

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

HERMINE RICKETTS and
LAURENCE CAROLL,

CASE NO.: 3D16-2212

Appellants,

L.T. CASE NO.: 13-36012-CA-02

v.

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

Appellees.

_____ /

ANSWER BRIEF OF APPELLEES

On Appeal from the Final Order of the Circuit Court of the
Eleventh Judicial Circuit in and for Miami-Dade County, Florida
Honorable Monica Gordo, Circuit Judge, Presiding

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TABLE OF CONTENTS

	<u>PAGES</u>
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	iii
PRELIMINARY STATEMENT	1
STATEMENT OF CASE AND FACTS	1
SUMMARY OF THE ARGUMENT	10
ARGUMENT	13
I. STANDARD OF REVIEW	13
II. THE TRIAL COURT CORRECTLY HELD THAT THE RATIONAL BASIS TEST APPLIES TO THIS CASE.....	14
A. Constitutionality Under the Inalienable Rights Clause is Subject to the Rational Basis Standard in this Case.....	15
B. The Florida Constitution’s Privacy Right Does Not Create any Fundamental Right to Grow Vegetables in a Front Yard, and There is No Violation of Privacy in this Case.....	17
III. RATIONAL BASIS SCRUTINY REQUIRES THAT THIS COURT AFFIRM THE TRIAL COURT’S DECISION	20
A. Aesthetics is a Legitimate Government Purpose.....	22
B. The Ordinance is Not Arbitrary	28

C.	Appellant’s Vagueness Challenge is Unavailing.....	32
1.	Appellants’ Invitation to Engage in Courtroom Fact Finding is Inappropriate and Unavailing.....	32
2.	Appellants May Not Now Assert a Vagueness Claim Not Raised in Their Complaint	33
3.	“Vegetable Garden” is a Commonly Understood Term.....	34
4.	The Expert Report of Falon Mihalic Was Inadmissible and Irrelevant	37
5.	The Individual, Non-Expert Opinions of Anthony Flores are also Insufficient to Defeat the Ordinance.....	40
D.	Appellants Have Not Shown That There is No Conceivable Factual Predicate Which Would Rationally Support the Ordinance.....	41
IV.	SUMMARY JUDGMENT WAS ALSO PROPER BECAUSE APPELLANTS’ CLAIMS ARE BARRED BY <i>RES JUDICATA</i> , OR WAIVER.....	42
	CONCLUSION.....	44
	CERTIFICATE OF SERVICE	46
	CERTIFICATE OF COMPLIANCE.....	47

TABLE OF AUTHORITIES

Albright v. Hensley
492 So. 2d 852 (Fla. 5th DCA 1986).....21

Bennett v. Walton County
174 So. 3d 386 (Fla. 1st DCA 2015) 34-35, 37

Bifulco v. State Farm Mutual Auto. Ins. Co.
693 So. 2d 707 (Fla. 4th DCA 1997)..... 38-39

Board of County Commissioners of Brevard County v. Snyder
627 So. 2d 469 (Fla. 1993)21

Buzzi v. Quality Service Station, Inc.
921 So. 2d 14 (Fla. 3d DCA 2006).....39

Campbell v. Monroe County
426 So. 2d 1158 (Fla. 3d DCA 1983).....29

Casa Investment Co., Inc. v. Nestor
8 So. 3d 1219 (Fla. 3d DCA 2009)..... 33-34

Chiquita Int’l Ltd. v. Fresh Del Monte Produce, N.V.
705 So. 2d 112 (Fla. 3d DCA 1998)..... 40-41

City of Coral Gables v. Wood
305 So. 2d 261 (Fla. 3d DCA 1974).....23

City of Dallas v. Stanglin
490 U.S. 19 (1989).....20

City of Fort Lauderdale v. Gonzalez
134 So. 3d 1119 (Fla. 4th DCA 2014).....25

City of Helena v. Dwyer
42 S.W. 1071 (Ark. 1897)19

City of Jacksonville v. Bowden
64 So. 769 (Fla. 1914)26

<i>City of Lake Wales v. Lamar Advertising Ass’n of Lakeland</i> 414 So. 2d 1030 (Fla. 1982)	11, 22
<i>City of Miami Beach v. Ocean & Inland Co.</i> 3 So. 2d 364 (Fla. 1941)	21
<i>City of North Miami v. Kurtz</i> 653 So. 2d 1025 (Fla. 1995)	17-18
<i>City of Pembroke Pines v. Villasenor</i> 894 So. 2d 991 (Fla. 1st DCA 2005)	10
<i>City of Pompano Beach v. Big Daddy’s, Inc.</i> 375 So. 2d 281 (Fla. 1979)	25
<i>Commonwealth v. Campbell</i> 117 S.W. 383 (Ky. Ct. App. 1909)	19
<i>Cook v. Stewart</i> 28 F. Supp. 3d 1207 (N.D. Fla. 2014)	31
<i>Eskind v. City of Vero Beach</i> 159 So. 2d 209 (Fla. 1963)	9, 29
<i>Estate of Magee</i> 988 So. 2d 1 (Fla. 2d DCA 2007)	15
<i>Estate of McCall v. U.S.</i> 134 So. 3d 894 (Fla. 2014)	26-27
<i>F.C.C. v. Beach Communications, Inc.</i> 508 U.S. 307 (1993)	12, 29, 31
<i>Florida Board of Bar Examiners Re: Applicant</i> 443 So. 2d 71 (Fla. 1983)	17
<i>Florida Dept. of Revenue v. Gainesville</i> 918 So. 2d 250 (Fla. 2005)	21, 32

<i>Fraternal Order of Police Metropolitan Dade County Lodge No. 6 v. Department of State</i> 392 So. 2d 1296 (Fla. 1980)	26
<i>Fulford v. Graham</i> 418 So. 2d 1204 (Fla. 1st DCA 1982)	22
<i>Gallagher v. Motors Ins. Corp.</i> 605 So. 2d 62 (Fla. 1992)	42
<i>Goldschmidt v. Holman</i> 571 So. 2d 422 (Fla. 1990)	33
<i>Gray v. State</i> 525 P.2d 524 (Alaska 1974)	19
<i>Haire v. Florida Dept. of Agriculture</i> 870 So. 2d 774 (Fla. 2004)	Passim
<i>Haves v. City of Miami</i> 52 F.3d 918 (11th Cir. 1995)	31
<i>Heller v. Doe</i> 509 U.S. 312 (1993).....	12, 30
<i>Holiday Isle Resort and Marina Ass'n v. Monroe County</i> 582 So. 2d 721 (Fla. 3d DCA 1991).....	43
<i>Holley v. Adams</i> 238 So. 2d 401 (Fla. 1970)	26
<i>Housing Authority of the City of Melbourne v. Richardson</i> 196 So. 2d 489 (Fla. 4th DCA 1967).....	25
<i>Humana Medical Plan, Inc. v. State</i> 898 So. 2d 1040 (Fla. 1st DCA 2005)	21-22
<i>ICC Chemical Corporation v. Freeman</i> 640 So. 2d 92 (Fla. 3d DCA 1994).....	43

<i>International Co. v. City of Miami Beach</i> 90 So. 2d 906 (Fla. 1956)	12, 23
<i>In re: Apportionment Law</i> 263 So. 2d 797 (Fla. 1972)	26
<i>Jones v. Williams Pawn & Gun, Inc.</i> 800 So. 2d 267 (Fla 4th DCA 2001).....	35
<i>Kirby v. City of Archer</i> 790 So. 2d 1214 (Fla. 1st DCA 2001)	13, 43-44
<i>Kuvin v. City of Coral Gables</i> 62 So. 3d 625 (Fla. 3d DCA 2010).....	Passim
<i>Lamar-Orlando Outdoor Advertising v. City of Ormond Beach</i> 415 So. 2d 1312 (Fla. 5th DCA 1982).....	12, 23
<i>Land v. Florida Dept. of Corrections</i> 181 So. 3d 1252 (Fla. 1st DCA 2015)	10
<i>Lane v. Chiles</i> 698 So. 2d 260 (Fla. 1997)	14, 16
<i>Marrs v. State</i> 413 So. 2d 774 (Fla. 1st DCA 1982)	34-35
<i>Martin County v. Yusem</i> 690 So. 2d 1288 (Fla. 1997)	21
<i>Membreno v. City of Hialeah</i> 188 So. 3d 13 (Fla. 3d DCA 2016).....	Passim
<i>Membreno v. City of Hialeah</i> 2016 WL 3486427 (Fla. Jun. 27, 2016).....	12, 27
<i>Metromedia, Inc. v. City of San Diego</i> 453 U.S. 490 (1981).....	29

<i>Metropolis Theater Co. v. Chicago</i> 228 U.S. 61 (1913).....	31
<i>Metropolitan Dade County v. Section 11 Property Corp.</i> 719 So. 2d 1204 (Fla. 3d DCA 1998).....	11, 23
<i>Moviematic Industries Corp. v. Board of County Commissioners of Metropolitan Dade County</i> 349 So. 2d 667 (Fla. 3d DCA 1977).....	23
<i>Nichols v. Preiser</i> 849 So. 2d 478 (Fla. 2d DCA 2003).....	39
<i>Orange County v. Costco Wholesale Corp.</i> 823 So. 2d 732 (Fla. 2002)	20, 26
<i>Palm Beach Motor Homes, Inc. v. Strong</i> 300 So. 2d 881 (Fla. 1974)	16
<i>Rainbow Lighting, Inc. v. Chiles</i> 707 So. 2d 939 (Fla. 1998)	25
<i>Ramon v. Saenz</i> 122 S.W. 928 (Tex. App. 1909)	17
<i>Ravin v. State</i> 537 P.2d 494 (Alaska 1975)	19
<i>Rose v. D’Alessandro</i> 380 So. 2d 419 (Fla. 1980)	26
<i>Sanford v. Rubin</i> 237 So. 2d 134 (Fla. 1970)	44
<i>Scudder v. Greenbrier C. Condominium Ass’n, Inc.</i> 663 So. 2d 1362 (Fla. 4th DCA 1995).....	35
<i>Shaktman v. State</i> 553 So. 2d 148 (Fla. 1989)	17-18

<i>Shriners Hospital for Crippled Children v. Zrillic</i> 563 So. 2d 64 (Fla. 1990)	16
<i>Snyder v. Board of County Commissioners of Brevard County</i> 595 So. 2d 65 (Fla. 5th DCA 1991).....	16-17
<i>South Florida Taxicab Ass’n v. Miami-Dade County</i> 2004 WL 958073 (S.D. Fla. Mar. 18, 2004)	31-32
<i>Southeastern Fisheries Ass’n, Inc. v. Dept. of Natural Resources</i> 453 So. 2d 1351 (Fla. 1984)	35-36
<i>State v. Bales</i> 343 So. 2d 9 (Fla. 1997)	21
<i>State v. Catalano</i> 104 So. 3d 1069 (Fla. 2012)	35
<i>State v. Hanna</i> 901 So. 2d 201 (Fla. 5th DCA 2005).....	20
<i>State v. Kennedy</i> 953 So. 2d 655 (Fla. 1st DCA 2007)	18
<i>State v. Reese</i> 222 So. 2d 732 (Fla. 1969)	26
<i>State v. Town of Sweetwater</i> 112 So. 2d 852 (Fla. 1959)	10
<i>State v. Yu</i> 400 So. 2d 762 (Fla. 1981)	26
<i>Stone v. Rosen</i> 348 So. 2d 387 (Fla. 3d DCA 1977).....	44
<i>U.S. v. Santana</i> 427 U.S. 38 (1976).....	18

Village of Euclid, Ohio v. Ambler Realty Co.
272 U.S. 365 (1926)..... 20-21

WCI Communities, Inc. v. City of Coral Springs
885 So. 2d 912 (Fla. 4th DCA 2004)..... 14

Williams v. Bank of America Corp.
927 So. 2d 1091 (Fla. 4th DCA 2006).....33

Williams v. City of Jacksonville
160 So. 15 (Fla. 1935)26

Wingreen Co. v. Montgomery Ward & Co.
171 So. 2d 408 (Fla. 3d DCA 1965).....33

RULES

Fla. R. Civ. P. 1.310..... 40-41

Fla. R. Civ. P. 1.510.....33, 37

OTHER AUTHORITIES

Miami Shores Village Code of Ordinances, § 100 2-3, 24

Miami Shores Village Code of Ordinances, § 536 Passim

Miami Shores Village Code of Ordinances, § 5382

Florida Constitution, Art. I, § 2.....6

Florida Constitution, Art. I, § 9.....6

Florida Constitution, Art. I, § 23.....6, 17

PRELIMINARY STATEMENT

In this Answer Brief, HERMINE RICKETTS and LAURENCE CARROLL will be referred to as the APPELLANTS, and the VILLAGE OF MIAMI SHORES, FLORIDA, and MIAMI SHORES CODE ENFORCEMENT BOARD¹ will collectively be referred to as the APPELLEE or the VILLAGE. The Record on Appeal shall be referred to as (“R.”). Citations to the items included in the record pursuant to the Village’s Motion to Supplement will be cited as (“MSV”).

STATEMENT OF CASE AND FACTS

The Village of Miami Shores, located in Northeast Miami-Dade County, is a municipal community composed primarily of single-family homes. [R. 86]. To protect and preserve the community feel and aesthetic appearance of its neighborhoods, the Village’s Zoning Code (the “Code”) contains certain landscape design standards and requirements which are enforced by the Miami Shores Village Code Enforcement Board in accordance with the provisions of Florida Statutes, Chapter 162.

Since at least 1992, the Code has required certain defined groundcover for all open spaces in all yards, but also contains an exception which permits vegetable gardens in backyards. Specifically, as relevant to this case, the Design Standards in

¹ Appellants sued the Miami Shores Code Enforcement Board. However, the Code Enforcement Board is not a separate or independent entity, but rather, is part of the Village.

the Code required that “all green space shall be planted with grass, sod or living groundcover and a minimum of two trees.” [R. 433, § 536(a)]. Section 538 of the Code provided Landscaping Descriptions and Definitions. [R. 434]. As relevant here, “Green Space” was defined as “all areas of a plot not occupied by buildings or impervious surfaces of any kind and that is located at ground level.” *Id.* “Groundcover” was 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.” *Id.*

The provision of the Code being challenged here by Appellants is Section 536(e). That provision, as enacted in 1992, created an exception to the foregoing design standards as follows: “Vegetable gardens are permitted in rear yards.” [R. 433, § 536(e)]. In 2013, Section 536(e) was amended to clarify that the exception allowed vegetable gardens in rear yards “only.” [R. 348]. The Amendment merely clarified the intent and effect of the prior language.²

The Preamble contained in Section 100 of the Code sets forth the statement of purposes for the Village’s Zoning Code. Specifically, that section confirms that the Zoning Code’s purpose includes “protection and promotion of the safety, health, comfort, morals, convenience, peace, prosperity, appearance and general

² Subsequent to entry of the Order on Appeal, these sections of the Village Zoning Code were amended, primarily to expand the types of approved groundcover; however, this amendment did not alter the issues in this case and the exception remains in place to permit vegetable gardens in rear yards.

welfare of the village and its inhabitants,” and more specifically the following purposes:

- (1) To protect the distinctive character of Miami Shores Village that has resulted from:
 - a. The comprehensive basic planning according to which the village was first laid out as an urban community
 - b. The application and careful administration of protective regulations, in the form both of private agreements and of municipal ordinances and requirements imposed pursuant thereto, under which the development of the village has been guided since its establishment,

...
 - d. The sense of stewardship and the community pride that have motivated the property owners and residents of the village in their improvement and maintenance of property in the village;

...
- (4) To protect property values and the enjoyment of property rights by minimizing and reducing conflicts among various land uses through the application of regulations designed to assure harmonious relationships among land uses

Miami Shores Village Code of Ordinances, § 100.

Appellants own and reside in the single-family home at 53 Northeast 106 Street in Miami Shores Village. [R. 11–13, ¶¶ 6-7, 19]. The home is located in a community of single-family homes. At some point, as can be seen from pictures in

the Record on Appeal, the Appellants transformed almost the entirety of their front yard into an extensive vegetable garden containing dozens of varieties of different vegetables. [R. 592-98] including, according to Plaintiffs' Complaint, "75 different varieties of vegetables." [R. 14, ¶ 29] and nearly a dozen different "varieties of Asian cabbage." [R. 14, ¶ 31].

In response to a Complaint received by the Miami Shores Village Code Enforcement Department, a Code Inspector on May 8, 2013 provided Appellants a Courtesy Notice that their property was in violation of the above described sections of the Code and requesting that the vegetable garden be removed from the front yard. [R. 86]. When Appellants failed to comply with the Courtesy Notice, the Village provided Appellants with a Notice of Violation. [R. 88–89]. That notice directed the Appellants to bring the property into compliance with the Code failing which they should appear at the Code Enforcement Board hearing on a specific date if they wished to contest the violation. *Id.*

Appellants did not comply with the Notice of Violation and on July 11, 2013, a hearing was held before the Code Enforcement Board, where the Appellants appeared and testified. Ultimately, after a second hearing, also attended by Appellants, the Code Enforcement Board entered its Order containing Findings of Fact and Conclusions of Law that a violation of the above described Code provisions existed and specifying a deadline to correct that violation to avoid the

imposition of fines. [R. 99].

Within 30 days thereafter, the Appellants filed an appeal to the Appellate Division of the Circuit Court, challenging that ruling of the Code Enforcement Board. [R. 105–06]. At no time during the Appellate proceedings, did the Appellants raise any constitutional issues. Instead, before the conclusion of the Appellate proceedings, the Appellants complied with the Code provisions at issue by removing the vegetable garden from their front yard, and then voluntarily dismissed the Appeal from the Code Enforcement Board’s determination. [R. 130-31]. No fines were ever assessed and no lien was ever recorded.

It is important to note that Appellants have never denied, and have admitted at each step of the process, that what occupied the bulk of their front yard was indeed a vegetable garden, and they never disputed that the provisions of the Village Zoning Code allowed them to have a vegetable garden only in their rear yard. [*See, e.g.*, R. 14, ¶ 29; R. 16, ¶¶ 45-46]. Appellants have also admitted that, although there had once been grass and soil in the backyard of the subject property, Appellants had opted to build a pool in that backyard in 1995, instead of having a vegetable garden in that location. [R. 400].

After dismissing the appeal and despite that they should have raised any constitutional claims on appeal, on November 18, 2013, Appellants filed their Complaint herein challenging the constitutionality of Section 536(e) of the

Ordinance. [R. 10-26]. In the Complaint, Appellants alleged four counts, each seeking a declaration that section 536(e) of the Ordinance is unconstitutional under Florida's Constitution. The Complaint alleged the Ordinance violated (1) the Inalienable Rights Clause, Article I, Section 2; (2) the Right of Privacy Clause, Article I, Section 23; (3) the Due Process Clause, Article I, Section 9; and (4) the Equal Protection Clause, Article I, Section 2. [R. 25-26].

Appellants' alleged basis for Count I (Inalienable Rights Clause), was a claim that Section 536(e) of the Ordinance, allowing vegetable gardens in rear yards only, deprived Appellants of their right to make peaceful and productive use of their property to feed themselves and their family. [R. 20, ¶ 76]. In Count II (Right of Privacy Clause), Appellants based their claim on the allegation that by allowing vegetable gardens in rear yards only, section 536(e) of the Ordinance deprives Appellants of the right to make decisions about what food to grow and consume on their property and to provide to their family. [R. 22, ¶ 87]. In Count III (Due Process Clause), Appellants claimed that defining permitted and excluded plants for a yard based on edibility is arbitrary and irrational. [R. 23, ¶ 98]. And, in Count IV (Equal Protection Clause), Appellants claimed that the Ordinance created an arbitrary distinction between people who grow vegetable plants in their front yard and people who grow other plants in their front yards. [R. 24, ¶ 109].

On December 23, 2015, Appellants filed a bare bones Motion for Summary

Judgment, which simply regurgitated the conclusions of law in each count of Appellants' four count Complaint and then concluded that section 536(e) of the Code did not pass constitutional muster. [R. 461-64]. Appellants' motion made the conclusion that they were entitled to summary judgment without identifying any summary judgment evidence with particularity. [R. 461-64]. Appellants did, however, briefly summarize "forthcoming" evidence to support its legal conclusion: "summary judgment evidence in this case will include, but is not limited to, deposition testimony...from Anthony Flores; testimony from [Appellant]s' expert, Falon Mihalic; documents obtained from...public records request; and information obtained from [discovery responses]." [R. 463, ¶ 13].

On January 27, 2016, the Village filed its Motion for Summary Judgment on all four counts of the Complaint. [R. 465-517]. The Village argued the claims were subject to summary judgment, because the interpretation of the Ordinance and of the Constitution are purely legal questions not dependent upon issues of fact. [R. 469]. The Village also argued that it may legislate to protect the appearance of its community as a legitimate exercise of the Village's inherent police power. [R. 469]. As a matter of law, it submitted, there is no fundamental right to grow a vegetable garden in one's front yard, and the Ordinance treats all residents of Miami Shores the same. [R. 469]. Further, the Village argued that the landscaping measures of the Ordinance, designed to enhance or maintain the aesthetic appeal of

a community, are a valid exercise of the Village's police power, and bear a rational relationship to a legitimate governmental purpose, as a matter of law. [R. 469].

Almost four months after filing their motion for summary judgment, Appellants filed a fifty-five page memorandum of law, providing for the first time affidavits of Hermine Ricketts, Laurence Carroll and Rebekah Ramirez -- none of which were served with nor identified with particularity in the motion. [R. 518-643, 686-690]. Additionally, Appellants served the unsworn report of Falon Mihalic and the deposition transcript of Anthony Flores. [R. 664-685, 691-744].

The trial court heard argument on the cross-motions for summary judgment on June 8, 2016. [R. 891]. The Court entered its detailed Order on Cross Motions for Summary Judgment on August 25, 2016. [R. 891-901]. The Court held that the challenged Ordinance was constitutional as a matter of law. [R. 891]. First, citing *Kuvin v. City of Coral Gables*, 62 So. 3d 625, 629 (Fla. 3d DCA 2010), the trial court held that the rational basis test applied to this matter, because there was no suspect class or constitutionally protected right involved. [R. 893]. Under the rational basis test, the trial court acknowledged that it must "only undertake a limited review that is highly deferential to the legislature's choice of ends and means." [R. 893, citing *Membreno v. City of Hialeah*, 188 So. 3d 13, 22 (Fla. 3d DCA 2016)]. Recognizing that Appellants had a very heavy burden to prove that there was "no conceivable factual predicate which would rationally support" the

Ordinance, the trial court found that in Florida it was clear that protecting aesthetics is a legitimate government purpose. [R. 894, citing *Eskind v. City of Vero Beach*, 159 So. 2d 209 (Fla. 1963); *Kuvin v. City of Coral Gables*, 62 So. 2d 625 (Fla. 3d DCA 2010)].

The trial court also determined that there was a rational relationship between the challenged Ordinance and the goal of promoting aesthetics. [R.894-99]. First the trial court recognized that the Ordinance passes the rational basis test if there is any conceivable reasonable relationship between the Ordinance and aesthetics. [R. 894, citing *Membreno*, 188 So. 3d at 25]. The trial court determined that any judicial adjudication as to whether vegetable gardens are indeed detrimental to aesthetic concerns -- as requested by Appellants -- would require the trial court to make factual determinations regarding the policy decision made by the Village that front yard vegetable gardens are not compatible with the Village's desired aesthetics, a determination that the trial court was not authorized by law to make. [R. 895]. The trial court also determined that the Ordinance was not arbitrary, because the purpose of a vegetable garden is to produce food, and not aesthetic concerns. [R. 900]. Thus, the trial court determined that given the high degree of deference that must be given to the legislative body of the Village, the Appellants had not met their heavy burden to show that there was "no conceivable factual predicate which would rationally support" the Ordinance, *i.e.*, to show that it is not

at least fairly debatable whether a restriction of vegetable gardens outside to rear yards only is connected to aesthetics; and the Court granted the Village's motion for summary judgment and denied Appellants' motion for summary judgment. [R. 900].

Appellants appealed the August 25, 2016 decision on the motions for summary judgment to this Court. [R. 858-59, 861-872]. Appellants also expressly appealed the trial court's March 11, 2015 Order Denying Plaintiffs' Motion to Compel Answers and Overrule Objections and May 18, 2015 Order Denying Plaintiffs' Motion for Clarification on Reconsideration of that discovery order. [R. 858-59, 873-90].³ Because the trial court properly granted the Village's motion for summary judgment and denied Appellants' motion for summary judgment, this Court should affirm the decision of the trial court.

SUMMARY OF THE ARGUMENT

Appellants misperceive the Ordinance they challenge. The sole and exclusive section they attack, Section 536(e) of the Ordinance, is neither a

³ Appellants' Initial Brief makes no argument on appeal as to why the trial court's decisions with regard to the motion to compel were not proper. Thus, this Court should not consider these issues. *See State v. Town of Sweetwater*, 112 So. 2d 852, 854 (Fla. 1959) (issues raised but not argued in Appellant's brief are deemed abandoned); *Land v. Florida Dept. of Corrections*, 181 So. 3d 1252, 1254 (Fla. 1st DCA 2015) (an issue not raised in an initial brief is deemed abandoned and may not be raised for the first time in a reply brief); *City of Pembroke Pines v. Villasenor*, 894 So. 2d 991, 995, n. 2 (Fla. 1st DCA 2005) (where party filed cross-appeal, but did not brief separate issues raised therein, the issues were waived).

vegetable ban nor vegetable garden ban. There is no such specific ban. The Ordinance identifies certain landscaping materials as approved ground cover and prohibits use of anything else. The section of the Ordinance Appellants attack merely provides an exception to allow vegetable gardens in the backyard. Such vegetable gardens, indisputably designed to produce food (without regard for aesthetics), are different in that regard from practically all other types of plantings a resident might consider using in a residential district. The Ordinance recognizes this distinction by expressly allowing such vegetable gardens as an exception to the general requirements, in the location the Village deemed reasonably appropriate -- “rear yards only.”

No fundamental constitutional right is impaired by this Ordinance, and thus, its constitutionality is tested under the rational basis test, with the Ordinance enjoying a strong presumption of validity and with all reasonable doubts resolved in favor of constitutionality. *Kuvin*, 62 So. 3d at 632 (Because no suspect class or fundamental right is implicated, the City’s zoning ordinances must be upheld if it can be shown that they bear a rational relationship to a legitimate public purpose). As the Trial Court expressly recognized, this Ordinance easily satisfies the test as it is reasonably related to aesthetic concerns, which the courts in this State have repeatedly recognized as a legitimate governmental interest. [R. 893-94, 899]; *see also City of Lake Wales v. Lamar Advertising 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); *International Co. v. City of Miami Beach*, 90 So. 2d 906 (Fla. 1956) (finding that zoning regulations based on aesthetics are relevant to maintaining the general welfare and well-being of a community).

The question of constitutionality is a “pure question of law.” *Kuvin*, 62 So. 3d at 629. The courts cannot second guess the legislative body on the wisdom of their judgments and policy decisions. It is neither a proper subject for submission of evidence nor courtroom fact-finding. *Id.* at 632-33; *see also Membreno v. City of Hialeah*, 188 So. 3d 13, 26-27 (Fla. 3d DCA 2016) *review denied Membreno v. City of Hialeah*, No. SC16-616, 2016 WL 3486427 (Fla. Jun. 27, 2016); *F.C.C. 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”).

Appellants’ assertion that the word “vegetable” is ambiguous is also misplaced. The correct inquiry is whether the term “vegetable garden” is something reasonably understood by a person of ordinary intelligence. Appellants

freely admit in their Complaint and summary judgment papers that what occupied the bulk of their front yard was indeed a vegetable garden. They claimed no confusion or uncertainty on that point nor has anyone.

Further, Appellants' constitutional challenges could have, and should have, been raised by Appellants in the Code Enforcement proceeding, or in the appeal they brought therefrom. A collateral attack on the rulings of the Code Enforcement Board in this subsequent action is not proper. *See Kirby v. City of Archer*, 790 So. 2d 1214, 1215 (Fla. 1st DCA 2001).

Given the high degree of deference that must be given to the Village when applying the rational basis test to the section of the Ordinance which allows vegetable gardens in rear yards only, the Appellants fail to meet their high burden of showing that there is no conceivable factual predicate which would rationally support the Ordinance. Accordingly, this Court should affirm the Order of the trial court.

ARGUMENT

I. STANDARD OF REVIEW

Constitutional challenges to statutes or ordinances involve pure questions of law reviewable on appeal de novo. *Kuvin v. City of Coral Gables*, 62 So. 3d 625, 629 (Fla. 3d DCA 2010). Municipal ordinances are presumed to be valid and constitutional and all reasonable doubts must be resolved in favor of

constitutionality. *Id.* In this case it is clear that the Village’s zoning Ordinance does not involve a suspect class or impinge on a fundamental right, and thus, the “rational relationship” standard applies in this case. *Id.*

II. THE TRIAL COURT CORRECTLY HELD THAT THE RATIONAL BASIS TEST APPLIES TO THIS CASE

The trial court correctly held that the rational basis test applies to this case. Unless an ordinance involves a suspect class or infringes upon a fundamental right, it need only bear a rational relationship to a legitimate governmental purpose. *Kuvin*, 62 So. 2d 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.).

Appellants concede that the rational basis test applies to their claims regarding substantive due process and equal protection under the Florida Constitution, but argue that strict scrutiny applies to their claims under Florida’s Inalienable Rights Clause and the Right of Privacy Clause. Appellants’ Br. at 42-50. Appellee disagrees.

A. Constitutionality Under the Inalienable Rights Clause is Subject to the Rational Basis Standard In This Case

Established Florida case law under the Inalienable Rights Clause confirms 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 as protected under the Inalienable Rights Clause, but, as here, do not require the absolute destruction of property rights. *See Estate of Magee*, 988 So. 2d 1, 5 (Fla. 2d DCA 2007); *see also Haire v. Florida 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). Plaintiffs admit that the Ordinance permits backyard vegetable gardens. [R. 16, ¶¶ 45-46]. Accordingly, the Ordinance does not require the entire destruction of the claimed property rights.

Appellants melodramatically argue that the vegetable garden in their front yard is akin to the frontier garden of yesteryear. *See Appellants’ Br.* at 48. Appellants posit they are somehow being deprived of the right to possess, use and enjoy their property, because the Ordinance prevents them from obtaining the “sustenance and self-sufficiency of the gardens of old.” *Id.* However, this is clearly not the case as the Ordinance merely regulates the location of vegetable gardens in the Village and the Ordinance does not prevent Appellants from growing food on their property. Appellants’ 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 fundamental right exists. *See Lane*, 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”).⁴ Thus, the rational basis test applies to Appellants’ claim under the Inalienable Rights Clause.

Appellants cite to *Shriners Hospital for Crippled Children v. Zrillic*, 563 So. 2d 64 (Fla. 1990), in support of their argument that their claim under the Inalienable Rights Clause is entitled to strict scrutiny review. However, even in *Zrillic*, which reviewed a testamentary (mortmain) statute, the Court did not decide whether strict scrutiny applied and applied the rational basis test. *See id.* at 70, n.6. Moreover, Appellants cite no case in Florida or elsewhere that actually supports the proposition that strict scrutiny applies to Appellants’ claim that an Ordinance allowing vegetable gardens to be grown in backyards violates the Inalienable Rights Clause under the Florida Constitution.⁵

⁴ Moreover, by logical extension, Appellants’ arguments if accepted by the courts would also logically give rise to a fundamental right to maintain and butcher livestock in a residential district.

⁵ Rather, Appellants rely upon cases that are inapposite and distinguishable from this case. *See Palm Beach Motor Homes, Inc. v. Strong*, 300 So. 2d 881 (Fla. 1974) (statute providing grounds for eviction from mobile home parks constituted reasonable and necessary regulation of right to use property, in view of peculiar nature and problems presented by mobile homes, and was constitutional); *Snyder v.*

B. The Florida Constitution’s Privacy Right Does Not Create Any Fundamental Right to Grow Vegetables in a Front Yard, and There is no Violation of Privacy in This Case

Appellants also argue that the Ordinance, by regulating the appearance of front yards, somehow violates Appellants’ privacy rights under the Florida Constitution. “[The] 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 North Miami v. Kurtz*, 653 So. 2d 1025, 1027 (Fla. 1995) (emphasis added) (citing *Shaktman v. State*, 553 So. 2d 148 (Fla. 1989)). 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 whether Appellants’ rights under Article I, Section 23, have been violated, the Court must first determine whether a governmental entity is intruding into an aspect of Appellants’ lives in which they have a “legitimate expectation of privacy.” *See id.* If the Court finds in the affirmative, only then must

Board of County Commissioners of Brevard County, 595 So. 2d 65 (Fla. 5th DCA 1991) (per curiam) (decision quashed) (owners of parcel of land zoned for general use under county comprehensive plan requested to be rezoned to multiple family dwelling classification to build a multi-unit dwelling); *Ramon v. Saenz*, 122 S.W. 928 (Tex. App. 1909) (under Texas law, lessee of land in possession obtained injunction against third party individuals who had thrown stones at him and threatened him with violence if he did not stop cultivating land). None of these cases actually support Appellants’ position.

the Court 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.*

The right of privacy ensures that individuals are able “to determine for themselves when, how and to what extent information about them is communicated to others.” *Shaktman v. State*, 553 So. 2d 148, 150 (Fla. 1989) (quoting A. Westin, *Privacy and Freedom* 7 (1967)). The Ordinance in this case does not implicate *any* privacy right, because it does not intrude into any aspect of the Appellants’ lives in which they have a legitimate expectation of privacy. Whether Plaintiffs have a vegetable garden in their front yard is open and notorious for all to see. *See U.S. v. Santana*, 427 U.S. 38, 42 (1976) (threshold of one’s dwelling is a “public” place as to which owner has no right of privacy); *State v. Kennedy*, 953 So. 2d 655, 56-57 (Fla. 1st DCA 2007) (no right of privacy in front yard). Appellants admitted in their Complaint that they often received comments about their front yard vegetable garden from neighbors and people who were passing by. [R. 15, ¶37]. Given that Appellants reveal to everyone who see their house whether they have a front yard vegetable garden, they have no reasonable expectation of privacy in maintaining a front yard vegetable garden, and thus no privacy right violation flows from the Ordinance.

Appellants suggest that the privacy clause protects their right to make

decisions about what foods to grow and consume, but offer no authorities supporting such a claim under the Florida Constitution.⁶ However, as Appellants admitted in their Complaint, they are allowed to grow vegetable gardens on their residential property - in their rear yard. Thus, 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. The Ordinance neither regulates what Appellants grow nor what they eat, but merely regulates the permitted location of any vegetable garden. The fact that Appellants chose to have a pool in lieu of a vegetable garden in their rear yard (or may have purchased a home with insufficient sunlight) does not make the Ordinance unconstitutional.

Therefore, because no suspect class or impairment of any fundamental right is involved in this case under any constitutional claim, the Village's Ordinance must be upheld if the Ordinance bears a rational relationship to any legitimate public purpose. *Membreno*, 188 So. 3d at 21; *Kuvin*, 62 So. 3d at 632. "In other

⁶ Appellants assert in a footnote that some courts of other states have held that the right of privacy or individual liberty protects certain choices concerning food or nutrition. However, none of these cases stand for the proposition that Appellants have a legitimate expectation of privacy in a vegetable garden located in their front yard. See *Gray v. State*, 525 P.2d 524, 528 (Alaska 1974) (in prosecution for sale of marijuana, court remanded for evidentiary hearing); *Ravin v. State*, 537 P.2d 494, 515 (Alaska 1975) (citing to concurring opinion in case addressing statute proscribing ingestion of marijuana); *City of Helena v. Dwyer*, 42 S.W. 1071 (Ark. 1897) (ordinance prohibiting sale of pork in hot summer months in 1890s); *Commonwealth v. Campbell*, 117 S.W. 383 (Ky. Ct. App. 1909) (criminal ordinance to regulate carrying and transferring alcohol).

words, is the City’s exercise of its police power rationally related to a legitimate purpose?” *Kuvin*, 62 So. 3d at 632.

III. RATIONAL BASIS SCRUTINY REQUIRES THAT THIS COURT AFFIRM THE TRIAL COURT’S DECISION

Rational basis scrutiny “**is the most relaxed and tolerant form of judicial scrutiny.**” *Id.* (quoting *City of Dallas v. Stanglin*, 490 U.S. 19, 26 (1989)) (emphasis in original). Additionally, zoning ordinances, which are legislative enactments, are presumed to be valid and constitutional. *Id.* (citing *Orange County v. Costco Wholesale Corp.*, 823 So. 2d 732, 737 (Fla. 2002)) (ordinances reflecting legislative action are entitled to a presumption of validity); *State v. Hanna*, 901 So. 2d 201, 204 (Fla. 5th DCA 2005) (statutes and ordinances are presumed to be constitutional and all reasonable doubts must be resolved in favor of constitutionality).

Further, “zoning restrictions must be upheld unless they bear no substantial relation to legitimate societal policies or it can be clearly shown that the regulations are a mere arbitrary exercise of the municipality’s police power.” *Kuvin*, 62 So. 3d at 632 (citations omitted). The deference that is provided to the legislation is based on the separation of powers:

A zoning regulation also must be upheld if reasonable persons could differ as to its propriety. In other words, “[i]f the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.” *Village of Euclid*,

Ohio v. Ambler Realty Co., 272 U.S. 365, 388 (1926); *Board of County Commissioners of Brevard County v. Snyder*, 627 So. 2d 469, 472 (Fla. 1993); *City of Miami Beach v. Ocean & Inland Co.*, 147 Fla. 480, 3 So. 2d 364 (1941).

“The fairly debatable rule has its basis in the deference that the judicial power owes the legislative function under the separation of powers doctrine inherent in our form of government and expressly embodied in our state and federal constitutions.” *Albright v. Hensley*, 492 So. 2d 852, 856 (Fla. 5th DCA 1986) (Cowart, J., dissenting). Thus, “[t]he fairly debatable standard of review is a highly deferential standard requiring approval of a planning action if reasonable persons could differ as to its propriety.” *Martin County v. Yusem*, 690 So. 2d 1288, 1295 (Fla.1997).

Kuvin, 62 So. 3d at 632-33.

It is the burden of the party challenging the law to prove that there is *no conceivable* factual predicate which would rationally support the legislation. *Membreno*, 188 So. 3d at 26. And, the fact that there may be differing views as to the reasonableness of the legislature body’s action is simply not sufficient to void the legislation. *Id.* (citation omitted); *see also State v. Bales*, 343 So. 2d 9, 11 (Fla. 1997) (citation omitted) (“[a]ny legislative enactment carries a strong presumption of constitutionality, including a rebuttable presumption of the existence of necessary factual support in its provisions. If any state of facts, known or to be assumed, justify the law, the Court’s power of inquiry ends.”); *Florida Dept. of Revenue v. Gainesville*, 918 So. 2d 250 (Fla. 2005) (same); *Humana Medical Plan*,

Inc. v. State, 898 So. 2d 1040, 1043-44 (Fla. 1st DCA 2005) (same); *Fulford v. Graham*, 418 So. 2d 1204, 1205 (Fla. 1st DCA 1982) (same).

As this Court stated in *Membreno*, the rational basis 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.” *Membreno*, 188 So. 3d at 26. Here, the Village’s Ordinance passes this objective test.

A. Aesthetics is a Legitimate Government Purpose

The first step in determining whether legislation survives the rational basis test is identifying 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; *see also City of Lake Wales*, 414 So. 2d at 1032 (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);

International Co., 90 So. 2d 906, 907 (finding that zoning regulations based on aesthetics are relevant to maintaining the general welfare and well-being of a community); *Metropolitan Dade County v. Section 11 Property 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 Advertising 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 Industries Corp. v. Board of County Commissioners of Metropolitan 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).

Additionally, 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.

Here, the Ordinance is directed at the aesthetics of the residential community of Miami Shores Village. The Ordinance on its face is directed at the aesthetic appeal, uniformity and attractive condition of landscaping in the Village. [R. 433-34]; *see also* Miami Shores Land Development and Zoning Code §100. The Village enacted Section 536(e) providing that an exception to the aesthetic requirements of the Village would be allowed for vegetable gardens in rear yards only. And, as set forth above, aesthetics is a legitimate government purpose. Likewise, enforcing the Village’s Ordinance is a legitimate government purpose. *See Membreno*, 188 So. 3d at 31 (enforcing City’s zoning code is legitimate government purpose).

Appellants’ arguments below and on appeal repeatedly seek to question whether aesthetic concerns were indeed the actual motivation for the Ordinance, as well as whether the Ordinance is the best way to address such aesthetic concerns. [R. 59-65, 226-27, 277-81, 564-74; Appellants’ Br. at 9, 12-14, 29-36]. However, as noted above, the rational basis test upholds an Ordinance whenever a rational basis exists for the governing body to believe that the legislation would promote

even any “hypothesized purpose” for the Ordinance.

In reviewing a legislative enactment, the actual “motives and reasons behind a legislative body’s adoption of an enactment are not relevant to a constitutional challenge.” *City of Pompano Beach v. Big Daddy’s, Inc.*, 375 So. 2d 281, 282 (Fla. 1979) (“it is a fundamental tenet of municipal law that when a municipal ordinance of legislative character is challenged in court, the motives of the commission and the reasons before it which induced passage of the ordinance are irrelevant); *Rainbow Lighting, Inc. v. Chiles*, 707 So. 2d 939 (Fla. 1998); *Housing Authority of the City of Melbourne v. Richardson*, 196 So. 2d 489, 492 (Fla. 4th DCA 1967) (“[T]he motives of a governing body of a municipal corporation in adopting an ordinance legislative in character will not be the subject of judicial inquiry).

And, in determining whether the methods involved are actually the best way to serve the legitimate purpose, the Village’s choice in that regard “is not subject to courtroom fact-finding.” *Membreno*, 188 So. 3d at 26 (citing *Haire*, 870 So. 2d at 787). These choices are not subject to courtroom fact finding because such laws “may be based on rational speculation unsupported by evidence or empirical data.” *Id.*; see also *City of Fort Lauderdale v. Gonzalez*, 134 So. 3d 1119, 1121 (Fla. 4th DCA 2014) (under rational basis review, statute bears a strong presumption of validity and must be upheld against constitutional challenge if there is any reasonably conceivably state of facts that could provide a rational basis for the

classification; a legislative choice is not subject to courtroom fact finding and may be based on rational speculation unsupported by evidence or empirical data).⁷

Appellants argue that *Estate of McCall v. U.S.*, 134 So. 3d 894 (Fla. 2014), authorizes such courtroom fact-finding and requires this Court to go beyond what long-standing Florida case law under the rational basis test requires. *See* Appellants' Br. at 25-28. However, in *Membreno*, this Court squarely rejected this argument (made by the same counsel for Appellants as here, who were then

⁷ Further, courts will not inquire into the wisdom or fairness of the legislative determination. *Fraternal Order of Police Metropolitan Dade County Lodge No. 6 v. Dept. of State*, 392 So. 2d 1296, 1302 (Fla. 1980) ("The fact that the legislature may not have chosen the best possible means to eradicate the evils perceived is of no consequence to the Courts, provided that the means selected are not wholly unrelated to achievement of the legislative purpose. A more rigorous inquiry would amount to a determination of the wisdom of the legislation and usurp the legislative prerogative to establish policy."); *Holley v. Adams*, 238 So. 2d 401, 405 (Fla. 1970) (Judiciary will not nullify legislative acts merely on grounds of the policy and wisdom of such act, no matter how unwise or unpolitic, so long as there is no plain violation of the constitution); *City of Jacksonville v. Bowden*, 64 So. 769 (Fla. 1914) (the questions of the wisdom, justice, policy or expediency of a statute are for the legislature alone); *State of Florida v. Yu*, 400 So. 2d 762, 765 (Fla. 1981) (court may not substitute its judgment for that of the legislature as to wisdom or policy of legislative act); *State v. Reese*, 222 So. 2d 732, 736 (Fla. 1969) (courts are not concerned with the wisdom or motives of legislature in enacting law); *In re: Apportionment Law*, 263 So. 2d 797, 805 (Fla. 1972) (the propriety and wisdom of legislation are exclusively matters for legislative determination); *Orange County v. Costco Wholesale Corp.*, 823 So. 2d 732, 736 (Fla. 2002) ("[W]hen the legislative branch of the government exercises a legislative power in the form of a duly enacted statute or ordinance it is not the function of a court to explore the wisdom or advisability of the enactment in order to bring its enforceability into question); *Williams v. City of Jacksonville*, 160 So. 15, 20 (Fla. 1935) (court cannot inquire into wisdom or fairness of legislative policy underlying statute); *Rose v. D'Alessandro*, 380 So. 2d 419 (Fla. 1980) (courts may not pass on wisdom of legislative determinations).

representing the street vendors). *Membreno*, 188 So. 3d at 28-31.⁸ Specifically, while recognizing that one of the plurality opinions in *McCall* gave the appearance of a willingness to depart from the traditional rational basis test, this Court concluded that it did not need to determine whether the “plurality opinion intended to modify the traditional rational basis test because only one other justice joined the opinion.” *Id.* at 30. This Court recognized that until and unless the Florida Supreme Court directly overruled the great body of law on the rational basis test, the District Courts are bound by the long-standing rational basis precedent. *Id.* at 31. Presumably, were the Supreme Court ready to directly overrule this body of law, they would not have denied review of *Membreno*. See *Membreno*, 2016 WL 3486427 (Fla. Jun. 27, 2016).

In this case, it is quite clear that reasonable people might conclude that allowing vegetable gardens only in the rear yards could preserve and enhance the street view aesthetic appeal of the Village. Indeed, it was the complaint of a neighbor that brought this violation at Appellants’ property to the attention of the Village. [R. 325; 710 at page 73 lines 18-25 to 74 lines 1-22].

Under Florida’s rational basis test, then, this Court -- as a matter of law -- should not entertain the Appellants’ invitation to second guess the determination of

⁸ Despite having actual knowledge that this Court in *Membreno* had rejected these same arguments about the effect of *McCall*, the Appellants below persisted in that argument, and did not advise the trial court that in *Membreno* such argument was rejected.

the legislative body nor to independently consider the wisdom of the Ordinance nor to pass upon the aesthetic merits of what is being regulated. Those decisions are simply not for this Court, but rather, are for legislative determination. *See Membreno*, 188 So. 3d at 27 (rejecting the Street Vendors’ argument that they are entitled to a trial on whether or not any considerations can be established or disproven by evidence admitted in a court of law, because under a rational basis test, a legislative choice is not subject to courtroom fact-finding).⁹

B. The Ordinance is Not Arbitrary

This Court has previously addressed Appellants’ argument that the rational basis test includes as a separate and additional component, consideration of whether the Ordinance is “arbitrary.” Contrary to the Appellants’ argument, this Court has concluded that the current Florida and federal tests include no such additional component. *Membreno*, 188 So. 3d at 21. Specifically, in describing the current test this Court stated that the term “arbitrary” -- among others -- was dropped because it was superfluous. *Id.* “A law bearing a rational basis to a legitimate legislative purpose is, by definition, not discriminatory, arbitrary, or oppressive, as those words are used in the test. Conversely, a law that is discriminatory, arbitrary, or oppressive cannot, by definition, bear a rational basis to a legitimate legislative purpose.” *Id.* Nevertheless, Appellants argue on appeal

⁹ *See also Haire*, 870 So. 2d at 787.

that the Ordinance is arbitrary, despite that it bears a rational relationship to promotion of a legitimate legislative purpose as a matter of law.

Moreover, Appellants cannot meet their burden on this issue either. Appellants' citation to *Campbell v. Monroe County*, 426 So. 2d 1158 (Fla. 3d DCA 1983) to support their claim of arbitrariness is unavailing. In *Campbell*, the ordinance at issue conflicted with the requirements of a state statute, and thus, if any doubt were found to exist, it would necessarily have had to be resolved in favor of the statute and against the ordinance. *Id.* at 1161. In this case, there is no such conflict with any state statute.

Likewise, *Eskind v. City of Vero Beach*, 159 So. 2d 209 (Fla. 1963), is also distinguishable. In that case, the ordinance at issue prohibited motel signs advertising rates but permitted other types of motel advertising signs and permitted other businesses in the area to advertise its rates for goods and services on signs. *Id.* at 210. First, while not discussed, the prohibition of rate signs in *Eskind* obviously involved impermissible content-based regulation of speech.¹⁰ Additionally, in this case, the Village is not regulating an edible plant that looks like a non-edible plant and is not actually even regulating plants per se; rather, the Village has determined that it will allow “vegetable gardens” in the rear yards as

¹⁰ See e.g., *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) (ordinance, insofar as permitting various kinds of non-commercial signs but not other noncommercial signs, infringed upon free speech rights).

an exception to the requirement that all green space be planted with grass, sod, or living ground cover and a minimum of two trees. *See* [R. 433-34].¹¹

The challenged section of the Ordinance is simply not a ban on vegetables, but rather is an exception that allows vegetable gardens in rear yards only. [R. 433-34, §536(a)&(e)].¹² Despite that the Ordinance is clear in this regard, *i.e.* that it regulates the location of “vegetable gardens,” Appellants persist in arguing that the Village is discriminating against vegetables by allowing plants in front yards that are allegedly visually indistinguishable from vegetables but that are not edible. There is no suggestion that the Ordinance allows plantings in the front yard which are visually indistinguishable from vegetable gardens.

The trial court put it aptly when it found the Ordinance not arbitrary:

It is not irrational to surmise that since the purpose of a vegetable garden is to grow food to eat, the primary purpose of such a garden is productivity, not aesthetics. It is rational to surmise that people do not grow vegetable gardens for the purpose of being aesthetically pleasing, and therefore it is rational to conclude that a vegetable garden is less likely to be aesthetically pleasing than other landscape options.

¹¹ Similarly none of the other cases Appellants cite on this point are availing because here, unlike the cases they cite, what is being regulated is aesthetics. The legislative body clearly could distinguish between vegetable gardens and ground cover, and the judiciary is not at liberty to second-guess this decision.

¹² In this regard, as recognized by the trial court and further addressed below, Appellants suggestion that the Ordinance is somehow anti-vegetable is simply misplaced. The Ordinance merely regulates location of vegetable gardens; it does not regulate individual plants.

[R. 899 (footnote omitted)]. As there is a rational basis to draw such distinctions for a legitimate governmental purpose, the Ordinance is clearly not arbitrary.

Appellants also argue that it arbitrary to ban vegetables, but not other types of plants such as fruit trees, flowers, vines and blueberry bushes. [Appellants' Br. at 34]. Again, Appellants focus on edibility, not aesthetics. Moreover, even if such items were deemed by the Village Council to be as unaesthetic as vegetable gardens, 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.' (Citation omitted). Thus to be valid a legislative policy does not need to apply equally to all persons. (Citation omitted). 'The problems of government are practical ones and may justify, if they do not require, rough accommodations - illogical, it may be and unscientific.' *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 316 n. 7 (1993) (quoting *Metropolis Theatre Co. v. Chicago*, 228 U.S. 61, 69-70 (1913)). '[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, 28 F. Supp. 3d 1207 (N.D. Fla. 2014); *see also Haves v. City of Miami*, 52 F.3d 918 (11th Cir. 1995) (citing *Beach Communications*) (A contrary decision would turn the court to something it should never become: a zoning board of appeals); *South Florida Taxicab Ass'n v. Miami-Dade County*, Nos. 00-1366-CIV-GOLD, 00-1366-CIV-SIMONTON, 2004 WL 958073, *9 (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”).

Thus, the trial court properly found that it was fairly debatable that the Ordinance served aesthetics, and that given the high degree of deference that the trial court must give to the Village when scrutinizing its laws, the Ordinance allowing vegetable gardens in rear yards only was not arbitrary and passed constitutional scrutiny. [R. 899].

C. Appellants Vagueness Challenge is Unavailing

1. Appellants’ Invitation to Engage in Courtroom Fact Finding is Inappropriate and Unavailing

The trial court was obligated to accord the Ordinance a presumption of constitutionality and to construe the challenged legislation to effect a constitutional outcome wherever possible. *See Florida Dept. of Revenue v. City of Gainesville*, 918 So. 2d 250, 256 (Fla. 2005). As set forth above, the burden is on the one attacking the legislative enactment; legislative findings and judgments are not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data; and if there exists good faith conflict over facts, some of which support the legislative finding, the court must uphold the finding if it is at least debatable. *Membreno*, 188 So. 3d at 26-28. Here, even the

legally impermissible fact-finding Appellants sought could not satisfy Appellants' heavy burden.

2. Appellants May Not Now Assert a Vagueness Claim Not Raised in Their Complaint

Appellants attempted to rely upon a new argument, raised for the first time in their memorandum in support of their motion for summary judgment, that the term “vegetable” is an unworkable and unknowable definition purportedly rendering the Ordinance invalid; and also raise this argument on appeal. This claim is nowhere pleaded in Appellants' Complaint nor in Appellants' motion for summary judgment filed on December 23, 2015 (as opposed to their memorandum of law in support thereof filed 4 months later). [R. 461-64]. It is not proper to consider a ground that was not raised with particularity or at all in the Complaint or a motion for summary judgment. *See* Fla. R. Civ. P. 1.510(c); *see also* *Wingreen Co. v. Montgomery Ward & Co.*, 171 So. 2d 408, 409-10 (Fla. 3d DCA 1965) (an affidavit upon a motion for a summary judgment may not be substituted for a complaint and Rule 1.510(c) does not provide for a trial court to grant a summary judgment upon an issue raised by an affidavit in support of the motion rather than by a complaint); *Goldschmidt v. Holman*, 571 So. 2d 422, 423 (Fla. 1990) (because complaint failed to set forth ultimate facts, plaintiffs were not entitled to relief on that claim); *Williams v. Bank of America Corp.*, 927 So. 2d 1091, 1093 (Fla. 4th DCA 2006) (citations omitted); *Casa Investment Co., Inc. v. Nestor*, 8 So. 3d 1219,

1221 (Fla. 3d DCA 2009). For this reason, Appellants' arguments as to whether the term "vegetable" is ambiguous should be summarily rejected.

3. "Vegetable Garden" is a Commonly Understood Term

Furthermore, even if this Court were to consider Appellants' argument, the actual language of the Ordinance: "[v]egetable gardens are permitted in rear yards only," is not unconstitutionally vague nor ambiguous. For a law or ordinance to be unconstitutionally ambiguous on its face, the challenger must establish that no set of circumstances exists under which the statute would be valid. *Bennett v. Walton County*, 174 So. 3d 386, 388 (Fla. 1st DCA 2015). Appellants have not and cannot meet that high burden. As recognized by the trial court in the Order on Appeal, the Ordinance is not focused upon any "particular edible plant that might look identical to some non-edible plant" but instead what is being regulated "is a vegetable garden." [R. 896]. Appellants have consistently admitted that what they grew in their front yard was indeed a "vegetable garden" and have not claimed any doubt about that. [See e.g., R. 13 (heading); R. 14, ¶¶ 26-27, 29, 32; R. 15 ¶¶ 33-35, 37-39; R. 16 ¶ 42; R. 17 (heading) and ¶ 49; R.526-29; R. 577; R. 583 ¶¶ 13-14]. The term "vegetable garden" is not unconstitutionally vague or ambiguous, because "contexts exist where it 'convey[s] a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice.'" *Bennett*, 174 So. 3d at 388 (citing *Marrs v. State*, 413 So. 2d 774, 775 (Fla. 1st

DCA 1982) (internal citation omitted)); *see also State v. Catalano*, 104 So. 3d 1069, 1075 (Fla. 2012) (“[I]n order to withstand [a vagueness] challenge, a statute must provide persons of common intelligence and understanding adequate notice of the proscribed conduct.”) (citation omitted).

As this Court has recognized, “[t]he standard for testing vagueness is whether a statute or ordinance ‘gives a person of ordinary intelligence fair notice of what constitutes forbidden conduct.’” *Kuvin*, 62 So. 3d at 639-40 (quoting *Jones v. Williams Pawn & Gun, Inc.*, 800 So. 2d 267, 270 (Fla 4th DCA 2001)). “The language of the statute [or ordinance] must provide a definite warning of what conduct is required or prohibited, measured by common understanding and practice.” *Id.* at 640 (citing *Jones*). Great latitude is afforded civil statutes against a vagueness challenge, and therefore, any doubts as to the constitutionality of the statute must be resolved in favor of its constitutionality. *Scudder v. Greenbrier C. Condo. Ass’n, Inc.*, 663 So. 2d 1362, 1367-68 (Fla. 4th DCA 1995) (internal citation omitted). “[I]t is the court’s obligation to find the statute constitutional if the application of ordinary logic and common understanding would permit the same.” *Id.* at 1367 (internal citation omitted).

In *Southeastern Fisheries Ass’n, Inc. v. Dept. of Natural Resources*, 453 So. 2d 1351 (Fla. 1984), the Supreme Court of Florida addressed whether a statute was unconstitutionally vague and unconstitutional where it did not define “illegal fish

trap.” In upholding the statute the Supreme Court stated:

In determining whether a statute is vague, common understanding and reason must be used. Where a statute does not specifically define words of common usage, such words must be given their plain and ordinary meaning. Further, courts cannot require the legislature to draft laws with such specificity that the intent and purpose of the law may be easily avoided.

Id. at 1353-54 (internal citation omitted). The Supreme Court found that the statute placed fisherman on notice that fish traps are unlawful, and that there were certain exceptions as set forth in the statute. *Id.* at 1354. The Court also found that if the definition of “fish trap” were more precise, then the purpose of the statute could be easily circumvented, and that the term was not so vague that persons of common intelligence must guess at its meaning.

In this case, Appellants made use of the term “vegetable garden” throughout their Complaint and summary judgment papers, as was pointed out in the Village’s papers and noted by the trial court. [R. 869, n.8]. They describe at great length the vegetables that they grew in their very extensive front yard “vegetable garden.” [R. 78, ¶ 13]. It is clear that Appellants had “fair notice” and knew what was prohibited. Further, the term “vegetable garden” is “not so vague that persons of common intelligence must guess at its meaning.”

As recognized by the trial court, it is possible for a person of common logic and understanding, based on dictionary definitions, to surmise that a “vegetable

garden” is a plot of land used for the purpose of cultivating plants grown to be eaten as opposed, for example, to ornamental plants, grass, sod, trees, or ground cover. *See* [R. 868-69]. Thus, the Ordinance is sufficiently clear to be uniformly enforced and withstand Appellants’ unpled vagueness challenge to the Ordinance. *See Bennett*, 174 So. 3d at 388 (“non-residential uses” prohibition in ordinance was not unconstitutionally ambiguous on its face).

Accordingly, since Appellants did not plead this claim regarding the ambiguity of the term “vegetable” in their Complaint, it should not be a basis for appellate review. However, even if this Court does consider the claim, the argument must fail because the term “vegetable garden” is clear based on common logic and understanding.

4. The Expert Report of Falon Mihalic Was Inadmissible and Irrelevant

Appellants devote much argument on appeal to purported evidence regarding their claims, including their unpled vagueness claim. As noted above, these constitutional claims involve pure issues of law and are not subject to courtroom fact finding. Additionally, however, Appellants proffered “evidence” was faulty.

On summary judgment, Appellants proffered the purported expert report of Falon Mihalic, PLA (the “Mihalic Report”) to support, among other unsupported propositions, their argument that the term “vegetable garden” is vague or

arbitrary.¹³ The Village moved to strike the Mihalic Report. *See* [R. 745-755]. While the trial court's Order discussed at length the arguments raised in the Mihalic Report, the trial court ultimately decided the Village's objections thereto were "essentially moot, and need not be determined." *See* [R.870-71]. Because Appellants here once again improperly raise the unpled issue of vagueness, and seek to rely on the Mihalic Report to do so, the Village addresses why the Mihalic Report constituted inadmissible evidence and is not proper for this Court to consider.

Essentially, no one has ever sworn to the truth of the contents of this purported expert report. As the Fourth District held in *Bifulco v. State Farm Mutual Auto. Ins. Co.*, 693 So. 2d 707 (Fla. 4th DCA 1997), "[R]ule 1.510(e) by its very language excludes from consideration on a motion for summary judgment, any document that is not one of the enumerated documents or is not a certified attachment to a proper affidavit." *Id.* at 709 (documents relied upon by trial court were not in compliance with Rule 1.510(e) so it was improper for court to consider them). In *Bifulco*, the court recognized that the rule "mandates that copies of all papers or parts thereof used to support or oppose a motion for summary judgment shall be sworn to or certified." *Id.*; *see also Nichols v. Preiser*, 849 So. 2d 478, 481

¹³ As discussed herein, because Appellants nowhere raised the issue of the vagueness of the term "vegetable garden" in their pleadings, they could not properly raise this argument at the summary judgment stage.

(Fla. 2d DCA 2003) (“Simply attaching documents that are not sworn or certified to a motion for summary judgment does not satisfy the procedural requirements of Florida Rule of Civil Procedure 1.510(e),” citing *Bifulco*); *Buzzi v. Quality Service Station, Inc.*, 921 So. 2d 14, 18 (Fla. 3d DCA 2006) (“The use of the...letter runs counter to a long line of Florida and federal jurisprudence holding that unsworn and unauthenticated documents cannot be used either to grant or deny summary judgment.”).

Here, in response to the Village seeking to strike the Mihalic Report, Appellants eventually submitted an Affidavit (*see* [R. 775-801] (the “Mihalic Affidavit”)) in a belated attempt to cure the defects inherent in Appellants having merely attached the unsworn, Mihalic Report to their summary judgment papers. However, in so doing, Appellants did nothing to bring the Mihalic Report within the ambit of Rule 1.510(e) as admissible summary judgement evidence.

Specifically, the Mihalic Affidavit merely states that the Mihalic Report and CV attached thereto were the same documents that Mihalic submitted to Appellants’ counsel for attachment to Appellants’ memorandum in support of their motion for summary judgment. *See* [R. 777, ¶ 4]. The contents thereof remain unsworn. Plainly then, the Mihalic Report remains inadmissible evidence under both *Bifulco* and *Nichols*.

More importantly, however, the gist of the Mihalic Report is merely that

Mihalic disagreed with the aesthetic value judgments of the Village Council in passing the Ordinance. As the trial court noted, however, the potential for such reasonable disagreement on such an issue that is fairly debatable, does not defeat the Ordinance. [R. 870].

5. The Individual, Non-Expert Opinions of Anthony Flores are also Insufficient to Defeat the Ordinance

Like the Mihalic Report, the trial court considered the deposition testimony of Code Enforcement Supervisor Anthony Flores despite the Village's objections thereto, finding that the objections were basically moot. [R. 870-71].

Appellants noticed the deposition of Mr. Flores in his individual capacity (*i.e.*, not as a Village representative). [MSV 3, ¶3, 7-8]. Appellants also served their subpoena on Mr. Flores in his individual capacity. [MSV 4 ¶ 7; 14-16]. On August 27, 2017, Mr. Flores appeared and testified at his deposition that he was providing his personal "opinions" only. [R. 725, page 133 lines 12-18; R. 741, page 199 lines 8-10; R. 741, page 200 lines 17-21]. As Mr. Flores appeared for deposition in his individual capacity (and *not* as a party representative), his opinion testimony is of no moment and is not the testimony of the Village. *See Fla. R. Civ. P. 1.310(b)(6); see also Chiquita Int'l Ltd. v. Fresh Del Monte Produce, N.V.*, 705 So. 2d 112, 113 (Fla. 3d DCA 1998) (by naming a particular corporate employee, and also by failing to designate with reasonable particularity the matters on which examination was being requested, the party failed to comply with Rule

1.310(b)(6)).¹⁴ Again, various opinions of individuals as to the decisions of the Village Council reflected in the Ordinance are not relevant to and are not dispositive of the proper constitutional analysis.

D. Appellants Have Not Shown That There is No Conceivable Factual Predicate Which Would Rationally Support the Ordinance

Even allowing consideration of Appellants' impermissible facts, this Court's clear and binding precedents have consistently upheld zoning regulations to preserve the residential character of a neighborhood or to enhance the aesthetic appeal of a community. *Kuvin*, 62 So. 3d at 634. What the Village seeks to preserve with the Ordinance is the residential character and attractive appearance of the Village. While residents may have a vegetable garden only in the rear yard the Ordinance does not restrict what may be grown in such vegetable gardens. The Ordinance only governs where vegetable gardens may be placed. *Id.* (ordinance requiring pick-up trucks be parked in an enclosed garage at night only restricted where these commercial-looking vehicles are parked at night and had rational basis of enhancing aesthetic appeal of community).

As set forth above aesthetics is a legitimate government purpose. The

¹⁴ Had Appellants issued a deposition notice to the Village under Rule 1.310(B)(6) seeking a corporate representative to testify regarding this Section 536(e), the Village would have appropriately designated the Planning Director, who drafted the Ordinance and who would have been able to answer Appellants' deposition questions on behalf of the Village.

requirement that vegetable gardens be located in rear yards, therefore, is rationally related to the health and welfare of the residents in the Village. *Id.* at 635. Because “under a rational basis test, a legislative choice is not subject to courtroom fact-finding,” the Appellants have failed to meet their heavy burden and this Court should affirm the trial court. *Haire*, 870 So. 2d at 787 (quotation omitted). “A rational relationship exists where, as here, it is found that the legislature rationally could have believed that the challenged statutory scheme would promote the asserted legislative objective. Whether the statutory scheme in fact would promote the legislative objective is not dispositive.” *Membreno*, 188 So. 3d at 31-32 (quoting *Gallagher v. Motors Ins. Corp.*, 605 So. 2d 62 (Fla. 1992)).

IV. SUMMARY JUDGMENT WAS ALSO PROPER BECAUSE APPELLANTS’ CLAIMS ARE BARRED BY *RES JUDICATA*, OR WAIVER

Appellants were cited for violating this Ordinance, because of their extensive front yard vegetable garden, and the Village Code Enforcement Board held hearings and entered a ruling adverse to Appellants, from which Appellants appealed. During the appeal and without seeking a stay pending appeal, Appellants complied with the Ordinance by removing the vegetable garden from their front yard, and then ultimately voluntarily dismissed their appeal. Appellants failed to raise any constitutional claims at any point in that proceeding.

As an independent basis for affirmance, Appellants’ Complaint in this matter

should have been deemed barred by the doctrine of *res judicata*, which applies to all matters actually raised and determined as well as to all other matters which could properly have been raised and determined in the prior action, whether they were so raised or not. *ICC Chemical Corp. v. Freeman*, 640 So. 2d 92, 93 (Fla. 3d DCA 1994). Here, Appellants' constitutional claims could have and should have been raised before the Code Enforcement Board and in their appeal to the Circuit Court, which Plaintiffs instead voluntarily dismissed. *See Kirby v. City of Archer*, 790 So. 2d 1214, 1215 (Fla. 1st DCA 2001) (citing *Holiday Isle Resort and Marina Ass'n v. Monroe County*, 582 So. 2d 721 (Fla. 3d DCA 1991) (constitutional claims are properly cognizable on appeal to the circuit court from a final order of a code enforcement board)).¹⁵

In *Kirby*, the city filed an action against a property owner, seeking to foreclose a Code Enforcement lien, and the trial court granted summary judgment. *Id.* On appeal, the property owner argued that the lower court erred because, among other things, the ordinance upon which the Code Lien was based was allegedly unconstitutional. *Id.* In affirming the decision of the trial court, the appellate court held that the property owner made his arguments too late, holding that the property owner's constitutional challenge could not be raised for the first

¹⁵ As explained herein, even if Appellants had raised such constitutional issues in the enforcement proceedings and appeal, since the Appellants did not prevail therein, the result would still be the same -- *res judicata* still precludes collateral attack.

time in the foreclosure action. The court explained that the constitutional claim was properly cognizable on appeal to the circuit court from the final order of the Code Enforcement Board, and was therefore waived. *Id.* (quoting *Sanford v. Rubin*, 237 So. 2d 134, 137 (Fla. 1970) (“[c]onstitutional issues, other than those constituting fundamental error, are waived unless timely raised”).

Similarly, in this case, Appellants are barred from asserting these constitutional claims now (and have waived such claims), because they could have and should have been raised in the appeal from the Enforcement Order, but were not. Appellants dismissed their appeal, and cannot now assert their constitutional claims. *Id.*¹⁶ Thus, Appellants’ Complaint is barred under the doctrine of *res judicata*. Since an appellate court may affirm for any reason, this Court should also affirm the trial court’s decision based on *res judicata*. See *Stone v. Rosen*, 348 So. 2d 387, 388 (Fla. 3d DCA 1977) (court may affirm for any reason appearing on the record).

CONCLUSION

Given the high degree of deference that must be given to the Village when applying the rational basis test to the section of the Ordinance which allows vegetable gardens in rear yards only, the Appellants fail to meet their high burden of showing that there is no conceivable factual predicate which would rationally

¹⁶ The Village raised this argument below. [R. 170-71, 500-02].

support the Ordinance. Accordingly, this Court should affirm the Order of the trial court.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of June, 2017, a true and correct copy of the foregoing Answer Brief was filed and served electronically on the following counsel of record:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of
Florida Rule of Appellate Procedure 9.210(a)(2).

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