085

SUPREME COURT OF FLORIDA

DEPARTMENT OF COMMUNITY AFFAIRS,

Petitioner,

vs.

CHARLES MOORMAN, KATHLEEN MOORMAN, and YOUR LOCAL FENCE,

Respondents.

82,946

CASE NO.
3RD DCA NO. 92-1785

ON APPEAL FROM
DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

JURISDICTIONAL BRIEF OF PETITIONER DEPARTMENT OF COMMUNITY AFFAIRS

David J. Russ
Assistant General Counsel
Florida Bar No.: 360422
Brigette Ffolkes
Assistant General Counsel
Department of Community Affairs
2740 Centerview Drive
Tallahassee, Florida 32399-2100
Florida Bar No. 0896160
(904) 488-0410

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases:

Other Authorities:

STATEMENT OF THE CASE AND THE FACTS

In 1986, the Monroe County Commission designated most of Big Pine Key in the Florida Keys an area of critical county concern. The county adopted Section 9.5-479, Monroe County Code, 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 needs of the Florida Key Deer." Hearing Officer's Recommended Order at 9. The county adopted two interim regulations[1] to be enforced on Big Pine Key "prior to the completion of the focal point planning program . . . and the adoption of amendments to the Monroe County Comprehensive Plan and land development regulations." *Id.* at 9-10. The county did not adopt a new plan or related amendments. Transcript at 142. Further, the county kept in place a variance section which allows aggrieved residents to apply for a conditional use permit so the

---

[1]Section 9.5-479(d)(1), Monroe County Code, says:

> 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.

Section 9.5-309, 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.

county can consider a balanced result, and relief, that "will further or not adversely affect either interest." Recommended order at 13, note 3.

Big Pine Key is located in the Florida Keys Area of Critical State Concern. *See* §§ 380.05(2)(a), 380.0552, Fla. Stat. This critical area designation allows the Department of Community Affairs (DCA) to appeal inconsistent development orders to the Florida Land and Water Adjudicatory Commission (FLWAC).

In 1991 Charles and Kathleen Moorman obtained a permit to erect a six-foot-high, 400-foot-long fence on their lot within the Big Pine Key Area of Critical County Concern without first obtaining a variance. Recommended Order at 8. The Department appealed the permits to FLWAC, which forwarded the case to the Division of Administrative Hearings (DOAH).

The DOAH hearing officer subsequently recommended that FLWAC rescind the fence permits. 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). FLWAC entered a final order which specifically rejected exceptions filed by respondents suggesting that some fences might be harmless to the Key Deer. Final Order at 3.

The Moormans and Your Local Fence appealed the final order to the Third District Court of Appeal, claiming for the first time that the fence regulation was unconstitutional on its face. The district court reversed, determining that Section 9.5-309(e) was

unconstitutional on its face in *Moorman v. Department of Community Affairs*, 18 Fla. L. Weekly D2484 (Fla. 3d DCA Nov. 23, 1993).

The district court found that it had been proven that "a fence on the Moorman property would be harmful to Key Deer because it would fence some Key Deer habitat." 18 Fla. L. Weekly at 2485. The court rejected relevant findings of fact to the effect that fences on the other lots could also be harmful when it said "there was no biological basis for objecting to fences" other than in the Moorman subdivision. *Id.* The district court determined that it, not the Monroe County Commission or FLWAC, was required "to seek a harmonious balance between the constitutional right to protect *and develop* one's property and the right of the Key Deer to exist unfettered." 18 Fla. L. Weekly at 2485 (emphasis added).

The district court acknowledged that the "rational relationship" test should generally be used to judge the validity of police power regulations. However, the court imposed a stricter standard for the fence regulation: whether the "ban [*sic*] against fences on Big Pine Key . . . is narrowly tailored to achieve the state's objective of protecting the Key Deer through the least restrictive alternative. *See In re Forfeiture of 1969 Piper Navajo*, 592 So.2d at 235." *Id.* The district court concluded that the regulation is unconstitutional because 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." *Id.*

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.

SUMMARY OF ARGUMENT

The Third District Court of Appeal expressly applied a conflicting and incorrect standard of review in its examination of the facial constitutionality of Section 9.5-309(e) of the Monroe County Code. The appropriate standard of review for a zoning ordinance of general applicability is the rational relationship test. However, the Third District employed the strict scrutiny analysis which historically has been reserved for the review of governmental intrusion into fundamental rights. If the appropriate standard of review is applied, the regulation at issue would pass constitutional muster. 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, in effect, construed (but incorrectly) three provisions of the Florida Constitution to create a brand new fundamental right to fence real property. This Court has jurisdiction to hear this case. Art. V, §3, Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(ii) and (iv).

ARGUMENT

I. The *Moorman* opinion expressly and directly conflicts with decisions of other district courts and this Court by holding that a police power regulation affecting the use of property must be "narrowly tailored" to accomplish its purpose through "the least restrictive alternative," as opposed to merely rationally related to the legitimate purpose to be accomplished.

This Court has stated that conflict jurisdiction may be based on decisions "out of harmony" that could generate "confusion and instability among the precedents." *Kyle v. Kyle*, 139 So.2d 885, 887 (Fla. 1962), *citing Ansin v. Thurston*, 101 So.2d 808 (Fla. 1958); *see also The Florida Star v. B.J.F.*, 530 So.2d 286 (Fla. 1988). That is certainly the situation in this instance.

In the *Moorman* decision, the Third District expressly employed an incorrect and conflicting standard of review for a facial challenge to a general zoning regulation by inappropriately applying a strict scrutiny analysis to determine whether the Monroe County fence regulation was constitutional. The district court thereby ignored decades of precedent which establishes that facial challenges to general zoning regulations should be examined under the rational relationship test.

The language used in the *Moorman* opinion is the strict scrutiny language used in cases where the Court examines governmental interference with fundamental rights. The opinion contains buzz phrases like "narrowly tailored" and "least restrictive alternative" which are applicable only in enhanced scrutiny situations. Also the district court concludes that Section 9.5-309(e) is "facially unconstitutional because the method chosen by the legislature is not narrowly tailored to achieve the state's objective of protecting the Key Deer." 18 Fla. L. Weekly at D2485-2486.

The standard of scrutiny used in the *Moorman* opinion is that used by the courts only when examining the validity of a police

power regulation that touches a fundamental right, such as freedom of the press or freedom of 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).

This Court provided an excellent narrative on the difference between the rational basis or fairly debatable test, and a more stringent analysis in *In re Estate of Greenberg*, 390 So.2d 40, 42-43 (Fla. 1980), *appeal dismissed*, 450 U.S. 961 (citations omitted), where it said:

> [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.

The district courts are 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 the Second District case of *Blank v. Town of Lake Clarke Shores*, 161 So.2d 683 (Fla. 2d 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 noted 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. *See also Lee County v. Sunbelt Equities II, Ltd.*, 619 So.2d 1996 (Fla. 2d DCA 1993); *Lee County v. Morales*, 557 So.2d 652 (Fla. 2d DCA 1990).

The Fourth District struck a population cap ordinance of the City of Boca Raton in *City of Boca Raton v. Boca Villas Corporation*, 371 So.2d 154 (Fla. 4th DCA 1979) because the ordinance was not "rationally related" to the public health, safety, and welfare, one of many cases from that district consistently using rational relationship standard of review for general zoning ordinances. *See Rotenberg v. City of Fort Pierce*, 202 So.2d 782 (Fla. 4th DCA 1967). From the Fifth District, *Town of Indialantic v. McNulty*, 400 So.2d 1227, 1230 (Fla. 5th DCA 1981) (citations omitted), 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.

The Supreme Court also has conflict jurisdiction in this case because the Third District relied on precedent which is materially different than the instant case. *Gibson v. Avis Rent-A-Car System, Inc.*, 386 So.2d 520 (Fla. 1980), *on remand*, 388 So.2d 55 (Fla. 3d DCA 1980). Conflict may be based on misapplication of established precedent, *Rinker Materials Corp. v. City of North Miami*, 286 So.2d 552 (Fla. 1973), such as where a district court of appeal cites a case as controlling the situation but that case is clearly distinguishable on the facts. *Wale v. Barnes*, 278 So.2d 601 (Fla. 1973), *conformed to*, 280 So.2d 476 (Fla. 3d DCA 1975). This happened in *Moorman*, where much of the confusion generated by application of the strict scrutiny test stems from the Third District's misplaced reliance on *In re Forfeiture of 1969 Piper Navajo*, 592 So.2d 233 (Fla. 1992). *Piper Navajo* involved the involuntary physical taking and confiscation of private, personal property through application of the penal forfeiture statute. 592 So.2d at 234-236. *Piper Navajo* also used a combination of rational relation and heightened scrutiny language (like "narrowly tailored") to carve a very narrow exception and to heighten the scrutiny for extraordinary cases which involve the confiscation of personal property. Unlike *Piper Navajo*, the *Moorman* case did not arise out of an involuntary physical taking of property (real or personal) or even a prohibition of development of single family residences in certain areas on Big Pine Key, but involved only the

prohibition of fences in the Big Pine Key Area of Critical County Concern. The regulation should have been examined under a rational relation test and not the strict scrutiny test with its "narrowly tailored" analysis. The Third District's reliance on the precedent in *Shriner's Hospital for Crippled Children v. Zrillic*, 563 So.2d 64 (Fla. 1990), is similarly misplaced. 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 a specific constitutional provision, Article I, Section 2, which strongly implied that such restrictions could only be applied to aliens ineligible for citizenship. 563 So.2d at 66-67. Also, the *Shriner's Hospital* case nowhere creates a strict scrutiny test; in fact, it specifically says 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).

II. The *Moorman* opinion construes, defines and overtly explains the meaning of several constitutional provisions in an unprecedented way that creates a fundamental right to fence real property.

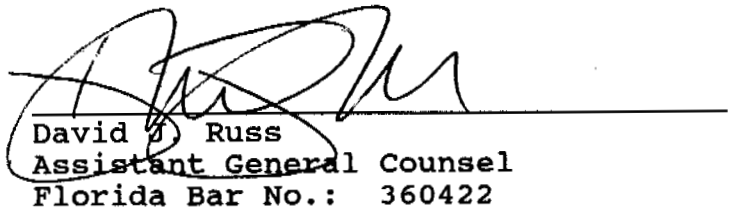
Discretionary jurisdiction is also proper when a district court initially or directly construes a provision of the Florida Constitution. In order to say that this has occurred, the appellate opinion must contain "some statement or citation that hypothetically could create conflict if there were another opinion reaching contrary result." *The Florida Star v. B.J.F.*, 530 So.2d

286 (Fla. 1988). Here, the district court clearly did "construe, define or overtly explain the meaning of" the three provisions it found relating to property in the constitution, See *Dykman v. State*, 294 So.2d 633 (Fla. 1973, *on remand*, 300 So.2d 695 (Fla.), *cert. denied*, 419 U.S. 1105: The right to own, acquire, possess, and protect property in Article I, Section 2; the right not to be deprived of property without due process of law in Article I, Section 9; and the right to be let alone and free of government intrusion in Article I, Section 23. 18 Fla. L. Weekly at D2486.

CONCLUSION

The decision of the Third District Court of Appeal in *Department of Community Affairs v. Moorman* expressly and directly conflicts with prior decisions of the Florida Supreme Court and the district courts of appeal on the same question of law and construes provisions of the state constitution. The Department respectfully requests that the Supreme Court accept jurisdiction of this case to resolve the conflict as authorized by the Constitution of the State of Florida and the Rules of Appellate Procedure. Otherwise, the now nearly hopeless plight of the Florida Key Deer will be pushed that much closer to the abyss of extinction and the Third District's opinion will result in a domino effect of environmental and land use laws falling under strict scrutiny.

Respectfully submitted,



David J. Russ
Assistant General Counsel
Florida Bar No.: 360422

Brigette A. Ffolkes
Assistant General Counsel
Department of Community Affairs
2740 Centerview Drive
Tallahassee, Florida 32399-2100
(904) 488-0410

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the party listed below on this 4th day of February, 1994.

David J. Russ
Assistant General Counsel

Theodore W. Herzog, Esquire
209 Duval Street
Key West, Florida 33040