IN THE DISTRICT COURT OF APPEAL
FOR THE STATE OF FLORIDA
THIRD DISTRICT

HERMINE RICKETTS and LAURENCE CARROLL

Appellants,

vs.

VILLAGE OF MIAMI SHORES, FLORIDA, et al.

Appellees.

CASE NO.: 3D16-2212

L.T. NO.: 13-36012

On Appeal from the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida
Case No. 13-36012
The Honorable Monica Gordo

APPELLANTS' REPLY BRIEF

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I. STATEMENT OF CORRECTED FACTS

This appeal stems from a lawsuit filed by the Appellants ("Hermine and Tom"), a married couple residing in Miami Shores, challenging the constitutionality of a law of the Appellee Village of Miami Shores ("the City"), which bans front-yard vegetable gardens ("the Ban").[1]

Despite the City's repeated denial, there is a ban on front-yard vegetable gardens in Miami Shores.[2] The City's contrary assertion is belied by: (1) the plain language of the City's code (R. 11, 16); (2) the sworn testimony of the City's Chief Code Enforcement Officer (R. 711); and (3) the fact that the City cited Hermine and Tom for violating this prohibition (R. 86, 88-89) (courtesy notice stating "Vegetable gardens in front yard prohibited"). Thus, the post hoc litigation position crafted by the City—that the Ban is merely "an exception" to a purportedly broader "ground cover" requirement—is simply false.[3] In fact, the City has *admitted* that

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[1] Hermine and Tom incorporate by reference the statement of facts from their Initial Brief. However, in light of several incorrect statements by the City, Hermine and Tom provide a brief statement of corrected facts herein.

[2] Hermine and Tom use the term "vegetable" in this brief, as they have throughout this litigation, for the obvious reason that this case involves a ban on so-called "vegetable gardens." The use of this term is not, as the City contends, a tacit concession that the term is unambiguous or that the Ban is otherwise constitutional.

[3] The very structure of Section 536 establishes that subpart "e" (prohibiting front-yard vegetable gardens) simply cannot be read as an exception to subpart "a" (requiring ground cover). These provisions are independent subparts *within a single ordinance*.

this position was retroactively formulated for this litigation. (R. 727, 829 n.15). In reality, the City has never enforced, or even threatened to enforce, its "ground cover" rule against Hermine and Tom or anyone else. (R.715).

Several other of the City's misstatements of fact also require correction:

- The City states that Hermine and Tom chose to construct a swimming pool in their rear yard instead of planting a vegetable garden. *See* Answer 19. However, the couple decided to construct a swimming pool in their rear yard *only after* their unsuccessful attempt to grow vegetables there. (R. 811 n.7).

- The City states the expert report of Falon Mihalic is unsworn. Answer at 37. However, it is signed, stamped, and includes a sworn affidavit. (R. 775-95).

- The City states that Hermine and Tom provide no argument in support of their appeal of the trial court's denial of their motion to compel. *See* Answer n.3. However, the couple devotes an entire section of the Initial Brief to this issue. *See* Initial Brief ("Initial Brief"), Part V.A.1.

- The City states that Hermine and Tom have not sufficiently pled that the term "vegetable," as used in the Ban, is vague. *See* Answer at 32-37. However, the couple has pled that the Ban is arbitrary. (R. 16, 23-25). They were not further required to spell out each reason that this is so, *Agrofollajes, S.A. v. E.I. Du Pont De Nemours & Co., Inc.*, 48 So. 3d 976, 994-96 (Fla. 3d DCA 2010), although the fact that the term "vegetable" defies any objective definition is certainly one such reason.

II. SUMMARY OF ARGUMENT

This case is about whether the City's ban on front-yard vegetable gardens violates Hermine and Tom's rights under the Florida Constitution. To that end, this Court must consider whether the Ban is properly tailored to a sufficiently weighty governmental interest (purportedly, aesthetics). As to Hermine and Tom's equal protection and substantive due process claims, however, the City simply dodges

this critical analysis regarding the Ban's means/ends fit. In fact, the City includes *no discussion whatsoever* to support its assertion that the Ban bears an actual relationship to aesthetics. Nor does the City attempt to refute any of the unrebutted evidence establishing the lack of such a connection.[4] Instead, the City focuses almost exclusively on the legitimacy of the interest asserted and the ostensibly boundless leeway the City enjoys whenever it purports to be acting in furtherance of that interest. Under the rational basis test, Hermine and Tom prevail, as they have shown that there is no relationship between the Ban and aesthetics.

Moreover, the City does not even attempt to address its burden under strict scrutiny, which is the test that *should* apply in this case given the Ban's violation of Hermine and Tom's fundamental property and privacy rights. And the City's remaining arguments—which attempt to divert this Court's attention to baseless procedural and jurisdictional matters—fail as a matter of law.

III. ARGUMENT

A. UNDER ANY PROPER CONSTRUCTION OF THE REASONABLE RELATIONSHIP TEST, HERMINE AND TOM HAVE MET THEIR BURDEN.

To resolve the equal protection and due process claims in this case, this Court must determine whether the Ban "bears a reasonable relationship to a

[4] Although the City raises numerous procedural and technical challenges to the evidence in the record, it never suggests that any of the evidence is incorrect or untrue.

permissible governmental objective" and is not "discriminatory, arbitrary, or oppressive." *Lane v. Chiles*, 698 So. 2d 260, 263 (Fla. 1997). Evidence and facts matter in this analysis. Yet the City provides no argument or analysis to demonstrate that the Ban satisfies this test or to refute Hermine and Tom's demonstration that it does not. Rather, the City: (1) argues that government has free rein whenever it claims to act in furtherance of aesthetics; (2) excuses the utterly arbitrary lines drawn by the Ban as a permissible "incremental" approach to legislation; and (3) claims cover for the Ban's irrationality in this Court's decision in *Membreno v. City of Hialeah*, 188 So. 3d 13, 28 (Fla. 3d DCA 2016), *review denied,* No. SC16-616, 2016 WL 3486427 (Fla. June 27, 2016). As discussed below, each of the City's three tactics fails.

1. "Aesthetics" Is Not a Magic Word That Resolves Any Constitutional Inquiry in Favor of the City.

The City offers a lengthy argument on the non-issue of whether aesthetics is a legitimate government interest. *See* Answer 22-28.[5] But nowhere does the City actually answer the *relevant* question of whether there exists a link between the Ban and that interest. *N. Broward Hosp. Dist. v. Kalitan*, No. SC15-1858, 2017 WL 2481225, at *7 (June 8, 2017) (holding that, "we observe[] a lack of evidence

[5] Hermine and Tom have not asserted that a municipality may not pass aesthetics-based ordinances. Rather, they simply take the unremarkable position that such ordinances—like all legislation—must meet baseline standards of constitutionality.

demonstrating how the statutory cap alleviated this crisis, and thus determine[] that the cap fail[s] the rational basis test.") (explicitly applying *Estate of McCall v. U.S.*, 134 So. 3d 894 (Fla. 2014), to strike down a cap on medical malpractice damages). Instead, the City asserts that because it is purportedly acting in furtherance of aesthetics, and aesthetics is a legitimate government interest, it wins. *See* Answer at 41-42 ("[A]esthetics is a legitimate government purpose. The [Ban], therefore, is rationally related to the health and welfare of the residents in the Village."). But "merely because the [government] has determined [something] unattractive to the eye, it does not give the [government] carte blanche to eliminate the perceived eyesore." *Signs Inc. of Fla. v. Orange Cty.* 592 F. Supp. 693, 697 (M.D. Fla. 1983); *see also Pagan v. Fruchey*, 492 F.3d 766, 776 (6th Cir. 2007) (holding that the mere "invocation of aesthetic objectives" does not carry with it "some talismanic quality" that "legitimizes all . . . regulation"). Indeed, Florida courts have repeatedly invalidated regulations under the reasonable relationship test even when those regulations purportedly furthered aesthetics.[6]

[6] The Fourth District Court of Appeals very recently struck down such an ordinance, finding that the existence of other aesthetics-based regulations belied the city's aesthetics justification. *Sears, Roebuck & Co. v. Forbes/Cohen Fla. Props.*, No. 4D16-2314, 2017 WL 2983290, at *6 (July 12, 2017) (holding that the existing zoning code "already sets forth aesthetic standards . . . [and] the City has failed to show how the Resolution accomplishes anything to further its supposed purpose beyond what [the existing code] already accomplishes."). Hermine and Tom have raised very similar arguments here. (R. 565-67); Initial Br. Part II.B.3(b).

For example, in *Eskind v. City of Vero Beach*, 159 So. 2d 209 (Fla. 1963), the Florida Supreme Court struck down a purportedly aesthetics-based regulation. The Court in *Eskind* held that the law—which distinguished between two aesthetically *indistinguishable* types of advertisements—was unconstitutional specifically because there was no connection between the distinction drawn and aesthetics. *Id*. at 211 ("It seems obvious to us that a rate sign in front of a motel is no more offensive to the aesthetic sensibilities . . . than would be a rate sign in the same immediate area advertising the charges of the other business activities."). That is *exactly* the sort of distinction that the City's Ban on front-yard vegetable gardens draws: It prohibits so-called "vegetables" while allowing identical, non-edible varieties of the very same plants. (R. 563; 676; 738; 791; 824; 898).

Similarly, in *Campbell v. Monroe County*, 426 So. 2d 1158 (Fla. 3d DCA 1983), this Court determined that a law which prohibited one type of structural façade, even though it was physically identical to another which was permitted, was "arbitrary and discriminatory," and thus void, because it had no connection to aesthetics. *Id*. at 1161. The Court relied heavily on the government's code enforcement officer, who admitted that "from an aesthetic point of view it doesn't make any difference because [the façades] both look the same," and that "you can stand twenty feet away and not tell the difference." *Id*. That is precisely the type of testimony given by the City's Chief Code Enforcement Officer in this case: Officer

Flores testified that, "to the naked eye," legal "ornamental plants and [illegal] edible plants can often be confused with one another," and that he "pass[ed] by [Hermine and Tom's property] *daily*," without ever noticing the alleged violation. (R. 709-10; 738).[7] As it did in *Campbell*, this Court should thus conclude that a law that draws such an arbitrary distinction cannot bear a rational connection with aesthetics. *See also Sunshine Key Assocs. v. Monroe Cty.*, 684 So. 2d 876 (Fla. 3d DCA 1996); *Dennis v. City of Key West*, 381 So. 2d 312 (Fla. 3d DCA 1980); *Kuster Enters., Inc. v. Fla. Dep't of Transp.*, 357 So. 2d 794 (Fla. 1st DCA 1978).[8]

The City attempts to distinguish *Campbell* and *Eskind*, but its arguments are unavailing. For example, it maintains that *Eskind* was actually a free speech case. *See* Answer 29 (arguing that "while not discussed," the law "obviously involved" a free speech violation). The City is correct that free speech protections were, to say the least, "not discussed" in *Eskind*. *See* Answer at 29. Rather, it was a straight-up rational basis case, and the Court held there was "no reasonably identifiable rational relationship between" the law and aesthetics. *Eskind*, 159 So. 2d at 212.

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[7] Attempting to divert focus away from the arbitrary distinctions it draws among visually identical *plants*, the City argues that "[t]here is no suggestion that the Ordinance allows plantings in the front yard which are visually indistinguishable from vegetable *gardens*." Answer at 30 (emphasis in original). But just as edible plants deemed "vegetables" *are* visually indistinguishable from their ornamental varietals (R. 566; 675; 790; 824), *groupings* of those edible plants will necessarily be indistinguishable from *groupings* of their ornamental varietals.

[8] The City disregards these cases in a two-sentence footnote. Answer, n.11.

Similarly, the City attempts to make much of the fact that *Campbell* was decided on statutory grounds. *See* Answer 29. Yet *Campbell* relied squarely on Florida constitutional jurisprudence in its analysis, *see Campbell*, 426 So. 2d at 1161, and held that the challenged law was "arbitrary and discriminatory" because there was "no showing of a relationship of [the law] to aesthetic[s]."

In the end, the City offers no explanation as to how the Ban reasonably relates to its claimed interest in aesthetics; rather, it provides "recitations amounting only to conclusions" of the sort that the Florida Supreme Court forbade in *McCall*, 134 So. 3d at 919 (Pariente, J., concurring), and recently reaffirmed in *Kalitan*. The City's only response is to try to discount *McCall*, claiming it was a fractured opinion that does not authorize "courtroom fact-finding"; the City thus invites this Court to uphold the Ban even if it is "unsupported by evidence." Answer at 26. But this argument—already incorrect under *McCall*—has since been completely foreclosed by the Court's follow-up decision in *Kalitan*, a decision in which a *majority* of the Florida Supreme Court fully embraced the shared rational basis analyses of the plurality and concurring opinions in *McCall*. *Kalitan*, 2017 WL 2481225, at *7-8 (holding, *in a four-judge majority opinion*, that a law failed the rational basis test, because in *McCall*, "[t]he concurring in result opinion reiterated the plurality's observation that *there is no mechanism in place to assure*

that . . . [the law acts] in accordance with [its] stated purpose.").[9] And, as the Court in *Kalitan* went on, "even if the . . . cap were rationally related to a legitimate government purpose," it remains true that there "is *no evidence of* a continuing . . . crisis that would justify the arbitrary [law]." *Id*. at *8. Both are true with respect to the Ban: there is *no evidence* that the Ban is reasonably related to aesthetics, and there is *no evidence* that "vegetables" pose an aesthetic threat to the City.

2. The Power to Regulate Incrementally Does Not Insulate Laws That Bear No Rational Relationship to Their Purported End.

Equally unavailing is the City's attempt to defend the Ban's arbitrary distinction as a permissible "incremental" approach to legislation. Answer at 31-32. Even if the Ban is an "incremental" measure, it still must meet the same basic constitutional criteria discussed above. *See Kalitan*, 2017 WL 2481225, at *7 (characterizing a law as "unreasonable and arbitrary," where it was nothing more than "a speculative experiment.") (emphasis in original).

In any case, it is unclear whether a blanket prohibition can even be logically classified as an "incremental" measure. In fact, blanket bans have been found to be unconstitutional precisely because of how *overbroad* they are. For example, in *Proctor v. City of Coral Springs*, 396 So. 2d 771, 772 (Fla. 4th DCA 1981), the

[9] Accordingly, the Florida Supreme Court has implicitly overruled *Membreno* to the extent that *Membreno* suggests (as the City argues here, *see* Answer at 27) that *McCall* is to be afforded diminished precedential value because "only one other justice joined the [plurality] opinion." *Id*. (quoting *Membreno*, 188 So. 3d at 30).

court struck down a blanket ban on so-called "commercial vehicles," holding that it was "unreasonable and unconstitutional" to classify all pick-up trucks as "commercial vehicles." Like the blanket ban in *Proctor*, which ignored the actual aesthetic factors that render a vehicle "commercial" in nature, the Ban at issue in this case prohibits *all* vegetable gardens without any regard for what they look like (*e.g.*, their height, setback, etc.) or how well they are manicured. *See id*. at 774 (finding that aesthetics is not served where "[t]he ordinance does not speak in terms of weight, width or other relevant concerns." (Hurley, J., concurring)). As a result of the Ban's disregard for any true measure of aesthetics, it actually prohibits many attractive landscapes—simply because the property owner has elected to attractively grow what the City deems "vegetables" instead of something else. This is precisely the sort of overinclusivity that the Fourth DCA held was impermissible in *Proctor*. And in this regard, the Ban is not an "incremental" step at all.[10]

To be sure, "[t]raditional equal protection analysis does not require that every classification be drawn with precise 'mathematical nicety.'" *USDA v. Moreno*, 413 U.S. 528, 538 (1973). But "the classification here in issue is not only 'imprecise,' it is wholly without any rational basis." *Id.* It therefore cannot stand. *Moore v. City of East Cleveland*, 431 U.S. 494, 508 (1977) ("The zoning power is not a license for local communities to enact senseless and arbitrary restrictions").

[10] The Ban is unconstitutionally underinclusive as well. Initial Br. Part V.A.2(b).

3. This Court's Ruling in *Membreno* Does Not Compel a Determination of Constitutionality.

The City next makes the extraordinary argument that the lack of evidence showing that the Ban actually furthers aesthetics—and, more importantly, the abundant evidence demonstrating that it does not—is entirely irrelevant. The City baldly insists that this Court is powerless to invalidate the Ban because "what is being regulated is aesthetics . . . and the judiciary is not at liberty to second-guess this decision." Answer at n.11. Such a position is at odds with the very case the City cites to support it, *Membreno v. City of Hialeah*. As *Membreno* pointedly held, "courts should not act as rubber stamps when analyzing a law under the rational basis test." *Id*. at 28 (citing *McCall*, 134 So. 3d at 919). And the Florida Supreme Court has since reaffirmed, unequivocally, this basic truism—that is, that evidence matters in rational basis cases. *Kalitan*, 2017 WL 2481225, at *8 ("We . . . conclude that *because there is no evidence* . . . justifying the arbitrary and invidious discrimination . . . there is no rational relationship."

Hermine and Tom are not, as the City suggests, asking this Court to resolve "a disagreement over policy or politics," *Membreno*, 188 So. 3d at 26. Rather, they ask that the Court evaluate the relationship between the Ban and aesthetics in light of the evidence. To that end, Hermine and Tom have proffered extensive evidence demonstrating the utter disconnect between the Ban and its purported ends, while the City has made the strategic decision to proffer no evidence whatsoever on that

score. As the Florida Supreme Court and this Court have held, the courts are not a "rubber stamp." *McCall*, 134 So. 3d at 919 (Pariente, J., concurring); *Membreno*, 188 So. 3d at 28. And this Court should resist the City's request that it act like one.

B. HERMINE AND TOM HAVE SEPARATELY DEMONSTRATED THAT THE BAN DOES NOT SURVIVE STRICT SCRUTINY.

Even if this Court disagrees and upholds the Ban under the reasonable relationship test, however, it still must address Hermine and Tom's fundamental rights claims and the strict scrutiny they trigger.

The City insists that the fundamental right to "acquire, possess and protect property," Fla. Const. art. I, § 2, is not implicated by the Ban. In a parade-of-horribles argument, it warns that recognizing a fundamental right to make peaceful and productive use of one's property will "give rise to a fundamental right to maintain and butcher livestock in a residential district." *See* Answer n.4. Further, the City argues that using one's property to feed one's self is not protected by the Florida Constitution because "fishing is not a fundamental right." Answer at 16.[11] Both arguments are entirely baseless: the government has a far weightier interest in regulating the waste associated with livestock and their slaughter than in regulating

[11] The City also incorrectly argues that strict scrutiny is not appropriate because the Ban does not "absolutely destroy" Hermine and Tom's property. *See* Answer at 15. This position is simply wrong, as the Florida Supreme Court has applied strict scrutiny to regulations that merely "restrain," but do not "destroy," property. *See, e.g.*, *Dep't of Law Enf. v. Real Prop.*, 588 So. 2d 957, 964 (Fla. 1991).

zucchini, and fish is a public resource, not private property. *Citizens for Better Forestry v. USDA*, 481 F. Supp. 2d 1059, 1064-65 (N.D. Cal. 2007).

Next, the City insists that the right of privacy—that is, "the right to be let alone and free from governmental intrusion into [a] person's private life," Fla. Const. art. I, § 23—does not encompass the right to make decisions about what foods to grow and consume because the right is essentially nothing more than a general right to maintain secrecy and be free from warrantless inspection. *See, e.g.*, Answer at 18 (arguing that Hermine and Tom have no "expectation of privacy" because their garden is "open and notorious for all to see."). The City is wrong: "[p]rivacy has been used interchangeably with the common understanding of the notion of 'liberty,' and both imply a fundamental right of self-determination." *In re Browning*, 568 So. 2d 4, 9-10 (Fla. 1990).

Because the Ban impinges fundamental rights, strict scrutiny applies. *N. Fla. Women's Health & Couns. Servs., Inc. v. State*, 866 So. 2d 612, 635 (Fla. 2003). And as the City offers no evidence under this standard, Hermine and Tom prevail.

C. THE CITY'S PROCEDURAL ARGUMENTS FAIL AS A MATTER OF LAW.

Finally, there is no merit to the host of procedural arguments advanced by the City. With respect to the issue of *res judicata*, *see* Answer 42-44, the City rehashes the exact same arguments that have now twice failed in this case (R. 170-71; 481-82). Moreover, the City's *res judicata* arguments are no longer proper, as

the City's failure to cross-appeal on this issue precludes the City from rearguing it now. *See Campbell v. State*, 9 So. 3d 59, 61 (Fla. 1st DCA 2009) ("[F]ailure to raise [an] issue on appeal . . . effect[s] a waiver of future arguments regarding that issue."); *see also Hous. Auth. of Kaw Tribe v. City of Ponca City*, 952 F.2d 1183, 1195-96 (10th Cir. 1991) (requiring cross-appeal to preserve *res judicata* defense).

Even if the issue of *res judicata* were properly before this Court, the City's argument—that Hermine and Tom's claims are barred because they should have pursued a code enforcement appeal—is squarely foreclosed by *Wilson v. County of Orange*, 881 So. 2d 625, 632 (Fla. 5th DCA 2004) (holding that "there [wa]s no identity of the causes of action" because "[t]he original action was a code enforcement proceeding," whereas "the second action . . . challenged the facial constitutionality of the applicable statutes and ordinances."); *see also City of Ft. Lauderdale v. Scott*, 773 F. Supp. 2d 1355, 1359 (S.D. Fla. 2011) (applying *Wilson* to reject *res judicata* defense to as-applied constitutional challenges that could have been, but were not, brought in a code enforcement appeal); *Zureikat v. Shaibani*, 944 So. 2d 1019, 1023 (Fla. 5th DCA 2006); *Seminole Entm't, Inc. v. City of Casselberry*, 866 So. 2d 1242, 1245 (Fla. 5th DCA 2004).

Finally, the City invites this Court to disregard, on procedural grounds, the unrebutted testimony in this case. With respect to the testimony of Officer Flores, such evidence is unquestionably relevant "with respect to the custom and practice

of the [City's] code enforcement office." *Oracle v. Santa Cruz Cty. Planning Dep't*, No. 5:09-cv-00373 JF (PVT), 2010 WL 4704465 (N.D. Cal. Nov. 12, 2010); *State v. McKinley*, 66 N.E.3d 200, 209 (Ohio 7th Dist. App. 2016) (ruling testimony of code enforcement officer was "helpful to get a clear understanding of . . . the parameters of the ordinance."). Similarly mistaken is the City's argument that the expert report of Falon Mihalic must be ignored because no one has "sworn to . . . [its] contents." Answer at 38. This is simply false. (R. 775-95).[12]

IV. CONCLUSION

For the foregoing reasons, Hermine and Tom respectfully request that this Court reverse the trial court's ruling on the parties' cross-motions for summary judgment and enter judgment in favor of them. Alternatively, they respectfully request that the trial court's order denying their motion to compel be vacated, the trial court's ruling on the parties' cross-motions for summary judgment be vacated, and this case be remanded for further proceedings consistent with such ruling.

[12] The expert report contains both a stamped signature page and is attested to by a sworn affidavit. None of the cases the City cites in support of its argument requires the "magic words" of affirmance the City apparently demands. *See, e.g.*, *Bifulco v. State Farm Mut. Auto. Ins. Co.*, 693 So. 2d 707 (Fla. 4th DCA 1997) (explaining that evidence need *not* always be accompanied by an affidavit). Moreover, the language the City cites in *Buzzi v. Quality Serv. Station, Inc.*, 921 So. 2d 14 (Fla. 3d DCA 2006), is actually from the *dissenting* opinion—a point which the City fails to note. Finally, *Nichols v. Preiser*, 849 So. 2d 478 (Fla. 2d DCA 2003), in which a party simply attached "documents that are not sworn," is almost the exact *opposite* of this case, as the report is signed, stamped, and sworn.

RESPECTFULLY SUBMITTED this 26th day of July 2017.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of July 2017, a true and correct copy of the foregoing *Appellants' Reply Brief* was filed with the Court and served electronically on the following counsel of record:

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