IN THE SUPREME COURT OF FLORIDA

CASE NO. 60,759

WILLIAM MARKHAM, as
BROWARD COUNTY PROPERTY APPRAISER,

Petitioner,

v.

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

Respondents.

BRIEF ON JURISDICTION IN OPPOSITION TO THE SUPREME COURT'S EXERCISING DISCRETIONARY JURISDICTION UNDER FLA. R. APP. P. 9.030 (a)(2)(A)(iii) & (iv) TO REVIEW A DECISION OF THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT

BRIEF FOR RESPONDENTS

GREENBERG, TRAURIG, ASKEW,
HOFFMAN, LIPOFF, QUENTEL &
WOLFF, P.A.
1401 Brickell Avenue, PH-1
Miami, Florida 33131

-By-

CLIFFORD A. SCHULMAN

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

CONSTITUTIONAL PROVISION

STATUTES

SECONDARY SOURCES

QUESTIONS PRESENTED

I. Whether this Court has conflict jurisdiction over the decision of the District Court of Appeal, Fourth District, which expressly followed this Court's "actual physical use" test of eligibility for a tax classification as agricultural land, and which applied Section 193.461 of the Florida Statutes to facts not appearing in the cases cited by Petitioner?

II. Whether the Fourth District's decision expressly affects an entire class of constitutional or state officers so as to give rise to this Court's discretionary jurisdiction, on the narrow facts of this case?

STATEMENT OF THE CASE AND FACTS

This case comes before the Court on a petition for discretionary review of a decision of the District Court of Appeal, Fourth District, which reversed the Broward County Circuit Court and held that Respondents were entitled to have their land classified as agricultural for tax purposes for the two years in question. Respondents brought this action against Petitioner WILLIAM MARKHAM, as Property Appraiser for Broward County, after Petitioner had failed to classify 270 acres of Respondents' land as agricultural in 1974 and 1975. The trial court acknowledged that Respondents and their lessee had used the land for grazing cattle and horses throughout the period at issue. The terms of Respondents' lease of most of the land had required the lessee to continue such use. Moreover, record documentation showed that

the City of Miramar had expressly condoned that continued agricultural use for at least the period at issue, after Respondents had authorized their prospective purchaser's successful application for rezoning. See Fogg v. Broward County, 397 So.2d 944, 949-50 (Fla. 4th DCA 1981) (No. 79-205); Order of the Circuit Court at 4-5. Nevertheless, the trial court upheld Petitioner's denial of the agricultural classification. On appeal, the Fourth District reversed, holding that the trial court had misconstrued and misapplied various provisions of Section 193.461(4)(c) of the Florida Statutes.

Because of the need for brevity in a jurisdictional brief, Respondents refer this Court to the opinion of the Fourth District (cited above) for further elaboration of the facts, except insofar as the argument below incorporates analysis of necessary facts.

ARGUMENT

I. THE SUPREME COURT LACKS DISCRETIONARY JURISDICTION OVER THIS CASE UNDER FLA. R. APP. P. 9.030 (a)(2)(A)(iv), BECAUSE IN NO CASE CITED BY PETITIONER DOES THE RULE OF DECISION OR ITS APPLICATION CONFLICT EXPRESSLY AND DIRECTLY WITH THE DISTRICT COURT'S DECISION NOW BEFORE THE COURT.

Petitioner has ignored the constitutional limitations on the Supreme Court's discretionary jurisdiction under Fla. R. App. P. 9.030(a)(2)(A)(iv) and Article V, Section 3(b)(3) of the Florida Constitution (as amended 1980). Before the recent amendment, the Constitutional provision required only that the conflict be "direct." Because the amendment augments rather than

replaces this requirement, pre-amendment cases retain vitality in explicating the meaning of "direct conflict." See England, Hunter, & Williams, Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform, 32 U. Fla. L. Rev. 147 (1980). In previously construing this phrase, this Court had declared that it had conflict jurisdiction only when presented with a "real and embarrassing conflict of opinion and authority" between a district court and the Supreme Court or among the district courts. Financial Federal Savings & Loan Association v. Burleigh House, Inc., 336 So.2d 1145, 1147 (Fla. 1976). In determining whether "conflict of opinion and authority" existed, the Court focused on the rule of decision in each case. Cf. Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980) ("language and expressions found in a dissenting or concurring opinion cannot support jurisdiction under section 3(b)(3) because they are not the decision of the district court") (emphasis in original). Thus, the Court had conflict jurisdiction in two main situations: (1) when courts announced conflicting rules of law for similar facts, or (2) when courts applied the same rule of law to "substantially the same controlling facts" but reached disparate results. Nielsen v. City of Sarasota, 117 So.2d 731, 734 (Fla. 1960). Spurious conflicts of obiter dicta do not provide a sufficient basis for the Court to exercise its discretionary jurisdiction. See Ciongoli v. State, 337 So.2d 780, 782 (Fla. 1976).

To ensure the ordinary finality of decisions by the district courts and eliminate an unnecessary source of the Supreme Court's burdensome case load, the constitutional amend-

ment in 1980 added a further restriction on the Court's conflict jurisdiction: the conflict must be express. The approach taken by the Court in Jenkins (emphasizing the plain dictionary meaning of "expressly") supports the inference that the amendment has rid the Court of jurisdiction based on merely "inherent" conflicts. See England, Hunter, & Williams, Constitutional Jurisdiction, 32 U. Fla. L. Rev. at 180 (discussing the amendment's apparent overruling of the inherency doctrine of Harrell's Candy Kitchen, Inc. v. Sarasota-Manatee Airport Authority, 111 So.2d 439 (Fla. 1959). At a minimum, then, the asserted conflict of decisions must arise from directly conflicting statements on a point of law that was necessary to the decision in each case. Under this strict new standard Respondents submit that the Court lacks jurisdiction, for no case cited by Petitioner expresses a result or rule of decision that directly conflicts with the decision of the Fourth District in this case.

A. The cryptic decision in Lauderdale v. Blake neither expressly nor directly conflicts with the decision of the Fourth District that a change in zoning designation that permits continued agricultural use does not require reclassification of the affected property as a matter of law.

Petitioner mistakenly relies on Lauderdale v. Blake, 351 So.2d 742 (Fla. 3d DCA 1977) as a basis for conflict jurisdiction over review of this case, Fogg v. Broward County, 397 So.2d 944 (Fla. 4th DCA 1981) (No. 79-205). The Court in Lauderdale announced no clear rule of decision to conflict with that in the Fogg case. Rather, the Lauderdale court merely cited and

quoted the pertinent language of Section 193.461(4)(a) of the Florida Statutes (1972) (current version not significantly changed), without expressly construing the statute. 351 So.2d at 743. In contrast, the rule of decision in Fogg depends on a lengthy discussion of the proper interpretation of the phrase "zoned to a nonagricultural use." See 397 So.2d at 949-50.

Moreover, the Fourth District's interpretation in Fogg applied to critical facts that do not appear in the Lauderdale opinion. In Lauderdale, the taxpayers were still using their land for agricultural purposes on January 1 of the year in question, after having requested and obtained rezoning to nonagricultural uses, but nothing in the opinion suggests that this use continued thereafter or was expressly condoned by the zoning authorities. In Fogg, however, the Fourth District stressed that "documentation in the record shows that the City . . . condoned the continued agricultural use on the property in question at least pending its actual use as a residential development under the rezoning." 397 So.2d at 949. Futhermore, the Fourth District repeatedly noted that the Respondents' agricultural use of the property continued throughout the period in issue. Significantly, also, the opinion in Fogg stated that the Respondents signed at least four successive contracts for the sale of their property, each of which expired before closing. Id. at 948-49. Since the contract for sale required the purchaser to obtain the rezoning as a condition of each party's duty of performance, the City of Miramar apparently drew the natural inference not that the Respondents intended to develop their property but that they

wished to sell it for someone else to develop. In the meantime, they would continue to use their land for commercial agricultural purposes. No such executory contracts for sale of the affected land appear in Lauderdale. The District Court of Appeal, Third District, in that case simply recited the continued use of the land for agriculture on January 1 of the contested period, the owner's obtaining of rezoning of the property, and the unexplicated language of Section 193.461(4)(a). The Third District then upheld the denial of an agricultural classification for the land, without further explanation or further specific facts.

Thus, although the results in Fogg and Lauderdale are different, they do not conflict. The Fogg court reached a different result because it took account of substantially different facts. The rule in Fogg covers a situation neither addressed in Lauderdale nor suggested by its controlling facts. The Fourth District construed the phrase "zoned to a nonagricultural use" as meaning that the new zoning must change the actual use of the land from agricultural to nonagricultural.* 397 So.2d at 949-

---

* **The Fourth District's interpretation relies on applying this Court's "actual physical use" test for the agricultural classification under subsection (4)(a)(3), since the provision specifically mentions "nonagricultural use" (emphasis added). Cf. Roden v. K & K Land Management, 368 So.2d 588 (Fla. 1978) (actual agricultural use is the test under § 193.461(4)(c), which specifically refers to such use); Straughn v. Tuck, 354 So.2d 368 (Fla. 1978) (same, under § 193.461(3)). In contrast, subsection (4)(a)(4) does not mention use, and this Court held that subsection unconstitutional for unjustifiably raising an irrebuttable presumption of nonagricultural use without regard to actual use. See Bass v. General Dev. Corp., 374 So.2d 479 (Fla. 1979). The Fourth District's approach enabled the Court to avoid a possibly unconstitutional interpretation of the statute (as**

(Continued)

50. For all that appears in the Lauderdale opinion, the Third District did not confront the facts of documented condonation of a prolonged continuance of agricultural use, which called for the Fourth District's interpretation of the statute. Viewed in their different factual contexts, the two cases complement each other.

B. The Fourth District's interpretation of the word "sale" in Section 193.461(4)(c) as not including executory agreements for sale does not conflict with the decisions in Jasper and deGive, which recognize that under such an agreement the purchaser acquires an equitable interest in the property to be sold, while the vendor retains the legal interest.

Despite Petitioner's careless characterization of holdings the Fourth District's decision conflicts in no way with Jasper v. Orange Lake Homes, Inc., 151 So.2d 331 (Fla. 2d DCA 1963) or First Mortgage Corp. v. deGive, 177 So.2d 741 (Fla. 2d DCA 1965). Neither Jasper nor deGive held that a "sale" of land has occurred when parties enter an agreement for such a sale, as Petitioner suggests. Neither decision construed the meaning of "sale" or considered the special context of Section 193.461(4)(c). Both decisions recognized that the vendor retains the legal title under an executory agreement for a sale, as the Fourth District also observed. See deGive, 177 So.2d at 745; ("merely a contract for the sale"); Jasper, 151 So.2d at 333-34 (speaking of a "contract to purchase" in the future) (emphasis added). Noth-

---

raising an irrebuttable presumption of nonagricultural use). By explaining rather than adding to the statutory language, the decision in Fogg remains consistent with the case cited by Petitioner, Chaffee v. Miami Transfer Co., 288 So.2d 209 (Fla. 1974).

ing in Jasper or deGive touches on the application of Section 193.461(4)(c) to a vendor whose agreements for sale have each expired without a closing, a critical fact in the Fogg case.

C. Consistently with accepted procedure, the Fourth District did not overturn purely factual findings of the trial court but reconstrued and applied the law to the facts.

In concluding that Respondents had used their land for bona fide agricultural purposes, the Fourth District interpreted the statutory terminology of Section 193.461(3) and applied the law to the facts of the case. The Court thereby overruled the trial court's conclusion on that issue, necessarily a mixed question of law and fact, rather than a purely factual finding. Thus, the Fourth District's approach is consistent with Holland v. Gross, 89 So.2d 255, 258 (Fla. 1956) and avoids any conflict with the cases cited by Petitioner.

D. The Fourth District's application of this Court's "actual physical use" test does not expressly and directly conflict with decisions based on factual findings that agricultural use in each case was only incidental to some other, primary use.

In construing Section 193.461(3) and (4), the Fourth District aligned its approach with that of this Court in the recent Tuck, Roden, and Bass decisions. See note * supra, at p. 7. The cases on "primary use" cited by Petitioner arose earlier and construed other statutory provisions. The Fourth District's application of the "actual physical use" test leaves intact the Court's conclusions about which physical use (agriculture or "the

discharge of smoke fumes and other by-products" from the owner's adjacent phosphate mining operations was determinative in Walden v. Borden Co., 235 So.2d 300 (Fla. 1970). Nor does the Fourth District's narrow statutory construction raise an express and direct conflict with the decision in First America Development Corp. v. County of Volusia, 298 So.2d 191 (Fla. 1st DCA 1974), which considered a different statutory provision and confronted no error in the trial court's interpretation and application of that provision.

II. THE FOURTH DISTRICT'S DECISION AFFECTS ONLY A SUBCLASS OF CONSTITUTIONAL OFFICERS AND ONLY IN RELATION TO THE UNUSUAL FACTS OF THIS CASE.

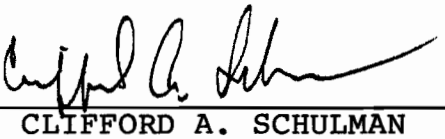
Petitioner has not supported or explained his assertion of this ground for jurisdiction. The Fourth District's carefully limited statutory construction and application does not "directly and . . . exclusively affect the duties" of all Property Appraisers in the State in any way not related to the facts of this case. See Spradley v. State, 293 So.2d 697, 701 (Fla. 1974) (emphasis in original). Rather, it affects only the subclass of appraisers who reclassify land as nonagricultural after unsuccessful attempted sales and its continued agricultural use by the same owner, when the local zoning authority has specifically condoned that continued agricultural use despite ostensible rezoning of the land. Thus, in similar suits brought by aggrieved taxpayers against the property appraiser (Tax Assessor), this Court has not recognized such a jurisdictional basis for certiorari. See Overstreet v. Cooper, 134 So.2d 255 (Fla. 1961).

CONCLUSION

Respondents submit that the Fourth District's decision raises no express and direct conflict with any case cited by Petitioner. Neither does the narrow decision directly and exclusively affect a whole class of constitutional officers. Since Petitioner has asserted no valid ground for this Court's jurisdiction, Respondents pray for dismissal.

Respectfully submitted,

GREENBERG, TRAURIG, ASKEW,
HOFFMAN, LIPOFF, QUENTEL
& WOLFF, P.A.
1401 Brickell Avenue, PH-1
Miami, Florida 33131
(305) 579-0500

By: 
CLIFFORD A. SCHULMAN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief was furnished by mail on July 9, 1981, to GAYLORD A. WOOD, JR., Attorney for Appellee Markham, 304 S.W. 12th Street, Fort Lauderdale, Florida 33315, JOHN FRANKLIN WADE and ALEXANDER COCALIS, Deputy General Counsel of Broward County 201 S.E. 6th Street, Room 248, Fort Lauderdale, Florida 33301, and WILLIAM D. TOWNSEND and E. WILSON CRUMP, II, Assistant Attorney General, Department of Legal Affairs, Post Office Box 5557, Tallahassee, Florida 32304.

GREENBERG, TRAURIG, ASKEW,
HOFFMAN, LIPOFF, QUENTEL
& WOLFF, P.A.
Counsel for Respondents
1401 Brickell Avenue, PH-1
Miami, Florida 33131
(305) 579-0500

By: _____
CLIFFORD A. SCHULMAN