APPENDIX CONTENTS

[DO NOT PUBLISH]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-13864
Non-Argument Calendar

DAVID W. FOLEY, JR.,
JENNIFER T. FOLEY,
Plaintiffs-Appellants

versus

ORANGE COUNTY,
a political subdivision of Florida,
ASIMA M. AZAM,
individually and together, in their
personal capacities,
TIM BOLDIG,
individually and together, in their
personal capacities,
FRED BRUMMER,
RICHARD CROTTY,
individually and together, in their personal capacities,
et.al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 6:22-cv-00456-RBD-EJK

(January 4, 2024)

Before ROSENBAUM, GRANT, and BRASHER, Circuit Judges.

PER CURIAM:

David Foley, Jr., and Jennifer Foley, proceeding *pro se*, sued Orange County, Florida, Orange County officials, and Orange County employees for ordering the Foleys to

destroy an aviary they used to maintain and sell a small flock of toucans on their property. The district court dismissed their complaint on res judicata grounds, denied their request for judicial notice, and denied their motion for leave to amend their complaint. The Foleys appealed. On appeal, the employee defendants moved for Rule 38 sanctions. For the reasons stated below, we affirm the district court and deny the defendants' motion for sanctions.

I.

Since the early 2000s, the Foleys owned and maintained a small flock of toucans on their property to breed and sell. David Foley held licenses from the Florida Fish and Wildlife Conservation Commission to sell the toucans on his property from 2002 to 2008; but after a private citizen initiated an investigation of the sale of the toucans in 2007, the Orange County Enforcement Board ordered the Foleys to get a permit for their aviary structure, destroy it, or pay a daily fine. David Foley applied for a permit, but a county employee denied the application because using an aviary for commercial purposes violated the Orange County Code. The Foleys were ultimately forced to destroy their aviary and make other accommodations for their toucans. The Orange County Board of Zoning Adjustment, the Board of County Commissioners, and Florida state courts upheld the decision to deny the permit.

The Foleys sued Orange County and 19 individual county employees in their official and individual capacities in federal court, seeking a declaratory judgment that the Orange County land use ordinance is void and alleging violations of the Fourteenth Amendment's Due Process Clause and Equal Protection Clause, First Amendment, and Fourth Amendment. The district court held that Orange County's land use regulations were unlawful and granted summary judgment to the Foleys on that claim but granted summary judgment to Orange County on the other

claims. *See Foley v. Orange County*, No. 6:12-cv-269, 2013 WL 4110414, at *14 (M.D. Fla. Aug. 13, 2013). The Foleys appealed, and we held that all the Foleys' federal claims had no plausible foundation or were clearly foreclosed by Supreme Court decisions. *See Foley v. Orange County*, 638 F. App'x 941, 945–46 (11th Cir. 2016). Thus, under *Bell v. Hood*, 327 U.S. 678, 682 (1946), we held that the district court lacked federal-question jurisdiction to decide the state law claim, vacated the district court's judgment, and ordered the district court to dismiss the case without prejudice. *See Foley*, 638 F. App'x at 946.

The Foleys again sued those defendants in Florida state court. They alleged state and federal takings and due process claims but later amended their complaint to drop the federal takings claim. The state court dismissed the Foleys' amended complaint with prejudice.

The Foleys then brought this suit against the same defendants in federal court, alleging federal takings and due process claims. The defendants moved to dismiss the complaint on res judicata grounds. The district court agreed and dismissed the federal due process claim because the Foleys had brought the same claim against the same defendants in state court and because the state court dismissed it on the merits. The district court also dismissed the federal takings claim on res judicata grounds because, even though the Foleys dropped that claim in state court, res judicata applies to all claims arising out of the same nucleus of operative facts, and the state takings claim the Foleys pursued was based on the same facts as their federal takings claim. The district court further held that even though the Foleys claimed they "reserved" their takings claim in state court, they made no affirmative representation in their state court pleadings to avoid the application of res judicata as required by our precedent. *See Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299, 1309 (11th Cir. 1992). The district court also denied in part the Foleys' motion for judicial notice to the extent the

Foleys sought notice of the defendant's motive of any previous filings and denied the Foleys motion for leave to amend their complaint.

On appeal, the Foleys challenge the district court's dismissal of their claims on res judicata grounds, the district court's partial denial of their request for judicial notice, and the district court's denial of their motion to amend their complaint. Additionally, the employee defendants ask us to sanction the Foleys under Federal Rule of Appellate Procedure 38 for submitting arguments on appeal that are devoid of merit.

II.

We review de novo the district court's dismissal of the complaint based on res judicata. *See Kizzire v. Baptist Health Sys., Inc.*, 441 F.3d 1306, 1308 (11th Cir. 2006). We review the district court's ruling on a request for judicial notice for an abuse of discretion. *See Lodge v. Kondaur Cap. Corp.*, 750 F.3d 1263, 1273 (11th Cir. 2014). We also review the district court's denial of a motion to amend for an abuse of discretion, "but whether the motion is futile is a question of law that we review de novo." *Brooks v. Warden*, 800 F.3d 1295, 1300 (11th Cir. 2015).

III.

The Foleys first argue that the district court erred in applying the federal res judicata standard instead of the state standard and that under the state standard the state court judgment creates no bar to this case on res judicata grounds.

The Foleys are correct that, "[i]n considering whether to give preclusive effect to state-court judgments under res judicata or collateral estoppel, the federal court applies the rendering state's law of preclusion." *Cmty. State Bank v. Strong*, 651 F.3d 1241, 1263 (11th Cir. 2011). Thus, the district court erred in applying the federal standard instead of the Florida standard. But because the Foleys' claims are

still barred by res judicata under Florida law, that error does not require reversal.

A claim is barred by res judicata under Florida law where there is: "(1) identity of the thing sued for; (2) identity of the cause of action; (3) identity of the persons and parties to the action; (4) identity of the quality [or capacity] of the persons for or against whom the claim is made; and (5) the original claim was disposed on the merits." *Lozman v. City of Riviera Beach*, 713 F.3d 1066, 1074 (11th Cir. 2013). And "res judicata bars relitigation in a subsequent cause of action not only of claims raised[] but also claims that could have been raised." *Fla. Dept. of Transp. v. Juliano*, 801 So.2d 101, 107 (Fla. 2001).

The Foleys argue that the state court claims were not disposed of on the merits and that there is no identity of the cause of action. The Foleys say the state court did not dispose of their claims on the merits because the state court dismissed their claims (1) for lack of standing and thus for lack of jurisdiction and (2) based on absolute immunity, which is not an adjudication on the merits. We disagree. While the state court discussed the lack of an existing case or controversy, mootness, and ripeness, it made clear that it dismissed each of the Foleys' claims for failure to state a cause of action and dismissed the complaint with prejudice. And while the state court dismissed the claims against the individual defendants based on absolute immunity, it did so with prejudice because none of the Foleys' allegations sufficiently stated a claim against the individual defendants. Our precedent establishes that "dismissal of a complaint with prejudice satisfies the requirement that there be a final judgment on the merits." *Citibank, N.A. v. Data Lease Fin. Corp.*, 904 F.2d 1498, 1501 (11th Cir. 1990). Even more, under Florida law, "[a]n order finally dismissing a complaint for failure to state a cause of action is an adjudication on the merits." *Smith v. St. Vil*, 714 So.2d 603, 605 (Fla. Dist. Ct. App. 1998). Thus, the district court disposed of the Foleys' claims

on the merits.

We also disagree with the Foleys' argument that there was no identity of the causes of action in state court and federal court. In their complaint, the Foleys acknowledged that the defendants and the incidents here are the same as those in the state court case. Indeed, the Foleys raised the same federal due process claim in state court that they now raise in federal court. And while the Foleys dropped their federal takings claim in state court to pursue their state takings claim, res judicata bars relitigation of any claims that could have been raised in the previous action. *See Fla. Dept. of Transp.*, 801 So.2d at 107. There is no serious dispute that the Foleys could not have raised their federal takings claim in state court—they did, even if they later decided to abandon it. And even though the Foleys now argue they "reserved" their federal takings claim in state court, we agree with the district court that they made no affirmative representation in their state court pleadings as required by our precedent to avoid the application of res judicata. *See Fields*, 953 F.2d at 1309. Thus, under res judicata, the Foleys are barred from now raising a claim they declined to pursue in state court.

The Foleys separately argue, citing *Laskar v. Peterson*, 771 F.3d 1291, 1300 (11th Cir. 2014), that the state court decision created a new intervening fact on which their federal due process claim now relies. In *Laskar* the state court's denial of a means available to remedy an alleged constitutional violation was the basis of the later due process claim in federal court. It was unclear whether the state court dismissed a mandamus request without considering the merits and thus whether there was a means available to Laskar to remedy the alleged constitutional violation. *See id.* at 1301. Here, however, the state court provided a means for the Foleys to remedy their alleged violations and dismissed their complaint on the merits, so this argument fails.

The Foleys next argue that the district court erred in denying their request for judicial notice of the defendants' inconsistent positions in state and federal court. It is appropriate for a court to take judicial notice of a fact that is both not subject to reasonable dispute and is either (1) "generally known within the trial court's territorial jurisdiction" or (2) "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). "Indisputability is a prerequisite" for a court to take judicial notice. *United States v. Jones*, 29 F.3d 1549, 1553 (11th Cir. 1994). The district court did not abuse its discretion in declining to take judicial notice of the defendants' intent in state court because the parties' intentions were subject to reasonable debate, as illustrated by the parties' briefs, and because the accuracy of the defendants' motive cannot be determined without being reasonably questioned. Thus, the district court did not abuse its discretion in denying in part the Foleys' request for judicial notice.

Finally, the Foleys argue that the district court erred in denying as futile their motion for leave to amend their complaint to add a new count for declaratory relief as to whether the Fourteenth Amendment recognizes a legitimate claim of entitlement to a state issued license to sell birds. The Foleys argue that the district court incorrectly concluded that the state court already rejected the argument. A district court is justified in denying leave to amend due to futility "when the complaint as amended is still subject to dismissal." *Hall v. United Ins. Co. of Am.*, 367 F.3d 1255, 1262–63 (11th Cir. 2004). We agree with the defendants that the district court did not err in denying the Foleys' motion for leave to amend because the Foleys could have raised that claim in their state court complaint. Thus, that claim would be barred by res judicata if the Foleys were allowed to add it to their complaint, so the district court's denial of their motion for leave to amend was justified by futility.

IV.

The employee defendants ask us to impose sanctions under Federal Rule of Appellate Procedure 38, arguing that the Foleys raised frivolous claims in the face of clearly established law demonstrating that their claims were barred by res judicata. "Rule 38 sanctions are appropriately imposed against appellants who raise clearly frivolous claims in the face of established law and clear facts." *Parker v. Am. Traffic Sols., Inc.*, 835 F.3d 1363, 1371 (11th Cir. 2016). Under Rule 38, "a claim is clearly frivolous if it is utterly devoid of merit." *Id.* As explained above, the Foleys are correct that the district court erroneously applied the federal res judicata test instead of the Florida test. Thus, even though this error does not require us to reverse, it shows that the Foleys' arguments were not utterly devoid of merit. Therefore, we deny the employee defendants' motion for sanctions.

V.

For the reasons stated above, we **AFFIRM** the district court's grant of the defendants' motions to dismiss, denial of the Foleys' request for judicial notice, and denial of the Foleys' motion for leave to amend. We **DENY** the employee defendants' motion for Rule 38 sanctions.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

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

v. Case No. 6:22-cv-456-RBD-EJK

ORANGE COUNTY; 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,
Defendants.

ORDER

Before the Court are motions to dismiss filed by Orange County and various officials and employees as well as related motions for judicial notice. (Docs. 33-36, 38, 44.) At a hearing, the Court orally ruled on the motions; this Order memorializes the Court's pronouncements. (*See* Doc. 66.)

This long-running case arises out of the County prohibiting the *pro se* Plaintiffs from selling birds out of their residential property more than a decade ago. (Doc. 1.) Plaintiffs acknowledge that they previously brought federal and then state litigation against these same Defendants for these same claims; nevertheless. Plaintiffs again assert claims for unconstitutional takings and due process violations. (*See id.*) So the Official Defendants (Doc. 35), the Employee Defendants (Doc. 36), and the County (Doc. 38) each moved to dismiss the Complaint with prejudice on the basis of res judicata;[1] Plaintiffs opposed (Docs. 58-60).

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[1] Given the nature of the motions to dismiss, the County (Doc. 33) and

For res judicata to bar a case: "(1) the prior decision must have been rendered by a court of competent jurisdiction; (2) there must have been a final judgment on the merits; (3) both cases must involve the same parties or their privies; and (4) both cases must involve the same causes of action." *Lobo Celebrity Cruises, Inc.*, 704 F.3d 882, 892 (11th Cir. 2013). Res judicata may be considered on a motion to dismiss "where the existence of the defense can be determined from the face of the complaint." *Solis v. Glob. Acceptance Credit Co.*, 601 F. App'x 767, 771 (11th Cir. 2015).

Here, these same Plaintiffs sued the same Defendants for takings and due process claims in state court in 2016. (*Compare* Doc. 33-1, pp. 8-11, 20, *with* Doc. 1, pp. 8-10, 28, 31.) There is no serious question that the state court is competent and entered a final judgment and that both cases involve the same parties, as Plaintiffs acknowledge. (*See* Doc. 1, ¶ 10(a)-(b); Doc. 33-4.) So the only factor for discussion is whether the cases involve the same causes of action.

In the state court litigation. Plaintiffs' original complaint asserted a takings claim under both the Florida and U.S. Constitutions as well as a denial of due process. (Doc. 33-1, p. 20 (Count Two).) In an amended complaint. Plaintiffs dropped the federal takings claim and proceeded only under Florida law; they also separated out the due process claim into a separate count. (Doc. 34-10, pp. 16- 17 (Count Four), 22-23 (Count Seven).) The state court later dismissed the amended complaint with prejudice, explicitly

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the Employee Defendants (Doc. 34) also sought judicial notice of various court filings from the prior litigation. Plaintiffs then sought their own judicial notice (Doc. 44). These motions are due to be granted only to the extent that the Court takes notice of the fact of the underlying court filings. See Fed. R. Evid. 201. Plaintiffs' motion is due to be denied in part to the extent it asks the Court to take note of the "motive of" certain briefs. *See United States v. Jones*, 29 F.3d 1549,1553 (11th Cir. 1994).

rejecting both the takings and the due process claims. (Doc. 33-4, p. 3.)

So the due process claim is easily resolved: it was brought in state court and rejected, so it is barred. The takings claim, though slightly more nuanced, is barred too, as res judicata applies not only to the "precise legal theory," but to all claims arising out of the same nucleus of operative facts.[2] *Lobo*, 704 F.3d at 893 (cleaned up); see *Wesch v. Folsom*, 6 F.3d 1465,1471 (11th Cir. 1993). Here, it is undisputed that the state takings claim Plaintiffs pursued to final judgment is based on the exact same facts as the federal takings claim they pursue here—a conclusion underscored by the fact that Plaintiffs originally brought both claims together in their initial complaint. Indeed, Plaintiffs freely admit that the underlying "incidents" of the state case and this case are the same. (Doc. 1, 10(b).) As both cases involve causes of action that arise out of the same nucleus of operative facts, all four elements of res judicata are met, and this case is due to be dismissed. *Lobo*, 704 F.3d at 893.

Accordingly, it is ORDERED AND ADJUDGED:

1. Defendants' motions for judicial notice (Docs. 33,34) are **GRANTED.**
2. Plaintiffs' motion for judicial notice (Doc. 44) is **GRANTED IN PART AND DENIED IN PART.** It is **GRANTED** insofar as the Court takes judicial notice of the existence of the underlying court filings; it is **DENIED** insofar as Plaintiffs ask the Court to take notice of the motive

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[2] Though Plaintiffs assert that they "reserved" their federal takings claim (*see* Doc. 1, ¶ 11(c)), they made no such affirmative reservation in the state court pleading (*see* Doc. 33-10, pp. 16-17), which is required to avoid the application of res judicata. *See Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299,1309 (11th Cir. 1992) (*citing Jennings v. Caddo Parish Sch. Bd.*, 531 F.2d 1331 (5th Cir. 1976)).

of any filings and in all other respects.

3. Defendants' motions to dismiss (Docs. 35, 36, 38) are **GRANTED.**

4. Plaintiffs' Complaint (Doc. 1) is **DISMISSED WITH PREJUDICE.**

5 The Clerk is **DIRECTED** to close the file. All deadlines are terminated and all pending motions (including Plaintiffs' appeal of a ruling by the U.S. Magistrate Judge concerning discovery (Doc. 67)) are denied as moot.

DONE AND ORDERED in Chambers in Orlando, Florida, on October 11, 2022.

ROY B. DALTON JR.
United States District Judge

Copies:
Pro se Plaintiffs David W. Foley, Jr. and Jennifer T. Foley

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 14-10936

D.C.Docket No. 6:12-cv-00269-RBD-KRS

DAVID W. FOLEY, JR.;
JENNIFER T. FOLEY,
Plaintiffs – Appellants,
Cross Appellants,
versus
ORANGE COUNTY,
A political subdivision of the State of Florida,
Defendant – Appellees,
Cross Appellee
PHIL SMITH
CAROL HOSSFIELD
MITCH GORDON
ROCCO RELVINI
TARA GOULD
TIM BOLDIG, et al.,
Defendants – Appellees.

Appeal from the United States District Court
For the Middle District of Florida

(January 29, 2016)

Before TJOFLAT, ROSENBAUM, and ANDERSON, Circuit Judges.

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. 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

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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.

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.

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[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).

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*, 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)).

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 nonlegislative 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.

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.

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.

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 . . . [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.

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[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.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

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

vs. Case No. 6:12-cv-269-Orl-37KRS

ORANGE COUNTY
Defendant.

ORDER

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

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[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."

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.

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

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[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, 197–200 (1985) (refusing to adjudicate the plaintiff's due process claims in a dispute concerning land 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.

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

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[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.

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 (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 (1991).

"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 Paving & Excavating, Inc. v. Pa. Mfrs.' Ass'n Ins. 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.*

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

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 non-native 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.* 68A-6.002(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).

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

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[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.

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.* 68A-6.003(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

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[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.

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

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

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[8] The rules do not provide for such notice when the application is to possess class III wildlife.

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.

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*, 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] 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

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[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

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").

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

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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.").

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.

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

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

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[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.

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

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[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.

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.)

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.

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[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.*

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).

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

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[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").

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

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[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.

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 (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 (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.

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 (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 (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 (1980), observed "that commercial speech is such a sturdy brand of expression that traditional prior restraint doctrine may not apply to it."

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[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.

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 (11th 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.

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 (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 (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 (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.

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 in Chambers in Orlando, Florida, on August 13, 2013.

ROY B. DALTON JR.
United States District Judge

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

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

CASE NO.: 2016-CA-007634-O

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:

After carefully reviewing the Amended Complaint, the

[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.

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]

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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.

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.

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

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. 5D19-2635

ORANGE COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF FLORIDA AND ASIMA AZAM, MITCH GORDON, ROCCO RELVINI, TARA GOULD, TIM BOLDIG, FRANK DETOMA, RODERICK LOVE, SCOTT RICHMAN, JOE ROBERTS, ET AL,
Appellees.

_____/

Decision filed October 13, 2020

Appeal from the Circuit Court for Orange County, Patricia Strowbridge, Judge.

David W. Foley, Jr. and Jennifer T. Foley, Orlando, Pro se.

Linda S. Brehmer Lanosa, Assistant County Attorney and Jeffrey J. Newton, for the Orange County Attorney's Office, Orlando, for Appellee, Orange County.

Ronald L. Harrop, of O'Connor & O'Connor, LLC, Orlando, for Appellees, 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.

Jessica C. Conner, of Dean, Ringers, Morgan and Lawton, P.A., Orlando, for Appellees, Tim Boldig, Carol Hossfield (n/k/a Carol Knox), Rocco Relvini, Phil Smith, Tara Gould, and Mitch Gordon.

PER CURIAM.

AFFIRMED.

ORFINGER and EDWARDS, JJ., and CHASE, M., Associate Judge, concur.

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

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

CASE NO.: 2016-CA-007634-O

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

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[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.

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,"[2] 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,"[3] 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 1 369, 1393 ("[G]overnment official s performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established

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[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 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.

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 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 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 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 a notice to all counsel of record.

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. CASE NO. 5D09-4021.5D09-4195
ORANGE COUNTY, FLORIDA,
Respondent.
_____/

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.

IN THE CIRCUIT COURT FOR THE
NINTH JUDICIAL CICUIT IN AND
FOR ORANGE COUNTY, FLORIDA
CASE NO.: 08-CA-5227-O
WRIT NO.: 08-20

DAVID W. FOLEY, JR., and
JENNIFER T. FOLEY,
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,
Jennifer T. Foley, Pro Se,
for Petitioners.

Joel D. Prinsell, Deputy County Attorney,
for Respondent.

Before POWELL, EVANS, T. SMITH, J.J.

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.

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-I A zoning district; and (3) aviculture with associated aviaries is not permitted as a home occupation in an R-1 A 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

DANIEL P. DAWSON
Circuit Judge

THOMAS B. SMITH
Circuit Judge

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

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.

THE FOREGOING DECISION HAS BEEN FILED WITH ME THIS 29TH DAY OF FEBRUARY 2008.

/s/

DEPUTY CLERK

BOARD OF COUNTY COMMISSIONERS ORANGE COUNTY, FLORIDA

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-13864
Non-Argument Calendar

DAVID W. FOLEY, JR.,
JENNIFER T. FOLEY,
Plaintiffs-Appellants

versus

ORANGE COUNTY,
a political subdivision of Florida,
ASIMA M. AZAM,
individually and together, in their
personal capacities,
TIM BOLDIG,
individually and together, in their
personal capacities,
FRED BRUMMER,
RICHARD CROTTY,
individually and together, in their personal capacities,
et.al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 6:22-cv-00456-RBD-EJK

(February 21, 2024)

Before ROSENBAUM, GRANT, and BRASHER, Circuit Judges.

PER CURIAM:

The Petition for Panel Rehearing filed by David Foley, Jr., and Jennifer Foley is DENIED.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-13864

DAVID W. FOLEY, JR., JENNIFER T. FOLEY,
Plaintiffs-Appellants

versus

ORANGE COUNTY,
a political subdivision of Florida, ASIMA M. AZAM,
individually and together, in their personal capacities,
TIM BOLDIG,
individually and together, in their personal capacities,
FRED BRUMMER, RICHARD CROTTY,
individually and together, in their personal capacities,
et.al.,
Defendants-Appellees.

Appeal from the United States District Court for the
Middle District of Florida
D.C. Docket No. 6:22-cv-00456-RBD-EJK

JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: January 4, 2024

For the Court: DAVID J. SMITH, Clerk of Court

ISSUED AS MANDATE: March 6, 2024

Article IV, Section 9, Florida Constitution

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.

FLORIDA FISH AND WILDLIFE CONSERVATION COMMISSION
LEGAL OFFICE

MEMORANDUM

TO: FWC Captive Wildlife Program
THROUGH: James V. Antista,
General Counsel
FROM: Carla J. Oglo,
Assistant General Counsel
DATE: May 17, 2007
RE: LOCAL ORDINANCES AND THE REGULATION OF CAPTIVE WILDLIFE

This memorandum addresses the applicability of local ordinance and zoning codes to the regulation of captive wildlife. For purposes of this memorandum, the term captive wildlife means wildlife regulated under Rule 68A-6, F.A.C.

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. Local governments are concerned about the proximity of captive wildlife to people and, based on a relatively few cases of escape, believe in stronger local control over captive wildlife. These concerns are prompting local governments to consider adopting ordinances and zoning codes which directly regulate

captive wildlife or to consider zoning codes which directly define the appropriate neighborhoods for the possession of captive wildlife. Both the local governments and those who have captive wildlife facilities are looking to the Florida Fish and Wildlife Conservation Commission (FWC) for guidance as to whether or not, or to what extent, these ordinances and zoning codes 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 regulation of captive wildlife in Florida.

FWC's predecessor agency, the Game and Fresh Water Fish Commission, did not always have constitutional authority over all captive wildlife. In 1960, the Florida Supreme Court held that the then Game and Fresh Water Fish Commission had the authority to regulate *ferae naturae* or untamed animals in the wild, but the agency 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. This constitutional provision has been interpreted to mean that GFC has constitutional authority over all fish and wildlife whether in the wild or in captivity. 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). 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 regulated all wildlife. The authority of FWC to regulate captive wildlife as part of its constitutional authority is no longer in question. Miramar v. Bain, 429 So.2d 40 (Fla. 4th DCA 1983) and Haddock & Greyhound Breeders Assn. of Fla. v. Florida Game and Fresh Water Fish Commission, DOAH Case No. 86-3341RP (decided May 19, 1997). Furthermore, FWC rules take precedence over legislative enactments which conflict with those rules. Whitehead v. Rogers. 223 So.2d 330 (Fla. 1969); Beck v. Game and Fresh Water Fish Commission, 33 So.2d 594 (Fla. 1948); State ex rel. Griffin v. Sullivan, 30 So.2d 919 (Fla. 1947) and Price v. City of St. Petersburg, 29 So.2d 753 (Fla. 1947).

Chapter 372, Florida Statutes is now considered to be in aid of FWC's constitutional authority by providing the authority for license fees and penalties for violations of FWC rules on captive wildlife. Rule Chapter 68, Florida Administrative Code provides the administrative rules relating to captive wildlife and Rule 68A-5.004, F.A.C. provides for suspension or revocation of licenses for a violation of the rules. This licensing and permitting program has extensive regulations regarding standards for possessing, housing, feeding, transporting, exhibiting, transferring, caring or selling animals. These regulations involve inspecting the property before the permit is issued. These regulations ensure both the safe and humane treatment of the animals and the public health safety and welfare. In 2007, the Legislature, in response to the escape of Burmese python 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 and for repeat offenders. Both the statutes and the rules are providing a comprehensive and uniform state licensing and permitting process for the possession, exhibition and sale of captive

wildlife.

Local Government and Captive Wildlife

Formerly, Rule 68A-6.0022(5)(a)5.b, F.A.C. required appropriate neighborhoods for wildlife. It states:

> 5. Facility Requirements:
>
> b. In order to assure public safety, Class I and Class II wildlife shall only be kept in appropriate neighborhoods and, accordingly, facilities that house such wildlife shall meet the requirements of this rule subsection. Compliance with these requirements is a necessary condition for licensure. For purposes of this subsection, a "facility" means the site at which Class I or Class II carnivores are kept or exhibited. Applicants shall submit documentation verifying that the construction of the facility, its cages and enclosures is not prohibited by county ordinances and, if within a municipality, municipal ordinance.

This rule has been replaced by Rule 68A-6.003, F.A.C., to be effective January 1, 2008. The rule deletes the appropriate neighborhood provision and states in pertinent part:

> **68A-6.003 Facility and Structural Caging Requirement for Class I, II and III Wildlife.**
>
> (2) In order to assure public safety, the facilities for the housing of Class I and Class II wildlife shall meet the requirements of this rule. Compliance with these requirements is a necessary condition for licensure. For the purposes of this rule, a "facility" means the site at which Class I or Class II wildlife are kept or exhibited. Applicants shall submit documentation verifying that the construction of the facility, its cages and enclosures are not prohibited by county ordinance and, if within a municipality, municipal ordinance.
>
> 5. Zoning;

Facilities housing the following Class 1 wildlife may not be located on property within an area zoned solely for residential use. Changes in zoning subsequent to fee issuance of the license or permit shall not be disqualifying provided the license is maintained in a current and valid status.

a. Primates (all listed species)

b. Cats (all listed species)

c. Bears (family *Ursidae)*

d. Elephants (family *Elephantidae)*

e. Rhinoceros (family *Rhinocerotidae)*

f. Hippopotamuses (family *Hippopotamidae)*

g. Cape Buffalos (*Synceurs caffer caffer*)

(c) Exemptions;

The following Class I and Class II wildlife are exempt from the facility requirements as listed above:

1. Permits authorizing possession of infants only including:

a. Class I or Class II carnivores until they reach 25 pounds or six (6) months of age, which ever comes first, provided written documentation is available to verify the age of the animal, the animal is marked or otherwise identifiable, and the animal is provided space for exercise on a daily basis:

b. Class I end II primates until they reach the age of twelve (12) months, provided written documentation is available to verify the age of the animal, the animal is marked or otherwise identifiable, and the animal is provided space for exercise on a daily basis.

2. Crocodilians four (4) feet in length or less.

3. Cats: Ocelots (*Leopardus pardalis*), Servals (*Leptailurus serval*), Caracals (*Caracal caracal*), Bobcats (*Lynx rufus*), African golden cats (*Profelis aurata*),

Temminck's golden cats (*Profelis temmincki*), and Fishing cats (*Prionailurus viverrina*).

4. Non-human primates; Uakaris (genus *Cacajao),* Bearded sakis *(genus Chiropotes),* and Guenons (genus *Ceropithecus)* not including De Brazza's monkey *(Cercopithecus neglactus),* Blue monkey *(Cercopithecus mitis).* Preuss's monkey *(Cercopithecus preussi)* or any other non-human primate of the genus *Cercopithecus* which exceeds the normal adult weight of fourteen (14) pounds.

(d) Any Class I *or* Class II wildlife exempt from meeting the facility requirements of this rule must meet the following:

1. Class I wildlife shall not be possessed in any multi-unit dwellings or on any premises consisting of less than one quarter acre of land area.

2. Class II wildlife shall not be possessed in multi-unit dwellings unless the dwelling in which they are housed is equipped with private entrance, exit and yard area.

3. A fence sufficient to deter entry by the public, which shall be a minimum of five (5) feet in height, shall be present around the premises wherein Class I or Class II animals are housed or exercised outdoors.

(e) The above requirements shall be effective January 1, 2008, but shall not apply to those facilities licensed to possess captive wildlife species prior to that date. After January 1, 2008, those licensees that desire to expand their inventory to include a family of Class I or Class II species not previously authorized at their facility location shall comply with the requirements here in. Requests to upgrade wildlife classification authorizations shall be considered new applications for license purposes.

Specific Authority Art. IV, Sec. 9. Fla. Const. Law

Implemented Art. IV. Sec 9, Fla. Const., 372.921, 372.922 FS History–New 8-1-79. Amended 6-21-82, Formerly 39-6.03. Amended 6-1-86. 7-1-90, 7-1-92, 2-1-98. Formerly 39-6.003. Amended 1-1-08.

City of Miramar v. Bain. 429 So.2d 40 (Fla. 4th DCA 1983) held that and (sic) state that the local governments are not authorized to adopt ordinances relating to captive wildlife which conflict with the authority of FWC. See also. Attorney General Opinion 2002-23 (March 15, 2002). These opinions also state that FWC has exclusive authority to enact rules and regulations governing wildlife. This means that local governments cannot directly regulate captive wildlife, even if the local ordinance is more restrictive than the FWC rules and regulations and even if FWC has no rules or regulations that apply to that particular area. But the District Court of Appeal in City of Miramar v. Bain recognized that local government had some sphere of control to determine "appropriate neighborhoods" and commented about Rule 68A-6.02 (then the "appropriate neighborhood rule" and predecessor to recently repealed Rule 68A-6.0022) as follows:

> We construe Rule 68A-6.02(5)(c) to mean that prior to issuance of a permit, applicants must demonstrate to the Commission that they can provide satisfactory caging facilities without violation of existing city or county building and zoning regulations. This construction provides for harmonious blending of the Commission's permit requirements and city and county building and zoning regulations. It also insures that wildlife will only be maintained in appropriate neighborhoods.
>
> City of Miramar v. Bain at 43.

Under the City of Miramar v. Bain decision, the Fourth District Court recognized that local government could adopt a comprehensive land use plan, zoning code or

building code that would ensure that permitted wildlife is maintained in suitable neighborhoods or locations as long as those regulations do not discriminate against captive wildlife. Under the former rule, FWC could give deference to these building codes and zoning ordinance to determine the "appropriate neighborhood" for wildlife. However, the new rule deletes the appropriate neighborhood language and, in our view renders the City of Miramar v. Bain language, as to local government sphere of local control over wildlife through zoning, inapplicable.

The new rule, to be effective January 1, 2008, offers no deference to local government to determine appropriate neighborhoods for wildlife; therefore, there is no authority under FWC rules for local governments to determine appropriate neighborhoods for wildlife. FWC interprets Rule 68A-6.003 to only allow local government to control the structural requirements of buildings, that is, the building or facility must meet the requirements of the building code. The new rule further states that Class I captive wildlife may not be possessed in areas zoned "residential only"; other Class I and II wildlife which are exempt from facility requirements (small cats and small primates) may not be possessed in "multi-unit dwellings". It has become a common occurrence for local governments to attempt to regulate some aspect of captive wildlife, which requires FWC to, on ad hoc basis, deal with draft local ordinances on captive wildlife. We hope this memorandum will help local government better understand the role of the state in regulation of captive wildlife and captive wildlife facilities.

The following are examples of some local actions or ordinances that FWC believes are either authorized or unauthorized by the Article IV, Section 9, Florida Constitution and FWC rules thereto.

Types of actions or ordinances which are authorized

- Local government can establish "residential use only" zoning, which can in effect prohibit certain kinds of Class I wildlife. Local governments are authorized to regulate the abatement of public nuisances such as poor sanitation or noise that may be associated with the keeping of wildlife provided the ordinance does not distinguish between nuisances from animals and nuisances from other sources.
- Local government can control structural requirements of buildings and if a property owner wants to build a structure for their animals, the structure must comply with local building codes. Local government can regulate the building of the structures as long as it does not distinguish between structures for wildlife and structures for other purposes.
- Local government can regulate commercial activity provided that captive wildlife is not discriminated against through this regulation.
- Local government may regulate the possession and discharge of firearms within municipal boundaries (FWC requests that portions of Wildlife Management Areas within municipalities be exempted from such restrictions).
- Local government may control the use of local government-owned property and facilities and prohibit or regulate exhibitions thereon, so long as the regulation is directed to behaviors which may be addressed under local police power, and does not regulate wildlife.
- Local government can require persons engaged in occupations to comply with registration requirements. This might require a captive wildlife

facility to disclose and describe the captive wildlife in possession.

Types of actions or ordinances which are unauthorized

- Local government is prohibited by the constitution, statute and rules from prohibiting the possession, breeding or sale of captive wildlife.
- Local government cannot establish zoning classifications which expressly regulate or prohibit possession of wildlife. Local government cannot prohibit the possession of Class I or II wildlife in zoning classifications such as mixed use residential or commercial.
- Local government may not regulate in the area of taking, possession, transportation or sale of wildlife, even if the ordinance is more restrictive, and even if there is no specific FWC rule dealing with that particular issue. These areas are preempted by FWC rules and regulations.
- Local government may not regulate in the areas of hunting or fishing, even if the ordinances are more restrictive than FWC rules and regulations, and even if there is no specific FWC rule dealing with that particular issue. These areas are preempted by FWC's rules and regulations.
- Local governments that create their own captive wildlife permitting and regulatory system are in conflict with Article IV, Section 9. If the ordinance gives the locality the authority to deny a permit for the possession of captive wildlife regulated by FWC, that permitting system would be in conflict with FWC's authority unless the ordinance is in effect as registration program that allows a person to possess wildlife if authorized by FWC provided that

possessors of captive wildlife must register with local government.

Conclusion

The Florida Constitution, FWC rules and those Florida Statutes in aid of the Commission provide authority for comprehensive and uniform state-wide regulation and control of captive wildlife by FWC. The Florida Courts have upheld FWC's exclusive authority in this area. Local government regulatory authority in the area of captive wildlife is limited. This governing structure is designed to provide state-wide regulation of captive wildlife without overlapping or conflicting local ordinances.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA • ORLANDO DIVISION

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

v.

ORANGE COUNTY,
a political subdivision 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

Case No. 6:22-CV-450-CEM-EJK

COMPLAINT
FOR VIOLATION OF
CIVIL RIGHTS
Demand for a Jury Trial

NATURE OF COMPLAINT

1. Orange County is constitutionally pre-empted by Article IV, Section 9, Florida Constitution, from regulating the possession and sale of captive exotic birds; this Court so held in Foley et ux v. Orange County et al., 6:12-cv-269-Orl-37KRS (M.D. Florida, August 13, 2013) ("Orange County cannot use its land use ordinances to regulate the [Foleys'] possession or sale of captive wildlife.").

2. Orange County is also constitutionally pre-empted by Article VIII, Section 1(j), Florida Constitution, from prosecuting or punishing persons violating county

ordinances except as provided by the Florida Legislature.

3. Defendants trespassed both of these separation-of-powers provisions of the Florida Constitution when they prosecuted and punished the plaintiffs David and Jennifer Foley (the Foleys) for an alleged violation of an un-codified prohibition of "raising birds to sell" as a *home occupation* in a proceeding that was not authorized by statute, and enjoined the Foleys from continuing to sell birds raised at their Solandra homestead.

4. Florida's Ninth Judicial Circuit and Fifth District Court of Appeal have denied the Foleys any meaningful hearing on the application of Article IV, Section 9, and Article VIII, Section 1(j), Florida Constitution, to the defendants' unlawful injunction of the Foleys' right to sell birds, and also have denied relief under the takings provision of Article X, Section 6(a), Florida Constitution; this Court required the Foleys exhaust state-court takings remedies in Foley et ux v. Orange County et al., 6:12-cv-269-Orl-37KRS †8 (M.D. Florida, December 4, 2012) ("[The Foleys] must demonstrate that [they] unsuccessfully 'pursued the available state procedures to obtain just compensation' before bringing [their] federal [takings] claim.").

5. The Foleys now press suit upon the defendants for compensatory relief pursuant Title 42 U.S. Code Section 1983, for their acts and omissions, under the color of ordinance, regulation, and custom, that subjected the Foleys, or caused them to be subjected, to the following constitutional deprivations:

a. The regulatory, exactions, and business taking of personal property without due process, public purpose/use, or just compensation in violation of Amendment V, United States Constitution, as guaranteed by Amendment XIV, Section 1, United States Constitution; this Court recommended a

regulatory taking in Foley et ux v. Orange County et al., 6:12-cv-269-Orl-37KRS (M.D. Florida, December 4, 2012) ("The application of an invalid land use regulation may form the basis of a regulatory takings claim.");

b. The deprivation of personal property by the denial of the adequate adversarial pre-deprivation process provided by Florida, and guaranteed by Amendment XIV, Section 1, United States Constitution; and,

c. The complete denial by the State of Florida of the due process guaranteed by Amendment XIV, Section 1, United States Constitution.

6. The Foleys request oral argument.

7. The Foleys demand a jury trial.

VENUE

8. Venue lies with this court pursuant Title 28 U.S. Code Section 1391(b) as the acts and omissions giving rise to this complaint occurred in Orange County, Florida.

JURISDICTION

9. Jurisdiction lies with this court pursuant Title 28 U.S. Code Sections 1331 1343, and 1367, and Title 42 U.S. Code Section 1988 to address the Foleys' claims arising under the laws and Constitution of the United States, and under common law, and to disregard an otherwise applicable state rule of law if it is inconsistent with the federal policy underlying Title 42 U.S. Code Section 1983.

10. This complaint is timely as to the defendants, incidents, and injuries at issue in Federal case 6:12-cv-00269-RBD-KRS, Florida case 2016-CA-007634-O, and Florida appellate case 5D21-0233, for the following reasons:

a. All defendants in this case were sued in the same capacity in Federal case 6:12-cv-00269-RBD-KRS, Florida case 2016-CA-007634-O, and Florida appellate case 5D21-0233.

b. The incidents in this case are the same as those in Federal case 6:12-cv-00269-RBD-KRS, Florida case 2016-CA-007634-O, and Florida appellate case 5D21-0233.

c. The claims of constitutional injury presented in this complaint are subject to a four-year statutory limitation pursuant Section 95.11(3) (d), (h), (m), and/or (p) Florida Statutes.

d. The takings claim presented is a continuing wrong claim that initially accrued February 19, 2008, the date the Orange County Board of County Commissioners (BCC) made its final decision in the Foleys' case, and remains timely with respect to that date for the following reasons:

1. February 21, 2012, the Foleys timely filed their original complaint with this court in case 6:12-cv-00269-RBD-KRS, and pursuant Rule 6(a)(1), Federal Rules of Civil Procedure, that day was the last their complaint could be filed to satisfy any four-year statute of limitation beginning February 18, 2008 through February 21, 2008, and ending the holiday weekend of February 18, 2012 through February 21, 2012 – February 20, 2012, a Monday, was Washington's Birthday, (Presidents' Day).

2. July 27, 2016, this court dismissed case 6:12-cv-00269-RBD-KRS without prejudice for lack of federal question subject matter jurisdiction.

3. August 25, 2016, the Foleys timely filed an original complaint with the Ninth Judicial Circuit Court of Florida in case 2016-CA-007634-O; the complaint was held timely per Title 28 U.S. Code §1367(d), as to the defendants, incidents and injuries at issue in Federal case 6:12-cv-00269-RBD-KRS, by the Florida Fifth District Court of Appeal in Foley v. Azam, 257 So.3d 1134 (5th DCA 2018).

4. December 18, 2020, the Ninth Judicial Circuit Court of Florida denied rehearing of its order dismissing with prejudice case 2016-CA-007634-O.

5. Today, the Florida Fifth District Court of Appeal in appellate case 5D21-0233, on rehearing affirmed the order of the Ninth Judicial Circuit Court of Florida in case 2016-CA-007634-O, without granting any of the jurisdictional predicates essential to review by Florida's Supreme Court.

e. The takings claim, as a continuing wrong claim, otherwise has accrued continuously since the BCC's final order February 19, 2008, as the defendants have continuously defended that order.

f. The pre-deprivation procedural due process claim presented in this complaint attacks an administrative prosecution action, and an administrative prosecution custom, that were not authorized by, and violated, state law, and this claim accrues today with the denial of any post-deprivation remedy by the Fifth District Court of Appeal, as stated in paragraph 10-d-5 *supra*, and is otherwise timely with respect to any continuing injury accruing after the BCC's final order February 19, 2008, for the reasons stated in paragraphs 10-d, subparagraphs 1 through 5 *supra*.

11. The claims and issues presented in this complaint are not barred or precluded by the judgments of Federal case 6:12-cv-00269-RBD-KRS, Florida case 2016-CA-007634-O, or Florida appellate case 5D21-0233, for the following reasons:

a. The Foleys restate paragraphs 10-a and b *supra*.

b. The Foleys have not previously asserted in federal or state court any cause of action against the defendants in Title 42 U.S. Code Section 1983, for the taking of personal property without public use or just

compensation in violation of Amendment V, United States Constitution, as guaranteed by Amendment XIV, Section 1, United States Constitution.

c. The Foleys expressly reserved their claim in Amendment V, United States Constitution, on the record of the state court.

d. The Foleys did not, and could not, assert in Federal case 6:12-cv-00269-RBD-KRS, any cause of action against the defendants in Title 42 U.S. Code Section 1983, for the denial of the adequate adversarial pre-deprivation process due and guaranteed by Amendment XIV, Section 1, United States Constitution.

e. Both the Ninth Judicial Circuit Court in case 2016-CA-007634-O, and the Fifth District Court of Appeal in appellate case 5D21-0233, neglected, or failed, to make any ruling, expressly or by implication, on the Foleys' claim in Title 42 U.S. Code Section 1983, asserted in those courts and in this complaint, for the denial of pre-deprivation procedural due process guaranteed by Amendment XIV, Section 1, United States Constitution.

f. Both the Ninth Judicial Circuit Court in case 2016-CA-007634-O, and the Fifth District Court of Appeal in appellate case 5D21-0233, neglected, failed, or refused to hear, or to make any express or implied ruling on, the following issues:

1. The Foleys' personal property right to possess and sell birds asserted in those courts and in this complaint; or,

2. The application to that right of Article IV, Section 9, and Article VIII, Section 1(j), Florida Constitution, urged in those courts and in this complaint.

PARTIES

12. Plaintiff David W. Foley, Jr., with his wife Jennifer T.

Foley, owns a residence, and resides, at 1015 North Solandra Drive, Orlando, Florida, 32807-1931.

13. Plaintiff Jennifer T. Foley, with her husband David W. Foley, Jr., owns a residence, and resides, at 1015 North Solandra Drive, Orlando, Florida, 32807-1931.

14. Defendant Orange County is a political subdivision of Florida, created by the Florida Legislature pursuant Article VIII, Section 1(a), Florida Constitution, with administrative offices at 201 South Rosalind Avenue, Orlando, Florida, 32801, and a mailing address of P.O. Box 2687, Orlando, Florida 32802-2687.

15. Defendant Asima Azam sat on the Board of Zoning Adjustment, November 1, 2007.

16. Defendant Tim Boldig as Zoning Division Chief of Operations prosecuted the Foleys' case before the Board of County Commissioners, February 19, 2008.

17. Defendant Fred Brummer sat on the Board of County Commissioners, February 19, 2008.

18. Defendant Richard Crotty sat on the Board of County Commissioners as County Mayor, February 19, 2008.

19. Defendant Frank Detoma sat on the Board of Zoning Adjustment, November 1, 2007.

20. Defendant Mildred Fernandez sat on the Board of County Commissioners, February 19, 2008.

21. Defendant Mitch Gordon as Zoning Manager recommended, participated in, defended, or knowingly acquiesced to the acts and omissions challenged in this complaint.

22. Defendant Tara Gould as Assistant County Attorney, representing Orange County, and representing the Board of Zoning Adjustment November 1, 2007, recommended, participated in, defended, or knowingly acquiesced to the acts and omissions challenged in this complaint.

23. Defendant Carol Hossfield as the Permitting Chief Planner recommended, participated in, defended, or knowingly acquiesced to the acts and omissions challenged in this complaint.

24. Defendant Teresa Jacobs was President of the Florida Association of Counties (FAC) in 2007 and 2008, and sat on the Board of County Commissioners, February 19, 2008.

25. Defendant Roderick Love sat on the Board of Zoning Adjustment, November 1, 2007.

26. Defendant Rocco Relvini as Chief Planner prosecuted the Foleys' case before the Board of Zoning Adjustment, November 1, 2007.

27. Defendant Scott Richman sat on the Board of Zoning Adjustment, November 1, 2007.

28. Defendant Joe Roberts sat on the Board of Zoning Adjustment, November 1, 2007.

29. Defendant Marcus Robinson sat on the Board of Zoning Adjustment, November 1, 2007.

30. Defendant Tiffany Russell sat on the Board of County Commissioners, February 19, 2008.

31. Defendant Bill Segal sat on the Board of County Commissioners, February 19, 2008.

32. Defendant Phil Smith was the code enforcement inspector who originally investigated the citizen complaint against the Foleys, and prosecuted the Foleys before the Orange County code enforcement board.

33. Defendant Linda Stewart sat on the Board of County Commissioners, February 19, 2008.

FACTS

Liberty interest

34. The Foleys have a right "to be let alone and free" of unauthorized regulation, per Article I, Section 23, Florida

Constitution; it is a right that is given shape in this case by the separation of powers provision of the Florida Constitution, Article II, Section 3, as effectuated by Article IV, Section 9, Florida Constitution, and Article VIII, Section 1(j), Florida Constitution; and, it is a right that cannot be deprived without the process it is due, as guaranteed by Article I, Section 9, Florida Constitution, and Amendment XIV, Section 1, United States Constitution.

35. Article IV, Section 9, Florida Constitution, states in part: "The [Florida Fish and Wildlife Conservation] commission shall exercise the regulatory and executive powers of the state with respect to wild animal life." This provision of the Florida constitution and its antecedents have for seventy-eight 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); 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.

36. Article VIII, Section 1(j), Florida Constitution, states: "Persons violating county ordinances shall be prosecuted and punished as provided by law." The terms of this constitutional provision are simple and clear; they give Florida's Legislature exclusive authority to determine the procedures to be used to prosecute and punish violations of county ordinances; Orange County is without authority to prosecute or punish the Foleys for code violations except as provided by Florida's Legislature.

Property interest

37. The Foleys have a right "to acquire, possess and protect property," per Article I, Section 2, Florida Constitution; it is

a right that cannot be deprived without the process it is due, as guaranteed by Article I, Section 9, Florida Constitution, and Amendment XIV, Section 1, United States Constitution.

38. The Foleys have since December 20, 1990, owned a homestead in Orange County at 1015 North Solandra Drive, Orlando, Florida, zoned R-1A (Solandra homestead).

39. The Foleys have since April 26, 2010, owned a manufactured home in Orange County on one acre at 1349 Cupid Road, Christmas, Florida, zoned A-2 (Cupid property).

40. The Foleys have since 2000, owned and kept a small breeding flock of toucans (Collared aracari, *Pteroglossus torquatus*), at their Solandra homestead.

41. Between 2002 and 2008, the Foleys advertised and sold 46 offspring of these toucans in interstate commerce for approximately $900 each.

42. All sales were facilitated by internet advertising, the Foleys' website diostede.com, and a regular classified ad that ran two years in the national pet bird magazine BirdTalk.

43. February 19, 2008, the Foleys had twenty-two (22) toucans at their Solandra homestead.

44. David Foley has since 2007, held a site-specific FWC Class III license for the Solandra homestead, issued by the Florida Fish and Wildlife Conservation Commission, per Rule 68A-6.003(6), Florida Administrative Code.

45. David Foley has since 2010, held a site-specific FWC Class III license for the Cupid property, issued by the Florida Fish and Wildlife Conservation Commission, per Rule 68A-6.003(6), Florida Administrative Code.

46. The Foleys established their breeding flock at the Solandra homestead, and David Foley secured a site-specific FWC Class III licence (sic) for the Solandra

homestead, in order to sell the birds raised at the Solandra homestead.

47. The Foleys bought the Cupid property, and David Foley secured a site-specific FWC Class III licence (sic) for the Cupid property, in order to move and/or expand the Foleys' bird business to the Cupid property.

48. On or about the day this complaint was filed, toucan farmers in the United States, were offering captive-bred Collared aracari, *Pteroglossus torquatus*, for sale at between $2,500 and $3,500 per bird, plus shipping.

Controversy

49. The defendants deprived the Foleys of their *aviary* and their *aviculture* business in an administrative prosecution that violated both the substantive restraint on county regulatory authority in Article IV, Section 9, Florida Constitution, and the procedural restraint on county prosecution and punishment of code violations in Article VIII, Section 1(j), Florida Constitution.

50. The defendants, in doing so:

a. effected a regulatory and exactions taking of the Foleys' *aviary*, birds, and bird business without the public purpose/use or the just compensation required by Amendment V, United States Constitution; and,

b. deprived the Foleys of their right to sell birds without providing the Foleys the adequate adversarial pre-deprivation remedy due that right, as required by Amendment XIV, Section 1, United States Constitution.

Procedural context

51. The defendants knew, or should have known, the following:

a. No Orange County ordinance, or published order or rule:

1. expressly prohibited *aviaries* as an *accessory structure* at the Foleys' R-1A Solandra homestead;

2. expressly prohibited *aviculture*, *aviculture (commercial)*, or "raising birds to sell," as an accessory use or *home occupation* at the Foleys' R-1A Solandra homestead; or,

3. put the Foleys on notice of such prohibitions.

b. Chapter 11, Orange County Code (the Orange County Code Enforcement Board Ordinance), was the only administrative process codified by Orange County for the prosecution and punishment of alleged code violations that was consistent with Article VIII, Section 1(j), Florida Constitution.

c. No provision of the Orange County Code authorizes the denial of a building permit on the basis of an un-adjudicated, alleged code violation.

d. State court review of any unauthorized administrative prosecution and punishment of allege code violations is limited by state judicial policy to a restricted form of certiorari that cannot:

1. reach the constitutionality of any substantive right effected;

2. correct any denial of the process due that right; or,

3. provide any post-deprivation remedy.

Procedural history

52. March 15, 2002, four-term Florida Attorney General Bob Butterworth, in Attorney General Opinion 2002-23, surveyed Florida judicial decisions to specifically conclude that county government is "prohibited by Article IV, section 9, Florida Constitution ... from enjoining the possession, breeding or sale of non-indigenous exotic birds."

53. February 23, 2007, a private citizen initiated

defendants' prosecution of the Foleys by filing a complaint with Orange County that alleged the Foleys were "raising birds to sell."

54. Defendant Phil Smith investigated the citizen complaint and gathered evidence that the Foleys:

a. were "raising birds to sell;" and,

b. had built an *aviary* without a building permit.

55. Defendants Phil Smith and Carol Hossfield discussed the following:

a. the evidence collected;

b. the two code violations that evidence represented; and,

c. how to proceed with the prosecution of those two code violations.

56. Phil Smith and/or Carol Hossfield were required to initiate any administrative prosecution of the two code violations pursuant Chapter 11, Orange County Code.

57. Phil Smith did not use the procedures of Chapter 11, Orange County Code, to prosecute the Foleys for a violation of any prohibition of, or restriction upon:

d. "raising birds to sell;"

e. aviculture;

f. aviculture (commercial);

g. aviary; or,

h. building an aviary without a building permit.

58. Phil Smith, instead, used the procedures of Chapter 11, in code enforcement board (CEB) case 2007-66690Z, solely to prosecute the Foleys for building a "structure," or "accessory structure," without a building permit.

59. Phil Smith, in CEB case 2007-66690Z, presented no evidence, and made no attempt to suggest, to the code enforcement board that the "structure" at issue was:

a. an aviary;

b. used for "raising birds to sell;"

c. used for *aviculture*; or,

d. used for *aviculture (commercial)*;

60. April 18, 2007, at hearing, the code enforcement board, in CEB case 2007-66690Z, ordered the Foleys to do one of the following, on or before June 17, 2007:

a. get a permit for the "structure;"

b. destroy the "structure;" or,

c. pay a fine of $500/day.

61. The code enforcement board refused the Foleys' request for more time to comply.

62. The conclusions of law in the written order of the code enforcement board, in CEB case 2007-66690Z, stated the following:

> 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.

63. Section 553.79(1)(a), Florida Statutes, requires a permit for all structures, and predictably denied the Foleys any basis for an appeal of the building permit requirement in the CEB order. It states:

> After the effective date of the Florida Building Code adopted as herein provided, it shall be unlawful for any person, firm, corporation, or governmental entity to construct, erect, alter, modify, repair, or demolish any

> building within this state without first obtaining a permit therefor from the appropriate enforcing agency or from such persons as may, by appropriate resolution or regulation of the authorized state or local enforcing agency, be delegated authority to issue such permits, upon the payment of such reasonable fees adopted by the enforcing agency.

64. The CEB order itself, by making no mention of *aviary*, *aviculture*, or "raising birds to sell," predictably denied the Foleys any basis for an appellate challenge to Orange County's regulation of *aviary*, *aviculture*, or "raising birds to sell," for conflict with Article IV, Section 9, Florida Constitution.

65. The Foleys, nevertheless, did appeal the CEB order to clarify the vagueness of its undifferentiated reference to dozens of pages in the Orange County Code, and its multiple use of "(s)", "or", and "and or," in an attempt to establish that the CEB had made no sub silentio, or implied, ruling on *aviary* or *aviculture* that could be challenged for conflict with Article IV, Section 9, Florida Constitution.

66. The order of the Ninth Judicial Circuit, on review of the CEB order, in appellate case CVA1 07-37, did not find any ruling in that order on *aviary*, *aviculture*, *aviculture (commercial)*, or "raising birds to sell."

67. In case CVA1 07-37, the court simply found, "The structures at issue are several large bird cages used by Appellants to raise and maintain exotic birds."

68. When David Foley went to Orange County's permitting counter to comply with the CEB order and to apply for a permit for the Foleys' existing "structure," Carol Hossfield, confronted him with the evidence Phil Smith had collected during his investigation of the citizen complaint prior to the CEB hearing, but had never presented to the Foleys or to the CEB.

69. Carol Hossfield, at the permitting counter, claimed this evidence proved the Foleys' "structure" was an *aviary* used for *commercial aviculture* in violation of the County's un-codified prohibition of *aviary* as an *accessory structure* (*aviary* custom) and the County's un-codified prohibition of *commercial aviculture* as a *home occupation* (*aviculture* custom).

70. Carol Hossfield then, at Orange County's permitting counter, without the notice or hearing required, adjudicated the Foleys guilty of violating the County's un-codified aviary and *aviculture* customs, and on that basis punished the Foleys by denying the permit required by the CEB order.

71. The Foleys offered to comply with Orange County's un-codified prohibition of *aviculture (commercial)* as a *home occupation*:

a. If doing so would secure the building permit before the compliance date of the CEB order, June 17, 2007; and,

b. Because per Rule 68A-6.01215(3), Florida Administration Code, the Florida Fish and Wildlife Conservation Commission (FWC) required the Foleys to provide their twenty-two (22) toucans with enclosures (cages/*aviaries*) having dimensions equal to (or greater than) those of the Foleys' existing *aviaries*.

72. Carol Hossfield, after talking with a representative of the Florida Fish and Wildlife Conservation Commission, did the following:

c. She conceded that Orange County could not prohibit an *aviary*;

d. She nevertheless refused to accept the Foleys' offer; and,

e. She required the Foleys to secure a determination from defendant Mitch Gordon as a pre-condition to a

building permit.

73. April 23, 2007, the Foleys began the administrative review of Carol Hossfield's permit denial by requesting Mitch Gordon determine whether an *aviary* was prohibited as an *accessory structure*, or *commercial aviculture* was prohibited as a *home occupation*.

74. May 17, 2007, the Florida Fish and Wildlife Conservation Commission released a Memorandum of Law, entitled "Local Ordinances and the Regulation of Captive Wildlife," which (1) was written in response to contemporaneous legislative initiatives of the *Florida Association of Counties* to increase regulation of exotic animals, (2) surveyed all relevant Florida judicial decisions dating to 1960 regarding the exclusive regulatory authority over "wild animal life" granted to the commission by Article IV, Section 9, Florida Constitution, and (3) concluded, "Local government is prohibited by the constitution, statute and rules from prohibiting the possession, breeding or sale of captive wildlife."

75. May 21, 2007, on or about, defendant Tara Gould provided defendants Mitch Gordon and Mildred Fernandez with a memorandum of law regarding "Aviaries and Aviculture within the R-1A Zoning District" in which she cited Attorney General Opinion 2002-23, referenced in paragraph 52 *supra*, but nevertheless concluded *aviculture* is a land use the county can regulate.

76. July 2, 2007, Mitch Gordon issued his determination which said, in pertinent part, the following:

> Based upon the information that ... we've obtained from the Code Enforcement Division staff, the use of the property at 1015 Solandra Drive for aviculture with aviaries is not a permitted use in the R-1A zoning district.
>
> ...

> The Attorney's Office found that Orange County has the authority to designate the permitted uses of land, including the location and extent of the uses of land for commercial purposes in this case aviculture.
>
> ...
>
> The fact that the definition of home occupation specifically excludes commercial kennels, is a clear indication that commercial aviculture is not permitted as a home occupation.
>
> ...
>
> An accessory structure to house a pet bird may be erected in conformance with the provisions in Section 38-77 (114) ...

77. The Foleys were ultimately forced to destroy their *aviaries* to comply with the CEB order, and to make other accommodations for their twenty-two (22) toucans, for the following reasons:

a. Carol Hossfield, on multiple occasions, refused to consider the Foleys' offer stated in paragraph 71 *supra*, including subparagraphs;

b. Carol Hossfield refused to grant a permit prior to Mitch Gordon's determination as stated in paragraph 72 *supra*; and,

c. Mitch Gordon, as stated in paragraph 76 *supra*, delayed the release of that determination for ten (10) weeks, and did not release it until two (2) weeks after the June 17th compliance date of the CEB order, and a full six (6) weeks after Tara Gould advised him with the memorandum reference in paragraph 75.

78. October 4, 2007, the defendant members of the Orange County Board of Zoning Adjustment (BZA), identified in paragraphs 15, 19, 25, 27, 28, and 29 *supra*, in the Foleys' case ZM-07-10-010, unanimously upheld the basis for Carol Hossfield's permit denial, and Mitch Gordon's

determination, as prosecuted, defended, and recommended by defendants Rocco Relvini and Tara Gould, in their order stating:

> *Aviculture* with associated *aviaries* is not permitted as a *principal use* or *accessory use* ... [or] ... as a *home occupation* in the R-1A (single-family - 7.500 sq. ft. lots) zone district.

79. November 30, 2007, Carol Hossfield offered to approve a site-plan and building permit to re-construct the Foleys' *aviaries*, if David Foley would sign an exaction on the face of the site-plan and building permit stating: "Pet Birds Only – No Commercial Activity Permitted."

80. The Foleys, now under duress, agreed and David Foley signed the exaction in order to rebuild the *aviaries* that Carol Hossfield had previously forced them to destroy when she rejected, as stated in paragraphs 71 and 77 *supra*, the very terms and conditions she now offered in the exaction.

81. February 19, 2008, the defendant members of the Orange County Board of County Commissioners (BCC), identified in paragraphs 17, 18, 20, 24, 30, 31, and 33 *supra*, unanimously approved the order of the BZA, as prosecuted, defended, and recommended by defendant Tim Boldig, and in their final order made the same ruling:

> *Aviculture* with associated *aviaries* is not permitted as a *principal use* or *accessory use* ... [or] ... as a *home occupation* in the R-1A (single-family - 7.500 sq. ft. lots) zone district.

82. The Foleys are still to this day required to obey the BCC's February 2008, order for the following reasons:

> a. Section 30-49(c), Orange County Code, threatens punishment for any failure "to abide by and obey all orders" of the Board of County Commissioners:
>
> > 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.

b. Section 1-9, Orange County Code, provides for substantial punishment for any failure to abide by and obey all orders of the Board of County Commissioners:

> 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.

83. Orange County, and every administrative employee and official, identified in paragraphs 15 through 31, and 33 *supra*, before making a final decision to enjoin, or to assist enjoining, or to act in common design to enjoin, the Foleys' sale of birds:

a. Rejected the attorney general opinion referenced in paragraph 52 *supra*, provided to them by the Foleys;

b. Rejected the FWC legal memorandum referenced in paragraph 74 *supra*, provided to them by the Foleys;

c. Knew, or should have known, and did misrepresent or conceal from the Foleys, that their actions were an unauthorized prosecution of the *aviary* and *aviculture* customs, that would punish the Foleys by destroying their *aviary* and bird business, and that would deny the Foleys any adequate pre-deprivation remedy, as stated in paragraphs 51 *supra*, including subparagraphs.

d. 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 pre-deprivation proceeding, pursuant Chapter 11, Orange County Code, or otherwise, as required by Article VIII, Section 1(j), Florida Constitution, but neglected the duty of reasonable care they owed the Foleys, and did not do so.

84. The Foleys petitioned the Ninth Judicial Circuit Court of Florida for first-tier certiorari of the BCC order in case 08-CA-5227-0, for the following reasons:

a. Certiorari is the only review Florida courts provide an order of a board of county commissioners.

b. Florida's legislature has provided no statutory appeal of an order of a board of county commissioners.

85. October 21, 2009, in case 08-CA-5227-0, the Ninth Circuit held that on certiorari of the BCC order the Foleys could not challenge Orange County's regulation of the possession or sale of birds for conflict with Article IV, Section 9, Florida Constitution:

> 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).

86. October 8, 2010, Florida's Fifth District Court of Appeal on second-tier certiorari in case SD09-4195, affirmed without opinion the Ninth Circuit's denial of first-tier certiorari in case 08-CA-5227-0.

87. The Foleys subsequently sought post-deprivation declaratory, injunctive, and compensatory relief in federal court, and then in state court, as stated in paragraphs 4, 10, and 11 *supra*, including subparagraphs.

88. Florida's Ninth Judicial Circuit Court in case 2016-CA-

007634-O, and the its Fifth District Court of Appeal in appellate case 5D21-0233, denied the Foleys due process when they turned a deaf ear to the substance of the Foleys' claims, as stated in paragraph 11-f, subparagraphs 1 and 2, and denied the Foleys a meaningful hearing on the application of Article IV, Section 9, and Article VIII, Section 1(j), Florida Constitution, to the defendants' injunction of the Foleys' right to sell birds.

Procedural custom

89. Discovery will confirm that, as a matter of un-codified custom (enforcement custom), when Orange County, or its agent or employee, finds a colorable, or alleged, use violation in association with a building permit violation, as in the Foleys' case, the County, through its agent or employee:

a. prosecutes only the building permit violation before the code enforcement board, and not the associated use violation, and does so to secure an order that requires only a building permit; then,

b. at its permitting counter, in violation of Article VIII, Section 1(j), Florida Constitution, adjudicates the associated use violation that was not noticed or heard by the code enforcement board; and,

c. on the basis of this unlawful adjudication, denies the building permit required by the very order it secured from the code enforcement board; and in doing so,

d. predictably confines any administrative challenge to this unlawful adjudication to its own lengthy, multi-level, fee-based forum; and,

e. predictably confines any subsequent state-court challenge to review by certiorari which, as a matter of historic judicial policy, and as confirmed in the Foleys' case at paragraph 85 *supra*, denies any pre-deprivation

remedy for any property deprivation associated with this unauthorized enforcement custom.

Damages

90. The defendants' actions as described herein, and the resulting final order of the Board of County Commissioners (BCC) February 19, 2008, effected a complete taking and deprivation of the following:

a. The Foleys' personal property right in the lost value of the twenty-two (22) toucans the Foleys had February 19, 2008, when the BCC issued its order effectively prohibiting their sale (approximately $55,000 to $77,000, based upon paragraph 48);

b. The Foleys' personal property right in the business income of the bird business established in 2000 at the Foleys' Solandra homestead where David Foley's FWC Class III license and the rules of the FWC permitted him to keep birds for sale that the BCC order effectively destroyed (approximately $692,500 to $848,238, based upon a static level of production/sales equal that of the last full year of operation, a pro-rated increase in price to meet that of paragraph 48, and statutory interest, over fourteen (14) years);

c. The Foleys' personal property right in the business income of the bird business David Foley planned to expand to the Foleys' Cupid property where David Foley's FWC Class III license and the rules of FWC permitted him to keep birds for sale, but for the County's demand of exactions specific to *commercial aviculture* and Standard Industrial Classification 0279 "Animal Specialties, Not Elsewhere Classified," at the Cupid property, in conflict with Article IV, Section 9, Florida Constitution;

d. The Foleys' personal property right in the costs associated with the maintenance of David Foley's FWC

Class III licenses to sell birds, from February 19, 2008, to the present day (approximately $1,300);

e. The Foleys' personal and intangible property right in the reputation and goodwill of the Foleys' bird business;

f. The Foleys' personal property right in the expenses and administrative and court costs incurred in the vindication of their rights (approximately $6,800);

COUNT ONE: TAKING

Plaintiffs Allege:

91. And restate, paragraphs 1 through 90 *supra*, including subparagraphs, and referenced paragraphs.

92. The defendants identified in paragraphs 14 through 33 *supra*, by the proceedings described in paragraphs 53 through 81 *supra*, and the final order of its Board of County Commissioners February 19, 2008, under the color of Orange County ordinance, regulation, and/or *aviary*, *aviculture*, and *enforcement* customs, exacted the forfeiture of the constitutionally protected liberty interests asserted in paragraphs 34 through 36 *supra*, in exchange for permission to exercise the property rights asserted in paragraphs 37 through 48 *supra*, within the confines of that unconstitutional exaction, and consequently subjected the Foleys, or caused the Foleys to be subjected, to a taking of all value in the personal property described in paragraph 90 *supra*, including all subparagraphs.

93. The taking was deprived police power, *id est* public purpose/use, by Article IV, Section 9, Florida Constitution, as stated in paragraphs 1, 35, 52, and 74 *supra*.

94. The taking was without the due process guaranteed by Amendment V, and Amendment XIV, Section 1, United States Constitution for the following reasons:

a. Orange County did not codify, memorialize, or in

any way give the Foleys notice of its prohibition of "raising birds to sell," or *aviculture*, or *aviculture (commercial)* as an *accessory use* or *home occupation* prior to its enforcement;

b. Orange County had no substantive authority over the Foleys' *aviary* qua *aviary*, or *aviculture* business, as stated in paragraph 93 *supra*, including referenced paragraphs and subparagraphs;

c. The defendants identified in paragraphs 15 through 33 *supra*, denied the Foleys the adequate adversarial pre-deprivation remedy Orange County made available in Chapter 11, Orange County Code, as required by Article VIII, Section 1(j), Florida Constitution, for the infraction alleged in the citizen complaint, identified in paragraph 53 *supra*;

d. The exaction of compliance and further impairment of the Foleys' personal property rights in the proceedings described in paragraphs 53 through 81 *supra*, and the resulting enforceable order, denied the Foleys their right to:

1. a pre-deprivation stay of the exaction and order pending administrative and state-court review; and,

2. a pre-deprivation state-court challenge to the constitutional validity of the exaction, the exaction review procedure, the resulting order, and the regulation they enforced.

e. Florida's Ninth Judicial Circuit in case 2016-CA-007634-O, and Fifth District Court of Appeal in appellate case 5D21-0233, have denied relief in Article X, Section 6(a), Florida Constitution, for regulatory, exactions, and business takings.

95. The taking of the *aviculture* business at the Solandra property could not feasibly be mitigated by relocating the business elsewhere in Orange County because doing so

would also require the Foleys to forfeit the constitutionally protected liberty interests asserted in paragraphs 34 and 35 *supra*, by submitting to the exaction of special exception fees, required by Sections 38-1, 38-74(b)(3), 38-77, and 30-48.5, Orange County Code, for the possibility of administrative approval by the board of zoning adjustment ($1316.00), or on appeal by the board of county commissioners ($671.00), in exchange for nothing more than the hope and prayer Orange County would grant the Foleys permission, over any community objection, to do what Orange County cannot prohibit or regulate as stated in paragraphs 1, 35, 52, and 74 *supra*.

96. The taking was without compensation.

WHEREFORE, the Foleys request this court,

> **GRANT JUDGMENT**, against the defendants, in an amount to be determined at trial by jury, PURSUANT Title 42 U.S. Code Section 1983, for denial of the Foleys' rights in Amendment V, United States Constitution, as guaranteed by Amendment XIV, Section 1, United States Constitution.

COUNT TWO: DUE PROCESS

Plaintiffs Allege:

97. And restate, paragraphs 1 through 90 *supra*, including subparagraphs, and referenced paragraphs.

98. Orange County, and the defendants identified in paragraphs 15 through 33 *supra*, by their recommendation or defense of, or by their acquiescence or participation in, the unlawful prosecution and punishment of the Foleys for "raising birds to sell," as described in in paragraphs 53 through 81 *supra*, or by their affirmance of that unauthorized enforcement action, or custom, in the final order of the Board of County Commissioners February 19, 2008, did under the color of Orange County ordinance, regulation, and/or *aviary*, *aviculture*, and *enforcement*

customs, deprive the Foleys of the liberty interests asserted in paragraphs 34 through 36 *supra*, and of all value in the personal property described in paragraph 90 *supra*, including all subparagraphs, by subjecting the Foleys, or causing the Foleys to be subjected, to a denial of the adequate adversarial pre-deprivation process due those liberty and property rights, as guaranteed by Amendment XIV, Section 1, United States Constitution.

99. The defendants prosecution and punishment, and its resulting deprivation of liberty and property rights, denied the Foleys the adequate adversarial pre-deprivation process due those rights, as guaranteed by Amendment XIV, Section 1, United States Constitution, for the following reasons:

a. Orange County did not codify, memorialize, or in any way give the Foleys pre-enforcement notice of its prohibition of "raising birds to sell," or *aviculture*, or *aviculture (commercial)* as an *accessory use* or *home occupation* prior to its enforcement of that prohibition;

b. The Foleys were not required by county ordinance or state law to ask Orange County for its pre-approval, or permission to raise birds to sell, or to pursue the vocation of *aviculture*.

c. The defendants identified in paragraphs 15 through 33 *supra*, denied the Foleys the adequate adversarial pre-deprivation remedy Orange County made available in Chapter 11, Orange County Code, as required by Article VIII, Section 1(j), Florida Constitution, for the infraction alleged in the citizen complaint, identified in paragraph 53 *supra*;

d. The defendants' unlawful prosecution and punishment of the Foleys under the color of the *aviary*, *aviculture*, and *enforcement* customs described in paragraphs 53 through 81 *supra*, and the resulting enforceable order of its Board of County Commissioners

(BCC), denied the Foleys their right to:

1. a pre-deprivation stay of the permit exaction and BCC order pending administrative and state-court review; and,

2. a pre-deprivation state-court challenge to the constitutional validity of the exaction, the exaction review procedure, the resulting BCC order, and the *aviary* and *aviculture* custom they enforced.

100. Orange County, and the defendants identified in paragraphs 15 through 33 *supra*, have subjected the Foleys, or caused the Foleys to be subjected, to a denial by the state of Florida of an adequate post-deprivation hearing on the application of Article IV, Section 9, and Article VIII, Section 1(j), Florida Constitution, to the defendants' unlawful injunction of the Foleys' right to sell birds, as stated in paragraphs 4, 11-f including subparagraphs, 84 through 88 including subparagraphs, 89-e, and 94-e.

WHEREFORE, the Foleys request this court,

GRANT JUDGMENT, against the defendants, in an amount to be determined at trial by jury, **PURSUANT** Title 42 U.S. Code Section 1983, for denial of the Foleys' right to due process guaranteed by Amendment XIV, Section 1, United States Constitution.

PRAYER FOR RELIEF

101. **WHEREFORE**, The Foleys respectfully request that this Court enter judgment providing the following relief:

102. Award just compensation as determined at trial;

103. Award damages as determined at trial;

104. Award punitive damages as determined at trial;

105. Award interest on such damages as allowed by law;

106. Award costs of suit and attorneys fees as allowed by law; and,

107. Such other relief as the court deems just and proper.

DEMAND FOR JURY TRIAL

108. Plaintiffs demand, pursuant Rule 38(b), Federal Rules of Civil Procedure, a jury trial for all issues triable by jury.

RULE 11 CERTIFICATE

PLAINTIFFS DAVID FOLEY AND JENNIFER FOLEY, by signing below, certify to the best of their knowledge, information, and belief that this complaint: (1) is not being presented for an improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (2) is supported by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law; (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the complaint otherwise complies with the requirements of Rule 11, Federal Rules of Civil Procedure.

CERTIFICATE OF PARTIES WITHOUT AN ATTORNEY

PLAINTIFFS DAVID FOLEY AND JENNIFER FOLEY agree to provide the Clerk's Office with any changes to our address where case-related papers may be served. We understand that our failure to keep a current address on file with the Clerk's Office may result in the dismissal of our case.

CERTIFICATE OF SERVICE

PLAINTIFFS CERTIFY that on March 3, 2022, a copy of the foregoing and a request to waive service of summons was sent by U.S. Mail to the following:

Linda S. Brehmer Lanosa,
Assistant Orange County Attorney

201 S. Rosalind Av., 3rd Floor, Orlando FL, 32801

Asima Azam
4317 New Broad Street, Orlando FL, 32814

Tim Boldig
155 South Court Avenue, Apartment 1716,
Orlando FL, 32801

Fred Brummer
191 East Ponkan Road, Apopka FL, 32703

Richard Crotty
6642 The Landings Drive, Belle Isle FL, 32812

Frank Detoma
2290 Tuscarora Trail, Maitland FL, 32751

Mildred Fernandez
6029 Lake Pointe Drive, Apartment 203, Orlando FL,
32822

Mitch Gordon
8807 Hackney Prairie Road, Orlando FL, 32818

Tara Gould
662 Selkirk Drive, Winter Park FL, 32792

Carol Hossfield
4855 Tellson Place, Orlando FL, 32812

Teresa Jacobs
8652 Sugar Palm Court, Orlando FL, 32835

Roderick Love
15 Salvo Place, Apopka FL, 32712

Rocco Relvini
5144 Fillmore Place, Sanford FL, 32773

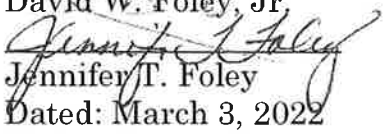
Scott Richman
2018 Lake Fischer Cove Lane, Gotha FL, 34734

Joe Roberts
622 Pinar Drive, Orlando FL, 32825

Marcus Robinson
4605 Cason Cove Drive, Apartment 123, Orlando FL, 32811

Tiffany Russell
425 North Orange Avenue, Suite 2110, Orlando FL, 32801
Bill Segal
1820 Windsor Drive, Winter Park FL, 32789
Phil Smith
16459 Sunflower Trail, Orlando FL, 32828
Linda Stewart
4206 Inwood Landing Drive, Orlando FL, 32812

David W. Foley, Jr.



Jennifer T. Foley
Dated: March 3, 2022
Plaintiffs
1015 N. Solandra Dr.
Orlando, FL 32807-1931
PH: 407 721-6132 • FX: none
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

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

v. Case: 2016-CA-007634-O

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.

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 RUSSEL (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.

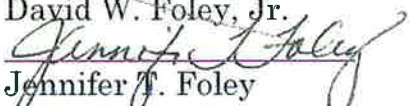
DEMAND FOR JURY TRIAL

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

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. 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*

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[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).

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.

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. Count 4 Should be Dismissed for Plaintiffs' Failure to State a Cause of Action Upon Which Relief Can Be Granted.

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 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*

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[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 . . ."

[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.

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).

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. 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 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.

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[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.*

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 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:

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

Jennifer T. Foley
1015 N. Solandra Drive
Orlando, FL 32807-1931
jtfoley60@hotmail.com

/s/ Elaine Marquardt Asad
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
Secondary Email: Gail.Stanford@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

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"), (sic) 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 (sic) 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]

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[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).

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.

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 (sic) 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]

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[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

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).

"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

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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).

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
LAMAR D. OXFORD, ESQ.
Florida Bar No. 0230871
ERIC J. NETCHER, ESQ.
Florida Bar No. 106530
Dean, Ringers, Morgan & Lawton, P.A.
Post Office Box 2928
Orlando, Florida 32802-2928
Tel: 407-422-4310 Fax: 407-648-0233
LOxford@drml-law.com
ENetcher@drml-law.com
Counsel for the Employee Defendants

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

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

v. Case No. 6:22-cv-456-RBD-EJK

ORANGE COUNTY; 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,
Defendants.

ORDER

The Court previously dismissed the *pro se* Plaintiffs' case with prejudice on the basis of res judicata. (Doc. 70.) The Employee Defendant[1] then moved for sanctions against Plaintiffs. (Doc. 73; see Doc. 90.) And all Defendants moved to declare Plaintiffs vexatious litigants, on the ground that they have continued to pursue this frivolous litigation for more than a decade. (Doc. 100; see Doc. 107.)

Both motions were referred to U.S. Magistrate Judge Embry J. Kidd, who entered a Report and Recommendation submitting that the Court should decline to impose monetary sanctions but should declare Plaintiffs vexatious litigants and restrict their ability to file additional lawsuits in federal court. (Doc. 151 ("R&R").) Plaintiffs then objected to the R&R on the ground that their history of litigation

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[1] The Employee Defendants are Phil Smith, Mitch Gordon, Rocco Relvini, Tara Gould, Tim Boldig, and Carol Hossfield.

was not frivolous and they filed the suits in good faith. (Doc. 154.) Orange County (Doc. 157)[2] and the Official Defendants[3] (Doc. 159) responded in support of the R&R.

After an independent *de novo* review of the record, the motions, and the objection, the Court agrees with Judge Kidd's R&R. *See* 28 U.S.C. § 636(b)(1); *Ernest S. ex rel. Jeffrey S. v. State Bd. of Educ.*, 896 F.2d 507, 513 (11th Cir. 1990).

Not only has Plaintiffs' continued pursuit of this litigation been ill-fated (as this Court and others have told them repeatedly), harassing to Defendants, and highly burdensome to the Court, but Plaintiffs have also lobbed ad hominem insults at Defendants and the Court along the way. (*See* Doc. 104.) It is time for this to stop. *See Patterson v. Aiken*, 841 F.2d 386, 387 (11th Cir. 1988) ("[O]ne acting pro se has no license to harass others, clog the judicial machinery with meritless litigation, and abuse already overloaded court dockets." (cleaned up)). Plaintiffs' objections have no merit, as Judge Kidd's thorough and well-reasoned examination of the relevant factors strongly supports the finding that this litigation is vexatious. (Doc. 151, pp. 6–10; *see* Doc. 104); *Ray v. Lowder*, No. 5:02-cv-316, 2003 WL 22384806, at *2–3 (M.D. Fla. Aug. 29, 2003). The Undersigned's long history with Plaintiffs suggests that restricting their filing privileges is the only way to deter them from continuing this nonmeritorious "obsessive litigation," as Judge Kidd aptly put it. (Doc. 151, p. 10.)

Accordingly, it is **ORDERED AND ADJUDGED**:

1. The Objection (Doc. 154) is **OVERRULED**.

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[2] The Employee Defendants joined Orange County's response. (Doc. 160.)

[3] The Official Defendants are Linda Stewart, Bill Segal, Frank Detoma, Mildred Fernandez, Teresa Jacobs, Roderick Love, Scott Richman, Joe Roberts, Marcus Robinson, Tiffany Russell, Asima Azam, Fred Brummer, and Richard Crotty.

2. Plaintiffs' attendant request for oral argument (Doc. 156) is **DENIED AS MOOT**.

3. The R&R (Doc. 151) is **ADOPTED**, **CONFIRMED**, and made a part of this Order in its entirety.

4. The vexatious litigants motion (Doc. 100) is **GRANTED IN PART AND DENIED IN PART**:

   a. The motion is **GRANTED** in that Plaintiffs are **DESIGNATED** vexatious litigants. Plaintiffs David W. Foley, Jr. and Jennifer T. Foley are hereby restricted from filing any pleading to open a new case in this Division. Any new pleading filed by these Plaintiffs in this Division will be assigned to and reviewed by the judges assigned to this case. See In re Vexatious Litigants in Orlando Div., No. 6:23-mc-3 (M.D. Fla. Jan. 18, 2023) (Doc. 1).

   b. In all other respects, the motion is **DENIED**.

5. The sanctions motion (Doc. 73) is **DENIED AS MOOT**.

DONE AND ORDERED in Chambers in Orlando, Florida, on July 24, 2023.

ROY B. DALTON JR.
United States District Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

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

v. Case No. 6:22-cv-456-RBD-EJK

ORANGE COUNTY; 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,
Defendants.

ORDER

Over a year ago in this long-running *pro se* case, the Court dismissed Plaintiffs' Complaint with prejudice on res judicata grounds. (Doc. 70.) After several more baseless motions, the Court also recently declared Plaintiffs vexatious litigants. (Doc. 162.)

Since the dismissal, the various sets of Defendants moved for attorney's fees. (Docs. 132, 135, 137.) On referral, U.S. Magistrate Judge Embry J. Kidd entered a Report and Recommendation suggesting that this Court should deny the fee motions because Plaintiffs' claims were not frivolous. (Doc. 163 ("R&R").) Defendants object (Doc. 166 ("Objection")), and the Court must agree with them. *See* 28 U.S.C. § 636.

The record makes clear that Plaintiffs' claims were frivolous, such that Defendants are entitled to prevailing party fees. Judge Kidd relied on *Cascella v. Canaveral Port District*, No. 6:04-cv-1822, 2006 WL 66719, at *5 (M.D. Fla.

Jan. 10, 2006), to reason that res judicata typically involves a complex analysis, so a dismissal on that basis does not necessarily imply frivolity. (Doc. 163.) A res judicata dismissal might not necessarily imply frivolity in all cases, but it sure does here. Unlike in *Cascella*, these Plaintiffs were very well-aware that the underlying state suit and the instant suit were based on the exact same nucleus of operative facts—they admitted it in the Complaint. (Doc. 1, ¶ 10 ("All defendants in this case were sued in the same capacity in [previous cases] . . . . The incidents in this case are the same as those in [previous cases]."); *see* Doc. 70, p. 4.) And again they readily admitted in their briefing that if the "federal complaint relied upon the same legal theories and issues adjudicated by [the] state court," then Defendants are entitled to fees. (Doc. 144.) They are correct—and that is exactly what the Court held when it dismissed the claims. (Doc. 70, pp. 2–4 ("[T]hese same Plaintiffs sued the same Defendants for takings and due process claims in state court . . . . [B]oth cases involve causes of action that arise out of the same nucleus of operative facts . . . ."); *see Lobo v. Celebrity Cruises, Inc.*, 704 F.3d 882, 893 (11th Cir. 2013) (holding that res judicata "applies not only to the precise legal theory presented in the prior case, but to all legal theories and claims arising out of the same nucleus of operative fact" (cleaned up)); *see also Fla. Dep't of Transp. v. Juliano*, 801 So. 2d 101, 105 (Fla. 2001). And while Plaintiffs are *pro se*, they are by no means unfamiliar with this process; they have been pursuing this same meritless matter for a long, long time, no matter how many courts have told them that these claims were not supportable. (Doc. 104, p. 3; Doc. 151, pp. 6–9); *see Patterson v. Aiken*, 841 F.2d 386, 387 (11th Cir. 1988) (affirming grant of sanctions against pro se litigant after res judicata dismissal and noting that a "man of [the plaintiff's] education, given a reasonable amount of time in a law library, could determine that once a judgment has been entered one cannot file another lawsuit to object

to the conduct of the first" (cleaned up)). Indeed, Judge Kidd himself previously concluded that Plaintiffs' claims were frivolous when he recommended that they be declared vexatious litigants. (Doc. 151, p. 8 ("[R]easonable inquiry should have revealed to Plaintiffs that their claims were objectively frivolous.").) Because Plaintiffs knew or should have known that they were bringing the same case the state court had already rejected, with no new or unadjudicated theories or facts, this case is frivolous on its face, so Defendants are entitled to fees.[1] *See* 42 U.S.C. § 1988; *Sullivan v. Sch. Bd. of Pinellas Cnty.*, 773 F.2d 1182, 1189 (11th Cir. 1985) ("[A] district court must focus on the question [of] whether the case is so lacking in arguable merit as to be groundless." (cleaned up)).

Accordingly, it is **ORDERED AND ADJUDGED**:

1. Defendants' Objection (Doc. 166) is **SUSTAINED**.
2. The R&R (Doc. 163) is **REJECTED**.
3. Defendants' motions for attorney's fees (Docs. 132, 135, 137) are **GRANTED**. Defendants are **ENTITLED** to fees. They are **DIRECTED** to file a motion to determine the amount unless they can resolve the issue by stipulation.
4. Plaintiffs' requests for oral argument (Docs. 146, 148, 171) are **DENIED AS MOOT**.

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[1] While the R&R focused primarily on whether Plaintiffs had established a prima facie case – which this Court concludes they objectively did not and they knew it – the Court agrees with Defendants that other facts weigh in favor of a finding of frivolity as well, such as the lack of any settlement offer legitimizing the case and the early stage at which the Court dismissed the case without leave to amend. *See Sullivan v. Sch. Bd. of Pinellas Cnty.*, 773 F.2d 1182, 1189 (11th Cir. 1985); *Angiolillo v. Bates*, No. 2:08-cv-606, 2010 WL 916377, at *6 (M.D. Fla. Mar. 11, 2010), aff'd, 394 F. App'x 609 (11th Cir. 2010).

DONE AND ORDERED in Chambers in Orlando, Florida, on November 2, 2023.

ROY B. DALTON JR.
United States District Judge

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

DAVID W. FOLEY, JR. AND JENNIFER T. FOLEY,
Appellants,

v. CASE NO. 5D21-0233
LT CASE NO. 2016-CA-007634-O

ORANGE COUNTY, A POLITICAL SUDIVISION OF THE STATE OF FLOIDA, PHIL SMITH, CAROL HOSFIELD, MITCH GORDON, ROCCO RELVINI, TARA GOULD, TIM BOLDIG, FRANK DETOMA, ASIMA AZAM, ET AL,
Appellees.

_____/

DATE: March 03, 2022

BY ORDER OF THE COURT:

ORDERED that Appellants' "Motion for Rehearing, Written Opinion, Clarification, Certified Question & Rehearing En Banc," filed February 16, 2022, is denied.

I hereby certify that the foregoing is
(a true copy of) the original Court order.

Sandra B. Williams

SANDRA B. WILLIAMS, CLERK

Panel: Judges Lambert, Wallis and Sawaya, T.D. (acting on panel-directed motion(s))
En Banc Court (acting on en banc motion)
Judge Eisnaugle recused from en banc consideration

cc:
Gail C. Bradford
Jennifer T. Foley
Linda Brehmer Lanosa
David W. Foley, Jr.
Ronald L. Harrop

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,

Case No. 5D21-233

v. LT Case No. 2016-CA-007634-O

ORANGE COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF FLORIDA, PHIL SMITH, CAROL HOSSFIELD, MITCH GORDON, ROCCO RELVINI, TARA GOULD, TIM BOLDIG, FRANK DETOMA, ASIMA AZAM, ET AL,
Appellees.

_____/

Decision filed January 11, 2022

Appeal from the Circuit Court for Orange County, Heather L. Higbee, Judge.

David W. Foley, Jr. and Jennifer T. Foley, Orlando, pro se.

Linda S. Brehmer Lanosa and Jeffrey J. Newton, of Office County Attorney's Office, Orlando, for Appellee, Orange County.

No Appearance for Other Appellees.

PER CURIAM.

AFFIRMED.

LAMBERT, C.J., WALLIS, J. and SAWAYA, T.D., Senior Judge, concur.

Supreme Court of Florida

TUESDAY, MARCH 26, 2019

CASE NO.: SC18-2120
Lower Tribunal No(s).:
5D18-145;
482016CA007634A001OX

ASIMA AZAM, ET AL.
Petitioner(s)
vs.
DAVID W. FOLEY JR., ET AL.
Respondent(s)

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the petition for review is denied.

No motion for rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d)(2).

CANADY, C.J., and POLSTON, LAWSON, LAGOA, and LUCK, JJ., concur.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

db
Served:

ERIC J. NETCHER
LAMAR D. OXFORD
DAVID W. FOLEY JR.
JENNIFER T. FOLEY
ELAINE M. ASAD
HON. JOANNE P. SIMMONS, CLERK
HON. RONALD P. HIGBEE, JUDGE
DEREK J. ANGELL
JEFFREY J. NEWTON
HON. TIFFANY MOORE RUSSELL, CLERK
WILLIAM C. TURNER, JR.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-13864
Non-Argument Calendar

DAVID W. FOLEY, JR.,
JENNIFER T. FOLEY,
Plaintiffs-Appellants

versus

ORANGE COUNTY,
a political subdivision of Florida,
ASIMA M. AZAM,
individually and together, in their
personal capacities,
TIM BOLDIG,
individually and together, in their
personal capacities,
FRED BRUMMER,
RICHARD CROTTY,
individually and together, in their personal capacities,
et.al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 6:22-cv-00456-RBD-EJK

(February 21, 2024)

ORDER:

Appellants' motion to certify question is DENIED.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-13864
Non-Argument Calendar

DAVID W. FOLEY, JR.,
JENNIFER T. FOLEY,
Plaintiffs-Appellants

versus

ORANGE COUNTY,
a political subdivision of Florida,
ASIMA M. AZAM,
individually and together, in their
personal capacities,
TIM BOLDIG,
individually and together, in their
personal capacities,
FRED BRUMMER,
RICHARD CROTTY,
individually and together, in their personal capacities,
et.al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 6:22-cv-00456-RBD-EJK

(February 21, 2024)

Before ROSENBAUM, GRANT, and BRASHER, Circuit Judges.

PER CURIAM:

The Petition for Panel Rehearing filed by David Foley, Jr., and Jennifer Foley is DENIED.