IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA SECOND DISTRICT

RICHARD HAZEN and LYNN TRAN,

Petitioners,

v. **Case No. 2D14-**
Lower Court Case No. 2013AP000297

CITY OF HOLMES BEACH, FLORIDA, a municipal corporation,

Respondent.
_____/

PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 9.100(a), Fla.R.App.Pro., Petitioners RICHARD HAZEN and LYNN TRAN, Petition this Court for a Writ of Certiorari to review a final order of the Circuit Court of the Twelfth Judicial Circuit, in and for Manatee County, Florida, wherein the Circuit Court, sitting in its appellate capacity, upheld a Final Administrative Order the Code Enforcement Board of the City of Holmes Beach, Florida rendered July 30, 2013, which found Petitioners to be in violation of multiple sections of the City of Holmes Beach Land Development Code regarding a tree house constructed on Petitioners' property.

I. BASIS FOR INVOKING JURISDICTION

Article V, Section 4(b) of the Florida Constitution provides that the District Courts of Appeal have original jurisdiction to issue writs of certiorari. Rule

9.030(b)(2)(b), Fla.R.App.Pro. provides that the District Courts of Appeal shall have certiorari jurisdiction to review final orders of circuit courts acting in their review capacity. The order to be reviewed in the present case was rendered September 16, 2014. This Petition is timely under Rule 9.100(c)(1), Fla.R.App.Pro.

II. STATEMENT OF THE FACTS

Petitioners are the owners of property at 103 29th Street in Holmes Beach, Florida. They were the Respondents in a proceeding before the City of Holmes Beach Code Enforcement Board ("CEB") wherein they were found to be in violation of multiple sections of the City of Holmes Beach Land Development Code for the construction of a tree house on their property. The Petitioners sought review of the CEB Final Administrative Order (App.Tab 1)[1] in the Circuit Court in and for Manatee County, Florida, and now seek review of the Decision of the Circuit Court upholding the CEB Final Administrative Order. App.Tab 2. The undisputed facts are as follows.

The Petitioners' troubles began one fateful day in April or May, 2011 when Richard Hazen, peering out the window of his residence at a large Australian Pine tree in his back yard, felt a desire to be in the tree. Tr.Pg.258,280. He decided to

1 References to the Appendix shall be App.Tab__; The Transcript is included in the Appendix under Tab 3.

build a "tree hut"[2]. Tr.Pg.213.

Mr. Hazen was aware that the local Building Department regulates construction. Tr.Pg.213. Accordingly, Mr. Hazen made an appointment to meet with the City Building Department. Tr.Pg.214.

When Mr. Hazen arrived at the Building Department, he was introduced to Bob Shaffer, a gentleman Mr. Hazen believed to be the head Building Inspector. Tr.Pg.214. Mr. Shaffer was in fact the City's Building Inspector and he met Mr. Hazen with three other persons in attendance. Tr.Pg.214,287. Mr. Hazen told Mr. Shaffer and the others in the Building Department, "I would like to build a tree house in an Australian Pine on the beach on my property. What do I have to do?" Tr.Pg.214. Mr. Shaffer recalls being asked whether the City "had any regulations for building a tree house". Tr.Pg.287. Mr. Shaffer said that he researched the Land Development Code to see if he "could find any regulations that would prevent this from happening". Tr.Pg.287. He even consulted with Joe Duennes, who was then the City's Building Official. Tr.Pg.181,288.

Mr. Shaffer did not ask Mr. Hazen to show any plans for the proposed tree house, nor did he ask about the size of the proposed structure. Tr.Pg.215,293. Mr. Shaffer testified that he had pictured what he had built in trees. He said he had built some pretty "sophisticated deer stands" when he hunted in Pennsylvania.

[2]Throughout these proceedings, the Hazens' "tree hut" has been variously referred to as a "tree house", "observation deck", "multi-story structure", or "structure".

Tr.Pg.290. Mr. Shaffer advised Mr. Hazen, "The City of Holmes Beach has no regulations involving construction of a tree house". Tr.Pg.288. Mr. Shaffer did not tell Mr. Hazen that any permits would be required to construct a tree house. Tr.Pg.293. Mr. Shaffer told Mr. Hazen that the only requirements were to make the tree house safe, and not to let anyone fall out of it. Tr.Pg.215. Mr. Hazen testified that he would have done anything the Building Official would have told him to do. That was the reason he went to the City's Building Department. Tr.Pg.216. Mr. Shaffer acknowledged that after his conversation with Mr. Hazen, he figured Mr. Hazen "would probably go forward with something." Pg. 294. About a week after his meeting with Mr. Shaffer, in May 2011 Mr. Hazen commenced construction of his tree house with the assistance of two professional carpenters. Tr.Pg.217,269.

The Petitioners' property consists of two separate parcels; the one where the residence is located is used for private residential purposes only and is homesteaded, the other parcel has four rental units. Tr.Pg.193,260,261. The Australian Pine in which the tree house was constructed is located on the private parcel. Tr.Pg.261. The Australian Pine is huge, about 89 inches around. Tr.Pg.218. It has been on the property since at least 1985. Tr.Pg.152,155. The tree has withstood a number of storms, most recently Hurricanes Isaac and Debbie. Tr.Pg.268. The tree house is primarily supported by the large Australian Pine.

Tr.Pg.218. It consists of two elevated decks with removable windows. Tr.Pg.226. The structure is not fully enclosed with the wind blowing through, even when the windows are closed. Tr.Pg.226. The structure is secured with hurricane brackets and straps. Tr.Pg.231.

The tree house is "furnished" with two hammocks, some very light chairs, a small picnic table, one folding chair, and one Rubbermaid storage bin. Tr.Pg.228,229. There are no electrical hookups or plumbing servicing the structure. Tr.Pg.219. The tree house is intended for the private use of the Petitioners. They use it for exercise, taking naps, watching the sunset, and solitude. Tr.Pg.223. It is not used for overnight sleeping. Tr.Pg.219. It is not used or to be used by the renters of units on the adjacent parcel. Tr.Pg.220. The structure was not hidden from the public's view while under construction. Tr.Pg.272. In fact, it is located in close proximity to a public beach access. Tr.Pg.109,111,264.

On July 27, 2011, a short article appeared in the Sun, a local newspaper. The article included a photograph of the tree house under construction. The two elevated decks supported by the Australian Pine are plainly evident in the photograph. App.Tab.4, Tr.Pg.269. Mr. Shaffer testified that after seeing the photograph of the tree house in the newspaper, he thought, "Boy, did I goof up here…but then realized that I did not give him any permission to build this thing, so I didn't feel at fault". Tr.Pg.293. The Petitioners believed that if there had been

anything improper about the construction of their tree house, after the July 27, 2011 publicity they would have heard from the City. Tr.Pg.269. Up to that point, the Petitioners had spent approximately $15,000 on the construction of the tree house. Tr.Pg.272.

It was not until five months later that the Petitioners received any communication from the City regarding their structure. App.Tab.5. By that time, the tree house was almost completed. Tr.Pg.222. At the time the City halted construction, the Petitioners had expended $30,000 to $50,000 on the cost of the construction. Tr.Pg.250,251.

The City has ordered the demolition of the tree house since it is the City's position that the structure cannot be located in its present location without violating the setback requirements of Part III, Article VII, Division 2, Section 7.2, Holmes Beach Code. Tr.Pg.93.

III. NATURE OF RELIEF SOUGHT

The nature of the relief sought by this Petition is a Writ of Certiorari quashing the Decision of the Circuit Court upholding the Final Administrative Order of the CEB rendered July 30, 2013.

IV. STANDARD OF REVIEW

The standard of review for a Petition for Certiorari seeking review of a decision of the Circuit Court sitting in its appellate capacity is whether the Circuit

Court afforded procedural due process and whether the Circuit Court applied the correct law. Haines City Community Development v. Heggs, 658 So.2d 523, 530 (Fla. 1995).

V. ARGUMENT

A. The City of Holmes Beach coastal setback provisions in Part III, Article VII, Division 2, Section 7.2, Holmes Beach Code are unconstitutional because they conflict with the provisions of Section 161.053, Florida Statutes.

A critical finding in this case was the CEB's determination, upheld by the Circuit Court, that Petitioners violated the setback provisions of Part III, Article VII, Division 2, Section 7.2, Holmes Beach Code. The reason why this finding is so crucial is that even if Petitioners applied for an after-the-fact permit, as directed in the July 30, 2013 CEB Final Administrative Order, the City would refuse to consider such a request in view of the alleged location of the tree house, within the 50 foot setback from the erosion control line. The City contends that pursuant to the terms of Part III, Article VII, Division 2, Section 7.2, Holmes Beach Code, a variance is not even an available option to authorize the tree house. Tr.Pg.87,88,93.

Part III, Article VII, Division 2, Section 7.2(A), Holmes Beach Code, provides

> A. *Setback from the **erosion control line***. Anything to the contrary contained in this ordinance notwithstanding, no person, firm, partnership, corporation or public agency shall construct any

structure or building, including any dwelling, hotel, motel, apartment building or other multifamily dwelling, nor construct any structures or facilities appurtenant to existing structures or buildings, including patios, garages, sheds, swimming pools or spas within 50 feet of the **erosion control line as established by the State of Florida**.

1. *Variances.* The board of adjustment shall have no authority to grant any variance from the provisions of this paragraph that would permit any excavation or construction as hereinabove specified within 50 feet of the **erosion control line as established by the State of Florida**.

2. *Exemptions.* Seawalls, groins, revetments, dune walkovers and similar structures, **the sole purpose of which** is the protection, establishment, maintenance or nourishment of beach areas, or for **the sole purpose of protection** of existing buildings or structures from the waters of the Gulf of Mexico, shall be exempt from the provisions of this section if the proposed work is first approved by the building official. (Emphasis Added). App.Tab 6.

Petitioners maintain that Part III, Article VII, Division 2, Section 7.2(A), Holmes Beach Code is unconstitutional on its face due to its conflict with State law. The principle of law called "conflict preemption", was recently described by the Florida Supreme Court in Masone v. City of Aventura, -- So.3d--, 2014 WL 2609201 (Fla. 2014) wherein the Court stated,

> In Florida, a municipality is given broad authority to enact ordinances under its municipal home rule powers….But municipal ordinances must yield to state statutes. Article VIII, section 2(b), Florida Constitution, specifically recognizes the power of municipalities 'to conduct municipal government, perform municipal functions and render municipal services,' and it specifically recognizes that municipalities 'may exercise any power for municipal purposes *except as otherwise provided by law.'...* 'The critical phrase of article VIII,

> section 2(b) –'except as otherwise provided by law' – establishes the constitutional superiority of the Legislature's power over municipal power….Even 'where concurrent state and municipal regulation is permitted because the state has not preemptively occupied a regulatory field, 'a municipality's concurrent legislation must not conflict with state law.'… 'Such 'conflict preemption' comes into play 'where the local enactment irreconcilably conflicts with or stands as an obstacle to the execution of the full purposes of the statute'.

In City of Palm Bay v. Wells Fargo Bank, 114 So.3d 924, 927 (Fla. 2013), the Florida Supreme Court stated,

> Section 166.021(3) provides in pertinent part as follows: The Legislature recognizes that pursuant to the grant of power set forth in section 2(b), Art. VIII of the State Constitution, the legislative body of each municipality has the power to enact legislation concerning any subject matter upon which the state Legislature may act, except:…(c) Any subject expressly preempted to state or county government by the constitution or by general law….But we have never interpreted either the constitutional or statutory provisions relating to the legislative preemption of municipal home rule powers to require that the Legislature specifically state that the exercise of municipal power on a particular subject is precluded. Instead, we have held that '[t]he preemption need not be explicit so long as it is clear that the legislature has clearly preempted local regulation of the subject.'…When a municipal 'ordinance flies in the face of state law' – that is, cannot be reconciled with state law – the ordinance 'cannot be sustained.'…Such 'conflict preemption' comes into play 'where the local enactment irreconcilably conflicts with or stands as an obstacle to the execution of the full purposes of the statute'….Although municipalities generally have 'the power to enact legislation concerning any subject matter upon which the state Legislature may act,'…in exercising their power within that scope municipalities are precluded from taking any action that conflicts with a state statute. In this context, concurrent power does not mean equal power.

The term "erosion control line", as used in Part III, Article VII, Division 2, Section 7.2(A), Holmes Beach Code, is not defined anywhere in the Holmes Beach Code, nor was there any testimony before the CEB describing the establishment thereof. The only known erosion control line "established by the State of Florida" is the erosion control line which is approved by the Board of Trustees of the Internal Improvement Trust Fund under the Beach and Shore Preservation Act, Sections 161.141-161.211, Florida Statutes. App.Tab 7. The function of the "erosion control line" was described by the U.S. Supreme Court in Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection, 130 S.Ct. 2592, 2599 (2010) as follows:

> Once a beach restoration 'is determined to be undertaken' the Board sets what is called 'an erosion control line'….It must be set by reference to the existing mean high-water line....Much of the project work occurs seaward of the erosion-control line, as sand is dumped on what was once submerged land….The fixed erosion-control line replaces the fluctuating mean-high water line as the boundary between privately owned littoral [private] property and state property….If the beach erodes back landward of the erosion-control line over a substantial portion of the shoreline covered by the project, the Board may, on its own initiative, or must, if asked by the owners or lessees of a majority of the property affected, direct the agency responsible for maintaining the beach to return the beach to the condition contemplated by the project. If that is not done within a year, the project is canceled and the erosion-control line is null and void….The erosion-control line is the pre-existing mean high water line.

Section 161.201, Florida Statutes provides, "Any upland owner or lessee who by operation of ss. 161.141-161.211 ceases to be a holder of title to the mean

high water line shall, nonetheless, continue to be entitled to all common-law riparian rights except as otherwise provided in s. 161.191(2), including but not limited to rights of ingress, egress, view, boating, bathing, and fishing. In addition the state shall not allow any structure to be erected upon lands created, either naturally or artificially, ***seaward*** of any erosion control line fixed in accordance with the provisions of ss.161.141-161.211, except such structures required for the prevention of erosion." (Emphasis Added).

The purpose of the established erosion control line is to identify and protect the publicly owned renourished beach. A plain reading of the Beach and Shore Preservation Act will reveal that the erosion control line is not a regulatory line intended to govern activities ***landward*** of said line. Thus, the term "erosion control line", as that term is used under the Act, is a misnomer; it is not intended to control erosion, it is merely a "line in the sand" designating where the shoreline and private property rights terminated prior to the pumping of sand to rebuild the beach.

In contrast to the erosion control line is the State's Coastal Construction Control Line. Pursuant to Section 161.053(1)(a), Florida Statutes, the Florida Legislature mandated that the Florida Department of Environmental Protection ("FDEP") establish coastal construction control lines on a county basis along the sand beaches to define that portion of the beach-dune system which is subject to

severe fluctuations based on a 100-year storm surge, storm waves, or other predictable weather conditions. App.Tab 8. The Legislature directed that special siting and design considerations shall be necessary seaward of established coastal construction control lines to ensure the protection of the beach-dune system, proposed or existing structures, and adjacent properties and the preservation of public beach access. Section 161.053(4), Florida Statutes authorizes the FDEP to issue permits for construction and excavation seaward of an established Coastal Construction Control Line. Section 161.053(11)(b), Florida Statutes authorizes the FDEP to exempt from the permitting requirements of Section 161.053(4), Florida Statutes "activities seaward of the coastal construction control line which are determined by the department not to cause a measurable interference with the natural functioning of the coastal system". Such exempt activities could include, but are not limited to the structures identified in Section 161.54(6)(b), Florida Statutes. App.Tab 9. That list includes a number of structures which would be prohibited by Part III, Article VII, Division 2, Section 7.2(A), Holmes Beach Code, including pile-supported, elevated viewing platforms; gazebos and boardwalks; lifeguard support stands; public and private bathhouses; sidewalks, driveways, parking areas, shuffleboard courts, tennis courts, handball courts, racquetball courts, and other uncovered paved areas.

In recognition that there are certain areas along the shoreline experiencing exceptionally high erosion rates, the Legislature adopted Section 161.053(5), Florida Statutes which prescribes limitations upon coastal construction by the creation of a so-called "30-year erosion projection". See, Section 62B-33.024, Florida Administrative Code. App.Tab 10. Section 161.053(5)(b), Florida Statutes provides that a Coastal Construction Control Line permit may not be issued "for any structure, other than a coastal or shore protection structure, minor structure, or pier,…which is proposed for a location that, based on the department's projections of erosion in the area, will be seaward of the seasonal high-water line within 30 years after the date of application for the permit." Notwithstanding the prohibition of Section 161.053(5)(b), Florida Statutes, under appropriate circumstances, Section 161.053(5)(c), Florida Statutes authorizes the FDEP to issue a permit for the construction of a single-family dwelling seaward of the 30-year erosion projection. Thus, even where an area is subject to the limitations of the 30-year erosion projection, a wide range of structures can be authorized by the FDEP, even if such structures are not for the sole purpose of protection, establishment, maintenance or nourishment of beach areas, or for the protection of existing buildings or structures.

A plain reading of Section 161.053, Florida Statutes reveals that an erosion control line established pursuant to the Beach and Shore Preservation Act, Sections

161.141-161.211, Florida Statutes has no bearing whatsoever upon the Coastal Construction Control Line permitting authority of the FDEP.

A Coastal Construction Control Line has been established within the City of Holmes Beach and the Petitioners' property, located seaward thereof, is subject to the FDEP's regulatory jurisdiction. Tr.Pg.337.

In contrast to the coastal construction regulatory program implemented by the FDEP, Part III, Article VII, Division 2, Section 7.2(A), Holmes Beach Code ***prohibits*** the construction of ***all*** buildings and structures within 50 feet of the erosion control line as established by the State of Florida except, "seawalls, groins, revetments, dune walkovers and similar structures, the ***sole purpose of which*** is the protection, establishment, maintenance or nourishment of beach areas, or ***for the sole purpose*** of protection of existing buildings or structures from the waters of the Gulf of Mexico". (Emphasis Added).

It appears that the setback prohibitions of Part III, Article VII, Division 2, Section 7.2(A), Holmes Beach Code were modeled after the provisions of Section 161.052(1), Florida Statutes which provides,

> No person…shall excavate or construct any dwelling house, hotel, motel, apartment building…or other structure incidental to or related to such structure, including but not limited to such attendant structures or facilities as a patio, swimming pool, or garage, within 50 feet of the line of mean high water at any riparian coastal location fronting the Gulf of Mexico….In areas where an erosion control line has been established under the provisions of ss. 161.141-161.211, that line, or the presently existing mean high-water line, whichever is more

landward, shall be considered to be the mean high-water line for the purposes of this section. App.Tab 11.

In contrast to the provisions of Section 161.052(2), Florida Statutes which authorize the FDEP to grant a waiver or variance from the setback requirements of said statute, Part III, Article VII, Division 2, Section 7.2(A)(1), Holmes Beach Code expressly ***prohibits*** the granting of a variance from the setback requirements of said ordinance.

Pursuant to the provisions of Section 161.053(10), Florida Statutes, upon the establishment of a Coastal Construction Control Line within a county, the setback provisions of Section 161.052, Florida Statutes are superseded by the permitting provisions of Section 161.053, Florida Statutes. Since a Coastal Construction Control Line has been established within the City of Holmes Beach, there is no longer a 50 foot setback under State law within the City.

It is noted that pursuant to Section 161.053(3), Florida Statutes, the Florida Legislature authorizes a coastal municipality to establish coastal construction zoning and building codes ***in lieu of*** the Coastal Construction Control Line permitting program of Section 161.053, Florida Statutes, but ***only if*** local such zones and codes are approved by the FDEP. Additionally, no exceptions to locally established coastal construction zoning and building codes may be granted ***unless*** such exceptions are approved by the FDEP. Finally, any approval to a coastal municipality to establish coastal construction zoning and building codes ***in lieu of***

the FDEP's Coastal Construction Control Line permitting program may be revoked at any time by the FDEP if said agency determines that the local program is inadequately administered.

The provisions of Section 161.053(3), Florida Statutes demonstrate the intention of the Legislature to give the FDEP primary jurisdiction over coastal construction regulation. There is no evidence that the City of Holmes Beach was ever approved by the FDEP to establish its coastal construction zoning and building codes in lieu of the provisions of Section 161.053, Florida Statutes.

In view of the fact that the provisions of Part III, Article VII, Division 2, Section 7.2(A), Holmes Beach Code unequivocally prohibit a vast number of structures which are, or are potentially authorized pursuant Section 161.053, Florida Statutes, either as permitted activities, or activities that are exempt from the requirement to obtain permits, it must be found as a matter of law that the provisions of Part III, Article VII, Division 2, Section 7.2(A), Holmes Beach Code conflict with the provisions of Section 161.053, Florida Statutes. For example, irrespective of the location of the erosion control line, pursuant to Section 161.053(11)(b), Florida Statutes, upon a determination that they will not cause "a measureable interference with the natural functioning of the coastal system", the following structures may be authorized as exempt from the permitting requirements of Section 161.053(4), Florida Statutes: pile-supported, elevated

viewing platforms; gazebos and boardwalks; lifeguard support stands; public and private bathhouses; sidewalks, driveways, parking areas, shuffleboard courts, tennis courts, handball courts, racquetball courts, and other uncovered paved areas.

Under the provisions of Part III, Article VII, Division 2, Section 7.2(A), Holmes Beach Code, however, the construction of State authorized pile-supported, elevated viewing platforms; gazebos and boardwalks; lifeguard support stands; public and private bathhouses within 50 feet of the erosion control line would be prohibited and a violation of the City's Code.

In recognition of the constitutional superiority of the Legislature's power over municipalities, as discussed above, it is well-established that "a municipality cannot forbid what the legislature has expressly licensed, authorized or required, nor may it authorize what the legislature has expressly forbidden". See, Rinzler v. Carson, 262 So.2d 661, 668 (Fla. 1972).

Describing the type of conflict which would run afoul of the constitutional limitation on municipal legislative power, the Court in City of Miami Beach v. Rocio Corp., 404 So.2d 1066, 1069 (Fla. 3rd DCA 1981) held, "An ordinance which supplements a statute's restriction of rights may coexist with that statute...whereas an ordinance which countermand's rights provided by statute must fail." In that case, the City of Miami Beach adopted an ordinance imposing restrictions upon the operation of condominiums intended to be more stringent than

those imposed by the Florida Condominium Act, a State statute.

Upholding the trial court's invalidation of the City of Miami Beach's ordinance, the Court noted, "When conduct permitted by state law is prohibited by local ordinance, citizens become hopelessly entangled in a web of government. Under the circumstances presented in this case, the local ordinances must yield to state statutes if stability in government is to prevail." City of Miami Beach, at 1071.

In Rinzler v. Carson, 262 So.2d 661 (Fla. 1972), the Florida Supreme Court invalidated a City of Jacksonville ordinance on the basis of a prohibited conflict with State law. The City argued its ordinance was merely more stringent than a State law by making it unlawful for any person to use, keep or store ***any*** machine gun, submachine gun, or similar firearm within the City. The State statute, however, regulating similar firearms, exempted from the operation of the State law certain types of machine guns and submachine guns, such as those that were only semi-automatic. The Court found that the more restrictive City ordinance unconstitutionally ***conflicted*** with the State law since the local ordinance "forbid what the legislature has expressly licensed, authorized, or required." Id. at 668.

In Phantom of Clearwater v. Pinellas County, 894 So.2d 1011,1020 (Fla. 2nd DCA 2005), this Court noted, "In a contest of power between state government and local government, the legislature can win even if it has not preempted a topic.

When the legislature takes action and enacts a statute, local government cannot adopt or enforce an ordinance that conflicts with the statute". See also, Thomas v. State, 614 So.2d 468, 470 (Fla. 1993) ("Municipal ordinances are inferior to laws of the state and must not conflict with any controlling provision of a statute".); and Brennan v. City of Miami, 146 So.3d 119 (Fla. 3rd DCA 2014).

As noted above, in Masone v. City of Aventura, -- So.3d--, 2014 WL 2609201 (Fla. 2014), the Florida Supreme Court stated that conflict preemption comes into play where the local enactment "irreconcilably conflicts with or stands as an obstacle to the execution of the full purposes of the statute". In Town of Longboat Key v. Mezrah, 467 So.2d 488, 490 (Fla. 2nd DCA 1985) the Court held, "The clear purpose of the legislation [Chapter 161, F.S.] is to *regulate* construction seaward of the coastal construction control line, *NOT* to prohibit it." (Emphasis in original).

It is self-evident that the prohibition of Part III, Article VII, Division 2, Section 7.2(A), Holmes Beach Code, without any opportunity for a variance, creates an irreconcilable conflict with, and an obstacle to the execution of the full purposes of Section 161.053, Florida Statutes.

The Circuit Court in the case at bar, however, found the provisions of Part III, Article VII, Division 2, Section 7.2(A), Holmes Beach Code and Section 161.053, Florida Statutes "to be consistent with each other"; the Circuit Court

found "Appellants did not suffer differing treatment under conflicting laws"; and the Circuit Court found "Appellants failed to show that the City code is unconstitutionally more restrictive than Chapter 161, Florida Statutes". The Circuit Court failed to cite a single case to justify its finding that Part III, Article VII, Division 2, Section 7.2(A), Holmes Beach Code was constitutional.

In order to reach its conclusion, in the absence of any legal justification for its finding, it must be assumed that the Circuit Court applied the incorrect law to find the clearly conflicting provisions of the City's coastal setback ordinance to be constitutional. As such, it may be concluded that the Circuit Court departed from the essential requirements of the law. See, Snell v. Mott's Contracting Services, Inc., 141 So.3d 605, 608 (Fla. 2nd DCA 2014). See also, City of Coral Gables Code Enforcement Board v. Tien, 967 So.2d 963, 965 (Fla. 3rd DCA 2007) ("Where 'there has been a violation of a clearly established principle of law resulting in a miscarriage of justice,' then we are authorized to reach down and supply relief.").

Under these circumstances, where the Circuit Court found Part III, Article VII, Division 2, Section 7.2(A), Holmes Beach Code to be constitutional despite a clear conflict with State law, said Decision should be quashed.

B. By upholding the CEB's ultimate findings of fact based solely upon hearsay evidence, unsupported by any non-hearsay evidence, the Circuit Court denied Petitioners' procedural due process rights.

Part III, Article VII, Division 2, Section 7.2(A), Holmes Beach Code, provides in pertinent part,

> *Setback from the* ***erosion control line***. Anything to the contrary contained in this ordinance notwithstanding, no person, firm, partnership, corporation or public agency shall construct any structure or building, including any dwelling, hotel, motel, apartment building or other multifamily dwelling, nor construct any structures or facilities appurtenant to existing structures or buildings, including patios, garages, sheds, swimming pools or spas within 50 feet of the **erosion control line as established by the State of Florida**. (Emphasis Added) App.Tab 6.

The Code Enforcement Board ("CEB") found Petitioners guilty of constructing their tree house within 50 feet of the "erosion control line", in violation of the provisions of Part III, Article VII, Division 2, Section 7.2, Holmes Beach Code, and the Circuit Court determined that there was competent, substantial evidence in the record to support said finding.

A complete review of the record will reveal that the only basis for identifying the location of the "erosion control line" for the purpose of determining compliance with Part III, Article VII, Division 2, Section 7.2(A), Holmes Beach Code were two exhibits, CHB-Exhibit #1 and CHB- Exhibit #2, consistently referred to as a "survey". Tr.Pg.71-81,104,105. App.Tab 12 and Tab13. City Building Official Tom O'Brien, the City's principal witness, testified that the "survey" was the only information the City had to show that the structure was located within 50 feet of the "erosion control line". Tr.Pg.123. The subject

"survey" was entered into the record over the objection of Petitioners' legal counsel. Tr.Pg.72.

The "survey" depicted on CHB-Exhibit #1 and CHB- Exhibit #2 was not dated, was not signed, contained no certification by a licensed land surveyor, and did not contain any form of authentication as an accurate depiction of the property. Neither the surveyor who purported to have prepared the "survey", nor anyone else who participated in the collection of the information contained on the "survey", testified at the hearing before the CEB. The "survey" relied upon by the CEB was clearly hearsay evidence. Hagood v. Willis, 342 So.2d 559 (Fla. 1st DCA 1977).

Notwithstanding the fact that the "survey" depicted on CHB-Exhibit #1 and CHB- Exhibit #2 was hearsay evidence, the Circuit Court found that the testimony of the City's primary witness, Tom O'Brien, City Building Official, provided supplementary competent, substantial evidence to support the "evidence" entered into the record by means of the "survey". The Circuit Court stated that the "hearsay problem" caused by the "survey" was "easily overcome" by the testimony of Mr. O'Brien.

In support of the Circuit Court's solution to the "hearsay problem", the Court erroneously stated that Mr. O'Brien had "made three inspections of

Appellants' property",[3] when in fact he testified that had "never stepped foot" on Petitioners' property. Tr.Pg.142. There was no evidence or testimony indicating that Mr. O'Brien was a licensed professional surveyor. Mr. O' Brien testified that neither he, nor anyone else in the City's Building Department made any measurements on Petitioners' property. Tr.Pg.142-143. In fact, Mr. O'Brien testified that CHB-Exhibit #1 and CHB- Exhibit #2 "were not intended to show the physical characteristics" of Petitioners' property. Tr.Pg.81.

Accordingly, the "survey", CHB-Exhibit #1 and CHB- Exhibit #2, was the only evidence relied upon by the CEB and Circuit Court to establish the existence and location of an "erosion control line as established by the State of Florida" in the vicinity of Petitioners' property.

It may be observed that there is a notation on CHB-Exhibit #1 and CHB-Exhibit #2 which reads, "EROSION CONTROL LINE". However, there is nothing on CHB-Exhibit #1 and CHB- Exhibit #2, nor was there any testimony or other evidence presented at the CEB hearing to identify said "erosion control line" as a jurisdictional line "established by the State of Florida". Furthermore, there was no testimony or evidence to demonstrate that said line was in fact in the specific location established by the State of Florida, nor was there any evidence or

[3] The testimony that the Circuit Court was referring to were inspections made by the Building Official to the beach area waterward of the Petitioners' property to investigate alleged disturbances to the beach unrelated to the construction of the tree house. Tr.Pg.188.

testimony demonstrating that an erosion control line was ever properly established pursuant to the provisions of the Beach and Shore Preservation Act, Sections 161.141-161.211, Florida Statutes, or that such a line remains in effect.

The real "hearsay problem" which was not "easily overcome" by the Circuit Court, was how were the Petitioners' due process rights, guaranteed by Article I, Section 9, Florida Constitution, protected by finding Petitioners to be in violation of Part III, Article VII, Division 2, Section 7.2(A), Holmes Beach Code, based solely upon the notation "EROSION CONTROL LINE" on CHB-Exhibit #1 and CHB- Exhibit #2?

It is acknowledged that pursuant to Section 162.07(3), Florida Statutes, formal rules of evidence do not apply. App.Tab 14. Nevertheless, said Section further provides, "fundamental due process shall be observed and shall govern the proceedings". In Thorn v. Florida Real Estate Commission, 146 So.2d 907, 908 (Fla. 2nd DCA 1962), this Court noted, "Administrative bodies are not exempt from the constitutional requirement that procedural due process be according those persons appearing before them."

This Court has recognized that the constitutional guarantee of due process requires that each litigant be given a full and fair opportunity to be heard, and that the right to be heard at an evidentiary hearing includes more than simply being allowed to be present and speak, it also includes the opportunity to cross-examine

witnesses. Vollmer v. Key Development Properties, Inc., 966 So.2d 1022,1027 (Fla. 2nd DCA 2007).

Hearsay evidence deprives a party of the privilege of viewing the witnesses and cross-examining them under oath. Such a privilege is an aspect of due process, and applies even in administrative proceedings. See, Finkley v. John Raffa Lathing, 120 So.2d 9,11 (Fla. 1960); Grabau v. Department of Health, Board of Psychology, 816 So.2d 701,709 (Fla. 1st DCA 2002).

Courts have specifically recognized property owners' rights to procedural due process in code enforcement proceedings under Chapter 162, Florida Statutes. See, Massey v. Charlotte County, 842 So.2d 142 (Fla. 2nd DCA 2003). See also, Kupke v. Orange County, 838 So.2d 598 (Fla. 5th DCA 2003).

Accordingly, procedural due process in code enforcement proceedings guarantees the rights of property owners alleged to have violated code provisions to cross-examine witnesses testifying against them.

Therefore, basing a finding of Petitioners' violation of Part III, Article VII, Division 2, Section 7.2(A), Holmes Beach Code solely upon hearsay evidence, violates Petitioners' rights to due process. The mere fact that Petitioners had the ability to cross-examine Mr. O'Brien, does not cure this violation of their rights. See, Jenkins v. State, 803 So.2d 783,786 (Fla. 5th DCA 2002) ("Confronting the messenger [of hearsay] does not meet the due process requirement".).

The Circuit Court failed to cite any law in support of its finding that "the use of the survey did not violate Petitioners' 'fundamental due process rights'." Based upon the foregoing case law, the CEB's finding Petitioners to be in violation of Part III, Article VII, Division 2, Section 7.2(A), Holmes Beach Code, based solely upon the notation "EROSION CONTROL LINE" on CHB-Exhibit #1 and CHB-Exhibit #2, without the testimony of the surveyor who purported to have prepared the "survey", or anyone else who participated in the collection of the information contained on the "survey", and Petitioners' opportunity to cross-examine such witnesses, constitutes a violation of Petitioners' due process rights.

It must be recalled that the subject "survey" was introduced by the City in a penal proceeding against Petitioners as "evidence" of Petitioners' guilt. See, City of Tampa v. Braxton, 616 So.2d 554 (Fla. 2nd DCA 1993). In quasi-judicial administrative proceedings, the burden of proof is on the party asserting the affirmative of the issue before the administrative tribunal. Balino v. Department of Health and Rehabilitative Services, 348 So.2d 349 (Fla. 1st DCA 1977).

Furthermore, where the administrative hearing is penal in nature, the Respondent "is assumed to be innocent until proved guilty and his guilt cannot be based on guesswork and suspicion." State Department of Agriculture and Consumer Services v. Strickland, 262 So.2d 893 (Fla. 1st DCA 1972).

Thus, the burden was upon the City to present competent, substantial

evidence of the existence and location of an "erosion control line as established by the State of Florida" in the vicinity of Petitioners' property, and that Petitioners' tree house violated the setback from such established line. Despite the Circuit Court's suggestion that Petitioners could have confronted the surveyor allegedly responsible for the preparation of CHB-Exhibit #1 and CHB- Exhibit #2 before coming to the CEB hearing, in the proceeding before the CEB it was not the Petitioners' duty to present witnesses to refute the hearsay testimony.

The Code Enforcement Board's reliance entirely upon hearsay evidence to find Petitioners in violation of Part III, Article VII, Division 2, Section 7.2(A), Holmes Beach Code, without affording Petitioners the opportunity to cross-examine the witnesses who provided the "evidence" upon which the CEB relied, constitutes a denial of Petitioners' due process rights. A violation of this right cannot be fully protected on appeal. Accordingly, that portion of the Circuit Court's Decision upholding the Final Administrative Order finding the Petitioners to have constructed their tree house "within the erosion control line setback", must be quashed.

C. The Circuit Court failed to apply the correct law when it found that the City of Holmes Beach should not be equitably estopped from enforcing its land development regulations against Petitioners.

This Court is well acquainted with the law of equitable estoppel as applied in the context of an act or omission of a local government in a land use setting. The

seminal case, Town of Largo v. Imperial Homes Corp., 309 So.2d 571, 572-573 (Fla. 2nd DCA 1975), set forth the frequently quoted principle that the doctrine of equitable estoppel is applicable to a local government when a property owner (1) relying in good faith, (2) upon some act or omission of the government, (3) has made such a substantial change in position or incurred such extensive obligations and expenses, that it would be highly inequitable and unjust to destroy the rights he acquired. Equally well-quoted is the Court's explanation that,

> Stripped of the legal jargon which lawyers and judges have obfuscated it with, the theory of estoppel amounts to nothing more than an application of the rules of fair play. One party will not be permitted to invite another onto a welcome mat and then be permitted to snatch the mat away to the detriment of the party induced or permitted to stand thereon. A citizen is entitled to rely on the assurances and commitments of a zoning authority and if he does, the zoning authority is bound by its representations, whether they be in the form of words or deeds. Town of Largo, pg. 573.

Few cases present a set of facts more appropriate for the application of the doctrine of equitable estoppel than those presented in the case at bar.

A. "Good Faith Reliance"

Notwithstanding the provisions of Article III, Section 3.2(B), City of Holmes Beach Code which provide, in pertinent part, "No building or structure shall be erected…until a permit therefore has been issued by the building official". App.Tab 15. And notwithstanding the provisions of Part III, Article I, Section 1.4, Holmes Beach Code which define the term "structure" to mean, "***Anything***

constructed or erected, the use of which requires a permanent location on land or attachment to something having a permanent location on land". (Emphasis Added). App.Tab 16. And notwithstanding the provisions of Part III, Article I, Section 1.4, Holmes Beach Code which define the term "building" to mean, "***Any*** structure, either temporary or permanent, having a roof and supported by columns or walls, used or built for the shelter, enclosure, support or protection of persons, animals, chattels or property of any kind". (Emphasis Added). App.Tab16. The City of Holmes Beach Building Department did not strictly construe the Building Permit requirements of the Code in all cases. If they did, irrespective of the size of Petitioners' proposed "tree house", the City's Building Inspector would have been expected to advise Mr. Hazen of the requirement for a building permit. It goes without saying that a tree house meets the definition of the term "structure" as noted above. But, the City's Building Inspector advised Mr. Hazen that the City had no regulations governing the construction of "tree houses". Tr.Pg.289,293-294.

During the July 30, 2013 hearing before the Code Enforcement Board, Tom O'Brien, the City of Holmes Beach Building Official was presented with a collection of photographs depicting various structures. Petitioners' Exhibit Number 3 was a composite of photographs of doghouses. App.Tab 17; Tr.Pg.158. All photographs depicted doghouses with a roof and wall, and would appear to

have been built or used for the protection, shelter, or enclosure of a dog. Nevertheless, Mr. O'Brien testified that not all of the doghouses depicted in Petitioners' Exhibit Number 3 would require a City of Holmes Beach Building Permit. He further testified that anyone desiring to build a doghouse should first come into the City Building Department to find out whether or not a permit would be required. Tr.Pg.158-161.

Mr. O'Brien was also presented with Petitioners' Exhibit Number 4, a composite of photographs of backyard swing sets. App.Tab 18; Tr.Pg.161; Petitioners' Exhibit Number 5, a composite of photographs of children's playhouses. App.Tab19; Tr.Pg.167; and Petitioners' Exhibit Number 6, a composite of photographs of cabanas. App.Tab 20; Tr.Pg.170-171. In each instance, the City's Building Official testified that a City Building Permit may, or may not be required. Typical of his testimony is Mr. O'Brien's answer to the question as to whether a children's playhouse would require a City Building Permit. He stated, "The code states clearly that any structure requires a permit. And through that process, we determine – sometimes we can determine that it doesn't." Tr.Pg.169.

Mr. O'Brien explained that the "process" includes the property owner speaking with an official in the City's Building Department to find out whether or not a Building Permit would be needed. Tr.Pg.161. When asked whether or not

every structure requires a permit the way the City's Code is written, Mr. O'Brien testified, "I did not make that statement. I said that every structure requires review to determine that, because it's on an ad hoc basis depending on the circumstances, the location, the height, and all other factors that would relate to that particular structure". Tr.166. He further testified that as the City's Building Official, he has the authority to determine that a structure does not require a permit. Tr.Pg.169-170.

Mr. O'Brien, testified that when citizens come to speak with him about whether or not their project would require a permit, it would be reasonable for the citizen to recognize the Building Official as an expert in the Building Code. Tr.Pg.187. Mr. O'Brien stated, "That's a requirement of the position, so I would think that's a reasonable expectation." Tr.Pg.187.

Mr. Hazen believed that Mr. Shaffer had the authority to tell him whether or not a permit was necessary for his "tree hut". If he had been advised that Mr. Shaffer did not have such authority, Mr. Hazen would have made an appointment to see someone else. Tr.Pg.225. There is no evidence in the record to suggest that the Petitioners' did not rely in "good faith" upon the statements made by the City's Building Officials, and upon the City's failure to act against them following the publicity their tree house received in July, 2011. App.Tab 4.

If Petitioners wanted to conduct themselves in bad faith, they certainly would not have made an appearance at the City Building Department to tip off the

City officials to their intended "illegal" actions. Instead, the Petitioners submitted themselves to the informal, "ad hoc process" recommended by the City's Building Official.

B. "Upon Some Act or Omission of the Government"

It is undisputed that Petitioners were advised by appropriate City employees who had the actual or apparent authority to render the opinion that the City had no regulations regarding the building of a tree house, and as noted by the Circuit Court, it may have been implied that no permit was required. It is also undisputed that notwithstanding the location of the tree house in plain view and in the vicinity of a public beach access, and notwithstanding the local newspaper publicity that the tree house received in July, 2011, and notwithstanding the fact that on November 15, 2011 the City received an anonymous complaint regarding the Petitioners' tree house, that it was not until December 6, 2011 that the City advised Petitioners that their tree house was alleged to be in violation of the City's Codes. Tr.Pg.68,69.

Thus, the Petitioners relied upon the statements of the City's employees and the lack of subsequent action in the commencement and continuation of the construction of their tree house until they were notified to stop in December, 2011.

C. "Made a Substantial Change in Position and Incurred Extensive Expenses"

Within about a week after Mr. Hazen's meeting with Mr. Shaffer, in May 2011 the Petitioners commenced construction of their tree house. Up to the time the City advised Petitioners to stop work, in good faith reliance of the City's acts and omissions, the Petitioners expended approximately $30,000 to $50,000 on the cost of the construction. Tr.Pg.250,251. This is a considerable expense by any standard.

The Circuit Court cited Ammons v. Okeechobee County, 710 So.2d 641 (Fla. 4th DCA 1998) in support of its finding that the City was not equitably estopped from enforcing the alleged violations of its Code against the Petitioners. The Ammons case, however, is factually dissimilar and is materially distinguishable from the case at bar.

In Ammons, the District Court of Appeal, Fourth District affirmed the Circuit Court's refusal to apply the doctrine of equitable estoppel to prevent Okeechobee County from revoking an "occupational license" which purported to authorize a business to be conducted within a residence, a license which was later determined to have been issued in error. The Court had found that the action of the local official granting the license "was completely unauthorized and in violation of the legislative direction through the county's ordinances".

The Court in Ammons stated, "estoppel cannot be asserted against a government entity based on mistaken statements of the law". Id. at 644. The Court impliedly found that the reliance of the recipients of the occupational license upon the acts of the local government was not in good faith because the recipients "are presumed to have constructive knowledge of the nature and extent of the powers of governmental agents who issue permits."

In determining that the doctrine of equitable estoppel would not prevent Okeechobee County from revoking an "occupational license", the Court in Ammons relied upon the decision of the District Court of Appeal, Third District in Corona Properties of Florida, Inc. v. Monroe County, 485 So.2d 1314 (Fla. 3rd DCA 1986). In that case, the Court declined to apply the doctrine of equitable estoppel to prevent the revocation of a Monroe County building permit that had been issued on the basis of a "vested rights letter" which was found to have been erroneously issued by another local government official. Of significance, the Court concluded that the official who issued the erroneous "vested right letter" had no legal authority under Monroe County ordinances to issue such a letter.

Accordingly, the Court found that equitable estoppel may not be applied where the "vested rights letter" and the permit issued pursuant to such letter were "*ultra vires* and void *ab initio*". Corona at 1317.

In the case at bar, however, it cannot be said that the City's building officials acted without authority when they verbally represented to Petitioner Hazen that the City had no regulations pertaining to the construction of a tree house, and impliedly, that no building permit was required. Tom O'Brien, the City's Building Official, testified repeatedly about the City's informal "process" whereby the City would routinely advise verbally whether or not a building permit would be required. There was no evidence that such a process was prohibited by any City ordinance. Thus, unlike the factual setting in Ammons and Corona, it cannot be said in the case at bar that the representations given by the City's Building Official regarding the lack of regulations requiring a permit for the construction of a tree house, was "completely unauthorized".

The Circuit Court, while not expressly stating so, also seems to have denied the application of equitable estoppel in the case at bar upon reliance of a statement found in Ammons, to-wit, "Estoppel cannot be asserted against a government entity based on mistaken statements of law".

The acknowledged statements made by the City's Building Official condoning the construction of Petitioners' tree house, are not, however "mistaken statements of law". The Building Official made a ***statement of fact***, there were no City regulations regarding building a tree house. It has been found that good faith reliance upon a government official's statements of fact, even if based upon a

misunderstanding of the law, will not prevent the application of equitable estoppel against the government. See, Kuge v. State Department of Administration, Division of Retirement, 449 So.2d 389 (Fla. 3rd DCA 1984).

The facts of the case at bar are analogous to those in Dolphin Outdoor Advertising v. Department of Transportation, 582 So.2d 709 (Fla. 1st DCA 1991). In that case, Dolphin applied for a sign permit from the Florida Department of Transportation ("FDOT") to erect a billboard on its leased property. State law required billboards on interstate highways to be spaced 1,500 feet apart. The State's sign permit official, however, mistakenly believed that the law only required a 1,000 foot separation and advised Dolphin that the sign permit application was "fine", notwithstanding the fact that said permit ultimately authorized Dolphin's sign to be located only 1,066 feet from the next sign. In reliance upon said statement, Dolphin made a significant financial expenditure.

The District Court of Appeal overturned the lower tribunal's finding that the FDOT's revocation of Dolphin's sign permit would not be barred by equitable estoppel. The Court found that while the sign permit official's representations regarding compliance with the spacing requirements were based upon a misunderstanding of the law, the statement made to Dolphin was a "factual representation". Accordingly, the Court found that equitable estoppel would

prevent FDOT from revoking Dolphin's sign permit since this was not a case involving a "mistaken statement of the law".

Thus, the Court in Dolphin recognized a distinction between erroneous opinions of fact and erroneous opinions of law when applying equitable estoppel against a government entity; equitable estoppel is a viable defense against government action in the former instance, and not one in the latter.

In its rejection of Petitioners' claim for protection under the doctrine of equitable estoppel, the Circuit Court stated, "Public policy would not be best served by allowing circumvention of the City's required, ***formal*** permitting process". (Emphasis Added). The record facts of this case, however, reveal that the City routinely circumvents the "formal permitting process" and encourages citizens to meet informally with the City's Building Official to determine whether or not a permit is required. Perhaps public policy might best be served if the City abandoned this informal approach. However, having encouraged this form of interaction between citizens and City agents, when mistakes are made following a good faith reliance upon the statements made by the City's building officials, and substantial expenditures are incurred as a consequence thereof, the application of the rules of fair play require that the City's enforcement actions against citizens like the Petitioners should be barred by application of the doctrine of equitable estoppel.

The facts of the case at bar are strikingly similar to those in the decision of the Mississippi Supreme Court in Mayor & Board of Aldermen, City of Clinton v. Welch, 888 So.2d 416 (Miss. 2004). That case involved efforts by the City of Clinton to require the removal of a tree house constructed in the property owner's front yard, allegedly in violation of the City's zoning ordinance. The property owner claimed that the City had given her permission to build the tree house.

According to the property owner's uncontradicted testimony, the property owner wanted a tree house in her front yard. She went to the City's building inspector who indicated that no permit was required. The property owner spent over $5,000 in the construction of the tree house. After the tree house had been completed, the City received a telephone complaint from a citizen and determined that the tree house violated a provision of the City's zoning code which prohibited accessory structures in the front yard of residential property.

The property owner claimed that the City should be equitably estopped from requiring removal of the tree house. The Mississippi Supreme Court noted, "The doctrine of estoppel is based upon the ground of public policy, fair dealing, good faith and justice".

The Court stated, "We realize that the City cannot notice or be aware of every code and zoning violation within its jurisdiction. But this alleged violation is a $5,000.00 tree house in a clump of sweetgum trees in a front yard on a public

street, in plain, open, obvious sight....The City knew or should have known about the tree house."

The Court noted, "The City's Building/Zoning Inspector...approved construction of the tree house. Thereafter, the City sat by in silence while the Welches invested thousands of dollars in reliance on the approval." The Court found, "The Welches sought and obtained lawful permission/authorization to construct their treehouse for a city official authorized to render such a decision".

The Court stated, "When applying the doctrine of equitable estoppel, 'the test is whether it would be substantially unfair to allow a person to deny what he has previously induced another to believe and take action thereon'." The Mississippi Supreme Court held that "the City is equitably estopped from requiring removal of the treehouse".

The public policy that the Mississippi Supreme Court relied upon in Welch to estop the City of Clinton from requiring the removal of Ms. Welch's front yard tree house is the same policy that this Court articulated in Town of Largo; "One party will not be permitted to invite another onto a welcome mat and then be permitted to snatch the mat away to the detriment of the party induced or permitted to stand thereon".

The Circuit Court declined to estop the City of Holmes Beach from the enforcement of its Codes against Petitioners finding it "unreasonable" for

Petitioners to have taken the informal, verbal statements by a City Official to build any type of tree house. It is noteworthy that the Circuit Court did not find that the Petitioners acted in bad faith. Neither this Court's decision in Town of Largo, nor any of the many decisions in this State and others which have followed that decision, have required a determination of "reasonableness" of reliance, in the absence of any evidence of bad faith reliance.

As an apparent justification for the Circuit Court's finding that Petitioners' reliance was "unreasonable", the Circuit Court stated "Appellants did not disclose the location of their property or that the tree was located near the shoreline". If such a failure of disclosure is so egregious that it should be the basis for the denial of the application of equitable relief, the Circuit Court should have found that the Petitioners did not act in good faith, rather than create a new "reasonableness" standard.

Just so the record is clear, however, there is no evidence suggesting that the tree in which the tree house is located is "located near the shoreline". Furthermore, contrary to the Circuit Court's statement, the uncontradicted testimony of Mr. Hazen was that he advised Mr. Shaffer and the others in the Building Department, that he would like to build a tree house in an Australian Pine ***on the beach at his property***. Tr.Pg.214.

The Circuit Court's decision that the Petitioners' equitable estoppel claim is without merit fails to apply the correct law, and results in a miscarriage of justice. The uncontradicted evidence and testimony in the record in this proceeding establish that the Petitioners, relying in good faith, upon the acts and omissions of the City of Holmes Beach, have made such a substantial change in position and incurred such extensive obligations and expenses, that it would be highly inequitable and unjust to destroy the rights they acquired.

Accordingly, the Circuit Court's decision should be quashed.

In summary, Petitioners contend that the Decision of the Circuit Court upholding the Final Administrative Order of the CEB results in a denial of Petitioners' procedural due process rights, failed to apply the correct law, results in a miscarriage of justice, and will work an extreme prejudice to the Petitioners if, as a consequence, their tree house must be demolished. Petitioners' resulting injury cannot be corrected on appeal. Therefore, it is respectfully requested that this Court grant the Petition for Writ of Certiorari and quash the Decision of the Circuit Court.

CERTIFICATE OF SERVICE

I hereby certify that a correct copy of the foregoing has been furnished by email to: James D. Dye and Patricia A. Petruff, Dye, Deitrich, Petruff & St. Paul, P.L., Dye@dyefirm.com and ppetruff@dyefirm.com on October 15, 2014.

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CERTIFICATE OF COMPLIANCE

I further certify that the type size and style used throughout this Brief is 14-point Times New Roman double-spaced, and that this Brief complies with the requirements of Rule 9.210(a)(2), Fla.R.App.Pro.

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