

127 So.3d 869 (2013)

Lisa M. DETOURNAY, et al., Appellants,
v.
CITY OF CORAL GABLES, etc., et al., Appellees.

No. 3D11-2012.

District Court of Appeal of Florida, Third District.

December 4, 2013.

870 *870 Andrew Dickman, P.A., and Andrew W.J. Dickman, Naples, for appellants.

Akerman Senterfitt and Gerald B. Cope, Jr., Elizabeth M. Hernandez, and Jennifer Cohen Glasser, Miami, for appellee **City of Coral** Gables; Tew Cardenas, Santiago D. Echemendia, Miami, and Maria P. Gonzalez for intervenor-appellee Amace Properties, Inc.

Before SHEPHERD, C.J., and LAGOA and LOGUE, JJ.

LOGUE, J.

Lisa **Detournay** and Brenda Randol, who own homes in **Coral** Gables, and their homeowners' association, the Rivera Neighborhood Association, Inc., (hereinafter "the Homeowners") filed a two-count complaint to require the **City of Coral** Gables to prosecute an enforcement action against nearby property owned by Amace Properties, Inc. The trial court dismissed the first count for lack of standing. Although it held the Homeowners had no standing, the trial court nevertheless entered a judgment against the Homeowners on the second count. On appeal by the Homeowners, we affirm the dismissal of count one, albeit on different grounds, and we direct the dismissal of count two. Under the doctrine of separation of powers, the **City's** discretion to file, prosecute, abate, settle, or voluntarily dismiss a building and zoning enforcement action is a purely executive function that cannot
871 be supervised by the courts, absent the violation *871 of a specific constitutional provision or law.

FACTS AND PROCEDURAL HISTORY

Amace Properties, Inc. owns commercial property on one of the branches of the canals that run through the **City** to Biscayne Bay. For the most part, these canals are lined with expensive homes. From its property, Amace operates what both the **City** and the Homeowners maintain is a private yacht basin that rents slips and moorings in a manner that violates various provisions of the **City's** building and zoning code. In April 2004, the **City** issued three administrative citations against Amace. After filing these enforcement actions, however, the **City** held them in abeyance for years while attempting to settle them as part of a proposed re-development of Amace's property. Unhappy at the **City's** failure to vigorously prosecute Amace, the Homeowners' filed the instant case to force the **City** to pursue its enforcement actions. Count one requested a declaratory judgment and count two requested an

injunction.

The tenor of the Homeowners' concerns are apparent from the following language in the complaint:

46. Unless restrained, defendant **city** will continue to ignore its zoning regulations, contrary to the express language in the zoning code, and continue to allow the operation of the illegal private yacht basin at issue here.

47. Immediate and irreparable injury, loss and damage for which there is no adequate remedy at law will result to the plaintiffs by this action of the **city** because this private yacht basin use will continue to operate in violation of the law.

48. The **city's** zoning code has as its basis the government's police powers — to protect the public health safety and welfare. Where the **city's** zoning code is ignored, the guarantee of the **city's** protection of the public health, safety and welfare is also ignored and the public is irreparably harmed.

49. The refusal of the **City of Coral Gables** to enforce its zoning code, where three notices of violation were issued and the **city** attorney confirmed the violation, creates an injury to plaintiffs and all **Coral Gables** citizens that cannot be compensated by money or remedied in any other manner except by requiring enforcement of the violated code provision.

50. Plaintiffs as residents of the **City of Coral Gables** have a legitimate and reasonable expectation that all citizens will be treated the same when it comes to the enforcement of the **city's** zoning code. Plaintiffs reasonably expect that certain citizens and/or property owners are not "more equal" than others when the **city** seeks to enforce its zoning code.

51. Plaintiffs cannot seek enforcement of the **city's** zoning code where the **city** refuses to do so.

52. Plaintiff's injury cannot be "cured" except by requiring the **city** to enforce its zoning code, follow its law and direct the property owner to cease its illegal use or to obtain the required conditional use approval, thus legalizing the illegal use.

Amace intervened in the lawsuit as a defendant, although the Homeowners made no allegations against Amace. In its answer, motion to dismiss, and renewed motion to dismiss, the **City** raised the holding of *Trianon Park Condominium Association, Inc. v. City of Hialeah*, 468 So.2d 912, 922 (Fla.1985), asserting that the Homeowners were not entitled to the relief sought because the **City** had discretion whether and how to prosecute violations of ⁸⁷² its zoning ordinances. On the second day of trial, the trial court entered the order and final judgment on appeal, dismissing count one for lack of standing and finding in favor of the **City** on count two. This appeal followed.

DISCUSSION

We agree with the dismissal of count one, albeit on grounds different than that relied upon by the trial judge.

Rather than basing the dismissal on standing, we think the simplest and most direct explanation of why dismissal is proper is provided by the principles of separation of powers discussed in *Trianon* and its progeny. Count two, seeking injunctive relief, should be dismissed for the same reason.^[1]

In *Trianon*, owners of units in a condominium building that had been constructed in an allegedly grossly negligent manner sued the **City** of Hialeah. They sought to hold the **City** liable for failure to enforce its building and zoning laws against the developer who built the condominium. *Id.* at 915. The Florida Supreme Court held that a government entity is not liable in tort to individual property owners for the failure to enforce provisions of building and zoning codes. *Id.* at 919. 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 codes against another private party.

In holding a **city** cannot be sued by a private party because it failed to enforce its building and zoning laws against another private party, the Court observed that "certain discretionary functions of government are inherent in the act of governing and are immune from suit." *Id.* at 918. In this regard, the Court stated:

We find that the enforcement of building codes and ordinances is for the purpose of protecting the health and safety of the public, not the personal or property interests of individual citizens. The discretionary power to enforce compliance with the building code flows from the police power of the state. In that regard, this power is no different from the discretionary power exercised by the police officer on the street in enforcing a criminal statute, the discretionary power exercised by a prosecutor in deciding whether to prosecute, or the discretionary power exercised by a judge in making the determination as to whether to incarcerate a defendant or place him on probation. Statutes and regulations enacted under the police power to protect the public and enhance the public safety do not create duties owed by the government to citizens as individuals without the specific legislative intent to do so.

Id. at 922; see also *Carter v. City of Stuart*, 468 So.2d 955, 957 (Fla.1985) ("The amount of resources and personnel to be committed to the enforcement of this ordinance was a policy decision of the **city**. The **city** has the right to set its priorities in reference to law enforcement.").

This immunity from suit is often called sovereign immunity. *Trianon*, 468 So.2d at 922. It bears repeating, however, that the reason courts cannot generally supervise the executive when it is deciding ⁸⁷³ when and how to enforce specific laws is not based on the archaic notion that "the king can do no wrong." Instead, it is founded on the doctrine of separation of powers, one of the structural pillars upon which American freedoms rest: "under 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. To hold otherwise, the Court reasoned, "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.*

Turning to the instant case, 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 to file, prosecute, abate, settle, or

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dismiss a criminal or civil lawsuit. *Id.* at 922. The prosecutor's discretion in this regard is a pure executive function that cannot be supervised by the courts, absent the violation of a specific constitutional provision or law.^[2]

It follows in the instant case that the **City's** discretion to file, prosecute, abate, settle, or dismiss a building and zoning enforcement action against Amace is an executive function that cannot be supervised by the courts, absent the violation of a specific constitutional provision or law.

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 private party. See *Alexander v. City of Coral Gables*, 745 So.2d 1004, 1005 (Fla. 3d DCA 1999) (holding that mandamus does not lie to compel a **city** to enforce its zoning regulations, because the decision whether to enforce is discretionary); *Centrust Sav. Bank v. City of Miami*, 491 So.2d 576, 577 (Fla. 3d DCA 1986) (holding that a writ of mandamus does not lie to compel a **city** to enforce its building code against third parties); *RHS Corp. v. City of Boynton Beach*, 736 So.2d 1211, 1213 (Fla. 4th DCA 1999) (holding that mandamus does not lie to compel a **city** to enforce its zoning regulations, because the decision whether to enforce is discretionary, rather than ministerial).

874 The few cases holding to the contrary pre-date *Trianon* and appear not to have considered or followed the controlling principle of separation of powers. See *Fortunato v. City of Coral Gables*, 47 So.2d 321, *874 323 (Fla. 1950) (reversing the denial of a temporary injunction sought to prevent the **city** from issuing a building permit); *Rebholz v. Floyd*, 327 So.2d 806, 809 (Fla. 2d DCA 1976) (reversing for issuance of a writ of mandamus to enforce zoning regulations).

While the cases we rely on arose in torts, mandamus and criminal law, the governing principles apply equally well to injunctions and declaratory actions. Separation of powers is a constitutional doctrine that extends across all procedural vehicles that might be used to challenge executive action. It would be a hollow idea if it applied only to some procedures and not others. In this regard, the case of *Kempfer v. St. Johns River Water Management District*, 475 So.2d 920 (Fla. 5th DCA 1985), is easily distinguishable. *Kempfer* held only that sovereign immunity does not bar property owners' rights to seek declaratory relief to construe a deed and easement that they conveyed to a government. It involved the government's legal rights and responsibilities as a property owner. It did not implicate the government's discretion whether or not to prosecute enforcement actions against third parties. Our decision does not address the ability of the Homeowners to bring a direct action against Amace because the Homeowners have filed no complaint and requested no relief against Amace; therefore, the issue of the validity of such a lawsuit is not before us.

CONCLUSION

We are sympathetic to the frustration of the Homeowners at the **City's** decision to abate its enforcement action against Amace, but we must defer to the **City's** right to exercise its discretion to seek a settlement that might accommodate the concerns of all parties. In this situation, the courts have no role in advising or directing a government when, if, and how to maintain an administrative enforcement action: the role of the courts is limited

to adjudicating any such action when it is properly at issue before them. To the extent that the Homeowners seek to have the **City** desist in its settlement efforts and instead vigorously prosecute the enforcement actions, they need to knock on the doors of **city** hall, not the courthouse.

For the foregoing reasons, we affirm the trial court's decision to dismiss, although on the grounds stated herein. We reverse that portion of the final judgment ruling on the merits because the court should not have reached that issue. Instead, count two should also be dismissed.

Affirmed, in part, reversed, in part, and remanded for proceedings consistent with this decision.

SHEPHERD, C.J., concurs.

LAGOA, J. (dissenting).

I respectfully disagree with the majority's decision to affirm the trial court. The plaintiffs, Lisa **Detournay** ("**Detournay**"), Brenda Randol ("Randol"), and the Riviera Neighborhood Association, Inc. ("RNA") (collectively, "Homeowners") appeal an order and final judgment dismissing with prejudice Count I (declaratory relief), and finding in favor of the defendant, **City of Coral Gables** (the "**City**"), on Count II (injunctive relief), of their second amended complaint. For the following reasons, I would reverse.

I. FACTUAL AND PROCEDURAL HISTORY

Detournay and Randol each own a home on Caballero Boulevard in **Coral Gables**. Their homes sit along what is known as the Mahi Waterway. The Mahi Waterway runs through the **City** and provides access to Biscayne Bay. Defendant/intervenor, *875 Amace Properties, Inc. ("Amace"), owns commercial property on the Mahi Waterway, west of **Detournay** and Randol's homes. Amace rents spaces behind its property to boat owners, allowing them to tie up their boats along bulkheads. RNA is a homeowners association "representing the interests of its members who are concerned with protecting and preserving the residential neighborhood in the area of and adjacent to" Amace's property.

The Homeowners filed a Second Amended Complaint for declaratory and injunctive relief pursuant to section 86.021, Florida Statutes (2009),^[3] seeking to end the **City's** abatement of its zoning regulation enforcement against Amace. The Homeowners assert that Amace's rental of the boat spaces constitutes the operation of an "illegal private yacht basin" under the **City's** zoning regulations.

In Count I, the Homeowners seek "a declaration regarding whether the private yacht basin is operating pursuant to the **City's** zoning regulations and whether the **City** acted contrary to the requirements of its zoning regulations when it failed to close the illegal private yacht basin." In Count II, the Homeowners seek "permanent injunctive relief that would enjoin the operation of the private yacht basin," if the trial court finds in Count I that Amace is operating a private yacht basin contrary to the **City's** zoning regulations and that "the **city** acted contrary to the requirements of its zoning regulations when it failed to close the illegal private yacht basin."

The Homeowners specifically allege that Amace's use of its property to rent out the boat spaces "has caused Plaintiffs to suffer from boat congestion, noise, pollution, canal bank erosion, wake damage and a diminution of

... "to ensure that the City's actions, policies, and programs do not constitute a violation of their privacy and the tranquil use of their property."

Amace's Answer raised several affirmative defenses, including estoppel, laches, and that the yacht basin, which was established in 1947, is a legally non-conforming use permitted under the **City's** code. The **City's** Answer raised various affirmative defenses, including that municipalities have discretion to enforce their zoning regulations and the **City** did not abuse its discretion, that the Homeowners' claim for injunctive relief fails to state a cause of action, that injunctive relief is an improper remedy, and that the Homeowners have failed to exhaust their administrative remedies.

On the morning of the third day of trial,^[4] the **City** filed a renewed motion to dismiss and memorandum of law. For the first time, the **City** argued that the Homeowners lacked standing to assert their claims because they had not alleged, and could not establish, that they had suffered a special injury as a result of the **City's** *876 failure to enforce its zoning code. The **City** also argued that the Homeowners' claims failed because municipalities have discretion as to how and when to enforce their zoning regulations.

The Homeowners objected, arguing that the issue of standing could not be raised at this point in the trial. The trial court conducted a hearing on the **City's** motion, and heard testimony from two of the **City's** witnesses — a **City** zoning official and Armando Guerra, Amace's president. Both witnesses testified to the history of various negotiations and alleged agreements between Amace and the **City** with regard to Amace's use of its property.

At the conclusion of Guerra's testimony, the trial court dismissed Count I, finding that the Homeowners lacked standing. At the conclusion of the zoning official's testimony, the trial court concluded that the **City** had not abused its discretion in the enforcement of its zoning regulations.

The trial court subsequently entered the order and final judgment on appeal. In its written order, the trial court dismissed Count I with prejudice, finding that the Homeowners lacked standing absent evidence of a special injury. Specifically, the trial court found "that there is no standing for these private citizens to bring this action absent evidence of a special injury.... Because Plaintiffs have not and cannot establish special injury, the Court finds, as a matter of law, that under the circumstances presented, these Plaintiffs lack standing as to Count I." The trial court further found in favor of the **City** on Count II, concluding that, based on the testimony heard in the case, the **City** had not abused its discretion. This appeal ensued.

II. ANALYSIS

The trial court dismissed Count I for lack of standing. "Whether a party is the proper party with standing to bring an action is a question of law to be reviewed *de novo*." *FCD Dev., LLC v. S. Fla. Sports Comm., Inc.*, 37 So.3d 905, 909 (Fla. 4th DCA 2010) (quoting *Westport Recovery Corp. v. Midas*, 954 So.2d 750, 752 (Fla. 4th DCA 2007)), *review denied*, 63 So.3d 750 (Fla.2011). An appellate court reviews an order of dismissal based on lack of standing *de novo*. *Wheeler v. Powers*, 972 So.2d 285, 288 (Fla. 5th DCA 2008); *Sanchez v. Century Everglades, LLC*, 946 So.2d 563, 564 (Fla. 3d DCA 2006). "In determining whether to dismiss a complaint for lack of standing, [the Court] must confine [its] review to the four corners of the complaint, draw all inferences in favor of the pleader, and accept all well-pled allegations in the complaint as true." *Payne v. City of Miami*, 927

So.2d 904, 906 (Fla. 3d DCA 2005).

As discussed below, the trial court erred in dismissing Count I for three reasons. First, the issue of standing was waived by the **City**. This Court has stated that a challenge to a party's standing can be waived if not raised as an affirmative defense. See Stratton v. 6000 Indian Creek, LLC, 95 So.3d 334, 336 (Fla. 3d DCA 2012) (standing is an affirmative defense that can be waived); Bank of New York Trust Co. v. Rodgers, 79 So.3d 108 (Fla. 3d DCA 2012) (reversing final judgment entered in favor of defendants based on plaintiff's lack of standing where there was no denial or defense raised in defendants' pleadings concerning standing); see also Phadael v. Deutsche Bank Trust Co. Americas, 83 So.3d 893, 895 (Fla. 4th DCA 2012) ("We have previously explained that lack of standing is an affirmative defense that must be raised by the defendant and the failure to raise it generally results in waiver."), review denied, 97 So.3d 824 (Fla. 2012); Kissman v. Panizzi, 891 So.2d 1147, 1150 (Fla. 4th DCA 2005) (same). *877 But see Maynard v. Fla. Bd. of Educ., 998 So.2d 1201 (Fla. 2d DCA 2009) (holding that standing need not be raised only by means of an affirmative defense). Here, the **City** failed to raise standing as an affirmative defense and only asserted lack of standing on the third day of trial. I would therefore find that the **City** waived the issue of standing by failing to raise it as an affirmative defense, and that the trial court erred in considering the **City's** motion to dismiss on that basis at such a late date in the proceedings.^[5]

Second, even if a challenge to standing had not been waived, the Declaratory Judgment Act does not require that a special injury be established in order to maintain a claim under the Act, as long as the elements of the Act itself are established. See Combs v. City of Naples, 834 So.2d 194, 197 (Fla. 2d DCA 2002) ("Section 86.021, which addresses standing to seek a declaratory judgment, contains no requirement that a special injury be established."). "[I]n order to properly invoke the jurisdiction of the circuit court, the party seeking a declaration must not only show that he is in doubt as to the existence or nonexistence of some right or status, but also that there is a bona fide, actual, present, and practical need for the declaration[.]" State, Dep't of Env'tl. Prot. v. Garcia, 99 So.3d 539, 544 (Fla. 3d DCA 2011) (citations omitted).^[6]

Accepting all well-pled allegations in the Homeowners' complaint as true, I would find that the Homeowners are in doubt as to the existence or nonexistence of a right under the **City's** zoning ordinances and that there exists a bona fide, actual, present and practical need for the declaration. Because the Homeowners' interests are sufficient to confer standing to seek a declaratory judgment here, I would find that the trial court erred in dismissing Count I for lack of standing.

Finally, even if the **City** had not waived the issue of standing and even if special damages were required under Florida's Declaratory Judgment Act, I nonetheless would reverse the trial court's order as it relates to **Detournay** and **Randol** because they sufficiently alleged special damages to allow them to maintain a cause of action. The seminal cases addressing the issue of a private citizen's right to seek enforcement of a municipal zoning ordinance are Boucher v. Novotny, 102 So.2d 132 (Fla. 1958), and Renard v. Dade County, 261 So.2d 832 (Fla. 1972). In Boucher, the Florida Supreme Court established the now well-settled rule that in order for a private citizen to maintain an action to enforce a valid municipal zoning ordinance, he or she must allege facts showing "special damages." 102 So.2d at 135. The Court explained:

We, therefore, align ourselves with the authorities which hold that one seeking redress, either preventive or corrective, against an alleged violation of a municipal zoning ordinance must allege

and prove *special damages peculiar to himself differing in kind as distinguished from damages differing in degree* suffered by the community as a whole.

Id. (emphasis added).

878 In *Renard*, the Court further clarified that the "special damage" rule of the *878 *Boucher* case is an outgrowth of the law of public nuisance. Zoning violations have historically been treated as public nuisances not subject to suit by an individual unless that individual has suffered damages different in kind and degree from the rest of the community." 261 So.2d at 835 (footnote omitted). Significantly, however, the Court noted that "in the twenty years since the *Boucher* decision, changed conditions, including increased population growth and density, require a more lenient application of that rule." *Id.* at 837-38 (emphasis added). Accord *Skaggs-Albertson's v. ABC Liquors, Inc.*, 363 So.2d 1082, 1088 (Fla.1978) (stating that the "special damage" rule still has vitality in actions seeking to enforce a valid zoning ordinance, albeit with a more liberal application).

Here, the Homeowners allege that Amace's rental of the boat spaces "has caused Plaintiffs to suffer from boat congestion, noise, pollution, canal bank erosion, wake damage and a diminution of their privacy and the tranquil use of their property." The Second Amended Complaint also states that **Detournay** and Randol live "immediately to the east" of Amace's property.

Applying *Renard's* mandate of a more lenient application of the *Boucher* rule, I would find that **Detournay** and Randol sufficiently alleged special damages particular to them that differ in kind, rather than simply degree, from those suffered by other homeowners within **Coral** Gables whose properties do not lie along the Mahi Waterway and who therefore are not uniquely affected by the yacht basin's activities.^[7] Compare *Kagan v. West*, 677 So.2d 905 (Fla. 4th DCA 1996) (Pariente, J.) (finding that plaintiffs alleged and proved special damages different from those suffered by the community as a whole where plaintiffs shared a private road with defendant property owner), with *Centrust Sav. Bank v. City of Miami*, 491 So.2d 576 (Fla. 3d DCA 1986) (no standing where plaintiff made no claim that it had suffered a special injury apart from the injury suffered by any member of the general public as a result of alleged building code violations), and *Cont'l Con-Dev Co. v. Shallberg*, 267 So.2d 40 (Fla. 4th DCA 1972) (finding that where plaintiff brought suit on behalf of himself and all other property owners in the **city**, he did not have damages different in kind from that of all the other property owners in the general area where his house was across the street from alleged zoning violation).

Additionally, I believe that the trial court erred in making a finding on the merits in favor of the **City** on Count II (injunctive relief). As pled, Count II is dependent upon a declaration in favor of the Homeowners in Count I.^[8]

879 Therefore, *879 once the trial court determined that the Homeowners lacked standing to proceed with Count I, the trial court was necessarily precluded from making a finding on Count II.

Turning to the majority, I cannot agree with its reliance upon the doctrine of separation of powers — an issue not raised by either party before the trial court or this Court — in order to affirm the result below. Not only does the majority misapply the doctrine of separation of powers to the Homeowners' allegations, it also fails to address the issue of the Homeowners' standing.

The majority asserts that the trial court properly dismissed Count I (declaratory relief), not on the grounds stated by the trial court — lack of standing — but rather, under the "controlling principle of separation of powers."

by the trial court — lack of standing — but rather, under the controlling principle of separation of powers. Specifically, the majority states that the **City's** discretion to prosecute a zoning violation is a purely executive function that cannot be supervised by the courts. The majority relies upon *Trianon Park Condominium Association v. City of Hialeah*, 468 So.2d 912 (Fla.1985), for this proposition.

First, the issue of separation of powers was not raised by the **City** or Amace before the trial court or this Court. At best, the **City** included a citation to *Trianon* in its Answer Brief bereft of any reference to the separation of powers doctrine.^[9] Moreover, as this issue was not raised on appeal, **Detournay** and Randol have not been given an opportunity to address the issue of separation of powers.

Notwithstanding the **City's** failure to raise or preserve this issue, I will address the majority's reliance on the *Trianon* case. In *Trianon*, the issue was whether the **City** of Hialeah could be held liable in tort to condominium owners for damage to condominium units caused by building defects on the basis that the **City** of Hialeah's building inspectors were negligent in their inspections during construction. In holding that the **City** of Hialeah could not be held liable, the Court reasoned that enforcement of building codes and ordinances constituted a discretionary governmental function for which there has never been a duty of care, and with which the judicial branch must not interfere. 468 So.2d at 917-18, 922.

Trianon, and the doctrine of separation of powers enunciated therein, however, do not apply in the instant case. First, *Trianon* concerns a cause of action at law for damages. Here, the Homeowners did not seek a remedy at law, but rather, sought declaratory and injunctive relief. See *Boucher*, 102 So.2d at 134 (stating that a citizen who suffers special damages resulting from a zoning violation "is entitled to injunctive relief in the absence of an adequate legal remedy"). Therefore the rules of governmental tort liability would not apply to Appellants' claims. See *Trianon*, 468 So.2d at 917 ("[F]or there to be governmental tort liability, there must be either an underlying common law or statutory duty of care with respect to the alleged negligent conduct. For certain basic judgmental or discretionary governmental *880 functions, there has never been an applicable duty of care.") (emphasis added).

Second, the "special damage" rule set forth in *Boucher* is an outgrowth of the law of public nuisance, which states that because a public nuisance is an offense against all citizens, it is subject to abatement only on motion of the state. *Renard*, 261 So.2d at 835 n. 5; *Skaggs-Albertson's*, 363 So.2d at 1088 ("Inasmuch as a public nuisance was an offense against the state and, accordingly, was subject to abatement on motion of the proper governmental agency, an individual could not maintain an action for a public nuisance unless he suffered some special damage from the public nuisance."). But, as discussed above, if an individual can show some special damage from an alleged zoning violation, he or she then has standing to maintain an action to enforce the zoning ordinance in equity against both a municipality and a private party. See *Skaggs-Albertson's*, 363 So.2d at 1088; *Renard*, 261 So.2d at 837; *Boucher*, 102 So.2d at 135; *Page v. Niagara Chem. Div. of Food Mach. & Chem. Corp.*, 68 So.2d 382 (Fla.1953); *Bozeman v. City of St. Petersburg*, 74 Fla. 336, 76 So. 894 (1917). In short, once special damages are shown, enforcement of the zoning ordinance is no longer an action purely within the discretion of the state.

Thus, if the Homeowners prevail on the merits, *Boucher* and its progeny entitle the Homeowners to a judicial injunction prohibiting Amace from continuing to operate an allegedly illegal yacht basin; *Trianon* likely prohibits the Homeowners from seeking damages from the **City** for its reluctance to enforce its zoning regulations but it

says nothing about the Homeowners' ability to stop the activity itself.

Additionally, the majority addresses itself to Count I (declaratory relief). But if separation of powers were a legally valid reason to dismiss the complaint, that basis would apply only to Count II (injunctive relief), in which the Homeowners sought enforcement of the **City's** zoning laws against the **City** and Amace. Notably, the **City** did not raise the issue of "separation of powers" either before the trial court or this Court, as it relates to either Count I or Count II. As Count II is pled as dependent on a finding in favor of the Homeowners in Count I, and the majority fails to discuss the issue of standing, which was the basis of the trial court's ruling on Count I below, and fails to address the Florida Supreme Court's opinions of *Boucher* and *Renard*,^[10] it is unclear how the majority can reach the issue at all.

Because there is no support for this alternative theory in the record, it is improper for the majority to rely upon it in affirming the trial court's dismissal of Count I. See *Robertson v. State*, 829 So.2d 901, 907-08 (Fla.2002) ("The key to the application of [the Topsy Coachman doctrine] of appellate efficiency is that there must have been support for the alternative theory or principle of law in the record before the trial court."); *State v. Gerry*, *881 855 So.2d 157, 163 n. 5 (Fla. 5th DCA 2003).

The majority further overlooks the fact that Amace was a party to this suit. Even if the Homeowners could not seek judicial relief against the **City**, they retain their ability to seek a declaration that Amace's use of its property violates the local zoning ordinances and they retain their ability to enjoin Amace from further alleged illegal activity. See e.g., *Boucher*; *Renard*; *Skaggs-Albertson's*.

Indeed, the analysis by the majority imports the tort-based sovereign immunity doctrine of *Trianon* into an area long recognized by the Florida Supreme Court as subject to judicial enforcement against both municipalities and private parties. See *Boucher*; *Renard*; *Skaggs-Albertson's*; *Fortunato*. The majority expands the law of Florida here by extending the concept of municipal immunity from tort liability and damages to municipal immunity from declaratory and injunctive relief-and it immunizes Amace's conduct along the way.

Finally, the majority's attempt to cast aside *Fortunato v. City of Coral Gables*, 47 So.2d 321 (Fla.1950), violates the Florida Supreme Court's express statement that it does not overrule precedent "*sub silentio*." See *Arsali v. Chase Home Finance LLC*, 121 So.3d 511 (Fla.2013). It may well be that the Florida Supreme Court will move the law of this State to where the majority believes it should be, but it is beyond our jurisdiction to recede from that Court's existing precedent.

III. CONCLUSION

For the reasons stated above as to Count I, I find that the **City** waived the issue of standing. Alternatively, I conclude that special damages were not required to be pled. Moreover, even if special damages were required, **Detournay** and Randol sufficiently alleged special damages. Lastly, I find that the trial court erred in ruling on Count II, which, as pled, was entirely dependent on Count I. Accordingly, I dissent from the majority's decision and would reverse the order and final judgment on appeal.

[1] Although we respect the dissent's concern in this regard, we believe that the **City's** two and one half page argument in their answer brief

citing to *Trianon* and contending "the **City** has prosecutorial discretion in whether or how to proceed" with its enforcement actions, coupled with the Homeowners' argument in their reply brief that the **City** should not have such discretion, is more than sufficient to raise the application of *Trianon* in this appeal.

[2] See *Valdes v. State*, 728 So.2d 736, 738-39 (Fla. 1999) ("This Court has long held that as the prosecuting officer, the state attorney has 'complete discretion' in the decision to charge and prosecute, and the judiciary cannot interfere with this 'discretionary executive function.'") (citations omitted); *State v. Bloom*, 497 So.2d 2, 3 (Fla. 1986) ("Under Florida's constitution, the decision to charge and prosecute is an executive responsibility, and the state attorney has complete discretion in deciding whether and how to prosecute."); *Johnson v. State*, 314 So.2d 573, 577 (Fla. 1975) ("[T]he discretion of the Attorney General in choosing whether to prosecute or not to prosecute, or to abandon a prosecution already started, is absolute."); *Bess v. Reno*, 563 So.2d 95, 96 (Fla. 3d DCA 1990) (holding that the trial court did not err in refusing, in effect, to mandamus the state attorney to institute extradition proceedings); *Thompson v. Reno*, 546 So.2d 83, 84 (Fla. 3d DCA 1989) (holding that the state attorney's discretion extends to civil actions as well as criminal actions); *State v. Jogan*, 388 So.2d 322, 323 (Fla. 3d DCA 1980) (holding that the decision to nolle prosequi is vested solely in the state attorney's discretion and cannot be made or supervised by the courts); *State v. C.C.B.*, 465 So.2d 1379, 1381 (Fla. 5th DCA 1985) ("In the criminal justice system the discretion to prosecute or not is a pre-trial posture vested solely in the state attorney's discretion.").

[3] That statute states as follows:

86.021. Power to construe

Any person claiming to be interested or who may be in doubt about his or her rights under a deed, will, contract, or other article, memorandum, or instrument in writing or whose rights, status, or other equitable or legal relations are affected by a statute, or any regulation made under statutory authority, or by municipal ordinance, contract, deed, will, franchise, or other article, memorandum, or instrument in writing may have determined any question of construction or validity arising under such statute, regulation, municipal ordinance, contract, deed, will, franchise, or other article, memorandum, or instrument in writing, or any part thereof, and obtain a declaration of rights, status, or other equitable or legal relations thereunder.

[4] During the first day and a half of trial, the parties attempted to reach a settlement agreement. On appeal, the Homeowners argue that the trial court erred in failing to enforce the alleged settlement agreement reached by the parties. I would find this argument without merit.

[5] Although not necessary to my conclusion on this point, I would note that the Homeowners' argument that they were denied due process when the trial court considered the **City's** "surprise" renewed motion to dismiss without notice has merit.

[6] "The Florida Declaratory Judgment Act, chapter 86, Florida Statutes (2009), is remedial in nature and should be broadly construed." *Garcia*, 99 So.3d at 544.

[7] In contrast, RNA did not allege special damages sufficient to maintain suit. The second amended complaint alleges that the RNA is a "homeowners association representing the interests of its members who are concerned with protecting and preserving the residential neighborhood in the area of and adjacent to the illegal private yacht basin." Homeowners who do not live on the Mahi Waterway cannot argue that they suffer special damages resulting from Amace's activity. Had the issue not been waived, and if a declaratory judgment proceeding required special damages, I would have affirmed as to RNA.

[8] In relevant part, Count II states as follows:

If the court declares (in Count 1) that (1) the private yacht basin is operating contrary to the **city's** zoning regulations and (2) the **city** acted contrary to the requirements of its zoning regulations when it failed to close the illegal private yacht basin, plaintiffs request that the court grant permanent injunctive relief that would enjoin the operation of the private yacht basin which is the subject of this action.

[9] Specifically, the sole reference made by the **City** to *Trianon* in its Answer Brief is as follows: "As the court found, municipalities have discretion as to enforcement of its codes. See *Trianon Park Condo. Assoc. v. City of Hialeah*, 468 So.2d 912 (Fla. 1985) (enforcement of law by regulatory officials such as building inspectors is discretionary)." (Answer Brief, p. 27). "In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved." *Tillman v. State*, 471 So.2d 32, 35 (Fla. 1985).

[10] The majority distinguishes the Florida Supreme Court's opinion in *Fortunato v. City of Coral Gables*, 47 So.2d 321 (Fla. 1950), by stating that it pre-dated *Trianon* and did not consider the principle of separation of powers. In *Boucher*, however, the Court explained that in *Fortunato* the plaintiff "carefully and in thorough detail delineated special and peculiar damages to himself which resulted from the violation of the setback requirements by his next door neighbor," which entitled him to proceed in equity. *Boucher*, 102 So.2d at 136. More significantly, *Fortunato* is still

good law and the fact that it pre-dates *Trianon* is of no moment because the Florida Supreme Court does not overrule itself *sub silentio*. *Arsali v. Chase Home Fin. LLC*, 121 So.3d 511 (Fla.2013); see *Puryear v. State*, 810 So.2d 901 (Fla.2002).

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