IN THE SUPREME COURT OF FLORIDA

DEPARTMENT OF COMMUNITY AFFAIRS,

Petitioner,

-vs-

CHARLES MOORMAN, KATHLEEN MOORMAN, and YOUR LOCAL FENCE,

Respondents.

SUPREME COURT
CASE NO. 82, 946

THIRD DISTRICT COURT OF
APPEAL CASE NO. 92-1785

INITIAL BRIEF OF AMICUS CURIAE, 1000 FRIENDS OF FLORIDA

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STATEMENT OF JURISDICTION

The Court has accepted this case for discretionary review under Article V, §3(b)(3) of the Constitution of Florida.

STATEMENT OF THE CASE AND THE FACTS

1000 Friends adopts the Statement of the case and of the Facts Included in the Initial Brief of the Department of Community Affairs.

SUMMARY OF ARGUMENT

The Third District Court of Appeal applied an incorrect standard of review in its examination of the facial constitutionality of certain Monroe County Land Development Regulations. The appropriate standard of review for a zoning ordinance of general applicability is the rational relationship test. Instead, the Third District employed the strict scrutiny analysis which historically has been reserved for the review of governmental intrusion into fundamental rights. The decision of the Third District, and its inappropriate analysis, conflict with precedential decisions of this Court and every district court of appeal, including the Third District. The Third District Court of Appeal also effectively (but incorrectly) created a brand new fundamental right to fence real property and possibly subjected all land use and environmental regulations to a previously unapplied requirement that they be as narrowly tailored and minimally intrusive as possible whenever they may limit what a landowner may do with his or her property. The opinion below is inconsistent with this Court's most recent opinions concerning the standard of review of land use regulations.

The second point is that the Third District's new approach to the standard of review of land use and environmental regulations is inappropriately based on the perceived need to expand and give greater weight to constitutionally protected property rights than to the constitutionally protected right to a healthy environment.

The court incorrectly seeks to change due process jurisprudence to protect , not the violation of, but the mere implication of property rights even where a property rights claim has not been raised. The court protected as a "right" of land ownership a use of land that is useful, beneficial, and important to a landowner but which is not a fundamental attribute or requirement of land ownership. It then categorically gave greater weight to this interest than to the state's interest in ensuring the very survival of an endangered species. The imbalance struck by the court ignores Florida's Constitutional provision requiring the protection of its natural resources and invalidated an entire legislative scheme where it should have only reversed a specific, inappropriate application.

ARGUMENT

POINT I. THE THIRD DISTRICT'S RULING IS BASED UPON AN INCORRECT STANDARD OF REVIEW.

A. The ruling below incorrectly employs the "strict scrutiny" standard of review rather than the well established "rational relationship" standard which has previously been applied to regulations affecting the use of land which do not infringe upon a fundamental right.

1. The strict scrutiny standard of review is reserved for fundamental rights review and not for reviewing the constitutionality of zoning ordinances.

In the opinion below, the Third District employed an incorrect standard of review for a facial challenge to a general zoning regulation, inappropriately applying the "strict scrutiny" standard of review to determine whether the regulation at issue was

constitutional. It thereby ignored decades of precedent which had established that facial challenges to general zoning regulations should be examined under the "rational relationship" test. The type of "strict scrutiny" analysis used by the Third District is reserved for instances where courts have examined governmental interference with fundamental rights

Strict scrutiny applies only when the statute operates to disadvantage some suspect class such as race, nationality, or alienage or impinges upon a fundamental right explicitly or implicitly protected by the constitution. Those fundamental rights to which this test applies have been carefully and narrowly defined by the courts to include the interests of the individual on issues concerning voting, interstate travel, procreation and abortion, and freedom of the press and speech. See Department of Revenue v. Magazine Publishers of America, 604 So.2d 459 (Fla. 1992); State v. Dodd, 561 So.2d 263 (Fla. 1990).

In In re Estate of Greenberg, 390 So.2d 40, 42-43 (Fla. 1980), appeal dismissed, 450 U.S. 961 (citations omitted), this Court explained that:

> [Strict scrutiny] applies only when the statute operates to the disadvantage of some suspect class such as race, nationality, or alienage or impinges upon a fundamental right explicitly or implicitly protected by the constitution. Those fundamental rights to which this test applies have been carefully and narrowly defined by the Supreme Court of the United States and have included rights of a uniquely private nature such as abortions,... the right to vote,... the right of interstate travel,... first amendment rights, ...and procreation....(citations omitted)

The opinion below notwithstanding, this is still the law in Florida and the Third District had no valid basis to attempt to establish new law. The Third District extended

this standard beyond its current ambit and announced a rule that regulations affecting the use of land must be as "narrowly tailored" as possible and constitute the "least restrictive alternative" to achieving the legitimate ends sought in order to be constitutional. It found the regulation at issue "facially unconstitutional because the method chosen by the legislature is not narrowly tailored to achieve the state's objective of protecting the Key Deer. As will be shown below, its rationale for the rule it announces is not persuasive.

The ordinance at issue is a legislative action which affects neither a suspect classification nor a fundamental right. Therefore the review of its constitutionality should be based upon the "rational relationship" standard, and not the "strict scrutiny" test used by the Third District. As will be shown below, the fencing ordinance is a valid exercise of the state's police power because it promotes the public welfare by seeking to prevent the extinction of the endangered key deer by preserving its ability to move freely from one habitat area to another and to maintain its genetic diversity. The ordinance passes constitutional muster under the rational relationship test because the means (prohibiting fences on Big Pine Key) are rationally related to the ends (protecting the key deer from loss of habitat and death).

The Third District's opinion viewed the ordinance under an inappropriately rigid standard of scrutiny and should therefore be reversed.

2. The facial validity of legislation affecting the use of land is reviewed by courts under the "rational relationship" standard of review.

This Court has historically and consistently recognized that zoning regulations of general applicability which comprehensively affect a large area are legislative acts and are presumptively valid exercises of the police power. Gulf & Eastern Dev. Corp. v. City of Fort Lauderdale, 354 So.2d 57 (Fla. 1978); Newman v. Carson, 280 So.2d 426, 428 (Fla. 1973); Harrell's Candy Kitchen v. Sarasota-Manatee Airport Authority, 111 So.2d 439 (Fla. 1959); City of Miami v. Romer, 58 So.2d 849, 851-2 (Fla. 1952); City of Miami v. Rosen, 10 So.2d 307, 310 (Fla. 1942). It reaffirmed this standard as recently as eight months ago, where in relating the history of zoning regulations it said:

> Both federal and state courts adopted a highly deferential standard of judicial review early in the history of local zoning. In Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926), the United States Supreme Court held that "[i]f the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." 272 U.S. at 388. This Court expressly adopted the fairly debatable principle in City of Miami Beach v. Ocean & Inland Co., 147 Fla. 480, 3 So.2d 364 (Fla. 1941).

Board of County Commissioners of Brevard County v. Snyder, 627 So. 2d 469, 472 (Fla. 1993)

Florida's District courts, at least until the opinion below, have been unanimous on this issue. The First District noted in Davis v. Sails, 318 So.2d 214, 217 (Fla. 1st DCA 1975), that "the law is so well settled as to require no citations of authority that a city or county has the right and power, . . . to adopt zoning ordinances or regulations. Further, such zoning ordinances or regulations are, like other legislative acts, presumed valid." See also Curless v. County of Clay, 395 So.2d 255, 257 (Fla. 1st

DCA 1981); Starkey v. Okaloosa County, 512 So.2d 1040, 1043-44 (Fla. 1st DCA 1987).

In Blank v. Town of Lake Clarke Shores, 161 So.2d 683 (Fla. 2nd DCA 1964), a property owner brought a facial challenge and an "as applied" challenge to the Town's zoning ordinance which limited the land uses within the Town's boundaries. The Second District upheld the ordinance, noting that "it could not be said that the restrictions placed upon the plaintiff's property were not reasonably related to the public welfare." Blank at 686. That Court recently affirmed and emphasized the respect given to land use regulations, especially those adopted in conformance with state law, in Lee County v. Sunbelt Equities II, Ltd., 619 So.2d 996, 1003 (Fla. 2d DCA 1993)(the circuit court is not permitted to ... substitute its judgement about what should be done for that of the administrative agency) and Lee County v. Morales, 557 So.2d 652 (Fla. 2d DCA 1990)(upheld decision which was fairly debatable because courts may not act as super zoning bodies).

Prior to the opinion below, the Third District had consistently applied this rule. Moviematic Industries Corp. v. Board of County Commissioners of Metro Dade County, 349 So. 2d 667 (Fla. 3rd DCA 1977) used the "reasonably related to public welfare" test to determine the validity of a land use ordinance validity. Id at 670. Additionally, in Watson v. Mayflower Property Inc, 223 So2d 368 (Fla. 4th DCA 1969) the Court ruled that the constitutional validity of a zoning ordinance depends upon its relation to the public health, safety, morals and welfare. If a zoning ordinance has a substantial relationship to any one of these, it is within the police power of the legislative body and

constitutionally valid. Id at 373. See also City of Miami Beach v. Weiss, 217 So. 2d 836 (Fla. 1969).

The Fourth District consistently has used the rational relationship standard of review for general zoning ordinances. See Rotenberg v. City of Fort Pierce, 202 So.2d 782 (Fla. 4th DCA 1967)and City of Boca Raton v. Boca Villas Corporation, 371 So.2d 154 (Fla. 4th DCA 1979)(building permit cap not "rationally related" to the public health, safety, and welfare).

A case from the Fifth District, Town of Indialantic v. McNulty, 400 So.2d 1227 (Fla. 5th DCA 1981), involved a facial and an "as applied" challenge to the Town of Indialantic's ocean setback ordinance. On the facial challenge, the Fifth District ruled that the setback ordinance was valid and stated:

> When a zoning ordinance is challenged on this basis, courts presume, unless shown otherwise, that the ordinance is valid, and if it is reasonably related to the public, welfare, health, and safety, in a manner characterized by the appellate courts as "fairly debatable," it will be upheld. Further, the burden of showing that the zoning ordinance is invalid is on the challenger - not the zoning authority[.] The courts should not become "super" zoning review boards. Zoning decisions are primarily "legislative" in nature and such decisions should be made by zoning authorities responsible to their constituents. Id at 1230

The cases from the Fifth District clearly demonstrate that land use and zoning regulations of general applicability are legislative acts subject to a deferential standard of review. In Battaglia Properties, Ltd. v. Florida Land and Water Adjudicatory Commission, 629 So. 2d 161 (Fla. 5th DCA 1993) the Court ruled that property ownership is protected from infringement of the state unless the regulations are

reasonably necessary to secure the health safety and welfare of the public. Id at 164. Further, it stated that the enactment of zoning ordinances is legislative action subject to deferential standard of review by courts and the role of a reviewing court is limited to determining whether the enactment is unreasonable and arbitrary. Id at 165. See also, Lamar Advertising Associates of East Florida, Ltd. v. City of Daytona Beach, 450 So.2d 1145 (Fla. 5th DCA 1984) and Town of Indialantic v. Nance, 400 So.2d 37 (Fla. 5th DCA 1981).

The common theme of these cases is the judicial understanding that Legislative bodies are the direct representatives of the people and their decisions are to be given due deference by the less accountable judicial branch. Because of the legislature's exclusive responsibility to enact laws and ordinances in the police power for the public interest, the courts will not substitute their judgment for that of a legislature on such matters. Graham v. Estuary Properties, Inc., 399 So. 2d 1374 (Fla. 1981), cert. denied, 454 U.S. 1083 (1981); City of Miami Beach v. Ocean & Inland Co., 3 So. 2d 364 (Fla. 1941).

Courts have been especially loathe to become "super" zoning review boards. Enactments of original zoning ordinances have always been considered legislative, policy-setting actions, Board of County Commissioners of Brevard County v. Snyder, 627 So. 2d 469, 474 (Fla. 1993), to which reviewing courts **must** apply a deferential standard of review. Battaglia Properties, at 168 (Goshorn, concurring).

In addition to a presumption of validity, zoning ordinances are subject to the rational relation or fairly debatable test which imposes a minimum level of scrutiny.

The often cited and heavily relied upon Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S. Ct. 114 (1926), adopts the fairly debatable standard in reviewing the validity of zoning ordinance, which says that the legislative judgment must be allowed to control. The court also adopts the rational relationship test for determining constitutionality. Id. "Before the ordinance can be declared unconstitutional, such provisions [must be shown to be] clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." Id. at 395.

The Fifth District explains how the fairly debatable test works and the deference it accords to zoning ordinances. "The fairly debatable rule is a rule of reasonableness; it answers the question of whether, upon the evidence presented to the municipal body, its action is reasonably based. Under the fairly debatable test the reviewing court must uphold the ordinance so long as a reasonable basis exists to support the zoning ordinance." Town of Indialantic v. Nance, 400 So. 2d 37, 39 (5th DCA 1981). In that case, this Court approved the lower court decision and emphasized that the fairly debatable test should be used to review legislative type zoning enactments. Nance v. Town Indialantic, 419 So. 2d 1041,1041 (Fla. 1981). Where the validity of a zoning ordinance is fairly debatable, a court may not substitute its judgment for that of a zoning authority. See City of Miami Beach v. Weiss, 217 So. 2d 836 (Fla. 1969); City of Miami v. Rosen, 10 So. 2d 307 (Fla. 1942).

The Court should reaffirm this long line of cases and reiterate that land use regulations of general applicability are to continue to be reviewed by Florida's judiciary under the "rational relationship" standard.

B. The Third District's reliance on forfeiture cases is misplaced and the cases it relies upon are distinguishable on the facts.

The Third District's opinion relied upon cases which simply are not applicable to the facts of this case. Much of the confusion generated by application of the strict scrutiny test stems from the Court's misplaced reliance on In re Forfeiture of 1969 Piper Navajo, 592 So.2d 233 (Fla. 1992). Piper Navajo involved the involuntary physical taking, confiscation, and transfer of title to the government, of private property through application of a state penal forfeiture statute, the violation of which was a felony. 592 So.2d at 234-236. In Piper, the government seized an airplane because it had an extra fuel tank in violation of FAA regulations relating to drug trafficking. The opinion recognized the general rule that the legislature, acting through its police power, can enact laws if they reasonably may be construed as expedient for protection of the public health, safety, and welfare and that due process requires that the law not be unreasonable, arbitrary, or capricious and that the means chosen be reasonably and substantial relation to purpose being sought. Id at 235. The opinion also specifically states that the state can infringe on an individual's property rights by regulating for the public safety and interest. Id.

After reiterating the viability of the "rational relationship" test, the Court specifically carved out a narrow, limited exception in forfeiture cases. In such cases, the Court held, the challenged regulation must be "'narrowly tailored," and constitute the "least restrictive alternative ".

The Piper decision was itself based upon a reading of Department of Law Enforcement v. Real Property, 588 So. 2d 957 (Fla. 1991). This case also involved the forfeiture of real property, a residential home. The Court noted that forfeitures are harsh exactions and are not favored either in law or equity, which had caused the Florida Supreme Court to follow a policy of strict construction of forfeiture statutes. The Court also recognized that strict construction clashes with the general judicial rule that all doubts to the validity of a statute are to be resolved in favor of constitutionality. Citing Article II, Section 3 of the Florida Constitution, the Court expresses its general hesitancy to transgress upon the authority of another branch of government. It made it clear that the standard of review it was applying was specifically tailored to the narrow facts of that case:

> The manner in which due process protections apply vary with the character of the interests and the nature of the process involved.
>
> Id at 960.

This exception to the general rule which was carved out in these cases was expressly based on the harsh nature of forfeitures and the disfavor with which courts view them. The subject case involves no such forfeiture, but merely a restriction regarding structures other than the principle residence which could be erected in the habitat of an endangered species. Therefore this case does not fall under this narrow and limited exception to the rational relation standard of review.

The Third District also erroneously relied on Shriner's Hospital for Crippled Children v. Zrillic, 563 So.2d 64 (Fla. 1990). That case found invalid on many grounds

a mortmain statute which purported to restrict a testator's power to convey property in the face of specific constitutional provisions which strongly implied that such restrictions could only be applied to aliens ineligible for citizenship. 563 So.2d at 66-67. See Fla. Const. Article I, Section 2. Also, the Shriner's Hospital case does not create a strict scrutiny test; it specifically says that even constitutionally protected property rights "are held subject to the fair exercise of the power inherent in the state to promote the general welfare of the people through regulations that are *reasonably necessary* to secure the health, safety, good order, [and] general welfare." 563 So.2d at 68 (citations omitted; emphasis added). The Shriner's Hospital case does not support the opinion below.

C. The opinion below is inconsistent with this court's recent decision in the Snyder case.

In Board County Commissioners of Brevard County v. Snyder, 627 So. 2d 469 (Fla. 1993) this Court considered the relationships between Florida's Growth Management Act, zoning decisions made under the Act, development order decisions made under the Act, and the rights of Florida land owners. The result was an opinion which comprehensively reviewed the constitutional and statutory considerations concerning the regulation of land use in Florida and set forth the standard of review to be followed by courts in this area. The Snyder decision refused to apply to a quasi-judicial action the intensive level of scrutiny advocated here by the Third District for legislative actions. The Court gave government more discretion in making decisions which affected specific parties and properties (the site specific application of existing

legislative policy) than the Third District has given it enacting legislation and rules of general applicability.

The Snyder opinion distinguishes between purely legislative functions and quasi-Judaical actions. Quasi-judicial actions (including rezonings), when they apply to a limited number of people (in the form of the application of a general rule or policy), are subject to "strict scrutiny" review. Id at 475. But the "strict scrutiny" described in Snyder is based upon a statutory "consistency" requirement, and differs from, and provides for more deference than, the "strict scrutiny" used by courts to review actions which threaten fundamental constitutional rights. Snyder determined the level of review in cases where a local government rezoning decision was challenged on the basis that it violated the statutory requirement that such decisions be "consistent" with previously adopted comprehensive plans. Id at 473. See s. 163.3194(1)(a), Fla. Stat. The "strict scrutiny" with which Snyder requires courts to review such decisions refers to the necessity for strict compliance with the comprehensive plan and statute. Snyder's rationale was the fact that rezoning decisions (except for broad scale rezonings) are no longer the place where local governments set general policy or legislate and that the discretion with which they make such decisions is limited by the requirement that the need to conform a rezoning decision to a previously adopted comprehensive plan. Id at 474-5. It increased the level of judicial review of such decisions, specifically because they involved the application of a specific set of facts to previously established legislative policy.

In Snyder, this Court specifically rejected the approach to judicial review which the Third District has taken in this case. Snyder reversed that part of the Fifth District's opinion which ruled that, in a specific application, local governments do not have the discretion to make any decision which falls within the range of options that would be consistent with the facial terms of their comprehensive plans. Id at 475. While the Fifth District had ruled that the local government *must grant* the option most beneficial to the landowner unless it could carry the burden of proving "by clear and convincing evidence that a specifically stated public necessity requires a more restricted use", the Supreme Court disagreed strongly and ruled that a court would not substitute its judgement for that of the local government as long as the decision being reviewed fell within the parameters of the adopted plan. Id. A reviewing court should not, according to Snyder, determine what decision would have been the most consistent with the plan or most beneficial to a landowner. Rather, it must determine only whether the decision under review is a reasonable, as opposed to the best, interpretation of the plan. Id. ("We do not believe that a property owner is necessarily entitled to relief by proving consistency [of his or her proposed use] when the board action is also consistent with the plan")

Interestingly, the opinion of the Fifth District which was reversed in Snyder, like that of the Third District that is under review here, had deviated greatly from existing precedent (that which had consistently placed the burden of proof on the party challenging a local government's development order decision) largely on the basis of the court's perceived need to protect the property rights of landowners. This Court,

however, recognized that a claim for inverse condemnation was always available to the landowner independent of the cause of action under which the case was brought (a statutory cause of action to enforce a comprehensive plan) and that the landowner's property rights did not include an entitlement to the maximum use potentially allowed on the face of a comprehensive plan or require a shifting of the burden of proof in such cases to the government. Id. Thus, this Court found no basis to deviate fundamentally from the historic burden of proof based on the fact that property rights were implicated by the decision under review. Snyder recognizes that property rights are protected in the context of the decisions to which it applies by the basic requirements that governmental decisions have resulted from an adherence to the due process rights of affected persons and the substantive terms of the comprehensive plans they were implementing.

It must be remembered that the Snyder strict scrutiny test applies only to quasi-judicial actions. For purely legislative acts, such as broad scale rezonings and the adoption of other regulations of general applicability, Snyder uses the rational relationship test. Without question, the regulation at issue here is of the latter type. However, because it falls within the permissible range of ways within which the state may achieve its valid objective of protecting the travel corridors of an endangered species and because their is a scientific basis for a general prohibition on fences, the regulation would meet even the type of scrutiny reserved under Snyder for quasi judicial cases. Nevertheless, the proper standard of review and judicial approach in this case, consistent with the recent pronouncements in Snyder, is one that upholds the

challenged regulation unless the challenger can demonstrate that it has no relationship whatsoever to a legitimate public purpose.

POINT II. THE THIRD DISTRICT'S "PROPERTY RIGHTS" RATIONALE FOR DEVIATING FROM ESTABLISHED PRECEDENT AND APPLYING THE "STRICT SCRUTINY" TEST IS INVALID.

A. Florida landowners may bring inverse condemnation actions based on the denial of land use or environmental permitting approval which takes the owner's property rights and thus there is no need to modify due process analysis to give greater weight to property interests.

This case does not involve a claim that a government regulation has violated a landowner's property right under either the State or Federal Constitutions. Therefore it inappropriate for the Court to base its analysis and standard of review on the need to protect the appellant's property rights. A Florida landowner may bring an inverse condemnation action based on the denial of land use or environmental permitting approval which "takes" the owner's property rights. Graham v. Estuary Properties, 399 So. 2d 1374 (Fla. 1981); Deltona Corporation v. United States, 657 F.2d 1184 (Cl.Ct. 1981); cert. denied, 455 U.S. 1017, 102 S.Ct. 1712, 72 L.Ed.2d 125 (1982); McNulty v. Town of Indialantic, 727 F.Supp. 604 (M.D. Fla. 1989); J.T. Glisson, et.al. v. Alachua County, 558 So.2d 1030 (Fla. 1st DCA 1990); Lee County v. Morales, 557 So.2d 652 (Fla. 2nd DCA 1990); Fox v. Treasure Coast Regional Planning Council, 442 So.2d 221 (Fla. 1st DCA 1983); Reahard v. Lee County, 968 F.2d 1131 (11th Cir. 1992). Thus, there is no need for Florida courts to graft onto decades of due process caselaw any

further limitations on the ability of government to regulate in the public interest in an effort to protect the interests of property owners. By doing so in this case, the Third District committed reversible error. It compounded that error by giving the landowners more "property rights" than either the Florida or Federal Constitutions protect.

While it is clear that landowners are guaranteed no more than a minimum economically viable use of their property and that having a single residence on a lot zoned for a single residence is such a use, the Third District found the need to elevate the correct level of scrutiny in order to protect the landowner's seeming right to fence in their property. This obviously has no basis in the caselaw.

If the appellants could not have won a takings case based on these facts (and they could not have), their "property rights" can not entitle them to a more beneficial standard of review of their due process claim than they otherwise would have had. It is not a prerequisite to the constitutional validity of an ordinance that it permit the highest and best use of a piece of property. In City of St. Petersburg v. Aikin, 217 So. 2d 315 (Fla. 1968) this Court held that the mere fact that a land owner is proposing to make a reasonable use of his property and one which is consistent with the public welfare does not require the conclusion that the existing zoning which precludes the proposed use is constitutionally defective.

The fact that the regulation at issue impacted the use of the plaintiff's property (as opposed to having "taken" the property) was not a basis to use a more stringent standard of review than was otherwise appropriate under the law.

B. The opinion below fails to properly balance the relevant interests and erroneously elevates one Article of Florida's Constitution over another, giving the desires of humans precedence over the basic survival needs of an endangered species.

1. Protection of Florida's natural resources is a legitimate public purpose.

Florida's Constitution includes a property rights clause similar to the one found in the United State's Constitution. [1] It also includes a natural resources clause, found in Article II, Section 7, which states that "'[i]t shall be the policy of the state to conserve and protect its natural resources and scenic beauty."

A third clause, Article IV, Section 9, creates the Florida Game and Fresh Water Fish Commission whose purpose is to manage, protect and conserve wild animal life and fresh water aquatic life.

These Constitutional provisions make it clear that the protection of Florida's environment... is a primary policy of the people and the legislature of Florida. State v. Davis, 556 So. 2d 1104, 1107-1108 (Fla. 1990).

Environmental protection promotes the public welfare and is a legitimate concern of the police power of the state. Graham at 1381. The opinion in Moviematic expressly found ecological considerations to be a legitimate objective of zoning ordinances, ruling that preservation of the ecological balance of a particular area is a valid exercise of the police power as it relates to the general welfare:

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[1]Article X, Section 6(a): "No private property shall be taken except for a valid public purpose and with full compensation thereof paid to each owner or secured by deposit in the registry of the court and available to the owner"

> The definition of "public health, safety and welfare" surely must now be broadened to include and provide for these belatedly recognized [ecological] threats and hazards to the public weal.

Moviematic, at 669-670.

Moviematic also quotes with approval Nattin Realty Inc v. Ludewig, 324 N.Y.S.2d 668, 672 (Supreme Court of Duchess County 1971):

> Respecting ecology as a new factor, it appears that the time has come - if, indeed, it has not already irretrievably passed - for the courts, as it were, to take "ecological notice" in zoning matters.

Moviematic at 669.

A recent opinion, Florida Game and Fresh Water Fish Commission v. Flotilla, 19 F. L. W. D627 (Fla. 2nd DCA 1994) specifically ruled that protecting environmentally endangered species is a valid concern within Florida's police power, one that is generally beneficial to the welfare and quality of life of the people of the state. Id at D628. The Court deemed the public interest in protecting an endangered species to be a vital one. Id at D629.

Another case, Sarasota v. Barg 302 So. 2nd 737 (Fla. 1974), eloquently states that:

> Where an area has the rare natural quality of serving as a haven or refuge for wildlife it may be the subject of leg protection under the state's police power.
>
> Id at 747.

Further, a local land development regulation that advances the substantial state interest in protecting environmentally sensitive areas is presumed valid. See Alachua v. Reddick, 368 So. 2d 653 (1979).

The need to protect natural resources is most compelling when the survival of a species is in jeopardy. State v. Davis, 556 So. 2d at 1108. That is why the Florida Legislature gives special protections to species deemed threatened or endangered.

> The policy of the state to conserve and wisely manage its wide diversity of wildlife resources with particular attention to those being endangered or threatened. Intent of legislature is to protect these species as a natural resource.
>
> Section 370.072(2), Fla. Stat. (1993).

The case of State of Florida v. Butler, 587 So. 2d 1391, 1392 (3d DCA 1991) recognizes the long standing common law principal that title to wildlife is vested in the state, as trustee for all citizens, and that the state has both the authority and the right to regulate and protect wildlife resources. See also Alford v. Finch, 155 So. 2d 790 (Fla. 1963).

The opinion below ignored a long line of cases and an increasing respect by the judiciary for legislative protection of Florida's environment and wildlife habitats. The resulting standard of review and the judicial philosophy expressed are legally and doctrinally erroneous.

2. The Third District Failed To Properly Balance the Interests at Issue.

The opinion below begins on correct footing by citing to Holley v. Adams, 238 So. 2d 401,404 (Fla. 1970) for the basic proposition that, if the act can be rationally interpreted to harmonize with the constitution, it is the duty of the court to adopt that construction and sustain the Act . Unfortunately, having cited this proposition, the Court failed to follow it.

The Third District's attempts to justify giving greater weight to property interests over these considerations are not persuasive. Shriners Hospitals For Crippled Children v. Zrillic, 563 So. 2d 64, 68 (Fla. 1990), relied upon by the Court to show the importance of property rights, involved a charitable bequest under a mortmain statute. While stressing the importance of the property rights involved, the opinion makes clear that "even constitutionally protected property rights are not absolute, and are held subject to the fair exercise of the power inherent in the state to promote the general welfare of the people through regulations that are reasonably necessary to secure the health, safety, good order [and] general welfare." (emphasis added)

It is decisions not discussed by the Third District which have provided the appropriate and precedential guidance on the proper balancing of the interests at stake in land use regulation.

The Moviematic opinion, discussed earlier, understood that zoning prompted by environmental considerations may appreciably limit the uses of land. There the Court held that, in balancing both factors, the pro bono publico considerations must prevail.

If substantial evidence exists that a zoning determination was based on ecology, the court should not void such legislative determination. Moviematic at 670

As for the instant case, the legislation is supported by the fact that, in general, fences have serious adverse impacts on key deer by inhibiting the movement of the deer. A proper balancing of the competing interests in this case would reveal that the compelling state and constitutional interests of protecting the key deer from extinction would clearly outweigh the mere desire for a fenced in yard. There is no deprivation of constitutionally protected property rights involved here. This case involves a minor and reasonable restriction on the property to prohibit the building of a fence to protect the lives and habitat of an endangered species. The Third District's invalidation of the regulation, instead of a more narrowly tailored remedy for the property owners to whom the application of the restriction was found to be unreasonable, needlessly and inappropriately places the wants of humans over the survival needs of an endangered species and, without justification, fails to harmonize two equally important Constitutional provisions.

CONCLUSION

1000 Friends of Florida respectfully requests that the Supreme Court reverse the Third District's opinion and reiterate that regulations designed to protect Florida's environment and its wildlife will be upheld if rationally related to that end.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the following by U.S. Mail on this 20th day of June, 1994.

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