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IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

CITY WALK - URBAN MISSION INC.,

Appellant,

CASE NO.: 2021 AP 000007
CASE NO.: 2021 AP 000008

vs.

CITY OF TALLAHASSEE,

Appellee.
_____/

INITIAL BRIEF OF APPELLANT

AN APPEAL FROM AN AMENDED INITIAL ORDER AND ORDER IMPOSING FINE OF THE MUNICIPAL CODE ENFORCEMENT MAGISTRATE FOR THE CITY OF TALLAHASSEE
Case No.: TCE 202807

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STATEMENT REGARDING ORAL ARGUMENT

Appellant requests oral argument in this matter. An oral presentation of the case would assist the Court in better understanding Appellant's arguments in a complex case involving the application of Federal and State statutory remedies presented in an unusual procedural posture.

PREFACE

The Appellant is the Respondent below and will be referred to as "Appellant" or "City Walk". Appellee is the Petitioner below and will be referred as "Appellee" or "the City".

The following symbols will be used:

App. __	Record instruments reflecting the page number shown in the Appendix.
T – 4/1 __	Transcript of the April 1, 2021 hearing before Special Magistrate[1]
T – 4/29 __	Transcript of the April 29, 2021 hearing before Special Magistrate
T – 5/4 __	Transcript of the May 4, 2021 hearing before Special Magistrate

The Tallahassee Code provisions cited in this Brief are included at the end of the Appendix.

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[1] The Transcripts have been filed with the Court separately from the Appendix.

STATEMENT OF THE CASE AND OF THE FACTS

City Walk operates a church and religious mission catering to the most downtrodden and needy of our fellow citizens – the homeless. Appellant's founder and pastor, Renee Miller, described this mission in the following terms:

> [O]ur mission is to connect people to God and to each other, to change lives forever. We do this by an Acts 2 church model, and we take very seriously the 73 times that we are commanded in scripture to take care of the poor and needy and to take up the cause of justice for those who are also poor and needy.… [T]he majority of the parishioners at our congregation and church members are in some form of crisis or experiencing homelessness in one form or another. (T- 4/1 at 80; *id.* at 81 ln. 4-5)

> [W]e are a church, and our focus is that we believe God has called us to … the people who are in crisis, specifically as it pertains to housing and food and clothing, taking care of people who are marginalized and looked over in society. So a large part of our worship with our church is bringing the stranger in as Jesus commands us to do in Matthew 25. (T- 5/4 at 9 ln 1-8).

City Walk provides food, shelter, and counseling for its residents. (T-4/1 at 83-84, 86). In addition, City Walk administers to its residents' religious needs through Bible studies and Christian church services. (T- 4/1 at 80, 87). However, City Walk does not impose a religious test

on its residents, and it welcomes all of God's children. (T- 4/1 at 80, ln 6-8).

The religious component of City Walk's mission sets it apart from secular providers of housing for the homeless:

> [H]ow we differ based on the service, delivery of services, would be that we have a more holistic approach. We are not just concerned with getting somebody three hot meals and a cot so that they, you know, don't die from exposure or something, but we really want to work on the whole person and their soul and the spirit at the same time.

(T- 5/4 at 9-10).

The City Walk mission is located at 1709 Mahan Drive in Tallahassee. (T- 4/1 at 5, 81). City Walk selected the property after first scouring the community for an appropriate site. It chose this particular site because it was an appropriate size and it was conveniently located near public transportation - a requirement under the City's Code. (T- 4/1 at 103: "Well, we looked at dozens of places prior to this place, and when we look at the city's code, it met all of the criteria… it was a stand-alone building and it was not in a neighborhood… it had over two acres, how it backed up to green space, how it was on a bus route…"). The property is separated from residences at the rear by railroad tracks and

a steep berm. (T- 4/1 at 118-19, 120-21). Mahan Drive bounds the front of the property.

The City Walk building provides accommodations for up to 64 residents, although it seldom operated at full capacity except during critical "cold nights" when emergency-shelter needs peaked. (T- 4/1 at 28, 87-88, 108). Residents are fed and housed on-site. (T- 4/1 at 84, 86). Security is provided around the clock including both surveillance cameras and inspections by staff. (T- 4/1 at 88, ln 11-15, 89, ln 12-18).

The facility is designed to provide supportive housing, which includes social services in a rules-based environment. City Walk employs substance-abuse and mental-health screening of potential residents. (T- 4/1 at 83-84, 101, ln 14-24; T- 5-4 at 13-14). Supportive housing is different from emergency shelters (also known as "low-barrier shelters"), which provide limited services on a temporary basis. (T- 4/1 at 82, ln 15-18: "Q. … Do you see… your operation as a homeless shelter? A. No, we see it as supportive housing and transitional housing.").

City's Walk's facility is located in an OR-2 zoning district, which allows a wide variety of uses, including churches. (T- 4/1 at 23, ln 14-

18, 37 ln 2-17). City Walk's religious mission falls within the definition of a "transitional residential facility" ("TRF") under the Tallahassee Land Development Code ("LDC"). *See*, §1-2- Definitions, Tallahassee LDC. The Code allows such facilities to locate in any zoning district in the City with the exception of industrial zones.[2] *See*, §10-417(b); T- 4/1 at 33, 7-10. The City acknowledges that operation of a TRF at City Walk's location is consistent with the Tallahassee Comprehensive Plan. (T-4/1 at 46: "The operation and location of the facility as proposed is consistent with the comprehensive plan and applicable land development regulations.").

However, no zone allows TRFs as a matter of right. (T- 4/1 at 24, ln 2-21, 40, ln 4-17). Instead, *all* TRFs must apply for discretionary approval of a "Type B site plan." *See*, §10-417(c) ("New transitional residential facilities and expansions to existing transitional residential facilities are subject to type B site plan approval."); *See, also*,

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[2] Of particular interest is the fact that Transitional Residential Facilities can locate in residential districts. To be clear, there is no buffer or setback required from residential districts. Rather, TRFs can be located in and among other residences.

§9-155(4) (requiring "Type B review" for new transitional residential facilities). The criteria for Type B site plans are set forth in §10-417(d)-(f). (*See*, App. 242-44; *See, also*, T- 4/1 at 33, ln 11-15). The review process is governed by §9-155(10).

Providing low-income and homeless housing is supposed to be an important goal for local government.[3] However, this basic social service appears to be honored only in the breach. In reality, there is a critical need for transitional housing in Tallahassee and there is a chronic shortage of beds in the community. (T- 5/4 at 15).

City Walk opened its facility during the last week of November 2020. (T- 4/1 at 24, ln 22-23; 81, ln 16-17). At first, City Walk was welcomed by many City officials, including the public-private partnership that manages homeless needs in the community: Big Bend Continuum of Care. (T- 4/1 at 29, 36, 81-82, 92-94; T- 5/4 at 12-13, 19-

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[3] *See*, Tallahassee Comprehensive Plan at VI, Housing Unit – Homeless, Goal 5: [H] (p. 264) ("Maintain and support a comprehensive homeless services plan that will serve as a coordinated, comprehensive means to provide for safe, temporary and transitional shelter and services for all homeless individuals who desire them.").

20). The City initially provided cots and portable showers for City Walk's use. (T- 4/1 at 93, 109). There were also discussions between the parties about direct City financial support for City Walk's operations. (T- 5/4 at 12-15, 17-19; *see especially*, 19, ln 3-5: "Mr. NORVELL: So I will acknowledge that there was some discussions between Ms. Miller and some city officials.").

During "cold nights," City police officers would frequently transport homeless residents to City Walk for care and housing:

> Q. Okay. Is it your understanding that the city was aware of the residential nature of your organization, that you are offering transitional housing to the homeless?
>
> A. Absolutely, they were. We had many discussions prior to us getting the property, and then after getting the property, we had several discussions with city staff who report directly to other staff and Commissioners and the Mayor about what was going on at the property. We also had the city, in fact, send us many people to help in such a capacity.
>
> Q. How did that happen? How did the city direct people to your facility?
>
> A. … [W]e did have TPD bringing us people a lot. They brought people just about every day that they would find in one situation or another…. (T-4/1 at 89-90).

As an accommodation to the City's immediate need for beds during cold nights, City Walk agreed to temporarily act as a low-barrier shelter rather than the supportive housing it had intended to operate. (T- 5/4 at 10: "The low barrier is not something that we ever set out to be or wanted to be. That is not part of our strategic plan."). City Walk's value to the community is measured not just in souls saved but in quantifiable, direct savings to the government. Those are estimated at $825,000 between November 20, 2021 and May 4, 2021. (T- 5/4 at 14).

That mutually beneficial relationship lasted for several months until the City began fielding complaints from neighbors about the increase in the homeless population in the area. (T- 4/1 at 99 at 5-18; T- 5/4 at 20, ln 18-24). In addition, the City's cold-night emergency eased so that it no longer needed to take advantage of City Walk's facilities. (T- 4/1 at 24-25, 35).

On December 16, 2020, the City delivered notice that City Walk must apply for "Type B Site Plan Approval" for its transitional residential facility. (T- 4/1 at 35). City Walk promptly retained an architect and filed the required application on February 3, 2021. (App. 10-32; 184-94, T-

4/1 at 92, 94, ln 13-16, 111-12). The application specifies that the purpose of City Walk is to manifest Christian faith by ministering to the homeless:

> Housing the unsheltered members of our congregation is a major aspect of our ministry, out [of] obedience to God's Word and a form of how we worship. That said, the "Purpose of the facility" is that we can live out our religious beliefs through faith and obedience in helping the "least of these." (Matthew 25).

(App. 14-15, 185-186). The application also provides information responsive to all the substantive criteria listed in §10-417, which supposedly governs the City's review process. (App. 10-32).

City staff recommended that Appellant's application be denied for three reasons: (1) City Walk failed to provide security *off*-site; (2) The TRF created a public nuisance; and (3) The TRF was inconsistent with the Comprehensive Plan because it "changed the character of the community." (App. 197-238, *especially*, 202-06; T- 4/1 at 30-31; 46-49).

The issue with security had nothing to do with City Walk's own property or facilities. Rather, the City sought to hold City Walk responsible for *off-site* security issues:

> We did find that they likely had security adequate for their own use, but other properties were experiencing security concerns from folks that were associated with City Walk… (T- 4/1 at 48, ln 9-12).

The public-nuisance finding hinged on a supposed increase in police calls for service in the vicinity of the City Walk property. (T- 4/1 at 47 ln 8-25). However, those data were acquired and analyzed only for the period of January 1 through February 9, 2021, when City Walk was operating *as a low-barrier shelter at the City's request*. (App. 226-229). The calls for service showed a temporary spike in calls related to problems commonly associated with homeless persons, such as vagrancy and suspicious persons. (Id.). City Staff and the DRC failed to consider data from the relevant time period when City Walk functioned as supportive housing rather than an emergency shelter (from February, 2021 onwards) (T- 4/1 at 100-101; T- 5/4 at 10-11). CFS data for that time period show a reduction of calls to baseline levels from before City Walk opened. (App. 181-83; T- 4/1 at 100-101).

The principal objection was that the facility was located too close to a residential neighborhood to the rear of the City Walk property. Staff found that homeless persons, some of whom might have been

affiliated with City Walk, sometimes walked along the streets of that residential district. (App. 201-03, 205, 211-12; T- 4/1 at 48-49). Notably, the criteria set out in §10-417 do not include a buffer zone or setback from residential uses.

The Zoning Code anticipates that City staff will suggest revisions to site-plan applications to resolve technical issues at a post-application meeting. *See*, §9-155(10)(h). However, that was not done in this case. (T- 4/1 at 98, ln 9-13). City staff confirmed that they saw no reason to offer that assistance to City Walk: "[W]e didn't feel that it was pertinent." (T- 4/1 at 52-53, *See especially*, 53, ln 16-17).

On March 8, 2021, the DRC denied City Walk's site-plan application. (App. 195). The formal letter denying City's Walk's application was served on the following day, May 9, 2021. (Id.) The denial letter does not specify any reasons for denial, saying only that "the application did not meet all of the criteria required by Section 10-417, as well as other pertinent sections, of the Tallahassee Land Development Code." (Id.) The Code authorizes the DRC to place conditions on site-plan approval to ameliorate any impacts a particular

project may have. *See*, §9-155(10)(j). DRC made no effort to assist City Walk in this regard. (App. 195-96).

City Walk filed an administrative appeal from that denial on April 7, 2021. (T- 1/4 at 8, 105, ln 12-17; T- 5/4 at 16, ln 2-4). In accordance with Chap. 2, Art. III, Div. 2, Subdiv. II of the Tallahassee LDC, the matter was assigned to an Administrative Law Judge at the Florida Division of Administrative Hearings. The administrative appeal is scheduled to be heard on August 9, 2021.[4]

On March 22, 2021, the City served a notice of violation on City Walk asserting three violations of the City's Code: (1) failure to obtain building permits; (3) failure to obtain inspections; and (3) operating a TRF without an approved site plan. (App. 33-39). City Walk filed several motions in response to the notice: (1) Motion to Dismiss for

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[4] This Court may take judicial notice of the pendency of the DOAH proceeding. *See*, Gulf Coast Home Health Servs. of Fla., Inc. v. Dep't of Health & Rehab. Servs., 503 So.2d 415, 417 (Fla. 1st DCA 1987) ("[I]t is altogether appropriate … to take judicial notice of the existence of other cases, either pending or closed, which bear a relationship to the case at bar."). The DOAH docket is accessible at https://www.doah.state.fl.us/ALJ/searchDOAH/docket.asp?T=7/18/2021%203:48:40%20PM (last accessed 7/18/21).

violation of RLUIPA / Free Exercise Clause of First Amendment (App. 65-116); (2) Motion to Dismiss for violation of First Amendment (prior restraint) (App. 117-170); (3) Motion to Dismiss for Due Process Violations / Motion for Continuance (App. 171-180).

A hearing was held before the City's Special Magistrate on April 1, 2021. (App. 36-37; T- 4/1, *generally*). Both parties appeared with counsel and submitted evidence. (T- 4/1 *generally*). The Special Magistrate denied City's Walk's motion for continuance. (T- 4/1 at 7-12). The Special Magistrate appears to have denied the constitutional motions as well. (T- 4/1 at 12-18).

City Walk introduced testimony in support of its constitutional and statutory claims in order to establish a record to support the instant appellate review. (*See generally*, T- 4/1). Both parties understood that the Special Magistrate had no jurisdiction to actually rule on those constitutional and statutory claims and informed the Magistrate of those limitations. (T- 4/1 at 12-18; *See, especially*, 13, ln 9-12: "[Y]ou, as an administrative magistrate, literally don't have jurisdiction to make decisions on those complex Constitutional issues.").

At the conclusion of the hearing, the City announced that it was dismissing the construction and inspection counts and was proceeding only on the count alleging a failure to obtain site plan approval (count III). (T- 4/1 at 124, 129). The Magistrate entered an Order of Violation on April 1, 2021. (App. 5-6).

The original Order included a number of ambiguities and errors pertaining to the building permits issue. A hearing was held to address those issues on April 29, 2021 (T- 4/29, *generally*). The Special Magistrate entered a Corrected Order on May 4, 2021. (App. 7-8). City Walk timely appealed from the Corrected Order on April 30, 2021.

On May 4, 2021 the Special Magistrate conducted a second hearing to consider imposition of a fine. (T- 5/4, *generally*) There was no dispute that City Walk continued to operate its religious mission. (T- 5/4 at 4-6). The parties argued over the appropriate amount of the fine, with the City requesting a daily fine of $250.00. (T- 5/4 at 4-6). The Special Magistrate entered his fine Order on May 4, 2021, which provided for a $25.00 daily fine. (App. 9). City Walk timely appealed from that Order on May 27, 2021.

This Court consolidated both appeals on June 15, 2021.

STANDARDS OF REVIEW

This is a plenary appeal from two code enforcement orders. However, this case differs from most such appeals because City Walk asserts that the City has violated state and federal statutes that protect religious freedoms. In particular, City Walk claims that the Type B Site Plan requirement, which was the substantive basis for the code enforcement orders, violates the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §2000cc ("RLUIPA") and the Florida Religious Freedom Restoration Act, §761.03, Fla.Stat. ("FRFRA").[5] Because the posture of this case is unusual, Appellant will provide a detailed review of the case law defining the scope of review, including the *de novo* statutory challenges.

(1) Scope of Review of Code Enforcement Order

Generally, appellate review of quasi-judicial decisions is

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[5] City Walk has reserved its other Federal claims, including a facial First Amendment challenge rooted in the law of prior restraints, for adjudication in Federal Court. *See*, Notice of Reservation of Right to Litigate Federal Constitutional Issues in Federal Court filed on May 24, 2021. Accordingly, City Walk will not present those claims here, but gives notice that those claims have not been abandoned.

accomplished through a certiorari proceeding. *See, generally*, City of Deerfield Beach v. Vaillant, 419 So.2d 624 (Fla. 1982). However, that is *not* the case when it comes to the review of orders and fines entered by code enforcement boards. The Florida Statutes specify that appellate review of code enforcement orders is by appeal:

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

§162.11, Fla.Stat.

While the Court's review will be limited to the record developed below, review is neither discretionary nor confined to the narrow inquiry permitted under first-tier certiorari. As the Fifth DCA said in Cent. Florida Investments, Inc. v. Orange County, 295 So.3d 292, 295 (Fla. 5th DCA 2019), "section 162.11 provides for an actual appeal, not something similar to an appeal." The Court elaborated on exactly what that means:

> [T]hat statutory section clearly provides for an appeal as a matter of right to the circuit court. *See*, City of Ocala v. Gard, 988 So.2d 1281, 1282-83 (Fla. 5th DCA 2008). This

> Court has described the nature of such an appeal as plenary. Id. at 1283. There is nothing in the statute to suggest otherwise….
>
> Review by certiorari is not the same as review by appeal. "The difference between certiorari review and appellate review is important." M.M. v. Dep't of Child. & Fams., 189 So.3d 134, 138 (Fla. 2016). "[O]n appeal, all errors below may be corrected: jurisdictional, procedural, and substantive." Haines City Cmty. Dev., 658 So.2d at 526 n.3…

Id., at 294–95.

(2) City Walk is Entitled to Present its Constitutional / Statutory Claims to this Court in the First Instance; Review is *De Novo*, but Record-Based.

City Walk asserts that the Special Magistrate cannot fine it because the underlying Land Development Code ("LDC") and the enforcement of that Code violate RLUIPA, FRFRA, and its Free Exercise rights under the United States Constitution.[6]

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[6] While RLUIPA is a statute, it codified the appropriate standard of review for First Amendment free exercise rights. *See,* Chabad Lubavitch of Litchfield Cty., Inc. v. Litchfield Historic Dist. Comm'n, 768 F.3d 183, 198 (2d Cir. 2014) ("RLUIPA, after all, codified 'existing Free Exercise, Establishment Clause[,] and Equal Protection rights against states and municipalities' that discriminated against religious land use." (citation omitted)).

These challenges are properly presented to this Court in the first instance because only judicial officers have the jurisdiction to consider constitutional and statutory arguments. *See*, Broward Cty. v. La Rosa, 505 So.2d 422, 423 (Fla. 1987) ("[A]lthough the legislature has the power to create administrative agencies with quasi-judicial powers, the legislature cannot authorize these agencies to exercise powers that are fundamentally judicial in nature."). In particular, administrative agencies and their officers lack jurisdiction to consider constitutional claims. *See*, Department of Revenue v. Young American Builders, Inc., 330 So.2d 864, 865 (Fla. 1st DCA 1976) (The Administrative Procedures Act cannot and does not relegate Fourteenth Amendment questions to administrative determination); *See, also*, Key Haven Associated Enterprises, Inc. v. Board of Trustees of Internal Improvement Fund, 427 So.2d 153 (Fla. 1983).

In addition to the bar against deciding constitutional issues, hearing officers are not permitted to invalidate a law on any other grounds. *See*, Commc'ns Workers of Am., Loc. 3170 v. City of Gainesville, 697 So.2d 167, 170 (Fla. 1st DCA 1997) ("The Administrative Procedure Act does not purport to confer authority on

administrative law judges or other executive branch officers to invalidate statutes on constitutional or *any other grounds*.") (emphasis added).

For that reason, this Court is empowered to consider Appellant's constitutional challenges *de novo*:

> [W]e consider it entirely proper for a district court of appeal to pass on the constitutionality of a statute or rule when that is necessary in reviewing agency action, though there has been no agency decision on the constitutional question nor could there have been.

Rice v. Department of Health and Rehabilitative Services, 386 So.2d 844, 847 (Fla. 1st DCA 1980) (footnote omitted); *See, also*, Cafe Erotica v. Florida Dept. of Transp., 830 So.2d 181, 183 (Fla. 1st DCA 2002) ("[A] constitutional challenge may be raised for the first time on appeal.").

This general rule applies with equal vigor to constitutional and statutory defenses associated with code enforcement hearings:

> Contrary to the circuit court's determination, constitutional claims such as those raised by the petitioners herein are properly cognizable on an appeal to the circuit court from a final order of an enforcement board taken pursuant to Section 162.11, Florida Statutes (1989).

Holiday Isle Resort & Marina Associates v. Monroe County, 582 So.2d 721, 721–22 (Fla. 3d DCA 1991) (citation omitted); *See, also*, City of Venice v. Gwynn, 76 So.3d 401, 404 (Fla. 2d DCA 2011) ("Section 162.11, Florida Statutes (2009), authorizes an aggrieved party to appeal a final administrative order to the circuit court…. For appeals under this section, the circuit court is the proper forum to address constitutional claims.").

Here, the record on appeal is clearly adequate to support *de novo* review of City Walk's statutory and constitutional claims on appeal. *See,* Cortes v. State Bd. of Regents, 655 So.2d 132, 139 (Fla. 1st DCA 1995) ("Where the record is adequate, nothing precludes relying on a constitutional provision, as grounds for invalidating a rule, for the first time on appeal from a hearing officer's final order in an administrative rule challenge.").

(3) Standard of Review for State Law-Based Claims

City Walk also presents conventional arguments in this appeal based on state law principles. Unless otherwise specified, this Court will apply a mixed standard of review as to those state-law-based claims:

> We review the trial court's factual findings to determine whether they are supported by competent, substantial evidence. McDougall v. Culver, 3 So.3d 391, 392 (Fla. 2d DCA 2009). But we review the trial court's interpretation of the law de novo.

Nat'l Council on Comp. Ins. v. Fee, 219 So.3d 172, 177 (Fla. 1st DCA 2017).

SUMMARY OF ARGUMENT

The City's refusal to approve City Walk's site plan and its subsequent enforcement action violated City's Walk's rights under the Religious Land Use and Institutionalized Persons Act ("RLUIPA" [42 U.S.C. §2000cc]) and the Florida Religious Freedom Restoration Act ("FRFRA" [§761.03(1), Fla. Stat.]) by substantially burdening religious exercise without a compelling justification. In particular, there are no places in Tallahassee where City Walk can operate its religious mission as of right, and the pretextual grounds used to deny its application will apply to any other property within the City. The City's regulatory approach leaves no other alternative sites available.

The City's own past conduct precludes it from justifying this substantial burden on City Walk's ministry. During a months-long partnership to address a homelessness crisis, the City took full advantage of City Walk's facilities. It transported scores of homeless persons to City Walk, contributed supplies to help City Walk shelter them, and otherwise induced City Walk to operate a low-barrier shelter. To be clear, a low-barrier shelter for the general homeless population is not City Walk's ministry; its calling is to offer supportive housing for

screened, lower-risk individuals. But out of Christian charity, City Walk opened its doors to the City during its time of need.

Unfortunately, no good deed goes unpunished. After neighbors complained about the low-barrier shelter that the City induced City Walk to operate, the City abruptly ended its partnership with City Walk and scapegoated City Walk's supportive housing ministry. It cited City Walk for operating a transitional residential facility without an approved site plan. After City Walk promptly filed a site-plan application, the City conceded that it met the objective criteria, but it denied the application through a bureaucratic, Catch-22 reading of the code that effectively bars City Walk from operating anywhere within Tallahassee. It also predicated the denial on the temporary spike in complaints that the City's own conduct had generated. The City then attempted to fine City Walk out of existence.

Because the City's past conduct precludes it from offering any justification - much less a compelling one - for its actions, it has violated City Walk's religious freedoms under RLUIPA and FRFRA. The City's orders must therefore be reversed. But reversal also is warranted for several other, independent reasons. Because it induced City Walk to

operate a shelter, the City should be estopped from attempting to shut down City Walk's lower-risk supportive housing ministry. Moreover, due process and exhaustion principles prohibit the City's premature code enforcement orders, which were issued before the conclusion of the administrative process that the City has itself established. Finally, because the City's sanctions ultimately rest on political pressures rather than on relevant data, they are not supported by competent, substantial evidence.

ARGUMENT

I. THE CITY'S ENFORCEMENT OF ITS SITE PLAN DENIAL VIOLATES RLUIPA.

A. RLUIPA's Jurisdictional Requirement is Satisfied.

City Walk's claim satisfies RLUIPA's jurisdictional provision. Among other situations, RLUIPA's substantial-burden prohibition applies whenever "the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved." 42 U.S.C. §2000cc(a)(2)(C). This entails three elements: "(1) the Code constitutes a land use regulation, (2) that the Code is a regulation under which the government makes an individualized assessment, and (3) that the Code permits the government to assess the proposed use of the property." City Walk – Urban Mission, Inc. v. Wakulla Cty., 471 F.Supp. 3d 1268, 1280 (N.D. Fla. 2020).

As in City Walk's prior successful RLUIPA claim against another

Florida locality,[7] all three elements are met here. The Tallahassee Code under which City Walk was cited constitutes a land-use regulation, as it "divides the [City] into multiple zoning districts and limits the use or development of land based on the zoning district where the land is located." Id. "The Code also permits" the City "to make an individualized assessment of a property." Id. To find a code violation, the City had to determine whether City Walk's property was being used for transitional housing and then determine whether that use violates the Code. In other words, the City made "a determination about the propriety of the Property's use and enforce[d] the" relevant code provisions. Id. And finally, as the notice of violation itself shows, "the Code allows [the City] to assess the proposed use of the Property." Id.

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[7] The facts of this case are remarkably similar to those before the Federal District Court in City Walk – Urban Mission, Inc. v. Wakulla County, *supra*, which considered a similar RLUIPA claim by City Walk against a zoning regulation that effectively prohibited transitional residential housing. Given the similarity between the two cases, this Court should treat City Walk – Urban Mission as persuasive authority and an appropriate guide to a similar decision in the instant litigation.

Therefore, this Court has jurisdiction over City Walk's RLUIPA claim.

B. The Code Enforcement Sanctions Substantially Burden City Walk's Religious Ministry, Triggering Strict Scrutiny under RLUIPA.

It is irrefutable that City Walk's homeless ministry and use of its facility are an exercise of religion within the meaning of RLUIPA. What Judge Walker wrote with respect to the City Walk facility in Wakulla County applies with full measure here:

> Inspired by scripture, Plaintiff believes that God has called on it to use the space it has available to serve those in need. Plaintiff's mission is to serve everyone regardless of their past because "[e]very saint has a past [and] [e]very sinner has a future." Plaintiff, therefore, wants to continue to use a three-bedroom home as a religious transition home to help as many of those in need as it can… to find love, forgiveness, and a new life in Jesus.

City Walk – Urban Mission, 471 F. Supp.3d at 1274-75.

Under RLUIPA, "the term 'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. §2000cc-5(7)(A). The statute further specifies that "[t]he use, building, or conversion of real property for the purpose of religious exercise" constitutes "religious exercise of

the person or entity that uses or intends to use the property for that purpose." Id. §2000cc-5(7)(B). The statute directs that it "shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." Id. §2000cc-3(g); *See, also,* Holt v. Hobbs, 574 U.S. 352, 356, 135 S.Ct. 853 (2015) ("Congress enacted RLUIPA and its sister statute, the Religious Freedom Restoration Act of 1993 (RFRA), in order to provide very broad protection for religious liberty." (internal citation and quotation marks omitted)); Cutter v. Wilkinson, 544 U.S. 709, 714, 125 S.Ct. 2113 (2005) ("RLUIPA is the latest of long-running congressional efforts to accord religious exercise heightened protection from government-imposed burdens.").

As Pastor Renee Miller explained before the Magistrate, City Walk is "a church, and our focus is that we believe God has called us to . . . the people who are in crisis, specifically as it pertains to housing and food and clothing, taking care of people who are marginalized and looked over in society." [T- 5/4 at 9, ln 1-5]. She further explained that "a large part of our worship with our church is bringing the stranger in as Jesus commands us to do in Matthew 25." [T- 5/4 at 9, ln 6-8]. As

Pastor Miller put it during another hearing before the Magistrate, City Walk "care[s] about the people that Jesus Christ died for." [T- 4/1 at 113, ln 7-8].

This record places beyond dispute that City Walk's use of its building for transitional housing of those in need is an exercise of its Christian faith. *See*, Harbor Missionary Church Corp. v. City of San Buenaventura, 642 F. App'x 726, 729 (9th Cir. 2016) (concluding that a Christian church's homeless ministry was religious exercise under RLUIPA). In its prior successful RLUIPA suit against Wakulla County, based on a similar record, Judge Walker concluded that City Walk was engaged in religious exercise protected by RLUIPA. *See*, City Walk – Urban Mission, 471 F. Supp. 3d at 1282-83 ("[City Walk's] commitment to serving anyone regardless of their past is consistent with the most basic [tenets] of Christianity… [City Walk's] use of the Property constitutes religious exercise…"). This Court should reach the same conclusion here.

The City's actions - its refusal to approve a site plan and subsequent enforcement sanctions - have substantially burdened City Walk's ministry in several ways. The City's convoluted regulatory

approach - which requires proximity to bus routes but precludes proximity to residential zones and prohibits location within industrial districts - deprives City Walk of any viable means to operate its ministry anywhere in Tallahassee. Moreover, the City's abrupt about-face toward City Walk after limited but vocal public opposition, and its disregard of City Walk's fulfillment of all objective site plan criteria, suggest animus toward City Walk. City Walk also had no meaningful opportunity to submit a modified application that might appease the City. And finally, the City's active partnership in operating a low-barrier shelter gave rise to City Walk's reasonable expectation that it would be able to transition into the lower-risk supportive housing ministry it has always been called to operate.

The Federal Courts of Appeals explain that to be "substantial," a burden need not be "disabling," "insuperable," "complete," or "total." See, Thai Meditation Assoc. of Ala., Inc. v. City of Mobile, 980 F.3d 821, 830 (11th Cir. 2020); Roman Catholic Bishop of Springfield v. City of Springfield, 724 F.3d 78, 96 (1st Cir. 2013); Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 349 (2d Cir. 2007). According to the Eleventh Circuit, a substantial burden need not "'completely prevent[]'

religious exercise" or "'impose[] pressure so significant as to require [p]laintiffs to forego their religious beliefs.'" Thai Meditation Assoc., 980 F.3d at 830. Rather, "'a substantial burden is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior…'" Id. at 831, *quoting* Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004).

In fleshing out this standard, the Eleventh Circuit and its sister courts have identified several examples of government conduct that constitute substantial burdens. Here, the City engaged in at least four of them.

First, the government substantially burdens religious exercise when its application of land-use provisions "effectively deprives the plaintiffs of any viable means by which to engage in protected religious exercise[.]" Thai Meditation Assoc., 980 F.3d at 832. As other circuits have explained, this may occur "even though other suitable properties might be available, because the 'delay, uncertainty and expense" of relocating "are themselves burdensome." Bethel World Outreach Ministries v. Montgomery Cty. Council, 706 F.3d 548, 557–58 (4th Cir. 2013); *See, also*, Westchester Day Sch., 504 F.3d at 352 (examining

whether the school had "quick, reliable, and financially feasible alternatives.... to meet its religious needs absent its obtaining" the required permit).

Particularly instructive here, the Ninth Circuit has held that even where the denial of a conditional-use permit for a church's homeless ministry leaves open alternative locations, the "substantial delay, uncertainty, and expense" of moving the ministry constitutes a substantial burden. *See*, Harbor Missionary Church, 642 F. App'x at 729.

Here, the City has gone further and effectively deprived City Walk of *any* viable means to operate its supportive housing ministry. The City's land-use code categorically bars transitional housing facilities from industrial areas. Elsewhere, they are permitted only at the City's discretion, and the same criteria that the City applied to City Walk's present location will apply to any other alternative location.[8] For several

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[8] It is notable that City Staff and the DRC never suggested that there were any superior locations where City Walk could operate a TRF or even that there were *any* locations that would allow the use without drawing exactly the same objections that Staff identified at the 1709 Mahan Drive location.

reasons explained below, the City's approach to those criteria renders unavailable all such alternatives.

Even though City Walk met all the objective site-plan criteria, the City found that it failed the subjective "character-of-the-neighborhood" criterion based on the unremarkable observation that an increased presence of high-risk homeless persons prompts an increase in calls for service. Putting aside the fact that City Walk's supportive housing ministry caters to lower-risk individuals and the City relied on outdated calls-for-service arising from the higher-risk shelter that the City itself encouraged, this observation will hold true anywhere in the City. Thus, the City's homelessness-leads-to-calls rationale would bar City Walk from operating anywhere in Tallahassee.

While the City also found that City Walk is too close to single-family residences, this approach likewise makes other alternatives unavailable. Because the Land Use Code requires transitional housing to locate close to bus routes and outside industrial districts, proximity to residential districts is a practical necessity. In addition, the Code does not specify proximity to residential districts as a factor to be

considered. Indeed, the Code allows transitional housing facilities to be located even *within* residences and residential districts.

The City's finding that City Walk is too close to residences traps City Walk in an impossible Catch-22. City Walk cannot locate within an industrial district. And, if City Walk locates far from a residential district, it will not be close enough to a bus route. But if it locates near a residential district, it will be "too close" to residences. Never mind that the Code allows transitional housing even *within* residential areas.

The bureaucratic nightmare that the City has created is precisely what Congress designed RLUIPA to prevent. In the Wakulla County case, Judge Walker rejected a similar attempt by a nearby jurisdiction to manipulate a shelter ordinance to suit its whims. *See*, City Walk – Urban Mission, 471 F.Supp. 3d at 1278 ("Defendant has already changed its interpretation of the Code as it relates to Plaintiff, and Ms. Pell's declaration is another attempt by Defendant to interpret the Code in a way that is convenient for it."). This Court should do the same.

Second, the government substantially burdens religious exercise when its "decisionmaking process… reflects… arbitrariness of the sort that might evince animus or otherwise suggests that the plaintiffs have

been, are being, or will be (to use a technical term of art) jerked around[.]" Thai Meditation Assoc., 980 F.3d at 832 (citing Westchester Day Sch., 504 F.3d at 352; Roman Catholic Bishop of Springfield, 724 F.3d at 96–97). This type of arbitrariness occurs where "regulators disregard[] objective criteria and instead act[] adversely to a religious organization based on the objections of a 'small but influential' group in the community." Roman Catholic Bishop of Springfield, 724 F.3d at 96–97 (quoting Westchester Day Sch., 504 F.3d at 346).

That is precisely what happened here. The City affirmatively conceded that City Walk met all the objective site-plan criteria. However, the City denied City Walk's application based solely on its purported failure of the subjective "character-of-the-neighborhood" criterion. And the City's denial (as well as its abrupt about-face toward partnering with City Walk) followed swiftly on the heels of objections from a few influential local community members. The suspect timing of the City's change in posture toward City Walk - coupled with its alternative-denying, Catch-22 reading of the code - gives rise to an unavoidable inference of the kind of arbitrariness, animus, or other "jerking around" that RLUIPA prohibits.

Third, the government substantially burdens religious exercise when the applicant lacks an "opportunity to submit modified applications that might satisfy the City's objections[.]" Thai Meditation Assoc., 980 F.3d at 832, *citing* Westchester Day Sch., 504 F.3d at 349; Bethel World Outreach, 706 F.3d at 558. Such is the case here. The City has insisted on relying upon outdated calls for service data attributable to its own conduct and has found that City Walk is located too close to a residential district, while simultaneously requiring proximity to a bus route and prohibiting location in industrial areas.

As explained above, this byzantine regulatory approach leaves City Walk with no real alternative locations. No modified application could appease the City, nor did the City suggest conditions to its approval which might address any perceived problems. The same subjective "defects" could be conjured up for any other site located anywhere in the community. Indeed, even if a modified application could succeed - and here it could not - the "substantial delay, uncertainty, and expense" of relocating a homeless ministry would itself be a substantial burden. Harbor Missionary Church, 642 F. App'x at 729.

Fourth, the government substantially burdens religious exercise when "the alleged burden is properly attributable to the government (as where, for instance, a plaintiff had a reasonable expectation of using its property for religious exercise[.])" Thai Meditation Assoc., 980 F.3d at 832, *citing* Jesus Christ is the Answer Ministries, Inc. v. Baltimore Cty., 915 F.3d 256, 261 (4th Cir. 2019) and Bethel World Outreach, 706 F.3d at 557.

By any measure, City Walk had such a reasonable expectation. Indeed, that expectation arose from the City's own conduct. When the City experienced a homelessness crisis, City Walk opened its doors to the City. Even though operating a higher-risk, low-barrier shelter was not its chosen ministry, City Walk came to the City's aid. The City transported scores of the general homeless population to City Walk, offered supplies to help City Walk deal with the influx, made verbal representations concerning grants that might be available, and otherwise partnered with City Walk to address the crisis. And City Walk's partnership with the City saved hundreds of thousands of dollars on critical services that the City would otherwise have had to provide for itself.

Any reasonable person would have concluded that the same City which encouraged City Walk to operate a higher-risk, higher-volume shelter for the general homeless population, would not object to City Walk's operation of a lower-risk, lower-volume supportive housing facility at the same location. Given the undisputed history between the parties, City Walk certainly had a reasonable expectation that it would be permitted to engage in its chosen ministry, which posed a far smaller risk to the surrounding area.[9]

C. The City cannot Satisfy Strict Scrutiny.

Because the City has substantially burdened City Walk's ministry, RLUIPA requires the City to demonstrate that the burden passes strict scrutiny. 42 U.S.C. §2000cc(a)(1). Specifically, the City must

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[9] All of the above conduct by the City - its *de facto* elimination of alternative locations, its bending to political pressure instead of objective criteria, its denial of any real opportunity to file a successful future application, and its past partnership with City Walk in running a low-barrier shelter - readily distinguish this case from Westgate Tabernacle, Inc. v. Palm Beach County, 14 So.3d 1027 (4th DCA 2009). There, a church seeking to operate a homeless shelter "ha[d] not applied for the required permits," church officials "had found a suitable alternative location for the shelter," and there was no evidence that the county induced the church to run a shelter. Id. at 1032.

demonstrate "that imposition of the burden on [City walk]… is in furtherance of a compelling governmental interest" and that it "is the least restrictive means of furthering that compelling governmental interest." Id.

The City cannot meet this stringent test. As an initial matter, its own conduct in inducing City Walk to operate a higher-risk, low-barrier shelter at the same location belies any claim that it has *any* legitimate interest - much less a compelling one - in suppressing City Walk's lower-risk supportive housing ministry. But in any event, the City's ambiguous interest in preserving the area's "character" is not compelling; the outdated calls-for-service data upon which the City relied undermine its contention that shutting down City Walk will serve any governmental interest; and there exist less intrusive means of achieving the City's interest without shutting down City Walk's ministry.

1. The City's Active Partnership with City Walk in Operating a Higher-Risk Cold Weather Shelter Is Antithetical to Its Later Claim that City Walk's Supportive Housing Ministry Harms the Public interest.

As an initial matter, the City's past conduct precludes it from asserting *any* legitimate interest in attempting to shut down City Walk's

supportive housing ministry. This is because, for several months at the very same location, the City transported scores of the general homeless population to City Walk and otherwise induced it to operate a higher-risk, low-barrier shelter.

City Walk's ministry is both lower risk and lower volume than the homeless shelter that the City encouraged it to operate. That is because City Walk's residents must commit to a program, and City Walk selectively chooses its residents based on the likelihood that they can complete the program and transition to self-sufficient housing. It is obvious that this ministry will pose far less risk to the surrounding area than the low-barrier shelter that the City promoted. And the record bears that out - calls for service receded to baseline levels once the City stopped transporting the general homeless population to City Walk and City Walk resumed its more selective supportive housing ministry.

For the City to argue that City Walk's lower-risk, lower-volume ministry threatens the surrounding area - after it induced City Walk to operate a higher-risk, higher-volume shelter at the very same location - is the kind of duplicity that RLUIPA will not tolerate.

2. The City's Vague Interest in Preserving the "Character" of the Surrounding Area is not Compelling.

To justify its suppression of City Walk's ministry, the City cited an interest in preserving the "character" of the surrounding area. This interest is too vague to qualify as compelling.

A general interest in enforcement of land-use regulations does not satisfy RLUIPA's strict-scrutiny standard. Strict scrutiny requires "a more precise analysis." Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1881 (2021). "Rather than rely on 'broadly formulated interests,' courts must 'scrutinze[] the asserted harm of granting specific exemptions to particular religious claimants." Id., *quoting* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 431 (2006). Stated another way, RLUIPA directs courts "to 'scrutinize[e] the asserted harm of granting specific exemptions to particular religious claimants' and 'to look to the marginal interest in enforcing' the challenged government action in that particular context." Holt v. Hobbs, 574 U.S. at 362-63, *quoting* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 726–27 (2014)); *See, also*, Mast v. Fillmore Cty., 141 S. Ct. 2430, 2430 (2021) (Gorsuch, J., concurring).

In the Wakulla County case, Judge Walker rejected an amorphous, generalized interest that was similar to the one that the City has asserted here:

> Defendant's justification boils down to its interest in enforcing its zoning regulation and furthering its zoning regulation's purpose in a general way. That is not enough. Defendant must establish that it has a compelling interest in excluding Plaintiff's use of the Property as intended from RR-1 zoning district. This makes sense. If Defendant could merely show a compelling interest in enforcing zoning regulations in general, then the compelling interest prong of the strict scrutiny test would eviscerate RLUIPA cases.

City Walk – Urban Mission, 471 F. Supp.3d at 1287. Because the City has failed to come forward with the kind of particularized interest that RLUIPA requires, it cannot justify its attempted termination of City Walk's ministry.

3. The City has Failed to Demonstrate that Shutting Down City Walk's Ministry will Further its Interest.

Putting aside the vagueness of the City's stated interest, the City cannot show that shutting down City Walk will advance any compelling interest that it might otherwise assert. In support of its decision to deny City Walk's site-plan application - which predicated its attempt to fine City Walk out of existence - the City cited only irrelevant evidence:

routine neighborhood complaints and the temporary spike in calls for service (i.e., the "public nuisance") that the *low-barrier shelter* had generated.[10] The City ignored the fact that once City Walk resumed its supportive housing ministry - the ministry at issue here - calls for service receded to baseline levels. In other words, in attempting to shut down City Walk, the City relied on a temporary spike in calls for service to which its own conduct had contributed, and which was not associated with the ministry it sought to shut down.

Whatever RLUIPA's strict scrutiny requires, it certainly requires the government to show that the problem it seeks to solve is not a

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[10] The neighborhood opposition to City Walk in this case resembles the neighborhood opposition to a temple and religious school in Westchester Day School v. Village of Mamaroneck, 417 F. Supp. 2d 477 (S.D.N.Y. 2006), *aff'd*, 504 F.3d 338 (2d Cir. 2007). In an earlier opinion, the district court was "'firmly convinced' that the Board's articulated reasons did not result from a 'fair balancing' but were rather influenced by 'public outcry, a paradigm of ... NIMBY (Not In My Backyard) syndrome.'" Westchester Day Sch. v. Vill. of Mamaroneck, 386 F.3d 183, 186–87 (2d Cir. 2004). After trial, the court concluded that the zoning decision was made "under intense and unrelenting pressure from politically well-connected neighboring residents, including a recent ex-Chairman of the ZBA." Westchester, 417 F. Supp. 2d at 570.

temporary one of its own creation. Here, the City fails that basic requirement.

4. Shutting Down City Walk's Ministry is not the Least Restrictive Means to Further the City's Interest.

Even assuming *arguendo* that the City could demonstrate that a compelling interest is implicated here, it could achieve that goal through means that are less restrictive than refusing to approve any site plan and attempting to fine City Walk's vital ministry out of existence. Rather than try to force City Walk to close its doors and put its residents back on the streets, the City could have asked City Walk to agree to a capacity limitation. It could have asked City Walk to install privacy fencing and instruct its residents to abide by a curfew. Likewise, it could have asked City Walk to install additional security cameras and lighting, to implement additional criteria for screening its residents, or to adopt any number of other measures that would address its concerns. *See*, Harbor Missionary Church, 642 F. App'x at 728, 730 (concluding that a city may have failed RLUIPA's least-restrictive-means requirement when it denied a conditional-use permit for a church's homeless ministry due to public nuisance concerns - including

"threats, trespassing, public nudity, and substance abuse" - because "[t]he application detailed a wide variety of measures the Church had implemented to address the concerns of its neighbors").

Ironically, the City's chosen blunt instrument - attempting to force City Walk to entirely cease its ministry and to abandon its residents to the streets - is far more likely to threaten the City's governmental interests than it is to serve them. City Walk's supportive housing program gives its residents not only a place to stay, but also employment opportunities, counseling and therapy services, and other vital support designed to keep them off the street and to transition them to full-time housing. In other words, City Walk's ministry *reduces* homelessness. It also saves the City money by providing resources that the City otherwise would have to provide with its own funds. Most importantly, City Walk saves both souls *and lives*.

By attempting to shut down City Walk rather than exploring the many available less restrictive alternatives, the City not only failed RLUIPA's least-restrictive-means requirement, but also cut off its nose to spite its face.

II. THE CITY'S ENFORCEMENT OF ITS SITE PLAN DENIAL VIOLATES FRFRA.

Like RLUIPA, Florida law also presumptively prohibits government actions that substantially burden exercises of religion. Under Florida's Religious Freedom Restoration Act (FRFRA):

> The government shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, except that government may substantially burden a person's exercise of religion only if demonstrates that application of the burden to the person… [i]s in furtherance of a compelling governmental interest [and] [i]s the least restrictive means of furthering that compelling governmental interest.

§761.03(1), Fla.Stat.

The elements of a FRFRA claim are exactly the same as the elements of a RLUIPA substantial-burden claim. *See*, Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward Cty., 450 F.3d 1295, 1303 (11th Cir. 2006) ("The [district] court also concluded that, since the standard for finding a violation of FRFRA and RLUIPA's substantial burden provision are identical, there was no violation of the FRFRA."); Temple B'Nai Zion, Inc. v. City of Sunny Isles Beach, 2012 WL 12893941 at *5 (S.D. Fla. 2012) ("Plaintiff's FRFRA claim follows federal law."), *vacated and remanded on other grounds*, 727 F.3d 1349

(11th Cir. 2013); Corouthers v. Flowers, 2011 WL 1321833 at *5 (N.D. Fla. 2011) ("[C]ourts apply the same analysis under RLUIPA to claims under FRFRA.").

Therefore, for all the reasons discussed above, the City's attempted shutdown of City Walk's ministry violates FRFRA.

III. THE CITY IS ESTOPPED FROM ENFORCING ITS SITE PLAN REQUIREMENT BECAUSE CITY WALK REASONABLY RELIED ON THE CITY'S DE FACTO APPROVAL OF ITS USE AND ACTIVE PARTICIPATION IN ITS OPERATIONS.

STANDARD OF REVIEW: "Review of whether the trial court has applied the correct legal rule is de novo, because the application of an incorrect rule is erroneous as a matter of law." Vaughn v. State, 711 So.2d 64, 66 (Fla. 1st DCA 1998); *See, also*, Landmark Am. Ins. Co. v. Studio Imports, Ltd., Inc., 76 So.3d 963, 964 (Fla. 4th DCA 2011) ("The standard of review of a trial court's denial of a motion to dismiss is de novo.").

The code enforcement orders cannot stand for another reason independent of City Walk's RLUIPA and FRFRA claims: the City must be estopped from requiring City Walk to obtain a Type B site plan and from imposing fines for actions that the City not only encouraged, but in which the City actively participated.

"Equitable estoppel is based on principles of fair play and essential justice and arises when one party lulls another party into a

disadvantageous legal position….". Major League Baseball v. Morsani, 790 So.2d 1071, 1076 (Fla. 2001). Government entities are subject to an estoppel defense. *See*, Bair v. City of Clearwater, 196 So.3d 577, 584 (Fla. 2d DCA 2016) ("Florida courts recognize that equitable estoppel may be invoked against a governmental entity…").

> "The elements which must be present for application of estoppel are: '(1) a representation as to a material fact that is contrary to a later-asserted position; (2) reliance on that representation; and (3) a change in position detrimental to the party claiming estoppel, caused by the representation and reliance thereon.'" Council Bros., Inc. v. City of Tallahassee, 634 So.2d 264, 266 (Fla. 1st DCA 1994) (*quoting* Dep't of Revenue v. Anderson, 403 So.2d 397, 400 (Fla. 1981))…
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> …
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> > One seeking to invoke the doctrine of estoppel against the government first must establish the usual elements of estoppel, and then must demonstrate the existence of affirmative conduct by the government which goes beyond mere negligence, must show that the governmental conduct will cause serious injustice, and must show that the application of estoppel will not unduly harm the public interest.
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> Council Bros., 634 So.2d at 266 (*citing* Alachua Cty v. Cheshire, 603 So.2d 1334, 1337 (Fla. 1st DCA 1992)).

Hamilton Downs Horsetrack, LLC v. State Dep't of Bus. & Pro. Regul., Div. of Pari-Mutuel Wagering, 226 So.3d 1046, 1051–52 (Fla. 1st DCA

2017); *See, also*, Coral Springs St. Sys., Inc. v. City of Sunrise, 371 F.3d 1320, 1334–35 (11th Cir. 2004) (citing the same elements of estoppel raised against a government entity).

Here, the City encouraged City Walk to open a facility because the City was facing a homeless crisis. City officials regularly toured the facility, and they engaged with City Walk about funding and grant arrangements. City Walk signed its lease in part because of assurances from the director of the City's public-private consortium for homeless relief. (T- 4/1 at 103, ln 1-16). The City contributed cots and portable showers for City Walk's use. City officials, including the Tallahassee Police Department, dropped off homeless individuals at City Walk. It was only when the City fielded complaints from influential citizens that political calculations led the City not only to withdraw assurances of financial support, but to attempt to crush this vital mission through code enforcement proceedings.

If ever there were a case for estoppel, this is it. *Compare*, Equity Res., Inc. v. County of Leon, 643 So.2d 1112, 1119–20 (Fla. 1st DCA 1994) ("The fact that the county continuously issued permits for the unrestricted construction of the project over a period of 18 years with

knowledge of expenditures for improvements to be made… establish that it would be grossly unfair to allow the county to deny [plaintiffs] a vested right at the eleventh hour of their development…").

IV. THE CITY IS BARRED FROM PURSUING CODE ENFORCEMENT SANCTIONS AS A MATTER OF DUE PROCESS AND FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES.

STANDARD OF REVIEW: Review is *de novo* when a hearing officer makes a legal error and fails to dismiss charges on legal grounds. *See*, Vaughn v. State, 711 So.2d 64, 66 (Fla. 1st DCA 1998); Landmark Am. Ins. Co. v. Studio Imports, Ltd., Inc., 76 So.3d 963, 964 (Fla. 4th DCA 2011).

The City's procedural missteps provide yet another, independent basis for reversal. Rather than wait for the conclusion of its own administrative process, the City of Tallahassee has employed strong-arm tactics in an effort to force City Walk to close before it can pursue its available remedies. The City's conduct gives rise to three distinct process-oriented claims.[11] First, City Walk's administrative appeal

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[11] These claims are not equivalent to takings claims under the Fifth Amendment. Takings cases are analyzed under a different line of cases. *See, generally*, Mission Springs, Inc. v. City of Spokane, 954 P.2d 250, 257 (1998) ("The criteria to establish a taking are 'quite

challenging the denial of its site plan is still pending. If City Walk prevails in that administrative proceeding, the justification for the code enforcement fine will disappear and the code proceedings themselves will be mooted. Second, the City cannot wrongfully withhold approval of City Walk's site plan and then impose a fine based on that wrongful withholding. Third, City Walk is qualified for the site plan in all respects, and the City's decision to withhold approval was arbitrary and capricious.

The key to City Walk's exhaustion and due process claims is the fact that Tallahassee has imposed fines while City Walk's entitlement to operate a transitional residential facility remains undecided. This misuse of the Code to deny City Walk an opportunity to avail itself of its appellate remedies cannot stand.

A. The City Improperly Fined Appellant before Available Administrative Remedies have been Exhausted.

The doctrine of exhaustion of administrative remedies requires

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different' from that required to establish a deprivation of property for want of due process….").

that litigants conclude available administrative procedures before seeking review in alternative forums. *See*, Palm Lake Partners II, LLC v. C & C Powerline, Inc., 38 So.3d 844, 853 (Fla. 1st DCA 2010). "The doctrine of exhaustion of remedies applies to municipal governmental agencies no less than it applies to state administrative agencies subject to the Administrative Procedure Act." Id. at 853. Furthermore, cities must exhaust their administrative remedies before seeking review, just as individuals must do. *See, e.g.*, Florida Dept. of Agric. & Consumer Services v. Haire, 865 So.2d 610 (Fla. 4th DCA 2004) (requiring municipalities to exhaust administrative remedies before challenging order to destroy citrus trees affected by canker).

The City's refusal to allow its own administrative procedures to run their course prejudices City Walk.[12] The coercive sanctions now in effect threaten City Walk's operations and interfere with its right to seek redress through available administrative and judicial remedies. The City's code enforcement proceeding also wastes administrative

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[12] Appellant raised this issue before the Special Magistrate by moving for a continuance and requesting abatement of the code-enforcement proceeding until the DRC appeal concluded. (T- 4/1 at 8-10).

resources, as a successful appeal of the DRC's decision will render the code enforcement order a nullity.

B. The Code Enforcement Sanctions Violate Procedural Due Process.

The Fourteenth Amendment's Due Process Clause provides protections that parallel the state-law exhaustion doctrine. Tallahassee violated City Walk's procedural due process rights because it failed to honor Appellant's procedural rights under its own ordinances.

In contrast, City Walk has fully complied with the City's Codes by diligently applying for and pursuing its Type B site-plan approval. The City wrongfully withheld that approval from City Walk - a violation that is central to Appellant's claims before this Court and to its reserved Federal constitutional claims. However, that initial denial is not supposed to be the end of the story. City Walk has filed an administrative appeal of that decision, which is exactly what it is supposed to do under the City's Code. That administrative decision is *not* final.

Due process requires that notice and an opportunity to be heard precede a deprivation of property rights. *See*, Massey v. Charlotte

County, 842 So.2d 142, 146 (Fla. 2d DCA 2003). To be sure, City Walk received notice of the code enforcement proceeding and had an opportunity to mount a defense there. However, City Walk has not yet had its day in court on the underlying question of whether it is entitled to site-plan approval (or whether such approval must be excused pursuant to RLUIPA and FRFRA). The City is not free to ignore a procedural remedy that its Code created. *Compare*, Alvey v. City of N. Miami Beach, 206 So.3d 67, 69 (Fla. 3d DCA 2016) (quashing decision where "the City failed to consider and apply its own Code"); Collier Cty. Bd. of Cty. Comm'rs v. Fish & Wildlife Conservation Comm'n, 993 So.2d 69, 72–73 (Fla. 2d DCA 2008) ("[A]n agency is required to follow its own rules."). "Where a city fails to comply with the provisions of its own Ordinance and the objective terms set out therein, then, by failing to follow its own established procedure the city denies the plaintiff its procedural due process rights." J & B Ent. v. City of Jackson, Miss., 2006 WL 1118130 at *10 (S.D. Miss., 2006); *See, also*, Browning-Ferris Indus. of St. Louis, Inc. v. City of Maryland Heights, Mo., 747 F. Supp. 1340, 1346 (E.D. Mo. 1990) (concluding that a landowner stated a claim where the City continued issuing citations

with knowledge that a license application was still pending before the local planning commission).

C. The Code Enforcement Sanctions Violate Substantive Due Process Because the Underlying Administrative Proceeding was Arbitrary and Capricious.

Florida law recognizes a property right in the use and development of real property. *See*, Duvall v. Fair Lane Acres, Inc., 50 So.3d 668, 671 (Fla. 2d DCA 2010) ("The most valuable aspect of the ownership of property is the right to use it. Any infringement on the owner's full and free use of privately owned property… is a direct limitation on, and diminution of, the value of the property and the value of its ownership and accordingly triggers constitutional protections."). Where government has created a substantive property right along with procedures to administer that right, it cannot arbitrarily and capriciously withhold its approval. If it does so, it violates substantive due process. In a similar vein, if laws and procedures do not advance the asserted governmental interest, they may be unconstitutionally arbitrary and capricious. *See, generally*, Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 542, 125 S. Ct. 2074, 2083–84 (2005) ("[A] regulation that fails to serve

any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause.").

As explained above, Tallahassee's Codes infringe City's Walk's rights under RLUIPA and FRFRA. In these circumstances, substantive due process claims trigger heightened scrutiny. *See*, Troxel v. Granville, 530 U.S. 57, 65, 120 S. Ct. 2054, 2059–60 (2000), *quoting* Washington v. Glucksberg, 521 U.S. 702 (1997) ("We have long recognized that the Amendment's Due Process Clause, like its Fifth Amendment counterpart, 'guarantees more than fair process.'… The Clause also includes a substantive component that 'provides heightened protection against government interference with certain fundamental rights and liberty interests.'").

The City's refusal to approve City Walk's site plan and its decision to fine City Walk were arbitrary in several respects. It is irrational to rely on City Walk's relative proximity to residences as a reason to deny its application. Distance from residences is not a criterion set forth in §10-417; there is no statutory buffer zone. More tellingly, the Tallahassee LDC specifically allows the establishment of transitional residential facilities *within residential districts*. S*ee*, §10-

417(b), LDC. Furthermore, the proximity-to-bus-routes criterion, coupled with the prohibition on locating within an industrial zone, effectively *requires* proximity to a residential area.

In addition, the City relied on obsolete and inapposite CFS data. The City focused only on the period of time when City Walk operated a low-barrier shelter *at the City's own request*. The CFS data after January 2021, prepared by the same City department (TPD) using the same exact criteria, showed that calls returned to baseline levels once City Walk reverted to its intended operations as supporting housing. *Compare*, Jesus Fellowship, Inc. v. Miami-Dade County, 752 So.2d 708, 710 (Fla. 3d DCA 2000) ("Past violations are not a basis to deny a present pending application that meets the code standards."). The City is not free to ignore its own data. *Compare*, Flanigan's Enterprises, Inc. of Georgia v. Fulton Cty., Ga., 242 F.3d 976, 986 (11th Cir. 2001) ("We recognize that a governmental entity is not required to perform empirical studies. However, having done so, the Board cannot ignore the results.… [W]e find that it was unreasonable for Defendants to rely on remote, foreign studies concerning secondary effects when the

county's own current, empirical data conclusively demonstrated that such studies were not relevant to local conditions." (citation omitted)).

Tallahassee punished City Walk for providing a valuable social service. The City's decision primarily depended on its finding that additional homeless persons could be found in City Walk's vicinity. That is a natural consequence of City Walk's provision of supportive housing. One is likely to find homeless persons near transitional residential facilities, and that fact is no reason to deny approval to a facility specifically intended to minister to those individuals. *Compare*, Mkt. St. Mission v. Zoning Bd. of Adjustment of City of Asbury Park, 2010 WL 3834409 (N.J. Super. Ct. App. Div. 2010) (City should have granted a variance for a soup kitchen where there was insufficient evidence that those who frequent the facility would harm the community).

The City's decision to withhold approval of a site plan for which City Walk clearly qualified was arbitrary and violated Appellant's' substantive due process rights. *See*, Lingle, 544 U.S. at 542, 125 S.Ct. at 2083–84 ("[A] regulation that fails to serve any legitimate

governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause.").

V. THERE WAS A LACK OF COMPETENT SUBSTANTIAL EVIDENCE TO SUPPORT THE FINDING THAT CITY WALK WAS IN VIOLATION OF §10-417.

STANDARD OF REVIEW: The Court reviews the Special Magistrate's factual findings to determine whether they were supported by competent, substantial evidence in the record. *See*, Twilegar v. State, 42 So.3d 177, 192 (Fla. 2010).

A final, independent basis for reversal of the code enforcement sanctions is their lack of evidentiary support. This Court's task in reviewing the factual record is not limited to the determination that City Walk was operating without an approved Type B site plan. Rather, the Court must also evaluate whether the City had any justification on the record then before it to deny City Walk's site-plan application, as that denial predicated the code enforcement sanctions.

The City identified three reasons for denying City Walk's site-plan application: (1) proximity to residences and the associated "change in character of the community; (2) a temporary increase in police calls for service; and (3) perceived problems with security off-premises. City

Walk has shown that none of those findings was supported by the record before the DRC. *See*, Argument *supra*.

The staff reports and the testimony before the Special Magistrate compel the conclusion that denial of City Walk's application and the subsequent code enforcement proceedings were motivated by one and only one fact: a few outspoken residents complained that they did not care for their new neighbors. However, the clamor of the crowd cannot constitute competent, substantial evidence. *See*, City of Apopka v. Orange Cty., 299 So.2d 657, 659 (Fla. 4th DCA 1974) ("The objections of a large number of residents of the affected neighborhood are not a sound basis for the denial of a permit."); Town of Ponce Inlet v. Rancourt, 627 So.2d 586, 588 (Fla. 5th DCA 1993) ("Objections of neighbors have been determined to be insufficient to deny a zoning application."). Because neighborhood opposition was the only real basis for the site plan denial and, thus, the code enforcement orders, the orders must be vacated.

CONCLUSION

City Walk operates a religious mission in an appropriate location where it has a right to be. Indeed, the record shows that the City actively encouraged City Walk to establish a shelter to serve a homeless population that would otherwise be on the streets during the coldest months of the year.

The City's later decision to fine City Walk based on the City's rejection of a site plan directly infringes upon City Walk's religious liberties. The purported basis for denial does not serve a compelling interest, does not consider less restrictive means of regulation and violates the protections afforded by RLUIPA and FRFRA.

The City's rush to fine City Walk before all administrative remedies have been exhausted offends procedural protections found in the City's own Code. It also runs contrary to principles of estoppel that prohibit government from repudiating actions which government itself encouraged and promoted.

The Code Enforcement Orders should be reversed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief has been forwarded to LOUIS C. NORVELL, Esquire [Louis.Norvell@talgov.com], City of Tallahassee, 300 S. Adams St. #A-5, Tallahassee, Florida 32301, by E-mail this 23rd day of July, 2021.

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CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief is typewritten using 14 point Arial font and complies with Rule 9.210(a)(2), Fla.R.App.P.

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