3L

O/A 1-7-82

IN THE SUPREME COURT

OF FLORIDA

WILLIAM MARKHAM as Broward County Property Appraiser,

Petitioner,

v.

CASE NO. 60,759

E. C. FOGG, III, ALLEN S. FOGG, and ELIZABETH FOGG LANE,

Respondents.

_____/

BRIEF OF AMICUS CURIAE

FLORIDA HOME BUILDERS ASSOCIATION

STEPHEN W. METZ
Post Office Box 1259
Tallahassee, Florida 32302
904/224-4316

ROBERT M. RHODES
TERRY E. LEWIS
Messer, Rhodes & Vickers
Post Office Box 1876
904/222-0720

TABLE OF CONTENTS

TABLE OF CITATIONS

U.S. Census of Agriculture; State Data, Florida, 1978 16

Annual Report Data, Florida Department of Revenue, Division of Ad Valorem Taxation, 1980 17

Agricultural Land Preservation; Serious Land Policy Concern or Latent "Public Interest" Ploy?, Frank Schnidman, Lincoln Institute Monograph #81-1, 1981 9

The Protection of Farm Land, A Reference Guidebook For State and Local Governments, Executive Summary, Robert E. Coughlin and John C. Keene, Senior Authors and Editors and Jay Dixon Esseks, William Toner, and Lisa Rosenberger, Authors, December, 1980. 11, 12

New Communities U.S.A., R.F. Burby and Shirley F. Weiss (Lexington, Mass., Lexington 1976) 19

STATEMENT OF THE CASE AND FACTS

Amicus adopts the statement of the case and facts presented in the brief of Respondents, E.C. Fogg, et al.

Unless otherwise stated, any emphasis noted in this brief is supplied by the writers.

Reference to Appendix material is cited as A-___.

POINT ON APPEAL

POINT I

ACTUAL LAND USE SHOULD BE THE DOMINANT DETERMINANT IN CLASSIFYING LAND AS AGRICULTURAL FOR AD VALOREM TAXATION PURPOSES UNDER SECTION 193.461, FLORIDA STATUTES.

ARGUMENT

POINT I

ACTUAL LAND USE SHOULD BE THE DOMINANT DETERMINANT IN CLASSIFYING LAND AS AGRICULTURAL FOR AD VALOREM TAXATION PURPOSES UNDER SECTION 193.461, FLORIDA STATUTES.

The issue before the Court is rational and practical application of statutory criteria to determine whether certain real property should continue to be classified as agricultural for ad valorem taxation purposes.

The case joins developers and homebuilders who desire to engage in good faith commercial agricultural activity on property acquired for ultimate urban development. This development commonly is planned over a period of years, with parts or phases built as the market, government and the economy dictate. During this pre-development period, the property is retained in productive argicultural use and it is Amicus' position that "actual use" of the land should continue to be the dominant judicial determinant for classification under Section 193.461, Florida Statutes.

In response to the commercial sector and the courts, hard pressed local officials rejoin that the motive and intent of the owner, as evidenced by the sale

price paid for the property, or rezoning to allow urban development, constitutes irrevocable dedication of the land to future urban growth, even though the property may still be productively used for agricultural. They urge that in addition to "actual use", Section 193.461, Florida Statutes, enables the property appraiser to consider classification factors such as land purchase price, continuity of use, use of accepted commercial agricultural practices and other applicable factors to reach his determination. They suggest that if these criteria, as determined and weighed solely by the local appraiser, indicate the agricultural property is eventually intended to be developed, then "actual use" must be disregarded and agricultural classification denied.

Farmer Fogg's case crystallizes these arguments. During 1974 and 1975 the Broward County Property Appraiser reclassified Fogg's property as non-agricultural, per Section 193.461(4), Florida Statutes, claiming the land was sold for three times its assessed value for agricultural use, and was rezoned for non-agricultural use. Fogg contested the classification. E. C. Fogg, III, et al. v. Broward County, 397 So.2d 944 (Fla. 4th DCA 1981).

The trial court agreed with the Broward County Appraiser's interpretation and application of Section 193.461, Florida Statutes, and upheld the reclassification. 397 So.2d 947. The Fourth District Court of Appeal reversed the trial court, held that "actual use" of the property remains the test for agricultural classification, and determined Fogg was actually using his property for agricultural purposes. 397 So.2d 950.

Section 193.461(3)(d), Florida Statutes, states that bona fide commercial agricultural use is the litmus test for agricultural classification of land for ad valorem tax purposes.[1] Appellate decisions provide valuable construction of this provision.

Bona fide agricultural use simply requires present use of the land for agricultural purposes. Roden v. K&K Land Management, Inc., 368 So.2d 588, 589 (Fla. 1979); and Straughn v. Tuck, 354 So.2d 368 (Fla. 1978). Further, accepted production and maintenance methods must be used. 368 So.2d 589. Finally, property

---

[1] To rebut the statutory requirement that agricultural land that is sold for three times the amount of its assessment must be stripped of its agricultural tax classification, the property owner must demonstrate continued bona fide agricultural use. Section 193.461(4)(c), Florida Statutes.

actually used for agriculture purposes that may be subject to a zoning change should not be stripped of its agricultural tax classification; the determinant for classification is "actual use" rather than any future motive or expectancy of urban development. Fisher v. Schooley, 371 So.2d 496 (Fla. 2nd DCA 1979).

Hence, this Court and lower appellate courts have repeatedly emphasized that land may be classified as agricultural if it is used for bona fide commercial agriculture purposes. "[A]s used in the statute, [Bona fide imposes] ... the requirement that the agricultural use be real, actual, of genuine nature - as opposed to a sham or deception." [Cites omitted.] Hausman v. Rudkin, 268 So.2d 407, 409 (Fla. 4th DCA 1972); Jeffreys v. Simpson, 222 So.2d 224, 227 (Fla. 1st DCA 1969). A more lucid rule of law is difficult to discern.

Turning to the present case, it is undisputed that Fogg's property was in agricultural use at the time of the disputed reclassification. The case focuses on the bona fides of the use and the appropriate classification standard. Precedents such as Straughn, Roden and Jeffreys clearly explain that "actual use" of land for an agricultural purpose, which is not a sham, is the only reasonable and practical way to interpret and apply

the agricultural classification statute and determine bona fide use. If the property is in actual agricultural use, and the use is not fraudulent, the agricultural classification should stand.

Application of Petitioner's ill-conceived interpretation of the statute to a common situation pinpoints the hollowness of the approach. A farmer enters into a contract for deed for his entire property and sells the land for more than three times its assessed value. Under the contract for deed, the farmer agrees to deed over one-tenth of the property each year for ten years and retains the right to farm the undeeded land through the tenth year.

Note that the property used by the farmer is not actually sold, it is under contract for sale. Moreover, the farmer will remain on the property and continue to farm diminishing parcels over the ten-year period. In this situation, even though a firm decision has been made to commit the land over a ten-year period to urban development, it is likely Petitioner would determine the three times value presumption is rebutted, and would retain the agricultural classification for the land actually farmed. Section 193.461(4)(c), Florida Statutes.

Consider another hypothetical. The same farmer sells the entire parcel outright to the same developer, conveys title, and vacates immediately. The developer determines to build-out one-tenth of the property each year and lease the remainder for agricultural purposes. In this case, Petitioner seemingly would apply the logic applied to Fogg, divine the development intent of the developer, and tax the entire parcel as developed urban property.

There is no difference in intent or motive between the two situations. However, in the first case, Petitioner would likely favor continuing an agricultural exemption for the undeeded land retained by the farmer even though he has intentionally chosen to phase out his farming operation. The three times value presumption would be rebutted by actual use. Yet, in the second case, Petitioner would likely discern an intent to develop and reclassify the entire agricultural parcel to an urban classification, notwithstanding actual use of the property over the ten year period. These examples point out the obvious problems of pinning the decision whether to classify property as agriculture on motive or intent and not on actual use. This is why the classification criteria of Section 193.461(3)(b)1-7,

Florida Statutes, do not recognize motive or intent as required criteria for re-classifying property as non-agricultural.

Engrafting motive and intent onto the statutory criteria, as suggested by Petitioner, exceeds the statutory mandate and imposes on the property appraiser the responsibility to divine intent and motive. Such a delegation of open-ended discretion certainly is constitutionally suspect. Askew v. Cross Keys Waterways, et al., 372 So.2d 913 (Fla. 1979).

Numerous compelling public policies buttress the need to retain and indeed strengthen the "actual use" test in classifying agricultural lands.

First, "[L]egitimate efforts at preserving agricultural land concentrate upon the economic activity of agriculture, . . ."[2] Hence, the use of land for agricultural purposes is the proper focal point for agricultural land preservation programs. The identity, character, business interest or motive of the agriculturalist, is and should be irrelevant. Indeed,

---

[2] Agricultural Land Preservation; Serious Land Policy Concern or Latent "Public Interest" Ploy?, Frank Schnidman, Lincoln Institute Monograph #81-1, 1981, Page 5.

Florida's tax classification program has always emphasized use of agricultural lands for agricultural activities as its controlling policy. Florida's first Green Belt Law, Chapter 59-226, Laws of Florida, expresses the following clear intent to give primacy in tax classification considerations to actual use:

> [W]HEREAS the climate of Florida has made the agricultural business the number one money producting business in our state, and
> WHEREAS, ... development has tended to increase assessments on farm and agricultural lands ... to unreasonable and unprofitable proportions ..., and
> WHEREAS, for the protection of the general welfare of the citizens of our state and our economy and to perpetuate and encourage agricultural pursuits ...

This policy is underscored in the 1972 amendments to the Green Belt Law:

> [I]t is the declared policy of the state to conserve and protect and to encourage the development and improvement of its agricultural lands for the production of food and other agricultural products; . . . Chapter 72-81, Laws of Florida.

The clear aim of the Green Belt Law is to encourage the maximum amount of land to be retained in agricultural use. Obviously, then, the key to Green Belt classification must and should be actual use of the property for agricultural purposes.

This conclusion is supported by the recent report of the National Agricultural Land Study (NALS).[3] NALS, whose purpose is to analyze the national extent and causes of agricultural land conversion and to propound various methods of preserving prime agricultural land, determined preservation of agricultural lands is most likely to be successful where a state government creates an integrated system of incentives to retain property in agricultural use.[4] Incentives include differential property tax assessment, income tax credits, farm use valuation for death taxes, agricultural zoning, and

---

[3] NALS is a federal inter-agency study group headed by the Council for Environmental Quality and the U. S. Department of Agriculture with ten other participating agencies. Participating agencies, include the U. S. Department of Commerce, U. S. Department of Defense, U. S. Department of Energy, U. S. Department of Housing and Urban Development, U. S. Department of the Interior, U. S. Department of State, U. S. Department of Transportation, U. S. Department of the Treasury, The Environmental Protection Agency, and The Water Resources Council.

[4] The Protection of Farm Land, A Reference Guidebook For State and Local Governments, Executive Summary, Robert E. Coughlin and John C. Keene, Senior Authors and Editors and Jay Dixon Esseks, William Toner, and Lisa Rosenberger Authors, December, 1980. Page 32.

purchase or transfer of development rights.[5]

More importantly, NALS finds that differential property taxation based on agricultural use is the centerpiece of every state agricultural preservation program. Forty-eight states have some type of differential property taxation program.[6] Moreover, even in those states where urban development of agricultural land may be ultimately penalized, the penalty is generally in the form of tax recapture at the time of actual development. No evidence exists that motivation or intent of a landowner as to ultimate land use should be questioned prior to actual development, or that ultimate motive or intent should be used to divest agricultural classification when agricultural use is retained. Agricultural land tax incentive preservation programs nationally are geared to actual use. It is, therefore, foolish and impractical for Florida to eviscerate a program which more effectively preserves agricultural lands than any other, as evidenced by NALS.

---

[5] The Protection of Farm Land, A Reference Guidebook For State and Local Governments, Page 14,

[6] Id.

Second, there is no compelling evidence that a crisis exists which warrants ferreting out insincere agriculturalists and stripping their property of agricultural classification. Since 1969, harvested cropland acreage and dollar value of crops sold in Florida has consistently and steadily increased. According to U.S. Census of Agriculture data for Florida, the State had 2,234,036 acres of harvested cropland in 1969. As of 1978, Florida had 2,761,473 acres of harvested cropland. From 1969 to 1978, the value of farm products sold increased from $1,132,074,000 to $3,047,231,000 in 1978.[7]

The obvious conclusion is that the Green Belt Law, as presently interpreted by this Court, is serving its legislative purpose. Hence, the "actual use" test forces "actual use". The result is increased agricultural production.

Third, Petitioner's scheme will adversely affect responsible, well planned urban land development and spur precipitous conversion of agricultural land.

---

[7] U.S. Census of Agriculture; State Data, Florida, 1978 (A-1).

Consider the following hypothetical. A developer purchases 5,000 acres of land on the edge of a growing metropolitan area. The land is agricultural land and has been assessed at $10 million. The developer successfully comprehensively plans and rezones the entire property for urban use, but desires to only develop 250 acres per year over a twenty-year period.

Currently, according to the Department of Revenue, Division of Ad Valorem Taxation, agricultural land is assessed at approximately one-third the value of urban land.[8] Under Petitioner's scheme, the developer will have his land reclassified following purchase and rezoning. The urban assessment will be approximately $30,000,000.00.

If the county levies twenty mills of property tax, including school taxes, the property assessed for agricultural use, will yield $200,000.00 per year in taxes. Loss of the agricultural classification for the entire parcel will require tax payments of $600,000.00 per year. Hence, the developer will be faced with an immediate 200% increase in taxes if he comprehensively

---

[8] Annual Report Data, Florida Department of Revenue, Division of Ad Valorem Taxation, 1980 (A-3).

plans and attempts to phase development commensurate with managed growth and available services.

Under Petitioner's scheme, there is no incentive for a responsible developer to comprehensively assemble and plan large parcels, even though this type of development is qualitatively superior to the standard grid pattern subdivision. There is no incentive for the developer to properly land bank and to phase development with expected natural growth and the availability of water, sewers and roads. To the contrary, there is an incentive to develop so that revenues can be generated to pay a 200% increase in property taxes. The developer's focus necessarily will be shifted from quality development over 20 years, to massive, dollar generating development over a much shorter period of time. Also, the bloated tax burden will be built into the costs of the ultimate product marketed to the consumer, unnecessarily inflating housing costs.

The consequence of Petitioner's scheme is to encourage immediate development at the quickest conceivable pace and penalize orderly, long term new community-type growth. Adoption of Petitioner's policy is ill advised in light of substantial documentation that long-term, new community-type growth is superior to

conventional development in terms of quality of development, unit cost of housing to the consumer, and cost of urban support services delivery and maintenance to local government.[9] This policy is also antithetical to unequivocal state policy supporting and encouraging long range comprehensive planning of large parcels to effectuate orderly growth.[10]

Moreover, and of particular significance, the developer, notwithstanding his good intention to retain substantial portions of the property in agricultural use, will be forced to convert the property to urban use. Such action does raise more taxes as Petitioner desires, but it effects undesirable, precipitous development of lesser quality, and absolutely contravenes Florida's policy to retain as much land as possible in agricultural use for as long as possible.

---

[9] See New Communities U.S.A., R.F. Burby & Shirley F. Weiss, (Lexington, Mass, Lexington, 1976).

[10] See Chapter 190, Florida Statutes, The Uniform Community Development District Act of 1980, and Chapter 380, Florida Statutes, The Florida Environmental Land and Water Management Act. Both laws embody a state policy to encourage orderly, long term urban growth, and discourage rapid, haphazard development.

Petitioner's scheme effects another pernicious result. Local government has a continuing duty and obligation to provide transportation, health, sanitary, recreational and other services to its citizens. Localities normally attempt to fulfill these urban service obligations through long range capital improvement planning. Government's ability to provide adequate urban service infrastructure on a timely basis is a direct function of controlled, orderly growth. The rate and location of new growth determines whether local government can timely meet public needs without assuming massive debt.

Local government can best realize necessary economies and meet public service needs if new growth around the urban area is compact and moderate in rate. Unfortunately, Petitioner's scheme, by forcing agricultural land to be precipitously developed, will press fiscally strapped localities even more. Once land is reclassified it must be developed as quickly as possible. Local governments will be pressed to extend necessary and unexpected services long distances from the community core to service premature development. The eventual impact will be inadequate services and larger, long term debt to pay for unforeseen and unplanned capital outlay.

Hence, the "actual use" test, by encouraging land to be retained in agricultural use for as long as possible, thereby enabling local governments to better manage growth and provide necessary concomitant services, ultimately benefits local government planning more than Petitioner's "motive and intent" scheme. It is, therefore, logical and prudent to retain this standard as the central component of Florida's agricultural property tax classification program.

CONCLUSION

Substituting a subjective "motive or intent" test for the "actual use" test to classify lands as agricultural for ad valorem tax purposes is antithetical to express state policy encouraging preservation of agricultural lands and production. Adopting Petitioner's scheme will result in irrational, unjust application of the Green Belt statute to similarly situated land owners and will force urban sprawl. Accordingly, the "actual use" test should remain the dominant determinant in classifying land as agricultural under Section 193.461, Florida Statutes.

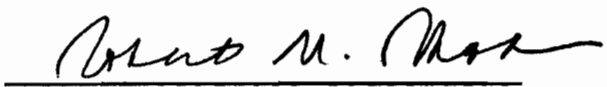
For these reasons, Amicus respectfully urges this Court to affirm the Fourth District Court of Appeal's reasoned opinion and discharge certiorari.

Respectfully submitted,

STEPHEN W. METZ
Post Office Box 1259
Tallahassee, Florida 32302
904/224-4316

and

ROBERT M. RHODES
TERRY E. LEWIS
MESSER, RHODES & VICKERS
Post Office Box 1876
Tallahassee, Florida 32302



ROBERT M. RHODES

TERRY E. LEWIS

Attorneys for Florida Home Builders Association

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief of Amicus Curiae Florida Home Builders Association has been furnished by U.S. Mail to Clifford Schulman, Esquire, Greenberg, Traurig, Askew, Hoffman, Lipoff, Quentel & Wolff, Post Office Box 012890, Miami, Florida 33101, Gaylord A. Wood, Jr., Esquire, 304 S.W. 12th Street, Ft. Lauderdale, Florida 33375, Harry Stewart, Esquire, Room 248, 201 S.E. Sixth Street, Ft. Lauderdale, Florida 33301, E. Wilson Crump, Esquire, Office of the Attorney General, The Capitol, Tallahassee, Florida 332301, and Ted R. Manry, Esquire, Macfarlane, Ferguson, Allison & Kelly, Post Office Box 1531, Tampa, Florida 33601, this 30th day of November, 1981.