

## SPECIAL MAGISTRATES IN CODE ENFORCEMENT PROCEEDINGS: LOCAL GOVERNMENT AGENTS OR ARBITERS OF FAIRNESS AND JUSTICE?

Harry M. Hipler\*

In the United States, the government that most directly affects people's daily lives is local government (counties and municipalities). Anytime people turn on the water; walk down the sidewalk; drive on the streets or take transit; send their children to school; go to parks, recreation centers, and libraries; record their deeds; open their businesses; or build their homes; they deal with local government.<sup>1</sup> Code enforcement is a function of local government and affects people's daily lives. Its purpose is to enhance the quality of life and economy of local government by protecting the health, safety, and welfare of the community.<sup>2</sup> Code violations "run with the land," and subsequent purchasers can be held responsible for bringing the property into compliance and can be liable for payment of a lien, interest, and costs.<sup>3</sup>

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\* © 2009, Harry M. Hipler. All rights reserved. J.D., University of Florida, 1975; LL.M., University of Miami, 1981; M.U.R.P., Florida Atlantic University, 2007. The Author practices primarily in the areas of local government law, commercial litigation, and family law. The Author has served frequently as a local government hearing officer in quasi-judicial proceedings, an attorney to code enforcement boards, and represented numerous property owners in code enforcement proceedings. The Author has also written many articles in a variety of areas including local government law, urban and regional planning, taxation, family law, evidence, and constitutional liberties.

1. Arlington Co. Manager, *Ethics in Local Government: It's More Than Not Doing Bad Things*, <http://www.arlingtonva.us/departments/CountyManager/miscellaneous/CountyManagerMiscellaneousEthics.aspx> (last updated Aug. 28, 2007); Ish Theilheimer, *A Day in Your Life Would Be Scary without Government*, <http://www.publicvalues.ca/ViewArticle.cfm?Ref=0023> (posted Apr. 3, 2008).

2. Fla. Stat. § 162.02 (2008).

3. *City of Gainesville Code Enforcement Bd. v. Lewis*, 536 So. 2d 1148, 1150–1151 (Fla. 1st Dist. App. 1988); *Monroe Co. v. Whispering Pines Assoc.*, 697 So. 2d 873, 875 (Fla. 3d Dist. App. 1997); *Henley v. MacDonald*, 971 So. 2d 998, 1000 (Fla. 4th Dist. App. 2008). Common code violations include inoperative vehicles, overgrown vegetation and landscaping, property upkeep, swale maintenance, illegal signs, outdoor sales, noise, occupational

Local governments in Florida have adopted ordinances authorizing special magistrates to hold hearings and assess fines against violators in their respective jurisdictions.<sup>4</sup> This Article discusses defenses and issues in code enforcement proceedings to provide guidance to special magistrates and private- and public-sector lawyers for fair, just, and equitable proceedings.

### I. QUASI-JUDICIAL POWER AND SPECIAL MAGISTRATES

Article V, Section 1 of the Florida Constitution empowers the legislature to create commissions and administrative bodies with quasi-judicial powers.<sup>5</sup> Code enforcement proceedings before special magistrates are constitutionally authorized as quasi-judicial rather than judicial in nature.<sup>6</sup> These hearing officers have jurisdiction to enforce building, zoning, land development, environmental, and other non-criminal local government ordinances that safeguard the health, safety, and welfare of the community.<sup>7</sup> Special magistrates are attorneys and members of the Florida Bar

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licenses, fire-code violations, zoning and building violations, construction without a building permit, among other non-criminal code violations.

4. Florida ordinances authorizing special magistrates in code enforcement proceedings can be found at Municode.com. Search “code enforcement,” “special magistrate,” or “special master” under any local government to determine if the respective county or municipality authorizes their use and under what circumstances. Municipal Code Corporation, *Online Library: Municipal Code Search Service*, [http://www.municode.com/resources/code\\_list.asp?stateID=9](http://www.municode.com/resources/code_list.asp?stateID=9) (accessed May 6, 2009) [hereinafter Municipal Code Corporation, *Online Library*].

5. Fla. Const. art. V, § 1. The use of special magistrates to conduct hearings and make recommended findings of fact and conclusions of law in code enforcement proceedings does not constitute a purely judicial function. *Verdi v. Metropolitan Dade Co.*, 684 So. 2d 870, 873–874 (Fla. 3d Dist. App. 1996). Local governments’ uses of special magistrates do not violate the separation of powers provision of Article II, Section 3 of the Florida Constitution. *Id.*

6. *Id.* Local government special magistrates were created by the Florida Constitution and statutes. Fla. Const. art. V, § 1; Fla. Stat. § 162.01. The special magistrates are not part of the judiciary, nor are they bound by Florida’s Code of Judicial Conduct. *Fla. Water Serv. Corp. v. Robinson*, 856 So. 2d 1035, 1038–1039 (Fla. 5th Dist. App. 2003). In contrast, Florida Rule of Civil Procedure 1.490 authorizes circuit courts to appoint general and special magistrates to investigate matters and conduct hearings as the “eyes and ears of the court.” *Pasteur Med. Ctr., Inc. v. Wellcare of Fla., Inc.*, 943 So. 2d 144, 147 (Fla. 3d Dist. App. 2006). These judicial magistrates are held to the same high standard of impartiality as trial judges. *Id.* at 146–147; *In re Supplemental Report of the Judicial Ethics Advisory Com. Regarding Code of Judicial Conduct*, [http://www.floridasupremecourt.org/clerk/comments/2005/05-281\\_report.pdf](http://www.floridasupremecourt.org/clerk/comments/2005/05-281_report.pdf), at 14 (Jan. 2005).

7. Fla. Stat. §§ 162.02, 162.03(2), 162.06, 162.07.

having knowledge and experience in local government law, judicial and administrative procedure, and the rules of evidence.<sup>8</sup> They are appointed and paid by a local government and they serve at the discretion of the local commission, resulting in a potential loyalty conflict.<sup>9</sup> A basic component of minimum due process in the decisionmaking process is an impartial decision-maker.<sup>10</sup> Special magistrates retain wide latitude in their investigative duties to discover facts, hold hearings, and draw conclusions as a basis for official action.<sup>11</sup> If an appeal is filed after a

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8. Not all local governments have special magistrates, but local governments that authorize special magistrates permit them to decide contested code enforcement disputes. *E.g.* Davie Code Ord. (Fla.) ch. 6, § 6-5 (2008); Jupiter Code Ord. (Fla.) art. II, §§ 8-26–8-33 (2008); Miami-Dade Co. Code Ordin. (Fla.) art. X, § 8CC-2 (2008); Plantation Code Ord. (Fla.) ch. 6, §§ 6-1 to 6-4.1 (2008). If the reader is interested in a particular local government ordinance authorizing special magistrates to hear contested code proceedings, see Municipal Code Corporation, *Online Library*, *supra* n. 4.

9. *Robinson*, 856 So. 2d at 1039. There is tension between a special magistrate's duty to a local government and his or her independence in the decisionmaking process, which presents a question as to who is owed a duty. *See id.* at 1040 (discussing a difference between a decision-maker's bias or an unfriendly political atmosphere and rulings that reflect a bias so pervasive as to render the proceedings a violation of due process). The Florida Supreme Court ruled in *Cherry Communications, Inc. v. Deason* that under Florida's Administrative Procedure Act (APA), the State's Public Service Commission violated a reseller's due process of law when it revoked its certificate. 652 So. 2d 803, 805 (Fla. 1995). The reseller's right to due process of law was violated because the same staff attorney who prosecuted the case against the reseller also served as the legal advisor to the Commission in a post-hearing matter. *Id.* The Court in *Cherry Communications* reiterated its view that a decision-maker is not constitutionally required to match the judicial model in administrative proceedings, but it is still a basic requisite of minimum due process to have a neutral decision-maker. *Id.* at 804. In *Charlotte County v. IMC-Phosphates Co.*, the district court disqualified an agency head after it found bias from statements he made. 824 So. 2d 298, 300–301 (Fla. 1st Dist. App. 2002). The district court stated that an agency head may serve investigative, prosecutorial, and adjudicative roles in the same case without creating an unconstitutional bias but further noted that, "while a person might argue that the nature of the process of having an agency head review the work of his or her own agency is inherently unfair, present case law has upheld the statutory framework, and we can only deal with statements indicating bias in a particular case." *Id.* at 301 n. 3. It is not a question of how fair a special magistrate actually is or can be, but instead what feeling exists in the mind of the alleged violator and the basis for such feeling as to whether there can be a fair and impartial hearing in a contested proceeding. *Id.* at 300. Due process requires that decisions be arrived at by maintaining the reality and appearance of fairness. *Ridgewood Prop. Inc. v. Dept. of Community Affairs*, 562 So. 2d 322, 323–324 (Fla. 1990); *Charlotte Co.*, 824 So. 2d at 300–301; *Fla. Water Serv. Corp.*, 856 So. 2d at 1039.

10. *Ridgewood*, 562 So. 2d at 323; *Charlotte Co.*, 824 So. 2d at 300–301.

11. *Verdi*, 684 So. 2d at 874. Where the decisionmaking authority is essentially judicial in nature, a local government's code provision violates Article II, Section 3 of the Florida Constitution as exemplified in the leading case, *Broward County v. LaRosa*, where a code enforcement board was authorized to award unliquidated damages for humiliation and embarrassment under a county's Human Rights Ordinance. 505 So. 2d 422, 423 (Fla.

decision, the scope of inquiry narrows as a case proceeds up the judicial ladder.<sup>12</sup> The circuit courts and district courts of appeal, sitting in their appellate capacity, pay great deference to a special magistrate decision and limit their review to the record rather than a hearing de novo.<sup>13</sup>

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1987). The Florida Supreme Court held such authority violated the separation of powers provision of Article II, Section 3 of the Florida Constitution. *Id.* at 422. See *City of Hollywood v. Mulligan*, 934 So. 2d 1238, 1248 (Fla. 2006) (ruling that a special magistrate has the authority to find that a vehicle is subject to impoundment for enumerated misdemeanor offenses and order the record owner of the vehicle civilly liable to the City for an administrative fee, towing, and storage costs, which the owner must then satisfy before the City will release the vehicle).

12. Fla. Stat. § 162.11. As the case travels up the judicial ladder, the standard of review is narrower. *Seminole Ent. Inc. v. City of Casselberry*, 813 So. 2d 186, 188 (Fla. 5th Dist. App. 2002). If an appeal is filed from a special magistrate's ruling, "first tier" certiorari review is not a hearing de novo but is limited to appellate review of the record created before the special magistrate. *Sarasota Co. v. Bow Point on the Gulf Condo. Dev., LLC*, 974 So. 2d 431, 433 n. 3 (Fla. 2d Dist. App. 2007). This appeal is three-pronged and limits review to the following: (1) whether procedural due process is afforded; (2) whether essential requirements of the law have been observed; and (3) whether the administrative findings and judgment are supported by competent substantial evidence. *Seminole Ent.*, 813 So. 2d at 188. In "second tier" review, the district court, upon review of the circuit court's judgment, determines if the circuit court did the following: (1) afforded procedural due process and (2) applied "clearly established law" resulting from controlling case law, rules of the court, statutes, ordinances, and constitutional law. *City of Coral Gables Code Enforcement Bd. v. Tien*, 967 So. 2d 963, 965 (Fla. 3d Dist. App. 2007).

13. The limited review of code enforcement decisions by appellate courts grants special magistrates broad discretion over the matters presented at administrative hearings, but the appellate review is not all-encompassing. See *City of Sarasota v. Pleasures II Adult Video, Inc.*, 799 So. 2d 325, 327 (Fla. 2d Dist. App. 2001) (stating that the circuit court must uphold the hearing officer's order unless there is no competent evidence or only substantial evidence to support its findings); *City of Deerfield Beach v. Boca Dominion*, 795 So. 2d 145, 146 (Fla. 4th Dist. App. 2001) (holding that on a review of an agency decision, "the circuit court may not reweigh the evidence," "substitute its judgment for that agency," or "review the record to determine whether the agency decision is support by competent substantial evidence"). Any appeal is limited to the factual record before the special magistrate, so the appellate court can consider the basis of the special magistrate's ruling. See *Kirby v. City of Archer*, 790 So. 2d 1214, 1215 (Fla. 3d Dist. App. 1996) (ruling that an owner must appeal an adverse code enforcement ruling to the circuit court, not wait to challenge the facts after commencement of a foreclosure action on an adverse lien filed against the property owner); *City of Miami v. Cortes*, 995 So. 2d 604 (Fla. 3d Dist. App. 2008) (ruling that a circuit court was without jurisdiction on a certiorari review of a code enforcement board's mitigation order that reduced an earlier imposed fine when the property owner had plead guilty to the code violation and failed to appeal the enforcement order). In *Verdi*, the district court decided, among other things, when a special magistrate renders a ruling, the case is res judicata and cannot be retried later in a foreclosure action. 684 So. 2d at 871. On the other hand, in *Jones v. Florida ex. rel. City of Winter Haven, Bankers Trust* sold the subject property to Jones, who indemnified Bankers Trust from any liens entered by the city in a money damages action. 870 So. 2d 52, 53 (Fla. 2d Dist. App. 2003). The district court ruled that where the new owner, Jones, became a third-

## II. EXHAUSTION OF ADMINISTRATIVE REMEDIES

Before an aggrieved party can resort to the courts to challenge code enforcement proceedings, administrative remedies must be exhausted.<sup>14</sup> Although the futility doctrine is an exception to the exhaustion requirement, it is premature for a property owner to ask a court to declare an ordinance unconstitutional before the law is enforced against the owner. To be sure, all claims should be raised in a code enforcement proceeding to preclude complaints that the aggrieved party has failed to exhaust administrative remedies.<sup>15</sup> On the other hand, if there has already been a decision to impose a fine, a landowner may generally attack the validity of an ordinance immediately without further exhausting administrative remedies.<sup>16</sup> If a property owner believes that an ordinance is per se invalid as applied to particular property, the landowner should apply for a variance or exception before seeking judicial review.<sup>17</sup>

## III. PROCEDURAL DUE PROCESS: NOTICE AND OPPORTUNITY TO BE HEARD

Due process of law imposes limits on governmental decisions that deprive individuals of property interests. Proper due process requires notice and an opportunity to be heard. It also prohibits complaints not specifically alleged in a charging document, unless they have been tried with consent of the parties.<sup>18</sup> Local govern-

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party defendant in the lien foreclosure action, res judicata did not preclude Jones from asserting estoppel and due process violations by the city in the lien foreclosure action. *Id.* at 54–55.

14. *Vanderbilt Shores Condo. Assn., Inc. v. Collier Co.*, 891 So. 2d 583, 585 (Fla. 2d Dist. App. 2004); *Cole v. City of Deltona*, 890 So. 2d 480, 483 (Fla. 5th Dist. App. 2004); *Central Fla. Inv., Inc. v. Orange Co. Code Enforcement Bd.*, 790 So. 2d 593, 596 (Fla. 5th Dist. App. 2001).

15. *Holiday Isle Resort & Marina Assoc. v. Monroe Co.*, 582 So. 2d 721, 721–722 (Fla. 3d Dist. App. 1991).

16. *Wilson v. Co. of Orange*, 881 So. 2d 625, 631 (Fla. 5th Dist. App. 2004). The exhaustion rule serves a number of policies, including promoting consistency in matters of agency discretion and expertise, permitting full development of a technical issue and factual record prior to court review, and avoiding unnecessary judicial decisions by giving the agency the first opportunity to correct any errors and moot the need for court action. *Central Fla. Inv., Inc.*, 790 So. 2d at 596.

17. *Central Fla. Inv., Inc.*, 790 So. 2d at 597.

18. *Orange Co. Bldg. Codes v. Strickland Constr. Serv.*, 913 So. 2d 718, 720 (Fla. 5th

ment must permit code enforcement participants to dispute a code inspector's evidence, cross-examine witnesses, and be informed of all facts upon which a special magistrate rules.<sup>19</sup> For example, when a code inspector conducts an inspection and submits a memorandum of findings directly to the special magistrate, the owner's due process is violated unless the government gives the owner an opportunity to be heard. In *Kupke v. Orange County*,<sup>20</sup> the magistrate permitted the county to call as many witnesses as it wished at the hearing, while the property owner's evidence and witnesses were limited.<sup>21</sup> The issue was whether the owner's property was equipped with farm-related machinery or whether it constituted an unauthorized junkyard.<sup>22</sup> The district court held that the denial of an opportunity to present evidence on any of the owner's defenses may have violated the owner's due process.<sup>23</sup>

Similarly, in *Massey v. Charlotte County, Florida*,<sup>24</sup> the owner was afforded due process up to the time of the initial order finding a violation.<sup>25</sup> Later, the board fined the owner and entered a lien against the owner's property based solely upon a code inspector's affidavit without providing the property owner an opportunity to dispute the findings, correct the violations, or consider mitigating

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Dist. App. 2005); *Delk v. Dept. of Prof. Reg.*, 595 So. 2d 966, 967 (Fla. 5th Dist. App. 2003).

19. *Massey v. Charlotte Co.*, 842 So. 2d 142, 147 (Fla. 2d Dist. App. 2003); *Kupke v. Orange Co.*, 838 So. 2d 598, 599–600 (Fla. 5th Dist. App. 2003); see generally Fla. Stat. § 162.07 (describing in general the conduct of county or municipal code enforcement hearings).

20. 838 So. 2d 598 (Fla. 5th Dist. App. 2003).

21. *Id.* at 599.

22. *Id.*

23. *Id.* The appellate court stated:

The circuit appellate division did not inform us as to which law it used to affirm a decision which denied the petitioner the basic right to be heard before a property right was taken from him. We conclude, however, that whatever law was applied was misapplied and we therefore grant certiorari, quash the decision of the circuit appellate division, and remand for an order quashing the decision of the Code Enforcement Board and requiring a new hearing in which [owner] must be given an opportunity to show, if he can, that in fact the challenged equipment has an agricultural use which meets the policy expressed by the legislature. . . .

*Id.* at 599–600. See also *Michael D. Jones, PA v. Seminole Co.*, 670 So. 2d 95, 96 (Fla. 5th Dist. App. 1996) (holding deprivation of due process can be addressed and remedied by a court in a proper case); *Rutledge v. Co. of Hillsborough*, 2005 WL 2416976 at \*6 (Fla. 13th Cir. Ct. Sept. 2, 2005) (finding due process was violated because there was no opportunity for the property owners to protest factual findings, the penalties were retroactive, and proper procedure was not followed).

24. 842 So. 2d 142 (Fla. 2d Dist. App. 2003).

25. *Id.* at 146.

factors.<sup>26</sup> The district court found the owner's due process was violated when the circuit court entered the lien based solely on the code inspector's affidavit and without giving the owner an opportunity to correct the violations or challenge the findings of the code inspector's affidavit.<sup>27</sup>

#### IV. NOTICE OF HEARING TO LEGALLY CORRECT ADDRESS

Notice required by Florida Statutes, Chapter 162 must be provided by certified mail, return receipt requested, to the property owner at the address listed in the tax collector's office for tax notices "and at any other address provided to the local government by such owner."<sup>28</sup> In *Little v. D'Aloia*,<sup>29</sup> the city was duly notified of the owner's correct mailing address but instead sent a notice of violation to an incorrect post office box listed in the tax assessor's office.<sup>30</sup> The district court held the city failed to comply with the due process requirements of Florida Statutes Section 162.12 because it failed to send a notice of violation to the designated address of the owner.<sup>31</sup> Nevertheless, some courts have held notice by regular mail of the final order is sufficient to inform the violator of findings, per diem fine, and the right to appeal, as long as it is sent to the correct address.<sup>32</sup>

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26. *Id.* at 144. The Florida Statutes grant special magistrates authority to impose a fine after considering mitigating and aggravating factors. Fla. Stat. § 162.09(2)(b). If a special magistrate imposes a fine without permitting the owner an opportunity to be heard, this will violate the owner's due process. *Jones*, 870 So. 2d at 53–54; *Baker v. Simpson*, 773 So. 2d 637, 638–639 (Fla. 5th Dist. App. 2000).

27. *Massey*, 842 So. 2d at 147.

28. Fla. Stat. §§ 162.06, 162.12 (2008).

29. 759 So. 2d 17 (Fla. 2d Dist. App. 2000).

30. *Id.* at 18.

31. *Id.* at 20.

32. *City of Tampa v. Brown*, 711 So. 2d 1188, 1189 (Fla. 2d Dist. App. 1998), rehearing granted 728 So. 2d 200 (Fla. 1988), rehearing dismissed as improvidently granted, 748 So. 2d 1002 (Fla. 1999).

*V. IS THERE SUBSTANTIAL, COMPETENT EVIDENCE TO  
SUPPORT A SPECIAL MAGISTRATE'S FINDING?*

There must be substantial, competent evidence to support findings by a special magistrate.<sup>33</sup> Upon appeal, the circuit court may not disregard an erroneous ruling and must overrule the lower tribunal if the special magistrate's findings are mistaken or inadequate.<sup>34</sup> However, a circuit court in its appellate capacity is limited because it cannot substitute its judgment for that of a special magistrate or reevaluate the evidence and credibility of witnesses.<sup>35</sup>

*VI. GRANDFATHERING NONCONFORMING USES INTO  
CONTINUATION OF USE AND DISCONTINUANCE  
OF NONCONFORMING USES*

Grandfathering an existing nonconforming use to permit its continuation requires balancing the rights of the property owner and the local government. Local governments seek to change the property's land use for future development in planning local zoning districts. In contrast, local governments have to respect an owner's vested right to use land without diminution of its value.<sup>36</sup> In *Richbon, Inc. v. Miami-Dade County*,<sup>37</sup> a nightclub began offering adult entertainment before the effective date of the new county ordinance regulating adult entertainment.<sup>38</sup> The nightclub tried to obtain a certificate for its operation but was refused.<sup>39</sup> The circuit court affirmed the special magistrate and upheld Miami-Dade County's refusal to issue a certificate of use and occupancy for adult entertainment.<sup>40</sup> The district court overruled the special magistrate and circuit court and held that Miami-Dade

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33. *Orange Co. v. Lewis*, 859 So. 2d 526, 528 n. 2 (Fla. 5th Dist. App. 2003).

34. *Bow Point on the Gulf*, 974 So. 2d at 432-433; *Richbon, Inc. v. Miami-Dade Co.*, 791 So. 2d 505, 508 (Fla. 3d Dist. App. 2001); *Marina Real No. 2, Inc. v. Miami-Dade Co.*, 2002 WL 31727039 at \*1 (Fla. 11th Cir. Ct. Nov. 19, 2002).

35. *Pleasures II*, 799 So. 2d at 326; *Boca Dominium*, 795 So. 2d at 146.

36. See generally Mark A. Rothenberg, *The Status of Nonconforming Use Law in Florida*, 79 Fla. B.J. 46 (Mar. 2005) (discussing the application of zoning regulations, how a structure becomes nonconforming, and the impacts of nonconformity).

37. 791 So. 2d 505.

38. *Id.* at 507.

39. *Id.*

40. *Id.* at 507-508.



County could not deny the issuance of a certificate of use and occupancy as a nightclub, because it was legally grandfathered in the land use before passage of the ordinance.<sup>41</sup>

A nonconforming use may be gradually eliminated over time if a local government passes an ordinance discontinuing the use.<sup>42</sup> One example is when local regulations provide that if a nonconforming use ceases and is abandoned for 180 consecutive days, then any subsequent land use must conform to regulations specified by the zoning regulations for the zoning district in which the land is located.<sup>43</sup> In *Sarasota County v. Bow Point on the Gulf Condominium Developers, LLC*,<sup>44</sup> the owner suspended motel operation for sixteen months during necessary repairs and renovation. At the time, the motel operated under a grandfather clause.<sup>45</sup> The special magistrate found that the motel violated the county's discontinuance ordinance by reopening after it ceased its nonconforming use for more than 365 consecutive days, and therefore, the nonconforming use was abandoned.<sup>46</sup> The circuit court overruled the special magistrate.<sup>47</sup> The district court held that reopening the motel after sixteen months of necessary repairs and renovation did not constitute abandonment, stating "the circuit court applied the correct law in determining that the suspension of Bow Point's motel operation for sixteen months during necessary repairs and renovations did not constitute a discontinuance of the nonconforming use."<sup>48</sup> Thus, temporarily discontinuing a nonconforming use does not constitute abandonment, but instead it is when a landowner intentionally and voluntarily foregoes a nonconforming use in excess of the time period permitted in a local ordinance.<sup>49</sup>

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41. *Id.* at 508.

42. Rothenberg, *supra* n. 36, at 47.

43. Ft. Lauderdale Unified Land Dev. Reg. (Fla.) § 47-3 (2008); Hallandale Beach Code Ordin. (Fla.) art. VII, §§ 32-921–32-931 (2008); Tampa Code Ordin. (Fla.) ch. 27, art. XII, § 27-297 (2008). If the reader is interested in reviewing ordinances on discontinuance of nonconforming status and use in Florida local governments, see Municipal Code Corporation, *Online Library*, *supra* n. 4, search "nonconforming uses" or "discontinuance of nonconforming uses."

44. 974 So. 2d at 433.

45. *Id.* at 432.

46. *Id.*

47. *Id.* at 431.

48. *Id.* at 433.

49. *Lewis v. City of Atlantic Beach*, 467 So. 2d 751, 755 (Fla. 1st Dist. App. 1985) (rul-

Another way nonconforming uses cease is when a local regulation provides that if a nonconforming use is expanded, enlarged, or increased, any subsequent land use must conform to the regulations in effect for the zoning and use district in which the land is located. A case in point is *JPM Investment Group, Inc. v. Brevard County Board of County Commissioners*,<sup>50</sup> where the holder of a beer and wine license applied for a license to sell all types of alcoholic beverages.<sup>51</sup> The district court held that the county zoning code prohibited expansion of activity constituting nonconforming use in the owner's zoning district.<sup>52</sup> Thus, in attempting to expand its use from serving beer and wine to serving all alcoholic beverages, the owner violated its covenant with the local government to continue with the nonconforming use.<sup>53</sup>

#### VII. SET-OFF OF LIENS AGAINST FINES AND DAMAGES

Set-off is a defense in a code enforcement proceeding where there is money due to the owner or local government. In *Monroe County v. McCormick*,<sup>54</sup> the county owed the owner attorney's fees, while the owner owed the county a fine.<sup>55</sup> The Third District Court of Appeal overruled the circuit court and held that the county was entitled to set off a lien amount it was due against an attorney's fees judgment the homeowner was due, even if the county's lien was unenforceable against homestead realty, stating "although the County is precluded from affirmatively foreclosing the lien on [owner's] homestead property, the County is still entitled to defensively set-off the amount due and owing under the lien against the attorney's fees judgment."<sup>56</sup>

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ing that an owner's temporary cessation of his use of a grandfathered nonconforming liquor license during an administrative proceeding did not constitute abandonment); *Hobbs v. Dept. of Transp.*, 831 So. 2d 745, 748 (Fla. 4th Dist. App. 2002) (holding that a grandfathered nonconforming use relates to the property and use and not the ownership or leasehold interest and temporary cessation of that use does not constitute abandonment).

50. 818 So. 2d 595 (Fla. 5th Dist. App. 2002).

51. *Id.* at 596.

52. *Id.* at 598.

53. *Id.* at 599.

54. 752 So. 2d 1239, 1240 (Fla. 3d Dist. App. 2000).

55. *Id.*

56. *Id.*

### VIII. STATUTE OF LIMITATIONS

There is a split of authority as to whether Chapter 95 applies to code violations. In *Latimore v. Monroe County*,<sup>57</sup> the circuit court in its appellate capacity found that Chapter 95 applied to code enforcement proceedings.<sup>58</sup> The court reasoned that if there was no limitations period, antiquated violations could remain inactive for years and be prosecuted at any time in the future.<sup>59</sup> When old violations are prosecuted, there is the potential that witnesses have either disappeared, or if they are found, their memories will have faded, hindering a fair determination.<sup>60</sup> Further, current, innocent property owners could be found liable for construction completed by previous property owners, unfairly requiring them to demolish their property and pay expensive fines and penalties without the ability to recoup losses from the person or agency responsible for the illegal structure.<sup>61</sup> As such, public policy concerns should deem a statute of limitations vital to the administration of justice.<sup>62</sup> *Latimore* also indicated that courts should not create exceptions to a statute of limitations because if the legislature intended to exclude code enforcement claims from Chapter 95, it could have said so.<sup>63</sup>

On the other hand, in *Sarasota County v. National City Bank of Cleveland, Ohio*,<sup>64</sup> a prior owner of the property renovated the home between 1980 and 1990 but failed to obtain a building permit.<sup>65</sup> In 2001, the county began a code enforcement proceeding against the current owner.<sup>66</sup> The district court overruled the special magistrate and circuit court and held that Chapter 95 did not apply because code enforcement proceedings are quasi-judicial administrative actions.<sup>67</sup> From a health, safety, and welfare

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57. No. 96-1109-CA-25, 2000 WL 34509018 (Fla. 16th Cir. Oct. 6, 2000).

58. *Id.* at \*1.

59. *Id.* at \*9.

60. *Id.*

61. *Id.*

62. *Hawkins v. Barnes*, 661 So. 2d 1271 (Fla. 5th Dist. App. 1995).

63. 2000 WL 34509018 at \*10.

64. 902 So. 2d 233 (Fla. 2d Dist. App. 2005).

65. *Id.* at 234.

66. *Id.*

67. *Id.* at 235. The Florida Senate weighed in on this issue when it argued that a statute of limitations should not apply to administrative proceedings. Fla. Sen., *Interim Project Report 2008-131: Statute of Limitations for Administrative Actions 3* (Oct. 2007) (available

standpoint, these proceedings are brought to protect the community's public interest, even if they are brought against landowners to correct long-standing violations.<sup>68</sup> Further, violations are ongoing and can pose a threat to human safety until they are corrected.<sup>69</sup> The decision in *National City Bank of Cleveland*, however, refused to rule out laches, equitable estoppel, or due process as delayed enforcement defenses.<sup>70</sup>

### IX. EQUITABLE ESTOPPEL AND LACHES

Long-standing violations may be subject to equitable estoppel and laches. In *Castro v. Miami-Dade County Code Enforcement*,<sup>71</sup> the owners purchased a townhouse built in 1980 that came with a

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at [http://www.flsenate.gov/data/Publications/2008/Senate/reports/interim\\_reports/pdf/2008-131go.pdf](http://www.flsenate.gov/data/Publications/2008/Senate/reports/interim_reports/pdf/2008-131go.pdf)). After considering the pros and cons of a statute of limitations as applied to administrative proceedings, including code enforcement proceedings, it stated:

This distinction between administrative proceedings designed to protect the public interest, and administrative proceedings that essentially act as substitutes for civil actions that may otherwise be subject to a statute of limitations, is important, as . . . actions taken by the sovereign in order to protect the public interest are not subject to civil or criminal statutes of limitation.

*Id.*

68. *Natl. City Bank of Cleveland, Ohio*, 902 So. 2d at 235.

69. *Id.*

70. In admitting that delayed enforcements (e.g., laches, equitable estoppel) are defenses to code enforcement prosecutions, the conclusion reached in *National City Bank of Cleveland*—that Chapter 95 does not apply to code enforcement actions—is questionable. What if a local government knows about “unlawful” code violations, but does nothing for ten, fifteen, or twenty years? Later, a newly elected commission decides to prosecute antiquated violations. Is long-term governmental inaction (e.g., laches and equitable estoppel) any different from applying a statute of limitations to code enforcement proceedings? No, because there are ongoing code violations that purportedly threaten the health, safety, and welfare of the community, and many years have passed since the start of the violations making it almost impossible to defend against a local government's claims. It is better public policy to apply a limitations period to code enforcement violations, so that there is a reasonably prompt resolution of controversies to protect against the risk of injustice. An open-ended time period for a local government to pursue code enforcement violations does not serve any public purpose. By failing to enforce a limitation period, the old maxim “the sovereign can do no wrong” has returned with a hollow, troubling ring. See *U.S. v. Nordic Village, Inc.*, 503 U.S. 30, 33–35 (1992); *McMahon v. U.S.*, 342 U.S. 25, 27 (1951). Local governments act wrongly if they do nothing for many years knowing that a code violation exists. Even if they do not know, how severe can long-term code violations be if a local government does nothing about them? A compelling argument can be made that long-term code violations are de minimus, and they do not threaten the health, safety, and welfare of the community. Further, local governments should be attentive and ready to act if code violations exist rather than sitting by and doing nothing for long periods of time.

71. 967 So. 2d 230 (Fla. 3d Dist. App. 2007).

family room encroaching fourteen feet into a setback.<sup>72</sup> The city later issued building permits for a hurricane re-roof on the entire house.<sup>73</sup> Miami-Dade County later passed an ordinance that retroactively applied twenty-five foot setbacks.<sup>74</sup> More than twenty years after construction of a townhouse, the city issued a citation against the owners for illegally constructing the addition in violation of the ordinance.<sup>75</sup> The special magistrate concluded that the owners were responsible for violating the 2003 ordinance, and the circuit court affirmed.<sup>76</sup> The district court quashed the lower tribunals and held that where the county issued additional permits over the years with knowledge that the owners were expending substantial time and money in reliance on building permits, it would be grossly unfair to deny the owners protection afforded by equitable estoppel.<sup>77</sup>

Laches can be used as a defense to code enforcement proceedings. In *Bennett D. Fultz, Co. v. City of Miami*,<sup>78</sup> the owner purchased a house that included a rental unit, which the owner openly and continuously operated for many years, believing it to be lawful.<sup>79</sup> The owner paid garbage collection for three units.<sup>80</sup> He made three permit applications during his time of ownership.<sup>81</sup> The owner spent large sums of money to maintain the property, including roof repair, new kitchen cabinets, painting, tiling, and electrical upgrades with the city's knowledge.<sup>82</sup> The owner had no reason to believe that the three units were not a legal use of the property.<sup>83</sup> The district court ruled that the city knew or should have known about the permit applications, alterations, and garbage collection for these three units in their "illegal" use by the owner without complaint, stating "it seems clear that a reasonable person should have been able to attain the knowledge

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72. *Id.* at 232.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 232–233.

77. *Id.* at 234.

78. 2005 WL 5302110 at \*2 (Fla. 11th Cir. June 7, 2005).

79. *Id.* at \*1.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at \*2.

of the violations upon inquiry.”<sup>84</sup> Accordingly, there was insufficient evidence to support the code board’s conclusion that the equitable defense of laches was inapplicable to this case.<sup>85</sup>

#### X. CONSTITUTIONAL RAMIFICATIONS OF SELECTIVE ENFORCEMENT AND THE FIRST AMENDMENT

No one suggests that local governments should discriminate based on race, color, gender, age, or sexual orientation; nevertheless, it is impossible to know what happens daily with the full range of people served at the local level. In *Powell v. City of Sarasota*,<sup>86</sup> the owners of property claimed a defense of selective enforcement against the city’s enforcement board.<sup>87</sup> The city relied on three “controlled buys” over a two-week period by undercover officers to support a finding of a nuisance.<sup>88</sup> The parties who sold drugs to police were not tenants of these owners’ buildings nor did they live in the neighborhood.<sup>89</sup> The police did not find illegal drugs while serving a search warrant on the premises. No criminal prosecutions ever occurred.<sup>90</sup> The owners before the board tried but failed to introduce evidence that the city’s nuisance abatement efforts were aimed at African-American neighborhoods and amounted to selective enforcement.<sup>91</sup> The owners unsuccessfully appealed to the circuit court.<sup>92</sup> The district court reversed and held that the property owners should have been allowed to present evidence that any violations were selectively enforced against them. The court explained, “[t]he Equal Protection Clause prohibits selective enforcement of the law based on considerations such as race.”<sup>93</sup> Selective code enforcement based on race is a violation of the equal protection clause. Procedural due process re-

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84. *Id.*

85. *Id.*

86. 953 So. 2d 5, 6 (Fla. 2d Dist. App. 2006).

87. *Id.* at 8.

88. *Id.*

89. *Id.* at 6.

90. *Id.*

91. *Id.* at 7.

92. *Id.*

93. *Id.*

quires a special magistrate to consider any of the accused's evidence that violations are selectively enforced.<sup>94</sup>

A recent example of a claim of religious discrimination by local government law is in *Westgate Tabernacle, Inc. v. Palm Beach County*.<sup>95</sup> In *Westgate Tabernacle, Inc.*, a church operated a homeless shelter as part of its Christian mission in a Multi-Family Residential High Density (RH) zoning district.<sup>96</sup> The Palm Beach County's Unified Land Development Code (ULDC) called homeless shelters "congregate living facilities" (CLFs) and permitted CLFs in RH zones with six or more residents provided the operating companies obtain Conditional Use Permits (CUPs).<sup>97</sup> Westgate operated its CLF for more than six people without the required CUP, so Palm Beach County issued a violation notice, giving Westgate two months to comply with the ULDC or go before a code enforcement hearing.<sup>98</sup> Westgate did not correct the violation, so Palm Beach County held a hearing during which Westgate's pastor admitted that Westgate's CLF housed about twenty residents without a CUP in violation of ULDC.<sup>99</sup> Upon Westgate's request, Palm Beach County's Code Enforcement Board granted Westgate 180 days to obtain a CUP or reduce the number to fourteen people.<sup>100</sup> Westgate eventually closed its CLF, but Palm Beach County's Code Enforcement Board assessed a fine of \$22,700 for Westgate's period of noncompliance.<sup>101</sup>

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94. See *Ross v. City of Tarpon Springs*, 802 So. 2d 473, 474 (Fla. 2d Dist. App. 2001) (requiring the consideration of evidence relating to sufficient notice of the hearing); *Miami-Dade Co. v. Reyes*, 772 So. 2d 24, 28 (Fla. 3d Dist. App. 2000) (holding that the circuit court must consider whether the administrative hearing followed all required elements of law).

95. \_\_\_ So. 3d \_\_\_, 2009 WL 1393429 (Fla. 4th Dist. App. May 20, 2009).

96. *Id.* at \*1.

97. Palm Beach County Unified Land Development Code art. 4 ch. B § 1(34) (2008). The ULDC allows for CLFs of the following sizes in RH zones: less than six residents is Type One and does not require a UCP; seven to fourteen residents is Type Two and requires a Class B CUP; Fifteen and up is Type Three and requires a Class A CUP with the Code Enforcement Board's approval, determining the number of permitted residents based on land density. *Id.*

98. *Westgate Tabernacle, Inc.*, 2009 WL 1393429 at \*1-2.

99. *Id.* at \*2.

100. *Id.* During the 180 days, Palm Beach County's Code Enforcement Board asked Westgate to keep the number of residents to no more than fourteen. *Id.* This reduced number of residents would change Westgate's CLF from a Type Three to a Type Two facility, thus altering the permit process requirements. *Id.*; see *supra* n. 3 (describing CLF categories and permitting requirements under ULDC).

101. *Westgate Tabernacle, Inc.*, 2009 WL 1393429 at \*2. The fine was \$100 per each day of noncompliance. *Id.* Within the 180-day window, Westgate submitted and then subse-

Westgate filed a multi-count complaint against the county alleging violations of state<sup>102</sup> and federal<sup>103</sup> constitutional doctrines.<sup>104</sup> Westgate presented evidence that its religious beliefs mandated operation of a CLF, the ULDC imposed an absolute ban of homeless shelters on RH-zoned property, and County agencies regularly sent homeless people to Westgate because no other CLFs existed in the county.<sup>105</sup> Palm Beach County presented evidence that the ULDC existed to ensure the public health, safety, and welfare, the ULDC permitted CLFs in RH zones if they obtained a CUP, Westgate was aware of the CUP requirement at the time of the violation, and the Palm Beach Code Enforcement Department tried to help Westgate obtain a CUP by repeatedly meeting with Westgate officials.<sup>106</sup>

The jury found that the application of the ULDC in Westgate's case did not substantially burden its religious activities because it was the least restrictive way to promote Palm Beach County's compelling interest of public health and safety, so the ULDC did not violate state or federal constitutional doctrines.<sup>107</sup> Florida's Fourth District Court of Appeal affirmed, finding that merely requiring the application for a special exception from a restrictive property ordinance was not a substantial burden, Westgate's operation of the CLF in the RH zone was not fundamental to its exercise of religion, alternative locations for Westgate's CLF existed, and even if it was financially inconvenient for the Westgate to move its location,<sup>108</sup> there was no interference with Westgate's free exercise of religion.<sup>109</sup> Therefore, the ULDC's special exception code provision did not violate state and federal constitutional doctrines<sup>110</sup> because it did not substantially burden Westgate's exercise of religion.<sup>111</sup>

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quently withdrew its CUP application. *Id.*

102. Florida's Religious Freedom Restoration Act of 1998, Fla. Stat. § 761 (2008).

103. Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc-2000cc-5 (2006).

104. *Westgate Tabernacle, Inc.*, 2009 WL 1393429 at \*2.

105. *Id.*

106. *Id.*

107. *Id.* at \*3; see *supra* nn. 9–10 and accompanying text (describing the applicable state and federal constitutional doctrines Westgate asserted in its complaint).

108. *Westgate Tabernacle, Inc.*, 2009 WL 1393429 at \*5. At the time of the trial, Westgate's CLF grew to over 100 residents, requiring substantial renovations to its building. *Id.*

109. *Id.*

110. See *supra* nn. 9–10 and accompanying text (describing the applicable state and



## XI. "DOUBLE DIPPING"

"Double dipping" is the unlawful receipt of multiple benefits from like conduct and the same source and has been discussed in civil, commercial, family, criminal, worker's compensation, and social security benefits cases.<sup>112</sup> Where an owner fails to cut high grass, weeds, overgrown vegetation, or maintain property, a local government cannot charge a violator a per diem fine on property once violations come into compliance or final judgment is rendered.<sup>113</sup> In *Fong v. Town of Bay Harbor*,<sup>114</sup> the district court ruled that code enforcement fines could only accrue until the earlier of the date of compliance or entry of final judgment.<sup>115</sup> Although *Fong* does not use the words "double dipping," it suggests that if fines continue to accrue after the earlier of the compliance date or entry of final judgment, a local government will unlawfully receive multiple benefits.<sup>116</sup> Still, a local government can charge reasonable costs to correct violations in addition to a per diem fine.<sup>117</sup> If successive violations occur on the same property, an accused can be charged as a repeat violator in a subsequent proceeding.<sup>118</sup> Special magistrates should be on guard for "double dipping" situations, so that multiple benefits are not paid to a local government for the same offense.

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federal constitutional doctrines *Westgate* asserted in its complaint).

111. *Westgate Tabernacle, Inc.*, 2009 WL 1393429 at \*5.

112. *Acker v. Acker*, 904 So. 2d 384, 389 (Fla. 2005); *Citizens of the State of Fla. v. Wilson*, 568 So. 2d 1267, 1271 (Fla. 1990); *Lambert v. State*, 545 So. 2d 838, 841 (Fla. 1989); *Acosta v. Kraco, Inc.*, 471 So. 2d 24, 26 (Fla. 1985); *Akers v. Akers*, 582 So. 2d 1212, 1217 (Fla. 1st Dist. App. 1991); *Maxwell v. State*, 576 So. 2d 367, 370 (Fla. 1st Dist. App. 1991); *Carlton v. Carlton*, 876 So. 2d 1267, 1269 (Fla. 2d Dist. App. 2004); *Mallard v. Mallard*, 750 So. 2d 42, 44 (Fla. 2d Dist. App. 1999); *Posey v. Grobman*, 951 So. 2d 857, 858 (Fla. 4th Dist. App. 2005); *City of Plantation v. May*, 476 So. 2d 1325, 1327 (Fla. 4th Dist. App. 1985); *Haye v. State*, 615 So. 2d 762, 766 (Fla. 5th Dist. App. 1993).

113. *Minutes of Dania Beach City Commn. Spec. Meeting Abatement Hrg.* (Mar. 18, 2004) (available at [http://fl-daniabeach.civicplus.com/documents/City%20Clerk/2004/Commission%20Minutes/20040318%20Spec\\_Abatement.pdf](http://fl-daniabeach.civicplus.com/documents/City%20Clerk/2004/Commission%20Minutes/20040318%20Spec_Abatement.pdf)).

114. 864 So. 2d 76 (Fla. 3d Dist. App. 2003).

115. *Id.*; Fla. Stat. §§ 162.04(5), 162.06(3), 162.07(2), (4), 162.09(1) (2008). Florida Statutes Section 162.09(3) provides that a fine pursuant to Chapter 162 shall accrue daily until the violations come into compliance or until a judgment is rendered in a suit pursuant to Chapter 162, whichever occurs first.

116. *Fong*, 864 So. 2d 76; Fla. Stat. §§ 162.04(5), 162.06(3), 162.07(2), (4), 162.09(1).

117. Fla. Stat. §§ 162.04(5), 162.06(3), 162.07(2), (4), 162.09(1).

118. Fla. Stat. §§ 162.04(5), 162.06(3).

## XII. SEPARATE OR THE SAME OFFENSE

Offenses are separate if each offense requires proof of an element that the other does not. If no additional elements of proof are required, then offenses are the same.<sup>119</sup> Where a building's deteriorated wall and roof that cause blight to adjoining property owners are located on one property having two addresses and folio numbers, a local government argued that two separate offenses arose permitting it to file two code violations. The owner argued that only one citation was appropriate, because the charges involved the same elements of proof on the same property.<sup>120</sup> Chapter 162 suggests that only one property can be the subject of a citation for a code violation.<sup>121</sup> If no additional elements of proof are required, offenses are the same and an owner should be charged with only one violation. It is fundamentally unfair for a local government to stack identical charges in different forms against a property owner because if a multitude of violations are found, a special magistrate can assess separate fines for the charges causing the violator undue financial hardship.<sup>122</sup> A special magistrate should decide if offenses involve separate or identical factual elements before rendering a decision and assessing fines.

If a local government ordinance expressly conflicts with a state statute or if the legislature has preempted a specific field, then a local ordinance is invalid.<sup>123</sup> But if there is an administrative ordinance and a state statute outlawing certain wrongdoing

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119. *Blockburger v. U.S.*, 284 U.S. 299, 304 (1932); *State v. Craft*, 685 So. 2d 1292, 1294 (Fla. 1996); *Johnson v. St.*, 597 So. 2d 798, 799 (Fla. 1992); *Billups v. State*, 690 So. 2d 1381 (Fla. 1st Dist. App. 1997); *Thomason v. State*, 790 So. 2d 1189, 1190 (Fla. 4th Dist. App. 2001). Although these decisions concern criminal statutes, the principles should apply to code enforcement proceedings to ensure that a property owner is charged with one rather than multiple violations where no additional elements of proof are required.

120. *Minutes of Dania Beach City Commn. Abatement Hrg.* (Jan. 18, 2007) (available at <http://ci.dania-beach.fl.us/documents/City%20Clerk/2007/Commission%20Minutes/20070118%20Abatement%20Hearing.pdf>).

121. See Fla. Atty. Gen. Op. 88-36 (1988) (available at <http://myfloridalegal.com/ago.nsf/Opinions/F99EBD55A07BB8FB85256571006ED39C>) (stating that one violation incites the code enforcement process).

122. Florida Statutes Section 162.09(2)(a) provides that a fine may not exceed \$250 per day for a first violation and \$500 per day for a repeat violation.

123. *Rinzler v. Carson*, 262 So. 2d 661, 668 (Fla. 1972); *City of Kissimmee v. Fla. Retail Fedn.*, 915 So. 2d 205, 209 (Fla. 5th Dist. App. 2005); *Phantom of Clearwater, Inc. v. Pinellas Co.*, 894 So. 2d 1011, 1023 (Fla. 2d Dist. App. 2005).

in a subject of concurrent legislation, there is no constitutional provision that prohibits either the local or state government or both from prosecuting a violator, so long as the local government ordinance does not conflict with state law. A case in point involves state and local government provisions concerning dangerous dogs. In *City of Ocala v. Green*,<sup>124</sup> a code officer required that a dangerous dog be humanely euthanized after it attacked another dog without provocation.<sup>125</sup> As a result, the city informed the attacker dog's owner that its animal control officer seized the animal and required that it be destroyed ten business days later unless the owner requested a hearing.<sup>126</sup> The dog owner objected, the code board upheld the destruction order, but the circuit court in its appellate capacity overruled the code board and held that a criminal prosecution against the dog owner under Florida Statutes Section 767.13 had to be successfully brought as a condition precedent to a code enforcement proceeding.<sup>127</sup> The district court overruled the circuit court, concluding that, for the local government to be entitled to euthanize the dog, the local government did not have to first successfully prosecute the owner under Florida Statutes Section 767.13 prior to prosecuting the owner for a code violation.<sup>128</sup> Thus, depending on the severity of the level of misconduct that is unlawful under a co-existing criminal statute and local ordinance, a criminal prosecution and code administrative proceeding can each be administered separately and in any order without violating state law.<sup>129</sup>

### XIII. FINES AND RECOVERABLE COSTS

Chapter 162 sets forth per diem fines that can become liens on owners' non-homestead real property.<sup>130</sup> A local government's capacity to assess fines, however, is limited by the excessive fines clause of the federal and state constitutions.<sup>131</sup> A fine must be

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124. 988 So. 2d 114 (Fla. 5th Dist. App. 2008).

125. *Id.* at 115.

126. *Id.* at 116.

127. *Id.*

128. *Id.*

129. See *Freeman v. State*, 969 So. 2d 473, 479 (Fla. 5th Dist. App. 2007); *Locklear v. Fla. Fish & Wildlife Conserv. Commn.*, 886 So. 2d 326, 327 (Fla. 5th Dist. App. 2004).

130. Fla. Stat. § 162.09 (2007).

131. U.S. Const. amend. VIII; Fla. Const. art. I, § 17. In *U.S. v. Halper*, the Supreme

grossly disproportionate to the severity of the offense being punished to violate the excessive fines clauses.<sup>132</sup> Factors that may be considered in determining if a fine is appropriate include severity of a violation, corrective action taken by a violator, and previous violations of a violator.<sup>133</sup> An integral part of any code enforcement proceeding is including recoverable costs in the lien if a violation is proved.<sup>134</sup> Taxable costs are those expressly permitted by statute, including administrative costs of the prosecuting agency and reasonable repair costs made by the local government to bring property into compliance. Taxable costs do not include payroll and overhead expenses of the local government employees, because they are not provided for by statute.<sup>135</sup>

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Court ruled that a civil penalty authorized by a congressional act was too extreme and unconnected from the government's actual damages and expenses as to constitute lawful punishment. 490 U.S. 435, 441 (1989). In *Halper*, the defendant was convicted of Medicare fraud, sentenced to prison, and fined \$5,000. *Id.* at 435. A civil suit was later filed by the government, and the court entered a summary judgment under a federal false claims act that permitted an award of \$130,000 against the defendant for sixty-five false claims. *Id.* The government's actual damages were \$585, and costs associated with prosecuting the action were \$16,000. *Id.* The United States Supreme Court ruled that a \$130,000 fine violated the double jeopardy clause of the United States Constitution because it constituted punishment and bore no rational relation to the goal of compensating the government for its loss. *Id.* at 452. The United States Supreme Court in *Hudson v. U.S.* disavowed the analysis of *Halper* on its position that "punishment" of any kind was subject to double jeopardy constraints. 522 U.S. 93 (1997). The Supreme Court in *Hudson*, however, acknowledged that the analysis in *Halper* can still apply to whether a fine is clearly unreasonable or unduly harsh based on violations of equal protection, due process, and the excessive fines clause of the state and federal constitutions. *Hudson*, 522 U.S. at 102–103; *Browning v. Angelfish Swim Sch., Inc.*, 1 So. 3d 355, 360 (Fla. 3d Dist. App. 2009) (granting leave to amend so the class action plaintiffs could argue a case of first impression challenging the constitutional legitimacy of Florida's Secretary of State's corporate reinstatement fees, late charges, fines, and filing penalties).

132. See *U.S. v. Bajakajian*, 524 U.S. 321, 324 (1998) (holding that the fine was disproportionately large considering the offense's level of severity, the fine was excessive and violated the Eighth Amendment); *Riopelle v. Dept. of Fin. Serv., Div. of Workers' Compen.*, 907 So. 2d 1220, 1223 (Fla. 1st Dist. App. 2005) (ruling that the fine must be proportionate to the conduct to follow the Eighth Amendment). In *Resort Timeshare Resales, Inc. v. Office of Attorney General, State of Florida*, the district court held that if a fine is so great as to shock the conscience of reasonable people or is patently and unreasonably harsh or oppressive, then an argument can be made that the fine violates the excessive fines clause, and therefore, it can be abated. 766 So. 2d 382 (Fla. 4th Dist. App. 2000); see *Locklear*, 886 So. 2d at 328–329 (stating the fine must be so large as to make the statute criminal to raise the question of double jeopardy).

133. Fla. Stat. § 162.09(2)(b).

134. Fla. Stat. § 162.07(2), (4).

135. *Stratton v. Sarasota Co.*, 983 So. 2d 51, 55 (Fla. 2d Dist. App. 2008). In *Stratton*, the district court stated that nothing in Florida Statutes Section 162.09(2)(b) permitted the county to charge an individual property owner for payroll expenses for time spent by

#### XIV. CONCLUSION

Code violations on household dwellings and business establishments can affect owners' and their neighborhoods' aesthetics, stability, and property value. If code violations remain unchecked and uncorrected, a once-solid neighborhood can turn into vacant buildings and foreclosed properties. If property values decline, there can be a drop in tax revenue and spending for schools, non-school services, and local development.<sup>136</sup>

If there is no question that violations exist, the owner or legal representative should resolve the problem with the assigned code enforcement officer. If a bona fide dispute arises, it is incumbent on a special magistrate to maintain high standards of fairness, impartiality, and diligence when rendering a decision. A party has the right to contest violations without fear of retribution. All decisions should be based on admissible evidence and defenses rather than innuendo, hearsay, or predetermined opinions.<sup>137</sup> If violations are found, then fines should be assessed without causing property owners undue financial hardship. Special magistrates have a unique opportunity to help mitigate blight and lend a hand to neighborhoods so that they retain their vitality. They can also be instrumental in helping property owners make affordable repairs and renovation. If rulings are arbitrary and fines are excessive, they can lead to an exodus of property owners and an increase in neighborhood vacancies and foreclosures. A once-manicured neighborhood with vitality and character may deteriorate if prohibitive renovation costs are mandated and fines are assessed.

The purpose of code enforcement is to work with residents and businesses to preserve the livability, ideals, and integrity of business and residential neighborhoods, but not to operate as a

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its code enforcement employees.

136. Property taxes help support many government programs, including school services, law enforcement, fire protection, utility services, waste collection, roads and transportation services, courts, health, public assistance, libraries, parks and recreation, among others. See Rodney Clouser, *Florida's Property Tax Reform: Local Government Impacts of the Proposed Constitutional Change: Using Ad Valorem Taxes 2*, <http://edis.ifas.ufl.edu/pdffiles/FE/FE70700.pdf> (2008) (listing public services funded by ad valorem taxes).

137. Fla. Stat. § 162.07 (2007); *Alpha Eta Chapter of Pi Kappa Alpha Fraternity v. U. Fla.*, 982 So. 2d 55, 56 (Fla. 1st Dist. App. 2008); *Morfit v. U. of S. Fla.*, 794 So. 2d 655, 656 (Fla. 2d Dist. App. 2001).

local government tax collector by assessing fines. The only way the public will have respect for code enforcement proceedings is if an accused is afforded fair and impartial process. It is only in exceptional situations that a special magistrate should consider imposing a fine as punishment.<sup>138</sup> Most individuals appearing at code enforcement proceedings are ordinary people and small business owners ready and willing to correct code violations if they exist. If a code enforcement proceeding is handled fairly and impartially, the special magistrate and local government will have completed their job as guardians of the public interest. And in considering the issues discussed in this Article, special magistrates will be arbiters of fairness and justice.

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138. Fla. Stat. § 162.09(1), (2)(a). Examples where punishment may be proper include the following: if violations are irreparable or irreversible, if violations are severe and for which the violator fails to take any corrective action, and if there is a history of previous violations by the owner. As always, the court should consider ramifications of the fine on the owner and vitality of the neighborhood.