OA 1-7-82

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IN THE SUPREME COURT OF FLORIDA

CASE NO. 60,759

WILLIAM MARKHAM, as Broward County Property Appraiser,

Petitioner,

vs.

E. C. FOGG, III, et al.,

Respondents.

CERTIORARI TO THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA

BRIEF ON THE MERITS OF AMICUS CURIAE, JOHN W. TURNER, JR., AS VOLUSIA COUNTY PROPERTY APPRAISER

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STATEMENT OF THE CASE AND FACTS

This brief on the merits is respectfully submitted on behalf of John W. Turner, Jr., as Volusia County Property Appraiser, as amicus curiae.

The statements of the case and facts of the petitioner, William Markham, etc., are adopted.

ARGUMENT

POINT I: WHETHER THE DISTRICT COURT ERRED IN SUBSTITUTING ITS OWN FINDINGS OF FACT FOR THE FINDINGS OF THE CHANCELLOR BASED ON CONFLICTING EVIDENCE.

The district court's decision reveals on its face that that court drastically exceeded its appellate jurisdiction and substituted its own findings of fact for those of the trial court on disputed and conflicting evidence. As the district court said, at p. 945:

> "The facts surrounding the property are disputed. Depending upon interpretation and resolution of conflicts, the property may be viewed as a family farm or in the alternative as a development tract for single family residences to be built."

The district court rejected the trial court's express finding that the property was not used for bona fide agricultural purposes, despite the fact--clearly revealed in the district court opinion--that that finding was amply supported by competent and substantial evidence. The district court thereby erred and exceeded its jurisdiction.

In Jeffreys v. Simpson, 222 So.2d 224 (Fla. 1st DCA 1969), the late Judge John Wigginton provided an excellent example of the way in which agricultural classification disputes should be reviewed on appeal. That case involved a 66-acre parcel of land in the Arlington area of Duval County. Plaintiff's claim that the land was being used in a bona fide forestry operation was rejected both by the tax assessor and the trial court. On appeal, Judge Wigginton observed that the record contained evidence which, viewed in a light most favorable to the plaintiff, would support his claim. However, the record also contained evidence which supported the trial court's findings, since it reasonably supported the conclusion

> "that he [plaintiff] entered into a contract in the last month of 1967 to have his land replanted with pine seedlings only as a subterfuge to enable him to secure a revaluation of his land for agricultural purposes at the lower rate and avoid the payment of taxes based upon an assessment of his property at its fair market value, the rate of which is not contested."

Then, instead of resolving the conflict and making his own findings, as the district court did here, Judge

Wigginton concluded:

> "The trial judge, in the exercise of a discretion vested in him by law, adopted the latter view expressed above and found that plaintiff was not using his land in a bona fide forestry operation during the years 1966 and 1967. The judgment here questioned, based as it is upon the trial judge's evaluation of conflicting evidence and his determination of the credibility of the witnesses, is clothed with a presumption of correctness and may not be disturbed on appeal except by a clear showing that it is unsupported by competent and substantial evidence or otherwise constitutes an abuse of discretion. Appellant having failed to make error clearly appear, the judgment appealed is affirmed."

The procedural posture of this case is similar to that of Greenwood v. Oates, 251 So.2d 665 (Fla. 1971). There, as here, the trial court approved the tax assesor's denial of agricultural classification and the district court reversed the judgment on appeal. This Court quashed the district court decision because that court had substituted its judgment for that of the chancellor. This Court also reminded Florida district courts of their limited jurisdiction in agricultural classification cases, as follows:

"At this juncture it is appropriate to comment on the role of the District Courts of Appeal in reviewing a judicial determination that a bona fide forestry operation does or does not exist. It is a well-established rule in Florida that a judgment, order, decree, or ruling of a trial court comes to the appellate court with a presumption of correctness. (Citations omitted.)

"Moreover, because the considerations involved in these cases are primarily questions of fact, the role of the District Courts should, in general, be limited to a consideration of the sufficiency of the evidence. Clearly, it is not the function of an appellate court to substitute its judgment for that of the trier of fact, be it a jury or trial judge. Accordingly, although an appellate court might have reached a different conclusion had it been the initial arbitrator of the factual issues, if a review of the record reflects competent, substantial evidence supporting the findings of the chancellor, the judgment should be affirmed." [1]

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[1] The Oates case involved an owner who listed the land with a broker, who was offering it for sale for development, and who claimed agricultural classification on the basis of a dubious "natural regeneration" forestry operation. In Oates, there were no non-agricultural on-site "physical uses" of the land. It was merely being marketed.

In numerous cases subsequent to Oates, district courts have affirmed the trial court's decision as to whether land should be classified as agricultural for ad valorem tax purposes. Smith v. Ring, 250 So.2d 913 (Fla. 1st DCA 1971) ("[W]e shall not be tempted to commit the cardinal sin of retrying the case on the evidence in an attempt to come up with findings of fact contrary to those reached by the court in whom this judicial function is exclusively vested."); Smith v. Parrish, 262 So.2d 237 (Fla. 1st DCA 1972); McKinney v. Hunt, 251 So.2d 6 (Fla. 1st DCA 1971); Harbor Ventures, Inc. v. Hutches, 278 So.2d 328 (Fla. 2d DCA 1973); Hausman v. Rudkin, 268 So.2d 407 (Fla. 4th DCA 1972); Schooley v. Wetstone, 258 So.2d 483 (Fla. 2d DCA 1972); Withers v. Metropolitan Dade County, 290 So.2d 573 (Fla. 3d DCA 1974); Firstamerica Development Corporation v. County of Volusia, 298 So.2d 191 (Fla. 1st DCA 1974), cert. den. 312 So.2d 755; First National Bank of Hollywood v. Markham, 342 So.2d 1010 (Fla. 4th DCA 1977), disapproved in part in Roden, v. K & K Land Management, Inc., 368 So.2d 588 (Fla. 1979). All of the above District Court

decisions are affirmances.

The trial court's judgment was reversed in Chapman v. Cassady, 278 So.2d 665 (Fla. 2d DCA 1973). However, from the standpoint of appellate review, that case is identical to the early case of Matheson v. Elcook, 173 So.2d 164 (Fla. 3d DCA 1965)--the so-called "coconut grove" case. In both of these cases the chancellor specifically found that a bona fide agricultural operation existed, but anomalously denied the claim for agricultural classification. In both cases, in other words, the trial court's judgment was inconsistent with its own findings of fact. In reversing the judgments, therefore, the district courts did not substitute their own findings for those of the trial court. The district courts merely prescribed judgment in accordance with the trial court's own findings. In this vital respect these cases are consistent with the foregoing cases affirming the chancellor, since in all instances the chancellor's findings of fact were accepted and enforced by the district court.

The question of whether land is used primarily for bona fide agricultural purposes is a question of fact. Greenwood v. Oates, 251 So.2d 665, 669 (Fla. 1971); Sapp v. Conrad, 240 So.2d 884, 886 (Fla. 1st DCA 1970); Firstamerica Development Corporation v. County of Volusia, 298 So.2d 191, 192 (Fla. 1st DCA 1974), cert. den. 312 So.2d 755; Walden v. Borden Company, 235 So.2d 300 (Fla. 1970) (the question of agricultural classification presented a genuine issue of fact which precluded summary judgment). In Conklin v. Pruitt, 182 So.2d 644 (Fla. 1st DCA 1966), the late Judge Wallace E. Sturgis penned these words, which might well be placed above the portals of our district courts of appeal.

> "Questions of fact are tradionally decided at the trial level. We adhere to the notion that such disposition should remain therein, secure from 'pick and choose' intermeddling of the appellate courts."

The reason assigned by the district court for its rejection of the trial court's finding of a lack of bona fide agricultural use is patently erroneous. The district court said at p. 950:

> "The third finding of the trial court was that the property in question was simply not used for bona fide agricultural purposes because it was not in good faith commercial agricultural use. We conclude that this finding cannot stand in view of the trial court's erroneous reliance upon both the sale statute and the rezoning statute. Since the trial court improperly employed these two statutory provisions, the further factual conclusion as to lack of good faith commerical agricultural use must fall."

The reasoning and conclusion of the district court are refuted by its own statement at p. 947 that the trial court's finding of a lack of bona fide agricultural use is "an <u>independent</u> factual determination which is not based on either the sale statute or the rezoning statute." (Emphasis added.) The district court was obliged to affirm the judgment by virtue of the trial court's independent finding of a lack of bona fide agricultural use, regardless of the correctness of other

reasons assigned in the judgment. It is well established that if a trial court assigns an erroneous reason for its decision the decision will be affirmed if there is some other valid reason or basis to support it. In re Estate of Yohn, 238 So.2d 290, 295 (Fla. 1970); Escarra v. Winn Dixie Stores, Inc., 131 So.2d 483 (Fla. 1961).

POINT II: WHETHER THE DISTRICT COURT DECISION VIOLATES THE PROPER CONSTRUCTION, APPLICATION AND ADMINISTRATION OF THE GREENBELT LAW.

The thoughtful student of Greenbelt litigation in Florida can discern a recurring struggle to transform the statute and bend it to serve a purpose never intended by the Legislature--the purpose of increasing the capital gains and profits of land speculators and developers at the expense of other taxpayers who pay taxes based on full value assessments. The struggle takes place in the judicial arena, in both trial and appellate courts, but primarily in appellate courts. The district court decision in this case is a classic example of the way in which Florida appellate courts have sometimes fallen prey to the specious but artful contentions of land developers.

A. THE DEVELOPER AMENDMENT-SUMMARY

The technique of transforming the statute from a protection for the struggling, bona fide agriculturalist, to a speculator/developer's tax shelter, follows a familiar and recurring pattern. It involves the following

basic elements:

1. Actual Agricultural Use-The statute is amended to eliminate the requirements that an agricultural use must be both bona fide and primary to qualify. Instead, courts are induced to accept the view that an actual agricultural use is sufficient.[2]

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[2] This statutory amendment appears in classic form on the face of the district court decision here, at p. 950:

> "We conclude that the property in question was actually being used at all times in question in agriculture. Although the property had been rezoned, the rezoning did not disturb its agricultural use. Although contracts had been signed for the sale of the property, it had not been actually sold. Under the statutes and the precedents construing them, actual use remains the test and we conclude that the owners herein were entitled to the agricultural classification for the years in question. We, therefore, reverse the judgment herein and remand for further proceedings consistent with this opinion." (Emphasis added.)

No doubt an agricultural use must be "actual" to qualify. But its actuality does not prove its bona fides or its primariness, as the district court mistakenly assumes. An actual agricultural use, complete with an actual cow, which actually moos, may be part of an actual tax avoidance scheme and subterfuge wholly lacking in bona fides, as both the property appraiser and chancellor concluded here.

The district court changed and side-stepped the true issue when it concluded that the judgment must be reversed merely because the agricultural operation was "actual". That analysis patently amends the statute by eliminating the express requirements that agricultural use must be bona fide and primary to qualify.

2. Physical Use- Once the statute is thus amended, and the question of actual (rather than bona fide and primary) use becomes the central issue, then the court is further induced to accept the view that the physical use of the land is the determinative factor, since that obviously determines whether the agricultural use is actual or not. This diverts attention from the owner's true intentions and purposes. It also diverts attention from all marketing and development activities prior to the point of groundbreaking. Until development activities involve physical use of the land they are deemed irrelevant, although in their economic importance they may stand beside the agricultural operation as an elephant stands beside a mouse. Similarly, marketing activities or a sale of the property for patently non-agricultural purposes are irrelevant if those activities do not result in any change in the physical use of the land. Thus, the physical use test tends to restrict the court's view to on-site activities on the land. The court may see the cow. But the rezoning, platting and other non-agricultural activities tend to be ruled out until they are accompanied by on-site physical use. The owner's non-agricultural activities and purposes become lost in the shuffle and it therefore becomes impossible to determine whether the agricultural use is either bona fide or primary.

3. Questions of Law and Fact- Courts are further induced to deal with agricultural classification disputes as though they present legal rather than factual questions. Thus, the proof of the actual existence of actual cows on the land entitles the owner to agricultural classification as a matter of law if that is the only physical use of the land. The factual questions presented by the statutory requirements that the agricultural use must be bona fide and primary as well as actual, are glossed over and brushed aside.

4. Consequences- Once the bona fide and primary statutory teeth have been pulled; the issue of actual or physical use is established as determinative; and the dispute is established as presenting legal rather than factual issues; the following results flow to the speculator/developer:

a. Property Appraiser's Discretion Limited- The property appraiser's discretion is reduced to a ministerial exercise of determing whether

the land is actually used for agricultural purposes.

b. Transfer of Jurisdiction to Courts- Discretion and jurisdiction for the administration of the statute are substantially shifted from the property appraiser to the courts, and especially appellate courts, in the event of any dispute.

c. Taxpayer's Burden of Proof Forgotten- The strong presumption of correctness of the property appraiser's administrative decision, and the immense burden of proof of the taxpayer on judicial review of that decision, become lost in the shuffle, once the factual issues become legal.

d. Liberal Construction and Application- In practice, the statute, which is in the nature of a partial tax exemption, becomes liberally rather than strictly construed and applied.

e. Form v. Substance- With the issues thus transformed and the property appraiser's discretion thus eliminated, the statute emerges as an excellent tax shelter device. The speculator/developer

need only maintain an actual agricultural operation on the land prior to the groundbreaking, the real profit of which is in reduced ad valorem taxes, rather than any agricultural income, which is often an incidental consideration at best. Moreover, the developer can often maintain the illusion of a serious agricultural operation by delaying the recordation of plats, tailoring purchase transactions to leave legal title in the selling agriculturalist as long as possible, and other stratagems that cause the form of agricultural use to triumph over the substance and reality of a serious marketing or development operation.

f. The Bottom Line- The profits and capital gains of the speculator and land developer are increased at the expense of other taxpayers, including the bona fide agriculturalist, who finds his millage increased. We end, therefore, with the statute aiding the developer instead of the agriculturalist- exactly the opposite of what the Legislature intended.

B. THE PURPOSE AND PROPER CONSTRUCTION AND ADMINISTRATION OF THE GREENBELT LAW.

1. Purpose of the Statute

The Greenbelt law was not enacted for the purpose of conferring a tax shelter on land speculators and developers. The purpose of the law is to permit the bona fide Florida agriculturalist to remain in agriculture and to prevent him from being forced to sell or develop his land by escalating full value tax assessments based on development and other non-agricultural uses.[3] From the beginning, the Legislature has expressed an intention to protect the existing bona fide agriculturalist who is desperately trying to avoid selling out to speculators and developers. The Legislature has simultaneously expressed the intention that the

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[3]The preamble of Ch. 59-226 §1, Laws of Fla., contained the following key whereas clause:

> "Whereas, much of the recent real estate development has tended to increase assessments on farm and agricultural lands and other agricultural products to unreasonable and unprofitable proportions, thus forcing many persons to give up their livelihood because of being taxed out of existence. . . ."

agricultural arriviste should be subjected to severe scrutiny.[4] The Legislature has always perceived the sale of agricultural land to be an event of great significance under the Greenbelt law. It has clearly recognized that once the established, bona fide agriculturalist gives up and sells the family farm for a price based on development values, any purported agricultural use of the land after the sale may be lacking in bona fides. Although it may appear to be the same on the ground, the purchaser's agricultural

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[4]Ch. 59-226, §1, Laws of Fla. provided for agricultural zoning "provided such lands have been used exclusively for agricultural purposes for five (5) years prior to such zoning." Ch. 63-245, §1, Laws of Fla., enacted as §193.11(3), Fla. Stat. (1963), provided:

> "Lands which have not been used for agricultural purposes prior to the effective date of the law shall be prima facie subject to assessment on the same basis as assessed for the previous year, and any demand for a reassessment of such lands for agricultural purposes shall be subject to the severest scrutiny of the county tax assessor to the end that the lands shall be classified properly."

The present statute, §193.461, Fla. Stat. continues to express an intention that historical factors, development activities, sale of the land and the price paid, should be considered as well as present actual use. The notion that present, actual, physical use, viewed totally out of context, is the controlling and determinative factor, is patently contrary to the intent of the Legislature.

use may be very different from that of the seller.[5]

The Legislature has expressed continuing concern about the misuse of the Greenbelt law to serve as a tax shelter for speculators and devel-

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[5]This perception of the Legislative design and intent was expressed in the following dictum in Lanier v. Overstreet, 175 So.2d 521, 524 (Fla. 1965), quoted in Walden v. Borden Company, 235 So.2d 300 (Fla. 1970):

> "It can thus be seen that no preferential treatment has been accorded the agriculturalist who desires to retain his property as such as against the encroachment of an expanding urban community. If and when he puts his agricultural land on the market for sale for a higher and better use-or, at least, one more valuable than an agricultural use-the property would no doubt no longer qualify as one being used for the agricultural purposes named in the statute and thus not within the intendment thereof."

Of course the purchaser is not disqualified as a matter of law. Some purchasers still purchase land primarily for bona fide agricultural purposes. However, the purchaser who pays a development price for development land and proceeds to implement an active marketing or development program, should not be permitted to escape full value taxation by means of agricultural activities which are primarily for purposes of tax reduction during the marketing or development program.

opers.[6] In conferring a special tax privilege upon the bona fide agriculturalist, the Legislature has simultaneously expressed a clear intention that the application of the statute should be carefully limited in its application. Contrary to the district court's conclusion here that actual agricultural use is the test, the Legislature has specified other criteria which must be met and several other factors which should be considered. If actual agricultural use were the sole test, the statute could be drastically shortened.

2. Protective Mechanisms In The Statute

The primary protection which the Legislature has included in the statute itself to guard against its misuse and abuse, is to be found precisely in those requirements which developers and speculators have labored so hard and so long to eliminate - the require-

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[6] The writer of the case comment on Roden v. K & K Land Management, Inc., 368 So.2d 588 (Fla. 1978), at 7 Fla. State. L.R. 571, 574, suggests that the 1972 amendments in Ch. 72-181, Laws of Fla., were designed to prevent speculator abuse of the statute.

ments that agricultural use must be bona fide and primary. These key protective requirements are specified in the following clear language:

> "Subject to the restrictions set out in this section, only lands which are used primarily for bona fide agricultural purposes shall be classified agricultural. 'Bona fide agricultural purposes' means good faith commerical agricultural use of the land." (Emphasis added.)

The Legislature has included a second fundamental protective mechanism in the statute. That is, the statute clearly expresses the Legislature's intention that the statute shall be administered by Florida property appraisers; that those officers will consider a broad range of information (far beyond the narrow confines of actual, physical use); and that they will exercise a broad administrative discretion each year to determine whether each parcel is used primarily for bona fide agricultural purposes. The property appraiser is to consider six enumerated

factors together with "such other factors as may from time to time become applicable."[7] The Legislature manifestly intends that the property appraiser will carefully investigate each application and that he will exercise broad, administrative discretion in determining whether the petitioner's claimed agricultural use is actual, primary, and bona fide in each case. The property appraiser should consider all pertinent factors in making that determination but, as this Court properly held in Roden v. K & K Land Management, Inc., 368 So.2d 588,589 (Fla.

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[7] The property appraiser may require that the taxpayer furnish "such information as may reasonably be required to establish that said lands were actually used for a bona fide agricultural purpose." The statute patently comtemplates that the property appraiser is not performing his intended official responsibility if he merely ascertains whether-in the district court's language--"the property in question was actually being used at all times in question in agriculture." Presumably he can do that in most instances by mere physical inspection of the land. A determination that the actual agricultural use is primary and bona fide requires a much more extensive inquiry.

1979), none of those factors is determinative.[8] That is another way of saying that the decision is, and should remain, essentially discretionary and factual in nature, rather than legal.

Of course, if the property appraiser's discretion is judicially limited and narrowly focused on the question of "actual" agricultural use, all of the Legislature's protective mechanisms are circumvented and the statute becomes an instrument of tax avoidance.

3. Taxpayer's Burden of Proof

In Straughn v. Tuck, 354 So.2d 368, 371 (Fla. 1978), this Court applied the severe "exclusion of every reasonable hypothesis" burden of proof to taxpayers who claim Greenbelt classification.

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[8] For purposes of appellate review, Roden is fundamentally different and more difficult than this case, in that in Roden the trial court overruled the property appraiser's denial of agricultural classification. Under those circumstances, the presumptions of correctness to which both the property appraiser and the trial court are entitled, tend to come into conflict on appeal. That problem is not present here.

This Court said:

> "Tax assessors are constitutional officers and as such their actions are clothed with the presumption of correctness. One asserting error on the part of the tax assessor must show 'proof' that every reasonable hypothesis has been excluded which would support the tax assessor. Powell v. Kelly, 223 So.2d 305 (Fla. 1969). Appellees have failed to meet this burden."

The taxpayer's burden of proof and the presumption of correctness of the property appraiser's discretionary decision do not become irrelevant on appeal. The burden of proof and presumption of correctness are strengthened by the trial court's judgment approving the assessment. Dean v. Palm Beach Mall, Inc., 297 So.2d 298, 300 (Fla. 1974).[9]

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[9] In the Dean case, as in Greenwood v. Oates, 251 So.2d 665 (Fla. 1971), the district court reversed the trial court's judgment approving the assessment. In both of these instances, this Court quashed the district court decision. Note also that this Court applied the "exclusion of every reasonable hypothesis" test in Straughn v. Tuck, supra, on appeal, despite the fact that the taxpayer appeared as appellee.

The district court decision provides no hint that that court was aware of or gave any consideration to the severe burden on the taxpayer both in the trial court and on appeal. Indeed, the district court proceeded as though the burden of proof were on the property appraiser. It certainly cannot be said that the taxpayer excluded every reasonable hypothesis of a legal assessment. As the court pointed out, depending on how the evidentary conflicts were resolved, "The property may be viewed as a family farm or in the alternative as a development tract...."

4. Strict Construction of The Greenbelt Law

The Greenbelt law confers a special privilege on the owner of land primarily used for bona fide agricultural purposes. Such owners are specially excepted from the mandate of full-value assessment which is applied to ad valorem taxpayers generally. JAR Corporation v. Culbertson, 246 So.2d 144 (Fla.3d DCA 1971). In its plain, practical effect, the Greenbelt law creates a partial exemption from full-value taxation. As such,

the statute should be strictly construed against those claiming its benefits.

In Harbor Ventures, Inc. v. Hutches, 366 So.2d 1173, 1174 (Fla. 1979), this Court appeared to rule that the statute should be liberally construed in favor of the taxpayer-claimant. The Court said:

> "We believe this interpretation is in compliance with our duty to construe tax statutes in favor of taxpayers where an ambiguity may exist. Maas Brothers, Inc. v. Dickinson, 195 So.2d 193 (Fla. 1967); Leadership Housing Inc. v. Department of Revenue 336 So.2d 1239 (Fla. 4th DCA 1976)."

It is respectfully submitted that the Court's foregoing ruling is clearly erroneous. Certainly it is the general rule that statutes which impose taxes are to be construed in favor of the taxpayer and against the government. Maas Brothers, Inc. v. Dickinson, 195 Sol2d 193 (Fla. 1967). See cases cited at 31 Fla. Jur., Taxation § 60. However, the general rule is subject to the equally well-established exception that statutes creating exemptions and special privileges are to be strictly construed

against the taxpayer-claimant. As this Court said in State ex rel. Wedgworth Farms v. Thompson, 101 So.2d 381, 386 (Fla. 1958):

> "While a taxing statute is always construed liberally in favor of the taxpayer and against the tax collector, we must remember that exemptions and special benefits to particular taxpayers that remove them from the more burdensome requirements, applicable to others are construed strictly against the exemption. Harper v. England, 1936, 124 Fla. 296, 168 So. 403."

And as this Court said in United States Gypsum Company, v. Green, 110 So.2d 409, 413 (Fla.1959):

> "While doubtful language in taxing statutes should be resolved in favor of the taxpayer, the reverse is applicable in the construction of exceptions and exemptions from taxation."

See the discussion and cases cited in 31 Fla. Jur., Taxation §§60 and 146.

It is fundamental that the burden is on the claimant to show clearly his entitlement to exemption and that exemption statutes are strictly construed against the party

claiming their benefits. Volusia County v. Daytona Beach Racing and Recreational Facilities District, 341 So.2d 498, 502 (Fla. 1977). In that case and in Williams v. Jones, 326 So.2d 425 (Fla. 1975), this Court emphasized the overriding importance of eliminating unfair and unauthorized exceptions and exemptions in Florida tax rolls. And in Dade County Taxing Authorities v. Cedars of Lebanon Hospital Corp., 355 So.2d 1202 (Fla. 1978), this Court declared that "fundamental principles of our democratic system mandate that every taxpayer contribute his fair share to the tax revenues."

This Court's suggestion in Harbor Ventures, Inc. v. Hutches, 366 So.2d 1173, 1174 (Fla. 1979), that the Greenbelt law should be construed in favor of the taxpayer-claimant, is patently erroneous. That ruling is contrary to the rule that statutory exemptions and special exceptions are strictly construed against the taxpayer claimant. The ruling undermines the otherwise consistent policy of this Court to eliminate unfair and unauthorized exemptions to achieve justice and equity

for the generality of taxpayers. The ruling also violates and undermines the manifest intention and policy of the Legislature itself that Greenbelt classification should be strictly limited to the bona fide agriculturalist and that it should not be misused as a tax shelter to enhance the profits of land speculators and developers at the expense of taxpayers struggling to pay ad valorem taxes based on full-value assessments sternly mandated by this Court in Walter v. Schuler, 176 So.2d 81 (Fla. 1965).

The rule of statutory construction is of fundamental importance. It provides the starting place for any consideration of the statute and guides property appraisers and courts as to its meaning and application. Much of the appellate confusion and error in dealing with the statute can be traced to a fundamentally erroneous judicial policy of liberal construction of the statute. This Court's clear and emphatic correction of that fundamental error will do much to place the Greenbelt law back on track so that it achieves its intended purpose without abuse.

5. Form v. Substance

In limiting the privilege of agricultural classification to lands which are primarily used for bona fide agricultural purposes; in providing for broad discretion in property appraisers in their administration of the statute; and in the other express limitations and protections contained in the Greenbelt law, the Legislature has clearly expressed its intention that property appraisers should look to the substance of a purported agricultural use, and not merely accept its form or appearance at face value. The bona fide agriculturalist, not the speculator or developer disguised as an agriculturalist, is the intended beneficiary of the special privilege created by the statute.

Unfortunately, the Legislature has evinced much more hard-headed and tough-minded awareness of the serious danger of abuse of the Greenbelt law than have our courts. In dealing with tax statutes, however, courts should keep the fundamental rule of form v. substance in mind at all times. As this Court said in State ex rel. Kurz v. Lee, 121 Fla. 360, 163 So. 859, 873 (1935):

> "[I]n dealing with finance and taxation measures passed by the Legislature, the courts are impelled to look to the substance of a legislative scheme in its practical operation and effect, rather than to the mere form in which it has been contrived and enacted."

Of course, if Florida appellate eliminate the requirements of primary and bona fide agricultural use; accept mere actual use as sufficient; deal with the statute as though it presents legal rather than factual questions; and construe it liberally in favor of the taxpayer claimant, it is painfully easy to see how form will triumph over substance. Land which is in truth and fact committed and dedicated to non-agricultural purposes, with the owner actively engaged in marketing or development operations, can thus qualify for preferential treatment merely if the owner continues to conduct some kind of agricultural operation on the land. The agricultural use need be only actual. It need not be either bona fide or primary.

6. The Fallacy of the "Actual" Use Test

There is nothing wrong with the actual use test, as such. The purported agricultural use must, of course, be actual. That is, it must exist. The statute itself, in Section 193.461(2), authorizes the property appraiser to require the taxpayer to furnish such information as may reasonably be required "to establish that said lands were actually used for bona fide agricultural purposes." (Emphasis added.) The problem is that through a gradual process of appellate error, brilliantly exploited by developers and speculators travelling in disguise as agriculturalists, the actual use test has become a malignant growth which threatens to destroy the vital protective mechanisms which the Legislature carefully placed in the statute.

The actual use test is a creation of Florida appellate courts. It developed, originally, as a way of emphasizing that the bona fide agriculturalist is not deprived of agricultural classification merely because he exhibits some passive or incidental interest in the possibility of selling or developing the land at some future time. However, the original assumption that the present, actual agricultural use was also bona fide and primary, gradually fell by the wayside.

Perhaps the original "actual use" case is Smith v. Ring, 250 So.2d 913 (Fla. 1st DCA 1971). Significantly, in this case the tax assessor appeared as appellant after the chancellor had reversed the denial of agricultural classification. In one of the few published instances in which the late Judge Wigginton missed the legal mark, he wrote the following significant lines:

> "We have reviewed the record and find therein ample evidence to sustain the trial court's findings and conclusions. The fact that the land may have been purchased and was being held as a speculative investment is of no consequence provided its actual use is for a bona fide agricultural purpose." (Emphasis added.)

One can see here, in the "no consequence" language, the genesis of the idea that physical use is determinative and that other factors such as the owner's marketing and development intentions and activities are "irrelevant." Of course, Judge Wigginton expressly stated that he was assuming that the actual agricultural purpose was bona fide, as found by the trial court.

Unfortunately, Judge Wigginton proceeded to discuss the tricky coconut grove case, Matheson v. Elcook, 173 So.2d 164 (Fla. 3d DCA 1965), and to draw some illicit legal conclusions from that decision. Judge Wigginton overlooked

the critical fact that the trial court had found the coconut grove operation to be bona fide. Judge Wigginton said:

> "The court held, however, that the fact that the coconut growing operation was not being efficiently managed and was less than profitable were matters of no consequence. The controlling factor which influenced the court's determination was that the land was actually being devoted to the growing of coconut trees and production of coconuts and therefore was entitled to the agricultural zoning classification claimed by the owners." (Emphasis added.)

In this dubious analysis, we can see the birth of the actual use test as the "controlling factor" which decides agricultural classification regardless of the legislative requirements of bona fides and primariness. We can also see here the genesis of another wrong-headed idea which has plagued the administration of the Greenbelt law ever since the coconut grove case; namely, the strange idea that inefficiency in an agricultural operation is somehow a virtue of the owner which tends to support his claim for agricultural classification. Efficiency, to be sure, is not required as a matter of law. But efficiency or inefficiency are certainly not matters "of no consequence," as Judge Wigginton said. The trial court in the coconut grove case found that the agricultural use was bona fide

despite the gross inefficiency of the operation; not because of it.

The foregoing errors of legal analysis no doubt stemmed from the fact that Judge Wigginton was speaking in support of the trial court's final judgment, which had overruled the taxing authorities. In supporting the judgment in that instance, the Court inadvertently overstated the case, misinterpreted the statute, and undermined the discretionary authority of the assessor. Speculative intent is not of "no consequence." It is one of the factors which the property appraiser must consider and weigh on a case by case basis.

The errors of Smith v. Ring, supra, were then escalated into the physical use test in Hausman v. Rudkin, 268 So.2d 407 (Fla. 4th DCA 1972), in the following passage penned by Judge Reed:

> "As we interpret the statute, the intent of the title holder and his desire for capital gain are immaterial to the application of agricultural zoning. The favorable tax treatment provided by the statute is predicated on land use, that is, physical activity conducted on the land. Smith v. Ring, Fla. App. 1971, 250 So.2d 913; Smith v. Parrish, Fla. App. 1972, 262 So.2d 237." (Emphasis added.)

Of course, later in the opinion Judge Reed corrected the

above erroneous formulation by stating:

> "Under the terms of the statute, as we understand them, if the land is physically used for agricultural purposes, it must be accorded agricultural zoning, provided the use is 'primarily for bona fide agricultural purposes.' " (Emphasis added by the Court.)

Nevertheless, the damage was done. From and after Hausman v. Rudkin, supra, Greenbelt litigation has been marked by violent evidentiary battles, in which the dubious agriculturalist insists that all evidence which does not pertain to "physical activity conducted on the land" is immaterial and irrelevant. Of course, that nicely excludes all evidence of the owner's true non-agricultural plans, intentions and motivations, as well as his off-site marketing and development activities. The Legislature's clear statutory direction that several enumerated factors plus "such other factors as may from time to time become applicable", is eviscerated.[10]

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[10]The problem may have resulted in part from judicial confusion in dealing with Section 193.461(6)(a), which provides that when the application has been granted, "the assessment of land shall be based solely on its agricultural use. The property appraiser shall consider the following use factors only . . . ." (Emphasis added.) These provisions, however, apply only to the valuation of agricultural land after it has been classified as agricultural.

[footnote continued]

We have now reached the point in the development of this malignant jurisprudence at which the actual use test is formulated and applied without mention of the additional statutory requirements of bona fides and primariness, as the district court did here.[11]

[footnote 10 continued]

In other words, the statute contemplates a broad exercise of administrative discretion in determining the bona fides of agricultural use. It then limits the property appraiser's discretion in valuing the property after it has been classified. The distinction is critical.

[11]The error and confusion was compounded by this Court's adherence to the actual use test as defined in Hausman v. Rudkin, supra, in Straughn v. Tuck, 354 So.2d 368 (Fla. 1978) and Harbor Ventures, Inc. v. Hutches, 366 So.2d 1173 (Fla. 1979). In Tuck, this Court declared Hausman to be "the leading case on this subject." In both Tuck and Hutches, this Court seemed to adopt the actual use test as controlling. In Roden v. K & K Land Management, Inc., 368 So.2d 588, 589 (Fla. 1979), the misleading effect was alleviated to some extent by this Court's statement that:

> "As we intimated in Tuck the factors listed in subsection (b) of Section 193.461(3) are to be considered in making the determination of good faith agricultural use but none is determinative." (Emphasis added.)

That formulation correctly states the law. However, the Court also said that it adheres to its view stated in Tuck that "Agricultural use is now and has always been the test." It is respectfully submitted that that statement is erroneous. In fact, "Bona fide, primary agricultural use is now and has always been the test." As the district court decision here demonstrates, the misleading and over simplified "test" defined in Tuck is conveying false legal signals to Florida courts and is producing erroneous decisions.

[footnote continued]

Factors other than physical use may be just as important and just as "actual" as physical use factors. Indeed, it is entirely possible that a claimed agricultural use of the land may be much less "actual" than a marketing or development operation, under circumstances in which the owner is actively pursuing those objectives and is merely engaging in an incidental agricultural use for purposes of tax avoidance. That is what the requirements of bona fide, primary agricultural use signify. Whether the claimed agricultural use is actual, bona fide and primary or not should be determined by the property appraiser. He is the consititutional officer who should determine, parcel by parcel,

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[footnote 11 continued]

Appellate limitation and usurpation of the property appraiser's discretion in these matters is exceedingly similar to the manner in which Florida appellate courts usurped trial court discretion in dissolution of marriage actions prior to Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980). The process is much the same here, complete with a similar formulation of dubious legal rules (the actual use test); treatment of factual issues as though they are legal; and finding facts on conflicting evidence at the appellate level. By and large, since Canakaris, dissolution actions are decided in the trial court, where they should be. Greenbelt cases should generally be decided by property appraisers, the constitutional officers to whom that responsibility is assigned and in whom the necessary discretion is invested.

as a matter of fact, whether the physical agricultural use conducted on the land is actual and bona fide, and whether agriculture is the owner's primary use and purpose, or whether present and active speculation, marketing and/or development activities constitute the primary use and purpose. Such determinations should not be made in general, as a matter of law, by appellate courts declaring that non-physical factors are "immaterial" or "of no consequence." As a matter of fact, purported agricultural activities, which are entirely actual, complete with actual cows that actually moo and actual cowboys riding herd on them, may be of virtually no consequence, financially, in comparison to the owner's multi-million dollar sales or development program, as was true in Firstamerica Development Corp. v. County of Volusia, 298 So.2d 191 (Fla. 1st DCA 1974).[12]

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[12] In Firstamerica, the owners were actively engaged in a multi-million dollar installment land sales operation in Hollywood and Miami, Florida, while they maintained an "actual" herd of cattle on the property which netted a few hundred dollars in agricultural revenue, and several thousand dollars in tax reductions, per year. Throughout the litigation, Firstamerica earnestly contended that only the "actual" physical uses on the tract west of DeLand were relevant, and that the immensely more important and profitable sales program in South Florida was irrelevant and immaterial since it did not involve any physical use on the land itself. This Court denied certiorari at 312 So.2d 755.

The "actual use test" was similarly rejected by this Court in Walden v. Borden Company, 235 So.2d 300 (Fla. 1970), although it was asserted by the taxpayer. This Court said:

> "It is clear that the lessees were on January 1, 1967, using the property -- or, at least, a portion of it -- for a recognized 'agricultural' purpose, the pasturing of cattle. The Borden Company takes the position that their lessees' use of the property for an agricultural purpose determines the character of the land for tax purposes, and that any potential use of the property by the company in connection with the adjoining phosphate operations is simply irrelevant. The tax assessor argues that the lessees' agricultural use is only 'servient, temporal and incidental' to the primary and dominant use of the property by the owner for non-agricultural purposes and that the company could not, therefore, claim a right to the preferential tax treatment accorded to 'bona fide' agricultural lands by the statute. Our examination of the history of the applicable statutes persuades us of the soundness of the assessor's position." (Emphasis added.)

The Borden case refutes the theory that an "actual" agricultural use provides a sufficient basis for agricultural classification as a matter of law. In that case the only "physical" use of the land was agricultural, i.e., the pasturing of cattle. There was no evidence that the land had ever been "actually" used for phosphate operations. Thus, the agricultural use was the sole and exclusive

physical use in the tax year. The Court nevertheless approved the tax assessor's determination that the physical agricultural use was only incidental, and that Borden's primary use and purpose was to hold the land for use in its phosphate operations.

The "actual use test" is also refuted by Judge Rawls' opinion in Stiles v. Brown, 177 So.2d 672, 676 (Fla. 1st DCA 1965), approved at 182 So.2d 612, in which the Court correctly stated:

> "As we construe this portion of the statute, the intent of the property owner, of necessity must be ascertained as to the utilization of the land . . . . Thus, it is the bona fides of the utilization by the landowner that makes the land eligible for the benefits of the statute, and the physical condition and appearance of the subject property is not of itself controlling."

See also Greenwood v. Oates, 251 So.2d 665 (Fla. 1971), in which this Court held that "any determination of a bona fide forestry operation must be arrived at upon consideration of all practices and indicia existing in each case, and on a case by case basis." (Emphasis added.)

The foregoing pronouncements in Stiles v. Brown, supra, and Oates, are of fundamental importance and they are

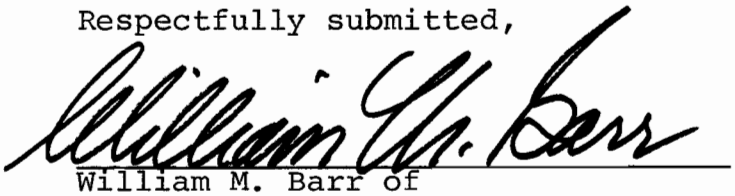
squarely in accord with the language of the statute and the Legislature's intent. The "actual use test" is manifestly erroneous and misleading, a jurisprudential aberration which has done enough damage during its career. It has unquestionably earned its involuntary retirement.

CONCLUSION

The district court decision is clearly erroneous and contrary to law. It patently exceeds the appellate jurisdiction of the district court. It should be quashed.

It is respectfully submitted that this Court should clarify the construction and administration of the Greenbelt law by (1) confirming that the statute should be strictly and narrowly construed against the taxpayer-claimant, (2) discarding the misleading and mischievous "actual use test" and its twin "physical use test" and (3) confirming that agricultural classification is the constitutional responsiblity of property appraisers, who should consider and weigh all pertinent factors bearing on actual, primary and bona fide use, including both physical use factors and non-physical use factors, none of which should be deemed to be "determinative", but all of which should be conscientiously weighed and considered in their totality in each case.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing BRIEF ON THE MERITS OF AMICUS CURIAE, JOHN W. TURNER, JR., AS VOLUSIA COUNTY PROPERTY APPRAISER, has been furnished by mail to Gaylord A. Wood, Jr., Esquire, 304 S. W. 12th Street, Fort Lauderdale, Florida 33315; Greenberg, Traurig, Askew, Hoffman, Lipoff, Quentell & Wolff, P.A., 1401 Brickell Avenue, PH-1, Miami, Florida, 33131; Harry A. Stewart, Esquire, 201 S. E. 6th Street, Fort Lauderdale, Florida 33301 and Honorable Jim Smith, Attorney General, Department of Revenue, Room LL-01, The Capitol, Tallahassee, Florida 32301 this 9th day of November, 1981.

Attorney