OA 1-7-82

FILED

NOV 10 1982

SID J. WHITE
CLERK SUPREME COURT
By _____ Deputy Clerk

SUPREME COURT OF FLORIDA

WILLIAM MARKHAM, etc., et al.,

Petitioners,

vs. Case No. 60,759

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

Respondents.
_____/

BRIEF ON THE MERITS OF RESPONDENT,
DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA

JIM SMITH
ATTORNEY GENERAL

E. WILSON CRUMP, II
ASSISTANT ATTORNEY GENERAL
DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FLORIDA
(904) 487-2142

ATTORNEYS FOR RESPONDENT,
DEPARTMENT OF REVENUE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION

For purposes of the following, the Petitioner, William Markham, as Property Appraiser for Broward County, Florida, will hereafter be referred to as "the Property Appraiser." Co-Petitioner, Department of Revenue of the State of Florida, will hereafter be referred to as "the Department." Respondents, E.C. Fogg, III, Allen S. Fogg, and Elizabeth Lane Fogg, will hereafter be collectively referred to as the"property owners." Reference to the page number of the record from the Fourth District Court of Appeal below will be made by the symbol "R" followed by the page number to which reference is intended.

STATEMENT OF THE CASE

This proceeding seeks discretionary review by this Court, predicated on conflict with other decisions of this Court and of the other District Courts of Appeal,of a decision by the District Court of Appeal, Fourth District of Florida, styled Fogg v. Broward County, and reported at 397 So.2d 944. The opinion was filed on April 8, 1981.

The action originally began in the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. The property owners initiated the suit contesting the denial of agricultural assessments for certain property for the 1974 tax year. Joined as Defendants in the Circuit

Court were the Property Appraiser and Department of Revenue. Later, a separate action was filed contesting the denial of agricultural assessment for the 1975 tax year. These suits were ultimately consolidated.

Following discovery, the case was tried without a jury before the Honorable Lamar Warren, Circuit Judge. Ultimately, the trial court entered judgment in favor of the Property Appraiser and the Department, holding that the subject property had properly been denied agricultural assessment for the tax years in issue. The property owners seasonably appealed this judgment to the Fourth District Court of Appeal. Following briefs and oral argument, the Fourth District entered its decision reversing the trial court.

That decision is the subject of the present appeal herein.

STATEMENT OF THE FACTS

The Department of Revenue will rely on the Statement of the Facts contained in the brief of its Co-Petitioner, the Property Appraiser, concurrently filed herein.

POINTS INVOLVED

POINT I

THE FOURTH DISTRICT IMPROPERLY DETERMINED THAT THE SUBJECT PROPERTY NEED NOT BE DENIED AGRICULTURAL ASSESSMENT INSPITE OF THE FACT THAT IT HAD BEEN REZONED TO A NONAGRICULTURAL CLASSIFICATION AT THE REQUEST OF THE OWNER.

POINT II

THE DISTRICT COURT OF APPEAL IMPROPERLY REVERSED THE DETERMINATION OF THE TRIAL COURT THAT THE PROPERTY IN QUESTION WAS NOT BEING PRIMARILY USED FOR BONA FIDE AGRICULTURAL PURPOSES ON JANUARY 1 OF EACH OF THE TAX YEARS IN QUESTION.

POINT III

THE FOURTH DISTRICT IMPROPERLY RULED AS A MATTER OF LAW THAT THERE HAD BEEN NO SALE OF THE SUBJECT PROPERTY.

ARGUMENT

POINT I

The statutory and constitutional provisions allowing certain properties to be classified and assessed based on agricultural character or use constitute exceptions to the general rule of ad valorem taxation that all property should be assessed at its full just value for ad valorem tax purposes in order that all property might bear its full share of the tax burden to meet the expenses of local government. Art. VII, Sec. 4, Florida Constitution; Walter v. Schuler, 176 So.2d 81 (Fla. 1965). The above-cited provision of the Florida Constitution, also contains the authorization for classification and assessment of lands as agricultural lands, even though they might have a higher just value than that which would be assessed, assessing them as agricultural lands. Thus, that provision reads in relevant part:

> Agricultural land. . . may be classified by general law and assessed solely on the basis of character or use.

In three of its earlier cases, Bass v. General Development Corporation, 374 So.2d 479 (Fla. 1979); Straughn v. Tuck, 354 So.2d 368 (Fla. 1978); and Rainey v. Nelson, 257 So.2d 538 (Fla. 1972), this Court has noted that the constitutional provision quoted above dealing with agricultural lands was permissive but not self executing in the sense that the legislature was allowed to set up mechanisms for the classification and assessment of agricultural land, but was not required to do so. Thus, these decisions indicate that there was no absolute constitutional right to an ad valorem assessment, but that the assessment must be authorized by the legislative implementation, subject only to the constitutional restrictions of the due process and equal protection clauses of the Federal and Florida Constitutions. Bass v. General Development Corp., supra.

Thus, the various decisions which have dealt with the availability of agricultural treatment for tax purposes have all, or necessity, been in the nature of cases dealing with statutory construction rather than constitutional construction. The statutory implementation of the constitutional provision itself appears as Sec. 193.461, F.S. This statute provides several tests for determining whether property might initially be granted agricultural assessment. Roden v. K&K Land Management, Inc., 368 So.2d 588 (Fla. 1979), affirming 347 So.2d 724 (Fla. 2nd DCA 1977); and Straughn v. Tuck, supra.

Section 193.461, F.S., also provides, in subsection (4), for the cessation of previously granted agricultural classifications. It reads in relevant part as follows:

> (4)(a) The property appraiser shall reclassify the following lands as nonagricultural:
>
> 1. Land diverted from an agricultural to a nonagricultural use;
>
> 2. Land no longer being utilized for agricultural purposes;
>
> 3. Land that has been zoned to a non-agricultural use at the request of the owner subsequent to the enactment of this law; or
>
> 4. Land for which the owner has recorded a subdivision plat subsequent to the enactment of this law.
>
> (b) The board of county commissioners may also reclassify lands classified as agricultural to nonagricultural when there is contiguous urban or metropolitan development and the board of county commissioners finds that the continued use of such lands for agricultural purposes will act as a deterrent to the timely and orderly expansion of the community.
>
> (c) Sale of land for a purchase price which is three times the agricultural assessment placed on the land shall create a presumption that such land is not used primarily for bona fide agricultural purposes. Upon a showing of special circumstances by the landowner demonstrating that the land is to be continued in bona fide agriculture, this presumption may be rebutted.

In the present case, since the property had enjoyed agricultural assessments until the tax years in issue, it is this subsection of the statutes with which one must be concerned.

It is submitted that one of the major problems with the decision of the Fourth District Court of Appeal herein below is that it projected from the decisions in Straughn v. Tuck and Roden v. K&K Land Management, Inc., supra, and determined that the statute as a whole embodied a strict use test which must necessarily be available to all property on which there is any kind of actual physical agricultural activity. It is respectfully submitted that this application under subsection (4)(a)3 does not create a logical interpretation of this portion of the statute. The Fourth District seems to have held that this statute can only be applied in situations where the rezoning requires a cessation of agricultural use, and the agricultural use is actually terminated. However, such a construction of subsection (4)(a)3 would render it a complete nullity and redundancy. Subsections (4)(a)1 and 2 already require reclassification of land which has been diverted from an agricultural use to a nonagricultural use and land which is no longer being utilized for agricultural purposes. If the test for reclassification is also to be based on an actual physical utilization, the legislature could very well have stopped here. However, the subsequent provisions of the statute make it clear that the legislature had something more in mind. In the case of Lykes Brothers, Inc. v. City of Plant City, 354 So.2d 878, 881 (Fla. 1978), this Court recognized that it

had a duty to avoid placing constructions on the ad valorem tax statutes which would render any portion of them a redundancy. See also, generally, 3 Fla. Jur., Statutes, Sec. 118. This can be done only by construing subsection (4)(a)3 in such a way that it applies to property which has been rezoned at the request of the owner, even though an actual physical agricultural activity may be continued on the property after reclassification.

Such an interpretation would also be supported by other case law from this Court. In particular, the Department's position finds support in the case of Bass v. General Development Corp., supra. In that case, the Court noted that there was a difference between the acts of classification and assessment. It noted that in making classifications, the legislature was not fettered even by the constitutional references to the character or use of the property. Thus, if properly viewed, the provisions of subsection (4)(a)3 represent a legislative classification to the effect that property for which the owner has secured nonagricultural zoning is no longer to be classified as agricultural land for ad valorem tax purposes. The right of the legislature to make classifications of this type not directly based on use is also supported by the case of Rainey v. Nelson, supra. That decision recites that the land in question was actually used for agricultural activities; nevertheless the Court sustained a denial of agricultural assessment

for ad valorem tax purposes under the forerunner of the present Sec. 193.461, F.S. The Rainey v. Nelson case appears to have been reaffirmed by this Court in Bass v. General Development Corp. inspite of a dissent by Justice Hatchett (at 374 So.2d 486) which noted that the decision was incompatible with the use test announced in Straughn v. Tuck and Roden v. K&K Land Management, Inc., and advocated that Rainey v. Nelson be receded from.

Instead, in Bass v. General Development Corp., the Court receded to some extent from some of the language in Straughn v. Tuck and Roden v. K&K Land Management, Inc. Thus, at 374 So.2d 482, the Court set out the language in Straughn v. Tuck which had been relied upon to establish a use test, and went on to note:

> However, the above quote from Tuck is somewhat misleading in that we failed to distinguish the single instance considered by this Court prior to Tuck wherein the legislature chose not to base agricultural classification upon the 'use' standard.

The Court also observed in a footnote that Roden v. K&K Land Management, Inc. was "also misleading in this respect." 374 So.2d 482, n.3.

There are in fact other instances where the Courts have rejected agricultural assessments even though there was some agricultural activity on the land. Another good example of

this is this Court's decision in Walden v. The Borden Company, 235 So.2d 300 (Fla. 1970). There, the Court rejected agricultural assessment for certain lands which were being used in part for cattle grazing upon a finding that this use was neither primary or bona fide, the lands actually being used instead in conjunction with a phosphate mining operation. Another case in which the appellate Courts have rejected agricultural classification inspite of some agricultural activity on the property is that of Lauderdale v. Blake, 351 So.2d 742 (Fla. 3rd DCA 1977). That case is very much on point with the present case. That case reflects clearly and succinctly that the property was being used for agricultural purposes on January 1, 1974, the tax year at issue. However, it had been rezoned to a nonagricultural classification during the previous tax year. The Third District held that the subsection of the statute under consideration here was mandatory and was controlling, and went on to sustain the trial court's denial of agricultural assessments. One of the decisions under review in Lauderdale v. Blake was also reported as Sepler v. Blake, 46 Fla. Supp. 199 (Cir. Ct., Dade County 1977). There, the trial court took note of the agricultural use of the property but went on to hold that agricultural assessment was unavailable because of the previous rezoning. The trial court also took note of the proposition that tax exemptions and privileges are to be strictly construed against the party

claiming them. This rule of constructions becomes significant when one considers, as developed as the outset of this brief, that the case law in this area deals with issues of statutory construction, rather than constitutional interpretation.

It is respectfully submitted that in order to effect the direct intention of the legislature, this subsection of the statutes should be construed so as to deny agricultural assessment to rezoned property even though some agricultural activity may thereafter continue on the property. It is submitted that the statute and its background and history reveal that it was intended to strike a balance between the competing interests of legitimate farmers and those of land speculators and developers whose activities were driving up the prices of land in such a way as to make its continued agricultural use disadvantageous. If the statute is used to create a loophole so that holding costs may be minimized prior to development for land which is ultimately intended for development, as the Fourth District opinion would certainly result in, the effect would be to frustrate the very purpose of the statute. It is submitted instead that the proper interpretation of the statute is to limit its application to legitimate agricultural interests but deny the assessment as a "tax break" to a spectator or developer who might continue some agricultural use on the property prior to development.

POINT II

In this case, the trial court made what the Fourth District recognized as an independent factual finding that the land was not being primarily used for good faith agricultural purposes during the tax years in question. The Fourt District's reversal of this is thus decidedly peculiar. The Fourth District reasoned that since the trial court was wrong as a matter of law, according to it, on two other issues, it must somehow necessarily have been wrong in this factual determination as well. This result certainly does not logically follow at all. The factual question of whether the land was being used primarily and in good faith for agricultural purposes is a totally separate and independent consideration from the question of the impact of the zoning subsection and the "three times" sales price presumption. The Department will defer to the brief of the Property Appraiser to demonstrate that there was actually more than adequate evidence in the record to support the trial court's factual determination.

Under the circumstances, however, it was clearly error for the Fourth District to reverse the trial court. This Court has recognized that the determination of whether property is being used primarily and in good faith for agricultural purposes is a question of fact for the trial court to deal with.

Thus, in the case of Greenwood v. Oates, 251 So.2d 665, 669 (Fla. 1971), the Court said:

> 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 a 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.

Also recognizing the factual nature of the determination which precluded reversal by the Appellate Court where supported by the record was the case of Firstamerica Development Corp. v. County of Volusia, 298 So.2d 191 (Fla. 1st DCA 1974), cert. den. 312 So.2d 755 (Fla. 1975). Even the Florida Supreme Court decision in Roden v. K&K Land Management, Inc. supra, recognized this determination as being largely factual in nature to be resolved by the trial court. Thus, the Court said:

> In this case the District Court upheld the trial court's determination that there existed special circumstances sufficient to rebut the presumption. . . . On the record before us, we cannot say the trial found incorrectly that the presumption had been rebutted and that respondent was entitled to agricultural classification. 368 So.2d 588

Thus, the Courts all recognize that this is a proper determination for the trial court to make.

The decision of the Fourth District cannot be supported by a suggestion that the trial court employed too liberal a view of the statute in making its determination. Although the Fourth District was apparently of the view that any actual physical agricultural activity on the land satisfied the use test represented by Straughn v. Tuck, and Roden v. K&K Land Management, Inc., and certain of their progeny, this view of the law by the Fourth District was in error. As has already been noted, this Court in Bass v. General Development characterized these statements from which the Fourth District's decision apparently flowed as being "misleading." Actually, the Straughn v. Tuck holding was fully correct when viewed in its proper context. In that decision, the taxpayer had argued that his property which he claimed had an agricultural character but which was being devoted to no agricultural use whatsoever was entitled to agricultural classification under the State Constitution. This Court properly held that under the statute in question, there must be an agricultural use before the agricultural treatment could be available. However,

it does not follow from this that agricultural use is the only test. Although agricultural use is a necessity, in the sense of being a prerequisite, the statute clearly contemplates that in some situations other things, such as a primary and bona fide use must be present as well. These requirements were first injected into the statute in 1972. (Ch. 72-181) From the timing, they appear to be as much as anything an effort by the legislature to codify the result which was obtained in the case of Walden v. The Borden Company, supra. Accordingly, since these tests are not incompatible with the Florida Constitution, where embodied in the statute, they certainly should be recognized and applied by the Court in construing and applying the statute.

POINT III

In the proceeding below, the trial court found that there was a sale of the property for more than three times the agricultural assessment. The trial judge went on to find that the property owner had not rebutted the presumption that the property was not to be used thereafter for bona fide agricultural purposes, applying Sec. 193.461(4)(c), F.S. He assigned this holding as one of his reasons for ruling in favor of the Property Appraiser and the Department.

Clearly, there were contracts of sale for the property in effect on January 1 of each tax year, although the sales had not then been closed. Because of this, the Fourth District reversed the trial court, holding:

> . . . Section 193.461(4)(c), Florida Statutes (1972 Supp.) applies only to a completed sale of realty. The effective transfer of legal title is thus a necessity before the new owner has the burden of showing 'special circumstances' warranting an agricultural classification. 397 So.2d at 948.

Although the Department quite candidly has some reservations about the trial court's ruling on this point, it feels that the Fourth District went much too far in reversing this portion of his decision. Under the Fourth District's holding, it would be necessary for the closing to have taken place and legal fee simple title fully vested in the purchaser before the subsection could apply.

However, there is substantial authority for the proposition that ad valorem tax consequences can and do flow from a contract for the sale of realty prior to the closing and completion of the sale. Thus, one encyclopedia has cited to the cases of Porter v. Carroll, 84 Fla. 62, 92 So. 809 (1922) and Dean v. State, 74 Fla. 277, 77 So. 107 (1917), as authority for the statement:

> The holder of the beneficial interest may be the proper person responsible for the tax. 31 Fla. Jur. Taxation §117

The Attorney General has opined that the vendor under contract to purchase previously exempt property from a municipality may be subjected to ad valorem taxation on that realty, even though the sale had not closed as of January 1 of the tax year. AGO 058-83, 1957-1958 Biennial Report of the Attorney General, p. 580 (March 10, 1958). See also AGO 047-14, 1947-1948 Biennial Report of the Attorney General, p. 205 (Jan. 21, 1947). Furthermore, Rule 12D-7.08(3), Fla. Admin. Code, allows a vendee under a contract for sale to file a claim for homestead exemption.

These authorities appear to be based on the doctrine of equitable conversion. Thus, they may also require that the vendee have entered into possession of the premises. This is where the Department has some reservation about the trial court's ruling. Although in the case at bar, the vendee did exercise considerable control over the property and activities concerning it, it is questionable whether the vendee had actually entered into possession.

However, the Department does strongly feel that at the very least, the Fourth District went entirely too far in holding that the sale must actually be closed before the provisions of subsection 193.461(4)(c), F.S., apply. It is submitted that this subsection would and should apply where the vendee is in possession of the property under a contract for sale, even though legal title has not passed as of the assessment date.

CONCLUSION

For the reasons stated herein, this Court should reverse the order and decision of the District Court of Appeal, Fourth District, and instruct it to enter an order affirming the final judgment of the trial court.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

E. Wilson Crump, II
Assistant Attorney General
Department of Legal Affairs
The Capitol
Tallahassee, Florida
(904) 487-2142

ATTORNEYS FOR PETITIONER
DEPARTMENT OF REVENUE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by U.S. Mail this 10th day of November, 1981, to: Gaylord A. Wood, Jr., Esq., 304 S.W. 12th Street, Fort Lauderdale, Florida 33315; Traurig, Askew, Hoffman, Lipoff, Quentel & Wolff, 1401 Brickell Avenue, PH-1, Miami, Florida 33131; Alton Parker, Jr., Esq., P.O. Box 1531, Tampa, Florida; William M. Barr, Esq., P.O. Box 5725, Daytona Beach, Florida 32018; and Harry A. Stewart, Esq., 201 S.E. 6th Street, Fort Lauderdale, Florida.

E. Wilson Crump, II
Assistant Attorney General