFFS DAVID AND JENNIFER FOLEY MOVE THE COURT pursuant §§90.202(12) and 90.203, Fla. Stat. to take judicial notice of the attached Orange County site-plan and building permit issued November 30, 2007.

SUMMARY

The attached Orange County site-plan and building permit are those referenced in the Foleys' Amended Complaint, e-filing #52564910, ¶40(d).

The attached site-plan and building permit confirm the allegations of ¶40(d), and provide the Court with an official copy of the exact language challenged by the Foleys' Amended Complaint. Judicial notice of the site-plan and building permit is essential to a final resolution of the Amended Complaint's Count One.

BACKGROUND

1. February 15, 2017, the Foleys filed their amended complaint, e-filing #52564910.

2. All Counts in the amended complaint, to some degree, directly or indirectly, involve the Orange County site-plan and building permit issued November 30, 2007.

3. No party to this case has yet asked the Court to take judicial notice of the site-plan or building permit, or otherwise put them before the Court.

4. The Foleys attach a copy of the site-plan and a copy of the building permit to this "Plaintiffs' Motion for Judicial Notice of Orange County Site-Plan and Building Permit."

5. The attached copy of the site-plan and the attached copy of the building permit are copies of documents acquired by the Foleys, August 30, 2017, from Orange County's Administrative & Development Services Division, of

Community, Environmental & Development Services, at 201 S. Rosalind Avenue, 2nd Floor, Orlando Florida, 32801.

6. The site-plan and the building permit, represented by the attached copies of those documents, are available to any member of the public from Orange County's Administrative & Development Services Division, of Community, Environmental & Development Services, at 201 S. Rosalind Avenue, 2nd Floor, Orlando Florida, 32801.

7. David Foley personally met with William Turner, counsel for Orange County, August 30, 2017, in the offices of the Orange County Attorney, at 201 S. Rosalind Avenue, 3rd Floor, Orlando Florida, 32801. At that time Mr. Turner told David Foley that he would not dispute the authenticity of the site-plan and building permit represented by the copies attached to this motion.

8. Below the Foleys certify that all parties to this case are on notice of this request that the Court take judicial notice of the attached copies of the Orange County site-plan and building permit issued November 30, 2007.

ARGUMENT

9. Section 90.202(12), Fla. Stat., permits this Court to take judicial notice of "facts that are not subject to dispute because they are capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned."

10. As stated in above paragraphs 5 and 6, the site-plan and building permit are publicly available and as such are "facts that are not subject to dispute."

11. Section 90.203, Fla. Stat., requires this Court take judicial notice of such "facts that are not subject to dispute," if the Foleys give all parties notice of the request, provide the court proof of that notice, and furnish the Court with sufficient information to enable it to take judicial notice.

12. By this motion all parties are on notice the Court has been asked to take judicial notice of the attached copies of the Orange County site-plan and building permit issued November 30, 2007; the certification of service below provides the Court with the proof required by §90.203, Fla. Stat.

13. The above **SUMMARY** and **BACKGROUND** provide the Court "with sufficient information to enable it to take judicial notice."

CONCLUSION

WHEREFORE, pursuant §§90.202(12) and 90.203, Fla. Stat., the Foleys here move the Court to take judicial notice of the attached Orange County site-plan and building permit issued November 30, 2007.

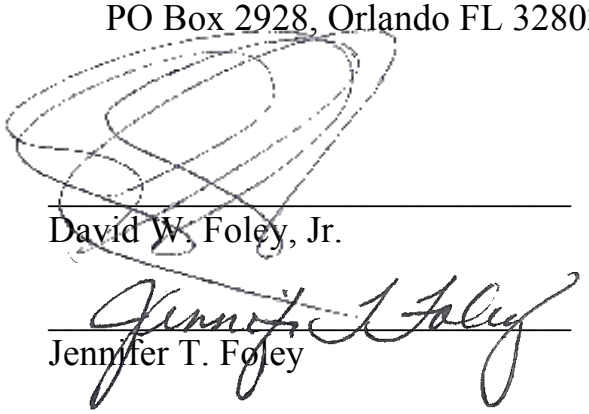
CERTIFICATE OF SERVICE

Plaintiffs certify that on August 30, 2017, the foregoing was electronically filed with the Clerk of the Court using the Florida Courts' eFiling Portal, which will send notice of filing and a service copy of the foregoing to the following:

William C. Turner, Jr., Assistant County Attorney,
P.O. Box 2687, Orlando FL, 32801, williamchip.turner@ocfl.net;

Derek Angell, O'Connor & O'Connor LLC,
840 S. Denning Dr. 200, Winter Park FL, 32789,
eservice@oconlaw.com, dangell@oconlaw.com;

Lamar D. Oxford, Dean, Ringers, Morgan & Lawton PA,
PO Box 2928, Orlando FL 32802-2928, loxford@drml-law.com.



David W. Foley, Jr.

Jennifer T. Foley

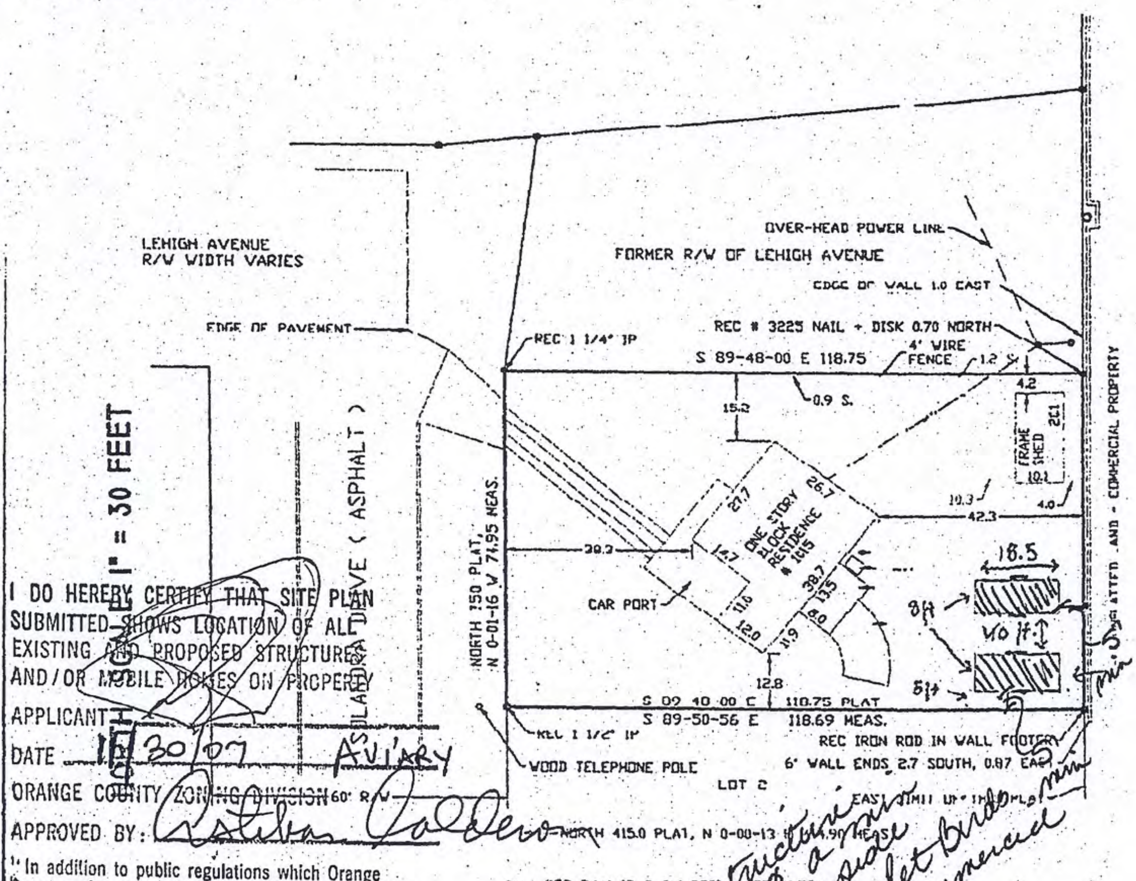
Date: August 30, 2017

Plaintiffs
1015 N. Solandra Dr.
Orlando FL 32807-1931
PH: 407 721-6132
e-mail: david@pocketprogram.org
e-mail: jtfoley60@hotmail

BOUNDARY SURVEY

CERTIFIED TO:
DAVID W. FOLEY, Jr.

LEGAL DESCRIPTION:
LOT 1, BLOCK B, LEJEUNE HEIGHTS, according to the Plat thereof as recorded in Plat Book U, Page 63, Public records of Orange County, Florida.
CONTAINS 0.204 ACRES +/-



I DO HEREBY CERTIFY THAT SITE PLAN SUBMITTED SHOWS LOCATION OF ALL EXISTING AND PROPOSED STRUCTURES AND/OR MOBILE HOMES ON PROPERTY

APPLICANT

DATE 10/30/07 AVIARY

ORANGE COUNTY ZONING DIVISION

APPROVED BY: Esteban Calderon

"In addition to public regulations which Orange County enforces, be advised that there may be other private restrictions or approval requirements that will affect your ability to erect this structure. Please review your deed restrictions and / or consult with your Homeowners Association or Architectural Review Board."

SURVEYOR'S NOTES:

PROPERTY DESCRIPTION PROVIDED BY CLIENT. THIS PROPERTY MAY BE SUBJECT TO ADDITIONAL EASEMENTS, RESTRICTIONS, AND/OR RIGHTS-OF-WAY FOR WHICH LEGAL DESCRIPTION WAS NOT PROVIDED. NO ABSTRACT OF TITLE IS IMPLIED WITHIN THIS SURVEY.
ALL LINEAR MEASUREMENTS ARE SHOWN IN DECIMAL FEET.
SIZE DIMENSIONS ARE IN FEET UNLESS SHOWN WITH INCH SYMBOL (").
ALL ANGLES AND/OR BEARINGS ARE DENOTED IN DEGREES-MINUTES-SECONDS.
UNDERGROUND IMPROVEMENTS AND/OR IMPROVEMENTS OUTSIDE OF PROPERTY LINES ARE NOT LOCATED UNLESS NOTED.
REPRODUCTIONS OF THIS DRAWING ARE NOT VALID UNLESS EMBOSSED WITH A RAISED SEAL.

ABBREVIATION LEGEND:
REC = RECOVERED   CALC = CALCULATED   SET = SET [illegible] 1/2" IRON ROD
MEAS. = MEASURED   DESC. = PER DESCRIPTION   PLAT = PER PLAT (ALL DISTANCES IN FEET)
IP = IRON PIPE   IR = IRON ROD   CM = CONCRETE MONUMENT   COR. = CORNER
CLF = CHAIN-LINK-FENCE   CONC. = CONCRETE   ASPH. = ASPHALT PAVEMENT
PP = POWER POLE   R/W = RIGHT-OF-WAY   C/L = CENTERLINE   WM = WATER METER
[illegible] = BREAK LINE (DISTANCE IS NOT SHOWN TO SCALE)

PATRICK K. VANDERWYDEN, PLS
LAND SURVEYING SERVICES
6419 VINELAND ROAD
ORLANDO, FLORIDA 32819

SURVEY DATE 8/2/07 BY PKV

Patrick K. Vanderwyden PLS 8/4

PATRICK K. VANDERWYDEN, PLS
FLORIDA REGISTRATION # 5154
I CERTIFY THAT THIS SURVEY MEETS MINIMUM TECHNI[CAL] STANDARDS FOR LAND SURVEYORS: CHAPTER 61G17-

dition to the requirements of this permit, there may estrictions applicable to this property that may be ublic records of this county, and there may be mits required from other governmental entities management districts, state agencies, or federal issuance of this permit does not grant permission applicable Orange County and/or State of Florida ordinances.

ORANGE COUNTY GOVERNMENT FLORIDA

ORANGE COUNTY DIVISION OF BUILDING S
201 SOUTH ROSALIND AVE.
ORLANDO, FLORIDA 32802-2687
PHONE 407-836-5550

PERM

B U I L D I N G

DUPLICA

PERMIT NUMBER B070148
JOB NUMBER

RMITS ARE REQUIRED FOR SIGNS, ELECTRICAL, PLUMBING AND MECHANICAL SERVICES. THIS PERMIT BECOMES VOID IF THE WORK AUTHOR WITHIN 6 MONTHS, OR IS SUSPENDED OR ABANDONED FOR A PERIOD OF 6 MONTHS AFTER COMMENCEMENT. WORK SHALL BE CONSIDERED ED INSPECTION HAS NOT BEEN MADE WITHIN A 6 MONTH PERIOD.

PERMISSION IS GRANTED TO DO THE FOLLOWING WORK THE CONDITIONS HEREON AND THE APPROVED PLANS AND SUBJECT TO COMPLIANCE WITH THE ORDINANCES COUNTY, FLORIDA.

CONTRACTOR

) FOLEY
5 N SOLANDRA DR
ANDO FL 32807

PHONE 407-658-4520

LE JEUNE HEIGHTS LOT #
OWNERSHIP IS PRIVATE
PARCEL NO. 21-22-30-5044-

JOB ADDRESS
1015 N SOLANDRA DR
ORLANDO FL 32807

PHONE

) FOLEY
5 N SOLANDRA DR
ANDO FL 32807

CT TYPE VB SHED/BARN/RESID.BOAT HOUSE/JAIL/STOR.GAR
CCUPANT
DRESS

PERMIT FEE 39.50

WORK / SPECIAL CONSIDERATIONS

DATE OF APPLICATION 11/30/2007
DATE ISSUED 11/30/2007

SSORY STRUCTURE SFR
SSORY STRUCTURE LESS THAN 150 SQ. FT. TO HOUSE
IRDS ONLY- NO COMMERCIAL ACTIVITIES PERMITTED
ZA LOT 1

BLDG DIV VALUE 1,200

INSPECTOR RGT / P

B U I L D I N G F E A T U R E S

T. AREA	149.00	OTHER INFO	
T./FLOOR	.00	OCC. GROUP	R3
F UNITS			
OCC/FLR		PERMITS REQ	
LIMIT	15		
TORIES	.0	COP .00	
OW FLR	.0	SEER .00	
LD.PLAIN	.0		
FL.LOAD			
CLASS	R-1A		
EST.VAL.	1,200		
R SYSTEM NA	0	PLANS - A	
F BLDGS.	0		

IMPACT FEES — D/T — ZONES

ENFORCE.	.00	SECTOR	
	.00	AREA	
FIC	.00	ZONE	
CRD RD	.00		
CRD PRK	.00		
& RBI	.00		
OL	.00		
S	.00		
CRD SCH	.00		

BUILDING FEES

CS	28.50	PLN	.00
	.00	PUB	.00
	11.00	HEA	.00
	.00	ENG	.00

VALIDATION Building and Zoning
PAID 2007/11/30 14:54:05 $3
002-374758:KOTASKA -00002539
0201 Building Permit B07014
B001 Zoning Dept. Fee $
B008 Build/Const. Sup Fee $
TOTAL $
8001 Credit Card $

UMENT BECOMES YOUR PERMIT WHEN PROPERLY VALIDATED.

30-180 PRINTED BY PWBRH2

DIVISION OF BUILDING SAFETY COPY

B07014

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

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

Plaintiffs,

v. CASE NUMBER: 2016-CA-007634-O

ORANGE COUNTY, PHIL SMITH, CAROL HOSSFIELD, MITCH GORDON, ROCCO RELVINI, TARA GOULD, TIM BOLDIG, FRANK DETOMA, ASIMA AZAM, RODERICK LOVE, SCOTT RICHMAN, JOE ROBERTS, MARCUS ROBINSON, RICHARD CROTTY, TERESA JACOBS, FRED BRUMMER, MILDRED FERNANDEZ, LINDA STEWART, BILL SEGAL, and TIFFANY RUSSELL,

Defendant.
_____/

NOTICE OF HEARING

(1 Hour Reserved – Confirmation # 964858)

PLEASE TAKE NOTICE that the Defendant, ORANGE COUNTY (the "County") Officials named in their individual and official capacities serving on the Board of Zoning Adjustment ("BZA") or Board of County Commissioners ("BCC"), ASIMA AZAM, FRED BRUMMER, RICHARD CROTTY, FRANK DETOMA, MILDRED FERNANDEZ, TERESA JACOBS, RODERICK LOVE, SCOTT RICHMAN, JOE ROBERTS, MARCUS ROBINSON, TIFFANY RUSSELL, BILL SEGAL, and LINDA STEWART (together, the "Officials"), by and through its undersigned counsel, will call up for hearing before The Honorable Heather L. Higbee, 425 North Orange Avenue, Orlando, FL, Hearing Room 20-B, on, **December 11, 2017, at 3:00 p.m.**, the following matter:

1. Orange County's Motion to Dismiss Plaintiff's Amended Complaint Pursuant to Florida Rules of Civil Procedure 1.140(b)(1) and (6) *(e-filed 3/7/2017)*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by Electronic Mail via the Florida E-Portal System to: David W. Foley, Jr. and Jennifer T. Foley, david@pocketprogram.org, jtfoley60@hotmail.com; William C. Turner, Esquire, Elaine Marquardt Asad, Esquire and Jeffrey J. Newton, Esquire, williamchip.turner@ocfl.net, judith.catt@ocfl.net, elaine.asad@ocfl.net, gail.stanford@ocfl.net; and Lamar D. Oxford, Esquire, loxford@drml-law.com, katietillotson@drml-law.com on this 15th day of September 2017.

DENNIS R. O'CONNOR, ESQ.
Florida Bar Number: 376574
DOConnor@oconlaw.com
DEREK J. ANGELL, ESQUIRE
Florida Bar Number: 73449
DAngell@oconlaw.com
O'CONNOR & O'CONNOR, LLC
840 S. Denning Drive, Suite 200
Winter Park, FL 32789
(407) 843-2100
(407) 843-2061 Facsimile
Attorneys for Defendant Orange County Board of County Commissioners

cc: First Choice Reporting

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

DAVID W. FOLEY and JENNIFER T. FOLEY,

CASE NO.: 2016-CA-007634-O

Plaintiffs,

v.

ORANGE COUNTY, PHIL SMITH, CAROL HOSSFIELD, MITCH GORDON, ROCCO RELVINI, TARA GOULD, TIM BOLDIG, FRANK DETOMA, ASIMA AZAM, RODERICK LOVE, SCOTT RICHMAN, JOE ROBERTS, MARCUS ROBINSON, RICHARD CROTTY, TERESA JACOBS, FRED BRUMMER, MILDRED FERNANDEZ, LINDA STEWART, BILL SEGAL, and TIFFANY RUSSELL,

Defendants.
_____/

ORDER GRANTING "THE OFFICIAL DEFENDANTS' MOTION TO STRIKE THE AMENDED COMPLAINT, RENEWED REQUEST FOR JUDICIAL NOTICE, AND MOTION TO DISMISS THIS ACTION WITH PREJUDICE"
and
ORDER GRANTING "DEFENDANTS PHIL SMITH, ROCCO RELVINI, TARA GOULD, TIM BOLDIG, AND MITCH GORDON'S MOTION TO DISMISS/MOTION TO STRIKE"

THIS MATTER came before the Court for a hearing on September 6, 2017 upon the "The Official Defendants' Motion to Strike the Amended Complaint, Renewed Request for Judicial Notice, and Motion to Dismiss This Action with Prejudice," filed on March 3, 2017, and the "Defendants Phil Smith, Rocco Relvini, Tara Gould, Tim Boldig, and Mitch Gordon's Motion to Dismiss/Motion to Strike," filed on March 7, 2017. The Court, having considered the

Motions, case law, and arguments of counsel from both parties, and otherwise being duly advised in the premises, finds as follows:

RELEVANT FACTS AND PROCEDURAL HISTORY

A detailed history of the instant matter merits discussion, as it factors into the Court's ultimate findings. The Plaintiffs are commercial toucan farmers. A citizen complained of the Plaintiffs' toucans, and Orange County Code Enforcement began an investigation. A zoning manager determined that the Plaintiffs were in violation of the Code. The issue then went to a public hearing, held by the Board of Zoning Adjustment ("BZA"), which continued to find that the Plaintiffs were in violation of the Code. The Plaintiffs appealed to the Board of County Commissioners ("BCC"), who affirmed the BZA's determination. The Plaintiffs then petitioned for a writ of certiorari to the Orange County Ninth Judicial Circuit Court, which ultimately found that the zoning manager, BZA, and BCC properly interpreted the relevant Code, thus denying their petition.

The Plaintiffs filed an action in the Middle District of Florida against the County, the Officials,[1] the BZA members, and other county employees. The District Court ultimately determined that the relevant Code provisions were unconstitutional under the Florida Constitution, but nevertheless, the Plaintiffs' claims for due process violations, equal protection violations, compelled speech, restraints on commercial speech, and unreasonable searches or seizures failed.[2] *See Foley v. Orange County*, 2013 WL 4110414 (M.D. Fla. August 13, 2013).

The Plaintiffs appealed to the Eleventh Circuit, which ultimately vacated the Middle District's judgment and remanded the case for the court to dismiss without prejudice for lack of

[1] "The Officials" refers to the members of the BZA and the BCC, who were named both in their individual and official capacities. They include the following Defendants: Asima Azam, Fred Brummer, Richard Crotty, Frank Detoma, Mildred Fernandez, Teresa Jacobs, Roderick Love, Scott Richman, Joe Roberts, Marcus Robinson, Tiffany Russell, Bill Segal, and Linda Stewart.

[2] That action contained many of the same arguments that are raised in the instant action.

subject matter jurisdiction. *See Foley v. Orange County*, 638 Fed. Appx. 941, 946 (11th Cir. 2016). In so doing, the court concluded that the Plaintiffs' claims either had no plausible foundation, or were proscribed by previous Supreme Court decisions. *Id.* at 945-46.

The Plaintiffs then petitioned the Supreme Court for a writ of certiorari, but it was summarily denied. *See Foley v. Orange County, Fla.*, 137 S. Ct. 378 (2016).

On August 25, 2016, the Plaintiffs filed their initial Complaint in this Court. They amended their Complaint on February 25, 2017 to include the following counts: declaratory and injunctive relief proscribing the enforcement of the relevant Code sections (Counts I and II); negligence, unjust enrichment, and conversion (Count III); taking (Count IV); abuse of process to invade privacy and rightful activity, and conversion (Count V); civil theft (Count VI); and due process (Count VII). All of these counts purport to stem from the administrative proceeding that was held on February 23, 2007 and became final after appeal on February 19, 2008.

On September 6, 2017, the Court held a hearing on "The Official Defendants' Motion to Strike the Amended Complaint, Renewed Request for Judicial Notice, and Motion to Dismiss This Action with Prejudice," filed on March 3, 2017, and the "Defendants Phil Smith, Rocco Relvini, Tara Gould, Tim Boldig, and Mitch Gordon's Motion to Dismiss/Motion to Strike," filed on March 7, 2017. This Order follows.

ANALYSIS AND RULING

"A motion to dismiss tests whether the plaintiff has stated a cause of action." *Bell v. Indian River Memorial Hosp.*, 778 So. 2d 1030, 1032 (Fla. 4th DCA 2001). Furthermore, "[w]hen determining the merits of a motion to dismiss, the trial court's consideration is limited to the four corners of the complaint, the allegations of which must be accepted as true and considered in the light most favorable to the nonmoving party." *Id.*; *see, e.g., Solorzano v. First*

Union Mortg. Corp., 896 So. 2d 847, 849 (Fla. 4th DCA 2005); *Taylor v. City of Riviera Beach*, 801 So. 2d 259, 262 (Fla. 4th DCA 2001); *Samuels v. King Motor Co. of Fort Lauderdale*, 782 So. 2d 489, 495 (Fla. 4th DCA 2001); *Bolz v. State Farm Mut. Ins. Co.*, 679 So. 2d 836, 837 (Fla. 2d DCA 1996) (indicating that a motion to dismiss is designed to test the legal sufficiency of a complaint, not to determine issues of fact).

"A motion to dismiss a complaint based on the expiration of the statute of limitations should be granted only in extraordinary circumstances where the facts constituting the defense affirmatively appear on the face of the complaint and establish conclusively that the statute of limitations bars the action as a matter of law." *Alexander v. Suncoast Builders, Inc.*, 837 So. 2d 1056, 1057 (Fla. 3d DCA 2002); *see also Pines Properties, Inc. v. Tralins*, 12 So. 3d 888, 889 (Fla. 3d DCA 2009).

In the instant matter, the Plaintiffs cause of action accrued when the BZA's determination became final on February 19, 2008, nine years prior to this action's filing. The Plaintiffs' Complaint must be dismissed, as it can be determined from the face of the amended Complaint that all of the causes of action fall outside of their respective limitations period.[3] *See* § 95.11(3)(p), Fla. Stat. (2016) (stating that any action not specifically provided for in the statute is subject to a four-year limitations period, which encompasses declaratory actions and alleged due process violations (Counts I, II, and VII)); § 95.11(3)(a), Fla. Stat. (2016) (indicating that a negligence action has a four-year limitations period (Count III)); § 95.11(3)(h), Fla. Stat. (2016) (specifying that there is a four-year limitations period to bring a claim for a taking (Count IV)); §

[3] The Plaintiffs attempt to circumvent the limitations period by arguing that 28 U.S.C. § 1367(d) "tolls the limitations period for thirty days after dismissal of any supplemental claims related to those asserted to be within the original jurisdiction of the federal court." However, as the Defendants point out in their Motions, section 1367(d) only applies where a federal court enjoyed original jurisdiction over the case, and if the initial assertion of federal jurisdiction is found to be insufficient, then the section does not apply and the party does not get the benefit of the tolling. *See Ovadia v. Bloom*, 756 So. 2d 137, 140 (Fla. 3d DCA 2000). Because the Eleventh Circuit determined that the Plaintiffs' claims had no plausible foundation, section 1367(d) is inapplicable to the instant matter.

95.11(3)(o), Fla. Stat. (2016) (stating that intentional torts, which include abuse of process and conversion, are subject to a four-year limitations period (Count V)); § 772.17, Fla. Stat. (2016) (stating that civil theft has a five-year limitations period (Count VI)).

Accordingly, the following is hereby **ORDERED AND ADJUDGED:**

1. "The Official Defendants' Motion to Strike the Amended Complaint, Renewed Request for Judicial Notice, and Motion to Dismiss This Action with Prejudice" is **GRANTED.**
2. The "Defendants Phil Smith, Rocco Relvini, Tara Gould, Tim Boldig, and Mitch Gordon's Motion to Dismiss/Motion to Strike" is **GRANTED.**
3. The Plaintiffs' Amended Complaint, filed February 25, 2017, is **DISMISSED with prejudice as to the following Defendants: Frank Detoma, Asima Azam, Roderick Love, Scott Richman, Joe Roberts, Marcus Robinson, Richard Crotty, Teresa Jacobs, Fred Brummer, Mildred Fernandez, Linda Stewart, Bill Segal, and Tiffany Russell.**

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on this 24 day of October, 2017.

HEATHER L. HIGBEE
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on Oct 25, 2017, a true and accurate copy of the foregoing was e-filed using the Court's ECF filing system, which will send notice to all counsel of record.

Judicial Assistant

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

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

Plaintiffs,

vs. CASE NUMBER: 2016-CA-007634-0

ORANGE COUNTY, PHIL SMITH,
CAROL HOSSFIELD, MITCH GORDON,
ROCCO RELVINI, TARA GOULD,
TIM BOLDIG, FRANK DETOMA,
ASIMA AZAM, RODERICK LOVE,
SCOTT RICHMAN, JOE ROBERTS,
MARCUS ROBINSON, RICHARD CROTTY,
TERESA JACOBS, FRED BRUMMER,
MILDRED FERNANDEZ, LINDA STEWART,
BILL SEGAL, and TIFFANY RUSSELL,

Defendants.
_____/

DEFENDANTS' PHIL SMITH, CAROL HOSSFIELD (n/k/a CAROL KNOX), MITCH GORDON, ROCCO RELVINI, TARA GOULD and TIM BOLDIG'S MOTION FOR ENTRY OF FINAL JUDGMENT

Defendants Phil Smith, Carol Hossfield (n/k/a Carol Knox), Mitch Gordon, Rocco Relvini, Tara Gould and Tim Boldig (hereinafter the "County Employee Defendants"), by and through undersigned counsel, respectfully request this Honorable Court enter Final Judgment on their behalf in this action, for the following grounds and reasons:

1. This Motion is brought pursuant to the Florida Rules of Civil Procedure, and the relief sought is well within the discretion of this Honorable Court.

2. In an Order dated October 24, 2017, this Court addressed the County Employee Defendants' Motion to Dismiss/Motion to Strike Plaintiffs' Amended Complaint. In a detailed 6-page Order, this Court concluded that the applicable Statutes of Limitations applied to bar all causes of action pled by the Plaintiffs in their Amended Complaint against the County Employee Defendants. As a result, this Honorable Court granted the County Employee Defendants' Motion to Dismiss/Motion to Strike. (Order of 10/24/17, p. 5).

3. In the same Order, and for the exact same grounds, this Honorable Court granted the Defendant County Official's Motion to Dismiss/Motion to Strike Plaintiffs' Amended Complaint.

4. In that context, it is undisputed that the County Employee Defendants are entitled to entry of a Final Judgment in their favor in this cause. No further amendment by the Plaintiffs could cure the application of the pertinent Statutes of Limitations, to their claims made against both the Defendant County Employees and the County Officials.

WHEREFORE, the County Employee Defendants, Phil Smith, Carol Hossfield (n/k/a Carol Knox), Mitch Gordon, Rocco Relvini, Tara Gould and Tim Boldig, by and through undersigned counsel, respectfully request this Honorable Court enter the attached Final Judgment, in their favor in this cause.

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by Electronic Mail via the Florida E-Portal System to: David W. Foley, Jr. and Jennifer T. Foley, david@pocketprogram.org, jtfoley60@hotmail.com; William C. Turner, Esquire, Elaine Marquardt Asad, Esquire and Jeffrey J. Newton, Esquire, williamchip.tumer@ocfl.net, judith.catt@ocfl.net, elaine.asad@ocfl.net, gail.stpnford@ocfl.net.on this 3rd day of November 2017.

Respectfully submitted,

/s/ Lamar D. Oxford

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Attorneys for Defendants

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

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

Defendants
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.

2016-CA-007634-O

PLAINTIFFS' MOTION FOR REHEARING

PLAINTIFFS DAVID AND JENNIFER FOLEY PURSUANT FL.R.CIV.P. 1.530, MOVE THE COURT TO REHEAR ITS FINAL ORDER filed October 25, 2017, dismissing with prejudice the Foleys' amended complaint as to defendants Asima Azam, Fred Brummer, Richard Crotty, Frank Detoma, Mildred Fernandez, Teresa Jacobs, Roderick Love, Scott Richman, Joe Roberts, Marcus Robinson, Tiffany Russell, Bill Segal, and Linda Stewart.

SUMMARY

Rehearing is justified because: *1)* the Foleys argued *Krause v. Textron Fin. Corp*., 59 So.3d 1085 (Fla. 2011); *2)* the Court has obviously overlooked this argument; and, *3) Krause* requires reversal.

BACKGROUND

1. May 24, 2017, the Foleys filed "Plaintiffs Response to Defendants' Motions to Dismiss," as their written response to all arguments presented in "The Official Defendants' Motion to Strike the Amended Complaint, Renewed Request for Judicial Notice, and Motion To Dismiss this Action with Prejudice."[1]

2. The Foleys' May 24, 2017 response, at §3.1.1, pp. 50-51, as quoted below, clearly argues that *Krause* is binding precedent as to limitations:

> *§3.1.1 Krause v. Textron Fin. Corp., 59 So.3d 1085 (Fla. 2011)*
>
> Florida's Supreme Court in *Krause v. Textron Financial Corp.*, 59 So. 3d 1085, 1091 (Fla. 2011), stated: "[T]he plain language of [28 USC §1367] leads us to conclude that the dismissal of a claim in federal court ... for lack of subject matter jurisdiction, does not bar the applicability of the federal tolling provision in the subsequent state court action." The Eleventh Circuit in *Foley v. Orange County*, 638 Fed.Appx. 941 (11th Cir. 2016), at 946, ordered the District Court to dismiss without prejudice for lack of subject matter jurisdiction. Therefore, per *Krause*, the Foleys' state law claims against the County officials and employees in their personal capacity are timely.

[1] The *officials* include: Asima Azam, Fred Brummer, Richard Crotty, Frank Detoma, Mildred Femandez, Teresa Jacobs, Roderick Love, Scott Richman, Joe Roberts, Marcus Robinson, Tiffany Russell, Bill Segal, and Linda Stewart.

Defense argues that the Third DCA reached a different result in *Ovadia v. Bloom*, 756 So. 2d 137, 139 (3d DCA 2000). It did not. The only basis for federal jurisdiction in *Ovadia* was diversity. Diversity jurisdiction in federal court per 28 U.S.C. §1332, must be complete – a non-diverse defendant destroys jurisdiction. On its face Ovadia's complaint included a non-diverse defendant. Limitations were not tolled per 28 USC §1367(d), on the state claims against the non-diverse defendant because "claims against a non-diverse defendant cannot be considered supplemental jurisdiction," *Ovadia* at 139. *Ovadia*'s rule applies only to diversity jurisdiction and not federal question jurisdiction. The Foleys presented the federal courts with a federal question per 28 U.S.C. §1331, and those courts went well beyond the face of the Foleys' federal complaint to determine they lacked subject matter jurisdiction.

In *Foleys v. Orange County*, et al 638 Fed.Appx. 941, 943 (11th Cir. 2016), the Eleventh Circuit drew the words "insubstantial," "frivolous" from *Bell v. Hood*, 327 US 678, 681-683 (1946).

> [W]here the complaint, as here, is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court, but for two possible exceptions, must entertain the suit. ... The previously carved out exceptions are that a suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous. The accuracy of calling these dismissals jurisdictional has been questioned. [Emphasis added.]

In other words, per *Bell v. Hood*, it can be said that the Eleventh Circuit found the Foleys' complaint was "so drawn as to seek recovery directly under the Constitution of the United States or laws of the United States," but was nevertheless "insubstantial and frivolous" – or, as the Eleventh Circuit put it at 946, "clearly foreclosed by a prior Supreme Court decision." Judge Tjoflat – the longest serving federal appeals judge still in active service – at oral argument put it this way:

> TJOFLAT: Dismissal without prejudice doesn't hurt you at all... There's no injury at all; you're back at square one with a remedy in the state court is what I'm trying to say.

3. September 6, 2017, between 4PM and 5PM, the Court heard the following two motions:[2]

1) The Official Defendants' Motion to Strike the Amended Complaint, Renewed Request for Judicial Notice, and Motion To Dismiss this Action with Prejudice; and,

2) Defendants Phil Smith, Rocco Relvini, Tara Gould, Tim Bodig and Mitch Gordon's Motion to Dismiss/Motion to Strike.

4. The Foleys attach a copy of the transcript of the September 6, 2017, hearing to this motion as Appendix A.

5. At oral argument September 6, 2017, the Foleys reiterated their reliance upon *Krause v. Textron* as to the question of limitations. *See* Appendix A, p. 22, lines 20-25; p. 23, lines 1-4; p. 35, lines 21-25; p. 36, lines 1-4.

6. October 24, 2017, the Court issued its "Order Granting 'The Official Defendants' Motion to Strike the Amended Complaint, Renewed Request for Judicial Notice, and Motion to Dismiss this Action with Prejudice' and Order

[2] Four additional motions were scheduled for this hearing but were not heard: Plaintiffs' Motion for Judicial Notice (5/22/2017); Plaintiffs' Response in Objection to Orange County's Motion for Judicial Notice, and Plaintiffs' Motion for Judicial Notice of Ord. No. 2016-19 (5/25/17); Plaintiffs' Motion for Judicial Notice of Ord. No. 2008-06 (5/25/2017); and, Orange County's Motion to Dismiss Plaintiff's Amended Complaint Pursuant to Florida Rules of Civil Procedure 1.140(b)(1) and (6) (3/7/2017).

Granting 'Defendants Phil Smith, Rocco Relvini, Tara Gould. Tim Boldig. And Mitch Gordon's Motion to Dismiss/Motion to Strike.'"[3]

7. The Foleys attach a copy of the Court's October 24, 2017, order to this motion as Appendix B.

8. In its October 24, 2017, order the Court's only discussion of argument relating to the tolling provision of 28 USC §1367, appears in footnote 3 on page 6, as follows:

> The Plaintiffs attempt to circumvent the limitations period by arguing that 28 U.S.C. §1367(d) "tolls the limitations period for thirty days after dismissal of any supplemental claims related to those asserted to be within the original jurisdiction of the federal court." However, as the Defendants point out in their Motions, section 1367(d) only applies where a federal court enjoyed original jurisdiction over the case, and if the initial assertion of federal jurisdiction is found to be insufficient, then the section does not apply and the party does not get the benefit of the tolling. *See Ovadia v. Bloom*, 756 So.2d 137, 140 (Fla. 3d DCA 2000). Because the Eleventh Circuit determined that the Plaintiffs' claims had no plausible foundation, section 1367(d) is inapplicable to the instant matter.

9. In its October 24, 2017, order the Court relies exclusively on *Ovadia v. Bloom*, 756 So.2d 137, 140 (Fla. 3d DCA 2000), and makes no reference to either of the following: *1)* *Krause v. Textron Financial Corp.*, 59 So.3d 1085 (Fla. 2011); or, *2)* the Foleys' written or oral arguments regarding *Krause*.

---

[3] In doing so the Court violated the promise it made twice at hearing September 6, 2017, to issue no order until after hearing Orange County's motion to dismiss. *See See* Appendix A, p. 39, lines 23-25; p. 40, lines 1-5, and lines 8-13.

10. The decretal portion of the court's order states in pertinent part:

> The Plaintiffs' Amended Complaint, filed February 25, 2017, is DISMISSED with prejudice as to the following Defendants: Frank Detoma, Asima Azam, Roderick Love, Scott Richman, Joe Roberts, Marcus Robinson, Richard Crotty, Teresa Jacobs, Fred Brummer, Mildred Fernandez, Linda Stewart, Bill Segal, and Tiffany Russell.

ARGUMENT

11. Rehearing is permitted pursuant Fla. R. Civ. P 1.539, because the decretal portion of the court's order makes the order final as to Asima Azam, Fred Brummer, Richard Crotty, Frank Detoma, Mildred Fernandez, Teresa Jacobs, Roderick Love, Scott Richman, Joe Roberts, Marcus Robinson, Tiffany Russell, Bill Segal, and Linda Stewart. *See* *Bd. of Cty. Comm'rs of Madison Cty. v. Grice,* 438 So. 2d 392, 394 (Fla. 1983).

12. Rehearing is justified because as demonstrated by the preceding paragraphs the Court has overlooked the Foleys' reliance upon *Krause v. Textron Financial Corp.*, 59 So.3d 1085 (Fla. 2011).

13. Rehearing is justified because *Krause*, not *Ovadia*, is Florida's binding precedent with respect to the application of the tolling provisions of 28 U.S. Code 1367(d), to any state law claim related to any federal question claim within the original jurisdiction of the federal district court *even if* that federal question claim is ultimately dismissed on appeal for lack of subject matter jurisdiction.

14. Rehearing is also justified because the bright-line rule of *Scarfo v. Ginsberg*, 817 So.2d 919 (4th DCA 2002), accepted by Florida's Supreme Court in *Krause*, applies here. *Scarfo* held that the plain language of 28 USC 1367 makes clear that "dismissal of a federal claim for lack of subject matter jurisdiction [does] not bar the application of section 1367(d) to toll the state limitations period for claims refiled in state court."

15. A memorandum discussing the application of 28 U.S. Code 1367(d), is attached as Appendix C, and is incorporated in this motion as if set out in full.

CONCLUSION

WHEREFORE David and Jennifer Foley move the court to rehear its order filed October 25, 2017, dismissing with prejudice the Foleys' amended complaint as to defendants Asima Azam, Fred Brummer, Richard Crotty, Frank Detoma, Mildred Fernandez, Teresa Jacobs, Roderick Love, Scott Richman, Joe Roberts, Marcus Robinson, Tiffany Russell, Bill Segal, and Linda Stewart.

CERTIFICATE OF SERVICE

Plaintiffs certify that on November 9, 2017, the foregoing was electronically filed with the Clerk of the Court using the Florida Courts' eFiling Portal, which will send notice of filing and a service copy of the foregoing to the following:

William C. Turner, Jr., Assistant County Attorney,
P.O. Box 2687, Orlando FL, 32801, williamchip.turner@ocfl.net;
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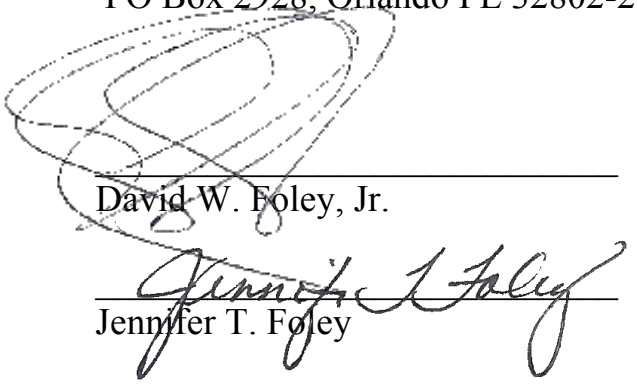

David W. Foley, Jr.

Jennifer T. Foley

Date: November 9, 2017

Plaintiffs
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IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

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

Defendants
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.

2016-CA-007634-O

APPENDIX A

TRANSCRIPT OF HEARING SEPTEMBER 6, 2017

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

CASE No.: 2016-CA-007634-O

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

Plaintiffs,

vs.

ORANGE COUNTY, PHIL SMITH, CAROL HOSSFIELD, MITCH GORDON, ROCCO RELVINI, TARA GOULD, TIM BOLDIG, FRANK DETOMA, AZIM AZAM, RODERICK LOVE, SCOTT RICHMAN, JOE ROBERTS, MARCUS ROBINSON, RICHARD CROTTY, TERESA JACOBS, FRED BRUMMER, MILDRED FERNANDEZ, LINDA STEWART, BILL SEGAL and TIFFANY RUSSELL,

Defendants.

_____/

Transcript of Proceedings
Before the Honorable Heather L. Higbee,
Circuit Court Judge

DATE TAKEN: September 6, 2017

TIME: Commenced at 4:00 p.m.
Concluded at 4:47 p.m.

LOCATION: Orange County Courthouse
425 North Orange Avenue
Hearing Room 20-B
Orlando, Florida 32801

REPORTED BY: Danette V. Lamb,
Court Reporter and Notary Public

A P P E A R A N C E S:

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ALSO PRESENT:

TERESA LAZAR, ESQUIRE
Staff Attorney for Judge Higbee

ELAINE MURQUARDT ASAD, ESQUIRE
Elaine.asad@ocfl.net

P R O C E E D I N G S

THE COURT: Good afternoon. All right. Is everybody ready? We're going to go ahead and get on the record. This is 2016-CA-7634. There are a myriad of hearings that are set for today. I'm not going to announce each one of them or I'll dip into your time. But understand that I have reviewed the motions, the information that has been forwarded to me, the case on the court file that's part of our record so that I would be prepared for today.

I also wanted to apologize to everyone for having to change the hearing on you a few weeks ago. I had a family emergency that I had to tend to. It had nothing to do with this case. It was just that particular time frame that I needed to make sure I had to -- something that unfortunately was more important than where I had to be here, so I apologize for that inconvenience. You have my full attention.

I also want to introduce you to my staff attorney, Teresa Lazar, who is sitting in on this hearing with me so that you know who she is. She is my staff attorney that assist me with the legalities of my job.

So I'm going to start with my immediate right

and have you identify for me who you are and who you represent, please.

MR. ANGELL: And I'd be here. Your Honor, my name is Derek Angell. I represent the Orange County Officials in this case, which is comprised of the members of The Board of Zoning Adjustment, BZA, and the Board of Commissioners, the BCC.

THE COURT: Thank you. Sir?

MR. OXFORD: Good afternoon, Your Honor. My name is Lamar Oxford from the Dean, Ringers firm. I represent the -- Phil Smith, who is the county code enforcement inspector. Carol Knox is her married -- is her name now. She was the chief planner for the County. Mitch Gordon is the former zoning manager for the County. Rocco Relvini, chief planner for the County; and Tara Gould, former assistant Orange County attorney.

THE COURT: Okay. Thank you. And I am going ask over here. Counsel?

MS. ASAD: Elaine Asad for Orange County.

MR. TURNER: And William Turner also on behalf of Orange County, Your Honor.

THE COURT: Okay. And that must make you Mrs. Foley?

MRS. FOLEY: Jennifer Foley.

THE COURT: All right. Very good.

Are you David Foley?

MR. FOLEY: I am.

THE COURT: All right. So I have Jennifer Foley and David Foley.

So I would like to go -- well, I have everything in the order of what was noticed and it would seem that if we go in that order -- I don't know that there's any better order to go in unless anyone has an objection. We have an hour, which means that I'm anticipating approximately 30 minutes of one side and 30 minutes of the other side. Although, it's going to be mixed in between all the different motions and responses. So hopefully we can make good use of that time and be out of here promptly.

So, Mr. Angell, you represent the Orange County officials and that's the first item that I have on my list. If you wish to proceed with your motion to strike the amended complaint?

MR. ANGELL: Thank you, Your Honor. And this is really I think what I'm going to begin with, going through the factual background and the lengthy procedural background before we got here as it is applicable to all the motions. And if we get

to all of them, great; if not, I think we all agreed to tack on as many of the notices as we can, but if we run out of time, so be it.

This case began a long time ago during the Bush administration. Frankly, it was an administrative investigation that the Foleys were growing -- or raising, I should say, toucans in a residentially zoned property. The toucans were raised for commercial purposes and constitutes -- aviculture is the fancy name for it. And there was an inspection of the zoning board violation, the zoning inspector determined the aviculture violated the zoning rules of Orange County, Orange County Code, and the Foleys appealed that to the BZA, Board of Zoning Adjustments. So I suppose the way that works is if you feel that you've been aggrieved wrongfully and you've been notified of a zoning violation, you take it up to the next level in front of the Board. The Board -- the individual members of the Board, the first group of my clients, they are sued in their personal not official capacity, which is important to state these sorts of cases. And that was a public hearing, which the transcript has been filed and subject to view on several different occasions.

And at that the hearing, Mr. Foley argued that the Orange County ordinance, which renders the -- or I should say regulates the aviculture commerce was unconstitutional under the State Constitution. His argument was and has remained and still is that only the Florida Official Wildlife Comission can regulate the commercial breeding of toucans. Toucans are in a class of animal -- there's something less wild, if you will, than lions, tigers, and bears, but certainly more than, you know, your house cats and your pet dogs and they are regulated in separate classifications. So his theory again, has been from the start and continues to be that only the FWC can regulate that class of animal, and that's a State constitutional issue that Orange County does not have the jurisdiction to enact ordinances, which would regulate those sorts of animals.

The BZA voted to uphold the zoning manager's determination that they were in violation of the local ordinance. It was a unanimous vote and it is that vote, which forms the basis of their lawsuit against my clients, the fact that my clients have voted to uphold the zoning manager's determination.

From there, Mr. Foley and Mrs. Foley appealed

that BZA determination to the Board of County Commissioners. The Board of County Commissioners, of course, is a constitutional body that comprises of the Mayor, Teresa Jacobs, and a number of other local fairly significant political personalities. They also voted unanimously to uphold the BZA's determination that the Foley's were in violation of the local ordinance.

From there, the Foleys properly filed a petition for a writ certiorari here in the circuit court back I think in 2009, which is how you appeal a file agency local administrative determination. The order that was issued in that case -- or I should say it's an opinion, stated that, first of all, it denied the petition. It also stated that the proper means to challenge the constitutionality of a local ordinance must be through an original proceeding, which is exactly what the Foleys did on the last day of the statute of limitations from what they acknowledged their cause of action, if any, would have accrued, which is the date of the final administrative action. The mistake they made, though, is they filed that action in Federal Court. They alleged along with the declaratory judgment action, I think it was around two dozen

causes of action opposed to the federal cause of action for everything from due process, equal protection, freedom of speech, a host of federal sort of theories. Along with state claims of civil RICO, full state and federal statutes, those sorts of things. So a conglomeration of both federal and state causes of action, and they were alleged against my clients and my colleagues' clients both part in their official and personal capacity as well as the County.

There was two significant orders among several orders that came out of that case. I believe it was Judge Antoon the first of which said that the claims against the individuals were dismissed with prejudice because the individuals had various immunities. It wasn't a hugely detailed examination. His Honor found that it was legislative immunity. I think retrospectively, it was really quasi-judicial immunity, but that's sort of academic. In any event, though, all the individuals were dismissed with prejudice at that point, but the Court allowed the Foleys to then file an amended pleading against the County to discuss the constitutionality of the ordinance vis-à-vis the Florida State Constitution, not the

Federal Constitution. In the meantime, the Foleys, when they filed their amended complaint, they still restated all the claims against the individuals, the Federal Court dismissed those sua sponte and the case received a summary judgment just against the County. The Federal Court found in its final order -- well, final really dispositive order not its actual judgment -- said that the claims against Orange County, the federal claims were denied, found for summary judgment for the County and found that the ordinance did, in fact, violate the Florida State Constitution, found it unconstitutional and enjoined its enforcement as a matter of State Constitutional law.

Cross appeals in the Eleventh Circuit were taken. All of us here were there and spent our time at the podium. And the Eleventh Circuit ruled differently than what Judge Antoon had determined. It says that: First of all, the federal claims were not just denied on their merits, they were frivolous. And that's the significant distinction in the federal form because if you bring a case that has federal and state claims, if the federal claims are frivolous, then the Federal Court does not have any discretionary supplemental

jurisdiction to retain the State claims. It must dismiss them. And so the Eleventh Circuit went through and looked at all of the federal claims, due process claims, and there's two or three other ones, equal projection, those sort of things, and said these are all frivolous and; therefore, there was no jurisdiction for the State -- for the Federal judge to make a determination of Florida law, which, of course, the interplay between the FWC and Orange County is paradigmatically the state law question.

So as the Foleys then filed a petition for certiorari with the Supreme Court, which was denied. It wound its way back down to the District Court, which then dismissed the state claims without prejudice, but federal claims were very much dismissed with prejudice.

Then this lawsuit was filed. This lawsuit arises out of the exact same facts, background, everything else. It's the same basic theories with different sort of names attached to some of the claims. And we're now here finally on behalf of our individuals certainly to ask that the individuals in their individual capacity for a whole host of reasons are dismissed with prejudice.

I don't know if this is -- this is the amended complaint even here in State Court; therefore, the right to amend has been taken advantage of and the Court would be within its discretion to dismiss this case with prejudice. It's been going on for nearly a decade, I think it's certainly time for our folks.

Now, to begin at least as it pertains to my clients and their individual capacity, as I read the complaint it's Counts, 5, 6, and 7 that are stated against our folks. Those are abuse of process, conversion, state civil theft, and there's allusion to Section 1983, the Federal Civil Rights Statute in Count 7.

And before I get to those, though, I want to talk about really our defenses. We have a host of defenses here for our individuals. The first of which is statute of limitations. The statute of limitations they have pled around it as best they can to establish that they filed their lawsuit in Federal Court on the last day of the limitations period, and I just stated I agree with that. The difference, though, is that by filing in Federal Court when there was no basis for Federal jurisdiction, they do not get the tolling provision

of the -- I think it's Section 1367, that allows a -- basically extends the statute of limitations after a case gets kicked out of Federal Court. The classic example is if you file -- if I had to -- if I was defending, I would move the case to Federal Court and get it dismissed for lack -- solely lack of jurisdiction and goes back, the statute of limitations is tolled the entire time it's in Federal Court. There is an exception, though, which is when a plaintiff files a case in Federal Court, if there never was a basis for Federal jurisdiction in the first place, that tolling provision doesn't apply. The case I cited in my motion is called Ovadia versus Bloom, and the citation is obviously in the papers. But the --

THE COURT: Yes, sir.

MR. ANGELL: What happened there was it was a -- plaintiff filed in Federal Court alleging diversity jurisdiction. It turns out there was not complete diversity and, therefore, when it went back to State Court the limitations period had run. And the language I enjoyed in that case was that: An improvident foray into the Federal Court does not toll the -- the statute of limitations. So in other words, if the plaintiff decides to go to

Federal Court, and there never was federal jurisdiction in the first place, tolling does not -- and they're defending that, and they cited that tolling statute in their papers. That's what they're relying on to escape the statute of limitations. And in this case, the Federal courts have expressly held that the federal claims are frivolous not just lack of merit but beyond the pale of what could be passable as a federal claim. I think that that under Ovadia is -- we do not have a tolling situation here. The statute of limitations is blown by four or five years. And that would apply to all of our people. It may be a little -- with apologies to the County, it might be a little bit different with them because they could have some ongoing claim thing and that was discussed actually with the Eleventh Circuit. But as to the individuals their actions were the date they voted, the statute of limitations is clearly run as to all of our folks. Also, as to the individuals we have various meetings. I mentioned earlier that as people voting on an administrative local board they are entitled to -- well, they call it -- well, it's an absolute immunity, which a subset of which is qualified immunity. But in our

case we have an absolute immunity in the quasi-judicial setting. Quasi-judicial means that you have it of the executive board, under the executive branch of the government basically interpreting and applying a local rule, local ordinance. That's exactly what they were doing here. And in Florida, the extent of quasi-judicial immunity is coextensive with judicial immunity, which is to say that even if somebody sitting in that capacity exceeds their jurisdiction they are entitled to absolutely any personal suit. So that is, I think, wraps it up really in almost two sentences wide. And our people have no business in this case, never have. But that is one of the arguments we have for dismissal.

Third, we have res judicata as to the Federal claims. I noted that they have cited Section 1983, that's a Federal claim obviously. And the Federal courts had dismissed all Federal claims with prejudice. So I think that goes without saying that that one has already been resolved.

And then finally, the counts on the merits are -- respectfully, they are also frivolous. We have abuse of process. The theory of that is I think the classic example would be where an

officer, a police officer arrest his girlfriend for -- 'cause he's mad at her. That's obviously something beyond what the purpose of his office was ever intended to be. Here we have local elected officials who have basically done exactly what they're supposed to by voting in public hearings. That's not an abuse of process. I think that's just again, so beyond a reasonable cause of action that it amounts to frivolity.

A conversion, the theory of conversion is that by voting to uphold the taking, if you will, or of the destruction of the aviary or the taking of the birds is that by voting to uphold that determination that our people have converted the birds. Well, that's not what conversion is. Conversion is taking somebody else's stuff for your own good one way or another. These are people voting to uphold the law. That is not -- conversion again, is so far from what that term means but any interpretation does not belong in this case. Civil theft goes along with conversion that requires criminal intent to say that somebody voting a local board votes and has a criminal intent I think is, frankly, offensive to our people. And I already discussed 1983 being already

resolved.

So that is a lot of legal arguments there. I tried to keep it sort of as succinct as I could. It's a long history. But the short of it is, Your Honor, the people who sit on the local board and vote are not liable personally for those votes.

And at this point I'll pass it along to my colleague, Mr. Oxford.

THE COURT: Okay. Well, actually what I would like to do since I'm not sure we'll have time for everything, I want to make sure I'm hearing everything individually. And I apologize because that means that some of you will have to come back and the Foleys will have to come back. But I'm already getting an eye on what the time is, and I'm not allowed to incur overtime for my staff. So what I'd like to do is just to keep us on track with each issue. And if that's acceptable, then I would turn it over to the Foleys unless you have something as to that particular issue as far as the official is concerned.

MR. OXFORD: The only -- thank you for letting me interrupt, Your Honor.

THE COURT: Yes, sir.

MR. OXFORD: I apologize for that.

Respectfully, I have the County employees who enforce the zoning code. In many ways my County employees, officials, and their arguments dovetail with those of Mr. Angell, with the County officials. So I think, if Mr. Foley doesn't mind, I would just like to summarize quickly and a quick overview. Because I don't have really separate arguments from those already given to you.

THE COURT: Okay. Mr. and Mrs. Foley, is that acceptable to you to let him --

MR. FOLEY: Sure.

THE COURT: And then you can respond to both together?

MRS. FOLEY: Yes.

THE COURT: And you're tracking the time?

MRS. FOLEY: I am.

THE COURT: 'Cause I was wondering about that.

MRS. FOLEY: Yes, thank you.

THE COURT: Don't worry, I am going to make sure that we try to do it fairly. I actually have a chess clock if next time we run into problems.

MRS. FOLEY: Which is fine.

THE COURT: We seriously do that. But I think that we --

MRS. FOLEY: Okay.
THE COURT: I understand some of the arguments. I've done my preparation --
MRS. FOLEY: Okay.
THE COURT: -- so I think so far we're still good.
MRS. FOLEY: Okay.
THE COURT: So, Mr. Oxford it is, sir?
MR. OXFORD: Yes, ma'am.
THE COURT: You may proceed with your similar -- just stick with what these same issues are as it relates to your clients, and then we'll move from there.
MR. OXFORD: I promise to be brief. And with respect to the Foleys they've had us in court for a long time, all the way to the United States Supreme Court and back. But the Court has to recognize that this all started ten and a half years ago. This Court now has discretion to bring it to an end with regard to the individual employees. The Federal courts, every one of them, all the way to the top, have said that the Federal claims against the employees, both sets, are not only not properly based under the facts or the law but they're frivolous. And as Mr. Angell pointed out in his

argument and in his motions, as we tried to ourselves, the State law claims are clearly dismissible with prejudice because the immunity of the officials in doing either their quasi-judicial acts, or in my case, doing their discretionary acts, which sovereign immunity directly applies to enforcing a county code, a governmental code. That's not what every man in the street does. That's a discretionary governmental function. So the immunity implies the res judicata clearly applies to the Federal claims.

They've already been tried all the way to the conclusion and there is simply not the basic elements of conversion. There is no criminal theft here. There is no civil theft here. There is no abuse of process as we recognize in the law. So we're asking the Court to consider the history of this case to take judicial notice of decisions that have already been made between the same parties on the same claims and concluded.

And with respect to the work done by the pro se plaintiffs here, bring it to a conclusion at this level. The taxpayers have spent an enormous amount of money defending 12 -- ten or 12 officials all the way to this point today. They've been in

too many courts. They've won every time.

And with respect, Your Honor, you are the judge who has the discretion with regard to all the individual defendants to bring it to an end. We believe the legal arguments that have been presented to you in the context of the history and your judicial notice of it should not only result in dismissal with prejudice but a consideration of the fact that now many, if not all, of these claims are essentially frivolous.

Thank you, Judge.

THE COURT: Thank you. All right. So, Mr. and Mrs. Foley, if you'd like to speak to those two issues.

MR. FOLEY: Which two? The two groups of --

THE COURT: Yes, sir. You can start in order or however you wish.

MR. FOLEY: Okay. And you, Judge, have you read the papers filed?

THE COURT: I have reviewed everything. I have read and will continue to read. I will not be making any rulings today especially since I don't know that we're going to get through everything. So ultimately, what you'll receive from me is a written order. And I assure you that in every case

I make sure that I've thoroughly read everything that each side has to say so that I can give each side a fair right to be heard.

MR. FOLEY: Sure, sure.

THE COURT: So if you wish to go into history, you're welcome to. If you wish to simply address some of the things that have been raised you are welcome to. It's your time and you're welcome to use it as you see fit.

MR. FOLEY: Well, I -- I -- Judge Tjoflat he has this YouTube video where he's giving a commencement to Mizzou Law School and he says that this exchange it's best when it's a conversation between attorney and the judge. So I'm really open to that. I'd kind of like to know given that you've read the papers and you've heard the arguments, which are identical to what they've already submitted without any -- without any modification given our response where you're at on -- on these issues. For instance, limitations, their case is Ovadia v. Bloom. It deals exclusively with diversity jurisdiction. Our case is Krause v. Textron it's a Federal question of jurisdiction. Whether our federal question succeeded or not, whether it was called good but

failed or frivolous but failed is irrelevant. The Florida Supreme Court has already settled the issue and I don't know why they have to -- they haven't addressed that.

On the issue of res judicata, as we've said in our response, our issue is simply a due process claim and due process is treated by the Federal courts exactly like takings. And what I've brought in for you and for the Defendants is a case out of the Seventh Circuit that says exactly that and it's just verbatim what I've just told you. Can I hand it to you?

THE COURT: If you have a copy for the opposing, then I'll be happy to take them, okay.

MR. FOLEY: So I've highlighted the statement, you know, the Seventh Circuit, that's Judge Posner's circuit --

THE COURT: Thank you.

MR. FOLEY: -- and according to Justice Alito he knows everything. So the Eleventh Circuit hasn't put it so plainly but all of their decisions imply the same conclusion that due process is the State's responsibility until the State has finally litigated it. There's no due process claim in Federal Court. So this is a claim that's presented

here in the alternative should you find that there is no remedy in Florida. And we think you'll find a remedy. So, if anything, it's just not right. If there's any problem with our due process claim it's because it's not right. It's because you haven't yet found that there's no other remedy because that's what due process is, it's remedy. It's an incredible word, remedy. So that's limitations, res judicata.

Their big issue is immunity and that's a big issue. I mean, they do deserve immunity if -- if they deserve -- it is their burden to establish this and then we simply send a response, and we don't believe they have because there are exceptions to what's called absolute immunity. The exceptions that we pled are three: Execution of a custom is not immunized and that's in a case that they cite. They cite Corn v. Lauderdale Lakes. And Corn v. Lauderdale Lakes went on for 20 years. There are three different Eleventh Circuit opinions in Corn v. Lauderdale Lakes. This is the '93 opinion. Do you want the citation, Your Honor?

THE COURT: Sure. If you know it, we can put that on the record as well.

MR. FOLEY: Corn v. Lauderdale Lakes, 997

F.2d 1369 at Page 1392 -- on legislative immunity for execution of policy, that's a paraphrase. I believe it's not legislative or quasi-legislative immunity for the execution of a policy. Here the BCC order is certainly a policy and leading up to that decision was a custom. This is really where I'd like to back right up to what they don't talk about and that is that we've alleged expressly over and over that there was no ordinance that prohibited us from doing what we were doing. It was, in fact, a custom. And that's a big difference because due process is all in that. We're on notice of an ordinance. It's published. We're not on notice, we're custom. So we -- we have to go through some procedure that revives the protection that we've lost by -- by the fact that there was not an ordinance to give us notice for. And that didn't happen here. And that really is the big thing.

So I know this is kind of corny but, you know, there's a couple of things I want you to remember. I'm going to stick this sticker on my chest. It's, you know, the number 11. This represents Chapter 11 of the Orange County letter. This is the number 30. I'm sticking this sticker

on my left shoulder. Chapter 11, Chapter 30. What happened here is, as we said, there was no ordinance that said you can't do aviculture at your home. They haven't addressed that. I put it in the response in today. You haven't heard them say that -- what ordinance they were enforcing. It was a custom. We had to ask them to explain it to us. But -- but I do want to get on the record too that although the entire episode began with a complaint that we were raising birds to sell, somebody told Orange County that we were raising birds to sell, and that's what initiated the investigation. So that's what they came out to enforce.

The Chapter 11 is the Code Enforcement Board ordinance. Chapter 30 is the Planning and Zoning Board ordinance. Chapter 11 is for prosecuting known violations of the code. Like a known violation that was reported in our case.

Chapter 30 is for the prospective enforcement of the Orange County Code. It's the permitting chapter. Whoops, I almost lost it. It's the permitting chapter. And as we've tried to put in our paragraph 40 of our complaint that they knew what they wanted to enforce and they didn't enforce it through Chapter 11. They had two violations.

One was the aviculture violation. One was the permitting violation. And they decided to do something that they do as an added practice when they have a dual violation. They prosecuted the permitting violation, that resulted in an order from Code Enforcement that said, You have a permit? Destroy your structure or pay a fine. So there we're facing a little coercion. We need to do something. We go to get the permit, and remember aviary is not used during this proceeding. Aviculture is not used, because these words are not used in the proceeding. There's no discussion violating any provision in the code that prohibits aviculture.

Two, they get the permit. And they say, Well, Mr. Foley, we heard, we have evidence here that you're -- you have another violation. You're raising birds to sell so we're not going to give you that permit and that resulted in destruction of the aviary. And now we're stuck in Chapter 30, right? Well, what's -- what's the problem? What's really the big problem here? They don't get the same state core per diem, that's the problem. If the Defendants had done exactly what they did in our case, that they were enforcing an ordinance, we

wouldn't be here. Because we could have had our due process at the front end. We would have been on notice that we had something to challenge, but we didn't have that. And once we got into this permitting process, there wasn't any way to arrest this. There wasn't any way to come here and seek an extraordinary writ. So that gives you kind of a story of the case.

But on the issue of immunity, why is that -- why is that a problem for them? As you said, there are three exceptions that we pled in our -- in our complaint: Execution of a custom, Corn v. Lauderdale Lakes, lack of jurisdiction, and that is, of course, the famous case of Fisher -- Bradley v. Fisher, U.S. Supreme Court case. And ultimately, lack of adequate review. We cited J. Randolph Block on the history of judicial immunity, which is what they're asking for here. And it says that -- we tried to make a joke, you know, at that point on paper. But the joke was that a thousand years ago there was no judicial immunity and if you didn't like what the judge had to say you could challenge them to a combat. Well, you know, that's doesn't work very well.

THE COURT: I don't vote for that one.

MR. FOLEY: I wouldn't either because you could also choose your own champion and I imagine you would pick, you know, the deputy. So judicial immunity he says and -- and due process protections for the litigant develop hand in hand. The appellate process or the writ of error he says -- in fact, I know I have the quote. The writ of error was the seed of -- he said, "In the development of the writ of error lay the seeds of the doctrine of judicial immunity. Randolph Block, Stump v. Sparkman and the History of Judicial Immunity. And there are cases one which they cite: Andrews v. Florida Parole Commission, which kind of reaffirms that -- the quote is: "Existence of adequate remedies for inmates including appeal and habeas corpus precludes a necessity where the advisability of doing away with the immunities that protect such officials or as within the scope of their official duties." I have three other Supreme Court cases, which again, reassert the proposition that we're suggesting to you today. And that is that the availability of a remedy to correct these errors is an element of determining how much immunity they should be given. In fact, Cleavinger v. Saxner, a U.S. Supreme Court case, which is

really referencing Butz v. Economou. It says, absolute immunity when you're talking about quasi-judicial action under executive agency, it's not absolute. It's not guaranteed. There are things that you really need to consider. Out of six, the last is: The correctability of error on appeal. And that's -- and there are five others. I'm not going to go through them right at this moment. I just want to make sure that I'm covering how we see this issue of immunity. I've certainly done it in the written response and the duty to -- one thing that we want -- one argument that we want to make is that there is a ministerial duty to provide due process. This is -- we do not have a case on this. What we have instead is just argument.

First, there are authorities in Florida that say where there are doubts as to the existence of authority, it should not be assumed. Now, Article 4, Section 9 of Florida's Constitution basically means that no one -- that no regulations touching upon wild animal life enjoys a presumption of correctness. Even -- even a judge has to ask themselves, does this interfere with FWC authorities. So it creates a question. The fact

that they were enforcing the custom and not the ordinance creates a question, creates a doubt. So this coming from Santa Rosa County versus Gulf Power Company says: "Where there are doubts as to the existence of the authority, it should not be assumed." So they can't tell us that just because we told them and had FWC contact them and tell them that they didn't have authority to do this that they need to listen. They told us -- you know, they told you that they didn't need to listen to us tell them. You know, that's fine, but here we are. And part of our argument to urge that due process is a ministerial duty. It comes to us really out of Rupp v. Bryant. It didn't have anything to do with due process but what it said was that school administrators have a ministerial duty to provide supervision for students. Now, of course, that's about their physical safety. We're talking about our legal safety. So we're saying that this guarantee of due process, which is in our State and our Federal Constitution is a ministerial duty because it's about our safety. It's about the safety of those -- those legal rights, so they have to provide that. And, you know, my 11, 30 thing is all about that. That if they prosecuted the custom

through Chapter 11, we wouldn't be here. Had they prosecuted an ordinance in the way that they did and it went through Chapter 30, we wouldn't be here. What happened was they prosecuted a custom not through Chapter 11 an available, and we believe a mandatory remedy -- we say mandatory -- I'm -- I'm -- I'm getting in my own way here. But I'm just going to go right ahead and do it. We want to emphasize that Chapter 11 was the way they should have gone particularly under this situation because it has an imperative language in it. I can't tell you that there's a case that says we have any right to the remedy or that Chapter 11 gives us any individual right in the remedy. But what it says is that when a covenants factor finds a violation he shall -- he uses the word "shall," and I understand judges can -- can fiddle with that and say that "shall" may mean maybe. But Orange County Code at Section 1-2 says, shall is imperative. That's what it says.

So we're -- we're saying that the four pillars really of our case and the four -- four spears that pierce their immunity here are Article 4, Section 9 of the Florida Constitution, which removes the presumption of correctability from any

-- any regulation that touches upon that authority. The absence -- the fact that they were enforcing a custom removed any pre-enforcement remedy. And the fact that they decided to use Chapter 30 and Chapter 11 interchangeably knowing that the appellate review of those two type orders is completely different. And with the -- any right -- any -- any way of a recoverable fee, injury that we -- that we were suffering.

THE COURT: If you need a minute to consult to make sure you covered everything that's part of this hearing, I'm happy to give you just a second if you wish.

MRS. FOLEY: Okay.

THE COURT: And then we can look at each other's notes and otherwise if you wish to reply, I'll give you time to do that, or we can see if we can move on to --

MR. FOLEY: We haven't discussed the cause of -- you know, they've said that we have not stated a cause of action.

MRS. FOLEY: (Conferring with Mr. Foley.)

MR. FOLEY: And is that what you're asking, do we want --

THE COURT: I want to make sure that you've

covered -- I've broken this down, so --

MR. FOLEY: We've only referenced the first three points.

THE COURT: Yeah, so I think the first three points really had to do with the motion to strike the amended complaint, the request for judicial notice of the Federal actions and then the motion to dismiss with prejudice that were your motions and then tagged on with Defendants, Smith, et cetera, as Mr. Oxford had indicated. So as to those portions of the noticed hearing, have you completed your, sort of, rebuttal, I guess, to what their oral statements were; and is it time to go back to them for their brief reply, or is there something that you want to make sure that you have covered or just this?

MR. FOLEY: Sure, there is. They say that we do not state a cause of action and abuse of process, that the BZA was just voting. But that's not an abuse of process. What we -- again, you know, we have our 11, we have our 30. You know, they use Chapter 11 to do what they should have done for Chapter 30, that's our abuse of process argument.

THE COURT: Okay. Well, I think I've heard

that one.

MR. FOLEY: And conversion, you know, they say that it has to be actual disposition, we say it has to be just -- what do you call it? Constructive disposition, and that's exactly what the order did. It stopped us from doing business. So that stays conversion. Conversion basically states civil theft.

And then in addition, as we've said in our written response there are various other ways in which we have alleged in our complaints. And that is again, what we're here for, whether or not the complaint survives so we can move on.

THE COURT: Yes, sir, okay. Do you wish to use any time in reply, or do you wish for me to move forward to the other folks that are here?

MR. ANGELL: Since we have a court reporter here very briefly if you don't mind, Your Honor.

THE COURT: Yes, sir.

MR. ANGELL: This is my only motion today is this: The Textron case that talks about the Federal question of jurisdiction where the Federal question was not frivolous it was resolved on the merits and then the Court declined to retain supplemental jurisdiction over the State claims.

It does not speak to a case where the Federal claims have no business in Federal Court in the first place, that's critically distinguishable there.

The takings issue that we have here from the Seventh Circuit, the takings issue itself is a Federal question. The Federal Court offered in effect, basically invited a takings claim in the first order -- by the way, I misspoke. It was not Judge Antoon, it was Judge Dalton in the middle district here. And his first order said this might be a takings claim that we have. And then the second order said I told you it might have been a takings claim. You guys decided not to bring one, therefore, it is res judicata because as the Court knows, res judicata applies to all claims that were or could have been brought in a prior action. That was a Federal cause of action and all Federal claims were dismissed with prejudice. So that's a not a basis to survive dismissal.

As far as this custom versus ordinance argument it's a little perplexing to me. This case has very much been focused on the interpretation of the local ordinances and vis-à-vis the State Constitution of Judge Dalton's first detailed -- or

I guess the second detailed order. It explains and walks through in great detail how all the ordinances work with each other and how they apply here and how His Honor found that they were unconstitutional. But, of course, that ruling has not ever been properly found by a State Court. It remains, and still is today, Mr. Foley's opinion that the ordinance violates the State Constitution, that has never been found. So we talk about the move to the immunities. To think that a judge, which is really the same in Florida as a quasi-judicial officer, enforces a statute, which later is deemed unconstitutional and is subject to personal liability for a business being shut down or other civil inconvenience is really offensive to our whole system of civil justice and even criminal justice for that matter and the whole judicial branch I would submit.

Finally, as far as abuse of process, I think where Mr. Foley misconstrues that term is that his definition of abuse of process is what his view is of misapplication of the law, misconstruction of the law. Abuse of process is again, using something for which the law was never intended to be used for in the first place, which is, like I

said, an officer arresting a girlfriend because he caught her cheating or some crazy situation like that.

I think with that, I will pass it over to my colleagues. And thank you very much for your time, Your Honor.

THE COURT: Okay. Thank you.

MR. OXFORD: And, Your Honor, in reply and in respect to the Foleys, I'll just try to give a minute's worth of overview.

In essence, the same arguments have been given to my clients as the zoning enforcement officials, employees to Mr. Angell's clients as essentially the zoning appeal body to the Ninth Circuit Court on petition for cert, then to the U.S. District Court in a Federal lawsuit that combined Federal and State law claims that went up to the Eleventh Circuit, that went up to the United States Supreme Court. Your Honor, these same arguments have been made at everybody for ten years. They had no merit then, they were found to have no merit in detail, and they have no merit now. Growing and wildlife, and they call it wildlife. They talk about the Fish and Wildlife Commission throughout, growing wildlife for profit

in a residential area is time-honored zoning. And they lost at every level. What is that six levels that I've named. This should stop it, Your Honor. Res judicata applies, statute of limitations apply. They admit in their complaint that my clients, Mr. Angell's clients, were all acting within their official capacities. Sovereign immunity applies. Absolute judicial immunity applies. It has to stop somewhere and we respectfully submit that today should be the day.

THE COURT: Mr. Turner, we haven't given you a whole lot of time left. If your arguments are more, you need for or you wish to have more time, I can reset you. If you wish to utilize the little bit of -- we've got about 15 minutes left if you think you can summarize your oral portion in half that time, and I get half that time to the Foleys, I can do that.

MR. TURNER: I'm going to need more time. In fact, I agreed to tack my motion onto this hearing if we could get it set.

THE COURT: Okay. Well, I think that answers that question. So what I'd like to do is to schedule a second hour so that you have the floor at that point, and then we can take those arguments

next. I'll keep my decision under advisement at this point until I -- I want to hear everything before I perform my written work. And so we'll get that scheduled as soon as possible with my calendar.

MR. TURNER: Thank you, Your Honor.

THE COURT: Okay.

MR. FOLEY: Can I clarify then? Mr. Turner will have an opportunity before you -- before you reach a conclusion on the --

THE COURT: Yes. So I'll see you all. We'll set a second hour for it, and I think we should be able to wrap it up at that time.

MR. ANGELL: Thank you, Your Honor.

MR. OXFORD: Thank you very much.

MRS. FOLEY: Thank you.

THE COURT: You're very welcome. Enjoy your evening, and I hope that you stay safe in the storm.

(The proceedings concluded at 4:47 p.m.)

CERTIFICATE OF REPORTER

STATE OF FLORIDA:
COUNTY OF ORANGE:

I, Danette V. Lamb, Stenographic Shorthand Reporter, certify that I was authorized to and did stenographically report the foregoing proceedings and that the foregoing pages are a true and complete record of my stenographic notes.

I further certify that I am not a relative or employee of any of the parties, nor am I a relative or counsel connected with the parties' attorneys or counsel connected with the action, nor am I financially interested in the outcome of the action.

DATED this 7th day of November, 2017.

Danette V. Lamb

Danette V. Lamb,
Stenographic Court Reporter

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

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

Defendants
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.

2016-CA-007634-O

APPENDIX B

ORDER OF OCTOBER 25, 2017

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

DAVID W. FOLEY and JENNIFER T. FOLEY,

CASE NO.: 2016-CA-007634-O

Plaintiffs,

v.

ORANGE COUNTY, PHIL SMITH, CAROL HOSSFIELD, MITCH GORDON, ROCCO RELVINI, TARA GOULD, TIM BOLDIG, FRANK DETOMA, ASIMA AZAM, RODERICK LOVE, SCOTT RICHMAN, JOE ROBERTS, MARCUS ROBINSON, RICHARD CROTTY, TERESA JACOBS, FRED BRUMMER, MILDRED FERNANDEZ, LINDA STEWART, BILL SEGAL, and TIFFANY RUSSELL,

Defendants.
_____/

ORDER GRANTING "THE OFFICIAL DEFENDANTS' MOTION TO STRIKE THE AMENDED COMPLAINT, RENEWED REQUEST FOR JUDICIAL NOTICE, AND MOTION TO DISMISS THIS ACTION WITH PREJUDICE"
and
ORDER GRANTING "DEFENDANTS PHIL SMITH, ROCCO RELVINI, TARA GOULD, TIM BOLDIG, AND MITCH GORDON'S MOTION TO DISMISS/MOTION TO STRIKE"

THIS MATTER came before the Court for a hearing on September 6, 2017 upon the "The Official Defendants' Motion to Strike the Amended Complaint, Renewed Request for Judicial Notice, and Motion to Dismiss This Action with Prejudice," filed on March 3, 2017, and the "Defendants Phil Smith, Rocco Relvini, Tara Gould, Tim Boldig, and Mitch Gordon's Motion to Dismiss/Motion to Strike," filed on March 7, 2017. The Court, having considered the

Motions, case law, and arguments of counsel from both parties, and otherwise being duly advised in the premises, finds as follows:

RELEVANT FACTS AND PROCEDURAL HISTORY

A detailed history of the instant matter merits discussion, as it factors into the Court's ultimate findings. The Plaintiffs are commercial toucan farmers. A citizen complained of the Plaintiffs' toucans, and Orange County Code Enforcement began an investigation. A zoning manager determined that the Plaintiffs were in violation of the Code. The issue then went to a public hearing, held by the Board of Zoning Adjustment ("BZA"), which continued to find that the Plaintiffs were in violation of the Code. The Plaintiffs appealed to the Board of County Commissioners ("BCC"), who affirmed the BZA's determination. The Plaintiffs then petitioned for a writ of certiorari to the Orange County Ninth Judicial Circuit Court, which ultimately found that the zoning manager, BZA, and BCC properly interpreted the relevant Code, thus denying their petition.

The Plaintiffs filed an action in the Middle District of Florida against the County, the Officials,[1] the BZA members, and other county employees. The District Court ultimately determined that the relevant Code provisions were unconstitutional under the Florida Constitution, but nevertheless, the Plaintiffs' claims for due process violations, equal protection violations, compelled speech, restraints on commercial speech, and unreasonable searches or seizures failed.[2] *See Foley v. Orange County*, 2013 WL 4110414 (M.D. Fla. August 13, 2013).

The Plaintiffs appealed to the Eleventh Circuit, which ultimately vacated the Middle District's judgment and remanded the case for the court to dismiss without prejudice for lack of

[1] "The Officials" refers to the members of the BZA and the BCC, who were named both in their individual and official capacities. They include the following Defendants: Asima Azam, Fred Brummer, Richard Crotty, Frank Detoma, Mildred Fernandez, Teresa Jacobs, Roderick Love, Scott Richman, Joe Roberts, Marcus Robinson, Tiffany Russell, Bill Segal, and Linda Stewart.

[2] That action contained many of the same arguments that are raised in the instant action.

subject matter jurisdiction. *See Foley v. Orange County*, 638 Fed. Appx. 941, 946 (11th Cir. 2016). In so doing, the court concluded that the Plaintiffs' claims either had no plausible foundation, or were proscribed by previous Supreme Court decisions. *Id.* at 945-46.

The Plaintiffs then petitioned the Supreme Court for a writ of certiorari, but it was summarily denied. *See Foley v. Orange County, Fla.*, 137 S. Ct. 378 (2016).

On August 25, 2016, the Plaintiffs filed their initial Complaint in this Court. They amended their Complaint on February 25, 2017 to include the following counts: declaratory and injunctive relief proscribing the enforcement of the relevant Code sections (Counts I and II); negligence, unjust enrichment, and conversion (Count III); taking (Count IV); abuse of process to invade privacy and rightful activity, and conversion (Count V); civil theft (Count VI); and due process (Count VII). All of these counts purport to stem from the administrative proceeding that was held on February 23, 2007 and became final after appeal on February 19, 2008.

On September 6, 2017, the Court held a hearing on "The Official Defendants' Motion to Strike the Amended Complaint, Renewed Request for Judicial Notice, and Motion to Dismiss This Action with Prejudice," filed on March 3, 2017, and the "Defendants Phil Smith, Rocco Relvini, Tara Gould, Tim Boldig, and Mitch Gordon's Motion to Dismiss/Motion to Strike," filed on March 7, 2017. This Order follows.

ANALYSIS AND RULING

"A motion to dismiss tests whether the plaintiff has stated a cause of action." *Bell v. Indian River Memorial Hosp.*, 778 So. 2d 1030, 1032 (Fla. 4th DCA 2001). Furthermore, "[w]hen determining the merits of a motion to dismiss, the trial court's consideration is limited to the four corners of the complaint, the allegations of which must be accepted as true and considered in the light most favorable to the nonmoving party." *Id.*; *see, e.g., Solorzano v. First*

Union Mortg. Corp., 896 So. 2d 847, 849 (Fla. 4th DCA 2005); *Taylor v. City of Riviera Beach*, 801 So. 2d 259, 262 (Fla. 4th DCA 2001); *Samuels v. King Motor Co. of Fort Lauderdale*, 782 So. 2d 489, 495 (Fla. 4th DCA 2001); *Bolz v. State Farm Mut. Ins. Co.*, 679 So. 2d 836, 837 (Fla. 2d DCA 1996) (indicating that a motion to dismiss is designed to test the legal sufficiency of a complaint, not to determine issues of fact).

"A motion to dismiss a complaint based on the expiration of the statute of limitations should be granted only in extraordinary circumstances where the facts constituting the defense affirmatively appear on the face of the complaint and establish conclusively that the statute of limitations bars the action as a matter of law." *Alexander v. Suncoast Builders, Inc.*, 837 So. 2d 1056, 1057 (Fla. 3d DCA 2002); *see also Pines Properties, Inc. v. Tralins*, 12 So. 3d 888, 889 (Fla. 3d DCA 2009).

In the instant matter, the Plaintiffs cause of action accrued when the BZA's determination became final on February 19, 2008, nine years prior to this action's filing. The Plaintiffs' Complaint must be dismissed, as it can be determined from the face of the amended Complaint that all of the causes of action fall outside of their respective limitations period.[3] *See* § 95.11(3)(p), Fla. Stat. (2016) (stating that any action not specifically provided for in the statute is subject to a four-year limitations period, which encompasses declaratory actions and alleged due process violations (Counts I, II, and VII)); § 95.11(3)(a), Fla. Stat. (2016) (indicating that a negligence action has a four-year limitations period (Count III)); § 95.11(3)(h), Fla. Stat. (2016) (specifying that there is a four-year limitations period to bring a claim for a taking (Count IV)); §

[3] The Plaintiffs attempt to circumvent the limitations period by arguing that 28 U.S.C. § 1367(d) "tolls the limitations period for thirty days after dismissal of any supplemental claims related to those asserted to be within the original jurisdiction of the federal court." However, as the Defendants point out in their Motions, section 1367(d) only applies where a federal court enjoyed original jurisdiction over the case, and if the initial assertion of federal jurisdiction is found to be insufficient, then the section does not apply and the party does not get the benefit of the tolling. *See Ovadia v. Bloom*, 756 So. 2d 137, 140 (Fla. 3d DCA 2000). Because the Eleventh Circuit determined that the Plaintiffs' claims had no plausible foundation, section 1367(d) is inapplicable to the instant matter.

95.11(3)(o), Fla. Stat. (2016) (stating that intentional torts, which include abuse of process and conversion, are subject to a four-year limitations period (Count V)); § 772.17, Fla. Stat. (2016) (stating that civil theft has a five-year limitations period (Count VI)).

Accordingly, the following is hereby **ORDERED AND ADJUDGED:**

1. "The Official Defendants' Motion to Strike the Amended Complaint, Renewed Request for Judicial Notice, and Motion to Dismiss This Action with Prejudice" is **GRANTED.**
2. The "Defendants Phil Smith, Rocco Relvini, Tara Gould, Tim Boldig, and Mitch Gordon's Motion to Dismiss/Motion to Strike" is **GRANTED.**
3. The Plaintiffs' Amended Complaint, filed February 25, 2017, is **DISMISSED with prejudice as to the following Defendants: Frank Detoma, Asima Azam, Roderick Love, Scott Richman, Joe Roberts, Marcus Robinson, Richard Crotty, Teresa Jacobs, Fred Brummer, Mildred Fernandez, Linda Stewart, Bill Segal, and Tiffany Russell.**

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on this 24 day of October, 2017.

HEATHER L. HIGBEE
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on Oct 25, 2017, a true and accurate copy of the foregoing was e-filed using the Court's ECF filing system, which will send notice to all counsel of record.

Judicial Assistant

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

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

Defendants
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.

2016-CA-007634-O

APPENDIX C

MEMORANDUM OF LAW REGARDING THE APPLICATION OF 28 USC §1367 TO *FOLEY ET UX V. ORANGE CTY. ET AL*

SUMMARY

October 25, 2017, the Ninth Circuit Court, relying on Ovadia v. Bloom, 756 So.2d 137 (3rd DCA 2000), granted the *employees*'[1] motion to dismiss, and

[1] The *employees* include: Tim Boldig, Mitch Gordon, Tara Gould, Carol Hossfield, Rocco Relvini, and Phil Smith.

dismissed the Foleys' complaint with prejudice as to the *officials*,[2] on grounds that 28 USC §1367, does not toll the statute of limitations "if the initial assertion of federal jurisdiction is found to be insufficient." The Court's unprecedented decision to apply *Ovadia* – a case involving diversity jurisdiction – to a case involving federal question jurisdiction conflicts irreconcilably with the bright line drawn by *Krause v. Textron Financial Corp*., 59 So.3d 1085 (Fla. 2011).

This memorandum provides a close reading of *Krause* (a case, like *Foley* involving federal question jurisdiction) and *Ovadia* (a case involving diversity jurisdiction), and explores the legal principles behind these two very different decisions. As will be shown below, it is the difference between "federal question" jurisdiction and "diversity" jurisdiction that explains the decision in *Krause* to apply the tolling provision in 28 USC §1367, and the decision in *Ovadia* not to do so. And it is this difference that makes *Krause* applicable to *Foley et ux* and requires this Court to rehear, reconsider, and reverse its decision.

This memorandum begins with the text of 28 USC §1367, reviews the Eleventh Circuit's decision in *Foley et ux v. Orange County et al*, and compares the application of 28 USC §1367 in *Krause v. Textron*, *Scarfo v. Ginsberg*, *Ovadia v. Bloom*, federal courts in Florida and in other jurisdictions.

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[2] The *officials* include: Asima Azam, Fred Brummer, Richard Crotty, Frank Detoma, Mildred Femandez, Teresa Jacobs, Roderick Love, Scott Richman, Joe Roberts, Marcus Robinson, Tiffany Russell, Bill Segal, and Linda Stewart.

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MEMORANDUM OF LAW REGARDING THE APPLICATION OF 28 USC §1367 TO *FOLEY ET UX V. ORANGE CTY. ET AL*

I. 28 USC §1367 – The plain text does not bar application to the Foleys' claims.

The first step in determining the proper application of 28 USC §1367, is to review its plain text.

The federal supplemental jurisdiction statute, 28 USC §1367, provides that a federal district court may exercise supplemental jurisdiction over certain claims, and it governs when the court may do so. The statute provides in pertinent part:

> **§ 1367. Supplemental Jurisdiction**
>
> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.
>
> (b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.
>
> (c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(Added Pub. L. 101–650, title III, § 310(a), Dec. 1, 1990, 104 Stat. 5113.)

II. The Eleventh Circuit dismissed without prejudice for lack of federal question jurisdiction per *Bell v. Hood*.

The second step in determining the proper application of 28 USC §1367 to the federal decision preceding the instant case is to review that federal decision.

The opinion of the Eleventh Circuit opens by saying, "Because we find that these federal [constitutional] claims on which the District Court's federal-question jurisdiction was based are frivolous under *Bell v. Hood*, 327 US 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946), we vacate the District Court's orders."

After a brief review of the case's procedural history the Eleventh Circuit pinpoints the words in Bell – *insubstantial and frivolous* – that anchor its analysis:

> Where a District Court's jurisdiction is based on a federal question, "a suit may sometimes be dismissed . . . where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction *or where such a claim is wholly insubstantial and frivolous*." Bell, 327 U.S. at 682-83, 66 S. Ct. at 776 (*emphasis added*).

The body of the opinion reviews each of the constitutional claims the Foleys raised in the district court[3] – substantive due process, class-of-one equal-protection, compelled speech, commercial speech, search and seizure – and concludes its review of each claim by stating, "Thus, this claim lacks merit."

By citation to Bell, 327 U.S. at 682-83, the Eleventh Circuit concluded that the District Court lacked federal-question jurisdiction and consequently "did not have jurisdiction to determine the state-law claims presented by the Foleys."[4]

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[3] The Eleventh Circuit opinion fails to dispose of the federal RICO claim the Foleys raised in the district court – an independent source of federal jurisdiction – and consequently does not thoroughly dispose of the jurisdiction exercised by the district court.

[4] This conclusion is consistent with 28 USC §1367(c)(3), and with Mine Workers v. Gibbs, 383 US 715, 726 (1966), which held: "Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law.[15] Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well."

> Note 15 of Gibbs states: "Some have seen this consideration as the principal argument against exercise of pendent jurisdiction. Thus, before

Finally, the Eleventh Circuit vacated the judgment of the District Court and remanded "with instructions that the court dismiss this case without prejudice for lack of subject matter jurisdiction."

III. Per *Bell*, and its antecedents, a dismissal of a federal question as *insubstantial* or *frivolous* is not a denial of original jurisdiction.

The third step in determining the proper application of 28 USC §1367 to the instant case is to review the authority cited by the Eleventh Circuit – Bell v. Hood.

The passage from Bell the Eleventh Circuit chose to quote – "a suit may sometimes be dismissed . . . *where such a claim is wholly insubstantial and frivolous*" – is followed in Bell by this statement and citation:

> The accuracy of calling these dismissals jurisdictional has been questioned. The Fair v. Kohler Die Co., [228 U.S. 22, 25 (1913)]. But cf. Swafford v. Templeton, [185 US 487 (19020].

The question then is whether it is accurate to call a dismissal of a *frivolous* federal claim a dismissal for lack of jurisdiction, or a dismissal on the merits. The

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> Erie, it was remarked that 'the limitations [on pendent jurisdiction] are in the wise discretion of the courts to be fixed in individual cases by the exercise of that statesmanship which is required of any arbiter of the relations of states to nation in a federal system.' Shulman & Jaegerman, supra, note 9, at 408. In his oft-cited concurrence in Strachman v. Palmer, 177 F. 2d 427, 431 (C. A. 1st Cir. 1949), Judge Magruder counseled that "[f]ederal courts should not be overeager to hold on to the determination of issues that might be more appropriately left to settlement in state court litigation," at 433. See also Wechsler, supra, note 9, at 232-233; Note, 74 Harv. L. Rev. 1660, 1661 (1961); Note, supra, note 11, at 1043-1044."

court in *The Fair v. Kohler Die at 25,* held that it was jurisdictional only *in form*, but was in fact on the merits:

> [I]f the claim of [federal] right were frivolous, the case might be dismissed… [but] jurisdiction would not be denied*, except possibly in form*. *Deming v. Carlisle Packing Co.*, 226 U.S. 102, 109 [(1912)]. [*Emphasis* added.]

The federal courts' rationale for conflating a dismissal of a *frivolous* federal question with a dismissal on the merits *in the form* of a dismissal for lack of subject matter jurisdiction is explained *Deming v. Carlisle Packing Co.*, 226 U.S. 102, 109 (1912), as follows:

> [A]lthough a Federal question was raised below in a formal manner, that question, when examined with reference to the averments of fact upon which it was made to depend, is one which has been so explicitly decided by this court as to foreclose further argument on the subject and hence to cause the Federal question relied upon to be devoid of any substantial foundation or merit. . . . It is likewise also apparent from the analysis previously made that even if the formal raising of a Federal question was alone considered on the motion to dismiss, and therefore the unsubstantial nature of the Federal question for the purposes of the motion to dismiss were to be put out of view, the judgment [would be the same]. This follows, since it is plain that as the substantiality of the claim of Federal right is the matter upon which the merits depend, and that claim being without any substantial foundation, the motion … would have to be granted …

In sum, *merit* and *jurisdiction* in this case are coterminous. Here, on defendants' motions for summary judgment the federal courts in *Foley et ux v. Orange County et al* exercised original federal question jurisdiction to determine that as a matter of law and fact the federal [constitutional] questions did not *merit* further exercise of

jurisdiction. No Florida or federal court has held that the tolling provisions of 28 USC §1367 do not apply to a case in that posture.

IV. *Krause v. Textron* clearly held that §1367 applies "to claims commenced in federal court but later dismissed for lack of federal subject matter jurisdiction."

The fourth step in determining the proper application of 28 USC §1367 is to review the Florida precedent applicable to a case dismissed like the Foleys' for lack of federal question jurisdiction – *Krause v. Textron*.

Florida's Supreme Court granted review of the Second District's decision in *Krause v. Textron Financial Corp.*, 10 So.3d 208 (Fla. 2d DCA 2009), on the ground that it expressly and directly conflicted with the Fourth District's decision in *Scarfo v. Ginsberg*, 817 So.2d 919 (Fla. 4th DCA 2002).

The question addressed by the Supreme Court in *Krause v. Textron Financial Corp.*, 59 So.3d 1085 (Fla. 2011), was whether 28 USC §1367(d), tolls a state statute of limitations after a state law claim is dismissed without prejudice by a federal appellate court determination that the lower (bankruptcy) court lacked subject matter jurisdiction – precisely the posture of the Foleys' case. The court decided limitations are tolled where dismissal is for lack of subject matter jurisdiction.

A. Facts and Procedural Background

June 15, 2000, David Bautsch and Andrew J. Krause filed a complaint in an adversary proceeding in a bankruptcy case between Twin Eagles Golf and Country Club and its primary financier Textron Financial Corporation. Bautsch and Krause sought to recover monies owed them by Twin Eagles for the resale of their golf membership.

Bautsch and Krause's complaint asked the court to impose a constructive trust against any proceeds realized from Twin Eagle's resale of their golf membership. On Textron's motion for summary judgment the bankruptcy court declined to do so.

Bautsch and Krause appealed the summary judgment to the United States District Court for the Middle District of Florida, in its appellate capacity pursuant 28 USC §158(a)(1).

On appeal Textron argued that the District Court "lacked appellate jurisdiction because the Bankruptcy Court lacked subject matter jurisdiction." *David Bautsch and Andrew J. Krause v.Textron Financial Corporation*, No. 2: 05-cv-317-FtM-29DNF (M.D. Fla. Jan. 12, 2006). The District Court, however, found that Bautsch and Krause had "alleged that the proceeding was 'a core proceeding pursuant 28 USC §1334,'" and held that "[t]his was sufficient to allege jurisdiction in the Bankruptcy Court." *Id*. The District Court further found that the bankruptcy court

ultimately established that the proceeding was not a "core proceeding" as required by 28 USC 157, and only then did the bankruptcy court lose subject matter jurisdiction. *Id*.

The District Court then directed the bankruptcy court to vacate its summary judgment entered in favor of Textron and dismiss without prejudice the adversary proceeding as to Textron.

Less than a month later, Bautsch and Krause filed suit against Textron in the Circuit Court for the Twentieth Judicial Circuit in and for Collier County. Bautsch and Krause again sought imposition of a constructive trust on any funds Textron received from Twin Eagles.

The Collier County Circuit Court held that section 28 USC §1367(d) did not toll limitations on the constructive trust claim because the federal district court, sitting in its appellate capacity, had determined that the bankruptcy court lacked subject matter jurisdiction over that claim. The Second District Court of Appeals affirmed the Circuit Court.

Bautsch and Krause then sought review in Florida's Supreme Court, alleging express and direct conflict with the Fourth District's decision in *Scarfo v. Ginsberg*, 817 So.2d 919 (Fla. 4th DCA 2002).

B. The Supreme Court's Analysis

On review of *Krause*, Florida's Supreme Court first applied the standard rules of statutory interpretation to 28 USC §1367, and held:

> The plain text of the federal statute does not, by its terms, bar the application of the tolling provision where a claim is dismissed for lack of federal subject matter jurisdiction. Rather, the savings protection of section 1367(d) applies "for any claim asserted under subsection (a)." The plain and unambiguous language of section 1367(d) thus permits the application of the tolling provision to claims commenced in federal court but later dismissed for lack of federal subject matter jurisdiction.

The Supreme Court expressly approved the decision of the Fourth District in *Scarfo v. Ginsberg*, 817 So.2d 919 (Fla. 4th DCA 2002), and emphatically concluded:

> Our precedent concerning statutory interpretation also supports the Fourth District's interpretation of section 1367(d) in *Scarfo*, where the court concluded that the dismissal of a federal claim for lack of subject matter jurisdiction did not bar the application of section 1367(d) to toll the state limitations period for claims refiled in state court.

V. *Scarfo v. Ginsburg* held that the success of a federal question is irrelevant because determination of that issue requires the federal court to exercise its original jurisdiction.

The issue in *Scarfo v. Ginsberg*, 817 So.2d 919 (4th DCA 2002), was whether the filing of state law claims in federal court pursuant 28 USC §1367, operated to toll the statute of limitations during the pendency of a federal action ultimately dismissed because the predicates of the alleged federal question were not satisfied. The court determined limitations were tolled on unsuccessful federal question claims.

A. Facts and Procedural Background

Elaine Scarfo filed suit in federal district court alleging a federal claim under Title VII of the Civil Rights Act of 1964 and state common law tort claims of battery, intentional infliction of emotional distress, and invasion of privacy.

The district court granted a summary judgment against Scarfo on the federal claims, holding that none of the defendants could be liable under that statute, and dismissed Scarfo's state law claims without prejudice. The district court's decision was affirmed on appeal.

B. Fourth District Analysis

Significantly in *Scarfo* – a post-*Ovadia* decision – the Fourth District drew the distinction essential here between "federal question" and "diversity" jurisdiction: "In this case plaintiff based subject matter jurisdiction in federal court on federal question grounds, rather than on diversity grounds." The Court then went on to note that where a "federal question" has been alleged, it is irrelevant whether the requirements of that "federal question" are ultimately satisfied because resolution of that issue requires the federal court to exercise its original "federal question" jurisdiction. The Fourth District held:

> [Federal question claims] are often joined with state law claims arising under a common nucleus of operative fact. Consequently, Congress also created section 1367 to allow such related state law claims to be joined with the federal claim in a federal court. At the same time, section 1367(d) provides for a non-prejudicial dismissal of the related state law claims when the federal claim is adjudicated before trial. That is, section 1367(d) tolls the

> running of any applicable state statute of limitations on the related state law claims during the pendency of the federal claim. The purpose of this tolling provision is undoubtedly to allow claimants to pursue their federal claim in a federal court without cost to their state law claims, should the federal claim prove unsuccessful.
>
> Section 1367(d) provides for a tolling of state law limitations on any state law claim asserted in federal court under section 1367(a). The only requirements are that the claim be asserted under section 1367(a)… The mere fact that the federal court of appeals saw the question of [liability] as an issue of subject matter jurisdiction does not change the text of section 1367.

In sum, limitations are tolled per 28 USC §1367, even when the federal action is ultimately dismissed because the predicates of the alleged federal question are not satisfied.

VI. The rule in *Ovadia v. Bloom*, constrained by its reference to *Wisconsin Dept. of Corrections v. Schacht*, must be understood as applicable only to diversity jurisdiction and not federal question jurisdiction.

In Ovadia v. Bloom, 756 So.2d 137 (3rd DCA 2000), the Third District had to decide whether the tolling provisions of 28 USC §1367, applied to state claims asserted in federal court on diversity grounds if the federal court dismissed the case for lack of diversity. The court decided limitations were not tolled where the absence of diversity was on the face of the complaint.

A. Facts and Procedural Background

February 3, 4, and 5, 1993, WTVJ-TV, broadcast a report on "Dangerous Doctors" which featured Dr. Ovadia. September 1994, Dr. Ovadia filed a common law action in federal court against the station and its reporters. October 1994, the

defendants filed an answer. On February 7, 1995, two days after the expiration of the two-year statute of limitations, the defendants filed a motion for judgment on the pleadings asserting the federal court lacked subject matter jurisdiction over the case because there was a *lack of complete diversity* on the face of the complaint. The court granted defendants' motion. Shortly thereafter, Dr. Ovadia filed a complaint for the same common law causes in the Miami-Dade County Circuit Court. The defendants filed a motion for surmmary judgment on statute of limitations grounds. The motion was granted. Dr. Ovadia appealed to the Third District.

B. Third District Analysis

The Third District held that 28 USC §1367 did not toll limitations because the presence of non-diverse defendants in the federal action destroyed jurisdiction at inception. The court said:

> Under the plain language of [28 USC §1367], the limitations period is not tolled because the federal court never had original jurisdiction over Dr. Ovadia's action. Any arguable jurisdiction was based on diversity, and the presence of non-diverse defendants in the action destroyed jurisdiction on that basis. *See Wisconsin Dept. of Corrections v. Schacht*, 524 U.S. 381, 118 S.Ct. 2047, 141 L.Ed.2d 364 (1998) (only complete diversity of citizenship among parties permits original jurisdiction over the case); *Finley v. Higbee Co.*, 1 F.Supp.2d 701, 702 (N.D.Ohio 1997). Under section 1367, claims against a non-diverse defendant cannot be considered supplemental jurisdiction. *See Dieter v. MFS Telecom, Inc.*, 870 F.Supp. 561 (S.D.N.Y.1994). Hence, this statute does not toll the limitations period for Dr. Ovadia's claims.

The Third District applied this rule to "diversity" jurisdiction only and did not in anyway suggest its application to "federal question" jurisdiction. In fact, by reference to *Wisconsin Dept. of Corrections v. Schacht*, 524 U.S. 381 (1998), the Third District implies its rule does not apply to "federal question" jurisdiction. The Supreme Court in *Wisconsin Dept. of Corrections v. Schacht* clarified the court's distinct duties on "federal question" and "diversity" jurisdiction – the former must be litigated, the later may be determined on the face of the complaint.[5]

In sum, *Ovadia* clearly holds that where the absence of diversity is on the face of a federal complaint, the tolling provisions of 28 USC §1367 do not apply to save the asserted state claims. However, no court has applied *Ovadia* to any case alleging federal question jurisdiction.

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[5] The Supreme Court in *Wisconsin Dept. of Corrections v. Schacht at 389*, distinguished "federal question" jurisdiction from "diversity" jurisdiction as follows:

> [A federal question] case differs significantly from a diversity case with respect to a federal district court's original jurisdiction. The presence of the nondiverse party automatically destroys original jurisdiction: No party need assert the defect. No party can waive the defect or consent to jurisdiction. *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U. S. 694, 702 (1982); People's Bank v. Calhoun, 102 U. S. 256, 260-261 (1880). No court can ignore the defect; rather a court, noticing the defect, must raise the matter on its own. *Insurance Corp. of Ireland, supra, at 702*; *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U. S. 379, 382 (1884). [Emphasis added.]

VII. Federal Courts in Florida apply §1367 per *Krause* to even "frivolous" federal question claims.

The cases below make clear that federal courts in Florida consider 28 USC §1367 to toll limitations even where claims are dismissed for lack of subject matter jurisdiction, or as *frivolous*.[6]

A. *Boatman v. Fortenberry,* No. 3:17cv29/RV/EMT (ND Fla., Pensacola 2017)

Citing *Kause v. Textron*, the Federal District Court of the Northern District of Florida, after dismissing various federal claims as either a failure to state a claim, Heck-barred, or *frivolous*, expressly dismissed Boatman's supplemental state law claims "without prejudice to his pursuing them in state court," per 1367(d).

B. *Farrest v. KNT Dist.'s, Inc.,* 2:16-cv-111-FtM-99MRM (MD Fla., Ft. Myers 2016)

The Federal District Court of the Middle District of Florida dismissed all federal claims for lack of subject matter jurisdiction but at †3 expressly held that 28 USC §1367(d), tolled limitations on supplemental state claims.

C. *Holley v. Bossert,* No. 3:15cv389/LAC/EMT (ND Fla., Pensacola 2016)

Citing *Kause v. Textron*, the Federal District Court of the Northern District of Florida, after dismissing Holley's federal claims for failure to state a cause of

[6] Federal courts in other states reach the same conclusion: *Graves v. Goodnow Flow Ass'n, INC.*, No. 8:16-CV-1546 (ND New York 2017); *Parker v. UGN INC.,* No. 2:13 CV 420 (ND Indiana 2016); *Thomas v. Buckner,* No. 2:11-CV-245-WKW (MD Alabama 2016).

action expressly dismissed supplemental state law claims "without prejudice to his pursuing them in state court," per 1367(d).

D. *Myers v. Watkins*, No. 5:12cv259/MW/EMT (ND Fla., Panama City 2015)

Citing Kause v. Textron, the Federal District Court of the Northern District of Florida expressly held that "Myer's pursuit of any state law claim in state court would not be prejudiced" by its dismissal of his federal claims for failure to exhaust administrative remedies.

E. *Brewer v. US Marshalls Courthouse Security*, No. 3:15cv497/MCR/EMT (ND Fla., Pensacola 2015)

Citing Kause v. Textron, the Federal District Court of the Northern District of Florida expressly held that "Brewer's pursuit of any state law claim in state court would not be prejudiced" by its dismissal of his federal claims as *frivolous*.

VIII. Other Jurisdictions without the generosity of state "savings statutes" apply §1367 to unsuccessful assertions of federal question jurisdiction.

Many states generously provide "savings statutes" which extend limitations beyond the 30 day grace period of 28 USC §1367 regardless the disposition of the case in federal court.[7] The majority of cases in the high courts of other states

[7] Examples include: Arizona Rev.Stat. Ann. § 12–504(A); Georgia Code Ann. § 9–2–61(a); Iowa Code § 614.10; Tennessee Code Ann. § 28–1–105(a); Virginia Code Ann. § 8.01–229(E)(3); Montana Code Ann. § 27–2–407; New York C.P.L.R. § 205(a); Okalahoma Title 12, § 96; Oregon Rev.Stat. Ann. §

involving 28 USC §1367 resolve questions involving either the "savings statutes" of their respective states or the question currently before the US Supreme Court in *Artis v. District of Columbia*, 137 S. Ct. 1202 (2017) – whether §1367(d) entirely suspends limitations while the federal suit is pending, or whether limitations continue to run and §1367(d) merely provides a 30 days grace period after dismissal. Consequently it is difficult to readily determine how these states deal with the issue in *Foley et ux v. Orange Coutny et al*.

Nevertheless, the high court of the District of Columbia in *Stevens v. Arco Management*, 751 A. 2d 995, 998 (DC Court of Appeals 2000) reached the same conclusion as Florida's Supreme Court in *Krause v. Textron*. In *Stevens v. Arco Management*, on the question of the application of 28 USC §1367 to state claims related to federal claims dismissed for lack of subject matter jurisdiction, the DC Court of Appeals held:

> The language of §1367(d) does not require a successful assertion of federal jurisdiction. Moreover, the subsection does not differentiate among the possible reasons for dismissal, whether it be on the merits, or for jurisdictional reasons.

CONCLUSION

This Court's decision to apply *Ovadia* to a case involving federal question jurisdiction has no precedent or support in Florida or federal courts, and directly

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12.220(1); Pennsylvania Cons.Stat. Ann. § 5535(a)(2)(ii); Rhode Island Gen. Laws Ann. § 9–1–22; Nebraska Rev.Stat. Ann. § 25–201.01(2).

conflicts with *Krause v. Textron Financial Corp.*, 59 So.3d 1085 (Fla. 2011). The Court should reconsider, rehear, and reverse its decision on limitations in *Foley et ux v. Orange County et al*.

PRAYER

WHEREFORE DAVID AND JENNIFER FOLEY MOVE THE COURT TO RECONSIDER AND REHEAR ITS ORDER OF OCTOBER 24, 2017.

CERTIFICATE OF SERVICE

Plaintiffs certify that on November 9, 2017, the foregoing was electronically filed with the Clerk of the Court using the Florida Courts' eFiling Portal, which will send notice of filing and a service copy of the foregoing to the following:

William C. Turner, Jr., Assistant County Attorney,
P.O. Box 2687, Orlando FL, 32801, williamchip.turner@ocfl.net;
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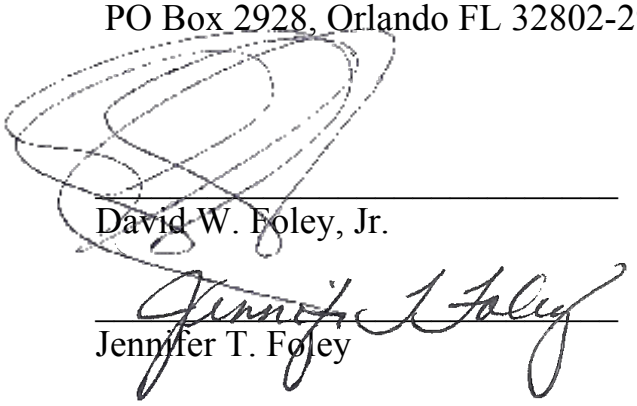

David W. Foley, Jr.

Jennifer T. Foley

Date: November 9, 2017

Plaintiffs
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IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

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

Defendants
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.

2016-CA-007634-O

PLAINTIFFS' MOTION FOR RECONSIDERATION

PLAINTIFFS DAVID AND JENNIFER FOLEY MOVE THE COURT TO RECONSIDER ITS NON-FINAL ORDER OF OCTOBER 24, 2017, granting "Defendants Phil Smith, Rocco Relvini, Tara Gould, Tim Boldig, and Mitch Gordon's Motion to Dismiss/Motion to Strike," filed on March 7, 2017.

SUMMARY

Reconsideration is justified because: *1)* the Foleys argued *Krause v. Textron Fin. Corp*., 59 So.3d 1085 (Fla. 2011); *2)* the Court has obviously overlooked this argument; and, *3) Krause* requires reversal.

BACKGROUND

1. May 24, 2017, the Foleys filed "Plaintiffs Response to Defendants' Motions to Dismiss," as their written response to all arguments presented in "Defendants Phil Smith, Rocco Relvini, Tara Gould, Tim Boldig, and Mitch Gordon's Motion to Dismiss/Motion to Strike."[1]

2. The Foleys' May 24, 2017 response, at §3.1.1, pp. 50-51, as quoted below, clearly argues that *Krause* is binding precedent as to limitations:

> *§3.1.1 Krause v. Textron Fin. Corp., 59 So.3d 1085 (Fla. 2011)*
>
> Florida's Supreme Court in *Krause v. Textron Financial Corp.*, 59 So. 3d 1085, 1091 (Fla. 2011), stated: "[T]he plain language of [28 USC §1367] leads us to conclude that the dismissal of a claim in federal court ... for lack of subject matter jurisdiction, does not bar the applicability of the federal tolling provision in the subsequent state court action." The Eleventh Circuit in *Foley v. Orange County*, 638 Fed.Appx. 941 (11th Cir. 2016), at 946, ordered the District Court to dismiss without prejudice for lack of subject matter jurisdiction. Therefore, per *Krause*, the Foleys' state law

[1] The *employees* include: Tim Boldig, Mitch Gordon, Tara Gould, Carol Hossfield, Rocco Relvini, and Phil Smith.

claims against the County officials and employees in their personal capacity are timely.

Defense argues that the Third DCA reached a different result in *Ovadia v. Bloom*, 756 So. 2d 137, 139 (3d DCA 2000). It did not. The only basis for federal jurisdiction in *Ovadia* was diversity. Diversity jurisdiction in federal court per 28 U.S.C. §1332, must be complete – a non-diverse defendant destroys jurisdiction. On its face Ovadia's complaint included a non-diverse defendant. Limitations were not tolled per 28 USC §1367(d), on the state claims against the non-diverse defendant because "claims against a non-diverse defendant cannot be considered supplemental jurisdiction," *Ovadia* at 139. *Ovadia*'s rule applies only to diversity jurisdiction and not federal question jurisdiction. The Foleys presented the federal courts with a federal question per 28 U.S.C. §1331, and those courts went well beyond the face of the Foleys' federal complaint to determine they lacked subject matter jurisdiction.

In *Foleys v. Orange County*, et al 638 Fed.Appx. 941, 943 (11th Cir. 2016), the Eleventh Circuit drew the words "insubstantial," "frivolous" from *Bell v. Hood*, 327 US 678, 681-683 (1946).

> [W]here the complaint, as here, is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court, but for two possible exceptions, must entertain the suit. ... The previously carved out exceptions are that a suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous. The accuracy of calling these dismissals jurisdictional has been questioned. [Emphasis added.]

In other words, per *Bell v. Hood*, it can be said that the Eleventh Circuit found the Foleys' complaint was "so drawn as to seek recovery directly under the Constitution of the United States or laws of the United States," but was nevertheless "insubstantial and frivolous" – or, as the Eleventh Circuit put it at 946, "clearly

foreclosed by a prior Supreme Court decision." Judge Tjoflat – the longest serving federal appeals judge still in active service – at oral argument put it this way:

> TJOFLAT: Dismissal without prejudice doesn't hurt you at all... There's no injury at all; you're back at square one with a remedy in the state court is what I'm trying to say.

3. September 6, 2017, between 4PM and 5PM, the Court heard the following two motions:[2]

1) The Official Defendants' Motion to Strike the Amended Complaint, Renewed Request for Judicial Notice, and Motion To Dismiss this Action with Prejudice; and,

2) Defendants Phil Smith, Rocco Relvini, Tara Gould, Tim Bodig and Mitch Gordon's Motion to Dismiss/Motion to Strike.

4. The Foleys attach a copy of the transcript of the September 6, 2017, hearing to this motion as Appendix A.

5. At oral argument September 6, 2017, the Foleys reiterated their reliance upon *Krause v. Textron* as to the question of limitations. *See* Appendix A, p. 22, lines 20-25; p. 23, lines 1-4; p. 35, lines 21-25; p. 36, lines 1-4.

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[2] Four additional motions were scheduled for this hearing but were not heard: Plaintiffs' Motion for Judicial Notice (5/22/2017); Plaintiffs' Response in Objection to Orange County's Motion for Judicial Notice, and Plaintiffs' Motion for Judicial Notice of Ord. No. 2016-19 (5/25/17); Plaintiffs' Motion for Judicial Notice of Ord. No. 2008-06 (5/25/2017); and, Orange County's Motion to Dismiss Plaintiff's Amended Complaint Pursuant to Florida Rules of Civil Procedure 1.140(b)(1) and (6) (3/7/2017).

6. October 24, 2017, the Court issued its "Order Granting 'The Official Defendants' Motion to Strike the Amended Complaint, Renewed Request for Judicial Notice, and Motion to Dismiss this Action with Prejudice' and Order Granting 'Defendants Phil Smith, Rocco Relvini, Tara Gould. Tim Boldig. And Mitch Gordon's Motion to Dismiss/Motion to Strike.'"[3]

7. The Foleys attach a copy of the Court's October 24, 2017, order to this motion as Appendix B.

8. In its October 24, 2017, order the Court's only discussion of argument relating to the tolling provision of 28 USC §1367, appears in footnote 3 on page 6, as follows:

> The Plaintiffs attempt to circumvent the limitations period by arguing that 28 U.S.C. §1367(d) "tolls the limitations period for thirty days after dismissal of any supplemental claims related to those asserted to be within the original jurisdiction of the federal court." However, as the Defendants point out in their Motions, section 1367(d) only applies where a federal court enjoyed original jurisdiction over the case, and if the initial assertion of federal jurisdiction is found to be insufficient, then the section does not apply and the party does not get the benefit of the tolling. *See Ovadia v. Bloom*, 756 So.2d 137, 140 (Fla. 3d DCA 2000). Because the Eleventh Circuit determined that the Plaintiffs' claims had no plausible foundation, section 1367(d) is inapplicable to the instant matter.

[3] In doing so the Court violated the promise it made twice at hearing September 6, 2017, to issue no order until after hearing Orange County's motion to dismiss. *See* Appendix A, p. 39, lines 23-25; p. 40, lines 1-5, and lines 8-13.

9. In its October 24, 2017, order the Court relies exclusively on *Ovadia v. Bloom*, 756 So.2d 137, 140 (Fla. 3d DCA 2000), and makes no reference to either of the following: *1)* *Krause v. Textron Financial Corp.*, 59 So.3d 1085 (Fla. 2011); or, *2)* the Foleys' written or oral arguments regarding *Krause*.

10. The decretal portion of the court's order states in pertinent part:

> The "Defendants Phil Smith, Rocco Relvini, Tara Gould, Tim Boldig, and Mitch Gordon's Motion to Dismiss/Motion to Strike" is GRANTED.

ARGUMENT

11. The Court has "has inherent authority to reconsider, as here, any of its interlocutory rulings prior to the entry of a final judgment or final order in the cause." *See* *Bettez v. City of Miami,* 510 So. 2d 1242, 1243 (3rd DCA 1987), *Zakak v. Broida and Napier, PA,* 545 So. 2d 380, 231 (2nd DCA 1989), *also* *Silvestrone v. Edell,* 721 So.2d 1173, 1175 (Fla. 1998).

12. Reconsideration is justified because as demonstrated by the preceding paragraphs the Court has overlooked the Foleys' reliance upon *Krause v. Textron Financial Corp.*, 59 So.3d 1085 (Fla. 2011).

13. Reconsideration is justified because *Krause*, not *Ovadia*, is Florida's binding precedent with respect to the application of the tolling provisions of 28 U.S. Code 1367(d), to any state law claim related to any federal question claim

within the original jurisdiction of the federal district court *even if* that federal question claim is ultimately dismissed on appeal for lack of subject matter jurisdiction.

14. Reconsideration is also justified because the bright-line rule of *Scarfo v. Ginsberg,* 817 So.2d 919 (4th DCA 2002), accepted by Florida's Supreme Court in *Krause*, applies here. *Scarfo* held that the plain language of 28 USC 1367 makes clear that "dismissal of a federal claim for lack of subject matter jurisdiction [does] not bar the application of section 1367(d) to toll the state limitations period for claims refiled in state court."

15. A memorandum discussing the application of 28 U.S. Code 1367(d), is attached as Appendix C, and is incorporated in this motion as if set out in full.

CONCLUSION

WHEREFORE David and Jennifer Foley move the court to reconsider its non-final order of October 24, 2017, granting "Defendants Phil Smith, Rocco Relvini, Tara Gould, Tim Boldig, and Mitch Gordon's Motion to Dismiss/Motion to Strike," filed on March 7, 2017.

CERTIFICATE OF SERVICE

Plaintiffs certify that on November 9, 2017, the foregoing was electronically filed with the Clerk of the Court using the Florida Courts' eFiling Portal, which will send notice of filing and a service copy of the foregoing to the following:

William C. Turner, Jr., Assistant County Attorney,
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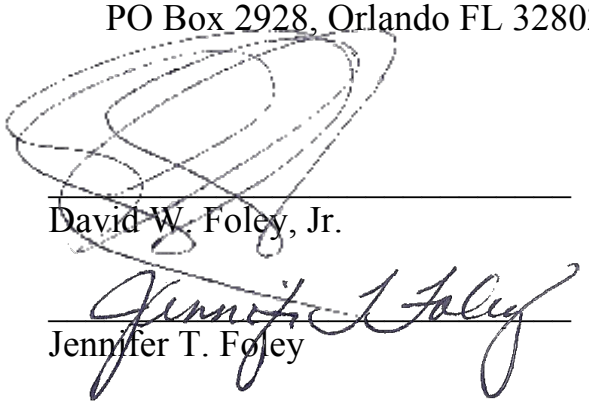

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Jennifer T. Foley

Date: November 9, 2017

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IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

Plaintiffs
DAVID W. FOLEY, JR., and
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v.

Defendants
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.

2016-CA-007634-O

APPENDIX A

TRANSCRIPT OF HEARING SEPTEMBER 6, 2017

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

CASE No.: 2016-CA-007634-O

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

Plaintiffs,

vs.

ORANGE COUNTY, PHIL SMITH, CAROL HOSSFIELD, MITCH GORDON, ROCCO RELVINI, TARA GOULD, TIM BOLDIG, FRANK DETOMA, AZIM AZAM, RODERICK LOVE, SCOTT RICHMAN, JOE ROBERTS, MARCUS ROBINSON, RICHARD CROTTY, TERESA JACOBS, FRED BRUMMER, MILDRED FERNANDEZ, LINDA STEWART, BILL SEGAL and TIFFANY RUSSELL,

Defendants.

_____/

Transcript of Proceedings
Before the Honorable Heather L. Higbee,
Circuit Court Judge

DATE TAKEN: September 6, 2017

TIME: Commenced at 4:00 p.m.
Concluded at 4:47 p.m.

LOCATION: Orange County Courthouse
425 North Orange Avenue
Hearing Room 20-B
Orlando, Florida 32801

REPORTED BY: Danette V. Lamb,
Court Reporter and Notary Public

A P P E A R A N C E S:

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ALSO PRESENT:

TERESA LAZAR, ESQUIRE
Staff Attorney for Judge Higbee

ELAINE MURQUARDT ASAD, ESQUIRE
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P R O C E E D I N G S

THE COURT: Good afternoon. All right. Is everybody ready? We're going to go ahead and get on the record. This is 2016-CA-7634. There are a myriad of hearings that are set for today. I'm not going to announce each one of them or I'll dip into your time. But understand that I have reviewed the motions, the information that has been forwarded to me, the case on the court file that's part of our record so that I would be prepared for today.

I also wanted to apologize to everyone for having to change the hearing on you a few weeks ago. I had a family emergency that I had to tend to. It had nothing to do with this case. It was just that particular time frame that I needed to make sure I had to -- something that unfortunately was more important than where I had to be here, so I apologize for that inconvenience. You have my full attention.

I also want to introduce you to my staff attorney, Teresa Lazar, who is sitting in on this hearing with me so that you know who she is. She is my staff attorney that assist me with the legalities of my job.

So I'm going to start with my immediate right

and have you identify for me who you are and who you represent, please.

MR. ANGELL: And I'd be here. Your Honor, my name is Derek Angell. I represent the Orange County Officials in this case, which is comprised of the members of The Board of Zoning Adjustment, BZA, and the Board of Commissioners, the BCC.

THE COURT: Thank you. Sir?

MR. OXFORD: Good afternoon, Your Honor. My name is Lamar Oxford from the Dean, Ringers firm. I represent the -- Phil Smith, who is the county code enforcement inspector. Carol Knox is her married -- is her name now. She was the chief planner for the County. Mitch Gordon is the former zoning manager for the County. Rocco Relvini, chief planner for the County; and Tara Gould, former assistant Orange County attorney.

THE COURT: Okay. Thank you. And I am going ask over here. Counsel?

MS. ASAD: Elaine Asad for Orange County.

MR. TURNER: And William Turner also on behalf of Orange County, Your Honor.

THE COURT: Okay. And that must make you Mrs. Foley?

MRS. FOLEY: Jennifer Foley.

THE COURT: All right. Very good.

Are you David Foley?

MR. FOLEY: I am.

THE COURT: All right. So I have Jennifer Foley and David Foley.

So I would like to go -- well, I have everything in the order of what was noticed and it would seem that if we go in that order -- I don't know that there's any better order to go in unless anyone has an objection. We have an hour, which means that I'm anticipating approximately 30 minutes of one side and 30 minutes of the other side. Although, it's going to be mixed in between all the different motions and responses. So hopefully we can make good use of that time and be out of here promptly.

So, Mr. Angell, you represent the Orange County officials and that's the first item that I have on my list. If you wish to proceed with your motion to strike the amended complaint?

MR. ANGELL: Thank you, Your Honor. And this is really I think what I'm going to begin with, going through the factual background and the lengthy procedural background before we got here as it is applicable to all the motions. And if we get

to all of them, great; if not, I think we all agreed to tack on as many of the notices as we can, but if we run out of time, so be it.

This case began a long time ago during the Bush administration. Frankly, it was an administrative investigation that the Foleys were growing -- or raising, I should say, toucans in a residentially zoned property. The toucans were raised for commercial purposes and constitutes -- aviculture is the fancy name for it. And there was an inspection of the zoning board violation, the zoning inspector determined the aviculture violated the zoning rules of Orange County, Orange County Code, and the Foleys appealed that to the BZA, Board of Zoning Adjustments. So I suppose the way that works is if you feel that you've been aggrieved wrongfully and you've been notified of a zoning violation, you take it up to the next level in front of the Board. The Board -- the individual members of the Board, the first group of my clients, they are sued in their personal not official capacity, which is important to state these sorts of cases. And that was a public hearing, which the transcript has been filed and subject to view on several different occasions.

And at that the hearing, Mr. Foley argued that the Orange County ordinance, which renders the -- or I should say regulates the aviculture commerce was unconstitutional under the State Constitution. His argument was and has remained and still is that only the Florida Official Wildlife Comission can regulate the commercial breeding of toucans. Toucans are in a class of animal -- there's something less wild, if you will, than lions, tigers, and bears, but certainly more than, you know, your house cats and your pet dogs and they are regulated in separate classifications. So his theory again, has been from the start and continues to be that only the FWC can regulate that class of animal, and that's a State constitutional issue that Orange County does not have the jurisdiction to enact ordinances, which would regulate those sorts of animals.

The BZA voted to uphold the zoning manager's determination that they were in violation of the local ordinance. It was a unanimous vote and it is that vote, which forms the basis of their lawsuit against my clients, the fact that my clients have voted to uphold the zoning manager's determination.

From there, Mr. Foley and Mrs. Foley appealed

that BZA determination to the Board of County Commissioners. The Board of County Commissioners, of course, is a constitutional body that comprises of the Mayor, Teresa Jacobs, and a number of other local fairly significant political personalities. They also voted unanimously to uphold the BZA's determination that the Foley's were in violation of the local ordinance.

From there, the Foleys properly filed a petition for a writ certiorari here in the circuit court back I think in 2009, which is how you appeal a file agency local administrative determination. The order that was issued in that case -- or I should say it's an opinion, stated that, first of all, it denied the petition. It also stated that the proper means to challenge the constitutionality of a local ordinance must be through an original proceeding, which is exactly what the Foleys did on the last day of the statute of limitations from what they acknowledged their cause of action, if any, would have accrued, which is the date of the final administrative action. The mistake they made, though, is they filed that action in Federal Court. They alleged along with the declaratory judgment action, I think it was around two dozen

causes of action opposed to the federal cause of action for everything from due process, equal protection, freedom of speech, a host of federal sort of theories. Along with state claims of civil RICO, full state and federal statutes, those sorts of things. So a conglomeration of both federal and state causes of action, and they were alleged against my clients and my colleagues' clients both part in their official and personal capacity as well as the County.

There was two significant orders among several orders that came out of that case. I believe it was Judge Antoon the first of which said that the claims against the individuals were dismissed with prejudice because the individuals had various immunities. It wasn't a hugely detailed examination. His Honor found that it was legislative immunity. I think retrospectively, it was really quasi-judicial immunity, but that's sort of academic. In any event, though, all the individuals were dismissed with prejudice at that point, but the Court allowed the Foleys to then file an amended pleading against the County to discuss the constitutionality of the ordinance vis-à-vis the Florida State Constitution, not the

Federal Constitution. In the meantime, the Foleys, when they filed their amended complaint, they still restated all the claims against the individuals, the Federal Court dismissed those sua sponte and the case received a summary judgment just against the County. The Federal Court found in its final order -- well, final really dispositive order not its actual judgment -- said that the claims against Orange County, the federal claims were denied, found for summary judgment for the County and found that the ordinance did, in fact, violate the Florida State Constitution, found it unconstitutional and enjoined its enforcement as a matter of State Constitutional law.

Cross appeals in the Eleventh Circuit were taken. All of us here were there and spent our time at the podium. And the Eleventh Circuit ruled differently than what Judge Antoon had determined. It says that: First of all, the federal claims were not just denied on their merits, they were frivolous. And that's the significant distinction in the federal form because if you bring a case that has federal and state claims, if the federal claims are frivolous, then the Federal Court does not have any discretionary supplemental

jurisdiction to retain the State claims. It must dismiss them. And so the Eleventh Circuit went through and looked at all of the federal claims, due process claims, and there's two or three other ones, equal projection, those sort of things, and said these are all frivolous and; therefore, there was no jurisdiction for the State -- for the Federal judge to make a determination of Florida law, which, of course, the interplay between the FWC and Orange County is paradigmatically the state law question.

So as the Foleys then filed a petition for certiorari with the Supreme Court, which was denied. It wound its way back down to the District Court, which then dismissed the state claims without prejudice, but federal claims were very much dismissed with prejudice.

Then this lawsuit was filed. This lawsuit arises out of the exact same facts, background, everything else. It's the same basic theories with different sort of names attached to some of the claims. And we're now here finally on behalf of our individuals certainly to ask that the individuals in their individual capacity for a whole host of reasons are dismissed with prejudice.

I don't know if this is -- this is the amended complaint even here in State Court; therefore, the right to amend has been taken advantage of and the Court would be within its discretion to dismiss this case with prejudice. It's been going on for nearly a decade, I think it's certainly time for our folks.

Now, to begin at least as it pertains to my clients and their individual capacity, as I read the complaint it's Counts, 5, 6, and 7 that are stated against our folks. Those are abuse of process, conversion, state civil theft, and there's allusion to Section 1983, the Federal Civil Rights Statute in Count 7.

And before I get to those, though, I want to talk about really our defenses. We have a host of defenses here for our individuals. The first of which is statute of limitations. The statute of limitations they have pled around it as best they can to establish that they filed their lawsuit in Federal Court on the last day of the limitations period, and I just stated I agree with that. The difference, though, is that by filing in Federal Court when there was no basis for Federal jurisdiction, they do not get the tolling provision

of the -- I think it's Section 1367, that allows a -- basically extends the statute of limitations after a case gets kicked out of Federal Court. The classic example is if you file -- if I had to -- if I was defending, I would move the case to Federal Court and get it dismissed for lack -- solely lack of jurisdiction and goes back, the statute of limitations is tolled the entire time it's in Federal Court. There is an exception, though, which is when a plaintiff files a case in Federal Court, if there never was a basis for Federal jurisdiction in the first place, that tolling provision doesn't apply. The case I cited in my motion is called Ovadia versus Bloom, and the citation is obviously in the papers. But the --

THE COURT: Yes, sir.

MR. ANGELL: What happened there was it was a -- plaintiff filed in Federal Court alleging diversity jurisdiction. It turns out there was not complete diversity and, therefore, when it went back to State Court the limitations period had run. And the language I enjoyed in that case was that: An improvident foray into the Federal Court does not toll the -- the statute of limitations. So in other words, if the plaintiff decides to go to

Federal Court, and there never was federal jurisdiction in the first place, tolling does not -- and they're defending that, and they cited that tolling statute in their papers. That's what they're relying on to escape the statute of limitations. And in this case, the Federal courts have expressly held that the federal claims are frivolous not just lack of merit but beyond the pale of what could be passable as a federal claim. I think that that under Ovadia is -- we do not have a tolling situation here. The statute of limitations is blown by four or five years. And that would apply to all of our people. It may be a little -- with apologies to the County, it might be a little bit different with them because they could have some ongoing claim thing and that was discussed actually with the Eleventh Circuit. But as to the individuals their actions were the date they voted, the statute of limitations is clearly run as to all of our folks. Also, as to the individuals we have various meetings. I mentioned earlier that as people voting on an administrative local board they are entitled to -- well, they call it -- well, it's an absolute immunity, which a subset of which is qualified immunity. But in our

case we have an absolute immunity in the quasi-judicial setting. Quasi-judicial means that you have it of the executive board, under the executive branch of the government basically interpreting and applying a local rule, local ordinance. That's exactly what they were doing here. And in Florida, the extent of quasi-judicial immunity is coextensive with judicial immunity, which is to say that even if somebody sitting in that capacity exceeds their jurisdiction they are entitled to absolutely any personal suit. So that is, I think, wraps it up really in almost two sentences wide. And our people have no business in this case, never have. But that is one of the arguments we have for dismissal.

Third, we have res judicata as to the Federal claims. I noted that they have cited Section 1983, that's a Federal claim obviously. And the Federal courts had dismissed all Federal claims with prejudice. So I think that goes without saying that that one has already been resolved.

And then finally, the counts on the merits are -- respectfully, they are also frivolous. We have abuse of process. The theory of that is I think the classic example would be where an

officer, a police officer arrest his girlfriend for -- 'cause he's mad at her. That's obviously something beyond what the purpose of his office was ever intended to be. Here we have local elected officials who have basically done exactly what they're supposed to by voting in public hearings. That's not an abuse of process. I think that's just again, so beyond a reasonable cause of action that it amounts to frivolity.

A conversion, the theory of conversion is that by voting to uphold the taking, if you will, or of the destruction of the aviary or the taking of the birds is that by voting to uphold that determination that our people have converted the birds. Well, that's not what conversion is. Conversion is taking somebody else's stuff for your own good one way or another. These are people voting to uphold the law. That is not -- conversion again, is so far from what that term means but any interpretation does not belong in this case. Civil theft goes along with conversion that requires criminal intent to say that somebody voting a local board votes and has a criminal intent I think is, frankly, offensive to our people. And I already discussed 1983 being already

resolved.

So that is a lot of legal arguments there. I tried to keep it sort of as succinct as I could. It's a long history. But the short of it is, Your Honor, the people who sit on the local board and vote are not liable personally for those votes.

And at this point I'll pass it along to my colleague, Mr. Oxford.

THE COURT: Okay. Well, actually what I would like to do since I'm not sure we'll have time for everything, I want to make sure I'm hearing everything individually. And I apologize because that means that some of you will have to come back and the Foleys will have to come back. But I'm already getting an eye on what the time is, and I'm not allowed to incur overtime for my staff. So what I'd like to do is just to keep us on track with each issue. And if that's acceptable, then I would turn it over to the Foleys unless you have something as to that particular issue as far as the official is concerned.

MR. OXFORD: The only -- thank you for letting me interrupt, Your Honor.

THE COURT: Yes, sir.

MR. OXFORD: I apologize for that.

Respectfully, I have the County employees who enforce the zoning code. In many ways my County employees, officials, and their arguments dovetail with those of Mr. Angell, with the County officials. So I think, if Mr. Foley doesn't mind, I would just like to summarize quickly and a quick overview. Because I don't have really separate arguments from those already given to you.

THE COURT: Okay. Mr. and Mrs. Foley, is that acceptable to you to let him --

MR. FOLEY: Sure.

THE COURT: And then you can respond to both together?

MRS. FOLEY: Yes.

THE COURT: And you're tracking the time?

MRS. FOLEY: I am.

THE COURT: 'Cause I was wondering about that.

MRS. FOLEY: Yes, thank you.

THE COURT: Don't worry, I am going to make sure that we try to do it fairly. I actually have a chess clock if next time we run into problems.

MRS. FOLEY: Which is fine.

THE COURT: We seriously do that. But I think that we --

MRS. FOLEY: Okay.
THE COURT: I understand some of the arguments. I've done my preparation --
MRS. FOLEY: Okay.
THE COURT: -- so I think so far we're still good.
MRS. FOLEY: Okay.
THE COURT: So, Mr. Oxford it is, sir?
MR. OXFORD: Yes, ma'am.
THE COURT: You may proceed with your similar -- just stick with what these same issues are as it relates to your clients, and then we'll move from there.
MR. OXFORD: I promise to be brief. And with respect to the Foleys they've had us in court for a long time, all the way to the United States Supreme Court and back. But the Court has to recognize that this all started ten and a half years ago. This Court now has discretion to bring it to an end with regard to the individual employees. The Federal courts, every one of them, all the way to the top, have said that the Federal claims against the employees, both sets, are not only not properly based under the facts or the law but they're frivolous. And as Mr. Angell pointed out in his

argument and in his motions, as we tried to ourselves, the State law claims are clearly dismissible with prejudice because the immunity of the officials in doing either their quasi-judicial acts, or in my case, doing their discretionary acts, which sovereign immunity directly applies to enforcing a county code, a governmental code. That's not what every man in the street does. That's a discretionary governmental function. So the immunity implies the res judicata clearly applies to the Federal claims.

They've already been tried all the way to the conclusion and there is simply not the basic elements of conversion. There is no criminal theft here. There is no civil theft here. There is no abuse of process as we recognize in the law. So we're asking the Court to consider the history of this case to take judicial notice of decisions that have already been made between the same parties on the same claims and concluded.

And with respect to the work done by the pro se plaintiffs here, bring it to a conclusion at this level. The taxpayers have spent an enormous amount of money defending 12 -- ten or 12 officials all the way to this point today. They've been in

too many courts. They've won every time.

And with respect, Your Honor, you are the judge who has the discretion with regard to all the individual defendants to bring it to an end. We believe the legal arguments that have been presented to you in the context of the history and your judicial notice of it should not only result in dismissal with prejudice but a consideration of the fact that now many, if not all, of these claims are essentially frivolous.

Thank you, Judge.

THE COURT: Thank you. All right. So, Mr. and Mrs. Foley, if you'd like to speak to those two issues.

MR. FOLEY: Which two? The two groups of --

THE COURT: Yes, sir. You can start in order or however you wish.

MR. FOLEY: Okay. And you, Judge, have you read the papers filed?

THE COURT: I have reviewed everything. I have read and will continue to read. I will not be making any rulings today especially since I don't know that we're going to get through everything. So ultimately, what you'll receive from me is a written order. And I assure you that in every case

I make sure that I've thoroughly read everything that each side has to say so that I can give each side a fair right to be heard.

MR. FOLEY: Sure, sure.

THE COURT: So if you wish to go into history, you're welcome to. If you wish to simply address some of the things that have been raised you are welcome to. It's your time and you're welcome to use it as you see fit.

MR. FOLEY: Well, I -- I -- Judge Tjoflat he has this YouTube video where he's giving a commencement to Mizzou Law School and he says that this exchange it's best when it's a conversation between attorney and the judge. So I'm really open to that. I'd kind of like to know given that you've read the papers and you've heard the arguments, which are identical to what they've already submitted without any -- without any modification given our response where you're at on -- on these issues. For instance, limitations, their case is Ovadia v. Bloom. It deals exclusively with diversity jurisdiction. Our case is Krause v. Textron it's a Federal question of jurisdiction. Whether our federal question succeeded or not, whether it was called good but

failed or frivolous but failed is irrelevant. The Florida Supreme Court has already settled the issue and I don't know why they have to -- they haven't addressed that.

On the issue of res judicata, as we've said in our response, our issue is simply a due process claim and due process is treated by the Federal courts exactly like takings. And what I've brought in for you and for the Defendants is a case out of the Seventh Circuit that says exactly that and it's just verbatim what I've just told you. Can I hand it to you?

THE COURT: If you have a copy for the opposing, then I'll be happy to take them, okay.

MR. FOLEY: So I've highlighted the statement, you know, the Seventh Circuit, that's Judge Posner's circuit --

THE COURT: Thank you.

MR. FOLEY: -- and according to Justice Alito he knows everything. So the Eleventh Circuit hasn't put it so plainly but all of their decisions imply the same conclusion that due process is the State's responsibility until the State has finally litigated it. There's no due process claim in Federal Court. So this is a claim that's presented

here in the alternative should you find that there is no remedy in Florida. And we think you'll find a remedy. So, if anything, it's just not right. If there's any problem with our due process claim it's because it's not right. It's because you haven't yet found that there's no other remedy because that's what due process is, it's remedy. It's an incredible word, remedy. So that's limitations, res judicata.

Their big issue is immunity and that's a big issue. I mean, they do deserve immunity if -- if they deserve -- it is their burden to establish this and then we simply send a response, and we don't believe they have because there are exceptions to what's called absolute immunity. The exceptions that we pled are three: Execution of a custom is not immunized and that's in a case that they cite. They cite Corn v. Lauderdale Lakes. And Corn v. Lauderdale Lakes went on for 20 years. There are three different Eleventh Circuit opinions in Corn v. Lauderdale Lakes. This is the '93 opinion. Do you want the citation, Your Honor?

THE COURT: Sure. If you know it, we can put that on the record as well.

MR. FOLEY: Corn v. Lauderdale Lakes, 997

F.2d 1369 at Page 1392 -- on legislative immunity for execution of policy, that's a paraphrase. I believe it's not legislative or quasi-legislative immunity for the execution of a policy. Here the BCC order is certainly a policy and leading up to that decision was a custom. This is really where I'd like to back right up to what they don't talk about and that is that we've alleged expressly over and over that there was no ordinance that prohibited us from doing what we were doing. It was, in fact, a custom. And that's a big difference because due process is all in that. We're on notice of an ordinance. It's published. We're not on notice, we're custom. So we -- we have to go through some procedure that revives the protection that we've lost by -- by the fact that there was not an ordinance to give us notice for. And that didn't happen here. And that really is the big thing.

So I know this is kind of corny but, you know, there's a couple of things I want you to remember. I'm going to stick this sticker on my chest. It's, you know, the number 11. This represents Chapter 11 of the Orange County letter. This is the number 30. I'm sticking this sticker

on my left shoulder. Chapter 11, Chapter 30. What happened here is, as we said, there was no ordinance that said you can't do aviculture at your home. They haven't addressed that. I put it in the response in today. You haven't heard them say that -- what ordinance they were enforcing. It was a custom. We had to ask them to explain it to us. But -- but I do want to get on the record too that although the entire episode began with a complaint that we were raising birds to sell, somebody told Orange County that we were raising birds to sell, and that's what initiated the investigation. So that's what they came out to enforce.

The Chapter 11 is the Code Enforcement Board ordinance. Chapter 30 is the Planning and Zoning Board ordinance. Chapter 11 is for prosecuting known violations of the code. Like a known violation that was reported in our case.

Chapter 30 is for the prospective enforcement of the Orange County Code. It's the permitting chapter. Whoops, I almost lost it. It's the permitting chapter. And as we've tried to put in our paragraph 40 of our complaint that they knew what they wanted to enforce and they didn't enforce it through Chapter 11. They had two violations.

One was the aviculture violation. One was the permitting violation. And they decided to do something that they do as an added practice when they have a dual violation. They prosecuted the permitting violation, that resulted in an order from Code Enforcement that said, You have a permit? Destroy your structure or pay a fine. So there we're facing a little coercion. We need to do something. We go to get the permit, and remember aviary is not used during this proceeding. Aviculture is not used, because these words are not used in the proceeding. There's no discussion violating any provision in the code that prohibits aviculture.

Two, they get the permit. And they say, Well, Mr. Foley, we heard, we have evidence here that you're -- you have another violation. You're raising birds to sell so we're not going to give you that permit and that resulted in destruction of the aviary. And now we're stuck in Chapter 30, right? Well, what's -- what's the problem? What's really the big problem here? They don't get the same state core per diem, that's the problem. If the Defendants had done exactly what they did in our case, that they were enforcing an ordinance, we

wouldn't be here. Because we could have had our due process at the front end. We would have been on notice that we had something to challenge, but we didn't have that. And once we got into this permitting process, there wasn't any way to arrest this. There wasn't any way to come here and seek an extraordinary writ. So that gives you kind of a story of the case.

But on the issue of immunity, why is that -- why is that a problem for them? As you said, there are three exceptions that we pled in our -- in our complaint: Execution of a custom, Corn v. Lauderdale Lakes, lack of jurisdiction, and that is, of course, the famous case of Fisher -- Bradley v. Fisher, U.S. Supreme Court case. And ultimately, lack of adequate review. We cited J. Randolph Block on the history of judicial immunity, which is what they're asking for here. And it says that -- we tried to make a joke, you know, at that point on paper. But the joke was that a thousand years ago there was no judicial immunity and if you didn't like what the judge had to say you could challenge them to a combat. Well, you know, that's doesn't work very well.

THE COURT: I don't vote for that one.

MR. FOLEY: I wouldn't either because you could also choose your own champion and I imagine you would pick, you know, the deputy. So judicial immunity he says and -- and due process protections for the litigant develop hand in hand. The appellate process or the writ of error he says -- in fact, I know I have the quote. The writ of error was the seed of -- he said, "In the development of the writ of error lay the seeds of the doctrine of judicial immunity. Randolph Block, Stump v. Sparkman and the History of Judicial Immunity. And there are cases one which they cite: Andrews v. Florida Parole Commission, which kind of reaffirms that -- the quote is: "Existence of adequate remedies for inmates including appeal and habeas corpus precludes a necessity where the advisability of doing away with the immunities that protect such officials or as within the scope of their official duties." I have three other Supreme Court cases, which again, reassert the proposition that we're suggesting to you today. And that is that the availability of a remedy to correct these errors is an element of determining how much immunity they should be given. In fact, Cleavinger v. Saxner, a U.S. Supreme Court case, which is

really referencing Butz v. Economou. It says, absolute immunity when you're talking about quasi-judicial action under executive agency, it's not absolute. It's not guaranteed. There are things that you really need to consider. Out of six, the last is: The correctability of error on appeal. And that's -- and there are five others. I'm not going to go through them right at this moment. I just want to make sure that I'm covering how we see this issue of immunity. I've certainly done it in the written response and the duty to -- one thing that we want -- one argument that we want to make is that there is a ministerial duty to provide due process. This is -- we do not have a case on this. What we have instead is just argument.

First, there are authorities in Florida that say where there are doubts as to the existence of authority, it should not be assumed. Now, Article 4, Section 9 of Florida's Constitution basically means that no one -- that no regulations touching upon wild animal life enjoys a presumption of correctness. Even -- even a judge has to ask themselves, does this interfere with FWC authorities. So it creates a question. The fact

that they were enforcing the custom and not the ordinance creates a question, creates a doubt. So this coming from Santa Rosa County versus Gulf Power Company says: "Where there are doubts as to the existence of the authority, it should not be assumed." So they can't tell us that just because we told them and had FWC contact them and tell them that they didn't have authority to do this that they need to listen. They told us -- you know, they told you that they didn't need to listen to us tell them. You know, that's fine, but here we are. And part of our argument to urge that due process is a ministerial duty. It comes to us really out of Rupp v. Bryant. It didn't have anything to do with due process but what it said was that school administrators have a ministerial duty to provide supervision for students. Now, of course, that's about their physical safety. We're talking about our legal safety. So we're saying that this guarantee of due process, which is in our State and our Federal Constitution is a ministerial duty because it's about our safety. It's about the safety of those -- those legal rights, so they have to provide that. And, you know, my 11, 30 thing is all about that. That if they prosecuted the custom

through Chapter 11, we wouldn't be here. Had they prosecuted an ordinance in the way that they did and it went through Chapter 30, we wouldn't be here. What happened was they prosecuted a custom not through Chapter 11 an available, and we believe a mandatory remedy -- we say mandatory -- I'm -- I'm -- I'm getting in my own way here. But I'm just going to go right ahead and do it. We want to emphasize that Chapter 11 was the way they should have gone particularly under this situation because it has an imperative language in it. I can't tell you that there's a case that says we have any right to the remedy or that Chapter 11 gives us any individual right in the remedy. But what it says is that when a covenants factor finds a violation he shall -- he uses the word "shall," and I understand judges can -- can fiddle with that and say that "shall" may mean maybe. But Orange County Code at Section 1-2 says, shall is imperative. That's what it says.

So we're -- we're saying that the four pillars really of our case and the four -- four spears that pierce their immunity here are Article 4, Section 9 of the Florida Constitution, which removes the presumption of correctability from any

-- any regulation that touches upon that authority. The absence -- the fact that they were enforcing a custom removed any pre-enforcement remedy. And the fact that they decided to use Chapter 30 and Chapter 11 interchangeably knowing that the appellate review of those two type orders is completely different. And with the -- any right -- any -- any way of a recoverable fee, injury that we -- that we were suffering.

THE COURT: If you need a minute to consult to make sure you covered everything that's part of this hearing, I'm happy to give you just a second if you wish.

MRS. FOLEY: Okay.

THE COURT: And then we can look at each other's notes and otherwise if you wish to reply, I'll give you time to do that, or we can see if we can move on to --

MR. FOLEY: We haven't discussed the cause of -- you know, they've said that we have not stated a cause of action.

MRS. FOLEY: (Conferring with Mr. Foley.)

MR. FOLEY: And is that what you're asking, do we want --

THE COURT: I want to make sure that you've

covered -- I've broken this down, so --

MR. FOLEY: We've only referenced the first three points.

THE COURT: Yeah, so I think the first three points really had to do with the motion to strike the amended complaint, the request for judicial notice of the Federal actions and then the motion to dismiss with prejudice that were your motions and then tagged on with Defendants, Smith, et cetera, as Mr. Oxford had indicated. So as to those portions of the noticed hearing, have you completed your, sort of, rebuttal, I guess, to what their oral statements were; and is it time to go back to them for their brief reply, or is there something that you want to make sure that you have covered or just this?

MR. FOLEY: Sure, there is. They say that we do not state a cause of action and abuse of process, that the BZA was just voting. But that's not an abuse of process. What we -- again, you know, we have our 11, we have our 30. You know, they use Chapter 11 to do what they should have done for Chapter 30, that's our abuse of process argument.

THE COURT: Okay. Well, I think I've heard

that one.

MR. FOLEY: And conversion, you know, they say that it has to be actual disposition, we say it has to be just -- what do you call it? Constructive disposition, and that's exactly what the order did. It stopped us from doing business. So that stays conversion. Conversion basically states civil theft.

And then in addition, as we've said in our written response there are various other ways in which we have alleged in our complaints. And that is again, what we're here for, whether or not the complaint survives so we can move on.

THE COURT: Yes, sir, okay. Do you wish to use any time in reply, or do you wish for me to move forward to the other folks that are here?

MR. ANGELL: Since we have a court reporter here very briefly if you don't mind, Your Honor.

THE COURT: Yes, sir.

MR. ANGELL: This is my only motion today is this: The Textron case that talks about the Federal question of jurisdiction where the Federal question was not frivolous it was resolved on the merits and then the Court declined to retain supplemental jurisdiction over the State claims.

It does not speak to a case where the Federal claims have no business in Federal Court in the first place, that's critically distinguishable there.

The takings issue that we have here from the Seventh Circuit, the takings issue itself is a Federal question. The Federal Court offered in effect, basically invited a takings claim in the first order -- by the way, I misspoke. It was not Judge Antoon, it was Judge Dalton in the middle district here. And his first order said this might be a takings claim that we have. And then the second order said I told you it might have been a takings claim. You guys decided not to bring one, therefore, it is res judicata because as the Court knows, res judicata applies to all claims that were or could have been brought in a prior action. That was a Federal cause of action and all Federal claims were dismissed with prejudice. So that's a not a basis to survive dismissal.

As far as this custom versus ordinance argument it's a little perplexing to me. This case has very much been focused on the interpretation of the local ordinances and vis-à-vis the State Constitution of Judge Dalton's first detailed -- or

I guess the second detailed order. It explains and walks through in great detail how all the ordinances work with each other and how they apply here and how His Honor found that they were unconstitutional. But, of course, that ruling has not ever been properly found by a State Court. It remains, and still is today, Mr. Foley's opinion that the ordinance violates the State Constitution, that has never been found. So we talk about the move to the immunities. To think that a judge, which is really the same in Florida as a quasi-judicial officer, enforces a statute, which later is deemed unconstitutional and is subject to personal liability for a business being shut down or other civil inconvenience is really offensive to our whole system of civil justice and even criminal justice for that matter and the whole judicial branch I would submit.

Finally, as far as abuse of process, I think where Mr. Foley misconstrues that term is that his definition of abuse of process is what his view is of misapplication of the law, misconstruction of the law. Abuse of process is again, using something for which the law was never intended to be used for in the first place, which is, like I

said, an officer arresting a girlfriend because he caught her cheating or some crazy situation like that.

I think with that, I will pass it over to my colleagues. And thank you very much for your time, Your Honor.

THE COURT: Okay. Thank you.

MR. OXFORD: And, Your Honor, in reply and in respect to the Foleys, I'll just try to give a minute's worth of overview.

In essence, the same arguments have been given to my clients as the zoning enforcement officials, employees to Mr. Angell's clients as essentially the zoning appeal body to the Ninth Circuit Court on petition for cert, then to the U.S. District Court in a Federal lawsuit that combined Federal and State law claims that went up to the Eleventh Circuit, that went up to the United States Supreme Court. Your Honor, these same arguments have been made at everybody for ten years. They had no merit then, they were found to have no merit in detail, and they have no merit now. Growing and wildlife, and they call it wildlife. They talk about the Fish and Wildlife Commission throughout, growing wildlife for profit

in a residential area is time-honored zoning. And they lost at every level. What is that six levels that I've named. This should stop it, Your Honor. Res judicata applies, statute of limitations apply. They admit in their complaint that my clients, Mr. Angell's clients, were all acting within their official capacities. Sovereign immunity applies. Absolute judicial immunity applies. It has to stop somewhere and we respectfully submit that today should be the day.

THE COURT: Mr. Turner, we haven't given you a whole lot of time left. If your arguments are more, you need for or you wish to have more time, I can reset you. If you wish to utilize the little bit of -- we've got about 15 minutes left if you think you can summarize your oral portion in half that time, and I get half that time to the Foleys, I can do that.

MR. TURNER: I'm going to need more time. In fact, I agreed to tack my motion onto this hearing if we could get it set.

THE COURT: Okay. Well, I think that answers that question. So what I'd like to do is to schedule a second hour so that you have the floor at that point, and then we can take those arguments

next. I'll keep my decision under advisement at this point until I -- I want to hear everything before I perform my written work. And so we'll get that scheduled as soon as possible with my calendar.

MR. TURNER: Thank you, Your Honor.

THE COURT: Okay.

MR. FOLEY: Can I clarify then? Mr. Turner will have an opportunity before you -- before you reach a conclusion on the --

THE COURT: Yes. So I'll see you all. We'll set a second hour for it, and I think we should be able to wrap it up at that time.

MR. ANGELL: Thank you, Your Honor.

MR. OXFORD: Thank you very much.

MRS. FOLEY: Thank you.

THE COURT: You're very welcome. Enjoy your evening, and I hope that you stay safe in the storm.

(The proceedings concluded at 4:47 p.m.)

CERTIFICATE OF REPORTER

STATE OF FLORIDA:
COUNTY OF ORANGE:

I, Danette V. Lamb, Stenographic Shorthand Reporter, certify that I was authorized to and did stenographically report the foregoing proceedings and that the foregoing pages are a true and complete record of my stenographic notes.

I further certify that I am not a relative or employee of any of the parties, nor am I a relative or counsel connected with the parties' attorneys or counsel connected with the action, nor am I financially interested in the outcome of the action.

DATED this 7th day of November, 2017.

Danette V. Lamb

Danette V. Lamb,
Stenographic Court Reporter

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

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

Defendants
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.

2016-CA-007634-O

APPENDIX B

ORDER OF OCTOBER 25, 2017

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

DAVID W. FOLEY and JENNIFER T. FOLEY,

CASE NO.: 2016-CA-007634-O

Plaintiffs,

v.

ORANGE COUNTY, PHIL SMITH, CAROL HOSSFIELD, MITCH GORDON, ROCCO RELVINI, TARA GOULD, TIM BOLDIG, FRANK DETOMA, ASIMA AZAM, RODERICK LOVE, SCOTT RICHMAN, JOE ROBERTS, MARCUS ROBINSON, RICHARD CROTTY, TERESA JACOBS, FRED BRUMMER, MILDRED FERNANDEZ, LINDA STEWART, BILL SEGAL, and TIFFANY RUSSELL,

Defendants.
_____/

ORDER GRANTING "THE OFFICIAL DEFENDANTS' MOTION TO STRIKE THE AMENDED COMPLAINT, RENEWED REQUEST FOR JUDICIAL NOTICE, AND MOTION TO DISMISS THIS ACTION WITH PREJUDICE"
and
ORDER GRANTING "DEFENDANTS PHIL SMITH, ROCCO RELVINI, TARA GOULD, TIM BOLDIG, AND MITCH GORDON'S MOTION TO DISMISS/MOTION TO STRIKE"

THIS MATTER came before the Court for a hearing on September 6, 2017 upon the "The Official Defendants' Motion to Strike the Amended Complaint, Renewed Request for Judicial Notice, and Motion to Dismiss This Action with Prejudice," filed on March 3, 2017, and the "Defendants Phil Smith, Rocco Relvini, Tara Gould, Tim Boldig, and Mitch Gordon's Motion to Dismiss/Motion to Strike," filed on March 7, 2017. The Court, having considered the

Motions, case law, and arguments of counsel from both parties, and otherwise being duly advised in the premises, finds as follows:

RELEVANT FACTS AND PROCEDURAL HISTORY

A detailed history of the instant matter merits discussion, as it factors into the Court's ultimate findings. The Plaintiffs are commercial toucan farmers. A citizen complained of the Plaintiffs' toucans, and Orange County Code Enforcement began an investigation. A zoning manager determined that the Plaintiffs were in violation of the Code. The issue then went to a public hearing, held by the Board of Zoning Adjustment ("BZA"), which continued to find that the Plaintiffs were in violation of the Code. The Plaintiffs appealed to the Board of County Commissioners ("BCC"), who affirmed the BZA's determination. The Plaintiffs then petitioned for a writ of certiorari to the Orange County Ninth Judicial Circuit Court, which ultimately found that the zoning manager, BZA, and BCC properly interpreted the relevant Code, thus denying their petition.

The Plaintiffs filed an action in the Middle District of Florida against the County, the Officials,[1] the BZA members, and other county employees. The District Court ultimately determined that the relevant Code provisions were unconstitutional under the Florida Constitution, but nevertheless, the Plaintiffs' claims for due process violations, equal protection violations, compelled speech, restraints on commercial speech, and unreasonable searches or seizures failed.[2] *See Foley v. Orange County*, 2013 WL 4110414 (M.D. Fla. August 13, 2013).

The Plaintiffs appealed to the Eleventh Circuit, which ultimately vacated the Middle District's judgment and remanded the case for the court to dismiss without prejudice for lack of

[1] "The Officials" refers to the members of the BZA and the BCC, who were named both in their individual and official capacities. They include the following Defendants: Asima Azam, Fred Brummer, Richard Crotty, Frank Detoma, Mildred Fernandez, Teresa Jacobs, Roderick Love, Scott Richman, Joe Roberts, Marcus Robinson, Tiffany Russell, Bill Segal, and Linda Stewart.

[2] That action contained many of the same arguments that are raised in the instant action.

subject matter jurisdiction. *See Foley v. Orange County*, 638 Fed. Appx. 941, 946 (11th Cir. 2016). In so doing, the court concluded that the Plaintiffs' claims either had no plausible foundation, or were proscribed by previous Supreme Court decisions. *Id.* at 945-46.

The Plaintiffs then petitioned the Supreme Court for a writ of certiorari, but it was summarily denied. *See Foley v. Orange County, Fla.*, 137 S. Ct. 378 (2016).

On August 25, 2016, the Plaintiffs filed their initial Complaint in this Court. They amended their Complaint on February 25, 2017 to include the following counts: declaratory and injunctive relief proscribing the enforcement of the relevant Code sections (Counts I and II); negligence, unjust enrichment, and conversion (Count III); taking (Count IV); abuse of process to invade privacy and rightful activity, and conversion (Count V); civil theft (Count VI); and due process (Count VII). All of these counts purport to stem from the administrative proceeding that was held on February 23, 2007 and became final after appeal on February 19, 2008.

On September 6, 2017, the Court held a hearing on "The Official Defendants' Motion to Strike the Amended Complaint, Renewed Request for Judicial Notice, and Motion to Dismiss This Action with Prejudice," filed on March 3, 2017, and the "Defendants Phil Smith, Rocco Relvini, Tara Gould, Tim Boldig, and Mitch Gordon's Motion to Dismiss/Motion to Strike," filed on March 7, 2017. This Order follows.

ANALYSIS AND RULING

"A motion to dismiss tests whether the plaintiff has stated a cause of action." *Bell v. Indian River Memorial Hosp.*, 778 So. 2d 1030, 1032 (Fla. 4th DCA 2001). Furthermore, "[w]hen determining the merits of a motion to dismiss, the trial court's consideration is limited to the four corners of the complaint, the allegations of which must be accepted as true and considered in the light most favorable to the nonmoving party." *Id.*; *see, e.g., Solorzano v. First*

Union Mortg. Corp., 896 So. 2d 847, 849 (Fla. 4th DCA 2005); *Taylor v. City of Riviera Beach*, 801 So. 2d 259, 262 (Fla. 4th DCA 2001); *Samuels v. King Motor Co. of Fort Lauderdale*, 782 So. 2d 489, 495 (Fla. 4th DCA 2001); *Bolz v. State Farm Mut. Ins. Co.*, 679 So. 2d 836, 837 (Fla. 2d DCA 1996) (indicating that a motion to dismiss is designed to test the legal sufficiency of a complaint, not to determine issues of fact).

"A motion to dismiss a complaint based on the expiration of the statute of limitations should be granted only in extraordinary circumstances where the facts constituting the defense affirmatively appear on the face of the complaint and establish conclusively that the statute of limitations bars the action as a matter of law." *Alexander v. Suncoast Builders, Inc.*, 837 So. 2d 1056, 1057 (Fla. 3d DCA 2002); *see also Pines Properties, Inc. v. Tralins*, 12 So. 3d 888, 889 (Fla. 3d DCA 2009).

In the instant matter, the Plaintiffs cause of action accrued when the BZA's determination became final on February 19, 2008, nine years prior to this action's filing. The Plaintiffs' Complaint must be dismissed, as it can be determined from the face of the amended Complaint that all of the causes of action fall outside of their respective limitations period.[3] *See* § 95.11(3)(p), Fla. Stat. (2016) (stating that any action not specifically provided for in the statute is subject to a four-year limitations period, which encompasses declaratory actions and alleged due process violations (Counts I, II, and VII)); § 95.11(3)(a), Fla. Stat. (2016) (indicating that a negligence action has a four-year limitations period (Count III)); § 95.11(3)(h), Fla. Stat. (2016) (specifying that there is a four-year limitations period to bring a claim for a taking (Count IV)); §

[3] The Plaintiffs attempt to circumvent the limitations period by arguing that 28 U.S.C. § 1367(d) "tolls the limitations period for thirty days after dismissal of any supplemental claims related to those asserted to be within the original jurisdiction of the federal court." However, as the Defendants point out in their Motions, section 1367(d) only applies where a federal court enjoyed original jurisdiction over the case, and if the initial assertion of federal jurisdiction is found to be insufficient, then the section does not apply and the party does not get the benefit of the tolling. *See Ovadia v. Bloom*, 756 So. 2d 137, 140 (Fla. 3d DCA 2000). Because the Eleventh Circuit determined that the Plaintiffs' claims had no plausible foundation, section 1367(d) is inapplicable to the instant matter.

95.11(3)(o), Fla. Stat. (2016) (stating that intentional torts, which include abuse of process and conversion, are subject to a four-year limitations period (Count V)); § 772.17, Fla. Stat. (2016) (stating that civil theft has a five-year limitations period (Count VI)).

Accordingly, the following is hereby **ORDERED AND ADJUDGED:**

1. "The Official Defendants' Motion to Strike the Amended Complaint, Renewed Request for Judicial Notice, and Motion to Dismiss This Action with Prejudice" is **GRANTED.**
2. The "Defendants Phil Smith, Rocco Relvini, Tara Gould, Tim Boldig, and Mitch Gordon's Motion to Dismiss/Motion to Strike" is **GRANTED.**
3. The Plaintiffs' Amended Complaint, filed February 25, 2017, is **DISMISSED with prejudice as to the following Defendants: Frank Detoma, Asima Azam, Roderick Love, Scott Richman, Joe Roberts, Marcus Robinson, Richard Crotty, Teresa Jacobs, Fred Brummer, Mildred Fernandez, Linda Stewart, Bill Segal, and Tiffany Russell.**

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on this 24 day of October, 2017.

HEATHER L. HIGBEE
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on Oct 25, 2017, a true and accurate copy of the foregoing was e-filed using the Court's ECF filing system, which will send notice to all counsel of record.

Judicial Assistant

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

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

Defendants
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.

2016-CA-007634-O

APPENDIX C

MEMORANDUM OF LAW REGARDING THE APPLICATION OF 28 USC §1367 TO *FOLEY ET UX V. ORANGE CTY. ET AL*

SUMMARY

October 25, 2017, the Ninth Circuit Court, relying on Ovadia v. Bloom, 756 So.2d 137 (3rd DCA 2000), granted the *employees*'[1] motion to dismiss, and

[1] The *employees* include: Tim Boldig, Mitch Gordon, Tara Gould, Carol Hossfield, Rocco Relvini, and Phil Smith.

dismissed the Foleys' complaint with prejudice as to the *officials*,[2] on grounds that 28 USC §1367, does not toll the statute of limitations "if the initial assertion of federal jurisdiction is found to be insufficient." The Court's unprecedented decision to apply *Ovadia* – a case involving diversity jurisdiction – to a case involving federal question jurisdiction conflicts irreconcilably with the bright line drawn by *Krause v. Textron Financial Corp*., 59 So.3d 1085 (Fla. 2011).

This memorandum provides a close reading of *Krause* (a case, like *Foley* involving federal question jurisdiction) and *Ovadia* (a case involving diversity jurisdiction), and explores the legal principles behind these two very different decisions. As will be shown below, it is the difference between "federal question" jurisdiction and "diversity" jurisdiction that explains the decision in *Krause* to apply the tolling provision in 28 USC §1367, and the decision in *Ovadia* not to do so. And it is this difference that makes *Krause* applicable to *Foley et ux* and requires this Court to rehear, reconsider, and reverse its decision.

This memorandum begins with the text of 28 USC §1367, reviews the Eleventh Circuit's decision in *Foley et ux v. Orange County et al*, and compares the application of 28 USC §1367 in *Krause v. Textron*, *Scarfo v. Ginsberg*, *Ovadia v. Bloom*, federal courts in Florida and in other jurisdictions.

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[2] The *officials* include: Asima Azam, Fred Brummer, Richard Crotty, Frank Detoma, Mildred Femandez, Teresa Jacobs, Roderick Love, Scott Richman, Joe Roberts, Marcus Robinson, Tiffany Russell, Bill Segal, and Linda Stewart.

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I. 28 USC §1367 – The plain text does not bar application to the Foleys' claims.

The first step in determining the proper application of 28 USC §1367, is to review its plain text.

The federal supplemental jurisdiction statute, 28 USC §1367, provides that a federal district court may exercise supplemental jurisdiction over certain claims, and it governs when the court may do so. The statute provides in pertinent part:

> **§ 1367. Supplemental Jurisdiction**
>
> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.
>
> (b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.
>
> (c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(Added Pub. L. 101–650, title III, § 310(a), Dec. 1, 1990, 104 Stat. 5113.)

II. The Eleventh Circuit dismissed without prejudice for lack of federal question jurisdiction per *Bell v. Hood*.

The second step in determining the proper application of 28 USC §1367 to the federal decision preceding the instant case is to review that federal decision.

The opinion of the Eleventh Circuit opens by saying, "Because we find that these federal [constitutional] claims on which the District Court's federal-question jurisdiction was based are frivolous under *Bell v. Hood*, 327 US 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946), we vacate the District Court's orders."

After a brief review of the case's procedural history the Eleventh Circuit pinpoints the words in Bell – *insubstantial and frivolous* – that anchor its analysis:

> Where a District Court's jurisdiction is based on a federal question, "a suit may sometimes be dismissed . . . where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction *or where such a claim is wholly insubstantial and frivolous*." Bell, 327 U.S. at 682-83, 66 S. Ct. at 776 (*emphasis added*).

The body of the opinion reviews each of the constitutional claims the Foleys raised in the district court[3] – substantive due process, class-of-one equal-protection, compelled speech, commercial speech, search and seizure – and concludes its review of each claim by stating, "Thus, this claim lacks merit."

By citation to Bell, 327 U.S. at 682-83, the Eleventh Circuit concluded that the District Court lacked federal-question jurisdiction and consequently "did not have jurisdiction to determine the state-law claims presented by the Foleys."[4]

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[3] The Eleventh Circuit opinion fails to dispose of the federal RICO claim the Foleys raised in the district court – an independent source of federal jurisdiction – and consequently does not thoroughly dispose of the jurisdiction exercised by the district court.

[4] This conclusion is consistent with 28 USC §1367(c)(3), and with Mine Workers v. Gibbs, 383 US 715, 726 (1966), which held: "Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law.[15] Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well."

> Note 15 of Gibbs states: "Some have seen this consideration as the principal argument against exercise of pendent jurisdiction. Thus, before

Finally, the Eleventh Circuit vacated the judgment of the District Court and remanded "with instructions that the court dismiss this case without prejudice for lack of subject matter jurisdiction."

III. Per *Bell*, and its antecedents, a dismissal of a federal question as *insubstantial* or *frivolous* is not a denial of original jurisdiction.

The third step in determining the proper application of 28 USC §1367 to the instant case is to review the authority cited by the Eleventh Circuit – Bell v. Hood.

The passage from Bell the Eleventh Circuit chose to quote – "a suit may sometimes be dismissed . . . *where such a claim is wholly insubstantial and frivolous*" – is followed in Bell by this statement and citation:

> The accuracy of calling these dismissals jurisdictional has been questioned. The Fair v. Kohler Die Co., [228 U.S. 22, 25 (1913)]. But cf. Swafford v. Templeton, [185 US 487 (19020].

The question then is whether it is accurate to call a dismissal of a *frivolous* federal claim a dismissal for lack of jurisdiction, or a dismissal on the merits. The

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> Erie, it was remarked that 'the limitations [on pendent jurisdiction] are in the wise discretion of the courts to be fixed in individual cases by the exercise of that statesmanship which is required of any arbiter of the relations of states to nation in a federal system.' Shulman & Jaegerman, supra, note 9, at 408. In his oft-cited concurrence in Strachman v. Palmer, 177 F. 2d 427, 431 (C. A. 1st Cir. 1949), Judge Magruder counseled that "[f]ederal courts should not be overeager to hold on to the determination of issues that might be more appropriately left to settlement in state court litigation," at 433. See also Wechsler, supra, note 9, at 232-233; Note, 74 Harv. L. Rev. 1660, 1661 (1961); Note, supra, note 11, at 1043-1044."

court in *The Fair v. Kohler Die at 25,* held that it was jurisdictional only *in form*, but was in fact on the merits:

> [I]f the claim of [federal] right were frivolous, the case might be dismissed… [but] jurisdiction would not be denied*, except possibly in form*. *Deming v. Carlisle Packing Co.*, 226 U.S. 102, 109 [(1912)]. [*Emphasis* added.]

The federal courts' rationale for conflating a dismissal of a *frivolous* federal question with a dismissal on the merits *in the form* of a dismissal for lack of subject matter jurisdiction is explained *Deming v. Carlisle Packing Co.*, 226 U.S. 102, 109 (1912), as follows:

> [A]lthough a Federal question was raised below in a formal manner, that question, when examined with reference to the averments of fact upon which it was made to depend, is one which has been so explicitly decided by this court as to foreclose further argument on the subject and hence to cause the Federal question relied upon to be devoid of any substantial foundation or merit. . . . It is likewise also apparent from the analysis previously made that even if the formal raising of a Federal question was alone considered on the motion to dismiss, and therefore the unsubstantial nature of the Federal question for the purposes of the motion to dismiss were to be put out of view, the judgment [would be the same]. This follows, since it is plain that as the substantiality of the claim of Federal right is the matter upon which the merits depend, and that claim being without any substantial foundation, the motion … would have to be granted …

In sum, *merit* and *jurisdiction* in this case are coterminous. Here, on defendants' motions for summary judgment the federal courts in *Foley et ux v. Orange County et al* exercised original federal question jurisdiction to determine that as a matter of law and fact the federal [constitutional] questions did not *merit* further exercise of

jurisdiction. No Florida or federal court has held that the tolling provisions of 28 USC §1367 do not apply to a case in that posture.

IV. *Krause v. Textron* clearly held that §1367 applies "to claims commenced in federal court but later dismissed for lack of federal subject matter jurisdiction."

The fourth step in determining the proper application of 28 USC §1367 is to review the Florida precedent applicable to a case dismissed like the Foleys' for lack of federal question jurisdiction – *Krause v. Textron*.

Florida's Supreme Court granted review of the Second District's decision in *Krause v. Textron Financial Corp.*, 10 So.3d 208 (Fla. 2d DCA 2009), on the ground that it expressly and directly conflicted with the Fourth District's decision in *Scarfo v. Ginsberg*, 817 So.2d 919 (Fla. 4th DCA 2002).

The question addressed by the Supreme Court in *Krause v. Textron Financial Corp.*, 59 So.3d 1085 (Fla. 2011), was whether 28 USC §1367(d), tolls a state statute of limitations after a state law claim is dismissed without prejudice by a federal appellate court determination that the lower (bankruptcy) court lacked subject matter jurisdiction – precisely the posture of the Foleys' case. The court decided limitations are tolled where dismissal is for lack of subject matter jurisdiction.

A. Facts and Procedural Background

June 15, 2000, David Bautsch and Andrew J. Krause filed a complaint in an adversary proceeding in a bankruptcy case between Twin Eagles Golf and Country Club and its primary financier Textron Financial Corporation. Bautsch and Krause sought to recover monies owed them by Twin Eagles for the resale of their golf membership.

Bautsch and Krause's complaint asked the court to impose a constructive trust against any proceeds realized from Twin Eagle's resale of their golf membership. On Textron's motion for summary judgment the bankruptcy court declined to do so.

Bautsch and Krause appealed the summary judgment to the United States District Court for the Middle District of Florida, in its appellate capacity pursuant 28 USC §158(a)(1).

On appeal Textron argued that the District Court "lacked appellate jurisdiction because the Bankruptcy Court lacked subject matter jurisdiction." *David Bautsch and Andrew J. Krause v.Textron Financial Corporation*, No. 2: 05-cv-317-FtM-29DNF (M.D. Fla. Jan. 12, 2006). The District Court, however, found that Bautsch and Krause had "alleged that the proceeding was 'a core proceeding pursuant 28 USC §1334,'" and held that "[t]his was sufficient to allege jurisdiction in the Bankruptcy Court." *Id*. The District Court further found that the bankruptcy court

ultimately established that the proceeding was not a "core proceeding" as required by 28 USC 157, and only then did the bankruptcy court lose subject matter jurisdiction. *Id*.

The District Court then directed the bankruptcy court to vacate its summary judgment entered in favor of Textron and dismiss without prejudice the adversary proceeding as to Textron.

Less than a month later, Bautsch and Krause filed suit against Textron in the Circuit Court for the Twentieth Judicial Circuit in and for Collier County. Bautsch and Krause again sought imposition of a constructive trust on any funds Textron received from Twin Eagles.

The Collier County Circuit Court held that section 28 USC §1367(d) did not toll limitations on the constructive trust claim because the federal district court, sitting in its appellate capacity, had determined that the bankruptcy court lacked subject matter jurisdiction over that claim. The Second District Court of Appeals affirmed the Circuit Court.

Bautsch and Krause then sought review in Florida's Supreme Court, alleging express and direct conflict with the Fourth District's decision in *Scarfo v. Ginsberg*, 817 So.2d 919 (Fla. 4th DCA 2002).

B. The Supreme Court's Analysis

On review of *Krause*, Florida's Supreme Court first applied the standard rules of statutory interpretation to 28 USC §1367, and held:

> The plain text of the federal statute does not, by its terms, bar the application of the tolling provision where a claim is dismissed for lack of federal subject matter jurisdiction. Rather, the savings protection of section 1367(d) applies "for any claim asserted under subsection (a)." The plain and unambiguous language of section 1367(d) thus permits the application of the tolling provision to claims commenced in federal court but later dismissed for lack of federal subject matter jurisdiction.

The Supreme Court expressly approved the decision of the Fourth District in *Scarfo v. Ginsberg*, 817 So.2d 919 (Fla. 4th DCA 2002), and emphatically concluded:

> Our precedent concerning statutory interpretation also supports the Fourth District's interpretation of section 1367(d) in *Scarfo*, where the court concluded that the dismissal of a federal claim for lack of subject matter jurisdiction did not bar the application of section 1367(d) to toll the state limitations period for claims refiled in state court.

V. *Scarfo v. Ginsburg* held that the success of a federal question is irrelevant because determination of that issue requires the federal court to exercise its original jurisdiction.

The issue in *Scarfo v. Ginsberg*, 817 So.2d 919 (4th DCA 2002), was whether the filing of state law claims in federal court pursuant 28 USC §1367, operated to toll the statute of limitations during the pendency of a federal action ultimately dismissed because the predicates of the alleged federal question were not satisfied. The court determined limitations were tolled on unsuccessful federal question claims.

A. Facts and Procedural Background

Elaine Scarfo filed suit in federal district court alleging a federal claim under Title VII of the Civil Rights Act of 1964 and state common law tort claims of battery, intentional infliction of emotional distress, and invasion of privacy.

The district court granted a summary judgment against Scarfo on the federal claims, holding that none of the defendants could be liable under that statute, and dismissed Scarfo's state law claims without prejudice. The district court's decision was affirmed on appeal.

B. Fourth District Analysis

Significantly in *Scarfo* – a post-*Ovadia* decision – the Fourth District drew the distinction essential here between "federal question" and "diversity" jurisdiction: "In this case plaintiff based subject matter jurisdiction in federal court on federal question grounds, rather than on diversity grounds." The Court then went on to note that where a "federal question" has been alleged, it is irrelevant whether the requirements of that "federal question" are ultimately satisfied because resolution of that issue requires the federal court to exercise its original "federal question" jurisdiction. The Fourth District held:

> [Federal question claims] are often joined with state law claims arising under a common nucleus of operative fact. Consequently, Congress also created section 1367 to allow such related state law claims to be joined with the federal claim in a federal court. At the same time, section 1367(d) provides for a non-prejudicial dismissal of the related state law claims when the federal claim is adjudicated before trial. That is, section 1367(d) tolls the

> running of any applicable state statute of limitations on the related state law claims during the pendency of the federal claim. The purpose of this tolling provision is undoubtedly to allow claimants to pursue their federal claim in a federal court without cost to their state law claims, should the federal claim prove unsuccessful.
>
> Section 1367(d) provides for a tolling of state law limitations on any state law claim asserted in federal court under section 1367(a). The only requirements are that the claim be asserted under section 1367(a)… The mere fact that the federal court of appeals saw the question of [liability] as an issue of subject matter jurisdiction does not change the text of section 1367.

In sum, limitations are tolled per 28 USC §1367, even when the federal action is ultimately dismissed because the predicates of the alleged federal question are not satisfied.

VI. The rule in *Ovadia v. Bloom*, constrained by its reference to *Wisconsin Dept. of Corrections v. Schacht*, must be understood as applicable only to diversity jurisdiction and not federal question jurisdiction.

In Ovadia v. Bloom, 756 So.2d 137 (3rd DCA 2000), the Third District had to decide whether the tolling provisions of 28 USC §1367, applied to state claims asserted in federal court on diversity grounds if the federal court dismissed the case for lack of diversity. The court decided limitations were not tolled where the absence of diversity was on the face of the complaint.

A. Facts and Procedural Background

February 3, 4, and 5, 1993, WTVJ-TV, broadcast a report on "Dangerous Doctors" which featured Dr. Ovadia. September 1994, Dr. Ovadia filed a common law action in federal court against the station and its reporters. October 1994, the

defendants filed an answer. On February 7, 1995, two days after the expiration of the two-year statute of limitations, the defendants filed a motion for judgment on the pleadings asserting the federal court lacked subject matter jurisdiction over the case because there was a *lack of complete diversity* on the face of the complaint. The court granted defendants' motion. Shortly thereafter, Dr. Ovadia filed a complaint for the same common law causes in the Miami-Dade County Circuit Court. The defendants filed a motion for surmmary judgment on statute of limitations grounds. The motion was granted. Dr. Ovadia appealed to the Third District.

B. Third District Analysis

The Third District held that 28 USC §1367 did not toll limitations because the presence of non-diverse defendants in the federal action destroyed jurisdiction at inception. The court said:

> Under the plain language of [28 USC §1367], the limitations period is not tolled because the federal court never had original jurisdiction over Dr. Ovadia's action. Any arguable jurisdiction was based on diversity, and the presence of non-diverse defendants in the action destroyed jurisdiction on that basis. *See Wisconsin Dept. of Corrections v. Schacht*, 524 U.S. 381, 118 S.Ct. 2047, 141 L.Ed.2d 364 (1998) (only complete diversity of citizenship among parties permits original jurisdiction over the case); *Finley v. Higbee Co.*, 1 F.Supp.2d 701, 702 (N.D.Ohio 1997). Under section 1367, claims against a non-diverse defendant cannot be considered supplemental jurisdiction. *See Dieter v. MFS Telecom, Inc.*, 870 F.Supp. 561 (S.D.N.Y.1994). Hence, this statute does not toll the limitations period for Dr. Ovadia's claims.

The Third District applied this rule to "diversity" jurisdiction only and did not in anyway suggest its application to "federal question" jurisdiction. In fact, by reference to *Wisconsin Dept. of Corrections v. Schacht*, 524 U.S. 381 (1998), the Third District implies its rule does not apply to "federal question" jurisdiction. The Supreme Court in *Wisconsin Dept. of Corrections v. Schacht* clarified the court's distinct duties on "federal question" and "diversity" jurisdiction – the former must be litigated, the later may be determined on the face of the complaint.[5]

In sum, *Ovadia* clearly holds that where the absence of diversity is on the face of a federal complaint, the tolling provisions of 28 USC §1367 do not apply to save the asserted state claims. However, no court has applied *Ovadia* to any case alleging federal question jurisdiction.

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[5] The Supreme Court in *Wisconsin Dept. of Corrections v. Schacht at 389*, distinguished "federal question" jurisdiction from "diversity" jurisdiction as follows:

> [A federal question] case differs significantly from a diversity case with respect to a federal district court's original jurisdiction. The presence of the nondiverse party automatically destroys original jurisdiction: No party need assert the defect. No party can waive the defect or consent to jurisdiction. *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U. S. 694, 702 (1982); People's Bank v. Calhoun, 102 U. S. 256, 260-261 (1880). No court can ignore the defect; rather a court, noticing the defect, must raise the matter on its own. *Insurance Corp. of Ireland, supra, at 702*; *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U. S. 379, 382 (1884). [Emphasis added.]

VII. Federal Courts in Florida apply §1367 per *Krause* to even "frivolous" federal question claims.

The cases below make clear that federal courts in Florida consider 28 USC §1367 to toll limitations even where claims are dismissed for lack of subject matter jurisdiction, or as *frivolous*.[6]

A. *Boatman v. Fortenberry,* No. 3:17cv29/RV/EMT (ND Fla., Pensacola 2017)

Citing Kause v. Textron, the Federal District Court of the Northern District of Florida, after dismissing various federal claims as either a failure to state a claim, Heck-barred, or *frivolous*, expressly dismissed Boatman's supplemental state law claims "without prejudice to his pursuing them in state court," per 1367(d).

B. *Farrest v. KNT Dist.'s, Inc.,* 2:16-cv-111-FtM-99MRM (MD Fla., Ft. Myers 2016)

The Federal District Court of the Middle District of Florida dismissed all federal claims for lack of subject matter jurisdiction but at †3 expressly held that 28 USC §1367(d), tolled limitations on supplemental state claims.

C. *Holley v. Bossert,* No. 3:15cv389/LAC/EMT (ND Fla., Pensacola 2016)

Citing Kause v. Textron, the Federal District Court of the Northern District of Florida, after dismissing Holley's federal claims for failure to state a cause of

[6] Federal courts in other states reach the same conclusion: *Graves v. Goodnow Flow Ass'n, INC.*, No. 8:16-CV-1546 (ND New York 2017); *Parker v. UGN INC.,* No. 2:13 CV 420 (ND Indiana 2016); *Thomas v. Buckner,* No. 2:11-CV-245-WKW (MD Alabama 2016).

action expressly dismissed supplemental state law claims "without prejudice to his pursuing them in state court," per 1367(d).

D. *Myers v. Watkins*, No. 5:12cv259/MW/EMT (ND Fla., Panama City 2015)

Citing Kause v. Textron, the Federal District Court of the Northern District of Florida expressly held that "Myer's pursuit of any state law claim in state court would not be prejudiced" by its dismissal of his federal claims for failure to exhaust administrative remedies.

E. *Brewer v. US Marshalls Courthouse Security*, No. 3:15cv497/MCR/EMT (ND Fla., Pensacola 2015)

Citing Kause v. Textron, the Federal District Court of the Northern District of Florida expressly held that "Brewer's pursuit of any state law claim in state court would not be prejudiced" by its dismissal of his federal claims as *frivolous*.

VIII. Other Jurisdictions without the generosity of state "savings statutes" apply §1367 to unsuccessful assertions of federal question jurisdiction.

Many states generously provide "savings statutes" which extend limitations beyond the 30 day grace period of 28 USC §1367 regardless the disposition of the case in federal court.[7] The majority of cases in the high courts of other states

[7] Examples include: Arizona Rev.Stat. Ann. § 12–504(A); Georgia Code Ann. § 9–2–61(a); Iowa Code § 614.10; Tennessee Code Ann. § 28–1–105(a); Virginia Code Ann. § 8.01–229(E)(3); Montana Code Ann. § 27–2–407; New York C.P.L.R. § 205(a); Okalahoma Title 12, § 96; Oregon Rev.Stat. Ann. §

involving 28 USC §1367 resolve questions involving either the "savings statutes" of their respective states or the question currently before the US Supreme Court in *Artis v. District of Columbia*, 137 S. Ct. 1202 (2017) – whether §1367(d) entirely suspends limitations while the federal suit is pending, or whether limitations continue to run and §1367(d) merely provides a 30 days grace period after dismissal. Consequently it is difficult to readily determine how these states deal with the issue in *Foley et ux v. Orange Coutny et al*.

Nevertheless, the high court of the District of Columbia in *Stevens v. Arco Management*, 751 A. 2d 995, 998 (DC Court of Appeals 2000) reached the same conclusion as Florida's Supreme Court in *Krause v. Textron*. In *Stevens v. Arco Management*, on the question of the application of 28 USC §1367 to state claims related to federal claims dismissed for lack of subject matter jurisdiction, the DC Court of Appeals held:

> The language of §1367(d) does not require a successful assertion of federal jurisdiction. Moreover, the subsection does not differentiate among the possible reasons for dismissal, whether it be on the merits, or for jurisdictional reasons.

CONCLUSION

This Court's decision to apply *Ovadia* to a case involving federal question jurisdiction has no precedent or support in Florida or federal courts, and directly

---

12.220(1); Pennsylvania Cons.Stat. Ann. § 5535(a)(2)(ii); Rhode Island Gen. Laws Ann. § 9–1–22; Nebraska Rev.Stat. Ann. § 25–201.01(2).

conflicts with *Krause v. Textron Financial Corp.*, 59 So.3d 1085 (Fla. 2011). The Court should reconsider, rehear, and reverse its decision on limitations in *Foley et ux v. Orange County et al*.

PRAYER

WHEREFORE DAVID AND JENNIFER FOLEY MOVE THE COURT TO RECONSIDER AND REHEAR ITS ORDER OF OCTOBER 24, 2017.

CERTIFICATE OF SERVICE

Plaintiffs certify that on November 9, 2017, the foregoing was electronically filed with the Clerk of the Court using the Florida Courts' eFiling Portal, which will send notice of filing and a service copy of the foregoing to the following:

William C. Turner, Jr., Assistant County Attorney,
P.O. Box 2687, Orlando FL, 32801, williamchip.turner@ocfl.net;
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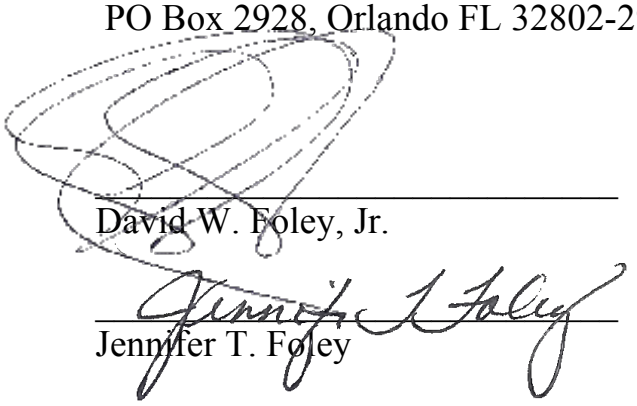

David W. Foley, Jr.

Jennifer T. Foley

Date: November 9, 2017

Plaintiffs
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IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

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

Plaintiffs,

vs. CASE NUMBER: 2016-CA-007634-0

ORANGE COUNTY, PHIL SMITH,
CAROL HOSSFIELD, MITCH GORDON,
ROCCO RELVINI, TARA GOULD,
TIM BOLDIG, FRANK DETOMA,
ASIMA AZAM, RODERICK LOVE,
SCOTT RICHMAN, JOE ROBERTS,
MARCUS ROBINSON, RICHARD CROTTY,
TERESA JACOBS, FRED BRUMMER,
MILDRED FERNANDEZ, LINDA STEWART,
BILL SEGAL, and TIFFANY RUSSELL,

Defendants.
_____/

FINAL JUDGMENT IN FAVOR OF DEFENDANTS
PHIL SMITH, CAROL HOSSFIELD (n/k/a CAROL KNOX),
MITCH GORDON, ROCCO RELVINI, TARA GOULD and TIM BOLDIG

THIS CAUSE came before the undersigned Circuit Judge for consideration of the Motion for Entry of Final Judgment filed by Defendants Phil Smith, Carol Hossfield (n/k/a Carol Knox), Mitch Gordon, Rocco Relvini, Tara Gould and Tim Boldig. The Court, having reviewed all pertinent materials in the Court file, and being otherwise fully advised in the premises, it is hereupon

ORDERED and ADJUDGED:

1. That Defendants Phil Smith, Carol Hossfield (n/k/a Carol Knox), Mitch Gordon, Rocco Relvini, Tara Gould and Tim Boldig are entitled to entry of Final Judgment in this cause, based upon the findings and conclusions of law made by this Court in its Order of October 24,

2017, granting said Defendants' Motion to Dismiss/Motion to Strike Plaintiffs' Amended Complaint. It is therefore

ORDERED and ADJUDGED that Final Judgment in this cause is hereby entered in favor of Defendants Phil Smith, Carol Hossfield (n/k/a Carol Knox), Mitch Gordon, Rocco Relvini, Tara Gould and Tim Boldig. Plaintiffs David W. Foley, Jr. and Jennifer T. Foley shall take nothing by this action against said Defendants, and said Defendants shall go hence without day. The Court reserves jurisdiction over any claims made or to be made by said Defendants for an award of costs and attorney's fees against the Plaintiffs.

DONE and ORDERED at Orlando, Orange County, Florida, this 13 day of November, 2017.

CIRCUIT JUDGE

Copies to: David W. Foley, Jr. and Jennifer T. Foley, david@pocketprogram.org, jtfoley60@hotmail.com; William C. Turner, Esquire, Elaine Marquardt Asad, Esquire and Jeffrey J. Newton, Esquire, williamchip.turner@ocfl.net, judith.catt@ocfl.net, elaine.asad@ocfl.net, gail.stpnford@ocfl.net; and Lamar D. Oxford, Esquire, loxford@drml-law.com, RhondaC@drml-law.com on this 13 day of NOV, 2017.

Judicial Assistant

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

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

Defendants
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.

2016-CA-007634-O

PLAINTIFFS' MOTION FOR REHEARING

PLAINTIFFS DAVID AND JENNIFER FOLEY PURSUANT FLA. R. CIV. P. 1.530, MOVE THE COURT TO REHEAR ITS "Final Judgment in Favor of Defendants Phil Smith, Carol Hossfield (n/k/a Carol Knox), Mitch Gordon, Rocco Relvini, Tara Gould and Tim Boldig," filed NOVEMBER 13, 2017.

SUMMARY

Rehearing is justified because: *1)* the Foleys argued *Krause v. Textron Fin. Corp*., 59 So.3d 1085 (Fla. 2011); *2)* the Court has obviously overlooked this argument; and, *3) Krause* requires reversal.

BACKGROUND

1. May 24, 2017, the Foleys filed "Plaintiffs Response to Defendants' Motions to Dismiss," as their written response to all arguments presented in the following motions:

1) "The Official Defendants' Motion to Strike the Amended Complaint, Renewed Request for Judicial Notice, and Motion to Dismiss this Action with Prejudice," filed March 3, 2017;
2) "Defendants Phil Smith, Rocco Relvini, Tara Gould, Tim Boldig and Mitch Gordon's Motion to Dismiss/Motion to Strike," filed March 7, 2017; and,
3) "Orange County's Motion to Dismiss Plaintiff's Amended Complaint Pursuant to Florida Rules of Civil Procedure 1.140(b)(1) and (6)," filed March 7, 2017.

2. The Foleys' May 24, 2017 response, at §3.1.1, pp. 50-51, as quoted below, clearly argues that *Krause* is binding precedent as to the application of 28 USC §1367, to their case:

> *§3.1.1 Krause v. Textron Fin. Corp., 59 So.3d 1085 (Fla. 2011)*
>
> Florida's Supreme Court in *Krause v. Textron Financial Corp.*, 59 So. 3d 1085, 1091 (Fla. 2011), stated: "[T]he plain language of [28 USC §1367] leads us to conclude that the dismissal of a claim in federal

court ... for lack of subject matter jurisdiction, does not bar the applicability of the federal tolling provision in the subsequent state court action." The Eleventh Circuit in *Foley v. Orange County*, 638 Fed.Appx. 941 (11th Cir. 2016), at 946, ordered the District Court to dismiss without prejudice for lack of subject matter jurisdiction. Therefore, per *Krause*, the Foleys' state law claims against the County officials and employees in their personal capacity are timely.

Defense argues that the Third DCA reached a different result in *Ovadia v. Bloom*, 756 So. 2d 137, 139 (3d DCA 2000). It did not. The only basis for federal jurisdiction in *Ovadia* was diversity. Diversity jurisdiction in federal court per 28 U.S.C. §1332, must be complete – a non-diverse defendant destroys jurisdiction. On its face Ovadia's complaint included a non-diverse defendant. Limitations were not tolled per 28 USC §1367(d), on the state claims against the non-diverse defendant because "claims against a non-diverse defendant cannot be considered supplemental jurisdiction," *Ovadia* at 139. *Ovadia*'s rule applies only to diversity jurisdiction and not federal question jurisdiction. The Foleys presented the federal courts with a federal question per 28 U.S.C. §1331, and those courts went well beyond the face of the Foleys' federal complaint to determine they lacked subject matter jurisdiction.

In *Foleys v. Orange County*, et al 638 Fed.Appx. 941, 943 (11th Cir. 2016), the Eleventh Circuit drew the words "insubstantial," "frivolous" from *Bell v. Hood*, 327 US 678, 681-683 (1946).

> [W]here the complaint, as here, is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court, but for two possible exceptions, must entertain the suit. ... The previously carved out exceptions are that a suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly *insubstantial* and *frivolous*. The accuracy of calling these dismissals jurisdictional has been questioned. [*Emphasis* added.]

In other words, per *Bell v. Hood*, it can be said that the Eleventh Circuit found the Foleys' complaint was "so drawn as to seek

recovery directly under the Constitution of the United States or laws of the United States," but was nevertheless "insubstantial and frivolous" – or, as the Eleventh Circuit put it at 946, "clearly foreclosed by a prior Supreme Court decision." Judge Tjoflat – the longest serving federal appeals judge still in active service – at oral argument put it this way:

> TJOFLAT: Dismissal without prejudice doesn't hurt you at all... There's no injury at all; you're back at square one with a remedy in the state court is what I'm trying to say.

3. September 6, 2017, between 4PM and 5PM, the Court heard the following two motions:[1]

1) The Official Defendants' Motion to Strike the Amended Complaint, Renewed Request for Judicial Notice, and Motion to Dismiss this Action with Prejudice; and,
2) Defendants Phil Smith, Rocco Relvini, Tara Gould, Tim Boldig and Mitch Gordon's Motion to Dismiss/Motion to Strike.

4. The Foleys attach a copy of the transcript of the September 6, 2017, hearing to this motion as Appendix A.

5. At oral argument September 6, 2017, the Foleys reiterated their reliance upon *Krause v. Textron* as to the question of limitations. *See* Appendix A, p. 22, lines 20-25; p. 23, lines 1-4; p. 35, lines 21-25; p. 36, lines 1-4.

[1] Four additional motions were scheduled for this hearing but were not heard: Plaintiffs' Motion for Judicial Notice (5/22/2017); Plaintiffs' Response in Objection to Orange County's Motion for Judicial Notice, and Plaintiffs' Motion for Judicial Notice of Ord. No. 2016-19 (5/25/17); Plaintiffs' Motion for Judicial Notice of Ord. No. 2008-06 (5/25/2017); and, Orange County's Motion to Dismiss Plaintiff's Amended Complaint Pursuant to Florida Rules of Civil Procedure 1.140(b)(1) and (6) (3/7/2017).

6. On October 24, 2017, the Court signed, and on October 25, 2017, the Court filed [rendered], its "Order Granting 'The Official Defendants' Motion to Strike the Amended Complaint, Renewed Request for Judicial Notice, and Motion to Dismiss this Action with Prejudice' and Order Granting 'Defendants Phil Smith, Rocco Relvini, Tara Gould, Tim Boldig, and Mitch Gordon's Motion to Dismiss/Motion to Strike.'"[2]

7. The Foleys attach to this motion as Appendix B a copy of the Court's order filed October 25, 2017.

8. In its order filed October 25, 2017, the Court's only discussion of argument relating to the tolling provision of 28 USC §1367, appears in footnote 3 on page 6, as follows:

> The Plaintiffs attempt to circumvent the limitations period by arguing that 28 U.S.C. §1367(d) "tolls the limitations period for thirty days after dismissal of any supplemental claims related to those asserted to be within the original jurisdiction of the federal court." However, as the Defendants point out in their Motions, section 1367(d) only applies where a federal court enjoyed original jurisdiction over the case, and if the initial assertion of federal jurisdiction is found to be insufficient, then the section does not apply and the party does not get the benefit of the tolling. *See Ovadia v. Bloom*, 756 So.2d 137, 140 (Fla. 3d DCA 2000). Because the Eleventh Circuit determined that the Plaintiffs' claims had no plausible foundation, section 1367(d) is inapplicable to the instant matter.

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[2] In doing so the Court violated the promise it made twice at hearing September 6, 2017, to issue no order until after hearing Orange County's motion to dismiss. *See See* Appendix A, p. 39, lines 23-25; p. 40, lines 1-5, and lines 8-13.

9. In its order filed October 25, 2017, the Court relies exclusively on Ovadia v. Bloom, 756 So.2d 137, 140 (Fla. 3d DCA 2000), and makes no reference to either of the following: *1)* Krause v. Textron Financial Corp., 59 So.3d 1085 (Fla. 2011); or, *2)* the Foleys' written or oral arguments regarding Krause.

10. The decretal portion of the Court's order filed October 25, 2017, states:

> Accordingly, the following is hereby ORDERED AND ADJUDGED:
>
> l. "The Official Defendants' Motion to Strike the Amended Complaint, Renewed Request for Judicial Notice, and Motion to Dismiss This Action with Prejudice," is GRANTED.
>
> 2. The "Defendants Phil Smith, Rocco Relvini, Tara Gould, Tim Boldig, and Mitch Gordon's Motion to Dismiss/Motion to Strike" is GRANTED.
>
> 3. The Plaintiffs' Amended Complaint, filed February 25, 2017, is DISMISSED with prejudice as to the following Defendants: Frank Detoma, Asima Azam, Roderick Love, Scott Richman, Joe Roberts, Marcus Robinson, Richard Crotty, Teresa Jacobs, Fred Brummer, Mildred Fernandez, Linda Stewart, Bill Segal, and Tiffany Russell.

11. November 3, 2017, attorney Oxford Lamar, counsel for the *employees*, filed "Defendants' Phil Smith, Carol Hossfield (n/k/a Carol Knox), Mitch Gordon, Rocco Relvini, Tara Gould and Tim Boldig's Motion for Entry of Final Judgment."

12. November 9, 2017, the Foleys filed the following two motions: *1)* "Plaintiffs Motion for Rehearing," per Fla. R. Civ. P. 1.530, with respect to Asima Azam, Fred Brummer, Richard Crotty, Frank Detoma, Mildred Fernandez, Teresa Jacobs, Roderick Love, Scott Richman, Joe Roberts, Marcus

Robinson, Tiffany Russell, Bill Segal, and Linda Stewart; and, *2)* "Plaintiffs' Motion for Reconsideration," regarding Tim Boldig, Mitch Gordon, Tara Gould, Carol Hossfield, Rocco Relvini, and Phil Smith.

13. November 13, 2017, the court filed its "Final Judgment in Favor of Defendants Phil Smith, Carol Hossfield (n/k/a Carol Knox), Mitch Gordon, Rocco Relvini, Tara Gould and Tim Boldig."

14. The Foleys attach to this motion as Appendix C a copy of the Court's order filed November 13, 2017.

15. The decretal portion of the Court's order filed November 13, 2017, states:

> ORDERED AND ADJUDGED:
>
> 1. That Defendants Phil Smith, Carol Hossfield (n/k/a Carol Knox), Mitch Gordon, Rocco Relvini, Tara Gould and Tim Boldig are entitled to entry of Final Judgment in this cause, based upon the findings and conclusions of law made by this Court in its Order of October 24, 2017, granting said Defendants' Motion to Dismss/Motion to Strike Plaintiffs' Amended Complaint. It is therefore
>
> ORDERED AND ADJUDGED that Final Judgment in this cause is hereby entered in favor of Defendants Phil Smith, Carol Hossfield (n/k/a Carol Knox), Mitch Gordon, Rocco Relvini, Tara Gould and Tim Boldig. Plaintiffs David W. Foley, Jr. and Jennifer T. Foley shall take nothing by this action against said Defendants, and said Defendants shall go hence without day. The Court reserves jurisdiction over any claims made or to be made by said Defendants for an award of costs and attorney's fees against Plaintiffs.

ARGUMENT

16. Rehearing is permitted pursuant Fla. R. Civ. P 1.530, because the Court's order filed November 13, 2017, is final as to Phil Smith, Carol Hossfield (n/k/a Carol Knox), Mitch Gordon, Rocco Relvini, Tara Gould and Tim Boldig. *See* Bd. of Cty. Comm'rs of Madison Cty. v. Grice, 438 So. 2d 392, 394 (Fla. 1983).

17. Rehearing is justified because as demonstrated by the preceding paragraphs the Court has overlooked the Foleys' reliance upon *Krause v. Textron Financial Corp.*, 59 So.3d 1085 (Fla. 2011).

18. Reversal is justified because *Krause*, not *Ovadia*, is Florida's binding precedent with respect to the application of the tolling provisions of 28 U.S. Code 1367(d), to any state law claim related to any federal question claim within the original jurisdiction of the federal district court. *Krause* held that the tolling provisions of 28 U.S. Code 1367(d), apply *even if* that federal question claim is ultimately dismissed on appeal for lack of subject matter jurisdiction.

19. Reversal is also justified because the bright-line rule of *Scarfo v. Ginsberg*, 817 So.2d 919 (4th DCA 2002), accepted by Florida's Supreme Court in *Krause*, applies here. *Scarfo* held that the plain language of 28 USC 1367 makes clear that "dismissal of a federal claim for lack of subject matter jurisdiction [does] not bar the application of section 1367(d) to toll the state limitations period for claims refiled in state court."

20. A memorandum discussing the application of 28 U.S. Code 1367(d), is attached as Appendix D, and is incorporated in this motion as if set out in full.

CONCLUSION

WHEREFORE David and Jennifer Foley move the Court to rehear its "Final Judgment in Favor of Defendants Phil Smith, Carol Hossfield (n/k/a Carol Knox), Mitch Gordon, Rocco Relvini, Tara Gould and Tim Boldig," filed November 13, 2017.

CERTIFICATE OF SERVICE

Plaintiffs certify that on November 17, 2017, the foregoing was electronically filed with the Clerk of the Court using the Florida Courts' eFiling Portal, which will send notice of filing and a service copy of the foregoing to the following:

William C. Turner, Jr., Assistant County Attorney,
P.O. Box 2687, Orlando FL, 32801, williamchip.turner@ocfl.net;
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Lamar D. Oxford, Dean, Ringers, Morgan & Lawton PA,
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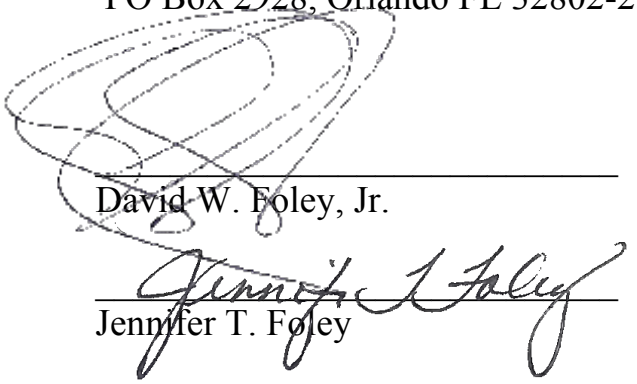

David W. Foley, Jr.

Jennifer T. Foley

Date: November 17, 2017

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IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

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

Defendants
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.

2016-CA-007634-O

APPENDIX A

TRANSCRIPT OF HEARING SEPTEMBER 6, 2017

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

CASE No.: 2016-CA-007634-O

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

Plaintiffs,

vs.

ORANGE COUNTY, PHIL SMITH, CAROL HOSSFIELD, MITCH GORDON, ROCCO RELVINI, TARA GOULD, TIM BOLDIG, FRANK DETOMA, AZIM AZAM, RODERICK LOVE, SCOTT RICHMAN, JOE ROBERTS, MARCUS ROBINSON, RICHARD CROTTY, TERESA JACOBS, FRED BRUMMER, MILDRED FERNANDEZ, LINDA STEWART, BILL SEGAL and TIFFANY RUSSELL,

Defendants.

_____/

Transcript of Proceedings
Before the Honorable Heather L. Higbee,
Circuit Court Judge

DATE TAKEN: September 6, 2017

TIME: Commenced at 4:00 p.m.
Concluded at 4:47 p.m.

LOCATION: Orange County Courthouse
425 North Orange Avenue
Hearing Room 20-B
Orlando, Florida 32801

REPORTED BY: Danette V. Lamb,
Court Reporter and Notary Public

A P P E A R A N C E S:

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ALSO PRESENT:

TERESA LAZAR, ESQUIRE
Staff Attorney for Judge Higbee

ELAINE MURQUARDT ASAD, ESQUIRE
Elaine.asad@ocfl.net

P R O C E E D I N G S

THE COURT: Good afternoon. All right. Is everybody ready? We're going to go ahead and get on the record. This is 2016-CA-7634. There are a myriad of hearings that are set for today. I'm not going to announce each one of them or I'll dip into your time. But understand that I have reviewed the motions, the information that has been forwarded to me, the case on the court file that's part of our record so that I would be prepared for today.

I also wanted to apologize to everyone for having to change the hearing on you a few weeks ago. I had a family emergency that I had to tend to. It had nothing to do with this case. It was just that particular time frame that I needed to make sure I had to -- something that unfortunately was more important than where I had to be here, so I apologize for that inconvenience. You have my full attention.

I also want to introduce you to my staff attorney, Teresa Lazar, who is sitting in on this hearing with me so that you know who she is. She is my staff attorney that assist me with the legalities of my job.

So I'm going to start with my immediate right

and have you identify for me who you are and who you represent, please.

MR. ANGELL: And I'd be here. Your Honor, my name is Derek Angell. I represent the Orange County Officials in this case, which is comprised of the members of The Board of Zoning Adjustment, BZA, and the Board of Commissioners, the BCC.

THE COURT: Thank you. Sir?

MR. OXFORD: Good afternoon, Your Honor. My name is Lamar Oxford from the Dean, Ringers firm. I represent the -- Phil Smith, who is the county code enforcement inspector. Carol Knox is her married -- is her name now. She was the chief planner for the County. Mitch Gordon is the former zoning manager for the County. Rocco Relvini, chief planner for the County; and Tara Gould, former assistant Orange County attorney.

THE COURT: Okay. Thank you. And I am going ask over here. Counsel?

MS. ASAD: Elaine Asad for Orange County.

MR. TURNER: And William Turner also on behalf of Orange County, Your Honor.

THE COURT: Okay. And that must make you Mrs. Foley?

MRS. FOLEY: Jennifer Foley.

THE COURT: All right. Very good.

Are you David Foley?

MR. FOLEY: I am.

THE COURT: All right. So I have Jennifer Foley and David Foley.

So I would like to go -- well, I have everything in the order of what was noticed and it would seem that if we go in that order -- I don't know that there's any better order to go in unless anyone has an objection. We have an hour, which means that I'm anticipating approximately 30 minutes of one side and 30 minutes of the other side. Although, it's going to be mixed in between all the different motions and responses. So hopefully we can make good use of that time and be out of here promptly.

So, Mr. Angell, you represent the Orange County officials and that's the first item that I have on my list. If you wish to proceed with your motion to strike the amended complaint?

MR. ANGELL: Thank you, Your Honor. And this is really I think what I'm going to begin with, going through the factual background and the lengthy procedural background before we got here as it is applicable to all the motions. And if we get

to all of them, great; if not, I think we all agreed to tack on as many of the notices as we can, but if we run out of time, so be it.

This case began a long time ago during the Bush administration. Frankly, it was an administrative investigation that the Foleys were growing -- or raising, I should say, toucans in a residentially zoned property. The toucans were raised for commercial purposes and constitutes -- aviculture is the fancy name for it. And there was an inspection of the zoning board violation, the zoning inspector determined the aviculture violated the zoning rules of Orange County, Orange County Code, and the Foleys appealed that to the BZA, Board of Zoning Adjustments. So I suppose the way that works is if you feel that you've been aggrieved wrongfully and you've been notified of a zoning violation, you take it up to the next level in front of the Board. The Board -- the individual members of the Board, the first group of my clients, they are sued in their personal not official capacity, which is important to state these sorts of cases. And that was a public hearing, which the transcript has been filed and subject to view on several different occasions.

And at that the hearing, Mr. Foley argued that the Orange County ordinance, which renders the -- or I should say regulates the aviculture commerce was unconstitutional under the State Constitution. His argument was and has remained and still is that only the Florida Official Wildlife Comission can regulate the commercial breeding of toucans. Toucans are in a class of animal -- there's something less wild, if you will, than lions, tigers, and bears, but certainly more than, you know, your house cats and your pet dogs and they are regulated in separate classifications. So his theory again, has been from the start and continues to be that only the FWC can regulate that class of animal, and that's a State constitutional issue that Orange County does not have the jurisdiction to enact ordinances, which would regulate those sorts of animals.

The BZA voted to uphold the zoning manager's determination that they were in violation of the local ordinance. It was a unanimous vote and it is that vote, which forms the basis of their lawsuit against my clients, the fact that my clients have voted to uphold the zoning manager's determination.

From there, Mr. Foley and Mrs. Foley appealed

that BZA determination to the Board of County Commissioners. The Board of County Commissioners, of course, is a constitutional body that comprises of the Mayor, Teresa Jacobs, and a number of other local fairly significant political personalities. They also voted unanimously to uphold the BZA's determination that the Foley's were in violation of the local ordinance.

From there, the Foleys properly filed a petition for a writ certiorari here in the circuit court back I think in 2009, which is how you appeal a file agency local administrative determination. The order that was issued in that case -- or I should say it's an opinion, stated that, first of all, it denied the petition. It also stated that the proper means to challenge the constitutionality of a local ordinance must be through an original proceeding, which is exactly what the Foleys did on the last day of the statute of limitations from what they acknowledged their cause of action, if any, would have accrued, which is the date of the final administrative action. The mistake they made, though, is they filed that action in Federal Court. They alleged along with the declaratory judgment action, I think it was around two dozen

causes of action opposed to the federal cause of action for everything from due process, equal protection, freedom of speech, a host of federal sort of theories. Along with state claims of civil RICO, full state and federal statutes, those sorts of things. So a conglomeration of both federal and state causes of action, and they were alleged against my clients and my colleagues' clients both part in their official and personal capacity as well as the County.

There was two significant orders among several orders that came out of that case. I believe it was Judge Antoon the first of which said that the claims against the individuals were dismissed with prejudice because the individuals had various immunities. It wasn't a hugely detailed examination. His Honor found that it was legislative immunity. I think retrospectively, it was really quasi-judicial immunity, but that's sort of academic. In any event, though, all the individuals were dismissed with prejudice at that point, but the Court allowed the Foleys to then file an amended pleading against the County to discuss the constitutionality of the ordinance vis-à-vis the Florida State Constitution, not the

Federal Constitution. In the meantime, the Foleys, when they filed their amended complaint, they still restated all the claims against the individuals, the Federal Court dismissed those sua sponte and the case received a summary judgment just against the County. The Federal Court found in its final order -- well, final really dispositive order not its actual judgment -- said that the claims against Orange County, the federal claims were denied, found for summary judgment for the County and found that the ordinance did, in fact, violate the Florida State Constitution, found it unconstitutional and enjoined its enforcement as a matter of State Constitutional law.

Cross appeals in the Eleventh Circuit were taken. All of us here were there and spent our time at the podium. And the Eleventh Circuit ruled differently than what Judge Antoon had determined. It says that: First of all, the federal claims were not just denied on their merits, they were frivolous. And that's the significant distinction in the federal form because if you bring a case that has federal and state claims, if the federal claims are frivolous, then the Federal Court does not have any discretionary supplemental

jurisdiction to retain the State claims. It must dismiss them. And so the Eleventh Circuit went through and looked at all of the federal claims, due process claims, and there's two or three other ones, equal projection, those sort of things, and said these are all frivolous and; therefore, there was no jurisdiction for the State -- for the Federal judge to make a determination of Florida law, which, of course, the interplay between the FWC and Orange County is paradigmatically the state law question.

So as the Foleys then filed a petition for certiorari with the Supreme Court, which was denied. It wound its way back down to the District Court, which then dismissed the state claims without prejudice, but federal claims were very much dismissed with prejudice.

Then this lawsuit was filed. This lawsuit arises out of the exact same facts, background, everything else. It's the same basic theories with different sort of names attached to some of the claims. And we're now here finally on behalf of our individuals certainly to ask that the individuals in their individual capacity for a whole host of reasons are dismissed with prejudice.

I don't know if this is -- this is the amended complaint even here in State Court; therefore, the right to amend has been taken advantage of and the Court would be within its discretion to dismiss this case with prejudice. It's been going on for nearly a decade, I think it's certainly time for our folks.

Now, to begin at least as it pertains to my clients and their individual capacity, as I read the complaint it's Counts, 5, 6, and 7 that are stated against our folks. Those are abuse of process, conversion, state civil theft, and there's allusion to Section 1983, the Federal Civil Rights Statute in Count 7.

And before I get to those, though, I want to talk about really our defenses. We have a host of defenses here for our individuals. The first of which is statute of limitations. The statute of limitations they have pled around it as best they can to establish that they filed their lawsuit in Federal Court on the last day of the limitations period, and I just stated I agree with that. The difference, though, is that by filing in Federal Court when there was no basis for Federal jurisdiction, they do not get the tolling provision

of the -- I think it's Section 1367, that allows a -- basically extends the statute of limitations after a case gets kicked out of Federal Court. The classic example is if you file -- if I had to -- if I was defending, I would move the case to Federal Court and get it dismissed for lack -- solely lack of jurisdiction and goes back, the statute of limitations is tolled the entire time it's in Federal Court. There is an exception, though, which is when a plaintiff files a case in Federal Court, if there never was a basis for Federal jurisdiction in the first place, that tolling provision doesn't apply. The case I cited in my motion is called Ovadia versus Bloom, and the citation is obviously in the papers. But the --

THE COURT: Yes, sir.

MR. ANGELL: What happened there was it was a -- plaintiff filed in Federal Court alleging diversity jurisdiction. It turns out there was not complete diversity and, therefore, when it went back to State Court the limitations period had run. And the language I enjoyed in that case was that: An improvident foray into the Federal Court does not toll the -- the statute of limitations. So in other words, if the plaintiff decides to go to

Federal Court, and there never was federal jurisdiction in the first place, tolling does not -- and they're defending that, and they cited that tolling statute in their papers. That's what they're relying on to escape the statute of limitations. And in this case, the Federal courts have expressly held that the federal claims are frivolous not just lack of merit but beyond the pale of what could be passable as a federal claim. I think that that under Ovadia is -- we do not have a tolling situation here. The statute of limitations is blown by four or five years. And that would apply to all of our people. It may be a little -- with apologies to the County, it might be a little bit different with them because they could have some ongoing claim thing and that was discussed actually with the Eleventh Circuit. But as to the individuals their actions were the date they voted, the statute of limitations is clearly run as to all of our folks. Also, as to the individuals we have various meetings. I mentioned earlier that as people voting on an administrative local board they are entitled to -- well, they call it -- well, it's an absolute immunity, which a subset of which is qualified immunity. But in our

case we have an absolute immunity in the quasi-judicial setting. Quasi-judicial means that you have it of the executive board, under the executive branch of the government basically interpreting and applying a local rule, local ordinance. That's exactly what they were doing here. And in Florida, the extent of quasi-judicial immunity is coextensive with judicial immunity, which is to say that even if somebody sitting in that capacity exceeds their jurisdiction they are entitled to absolutely any personal suit. So that is, I think, wraps it up really in almost two sentences wide. And our people have no business in this case, never have. But that is one of the arguments we have for dismissal.

Third, we have res judicata as to the Federal claims. I noted that they have cited Section 1983, that's a Federal claim obviously. And the Federal courts had dismissed all Federal claims with prejudice. So I think that goes without saying that that one has already been resolved.

And then finally, the counts on the merits are -- respectfully, they are also frivolous. We have abuse of process. The theory of that is I think the classic example would be where an

officer, a police officer arrest his girlfriend for -- 'cause he's mad at her. That's obviously something beyond what the purpose of his office was ever intended to be. Here we have local elected officials who have basically done exactly what they're supposed to by voting in public hearings. That's not an abuse of process. I think that's just again, so beyond a reasonable cause of action that it amounts to frivolity.

A conversion, the theory of conversion is that by voting to uphold the taking, if you will, or of the destruction of the aviary or the taking of the birds is that by voting to uphold that determination that our people have converted the birds. Well, that's not what conversion is. Conversion is taking somebody else's stuff for your own good one way or another. These are people voting to uphold the law. That is not -- conversion again, is so far from what that term means but any interpretation does not belong in this case. Civil theft goes along with conversion that requires criminal intent to say that somebody voting a local board votes and has a criminal intent I think is, frankly, offensive to our people. And I already discussed 1983 being already

resolved.

So that is a lot of legal arguments there. I tried to keep it sort of as succinct as I could. It's a long history. But the short of it is, Your Honor, the people who sit on the local board and vote are not liable personally for those votes.

And at this point I'll pass it along to my colleague, Mr. Oxford.

THE COURT: Okay. Well, actually what I would like to do since I'm not sure we'll have time for everything, I want to make sure I'm hearing everything individually. And I apologize because that means that some of you will have to come back and the Foleys will have to come back. But I'm already getting an eye on what the time is, and I'm not allowed to incur overtime for my staff. So what I'd like to do is just to keep us on track with each issue. And if that's acceptable, then I would turn it over to the Foleys unless you have something as to that particular issue as far as the official is concerned.

MR. OXFORD: The only -- thank you for letting me interrupt, Your Honor.

THE COURT: Yes, sir.

MR. OXFORD: I apologize for that.

Respectfully, I have the County employees who enforce the zoning code. In many ways my County employees, officials, and their arguments dovetail with those of Mr. Angell, with the County officials. So I think, if Mr. Foley doesn't mind, I would just like to summarize quickly and a quick overview. Because I don't have really separate arguments from those already given to you.

THE COURT: Okay. Mr. and Mrs. Foley, is that acceptable to you to let him --

MR. FOLEY: Sure.

THE COURT: And then you can respond to both together?

MRS. FOLEY: Yes.

THE COURT: And you're tracking the time?

MRS. FOLEY: I am.

THE COURT: 'Cause I was wondering about that.

MRS. FOLEY: Yes, thank you.

THE COURT: Don't worry, I am going to make sure that we try to do it fairly. I actually have a chess clock if next time we run into problems.

MRS. FOLEY: Which is fine.

THE COURT: We seriously do that. But I think that we --

MRS. FOLEY: Okay.
THE COURT: I understand some of the arguments. I've done my preparation --
MRS. FOLEY: Okay.
THE COURT: -- so I think so far we're still good.
MRS. FOLEY: Okay.
THE COURT: So, Mr. Oxford it is, sir?
MR. OXFORD: Yes, ma'am.
THE COURT: You may proceed with your similar -- just stick with what these same issues are as it relates to your clients, and then we'll move from there.
MR. OXFORD: I promise to be brief. And with respect to the Foleys they've had us in court for a long time, all the way to the United States Supreme Court and back. But the Court has to recognize that this all started ten and a half years ago. This Court now has discretion to bring it to an end with regard to the individual employees. The Federal courts, every one of them, all the way to the top, have said that the Federal claims against the employees, both sets, are not only not properly based under the facts or the law but they're frivolous. And as Mr. Angell pointed out in his

argument and in his motions, as we tried to ourselves, the State law claims are clearly dismissible with prejudice because the immunity of the officials in doing either their quasi-judicial acts, or in my case, doing their discretionary acts, which sovereign immunity directly applies to enforcing a county code, a governmental code. That's not what every man in the street does. That's a discretionary governmental function. So the immunity implies the res judicata clearly applies to the Federal claims.

They've already been tried all the way to the conclusion and there is simply not the basic elements of conversion. There is no criminal theft here. There is no civil theft here. There is no abuse of process as we recognize in the law. So we're asking the Court to consider the history of this case to take judicial notice of decisions that have already been made between the same parties on the same claims and concluded.

And with respect to the work done by the pro se plaintiffs here, bring it to a conclusion at this level. The taxpayers have spent an enormous amount of money defending 12 -- ten or 12 officials all the way to this point today. They've been in

too many courts. They've won every time.

And with respect, Your Honor, you are the judge who has the discretion with regard to all the individual defendants to bring it to an end. We believe the legal arguments that have been presented to you in the context of the history and your judicial notice of it should not only result in dismissal with prejudice but a consideration of the fact that now many, if not all, of these claims are essentially frivolous.

Thank you, Judge.

THE COURT: Thank you. All right. So, Mr. and Mrs. Foley, if you'd like to speak to those two issues.

MR. FOLEY: Which two? The two groups of --

THE COURT: Yes, sir. You can start in order or however you wish.

MR. FOLEY: Okay. And you, Judge, have you read the papers filed?

THE COURT: I have reviewed everything. I have read and will continue to read. I will not be making any rulings today especially since I don't know that we're going to get through everything. So ultimately, what you'll receive from me is a written order. And I assure you that in every case

I make sure that I've thoroughly read everything that each side has to say so that I can give each side a fair right to be heard.

MR. FOLEY: Sure, sure.

THE COURT: So if you wish to go into history, you're welcome to. If you wish to simply address some of the things that have been raised you are welcome to. It's your time and you're welcome to use it as you see fit.

MR. FOLEY: Well, I -- I -- Judge Tjoflat he has this YouTube video where he's giving a commencement to Mizzou Law School and he says that this exchange it's best when it's a conversation between attorney and the judge. So I'm really open to that. I'd kind of like to know given that you've read the papers and you've heard the arguments, which are identical to what they've already submitted without any -- without any modification given our response where you're at on -- on these issues. For instance, limitations, their case is Ovadia v. Bloom. It deals exclusively with diversity jurisdiction. Our case is Krause v. Textron it's a Federal question of jurisdiction. Whether our federal question succeeded or not, whether it was called good but

failed or frivolous but failed is irrelevant. The Florida Supreme Court has already settled the issue and I don't know why they have to -- they haven't addressed that.

On the issue of res judicata, as we've said in our response, our issue is simply a due process claim and due process is treated by the Federal courts exactly like takings. And what I've brought in for you and for the Defendants is a case out of the Seventh Circuit that says exactly that and it's just verbatim what I've just told you. Can I hand it to you?

THE COURT: If you have a copy for the opposing, then I'll be happy to take them, okay.

MR. FOLEY: So I've highlighted the statement, you know, the Seventh Circuit, that's Judge Posner's circuit --

THE COURT: Thank you.

MR. FOLEY: -- and according to Justice Alito he knows everything. So the Eleventh Circuit hasn't put it so plainly but all of their decisions imply the same conclusion that due process is the State's responsibility until the State has finally litigated it. There's no due process claim in Federal Court. So this is a claim that's presented

here in the alternative should you find that there is no remedy in Florida. And we think you'll find a remedy. So, if anything, it's just not right. If there's any problem with our due process claim it's because it's not right. It's because you haven't yet found that there's no other remedy because that's what due process is, it's remedy. It's an incredible word, remedy. So that's limitations, res judicata.

Their big issue is immunity and that's a big issue. I mean, they do deserve immunity if -- if they deserve -- it is their burden to establish this and then we simply send a response, and we don't believe they have because there are exceptions to what's called absolute immunity. The exceptions that we pled are three: Execution of a custom is not immunized and that's in a case that they cite. They cite Corn v. Lauderdale Lakes. And Corn v. Lauderdale Lakes went on for 20 years. There are three different Eleventh Circuit opinions in Corn v. Lauderdale Lakes. This is the '93 opinion. Do you want the citation, Your Honor?

THE COURT: Sure. If you know it, we can put that on the record as well.

MR. FOLEY: Corn v. Lauderdale Lakes, 997

F.2d 1369 at Page 1392 -- on legislative immunity for execution of policy, that's a paraphrase. I believe it's not legislative or quasi-legislative immunity for the execution of a policy. Here the BCC order is certainly a policy and leading up to that decision was a custom. This is really where I'd like to back right up to what they don't talk about and that is that we've alleged expressly over and over that there was no ordinance that prohibited us from doing what we were doing. It was, in fact, a custom. And that's a big difference because due process is all in that. We're on notice of an ordinance. It's published. We're not on notice, we're custom. So we -- we have to go through some procedure that revives the protection that we've lost by -- by the fact that there was not an ordinance to give us notice for. And that didn't happen here. And that really is the big thing.

So I know this is kind of corny but, you know, there's a couple of things I want you to remember. I'm going to stick this sticker on my chest. It's, you know, the number 11. This represents Chapter 11 of the Orange County letter. This is the number 30. I'm sticking this sticker

on my left shoulder. Chapter 11, Chapter 30. What happened here is, as we said, there was no ordinance that said you can't do aviculture at your home. They haven't addressed that. I put it in the response in today. You haven't heard them say that -- what ordinance they were enforcing. It was a custom. We had to ask them to explain it to us. But -- but I do want to get on the record too that although the entire episode began with a complaint that we were raising birds to sell, somebody told Orange County that we were raising birds to sell, and that's what initiated the investigation. So that's what they came out to enforce.

The Chapter 11 is the Code Enforcement Board ordinance. Chapter 30 is the Planning and Zoning Board ordinance. Chapter 11 is for prosecuting known violations of the code. Like a known violation that was reported in our case.

Chapter 30 is for the prospective enforcement of the Orange County Code. It's the permitting chapter. Whoops, I almost lost it. It's the permitting chapter. And as we've tried to put in our paragraph 40 of our complaint that they knew what they wanted to enforce and they didn't enforce it through Chapter 11. They had two violations.

One was the aviculture violation. One was the permitting violation. And they decided to do something that they do as an added practice when they have a dual violation. They prosecuted the permitting violation, that resulted in an order from Code Enforcement that said, You have a permit? Destroy your structure or pay a fine. So there we're facing a little coercion. We need to do something. We go to get the permit, and remember aviary is not used during this proceeding. Aviculture is not used, because these words are not used in the proceeding. There's no discussion violating any provision in the code that prohibits aviculture.

Two, they get the permit. And they say, Well, Mr. Foley, we heard, we have evidence here that you're -- you have another violation. You're raising birds to sell so we're not going to give you that permit and that resulted in destruction of the aviary. And now we're stuck in Chapter 30, right? Well, what's -- what's the problem? What's really the big problem here? They don't get the same state core per diem, that's the problem. If the Defendants had done exactly what they did in our case, that they were enforcing an ordinance, we

wouldn't be here. Because we could have had our due process at the front end. We would have been on notice that we had something to challenge, but we didn't have that. And once we got into this permitting process, there wasn't any way to arrest this. There wasn't any way to come here and seek an extraordinary writ. So that gives you kind of a story of the case.

But on the issue of immunity, why is that -- why is that a problem for them? As you said, there are three exceptions that we pled in our -- in our complaint: Execution of a custom, Corn v. Lauderdale Lakes, lack of jurisdiction, and that is, of course, the famous case of Fisher -- Bradley v. Fisher, U.S. Supreme Court case. And ultimately, lack of adequate review. We cited J. Randolph Block on the history of judicial immunity, which is what they're asking for here. And it says that -- we tried to make a joke, you know, at that point on paper. But the joke was that a thousand years ago there was no judicial immunity and if you didn't like what the judge had to say you could challenge them to a combat. Well, you know, that's doesn't work very well.

THE COURT: I don't vote for that one.

MR. FOLEY: I wouldn't either because you could also choose your own champion and I imagine you would pick, you know, the deputy. So judicial immunity he says and -- and due process protections for the litigant develop hand in hand. The appellate process or the writ of error he says -- in fact, I know I have the quote. The writ of error was the seed of -- he said, "In the development of the writ of error lay the seeds of the doctrine of judicial immunity. Randolph Block, Stump v. Sparkman and the History of Judicial Immunity. And there are cases one which they cite: Andrews v. Florida Parole Commission, which kind of reaffirms that -- the quote is: "Existence of adequate remedies for inmates including appeal and habeas corpus precludes a necessity where the advisability of doing away with the immunities that protect such officials or as within the scope of their official duties." I have three other Supreme Court cases, which again, reassert the proposition that we're suggesting to you today. And that is that the availability of a remedy to correct these errors is an element of determining how much immunity they should be given. In fact, Cleavinger v. Saxner, a U.S. Supreme Court case, which is

really referencing Butz v. Economou. It says, absolute immunity when you're talking about quasi-judicial action under executive agency, it's not absolute. It's not guaranteed. There are things that you really need to consider. Out of six, the last is: The correctability of error on appeal. And that's -- and there are five others. I'm not going to go through them right at this moment. I just want to make sure that I'm covering how we see this issue of immunity. I've certainly done it in the written response and the duty to -- one thing that we want -- one argument that we want to make is that there is a ministerial duty to provide due process. This is -- we do not have a case on this. What we have instead is just argument.

First, there are authorities in Florida that say where there are doubts as to the existence of authority, it should not be assumed. Now, Article 4, Section 9 of Florida's Constitution basically means that no one -- that no regulations touching upon wild animal life enjoys a presumption of correctness. Even -- even a judge has to ask themselves, does this interfere with FWC authorities. So it creates a question. The fact

that they were enforcing the custom and not the ordinance creates a question, creates a doubt. So this coming from Santa Rosa County versus Gulf Power Company says: "Where there are doubts as to the existence of the authority, it should not be assumed." So they can't tell us that just because we told them and had FWC contact them and tell them that they didn't have authority to do this that they need to listen. They told us -- you know, they told you that they didn't need to listen to us tell them. You know, that's fine, but here we are. And part of our argument to urge that due process is a ministerial duty. It comes to us really out of Rupp v. Bryant. It didn't have anything to do with due process but what it said was that school administrators have a ministerial duty to provide supervision for students. Now, of course, that's about their physical safety. We're talking about our legal safety. So we're saying that this guarantee of due process, which is in our State and our Federal Constitution is a ministerial duty because it's about our safety. It's about the safety of those -- those legal rights, so they have to provide that. And, you know, my 11, 30 thing is all about that. That if they prosecuted the custom

through Chapter 11, we wouldn't be here. Had they prosecuted an ordinance in the way that they did and it went through Chapter 30, we wouldn't be here. What happened was they prosecuted a custom not through Chapter 11 an available, and we believe a mandatory remedy -- we say mandatory -- I'm -- I'm -- I'm getting in my own way here. But I'm just going to go right ahead and do it. We want to emphasize that Chapter 11 was the way they should have gone particularly under this situation because it has an imperative language in it. I can't tell you that there's a case that says we have any right to the remedy or that Chapter 11 gives us any individual right in the remedy. But what it says is that when a covenants factor finds a violation he shall -- he uses the word "shall," and I understand judges can -- can fiddle with that and say that "shall" may mean maybe. But Orange County Code at Section 1-2 says, shall is imperative. That's what it says.

So we're -- we're saying that the four pillars really of our case and the four -- four spears that pierce their immunity here are Article 4, Section 9 of the Florida Constitution, which removes the presumption of correctability from any

-- any regulation that touches upon that authority. The absence -- the fact that they were enforcing a custom removed any pre-enforcement remedy. And the fact that they decided to use Chapter 30 and Chapter 11 interchangeably knowing that the appellate review of those two type orders is completely different. And with the -- any right -- any -- any way of a recoverable fee, injury that we -- that we were suffering.

THE COURT: If you need a minute to consult to make sure you covered everything that's part of this hearing, I'm happy to give you just a second if you wish.

MRS. FOLEY: Okay.

THE COURT: And then we can look at each other's notes and otherwise if you wish to reply, I'll give you time to do that, or we can see if we can move on to --

MR. FOLEY: We haven't discussed the cause of -- you know, they've said that we have not stated a cause of action.

MRS. FOLEY: (Conferring with Mr. Foley.)

MR. FOLEY: And is that what you're asking, do we want --

THE COURT: I want to make sure that you've

covered -- I've broken this down, so --

MR. FOLEY: We've only referenced the first three points.

THE COURT: Yeah, so I think the first three points really had to do with the motion to strike the amended complaint, the request for judicial notice of the Federal actions and then the motion to dismiss with prejudice that were your motions and then tagged on with Defendants, Smith, et cetera, as Mr. Oxford had indicated. So as to those portions of the noticed hearing, have you completed your, sort of, rebuttal, I guess, to what their oral statements were; and is it time to go back to them for their brief reply, or is there something that you want to make sure that you have covered or just this?

MR. FOLEY: Sure, there is. They say that we do not state a cause of action and abuse of process, that the BZA was just voting. But that's not an abuse of process. What we -- again, you know, we have our 11, we have our 30. You know, they use Chapter 11 to do what they should have done for Chapter 30, that's our abuse of process argument.

THE COURT: Okay. Well, I think I've heard

that one.

MR. FOLEY: And conversion, you know, they say that it has to be actual disposition, we say it has to be just -- what do you call it? Constructive disposition, and that's exactly what the order did. It stopped us from doing business. So that stays conversion. Conversion basically states civil theft.

And then in addition, as we've said in our written response there are various other ways in which we have alleged in our complaints. And that is again, what we're here for, whether or not the complaint survives so we can move on.

THE COURT: Yes, sir, okay. Do you wish to use any time in reply, or do you wish for me to move forward to the other folks that are here?

MR. ANGELL: Since we have a court reporter here very briefly if you don't mind, Your Honor.

THE COURT: Yes, sir.

MR. ANGELL: This is my only motion today is this: The Textron case that talks about the Federal question of jurisdiction where the Federal question was not frivolous it was resolved on the merits and then the Court declined to retain supplemental jurisdiction over the State claims.

It does not speak to a case where the Federal claims have no business in Federal Court in the first place, that's critically distinguishable there.

The takings issue that we have here from the Seventh Circuit, the takings issue itself is a Federal question. The Federal Court offered in effect, basically invited a takings claim in the first order -- by the way, I misspoke. It was not Judge Antoon, it was Judge Dalton in the middle district here. And his first order said this might be a takings claim that we have. And then the second order said I told you it might have been a takings claim. You guys decided not to bring one, therefore, it is res judicata because as the Court knows, res judicata applies to all claims that were or could have been brought in a prior action. That was a Federal cause of action and all Federal claims were dismissed with prejudice. So that's a not a basis to survive dismissal.

As far as this custom versus ordinance argument it's a little perplexing to me. This case has very much been focused on the interpretation of the local ordinances and vis-à-vis the State Constitution of Judge Dalton's first detailed -- or

I guess the second detailed order. It explains and walks through in great detail how all the ordinances work with each other and how they apply here and how His Honor found that they were unconstitutional. But, of course, that ruling has not ever been properly found by a State Court. It remains, and still is today, Mr. Foley's opinion that the ordinance violates the State Constitution, that has never been found. So we talk about the move to the immunities. To think that a judge, which is really the same in Florida as a quasi-judicial officer, enforces a statute, which later is deemed unconstitutional and is subject to personal liability for a business being shut down or other civil inconvenience is really offensive to our whole system of civil justice and even criminal justice for that matter and the whole judicial branch I would submit.

Finally, as far as abuse of process, I think where Mr. Foley misconstrues that term is that his definition of abuse of process is what his view is of misapplication of the law, misconstruction of the law. Abuse of process is again, using something for which the law was never intended to be used for in the first place, which is, like I

said, an officer arresting a girlfriend because he caught her cheating or some crazy situation like that.

I think with that, I will pass it over to my colleagues. And thank you very much for your time, Your Honor.

THE COURT: Okay. Thank you.

MR. OXFORD: And, Your Honor, in reply and in respect to the Foleys, I'll just try to give a minute's worth of overview.

In essence, the same arguments have been given to my clients as the zoning enforcement officials, employees to Mr. Angell's clients as essentially the zoning appeal body to the Ninth Circuit Court on petition for cert, then to the U.S. District Court in a Federal lawsuit that combined Federal and State law claims that went up to the Eleventh Circuit, that went up to the United States Supreme Court. Your Honor, these same arguments have been made at everybody for ten years. They had no merit then, they were found to have no merit in detail, and they have no merit now. Growing and wildlife, and they call it wildlife. They talk about the Fish and Wildlife Commission throughout, growing wildlife for profit

in a residential area is time-honored zoning. And they lost at every level. What is that six levels that I've named. This should stop it, Your Honor. Res judicata applies, statute of limitations apply. They admit in their complaint that my clients, Mr. Angell's clients, were all acting within their official capacities. Sovereign immunity applies. Absolute judicial immunity applies. It has to stop somewhere and we respectfully submit that today should be the day.

THE COURT: Mr. Turner, we haven't given you a whole lot of time left. If your arguments are more, you need for or you wish to have more time, I can reset you. If you wish to utilize the little bit of -- we've got about 15 minutes left if you think you can summarize your oral portion in half that time, and I get half that time to the Foleys, I can do that.

MR. TURNER: I'm going to need more time. In fact, I agreed to tack my motion onto this hearing if we could get it set.

THE COURT: Okay. Well, I think that answers that question. So what I'd like to do is to schedule a second hour so that you have the floor at that point, and then we can take those arguments

next. I'll keep my decision under advisement at this point until I -- I want to hear everything before I perform my written work. And so we'll get that scheduled as soon as possible with my calendar.

MR. TURNER: Thank you, Your Honor.

THE COURT: Okay.

MR. FOLEY: Can I clarify then? Mr. Turner will have an opportunity before you -- before you reach a conclusion on the --

THE COURT: Yes. So I'll see you all. We'll set a second hour for it, and I think we should be able to wrap it up at that time.

MR. ANGELL: Thank you, Your Honor.

MR. OXFORD: Thank you very much.

MRS. FOLEY: Thank you.

THE COURT: You're very welcome. Enjoy your evening, and I hope that you stay safe in the storm.

(The proceedings concluded at 4:47 p.m.)

CERTIFICATE OF REPORTER

STATE OF FLORIDA:
COUNTY OF ORANGE:

I, Danette V. Lamb, Stenographic Shorthand Reporter, certify that I was authorized to and did stenographically report the foregoing proceedings and that the foregoing pages are a true and complete record of my stenographic notes.

I further certify that I am not a relative or employee of any of the parties, nor am I a relative or counsel connected with the parties' attorneys or counsel connected with the action, nor am I financially interested in the outcome of the action.

DATED this 7th day of November, 2017.

Danette V. Lamb

Danette V. Lamb,
Stenographic Court Reporter

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

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

Defendants
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.

2016-CA-007634-O

APPENDIX B

ORDER RENDERED OCTOBER 25, 2017

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

DAVID W. FOLEY and JENNIFER T. FOLEY,

CASE NO.: 2016-CA-007634-O

Plaintiffs,

v.

ORANGE COUNTY, PHIL SMITH, CAROL HOSSFIELD, MITCH GORDON, ROCCO RELVINI, TARA GOULD, TIM BOLDIG, FRANK DETOMA, ASIMA AZAM, RODERICK LOVE, SCOTT RICHMAN, JOE ROBERTS, MARCUS ROBINSON, RICHARD CROTTY, TERESA JACOBS, FRED BRUMMER, MILDRED FERNANDEZ, LINDA STEWART, BILL SEGAL, and TIFFANY RUSSELL,

Defendants.
_____/

ORDER GRANTING "THE OFFICIAL DEFENDANTS' MOTION TO STRIKE THE AMENDED COMPLAINT, RENEWED REQUEST FOR JUDICIAL NOTICE, AND MOTION TO DISMISS THIS ACTION WITH PREJUDICE"
and
ORDER GRANTING "DEFENDANTS PHIL SMITH, ROCCO RELVINI, TARA GOULD, TIM BOLDIG, AND MITCH GORDON'S MOTION TO DISMISS/MOTION TO STRIKE"

THIS MATTER came before the Court for a hearing on September 6, 2017 upon the "The Official Defendants' Motion to Strike the Amended Complaint, Renewed Request for Judicial Notice, and Motion to Dismiss This Action with Prejudice," filed on March 3, 2017, and the "Defendants Phil Smith, Rocco Relvini, Tara Gould, Tim Boldig, and Mitch Gordon's Motion to Dismiss/Motion to Strike," filed on March 7, 2017. The Court, having considered the

Motions, case law, and arguments of counsel from both parties, and otherwise being duly advised in the premises, finds as follows:

RELEVANT FACTS AND PROCEDURAL HISTORY

A detailed history of the instant matter merits discussion, as it factors into the Court's ultimate findings. The Plaintiffs are commercial toucan farmers. A citizen complained of the Plaintiffs' toucans, and Orange County Code Enforcement began an investigation. A zoning manager determined that the Plaintiffs were in violation of the Code. The issue then went to a public hearing, held by the Board of Zoning Adjustment ("BZA"), which continued to find that the Plaintiffs were in violation of the Code. The Plaintiffs appealed to the Board of County Commissioners ("BCC"), who affirmed the BZA's determination. The Plaintiffs then petitioned for a writ of certiorari to the Orange County Ninth Judicial Circuit Court, which ultimately found that the zoning manager, BZA, and BCC properly interpreted the relevant Code, thus denying their petition.

The Plaintiffs filed an action in the Middle District of Florida against the County, the Officials,[1] the BZA members, and other county employees. The District Court ultimately determined that the relevant Code provisions were unconstitutional under the Florida Constitution, but nevertheless, the Plaintiffs' claims for due process violations, equal protection violations, compelled speech, restraints on commercial speech, and unreasonable searches or seizures failed.[2] *See Foley v. Orange County*, 2013 WL 4110414 (M.D. Fla. August 13, 2013).

The Plaintiffs appealed to the Eleventh Circuit, which ultimately vacated the Middle District's judgment and remanded the case for the court to dismiss without prejudice for lack of

[1] "The Officials" refers to the members of the BZA and the BCC, who were named both in their individual and official capacities. They include the following Defendants: Asima Azam, Fred Brummer, Richard Crotty, Frank Detoma, Mildred Fernandez, Teresa Jacobs, Roderick Love, Scott Richman, Joe Roberts, Marcus Robinson, Tiffany Russell, Bill Segal, and Linda Stewart.

[2] That action contained many of the same arguments that are raised in the instant action.

subject matter jurisdiction. *See Foley v. Orange County*, 638 Fed. Appx. 941, 946 (11th Cir. 2016). In so doing, the court concluded that the Plaintiffs' claims either had no plausible foundation, or were proscribed by previous Supreme Court decisions. *Id.* at 945-46.

The Plaintiffs then petitioned the Supreme Court for a writ of certiorari, but it was summarily denied. *See Foley v. Orange County, Fla.*, 137 S. Ct. 378 (2016).

On August 25, 2016, the Plaintiffs filed their initial Complaint in this Court. They amended their Complaint on February 25, 2017 to include the following counts: declaratory and injunctive relief proscribing the enforcement of the relevant Code sections (Counts I and II); negligence, unjust enrichment, and conversion (Count III); taking (Count IV); abuse of process to invade privacy and rightful activity, and conversion (Count V); civil theft (Count VI); and due process (Count VII). All of these counts purport to stem from the administrative proceeding that was held on February 23, 2007 and became final after appeal on February 19, 2008.

On September 6, 2017, the Court held a hearing on "The Official Defendants' Motion to Strike the Amended Complaint, Renewed Request for Judicial Notice, and Motion to Dismiss This Action with Prejudice," filed on March 3, 2017, and the "Defendants Phil Smith, Rocco Relvini, Tara Gould, Tim Boldig, and Mitch Gordon's Motion to Dismiss/Motion to Strike," filed on March 7, 2017. This Order follows.

ANALYSIS AND RULING

"A motion to dismiss tests whether the plaintiff has stated a cause of action." *Bell v. Indian River Memorial Hosp.*, 778 So. 2d 1030, 1032 (Fla. 4th DCA 2001). Furthermore, "[w]hen determining the merits of a motion to dismiss, the trial court's consideration is limited to the four corners of the complaint, the allegations of which must be accepted as true and considered in the light most favorable to the nonmoving party." *Id.*; *see, e.g., Solorzano v. First*

Union Mortg. Corp., 896 So. 2d 847, 849 (Fla. 4th DCA 2005); *Taylor v. City of Riviera Beach*, 801 So. 2d 259, 262 (Fla. 4th DCA 2001); *Samuels v. King Motor Co. of Fort Lauderdale*, 782 So. 2d 489, 495 (Fla. 4th DCA 2001); *Bolz v. State Farm Mut. Ins. Co.*, 679 So. 2d 836, 837 (Fla. 2d DCA 1996) (indicating that a motion to dismiss is designed to test the legal sufficiency of a complaint, not to determine issues of fact).

"A motion to dismiss a complaint based on the expiration of the statute of limitations should be granted only in extraordinary circumstances where the facts constituting the defense affirmatively appear on the face of the complaint and establish conclusively that the statute of limitations bars the action as a matter of law." *Alexander v. Suncoast Builders, Inc.*, 837 So. 2d 1056, 1057 (Fla. 3d DCA 2002); *see also Pines Properties, Inc. v. Tralins*, 12 So. 3d 888, 889 (Fla. 3d DCA 2009).

In the instant matter, the Plaintiffs cause of action accrued when the BZA's determination became final on February 19, 2008, nine years prior to this action's filing. The Plaintiffs' Complaint must be dismissed, as it can be determined from the face of the amended Complaint that all of the causes of action fall outside of their respective limitations period.[3] *See* § 95.11(3)(p), Fla. Stat. (2016) (stating that any action not specifically provided for in the statute is subject to a four-year limitations period, which encompasses declaratory actions and alleged due process violations (Counts I, II, and VII)); § 95.11(3)(a), Fla. Stat. (2016) (indicating that a negligence action has a four-year limitations period (Count III)); § 95.11(3)(h), Fla. Stat. (2016) (specifying that there is a four-year limitations period to bring a claim for a taking (Count IV)); §

[3] The Plaintiffs attempt to circumvent the limitations period by arguing that 28 U.S.C. § 1367(d) "tolls the limitations period for thirty days after dismissal of any supplemental claims related to those asserted to be within the original jurisdiction of the federal court." However, as the Defendants point out in their Motions, section 1367(d) only applies where a federal court enjoyed original jurisdiction over the case, and if the initial assertion of federal jurisdiction is found to be insufficient, then the section does not apply and the party does not get the benefit of the tolling. *See Ovadia v. Bloom*, 756 So. 2d 137, 140 (Fla. 3d DCA 2000). Because the Eleventh Circuit determined that the Plaintiffs' claims had no plausible foundation, section 1367(d) is inapplicable to the instant matter.

95.11(3)(o), Fla. Stat. (2016) (stating that intentional torts, which include abuse of process and conversion, are subject to a four-year limitations period (Count V)); § 772.17, Fla. Stat. (2016) (stating that civil theft has a five-year limitations period (Count VI)).

Accordingly, the following is hereby **ORDERED AND ADJUDGED:**

1. "The Official Defendants' Motion to Strike the Amended Complaint, Renewed Request for Judicial Notice, and Motion to Dismiss This Action with Prejudice" is **GRANTED.**
2. The "Defendants Phil Smith, Rocco Relvini, Tara Gould, Tim Boldig, and Mitch Gordon's Motion to Dismiss/Motion to Strike" is **GRANTED.**
3. The Plaintiffs' Amended Complaint, filed February 25, 2017, is **DISMISSED with prejudice as to the following Defendants: Frank Detoma, Asima Azam, Roderick Love, Scott Richman, Joe Roberts, Marcus Robinson, Richard Crotty, Teresa Jacobs, Fred Brummer, Mildred Fernandez, Linda Stewart, Bill Segal, and Tiffany Russell.**

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on this 24 day of October, 2017.

HEATHER L. HIGBEE
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on Oct 25, 2017, a true and accurate copy of the foregoing was e-filed using the Court's ECF filing system, which will send notice to all counsel of record.

Judicial Assistant

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

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

Defendants
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.

2016-CA-007634-O

APPENDIX C

ORDER RENDERED NOVEMBER 13, 2017

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

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

Plaintiffs,

vs.

CASE NUMBER: 2016-CA-007634-0

ORANGE COUNTY, PHIL SMITH,
CAROL HOSSFIELD, MITCH GORDON,
ROCCO RELVINI, TARA GOULD,
TIM BOLDIG, FRANK DETOMA,
ASIMA AZAM, RODERICK LOVE,
SCOTT RICHMAN, JOE ROBERTS,
MARCUS ROBINSON, RICHARD CROTTY,
TERESA JACOBS, FRED BRUMMER,
MILDRED FERNANDEZ, LINDA STEWART,
BILL SEGAL, and TIFFANY RUSSELL,

Defendants.
_____/

FINAL JUDGMENT IN FAVOR OF DEFENDANTS
PHIL SMITH, CAROL HOSSFIELD (n/k/a CAROL KNOX),
MITCH GORDON, ROCCO RELVINI, TARA GOULD and TIM BOLDIG

THIS CAUSE came before the undersigned Circuit Judge for consideration of the Motion for Entry of Final Judgment filed by Defendants Phil Smith, Carol Hossfield (n/k/a Carol Knox), Mitch Gordon, Rocco Relvini, Tara Gould and Tim Boldig. The Court, having reviewed all pertinent materials in the Court file, and being otherwise fully advised in the premises, it is hereupon

ORDERED and ADJUDGED:

1. That Defendants Phil Smith, Carol Hossfield (n/k/a Carol Knox), Mitch Gordon, Rocco Relvini, Tara Gould and Tim Boldig are entitled to entry of Final Judgment in this cause, based upon the findings and conclusions of law made by this Court in its Order of October 24,

2017, granting said Defendants' Motion to Dismiss/Motion to Strike Plaintiffs' Amended Complaint. It is therefore

ORDERED and ADJUDGED that Final Judgment in this cause is hereby entered in favor of Defendants Phil Smith, Carol Hossfield (n/k/a Carol Knox), Mitch Gordon, Rocco Relvini, Tara Gould and Tim Boldig. Plaintiffs David W. Foley, Jr. and Jennifer T. Foley shall take nothing by this action against said Defendants, and said Defendants shall go hence without day. The Court reserves jurisdiction over any claims made or to be made by said Defendants for an award of costs and attorney's fees against the Plaintiffs.

DONE and ORDERED at Orlando, Orange County, Florida, this 13 day of November, 2017.

CIRCUIT JUDGE

Copies to: David W. Foley, Jr. and Jennifer T. Foley, david@pocketprogram.org, jtfoley60@hotmail.com; William C. Turner, Esquire, Elaine Marquardt Asad, Esquire and Jeffrey J. Newton, Esquire, williamchip.turner@ocfl.net, judith.catt@ocfl.net, elaine.asad@ocfl.net, gail.stpnford@ocfl.net; and Lamar D. Oxford, Esquire, loxford@drml-law.com, RhondaC@drml-law.com on this 13 day of NOV, 2017.

Judicial Assistant

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

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

Defendants
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.

2016-CA-007634-O

APPENDIX D

MEMORANDUM OF LAW REGARDING THE APPLICATION OF 28 USC §1367 TO *FOLEY ET UX V. ORANGE CTY. ET AL*

SUMMARY

November 13, 2017, relying upon the findings and conclusions of law made in its order signed October 24, 2017, and filed [rendered] October 25, 2017, the Court issued its "Final Judgment in Favor of Defendants Phil Smith, Carol Hossfield (n/k/a Carol Knox), Mitch Gordon, Rocco Relvini, Tara Gould and Tim Boldig." In its order rendered October 25, 2017, the Court granted the defendants' motion to dismiss on grounds that all the Foleys' "causes of action fall outside of their

respective limitations period." The Court claimed its decision was supported by *Ovadia v. Bloom*, 756 So.2d 137 (3rd DCA 2000). The Court interpreted *Ovadia* to generally hold that 28 USC §1367, does not toll the statute of limitations "if the initial assertion of federal jurisdiction is found to be insufficient."

The Court's unprecedented decision to apply *Ovadia* – a case involving diversity jurisdiction – to the Foleys' case involving federal question jurisdiction conflicts irreconcilably with the bright line drawn by *Krause v. Textron Financial Corp*., 59 So.3d 1085 (Fla. 2011).

This memorandum provides a close reading of *Krause* (a case, like *Foley* involving federal question jurisdiction) and *Ovadia* (a case involving diversity jurisdiction), and explores the legal principles behind these two very different decisions. As will be shown below, it is the difference between "federal question" jurisdiction and "diversity" jurisdiction that explains the decision in *Krause* to apply the tolling provision in 28 USC §1367, and the decision in *Ovadia* not to do so. And it is this difference that makes *Krause* applicable to *Foley et ux* and requires this Court to rehear, reconsider, and reverse its decision.

This memorandum begins with the text of 28 USC §1367, reviews the Eleventh Circuit's decision in *Foley et ux v. Orange County et al*, and compares the application of 28 USC §1367 in *Krause v. Textron*, *Scarfo v. Ginsberg*, *Ovadia v. Bloom*, federal courts in Florida and in other jurisdictions.

TABLE OF CONTENTS

MEMORANDUM OF LAW REGARDING THE APPLICATION OF 28 USC §1367 TO *FOLEY ET UX V. ORANGE CTY. ET AL*

I. 28 USC §1367 – The plain text does not bar application to the Foleys' claims.

The first step in determining the proper application of 28 USC §1367, is to review its plain text.

The federal supplemental jurisdiction statute, 28 USC §1367, provides that a federal district court may exercise supplemental jurisdiction over certain claims, and it governs when the court may do so. The statute provides in pertinent part:

> **§ 1367. Supplemental Jurisdiction**
>
> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.
>
> (b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.
>
> (c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(Added Pub. L. 101–650, title III, § 310(a), Dec. 1, 1990, 104 Stat. 5113.)

II. The Eleventh Circuit dismissed the Foleys' case without prejudice for lack of federal question jurisdiction per *Bell v. Hood*.

The second step in determining the proper application of 28 USC §1367 to the federal decision preceding the instant case is to review that federal decision.

The U.S. Court of Appeals for the Eleventh Circuit in *Foley et ux v. Orange County et al*, 638 Fed.Appx. 941 (11th Cir. 2016), on review of the decisions of the U.S. District Court for the Middle District of Florida in *Foley et ux v. Orange County et al*, 6:12-cv-00269-RBD-KRS, begins its opinion by stating:

> Because we find that these federal [constitutional] claims on which the District Court's federal-question jurisdiction was based are

> frivolous under *Bell v. Hood*, 327 US 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946), we vacate the District Court's orders.

The Eleventh Circuit then provides the following brief review of the case's procedural history:

> [T]he District Court granted partial summary judgment in favor of the Foleys on one of their state-law claims and granted partial summary judgment to the County on the Foleys' remaining claims. The District Court also made various immunity rulings in relation to the suits against the County employees. Most relevant here, the Foleys appeal the grant of summary judgment against their four federal Constitutional claims based on (1) substantive due process; (2) equal protection; (3) compelled and commercial speech; and (4) illegal search and seizure."

After its review of the case's procedural history the Eleventh Circuit pinpoints the words in *Bell* – *insubstantial and frivolous* – that summarize its conclusion:

> Where a District Court's jurisdiction is based on a federal question, "a suit may sometimes be dismissed . . . where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction *or where such a claim is wholly insubstantial and frivolous*." *Bell*, 327 U.S. at 682-83, 66 S. Ct. at 776 (*Emphasis added*).

The body of the opinion reviews each of the constitutional claims the Foleys raised in the district court[1] – substantive due process, class-of-one equal-protection,

---

[1] The Eleventh Circuit opinion does not address the district court's "various immunity rulings," rulings which subsumed the federal RICO claims the Foleys also appealed – an independent source of federal jurisdiction. Consequently the opinion does not expressly address every element of the federal jurisdiction exercised by the district court.

compelled speech, commercial speech, search and seizure – and concludes its review of each claim by stating, "Thus, this claim lacks merit."

By citation to *Bell*, 327 U.S. at 682-83, the Eleventh Circuit concluded that the District Court lacked federal-question jurisdiction and consequently "did not have jurisdiction to determine the state-law claims presented by the Foleys."[2]

Finally, the Eleventh Circuit vacated the judgment of the District Court and remanded "with instructions that the court dismiss this case without prejudice for lack of subject matter jurisdiction."

---

[2] This conclusion is consistent with 28 USC §1367(c)(3), and with *Mine Workers v. Gibbs*, 383 US 715, 726 (1966), which held: "Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law.[15] Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well."

> Note 15 of *Gibbs* states: "Some have seen this consideration as the principal argument against exercise of pendent jurisdiction. Thus, before Erie, it was remarked that 'the limitations [on pendent jurisdiction] are in the wise discretion of the courts to be fixed in individual cases by the exercise of that statesmanship which is required of any arbiter of the relations of states to nation in a federal system.' Shulman & Jaegerman, supra, note 9, at 408. In his oft-cited concurrence in Strachman v. Palmer, 177 F. 2d 427, 431 (C. A. 1st Cir. 1949), Judge Magruder counseled that "[f]ederal courts should not be overeager to hold on to the determination of issues that might be more appropriately left to settlement in state court litigation," at 433. See also Wechsler, supra, note 9, at 232-233; Note, 74 Harv. L. Rev. 1660, 1661 (1961); Note, supra, note 11, at 1043-1044."

III. Per *Bell v. Hood*, and its antecedents, a dismissal of a federal question as *insubstantial* or *frivolous* is not a denial of original jurisdiction.

The third step in determining the proper application of 28 USC §1367 to the instant case is to review the authority cited by the Eleventh Circuit – Bell v. Hood.

The passage from Bell the Eleventh Circuit chose to quote – "a suit may sometimes be dismissed . . . *where such a claim is wholly insubstantial and frivolous*" – is followed in Bell by this statement and citation:

> The accuracy of calling these dismissals jurisdictional has been questioned. The Fair v. Kohler Die Co., [228 U.S. 22, 25 (1913)]. But cf. Swafford v. Templeton, [185 US 487 (19020].

The question then is whether it is accurate to call a dismissal of a *frivolous* federal claim a dismissal for lack of jurisdiction, or a dismissal on the merits. The court in The Fair v. Kohler Die *at 25,* held that it was jurisdictional only *in form*, but was in fact on the merits:

> [I]f the claim of [federal] right were frivolous, the case might be dismissed… [but] jurisdiction would not be denied*, except possibly in form*. Deming v. Carlisle Packing Co., 226 U.S. 102, 109 [(1912)]. [*Emphasis* added.]

The federal courts' rationale for conflating a dismissal of a *frivolous* federal question with a dismissal on the merits *in the form* of a dismissal for lack of subject matter jurisdiction is explained in Deming v. Carlisle Packing Co., 226 U.S. 102, 109 (1912), as follows:

> [A]lthough a Federal question was raised below in a formal manner, that question, *when examined with reference to the averments of fact*

> upon which it was made to depend, is one which has been so explicitly decided by this court as to foreclose further argument on the subject and hence to cause the Federal question relied upon to be devoid of any substantial foundation or merit. . . . It is likewise also apparent from the analysis previously made that even if the formal raising of a Federal question was alone considered on the motion to dismiss, and therefore the unsubstantial nature of the Federal question for the purposes of the motion to dismiss were to be put out of view, the judgment [would be the same]. This follows, since it is plain that as the substantiality of the claim of Federal right is the matter upon which the merits depend, and that claim being without any substantial foundation, the motion … would have to be granted … [*Emphasis* added.]

In sum, *merit* and *jurisdiction* in this case are coterminous. Here, on defendants' motions for summary judgment the federal courts in Foley et ux v. Orange County et al exercised original federal question jurisdiction to determine that as a matter of law and "*averments of fact*" the federal [constitutional] questions did not *merit* further exercise of *jurisdiction*. Florida or federal court apply the tolling provisions of 28 USC §1367 to a case in this posture.

IV. *Krause v. Textron* clearly held that §1367 applies "to claims commenced in federal court but later dismissed for lack of federal subject matter jurisdiction."

The fourth step in determining the proper application of 28 USC §1367 is to review the Florida precedent applicable to a case dismissed like the Foleys' for lack of federal question jurisdiction – *Krause v. Textron*.

Florida's Supreme Court granted review of the Second District's decision in *Krause v. Textron Financial Corp.*, 10 So.3d 208 (Fla. 2d DCA 2009), on the

ground that it expressly and directly conflicted with the Fourth District's decision in *Scarfo v. Ginsberg*, 817 So.2d 919 (Fla. 4th DCA 2002).

The question addressed by the Supreme Court in *Krause v. Textron Financial Corp.*, 59 So.3d 1085 (Fla. 2011), was whether 28 USC §1367(d), tolls a state statute of limitations after a state law claim is dismissed without prejudice by a federal appellate determination that the lower (bankruptcy) court lacked subject matter jurisdiction – precisely the posture of the Foleys' case. The court decided limitations are tolled where dismissal is for lack of subject matter jurisdiction.

A. Facts and Procedural Background

June 15, 2000, David Bautsch and Andrew J. Krause filed a complaint in an adversary proceeding in a bankruptcy case between Twin Eagles Golf and Country Club and its primary financier Textron Financial Corporation. Bautsch and Krause sought to recover monies owed them by Twin Eagles for the resale of their golf membership.

Bautsch and Krause's complaint asked the court to impose a constructive trust against any proceeds realized from Twin Eagle's resale of their golf membership. On Textron's motion for summary judgment the bankruptcy court declined to do so.

Bautsch and Krause appealed the summary judgment to the United States District Court for the Middle District of Florida, in its appellate capacity pursuant 28 USC §158(a)(1).

On appeal Textron argued that the District Court "lacked appellate jurisdiction because the Bankruptcy Court lacked subject matter jurisdiction." *David Bautsch and Andrew J. Krause v.Textron Financial Corporation*, No. 2: 05-cv-317-FtM-29DNF (M.D. Fla. Jan. 12, 2006). The District Court, however, found that Bautsch and Krause had "alleged that the proceeding was 'a core proceeding pursuant 28 USC §1334,'" and held that "[t]his was sufficient to allege jurisdiction in the Bankruptcy Court." *Id*. The District Court further found that the bankruptcy court ultimately established that the proceeding was not a "core proceeding" as required by 28 USC 157, and only then did the bankruptcy court lose subject matter jurisdiction. *Id*.

The District Court then directed the bankruptcy court to vacate its summary judgment entered in favor of Textron and dismiss without prejudice the adversary proceeding as to Textron.

Less than a month later, Bautsch and Krause filed suit against Textron in the Circuit Court for the Twentieth Judicial Circuit in and for Collier County. Bautsch and Krause again sought imposition of a constructive trust on any funds Textron received from Twin Eagles.

The Collier County Circuit Court held that section 28 USC §1367(d) did not toll limitations on the constructive trust claim because the federal district court, sitting in its appellate capacity, had determined that the bankruptcy court lacked subject matter jurisdiction over that claim. The Second District Court of Appeals affirmed the Circuit Court.

Bautsch and Krause then sought review in Florida's Supreme Court, alleging express and direct conflict with the Fourth District's decision in *Scarfo v. Ginsberg*, 817 So.2d 919 (Fla. 4th DCA 2002).

B. The Supreme Court's Analysis

On review of *Krause*, Florida's Supreme Court first applied the standard rules of statutory interpretation to 28 USC §1367, and held:

> The plain text of the federal statute does not, by its terms, bar the application of the tolling provision where a claim is dismissed for lack of federal subject matter jurisdiction. Rather, the savings protection of section 1367(d) applies "for any claim asserted under subsection (a)." The plain and unambiguous language of section 1367(d) thus permits the application of the tolling provision to claims commenced in federal court but later dismissed for lack of federal subject matter jurisdiction.

The Supreme Court expressly approved the decision of the Fourth District in *Scarfo v. Ginsberg*, 817 So.2d 919 (Fla. 4th DCA 2002), and emphatically concluded:

> Our precedent concerning statutory interpretation also supports the Fourth District's interpretation of section 1367(d) in *Scarfo*, where the court concluded that the dismissal of a federal claim for lack of

subject matter jurisdiction did not bar the application of section 1367(d) to toll the state limitations period for claims refiled in state court.

V. *Scarfo v. Ginsburg* held that the failure of a federal question is irrelevant because determination of that issue requires the federal court to exercise its original jurisdiction.

The issue in Scarfo v. Ginsberg, 817 So.2d 919 (4th DCA 2002), was whether the filing of state law claims in federal court pursuant 28 USC §1367, operated to toll the statute of limitations during the pendency of a federal action ultimately dismissed because the predicates of the alleged federal question were not satisfied. The court determined limitations were tolled on unsuccessful federal question claims.

A. Facts and Procedural Background

Elaine Scarfo filed suit in federal district court alleging a federal claim under Title VII of the Civil Rights Act of 1964 and state common law tort claims of battery, intentional infliction of emotional distress, and invasion of privacy.

The district court granted a summary judgment against Scarfo on the federal claims, holding that none of the defendants could be liable under that statute, and dismissed Scarfo's state law claims without prejudice. The district court's decision was affirmed on appeal.

B. Fourth District Analysis

Significantly in *Scarfo* – a post-*Ovadia* decision – the Fourth District drew the distinction essential here between "federal question" and "diversity" jurisdiction: "In this case plaintiff based subject matter jurisdiction in federal court on federal question grounds, rather than on diversity grounds." The Court then went on to note that where a "federal question" has been alleged, it is irrelevant whether the requirements of that "federal question" are ultimately satisfied because resolution of that issue requires the federal court to exercise its original "federal question" jurisdiction. The Fourth District held:

> [Federal question claims] are often joined with state law claims arising under a common nucleus of operative fact. Consequently, Congress also created section 1367 to allow such related state law claims to be joined with the federal claim in a federal court. At the same time, section 1367(d) provides for a non-prejudicial dismissal of the related state law claims when the federal claim is adjudicated before trial. That is, section 1367(d) tolls the running of any applicable state statute of limitations on the related state law claims during the pendency of the federal claim. The purpose of this tolling provision is undoubtedly to allow claimants to pursue their federal claim in a federal court without cost to their state law claims, should the federal claim prove unsuccessful.
>
> Section 1367(d) provides for a tolling of state law limitations on any state law claim asserted in federal court under section 1367(a). The only requirements are that the claim be asserted under section 1367(a)… The mere fact that the federal court of appeals saw the question of [liability] as an issue of subject matter jurisdiction does not change the text of section 1367.

In sum, limitations are tolled per 28 USC §1367, even when the federal action is ultimately dismissed because the predicates of the alleged federal question are not satisfied.

VI. The rule in *Ovadia v. Bloom*, constrained by its reference to *Wisconsin Dept. of Corrections v. Schacht*, is applicable only to diversity jurisdiction and not federal question jurisdiction.

In *Ovadia v. Bloom*, 756 So.2d 137 (3rd DCA 2000), the Third District had to decide whether the tolling provisions of 28 USC §1367, applied to state claims asserted in federal court on diversity grounds if the federal court dismissed the case for lack of diversity. The court decided limitations were not tolled where the absence of diversity was on the face of the complaint.

A. Facts and Procedural Background

February 3, 4, and 5, 1993, WTVJ-TV, broadcast a report on "Dangerous Doctors" which featured Dr. Ovadia. September 1994, Dr. Ovadia filed a common law action in federal court against the station and its reporters. October 1994, the defendants filed an answer. On February 7, 1995, two days after the expiration of the two-year statute of limitations, the defendants filed a motion for judgment on the pleadings asserting the federal court lacked subject matter jurisdiction over the case because there was a *lack of complete diversity* on the face of the complaint. The court granted defendants' motion. Shortly thereafter, Dr. Ovadia filed a complaint for the same common law causes in the Miami-Dade County Circuit

Court. The defendants filed a motion for surmmary judgment on statute of limitations grounds. The motion was granted. Dr. Ovadia appealed to the Third District.

B. Third District Analysis

The Third District held that 28 USC §1367 did not toll limitations because the presence of non-diverse defendants in the federal action destroyed jurisdiction at inception. The court said:

> Under the plain language of [28 USC §1367], the limitations period is not tolled because the federal court never had original jurisdiction over Dr. Ovadia's action. Any arguable jurisdiction was based on diversity, and the presence of non-diverse defendants in the action destroyed jurisdiction on that basis. *See Wisconsin Dept. of Corrections v. Schacht*, 524 U.S. 381, 118 S.Ct. 2047, 141 L.Ed.2d 364 (1998) (only complete diversity of citizenship among parties permits original jurisdiction over the case); *Finley v. Higbee Co.*, 1 F.Supp.2d 701, 702 (N.D.Ohio 1997). Under section 1367, claims against a non-diverse defendant cannot be considered supplemental jurisdiction. *See Dieter v. MFS Telecom, Inc.*, 870 F.Supp. 561 (S.D.N.Y.1994). Hence, this statute does not toll the limitations period for Dr. Ovadia's claims.

The Third District applied this rule to "diversity" jurisdiction only and did not in anyway suggest its application to "federal question" jurisdiction. In fact, by reference to *Wisconsin Dept. of Corrections v. Schacht*, 524 U.S. 381 (1998), the Third District implies its rule does not apply to "federal question" jurisdiction. The Supreme Court in *Wisconsin Dept. of Corrections v. Schacht* clarified the court's

distinct duties on "federal question" and "diversity" jurisdiction – the former must be litigated, the later may be determined on the face of the complaint.[3]

In sum, *Ovadia* clearly holds that where the absence of diversity is on the face of a federal complaint, the tolling provisions of 28 USC §1367 do not apply to save the asserted state claims. However, no court has applied *Ovadia* to any case alleging federal question jurisdiction.

VII. Federal Courts in Florida apply §1367 per *Krause* to even "frivolous" federal question claims.

The cases below make clear that federal courts in Florida consider 28 USC §1367 to toll limitations even where claims are dismissed for lack of subject matter jurisdiction, or as *frivolous*.[4]

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[3] The Supreme Court in *Wisconsin Dept. of Corrections v. Schacht at 389*, distinguished "federal question" jurisdiction from "diversity" jurisdiction as follows:

> [A federal question] case differs significantly from a diversity case with respect to a federal district court's original jurisdiction. The presence of the nondiverse party automatically destroys original jurisdiction: No party need assert the defect. No party can waive the defect or consent to jurisdiction. *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U. S. 694, 702 (1982); People's Bank v. Calhoun, 102 U. S. 256, 260-261 (1880). No court can ignore the defect; rather a court, noticing the defect, must raise the matter on its own. *Insurance Corp. of Ireland, supra, at 702*; *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U. S. 379, 382 (1884). [Emphasis added.]

[4] Federal courts in other states and federal circuits reach the same conclusion: *Graves v. Goodnow Flow Ass'n, INC.*, No. 8:16-CV-1546 (ND New York 2017); *Parker v. UGN INC.,* No. 2:13 CV 420 (ND Indiana 2016); *Thomas v. Buckner,* No. 2:11-CV-245-WKW (MD Alabama 2016).

A. *Boatman v. Fortenberry,*
No. 3:17cv29/RV/EMT (ND Fla., Pensacola 2017)

Citing Krause v. Textron, the Federal District Court of the Northern District of Florida, after dismissing various federal claims as either a failure to state a claim, Heck-barred, or *frivolous*, expressly dismissed Boatman's supplemental state law claims "without prejudice to his pursuing them in state court," per 1367(d).

B. *Farrest v. KNT Dist.'s, Inc.,*
2:16-cv-111-FtM-99MRM (MD Fla., Ft. Myers 2016)

The Federal District Court of the Middle District of Florida dismissed all federal claims for lack of subject matter jurisdiction but at †3 expressly held that 28 USC §1367(d), tolled limitations on supplemental state claims.

C. *Holley v. Bossert,*
No. 3:15cv389/LAC/EMT (ND Fla., Pensacola 2016)

Citing Krause v. Textron, the Federal District Court of the Northern District of Florida, after dismissing Holley's federal claims for failure to state a cause of action expressly dismissed supplemental state law claims "without prejudice to his pursuing them in state court," per 1367(d).

D. *Myers v. Watkins*,
No. 5:12cv259/MW/EMT (ND Fla., Panama City 2015)

Citing Krause v. Textron, the Federal District Court of the Northern District of Florida expressly held that "Myer's pursuit of any state law claim in state court

would not be prejudiced" by its dismissal of his federal claims for failure to exhaust administrative remedies.

E. *Brewer v. US Marshalls Courthouse Security*, No. 3:15cv497/MCR/EMT (ND Fla., Pensacola 2015)

Citing Krause v. Textron, the Federal District Court of the Northern District of Florida expressly held that "Brewer's pursuit of any state law claim in state court would not be prejudiced" by its dismissal of his federal claims as *frivolous*.

VIII. Other Jurisdictions without the generosity of state "savings statutes" apply §1367 to unsuccessful assertions of federal question jurisdiction.

Many states generously provide "savings statutes" which extend limitations beyond the 30 day grace period of 28 USC §1367 regardless the disposition of the case in federal court.[5] The majority of cases in the high courts of other states involving 28 USC §1367 resolve questions involving either the "savings statutes" of their respective states or the question currently before the US Supreme Court in Artis v. District of Columbia, 137 S. Ct. 1202 (2017) – whether §1367(d) entirely suspends limitations while the federal suit is pending, or whether limitations continue to run and §1367(d) merely provides a 30 days grace period after

[5] Examples include: Arizona Rev.Stat. Ann. § 12–504(A); Georgia Code Ann. § 9–2–61(a); Iowa Code § 614.10; Tennessee Code Ann. § 28–1–105(a); Virginia Code Ann. § 8.01–229(E)(3); Montana Code Ann. § 27–2–407; New York C.P.L.R. § 205(a); Okalahoma Title 12, § 96; Oregon Rev.Stat. Ann. § 12.220(1); Pennsylvania Cons.Stat. Ann. § 5535(a)(2)(ii); Rhode Island Gen. Laws Ann. § 9–1–22; Nebraska Rev.Stat. Ann. § 25–201.01(2).

dismissal. Consequently it is difficult to readily determine how these states deal with the issue in *Foley et ux v. Orange Coutny et al*.

Nevertheless, the high court of the District of Columbia in *Stevens v. Arco Management*, 751 A. 2d 995, 998 (DC Court of Appeals 2000) reached the same conclusion as Florida's Supreme Court in *Krause v. Textron*. In *Stevens v. Arco Management*, on the question of the application of 28 USC §1367 to state claims related to federal claims dismissed for lack of subject matter jurisdiction, the DC Court of Appeals held:

> The language of §1367(d) does not require a successful assertion of federal jurisdiction. Moreover, the subsection does not differentiate among the possible reasons for dismissal, whether it be on the merits, or for jurisdictional reasons.

CONCLUSION

This Court's decision to apply *Ovadia* to a case involving federal question jurisdiction has no precedent or support in Florida or federal courts, and directly conflicts with *Krause v. Textron Financial Corp.*, 59 So.3d 1085 (Fla. 2011). The Court should rehear and reverse its decision on limitations in *Foley et ux v. Orange County et al*.

PRAYER

WHEREFORE DAVID AND JENNIFER FOLEY MOVE THE COURT TO REHEAR ITS ORDER OF NOVEMBER 13, 2017.

CERTIFICATE OF SERVICE

Plaintiffs certify that on November 17, 2017, the foregoing was electronically filed with the Clerk of the Court using the Florida Courts' eFiling Portal, which will send notice of filing and a service copy of the foregoing to the following:

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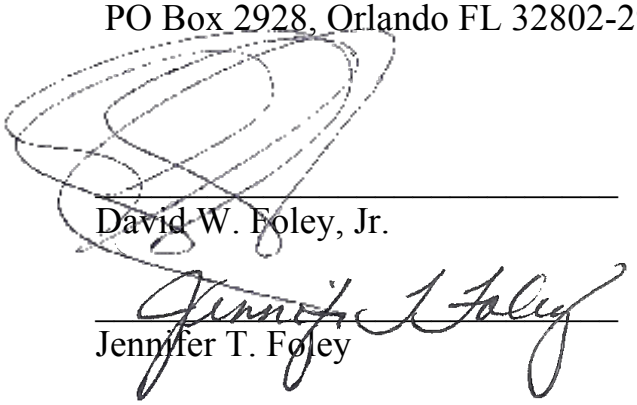

David W. Foley, Jr.

Jennifer T. Foley

Date: November 17, 2017

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IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, FLORIDA

CASE NO.: 2016-CA-007634-O
DIVISION: 35

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

Plaintiffs,

v.

ORANGE COUNTY, FLORIDA, et al.,

Defendants.
_____/

ORANGE COUNTY'S AMENDED MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT PURSUANT TO FLORIDA RULES OF CIVIL PROCEURE 1.140(b)(1) and (6), AMENDED SO AS TO RAISE STATUTE OF LIMITATIONS DEFENSE

Defendant, Orange County, Florida ("Orange County"), hereby moves this Court to dismiss the Amended Complaint filed by David W. Foley, Jr. and Jennifer T. Foley ("Foleys"), pursuant to Florida Rules of Civil Procedure 1.140(b)(1) and (6), for lack of subject matter jurisdiction and for failure to state a cause of action.

The Foleys' Amended Complaint against Orange County and various third party individuals and officials purports to state six counts, only four of which appear to be raised against Orange County. Counts 1 and 2 purport to be claims for a 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 individuals, not Orange County. Count 7 is pleaded in the alternative, and is titled "Due Process."

The Foleys' Amended Complaint makes allegations concerning events in 2007-2008, centering on a license David Foley purportedly obtained from the State of Florida Fish & Wildlife Conservation Commission to exhibit and sell exotic birds at the Foleys' Solandra Drive residence in Orange County, Florida. Orange County's zoning regulations did not permit aviculture or the exhibiting and selling of exotic birds as a home occupation. The Foleys claimed in 2007 that Orange County could not regulate away, at the county level, a license they had obtained from the state. Orange County disagreed. Litigation ensued between the Foleys and Orange County in state and federal courts.

The Foleys' Amended Complaint also makes allegations concerning more recent events. The Foleys allege that Orange County's recently amended zoning ordinance is invalid, and also allege problems with a separate property owned by the Foleys, called the "Cupid Property."

1. Plaintiffs' Amended Complaint should be Dismissed, with Prejudice, Because Plaintiffs Claim, on Their Face, are Barred by the Affirmative Defense of the Statute of Limitations.

On August 25, 2016, Plaintiffs filed their initial Complaint in this matter. On February 25, 2017, Plaintiffs amended their complaint to allege: declaratory and injunctive relief for enforcement of relevant Code sections (Counts I and II); negligence, unjust enrichment and conversion (Count III); taking (Count IV); abuse of process to invade privacy and rightful activity and conversion (Count V); civil theft (Count VI); and due process (Count VII). The basis of Plaintiff claims arise out of administrative proceedings occurring on February 23, 2007,

which became final after appeal on February 19, 2008. (*See* this Court's October 25, 2017 Order attached as Exhibit "A" and incorporated fully herein).

For the reasons stated by this Court in its "Order Granting 'The Official Defendants' Motion to Strike the Amended Complaint, Renewed Request for Judicial Notice, and Motion to Dismiss this Action with Prejudice' and Order Granting 'Defendants Phil Smith, Rocco Relvini, Tara Gould, Tim Boldig, and Mitch Gordon's Motion to Dismiss/Motion to Strike'", issued October 25, 2017, the Foleys claims are barred by the statute of limitations as to Orange County too. The Plaintiff's attempt to circumvent the limitations period by arguing that 28 U.S.C. Sec. 1367(d) applies is incorrect. Because the Eleventh Circuit determined that the Plaintiffs' claims had no plausible foundation, 28 U.S.C. Sec. 1367(d) is inapplicable in this matter. *See* October 25, 2017 Order, page 4, footnote 3. Thus the statute of limitations for each count falls outside their respective limitations period.[1] Accordingly, the Foleys' Amended Complaint against Orange County should likewise be dismissed, with prejudice.

2. <u>Counts 1 and 2 Should be Dismissed Because Plaintiffs Fail to Allege a Ripe Justiciable Controversy under Florida's Declaratory Judgment Act.</u>

Counts 1 and 2 should be dismissed for failure to state a claim. 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 Dept. of Environmental Protection v Garcia,* 99 So. 3d 539, 545 (Fla. 3rd DCA 2011) (there must exist

[1] Counts I, II, and VII subject to Sec. 95.11(3)(p), F.S.(4-year limitations period); Count III subject to Sec. 95-11(3)(a), F.S. (4-year limitations period); Count IV subject Sec. 95.11(3)(h), F.S. (4-year limitations period); Count V subject to Sec. 95.11(3)(o), F.S. (4-year limitations period)and Count VI subject to Sec. 772.17, F.S. (subject to 5-year limitations period). (*See* Court's October 25, 2017 Order attached).

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 language that had been challenged by the Foleys in prior litigation. 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 newly amended zoning ordinance. 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, known as Ordinance 2016-19, with an effective date of September 23, 2016. The Foleys do not allege that Orange County has deprived them of any right they may have since the amendment. Because the Foleys have not alleged 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. 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 Court lacks subject matter jurisdiction. Therefore, Counts 1 and 2 of the Amended Complaint, seeking declaratory judgment and injunctive relief, should be dismissed.

3. Count 3 Should be Dismissed Because Plaintiffs Failed to State a Cause of Action Upon Which Relief Can be Granted.

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

The Foleys' claims for negligence, unjust enrichment, and conversion fail and should be dismissed with prejudice. As to the claim for negligence, their complaint does not allege any duty recognized under Florida negligence law on the part of Orange County, nor does it allege a breach of any such duty. Florida law is clear that the existence of a duty in negligence is a pure question of law. *See Williams v. Davis,* 974 So. 2d 1052, 1057 n. 2 (Fla. 2007); *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.

See Amended Complaint, 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.

As to Foleys' "unjust enrichment claim," apparently found at paragraph 62(b), 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. *See* Amended Complaint, paragraph 40. The Foleys received the value of participating in these proceedings.

Nor do the Foleys state a claim for conversion. 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.

Count 3 fails to state a cause of action and should be dismissed.

4. <u>Count 4 Should be Dismissed for Plaintiffs' Failure to State a Cause of Action Upon Which Relief Can Be Granted</u>.

In Count 4 of the Foleys' Amended Complaint, they seek monetary damages for a taking without public purpose, due process or just compensation pursuant to Article X, Section 6, Florida Constitution (eminent domain)[2]. This theory purports to allege an inverse condemnation claim. The Foleys seek damages including purported lost business income.

The exercise of the power of eminent domain and the constitutional limitations on that power are vested in the legislature. The right to exercise the eminent domain power is delegated by the legislature to the agencies of government and implemented by legislative enactment. The

[2] Article X, Section 6, Florida Constitution, provides that "[n]o private property shall be taken except for a public purpose and with full compensation therefor . . . "

right of a county to exercise the power of eminent domain is granted pursuant to Florida Statute Sec. 127.01 (2016)[3] See also *Systems Components Corp v. Florida Department of Transportation*, 14 So.3d 967, 975-76 (Fla. 2009). [T]he "full compensation" mandated by article X, Section 6 of the Florida Constitution is restricted to (1) the value of the condemned land, (2) the value of associated appurtenances and improvements, and (3) damages to the remaining land (i.e., severance damages). *See, e.g., State Road Dep't v. Bramlett,* 189 So. 2d 481, 484 (Fla. 1966); *cf. United States v. Bodcaw Co*., 440 U.S. 202, 204 (1979). Nowhere in Florida's constitution, Florida Statutes, or in case law does property mean or include a permit or license to sell, breed or raise wildlife (Toucans).

The Foleys cannot state a claim for inverse condemnation because 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 1985). Moreover, even if Orange County's interpretation of its Zoning Ordinance could somehow be deemed as confiscatory, inverse condemnation would still not be a viable cause of action; instead, the relief available would be a judicial determination that the ordinance or resolution is unenforceable and must be stricken. *Id.; see also* Section 6, *Infra.*

The only "right" the Foleys arguably ever had was a "right" granted to Mr. Foley alone by a state-issued permit or license, not a property right. 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. 3rd DCA 1993).

[3] Chapter 127, Florida Statutes (2016) - Section127.01-Counties delegated power of eminent domain; recreational purposes, issue of necessity of taking; compliance with limitations.— (1)(a) Each county of the state is delegated authority to exercise the right and power of eminent domain; that is, the right to appropriate property, except state or federal, for any county purpose. The absolute fee simple title to all property so taken and acquired shall vest in such county unless the county seeks to condemn a particular right or estate in such property.

Finally, the Foleys are not entitled to business damages under their takings claim. Under Florida law, business damages in a takings context are not damages that are constitutionally created, but instead are statutorily based. *See Systems Components Corp,* 14 So. 3d at 978. Furthermore, business damages are statutorily limited to certain types of takings by governmental entities, none of which are involved here. *Id.* According to Florida's Supreme Court:

> In more informal terms, the business-damages portion of the statute has been suggested to generally *apply if, and only if:*
>
> (1) A partial taking occurs;
> (2) The condemnor is a state or local "public body";
> (3) The land is taken to construct or expand a right-of-way;
> (4) The taking damages or destroys an established business, which has existed on the parent tract for the specified number of years;
> (5) The business owner owns the condemned and adjoining land (lessees may qualify)
> (6) The business was conducted on the condemned land and the adjoining remainder; and
> (7) The condemnee specifically pleads and proves (1)-(6).

Id.

The Foleys did not plead these statutorily required elements. Consequently, the Foleys are not entitled to business damages, Count 4 does not state a cause of action upon which relief can be granted, and as such, Count 4 should be dismissed.

5. <u>Plaintiffs Do Not State a Viable Cause of Action For a Constitutional Tort Denial of Fundamental Rights and Conspiracy to Deny Fundamental Rights Under Florida Law</u>

In Count 7 of the Foleys' Amended Complaint, they allege an alternative theory of "Due Process." However, no cause of action for money damages exists under Florida law for violation of a state constitutional right. Specifically, 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).

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) Sec. 1983 to breath life into the state constitutional provisions." *Id*. at 1146 (concurring opinion Justice Sharp).

Since there is no recognizable cause of action under state law for money damages based on a constitutional tort of violation of fundamental rights, this portion of the Foleys' Amended Complaint must be dismissed for failure to state a cause of action.

6. Plaintiffs Do Not State a Federal Cause of Action Under 42 U.S.C. Sec. 1983

To the extent the Foleys' Amended Complaint seeks monetary damages for an alleged violation of their rights under 42 U.S.C. Sec. 1983, the Amended Complaint should be dismissed because the substance of their grievances do not state a cause of action under federal law.

The Due Process Clause of the Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The Supreme Court has interpreted this clause to provide for two different kinds of constitutional protection: substantive due process and procedural due process. *McKinney v. Pate,* 20 F. 3d 1550, 1555 (11th Cir. 1994) (en banc). The Foleys bring only substantive due process claims, which this Court must carefully analyze to determine the nature of the Foleys' rights that allegedly have been deprived. *DeKalb Stone, Inc. v. County of DeKalb,* 106 F.3d 956, 959 (11th Cir. 1997).

The Foleys at best assert two possible bases for their claims. They contend first that Orange County's zoning ordinances are *ultra vires* and, therefore, are arbitrary and irrational. They also contend that Orange County's decision to uphold the zoning manager's determinations that a commercial aviary is not a permissible use of a residential-only zoned property, and that a commercial aviculture operation also cannot be a home occupation, are substantive due process violations.

In order to address these claims, the Court should first review the law applicable to substantive due process claims. The Court should then apply that law to the two possible bases for the Foleys' claims to see if they state a claim under federal law.

The substantive component of the Due Process Clause protects those rights that are fundamental—that is, rights that are "implicit in the concept of ordered liberty." *McKinney,* 20 F.3d at 1556. Fundamental rights are those protected by the U.S. Constitution. *Id.* Substantive rights that are created by state law are generally not subject to substantive due process protection. *Id.* Land use regulations like those at issue in this case are state-created rights that are not protected by substantive due process. *Greenbriar Village, L.L.C. v. Mountain Brook,* 345 F.3d 1258, 1262 (11th Cir. 2003). Moreover, the Foleys were deprived at most of their rights under a permit, which does not constitute a property right. *See Hernandez,* 629 So. 2d at 206. Thus, the Foleys were not deprived of life, liberty or property.

The Foleys' theory also fails because the Foleys complain about Orange County's executive acts, i.e. applying an allegedly invalid ordinance to the particular facts of the Foleys' request for a determination that the Foleys were permitted to exhibit and sell birds at their home. The Eleventh Circuit Court of Appeals describes executive acts as those acts that "apply to a limited number of persons (and often only one person)" and which "typically arise from the

ministerial or administrative activities of members of the executive branch." *McKinney*, 20 F.3d at 1557 n.9. An example of an executive act that is not subject to substantive due process is the enforcement of existing zoning regulations. *DeKalb Stone, Inc.*, 106 F.3d at 959. Legislative acts, in contrast, "generally apply to larger segments of—if not all—society." *Id.* The Eleventh Circuit cites "laws and broad-ranging executive regulations" as common examples of legislative acts. *Id.*

The Foleys challenge Orange County's decision to uphold the determinations of the county zoning manager that a commercial aviary is not an authorized use in the residential zoning category applicable to their residence, and that operation of a commercial aviary is not an authorized home occupation under the zoning regulations. The chain of events began about ten years ago when the Foleys requested an official determination from the zoning manager as to whether the operation of a commercial aviary at their residence was permitted by the zoning code. The zoning manager concluded that a commercial aviary was not permitted in residential-only zoned areas. They appealed to the Board of Zoning Adjustment, ("BZA") an advisory body to the Orange County Board of County Commissioners, which upheld the zoning manager's interpretation of the zoning ordinances. Plaintiffs then appealed the BZA's recommendation to the Board of County Commissioners ("BCC") and the BCC upheld the BZA's recommendation.

The Foleys' substantive due process claim is a dispute over how Orange County interprets its existing zoning ordinances. They sought to persuade Orange County that a commercial aviary would be a permissible use of their residentially zoned property or that a home occupation (as that term was used in the zoning ordinances) could encompass the operation of a commercial aviary. They were unsuccessful. The county zoning manager, the Board of Zoning Adjustment, and the Board of County Commissioners all decided that Plaintiffs'

interpretation of the existing zoning ordinances was incorrect. The interpretation of existing laws is not a legislative function; it is an executive act usually intertwined with an enforcement action.[4] While the Foleys asked Orange County directly for an interpretation in this case, the nature of the action is the same—Orange County was interpreting the existing law.[5] That is an executive act that cannot serve as the basis for a substantive due process claim.

7. Plaintiffs' Allegation that They Could Not have Prevented Any Alleged Injury by State Court Intervention or Review is Legally Incorrect and Should be Stricken.

In their Amended Complaint, the Foleys now allege that the wrongs allegedly perpetrated by the Defendants could not have been prevented by state court intervention or review. *See*, Amended Complaint, ¶52 ("Defendants' practice and proceeding described in paragraphs 39 – 51 could not be prevented from injuring the Foleys by state court intervention or review") and 66(e). However, the Foleys could have challenged the validity or enforceability of the Orange County Zoning Code that the Foleys challenged in a declaratory judgment action filed at the

[4] The ordinance that created Board of Zoning Adjustment tasked it with, among other things, hearing and deciding "appeals taken from the requirement, decision or determination made by the planning or zoning department manager where it is alleged that there is an error in the requirement, decision or determination made by said department manager in the *enforcement of zoning regulations."* Art. V, § 502, Orange County Charter (emphasis added).

[5] The Eleventh Circuit reached a similar conclusion in *Boatman v. Town of Oakland*, 76 F.3d 341 (11th Cir. 1996), when it rejected a property owner's assertion that he had a substantive due process "right to a correct decision from a government official." In that case, a building inspector decided that the property owner's building was a mobile home that was prohibited by the applicable zoning ordinance. *Id*. At 345. The inspector therefore refused to inspect the property and issue a certificate of occupancy. *Id.* The property owner, who was also a member of the town zoning board, disagreed with the building inspector's interpretation of the zoning ordinance. *Id.* When the town council agreed with the inspector's interpretation of the ordinance, the property owner sued, arguing that the town's refusal to perform the inspection was arbitrary in violation of their federal due process rights. *Id.* The Eleventh Circuit concluded that such a "claim is not cognizable under the substantive component" of the Due Process Clause. *Id.*

time. *See Nannie Leave's Strawberry Mansion v. City of Melbourne*, 877 So. 2d 793, 794 (Fla. 5th DCA 2004); *see also Pinellas County*, 464 So. 2d at 176. They could have contemporaneously brought a declaratory judgment action seeking to have Orange County's Land Use Code declared unconstitutional or otherwise invalid, and could have, through the declaratory judgment statute, sought equitable relief, including injunctive relief, both temporary and permanent. The fact that they failed to take such action at the time does not mean they could not have taken such action.

8. Conclusion.

For the foregoing reasons, the Foleys' Amended Complaint should be dismissed.

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that on November 20, 2017 the foregoing was electronically filed with the Clerk of the Court using the Florida Courts eFiling Portal, which will send notice of filing and a service copy of the foregoing to the following:

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IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

DAVID W. FOLEY and JENNIFER T. FOLEY,

CASE NO.: 2016-CA-007634-O

Plaintiffs,

v.

ORANGE COUNTY, PHIL SMITH, CAROL HOSSFIELD, MITCH GORDON, ROCCO RELVINI, TARA GOULD, TIM BOLDIG, FRANK DETOMA, ASIMA AZAM, RODERICK LOVE, SCOTT RICHMAN, JOE ROBERTS, MARCUS ROBINSON, RICHARD CROTTY, TERESA JACOBS, FRED BRUMMER, MILDRED FERNANDEZ, LINDA STEWART, BILL SEGAL, and TIFFANY RUSSELL,

Defendants.
_____/

ORDER GRANTING "THE OFFICIAL DEFENDANTS' MOTION TO STRIKE THE AMENDED COMPLAINT, RENEWED REQUEST FOR JUDICIAL NOTICE, AND MOTION TO DISMISS THIS ACTION WITH PREJUDICE"
and
ORDER GRANTING "DEFENDANTS PHIL SMITH, ROCCO RELVINI, TARA GOULD, TIM BOLDIG, AND MITCH GORDON'S MOTION TO DISMISS/MOTION TO STRIKE"

THIS MATTER came before the Court for a hearing on September 6, 2017 upon the "The Official Defendants' Motion to Strike the Amended Complaint, Renewed Request for Judicial Notice, and Motion to Dismiss This Action with Prejudice," filed on March 3, 2017, and the "Defendants Phil Smith, Rocco Relvini, Tara Gould, Tim Boldig, and Mitch Gordon's Motion to Dismiss/Motion to Strike," filed on March 7, 2017. The Court, having considered the

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Motions, case law, and arguments of counsel from both parties, and otherwise being duly advised in the premises, finds as follows:

RELEVANT FACTS AND PROCEDURAL HISTORY

A detailed history of the instant matter merits discussion, as it factors into the Court's ultimate findings. The Plaintiffs are commercial toucan farmers. A citizen complained of the Plaintiffs' toucans, and Orange County Code Enforcement began an investigation. A zoning manager determined that the Plaintiffs were in violation of the Code. The issue then went to a public hearing, held by the Board of Zoning Adjustment ("BZA"), which continued to find that the Plaintiffs were in violation of the Code. The Plaintiffs appealed to the Board of County Commissioners ("BCC"), who affirmed the BZA's determination. The Plaintiffs then petitioned for a writ of certiorari to the Orange County Ninth Judicial Circuit Court, which ultimately found that the zoning manager, BZA, and BCC properly interpreted the relevant Code, thus denying their petition.

The Plaintiffs filed an action in the Middle District of Florida against the County, the Officials,[1] the BZA members, and other county employees. The District Court ultimately determined that the relevant Code provisions were unconstitutional under the Florida Constitution, but nevertheless, the Plaintiffs' claims for due process violations, equal protection violations, compelled speech, restraints on commercial speech, and unreasonable searches or seizures failed.[2] *See Foley v. Orange County*, 2013 WL 4110414 (M.D. Fla. August 13, 2013).

The Plaintiffs appealed to the Eleventh Circuit, which ultimately vacated the Middle District's judgment and remanded the case for the court to dismiss without prejudice for lack of

[1] "The Officials" refers to the members of the BZA and the BCC, who were named both in their individual and official capacities. They include the following Defendants: Asima Azam, Fred Brummer, Richard Crotty, Frank Detoma, Mildred Fernandez, Teresa Jacobs, Roderick Love, Scott Richman, Joe Roberts, Marcus Robinson, Tiffany Russell, Bill Segal, and Linda Stewart.

[2] That action contained many of the same arguments that are raised in the instant action.

subject matter jurisdiction. *See Foley v. Orange County*, 638 Fed. Appx. 941, 946 (11th Cir. 2016). In so doing, the court concluded that the Plaintiffs' claims either had no plausible foundation, or were proscribed by previous Supreme Court decisions. *Id.* at 945-46.

The Plaintiffs then petitioned the Supreme Court for a writ of certiorari, but it was summarily denied. *See Foley v. Orange County, Fla.*, 137 S. Ct. 378 (2016).

On August 25, 2016, the Plaintiffs filed their initial Complaint in this Court. They amended their Complaint on February 25, 2017 to include the following counts: declaratory and injunctive relief proscribing the enforcement of the relevant Code sections (Counts I and II); negligence, unjust enrichment, and conversion (Count III); taking (Count IV); abuse of process to invade privacy and rightful activity, and conversion (Count V); civil theft (Count VI); and due process (Count VII). All of these counts purport to stem from the administrative proceeding that was held on February 23, 2007 and became final after appeal on February 19, 2008.

On September 6, 2017, the Court held a hearing on "The Official Defendants' Motion to Strike the Amended Complaint, Renewed Request for Judicial Notice, and Motion to Dismiss This Action with Prejudice," filed on March 3, 2017, and the "Defendants Phil Smith, Rocco Relvini, Tara Gould, Tim Boldig, and Mitch Gordon's Motion to Dismiss/Motion to Strike," filed on March 7, 2017. This Order follows.

ANALYSIS AND RULING

"A motion to dismiss tests whether the plaintiff has stated a cause of action." *Bell v. Indian River Memorial Hosp.*, 778 So. 2d 1030, 1032 (Fla. 4th DCA 2001). Furthermore, "[w]hen determining the merits of a motion to dismiss, the trial court's consideration is limited to the four corners of the complaint, the allegations of which must be accepted as true and considered in the light most favorable to the nonmoving party." *Id.*; *see, e.g., Solorzano v. First*

Union Mortg. Corp., 896 So. 2d 847, 849 (Fla. 4th DCA 2005); *Taylor v. City of Riviera Beach*, 801 So. 2d 259, 262 (Fla. 4th DCA 2001); *Samuels v. King Motor Co. of Fort Lauderdale*, 782 So. 2d 489, 495 (Fla. 4th DCA 2001); *Bolz v. State Farm Mut. Ins. Co.*, 679 So. 2d 836, 837 (Fla. 2d DCA 1996) (indicating that a motion to dismiss is designed to test the legal sufficiency of a complaint, not to determine issues of fact).

"A motion to dismiss a complaint based on the expiration of the statute of limitations should be granted only in extraordinary circumstances where the facts constituting the defense affirmatively appear on the face of the complaint and establish conclusively that the statute of limitations bars the action as a matter of law." *Alexander v. Suncoast Builders, Inc.*, 837 So. 2d 1056, 1057 (Fla. 3d DCA 2002); *see also Pines Properties, Inc. v. Tralins*, 12 So. 3d 888, 889 (Fla. 3d DCA 2009).

In the instant matter, the Plaintiffs cause of action accrued when the BZA's determination became final on February 19, 2008, nine years prior to this action's filing. The Plaintiffs' Complaint must be dismissed, as it can be determined from the face of the amended Complaint that all of the causes of action fall outside of their respective limitations period.[3] *See* § 95.11(3)(p), Fla. Stat. (2016) (stating that any action not specifically provided for in the statute is subject to a four-year limitations period, which encompasses declaratory actions and alleged due process violations (Counts I, II, and VII)); § 95.11(3)(a), Fla. Stat. (2016) (indicating that a negligence action has a four-year limitations period (Count III)); § 95.11(3)(h), Fla. Stat. (2016) (specifying that there is a four-year limitations period to bring a claim for a taking (Count IV)); §

[3] The Plaintiffs attempt to circumvent the limitations period by arguing that 28 U.S.C. § 1367(d) "tolls the limitations period for thirty days after dismissal of any supplemental claims related to those asserted to be within the original jurisdiction of the federal court." However, as the Defendants point out in their Motions, section 1367(d) only applies where a federal court enjoyed original jurisdiction over the case, and if the initial assertion of federal jurisdiction is found to be insufficient, then the section does not apply and the party does not get the benefit of the tolling. *See Ovadia v. Bloom*, 756 So. 2d 137, 140 (Fla. 3d DCA 2000). Because the Eleventh Circuit determined that the Plaintiffs' claims had no plausible foundation, section 1367(d) is inapplicable to the instant matter.

95.11(3)(o), Fla. Stat. (2016) (stating that intentional torts, which include abuse of process and conversion, are subject to a four-year limitations period (Count V)); § 772.17, Fla. Stat. (2016) (stating that civil theft has a five-year limitations period (Count VI)).

Accordingly, the following is hereby **ORDERED AND ADJUDGED:**

1. "The Official Defendants' Motion to Strike the Amended Complaint, Renewed Request for Judicial Notice, and Motion to Dismiss This Action with Prejudice" is **GRANTED.**
2. The "Defendants Phil Smith, Rocco Relvini, Tara Gould, Tim Boldig, and Mitch Gordon's Motion to Dismiss/Motion to Strike" is **GRANTED.**
3. The Plaintiffs' Amended Complaint, filed February 25, 2017, is **DISMISSED with prejudice as to the following Defendants: Frank Detoma, Asima Azam, Roderick Love, Scott Richman, Joe Roberts, Marcus Robinson, Richard Crotty, Teresa Jacobs, Fred Brummer, Mildred Fernandez, Linda Stewart, Bill Segal, and Tiffany Russell.**

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on this 24 day of October, 2017.

HEATHER L. HIGBEE
Circuit Judge

EXHIBIT A

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on Oct 25, 2017, a true and accurate copy of the foregoing was e-filed using the Court's ECF filing system, which will send notice to all counsel of record.

Judicial Assistant

EXHIBIT A

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

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

Defendants
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.

2016-CA-007634-O

PLAINTIFFS' RESPONSE TO THE LIMITATIONS DEFENSE IN ORANGE COUNTY'S AMENDED MOTION TO DISMISS

PLAINTIFFS DAVID AND JENNIFER FOLEY make this response to the limitations argument in "Orange County's Amended Motion to Dismiss Plaintiffs' Amended Complaint Pursuant to Florida Rules of Civil Proceure (*sic*) 1.140(b)(1) and (6), Amended so as to Raise Statute of Limitations Defense," filed November 20, 2017.

PURPOSE

This response to Orange County's amended motion is not intended to replace the Foleys' response to Orange County's original motion. It is intended to supplement the Foleys' response to the County's original motion in order to address the only substantive amendment the County now makes, namely the County's addition in its amended motion of an affirmative defense in limitations.

SUMMARY

Orange County's limitations defense fails because: *1)* *Krause v. Textron Financial Corp.*, 59 So.3d 1085 (Fla. 2011), holds that the tolling provisions of 28 USC §1367, apply to any federal action, like the Foleys, which properly asserted federal question jurisdiction, regardless the final disposition of that federal question; *2)* Even if the Court holds *Krause* inapplicable, the Foleys' claims present a continuing wrong, and consequently the Foleys can, at minimum, recover losses suffered during the four year limitations period prior to filing their claims in this Court; and, *3)* Limitations are irrelevant to the declaratory and injunctive relief sought in Counts 1 and 2, because: *a)* their challenge to Ordinance 2016-19 is clearly within the limitations period; and, *b)* the 2008 BCC order challenged in Count 1 is per Art. IV, §9, Fla. Const., as the Foleys allege in their amended complaint at ¶ 28, without subject matter jurisdiction, and consequently may be collaterally attacked at any time.

BACKGROUND

1. August 25, 2016, the Foleys filed their original complaint in this case.

2. September 23, 2016, Orange County adopted Ordinance No. 2016-19.

3. February 15, 2017, the Foleys filed their amended complaint in this case.

   a. Count 1 of the amended complaint, in part, seeks declaratory and injunctive relief with respect to conflict between Art. IV, §9, Fla. Const., and the following:

      1. The 2008 BCC order which continues to prohibit *aviculture* and/or associated *aviaries* as an *accessory use* or a *home occupation* at the Foleys' R-1A zoned Solandra homestead; and,

      2. Ordinance 2016-19 which effectively codifies the 2008 BCC order by expressly prohibiting the *commercial sale of animals* as a *home occupation* at the Foleys' homestead.

   b. Count 2 of the amended complaint, in part, seeks declaratory and injunctive relief with respect to conflict between Art. IV, §9, Fla. Const., and the County's regulation of the Standard Industrial Classification (SIC) 0279, "Animal Specialties Not Elsewhere Classified," at the Foleys' A-2 zoned Cupid property.

   c. Count 3 of the amended complaint, in part, seeks compensatory relief in negligence for invasion of privacy and rightful activity immune to

County regulation per Art. IV, §9, Fla. Const., and the consequent conversion.

d. Count 4 of the amended complaint, per Art. X, §6(a), Fla. Const., seeks compensatory relief from a temporary, or regulatory, taking, denied police power, i.e., public purpose, by Art. IV, §9, Fla. Const.

4. March 7, 2017, Orange County filed "Orange County's Motion to Dismiss Plaintiffs' Amended Complaint Pursuant to Florida Rules of Civil Proceure (*sic*) 1.140(b)(1) and (6)."

5. Orange County's motion of March 7, 2017, asserted no affirmative defense in limitations.

6. May 24, 2017, the Foleys filed "Plaintiffs Response to Defendants' Motions to Dismiss," as their written response to all arguments presented in the following motions:

a. "The Official Defendants' Motion to Strike the Amended Complaint, Renewed Request for Judicial Notice, and Motion To Dismiss this Action with Prejudice," filed March 6, 2017;

b. "Defendants Phil Smith, Rocco Relvini, Tara Gould, Tim Boldig, and Mitch Gordon's Motion to Dismiss/Motion to Strike," filed March 7, 2017; and,

c. "Orange County's Motion to Dismiss Plaintiffs' Amended Complaint Pursuant to Florida Rules of Civil Proceure (*sic*) 1.140(b)(1) and (6)," filed March 7, 2017.

7. October 25, 2017, the Court filed [rendered], its "Order Granting 'The Official Defendants' Motion to Strike the Amended Complaint, Renewed Request for Judicial Notice, and Motion to Dismiss this Action with Prejudice' and Order Granting 'Defendants Phil Smith, Rocco Relvini, Tara Gould, Tim Boldig, and Mitch Gordon's Motion to Dismiss/Motion to Strike.'"

8. The Court's order of October 25, 2017, dismissed the defendant *officials*[1] and the defendant *employees*[2] with prejudice on grounds that all claims were barred by the statute of limitations because 28 USC 1367(d), did not apply to toll those limitations.

9. The Court's order of October 25, 2017, was final as to the defendant *officials*, but not as to the defendant *employees*.

10. The Court's order of October 25, 2017, made no decision with respect to "Orange County's Motion to Dismiss Plaintiffs' Amended Complaint Pursuant to Florida Rules of Civil Proceure (*sic*) 1.140(b)(1) and (6)."

---

[1] The *officials* include: Asima Azam, Fred Brummer, Richard Crotty, Frank Detoma, Mildred Femandez, Teresa Jacobs, Roderick Love, Scott Richman, Joe Roberts, Marcus Robinson, Tiffany Russell, Bill Segal, and Linda Stewart.

[2] The *employees* include: Tim Boldig, Mitch Gordon, Tara Gould, Carol Hossfield, Rocco Relvini, and Phil Smith.

11. November 3, 2017, attorney Oxford Lamar, counsel for the defendant *employees*, filed "Defendants' Phil Smith, Carol Hossfield (n/k/a Carol Knox), Mitch Gordon, Rocco Relvini, Tara Gould and Tim Boldig's Motion for Entry of Final Judgment."

12. November 9, 2017, the Foleys filed the following two motions:

a. "Plaintiffs Motion for Rehearing," per Fla. R. Civ. P. 1.530, with respect to the defendant *officials*; and,

b. "Plaintiffs' Motion for Reconsideration," with respect to the defendant *employees*.

13. The Foleys' motions of November 9, 2017, included as Appendix C, a "Memorandum of Law Regarding the Application of 28 USC §1367 to *Foley et ux v Orange Cty. et al*."

14. November 13, 2017, the court filed its "Final Judgment in Favor of Defendants Phil Smith, Carol Hossfield (n/k/a Carol Knox), Mitch Gordon, Rocco Relvini, Tara Gould and Tim Boldig."

15. November 17, 2017, the Foleys filed "Plaintiffs' Motion for Rehearing," with respect to the Court's order of November 13, 2007.

16. The Foleys' motion of November 17, 2017, included as Appendix D, a "Memorandum of Law Regarding the Application of 28 USC §1367 to *Foley et ux v. Orange Cty. et al*."

17. November 20, 2017, Orange County filed "Orange County's Amended Motion to Dismiss Plaintiffs' Amended Complaint Pursuant to Florida Rules of Civil Proceure (*sic*) 1.140(b)(1) and (6), Amended so as to Raise Statute of Limitations Defense."

18. Orange County's motion of November 20, 2017, is identical to its motion of March 7, 2017, with the exception of pages 2 and 3, where the County adds an affirmative defense in limitations grounded solely in this Court's order of October 25, 2017.

ARGUMENT

Krause v. Textron Financial Corp. **tolls limitations per 28 USC §1367 where a properly asserted federal question is ultimately found not to state a federal question.**

As stated in the summary above, *Krause v. Textron Financial Corp.*, 59 So. 3d 1085 (Fla. 2011), holds that the tolling provisions of 28 USC §1367, apply to any federal action, like the Foleys, which properly asserted federal question jurisdiction, regardless the final disposition of that federal question.

With respect to the application in this case of *Krause v. Textron Financial Corp.*, 59 So. 3d 1085 (Fla. 2011), and its holding regarding the tolling provisions of 28 USC §1367, the Foleys incorporate by reference, as though set out here in full, argument the Foleys have previously placed in the record, as follows:

a. The Foleys' May 24, 2017 response, at §3.1.1, pp. 50-51; and,

b. The Foleys' "Memorandum of Law Regarding the Application of 28 USC §1367 to *Foley et ux v. Orange Cty. et al*," attached as Appendix C, to their motions for rehearing and reconsideration of November 9, 2017, and attached as Appendix D, to their motion for rehearing of November 17, 2017.

The "continuing wrong" or "continuing tort" doctrine applies to government regulation and permits recovery for the limitations period where the trespass is abatable and the government continues to defend the injurious regulation.

As stated in the summary above, even if the Court holds Krause inapplicable, the Foleys' claims present a continuing wrong, and consequently the Foleys can, at minimum, recover losses suffered during the four-year limitations period prior to filing their claims in this Court.

Florida courts recognize the rule, or doctrine, of continuing violation, also known as continuing wrong, or continuing tort. *See Winn-Dixie Stores, Inc. v. Dolgencorp, LLC*, 746 F.3d 1008, 1034 (11th Cir. 2014), citing *Carlton v. Germany Hammock Groves*, 803 So.2d 852, 854-56 (Fla. 4th DCA 2002).

A trespass may constitute a continuing tort, if temporary rather than permanent, that is, if abatable or reversible. *See* Suarez v. City of Tampa, 987 So. 2d 681, 685 (2nd DCA 2008), by reference to Carlton v. Germany Hammock Groves, 803 So.2d 852 (Fla. 4th DCA 2002).

The continuing tort doctrine is applicable to the Foleys allegations of ultimate fact because they are consistent with a theory of injuries in trespass, which are temporary, abatable. *See* Town of Miami Springs v. Lawrence, 102 So.2d 143, 146 (Fla.1958). In Count 3, the Foleys ground their claims of invasion of privacy and rightful activity, and their claims of conversion, in allegations of defendants' continuing, abatable trespass of rights removed from defendants' regulatory authority by Art. IV, §9, Fla. Const. Likewise, in Count 4, the Foleys ground their claims of taking in allegations of defendants' continuing, abatable trespass of those same rights.

"[T]he statute of limitations, in a continuing tort action, runs from the time of the last tortious act," *See* Millender v. Fla. Dep't of Transp., 774 So.2d 767, 769 (Fla. 1st DCA 2000).

"[A] local government's acts in defending its ordinance in court [are], themselves, continuous acts of taking [or trespass] that [extend] the limitations period: in effect, a continuing wrong," *See* Judge Edmonson's specially concurring opinion in New Port Largo, Inc. v. Monroe County, 985 F.2d 1488, 1500 (11th Cir.1993), citing the holding in Gordon v. City of Warren, 579 F. 2d 386, 391 (6th Cir. 1978).

Consequently, because their amended complaint at ¶¶ 1-2, clearly alleges that defendants, from February 21, 2012, to July 26, 2016, defended in federal

court the regulatory actions at issue in this case, the Foleys can, at minimum, recover for injuries suffered during the four-year limitations period that preceded filing their claims in this Court August 25, 2016 – that is, at minimum, the Foleys can recover for the period beginning August 25, 2012, and running until the trespass is voluntarily abated, or enjoined by order of this Court.

Ordinance 2016-19 is clearly within the limitations period, and the 2008 BCC order is without subject matter jurisdiction and may be collaterally attacked at any time.

As stated in the summary above, and supported above in numbered paragraphs 2, 3.a, and 3.b, limitations are irrelevant to the declaratory and injunctive relief sought in Counts 1 and 2, because: *a)* their challenge to Ordinance 2016-19 is clearly within the limitations period; and, *b)* the 2008 BCC order challenged in Count 1 is per Art. IV, §9, Fla. Const., as the Foleys allege in their amended complaint at ¶ 28, without subject matter jurisdiction, and consequently may by collaterally attacked at any time.

CONCLUSION

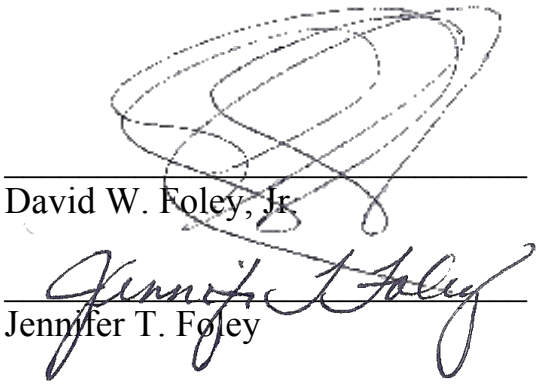
WHEREFORE David and Jennifer Foley request the Court deny the affirmative defense in limitations presented in "Orange County's Amended Motion to Dismiss Plaintiffs' Amended Complaint Pursuant to Florida Rules of Civil Proceure (*sic*)

1.140(b)(1) and (6), Amended so as to Raise Statute of Limitations Defense," filed November 20, 2017.

CERTIFICATE OF SERVICE

Plaintiffs certify that on December 5, 2017, the foregoing was electronically filed with the Clerk of the Court using the Florida Courts' eFiling Portal, which will send notice of filing and a service copy of the foregoing to the following:

William C. Turner, Jr., Assistant County Attorney,
P.O. Box 2687, Orlando FL, 32801, williamchip.turner@ocfl.net.



David W. Foley, Jr.

Jennifer T. Foley

Date: December 5, 2017

Plaintiffs
1015 N. Solandra Dr.
Orlando FL 32807-1931
PH: 407 721-6132
e-mail: david@pocketprogram.org
e-mail: jtfoley60@hotmail.com

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

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

Plaintiffs,

v. CASE NUMBER: 2016-CA-007634-O

ORANGE COUNTY, PHIL SMITH, CAROL HOSSFIELD, MITCH GORDON, ROCCO RELVINI, TARA GOULD, TIM BOLDIG, FRANK DETOMA, ASIMA AZAM, RODERICK LOVE, SCOTT RICHMAN, JOE ROBERTS, MARCUS ROBINSON, RICHARD CROTTY, TERESA JACOBS, FRED BRUMMER, MILDRED FERNANDEZ, LINDA STEWART, BILL SEGAL, and TIFFANY RUSSELL,

Defendant.
_____/

NOTICE OF CANCELLATION OF HEARING

PLEASE TAKE NOTICE that the Defendant, Orange County's Motion to Dismiss Plaintiff's Amended Complaint Pursuant to Florida Rules of Civil Procedure 1.140(b)(1) and (6), before the The Honorable Heather L. Higbee, Judge of the above Court, scheduled to be heard on December 11, 2017 at 3:00 p.m. has been canceled.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by Electronic Mail via the Florida E-Portal System to: David W. Foley, Jr. and Jennifer T. Foley, david@pocketprogram.org, jtfoley60@hotmail.com; William C. Turner, Esquire, Elaine Marquardt Asad, Esquire and Jeffrey J. Newton, Esquire, williamchip.turner@ocfl.net, judith.catt@ocfl.net, elaine.asad@ocfl.net, gail.stanford@ocfl.net; and Lamar D. Oxford,

Esquire, loxford@drml-law.com, katietillotson@drml-law.com on this 6th day of December, 2017.

DENNIS R. O'CONNOR, ESQ.
Florida Bar Number: 376574
DOConnor@oconlaw.com
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Attorneys for Defendant

IN THE CIRCUIT COURT OF THE 9TH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

DAVID W. FOLEY and JENNIFER T. FOLEY,

CASE NO.: 2016-CA-007634-O

Plaintiffs,

v.

ORANGE COUNTY, PHIL SMITH, CAROL HOSSFIELD, MITCH GORDON, ROCCO RELVINI, TARA GOULD, TIM BOLDIG, FRANK DETOMA, ASIMA AZAM, RODERICK LOVE, SCOTT RICHMAN, JOE ROBERTS, MARCUS ROBINSON, RICHARD CROTTY, TERESA JACOBS, FRED BRUMMER, MILDRED FERNANDEZ, LINDA STEWART, BILL SEGAL, and TIFFANY RUSSELL,

Defendants.
_____/

ORDER ON PLAINTIFFS' MOTION FOR REHEARING

THIS MATTER comes before the Court on the Plaintiffs' Motion for Rehearing, filed November 17, 2017. The Court, having considered the Motion, the record, and otherwise being duly advised in the premises, finds as follows:

ORDERS AND ADJUDGES that the Plaintiffs' Motion is **DENIED**. The instant Motion is simply an attempt to reargue points that were raised or should have been raised at the hearing on the Defendants' motion to dismiss. This is not permitted. *See Epperson v. Epperson*, 101 So.

2d 367, 368-9 (Fla. 1958).

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on this 6 _____ day of December, 2017.

HEATHER L. HIGBEE
Circuit Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on Dec 7, 2017, a true and accurate copy of the foregoing was e-filed using the Court's ECF filing system, which will send notice to all counsel of record.

Judicial Assistant

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, FLORIDA

CASE NO.: 2016-CA-007634-O
DIVISION: 35

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

Plaintiffs,

v.

ORANGE COUNTY, FLORIDA, et al.,

Defendants.
_____/

ORANGE COUNTY'S AMENDED NOTICE OF HEARING
(Amended as to Attorney Re-Filing)
(1 Hour Reserved – Confirmation #964858)

PLEASE TAKE NOTICE that the Defendant, Orange County, Florida, by and through its undersigned counsel, will call up for hearing before The Honorable Heather L. Higbee, 425 North Orange Avenue, Orlando, FL, Hearing Room 20-B, on **December 11, 2017 at 3:00 p.m.,** the following matter:

> **Orange County, Florida's Amended Motion to Dismiss Plaintiff's Amended Complaint Pursuant to Florida Rules of Civil Procedure 1.140(b)(1) and (6) (*e-filed 11/20/17*)**

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that on December 7, 2017 a true and correct copy of the foregoing was electronically filed with the Clerk of the Court using the Florida Courts eFiling Portal, which will send notice of filing and a service copy of the foregoing to the following:

David W. Foley, Jr. and Jennifer T. Foley, david@pocketprogram.org; jtfoley60@hotmail.com; Lamar D. Oxford, Esquire loxford@drml-law.com; katiellotson@drml-law.com; Dennis O'Connor, Esquire, DOConnor@oconlaw.com; Derek K. Angell, Esquire, DAngell@oconlaw.com.

/s/ William C. Turner, Jr.
WILLIAM C. TURNER, JR.
Assistant County Attorney
Florida Bar No. 871958
Primary Email: WilliamChip.Turner@ocfl.net
Secondary Email: Judith.Catt@ocfl.net
ELAINE MARQUARDT ASAD
Senior Assistant County Attorney
Florida Bar No. 109630
Primary Email: Elaine.Asad@ocfl.net
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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

S:\WTurner\Chip\Cases\Foley - Circuit Ct\Drafts\Amd Notice of Hearing 12-11-17.doc

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

2016-CA-007634-O

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

Defendants
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.

PLAINTIFFS' MOTION FOR JUDICIAL NOTICE OF MAY 24, 2017 FWC MEMORANDUM, "Local Ordinances and the Regulation of Captive Wildlife"

PLAINTIFFS DAVID AND JENNIFER FOLEY MOVE THE COURT pursuant §§90.202 (5), (12), (13), and 90.203, Fla. Stat. TO TAKE JUDICIAL NOTICE OF MAY 24, 2017 FWC MEMORANDUM, "Local Ordinances and the Regulation of Captive Wildlife."

SUMMARY

Paragraph 49 of the Foleys' amended complaint alleges that defendants rejected a memorandum of law written by the Florida Fish and Wildlife Conservation

Commission (FWC) "in response to contemporaneous legislative initiatives of the [Florida Association of Counties] to increase regulation of exotic animals." The FWC memorandum, dated May 17, 2007, and titled, "Local Ordinances and the Regulation of Captive Wildlife" was revised May 24, 2017, to include a quote from the opinion of Judge Roy B. Dalton in *Foley v. Orange Cnty.,* 638 Fed. Appx. 941, 2013 U.S. Dist. Lexis 114054. The revised memorandum represents the stability of FWC's conviction that courts will continue to construe Art. IV, §9, Fla. Const., to grant FWC exclusive regulatory authority over wild animal life. Judicial notice will establish the veracity and continuing relevance of any material evidence relating to the allegation of paragraph 49.

BACKGROUND

1. A copy of the official May 24, 2017, FWC Memorandum, "Local Ordinances and the Regulation of Captive Wildlife" is attached as Exhibit A.

2. The attached copy of the official May 24, 2017, FWC Memorandum, "Local Ordinances and the Regulation of Captive Wildlife":

a. Was made available to the Foleys on June 16, 2017, by Hollie Weathersbee, Agency Clerk for the Florida Fish and Wildlife Conservation Commission, pursuant a public records request; and,

b. Bears the official seal of the Florida Fish and Wildlife Conservation Commission.

3. May 25, 2017, the Foleys provided a copy of the revised FWC Memorandum dated May 24, 2017, to defense attorneys Derek Angell, Lamar Oxford and William Turner – attached as Exhibit B.

4. Below the Foleys certify that all parties to this case are on notice of this request that the Court take judicial notice of the attached copy of the May 24, 2017, FWC Memorandum, "Local Ordinances and the Regulation of Captive Wildlife."

ARGUMENT

5. Section 90.203, Fla. Stat., requires this Court take judicial notice of the May 24, 2017, FWC Memorandum, "Local Ordinances and the Regulation of Captive Wildlife," because:

a. It is an official action of the Florida Fish and Wildlife Conservation Commission, *see* §90.202 (5) Fla. Stat.;

b. It is a fact that is not subject to dispute because it is capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned, *see* §90.202 (12) Fla. Stat.;

c. It includes the official seal of the Florida Fish and Wildlife Conservation Commission, *see* §90.202 (13) Fla. Stat.;

d. The Foleys have provided all adverse parties with timely written notice of the request, by this motion, *see* §90.203 (1) Fla. Stat.;

e. The Foleys have provided the Court with proof of service, *see* §90.203 (1) Fla. Stat.; and,

f. The Foleys have provided the Court with sufficient information to take judicial notice of the matter, *see* §90.203 (2) Fla. Stat.

CONCLUSION

WHEREFORE, pursuant §§90.202 (5), (12), (13), and 90.203, Fla. Stat., THE FOLEYS MOVE THE COURT TO TAKE JUDICIAL NOTICE OF MAY 24, 2017 FWC MEMORANDUM, "Local Ordinances and the Regulation of Captive Wildlife."

CERTIFICATE OF SERVICE

Plaintiffs certify that on December 10, 2017, the foregoing was electronically filed with the Clerk of the Court using the Florida Courts' eFiling Portal, which will send notice of filing and a service copy of the foregoing to the following:

William C. Turner, Jr., Assistant County Attorney,
P.O. Box 2687, Orlando FL, 32801, williamchip.turner@ocfl.net;
Derek Angell, O'Connor & O'Connor LLC,
840 S. Denning Dr. 200, Winter Park FL, 32789, dangell@oconlaw.com;
Lamar D. Oxford, Dean, Ringers, Morgan & Lawton PA,
PO Box 2928, Orlando FL 32802-2928, loxford@drml-law.com.

David W. Foley, Jr.

Jennifer T. Foley

Date: December 10, 2017

Plaintiffs
1015 N. Solandra Dr.
Orlando FL 32807-1931
PH: 407 721-6132
e-mail: david@pocketprogram.org
e-mail: jtfoley60@hotmail.com

Florida Fish and Wildlife Conservation Commission

Commissioners
Brian Yablonski
Chairman
Tallahassee

Aliese P. "Liesa" Priddy
Vice Chairman
Immokalee

Ronald M. Bergeron
Fort Lauderdale

Richard Hanas
Oviedo

Bo Rivard
Panama City

Michael W. Sole
Tequesta

Robert A. Spottswood
Key West

Executive Staff
Nick Wiley
Executive Director

Eric Sutton
Assistant Executive Director

Jennifer Fitzwater
Chief of Staff

Legal Office
Harold "Bud" Vielhauer
General Counsel
(850) 487-1764
(850) 487-1790-FAX

Managing fish and wildlife resources for their long-term well-being and the benefit of people.

620 South Meridian Street
Tallahassee, Florida
32399-1600
Voice: (850) 488-4676

Hearing/speech-impaired:
(800) 955-8771 (T)
(800) 955-8770 (V)

MyFWC.com

June 16, 2017

Mr. David Foley
1015 N. Solandra
Orlando, Florida 32807

Dear Mr. Foley:

In response to your request, please find attached a certified copy of the following documents:

Memorandum Re: LOCAL ORDINANCES AND THE REGULATION OF CAPTIVE WILDLIFE

These records were reproduced from the files of the Division of Law Enforcement.

I, Hollie Weathersbee, Agency Clerk for the Florida Fish and Wildlife Conservation Commission, do hereby certify that the attached documents are a true and correct duplication of the Agency's record copy of the documents described in the above paragraph.

Signature

June 16, 2017
Date

FISH AND WILDLIFE CONSERVATION COMMISSION STATE OF FLORIDA

Exhibit A

FLORIDA FISH AND WILDLIFE CONSERVATION COMMISSION
LEGAL OFFICE

MEMORANDUM

To: **FWC Captive Wildlife Program**

From: **Carla J. Oglo, Assistant General Counsel**

Date: **5/24/17**

Re: **LOCAL ORDINANCES AND THE REGULATION OF CAPTIVE WILDLIFE**

Background

As the population of Florida grows and urban sprawl consumes rural Florida, captive wildlife facilities which were originally on fairly rural land are now found amidst urban and suburban development. Concerns over noise, smell or perceived danger associated with captive wildlife may prompt local governments to consider adopting ordinances which regulate captive wildlife or to consider zoning ordinances which define the appropriate neighborhoods for the possession of captive wildlife. Local governments and captive wildlife licensees are looking to the Florida Fish and Wildlife Conservation Commission (FWC or Commission) for guidance as to whether or not, or to what extent, these local ordinances may be enacted consistent with the authority granted to the FWC by the Florida Constitution. In order to address this issue, it is necessary to understand some history about the regulation of captive wildlife in Florida.

FWC's predecessor agency, the Game and Fresh Water Fish Commission (GFC), did not always have constitutional authority over all captive wildlife. In 1960, the Florida Supreme Court held that the then GFC had the authority to regulate *ferae naturae* or untamed animals in the wild, but did not have the authority to regulate ownership of the animals once they became the property of someone, especially non-native animals. Barrow v. Holland, 125 So.2d 749 (Fla. 1960). In response to this issue, the Legislature enacted section 372.921 and 372.922 to authorize GFC to regulate captive wildlife, including wildlife possessed as pets or for exhibition or sale.

In 1974, the Florida Constitution was amended to empower GFC to "exercise the regulatory and executive powers of the State with respect to wild animal life and freshwater aquatic life." Article IV, Section 9, of the Florida Constitution. The authority of GFC to regulate captive wildlife as part of its constitutional authority was affirmed in Miramar v. Bain, 429 So.2d 40 (Fla. 4th DCA 1983).

In 1998, the citizens of Florida voted to amend the state constitution in order to create the Florida Fish and Wildlife Conservation Commission which continued the grant of constitutional authority to the Commission to regulate all wild animal life. Article IV, Section 9 of the Florida Constitution gives the legislature the authority to enact laws in aid of the commission, not inconsistent with this section. Several provisions of Chapter 379, Florida Statutes (F.S.), are in aid of FWC's authority to regulate captive wildlife, providing fees for captive wildlife licenses and penalties for captive wildlife rule violations.

Exhibit A

In 2007, the Legislature, in response to the escape of Burmese pythons into the Everglades National Park and to assist FWC in dealing with other reptiles of concern, enacted HB 1505 which provides for enhanced penalties for repeat offenders of captive wildlife violations. Both the statutes and the rules provide a comprehensive and uniform state licensing and permitting process for the possession, exhibition and sale of captive wildlife.

The Regulation of the Possession, Exhibition and Sale of Wildlife in Florida

FWC has exercised the powers given to it by promulgating rules regulating the possession, exhibition and sale of wildlife. Rule 68A-1.002, Florida Administrative Code (F.A.C.), declares that "All wild animal life within the jurisdiction of the State of Florida, whether such wild animal life is privately owned or otherwise, is subject to the regulation of the Commission." Rule 68A-6.0011(1), F.A.C., requires all persons, except in limited circumstances, to obtain a permit from the commission in order to lawfully "possess any native or non-native wildlife in captivity."

The majority of FWC's captive wildlife rules can be found in Chapter 68A-6, F.A.C. Related rules for conditional and prohibited species can be found in Chapter 68-5, F.A.C. ; listed species in Chapter 68A-27, F.A.C; wildlife rehabilitation facilities in Rule 68A-9.006, F.A.C.; falconry in Rule 68A-9.005, F.A.C.; alligator farms in Rule 68A-25.004, F.A.C., hunting preserves in Rule 12.010, F.A.C., and game farms in Rule 68A-12.011, F.A.C.

Captive wildlife have been categorized into three classes. Class I wildlife are considered to pose the most real or potential threat to Florida, such as lions, tigers, bears and gorillas. Rule 68A-6.0021(1), F.A.C., prohibits Class I wildlife from being possessed as personal pets. Class II wildlife are considered to pose less of a threat than Class I wildlife, like smaller monkeys, smaller cats and smaller canines. Class III wildlife are considered to pose the least threat to Florida and include every species not listed as a Class I or Class II species. Wildlife classifications can be found in Rule 68A-6.002, F.A.C. Licenses issued by FWC indicate the activity authorized, location authorized as well as the type and number of animals that the licensee is authorized to possess. See, Rule 68A-6.0022(1), F.A.C.

Florida's captive wildlife regulations are among the most stringent in the nation. Rule 68A-6.0023(6). F.A.C., requires persons possessing wildlife to document the source and supplier of every animal possessed, as well as the birth, death, sale and transfer of every animal possessed. Rule 68A-6.0023(7), F.A.C., requires licensees to maintain these records and make them available upon FWC's request. Rule 68A-4.006 requires licensees to allow the inspection of the facility housing the wildlife.

FWC investigators routinely conduct inspections of captive wildlife facilities to ensure cage size, construction and security requirements are followed to ensure public safety. FWC investigators also inspect to ensure that humane treatment is provided and sanitary conditions are in place for the animals. The penalties for most, but not all, captive wildlife violations are criminal and increase with repeat violations. Facility requirements can be found in Rules 68A-6.0023, 68A-6.003, 68A-6.004 68A-6.0041 and 68A-6.007, F.A.C. Penalties for captive wildlife violations can be found in Section 379.4015, F.S.

Determination of Appropriate Neighborhoods by the Commission

Section 379.303(1), F.S., requires FWC to establish rules and requirements necessary to ensure that permitted wildlife possessed as personal pets be maintained in appropriate neighborhoods. The commission considers, prior to issuance of a permit, the property where captive wildlife will

be housed. The way in which the commission has done so has changed over the years. Prior to 2008, Rule 68A-6.0022(5)(b), FWC required applicants for class I and class II permits to show that the wildlife would be kept in "appropriate neighborhoods," and to submit documentation verifying that the construction of the facility, its cages and enclosures were not prohibited by local ordinances.

The current version of Rule 68A-6.003, F.A.C., requires facilities housing Class I and Class II wildlife to meet certain ownership requirements, be of a certain size, contain an appropriate buffer zone, and be enclosed by a perimeter fence. The rules no longer require applicants to show the wildlife would be kept in "appropriate neighborhoods" and that the required cages and enclosures would not be prohibited by a county or municipal ordinance. In place of such requirements, Rule 68A-6.003(3)(2), F.A.C., directs commission staff to provide notice of an initial permit application to the county or municipality in which a proposed Class I or Class II wildlife facility is to be located. This gives the local governments the opportunity to ensure that the facility is in compliance with local ordinances. Notification to local governments is not required for applications for Class III licenses.

Local Ordinances and Captive Wildlife

The Commission and local governments have powers provided to them by the Florida Constitution. Article VIII of the Florida Constitution grants local governments broad powers of self-governance, but prohibits local governments from passing ordinances inconsistent with general law. Article IV, Section 9 of the Florida Constitution grants the Commission the exclusive authority to regulate wildlife.

In City of Miramar v. Bain, 429 So. 2d 40, (Fla. 4th DCA 1983), the city sought an injunction to require removal of the fence Ms. Bain had constructed in her front yard in violation of a Miramar ordinance prohibiting any type of fence in the front yard of a home. Ms. Bain, who had a permit from the Commission to possess cougars, asserted that the city lacked jurisdiction to require removal of the fence because the Commission had exclusive jurisdiction of the matter and it had approved the fence after an inspection of the property.

The Court stated that a legislative enactment or municipal ordinance, if in conflict with the regulations of the Commission, must give way to the Constitutional mandate establishing the Commission, citing Whitehead v. Rogers, 223 So.2d 330 (Fla. 1969). See also, Attorney General Opinion 2002-23 (March 15, 2002).

Before Ms. Bain constructed the fence in her front yard, she had maintained her cougars in the back yard, which was in compliance with both Commission regulations and City of Miramar ordinances. As Ms. Bain met the requirements of the Commission with the existing back yard fence and she offered no evidence showing that the construction of the front yard fence resulted from a requirement of the Commission, the court found no conflict existed between the regulations of the Commission and the ordinances of the City of Miramar. The City of Miramar prevailed.

It should be noted that the language in Miramar v. Bain, regarding applicants being required to provide satisfactory caging facilities without violation of existing city or county building and zoning regulations and to show that the wildlife would be kept in appropriate neighborhoods is based upon rule language which was removed and is not in the current captive wildlife regulations.

Exhibit A

In Whitehead v. Rogers, 223 So. 2d 330 (Fla. 1968), Mr. Rogers had been issued a hunting license by the Commission. He went hunting during open season for mourning doves, which included Sundays, and was arrested for violating a statute which prohibited the discharge of firearms on Sundays. The Court found the statute in conflict with the Commission's constitutional authority to regulate Sunday hunting and prohibited the prosecution of Mr. Rogers for this offense. Because the state legislature could enact only "laws in aid of, but not inconsistent with," the Game Commission's constitutional grant of authority, the court reasoned that the statute was void to the extent it prohibited an activity that was expressly authorized by the Game Commission. *Id.* at 330–31.

The federal district court for the Middle District of Florida recently weighed in on an alleged conflict between the Commission's authority and local zoning ordinances. See, Foley v. Orange Cnty., 638 Fed. Appx. 941, 2013 U.S. Dist. Lexis 114054. An appellate court vacated the district court's order finding the district court lacked jurisdiction to rule on this issue. While the vacated order is not binding on any courts, the court's order gives us some insight as to how courts with jurisdiction will rule on this issue. In Foley, local zoning ordinances prohibited the Foleys from using their residence for "commercial aviculture, aviaries" and the "breeding, keeping, and raising of exotic animals."

The Foley court held that Orange County could not use its land use ordinances to regulate the possession or sale of captive wildlife and invalidated the ordinance. Those ordinances specifically sought to prohibit the use of Plaintiffs' residence for "commercial aviculture, aviaries" and the "breeding, keeping, and raising of exotic animals." The court found that those land uses specifically target activities that fall within the exclusive authority of the commission, whose rules on the topic are the governing law of the state. *See, e.g.*, *Grant*, 935 So. 2d at 523 (holding a charter county in Florida may only "enact county ordinances not inconsistent with general law").

The court in Foley did an excellent job analyzing the Commission's authority and possible conflicts with that authority. A portion of that analysis is provided below:

> In sum, 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 effect of the transfer of that portion of the state's legislative power was to divest the state legislature of authority to regulate the possession and sale of captive wildlife, *Beck v. Game and Fresh Water Fish Commission*, 33 So. 2d 594, 595 (Fla. 1948), and vest that power in the commission, *State ex rel. Griffin v. Sullivan*, 30 So. 2d 919, 920 (Fla. 1947). The commission therefore assumed the regulatory authority that the legislature had prior to the transfer. *Caribbean Conservation*, 838 So. 2d at 497. As such, the rules adopted by the commission are tantamount to legislative acts, *Airboat Ass'n of Florida, Inc.*, 498 So. 2d at 630, and become the governing law of the state, *Griffin*, 30 So. 2d at 920. Any and all laws in conflict with the commission's rules are consequently void. *Whitehead*, 223 So. 2d at 330–31.
>
> Even if the Court were to accept Orange County's characterization of its ordinances as generally applicable—which it does not because the ordinances are not crafted in that way—Orange County still could not enforce its ordinances banning commercial aviculture against Plaintiffs. *See Whitehead*, 223 So. 2d at

330–31. In *Whitehead*, 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.*

In Conclusion

Case law indicates that land use and other local ordinances that specifically target activities that fall within the exclusive authority of FWC to regulate wildlife are in direct conflict with FWC's authority and are void.

Case law indicates that if an ordinance is of general applicability (not specific to wildlife), and captive wildlife licensees are able to comply with both the local ordinance and FWC rules, the ordinance will not be seen as in conflict with FWC's authority. For example, an ordinance prohibiting any type of fence in the front yard of a home was determined to not be in conflict with the Commission's authority because the licensee was able to have her facility in the back yard and comply with both Commission rules and local ordinances.

Case law indicates that even if an ordinance is of general applicability (not specific to wildlife), it will be seen as in conflict with FWC's authority if the ordinance prevents captive wildlife licensees from conducting activities authorized by FWC rules. For example, an ordinance that prohibits any fencing in a particular area would likely conflict with FWC's authority as perimeter fencing is required for Class I and Class II wildlife facilities. The ordinance would conflict with FWC's authority as it would prohibit Class I or Class II wildlife licensees from possessing their wildlife in that area. If an ordinance is seen as in conflict with FWC's authority, the ordinance would be void to the extent that it would prohibit an activity authorized by FWC rules.

Exhibit A

From: **David Foley** david@pocketprogram.org
Subject: Certificates of Service per FRJA 2.516, and new FWC memo
Date: May 26, 2017 at 10:52 AM
To: Derek Angell dangell@oconlaw.com, Mr. Lamar Dwight Oxford loxford@drml-law.com, William Turner WilliamChip.Turner@ocfl.net
Bcc: Jennifer Foley jtfoley60@hotmail.com

DF

Would you all mind fixing the service errors in your certificates of service?

Each of you regularly certifies that you have served us. However, the only paper we find on file that certifies service to “each party” as required by FRJA 2.516(a), is – not surprisingly – Mr. Angell’s motion for sanctions.

As you each represent parties with separate interests compliance with 2.526 is a pretty big deal. Perhaps you haven’t thought of that. Or, perhaps you have.

So, let us know how you want to proceed. Can you each provide us with written agreement that you have timely received all of the others' various motions, so that we can actually proceed on all motions at the upcoming hearing? Or, in the alternative, can you withdraw and/or amend all motions that fail to comply with FRJA 2.516, cancel the hearing, correct/amend your motions, refile, and re-schedule the hearing? Now that you have our response, you might prefer the later.

Please let me know as soon as possible. Today I will be preparing motions to require the court resolve the problem.

Attached is a memo I received this morning from Carla Oglo (Carla.Oglo@floridarevenue.com). You may remember that Ms. Oglo, while at FWC, wrote the memo given the defendants in 2007. The attached is recently dated, and it is on FWC letterhead. But it has not in anyway been authenticated. I am not holding it out as an official FWC document – I’m really not sure yet myself how “official” it is. You should verify with Ms. Oglo or FWC, if you are concerned about authenticity. We will when we need to. Nevertheless, I thought you all might be interested.

David Foley

Captive Wildlife and Local Ordin…s 2017.doc

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

Case number: 2016-CA-007634-O

COURT MINUTES

COURT OPENED 3:00 PM on December 11, 2017
This case came on this day for Motion
Honorable Higbee, Heather L , presiding

David W Foley, Jr; Jennifer T Foley

Petitioner / Plaintiff

VS

Orange County; Phil Smith; Carol Hossfield; Mitch Gordon; Rocco Relvini; Tara Gould; Tim Boldig; Frank Detoma; Asima Azam; Roderick Love; Scott Richman; Joe Roberts; Marcus Robinson; Richard Crotty; Teresa Jacobs; Fred Brummer; Mildred Fernandez; Linda Stewart; Bill Segal; Tiffany Moore Russell

Respondent / Defendant

Parties Present:

FOLEY, DAVID W, JR Plaintiff
FOLEY, JENNIFER T Plaintiff

- Court reporter: None

Court Deputy: R. Apostolico

Counsel for Defendant: William Turner

.

COURT RULING:

Case taken under advisement

COURT RECESSED at 4:00 PM on this the 11th day of December, 2017, subject to call.
Filed in Open Court on 12/11/2017
Deputy Clerk in Attendance: s/Nekeshia B.
Office of Tiffany M. Russell, Orange County Clerk of the Circuit and County Courts

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

Case number: 2016-CA-007634-O

AMENDED COURT MINUTES

COURT OPENED 3:00 PM on December 11, 2017
This case came on this day for Motion
Honorable Higbee, Heather L, presiding

David W Foley, Jr; Jennifer T Foley

Petitioner / Plaintiff

VS

Orange County; Phil Smith; Carol Hossfield; Mitch Gordon; Rocco Relvini; Tara Gould; Tim Boldig; Frank Detoma; Asima Azam; Roderick Love; Scott Richman; Joe Roberts; Marcus Robinson; Richard Crotty; Teresa Jacobs; Fred Brummer; Mildred Fernandez; Linda Stewart; Bill Segal; Tiffany Moore Russell

Respondent / Defendant

Parties Present:

FOLEY, DAVID W, JR	Plaintiff
FOLEY, JENNIFER T	Plaintiff

- Court reporter: Abigail Rusboldt Milestone Reporting 407-423-9900

Court Deputy: R. Apostolico

Counsel for Defendant: William Turner

COURT RULING:

Case taken under advisement

COURT RECESSED at 4:00 PM on this the 11th day of December, 2017, subject to call.
Filed in Open Court on 12/11/2017
Deputy Clerk in Attendance: s/Nekeshia B.
Office of Tiffany M. Russell, Orange County Clerk of the Circuit and County Courts

IN THE CIRCUIT COURT OF THE 9TH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

DAVID W. FOLEY and JENNIFER T. FOLEY,

CASE NO.: 2016-CA-007634-O

Plaintiffs,

v.

ORANGE COUNTY, PHIL SMITH, CAROL HOSSFIELD, MITCH GORDON, ROCCO RELVINI, TARA GOULD, TIM BOLDIG, FRANK DETOMA, ASIMA AZAM, RODERICK LOVE, SCOTT RICHMAN, JOE ROBERTS, MARCUS ROBINSON, RICHARD CROTTY, TERESA JACOBS, FRED BRUMMER, MILDRED FERNANDEZ, LINDA STEWART, BILL SEGAL, and TIFFANY RUSSELL,

Defendants.
_____/

ORDER ON PLAINTIFFS' MOTIONS FOR REHEARING/RECONSIDERATION

THIS MATTER comes before the Court on the Plaintiffs' Motion for Rehearing, and the Plaintiffs' Motion for Reconsideration, both filed November 9, 2017.[1] The Court, having considered the Motion, the record, and otherwise being duly advised in the premises, finds as follows:

ORDERS AND ADJUDGES that the Plaintiffs' Motion is **DENIED**. The instant Motion is simply an attempt to reargue points that were raised or should have been raised at the hearing

[1] Both of these Motions are substantially similar not only to each other, but also to the Motion for Rehearing filed on November 17, 2017, which was denied on December 7, 2017.

on the Defendants' motion to dismiss. This is not permitted. *See Epperson v. Epperson*, 101 So. 2d 367, 368-9 (Fla. 1958).

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on this ____ 11th day of December, 2017.

HEATHER L. HIGBEE
Circuit Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on Dec 12, 2017, a true and accurate copy of the foregoing was e-filed using the Court's ECF filing system, which will send notice to all counsel of record.

Judicial Assistant

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

Appellants/Plaintiffs
DAVID W. FOLEY, JR., and
JENNIFER T. FOLEY
v.

Appellees/Defendants
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.

2016-CA-007634-O

NOTICE OF APPEAL

NOTICE IS GIVEN that plaintiffs/appellants David W. Foley, Jr., and Jennifer T. Foley, appeal to the Fifth District Court of Appeal, the final orders of this court rendered December 7, 2017, and December 12, 2017, dismissing with prejudice plaintiffs'/appellants' amended complaint as to defendants 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.

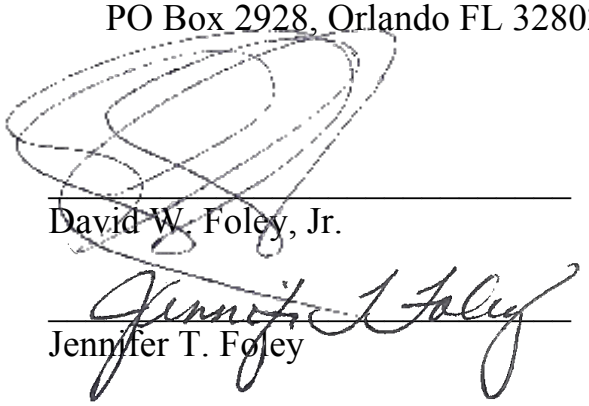
Conformed copies of orders designated in this notice of appeal are attached in accordance with Fla. R. App. P. 9.110(d).

This notice is timely per Fla. R. Jud. Admin. 2.514(a)(2)(c), as the filing date specified by Fla. R. App. P. 9.110(b), was Saturday, January 6, 2018.

CERTIFICATE OF SERVICE

Plaintiffs certify that on January 8, 2018, the foregoing was electronically filed with the Clerk of the Court using the Florida Courts' eFiling Portal, which will send notice of filing and a service copy of the foregoing to the following:

William C. Turner, Jr., Assistant County Attorney,
P.O. Box 2687, Orlando FL, 32801, williamchip.turner@ocfl.net;
Derek Angell, O'Connor & O'Connor LLC,
840 S. Denning Dr. 200, Winter Park FL, 32789, dangell@oconlaw.com;
Lamar D. Oxford, Dean, Ringers, Morgan & Lawton PA,
PO Box 2928, Orlando FL 32802-2928, loxford@drml-law.com.



David W. Foley, Jr.

Jennifer T. Foley

Date: January 8, 2018

Plaintiffs
1015 N. Solandra Dr.
Orlando FL 32807-1931
PH: 407 721-6132
e-mail: david@pocketprogram.org
e-mail: jtfoley60@hotmail.com

IN THE CIRCUIT COURT OF THE 9TH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

DAVID W. FOLEY and JENNIFER T. FOLEY,

CASE NO.: 2016-CA-007634-O

Plaintiffs,

v.

ORANGE COUNTY, PHIL SMITH, CAROL HOSSFIELD, MITCH GORDON, ROCCO RELVINI, TARA GOULD, TIM BOLDIG, FRANK DETOMA, ASIMA AZAM, RODERICK LOVE, SCOTT RICHMAN, JOE ROBERTS, MARCUS ROBINSON, RICHARD CROTTY, TERESA JACOBS, FRED BRUMMER, MILDRED FERNANDEZ, LINDA STEWART, BILL SEGAL, and TIFFANY RUSSELL,

Defendants.
_____/

ORDER ON PLAINTIFFS' MOTIONS FOR REHEARING/RECONSIDERATION

THIS MATTER comes before the Court on the Plaintiffs' Motion for Rehearing, and the Plaintiffs' Motion for Reconsideration, both filed November 9, 2017.[1] The Court, having considered the Motion, the record, and otherwise being duly advised in the premises, finds as follows:

ORDERS AND ADJUDGES that the Plaintiffs' Motion is **DENIED**. The instant Motion is simply an attempt to reargue points that were raised or should have been raised at the hearing

[1] Both of these Motions are substantially similar not only to each other, but also to the Motion for Rehearing filed on November 17, 2017, which was denied on December 7, 2017.

on the Defendants' motion to dismiss. This is not permitted. *See Epperson v. Epperson*, 101 So. 2d 367, 368-9 (Fla. 1958).

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on this ____ 11th day of December, 2017.

HEATHER L. HIGBEE
Circuit Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on Dec 12, 2017, a true and accurate copy of the foregoing was e-filed using the Court's ECF filing system, which will send notice to all counsel of record.

Judicial Assistant

IN THE CIRCUIT COURT OF THE 9TH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

DAVID W. FOLEY and JENNIFER T. FOLEY,

CASE NO.: 2016-CA-007634-O

Plaintiffs,

v.

ORANGE COUNTY, PHIL SMITH, CAROL HOSSFIELD, MITCH GORDON, ROCCO RELVINI, TARA GOULD, TIM BOLDIG, FRANK DETOMA, ASIMA AZAM, RODERICK LOVE, SCOTT RICHMAN, JOE ROBERTS, MARCUS ROBINSON, RICHARD CROTTY, TERESA JACOBS, FRED BRUMMER, MILDRED FERNANDEZ, LINDA STEWART, BILL SEGAL, and TIFFANY RUSSELL,

Defendants.
_____/

ORDER ON PLAINTIFFS' MOTION FOR REHEARING

THIS MATTER comes before the Court on the Plaintiffs' Motion for Rehearing, filed November 17, 2017. The Court, having considered the Motion, the record, and otherwise being duly advised in the premises, finds as follows:

ORDERS AND ADJUDGES that the Plaintiffs' Motion is **DENIED**. The instant Motion is simply an attempt to reargue points that were raised or should have been raised at the hearing on the Defendants' motion to dismiss. This is not permitted. *See Epperson v. Epperson*, 101 So.

2d 367, 368-9 (Fla. 1958).

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on this 6 _____ day of December, 2017.

HEATHER L. HIGBEE
Circuit Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on _____, 2017, a true and accurate copy of the foregoing was e-filed using the Court's ECF filing system, which will send notice to all counsel of record.

Judicial Assistant

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

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

Plaintiffs,

vs.

CASE NUMBER: 2016-CA-007634-0

ORANGE COUNTY, PHIL SMITH,
CAROL HOSSFIELD, MITCH GORDON,
ROCCO RELVINI, TARA GOULD,
TIM BOLDIG, FRANK DETOMA,
ASIMA AZAM, RODERICK LOVE,
SCOTT RICHMAN, JOE ROBERTS,
MARCUS ROBINSON, RICHARD CROTTY,
TERESA JACOBS, FRED BRUMMER,
MILDRED FERNANDEZ, LINDA STEWART,
BILL SEGAL, and TIFFANY RUSSELL,

Defendants.
_____/

FINAL JUDGMENT IN FAVOR OF DEFENDANTS
PHIL SMITH, CAROL HOSSFIELD (n/k/a CAROL KNOX),
MITCH GORDON, ROCCO RELVINI, TARA GOULD and TIM BOLDIG

THIS CAUSE came before the undersigned Circuit Judge for consideration of the Motion for Entry of Final Judgment filed by Defendants Phil Smith, Carol Hossfield (n/k/a Carol Knox), Mitch Gordon, Rocco Relvini, Tara Gould and Tim Boldig. The Court, having reviewed all pertinent materials in the Court file, and being otherwise fully advised in the premises, it is hereupon

ORDERED and ADJUDGED:

1. That Defendants Phil Smith, Carol Hossfield (n/k/a Carol Knox), Mitch Gordon, Rocco Relvini, Tara Gould and Tim Boldig are entitled to entry of Final Judgment in this cause, based upon the findings and conclusions of law made by this Court in its Order of October 24,

2017, granting said Defendants' Motion to Dismiss/Motion to Strike Plaintiffs' Amended Complaint. It is therefore

ORDERED and ADJUDGED that Final Judgment in this cause is hereby entered in favor of Defendants Phil Smith, Carol Hossfield (n/k/a Carol Knox), Mitch Gordon, Rocco Relvini, Tara Gould and Tim Boldig. Plaintiffs David W. Foley, Jr. and Jennifer T. Foley shall take nothing by this action against said Defendants, and said Defendants shall go hence without day. The Court reserves jurisdiction over any claims made or to be made by said Defendants for an award of costs and attorney's fees against the Plaintiffs.

DONE and ORDERED at Orlando, Orange County, Florida, this 13 day of November, 2017.

CIRCUIT JUDGE

Copies to: David W. Foley, Jr. and Jennifer T. Foley, david@pocketprogram.org, jtfoley60@hotmail.com; William C. Turner, Esquire, Elaine Marquardt Asad, Esquire and Jeffrey J. Newton, Esquire, williamchip.turner@ocfl.net, judith.catt@ocfl.net, elaine.asad@ocfl.net, gail.stpnford@ocfl.net; and Lamar D. Oxford, Esquire, loxford@drml-law.com, RhondaC@drml-law.com on this 13 day of NOV, 2017.

Judicial Assistant

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

DAVID W. FOLEY and JENNIFER T. FOLEY,

CASE NO.: 2016-CA-007634-O

Plaintiffs,

v.

ORANGE COUNTY, PHIL SMITH, CAROL HOSSFIELD, MITCH GORDON, ROCCO RELVINI, TARA GOULD, TIM BOLDIG, FRANK DETOMA, ASIMA AZAM, RODERICK LOVE, SCOTT RICHMAN, JOE ROBERTS, MARCUS ROBINSON, RICHARD CROTTY, TERESA JACOBS, FRED BRUMMER, MILDRED FERNANDEZ, LINDA STEWART, BILL SEGAL, and TIFFANY RUSSELL,

Defendants.
_____/

ORDER GRANTING "THE OFFICIAL DEFENDANTS' MOTION TO STRIKE THE AMENDED COMPLAINT, RENEWED REQUEST FOR JUDICIAL NOTICE, AND MOTION TO DISMISS THIS ACTION WITH PREJUDICE"
and
ORDER GRANTING "DEFENDANTS PHIL SMITH, ROCCO RELVINI, TARA GOULD, TIM BOLDIG, AND MITCH GORDON'S MOTION TO DISMISS/MOTION TO STRIKE"

THIS MATTER came before the Court for a hearing on September 6, 2017 upon the "The Official Defendants' Motion to Strike the Amended Complaint, Renewed Request for Judicial Notice, and Motion to Dismiss This Action with Prejudice," filed on March 3, 2017, and the "Defendants Phil Smith, Rocco Relvini, Tara Gould, Tim Boldig, and Mitch Gordon's Motion to Dismiss/Motion to Strike," filed on March 7, 2017. The Court, having considered the

Motions, case law, and arguments of counsel from both parties, and otherwise being duly advised in the premises, finds as follows:

RELEVANT FACTS AND PROCEDURAL HISTORY

A detailed history of the instant matter merits discussion, as it factors into the Court's ultimate findings. The Plaintiffs are commercial toucan farmers. A citizen complained of the Plaintiffs' toucans, and Orange County Code Enforcement began an investigation. A zoning manager determined that the Plaintiffs were in violation of the Code. The issue then went to a public hearing, held by the Board of Zoning Adjustment ("BZA"), which continued to find that the Plaintiffs were in violation of the Code. The Plaintiffs appealed to the Board of County Commissioners ("BCC"), who affirmed the BZA's determination. The Plaintiffs then petitioned for a writ of certiorari to the Orange County Ninth Judicial Circuit Court, which ultimately found that the zoning manager, BZA, and BCC properly interpreted the relevant Code, thus denying their petition.

The Plaintiffs filed an action in the Middle District of Florida against the County, the Officials,[1] the BZA members, and other county employees. The District Court ultimately determined that the relevant Code provisions were unconstitutional under the Florida Constitution, but nevertheless, the Plaintiffs' claims for due process violations, equal protection violations, compelled speech, restraints on commercial speech, and unreasonable searches or seizures failed.[2] *See Foley v. Orange County*, 2013 WL 4110414 (M.D. Fla. August 13, 2013).

The Plaintiffs appealed to the Eleventh Circuit, which ultimately vacated the Middle District's judgment and remanded the case for the court to dismiss without prejudice for lack of

[1] "The Officials" refers to the members of the BZA and the BCC, who were named both in their individual and official capacities. They include the following Defendants: Asima Azam, Fred Brummer, Richard Crotty, Frank Detoma, Mildred Fernandez, Teresa Jacobs, Roderick Love, Scott Richman, Joe Roberts, Marcus Robinson, Tiffany Russell, Bill Segal, and Linda Stewart.

[2] That action contained many of the same arguments that are raised in the instant action.

subject matter jurisdiction. *See Foley v. Orange County*, 638 Fed. Appx. 941, 946 (11th Cir. 2016). In so doing, the court concluded that the Plaintiffs' claims either had no plausible foundation, or were proscribed by previous Supreme Court decisions. *Id.* at 945-46.

The Plaintiffs then petitioned the Supreme Court for a writ of certiorari, but it was summarily denied. *See Foley v. Orange County, Fla.*, 137 S. Ct. 378 (2016).

On August 25, 2016, the Plaintiffs filed their initial Complaint in this Court. They amended their Complaint on February 25, 2017 to include the following counts: declaratory and injunctive relief proscribing the enforcement of the relevant Code sections (Counts I and II); negligence, unjust enrichment, and conversion (Count III); taking (Count IV); abuse of process to invade privacy and rightful activity, and conversion (Count V); civil theft (Count VI); and due process (Count VII). All of these counts purport to stem from the administrative proceeding that was held on February 23, 2007 and became final after appeal on February 19, 2008.

On September 6, 2017, the Court held a hearing on "The Official Defendants' Motion to Strike the Amended Complaint, Renewed Request for Judicial Notice, and Motion to Dismiss This Action with Prejudice," filed on March 3, 2017, and the "Defendants Phil Smith, Rocco Relvini, Tara Gould, Tim Boldig, and Mitch Gordon's Motion to Dismiss/Motion to Strike," filed on March 7, 2017. This Order follows.

ANALYSIS AND RULING

"A motion to dismiss tests whether the plaintiff has stated a cause of action." *Bell v. Indian River Memorial Hosp.*, 778 So. 2d 1030, 1032 (Fla. 4th DCA 2001). Furthermore, "[w]hen determining the merits of a motion to dismiss, the trial court's consideration is limited to the four corners of the complaint, the allegations of which must be accepted as true and considered in the light most favorable to the nonmoving party." *Id.*; *see, e.g., Solorzano v. First*

Union Mortg. Corp., 896 So. 2d 847, 849 (Fla. 4th DCA 2005); *Taylor v. City of Riviera Beach*, 801 So. 2d 259, 262 (Fla. 4th DCA 2001); *Samuels v. King Motor Co. of Fort Lauderdale*, 782 So. 2d 489, 495 (Fla. 4th DCA 2001); *Bolz v. State Farm Mut. Ins. Co.*, 679 So. 2d 836, 837 (Fla. 2d DCA 1996) (indicating that a motion to dismiss is designed to test the legal sufficiency of a complaint, not to determine issues of fact).

"A motion to dismiss a complaint based on the expiration of the statute of limitations should be granted only in extraordinary circumstances where the facts constituting the defense affirmatively appear on the face of the complaint and establish conclusively that the statute of limitations bars the action as a matter of law." *Alexander v. Suncoast Builders, Inc.*, 837 So. 2d 1056, 1057 (Fla. 3d DCA 2002); *see also Pines Properties, Inc. v. Tralins*, 12 So. 3d 888, 889 (Fla. 3d DCA 2009).

In the instant matter, the Plaintiffs cause of action accrued when the BZA's determination became final on February 19, 2008, nine years prior to this action's filing. The Plaintiffs' Complaint must be dismissed, as it can be determined from the face of the amended Complaint that all of the causes of action fall outside of their respective limitations period.[3] *See* § 95.11(3)(p), Fla. Stat. (2016) (stating that any action not specifically provided for in the statute is subject to a four-year limitations period, which encompasses declaratory actions and alleged due process violations (Counts I, II, and VII)); § 95.11(3)(a), Fla. Stat. (2016) (indicating that a negligence action has a four-year limitations period (Count III)); § 95.11(3)(h), Fla. Stat. (2016) (specifying that there is a four-year limitations period to bring a claim for a taking (Count IV)); §

[3] The Plaintiffs attempt to circumvent the limitations period by arguing that 28 U.S.C. § 1367(d) "tolls the limitations period for thirty days after dismissal of any supplemental claims related to those asserted to be within the original jurisdiction of the federal court." However, as the Defendants point out in their Motions, section 1367(d) only applies where a federal court enjoyed original jurisdiction over the case, and if the initial assertion of federal jurisdiction is found to be insufficient, then the section does not apply and the party does not get the benefit of the tolling. *See Ovadia v. Bloom*, 756 So. 2d 137, 140 (Fla. 3d DCA 2000). Because the Eleventh Circuit determined that the Plaintiffs' claims had no plausible foundation, section 1367(d) is inapplicable to the instant matter.

95.11(3)(o), Fla. Stat. (2016) (stating that intentional torts, which include abuse of process and conversion, are subject to a four-year limitations period (Count V)); § 772.17, Fla. Stat. (2016) (stating that civil theft has a five-year limitations period (Count VI)).

Accordingly, the following is hereby **ORDERED AND ADJUDGED:**

1. "The Official Defendants' Motion to Strike the Amended Complaint, Renewed Request for Judicial Notice, and Motion to Dismiss This Action with Prejudice" is **GRANTED.**
2. The "Defendants Phil Smith, Rocco Relvini, Tara Gould, Tim Boldig, and Mitch Gordon's Motion to Dismiss/Motion to Strike" is **GRANTED.**
3. The Plaintiffs' Amended Complaint, filed February 25, 2017, is **DISMISSED with prejudice as to the following Defendants: Frank Detoma, Asima Azam, Roderick Love, Scott Richman, Joe Roberts, Marcus Robinson, Richard Crotty, Teresa Jacobs, Fred Brummer, Mildred Fernandez, Linda Stewart, Bill Segal, and Tiffany Russell.**

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on this 24 day of October, 2017.

HEATHER L. HIGBEE
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on Oct 25, 2017, a true and accurate copy of the foregoing was e-filed using the Court's ECF filing system, which will send notice to all counsel of record.

Judicial Assistant

District Court of Appeal
Fifth District
300 South Beach Street
Daytona Beach, Florida 32114
(386) 255-8600

ACKNOWLEDGMENT OF NEW CASE

DATE: January 16, 2018

STYLE: DAVID W. FOLEY, JR. AND JENNIFER T. FOLEY v. 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, ET AL

5DCA#: 18-0145

The Fifth District Court of Appeal has received the Notice of Appeal reflecting a filing date of January 8, 2018.

The county of origin is Orange.

The lower tribunal case number provided is 2016-CA-7634.

The filing fee is Billed - $300.

Case Type: Civil Other Final

The Fifth District Court of Appeal's case number must be utilized on all pleadings and correspondence filed in this cause. Moreover, ALL PLEADINGS SIGNED BY AN ATTORNEY MUST INCLUDE THE ATTORNEY'S FLORIDA BAR NUMBER.

Any party who may properly proceed in this Court pro se, i.e., unrepresented by counsel, may find useful "The Pro Se [Self-Represented] Appellate Handbook," which is provided by the Appellate Practice Section of The Florida Bar (available at www.flabarappellate.org.).

Please review and comply with any handouts enclosed with this acknowledgment.

cc: Lamar D Oxford
Derek J Angell
William C Turner
David W Foley, Jr
Orange Cty Circuit Ct Clerk
Jennifer T Foley

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

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

Plaintiffs,

v. CASE NUMBER: 2016-CA-007634-O

ORANGE COUNTY, PHIL SMITH, CAROL HOSSFIELD, MITCH GORDON, ROCCO RELVINI, TARA GOULD, TIM BOLDIG, FRANK DETOMA, ASIMA AZAM, RODERICK LOVE, SCOTT RICHMAN, JOE ROBERTS, MARCUS ROBINSON, RICHARD CROTTY, TERESA JACOBS, FRED BRUMMER, MILDRED FERNANDEZ, LINDA STEWART, BILL SEGAL, and TIFFANY RUSSELL,

Defendant.
_____/

NOTICE OF HEARING

(30 Minutes Reserved – Confirmation # 148055)

PLEASE TAKE NOTICE that the Defendant, ORANGE COUNTY (the "County") Officials named in their individual and official capacities serving on the Board of Zoning Adjustment ("BZA") or Board of County Commissioners ("BCC"), ASIMA AZAM, FRED BRUMMER, RICHARD CROTTY, FRANK DETOMA, MILDRED FERNANDEZ, TERESA JACOBS, RODERICK LOVE, SCOTT RICHMAN, JOE ROBERTS, MARCUS ROBINSON, TIFFANY RUSSELL, BILL SEGAL, and LINDA STEWART (together, the "Officials"), by and through its undersigned counsel, will call up for hearing before The Honorable Heather L. Higbee, 425 North Orange Avenue, Orlando, FL, Hearing Room 20-B, on, **April 4, 2018, at 10:00 a.m**., the following matters:

1. The Official Defendant's Motion to Tax Attorneys' Fees and Costs (filed 11/9/17)

2. The Official Defendant's Motion for §57.105 Sanctions (served on 1/4/17 & filed on 3/8/17).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by Electronic Mail via the Florida E-Portal System to: David W. Foley, Jr. and Jennifer T. Foley, david@pocketprogram.org, jtfoley60@hotmail.com; William C. Turner, Esquire, Elaine Marquardt Asad, Esquire and Jeffrey J. Newton, Esquire, williamchip.turner@ocfl.net, judith.catt@ocfl.net, elaine.asad@ocfl.net, gail.stanford@ocfl.net; and Lamar D. Oxford, Esquire, loxford@drml-law.com, katietillotson@drml-law.com on this 18th day of January, 2018.

/s/ Derek J. Angell

DENNIS R. O'CONNOR, ESQ.
Florida Bar Number: 376574
DOConnor@oconlaw.com
DEREK J. ANGELL, ESQUIRE
Florida Bar Number: 73449
DAngell@oconlaw.com
O'CONNOR & O'CONNOR, LLC
800 North Magnolia Avenue, Suite 1350
Orlando, Florida 32803
(407) 843-2100
(407) 843-2061 Facsimile
Attorneys for Defendant Orange County Board of County Commissioners

IN THE CIRCUIT COURT OF
THE NINTH JUDICIAL CIRCUIT
IN AND FORORANGE COUNTY, FLORIDA

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

Defendants
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.*

2016-CA-007634-O

PLAINTIFFS' RESPONSE TO THE OFFICIAL DEFENDANTS' MOTION FOR §57.105 SANCTIONS FILED JANUARY 4, 2017

THIS COURT SHOULD DENY "The Official Defendants' Motion for §57.105 Sanctions," to the extent that Asima Azam, Fred Brummer, Richard Crotty, Frank Detoma, Mildred Femandez, Teresa Jacobs, Roderick Love, Scott Richman, Joe Roberts, Marcus Robinson, Tiffany Russell, Bill Segal, and Linda Stewart, seek sanctions in attorney's fees and costs as prevailing parties in this court's order signed October 24, 2017, filed October 25, 2017, and rendered December 12, 2017, on plaintiffs' motion for rehearing.

ARGUMENT SUMMARY

While the following Course of the Proceedings (pp. 2-8) demonstrates the *officials* have satisfied the procedural requisites of §57.105, Fla. Stat., it also demonstrates the *officials* have not satisfied the principal substantive requirement of §57.105(1)(b) – defendants have not and cannot show that the Foleys "knew or should have known" that "the application of then-existing law" compelled the conclusion reached by the court in this case. This court has decided that 28 USC §1367 does not toll limitations on state claims during the pendency of a federal proceeding if related federal questions are dismissed as "frivolous" per *Bell v. Hood*, 327 U.S. 678 (1946). On that basis the court has dismissed the Foleys' complaint as untimely. Whether or not the Foleys succeed in their pending appeal of this decision, the decision is without precedent – no other court has denied the tolling provision of 28 USC §1367, to such claims. As the following Judicial Standards (pp. 8-12) demonstrate, the *officials* get no reward per §57.105 for convincing this court to set such a precedent the Foleys could not have foreseen.

COURSE OF THE PROCEEDINGS

August 25, 2016, the Foleys filed their "Verified Complaint for Declaratory & Injunctive Relief, Constitutional Tort, Civil Theft, and Other Relief."

September 20, 2016, while the Foleys were still attempting to perfect service of their complaint on the *officials*, Derek Angell, as counsel to the *officials*, sent a letter to the Foleys refusing waiver of service and threatening a motion for sanctions should personal service be perfected [*See* "The Official Defendants' Motion for §57.105 Sanctions Filed January 4, 2017," Ex. B].

December 19, 2016, the *officials* filed "The Official Defendants' Motion to Dismiss, Motion to Strike, and Request for Judicial Notice" [*See* "The Official Defendants' Motion for §57.105 Sanctions Filed January 4, 2017," Ex. A].

January 4, 2017, the *officials* served the Foleys with "The Official Defendants' Motion for §57.105 Sanctions." The motion repeatedly characterized the Foleys' claims as "frivolous," and requested the court grant an award of attorney's fees and costs unless "Plaintiffs file a notice of voluntary dismissal of their claims against the Officials within twenty-one days hereof." Attached to the motion were two exhibits. Exhibit A was the motion to dismiss filed December 19, 2016. Exhibit B was the letter served on the Foleys September 20, 2016.

February 15, 2017, the Foleys filed their "Amended Complaint for Declaratory and Injunctive Relief, Constitutional and Common Law Tort, Civil Theft, and Demand for Jury Trial."

March 3, 2017, the *officials* filed "The Official Defendants' Motion to Strike the Amended Complaint, Renewed Request for Judicial Notice, and Motion to Dismiss This Action with Prejudice." Attached to the motion as Exhibit A was the motion to dismiss filed December 19, 2016. At pp. 7-8, of Exhibit A the *officials* argue that *Ovadia* – a diversity jurisdiction case that in no way involved federal question jurisdiction – controls the application of 28 USC §1367:

> Section 1367(d) only applies where a federal court indeed enjoyed original jurisdiction over a case. See *Ovadia v. Bloom*, 756 So. 2d 137, 139 (Fla. 3d DCA 2000). But where an initial assertion of federal jurisdiction is shown to be insufficient, §1367(d) does not apply and no tolling occurs. *See id*. ("Any arguable jurisdiction was based on diversity, and the presence of non-diverse defendants in the action destroyed jurisdiction on that basis."). More colorfully, "[a] voluntary but improvident foray into the federal arena does not toll the statute of limitations." *Id*. (citation omitted). In other words, §1367(d) only applies where a properly filed federal action fails on the merits and a district court, in its discretion, declines to retain supplemental state law claims. Conversely, where underlying federal claims are improper ab initio, §1367(d) does not save a plaintiff for their "improvident foray into the federal arena."
>
> The Eleventh Circuit has now held that all of the Foleys' federal claims were frivolous. *See generally Foley, supra.* The case should never have been brought in federal court, and §1367(d) does not apply. The result might be different if a non-frivolous federal claim had been brought and later lost on summary judgment, but that clearly is not our posture. A frivolous foray into the federal forum does not toll otherwise expired limitations periods.

March 8, 2017, the *officials* filed "The Official Defendants' Motion for §57.105 Sanctions." The motion was that served on the Foleys January 4, 2017.

May 24, 2017, the Foleys filed "Plaintiffs Response to Defendants' Motions to Dismiss." In their response, at §3.1.1, pp. 50-51, as quoted below, the Foleys clearly argue that *Krause* is binding precedent as to the application of 28 USC §1367 to state law claims related to federal question claims dismissed for lack of subject matter jurisdiction:

> Florida's Supreme Court in *Krause v. Textron Financial Corp.*, 59 So. 3d 1085, 1091 (Fla. 2011), stated: "[T]he plain language of [28 USC §1367] leads us to conclude that the dismissal of a claim in federal court ... for lack of subject matter jurisdiction, does not bar the applicability of the federal tolling provision in the subsequent state court action." The Eleventh Circuit in *Foley v. Orange County*, 638 Fed.Appx. 941 (11th Cir. 2016), at 946, ordered the District Court to dismiss without prejudice for lack of subject matter jurisdiction. Therefore, per *Krause*, the Foleys' state law claims against the County officials and employees in their personal capacity are timely.
>
> Defense argues that the Third DCA reached a different result in *Ovadia v. Bloom*, 756 So. 2d 137, 139 (3d DCA 2000). It did not. The only basis for federal jurisdiction in *Ovadia* was diversity. Diversity jurisdiction in federal court per 28 USC §1332, must be complete – a non-diverse defendant destroys jurisdiction. On its face Ovadia's complaint included a non-diverse defendant. Limitations were not tolled per 28 USC §1367(d), on the state claims against the non-diverse defendant because "claims against a non-diverse defendant cannot be considered supplemental jurisdiction," *Ovadia* at 139. *Ovadia*'s rule applies only to diversity jurisdiction and not federal question jurisdiction. The Foleys presented the federal courts with a federal question per 28 USC §1331, and those courts went well beyond the face of the Foleys' federal complaint to determine they lacked subject matter jurisdiction.

In *Foleys v. Orange County*, et al 638 Fed.Appx. 941, 943 (11th Cir. 2016), the Eleventh Circuit drew the words "insubstantial," "frivolous" from *Bell v. Hood*, 327 U.S. 678, 681-683 (1946).

> [W]here the complaint, as here, is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court, but for two possible exceptions, must entertain the suit. ... The previously carved out exceptions are that a suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly *insubstantial* and *frivolous*. The accuracy of calling these dismissals jurisdictional has been questioned. [*Emphasis* added.]

In other words, per *Bell v. Hood*, it can be said that the Eleventh Circuit found the Foleys' complaint was "so drawn as to seek recovery directly under the Constitution of the United States or laws of the United States," but was nevertheless "insubstantial and frivolous" – or, as the Eleventh Circuit put it at 946, "clearly foreclosed by a prior Supreme Court decision." Judge Tjoflat – the longest serving federal appeals judge still in active service – at oral argument put it this way:

> TJOFLAT: Dismissal without prejudice doesn't hurt you at all... There's no injury at all; you're back at square one with a remedy in the state court is what I'm trying to say

September 6, 2017, at oral argument the Foleys reiterated their reliance upon *Krause v. Textron Financial Corp.*, 59 So.3d 1085 (Fla. 2011), as to the question of limitations [Exhibit A, Transcript, p.1217, lines 20-25; p. 1218, lines 1-4].

September 6, 2017, at oral argument Derek Angell, counsel for the *officials*, further clarified his position on the application of 28 USC §1367(d) per *Ovadia v.*

Bloom, 756 So.2d 137 (Fla. 3d DCA 2000); Angell argued that the tolling provisions apply only when a *defendant* removes a case to federal court that is dismissed, but not when a *plaintiff* initiates a case in federal court that is dismissed [Exhibit A, Transcript, p. 1208, lines 1-15].

October 25, 2017, the court filed its "Order Granting 'The Official Defendants' Motion to Strike the Amended Complaint, Renewed Request for Judicial Notice, and Motion to Dismiss this Action with Prejudice' and Order Granting 'Defendants Phil Smith, Rocco Relvini, Tara Gould, Tim Boldig, and Mitch Gordon's Motion to Dismiss/Motion to Strike.'" The court's only discussion of argument relating to the tolling provision of 28 USC §1367, appears in footnote 3 on page 4, as follows:

> The Plaintiffs attempt to circumvent the limitations period by arguing that 28 USC §1367(d) "tolls the limitations period for thirty days after dismissal of any supplemental claims related to those asserted to be within the original jurisdiction of the federal court." However, as the Defendants point out in their Motions, section 1367(d) only applies where a federal court enjoyed original jurisdiction over the case, and if the initial assertion of federal jurisdiction is found to be insufficient, then the section does not apply and the party does not get the benefit of the tolling. *See Ovadia v. Bloom*, 756 So.2d 137, 140 (Fla. 3d DCA 2000). Because the Eleventh Circuit determined that the Plaintiffs' claims had no plausible foundation, section 1367(d) is inapplicable to the instant matter.

The court's order relies exclusively on *Ovadia v. Bloom*, 756 So.2d 137, 140 (Fla. 3d DCA 2000), and makes no reference to either *Krause v. Textron Financial*

Corp., 59 So.3d 1085 (Fla. 2011) or the Foleys' written or oral arguments regarding *Krause*.

JUDICIAL STANDARDS

The 1999 amendment of §57.105, Fla. Stat., broadened its scope to permit sanctions against any claim or defense unsupported by fact or law. "In 1999, the Legislature substantially rewrote [section 57.105] to significantly broaden the courts' authority to award attorneys' fees under that section," *Boca Burger, Inc. v. Forum*, 912 So.2d 561, 570 (Fla. 2005). "[T]he statute no longer applies only to an entire action; it now applies to *any* claim or defense. The standard for granting fees also has changed. Previously, a movant had to show 'a complete absence of a justiciable issue of either law or fact raised by the losing party.' § 57.105, Fla. Stat. (Supp.1978). Under the revised version, however, a movant need only show that the party and counsel 'knew or should have known' that any claim or defense asserted was (a) not supported by the facts or (b) not supported by an application of 'then-existing' law. § 57.105, Fla. Stat. (2000)," *Id.*

However, §57.105, is not a reward to every prevailing party for every successful claim or defense. "[A]n award of fees is not always appropriate under section 57.105, even though the party seeking fees was successful in obtaining the dismissal of the action," *Mullins v. Kennelly*, 847 So. 2d 1151, 1155 (5th DCA 2003), *citing Read v. Taylor*, 832 So.2d 219, 222 (4th DCA 2002).

Instead, §57.105, is a penalty on losing parties to discourage baseless claims or defenses. "The purpose of section 57.105 is to discourage baseless claims, stonewall defenses and sham appeals in civil litigation by placing a price tag through attorney's fees awards on losing parties who engage in these activities," *Whitten v. Progressive Cas. Ins. Co.*, 410 So.2d 501, 505 (Fla.1982).

Nevertheless, §57.105(3)(a), does not permit sanctions for "good faith" claims or defenses. "[M]onetary sanctions may not be awarded 'if the court determines that the claim or defense was initially presented to the court as a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law, as it applied to the material facts, with a reasonable expectation of success.' § 57.105(3)(a), Fla. Stat. (2012)," *Austin & Laurato, Pa v. State Farm Florida Insurance Company*, Case No. 5D15-3616 (5th DCA 2017).

Ultimately, it is the "frivolous" standard that is most often used to distinguish "good faith" claims and defenses from those that are "unsupported " or "baseless." "[I]n applying revised section 57.105, Florida appellate courts have recognized that… the statute 'still is intended to address the issue of frivolous pleadings,'" *Martin County Conservation v. Martin County*, 73 So. 3d 856, 867 (1st DCA 2011), *citing* *Read v. Taylor*, 832 So.2d 219, 222 (4th DCA 2002), *Connelly v. Old Bridge Village Co-Op, Inc.*, 915 So.2d 652, 656 (2nd DCA 2005), and *Pappalardo v. Richfield Hospitality Serv., Inc.*, 790 So.2d 1226,

1228 (4th DCA 2001)." See also Cullen v. Marsh, 34 So.3d 235, 239 (3rd DCA 2010), *and* Matte v. Caplan, 140 So.3d 686, 688 (4th DCA 2014).

Florida courts have established guidelines for the application of the "frivolous" standard. "[A] review of Florida caselaw reveals there are established guidelines for determining when an action is frivolous. These include where a case is found: (a) to be completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (b) to be contradicted by overwhelming evidence; (c) as having been undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (c) as asserting material factual statements that are false," Visoly v. Security Pacific Credit Corp., 768 So. 2d 482 (3rd DCA 2000), *cited with favor by* Mullins v. Kennelly, 847 So. 2d 1151 †4 (5th DCA 2003).

Finally, the "frivolous" standard is identical to that governing the practice of law. "Section 57.105, as well as the Florida Bar rules of professional conduct and even the oath of admission to the Florida Bar, all warn—if any warning were needed—that counsel must be governed by considerations other than mere zealous advocacy for the client. *See* §57.105, Fla. Stat. (2002) (allowing a court to sanction the losing party and the losing party's attorney if the court finds the losing party's attorney knew or should have known that a claim or defense was not supported by the application of then-existing law); R. Regulating Fla. Bar 4-

3.3(a)(1) ('A lawyer shall not knowingly make a false statement of material fact or law to a tribunal.'); *Oath of Admission*, Fla. Bar J., Sept. 2004, at 2 ('I will employ for the purposes of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law.'). Rule 4-3.3(a)(3) of the Rules Regulating the Florida Bar specifically prohibits an attorney from knowingly 'fail[ing] to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel…' [T]he rules already require counsel to concede error... " *See* Boca Burger, Inc. v. Forum, 912 So.2d 561, 571-2 (Fla. 2005).

See also the discussion of the Rules Regulating the Florida Bar as a standard for sanctions per §57.105, in *Visoly v. Security Pacific Credit Corp.*, 768 So. 2d 482, 492 (3rd DCA 2000): "The privilege to practice law requires attorneys to conduct themselves in a manner compatible with the administration of justice. While counsel does have an obligation to be faithful to their clients' lawful objectives, that obligation cannot be used to justify unprofessional conduct by elevating the perceived duty of zealous representation over all other duties. *See* P.T.S. Trading Corp. v. Habie, 673 So.2d 498 (Fla. 4th DCA 1996) (fees awarded for abuse of process, quoting Rules Regulating the Florida Bar, Rule 4-3.1). Counsel has a concurrent duty to the legal system and the public good to ensure

appeals are pursued in good faith and are not frivolous. See R. Regulating Fla. Bar 4-3.1, ('A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous ....'); *see also* R. Regulating Fla. Bar 4-3.2 ('A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.')"

ANALYSIS

Application of the Judicial Standards (p. 8-12), to the Course of the Proceedings (pp. 2-8), restricts analysis to these two questions: *1)* Can the court find that the Foleys' reliance upon *Krause v. Textron Financial Corp.*, 59 So.3d 1085 (Fla. 2011), was "completely without merit" [*Visoly v. Security Pacific Credit Corp.*, 768 So. 2d 482 (3rd DCA 2000)] and not supported by a reasonable "good faith argument for an extension, modification or reversal of existing law," [§57.105(3)(a), Fla. Stat.]?; or, *2)* Can the court find that the Foleys "knew or should have known" that *Ovadia v. Bloom*, 756 So.2d 137 (3rd DCA 2000), or any other "then-existing law" [§57.105(1)(b), Fla. Stat.] unequivocally compelled the conclusion urged by the *officials* and reached by the court in this case? If the answer to either question is "No," the *officials*' motion fails.

These questions do not require the court to re-litigate the issue of limitations per 28 USC §1367. Nor is the court asked again to decide between *Krause* and *Ovadia*. Indeed, it cannot – jurisdiction over that issue is now with the Fifth

District Court of Appeals. The court is asked, instead, to decide between the Foleys and the *officials*. Will the court rule for the Foleys – will it acknowledge that its decision to extend *Ovadia* to create an exception to *Krause* set a precedent the Foleys could not have foreseen? Or, will the court rule for the *officials* – will it hold that *Ovadia* so patently trumps *Krause* the Foleys should be sanctioned just as any attorney should be sanctioned who foolishly defrauds the court?

Can the court find that the Foleys' reliance upon *Krause v. Textron Financial Corp.*, 59 So.3d 1085 (Fla. 2011), was "completely without merit" and not supported by a reasonable "good faith argument for an extension, modification or reversal of existing law?" No.

Krause clearly held that the tolling provisions of 28 USC §1367 apply "to claims commenced in federal court but later dismissed for lack of federal subject matter jurisdiction," *at 1090*. The Federal District Court, July 27, 2016, dismissed *Foley et ux v. Orange County et al.*, "without prejudice for lack of subject matter jurisdiction." The dismissal of *Foley et ux* dovetails with the rule announced in *Krause*, and thus gives the Foleys' reliance upon *Krause* sufficient merit to compel this court to deny the *officials'* motion for sanctions. Nevertheless, below the Foleys compare the basis of federal jurisdiction in *Krause* with that of *Foley et ux* to add greater merit to their reliance upon it, and to give the court greater reason to deny the *officials'* motion for sanctions.

Krause began in federal court as a federal question case, specifically a bankruptcy case. The federal court had federal jurisdiction generally pursuant 28 USC §1331, and specifically pursuant 28 U.S.C. §1334. It had supplemental jurisdiction over related state law claims pursuant 28 USC §1367. Ultimately, the federal court dismissed federal and state claims for lack of federal subject matter jurisdiction. Similarly, in *Foley et ux*, the federal court had federal question jurisdiction pursuant 28 USC §1331, over claims brought under 42 USC §§1983, 1985(3), and 1986, and 18 USC §1964(c), and supplemental jurisdiction pursuant 28 USC §1367, over related state law claims brought under common law and §§772.104, 772.11, and 768.72, Fla. Stat. Like the court in *Krause*, the court in *Foley et ux* ultimately dismissed federal and state claims for lack of federal subject matter jurisdiction. This similarity alone gives the Foleys' reliance upon *Krause* sufficient merit to compel this court to deny the *officials'* motion for sanctions.

Krause was taken up by Florida's Supreme Court to resolve conflict between the 2nd DCA's opinion in that case[1] and *Scarfo v. Ginsberg*, 817 So.2d 919 (4th DCA 2002). Florida's Supreme Court adopted the opinion and reasoning of the 4th DCA in *Scarfo* and reversed the 2nd DCA, stating, "[I]n *Scarfo* … the court concluded that the dismissal of a federal claim for lack of subject matter

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1 *Krause v. Textron Financial Corp.*, 10 So.3d 208 (2nd DCA 2009).

2 The Supreme Court in *Wisconsin Dept. of Corrections v. Schacht at 389*, distinguished "federal question" jurisdiction from "diversity" jurisdiction as

jurisdiction did not bar the application of section 1367(d) to toll the state limitations period for claims refiled in state court." The court in *Scarfo* itself states, "Section 1367(d) provides for a tolling of state law limitations on any state law claim asserted in federal court under section 1367(a). The only requirements are that the claim be asserted under section 1367(a)." Here, again, these statements of law dovetail with the statement of dismissal in *Foley et ux*, and give the Foleys' reliance upon *Krause* sufficient merit to compel this court to deny the *officials'* motion for sanctions. Nevertheless, below the Foleys further compare the basis of federal jurisdiction in *Scarfo* with that of *Foley et ux* to add greater merit to their reliance upon *Krause*, and to give the court greater reason to deny the *officials'* motion for sanctions.

Scarfo began in federal court as an employment discrimination case; the federal court had federal jurisdiction generally pursuant 28 USC §1331, and specifically, pursuant 42 USC §2000e-5(f)(3), and it had supplemental jurisdiction over related state law claims pursuant 28 USC §1367. As in *Krause*, the federal court in *Scarfo* ultimately dismissed both federal and state claims for lack of federal subject matter jurisdiction. Similarly, in *Foley et ux*, the federal court had federal question jurisdiction pursuant 28 USC §1331, and supplemental jurisdiction over related state law claims pursuant 28 USC §1367, but ultimately dismissed federal and state claims for lack of federal subject matter jurisdiction.

Again, this similarity with *Scarfo* as adopted in *Krause* gives the Foleys' reliance upon *Krause* sufficient merit to compel this court to deny the *officials'* motion for sanctions.

Krause also favorably discusses the opinion in *Blinn v. Florida Department of Transportation*, 781 So.2d 1103 (1st DCA 2000). *Blinn*, perhaps even more that *Krause* or *Scarfo*, gives the Foleys' reliance upon the plain language of 28 USC §1367, sufficient merit to compel this court to deny the *officials'* motion for sanctions. That is because the dismissal of *Blinn* in federal court was *voluntary* – the original, unchallenged basis for federal jurisdiction was *irrelevant*. Yet, the 1st DCA nevertheless ruled that the tolling provisions of 28 USC §1367, applied!

Blinn began in federal court as a federal question case, specifically an age discrimination case. The federal court had federal jurisdiction generally pursuant 28 USC §1331, and specifically pursuant 29 USC §626, to enforce the provisions of 29 USC §621. It had supplemental jurisdiction over related state law claims pursuant 28 USC §1367. Ultimately, however the federal court never exercised jurisdiction because plaintiff Anna Blinn "believing that her claims were susceptible to dismissal on Eleventh Amendment grounds … voluntarily dismissed the federal court action," *Blinn at 1104*. Consequently, *Krause's* favorable reliance on *Blinn – a case where the federal action was voluntarily dismissed by the party that initiated it* – gives the Foleys' reliance upon *Krause*, and the plain language of

28 USC §1357, sufficient merit to compel this court to deny the *officials'* motion for sanctions.

Can the court find that the Foleys "knew or should have known" that *Ovadia v. Bloom*, 756 So.2d 137 (3rd DCA 2000), or any other "then-existing law," compelled the conclusion urged by the *officials* and reached by the court in this case? No.

Right or wrong, *Ovadia* stands alone. There is no concurring appellate decision in Florida. There is no appellate decision in Florida that applies *Ovadia* to any case involving 28 USC 1367. And there is no reported state appellate decision in the entire United States – none the Foleys have found – that denies the tolling provisions of 28 USC 1367, to a dismissal for lack of diversity as *Ovadia* does. This court cannot in good faith say the Foleys "knew or should have known" that *Ovadia* – by itself – compelled the conclusion it reached in this case.

Ovadia cannot otherwise be said to trump *Krause* because their rulings are specific to their very different legal postures. *Ovadia* began in federal court as a diversity case. *Krause* began in federal court as a federal question case. *Ovadia* presented no federal question and alleged the federal court's original jurisdiction was based solely on diversity of citizenship per 28 USC §1332. *Krause* did not involve diversity of citizenship and alleged the federal court's original jurisdiction was in bankruptcy per 28 USC §1334. Because original jurisdiction in diversity per 28 USC §1332, and original jurisdiction in bankruptcy per 28 USC §1334, are as

different as night and day, *Ovadia* cannot be said to trump *Krause*. Consequently, the court cannot say that the rule in *Ovadia* so clearly compelled its application to *Foley et ux* that the Foleys "knew or should have known" their reliance upon Florida's Supreme Court's decision in *Krause* was foreclosed by the 3rd DCA's decision in *Ovadia*.

Original jurisdiction in diversity per 28 USC §1332, as in *Ovadia*, and original jurisdiction in a federal question per 28 USC §1331, as in *Foley et ux,* are likewise as different as night and day – the former is determined by simply looking at the face of the complaint to check the names and addresses of the parties (or a general allegation based on "information and belief"), the later must be litigated.[2] Diversity is, or isn't. Its absence cannot be cured by agreement, nor its presence destroyed by argument. On the other hand, a challenge to *stare decisis* or the applicability of accepted precedent to a federal question, or a determination of the

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[2] The Supreme Court in *Wisconsin Dept. of Corrections v. Schacht at 389*, distinguished "federal question" jurisdiction from "diversity" jurisdiction as follows:

> [A federal question] case differs significantly from a diversity case with respect to a federal district court's original jurisdiction. The presence of the nondiverse party automatically destroys original jurisdiction: No party need assert the defect. No party can waive the defect or consent to jurisdiction. *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982); *People's Bank v. Calhoun*, 102 U.S. 256, 260-261 (1880). No court can ignore the defect; rather a court, noticing the defect, must raise the matter on its own. *Insurance Corp. of Ireland, supra, at 702*; *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U.S. 379, 382 (1884). [Emphasis added.]

construction of an ordinance, statute, or constitutional provision, can only be settled by adversarial debate. Consequently, *Ovadia* – a diversity case – cannot be said to trump *Krause* – a federal question case – or to be so patently applicable to *Foley et ux* that the Foleys "knew or should have known" that *Ovadia* compelled the conclusion of the court's October 25th order. And for this reason the court must deny the *officials'* motion for sanctions.

CONCLUSION

WHEREFORE David and Jennifer Foley request the Court deny "The Official Defendants' Motion for §57.105 Sanctions."

CERTIFICATE OF SERVICE

Plaintiffs certify that on March 27, 2018, the foregoing was electronically filed with the Clerk of the Court using the Florida Courts' eFiling Portal, which will send notice of filing and a service copy of the foregoing to the following:

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Date: March 27, 2018

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IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

CASE No.: 2016-CA-007634-O

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

Plaintiffs,

vs.

ORANGE COUNTY, PHIL SMITH, CAROL HOSSFIELD, MITCH GORDON, ROCCO RELVINI, TARA GOULD, TIM BOLDIG, FRANK DETOMA, AZIM AZAM, RODERICK LOVE, SCOTT RICHMAN, JOE ROBERTS, MARCUS ROBINSON, RICHARD CROTTY, TERESA JACOBS, FRED BRUMMER, MILDRED FERNANDEZ, LINDA STEWART, BILL SEGAL and TIFFANY RUSSELL,

Defendants.

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Appendix A

Transcript of Proceedings
Before the Honorable Heather L. Higbee,
Circuit Court Judge

DATE TAKEN: September 6, 2017

TIME: Commenced at 4:00 p.m.
Concluded at 4:47 p.m.

LOCATION: Orange County Courthouse
425 North Orange Avenue
Hearing Room 20-B
Orlando, Florida 32801

REPORTED BY: Danette V. Lamb,
Court Reporter and Notary Public

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P R O C E E D I N G S

THE COURT: Good afternoon. All right. Is everybody ready? We're going to go ahead and get on the record. This is 2016-CA-7634. There are a myriad of hearings that are set for today. I'm not going to announce each one of them or I'll dip into your time. But understand that I have reviewed the motions, the information that has been forwarded to me, the case on the court file that's part of our record so that I would be prepared for today.

I also wanted to apologize to everyone for having to change the hearing on you a few weeks ago. I had a family emergency that I had to tend to. It had nothing to do with this case. It was just that particular time frame that I needed to make sure I had to -- something that unfortunately was more important than where I had to be here, so I apologize for that inconvenience. You have my full attention.

I also want to introduce you to my staff attorney, Teresa Lazar, who is sitting in on this hearing with me so that you know who she is. She is my staff attorney that assist me with the legalities of my job.

So I'm going to start with my immediate right

and have you identify for me who you are and who you represent, please.

MR. ANGELL: And I'd be here. Your Honor, my name is Derek Angell. I represent the Orange County Officials in this case, which is comprised of the members of The Board of Zoning Adjustment, BZA, and the Board of Commissioners, the BCC.

THE COURT: Thank you. Sir?

MR. OXFORD: Good afternoon, Your Honor. My name is Lamar Oxford from the Dean, Ringers firm. I represent the -- Phil Smith, who is the county code enforcement inspector. Carol Knox is her married -- is her name now. She was the chief planner for the County. Mitch Gordon is the former zoning manager for the County. Rocco Relvini, chief planner for the County; and Tara Gould, former assistant Orange County attorney.

THE COURT: Okay. Thank you. And I am going ask over here. Counsel?

MS. ASAD: Elaine Asad for Orange County.

MR. TURNER: And William Turner also on behalf of Orange County, Your Honor.

THE COURT: Okay. And that must make you Mrs. Foley?

MRS. FOLEY: Jennifer Foley.

THE COURT: All right. Very good.

Are you David Foley?

MR. FOLEY: I am.

THE COURT: All right. So I have Jennifer Foley and David Foley.

So I would like to go -- well, I have everything in the order of what was noticed and it would seem that if we go in that order -- I don't know that there's any better order to go in unless anyone has an objection. We have an hour, which means that I'm anticipating approximately 30 minutes of one side and 30 minutes of the other side. Although, it's going to be mixed in between all the different motions and responses. So hopefully we can make good use of that time and be out of here promptly.

So, Mr. Angell, you represent the Orange County officials and that's the first item that I have on my list. If you wish to proceed with your motion to strike the amended complaint?

MR. ANGELL: Thank you, Your Honor. And this is really I think what I'm going to begin with, going through the factual background and the lengthy procedural background before we get here as it is applicable to all the motions. And if we get

to all of them, great; if not, I think we all agreed to tack on as many of the notices as we can, but if we run out of time, so be it.

This case began a long time ago during the Bush administration, frankly. It was an administrative investigation that the Foleys were growing -- or raising, I should say, toucans in a residentially zoned property. The toucans were raised for commercial purposes and constitutes -- aviculture is the fancy name for it. And there was an inspection of the zoning ordinance violation, the zoning inspector determined the aviculture violated the zoning rules of Orange County, Orange County Code, and the Foleys appealed that to the BZA, Board of Zoning Adjustments. So I suppose the way that works is if you feel that you've been aggrieved wrongfully and you've been notified of a zoning violation, you take it up to the next level in front of the Board. The Board -- the individual members of the Board, the first group of my clients, and they are sued in their personal not official capacity, which is important to distinction in these sorts of cases. And that was a public hearing, which the transcript has been filed and has been subject to review on several

different occasions. And at that the hearing, Mr. Foley argued that the Orange County ordinance, which renders the -- or I should say regulates the aviculture commerce was unconstitutional under the State Constitution. His argument was and has remained and still is that only the Florida Fish and Wildlife Comission can regulate the commercial breeding of toucans. Toucans are in a class of animal -- there's something less wild, if you will, than lions, tigers, and bears, but certainly more than, you know, your house cats and your pet dogs and they are regulated in separate classifications. So his theory again, has been from the start and continues to be that only the FWC can regulate that class of animal, and that's a State constitutional issue that Orange County does not have the jurisdiction to enact ordinances, which would regulate those sorts of animals.

The BZA voted to uphold the zoning manager's determination that they were in violation of the local ordinance. It was a unanimous vote and it is that vote, which forms the basis of their lawsuit against my clients, the fact that my clients have voted to uphold the zoning manager's determination.

From there, Mr. Foley and Mrs. Foley appealed

that BZA determination to the Board of County Commissioners. The Board of County Commissioners, of course, is a constitutional body that comprises of the Mayor, Teresa Jacobs, and a number of other local fairly significant political personalities. They also voted unanimously to uphold the BZA's determination that the Foley's were in violation of the local ordinance.

From there, the Foleys properly filed a petition for a writ certiorari here in the circuit court back I think in 2009, which is how you appeal a final agency local administrative determination. The order that was issued in that case -- or I should say it's an opinion, stated that, first of all, it denied the petition. It also stated that the proper means to challenge the constitutionality of a local ordinance must be through an original proceeding, which is exactly what the Foleys did on the last day of the statute of limitations from what they acknowledged their cause of action, if any, would have accrued, which is the date of the final administrative action. The mistake they made, though, is they filed that action in Federal Court. They alleged along with the declaratory judgment action, I think it was around two dozen

causes of action, a host of the federal causes of action for everything from due process, equal protection, freedom of speech, a host of federal sort of theories. Along with state claims of civil RICO, both state and federal statutes, those sorts of things. So a conglomeration of both federal and state causes of action, and they were alleged against my clients and my colleagues' clients both per in their official and personal capacity as well as the County.

There was two significant orders among several orders that came out of that case. I believe it was Judge Antoon the first of which said that the claims against the individuals were dismissed with prejudice because the individuals had various immunities. It wasn't a hugely detailed examination. His Honor found that it was legislative immunity. I think retrospectively, it was really quasi-judicial immunity, but that's sort of academic. In any event, though, all the individuals were dismissed with prejudice at that point, but the Court allowed the Foleys to then file an amended pleading against the County to discuss the constitutionality of the ordinance vis-à-vis the Florida State Constitution, not the

Federal Constitution. In the meantime, the Foleys, when they filed their amended complaint, they still restated all the claims against the individuals, the Federal Court dismissed those sua sponte and the case received a summary judgment just against the County. The Federal Court found in its final order -- well, final really dispositive order not its actual judgment -- said that the claims against Orange County, the federal claims were denied, found for summary judgment for the County and found that the ordinance did, in fact, violate the Florida State Constitution, found it unconstitutional and enjoined its enforcement as a matter of State Constitutional law.

Cross appeals in the Eleventh Circuit were taken. All of us here were there and spent our time at the podium. And the Eleventh Circuit ruled a little bit differently than what Judge Antoon had determined. That, that first of all, the federal claims were not just denied on their merits, they were frivolous. And that's the significant distinction in the federal forum because if you bring a case that has federal and state claims, if the federal claims are frivolous, then the Federal Court does not have any discretionary supplemental

jurisdiction to retain the State claims. It must dismiss them. And so the Eleventh Circuit went through and looked at all of the federal claims, due process claims, and there's two or three other ones, equal projection, those sort of things, and said these are all frivolous and therefore there was no jurisdiction for the State -- for the Federal judge to make a determination of Florida law, which, of course, the interplay between the FWC and Orange County is paradigmatically a state law question.

So as the Foleys then filed a petition for certiorari with the Supreme Court, which was denied. It wound its way back down to the District Court, which then dismissed the state claims without prejudice, but the federal claims were very much dismissed with prejudice.

Then this lawsuit was filed. This lawsuit arises out of the exact same facts, background, everything else. It's the same basic theories with different sort of names attached to some of the claims. And we're now here finally on behalf of our individuals certainly to ask that the individuals in their individual capacity for a whole host of reasons are dismissed with prejudice.

I will note this is -- this is the amended complaint even here in State Court; therefore, the right to amend has been taken advantage of and the Court would be within its discretion to dismiss this case with prejudice. It's been going on for nearly a decade, I think it's certainly time for our folks.

Now, to begin at least as it pertains to my clients and their individual capacity, as I read the complaint it's Counts, 5, 6, and 7 that are stated against our folks. Those are abuse of process, conversion, state civil theft, and there's an allusion to Section 1983, the Federal Civil Rights Statute in Count 7.

And before I get to those, though, I want to talk about really our defenses. We have a host of defenses here for our individuals. The first of which is statute of limitations. The statute of limitations they have pled around it as best they can to establish that they filed their lawsuit in Federal Court on the last day of the limitations period, and I just stated I agree with that. The difference, though, is that by filing in Federal Court when there was no basis for Federal jurisdiction, they do not get the tolling provision

of the -- I think it's Section 1367, that allows a -- basically extends the statute of limitations after a case gets kicked out of Federal Court. The classic example is if you file -- if I had a pretty big -- if I had a defendant, If I would remove a case to Federal Court and get it dismissed for lack -- solely for lack of jurisdiction and it goes back, the statute of limitations is tolled the entire time it's in Federal Court. There is an exception, though, which is when a plaintiff files a case in Federal Court, if there never was a basis for Federal jurisdiction in the first place, that tolling provision doesn't apply. The case I cited in my motion is called Ovadia versus Bloom, and the citation is obviously in the papers. But the --

THE COURT: Yes, sir.

MR. ANGELL: What happened there was it was a -- plaintiff filed in Federal Court alleging diversity jurisdiction. It turns out there was not complete diversity and, therefore, when it went back to State Court the limitations period had run. And the language I enjoyed in that case was that: An improvident foray into the Federal Court does not toll the -- the statute of limitations. So in other words, if the plaintiff decides to go to

Federal Court, and there never was federal jurisdiction in the first place, tolling does not -- and they're defending that, and they cited that tolling statute in their papers. That's what they're relying on to escape the statute of limitations. And in this case, the Federal courts have expressly held that the federal claims are frivolous not just lack of merit but beyond the pale of what could be passable as a federal claim. I think that that under Ovadia is -- we do not have a tolling situation here. The statute of limitations is blown by four or five years. And that would apply to all of our people. It may be a little -- with apologies to the County, it might be a little bit different with them because they could have some ongoing claim thing and that was discussed actually with the Eleventh Circuit. But as to the individuals their actions were the date they voted, the statute of limitations is clearly run as to all of our folks. Also, as to the individuals we have various immunities. I mentioned earlier that as people voting on an administrative local board they are entitled to -- well, they call it -- well, it's an absolute immunity, which a subset of which is qualified

immunity. But in our case we have an absolute immunity in the quasi-judicial setting. Quasi-judicial means that you have it of the executive board, under the executive branch of the government basically interpreting and applying a local rule, local ordinance. That's exactly what they were doing here. And in Florida, the extent of quasi-judicial immunity is coextensive with judicial immunity, which is to say that even if somebody sitting in that capacity exceeds their jurisdiction they are entitled to absolute immunity from personal suit. So that is, I think, wraps it up really in almost two sentences why our people have no business in this case, never have. But that is one of the arguments we have for dismissal.

Third, we have res judicata as to the Federal claims. I noted that they have cited Section 1983. That's a Federal claim obviously. And the Federal courts have dismissed all Federal claims with prejudice. So I think that goes without saying that that one has already been resolved.

And then finally, the counts on the merits are -- respectfully, they are also frivolous. We have abuse of process. The theory of that is I think the classic example would be where an

officer, a police officer arrests his girlfriend for -- 'cause he's mad at her. That's obviously something beyond what the purpose of his office was ever intended to be. Here we have local elected officials who have basically done exactly what they're supposed to by voting in public hearings. That's not an abuse of process. I think that's just again, so beyond a reasonable cause of action that it amounts to frivolity.

A conversion, the theory of conversion is that by voting to uphold the taking, if you will, or of the destruction of the aviary or the taking of the birds is that by voting to uphold that determination that our people have converted the birds. Well, that's not what conversion is. Conversion is taking somebody else's stuff for your own good one way or another. These are people voting to uphold the law. That is not -- conversion again, is so far from what that term means by any interpretation. It does not belong in this case. Civil theft goes along with conversion. That requires criminal intent. To say that somebody voting a local board votes and has a criminal intent I think is, frankly, offensive to our people. And I already discussed 1983 being

already resolved.

So that is a lot of legal arguments there. I tried to keep it sort of as succinct as I could. It's a long history. But the short of it is, Your Honor, the people who sit on local boards and vote are not liable personally for those votes.

And at this point I'll pass it along to my colleague, Mr. Oxford.

THE COURT: Okay. Well, actually what I would like to do since I'm not sure we'll have time for everything, I want to make sure I'm hearing everything individually. And I apologize because that means that some of you will have to come back and the Foleys will have to come back. But I'm already getting an eye on what the time is, and I'm not allowed to incur overtime for my staff. So what I'd like to do is just to keep us on track with each issue. And if that's acceptable, then I would turn it over to the Foleys unless you have something as to that particular issue as far as the officials are concerned.

MR. OXFORD: The only -- thank you for letting me interrupt, Your Honor.

THE COURT: Yes, sir.

MR. OXFORD: I apologize for that.

Respectfully, I have the County employees who enforce the zoning code. In many ways my County employees, officials, and their arguments dovetail with those of Mr. Angell, with the County officials. So I think, if Mr. Foley doesn't mind, I would just like to summarize quickly and a quick overview. Because I don't have really separate arguments from those already given to you.

THE COURT: Okay. Mr. and Mrs. Foley, is that acceptable to you to let him --

MR. FOLEY: Sure.

THE COURT: And then you can respond to both together?

MRS. FOLEY: Yes.

THE COURT: And you're tracking the time?

MRS. FOLEY: I am.

THE COURT: 'Cause I was wondering about that.

MRS. FOLEY: Yes, thank you.

THE COURT: Don't worry, I am going to make sure that we try to do it fairly. I actually have a chess clock if next time we run into problems.

MRS. FOLEY: Which is fine.

THE COURT: We seriously do that. But I think that we --

MRS. FOLEY: Okay.
THE COURT: I understand some of the arguments. I've done my preparation --
MRS. FOLEY: Okay.
THE COURT: -- so I think so far we're still good.
MRS. FOLEY: Okay.
THE COURT: So, Mr. Oxford it is, sir?
MR. OXFORD: Yes, ma'am.
THE COURT: You may proceed with your similar -- just stick with what these same issues are as it relates to your clients, and then we'll move from there.
MR. OXFORD: I promise to be brief. And with respect to the Foleys they've had us in court a long time, all the way to the United States Supreme Court and back. But the Court has to recognize that this all started ten and a half years ago. This Court now has discretion to bring it to an end with regard to the individual employees. The Federal courts, every one of them, all the way to the top, have said that the Federal claims against the employees, both sets, are not only not properly based under the facts or the law but they're frivolous. And as Mr. Angell pointed out in his

argument and in his motions, as we tried to ourselves, the State law claims are clearly dismissible with prejudice because the immunity of the officials in doing either their quasi-judicial acts, or in my case, doing their discretionary acts, which sovereign immunity directly applies to -- enforcing a county code, a governmental code. That's not what every man in the street does. That's a discretionary governmental function. So the immunity applies. The res judicata clearly applies to the Federal claims. They've already been tried all the way to the conclusion.

And there is simply not the basic elements of conversion. There is no criminal theft here. There is no civil theft here. There is no abuse of process as we recognize in the law. So we're asking the Court to consider the history of this case to take judicial notice of decisions that have already been made between the same parties on the same claims and concluded.

And with respect to the work done by the pro se plaintiffs here, bring it to a conclusion at this level. The taxpayers have spent an enormous amount of money defending 12 -- ten or 12 officials all the way to this point today. They've been in

too many courts. They've won every time.

And with respect, Your Honor, you are the judge who has the discretion with regard to all the individual defendants to bring it to an end. We believe the legal arguments that have been presented to you in the context of the history and your judicial notice of it should not only result in dismissal with prejudice but a consideration of the fact that now many, if not all, of these claims are essentially frivolous.

Thank you, Judge.

THE COURT: Thank you. All right. So, Mr. and Mrs. Foley, if you'd like to speak to those two issues.

MR. FOLEY: Which two? The two groups of --

THE COURT: Yes, sir. You can start in order or however you wish.

MR. FOLEY: Okay. And you, Judge Higbee, you've read the papers filed?

THE COURT: I have reviewed everything. I have read and I will continue to read. I will not be making any rulings today especially since I don't know that we're going to get through everything. So ultimately, what you'll receive from me is a written order. And I assure you that

in every case I make sure that I've thoroughly read everything that each side has to say so that I can give each side a fair right to be heard.

MR. FOLEY: Sure, sure.

THE COURT: So if you wish to go into history, you're welcome to. If you wish to simply address some of the things that have been raised you are welcome to. It's your time and you're welcome to use it as you see fit.

MR. FOLEY: Well, I -- I -- Judge Tjoflat he has this YouTube video where he's giving a commencement to Mizzou Law School and he says that this exchange it's best when it's a conversation between attorney and the judge. So I'm really open to that. I'd kind of like to know, given that you've read the papers, and heard the arguments -- which are identical to what they've already submitted, without any -- without any modification -- given our response, where you're at on -- on these issues. For instance, limitations. Their case is Ovadia v. Bloom. It deals exclusively with diversity jurisdiction. Our case is Krause v. Textron. It's federal question jurisdiction. Whether our federal question succeeded or not, whether it was called good but failed or frivolous

but failed is irrelevant. The Florida Supreme Court has already settled the issue and I don't know why they haven't -- they haven't addressed that.

On the issue of res judicata, as we've said in our response, our issue is simply a due process claim and due process is treated by the Federal courts exactly like takings. And what I've brought in for you and for the Defendants is a case out of the Seventh Circuit that says exactly that. I mean, it's just verbatim what I've just told you. Can I hand it to you?

THE COURT: If you have a copy for the opposing counsel and then I'll be happy to take one, okay.

MR. FOLEY: So I've highlighted the statement. You know, the Seventh Circuit, that's Judge Posner's circuit --

THE COURT: Thank you.

MR. FOLEY: -- and according to Justice Alito he knows everything. So, the Eleventh Circuit hasn't put it so plainly, but all of their decisions imply the same conclusion that due process is the State's responsibility. Until the State has finally litigated it, there's no due

process claim in Federal Court. So this is a claim that's presented here in the alternative should you find that there is no remedy in Florida. And we think you'll find a remedy. So, if anything, it's just not ripe. In fact, if there's any problem with our due process claim it's because it's not ripe. It's because you haven't yet found that there's no other remedy. Because that's what due process is -- it's remedy. It's an incredible word, remedy. So that's limitations, res judicata.

Their big issue is immunity. And that's a big issue. I mean, they do deserve immunity if -- if they deserve immunity. It is their burden to establish this. And we said this in our response. And we don't believe they have because there are exceptions to what's called absolute immunity.

The exceptions that we pled are three. Execution of a custom is not immunized -- and that's in a case that they cite. They cite Corn v. Lauderdale Lakes. And Corn v. Lauderdale Lakes went on for 20 years. There are three different Eleventh Circuit opinions in Corn v. Lauderdale Lakes. This is the '93 opinion. Do you want the citation, Your Honor?

THE COURT: Sure. If you know it, we can put

that on the record as well.

MR. FOLEY: Corn v. Lauderdale Lakes, 997 F.2d 1369 at Page 1392 -- no ministerial or legislative immunity for execution of policy. That's a paraphrase. I believe it's no legislative or quasi-legislative immunity for the execution of a policy. Here the BCC order is certainly a policy and leading up to that decision was a custom.

This is really where I'd like to back right up to what they don't talk about. And that is that we've alleged expressly over and over that there was no ordinance that prohibited us from doing what we were doing. It was, in fact, a custom. And that's a big difference because due process is all in that. We're on notice of an ordinance. It's published. We're not on notice of a custom. So we -- we have to go through some procedure that revives the protection that we've lost by -- by the fact that there was not an ordinance to give us notice, right? And that didn't happen here. And that really is the big thing.

So I know this is kind of corny but, you know, there's a couple of things I want you to remember. I'm going to stick this sticker on my chest. It's, you know, the number 11. This

represents Chapter 11 of the Orange County code. This is the number 30. I'm sticking this sticker on my left shoulder. Chapter 11, Chapter 30. What happened here is, as we said, there was no ordinance that said you can't do aviculture at your home. They haven't addressed that. Including the response of today, you haven't heard them say that -- what ordinance they were enforcing. It was a custom. We had to ask them to explain it to us. But -- but I do want to get on the record too -- that although the entire episode began with a complaint that we were raising birds to sell -- somebody told Orange County that we were raising birds to sell. And that's what initiated the investigation. So that's what they came out to enforce.

The Chapter 11 is the Code Enforcement Board ordinance. Chapter 30 is the Planning and Zoning Board ordinance. Chapter 11 is for prosecuting known violations of the code. Like the known violation that was reported in our case. Chapter 30 is for the prospective enforcement of the Orange County Code. It's the permitting chapter. Whoops, I almost lost it. It's the permitting chapter. And as we've tried to put in our paragraph 40 of

our complaint that they knew what they wanted to enforce and they didn't enforce it through Chapter 11. They had two violations. One was the aviculture violation. One was the permitting violation. And they decided to do something that they do as a matter of practice when they have a dual violation. They prosecuted the permitting violation. That resulted in an order from Code Enforcement that said, "Get the permit, destroy your structure, or pay a fine." So there we're facing a little coercion. We need to do something. We go to get the permit, and remember aviary is not used during this proceeding. Aviculture is not used, because these words are not used in the proceeding. There's no discussion of violating any provision in the code that prohibits aviculture.

So, we've got to get the permit. And they say, "Well, Mr. Foley, we heard -- we have evidence here that you're -- you have another violation. You're raising birds to sell. So, we're not going to give you that permit." And that resulted in destruction of the aviary. And now we're stuck in Chapter 30, right? Well, what's -- what's the problem? What's really the big problem here? They don't get the same state court review. That's the

problem. If the Defendants had done exactly what they did in our case and they were enforcing an ordinance, we wouldn't be here. Because we could have had our due process at the front end. We would have been on notice that we had something to challenge, but we didn't have that. And once we got into this permitting process, there wasn't any way to arrest it. There wasn't any way to come here and seek an extraordinary writ. So that gives you kind of a story of the case.

But on the issue of immunity, why is that -- why is that a problem for them? As we said, there are three exceptions that we pled in our -- in our complaint: Execution of a custom, Corn v. Lauderdale Lakes; lack of jurisdiction -- and that is, of course, the famous case of Fisher -- Bradley v. Fisher, U.S. Supreme Court case; and ultimately, lack of adequate review -- we cited J. Randolph Block on the history of judicial immunity, which is what they're asking for here. And it says that -- we tried to make a joke, you know, at that point in the paper. But the joke was that a thousand years ago there was no judicial immunity, and if you didn't like what the judge said, you could challenge them to combat. Well, you know, that's

doesn't work very well.

THE COURT: I don't vote for that one.

MR. FOLEY: I wouldn't either because you could also choose your own champion, and I imagine you would pick, you know, the deputy with the flak vest. So judicial immunity he says and -- and due process protections for the litigant developed hand in hand. The appellate process or the writ of error he says -- in fact, I know I have the quote. The writ of error was the seed of -- he said, "In the development of the writ of error lay the seeds of the doctrine of judicial immunity." Randolph Block, Stump v. Sparkman and the History of Judicial Immunity. And there are cases -- one which they cite: Andrews v. Florida Parole Commission -- which kind of reaffirms that -- the quote is: "Existence of adequate remedies for inmates including appeal, mandamus, and habeas corpus precludes the necessity or the advisability of doing away with the immunities that protect such officials for acts within the scope of their official duties." I have three other Supreme Court cases, which again, reassert the proposition that we're suggesting to you today. And that is that the availability of a remedy to correct these

errors is an element of determining how much immunity they should be given. In fact, Cleavinger v. Saxner, a U.S. Supreme Court case, which is really referencing Butz v. Economou, it says, absolute immunity -- when you're talking about quasi-judicial action of an executive agency -- it's not absolute. It's not guaranteed. There are things that you really need to consider. Now, out of six, the last one is: The correctability of error on appeal. And that's -- and there are five others. I'm not going to go through them right at this moment. I just want to make sure that I'm covering how we see this issue of immunity. I've certainly done it in the written response. And the duty to --

One thing that we want -- one argument that we want to make is that there is a ministerial duty to provide due process. This is -- we do not have a case on this. What we have instead is just argument. First, there are authorities in Florida that say, "Where there are doubts as to the existence of authority, it should not be assumed." Now, Article 4, Section 9 of Florida's Constitution basically means that no one -- that no regulation touching upon wild animal life enjoys a presumption

of correctness. Even -- even a judge has to ask themselves, "Does this interfere with FWC authorities?" So it creates a question. The fact that they were enforcing a custom and not an ordinance creates a question, creates a doubt. So, this -- coming from Santa Rosa County versus Gulf Power Company -- it says, "Where there are doubts as to the existence of the authority, it should not be assumed." So they can't tell us that just because we told them -- and had FWC contact them and tell them that they didn't have authority to do this -- that they need to listen. They told us -- you know, they told you that they didn't need to listen to us tell them. You know, that's fine, but here we are. And part of our argument to urge that due process is a ministerial duty. It comes to us really out of Rupp v. Bryant. It didn't have anything to do with due process but what it said was that school administrators have a ministerial duty to provide supervision for students. Now, of course, that's about their physical safety. We're talking about our legal safety. So we're saying that this guarantee of due process, which is in our State and our Federal Constitution is a ministerial duty because it's about our safety. It's about the

safety of those -- those legal rights, so they have to provide that. And, you know, my 11, 30, thing is all about that. That if they prosecuted the custom through Chapter 11, we wouldn't be here. Had they prosecuted an ordinance in the way that they did and it went through Chapter 30, we wouldn't be here. What happened was they prosecuted a custom not through Chapter 11 -- an available, and we believe a mandatory remedy. We say mandatory -- I'm -- I'm -- I'm getting in my own way here. But I'm just going to go right ahead and do it. We want to emphasize that Chapter 11 was the way they should have gone, particularly under this situation, because it has some imperative language in it. I can't tell you that there's a case that says we have any right to the remedy or that Chapter 11 gives us any individual right in the remedy. But what it says is that when a code inspector finds a violation he shall -- it uses the word "shall." And I understand judges can -- can fiddle with that and say that "shall" may mean "maybe." But Orange County Code at Section 1-2 says, "shall" is imperative. That's what it says.

So we're -- we're saying that the four

pillars really of our case and the four -- four spears that pierce their immunity here are: Article 4, Section 9 of the Florida Constitution, which removes the presumption of correctability from any -- any regulation that touches upon that authority; the absence -- the fact that they were enforcing a custom removed any pre-enforcement remedy; and the fact that they decided to use Chapter 30 and Chapter 11 interchangeably knowing that the appellate review of those two type orders is completely different, and would deny us any right -- any -- any way of a recovering the injury that we -- that we were suffering.

THE COURT: If you need a minute to consult to make sure you covered everything that's part of this hearing, I'm happy to give you just a second if you wish.

MRS. FOLEY: Okay.

THE COURT: And then you can look at each other's notes and otherwise if you wish to reply, I'll give you time to do that, or we can see if we can move on to --

MR. FOLEY: We haven't discussed the cause of -- you know, they've said that we have not stated a cause of action.

MRS. FOLEY: (Conferring with Mr. Foley.)

MR. FOLEY: And is that what you're asking, do we want --

THE COURT: I want to make sure that you've covered -- I've broken this down, so --

MR. FOLEY: We've only covered the first three points.

THE COURT: Yeah, so I think the first three points really had to do with the motion to strike the amended complaint, the request for judicial notice of the Federal actions and then the motion to dismiss with prejudice that were your motions and then tagged on with Defendants, Smith, et cetera, as Mr. Oxford had indicated. So as to those portions of the noticed hearing, have you completed your, sort of, rebuttal, I guess, to what their oral statements were; and is it time to go back to them for their brief reply, or is there something that you want to make sure that you have covered or just this?

MR. FOLEY: Sure, there is. They say that we do not state a cause of action in abuse of process, that the BZA was just voting, but that's not an abuse of process. What we -- again, you know, we have our 11, we have our 30. You know, they use

Chapter 11 to do what they should have done for Chapter 30, that's our abuse of process argument.

THE COURT: Okay. Well, I think I've heard that one.

MR. FOLEY: And conversion, you know, they say that it has to be actual dispossession, we say it has to be just -- what do you call it? Constructive dispossession, and that's exactly what the order did. It stopped us from doing business. So that states conversion. Conversion basically states civil theft.

And then in addition, as we've said in our written response there are various other ways in which we have alleged in our complaint civil theft. And that is again, what we're here for, whether or not the complaint survives so we can move on.

THE COURT: Yes, sir, okay. Do you wish to use any time in reply, or do you wish for me to move forward to the other folks that are here?

MR. ANGELL: Since we have a court reporter here very briefly if you don't mind, Your Honor.

THE COURT: Yes, sir.

MR. ANGELL: This is my only motion today is this. The Textron case that talks about the Federal question of jurisdiction where the Federal

question was not frivolous it was resolved on the merits and then the Court declined to retain supplemental jurisdiction over the State claims. It does not speak to a case where the Federal claims have no business in Federal Court in the first place, that's critically distinguishable there.

The takings issue that we have here from the Seventh Circuit, the takings issue itself is a Federal question. The Federal Court offered in effect, basically invited a takings claim in the first order -- by the way, I misspoke. It was not Judge Antoon, it was Judge Dalton in the middle district here. And his first order said, "This might be a takings claim that we have." And then the second order said, "I told you it might have been a takings claim. You guys decided not to bring one." Therefore, it is res judicata because as the Court knows, res judicata applies to all claims that were or could have been brought in a prior action. That was a Federal cause of action and all Federal claims were dismissed with prejudice. So that's a not a basis to survive dismissal.

As far as this custom versus ordinance

argument it's a little perplexing to me. This case has very much been focused on the interpretation of the local ordinances and vis-à-vis the State Constitution. Judge Dalton's first detailed -- or I guess the second detailed order -- it explains and walks through in great detail how all the ordinances work with each other and how they apply here and how His Honor found that they were unconstitutional. But, of course, that ruling has not ever been properly found by a State Court. It remains, and still is today, Mr. Foley's opinion that the ordinance violates the State Constitution. That has never been found. So we talk about the -- move to the immunities. To think that a judge, which is really the same in Florida as a quasi-judicial officer, enforces a statute, which later is deemed unconstitutional and is subject to personal liability for a business being shut down or other civil inconvenience is really offensive to our whole system of civil justice and even criminal justice for that matter and the whole judicial branch I would submit.

Finally, as far as abuse of process, I think where Mr. Foley misconstrues that term is that his definition of abuse of process is what his view is

of misapplication of the law, misconstruction of the law. Abuse of process is again, using something for which the law was never intended to be used for in the first place, which is, like I said, an officer arresting a girlfriend because he caught her cheating or some crazy situation like that.

I think with that, I will pass it over to my colleagues. And thank you very much for your time, Your Honor.

THE COURT: Okay. Thank you.

MR. OXFORD: And, Your Honor, in reply and in respect to the Foleys, I'll just try to give a minute's worth of overview.

In essence, the same arguments have been given to my clients as the zoning enforcement officials, employees to Mr. Angell's clients as essentially the zoning appeal body to the Ninth Circuit Court on petition for cert, then to the U.S. District Court in a Federal lawsuit that combined Federal and State law claims that went up to the Eleventh Circuit, that went up to the United States Supreme Court. Your Honor, these same arguments have been made at everybody for ten years. They had no merit then, they were found to

have no merit in detail, and they have no merit now. Growing wildlife, and they call it wildlife. They talk about the Fish and Wildlife Commission throughout, growing wildlife for profit in a residential area is time-honored zoning. And they lost at every level. What is that six levels that I've named. This should stop it, Your Honor. Res judicata applies, statute of limitations apply. They admit in their complaint that my clients, Mr. Angell's clients, were all acting within their official capacities. Sovereign immunity applies. Absolute judicial immunity applies. It has to stop somewhere and we respectfully submit that today should be the day.

THE COURT: Mr. Turner, we haven't given you a whole lot of time left. If your arguments are more, you need for or you wish to have more time, I can reset you. If you wish to utilize the little bit of -- we've got about 15 minutes left if you think you can summarize your oral portion in half that time, and I get half that time to the Foleys, I can do that.

MR. TURNER: I'm going to need more time. In fact, I agreed to tack my motion onto this hearing if we could get it set.

THE COURT: Okay. Well, I think that answers that question. So what I'd like to do is to schedule a second hour so that you have the floor at that point, and then we can take those arguments next. I'll keep my decision under advisement at this point until I -- I want to hear everything before I perform my written work. And so we'll get that scheduled as soon as possible with my calendar.

MR. TURNER: Thank you, Your Honor.

THE COURT: Okay.

MR. FOLEY: Can I clarify then? Mr. Turner will have an opportunity before you -- before you reach a conclusion on the --

THE COURT: Yes. So I'll see you all. We'll set a second hour for it, and I think we should be able to wrap it up at that time.

MR. ANGELL: Thank you, Your Honor.

MR. OXFORD: Thank you very much.

MRS. FOLEY: Thank you.

THE COURT: You're very welcome. Enjoy your evening, and I hope that you stay safe in the storm.

(The proceedings concluded at 4:47 p.m.)

CERTIFICATE OF REPORTER

STATE OF FLORIDA:
COUNTY OF ORANGE:

I, Danette V. Lamb, Stenographic Shorthand Reporter, certify that I was authorized to and did stenographically report the foregoing proceedings and that the foregoing pages are a true and complete record of my stenographic notes.

I further certify that I am not a relative or employee of any of the parties, nor am I a relative or counsel connected with the parties' attorneys or counsel connected with the action, nor am I financially interested in the outcome of the action.

DATED this 7th day of November, 2017.

Danette V. Lamb

Danette V. Lamb,
Stenographic Court Reporter

M A N D A T E

from

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FIFTH DISTRICT

THIS CAUSE HAVING BEEN BROUGHT TO THIS COURT BY APPEAL OR BY PETITION, AND AFTER DUE CONSIDERATION THE COURT HAVING ISSUED ITS OPINION OR DECISION;

YOU ARE HEREBY COMMANDED THAT FURTHER PROCEEDINGS AS MAY BE REQUIRED BE HAD IN SAID CAUSE IN ACCORDANCE WITH THE RULING OF THIS COURT AND WITH THE RULES OF PROCEDURE AND LAWS OF THE STATE OF FLORIDA.

WITNESS THE HONORABLE KERRY I. EVANDER, CHIEF JUDGE OF THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FIFTH DISTRICT, AND THE SEAL OF THE SAID COURT AT DAYTONA BEACH, FLORIDA ON THIS DAY.

DATE: March 28, 2019

FIFTH DCA CASE NO.: 5D 18-0145

CASE STYLE: DAVID W. FOLEY, JR. AND JENNIFER T. FOLEY v. 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, ET AL

COUNTY OF ORIGIN: Orange

TRIAL COURT CASE NO.: 2016-CA-7634

I hereby certify that the foregoing is
(a true copy of) the original Court mandate.

Joanne P. Simmons
JOANNE P. SIMMONS, CLERK

DISTRICT COURT OF APPEAL FIFTH DISTRICT STATE OF FLORIDA

cc:

Lamar D. Oxford	William C. Turner, Jr.	Derek J. Angell
Eric J. Netcher	David W. Foley, Jr.	Jennifer T. Foley
Orange Cty Circuit Ct Clerk		

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

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

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

Appellants,

v.

Case No. 5D18-145
CORRECTED OPINION

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, ET AL.,

Appellees.

_____/

Opinion filed October 19, 2018

Appeal from the Circuit Court
for Orange County,
Heather L. Higbee, Judge.

David W. Foley, Jr. and Jennifer T. Foley, Orlando, pro se.

Lamar D. Oxford and Eric J. Netcher, of Dean, Ringers, Morgan & Lawton, P.A., Orlando, for Appellees, Tim Boldig, Carol Hossfield, Rocco Relvini, Phil Smith, Tara Gould and Mitch Gordon.

Derek J. Angell, B.C.S., of O'Connor & O'Connor, LLC, Orlando, for Asima Azam, Fred Brummer, Richard Crotty, Frank Detoma, Mildred Fernandez, Teresa

Jacobs, Roderick Love, Scott Richman, Joe Roberts, Marcus Robinson, Tiffany Russell, Bill Segal and Linda Stewart.

No Appearance for Orange County, a political subdivision of the State of Florida.

ORFINGER, J.

David W. Foley, Jr. and Jennifer T. Foley appeal the trial court's dismissal of their amended complaint. The Foleys argue that, contrary to the court's order, the statute of limitations did not bar their action because 28 U.S.C. § 1367(d) (2016) tolled the limitations period. We agree and reverse.

The Foleys were commercial toucan farmers who attempted to run their business out of their home in Orange County. After a neighbor complained, Orange County Code Enforcement investigated and determined that the Foleys were violating the Orange County Code. Following a public hearing, the Board of Zoning Adjustment ("BZA") found that the Foleys were in violation of the Code and the Board of County Commissioners ("BCC") affirmed that decision.

After exhausting their administrative remedies, the Foleys filed a complaint in the U.S. District Court for the Middle District of Florida against Orange County (the "County"), various county employees (the "Employee Defendants"), and the members of the BZA and BCC in both their individual and official capacities (the "Official Defendants"), raising federal and state claims. Foley v. Orange Cty., Fla., No. 6:12–cv–269–Orl–37KRS (M.D. Fla. Dec. 4, 2012). The district court determined that the County was entitled to summary judgment on all of the Foleys' federal claims. However, it ruled that the Foleys were entitled to summary judgment on their state law claims because the relevant Code

provisions were void. Foley v. Orange Cty., Fla., No. 6:12–cv–269–Orl–37KRS (M.D. Fla. Aug. 13, 2013).

The Foleys and the County cross-appealed to the U.S. Court of Appeals for the Eleventh Circuit. Foley v. Orange Cty., 638 F. App'x 941 (11th Cir. 2016). The Eleventh Circuit affirmed in part and reversed in part, holding that the Foleys' federal claims were frivolous and that the district court lacked subject matter jurisdiction to adjudicate the state law claims, explaining that

> [a]ll of the Foley's federal claims either "'ha[ve] no plausible foundation, or . . . [are clearly foreclosed by] a prior Supreme Court decision.'" Blue Cross & Blue Shield of Ala. [v. Sanders], 138 F.3d [1347,] 1352 [(11th Cir. 1998)] (quoting Barnett [v. Bailey], 956 F.2d [1036,] 1041 [(11th Cir. 1992)]). The District Court therefore lacked federal-question jurisdiction. Bell [v. Hood], 327 U.S. [678,] 682–83, 66 S. Ct. [773,] 776 [(1946)]. Without federal-question jurisdiction, the District Court did not have jurisdiction to determine the state-law claims presented by the Foleys. See 28 U.S.C. § 1331; 28 U.S.C. § 1332(a)(1).

Id. at 945-46.

On remand, the district court dismissed the case. Within thirty days of the dismissal, the Foleys initiated a state court action against the County and the Official and Employee Defendants. They subsequently amended their complaint, alleging that their action was timely because "28 USC § 1367(d), tolls for thirty days after such dismissal all limitations on supplemental claims related to those asserted to be within the original jurisdiction of the federal district court." The Official and Employee Defendants filed motions to dismiss, alleging, in part, that Florida's statute of limitations barred the action.[1]

In their motions to dismiss, the Official and Employee Defendants argued that the

[1] The trial court has not yet considered the County's motion to dismiss. As such, the County is not a party to this appeal.

Foleys' cause of action accrued on February 18, 2008, that all of the claims were governed by the four-year statute of limitations in section 95.11(3), Florida Statutes (2016), and that the Foleys did not file their complaint in state court until eight years after the action accrued. They admitted that the Foleys filed their federal lawsuit within the limitations period, but asserted that section 1367(d) did not toll the limitations period while the federal action was pending because the Eleventh Circuit concluded that the federal district court lacked original jurisdiction.

Following a hearing, the trial court entered an order granting both the Official Defendants' and the Employee Defendants' motions to dismiss, dismissed the amended complaint with prejudice as to the Official Defendants and entered a final judgment in favor of the Employee Defendants. The court determined that the applicable statute of limitations barred all of the Foleys' claims and rejected the Foleys' argument that section 1367(d) tolled the limitations period because that section

> only applies where a federal court enjoyed original jurisdiction over the case, and if the initial assertion of federal jurisdiction is found to be insufficient, then the section does not apply and the party does not get the benefit of the tolling. See Ovadia v. Bloom, 756 So. 2d 137, 140 (Fla. 3d DCA 2000). Because the Eleventh Circuit determined that the Plaintiffs' claims had no plausible foundation, section 1367(d) is inapplicable to the instant matter.

As we will explain, we disagree.

A legal issue concerning a statute of limitations is subject to de novo review. Desai v. Bank of N.Y. Mellon Tr. Co., 240 So. 3d 729, 730 (Fla. 4th DCA 2018). 28 U.S.C. § 1367 provides federal district courts with supplemental subject matter jurisdiction and reads, in relevant part:

> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.
>
> . . . .
>
> (d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

Thus, section 1367 provides that when a federal district court has original jurisdiction—either based on diversity, 28 U.S.C. § 1332 (2016), or federal question jurisdiction, 28 U.S.C. § 1331 (2016)—it may exercise supplemental jurisdiction over "all other claims," including state law claims, "that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy." 28 U.S.C. § 1367 (2016). Here, the federal court's supplemental jurisdiction over the state claims was based on its federal question jurisdiction over the Foleys' federal claims.[2]

With this background in mind, we now review the development of Florida law regarding the application of section 1367(d), culminating in the Florida Supreme Court's decision in Krause v. Textron Financial Corp., 59 So. 3d 1085 (Fla. 2011). In 2000, the

[2] Federal question jurisdiction exists when the action arises under the Constitution, laws, or treaties of the United States. 28 U.S.C. § 1331 (2016).

Third District Court of Appeal addressed the application of section 1367(d) in Ovadia v. Bloom, 756 So. 2d 137 (Fla. 3d DCA 2000), the case relied on by the Official and Employee Defendants and the trial court. There, the plaintiff filed an action in federal court based on diversity jurisdiction. Id. at 138. The federal court dismissed the case because the parties did not have diversity of citizenship. Id. at 139. Within thirty days following the dismissal, but after the limitations period had expired, the plaintiff filed an action in state court. Id. The trial court dismissed the case as barred by the statute of limitations, and the Third District Court affirmed, holding that the tolling provision of section 1367(d) was not applicable "because the federal court never had original jurisdiction over [the plaintiff]'s action. Any arguable jurisdiction was based on diversity, and the presence of non-diverse defendants in the action destroyed jurisdiction on that basis." Id.

That same year, the First District Court of Appeal addressed a similar issue in Blinn v. Florida Department of Transportation, 781 So. 2d 1103 (Fla. 1st DCA 2000). There, the plaintiff filed her action in federal court, asserting federal question and supplemental jurisdiction. Blinn, 781 So. 2d at 1104. She later voluntarily dismissed her federal case and nine days later filed her state claims in state court. Id. The trial court dismissed the case for exceeding the statute of limitations, but the First District Court reversed, concluding that "the tolling provision of section 1367 ought not be interpreted as applicable only to dismissals predicated on a federal court's decision to decline supplemental jurisdiction," and consequently, held that the limitations period was tolled for thirty days following the dismissal of the federal case. Id.; see Stevens v. ARCO Mgmt. of Wash., D.C., Inc., 751 A.2d 995, 998 (D.C. 2000) (holding that section 1367(d) tolled

statute of limitations where federal case dismissed for lack of subject matter jurisdiction, and noting that it "does not require a successful assertion of federal jurisdiction" and does not "differentiate among the possible reasons for dismissal, whether it be on the merits, or for jurisdictional reasons").

In 2002, the Fourth District Court of Appeal reached the same conclusion as Blinn in Scarfo v. Ginsberg, 817 So. 2d 919 (Fla. 4th DCA 2002). There, the plaintiff filed an action in state court less than a month after a federal court dismissed her case for lack of subject matter jurisdiction. Scarfo, 817 So. 2d at 920. The trial court dismissed the case for exceeding the limitations period. The Fourth District Court reversed, holding that section 1367(d) applied and explaining that the purpose of the tolling provision was to allow plaintiffs to pursue their federal claims in federal court without risking their state claims "should the federal claim prove unsuccessful." Id. at 921. The Fourth District reasoned:

> Section 1367(d) provides for a tolling of state law limitations on any state law claim asserted in federal court under section 1367(a). The only requirements are that the claim be asserted under section 1367(a). Plaintiff's dismissed claims arose under state law and they were asserted in federal court under section 1367(a). The mere fact that the federal court of appeals saw the question of the employers' liability under Title VII as an issue of subject matter jurisdiction does not change the text of section 1367.

Id.

Then, in 2011, the Florida Supreme Court addressed the issue in Krause. 59 So. 3d at 1088-91. The plaintiff in Krause filed his claims in state court less than one month after a federal court dismissed his case for lack of subject matter jurisdiction. Id. at 1087. The state court also dismissed the case for filing beyond the limitations period and the

Second District Court of Appeal affirmed. Id. at 1088. In reversing, the Florida Supreme Court held that "[t]he plain text of the federal statute [section 1367(d)] does not, by its terms, bar the application of the tolling provision where a claim is dismissed for lack of federal subject matter jurisdiction." Id. at 1090. It agreed with the analysis in Blinn and Scarfo, noting that the tolling provision "serves to prevent the limitations period from expiring while a plaintiff unsuccessfully pursues state claims in federal court in conjunction with federal claims." Id. at 1091. It determined that "[a]s we have explained above, the plain language of section 1367 leads us to conclude that the dismissal of a claim in federal court . . . for lack of subject matter jurisdiction, does not bar the applicability of the federal tolling provision in the subsequent state court action." Id.

The Official and Employee Defendants attempt to distinguish Krause, contending that it was "bottomed on the premise that the federal claims were at least plausible" and here, the Foleys' federal claims were frivolous. However, Krause makes no such distinction. It did not matter in Krause why the federal court found a lack of jurisdiction. See Krause, 59 So. 3d at 1091 (holding that applicability of tolling provision is not limited to instances where court declines to exercise supplemental jurisdiction solely for reasons under section 1367); see also Scarfo, 817 So. 2d at 921 (holding that "[t]he only requirements [under section 1367(d)] are that the claim be asserted under section 1367(a)" and later dismissed for lack of subject matter jurisdiction).

For these reasons, we conclude that section 1367(d) applies, as its text does not require a successful assertion of federal jurisdiction. Because the Foleys brought their

state court claims within thirty days of the dismissal of their federal case, the trial court erred in finding that the statute of limitations barred their action.[3]

REVERSED and REMANDED.

TORPY, J., concurs.
BERGER, J., dissents with opinion.

[3] The Official and Employee Defendants argue that if this Court finds that the amended complaint is not barred by the statute of limitations, we should affirm on tipsy coachman grounds because they are entitled to immunity from suit. Inasmuch as the trial court did not consider that issue, we decline to do so as well. We "cannot employ the tipsy coachman rule where a lower court has not made factual findings on an issue and it would be inappropriate for an appellate court to do so." Bueno v. Workman, 20 So. 3d 993, 998 (Fla. 4th DCA 2009).

BERGER, J., dissenting. Case No. 5D18-145

While I agree with the majority that the Foleys' complaint was not barred by the statute of limitations, I would nevertheless affirm the order of dismissal under the tipsy coachman doctrine[4] because the record reflects that both the Official and Employee Defendants are entitled to immunity from suit. See Willingham v. City of Orlando, 929 So. 2d 43, 50 (Fla. 5th DCA 2006) ("Judgmental or discretionary government functions are immune from legal action . . . ."); Grady v. Scaffe, 435 So. 2d 954, 955 (Fla. 2d DCA 1983) (finding public officials immune for actions taken in connection with public office).

[4] Under the tipsy coachman doctrine, "where the trial court 'reaches the right result, but for the wrong reasons,' an appellate court can affirm the decision only if 'there is any theory or principle of law in the record which would support the ruling.'" Butler v. Yusem, 44 So. 3d 102, 105 (Fla. 2010) (emphasis is omitted) (quoting Robertson v. State, 829 So. 2d 901, 906 (Fla. 2002)).

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

Plaintiffs
DAVID W. FOLEY, JR., and
JENNIFER T. FOLEY
v.
Defendants
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.

2016-CA-007634-O

PLAINTIFFS' MOTION FOR RELIEF FROM JUDGEMENT AND FOR OTHER RELIEF

PLAINTIFFS DAVID AND JENNIFER FOLEY MOVE THE COURT for the following relief: (1) pursuant Fla.R.Civ.P. 1.540, for relief from the judgments rendered December 7 and 12, 2017, and reversed by mandate of the 5th District Court of Appeal in appellate case 5D 18-0145, March 28, 2019; and, (2) for relief from the decision of this court December 11, 2017, to take under advisement, pending disposition of appellate case 5D 18-0145, "Orange County's Amended Motion to Dismiss Plaintiffs' Amended

Complaint Pursuant to Florida Rules of Civil Proceure (*sic*) 1.140(b)(1) and (6), Amended so as to Raise Statute of Limitations Defense."

PROCEDURAL HISTORY

1. August 25, 2016, the Foleys filed their original complaint in this case.

2. September 23, 2016, Orange County adopted Ordinance No. 2016-19, and amended several provisions in the Code of Ordinances challenged by the Foleys' original complaint.

3. February 15, 2017, the Foleys filed their amended complaint.

4. March 3, 2017, attorney Derek Angell, counsel for the *officials*,[1] filed "The Official Defendants' Motion to Strike the Amended Complaint, Renewed Request for Judicial Notice, and Motion to Dismiss This Action with Prejudice."

[1] The *officials*: Asima Azam, Fred Brummer, Richard Crotty, Frank Detoma, Mildred Fernandez, Teresa Jacobs, Roderick Love, Scott Richman, Joe Roberts, Marcus Robinson, Tiffany Russell, Bill Segal, and

5. March 7, 2017, attorney Oxford Lamar, counsel for the *employees*,[2] filed "Defendants Phil Smith, Rocco Relvini, Tara Gould, Tim Boldig, and Mitch Gordon's Motion to Dismiss/Motion to Strike." [3]

6. March 7, 2017, Orange County filed "Orange County's Motion to Dismiss Plaintiffs' Amended Complaint Pursuant to Florida Rules of Civil Proceure (*sic*) 1.140(b)(1) and (6)."

7. May 24, 2017, the Foleys filed "Plaintiffs' Response to Defendants' Motions to Dismiss."

8. October 25, 2017, Judge Higbee filed this court's "Order Granting 'The Official Defendants' Motion to Strike the Amended Complaint, Renewed Request for Judicial Notice, and Motion to Dismiss this Action with Prejudice' and Order Granting 'Defendants Phil Smith, Rocco Relvini, Tara Gould, Tim Boldig, and Mitch Gordon's Motion to Dismiss/Motion to Strike.'" This order was a final judgment as to the *officials* but not as to the *employees*.

---

[2] The *employees*: Tim Boldig, Mitch Gordon, Tara Gould, Carol Hossfield, Rocco Relvini, and Phil Smith.

[3] July 14, 2017, Mr. Lamar corrected his omission of Carol Hossfield by filing "Defendant Carol Hossfield n/k/a Carol Knox's Notice of Incorporation".

9. November 13, 2017, Judge Higbee filed this court's "Final Judgment in Favor of Defendants Phil Smith, Carol Hossfield (n/k/a Carol Knox), Mitch Gordon, Rocco Relvini, Tara Gould and Tim Boldig." This judgment was final as to the *employees.*

10. November 20, 2017, Orange County filed "Orange County's Amended Motion to Dismiss Plaintiffs' Amended Complaint Pursuant to Florida Rules of Civil Proceure (*sic*) 1.140(b)(1) and (6), Amended so as to Raise Statute of Limitations Defense."

11. December 5, 2017, the Foleys filed "Plaintiffs' Response to the Limitations Defense in Orange County's Amended Motion to Dismiss."

12. December 7, 2017, Judge Higbee rendered this court's order, filed November 13, 2017, referenced in ¶9, when she denied the Foleys' motion for rehearing as to the *employees* filed November 17, 2017.

13. December 11, 2017, Judge Higbee heard Orange County's motion referenced in ¶10. The court minutes of the hearing state: "Case taken under advisement." The court has taken no further action on Orange County's motion.

14. December 12, 2017, Judge Higbee rendered this court's order, filed October 25, 2017, referenced in ¶8, when she denied the Foleys' motion

for rehearing as to the *officials* and the Foleys' motion for reconsideration as to the *employees*, both filed November 9, 2017.

15. November 26, 2018, the Fifth District Court of Appeal in appellate case 5D 18-0145, reversed this court's orders rendered December 7, 2017, and December 12, 2017, and referenced in ¶¶12 and 14, respectively.

16. December 17, 2018, the Fifth District Court of Appeal issued its corrected opinion and mandate in appellate case 5D 18-0145.

17. December 19, 2018, counsel for the *officials*, Derek Angell, and counsel for the *employees*, Lamar Oxford, filed with the Fifth District Court of Appeal "Appellees' Notice to Invoke the Discretionary Jurisdiction of the Florida Supreme Court."

18. December 27, 2018, counsel for the *officials*, Derek Angell, filed with the Supreme Court of Florida "Petitioners' Brief on Jurisdiction." The names, bar license numbers, and contact information of Oxford Lamar and Eric Netcher, counsel for the *employees,* appear on the cover and signature pages of the brief. However, neither the actual nor electronic signatures of Lamar or Netcher appear on the brief.

19. January 7, 2019, the Foleys filed with the Supreme Court of Florida "Respondents' Brief on Jurisdiction."

20. January 21, 2019, attorney Derek Angell, counsel for the *officials*, filed the *officials*' "Motion to Recall Mandate," in 5D 18-0145.

21. January 25, 2019, the Fifth District Court of Appeal recalled its mandate in appellate case 5D 18-0145.

22. March 26, 2019, the Supreme Court of Florida issued its order in SC18-2120, denying review of appellate case 5D 18-0145.

23. March 28, 2019, the Fifth District Court of Appeal re-issued its mandate in appellate case 5D 18-0145.

ARGUMENT

"When a case is appealed and the appellate court acts by issuing its mandate, the trial court must follow the dictate of the mandate and should not stray from it. *Marine Midland Bank Central v. Cote*, 384 So.2d 658 (5th DCA 1980). Compliance by the trial court with the appellate mandate is a purely ministerial act. *Robbins v. Pfeiffer*, 407 So.2d 1016 (5th DCA 1981)." *Florida Power & Light v. Flichtbeil*, 513 So. 2d 1078, 1080 (5th DCA 1987).

Consequently, this court is required by the mandate in appellate case 5D 18-0145 to vacate the following: 1) its "Order Granting 'The Official Defendants' Motion to Strike the Amended Complaint, Renewed Request

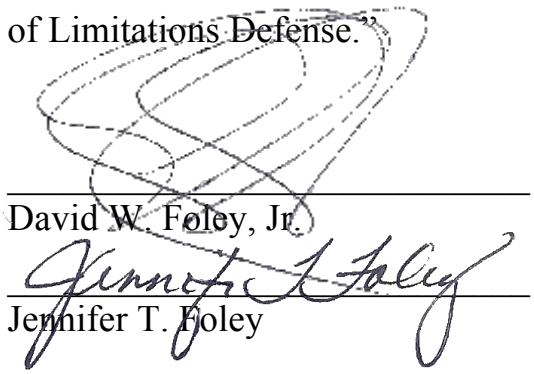
for Judicial Notice, and Motion to Dismiss this Action with Prejudice' and Order Granting 'Defendants Phil Smith, Rocco Relvini, Tara Gould, Tim Boldig, and Mitch Gordon's Motion to Dismiss/Motion to Strike,'" issued October 25, 2017, rendered December 12, 2017, and referenced above in ¶¶8 and 14; and, 2) its "Final Judgment in Favor of Defendants Phil Smith, Carol Hossfield (n/k/a Carol Knox), Mitch Gordon, Rocco Relvini, Tara Gould and Tim Boldig," issued November 13, 2017, rendered December 7, 2017, and referenced above in ¶¶9 and 12.

The mandate in appellate case 5D 18-0145, also settles in the Foleys' favor the limitation defense presented to Judge Higbee, December 11, 2017, at the hearing of "Orange County's Amended Motion to Dismiss Plaintiffs' Amended Complaint Pursuant to Florida Rules of Civil Proceure (*sic*) 1.140(b)(1) and (6), Amended so as to Raise Statute of Limitations Defense." Whether or not Orange County's limitation defense, or then pending appellate case 5D 18-0145, were the reasons Judge Higbee decided to take the County's motion "under advisement," neither now presents an obstacle to final disposition of the County's motion. Unless the court has some other reason for delay, the Foleys request the court make a decision on "Orange County's Amended Motion to Dismiss Plaintiffs' Amended

Complaint Pursuant to Florida Rules of Civil Proceure (*sic*) 1.140(b)(1) and (6), Amended so as to Raise Statute of Limitations Defense," filed November 20, 2017, and heard December 11, 2017, as stated above in ¶¶ 10 and 13.

CONCLUSION

WHEREFORE, plaintiffs David and Jennifer Foley request the court grant the following relief: (1) pursuant Fla.R.Civ.P. 1.540, relief from the judgments rendered December 7 and 12, 2017, and reversed by mandate in appellate case 5D 18-0145, March 28, 2019; and, (2) relief from the decision of this court December 11, 2017, to take under advisement, pending disposition of appellate case 5D 18-0145, "Orange County's Amended Motion to Dismiss Plaintiffs' Amended Complaint Pursuant to Florida Rules of Civil Proceure (*sic*) 1.140(b)(1) and (6), Amended so as to Raise Statute of Limitations Defense."



David W. Foley, Jr.

Jennifer T. Foley

Date: April 8, 2019

Plaintiffs
1015 N. Solandra Dr.
Orlando FL 32807-1931
PH: 407 721-6132
e-mail: david@pocketprogram.org
e-mail: jtfoley60@hotmail.com

CERTIFICATE OF SERVICE

Plaintiffs certify that on April 8, 2019, the foregoing was electronically filed with the Clerk of the Court and served to the following:

William C. Turner, Jr., Assistant County Attorney,
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David W. Foley, Jr.

Jennifer T. Foley

Date: April 8, 2019

Plaintiffs
1015 N. Solandra Dr.
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e-mail: jtfoley60@hotmail.com

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

DAVID W. FOLEY and JENNIFER T. FOLEY,

Plaintiffs,

vs.

ORANGE COUNTY, PHIL SMITH, CAROL HOSSFIELD, MITCH GORDON, ROCCO RELVINI, TARA GOULD, TIM BOLDIG, FRANK DETOMA, ASIMA AZAM, RODERICK LOVE, SCOTT RICHMAN, JOE ROBERTS, MARCUS ROBINSON, RICHARD CROTTY, TERESA JACOBS, FRED BRUMMER, MILDRED FERNANDEZ, LINDA STEWART, BILL SEGAL, and TIFFANY RUSSELL,

Defendants.
_____/

Case No. 2016-CA-007634-O

THE OFFICIAL DEFENDANTS' MOTION TO STRIKE THE AMENDED COMPLAINT, RENEWED REQUEST FOR JUDICIAL NOTICE, AND MOTION TO DISMISS THIS ACTION WITH PREJUDICE

COME NOW, current and former ORANGE COUNTY (the "County") Officials named in their individual and official capacities serving on the Board of Zoning Adjustment ("BZA") or Board of County Commissioners ("BCC"), ASIMA AZAM, FRED BRUMMER, RICHARD CROTTY, FRANK DETOMA, MILDRED FERNANDEZ, TERESA JACOBS, RODERICK LOVE, SCOTT RICHMAN, JOE ROBERTS, MARCUS ROBINSON, TIFFANY RUSSELL, BILL SEGAL, and LINDA STEWART (together, the "Officials"), by and through their undersigned counsel, hereby file these, their Motion to Strike the Amended Complaint, Renewed Requests for Judicial Notice, and Motion to Dismiss this Action with Prejudice, and state as follows:

Postural Background & Adoption of Prior Motion to Dismiss

This case arises from the enforcement of a local ordinance which prohibited aviculture. The Foleys commercially bred toucans in violation of the ordinance. Administrative and judicial actions through county, state court, and federal court ranks commenced years ago, leading to this new lawsuit filed in 2016.

A more detailed history of this case is articulated in the Officials' initial Motion to Dismiss, which is incorporated as Exhibit A. After that motion was filed, a good faith conference was held among all counsel and the pro se Foleys. The Foleys requested leave to amend their complaint as opposed to proceeding to hearing, and the Defendants did not object. *See, e.g., Unrue v. Wells Fargo Bank, N.A.*, 161 So. 3d 536, 538 (Fla. 5th DCA 2014) ("Plaintiffs have an automatic right to amend the complaint once before a responsive pleadings is served."). The Amended Complaint was then filed.

However, the Amended Complaint does not add any new facts or otherwise remedy improperly-stated causes of action. Rather, it *deletes* details of the various individual defendants' roles in the underlying saga, lumping them all together as "Defendants." This would normally constitute grounds for dismissal on its own for failing to state separate counts against separate defendants. *See K.R. Exchange Servs., Inc. v. Fuerst, Humphrey, Ittleman, PL*, 48 So. 3d 889, 893 (Fla. 3d DCA 2010); *see also Pratus v. City of Naples*, 807 So. 2d 795, 797 (Fla. 2d DCA 2002) (where plaintiffs had three independent causes of action, "each claim should be pleaded in a separate count instead of lumping all defendants together"). But that is not necessary here because the original Complaint indeed parsed out the roles of the individual defendants.

Instead, the Amended Complaint is a sham because it avoids facts alleged by the Foleys themselves merely to avoid dismissal. A similar question was asked 66 years ago in *Schaal v. Race*, 135 So. 2d 252, 253 (Fla. 2d DCA 1961):

> We shall consider first the decision of the lower court in dismissing the amended complaint as a sham since it was apparent from the record that the amended complaint deleted from the original complaint all reference to an election, which showed in the original complaint an illegal contract.

After considering several treatises and rules from other jurisdictions, the court reached the following conclusion:

> We hold that the lower court was justified in dismissing the amended complaint as a sham in view of the record in the case before him.
>
> When questioned by the court, the attorney for the appellant-plaintiff answered frankly that it would serve no purpose to overrule the lower court on dismissing the amended complaint as the data eliminated from the original complaint would necessarily be brought out in a trial of the case and that the real question with which they were concerned was whether or not the court erred in dismissing the original complaint because the indebtedness incurred violated the corrupt practice provisions of Florida election code.

Id. at 254-55; *see also Inter-Continental Promotions, Inc. v. MacDonald*, 367 F.2d 293, 302 (5th Cir. 1966) (summarizing *Schaal*'s facts as "The amended complaint, in effect, was a direct contradiction of the very facts alleged in the original complaint that had made the contract unenforceable").

Here, the motion to dismiss identified the frivolity of the Foleys' claims given the specific roles of government the Officials held during the municipal proceedings giving rise to this lawsuit. The motion walked through the Officials' immunities, the statute of limitations and res judicata issues, and the Foleys' failure to state a cognizable cause of action. None of this was news to the Foleys; the initial federal lawsuit made it up to the federal Supreme Court and back, and the same topics have been addressed multiple times. The basic facts "would necessarily be

brought out in a trial of the case." *Schaal*. By deleting them, the Foleys rendered their Amended Complaint a sham, and it should be stricken.

The Newly Added Theories in Count Five Are Frivolous

The Foleys seem to state their claims against the "individual Defendants" in counts five through seven. Count five is titled "Acting in Concert; Abuse of Process to Invade Privacy and Rightful Activity, and Conversion." The phrase "abuse of process to invade privacy and rightful activity" is absent from the body of Florida decisional law. But even liberally construing these newly added theories for abuse of process and conversion, the Amended Complaint fails to state a cause of action.

"Abuse of process involves the use of criminal or civil legal process against another primarily to accomplish a purpose for which it was not designed." *Bothmann v. Harrington*, 458 So. 2d 1163, 1169 (Fla. 3d DCA 1984). "[T]he usual case of abuse of process involves some form of extortion." *Id.* Ulterior motives, and even subjective malice of the alleged tortfeasor, are irrelevant so long as "the process is used to accomplish the result for which it was created." *Id.*

As the initial Complaint (and hundreds of pages of federal filings) makes clear, the claim against the Officials arises from their *official votes* taken during *official, public hearings*. In other words, the Officials were carrying out their duties as elected government officials. Voting on local matters, here, the propriety of a zoning interpretation, is precisely what is expected of our local government administrators. No claim for abuse of process can exist on these allegations.

Nor have the Foleys stated a cause of action in conversion. "The essence of the tort of conversion is the exercise of wrongful dominion or control over property to the detriment of the

rights of the actual owner." *DePrince v. Starboard Cruise Servs., Inc.*, 163 So. 3d 586 (Fla. 3d DCA 2015). The Foleys have never alleged that any of the Officials actually exercised dominion or control over their toucans. They have merely alleged that the Officials *voted* to uphold the zoning manager's determination that the Foleys' toucan farm violated an ordinance. If the Foleys could state a claim against the Officials in their individual capacities here, then local board members could be dragged into litigation every time a government agency repossesses property, enforces building codes, or even enforces a parking ticket. Public votes do not constitute "dominion or control" over private property. This is not conversion.

The Theories in Count Six and Seven Were Addressed in the Motion to Dismiss

Count six realleges civil theft claims against the Officials. The Officials would refer the Court to their initial motion to dismiss, which adequately addresses the issue. Suffice to say count six does not state a cause of action.

Finally, count seven contains an alleged due process violation under 42 U.S.C. § 1983. This precise claim was deemed frivolous by the Eleventh Circuit. *See Foley v. Orange Cnty.*, 638 Fed.Appx. 941, 944 (11th Cir. 2016). It is also barred by res judicata since the question has been litigated to finality in the federal forum. This was discussed in the initial motion to dismiss as well.

Conclusion

The Foleys have attempted to avoid dismissal by eliminating allegations that demonstrate the frivolity of their claims against the individual Officials. That is prohibited by the rules of procedure, and the Amended Complaint should be stricken. Further attempts at pleading should be denied given that the facts are well-known to all parties in light of the years of federal litigation that preceded this case.

And as explained in the Officials' first motion to dismiss, the Officials are entitled to dismissal because (1) the statute of limitations bars the claims; (2) the Officials enjoy absolute immunity from suit on these allegations; (3) the Officials enjoy qualified immunity from suit; (4) res judicata bars the federal claim(s); and (4) the theories of liability are frivolous on the merits.

WHEREFORE, respectfully, the Official Defendants hereby request that this Honorable Court takes judicial notice of the federal records in this litigation, that the Amended Complaint is stricken as a sham, and that they all be dismissed with prejudice from this action..

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was electronically filed with the Clerk of the Court using the Florida Courts eFiling Portal, which will send notice of filing and a service copy of the foregoing to the following: David W. Foley, Jr. and Jennifer T. Foley, david@pocketprogram.org, jtfoley60@hotmail.com; William C. Turner, Esquire, Elaine Marquardt Asad, Esquire and Jeffrey J. Newton, Esquire, williamchip.turner@ocfl.net, judith.catt@ocfl.net, elaine.asad@ocfl.net, gail.stanford@ocfl.net; Lamar D. Oxford, Esquire, loxford@drml-law.com, katietillotson@drml-law.com; and Eric J. Netcher, Esquire, ENetcher@drml-law.com; RhondaC@drml-law.com; on this 18th day of April, 2019.

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IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

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

Plaintiffs,

vs. **CASE NO: 2016-CA-007634-O**

ORANGE COUNTY; PHIL SMITH; CAROL HOSSFIELD; MITCH GORDON; ROCCO RELVINI; TARA GOULD; TIM BOLDIG; FRANK DETOMA; ASIMA AZAM; RODERICK LOVE; SCOTT RICHMAN; JOE ROBERTS; MARCUS ROBINSON; RICHARD CROTTY; TERESA JACOBS; FRED BRUMMER; MILDRED FERNANDEZ; LINDA STEWART; BILL SEGAL; and TIFFANY RUSSELL,

Defendants.
_____/

THE EMPLOYEE DEFENDANTS' MOTION TO STRIKE THE AMENDED COMPLAINT, REQUEST FOR JUDICIAL NOTICE, AND MOTION TO DISMISS THIS ACTION WITH PREJUDICE

Phil Smith, Rocco Relvini, Carol Hossfield (n/k/a Carol Knox), Tara Gould, Tim Boldig, and Mithc Gordon (together, the Employees"), by and through undersigned counsel, file this Motion to Strike the Amended Complaint, Requests for Judicial Notice, and Motion to Dismiss this Action with Prejudice. In support, the Employees state as follows:

Background

This action has a long and tortured history. Plaintiffs David and Jennifer Foley are commercial toucan farmers. Commercial aviculture is regulated by Orange County Code. After a citizen made a complaint regarding the Foleys' toucans, the County began

a code enforcement investigation. The Zoning Manager – Defendant Mitch Gordon – concluded that the Foleys were in violation of the Code. The Foleys then appealed to the Board of Zoning Adjustment (the "BZA") to argue that the County's regulation was unconstitutional under the Florida Constitution because only the Florida Fish and Wildlife Commission had authority to regulate wildlife.

After a hearing, the BZA concluded that the Foleys were in violation of the ordinance. The Foleys then appealed this decision to the Board of County Commissioners (the "BCC") which voted to affirm the BZA. Undeterred, the Foleys petitioned for a writ of certiorari to the Ninth Judicial Circuit in Case No. 08-CA-005227-O. Under Plaintiff's original allegations in this action, this proceeding concluded with a finding that the Foleys were "prohibited . . . from challenging the constitutionality of the County code on certiorari review of the BCC order." (Complaint, ¶ 40).

The Foleys then filed a pro se federal lawsuit against the County, the Employees, the BZA members, and other County officials. The proceedings before the federal district court resulted in two significant orders. On December 4, 2012, the district court dismissed with prejudice the claims against the Employees because they are immune from suit. *Foley v. Orange County*, 2012 WL 6021459, *5 (M.D. Fla. Dec. 14, 2012). Judge Roy B. Dalton Dalton concluded that the "factual allegations in this case demonstrate that the county employees were acting within the scope of their employment" and that "[n]othing alleged suggests that the county employees acted in bad faith, with malicious purpose, or in wanton and willful disregard of human rights." *Id.*

The claims against the County were dismissed without prejudice and the case

continued as against the County. Eventually, the district court concluded that the relevant Code provision was unconstitutional but that the Foleys failed to show due process violations, equal protection violations, compelled speech, restrains on commercial speech, or an unreasonable search or seizure. *Foley v. Orange County*, 2013 WL 4110414, *9-14 (M.D. Fla. Aug. 13, 2013). The Code provisions were declared void, but the Foleys were denied further relief.

The Foleys then appealed to the Eleventh Circuit. *Foley v. Orange County*, 638 F. App'x 941 (11th Cir. 2016). The Eleventh Circuit concluded that "all of the Foleys' federal claims either have no plausible foundation, or are clearly foreclosed by a prior Supreme Court precedent." *Id.* at 945-46 (cleaned up). Therefore, the court concluded that the district court lack subject matter jurisdiction. *Id.* And without federal-question jurisdiction, the district court similarly lacked jurisdiction over the state law claims. *Id.* The Foleys then sought United States Supreme Court review, which was denied. *Foley v. Orange County*, 137 S. Ct. 378 (2016).

The Foleys continued their misguided crusade by filing the present action. After the original Complaint and a round of motions to dismiss, Plaintiff filed the currently operative Amended Complaint. The Employees and the Officials each filed motions to dismiss raising several arguments, including immunity, res judicata, and the statute of limitations. Judge Heather Higbee entered an Order granting these motions on October 25, 2017. But the order dismissed the Employees and the Officials solely based on the statute of limitations argument. *See* (10/25/2017 Order). The other arguments in the motions went unaddressed.

Characteristically, the Foleys again appealed. *Foley v. Azam*, 257 So. 3d 1134 (Fla. 5th DCA 2018). The Fifth District Court of Appeal reversed, concluding that the Foleys'

claims were not barred by the statute of limitations because the statute was tolled by operation of 28 U.S.C. § 1367(d) while the federal action was pending. *Id.* at 1139. The court did not consider the immunity and other arguments because the trial court had not considered the issues in the first instance.

Now, this case is back before this Court so that the other dispositive issues raised by the Employees and the Officials can be considered in the first instance. The claims against the Employees remain frivolous and subject to dismissal with prejudice.

While the "Employees" are being referred to as such, it is important to point out that these are higher level employees with Orange County. The Foleys' Amended Complaint alleges the following: Phil Smith was a Code Enforcement Inspector; Carol Hossfield was the Permitting Chief Planner; Mitch Gordon was a Zoning Manager; Rocco Relvini was the BZA Coordination Chief Planner; Tim Boldig was the Chief of Operations of the Orange County Zoning Division; and Tara Gould was an Assistant County Attorney with the Orange County Attorney's Office. (Amended Complaint, pg. 4-5).

Simply because these Employees were doing their job, they have been dragged into this never-ending litigation without ever having a single colorable claim made against them. The Amended Complaint simply lumps these Employees with the Officials and the County as the "Defendants." Absurdly, the Foleys allege that these "Defendants" acted "in concert either as tortfeasors, knowing assistants of a tortfeasor, or with common design to effect the ultimate harm." (Amended Complaint, ¶ 39).

The only claims ostensibly asserted against the Employees are Count Five, entitled "Acting in Concert, Abuse of Process to Invade Privacy and Rightful Activity, and Conversion;" Count Six purportedly for statutory civil theft under § 772.11; and

Count Seven for a purported due process violation. (Amended Complaint, pg. 17-22). These claims are frivolous on their faces and fail entirely to state a cause of action against any one of the six Employees. This Court should so conclude and dismiss the Employees with prejudice.[1]

Memorandum of Law

I. This Court should take judicial notice of all records from the federal proceedings.

Generally, courts are limited to the four corners of the complaint in determining the complaint's sufficiency. However, when a trial court takes judicial notice of a fact outside the four corners, that fact may be considered for dismissal purposes. *All Pro Sports Camp, Inc. v. Walt Disney Co.*, 727 So. 2d 363, 366 (Fla. 5th DCA 1999).

Section 90.201 requires state courts to take judicial notice of Florida and federal common law, constitutional law, legislative acts, and rules of court. Moreover, trial courts may take notice of the "records of any court of this state or of any court of record in the United States." § 90.202(6), Fla. Stat.

Here, this Court should take notice of the Middle District, Eleventh Circuit, and United States Supreme Court records concerning the Foleys' federal suit. Judicial notice will assist the Court with assessing the background of this case and understanding the allegations of the Amended Complaint. That said, judicial notice is not required to resolve the dispositive arguments raised by the Employees that were not addressed in Judge Higbee's original Order.

[1] As an initial matter, the Employees adopt and incorporate the Officials' argument that the Amended Complaint is a sham that should be stricken. *See* (Official Defendants' Motion to Strike the Amended Complaint at pg. 2-4).

II. All federal claims are barred by res judicata.

It appears that only one federal claim is asserted against the Employees. Namely, Count Seven is a purported due process claim in which Plaintiff claims that all "Defendants" violated his federal constitutional rights. (Amended Complaint, pg. 22). This claim, and any other federal claim, asserted by Plaintiff are barred by res judicata.

"The doctrine of res judicata bars relitigation in a subsequent cause of action not only of claims raised, but also claims that could have been raised." *Topps v. State*, 865 So. 2d 1253, 1255 (Fla. 2004). As discussed above, the Eleventh Circuit affirmed the dismissal of the Foleys' federal constitutional claims. The court specifically found that "all of the Foleys' federal claims either have no plausible foundation, or are clearly foreclosed by a prior Supreme Court decision." *Foley*, 638 F. App'x at 946.

Consequently, all federal claims raised by the Foleys in the Amended Complaint including the only one asserted against the Employees (Count Seven) are barred by res judicata.

III. The Employees are immune from suit.

Section 768.28(9)(a) provides that no employee or agent of a governmental entity can "be held personally liable in tort or named as a party defendant in any action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of her or his employment or function." Liability is only permitted if the employee or agent "acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property." § 768.28(9)(a), Fla. Stat.

As the statute makes clear, it is not merely an immunity from liability. It is an immunity from even being named as a defendant in a lawsuit. *Willingham v. City of Orlando*, 929 So. 2d 43, 48 (Fla. 5th DCA 2006) ("Importantly, the immunity provided

by section 768.28(9)(a) is both an immunity from liability *and* an immunity from suit, and the benefit of this immunity is effectively lost if the person entitled to assert it is required to go to trial.").

Here, Plaintiff has never and could never allege that the any of the six Employees were acting outside the course and scope of their employment. Likewise, there are no *factual* allegations whatsoever that suggest that any of the six Employees acted in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. *See Fernander v. Bonis*, 947 So. 2d 584, 589 (Fla. 4th DCA 2007) (affirming dismissal of claim against a police officer where complaint's *factual* allegations did not establish that the officer acted outside the scope of his employment or with wanton or willful disregard of the plaintiff's rights).

Federal District Judge Roy B. Dalton Dalton concluded that the "factual allegations in this case demonstrate that the county employees were acting within the scope of their employment" and that "[n]othing alleged suggests that the county employees acted in bad faith, with malicious purpose, or in wanton and willful disregard of human rights." *Foley*, 2012 WL 6021459, *5. Six-and-a-half years later, this plain rationale still applies. The Employees are entitled to immunity under 768.28(9)(a). Indeed, the fact that the Foleys include claims against the County underscores the Employees entitlement to immunity. "In any given situation either the agency can be held liable under Florida law, or the employee, but not both." *McGhee v. Volusia*

County, 679 So. 2d 729, 733 (Fla. 1996). This Court must dismiss the Employee Defendants.[2]

Moreover, to the extent that Count Seven can survive res judicata, the Employees are entitled to qualified immunity. "Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Corn v. City of Lauderdale Lakes*, 997 F.2d 1369, 1393 (11th Cir. 1993) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). The Employees are entitled to qualified immunity.

IV. The theories alleged against the Employees are frivolous on the merits.

Putting aside for a moment the Employees' entitlement to immunity and res judicata, the three claims against the Employees are entirely frivolous. Again, the claims are for abuse of process and conversion (Count Five), statutory civil theft (Count Six), and a federal due process violation (Count Seven).

---

[2] Moreover, the Foleys are apparently challenging actions of County Employees related to code enforcement. However, in "both permitting and enforcement, there is a general duty to the public as a whole which does not constitute a duty to a particular individual." *Brown v. Dep't of Health & Rehab. Servs.*, 690 So. 2d 641, 644 (Fla. 1st DCA 1997). There is no actionable duty of care with respect to the enforcement issues apparently raised by the Foleys. Even if there were a duty, the discretionary function exception to the waiver of sovereign immunity prevents the apparent types of claims being made against the Employees. *See Lewis v. City of St. Petersburg*, 260 F.3d 1260, 1264 (11th Cir. 2001) (citing *Kaisner v. Kolb*, 543 So. 2d 732, 736 (Fla. 1989)). Decisions regarding the enforcement of ordinances involve discretionary acts that cannot give rise to liability. *See, e.g., Carter v. City of Stuart*, 468 So. 2d 955 (Fla. 1985) (holding that there could be no liability for failing to enforce its animal control ordinance as the "amount of resources and personnel to be committed to the enforcement of this ordinance was a policy decision of the city."); *Elliott v. City of Hollywood*, 399 So. 2d 507 (Fla. 4th DCA 1981) (holding that City's decision not to enforce an ordinance designed to prevent the homeowner from growing bushes and hedges so as not to interfere with the vision of motorists could not subject the City to liability because the failure to enforce was a planning level decision); *Detournay v. City of Coral Gables*, 127 So. 3d 869 (Fla. 3d DCA 2013) (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 lack jurisdiction to hear declaratory judgment action by nearby property owners against city seeking enforcement of zoning code).

"Abuse of process involves the use of criminal or civil legal process against another primarily to accomplish a purpose for which it was not designed." *Bothmann v. Harrington*, 458 So. 2d 1163, 1169 (Fla. 3d DCA 1984). "[T]he usual case of abuse of process involves some form of extortion." *Id*. The Foleys Amended Complaint obviously fails to state a claim for abuse of process against any of the six Employees. There simply is no factual basis to support an abuse of process claim against the Employees.

Likewise, the Foleys did not state a cause of action for conversion. "The essence of the tort of conversion is the exercise of wrongful dominion or control over property to the detriment of the rights of the actual owner." *DePrince v. Starboard Cruise Servs., Inc.*, 163 So. 3d 586, 597 (Fla. 3d DCA 2015). The Foleys do not allege that any of the Employees exercised dominion or control over their toucans. The conversion claim is completely meritless.

The related claim for statutory civil theft in Count Six is equally absurd. Section 772.11 creates a civil cause of action for violation of certain criminal theft statutes. Criminal intent is a required element of the claim. *See Westinghouse Elec. Corp. v. Shuler Bros.*, 590 So. 2d 986, 988 (Fla. 1st DCA 1991) ("A necessary element of proof in a [statutory civil theft] case is a felonious intent to steal on the part of the defendant."). The Foleys have not whatsoever alleged, nor could they, that any of the six Employees committed theft. The claim is frivolous.

Lastly, the due process claim in Count Seven has already been found to be frivolous by the Eleventh Circuit Court of Appeals. Therefore, it is barred by res judicata. To the extent that res judicata does not apply, the Eleventh Circuit's analysis of the Foleys' due process claim would likewise be dispositive here. *See Foley*, 638 F. App'x at

944. Simply put, the Foleys have not and cannot state a claim that any of the six Employees violated their due process rights.

Even if the Foleys could jump the insurmountable immunity hurdle, the Foleys' claims against the Employees are frivolous. The complete lack of merit to any one of the Foleys' claims against the Employees would require dismissal even if immunity were not dispositive.

Conclusion

Tim Boldig, Carol Hossfield, Rocco Relvini, Phil Smith, Tara Gould, and Mitch Gordon were doing their jobs. And because of that, they have now had to endure years of the Foleys' frivolous litigation. It is time to bring this vexatious litigation to an end. This Court should dismiss the Employee Defendants from this action with prejudice.

Certificate of Service

I certify that on May 3, 2019, the foregoing was filed via the Florida e-portal which will serve a notice of filing and a service copy to: David W. Foley, Jr. (david@pocketprogram.org); Jennifer T. Foley (jtfoley60@hotmail.com); Derek J. Angell, Esq. (dangell@oconlaw.com); William C. Turner, Esq. (williamchip.turner@ocfl.net, judith.catt@ocfl.net, gail.stanford@ocfl.net).

/s/ Eric J. Netcher

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IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

Case number: 2016-CA-007634-O

COURT MINUTES

COURT OPENED 8:30 AM on May 07, 2019
This case came on this day for Ex Parte
Honorable Strowbridge, Patricia L , presiding

David W Foley, Jr; Jennifer T Foley

Petitioner / Plaintiff

VS

Orange County; Phil Smith; Carol Hossfield; Mitch Gordon; Rocco Relvini; Tara Gould; Tim Boldig; Frank Detoma; Asima Azam; Roderick Love; Scott Richman; Joe Roberts; Marcus Robinson; Richard Crotty; Teresa Jacobs; Fred Brummer; Mildred Fernandez; Linda Stewart; Bill Segal; Tiffany Moore Russell

Respondent / Defendant

Parties Present:

- Court reporter: n/a

Court Deputy: M. Kleinfelt

Attorney Derek Angel appeared

Foley on behalf of the Defendant

THE COURT RULES AS FOLLOWS:

Motions to be set on May 28

From 2:15pm to 3:30 will be the Motion to Dismiss

Ex Parte Hearing Held

COURT RECESSED at 9:00 AM on this the 7th day of May, 2019, subject to call.
Filed in Open Court on 05/07/2019
Deputy Clerk in Attendance: s/Lianny H.

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

CASE NUMBER: 2016-CA-007634-O

DAVID W FOLEY, JR; JENNIFER T FOLEY

Plaintiff(s),

vs.

ORANGE COUNTY
PHIL SMITH
CAROL HOSSFIELD
MITCH GORDON
ROCCO RELVINI
TARA GOULD
TIM BOLDIG
FRANK DETOMA
ASIMA AZAM
RODERICK LOVE
SCOTT RICHMAN
JOE ROBERTS
MARCUS ROBINSON
RICHARD CROTTY
TERESA JACOBS
FRED BRUMMER
MILDRED FERNANDEZ
LINDA STEWART
BILL SEGAL
TIFFANY MOORE RUSSELL

Defendant(s).
_____/

ORDER ON HEARING SCHEDULED FOR APRIL 4, 2018

THIS CAUSE having come on to be heard by the Court in chambers and the Court being otherwise duly advised in the premises it is hereby **ORDERED** that:

1. The Court having stayed Orange County's *Motion to Dismiss* pending appeal, the mandate having been issued, this matter is no longer stayed and is properly before the current judge in Division 35.

DONE AND ORDERED on this 7 day of May, 2019

Heather L. Higbee
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was filed with the Clerk of the Court this 7 day of May, 2021 by using the Florida Courts E-Filing Portal System. Accordingly, a copy of the foregoing is being served on this day to all attorney(s)/interested parties identified on the ePortal Electronic Service List, via transmission of Notices of Electronic Filing generated by the ePortal System.

I HEREBY CERTIFY that a copy of the foregoing was furnished on this 7 day of May, 2021 by U.S. Mail to:

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Donna Isaacson, Judicial Assistant to Judge Heather L. Higbee

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

DAVID W. FOLEY and JENNIFER T. FOLEY,

Plaintiffs,

vs.

ORANGE COUNTY, PHIL SMITH, CAROL HOSSFIELD, MITCH GORDON, ROCCO RELVINI, TARA GOULD, TIM BOLDIG, FRANK DETOMA, ASIMA AZAM, RODERICK LOVE, SCOTT RICHMAN, JOE ROBERTS, MARCUS ROBINSON, RICHARD CROTTY, TERESA JACOBS, FRED BRUMMER, MILDRED FERNANDEZ, LINDA STEWART, BILL SEGAL, and TIFFANY RUSSELL,

Defendants.
_____/

Case No. 2016-CA-007634-O

THE OFFICIAL DEFENDANTS'
AMENDED MOTION TO DISMISS WITH PREJUDICE[1]

COME NOW, current and former ORANGE COUNTY (the "County") Officials named in their individual and official capacities serving on the Board of Zoning Adjustment ("BZA") or Board of County Commissioners ("BCC"), ASIMA AZAM, FRED BRUMMER, RICHARD CROTTY, FRANK DETOMA, MILDRED FERNANDEZ, TERESA JACOBS, RODERICK LOVE, SCOTT RICHMAN, JOE ROBERTS, MARCUS ROBINSON, TIFFANY RUSSELL, BILL SEGAL, and LINDA STEWART (together, the "Officials"), by and through their undersigned counsel, hereby file this Amended Motion to Dismiss with Prejudice.

[1] The Officials' motion filed April 18, 2019, was erroneously printed from a much earlier motion to dismiss. We had significant technical issues that day, and I must have not realized what I was signing when I executed that document. I apologize for any confusion; the present motion was intended to have been filed then.

Background

This case has a truly remarkable history.

The Foleys were commercial toucan farmers. Roughly a dozen years ago, the County instituted code enforcement proceedings on the grounds that the toucan farming activity violated local ordinances governing aviculture. The Foleys appealed that decision to the BZA, and that body held a public hearing where testimony was taken. The BZA affirmed the finding that the toucan farming violated code. The Foleys appealed that decision to the BCC – the constitutional body that included then-Mayor JACOBS and now-Clerk of Courts RUSSELL. The BCC affirmed the BZA. The Foleys appealed to the Circuit Court, which also affirmed.

In 2012, the Foleys proceeded to file a federal lawsuit alleging that the local ordinance was unconstitutional under the Florida Constitution. They argued that only the state Fish and Wildlife Commission could regulate aviculture. The Foleys also sued the individual BZA and BCC members in their personal capacities. The federal court dismissed with prejudice all claims against the BZA and BCC members as "absolutely immune" from suit. *Foley v. Orange Cty., Fla.*, 2012 WL 6021459, *4 (M.D. Fla. Dec. 4, 2012) ("*Foley M.D. Fla. I*"). The case proceeded only against the County. The court ultimately found that the aviculture ordinance indeed violated the state Constitution but awarded the Foleys no damages. *Foley v. Orange Cty.*, 2013 WL 4110414, *14 (M.D. Fla. Aug. 13, 2013) ("*Foley M.D. Fla. II*").

The Foleys and the County cross-appealed. The Eleventh Circuit held that the federal claims purportedly serving as the basis for federal jurisdiction were "frivolous under *Bell v. Hood*, 327 U.S. 678 (1946)" such that the district court lacked subject matter jurisdiction over the action. *Foley v. Orange Cty.*, 638 F. App'x 941, 942 (11th Cir. 2016) ("*Foley 11th Cir.*"). The appellate court recognized the district court's "various immunity rulings" in favor of the BZA and BCC

members but did not elaborate. *Id.* at 943. Importantly, however, the immunity rulings were predicated on federal law, and therefore properly before the district and appellate courts, and the rulings were not reversed. *See Foley M.D. Fla. I* at *4.

The Foleys sought certiorari in the United States Supreme Court, which was denied. 137 S.Ct. 378 (2016).

Following remand and dismissal for lack of jurisdiction, the Foleys filed this action in Circuit Court. The Officials moved to dismiss because (1) the statute of limitations barred the claims; (2) the federal claims were res judicata; (3) the Officials were absolutely immune from liability; and (4) even disregarding all of these arguments, the Foleys had not stated a cause of action.

Judge Higbee granted the motion with prejudice. However, Her Honor's authored order spoke only to the statute of limitations and was silent as to the alternative bases for dismissal. The Foleys appealed, and the Fifth District reversed. *Foley v. Azam*, 257 So. 3d 1134 (Fla. 5th DCA 2018) ("*Foley 5th DCA*"). The opinion only discussed the tolling provision of 28 U.S.C. § 1367(d)'s application to the case and "declined" to consider the alternative arguments because Judge Higbee did not pass on them in the first instance. *Id.* at 1139 n.3.

However, Judge BERGER dissented on tipsy coachman grounds, recognizing that "the record reflects that both the Official and Employee Defendants are entitled to immunity from suit." *Id.* (BERGER, J., dissenting) (citing *Willingham v. City of Orlando*, 929 So. 2d 43 (Fla. 5th DCA 2006), and *Grady v. Scaffe*, 435 So. 2d 954 (Fla. 2d DCA 1983.)). The state Supreme Court declined review on March 26, 2019. Fla. S.Ct. Case No. SC18-2120.

We now return to this Court to consider whether the alternative bases for dismissal, previously argued but never ruled upon by Judge Higbee, require dismissing this action with prejudice. They do.

The Officials Are Immune from Suit

The Amended Complaint was filed on February 15, 2017, and has been reinstated pursuant to *Foley 5th DCA*. Counts 5-7 are stated against the Officials. They are frivolous.

The facts here are drawn not just from the four corners, but also from the numerous judicial opinions addressing the same allegations.[2] In short, the only activity alleged against the Officials is that they voted at public hearings pursuant to their official duties as either elected or appointed members of local government entities. Absent extraordinary allegations such as bribery or some other illegal conduct, it should go without saying that a political vote is not actionable. The Foleys are well aware of this but insist on pursuing damages against the Officials. The time has finally come to dismiss them with prejudice.

The Foleys have pled the following theories against the Officials:

V. "Abuse of Process to Invade Privacy & Rightful Activity, Conversion";

VI. Civil Theft under § 772.11 & 812.014, Fla. Stat.; and

VII. "Due Process" under 42 U.S.C. § 1983.

None remotely state a cause of action.

[2] The judicial notice rule requires trial courts to consider "Decisional" law during court proceedings. § 90.201, Fla. Stat. This is after all how we are permitted to argue caselaw at *any* motion to dismiss hearing. *See All Pro Sports Camp, Inc. v. Walt Disney Co.*, 727 So. 2d 363, 366 (Fla. 5th DCA 1999) (where judicial notice procedure brought extraneous lawsuit within four corners for dismissal purposes). Moreover, the Foleys previously stipulated that the prior federal decisions could be judicially noticed for purposes of dismissal. The Fifth District did not mention the issue in its opinion.

I. The Official are absolutely immune from liability.

"We have repeatedly stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Furtado v. Yun Chung Law*, 51 So. 3d 1269, 1275 (Fla. 4th DCA 2011) (citing *Saucier v. Katz*, 533 U.S. 194, 200-01 (2001)).

The Foleys' allegations boil down their disagreement with how the Officials voted in an official public proceeding. Although the Middle District granted the Officials absolute *legislative* immunity, the Officials argued to the Eleventh Circuit that they actually sat *quasi-judicially* on the BZA or BCC, and they will maintain that position here.[3]

> It is the character of the hearing that determines whether or not board action is legislative or quasi-judicial. Generally speaking, legislative action results in the formulation of a general rule of policy, whereas judicial action results in the application of a general rule of policy.

Bd. of Cty. Comm'rs of Brevard Cty. v. Snyder, 627 So. 2d 469, 474 (Fla. 1993) (citation omitted) (emphasis in original).

In other words, the question is framed as whether the governmental body is enacting or modifying an ordinance (legislative) or enforcing one (quasi-judicial). *See also Hirt v. Polk Cty. Bd. of Cty. Comm'rs*, 578 So. 2d 415, 417 (Fla. 2d DCA 1991). The enforcement of existing code is quasi-judicial. *Michael D. Jones, P.A. v. Seminole Cty.*, 670 So. 2d 95, 96 (Fla. 5th DCA 1996).

The Foleys specifically pled that their alleged damages include the costs associated with their "appeal to the BZA" and "appeal to the BCC." (Am. Compl. ¶ 56(b).)[4] The Zoning Manager under review was unquestionably enforcing the Code, and the BZA was then called upon to review

[3] If the Court should disagree and find that the Officials were acting quasi-legislatively, then immunity clearly applies under the authorities cited in *Foley M.D. Fla. I.*

[4] The Foleys have conceded that the BZA and BCC are prohibited to address an ordinance's constitutionality. (M.D. Fla. Case No. 6:12-cv-269 Doc. 1, ¶ 27-28 n.26). Nor could they argue to the contrary here.

his findings. The BCC reviewed those findings in due course. This activity was paradigmatically quasi-judicial.

The limits of judicial immunity and quasi-judicial immunity are coextensive in Florida. *Office of the State Attorney, Fourth Judicial Circuit of Fla. v. Parrotino*, 628 So. 2d 1097, 1099 (Fla. 1993). Not surprisingly, the reach of judicial immunity, and therefore also of quasi-judicial immunity, is expansive. As explained in *Andrews v. Florida Parole Commission*, 768 So. 2d 1257, 1263 (Fla. 1st DCA 2000) (citation omitted), "judges are not liable in civil actions for their judicial acts, even when such acts are in excess of their jurisdiction." This bedrock principle of American jurisprudence forecloses the Foleys' claims against the Officials because they enjoy the same protections.

The Officials were acting within their charge and duties in voting to either uphold or vacate the Zoning Manager's determination that the Foleys were violating Orange County Code. They were acting quasi-judicially and are entitled to absolute immunity from suit. Indeed, Judge BERGER would have affirmed this finding had Judge Higbee incorporated it into Her Honor's first order of dismissal. Prejudicial dismissals remain warranted.

II. Even ignoring immunity, the Foleys have failed to state any causes of action.

Count five is titled "Acting in Concert; Abuse of Process to Invade Privacy and Rightful Activity, and Conversion." The phrase "abuse of process to invade privacy and rightful activity" is absent from the body of Florida decisional law. But even liberally construing these theories for abuse of process and conversion, this does not state a cause of action.

"Abuse of process involves the use of criminal or civil legal process against another primarily to accomplish a purpose for which it was not designed." *Bothmann v. Harrington*, 458 So. 2d 1163, 1169 (Fla. 3d DCA 1984). "[T]he usual case of abuse of process involves some form

of extortion." *Id.* Ulterior motives, and even subjective malice of the alleged tortfeasor, are irrelevant so long as "the process is used to accomplish the result for which it was created." *Id.* Moreover, the tort only arises where the tortfeasor misused process after it issues. *S&I Invs. v. Payless Flea Mkt., Inc.*, 36 So. 3d 909, 917-78 (Fla. 4th DCA 2010). The Foleys have not alleged the issuance of any process in the first place, much less an abuse of it. And again, their claims arise from official votes taken during official public hearings. In other words, the Officials were carrying out their duties as elected government officials. Voting on local matters, such as the propriety of a zoning interpretation, is precisely what is expected of our local government administrators. We are nowhere near a legitimate abuse of process lawsuit.

Nor have the Foleys stated a cause of action in conversion. "The essence of the tort of conversion is the exercise of wrongful dominion or control over property to the detriment of the rights of the actual owner." *DePrince v. Starboard Cruise Servs., Inc.*, 163 So. 3d 586 (Fla. 3d DCA 2015). The Foleys have never alleged that any of the Officials individually exercised dominion or control over their toucans. They have merely alleged that the Officials voted to uphold the zoning manager's determination that the Foleys' toucan farm violated an ordinance. If the Foleys could state a claim against the Officials in their individual capacities, then local board members could be dragged into litigation every time a government agency repossesses property, enforces building codes, or even enforces a parking ticket. Public votes do not constitute "dominion or control" over private property. This is not conversion.

The civil theft allegations fail for the same reason. To establish a civil theft violation, a plaintiff must allege that they have been victimized by the violation of the theft statutes, sections 812.012-812.037 and 825.103(1), Fla. Stat. § 772.11. But an element of any theft claim requires the defendant to "obtain[] or use[]" the property of another with criminal intent. § 812.014. The

Complaint is woefully bereft of any allegation that the BZA or BCC members, by exercising public votes, "obtained or used" the Foleys' toucans. The theory is utter nonsense, no matter how verbose the complaint or in how many different fora the Foleys recast their misguided allegations. In fact, the theory is so frivolous that the Middle District, the Eleventh Circuit, and the Fifth District did not even reference the term "civil theft." Rather, those courts benignly lumped the civil theft allegations in among the other "state-law claims."

Finally, the Foleys continue to asset federal section 1983 civil rights violations despite the Eleventh Circuit having informed them that their federal claims were "frivolous." *Foley 11th Cir.*, 638 F. App'x at 942. This expressly included due process allegations under section 1983. *Id.* at 942-43. Aside from their established frivolity on the merits, the claims are barred by basic principles of res judicata and collateral estoppel. *See*, *e.g.*, *Topps v. State*, 865 So. 2d 1253, 1255 (Fla. 2004) ("The doctrine of res judicata bars relitigation in a subsequent cause of action not only of claims raised, but also claims that could have been raised."). All federal claims that were or could have been raised in the federal proceedings are clearly barred here. Specifically, the Eleventh Circuit affirmed the dismissal of the federal constitutional claims, and it went further to observe that those claims were frivolous. *Foley 11th Cir.*, 638 F. App'x at 942. It then vacated the judgments entered on the state law theories because no federal supplemental jurisdiction lies where the underlying federal claims are frivolous. *Id.* at 946.

In short, the Officials did not abuse any process, convert any property, steal anything, or violate the Foleys' due process rights, a finding which has already been made and affirmed in the federal court system. Their lawsuit against the Officials is patently frivolous.

Conclusion

While the Fifth District resolved the fairly academic statute of limitations question in the Foleys' favor, this Court is now invited to resolve the claims on their merits. The Officials voted at hearings. Allowing this case to proceed to discovery would open the gates for litigants to sue judges whenever they were unhappy with a ruling. The immunity is the same, and the frivolity of suit should be evident. The time has come to end this vexation litigation once and for all.

WHEREFORE, respectfully, the Official Defendants hereby request that this Honorable Court to dismiss them from this lawsuit with prejudice.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was electronically filed with the Clerk of the Court using the Florida Courts eFiling Portal, which will send notice of filing and a service copy of the foregoing to the following: **David W. Foley, Jr.** and **Jennifer T. Foley**, david@pocketprogram.org, jtfoley60@hotmail.com; and **William C. Turner, Esq.**, **Elaine Marquardt Asad, Esq.**, and **Jeffrey J. Newton, Esq.**, williamchip.turner@ocfl.net, Judith.catt@ocfl.net, elaine.asad@ocfl.net, gail.stanford@ocfl.net; on this **8th** day of May, 2019.

/s Derek J. Angell
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IN THE NINTH JUDICIAL CIRCUIT COURT,
IN AND FOR ORANGE COUNTY, FLORIDA

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

Plaintiffs,

v. CASE NUMBER: 2016-CA-007634-O

ORANGE COUNTY, PHIL SMITH, CAROL HOSSFIELD, MITCH GORDON, ROCCO RELVINI, TARA GOULD, TIM BOLDIG, FRANK DETOMA, ASIMA AZAM, RODERICK LOVE, SCOTT RICHMAN, JOE ROBERTS, MARCUS ROBINSON, RICHARD CROTTY, TERESA JACOBS, FRED BRUMMER, MILDRED FERNANDEZ, LINDA STEWART, BILL SEGAL, and TIFFANY RUSSELL,

Defendant.
_____/

NOTICE OF HEARING

PLEASE TAKE NOTICE that Defendants, ORANGE COUNTY (the "County") Officials named in their individual and official capacities serving on the Board of Zoning Adjustment ("BZA") or Board of County Commissioners ("BCC"), ASIMA AZAM, FRED BRUMMER, RICHARD CROTTY, FRANK DETOMA, MILDRED FERNANDEZ, TERESA JACOBS, RODERICK LOVE, SCOTT RICHMAN, JOE ROBERTS, MARCUS ROBINSON, TIFFANY RUSSELL, BILL SEGAL, and LINDA STEWART (together, the "Officials"), by and through its undersigned counsel, will bring on for hearing **Plaintiffs' Amended Motion to Tax Appellate Costs** and **Plaintiffs' Motion for Relief from Judgement (sic) and for Other Relief** before The Honorable Patricia L. Strowbridge, 425 N. Orange Ave. Hearing Room 20B, Orlando, FL, on **May 28, 2019 at 11:30 a.m.**

The time estimated for this hearing is 15 minutes.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that a lawyer in my firm with full authority to resolve this matter had a substantive conversation in person or by telephone with opposing counsel in a good faith effort to resolve this motion before the motion was noticed for hearing but the parties were unable to reach an agreement.

Derek J. Angell, Esquire

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by Electronic Mail via the Florida E-Portal System to David W. Foley, Jr. and Jennifer T. Foley, david@pocketprogram.org, jtfoley60@hotmail.com; William C. Turner, Esquire, Elaine Marquardt Asad, Esquire and Jeffrey J. Newton, Esquire, williamchip.turner@ocfl.net, judith.catt@ocfl.net, elaine.asad@ocfl.net, gail.stanford@ocfl.net; Lamar D. Oxford, Esquire, loxford@drml-law.com, katietillotson@drml-law.com; and Eric J. Netcher, Esquire, ENetcher@drml-law.com; RhondaC@drml-law.com on this 9th day of May, 2019.

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

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

Plaintiffs,

v. CASE NUMBER: 2016-CA-007634-O

ORANGE COUNTY, PHIL SMITH, CAROL HOSSFIELD, MITCH GORDON, ROCCO RELVINI, TARA GOULD, TIM BOLDIG, FRANK DETOMA, ASIMA AZAM, RODERICK LOVE, SCOTT RICHMAN, JOE ROBERTS, MARCUS ROBINSON, RICHARD CROTTY, TERESA JACOBS, FRED BRUMMER, MILDRED FERNANDEZ, LINDA STEWART, BILL SEGAL, and TIFFANY RUSSELL,

Defendant.
_____/

NOTICE OF HEARING
(Confirmation # 466018)

PLEASE TAKE NOTICE that Defendants, ORANGE COUNTY (the "County") Officials named in their individual and official capacities serving on the Board of Zoning Adjustment ("BZA") or Board of County Commissioners ("BCC"), ASIMA AZAM, FRED BRUMMER, RICHARD CROTTY, FRANK DETOMA, MILDRED FERNANDEZ, TERESA JACOBS, RODERICK LOVE, SCOTT RICHMAN, JOE ROBERTS, MARCUS ROBINSON, TIFFANY RUSSELL, BILL SEGAL, and LINDA STEWART (together, the "Officials"), by and through its undersigned counsel, will bring on for hearing **The Official Defendants' Amended Motion to Dismiss with Prejudice** and **The Employee Defendants' Motion to Strike the Amended Complaint, Request for Judicial Notice, and Motion to Dismiss this Action with Prejudice** before The Honorable Patricia L. Strowbridge, 425 N. Orange Ave. Hearing Room 20B, Orlando, FL, on **May 28, 2019 at 2:15 p.m.**

The time estimated for this hearing is 1 hour.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that a lawyer in my firm with full authority to resolve this matter had a substantive conversation in person or by telephone with opposing counsel in a good faith effort to resolve this motion before the motion was noticed for hearing but the parties were unable to reach an agreement.

Derek J. Angell, Esquire

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by Electronic Mail via the Florida E-Portal System to David W. Foley, Jr. and Jennifer T. Foley, david@pocketprogram.org, jtfoley60@hotmail.com; William C. Turner, Esquire, Elaine Marquardt Asad, Esquire and Jeffrey J. Newton, Esquire, williamchip.turner@ocfl.net, judith.catt@ocfl.net, elaine.asad@ocfl.net, gail.stanford@ocfl.net; Lamar D. Oxford, Esquire, loxford@drml-law.com, katietillotson@drml-law.com; and Eric J. Netcher, Esquire, ENetcher@drml-law.com; RhondaC@drml-law.com on this 9th day of May, 2019.

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

———♦———

Case No.: 2016-CA-007634-O

———♦———

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

Plaintiffs,

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,

Defendants.

———♦———

Judge Patricia L. Strowbridge

———♦———

PLAINTIFFS' RESPONSE to

"The Employee Defendants' Motion to Strike the Amended Complaint, Request for Judicial Notice, and Motion to Dismiss This Action With Prejudice"
and
"The Official Defendants' Amended Motion to Dismiss with Prejudice"

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BACKGROUND

The Foleys began raising toucans at their home in 2000, and began advertising and selling the birds' offspring in 2002 [Amended Complaint (AC) ¶¶32, 33]. At that time there was no Orange County ordinance prohibiting the Foleys from doing so as an *accessory use* or within the limits of a *home occupation* [AC ¶41]. Nor was there any reason for the Foleys to believe that defendants would otherwise attempt to prohibit them from doing so; Art. IV, §9, Fla.Const., removes the subject matter of captive exotic birds from local regulatory jurisdiction [AC ¶28].

Nevertheless, February 23, 2007, a private citizen reported to Orange County that the Foleys were "raising birds to sell," and that report initiated a code enforcement investigation [AC ¶40(a)]. The investigation produced evidence of what defendants believed to be two separate code violations: *1)* an "accessory structure" (i.e., *aviary*) without a building permit; and, *2)* "raising birds to sell" [AC ¶40(b),(c)].

Defendants used the two violations as a blacksmith uses Hammer and Anvil. The Hammer: Defendants prosecuted the building permit violation pursuant Ch. 11, OCC before the Orange County Code Enforcement Board (CEB) [AC ¶40(c)1], and the CEB ordered the Foleys to secure a building permit or destroy the "accessory structure" on or before June 18, 2007 [*Id*.]. The Anvil: When the Foleys

sought the required permit, defendants denied the permit (without notice, opportunity to correct, or hearing) "because, per the citizen complaint, the "structure" was an *aviary* and/or used for *aviculture*" (i.e., raising birds to sell) [AC ¶40(c)2]. The Hammer came down on the Anvil and defendants forced the destruction of the *aviary* by delaying issuance of the permit until November 30, 2007 [AC ¶40(d)], well after the June 18th compliance due date of the CEB order [AC ¶40(c)]. After destroying the *aviary* defendants destroyed the Foleys' bird business by requiring the exaction "Pet birds only – No Commercial Activities Permitted" on the face of the permit to rebuild the *aviary* [AC ¶40(d)]. In sum, defendants neglected and violated their ministerial and imperative duty to prosecute the original citizen complaint pursuant Ch. 11, OCC, as they had the building permit violation [AC ¶47], and instead, without authority [AC ¶43], used the CEB order and the building permit denial as a Hammer and Anvil to prosecute the Foleys for "raising birds to sell" [AC ¶40], an alleged violation of the code in conflict with Art. IV, §9, Fla.Const.

The Foleys were required to pay $1030.00 [AC ¶56(b)], to exhaust the only administrative review available to correct this Hammer and Anvil proceeding. This review was a prerequisite to any state court remedy. The review concluded February 19, 2008, with a final order of the Orange County Board of County Commissioners (BCC) that broadly prohibited *aviculture*, or "raising birds to sell,"

as a *primary use*, *accessory use* and as *home occupation* in "the R-1A … zone district" throughout Orange County [AC ¶40(e)].

There was no extraordinary writ that could arrest, nor any state court review that could correct, the administrative practice and proceeding described above. [AC ¶52]. State court review of the Hammer – the CEB proceeding – could not reach "raising birds to sell" because defendants didn't prosecute it there.[1] State court review of the Anvil – the zoning division proceeding – couldn't reach "raising birds to sell" because of the state judicial policy – followed by the Ninth Circuit in the Foleys' case[2] – which refuses to rule on the constitutional validity of county administrative action because "The executive branch has the duty, and must be given the opportunity, to correct its own errors in drafting a facially unconstitutional rule."[3] In other words, Defendants not only usurped FWC's jurisdiction, but deliberately shielded that decision from direct, State court review

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1 *Foleys v. Orange County*, CV AI 07-37 (Fla.9thCir. September 24, 2009); *Foleys v. Orange County*, 5009-4021 (Fla. 5th DCA, October 8, 2010):

> "The structures at issue are several large bird cages used by Appellants to raise and maintain exotic birds."

2 *Foleys v. Orange County*, 08-CA-5227-0 (Fla.9thCir., October 21, 2009); *Foleys v. Orange County*, SD09-4195 (5th DCA, October 8, 2010):

> "Petitioners' assertion that sections of the Orange County Code are unconstitutional is one that can only be made in a separate legal action, not on certiorari. See *Miami-Dade County v. Omnipoint Holdings, Inc.*, 863 So.2d 195 (Fla.2003)."

3 *Key Haven Assoc. Enter. v. Bd. of Trustees of Internal Imp. Trust Fund*, 427 So.2d 153,158 (Fla.1982).

by using this *ultra vires* Hammer and Anvil procedure to destroy the Foleys' bird business.

INTRODUCTION: Defendants have not met their burden.

Immunity is not the Court's default position; it is not granted simply because defendants are public servants. The burden of justifying immunity, or any affirmative defense, is on the defendants.[4] And on a motion to dismiss defendants must show the facts alleged make the defense clearly applicable.[5,6,7] In this case the facts alleged do the opposite. Each allegation in the Foleys' amended complaint asserts an exception to, or removes a predicate of, the defenses the *officials* and

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[4] "The burden of justifying [immunity] rests on the official asserting the claim." *Harlow v. Fitzgerald*, 457 US 800, 812 (1982), *also Junior v. Reed*, 693 So.2d 586, 589 (1st DCA 1997), *citing Butz v. Economou*, 438 US 478 (1978), *and Nixon v. Fitzgerald*, 457 US 731 (1982).

[5] Fla.R.Civ.P. 1.110(d). …Affirmative defenses appearing on the face of a prior pleading may be asserted as grounds for a motion or defense under rule 1.140(b); provided this shall not limit amendments under rule 1.190 even if such ground is sustained.

[6] Affirmative defenses may only be urged on a motion to dismiss in "exceptional cases in which the facts giving application to the defense are clearly apparent on the face of the complaint." *Fariello v. Gavin*, 873 So.2d 1243, 1245 (5th DCA 2004).

[7] Affirmative defenses "cannot properly be raised by a motion to dismiss unless the complaint affirmatively and clearly shows the conclusive applicability of such defense to bar the action. Rule 1.110(d), Florida Rules of Civil Procedure." *Jackson v. BellSouth Telecommunications*, 372 F.3d 1250, 1277 (11th Cir. 2004); also *Evans v. Parker*, 440 So.2d 640, 641 (1st DCA 1983).

employees now assert. The true test of their defenses is in their answer to the amended complaint. The amended complaint is well-pled.

The *officials'* and the *employees'* motions to dismiss make no reference to any of the numbered paragraphs in the Foleys' amended complaint. Each of these paragraphs is pled to remove any defense in absolute immunity, qualified/sovereign immunity per §768.28, Fla.Stat., or failure to state a claim. Consequently, every argument made by the defendants is a *material fallacy*[8] – it is not properly rooted in the allegations of the complaint. Compounding this error, defendants hurl a blitz of other fallacies – *dicto simpliciter* (generalization), *ad hominem* (attack the man), *ad populum* (appeal to bias), *ad nomine* (naming explains all), *ad nauseum* (attack by repetition) – and repeatedly "boil down"[9] the "pro se"[10] Foleys' "frivolous"[11] and "vexatious"[12] allegations into a complaint about how the *officials* "voted"[13] and how the *employees* were "doing their job,"[14] as though saying this *over and over* makes it so. It does not. And the circular reasoning of simply saying the *officials* "were acting within their charge and

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[8] *material fallacy*: a reasoning that is unsound because of an error concerning the subject matter of an argument. *See* https://www.merriam-webster.com/dictionary/material_fallacy.

[9] Officials' Amended Motion to Dismiss (OMtD) p.5.

[10] Employees' Motion to Dismiss (EMtD) p.2.

[11] OMtD pp.2,4,8,8,8,8,8. EMtD pp.4,5,8,8,9,9,10,10.

[12] OMtD p.9. EMtD p.10.

[13] OMtD pp.4,5,7,9.

[14] EMtD pp.4,10.

duties"[15] and the *employees* "were doing their jobs,"[16] without reference to the code's definition of their "charge and duties" or their "job," only begs the question – Does the County code's definition of the *officials'* "charge and duties" and the *employees'* "job" indict the defendants as the Foleys' specific allegations claim? If it does, denying immunity opens no flood-gate of litigation "every time a government agency repossesses property, enforces building codes, or even enforces a parking ticket."[17] If the County code indicts the defendants as the Foleys allege, these will be *the last county officials and employees to make their mistake*.

It would be proper to deny the *officials'* and the *employees'* motions to dismiss solely for failure to carry their burden. Defendants fail to show that any affirmative defense is "clearly apparent on the face of the complaint," and ignore every allegation specifically drawn to undercut the predicates of the defenses asserted. The Court cannot grant immunity on defendants' bald claim that they acted "in the interest of the public good," when "the public good," is constitutionally defined by Art. IV, §9, Fla.Const., and unequivocally precludes defendants' interference with the Foleys' bird business [AC ¶¶44,28], and when "the public good," is otherwise defined by Ch. 11, OCC, which required defendants to prosecute the alleged violation "raising birds to sell" before the Code

[15] OMtD p.6.
[16] EMtD pp.4,10.
[17] OMtD p.7.

Enforcement Board (or in county Court), and granted the Foleys a right to full appellate review.

IMMUNITY

QUESTION PRESENTED: Did the individual defendants forfeit absolute "Separation of Powers" immunity – whether nominated "executive," "legislative," or "quasi-judicial" – and immunity per §768.28 Fla.Stat., when they: *1) Usurped the executive and regulatory authority of the Florida Fish and Wildlife Conservation Commission; 2) Ignored their ministerial duty to prosecute the Foleys for "raising birds to sell" pursuant the procedures prescribed by the Orange County Code; 3) Ignored their imperative duty to provide the Foleys the pre-deprivation protections of those procedures; 4) Prosecuted the allegation that the Foleys were "raising birds to sell" in an unauthorized Hammer and Anvil proceeding, and imposed penalties not provided by law; and, 5) Without authority to do so in either an enforcement or permitting proceeding, effectively amended the Code during their prosecution of the Foleys, and legislated a new prohibited use, namely a prohibition of "aviculture" as a primary use, an accessory use, and as a home occupation in R-1A zoned districts throughout Orange County?*

SOVEREIGN'S INTEREST: "Act for he who acts for you."

The first recorded and successful case against a public servant was ultimately heard, upon the ninth petition of Khunanup, a peasant of the Wadi Natrun, by his Majesty the Dual King Nebkaure, roughly 4,100 years ago. It is recounted in a poem pieced together from bits of papyrus found in various tombs of ancient Egypt. Khunanup sought to recover his donkey and the trade goods that were loaded upon it when they were confiscated by Nemtinakht, a liegeman of a

steward of the Dual King. In his ninth petition Khunanup presents the scale upon which the Dual King's decision must be weighed, "Act for he who acts for you."[18]

The decision to grant or deny immunity to a public servant is not a decision between the parties; it is a decision to do what is in the best interests of the sovereign. And the sovereign has always recognized that when it is the peasant who advances the sovereign's best interests, and it is the servant who betrays them, the servant must repay the peasant all, and more.

SOVEREIGN'S INTEREST IN APPELLATE REVIEW: Immunity has never extended beyond what could be corrected on appellate review.

Though there are many maxims restating its importance,[19] judicial immunity was unknown before the advent of appellate review.[20,21] In his thesis on the history

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[18] The Tale of Sinuhe and other Ancient Egyptian Poems 1940-1640BC, translated by R.B. Parkinson; Ch. 2 The Tale of the Eloquent Peasant, p.74.

[19] Judges are "to make an account to G-d and King only." [W. Holdsworth, A History of English Law 237 (1924), quoting *Floyd v. Barker,* 12 Co. Rep. 23, 24 (1608)].

"Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine, in Bradley v. Fisher, 13 Wall. 335 (1872)." [*Pierson v. Ray*, 386 US 547, 554-555 (1967)]

"The public are deeply interested in this rule [of judicial immunity], which, indeed, exists for their benefit." [*Fray v. Blackburn* (1863), per 3 Best & Smith, 576, *quoted by*: *Bradley v. Fisher*, 80 US 335, 349 (1872); *Yaselli v. Goff*, 12 F.2d 396, 399-400 (2nd Cir. 1926); *United States v. Chaplin*, 54 F. Supp. 926, 928 (S.D. Cal. 1944); *Olepa v. Mapletoff*, 141 N.W.2d 350, 2 Mich. App. 734, 738 (Ct. App. 1966); *State v. Winne*, 91 A.2d 65, 21 N.J. Super. 180, 210

of immunity, J.R. Block explains that until the eleventh century a judge (or doomsman) was personally liable for "false judgment." Block further explains that this liability to the collateral attack of "forsaking the doom" by physical combat was replaced with appellate review for one reason – to permit "authoritative declaration of law by the central government."

> *A. The English Origins of the Doctrine: Judicial Immunity and the Development of Appellate Procedures.*
>
> Disappointed suitors will exert pressure upon any legal system to provide relief for the mistakes of its judges. The relief provided, however, will not necessarily take the form of appellate proceedings as we know them today. In early English law, the now familiar proceedings in error by appeal from one court to a higher court were completely unknown. A litigant challenged the correctness of a

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(Super. Ct. Law Div. 1952);[19] Ray v. Judicial Corrections Services, Inc., No. 2: 12-CV-02819-RDP, †13 (N.D. Ala. Oct. 9, 2014)].

"This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence, and without fear of consequences." [Scott v. Stansfield, 3 Law Reports Exchequer 220, at 223 (1868), *quoted by*: Bradley v. Fisher, 80 US 335, †11 (1872); Spalding v. Vilas, 161 US 483, 495 (1896); Pierson v. Ray, 386 US 547, 554 (1967); Imbler v. Pachtman, 424 US 409, †12 (1976); Nixon v. Fitzgerald, 457 US 731, 745 (1982); Pulliam v. Allen, 466 US 522, 532 (1984)].

"[I]t has been thought in the end better to leave undressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation." [Imbler v. Pachtman, 424 US 409, 427, 430 (1976) (quoting Judge Learned Hand in Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir.1949)).][19]

[20] J. Randolph Block, "Stump v. Sparkman and the History of Judicial Immunity," 1980 Duke Law Journal 879-925, 881 (1980).

[21] Prof. Block's treatise is cited by Justice O'Connor in Forrester v. White, 484 US 219, 225 (1988), by federal courts in the 1st, 3rd, 5th, 6th, 9th, 10th, and 11th Circuits, and the high courts of Washington and Alaska.

> decision by an accusation against those who decided the case; for instance, a complaint against the verdict of a jury took the form of a charge of perjury under the procedure of attaint. Under Anglo-Saxon law of the tenth and eleventh centuries, a judgment (doom) could be impeached by charging the official proposing the judgment (the doomsman) with falsehood. This proceeding, known as "forsaking the doom," developed into the complaint of "false judgment," whereby a dissatisfied litigant obtained a writ commanding the challenged court to cause a record of its proceedings to be made and brought before the court of the litigant's superior lord. The complainant could accept the court's record and thus confine the issues to errors of law. But this record could be challenged by anyone willing to engage in physical combat with the champions of the challenged court. If the challenge succeeded, the lower court's judgment was annulled and the court was amerced.
>
> These challenges to the record were costly and lengthy. Moreover, the fact that the challenged court – rather than the successful party to the original action – had to defend against the action of false judgment meant that such actions could be, and often were, brought to intimidate a judge.[13][omitted] Gradually, false judgment proceedings were transformed: combat was avoided (usually by agreement of the parties), and both parties were heard on review,[14][omitted] but the burdensome attacks on the record were still possible.
>
> Other features of the system of correcting errors by false judgment were also unsatisfactory to the central government. False judgments in the local courts were redressed in the court of the lord immediately superior to the original court, and the appeal proceeded upwards through the ranks of the feudal courts.[15][omitted] This meant that the king's courts received no amercements from lower courts and could redress errors only after long delays, if at all. [This] system of false judgment did not permit *an authoritative declaration of law by the central government*. [*Emphasis* added.]

Block's history of "*Judicial Immunity and the Development of Appellate Procedures*" provides the scale upon which the court must weigh defendants' claim to immunity. Block's history teaches that immunity cannot extend beyond

what can be remedied on direct, state-court review.[22] If, as the Foleys allege, they were injured because defendants stepped aside from the duty assigned to them by the County Code and denied the Foleys full appellate review, then defendants have also betrayed the sovereign's interest in an "authoritative declaration of law by the central government" and forfeit immunity.

ORDER OF BATTLE: The Court must decide the source of the Foleys' right to keep and sell birds, the adequacy of the County's enforcement procedures, and whether defendants ignored or violated those procedures.

If Orange County is the source of the Foleys' right to keep and sell birds, if the Foleys were required to request that right from the County before exercising it, then the Foleys injury is self-inflicted and they are liable for all they have lost, regardless the procedure defendants used to destroy their *aviary* and backyard bird business. However, if as four-term Attorney General, Bob "Tobacco Buster" Butterworth said in *Op. Att'y Gen. Fla*. 2002-23, "[The] County 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 nonindigenous exotic birds," then the County's liability for the Foleys' injury is weighed against the procedures it enacted to challenge the Foleys' exercise of that

[22] This conclusion of legal scholarship is not questioned by the courts. *See* †32, p.15, for a list of state cases adopting the Supreme Court's intuitive declaration in *Cleavinger* that "correctability of error on appeal" is an essential consideration in evaluating any defense in quasi-judicial immunity.

contested right, while the defendants' liability – and immunity – is weighed against their decision to ignore those procedures. Put succinctly, if the sovereign's procedures were good but were not followed, then the defendants must answer.

In this case the questions of immunity and liability are closely intertwined. To separate and to answer them the Court must determine the following: *1)* the source of the Foleys' right to possess, breed, and sell nonindigenous exotic birds; *2)* the adequacy of the procedures Orange County enacted to challenge the exercise of a contested right; and, *3)* whether the *employees* and *officials* ignored or violated those procedures. This can be done within the analytical framework below.

ANALYTICAL FRAMEWORK FOR QUASI-JUDICIAL IMMUNITY

On a motion to dismiss there are four questions the Court asks in analyzing a defense in quasi-judicial immunity. The first is the preliminary question essential to any analysis of a motion to dismiss – *What do the Foleys allege defendants did to injure them?*[23] After the Court identifies the action that the Foleys allege injured them, it asks a second question – *Was that action quasi-judicial?*[24] If it wasn't, the

[23] "A motion to dismiss is designed to test the legal sufficiency of the complaint, not to determine factual issues, and the allegations of the complaint must be taken as true and all reasonable inferences therefrom construed in favor of the nonmoving party." *The Florida Bar v. Greene*, 926 So.2d 1195 (Fla.2006).

[24] "In *Stump v. Sparkman*, 435 US 349, 359, (1978), the Court … articulated a sequential two-part test … The first part seeks to discover whether the conduct of the judge is a 'judicial act.'" *Kalmanson v. Lockett*, 848 So.2d 374, 378 (5th DCA 2003).

inquiry ends; immunity is denied.[25] But even if the action that injured the Foleys was quasi-judicial, the Court must ask a third question – *Was that quasi-judicial action authorized?*[26] In other words, the Court cannot assume that quasi-judicial action is authorized; the Court must establish the action's authority in law. If it cannot, immunity is denied.[27] Even then, even if the Court establishes the authority of a quasi-judicial action, it asks the most critical question – *Did that authorized quasi-judicial action provide the Foleys with adequate safeguards from erroneous injury?* This final question goes to the Court's fundamental concern for its primary function – providing due process, a fair fight. This final question recognizes that even though judicial immunity is extended to quasi-judicial acts,[28] the safeguards

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[25] "[A] judge is not immune from liability for nonjudicial actions, i.e., actions not taken in the judge's judicial capacity. Forrester v. White, 484 US [219, 227-229 (1988)]; Stump v. Sparkman, 435 US [349, 360 (1978)]." Mireles v. Waco, 502 US 9, 11-12 (1991), cited in Kalmanson v. Lockett, 848 So.2d 374, 379-80 (5th DCA 2003).

[26] "In Stump v. Sparkman, 435 US 349, 359, (1978), the Court … articulated a sequential two-part test … [T]he second part asks whether the judge acted in the clear absence of all jurisdiction. Kalmanson v. Lockett, 848 So.2d 374, 378 (5th DCA 2003).

[27] "[A] judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction. [Stump v. Sparkman], at 356-357; Bradley v. Fisher, 13 Wall. [335, 351 (1872)]." Mireles v. Waco, 502 US 9, 11-12 (1991), cited in Kalmanson v. Lockett, 848 So.2d 374, 379-80 (5th DCA 2003).

[28] "[T]he Court has extended absolute immunity to certain others who perform functions closely associated with the judicial process." Cleavinger v. Saxner, 474 US 193, 200 (1985).

"[T]he Florida Supreme Court has held that the doctrine of judicial immunity embraces persons who exercise a judicial or quasi-judicial function."

provided by a Court of law are not uniformly available, nor always functionally equivalent, in an action before an administrative decision maker. This "function" test is well-established in Florida,[29] well-enumerated by the High Court,[30,31] and

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Department of Hwy. Safety v. Marks, 898 So.2d 1063 (5th DCA 2005), quoting *Office of the State Attorney v. Parrotino*, 628 So.2d 1097, 1099 (Fla.1993)].

[29] "Absolute quasi-judicial immunity for nonjudicial officials is determined by a functional analysis of their actions in relation to the judicial process." *Zoba v. City of Coral Springs*, (4th DCA 2016), citing *Fuller v. Truncale*, 50 So.3d 25, 28 (1st DCA 2010) which cited *Office of the State Attorney v. Parrotino*, 628 So.2d 1097, 1099 (Fla.1993).

"Immunity, as stated in *Forrester v. White*, 484 US 219, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988) 'is justified and defined by the functions it protects and serves, not by the person to whom it attaches.' *Id*. at 227, 108 S.Ct. at 544 (emphasis added)." *Andrews v. Florida Parole Com'n*, 768 So.2d 1263 (1st DCA 2000), rev. dismissed, 791 So.2d 1093 (Fla.2001).

"[W]e determine the absolute quasi-judicial immunity of a nonjudicial official through a functional analysis of the action taken by the official in relation to the judicial process." *Roland v. Phillips*, 19 F.3d 552, 555 (11th Circ. 1994).

[30] *Cleavinger v. Saxner*, 474 US 193, 201-202 (1985), identified the following factors characteristic of the judicial function as important considerations before extending absolute immunity to a quasi-judicial function:

> "(a) the need to assure that the individual can perform his functions without harassment or intimidation; (b) the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct; (c) insulation from political influence; (d) the importance of precedent; (e) the adversary nature of the process; and (f) the correctability of error on appeal."

[31] *Butz v. Economou,* 438 US 478 (1978), first identified these functional factors, and did so as follows:

> "The insulation of the judge from political influence, the importance of precedent in resolving controversies, the adversarial nature of the process, and the collectability of error on appeal are just a few of the many checks on malicious action by judges."

well-accepted by the high courts of the several states.[32,33] In this final "function" inquiry the Court asks – *Did the procedure defendants used to prosecute the Foleys for "raising birds to sell" deny the Foleys adequate appellate review?*

Question #1: What do the Foleys allege defendants did to injure them?

The Foleys allege defendants injured them in at least five ways; *1)* in the absence of any county ordinance prohibiting the Foleys from "raising birds to sell" as an *accessory use* or *home occupation,* defendants usurped the executive and the regulatory authority granted exclusively to FWC by Art. IV, §9, Fla.Const., and *sua sponte* ordered the Foleys to stop selling birds (AC *passim*); *2)* defendants neglected a ministerial duty to prosecute the Foleys for "raising birds to sell" pursuant the procedures of Ch. 11, OCC, [AC ¶¶40(a),47]; *3)* defendants neglected

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[32] The *Cleavinger* test was expressly used in the Supreme and Appellate Courts of Arkansas, Colorado, Connecticut, Illinois, and Texas: *John v. Faitek*, 2019 Ark. App. 215 (Ark. App. Ct. 2019); *Blevins v. Hudson*, 489 S.W.3d 165, (Ark. 2016); *Gross v. Rell*, 40 A.3d 240, (Conn. 2012); *Vlastelica v. Brend*, 2011 I.L. App (1st) 102587 (Ill. App. Ct. 2011); *Churchill v. Univ. of Colorado at Boulder*, 293 P.3d 16 (Colo. App. 2010); *Williams v. Houston Firemen's Relief*, 121 S.W.3d 415 (Tex. App. 2003); *Robinson v. Langdon*, 970 S.W.2d 292 (Ark. 1998).

[33] The original formulation of the *Butz* test of quasi-judicial function was expressly used in the Supreme and Appellate Courts of California, Colorado, New Jersey, North Dakota, Washington: *FTR International, Inc. v. Bd. of Trustees of Los Angeles Community College DCA*, No. B242220 (Cal. Ct. App. 2015); *Riemers v. O'Halloran*, 678 N.W.2d 547 (N.D. 2004); *Hoffler v. Colorado Dept. of Corrections*, 27 P.3d 371 (Colo. 2001); *Gilliam v. Dept. of Social and Health Servs.*, 950 P.2d 20 (Wash. Ct. App. 1998); *Babcock v. State*, 768 P.2d 481 (Wash. 1989); *Delbridge v. Schaeffer*, 569 A.2d 872 (N.J Super. Ct. Law Div. 1989); *Overman v. Klein*, 654 P.2d 888, 103 Idaho 795 (1982).

an imperative duty to provide the Foleys with a meaningful pre-deprivation remedy [AC ¶40(a) and ¶¶42-47] by denying them (legislative and executive) notice of their alleged violation [AC ¶41 and ¶40(a),(b),(c)2], an opportunity to correct the alleged violation [AC ¶40(a),(b),(c)], a pre-deprivation hearing on the alleged violation [*Id.*], and full appellate review of the alleged violation [AC ¶52]; *4)* defendants prosecuted the Foleys for "raising birds to sell" through an unauthorized hybrid of code enforcement and permitting procedures [AC ¶¶40, 42-47], that effectively imposed, as administrative penalties[34] not provided by law,[35] the destruction of their *aviary* [AC ¶40(c)], the destruction of their bird business by demanding the exaction "Pet Birds Only – No Commercial Activity" as a pre-condition to a permit to rebuild the *aviary* [AC ¶40(d)], and fees for administrative

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[34] *penalty*. 1. Punishment imposed on a wrongdoer. *Black's Law Dictionary*, p. 1153, (7th ed. 1999).

punishment, n. A sanction – such as a fine, penalty, confinement, or loss of property, right, or privilege – assessed against a person who has violated the law. *Black's Law Dictionary*, p. 1247, (7th ed. 1999).

"[I]f the concept of penalty means anything, it means punishment for an unlawful act or omission, and a punishment for an unlawful omission is what this exaction is." United States v. Reorganized CF&I Fabricators of Utah, Inc., 518 US 213 (1996).

"Webster's dictionary defines 'penalty' as '[a] punishment established by law or authority for a crime or offense.' Webster's II New College Dictionary 812 (1995)." IU, 207 P. 3d 678 (Ariz. 1st Div., Dept. C 2008)

[35] Art. I, §18, Fla.Const.: Administrative penalties. No administrative agency, except the Department of Military Affairs in an appropriately convened court-martial action as provided by law, shall impose a sentence of imprisonment, nor shall it impose any other penalty except as provided by law.

review of this enforcement proceeding [AC ¶56(b)]; and, *5)* without authority to do so in an enforcement or permitting proceeding, defendants effectively amended the Code during their prosecution of the Foleys, and legislated a new prohibited use, namely a prohibition of *aviculture* as a *primary use*, an *accessory use*, and as a *home occupation* in R-1A zoned districts throughout Orange County [AC ¶¶41 and 40(e)].

Question #2: Was that action quasi-judicial? No.

No. Usurping the constitutionally ordained regulatory subject matter jurisdiction of FWC is not quasi-judicial; it is an assault on the separation of powers, an assault on the very basis of absolute "separation of powers" immunity.[36] Neglecting or violating a ministerial duty[37] to prosecute as prescribed by law is not quasi-judicial; it is executive misfeasance[38] or malfeasance[39] for

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[36] "[A]s recognized by the doctrine of separation of powers, some governmental decisions should be at least presumptively insulated from judicial review." Owen v. Independence, 445 US 622, 667 (1980).

[37] "The Florida Supreme Court has defined a ministerial duty as 'a duty that has been positively imposed by law, and its performance required at a time and in a manner, or upon conditions which are specifically designated; the duty to perform under the conditions specified not being dependent upon the officer's judgment or discretion.'" Arena Development v. Broward County, 708 So.2d 976, 979 (4th DCA 1998), quoting First National Bank v. Filer, 107 Fla. 526, 534 (1933).

[38] *misfeasance*, n. 1. A lawful act performed in a wrongful manner. 2. More broadly, a transgression or trespass. *Black's Law Dictionary*, p. 1015, (7th ed. 1999).

which the defendants are liable.[40] Neglecting or violating an imperative duty[41] to provide the fundamental safeguards of due process[42] [AC ¶¶27, 77] is not quasi-judicial; it is executive misfeasance or malfeasance, a common law[43] and

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[39] *malfeasance*, n. A wrongful or unlawful act; esp., wrongdoing or misconduct by a public official. *Black's Law Dictionary*, p. 968, (7th ed. 1999).

[40] "[W]here the law imposes upon a public officer the performance of ministerial duties in which a private individual has a special and direct interest, the officer will become liable to such individual for any injury which he may proximately sustain in consequence of the failure or neglect of the officer either to perform the duty at all, or to perform it properly. In such case the officer is liable as well for nonfeasance as for misfeasance or malfeasance." *First National Bank v. Filer*, 107 Fla. 526, 534 (1933), quoted by *Huhn v. Dixie Ins. Co.*, 453 So.2d 70 (5th DCA 1984).

"[T]he king can do no wrong but his ministers may." Hugh Douglas Price and J. Allen Smith, Municipal Tort Liability: A Continuing Enigma, 6 U.FLA.L.REV. 330, 334 (1953) (quoting *Ballard v. Tampa*, 168 So. 654, 657 (1936)). Also quoted in: *Hargrove v. Town of Cocoa Beach*, 96 So.2d 130, 132 (Fla.1957); *Nobles v. City of Jacksonville*, 316 So.2d 565 (1st DCA 1975); *Everton v. Willard*, 468 So.2d 936, 954 (Fla.1985).

[41] "[T]he fundamental law of the state is *imperative* and unceasing and applies as *imperatively* when properly invoked against a zoning ordinance as it does against an act of the legislature." *City of Miami Beach v. Lachman*, 71 So.2d 148, 150 (Fla.1953), citing *Marbury v. Madison*, 5 US 137 (1803). [*Emphasis* added].

[42] Art. I, §9, Fla.Const. Due process. No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against oneself.

[43] "Whenever there is a wrong there is a remedy. And the general test to determine whether there is a liability in an action of tort, is the question whether the defendant has by act or omission disregarded his duty. This applies to public officers who may become liable on common law principles to individuals who sustain special damages from the negligent or wrongful failure to perform imperative or ministerial duties. Dillon on Municipal Corporations (5th Ed.), Vol. 1, page 762; 22 R. G. S. par. 160-162, pages 483-484)." *First National Bank v. Filer*, 107 Fla. 526, 532 (1933).

constitutional tort.[44,45] Imposing unauthorized executive penalties in an unauthorized executive proceeding with no adequate appellate review – to be the final judge of one's own case[46] – this is not quasi-judicial *virtute officii*; it is

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[44] Where "the legislature has, for whatever reason, failed to act to remedy a gap in the common law that results in injustice, it is the imperative duty of the court to repair that injustice and reform the law." *Alvis v. Ribar*, 421 NE 2d 886 (Ill.1981), *Smith v. Eli Lilly & Co.*, 560 N.E.2d 324, 137 (Ill.1990), *Charles v. Seigfried*, 651 N.E.2d 154 (Ill.1995), *Board of Trustees of Community College District No. 508 v. Lybrand*, 803 N.E.2d 460 (Ill.2003).

[45] Restatement (Second) of Torts §874A *Tort Liability for Violation of Legislative Provision* (1979): 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.

[46] "No one ought to be a judge in his own cause." *Dr. Bonham's* Case, 8 Co. Rep. 114a, 77 Eng. Rep. 646 (C.P. 1610).

"[N]o man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity." *Caperton v. A.T. Massey Coal Co.*, 556 US 868, 876 (2009) (quoting The Federalist No. 10, at 59 (J. Madison) (J. Cooke ed. 1961).

"There can be no doubt that when any party, including a Governor, is involved in a direct dispute and at the same time maintains the power to act as final arbiter of the dispute … [the] process is subverted. *See In re Murchison*, 349 US 133,136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process.")." *Assn. of Firefighters v. State*, 257 So.3d 364, 365-366 (Fla.2018).

"This Court has said, however, that "every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." Tumey v. Ohio, 273 U. S. 510, 532." *In re Murchison*, 349 US 133 (1955).

"[N]o man can be judge in his own case, however exalted his station, however righteous his motives, and irrespective of his race, color, politics, or religion.

executive malfeasance *colore officii*, and violates not only Art. I, §18, Fla.Const., but also the foundation of *natural law – nemo judex in propria causa* (none should judge their own case). Amending the County code under the guise of an enforcement/permitting action is not quasi-judicial; it's *ultra vires* legislative action *colore officii* and void.[47]

This Court cannot hold that the petitioners were constitutionally free to ignore all the procedures of the law and carry their battle to the streets. One may sympathize with the petitioners' impatient commitment to their cause. But respect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom." Rubin v. State, 490 So.2d 1001 (3rd DCA 1986), quoting Walker v. City of Birmingham, 388 US 307, 320-321 (1967).

[47] "Our review of the cases on the subject reflects that … [where] the court concluded the [permitting] action taken by the board or commission constituted the exercise of legislative authority… the administrative agency's action was struck down … Cases representative of [this] category are Josephson v. Autrey, 96 So.2d 784 (Fla.1957), wherein the board was held to be without authority to allow construction of a filling station in an area zoned restrictively for motels and tourist accommodations; Mayflower Property, Inc. v. City of Fort Lauderdale, 137 So.2d 849 (2nd DCA 1962), wherein the board was not permitted to allow petitioner to build hotels, motels, or apartments on property zoned Residential because this indulgence would be tantamount to placing the property affected in an entirely different zone; Clarke v. DiDio, 226 So.2d 23 (2d DCA 1969), wherein the board was held powerless to grant a permit allowing construction of two apartment buildings in an area zoned for single family dwellings." Clarke v. Morgan, 327 So.2d 769, 771,772 (Fla.1975).

"To endow such a board with the authority to amend the zoning ordinance in particular instances by authorizing a use of property prohibited by the ordinance itself would be to convey to the appeals board the authority to enact legislation, nullify the decision of the municipal legislative body, and in effect destroy the beneficent results to be obtained by comprehensive zoning." Josephson v. Autrey, 96 So.2d 784 (Fla.1957).

None of defendants' actions that the Foleys allege injured them are quasi-judicial. The Court can deny immunity without proceeding further.

Question #3: If the action was quasi-judicial, was it authorized? No.

The Foleys, of course, argue they do not attack quasi-judicial action; they attack administrative, ministerial, and pseudo-legislative acts. Consequently, there is no need to answer this question. However, assuming *arguendo* the Court finds that one or more of the actions attacked is quasi-judicial, the Foleys present argument regarding defendants' authority.

No; defendants' regulation of "raising birds to sell" was not authorized because it was beyond County authority per Art.IV,§9,Fla.Const.

The outer bounds of immunity are the jurisdictional limits of the institution served [*Kalmanson v. Lockett*, 848 So.2d 374, 380-81 (5th DCA 2003), granting immunity to judicial acts outside judge's jurisdiction but within the court's]. In this case, the outer bounds of defendants' immunity are the jurisdictional limits of the County's regulatory authority. As previously stated, those limits were defined concisely by Florida's Attorney General in *Op. Att'y Gen. Fla*. 2002-23 – "[The] County is prohibited … from enjoining the possession, breeding or sale of

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In *Josephson v. Autrey* "[t]he Court held that the Board did not have the power to effectuate a *pro tanto* amendment of the basic zoning ordinance by authorizing such a [prohibited] use." *Mayflower Property, Inc. v. City of Fort Lauderdale*, 137 So.2d 849 (2nd DCA 1962).

nonindigenous exotic birds." As comprehensively, the jurisdictional limits of the County's regulatory authority were defined by Judge Roy B. "Skip" Dalton, Jr., in Foley v. Orange County, No. 6:12-cv-269-Orl-37KRS (M.D. Fla. August 13, 2013) [footnotes 9-12 are bracketed inline].

> 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 effect of the transfer of that portion of the state's legislative power was to divest the state legislature of authority to regulate the possession and sale of captive wildlife, *Beck v. Game and Fresh Water Fish Commission,* 33 So.2d 594, 595 (Fla.1948), and vest that power in the commission, *State ex rel. Griffin v. Sullivan,* 30 So.2d 919, 920 (Fla.1947).[9] [As the Florida Attorney General concluded shortly after the adoption of the Constitution of 1968, the commission has "replaced the legislature as the representative of the people." *Op. Att'y Gen. Fla*. 72-41 (1972). "The commission's decisions are the law" when its regulations concern "wild animal life and fresh water aquatic life" in Florida. *Id.*] The commission therefore assumed the regulatory authority that the legislature had prior to the transfer. *Caribbean Conservation,* 838 So.2d at 497. As such, the rules adopted by the commission are tantamount to legislative acts, *Airboat Ass'n of Florida, Inc.,* 498 So.2d at 630, and become the governing law of the state, *Griffin,* 30 So.2d at 920. 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. Those ordinances specifically seek to prohibit the use of Plaintiffs' residence for "commercial aviculture, aviaries" and the "breeding, keeping, and raising of exotic animals." Ch. 38, Art. IV, §38-78, OCC; *Id.* Art. VI, §38-304, OCC.[10] [Moreover, in its papers, Orange County admits that its ordinances specifically prohibit Plaintiffs from keeping, breeding, and raising exotic animals at their residence in addition to commercial aviculture. (Doc. 287, pp. 2-3.)] Those land uses specifically target activities that fall within the

exclusive authority of the commission,[11] [Thus, the case of *City of Miramar v. Bain,* 429 So.2d 40, (4th DCA 1983), is inapposite because the ordinances in that case did not specifically seek to regulate the possession of captive wildlife.] whose rules on the topic are the governing law of the state. Orange County's prohibitions against land uses such as "commercial aviculture, aviaries" and "breeding, keeping, and raising of exotic animals" are in direct conflict with the commission's rules, which impose an obligation on the breeders of exotic birds to maintain a commercial enterprise. For this reason, Orange County's ordinances, to the extent that they regulate captive wildlife, and more specifically commercial aviculture, are inconsistent with general law and are therefore void. [12] [Indeed, Florida's Attorney General came to the same conclusion when he was asked to opine whether a non-charter county could enjoin "the possession, breeding or sale of non-indigenous exotic birds" using the county's land use ordinances. *Op. Att'y Gen. Fla.* 2002-23 (2002). Tellingly, Orange County has made no attempt in any of the papers filed in this case to distinguish its ordinances from those analyzed in the Attorney General's opinion, nor has Orange County attempted to explain why this Court should not be persuaded by the Attorney General's interpretation of Florida law. An opinion's arguments need not be compulsory in order to be compelling. While all too common, this ostrich-like tactic is generally not considered persuasive advocacy. *See, e.g., Gonzalez-Servin v. Ford Motor Co.,* 662 F.3d 931, 934 (7th Cir. 2011) (noting that the "ostrich is a noble animal, but not a proper model for an . . . advocate.").] *See, e.g., Grant,* 935 So.2d at 523 (holding a charter county in Florida may only "enact county ordinances not inconsistent with general law").

Even if the Court were to accept Orange County's characterization of its ordinances as generally applicable—which it does not because the ordinances are not crafted in that way—Orange County still could not enforce its ordinances banning commercial aviculture against Plaintiffs. *See Whitehead,* 223 So.2d at 330-31. In *Whitehead,* 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.*
>
> For these reasons, the Court concludes that Plaintiffs are entitled to summary judgment on their state law declaratory judgment claims that Orange County's ordinances are void.

In sum, Art. IV, §9, Fla.Const., removes the subject matter of captive exotic birds from the County's regulatory subject matter jurisdiction. That means the defendants' decision to regulate the Foleys' possession and sale of Collared aracari is not shielded by the outer bounds of the County's regulatory authority. Defendants stepped beyond that authority and must find their shield, if at all, elsewhere.

No; defendants' actions were not authorized by an ordinance regulating "raising birds to sell" at the Foleys' home because there was no such ordinance.

If there were an ordinance, even an invalid ordinance, prohibiting "raising birds to sell," or *aviculture* as an *accessory use* or as a *home occupation*, the outer bounds of defendants' immunity would extend to its enforcement. But there wasn't one. Despite defendants many unsubstantiated claims to the contrary,[48] as the Foleys allege at AC ¶41, "there was no ordinance, or published order or rule that:

[48] OMtD, p.2: "[T]he County instituted code enforcement proceedings on the grounds that the toucan farming activity violated local ordinances governing aviculture." *Id.* p.7: "[T]he Officials voted to uphold the zoning manager's determination that the Foleys' toucan farm violated an ordinance." EMtD, p2: "[T]he BZA concluded that the Foleys were in violation of the ordinance."

(a) expressly prohibited *aviaries* as an *accessory structure*, or *aviculture* as an *accessory use* or *home occupation* at the FOLEYS' Solandra homestead; or *(b)* put the FOLEYS on notice of such prohibitions."

Consequently, the defendants' decision to destroy the Foleys' *aviary* and bird business is not shielded by any claim that they were enforcing an ordinance regulating "*aviaries* as an *accessory structure*, or *aviculture* as an *accessory use* or *home occupation*." There was no such ordinance. Defendants must find their shield, if at all, elsewhere.

No; defendants were not authorized to ignore or violate their ministerial duty to prosecute the alleged violation "raising birds to sell" pursuant Chapter 11.

Immunity is forfeit for violation or neglect of a ministerial duty.[49]

Absent institutional and ordained authority to regulate "raising birds to sell," defendants must find the outer bounds of their immunity in the procedures they used to prosecute the alleged violation of "raising birds to sell." And there was a quasi-judicial procedure that *could have* provided them that immunity, and it would have done so by ensuring the Foleys had all the requisites of due process, including full appellate review. But defendants didn't use it.

Chapter 162, of Florida's Statutes, the "Local Government Code Enforcement Boards Act," was adopted by Orange County in 1965, and is found in

[49] *See* †40, p.18.

the Orange County Code at Ch. 11, OCC. Since 1965, Ch. 162, Fla.Stat., and Ch. 11, OCC, have been tested and occasionally corrected by the court so as to provide all the requisites of due process – including the full appellate review[50] that was absent on certiorari of the final order of the BCC in the Foleys' case.[51] In other words, the defendants at all times had at their disposal an enforcement procedure that would have effectively immunized any decision that they made – no matter how wild or wooly – because that procedure would have allowed the Foleys to

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[50] "An aggrieved party, including the board of county commissioners, may appeal a final administrative order of the code enforcement board or special magistrate to the circuit court. Such an appeal shall not be a hearing de novo, but shall be limited to appellate review of the record created before the code enforcement board or special magistrate. An appeal shall be foiled within thirty (30) days of the execution of the order to be appealed." Ch. 11, Art. II, §11-40, OCC.

Cf, §162.11, Fla.Stat.: "Appeals.—An aggrieved party, including the local governing body, may appeal a final administrative order of an enforcement board to the circuit court. Such an appeal shall not be a hearing de novo but shall be limited to appellate review of the record created before the enforcement board. An appeal shall be filed within 30 days of the execution of the order to be appealed."

[51] Cases holding that constitutional questions cannot be raised on certiorari review of a decision of a Board of County Commissioners: *Foleys v. Orange County*, 08-CA-5227-0 (Fla.9th Cir. 2009); *Nannie Lee's Strawberry Mansion, Etc. v. City of Melbourne*, 877 So.2d 793 (5th DCA 2004); *Wilson v. County of Orange*, 881 So.2d 625 (5th DCA 2004), citing *Key Haven Assoc. Enter. 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. City of Clearwater,* 594 So.2d 779 (2nd DCA 1992); *Town of 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).

challenge those decisions on full appellate review. But defendants didn't use it. They went their own way. They stepped aside from the procedure that would have immunized them – without discretion to do so.

Below, relying on basic rules of statutory construction, the Foleys argue that defendants' duty to prosecute them pursuant Ch. 11, OCC, was ministerial. That argument is essentially as follows: *1)* Ch. 11, OCC, gives "code inspectors" a ministerial duty to prosecute code violations pursuant the procedures of Ch. 11; and, *2)* Ch. 11, labels all defendants "code inspectors." This construction is made *imperative* by Art. I, §18, Fla.Const., which prohibits any penal administrative enforcement not authorized by law.

Chapter 11, Art. II, §11-34(a), OCC,[52] states: "It *shall* be the duty of the code enforcement officer/inspector to initiate enforcement proceedings of the various codes and ordinances." [*Emphasis* added.] "Although there is no fixed construction of the word 'shall,' it is normally meant to be mandatory in nature. *Neal v. Bryant,*149 So.2d 529 (Fla.1962). Its interpretation depends upon the context in which it is found and upon the intent of the legislature as expressed in the statute. *White v. Means,* 280 So.2d 20 (1st DCA 1973)." [*SR v. State*, 346 So.2d 1018, 1019 (Fla.1977)]. "The word 'shall' shall be construed as being mandatory,"

[52] *Cf.* §162.06(1), Fla.Stat., Enforcement Procedure. It shall be the duty of the code inspector to initiate enforcement proceedings of the various codes; however, no member of a board shall have the power to initiate such enforcement proceedings.

Ch. 1, §1-2, OCC. Giving the word "shall" the imperative meaning §1-2, requires, §11-34(a), clearly assigns to the code enforcement officer/inspector the duty to initiate enforcement action.

Chapter 11, Art. II, §11-34(b), OCC,[53] explains how an enforcement action must proceed: "[I]f a violation of the codes or ordinances is found, the code enforcement officer/inspector *shall* notify the violator and give him a reasonable time to correct the violation. Should the violation continue past the time specified for correction, the code enforcement officer/inspector *shall* notify the code enforcement board or special magistrate and request a hearing." [*Emphasis* added.] The imperative "shall" is again used to bind the "code inspector" to a specific course of action if a violation is found and administratively prosecuted.

Chapter 11, Art. II, §11-28, OCC,[54] states: "*Code inspector* shall mean any authorized agent or employee of the county whose duty it is to assure code compliance." [Emphasis added.] All the defendants are either agents or employees of the county. All have a duty to assure code compliance, as detailed below. And

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[53] *Cf.* §162.06(2), Fla.Stat., … [I]f a violation of the codes is found, the code inspector shall notify the violator and give him or her a reasonable time to correct the violation. Should the violation continue beyond the time specified for correction, the code inspector shall notify an enforcement board and request a hearing. [Emphasis added.]

[54] *Cf.* §162.04(2), Fla.Stat., "Code inspector" means any authorized agent or employee of the county or municipality whose duty it is to assure code compliance.

all are authorized. Certainly, to the extent they are duty-bound, all are authorized to execute their duty. All the defendants are "code inspectors."

There is no limiting language in §11-28, or elsewhere in the code, that would restrict application of the label "code inspector" to select agents or select employees specifically "appointed by," or "designated by," a county board, or department head. This alone suggests there is no legislative intent to preclude the broad application of "code inspector" urged here. This broad application is further supported by evidence that the County knows how to precisely legislate a restrictive nomination. For example, Ch. 11, Art. III, §11-63, OCC, states: "The board of county commissioners, hereinafter referred to as the 'board,' is hereby authorized to *designate*, by resolution, *certain* employees or agents as 'code enforcement officers.' Code enforcement officers so *designated* shall have the powers and limitations as prescribed herein and by statute." [*Emphasis* added.] Here the County has distinguished "code enforcement officers" as "certain" agents or employees so "designated" by the BCC. "Code enforcement inspectors," on the other hand, per §11-28, are "any" agent or employee "whose duty it is to assure code compliance."

Without question, defendant Code Enforcement Officer/Inspector Phil Smith is a "code inspector."

Defendant zoning manager/director[55] Mitch Gordon and the defendants Hossfield, Relvini, and Boldig, employed by his office, the zoning department, are – per Ch. 30, Art. II, §30-41, OCC[56] – county employees "whose duty it is to assure code compliance." Indeed, §30-41(b),[57] a code provision originally adopted pursuant the Laws of Florida, Ch. 63-1717, tracks the language later used in Ch. 11, Art. II, §11-34(b), OCC, setting out the procedures a "code inspector" is to follow when a violation is found. The zoning manager/director and the employees of the zoning department have always been "code inspectors" with the duty "to assure code compliance."

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[55] "[W]herever in this Code, particularly in chapters 38, 30 and 31.5, the terms 'manager of the zoning, division,' 'manager of the zoning department,' and 'zoning director' are referenced, those terms shall be deemed to be the term 'zoning manager.'" Ch. 30, Art. II, §30-34(i), OCC.

[56] "An administrative official, to be known as the zoning director and employed by the board of county commissioners, shall administer and enforce the zoning ordinance and rules and regulations adopted under the authority of this article. The office of the zoning director shall be known as the zoning department." Ch. 30, Art. II, §30-41, OCC.

[57] "If the zoning director shall find that any of the provisions of the zoning ordinance and rules and regulations adopted under this article are being violated, he shall notify in writing the person responsible for such violations, indicating the nature of the violation and ordering the action necessary to correct it. He shall order discontinuance of illegal use of land, buildings, or structures; removal of illegal buildings or structures or of additions, alterations, or structural changes thereto; discontinuance of illegal work being done; or shall take any other action authorized by the zoning ordinance or this article to insure compliance with or to prevent violation of its provisions." Ch. 30, Art. II, §30-41(b), OCC.

Defendant members of the Board of Zoning Adjustment (BZA)[58] – per Ch. 30, Art. II, §30-43(4), OCC[59] – have all the powers and duties of the zoning manager/director, and consequently are agents of the county "whose duty it is to assure code compliance."

Defendant Assistant Orange County Attorney Tara Gould in her capacity as legal adviser to the BZA, and to the extent it was her duty to advise the BZA as to their own duty, was also a county employee "whose duty it is to assure code compliance."

Defendant members of the Board of County Commissioners (BCC)[60] – per Ch. 30, Art. II, §30-45(d), OCC[61] – have all the powers of the BZA, and like the BZA are agents of the county "whose duty it is to assure code compliance."

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[58] BZA: Asima Azam, Frank Detoma, Roderick Love, Scott Richman, Joe Roberts, and Marcus Robinson.

[59] "*Decisions of the board of zoning adjustment.* In exercising the above-mentioned powers, the board of zoning adjustment may, so long as such action is in conformity with the terms of the zoning regulations, reverse or affirm, wholly or partly, or may modify the order, requirement, decision, or determination as ought to be made, and to that end shall have powers of the planning and/or zoning director(s) from whom the appeal is taken." Ch. 30, Art. II, §30-43(4), OCC.

[60] BCC: Fred Brummer, Richard Crotty, Mildred Fernandez, Teresa Jacobs, Tiffany Russell, Bill Segal, and Linda Stewart.

[61] "The board of county commissioners shall conduct a trial de novo hearing upon the appeal taken from the ruling of the planning and zoning commission or board of zoning adjustment and hear the testimony of witnesses and other evidence offered by the aggrieved person and interested parties to the appeal and may in conformity with this article and the zoning regulations, rules and

While Ch. 11, Art. II, §11-33(b), OCC, states, "Nothing contained in this article shall prohibit the board of county commissioners from enforcing such codes and ordinances by any other means," this caveat cannot be read to make the enforcement procedures of Ch. 11, OCC, discretionary in any retrospective,[62] administrative enforcement of the code. This is because, as stated by Attorney General Butterworth in *Op. Att'y Gen. Fla.* AGO 2001-77, by reference to *Broward County v. Plantation Imports, Inc.*, 419 So. 2d 1145, 1148 (4th DCA 1982):

> "[T]he provisions of Article V, section 1, and Article I, section 18, Florida Constitution, … provide that while commissions established by law or administrative officers or bodies may be granted quasi-judicial power in matters connected with the functions of their offices, no administrative agency shall impose a sentence of imprisonment, nor shall it impose any other penalty except as provided by law."

So, whether or not all the defendants can be branded "code inspectors," absent the authority to impose a penalty of their own making, the only penal, retrospective, administrative enforcement of County ordinances that the County, its agents, or its

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regulations adopted thereunder, reverse, or affirm, wholly or partly, or may modify the order, requirement, decision or determination of the board of zoning adjustment or recommendation of the planning and zoning commission." Ch. 30, Art. II, §30-45(d), OCC.

[62] retroactive, adj. (Of a statute, ruling, etc.) extending in scope or effect to matters that have occurred in the past. - Also termed retrospective. Cf. PROSPECTIVE. Black's Law Dictionary, p.1318, (7th Ed. 1999). [Emphasis added.]

employees, may pursue is that prescribed by Ch. 11, OCC. They were prohibited by Art. I, §18, Fla.Const., from doing otherwise.

The supplemental actions in circuit court to "enjoin and restrain" that are available to the zoning director/manager, the BCC, or "any aggrieved person," pursuant Ch.30, Art.II, §30-49(b), OCC, or Ch.38, Art.II, §38-29, OCC, are supplemental. They are *state court* substitutes or alternatives to administrative enforcement. But within the context of any *administrative enforcement* the duties and procedures prescribed by Ch. 11, OCC, remain mandatory, ministerial.

In sum, all defendants are "code inspectors" and all had the duty alleged in AC ¶47. That duty was ministerial. And, as alleged, defendants neglected or violated that duty. They have no defense in immunity.

No; defendants were not authorized to ignore or violate their imperative duty to provide the procedural safeguards of Chapter 11.

Defendants not only had a ministerial duty to provide the safeguards of Ch. 11, OCC, they also had an *imperative* duty to do so. The due process clause[63] of Florida's *fundamental* law[64] makes that duty *imperative.*[65]

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[63] "No person shall be deprived of life, liberty or property without due process of law…." Art. I, §9, Fla.Const.

[64] "[T]he state constitution … is the organic and *fundamental* law of the State," *Hawkes v. Locke*, 559 So.2d 1202 (5th DCA 1990).

[65] "[T]he duty … to maintain the constitution as the *fundamental* law of the state is *imperative* and unceasing," *City of Miami Beach v. Lachman*, 71 So.2d 148, 150 (Fla.1953), and *North Fla. Women's Health Services v. State*, 866 So.2d

The Foleys' complaint, and this response to defendants' motions to dismiss, clearly alleges and argues that defendants violated or neglected that duty. The absence in Florida of a compensatory constitutional tort (other than *takings*),[66] does not make the constitution meaningless. The *imperative* constitutional duties it creates in due process can be used as the scale upon which immunity is weighed. Indeed, it is the Court's duty[67] to deny immunity per the constitution's standards[68] if that is the only way to give the Foleys access to the other remedies they seek.[69]

No; defendants were not authorized to prosecute the alleged violation "raising birds to sell" pursuant a hybrid enforcement/permitting process that imposed penalties not provided by law and had no adequate judicial review.

The hybrid enforcement/permitting, Hammer and Anvil, "practice and proceeding," described at AC ¶40 [*also herein* p.1], used to prosecute the Foleys for "raising birds to sell," violates the most fundamental principle of natural justice – *nemo judex in propria causa* (none should judge their own case). If any case is on all proverbial fours, it is the one every student of law knows – Dr. Bonham's

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612 (Fla.2003), quoting Marbury v. Madison, 5 US 137 (1803). [*Emphasis* added].

66 *Fernez v. Calabrese*, 760 So.2d 1144 (5th DCA 2000), found no state constitutional tort.

67 *See* †44, p.19.

68 *See* †45, p.19.

69 *Tucker v. Resha*, 648 So.2d 1187 (Fla.1994), found no reason for a constitutional tort where defendant had otherwise acted "beyond the scope of his employment" and there was a common law remedy.

Case.[70] The court in *Bonham* improperly assumed jurisdiction to force Bonham to pay certain fees into the court treasury and to destroy his medical practice. That's precisely what happened here. Rather than prosecute the Foleys before the code enforcement board for "raising birds to sell" – which would have cost the Foleys nothing yet would have provided the Foleys full appellate review – the defendants used their hybrid Hammer and Anvil proceeding to destroy the Foleys' *aviaries* and bird business, without notice [AC ¶41] or hearing [AC ¶40(c)(2)], and then required the Foleys to pay fees of $1000+ [AC ¶56(b)] into the BZA and BCC treasury for an administrative appeal that denied state court review of their improper assumption of jurisdiction. With no higher court to review their improper assumption of jurisdiction, they judged their own authority to do so – and they charged the Foleys to boot! *Bonham Redux! Colore oficii,* not *virtute officii* [*See* †84, p.43.]

No; defendants were not authorized to issue, or to assist in common design with the issuance of, a final administrative order in the Foleys' case that effectively legislated a new prohibited "home occupation."

As alleged at AC ¶¶39 and 40, all the defendants took part in moving the prosecution of the Foleys toward the final order of the BCC, and as alleged at AC §40(e), the final order of the BCC February 19, 2008, was broadly worded to apply

[70] "No one ought to be a judge in his own cause." *Dr. Bonham's Case*, 8 Co. Rep. 114a, 77 Eng. Rep. 646 (C.P. 1610). *See also* †46, p.19.

to the entire "R-1A … zone district." Though it was clearly intended to be a retrospective adjudication[71] of the Foleys' right to do what they had been doing for seven years – "raising birds to sell" – it was in the end the very definition of legislation.[72] Defendants procedurally bred executive and quasi-judicial action to conceive an illegitimate quasi-legislative rule. And, as stated herein at †47, p.20, the act of legislating in such a proceeding is not authorized. And it is void.

Question #4: If the action was quasi-judicial, and if it was authorized, did the Foleys have adequate safeguards from erroneous injury? No.

The Foleys, of course, argue they do not attack authorized quasi-judicial action. Consequently, there is no need to answer this question. Again, however, assuming *arguendo* that the Court finds one or more of the actions attacked is an authorized quasi-judicial action, the Foleys present argument regarding the absence of adequate safeguards.

No; there was no adequate notice in the form of a published prohibition of "raising birds to sell" as an accessory use or home occupation.

The Foleys allege at AC ¶41, there was no ordinance that prohibited "raising birds to sell" as an *accessory use* or *home occupation*. Defendants claim there was,

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[71] "A judicial or quasi-judicial act determines the rules of law applicable, and the rights affected by them, in relation to past transactions." West Flagler Amusement Co. v. State Racing Commission, 122 Fla. 222, 225 (Fla. 1935).

[72] "[L]egislative action results in the formulation of a general rule of policy." Bd. of Cty. Comm 'rs of Brevard Cty. v. Snyder, 627 So.2d 469, 474 (Fla.1993).

but do not identify it.[73] So, until defendants identify an ordinance prohibiting "raising birds to sell" as an *accessory use* or *home occupation*, the Foleys' allegation must be accepted as true – there wasn't one. The Foleys were never provided notice in the form of a published ordinance, regulation, or rule that "raising birds to sell" was prohibited as an *accessory use* or *home occupation*.

The Foleys were not provided this procedural safeguard. Per Cleavinger [*herein* †30, p.14], its absence weighs against granting immunity.

No; executive notice at the moment of deprivation is not adequate.

Defendants denied the Foleys a permit for their existing *aviary* "because, per the citizen complaint, the 'structure' was an *aviary* and/or used for *aviculture*" (i.e., raising birds to sell) [AC ¶40(c)2]. Absent notice by ordinance, this was the Foleys' *first* notice that "raising birds to sell" was a violation of defendants' interpretation of *accessory use* and *home occupation.* And it was delivered to justify – without hearing – the immediate penalty of permit denial.

Typically, a permit applicant self-reports a violation by submitting plans that fail to meet the requirements. The permit is then denied. Here, the alleged violation was not self-reported. It was found [*see* †53, p.28] by the defendants prior to any enforcement action and reported by the defendants to the Foleys only after the Foleys were ordered to acquire the permit [AC ¶40]. Under these conditions the

[73] †48, p.24

permit denial departs entirely from the normal prospective permitting process and becomes a penal retrospective enforcement of the code without notice, without hearing, and without authority in Chs. 11 or 30, OCC., in violation of Art. I, §18, Fla.Const.

The inadequacy of such an *ex officio* procedure should be obvious. It violates the ministerial and imperative duties assigned the defendants by Ch. 11, OCC, and Art.I, §9, Fla.Const. Per Cleavinger [*herein* †30, p.14], the denial of these procedural safeguards weighs heavily against granting immunity.

No; state court intervention in defendants' Hammer and Anvil proceeding was not possible.

As a rule, unless futile, an extraordinary writ will not interrupt administrative proceedings.[74] Any court would have required the Foleys to give the defendants an opportunity to reach a final interpretation of *accessory use* or *home occupation* consistent with Art.IV,§9,Fla.Const., before intervening to enforce the defendants' constitutional duty to do so. No court would have assumed that exhaustion of the administrative proceeding would be futile.

[74] De Carlo v. West Miami, 49 So.2d 596 (Fla.1950), applying rule to injunction; Menendez v. Hialeah, 143 So.3d 1136 (Fla.3rdDCA 2014), applying De Carlo to declaration; Vanderbilt Shores Condo. v. Collier County, 891 So.2d 583 (4th DCA 2004), applying De Carlo to mandamus.

Too, as a rule, unless there is no "adequate legal remedy," an extraordinary writ will not interrupt an administrative proceeding.[75] So, even if at that time a court were convinced defendants had or were preparing to injure the Foleys, it would not assume defendants' torts had no remedy in damages.

Per Cleavinger [*herein* †30, p.14], the absence of a remedy in the extraordinary writs weighs against granting immunity.

No; state court review of defendants' Hammer and Anvil proceeding was not adequate.

State court review of the Hammer – the CEB proceeding – could have reached the facial and as-applied validity[76] of defendants' regulation of "raising birds to sell," IF defendants had prosecuted that alleged violation before the CEB. BUT they did not.[77] The issue of "raising birds to sell" was never put before the CEB as it could and should have been. So, in their appeal of the CEB proceeding

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[75] *Shevin ex rel. State v. Pub. Serv. Com.*, 333 S.2d 9, 12 (Fla. 1976), applying rule to mandamus; *English v. McCrary*, 348 S.2d 293, 296–297 (Fla. 1977), applying rule to prohibition.

[76] "[C]onstitutional claims such as those [facial and as-applied] raised by the petitioners herein are properly cognizable on an appeal to the circuit court from a final order of an enforcement board taken pursuant to Section 162.11, Florida Statutes (1989), see *Key Haven Assoc. Enters. v. Board of Trustees of the Internal Improvement Trust Fund,* 427 So.2d 153, 156-58 (Fla. 1982)." *Holiday Isle Resort & Marina Associates v. Monroe County*, 582 So.2d 721,722 (3rd DCA 1991). *See also Wilson v. County of Orange*, 881 So.2d 625,632 (5th DCA 2004) citing *Holiday Isle Resort*.

[77] *See* †1, p.3.

the Foleys could not claim that defendants' regulation of "raising birds to sell," was in conflict with Art. IV, §9, Fla.Const.

State court review of the Anvil – the zoning division proceeding – could not reach the facial and as-applied validity of defendants' regulation of "raising birds to sell," because of the state judicial policy[78,79,80] – followed by the Ninth Circuit in the Foleys' case[81] – which in deference to the separation of powers provides the executive branch plenty of rope to hang itself:

> The executive branch has the duty, and must be given the opportunity, to correct its own errors in drafting a facially unconstitutional rule. As

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78 "[Q]uasi-judicial boards cannot make decisions based on anything but the local criteria enacted to govern their actions." *Miami-Dade County v. Omnipoint Holdings, Inc.*, 863 So.2d 375, 377 (3rd DCA 2003).

79 "Appellee also argues that Pick Kwik's 'unconstitutional as applied' argument had already been determined by the court when it denied Pick Kwik's petition for cetiorari. However, this is not true. Certiorari review may only properly consider procedural due process afforded. See *Hirt v. Polk Bd. of County Comm'rs*, 518 So.2d 415 (2nd DCA 1991). The substantive due process argument presented here must be determined in a declaratory action." *Nostimo, Inc. v. City Clearwater*, 594 So.2d 779, 782 (2nd DCA 1992).

80 "The circuit court [correctly] held that constitutional challenges to a zoning ordinance must be raised in an original declaratory judgment action or other equitable proceeding in circuit court, not in a certiorari petition in a reviewing court. See, e.g., *First Baptist Church of Perrine v. Miami-Dade County*, 768 So.2d 1114, 1115 n.l (3rd DCA 2000), rev. den., 790 So.2d 1103 (Fla. 2001); *Nostimo, Inc. v. City of Clearwater*, 594 So.2d 779, 782 (2nd DCA 1992) (holding review of denial of zoning variance was properly brought as a declaratory judgment action in circuit court rather than by certiorari, where action was challenging not only the application of a zoning code section but also its very validity or constitutionality)." *Nannie Lee's Strawberry Mansion, Etc. v. City of Melbourne*, 877 So.2d 793, 794 (5th DCA 2004).

81 *See* †2, p.3.

> a matter of policy, therefore, a circuit court should refrain from interfering in the administrative process since a remedy for a facially unconstitutional rule can be fashioned within that process.[82]

The court should meditate on these words for a moment or two – they are the reason this case is here. They give the executive great freedom. But they also give the executive a crushing responsibility – the executive has the *duty* to make constitutional rules, and to remedy unconstitutional ones. It is always their duty to determine the constitutionality of their own actions. From Key Haven through *Omnipoint* the court has been telling defendants essentially, "Don't count on us to fix your constitutional blunders on certiorari. Do it yourself." But defendants behaved as though the court had been saying, "You can get away with your constitutional blunders on certiorari. Try it!"

When a prospective permit proceeding is re-tasked for penal, retrospective enforcement and used, as it was in this case, to force the destruction of the Foleys' *aviary,* and to exact the abandonment of their bird business as a condition precedent to a building permit, certiorari review in state court is entirely inadequate to challenge, stay, or recover the loss.

Per *Cleavinger* [*herein* †30, p.14], the inadequacy of the state court's review of defendants' Hammer and Anvil practice and proceedings weighs against granting immunity.

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[82] *Key Haven Assoc. Enter. v. Bd. of Trustees of Internal Imp. Trust Fund*, 427 So.2d 153,158 (Fla.1982).

IMMUNITY per §768.28(9), Fla.Stat.

QUESTION PRESENTED: Do the Foleys specific allegations support the general allegation that the officials and the employees acted outside the scope of their employment or function, in bad faith, with legal malice, and in wanton and willful disregard of property? Yes.

Yes; the Foleys make specific allegations that effectively assert the defendants usurped the authority of FWC, and the court – acts which are beyond defendants' "scope of employment."

McGhee v. Volusia County, 679 So.2d 729, 733 (Fla.1996), makes clear that §768.28(9)(a), Fla.Stat. (1989),[83] did not "change the traditional law defining 'scope of employment.'" By reference to *Swenson v. Cahoon*, 111 Fla. 789, 792-793 (Fla.1933), *McGhee at 731*, simplifies the line between tortious conduct *within* and tortious conduct *not within* the scope of employment or function – the former is an *abuse of power* and the later is a *usurpation of power*:

> To abuse power is to use it in an extravagant manner, to employ it contrary to the law of its use, or to use it improperly and to excess.
>
> The usurpation of power has reference to the unlawful assumption, or seizure and exercise of power not vested in one, or where one *interrupts* another in the exercise of a right belonging to him. [*Emphasis* added.]

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[83] §768.28(9)(a), Fla.Stat. "No officer, employee, or agent of the state or of any of its subdivisions shall be held personally liable in tort or named as a party defendant in any action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of her or his employment or function, unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property."

McGhee, further holds that §768.28,Fla.Stat., makes the "master" liable for any *abuse of power* the "servant" possessed *virtute officii*, or "by virtue of office," but makes the "servant" liable for any *usurpation of power* the "master" did not possess but which the "servant" asserts *colore officii*, or "by color of office" [*See also* *Malone v. Howell* [84]].

In this case, the Foleys' amended complaint aligned its allegations with *Swenson*'s distinction between *abuse* and *usurpation* of power. The Foleys allege the *officials* and *employees* had no authority to *"interrupt"* their right to possess and sell toucans, but nevertheless, in concert, did so [AC ¶¶28, 41, 44, 45, 48, 49, 69, 70, 72 *in toto*, 74 *in toto*,] – the *officials* and *employees* usurped the power Art. IV, §9, Fla.Const., grants only FWC. In adddition, the Foleys' allege that the *officials* and *employees* did *"interrupt"* their right to possess and sell toucans deliberately by means of a procedure that did also *"interrupt"* the Foleys' right to direct or appellate judicial review of their contested right [AC ¶¶40 *in toto*, 42, 43, 46, 47, 50, 51, 52] – the *officials* and *employees* usurped the power of the courts.

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[84] "The distinction is that acts are done *'virtute officii'* when they are within the authority of the officer, but done in an improper exercise of his authority or in abuse of the law, while acts are done *'colore officii'* where they are of such nature the office gives him no authority to do them." *Malone v. Howell*, 140 Fla. 693, 702, 192 So.224, 227 (Fla.1939).

Held Sheriff Howell had no liability *respondeat superior* for the actions of deputy who bushwacked the bootlegger Malone with no warrant or just cause *colore officii*.

These allegations remove the conclusive applicability of any affirmative defense in §768.28, Fla.Stat., from the face of the amended complaint.[85]

Yes; the Foleys make specific allegations that effectively assert the defendants acted with "malicious purpose," even if they acted within "the scope of their employment."

If they act "with malicious purpose," §768.28(9)(a), Fla.Stat., makes the *officials* and *employees* liable for the Foleys injuries – even if they where acting within the scope of their employment or function.

Maliciously "means wrongfully, intentionally, without legal justification or excuse, and with the knowledge that injury or damage will or may be caused to another person or the property of another person." *IN RE: STANDARD JURY INSTRUCTIONS*, 253 So. 3d 1024, 1027 (Fla.2018); *State v. Kettell*, 980 So. 2d 1061, 1063 (Fla.2008).

The Foleys at AC ¶72(a), clearly allege the *officials* and *employees* acted *without legal justification*, and at AC ¶72(b), that the *officials* and *employees* acted with *legal malice*.[86] The Foleys support the general allegations in ¶72 by reference to the more specific ultimate facts alleged at AC ¶¶28, 40(b), 42-49. The Foleys

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[85] *See* ††5, 6, 7, p.4.

[86] *implied malice*. Malice inferred from a person's conduct. - Also termed *constructive malice; legal malice; malice in law*. CF. *actual malice* (1). Black's Law Dictionary, p.969, (7th Ed. 1999).

explain below that allegations of *legal malice* are equivalent to allegations of *malicious purpose*.

Judge Farmer in Seese v. State, 955 So.2d 1145, 1149 (4th DCA 2007), defined *legal malice* by comparison to *actual malice*, as follows:

> In law the term malice and its adverbial form maliciously have two meanings: "legal malice" (also known as "malice in law"), and "actual malice" (also known as "malice in fact"). Reed v. State, 837 So.2d 366, 368 (Fla.2002). Legal malice means "wrongfully, intentionally, without legal justification or excuse," while actual malice means "ill will, hatred, spite, an evil intent."

Although Florida courts have found that *legal malice* satisfies the *malice* or *malicious purpose* prerequisite in §§784.048(4),[87] 827.03,[88] and 836.05,[89] Fla.Stat., no Florida appellate court has done so with respect to §768.28(9)(a), Fla.Stat. Nevertheless, because Florida courts clearly define *bad faith* in §768.28, as *actual malice*,[90] it would be impermissibly redundant and absurd[91] to construe "bad faith

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87 Seese v. State, 955 So.2d 1145 (4th DCA 2007).

88 Reed v. State, 837 So.2d 366, 368 (Fla.2002).

89 Alfonso v. State, 447 So.2d 1029 (Fla.1984).

90 "Bad faith has been equated with the actual malice standard." Ford v. Rowland, 562 So.2d 731, 734 (5th DCA 1990).

91 "Statutory interpretations that render statutory provisions superfluous 'are, and should be, disfavored.' Patagonia Corporation v. Board of Governors of the Federal Reserve System, 517 F.2d 803, 813 (9th Cir.1975). See also Smith v. Piezo Technology and Professional Administrators, 427 So.2d 182, 184 (Fla.1983) (courts must assume that statutory provisions are intended to have some useful purpose). Courts are not to presume that a given statute employs 'useless language.' Times Publishing Company v. Williams, 222 So.2d 470, 476 (2nd DCA 1969)." Johnson v. Feder, 485 So.2d 409, 411 (Fla.1986).

or with malicious purpose" to mean only *actual malice*, rather than both *actual* and *legal malice*; unless *malicious purpose* in §768.28, is superfluous it must mean *legal malice*. Consequently, the Foleys' specifically supported, general allegation that the *officials* and *employees* acted *without legal justification* and/or *legal malice* effectively removes the conclusive applicability of any affirmative defense in §768.28, Fla.Stat., from the face of the amended complaint, [92] and the *officials'* and the *employees'* motions to dismiss must be denied.

Furthermore, "[l]egal malice is presumed to exist if the plaintiff establishes that the process has been used for an improper purpose," Bothmann v. Harrington, 458 So.2d 1163, †7 (3rd DCA 1984). The usual case of abuse of process involves some form of extortion.[93] Extortion generally means obtaining something or compelling some act by unlawful oral, written, or actual threat.[94] This is what the

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92 *See:* ††5 – 7, p.4.

93 "[T]he usual case of abuse of process involves some form of extortion. Restatement (Second) of Torts §682 *Abuse of Process* comment b (1977)." Bothmann v. Harrington, 458 So.2d 1163, 1169 (3rd DCA 1984).

94 *extort* , vb. 1. To compel or coerce (a confession, etc.) by means that overcome one's power to resist. 2. To gain by wrongful methods; to obtain in an unlawful manner; to exact wrongfully by threat or intimidation. - extortive, adj. Black's Law Dictionary, p.605, (7th Ed. 1999).

extortion, n. 1. The offense committed by a public official who illegally obtains property under the color of office; esp., an official's collection of an unlawful fee. - Also termed common- law extortion. [Quote omitted.] 2. The act or practice of obtaining something or compelling some action by illegal means, as by force or coercion. - Also termed statutory extortion. - extortionate, adj. Black's Law Dictionary, p.605, (7th Ed. 1999).

Foleys allege at AC ¶71(b)(1) and (2). The Foleys' allegation of extortion describes what is defined in tort as *intentional harm to a property interest*.[95] And the tort of *intentional harm to a property interest* generally involves conduct that is not "justifiable under the circumstances," which is to say *legal malice*.[96] In this

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[95] Restatement (Second) of Torts §871 (1965). *Intentional Harm To A Property Interest*: One who intentionally deprives another of his legally protected property interest or causes injury to the interest is subject to liability to the other if his conduct is generally culpable and not justifiable under the circumstances.

Comment:

f.Duress. The rule stated in this Section applies when a person uses duress; the liabilities and remedies are the same as those when his conduct is fraudulent… [T]here is a tort under this Section when the duress results in an invasion of a possessory or proprietary interest.

Duress means a threat of unlawful conduct that is intended to prevent and does prevent another from exercising free will and judgment in his conduct. It is commonly committed by an oral or written threat but may be accomplished by acts. It may be by … threats of any unlawful conduct directed against the other … that in fact … deprives the other of a freedom of choice. (See Illustrations 4 and 5)

Illustrations:

4. A wrongfully seizes possession of B's chattel needed by B in his business and refuses to return it unless B transfers the title of certain land to C. In response to this coercion B transfers the land to C, who later sells the property to a bona fide purchaser. A is subject to liability to B for the value of the property so transferred.

5. A, who in fact has no claim against B, in bad faith threatens B, who is about to present a dramatic performance, that he will obtain an injunction against the performance unless B pays A $1,000. B makes the payment, since the performance has been advertised and a considerable sum has been spent on its preparation. A is subject to liability to B for the amount so paid him.

[96] "[L]egal malice merely requires proof of an intentional act performed without legal justification or excuse. Legal malice may be inferred from one's acts, and

way too, the Foleys' effectively allege "malicious purpose" and remove §768.28(9)(a), Fla.Stat., as an affirmative defense that may be urged on a motion to dismiss. The defendants must answer the amended complaint.

Yes; the Foleys make specific allegations that effectively assert the defendants acted with "bad faith," even if they acted within "the scope of employment."

If they act in "bad faith," §768.28(9)(a), Fla.Stat., makes the *officials* and *employees* liable for the Foleys' injuries – even if they where acting within the scope of their employment or function.

"[F]raudulent misrepresentation *per se* contains the element of bad faith," Parker v. State of Florida Bd. of Regents, 724 So.2d 163, 169 (1st DCA 1998), citing First Interstate Dev. Corp. v. Ablanedo, 511 So.2d 536, 539 (Fla.1987).

"A misrepresentation is fraudulent if the maker (a) knows or believes that the matter is not as he represents it to be, (b) does not have the confidence in the accuracy of his representation that he states or implies, or (c) knows that he does not have the basis for his representation that he states or implies." Restatement (Second) of Torts §526 *Conditions Under Which Misrepresentation Is Fraudulent* (1965).

The Foleys allege that in concert the *officials* and *employees* intentionally injured the Foleys by an *abuse of process to invade privacy and rightful activity*:

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does not require proof of evil intent or motive." Reed v. State, 837 So.2d 366, 369 (Fla.2002).

that is, despite their knowledge, belief, and doubts [AC ¶¶41, 46, 48, 49], the *officials* and *employees* used the coercive force of their office [AC ¶69], to execute an order enforcing on the Foleys an unpublished prohibition of *aviaries* and *aviculture* solicited by a private citizen [AC ¶70]; and, by a bad faith *misrepresentation* of the subject matter of their prosecution of the Foleys as stated in AC ¶51 [AC ¶71(a)], the *officials* and *employees* colored their action with official right to coerce the Foleys [AC ¶71(a)(1)], and to misuse the procedures of Chs. 30 and 38, OCC [AC ¶71(a)(2)], in order to deny the Foleys' liberty and property interests asserted at AC ¶¶27-28 [AC ¶71(a)(3)], and to deny the Foleys a meaningful remedy as stated at AC ¶¶40(b), and 42-47 [AC ¶71(a)(4)], and they did so verbally and/or by printed communication to compel the Foleys to destroy their *aviaries* [AC ¶71(b)(1)], and to abandon their bird business [AC ¶71(b)(2) and at AC ¶72(b)], and in this way injured the Foleys' interests described at AC ¶56.

These allegations of *abuse of process* clearly include allegations of fraudulent misrepresentation [AC ¶71(a)-(c)]; the defendants' misrepresentations of the subject matter of the proceedings against the Foleys [AC ¶51], despite their knowledge of FWC authority [AC ¶49], despite their doubts as to their own authority [AC ¶46], and despite their duty to resolve doubt per Ch. 11, OCC [AC ¶47], foreclosed any possibility of an adequate remedy in Ch. 11, OCC [AC

¶40(b)], or the extraordinary writs [AC 52], and resulted in the injuries enumerated at AC ¶56. These allegations of fraudulent misrepresentation effectively allege "bad faith" and remove §768.28(9)(a), Fla.Stat., as an affirmative defense from the face of the Foleys' amended complaint. The defendants must answer.

Yes; the Foleys make specific allegations that effectively assert the defendants acted with "wanton and willful disregard of… property," even if they acted within "the scope of employment."

The Foleys in AC ¶¶39-52, allege ultimate facts demonstrating the *officials* or *employees* "wanton and willful disregard of… property." The Foleys allege defendants knew the risk [AC ¶45], had doubts [AC ¶46], had options [AC ¶47], were provided authoritative advice [AC ¶49], but proceeded anyway [AC ¶¶40,56].

"*Wantonly* means consciously and intentionally, with reckless indifference to consequences and with the knowledge that damage is likely to be done to some person." *IN RE: STANDARD JURY INSTRUCTIONS*, 253 So. 3d 1024, 1027 (Fla.2018); *also State v. Kettell*, 980 So. 2d 1061, 1063 (Fla.2008).

Reckless is "[c]haracterized by the creation of a substantial and unjustifiable risk of harm to others and by a conscious (and sometimes deliberate) disregard for or indifference to that risk; heedless; rash." *Black's Law Dictionary*, p. 1276, (7th ed. 1999). "Reckless conduct is much more than mere negligence: it is a gross deviation from what a reasonable person would do." *Id.*

At AC ¶46 and 49, the Foleys allege defendants had both reason to doubt and avoid taking action. At AC ¶47, the Foleys allege defendants had a means and a duty to take action in a manner that would safeguard the interests of all parties. At AC ¶¶39 and 40, the Foleys allege defendants nevertheless took action that injured the Foleys as stated at AC ¶56. In this way the Foleys have alleged "wanton and willful disregard of… property."

Consequently, there is no conclusive applicability of any affirmative defense in §768.28(9), Fla.Stat. for the *officials* or *employees* on the face of the Foleys' amended complaint;[97] defendants' motions to dismiss must be denied.

COUNT FIVE: Acting In Concert; Abuse of Process to Invade Privacy and Rightful Activity, and Conversion

QUESTIONS PRESENTED: Do the Foleys allege defendants in concert used a proceeding to accomplish a purpose for which it was not designed (i.e., to invade privacy and rightful activity)? Yes. Do the Foleys allege defendants in concert did, or did endeavor to, take constructive possession of their aviaries and toucans? Yes.

Yes; the Foleys do allege the defendants in concert used a practice and proceeding "primarily to accomplish a purpose for which it was not designed."

"Abuse of process involves the use of criminal or civil legal process against another primarily to accomplish a purpose for which it was not designed,"

[97] *See:* ††5 – 7, p.4.

Bothmann v. Harrington, 458 So.2d 1163, 1169, †7 (3rd DCA 1984).[98] So, it is irrelevant whether *abuse of process to invade privacy and rightful activity* is so nominated by Florida case law. The practice and proceeding to enforce the unconstitutional *aviculture custom* was abused, if it was not authorized to *invade privacy*[99] or *rightful activity*.[100] The Foleys allege it was not. Defense must answer.

"[I]t is immaterial that the process was properly issued, that it was obtained in the course of proceedings that were brought with probable cause and for a proper purpose, or even that the proceedings terminated in favour of the person instituting or initiating them," Restatement (Second) of Torts §682 *Abuse of Process* Comment a (1965). So, it is likewise immaterial that a "vote" or a "hearing" is, or is not, "official." The critical question is – Was the process used "primarily to accomplish a purpose for which it was not designed?" And on a

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[98] Restatement (Second) of Torts §682 (1977) *Abuse of Process: General principle*. One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process.

[99] Restatement (Second) of Torts §652B (1977): *Intrusion upon Seclusion*. One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for an invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

[100] Restatement (Second) of Torts §309(a)(i) (1965): *Right of Other to be at Place or Engage in Activity*. An act may be negligent toward another who is in a place or engaged in an activity

(a) in which he is entitled to be or to engage

(i) irrespective of the actor's consent, or…

motion to dismiss[101] in this case the critical question is – Do the Foleys allege sufficient ultimate facts to claim the *officials* and *employees in concert*[102,103] used the process "primarily to accomplish a purpose for which it was not designed?"[104]

The Foleys do make the essential allegations. At AC ¶40, the Foleys outline the "practice and procedure" abused to enforce the *aviculture custom* violating Art. IV, §9, Fla.Const. At AC ¶70, the Foleys identify the procedural objective of the enforcement action, and allege the *officials* and *employees* acted *in concert* to prosecute the *aviculture custom*. At AC ¶42, the Foleys identify the procedural

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[101] "The function of a motion to dismiss a complaint is to raise as a question of law the sufficiency of the facts alleged to state a cause of action." Connolly v. Sebeco, Inc., 89 So.2d 482, 484 (Fla.1956).

[102] Florida courts recognize the "acting in concert" basis for joint and several liability; e.g., Acadia Partners, L.P. v. Tompkins, 759 So.2d 732, 736-37 (5th DCA 2000), which quotes Restatement (Second) of Torts §876.

[103] Restatement (Second) of Torts §876 (1979): *Persons Acting In Concert*

For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he

a) does a tortious act in concert with the other or pursuant to a common design with him, or

b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so conduct himself, or

c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

[104] "The critical concern in abuse of process cases is whether process was used to accomplish an end unintended by law, and whether the suit was instituted to achieve a result not regularly or legally obtainable." Morowitz v. Marvel, 423 A.2d 196, 198 (D.C. 1980).

authority claimed by the *officials* and *employees*. At AC ¶¶50, 51, and 69, the Foleys identify the substantive authority claimed by the *officials* and *employees*. At AC ¶¶43 and 27-28, the Foleys identify the purposes prohibited to that claimed procedural and substantive authority. At AC ¶¶44, 45, and 48-51, the Foleys identify the intent to accomplish the prohibited purposes. At AC ¶56, the Foleys identify the injury consequent to the accomplishment of those prohibited purposes.

The *officials* and *employees* must now answer.

Yes; the Foleys do allege defendants in concert did, or did endeavor to, take constructive possession of their aviaries and toucans?

Both the *officials* and the *employees* argue that the Foleys do not allege defendants ever "exercised dominion or control over their toucans." Untrue.

The Foleys clearly allege defendants destroyed the Foleys' *aviaries* and/or bird business [AC ¶45], and endeavoured to obtain, and did obtain "control and dominion" of the property identified in ¶56(a) and (d)-(h) [AC ¶62(c)]. This allegation of *constructive possession*[105] satisfies the definition of *conversion* in the Restatement (Second) of Torts §222A(1) *Conversion* (1965):

> Conversion is an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel.

[105] *constructive possession.* Control or dominion over a property without actual possession or custody of it. - Also termed *effective possession*; *possessio fictitia*. Black's Law Dictionary, p.1183, (7th Ed. 1999)

The Restatement (Second) of Torts §221 *Dispossession* (1965), further refines *dispossession*.[106] The Comments on clauses (a), (b), and (e), make clear that *actual* possession is not required for a claim of *conversion*.[107]

The claim sounds in conversion; defendants must answer.

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[106] §221. Dispossession

A dispossession may be committed by intentionally

(a) taking a chattel from the possession of another without the other's counsel, or
(b) obtaining possession of a chattel from another by fraud or duress, or
(c) barring the possessor's access to a chattel, or
(d) destroying a chattel while it is in another's possession, or
(e) taking the chattel into the custody of the law.

[107] Comment on Clause (a)

c. A dispossession may consist of an assumption of complete control and dominion over the chattel without an actual taking or carrying away. If the assumption of control effectively deprives the other of all the essential advantages of possession, the dispossession is complete, although the physical position of the chattel may remain unchanged. Thus a sheriff or other officer may levy upon goods, and thereby dispossess another of them without actually coming into contact with or touching the goods.

Comment on Clause (b)

d. One who by fraudulent representations induces another to surrender the possession of a chattel to him has dispossessed the other of the chattel. Assent to the actor's taking possession of the chattel given under such circumstances is ineffectual to constitute a consent to the taking.

Comment on Clause (e):

Taking a chattel into the custody of the law, as by levy of execution or attachment, impounding, and the like, is a dispossession, even though the chattel is not touched, and is not removed from the possession of the one who had it. The chattel is regarded as having passed into the possession of the officers of the law.

COUNT SIX: Civil Theft

QUESTIONS PRESENTED: Do the Foleys allege defendants did, or did endeavor to, "obtain or use" the Foleys' toucans? Yes. Do the Foleys allege defendants acted with "criminal intent"? Yes.

The *officials* argue the Foleys' civil theft claim should be dismissed because the Foleys fail to allege defendants "obtained or used" anything. The *employees* do not make this argument. The *employees*, instead, argue the Foleys fail to allege defendants did so with "criminal intent." The *officials* do not make this argument.

Yes; the Foleys allege that defendants endeavored to obtain or use and this is all that civil theft requires.

The *officials'* argument fails for the following reasons: *1)* an allegation that defendants "obtained or used" is not an essential element of civil theft; and, *2)* the statutory definition of "obtain or use" has been sufficiently alleged. The *officials* and *employees* did, and did endeavour to, "obtain or use."

As outlined below, the theft statute – §812.014(1), Fla.Stat. – does not require an allegation that defendants *obtained or used*, if it is alleged defendants *endeavoured* to obtain or use:

> (1) A person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently:
> (a) Deprive the other person of a right to the property or a benefit from the property.
> (b) Appropriate the property to his or her own use or to the use of any person not entitled to the use of the property.

"Endeavor" means to attempt or try.[108] The Foleys' amended complaint at ¶74(b), alleges defendants did "knowingly endeavour to extort, to take, and to exercise control over the Foleys' property identified in paragraphs 56(a), (b), and (d)-(h)." This allegation is not specifically challenged by the defendants and is sufficient to withstand their motions to dismiss; they must answer.

Yes; the Foleys also allege in several ways that defendants did "obtain or use."

As outlined below, the phrase "obtains or uses" is statutorily defined by §812.013(3), Fla.Stat.:

> (3) "Obtains or uses" means any manner of:
> (a) Taking or exercising control over property.
> (b) Making any unauthorized use, disposition, or transfer of property.
> (c) Obtaining property by fraud, willful misrepresentation of a future act, or false promise.
> (d) 1. Conduct previously known as stealing; larceny; purloining; abstracting; embezzlement; misapplication; misappropriation; conversion; or obtaining money or property by false pretenses, fraud, or deception; or
> 2. Other conduct similar in nature.

"Exercising control" satisfies the definition of "obtains or uses" at §812.013(3)(a), Fla.Stat. "Control" is broadly defined[109] – to exercise power or

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[108] *IN RE STD. JURY INSTRS. REPORT NO. 2015-04*, 190 So.3d 614, 622 (Fla.2016).

[109] *control*, vb. 1. To exercise power or influence over <the judge controlled the proceedings>. 2. To regulate or govern <by law, the budget office controls expenditures>. 3. To have a controlling interest in <the five shareholders controlled the company> Black's Law Dictionary, p.330, (7th Ed. 1999).

influence over, to regulate or govern. The Foleys allege in their amended complaint at AC ¶74(b) – "[Defendants]… did… knowingly endeavour… to exercise control…" This allegation – that defendants *endeavored* to obtain or use – was supported by ultimate facts demonstrating "control" at AC ¶¶39-52.

"Unauthorized disposition" satisfies the definition of "obtains or uses" at §812.013(3)(b), Fla.Stat. The Foleys allege defendants acted "under the colore and coercive force of official right" at AC ¶74(a). The Foleys allege defendants acted "without legal justification" at AC ¶74(b). Indeed, the defendants' lack of *police power* (i.e., *public purpose*)[110] with respect to "wild animal life" (i.e., captive exotic birds), is the keystone of the case against them as stated in Count Six by reference to AC ¶¶27, 28, 41-43, and 52. Consequently, defendants' *disposition* or *attempted* disposition of the Foleys' interests, alleged in AC ¶¶39-52, was *unauthorized*. Unauthorized disposition is well pled to satisfy theft's definition of "obtains or uses."

"Fraud" satisfies the definition of "obtains or uses" at §812.013(3)(c), Fla.Stat. "False pretenses, fraud, or deception" also satisfy the definition of "obtains or uses" at §812.013(3)(d)(1), Fla.Stat. The Foleys allege fraud and

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[110] "[I]n those [eminent domain] decisions no distinction was made between 'public purpose' and 'public use.'" *Grubstein v. Urban Renewal Agency of City of Tampa*, 115 So.2d 745, 749 (Fla.1959).

"[T]he public use requirement is ... coterminous with the scope of a sovereign's police powers." *Hawaii Housing Authority v. Midkiff*, 467 US 229, 240 (1984).

misrepresentation at AC ¶74(a), and by reference to AC ¶¶42, 43, 50, 51, and 69-71. Fraud and deception are well pled to satisfy theft's definition of "obtains or uses."

"Conversion" satisfies the definition of "obtains or uses" at §812.013(3)(d)(1), Fla.Stat. The Foleys allege conversion in Count Six at AC ¶74, by reference to AC ¶¶69-72. Conversion is well pled to satisfy theft's definition of "obtains or uses."

"Other conduct similar in nature" satisfies the definition of "obtains or uses" at §812.013(3)(d)(2), Fla.Stat. The Foleys allege "to extort, to take" in Count Six at AC ¶74(b). "Other conduct" is generally pled at AC ¶¶39-52. Other conduct is well pled to satisfy theft's definition of "obtains or uses."

Yes; the Foleys allege that defendants did act with "criminal intent."

The *employees'* argument fails per Florida's Standard Jury Instruction 411.5,[111] which defines "criminal intent" per the plain language of §812.014(1)(a)&(b), Fla.Stat. : "[to deprive (claimant), either temporarily or permanently, of a [superior]* right to the property or a benefit from it]… * The bracketed word "superior" should be used when there is evidence that the defendant took the property pursuant to a claim of right." From the first word of

[111] IN RE STANDARD JURY INST. CIV. CASES-09-01, 35 So.3d 666, 763 (Fla.2010).

their amended complaint to the last the Foleys allege the *employees* and the *officials* did, and did endeavour to, deprive them, either temporarily or permanently, of their superior right to and the benefit from their breeding flock of *Pteroglossus torquatus*. The defendants might wish to read it.

The *officials* and *employees* must answer in civil theft. Whether defendants with *criminal intent* did *obtain or use* or *endeavour* to obtain or use is for the jury.

COUNT SEVEN: Due Process (*res judicata*)

QUESTION PRESENTED: Were the federal claims raised in federal court ripe for federal adjudication? No.

The *officials* and *employees* insist the Foleys' federal claim in Count Seven either was raised or could have been raised in federal court and is therefore *res judicata*.

There is no defense in *res judicata* on the face of the Foleys amended complaint;[112] the amended complaint says nothing about the federal questions raised in federal case 6:12-cv-00269-RBD-KRS. Even if the court reaches into Foley et ux v. Orange County et al., 638 Fed.Appx. 941, 944 (11th Cir. 2016), it will find the entire case was dismissed "without prejudice for lack of subject matter

[112] *See* ††4, 5, 6, and 7, p.4.

jurisdiction."[113] And if the court reaches into the law of *due process*, it will learn what the Foleys learned – a claim in *due process* is not ripe for federal adjudication until relief is denied in state court.[114] In other words, any federal claim in *due process* the Foleys presented the federal court was not ripe for adjudication and was therefore dismissed by the Eleventh Circuit without prejudice for lack of subject matter jurisdiction.

The Eleventh Circuit did not factor Art.IV,§9,Fla.Const., into its analysis of any of the Foleys' federal claims. The Eleventh Circuit did not do so because *comity* demands state court first resolve any claims based upon Art. IV, §9, Fla.Const. Judge Tjoflat at oral argument put it this way:

> **TJOFLAT**: Generally, the federal courts in these kinds of things, involving local ordinances and the like, there's an old doctrine in the law which says because of comity our respect for the state governments and local governments the federal court stays its hand and it doesn't act… and gets an answer to the question out of the state

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[113] "Unless the court, in rendering the former judgment, was called upon to determine the merits, the judgment is never a complete bar." Cromwell v. County of Sac, 94 US 351, 365 (1877)

[114] "Federal courts must not usurp the roles of agencies, review boards, and state courts in reviewing the wisdom of [state] executive actions." DeKalb Stone, Inc. v. County of DeKalb, Ga., 106 F.3d 956, 960 (11th Cir. 1997).

"[A] rationale against federal review of local regulatory decisions, such as zoning matters, under a federal substantive due process theory is the avoidance of federal court intrusion on Fourteenth Amendment grounds into state executive matters better suited for review in state tribunals." Bennett v. Walton County, 174 So.3d 386, 396-397 (1st DCA 2015).

> courts… You follow me? Then, if they're wrong, we have a constitutional argument in this court.[115]

In other words, federal court does not assume jurisdiction of the claims until state court denies relief. The Eleventh Circuit has in essence treated the Foleys' federal claims as it would a takings claim per *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 US 172, 186 (1985), or a due process case per *McKinney v. Pate*, 20 F.3d 1550, 1560 (11th Cir. 1994) – unripe without state resolution. At bottom the Eleventh Circuit simply decided the Foleys federal claims were not ripe for federal adjudication [†114, p.61]

Supreme Court precedent construes the Fourteenth Amendment to make the state the guarantor of federal constitutional rights. When a subdivision of the state, or its agent, acts to deprive a person of property or liberty, the state must ensure the person is provided an adequate remedy. Then, as Judge Tjoflat said, "[I]f they're wrong, we have a constitutional argument in [federal] court."

It is in this spirit the Foleys properly assert their federal claim "in the alternative;" should this Court find no state or common law remedy it can provide one pursuant 42 USC §1983 and the Fourteenth Amendment.

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[115] *Foley et. ux. v. Orange County, et. al.* 137 S.Ct. 378 (2016), Petition for a Writ of Certiorari, Appendix, p. 29a, lines 15–25. Plaintiffs' Motion for Judicial Notice, e-filing # 56758653, App. B.

PRAYER

WHEREFORE David and Jennifer Foley request the Court deny defendants' motions to dismiss, and order defendants answer the amended complaint within ten days.

CERTIFICATE OF SERVICE

Plaintiffs certify that on May 20, 2019, the foregoing was electronically filed with the Clerk of the Court using eDCA, and electronically served to the following:

William C. Turner, Jr., Assistant County Attorney,
P.O. Box 2687, Orlando FL, 32801, williamchip.turner@ocfl.net;

Derek Angell, O'Connor & O'Connor LLC,
840 S. Denning Dr. 200, Winter Park FL, 32789, dangell@oconlaw.com;

Lamar D. Oxford, Dean, Ringers, Morgan & Lawton PA,
PO Box 2928, Orlando FL 32802-2928, loxford@drml-law.com; and,

Eric J. Netcher, Dean, Ringers, Morgan & Lawton PA,
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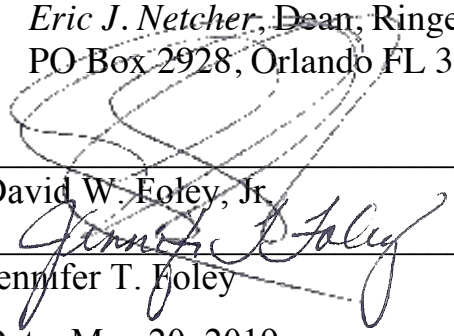

David W. Foley, Jr.

Jennifer T. Foley

Date: May 20, 2019

Plaintiffs
1015 N. Solandra Dr.
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IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

Case number: 2016-CA-007634-O
Motion to Tax Costs

COURT MINUTES

COURT OPENED 12:05 PM on May 28, 2019
This case came on this day for Motion
Honorable Strowbridge, Patricia L , presiding

David W Foley, Jr; Jennifer T Foley

Petitioner / Plaintiff

VS

Orange County; Phil Smith; Carol Hossfield; Mitch Gordon; Rocco Relvini; Tara Gould; Tim Boldig; Frank Detoma; Asima Azam; Roderick Love; Scott Richman; Joe Roberts; Marcus Robinson; Richard Crotty; Teresa Jacobs; Fred Brummer; Mildred Fernandez; Linda Stewart; Bill Segal; Tiffany Moore Russell

Respondent / Defendant

Parties Present:

- Court reporter: Kara Reynolds with CRS

Court Deputy: M. Kleinfelt

Plaintiff appeared Pro Se

Attorney appeared on behalf of the Defendant

THE COURT RULES AS FOLLOWS:

2, 4, 5 and 7 are allowed

Parties to prepare an order

COURT RECESSED at 12:33 PM on this the 28th day of May, 2019, subject to call.
Filed in Open Court on 05/28/2019
Deputy Clerk in Attendance: s/Lianny H.
Office of Tiffany M. Russell, Orange County Clerk of the Circuit and County Courts

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

DAVID W. FOLEY and JENNIFER T. FOLEY,

CASE NO.: 2016-CA-007634-O

Plaintiffs,

v.

ORANGE COUNTY, PHIL SMITH, CAROL HOSSFIELD, MITCH GORDON, ROCCO RELVINI, TARA GOULD, TIM BOLDIG, FRANK DETOMA, ASIMA AZAM, RODERICK LOVE, SCOTT RICHMAN, JOE ROBERTS, MARCUS ROBINSON, RICHARD CROTTY, TERESA JACOBS, FRED BRUMMER, MILDRED FERNANDEZ, LINDA STEWART, BILL SEGAL, and TIFFANY RUSSELL,

Defendants.
_____/

ORDER DISMISSING THE AMENDED COMPLAINT WITH PREJUDICE AS TO PHIL SMITH, CAROL HOSSFIELD, MITCH GORDON, ROCCO RELVINI, TARA GOULD, TIM BOLDIG, FRANK DETOMA, ASIMA AZAM, RODERICK LOVE, SCOTT RICHMAN, JOE ROBERTS, MARCUS ROBINSON, RICHARD CROTTY, TERESA JACOBS, FRED BRUMMER, MILDRED FERNANDEZ,LINDA STEWART, BILL SEGAL, AND TIFFANY RUSSELL

THIS MATTER came before the Court for a hearing on May 30, 2019 upon the "The Official Defendants' Motion to Strike the Amended Complaint, Renewed Request for Judicial Notice, and Motion to Dismiss This Action with Prejudice,"[1] filed on April 18, 2019, and "The Employee Defendants' Motion to Strike the Amended Complaint, Request for Judicial Notice,

[1] "The Official Defendants" refer to the members of the Board of Zoning Adjustment and the Board of County Commissioners, who were named both in their individual and official capacities. They include the following Defendants: Asima Azam, Fred Brummer, Richard Crotty, Frank Detoma, Mildred Fernandez, Teresa Jacobs, Roderick Love, Scott Richman, Joe Roberts, Marcus Robinson, Tiffany Russell, Bill Segal, and Linda Stewart.

and Motion to Dismiss This Action with Prejudice,"[2] filed on May 3, 2019. The Court, having carefully considered the Motions, case law, and arguments of counsel from both parties, and otherwise being duly advised in the premises, finds as follows:

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. *Corn v. City of Lauderdale Lakes*, 997 F. 2d 1369, 1393 ("[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982))); § 768.28(9)(a), Fla. Stat. (2016) ("No officer, employee, or agent of the state or of any of its subdivisions shall be held personally liable in tort or named as a party defendant in any action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of her or his employment or function, unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property."); *Willingham v. City of Orlando*, 929 So. 2d 43, 48 (Fla. 5th DCA 2006) "(Importantly, the immunity provided by section 768.28(9)(a) is both an immunity from liability *and* an immunity from suit, and the benefit of this immunity is effectively lost if the person entitled to assert it is required to go to trial. (emphasis in original)); *Lemay v. Kondrk*, 923 So. 2d 1188, 1192 (Fla. 5th DCA 2006) ("We fully recognize that the immunity provided by section 768.28(9)(a) is both an

[2] The "Employee Defendants" refer to the named Defendants that were higher level employees within the Orange County government at the time of these incidents: Phil Smith, as Code Enforcement Inspector; Carol Hossfield, as the Permitting Chief Planner; Mitch Gordon, as the Zoning Manager; Rocco Relvini, as the Board of Zoning Adjustment Coordination Chief Planner; Tim Boldig, as the Chief of Operations of the Orange County Zoning Division; and Tara Gould, as an Assistant Orange County Attorney with the Orange County Attorney's Office.

immunity from suit and an immunity from liability, and we recognize that an entitlement is effectively lost if the case is erroneously permitted to go to trial."). This does not preclude the Plaintiffs from seeking redress against Orange County. *See McGhee v. Volusia Co.*, 679 So. 2d 729, 733 (Fla. 1996) ("In any given situation either the agency can be held liable under Florida law, or the employee, but not both.").

Accordingly, the following is hereby **ORDERED AND ADJUDGED:**

1. "The Official Defendants' Motion to Strike the Amended Complaint, Renewed Request for Judicial Notice, and Motion to Dismiss This Action with Prejudice" is **GRANTED.**
2. "The Employee Defendants' Motion to Strike the Amended Complaint, Request for Judicial Notice, and Motion to Dismiss This Action with Prejudice" is **GRANTED.**
3. The Plaintiffs' Amended Complaint, filed February 15, 2017, is **DISMISSED with prejudice as to the following Defendants: Phil Smith, Carol Hossfield, Mitch Gordon, Rocco Relvini, Tara Gould, Tim Boldig, Frank Detoma, Asima Azam, Roderick Love, Scott Richman, Joe Roberts, Marcus Robinson, Richard Crotty, Teresa Jacobs, Fred Brummer, Mildred Fernandez, Linda Stewart, Bill Segal, and Tiffany Russell.**
4. Therefore, **final judgment** is hereby entered in favor of the Defendants Phil Smith, Carol Hossfield, Mitch Gordon, Rocco Relvini, Tara Gould, Tim Boldig, Frank Detoma, Asima Azam, Roderick Love, Scott Richman, Joe Roberts, Marcus Robinson, Richard Crotty, Teresa Jacobs, Fred Brummer, Mildred Fernandez, Linda Stewart, Bill Segal, and Tiffany Russell. The Plaintiffs, David W. Foley and Jennifer

T. Foley, shall take nothing by this action against said Defendants, and said Defendants shall go hence without day.

5. The Court reserves jurisdiction over any claims made or to be made by said Defendants for an award of costs and attorney's fees against the Plaintiffs.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on this 2nd day of August, 2019.

PATRICIA L. STROWBRIDGE
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 2, 2019, a true and accurate copy of the foregoing was e-filed using the Court's ECF filing system, which will send notice to all counsel of record and parties registered on the E-Portal.

Judicial Assistant

**IN THE CIRCUIT COURT OF
THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA**

FOLEY, *et ux, Plaintiffs*

v.

ORANGE COUNTY, *et alia*, *Defendants*

2016-CA-007634-O

PLAINTIFFS' MOTION FOR REHEARING AND LEAVE TO AMEND, OR CLARIFICATION

PLAINTIFFS DAVID AND JENNIFER FOLEY MOVE THE COURT for rehearing and leave to amend.

SUMMARY

The court's order of August 2, 2019, makes the following five rulings the Foleys request it rehear, or clarify to narrow the issues to be appealed:

1. "The Court, having considered the Motions, case law, and arguments of counsel from both parties, and otherwise being duly advised in the premises, finds…"

2. "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;"

3. "[A]ll the individual Defendants in this cause are afforded absolute immunity [pursuant §768.28(9)(a), Fla. Stat. (2016)];"

4. "This does not preclude the Plaintiffs from seeking redress against Orange County;" and,

5. "In any given situation either the agency can be held liable under Florida law, or the employee, but not both."

If the court grants rehearing, then the Foleys request leave to amend their amended complaint to correct any defect the court identifies.

"Motions, case law, and arguments of counsel"

The court's first ruling states: "The Court, having considered the Motions, case law, and arguments of counsel from both parties, and otherwise being duly advised in the premises, finds…"

This ruling is careless and prejudicial. The "Motions" the court considered were not the motions before it. The "Motions" the court considered are identified in its order's first sentence as follows:

> "The Official Defendants' Motion to Strike the Amended Complaint, Renewed Request for Judicial Notice, and Motion to Dismiss This Action with Prejudice," (filed on April 18, 2019); and,
>
> "The Employee Defendants' Motion to Strike the Amended Complaint, Request for Judicial Notice, and Motion to Dismiss This Action with Prejudice," (filed on May 3, 2019).

But these were not the motions noticed for the hearing held Tuesday, May 28, 2019. The notice of hearing (filed May 9, 2019) identifies the motions to be heard, just as they are identified on the cover page of the Foleys' response (filed Monday, May 20, 2019), as follows:

> "The Official Defendants' Amended Motion to Dismiss with Prejudice," (filed May 8, 2019); and,
>
> "The Employee Defendants' Motion to Strike the Amended Complaint, Request for Judicial Notice, and Motion to Dismiss This Action with Prejudice," (filed on May 3, 2019).

In sum, taken on its face, the first ruling admits to carelessness and prejudice; the court failed to consider "The Official Defendants' Amended Motion to Dismiss with Prejudice."

The first ruling admits to even more serious error – the court failed to consider the Foleys' written response[1] to the motions noticed for hearing (or those the court reviewed). Indeed, at hearing Judge Patricia Strowbridge said she had not read the Foleys' response (or defendants' motions) prior to hearing,[2] but had simply contacted Judge Heather Higbee to determine that there was just "one issue" remaining. Nowhere does the order reference anything in the Foleys' written response or amended complaint – nowhere does it name the injury the Foleys seek to redress! So, taken on its face, the first ruling admits a prejudice to the Foleys that a hearing transcript and the Foleys' response and amended complaint will support.

This prejudice to the Foleys is further admitted where the court's first ruling states that the court considered only "the arguments of counsel." The Foleys are

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1 "PLAINTIFFS' RESPONSE to 'The Employee Defendants' Motion to Strike the Amended Complaint, Request for Judicial Notice, and Motion to Dismiss This Action With Prejudice' and 'The Official Defendants' Amended Motion to Dismiss with Prejudice,'" filed Monday, May 20, 2019.

2 The Foleys' May 20th delivery of a hard copy to Judge Strowbridge, in satisfaction of the 5 business-day requirement of Div. 35 Policies, was confirmed next-day by email from Judicial Assistant, Jessica Blow (see attached).

not attorneys. They are not represented by counsel. They represent themselves. And the court's order nowhere reflects this. So, again, on its face, the first ruling admits to carelessness and prejudice.

These errors of omission can only be corrected by rehearing.

"There are no allegations"

The court's second ruling states: "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."

This ruling is mysterious and injudicious. It presumes – without any discussion – that the defendants were acting within an *authorized* quasi-judicial capacity, or within their *scope of employment or function*. There is no other reason for the court to reach the questions of *bad faith*, *malicious purpose*, and *wanton and willful disregard*, except that it has determined the defendants' actions against the Foleys were authorized by Orange County ordinance. Yet neither the court nor the defendants have identified this mystery ordinance – *the* ordinance *essential* to *any* defense in immunity. The Foleys request the court remove the mystery and expressly identify the Orange County ordinance that authorized the defendants to use the permitting process of Ch. 30, OCC, as a *coup de grâce* in the code enforcement action initiated against the Foleys per Ch. 11, OCC.

The ruling is also ambiguous. "There are no allegations," could mean the allegations do not exist in the amended complaint – as a matter of fact. "There are no allegations," could also mean the allegations exist but are legally insufficient – as a matter of law. The difference is critical.

If the court has overlooked the Foleys' specific allegations of *bad faith*, *malicious purpose*, and *wanton and willful disregard*, then the Foleys refer the court to pages 42 through 51 of their May 20th response to the defendants' motions to dismiss – there the Foleys identify and explain how each allegation in their amended complaint serves as a legal predicate sufficient to make a *jury question* of *bad faith*, *malicious purpose*, and *wanton and willful disregard*.

If the court has found, or does find, these allegations but has determined, or does determine, they are not legally sufficient to make a *jury question* of *bad faith*, *malicious purpose*, and *wanton and willful disregard*, then the Foleys request the court elaborate pursuant the legal standards presented by the parties for *bad faith*, *malicious purpose*, and *wanton and willful disregard*. Inasmuch as neither the *officials*[3] nor the *employees*[4] motions presented any such legal standards, the

[3] The *officials*: Asima Azam, Fred Brummer, Richard Crotty, Frank Detoma, Mildred Femandez, Teresa Jacobs, Roderick Love, Scott Richman, Joe Roberts, Marcus Robinson, Tiffany Russell, Bill Segal, and Linda Stewart.

[4] The *employees*: Tim Boldig, Mitch Gordon, Tara Gould, Carol Hossfield, Rocco Relvini, and Phil Smith.

Foleys ask the court to apply the standards set forth on pages 42 through 51 of their May 20th response to the defendants' motions to dismiss.

At minimum, the Foleys ask the court to clarify its second ruling, if only by prepending it with the phrase "As a matter of fact, there are no allegations…" or the phrase "As a matter of law, there are no allegations…" This would narrow the issue for amendment or appeal.

Absolute immunity for all per §768.28, Fla.Stat.

The court's third ruling states: "[A]ll the individual Defendants in this cause are afforded absolute immunity [pursuant §768.28(9)(a), Fla. Stat. (2016)]."

This ruling makes no sense. It makes no sense because the *officials* never even made a defense in the qualified statutory immunity provided by F.S. §768.28; instead, they asserted only the judicial doctrine of "absolute immunity." Even with respect to the *employees*, the ruling makes no sense because immunity per F.S. §768.28, is fact-based and consequently *qualified*,[5] never "absolute." Absolute quasi-judicial immunity and qualified immunity per §768.28, are entirely different: absolute immunity is a question of law; qualified immunity per §768.28, is a question of fact, and/or allegation of fact.

[5] Immunity per F.S. §768.28, is referred to repeatedly as *qualified immunity* by Judge Orfinger in his dissent in *Lemay v. Kondrk*, 860 So. 2d 1022 (5th DCA 2003), and by Judge Thompson in his dissent in *Lemay v. Kondrk*, 923 So. 2d 1188 (5th DCA 2006).

The Foleys request the court rehear the issue of immunity and rule separately on the absolute quasi-judicial immunity asserted by the *officials*, and the qualified immunity per F.S. §768.28, asserted by the *employees*.

"[R]edress against Orange County"

The court's fourth ruling states: "This does not preclude the Plaintiffs from seeking redress against Orange County."

This ruling is premature and ungrounded. Like the previous rulings, it presumes – without discussion – that even if the Foleys' right to keep and sell toucans is immune to county regulation per Art. IV, §9, Fla. Const., that the *officials* and *employees* were nevertheless authorized by Orange County ordinance to challenge and extinguish that right as they did. It presumes the *officials*' and *employees*' actions against the Foleys were authorized by ordinance – but it never finds or identifies that authorizing ordinance. To ground any decision on the defendants' immunity or the County's liability, the court *must* find and identify the mystery ordinance.

Before the court carelessly suggests Orange County may be liable, the Foleys request that it do what the defendants did not – the Foleys request the court cite the specific provisions of the Orange County code, if any can be found, that authorized the *officials* and the *employees* to challenge and extinguish the Foleys' right to sell toucans in the manner that they did so.

"[E]ither the agency … or the employee, but not both."

The fifth ruling – or, the authority cited for the fourth ruling – quotes *McGhee v. Volusia Co.*, 679 So.2d 729, 733 (Fla. 1996), as follows: "In any given situation either the agency can be held liable under Florida law, or the employee, but not both."

The court's reference to *McGhee* is odd. It is odd because it is unnecessary. It is unnecessary because the court's second ruling, though premature and erroneous, already removes the individual defendants from the case without the need for further justification. It is also odd because *McGhee* has only ever been applied in this way where the same cause of action was asserted on the same theory of liability against both master and servant. Here only conversion is pled against both, but even it is asserted on distinct theories of liability. Otherwise, the Foleys plead separate, mutually exclusive causes and theories of liability against Orange County and the *officials* and *employees* (e.g.: negligence, unjust enrichment, and takings are not, or cannot be, brought against the individuals; abuse of process and civil theft are not, or cannot be, brought against the County). So, *McGhee* has no apparent application.

For these reasons, and to narrow the issues on appeal, the Foleys request the court rehear and either remove reference to *McGhee*, or state how *McGhee* applies to the Foleys' separate, mutually exclusive causes and theories of liability.

CONCLUSION

WHEREFORE plaintiffs David and Jennifer Foley move the court for rehearing and leave to amend.

CERTIFICATE OF SERVICE

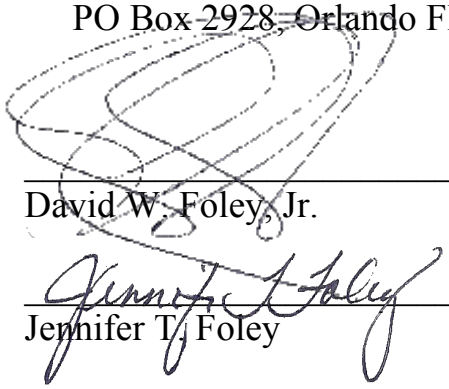
Plaintiffs certify that on August 12, 2019, the foregoing was electronically filed with the Clerk of the Court and served to the following:

William C. Turner, Jr., Assistant County Attorney,
P.O. Box 2687, Orlando FL, 32801, williamchip.turner@ocfl.net;

Derek Angell, O'Connor & O'Connor LLC,
840 S. Denning Dr. 200, Winter Park FL, 32789, dangell@oconlaw.com;

Lamar D. Oxford, Dean, Ringers, Morgan & Lawton PA,
PO Box 2928, Orlando FL 32802-2928, loxford@drml-law.com;

Eric J. Netcher, Dean, Ringers, Morgan & Lawton PA,
PO Box 2928, Orlando FL 32802-2928, enetcher@drml-law.com.



David W. Foley, Jr.

Jennifer T. Foley

Date: August 12, 2019

Plaintiffs
1015 N. Solandra Dr.
Orlando FL 32807-1931
PH: 407 721-6132
e-mail: david@pocketprogram.org
e-mail: jtfoley60@hotmail.com

From: **Blow, Jessica** ctjajb4@ocnjcc.org
Subject: RE: CASE # 2016-CA-7634 • FOLEY et ux. v.ORANGE COUNTY et al.
Date: May 21, 2019 at 10:53 AM
To: David Foley david@pocketprogram.org

Good morning,

The envelope was received. The 5 business day requirement was met.

Thanks so much and have a great day.

Jessie Blow
Judicial Assistant to the
Honorable Patricia L. Strowbridge
Circuit Civil, Division 35
425 N. Orange Ave, Suite 1115
Orlando, FL 32801
407.836.2481

Division 35 Policies and Procedures
Division 35 Hearing Times
Division 35 Docket

From: David Foley <david@pocketprogram.org>
Sent: Tuesday, May 21, 2019 10:52 AM
To: Blow, Jessica <ctjajb4@ocnjcc.org>
Subject: CASE # 2016-CA-7634 • FOLEY et ux. v.ORANGE COUNTY et al.

Ms. Blow -

Can you confirm receipt of the envelope I left yesterday in Judge Strowbridge's drop-off?

It contained our comb bound Response and a USB with a pdf of the Response.

Does the Table of Contents and Table of Authorities satisfy Div. 35 rules?

Was delivery yesterday within the five business days required by Div 35 rules?

Thank you,

David Foley
PH: 407 721 6132
email: david@pocketprogram.org

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

Appellants/Plaintiffs DAVID W. FOLEY, JR., and JENNIFER T. FOLEY *v.* ***Appellees/Defendants*** 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.*	2016-CA-007634-O **NOTICE OF APPEAL**

NOTICE IS GIVEN that plaintiffs/appellants David W. Foley, Jr., and Jennifer T. Foley, appeal to the Fifth District Court of Appeal, the final order of this court rendered August 2, 2019, dismissing with prejudice plaintiffs'/appellants' amended complaint as to defendants 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.

A conformed copy of the order designated in this notice of appeal is attached in accordance with Fla. R. App. P. 9.110(d).

This notice is timely per Fla. R. Jud. Admin. 2.514(a)(1)(C), as the filing date specified by Fla. R. App. P. 9.110(b), was Tuesday, September 3, 2018.

CERTIFICATE OF SERVICE

Plaintiffs certify that on September 3, 2019, the foregoing was electronically filed with the Clerk of the Court and served to the following:

William C. Turner, Jr., Assistant County Attorney,
P.O. Box 2687, Orlando FL, 32801, williamchip.turner@ocfl.net;
Derek Angell, O'Connor & O'Connor LLC,
840 S. Denning Dr. 200, Winter Park FL, 32789, dangell@oconlaw.com;
Lamar D. Oxford, Dean, Ringers, Morgan & Lawton PA,
PO Box 2928, Orlando FL 32802-2928, loxford@drml-law.com;
Eric J. Netcher, Dean, Ringers, Morgan & Lawton PA,
PO Box 2928, Orlando FL 32802-2928, enetcher@drml-law.com.

David W. Foley, Jr.
Jennifer T. Foley

1015 N. Solandra Dr.
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PH: 407 721-6132
e-mail: david@pocketprogram.org
e-mail: jtfoley60@hotmail.com

Date: September 3, 2019

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

DAVID W. FOLEY and JENNIFER T. FOLEY,

CASE NO.: 2016-CA-007634-O

Plaintiffs,

v.

ORANGE COUNTY, PHIL SMITH, CAROL HOSSFIELD, MITCH GORDON, ROCCO RELVINI, TARA GOULD, TIM BOLDIG, FRANK DETOMA, ASIMA AZAM, RODERICK LOVE, SCOTT RICHMAN, JOE ROBERTS, MARCUS ROBINSON, RICHARD CROTTY, TERESA JACOBS, FRED BRUMMER, MILDRED FERNANDEZ, LINDA STEWART, BILL SEGAL, and TIFFANY RUSSELL,

Defendants.
_____/

ORDER DISMISSING THE AMENDED COMPLAINT WITH PREJUDICE AS TO PHIL SMITH, CAROL HOSSFIELD, MITCH GORDON, ROCCO RELVINI, TARA GOULD, TIM BOLDIG, FRANK DETOMA, ASIMA AZAM, RODERICK LOVE, SCOTT RICHMAN, JOE ROBERTS, MARCUS ROBINSON, RICHARD CROTTY, TERESA JACOBS, FRED BRUMMER, MILDRED FERNANDEZ,LINDA STEWART, BILL SEGAL, AND TIFFANY RUSSELL

THIS MATTER came before the Court for a hearing on May 30, 2019 upon the "The Official Defendants' Motion to Strike the Amended Complaint, Renewed Request for Judicial Notice, and Motion to Dismiss This Action with Prejudice,"[1] filed on April 18, 2019, and "The Employee Defendants' Motion to Strike the Amended Complaint, Request for Judicial Notice,

[1] "The Official Defendants" refer to the members of the Board of Zoning Adjustment and the Board of County Commissioners, who were named both in their individual and official capacities. They include the following Defendants: Asima Azam, Fred Brummer, Richard Crotty, Frank Detoma, Mildred Fernandez, Teresa Jacobs, Roderick Love, Scott Richman, Joe Roberts, Marcus Robinson, Tiffany Russell, Bill Segal, and Linda Stewart.

and Motion to Dismiss This Action with Prejudice,"[2] filed on May 3, 2019. The Court, having carefully considered the Motions, case law, and arguments of counsel from both parties, and otherwise being duly advised in the premises, finds as follows:

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. *Corn v. City of Lauderdale Lakes*, 997 F. 2d 1369, 1393 ("[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982))); § 768.28(9)(a), Fla. Stat. (2016) ("No officer, employee, or agent of the state or of any of its subdivisions shall be held personally liable in tort or named as a party defendant in any action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of her or his employment or function, unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property."); *Willingham v. City of Orlando*, 929 So. 2d 43, 48 (Fla. 5th DCA 2006) "(Importantly, the immunity provided by section 768.28(9)(a) is both an immunity from liability *and* an immunity from suit, and the benefit of this immunity is effectively lost if the person entitled to assert it is required to go to trial. (emphasis in original)); *Lemay v. Kondrk*, 923 So. 2d 1188, 1192 (Fla. 5th DCA 2006) ("We fully recognize that the immunity provided by section 768.28(9)(a) is both an

[2] The "Employee Defendants" refer to the named Defendants that were higher level employees within the Orange County government at the time of these incidents: Phil Smith, as Code Enforcement Inspector; Carol Hossfield, as the Permitting Chief Planner; Mitch Gordon, as the Zoning Manager; Rocco Relvini, as the Board of Zoning Adjustment Coordination Chief Planner; Tim Boldig, as the Chief of Operations of the Orange County Zoning Division; and Tara Gould, as an Assistant Orange County Attorney with the Orange County Attorney's Office.

immunity from suit and an immunity from liability, and we recognize that an entitlement is effectively lost if the case is erroneously permitted to go to trial."). This does not preclude the Plaintiffs from seeking redress against Orange County. *See McGhee v. Volusia Co.*, 679 So. 2d 729, 733 (Fla. 1996) ("In any given situation either the agency can be held liable under Florida law, or the employee, but not both.").

Accordingly, the following is hereby **ORDERED AND ADJUDGED:**

1. "The Official Defendants' Motion to Strike the Amended Complaint, Renewed Request for Judicial Notice, and Motion to Dismiss This Action with Prejudice" is **GRANTED.**
2. "The Employee Defendants' Motion to Strike the Amended Complaint, Request for Judicial Notice, and Motion to Dismiss This Action with Prejudice" is **GRANTED.**
3. The Plaintiffs' Amended Complaint, filed February 15, 2017, is **DISMISSED with prejudice as to the following Defendants: Phil Smith, Carol Hossfield, Mitch Gordon, Rocco Relvini, Tara Gould, Tim Boldig, Frank Detoma, Asima Azam, Roderick Love, Scott Richman, Joe Roberts, Marcus Robinson, Richard Crotty, Teresa Jacobs, Fred Brummer, Mildred Fernandez, Linda Stewart, Bill Segal, and Tiffany Russell.**
4. Therefore, **final judgment** is hereby entered in favor of the Defendants Phil Smith, Carol Hossfield, Mitch Gordon, Rocco Relvini, Tara Gould, Tim Boldig, Frank Detoma, Asima Azam, Roderick Love, Scott Richman, Joe Roberts, Marcus Robinson, Richard Crotty, Teresa Jacobs, Fred Brummer, Mildred Fernandez, Linda Stewart, Bill Segal, and Tiffany Russell. The Plaintiffs, David W. Foley and Jennifer

T. Foley, shall take nothing by this action against said Defendants, and said Defendants shall go hence without day.

5. The Court reserves jurisdiction over any claims made or to be made by said Defendants for an award of costs and attorney's fees against the Plaintiffs.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on this 2nd day of August, 2019.

PATRICIA L. STROWBRIDGE
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 2, 2019, a true and accurate copy of the foregoing was e-filed using the Court's ECF filing system, which will send notice to all counsel of record and parties registered on the E-Portal.

Judicial Assistant

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

Appellants/Plaintiffs DAVID W. FOLEY, JR., and JENNIFER T. FOLEY *v.* ***Appellees/Defendants*** 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.*	2016-CA-007634-O **DESIGNATION TO CIVIL COURT REPORTER** **AMANDA L. THOMPSON,** **ESQUIRE DEPOSITION SOLUTIONS**

PLAINTIFFS/APPELLANTS David W. Foley, Jr., and Jennifer T. Foley, file this Designation to Civil Court Reporter and Acknowledgement and direct Amanda L. Thompson, Esquire Deposition Solutions, 200 E. Robinson St., Ste. 725, Orlando, FL 32801, PH: 800.211.3376, email: esquireconnect@ esquiresolutions.com, to do as follows:

1. Transcribe, for use in this appeal, the entire proceeding recorded by the reporter May 28, 2019, before the Honorable Patricia L. Strowbridge;

2. File a copy with the clerk of the Circuit Court for the Ninth Judicial Circuit; and,

3. Serve a copy on each of the following:

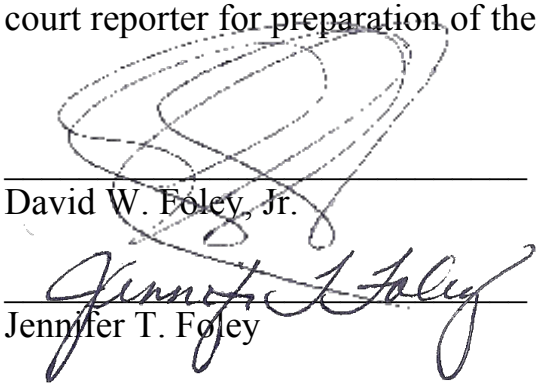
   a. *David W. Foley, Jr., and Jennifer T. Foley*
   1015 N. Solandra Dr., Orlando 32807
   david@pocketprogram.org
   jtfoley60@hotmail.com

   b. *William C. Turner, Jr.*, Assistant County Attorney,
   P.O. Box 2687, Orlando FL 32801
   williamchip.turner@ocfl.net;

   c. *Derek Angell*, O'Connor & O'Connor LLC,
   800 North Magnolia Avenue, Suite 1350, Orlando, Florida 32803
   dangell@oconlaw.com;

   d. *Eric J. Netcher*, Dean, Ringers, Morgan & Lawton PA,
   PO Box 2928, Orlando FL 32802
   enetcher@drml-law.com.

PLAINTIFFS/APPELLANTS David W. Foley, Jr., and Jennifer T. Foley, certify that satisfactory financial arrangements have been made with the civil court reporter for preparation of the transcript.



David W. Foley, Jr.

Jennifer T. Foley

Date: September 12, 2019

Plaintiffs/Appellants
1015 N. Solandra Dr.
Orlando FL 32807-1931
PH: 407 721-6132
e-mail: david@pocketprogram.org
e-mail: jtfoley60@hotmail.com

CIVIL COURT REPORTER'S ACKNOWLEDGMENT

The following acknowledgment shall be properly completed, signed by the court reporter, and filed with the clerk of the Fifth District Court of Appeals within 5 days of service of the designation on the court reporter.

1. The foregoing designation was served on September _____, 2019, and received on September _____, 2019.

2. Satisfactory arrangements have ( ) have not ( ) been made for payment of the transcript cost. These financial arrangements were completed on _____ _____, 2019.

3. Length of hearing – **60 minutes**.

4. Estimated number of transcript pages – **47 pages**.

5. The transcript will be available within 30 days of service of the foregoing designation and will be filed with the Orange County Clerk of Courts on or before _____ _____, 2019.

6. Completion and filing of this acknowledgment by the undersigned constitutes submission to the jurisdiction of the court for all purposes in connection with these appellate proceedings.

7. The undersigned civil court reporter certifies that the foregoing is true and correct and that a copy has been furnished by mail ( ) email ( ) hand delivery ( ) on _____ _____, 2019, to each of the parties or their counsel.

_____

Civil Court Reporter

Amanda L. Thompson, Esquire Deposition Solutions,
200 E. Robinson St. Ste 725, Orlando, FL 32801,
PH: 800.211.3376, email: esquireconnect@esquiresolutions.com

CERTIFICATE OF SERVICE

Plaintiffs certify that on September 12, 2019, the foregoing Designation and Acknowledgement was electronically filed with the Clerk of the Court using the Florida Courts' eFiling Portal, which will send notice of filing and a service copy of the foregoing to the following:

William C. Turner, Jr., Assistant County Attorney,
P.O. Box 2687, Orlando FL 32801, williamchip.turner@ocfl.net;

Derek Angell, O'Connor & O'Connor LLC,
840 S. Denning Dr. 200, Winter Park FL 32789, dangell@oconlaw.com;

Eric J. Netcher, Dean, Ringers, Morgan & Lawton PA,
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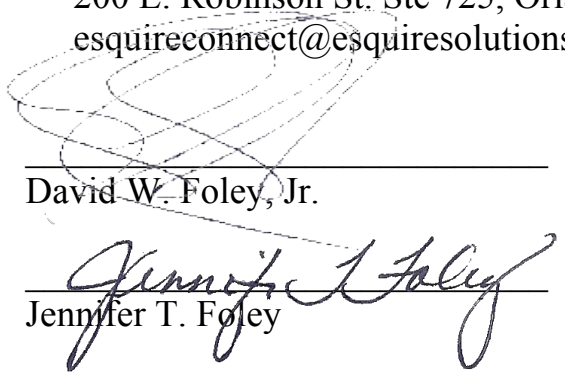

David W. Foley, Jr.

Jennifer T. Foley

Date: September 12, 2019

Plaintiffs/Appellants
1015 N. Solandra Dr.
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IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

Appellants/Plaintiffs DAVID W. FOLEY, JR., and JENNIFER T. FOLEY *v.* ***Appellees/Defendants*** 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.*	2016-CA-007634-O **DESIGNATION TO CIVIL COURT REPORTER** **ABIGAIL RUSBOLDT,** **MILESTONE REPORTING COMPANY**

PLAINTIFFS/APPELLANTS David W. Foley, Jr., and Jennifer T. Foley, file this Designation to Civil Court Reporter and Acknowledgement and direct Abigail Rusboldt, Milestone Reporting Company, 100 E. Pine St., Ste. 308, Orlando, FL 32801, PH: 407.423.9900, email: scheduling@ milestonereporting.com, to do as follows:

1. Transcribe, for use in this appeal, the entire proceeding recorded by the reporter December 11, 2017, before the Honorable Heather Higbee;

2. File a copy with the clerk of the Circuit Court for the Ninth Judicial Circuit; and,

3. Serve a copy on each of the following:

   a. *David W. Foley, Jr., and Jennifer T. Foley*
   1015 N. Solandra Dr., Orlando 32807
   david@pocketprogram.org
   jtfoley60@hotmail.com

   b. *William C. Turner, Jr.*, Assistant County Attorney,
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   williamchip.turner@ocfl.net;

   c. *Derek Angell*, O'Connor & O'Connor LLC,
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   d. *Eric J. Netcher*, Dean, Ringers, Morgan & Lawton PA,
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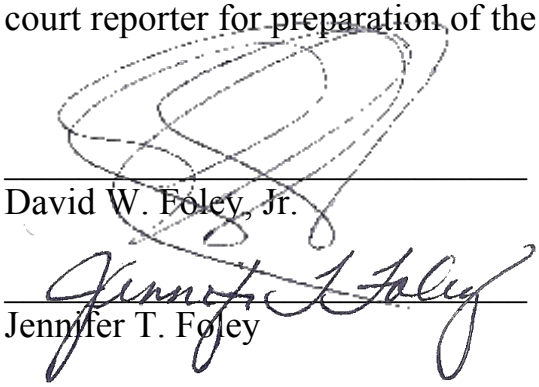
PLAINTIFFS/APPELLANTS David W. Foley, Jr., and Jennifer T. Foley, certify that satisfactory financial arrangements have been made with the civil court reporter for preparation of the transcript.



_____
David W. Foley, Jr.

_____
Jennifer T. Foley

Date: September 12, 2019

Plaintiffs/Appellants
1015 N. Solandra Dr.
Orlando FL 32807-1931
PH: 407 721-6132
e-mail: david@pocketprogram.org
e-mail: jtfoley60@hotmail.com

CIVIL COURT REPORTER'S ACKNOWLEDGMENT

The following acknowledgment shall be properly completed, signed by the court reporter, and filed with the clerk of the Fifth District Court of Appeals within 5 days of service of the designation on the court reporter.

1. The foregoing designation was served on September _____, 2019, and received on September _____, 2019.

2. Satisfactory arrangements have ( ) have not ( ) been made for payment of the transcript cost. These financial arrangements were completed on _____ _____, 2019.

3. Length of hearing – **____ minutes**.

4. Estimated number of transcript pages – **____ pages**.

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7. The undersigned civil court reporter certifies that the foregoing is true and correct and that a copy has been furnished by mail ( ) email ( ) hand delivery ( ) on _____ _____, 2019, to each of the parties or their counsel.

_____

Civil Court Reporter

Abigail Rusboldt, Milestone Reporting Company,
100 E. Pine St., Ste. 308, Orlando, FL 32801,
PH: 407.423.9900, email: scheduling@milestonereporting.com

CERTIFICATE OF SERVICE

Plaintiffs certify that on September 12, 2019, the foregoing Designation and Acknowledgement was electronically filed with the Clerk of the Court using the Florida Courts' eFiling Portal, which will send notice of filing and a service copy of the foregoing to the following:

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840 S. Denning Dr. 200, Winter Park FL 32789, dangell@oconlaw.com;

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100 E. Pine St., Ste. 308, Orlando, FL 32801,
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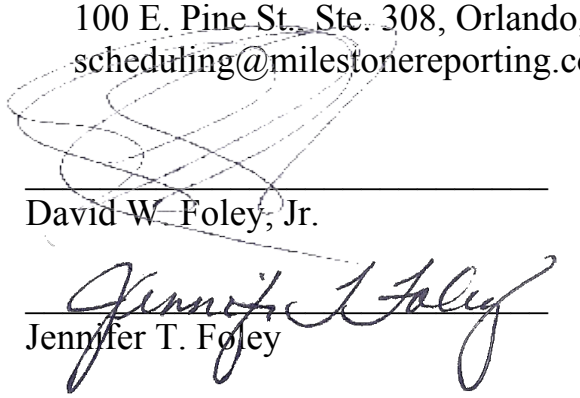

David W. Foley, Jr.

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Date: September 12, 2019

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IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

CASE NO.: 2016-CA-007634-O

ORIGINAL

DIVISION: 35

DAVID W. FOLEY, JR., AND
JENNIFER T. FOLEY,
PLAINTIFFS,

V.

ORANGE COUNTY, FLORIDA, ET AL.,
DEFENDANTS.
_____/

HEARING BEFORE THE HONORABLE JUDGE HEATHER HIGBEE

APPEAL TRANSCRIPT

DATE: DECEMBER 11, 2017
REPORTER: ABIGAIL RUSBOLDT
PLACE: ORANGE COUNTY COURTHOUSE
425 NORTH ORANGE AVENUE
HEARING ROOM 20B
ORLANDO, FLORIDA 32801

APPEARANCES

ON BEHALF OF THE PLAINTIFFS, DAVID W. FOLEY, JR., AND JENNIFER T. FOLEY:
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JENNIFER FOLEY, PRO SE
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ORLANDO, FLORIDA 32807
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JTFOLEY60@HOTMAIL.COM

ON BEHALF OF THE DEFENDANTS, ORANGE COUNTY, FLORIDA, ET AL.:
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E-MAIL: DANGELL@OCONLAW.COM

AND

WILLIAM TURNER, ESQUIRE
ELAINE M. ASAD, ESQUIRE
ORANGE COUNTY ATTORNEY
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INDEX

EXHIBITS

(NONE MARKED)

STIPULATION

THE HEARING BEFORE THE HONORABLE JUDGE HEATHER HIGBEE TAKEN AT ORANGE COUNTY COURTHOUSE, 425 NORTH ORANGE AVENUE, HEARING ROOM 20B, ORLANDO, FLORIDA 32801 ON MONDAY THE 11TH DAY OF DECEMBER 2017 AT APPROXIMATELY **3:03 P.M.; SAID HEARING WAS TAKEN PURSUANT TO THE** FLORIDA RULES OF CIVIL PROCEDURE.

PROCEEDINGS

JUDGE HIGBEE: This is 2016CA7634, Judge Higbee presiding. If I could have appearances, beginning to my right.

MR. TURNER: William Turner and Elaine Asad from Orange County Attorney's office on behalf of the defendant, Orange County. We're also the movant here today.

JUDGE HIGBEE: Uh-huh.

MR. ANGELL: Good afternoon, Your Honor. Derek Angell for the official defendants, who've been dismissed. Here for relation purposes.

JUDGE HIGBEE: Okay.

MR. OXFORD: Lamar Oxford for the County employee defendants, who have been dismissed.

MR FOLEY: David Foley.

MS. FOLEY: Jennifer Foley.

JUDGE HIGBEE: All right. Nice to see everyone today. I've reviewed the notice of hearing, the motions, the binders, the materials that have all been sent to me. I have them here for my reference if I need them during the hearing. And I also have a Chess clock on my phone. It has 30 minutes for each side. So I'm prepared and I'm ready to take notes and hear the argument. This will basically be

-- you can split your 30 minutes. And you can have yours in totality. And they get the last word in the rebuttal. All right?

MR. TURNER: Okay.

JUDGE HIGBEE: We can begin.

MR. TURNER: Thank you, Your Honor. As stated we're here on behalf of Orange County, who's filed an amended motion to dismiss the complaint brought by Mr.

and Mrs. Foley. The amended part of the motion to dismiss, really kind of piggy backs on an order Your Honor has already entered of finding that the statute of limitations has run on various counts against individual defendants. It's Orange County's position that the statute of limitation should likewise bar claims the Foleys have made against Orange County, with the exception of the portion of count one, which seeks a declaratory judgment concerning a recently amended Orange County land use regulation and definitions therein. I don't think the limitations would run on any declaratory judgment action dealing with a recently amended and now operative charter amendment. So that's the basis and the reason that our motion to dismiss has been amended. With respect to the initial arguments

that Orange County had made to this motion to dismiss, first dealing with count one of the amended complaint. It's Orange County's position that the Court lacks subject matter jurisdiction to hear a declaratory judgment action when as here, there is no actual case or controversy that exists or that has been alleged. While we do understand that the Foleys alleged that they were -- that an earlier provision of Orange County's code may have been in conflict with State rules dealing with exotic birds. The theory being that Mr. Foley had obtained a license from the State to own and sell particular birds at a particular address and that Orange County could not by dint of its land use regulations stand in the way of a license Mr. Foley had otherwise received from the State of Florida. Well, that fact situation is gone by virtue of the fact that Orange County amended its land use regulations to be consistent with the theory that Mr. and Mrs. Foley had put forward. Moreover, there is no allegation, and to my knowledge, there hasn't been an instance in which Orange County has gone out and attempted to enforce the new ordinance to - - against Mr. and Mrs. Foley. So what Mr. and Mr. Foley are alleging here is a purely hypothetical situation that is not

borne out by the facts. They seem to be alleging that while they understand Orange County amended its land use ordinances to be consistent with the theory that Mr. and Mrs. Foley earlier put forward. Their argument is well, it may very well at some point, be interpreted differently by Orange County to their detriment. Well, again, that hasn't happened and there's no allegation that that has happened. So without an actual case or controversy before this Court for a declaratory judgment, the Court lacks subject matter jurisdiction to hear a declaratory judgment action. And in support of that proposition, Your Honor, we've cited a number of cases in our brief. As to count two, that count should, like the other counts brought against the individual defendants, be dismissed by virtue of the operation of the statute of limitations under your Court's reasoning in the earlier order. The federal action, the Eleventh Circuit, as Your Honor notes, determined that there was never any jurisdiction of the Federal Court that the federal action claims brought by the Foleys in Federal Court had no merit and that the Court never had subject matter jurisdiction, so consequently the limits of the statute of limitation should likewise apply to the

benefit of Orange County with respect to count two. Even without the benefit of the statute of limitations, however, count two should be dismissed on its merits because Plaintiff does not allege any actionable negligence. While they use the label, "Negligence," they do not allege the existence or violation of any cognizable duty that Orange County has under Florida law. At most, they may be alleging that Orange County neglected to -- I'm looking at paragraph 62a of their amended complaint, which is quoted in page 5 of our brief. They alleged that Orange County neglected the duty of reasonable care it owed the Foleys, either to decline regulatory quasi judicial jurisdiction placed in reasonable doubt by Article 9, section 9, Florida Constitution. Or to remove the unreasonable risk of injury from the erroneous exercise of jurisdiction by means of adequate and available adversarial proceedings pursuant to chapter 11, OCC or otherwise. Your Honor, Orange County does not have a duty imposed by law to decline jurisdiction over a disputed matter that was then existing between the Foleys and Orange County. They may have taken issue with Orange County's ordinance, Orange County's interpretation of its ordinance, but they

cannot allege a cognizable and recognizable negligence theory based upon an alleged duty of neglecting to essentially just roll over and agree with the Foleys' position -- and by disagreeing with their position they were then taking that Orange County somehow negligent. That just doesn't hang together under Florida law, Your Honor. Moreover, to the extent they're arguing that Orange County was somehow negligent in connection with its permitting powers as a sovereign entity, entitled to sovereign immunity, Orange County would be entitled to the benefit of sovereign immunity even if a duty could be recognized because when dealing with the interpretation, enactment, and enforcement of its regulation as the government, it is sovereignly immune from doing that. That isn't an operational -- side of government. That's the core of governmental duties and governmental action. So not only is there no duty alleged, but were there duty alleged on the face, Orange County would be entitled of the protections of sovereign immunity. And I'm not talking about the sovereign immunity statute that typically applies to tort claims. I'm talking about true separation of powers of sovereign immunity that insulates Orange County from the

jurisdiction of this Court. Still on count two, the Foleys also allege in count two or purport to allege an unjust enrichment claim. Well, that doesn't hang together because the allegations are that they were -- that they paid fees to protest Orange County's interpretation. And that thereafter they got the benefit of the fees they paid by going through those proceedings. So there is no unjust enrichment when a complaining party, such as the Foleys, is required to follow the rules for protest and appeal under local ordinances. Finally, the Foleys do not state a claim in count two for conversion because an essential element of conversion is that the defendant must have taken possession of an item the plaintiff has the right to own or possess. There's no allegation of Orange County ever physically took anything from the Foleys. At most, the allegation is that Orange County was attempting to enforce a zoning regulation that the Foleys contended Orange County had no right to enforce. But, Orange County took nothing. Anything that was taken down, dissembled, et cetera was done voluntarily by the Foleys in response to Orange County's position. And that then leads us, Your Honor, to count four, which is -- purports to be some sort of eminent domain,

takings, inverse condemnation theory. That claim fails for the reason I just mentioned, which is Orange County never took anything. The alleged facts here are that faced with Orange County's resolve to enforce its then existing land use regulation, the Foleys decided to take down their business, and no longer conduct business, and to litigate against Orange County. There was nothing that actually required the Foleys to do that. Alternatively, the Foleys had the ability to seek an injunction in a court of competent jurisdiction to interpret the law at that time. They did so in the federal action, but the federal action had no jurisdiction. They tried to appeal a procedural defect in the ordinance and were told by the Fifth District Court of Appeals that they didn't have a valid writ of - - petition for a certiorari claim, but they might have had a claim to declare an ordinance unconstitutional by virtue of the declaratory judgment act at that time back in the late 2000s. Which again, they chose not to avail themselves of. So they can't decide not to take preemptive injunctive relief and then over ten years later come to this Court and say Orange County took property from them in violation of the constitution.

That again doesn't really hang together either legally or logically. Furthermore, the only right that Mr. Foley ever arguable had was a licensure right that was founded in a permit or license. And it's important to note here that the license was granted only to Mr. Foley, not Mrs. Foley. So really, she doesn't have any standing whatsoever to bring a claim based upon a violation of rights in that license. The claim would reside solely with Mr. Foley. But here again, a State issued permit or license is under Florida law not a property right. So consequently, it cannot be taken. And we've cited law to that effect on page 7 of our memorandum, Your Honor. While also focusing attention on the inverse condemnation takings count, Orange County would further note that Foleys -- if Foleys could otherwise be deemed to have stated a cause of action under an inverse condemnation theory, they would not be entitled to the benefit of loss of any business damages because statutorily business damages claims -- or under law, business damages claims under condemnation law in Florida are statutorily based and they're limited to the instances that the statute allows for such business damages which are not here. In summary, those instances usually deal

with the construction of a -- roadway that's going to impair a business, leading to associated business damages. But, it's not a constitutional right in the Florida constitution dealing with a takings claim. None of the elements necessary for business damages are pleaded in the amended complaint and then -- so consequent -- consequently at the very least, the Foleys' claim for business damages need to be stricken. Counts five and six says Orange County reads the complaint are not brought against Orange County, they were brought against the individual defendants. That Orange County is not involved in the addendum clause of either count five or six. Therefore, Orange County has not addressed counts five or six of the amended complaint. However, count seven of the amended complaint appears to be an -- a plea in the alternative. It's some sort of catch all due process claim. Well, Your Honor, as Orange County looks at count seven, it's largely a reiteration of the federal due process claims that the Foleys attempted to bring in the federal action. Federal due process claims that the Eleventh Circuit ultimately held, were neither properly pleaded, properly proven, and were so deficient to essentially deprive the federal court

of jurisdiction ab initio. So there's no basis for them to re-allege those allegations now that they're here in State court. What wasn't good in federal court is not any better for the Foleys here in State court. Particularly since State law, Florida State law does not recognize an action -- a cause of action for money damages for violation of a state constitutional right. If there's going to be any such claim, it has to fall under the federal constitution. And once again, it's already gone up to the Eleventh Circuit Court of Appeals in the federal circuit to determine that the Foleys did not have such a claim. And so for these reasons, Your Honor, we would respectfully request Your Honor to dismiss the Foleys' complaint. All but count one should be dismissed on the statute of limitations ground that Your Honor has already analyzed and decreed in the earlier order. That same analysis should apply to the benefit of Orange County. And then for count one, there is no subject matter jurisdiction because there is no active case or controversy between the parties.

JUDGE HIGBEE: Okay. Thank you very much. You have 14 minutes remaining. All right. Mr. and Mrs. Foley, whoever wishes to speak on your behalf?

MR. FOLEY: Sure. We've heard nothing new and nothing true. Judge Higbee, if you -- if you do what you should not do. And I say this with all due respect, because I know that you can put us in the position of having to appeal every single issue. But if you continue to ignore our reliance on the Florida Supreme Court's decision in Krause v. Textron; if you deny our claims against the county that saving grace of the tolling provisions in chapter 28 US code Section 1367; if you dismiss our claims against Orange County, as you have already erroneously done with our claims against the individual defendants; there are still three reasons that you will have to answer the keystone question in this case. And that question is this: Can Orange County prohibit us from doing what the Florida Fish and Wildlife Conservation Commission permits us to do? The first reason you will have to answer that question is that count one of our amended complaint challenges the newly adopted ordinance 2016-19. That ordinance was adopted after we filed our original complaint. So it's timely. Count one challenges old, unrevised language that the BCC used to -- in its order in 2008, in our case. Count one also challenges new language that

effectively codifies that BCC order. So Mr. Turner just has a lot of nerve suggesting that Orange Country has changed its ordinance to be consistent with the victory that we achieved in the federal court. It is not consistent at all. So to resolve that question the Court will have to answer -- will have to ask "Can Orange Country continue to prohibit the sale of toucans that we raised at our home when the FWC says we can do it?" The second reason the Court will have to answer that question is that count one challenges the language in the BCC order. We say the order is void for lack of subject matter jurisdiction. An order void for lack of subject matter jurisdiction can be challenged at any time. So even to dismiss the claim as untimely, the Court will have to decide whether or not the issue is void -- the order is void. And the Court will have to again ask that question "Can Orange County do" -- "can Orange County prohibit us from doing what FWC permits us to do?" And the third reason the Court will have to answer that question is this: Our compensatory claims, they fit a theory of continuing wrong. We say that Orange County's order is a trespass. It injures us and per Article 4, section 9 of Florida's Constitution, it is void. It is

without authority. Orange County's continuing defense of that order is a continuing trespass. Every day they defend that order in Court, it is as though Orange County has issued the order again. So those compensatory claims are timely for at least that four-year period that precedes the day we filed in this Court. So unless the Court ignores the continuing wrong doctrine, it will have to determine whether or not the BCC order is void. And to do that, it'll have to answer that question. Can Orange County prohibit us from doing what FWC permits? How should you approach that question? Well, there -- there -- here's a suggestion. Orange County has prohibited us from doing what -- what FWC permits by enforcing zoning regulation. What is zoning regulation? Zoning regulation is prophylactic, preemptive, nuisance regulation. It prevents nuisance by regulating the source of nuisance. So for example, Orange County prohibits commercial kennel as a home occupation. And in doing that, it prevents the nuisance of odor and noise by categorically prohibiting commercial kennel as a home occupation. The question here is: Can Orange County do that to the nuisance associated with aviary, agriculture, or now, the commercial

retail sale of animals? And that would be all animals, including those regulated exclusively by the FWC. Well, that is exactly the question that Martin Feagle, County Attorney for Columbia County asked the four-term Attorney General Bob Tobacco-Buster Butterworth in 2002. And the attorney general said "No." That's AGO 2002-23. I'd like to read into the record the question that Mr. Feagle asked, "Is Columbia County prohibited by Article 4, Section 9, Florida Constitution from enjoining the possession, breeding, or sale of non-indigenous exotic birds in neighborhoods where the county determines that such use of the individuals land constitutes a public nuisance or a threat to the public." Now, I'd like to read Mr. Butterworth's answer. "The author" -- I'm sorry. Excuse me. Let me start again. "The authority to determine initially whether the possession, breeding, or sale of non-indigenous exotic birds constitutes a public nuisance or a threat to the public is vested exclusively in the Florida Fish and Wildlife Conservation Commission." If the commission is regulating the nuisance, it's done. Orange County has nothing left to regulate. Judge Dalton of the Middle District found AGO 2002-23 persuasive in his

answer to this keystone question in our favor in Federal court. Judge Dalton's decision got the attention of the Florida Fish and Wildlife Conservation Commission. The FWC adopted Judge Dalton's opinion in May and it published what it adopted in a revision of the legal memorandum -- the official legal memorandum regarding local ordinances and the regulation of wild animal life that was originally published in 2007 and provided to all the -- all the defendants, with the exception of Phil Smith.

MS. FOLEY: At that time.

MR. FOLEY: So FWC revised that 2007 memorandum -- the memorandum that we provided the BCC in 2008 -- to include the following passage from Judge Dalton's opinion. And I'd like to read that into the record. "Even if the Court were to accept Orange County's characterization of its ordinances as generally applicable, Orange County still could not enforce its ordinances banning commercial aviculture against Plaintiffs. See Whitehead v. Rogers 223 Southern Reporter Second 330, pages 330 and 31, the Florida Supreme Court 1968. In Whitehead, 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. 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 3 birds from their residence. Thus, like the statute in Whitehead, Orange County's ordinances are void to the extent such ordinances prohibit plaintiffs from possessing and selling class 3 birds from their residence." So Judge Higbee, you'll have to answer this keystone question. There -- there is one affirmative defense that the defendants have not raised. None of them. One affirmative defense that would dispose of the entire case. All they have to do is say we have no injury. All they have to do is say that we had no right to have birds at our home or that we have no right to sell birds that we keep at our home without asking them for permission. If they can do that -- if they could do that, you know that they would assert that because that would end the entire case.

MS. FOLEY: I just wanted to add for the record too that the revised memorandum was May of 2017.

MR. FOLEY: And we filed last night a motion

for judicial notice of that memorandum and we do have copies that we can --

JUDGE HIGBEE: All right.

MR. FOLEY: -- we can give all the parties in the case. So perhaps Jennifer, you could hand those out.

MS. FOLEY: Would that be okay, Judge Higbee?

JUDGE HIGBEE: Yes, that's fine.

MR. FOLEY: I --

JUDGE HIGBEE: I can give you a minute to look at the notes to make sure there's nothing else you want to address.

MR. FOLEY: There is. I mean -- yes, well -- this is exactly where we live --

JUDGE HIGBEE: Thank you.

MR. FOLEY: So you know, we could go on and on about it, but I -- I know that I say we've heard nothing new and really nothing true. We have provided the Court with two papers that address all the claims that Orange County has raised here today. One was our response to their original motion to dismiss. And the second paper was a supplemental response to that, which addressed simply the affirmative defense. Orange County has said today that the ordinances are so different -- I mean,

they're consistent with -- I think they -- they intended to say they're consistent with Judge Dalton's order. But they're absolutely not. The -- the language that hurt us was the prohibition of a commercial kennel in home occupation. There was no prohibition of aviculture in the definition of home occupation. The defendants know that the basis for the BCC's decision was that it saw the prohibition of commercial kennel, and it said "Well, we'll just extend that. That must mean they don't want commercial animal business." And guess what? The new ordinance says, "No commercial retail sale of animals." So it does codify the -- the original order. And I don't know whether you, Your Honor, will stumble over this, but commercial retail sale of animals, as we read the ordinance, doesn't mean a storefront at the home. Because also in the definition is prohibited on site sales. "There can be no customers," it says, "at the location." So it's not, like, they mean retail, as in people coming because people can't come period. They mean raising birds there or raising animals there and selling them somewhere else. Mr. -- Mr. Turner has confused count two and three. It took me awhile to -- to catch on. But what -- when Mr. Turner says

that count two is barred by the statute of limitations. He really means the compensatory claims in count three. Count two is also a declaratory relief claim for the SIC code 0279, which oddly still appears in the code. 0279, I have to say, is an SIC code that is -- that the county can enforce, and it represents a classification of all animals not otherwise classified by the standard industrial classification code. So that means, actually, one of the items is specifically rattle snake farms. One is aviaries. One is bee keeping. So exotic animals -- even though the ordinance has eliminated the -- the text which says "aviculture" and the text that says "exotic animals," it has not eliminated the SIC code has always been associated with that activity. Mr. -- I'm -- I'm really happy that Mr. Turner has pointed out that the sovereign immunity that he claims is separation of powers immunity. Because please tell me what is it when the county invades the jurisdiction of a constitutionally created agency that has so much power that -- that the State legislature would go to -- would attempt to call Lake Okeechobee saltwater, would attempt to call the Saint John's river saltwater. That's an agent -- one attorney general

said the FWC has so much power, we're lucky they don't tax us. What the county has done is a violation of the separation of powers. So there is no separation of powers immunity for that. Mr. Turner has attempted to characterize the administrative proceedings as our protest of what -- what the county was doing. I don't -- I don't know how to handle that. Except we -- we narrowed it down in our complaint. We said they knew from the beginning that what they wanted to prosecute us for was for selling birds at our home. What did they do? They did something that they do, not infrequently. It works like this. They have one violation that they know exists. And they have a second violation that they discover. We -- I have a case. I have a case that actually was heard at the time this new ordinance was being amended. The -- the fellow built a garage but he over build. He built it too big. So he didn't get a permit to build a garage. And he didn't -- he violated the code by building it too big. He was -- he was prosecuted for not having a permit. The same thing that happened to us happened to him. Code enforcement board said, "Get that permit, destroy the structure, or pay a fine." He went to get the permit and discovered, low and

behold, he's in violation of another provision. And he had to go through the same sort of administrative process that we did in order to get a resolution. He asked the commissioners for permission to -- for variance. One in particular was very unhappy with him and just said you know -- you know, he wasn't going to do it. And in his case, that's okay. You know why? Because Orange County has authority over all of that. But they don't have authority over -- this is where we did the 11 -- the 11 -- this two sticker thing. I don't know if you remember me or this or anything, but you know, they have -- they have two procedures for prosecuting violations to their code. One is respective. And that's really the one to be used when they know they have a violation and they want to straighten it out. The other is prospective. It's really just meant for permitting. But, they use it. But, Orange County uses it consistently when it can do to someone like they did to us. The problem is at the end of this procedure you don't have what Mr. Turner wants to say you have, a remedy because you've already been injured. We had to destroy our aviary because we were selling birds. We had to do that. The code enforcement board said, "Get a permit, destroy the

aviary, or pay the fine." Permitting would not issue the permit until the -- until the time period lapsed. So we had to destroy it. And we were waiting, and waiting, and waiting for the zoning manager to issue that opinion. Oh my God, he just took forever -- he just took -- he took so long that we had to destroy it, right? And now we've got -- and now we've got 20 cages of birds in our living room for nearly six months.

MS. FOLEY: And in addition, when we finally got the permit, it was written on its face, "Pet birds only."

MR. FOLEY: So what I'm saying is what they do isn't always wrong. But when there is a contested right; when they're told up front this violates the State constitution; when the agency says to them, "Hey look, we've written a memorandum of law on this," they can't disregard it and -- and satisfy the requirements of the reasonable man -- the reasonableness standard of tort. Mr. Turner wants to say that our negligence claim is bad because of the way we worded it. It's really just a special wording that is in the context of this action, but it's basically the reasonableness standard. Negligence is injury, which we've established, and

they haven't discussed at all, proximate cause and -- and unreasonableness, right? Lack of reasonableness. We had to allege -- unreasonableness. And the way we did it was by pointing to the procedures that they did follow and the procedures that they didn't follow. In addition, you know, we allege in -- in our negligence claim that -- that they invaded our rightful activity. That is a -- a restatement claim. We said they invaded our privacy. That is a restatement of tort's claim. Those are independent, entirely independent, of whether or not we've alleged a general negligence claim for failing to be reasonable. Injuring us by failing to be reasonable. Do you -- do you need to know what sections of the restatement I'm talking about when I say, "Invasion of" -- "of rightful activity"?

JUDGE HIGBEE: You're welcome to put them on the record if you wish.

MR. FOLEY: And then, you know, the unjust enrichment thing. How can it be just for Orange County to take fees for a procedure that couldn't -- couldn't adjudicate the real right that was at issue? And that was whether or not we could -- we could keep birds. How can they take money for an

order that does something that they have no authority to do? Mr. Turner says you have to have actual possession for conversion. Baloney. You do not. It's just a constructive possession. That's all conversion requires. That's what we've alleged. Intrusion upon seclusion is a restatement, 2nd torts, Section 652b. That's the 1965 edition. And then we alleged that they invaded our privacy, which is -- I'm sorry. "Intrusion upon seclusion" is what I just quoted. Section 652b. "Invasion of" -- "of a right of" -- "to be at a place where engaging in activity" is Section 309ai. The issue of -- so again, I want to repeat. We were injured before we had an opportunity to -- to prevent the injury. On the issue of business damages, I just don't think we're there yet. And I don't -- I don't think I need to discuss that. I mean, there are -- Mr. Turner's right to an extent. On the issue of due process, again, I don't know -- I don't think the Court is going to go all the way there. There's a very big difference between State and Federal due process and we covered this last time. You don't have a federal due process claim until you've exhausted all your remedies in State court. And that's basically what the federal court did in our

case. That's why they've dismissed it. And again, this issue that it was frivolous. Yeah, they used that language "frivolous." But what -- what they mean by is that is -- is not that we didn't state a federal question. We definitely stated a federal question. The problem was the federal question had already been stated, and stated, and stated, and stated so many times that the Court said we've already resolved this. So they dismissed it without prejudice. You know, I quoted in our response Judge Tjoflat, who said, "You're not injured at all. You just go back to State court and start over." Judge Tjoflat, I don't know -- you know. I -- come to here thinking this is -- this is sort of, like, a Temple of Law, really. And -- all right. Thank you.

JUDGE HIGBEE: Thank you.

MR. TURNER: Your Honor, Mr. Foley is correct when he said I got counts two and three confused. Yes, both counts one and two are declaratory judgment counts. And count three is the count that purports to be a tort. Mr. Foley is contending that the keystone question here is whether Orange County and can -- and I believe he is contending that we are continuing to prohibit them from doing what

they're licensed under State law from doing. Well, that's not true. Our land use ordinance was amended in 2016. It has not been applied against the Foleys. There's been no case or controversy under that 2016 amendment. The only thing that actually happened is what happened back in the 2008-time period, which was the subject of the earlier filed action. And once again, Orange County has amended its land use ordinances to be consistent with the theory that the Foleys were being -- were putting forward and that Judge -- the federal judge in the district court opinion had articulated. So that's the current state of affairs. And you can't contend that Orange County is continuing to do to the Foleys what Orange County allegedly did to the Foleys back in the 2008-time period. That just isn't the case and it's not alleged. That's why the declaratory judgment counts need to be dismissed because there's no application of a current land use regulation against the Foleys in derogation of the Florida license. It simply isn't happening. It's not alleged to happen and it isn't happening. As to the cite of the Krause v. Textron case, that case at footnote 4, specifically notes that the case -- the federal question and the federal action that it was

dealing with was not one in which the Court never had original jurisdiction. That's footnote 4 of the Krause decision. And that's the basis as we understand your Court's order that the federal courts found there was never any jurisdiction, never any basis for jurisdiction in the federal action. And that that was the basis of Your Honor's earlier order.

JUDGE HIBGEE: Okay. Thank you all very much. I'll take that under advisement and I'll issue an order.

MR. TURNER: Thank you.

MR. FOLEY: Thank you.

MS. FOLEY: Thank you.

(HEARING CONCLUDED AT 3:46 P.M.)

C E R T I F I C A T E

STATE OF FLORIDA)

COUNTY OF ORANGE)

I, ABIGAIL RUSBOLDT, Court Reporter and Notary Public for the State of Florida at Large, do hereby certify that I was authorized to and did report the foregoing proceeding, and that said transcript is a true record of the testimony given by the witness.

I FURTHER CERTIFY that I am not of counsel for, related to, or employed by any of the parties or attorneys involved herein, nor am I financially interested in said action.

Submitted on: December 27, 2017.

ABIGAIL RUSBOLDT

Court Reporter, Notary Public

B

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, FLORIDA

CASE NO.: 2016-CA-007634-O

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

Plaintiffs,

vs.

ORANGE COUNTY, PHIL SMITH, CAROL HOSSFIELD, MITCH GORDON, ROCCO RELVINI, TARA GOULD, TIM BOLDIG, FRANK DETOMA, ASIMA AZAM, RODERICK LOVE, SCOTT RICHMAN, JOE ROBERTS, MARCUS ROBINSON, RICHARD CROTTY, TERESA JACOBS, FRED BRUMMER, MILDRED FERNANDEZ, LINDA STEWART, BILL SEGAL, and TIFFANY RUSSELL,

Defendants.
_____/

APPEAL TRANSCRIPT

PROCEEDINGS:	THE OFFICIAL DEFENDANTS' AMENDED MOTION TO DISMISS WITH PREJUDICE AND THE EMPLOYEE DEFENDANTS' MOTION TO STRIKE THE AMENDED COMPLAINT, REQUEST FOR JUDICIAL NOTICE, AND MOTION TO DISMISS THIS ACTION WITH PREJUDICE
BEFORE:	HONORABLE PATRICIA L. STROWBRIDGE
DATE:	TUESDAY, MAY 28, 2019
TIME:	2:22 P.M. - 3:23 P.M.
PLACE:	ORANGE COUNTY COURTHOUSE 425 NORTH ORANGE AVENUE HEARING ROOM 20-B ORLANDO, FLORIDA 32801
STENOGRAPHICALLY REPORTED BY:	AMANDA L. THOMPSON

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ALSO PRESENT:
DAVID FOLEY, PLAINTIFF
JENNIFER FOLEY, PLAINTIFF

P R O C E E D I N G S

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THE COURT: So this is on the, I guess, amended motion to dismiss.

MR. NETCHER: And there are two separate sets of defendants.

THE COURT: Right. The May 3rd and May 8th motions -- we have the employee defendants and we have the officials. Okay. Folks, ordinarily, I'm very well-apprized before I come into a hearing, but we are coming off a holiday weekend, in which I had a house full. So I have not fully read these motions. I skimmed through them. So based upon that -- who filed the employee defendants?

MR. NETCHER: We did, Your Honor.

THE COURT: And who filed the officials?

MR. ANGELL: I did, Your Honor, Derek Angell.

And there was a misfiling, so the Court knows. The May 8th should have been filed earlier, but we had a computer issue that day. I filed an old copy of it. So this is the only thing we're here on, in case you see anything like that.

THE COURT: Okay. Which of you two would like to argue first? I assume they are the same argument.

MR. ANGELL: They are a little bit different.

I'm happy to take the lead.

MR. NETCHER: Sure.

MR. ANGELL: May it please the Court. This case is truly remarkable. The history -- the life this thing has taken has been amazing to watch. And I need to go through the history, so the Court understands exactly how and why we are where we are today.

This began back in the latter part of the last decade. And this was in the complaint. There was a citizen complaint made about the Foley's property. They were raising toucans commercially at the property that was --

THE COURT: By the way, I do know that background of it. From the prior hearing, I had reviewed the background of the case.

MR. ANGELL: I don't mean to belabor something the Court is familiar with, but I'm just going to walk through how we are -- impact today's decision.

THE COURT: Here's where I'd like you to start off from --

MR. ANGELL: Sure.

THE COURT: My understanding is that there was -- we are just coming off the appeal where there had been a prior motion to dismiss. And what I understood was there were essentially two arguments that were being

made on the motion to dismiss. And Judge Higbee issued a ruling as to one of those arguments and that's what was reversed. So am I correct in assuming that this motion to dismiss is now on the other of those two arguments?

MR. ANGELL: There are -- there was more than just two. She only ruled on statute of limitations. And she had a written five-page order, I think it was, and never touched the other issues. You are correct. So when the Fifth DCA reversed, they -- a footnote in there specifically saying we're not going to -- within our discretion -- we're not going to address these other issues for the first time at the appellate level, even though we raised it before, because --

THE COURT: Because there was no ruling on it.

MR. ANGELL: There was no ruling on it.

THE COURT: And she told me that she had not ruled on -- she said there were basically two arguments for dismissal and she only ruled on one of them.

MR. ANGELL: There were two major arguments. There were some other ancillary --

THE COURT: Okay. So we are going to do the second major one and the other ancillary ones she didn't rule on?

MR. ANGELL: That's correct.

THE COURT: So tell me what the second major argument is because statute of limitations has been ruled on by the Fifth.

MR. ANGELL: That's right. The other major argument is immunity. In our case, the officials -- and I'll allow the employees to speak for themselves, which is a slightly different analysis -- but it is that our individuals, who are sued individually, not as a corporate body or governmental body -- individually have quasi-judicial immunity from civil suit. That is the argument. And if you read the complaint and sift through it and look at everything that was filed in the federal court, the only activity -- the only activity alleged by any of my clients was that they participated in government activity.

They were at public hearings and they voted and entered an order that upheld the code enforcement employees determination that the Foleys were violating Orange County code as written at the time. In fact, the way it works in the administrative process, if you have a code enforcement violation, you appeal to the Board of Zoning Adjustment. Right? They have a public hearing. Those individuals who were there are

the defendants in this case.

They are an executive agency -- a member of local government. They do not have the authority to make constitutional rulings. That is purely a judicial determination. In fact, that was discussed -- and there's record of it -- in that hearing. Mr. Foley made the argument that the Orange County code as written at the time has since changed. And that's an issue that the Court will take up with the County when their motion is heard.

At the time, the code enforcement guy said, "You are violating this code." He said, "Well, this code is unconstitutional because it is in conflict essentially with the Florida Fish and Wildlife Commission" -- which is a State agency. And his argument was they are the only ones that have the authority to regulate aviculture -- that's the word for it -- and therefore, this ordinance is unconstitutional under the state constitution. And they said, "Well, that's a nice argument. You made it very well. However, we can't do anything about that. That's not our job. Our job as an administrative agency in this capacity is to review what the code enforcement guy did and either affirm it or reverse it, so to speak."

So they voted. I think it was seven to nothing. And said that they were affirming. So the next step in the process is to go the Board of County Commissioners. Again, I represent all of those people, which includes at the time Mayor Jacobs, Tiffany Russell, and other local dignitaries. And they are -- there's another layer reviewing what the BZA did. And they, again, voted publicly affirming down the line -- said you are violating this ordinance. You are selling toucans in an area that you can't do that per code, essentially.

The next step in the process was they appealed to the Circuit Court, which is the next step. When you are appealing a local administrative agency, you go to the Circuit Court. And the Circuit Court affirmed and said no. You have to file a dec action, essentially, as an original action to say this ordinance is unconstitutional -- if that's your theory -- and void it that way. And that's what they did.

And the mistake that they made, respectfully, is that they filed it in federal court. And along with a host of other theories -- I can't remember -- I think there was two dozen counts -- a lot of the same sort of things here, you know, civil theft, there was RICO -- I can't remember. At one point, there was a

200-page complaint. There was a lot of allegations. And it included a bunch of federal due process -- equal protection -- all those things.

And the first order -- it also includes suits against my individuals, personally and in their official capacity. The first major order in this case came from the Middle District and they dismissed all of individuals because a very, very short paragraph, quasi-legislative, which I think it should have been quasi-judicial. That's academic because the result is the same. If a person is sitting either quasi-judicially or quasi-legislatively or actually judicially or legislatively, they are all entitled to absolute immunity. It's no different than Your Honor is as a result of the orders that the Court promulgates. The complaint says that the order that the executive agency promulgated caused them all these damages.

The Court kept the case as to the County. So the County stayed in the case after that first order, which was in 2012. The next order that comes out rules on -- first of all, none of the federal counts survive summary judgment and that there would be no damages. At this point, it's just the Foleys and the County -- but that the ordinance, in fact, violated

the Florida constitution for the theory that they addressed.

Both sides appealed. They appealed because they wanted money, at least that's how I interpreted it. It could be something else. And the County appealed because they are protecting their ordinance -- to the 11th Circuit. All of us were here -- actually, not Mr. Netcher, but we were all here. And what the 11th did -- they said, hold on a second. The federal theories in your complaint are not just groundless, they are frivolous. And that's an important distinction for when we talk about federal subject matter jurisdiction. They said we -- they are so far from a viable federal cause of action that the district court did not have the authority to rule on a Florida constitutional question.

So the 11th Circuit opinion, which, of course, is in this record, said all right. We're dismissing this all without prejudice as to the state law claims because the federal court cannot adjudicate state law claims when there's no adequate basis for federal jurisdiction. So they didn't reverse anything as to the federal claims, but just said there's no jurisdiction over the state claims, which is how the court decided that the ordinance was unconstitutional.

It was not a federal unconstitutional problem. It was just the way the Florida constitution sets up the regulation of wildlife.

So we get back to this court. They file a -- I can't remember exactly if we filed a motion to dismiss and they amended, but I know that they amended at some point. So there's been at least one amendment. And we filed a motion to dismiss again here with Judge Higbee. And the argument began with statute of limitations and immunity and there's no cause of action. She entered the order on statute of limitations, which is a fairly interesting question as it turns out and we -- so here we are. So that is the history -- the detailed and significant history.

At the end of the day, this whole lawsuit against my folks in a personal individual capacity is what they did as part of their official duties as a government agency, acting in that very capacity doing the very sorts of things that we expect them to do -- voting on public matters. They were reviewing what the code enforcement employees did and passing their judgment.

The fact that this complaint alleges that they are outside of their jurisdiction because retrospectively that ordinance may or may not be constitutional is totally irrelevant. The scope

quasi-judicial and judicial immunity is extremely expansive. It's -- even if a judge does something they don't have jurisdiction over, there's no personal cause of action. And that makes perfect sense. Otherwise, judges would be sued multiple times a day, I would imagine. Judges have the same defenses here as my folks on the Board.

So it really is that -- despite the complexity and verbiage and the allegations of bad faith and theft and everything else, it is that simple, Your Honor. You cannot sue a member of the government for a vote that they take. That is just the way our country works and, I think, most of the developed world.

So that is as far from a realistic cause of action that I've seen. And for a case to last this long is astounding that we are still here. And so -- and make no mistake, Judge Berger on the Fifth said -- no, look, there is immunity and there was no even analysis. I think it's that obvious. She said I would affirm on what we call tipsy coachman because, yeah, they are immune. And they said no, we are going to deal with the statute of limitations issue and send it back down. So be their prerogative.

So that is it. And if we look at the causes of

action, we see how removed from a cause of action we are. They've alleged against my folks -- their Count 5 was called, "Acting in concert abuse of process to invade privacy and rightful activity and conversion," which is a novel phrase, as far as my research revealed. Now, abuse of process that that cause of action -- if we need to analyze this at any technical level -- it requires the wrongful use of process after -- processes you've been served. That's the process. And you use it for something wrong. There was no process in this case as far as that phrase is used in this tort -- the context of this tort. Nobody sued anybody except the Foleys suing the officials. They go to their public meeting and have their votes. I'm sure there was a court reporter and there was an official record made of it. That is not a process that can be abused, nor do these allegations come close to that.

If you look at conversion, you know, conversion is basically taking somebody's stuff. There's other ways to do it, you know, if I put my hose into my neighbor's yard and destroy his stuff, that's a conversion. There's damage on his property, what have you. Conversion here -- I mean, what they're trying to say is that because of the order that resulted from

these hearings -- that they have to take down their aviaries because of judicial process -- or the quasi-judicial process, I should say. That's not conversion any more than it is to have a traffic ticket that I have to pay $35 if I leave my car too late in the morning. That's not conversion. The government is not converting my money. That's just the government process, not conversion. The officer issuing the ticket is not converting my money. The folks who voted at this hearing are not converting -- taking their aviaries. It's just preposterous. That's not even close to what that means.

And then we get to -- same token -- civil theft. Civil theft is a civil remedy for literally criminal activity. And to suggest that voting as a government actor is criminal, even if you are wrong or bad judgment or even if you have some -- you're just a bad person, that's not criminal. You're not stealing anything. Judges don't steal things when they enter orders of restitution or what have you -- or an order to take down something -- an injunction. That's not stealing. That's not theft. That's not criminal intent. It's just, again, preposterous that these allegations have survived to this stage.

Then finally, what perhaps is most procedurally

concerning is that in their last count, which is a due process theory, is that the reallege Chapter 42 USC 1983, a civil rights federal statute, which federal courts -- the 11th Circuit no less -- said is frivolous. And yet they slide section 1983 back into this lawsuit. That's res judicata, make no mistake about it. The federal court did not reverse anything as to the immunity our folks had. They were just talking about the jurisdiction over the state law theories and how the ordinance operated with the Florida constitution.

So the federal court ruled in summary fashion that the counts against our folks were frivolous. And yet, here they are again, realleged and we're defending again at another motion to dismiss hearing. So the fact that 1983 is back in here -- it's just -- I can't -- it's hard to believe.

And, again, this was not, you know, the liberality that we normally afford to pro se litigants. The Foleys are very well-versed with what we're talking about. We have argued, like I said to the 11th Circuit, Judge Higbee, multiple times -- Your Honor, now I think three times. And we've had many conversations off the record of course. This is -- they know what they are doing with this. These

theories do not pass the flush test, respectfully.

So that's our motion, Judge. I think it's as simple as it should be. The case's life has made it more complicated than it is. We firmly believe that prejudicial dismissal is warranted at this stage. Thank you.

MR. NETCHER: Your Honor, would you like me to proceed with mine? It's fairly similar --

THE COURT: Don't plow the same ground, but anything else new.

MR. NETCHER: Sure. I would concur with what Mr. Angell has said. My name is Eric Netcher. I represent who we are calling the employee defendants. And I'd like to briefly just say what they did. Tara Gould was an assistant county attorney for the County. Phil Smith was a code enforcement inspector. Mitch Gordon was a zoning manager.

THE COURT: Hold on a second. Who was the county attorney?

MR. NETCHER: Tara, T-A-R-A, Gould.

THE COURT: Got that.

MR. NETCHER: Phil Smith is a -- these are alleged in the complaint as what their roles were, but --

THE COURT: I know.

MR. NETCHER: Phil Smith, Code Enforcement Inspector; Mitch Gordon, Zoning Manager; Rocco Relvini, Board of Zoning Adjustment Coordination Chief Planner; Tim Boldig, B-O-L-D-I-G, Chief Operations of the Orange County Zoning Division; and Carol Hossfield, Permitting Chief Planner. And these are employees of the County, who were performing their jobs and have now been in this litigation since 2012 when the first federal lawsuit was filed.

And our immunity is based off of section 768.28, subsection 9, which provides that no employee or agent of a governmental agency can be held personally liable in tort or named as a party defendant for any injury or damage suffered as a result of any act, event or omission in the scope of his or her employment or function. There's an exception if they are acting in bad faith with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights. This is an immunity from suit. So it's a prevention from even being named in a suit, which is somewhat ironic given the extent of the procedural history that Mr. Angell laid out.

And so there are no allegations in this complaint, nor could there be that Tara Gould, Phil Smith, Mitch Gordon, Rocco Relvini, Tim Boldig, or

Carol Hossfield acted with a malicious purpose or in a wanton manner. And the fact that the County is in this suit is indicative of the fact that these individual employees cannot be liable because the case law is clear that in any circumstance, either the County or employees, can be liable, but not both. So in circumstances where the governmental entity is liable, the individuals cannot be. And circumstances where the individual is liable, the government can't be.

And so reading the complaint, as I've mentioned, there's just no allegations that any one of these individuals acted in that manner. And so they are entitled to immunity under 768.28, 9A.

And then I would concur, again, with everything that Mr. Angell said regarding res judicata for the federal claim in Count 7, with regard to the absence -- entire absence -- of factual allegations that state a cause of action for abuse of process, conversion, or civil theft.

You know, at this point in time, Your Honor, it is time to bring this journey to an end. Especially for my clients, who are employees performing a function that was then reviewed and voted on. There is just no basis to hold them liable in tort or

otherwise. And we request dismissal with prejudice as to the employee defendants.

THE COURT: Anybody else on Defense side arguing?

MR. TURNER: No, Your Honor.

THE COURT: All right. Plaintiffs' side?

MR. FOLEY: What we would like for you to do is to deny the motion to dismiss and make no ruling on their affirmative defenses. We think that they're asking you to answer our complaint. We think you can give us the order that we're looking for by saying that our complaint is well pled and that our allegations go directly to the exceptions to immunity they've raised and to the predicates of the various causes of action.

This does not deny them their right to avoid suit if they, in their answer, can establish that they do indeed have immunity. But our -- I guess I want to try to walk you through some of the allegations in the complaint that go to these issues of -- first, absolute immunity.

There are five primary allegations that go to absolute immunity in the amended complaint. The first one is at paragraph 28. It's the paragraph that essentially says that Orange County cannot regulate raising birds to sell. It is longer than that. It

says that -- Article 4 of section 9 of Florida's constitution has, for 72 years, been consistently construed by the doctrine of 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 the Florida Fish and Wildlife Conservation Commission.

So the -- and we have said -- used the same words in our written response -- the outer bounds of the defendants' immunity is going to be outer bounds of Orange County authority. So this subject is outside of Orange County's authority. So the regulation of raising birds to sell isn't something that's going to be immune.

THE COURT: Let me ask you a question. So let's say you are right and this is an issue where Orange County doesn't have the authority to do this, are you suggesting that these individuals were not acting within the scope of their employment when they did that?

MR. FOLEY: Not on that --

THE COURT: Even if -- let me ask you this. At this point in time, nobody has ruled on that question, have they -- whether or not Orange County has that

authority?

MR. FOLEY: Well, the ruling Judge Dalton made was ultimately reversed, as all his rulings were in the federal court. I mean, he did --

THE COURT: The 11th Circuit?

MR. FOLEY: The 11th Circuit overruled Judge Dalton's decision.

THE COURT: So at this point, we don't have a ruling from the Florida Supreme Court or from the federal court that says that this topic is controlled at the state level and not at the county level. We don't have a ruling that says that right now that captive exotic birds is not an issue in Orange County.

MR. FOLEY: Not a judicial ruling, but the attorney general in AGO200223 did specifically address captive exotic birds. And he said no, you can't do it. Again, that's referenced --

THE COURT: And let me explain to you where I'm going.

MR. FOLEY: Sure.

THE COURT: So -- and the reason I'm asking this is if there were a clear directive from the Florida Supreme Court or from the federal court that Orange County had no authority whatsoever to be dealing with captive exotic birds, then there still would be

immunity, wouldn't there? But it would be a different type of immunity because they would be outside of the scope, right?

MR. FOLEY: Right. I mean, I wasn't really going to start -- I mean, I started there because that's the outer bounds of the issue of immunity.

THE COURT: Okay.

MR. FOLEY: But that's not our argument. At paragraph 42, 43 and 45, we say that the defendants claimed they were acting pursuant Chapter 30 and 38 of the Orange County code -- that they knew that Chapter 30 and 38 did not give them authority to take anything from us, birds or otherwise -- that they knew if they proceeded, they would be taking something from us and they proceeded anyway. So what we are alleging there is that under the Orange County code, they did not have authority to do what they did.

THE COURT: So let me -- I'm trying to understand where the parameters of this immunity would be. So let's say we have a situation where somebody's house is in foreclosure. So if the Court proceeds to enter a judgment -- foreclosure -- they are, in fact, taking a house from somebody, right? So there -- as an argument that maybe that was something that cannot occur under the federal constitution because of the

14th Amendment. So let's say we had that argument and there hadn't actually been a ruling on that, but you go to state court entering foreclosure judgments. And they may be arguably outside of their authority if somebody were successful in determining that this is only a federal issue because it's a taking of property under the 14th Amendment and can only be handled in federal court. So that might make me, as a judge, outside of my jurisdiction when I do it, but does that take away my immunity if I entered that judgment believing that it was within the authority that I had at the time because there hadn't been a ruling?

MR. FOLEY: The person affected by your ruling would have some remedy in court.

THE COURT: To me, as a judge for entering --

MR. FOLEY: No, no. I would imagine -- I don't know foreclosure law. But I would imagine that after you made your decision, they could appeal every element of your decision to another court.

THE COURT: But they can do that whether or not I have immunity.

MR. FOLEY: This is the issue. I really do -- Mr. Angell has given us our case, if you understand the difference between Chapter 30 of the Orange County code and Chapter 11. I just talked about the first

two of five -- different primary allegations that go to immunity.

Now, remember what we are asking you to do is to ask them to answer the complaint. We're asking you not to answer it. So the third one is at paragraph 47. We say that these defendants had a duty -- in fact, it's really a ministerial duty to prosecute anything they think is a violation of their code pursuant Chapter 11. That's the Orange County Code -- Orange County Code Enforcement Board ordinance.

And so if we are right, then the defendants have violated a ministerial or imperative duty to follow the provisions laid out in the code for enforcement of a violation that they found.

THE COURT: And I get that.

MR. FOLEY: Okay.

THE COURT: Doesn't that just give you a cause of action against the County? That doesn't give you a cause of action against the individual code enforcement officer, does it? I mean, this guy is hired to do code enforcement. He goes out and he's got a code they hand him. And if it violates the code he's got in his hands, he writes his ticket, right? He's just a County employee. And so he is operating within the constructs that are given to him by the

County.

MR. FOLEY: No, he's not.

THE COURT: He is not a constitutional officer. So he's an employee, right?

MR. FOLEY: But he doesn't have the option -- they don't have the option to prosecute an existing --

THE COURT: Wait. "They" is the county. I'm talking about --

MR. FOLEY: Well, I'm talking about these individuals. And they do not have that authority.

THE COURT: Mr. Smith --

MR. FOLEY: Right. Mr. Smith, Carol Hossfield --

THE COURT: Let's stick with Mr. Smith. Mr. Smith is just an employee. He works for the County. The arguments you're making sound to me like arguments against the County. But what about Mr. Smith? Why does he get sued in this for just being an employee and just doing his job? Doesn't he have immunity under 768 as an employee? Because that's the -- this may still be an issue that the County has to deal with.

MR. FOLEY: Why? They have laid out the procedures for them to follow and they didn't follow them.

THE COURT: Do they have the authority to

overrule the County? Because --

MR. FOLEY: Absolutely not. That's why they are here in court. They don't have --

THE COURT: Don't raise your voice with me, Mr. Foley.

MR. FOLEY: Okay. But --

THE COURT: I'm not raising my voice with you.

MR. FOLEY: Right. All right.

THE COURT: The question is can Mr. Smith go to work and say, "Orange County, you're just wrong. So I'm not going to write this code enforcement violation because it violates the constitution." As an employee, he has to do what the County directs him to do.

MR. FOLEY: And the County directed him to do -- once he established that we were in violation of their interpretation of the code -- that we were raising birds to sell -- County code says you prosecute the Foleys pursuant Chapter 11 -- because at the end of Chapter 11, you have full appellate review. You provide the Foleys with every single due process protection that they deserve. But Mr. Smith didn't do that and neither did Carol Hossfield and neither did Mitch Gordon. They put us -- let's walk through the real background. Do you want to do that? Are you

familiar? Because you --

THE COURT: If you can do it -- if you can calm down --

MR. FOLEY: I'm trying.

THE COURT: -- because I'm not going to tolerate you raising your voice with me. I'm here to try to understand the argument. I'm going to ask questions that --

MR. FOLEY: Well, you did say --

THE COURT: -- the motion. I've read through your case before.

MR. FOLEY: Have you read our written response to their motion?

THE COURT: I have not. I'm not ruling today, folks. I'm asking questions today.

MR. FOLEY: All right. And, again, I want to repeat, what we want is for you to deny the motion to dismiss and let them answer.

THE COURT: I understand. That's why we are having a hearing, but I need to understand what the arguments are, so that I can make the ruling -- because, folks, let me be clear with you -- I don't care about toucans or the County or anybody else. What I care about is being right on the law. And I'm going to read everything that's been submitted. I'm

going to read every single case that's been submitted. And then I'm going to make the decision that I think is the most correct on the law because that is my only dog in this fight. So what I'm trying to understand is why you believe there's personal liability in the face of a statute that says that the employees to work for the County can't be held personally liable. What is the legal exception that would allow you to do that? Because the fact that -- there could be an argument that it's outside the County's jurisdiction. First of all, I don't even have an actual ruling that says it's outside the County's jurisdiction, but even if I did -- even if there had been a ruling from the Florida Supreme Court -- that counties can't do this. These are birds -- they can't do it anymore. If the County did it in face of that, then the County might be liable. But what about Mr. Smith, the employee of the County -- why would he be personally liable? Why can you sue him, personally, as an employee of the County if he is just doing his job?

MR. FOLEY: We are suing them as acting in concert. So that means that some, but not necessarily all, did something tortuous. But all were involved in the same objective. So that's a partial answer to your question.

Mr. Smith didn't have to make any decision as to Orange County's constitutional authority to regulate wild animal life. What Mr. Smith and the other defendants had to do and had to do correctly was to prosecute us pursuant Chapter 11. That's our big argument. They can't turn the BZA and the BCC into a code enforcement board. And that's what they did here.

Let me tell you how it happened. All right. So we started raising birds. And then February 23rd, 2007, a private citizen reports to Orange County that we're raising birds to sell. That report initiated a code enforcement action. The investigation produced evidence of two violations. We had an accessory structure without a building permit. And we were raising birds to sell.

The defendants used these two violations the way a blacksmith uses a hammer and anvil. We were prosecuted before the code enforcement board on only one, the first -- that we had an accessory structure without a permit. No mention was made of toucans or its aviaries. The Board says, "Go get a permit, destroy your structure, or pay a $500 a day fine."

So we went to get a permit. We go to permitting. Now, this is condensed in paragraph 40 of our amended

complaint. We go to get the permit and permitting says -- wait a minute, we have been told that you are raising birds to sell and we are not going to issue you that permit. Now, we are in a pickle.

You tell me, Judge Strowbridge, what do you do if you are in an administrative proceeding -- procedure -- and you've been told that you can't get permitting -- that you can't get the -- you can't satisfy the order of the code enforcement board -- what do you do? You don't have a route to court. You can't go to court and say they are denying me this based on this constitutional -- because I'm raising bird to sell. And that's -- the Court would say to go back to the administrative procedure and settle it there because they can settle it there. All right.

So you go back -- what did we do? We went through the only route that we could. Mitch Gordon decided yeah, we are in violation of the code. Well, what does the code say to Mitch Gordon when it says you found the Foleys in violation of the code? It says you need to prosecute them pursuant Chapter 11. But no, he didn't do that.

We appealed his decision to the BZA. They found as -- as these both -- no --you're just with the employees, but as Mr. Angell has said, they found us

in violation of the code too. What does the code say to them when they find somebody in violation? They say prosecute them pursuant Chapter 11. And they didn't do that. They just ordered us to stop. Well, we have to obey the order.

And now what are we going to do? Can we appeal? Sure -- well, no, you can't. You can't appeal. You don't have an appeal from a Board of County Commissioners' decision. What you have is petition for certiorari. And under the line of cases coming out of Key Haven, which is -- they say, as the Court in our case said, we can't reach the constitutional question. Well, how? That's where the injury lies. That's the source of all the injury -- is the fact that they violated the constitution, but they can't reach it.

Now, had they prosecuted it pursuant Chapter 11, we could have posted a bond with the court in -- to pay for any fines that might accrue while we're on appeal and we could have challenged the constitutionality of the regulations they were enforcing, whether they were actual ordinances, which they weren't. They were an interpretation of ordinances. We could have challenged the constitutionality there. And I'm sure we would have

prevailed because we are very firm on this whole -- on Article 4, Section 9 of Florida's constitution. And we would never have been injured. So --

THE COURT: I'm still waiting to hear --

MR. FOLEY: -- Orange County and not the defendants --

THE COURT: I'm still waiting to hear why that's not a lawsuit against Orange County because all of these folks are affiliated with Orange County.

MR. FOLEY: How do I sue Orange County when they have the --

THE COURT: Well, you did, didn't you?

MR. FOLEY: No, no, no. They are responsible for the final order. Orange County is definitely responsible for saying in an order that is effectively a piece of legislation -- it's broad. It applies not just to Jennifer and I. It applies to all of the county.

THE COURT: But they are also responsible for everything that their employees do, aren't they? I mean, ultimately, isn't that their responsibility? They direct their employees. I mean, I think that's why we have --

MR. FOLEY: But the employees weren't following the direction and they were exercising authority that

they didn't have. They don't have authority to prosecute a code violation in that channel -- in permit -- permitting is entirely prospective. You go to permitting and you say, hey, can I do this? And they say yes or no in the future. They don't say you can't do it and so we are going to keep your permit away from you -- you've got to stop doing it. They can't do that. They are not going to find anywhere in the code where it says that a permit can be denied because somebody -- wait a minute. I don't want to go too far.

Well, I see where we have a difference of opinion and I'm not sure that I'm going to convince you. I hope that the written response does.

THE COURT: Well, my question --

MR. FOLEY: There's a difference between excess of authority and absence of authority. And you, as a judge, should know this. When you act in excess of authority, you've got immunity. When you act in absence of authority, you don't.

THE COURT: Well, what is the standard to avoid the immunity -- just for the employees? I don't want to get into the officials. But just for the employees, what's the standard to avoid that immunity in Chapter 768?

MR. FOLEY: Well, of course, if you -- we are alleging legal malice. They did something that they weren't supposed to do. That's legal malice.

THE COURT: Did they or did they believe that they were acting under authority that you disagree with? They think they have authority.

MR. FOLEY: No, no. We're not talking about the constitutional issue. We're saying that under Chapter 30, they did something that Chapter 30 does not authorize them to do. We're saying they did not follow their own rules.

THE COURT: Mr. Netcher, what's the standard for avoiding the immunity in 768.28?

MR. NETCHER: Bad faith, malicious purpose, or wanton and willful -- essentially, criminal conduct. And as I've said before, there's not an allegation that any of these individuals were acting with bad faith or with malicious purpose. And I don't want to far off from your question. I've heard a number of times that he just wants us to answer and assert this as a defense. This immunity is not an affirmative defense. It is immunity from even being named in the suit, which I think is critical.

THE COURT: Well, it's an interesting thing to state when there is no way to test that. I get where

the legislature is going with that, but putting it in the statute only -- is only going to ever come to a decision if somebody has named them.

MR. NETCHER: Of course, Your Honor. But I think my point being in response to Mr. Foley's assertion that we just need to assert this under affirmative defense is off base.

THE COURT: It certainly can be asserted in an affirmative defense. Immunity can be, but it's not inappropriate to raise it in a motion to dismiss. So I just have to get to the route of -- so that being the standard -- now, back to you, Mr. Foley -- what did anyone or the group of these individuals do that meets that standard so that they can be individually sued, as opposed to -- I don't want to get into whether or not the County -- because we keep going back to that. You've said a lot things which implicate the County. I want to talk about Ms. Gould, Mr. Smith, Mr. Gordon -- those individuals -- what did each one of them do that shows the level of malice or, essentially, criminal activity that would avoid that immunity? Because that is a pretty high standard. And it's an intentionally high standard because we don't want County employees to lose their homes and their life savings because they did something that

they were instructed to do by their employer, Orange County -- which Orange County's liability is a different issue -- but for them, individually, in order for that immunity to be stripped away from them, they have to have engaged in malicious, willful, wanton behavior. And that's what I'm asking you -- where is that argument?

MR. FOLEY: It's on pages 42 through 51 of our written response. So in a place where we can be free of aggravation, I've spent some time thinking about that question because I want to give a very good answer.

THE COURT: Pages 42?

MR. FOLEY: Mm-hmm. Criminal intent is -- we address that at page 59 of the response. We relied on the jury instruction on that and it just means, you know, the intention was to deprive us of our property.

THE COURT: I'm on page 44 and I don't see anything yet that says this is willful and wanton behavior.

MR. FOLEY: That we discussed --

THE COURT: I understand there's a difference between I disagree with what they did and how they did it versus they are engaging in behavior which is of such a nature that it can be called malicious,

willful, and wanton.

MR. FOLEY: Well, let me put it to you this way. What message do you want to send to County administration --

THE COURT: I don't send messages.

MR. FOLEY: You definitely will.

THE COURT: No. My job is to make sure that I apply the law correctly. And that's it.

MR. FOLEY: How would a county fix this problem if it's laid out procedures that guarantee appellate review -- laid out procedures for purely prospective permitting --

THE COURT: That puts us back to the County. You've made a lot of arguments about the County.

MR. FOLEY: The County has solved the problem. The problem is the individual defendants. They manipulated these two very different quasi-judicial tracks in a way that made it impossible for us to avoid injury. And it was done intentionally because they knew from the very beginning that the issue was raising birds to sell. It was not about the building permit. They used the building permit to put us into the permitting track, which meant immediately that we are denied full appellate review. Now, they don't do that accidently. And there's nothing in the code that

says that they can do it. And the code specifically says you shall -- you shall -- you shall do it this way. And the code even defines the term "shall" as though it needs a definition.

THE COURT: But, again, that decision is controlled by the County.

MR. FOLEY: No.

THE COURT: Your code enforcement guy that goes out there, he doesn't control that decision. He just writes a violation. That's his job. He writes a violation and he gives it up the chain. And then it goes to the administrative folks and they decide what they're going to do about it. What I'm trying to get at is what this guy did that was malicious, willful, and wanton. Going out and doing his job doesn't meet that standard. Did he do something -- and I understand your argument --

MR. FOLEY: Chapter 11 says when the code inspector finds a violation of the code, he or she shall -- shall --

THE COURT: Let's say he's dead wrong --

MR. FOLEY: So he didn't do what he was supposed to do.

THE COURT: Let's say he's dead wrong -- he shouldn't have done it that way. Okay? We start out

with that's an error. Is it malicious, willful and wanton or is it he's just wrong? I mean, County employees make mistakes. That doesn't mean that they can be sued over it. See, when they set up that standard -- malicious, willful, and wanton -- it is because we don't want to take away that immunity unless they are engaging in behavior which could be argued to be criminal. And what I'm still trying to hear is -- for any of these individuals, did they meet that standard?

MR. FOLEY: Yes.

THE COURT: What did they do that met that standard? And don't tell me that they went under the wrong code --

MR. FOLEY: I'm not going to argue --

THE COURT: Besides going under the wrong code, what did they do that met that standard?

MR. FOLEY: Besides -- is there really a besides?

THE COURT: Yes, there's a besides.

MR. FOLEY: No. Our argument is there isn't. Your argument is that there is.

THE COURT: I'm not making an argument. I'm asking a question. What besides that would you believe constitutes willful, wanton, and malicious conduct for the employees? I'm not even at the folks

who were on the Board.

MR. FOLEY: Our argument is that that's enough.

THE COURT: Okay. As to the board members, Mr. Angell, what would be the standard to avoid their immunity?

MR. ANGELL: Bribery, perhaps. There are cases where when you are talking about criminal conduct, that's happened in our country. I think -- and I'm not -- even then -- I'm not 100 percent sure what your remedy is for bribery, but I think something like that would satisfy a piercing of immunity. Another example is where -- and there are cases where this has happened also -- a judge loses their office and nonetheless issues an order that is then carried out. That's happened. But these are -- so in that case, the former judge knows that they are not a judge and yet they still go along and do something. Now, that's what we call malice. That is what we call criminal conduct. That's what puts people in jail and that's when you have a cause of action. Exactly what the theory would be, I don't know, but that is what --

THE COURT: So it's a similar standard? It has to be some sort of malice or --

MR. ANGELL: Something objectively just beyond the pale could be considered a judicial act, right?

If you've been kicked out of office and yet you continue to wield the sword of the office, that I think would -- if you are taking bribes or shutting down construction sites or something like that, that is by definition criminal. So it takes something like that.

In fact, the case I've cited -- Andrews versus Florida Parole Commission, which is 768 Southern 2nd 1257 says that judges are not liable in civil actions for their judicial acts, even when such acts are in excess of their jurisdiction. It goes on and explains it applies equally to quasi-judicial officers. To rule otherwise would be to hold that an officer, judicial or quasi-judicial, may be viewed as acting within his or her jurisdiction only when acting without error. I think that's kind of what we are talking about.

This case was more significant. A local board issued -- it was a parole commission that had something to do with letting the guy go or not letting him go. So it directly spoke to his -- the plaintiff's freedom. And the Board made a mistake about the scope of their authority and then the guy sued the Board. They said no -- they have pure immunity -- absolute immunity -- even though he lost

his -- literally his freedom.

So it all makes sense. We just can't have judges even acting -- even in their -- I have it in here. I believe it was the -- case. It was a Supreme Court case from 1993. It says even bad faith from the judge on the bench is not actionable. They have some animus against a litigant for whatever reason. That's not actionable. Otherwise, again, judges would be sued all the time --

THE COURT: So let me ask you a question. Mr. Foley's argument is that if he had been prosecuted under Chapter 11, he would have had different or additional remedies to what he has been given in this case. What is his remedy?

MR. ANGELL: I'll explain. There are a couple. First of all, we need to go all the way back to when he built these aviaries and engaged in any of this. What he did was violate the code as written by engaging in this conduct as it was written at the time. And then it wasn't until it was enforced that he starts bringing his defenses.

The proper thing to do -- and I've been involved in cases like this -- is if you are unsure of whether you are going to do something that's violative or if you think the statute is unconstitutional or what have

you, you file a declaratory judgment action to declare an ordinance or a statute unconstitutional on the front end. Right?

And that's -- we can look at the flag burning cases -- I want to burn this flag, but the statute says it's illegal. I think it violates my 1st Amendment right. You file a dec action -- that's one way you get there. We have tons of cases like that, that come up from time to time.

THE COURT: Okay. But that didn't happen.

MR. ANGELL: That didn't happen. So --

THE COURT: Now, he says he has a right to be prosecuted under Chapter 11 and that didn't happen. What's his remedy now?

MR. ANGELL: Well, his remedy would be -- I think his remedy now is, again, to declare the ordinance unconstitutional, which he has done that against the County. And monetarily, I don't know that he has a remedy because, again, the mistake he made was violating the code in the first place. It's your obligation to follow the law. We all have -- are said to know the law. And if you disagree with the law, you go to the courts on the front end.

THE COURT: But separate and apart from what the damages would be, he says he should have been

prosecuted under this section of the code and all of these folks decided to handle it under a different section of the statute. And --

MR. ANGELL: What I'm hearing from him -- and I don't think this was articulated in the complaint -- what I think I'm hearing is that the permitting guy didn't give him the permit he wanted. So, you know, they have various discretion and you go through the review board. And for all we know -- and I don't think there's a published opinion from the Circuit Court on that, but you're deferential -- deferential to agents carrying out their duties.

If he denied their permitting request, that's subject to review. It was reviewed. It was affirmed. He got due process. He just doesn't like the result. And so if they don't follow their own procedures -- that's why we have the administrative review process, which is what he went through and our folks voted. If they voted wrong, they are still immune, right? I mean, what he's trying to do is say I disagree with what the government is doing, so I want to sue everybody involved. And also, everybody should have known on the front end that this ordinance was unconstitutional. Despite -- as Your Honor has pointed out -- no judge -- no competent

Court anyway -- has ever made that finding. So --

THE COURT: Has an incompetent Court made that finding?

MR. ANGELL: Well, we say competent jurisdiction --

THE COURT: It's all right.

MR. ANGELL: So --

THE COURT: Just questioning -- the way you said that...

MR. ANGELL: Fair enough. And I caught myself a little too late. The point is the district -- the federal court did not have the jurisdiction to enter the order they did -- that's what the 11th Circuit has told us. So until --

THE COURT: So the Middle District entered an order that said --

MR. ANGELL: That the Orange County code as written violates the constitution. The 11th Circuit said -- Middle District, you can't do that because --

THE COURT: Because you are in the wrong area of court system -- the states need to make their own decisions about their own constitution?

MR. ANGELL: That's exactly right.

THE COURT: That is kind of, you know, fundamental.

MR. ANGELL: Exactly. And it is purely a question of state law. It's very conceivable that the circuit court or the appellate court or whoever could find that it does not, in fact, conflict with the state constitution. We've never gotten there. So that's what the -- ultimately boils down to that -- we should have known what would have been constitutional.

And that, of course, can never be the law. Otherwise, the problems would unravel whenever the Court enters an order on a statute that turns out later to be held unconstitutional. We deal with the law as it comes to us. And as my folks, sitting on the Board, the law was -- as executive officers, no less -- here's the code that I have. Here's the facts that we have -- you see what the folks did below. They had a full public hearing and they affirmed it. That is due process of the law. The fact that they are not happy with the result or if there was an error in the procedure along the way, it does not open up the flood gates to personal civil liability.

THE COURT: What's the difference in remedies available under 11 versus 30?

MR. ANGELL: I could not tell you.

MR. NETCHER: I do not know. As Mr. Angell said, I don't think there's a statement anywhere in the

amended complaint about Chapter 11 versus Chapter 30.

THE COURT: What's the difference, Mr. Foley -- if it was under 11 versus 30?

MR. FOLEY: In the amended --

THE COURT: No, no, no. Answer me. What's the difference between 11 versus 30?

MR. FOLEY: Well, we had an order here in the 9th District that addressed that issue or at least what they could not reach under their certiorari review of the BCC order. And they said was -- and we quoted -- I have it --

THE COURT: What I'm getting at is --

MR. FOLEY: The difference --

THE COURT: -- do you believe would have been your benefit to it being handled under 11 versus 30.

MR. FOLEY: All right. I can go through it again. Under 11, you get full appellate review. Under 11, is almost -- it was at one time -- a verbatim copy of Chapter 162 of the Florida statutes, which is the Local Code Enforcement Boards Act. And the legislature established appellate review. And here -- but under certiorari review, what the courts have done -- and there's many that have said the same thing -- the petitioner cannot challenge the -- cannot raise really any constitutional question.

So in our case, what the 9th Circuit said -- "Petitioner's assertion that sections of the Orange County code are unconstitutional is one that can only be made in a separate legal action, not on certiorari." Well, of course, that's what we are doing here. But that is too little too late because if we don't have our opportunity to challenge the constitutionality of the injury -- we've been -- we can't remedy the injury.

THE COURT: And so you are saying that if it was brought under Chapter 11, you would have had a level of appellate review you were not granted because it was brought under 30?

MR. FOLEY: Right.

THE COURT: Okay.

MR. ANGELL: I don't understand that. They did have two levels of appellate review. Now, again, I think what's missing from all this is -- that is exactly right what we hear from that circuit court order. And I've said it before -- they should have filed a dec action before engaging in the illegal activity. If they are successful in knocking out the ordinance, then they get to build their aviaries without problems.

THE COURT: Understood. I'm just trying to

understand the parameters of the argument.

MR. FOLEY: What he is saying though is -- might be true if there were, in fact, an ordinance that said we could not raise birds to sell as an accessory use or home occupation. The problem was there was no such ordinance. And there was no reason to believe that we were prohibited from doing that, if 72 years of court decisions said that Florida Fish and Wildlife Conservation has exclusive authority over wild animal life. So his dec theory doesn't work. There's no way to -- there's no pre-enforcement -- I'm surprised he's even suggesting there was a pre-enforcement challenge, but he is. And there wasn't one available.

THE COURT: Mr. Angell, you said you had some other arguments besides immunity. I believe I saw somewhere that you were arguing that these were -- that some of the individuals' causes of action did not have a sufficient legal basis.

MR. ANGELL: Yes, Your Honor. And I ran through those earlier. I know it seems like a long time ago.

THE COURT: No. My question was did you have anything besides what you raised.

MR. ANGELL: No. And just -- clear -- I was arguing that a cause of action had not been stated for civil theft, conversion, or abuse of process. And in

section 1983, due process has already been addressed by the federal court in the 11th Circuit -- wrote on due process -- allegations do not sustain a due process. So it's immunity and failure to state a cause of action, to be clear.

THE COURT: Got it. All right. Folks, I will take it under advisement and let you know.

MR. ANGELL: Thank you, Your Honor.

MR. NETCHER: Thank you, Judge.

(The proceedings concluded at 3:22 p.m.)

CERTIFICATE OF REPORTER

STATE OF FLORIDA)
)
COUNTY OF ORANGE)

I, AMANDA L. THOMPSON, Notary Public, State of Florida, I was authorized to and did stenographically report the foregoing proceedings; and that the transcript, pages 3 through 50, is a true and accurate record of my stenographic notes.

I FURTHER CERTIFY that I am not a relative, or employee, or attorney, or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

Dated this 28th day of September, 2019.

AMANDA L. THOMPSON
Esquire Solutions

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

DAVID W. FOLEY and JENNIFER T. FOLEY,

CASE NO.: 2016-CA-007634-O

Plaintiffs,

v.

ORANGE COUNTY, PHIL SMITH, CAROL HOSSFIELD, MITCH GORDON, ROCCO RELVINI, TARA GOULD, TIM BOLDIG, FRANK DETOMA, ASIMA AZAM, RODERICK LOVE, SCOTT RICHMAN, JOE ROBERTS, MARCUS ROBINSON, RICHARD CROTTY, TERESA JACOBS, FRED BRUMMER, MILDRED FERNANDEZ, LINDA STEWART, BILL SEGAL, and TIFFANY RUSSELL,

Defendants.
_____/

ORDER DENYING THE PLAINTIFFS' MOTION FOR REHEARING

THIS MATTER came before the Court upon the Plaintiff's Motion for Rehearing, filed on August 12, 2019. The Court, having considered the Motion, and otherwise being duly advised in the premises,

ORDERS AND ADJUDGES that the Plaintiffs' Motion is **DENIED**. The instant Motion is a dissection of the Court's "Order Dismissing the Amended Complaint with Prejudice as to Phil Smith, Carol Hossfield, Mitch Gordon, Rocco Relvini, Tara Gould, Tim Boldig, Frank Detoma, Asima Azam, Roderick Love, Scott Richman, Joe Roberts, Marcus Robinson, Richard Crotty, Teresa Jacobs, Freb Brummer, Mildred Fernandez, Linda Stewart, Bill Segal, and Tiffany

Russell."[1] In short, it is simply an attempt to reargue points that were raised or should have been raised at the hearing on the Defendants' motions to dismiss. This is not permitted on a motion for rehearing. *See Epperson v. Epperson*, 101 So. 2d 367, 368-9 (Fla. 1958).

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on this 10th day of October, 2019.

PATRICIA L. STROWBRIDGE
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 11, 2019, a true and accurate copy of the foregoing was e-filed using the Court's ECF filing system, which will send notice to all counsel of record.

Judicial Assistant

[1] The Court has since amended this Order, as it contained several discrepancies. The ruling of that original Order remains unchanged.

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

DAVID W. FOLEY and JENNIFER T. FOLEY,

CASE NO.: 2016-CA-007634-O

Plaintiffs,

v.

ORANGE COUNTY, PHIL SMITH, CAROL HOSSFIELD, MITCH GORDON, ROCCO RELVINI, TARA GOULD, TIM BOLDIG, FRANK DETOMA, ASIMA AZAM, RODERICK LOVE, SCOTT RICHMAN, JOE ROBERTS, MARCUS ROBINSON, RICHARD CROTTY, TERESA JACOBS, FRED BRUMMER, MILDRED FERNANDEZ, LINDA STEWART, BILL SEGAL, and TIFFANY RUSSELL,

Defendants.
_____/

AMENDED[1] ORDER DISMISSING THE AMENDED COMPLAINT WITH PREJUDICE AS TO PHIL SMITH, CAROL HOSSFIELD, MITCH GORDON, ROCCO RELVINI, TARA GOULD, TIM BOLDIG, FRANK DETOMA, ASIMA AZAM, RODERICK LOVE, SCOTT RICHMAN, JOE ROBERTS, MARCUS ROBINSON, RICHARD CROTTY, TERESA JACOBS, FRED BRUMMER, MILDRED FERNANDEZ,LINDA STEWART, BILL SEGAL, AND TIFFANY RUSSELL

THIS MATTER came before the Court for a hearing on May 30, 2019 upon the "The Official Defendants' Amended Motion to Dismiss with Prejudice,"[2] filed on May 8, 2019, and

[1] This Court entered its initial Order on August 2, 2019, and it made the following statement in the introductory paragraph: "The Court, having carefully considered the Motions, case law, and arguments of counsel from both parties, and otherwise being duly advised in the premises, finds as follows:." The Plaintiffs have correctly pointed out that they are not represented by counsel. The Court corrects that discrepancy in this Order. Additionally in the introductory paragraph, the Court erroneously included an outdated motion from the Official Defendants; this Order now references the most recent motion to dismiss from the Official Defendants. The ruling contained in this Order otherwise remains undisturbed.

[2] "The Official Defendants" refer to the members of the Board of Zoning Adjustment and the Board of County Commissioners, who were named both in their individual and official capacities. They include the following

"The Employee Defendants' Motion to Strike the Amended Complaint, Request for Judicial Notice, and Motion to Dismiss This Action with Prejudice,"[3] filed on May 3, 2019. The Court, being duly advised in the premises, finds as follows:

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. *Corn v. City of Lauderdale Lakes*, 997 F. 2d 1369, 1393 ("[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982))); § 768.28(9)(a), Fla. Stat. (2016) ("No officer, employee, or agent of the state or of any of its subdivisions shall be held personally liable in tort or named as a party defendant in any action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of her or his employment or function, unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property."); *Willingham v. City of Orlando*, 929 So. 2d 43, 48 (Fla. 5th DCA 2006) "(Importantly, the immunity provided by section 768.28(9)(a) is both an immunity from liability *and* an immunity from suit, and the benefit of this immunity is effectively lost if the person entitled to assert it is required to go to trial. (emphasis in original)); *Lemay v. Kondrk*, 923 So. 2d 1188, 1192 (Fla. 5th

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Defendants: Asima Azam, Fred Brummer, Richard Crotty, Frank Detoma, Mildred Fernandez, Teresa Jacobs, Roderick Love, Scott Richman, Joe Roberts, Marcus Robinson, Tiffany Russell, Bill Segal, and Linda Stewart.

[3] The "Employee Defendants" refer to the named Defendants that were higher level employees within the Orange County government at the time of these incidents: Phil Smith, as Code Enforcement Inspector; Carol Hossfield, as the Permitting Chief Planner; Mitch Gordon, as the Zoning Manager; Rocco Relvini, as the Board of Zoning Adjustment Coordination Chief Planner; Tim Boldig, as the Chief of Operations of the Orange County Zoning Division; and Tara Gould, as an Assistant Orange County Attorney with the Orange County Attorney's Office.

DCA 2006) ("We fully recognize that the immunity provided by section 768.28(9)(a) is both an immunity from suit and an immunity from liability, and we recognize that an entitlement is effectively lost if the case is erroneously permitted to go to trial."). This does not preclude the Plaintiffs from seeking redress against Orange County. *See McGhee v. Volusia Co.*, 679 So. 2d 729, 733 (Fla. 1996) ("In any given situation either the agency can be held liable under Florida law, or the employee, but not both.").

Accordingly, the following is hereby **ORDERED AND ADJUDGED:**

1. "The Official Defendants' Amended Motion to Dismiss with Prejudice" is **GRANTED.**
2. "The Employee Defendants' Motion to Strike the Amended Complaint, Request for Judicial Notice, and Motion to Dismiss This Action with Prejudice" is **GRANTED.**
3. The Plaintiffs' Amended Complaint, filed February 15, 2017, is **DISMISSED with prejudice as to the following Defendants: Phil Smith, Carol Hossfield, Mitch Gordon, Rocco Relvini, Tara Gould, Tim Boldig, Frank Detoma, Asima Azam, Roderick Love, Scott Richman, Joe Roberts, Marcus Robinson, Richard Crotty, Teresa Jacobs, Fred Brummer, Mildred Fernandez, Linda Stewart, Bill Segal, and Tiffany Russell.**
4. Therefore, **final judgment** is hereby entered in favor of the Defendants Phil Smith, Carol Hossfield, Mitch Gordon, Rocco Relvini, Tara Gould, Tim Boldig, Frank Detoma, Asima Azam, Roderick Love, Scott Richman, Joe Roberts, Marcus Robinson, Richard Crotty, Teresa Jacobs, Fred Brummer, Mildred Fernandez, Linda Stewart, Bill Segal, and Tiffany Russell. The Plaintiffs, David W. Foley and Jennifer

T. Foley, shall take nothing by this action against said Defendants, and said Defendants shall go hence without day.

5. The Court reserves jurisdiction over any claims made or to be made by said Defendants for an award of costs and attorney's fees against the Plaintiffs.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on this 10th day of October, 2019.

PATRICIA L. STROWBRIDGE
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 11, 2019, a true and accurate copy of the foregoing was e-filed using the Court's ECF filing system, which will send notice to all counsel of record.

Judicial Assistant

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

DAVID W. FOLEY and JENNIFER T. FOLEY,

CASE NO.: 2016-CA-007634-O

Plaintiffs,

v.

ORANGE COUNTY, PHIL SMITH, CAROL HOSSFIELD, MITCH GORDON, ROCCO RELVINI, TARA GOULD, TIM BOLDIG, FRANK DETOMA, ASIMA AZAM, RODERICK LOVE, SCOTT RICHMAN, JOE ROBERTS, MARCUS ROBINSON, RICHARD CROTTY, TERESA JACOBS, FRED BRUMMER, MILDRED FERNANDEZ, LINDA STEWART, BILL SEGAL, and TIFFANY RUSSELL,

Defendants.
_____/

ORDER DISMISSING THE AMENDED COMPLAINT WITH PREJUDICE AS TO ORANGE COUNTY

THIS MATTER came before the Court for a hearing on December 11, 2017[1] upon the "Orange County's Amended Motion to Dismiss Plaintiffs' Amended Complaint Pursuant to Florida Rules of Civil Procedure 1.140(b)(1) and (6), Amended as to Raise Statute of Limitations Defense," filed on November 20, 2017. The Court, having considered the Motion, case law, and arguments of counsel from both parties, and otherwise being duly advised in the premises, finds as follows:

[1] The Court would like to explain why this Order is so delayed. Plaintiffs filed an appeal on another final order entered in this case, and the Court was without jurisdiction to enter this order until the Fifth District recently entered its mandate. Additionally, the undersigned rotated out of this general civil division at the end of 2017, and only recently became aware that this Order was still outstanding.

After carefully reviewing the Amended Complaint, the Court finds that Plaintiffs fail to state a cause of action as to every claim, and the Amended Complaint must be dismissed with prejudice, as Plaintiffs cannot cure these deficiencies for the reasons discussed below. Counts I and II attempt to make out claims of declaratory relief and injunctive relief for portions of the Orange County Code that have since been amended. However, a court only has jurisdiction over a declaratory judgment action where there is a valid or 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). Because Orange County has amended the relevant portions of the zoning ordinance, such action rendered these counts moot. To the extent that Plaintiffs attempt to state a cause of action under the amended zoning ordinance, any such declaration from the Court would be an improper advisory opinion, as the amended zoning ordinances serve as no ripe dispute between the parties. *See Apthrop v. Detzner*, 162 So. 3d 236, 242 (Fla. 1st DCA 2015) ("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.").

Plaintiffs simply title Count III "Tort", with a subtitle of "Negligence Unjust Enrichment and Conversion." Any attempt to state a cause of action for negligence is belied by the fact that Plaintiffs 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, even if they had, Defendant owes Plaintiffs no duty of care in how it carries out its governmental functions. *See Trianon Park Condo. Ass'n v. City of Hialeah*, 468 So. 2d 912, 919 (Fla. 1985). Similarly, Plaintiffs 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. Plaintiffs' conversion claim likewise fails because Plaintiffs fail to plead that Defendant ever took possession of items

belonging to them. *See DePrince v. Starboard Cruise Svs.*, 163 So. 3d 586, 598 (Fla. 3d DCA 2015).

Count IV purports to state a cause of action for inverse condemnation, as well as damages associated with lost business revenue. Plaintiffs' inverse condemnation claim automatically fails because they did not allege and they cannot allege that Defendant's action prevented them from all beneficial uses of their property. *Pinellas Cty. v. Ashley*, 464 So. 2d 176 (Fla. 2d DCA 1985).[2] Instead, the only "right" that Plaintiffs claim is Mr. Foley's state-issued permit, which is not a property right. *Hernandez v. Dept. of State, Div. of Licensing*, 629 So. 2d 205, 206 (Fla. 3d DCA 1993). As to any associated damages, Plaintiffs failed to plead, and moreover fail to meet, the necessary statutory requirements. §127.01, Fla. Stat. (2016); *Sys. Component Corp. v. Fla. Dept. of Transp.*, 14 So. 3d 967, 975–76 (Fla. 2009). Plaintiffs therefore cannot state a cause of action as to Count IV.

Count VII attempts to state a cause of action for due process. This is not a recognized cause of action under Florida law. *Fernez v. Calabrese*, 760 So. 2d 1144 (Fla. 5th DCA 2000); *Garcia v. Reyes*, 697 So. 2d 549 (Fla. 4th DCA 1997). This Count therefore must be dismissed.[3]

Based on the foregoing, the 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. For reasons explained above, each attempted cause of action could not be cured by filing another amended complaint; the Court therefore dismisses Plaintiffs' Amended Complaint with prejudice.

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[2] Even if Plaintiffs could successfully prove that Defendant did deprive them of the use of their property, inverse condemnation is not the proper remedy—rather, a court would have to determine if the ordinance is unenforceable and should be stricken. *Ashley*, 464 So. 2d at 176. Because the ordinance has since changed, this remedy is not available to Plaintiffs either.

[3] Plaintiffs also seek money damages for an alleged violation of 42 U.S.C. § 1983 for violation of their due process. This allegation must be similarly dismissed with prejudice for failure to state a cause of action because they do not allege and cannot prove that they were deprived of life, liberty or property (i.e., substantive due process) under the facts of this case.

Accordingly, the following is hereby **ORDERED AND ADJUDGED:**

1. "Orange County's Amended Motion to Dismiss Plaintiffs' Amended Complaint Pursuant to Florida Rules of Civil Procedure 1.140(b)(1) and (6), Amended as to Raise Statute of Limitations Defense" is **GRANTED.**
2. The Plaintiffs' Amended Complaint, filed February 25, 2017, is **DISMISSED with prejudice as to Defendant, Orange County.**
3. Therefore, **final judgment** is hereby entered in favor of Defendant, Orange County. The Plaintiffs, David W. Foley and Jennifer T. Foley, shall take nothing by this action against said Defendant, and said Defendant shall go hence without day.
4. The Court reserves jurisdiction over any claims made or to be made by said Defendant for an award of costs and attorney's fees against the Plaintiffs.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on this 10th day of November, 2020.

HEATHER L. HIGBEE
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 10, 2020, a true and accurate copy of the foregoing was e-filed using the Court's ECF filing system, which will send notice to all counsel of record.

Judicial Assistant

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, FLORIDA

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

Plaintiffs,

v.

ORANGE COUNTY, PHIL SMITH,
CAROL HOSSFIELD, MITCH GORDON,
ROCCO RELVINI, TARA GOULD,
TIM BOLDIG, FRANK DETOMA,
ASIMA AZAM, RODERICK LOVE,
SCOTT RICHMAN, JOE ROBERTS,
MARCUS ROBINSON, RICHARD CROTTY,
TERESA JACOBS, FRED BRUMMER,
MILDRED FERNANDEZ, LINDA STEWART,
BILL SEGAL, and TIFFANY RUSSELL,

Defendants.
_____/

CASE NO.: 2016-CA-007634-O
DIVISION: 35

NOTICE OF APPEARANCE ON BEHALF OF DEFENDANT, ORANGE COUNTY, AND DESIGNATION OF E-MAIL ADDRESSES

PLEASE TAKE NOTICE that **Linda S. Brehmer Lanosa**, Assistant County Attorney, hereby appears as counsel of record for Defendant, Orange County, Florida, and requests that all pleadings and documents be served upon her at the address below.

Ms. Brehmer Lanosa hereby designates the e-mail addresses listed below for the purpose of service of all documents required to be served pursuant to Rule 2.516 of the Rules of Judicial Administration in this proceeding.

Primary Email Address: Linda.Lanosa@ocfl.net

Secondary Email Address: Judith.Catt@ocfl.net

CERTIFICATE SERVICE

I HEREBY CERTIFY that, pursuant to Florida Rule of Judicial Administration 2.516, the foregoing was filed with the Clerk of the Court on the 18th day of November 2020, by using the Florida Courts E-Filing Portal System. Accordingly, a copy of the foregoing is being served on this day to the attorney(s) or interested parties identified in the e-Portal Electronic Service List, including the individuals listed below, via transmission of Notices of Electronic Filing generated by the e-Portal System.

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**IN THE CIRCUIT COURT OF
THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA**

FOLEY, *et ux, Plaintiffs*

v.

ORANGE COUNTY, *et alia*, *Defendants*

2016-CA-007634-O

PLAINTIFFS' MOTION FOR REHEARING AND LEAVE TO AMEND

PLAINTIFFS DAVID AND JENNIFER FOLEY MOVE THE COURT for rehearing and leave to amend.

DECLARATORY AND INJUNCTIVE RELIEF

1. The Court's order of November 10, 2020,[1] states:

[1] The Court should delete its footnote 1 because it is unnecessary and adds insult to injury; the delay of three years did not result because the Court was "without jurisdiction" pending appeal, or because Judge Higbee "rotated out … at the end of 2017." Here's what happened. September 6, 2017, Judge Higbee ended oral argument on the *employees*,' *officials*,' and Orange County's motions to dismiss before hearing Orange County's motion, but twice promised to make no ruling until Orange County's motion was heard. However, six weeks later, October 25, 2017, prior to hearing Orange County's motion, Judge Higbee granted the *employees*' and *officials*' motions solely on the issue of limitations, and effectively bifurcated the case. Then, December 11, 2017, Judge Higbee heard Orange County's motion to dismiss. Four months later, April 4, 2018, after presumably "rotating out," Judge Higbee heard the *employees*' and *officials*' motions for sanctions per §57.105, FS. Judge Higbee's Oct. 2017 dismissal was reversed on appeal October 18, 2018, and the mandate issued March 28, 2019. May 7, 2019, Judge Higbee issued an order removing the "stay on Orange County's pending motion to dismiss" to place it "properly before the current judge in Division 35." The "current judge," Judge Strowbridge, refused to take action, insisting that duty belonged to Judge Higbee. It was not until after the *employees* and *officials* successfully defended an order granting

> "Counts I and II attempt to make out claims of declaratory relief and injunctive relief for portions of the Orange County Code that have since been amended… Because Orange County has amended the relevant portions of the zoning ordinance, such action rendered these counts moot. To the extent that Plaintiffs attempt to state a cause of action under the amended zoning ordinance, any such declaration from the Court would be an improper advisory opinion, as the amended zoning ordinances serve as no ripe dispute between the parties. See *Apthrop v. Detzner*, 162 So. 3d 236, 242 (Fla. 1st DCA 2015) ("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.")."

2. The Court has made three errors. First, the relief the Foleys seek with respect to the "permit," the "order," and the SIC code "0279" is entirely unaffected by the amendment. Second, the weight of authority grants relief where as here the amendment's redefinition of "home occupation," which now broadly prohibits all "commercial retail sale of animals," merely confirms and ratifies the prohibition of "aviculture" as "home occupation" in the challenged "order." Third, *Apthrop v. Detzner*, 162 So.3d 236, 242 (1st DCA 2015) is inapplicable because it involved no allegation of pre-suit injury or of amendment after initiation of suit. Below the Foleys step through these errors in detail, and request the Court grant relief.

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immunity in a second appeal October 13, 2020, that Judge Higbee granted Orange County's motion to dismiss with prejudice. In sum, the prejudice of Judge Higbee's deliberate bifurcation was exacerbated by callous indifference and mismanagement.

Count I

3. The Foleys' Count I requests the Court:

> **DECLARE** void on its face as a violation of Art. II, §3, Fla. Const., and Art. I, §9, Fla. Const., for conflict with Art. IV, §9, Fla. Const., and **ENJOIN** the enforcement of, any custom, permit, order, policy, or ordinance to the extent that it:
>
> *1)* prohibits the advertising or sale of birds kept at the FOLEYS' R-1A zoned Solandra homestead;
>
> *2)* demands "Pet birds only – No Commercial Activities Permitted" as an exaction or condition to the construction or use of the FOLEYS' *aviaries* at their Solandra homestead;
>
> *3)* prohibits *aviculture* and/or associated *aviaries* as an *accessory use* or *home occupation*; or,
>
> *4)* includes "wild or non-domestic birds" in any prohibition of *commercial retail sale of animals* as a *home occupation*.

4. The Building "permit" referenced in Count I is before the court on "Plaintiffs' Motion for Judicial Notice of Orange County Site-Plan and Building Permit Issued November 30, 2007," filed August 30, 2017, court document #61168439. The permit applies to the Foleys' Solandra property and includes the exaction or condition "Pet birds only – No Commercial Activities Permitted," as described in ¶40(d) of the Foleys' Amended Verified Complaint (AVC). Count I specifically seeks relief from this exaction or condition on grounds of conflict with Art.IV, §9, Fla.Const. Orange County makes no objection to the relief requested with respect to the "permit." Consequently, contrary to the Court's order, there is

an existing case and controversy, and the Court should grant the relief requested as to the "permit."

5. The Board of County Commissioners' "order" (BCC order) referenced in Count I is before the court on "Plaintiffs' Motion for Judicial Notice of the Order of Orange County's Board of County Commissioners February 19, 2008, in Case ZM-07-10-010," filed August 30, 2017, court document #61168439. The BCC order applies to the Foleys' Solandra property and generally prohibits in the R-1A zoning districts "*aviculture* and/or associated *aviaries* as an *accessory use* or *home occupation*," as described in ¶40(e) AVC. Count I specifically seeks relief from this prohibition on grounds of conflict with Art.IV, §9, Fla.Const. Orange County makes no objection to the relief requested with respect to the "order." Consequently, contrary to the Court's order, there is an existing case and controversy, and the Court should grant the relief requested as to the "order."

6. The "ordinance" referenced in Count I is identified as "Ordinance No. 2016-19" in ¶55 and ¶56 AVC. Ordinance No. 2016-19 is before the court on "Plaintiffs' Response in Objection to Orange County's Motion for Judicial Notice, and Plaintiffs' Motion for Judicial Notice of Ord. No. 2016-19." filed May 25, 2017, court document #56919265, and "Orange County's Motion for Judicial Notice Pursuant to Florida Rule of Evidence 90.202(10) and 90.203," filed October 25, 2016, court document #48082823. Ordinance No. 2016-19, amends the definition

of "home occupation." Count I specifically seeks relief from this definition of "home occupation" to the extent it prohibits "aviculture" or "aviaries" or includes "wild or non-domestic birds" in its prohibition of "commercial retail sales of animals," on grounds of conflict with Art.IV, §9, Fla.Const. The ordinance, by underscore and ~~strike-through~~, shows respectively what has been added to and stricken from the definition of "home occupation," in §38-1, Orange County Code (OCC), at pp. 4-5 (pp.12-13, Doc.#56919265), and its applicable condition in §38-79(101), OCC, at pp.42-43 (pp.50-51, Doc. #56919265). The Court will note that neither before or after amendment has the definition of "home occupation" specifically prohibited "aviculture" or "aviaries" as the BCC order clearly does. This historical conclusion is supported by pp.6-7 of Ordinance 2008-06 (pp.10-11, Doc.#56928070), which is before the Court in "Plaintiffs' Motion for Judicial Notice of Ord. No. 2008-06," filed May 25, 2017, court document #56928070. Ordinances 2008-06 and 2016-19 demonstrate their amendment to "home occupation" was, at least in part, meant to confirm, clarify, and ratify the prohibition in the building permit and BCC order enforced upon the Foleys. Nothing in the amendments suggests that the prohibition in the building permit and BCC order have been rescinded. The amended ordinance, moreover, now expressly prohibits all "commercial retail sale of animals" as a "home occupation." Nothing in the amendment suggests that now "aviculture" or "aviaries" or "wild or non-

domestic birds" are exempt from the prohibition of "commercial retail sales of animals." The amended ordinance applies to the Foleys' Solandra and Cupid properties. Count I specifically seeks relief from the all-encompassing breadth of this prohibition of "commercial retail sale of animals" as a "home occupation" on grounds of conflict with Art.IV, §9, Fla.Const. Consequently, contrary to the Court's order, there is, as a matter of fact, an existing and continuing case and controversy. The Court should grant the requested relief as to the "ordinance."

7. The Court's reliamce upon *Apthrop v. Detzner*, 162 So.3d 236, 242 (1st DCA 2015), is misplaced. That case is entirely unlike this case. Apthrop asked the court to require Detzner to refuse filings from election candidates that included qualified blind trusts. Apthrop, however, could show no injury or that any candidate had made such filings. Start to finish Apthrop's claim was preemptive and hypothetical. The Foleys, on the other hand, clearly allege the prohibition of "aviculture" as a "home occupation" has already been enforced upon them by "permit" and "order," and that the enforced prohibition continues now in the prohibition of "commercial retail sale of animals" in the clarifying amendment to the definition of "home occupation" that was made after this suit was initiated. Consequently, the amended ordinance simply continues the preexisting case and controversy. The Court should grant the requested relief as to the "ordinance."

8. Moreover, contrary to the Court's conclusion, amendment does not *per se* moot a claim of relief, as a matter of law, particularly when the original regulation has been enforced upon the plaintiff and amendment occurs *after* suit is initiated against the original regulation. 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 § 134 (1984). It 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 the court 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 *City of Pompano Beach* 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." In sum, the weight of authority favors granting the requested relief as to the "ordinance."

9. Too, the court has overlooked law to the same effect cited by the Foleys in their response to Orange County's motion to dismiss, filed May 24, 2017, court document # 56901050. There the Foleys said, page 5:

> The two primary questions this court asks in analyzing a change in statutory language are authoritatively outlined in *Coral Springs Street Systems v. City of Sunrise*, 371 F. 3d 1320 (11th Cir. 2004): 1) Does the new language still disadvantage the Foleys?; and, 2) Is there a reasonable expectation the challenged practice will resume? The burden of proof in both questions is upon the County. And the County has not carried that burden.

10. Contrary to the Court's conclusion there is no factual or legal obstacle to declaratory and injunctive relief because the permit, order, and ordinance, clearly prohibit the use of the Foleys' Class III license issued by the Florida Fish and Wildlife Conservation Commission (FWC) to sell toucans kept and raised at their Solandra property as a "home occupation."

11. Moreover, the relief sought is well supported by the persuasive authority of *Foley v. Orange County*, No. 6: 12-cv-269-Orl-37KRS (M.D. Fla. Dec. 4, 2012), and the authorities presented in the Foley's "Memorandum of Law: FWC's Subject Mater [sic] Jurisdiction & County Aviculture Regulation" in Appendix I, to

"Plaintiffs' Response to Defendants' Motions to Dismiss," May 24, 2017, court document #56901050.

12. The Court should not dismiss these claims, but should instead grant relief.

Count II

13. The Foleys' Count II requests the Court:

> **DECLARE** void on its face as a violation of Art. II, §3, Fla. Const., and Art. I, §9, Fla. Const., for conflict with Art. IV, §9, Fla. Const., and **ENJOIN** the enforcement of, any ORANGE COUNTY ordinance to the extent that it:
>
> *1)* includes the possession or sale of birds in its regulation of the Standard Industrial Classification (SIC) group 0279, "Animal Specialties, Not Elsewhere Classified," in A-2 zoned districts; or,
>
> *2)* prohibits, or makes *special exception* fees and procedures a precondition to *Commercial aviculture, aviaries SIC 0279*, in A-2 zoned districts.

14. The "Standard Industrial Classification (SIC) group 0279, 'Animal Specialties, Not Elsewhere Classified,'" referenced in Count II is before the court in the second column, second row, of the Orange County Use Table §38-77, OCC, on page 130, Doc.# 56919265, "Plaintiffs' Response in Objection to Orange County's Motion for Judicial Notice, and Plaintiffs' Motion for Judicial Notice of Ord. No. 2016-19."

15. The Court will note that the SIC group number "0279" was directly linked to the deleted use "Commercial aviculture, aviaries," but nevertheless has not itself

been deleted. Consequently, contrary to the Court's order, amendment did not moot this case and controversy.

16. The application of SIC group number "0279" to the Foleys' Cupid property begins by noting the absence of either "P" or "S" at the intersection of the row containing "0279" and the column headed "A-2," the zoning classification of the Cupid property. The significance of this absence is explained by §38-74(b), OCC (p.160, Doc.# 56901050), to mean that SIC 0279, "Animal Specialties, Not Elsewhere Classified," is entirely prohibited at the Cupid property as a primary use:

> §38-74
>
> (b) Use table.
>
> > (1) The permitted uses and special exceptions allowed in the zoning districts identified in the use table set forth in section 38-77 are respectively indicated by the letters "P" and "S" in the cells of the use table. No primary use shall be permitted in a district unless the letter "P" or the letter "S" appears for that use in the appropriate cell.
> >
> > (2) When a use is a permitted use in a particular zoning district, it is permitted in that district subject to:
> >
> > > a. Compliance with all applicable requirements of chapter 38 and elsewhere in the Orange County Code; and
> > >
> > > b. Compliance with all requirements specified in the conditions for permitted uses and special exceptions set forth in section 38-79 which correlate with the number which may appear within the cell of the use table for that permitted use.

> c. A use variance from section 38-77 (Use table) and section 38-79 (Conditions for permitted uses and special exceptions) shall be prohibited.

17. The Foleys' Amended Complaint at ¶31 alleges:

> The FOLEYS have since April 26, 2010, owned a manufactured home on one acre at 1349 Cupid Rd., Christmas, FL, zoned A-2 (Cupid property).

18. The Foleys' Amended Complaint at ¶36 alleges:

> David Foley has since 2010, held a site-specific Class III license issued by FWC that permits him to sell toucans kept and raised at the Cupid property.

19. In sum, contrary to the Court's conclusion, there is no factual or legal obstacle to declaratory and injunctive relief as to SIC 0279 in Ordinance No. 2016-19, as it clearly prohibits the use of the Foleys' Class III license issued by FWC to sell toucans kept and raised at their Cupid property.

20. Moreover, the relief sought is well supported by the persuasive authority of *Foley v. Orange County*, No. 6: 12-cv-269-Orl-37KRS (M.D. Fla. Dec. 4, 2012), and the authorities presented in the Foley's "Memorandum of Law: FWC's Subject Mater [sic] Jurisdiction & County Aviculture Regulation" in Appendix I, to "Plaintiffs' Response to Defendants' Motions to Dismiss," May 24, 2017, court document #56901050.

21. The Court should not dismiss these claims, but should instead grant the relief requested.

Count III

22. The Court's order states:

> "Plaintiffs 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, even if they had, Defendant owes Plaintiffs no duty of care in how it carries out its governmental functions. See *Trianon Park Condo. Ass'n v. City of Hialeah*, 468 So. 2d 912, 919 (Fla. 1985). Similarly, Plaintiffs 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. Plaintiffs' conversion claim likewise fails because Plaintiffs fail to plead that Defendant ever took possession of items belonging to them. *See DePrince v. Starboard Cruise Svs.*, 163 So. 3d 586, 598 (Fla. 3d DCA 2015)."

23. The Court has made six errors. First, the Foleys allege a regulatory duty owed especially to them pursuant Ch. 11, OCC, a duty that is non-delegable per Art.VIII, §1(j), Fla.Const., and Art.I, §18, Fla.Const. Second, *Trianon Park at 919*, recognizes claims against ministerial "operational functions" of this type, particularly where, as here, neglect of Ch. 11, OCC, results in a violation of "a constitutional or statutory provision," or "right," namely Art.VI, §9, Fla.Const., and, as alleged in Count VII, Art. I, §§ 2, 9, and 23, and Art. II, §3, Fla. Const. Third, the regulatory duty alleged has its common law corollary in the general principal of negligence that there is always a duty to avoid foreseeable risk. Fourth, any determination of who initiated the prosecution of the Foleys for "raising birds to sell," and how it proceeded, that conflicts with ¶40 AVC, is an issue of fact for the jury, not the court. Fifth, the constructive possession pled by the Foleys

satisfies the pleading requirements of conversion. Sixth, the Court has entirely overlooked that ¶62(a)(1) AVC alleges the common law tort of invasion of privacy, or liberty, and ¶62(a)(2) AVC alleges the common law tort of invasion of rightful activity (quoted below in ¶27). Below the Foleys step through these errors in detail, and request the Court grant relief.

Allegations

24. Paragraph 40 AVC is incorporated in Count III by ¶61 AVC. Paragraph 40 AVC states that Orange County:

> ¶40 Divested the FOLEYS of their *aviary* and/or their right to sell birds kept at their Solandra homestead, pursuant the *colore* and coercive force of an ORANGE COUNTY administrative practice and proceeding that: *(a)* was initiated February 23, 2007, by a private citizen complaint which alleged the FOLEYS were "raising birds to sell;" *(b)* denied the FOLEYS any pre-deprivation remedy in Ch. 11, OCC, for the allegation in that citizen complaint; *(c)* forced the destruction of the FOLEYS' "*accessory structure*" (i.e., *aviary*) June 18, 2007, by *(1)* ordering the FOLEYS pursuant Ch. 11, OCC, to secure a building permit or destroy the "*structure*", and then *(2)* denying site-plan and permit approval pursuant Ch. 30, OCC, because, per the citizen allegation, the "*structure*" was an *aviary* and/or used for *aviculture*; *(d)* ultimately approved a site-plan and building permit to re-construct the FOLEYS' "*aviary*" November 30, 2007, with the exaction "Pet birds only – No Commercial Activities Permitted" on their face; and *(e)* 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 R-1A … zone district" throughout ORANGE COUNTY;

25. Paragraphs 42 through 46 AVC are incorporated in Count III by ¶61 AVC.

Paragraphs 42 through 46 AVC state that Orange County:

> ¶42 Claimed that [its] actions in the proceeding against the FOLEYS' *aviary* and bird sales, described in paragraph 2*(c)(2)-(e),* were pursuant Chs. 30 and/or 38, OCC;
>
> ¶43 Knew that Chs. 30 and 38, OCC, did not authorize [Orange County] to divest or impair an otherwise vested right;
>
> ¶44 Knew that the FOLEYS claimed that their right to keep birds in an *aviary*, or *accessory structure*, at the Solandra homestead, and their right to sell the birds kept there, are rights vested pursuant Art. IV, §9, Fla. Const., and the rules of FWC;
>
> ¶45 Knew [its] actions would either destroy the FOLEYS' *aviary* and/or bird business, assist in that destruction, or be in common design to effect that destruction;
>
> ¶46 Expressed or demonstrated reasonable doubt regarding [its] power to use the *land use* regulations of Ch. 38, OCC, to directly and specifically enjoin bird possession, advertising, and/or sale;

26. Paragraph 47 AVC is incorporated in Count III by ¶61 AVC. Paragraph 47 AVC states that Orange County:

> ¶47 Had the authority, duty, experience, evidence, and specific opportunities to remove any doubt regarding their authority to enjoin bird possession, advertising, or sale, and/or to counsel or recommend the removal of any such doubt, by means of an adequately adversarial proceeding, pursuant Ch. 11, OCC, or otherwise, but neglected the duty of reasonable care they owed the FOLEYS, and did not do so;

27. Paragraph 47 AVC is reiterated at ¶62(a) AVC. Paragraph 62(a) AVC states that Orange County:

> ¶62(a) 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 Ch. 11, OCC, or otherwise; and,

(1) Invaded and denied the Foleys' privacy, or liberty; and,

(2) Invaded and denied the Foleys' right to engage in an activity (advertising and sale of toucans) entirely immune to Orange County regulation, per Art. IV, §9, Fla. Const; and,

(3) As a direct and proximate result injured the Foleys' interests identified in paragraph 56, including subparagraphs;

Negligence: Regulatory Duty Alleged

28. Paragraphs 40, 42 through 46, 47, and 62(a) AVC effectively allege Orange County took enforcement action that was not authorized by Ch.30, OCC, and neglected a duty it owed the Foleys to follow the procedures of Ch. 11, OCC, in its prosecution of the Foleys for "raising birds to sell." Chapter 11, OCC, is the only administrative procedure adopted by Orange County pursuant statute (Ch. 162, Fla.Stat.) for the administrative prosecution and punishment of code violations. Article VIII, Section 1(j), Fla.Const., 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." Article I, Section 18, Fla.Const., further guarantees the Foleys will not suffer any penalty except as provided by statute; it states, "No administrative agency… shall impose a sentence of imprisonment, nor shall it impose any other penalty except as provided by law." Consequently, the duty alleged is a non-delegable, ministerial,

statutory and constitutional duty. It is owed to the Foleys personally as an individual right appearing in Art.I, §18, Fla.Const. It is also owed the Foleys personally because the Foleys are "persons" within the meaning of Art.VIII, §1(j), and because the administrative statutory remedy to which Orange County is bound by Art.VIII, §1(j) – Ch.162, Fla.Stat. – was drafted to provide the Foleys with the individual rights in due process – notice, hearing, and state court appeal – as guarantees against the "foreseeable risk" of erroneous deprivation per Art.1, §§9 and 21, Fla.Const.

29. Contrary to the Court's conclusion, as matter of law, *Trianon Park* recognizes the non-delegable, ministerial, statutory and constitutional duty asserted in the Foleys' allegations. To "clarify the concept of government tort liability" *Trianon Park at 919* originated an analytical tool that divided "governmental functions and activities into the following four categories: (I) legislative, permitting, licensing, and executive officer functions; (II) enforcement of laws and the protection of the public safety; (III) capital improvements and property control operations; and (IV) providing professional, educational, and general services for the health and welfare of the citizens." *Trianon Park at 921* found "that there is no governmental tort liability for the action or inaction of governmental officials or employees in carrying out the discretionary governmental functions described in categories I and II because there has never been a common law duty of care with

respect to these legislative, executive, and police power functions, and the statutory waiver of sovereign immunity did not create a new duty of care," though, "there may be substantial governmental liability under categories III and IV." Nevertheless, *Trianon Park* made a clear exception, even for categories I and II, when a statutory or constitutional "provision" or "right" is violated. *Trianon Park at 919* says, "The judicial branch has no authority to interfere with the conduct of [legislative, permitting, licensing, and executive officer] functions *unless they violate a constitutional or statutory* ***provision***" [***Emphasis*** added]. This reference to "provision" is an expansion of what *Trianon Park* first says regarding "rights" *at 918*: "[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]. In addition, three years later the High Court found that "the categories set out in *Trianon* offer only a rough guide to the type of activities which are either immune or not immune" and "[t]he test for determining immunity, and for determining which category the activity falls into, is still *Commercial Carrier*'s operational versus planning dichotomy," *see Dept. of Health & Rehab. Servs. v. Yamuni*, 529 So.2d 258, 261 (Fla. 1988). The *Yamuni* court further held that "[i]f 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," *see Dept. of*

Health & Rehab. Servs. v. Yamuni, 529 So.2d 258, 260 (Fla. 1988). The four question test of *Commercial Carrier at 1019*, is as follows:

> (1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective?
>
> (2) Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective?
>
> (3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved?
>
> (4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision?"

30. Here, none of these questions can be answered yes. The answer to every question is no. The challenged proceeding was clearly "operational" and subject to suit. Orange County's decision to prosecute and punish a code violation in an *unauthorized* proceeding pursuant Ch.30, OCC, that *denies the individual rights* guaranteed by Ch.11, OCC, Ch.162, Fla.Stat., and Art.I, §§9, 18, and 21, and Art.VIII, §1(j), Fla.Const.: (1) *is not* "a basic governmental policy, program, or objective;" (2) *is not* "essential to the realization or accomplishment of that policy, program, or objective;" (3) *is not* "the exercise of basic policy evaluation, judgment, and expertise;" because it, (4) *does not* "possess the requisite constitutional, statutory, or lawful authority." Moreover, once the government has

exercised its discretion and decided to act, the act becomes "operational" and the government 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 asphyxiation by smoke), Henderson v. City of St. Petersburg, 247 So.2d 23 (2nd DCA) (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). In sum, if Orange County prosecutes a code violation, it must do so by providing the safeguards established by the Legislature as required by Art.I, §18, and Art.VIII, §1(j), Fla.Const. In this case Orange County failed to do so and is liable.

31. Too, as matter of fact, the Court's comparison with *Trianon Park* is unworkable, inapposite. The facts in *Trianon Park* have no parallel in this case. 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 the condo owners from the lousy contractor responsible for the roof leaks? That's a question of third-party liability. *Trianon Park at 917 and †2*, adopted §315 of the Restatement (Second) of Torts, and held that at common law no defendant, government or otherwise, 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 question of duty in *Trianon Park* had nothing to do with whether the defendant

was the government or a private person – it was all about whether one person has a duty to protect another from injury caused by a third party. *Trianon Park* supported its reliance upon §315 by a string citation of thirteen similar third-party cases in which a government defendant was held blameless for failing to enforce a regulation upon a third party who injured the plaintiff. But here – as a matter of fact – there is ***NO*** third-party. The Foleys do not seek to hold Orange County liable for improperly enforcing a regulation on someone who then injured the Foleys. The Foleys seek to hold Orange County liable for directly injuring them when it improperly took direct enforcement action against them that was not authorized by law. Totally different. Orange County broke the law. The Court must fix it.

32. The Court has no basis in *Trianon Park* or otherwise to dismiss the Foleys' Count III and should not do so.

Negligence: Common Law Duty Alleged

33. There is a clear common law corollary to the County's neglect of its duty in Ch.11, Fla.Stat. That statutory and constitutional duty was intended to provide the Foleys with an adequate pre-deprivation remedy and to prevent the "foreseeable risk" of an erroneous deprivation of the Foleys' property. Common law "recognizes that a legal duty will arise whenever a human endeavor creates a generalized and foreseeable risk of harming others," *see* *McCain v. Florida Power Corp.*, 593 So.2d 500, 503 (Fla.1992). "Where a defendant's conduct creates a

foreseeable zone of risk, the law generally will recognize a duty placed upon defendant either to lessen the risk or see that sufficient precautions are taken to protect others from the harm that the risk poses," *see* Kaisner v. Kolb, 543 So.2d 732, 735 (Fla. 1989), and cases cited above in ¶30. Here Orange County's neglect of its non-delegable duty in Ch. 11, OCC, to provide an adequate pre-deprivation remedy, created "a foreseeable risk" to the Foley's property, and Orange County did not "lessen the risk or see that sufficient precautions [were] taken to protect [the Foleys] from the harm that the risk pose[d]."

34. Consequently, the Court has overlooked that the Foleys do, in fact, allege a common law duty for which "a private person would be liable to the claimant," *see* §768.28(1), Fla.Stat. The Court should not dismiss the Foleys' Count III claim in negligence.

Unjust Enrichment

35. The Court says, "Plaintiffs 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."

36. This is a factual determination. And it is not what the Foleys allege, *see* ¶40(a) AVC: "[The Orange County practice and proceeding at issue] was initiated February 23, 2007, by a private citizen complaint." So, the Court has gone beyond the four corners of the Foleys' amended complaint, or assumed that the Foleys'

allegations are not true. The Court is not permitted to do either on Orange County's motion to dismiss, *see* Grove Isle Ass'n v. Grove Isle Associates, 137 So.3d 1081, 1089 (3rd DCA 2014).

37. The Court should rehear the issue of unjust enrichment, confine itself to the four corners of the complaint, and draw all inferences in the Foleys' favor, *see Id*.

38. The Court should permit a jury to decide whether, as the Court implies, the Foleys are the sort of knucklehead, numbskull, chuckleberries who would pay Orange County to prosecute them for "raising birds to sell."

Conversion

39. The Court says, "Plaintiffs' conversion claim likewise fails because Plaintiffs fail to plead that Defendant ever took possession of items belonging to them. *See* DePrince v. Starboard Cruise Svs., 163 So.3d 586, 598 (Fla. 3d DCA 2015)."

40. DePrince v. Starboard Cruise Svs., favors the Foleys' claim. In that case the court decided that the appellee Starboard had "constructive possession" of the converted property DePrince sought to recover. Absent any evidence of "actual possession," the DePrince court based its finding of "constructive possession" on a single written consignment agreement between Starboard and a third party.

41. In this case, "constructive possession" is proven by the regulatory actions of Orange County described in ¶40 AVC. Those actions effectively took

"constructive possession" of all essential advantages of possession in their aviary, toucans, and bird business as stated in ¶62(c) of Count III in the Foleys' amended complaint. The "permit" and "order," in particular, are documentary evidence that proves Orange County took "constructive possession" of the Foleys' right to sell any of their toucans.

42. The Court should not dismiss the Foleys' claim of conversion because the Foleys have adequately alleged *constructive possession*.

Invasion of *privacy* and *rightful activity*

43. The Court has entirely overlooked that ¶62(a)(1) AVC alleges the common law tort of invasion of privacy, or liberty, and ¶62(a)(2) AVC alleges the common law tort of invasion of rightful activity.

44. Orange County did not object to these claims.

45. The Foleys defend the claims on pages 18-20 of "Plaintiffs' Response to Defendants' Motions to Dismiss," filed May 24, 2017, document #56901050.

COUNT IV

46. The Court's order states:

> Count IV purports to state a cause of action for inverse condemnation, as well as damages associated with lost business revenue. Plaintiffs' inverse condemnation claim automatically fails because they did not allege and they cannot allege that Defendant's action prevented them from all beneficial uses of their property. Pinellas Cty. v. Ashley, 464 So.2d 176 (Fla. 2d DCA 1985).[2] Instead, the only "right" that Plaintiffs claim is Mr. Foley's state-issued permit, which is not a

> property right. *Hernandez v. Dept. of State, Div. of Licensing*, 629 So.2d 205, 206 (Fla. 3d DCA 1993). As to any associated damages, Plaintiffs failed to plead, and moreover fail to meet, the necessary statutory requirements. §127.01, Fla.Stat. (2016); *Sys. Component Corp. v. Fla. Dept. of Transp.*, 14 So.3d 967, 975–76 (Fla. 2009). Plaintiffs therefore cannot state a cause of action as to Count IV.
>
> †2 Even if Plaintiffs could successfully prove that Defendant did deprive them of the use of their property, inverse condemnation is not the proper remedy – rather, a court would have to determine if the ordinance is unenforceable and should be stricken. *Ashley*, 464 So.2d at 176. Because the ordinance has since changed, this remedy is not available to Plaintiffs either.

47. The Court has made four errors. First, the Foleys do not have to allege or prove "all beneficial uses" were destroyed, but do, at ¶64 AVC, allege Orange County took "all value in the property described in paragraphs 56(a)-(h)," *see United States v. Causby*, 328 US 256 (1946). Second, because the taking resulted from the challenged permit and BCC order and not an ordinance, Ordinance No. 2016-19 is only relevant to the Foleys' takings claim to the extent it reinforces the effect of the permit and order. Third, *Hernandez v. Dept. of State, Div. of Licensing* has no application here because the Foleys do not claim an entitlement to a permit against the issuing authority, but against Orange County who took the value in a permit issued by FWC. Fourth, *Sys. Component Corp. v. Fla. Dept. of Transp* and §73.071(3)(b), Fla.Stat., are inapplicable here, or are invalid to the extent they conflict with the guarantee of full compensation in Art. X, §6,

Fla.Const., *see* Backus v. Fort Street Uniou Depot Co. 169 US 557, 575 (1998). Below the Foleys step through these errors in detail.

Takings

48. Paragraph 64 AVC states: "The practice and proceeding described in paragraphs 39–52, effected a taking of all value in the property described in paragraphs 56(a)–(h)."

49. Paragraphs 56(a)-(h) AVC list the property at issue as follows:

(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;

50. Whether or not the Foleys' amended complaint is correct in alleging that *all* value in the property rights identified by ¶56(a)-(h) AVC was taken by the regulatory actions of Orange County described in ¶40 AVC is a question of fact for

the jury, not the court. Moreover, as a matter of law, the Foleys do not 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).

51. As a matter of law, the property rights identified by ¶56(a)-(h) AVC are recoverable pursuant Art. X, §6, Fla.Const.

a. Florida does recognize taking without public purpose, *see*: Kirkpatrick v. City of Jacksonville, 312 So.2d 487, 489 (1st DCA 1975); Flatt v. City of

Brooksville, 368 So.2d 631, 632 (2nd DCA 1979); *Patchen v. Florida Dept. of Agriculture*, 906 So.2d 1005 †2 (Fla. 2005); and, *City of West Palm Beach v. Roberts*, 72 So. 3d 294, 297 (4th DCA 2011).

b. Florida does recognize taking of personal property, *see*: *State Road Department of Florida v. Tharp*, 146 Fla. 745, 749 (1941); and, *Flatt v. City of Brooksville*, 368 So.2d 631 (2nd DCA 1979).

c. Florida does recognize takings of intangible property, *see*: *Williams v. American Optical Corp.*, 985 So.2d 23 (4th DCA 2008).

d. 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 (1958) (reasonable compensation for the cost of *moving* personal property and attorney's fees); *Consumer Serv. v. Mid-Florida Growers, Inc.*, 570 So.2d 892, 895-899 (Fla. 1990) (probable yield and value of the crop when harvested); *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 associated with proceeding).

52. *Hernandez v. Dept. of State, Div. of Licensing* has no application to their FWC permits because the Foleys do not claim an entitlement to the permits against

the issuing authority FWC, but against Orange County's rival claim that it can prohibit what FWC has authorized by the permits issued to the Foleys.

53. Contrary to the Court's order, the Foleys' takings claim is ripe because it is based upon the challenged permit and BCC order and not an ordinance, or the definitions of "aviary," "aviculture," or "home occupation," or their 2016 amendment.

54. Article X, Section 6, of Florida Constitution guarantees "full compensation." Consequently, neither the Legislature per §73.071(3)(b), Fla.Stat., nor the Judiciary per *Sys. Component Corp. v. Fla. Dept. of Transp* 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.

55. The Court has no basis in fact or law to dismiss the Foleys' takings claim, and should not do so.

COUNT VII

56. The Court's order states:

> Count VII attempts to state a cause of action for due process. This is not a recognized cause of action under Florida law. *Fernez v. Calabrese*, 760 So.2d 1144 (Fla. 5th DCA 2000); *Garcia v. Reyes*, 697 So.2d 549 (Fla. 4th DCA 1997). This Count therefore must be dismissed.[3]
>
> †3 Plaintiffs also seek money damages for an alleged violation of 42 U.S.C. § 1983 for violation of their due process. This allegation must be similarly dismissed with prejudice for failure to state a cause of action because they do not allege and cannot prove that they were deprived of life, liberty or property (i.e., substantive due process) under the facts of this case.

57. The Court has made two errors. First, because the Court determines Florida courts provide the Foleys no remedy at common law or in Art.X, §6 Fla.Const., it must now create one per Art.I, §9, Fla.Const., *see* *Everton v. Willard*, 468 So.2d 936, 946 (Fla.1985), "We have no constitutional power to refuse to hear suits for the redress of wrongs under article I, section 21." Second, because the Court determines Florida courts provide the Foleys no remedy at common law or in Art.X, §6 Fla.Const., and furthermore refuses to create one per Art.I, §9, Fla.Const., it must grant the one provided by the Federal government in 42 USC §1993, and Amend. XIV, U.S. Const. The Foleys have already made their

argument on these points on pages 38-48 of "Plaintiffs' Response to Defendants' Motions to Dismiss," May 24, 2017, court document #56901050.

LEAVE TO AMEND

58. The Foleys request leave to amend ¶47 of their amended verified complaint to place the words, "and Ch.162, Fla.Stat., as required by Art.VIII, §1(j), Fla.Const., and Art.I, §18, Fla.Const." between "Ch. 11, OCC," and "or otherwise".

59. The Foleys request leave to amend their amended verified complaint to add a paragraph, and/or claim, that states, "DEFENDANTS' practice and proceeding described in paragraphs 39-51 subverts Art.V, §1, Fla.Const., and denies the rights guaranteed the Foleys by Art.I, §§2, 9, 18, and 21, Fla.Const."

60. The Foleys request leave to amend ¶40 of their amended verified complaint to more clearly allege Orange County's sole responsibility for all aspects of the practice and proceeding alleged.

61. The Foleys request leave to amend Count IV of their amended verified complaint to replace "all" in ¶64 with "substantially all," and to include a federal takings claim pursuant Amend. V, U.S. Const.

CONCLUSION

WHEREFORE plaintiffs David and Jennifer Foley move the court for rehearing and leave to amend.

CERTIFICATE OF SERVICE

Plaintiffs certify that on November 25, 2020, the foregoing was electronically filed with the Clerk of the Court and served to the following:

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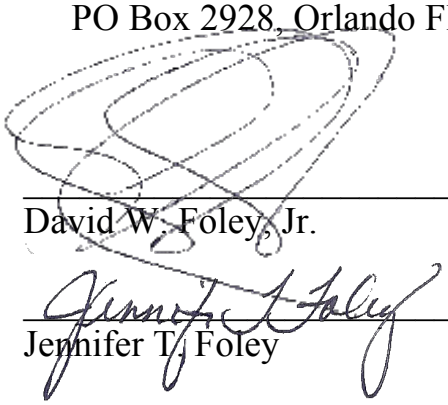

David W. Foley, Jr.

Jennifer T. Foley

Date: November 25, 2020

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IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, FLORIDA

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

Plaintiffs,

v.

ORANGE COUNTY, PHIL SMITH,
CAROL HOSSFIELD, MITCH GORDON,
ROCCO RELVINI, TARA GOULD,
TIM BOLDIG, FRANK DETOMA,
ASIMA AZAM, RODERICK LOVE,
SCOTT RICHMAN, JOE ROBERTS,
MARCUS ROBINSON, RICHARD CROTTY,
TERESA JACOBS, FRED BRUMMER,
MILDRED FERNANDEZ, LINDA STEWART,
BILL SEGAL, and TIFFANY RUSSELL,

Defendants.
_____/

CASE NO.: 2016-CA-007634-O
DIVISION: 35

DEFENDANT, ORANGE COUNTY, FLORIDA'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR REHEARING AND LEAVE TO AMEND

Defendant, Orange County, Florida, pursuant to Rule 1.530 of the Florida Rules of Civil Procedure, files this as its response in opposition to Plaintiffs' Motion for Rehearing and Leave to Amend (filed on November 25, 2020) and states:

1. A Final Order dismissing the Amended Complaint with Prejudice as to Orange County ("Dismissal with Prejudice") was entered on November 10, 2020.

2. This Court should deny Plaintiffs' Motion for Rehearing and Leave to Amend.

3. The reiteration of the same arguments and issues raised in Orange County's Amended Motion to Dismiss and Plaintiffs' responses do not warrant a rehearing of the issues

already decided by this Court. This Court heard argument from the parties at a duly noticed hearing. The transcript of that hearing was filed and available for the Court's review.

4. Further, as articulated by this Court's Dismissal with Prejudice, leave to amend was properly denied as futile.

5. There are related cases that have been adjudicated. In 2009, over ten years ago, the Florida Ninth Judicial Circuit in and for Orange County, acting in its appellate capacity, considered and rejected Plaintiffs' prior appeal of the 2007 Order entered by the Orange County Code Enforcement Board ("CEB"). In *Foley v. Orange County,* Case No. CVA1 07-37 (Fla. 9th Jud. Cir. Sept. 24, 2009), the Florida Ninth Judicial Circuit rejected the Foleys' plenary[1] "appeal from an order of the Orange County Code Enforcement Board (CEB), dated April 18, 2007, finding [the Foleys] in violation of Code sections 38-3, 38-74, and 38-77, by erecting structures on their residential property with the proper building or use permits." *See* Amended Complaint, ¶ 40.

6. The Florida Ninth Judicial Circuit held, in part, that "there was clear and convincing evidence presented to the CEB to support its decision that [Plaintiffs] had violated the Code sections under which they were charged."[2] For ease of reference, true and correct copies of the CEB Order and the Florida Ninth Judicial Circuit's Mandate and Final Order are attached as **Exhibits A and B**, respectively**.**

7. Plaintiffs then unsuccessfully appealed the Florida Ninth Judicial Circuit's adverse ruling to the Florida Fifth District Court of Appeal ("Fifth DCA") in *David W. Foley, Jr. and*

[1] 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).
[2] "[C]onstitutional claims . . . are properly cognizable on an appeal to the circuit court from a final order of an enforcement board taken pursuant to Section 162.11, Florida Statutes." *Holiday Isle Resort & Marina Assoc. v. Monroe County*, 582 So. 2d 721, 721-722 (Fla. 3d DCA 1991).

Jennifer T. Foley v. Orange County, Florida, Case No. 5D09-4021 (for Lower Tribunal Case No. CVA1 07-37) as shown by **Exhibit C.**

8. Additionally, in 2009, the Florida Ninth Judicial Circuit, acting in its appellate capacity, considered and denied Plaintiffs' Petition for Writ of Certiorari challenging the 2008 decision of the Orange County Board of County Commissioners affirming the recommendation of the Board of Zoning Adjustment ("BCC Appellate Decision") as shown by **Exhibits D and E**. *See Foley v. Orange County,* Case No. 08-CA-005227-O, Writ No. 08-20 (Fla. 9th Jud. Cir. Oct. 21, 2009); Complaint, ¶40; Amended Complaint ¶40.

9. Plaintiffs then unsuccessfully appealed this decision to the Florida Fifth District Court of Appeal ("Fifth DCA") in *David W. Foley, Jr. and Jennifer T. Foley v. Orange County, Florida*, Case No. 5D09-4195 (for Lower Tribunal Case No. 08-CA-0005227-O, Writ No. 08-20). After consolidating the appeals, the Fifth DCA denied the Petitions for Writ of Certiorari as shown by **Exhibit C.**

10. In conclusion, Defendant, Orange County, Florida, pursuant to Rule 1.530, Fla. R. Civ. P., respectfully requests that this Court deny Plaintiffs' Motion for Rehearing and Leave to Amend.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, pursuant to Florida Rule of Judicial Administration 2.516, the foregoing was filed with the Clerk of the Court on the 14th day of December 2020, by using the Florida Courts E-Filing Portal System. Accordingly, a copy of the foregoing is being served on this day to the attorney(s) or interested parties identified in the e-Portal Electronic Service List,

including the individuals listed below, via transmission of Notices of Electronic Filing generated by the e-Portal System.

David W. Foley, Jr.
david@pocketprogram.org

Jennifer T. Foley
jtfoley60@hotmail.com;

Jessica C. Conner, Esq.
Jessica.Conner@drml-law.com; zaida@drml-law.com;

Ronald Harrop, Esq.
RHarrop@oconlaw.com; eservice@oconlaw.com;

/s/ Linda S. Brehmer Lanosa
LINDA S. BREHMER LANOSA
Assistant County Attorney
Florida Bar No. 901296
Primary Email: Linda.Lanosa@ocfl.net
Secondary Email: 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

ORANGE COUNTY, FLORIDA
CODE ENFORCEMENT BOARD

ORANGE COUNTY,
Petitioner,
v.

CEB-**2007-66690Z**

DAVID W. FOLEY, Jr. &
JENNIFER T. FOLEY,

Respondent.
_____/

EXHIBIT A

This is to certify that the foregoing pages numbered one (1) through twenty-seven (27), inclusive, contain a true and correct copy of the original record of proceedings in the case of County of Orange v. DAVID W. FOLEY, Jr. & JENNIFER T. FOLEY, on file in this office.

Orange County, Florida
Code Enforcement Board

By Maritza Del Valle
Recording Secretary

STATE OF FLORIDA {
} SS:
COUNTY OF ORANGE {

I HEREBY CERTIFY that on this day before me, an office duly qualified to take acknowledgments, personally appeared Maritza Del Valle, Recording Secretary of the Orange County, Florida, Code Enforcement Board, who is personally known to me to be the person described in and who executed the foregoing instrument and she/he acknowledged to me that she/he executed the same.

WITNESS my hand and official seal this 22 day of May, 2007.

Myra J Bonta
Signature of person taking acknowledgment

Myra J. Bonta
Name of acknowledger type, print or stamp

NOTARY PUBLIC
Title or rank/Serial number, if any

MYRA J. BONTA NOTARY PUBLIC STATE OF FLORIDA MY COMM. EXPIRES JUNE 12, 2009 #DD422627

ORANGE COUNTY, FLORIDA
CODE ENFORCEMENT BOARD

CEB NO. **2007-66690Z**

ORANGE COUNTY, FLORIDA

Petitioner,

vs

FOLEY DAVID W JR &FOLEY JENNIFER T

Respondent(s),

_____/

FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND ORDER

THIS CAUSE originally came on for public hearing before the Code Enforcement Board on **April 18, 2007**, after due notice to the Respondent, and the Board having heard testimony under oath, received evidence, and heard argument of counsel (if any), thereupon issues its Findings and Facts, Conclusions of Law, and Order as follows:

I. FINDINGS OF FACT

A. This property is located at: **1015 N SOLANDRA DR Parcel ID: 21-22-30-5044-02-010** and

B. The Respondent is the owner of Record and the Respondent has custody of the property shown in the statenment of violation and request for hearing.

C. Testimony and evidence was taken and considered by the Board

D. Proper notice of this hearing was given to the owner/violator; and

E. Based on the evidence of record the Board finds as fact that the conditions described in the statement violation and request for hearing, do exist and do not meet Code requirements; and

II. CONCLUSIONS OF LAW

The Code Enforcement Board finds the Respondent, **FOLEY DAVID W JR &FOLEY JENNIFER T** to be in violation of:

38-3, 38-74, 38-77 Building, structure, or land use erected or used without obtaining building permit(s) and or land use permit.
Obtain building permit(s) and or land use permit or remove illegal use and or structure or alterations from property.

III. ORDER CEB NO. **2007-66690Z**

Based upon the foregoing Findings of Fact and Conclusions of Law, it it here by ORDERED that:

Respondent, **FOLEY DAVID W JR &FOLEY JENNIFER T** shall correct the violation on or before **June 17, 2007**. In order to correct violation, the Respondent shall take the remedial action set forth in the notice of violation. Failure to comply will result in a fine of **$500.00** for each day the violation continues past the above-stated compliance date. The Respondent is further ordered to contact the Code Enforcement Officer bringing this violation to arrange for an inspection of the property to verify compliance with this Order.

For reinspection, please contact: Inspector **Phil Smith** at Orange County Code Enforcement, 2450 W. 33rd Street, Orlando FL 32839, Phone: 407-836-3111.

NOTICE OF RIGHT TO APPEAL

Respondents are hereby notified that they or anyone else, including the County, Who may be aggrieved by this order, have the right to appeal it to the Circuit Court within 30 calendar days of rendition of this Order as set forth Section 162.11, F.S.

Upon expiration of the time for compliance stated herein, accrual of any fine hereunder and upon presentation of an Affidavit of Non-Compliance from the Code Enforcement Officer, the chairman of the Board is authorized to enter an Order Imposing Fine and Creating Lien and County may record this Order in the Public Records as provided in Section 162.09, F. S.

DONE AND ORDERED on APR 18 2007 at Orange County, Florida.

CODE ENFORCEMENT BOARD
ORANGE COUNTY, FLORIDA

STATE OF FLORIDA
COUNTY OF ORANGE

By: _____
Chairperson / Vice-Chairperson

The foregoing instrument was acknowledged before me this APR 18 2007 by Frederick Mellin, who is personally known to me as Chairman to the Orange County Code Enforcement Board.

_____
Signature of person taking acknowledgement

_____
Name of officer taking acknowledgement--typed, printed or stamped

NOTARY PUBLIC

_____
Title or rank Serial number, if any

MARITZA DEL VALLE
MY COMMISSION EXPIRES
April 20, 2010
#DD 542731
Bonded thru
Notary Public Underwriters
NOTARY PUBLIC, STATE OF FLORIDA

A TRUE and CORRECT certify copy of foregoing Findings of Facts, Conclusions of Law, and Order has been furnished by mail/personal service to: **FOLEY DAVID W JR &FOLEY JENNIFER T at 1015 N SOLANDRA DR, ORLANDO, FL 32807-1931.**

EXHIBIT B

MANDATE

CIRCUIT COURT IN AND FOR ORANGE COUNTY, FLORIDA

To the Honorable, the Judges of: **THE COUNTY COURT GREETINGS:**

WHEREAS, in the certain cause filed in this court styled:

David & Jennifer Foley, Appellants

-Vs.-

Orange County Florida, Appellee

Case Number: CVA 07-37
Your Case Number: CEB 2007-66690Z

The order or judgment of your court dated April 18, 2007 was duly brought to this court by virtue of proceedings agreeable by law; and

WHEREAS, this court on October 23, 2009, rendered its decision and judgment, a copy of which is attached hereto and made part of hereof;

YOU ARE HEREBY COMMANDED that such further proceedings be had in said cause as ought to be had in accordance with the decision and judgment of this court, the rules of procedure and the laws of the State of Florida

WITNESS MY HAND

The Honorable Belvin Perry, JR
Chief Judge of the Circuit Court
And seal of said court of Orlando,

This 25th Day of October, 2010

LYDIA GARDNER, CLERK
CIRCUIT COURT, NINTH JUDICIAL
CIRCUIT IN AND FOR ORANGE
COUNTY, FLORIDA

BY: C. Chong

State of Florida, County of Orange
I hereby certify that the foregoing is a true and correct copy of the instrument filed in this office.
Confidential items have been removed, as necessary per Fla.R.Jud.Admin. 2.240.
Witness my hand and official seal this 29 day of March 2012.
Lydia Gardner, Clerk of the Circuit Court
By: C. Chong Deputy Clerk.

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

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

Appellants,

v.

ORANGE COUNTY, FLORIDA,

Appellee.

CASE NO.: CVA1 07-37

Appeal from a decision of the Orange County Code Enforcement Board.

David W. Foley, Jr., and Jennifer T. Foley, Pro Se, for Appellants.

George W. Dorsett, Assistant County Attorney, for Appellee.

Before POWELL, DAWSON, M. SMITH, J.J.

PER CURIAM.

FINAL ORDER AFFIRMING LOWER COURT

Appellants David W. Foley, Jr. and Jennifer T. Foley (Appellants), timely appeal from an order of the Orange County Code Enforcement Board (CEB), dated April 18, 2007, finding Appellants 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.[1] The structures at issue are

[1] The order appealed from was entered after a hearing pursuant to section 162.07(4), Florida Statutes. It is a final appealable order. However, it is customary in most cases to file a notice of appeal to this order and then amend the notice to include the subsequent order issued pursuant to section 162.09, Florida Statutes. It appears that a second order has not been issued in this case, the possible reason being the Appellants have filed another case challenging the Orange County Board of County Commissioners action upholding the County Zoning Manager's determination that aviculture with associated aviaries is not a permitted principal or accessory use or a home occupation in Appellants R-1A zoning district. See pending Case No. 08-CA-005227-O.

cc: Aplnt, Aplee, Lower Court

several large bird cages used by Appellants to raise and maintain exotic birds. This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(1)(C). We dispense with oral argument per Florida Rule of Appellate Procedure 9.320.

Appellants argue that they were denied due process by certain actions of the CEB and that the evidence at the hearing did not support the CEB's decision and order. After careful review of Appellants' Amended Initial Brief, Appellee's Answer Brief, Appellants' Reply Brief, the record on appeal, the transcript of the hearing, and governing legal authorities, the Court finds as follows:

First, contrary to Appellants' argument, the hearing notice, which Appellants admitted to receiving, did contain, among other things, the Code sections allegedly violated and the facts constituting the alleged violation. Contrary to Appellants contention, the notice was not required to place Appellants on notice that fines would be "discussed, calculated and imposed at the hearing." The Court finds that the notice met the due process requirement of adequate notice.

Second, Appellants are correct that a fine and its amount were mentioned at the hearing; however, a fine was ***not imposed***, either verbally at the hearing or in the order appealed from. Section 162.07(4), Florida Statutes, states that such an order "may include a notice that it must be complied with by a specified date and that a find *may* be imposed." (emphasis added). The CEB order says "[f]ailure to comply *will* result in a fine of $500.00 for each day the violation continues past the above-stated compliance date." (emphasis added). The Court reads this phrase to simply be a notice that unless there was compliance, a fine would be imposed in the future and that $500.00 is the maximum amount which could be imposed. It is not, as Appellants

contend, the actual imposition of a fine. That has yet to be done, if it is to be done, by a separate subsequent order of the CEB.[2]

Third, contrary to Appellants' argument, the Court finds that there was clear and convincing evidence presented to the CEB in support of its decision that Appellants had violated the Code sections under which they were charged.[3]

All other arguments made by Appellants were considered and found to be without merit. Consequently, based upon the foregoing reasons, the order appealed from is **AFFIRMED** and the case is **REMANDED** to the CEB for further proceedings in accordance with Chapter 162, Florida Statutes.

AFFIRMED and REMANDED.

DONE and ORDERED at Orlando, Florida this 24 day Sept, 2009.

ROM W. POWELL
Senior Judge

DANIEL P. DAWSON
Circuit Judge

MAURA T. SMITH
Circuit Judge

[2] For future guidance of the parties, we note that the Second District Court of Appeal indicated in Massey v. Charlotte County, 842 So. 2d 142 (Fla. 2d DCA 2003), that due process requires that a property owner be afforded an opportunity to challenge a fine, the amount thereof, and the resulting lien. It further suggested that the property owner could be given notice that it could request a second hearing before a fine and lien could actually be imposed by subsequent order. Id.

[3] We need not address Appellants' request that we construe the Code to require "clear and convincing" evidence, not the lower degree of "preponderance," as Code section 11-35(d) provides, in order to sustain the decision of the CEB. The evidence at the hearing actually met the higher standard of clear and convincing. Without needing to recite a summary of the testimony of the code inspector, a reading of Appellants' testimony shows that Appellants knew what they were charged with, they did not challenge their guilt or innocence (thereby tacitly admitting guilt), they stated that they were in the process of obtaining the necessary permits from the Zoning Division, and they requested additional time to bring the structures into compliance.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing order was furnished via U.S. mail on this 24 day of Sept., 2009, to the following: **David W. Foley, Jr. and Jennifer T. Foley**, 1015 North Solandra Drive, Orlando, FL 32807-1931 and **George L. Dorsett, Assistant County Attorney**, Orange County Attorney's Office, P.O. Box 1393, Orlando, FL 32802-1393.

Judicial Assistant

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

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

Petitioner,

v.

ORANGE COUNTY, FLORIDA,

Respondent.
_____/

CASE NO. 5D09-4021,5D09-4195

EXHIBIT C

DATE: August 16, 2010

BY ORDER OF THE COURT:

ORDERED that the consolidated Petitions For Writ of Certiorari are denied. It is further

ORDERED that Petitioners' David W. Foley and Jennifer T. Foleys' Motion For Oral Argument and For Costs and Attorney's Fees, and Motion For Oral Argument, filed July 6, 2010 and Petitioners' Motion For Sanctions, filed August 4, 2010, are all denied. It is also

ORDERED that Respondent Orange County's Motion For Sanctions, filed July 16, 2010, is denied.

I hereby certify that the foregoing is
(a true copy of) the original Court order.

SUSAN WRIGHT, CLERK

cc: David W. Foley Jr. and Jennifer T. Foley
George L. Dorsett, Esq.
Tara L. Gould, Esq.
Joel Prinsell, Esq.

RIO-MFR:013

DECISION OF THE BOARD OF COUNTY COMMISSIONERS
ORANGE COUNTY, FLORIDA

EXHIBIT D

ON FEBRUARY 19, 2008, THE BOARD OF COUNTY COMMISSIONERS SAT AS A BOARD OF APPEALS TO CONSIDER THE FOLLOWING MATTER:

APPELLANTS:
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;
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: DISTRICT 3; PROPERTY GENERALLY LOCATED ON THE EAST SIDE OF NORTH SOLANDRA DRIVE, SOUTH OF OLD CHENEY HIGHWAY, WEST OF SEMORAN BOULEVARD OR 1015 NORTH SOLANDRA DRIVE; PARCEL ID 21-22-30-5044-02-010; SECTION 21, TOWNSHIP 22, RANGE 30; ORANGE COUNTY, FLORIDA (LEGAL PROPERTY DESCRIPTION ON FILE)

UPON A MOTION, THE BOARD OF COUNTY COMMISSIONERS UPHELD THE ZONING MANAGER'S DETERMINATION, CONSISTENT WITH THE BOARD OF ZONING ADJUSTMENT RECOMMENDATION; IN R-1A ZONE 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; ON THE DESCRIBED PROPERTY.

BOARD OF COUNTY COMMISSIONERS · ORANGE COUNTY FLORIDA

THE FOREGOING DECISION HAS BEEN FILED WITH ME THIS 29TH DAY OF FEBRUARY 2008.

DEPUTY CLERK
BOARD OF COUNTY COMMISSIONERS
ORANGE COUNTY, FLORIDA

Note: This document constitutes the final decision of the Board of County Commissioners on this matter. If, upon the Board's subsequent review and approval of its minutes, an error affecting this final decision is discovered, a corrected final decision will be prepared, filed, and distributed.
ldh

COUNTY COMPTROLLER SEAL ORANGE COUNTY FLORIDA

STATE OF FLORIDA, COUNTY OF ORANGE
I HEREBY CERTIFY that this is a true and accurate copy of a document from the Public Records of the Comptroller
PHIL DIAMOND, COUNTY COMPTROLLER
BY: _____ D.C.
DATED: AUG 29 2017

RIO-MFR:014

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

CASE NO.: 08-CA-5227-O
WRIT NO.: 08-20

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

EXHIBIT E

Petitioners,

v.

ORANGE COUNTY, FLORIDA,

Respondent.
_____/

Petition for Writ of Certiorari from the Decision of the Orange County Board of Commissioners.

David W. Foley, Jr., Pro Se, and Jennifer T. Foley, Pro Se, for Petitioners.

Joel D. Prinsell, Deputy County Attorney, For Respondent.

Before POWELL, EVANS, and T. SMITH, JJ.

PER CURIAM.

FINAL ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioners, David W. Foley and Jennifer T. Foley, seek certiorari review of Respondent's, Orange County Board of County Commissioners, final zoning decision, dated February 29, 2008. This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(3). We dispense with oral argument pursuant to Florida Rule of Appellate Procedure 9.320.

Tab 1

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-1A zoning district; and (3) aviculture with associated aviaries is not permitted as a home occupation in an R-1A zoning district.

Petitioners timely filed a Petition for Writ of Certiorari seeking review of the BCC's decision. This Court has considered the Petition, Response, Reply, all appendices and the transcript of the proceedings.

Where a party is entitled to seek review in the circuit court from a quasi-legal administrative action, the circuit court is limited in its review to determining: (1) whether due process of law was accorded; (2) whether the essential requirements of law were observed; and (3) whether the agency's decision is supported by substantial competent evidence. Fla. Power & Light Co. v. City of Dania, 761 So. 2d 1089 (Fla. 2000); Haines City Cmty. Dev. v. Heggs, 658 So. 2d 523 (Fla. 1995); City of Deerfield Beach v. Valliant, 419 So. 2d 624 (Fla. 1982). Petitioners do not dispute requirements (1) and (3); therefore, the sole issue before this Court is whether the BCC observed the essential requirements of law.

In order to constitute a departure from the essential requirements of law, there must be a violation of a clearly established principle of law resulting in a miscarriage of justice. See Combs v. State, 436 So. 2d 93 (Fla. 1983); Tedder v. Fla. Parole Comm'n, 842 So. 2d 1022 (Fla. 1st DCA 2003). A clearly established principle of law can derive from a variety of legal sources, including an interpretation or application of a statute, ordinance, administrative or procedural rule. See Fassy v. Crowley, 884 So. 2d 359 (Fla. 2d DCA 2004). The BCC's interpretation and application of its own zoning code is entitled to great deference by the reviewing court, especially in the absence of other court decisions or legal authorities, as is the case here. See Verizon Fla., Inc. v. Jacobs, 810 So. 2d 906 (Fla. 2002); Las Olas Tower Co. v. City of Ft. Lauderdale, 733 So. 2d 1034 (Fla. 4th DCA 1999).

Petitioners' other arguments have been considered and found to be without merit. Only two of which bear brief mention. The fact that one neighbor testified before the BCC and that Petitioners presented 23 favorable affidavits does not carry the day for them. See City of Apopka v. Orange County, 299 So. 2d 657 (Fla. 4th DCA 1974)(the function of the board of county commissioners is to hold public hearings, hear neighborhood residents, and obtain facts, not to hold a plebiscite; a majority's desires or opinions can never control the zoning decision). Finally, 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).

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.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the Petition for Writ of Certiorari is **DENIED.**

DONE and ORDERED at Orlando, Florida this 21st day October, 2009.

ROM W. POWELL
Senior Judge

ROBERT M. EVANS
Circuit Judge

THOMAS B. SMITH
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing order was furnished via U.S. mail on this 21 day of October 2009, to the following: **David W. Foley and Jennifer T. Foley,** 1015 North Solandra Drive, Orlando, Florida 32807-1931 and **Joel D. Prinsell, Deputy County Attorney,** Orange County Attorney's Office, PO Box 1393, Orlando, FL 32802-1393.

Judicial Assistant

State of Florida, County of Orange
I hereby certify that the foregoing is a true and correct copy of the instrument filed in this office.
Confidential items have been removed, as necessary per Fla.R.Jud.Admin. 2.240.
Witness my hand and official seal this 27 day of MARCH, 2012
Lydia Gardner, Clerk of the Circuit Court
By: _____ Deputy Clerk.

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

CASE NUMBER: 2016-CA-007634-O

DAVID W FOLEY, JR; JENNIFER
T FOLEY

Plaintiff(s),
vs.

ORANGE COUNTY, et alia, Defendants

_____/

ORDER ON MOTION FOR REHEARING AND MOTION TO AMEND

THIS CAUSE having come on to be heard by the Court and the Court being otherwise duly advised in the premises it is hereby **ORDERED and ADJUDGED** that:

1. The Motion For Rehearing And Motion To Amend is hereby denied.

DONE AND ORDERED on this 18 day of December, 2020.

Heather L. Higbee
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was filed with the Clerk of the Court this 18 day of December, 2020 by using the Florida Courts E-Filing Portal System. Accordingly, a copy of the foregoing is being served on this day to all attorney(s)/interested parties identified on the ePortal Electronic Service List, via transmission of Notices of Electronic Filing generated by the ePortal System.

I HEREBY CERTIFY that a copy of the foregoing was furnished on this 18th day of December, 20 20 by U.S. Mail to:

David W Foley, Jr	1015 N Solandra Dr Orlando, Fl 32807-1931
Ronald Harrop, Esq.	800 N. Magnolia Avenue. Ste 1350, Orlando, FL 32789
William C. Turner, Jr. Assistant County Attorney	PO Box 2687, Orlando, FL 32802
Derek Angell, Esquire	840 S. Denning Drive. 200, Winter Park FL 32789
Lamar D. Oxford, Esquire	PO Box 2828, Orlando FL 32802
Linda Sue Brehmer-Ianosa, Esq.	Orange County Attorney.s Office 201 S Rosalind Ave Fl 3 Orlando Fl 32801
Eric J Netcher, Esquire	189 S Orange Ave Ste 1830 Orlando Fl 32801
Jessica Christy Conner, Esquire	Dean Ringers Morgan & Lawton P A Po Box 2928 Orlando Fl 32802

_____

Judicial Asst. to Heather L. Higbee

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

CASE NO: 2016-CA-007634-O

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

Plaintiffs,

vs.

ORANGE COUNTY; PHIL SMITH;
CAROL HOSSFIELD; MITCH GORDON;
ROCCO RELVINI; TARA GOULD;
TIM BOLDIG; FRANK DETOMA;
ASIMA AZAM; RODERICK LOVE;
SCOTT RICHMAN; JOE ROBERTS;
MARCUS ROBINSON; RICHARD CROTTY;
TERESA JACOBS; FRED BRUMMER;
MILDRED FERNANDEZ; LINDA STEWART;
BILL SEGAL; and TIFFANY RUSSELL,

Defendants.
_____/

NOTICE OF APPEARANCE AND DESIGNATION OF EMAIL ADDRESS FOR DEFENDANTS, ORANGE COUNTY, PHIL SMITH, CAROL HOSSFIELD, MITCH GORDON, ROCCO RELVINI, TARA GOULD, AND TIM BOLDIG

Gail C. Bradford, Esquire, with the law firm of Dean, Ringers, Morgan and Lawton, P.A., hereby files this Notice of Appearance on behalf of Defendants, Orange County, Phil Smith, Carol Hossfield, Mich Gordon, Rocco Relvini, Tara Gould, and Tim Boldig in the above styled cause of action.

In compliance with Fla. R. Jud. Admin. 2.516, undersigned counsel

designates the following primary and secondary electronic mail addresses for this matter:

Primary Electronic Mail Address: GBradford@drml-law.com

Secondary Electronic Mail Addresses: Suzanne@drml-law.com

Please forward copies of all future pleadings, filings, discovery, and correspondence to undersigned counsel using the contact information contained herein.

I HEREBY CERTIFY that on January 13, 2021, the foregoing was electronically filed through the Florida Courts E-Filing Portal which will send a notice of electronic filing to Pro-Se Plaintiffs David W. Foley, Jr. (david@pocketprogram.org) and Jennifer T. Foley (jtfoley60@hotmail.com); and all counsel of record.

/s/ Gail C. Bradford

Gail C. Bradford, Esq.
Florida Bar No. 0295980
Dean, Ringers, Morgan & Lawton, P.A.
Post Office Box 2928
Orlando, Florida 32802-2928
Tel: 407-422-4310 Fax: 407-648-0233
GBradford@drml-law.com
Suzanne@drml-law.com
Attorneys for Defendants, Orange County, Phil Smith, Carol Hossfield, Mich Gordon, Rocco Relvini, Tara Gould, and Tim Boldig

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

Appellants/Plaintiffs DAVID W. FOLEY, JR., and JENNIFER T. FOLEY *v.* ***Appellees/Defendants*** 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.*	2016-CA-007634-O **NOTICE OF APPEAL**

NOTICE IS GIVEN that plaintiffs/appellants David W. Foley, Jr., and Jennifer T. Foley, appeal to the Fifth District Court of Appeal, the final order of this court filed November 10, 2020, and rendered December 18, 2020, dismissing with prejudice plaintiffs'/appellants' amended complaint as to defendant Orange County.

Conformed copies of the orders designated in this notice of appeal are attached in accordance with Fla. R. App. P. 9.110(d).

This notice is timely per Fla. R. Jud. Admin. 2.514(a)(1)(C), as the notice filing date specified by Fla. R. App. P. 9.110(b), is Monday, January 18, 2021.

CERTIFICATE OF SERVICE

Plaintiffs certify that on January 18, 2021, the foregoing was electronically filed with the Clerk of the Court and served to the following:

Linda S. Brehmer Lanosa, Assistant County Attorney,
201 S. Rosalind Av., 3rd Floor, Orlando FL, 32802, linda.lanosa@ocfl.net;
Ronald L. Harrop, O'Connor & O'Connor LLC,
800 N. Magnolia Av. Ste 1350, Orlando FL, 32789, rharrop@oconlaw.com;
Gail C. Bradford, Dean, Ringers, Morgan & Lawton PA,
PO 2928, Orlando FL 32802, gbradford@drml-law.com

David W. Foley, Jr.
Jennifer T. Foley

Date: January 18, 2021

Plaintiffs/Appellants
1015 N. Solandra Dr.
Orlando FL 32807-1931
PH: 407 721-6132
e-mail: david@pocketprogram.org
e-mail: jtfoley60@hotmail.com

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

CASE NUMBER: 2016-CA-007634-O

DAVID W FOLEY, JR; JENNIFER
T FOLEY

Plaintiff(s),
vs.

ORANGE COUNTY, et alia, Defendants

_____/

ORDER ON MOTION FOR REHEARING AND MOTION TO AMEND

THIS CAUSE having come on to be heard by the Court and the Court being otherwise duly advised in the premises it is hereby **ORDERED and ADJUDGED** that:

1. The Motion For Rehearing And Motion To Amend is hereby denied.

DONE AND ORDERED on this 18 day of December, 2020.

Heather L. Higbee
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was filed with the Clerk of the Court this 18 day of December, 2020 by using the Florida Courts E-Filing Portal System. Accordingly, a copy of the foregoing is being served on this day to all attorney(s)/interested parties identified on the ePortal Electronic Service List, via transmission of Notices of Electronic Filing generated by the ePortal System.

I HEREBY CERTIFY that a copy of the foregoing was furnished on this 18th day of December, 20 20 by U.S. Mail to:

David W Foley, Jr	1015 N Solandra Dr Orlando, Fl 32807-1931
Ronald Harrop, Esq.	800 N. Magnolia Avenue. Ste 1350, Orlando, FL 32789
William C. Turner, Jr. Assistant County Attorney	PO Box 2687, Orlando, FL 32802
Derek Angell, Esquire	840 S. Denning Drive. 200, Winter Park FL 32789
Lamar D. Oxford, Esquire	PO Box 2828, Orlando FL 32802
Linda Sue Brehmer-Ianosa, Esq.	Orange County Attorney.s Office 201 S Rosalind Ave Fl 3 Orlando Fl 32801
Eric J Netcher, Esquire	189 S Orange Ave Ste 1830 Orlando Fl 32801
Jessica Christy Conner, Esquire	Dean Ringers Morgan & Lawton P A Po Box 2928 Orlando Fl 32802

_____

Judicial Asst. to Heather L. Higbee

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

DAVID W. FOLEY and JENNIFER T. FOLEY,

CASE NO.: 2016-CA-007634-O

Plaintiffs,

v.

ORANGE COUNTY, PHIL SMITH, CAROL HOSSFIELD, MITCH GORDON, ROCCO RELVINI, TARA GOULD, TIM BOLDIG, FRANK DETOMA, ASIMA AZAM, RODERICK LOVE, SCOTT RICHMAN, JOE ROBERTS, MARCUS ROBINSON, RICHARD CROTTY, TERESA JACOBS, FRED BRUMMER, MILDRED FERNANDEZ, LINDA STEWART, BILL SEGAL, and TIFFANY RUSSELL,

Defendants.
_____/

ORDER DISMISSING THE AMENDED COMPLAINT WITH PREJUDICE AS TO ORANGE COUNTY

THIS MATTER came before the Court for a hearing on December 11, 2017[1] upon the "Orange County's Amended Motion to Dismiss Plaintiffs' Amended Complaint Pursuant to Florida Rules of Civil Procedure 1.140(b)(1) and (6), Amended as to Raise Statute of Limitations Defense," filed on November 20, 2017. The Court, having considered the Motion, case law, and arguments of counsel from both parties, and otherwise being duly advised in the premises, finds as follows:

[1] The Court would like to explain why this Order is so delayed. Plaintiffs filed an appeal on another final order entered in this case, and the Court was without jurisdiction to enter this order until the Fifth District recently entered its mandate. Additionally, the undersigned rotated out of this general civil division at the end of 2017, and only recently became aware that this Order was still outstanding.

After carefully reviewing the Amended Complaint, the Court finds that Plaintiffs fail to state a cause of action as to every claim, and the Amended Complaint must be dismissed with prejudice, as Plaintiffs cannot cure these deficiencies for the reasons discussed below. Counts I and II attempt to make out claims of declaratory relief and injunctive relief for portions of the Orange County Code that have since been amended. However, a court only has jurisdiction over a declaratory judgment action where there is a valid or 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). Because Orange County has amended the relevant portions of the zoning ordinance, such action rendered these counts moot. To the extent that Plaintiffs attempt to state a cause of action under the amended zoning ordinance, any such declaration from the Court would be an improper advisory opinion, as the amended zoning ordinances serve as no ripe dispute between the parties. *See Apthrop v. Detzner*, 162 So. 3d 236, 242 (Fla. 1st DCA 2015) ("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.").

Plaintiffs simply title Count III "Tort", with a subtitle of "Negligence Unjust Enrichment and Conversion." Any attempt to state a cause of action for negligence is belied by the fact that Plaintiffs 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, even if they had, Defendant owes Plaintiffs no duty of care in how it carries out its governmental functions. *See Trianon Park Condo. Ass'n v. City of Hialeah*, 468 So. 2d 912, 919 (Fla. 1985). Similarly, Plaintiffs 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. Plaintiffs' conversion claim likewise fails because Plaintiffs fail to plead that Defendant ever took possession of items

belonging to them. *See DePrince v. Starboard Cruise Svs.*, 163 So. 3d 586, 598 (Fla. 3d DCA 2015).

Count IV purports to state a cause of action for inverse condemnation, as well as damages associated with lost business revenue. Plaintiffs' inverse condemnation claim automatically fails because they did not allege and they cannot allege that Defendant's action prevented them from all beneficial uses of their property. *Pinellas Cty. v. Ashley*, 464 So. 2d 176 (Fla. 2d DCA 1985).[2] Instead, the only "right" that Plaintiffs claim is Mr. Foley's state-issued permit, which is not a property right. *Hernandez v. Dept. of State, Div. of Licensing*, 629 So. 2d 205, 206 (Fla. 3d DCA 1993). As to any associated damages, Plaintiffs failed to plead, and moreover fail to meet, the necessary statutory requirements. §127.01, Fla. Stat. (2016); *Sys. Component Corp. v. Fla. Dept. of Transp.*, 14 So. 3d 967, 975–76 (Fla. 2009). Plaintiffs therefore cannot state a cause of action as to Count IV.

Count VII attempts to state a cause of action for due process. This is not a recognized cause of action under Florida law. *Fernez v. Calabrese*, 760 So. 2d 1144 (Fla. 5th DCA 2000); *Garcia v. Reyes*, 697 So. 2d 549 (Fla. 4th DCA 1997). This Count therefore must be dismissed.[3]

Based on the foregoing, the 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. For reasons explained above, each attempted cause of action could not be cured by filing another amended complaint; the Court therefore dismisses Plaintiffs' Amended Complaint with prejudice.

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[2] Even if Plaintiffs could successfully prove that Defendant did deprive them of the use of their property, inverse condemnation is not the proper remedy—rather, a court would have to determine if the ordinance is unenforceable and should be stricken. *Ashley*, 464 So. 2d at 176. Because the ordinance has since changed, this remedy is not available to Plaintiffs either.

[3] Plaintiffs also seek money damages for an alleged violation of 42 U.S.C. § 1983 for violation of their due process. This allegation must be similarly dismissed with prejudice for failure to state a cause of action because they do not allege and cannot prove that they were deprived of life, liberty or property (i.e., substantive due process) under the facts of this case.

Accordingly, the following is hereby **ORDERED AND ADJUDGED:**

1. "Orange County's Amended Motion to Dismiss Plaintiffs' Amended Complaint Pursuant to Florida Rules of Civil Procedure 1.140(b)(1) and (6), Amended as to Raise Statute of Limitations Defense" is **GRANTED.**
2. The Plaintiffs' Amended Complaint, filed February 25, 2017, is **DISMISSED with prejudice as to Defendant, Orange County.**
3. Therefore, **final judgment** is hereby entered in favor of Defendant, Orange County. The Plaintiffs, David W. Foley and Jennifer T. Foley, shall take nothing by this action against said Defendant, and said Defendant shall go hence without day.
4. The Court reserves jurisdiction over any claims made or to be made by said Defendant for an award of costs and attorney's fees against the Plaintiffs.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on this 10th day of November, 2020.

HEATHER L. HIGBEE
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 10, 2020, a true and accurate copy of the foregoing was e-filed using the Court's ECF filing system, which will send notice to all counsel of record.

Judicial Assistant

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

Appellants/Plaintiffs DAVID W. FOLEY, JR., and JENNIFER T. FOLEY *v.* ***Appellees/Defendants*** 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.*	2016-CA-007634-O **DIRECTIONS TO CLERK** **and** **STATEMENT OF THE JUDICIAL ACTS TO BE REVIEWED** **per** **RULE 9.200(a)(2)**

PLAINTIFFS/APPELLANTS David W. Foley, Jr., and Jennifer T. Foley, pursuant Fla.R.App.P. 9.200(a)(2), direct the clerk to include the following in the record for appeal: *1)* the transcript of the hearing of December 11, 2017, filed by an approved civil court reporter September 16, 2019 (Doc# 95730801), pursuant Fla.R.App.P. 9.200(b); *2)* the progress docket; and, *3)* those items filed with the lower tribunal listed below:

#	Date Filed	Doc #	Title
1.	10/25/2016	48082823	Orange County's Motion to Dismiss Plaintiffs' Complaint Pursuant to Florida Rules of Civil Proceure 1.140(B)(1) and (6)
2.	10/25/2016	48082823	Orange County's Motion for Judicial Notice Pursuant to Florida Rule of Evidence 90.202(10) and 90.203
3	02/15/2017	52564910	Amended Verified Complaint for Declaratory & Injunctive Relief, Constitutional and Common Law Tort, Civil Theft, and Demand for Jury Trial
4.	03/07/2017	53377215	Orange County's Motion to Dismiss Plaintiffs' Amended Complaint Pursuant to Florida Rules of Civil Proceure 1.140(b)(1) and (6)
5.	05/22/2017	56758653	! "#$%&$'()*+ , &$ %", -*./0$1$#"*2 , &$13*
6.	05/24/2017	56901050	Plaintiffs' Response to Defendants' Motions to Dismiss
7.	05/25/2017	56928070	Plaintiffs' Motion for Judicial Notice of Ord. No. 2008-06
8.	05/25/2017	56919265	Plaintiffs' Response in Objection to Orange County's Motion for Judicial Notice, and Plaintiffs' Motion for Judicial Notice of Ord. No. 2016-19
9.	08/30/2017	61168439	Plaintiffs' Motion for Judicial Notice of Orange County Site-Plan and Building Permit Issued November 30, 2007
10.	08/30/2017	61168439	Plaintiffs' Motion for Judicial Notice of the Order of Orange County's Board of County 10.Commissioners February 19, 2008, in Case ZM-07-10-010
11.	11/20/2017	64432177	Orange County's Amended Motion to Dismiss Plaintiffs' Amended Complaint Pursuant to Florida Rules of Civil Proceure 1.140(B)(1) and (6), Amended so as to Raise Statute of Limitations Defense
12.	12/05/2017	65010225	Plaintiffs' Response to the Limitations Defense in Orange County's Amended Motion to Dismiss

13.	12/10/2017	65191504	Plaintiffs Motion for Judicial Notice of May 24, 2017 FWC Memorandum "Local Ordinances and the Regulation of Captive Wildlife"
14.	04/08/2019	87651313	Plaintiffs' Motion for Relief from Judgment and for Other Relief
15.	05/07/2019	89127613	Order on Hearing Scheduled for 4/4/18
16.	05/07/2019		Court Minutes
17.	09/12/2019	95633154	Designation to Civil Court Reporter Abigail Rusboldt, Milestone Reporting Company
18.	09/16/2019	95730801	12/11/17 Transcript
19.	11/10/2020	116422339	Order Dismissing the Amended Complaint with Prejudice as to Orange County
20.	11/18/2020	116917812	Notice of Appearance on Behalf of Defendant, Orange County, and Designation of E-Mail Addresses
21.	11/25/2020	117291870	Plaintiffs' Motion for Rehearing and Leave to Amend
22.	12/18/2020	118469811	Order on Motion for Rehearing and Motion to Amend
23.	01/13/2021	119554607	Notice of Appearance and Designation of Email Address for Defendants, Orange County, Phil Smith, Carol Hossfield, Mitch Gordon, Rocco Relvini, Tara Gould, and Tim Boldig

STATEMENT OF THE JUDICIAL ACTS TO BE REVIEWED

PLAINTIFFS/APPELLANTS David W. Foley, Jr., and Jennifer T. Foley, seek review of Judge Heather Higbee's, November 10, 2020, "Order of Dismissal and Final Judgment in Favor of Defendant," and December 18, 2020, "Order on Motion for Rehearing and Motion to Amend."

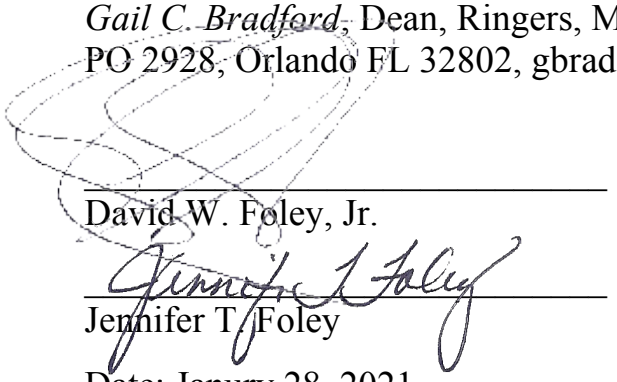
CERTIFICATE OF SERVICE

Plaintiffs certify that on Janury 28, 2021, the foregoing was electronically filed with the Clerk of the Court using the Florida Courts' eFiling Portal, which will send notice of filing and a service copy of the foregoing to the following:

Linda S. Brehmer Lanosa, Assistant County Attorney,
201 S. Rosalind Av., 3rd Floor, Orlando FL, 32802, linda.lanosa@ocfl.net;

Ronald L. Harrop, O'Connor & O'Connor LLC,
800 N. Magnolia Av. Ste 1350, Orlando FL, 32789, rharrop@oconlaw.com;

Gail C. Bradford, Dean, Ringers, Morgan & Lawton PA,
PO 2928, Orlando FL 32802, gbradford@drml-law.com



David W. Foley, Jr.

Jennifer T. Foley

Date: Janury 28, 2021

Plaintiffs/Appellants
1015 N. Solandra Dr.
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IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, FLORIDA

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

Plaintiffs,

v.

ORANGE COUNTY, PHIL SMITH, CAROL HOSSFIELD, MITCH GORDON, ROCCO RELVINI, TARA GOULD, TIM BOLDIG, FRANK DETOMA, ASIMA AZAM, RODERICK LOVE, SCOTT RICHMAN, JOE ROBERTS, MARCUS ROBINSON, RICHARD CROTTY, TERESA JACOBS, FRED BRUMMER, MILDRED FERNANDEZ, LINDA STEWART, BILL SEGAL, and TIFFANY RUSSELL,

Defendants.
_____/

CASE NO.: 2016-CA-007634-O
DIVISION: 35

DEFENDANT/APPELLEE, ORANGE COUNTY, FLORIDA'S DIRECTIONS TO CLERK

Defendant/Appellee, Orange County, Florida, pursuant to Rule 9.200(a)(2) of the Florida Rules of Appellate Procedure, directs the Clerk to include the items listed below from the record. The index to the record was retrieved from the Court's E-Filing portal. For ease of reference, the document numbers listed in the first column correspond to the document numbers in the Clerk of the Court's Portal.

Doc #	Date Filed	Filing #	Description	Pgs
242	01/18/2021	119760929	Notice of Appeal	9
237	12/18/2020	118469811	Order Denying Motion for Rehearing and Motion to Amend	3
236	12/14/2020	118172103	Orange County's Response in Opposition to Plaintiffs' Motion for Rehearing and Leave to Amend	18
234	11/25/2020	117291870	Plaintiffs' Motion for Rehearing and Leave to Amend	32
231	11/10/2020	116422339	Order Dismissing the Amended Complaint with Prejudice as to Orange County	4
209	10/11/2019	97138209	Amended Final Judgment: Amended Order Dismissing the Amended Complaint with Prejudice as to Defendant Employees and Defendant Officials	4
208	10/11/2019	97137693	Order Denying Plaintiffs' Motion for Rehearing	2
206	10/07/2019	96844013	Transcript of Hearing on May 28, 2019	51
201	09/16/2019	95730801	Transcript of Hearing on December 11, 2017	47
191	09/03/2019	95095470	Notice of Appeal	6
188	08/12/2019	94027584	Plaintiffs' Motion for Rehearing and Leave to Amend, or Clarification	10
185	08/02/2019	93604449	Final Judgment: Order Dismissing the Amended Complaint with Prejudice as to Defendant Employees and Official Defendants	4

Doc #	Date Filed	Filing #	Description	Pgs
182	05/30/2019		Court Minutes	1
181	05/20/2019	89792175	Plaintiffs' Response to the Employee Defendants' Motion to Strike the Amended Complaint, Request for Judicial Notice, and Motion to Dismiss this Action with Prejudice and Official Defendants' Amended Motion to Dismiss with Prejudice	77
178	05/09/2019	89235328	Notice of Hearing on May 28, 2019 on Official Defendants' Motion to Dismiss and Employees' Motion to Dismiss	2
176	05/08/2019	89187999	Official Defendants' Amended Motion to Dismiss with Prejudice	9
175	05/07/2019	89127613	Order on Hearing scheduled for April 4, 2018 on Orange County's Motion to Dismiss	2
174	05/07/2019		Court Minutes	2
173	05/03/2019	88943434	Defendant Employees' Motion to Dismiss the Amended Complaint, Request for Judicial Notice, and Motion to Dismiss this Action with Prejudice	10
170	04/18/2019	88210325	Official Defendants' Petition or Motion to Strike the Amended Complaint, Renewed Request for Judicial Notice, and Motion to Dismiss this Action with Prejudice	6
166	03/28/2019		Mandate from the Fifth District Court of Appeal, Case No. 5D18-145	11
159	03/27/2018	69875215	Plaintiffs' Response to the Official Defendants' Motion for §57.105 Sanctions	68

Doc #	Date Filed	Filing #	Description	Pgs
			filed January 4, 2017 (with transcript of hearing on September 6, 2017)	
144	01/18/2018	66710386	Notice of Hearing on 4/4/18 at 10am	2
142	01/17/2018		Acknowledgment of Appeal 5D18-145	1
138	01/08/2018	66242544	Notice of Appeal	14
136	12/12/2017	65268325	Order on Plaintiffs' Motion for Rehearing / Reconsideration	2
135	12/11/2017		Amended Court Minutes	1
134	12/11/2017		Court Minutes	2
133	12/10/2017	65191504	Plaintiffs' Motion for Judicial Notice of May 24, 2017 FWC Memorandum, "Local Ordinances and the Regulation of Captive Wildlife"	11
132	12/07/2017	65080851	Orange County's Amended Notice of Hearing on December 11, 2017	2
131	12/07/2017	65119855	Order Denying Plaintiffs' Motion for Rehearing	2
130	12/06/2017	65059228	Notice Cancellation of Hearing on December 11, 2017	2
129	12/05/2017	65010225	Plaintiffs' Response to the Limitations Defense in Orange County's Amended Motion to Dismiss	11
128	11/20/2017	64432177	Orange County's Amended Motion to Dismiss Plaintiffs' Amended Complaint pursuant to Florida Rules of Civil Procedure	20

Doc #	Date Filed	Filing #	Description	Pgs
			1.140(b)(1) and (6), Amended so as to Raise Statute of Limitations Defense	
127	11/17/2017	64343848	Plaintiffs' Motion for Rehearing	91
125	11/13/2017	64108000	Final Judgment in favor of Defendant Employees	2
124	11/09/2017	64028933	Plaintiffs' Motion for Reconsideration	86
123	11/09/2017	64028933	Plaintiffs' Motion for Rehearing	86
121	11/03/2017	63737267	Defendant Employees' Motion for Entry of Final Judgment	3
120	10/25/2017	63317556	Order Granting "The Official Defendants' Motion to Strike the Amended Complaint, Renewed Request for Judicial Notice, and Motion to Dismiss this Action with Prejudice" and Order Granting Defendant Employees' Motion to Dismiss/Motion to Strike	6
119	09/15/2017	61603249	Notice of Hearing on December 11, 2017 on Orange County's Motion to Dismiss	2
118	08/30/2017	61168439	Plaintiffs' Motion for Judicial Notice of Orange County Site-Plan and Building Permit Issued November 30, 2007	7
117	08/30/2017	61168439	Plaintiffs' Motion for Judicial Notice of the Order of Orange County Board of County Commissioners dated February 19, 2008 in Case ZM-07-10-010	6
116	08/22/2017	60756937	Notice of Hearing on September 6, 2017	2

Doc #	Date Filed	Filing #	Description	Pgs
115	07/14/2017	59036001	Defendant Carol Hossfield n/k/a Carol Knox's Notice of Incorporation of Defendant Employees' Motion to Dismiss	2
114	07/03/2017	58541152	Notice of Hearing on August 22, 2017	2
112	05/25/2017	56928070	Plaintiffs' Motion for Judicial Notice of Ordinance No. 2008-06	66
111	05/25/2017	56919265	Plaintiffs' Response in Objection to Orange County's Motion for Judicial Notice, and Plaintiffs' Motion for Judicial Notice of Ordinance No. 2016-19	137
110	05/24/2017	56901050	Plaintiffs' Response to Defendants' Motions to Dismiss	186
109	05/22/2017	56761641	Re-Notice of Hearing on Official Defendants' Motion to Strike, Renewed Request for Judicial Notice, and Motion to Dismiss and Employee Defendants' Motion to Dismiss (August 1, 2017)	2
108	05/22/2017	56758653	Plaintiffs' Motion for Judicial Notice (Docket and transcript)	28
107	05/22/2017	56758653	Plaintiffs' Response in Objection to Officials' and Employees' Motions for Judicial Notice	5
101	03/07/2017	53377215	Orange County's Motion to Dismiss Plaintiffs' Amended Complaint pursuant to Florida Rules of Civil Procedure 1.140(b)(1) and (6)	13

Doc #	Date Filed	Filing #	Description	Pgs
100	03/07/2017	53363907	Defendants Phil Smith, Rocco Relvini, Tara Gould, Tim Boldig and Mitch Gordon's Motion to Dismiss/Motion to Strike	4
99	03/06/2017	53349478	The Official Defendants' Motion to Strike the Amended Complaint, Renewed Request for Judicial Notice, and Motion to Dismiss this Action with Prejudice	19
98	02/15/2017	52564910	Amended Complaint for Declaratory and Injunctive Relief, Constitutional and Common Law Tort, Civil Theft, and Demand for Jury Trial	23
97	01/27/2017	51746516	Defendant, Mitch Gordon's Notice of Incorporation of the Defendants' Motion to Dismiss	2
85	12/20/2016	50321893	Defendants, Phil Smith, Rocco Relvini, Tara Gould, and Tim Boldig's Motion to Dismiss	6
84	12/19/2016	50285273	Exhibit: *Foley v. Orange County, et al.,* 137 S. Ct. 378 (2016)	1
83	12/19/2016	50285273	Exhibit: *Foley v. Orange County, et al.,* 638 Fed. Appx. 941 (11th Cir. 2016)	4
82	12/19/2016	50285273	Exhibit: *Foley v. Orange County, et al.,* Case No. 6:12–cv–269–Orl–37KRS (M.D. Fla. August 13, 2013) ("Second Order").	13
81	12/19/2016	50285273	Exhibit: *Foley v. Orange County, et al.,* Case No. 6:12–cv–269–Orl–37KRS (M.D. Fla. Dec. 4, 2012) ("First Order")	8

Doc #	Date Filed	Filing #	Description	Pgs
80	12/19/2016	50285273	The Official Defendants' Motion to Dismiss, Motion to Strike, and Request for Judicial Notice	13
26	10/25/2016	48082823	Orange County's Motion to Dismiss Complaint pursuant to Florida Rules of Civil Procedure 1.140(b)(1) and (6)	21
25	10/25/2016	48082823	Orange County's Motion for Judicial Notice pursuant to Florida Rule of Evidence 90.202(10) and 90.203 (Ordinance 2016-19)	131
3	08/25/2016	45714053	Verified Complaint for Declaratory & Injunctive Relief, Constitutional Tort, Civil Theft and Other Relief	46
2	08/25/2016	45714053	Civil Cover Sheet	2

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the 5th day of February 2021, pursuant to Florida Rule of Judicial Administration 2.516, the foregoing was filed with the Clerk of the Court on by using the Florida Courts E-Filing Portal System. Accordingly, a copy of the foregoing is being served on this day to the attorney(s) or interested parties identified in the e-Portal Electronic Service List, including the individuals listed below, via transmission of Notices of Electronic Filing generated by the e-Portal System.

David W. Foley, Jr.
david@pocketprogram.org

Jennifer T. Foley
jtfoley60@hotmail.com;

Gail C. Bradford, Esq.
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Ronald Harrop, Esq.
RHarrop@oconlaw.com; eservice@oconlaw.com;

All other interested persons listed in the e-filing portal

/s/ Linda S. Brehmer Lanosa
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JEFFREY J. NEWTON
County Attorney
ORANGE COUNTY ATTORNEY'S OFFICE
Orange County Administration Center
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Counsel for Orange County, Florida

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, FLORIDA

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

Plaintiffs,

v.

ORANGE COUNTY, PHIL SMITH, CAROL HOSSFIELD, MITCH GORDON, ROCCO RELVINI, TARA GOULD, TIM BOLDIG, FRANK DETOMA, ASIMA AZAM, RODERICK LOVE, SCOTT RICHMAN, JOE ROBERTS, MARCUS ROBINSON, RICHARD CROTTY, TERESA JACOBS, FRED BRUMMER, MILDRED FERNANDEZ, LINDA STEWART, BILL SEGAL, and TIFFANY RUSSELL,

Defendants.
_____/

CASE NO.: 2016-CA-007634-O
DIVISION: 35

DEFENDANT/APPELLEE, ORANGE COUNTY, FLORIDA'S AMENDED DIRECTIONS TO CLERK
(amended to remove Plaintiffs' designations at Plaintiffs' request)

Defendant/Appellee, Orange County, Florida, pursuant to Rule 9.200(a)(2) of the Florida Rules of Appellate Procedure and in response to Plaintiffs' request, submits this as Orange County's Amended Directions to Clerk. In support thereof, Orange County states:

1. Plaintiffs brought to Orange County's attention that there were duplicate entries in Plaintiffs' Directions (filed 1/28/21) and Orange County's

Directions to Clerk (filed 2/5/21).

2. Accordingly, to avoid the duplicate entries and corresponding charges, Orange County seeks to remove those items that have already been designated by Plaintiffs, David Foley and Jennifer Foley, including the documents listed in Orange County's Directions as documents numbered 25, 26, 98, 101, 108, 110, 111, 112, 117, 118, 128, 129, 133, 174, 175, 201, 231, 234, and 237.

3. In addition, Orange County requests that an amended invoice be prepared that reflects the reduction in the number of documents comprising the record on appeal.

4. In light of the above, Orange County amends its Directions to the Clerk to include the items listed below from the record. The index to the record was retrieved from the Court's E-Filing portal. For ease of reference, the document numbers listed in the first column correspond to the document numbers in the Clerk of the Court's Portal.

Doc #	Date Filed	Filing #	Description	Pgs
242	01/18/2021	119760929	Notice of Appeal	9
236	12/14/2020	118172103	Orange County's Response in Opposition to Plaintiffs' Motion for Rehearing and Leave to Amend	18

Doc #	Date Filed	Filing #	Description	Pgs
209	10/11/2019	97138209	Amended Final Judgment: Amended Order Dismissing the Amended Complaint with Prejudice as to Defendant Employees and Defendant Officials	4
208	10/11/2019	97137693	Order Denying Plaintiffs' Motion for Rehearing	2
206	10/07/2019	96844013	Transcript of Hearing on May 28, 2019	51
191	09/03/2019	95095470	Notice of Appeal	6
188	08/12/2019	94027584	Plaintiffs' Motion for Rehearing and Leave to Amend, or Clarification	10
185	08/02/2019	93604449	Final Judgment: Order Dismissing the Amended Complaint with Prejudice as to Defendant Employees and Official Defendants	4
182	05/30/2019		Court Minutes	1
181	05/20/2019	89792175	Plaintiffs' Response to the Employee Defendants' Motion to Strike the Amended Complaint, Request for Judicial Notice, and Motion to Dismiss this Action with Prejudice and Official Defendants' Amended Motion to Dismiss with Prejudice	77
178	05/09/2019	89235328	Notice of Hearing on May 28, 2019 on Official Defendants' Motion to Dismiss and Employees' Motion to Dismiss	2
176	05/08/2019	89187999	Official Defendants' Amended Motion to Dismiss with Prejudice	9

Doc #	Date Filed	Filing #	Description	Pgs
173	05/03/2019	88943434	Defendant Employees' Motion to Dismiss the Amended Complaint, Request for Judicial Notice, and Motion to Dismiss this Action with Prejudice	10
170	04/18/2019	88210325	Official Defendants' Petition or Motion to Strike the Amended Complaint, Renewed Request for Judicial Notice, and Motion to Dismiss this Action with Prejudice	6
166	03/28/2019		Mandate from the Fifth District Court of Appeal, Case No. 5D18-145	11
159	03/27/2018	69875215	Plaintiffs' Response to the Official Defendants' Motion for §57.105 Sanctions filed January 4, 2017 (with transcript of hearing on September 6, 2017)	68
144	01/18/2018	66710386	Notice of Hearing on 4/4/18 at 10am	2
142	01/17/2018		Acknowledgment of Appeal 5D18-145	1
138	01/08/2018	66242544	Notice of Appeal	14
136	12/12/2017	65268325	Order on Plaintiffs' Motion for Rehearing / Reconsideration	2
135	12/11/2017		Amended Court Minutes	1
134	12/11/2017		Court Minutes	2
132	12/07/2017	65080851	Orange County's Amended Notice of Hearing on December 11, 2017	2
131	12/07/2017	65119855	Order Denying Plaintiffs' Motion for Rehearing	2

Doc #	Date Filed	Filing #	Description	Pgs
130	12/06/2017	65059228	Notice Cancellation of Hearing on December 11, 2017	2
127	11/17/2017	64343848	Plaintiffs' Motion for Rehearing	91
125	11/13/2017	64108000	Final Judgment in favor of Defendant Employees	2
124	11/09/2017	64028933	Plaintiffs' Motion for Reconsideration	86
123	11/09/2017	64028933	Plaintiffs' Motion for Rehearing	86
121	11/03/2017	63737267	Defendant Employees' Motion for Entry of Final Judgment	3
120	10/25/2017	63317556	Order Granting "The Official Defendants' Motion to Strike the Amended Complaint, Renewed Request for Judicial Notice, and Motion to Dismiss this Action with Prejudice" and Order Granting Defendant Employees' Motion to Dismiss/Motion to Strike	6
119	09/15/2017	61603249	Notice of Hearing on December 11, 2017 on Orange County's Motion to Dismiss	2
116	08/22/2017	60756937	Notice of Hearing on September 6, 2017	2
115	07/14/2017	59036001	Defendant Carol Hossfield n/k/a Carol Knox's Notice of Incorporation of Defendant Employees' Motion to Dismiss	2
114	07/03/2017	58541152	Notice of Hearing on August 22, 2017	2

Doc #	Date Filed	Filing #	Description	Pgs
109	05/22/2017	56761641	Re-Notice of Hearing on Official Defendants' Motion to Strike, Renewed Request for Judicial Notice, and Motion to Dismiss and Employee Defendants' Motion to Dismiss (August 1, 2017)	2
107	05/22/2017	56758653	Plaintiffs' Response in Objection to Officials' and Employees' Motions for Judicial Notice	5
100	03/07/2017	53363907	Defendants Phil Smith, Rocco Relvini, Tara Gould, Tim Boldig and Mitch Gordon's Motion to Dismiss/Motion to Strike	4
99	03/06/2017	53349478	The Official Defendants' Motion to Strike the Amended Complaint, Renewed Request for Judicial Notice, and Motion to Dismiss this Action with Prejudice	19
97	01/27/2017	51746516	Defendant, Mitch Gordon's Notice of Incorporation of the Defendants' Motion to Dismiss	2
85	12/20/2016	50321893	Defendants, Phil Smith, Rocco Relvini, Tara Gould, and Tim Boldig's Motion to Dismiss	6
84	12/19/2016	50285273	Exhibit: *Foley v. Orange County, et al.,* 137 S. Ct. 378 (2016)	1
83	12/19/2016	50285273	Exhibit: *Foley v. Orange County, et al.,* 638 Fed. Appx. 941 (11th Cir. 2016)	4
82	12/19/2016	50285273	Exhibit: *Foley v. Orange County, et al.,* Case No. 6:12–cv–269–Orl–37KRS (M.D. Fla. August 13, 2013) ("Second Order").	13

Doc #	Date Filed	Filing #	Description	Pgs
81	12/19/2016	50285273	Exhibit: *Foley v. Orange County, et al.,* Case No. 6:12–cv–269–Orl–37KRS (M.D. Fla. Dec. 4, 2012) ("First Order")	8
80	12/19/2016	50285273	The Official Defendants' Motion to Dismiss, Motion to Strike, and Request for Judicial Notice	13
3	08/25/2016	45714053	Verified Complaint for Declaratory & Injunctive Relief, Constitutional Tort, Civil Theft and Other Relief	46
2	08/25/2016	45714053	Civil Cover Sheet	2

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the 9th day of February 2021, pursuant to Florida Rule of Judicial Administration 2.516, the foregoing was filed with the Clerk of the Court on by using the Florida Courts E-Filing Portal System. Accordingly, a copy of the foregoing is being served on this day to the attorney(s) or interested parties identified in the e-Portal Electronic Service List, including the individuals listed below, via transmission of Notices of Electronic Filing generated by the e-Portal System.

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IN THE CIRCUIT/COUNTY COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

Lower Tribunal Case No.: 2016-CA-007634-O
Higher Court Case No.: 5D21-233

I, Clerk of the Circuit and County Courts in and for Orange County, Florida do hereby certify that the foregoing pages contain a correct transcript of the record.

IN WITNESS WHEREOF, I have set my hand and affixed the seal of the Circuit Court in and for Orange County, Florida, on this 9th day of March, 2021.

Clerk of the Circuit and County Courts
425 N. Orange Ave., Orlando, FL 32801
(407) 836-2000
DIS-eDCA-Appeals@myorangeclerk.com

Laura Keating
Deputy Clerk

Certificate of Compliance
This document if in conformity with all font and word county requirements per F.R.A.P. 9.045