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UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

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HONORABLE CHARLENE EDWARDS HONEYWELL
UNITED STATES DISTRICT JUDGE PRESIDING

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

PLAINTIFFS,)

VS:) 8:19-CV-1210

CITY OF DUNEDIN, FLORIDA, and DUNEDIN)
CODE ENFORCEMENT BOARD,)

DEFENDANTS.)

MOTION HEARING (via ZOOM)
TRANSCRIPT OF PROCEEDINGS
NOVEMBER 16, 2020

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IL CSR 084-2617
FEDERAL OFFICIAL COURT REPORTER
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TAMPA, FLORIDA 33602

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transcript produced by computer-aided transcription

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1 THE COURT: Good morning. Is there a problem,
2 Mr. Daigneault?

3 MR. DAIGNEAULT: There appears to be a problem
4 except I don't know what that problem is, Your Honor.

5 THE COURT: It's not showing stop video?

6 MR. DAIGNEAULT: It shows stop video and I'm
7 unable to stop and start it but apparently it's not --
8 it's not transmitting to you folks. But by the way, I can
9 hear all of you I think.

10 THE COURT: There you are.

11 MR. DAIGNEAULT: I can't see anybody else but me.

12 THE COURT: I can see you now.

13 MR. DAIGNEAULT: Okay. I can't see you, Your
14 Honor. I can see that your iPad is there. I can see
15 Mr. Bargil's presence and Mr. Ward's law clerk and a court
16 reporter but I can't see anybody else physically.

17 THE COURT: Are you prepared to proceed or do you
18 want to figure out what are the technical issues and ask
19 to reschedule?

20 MR. DAIGNEAULT: No, Your Honor, I don't think we
21 need to reschedule. If you're not comfortable
22 proceeding -- frankly it's better to not see me. So we
23 seem to have a good audio connection for everybody so if
24 you're comfortable proceeding that way, I certainly am.

25 THE COURT: I'm comfortable with it. I handle

1 telephonic hearings too, although this one is one that I
2 would not necessarily schedule telephonically just because
3 of the length of it. As long as you're comfortable and
4 you can proceed. I don't know what is the technical
5 glitch here this morning, but we certainly can proceed.

6 So let me go on and first just introduce the case.
7 We are here this morning in James Ficken, Trustee, et al.,
8 versus City of Dunedin, et al, case number 8:19-cv-1210.

9 Identify yourselves for the Court starting first
10 with Counsel for the Plaintiffs.

11 MR. BARGIL: This is Ari Bargil, Institute for
12 Justice on behalf of the Plaintiff. I'm joined by my
13 colleague this morning Andrew Ward.

14 THE COURT: Counsel for the Defendant.

15 MR. DAIGNEAULT: Good morning, Your Honor. Jay
16 Daigneault on behalf of all of the Defendants as well as
17 my partner Randy Mora with the law firm of Trask here in
18 Clearwater.

19 THE COURT: All right. And we are here on
20 cross-motions for summary judgment which I scheduled once
21 before, but we've now had an opportunity for the
22 Plaintiffs to file their Amended Complaint which cleared
23 or corrected the issues pointed out by the Court at our
24 previous gathering and the parties requested to renew
25 their already filed motions which included, of course,

1 exhibits in support or in opposition, so with that in
2 mind, then we will proceed. And let's see here. It
3 doesn't really matter to me. We can start first with
4 Plaintiffs. They were both filed on April 10th, 2020, so
5 we'll start with Plaintiffs' dispositive motion for
6 summary judgment at Docket Entry 43. Actually Defendants
7 was filed first. I see his is Docket 42. It doesn't
8 really matter. They were filed both on the same day and
9 then we will go to Defendants' dispositive motion for
10 summary judgment, so, Mr. Bargil, you may proceed.

11 MR. BARGIL: Good morning, Your Honor. This case
12 asks two very simple questions. The first is a \$30,000
13 fine and the threat of losing your house for the trivial
14 code violation of having tall grass an excessive fine
15 under the Eighth Amendment. And, second, can the
16 Government impose this sanction without ever once
17 providing you notice that you were being fined? Because
18 the answer to both of these questions is no, summary
19 judgment in favor of the Plaintiffs is appropriate.

20 Your Honor, the critical facts in the case are
21 this: Jim Ficken was fined nearly \$30,000 at a rate of
22 \$500 a day for tall grass. Code enforcement officers
23 identified the violation and rather than advising Jim that
24 his grass was too tall or telling him that he was being
25 fined, they tracked the violation, photographed it,

1 recorded it and left. All tolled this went on for nearly
2 two months.

3 Your Honor, the City's position is simply that Jim
4 was not entitled to notice that he was being fined because
5 he was ruled to have had tall grass once in 2015. That
6 position is wrong. Jim was entitled to notice and in
7 failing to provide it, the City violated its own
8 ordinances and State law. This is a violation of Jim's
9 right to due process and it lead to the imposition of
10 constitution -- unconstitutionally excessive fines.

11 THE REPORTER: Mr. Bargil, can you slow down a
12 little?

13 MR. BARGIL: Yes, ma'am. Absolutely. I
14 apologize.

15 Your Honor, I think some context on the dates
16 might be helpful here, and there are two very important
17 ones. The first is July 5th, 2018, and that was where the
18 violation was first observed on Mr. Ficken's property and
19 that's when the fines began.

20 The next important date is August 20th. That's
21 the date of the very first interaction that Jim had with
22 the code enforcement officer in this case. That's when
23 Officer Colbert came by his property and told him you're
24 going to get a big bill from the City. So Jim's notice
25 came a month and a half after the violation was first

1 observed.

2 Now, Jim then went and bought a new lawnmower and
3 he cut his grass within a day, but by then the damage was
4 done. Jim owed over \$20,000 at that point. All these
5 dates, Your Honor, are included in a timeline which is
6 Exhibit 8 to Jim's declaration in support of summary
7 judgment and that includes a helpful info-graph that shows
8 the height of the grass at its tallest point.

9 Your Honor, I think the timeline is critical to
10 understanding the due process arguments. And first thing,
11 I'd like to start with the applicable ordinance and
12 statute because the City violated both here. The City's
13 own ordinance says that a fine for a repeat violation may
14 accrue, quote, *"for each day the repeat violation*
15 *continues past the date of notice to the violator of the*
16 *repeat violation."* In other words, it's a daily fine once
17 you're made aware of the condition, and that's Dunedin
18 Code of Ordinances 22-79(a).

19 Compliance with the ordinance didn't happen here.
20 Instead, the City observed the violation on Jim's property
21 for a total of nearly two months and they didn't tell him
22 about the possibility of being fined until after he owed
23 over \$20,000. Now, were that not enough, here's what the
24 State statute says, quote, *"if a repeat violation is*
25 *found, the code inspector shall notify the violator."*

1 That's Florida Statute 162.06, Subsection 3.

2 Now, the City's argument is apparently that it
3 doesn't need to follow its own ordinances and that it
4 technically complied with State statute because the State
5 statute doesn't say precisely when they need to notify the
6 violator that they're being fined. Your Honor, that's
7 just wrong as a matter of law. As for the statute, both
8 State and Federal courts in Florida have said that any
9 procedural gaps in Chapter 162 are to be filled in
10 applying, quote, *"the common sense principles of due*
11 *process."* That's the Ciolli v. Palm Bay Case. That's a
12 50 DCA case from 2011, and in the Eleventh Circuit it's
13 Kupke v. Orange County. That's a 2008 case.

14 Your Honor, this is not an instance where the
15 common sense principles of due process were applied, and
16 the on-point Federal case law here also says that notice
17 must precede fines. And I think a good place to start is
18 the MAK Investment Group case that we cite on Page 14 to
19 16 of our brief because I think it provides really
20 excellent guidance here, and that case very pointedly says
21 as follows: When in the absence of notice, property
22 owners are likely to lose a property right and a cause of
23 action or otherwise the Mullane rule applies. And what
24 that means in its reference to the Mullane rule is that
25 parties are entitled to notice reasonable under the

1 circumstances when a property interest is at stake. In
2 this case clearly Jim had a property interest at stake.
3 He was going to be fined \$500 per day and, in fact, was
4 being fined \$500 per day without his knowledge.

5 Now, what does notice reasonable under the
6 circumstances look like? Well, we can look to the
7 ordinance. The ordinance actually tells us what the City
8 is supposed to do when it observes a repeat violation.
9 It's supposed to tell the violator, hey, you have got this
10 condition on your property and we're going to start fining
11 you, and that's not what happened here. But his property
12 was on the line the instant that the violation was first
13 observed, and the City didn't say anything and instead
14 they quietly observed the violation, they ticked off fines
15 on a daily basis. Seemingly a dozen times they made these
16 visits to his property and none of those times did they
17 advise Jim that he was being investigated or that he was
18 being fined \$500 per day.

19 Now, Your Honor, you could easily end the inquiry
20 right here and find that because of the due process
21 violation the fines against Jim are void and
22 unenforceable. But even if we were to set aside the fact
23 that the process violated State and local law and was
24 unconstitutionally insufficient, the fines imposed are
25 plainly unconstitutional because \$30,000 is grossly

1 disproportionate to the offense of tall grass.

2 And that brings us to our Eighth Amendment
3 argument. Your Honor, the first and best place to look
4 for consideration of what our excessive fines arguments
5 require this Court to do is the U. S. Supreme Court's 1998
6 decision in *Bajakajian* where the Court's -- where the
7 Court then identified a series of factors that lower
8 courts should consider in weighing whether or not there's
9 been an Eighth Amendment violation and that essentially is
10 the consideration of whether or not a fine is grossly
11 disproportionate to the offense.

12 The first factor that Your Honor should consider
13 is whether or not Jim falls within the class of persons
14 whom \$500 fines are principally directed. Plainly, Your
15 Honor, Jim is not the reason why \$500 daily fines exists.
16 These weren't structural violations. Nobody's health was
17 at risk and Jim had no notice of the condition. And as
18 the ordinance points out, that's who these violations are
19 for, people who are aware of the problem and they do
20 nothing, and all of the cases that the City cites support
21 that position because in nearly all of those scenarios you
22 have people who are aware that they were facing fines and
23 yet did nothing and then later on brought these cases into
24 court. \$500 a day, your Honor, or \$500 fine, Your Honor,
25 it should be noted is the fine for barreling through a

1 school zone at 60 miles an hour. That's not Jim. Jim is
2 somebody who let his grass get too tall.

3 THE COURT: How does the fact -- Let me stop you
4 there, Mr. Bargil. How does the fact that he was a repeat
5 offender, though, play into the \$500 assessment? So this
6 was not the first time that the City had cited or had
7 contact with the Plaintiff in this case because of the
8 overgrown grass on his property.

9 MR. BARGIL: That's right, Your Honor, it wasn't
10 the first time. The class fit as a repeat violator
11 matters certainly for purposes of the type of notice to
12 which he was entitled under the city's ordinances, whether
13 he was supposed to have a period of time to correct the
14 violation, which he isn't and, you know, we admit that in
15 our briefing, but what can't happen is what happened here
16 where the City begins fines without providing notice.

17 Now, on the question of how that plays into the
18 excessiveness of the fine, I think Bajakajian really
19 supplies a pretty straightforward answer here. Footnote
20 12 of Bajakajian, they reject the very similar argument
21 that was presented by the Government in that case where
22 the Government said, Your Honor's -- you know, this is a
23 case involving somebody who was --

24 THE COURT: Slow down a little bit.

25 MR. BARGIL: I'm sorry. The Supreme Court in

1 Bajakajian footnote 12 considered this same argument and
2 there they said we're not going to consider a separate
3 criminal charge that arose out of the same course of
4 conduct, and the explanation they gave there, and I'd like
5 to quote it, is that the nature of the offense was not
6 altered by the circumstances surrounding it because,
7 quote, *"a single willful failure to declare the currency*
8 *constitutes the crime, the gravity of which is not*
9 *exacerbated or mitigated by another alleged offense."*

10 So I think that pretty squarely addresses the
11 question here of whether this Court should be considering
12 other violations. Certainly those violations weren't in
13 front of the Code Enforcement Board when they determined
14 what fine to levy. And as Bajakajian suggests, it's
15 probably not appropriate for the Court to consider that
16 here.

17 I think it's also worth mentioning, Your Honor,
18 that while he had been cited in the past, he had never
19 been fined before and this was the first instance of a
20 tall grass violation since he was actually found to be in
21 violation of a 2015 case, so this is an instance of
22 somebody who had been compliant in the period of time
23 since the last violation. And certainly, Your Honor, you
24 know this plays into and links to the next consideration
25 under the Bajakajian factor which is what are the other

1 penalties authorized? What else could the City have done
2 here before moving to the maximum fine allowed by State
3 law?

4 Nobody here is arguing that the City could not
5 have fined Jim, but they could certainly have fined him
6 far, far less. What they couldn't have done is fined him
7 anymore. That would have been illegal, but both code
8 enforcement officers told us that this was an
9 unprecedented fine. This is a common violation and an
10 unprecedented fine.

11 Officer Colbert in his deposition had no memory of
12 a fine like this for tall grass. And Officer Kepto
13 testified that he could only remember one scenario in
14 which somebody received a \$500 fine for tall grass and
15 that was a case involving a woman who wanted to turn her
16 property into a wildlife refuge, and there was concern for
17 neighbors that coyotes were eating neighborhood cats and
18 dogs and that was the only other instance where there was
19 a \$500 fine. Weighing this against the other possible
20 fines that the City could have issued here I think says a
21 lot about whether or not these fines are excessive.

22 The third factor, Your Honor, is the harm caused.
23 Nobody is seriously arguing that tall grass is a threat to
24 the health and safety of the good people of Dunedin, and
25 any suggestion to the contrary is really just fanciful.

1 And, finally, Your Honor, other cases have come up
2 with other factors outside of the three outlined in
3 Bajakajian, and they've all kind of held generally that
4 there is no finite list of things that the Court ought to
5 consider, and one of those things is the culpability of
6 the parties. Jim was somebody who was out of town when
7 his grass grew -- his lawn man died -- and when he came
8 back he was facing massive fines. The City on the other
9 hand was well aware of the condition and they came to the
10 property over at least a dozen times to track the
11 violation and to tabulate it while Jim was unaware that he
12 was being fined by the City.

13 So considering these two things together, it
14 certainly weighs in favor of fining the excessiveness or
15 finding that the fines are excessive in light of who knew
16 what and when, and this, of course, plays a fact to what
17 the City was supposed to do under its own ordinances in
18 order to prevent all of this from happening. Your Honor,
19 as the record shows, Jim did take action when he was
20 required to. The City could have fined him but just not
21 in this way, and all of this could have been resolved with
22 a Post-it note to be quite frank and we probably wouldn't
23 be here. But instead this is how the City went about
24 doing things, and as a result Jim owes nearly \$30,000 for
25 tall grass.

1 Unless Your Honor has any questions, I'd like to
2 reserve a little bit of time for rebuttal.

3 THE COURT: Not at this time. All right.
4 Response to the Plaintiffs' motion, Mr. Daigneault.

5 MR. DAIGNEAULT: Thank you, Your Honor. I
6 appreciate you taking time for us this morning. If this
7 matter could have been resolved with a Post-it note, there
8 wouldn't be 11 prior violations at this property. It's
9 simply -- I know that this case for Mr. Ficken's part has
10 a lot of emotional appeal. It has appeal in the media
11 which has been leveraged ad infinitum. It has, you know,
12 this sort of visceral, oh, my gosh, the poor guy getting
13 fined for tall grass, but that does not look at the facts
14 of this case which we've explained explicitly in our
15 briefing. Mr. Ficken simply is the precise person to whom
16 the code enforcement statutes are directed because
17 Mr. Ficken, for whatever reason, simply has not diligently
18 and consistently maintained his property.

19 Now, we can laugh and say, well, folks, it's just
20 tall grass, no one's ox is really gored here, but the fact
21 of the matter is that these ordinances are legislatively
22 imposed for a reason and to cast them aside with the ease
23 with which Mr. Ficken has done is very troubling. Bear in
24 mind, the Amended Complaint in this case says
25 Mr. Ficken -- and Mr. Bargil has made the same argument

1 today, *"I didn't know I was being fined."* Mr. Bargil at
2 several points today said Mr. Ficken was being fined as of
3 July 5th, 2018 without his knowledge. That's factually
4 unsupportable. It's false. Mr. Ficken was not and cannot
5 by law be fined unless and until he goes to the Code
6 Enforcement Board, which as Your Honor knows and
7 Mr. Bargil knows is the form in which it is determined by
8 a seven-member body in this instance whether the violation
9 existed at all and whether considering the statutory
10 factors at issue Mr. Ficken should be fined and in what
11 amount and that's precisely what happened in this case.

12 So the idea and the explicit statement that
13 Mr. Ficken was being fined before he went to a hearing is
14 incorrect. The MAK Investment Group case out of the Tenth
15 Circuit that's cited by Plaintiffs in their briefing and
16 here this morning is distinguishable on its facts and it's
17 distinguishable on its facts because in that case the
18 statute at issue didn't require notice to property owners
19 after the City Council, the governing body, determined
20 that their property was blighted even though that base
21 determination began a clock running of 30 days which those
22 same owners had to challenge that determination, so a
23 determination was made and they never had the opportunity
24 to challenge it. That's not what happened here.

25 A determination here was made, not by the City

1 Council and not by the Code Enforcement Board, but by the
2 Code Enforcement inspectors that a violation, a repeat
3 violation had occurred.

4 Now, Mr. Ficken -- and, Your Honor, this is
5 another reason that the case has such emotional appeal.
6 Mr. Ficken has raised at several points and leveraged the
7 fact that his mom was ill and ultimately passed away and
8 he came back and, you know, his poor lawn man passed away
9 and that lawn man was either the guy who repaired the
10 mower during his periods of absence or he was the guy who
11 actually mowed the lawn during the time that Mr. Ficken
12 was away.

13 What the facts show in the case, the facts, not
14 the emotion, what the facts show is Mr. Ficken simply
15 doesn't live here. I'm not disputing the fact that he's
16 here from time to time, and maybe he lives here now, but
17 during the course of these events, he simply wasn't here.
18 It's important to remember that he admitted the violation.
19 We don't have a case here where Mr. Ficken's going to say,
20 wait a minute, this didn't really ever happen. He knew
21 when he came back from South Carolina in the summer of '18
22 that his lawn was overgrown and then he began to feed the
23 Code Enforcement Board varying stories as to why that was,
24 so -- and he had the chance, not just in 2018 when he was
25 imposed this fine, but in 2015. And the record is

1 interesting in 2015. Well, Mr. Kepto, I can't keep the
2 lawn mowed because I can't find my lawnmower. My
3 lawnmower is broken down. I had a guy who used to mow it
4 but I can't find now. I'm not sure what's going on.

5 As we approach -- as we approach the Thanksgiving
6 holiday, I'm reminded of the story that we frequently hear
7 about the Thanksgiving turkey having many excuses for why
8 he or she shouldn't be slaughtered. I'm not suggesting
9 that Mr. Ficken be slaughtered here, but the record
10 demonstrates that there's a lot of points in time where
11 Mr. Ficken doesn't take care of his property and, hey,
12 that's his choice to do, and then he says, well, I can't,
13 I can't take care of the property because my mom is sick
14 and I'm in South Carolina. I can't go to the hearing. I
15 can't have somebody else appear in my place. I can't hire
16 a lawyer, and you should give me some more time. You
17 should continue the hearing.

18 Mr. Ficken, whatever his reasons are, simply does
19 not wish to participate in the statutorily mandated
20 process for code violation. So this case is not like MAK
21 in terms of its -- in terms of the due process at issue
22 because not only did Mr. Ficken have the opportunity,
23 which he did not avail himself of, to take his complaints
24 about the timing of the issuance of the notice of
25 violation relative to the initial observance of the

1 violation by the code enforcement officer. He had the
2 opportunity to take those to the Code Enforcement Board.
3 He didn't take that. He had the opportunity to take that
4 matter to appeal. He didn't do that. So in terms of the
5 Federal due process claim, whether he did or he didn't is
6 not material, because to make a Federal due process claim
7 under the 14th Amendment, Mr. Ficken needs to show and
8 cannot the element of constitutionally inadequate process.

9 The fact is that Chapter 162 provides for
10 constitutionally adequate process, and the Courts that
11 have reviewed that said that it's fine. Whether
12 Mr. Ficken opted to avail himself of that process or not,
13 the fact is that it's there, and Mr. Bargil can't tell you
14 that it's not there. The statute says what it says, and
15 the record says what it says if he didn't do that.

16 As to the State requirement, the State's
17 requirement is a little different. It's an exhaustion of
18 remedies, and Mr. Bargil has indicated in his briefing and
19 is confused a little bit. I'm not arguing. I want to
20 make clear for the record, I'm not arguing the Chapter
21 1983 -- Section 1983, pardon me, has an exhaustion
22 requirement. I'm aware that it doesn't, but the Federal
23 claim doesn't fail on exhaustion. It fails on the
24 required element of constitutionally inadequate process.

25 But the claim under the State constitution fails

1 because Mr. Ficken -- and this is a factual circumstance
2 that this very court has passed on in the past in the same
3 city. You know, I guess that's a coincidence but that's
4 the fact. The fact is that under the Florida Constitution
5 Mr. Ficken needed to exhaust his remedies under the code
6 enforcement statutes before he can bring his due process
7 claim to this court. He didn't do that. There's no
8 question, there's not a factual question that he didn't do
9 that and frankly it's just the end of a very long list of
10 things that Mr. Ficken didn't do relative to his
11 maintenance of this property and others.

12 Look, we can wash it away and we can laugh at it
13 and say, well, it's just some grass and we should just let
14 it go and the City could have done that. What the record
15 makes very clear is Mr. Ficken was using the city's code
16 enforcement officers and its staff as his de facto
17 property manager and that's just not appropriate. He lost
18 the ability to do it when -- in 2015 when he was found in
19 violation.

20 I find it really interesting in the briefing where
21 there's a complaint that Mr. Ficken wasn't -- he wasn't
22 fined before in 2015. That's been sort of turned around
23 on the City and the Code Enforcement Board as sort of a
24 weapon. It really should be a shield, not a sword, in
25 this case, but because what it shows is the Code

1 Enforcement Board is seeking compliance and what they have
2 in this case is a property owner who just doesn't own one
3 property. I know we have -- the Court's been sold and so
4 have the newspapers on this narrative that poor
5 Mr. Ficken, poor Mr. Ficken. Mr. Ficken is a real estate
6 investors who owns multiple properties, all of which have
7 had problems with compliance and maintenance and all of
8 those things, one of which he hasn't even been to in a
9 number of years, so the Code Enforcement Board in this
10 case in 2015 says, look, you know, we have 10 violations
11 where you've complied within the time set for compliance.
12 We're not going to be doing that any more because in this
13 particular one you didn't. They could have fined him in
14 2015, they could have, up to \$250.

15 He received explicit notice, explicit notice on
16 June 20 of 2015, that's the date that he received the Code
17 Enforcement Board's order from 2015 indicating to him
18 explicitly informing him that future violations within the
19 five years could result in a fine up to the statutory
20 maximum of \$500.

21 So the due process arguments in this case, they
22 simply fail. They fail on a Federal level. They fail on
23 the State level and the case provided by Plaintiffs'
24 Counsel does not change that analysis.

25 Turning to the matter of the excessiveness of the

1 fines.

2 THE COURT: Well, before you go there, let me stop
3 you. With regard to the due process violation and the
4 argument made by Mr. Bargil that the Defendant -- I'm
5 sorry, that the Plaintiff didn't have any notice of the
6 fine, the \$500 fine, advise the Court of the notice that
7 Mr. Ficken received with regard to the \$500 fine?
8 Mr. Bargil specifically referred to the Dunedin statute as
9 well as Chapter 162 and its provisions that includes
10 providing notice.

11 MR. DAIGNEAULT: Mr. Ficken was advised. There
12 was notice of repeat violation issued on August 22nd of
13 2018, and the notice provided as follows: It advised
14 that -- and this is Exhibit 33 to Joan McHale's affidavit.
15 She's the City Code Enforcement Board's clerk. She says
16 you're going to have a hearing. There's been a repeat
17 violation observed and it was sent with a notice of
18 hearing of repeat violation. And it says, and I quote,
19 *"If you wish to present your side of the case, you must*
20 *appear before the Code Enforcement Board on that date."*
21 And that date was September 4th, 2018. *"Failure to appear*
22 *may result in the Board proceeding in your absence,"* and
23 ultimately he was absent and he did not appear. *"Should*
24 *you be found in violation of the above code, the Code*
25 *Enforcement Board has the power by law to levy fines of up*

1 to \$500 a day against you and your property. Should you
2 desire, you have the right to obtain an attorney at your
3 own expense to represent you before the Board. You will
4 also have the opportunity to present witnesses as well as
5 question the witnesses against you prior to the Board
6 making a determination." And that is really where the
7 rubber meets the road, Your Honor. That's what
8 distinguishes this case from the MAK case and that's where
9 this case needs to allay the standard. You have the
10 opportunity to question the witness against you and
11 present evidence prior to the Board making its
12 determinations so they had been told this morning that he
13 was being fined as of July 25th of 2018. The fact of the
14 matter is he couldn't have been because those code
15 enforcement inspectors lacked the authority to issue a
16 fine. That remains with the Code Enforcement Board based
17 on the evidence received by it.

18 Now, it's very possible, and I think perhaps even
19 likely, that the case would have turned out very
20 differently had Mr. Ficken appeared at the Code
21 Enforcement Board hearing or sent someone in his stead but
22 those are, you know, wishing doesn't make it so. Those
23 are not the facts of our case. But the fact is that
24 Mr. Ficken was well-advised of what the -- not just in
25 2015, but in 2018 in advance of the hearing what the

1 potential consequences were.

2 May I move on to the excessive fines analysis now,
3 Your Honor?

4 THE COURT: Yes.

5 MR. DAIGNEAULT: Mr. Bargil and I don't
6 necessarily disagree on the standard of proportionality of
7 fines, and it's really -- it is a proportionality
8 analysis. The cases I think are not especially -- I don't
9 want to call them uninformative. They're just fact
10 specific. Bajakajian has some place here but it
11 doesn't -- it doesn't carry the day because of the facts
12 of our case. And Your Honor has already hit on this.

13 What Mr. Ficken desperately wants to avoid in this
14 case is the statute because the statute does say, which
15 you've already touched on, there are three factors to be
16 considered by the Code Enforcement Board in determining
17 the amount of the fine. The first as we've discussed at
18 length is the gravity of the violation. Here, the gravity
19 of the violation is pretty clear from Mr. Bargil's
20 argument, they think very little of the gravity of the
21 violation. It may be low. So let's concede that it is
22 just for the sake of argument even though it can be
23 serious at times.

24 The actions taken to correct the violation. Well,
25 in this case, you have a shifting story from Mr. Ficken.

1 First of all, Mr. Ficken admits the violation; right? He
2 wasn't even in town. He wasn't in town, and so, oh, my
3 gosh, what do you do when you're not in town? I got to
4 explain why this lawn is out of compliance again for
5 the -- you know, times exceeding a dozen over a five-year
6 period. How do I do that?

7 Well, he tries to mow it and says his lawnmower is
8 now broken down, but, you know, he mowed part of it and
9 his stories now are all over the place. First, Mr. Kellum
10 was the guy who repaired his mower, so Ficken called
11 Kellum to fix it but he couldn't fix it. Apparently he
12 had passed away, but now he's the guy who used to mow his
13 lawn. I can only speculate that that shifting story was
14 intended to convey to the Code Enforcement Board that he
15 actually had someone taking care of the lawn while he was
16 away in South Carolina. Of course I'm speculating, but
17 what I think to me what it says is if I tell the Code
18 Enforcement Board that this guy was only going to repair
19 my mower if it broke, it suggests again strongly that I
20 wasn't trying to correct the violation. I wasn't having
21 anybody taking care of my property.

22 So the second factor under the statute is the
23 actions taken to correct the violation, and here there
24 were virtually none. He let the thing go. Again, all
25 right, now, he did go out and by a new mower, right, and

1 so would have and could have been presented to the Code
2 Enforcement Board.

3 And the third factor in that statutory
4 proportionality analysis is the previous violations. And
5 here there are previous violations, and not just -- I want
6 to point out, Your Honor, also that the Board is
7 authorized not to just consider previous violations at the
8 property, but what the statutory language is is that they
9 can consider previous violations by the violator, and in
10 this particular -- in this very, very same hearing there
11 was a violation committed by Mr. Ficken at his Highland
12 property at issue. So those simply can't be extracted
13 from the proportionality analysis.

14 As you know, courts and bodies like this are not
15 always required to explicate on their reasoning, but those
16 are the statutory factors at issue.

17 The other thing that I wish to note about the
18 excessive force analysis is that the Eighth Amendment was
19 intended as a prescription on courts, not on legislatures,
20 and the legislative determinations are proportionality
21 should and must receive significant deference from this
22 court, and what the cases show is that when those types of
23 fines are -- they fall within those statutorily authorized
24 boundaries, that they are -- I won't say without exception
25 because that's not accurate, but they are almost always

1 found to be compliant with the Eighth Amendment. And I
2 think I suggest to Your Honor that this case fits in those
3 class of cases where it was proportional.

4 Mr. Ficken always had, he didn't take it, but he
5 always had the opportunity to keep this property in
6 compliance and he always had, again, though, he didn't
7 take it, the ability to explain why he couldn't keep the
8 property to the Code Enforcement Board which was the
9 authority charged with issuing these fines, so with that,
10 Your Honor, I haven't anything else to add but I'm happy
11 to answer any questions that you may have.

12 THE COURT: Plaintiff appears to argue that the
13 notice is some type of notice that should have been given
14 to him on or about I guess July 5th, 2018 when the fine
15 began to accrue, and I realize that was before there was
16 any Code Enforcement Board hearing, et cetera, but I
17 presume the argument, and I'll let Mr. Bargil clear this
18 up, but the argument is that the code enforcement
19 inspector should have perhaps left a note or something at
20 the property, something that made Mr. Ficken aware that
21 his property was accruing a fine or was subject to the
22 accrual of a fine. Why don't you address that aspect of
23 the argument?

24 MR. DAIGNEAULT: And, again, this is a point on
25 which Mr. Bargil and I don't think disagree, though I'm

1 sure he'll correct me if I'm wrong. The distinction
2 between a first violation and a repeat violation within
3 the statute is that in an initial violation, the code
4 enforcement inspector is required to give the violator a
5 time -- a reasonable time to comply. And so if you say
6 your grass is too long under our code, you have four days
7 to mow it, if you don't mow it by day five, then you can
8 go to the -- and this is exactly what happened in the 2015
9 violation. Then you go to the Code Enforcement Board and
10 they can fine you but they may not.

11 In a repeat violation, though, it's a little bit
12 different. The statute, as Mr. Bargil said, does say that
13 the code enforcement inspector shall notify the violator
14 of a repeat violation. What the statute does not do,
15 though, is prescribe a specific time frame or a specific
16 time at which the violator is to be notified after the
17 observation of the repeat violation, and so that's -- I
18 think that that's what Mr. Bargil is arguing here.

19 His argument, though, is incorrectly contingent on
20 the idea that the due process violation is complete at
21 that time, so even if you accept Mr. Bargil's argument
22 that the time between the notice of violation issuing on
23 August 22nd and July 5th is somehow -- is unreasonable
24 under Chapter 162, the due process violation can't be
25 complete until he's deprived of an opportunity to

1 meaningful notice of the proceeding and an opportunity to
2 be heard, both of which he had and was provided but did
3 not take, so I don't think the Court needs to spend a lot
4 of time on the gap period because the gap period could
5 have been, whether it was one hour, two weeks or four
6 weeks or six weeks, it could have been -- it could have
7 been evaluated and adjudicated within the code enforcement
8 proceeding but it was not.

9 THE COURT: Okay. Thank you. Mr. Bargil.

10 MR. BARGIL: Thank you, Your Honor. A couple
11 points on rebuttal. I think to start, you know,
12 Mr. Daigneault has tried to frame this case as a decision
13 between emotional appeal, which is our position as he's
14 framing it, or the facts and the law. And I don't think
15 that that distinction is appropriate. Certainly I think
16 it indicates their recognition that perhaps this looks
17 bad, but let's drill down into the facts and law as
18 they've described them.

19 First of all, Your Honor, they offered a
20 distinction of the MAK case that I think is completely
21 unavailing. He said in that case a determination was made
22 that triggered a series of events that effected the
23 property interest of the Plaintiffs in that case. That is
24 exactly what happened here. Somebody came to Jim's
25 property, they observed a violation and he immediately

1 became liable for fines from that point going forward. A
2 determination was made. Jim's property interests were on
3 the line. Now, Your Honor --

4 THE COURT: Let me just stop you there, though,
5 because is that correct? Someone came to the property,
6 saw that the grass was overgrown, noted that he was a
7 repeat offender, but the fine itself is not assessed until
8 you go to the Code Enforcement Board hearing. Isn't it
9 the Board that has the sole authority to actually
10 determine the fine and assess the fine?

11 MR. BARGIL: Okay. So two responses to that, Your
12 Honor. The first is once that happened, once that person,
13 the code enforcement officer observed the violation, under
14 the City's ordinances the code inspector was required to
15 notify the violator of the repeat violation. That didn't
16 happen here. Okay. But turning --

17 THE COURT: What ordinance are you referring to,
18 because Mr. Daigneault doesn't seem to know about that
19 ordinance. So what is that ordinance so the Court can
20 look at it? What ordinance number -- which number are you
21 referring to?

22 MR. BARGIL: It's 22-79(a). I think it's telling,
23 Your Honor, that when you asked about it, he shifted to a
24 discussion of State statute.

25 THE COURT: What does 22-79(a) say? I know it's

1 in the record. Just tell me.

2 MR. BARGIL: It says the following -- It says that
3 for a repeat -- a fine for a repeat violation may accrue,
4 quote, *"for each day the repeat violation continues past*
5 *the date of notice to the violator of the repeat*
6 *violation."*

7 Now, Mr. Daigneault explained to you that the
8 first time when you asked when was notice provided, he
9 said August 22nd. Your Honor, not only was that more than
10 a month and a half after the violation was first observed,
11 it was after Jim cut his grass and brought the property
12 into compliance.

13 Now, there's this separate suggestion that I think
14 bears discussion about, well, when as a matter of
15 technical administration is the fine actually assessed?
16 His position is, well, it doesn't happen until you go in
17 front of the Code Enforcement Board. Your Honor, that is
18 completely belied by the testimony in this case. This is
19 the testimony of Officer Kepto, quote, *"fines start*
20 *accruing when we first observe that it's a repeat*
21 *violation."* This is City Attorney Trask who's the City's
22 representative in this case, quote, *"a repeat violator*
23 *does not receive the same type of notice as a nonrepeat*
24 *violator."* When it gets to the Code Enforcement Board,
25 they are actually considering the fine retroactively to

1 the date of the inspection.

2 Again, City Attorney Trask here. *"Fines begin to*
3 *run on the day of the inspection."* That's the way it's
4 been done for 30 years. There are three separate
5 instances in the record where the City Attorney, the
6 City's own representative and the City's code enforcement
7 officers actually explain an enforcement process that is
8 completely contrary to what Mr. Daigneault just described
9 here.

10 Now, their big issue in this case is that Jim has
11 these excuses, that he's a bad guy. Nobody is saying they
12 couldn't have fined Jim. What we're saying is when those
13 fines are assessed, he's entitled to notice. If he
14 doesn't take any action, the fines will go day by day.

15 THE COURT: Is assessment the same as an accrual?
16 You seem to be equating the two. I mean, an assessment --
17 is assessment the same as an accrual?

18 MR. BARGIL: Is it the same as a what?

19 THE COURT: Accrual. In other words, when the
20 fine accrues, is that an automatic assessment? I don't
21 think it is. Isn't -- doesn't the actual assessment --
22 isn't the assessment imposed by the Board, the amount that
23 the Board has to determine? It's accruing. In other
24 words, they can apply it retroactively but they could also
25 find that there was no fine. I mean that's the purpose of

1 having the Board, this quasi-judicial entity, if you will,
2 consider the case.

3 MR. BARGIL: I think for all intents and purposes,
4 Your Honor, it is the same. But I would direct your
5 attention to the actual MAK case where the Court said when
6 in the absence of notice, property owners are likely to
7 lose a property right in a cause of action or otherwise,
8 the Mullane rule applies, so it almost doesn't matter
9 whether you classify it as an accrual or an immediate
10 tabulation that just gets calculated at the time of the
11 code enforcement meeting. What matters is, look, you have
12 rights on the line as of this moment. We need to apprise
13 you of that. The City is under an obligation to apprise
14 people of that, otherwise this is what's going to happen.

15 Your Honor, this is not a code enforcement system
16 that reflects, although this is the city's argument, a
17 desire to obtain compliance. If compliance is what is
18 desired, then you'll comply with your own ordinances and
19 provide people notice once you observe a repeat violation,
20 and then in that scenario, the only people who will get
21 really high fines are those who were made aware but then
22 didn't take any action, and that's actually what happens
23 in the cases that they cite in support of their fines.
24 The Moustakis case, the Conley case, the Marfut case,
25 those were all scenarios where the people who had been

1 fined were aware of the fines against them. And so
2 there's a lot of discussion also being made about, well,
3 Jim just didn't avail himself of his rights.

4 Your Honor, I think we should talk about what Jim
5 did do. He sent three letters to the Code Enforcement
6 Board seeking a continuance, and they said no. He offered
7 to appear by phone, and they said no. He asked for
8 reconsideration of the fines twice and they denied it
9 without allowing him to speak at the hearing because the
10 City has a policy of non-negotiation with repeat
11 violators.

12 So this discussion about what's available under
13 162 I think misses the fact that 162 presumes a certain
14 amount of fair play on the part of the City and its
15 compliance with its end of the bargain under 162. 162.06
16 requires that they provide notice. 162.07 says they shall
17 hear the testimony of the alleged violator, which they
18 didn't do, and, of course, 162.11, and this matters a lot,
19 Your Honor, says that the --

20 THE COURT: Okay. Let me stop you, again, though.
21 How can you hear the testimony of the alleged violator if
22 he doesn't appear? I mean that's just like in court. I
23 schedule a hearing time and somebody doesn't appear, oh,
24 well. That doesn't mean I have to continue my hearing.

25 MR. BARGIL: Well, Your Honor, I agree with that

1 but that -- there's a pretty big distinction between
2 someone who just doesn't show up and someone who begs for
3 a continuance because they know they're going to be out of
4 town and are not expecting that the fines will exceed the
5 cost of their flight change.

6 THE COURT: But doesn't that -- isn't that left
7 with the Board to decide? I mean in other words, because
8 somebody asked me to continue their case doesn't mean I
9 have to continue it. I deny continuances all the time.
10 That means you either need to come or I'm proceeding
11 without you. That's in the discretion of the person who's
12 making the determination, the hearing officer, if you
13 will. In this case it was a Board, the Code Enforcement
14 Board, so I think if they provide you with a hearing and
15 an opportunity to be heard and you don't appear for
16 whatever reason, that's the risk you run for your
17 non-appearance. I mean they don't have to accept your
18 request to continue it or reschedule it. I don't know
19 anywhere in the law that that's required.

20 MR. BARGIL: Well, 162 does say, you know, the
21 basic requirements of due process apply here. And --

22 THE COURT: That's not a due process requirement.
23 They have to provide the hearing. That's a due process
24 requirement, but they don't have to make you come.

25 MR. BARGIL: That's right, Your Honor. There's

1 sort of a conflation here between the requirements of
2 Mathews which is what we're really talking about now and
3 the requirements of Mullane where I think that distinction
4 is important. Mullane requires a certain type of notice
5 before the process that Mullane initiates begins, and that
6 process that Mullane initiates is essentially the Mathews
7 process. And we're talking about Mathews now where this
8 is really much more of a Mullane issue.

9 Now, the testimony of the City attorney here is,
10 in fact, that Jim, for whatever this is worth, did meet
11 the criteria for getting a continuance. And assuming that
12 the City's interested in maintaining compliance and
13 allowing the people to make their record so that they can
14 actually take up the appeal that they're saying Jim should
15 have taken up would certainly weigh in favor of allowing
16 him to appear at a later date or by phone which is what he
17 also offered, and, of course, they didn't do that and now
18 Jim according to 162 is limited to the record that was in
19 front of the Code Enforcement Board. And I think cases
20 like Lindbloom and Massey have a great deal to say about
21 what happens when somebody isn't entitled to relief and
22 then later on -- I'm sorry -- had a lot to say about what
23 happens when somebody is accused of not meaningfully
24 participating in the appellate process but where there
25 were things that happened earlier in the 162 hearing

1 process that completely impaired their ability to take up
2 that appeal to begin with, and so --

3 THE COURT: Well, what impaired Mr. Ficken's
4 ability to file a petition for writ of cert with regard to
5 the Code Enforcement Board's actions? I was a State court
6 judge and we used to get them all the time when there was
7 someone that was aggrieved by the City of Tampa's Code
8 Enforcement Board proceeding, and I used to hear their
9 petitions before me. Basically it was brought before the
10 State court judge on a petition for writ of cert.

11 MR. BARGIL: That is the process, Your Honor, and
12 as you likely well know, once that petition for writ of
13 cert got to you, the amount of information and the
14 universe of evidence that you were allowed to consider
15 would have been completely limited to whatever was created
16 below. Here --

17 THE COURT: Well, it's based upon what the law
18 says, though. That's what the law required. In other
19 words, the law is what establishes -- that established for
20 me as a State court judge the parameters of my review.

21 MR. BARGIL: That's right, Your Honor.

22 THE COURT: The law requires it.

23 MR. BARGIL: That's right, it does, Your Honor,
24 and I think Lindbloom and Massey have a lot to say about
25 when that universe of information is so deeply infected by

1 what happened below that there is nothing for a person in
2 Mr. Ficken's position to actually argue in their case.

3 I do think that makes a big distinction. And it
4 brings us back to the original violation, the Mullane
5 violation where had Jim been made aware of these fines as
6 they were accruing, all of this would have been completely
7 different.

8 This is what Massey has to say about that under
9 the question of whether or not an appeal is required under
10 162. It says, quote, "*There remains a serious risk of*
11 *erroneous deprivation because the amount of fines imposed*
12 *and the propriety of the lien depended on factual findings*
13 *that the Masseys were never given an opportunity to*
14 *protest.*" This is -- they have the same right as
15 Mr. Ficken did, but nevertheless, the Court said they
16 didn't have the opportunity to contest them and that's our
17 contention here, but I think we --

18 THE COURT: Where is the Massey case from? I'm
19 not familiar with that one.

20 MR. BARGIL: The Massey case is a First DCA case
21 from 2003.

22 MR. DAIGNEAULT: That's a Second DCA case I think,
23 Ari.

24 MR. BARGIL: I'm sorry. I thought it was a First
25 DCA case, but in any case, it's an intermediate Appellate

1 Court case from 2003, but I think all of this discussion
2 is forgetting the fact that these are exhaustion
3 arguments, and exhaustion is not required for a 1983 claim
4 as a matter of black letter law according to the U. S.
5 Supreme Court. That's something that they decided in
6 Knick very recently, reaffirming the Patsy decision from
7 around 1983, so I think we are getting a little bit too
8 far ahead of ourselves in talking about what he was
9 supposed to do.

10 There was a due process violation that occurred
11 early on that infected this entire process and an appeal
12 through Chapter 162 wasn't going to correct that, and
13 that's the main inquiry.

14 THE COURT: All right. Let me hear from you,
15 Mr. Daigneault, with regard to the Dunedin Code Section
16 22-79(a) which Mr. Bargil argues was the source for the
17 violation of the notice requirement.

18 MR. DAIGNEAULT: I appreciate that, Your Honor.
19 I'm sorry. I'll let you finish your question. I
20 apologize.

21 THE COURT: Because Mr. Bargil said that in your
22 earlier argument you went right to the State statute, that
23 you didn't really address the Dunedin provision with
24 regard to notice which is also something that he's relying
25 upon to argue that there was no notice.

1 MR. DAIGNEAULT: The ordinance that he's relying
2 on hasn't to do with notice. It has to do with the
3 accrual of the fine, and it's been applied as testified to
4 by the City Attorney for many years to indicate that the
5 fine would accrue from the date of violation indicated in
6 the notice of violation.

7 Mr. Bargil receives that as the City violating its
8 own ordinance. I don't believe that that's supportable by
9 the language of the ordinance. I think it's -- and even
10 if it did, Mr. Bargil hasn't told you why it would violate
11 due process and he hasn't given you a case to suggest that
12 it does violate due process.

13 There's -- there is a suggestion that the City
14 violated the ordinance based on when -- the beginning
15 point of the accruing fine and Your Honor made a series of
16 observations as to, you know, being subject to liability
17 or being imposed liability, and so the accrual date I
18 think is what he's trying to get at with the 22-79
19 argument but it doesn't change the result in this case.

20 And I'd like to also -- again, I have not argued,
21 and I've explicitly stated as clear as I can that I'm not
22 here arguing that there's an exhaustion requirement under
23 1983. I'm aware that there's not. I think it is very
24 clear law.

25 The exhaustion requirement applies to a Florida

1 constitutional claim here for procedural due process
2 violation. It's a different argument in the Federal
3 claim. It has to do with the failure of a required
4 element of the claim of the constitutionally inadequate
5 process.

6 THE COURT: Okay. And, Mr. Daigneault, was there
7 anything else that you wanted to argue with regard to your
8 motion?

9 And sometimes it gets a little tricky but I want
10 to make sure that I give everybody an opportunity to make
11 all arguments when I have cross motions, so we were
12 hearing the Plaintiffs' dispositive motion. Of course,
13 the Defendant City of Dunedin and the Code Enforcement
14 Board also have a dispositive motion for summary judgment.

15 Is there anything you'd like to offer with regard
16 to your motion that hasn't been addressed?

17 MR. DAIGNEAULT: Nothing that's not been addressed
18 other than to say I want to correct the record. No one on
19 the City's side ever said that Jim was a bad guy or that
20 we called -- in the briefings it was alleged that we
21 called him a lout. I didn't call him a lout. I deposed
22 him for a good long day. He seems like a really, really
23 nice guy.

24 The facts are that he didn't take care of his
25 property on multiple occasions. The facts are that he was

1 given adequate and more than ample opportunity to come to
2 a hearing. The facts are that he simply is not here.
3 Whether he's a good guy or a bad guy, what he is most
4 definitely not is a person that at least at the time
5 relevant not present in the State of Florida. And asked
6 for continuances, yes.

7 The Conley case addressed continuance as well
8 because the legal secretary had requested continuances on
9 behalf, and, you know, said that she was assured by the
10 Code Enforcement Board clerk that the matter would be
11 continued. It's no more availing here than it is there.
12 It doesn't make any sense.

13 The fact of the matter is if the City Code
14 Enforcement Board had to wait until Mr. Ficken was
15 available for a hearing, the fine would have been
16 \$800,000. The fact of the matter is he's just not here.
17 He's just not here. Again, that's not a value judgment at
18 all. It's a matter of fact.

19 We have put into evidence how many days he was
20 actually in Florida during these time frames. The fact is
21 he lives in South Carolina. The fact is that he -- his
22 homesteaded real property is in Clearwater, Florida, not
23 this home in Dunedin. It's been homesteaded for almost 30
24 years. And so the play to the emotions of the Court to
25 say that poor Mr. Ficken is going to lose his home because

1 he was treated unfairly simply doesn't withstand the
2 factual analysis or the legal analysis required in this
3 case. I appreciate it, Your Honor.

4 THE COURT: Mr. Bargil, anything further, sir?

5 MR. BARGIL: Yes, Your Honor. Just one thing to
6 add in light of the comment Mr. Daigneault offered. The
7 question about whether there's law on the point of while
8 violating our own ordinances is a signal of a due process
9 violation, it absolutely is. Mullane requires notice
10 that's reasonable under the circumstances.

11 There is case law from the Second Circuit, I'll
12 give you the cite, the Brody case, 434 F.3d on Page 129,
13 and there where the Court says, *"where there is an*
14 *ordinance that describes what the City is supposed to do*
15 *in terms of providing notification, that explains what*
16 *notice reasonable under the circumstances is."* So here,
17 we have a Mullane issue. We're not talking about all the
18 Mathews stuff about, you know, whether or not he could get
19 a continuance or what the process was once the Code
20 Enforcement Board talked about it.

21 Our arguments on due process are focused on what
22 Jim was entitled to know when a city code enforcement
23 officer came to his property and viewed that his grass was
24 too tall. Now, there are two narratives here. One is
25 that they were required to do nothing and they could just

1 wait until he brought the property into compliance,
2 whether he owed 30,000 or 800,000 as he just said. The
3 other is that city ordinance actually speaks to this, that
4 Federal law actually speaks to this, that Mullane says
5 that you got to provide notice reasonable under the
6 circumstances. The MAK case has interpreted that to mean
7 that when your property is on the line, the City can't
8 just sit on its hands and do nothing. Sure, they could
9 have fined you. Nobody is suggesting that they couldn't
10 have fined you, but the question is can they, consistent
11 with due process and the Eighth Amendment, let a condition
12 exist on a property for months on end and then stick
13 somebody with a bill for \$30,000 and then still say, all
14 of this is motivated by compliance.

15 Your Honor, what they did in this case doesn't
16 reflect any devotion or motivation for compliance.
17 Whatever they want to say about Jim about where he lived
18 or his previous code violations, there's no need to
19 address that because due process applies all the same to
20 residents and nonresidents alike and the Eight Amendment's
21 protections apply evenly regardless of whether somebody is
22 likeable or not likeable. And so, Your Honor, unless you
23 have any further questions, we're content to rest on our
24 brief.

25 THE COURT: Let me ask you because you suggest

1 that if the City let the grass grow and the fine I guess
2 continue to run, but what about the property owner?
3 Doesn't the property owner have some responsibility with
4 regard to the grass on his property? Who is it that
5 really let the grass grow?

6 MR. BARGIL: That's absolutely right, Your Honor.
7 That's why our entire contention in this case is not that
8 you can't fine him. It's that you can fine him subject to
9 the prerequisites of due process. And so if the City
10 would have called him or posted a note or done anything
11 that reflects notice reasonable under the circumstances,
12 and this is how high the fines ended up getting, that's a
13 completely different case. I mean I think -- I still
14 think \$500 per day on this complaint is a pretty severe
15 sanction for something that there seems to be general
16 agreement isn't a huge deal, but all of this is going back
17 to the point about, yes, you can fine, but you must
18 provide appropriate notice. That certainly would reflect
19 a commitment to obtain a compliance and it's how you
20 guarantee that people don't have their rights violated
21 like this. The City didn't do that here.

22 THE COURT: All right. Anything else, Counsel?

23 MR. BARGIL: No, Your Honor. Thank you.

24 MR. DAIGNEAULT: No, Your Honor, appreciate the
25 time again.

1 THE COURT: Okay. Thank you, all. I am going to
2 take this matter under advisement and, of course, issue a
3 written opinion. I've got two bench trials coming up so
4 it's going to be probably closer to the end of the year
5 before I get an order out on it, but I want you to know
6 that I am considered it. I have reviewed your initial
7 submissions. I haven't completed the review of the case
8 law yet and your exhibits, but once that's completed an
9 order will enter on the cross motions for summary
10 judgment. If there's nothing else, Counsel, that
11 concludes this proceeding. We are adjourned, and you are
12 free to leave the meeting. Thank you.

13 (End of proceedings.)

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UNITED STATES DISTRICT COURT)
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MIDDLE DISTRICT OF FLORIDA)

I, SHARON A. MILLER, Official Court Reporter for the United States District Court, Middle District of Florida, do hereby certify that pursuant to Section 753, Title 28, United States Code that the foregoing is a true and correct transcript of the stenographic notes taken by computer-aided transcription taken in the above-entitled cause by the undersigned and that the transcript format is in conformance with the regulations of the Judicial conference of the United States.

/S/Sharon A. Miller, CSR, RPR, CRR, FCRR
Official Court Reporter