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FILED
SID J. WHITE
JUN 21 1994
CLERK, SUPREME COURT
By ______
Chief Deputy Clerk

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

PETITIONER DEPARTMENT OF COMMUNITY AFFAIRS' INITIAL BRIEF ON THE MERITS

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TABLE OF CONTENTS

	Page(s)
Table of Contents	i
Table of Authorities	ii
Statement of the Case and the Facts	1
Summary of Argument	9
Argument	11
I. The district court of appeal applied an incorrect "strict scrutiny" standard to strike down a police power fence regulation affecting the use of property as violative of the substantive due process guarantees of the Florida Constitution.	11
II. The district court improperly construed several provisions of the Florida Constitution to create a fundamental right to fence real property and improperly engaged in a balancing the competing state and individual interests.	21
Conclusion	26
Certificate of Service	27

TABLE OF AUTHORITIES

Cases: **Page(s)**

Blank v. Town of Lake Clarke Shores,
161 So.2d 683 (Fla. 2d DCA 1964) 14

Board of County Commissioners of Brevard County v. Snyder, 627 So.2d 469 (Fla. 1993) 13

City of Boca Raton v. Boca Villas Corporation,
371 So.2d 154 (Fla. 4th DCA 1979) 14

City of Miami Beach v. Ocean & Inland Company,
3 So.2d 364 (Fla. 1941) 13, 14

City of Miramar v. Bain,
429 So.2d 40 (Fla. 4th DCA 1983). 16

Davis v. Sails,
318 So.2d 214 (Fla. 1st DCA 1975) 14

Department of Revenue v. Magazine Publishers of America, 604 So.2d 459 (Fla. 1992) 12

Department of Law Enforcement v. Real Property,
588 So.2d 957 (Fla. 1991) 17, 23, 24

Florida Game and Fresh Water Fish Commission v. Flotilla, Inc., 19 Fla. L. Weekly 627 (Fla. 2d DCA March 16, 1994) 20

Golden v. McCarty,
337 So.2d 388 (Fla. 1976) 25

Harrell's Candy Kitchen v. Sarasota-Manatee Airport Authority, 111 So.2d 439 (Fla. 1959) 13

Harris v. Martin Regency, Ltd.,
576 So.2d 1294 (Fla. 1991) 25

In re Estate of Greenberg,
390 So.2d 40 (Fla. 1980) 12, 13, 24

In re Forfeiture of 1969 Piper Navajo,
592 So.2d 235 (Fla. 1992) 16, 17, 23, 24

In re Southview Associates,
153 Vt. 171, 569 A.2d 501 (Vt. 1989) 20

TABLE OF AUTHORITIES (CONTINUED)

Cases: **Page(s)**

Moorman v. Department of Community Affairs,
626 So.2d 1108 (Fla. 3d DCA 1993) . . 1, 8, 11, 18, 19, 20, 22

Moviematic Industries Corporation v. Board of County Commissioners of Metropolitan Dade County,
349 So.2d 667 (Fla. 3d DCA 1977) 14, 15

Sarasota County v. Barg,
302 So.2d 737 (Fla. 1974) 11, 13, 14

Shriners Hospitals for Crippled Children v. Zrillic,
563 So.2d 64 (Fla. 1990) 24

State v. Butler,
587 So.2d 1391 (Fla. 3d DCA 1991) 16, 22

State v. Dodd,
561 So.2d 263 (Fla. 1990) 12

Town of Indialantic v. McNulty,
400 So.2d 1227 (Fla. 5th DCA 1981) 14

Village of Euclid v. Ambler Realty Co.,
272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926) 14

Winfield v. Division of Pari-Mutuel Wagering,
447 So.2d 544 (Fla. 1985) 23

Young v. Department of Community Affairs,
625 So.2d 831 (Fla. 1993) 25

Other authorities:

Article 1, Section 2, Fla. Const 22, 23, 24

Article 1, Section 9, Fla. Const 22

Article 1, Section 23, Fla. Const 22, 23

Article 11, Section 7, Fla. Const 23

Fla. Admin. Code R. 28-20.020 . . . . 1, 2

Fla. Admin. Code R. 28-20.020(8)4 . . . . 7, 19

TABLE OF AUTHORITIES (CONTINUED)

Other authorities: **Page(s)**

Section 380.05(2)(a), Fla. Stat. (1993) 5

Section 380.0552, Fla. Stat. (1993) 5, 25

Section 380.0552(1), (2)(a), (f), Fla. Stat. (1993) 4

Section 380.0552(7)(c), Fla. Stat. (1993) 5

Section 380.0552(8), Fla. Stat. (1993) 5

Section 9.5-309, Monroe County Code 6

Section 9.5-309(e), Monroe County Code 6

Section 9.5-479, Monroe County Code 6

Section 9.5-479(d)(1), Monroe County Code 6

STATEMENT OF THE CASE AND THE FACTS

The petition of the Department of Community Affairs (Department) seeks review of the correctness of the Third District's opinion in Moorman v. Department of Community Affairs[1] based on conflict with the opinions of this Court and the courts of appeal on the proper level of scrutiny to apply to police power regulations; specifically, regulations affecting the use of land. The Moorman opinion declared facially unconstitutional a fencing regulation on Big Pine Key in Monroe County because it was not narrowly enough drawn to achieve the legislative objective, thereby effectively 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.

The remaining population of the Key Deer, one of Florida's most charming and ecologically threatened indigenous animals, is now concentrated on and around Big Pine Key in the Lower Florida Keys in Monroe County. (T. 138-139).[2] It was for that reason that a majority of the Key was designated as an area of critical county concern by the county. (R. 274). As pointed out in the hearing, the deer are highly mobile animals and utilize almost all habitats and vegetation communities within their relatively large range

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[1] 626 So.2d 1108 (Fla. 3d DCA 1993).

[2] See also Monroe County Comprehensive Plan, Volume 1, Background Data Element pp. 125-127 (Feb. 26, 1986), incorporated by reference in Florida Administrative Code Rule 28-20.020. A portion of a USGS map of Florida showing The Keys is included in this brief as Figure 1 at Page XX.

requirements; however, for food and water, they especially rely on the freshwater wetlands and slashed pinelands--particularly freshly burned pinelands--interspersed on various parts of Big Pine Key and surrounding islands. (T. 137-141).[3] Although the deer swim between islands, and may migrate to surrounding smaller islands during the wet season when rainwater is collected, Big Pine Key provides the greatest acreage of slash pineland habitat and freshwater wetlands as sources of sustenance. Id.

To a critical extent, the Key Deer's ability to survive as a species is dependent on its ability to move freely around the area that forms its habitat, including private lands located within that habitat. (T. 137-141). Because of the patchwork pattern of developed and undeveloped lands on Big Pine Key, and the deer's natural tendency to roam and its need to roam to find food and water, it is not unusual for Key Deer to appear throughout the residential subdivisions on Big Pine Key. (T. 137-139). Indeed, it is not unusual for residents of subdivisions to feed the deer, although this is prohibited by law, and the animals may eventually be transformed from "browsers" (which is their natural feeding pattern) into "grazers" by virtue of the human-induced changes in their environment, making them more subject to being hit by vehicles on roads in areas of human habitation. (T. 141-146; Vol. VI, Ex. 5). Even though Monroe County requires that dogs be fenced or leashed, the deer are often killed or injured by pets roaming free, and have even been killed by poachers. (T. Vol. VI, Ex. 5).

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[3]See Monroe County Comprehensive Plan, Volume 1, Background Data Element pp. 125-126 (Feb. 26, 1986), incorporated by reference in Florida Administrative Code Rule 28-20.020.

The side-effects of human development have thus placed the Key Deer in extreme danger of extinction. (T. 139-140). Although their numbers increased to an estimated 350-400 animals in the mid-1970's, increased development in the Keys started a declining trend in their population in 1980; as of 1991, there were only about 300 deer left, and their annual deaths (60) outpace their births (50) by ten deer each year, bringing them perilously close to the absolute minimum needed to sustain the viability of the species, 100 to 250 animals. (T. 139). The primary causes of Key Deer mortality are loss of habitat to development and "roadkill" by cars. (T. 139-140). Efforts to suppress wildfires on Big Pine Key have reduced the availability of preferred food sources and allowed slash pinelands habitats to change by ecological succession to tropical hardwood hammock communities, which offer much less foodstuff because of the absence of grasses and low shrubs. (T. 140). Also, development has made the deer's access to drinking water more difficult. (T. 138-140).

The Key Deer's survival is dependent on its ability to move from one part of its natural habitat to another, not only to find food and water but also to escape harassing pets and humans. (T. 137-148; Vol. IV, Ex. 5). This is why the issue of restricting fences on Big Pine Key is so critical to the species; affecting their patterns of movement is deleterious to them. (T. 141). The cumulative effect of fences on Big Pine Key imperil the Key Deer, in a biological sense, by interrupting their normal movements and by excluding them from, and interfering with their movements within or between their natural habitats. (T. 141).

Furthermore, the hearing officer, who--for purely procedural reasons--severed a case between the parties to this appeal after hearing the case now before this Court on the same record, made the following finding of fact in the severed case:

> The primary causes of Key Deer fatalities are habitat loss and human-induced mortality. Pertinent to this case, fences are harmful to the Key Deer because the deer are extremely mobile and need all of the space afforded by Big Pine Key to survive. Fences prevent access to food supplies, complicate the desired mixing of the gene pool, block exit routes out of canals, and funnel the deer into undesirable locations such as roadways. Here, as previously noted, the Moorman property is located within, and surrounded by, native pine lands, which are natural habitat for the Key Deer. The erection of the Moorman fence restricts the Key Deer's access to native habitat as well as providing a barrier that could funnel the deer toward the road at the front of the Moorman property. Erection of the fence was not, however, shown to have destroyed any native vegetation such as to require, beyond removal of the fence, restoration of the property.[4]

The fence permits appealed in this case were initiated by the Department under authority of Section 380.07(2), Florida Statutes (1993), which allows appeals of development orders in areas of critical state concern. In 1979 the Florida Legislature adopted the "Florida Keys Area Protection Act," thereby making parts of Monroe County an area of critical state concern. This state critical area designation was made to "establish a land use management system that protects the natural environment of the Florida Keys" and to "protect the constitutional rights of property owners to own, use, and dispose of their real property."[5] Because

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[4]Department of Community Affairs v. Moorman, DOAH Case No. 91-7300, Recommended Order, Page 6, Note 1 (William J. Kendrick, Hearing Officer, April 30, 1992), affirmed, Department of Community Affairs v. Moorman, DCA Case No. 92-51-FOF-ACSC, Final Order (Linda Loomis Shelley, Secretary, July 30, 1992). No exceptions to the recommended order were filed. Id.

[5]§ 380.0552(1), (2)(a), (f), Fla. Stat. (1993).

the Keys were designated an area of critical state concern, Monroe County was obliged to adopt a comprehensive plan and land development regulations consistent with legislatively established principles for guiding development, including the principle in Section 380.0552(7)(c), Florida Statutes (1993), to "protect upland resources, tropical biological communities, freshwater wetlands, native tropical vegetation. . ., dune ridges and beaches, wildlife, and their habitat."[6]

As part of the county's effort to protect the Florida Key Deer, it included in the Monroe County Comprehensive Plan the following general objective in the section entitled "Criteria for Designating of Areas of Particular Concern":

> Development within areas identified as Key Deer habitat shall insure that the continuity of habitat is maintained to allow deer to roam freely without impediment from fences or other development.

This objective was approved by rule of the Administration Commission, as provided by the statute setting up the process for establishing areas of critical state concern.[7] To further implement the objective of allowing the Key Deer "to roam freely without impediment from fences or other development," in 1986 the Monroe County Commission designated most of Big Pine Key--the deer's primary habitat--an area of critical county concern and enacted a regulation to establish a "focal point planning program" to be completed in 12 months which would reconcile "the conflict between reasonable investment backed expectations and the habitat

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[6]<u>See</u> § 380.0552(7)-(9), Fla. Stat. (1993).

[7]<u>See</u> Fla. Admin. Code R. 28-20.020(8)4; § 380.05, Fla. Stat. (1993).

needs of the Florida Key Deer."[8] (R. 274-275). The county also adopted two interim regulations to protect the deer to be enforced on Big Pine Key prior to the completion of the focal point planning program and the adoption of conforming amendments to the Monroe County Comprehensive Plan and land development regulations.[9] (R.274-275).

The first regulation, Section 9.5-479(d)(1) of the Monroe Code, provides:

> No development shall be carried out in the Big Pine Key Area of Critical County Concern except for single-family detached dwellings on lots in the Improved Subdivision District or on lots having an area of one (1) acre or more.

The second, Section 9.5-309 of the Code, provides:

> It is the purpose of this section to regulate fences and freestanding walls in order to protect the public health, safety, and welfare.
>
> * * * *
>
> (e) Big Pine Key Area of Critical County Concern. No fences shall be erected here until such time as this chapter is created [*sic*] to provide for the regulation of fences within this ACCC.

The county has not yet adopted the focal point plan or related amendments which would establish specific design criteria for fences, as it originally contemplated in 1986. (T. 141-142). However, since 1986 the county has studied the issue of fences on Big Pine Key and has not changed the original fencing restrictions put in place at that time. (T. 141-142).

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[8]§ 9.5-479, Monroe County Code.

[9]§§ 9.5-479(d)(1), 9.5-309, Monroe County Code;

In April 1990, Charles Moorman, who owns and operates Your Local Fence, applied for and received from Monroe County a permit to erect a fence on his property on Big Pine Key. (T. 50-55; R. 281 n. 6). The Department appealed that fence permit. Id. After signing a consent agreement stipulating that the permit was illegal, Mr. Moorman went to the county, withdrew the permit, and received a refund of his permit fee. Id. The following day he submitted an identical application for a fence permit, with he and his wife as owners and his company, Your Local Fence, as contractor. Id. Monroe County issued a permit to erect a six-foot-high, 400-foot-long fence on the Moorman's lot within the Big Pine Key Area of Critical County Concern without requiring that they obtain a variance or a conditional use permit. (R. 270-271, 279). The Moorman lot is located within, and surrounded by, native slash pineland -- natural habitat for the Key Deer. (R. 272). The Department appealed the Moorman permit, along with three other fence permits, to the Florida Land and Water Adjudicatory Commission, which forwarded the cases to the Division of Administrative Hearings.

The hearing officer subsequently recommended that the Governor and Cabinet--sitting as the Florida Land and Water Adjudicatory Commission--rescind all four of the fence permits. (R. 284). He found that the permits, because they were issued as of right and not pursuant to a conditional use process, were inconsistent with the regulations adopted in 1986, particularly the general prohibition against erecting fences in Section 9.5-309(e) of the Monroe County Code. (R. 282). The Commission entered a final

order which specifically rejected an exception suggesting that some fences might be harmless to the Key Deer. (R. 326).[10]

The Moormans and Your Local Fence appealed the final order to the Third District Court of Appeal, claiming that the fence regulation was unconstitutional on its face. The district court agreed, determining that the regulation prohibiting fences within the Big Pine Key area of critical concern was facially unconstitutional in Moorman v. Department of Community Affairs, 626 So.2d 1108 (Fla. 3d DCA 1993).

The Department filed an untimely motion and amended motion for rehearing and rehearing en banc. The mandate issued on December 9, 1993. A notice of appeal to this Court was filed on December 22, 1993. This Court accepted jurisdiction in an order dated May 16, 1994.

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[10]In rejecting the exception, the Commission said:

> DENIED. The record reflects on page 137 of the Final Hearing Transcript that although Mr. Pete Kalla, expert witness in biology stated, "I don't regard subdivisions as habitat, per se, because I don't believe it's a natural situation for Key Deer to be in the subdivisions," he went on to say on page 141 of the Final Hearing Transcript that "fences are harmful to the Key Deer in that they do two things: 1) they interrupt the normal movements of the animal; and 2) they exclude habitat from the animal." Mr. Kalla further stated that "Key Deer move essentially constantly and they take up a large area and to have fences in that area and affect their movements is deleterious to them." (R. 326).

SUMMARY OF ARGUMENT

The Third District Court of Appeal applied an incorrect "strict scrutiny" standard of review when it struck down the Monroe County fence regulation as violative of the substantive due process guarantees of the Florida Constitution. The reasonable or rational relation standard is the correct standard for judicial review of such a land use regulation. The strict scrutiny standard, typically reserved for regulations that infringe on a protected class of people or on fundamental constitutional rights, is simply not justified here because the fence regulation impacts neither category of specially protected rights. Nor does the regulation fall within the very narrow, longstanding exception that this Court has carved out for forfeiture cases that involve the actual deprivation of real and personal property through the extraordinary means of seizure and forfeiture. Consequently, the fence regulation triggers only a rational basis standard of review and clearly passes constitutional muster under that standard.

Further, the district court improperly construed three provisions of the Florida Constitution to create a fundamental right to fence real property. While property rights are generally protected by Article I, Sections 2, 9 and 23 of the Florida Constitution, the fence regulation at issue implicates only the Article I, Section 2 individual right to protect one's property. That constitutional right has never been treated or characterized as "fundamental" so as to trigger strict judicial scrutiny, or construed to create a protectible right to erect a fence. Additionally, because the State's interest in protecting the

endangered Key Deer is a legitimate one of constitutional proportion and does not infringe on a recognized constitutional right, the Third District Court, by balancing the interests involved, incorrectly struck the balance in favor of the individual desire to erect a fence. The State of Florida, primarily, and Monroe County, secondarily, in their collective legislative wisdoms, properly perceived the competing interests involved in the deer-versus-fence debate, and correctly struck the balance in favor of the compelling state interest in saving the endangered Key Deer from extinction. Deference is due and owing to this legislative determination because the regulation is rationally related to a legitimate state interest.

ARGUMENT

I. THE DISTRICT COURT OF APPEAL APPLIED AN INCORRECT "STRICT SCRUTINY" STANDARD TO STRIKE DOWN A POLICE POWER FENCE REGULATION AFFECTING THE USE OF PROPERTY AS VIOLATIVE OF THE SUBSTANTIVE DUE PROCESS GUARANTEES OF THE FLORIDA CONSTITUTION.

The Third District Court of Appeal, in Moorman v. Department of Community Affairs, 626 So.2d 1108 (Fla. 3d DCA 1993), employed an incorrect standard of review for a facial constitutional challenge to a land use regulation by applying a strict scrutiny analysis to determine whether a Monroe County fence regulation was violative of substantive due process guarantees. Citing this Court's controlling principles of law, the district court acknowledged that the "rational relation" test should generally be used to judge the validity of police power regulations, and acknowledged that "reasonable restrictions upon the use of property in the interest of the public health, welfare, morals, and safety are valid exercises of the state's police power." Id. at 1110. (quoting Sarasota County v. Barg, 302 So.2d 737, 741 (Fla. 1974)). However, drawing heavily on a forfeiture case that involved the actual deprivation of personal property under a penal statute, the court went on to impose a stricter standard for the interim fence regulation. Id. The district court specifically framed the issue using terminology such as "narrowly tailored" and "least restrictive alternative," reserved only for heightened scrutiny situations:

> [W]e must decide whether the means chosen by the legislature (the absolute ban against fences on Big Pine Key in section 9.5-309, MCLDR), is narrowly tailored to

> achieve the state's objective of protecting the Key Deer through the <u>least restrictive alternative</u>. See *In re Forfeiture of 1969 Piper Navajo*, 592 So.2d at 235.

<u>Id</u>. (emphasis added).

Having thusly framed the issue, the district court revisited the evidence and launched a heightened fact-intensive inquiry on the nexus between the means chosen by the legislature and the objective sought to be attained. The deference usually accorded to legislative enactments, which the court alluded to earlier in its opinion when it set forth the controlling principles of law, was apparently forgotten. The district court then concluded that the fence regulation is facially unconstitutional because the method chosen is "not narrowly tailored to achieve the state's objective of protecting the Key Deer," in that it does not "always protect the Key Deer as some deer can be harmed in places where there are no fences" and it does not "recognize the individual's right to protect, enjoy and use one's property." <u>Id</u>. at 1110-1111.

This strict standard of scrutiny, with its heightened fact-intensive inquiry and "narrowly tailored" analysis, is employed by the Florida courts when examining the validity of police power regulations that disadvantage some protected classes or infringe on "fundamental" constitutional rights, such as freedom of the press or freedom of speech. <u>See</u> <u>Department of Revenue v. Magazine Publishers of America</u>, 604 So.2d 459 (Fla. 1992); <u>State v. Dodd</u>, 561 So.2d 263 (Fla. 1990). As this Court stated in its discussion of the difference between the rational relation and strict scrutiny standards of review in <u>In re Estate of Greenberg</u>, 390 So.2d 40, 42-43 (Fla. 1980):

> [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.[11]

The instant facts do not involve a regulation that operates to the disadvantage of some protected class or impinges on a fundamental constitutional right. The Florida constitutional right implicated in the instant case, the right to protect property, has never been characterized as "fundamental" so as to trigger the strict scrutiny standard of review of a land use regulation. Nor has that right been construed to create a constitutionally protected interest to fence real property.[12] The district court has clearly applied the incorrect standard of review.

This Court's longstanding and well-defined position has always been that land use regulations that are reasonably or rationally related to a legitimate government objective, which objective bears a substantial relation to the public health, safety, morals or general welfare, will withstand constitutional substantive due process challenges where the question of reasonableness or rationality is "fairly debatable." Sarasota County v. Barg, 302 So.2d 737, 741 (Fla. 1974); Harrell's Candy Kitchen v. Sarasota-Manatee Airport Authority, 111 So.2d 439 (Fla. 1959); City of Miami

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[11]The Greenberg case was recently reaffirmed in Board of County Commissioners of Brevard County v. Snyder, 627 So. 2d 469, 475 (Fla. 1993).

[12]See infra p. 24.

Beach v. Ocean & Inland Company, 3 So.2d 364 (Fla. 1941)(expressly adopting the "fairly debatable" principle as stated by the United States Supreme Court in Village of Euclid v. Ambler Realty Company, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926)). This Court has consistently applied this "rational relation" standard of review to determine the constitutional validity of land use regulations and has always been mindful of the presumption of validity, in the form of the "fairly debatable" principle, which it must accord to all legislative enactments. As the Court explained in Sarasota County, "[b]ecause of the presumption, 'It has long been the policy of this court in the interpretation of statutes where possible to make such an interpretation as would enable the Court to hold the statute constitutional.'" 302 So.2d at 741.

Likewise, the Florida appellate courts, including the Third District court before issuing the opinion under review, are unanimous in holding that the reasonable or rational relation standard of review is the appropriate standard for the review of land use regulations which are challenged on substantive due process grounds. See Town of Indialantic v. McNulty, 400 So.2d 1227, 1230 (Fla. 5th DCA 1981); City of Boca Raton v. Boca Villas Corporation, 371 So.2d 154 (Fla. 4th DCA 1979); Moviematic Industries Corporation v. Board of County Commissioners of Metropolitan Dade County, 349 So.2d 667, 670-671 (Fla. 3d DCA 1977); Davis v. Sails, 318 So.2d 214, 217 (Fla. 1st DCA 1975); Blank v. Town of Lake Clarke Shores, 161 So.2d 683 (Fla. 2d DCA 1964). The Fifth District's Town of Indialantic case, which involved a facial and as applied challenge to the Town's ocean

setback ordinance, is particularly illustrative. 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.

400 So.2d at 1230.

Also illustrative is the Third District's opinion in Moviematic, supra. There, a property owner challenged the county's refusal to maintain a heavy industrial zoning category on its 1,200 acres of land that overlay the Biscayne Aquifer as having no reasonable relationship to the public health, safety and welfare. 349 So.2d at 668-669. Stating that the "preservation of an adequate drinking water supply and ecological system in an area "are legitimate objects of the police power, the court upheld the zoning because it had a "tendency to insure that such essential governmental services as water supply will be maintained" and would "tend to preserve the residential or historical character of a neighborhood and to enhance the aesthetic appeal of a community." 349 So.2d at 669 (citation omitted; emphasis added). Surely it must be acknowledged that the fence restrictions on Big Pine Key have a tendency to help the Key Deer survive, even if there are possibly less restrictive alternatives that, after careful study, consideration, and testing, might accomplish the same goal (a questionable proposition for the near future, given the dire straits of the deer).

A municipal ordinance prohibiting fences in front yards,

presumably on merely aesthetic grounds, similarly withstood attack in City of Miramar v. Bain, 429 So.2d 40 (Fla. 4th DCA 1983). The ordinance was upheld even though the homeowner argued that the fence was necessary to keep children away from the garage in which she kept two lawfully permitted mountain lions which she used to promote suntan lotion, and that the prohibition was inconsistent with the constitutional powers over wildlife of the Florida Game and Fresh Water Fish Commission.

Despite the existence of all of these firmly established precedents, some of which the Third District court acknowledged in its opinion under review, that court nonetheless went far afield to hold the fence regulation unconstitutional by relying heavily on this Court's precedent, In re Forfeiture of 1969 Piper Navajo, 592 So.2d 233 (Fla. 1992), as controlling the situation. The Piper Navajo case is materially different from the instant case. The district court's reliance on it was misplaced.

Piper Navajo involved an actual, physical deprivation of personal property (an aircraft which was parked in a private field) through the application of a penal forfeiture statute. 592 So.2d at 234-236. The forfeiture statute at issue expressly authorized forfeiture of certain aircraft and made it unlawful for any person "to install, maintain or possess any aircraft" equipped with more fuel tanks than were allowed by federal aviation regulations. Under the forfeiture statute, such nonconforming aircrafts were contraband per se. Id. at 234-235.[13]

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[13]No constitutionally protected property rights exist in per se contraband, the mere possession of which constitutes a crime. State v. Butler, 587 So. 2d 1391, 1392 (Fla. 3d DCA 1991); §

Although not expressly enunciated in the Piper Navajo opinion, this Court apparently found that the character of the interest (personal property) and the nature of the government action or process (forfeiture--a disfavored remedy) involved in that case warranted a strict scrutiny standard of review. This is clear from a thorough reading of the main precedent that this Court relied on in Piper Navajo, that being Department of Law Enforcement v. Real Property, 588 So.2d 957 (Fla. 1991) (hereinafter "DLE").

DLE involved a facial challenge to a forfeiture statute whose application resulted in the seizure and forfeiture of a family's homestead. In DLE, this Court explained that "[t]he manner in which due process protections apply vary with the character of interests and the nature of the process involved." Id. at 960. This Court noted that seizure is "an extreme measure because seizure effectively ousts an individual from all rights concerning property." Id. at 962. This Court also stated that it "has long followed a policy that it must strictly construe forfeiture statutes" because "forfeitures are considered harsh exactions, and as a general rule they are not favored either in law or equity." Id. at 961. Thus, Piper Navajo and DLE are cases which involve the disfavored means of seizure and forfeiture of real and personal property.

Although this case implicates a constitutionally protected property right, i.e., the right to protect one's property, it is unlike Piper Navajo and DLE in that it does not arise out of an actual deprivation of property (real or personal) through the

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933.14, Fla. Stat. (1993).

extraordinary measures of seizure and forfeiture. This case does not even involve the constructive deprivation of real property that we know of as a "regulatory taking." Moreover, since fencing has never been recognized as a necessary element of the right to protect property, the regulation does not infringe on that constitutional right. All that we have here is a relatively minor infringement on the specific options an owner has to protect her property in the Big Pine Key Area of Critical Concern -- an area critical to the survival of the endangered Key Deer.

Neither Piper Navajo nor DLE overrules this Court's well-established precedents which hold that the "rational relation" standard is the correct standard of review of land use regulations which are challenged on substantive due process grounds. Piper Navajo and DLE represent this Court's application of its longstanding policy that forfeiture statutes must be strictly construed. Consequently, the district court's reliance on Piper Navajo was misplaced. This district court should have examined the fence regulation under the rational relation test, and not under the strict scrutiny test with its "narrowly tailored" analysis.

Under the rational relation test, the fence regulation passes constitutional muster because it falls squarely within the bounds of reason. As the district court correctly found, the state's and county's interests in protecting the endangered Key Deer, manifested in both governments' critical area designations, are legitimate government interests. Moorman, 626 So.2d at 1110 (citing Moviematic, 349 So.2d 667 (Fla. 3d DCA 1977)). The specific statement of the County's legislative objective to protect

the deer from fences is contained in the Monroe County Comprehensive Plan's "Criteria for Designating Areas of Particular Concern":

> Development within areas identified as Key Deer habitat shall insure that the continuity of habitat is maintained to allow deer to roam freely without impediment from fences or other development.

Fla. Admin. Code R. 28-20.020(8)4. (emphasis added).

Big Pine Key is the primary habitat of the endangered Key Deer. Most of the Key, including the Moorman's subdivision, is included in the County's designated critical area. In the opinion under review, the Third District court noted that the DCA's expert witness in biology testified, "I don't regard subdivisions as habitat, per se, because I don't believe it's a natural situation for Key Deer to be in the subdivisions." See 626 So.2d at 1109. However, as the Adjudicatory Commission pointed out in its final order rejecting a suggestion that some fences are harmless to the Key Deer, "[T]he expert went on to say . . . that 'fences are harmful to the Key Deer in that they do two things: 1) they interrupt the normal movements of the animal; and 2) they exclude habitat from the animal.'" (R. 326). The expert witness further testified that "Key Deer move essentially constantly and they take up a large area and to have fences in that area and affect their movements is deleterious to them." (T. 141). Also, it was undisputed that the Key Deer could be found roaming throughout the subdivisions on Big Pine Key. (T.145).

Given this scenario, and according the due deference owed to legislative enactments, it is at least fairly debatable that a

legislative objective to protect Key Deer may be accomplished by broadly designating an area that is rationally related to that purpose and by regulating within that area activities that are rationally related to protecting the deer and the habitat, such as the erection of fences in general.[14] Moreover, if one approaches the issue by observing the forest rather than the trees, it is immediately apparent that protection of the endangered Key Deer species generally is the larger goal and habitat preservation is only a subpart, albeit an essential one, of that ultimate protection. Therefore, although there are subdivision areas on Big Pine Key which may not be strictly classified as natural habitat in the biological sense,[15] it is beyond dispute that locating fences, in general, on the Key generally significantly imperils the deer themselves by interfering with their normal movement patterns and by contributing to the escalating roadkill mortality rate by funneling the deer into the roadways. Ignoring that fact would thwart the legislative objective of protecting the endangered Key Deer species generally.

Given all of the evidence, it is clear that the regulation which prohibits the erection of fences on most of Big Pine Key is rationally related to the end sought to be attained (protection of the endangered Key Deer). Certainly, the existence of such a

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[14]See Florida Game and Fresh Water Fish Commission v. Flotilla, Inc., 19 Fla. L. Weekly 627 (Fla. 2d DCA March 16, 1994) and In re Southview Associates, 153 Vt. 171, 176, 569 A.2d 501, 503 (Vt. 1989), for varying interpretations of the term wildlife "habitat."

[15]This was what the Third District Court meant when it said "in three out of the four cases...there was no biological basis for denying the fences." Moorman, 626 So. 2d at 1110.

rational basis is at least fairly debatable. As such, this Court, in keeping with its longstanding caselaw, should find that the fence regulation is constitutional. To hold otherwise would mean that courts across the State could second-guess numerous land use decisions made by local governments. The citizens of Florida have elected representatives to make those decisions. Courts exist redress grievances when rights and obligations are violated, not to strike a different legislative balance in the marketplace of ideas. Any other result threatens the separation of powers that makes our system work.

II. THE DISTRICT COURT IMPROPERLY CONSTRUED SEVERAL PROVISIONS OF THE FLORIDA CONSTITUTION TO CREATE A FUNDAMENTAL RIGHT TO FENCE REAL PROPERTY AND IMPROPERLY ENGAGED IN A BALANCING OF THE COMPETING STATE AND INDIVIDUAL INTERESTS.

The Third District Court of Appeal, presented with a substantive due process challenge to a land use (fence) regulation, embarked on a peculiar path of constitutional interpretation. The district court incorrectly interpreted the extent of the protection afforded property rights under the Florida Constitution when it construed three constitutional provisions relating to property rights to conclude, in effect, that the right to protect one's property includes a specific, fundamental constitutionally protected right to erect a fence. The district court improperly elevated the desire to fence one's property to the status of a fundamental right by employing a strict scrutiny standard of review.

In analyzing the nature of the individual constitutional right

allegedly infringed upon, the Third District court correctly opined that "property rights are protected by numerous provisions in the Florida Constitution," specifically, Article I, Sections 2, 9 and 23. Moorman, 626 So.2d at 1111. However, the district court failed to recognize that not all three of those constitutional provisions had been implicated by the fence regulation at issue. Indeed, the fence regulation, if it implicates any right, implicates only the Article I, Section 2 right to protect one's property.

The fence regulation does not implicate the Due Process Clause in Article I, Section 9 of the Florida Constitution. As the Third District Court itself has held, an essential element of a claim that the Due Process Clause has been violated is a showing of deprivation of a constitutionally protected right. State v. Butler, 587 So.2d 1391, 1392 (Fla. 3d DCA 1991). Absent such a right, and absent the deprivation thereof, there can be no denial of due process. Id. Here, there is no deprivation, actual or constructive, of a constitutionally protected property right. In fact, no such claim was ever made. Absent a deprivation, the most that could possibly be said is that the Moorman's constitutional right to protect their property has been implicated.[16]

Likewise, the fence regulation does not infringe on the Moorman's privacy rights under Article I, Section 23 of the Florida Constitution. Again, the Moormans made no such claim. Moreover, as this Court stated, in deciding the limitations and latitude

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[16]The absence of an Article I, section 9 Due Process Clause violation buttresses the argument that the district court's reliance on Piper Navajo was misplaced. Piper Navajo involved a clear Article I, section 9 Due Process Clause violation, as did DLE.

afforded Article I, Section 23, "before the right of privacy is attached . . . a reasonable expectation of privacy must exist." Winfield v. Division of Pari-Mutuel Wagering, 447 So.2d 544, 547 (Fla. 1985)(recognizing an individual's legitimate expectation of privacy in financial institution records). Additionally, the zone of privacy interests protected under the Florida Constitution includes the personal decision-making or personal autonomy privacy interests. Id. at 546. Thus, although Floridians have a reasonable legitimate expectation of privacy in the sanctity of their homes,[17] there is no reasonable legitimate expectation of privacy in being able to erect a fence on real property. The decision to erect a fence is clearly not one of those uniquely personal decisions that fall within the zone of privacy interests protected by the Constitution.

The fence regulation does not even infringe on the right to "protect" one's property contained in Article I, Section 2 of the Florida Constitution because the right to protect real property does not by necessity include the right to fence it. Thus, the desire to protect property by erecting a fence can hardly be treated or characterized as a "fundamental" right.

The constitutionally protected rights typically characterized as "fundamental" are those individual rights of a "uniquely private nature such as abortions, the right to vote, the right of

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[17]This particular privacy right was directly infringed on in DLE. DLE involved the deprivation (by seizure and forfeiture) of a family's residence, wherein this Court said that the property rights infringement was "particularly sensitive" where a residence is at stake because individuals have "constitutional privacy rights in the sanctity of their homes." 588 So. 2d at 964.

interstate travel, first amendment rights, and procreation." In re Estate of Greenberg, 390 So.2d at 42-43.[18] Since the right to protect one's property is not held in such high regard and does not bestow a concomitant protectible right to erect a fence, its claimed infringement does not justify the use of a strict scrutiny standard of review. In fact, this Court has consistently held that:

> restricting property rights guaranteed by Article I, Section 2 of the Florida Constitution ... may be permissible if the restrictions are "'reasonably necessary to secure the health, safety, good order, [and] general welfare.'"

Harris v. Martin Regency, Ltd., 576 So.2d 1294 (Fla. 1991)(quoting Shriners Hospitals for Crippled Children v. Zrillic, 563 So.2d 64, 68 (Fla. 1990)(quoting Golden v. McCarty, 337 So.2d 388, 390 (Fla. 1976))).[19]

Since the constitutional right to protect one's property is not a fundamental right and does not inexorably lead to a right to erect a fence, the Third District's balancing of the interests below was improper. While conceding that the state's interest in protecting the Key Deer is a legitimate one, the Third District failed to recognize that the citizens of Florida have elevated such environmental interests to constitutional guarantees in Article II, Section 7 of the Florida Constitution. That constitutional provision makes it a policy of the state "to conserve and protect

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[18]Cited supra p. 12.

[19]Curiously, the Third District court relied on Shriners Hospital in its analysis of the importance of property rights but apparently ignored the reasonableness standard of review espoused by that Court. Moorman, 626 So. 2d at 1111.

its natural resources and scenic beauty." Thus, the state's interest in protecting the endangered Key Deer is a compelling one of constitutional proportion.

The State, primarily, and Monroe County, secondarily, in their collective legislative wisdoms, properly perceived the competing state and individual interests and correctly struck the balance in favor of saving the endangered Key Deer from extinction. As this Court recently recognized in Young v. Department of Community Affairs, 625 So.2d 831 (Fla. 1993), the state legislature, in enacting the critical area legislation and in making the Florida Keys Area designation, has "statutorily determined that development in the Florida Keys Area will have an adverse impact [on the environment and natural resources] if not in accordance with chapter 380, the local development regulations, and the local comprehensive plan." Id. at 834. One of the stated purposes of the Florida Keys Area designation is to protect the natural environment, including "wildlife and their habitat." § 380.0552(2) and (7), Fla. Stat. (1993).

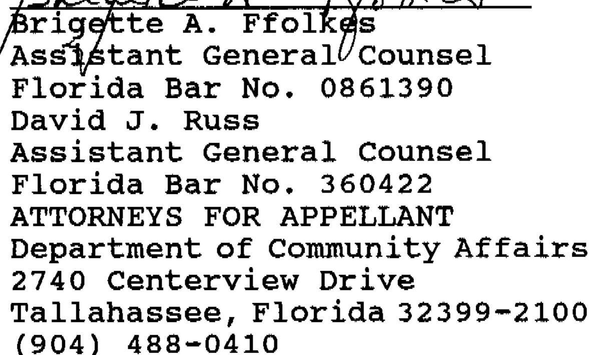
The Monroe County Commission, in its legislative capacity, adopted a comprehensive plan policy to specifically protect the Key Deer from the harmful effects of fences on Big Pine Key, in accordance with and in furtherance of the State's Critical Area designation. The county then enacted the interim fence regulation at issue to implement its comprehensive plan policy and the mandates of the state's legislation. In so doing, the county was mindful of the impact the regulation could have on the desires of individual property owners.

This court should accord the state and county legislative enactments their due deference and find the fence regulation constitutional. Otherwise, Florida's land use and environmental laws that come under attack will not survive strict scrutiny and Floridians will soon be deprived of their unique environmental treasure known as the Key Deer.

CONCLUSION

Based on the foregoing, this Court should reverse the Third District Court of Appeal and find that Section 9.5-309(e) of the Monroe County Code is constitution on its face because it is rationally related to the legitimate governmental objective of protecting the Florida Key Deer.

Respectfully submitted this 20th day of June, 1994.



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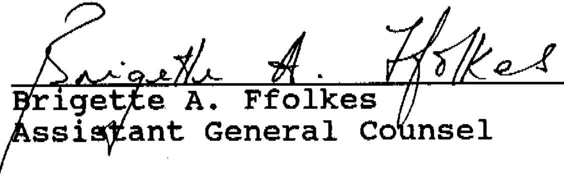
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the party listed below on the 20th day of June, 1994.



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