IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CASE NO.: 2013-36012 CA 01 (02)

HERMINE RICKETTS and
LAURENCE "TOM" CARROLL,

Plaintiffs,

v.

VILLAGE OF MIAMI SHORES, FLORIDA
and MIAMI SHORES CODE
ENFORCEMENT BOARD,

Defendants.
_____/

DEFENDANTS' RESPONSE MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Defendants Village of Miami Shores, Florida (a/k/a Miami Shores Village) and Miami Shores Code Enforcement Board[1] (collectively, "Miami Shores" or the "Village"), by and through undersigned counsel and pursuant to Fla. R. Civ. P. 1.510 (the "Rules"), submits this Response Memorandum of Law in Opposition (the "Response") to Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment (the "Memorandum")[2] and states:

[1] While Plaintiffs Hermine Ricketts ("Ricketts") and Laurence "Tom" Carroll ("Carroll") (collectively "Plaintiffs") have sued the Miami Shores Code Enforcement Board, it is not a separate or independent entity.

[2] Miami Shores has separately moved to strike Plaintiffs' Memorandum, for a host of reasons, including: **(1)** failing to identify with particularity in their 4-page Motion for Summary Judgment (the "Motion"), what evidence they planned to rely upon; **(2)** the Memorandum and supporting evidence was untimely filed under the Rules; **(3)** Plaintiffs' "expert report" must be stricken since it is unverified and hearsay and the affidavit of Plaintiffs' counsel's paralegal should also be stricken since it contains only hearsay and violates the best evidence rule, and; **(4)** the Memorandum impermissibly asserts a new unpleaded theory that "vegetable" has an unworkable definition (the "Motion to Strike").

I. INTRODUCTION[3]

As their Memorandum, Motion and Complaint each make plain, Plaintiffs' declaratory judgment claims[4] hinge entirely on their legally incorrect premise of an inalienable/fundamental right under the Florida Constitution to grow vegetables in their front yard that simply does not exist under Florida law. As a pure matter of law, there is no "fundamental constitutional right" to have a vegetable garden in one's *front yard*. Simply stated, this fatal defect defeats each of the various "kitchen sink" arguments proffered by Plaintiffs in their Complaint and Memorandum.

Tellingly, Plaintiffs do not cite to a single case recognizing any such fundamental constitutional right, despite the prolixity of their 55-page Memorandum. Instead, highlighting the untenable nature of their position, Plaintiffs assert -- without citation to any authority -- that because the rights they are seeking to invoke under the Florida Constitution are purportedly "specifically enumerated," they are somehow "fundamental" in nature. *See* Memorandum at p. 15.

Plaintiffs argue that Miami Shores' Code of Ordinances, Division 17 (Landscaping), Section 536 (Design Standards) (the "Ordinance"),[5] is unconstitutional, simply because it

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[3] Although Miami Shores maintains that Plaintiffs' Memorandum should be stricken in its entirety, it submits this Response in an abundance of caution. Miami Shores has also moved for summary judgment and hereby incorporates its Amended Motion for Summary Judgment, filed on January 27, 2016, herein (the "Miami Shores MSJ").

[4] Plaintiffs' Complaint alleges claims for violations under the Florida Constitution under: **(1)** the Inalienable Rights Clause (Claim I); **(2)** the Right of Privacy Clause (Claim II); **(3)** the Due Process Clause (Claim III), and; **(4)** the Equal Protection Clause (Claim IV).

[5] *See* Miami Shores Ordinance, Part II, App. A, Art. V, Div. 17, §536(e), a copy of which is attached to the Miami Shores MSJ at Ex. "A." Specifically, the Ordinance requires that all open space in residential yards be planted with certain specified types of living ground cover, which would preclude vegetable gardens. The term "ground cover" is defined as "[a] planting of low growing plants that provide a complete cover over an area in one growing season and including the area of lawful mulch around the plant." The Ordinance also contains an express exception allowing vegetable gardens in rear yards.

prevents them from growing a vegetable garden in their front yard. Plaintiffs assert that under an assortment of various Florida constitutional provisions (inalienable rights, privacy rights, due process and equal protection), addressed below, they are somehow entitled to grow vegetables in their front yard as a fundamental constitutional right. To be clear, **the Village's Ordinance does not deprive Plaintiffs of anything**. Rather, it merely regulates the location of where residents of Miami Shores, including Plaintiffs, can maintain a vegetable garden (*i.e.*, the rear yard).

The basis for all land use regulation is derived from the police power of the government to protect the health, safety and welfare of the public. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (holding zoning constitutional as a valid use of police power). The case law in the Third District is crystal clear that, because no suspect class or fundamental right is implicated, Miami Shores' zoning Ordinance must be upheld if it can be shown that it bears a rational relationship to a legitimate public purpose. *Kuvin v. City of Coral Gables*, 62 So. 3d 625, 632 (Fla. 3d DCA 2010); *see also Silvio Membrano and Florida Ass'n of Vendors, Inc. v. City of Hialeah*, 2016 WL 889178 (Fla. 3d DCA Mar. 9, 2016).

Further, Florida courts have repeatedly held that "measures designed to enhance or maintain the aesthetic appeal of a community are a valid exercise of a local government's police power and these measures bear a rational relationship to a legitimate purpose." *Kuvin*, 62 So. 3d at 633. And as the Third District held in *City of Hialeah*, these choices are not subject to "courtroom fact-finding" because, as courts throughout Florida have held, such legislative pronouncements "may be based on rational speculation unsupported by evidence or empirical data." *City of Hialeah*, 2016 WL 889178 at *9 (citations omitted). Accordingly, even to the extent Plaintiffs can overcome the hearsay problems of their "expert report" (the "Mihalic Report") (*see* Memorandum at Ex. "C"), it is of no moment under the law in any event.

In this case, by enacting the Ordinance at issue, Miami Shores seeks to preserve the residential character of the Village and to enhance the aesthetic appeal of the Village. Any resident of Miami Shores may have a vegetable garden on their residential property, but not in their front yard. Thus, the Ordinance is constitutional and Plaintiffs' claims necessarily fail as a matter of law. Accordingly, Plaintiffs' Motion must be denied.

II. MEMORANDUM OF LAW

A. MOTION FOR SUMMARY JUDGMENT STANDARD

A motion for summary judgment should be granted where the "'pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" *Zabrani v. Riveron*, 495 So. 2d 1195, 1199 (Fla. 3d DCA 1986) (quoting Fla. R. Civ. P. 1.510(c); *see also City of St. Petersburg v. Norris*, 335 So. 2d 333, 334 (Fla. 2d DCA 1976). A trial judge has the power to decide a question of law on summary judgment where the basic facts are clear and undisputed. *See Fredericks v. School Board of Monroe County*, 307 So. 2d 463, 465 (Fla. 3d DCA 1975).

B. PLAINTIFFS' CLAIMS MUST BE ASSESSED UNDER THE RATIONAL BASIS TEST ARTICULATED BY THE THIRD DISTRICT IN *KUVIN* & *CITY OF HIALEAH*

As an initial matter, while Plaintiffs' Memorandum haphazardly sets forth alternative standards of analysis (*i.e.*, rational basis and strict scrutiny) for the purported constitutional violations alleged in their Complaint, the facts of this case clearly require application of the rational basis test, a test that is highly deferential to government regulation and dispositive to Plaintiffs' claims in this matter. As the Third District held in *Kuvin v. City of Coral Gables*, 62

So. 3d 625 (Fla. 3d DCA 2010),[6] unless an ordinance involves a suspect class or a fundamental right -- neither of which Plaintiffs have proffered any record evidence in support of in their Motion and Memorandum -- it need only bear a rational relationship to a legitimate state purpose. *Id.* at 629; *see also Lane v. Chiles*, 698 So. 2d 260, 263 (Fla. 1997) ("because fishing is not a fundamental right, and commercial fisherman do not constitute a suspect class, the rational basis test rather than the strict scrutiny standard applies in the instant case"); *WCI Communities, Inc. v. City of Coral Springs*, 885 So. 2d 912, 914 (Fla. 4th DCA 2004) (when legislation being challenged does not target a protected class, the rational basis test is applied).

As the Third District noted last month in *Silvio Membrano and Florida Ass'n of Vendors, Inc. v. City of Hialeah*, 2016 WL 889178 (Fla. 3d DCA Mar. 9, 2016), "rational basis scrutiny is the most relaxed and tolerant form of judicial scrutiny." *Id.* at *8 (quoting *Kuvin*, 62 So. 3d at 632 (citation and quotations omitted)). In *City of Hialeah*, the Third District affirmed two challenged provisions of the City of Hialeah's Code of Ordinances regulating the activities of street vendors. *Id.* at *1. The Third District in *City of Hialeah* applied the rational basis test and held that the ordinances did not violate the street vendors' due process rights under the Florida Constitution.

In so holding, the Third District noted the five principles of Florida's rational basis test, which collectively serve to extinguish Plaintiffs' claims:

1. "Reasonable" and "Rational" Means "Fairly Debatabale";

2. The Party Challenging the Constitutionality of the Law Bears the Burden of Proof;

[6] Not surprisingly, Plaintiffs' Memorandum conveniently ignores the actual holding of *Kuvin* and instead only cites to dicta in the concurring opinion of Judge Shepard and dissenting opinion of Judge Cortiñas. *See* Memorandum at p. 52.

3. Legislative Findings and Judgments are Not Subject to Courtroom Fact Findings and May be Based on Rational Speculation Unsupported by Evidence or Empirical Data;

4. Legislation Can Pass the Rational Basis Test Even if Experimental

5. The Florida Constitution Does Not Prohibit Legislatures from Passing Unwise Laws.

Id. at *8-*12.

Florida Courts have confirmed that the "reasonable relationship" or "rational basis" standard is the correct test to be used in evaluating statutes and regulations that allegedly infringe on property rights but do not require the absolute destruction of property, such as alleged here by Plaintiffs. *Estate of Magee*, 988 So. 2d 1, 5 (Fla. 2d DCA 2007); *see also Haire v. Fla. Dept. of Agriculture*, 870 So. 2d 774, 783 (Fla. 2004) ("reasonable relationship" or "rational basis" standard applies to review a statute that potentially infringes on (but does not destroy entirely) property rights). Under this deferential standard of review, the Village's Ordinance must be upheld if there is any rational basis between the act and the furtherance of a valid governmental objective. *Haire*, 870 So. 2d at 782.

The first step in determining whether the legislation survives the rational basis test is to identify a legitimate government purpose that the governing body could have been pursuing. *Kuvin,* 62 So. 3d at 629. The second step considers whether a "rational basis exists for the enacting government body to believe that the legislation would further the hypothesized purpose." *Id.*

"Florida has long recognized that local governments may legislate to protect the appearance of their communities as a legitimate exercise of their inherent police power." *Id.* at 634.[7] Additionally, as the Third District held in *Kuvin*, the courts in this state have repeatedly held that "measures designed to enhance or maintain the aesthetic appeal of a community are a valid exercise of a local government's police power and these measures bear a rational relationship to a legitimate purpose." *Id.* at 633.

Thus, when the correct, rational basis test is applied, the Ordinance is revealed to be constitutional as a matter of law. This is especially true because the Ordinance does not restrict Village residents from having a vegetable garden, but merely sets forth where it can be located.

C. PLAINTIFFS CANNOT MEET THEIR HEAVY BURDEN UNDER THE RATIONAL BASIS TEST

As the Third District recently explained in *City of Hialeah*, under the rational basis test, "[t]he burden is on the one attacking the legislative enactment." *City of Hialeah*, 2016 WL 889178 at *9 (citing *Eastern Air Lines, Inc. v. Dep't of Revenue*, 455 So. 2d 311, 314 (Fla.

[7] *See also City of Lake Wales v. Lamar Adver. Ass'n of Lakeland, Fla.*, 414 So. 2d 1030, 1032 (Fla. 1982) (recognizing that "[z]oning solely for aesthetic purposes is an idea whose time has come; it is not outside the scope of the police power") (quotation omitted); *Int'l Co. v. City of Miami Beach*, 90 So. 2d 906, 906 (Fla. 1956) (finding that zoning regulations based on aesthetics are relevant to maintaining the general welfare and well-being of a community); *Metro. Dade County v. Section 11 Prop. Corp.*, 719 So. 2d 1204, 1205 (Fla. 3d DCA 1998) (reinstating administrative agency's denial of a special exception to develop land with an industrial-looking mini self-storage facility, finding that aesthetics may be properly considered by the agency); *Lamar–Orlando Outdoor Adver. v. City of Ormond Beach*, 415 So. 2d 1312, 1318 (Fla. 5th DCA 1982) (upholding an ordinance banning billboards and off-site advertising in Ormond Beach, a primarily residential community, as a valid exercise of the police power); *Moviematic Indus. Corp. v. Bd. of County Comm'rs of Metro. Dade County*, 349 So. 2d 667, 669 (Fla. 3d DCA 1977) (holding that "zoning regulations which tend to preserve the residential or historical character of a neighborhood and/to enhance the aesthetic appeal of a community are considered valid exercises of the public power as relating to the general welfare of the community"); *City of Coral Gables v. Wood*, 305 So. 2d 261, 263 (Fla.3d DCA 1974) (recognizing that "[a]esthetic considerations have been held to be a valid basis for zoning in Florida" and finding that an ordinance prohibiting campers or other vehicles designed or adaptable for human habitation from being kept or parked upon public or private property within the City of Coral Gables, unless confined in a garage, was constitutional).

1984)). Accordingly, the burden is squarely on Plaintiffs, who have not (and cannot) meet this high burden under Florida law in their Complaint, Motion or Memorandum. *Id.*; *see also Lite v. State*, 617 So. 2d 1058, 1060 (Fla. 1993) ("[u]nder the rational basis standard, the party challenging the statute bears the burden of showing that the statutory classification does not bear a rational relationship to a legitimate state purpose."); *Florida High School Activities Ass'n v. Thomas*, 434 So. 2d 306, 308 (Fla. 1983) ("[t]he burden is upon the party challenging the statute or regulation to show that there is no conceivable factual predicate which would rationally support the [law].").

As the Third District noted in *City of Hialeah*:

> This standard is not only designed to be lenient, it is intended to be objective. **The rational basis test does not license a judge to insert courts into a disagreement over policy or politics. It merely requires a judge to decide if reasonable people might disagree.** If we are intellectually honest, we will admit that most legislation easily passes this test.

City of Hialeah, 2016 WL 889178 at *9 (emphasis added).

In their Memorandum, as described below, Plaintiffs impermissibly attempt to ignore the *City of Hialeah* decision by asking this Court to do what it plainly cannot: engage in judicial fact-finding through their "expert report," which is inadmissible in any event.

D. THIS COURT CANNOT ENGAGE IN COURTROOM FACT-FINDING

It is well recognized that "constitutional challenges to statutes or ordinances involve pure questions of law…." *Kuvin*, 62 So. 3d at 629 (citing *Caribbean Conservation Corp. v. Fla. Fish & Wildlife Conservation Commission*, 838 So. 2d 492, 500 (Fla. 2003)). This makes perfect sense as the interpretation of the Ordinance and of the Florida Constitution are purely legal questions not dependent upon issues of fact. Indeed, the Supreme Court of the United States and other courts have repeatedly recognized that, under the rational basis test, a legislative enactment

must be upheld if there is *any* reasonably conceivable state of facts that could provide a rational basis for the legislation. *Federal Communications Commission v. Beach Communications, Inc.*, 508 U.S. 307 (1993) (on rational basis review, legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data); *Heller v. Doe*, 509 U.S. 312 (1993) (legislative body need not actually articulate at any time the purpose or rationale supporting the legislation as the legislative choice "is not subject to courtroom fact finding"); *see also City of Hialeah*, 2016 WL 889178 at *9 (citing *City of Fort Lauderdale v. Gonzalez*, 134 So. 3d 1119, 1121 (Fla. 4th DCA 2014)).

The Third District in *City of Hialeah* further noted that for a court such as this to engage in "courtroom fact-finding" constitutes error:

> Courts deal in findings of concrete facts concerning past events based on record evidence subject to strict standards of reliability, codified in the rules of evidence and procedure. So it is understandable that a court might attempt to import concepts of record-based fact finding into their review of the legislative process. **But this attempt constitutes error.** While courts deal with record-based facts of past events, legislatures generally do not.

Id. at *10 (emphasis added).

In their Memorandum, Plaintiffs attempt to dance around *City of Hialeah* by reluctantly conceding, in a footnote, that Florida's rational basis test "compels courts to avoid considering the propriety of the government's actions." *See* Memorandum at p. 37, n. 23. However, Plaintiffs then pretend as if *City of Hialeah* and the line of cases prohibiting "courtroom fact-finding" do not exist by arguing that this Court should nevertheless rely on the opinion of their expert, which merely attempts to second-guess the Village: "[n]otwithstanding, while the Court may defer to the [Village's] suggestion that the ban is meant to preserve aesthetics, the evidence of how the ban operates confirms that there is no nexus between the ban and its stated goal." *Id.*

(citing to Mihalic Report (Ex. "C" thereto)). Plaintiffs also argue that if there is no aesthetic difference between the items the Village allows and those that it bans in front yards, then there can be no aesthetic justification for the ban and Plaintiffs' front yard garden is therefore not a threat to the aesthetic of the Village. *See* Memorandum at pp. 44-46. Yet again, Plaintiffs engage in fallacious logic.

First, as explained above, the actual terms of the Ordinance require that all open space in a residential yard be planted with approved ground cover in accordance with the Landscape Design Standards set forth in the Ordinance. In actuality, the Ordinance is not an Ordinance "banning" vegetable gardens in the front yard, rather it is an Ordinance precluding anything planted in the front yard other than the approved ground cover specified. The only reference to "vegetable gardens" in the Ordinance is an exception, not a ban, which **allows** vegetable gardens in the rear yard as an exception to the requirement of approved ground cover. *See* Miami Shores MSJ at Ex. "A" thereto. Thus, the predicate assumption upon which Plaintiffs' argument in this regard entirely rests is demonstrably inaccurate based on the face of the Ordinance itself.

Next, Plaintiffs' suggestion is illogical. Essentially Plaintiffs are arguing that, while aesthetics are clearly a legitimate governmental interest as a matter of law (as recognized by numerous courts including the Third District in *Kuvin*), there can be no aesthetic justification for excluding vegetable gardens from the front yard if other (presumably equally aesthetically offensive plantings) are permitted in the front yard.[8] This amounts to an assertion by Plaintiffs that the Village cannot preclude anything deemed aesthetically offensive if they fail to prohibit every other thing which could be characterized as aesthetically offensive. This is simply not the law.

[8] Of course, as already mentioned, nothing other than approved ground cover is permitted in the front yard as apparent on the face of the Ordinance.

To the contrary, the law recognizes that legislative bodies can and often must enact incremental approaches towards pursuit of legitimate governmental objectives. For example, in *Kuvin*, some might argue that there are other vehicles, just as aesthetically displeasing as pick-up trucks, that the City of Coral Gables did not preclude under the Ordinance at issue. However, that in no way diminished the fact that, as recognized by the Third District, the City was well within its constitutional authority in pursuing the legitimate governmental interest of protecting the aesthetic appearance of its community by regulating the parking of pick-up trucks on residential streets. Legislative bodies can address legitimate governmental issues incrementally.

> Equal protection does not force a legislative body to engage in reforms in a comprehensive matter, but instead allows reforms to proceed 'one step at a time.' Thus to be valid a legislative policy does not need to apply equally to all persons. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations - illogical, it may be and unscientific.' '[L]ogical appropriateness of the inclusion or exclusion of objects or person and exact wisdom and nice adaption of remedies are not required.'

Cook v. Stewart, 2014 WL 2959248 (N.D. Fla. May 6, 2014) (citations and quotations omitted). *See also Haves v. City of Miami*, 52 F. 3d 918 (11th Cir. 1995) (under rational-basis scrutiny, legislative branch has "the flexibility to address problems incrementally and to engage in the delicate line-drawing process of legislation without undue interference from the judicial branch. A contrary decision would turn the court into something it should never become: a zoning board of appeals); *South Florida Taxi Cab Ass'n v. Miami-Dade County*, 2004 WL 958073 (S.D. Fla. Mar. 18, 2004) ("According to the Supreme Court and the 11th Circuit the 'legislature must be allowed leeway to approach a perceived problem incrementally' even if its approach is significantly over inclusive or under inclusive. Incremental steps do not render legislation unconstitutional under rational basis scrutiny").

Here, whether or not there is something else equally offensive aesthetically as vegetable gardens in the front yard, which other thing conceivably is not prohibited by the Ordinance (and, as noted, everything other than approved ground cover would be precluded), simply bears no relevancy to any issue of constitutionality.

As a result, as *City of Hialeah* notes "although courts should not act as rubber stamps when analyzing a law under the rational basis test, neither should the courts presume to second guess the legislature by purporting to conduct a courtroom-style evidentiary hearing regarding a legislative finding that is really more of a value judgment than a historical fact" *Id.* at *11. Here, there can be no value judgment, despite Plaintiffs' urging to the contrary. The law is clear that Plaintiffs' claims cannot meet their burden and the Ordinance is a proper exercise of the Village's powers.

E. PLAINTIFFS' ARGUMENTS CONCERNING THE DEFINITION OF "VEGETABLE" AND "VEGETABLE GARDEN" ARE OF NO MOMENT

Plaintiffs' Memorandum and the Mihalic Report each attempt to set forth unsworn testimony that a categorical ban on "vegetables" is impossible to apply consistently. *See* Memorandum at p. 9. Further, the Mihalic Report suggests that the words "vegetable" and "vegetable garden" are subjective terms and hard for most people to understand and therefore a ban on front yard vegetable gardens is "arbitrary and undefinable." *Id.* at pp. 9-10. Then, Plaintiffs attempt to bolster this testimony by referring to deposition testimony of a Village employee, Anthony Flores, in which he stated that his personal understanding of what is a vegetable is based upon what his mother taught him. *Id.* at p. 10.[9]

Plaintiffs' attempt to argue that "vegetable" is inherently arbitrary and undefinable flies squarely in the face of their own allegations at every step in this litigation, where they have

[9] Mr. Flores was expressly **not** deposed as a designated representative to testify on behalf of the Village. *See* Motion to Strike. To the contrary, he was speaking solely on his own behalf.

repeatedly admitted the extent to which they were cultivating "vegetables" on their property. Indeed, Plaintiffs have an entire section of their Complaint titled "Hermine and Tom's Vegetable Garden," which describes Plaintiffs' long history of growing, maintaining and eating, by their own allegations, "approximately 75 different varieties of vegetables," including "nearly a dozen varieties of Asian cabbage." *See* Complaint at ¶¶ 18-43; *see also* ¶¶ 1 ("[Plaintiffs] seek nothing more than to grow vegetables on their own property for their own consumption"), 6 & 7 ("[f]or approximately 17 years, [Plaintiffs] grew vegetables in the front yard of their Miami Shores home in order to feed themselves). Plaintiffs similarly have no trouble recognizing "vegetables" when it suits them in their Memorandum, including in the Affidavit of Carroll, attached thereto as Ex. "B." Plaintiffs have also never disputed that they had a vegetable garden in their front yard.

At the very least, Plaintiffs have not met their burden to demonstrate the absence of a material fact regarding whether or not there is a common workable understanding of what the terms "vegetable" and "vegetable garden" mean. Accordingly, Plaintiffs' Motion must be denied on this basis as well.

F. PLAINTIFFS' MOTION MUST BE DENIED BECAUSE EACH OF THEIR CLAIMS FAIL AS A MATTER OF LAW

1. Count I: Inalienable Rights Clause

In their Memorandum and Count I of their Complaint, Plaintiffs assert that by Miami Shores limiting vegetable gardens to back yards, the Village has somehow deprived Plaintiffs of their "fundamental" right to "peacefully and productively" use their property to feed themselves and also imposed financial costs on them. *See* Complaint at ¶¶ 75-77; *see also* Memorandum at pp. 16-23. However, as Plaintiffs admit in their Complaint and as made clear in the Ordinance, Plaintiffs are in fact allowed to grow vegetables on their property, in their rear yard. *See*

Complaint at ¶¶ 45-46. However, this is not good enough for Plaintiffs who seek to pervert the Florida Constitution and Florida law by having this Court essentially grant them unfettered discretion to do whatever they want on their property, all under the guise of a non-existent "fundamental" right.

Plaintiffs argue in their Memorandum -- again without citation to any relevant authority -- that their right to grow vegetables in their front yard constitutes a "fundamental" right under the Florida Constitution that cannot survive strict scrutiny as it is "presumptively invalid." *See* Memorandum at pp. 16-17. Highlighting the speciousness of this argument and Plaintiffs' position in this case, Plaintiffs liken their right to grow vegetables in their front yard as being a similarly "fundamental" right as a woman's decision whether to continue her pregnancy by citing to *North Florida Women's Health & Counseling Services, Inc. v. State*, 866 So. 2d 612 (Fla. 2003), which held the Parental Notice of Abortion Act unconstitutional on the basis that it violated the Florida Constitution's right of privacy (and does not even mention the Inalienable Rights Clause).

Plaintiffs also melodramatically argue in their Memorandum that "[t]he right to grow food on one's property is a right without which the Republic as we know it could not exist, and the framers of the Florida Constitution protected it as such." *See* Memorandum at p. 23. Plaintiffs posit they are somehow being deprived of the right to possess, use and enjoy their property because the Ordinance prevents "the harmless act of growing food on one's property." However, this is not the case as, once again, the Ordinance merely regulates the **location** of vegetable gardens in the Village and does not prevent Plaintiffs from growing food on the entirety of their property. Plaintiffs' argument, if correct, would likewise give rise to the "fundamental right" to engage in the "harmless act" of, for example, catching and eating fish. Of

course, no such right exists. *See Lane v. Chiles*, 698 So. 2d at 263 ("because fishing is not a fundamental right, and commercial fisherman do not constitute a suspect class, the rational basis test rather than the strict scrutiny standard applies in the instant case").

Article I, Section 2, of the Florida Constitution provides to all persons "the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property…." Fla. Const. Art. I, § 2; *see also In re Estate of Magee*, 988 So. 2d 1, 2 (Fla. 2d DCA 2007). There is no case law in Florida that even comes remotely close to construing this provision as creating any "fundamental right" to grow vegetable gardens in a residential front yard. The courts in this state have repeatedly held that "measures designed to enhance or maintain the aesthetic appeal of a community are a valid exercise of a local government's police power and these measures bear a rational relationship to a legitimate purpose." *Kuvin*, 62 So. 3d at 633.

Plaintiffs' claim under the Inalienable Rights Clause is subject to summary judgment upholding the Ordinance, because the interpretation of the Ordinance and of the Florida Constitution are purely legal questions not dependent upon issues of fact. *See Kuvin*, 62 So. 3d at 629 (citing *Caribbean Conservation Corp. v. Florida Fish & Wildlife Conservation Commission*, 838 So.2d 492, 500 (Fla. 2003)). Under the rational basis test, a legislative enactment must be upheld if there is *any* reasonably conceivable state of facts that could provide a rational basis for the legislation. *Federal Comm. Commission v. Beach Comm., Inc.*, 508 U.S. 307, 315 (1993) (on rational basis review, legislative choice is not subject to courtroom fact finding and may be based on rational speculation unsupported by evidence or empirical data); *Heller v. Doe*, 509 U.S. 312, 320 (1993) (legislative body need not actually articulate at any time the purpose or rationale supporting the legislation as the legislative choice "is not subject to

courtroom fact finding"); *see also City of Fort Lauderdale v. Gonzalez*, 134 So. 3d 1119, 1121-22 (Fla. 4th DCA 2014) (same) (*citing Beach Comm.*).

Thus, the Ordinance is constitutional as a matter of law. It does not restrict the Village's residents from having a vegetable garden, but merely sets forth where it can be located. Plainly, therefore, Plaintiffs are not entitled to summary judgment on this claim.

2. Count II: Right of Privacy Clause

Plaintiffs next allege that the Ordinance, by limiting vegetable gardens to rear yards only, somehow violates Plaintiffs' "fundamental" privacy rights under the Florida Constitution to make decisions about what foods to grow and consume on their own property and to provide to their families. *See* Complaint at ¶87. Plaintiffs also allege that they are deprived of their preferred source of sustenance and the ability to choose the foods they eat. *Id.* at ¶88. In their Memorandum, Plaintiffs argue that "by outlawing the sole source of Hermine and Tom's vegetable diet -- and the primary source of their overall diet -- the [Village] has deprived them of the freedom to grow and consume the foods of their choice." *See* Memorandum at p. 23. This is absurd.

Once again, Plaintiffs attempt to justify their position by citing to an inapposite case that has nothing to do with Plaintiffs' right to grow vegetables in the front yard, but rather concerns an actual fundamental right under the Florida Constitution (*i.e.*, the right to terminate a patient's artificial life support). *See In re Guardianship of Browning*, 568 So. 2d 4 (Fla. 1990) (holding that a surrogate or proxy may exercise constitutional right of privacy for one who has become incompetent and who, while competent, expressed his or her wishes orally or in writing). In citing to *Browning*, Plaintiffs attempt to equate their desire to consume vegetables from their front yard vegetable garden to *Browning*, which concerned a comatose person's medical

treatment. *Id.*; *see also* Memorandum at pp. 25-26.

However, Plaintiffs miss the mark because, again, as Plaintiffs admit in their Complaint and as made clear in the Ordinance, Plaintiffs *are* allowed to grow vegetables on their residential property -- in their rear yard. *Id.* at ¶¶ 45-46. Thus, Plaintiffs' own Complaint and Memorandum shows that the Ordinance does not deprive them of the right to make decisions about what foods to grow and consume on their own property and provide to their families. Neither does the Ordinance deprive them of their preferred source of sustenance. "This right of privacy protects Florida's citizens from the government's *uninvited observation* of or interference in those areas that fall within the ambit of the zone of privacy afforded under the provision." *City of Miami v. Kurtz*, 653 So. 2d 1025, 1027 (Fla. 1995) (citing *Shaktman v, State*, 553 So. 2d 148 (Fla. 1989) (emphasis added)).

However, Florida's privacy right is not intended to be a guarantee against all intrusion into the life of an individual. *Id.* at 1028 (citing *Florida Board of Bar Examiners re: Applicant*, 443 So. 2d 71 (Fla. 1983)). To determine in this case whether Plaintiffs rights under Article I, Section 23, have been violated, the Court must first determine whether a governmental entity is intruding into an aspect of Plaintiffs' life in which they have a "legitimate expectation of privacy." *Id.* (court was required to first determine whether job applicant of City of North Miami was entitled to protection under Article I, Section 23, by determining whether a governmental entity was intruding into an aspect of the Plaintiffs' life in which they have a "legitimate expectation of privacy"). Then, only if the court finds in the affirmative, the court must determine whether a compelling state interest exists to justify that intrusion and, if so, whether the least intrusive means is being used to accomplish this goal. *Id.*

In the instant matter, the Village's Ordinance does not intrude into an aspect of the

Plaintiffs' life in which they have a legitimate expectation of privacy. This is so because whether Plaintiffs have a vegetable garden in their front yard is open and notorious for all to see. Even Plaintiffs state in their Complaint that they often received comments about their front yard vegetable garden from neighbors and people who were passing by. *See* Complaint at ¶ 37. Plainly then, given that Plaintiffs reveal to everyone who happens to see their house whether they have a front yard vegetable garden, Plaintiffs have no reasonable expectation of privacy in maintaining a front yard vegetable garden.

Further, the Ordinance does not prohibit Plaintiffs from deciding what foods to grow and consume on their property and to provide to their families. Again, the Ordinance allows Plaintiffs to grow any vegetables they wish, in their rear yard (or even indoors). Likewise, the Ordinance does not deprive Plaintiffs of their preferred source of sustenance and the ability to choose the foods they eat. To the extent that they use their rear yard for the purpose of growing vegetables, they may choose the foods from there or they may grow them on other properties or purchase them from wherever else they desire.

Simply stated, there is and can be nothing "private" about a front yard vegetable garden. As the Village's Ordinance is not requiring Plaintiffs to disclose information about themselves and allows vegetable gardens to be grown in rear yards, Plaintiffs simply have no privacy right in a vegetable garden in their front yard. Count II of Plaintiffs' Complaint fails as a matter of law.

3. Count III: Due Process Clause

In addition to the fatal deficiencies in Plaintiffs' inalienable rights and privacy claims already detailed above, it is also clear that Plaintiffs' claim under the Florida Constitution's Due Process Clause similarly fails as a matter of law. The Due Process Clause states that "[n]o person shall be deprived of life, liberty or property without due process of law…." Fla. Const.

Art. I, § 9. Plaintiffs allege in their Complaint that substantive due process "protects, among other things, the right to be free from arbitrary and unreasonable government interference." See Complaint at ¶ 95. Further, they allege that the ban on front-yard vegetable gardens is arbitrary and unreasonable and violates the due process clause. *Id.* at ¶¶ 97, 102.

With respect to substantive due process, a statute is valid if it bears a rational relation to a legitimate legislative purpose in safeguarding the public health, safety, or general welfare and is not discriminatory, arbitrary, or oppressive. *Haire v. Fla. Dept. of Agriculture and Consumer Services*, 870 So. 2d 774, 782 (Fla. 2004) (reasonable relationship test applied to substantive due process challenge).

Again, Plaintiffs' Complaint completely ignores the fact that measures designed to enhance or maintain the aesthetic appeal of a community, such as the Ordinance at issue here, are a valid exercise of a local government's police power and "these measures bear a rational relationship to a legitimate purpose." *Kuvin,* 62 So. 3d at 634; *Wood,* 305 So. 2d at 263. Therefore, Count III of Plaintiffs' Complaint for violation of substantive due process fails since an ordinance, such as the Ordinance at issue here, based on aesthetic grounds alone is a valid exercise of a city's police power. *Merritt v. Peters*, 65 So. 2d 861, 862 (Fla. 1953).

As set forth more fully above, Florida has long recognized that local governments may legislate to protect the appearance of their communities as a legitimate exercise of their inherent police power, and upheld zoning regulations that tend to preserve the residential character of a neighborhood and/or to enhance the aesthetic appeal of a community. *See Kuvin*, 62 So. 3d at 634.

Miami Shores has an interest in maintaining certain basic residential community standards by limiting vegetable gardens to locations other than the front yard. Additionally, the

Ordinance does not prohibit Plaintiffs or other homeowners from maintaining a vegetable garden in the rear yard of their property. Therefore, since this Ordinance, on its face, could reasonably have been designed to maintain the aesthetic appeal of the community, it bears a rational relationship to a legitimate purpose as a matter of law. This is so, even if, as the Third District pointed out in *City of Hialeah* "reasonable people might disagree." *City of Hialeah*, 2016 WL 889178 at *9.

4. Count IV: Equal Protection Clause

Plaintiffs allege in Count IV of their Complaint that application of the Ordinance violates the Equal Protection Clause of the Florida Constitution, because it purportedly creates an arbitrary legal distinction between people who grow vegetable plants in their front yard and people who grow other plants in their front yard. *See* Complaint at ¶¶ 109-111.

An equal protection analysis is appropriate only where similarly situated persons are being treated differently. *Fredman v. Fredman*, 960 So. 2d 52, 59 (Fla. 2d DCA 2007). "Equal protection is not violated merely because some persons are treated differently than other persons. It only requires that persons similarly situated be treated similarly." *Id.* (quoting *Troy v. State*, 948 So. 2d 635, 645 (Fla. 2006)). Here, the Ordinance treats all residents of Miami Shores the same.

Assuming *arguendo* that similarly situated persons are being treated differently, once again this case does not involve a "fundamental" right (or suspect class), so the rational basis analysis discussed above would apply. As set forth above, unless an ordinance involves a suspect class or a fundamental right, **none of which Plaintiffs can show here**, the ordinance need only bear a rational relationship to a legitimate state purpose. *Kuvin*, 62 So. 3d at 629; *Lane v. Chiles*, 698 So. 2d at 263 (because fishing is not a fundamental right and commercial

fisherman do not constitute a suspect class, the rational basis test should be applied.); *WCI Communities, Inc.*, 885 So. 2d at 914 (when the legislation being challenged does not target a protected class, the rational basis test is applied).

Further, as previously stated, the Supreme Court of Florida has set forth that the "reasonable relationship" or "rational basis" standard is the proper test to be used in evaluating statutes and regulations that allegedly infringe on property rights but do not require the absolute destruction of property. *Id.* at 5; *see also Haire v. Fla. Dept. of Agriculture*, 870 So. 2d 774, 783 (Fla. 2004) ("reasonable relationship" or "rational basis" standard applies to review a statute that potentially infringes on (but does not destroy entirely) property rights). The Ordinance at issue does not violate Florida's equal protection clause.

Moreover, in this case, similarly situated persons simply are not being treated differently. As alleged in the Complaint and Memorandum, Plaintiffs claim that they, as people who want to grow vegetables in their front yard, are being treated differently than people who grow other flowers or fruit in their front yards. However, the distinction that the Ordinance is drawing is not between persons, but rather, between the front yard and the back yard. Thus, there can be no equal protection violation.[10]

Additionally, even if the Court were to somehow find that similarly situated persons are being treated differently, under the rational basis test which applies to this matter, this Court must uphold the Ordinance if the classification bears any rational relationship to a legitimate governmental objective. *Fl. Dept. of Children and Families v. Adoption of X.X.G. and N.R.G.*, 45 So. 3d 79, 83 (Fla. 3d DCA 2010).

[10] To further illustrate, Plaintiffs' argument, if correct, would preclude the State of Florida, on equal protection grounds, from treating people who want to travel the highways at 100 mph differently than those who observe the speed limit. The Ordinance, like the traffic laws, treats people based upon their conduct, not based upon who they are.

Again, as set forth above, "Florida has long recognized that local governments may legislate to protect the appearance of their communities as a legitimate exercise of their inherent police power." *Kuvin*, 62 So. 3d at 634. Further, zoning regulations that tend to preserve the residential character of a neighborhood and/or to enhance the aesthetic appeal of a community are constitutional. Therefore, since this Ordinance tends to maintain the aesthetic appeal of the community, it bears a rational relationship to a legitimate purpose and Count IV of Plaintiffs' Complaint for violation of the equal protection clause fails as a matter of law.

III. CONCLUSION

For the reasons set forth above, Plaintiffs have no fundamental right under the Florida Constitution to have a vegetable garden in their front yard, and thus, their Motion must be denied as a matter of law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via eservice@myflcourtaccess.com this 28th day of April, 2016 on: **(1)** Ari Simon Bargil (abargil@ij.org), Institute for Justice, 999 Brickell Avenue - Suite 720, Miami, Florida 33131 and **(2)** Michael Bindas (mbindas@ij.org), Institute for Justice, 10500 Northeast 8th Street - #1760, Bellevue, Washington 98004.

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