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

HERMINE RICKETTS and
LAURENCE CARROLL,
a married couple,

Plaintiffs,

v.

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

Defendants.
_____/

CASE NO.: 13-36012-CA
CIVIL DIVISION: 01

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT

Plaintiffs Hermine Ricketts and Laurence "Tom" Carroll ("Plaintiffs"), by and through their undersigned counsel, hereby file this memorandum of law in opposition to the motion to dismiss filed by Defendants Miami Shores Village and the Miami Shores Code Enforcement Board (together, "Village").

I. INTRODUCTION

This is a civil rights lawsuit brought by Hermine Ricketts and her husband, Laurence "Tom" Carroll, a married couple who simply wish to grow vegetables on their own property for their own consumption. In fact, for seventeen years, they did precisely that, maintaining a modest, well-manicured vegetable garden in the front yard of their Miami Shores home after attempts to grow a backyard vegetable garden proved unsuccessful. Earlier this year, however, the Village ordered them to destroy their garden—which they had kept for their own personal consumption and which had provided a large part of their diet—after it enacted an ordinance providing that "[v]egetable gardens are permitted in rear yards only." Miami Shores, Fla., Code

of Ordinances Part II, app. A, art. V, div. 17, § 536(e). This ordinance violates Hermine and Tom's right to make peaceful, productive use of their own property to feed themselves and their family and to make inherently intimate decisions about what foods to grow and consume on their own property. They have plainly stated claims for violation of these rights under the Inalienable Rights, Right of Privacy, Due Process, and Equal Protection Clauses of the Florida Constitution, and the Village's motion to dismiss should accordingly be denied.

II. FACTS

Hermine and Tom are a married couple who have called Miami Shores home for over 20 years. Compl. ¶ 19. The two have long been very conscientious about what foods they consume and where those foods come from. *Id*. at ¶ 20. They desire a plant and vegetable-based diet, consisting of wholesome and nutritious items that often cannot be found in conventional grocery stores. *Id*. Hermine and Tom are just as careful about the source of the foods they eat, and how those items are processed before they reach store shelves. *Id.* For those reasons, the two decided that there was only one way they could consume the food of their choice while also ensuring that it was grown in accordance with their preferences: grow it themselves. *Id.* at ¶¶ 19-21; 28.

Hermine and Tom began growing vegetables on their property, in the back yard only, shortly after moving in to their property. *Id*. at ¶¶ 21-23. However, their south-facing home left their back-yard garden covered in shadows during the fall/winter planting season—by far South Florida's most fertile time of year. *Id*. at ¶¶ 22-23; 58-60. After several years of planting in their back yard without success, Hermine and Tom moved their garden to the front of the property, where the increase in sunlight allowed it to flourish. *Id*. at ¶ 24. For 17 years, until just this August, Hermine and Tom maintained their front-yard vegetable garden, which had become a source of both material sustenance and joy for the couple. *Id*. at ¶¶ 24-34; 36-40. The garden

provided 100 percent of their vegetable intake—the majority of their diet—while adding beauty and character to their home and community. *Id*. at ¶¶ 26; 37-40. An architect by trade, Hermine took great care in the planning and design of a garden that melded both form and function, a fact which was not lost on the regular stream of neighbors and passers-by who stopped to compliment her on its appeal. *Id*. at ¶¶ 40-42. And for 17 years, those compliments were the only comments that Hermine and Tom received about the garden; not once did the Village advise the couple that their garden posed a threat to the city's aesthetic appeal, community character, or otherwise ran afoul of any ordinance. *Id*. at ¶ 43.

But in March 2013, the Village of Miami Shores adopted a new zoning code with a provision stating that "[v]egetable gardens are permitted in rear yards." Miami Shores, Fla., Code of Ordinances Part II, app. A, art. v, div. 17, § 536(e); Compl. ¶¶ 44-46.[1] The code, however, does not prohibit homeowners from growing other plants in their front yard, such as fruit and flowers. Compl. ¶ 47. Thus, a homeowner is free to grow pineapple plants, watermelon vines, coconut palms, and bamboo, but not peppers, lettuces, or onions.

Less than two months after the new zoning code was adopted, Hermine and Tom received a Courtesy Notice from the Village that the garden was illegal and had to be destroyed. *Id.* at ¶ 49. In August 2013, the matter was heard by the Code Enforcement Board of the Village of Miami Shores, which found Hermine and Tom to be in violation instructed them that a failure to uproot the garden would result in daily fines of $50 for noncompliance. *Id.* at ¶ 51.

Hermine and Tom initially filed a Notice of Appeal from the Board's ruling. *Id*. at ¶ 53. Just a day later, however, faced with the threat of looming fines that they simply could not afford to bear (their plea to the Village to stay the fines during the pendency of the appeal was rejected),

[1] The previous version of the zoning code provided that "vegetable gardens are permitted in rear yards."

Hermine and Tom had no choice but to destroy their garden as ordered. *Id.* at ¶¶ 53-57. Immediately after receiving confirmation from the Village Attorney that they were now in compliance, they voluntarily dismissed their appeal. Compl. ¶ 56.

Hermine and Tom were thus deprived of what had been the source of their sustenance for 17 years. Compl. ¶¶ 24-26; 32-33; 36; 58-59; 61-71. They were likewise deprived of the right to use their own property in a peaceful and productive manner to provide for themselves and their family. *Id.* at ¶ 62. They now must purchase their vegetables—which are of decreased quality and freshness—from grocery stores, a needless chore which costs them both time and money. *Id.* at ¶¶ 28; 31-35; 63-69; 71. They have also been forced to change their diet outright, as many of their preferred foods are not even available in local stores, and even when substitutes are available, Hermine and Tom are unsure of their origins. *Id.* at ¶¶ 66; 69. In short, the Village's ban on front-yard vegetable gardens has not only cost Hermine and Tom a substantial amount of time and money, but has also deprived them of the joy and assurance that can only be attained through this sort of dedicated self-reliance. *Id.* at ¶¶ 28; 31-35; 61-71.

On November 18, 2014, Hermine and Tom filed this declaratory judgment action to vindicate their property and privacy rights under the Inalienable Rights, Right of Privacy, Due Process, and Equal Protection Clauses of the Florida Constitution. The Village has now moved to dismiss the action. For the reasons discussed below, that motion should be denied.

III. ARGUMENT

The Village offers five distinct, but equally unconvincing, arguments in support of its motion to dismiss:

- First, the Village maintains that Hermine and Tom cannot prevail because their claims are subject to rational basis review, which the Village can survive by

simply invoking a governmental interest in aesthetics. *See* Mot. to Dismiss 5. The Village ignores the need for a rational connection between the ordinance and this purported interest.

- Second, the Village asserts that Hermine and Tom's claims are foreclosed by supposedly inconsistent allegations in their complaint. *See* Mot. to Dismiss 8. There is no such inconsistency.
- Third, the Village argues that Hermione and Tom cannot state a Right of Privacy Clause claim because their yard is "open and notorious for all to see." Mot. to Dismiss 9. The Village ignores the fact that the clause also protects a person's liberty, self-determination, and freedom from governmental intrusion into her personal life.
- Fourth, the Village argues that Hermine and Tom cannot state an Equal Protection Clause claim because the ban on front-yard vegetables distinguishes between types of yards and gardens, not people. *See* Mot. to Dismiss 14. That argument is sophistry: the ban governs property owners, not property.
- Fifth, Defendants' contend that the Hermine and Tom's claims are barred by res judicata, because they could have been raised in their code enforcement proceeding appeal. There is no identity of causes of action, however, between the code enforcement proceeding and the present constitutional challenge, and identity of causes of action is a prerequisite to res judicata.

Because there is no merit to any of the Village's arguments, this Court should deny the Village's motion to dismiss.

A. LEGAL STANDARD

"[W]hen presented with a motion to dismiss, the trial court is required to 'treat the factual allegations of the complaint as true and to consider those allegations in the light most favorable to the plaintiffs.'" *Siegle v. Progressive Consumers Ins. Co.*, 819 So. 2d 732, 734-35 (Fla. 2002) (quoting *Hollywood Lakes Section Civic Ass'n, Inc. v. City of Hollywood*, 676 So. 2d 500, 501 (Fla. 4th DCA 1996)). Motions to dismiss should be granted infrequently and only where the court has concluded that there is no conceivable state of facts under which a plaintiff could prevail:

> Cases are generally to be tried on their proofs rather than the pleadings and there is insufficient justification for granting a motion to dismiss a complaint for failure to state a claim unless the allegations in the pleading attacked show with certainty that the plaintiff would not be entitled to relief under any state of facts which could be proved in support of the claim.

Midflorida Sch. Fed. Credit Union v. Fansler, 404 So. 2d 1178, 1179 (Fla. 2d DCA 1981); *see also Redland Estates, Inc. v. Lynn*, 920 So. 2d 1218, 1219-20 (Fla. 3d DCA 2006) (applying *Midflorida Schools*). In short, so long as the complaint "contains sufficient allegations to acquaint the defendant with the plaintiff's charge of wrongdoing so that the defendant can intelligently answer the same, it is error to dismiss the action on the ground that more specific allegations are required." *Rio v. Minton*, 291 So. 2d 214, 215 (Fla. 2d DCA 1974) (quoting *Fontainebleau Hotel Corp. v. Walters*, 246 So. 2d 563, 565 (Fla. 1971)).

Here, Hermine and Tom have sufficiently alleged a set of facts that, if true, entitle them to relief. The Village's motion should therefore be denied.

B. THE VILLAGE'S MERE INVOCATION OF AESTHETICS DOES NOT DEFEAT HERMINE AND TOM'S CLAIMS.

There is no basis for the Village's primary argument, which is that Hermine and Tom's claims necessarily fail because they are subject to rational basis review and the Village has

identified a legitimate governmental interest in aesthetics. For one thing, Hermine and Tom's claims involve fundamental rights and are therefore subject to strict scrutiny—not rational basis review. But even if their claims are subject to rational basis review, they still have stated claims. "[R]ational basis review is not a rubber stamp of all legislative action," *Hadix v. Johnson*, 230 F.3d 840, 843 (6th Cir. 2000), and the mere "invocation of aesthetic objectives" does not carry with it "some talismanic quality" that "legitimizes" every regulation, *Pagan v. Fruchey*, 492 F.3d 766, 776 (6th Cir. 2007) (en banc). Thus, the Village's primary argument for dismissal fails.

1. *Strict Scrutiny, Not Rational Basis Review, Governs Hermine and Tom's Claims Because They Allege Abridgement of Fundamental Rights*

Hermine and Tom's claims are subject to strict scrutiny, not rational basis review, because they allege violation of fundamental rights: specifically, the right to use and enjoy property and the right of privacy.

First, Hermine and Tom allege a violation of their right to use and enjoy their own property to feed themselves and their family. Compl. ¶¶ 62-64. "The right . . . . to use one's property as one wills [is a] fundamental right[] guaranteed by . . . the constitution of the State of Florida." *Palm Beach Mobile Homes, Inc. v. Strong*, 300 So. 2d 881, 884 (Fla. 1974).[2] Moreover, it is a right squarely protected by the Inalienable Rights Clause of the Florida Constitution. *Shriners Hosp. for Crippled Children v. Zrillic*, 563 So. 2d 64, 67 (Fla. 1990)

[2] *See also In re Estate of Magee*, 988 So. 2d 1, 3 (Fla. 2d DCA 2007) (noting that Florida courts treat property rights as "inalienable rights grounded in natural law" and as "fundamental") (internal quotation marks and citation omitted); *Pembroke Ctr., LLC v. State*, 64 So. 3d 737, 742 (Fla. 4th DCA 2011) (Levine, J., concurring) ("[T]he right of property is fundamental to a free society."); *N. Fla. Women's Health and Counseling Svcs., Inc. v. State*, 866 So. 2d 612, 635 (Fla. 2003) ("[I]t is settled in Florida that each of the personal liberties enumerated in the Declaration of Rights is a fundamental right.").

("The phrase 'acquire, possess and protect property' in article I, section 2, includes the incidents of property ownership: the '[c]ollection of rights to use and enjoy property' . . . .").[3]

Hermine and Tom have likewise alleged violation of their right to privacy, which is also a fundamental right. *N. Fla. Women's Health and Counseling Svcs. v State*, 866 So. 2d 612, 626. Florida is one of only a handful of states "having its own express constitutional provision guaranteeing an independent right to privacy," *In re T.W.*, 551 So. 2d 1186, 1190 (Fla. 1989), and this right "is much broader in scope than that of" its unenumerated counterpart recognized in federal constitutional law. *Winfield v. Div. of Pari-Mutuel Wagering, Dep't of Bus. Regulation*, 477 So. 2d 544, 548 (Fla. 1985). It includes "the right to liberty and self-determination," *State v. J.P.*, 907 So. 2d 1101, 1115 (Fla. 2004)—that is, "to be free from governmental intrusion in . . . the maintenance of [our] personal lives," *Dep't of Law Enforcement v. Real Property*, 588 So. 2d 957, 963 (Fla. 1991). And as the Supreme Court of Alaska—one of the few other states with an express right-of-privacy protection in its constitution, *see* Alaska Const. art. I, § 22—has held, it specifically protects personal choice in food matters. *Gray v. State*, 525 P.2d 524, 528 (Alaska 1974) (holding that the right to privacy "clearly . . . shields the ingestion of food, beverages, and other substances."); *Ravin v. State*, 537 P.2d 494, 515 (Alaska 1975) ("Thus, the decision whether to ingest food, beverages or other substances comes within the purview of that right to privacy.").

Because Hermine and Tom's complaint states claims for abridgement of property rights and the right to privacy, their claims are subject to strict scrutiny—not rational basis review, as the Village contends. *State v. J.P.*, 907 So. 2d 1101, 1109 (Fla. 2004) ("When a statute or . . .

[3] Of course, this right is also protected by the Due Process Clause, which protects against "depriv[ations] of . . . property," Fla. Const. art. I, § 9, as well as the Equal Protection and Right of Privacy Clauses. *See Zrillic*, 563 So. 2d at 67 (applying Equal Protection Clause in property context); *In re Forfeiture of 1969 Piper Navajo*, 592 So. 2d 233, 236 (Fla. 1992) (noting that the Right of Privacy Clause protects property rights).

impairs the exercise of a fundamental right, then the law must pass strict scrutiny."); *see also id.* ("Florida courts consistently have applied the 'strict' scrutiny standard whenever the Right of Privacy Clause was implicated, regardless of the nature of the activity."); *In re Forfeiture of 1969 Piper Navajo*, 592 So. 2d at 235 ("[When] the state . . . infringe[s] upon an individual's property rights by regulating for the public safety, we must . . . decide whether the means chosen by the legislature . . . are narrowly tailored to achieve the state's objective . . . through the least restrictive alternative.").[4] The Village's ban on front-yard vegetable gardens cannot withstand strict scrutiny for two reasons. First, Miami Shores' asserted interest—aesthetics—is not compelling. *See Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1267 (11th Cir., 2005); *State v. Catalano*, 104 So. 3d 1069, 1079 (Fla. 2012) (citing, approvingly, cases holding that aesthetics is not a compelling governmental interest); *but see City of Sunrise v. D.C.A. Homes, Inc.*, 421 So. 2d 1084, 1085 (Fla. 4th DCA 1982) (holding that the trial court erred in its finding that aesthetics alone was not a compelling government interest). Second, even if aesthetics were a compelling governmental interest—and even if a front-yard vegetable garden were a threat to aesthetics—a blanket ban, rather than a set of reasonably considered regulations, is not the "least intrusive" means of achieving that interest. *See State v. Bradford*, 787 So. 2d 811, 823-28 (Fla. 2001); *see also Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 430 F. Supp. 2d 222, 270 (S.D.N.Y. 2006); *District of Columbia ex rel. W.J.D. v. E.M.*, 467 A.2d 457, 466 (D.C. 1983).

[4] Florida courts have occasionally suggested that laws interfering with property rights may not always be subject to strict scrutiny. *See, e.g.*, *Zrillic*, 563 So. 2d at 70 & n.6 ("Although the express constitutional property right at issue in the instant case may well qualify for application of a more stringent test, we need not address that issue because the . . . [statute at issue] fails to satisfy even the rational basis test."). As in *Zrillic*, Hermine and Tom have stated claims even under the rational basis test.

2. *Even If Rational Basis Review Applies, Hermine and Tom Have Stated Claims*

Even if rational basis review governs this case, however, Hermine and Tom still have stated claims. In arguing otherwise, the Village maintains that so long as the government asserts a legitimate governmental interest for a challenged law (here, aesthetics), the plaintiff challenging the law cannot state a claim. *See* Mot. to Dismiss 6-7, 12, 14. There is no basis for the Village's contention.

First, the rational basis test "is not a rubber stamp" that mandates automatic dismissal of a plaintiff's constitutional claims. *Hadix*, 230 F.3d at 843. Plaintiffs in rational basis cases not only commonly survive motions to dismiss—they also go on to prevail *on the merits* of their claims. In fact, in the U.S. Supreme Court alone, plaintiffs have prevailed on the merits in 21 rational basis cases since 1970.[5] And Florida is no different; plaintiffs can and do win cases under the rational basis test. *See, e.g., Proctor v. City of Coral Springs*, 396 So. 2d 771 (Fla. 4th DCA 1981) (holding that a parking restriction on pickup trucks had "no foundation in reason").

Second, merely invoking an interest in aesthetics, as the Village has done, will not defeat Hermine and Tom's claims. *See, e.g., id.* (recognizing governmental interest in aesthetics but nevertheless holding a parking restriction on pickup trucks to be unconstitutional). Rather, the Village must also show that its ban on front-yard vegetable gardens is rationally related to the achievement of that interest. Specifically, it must show: (1) that there is "a reasonable and

[5] *See United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013); *id.* at 2706 (Scalia, J., dissenting) (noting Court relied on rational basis review); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); *United States v. Morrison*, 529 U.S. 598, 617-19 (2000); *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 565 (2000); *Romer v. Evans*, 517 U.S. 620, 634-35 (1996); *United States v. Lopez*, 514 U.S. 549, 567-68 (1995); *Quinn v. Millsap*, 491 U.S. 95, 109 (1989); *Allegheny Pittsburgh Coal Co. v. Cnty. Comm'n of Webster Cnty.*, 488 U.S. 336, 345-46 (1989); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985); *Hooper v. Bernalillo Cnty. Assessor*, 472 U.S. 612, 623 (1985); *Williams v. Vermont*, 472 U.S. 14, 24-27 (1985); *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 880 (1985); *Plyler v. Doe*, 457 U.S. 202, 230 (1982); *Zobel v. Williams*, 457 U.S. 55, 64 (1982); *Chappelle v. Greater Baton Rouge Airport Dist.*, 431 U.S. 159, 159 (1977) (per curiam); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534, 538 (1973); *James v. Strange*, 407 U.S. 128, 141-42 (1972); *Lindsey v. Normet*, 405 U.S. 56, 78-79 (1972); *Mayer v. City of Chicago*, 404 U.S. 189, 195-96 (1971); *Reed v. Reed*, 404 U.S. 71, 76-77 (1971); *Turner v. Fouche*, 396 U.S. 346, 362-64 (1970).

substantial relation" between the ban on front-yard vegetable gardens and aesthetics, *State v. Saiez*, 489 So. 2d 1125, 1127, 1128 (Fla. 1986); (2) that the ban is "not . . . unreasonable, arbitrary, or capricious," *id.*; and (3) that the ban is "reasonably necessary" to achieve the Village's aesthetic interests, *Maxwell v. City of Miami*, 100 So. 147, 149 (Fla. 1924).[6] The Village has not even attempted to make such a showing, nor could it. An ordinance that prohibits vegetables while permitting fruit, flowers, and other plants is not reasonably and substantially related to aesthetics. There is no aesthetic basis for banning peppers, lettuces, and onions in a front yard while allowing pineapple plants, watermelon vines, coconut palms, and bamboo. There is nothing inherent in vegetables that renders them any more aesthetically displeasing than these other, permitted items. *See Zrillic*, 563 So. 2d at 70 (holding that a statute intended to prevent the undue influence of charities on property devises failed the rational basis test because "[t]here is no reason to believe that testators need more protection against charities than against unscrupulous and greedy relatives, friends, or acquaintances"); *In re Florida Bar*, 349 So. 2d 630, 634-35 (Fla. 1977) (holding there was no rational basis for a contingency fee ceiling because there was "a paucity of evidence that any significant evil [wa]s being advanced through utilization of the contingent fee arrangement" and "a complete absence of any evidence that the proposed maximum fee schedule in contingent fee cases has any real or substantial relation to the cure of the espoused evil"); *DeWeese v. Town of Palm Beach*, 812 F.2d 1365, 1367-68 (11th Cir. 1987) ("[T]he Town has not indicated how it will help preserve the residential

[6] *See also In re Florida Bar*, 349 So. 2d 630, 634 (Fla. 1977) ("[I]f it appears . . . that the means employed have no real and substantial relation to the avowed or ostensible purpose, or that there is wanton or arbitrary interference with private rights, the legitimate bounds of the police power may be exceeded."); *Zrillic*, 563 So. 2d at 70 (noting that the Equal Protection Clause requires that a statutory classification "be based at a minimum on a rational distinction having a just and reasonable relation to a legitimate state objective").

nature of the Town to require men to wear a shirt while jogging. Nor can we divine any rational way.").[7]

Third, facts matter in rational basis cases, because a plaintiff is entitled to try "to negate a seemingly plausible basis for the [challenged] law by adducing evidence of irrationality." *St. Joseph Abbey v. Castille*, 712 F.3d 215, 223 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 423 (2013). That is why virtually every case the Village cites in its discussion of aesthetic interests was resolved *not* on a motion to dismiss, but on the merits, after full development of the facts. *See, e.g., City of Lake Wales v. Lamar Adver. Ass'n of Lakeland*, 399 So. 2d 981 (Fla. 2d DCA 1981) (affirming judgment entered after trial on the merits); *Metro. Dade Cnty. v. Section 11 Prop. Corp.*, 719 So. 2d 1204 (Fla. 3d DCA 1998) (holding that "substantial competent evidence" adduced at evidentiary hearing supported denial of application for special exception); *Lamar-Orlando Outdoor Adver. v. City of Ormond Beach,* 415 So. 2d 1312 (Fla. 5th DCA 1982) (affirming grant of summary judgment); *Moviematic Indus. Corp. v. Bd. of Cnty. Comm'rs of Metro. Dade Cnty.,* 349 So. 2d 667 (Fla. 3d DCA 1977) (holding evidence adduced at hearing, including expert testimony, supported municipality's rezoning decision); *City of Coral Gables v. Wood,* 305 So. 2d 261 (Fla. 3d DCA 1974) (granting writ of certiorari after trial). In none of these cases did the mere assertion of a governmental interest in aesthetics deny a party the opportunity to present facts showing that the challenged law was irrational and, thus, unconstitutional.

In fact, even the case on which the Village relies most heavily, *Kuvin v. City of Coral Gables*, 62 So. 3d 625 (Fla. 3d DCA 2010), makes clear that dismissal of Hermine and Tom's

[7] The irrationality of the "vegetable" classification is only compounded by the difficulty—if not impossibility—of categorizing particular produce items as "vegetables," on one hand, as opposed to fruit, on the other. The difficulty in drawing that line has plagued the law for centuries. *See, e.g.*, *Nix v. Hedden*, 149 U.S. 304 (1893) (holding that, although fruit for botanical purposes, tomatoes were vegetables for tax purposes).

claims is inappropriate. In *Kuvin*, the plaintiff challenged municipal ordinances that restricted the parking of trucks in residential areas of Coral Gables. *Id.* at 628. Like Miami Shores, Coral Gables moved to dismiss the plaintiff's complaint. The court *denied* the motion. *See Kuvin v. City of Coral Gables*, No. 2003-8911-CA-01(Fla. 11th Jud. Cir. Ct., Mar. 23, 2005) (Order Den. Mot. to Dismiss & for More Definite Statement).[8] Only after cross-motions for summary judgment did the court rule against the plaintiff in that case.

Thus, even the cases the Village invokes make clear that its motion to dismiss should be denied and that Hermine and Tom's claims should proceed to the merits. They have plainly stated claims for abridgement of their constitutional rights, and they have specifically alleged that there is no rational (or any other) basis for a ban on front-yard vegetable gardens. They should be allowed to prove their claims.

C. THERE IS NO INTERNAL INCONSISTENCY IN HERMINE AND TOM'S COMPLAINT

There is likewise no basis for the Village's argument that Hermine and Tom's claims should be dismissed because of supposedly inconsistent allegations in their complaint. *See* Mot. to Dismiss 4, 7-8.[9] An inconsistency within a complaint may defeat a claim for relief if it involves material allegations that are "[c]ontradictory" and therefore "neutralize each other." *Peacock v. General Motors Acceptance Corp.*, 432 So. 2d 142, 146 (Fla. 1st DCA 1983) (affirming dismissal where plaintiffs asserted a defamation claim, while simultaneously alleging "that the statements relied on as defamatory are true"); *see also Brocato v. Health Options, Inc.*, 811 So. 2d 827, 829 (Fla. 2d DCA 2002) ("Brocato cannot state a cause of action . . . by

[8] This Court may take judicial notice of this order pursuant to Section 90.202(5), Florida Statutes, which provides that "[a] court may take judicial notice of . . . [o]fficial actions of the . . . judicial departments . . . of any state."

[9] The Village makes this argument specifically in regard to Hermine and Tom's claims under the Inalienable Rights and Right of Privacy Clauses.

asserting that Watson is an eligible plan participant, while at the same time asserting that she is ineligible to participate in the plan . . . ."). Here, there is no inconsistency in Hermine and Tom's complaint, much less one rising to that level.

According to the Village, the supposedly fatal "inconsisten[cy]" lies in the complaint's: (1) allegation, on one hand, that the Village's ordinance deprives Hermine and Tom of their right to use their property to feed themselves; and (2) its acknowledgement, on the other hand, that the Village allows property owners to plant vegetables in their backyard. *See* Mot. to Dismiss 4, 7-8. There is no inconsistency between these two points. As Hermine and Tom alleged—and as the Village neglects to mention—they are unable to maintain a vegetable garden in their backyard because it is heavily shaded during South Florida's peak planting season (September through April). *See* Compl. ¶¶ 21-24. Thus, it is perfectly consistent for them to allege that the ban on front-yard vegetable gardens prevents them from using their property to feed themselves even though they are permitted to plant (though not able to raise) a vegetable garden in their backyard. The Village's argument to the contrary is baseless.

Nor is there any merit to the Village's related suggestion that Hermine and Tom's claims must fail because the front-yard vegetable garden ban does not *completely* deprive them of their property and privacy rights. In fact, the Village's own motion belies this contention: it elsewhere acknowledges that an ordinance that "infringes on (but does not destroy entirely) property rights" is unconstitutional if it fails to satisfy "'reasonable relationship'" or "'rational basis'" review. Mot. to Dismiss 5.[10] Thus, there is simply no basis for the contention that a plaintiff can only state a claim if he or she alleges a *total* deprivation of property or privacy rights.

[10] As noted above, Hermine and Tom maintain that strict scrutiny—not rational basis review—is the appropriate standard governing their claims.

D. THE RIGHT OF PRIVACY PROTECTS AGAINST GOVERNMENTAL INTRUSION INTO PERSONAL MATTERS, INCLUDING FOOD CHOICES.

The Village's next argument—that Hermine and Tom have failed to state a right-of-privacy claim because their front yard is visible to the public, *see* Mot. to Dismiss 8-11—is equally unavailing. The Village's argument fundamentally misapprehends the scope of protection that the Right of Privacy Clause of the Florida Constitution provides.

As noted above, the right of privacy enumerated in the Florida Constitution "is much broader in scope than that of" its unenumerated federal counterpart. *Winfield's*, 477 So. 2d at 548 (Fla. 1985). Although the Village would reduce it to a mere freedom from governmental *observation* in areas where one has a reasonable expectation of privacy, the Florida Supreme Court has held that it also includes "the right to liberty and self-determination," *J.P.*, 907 So. 2d at 1115—that is, "to be free from governmental intrusion in . . . the maintenance of [our] personal lives," *Dep't of Law Enforcement*, 588 So. 2d at 963. That includes freedom from governmental intrusion in our food choices. *See Gray*, 525 P.2d at 528 (holding that the right-of-privacy provision in Alaska Constitution "clearly . . . shields the ingestion of food, beverages, and other substances."); *see also Ravin*, 537 P.2d at 515. The Village cites no case law to the contrary, and its attempt to limit the right of privacy to a mere right against governmental "observation," *see* Mot. to Dismiss 8, cannot be squared with Florida jurisprudence applying the protections of Article I, section 23, "in a vast array of cases dealing with personal privacy." *J.P.*, 907 So. 2d at 1115.

Nor is there any basis to the Village's contention that its ban on front-yard vegetable gardens does not really affect the dietary choices of Hermine and Tom. See Mot. to Dismiss 10-11. Before they were ordered to destroy it, their garden provided more than half of their overall diet and the entirety of their vegetable intake. Compl. ¶ 26. Now, it is gone, and it

cannot be replicated elsewhere on their property. *Id.* ¶¶ 21-24. To suggest that the vegetable-garden ban "does not deprive them of their preferred source of sustenance and the ability to choose the foods they eat," Mot. to Dismiss 10-11, is to ignore reality.

Finally, the Village's attempt to analogize Hermine and Tom's case to *City of N. Miami v. Kurtz*, 653 So. 2d 1025 (Fla. 1995), falls flat. In *Kurtz*, the plaintiff challenged a requirement that she sign, as part of a job application, an affidavit stating that she did not smoke. *Id.* at 1026. She alleged that this requirement violated her right to privacy, and the court held it did not, because she "ha[d] no legitimate expectation of privacy in revealing that she is a smoker under the Florida constitution." *Id.* at 1028. But the court carefully qualified its holding:

> In reaching the conclusion that the right to privacy is not implicated in this case, however, we emphasize that our holding is limited to the narrow issue presented. *Notably, we are not addressing the issue of whether an applicant, once hired, could be compelled by a government agency to stop smoking.*

Id. at 1028 (emphasis added).

The issue in Hermine and Tom's case is akin to the issue that the court *declined* to resolve in *Kurtz*. Specifically, it is whether the government can prohibit a property owner from growing vegetables in her front yard, for her own consumption—not whether the government can ask her to reveal whether she grows vegetables in her front yard. *Kurtz*, therefore, has nothing to say on this case.

In short, there is no basis for dismissing Hermine and Tom's right-of-privacy claim. Article I, section 23, protects the freedom of individuals to make personal, intimate decisions about the foods they consume and feed their families. Hermine and Tom have alleged that the Village's ban on front-yard vegetable gardens abridges that right, and they are entitled to try to prove their claim.

E. THE VILLAGE'S ORDINANCE DISTINGUISHED BETWEEN PEOPLE, NOT THINGS.

The Village is again wrong when it argues that Hermine and Tom's Equal Protection Clause claim must be denied because the front-yard vegetable garden ban does not treat similarly situated people differently. *See* Mot. to Dismiss 14. Hermine and Tom specifically alleged that it does,[11] and the Village's argument to the contrary is mere sophistry.

The nub of the Village's argument on this point is that the distinction the vegetable garden ban draws is "between the front yard and the back yard, or between types of gardens"—"not between persons." Mot. to Dismiss. 14. Of course, any law regulating where a person may engage in certain conduct may be recast as one governing the conduct or its location—not the person. The fact that a law can be reimagined in that way, however, does not shield it from constitutional scrutiny.

In *Proctor v. City of Coral Springs*, for example, the Court of Appeals struck down an ordinance that classified pick-up trucks as "commercial vehicles" and restricted them to garages and carports during certain times of the day. *Proctor*, 396 So. 2d at 772. The court held the law unconstitutional because it "restrict[ed] *drivers* of pickup trucks from visiting with friends or family by making it illegal to be parked in a residential driveway, or on the hosts' lawn." *Id.* at 772 (emphasis added). In other words, even though the ordinance distinguished between types of vehicles, and between garages and driveways, the effect of those distinctions was on *people*. *See also State v. Stewart*, 529 N.W.2d 493, 497 (Minn. Ct. App. 1995) ("The location specific application of the statute unreasonably treats similarly situated persons differently in violation of equal protection rights").

[11] *See* Compl. ¶¶ 108-09 ("Miami Shores' ban on front-yard vegetable gardens treats similarly-situated persons differently. Miami Shores ban on front-yard vegetable gardens creates an arbitrary legal distinction between persons who grow vegetable plants in their front yards and persons who grow other plants in their front yards.").

The same is true here. Although the Village can attempt to recast its ordinance as one distinguishing between types of gardens, or between front yards and back yards, the fact remains that it distinguishes between—and regulates—people. The ordinance distinguishes between individuals who grow vegetables in their front yards, on one hand, and those who grow fruit and ornamental flowers in their front yards, on the other. As discussed above and alleged in Hermine and Tom's complaint, *see* Compl. ¶¶ 109-11, that distinction has no "just and reasonable relation to a legitimate state objective." *Zrillic*, 563 So. 2d at 70. Consequently, the Village's argument fails.[12]

F. THE VILLAGE'S ARGUMENT THAT HERMINE AND TOM'S CLAIMS ARE BARRED BY RES JUDICATA IS MERITLESS.

Finally, there is no merit to the Village's argument that Hermine and Tom's claims are barred by res judicata. *See* Mot. to Dismiss 15-16. According to the Village, res judicata applies because Hermine and Tom's constitutional claims could have been raised in their appeal of the Village's code enforcement board decision. However, *res judicata* will only bar a subsequent suit where, among other things, there is an identity of causes of action between the prior and subsequent action. Here, there is none.[13]

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[12] The Village's argument that Hermine and Tom's position, if accepted, would put speed limit laws at risk is a non-starter. *See* Mot. to Dismiss 14 n.13. Speed limits do in fact treat people differently based on their rate of speed. *Arceneaux v. Treen*, 671 F.2d 128, 137 n.4 (5th Cir. 1982) ("The speed limit is a rule which affects different groups of people in different ways."). However, a speed limit does not violate Equal Protection because, unlike a ban on growing vegetables (but not fruit or flowers) in a front yard, the imposition of a speed limit is rationally related to a legitimate government interest. *Dixon v. District of Columbia*, 666 F.3d 1337, 1342-44 (D.C. Cir. 2011) (rejecting equal protection challenge to a traffic regulation on the grounds that the law was rationally related to the District's "legitimate interest in deterring speeding to ensure public safety").

[13] The Village's res judicata argument is also procedurally improper because res judicata is "an affirmative defense not apparent on the face of the complaint, and therefore, not cognizable on a motion to dismiss." *Wilson* at 632; *see also Calder Race Course, Inc. v. Dep't of Bus. & Prof'l Reg.*, 838 So. 2d 1241 (Fla. 1st DCA 2003) (finding error to dismiss a complaint because "the affirmative defense of res judicata . . . [must be] *conclusively demonstrated within the four corners of the complaint.*") (citing *Livingston v. Spires*, 481 So. 2d 87 (Fla. 1st DCA 1986) (emphasis added).

For example, in *Wilson v. Cnty. of Orange*, 881 So. 2d 625, 631 (Fla. 5th DCA 2004), property owners were cited and issued a violation order by a local code enforcement board, just as Hermine and Tom were. *Id.* at 627-28. The property owners could have, but did not, appeal the violation to the circuit court. *Id.* at 632 n.4. Rather, like Hermine and Tom, they filed a new declaratory judgment (and Section 1983) lawsuit challenging the constitutionality of the ordinances under which they had been cited. *Id.* at 628. The county moved to dismiss the complaint, arguing that the constitutional challenges were barred by res judicata. *Id.* at 628-29. The circuit court agreed and dismissed the complaint, but the court of appeals reversed.

The court of appeals recognized that the property owners "could have raised their constitutional challenges on appeal to the circuit court," *id.* at 632, but it held the constitutional claims were not barred. When there is no identity of causes of action, the court noted, res judicata applies only to bar the determination of issues that were actually litigated and determined in the first action—not those that merely could have been litigated:

> [I]f the cause of action is not the same there will be no estoppel as to those issues which could have been litigated in the previous action. The determining factor in deciding whether the cause of action is the same is whether the facts or evidence necessary to maintain the suit are the same in both actions.

Id. at 632 (quoting *Albrecht v. State*, 444 So. 2d 8, 11-12 (Fla. 1984)). As the court explained, there was no identity between the code enforcement proceeding and the property owners' challenge to the constitutionality of the ordinances under which they were cited:

> In the instant case, there is no identity of the causes of action. The original action was a code enforcement proceeding against the Wilsons. In the second action, the Wilsons sued Orange County for deprivation of rights under 42 U.S.C. § 1983 and also challenged the facial constitutionality of the applicable statutes and ordinances. These are different actions and the facts necessary to support them are different.

Id. at 632 (emphasis added) (citations omitted). Accordingly, the court held that res judicata did not bar the property owners' constitutional claims. *Id.* at 633; *see also Seminole Entm't., Inc. v. City of Casselberry*, 866 So. 2d 1242, 1245 (Fla. 5th DCA 2004) (rejecting res judicata defense: "That Rachel's could have raised, but did not raise, a given constitutional claim in the *certiorari* proceeding is not fatal to its entitlement to raise it in its declaratory judgment action."); *City of Ft. Lauderdale v. Scott*, 773 F. Supp. 2d 1355, 1359 (S.D. Fla. 2001) (applying *Wilson* to reject res judicata defense to as-applied constitutional challenges that could have been, but were not, brought in a code enforcement appeal); *Zureikat v. Shaibani*, 944 So. 2d 1019, 1023 (Fla. 5th DCA 2006) (applying *Wilson* to reject res judicata defense: "In the initial proceeding, Shaibani did not, and was not required to, assert a cause of action based upon an equitable lien. None of Shaibani's claims in the underlying action involved a showing that the money solicited from Shaibani was used to improve Zureikat's real estate. Thus, there was no identity of cause of action, which is one of the required elements of res judicata.") (internal quotation marks and citations omitted).

The same is true here. There is no identity of causes of action between Hermine and Tom's code enforcement proceeding and their constitutional challenge to the Village's ordinance banning front-yard vegetable gardens. The facts at issue in the code enforcement proceeding concerned whether "a code violation exsited[d]" and whether it "ha[d] been corrected." *Id.* In the constitutional challenge, the facts at issue concern whether Hermine and Tom "have been deprived of their rights" under the Florida Constitution. *Id.* at 632-33. Moreover, the very nature of the relief Hermine and Tom seek now is far different than what was at issue in the code enforcement proceeding. The code enforcement proceeding "necessarily focus[ed] on past conduct"; by seeking declaratory relief and an injunction, however, Hermine and Tom are "now

seeking to enjoin future [citations under] the code." *Miami-Dade Cnty. v. Fernandez*, 905 So. 2d 213, 217 (Fla. 3d DCA 2005) (rejecting res judicata defense). Accordingly, Hermine and Tom's constitutional claims are not barred by res judicata.

Finally, it is of no moment that Hermine and Tom briefly commenced an appeal in their code enforcement proceeding but then voluntarily dismissed it when the Village refused to stay the accrual of fines during the appeal's pendency. *See* Compl. ¶¶ 54-58. For example, in *Metro. Dade Cnty. v. Goldberg*, 687 So. 2d 7 (Fla. 3d DCA 1997), a property owner was cited for zoning code violations and commenced an appeal, which was later dismissed. *Id.* at 8. He then brought a new lawsuit challenging: (1) the constitutionality of the zoning ordinance under which he had been cited; and (2) the citations themselves. *Id.* The county asserted a res judicata defense. *Id.* Although the court held that the challenges to the citations themselves were barred by res judicata, the constitutional challenge to the ordinance itself was not: the court resolved it on the merits. *Id.* at 9*; see also id.* at *8 (noting circuit court had "ruled against Goldberg on his claim of unconstitutionality" but "denied relief with regard to the three citations because the earlier administrative adjudication was res judicata"). Here, of course, Hermine and Tom challenge *only* the constitutionality of the ordinance under which they were cited—not the citation itself. Their claims, therefore, are not barred.

IV. CONCLUSION

For the foregoing reasons, this Court should deny the Village's motion to dismiss.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served electronically this 6th day of March, 2014, upon:

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