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

CASE NO: 2013-36012 CA 01 (02)

HERMINE RICKETTS and LAURENCE "TOM" CARROLL, a married couple,

Plaintiffs,

v.

VILLAGE OF MIAMI SHORES, FLORIDA; MIAMI SHORES CODE ENFORCEMENT BOARD, et al.,

Defendants.
_______________________________________/

MOTION TO DISMISS PLAINTIFFS' COMPLAINT

Defendants, Village of Miami Shores, Florida (a/k/a Miami Shores Village) and Miami Shores Code Enforcement Board[1] (collectively, the "Village"), by and through undersigned counsel and pursuant to Rule 1.140(b)(6) of the Florida Rules of Civil Procedure, hereby move to Dismiss Plaintiffs' Complaint for failure to state a cause of action and otherwise, and in support thereof state:[2]

I. INTRODUCTION

Plaintiffs' Complaint hinges entirely on the legally incorrect claim of an inalienable/fundamental/constitutional right to grow vegetables in their front yard. This fatal defect defeats each of the various "kitchen sink" challenges alleged by Plaintiffs.

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[1] Plaintiffs have 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. For this reason alone, this Court should dismiss the action against the Miami Shores Code Enforcement Board.

[2] All claims against all individual Defendants are the subject of a separate Stipulation and proposed Agreed Order of Dismissal.

Specifically, Plaintiffs, Hermine Ricketts and Laurence "Tom" Carroll, allege in their Complaint that the Village's Ordinance, which provides that vegetable gardens are permitted in rear yards only (the "Ordinance"), is unconstitutional, simply because it prevents them from growing a vegetable garden in their front yard. Plaintiffs assert that under an assortment of various Florida constitutional provisions (inalienable rights, privacy rights, due process and equal protection), they are entitled to grow vegetables in their front yard despite that the Ordinance allows them to have a vegetable garden in their back yard.

The basis for all land use regulation is derived from the police power of the government to protect the health, safety and welfare of the public. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)(holding zoning constitutional as a valid use of police power). The case law in Florida is clear that, because no suspect class or fundamental right is implicated, the Village's zoning ordinance must be upheld if it can be shown that it bears a rational relationship to a legitimate public purpose. *Kuvin v. City of Coral Gables*, 62 So. 3d 625, 632 (Fla. 3d DCA 2010). Further, the courts in this state have repeatedly held that "measures designed to enhance or maintain the aesthetic appeal of a community are a valid exercise of a local government's police power and these measures bear a rational relationship to a legitimate purpose." *Id.* at 633.

By enacting the Ordinance at issue, the Village seeks to preserve the residential character of the Village and to enhance the aesthetic appeal of the Village. Any resident of the Village may have a vegetable garden on their residential property, but it simply must be located in their back yard. Miami Shores Ordinance, Part II, App. A, Art. V, Div. 17, §536(e). Thus, the Ordinance is constitutional, because, *inter alia*, it does not prohibit Village residents from having a vegetable garden, but simply regulates the location thereof.

Plainly, therefore, Plaintiffs' Complaint fails to state a cause of action and this Court must dismiss the Complaint with prejudice.

II. MEMORANDUM OF LAW

A. Motion to Dismiss Standard

"Whether a complaint is sufficient to state a cause of action is an issue of law." *W.R. Townsend Contracting, Inc. v. Jensen Civil Construction, Inc.*, 728 So. 2d 297, 300 (Fla. 4th DCA 1999). "To state a cause of action, a complaint must allege sufficient ultimate facts to show that the pleader is entitled to relief." *Id.* at 300 (quoting *Perry v. Cosgrove*, 464 So. 2d 664, 665 (Fla. 2d DCA 1985)); Fla. R. Civ. P. 1.110(b) (requiring "a short and plain statement of the ultimate facts showing that the pleader is entitled to relief"). While "courts must liberally construe, and accept as true, factual allegations in a complaint and reasonably deductible inferences therefrom," they "need not accept … conclusory allegations, unwarranted deductions, or mere legal conclusions made by a party." *Id.* (citing *Response Oncology, Inc. v. Metrahealth Ins. Co.*, 978 F. Supp. 1052, 1058)(S.D. Fla. 1997). Thus, the question for the trial court to decide is whether, assuming the well-pleaded factual allegations in the Complaint are true, Plaintiffs would be entitled to the relief requested.

Additionally, where, as here, it is clear that the Plaintiffs are unable to amend a pleading to state a claim, dismissal with prejudice is appropriate. *See Hansen v. Central Adjustment Bureau, Inc.*, 348 So.2d 608, 610 (Fla. App. 4th DCA 1977) (citing 10 Fla. Jur., Dismissal § 33, p. 544) ("A dismissal with prejudice for failure to state a cause of action should not be ordered without giving the party offering the defective pleading an opportunity to amend, **unless it is apparent that the pleading cannot be amended so as to state a cause of action**.") (emphasis added).

B. Plaintiffs' Claim for Violation of the Florida Constitution's Inalienable Rights Clause, Count I, Fails to State a Claim and Must be Dismissed as a Matter of Law

Plaintiffs allege in Count I of their Complaint that, by prohibiting front-yard vegetable gardens, the Village deprived Plaintiffs of their right to use their property to feed themselves and also imposed financial costs on them. Pls.' Compl. at ¶¶75-77.

However, as Plaintiffs admit in their Complaint and as made clear in the Ordinance, Plaintiffs are allowed to grow vegetables in their rear yard. *Id.* at ¶¶45-46. Thus, Plaintiffs' own Complaint shows that the Ordinance does *not* deprive them of the right to use their property to feed themselves and does not subject them to financial costs. As Plaintiffs' Complaint is internally inconsistent and shows that Plaintiffs are unable to state a cause of action, Plaintiffs' claim fails as a matter of law. *See*, Trawick's, *Florida Practice and Procedure*, § 6:7(2008-2009 edition)("Repugnancy occurs when allegations within a single cause of action or defense are inconsistent and thus neutralize each other. The resulting pleading is a nullity. This may occur in the pleading or between it and an attached exhibit.")(citing *Hoopes v. Crane*, 47 So. 992 (Fla. 1908); *Shelton v. Eisemann*, 79 So. 75 (Fla. 1918); *Harry Pepper & Associates, Inc. v. Lasseter*, 247 So. 2d 736 (Fla. 3d DCA 1971); and *Peacock v. General Motors Acceptance Corp.*, 432 So. 2d 142 (Fla. 1st DCA 1983)).

Additionally, Count I fails to state a cause of action, because as a matter of law, the Ordinance does not violate Florida's inalienable rights clause.

Article I, Section 2, of the Florida Constitution provides to all persons "the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property…." Fla. Const. Art. I, § 2; *see also In re Estate of Magee*, 988 So.2d 1, 2 (Fla. 2d DCA 2007).

While Plaintiffs set forth three different standards of review for a constitutional violation in their Complaint, the facts of this case clearly require application of the rational basis test, a test that is highly deferential to government regulation. *Kuvin v. City of Coral Gables,* 62 So. 3d 625, 629 (Fla. 3d DCA 2010). Unless an ordinance involves a suspect class or a fundamental right, none of which Plaintiffs can properly allege here, it need only bear a rational relationship to a legitimate state purpose." *Kuvin,* 62 So. 3d at 629*; 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.).

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

The first step in determining whether the legislation survives the rational basis test is identifying a legitimate government purpose which the governing body could have been pursuing. *Kuvin,* 62 So. 3d at 629. The second step is 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 v. Lamar Adver. Ass'n of Lakeland, Fla.,* 414 So. 2d 1030, 1032 (Fla.1982) (recognizing that "[z]oning solely for aesthetic purposes is an idea whose time has come; it is not outside the scope of the police power") (quoting *Westfield Motor Sales Co. v. Town of Westfield,* 129 N.J. Super. 528, 324 A.2d 113, 119 (1974)); *Int'l Co. v. City of Miami Beach,* 90 So. 2d 906, 906 (Fla.1956) (finding that zoning regulations based on aesthetics are relevant to maintaining the general welfare and well-being of a community); *Metro. Dade County v. Section 11 Prop. Corp.,* 719 So. 2d 1204 (Fla. 3d DCA 1998) (reinstating administrative agency's denial of a special exception to develop land with an industrial-looking mini self-storage facility, finding that aesthetics may be properly considered by the agency); *Lamar–Orlando Outdoor Adver. v. City of Ormond Beach,* 415 So. 2d 1312 (Fla. 5th DCA 1982) (upholding an ordinance banning billboards and off-site advertising in Ormond Beach, a primarily residential community, as a valid exercise of the police power); *Moviematic Indus. Corp. v. Bd. of County Comm'rs of Metro. Dade County,* 349 So. 2d 667, 669 (Fla. 3d DCA 1977) (holding that "zoning regulations which tend to preserve the residential or historical character of a neighborhood and/to enhance the aesthetic appeal of a community are considered valid exercises of the public power as relating to the general welfare of the community"); *City of Coral Gables v. Wood,* 305 So. 2d 261, 263 (Fla. 3d DCA 1974) (recognizing that "[a]esthetic considerations have been held to be a valid basis for zoning in Florida" and finding that an ordinance prohibiting campers or other vehicles designed or adaptable for human habitation from being kept or parked upon public or private property within the City of Coral Gables, unless

confined in a garage, was reasonable and 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 v. City of Coral Gables*, 62 So. 3d 625, 633 (Fla. 3d DCA 2010).

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

Plainly, therefore, Count I for Violation of Plaintiffs' Inalienable Rights fails to state a cause of action and this Court must dismiss the Complaint with prejudice.

C. Plaintiffs' Claim for Violation of Right of Privacy, Count II, Fails to State a Claim and Must be Dismissed as a Matter of Law

Plaintiffs next allege that the Ordinance, by limiting vegetable gardens to rear yards only, somehow violates Plaintiffs' privacy rights under the Florida Constitution to make decisions about what foods to grow and consume on their own property and to provide to their families. Pls.' Compl. at ¶87. Further, Plaintiffs allege that they are deprived of their preferred source of sustenance and the ability to choose the foods they eat. *Id.* at ¶88.

Again, as Plaintiffs admit in their Complaint and as made clear in the Ordinance, Plaintiffs *are* allowed to grow vegetables on their residential property -- in their rear yard. *Id.* at ¶¶45-46. Thus, Plaintiffs' own Complaint shows that the Ordinance does not deprive them of the right to make decisions about what foods to grow and consume on their own property and provide to their families. Neither does the Ordinance deprive them of their preferred source of sustenance. To the contrary, as Plaintiffs set forth in their Complaint, the Village has done nothing to prevent them from having a vegetable garden in their rear yard. The fact that Plaintiffs

do not (if indeed they do not) do so is of their own choosing. Thus, as set forth above, Plaintiffs' Complaint is internally inconsistent and shows that Plaintiffs are unable to state a cause of action requiring dismissal. *See*, Trawick's, *Florida Practice and Procedure*, § 6:7(2008-2009 edition)("Repugnancy occurs when allegations within a single cause of action or defense are inconsistent and thus neutralize each other. The resulting pleading is a nullity. This may occur in the pleading or between it and an attached exhibit.")(citing *Hoopes v. Crane*, 47 So. 992 (Fla. 1908); *Shelton v. Eisemann*, 79 So. 75 (Fla. 1918); *Harry Pepper & Associates, Inc. v. Lasseter*, 247 So. 2d 736 (Fla. 3d DCA 1971); and *Peacock v. General Motors Acceptance Corp.*, 432 So. 2d 142 (Fla. 1st DCA 1983)). Merely alleging the legally insufficient legal conclusion that Plaintiffs are being deprived of certain rights is unavailing, particularly where specific facts showing the opposite are also alleged.

Additionally, Count II fails to state a cause of action, because as a matter of law, the Ordinance does not violate the privacy rights clause of Florida's Constitution.

Article I, Section 23 of the Florida Constitution states:

> Right of Privacy.—Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

Fla. Const. Art. I, § 23.

"This right of privacy protects Florida's citizens from the government's *uninvited observation* of or interference in those areas that fall within the ambit of the zone of privacy afforded under the provision." *City of Miami v. Kurtz*, 653 So. 2d 1025, 1027 (Fla. 1995) (citing *Shaktman v, State*, 553 So. 2d 148 (Fla. 1989)(emphasis added)).

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

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)). Clearly, the Ordinance does not implicate any privacy right.

In the instant matter, the Village's Ordinance does not intrude into an aspect of the Plaintiffs' life in which they have a legitimate expectation of privacy. This is so because whether Plaintiffs have a vegetable garden in their front yard is open and notorious for all to see. Even Plaintiffs state in their Complaint that they often received comments about their front yard vegetable garden from neighbors and people who were passing by. Pls.' Compl. at ¶37. Plainly, therefore, given that Plaintiffs reveal to everyone who happens to see their house whether they have a front yard vegetable garden, Plaintiffs have no reasonable expectation of privacy in maintaining a front yard vegetable garden.

City of Miami v. Kurtz, is instructive. In that case, the City of North Miami adopted a policy designed to reduce the number of employees who smoke tobacco. *Id.* at 1026. The city issued an administrative regulation which required all job applicants to sign an affidavit stating that they have not used tobacco or tobacco products for the past year immediately preceding their application for employment. *Id.*

The Plaintiff in that case applied for a clerical position and told the interviewer that she smoked and could not sign the affidavit. *Id.* at 1028. The plaintiff was told that she would not be considered for employment until she had been smoke-free for at least one year. *Id.* The plaintiff then filed suit seeking to enjoin the enforcement of the regulation and asking for a declaratory judgment finding the regulation to be unconstitutional. The case made its way to the Florida Supreme Court, which ultimately held that the City's actions did not intrude into an aspect of the plaintiff's life in which she had a legitimate expectation of privacy. *Id.* The Court made this determination based on the conclusion that smokers in today's society are constantly required to reveal whether they smoke, such as when they are seated in restaurants, renting a hotel room, renting a car, etc. *Id.* Thus, the Supreme Court held that since the plaintiff had to repeatedly reveal whether she was a smoker in society, there could be no reasonable expectation of privacy in the disclosure in applying for a job. *Id.*

Similarly, in this case, Plaintiffs reveal every day whether they have a front yard vegetable garden, and thus, can have no reasonable expectation of privacy with regard to a front yard vegetable garden. Further, the Ordinance does not prohibit Plaintiffs from deciding what foods to grow and consume on their property and to provide to their families. Again, the Ordinance allows Plaintiffs to grow any vegetables they wish, in their rear yard (or even indoors). Likewise, the Ordinance does not deprive Plaintiffs of their preferred source of

sustenance and the ability to choose the foods they eat. To the extent that they use their rear yard for the purpose of growing vegetables, they may choose the foods from there or they may purchase them from wherever else they desire.

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

D. Plaintiffs' Claim of Violation of Florida's Due Process Clause, Count III, Fails to State a Claim and Must be Dismissed as a Matter of Law

In addition to the serious defects and deficiencies in Plaintiffs' Complaint already detailed above, it is also clear from the face of the Complaint that Plaintiffs fail to state a claim under the Florida Constitution's Due Process Clause. The Due Process Clause states that "[n]o person shall be deprived of life, liberty or property without due process of law…." Fla. Const. Art. I, § 9.

Plaintiffs allege that substantive due process "protects, among other things, the right to be free from arbitrary and unreasonable government interference." Pls' Compl. at ¶95. Further, they allege that the ban on front-yard vegetable gardens is arbitrary and unreasonable and violates the due process clause. *Id.* at ¶¶97 and 102.

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

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

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

Miami Shores has an interest in maintaining certain basic residential community standards by limiting vegetable gardens to locations other than the front yard. Further, the Ordinance does not prohibit Plaintiffs or other homeowners from maintaining a vegetable garden in the rear yard of their property. Therefore, since this Ordinance, on its face, was plainly designed to maintain the aesthetic appeal of the community, it bears a rational relationship to a legitimate purpose and Count III should be dismissed.

E. Plaintiffs' Claim for Violation of Florida's Equal Protection Clause, Count IV, Fails to State a Claim and Must be Dismissed as a Matter of Law

Plaintiffs allege in Count IV of their Complaint that application of the Ordinance violates the Equal Protection Clause of the Florida Constitution, because the ban on vegetable gardens outside of the rear yard purportedly creates an arbitrary legal distinction between people who

grow vegetable plants in their front yard and people who grow other plants in their front yard. Pls.' Compl. at ¶¶109-111.

Count IV fails to state a cause of action, because as a matter of law, the Ordinance does not violate the equal protection clause of Florida's Constitution.

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

Assuming *arguendo* that similarly situated persons are being treated differently, this case does not involve a fundamental right or suspect class, so the rational basis test would apply. Again, as set forth above, unless an ordinance involves a suspect class or a fundamental right, none of which the Plaintiffs have alleged here, the ordinance need only bear a rational relationship to a legitimate state purpose. *Kuvin,* 62 So. 3d at 629*; Lane v. Chiles*, 698 So. 2d 260, 263 (Fla. 1997) (because fishing is not a fundamental right and commercial fisherman do not constitute a suspect class, the rational basis test should be applied.); *WCI Communities, Inc. v. City of Coral Springs*, 885 So. 2d 912, 914 (Fla. 4th DCA 2004) (when the legislation being challenged does not target a protected class, the rational basis test is applied.).

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

potentially infringes on (but does not destroy entirely) property rights). The Ordinance at issue does not violate Florida's equal protection clause.

Moreover, in this case, similarly situated persons simply are not being treated differently. As alleged in the Complaint, Plaintiffs claim that they, as people who want to grow vegetables in their front yard, are being treated differently than people who grow other flowers or fruit in their front yards. However, the distinction that the Ordinance is drawing is not between persons, but rather, between the front yard and the back yard, or between types of gardens. Thus, there can be no equal protection violation.[3]

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

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

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

F. Plaintiffs' Claims are Barred as a Matter of Law, Because They Should Have Been Raised in Their Appeal to the Circuit Court

Plaintiffs allege violations of various rights under the Ordinance. Pls' Compl. ¶¶45-46. Plaintiffs were cited for code violations for having a vegetable garden in their front lawn. *Id.* at 49. The Village Code Enforcement Board held hearings on this matter, and entered a ruling adverse to Plaintiffs, from which Plaintiffs appealed. *Id.* at ¶¶ 50, 51 and 53. During the appeal and without seeking a stay pending appeal, Plaintiffs complied with the Ordinance by removing the vegetable garden in their front yard, and then ultimately voluntarily dismissed their appeal. *Id.* at ¶¶ 54-56.

Plainly, Plaintiffs' Complaint is 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. *Ice Chemical Corp. v. Freeman*, 640 So. 2d 92, 93 (Fla. 3d DCA 1994). Here, the Village's Code Enforcement Order, enforcing the Ordinance is a final order, and Plaintiffs' current claims could have and should have been raised in their appeal to the Circuit Court, which Plaintiffs instead voluntarily dismissed. *Kirby v. City of Archer*, 790 So. 2d 1214 (Fla. 1st DCA 2001). Thus, this Court must dismiss Plaintiffs' Complaint with prejudice,

In *Kirby*, the city obtained a lien, which arose from fines imposed by the City's Code Enforcement Board, against the property owner. The fines levied against the property owner were based on the Board's findings, following a hearing, that the property owner violated an ordinance prohibiting the maintaining of certain types of vehicles on any real property in the city. The property owner did not appeal the final order of the code enforcement board.

The city then filed a foreclosure action against the property owner, and the trial court granted summary judgment. On appeal, the property owner argued that the lower court erred in

granting summary judgment in the foreclosure action, because among other things, the ordinance was unconstitutionally applied to him. In affirming the decision of the trial court, the appellate court stated that the property owner made his arguments too late. *Id.* at 1215. The appellate court held that the property owner's constitutional challenge could not be raised for the first time in the foreclosure action, because it was properly cognizable on an appeal to the circuit court from a final order of the enforcement board. *Id.* (quoting *Holiday Isle Resort & Marina Assoc. v. Monroe Cty*, 582 So. 2d 721-22 (Fla. 3d DCA 1991)).

Similarly, in this case, Plaintiffs are barred from asserting their claims now, because they should have and could have been raised in their appeal from the Village's Order. However, Plaintiffs dismissed their appeal, and cannot now assert their constitutional claims. Thus, Plaintiffs' Complaint is barred as a matter of law, and must be dismissed with prejudice.

III. CONCLUSION

Plaintiffs have no fundamental constitutional right to a vegetable garden in their front yard. As such, the Ordinance is constitutional as a matter of law, and this Court should dismiss Plaintiffs' Complaint with prejudice.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served **via eservice@myflcourtaccess.com** this **10th** day of **January, 2014** on *Ari Simon Bargil, Esq.* (*abargil@ij.org*), 999 Brickell Avenue, Suite 720, Miami, FL 33131 and *Michael Bindas, Esq.* (*mbindas@ij.org*) 10500 Northeast 8th Street, #1760, Bellevue, WA 98004.

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