**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF FLORIDA**
**TAMPA DIVISION**

JAMES FICKEN, trustee,
SUNCOAST FIRST TRUST; and
SUNCOAST FIRST TRUST,

Plaintiffs,

vs.

Case No.: 8:19-cv-01210
State Court Case No.: 19-003181-CI

CITY OF DUNEDIN, FLORIDA;
DUNEDIN CODE ENFORCEMENT BOARD;
MICHAEL BOWMAN, in his official capacity as Code Enforcement Board Chairman; LOWELL SUPLICKI, in his official capacity as Code Enforcement Board Vice-Chair; ARLENE GRAHAM, in her official capacity as a member of the Code Enforcement Board; KEN CARSON, in his official capacity as a member of the Code Enforcement Board; WILLIAM MOTLEY, in his official capacity as a member of the Code Enforcement Board; DAVE PAULEY, in his official capacity as a member of the Code Enforcement Board; and BUNNY DUTTON, in her official capacity as a member of the Code Enforcement Board,

Defendants.
_____________________________________________/

# PLAINTIFFS' DISPOSITIVE MOTION FOR SUMMARY JUDGMENT AND INCORPORATED MEMORANDUM OF LAW

Q: *Point blank. Do you think that it is extreme that high grass or [an] uncut lawn could lead to someone losing their home?*

A: *Well, the answer is yes.*

— Dunedin Mayor Julie Bujalski

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES .......... iv

I. INTRODUCTION .......... 1

II. STATEMENT OF FACTS .......... 2

A. THE CITY ACTIVELY INVESTIGATES AND PURSUES CODE ENFORCEMENT CASES BUT ADMITS THAT FINES DO NOT NECESSARILY LEAD TO COMPLIANCE .......... 2

1. The City actively investigates code enforcement cases .......... 2

2. Code enforcement in the City is uneven and the City's process for fines does not necessarily lead to increased compliance .......... 3

3. For first-time offenders, as Jim was in 2015, the City provides notice and an opportunity to remedy the violation .......... 6

i. Code enforcement for first-time offenders is straightforward and requires notice and a hearing before a fine can be imposed .......... 6

ii. At Jim's hearing for tall grass in 2015, the City represented that it would not fine Jim $500 per day without notice .......... 7

B. IN JIM'S 2018 CASE, JIM WAS TREATED AS A "REPEAT VIOLATOR" AND FINED $500 PER DAY WITH NO NOTICE AT ALL .......... 9

1. The City admits that it did not notify Jim of the fines until after Jim already owed tens of thousands of dollars .......... 9

2. Jim tried to work with the City to have the fines reduced, but the City refuses to negotiate with repeat violators .......... 13

C. TALL-GRASS CASES ARE VERY COMMON, BUT $500 DAILY FINES ARE EXTREMELY RARE—IF NOT ENTIRELY UNPRECEDENTED .......... 14

III. SUMMARY JUDGMENT STANDARD .......... 16

IV. ARGUMENT .......... 16

A. THE FINES ARE UNCONSTITUTIONALLY EXCESSIVE .......... 16

1. Daily fines of $500 and total fines of $30,000 for tall grass are unconstitutional under the Eighth Amendment ......................................16

2. Daily fines of $500 and total fines of $30,000 for tall grass are unconstitutional under Art. I, section 17 of the Florida Constitution .....20

B. THE CITY'S TREATMENT OF JIM AS A "REPEAT VIOLATOR" VIOLATED JIM'S RIGHT TO DUE PROCESS ..........................................................................23

1. The City violated Jim's right to due process when it failed to inform him that he would be fined.....................................................23

2. The City violated Jim's procedural due process rights when it classified him as a repeat violator........................................................24

V. CONCLUSION AND REQUEST FOR ORAL ARGUMENT ....................................25

CERTIFICATE OF SERVICE..........................................................................................27

## TABLE OF AUTHORITIES

**Case** **Page(s)**

*Amos v. Gunn*,
94 So. 615 (Fla. 1922)....................20, 21, 22

*Celotex Corp. v. Catrett*,
477 U.S. 317 (1986)....................16

*Ciolli v. City of Palm Bay*,
59 So. 3d 295 (Fla. 5th DCA 2011)....................23

*City of Deerfield Beach v. Vaillant*,
419 So. 2d 624 (Fla. 1982)....................25

*Conley v. City of Dunedin*,
No. 8:08-cv-01793-T-24-AEP, 2010 WL 146861 (M.D. Fla. Jan. 11, 2010)....................22

*Gordon v. State*,
139 So. 3d 958 (Fla. 2d DCA 2014)....................21

*Kupke v. Orange Cty.*,
293 F. App’x 695 (11th Cir. 2008)....................23, 24, 25

*Little v. D’Aloia*,
759 So. 2d 17 (Fla. 2d DCA 2000)....................24

*Locklear v. Fla. FWC*,
886 So. 2d 326 (Fla. 5th DCA 2004)....................21

*M.A.K. Inv. Grp., LLC v. City of Glendale*,
897 F.3d 1303 (10th Cir. 2018)....................24

*Marfut v. City of N. Port*,
No. 8:08-cv-2006-T-27EAJ, 2009 WL 790111 (M.D. Fla. Mar. 25, 2009)....................20

*Massey v. Charlotte Cty.*,
842 So. 2d 142 (Fla. 2d DCA 2003)....................24

*Mullane v. Cent. Hanover Bank & Tr.*,
339 U.S. 306 (1950)....................24

*State v. Cotton*,
198 So. 3d 737 (Fla. 2d DCA 2016)....................21, 22

*State v. Jones*,
180 So. 3d 1085 (Fla. 4th DCA 2015)....................21

*United States v. Bajakajian*,
524 U.S. 321 (1998) ... 16, 17, 21

*United States v. Ferro*,
681 F.3d 1105 (9th Cir. 2012) ... 17, 19, 20

*United States v. Heldeman*,
402 F.3d 220 (1st Cir. 2005) ... 16, 17

*United States v. Mackby*,
221 F. Supp. 2d 1106 (N.D. Cal. 2002) ... 18

*United States v. One Parcel Prop. Located at 427 and 429 Hall Street, Montgomery, Montgomery Cty., Ala.*, 74 F.3d 1165 (11th Cir. 1996) ... 19

*von Hofe v. United States*,
492 F.3d 175 (2d Cir. 2007) ... 17, 20

**Constitutional Provisions**

Fla. Const. art. I, § 17 ... 20

**Codes**

Dunedin, Fla. Code § 22-79(d) (2019) ... 12, 18

Dunedin, Fla. Code § 22-79(a) (2019) ... 23

**Statutes**

Fla. Stat. § 162.02 (2020) ... 24

Fla. Stat. § 162.06(2) (2020) ... 6

Fla. Stat. § 162.06(3) (2020) ... 23, 24, 25

Fla. Stat. § 162.09(2)(a) (2020) ... 12, 18

**Rules**

Fed. R. Civ. P. 56(c) ... 16

Dunedin, Fla. Code Enf't Bd. R. Pro. 5(4) ... 21

**Other Authorities**

Calvin, Giordano & Assocs.,
*Assessment of Dunedin's Code Enforcement Process* 6 (Jan. 10, 2020),
https://tinyurl.com/vpcvvfd ....................................................................................4

City of Dunedin,
Adopted Operating & Capital Budget FY 2020, https://tinyurl.com/vzqs82d ..........................5

City of Dunedin,
Comprehensive Annual Financial Report FY 2008, https://tinyurl.com/t738vgx .....................5

*Full Interview: Dunedin mayor and city manager talk excessive fines*,
YouTube (July 26, 2019), https://tinyurl.com/tr2xpjo.....................................................15, 16

Kylie McGivern,
*Dunedin hires crisis PR firm after lawsuit surrounding uncut grass gains national attention*,
WFTS Tampa Bay, June 6, 2019, https://tinyurl.com/sfzpjlw .................................................4

Kylie McGivern,
*Dunedin mayor faces questions about home conditions*, WFTS Tampa Bay, Sept. 18, 2019,
https://tinyurl.com/to4uhg6..................................................................................................19

Oral Argument,
*City of Dunedin Code Enf't Bd. v. ARL & IL Revocable Trust*,
(Fla. 1st DCA May 21, 2019) (No. 18-4401), https://tinyurl.com/wg4jetc ............................18

## I. INTRODUCTION

Plaintiff Jim Ficken ("Jim") is a 70-year-old retiree who lives in Dunedin, Florida ("the City"[1]). In the summer of 2018, Jim left town to tend to his late mother's estate in South Carolina. While he was gone, his lawn man died unexpectedly. During that period, Jim's grass did what grass in the Florida summer does—it grew. When Jim returned from South Carolina, he noticed the height of the grass and cut it partially before his mower broke. Not long after, with his lawn mower still broken, a code enforcement officer approached Jim in his front yard. The officer told Jim that the tall grass would lead to "a big bill from the city." So Jim bought a new mower and the next day he cut his grass. Jim expected that if the indiscretion led to a fine—his first ever—it would be a small one. He was wrong.

*Jim owed the City $23,500.*

And by the time the 2018 case against Jim was finally closed, Jim was in debt to the City for about $30,000 in fines. All for tall grass.

This scenario stems from an earlier instance, in 2015, in which Jim was cited—but not fined—for tall grass. The 2015 case allowed the City to designate Jim for future classification as a "repeat violator." According to the City, such a classification stripped Jim of several rights he ordinarily would have had. And it absolved the City of its general obligation to provide him with any notice of a violation. In fact, the City believes that it was empowered to secretly fine Jim $500 per day for weeks before advising him that he was actively accruing daily fines. In Jim's 2015 hearing, however, the City promised that it would not do any of those things. This matter is before this Court because the City did *all* of them.

[1] The Defendants here are the City of Dunedin, Florida; the City of Dunedin Code Enforcement Board; and the members of the Dunedin Code Enforcement Board in their official capacities. For the sake of clarity, all defendants, individually or collectively, are referred to as "the City" unless otherwise noted.

Jim is retired and earns little income. So he tried to work with the City to get them to reduce or reconsider the fines. But by rule, the City does not negotiate with "repeat violators." With Jim overwhelmed by the amount in fines, and no hope for a settlement, the City voted unanimously to authorize the foreclosure of Jim's property to collect on the debt. Jim filed this lawsuit to save his home.

## II. STATEMENT OF FACTS

The material facts are not in dispute. In Part A, Jim establishes that the City actively polices code violations. In Part B, Jim establishes that because of a case in 2015, the City treated him in 2018 as a "repeat violator," a classification which, according to the City, led to the commencement and accrual of fines without notice or hearing. And in Part C, Jim establishes—because the City acknowledges—that the fines against him are unprecedented and excessive.

### A. THE CITY ACTIVELY INVESTIGATES AND PURSUES CODE ENFORCEMENT CASES BUT ADMITS THAT FINES DO NOT NECESSARILY LEAD TO COMPLIANCE.

The purported purpose of fining those who violate the City's landscaping ordinances is to incentivize compliance. But the City's fines are controversial and do not necessarily even motivate compliance. In Part 1 of this section, Jim discusses the zeal with which the City pursues its code enforcement aims. In Part 2, Jim establishes that this enforcement is sometimes uneven. And in Part 3, Jim explains the general process of code enforcement in the City once an investigation has begun, including how the process was applied to him in 2015.

#### 1. The City actively investigates code enforcement cases.

Code enforcement officers in the City see their role as "similar to policing." Declaration of Ari Bargil ("Bargil Decl.") Ex. 1, Colbert Dep. 20:10–14. They spend the day on patrol in officially marked vehicles and identify or respond to alleged code violations before returning to the office to prepare their case reports. Bargil Decl. Ex. 2, Trask Dep. 80:12–81:5; Colbert Dep.

20:20–22:13, 73:16–74:12. When the City has a full complement of code enforcement officers in the field, the officers divide up the City into separate "beats," which become their main areas of regular patrol. *See* Trask Dep. 81:19–82:22.

Code enforcement in the City is said to be complaint-driven, Bargil Decl. Ex. 3, Kepto Dep. 36:7–10, though at least one officer had no idea what percentage of cases originate from complaints, Colbert Dep. 53:15–25. Still, inspectors admit that they "self-generate cases" regularly. Colbert Dep. 21:18–20. And even when a complaint is received, inspectors do not limit their investigation to only the property identified in the complaint; instead they will "typically do that entire street." Colbert Dep. 21:6–13. Moreover, to stay in front of complaints, inspectors often inspect and cite properties they identify as a potential source of *future* complaints, even if one has not yet been made. Kepto Dep. 30:11–14. Thus, code enforcement officers acknowledge that their job sometimes requires them to focus on issues not necessarily related to health and safety, but on "prioritizing properties that [they] thought would get more complaints." *Id.* at 36:12–15, 24:16–19. Thus, enforcement priorities are not directed by supervisors, *id*. at 30:16–19; they are driven by those who complain (or might complain) the most, *id*. at 25:4–11, 29:12–24.

### 2. Code enforcement in the City is uneven and the City's process for fines does not necessarily lead to increased compliance.

The stated goal of code enforcement in the City is "to maintain property values" and "make sure that people are maintaining their homes." Colbert Dep. 24:20–25:2; *see also id.* at 56:17–21; Trask Dep. 30:23–31:6.[2] But the City's enforcement of its codes is controversial. The City's code enforcement apparatus has been widely criticized, both externally and internally, for

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[2] The City could not identify any evidence to support the notion that property values bear any connection to grass height. Trask Dep. 53:4–22.

its imposition of "outrageous" and "extremely high fines" on the City's citizens. Bargil Decl. Ex. 4, Calvin, Giordano & Assocs., *Assessment of Dunedin's Code Enforcement Process* 6 (Jan. 10, 2020), https://tinyurl.com/vpcvvfd. Specifically, the City's internal investigation led to criticism of the City's use of "rolling fines"—daily fines that rapidly accumulate to reach "outrageous" aggregate amounts. *Id*. Indeed, "[t]his daily accrual of fines means that a non-compliant property owner can easily accrue several thousand to hundreds of thousands of dollars" in fines. *Id*. In such instances, the auditor found, "the rolling fines become economically unfeasible." *Id*.

Code enforcement in the City is also uneven. For example, while the City has the authority to remediate, or "abate" problematic violations, "there is no criteria that the City follows when deciding whether to initiate an abatement action." Trask Dep. 67:10–15. To the contrary, officials have their own understanding of when abatement is proper. Trask Dep. 69:10–25; Kepto Dep. 43:25–44:11; Colbert Dep. 113:20–114:8. Thus, sometimes the City hires contractors to mow tall grass; other times it does not. Trask Dep. 68:6–12, 71:5–72:2.

Preferential treatment has also been reported. The mayor's own home was shown to have obvious code violations that went uncited.[3] And Officer Colbert quit his job out of fear that he would soon be fired for refusing to rescind an overgrowth violation *at a suspected meth lab* owned by a "friend of the Mayor's from a bar that she goes to." Colbert Dep. 35:7–37:22 (testifying that he thought he would ultimately be fired for resisting the city manager's directive). At least one violator, a world-renowned marine biologist (and supposed "repeat violator"[4]), managed to secure a fine reduction to around $10,000—but only after she agreed to fly across

[3] *See* Kylie McGivern, *Dunedin mayor faces questions about home conditions*, WFTS Tampa Bay, Sept. 18, 2019, https://tinyurl.com/to4uhg6.

[4] As discussed below, the City has a stated policy of non-negotiation when it comes to so-called "repeat violators."

the country, waive her customary fee, and speak for free at a community event. Trask Dep. 33:12–37:1. This "settlement" was only reached after the City had pursued the property owner for years for about $30,000 in fines for overgrowth. Bargil Decl. Ex. 5, Dunedin Code Enf't Bd., Oct. 2018 minutes 24–25; Kepto Dep. 92:14–19.

Still, the City's officials uniformly testified that the purpose behind imposing financial penalties for violations is to obtain compliance, not generate revenue. *See* Kepto Dep. 66:12–67:10; Trask Dep. 137:4–19. Yet the City's enforcement proceeds have increased exponentially over the last decade.[5] And after fines on an individual property reach a certain level, increasing them produces *no additional incentive* for compliance anyway. Kepto Dep. 86:12–14. In other words, as "the rolling fines become economically unfeasible[,] . . . the goal of attaining compliance is not achieved and properties remain a blight on neighborhoods." Bargil Decl. Ex. 4 at 6. These "economically unfeasible" fines can occur because, in dealing with repeat violators, the City may opt to surreptitiously track a violation rather than advise the owner of it.[6] The City acknowledges the obvious here—that operating this way will lead to higher fines, but not faster compliance. Kepto Dep. 49:7–50:24. Thus, one code enforcement officer described himself as a "financial asset" to the City and measured his own productivity in terms of how much revenue he generated. Bargil Decl. Ex. 6, Annual Employee Performance Pre-Evaluation Form for Michael Kepto 3 (Sept. 11, 2015).[7]

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[5] *Compare* City of Dunedin, Adopted Operating & Capital Budget FY 2020 at 74 (reflecting more than $1.5 million in fines in FY 2018), https://tinyurl.com/vzqs82d, *with* City of Dunedin, Comprehensive Annual Financial Report FY 2008 at B-6 (reflecting less than $211,000 in fines FY 2008), https://tinyurl.com/t738vgx.

[6] *See* Section II.B.1, *infra*.

[7] Mr. Trask asserted that the City's increasing revenues from fines stemmed from *all* enforcement, not just code violations. Trask Dep. 226:7–21. But Officer Kepto's employee file indicates that in a given year, he single-handedly helped the City bring in over $400,000 in revenue from code enforcement specifically. Bargil Decl. Ex. 6, 2015 Kepto Self-Evaluation at 1; *see also id.* at 3, 5 (2016 and 2018 Kepto Self-Evaluations) (accomplishments list

### 3. For first-time offenders, as Jim was in 2015, the City provides notice and an opportunity to remedy the violation.

For a property owner who is alleged to have violated the City's code, both state and local law establish how due process must be afforded to first-time offenders. In subsection (i) of this Part, Jim explains the general process of investigation and enforcement for first-time offenders. And in subsection (ii) of this Part, Jim explains both his specific experience as a first-time offender in his 2015 tall-grass case and the City's promise, made in that case, that it would not later fine him $500 per day without notice.

(i) <u>Code enforcement for first-time offenders is straightforward and requires notice and a hearing before a fine can be imposed.</u>

Before the City may impose a fine, it must first provide a property owner with notice of the alleged violation and a reasonable period of time in which to cure it. Fla. Stat. § 162.06(2). Investigations begin with either a complaint or observation by a code enforcement officer. Trask Dep. 80:6–14. Once the investigation is initiated, a City code enforcement officer will typically "take photographs of the property and then . . . go back to their office and . . . see whether or not the property has been cited before." Trask Dep. 83:18–23. If—and only if—the property has *not* been cited before, the officer may try to contact the property owner by telephone or send a "courtesy notice"—a letter sent by U.S. Mail, to advise a property owner of an existing violation.[8] Trask Dep. 88:18–89:19, 91:7–9; Kepto Dep. 26:9–27:9; Colbert Dep. 26:8–17.[9]

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helping to bring in $1 million or more in total code enforcement revenue each year). And Mr. Trask did not dispute that in 2017, the City brought in at least $703,000 from code enforcement alone, Trask Dep. 222:4–13, more than triple its *entire* fine revenue a decade earlier, *see* note 5, *supra*.

[8] As discussed in Section II.B.1, below, if the property *has* received prior violations, the City's interpretation of state law is that none of the notice and due process steps described in this section apply. *See* Trask Dep. 132:25–133:5.

[9] Enforcement officers used to provide door hanger notices "back in the '90s," but the practice fell out of fashion at least in the past "five or six years" because "different code enforcement officers [began] doing things differently." Trask Dep. 89:20–91:1. The City has since resumed the practice. Trask Dep. 89:20–90:7.

Courtesy notices are sometimes sent together with or instead of phone calls, or officers may sometimes leave a business card. Trask Dep. 83:11–84:17.

If the property is still not in compliance after these informal warnings, a formal notice of violation is sent to the property owner. *See* Trask Dep. 91:2–92:13 (describing the pre-hearing phase of code enforcement in the City). The notice is typically sent by certified mail and physically "posted" at the property. Trask Dep. 94:6–95:2. This process—providing a notice through two separate methods—is intended to "make sure that property owner[s] ha[ve] been given due process." Trask Dep. 94:21–24. Cases are then heard by the Code Enforcement Board ("the Board"), and if a violation is found, the Board will set a deadline by which the violator must either bring the property into compliance or suffer daily fines. Trask Dep. 92:14–20. The City keeps track of all of these deadlines—along with records of complaints, interactions with property owners, dates of correspondences, and other relevant events—in each case history file. *See, e.g.*, Trask Dep. 96:12–15,103:9–105:14; Colbert Dep. 98:23–24, 121:14–18.

(ii) <u>At Jim's hearing for tall grass in 2015, the City represented that it would not fine Jim $500 per day without notice.</u>

Jim was formally cited for tall grass in 2015. And in that case, the above protocol is essentially what the City followed, albeit in Jim's absence and over his requests for an extension. At the time, Jim was his mother's full-time caregiver in South Carolina, and he could not attend the hearing. Declaration of Jim Ficken ("Jim Decl.") ¶¶ 10–11. Jim sought a continuance, *id.* at ¶ 12, and although he met the unwritten criteria for additional time, *see* Trask Dep. 170:19–171:1, 172:2–15, 173:8–12, his request was denied, Jim Decl. ¶ 12.

The 2015 hearing went forward without Jim. *Id.* at ¶¶ 12–13. And although witnesses would often attend the hearings if "they felt strongly about certain properties not being maintained," Colbert Dep. 59:7–9, Jim's neighbor James McLymas in fact attended the hearing

*to defend Jim*, Jim Decl. ¶ 12. At the hearing, Mr. McLymas testified that "[Officer Kepto] is well aware of Mr. Ficken's situation with his mother. His mother is terminal. She is dying. She's up in South Carolina. . . . He has to be with her at least 60 days . . . in a row . . . and then he has five days where . . . he can come down here." Bargil Decl. Ex. 8, Dunedin Code Enf't Bd., May 2015 Tr. 8:6–17. The Board proceeded with the hearing anyway, ostensibly because the only purpose at that point was to "document for a repeat [violation]." *Id.* at 3:24–25.

During that 2015 hearing, Mr. McLymas addressed the Board and expressed Jim's concern that Jim could be fined "$500 a day with no—with no court date, with no hearing, with no—no anything, no recourse on our part no matter what. . . . I think that's very punitive." *Id.* at 9:21–25. Mr. McLymas continued: "As soon as [Jim] got the notice, he got it taken care of. . . . We're just trying to avoid having an arbitrary punishment that hits him for $500 every time." *Id.* at 11:12–25. But these concerns—though fully justified then—were dismissed out of hand by Chairman Bowman: "It doesn't necessarily mean 500 bucks, 500 bucks, 500 bucks, all right? . . . I think you're taking this to an extreme . . . It could be $1. It's not an automatic $500, okay? . . . it can be nothing . . . ." *Id.* at 11:1–12:5. Mr. McLymas then explained that Jim feared *precisely* the scenario that later played out in this case:

> Mr. McLymas: [I]f it has a serious rainy spell and we're having the lawn mowed every three weeks, say, if [a code enforcement officer] is going over there August 19th, August 20th, there's a picture, that's $500, that's what we're trying to avoid.
>
> Chairman Bowman: All right. You—you've taken this to the extreme. It's not an automatic $500. It can be up to $500, *if we feel there's some massive violation.*
>
> Mr. McLymas: Without a hearing?
>
> Chairman Bowman: . . . . *No, it comes here . . . If there is an issue then he will know about it* and . . . we're going to hear it and then we will decide at that time.

*Id.* at 14:9–19; 20:2–6. Chairman Bowman then advised, incorrectly, that in future tall-grass violations, "*[Jim] will be notified of it just like he was with this*." *Id.* at 22:13–14. He was wrong.

### B. IN JIM'S 2018 CASE, JIM WAS TREATED AS A "REPEAT VIOLATOR" AND FINED $500 PER DAY WITH NO NOTICE AT ALL.

Despite Chairman Bowman's representation that Jim would "be notified just like he was" in the 2015 case, Jim's 2018 tall-grass case played out much differently. Indeed, Jim's 2018 case is emblematic of what the City's auditors have characterized as the "aggressive blow of extremely high fines." Bargil Decl. Ex. 4 at 6. In Part 1 of this section, Jim establishes that—as the City acknowledges—nobody told him he was being fined. And in Part 2 of this section, Jim establishes that his classification as a "repeat violator" meant that the City took a position of categorical inflexibility regarding any hearings, fines, and collections efforts.

#### 1. The City admits that it did not notify Jim of the fines until after Jim already owed tens of thousands of dollars.

In the summer of 2018, Jim returned to South Carolina to tend to his by-then deceased mother's estate. *See* Jim Decl. ¶¶ 14–15. While he was gone, Jim's hired lawn man, Russ Kellum, died unexpectedly, and the grass grew unabated. *Id.* ¶ 15. Before Jim returned, the City got a complaint about Jim's grass. Officer Colbert visited the property on July 5, 2018. Colbert Dep. 95:20–25; Bargil Decl. Ex. 7, Case History at 26. And because Jim was flagged for repeat-violator status in 2015, Officer Colbert simply observed that the grass was over ten inches, photographed the property, and then left. And the fines began. Jim Decl. ¶ 25; Trask Dep. 126:17–24; Kepto Dep. 49:16–50:2 ("fines start accruing . . . when we first observe that it's a repeat violation.").[10]

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[10] *See also* Bargil Decl. Ex. 9, Dunedin Ordinance Review Comm., May 2019 minutes 19-4 ("A repeat violator does not receive the same type of notice requirements, because of the fact if you did not learn the first time you should not be given a second opportunity to violate the code. The fine starts at a different period of time. An original code

This sequence—visit, photograph, document, leave—occurred at least *twelve times* in the summer of 2018. *See* Bargil Decl. Ex. 10, Dunedin Code Enf't Bd., Sept. 2018 minutes 19. But Officer Colbert did not contact Jim in any of those instances because "[w]e don't really have the time to go up and knock on the door to make contact with a property owner." Colbert Dep. 120:3–5. Instead, owner interaction only occurred if it was owner-initiated. *Id*. at 119:22–24. But such a practice undermines the City's purported goal of securing compliance:

> Code enforcement is all about compliance . . . [T]he majority of the time a[n] . . . officer will go to the door or try to make contact . . .What we're seeking to obtain is compliance, *so it doesn't do us any good to take a photograph and move on*.

Trask Dep. 137:4–13; *see also* Kepto Dep. 60:22–61:7. And while Mr. Trask admits "it doesn't do [the City] any good to take a photograph and move on," he nevertheless testified that it would be just fine for an officer to do just that. *Compare* Trask Dep. 137:12–13, *with id*. at 132:25–133:5. So "take a photograph and move on" is precisely what Officer Colbert did. *Twelve times*. Colbert Dep. 117:25–121:13. He never called Jim, *see* Trask Dep. 110:20–111:3, and he never left a door hanger or a courtesy notice, *id*. 111:4–10. And all the while, the fines kept running.

Finally, on August 20, 2018, more than six weeks after the violation was first observed and fines began to accrue, Officer Colbert encountered Jim in the front yard. Colbert Dep. 94:11–95:19; Jim Decl. ¶ 18.[11] It was the first and only time the two had interacted since the fines began. Colbert Dep. 105:2–13; Jim Decl. ¶ 18. Officer Colbert advised Jim that he was "going to get a big bill from the City." Jim Decl. ¶ 18. So Jim bought a new lawnmower and cut

violation, the Code Enforcement Board allows a period of time to come into compliance, sometimes a week, sometimes two weeks or a month and sometimes more than a month. A repeat violator does not get the benefit of more time and the fine begins to run on the day of the inspection of the property. . . . When it gets to the Code Enforcement Board they are actually considering the fine retroactively to the date of the inspection. That is the way it has been treated for 30 years . . . .").

[11] This was several weeks after Jim attempted, unsuccessfully, to mow it with no admonition or intervention from the City. Jim Decl. ¶ 17.

the grass the next day. Jim Decl. ¶ 19; Bargil Decl. Ex. 7 at 26. On August 22, the day *after* Jim cut the grass, the City sent him a notice of violation—its first formal communication to Jim since the case against him began some six weeks earlier:

> Q: [O]n August 22nd . . . is when that notice of violation was signed and mailed?
>
> A: Yes.
>
> Q: So it's correct to say that that notice of violation was sent after the violation had already been remedied?
>
> A: Correct.

Trask Dep. 106:5–11; *see also id*. at 101:19–102:11, 120:13–121:6; Bargil Decl. Ex. 7 at 26.

In the end, Jim only learned by happenstance that he was being fined. But the City starts fines against a repeat violator the instant a repeat violation is observed. Trask Dep. 126:17–24; Kepto Dep. 49:16–50:2; Bargil Decl. Ex. 9 at 19-4. The City does this because it believes that there is no point at which it must provide notice that a violation has been identified and fines are accruing. Kepto Dep. 86:21–24, 90:16–19 (testifying that he could wait to issue a notice of violation until "after the violation was corrected"). Indeed, the City testified that a tall-grass fine could reach into the millions of dollars and, even if a homeowner was completely unaware, that would be legal. Trask Dep. 267:21–268:12 (testifying that a $1 million fine for tall grass would not be excessive because "when [a violator] doesn't limit his own exposure . . . by taking care of what the code requires, then those are the consequences"); *id*. at 124:25–126:24 (agreeing that a code inspector could "wait three years to notify [a] violator" and the eventual fines could start "at any particular time all the way back to the initial inspection"). Thus, the City believes, it is appropriate to allow fines to run for an indeterminate period and only provide "notice" of a violation after it has been remedied. Kepto Dep. 86:21–87:15 ("Q: You said earlier that when to issue a notice of violation for a repeat offender is a matter of your discretion; is that right? . . . .

A: Not when, but *if* we would send a notice of violation"); *id*. at 90:16–19 ("Q: [D]o you think you had the authority to issue a notice of repeat violation after the violation was corrected? A: I believe I had that authority, yes."); *see also* Trask Dep. 106:13–14, 123:9–12.

That is what happened to Jim. In his case, the August 22 "notice" did not advise him of an ongoing violation. Instead, it informed him that he was *already in violation* and the case was to be heard on September 4, 2018. Jim Decl. ¶ 20; Trask Dep. 120:20–121:12. Jim had planned to be back in South Carolina, so he sought a continuance, which was denied. Jim Decl. ¶¶ 21–23; Trask Dep. 167:2–17. However, just as Chairman Bowman suggested that the fine "could be $1" or "nothing," Jim believed that the cost of changing his flight would exceed any potential fine. Jim Decl. ¶ 21. So with his lawn in compliance, Jim left for South Carolina. *Id*. at ¶ 24.

The City then started fining Jim for tall grass—again at a clip of $500 per day—almost right away. On August 31, just ten days after Jim mowed, Officer Colbert returned to the property and observed that the grass was allegedly too long. This time, there was no record of a complaint, and Officer Colbert knew Jim was gone. Colbert Dep. 115:21–116:11, 120:20–121:13; Bargil Decl. Ex. 11, Dunedin Code Enf't Bd., Sept. 2018 Tr. 6:4–7. As before, Officer Colbert visited the property simply to document the violation. Bargil Decl. Ex. 11 at 5:25–6:8. And as before, he made no effort to contact Jim. Trask Dep. 175:2–24.

Jim was found to be in violation for both periods. Jim Decl. ¶ 25; Bargil Decl. Ex. 10 at 20; Bargil Decl. Ex. 11 at 6:9–7:18. Officer Colbert, for the first time in his career that he could recall, recommended that the Board impose a fine of $500 per day. *See* Colbert Dep. 121:22–122:20. Anything higher would have been illegal. Fla. Stat. § 162.09(2)(a); Dunedin, Fla. Code § 22-79(d). And the Board, including Chairman Bowman, agreed. Bargil Decl. Ex. 11 at 11:3–23. The result: Jim owed $23,500 for the first violation and $5,000 for the second—plus interest

and costs for both. *See* Jim Decl. ¶ 25 & Ex. 7. Of course, the City could have mowed the grass at any point. Trask Dep. 67:17–68:12. It just decided not to. Colbert Dep. 113:20–114:1.

#### 2. Jim tried to work with the City to have the fines reduced, but the City refuses to negotiate with repeat violators.

The City does not negotiate with repeat violators. *Period*. Bargil Decl. Ex. 16, Dunedin, Fla. Code Enf't Bd. R. Pro. 5(4); Trask Dep. 200:5–25, 192:23–25 ("Q: So, if you have an extreme and undue hardship and you're a repeat violator – A: It doesn't matter."). Even so, Jim sought reconsideration of the fines and explained the hardship of paying $30,000 to the City. Jim Decl. ¶¶ 5, 31. The request was denied. Bargil Decl. Ex. 12, Dunedin, Fla. Code Enf't Bd., Nov. 2018 minutes.

The City's inflexibility extends to the City's collections efforts as well. The City's Attorney, Tom Trask, sent Jim a letter in which he falsely represented that the City had "no choice but to pursue foreclosure." Jim Decl. ¶ 32. Mr. Trask admits that there is zero legal basis for this purported lack of choice. Trask Dep. 182:3–183:6.[12] But based on the (wrong) information Jim was given, he believed payment in full was his only option. Jim Decl. ¶¶ 32–34.

Jim cannot pay $30,000 in fines without incurring significant financial hardship. Jim Decl. ¶ 30. So to collect on the debt, Mr. Trask sought authorization to foreclose on Jim's home. In doing so, he represented that his "negotiati[on]" with Jim was "unsuccessful." Bargil Decl. Ex. 13, Tom Trask, Mem. to Code Enf't Bd. (Apr. 18, 2019). But as Mr. Trask later testified, he in fact "do[esn't] negotiate" at all. Trask Dep. 161:22–162:4. And that is the reality: Mr. Trask never made an offer to Jim or suggested any alternative to full payment. Jim Decl. ¶ 33.

[12] Mr. Trask also testified that property owners can reach out to him personally to seek lien reductions. Trask Dep. 187:3–188:20. But that policy is not stated anywhere. Trask Dep. 161:22–162:4. In fact, the letters suggest the opposite—that "payment in full" is the only option. Jim. Decl. ¶¶ 31–34. And although Mr. Trask admits that he sometimes provides incomplete information, he believes it is his duty to do so. Trask Dep. 182:3–183:10.

### C. TALL-GRASS CASES ARE VERY COMMON, BUT $500 DAILY FINES ARE EXTREMELY RARE—IF NOT ENTIRELY UNPRECEDENTED.

Tall-grass cases arise often in the City, especially in the summer rainy season. Colbert Dep. 71:18–72:6, Kepto Dep. 26:3–8; Trask Dep. 71:14–15. And though it is a common violation, it has not been seriously suggested that it is a grave one.[13] Tall-grass cases are therefore not seen as a priority, *see* Colbert Dep. 72:10–11, because "some code violations are more important than others" and tall-grass cases are not considered "a life safety issue." Colbert Dep. 75:5–7, 76:18–19; Trask Dep. 134:4–7.[14]

Given that Jim's offense was admittedly not serious, it follows that Jim's fine of $500 per day was exceptionally rare—if not entirely unprecedented. In fact, it was odd for the City to impose a fine of $500 per day for *any violation*, much less tall grass. Bargil Decl. Ex. 8 at 16:8–9 ("I don't remember even doing a 500 [dollar fine], and I've been on this [Code Enforcement] Board for years."); Colbert Dep. 90:1–5 ("Q: But it wasn't common for you to recommend a $500 [daily] fine for a repeat violator? A: Not really."). And Officer Colbert repeatedly testified that he could not remember a single case—other than this one—in which he or anyone else recommended $500 daily fines for tall grass. Colbert Dep. 89:7–90:5, 121:22–25, 123:8–10 ("Q: Can you recall any other $500 daily fines for long grass that the Board issued? A: No."). Similarly, Officer Kepto testified that in 11 years, he could recall only one overgrowth fine as high as Jim's. Kepto Dep. 92:18–19. Thus, given that the City does not consider tall grass to be a

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[13] Mr. Trask conjured a handful of fantastical instances in which tall grass could create a life safety issue. Trask Dep. 251:14–18 ("Maybe there is a sinkhole in the middle of that tall grass . . . Maybe that grass is covering up, you know, a leaky pipe that someone could fall into."). Those scenarios, as Officers Kepto and Colbert confirmed, are not grounded in reality. Kepto Dep. 37:5–11; Colbert Dep. 78:11–22.

[14] Officer Kepto offered a list of items more pressing than tall grass: unpermitted work, Kepto Dep. 32:2–5; vacant houses, *id*. at 32:11–13; green swimming pools, *id*. at 32:13, 41:8–9; rats, snakes, and other critters on properties, *id*. at 32:15–16; an open or leaking septic tank, *id.* at 40:14–41:5; and "[t]rash that would draw rats," *id*. at 32:16–17.

serious violation, Colbert Dep. 76:7–19, and $500 daily fines are rare in general, daily fines of $500 for tall grass are highly atypical. *See* Colbert Dep. 145:25–146:15. That is because $500 daily fines are reserved for scenarios in which the Board "feel[s] there's some massive violation." Bargil Decl. Ex. 8 at 14:16–17.

But even modest daily fines can become harsh, since the City does not cap its fines like many other jurisdictions in the state. Bargil Decl. Ex. 4 at 6. And the City pays no mind to the *total* fine that results when daily fines stack up. The City's view, rather, is that the total amount is a "number [that] doesn't matter," so it is irrelevant whether the fine is "$10,000 or $100,000." Trask Dep. 213:4–7. Likewise, the City also sometimes ignores what the fine was even for. Indeed, as the mayor explained, "fines don't look at what the violation is." *Full Interview: Dunedin mayor and city manager talk excessive fines* 17:03–32, YouTube (July 26, 2019), https://tinyurl.com/tr2xpjo. So the fines can—and do—explode. This is because, the mayor explained, the City "d[oes]n't consider what the offense [i]s" "or the circumstances." *Id.* at 17:46–18:04. Instead, the City is preoccupied with strict adherence to ordinance and statute. *Id.* at 17:11–18:04; Trask Dep. 213:4–6. This approach, the mayor admitted, leads to "extreme" punishments for small violations like tall grass. *Full Interview* at 01:27–38.[15]

Ultimately, it is undisputed that a total fine of $30,000 is abnormally large for "something as simple as cutting the grass." Bargil Decl. Ex. 11 at 7:19–25. And the City's official representative, City Attorney Trask, agreed that a fine of only $20,000 would be quite high. *See* Trask Dep. 217:25–218:1 ("$20,000 seems like a lot to me for tall grass . . ."). Other officials felt similarly. *See, e.g.*, Colbert Dep. 143:24–25 ("I consider it to be a lot of money for something . . .

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[15] As Officer Kepto agreed, the Board's fines can be too high, and sometimes "go past the point that someone can pay them." Kepto Dep. 80:4–7, 86:12–16.

that's very simple to correct."). Even the Mayor agreed Jim's fine is "extreme." *Full Interview* at 01:27–38. Nevertheless, the City believes that the amount it assesses in fines is *totally irrelevant* because compliance with state law establishes constitutionality. Trask Dep. 266:18–267:6.

## III. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate if there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); Fed. R. Civ. P. 56(c).

## IV. ARGUMENT

The central questions in this case are simple: First, can the government impose a $30,000 fine—and threaten to take someone's house—for the "crime" of having tall grass? And second, does due process allow for the imposition of such fines without any notice at all? The answer to both questions is no. In Part A of this section, Jim argues that the fines are unconstitutional under both the state and federal constitutions. That is because they are both grossly disproportionate to the offense of tall grass and so excessive as to "shock the conscience." In Part B, Jim argues that his right to due process was violated when the City began fining him $500 per day, with no notice at all, and that he was stripped of his right to have a meaningful hearing in light of the City's misrepresentations when Jim first came before the Board in 2015.

### A. THE FINES ARE UNCONSTITUTIONALLY EXCESSIVE.

#### 1. Daily fines of $500 and total fines of $30,000 for tall grass are unconstitutional under the Eighth Amendment.

A fine is excessive if it is "grossly disproportional to the gravity of the defendant's offense." *United States v. Bajakajian*, 524 U.S. 321, 337 (1998). In weighing proportionality under the federal standard, courts review "as pertinent factors (1) whether the defendant falls into the class of persons at whom the [] statute was principally directed; (2) other penalties authorized

by the legislature . . . ; and (3) the harm caused by the defendant." *United States v. Heldeman*, 402 F.3d 220, 223 (1st Cir. 2005) (citing *Bajakajian*, 524 U.S. at 337–40). Other circuit courts have also identified additional considerations, including, for example, an offender's level of culpability. *United States v. Ferro*, 681 F.3d 1105, 1115 (9th Cir. 2012) ("The Eighth Amendment's Excessive Fines Clause requires the property owner's culpability to be considered."); *von Hofe v. United States*, 492 F.3d 175, 185 (2d Cir. 2007) ("[C]ulpability . . . is relevant to . . . excessiveness."). Each proportionality factor is addressed in turn.

First, Jim does not fall into the class of persons at whom the ordinance was principally directed. Fines of $500 for landscaping violations were intended for vacant properties and properties owned by absentee landlords and neglectful institutional owners. *See* Kepto Dep. 71:24–72:18; Colbert Dep. 59:14–25, 81:3–12. Otherwise, steep fines are reserved for "massive violations." Bargil Decl. Ex. 8 at 14:16–17. But as the City acknowledges, Jim lives in the house, Colbert Dep.114:1 (describing the Lady Marion Property as "[o]ccupied property"), and thus he presents none of the hypothetical hazards the City associates with unmaintained institutionally owned properties. *See* Kepto Dep. 72:6–13; Colbert Dep. 65:6–11. To the contrary, because Jim lives in the property, Jim Decl. ¶¶ 3–4, he was able to take immediate action to bring it into compliance when he found out he would get fined, *id*. ¶¶ 18–19. People like Jim are not the reason the City can fine a resident $500 per day (and take his home) for tall grass.

Second, the existence of lesser penalties that the City *could have* imposed, but did not, highlights the excessiveness of the fines here. Indeed, the City could not have punished Jim—without violating state statute—any more harshly than it did. The Board did not consider starting Jim's fines at $25 or $50 per day before increasing. Bargil Decl. Ex. 11 at 7:19–11:23. Rather, the City's very first fine against Jim (for anything, ever) was the maximum amount allowed by

law. Fla. Stat. § 162.09(2)(a); Dunedin, Fla. Code § 22-79(d). That amount, $500, is an unprecedented sum for nearly any violation. Bargil Decl. Ex. 8 at 16:8–9; Colbert Dep. 89:7–90:5. Nor is this massive fine even needed for the City to accomplish what it insists fines are meant to accomplish—securing compliance—as Jim had already brought his property into compliance *before* the meeting took place. Jim Decl. ¶¶ 18–20; Bargil Decl. Ex. 7 at 26. Indeed, the compliance pattern established by the record—that Jim mows his grass right after the City tells him to—shows that this matter could have easily been resolved without such severe financial pain. As the record shows, a verbal warning would have sufficed. *See generally* Bargil Decl. Ex. 7; Kepto Dep. 105:22–106:1.[16] Thus a much lower fine would have worked as well.

Third, Jim's tall grass has caused zero harm to his neighbors or the government. *See United States v. Mackby*, 221 F. Supp. 2d 1106, 1111 (N.D. Cal. 2002) (noting that "[r]elevant to this consideration is the government's actual loss"). The City has admitted as much. *See* Oral Arg. at 11:51, *City of Dunedin Code Enf't Bd. v. ARL & IL Revocable Trust* (Fla. 1st DCA May 21, 2019) (No. 18-4401), https://tinyurl.com/wg4jetc ("Is the City going to collapse institutionally as a result of a lawn that went unmowed for over a day? Of course not."); Colbert Dep. 104:8–11 ("Q: Did you see any other problems that the grass was causing beyond the fact of it being long itself? A: No."). In fact, not only does the City admit that fines of this magnitude do nothing to prevent harm to the government, it also admits that they do nothing to further its goals of compliance. *See* Kepto Dep. 86:12–16. And to the extent that the government even

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[16] And of course fines of nearly $30,000 are even more excessive when the City could have had Jim's lawn mowed and sent him a bill for roughly $40 to $120. Trask Dep. 72:3–7. Thus, the City's imposition of the maximum fine for a trivial violation (that the City *could have* fixed and that Jim *did* fix) is excessive.

*could have* incurred any costs, such costs pale in comparison to the amount now owed by Jim. Trask Dep. 72:3–7 (estimating that mowing a resident's lawn costs the City $40 to $120).

Even without the City's concessions, the harmlessness of a temporarily unmowed lawn is obvious. The City acknowledges as much—tall grass is not considered a life safety issue. Colbert Dep. 76:18–19. This is why tall-grass cases were a low priority, *see* Colbert Dep. 72:10–11, and why code officers uniformly testified that they were more concerned with code violations that impact human health. *See* nn.13–14, *supra*. Likewise, as for any costs or harms to the neighbors, the City does not know of any evidence linking tall grass and property values. Trask Dep. 53:6–18. And while some of Jim's infractions were complaint-driven,[17] many were inspector-generated. Bargil Decl. Ex. 7 at 1, 6, 8, 10, 11, 13, 15, 21. In fact, in Jim's 2015 case, a neighbor spoke on Jim's behalf. And in this case, Jim received a kind note from a neighbor offering assistance in response to the City's incorrect public statements about Jim. Jim Decl. ¶ 30, Ex. 9.[18]

Finally, it is appropriate for this Court to consider additional factors beyond the three identified in *Heldemen*. As the Eleventh Circuit has recognized, "[w]hile the core of proportionality review is a comparison of the severity of the fine with the seriousness of the underlying offense, it would be futile to attempt a definitive checklist of relevant factors. Th[ose] *will necessarily vary from case to case*." *United States v. One Parcel Property Located at 427 and 429 Hall Street, Montgomery, Montgomery Cty., Ala.*, 74 F.3d 1165, 1172 (11th Cir. 1996).

For example, this Court can and should consider Jim's culpability as part of its excessiveness determination. *Ferro*, 681 F.3d at 1115–16 ("[T]he proportionality inquiry must

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[17] In any case, the fact that a neighbor has called the code enforcement department to complain about tall grass does not mean they have suffered actual harm, in the legal sense of the term. It just means they think the grass is too tall.

[18] The note was in response to a news report in which the City's hired representative, Ron Sachs, made several false and disparaging remarks about Jim. *See* Kylie McGivern, *Dunedin hires crisis PR firm after lawsuit surrounding uncut grass gains national attention*, WFTS Tampa Bay, June 6, 2019, https://tinyurl.com/sfzpjlw.

center on [the party's] culpability."); *see also von Hofe*, 492 F.3d at 178–79 (same). Jim was in another state when this matter began. Jim Decl. ¶ 15. Still, Jim arranged for his friend Russ Kellum to mow the lawn. *Id*. When Jim got back and learned that Russ had died, he tried to cut the yard himself, but his mower broke down. *Id*. at ¶ 17. Then, once he finally found out that he was "going to get a big bill from the city," he stopped trying to repair his old mower and immediately bought a new one. *Id*. at ¶¶ 18–19. He mowed the lawn within a day. *Id*. Thus, the fines are excessive because they are grossly disproportionate given Jim's culpability.

On the other hand, the City's conduct should also be considered. While Jim dutifully cut his grass as soon as he was aware of the violation, the City kept those violations a secret for six weeks while fines accumulated. It patrolled Jim's property, without a complaint, mere days after he left town and while it knew he would be gone. Colbert Dep. 115:21–116:11, 120:20–121:13. Although the City's position is that it need not provide notice for a repeat violation—"How many times do we need to warn them?" Officer Kepto asked, Kepto Dep. 54:22–23—that does not mean that its inaction should be ignored in this Court's consideration of the excessiveness of the fines. *See Marfut v. City of N. Port*, No. 8:08-cv-2006-T-27EAJ, 2009 WL 790111, at *7 (M.D. Fla. Mar. 25, 2009) (whether inaction allowed large fines to accrue is part of the analysis).

**2. Daily fines of $500 and total fines of $30,000 for tall grass are unconstitutional under Art. I, section 17 of the Florida Constitution.**

The Florida Constitution provides that "excessive fines . . . are forbidden." Fla. Const. art. I, § 17. Historically, "[t]here being no definitely fixed rules or standards for determining what are and what are not excessive fines, each case, whether a statute prescribing fines or a judgment imposing a fine under statute, must be adjudged on its merits." *Amos v. Gunn*, 94 So. 615, 641 (Fla. 1922) (citation omitted).

As *Amos* suggests, there is no bright-line test for excessiveness in Florida. And it remains the case, nearly 100 years later, that "[t]here is a dearth of caselaw discussing the provisions of the . . . Florida [C]onstitution[']s bars to excessive fines." *Gordon v. State*, 139 So. 3d 958, 960 (Fla. 2d DCA 2014).[19] At the very least, however, *Amos* establishes that fines are excessive when they are "so great as to shock the conscience of reasonable men or [are] patently and unreasonably harsh or oppressive," *Locklear v. Florida FWC*, 886 So. 2d 326, 329 (Fla. 5th DCA 2004) (citing *Amos*, 94 So. at 641), or "exceed[] 'any reasonable requirements for redressing the wrong,'" *State v. Cotton*, 198 So. 3d 737, 743 (Fla. 2d DCA 2016) (quoting *Amos*, 94 So. at 641).

First, the fines and foreclosure are patently and unreasonably harsh or oppressive because they work a drastic sanction on Jim: He is either going to lose his home or pay an exorbitant fine to save it. Jim Decl. ¶¶ 5, 29–30. And the City will not reduce or reconsider Jim's fine. Bargil Decl. Ex. 16 (Rule 5.(4)); Trask Dep. 200:5–25.[20] But Jim is 70 years old, and all of his income goes to meet his living expenses. Jim Decl. ¶¶ 5, 7. The fines are thus harsh and oppressive because any money Jim spends on the City's fines will diminish his ability to provide for his basic needs. And the loss of his home for failure to pay is no less harsh or oppressive.

Second, the fines and foreclosure shock the conscience of reasonable men. In recent months, the City called in its own team of "reasonable people," when it ordered an audit of the

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[19] At least two intermediate courts in Florida have adopted the test first articulated by the U.S. Supreme Court in *Bajakajian*. *See State v. Jones*, 180 So. 3d 1085, 1089 (Fla. 4th DCA 2015); *Gordon*, 139 So. 3d at 960. But because *Amos* is also still good law in Florida, this section will address the factors articulated by the Florida Supreme Court in *Amos* and the cases to apply it since.

[20] As discussed in Section II.B.2, *supra*, the City purportedly provides for a back-channel negotiation with the City Attorney. But the City admits that such a practice is informal and unwritten and involves no back-and-forth discussion. Trask Dep. 161:22–162:4 ("I don't negotiate . . . I make a recommendation . . . It's not a policy and it's not written down anywhere.").

City's own fines and fees habits. That team concluded that the City's fines indeed shock the conscience, using synonymous words to describe the City's enforcement apparatus. Specifically, the auditors concluded that the City's misuse of rolling fines led to penalties that were "extremely high" and "outrageous." Bargil Decl. Ex. 4 at 6. Officer Colbert acknowledged that these fines are "a lot of money in my book." Colbert Dep. 142:18–143:1. Both code officers were non-committal when asked whether the City's fines here were outrageous, *see* Kepto Dep. 80:21–81:23, Colbert Dep. 142:6–143:1, but both favored the City establishing a cap on fines. And even City Attorney Trask recognized that $20,000 would be a high fine for tall grass. *See* Trask Dep. 217:25–218:1. Except the fine owed by Jim is *fifty percent greater* than that.

Finally, the fines and foreclosure "exceed[] 'any reasonable requirements for redressing the wrong.'" *Cotton*, 198 So. 3d at 743 (quoting *Amos*, 94 So. at 641). The City admits that its actions are extreme in light of the infraction—not doing "something as simple as cutting the grass." Bargil Decl. Ex. 11 at 7:19–22. And the City also admits that tall grass is not a serious violation. Thus, fines at the legal maximum far exceed what is necessary to redress the "problem" of tall grass. *Cf. Conley v. City of Dunedin*, No. 8:08-cv-01793-T-24-AEP, 2010 WL 146861, at *5 (M.D. Fla. Jan. 11, 2010) (noting that fines of $50 and $100 per day are appropriate as "small fines [that] are proportional to [a] small offense"). The City had other ways to redress the wrong. It could have hired a contractor to mow. Trask Dep. 68:6–12. It could—and indeed conceded that it *should* have—sent Jim a warning to let him know he could be facing fines. Colbert Dep. 110:21–111:18 (testifying that "[n]otification should have gone out before" August 22). And of course it could have started with lower fines and then increased them. The City's decision to instead "go nuclear" on its *very first* monetary sanction proves that the law "exceeds any reasonable requirements for redressing the wrong" under *Cotton*.

## B. THE CITY'S TREATMENT OF JIM AS A "REPEAT VIOLATOR" VIOLATED JIM'S RIGHT TO DUE PROCESS.

### 1. The City violated Jim's right to due process when it failed to inform him that he would be fined.

Jim was never notified by the City that his property was the subject of open code enforcement cases. Jim Decl. ¶¶ 15–24. As the City has admitted, this is because once the City observed the violation, it did nothing besides track its continuation until, nearly two months (and tens of thousands of dollars) later, it set a hearing to decide how much Jim owed. Colbert Dep. 95:20–96:17; Kepto Dep. 49:16–50:2 (testifying that the "fines start accruing from . . . when we first observe that it's a repeat violation"); Bargil Decl. Ex. 9 at 19-4 (same).

That inaction violates due process. Florida law is clear: "If a repeat violation is found, the code inspector *shall notify the violator*." Fla. Stat. § 162.06(3). And while the statute is silent on precisely when the City must provide notice, the answer is not "after tens of thousands in fines have accrued." *Ciolli v. Palm Bay*, 59 So. 3d 295, 298 n.5 (Fla. 5th DCA 2011) ("It is necessary to fill the procedural gaps in [Chapter 162] by the common-sense application of basic principles of due process.") (citation omitted). And the Eleventh Circuit is in lockstep with that principle. *Kupke v. Orange Cty.*, 293 F. App'x 695, 699 (11th Cir. 2008) (Florida courts "fill the procedural gaps in [Chapter 162] by the common-sense application of basic principles of due process."). Even the City's ordinance seemingly adopts such a reading. Dunedin, Fla. Code § 22-79(a) (establishing that a fine may only be imposed "for each day the repeat violation continues *past the date of notice to the violator of the repeat violation*"). The City just ignores it.

At a minimum, a plain reading of Chapter 162 compels a code enforcement officer to notify a repeat violator *before* requesting a hearing. *See* Fla. Stat. § 162.06(3) ("The code inspector, *upon notifying the violator of a repeat violation*, shall notify an enforcement board and

request a hearing."). Jim was therefore entitled to reasonable notice once he was on the hook for daily fines. That is what is both required by statute and would have been "reasonable under [the] circumstances." *Little v. D'Aloia*, 759 So. 2d 17, 20 (Fla. 2d DCA 2000).[21] Federal due process law essentially requires the same "reasonableness" under the circumstances: When a property owner is "likely to lose a property right—in a cause of action or otherwise—" the government must take "the minimal step of actual notice . . . of the potentially looming . . . action." *M.A.K. Inv. Grp., LLC v. City of Glendale*, 897 F.3d 1303, 1312 (10th Cir. 2018) (citing *Mullane v. Cent. Hanover Bank & Tr.*, 339 U.S. 306 (1950)).

Yet Jim was not notified until months after the violation was observed—*even as the City made near-daily visits to track his noncompliance*. Colbert Dep. 117:25–120:5. All the while, the City never told Jim—as it was required to do—that a "repeat violation [was] found," Fla. Stat. § 162.06(3), much less that he was facing skyrocketing fines. Trask Dep. 110:20–111:3, 111:4–10. Thus, "[a]s a consequence of the City's failure" to notify Jim as required by statute, Jim was "denied the due process . . . reasonable under the circumstances." *Little*, 759 So. 2d at 20 (holding that failure to comply with Chapter 162 established a procedural due process violation). Simply put, the law does not sanction "gotcha"-style enforcement.

**2. The City violated Jim's procedural due process rights when it classified him as a repeat violator.**

To provide adequate process, the process must be *meaningful*. *Massey v. Charlotte Cty.*, 842 So. 2d 142, 146 (Fla. 2d DCA 2003). And process is not meaningful if the consequences of that process are not properly communicated. *Kupke*, 293 F. App'x at 698. The City will surely argue that Jim's 2015 violation stripped him of any entitlement to notice for future violations.

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[21] Such an interpretation is consistent with the goal of Chapter 162—to "authoriz[e] the creation of administrative boards . . . to provide an . . . *expeditious* . . . method of enforcing any codes and ordinances." Fla. Stat. § 162.02.

*See* Fla. Stat. § 162.06(3). But that was not made known at the time of the 2015 hearing. Just the opposite, the City represented that it would *not* do precisely what it did—fine Jim $500 per day without notice. Bargil Decl. Ex. 8 at 14:9–19, 20:2–6 ("You—you've taken this to the extreme. It's not an automatic $500. It can be up to $500 . . . *If there is an issue then he will know about it* and . . . we're going to hear it and then we will decide. . . ."). Thus, at the very instant Jim lost his right to notice and a hearing, the City still insisted that he would get notice and a hearing. *Id.* at 20:2–3, 22:13–14 ("If there is an issue . . . he will be notified just like he was with this.").

Accordingly, the 2015 case, without Jim having known it, "deprive[d] . . . [him] of state procedural remedies," *Kupke*, 293 F. App'x at 697–98, that hindered his ability to defend himself later. Indeed, Jim was not present for the 2018 hearing because he believed that the flight-change fee would exceed the cost of the fines. Jim Decl. ¶ 21; *see also* Bargil Decl. Ex. 8 at 14:14–15 (Chairman Bowman representing that the very notion of a daily fine of $500 for tall grass was "tak[ing] [it] to the extreme"). As in *Kupke*, therefore, "a meaningful pre-deprivation remedy is precisely what [Jim was] denied here," as the City's failure to warn Jim that he "could no longer avail [himself] of" certain rights under Chapter 162.06(2) rendered any subsequent process not meaningful. 293 F. App'x at 697–98. And that failure could not have been remedied by an appeal from the 2018 ruling; such an action would be confined only to the 2018 matter. *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982).

## V. CONCLUSION AND REQUEST FOR ORAL ARGUMENT

The Plaintiffs' Motion should be granted. The undersigned requests oral argument on the motion, estimated at fifteen minutes per side, to provide further clarification to the Court.

Respectfully submitted this 10th day of April 2020.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 10th day of April, 2020, a true and correct copy of *Plaintiffs' Dispositive Motion for Summary Judgment and Incorporated Memorandum of Law* was filed with the Clerk of the Court using the CM/ECF system, which will send a notice of electronic filing to the following CM/ECF participants:

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