IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

LOWELL JOSEPH KUVIN,

Appellant,

v. Case no. 3D05-2845

CITY OF CORAL GABLES,

Appellee.

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CITY OF CORAL GABLES'
MOTION FOR REHEARING EN BANC

This case is about line-drawing. Most obviously, the case is about line-drawing between cars and trucks in residential areas in the City of Coral Gables. But just as importantly, the case is about the lines to be drawn between the legislative and judicial branches of our government. Because there is a need for clarification on where these lines should be drawn, we ask the Court to grant rehearing en banc.

Coral Gables has addressed a difficult question concerning the definition of commercial vehicles which may be restricted in residential areas. The way that Coral Gables has addressed the issue is controversial, and might not be right for

many other places. But the issue before the Court is not the *wisdom* of the classification. Our system does not entrust courts to determine the wisdom of laws. That, for better or worse, is the domain of the other two branches of government. The Court's limited function in this case is to determine the *rationality* of the Coral Gables ordinance, and nothing more. "[E]ven if it appears that the legislature has made an improvident, ill-advised, or unnecessary decision, the law must be upheld if there is any state of facts that may reasonably be conceived to justify it." *Lucas v. Englewood Community Hospital*, 2007 WL 2384445 (Fla. 1st DCA Aug. 23, 2007). Furthermore, a determination of whether a rational basis exists is "not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Federal Communications Commission v. Beach Communications, Inc.*, 508 U.S. 307, 315-16 (1993). These restraints on the judiciary have added force where—as here—"the legislature must necessarily engage in a process of line-drawing." *Id.* (citations omitted).

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Coral Gables has addressed the question of which vehicles may be parked outdoors overnight in residential areas. This question relates to the scope of zoning laws, the "crux" of which is the "creation and maintenance of residential districts, from which business and trade of every sort . . . are excluded." *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 190 (1926).

Consistent with this principle, there is no dispute that "commercial" vehicles may be banned from being parked outdoors overnight in residential neighborhoods. The majority opinion notes that such a restriction would be permissible to "preserve the residential character of a neighborhood by excluding commercial uses." *See also City of Coral Gables v. Wood*, 305 So. 2d 261 (Fla. 3d DCA 1974) (upholding ordinance which prohibits recreational vehicles from being parked outdoors overnight in residential areas). The limitation on commercial uses in residential areas is supported by the principle that "[z]oning solely for aesthetic purposes is an idea whose time has come; it is not outside the scope of the police power." *City of Lake Wales v. Lamar Advertising*, 414 So. 2d 1030, 1032 (Fla. 1982) (citation omitted). The separation of commercial from residential rests in part on the impact that aesthetics have on property values. *United Advertising Corp. v. Borough of Methuchen*, 198 A.2d 447, 449 (N.J. 1964).

This case presents a difficult question—whether a pick-up truck may be prohibited from being parked overnight outdoors in residential neighborhoods. Pick-up trucks are designed for commercial purposes, but not infrequently are used for noncommercial purposes (as is the case with Lowell Kuvin).

With some vehicles, it seems clear, if the *design* is commercial, the city could ban the vehicles from being parked outdoors overnight in residential neighborhoods. For example, a dump truck could be restricted, even if was used

entirely for non-commercial purposes. The design of the vehicle alone is such that it may be regulated as a commercial vehicle.

Coral Gables has chosen to regulate in this area based on the design of the vehicle. If the vehicle is "***designed***, used or maintained ***for transporting or delivering property or material used in trade or commerce in general***," then the vehicle is a truck subject to restriction in residential neighborhoods. There are many laws and many jurisdictions which similarly define commercial vehicles by their design. *See, e.g.*, § 320.01(9), Fla. Stat. ("truck" defined as motor vehicle "designed or used principally for the carriage of goods."); *California Career Schools v. Department of Motor Vehicles*, 15 Cal. Rptr. 3d 813, 815 (Ct. App. 2004) ("A commercial vehicle does not mean it is used in business. Commercial is a term that refers to the design of the vehicle.").

We acknowledge that the distinction drawn by the City is not the only reasonable distinction. Judge Cortinas, in his concurring opinion, has made a sensible distinction. He suggests two general categories of vehicles. The first, which may be restricted in residential neighborhoods, is "commercial and/or recreational vehicles." According to Judge Cortinas, "[c]ommercial vehicles include tow trucks, dump trucks, and buses, among others, while recreational vehicles may include trailers, campers, motor homes, and boats, among others." The second group of vehicles, according to Judge Cortinas, is what he calls

"personal use mainstream vehicles." "Personal use mainstream vehicles include cars, station wagons, minivans, sport-utility vehicles ('SUVs'), and light trucks." Under this approach, general usage of a vehicle seems to determine whether a vehicle is commercial for purposes of regulation.

The panel's majority opinion summarily concludes that the classification by the City of Coral Gables is wrong. According to the majority opinion, the ordinance is not related to a permissible attempt to preserve the residential character of a neighborhood by excluding commercial uses. "This is so for the very simple reason that the ordinances are not restricted to 'commercial vehicles' and admittedly include the truck here, which serves only the personal use of a resident who both owns the vehicle and lives in Coral Gables." The majority opinion tells us that Kuvin's vehicle is a "personal truck."

So Coral Gables has concluded that a vehicle is commercial based on its design, use or maintenance. Judge Cortinas suggests that the proper distinction is between "commercial" and "personal use mainstream" vehicles. The majority disagrees with the "design" part of our definition, and concludes that Kuvin's vehicle is a "personal truck."

We acknowledge that this is not an easy issue. But here, despite the strong language about personal freedom in the majority and concurring opinions, the Coral Gables ordinance must 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." *City of Coral Gables v. Wood*, 305 So. 2d 261 (Fla. 3d DCA 1974) (upholding prohibition against outdoor parking of recreational vehicles in residential areas). "If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' 'The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.'" *City of Dallas v. Stanglin*, 490 U.S. 19, 26-27 (1989) (citations omitted).

The panel erred by failing to defer to the decision of the Coral Gables City Commission. The panel should have concluded, as did Judge Rothenberg, that the ordinances "are neither unreasonable nor arbitrary and, therefore, are constitutional."

We express a belief, based on a reasoned and studied professional judgment, that the panel decision is of exceptional importance. Indeed, the panel majority found the issue to be of significance. "[T]here is a larger issue at stake here," it concluded.

We respectfully request that the Court grant rehearing en banc to consider the important, difficult issues in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

We hereby certify that a copy of this document was served by U.S. Mail on this 5th day of September, 2007, to Spencer T. Kuvin, Esq., Ricci Leopold, P.A., 2925 PGA Blvd., Suite 200, Palm Beach Gardens, FL 33410.

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