

# **Third District Court of Appeal**

**State of Florida, July Term, A.D. 2007**

Opinion filed August 22, 2007.  
Not final until disposition of timely filed motion for rehearing.

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No. 3D05-2845  
Lower Tribunal No. 03-8911

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**Lowell Joseph Kuvin,**  
Appellant,

vs.

**City of Coral Gables,**  
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Michael A. Genden, Judge.

Lowell Joseph Kuvin, in proper person.

Ricci~Leopold and Spencer T. Kuvin, (Palm Beach Gardens) for appellant.

Akerman Senterfitt and Michael Fertig and Jennifer Cohen Glasser; Robert S. Glazier; and Elizabeth M. Hernandez, City Attorney, for appellee.

Before CORTIÑAS, and ROTHENBERG, JJ., and SCHWARTZ, Senior Judge.

SCHWARTZ, Senior Judge.

Kuvin appeals a final declaratory judgment in favor of the City of Coral Gables which upheld the validity of ordinances he violated by parking his personally-used pickup truck on a street in a residential area of the municipality. Coral Gables is justly regarded by itself, by its citizens, and by the entire community as The City Beautiful.<sup>1</sup> Famously, and in most cases appropriately, it seeks to maintain that reputation by enacting and strictly enforcing rigorous restrictions on the design and construction of commercial and residential structures in the City. In this case, however, we conclude that the City has unconstitutionally crossed the line into an impermissible interference with the personal rights of its residents and therefore reverse the judgment below.

## I.

In 2003, Kuvin lived in the City in a rental home with no garage. On February 7 of that year, after a previous warning, he parked his Ford F-150 overnight on the public asphalt in front of his residence. This conduct violated both sections 8-11<sup>2</sup> and 8-12<sup>3</sup> of the City's Zoning Code, which respectively

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<sup>1</sup> Dep't of Highway Safety & Motor Vehicles v. Pipkin, 927 So. 2d 901, 904 (Fla. 3d DCA 2005)(dissenting opinion).

<sup>2</sup> Section 8-11, Coral Gables, Florida, Zoning Code, provides, in pertinent part:

Parking in residential areas.

(a) It shall be unlawful for any person to park any . . . truck . . . in or upon any property, public or private, in any area of the city which is zoned residential. This

prohibit parking a “truck”<sup>4</sup> (the definition of which clearly includes an F-150) anywhere at any time in a residential area (including a private driveway) or on a public street between 7:00 p.m. and 7:00 a.m. On March 12, a Gables hearing officer found him guilty and assessed fees and costs against him.

Kuvin subsequently filed a complaint in the circuit court<sup>5</sup> and then a motion for summary judgment, asserting, on various grounds, including the invalidity of

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prohibition, however, shall not apply in the following cases:

1. Vehicles which are entirely enclosed within the confines of an enclosed garage . . . .

<sup>3</sup> Section 8-12, Coral Gables, Florida, Zoning Code, provides:

Trucks, trailers, commercial vehicles, and recreational vehicles – Parking upon streets and public places. Except as provided for herein no trucks, trailers, commercial vehicles, or recreational vehicles, shall be parked upon the streets or other public places of the City between the hours of 7:00 p.m. on one day and 7:00 a.m. of the next day. This prohibition is in addition to the total prohibition covering residential areas dealt with in Section 8-11 hereof.

<sup>4</sup> Section 2-128, Coral Gables, Florida, Zoning Code, defines a “truck” as:

Any motor vehicle designed, used or maintained for transporting or delivering property or material used in trade or commerce in general. Trucks shall include any motor vehicle having space designed for and capable of carrying property, cargo, or bulk material and which space is not occupied by passenger seating.

<sup>5</sup> This procedure is the appropriate means to challenge the validity of an allegedly unconstitutional city ordinance because the hearing officer has no authority over

sections 8-11 and 8-12, that his conviction had been unconstitutionally secured. The City responded and filed a cross-motion for summary judgment, which was granted.

## II.

We reverse that ruling because there is no lawful basis for this restriction of the freedom of the residents of the City. The City seeks to justify it as an allegedly appropriate exercise of its general police power over the safety, morals and general well-being of its citizens and the particular authority to regulate zoning and land use in the city. We find, however, that the only proposed and even arguable rationales for this use of the power entirely fail the requirement for a discernible rational relationship between a municipal regulation and the advancement of a governmental goal the City has a right to promote or the discouragement of what it has a right to restrict. See *County Bd. of Arlington County v. Richards*, 434 U.S. 5 (1977); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926); *Dep't of Cmty. Affairs v. Moorman*, 664 So. 2d 930 (Fla. 1995), cert. denied, 519 U.S. 822 (1996); *City of Miami Beach v. Lachman*, 71 So. 2d 148 (Fla. 1954), appeal

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that question. *Miami-Dade County v. Omnipoint Holdings, Inc.*, 863 So. 2d 195 (Fla. 2003).

dismissed, 348 U.S. 906 (1955). In our view, therefore, the ordinances are clearly invalid as applied to the appellant and his vehicle:<sup>6</sup>

(a) First, the truck parking ban cannot be related to what might be, at least as to section 8-11, a permissible attempt to preserve the residential character of a neighborhood by excluding commercial uses. See *Parking Facilities, Inc. v. City of Miami Beach*, 88 So. 2d 141 (Fla. 1956). This is so for the very simple reason that the ordinances are not restricted to “commercial” vehicles and admittedly include the truck involved here, which serves only the personal use of a resident who both owns the vehicle and lives in Coral Gables.

(b) The argument that the ordinances may be supported on aesthetic grounds is just as unacceptable. Apart from pure matters of taste, concerning which government cannot be involved, *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 510 (1981), there is nothing to distinguish Kuvin’s truck or others like it from what some might think are even more aesthetically displeasing cars or, even more plainly, from one of whatever make or model which is in obvious disrepair or just

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<sup>6</sup> It is not necessary or -- applying the rule that appellate decisions in general, and ones based on constitutional grounds in particular, should be restricted to the narrowest possible ground, see *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 447 (1985), -- it is not even appropriate to go further and determine whether the ordinances are also invalid on their face. See 10 Fla. Jur. 2d Constitutional Law § 102 (2003).

plain dirty.<sup>7</sup> As the court said in *City of Nichols Hills v. Richardson*, 939 P.2d 17, 19-20 (Okla. Crim. App. 1997):

Any vehicle that meets the definition of a “private passenger vehicle” - no matter how ugly, rusted or offensive, may be parked in this municipality between the hours of 2:00 a.m. and 5:00 a.m. However, not a single pickup -- no matter how new, expensive, or “pleasing to the eye,” may be parked in any driveway during these hours. The obvious contradiction belies the City's claim that it has enacted the ordinance to protect the aesthetic integrity of the community.

The result we reach in this case is in full accordance with numberless decisions of this and every other court which have invalidated government attempts to regulate conduct in similar regards but for no supportable reasons. See *Eskind v. City of Vero Beach*, 159 So. 2d 209, 211 (Fla. 1963)(holding ordinance prohibiting motel signs advertising rates but permitting other motel advertising signs unconstitutional as having “no justification from an aesthetic viewpoint[:]. . . a sign advertising rates is not aesthetically distinguishable from a sign advertising [other] motel services”); *Pinellas County v. Fiore*, 732 So. 2d 1152 (Fla. 2d DCA 1999)(upholding judgment invalidating, as bearing no rational relationship to asserted government interest in prohibiting gambling, ordinance regulating skill machines so as to bar leasing of toy crane machines on premises conducting bingo

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<sup>7</sup> Quaere: Could Coral Gables forbid the parking of military-looking, right-angled vehicles, or any car which has not been washed and polished within the previous twenty-four hours?

games); *Sunshine Key Assocs. Ltd. P' ship v. Monroe County*, 684 So. 2d 876 (Fla. 3d DCA 1996)(reversing order upon holding invalid, as being arbitrary and unenforceable, regulation defining recreational vehicles as less than eight feet wide so as to bar from park vehicles now classified as mobile homes based on width greater than eight feet); *Fox v. Town of Bay Harbor Islands*, 450 So. 2d 559, 561 (Fla. 3d DCA 1984)(reversing order upon holding invalid, as having “not the slightest bearing upon the health, safety, morals or welfare of the public,” ordinance limiting occupancy of parking facility apartment to building superintendent so as to bar occupancy by plaintiff); *Campbell v. Monroe County*, 426 So. 2d 1158 (Fla. 3d DCA 1983)(reversing order upon holding invalid, as showing no relationship to aesthetic uniformity or safety, ordinance requiring homes be built of masonry to the roof line so as to bar modular housing); *Dennis v. City of Key West*, 381 So. 2d 312 (Fla. 3d DCA 1980)(reversing judgment upon holding invalid, as having no discernible relationship to public health, welfare or safety, ordinance requiring all live-aboard vessels be docked or moored at designated areas so as to bar live-aboard vessels moored to pilings off the coast of Key West), petition for review dismissed, 389 So. 2d 1108 (Fla. 1980); *Kuster Enters., Inc. v. Dep't of Transp.*, 357 So. 2d 794 (Fla. 1st DCA 1978)(quashing Department order upon holding that denial of rule permitting transport of extra-wide prefabricated pools while permitting transport of mobile homes and boats of

the same width as having no substantial relationship to legislative purpose); *Fogg v. City of S. Miami*, 183 So. 2d 219 (Fla. 3d DCA 1966)(reversing order upon holding invalid, as having no relation to public welfare, ordinance prohibiting drive-in stores so as to bar drive-in retail dairy business); *City of Miami v. duPont*, 181 So. 2d 599 (Fla. 3d DCA 1965)(upholding order invalidating, as unrelated to legitimate use of police power, ordinance regulating size of boathouses so as to bar erection of large structure in residential area on Biscayne Bay); see also *Town of Chesterfield v. Brooks*, 489 A.2d 600 (N.H. 1985)(holding ordinance regulating location of mobile homes invalid as bearing no substantial relationship to goal of retaining town's rural character); *Ohio v. Lanham*, 669 N.E.2d 80 (Ohio Ct. App. 1995)(reversing judgment upon finding ordinance prohibiting unlicensed vehicles from being on property for more than thirty days invalid as not advancing public welfare). See generally 2 Sandra M. Stevenson, *Antieau on Local Government Law* §§ 29.01, 29.26(1) (2d ed. 2006); 6A Eugene McQuillin, *The Law of Municipal Corporations* §§ 24:15, 24:29 (3d ed. Westlaw database updated Jan. 2007); 8 McQuillin, § 25.31 (3d ed. Westlaw database updated Oct. 2006); 1 E.C. Yokley, *Zoning Law and Practice*, §§ 3-13, 3-14, 4-6 (4th ed. rev. 2000); 1 Kenneth H. Young, *Anderson's Am. Law of Zoning* §§ 3:10, 7:3, 7:13, 7:24 (4th ed. Westlaw database updated Nov. 2006); 2 Edward H. Ziegler, Jr., *Rathkopf's*

The Law of Zoning and Planning, §§ 16:7, 16:13-16:16, 16:19 (4th ed. Westlaw database updated Apr. 2007).

Even more to the point, indeed directly on it, the only cases which have specifically considered a “personal truck” restriction, City of Nichols Hills, 939 P.2d at 17, and Proctor v. City of Coral Springs, 396 So. 2d 771 (Fla. 4th DCA 1981), review denied, 402 So. 2d 608 (Fla. 1981), have, as we do, held it invalid. See Pennsylvania v. Frederick, 10 Pa. D. & C. 4th 554 (Pa. Com. Pl. 1991)(available at 1991 WL 341737); see also Minx v. Vill. of Flossmoor, 724 F. Supp. 592 (N.D. Ill. 1989)(holding that resident stated equal protection claim in alleging that ordinance impermissibly prohibited parking of personal-use pickup truck in driveway while permitting parking of other types of personal-use vehicles). But cf. Henley v. City of Cape Coral, 292 So. 2d 410 (Fla. 2d DCA 1974)(upholding broad ordinance prohibiting commercial vehicles, including “trucks,” in residential area; nature of vehicle involved not disclosed).

On the other hand, City of Coral Gables v. Wood, 305 So. 2d 261 (Fla. 3d DCA 1974), is decisively distinguishable. First, it regulates “campers,” an entirely different vehicular breed. More importantly, the decision is based on the fact that the offender may avoid prosecution by parking his camper in an enclosed garage.<sup>8</sup>

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<sup>8</sup> Apparently, the mere configuration of a “truck” is so offensive to the sensibilities of Gables’ residents that its enforcement officers have refused to allow Kuvin’s

Henley, 292 So. 2d at 410 (containing similar exception). Kuvin's home, however, has no garage. The effect of the ordinances are therefore to do just what the court said was not involved in Wood: they require Kuvin to choose between owning and parking a personal vehicle of his choice in Coral Gables and leaving town (which is what Kuvin, taking his cursed truck with him, actually did). That is a decision that no government may require.

### III.

But there is a larger issue at stake here. Absent any legitimate basis for the ordinances, what remains is that the City Parents disapprove of a perhaps unorthodox vehicle and the possibly diverse taste and lifestyle which may be reflected by its ownership.<sup>9</sup> See Reid R. Heffner, Thomas S. Turrentine and Kenneth S. Kurani, A Primer on Automobile Semiotics, Institute of Transportation Studies, U. of Cal. Davis (Feb. 2006), <http://www.its.ucdavis.edu/>, available at <http://repositories.cdlib.org/itsdavis/UCD-ITS-RR-06-01/>; Sangho Choo and Patricia L. Mokhtarian, What Type of Vehicle do People Drive? The Role of Attitude and Lifestyle in Influencing Vehicle Type Choice, Institute of Transportation Studies, U. of Cal. Davis (2004), <http://www.its.ucdavis.edu/>,

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truck to be parked there, even if, as he offered, it was completely covered by a protective tarp.

<sup>9</sup> We are told that in response to an inquiry from Mr. Kuvin as to how she felt about the anti-pickup-truck law, a passer-by responded that she did not understand why a person who owned such a vehicle would want to live in Coral Gables.

available at <http://repositories.cdlib.org/postprints/39/>; Paul Hollis, Pickup Trucks Have Become Transportation for the Masses (April 5, 2006), [www.southeastfarmexpress.com/mag/farming\\_pickup\\_trucks\\_become/index.html](http://www.southeastfarmexpress.com/mag/farming_pickup_trucks_become/index.html). This is just what Judge Hurley was getting at in Proctor by characterizing an anti-truck parking ordinance as unconstitutionally contrary to protected rights of association, privacy and “personhood.” Proctor, 396 So. 2d at 773 (Hurley, J., concurring); see also Moore v. City of E. Cleveland, 431 U.S. 494 (1977)(invalidating municipal zoning limitation on occupancy of dwelling to defined “family” as unconstitutionally restricting family choice to “nuclear” family).

For a governmental decision to be based on such considerations is more than wrong; it is frightening. Perhaps Coral Gables can require that all its houses be made of ticky-tacky and that they all look just the same,<sup>10</sup> but it cannot mandate that its people are, or do. Our nation and way of life are based on a treasured diversity, but Coral Gables punishes it. Such an action may not be upheld.

Reversed with directions to enter declaratory judgment for the appellant and to vacate the guilty determination of the hearing officer.

CORTIÑAS, J., concurs.

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<sup>10</sup> See Fine v. City of Coral Gables, 958 So. 2d 433 (Fla. 3d DCA 2007).

Lowell Joseph Kuvin v. City of Coral Gables  
Case No. 3D05-2845

CORTIÑAS, Judge (concurring).

I concur entirely but write only to highlight the fundamental and legally significant difference between aesthetic regulations aimed at commercial and/or recreational vehicles<sup>11</sup> and those aimed at personal use mainstream vehicles. While commercial and recreational vehicles have been the subject of judicially-upheld regulations based on aesthetic considerations, personal use mainstream vehicles have not.

Personal use mainstream vehicles include cars, station wagons, minivans, sport-utility vehicles (“SUVs”), and light trucks. Record evidence shows that the category of light trucks may encompass pickup trucks, minivans, and SUVs, many of which are smaller in length than some full-size cars.<sup>12</sup> According to Edmunds, a well-known resource for information on personal use vehicles, the Ford F-150 is

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<sup>11</sup> Commercial vehicles include tow trucks, dump trucks, and buses, among others, while recreational vehicles may include trailers, campers, motor homes, and boats, among others.

<sup>12</sup> For example, the dimensions of a Ford F-150 (211.2 inches (l) x 78.9 inches (w) x 73.7 inches (h)), the vehicle in this case, are comparable to those of a Ford Crown Victoria (212 inches (l) x 77.3 inches (w) x 58.3 inches (h)) and a Lincoln Town Car (215.4 inches (l) x 78.5 inches (w) x 59 inches (h)). This vehicle is also smaller than many SUVs. Unlike those of other cities, the ordinances at issue in this case do not contain any limitations concerning the weight or dimensions of trucks being prohibited from driveways or public areas. Such weight and dimension limitations may be enacted by the City to properly regulate much larger commercial use trucks.

the best-selling vehicle in the United States. It is also common knowledge that many citizens, just like appellant, choose to drive a light truck as their personal mode of transportation.

Courts have upheld municipal ordinances prohibiting the outside parking or storage of recreational vehicles in residential areas. See, e.g., City of Coral Gables v. Wood, 305 So. 2d 261, 263 (Fla. 3d DCA 1974) (upholding zoning ordinance prohibiting campers, trailers, and other vehicles “designed and adaptable for human habitation” on public and private property within the City of Coral Gables as applied to a resident who parked an Apache vehicle in his backyard in a residential area). Similarly, courts have upheld municipal ordinances aimed at curbing the intrusion of commercial vehicles into residential areas. See, e.g., Henley v. City of Cape Coral, 292 So. 2d 410, 411 (Fla. 2d DCA 1974)(upholding ordinance prohibiting commercial vehicles in residential areas except when engaged in construction or repair work); City of Blue Springs v. Gregory, 764 S.W.2d 101 (Mo. Ct. App. 1988)(upholding ordinance prohibiting the parking or storing of commercial vehicles over six tons in residential areas except while making deliveries); but cf. Proctor v. City of Coral Springs, 396 So. 2d 771, 774 (Fla. 4th DCA 1981)(invalidating ordinance as applied to a personal use truck that, nevertheless, met the City’s definition of a commercial vehicle).

In sharp contrast, there is only one reported case involving a municipal regulation prohibiting the parking of a personal use mainstream vehicle, namely a light truck, in a residential area. See City of Nichols Hills v. Richardson, 939 P.2d 17 (Okla. Crim. App. 1997). That case addressed the precise issue before us and struck down the regulation in question as not rationally related to aesthetics. Id. Nichols Hills is a very affluent neighborhood near Oklahoma City, similar to Coral Gables. In Nichols Hills, the appellant was cited for violating a city ordinance by parking her pickup truck in the driveway of her Nichols Hills home between the hours of 2:00 and 5:00 a.m. Id. at 17-18. There, the City argued “(a) that ‘aesthetics’ is one of the primary reasons the ordinance was enacted and (b) that the prohibition against pickups ‘directly relates to the City’s interest in controlling land use and maintaining land values.’” Id. at 19. The Oklahoma Court of Criminal Appeals held that, as applied to that appellant and all pickup trucks, the ordinance was unreasonable and overbroad. Id. at 20.

In Henley v. City of Cape Coral, 292 So. 2d 410, 411 (Fla. 2d DCA 1974), the Second District upheld a municipal ordinance aimed at protecting residential neighborhoods against the lingering presence of commercial vehicles. The Henley court was not presented with an as-applied challenge to the ordinance. Id. Instead, the court only considered the constitutionality of the ordinance on its face and found it to be “on the whole reasonable.” Id. However, most significant to our

case, the Second District acknowledged that, if confronted with an as-applied challenge, such an ordinance “may be unconstitutionally applied as for example to a station wagon which gives no outward appearance of being used in business.” Id. (emphasis added). In so stating, Henley is entirely consistent with all cases that have struck down, on an as-applied basis, municipal parking regulations affecting a personal use pickup truck. See Proctor, 396 So. 2d at 774; Nichols Hills, 939 P.2d at 20.

In Proctor, the Fourth District was faced with the type of situation foreseen in Henley, namely a municipal ordinance that, as-applied, was used to prohibit the parking of a personal use vehicle on residential property. Proctor, 396 So. 2d 771-74. Mr. Proctor’s vehicle was a personal use pickup truck, without commercial markings, but which qualified within the ordinance’s definition of a “commercial vehicle” because it weighed 3/4 of a ton. Id. at 771. The Fourth District held that the subject ordinance was unreasonable and unconstitutional as applied to pickup trucks. Id. at 772. The court found that the ordinance “restricts 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, or in the street in front of the home

after 9:00 p.m. even though the vehicle in question is not truly a commercial vehicle . . . .”<sup>13</sup> Id.

As applied to this case, the city ordinances prohibit anyone driving a personal use light truck from parking in the private driveway of a Coral Gables property owner. Similarly, an owner of a Ford F-150 vehicle is also prohibited from parking in a Coral Gables metered-parking space or other public area of the City during the evening and overnight hours of every single day. Thus, under the subject ordinances, anyone wishing to dine in Coral Gables may not park his/her personal use light truck in any public area of the City or any residential driveway.

The dissent appears to agree that there is a legally significant difference between regulations aimed at a personal use vehicle and those aimed at commercial or recreational vehicles. However, the dissent dispenses with this critical distinction and would uphold the ordinances on the ground that appellant’s personal use light truck “looks commercial.” Presumably, the same reasoning could be used to uphold a prohibition against the intrusion of Hummers within city limits because they are “military looking.” Like Judge Schwartz, I find this distinction to be frightening. It would allow government to regulate the types of personal use vehicles its citizens drive simply based on their outward appearance.

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<sup>13</sup> Our case is even more compelling than Proctor since there is no dispute that appellant’s Ford F-150 is a personal use vehicle with no commercial markings and does not remotely qualify as a commercial vehicle.

Such a holding embraces George Orwell's dystopia, where personal rights are subverted by the government.

While affording all appropriate presumptions in favor of the constitutionality of the city ordinances at issue, as applied to appellant's Ford F-150, these ordinances bear no rational relationship to aesthetics. Nichols Hills, Henley, and Proctor stand for the clear proposition that a municipality may not exercise its police powers to regulate the parking of a personal use light truck based on aesthetic considerations. There is nothing to indicate that property values may be affected by the mere presence of a light truck in a private driveway or public parking space. Without more, there is simply no rational relationship between the parking of a personal use Ford F-150 in a residential neighborhood or public street and aesthetics. That is the case in Coral Gables, as it is in Nichols Hills, and in every town in between.

ROTHENBERG, Judge (dissenting).

The plaintiff, Lowell Joseph Kuvin (“Kuvin”), appeals a final order granting summary judgment in favor of the defendant, The City of Coral Gables (“City”), and upholding the constitutionality of the ordinances he was charged with violating.

The majority concludes that the ordinances are unconstitutional as applied to Kuvin because, while an ordinance may constitutionally preserve the residential character of a neighborhood by restricting **commercial vehicles**, restricting **personal use trucks** is unconstitutional, and ordinances enacted for purely “aesthetic grounds is just as unacceptable.” While Judge Cortiñas in his concurring opinion acknowledges clear precedent in this state holding aesthetic considerations to be a **valid exercise of the City’s police power**, he, however, concludes that the ordinances in question are unconstitutional as applied to Kuvin’s personal use pickup truck because, in his mind, the regulation of this particular pickup truck, a 1993 Ford F-150 pickup truck, which he refers to as a “light truck,” is not rationally related to aesthetics. In other words, Judge Cortiñas is of the view that this particular model of pickup truck is more aesthetically acceptable than all other open bed pickup trucks. I would conclude, as this court and other courts of

this state have concluded, that ordinances enacted to enhance or maintain the aesthetic appeal of a community are a valid exercise of the community's police power and bear a rational relationship to a legitimate purpose. Because the ordinances Kuvin violated, which prohibit parking an open bed pickup truck on the streets of a residential neighborhood in the City at night during the prohibited hours, are rationally related to preserving the aesthetic appeal of the City, I would conclude that they are neither unreasonable nor arbitrary and, therefore, are constitutional.

### **THE FACTS**

The undisputed facts are as follows. For a period of time, Kuvin resided in the City in a rental home that did not have a garage. At the time of his residency in the City, Kuvin owned and drove a personal use Ford F-150 pickup truck. After receiving a warning citation, Kuvin was cited by the City for parking his pickup truck on the street in front of his home. The citation was issued pursuant to sections 8-11 and 8-12 of the City of Coral Gables Zoning Code ("Code"). Section 8-11 prohibits the parking of trucks in residential areas of the City. Section 8-12 prohibits the parking of trucks, trailers, and commercial and recreational vehicles upon the streets or other public places of the City between the hours of 7:00 p.m. and 7:00 a.m. of the following day. Kuvin pled not guilty to the citation. The City's Building and Zoning Board ("Board") found Kuvin guilty of the violations,

and assessed him fees and costs.

Kuvin appealed the Board’s decision by filing a complaint in the circuit court, alleging that sections 8-11 and 8-12 of the Code were unconstitutional as applied to personal use pickup trucks.<sup>14</sup> Kuvin subsequently filed a motion for summary judgment, asserting that (1) sections 8-11 and 8-12 of the Code violate his right to freedom of association, and (2) sections 8-11 and 8-12 of the Code are unconstitutionally vague, arbitrary, capricious, and selectively enforced as applied to pickup trucks. The City responded and filed a cross-motion for summary judgment, which the trial court granted.

The pertinent portions of the Code are as follows:

**Sec. 8-11 – Parking in residential areas.**

(a) It shall be unlawful for any person to park any . . . truck . . . in or upon any property, public or private, in any area of the city which is zoned residential. This prohibition, however, shall not apply in the following cases:

1. Vehicles which are entirely enclosed within the confines of an enclosed garage . . . .

Coral Gables, Fla., Zoning Code § 8-11.

**Sec. 8-12 Trucks, trailers, commercial vehicles, and recreational vehicles – Parking upon streets and public places.**

Except as provided for herein no **trucks**, trailers, commercial vehicles, or recreational vehicles, shall be parked upon the streets or

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<sup>14</sup> Section 8-11 of the Code creates a “garage exception” wherein trucks and other prohibited vehicles can be parked in the City so long as the prohibited vehicle is “entirely enclosed within the confines of an enclosed garage.”

other public places of the City between the hours of 7:00 p.m. on one day and 7:00 a.m. of the next day. This prohibition is in addition to the total prohibition covering residential areas dealt with in Section 8-11 hereof.

Coral Gables, Fla., Zoning Code § 8-12 (emphasis added).

The City's Code defines a "truck" as:

Any motor vehicle designed, used or maintained for transporting or delivering property or material used in trade or commerce in general. Trucks shall include any motor vehicle having space designed for and capable of carrying property, cargo, or bulk material and which space is not occupied by passenger seating.

Coral Gables, Fla., Zoning Code § 2-128.

### **STANDARD OF REVIEW**

Summary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to judgment as a matter of law. Volusia County v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000). Constitutional challenges to statutes or ordinances involve pure questions of law reviewable on appeal *de novo*. Caribbean Conservation Corp. v. Fla. Fish & Wildlife Conservation Comm'n, 838 So. 2d 492, 500 (Fla. 2003); see also State v. Hanna, 901 So. 2d 201, 204 (Fla. 5th DCA 2005) ("The interpretation of a statute or an ordinance is a purely legal matter and is subject to *de novo* review.").

**Municipal zoning ordinances, which are legislative enactments, are presumed to be valid and constitutional. See Orange County v. Costco**

Wholesale Corp., 823 So. 2d 732, 737 (Fla. 2002)(specifying that ordinances reflecting legislative action are entitled to a presumption of validity); Hanna, 901 So. 2d at 204 (**holding that statutes and ordinances are presumed to be constitutional and that all reasonable doubts regarding an ordinance must be resolved in favor of constitutionality**). Accordingly, **the party challenging the constitutional validity of an ordinance bears a heavy burden of establishing its invalidity**. Hanna, 901 So. 2d at 204; Gates v. City of Sanford, 566 So. 2d 47, 49 (Fla. 5th DCA 1990).

### **THE ORDINANCES DO NOT INFRINGE UPON A FUNDAMENTAL RIGHT**

Kuvin's primary argument on appeal is that the ordinances in question infringe on his First Amendment fundamental right of freedom of association. It is well-settled law that if a fundamental right or suspect class is involved, the ordinances in question are subject to strict scrutiny and may only be upheld if they are strictly tailored to serve a compelling state interest. See State v. J.P., 907 So. 2d 1101, 1110 (Fla. 2004)("To withstand strict scrutiny, a law must be necessary to promote a compelling governmental interest and must be narrowly tailored to advance that interest."). Kuvin does not assert, nor would I find, that he is a member of a suspect class. Rather, he asserts that he is an owner of a personal use pickup truck and that the ordinances impinge on his fundamental right of freedom

of association. He, therefore, claims that because the ordinances infringe upon a fundamental right, the trial court erred in failing to perform a strict scrutiny analysis in determining its constitutionality. This argument is without merit.

The Constitution does not specifically protect a “right of association.” Rather, the right of association is derived by implication from the First Amendment’s guarantees of speech, press, petition, and assembly. Proctor v. City of Coral Springs, 396 So. 2d 771, 772 (Fla. 4th DCA)(Hurley, J., concurring), cert. denied, 402 So. 2d 608 (Fla. 1981). The two types of freedom of association recognized by the United States Supreme Court as protected by the Constitution are: (1) the right of association to enter into and to maintain certain intimate human relationships; and (2) the right to associate for the purpose of engaging in those expressive activities protected by the First Amendment. City of Dallas v. Stanglin, 490 U.S. 19, 24 (1989); Roberts v. United States Jaycees, 468 U.S. 609, 617 (1984). Because each is different, I will address them separately.

### **INTIMATE RELATIONSHIPS**

The Supreme Court has not marked the precise boundaries necessary to meet the “intimate relationship” protection. Courts, however, have accorded constitutional protection to marriage, the begetting and bearing of children, child rearing and education, and cohabitation with relatives. Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte, 481 U.S. 537, 546 (1987); Wallace v. Texas Tech Univ.,

80 F.3d 1042, 1051 (5th Cir. 1996). Although the Supreme Court has not held that “constitutional protection is restricted to relationships among family members,” it has “emphasized that the First Amendment protects those relationships . . . that presuppose ‘deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one’s life.’” Duarte, 481 U.S. at 545 (quoting Roberts, 468 U.S. at 619-20).

Kuvin received a citation for parking his open bed pickup truck in front of his residence at night. Kuvin does not allege, nor does the record demonstrate, that the City’s ordinances restricting the overnight parking of trucks, except in enclosed garages, interferes with any of his intimate relationships. Kuvin was cited for parking his truck in front of his own home during the prohibited time, not for visiting a close friend or relative in the City. Kuvin does not claim that any of his friends or family members were prevented from visiting him when he lived in the City. He does, however, claim that he is prevented from visiting his friends who live in the City after 7:00 p.m. in his truck. While Kuvin does not substantiate this claim and has never been ticketed for visiting a friend in the City, the types of “intimate associations” that have found protection in the First Amendment have been more intimate than Kuvin occasionally visiting friends who currently reside in the City. See Wallace, 80 F.3d at 1051 (“The specific types of intimate

associations which have found protection in the First Amendment have been more intimate than our image of typical coach-player relationships.”). Even assuming Kuvin maintained or maintains a close friendship with individuals living in the City, I am unaware of, and Kuvin has failed to direct us to, “any authority which has recognized a close friendship, without more, as the highly personal or intimate human relationship that is protected by the United States Constitution.” Henrise v. Horvath, 174 F. Supp. 2d 493, 500 (N.D. Tex. 2001)(footnote omitted).

### **EXPRESSIVE ASSOCIATION**

The second protected right of association is the right of “expressive association.” “The First Amendment protects ‘the right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.’” Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y., 443 F. Supp. 2d 374, 389 (E.D.N.Y. 2006)(quoting Roberts, 468 U.S. at 622). “According [constitutional] protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority.” Roberts, 468 U.S. at 622.

Although “[t]he First Amendment’s protection of expressive association is not reserved for advocacy groups,” in order “to come within its ambit, a group must engage in some form of expression, whether it be public or private.” Boy

Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000). If the group engages in “expressive association,” constitutional protections are only implicated if the government action “would significantly affect the group’s ability to advocate public or private viewpoints.” Chi Iota, 443 F. Supp. 2d at 390 (quoting Dale, 530 U.S. at 650). The Supreme Court cautioned in Chi Iota that:

**“It is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one’s friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.”** Stanglin, 490 U.S. at 25, 109 S. Ct. 1591. Nevertheless, it is not necessary that the group be devoted to advocacy, Dale, 530 U.S. at 648, 120 S. Ct. 2446, or taking public stances, Duarte, 481 U.S. at 548, 107 S. Ct. 1940. Indeed, the nature of the group’s expression may be private, and “[t]he fact that the organization does not trumpet its views from the housetops . . . does not mean that its views receive no First Amendment protection.” Dale, 530 U.S. at 648, 656, 120 S. Ct. 2446. Pursuits or activities that may bear on a group’s classification as an expressive association include community service, Duarte, 481 U.S. at 548, 107 S. Ct. 1940; “transmit[ing] . . . a system of values,” Dale, 530 U.S. at 650, 120 S. Ct. 2446; and “civic, charitable, lobbying, [or] fundraising” activities, Roberts, 468 U.S. at 627, 104 S. Ct. 3244.

Chi-Iota, 443 F. Supp. 2d at 390-91 (emphasis added).

The “expressive associations” that Kuvin asserts are constitutionally protected are: (1) his occasional visits to the homes of his friends who reside in the City between the hours of 7:00 p.m. and 7:00 a.m. or on the weekends in his open bed pickup truck, and (2) the occasional visits by a friend who also drives a pickup truck. Kuvin asserts that when his friend came to Kuvin’s home to “talk, share

ideas about work, or ideas about anything, [his friend] had to violate the City's ordinances and risk being cited for violating its ordinances . . . .”

Kuvin, however, fails to allege that the ordinances restrict the types of “expressive associations” that are protected under the First Amendment, and certainly, he lacks standing to raise any concerns a friend may have had, especially since Kuvin does not assert that the ordinances in question hampered visitation by his friend. Additionally, the types of expressive associations protected by the Constitution are clearly more “expressive” than Kuvin’s occasional visits with his friends residing in the City after 7:00 p.m. or friends with trucks visiting him after 7:00 p.m. for the purpose of sharing time with each other, and discussing issues and ideas. Kuvin, therefore, has failed to establish that his “associations” have a clearly articulated expressive identity worthy of constitutional protection under the First Amendment. See id. at 391.

More importantly, Kuvin’s **associations are not being restricted**. Rather, the restrictions provided in the ordinances apply solely to his **vehicle and the ordinances do not prohibit his ownership of a truck. The ordinances permit Kuvin to own and drive his pickup truck in the City. He simply must garage the vehicle at night**. As the prohibited activity does not infringe on a fundamental right, the trial court did not err in failing to apply strict scrutiny in its constitutional analysis.

## **THE ORDINANCES BEAR A RATIONAL RELATIONSHIP TO A LEGITIMATE STATE INTEREST**

Because the City’s ordinances do not involve a fundamental right, they must be upheld as constitutional unless they are not rationally related to a legitimate state purpose. This rational basis scrutiny, **“is the most relaxed and tolerant form of judicial scrutiny . . . .”** Stanglin, 490 U.S. at 26 (emphasis added); see also City of Coral Gables v. Wood, 305 So. 2d 261, 263 (Fla. 3d DCA 1974)(holding that a zoning ordinance must be upheld unless clearly shown to have no foundation in reason and it is an arbitrary exercise of police power without reference to public health, morals, safety, or welfare); see also Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926)(holding that “[i]f the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control”).

The City asserts that the ordinances in question are a valid exercise of the City’s police powers because the ordinances seek to preserve the integrity of the residential areas and the unique aesthetic qualities of the City. While Kuvin admits that an ordinance may regulate or limit the use of property on behalf of the general welfare of its citizens, he correctly asserts that if the City exercises its police powers in a clearly unreasonable and arbitrary fashion with no substantial relation to the public health, safety, morals, or general welfare, the action is violative of constitutional due process. See Fox v. Town of Bay Harbor Islands, 450 So. 2d

559, 560 (Fla. 3d DCA 1984). Kuvin, therefore claims that, while the ordinances' restrictions regarding trucks used for commercial purposes may pass constitutional scrutiny, a total ban against trucks, including those used solely for private use and those displaying no commercial markings or advertisements during the prohibited times, is both arbitrary and unreasonable. It is this argument which the majority found persuasive and upon which the majority concludes that the ordinances as applied to Kuvin's truck are unconstitutional.

### **ANALYSIS**

There are four areas upon which I base this dissent: (1) the ordinances do not prohibit nor restrict residents from owning and using their chosen vehicle, they restrict, and Kuvin was ticketed for, parking his chosen vehicle, an open bed pickup truck, on the street of a residential neighborhood at night; (2) Florida has long recognized that zoning for aesthetic purposes is a valid exercise of a community's police powers; (3) open bed pickup trucks, which are designed to carry things, not people, whether used to carry and store goods for commercial or personal purposes, when parked on the street or in driveways in residential neighborhoods at night, detract from the residential character of the City's residential neighborhoods; and (4) if the ordinances are constitutional on their face, they are constitutional as applied to Kuvin's open bed pickup truck, which has a large open space designed to carry and store objects, not to transport people. I

would, therefore, find, as did the trial court, that the ordinances are constitutional as applied to personal use pickup trucks, regardless of make or model, and to Kuvin's personal use 1993 Ford F-150 open bed pickup truck.

### **THE ORDINANCES DO NOT RESTRICT OWNERSHIP NOR USE**

The ordinances Kuvin violated do not prohibit his ownership or use of his pickup truck. He was ticketed for parking his truck on the street in front of a house he was renting, at night. Section 8-11 of the Code provides a garage exception, wherein trucks and other listed vehicles can be parked in the City as long as they are enclosed in a garage. Thus, Kuvin's ownership and use of his vehicle was not being restricted. He simply was required to park his truck in a garage at night.

I, therefore, take issue with statements and conclusions found in both the majority and concurring opinions. Judge Cortiñas in his concurring opinion states: "Like Judge Schwartz, I find this distinction to be frightening. It would allow government to regulate the types of personal use vehicles its citizens **drive** simply based on their outward appearance. Such a holding embraces George Orwell's dystopia, where personal rights are subverted by the government." (emphasis added). The ordinances do not regulate "the types of personal use vehicles its citizens drive," they regulate where they park them at night. I also take exception to two conclusions reached in the majority opinion. The first is that because the house Kuvin was renting had no garage, he had to choose between owning and

parking his truck in the City or leaving town. Kuvin was not required to make such a choice. He could have chosen to rent an abode **with** a garage, or could have found an alternative parking place for his truck at night. The second conclusion I take issue with is that the City, in passing these ordinances, attempts to restrict diversity and, in fact, punishes it. The majority writes:

For a governmental decision to be based on such considerations is more than wrong; it is frightening. Perhaps Coral Gables can require that all its houses be made of ticky-tacky and that they all look the same, but it cannot mandate that its people are, or do. Our nation and way of life are based on a treasured diversity, but Coral Gables punishes it. Such an action may not be upheld.

This dramatic rhetoric has no application to the facts before this court. The ordinances in question do not restrict nor do they mandate the type of vehicle its residents own and drive. There are a myriad of makes and models of cars, all of which fall outside of the parking restriction. The City's residents may own and drive cars, buses, trucks, and campers, big and small, within the City. They just cannot park them overnight on the street in the City's residential neighborhoods.

### **ZONING BASED UPON AESTHETICS IS A VALID EXERCISE OF POLICE POWER**

This court and other courts of this state have already found that measures designed to enhance or maintain the aesthetic appeal of a community are a valid exercise of their police power and these measures bear a rational relationship to a legitimate purpose. **“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.”** City of Sunrise v. D.C.A. Homes, 421 So. 2d 1084, 1085 (Fla. 4th DCA 1982)(emphasis added); 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, 539, 324 A.2d 113, 119 (1974)); 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, 1316 (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/or 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”); Wood, 305 So. 2d at 263 (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, reasonable and constitutional); see also Sunad, Inc. v. City of Sarasota, 122 So. 2d 611 (Fla. 1960); Rotenberg v. City of Fort Pierce, 202 So. 2d 782 (Fla. 4th DCA 1967); State ex rel. Boozer v. City of Miami, 193 So. 2d 449 (Fla. 3d DCA 1967).

### **OPEN BED PICKUP TRUCKS PARKED IN RESIDENTIAL NEIGHBORHOODS AT NIGHT DETRACT FROM THEIR RESIDENTIAL CHARACTER**

The majority acknowledges that Florida and other states have upheld regulations based solely on aesthetics. Judge Cortiñas additionally acknowledges in his concurring opinion that courts in this state and outside of this state have upheld ordinances prohibiting the parking or storage of recreational or commercial vehicles in residential areas. The majority, however, holds that the ordinances in question are unconstitutional as applied to Kuvin’s open bed pickup truck because it is not a recreational vehicle nor a vehicle **used** for commercial purposes. In other words, if Kuvin was a handyman or construction worker by trade and used his open bed pickup truck for commercial purposes, the majority would have no problem with an ordinance that restricts his ability to park his truck in front of his house in the City at night, even if he left all of his supplies and equipment at the

business. On the other hand, if Kuvin only used his pickup truck for personal use, the majority would find it unconstitutional to restrict his ability to park his truck in front of his house at night with a surfboard, smelly fishing nets, or a number of other items in the open bed of his truck. To base the constitutionality of the ordinances solely on whether a person uses his truck for personal or commercial purposes obviously makes no sense and would lead to absurd results. That is why the ordinances restrict the parking of all trailers, recreational vehicles, and trucks in residential neighborhoods at night unless enclosed in a garage. Section 8-12 defines a truck as:

Any motor vehicle **designed, used or maintained for transporting or delivering property or material used in trade or commerce in general.** Trucks shall include any motor vehicle having space designed for and capable of carrying property, cargo, or bulk material and which space is not occupied by passenger seating.

Coral Gables, Fla., Zoning Code § 8-12 (emphasis added).

These ordinances make perfect sense and are rationally related to maintaining and enhancing the residential character of the City's neighborhoods and the aesthetics of the City because any vehicle that was **designed** for commercial use, regardless of whether it is **used** for commercial purposes, **looks the same and is likely to be used to store and carry bulk material exposed to public view.** The restriction is, therefore, rationally related to the health and welfare of the residents in the City.

Maintaining the aesthetics of the City is rationally related to the welfare of the City. The courts in this state and others have recognized that aesthetics can be an important factor in ensuring the economic vitality of an area and that the separation of the commercial from residential not only affects the health and hazards of the community, it impacts upon the welfare of the community and upon the value of the property within its borders. The “attractiveness of a community . . . [is] of prime concern to the whole people and therefore affect[s] the welfare of all.” Merritt v. Peters, 65 So. 2d 861, 862 (Fla. 1953); see also United Adver. Corp. v. Borough of Metuchen, 198 A.2d 447, 449 (N.J. 1964)(“There are areas in which aesthetics and economics coalesce, areas in which a discordant sight is as hard an economic fact as an annoying odor or sound.”).

Ordinances prohibiting trucks, house trailers, and campers from being parked in residential neighborhoods have withstood constitutional challenges and have been upheld by various Florida courts. The common thread appears to be the intent to preserve the residential feel and look of the residential areas of the communities that have enacted these ordinances, which Florida’s courts have determined is a legitimate governmental interest.

We begin with this court’s ruling in Wood, which involved an ordinance strikingly similar to section 8-11 of the Code, one of the ordinances Kuvin was charged with violating. The ordinance this court reviewed in Wood prohibited

campers, house trailers, and any other vehicle or part of a vehicle designed or adaptable for human habitation, from being parked or kept on public or private property in Coral Gables unless enclosed in a garage. In upholding the ordinance, **this court held that neighborhood aesthetics are integrally bound to property values and are relevant zoning considerations, and that because Wood was not being deprived of his right to own a camper or recreational vehicle or to store it on his property, but was only being required to store it in a garage or similar structure, the ordinance was not unreasonable.** Id. at 263-64. Therefore, the ordinance was found to be constitutional as a valid exercise of the City's police powers on its face and as applied to Wood. This court, therefore, has already spoken loudly and clearly on the constitutionality of ordinances enacted for aesthetic reasons. This court also specifically held that **because Wood's ownership or use of the vehicle was not prohibited, the ordinance was not unreasonable.** Likewise, the ordinances in question seek to prohibit vehicles designed for commercial use from being parked in residential neighborhoods at night. As in Wood, the restrictions only apply to the parking of such vehicles at night, not to ownership or use, and provides for a garage exception. Therefore, based upon Wood, the ordinances in question are constitutional.

In Henley v. City of Cape Coral, 292 So. 2d 410 (Fla. 2d DCA 1974), the Second District Court of Appeal upheld an ordinance prohibiting **trucks** and house

trailers of **any kind** from being parked in the subdivision for more than four hours, and **trucks from being parked overnight in all areas zoned residential**. Id. at 411. The ordinance provided that **no truck, whether being used for commercial or personal purposes, could be parked overnight in residential areas**. The court, in upholding the constitutionality of the ordinance, held that the ordinance, which was intended “to protect [the city’s] residential neighborhoods against the lingering presence of commercial vehicles,” was rationally related to a legitimate governmental interest and was not unreasonable nor overbroad as the ordinance did not result in a total ban since it provided for a “garage exception.” Id. Henley is indistinguishable from this case, and therefore, requires a finding that the instant ordinances are constitutional.

Judge Cortiñas attempts to distinguish Wood and Henley. In attempting to distinguish Wood, he argues that there is a difference between aesthetic regulations directed to commercial and/or recreational vehicles and those directed to vehicles that, while designed for commercial use, are being used for personal use. Wood is, however, important because in that case this court upheld the ordinance even though it made no distinction between large campers and small campers or whether they were being **used** for personal habitation, as long as they were either **designed** for that purpose or **could be adapted** for that purpose.

The ordinance in Henley was not restricted to recreational and commercial

vehicles. It prohibited all trucks, **including personal use trucks**, from being parked for greater than four hours or overnight in residential areas unless enclosed in a garage or a similar structure. Judge Cortiñas attempts to dismiss that holding because the court was not presented with an “as-applied” challenge. Henley cannot, however, be so easily dismissed because the ordinance that was upheld included a parking restriction of **personal use trucks**. Thus, Henley cannot be distinguished and the majority’s opinion presents a clear conflict with that decision.

The Second District Court of Appeal made no distinction in Henley between large trucks and small trucks, or whether they are being **used** for commercial purposes or solely for personal use, as long as they were **designed** for commercial use. Thus, in both cases, the focus was not on the use, it was, instead, on the design. So too is the focus in the instant case. Because the open bed of Kuvin’s pickup truck was designed to carry and store materials, not for passenger travel, it is indistinguishable from other pickup trucks in general, which are used for commercial purposes. Because Kuvin’s truck was designed for commercial purposes, it matters not whether he uses it for its intended use. Either way, it projects the same image.

Wood and Henley are important because just like the ordinances reviewed in those cases, which were upheld as constitutional, the ordinances in question do not

regulate ownership or use. They regulate the parking of trucks, trailers, commercial vehicles, and recreational vehicles within the City. Trucks are defined as “[a]ny motor vehicle designed, used or maintained for transporting or delivering property or material used in trade or commerce in general . . . includ[ing] any motor vehicle having space designed for and capable of carrying property, cargo, or bulk material and which space is not occupied by passenger seating.” Coral Gables, Fla., Zoning Code § 2-128. It is clear from the wording of the ordinances and the definition of truck, that the purpose of the ordinances is to protect the City’s residential neighborhoods against commercial intrusions and to maintain the residential character of these residential neighborhoods, and that this is a legitimate exercise of the City’s inherent police power.

Because Kuvin’s pickup truck has a large open bed, an open space clearly designed for transporting material used in trade or commerce, property, cargo, or bulk material, and is not designed for passenger seating or travel, the ordinances as applied to his pickup truck are rationally related to a legitimate purpose regardless of whether Kuvin actually uses his truck to transport material used in trade or commerce. At the end of the day, the “look” is still the same. If a City may regulate the parking of trucks with open spaces **designed for** and **used** for commercial purposes in residential neighborhoods, it is illogical to conclude that the very same trucks may not be regulated if their owners do not use them for their

designed purpose. Either way, the vehicle is the same vehicle and the effect upon the residential character of the City is the same because the open space of the vehicle is not designed for, nor may it be used for, passenger travel. The open space is specifically designed to store and transport things. The ordinances as applied to Kuvin's open bed pickup truck, therefore, are constitutional.

The rulings by the Fourth District Court of Appeal in Proctor v. City of Coral Springs, 396 So. 2d 771 (Fla. 4th DCA 1981), and by an appellate court in Oklahoma, in City of Nichols Hills v. Richardson, 939 P.2d 17 (Okla. Crim. App. 1997), do not require that we reach a contrary conclusion.

In Proctor, the Fourth District Court of Appeal struck down an ordinance prohibiting the parking of **commercial vehicles** on a public right-of-way adjacent to or on private property during certain times unless in a garage or carport. The analysis in Proctor, however, revolved around whether the classification of Proctor's personal use pickup truck as a **commercial vehicle** was reasonable, and whether including a pickup truck used only for personal use within the definition of a commercial vehicle was rationally related to an ordinance intended to protect residential neighborhoods against the lingering presence of commercial vehicles. Thus, the analysis dealt with the **definition** of a "commercial vehicle," since that was what was being restricted. The ordinances we have before us do not restrict commercial vehicles. They restrict trailers, campers, recreational vehicles, and

trucks. Proctor is, therefore, inapplicable.

Additionally, while the purpose of the ordinance in Proctor was limited to protecting residential neighborhoods against commercial influence, the purpose and intent of the instant ordinances are more general, inclusive, and seek to protect the aesthetic appeal of the community, the diminution of property values, and the general welfare of the community. In fact, the court in Proctor recognized that an ordinance should be **upheld** “unless it is clearly shown that it has no foundation in reason and is a mere arbitrary exercise of power without reference to public health, morals, safety, or welfare,” and that “[z]oning measures designed to enhance the aesthetic appeal of a community have been recognized as a valid exercise of the police power.” Id. at 771-72 (citing Wood, 305 So. 2d at 203). The Proctor court also noted that in Wood, the ordinance was **not** arbitrary or unreasonable because its aim was to prevent “the unsightly appearances and diminution of property values that occurred when camper-type vehicles were parked or stored out of doors in residential areas of a community . . . .” Id. (emphasis added).

The Nichols Hills case was premised on an ordinance making it unlawful to park commercial or recreational vehicles, trailers, taxi-cabs, or mobile homes within certain zoned districts in Nichols Hills, Oklahoma, during certain times, unless the vehicle was screened from view. While the Nichols Hills court found that “[a]esthetic zoning measures aimed at maintaining property values, thereby

promoting the general welfare, can be a valid and permissible exercise of the police power[.]” Nichols Hills, 939 P.2d at 19, the court concluded that the ordinance in question was “unreasonably broad” and struck it down. The court concluded that a blanket prohibition of all pickup trucks regardless of weight, width, or other factors, including its age or condition, was overbroad as applied to all pickup trucks and as applied to the pickup truck in question. I am unpersuaded by this finding. Additionally, because Nichols Hills is an Oklahoma case, and because no Florida court has concluded, as has the Oklahoma court in Nichols Hills, we are not required to follow it, and therefore, failure to apply its holding in our case presents no conflict.

To require a weight, width, age, or condition factor to uphold the ordinances as the Nichols Hills court found, ignores our standard of review. A rational basis analysis is the most relaxed and tolerant form of judicial scrutiny, Stanglin, 490 U.S. at 26, and a zoning ordinance must be upheld unless it is clearly shown that it possesses no foundation in reason. Wood, 305 So. 2d at 263. The ordinances in question seek to preserve the residential character of residential neighborhoods within the City and to preserve the aesthetics of the City. Kuvin’s pickup truck contains a large open bed on the outside of his truck which is designed to carry bulk material, and to store and transport cargo and other items in plain view. Whether Kuvin uses his truck for commercial purposes or simply stores and/or

carts his personal property around in the open bed of his truck for all to see, matters little. The effect upon the viewer is the same. Thus, the ordinances in question are rationally related to the City's legitimate interest and are constitutional as applied to Kuvin's truck.

### **THE ORDINANCES ARE NOT UNCONSTITUTIONAL AS APPLIED TO KUVIN'S MODEL OF TRUCK**

Judge Cortiñas in his concurring opinion refers to Kuvin's Ford F-150 open bed pickup truck as a "mainstream" vehicle and as a "light truck." It is unclear where the label "mainstream vehicle" originates. The references in the concurring opinion to Kuvin's truck as a "mainstream vehicle" begins with the statement: "Personal use mainstream vehicles include cars, station wagon, minivans, sport-utility vehicles ("SUV's"), and light trucks." There is, however, no citing authority for this "mainstream" classification, nor for the conclusion that Kuvin's pickup truck falls into a separate classification of "light truck." The justification(s) for referring to Kuvin's pickup truck in this manner appear(s) to come from "Edmunds," a source of information not contained in the record, and touted as a "well-known resource for information on personal use vehicles," a source perhaps well-known to some, but which is completely unknown to me. The second source is a document submitted by Kuvin, which has no reference as to where it came from, and which states that **all** pickup trucks are "light vehicles." Such a

conclusion is incomprehensible as many pickup trucks are quite large and quite heavy. The dimensions of Ford F-150 trucks provided in footnote two of the concurring opinion is also unavailing as the footnote makes no reference as to where this measurement comes from and whether it relates to Kuvin's 1993 F-150 pickup truck, which appears in the photos contained in the record, to be larger than later models and substantially larger than the cars the concurring opinion compares Kuvin's truck to. I, therefore, prefer to call Kuvin's truck what it is: a 1993 Ford F-150 open bed pickup truck.

Judge Cortiñas takes the position in his concurring opinion that, because Kuvin's pickup truck is a "mainstream vehicle, namely a light truck," it deserves some special treatment and exclusion in the City's zoning regulations. I must respectfully disagree.

An ordinance which prohibits overnight parking of open bed pickup trucks, designed to store and transport property, cargo, or bulk material, rather than to transport people, regardless of size and weight, in residential neighborhoods at night, unless enclosed in a garage, is reasonable and rationally related to the City's intent to preserve the aesthetic appeal of the City and the property values of its residents. Kuvin's "light truck" is still a vehicle designed for commercial purposes. Its large open bed is designed to store and transport items, not people. The size and weight of these trucks vary, depending on whether the truck is

designed for two passengers or more and the size of the open bed. An argument could be made that Kuvin's smaller truck is more "commercial looking" because it has very limited space for passenger use and a large open cargo area. Thus, calling Kuvin's vehicle a "light truck" adds nothing to the analysis and appears to be nothing more than a term used to deflect attention from the fact that Kuvin's truck is an open bed pickup truck.

Because the ordinances are constitutional on their face, and Kuvin makes no claim that they are not, and because I would find that they are constitutional as applied to personal use trucks designed for commercial purposes, I would also conclude that they are constitutional as applied to Kuvin's 1993 Ford F-150 open bed pickup truck. Kuvin, a renter, was also on notice regarding the City's regulations when he chose to rent at a location with no garage to park his truck at night.

### **THE ORDINANCES ARE NOT UNCONSTITUTIONALLY VAGUE**

Kuvin also asserts that the ordinances are void for vagueness as they do not give him or persons of ordinary intelligence fair notice of what constitutes the forbidden conduct. Kuvin claims that the vagueness of the ordinances invites arbitrary and selective enforcement against pickup trucks, as the ordinances are not enforced against sport utility vehicles, which technically meet the definition of "truck" under the City's ordinances. On this point, Judge Cortiñas, Judge

Schwartz and I agree, and we find this argument to be without merit.

The standard for testing vagueness is whether a statute or ordinance “gives a person of ordinary intelligence fair notice of what constitutes forbidden conduct.” Jones v. Williams Pawn & Gun, Inc., 800 So. 2d 267, 270 (Fla. 4th DCA 2001)(citing Sieniarecki v. State, 756 So. 2d 68, 74 (Fla. 2000)). “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.

Sections 8-11 and 8-12 of the Code prohibit, in pertinent part, the overnight parking of “trucks” except in an enclosed garage. The Code defines “truck” as “[a]ny motor vehicle designed, used or maintained for transporting or delivering property or material used in trade or commerce in general.” Coral Gables, Fla., Zoning Code § 2-128. The Code further specifies that “[t]rucks shall include any motor vehicle having space designed for and capable of carrying property, cargo, or bulk material and which space is not occupied by passenger seating.” Id. In this instance, there is no doubt that Kuvin’s Ford F-150 pickup truck, as defined by the Code, is a “truck.” Kuvin admits that his pickup truck is a “truck.” Consequently, as sections 8-11 and 8-12 of the Code forbid the overnight parking of “trucks” and Kuvin’s pickup truck clearly falls within the Code’s definition of “truck,” Kuvin had fair notice of the prohibited conduct. We additionally note that, prior to being cited by the City, Kuvin received a written warning notifying him that his conduct

was prohibited. We, therefore, conclude that sections 8-11 and 8-12 of the Code, as applied to Kuvin, are not void for vagueness.

Additionally, Kuvin lacks standing to challenge sections 8-11 or 8-12 of the Code on the premise that the ordinances may conceivably be applied unconstitutionally to others. We, therefore, need not address his arguments on this ground. See Jones, 800 So. 2d at 270 (specifying that if the record demonstrates that a person “engaged in some conduct clearly proscribed by the plain and ordinary meaning of the statute [or ordinance], then [that person] cannot successfully challenge it for vagueness nor complain of its vagueness as applied to the hypothetical conduct of others”)(quoting Sieniarecki, 756 So. 2d at 74-75).

## **CONCLUSION**

Municipal zoning ordinances, which are legislative enactments, are presumed to be valid and constitutional. Because the ordinances do not impinge on a fundamental right, the trial court correctly applied rational basis scrutiny in evaluating the ordinances and recognized that the ordinances in question must be upheld as constitutional unless they are not rationally related to a legitimate state purpose. Because the City may constitutionally pass ordinances to enhance or maintain the aesthetic appeal of the community and to protect the City’s residential neighborhoods against the lingering presence of commercial-looking vehicles, and Kuvin’s truck has a large open bed, a space designed for the storage and

transporting of cargo in plain view, I would find that the ordinances prohibiting trucks and other vehicles containing space for transporting or delivering property, rather than for passenger travel, are constitutional as applied to Kuvin's truck. I therefore, respectfully disagree with and submit this dissent to the opinions authored by my colleagues.