

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.

REPLY BRIEF

OF

CITY OF WEST PALM BEACH, INC.

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

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PRELIMINARY STATEMENT

This appeal was taken to resolve a certified decisional conflict. The penultimate question needing resolution is: May a property owner sue a municipality and obtain an injunction compelling it to prosecute an alleged zoning violation when the municipality has investigated the property owner's complaint and exercised its discretion not to pursue enforcement?

In *Trianon Park Condominium Ass'n, Inc. v. City of Hialeah*, 468 So. 2d 912 (Fla. 1985), this Court held, in a tort action, that the judicial power cannot be used to interfere with a municipality's discretionary power to enforce compliance with its building code absent a violation of constitutional or statutory rights. The Third and Second Districts have since applied this non-justiciable principle of law to actions in equity seeking an injunction compelling a municipality to enforce its zoning ordinance.

In *Haver v. City of West Palm Beach, Inc.*, the Fourth District disagreed with its two sister courts finding *Trianon*, a tort case, inapplicable. Instead, it held that *Boucher v. Novotny*, 102 So. 2d 132 (Fla. 1958) and other precedent from this Court bound it to hold that an individual who alleges a zoning violation has caused special

damages has standing to maintain an action in equity to compel the municipality to enforce the zoning ordinance.

This Court should resolve the decisional conflict by applying *Trianon* to preclude judicial review of a municipality's discretionary decision not to prosecute an alleged zoning violation, when there is no allegation the municipality's decision violates a constitutional or statutory right or other provision of law. This holding may require clarification that *Boucher* addresses the question of standing, not justiciability.

ARGUMENT

I. RESOLVING THE DECISIONAL CONFLICT DOES NOT REQUIRE THIS COURT TO RECEDE FROM *BOUCHER*. IT SIMPLY REQUIRES CLARIFICATION THAT THE JUSTICIABILITY PRINCIPLES IN *TRIANON* APPLY HERE

A. The Havers' invocation of *stare decisis* is irrelevant

This appeal was taken to resolve the certification in *Haver v. City of West Palm Beach, Inc.*, 298 So. 3d 647 (Fla. 4th DCA 2020) of decisional conflict with *Detournay v. City of Coral Gables*, 127 So. 3d 869 (Fla. 3d DCA 2013), and *Chapman v. Town of Reddington Beach*, 282 So. 979 (Fla. 2d DCA 2019).

The Havers consume their entire Answer Brief plumbing the depths of *stare decisis*. That doctrine is inapplicable. This Court need

not disturb *Boucher* and its progeny on special damages standing in zoning enforcement cases. Justiciability was not addressed in those cases because the municipality had acted or threatened to act in violation of the law. Instead, as outlined below and in the City's Initial Brief, the Court should resolve the decisional conflict by clarifying that *Trianon's* holding applies to preclude declaratory and injunctive relief actions seeking to force the City to prosecute an enforcement action it considered and decided not to pursue.

B. The Havers concede zoning policy is not subject to judicial review

The Havers admit that zoning policymaking is not subject to judicial review. [A.B. at 46 (“Respondents concede that the separation-of-powers doctrine insulates municipalities’ formulation of zoning policy from most forms of judicial intervention”)]. What they overlook is that a municipality’s discretionary decision not to pursue an enforcement action is also a policy decision that is not subject to judicial review absent a violation of constitutional or statutory rights or other law. *Trianon*, 468 So. 2d at 919 (“This same discretionary power to enforce compliance with the law is given to regulatory officials such as building inspectors”).

The Havers' complaint is based on the City's alleged "refusal to enforce validly enacted zoning laws." [A.B. at 46]. The Havers do not allege the City unlawfully interpreted the ordinance, failed to follow any procedural requirement or substantive mandate of the ordinance, or violated any constitutional or statutory right. Instead, the Havers want the judiciary to exercise its power to compel the city to initiate a zoning enforcement action.

As alleged, the Havers' claim is not justiciable because, as the Havers acknowledge and *Trianon* dictates, the city's policy decisions are not subject to judicial review as a matter of separation of powers. *Trianon*, 468 So. 2d at 918 ("certain discretionary functions of government are inherent in the act of governing and are immune from suit.").

II. BOUCHER AND TRIANON CAN BE RECONCILED: BOUCHER ADDRESSED SPECIAL DAMAGES STANDING NEEDED TO SUE A CITY IN EQUITY FOR VIOLATING ITS ORDINANCES; TRIANON ADDRESSED THE JUSTICIABILITY OF AN ACTION BASED ON A CITY'S DISCRETIONARY FUNCTION

A. *Boucher's* special damages rule does not answer the distinct question of justiciability for a lawsuit in equity involving a municipality's discretionary function

1. Cities have discretion to enforce zoning ordinances.

Florida’s Constitution and statutory law provide cities “may exercise any power for municipal purposes except as otherwise provided by law.” Art. VIII, § 2(b), Fla. Const.; § 166.021 (1)(2)(4)) Fla. Stat. (2020). “In Florida, a municipality is given broad authority to enact ordinances under its municipal home rule powers.” *City of Hollywood v. Mulligan*, 934 So. 2d 1238, 1243 (Fla. 2006).¹

The plaintiff in *Trianon* challenged a city’s inspection under the building code. The Court identified “[t]he discretionary power to enforce compliance with the building code flows from the police power of the state.” *Trianon*, 468 So. 2d at 922.

Ultimately in rejecting the tort action in that case, the Court grounded its decision not to interfere on the basis “of exercising basic discretionary judgment in the enforcement of police power, public safety functions by a state, county, or municipal government entity.” *Id.* at 923. That principle was not limited to actions in tort.

¹ The City of Miami Amicus Brief provides meaningful analysis of a municipality’s discretion. [See Amicus Br. at 6-12]. Though in the Brief’s following pages, it characterizes the City’s position in a too limited manner. While inaction may likely correlate to discretion, the City’s position is that it may exercise discretion in zoning – for enforcement or lack thereof – as long as it does not violate the law. Rather than distinguishing between action and inaction, judicial review is not proper without allegations the city violated the law.

2. *Boucher* special damages rule on standing does not address or negate the requirement that the action be justiciable.

As discussed in the City’s Initial Brief, *Boucher* and similar special damages cases that permit an individual to sue a city are all based on allegations that the municipality acted unlawfully. [I.B. at 8-11, 13-14, 25-26]. In those cases, it was alleged a municipality had acted unlawfully in enacting or enforcing an ordinance, for instance where a plaintiff alleged a municipality had misapplied its regulations and violated an ordinance’s setback requirements. *See e.g. Fortunato v. City of Coral Gables*, 47 So. 2d 321 (Fla. 1950); *Boucher*, 102 So. 2d 132; *Renard v. Dade Cnty.*, 261 So. 2d 832 (Fla. 1972). In each of these “special damages standing” cases, the cause of action was predicated on an allegation that the municipality itself had violated the law.

The Havers and Fourth District misread *Boucher* to allow an equitable cause of action against a municipality to require it to enforce its zoning laws simply upon a showing of special damages. [A.B. at 16]. *Boucher* actually demands more: special damages standing provides a cause of action against a city “**where** municipal officials threaten or commit a violation of municipal ordinances.” *See*

id. (quoting *Boucher*, 102 So. 2d at 134 (emphasis added)).

In other words, *Boucher* holds, if special damages exist, a property owner has standing in equity when a municipality is alleged to have violated its own ordinance. *Boucher* does not address whether that same property owner may sue to compel a municipality to prosecute an enforcement action.

3. Failure to enforce a zoning ordinance is not a violation of that ordinance.

The Havers' complaint seeks a declaratory judgment "that the City's refusal to enforce the single-family zoning classification violates West Palm Beach Ordinance § 94-34(b)(2)" and an injunction "requiring the City to enforce the single-family zoning classification and requiring the City to take the enforcement measures provided for in West Palm Beach Ordinance § 94-34(b)(2)." *Haver*, 298 So. 3d at 649; [A.B. at 3]. They do not allege that the City's "failure to enforce" violates any constitutional or statutory right or other law.

Lacking an allegation the City violated some other provision of law, the Havers are left to assert the ordinance "expressly rules out any discretion" in the City's enforcement of the zoning laws, thus implying that the City did in fact violate the law by simply failing to

enforce the zoning provision. [A.B. at 47].

The plain language of the ordinance demonstrates this assertion is incorrect. First, the City's enforcement of the ordinance, or lack thereof, is within its discretion. West Palm Beach Ordinance Section 94-34(b) is the relevant enforcement provision of the City's Single-Family Zoning Classification. Section 94-34(b)(1) assigns to the planning and zoning administrator or a designee "the authority to investigate alleged violations" requiring the designee to be a "planner employed by the city." After the Havers' complaint, the City inspected the alleged violation and found none. Section 94-34(b)(2) states "[w]here it is determined that a violation of this chapter exists, the planning and zoning administrator or his designee shall notify the violator in writing and order compliance." Consistent with this provision, the City did not determine a violation existed and, therefore, it did not enforce the ordinance. [R. 13-14].

Second, the City's refusal to enforce the ordinance is not a violation of the ordinance. Section 94-34(b)(2) gives the City's administrator and his designee the discretion to determine if there is a violation. Contingent on that determination, the ordinance requires a compliance order. But if the inspection reveals no violation, the

administrator is not compelled to enforce the ordinance.

Simply put, the City has the discretion to determine whether the Havers' neighbor violated the zoning ordinance. The ordinance does not provide the Havers the right to sue the City to have a court review that decision and, should the court disagree, compel an enforcement action. Whether to prosecute enforcement of the zoning ordinance is a pure discretionary decision.

B. Where enforcement of a zoning ordinance is discretionary, *Trianon's* holding on justiciability should be extended for suits in equity

1. The Fourth District incorrectly held special damages allegedly due to the City's lack of enforcement was alone sufficient to allow for an equitable zoning enforcement action.

This Court's precedents relied upon by the Fourth District allow for a cause of action where a municipality has allegedly violated the law, including its own ordinance. But a cause of action seeking to enjoin a city from violating the law is fundamentally different than an action seeking to compel the city to take an enforcement action it has decided not to prosecute. Actions to prevent affirmative acts in violation of the law may be justiciable; actions to compel a discretionary act are not justiciable.

The Florida League of Cities Amicus Brief well-states this distinction. Its comparison of the proper use of writs of mandamus and mandatory injunctions is particularly compelling. [See Amicus Br. at 11-14]. The *Detournay* decision makes the same correlation when it states: “Our decision in this regard dovetails with the cases holding that a writ of mandamus cannot issue against a city on behalf of a private party to require the city to enforce its building and zoning laws against another party.” 127 So. 3d at 873 (citations omitted). The reasoning for this judicial restraint is that courts will not interfere with a city’s discretionary enforcement decision.

The Fourth District acknowledged and applied this law when it affirmed the trial court’s dismissal of the Havers’ claim seeking a writ of mandamus to compel the City “to determine” whether their neighbor violated the ordinance. *See Haver*, 298 So. 3d at 649. In affirming this dismissal, the Fourth District relied upon *RHS Corp. v. City of Boynton Beach*, 736 So. 2d 1211, 1212 (Fla. 4th DCA 1991) (“mandamus is not available to compel such action”). *See id.* at 654. What the Fourth District did not address is that its *RHS Corp.* decision expressly relied upon *Trianon* to dismiss a complaint seeking to compel the City of Boynton Beach to inspect certain property and

enforce its land development regulations against a private property owner. *See RHS Corp.*, 736 So. 2d at 1211 (the enforcement of the law by regulatory officials such as building inspectors is discretionary).

The Fourth District decision relied, incorrectly, upon the *Detournay* dissent. That dissent concluded that “once special damages are shown, enforcement of the zoning ordinance is no longer an action purely within the discretion of the state.” *Detournay*, 127 So. 3d. at 880. But as discussed above and in the City’s Initial Brief, the cases upon which that dissent relies all identified special damages predicated on a municipality’s violation of law. In none of those cases did the court find special damages based upon a municipality’s decision not to enforce its ordinance. Yet in *Detournay*, as in *Haver*, the only allegation was the city’s failure to enforce its zoning regulation. Without more, the enforcement of the ordinance remains a matter of municipal discretion.

The *Detournay* dissent stated that in *Boucher* and its progeny, where special damages were shown due to *a municipality’s violation of law*, a cause of action in equity existed. Yet in *Detournay*, as in *Haver*, the alleged special damages were based on *the city’s lack of*

enforcement – that alone is no violation of law, and such nonenforcement discretion is not subject to judicial review.

2. *Trianon's holding is applicable to suits in equity.*

Applying *Trianon's* reasoning, the Third District found “the City’s discretion to file, prosecute, abate, settle, or voluntarily dismiss a building and zoning enforcement action is analogous to a prosecutor’s discretion.” *Detournay*, 127 So. 3d at 873.

Trianon held that “executive officers” “by their issuance of, or refusal to issue, licenses, permits, variances, or directives, are acting pursuant to basic governmental functions. The judicial branch has no authority to interfere with the conduct of those functions unless they violate a constitutional or statutory provision.” 468 So. 2d at 919. *Trianon* further recognized “[h]ow a governmental entity, through its officials and employees, exercises its discretionary power to enforce compliance with the laws duly enacted by a governmental body is a matter of governance.” *Id.*

Acknowledging this discretion, *Trianon* rejected “the assertion that the judiciary should interfere with how another branch of

government chooses to enforce the law.” *Id.* at 922.² To hold otherwise “would represent an unconstitutional intrusion by the judiciary into the discretionary judgmental functions.” *Id.* at 923.

The doctrine of justiciability at issue here is constitutional. See *Detournay*, 127 So. 3d at 873 (“it is founded on the doctrine of separation of powers”). And it is applicable in tort and equity. As the *Detournay* majority recognized:

Although *Trianon* involved a suit for torts, its reasoning and holding apply equally well to suits like the instant case, where private parties seek a declaratory judgment and injunction against a city regarding the failure of the city to enforce its building and zoning code against another private party.

² The Attorney General brief makes no argument for the propriety of judicial review on the City’s nonenforcement of the ordinance. The Attorney General raises a new issue seeking this Court to unhinge the justiciability question in this case from the Florida Constitution’s explicit separation of powers clause. Her expressed concern is with this Court elevating municipal functions to the level of actual, distinct “legislative” and “executive” branches under Article II, Section 3 of the Florida Constitution. The City does not need that result. *Trianon* confirms that discretionary functions, whatever their form in municipal policymaking and decision-making, are insulated from judicial review under the doctrine of justiciability which in turn is at least a matter of the structural constitutional separation of powers (“aggregating such policy choices to the judiciary would do great violence to the separation of power established in our Constitution.” *Citizens for Strong Sch. v. Fla. State Bd. of Educ.*, 262 So. 3d 127, 144 (Fla. 2019) (Canady, C.J., concurring)).

Id. at 872.

The Second District in *Chapman* agreed. *See* 282 So. 3d 979. It held the lower court committed no err in its dismissal of a lawsuit seeking equitable relief to compel a municipality to enforce its zoning ordinances as violative of separation of powers. *Id.* at 981.

Absent any alleged violation of constitutional or statutory rights or other provision of law, a municipality's enforcement of a zoning ordinance, or lack thereof, is a matter of discretion. Whether in tort or equity, special damages standing alone is insufficient to subject a municipality's discretionary enforcement decision to judicial review. The judicial power cannot be applied to force the City to take an enforcement action it has decided not to take.

CONCLUSION

For the foregoing reasons, this Court should find that *Trianon* applies and accordingly reverse Fourth District.

January 4, 2021

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 4th day of January, 2021.

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