IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA
Case No. 50-2019CA008660XXXXMB

B & B PROPERTIES, INC., a Florida corporation, and on behalf of all others similarly situated,

Plaintiff, CLASS REPRESENTATION

vs.

PALM BEACH COUNTY, FLORIDA, a political subdivision of the State of Florida,

Defendant.
_____/

**CLASS PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

Class Plaintiffs, by and through their representative, B & B Properties, Inc. ("B&B") and their undersigned counsel, and pursuant to Rule 1.510, Fla. R. Civ. P., hereby file this Motion for Partial Summary Judgment, and in support thereof state:

## I. INTRODUCTION

Class Plaintiffs are entitled to a partial summary judgment on the claims and defenses asserted in the Third Amended Complaint, because the discovery obtained, the pleadings, and the deposition testimony from Palm Beach County's corporate representatives establish that there is no genuine dispute as to any material fact, and therefore partial summary judgment should be granted as a matter of law. Fla. R. Civ. P. 1.510(a).

More specifically, the Class Plaintiffs are entitled to summary judgment on the following claims:

1. That Palm Beach County ("the County") has improperly charged and collected interest on code enforcement liens without filing a lawsuit to foreclose the lien in violation of Fla.

Stat. § 162.09 and the County's Ordinance, Article 10 of the Uniform Land Development Code ("ULDC").

2. That the County improperly calculated interest on code enforcement liens by compounding the interest so that interest is charged on interest, which is not permissible under Fla. Stat. § 55.03 or any other Florida Statute.

3. That the County improperly charged and collected collection agency fees on code enforcement liens when there was no lawsuit to foreclose the lien, in violation of Fla. Stat. § 162.09, the County's Code Enforcement Ordinance, Article 10 of the ULDC, and Fla. Stat. § 938.35 and § 938.31.

4. That the County improperly charged and collected collection agency fees on code enforcement liens in excess of what the County paid the collection agency, in violation of Fla. Stat. § 938.35.

5. That the County's policy and practice of prohibiting any modification hearings, once the code enforcement lien is referred to the Office of Management and Budget (OFMB), eliminates any meaningful opportunity to challenge the improper interest and collection agency charges, or the amounts thereof, which violates due process under the Fourteenth Amendment to the United States Constitution.

6. That the County, by adding improper interest charges and collection agency fees to the code enforcement daily fine, increases the code enforcement penalty without a lawful basis so that it violates the Excessive Fines Clause of the Eighth and Fourteenth Amendments to the United States Constitution.[1]

[1] The United States Supreme Court in *Timbs v. Indiana*, 139 S.Ct. 682, 687 (2019), incorporated the Excessive Fines Clause of the Eighth Amendment to the states through the Fourteenth Amendment.

7. That as a result of the County improperly charging and collecting interest and collection agency fees and failing to provide a meaningful opportunity to challenge these charges, the Class Plaintiffs are entitled to declaratory, injunctive, and monetary relief.

## II. SUMMARY JUDGMENT STANDARDS

8. In 2020 and 2021, the Florida Supreme Court amended Fla. R. Civ. P. 1.510 to adopt the federal summary judgment standard set out in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986); and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574 (1986). *In re: Amendments to the Florida Rule of Civil Procedure 1.510*, 309 So. 3d 192 (Fla. 2020), and *In Re: Amendments to Florida Rule of Civil Procedure 1.510*, 317 So. 3d 72 (Fla. 2021). Under this new Florida standard, "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no **genuine** issue of **material** fact." *Anderson v. Liberty Lobby,* 477 U.S. at 247-248 (emphasis added).

9. The burden on Plaintiffs and Defendants at summary judgment turns on which party "bear[s] the burden of persuasion at trial":

> [T]hose applying new rule 1.510 must recognize that a moving party that does not bear the burden of persuasion at trial can obtain summary judgment without disproving the nonmovant's case.... **A movant for summary judgment need not set forth evidence when the nonmovant bears the burden of persuasion at trial**.... As to summary judgment movant's initial burden of production, we emphasize that where the nonmovant bears the ultimate burden of persuasion at trial on a particular issue .... the requirements that Rule 56 imposes on the moving party are not onerous. *Modrowski v. Pigatto*, 712 F. 3d 1166, 1168 (7th Cir. 2013).

*In Re: Amendments to Florida Rule of Civil Procedure 1.510*, 317 So. 3d at 77.

10. As the Fourth District has stated:

> "**[T]here is 'no express or implied requirement ... that the moving party support its motion with affidavits or other similar materials negating the opponent's claim**." "*In re Amends. 1.510 I*, 309 So. 3d at 193 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323[] (1986)). Rather, "the burden on the moving

> party may be discharged by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Id*. (quoting *Celotex*, 477 U.S. at 325[]).

*Patient Depot, LLC v. Acadia Enterprises, Inc*., 360 So. 3d 399, 408 (Fla. 4th DCA 2023) (emphasis added). Thus, the burdens differ on each claim or defense depending on which party bears the burden of persuasion at trial.

11. The Class Plaintiffs have the burden at trial of proving their claims, and Defendant has the burden at trial of proving its defenses. *Custer Med. Ctr. v. United Auto. Ins. Co*., 62 So. 3d 1086, 1097 (Fla. 2010) (the "defendant has the burden of proving an affirmative defense."). Thus, a plaintiff is entitled to summary judgment on affirmative defenses unless the defendant can establish that the defenses are legally sufficient and supported with competent evidence. "A movant for summary judgment need not set forth evidence when the nonmovant bears the burden of persuasion at trial." *In re Rule 1.150*, 317 So. 3d at 75.

12. Here, Class Plaintiffs are entitled to summary judgment because there are no genuine issues as to any material facts, and the County's affirmative defenses are insufficient as a matter of law.

## III. THE COUNTY'S CUSTOM AND PRACTICES REGARDING INTEREST CHARGES

13. During the Class Period, it was the County's policy, custom and practice to charge interest in addition to the daily fine on all code enforcement liens. This was confirmed by Sherry Brown, the Director of OFMB, which is the office responsible for collecting the amounts arising from code enforcement liens. (*See* Brown Dep. 7/14/21 pp. 10, 14, and 82). Ms. Brown was designated as one of the County's corporate representatives pursuant to Fla. R. Civ. P. 1.310(b)(6). (*See* Brown Dep. 7/14/21 p. 19).

14. On July 13, 2018, the County first notified B&B through a Statement of Account that B&B owed interest fees as part of its code enforcement lien totaling $67,548.27. (*See* Ex. 5,[2] and Brown Dep. 7/14/21, p. 45). On January 16, 2019, the County sent B&B another Statement of Account containing interest charges of $68,589.51, calculated through January 31, 2019. (*See* Ex. 6). The Statements of Account were prepared and sent to B&B from OFMB. (*See* Brown Dep. 7/14/21, p. 45). Ms. Brown also acknowledged that with regard to interest charges, B&B's code enforcement lien was not treated any differently than any other code enforcement lien. (*See* Brown Dep. 7/14/21, p. 82).

15. The County claims that its legal justification for charging interest on code enforcement violations is Fla. Stat. § 162.09(3). This was testified to by the County's other designated corporate representative, Ramsay Bulkeley, who is the executive director of Planning, Zoning & Building. (*See* Bulkeley Dep., 6/21/21, pp. 10 and 15 and Bulkeley Dep. 2/17/22, pp. 32-33). This same statute, § 162.09(3), was also cited by Assistant County Attorney Shannon Fox in her email to B&B's prior counsel, Gary Brandenberg, to justify the interest charges. (*See* Ex. 11).

16. However, Fla. Stat. § 162.09(3) only refers to interest charges in conjunction with a lawsuit to foreclose on the lien or to recover a money judgment for the amount of the lien. Section 162.09(3) states in pertinent part:

> … After three months from the filing of any such lien which remains unpaid, the enforcement board may authorize the local governing body attorney **to foreclose on the lien or to sue to recover a money judgment for the amount of the lien plus accrued interest.**

[2] As indicated in the Statement of Material Facts, all the exhibits are part of the record in this case since the exhibits were identified at the depositions of the County's two corporate representatives, Ramsay Bulkeley and Sherry Brown, or by the County at the deposition of B&B's corporate representative, O'Neal Bates. These exhibits are attached to the Statement of Material Facts, and the deposition exhibit numbers are also referred to in the Statement of Material Facts.

(emphasis added).

17. This Court has determined that Fla. Stat. § 162.22 allows counties and municipalities to designate the enforcement method and penalties for building code violations. Through passage of its code enforcement ordinance, Section 3(F) of Article 10 of the ULDC, the County designated that its enforcement method would be an action to foreclose the code enforcement lien in the same manner as mortgage liens are foreclosed. (D.E. 225, pages 3-4, paras. 1, 2, & 6). As the Court concluded:

> Therefore, the Court finds that the County, pursuant to Fla. Stat. § 162.22 and its home rule powers of self -government, designated its enforcement methods to be a foreclosure action, and the County is estopped from enforcing its code enforcement lien through a money judgment action.

(D.E. 225 p. 7, para. 13).

18. The County has never filed an action to foreclose the code enforcement lien against B&B, which is consistent with the County's practice of rarely filing a foreclosure action against code enforcement violators. (*See* Brown Dep. 7/14/21, pp. 87 & 195). In fact, the County has admitted that since 2005, it has only brought two lawsuits to foreclose a code enforcement lien. (*See* Palm Beach County's Response to Plaintiff's first Request for Admissions #1 (D.E. 114, and Brown Dep. 7/14/21, pp. 85-87).

19. Additionally, an analysis of the language of Fla. Stat. § 162.09 and Article 10 of the ULDC firmly supports the position that interest charges are improper in the absence of a lawsuit to foreclose the code enforcement lien. Fla. Stat. § 162.09 is entitled **Administrative fines; costs of repair; liens.** Fla. Stat. § 162.09(1) empowers the enforcement board to issue daily fines against property owners who fail to correct conditions on their property constituting code violations. This section also provides that if a code inspector has reason to believe that a violation or the condition causing the violation presents a serious threat to public health, safety

and welfare, or if the violation is irreparable or irreversible in nature, the enforcement board may make all reasonable repairs and charge the violator reasonable costs for the repairs along with the daily fine. Nowhere in Fla. Stat. § 162.09(1) is there any language authorizing the County to charge interest in addition to the daily fine or the cost of reasonable repairs. In fact, the word "interest" is not found in this section of the statute.

20. The next section, Fla. Stat § 162.09(2)(a), sets forth the amounts of the permissible daily fine. Fla. Stat. § 162.09(2)(b) establishes the criteria to be used for the amount of the fine, and Fla. Stat. § 162.09(2)(d) permits the County to impose additional fines, if necessary. As was the case with Fla. Stat. § 162.09(1), there is no reference to interest charges or even the word "interest," in any of the subsections of Fla. Stat. §162.09(2). Thus, the only reference to interest in Fla. Stat. § 162.09 is in conjunction with a lawsuit to foreclose the lien or to seek a money judgment as set forth in Fla. Stat. § 162.09(3).

21. The County's Ordinance regarding code enforcement, Article 10 of the ULDC, is set up in the same manner as Fla. Stat. § 162.09. Section 3 of this ordinance is entitled **Administrative Fines; Costs; Liens**. Subsection A under Section 3 is entitled **Assessing Fines.** Similar to Fla. Stat. §162.09(1)**,** this subsection empowers the Special Master to impose a daily fine and also provides a procedure that allows the County, if necessary, to make all reasonable repairs or take other corrective action required to bring the property into compliance, and to charge the violator with the reasonable cost of the repairs or other corrective action. Subsection 3(C) establishes the amount of the daily fine allowed and lists the factors that the Special Master may consider in determining the amount of the daily fine. Subsection 3(E) provides that if the lien remains unpaid, the County shall record a lien on the property in question, and on any other real or personal property owned by the code violator. Of significance is that the word interest is

not found in subsections (A)-(E) of the Ordinance. Instead, similar to Fla. Stat. § 162.09(3), it is only Section 3(F), entitled **Foreclosure**, that, after three months, allows the County to foreclose the lien in the same manner as mortgage liens are foreclosed and then indicates, "Such lien shall bear **interest** at the rate allowable by law…." *Id.* (emphasis added). Therefore, the very language of Fla. Stat. § 162.09 and Article 10 of the ULDC does not justify interest charges as an additional penalty for a code enforcement violation, in the absence of a lawsuit to foreclose the lien. To find otherwise would violate well-established principles of statutory construction.

22. In analyzing a statute to determine its meaning and/or the legislative intent, what is most important is the "actual language used in the statute." *Horowitz v. Plantation General Hosp. Limited P'ship*, 959 So. 2d 176, 182 (Fla. 2007); *Borden v. East-European Ins. Co.*, 921 So. 2d 587, 595 (Fla. 2006). The Florida Supreme Court has reaffirmed the "supremacy-of-the text principal" in determining the meaning of a statute. This principal recognizes that "[t]he words of a governing text are of paramount concern, and what they convey, in their context, is what the text means." *Levy v. Levy*, 326 So. 3d 678, 681 (Fla. 2021). Therefore, in analyzing the text of Fla. Stat. § 162.09, it is significant that interest charges are not included in Sections 162.09(1) and (2) and are only referred to in Section 162.09(3), in conjunction with a lawsuit. Certainly, if the Legislature had intended to include interest, in addition to the daily fine and repair costs, the Legislature would not have omitted interest charges from Sections 162.09(1) and (2). *See Cason v. Florida Dept. of Mgmt. Serv*s., 944 So. 2d 306, 315 (Fla. 2006); *Rollins v. Pizzarelli*, 761 So. 2d 294, 298 (Fla. 2000). The omission of interest charges from Fla. Stat. § 162.09, except in conjunction with a lawsuit, indicates the statute's meaning and speaks volumes regarding the Legislature's intent. As this Court has pointed out, "In analyzing a statute, it has been stated time and time again that courts must presume that a legislature says in a statute what

it means and means in a statute what it says." (D.E. 225, p. 4, para. 6 - Order Denying In Part and Granting In Part Partial Summary Judgment, citing *White v. Autozone Investment Corp.,* 345 So. 3d 284, 2022 WL 4087811 at *3 (Fla. 3d DCA Sep. 7, 2022) (unpublished). In *Gabriji, LLC v. Hollywood East, LLC,* 304 So. 3d 346, 351 (Fla. 4th DCA 2020), the appellate court cited the statutory construction canon, "*expressio unius est exclusio alterius,"* which means that "the mention of one thing implies the exclusion of another." Here, the inclusion of "accrued interest" in Section 162.09(3) in conjunction with a lawsuit, and the omission of interest from Sections 162.09(1) and (2) indicate that the Legislature intended to exclude interest charges unless there is a lawsuit. To hold otherwise would contradict these principles. The County's attempt to have the Court rewrite Section 162.09 to include interest charges that are not in conjunction with a foreclosure action must be rejected. As the Florida Supreme Court made clear:

> Moreover, we agree with the overarching principle that judges lack the power "to construe an unambiguous statute in a way which would extend, modify, or limit its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power".

*Horowitz, supra* at 182 (quoting *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984)); *Brown v. State*, 263 So. 3d 48 (Fla. 4th DCA 2018). (*See also* D.E. 225, p.4, para. 6).

23. A case that discusses these same issues is *Stratton v. Sarasota County,* 983 So. 2d 51 (Fla. 2d DCA 2008), which also involved a county's attempt to charge amounts for a code violation that are not authorized by Fla. Stat. § 162.09. In *Stratton*, the county sought to pass through payroll expenses for its code enforcement employees, as an additional charge for the code violation. The court held that Section 162.09 limited the county to the collection of a daily fine and repair costs, and the county had no authority to seek any further amounts not authorized by the statute. *Id*. at 55. It is specifically noteworthy that *Stratton* relied upon Article I, § 18 of

the Florida Constitution, which forbids administrative bodies from imposing any penalties except as provided by law. *Id*. As the court explained:

> Section 162.09(1), Florida Statutes (2004), permits a local code enforcement board to impose fines against a property owner who fails to correct conditions constituting code violations on his or her property. The County may also "make all reasonable repairs which are required to bring the property into compliance and charge the violator with the reasonable cost of the repairs along with the fine imposed pursuant to this section." § 162.09(1). Section 162.09(2)(a) sets forth the permissible per diem fines and permits those fines to be imposed together with "all costs of repairs pursuant to subsection (1)." Section 162.09(2)(b) sets forth the criteria to be used in determining the amount of the fine. **Nothing in these provisions permits the County to directly pass through the payroll expenses for the time spent by its code enforcement employees to an individual property owner in a code enforcement proceeding.**
>
> … However, the County has no authority to impose penalties that are not authorized by law. *See* Art. V, § 1, Fla. Const. (permitting the legislature to create commissions and administrative bodies and grant them quasi- judicial powers); Art. I, § 18, Fla. Const. (forbidding administrative bodies from imposing any penalties except as provided by law); *see also* Op. Att'y Gen. Fla. 2000–53 (2000). **Neither chapter 162 nor any other statute permits the County to directly pass through its payroll expenses for code enforcement employees' time spent on an individual case. Instead, the County is authorized only to impose fines to recoup these costs…**

*Id.* (emphasis added). Similarly, neither Chapter 162 nor any other statute permits the County to include interest charges for code violations, unless the interest charges are in conjunction with a lawsuit.

24. These same principles of statutory construction apply to municipal and county ordinances. See *Lacroix v. Town of Fort Myers Beach, Florida,* 38 F. 4th 941, 948 (11th Cir. 2022) ("Local Ordinances, like all statutes, are subject to traditional rules of statutory interpretation."); *Artistic Ent., Inc. v. City of Warner Robins,* 331 F. 3d 1196, 1206 n.14 (11th Cir. 2003) ("A municipal ordinance is essentially a 'local statute', it is subject to the same rules that govern the construction of the statutes."). Therefore, applying these principles, both Fla. Stat. §

162.09 and Article 10 of the ULDC do not authorize interest charges as a code enforcement penalty when no action to foreclose the lien has been filed, and Class Plaintiffs are entitled to declaratory, injunctive, and monetary relief.

## IV. THE COUNTY HAS NO AUTHORITY TO CHARGE COLLECTION AGENCY FEES FOR CODE VIOLATIONS

25. The County also claims that Class Plaintiffs owe collection agency fees as part of the code violation. The Statement of Account of July 13, 2018, sent to B&B by the County, lists collection agency fees of $22,460.60. The January 31, 2019, Statement of Account sent to B&B lists the amount of collection fees owed as $22,658.51. Ms. Brown testified that B&B's code enforcement lien as it relates to collection agency fees was treated no differently than any other code enforcement lien. (*See* Brown Dep. 7/14/21, pp. 82-83, 132-133). As set forth above as to interest, which arguments are incorporated herein, neither Fla. Stat. § 162.09 nor Article 10 of the ULDC authorizes the County to charge or collect collection agency fees. Instead, the County relies on Fla. Stat. § 938.35 as its legal basis to charge collection agency fees. (*See* Bulkeley Dep. 2/17/22, pp. 50). This same statute, § 938.35, was also included in Assistant County Attorney Shannon Fox's email of March 28, 2019, to B&B's prior counsel, Gary Brandenberg. (*See* Ex. 11).

26. Fla. Stat. § 938.35 is entitled **"Collection of court-related financial obligations."** This statute must be read in conjunction with Fla. Stat. § 938.31 entitled, **"Incorporation by reference,"** which provides that the purpose of Chapter 938 is to **"facilitate uniform imposition and collection of court-costs throughout the state."** *Id.* (emphasis added). Importantly, a code enforcement proceeding is not a court proceeding but is instead an administrative proceeding. *See Saratoga County v. Nat'l City Bank of Cleveland, Ohio*, 902 So. 2d 233, 235 (Fla. 2d DCA 2005) (cited approvingly in *Siegle v. Lee County*, 198 So.3d 773, 777

(Fla. 2d DCA 2016)). Any financial obligation due to a code violation would be an administrative financial obligation unless the County proceeded to obtain a court judgment. This is further supported by Fla. Stat. § 162.09 entitled "**Administrative Fines; Costs of repairs, Liens,**" and Article 10 ULDC, Section 3, entitled "**Administrative Fines; Costs; Liens."** Under the principles of statutory construction, as discussed above, if it were the Legislature's intent to include administrative proceedings and obligations as part of Fla. Stat. §§ 938.31 and 938.35, it would have so stated. These statutes refer only to **court**-related financial obligations. There is no authority to extend or modify the clear statutory language of Sections 938.31 and 938.35 to include administrative, non-court-related financial obligations; to do so would abrogate legislative powers and violate the principles of statutory construction. *See Horowitz*, *supra* at 182; *Brown*, *supra*, at 50.

## V. THE COUNTY'S CALCULATION REGARDING AMOUNTS OF INTEREST AND COLLECTION AGENCY FEES IS IMPROPER

27. Ms. Brown testified that the County calculates the amount of interest by compounding the interest, so that interest is being charged on interest. (*See* Brown Dep. 7/14/21, pp. 107-108 and Brown Dep. 7/15/21, pp. 318-319). There is no Florida statute that justifies compounding interest fees for code violations. Ms. Fox, the Assistant County Attorney, in her email to B&B's prior counsel, Gary Brandenberg, refers to Fla. Stat. § 55.03 to justify the calculation for the amount of interest charges. (*See* Ex. 11). However, neither Fla. Stat. § 55.03 nor any other statute that relates to pre-judgment interest or post-judgment interest allows for compounding this interest. *See Central Bank of the South v. Seppala & AHO Construction Co.*, 658 So. 2d 1248 (Fla. 4th DCA 1995); *Coggan v. Coggan,* 183 So. 2d 839 (Fla. 2d DCA 1966). The only exception is when there is a contractual agreement and the parties have agreed to allow compounding interest. *See Lions v. Wyman,* 658 So. 2d 1104 (Fla. 4th DCA 1995), and *PDGS,*

*Ltd. v. Motwani*, 729 So. 2d 399 (Fla. 4th DCA 1999). Here, the County and Class Plaintiffs have no such contractual agreement.

28. As to collection agency fees, Fla. Stat. § 938.35 only authorizes the County to charge collection agency fees that are actually paid to a collection agent. The statute reads in pertinent part:

> The collection fee, including any reasonable attorney's fee, **paid** to any attorney or **collection agent** retained by the Board of County Commissioners or the governing body of a municipality may be added to the balance owed, in an amount not to exceed 40% of the amount owed at the time the account is referred to the attorney or **agents for collection**.

(Emphasis added).

29. The County's corporate representative confirmed that the only payment to the collection agency regarding B&B's code enforcement lien was in June of 2018 in the amount of $7,146.81. (*See* Brown Dep. 7/14/21, pp. 131-132, 137-138). This is significant, because the first time the County notified B&B that any collection agency fees were incurred was when the County sent B&B the Statement of Account dated July 13, 2018. (*See* Brown Dep. 7/14/21, pp. 124-125). Instead of charging B&B $7,146.81, the amount that the County actually paid a collection agent, the Statement of Account of July 13, 2018 charged B&B collection agency fees of $22,460.60. (*See* Ex. 5). In the Statement of Account dated January 31, 2019, the County charged B&B $22,658.51 for collection agency fees, even though no further collection agency fees were paid to a collection agency by the County. (*See* Ex. 6). The County's corporate representative admitted that the County calculates collection agency fees not based on what the County actually paid, as required by Fla. Stat. § 938.35, but instead charges collection agency fees based on the entire amount of the daily fine of the code enforcement lien, plus all interest charges, as if that amount was paid, and charges this amount to the property owner. (*See* Brown Dep. 7/14/21 pp. 121-123). Therefore, neither the calculation of interest nor collection agency

fees is in accordance with Florida law, thus further entitling the Class Plaintiffs to declaratory, injunctive, and monetary relief.

## VI. BECAUSE THE COUNTY'S WRITTEN POLICY PROHIBITS HEARINGS TO CHALLENGE INTEREST AND COLLECTION AGENCY CHARGES, IT VIOLATES DUE PROCESS

30. It is the County's policy that once a code enforcement lien is referred to OFMB, "[n]o cases will be considered for a modification hearing." (*See* Ex. 8, and Bulkeley Dep. 6/23/21, pp. 276-278, 285-286). It is also the County's policy and practice that no code enforcement lien is referred to a collection agency unless and until the code enforcement lien is first referred to OFMB. (*See* Brown Dep. 7/14/21, pp. 184, 207-208). These policies and practices are regularly enforced by the County, and the only exception would be rare cases where the Planning, Zoning, & Building Department finds an error which would cause the lien to be recalled. (*See* Brown Dep. 7/14/21, p. 192). Therefore, since only OFMB can refer a code enforcement lien to a collection agency, and since the County's policies prohibit any modification hearings, once the lien is referred to OFMB, there is no opportunity for a property owner to contest collection agency fees before an impartial magistrate. (*See* Ex. 8 and Brown Dep. 7/14/21 pp. 184, 207-208, 221).

31. In B&B's case, its code enforcement lien was referred to OFMB on November 21, 2007 (*See* Ex. 7, case note entry 11/21/07). The County's corporate representative admitted that the first and only time that the County paid any collection agency fees was in June of 2018, and first notified B&B in July of 2018, that collection agency fees were owed.

32. Since the County had previously referred the code enforcement lien to OFMB, B&B had no opportunity under the County's policy to request a modification hearing to challenge these improper collection agency charges. (*See* Ex. 8 and Brown Dep. 7/14/21, pp. 124-125, 137-138).

33. This same lack of due process also affects the Class Plaintiffs' right to challenge the unauthorized interest charges. As discussed above, it was the County's custom and practice to ignore the requirements of Fla. Stat. § 162.09(3) and Section 3(F), Article 10 of the ULDC, and to charge interest as part of the code enforcement penalty, even when no lawsuit to foreclose the lien was filed. Similar to collection agency fees, the County first notifies a code violator that interest is being charged, without there being a lawsuit, only after the lien has been referred to OFMB. (*See* Brown Dep. 7/14/21 pp. 184, 207-208). This is because the sole method of notifying a code violator as to the actual charges that make up the code enforcement lien, including interest and collection agency fees, is by sending the code violator a Statement of Account. (*See* Brown Dep. 7/14/21, pp. 46-47). The County has admitted that these statements of account are prepared by OFMB, either by an OFMB collection coordinator or by an OFMB analyst. (*See* Brown Dep. 7/14/21, p. 45). The County confirmed that the first time it has a record that it sent B&B a Statement of Account which indicated that interest was being charged without an ongoing foreclosure action was on July 13, 2018. (*See* Brown Dep. 7/14/21, p. 45). This is when Glenn Meeder, a collection coordinator employed by the County's OFMB, sent an email to B&B's counsel, Ellie Halperin, enclosing the Statement of Account with the amounts of the interest and collection agency fees which the County claimed that B&B owed as part of its code enforcement lien. (*See* Ex. 9 and Ex. 5). Since the County has acknowledged that B&B's code enforcement lien was treated no differently than any other code enforcement lien, the same notification through a Statement of Account would only be prepared and sent to a code violator after the lien had been referred to OFMB, at which time the County's written policy and standard practice prohibits modification hearings. (*See* Ex. 8 and Brown Dep. 7/14/21, pp. 82-83, 132-133). This policy and practice violates the property owner's due process rights, under

the Fourteenth Amendment to the United States Constitution, to challenge the unauthorized interest charges.

34. The Fourteenth Amendment guarantees due process of law, and 42 U.S.C. § 1983 provides a remedy when there has been a deprivation of due process of law. Here, the County has acted under the color of state and county law, and its policy, practice, and custom have deprived the Class Plaintiffs of their property without due process of law. Procedural due process imposes constraints on governmental decisions that deprive individuals of their property interests. *County of Pasco v. Riehl,* 620 So. 2d 229, 231 (Fla. 2d DCA 1993). Procedural due process serves as a vehicle to ensure fair treatment through the proper administration of justice where substantive rights are at issue. *Keys Citizens for Responsible Gov't, Inc. v. Fla. Keys Aqueduct Auth.,* 795 So. 2d 940, 948 (Fla. 2001). Procedural due process requires both fair notice and a real opportunity to be heard "at a meaningful time and in a meaningful manner." *Id*. (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976)).

35. "The right to prior notice and a hearing is central to the Constitution's command of due process." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993). The right to prior notice and a hearing is referred to as pre-deprivation process. *Id.* Post-deprivation process, which is notice and a hearing after the deprivation, is only allowed in "extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972). The County has identified no extraordinary situation here. Further, any exceptions to the requirements of a pre-deprivation notice and hearing, such as those recognized in *Parratt v. Taylor*, 451 U.S. 527 (1981),[3] and *Hudson v. Palmer*, 458 U.S. 517 (1984), are "narrow." *Plumer v. State of Maryland*, 915 F.2d

[3] Overruled on other grounds by *Daniels v. Williams,* 474 U.S. 327 (1986).

927, 929 (4th Cir. 1990) (citing *Zinermon v. Burch*, 494 U.S. 113 (1990)); *Simpson v. Brown*, 860 F.3d 1001, 1011 (7th Cir. 2017). By referring all code enforcement liens to OFMB before the liens are sent to a collection agency, and then prohibiting any opportunity for a hearing before an impartial magistrate, the County has eliminated the due process rights of affected property owners to contest these unauthorized collection agency charges. At no time would an affected property owner learn of any collection agency fee charges until after the code enforcement lien was referred to OFMB. Similarly, as to interest, the County's policy prohibiting any hearings before an impartial magistrate, after referral to OFMB, to challenge the unauthorized interest charges, violates the property owner's due process rights under the Fourteenth Amendment, for which Section 1983 provides appropriate remedies.

## VII. BECAUSE THE INTEREST AND COLLECTION AGENCY FEES ARE TETHERED TO THE CODE ENFORCEMENT FINES, AND ARE NOT AUTHORIZED BY LAW, THEY ARE THEREFORE SUBJECT TO THE EXCESSIVE FINES CLAUSE AND *PER SE* VIOLATE THE EIGHTH AMENDMENT

36. "We expect that … government officials... [will] follow the law." *Bialek v. Mukasey*, 529 F.3d 1267, 1274 (10th Cir. 2008). This case, and particularly this Eighth Amendment issue, involves what Chief Justice Marshall called "a proposition too plain to be contested," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803), namely that interest and collection agency fees that are tethered to the code enforcement fines, and are not authorized by law, are subject to the Excessive Fines Clause and constitute a *per se* violation of the Eighth Amendment.

37. The Eighth Amendment provides that: "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., amdt. 8. The Supreme Court has held that "[t]he Excessive Fines Clause limits the government's power to

extract payments, whether in cash or in kind, as punishment for some offense." *Austin v. United States*, 509 U.S. 602, 609–10 (1993) (internal quotation marks omitted).

38. That is because the object of the Eighth Amendment is "to prevent the government from abusing its power to punish." *Id*. at 607. The Eighth Amendment's protections extend beyond government monetary exactions related to criminal proceedings. *Id.* at 607-08. In *Robson 200, LLC v. City of Lakeland, Florida*, 593 F. Supp. 3d 1110, 1119 (M.D. Fla. 2022), which involved a code enforcement fine, the court acknowledged that the Excessive Fines Clause of the Eighth Amendment applies to code enforcement penalties.

39. Furthermore, these interest and collection agency fees not authorized by law, when added to the daily fine, are excessive *per se*. *See Johnson v. Becerra*, 674 F. Supp. 3d 949, 958 (D. Mont. 2023) ("The formula's multiplier and interest provisions [for breach of contract] suggest an attempt to exact a higher cost on the breaching participant"). Similarly, interest charges and collection agency fees not authorized by law exact a higher cost on the property owner and therefore violate the Excessive Fines Clause of the Eighth Amendment.

40. This principle was recently applied in *Beatty v. Gilman*, No. 3:22-CV-00380 (JAM), 2024 WL 808552 (D. Conn. Feb. 27, 2024). In *Beatty,* two of the plaintiffs - who were released from incarceration and who were required to reimburse the state for the cost of their confinement - alleged that the defendants were violating the Eighth Amendment Excessive Fines Clause by seeking to make the plaintiffs pay more for their costs of imprisonment than what the state's pay-to-stay law permits. The plaintiff Beatty claimed that the defendants overcharged her during the years 2000 and 2001, assessing daily rates of $123 and $122 rather than the correct rates of $99 and $96. Another plaintiff, Johnson, alleged that the defendants were seeking to impose on him the full costs of his imprisonment without crediting him, as the law requires, with a previous

payment towards his cost of imprisonment that was made from his mother's estate. *Id.* at *16.

41. The district court held in *Beatty* that both plaintiffs had "alleged facts to plausibly suggest that the defendants seek to enforce a fine against them that exceeds the amount that the defendants are allowed to impose under Connecticut's pay-to-stay law" and thus had "plausibly alleged a violation of the Excessive Fines Clause." *Id.* at *17. In so holding, the court reasoned as follows:

> To be sure, a violation of state law does not automatically mean that there has been a violation of the federal constitution. *See Torcivia v. Suffolk Cnty., New York*, 17 F.4th 342, 368 (2d Cir. 2021). But the Eighth Amendment does not allow the government to impose punishment that is more than the maximum sentence established by an authorizing statute. "'A sentence that exceeds the statutory maximum has traditionally been viewed as a violation of the [E]ighth [A]mendment's prohibition against cruel and unusual punishment.'" *Ford v. Moore*, 296 F.3d 1035, 1037 n.6 (11th Cir. 2002) …. **What is true for the Cruel and Unusual Punishments Clause is also true for the Excessive Fines Clause.** Both clauses "place 'parallel limitations' on 'the power of those entrusted with the criminal-law function of government.'" *Timbs v. Indiana*, —— U.S. ——, 139 S. Ct. 682, 687, 203 L.Ed.2d 11 (2019) (quoting *Browning-Ferris*, 492 U.S. at 263, 109 S.Ct. 2909). And the Supreme Court has explicitly imported the standard of "gross disproportionality" from the Cruel and Unusual Punishments Clause into the Excessive Fines Clause. *See Bajakajian*, 524 U.S. at 336.
>
> …**But when the government seeks to punish by extracting payment of a fine greater than what is allowed by the statute that authorizes the government to impose the fine, then the government has no legitimate penological justification for its action. And "[a] sentence lacking any legitimate penological justification is by its nature disproportionate to the offense.**" *See Graham v. Florida*, 560 U.S. 48, 71, 130 S. Ct. 2011.

Particularly, in this case, the County was authorized to charge $50,600.00 as the total daily fine amount but was not authorized to seek in excess of $90,000.00 in interest and collection agency fees, not authorized by law. The result is a violation of the Eighth Amendment's Excessive Fines Clause.

42. This conclusion is bolstered by the Eleventh Circuit's decisions in *Ficken v. City of Dunedin, Fla.*, No. 21-11773, 2022 WL 2734429 (11th Cir. July 14, 2022), and *Moustakis v. City*

*of Ft. Lauderdale*, 338 F. App'x 820, 821 (11th Cir. 2009). *See Ficken*, at *3-*4 (recognizing that a "fine that falls within the range authorized by the legislature enjoys a 'strong presumption of constitutionality.'" (quoting *United States v. Chaplin's, Inc.,* 646 F.3d 846, 852 (11th Cir. 2011), and holding that because "Florida law permits a $500-per-day fine for repeat violations of municipal ordinances, *see* FLA. STAT. § 162.09(2)(a), … Ficken's fine is 'almost certainly ... not excessive'"; *Moustakis,* at 821 (there "is a strong presumption that the amount of a fine is not unconstitutionally excessive if it lies within the range of fines prescribed by the legislature") (quoting *United States v. Bajakajian*, 524 U.S. 321, 326 (1998)). If a statute enjoys a strong presumption of constitutionality where the fine falls within the range authorized by the legislature, then such statute should be presumed unconstitutional (unconstitutional *per se*, or facially unconstitutional) and the fine deemed to be unconstitutionally excessive, where the fine is not authorized by the legislature.

## VIII. THE COUNTY'S REFUSAL TO STIPULATE THAT IT WILL NO LONGER SEEK INTEREST AND COLLECTION FEES FROM CODE VIOLATORS

43. On April 22, 2024, the County responded to Class Plaintiff's interrogatories and disclosed that on or about January 27, 2023, the County had decided that it would no longer seek interest charges and collection costs on code violations. (*See* D.E. 292, Interrogatory response #1). The County never notified the class, class counsel, the trial court, or the appellate court (the matter was on appeal from January 2023 through August of 2023) until December 6, 2023, when class counsel received a letter from the County's outside attorney. (*See* Ex. 12). Class Plaintiffs then followed with certain targeted interrogatories. (D.E. 289). The responses to the interrogatories reveal that even though the County claims that it no longer seeks interest and collection agency fees, the County refuses to enter into a Stipulation or agree to the entry of a Court Order that it will not seek interest or collection costs from any class member, or any

property owner with a code enforcement lien, currently recorded against their property, whether recorded prior to or after October 31, 2023, **"pending the outcome of this lawsuit."** (emphasis added). (*See* D.E. 292, Interrogatory responses #4 and #5). Additionally, the County has refused to enter into a Stipulation or agree to a Court Order that the property owners with code enforcement liens recorded against their properties, listed on the Excel spreadsheet provided by Palm Beach County to Class Plaintiffs pursuant to the Court's Order of January 29, 2024, do not have to pay interest or collection costs as part of a code enforcement violation penalty, "**pending the outcome of this lawsuit**." (emphasis added). (*See* D.E. 292, Interrogatory response #7). The County also refuses entry of an injunction order prohibiting the County from charging interest and collection fees on code enforcement liens, without first filing a foreclosure lawsuit. (*See* D.E 292, Interrogatory response #10). Finally, the County will not agree to reimburse class members who have paid the County improper and unauthorized interest and/or collection costs. (*See* D.E. 292, Interrogatory response #13). Therefore, the County's responses to Class Plaintiffs' interrogatories make it clear that a determination of the issues herein must proceed.

## IX. THE COUNTY'S AFFIRMATIVE DEFENSES ARE NOT SUPPORTED BY LAW OR THE EVIDENCE IN THE RECORD

### A. STATUTE OF LIMITATIONS

44. The County's First Affirmative Defense is that the statute of limitations bars the Class Plaintiffs' procedural due process claim. (D.E. 193, p. 12). As discussed above, the County has the burden of establishing its defenses legally and factually. The statute of limitations governing claims brought pursuant to 42 U.S.C. § 1983 is four years. *See Burton v. City of Belle Glade*, 178 F.3d 1175, 1188 (11th Cir. 1999). The statute of limitations for § 1983 actions begins to run when "the facts which would support a cause of action are apparent or should be apparent to a person with reasonable prudent regard for his rights." *Foudy v. Indian River County Sheriff's*

*Office*, 845 F.3d 117, 1122–1123 (11th Cir. 2017); *Rozar v. Mullis*, 85 F.3d 556, 561, 562 (11th Cir. 1996). Further, the United States Supreme Court has held that § 1983 claims accrue "when [the plaintiff] has 'a complete and present cause of action.'" *Wallace v. Kato*, 549 U.S. 384, 388 (2007).

45. The County previously claimed in its Motion to Dismiss (D.E. 175) that the statute of limitations began to run on March 7, 2007, relying on the language in the Order Imposing Fine/Lien (Ex. 2) relating to collection fees, which states:

> **NOTE:** IF THIS LIEN IS NOT SATISFIED WITHIN 90 DAYS OF THE DATE THE LIEN IS RECORDED, IT WILL BE REFERRED TO THE OFFICE OF FINANCIAL MANAGEMENT FOR REFERRAL TO A COLLECTION AGENCY. NO MODIFICATION REQUESTS WILL BE ACCEPTED AND YOU WILL BE RESPONSIBLE **FOR ANY COLLECTION FEES INCURRED BY THE COUNTY.**

(emphasis added).

46. Since B&B filed its class action complaint on July 3, 2019 (D.E. 2), the County therefore claims that Class Plaintiffs' procedural due process claim is barred. However, the undisputed facts negate this affirmative defense. These facts indicate the following:

a. On May 25, 2018, the County received $44,761.60 from a tax deed sale on B&B's cross attached property located at 583 105th Avenue N., Unit 8, RFB (72-41-43-36-10-000-80). (Exhibit 7, case note entry of May 30, 2018).

b. In June of 2018, the County paid $7,146.81 to a collection agent for collection agency fees (*See* Exhibit 7, case note entry of June 12, 2018, and Brown Dep. 7/14/21, p. 120).

c. The County's corporate representative, Sherry Brown, Director of OFMB, testified that the County only incurred collection agency fees in May of 2018, when the County received proceeds from the tax deed sale on property owned by B&B. (*See* Brown Dep., 7/14/2021, pp. 120 and 123).

d. The first time the County informed B&B that it owed any collection agency fees, which it claimed was in the amount of $22,460.60, was when the County sent B&B's counsel the Statement of Account dated July 13, 2018. (*See* Exhibit 5 and Brown Dep. 7/14/2021 pp. 124-125).

47. Therefore, it was not until May of 2018 that the County "incurred any collection fees" for which B&B would be responsible. Equally if not more important for statute of limitations purposes, it was not until July 13, 2018, that the County first informed B&B that it owed any collection fees. Since B&B filed its class action complaint in July of 2019, there is no statute of limitations issue.

48. The County first paid collection agency fees in June of 2018, when it paid the collection agent $7,146.81 (*See* Ex. 7, case note entry of June 12, 2018, and Brown Dep. 7/14/2021, pp. 131-132). Putting aside that the County has no authority under Fla. Stat. § 938.35 to charge any collection agency fees for code enforcement violations unrelated to a "court" obligation, the key factual question for statute of limitations purposes regarding the procedural due process claim is when did the County pay any collection agency fees and then notify B&B that it owed the County for any such payments? Only then would B&B have a "complete and present cause of action." *See Wallace v. Kato,* 549 So. 2d at 388. That is why the statute of limitations would not begin to run until July 13, 2018, negating any statute of limitations defense. Additionally, it would also not have been known to B&B until July 13, 2018, that the County was charging B&B $22,658.51 for collection agency fees, when it only paid $7,146.81 to a collection agent, thus charging B&B more than three times what the County actually paid. (*See* Exhibit 5, Exhibit 7, and Brown Dep. 7/14/2021 pp. 129-132).

49. Similarly, the undisputed facts also show that the statute of limitations regarding improper interest charges would not begin to run until July 13, 2018. This is when the County first notified B&B, through the Statement of Account, that it owed interest charges of $67,548.27, even though no lawsuit to foreclose the code enforcement lien had been filed. (*See* Exhibit 5 and Brown Dep. 7/14/2021, pp. 45 and 76).

50. The County previously relied on language in the Order Imposing Fine/Lien dated March 7, 2007, which states, "This amount shall accrue interest at the rate allowed by law," and argues that this language should have put B&B on notice that interest was being charged. (*See* Ex. 2). However, as fully discussed above, Fla. Stat. § 162.09(3) only allows interest in conjunction with a foreclosure action or a money judgment, and the County's ordinance, Section 3(F) of Article 10 of the ULDC, further limits interest charges to a foreclosure action. As of July 13, 2018, there was no lawsuit to foreclose on the lien. (*See* Brown Dep. 7/14/2021, p. 76). Therefore, until B&B was notified on July 13, 2018, that the County was charging B&B interest of $67,548.27, it would not have been "apparent" to B&B that the County was not complying with the lawsuit requirements of Fla. Stat. § 162.09(3) and Section 3(F), Article 10 of the ULDC. In the Court's Order Denying the County's Motion to Dismiss on these same grounds, the Court made the following observation.

> The County's argument requires B&B to assume that the County would seek to collect accrued interest and ignore, as B&B alleges, the lawsuit requirements mandated by Fla. Stat. §162.09(3) and the code enforcement ordinance and expect that the County would improperly compound interest.
>
> However, as alleged, the **statute of limitations may not begin to run until the facts which support a cause of action are apparent and complete and is not based on what a party should or should not assume**. *See Bialek v. Mukasey*, 529 F.3d 1267, 1274 (10th Cir. 2008) **("We expect that…government officials…[will] follow the law.")** …"

(D.E. 192 at 5-6) (emphasis added).

51. Also of importance is the language in the Order Imposing Fine/Lien which states: "After three months from the filing of the lien, the County is authorized to foreclose the lien or pursue any other collection actions that the County deems appropriate." (*See* Ex. 2). This "authorization" is reflected in Fla. Stat. § 162.09(3) and Section 3(F) of Article 10 of the ULDC, which "authorizes" the County to foreclose the lien in order to obtain the amount of the lien, "plus accrued interest." Thus, until the County notified B&B on July 13, 2018, that it was seeking interest charges without filing a lawsuit to foreclose the lien, it would not have been "apparent and complete" for the statute of limitations to begin to run on Class Plaintiffs' Section 1983 claim. Finally, B&B would not have known that the County was compounding interest until, at the earliest, when it received the Statement of Account of July 13, 2018, or until Ms. Brown admitted such in her deposition in July of 2021. (*See* Brown Dep. 7/14/2021 at pp. 107-108 and 7/15/2021 at pp. 318-319). Since B&B filed its original class action complaint alleging a Section 1983 claim in July of 2019, there is no statute of limitations defense.[4] (D.E. 2).

**B. OTHER AFFIRMATIVE DEFENSES**

52. The County's Second Affirmative Defense is that B&B's failure to appeal the final administrative order to the Florida Circuit Court bars B&B's due process claim because there was an adequate state court remedy. (D.E. 193, pp. 12-13). However, Fla. Stat. § 162.11 only allows for a limited appeal. The statute reads:

[4] The County's statute of limitations affirmative defense only refers to Class Plaintiffs' procedural due process claim and not their claim for declaratory judgment. If somehow the County claims that it has raised a statute of limitations defense to the declaratory action claim, the Class Plaintiffs would state that the undisputed facts discussed above would also apply to the declaratory judgment claim. A declaratory judgment is only permissible when a party can show a real, actual, and bona fide injury that needs to be presently resolved between adverse parties. *See Riverside Avenue Property, LLC v. 1661 Riverside Condominium Association, Inc.*, 325 So. 3d 997, 1000 (Fla. 1st DCA 2021). The mere possibility of damages for a legal injury is not sufficient for a declaratory judgment action. *See Apthorp v. Detzner*, 162 So. 3d 236, 240-241 (Fla. 1st DCA 2015). As discussed above, there was no real, actual, or legal injury until May of 2018, or June of 2018, or most likely July of 2018, when the County incurred these improper charges, or paid the charges, or first notified B&B that these charges were owed without the filing of a lawsuit, respectively.

> **162.11 Appeals –** An aggrieved party, including the local governing body, may appeal a final administrative order of an enforcement board to the circuit court. Such an appeal shall not be a hearing de novo but shall **be limited to appellate review of the record created before the enforcement board.** An appeal shall be filed within thirty (30) days of the execution of the order to be appealed.

(emphasis added).

53. Here, the undisputed facts are that the Class Plaintiffs are not challenging the record before the special master, or the code violation, or the imposition of the daily fine, or the amount of the fine. (*See* Third Amended Complaint (D.E. 172) and testimony of O'Neal Bates, Amended Motion for Class Certification Hearing, 8/23/22, Transcript, p. 122). Moreover, it is undisputed that B&B offered to pay the County $5,904.20, which was the remaining portion of the total daily fine of $50,600.00. (*See* Ex. 10, letter from Gary Brandenberg dated 3/25/2019, and Ex. 11, email response from Shannon Fox to Gary Brandenberg dated 3/28/2019). This amount was calculated by subtracting the proceeds of $44,761.60 that the County received from a tax deed sale of B&B's cross-attached property, and then adding to that the County's recording costs of $65.80. (*See* Exs. 5 and 6). However, the County did not accept this offer when Assistant County Attorney Shannon Fox responded to B&B's counsel as follows:

> As to your offer to pay the $5,904.20 to dispose of your client's lien, the County cannot accept that offer as we feel **the interest has been properly imposed on this lien.**

(*See* Ex. 11, email dated 3/28/2019 from Shannon Fox to Gary Brandenberg) (emphasis added).

54. Therefore, since the Class Plaintiffs are not contesting the record on appeal or the violation or the amount of the daily fine, there would have been no basis to file an appeal pursuant to Fla. Stat. § 162.11. The administrative order did not provide notice that the County had incurred or paid any collection fees or provide notice that B&B was being charged interest and collection agency fees without the County first filing a lawsuit. Nor did the administrative order include any

amount of interest or collection costs owed by B&B. Thus, there was nothing for B&B to appeal or challenge until it became apparent that the County was charging interest and collection agency fees not authorized by law. As the Court noted in its denial of the County's Motion to Dismiss the Third Amended Complaint:

> … The County cites no cases where the Plaintiff was *not* challenging the record below or the amount of the daily fine. Here, B&B alleges and argues that it makes no challenge to the record below or the amount of the fine, and challenges, only the imposition of interest charges and collection agency fees not authorized by law.

(D.E. 192 at 6).

55. The County's Third Affirmative Defense asserts that because there was no appeal of the original Order imposing the fine, the Court lacks subject matter jurisdiction. (D.E. 193, p. 13). For the very same reasons why an appeal was not appropriate or permissible under Fla. Stat. § 162.11, and due to the undisputed facts cited above, this affirmative defense is not supported by the facts and is insufficient as a matter of law.

56. In its Fourth and Fifth Affirmative Defenses, the County claims that B&B was provided "the paradigm of due process" and thus its due process claim fails. (*See* D.E. 193, p.14). In both of these defenses, the County refers to B&B's rights during the hearing before the Special Master. Plaintiffs agree that due process was provided at the initial hearing. However, the County ignores the undisputed facts that there was no interest or collection agency fees lawfully incurred at the time of the administrative hearing, and no amounts of these charges were included in the administrative order. It is also undisputed that when the County did notify B&B that it was charging collection agency fees and interest, without having initiated a lawsuit, the County's written policy prohibited a hearing before an impartial magistrate to challenge these charges. (*See* Ex. 8).

57. The Sixth Affirmative Defense claims that B&B has not alleged a "liberty interest" (D.E. 193, pp. 15). B&B has never alleged or sought relief for denial of any "liberty interest." Rather, B&B has alleged a deprivation of property rights. *See* Third Amended Complaint attached to Motion for Leave to File Third Amend Complaint (D.E. 172) and the Court's Order Granting Motion for Leave to File Third Amended Complaint (D.E. 183). The Supreme Court has long held that "temporary or partial impairments to property rights [such as] liens … and similar encumbrances … are sufficient to merit due process protection." *Connecticut v. Doehr*, 501 U.S. 1, 12 (1991).

58. The Seventh Affirmative Defense claims that the Eighth Amendment fails to state a cause of action because the claim is a collateral attack on a code enforcement order. (D.E. 193, pp. 15-16). This is simply not so. The undisputed facts show that B&B is not challenging either the imposition or the amount of the daily fine, and that B&B offered to pay the County the remaining balance due of the $50,600.00 total daily fine amount imposed by the Special Magistrate plus recording costs, but the County refused to accept the offer because it did not include interest charges. (*See* Ex. 11). The County has relied previously on *Innova Investment Group, LLC v. Village of Key Biscayne*, No. 1:19-CV-22540, 2020 WL 6781821, at *2 (S.D. Fla. Nov. 18, 2020), where the plaintiff challenged "the fine imposed against the property and alleges that the daily rate of the fine is excessive…." Here, Plaintiffs make no such challenge. Class Plaintiffs do not challenge the imposition of the lien or the fine imposed by the Special Magistrate. This claim solely deals with the County's imposition of interest and collection agency fees in the absence of a lawsuit.

59. The Eighth Affirmative Defense asserts that Plaintiffs' Eighth Amendment claims are time-barred. (*See* D.E. 193, p. 16). For the reasons discussed above (*see* points and authorities as to County's First Affirmative Defense, *supra*), this defense has no merit.

60. The Ninth Affirmative Defense claims that "neither interest nor collections costs are 'fines' subject to the Eighth Amendment" and further asserts that "Florida law rejects the concept of prejudgment interest is [sic] a penalty." (citations omitted) (D.E. 193, p. 17). Here, this case does not involved "prejudgment interest" since there are no judgments. Further, as previously discussed, the code enforcement fine is considered a civil penalty, and since interest and collection agency fees are not authorized by law, when added to the daily code enforcement fine, they are subject to the Eighth Amendment. *See* discussion at paragraphs 37 to 42 *supra.*

61. The Supreme Court in *Austin,* 509 U.S. at 610, announced a test for identifying an Eighth Amendment "fine" subject to the Eighth Amendment that is both simple and broad. Under *Austin*, because "'[t]he notion of punishment ... cuts across the division between the civil and the criminal law,'" a monetary sanction that cannot "'fairly be said solely to serve a remedial purpose'" will be subject to scrutiny as an Eighth Amendment fine if it "can only be explained as serving in part to punish." *Id*. Because "sanctions frequently serve more than one purpose" and "civil proceedings may advance punitive as well as remedial goals," the fact that a "forfeiture serves remedial purposes" will not exclude it from the Excessive Fine Clause's purview. *Id*. (citing *U.S. v. Halper*, 490 U.S. 435, 448 (1989)). "[A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." *Id*. *See also Paroline v. U.S*., 572 U.S. 434, 456 (2014) ("The primary goal of restitution is remedial or compensatory, but it also serves punitive purposes[.]… That may be "sufficient to bring [it] within the purview of the Excessive Fines Clause…") (citations omitted)). Here, Fla. Stat. § 162.02 clearly indicates that the intent of Sections 162.01-162.13 is to create administrative boards with authority to impose administrative fines, which are "**non-criminal penalties**." (emphasis added).

62. Since the unauthorized interest and collection agency fees are improperly sought, and are tethered to the code enforcement fines, they are subject to the Excessive Fines Clause. *See Pimentel v. City of Los Angeles*, 974 F.3d 917, 925 (9th Cir. 2020) (remanding to determine whether late payment penalty of $63 tethered to a parking fine "is grossly disproportional to the offense of failing to pay the initial fine within 21 days"). If a late fee of $63 for a parking fine could result in a violation of the Eighth Amendment, then unauthorized interest and collection agency fees that make up over $90,000 of a $95,000 balance due under the code enforcement lien would constitute an Eighth Amendment violation. This is especially true since the County has also unlawfully compounded interest and charged three times the amount of collection agency fees that it actually paid to the collection agent in violation of Florida law.

63. The Tenth Affirmative asserts that even if interest and collections costs were subject to the Eighth Amendment, their statutory authorization and proportionality preclude Plaintiffs from judgment on their excessive fines claim. (D.E. 193, pp. 17-18). However, interest and collection fees charged by the County without the initiation of a lawsuit are not statutorily authorized, and the attempts to collect and the collections thereon are improper, illegal, and render the fines excessive under the Eighth and Fourteenth Amendments to the United States Constitution. (*See Beatty v. Gilman* at *16-*17). In other words, because there has been no range prescribed by the Florida legislature beyond zero, charging interest and collection fees without the filing of a lawsuit is excessive under the Eighth and Fourteenth Amendments to the United States Constitution, and the County's proportionality argument is therefore inapplicable. *Id.*

64. In its Eleventh Affirmative Defense, the County claims that "B&B has no standing to seek monetary damages because B&B has not paid any interest or collection costs nor suffered any damages." (D.E. 193, p. 21). This is simply inaccurate. It is undisputed that on May 25, 2018,

the County received $44,761.60 paid by B&B pursuant to a tax deed sale of property owned by B&B. (*See* Exs. 5 and 6). In the County's own case notes, dealing with B&B's code enforcement lien, there is a 5/30/18 entry which indicates that $44,761.60 was paid to OFMB pursuant to a tax deed surplus distribution from Tax Deed sale of cross-attached property, located at 583 105th Avenue N., Unit 8, RPB (72-41-43-36-10-000-0080). (*See* case notes Ex. 7, entry 5/30/18). These same case notes have an entry of 6/12/18, which indicates that the County applied $7,146.81 to collection agency fees, $65.80 to a CE document recording fee, and $37,548.99 to the fine/lien. This amount totals $44,761.60. *Id*. (*See* case note entry 6/12/18). Further, the County's corporate representative confirmed that the amount of collection agency fees that were paid by the County was $7,146.00. (*See* Brown Dep. 7/14/21 at 120). Therefore, B&B has standing because the County wrongfully allocated tax deed sale proceeds paid by B&B to collection agency fees, rather than the daily fine, resulting in the County claiming that B&B owed more to the County than what B&B actually owed.

65. It is undisputed that when the County notified B&B in July of 2018 that, to release the lien, B&B not only had to pay the daily fine but that it owed significant amounts of interest and collection agency fees that would also have to be paid. (*See* Exhibits 5, 9 and 11). Thus, B&B has standing, because the County's code enforcement lien seeking interest and collection agency fees, to which the County is not entitled, encumbers B&B's real and personal property. This lien, like any encumbrance on one's property, creates a real legal injury because of the effect it has on the ability to sell, transfer, or refinance these properties.

66. Finally, the Twelfth Affirmative Defense asserts that refunds are not appropriate for procedural due process violations. (D.E. 193, p. 22). The case upon which the County relies, *City of Hollywood v. Miller,* 471 So. 2d 655 (Fla. 4th DCA 1985), is not a § 1983 case. Furthermore,

this affirmative defense fails as a matter of law, since a party who demonstrates the violation of a federally protected right, which causes actual injury, may recover compensatory damages under § 1983. *See Carey v. Piphus,* 435 U.S. 247, 253 (1978). Here, B&B seeks damages under § 1983 and based on violations of the due process clause of the Fourteenth Amendment to the United States Constitution.

## X. CONCLUSION

This Motion for Partial Summary Judgment centers on the Court's interpretation of certain Florida statutes and County ordinances, which are purely legal matters. *City of Miami Beach v. Nichols*, 314 So. 3d 313, 315 (Fla. 3d DCA 2020). As discussed above, there are well established principles of statutory construction, along with a body of case law, which provide guidance to the Court in determining the penalties that the County can and cannot seek in its enforcement of code violations. Those principles and cases clearly indicate as a matter of law that the County is not authorized to collect or charge interest and collection agency fees without a lawsuit to foreclose its code enforcement lien. These improper charges violate Fla. Stat. §§ 162.09, 938.31, 938.35, and the County's ordinance Article 10 of the ULDC. Additionally, these unauthorized charges violate the Excessive Fines Clause of the Eighth and Fourteenth Amendments to the United States Constitution. Further, the County's written policy and procedure, which effectively prohibits a property owner from challenging these improper and unauthorized interest and collection agency charges before an impartial magistrate, violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

The County has now apparently reversed course and changed its long-standing policy, so that it currently no longer charges or collects interest or collection fees as part of its code enforcement penalty. The County's decision to change its conduct, on or about January 27, 2023,

came about only after the Fourth DCA affirmed the Court's class certification order. (*See Palm Beach County v. B & B Properties, Inc*., 370 So. 3d 655 (Fla. 4th DCA 2023)*; see also Mandate* D.E. 259). However, the County refuses to enter into an appropriate stipulation or court order prohibiting it from collecting or charging interest or collection agency fees absent a foreclosure action. Further, the County will not agree to reimburse those property owners who have already paid the County these unauthorized and improper charges. Instead, the County claims that it will only do so "**pending the outcome of this lawsuit**" (emphasis added), and therefore, the Court, for all of the reasons stated above, should grant this Motion for Partial Summary Judgment.

WHEREFORE, B&B and the Class Plaintiffs respectfully request that the Court grant this Motion for Partial Summary Judgment, and grant the Injunctive Relief prayed for in Count I of the Third Amended Complaint, and Declaratory and Injunctive Relief prayed for in Counts II, III, and IV. With regard to monetary relief, Plaintiffs request that the Court reserve ruling subject to further proceedings in this action and also reserve ruling on the entitlement and amount of attorney's fees and costs.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via the E-Filing Portal to all individuals on the attached Service List, this 21st day of May 2024.

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***B. & B. Properties v Palm Beach County***
**Case No: 502019CA008660XXXXMB AA**

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