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SID J. WHITE

AS

SUPREME COURT OF FLORIDA

FEB 25 1994

CLERK, SUPREME COURT

By

Chief Deputy Clerk

DEPARTMENT OF COMMUNITY AFFAIRS,

Petitioner,

vs.

CASE NO.

3RD DCA NO. 92-1785

CHARLES MOORMAN, KATHLEEN MOORMAN,
and YOUR LOCAL FENCE,

Respondents.

ON APPEAL FROM
DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

REPLY BRIEF OF THE RESPONDENTS,
CHARLES MOORMAN, KATHLEEN MOORMAN,
AND YOUR LOCAL FENCE

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TABLE OF CONTENTS

Table of Contents..... 1

Table of Citations.....ii

Statement of the Case and Facts..... 1

Summary of Argument..... 2

Argument.....

I. This court should decline to accept jurisdiction
because the Moorman decision does not expressly
or directly conflict with the decisions of other
district courts or this court.

Conclusion.....

Certificate of Service.....

STATEMENT OF THE CASE AND THE FACTS

The Respondents adopt the statement of the case and the facts set forth by the Petitioner with the following exception. The Court at page 3 of the Moorman Opinion stated "the fence permits are contrary to Section 95-309, MCLDR, which bans all fences in the area of critical concern."

SUMMARY OF ARGUMENT

The Third District Court of Appeals decision did not apply a conflicting and incorrect standard of review of Section 9.5-309(e) of the Monroe County Code. The Court correctly applied the rationale relationship test. The Court correctly held that the total ban on fences in the Big Pine Key Area of Critical Concern was arbitrary and did not bear a reasonable relationship to the health, safety and welfare of the public.

ARGUMENT

The Third District Court of Appeals decision does not conflict with the decisions of the other District Courts of Appeal or the decisions of this Court.

A careful reading of the Third District Court of Appeals decision shows how carefully that Court was in deciding that case based on prior decisions. The entire thrust of Appellants argument is based on the Court's expression that the ordinance was not "narrowly tailored" (Moorman Page 7) to achieve the States objective in protecting the Key Deer.

While the Court did use this expression in one sentence of its opinion, throughout the decision the standards it used in making its determination are clearly consistent with the case law promulgated by this Court as well as by the Courts of Appeal of this State.

It is interesting to note that perhaps the most widely cited case concerning environmental regulations, Graham v. Estuary Properties, Inc. 399 So 2d 1374 (Fla 1982), a decision of The Supreme Court, was the first case cited by the Third District in setting forth the standard of review in these cases in its opinion (Moorman Page 5) and it was almost totally ignored in Petitioners Brief on Jurisdiction. The Court of Appeal went on further to say at Page 6:

"Every reasonable doubt must be indulged in favor of the net. If it can be rationally interpreted (emphasis added) to harmonize with the constitution it is the duty of the Court to adopt that construction and sustain the act." id. (Quoting Holley v. Adams 238 So 2d 401, 404 (Fla 1970).

and yet the Petitioner would have this Court believe that the "rational relationship test" was ignored by the Court of Appeals. At Page 5 of Petitioners Brief on Jurisdiction the Petitioner alleges:

"The District Court thereby ignored decades of precedent which establishes that facial challenges to general zoning regulations should be examined under the rational relationship (emphasis added) test.

However, at Page 5 at the Courts decision in Moorman, the Court states:

"In addition, due process also requires that "the means selected by the legislature bear a reasonable and substantial relationship (emphasis added) to the purpose sought to be obtained." In re forfeiture of 1969 Piper Navajo, 592 So 2d 233 (Fla 1992).

Further in its opinion at Page 5 the Court stated:

"Reasonable restrictions (emphasis added) upon the use of property in the interest of the public health welfare, morals and safety are valid exercises of the States police power." Sarasota County v. Barg 302 So 2d 737, 741 (Fla 1974).

And yet the Petitioner would ask this Court to believe the Third District ignored the reasonable relationship test.

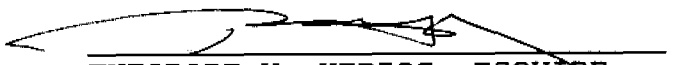
The Third District in deciding whether or not the total ban on fences on Big Pine Key was reasonably related to the purpose of protecting the Key Deer not only found there was no reasonable relationship between the ordinance and the protection of the Key Deer as balanced against the rights of property owners by stating at Page 6:

"Thus, the complete ban on all fences on Big Pine Key does not accomplish either of the two goals of the legislation: 1) The ban does not always protect the Key Deer as some deer can be harmed in places where there are no fences; and 2) The fence ban does not recognize the individual's right to protect, enjoy and use over property. (Moorman Page 7).

The Third District clearly states in its opinion that the total ban on fences on Big Pine Key is not only not rationally related to the protection of the Key Deer, but it does nothing to protect the Key Deer and in some cases the ban on fences will be harmful to the Deer.

CONCLUSION

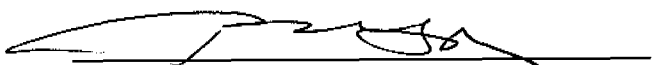
The decision of The Third District Court of Appeal in this case does not conflict with decisions of other Courts of Appeal and follows the standards and guidelines set forth by this Court in numerous cases.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail to Ms. Katherine Castor, Ms. Brigitte Ffolkes and Mr. David Russ, Department of Community Affairs, 2740 Centerview Drive, Tallahassee, Florida 32399-2100 on this the 24th day of February, 1994.



Theodore W. Herzog, Esquire

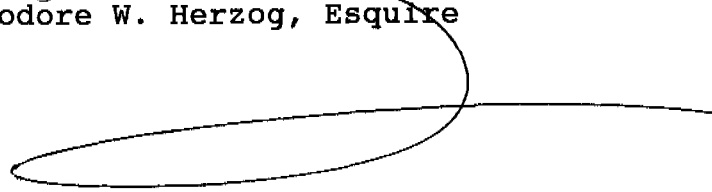


TABLE OF CITATIONS

	Page
<u>Graham v. Estuary Properties</u> 399 So 2d 1374 (Fla 1982)	3
<u>Holley v. Adams</u> 238 So 2d 401 (Fla 1970)	3
<u>In re Forfeiture of 1969 Piper Navajo</u> 592 So 2d 233 (Fla 1992)	4
<u>Sarasota County v. Barg</u> 302 So 2d 737 (Fla 1974)	4