

IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC20-1284

CITY OF WEST PALM BEACH, INC.

Petitioner - Appellant,

vs.

PETER AND GALINA HAVER,

Respondents - Appellees.

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**INITIAL BRIEF**

**OF**

**CITY OF WEST PALM BEACH, INC.**

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On Appeal from the Fourth District Court of Appeal  
Case No.: 4D19-1537

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## **CITATION TO RECORD**

Citations to the record in Petitioner's Initial Brief are cited "R. \_\_\_\_," referring to the page number assigned on the bottom of each page of the record prepared by the lower court. All emphasis is counsel's unless otherwise noted.

## INTRODUCTION

If a city investigates a citizen's allegation that his neighbor is violating a zoning ordinance or building code and decides to not take an enforcement action, does that executive decision create a justiciable issue? In other words, may the complaining citizen seek judicial review of the city's decision to not act? That is the decisive issue in this appeal.

Relying on *Trianon Park Condominium Ass'n, Inc. v. City of Hialeah*, 468 So. 2d 912 (Fla. 1985), the Third District Court of Appeals has determined that an order compelling a city to enforce its ordinances would violate the separation of powers doctrine as enshrined in the Article II, § 3 of the Florida Constitution. *Detournay v. City of Coral Gables*, 127 So. 3d 869 (Fla. 3d DCA 2013). *See also Chapman v. Town of Reddington Beach*, 282 So. 3d 979 (Fla. 2d DCA 2019). The Fourth District Court of Appeals disagreed and has certified a direct conflict with *Detournay* and *Chapman*.

The decisional conflict is resolved by separating the question of a person's standing to sue their government from the question of whether the governmental act at issue is subject to judicial review (*i.e.*, a justiciable issue). Failing to acknowledge this distinction, the Fourth District held the Respondents, Peter and Galina Haver's (the "Havers") pleading of special damages alone automatically provides a basis to sue Petitioner, City of West Palm Beach, Inc. (the "City") for



equitable relief in connection with the City’s decision to take no action against their neighbor. Because the Havers’ claims are not justiciable under Florida law, this Court should reverse.

## **STATEMENT OF THE CASE AND FACTS**

### **I. STATEMENT OF THE FACTS**

The Havers live in the City of West Palm Beach. [R. 8]. They claim their elderly neighbor violated the City’s single-family zoning classification and building code requirements by permitting at least two unrelated individuals to live in her home. [R. 9-12]. Specifically, the Havers believe their neighbor has at various points in time allowed at least one other elderly woman to live in her home, as well as an approximately 40-year-old man who spent “hours during the day smoking cigarettes” and “shouting in Spanish into his cell-phone.” [R. 10-11]. The Havers also “suspected” their neighbor made renovations to her home in order to convert it to multi-family use in violation of the applicable building and zoning ordinances. [R. 9].

The Havers state they fear the unrelated residents will have a “direct impact on the value of” their home. [R. 17]. They also say they are concerned about the “possibility of nefarious conduct” if the neighbor’s “room-and-board operation” is not limited to elderly persons, intimating about the potential operation of a “meth-house” as a result. [R. 18].

The Havers complained to the City about the suspected zoning and building code violations. [R. 9-12]. A City code enforcement officer visited their neighbor's home, prepared a report, photographed the property, and indicated he would investigate possible building code violations. [R. 9-14]. The inspector's report did not find any code violations. [R. 13-14]. The Havers received no further communication from the City's code enforcement department about their complaint. [R. 14].

## **II. STATEMENT OF THE CASE**

On December 9, 2018, the Havers filed suit against the City, City code enforcement officials, and the Havers' neighbor. [R. 8-74]. Their five-count complaint asked the court to: (1) "enforce the single-family zoning classification by way of declaratory and injunctive relief," (2) declare that the neighbor violated the zoning code and does not qualify for exemption, that the Havers have standing, and that the City's refusal to enforce the zoning classification violates Ordinance 94-34(b)(2), (3) require the neighbor to cease and desist from providing room and board to unrelated persons and require the City to enforce the zoning classification, (4) issue a writ of mandamus compelling the City to determine whether the neighbor was violating the zoning classification, and (5) issue a writ of certiorari "quash[ing] any quasi-judicial decisions or acts" taken by the City in connection

with its alleged refusal to enforce the zoning classification. [R. 19, 61, 63, 67-68, 70].

On February 28, 2019, the City filed a motion to dismiss arguing its decision to take no action regarding enforcement of zoning and building codes is a discretionary act not subject to judicial review. [R. 101-06]. The City relied on *Trianon* and *Detournay* and argued separation of powers prohibits courts from hearing lawsuits seeking to require local governments to take particular government action regarding zoning and code enforcement. [R. 102-03, 203].<sup>1</sup> In their response, the Havers attempted to distinguish *Trianon* and *Detournay* and argued their claims were actionable under Florida law. [R. 125-53].

On May 23, 2019, the trial court entered its order dismissing the complaint in its entirety without prejudice, citing *Detournay* in support. [R. 186]. Instead of amending their allegations, the Havers asked the trial court to enter final judgment, which the court entered on June 12, 2019. [R. 186, 197]. The Havers appealed that judgment to the Fourth District. [R. 186, 192-93, 197].

The Fourth District reversed the trial court's dismissal of Counts I-III and affirmed the dismissal of Counts IV and V. *Haver v. City of West Palm Beach, Inc.*, 298 So. 3d 647, 653 (Fla. 4th DCA 2020). Relying heavily on the dissent in *Detournay*, the Fourth District found the *Detournay* court and trial court below

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<sup>1</sup> The City also addressed the mandamus and certiorari claims, which are not at issue in this appeal.

erred by failing to apply *Boucher v. Novotny*, 102 So. 2d 132 (Fla. 1958) and *Renard v. Dade County*, 261 So. 2d 832 (Fla. 1972). *See id.* at 652-53. Characterizing *Boucher* and *Renard* as setting forth the “standing requirement for equitable zoning enforcement,” the Fourth District concluded that, as long as the plaintiff can show special damages, the doctrine of separation of powers does not preclude a plaintiff from bringing an equitable enforcement action against the city seeking a court order compelling enforcement of zoning codes. *Id.* The court also concluded this Court’s decision in *Trianon* was not controlling because that case dealt with claims for damages against the government in tort rather than claims for equitable relief. *Id.* at 650-51. The court certified conflict with *Detournay* and *Chapman*. *Id.* at 653.

The City sought discretionary jurisdiction and this Court accepted jurisdiction on October 9, 2020.

### **SUMMARY OF THE ARGUMENT**

If a city investigates a citizen’s allegation that his neighbor is violating a zoning ordinance or building code and decides to not take an enforcement action, that executive decision is not subject to judicial review absent the city’s violation of law. As recognized by this Court in *Trianon* and the Third District in *Detournay*, this fundamental exercise of local government police power is not justiciable under the doctrine of separation of powers.

By failing to distinguish the issue of standing from the question of justiciability, the Fourth District misapplied this Court's precedent in *Boucher* and *Renard* as well as *Fortunato*. While a citizen may establish *standing* to sue his local government for equitable relief by pleading special damages, the claim brought must still be *justiciable*. The Fourth District's conclusion that the Havers could sue the City in equity solely by establishing special damages misapplies this Court's earlier precedent and disregards the fundamental principle recognized in *Trianon* and *Detournay*: absent the violation of a constitutional provision or law, the separation of powers clause enshrined in the Florida Constitution precludes a court from entertaining an action brought to compel enforcement when a city has simply investigated a complaint and decided not to act. That executive decision to not act does not create a judiciable issue. To do otherwise ignores the fundamental importance of prosecutorial discretion in the context of a local government's exercise of its police power where, based on policy judgments and budgetary and resource limitations, government may appropriately prioritize enforcement of some violations over others.

Applying the rule of law in *Trianon* and *Detournay*, the City's decision to take no action against the Havers' neighbor for alleged violation of the single-family zoning ordinance was a matter of pure executive discretion. And, with no allegation that the City's decision violated a constitutional or statutory right,

breached a legal duty owed, or otherwise violated the ordinance or the law, the Havers' claims for equitable relief are not justiciable.

The absence of a claim against the City does not leave the Havers without a remedy. As they have done below, the Havers may pursue claims against their neighbor for the alleged violations, including claims for monetary relief in tort. They may also advocate for different code enforcement priorities before their City Commission. But they cannot sue their city and have a court order the City to take a particular action the City has chosen not to take. As such, this Court should reverse the Fourth District and, consistent with the Third District and Second District decisions, find the separation of powers clause in the Florida Constitution renders the Havers' claims non-justiciable.

## **ARGUMENT**

### **I. STANDARD OF REVIEW**

The standard of review of an order on a motion to dismiss is *de novo*. *Siegle v. Progressive Consumers Ins. Co.*, 819 So. 2d 732, 734 (Fla. 2002).

### **II. PLEADING SPECIAL DAMAGES ESTABLISHES STANDING TO SUE; BUT IT DOES NOT RESOLVE THE SEPARATE QUESTION OF JUSTICIABILITY**

The Fourth District held the Havers could pursue an equitable enforcement action against the City because they had pled special damages. In so doing, it misapplied this Court's decisions in *Boucher* and *Renard* and confused the distinct inquiries of standing and justiciability under the doctrine of separation of powers.

While the pleading of special damages may confer standing, it does not resolve the separate jurisdictional question of whether a citizen has asserted a claim seeking relief the court has the power to decide. Specifically, standing does not answer the question of whether, without any assertion that the city violated its own zoning ordinance, a court may compel a city to enforce an ordinance after the city has investigated the complaint and decided against enforcement.

The absence of a justiciable enforcement claim against the City does not mean the Havers are without a remedy. They have already pursued claims for relief against their neighbor in the trial court below. The Havers may also seek relief from their local City Commission.

**A. The Fourth District misconstrued and misapplied *Boucher* and *Renard* by ignoring the presumption in those cases that the municipal action taken violated a zoning ordinance**

Relying heavily on the dissent in *Detournay*, the Fourth District misapplied this Court's opinions *Boucher* and *Renard*. See *Haver*, 298 So. 3d at 652-53. Those decisions address a plaintiff's standing to bring a lawsuit but leave unaddressed the justiciability question.

**1. *Boucher*: Permit was issued in violation of the zoning ordinance.**

*Boucher* addressed the standing requirements necessary for the plaintiff to bring an equitable enforcement action against the city based on the city having approved issuance of a building permit in violation of its own ordinance. *Boucher*,

102 So. 2d at 132. The plaintiffs complained to the City of Clearwater about a municipal building official's issuance of a building permit for a motel that was not consistent with city setback requirements for access ways, porches and sun decks. *Id.* at 133. The building official later revoked the permit, but the city council reinstated it at a meeting allegedly "without public notice as required by the zoning ordinance." *Id.* at 134. In response to the violation by the city, the plaintiffs filed an action seeking injunctive relief.

The Court reaffirmed "*where municipal officials threaten or commit a violation of municipal ordinances which produces an injury to a particular citizen which is different in kind from the injury suffered by the people of the community as a whole then such injured individual is entitled to injunctive relief in the absence of an adequate legal remedy.*" *Id.* at 134 (emphasis added). To have standing to challenge such a violation, the Court stated a plaintiff must allege "special damages peculiar to himself and differing in kind rather than in degree from the damages suffered by the people as a whole." *Id.*

The *Boucher* Court then summarized how special damages applies to challenges concerning zoning ordinances: "The rule of our cases cited above with reference to the abatement of alleged nuisances *resulting from the threatened or consummated municipal conduct* is equally applicable to actions to remedy or prevent breaches of municipal zoning ordinances." *Id.* at 135 (emphasis added).



The predicate underlying this “special damages” standing rule for equitable enforcement actions was the fact that city officials had taken actions in violation of the city’s ordinance.

Understanding this underlying predicate is essential to resolving the decisional conflict in this appeal. In *Boucher*, even when special damages are established, the Court predicates a plaintiff’s ability to seek redress on there being “an *alleged violation of a municipal zoning ordinance*.” *Id.* (emphasis added). In other words, the special damages analysis in *Boucher* stands upon the allegation that (1) the permit the city approved violated its zoning ordinance’s setback requirements and (2) the city council’s action approving of that permit was taken at a meeting held without proper notice.

**2. *Renard*: Challenge to a county’s granting a rezoning as a violation of law.**

Years after *Boucher*, the Court decided *Renard*. The petitioner challenged Dade County’s rezoning of his neighbor’s property from industrial to multi-family residential including a variance for private roads. *Renard*, 261 So. 2d at 834. That rezoning action involved proceedings before the zoning appeals board and the board of county commissioners. *Id.*

In answering the certified question, this Court distinguished between the *Boucher* special damages standing rule applying only to “suits by individuals for zoning violations” while general standing requirements applied to challenge

“action of a zoning authority.” *Id.* at 835. For this first part of the certified question, the Court confirmed the *Boucher* rule requires special damages for individuals to have standing “to enforce a valid zoning ordinance.” *Id.* at 837. The Court affirmed the district court’s decision that “when there is a proceeding in which a plaintiff seeks to enforce an existing zoning ordinance, such as *a violation of a setback requirement*, special damage is necessary.” *Id.* at 834 (emphasis added). In other words, as in *Boucher*, the underlying predicate to the “special damages” standing rule was an action addressing a violation of a zoning ordinance or its unlawful enforcement.<sup>2</sup>

*Renard* acknowledges a more lenient approach to determining special damages over the years. *Id.* at 838. Yet *Renard* does not alter the *Boucher* predicate or presumption that the justiciable issue raised is that the local government had taken an action that violated the ordinance. Florida courts are clearly empowered to resolve such issues.

**3. *Haver*: No allegation the City took action in violation of any ordinance.**

Unlike *Boucher* and *Renard*, the Havers do not allege the City has taken an enforcement action in violation of its ordinance. Instead, they are asking the courts

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<sup>2</sup> The *Renard* Court’s response to Parts 2 and 3 of certified question is for challenges to an invalid zoning ordinance due to either a substantive flaw or procedural error in its enactment. *Id.* at 838. The Court upheld the zoning authority’s legislative exercise of power. *Id.*

to compel the City to take some action in the first instance. Neither *Boucher* nor *Renard*, based solely on the Havers' allegation of special damages, empower a court declare and enjoin the zoning enforcement actions the City must take. To do so would violate the doctrine of separation of powers.

The Fourth District relies heavily on the dissent in *Detournay*. In that case, the plaintiffs filed suit asking the court “to require the City of Coral Gables to prosecute an enforcement action.” *Detournay*, 127 So. 3d. at 870. The City had issued several citations against a private yacht basin but held them in abeyance while attempting to settle the matter. *Id.* at 871. As the dissent notes, plaintiffs sought equitable relief because the city “failed to close the illegal private yacht basin.” *Id.* at 875. The dissent then explains why the trial court erred by not properly considering special damages for standing under *Boucher* and *Renard*. *Id.* at 877.

The *Detournay* dissent tries to discredit the majority's reliance on *Trianon*, a case addressing building code enforcement in which the Court found no duty of care resulting in tort liability and no appropriateness for judicial review. *Id.* at 879. The dissent first distinguishes *Trianon*'s approach to standing in a tort case from the *Boucher* special damages rule for cases in equity. The dissent however does not, and cannot, differentiate why the *Detournay* majority's additional

consideration of justiciability grounded in constitutional separation of powers should not apply regardless of whether the case involves torts or claims in equity.

Second, the *Detournay* dissent correctly recognizes that special damages provide standing to bring a lawsuit seeking injunctive or declaratory relief from “an alleged zoning violation.” *Id.* at 880. However, that dissent overlooks the fact that the predicate in *Boucher* and *Renard* was the local government had taken actions that violated its own ordinance. Indeed, the petitioner in each case brought suit “to enforce the zoning ordinance in equity against . . . a municipality.” *Id.*

Similar unlawful municipal actions as in *Boucher* and *Renard* were the justiciable basis for the litigation in the other cases cited by the *Detournay* dissent and the Fourth District in *Haver*. For example, in *Bozeman v. City of St. Petersburg*, 76 So. 894 (Fla. 1917), the plaintiffs claimed the city lacked the authority to adopt an ordinance and convey certain land. The court stated standing is available if an “unlawful obstruction” injures the plaintiff in a manner differing from the general public. *Bozeman*, 76 So. at 900.<sup>3</sup>

In *Skaggs-Albertson’s v. ABC Liquors, Inc.*, 363 So. 2d 1082 (Fla. 1978), the plaintiff filed suit based upon a zoning official’s refusal to issue a permit which he certified would violate the county zoning resolution. 363 So. 2d at 1084. That

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<sup>3</sup> The *Detournay* dissent and *Haver* decision also cite to *Page v. Niagara Chem. Div. of Food Mach. & Chem. Corp.*, 68 So. 2d 382 (Fla. The 1953). That decision determining standing for special injury did not involve a governmental entity and its alleged violation of law.

official's decision was subsequently reversed by the zoning board and ultimately reinstated by the board of county commissioners. *Id.* at 86. And in *Fortunato v. City of Coral Gables*, 47 So. 2d 321 (Fla. 1950), the plaintiff sought to enjoin city from issuing a building permit where the city's zoning board had recommended approval of a variance to an ordinance's setback requirements. 47 So. 2d at 322. The plaintiff challenged the proper interpretation of those requirements. *Id.* The city commission adopted and approved the variance; and, the plaintiff further claimed procedural violations that he received no notice of the zoning board's meeting and insufficient notice of the commission's special meeting. *Id.*

Each of the above cases relied upon by the Fourth District here and by the dissent in *Detournay* addressed the plaintiff's "standing to contest zoning decisions." *Skaggs-Albertson's*, 363 So. 2d at 1088. And, the issue to be adjudicated in each case was municipal action alleged to be unlawful. Without such unlawful enforcement action for the court to review in *Haver*, a plaintiff may have standing, but as the *Detournay* majority found, the case still lacks justiciability.

Finally, the *Detournay* dissent summarizes its analysis with this statement: "In short, once special damages are shown, enforcement of the zoning ordinance is no longer an action purely within the discretion of the state." *Id.* at 880. This statement assumes too much. It ignores the "justiciable issue" predicate in each of

those cases. A plaintiff's special damages may provide standing to sue; but a justiciable issue (e.g. the violation of an ordinance) must exist before a court may consider whether it should compel enforcement of a zoning ordinance.

As explained below, the Havers do not allege the City violated its zoning ordinance. They also do not allege the City has violated a constitutional or statutory right, or that the City has breached any duty of care owed. Without any such violation, regardless of whether the Havers have standing to sue, there is no justiciable issue for a court to decide.

**B. The Havers have an adequate remedy**

While special damages alone do not provide a basis to sue the City, the Havers are not without an adequate legal remedy to resolve their dispute with their elderly neighbor.

While the City's motion to dismiss only sought the dismissal of the City, the Havers' action against their neighbor continued in the trial court as permissible under Florida law. *See Chapman*, 282 So. 3d at 981, 988 (action against town could not proceed based on separation of powers, but action against the neighbor was allowed to proceed); *Carroll v. City of West Palm Beach*, 276 So. 2d 491 (Fla. 4th DCA 1973) (property owner could maintain injunctive relief action against Florida Power & Light Company for installing power lines that allegedly violated municipal zoning ordinances but could not maintain action against the city). *See*

also *Detournay*, 127 So. 3d at 874 (“Our decision does not address the ability of the Homeowners to bring a direct action against Amace [the violator] because the Homeowners have filed no complaint and requested no relief against Amace.”).

The Havers might also have a basis to bring a private nuisance action against their neighbor seeking to recover monetary damages for the alleged zoning and building code violations:

An owner or occupant of property must use it in a way that will not be a nuisance to other owners and occupants in the same community. Anything which annoys or disturbs one in the free use, possession, or enjoyment of his property or which renders its ordinary use or occupation physically uncomfortable may become a nuisance and may be restrained.

*Mercer v. Keynton*, 163 So. 411, 413-14 (Fla. 1935) (action alleging that a gasoline filling station and garage was a nuisance).

Indeed, Florida law has repeatedly recognized this is a classic avenue for relief from damage to property caused by disruptive neighbors: “the law of private nuisance is bottomed on the fundamental rule that every person should so use his own property as not to injure that of another.” *Jones v. Trawick*, 75 So. 2d 785, 787 (Fla. 1954). See *Burnett v. Rushton*, 52 So. 2d 645 (Fla. 1951) (action to enjoin private nuisance caused by neighbor operating lawn mower and radio at odd hours and inciting dog to bark); *Mayflower Holding Co. v. Warrick*, 196 So. 428 (Fla. 1940) (nuisance action by hotel against nightclub alleging late-night noise that disturbed hotel guests); *Baum v. Coronado Condominium Ass’n, Inc.*, 376 So. 2d

914 (Fla. 3d DCA 1979) (injunctive relief action by condominium unit owners against condominium association to abate noise in the lobby); *Rae v. Flynn*, 690 So. 2d 1341 (Fla. 3d DCA 1997) (action alleging neighborhood dogs were a nuisance).

Additionally, to the extent the Havers believe the City is not vigorously enforcing its code, they may petition the City Commission and advocate for the City to make different policy judgments regarding its exercise of discretion in enforcement of its zoning and building code. *See Detournay*, 127 So. 3d at 874 (“They need to knock on the doors of city hall, not the courthouse.”).

Both avenues for relief, suing the neighbor and advocating before their local government to change its enforcement priorities, remain open to the Havers. Consequently, the Havers’ ability to obtain their desired result is unaffected by whether they may sue the City directly in equity for its exercise of executive discretion.

Having distinguished the “special damages” standing case law relied upon by the Fourth District and the *Detournay* dissent, this brief will next address why the separation of powers doctrine as enshrined in the Florida Constitution render the Havers’ claims non-justiciable.



### III. THE SEPARATION OF POWERS CLAUSE PRECLUDES A COURT FROM ADJUDICATING THE HAVERS' CLAIMS

Separation of powers among our three branches of government is a “cornerstone of American democracy.” *Bush v. Schiavo*, 885 So. 2d 321, 328 (Fla. 2004). It “is a constitutional doctrine that extends across all procedural vehicles that might be used to challenge executive action.” *Detournay*, 127 So. 3d 869. As a result, “[t]he judicial branch must not interfere with the discretionary functions of the legislative or executive branches of government absent a violation of constitutional or statutory rights.” *Trianon*, 468 So. 2d at 918; *Detournay*, 127 So. 3d at 873. Separation of powers applies to local government just as it applies to state and federal government. *City of Fort Lauderdale v. Patrick*, 254 So. 2d 193, 195 (Fla. 1971).

The Florida Constitution enshrines this doctrine in Article II, § 3 which states:

**Section 3. Branches of government.** -- The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless provided herein.

As explained above, to maintain the equitable enforcement action the Havers have brought against their City, they must satisfy two requirements. First, the Havers must plead and establish special damages. Second, their claims must be justiciable under the doctrine of separation of powers.

Standing and justiciability are separate inquiries involving distinct legal questions. *Weiss v. Johansen*, 898 So. 2d 1009, 1011 (Fla. 4th DCA 2005) (“Standing depends on whether a party has a sufficient stake in a justiciable controversy, with a legally cognizable interest which would be affected by the outcome of the litigation.”). The establishment of standing alone does not itself open the door to the courthouse for citizens to sue their city. The claim asserted must also be justiciable.

The City investigated the Havers’ complaint against their neighbor and decided there was not a sufficient basis to pursue a zoning or code enforcement. That decision was a pure act of executive discretion that is fundamental to the City’s exercise of its police power.<sup>4</sup> The City’s decision not to pursue an

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<sup>4</sup> See *Heckler v. Chaney*, 470 U.S. 821 (1985):

This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion. *United States v. Batchelder*, 442 U.S. 114, 123-124 (1979); *United States v. Nixon*, 418 U.S. 683, 693 (1974); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967); *Confiscation Cases*, 7 Wall. 454 (1869). This recognition of the existence of discretion is attributable in no small part to the general unsuitability for judicial review of agency decisions to refuse enforcement.

The reasons for this general unsuitability are many. First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another,

enforcement action does not violate its ordinance, much less any constitutional or statutory right of the Havers.

As such, whether or not the Havers may claim special damages for purposes of standing, they have failed to present a justiciable issue that a Florida court may adjudicate.<sup>5</sup> As such, this Court should follow *Trianon*, affirm *Detournay*, reverse the Fourth District, and dismiss the Havers' suit against the City.

**A. A local government's decision to not to take a code enforcement action is generally a discretionary act not subject to judicial review under the doctrine of separation of powers**

Under Florida law, a local government's exercise of executive discretion to take no action in the zoning and building code enforcement context is not justiciable absent a violation of constitutional or statutory rights or other violation of law by the municipality—regardless of whether the relief sought is equitable or monetary in nature.

This fundamental principle was recognized in this Court's *Trianon* decision. In *Trianon*, condominium owners sued the City of Hialeah for damage to their

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whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing.

<sup>5</sup> That is, absent any allegation the City violated its own ordinance. See *Rebholz v. Floyd*, 327 So. 2d 806 (Fla. 2d DCA 1976) (in a mandamus action seeking to compel municipal officials to enforce a zoning ordinance, the court recognized at the outset that “the petition sets forth a clear violation of the City’s ordinance”).

units due to building defects after the city's building inspectors were allegedly negligent in inspecting the building. 468 So. 2d at 914-15. While the issue before the Court involved the application of sovereign immunity to claims for monetary relief against the city, the Court also recognized the overarching application of the doctrine of separation of powers in the context of local government exercise of discretionary power: "[U]nder the constitutional doctrine of separation of powers, the judicial branch must not interfere with the discretionary functions of the legislative or executive branches of government absent a violation of constitutional or statutory rights." *Id.* at 918.<sup>6</sup>

In finding the plaintiffs' claims were not justiciable, the Court held the city's enforcement of its building code was a discretionary function flowing from "the police power of the state," *id.* at 922, and analogized the exercise of prosecutorial discretion in the context of criminal prosecutions to the exercise of discretion in zoning and building code enforcement:

This discretionary power to enforce compliance with the law, as well as the authority to protect the public safety, is most notably reflected in the discretionary power given to judges, prosecutors, arresting officers, and other law enforcement officials, as well as the discretionary authority given fire protection agencies to suppress fires. This same discretionary power to enforce compliance with the law is given to regulatory officials such as building inspectors, fire department inspectors, health department inspectors, elevator

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<sup>6</sup> The Court previously recognized "there is not now, nor has there ever been, any common law duty for either a private person or a government entity to enforce the law for the benefit of an individual." *Id.*

inspectors, hotel inspectors, environmental inspectors, and marine patrol officers.

*id.* at 919 (emphasis added). Thus, while *Trianon* was a tort case, the relevant holding was that the judiciary may not review certain “discretionary decisions relating to basic governmental functions” because that would “require the judicial branch to second guess the political and police power decisions of the other branches of government and would violate the separation of powers doctrine.” *Id.*

The Third District properly applied this holding in *Trianon* in its decision in *Detournay*. As referenced above, the homeowners and their homeowners’ association filed a declaratory and injunctive relief action against the City of Coral Gables. *Detournay*, 127 So. 3d at 871. The homeowners alleged a neighboring property owner was operating a private yacht basin in a manner that violated the city’s building and zoning code. *Id.* The city issued administrative citations, but it chose not to pursue enforcing them while seeking a settlement with the property owner. *Id.* The homeowners sued the city to compel it to pursue a satisfactory enforcement action. *Id.*

The Third District held the claims for equitable relief were barred under the doctrine of separation of powers. *Id.* at 872-73. Relying on *Trianon*, the court found the city had the discretion whether to prosecute citations under its municipal building and zoning code and had not violated the plaintiff’s constitutional or statutory rights; thus, the court had no power to direct the local government to take

a particular action where it had chosen to take none. *Id.* at 873 (“[T]he City’s discretion to file, prosecute, abate, settle, or dismiss a building and zoning enforcement action... is an executive function that cannot be supervised by the courts, absent the violation of a specific constitutional provision or law.”). Acknowledging that *Trianon* was a tort case and the plaintiffs sought equitable relief, the majority in *Detournay* correctly recognized *Trianon*’s “reasoning and holding apply equally well to suits . . . where private parties seek a declaratory judgment and injunction against a city regarding the failure of the city to enforce its building and zoning codes against another private party.” *Id.* at 872.

The Second District in *Chapman* also correctly applied this same principle. *See* 282 So. 3d at 981. In *Chapman*, the plaintiffs filed a declaratory and injunctive relief action against their town and neighbor alleging the neighbor’s property improvements violated various zoning ordinances. *Id.* at 980-81. The complaint requested a declaratory judgment that the property improvements constituted a violation, requested an injunction requiring the town’s building official to “conduct and enforce certain activities,” and sought an order compelling the neighbor’s improvements to be brought into compliance with certain code provisions. *Id.* at 981.<sup>7</sup>

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<sup>7</sup> *See also Chapman*, 2016 WL 11656391 at \*1 (Fla. 6th Cir. Ct. Oct. 31, 2016).

The town argued a court decree compelling it to enforce its local zoning ordinances in a particular manner would violate the doctrine of separation of powers. *Id.* The trial court granted summary judgment to the town on this basis, and the Second District affirmed. *Id.* The Second District applied the relevant holdings from *Boucher*, *Renard* and *Skaggs-Albertson's* discussed above and recognized that because the plaintiffs had pled special damages, they had standing to pursue relief against their neighbor—even though they could not pursue claims against the town itself. *Id.* at 983-88.

Both *Detournay* and *Chapman* correctly apply the rule recognized in *Trianon* that local government exercise of prosecutorial discretion to take no action that does not otherwise violate the law is not justiciable. This rule applies whether the plaintiff-citizen seeks equitable or monetary relief from his local government.

**B. The Fourth District misapplied *Fortunato*, *Boucher* and *Renard* and failed to apply *Trianon***

As discussed above, the Fourth District conflated the Havers' standing to sue with the separate question of the justiciability of its equitable claim against the City under the doctrine of separation of powers. Relying in part on the dissent in *Detournay*, the Fourth District incorrectly focused its inquiry on whether a litigant pleading special damages is seeking equitable or monetary relief. It then incorrectly held that a plaintiff-citizen seeking solely equitable relief may compel his local government to enforce zoning codes in a particular manner, despite the

exercise of prosecutorial discretion to take no action, so long as special damages are pled. *Haver*, 298 So. 3d at 652-53.

Under the relevant holding in this Court's decision in *Trianon*, as well as *Detournay* and *Chapman*, the justiciability question is not determined simply by the form of relief the plaintiff seeks after alleging special damages, but by whether the government acts in a manner that allegedly violates the law. As the *Detournay* majority recognized, "[s]eparation of powers is a constitutional doctrine that extends across all procedural vehicles that might be used to challenge executive action." 127 So. 3d at 874. And "[i]t would be a hollow idea if it applied only to some procedures and not others." *Id.*

As explained above, while the citizen-plaintiffs in *Boucher*, *Fortunato*, and *Renard* were able to seek equitable relief against their local government, the unifying principle in each case was their governments had taken affirmative action that violated their local zoning ordinances and building codes. In *Boucher*, this Court held the plaintiffs' entitlement to sue for injunctive relief was based on its local government's "violation of a municipal zoning ordinance," *id.* at 134, not an unsatisfactory exercise of prosecutorial discretion. By the same token, the plaintiffs in *Fortunato* challenged the city's actions involving the issuance of a zoning variance as violating the ordinance both substantively and procedurally. 47 So. 2d at 322. And in *Renard*, the plaintiff challenged the rezoning of an adjacent property



from industrial to multi-family residential and sought to enforce the zoning ordinance upon which the city had allegedly acted unlawfully. 261 So. 2d at 834-37. In each case, the claims were justiciable because the local government took a particular action that caused special damages *and* that action was in violation of the zoning ordinances.

By contrast, if a local government exercises its executive discretion to take no action to enforce an alleged zoning or building code violation, that decision is not justiciable. As such, in *Detournay* and *Chapman*, the plaintiffs' claims for equitable relief against their local government for declining to enforce alleged violations were not subject to judicial review. *Detournay*, 127 So. 3d at 872-74; *Chapman*, 282 So. 3d at 981. Indeed, the *Chapman* court specifically recognized the plaintiffs had pled special damages consistent with *Boucher* and *Renard* but nevertheless concluded only their claims for equitable enforcement against their neighbor—but not their local government—were actionable. 282 So. 3d at 983-84.

The Fourth District's decision misconstrued the relevant holdings from *Boucher*, *Fortunato* and *Renard* to the facts of this case. It also failed to apply the relevant holding of this Court in *Trianon* as applied in *Detournay* and *Chapman*: a local government's exercise of pure executive discretion in zoning and building code enforcement is not justiciable under the doctrine of separation of powers, regardless of whether the plaintiff sues in equity or tort and regardless of whether

he pleads special damages. As such, this Court should reject the Fourth District holding on this point.

**C. The Fourth District also ignored that prosecutorial discretion is fundamental to separation of powers and the police power of local government**

The Fourth District's decision also ignored the bedrock principle, recognized in Florida's Constitution, that local governments are vested with police power that affords them with necessary prosecutorial discretion. *State v. Bloom*, 497 So. 2d 2, 3 (Fla. 1986) (citing Art. II, § 3, Fla. Const. and holding "[u]nder Florida's Constitution, the decision to charge and prosecute is an executive responsibility, and the [local government] has complete discretion in deciding whether and how to prosecute").

"Prosecutorial discretion is itself an incident of the constitutional separation of powers," and thus, courts may not interfere with that "free exercise" of discretion. *Barnett v. Antonacci*, 122 So. 3d 400 (Fla. 4th DCA 2013) (discussing separation of powers in context of criminal prosecution). *See also State v. Cain*, 381 So. 2d 1361, 1367 n.8 (Fla. 1980) (same). And while Florida courts repeatedly recognize the importance of this discretion and its freedom from judicial review in the context of criminal prosecutions that implicate citizens' liberty and freedom, the concept is equally applicable to questions of prosecution of zoning and building code violations. *Detournay*, 127 So. 3d at 873 (recognizing prosecutorial

discretion applies equally well in the context of zoning enforcement as criminal or civil suit).

This Court recognized the fundamental importance of prosecutorial discretion thirty-five years ago:

A government must have the flexibility to set enforcement priorities on its police power ordinances in line with its budgetary constraints. Without the ability to make such choices a government must either pay the high cost of total enforcement or forego the exercise of its police power. Neither option services the public interest.

*Carter v. City of Stuart*, 468 So. 2d 955, 957 (Fla. 1985).

This prosecutorial discretion is thus both practical and necessary. Local governments must prioritize enforcement of some violations over others due to policy judgments impacted by budgetary and resource limitations. And without prosecutorial discretion, cities would be subject to “an unrealistic duty . . . to discover all municipal violations and enforce all municipal violations with equal fervor.” *Elliott v. City of Hollywood*, 399 So. 2d 507, 508 (Fla. 4th DCA 1981). Every decision to not prosecute would subject local governments to potential litigation, regardless of their ability to meet such a universal enforcement standard, and regardless of whether citizens retain other avenues for obtaining relief.

Just as it may not review a criminal prosecutor’s decision to decline prosecution, Florida’s judicial branch does not have the authority to review (much less contradict) a local government’s discretion to not take action in enforcement

of local zoning and building code violations when no violation of constitutional or statutory rights has occurred. The separation of powers reasoning of *Trianon* and *Detournay* recognized the fundamental and practical importance of this executive discretion, while the Fourth District below did not.

**D. The City’s decision to decline to prosecute the alleged zoning violation is a discretionary executive act not subject to review by the judicial branch**

Applying the above rule from *Detournay* and *Trianon*, the City’s decision to take no action against the Havers’ neighbor is a not subject to judicial review for two reasons.

First, the Havers have not alleged the City’s decision violated any constitutional or statutory right or violated any other provision of law. Under *Trianon* and *Detournay*, an act of pure executive function—the decision to exercise prosecutorial discretion and decline to take an action—is not justiciable “absent the violation of a specific constitutional provision or law.” *Detournay*, 127 So. 3d at 873. In fact, the City’s alleged failure to prosecute the neighbor for a suspected violation of a local zoning ordinance does not infringe on any constitutional or statutory rights of the Havers.<sup>8</sup>

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<sup>8</sup> Again, this is not to say courts have no jurisdiction for equitable relief against a governmental entity when special damages are shown. But that jurisdiction opens only upon a governmental action that moves out the realm of pure executive discretion.

Second, the City's decision to decline to prosecute the Havers' neighbor is a discretionary act of pure executive function as recognized in *Detournay* and *Trianon*. It is well-settled that a local government's decision as to whether to enforce its zoning code is a discretionary action. *See id.* at 873; *Trianon*, 468 So. 2d at 919; *Elliott*, 399 So. 2d at 508-09; *RHS Corp. v. City of Boynton Beach*, 736 So. 2d 1211, 1212 (Fla. 4th DCA 1999) (holding mandamus is not appropriate because inspection and enforcement of land development regulations are discretionary). And declining to act does not transform that discretionary, executive act into a quasi-discretionary act subject to review by the courts. *Bd. of Cnty. Cm'rs of Brevard Cnty. v. Snyder*, 627 So. 2d 469, 474 (Fla. 1993) (recognizing quasi-judicial actions are “*rulings* of a board acting in its quasi-judicial capacity” (emphasis added)).

This rule of law makes sense. As explained above, discretion is inherent in the power of local government to determine whether and when to enforce compliance with a local ordinance. *Johnson v. State*, 314 So. 2d 573, 577 (Fla. 1975) (recognizing that prosecutorial discretion is “absolute”); *Carter*, 468 So. 2d at 957.

The City's zoning ordinance similarly reflects its broad discretion to enforce the local code; indeed, it provides several avenues of enforcement, all of which are discretionary. For example, Section 94-34(b) vests the City with authority to

investigate alleged violations and determine whether they exist. In this case, code enforcement officials investigated the neighbor's residence, took pictures, and opened a file, exactly as contemplated by Section 94-34(b). [R. 14]. Ultimately, the City found there was no violation and determined to take no action.

Additionally, under Section 94-34, if a violation is found, the City retains the discretion as to how to prosecute any violations—such as notification, legal action, cease and desist orders, fines, etc. And under Section 94-9(d), the City “*may* institute in a court of competent jurisdiction any appropriate action or proceeding.” (emphasis added). But it is not required to take any particular action.<sup>9</sup>

Thus, the City's decision to not prosecute the alleged zoning and building code violation is an exercise of pure executive discretion under Florida law. The City may pursue any of these remedies at its discretion if an individual violation is found to exist. Where, as here, no violation is found, the City is not required to take any further action.

Thus, the Havers have no basis to obtain injunctive and declaratory relief against their local government to compel a desired result. They retain the right to

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<sup>9</sup> Under 94-9(b), the City also declares a violation of the provisions of the zoning code to be unlawful and “any person violating any provisions of this chapter, who shall fail to abide by and obey all orders and regulations promulgated as provided in this chapter, shall upon conviction thereof, be punished by a fine not exceeding \$500.00 or by imprisonment.” The City also chooses to enforce the zoning code by “taking such other lawful action as is necessary to prevent or remedy any violation, including all available code enforcement measures and penalties contained in chapter 26.” Sec. 94-9(e).

seek judicial relief against their neighbor directly; they have done so in this case. But under Article II, § 3, of the Florida Constitution, *Trianon* and *Detournay*, their claims against the City are not justiciable.

### **CONCLUSION**

For the foregoing reasons, Petitioner, City of West Palm Beach, Inc. respectfully requests this Court reverse the Fourth District's order and find Respondents, Peter and Galina Havers' claims are barred by the doctrine of separation of powers.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via electronic transmission through the Florida courts e-filing portal to all counsel or parties of record on the Service List below, on this 30th day of November, 2020.

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## **CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY this brief complies with the type size and style requirements and has been prepared in Times New Roman, 14 Point Font.

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