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CLERK, SUPREME COURT

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SUPREME COURT OF FLORIDA

DEPARTMENT OF COMMUNITY AFFAIRS,

Petitioner/Appellant,

vs.

CASE NO. 82,946

CHARLES MOORMAN, KATHLEEN MOORMAN,
and YOUR LOCAL FENCE,

Respondents/Appellees.

ON REVIEW FROM
THE DISTRICT COURT OF APPEAL
THIRD DISTRICT
Case No. 92-1785

RESPONDENTS' / APPELLEES' ANSWER BRIEF

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STATEMENT OF THE CASE AND THE FACTS

The statement of the case and the facts as presented by Appellant Department of Community Affairs is essentially correct and accurate except in the particular that paragraph one thereof characterizes the Moorman Opinion as "...creating for homeowners on that Key a new fundamental right to erect fences around their property even when the fences directly threaten the survivability of the critically endangered, miniature Florida Key Deer..." In point of fact there is absolutely nothing in the Moorman Opinion or in the transcript which indicates that the fences in question on Big Pine Key directly threaten the survivability of the critically endangered miniature Florida Key Deer. The Moorman Court specifically recognized that the State has an interest in protecting endangered species and that such goal is a legitimate governmental interest.

The Moorman Court, however, carefully referenced the fact that Appellant's expert testimony at trial established the impropriety of a blanket prohibition on fences. The Third DCA specifically found that the complete ban under the subject ordinance on all fences in Big Pine Key does not accomplish either of the goals of the legislation: i.e.: (1) a ban on all fences does not always protect Key Deer in that some Deer can be harmed in places where there are not fences, and (2) the fence ban does not recognize certain rights

(1) Moorman v. Department of Community Affairs, 626 So.2nd (Fla. 3d DCA 1993) at 1110.

(2) Id

under the Florida Constitution with regard to protection, enjoyment and use of ones property. The characterization of the statement of facts as presented by Appellant fails to point out that the opinion of the Appellate Court below recognizes the need to protect and preserve endangered species but turns rather on the fact that the ordinance in question escalates the goal of preservation of animal species over human life so as to render the subject ordinance facially unconstitutional.

(3) Id

SUMMARY OF ARGUMENT

Monroe County adopted a land development regulation (Section 9.5-479) in 1986 pertaining to fences on Big Pine Key. The subject ordinance called for the development of a "focal point planning program" for the purpose of balancing the needs of Key Deer protection with growth and development on Big Pine Key. The focal point plan was to be developed within twelve (12) months of enactment of the regulation but has not been developed or put in place since 1986. The failure to adopt the focal point plan establishes a de facto moratorium without a defined time limit and constitutes a total ban on fences in its practical effect.

At trial the expert for the DCA (Appellant herein) testified that a significant part of the area of Big Pine Key which is effected by the regulation is not Key Deer habitat and that fences are in some circumstances harmful to Key Deer while being beneficial in others.

As against this backdrop, the Third District Court of Appeal struck down the fence regulation in question as facially unconstitutional because it was not rationally connected to its objectives and established the preservation of an animal species over human life in the face of evidence in the trial record that childrens' lives were in danger on their own property (which was not Key Deer habitat) because of the ban on fences.

The Third District Court of Appeals decision in Moorman is in comportment with its conclusion that a blanket prohibition on fences on Big Pine Key does not accomplish its legislative goal of

protecting Key Deer (witness the DCA's expert testimony that a significant part of the land regulated was not Key Deer habitat and that Deer in some circumstances can be harmed by the absence of fences) and does not rationally harmonize with Constitutionally recognized property rights and the protection of human life.

The Monroe County ordinance is an arbitrary fiat which does not bear a reasonable and substantial relation to the purpose sought to be attained. The ordinance in question is an unreasonable restriction that is facially unconstitutional on due process standards, Constitutional property rights standards and standards relating to the Constitutional right of an individual to be free from intrusion into his private life. The ordinance in question does not pass muster on a "fairly debatable" standard, on a "competent substantial evidence" standard or on a "strict scrutiny" standard. The ordinance in place has no logical or rational nexus to its legislative purpose.

ARGUMENT

- I. The District Court of Appeal (Third District) struck down a police power fence regulation affecting the use of property as violative of the substantive due process guarantees of the Florida Constitution based upon the fact that the ordinance in question is a blanket attempt at exercise of the police power to totally ban fences which passes the bounds of reason and assumes the character of a merely arbitrary fiat.

Appellant in its Initial Brief inaccurately concludes that a "strict scrutiny" standard was applied by the Appellate Court below to strike down a police power fence regulation. In attempting to advance its position, Appellant makes extensive reference to the application by the Third District Court of Appeals in rendering its decision in this cause to In re Forfeiture of 1969 Piper Navaho, 592 So.2nd 233 (Fla. 1992). In actual fact, the Third District Court of Appeals in deciding the Moorman case made reference to the In re Forfeiture of 1969 Piper Navaho case for the purpose of concluding that restrictions on property in the interest of public health, welfare, morals and safety are valid exercises of the state's police power when the applicable restrictions are reasonable but the means selected must bear a reasonable and substantial relation to the purpose sought to be attained. (See Moorman v. Department of Community Affairs, 626 So.2nd 1108 (Fla. 3d DCA 1993 at 1110). The Court then immediately continued at the same page of the subject opinion to add to the "reasonable restriction" rule the language of this Court in Sarasota County v. Barg, 302 So.2nd 737, 741 (Fla. 1974) which indicates that the attempted use of the police power by a state will be stricken when

it "...passes the bounds of reason and assumes the character of a merely arbitrary fiat....".

In point of fact the Appellate Court below relied on Holley v. Adams, 238 So.2nd 401, 404 (Fla. 1970) for the proposition that: "Every reasonable doubt must be indulged in favor of the act. If it can be rationally interpreted to harmonize with the Constitution, it is the duty of the Court to adopt that construction and sustain the act." In addition, recognition was given of the fact that the State's interest in protecting endangered species is a legitimate governmental interest.

The Third District Court of Appeals opinion was keyed upon the testimony of Appellant's expert testimony at trial confirming and establishing the impropriety of a blanket prohibition on fences as was presented to them by Monroe County Land Development Land Regulation Section 9.5-479(c)(3). The MCLDR in question was enacted in 1986 and provided that Monroe County would have twelve months to complete a "focal point plan" for Big Pine Key. One of the purposes of the focal point plan was to provide criteria for permitting fences in designated areas on Big Pine Key which is within an Area of Critical Concern. Monroe County, after the expiration of a period in excess of five years, failed to complete a focal point plan. In the face of the foregoing circumstances (i.e.; a county ordinance generally banning all fences without additional consideration as prescribed by the adoption of a focal point plan) the Appellant's expert testified that some fences would not harm Key Deer and, in fact, would be beneficial to them. The Appellate Court was also faced with the expert's testimony that in

three out of the four cases presented at trial there was no biological basis for denying the fences.

Based upon the foregoing the Court in Moorman v. Department of Community Affairs found as follows:

"Thus, the complete ban on all fences in Big Pine Key does not accomplish either of the two goals of the legislation: (1) the ban on all fences does not always protect the Key Deer as some Deer can be harmed in places where there are no fences; and (2) the fence ban does not recognize the individual's right to protect, enjoy and use one's property. Therefore the fence regulation clashes with Florida's Constitution".

It is important for this Court to note that Monroe County, Florida has designated most of Big Pine Key as an area of Critical County Concern in Section 9.5-479 of the Monroe County Land Development Regulations. That provision provides at subparagraph (D) that "no development shall be carried out in the BPKACCC prior to completion of the focal point planning program" except single family detached dwellings on lots in the Improved Subdivision District or lots having an area of one acre or more. The purpose of a focal point plan for the BPKACCC was to balance the needs of the endangered Key Deer with the growth and development taking place on Big Pine Key. It is critical for this Court to note that the failure to adopt the focal point plan in question had the effect of totally abolishing the creation of fences in the BPKACCC until such time as the focal point plan was adopted. The failure to adopt the focal point plan therefore constituted a de facto moratorium without a defined time limit within which to adopt appropriate legislative standards. It is that total ban on fences within the Big Pine Key area of Critical County Concern which invalidated the police power exercise presented to the Third

District Court of Appeal, which fact is confirmed by their holding. The Third District Court of Appeals opinion is confirmed by the testimony at trial of Kenneth Metcalf (who is the Community Program Administrator for the Department of Community Affairs) who testified as to the result of the failure to adopt a focal point plan for Big Pine Key as follows:

Question: "What does that Section mean for people that want to obtain fence permits?"

Answer: "That means that property owners that would like to build fences cannot do so until such time as the focal point plan is adopted."

All of the foregoing logically and correctly led the Moorman Appellate Court to hold that Section 9.5-309(e) MCLDR is facially unconstitutional because it is not narrowly tailored to achieve the State's objective of protecting the Key Deer. The use of the word "narrowly" in the Moorman Court's opinion at page 1111 is not an indicator of an incorrect application of a "strict scrutiny" standard but rather a simple and direct confirmation of the fact that the ban on all fences in Big Pine Key by Monroe County does not accomplish the goals of the legislation as is indicated above.

Since the Third District Court of Appeals in the Moorman case concluded at page 1111 that "...based upon the record before us, there was simply no showing that the Statute was unconstitutional as applied..." It held (again at page 1111) that the ordinance in question is facially unconstitutional because of its failure to achieve its objective.

The opinion below is based in significant part on Article I, Section 2 of the Florida Constitution and Article I, Section 9 which provides that all persons are equal before the law and that

they cannot be deprived of life, liberty or property without due process of law. The Court further referenced Article I, Section 23 of the Constitution which provides that "...every natural person has the right to be let alone and free from governmental intrusion into his private life...."

The District Court of Appeal struck down the fence regulation in question because it violated the due process rights of Appellees, was not rationally connected to its legislative objectives by the testimony of the State's own expert and escalated the preservation of an animal species over human life in light of the fact that there was evidence in the trial record that childrens' lives were in danger on their own property because of the ban on fences.

The Third District Court of Appeal's decision below is in complete accord with this Court's decision in Board of County Commissioners of Brevard County, Florida v. Snyder 627 So.2nd 469 (Fla. 1993). This Court in Snyder applied the "competent substantial evidence" test. As is indicated above, the testimony of the State's own expert (that there are good fences as well as bad fences with respect to the survival of Key Deer) and the testimony of Appellant's local agent (Kenneth Metcalf) that the failure to adopt a focal point plan by Monroe County effectively banned all fences, confirms that there was a total lack of "competent substantial evidence" upon which the subject ordinance could be sustained on a Constitutional basis since the evidence presented by Appellant itself controverted conclusively the accomplishment of the intended goals of the fence ordinance in

question. The circumstances as presented at trial by Appellant which surround the fence ordinance in question indicate that it is not a reasonable restriction on the property rights of individuals.

II. The District Court of Appeal construed several provisions of the Florida Constitution and properly held that a balancing of competing State and individual interests failed under the circumstances of the case to recognize the individuals' right to protect, enjoy, and to use property.

In the Moorman opinion the Third District Court of Appeal at page 1109 indicated that decision of the case required the establishment of "harmonious balance between the Constitutional right to protect and develop one's property and the right of the Key Deer to exist unfettered." The Moorman Court referred to Florida Statute Section 380.0552 designating the Florida Keys as an Area of Critical State Concern and indicated that the Statutes intent was to establish "a land use management system that protects the natural environment of the Florida Keys" and protects the "Constitutional rights of property owners to own, use, and dispose of their real property." The Moorman Court further referred to the MCLDR at Section 9.5-479(b) which designates the purpose of establishing Big Pine Key as an Area of Critical County Concern as the reconciliation of the conflict between the habitat needs of the Florida Key Deer and reasonable investment backed expectations of the property owner.

Appellant in its Brief emphasizes that the Appellate Court below concluded that the right to protect one's property includes a specific fundamental constitutionally protected right to erect a

fence. That conclusion as to the intent or effect of the Third District Court of Appeals opinion in the Moorman case is unsubstantiated by the record. The Third District Court of Appeals in deciding this case did not reach or make a specific finding as to the fundamental Constitutional right to erect a fence. The Moorman Court below simply concluded that MCLDR 9.5-309(e) is facially unconstitutional because it does not achieve the objective of protecting the Key Deer. This basis for the Court's ruling is clearly stated at page 1110 of its opinion in which the Court found as follows:

"Thus, the complete ban on all fences in Big Pine Key does not accomplish either of the two goals of the Legislation: (1) the ban on all fences does not always protect the Key Deer as some Deer can be harmed in places where there are no fences; and (2) the fence ban does not recognize the individual's right to protect, enjoy and use one's property."

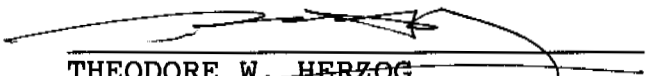
Therefore, the fence regulation clashes with Florida's Constitution. The ordinance in question does not pass muster on a "fairly debatable" standard, on a standard based upon interpretation of "competent substantial evidence" or on a "strict scrutiny" standard. The Constitutional right abrogated by Monroe County in its ordinance (and by the DCA through its actions) is not the narrow right to build a fence but rather the deprivation of due process of law and the right to acquire, possess and protect property by virtue of the enactment of a blanket fence ordinance which has no rational nexus with its objectives and goals. The Appellant's argument that the Third District Court of Appeals in the Moorman opinion inappropriately elevated the right to construct a fence to a fundamental Constitutional right is a spurious argument arising out of an apparent paranoia with the level of

Constitutional protection which exists in terms of the right to fence one's property. The Third District Court of Appeals opinion is founded upon fundamental Constitutional rights prohibiting an arbitrary and capricious statutory fiat that flies in the face of private property rights, due process and the protection of human life.

CONCLUSION

Based upon the foregoing, this Court should affirm the Third District Court of Appeal in its finding that Section 9.15-309(e) of the Monroe County Code is unconstitutional on its face.

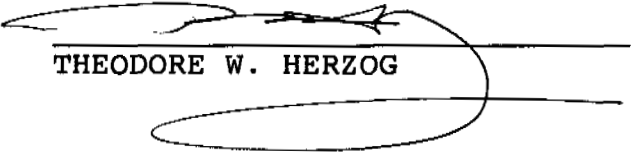
Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the parties listed below on this the 11TH day of July, 1994 by Facsimile Telephone Transmission and United States Mail.


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