2. Administrative Law and Procedure ⇐670

Court reviewing administrative order declined to take judicial notice of factual matter based on records that could have been offered at administrative hearing, which challenger did not request despite being offered opportunity to do so.

Robert A. Emmanuel, of Emmanuel, Sheppard & Condon, Pensacola, for appellant.

Gary J. Anton and John T. Mitchell, of Stowell, Anton & Kraemer, Tallahassee, for appellee.

WENTWORTH, Judge.

Appellant seeks review of an administrative order determining that he had performed work on a dam without the necessary permits, and directing him to dewater the facility or apply for a permit and repair the dam. No point of reversible error has been presented for our review, and we affirm the order appealed.

Appellee Northwest Florida Water Management District (hereinafter "District") issued an administrative complaint/notice of violation and order describing appellant as the record owner of the property upon which the subject dam is located. The complaint recited the dam's history of structural failures and appellant's repeated unpermitted repairs. It was also indicated that appellant had not complied with a prior order for corrective action, leaving the dam in an unsafe condition which could lead to a catastrophic failure. Appellant was directed to dewater the facility or apply for a permit and make repairs. The complaint advised appellant of his right to an administrative hearing, and contained information as to the procedure for initiating this process. Appellant did not request a hearing and the District eventually entered a final order expressly approving the directive for corrective action.

[1, 2] Appellant challenges this order, contending that it is actually one for remedial measures as authorized by section 373.436, Florida Statutes, rather than one for corrective action as authorized by section 373.119, Florida Statutes. Appellant notes that Rule 40A-4.481, F.A.C., requires that a remedial order be served upon the owner of the involved facility, and asserts that he is not an individual owner of the property in the present case, requesting that this court take judicial notice of property records which allegedly indicate that the property is owned by appellant and his spouse as a tenancy by the entireties. However, we find that the challenged order is properly deemed a corrective order under section 373.119, which by the statute's literal terms need only be served upon "the alleged violator." On the alternative argument, we decline to take judicial notice as to a factual matter based on records of a character more properly presented below. *See generally, Hillsborough County Board of County Commissioners v. Public Employees Relations Commission*, 424 So.2d 132 (Fla. 1st DCA 1982). Appellant's failure to invoke the administrative process so as to raise the point below precludes an appellate challenge on this factual issue. *Dickerson Inc. v. Rose*, 398 So.2d 922 (Fla. 1st DCA 1981); *see also, Paradyne v. State of Florida Department of Transportation*, 528 So.2d 921 (Fla. 1st DCA 1988), *rev. denied* 536 So.2d 244 (Fla.1988); *Florida Department of Corrections v. Bradley*, 510 So.2d 1122 (Fla. 1st DCA 1987).

The order appealed is affirmed.

NIMMONS and ALLEN, JJ., concur.

Josephine GATES and Randall J. Gates, Appellants,

v.

CITY OF SANFORD, Florida, etc., Appellee.

No. 89-1820.

District Court of Appeal of Florida, Fifth District.

Aug. 23, 1990.

Homeowners brought action against city, alleging that ordinance restricting

number of dogs and cats per residence was unconstitutionally arbitrary, unreasonable and discriminatory. The Circuit Court, Seminole County, S. Joseph Davis, Jr., J., upheld restrictive provision, but struck variance provision. Homeowners appealed. The District Court of Appeal, Harris, J., held that: (1) ordinance limiting each residence to three dogs and three cats was not unreasonable in light of potential detriment to public health, safety and general welfare because of overabundance of animals in residential area; (2) case specific classification such as type of dog, size of dog, or size of residence was not constitutionally required; and (3) entire ordinance did not fall upon declaring that variance provision of ordinance was unconstitutional.

Affirmed.

1. Municipal Corporations ⇐122(2)

One challenging constitutionality of ordinance has burden of proving its invalidity.

2. Constitutional Law ⇐87

All property is held subject to right of state to regulate it and on implied condition that its use shall not be injurious to equal rights of others.

3. Constitutional Law ⇐212, 253.1
Municipal Corporations ⇐589

Ordinances enacted pursuant to general police powers must not infringe constitutional guarantees by invading personal or property rights unnecessarily or unreasonably or by denying due process or equal protection of laws. U.S.C.A. Const. Amends. 5, 14.

4. Constitutional Law ⇐211(2)

Classification does not deny equal protection if it is reasonable and nonarbitrary and if it treats all persons in same class alike.

5. Animals ⇐4

City ordinance limiting each residence to three dogs and three cats was not unconstitutionally unreasonable in light of potential detriment to public health, safety and general welfare because of overabundance of animals in residential area. U.S.C.A. Const.Amends. 5, 14.

6. Animals ⇐4

To prevent finding that ordinance limiting number of dogs and cats per residence was unconstitutionally arbitrary, unreasonable and discriminatory, case specific classification such as type of dog, size of dog, or size of residence was not required. U.S.C.A. Const.Amends. 5, 14.

7. Municipal Corporations ⇐111(4)

Court should give effect to remaining valid portion of ordinance, if unconstitutional portion of ordinance can be eliminated without doing violence to legislative purpose expressed in valid portion, if remaining portion is complete in itself, and if valid and invalid portions are not so inseparable that one portion would not have been enacted without the other.

8. Municipal Corporations ⇐111(4)

Entire ordinance restricting number of dogs and cats per residence did not have to be invalidated upon finding that provision of ordinance on variances was invalid as lacking sufficient guidelines for exercise of discretion; provision restricting number of dogs and cats in residential area was not affected by invalidity of ordinance section, invalid portion was easily separable from valid portion and remaining portion was complete in itself, and city ordinances contained severability provision.

William J. Sheaffer, Orlando, for appellants.

William L. Colbert and Donna L. Surratt-McIntosh of Stenstrom, McIntosh, Julian, Colbert, Whigham & Simmons, P.A., Sanford, for appellee.

HARRIS, Judge.

In response to anonymous complaints concerning the number of animals being kept in a residence, the City of Sanford inspected the residence of Mr. and Mrs. Gates. Although the Gates were found to have maintained their residence and animals in an admirable fashion, they were cited for exceeding the maximum number

of dogs and cats permitted by the city ordinance. When their application for a variance was denied, they sued challenging the ordinance as being unconstitutionally arbitrary, unreasonable and discriminatory.

The trial court upheld the restrictive provision of the ordinance but struck the variance provision because it lacked sufficient guidelines for the exercise of variance discretion. We affirm the trial court.

[1] Appellants first contend that the ordinance is invalid because it is based solely on the number of animals as opposed to type of animals, weight of animals, size of property, etc. The one challenging the constitutionality of an ordinance has the burden of proving its invalidity. *Wiggins v. City of Jacksonville*, 311 So.2d 406 (Fla. 1st DCA 1975).

[2] All property is held subject to the right of the State to regulate it and on the implied condition that its use shall not be injurious to the equal rights of others. *Miami Shores Village v. Wm. N. Brockway Post No. 124 of American Legion*, 156 Fla. 673, 24 So.2d 33 (1945).

Regulation of animals has a long-standing history of constitutionality. *State v. Peters*, 534 So.2d 760 (Fla. 3d DCA 1988), *rev. denied* 542 So.2d 1334 (Fla.1989) citing *Sentell v. New Orleans & Carrollton R.R. Co.*, 166 U.S. 698, 17 S.Ct. 693, 41 L.Ed. 1169 (1897) and *Nicchia v. New York*, 254 U.S. 228, 41 S.Ct. 103, 65 L.Ed. 235 (1920).

[3] Ordinances enacted pursuant to general police powers must not infringe constitutional guarantees by invading personal or property rights unnecessarily or unreasonably or by denying due process or equal protection of laws. *Miami Shores Village v. Wm. N. Brockway Post No. 124 of American Legion, supra.*

[4] A classification does not deny equal protection if it is reasonable and non-arbitrary and if it treats all persons in the same class alike. *Lasky v. State Farm Insurance Co.*, 296 So.2d 9 (Fla.1974).

Appellants primarily rely on *Smith v. Steineauf*, 140 Kan. 407, 36 P.2d 995 (1934) which held unconstitutional an ordinance limiting the number of animals solely on a numerical classification; however, other cases have rejected this view. *See State v. Mueller*, 220 Wis. 435, 265 N.W. 103 (1936); *State v. Beckert*, 137 N.J.L. 562, 61 A.2d 213 (1948); *People v. Yeo*, 103 Mich.App. 418, 302 N.W.2d 883 (1981).

[5, 6] We find that the city's ordinance limiting each residence to three dogs and three cats is not unreasonable in light of the potential detriment to public health, safety and general welfare because of an overabundance of animals in a residential area. We further find that the constitution does not require a case specific classification such as type of dog, size of dog, or size of residence. The difficulty in enforcing such an ordinance would, in effect, render the ordinance meaningless.

Appellants next contend that by declaring a portion of the ordinance unconstitutional, the entire ordinance must fall.

[7] If the unconstitutional portion of the ordinance can be eliminated without doing violence to the legislative purpose expressed in the valid portion, if the remaining portion is complete in itself and if the valid and invalid portions are not so inseparable that one portion would not have been enacted without the other, then the courts should give effect to the remaining valid portion of the ordinance. *Cramp v. Board of Public Instruction of Orange County*, 137 So.2d 828 (Fla.1962); *High Ridge Management Corp. v. State*, 354 So.2d 377 (Fla.1977).

[8] Here the purpose of the ordinance was to restrict the number of dogs and cats in a residential area for public health and safety. That purpose is not affected by the invalidity of the variance section. The invalid portion is easily separable from the valid portion and the remaining portion is complete in itself. Further, the fact that the City of Sanford ordinances contain a severability provision is evidence that the valid portion would have been enacted even without the variance provision.

We find the ordinance constitutional and affirm the trial court.

AFFIRM.

PETERSON and McNEAL, R. T., Associate Judge, concur.

Richard L. GOODWIN, Appellant,

v.

Lonnie LAWRENCE, Director, Dade County Department of Corrections, Appellee.

No. 90-1917.

District Court of Appeal of Florida, Third District.

Aug. 23, 1990.

An Appeal from the Circuit Court for Dade County; Murray Goldman, Judge.

Kurt R. Klaus, Miami, for appellant.

Robert A. Butterworth, Atty. Gen., and Anita J. Gay, Asst. Atty. Gen., for appellee.

Before SCHWARTZ, C.J., and NESBITT and COPE, JJ.

CORRECTED OPINION

PER CURIAM.

We treat the petition for habeas corpus as an appeal from the judgment of contempt. As it appears the purge amount is manifestly incorrect, we reverse the judgment, and remand to fix the correct amount. This removes the basis of the appellant's imprisonment and thus effects his release pending further proceedings. No motion for rehearing will be entertained.

STATE of Florida, Appellant,

v.

Sandra Denise FLOWERS, Appellee.

No. 90-00454.

District Court of Appeal of Florida, Second District.

Aug. 24, 1990.

Defendant charged with narcotics offense filed motion to suppress cocaine. The Circuit Court, Polk County, J. Tim Strickland, J., granted suppression motion, and the State appealed. The District Court of Appeal held that tip received by police from known and reliable confidential informant was sufficiently detailed to give police probable cause to arrest and search defendant.

Reversed and remanded.

Arrest ⇐63.4(8, 12)

Information provided to police by known and reliable confidential informant, stating that informant observed woman inside a parked green Oldsmobile Cutlass, in possession of cocaine, and giving the address where car could be found and license plate number as well as location on woman's body where cocaine could be found, was sufficiently detailed to provide probable cause to arrest defendant found in the situation described by the informant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Brenda S. Taylor, Asst. Atty. Gen., Tampa, for appellant.

James Marion Moorman, Public Defender, and Andrea Norgard, Asst. Public Defender, Bartow, for appellee.

PER CURIAM.

This is an appeal from the trial court's order suppressing cocaine taken from Sandra Flowers by the police as well as sup-