O/A 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,

v.

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

Respondents.

ANSWER BRIEF OF RESPONDENTS ON THE MERITS

GREENBERG, TRAURIG, ASKEW,
HOFFMAN, LIPOFF, QUENTEL &
WOLFF, P.A.
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§TATEMENT OF THE FACTS.

The Petitioner Property Appraiser's Statement of the Facts contains reassertion of facts that occurred well after the tax years in question and, in certain instances, as late as the trial of the cause in 1978. See Brief for Petitioner at 8, ¶3 through 9, ¶3. Moreover, as noted in the Motion to Strike that accompanies Respondents' Brief, the Property Appraiser also has attached to his Brief an Affidavit and Proposed Committee Report that were not part of the evidence in the cause. By commingling and intertwining both relevant and irrelevant facts, the Property Appraiser casts significant doubt upon the reliability of his own Statement of the Facts and his argument concerning "primary-incidental" use, which is predicated thereon. This is neither helpful to the Court nor conducive to a succinct argument on the issues. Therefore, Respondents cannot accept the Property Appraiser's Statement of the Facts and find it necessary to set forth their own statement. See Fla. R. App. P. 9210(c).

A. The Existing Agricultural Use

As of January 1, 1974, and January 1, 1975, the Fogg family owned 500 acres of land in the vicinity of Pembroke Road and Douglas Road, Broward County, Florida. (R. 109-12; Aerial Photograph, Plaintiffs' Exhibit "8," R. 421). During the court hearing, the land was identified and referred to as the "Pembroke Parcel," consisting of approximately 180 acres (located west of

Douglas Road and north of Pembroke Road); the "Fogg Parcel," consisting of approximately 270 acres (located west of Douglas Road and south of Pembroke Road), and the "Contiguous Parcel," consisting of approximately 31 acres (located in the northeast corner of the Fogg Parcel). (R. 109-12). Prior to 1974, all three parcels were regularly classified as agricultural lands for tax assessment purposes. (R. 29, 112). As of January 1, 1974, and January 1, 1975, the Broward County Property Appraiser continued to classify both the Pembroke Parcel and the Contiguous Parcel as agricultural under Section 193.461, Florida Statutes, but denied such classification to the Fogg Parcel. (R. 112-13).

Following acquisition of the land in 1943, the Fogg family commenced a dairy operation on the land which continued until approximately 1952. (R. 114). At that time, the Foggs converted the use of the land to a beef cattle operation which continued until 1972. (R. 116-18). In 1972, the Foggs leased all three parcels to Joseph Bregman, with the exception of 100 acres of the Fogg Parcel immediately west of Douglas Road. Id.; Plaintiffs' Exhibit "7," R. 419-20). Under the lease, Bregman commenced his own beef cattle operation on all three parcels (with the exception of the 100 acres). (R. 117). The lease, although cancellable on 90 days notice, required the tenant to keep livestock on the land. (Exhibit "7," R. 419-20). This lease arrangement and cattle operation continued in existence from 1972 through and

including January 1, 1975. (R. 117-18; Plaintiffs' Exhibit "7," R. 419-20).*

The 100 acres of the Fogg Parcel excluded from the Bregman lease have been used by the Foggs since 1962 to pasture horses boarded on their property. (R. 114-15). The vast majority of the horses have been mares that have been bred about every two years, producing around 20 foals per year. (R. 115). No pleasure riding of any kind is permitted or allowed on the 100 acres of pasture. (R. 116).

During the tax years in question, beef cattle were also interspersed among the horses and grazed, at different times of the year, on the 100 acres of pasture. (R. 118). These cattle were owned by the manager of the property (a Fogg employee) who was permitted to graze the herd as part of his compensation. (R. 118-19). The Trial Court's Order acknowledges the cattle and horsebreeding uses (Circuit Court's Order at 4; R. 374) and finds no issue with the actual agricultural use.**

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* During the tax years, the Fogg Parcel was regularly fertilized, mowed, and otherwise maintained and kept in good repair. (R. 118-19). Four different kinds of grasses were planted. (R. 119). The property was fully fenced and contained windmills, wells, watering troughs, and other necessary improvements and equipment to sustain the total agricultural operation. (R. 118-19).

** The Trial Court's Order stated:

> At the times material to this cause all but 100 acres of the parcel under consideration had been used under a lease with one Joseph Bregman, cancellable

(Continued)

B. The Profitability of the Agricultural Use

The Fogg family acquired the 500 acres (consisting of the three parcels) in 1943. (R. 113).* The total purchase price for the entire property was $75,000.00. Id. This price also included improvements, farm implements and equipment, and 500 head of dairy cattle. (R. 113-14). At the time of acquisition, the cattle had a fair market value of $45,000.00 (R. 113). The allocable portion of the purchase price attributable to the land was approximately $25,000.00. Id.

In 1965, the entire property was mortgaged to obtain capital for the expansion of unrelated Fogg ventures. (R. 120; Plaintiffs' Exhibit "9," R. 422). The proceeds of the loans were not in any manner used to improve the property and the original investment costs remained at $25,000.00. (R. 120-21).

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with 90 days notice to Bregman, under which the lessee guaranteed to keep cattle on the land at all times during the life of the lease. The 100 acres excluded from the lease have been used by the plaintiffs to pasture some horses boarded on the property, mostly breeding mares, during which time a small number of cattle grazed among the horses, owned by an employee who was permitted to graze his cattle as part of his compensation.

Order at 4 (R. 374).

* In 1943, the property was purchased in the name of Land O'Sun Milk Company, which was then owned by Respondents' father (R. 123). The Company's stock was later divided between the father and the Respondents. Id. In 1971, Land O'Sun Milk Company was liquidated and a partnership, consisting of the Respondents, took title to the land, subject to the mortgage indebtedness. Id.

The essence of Edward Fogg's testimony at the hearing was that interest payments relating to the mortgages, although reflected on the books and records of the farm operation for purposes of an intra-family liquidation of assets, had nothing to do with the actual farm operation and, therefore, should not be considered as part of Exhibit "13" in determining the profitability thereof. (R. 120-26). With the exception of taxes, the remaining expenses listed on Exhibit "13" were all allocable to the horse operation. (R. 125). As shown on Exhibit "13," the Foggs had a net profit from the farm operation for each year immediately preceding the taxing date. Id. Even excluding the horse rent, the remaining income under the Bregman lease ($10,200.00 per year) more than met expenses (less interest payments) incurred during 1973 and 1974. (R. 125-26). Thus, the farm operation was profitable during both tax years and more than amortized the original investment costs in the land.

Upon cross-examination, the Property Appraiser admitted that, in his opinion, the use of the Pembroke and Contiguous Parcels was bona fide commercial agricultural during the tax years in question. (R. 163-65). In reaching this determination, the Appraiser did not consider income or expenses, but, rather, grandfathered those properties under the pre-existing green belt law. Id.

C. The Expired Sale Contracts

During the period that the above uses were being made of the land, several independent contracts to sell the land were entered into by the Foggs. None of these contracts ever closed and neither legal title nor possession ever actually passed from the Foggs to the various prospective purchasers who intended to develop the property (except for twelve acres which is not the subject of this litigation). (R. 374.) All remained unexecuted, with various conditions precedent unfulfilled. There is no dispute over the existence of these contracts, or over the failure of the contracts ever to close, and they are set forth by the Trial Court's Order (R. 372-74).*

In summary, a contract was entered into on December 8, 1972, between the Foggs and the Cal-Florida Corporation, containing many conditions precedent and with the provision that the "Purchaser shall have until December 8, 1973, to accomplish the above conditions and make the above determimations." (R. 372; Defendant's Exhibit "6," R. 490). A second contract, superseding the first, was entered into on May 1, 1973, between the Foggs and Arthur August, as Trustee. This contract similarly contained various conditions precedent. (R. 373; Plaintiffs' Exhibit "11,"

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* The statement in the Court's Order at 3 (R. 373) that the "August" contract "did close" is apparently a typographical error, since there is no dispute that none of the contracts closed and the Court's Order otherwise assumes that none closed.

R. 452). A third contract was entered into on April 30th, 1974, between the Foggs and the University Park Corporation, also containing numerous conditions precedent. The closing date of this contract was set for December 31, 1974, but was extended to June 30, 1975. (R. 373-74; Plaintiffs' Exhibit "10," R. 434). The contract expired on July 1, 1975. Still additional contracts were entered into thereafter (R. 374).

D. The Purchaser's Application For Planned Unit Development Approval

One of the conditions inserted in the contract of December 8, 1972 (which, like the other contracts, expired without closing), by the purchaser was that he succeed in obtaining rezoning for the parcel before December 8, 1973. The purchaser, Cal-Federal, thereafter submitted to the City of Miramar an application for "preliminary P.U.D. - residential" rezoning, dated April 16, 1973. (Plaintiffs' Exhibit "1," R. 386).

The proposed development by Cal-Florida was of sufficient magnitude to be classified as a "development of regional impact." Thus, under the Florida Environmental Land and Water Management Act of 1972 (Fla. Stat. ch. 380), no action could be taken by local government (approving or disapproving such claims) until the application had first been considered by the local regional planning agency. Cal-Florida submitted its application to the South Florida Regional Planning Council, which issued its recommendations in the first half of 1974. Those recommendations were

forwarded to the City of Miramar, which, under the terms of Chapter 380, could not rezone the land until it had considered the recommendations of the Planning Council. The City of Miramar reviewed the recommendations of the South Florida Regional Planning Council, and on July 12, 1974, issued its "development order" under the terms of Chapter 380. (Chapter 380 defines any rezoning as a "development permit," which requires a "development order" pursuant to the development of regional impact process, for projects that are of sufficient magnitude). (Plaintiff's Exhibit "6," R. 411).

Before receiving and reviewing the recommendations of the South Florida Regional Planning Council, and issuing its own "development order" in July 1974, the City apparently recognized that it did not have authority under Chapter 380 to rezone property that was subject to the development of regional impact process, although it had granted preliminary approval in November 1973. To avoid any confusion that might arise from the City's preliminary approval in November 1973, the Mayor wrote in July 1974:

> [T]he city, as of January 1, 1974, was not in a position to release this property for development until completion of the D.R.I. Utilization of the land other than at its present category will not be allowed until the completion of the D.R.I. and additional completion of the platting.

(Plaintiffs' Exhibit "12," R. 476).

The application for "preliminary P.U.D." rezoning was submitted to Miramar in accordance with the requirements of City Ordinance 68-4, entitled "An Ordinance Establishing Comprehensive Zoning," in particular those portions dealing with planned unit development. (Plaintiffs' Exhibit "2," R. 388). The planned unit development requirements establish a lengthy, complicated process of rezoning, involving initial application and subsequent submission of detailed plans, the actual rezoning to specific uses being in accordance with the final detailed plans. That is, the actual permitted use under the rezoning is in accordance with particular plans submitted. The "process" of P.U.D. rezoning begins, however, with an initial application. While the process is under way, the only permitted uses of the land are those established by the existing zoning classification (in this case, "Agricultural"), which continues in effect. (R. 97.)

The "process" is established by the P.U.D. zoning ordinance, which reads:

> E. PLANNING. . . .
>
> The following procedures, applications and exhibits shall be required while applying for rezoning to a Planned Unit Development District.
>
> . . . [A]pproval of said application will rezone said property to 'P' Planned Unit Development District as described in, and to the extent of, the Plan (a, b, c, or d below) [a. Conceptual Development Plan (Sketch Plan); b. Master Development Plan (Overall Plan); c. Layout Site Development Plan (Preliminary Plat); and d. Final Site Development Plan (Final Plat)] approved by the City Council . . . .

F. CONTROLS

> Upon rezoning of land to "P" District, the approved Final Site Development Plan . . . shall be the basis for issuing of all Building Permits, zoning compliances, and certificates of occupancy by the City. Deviations from the approved development plan . . . shall constitute a violation of the Zoning Ordinance . . . .

(Ordinance 68-4, Plaintiff's Exhibit "2," R. 395-96, 400-61).

The Miramar City Council first granted preliminary approval of the application for "preliminary P.U.D." rezoning (the beginning of the overall P.U.D. rezoning process) on November 19, 1973, prior to the completion of the D.R.I. process. Ordinance 73-19, entitled "An Ordinance Granting Application No. 072-333 For Rezoning From 'R-1B Residential' and 'A' Agrigultural to Planned Unit Development District," approved the application subject to a number of conditions:

> Application No. 072-333 . . . is . . . granted and approved, subject to Petitioner complying with ordinance No. 68-4, entitled "An Ordinance Establishing Comprehensive Zoning,". . . and subject to the following conditions:
>
> (a) Before North-South road is opened to South side of project, a median must be placed in the appropriate place. . . .
>
> (b) Developer must dedicate for public use 15.05 acres. . . .
>
> (c) Developer will comply with all future ordinances and amendments to ordinances . . . pertaining to zoning, zoning procedure, planned unit development district and impact.

> (d) Approval of developer's application for development approval in compliance with Florida Statute 380.
>
> (e) Approval of developer's application for development approval in compliance with any future City impact ordinances.

(Plaintiff's Exhibit "3," R. 402).

The minutes of the Council meeting of November 19, 1973, during which the preliminary approval was granted, read as follows:

> If the City Council approves the current application of Cal-Florida, before any building permits are issued, a Final Site Development Plan must be submitted by Cal-Florida and processed in the same manner as any other rezoning petition. . . . Depending upon the procedure adopted by the City, such impact study by the City will be considered by the Council either at the time of the final zoning approval or at a separate hearing. . . .
>
> Furthermore, the Council will approve at a public meeting, the Final Site Plan before any building permits are issued.

(Petitioners' Exhibit "15," R. 469).

The rezoning process continued thereafter, and on March 18, 1974, the Master Development Plan was approved (Resolution 73-149; Plaintiffs' Exhibit "4," R. 405). As of January 1, 1975, the process was not yet complete, because the Final Site Development Plan had not yet been approved. (R. 38-39.)

ARGUMENT

I. THE DISTRICT COURT CORRECTLY REVERSED THE CIRCUIT COURT, WHICH MISCONSTRUED THE APPLICABLE STATUTE AND THE LEGAL EFFECT OF THE EVIDENCE IN FINDING A LACK OF GOOD FAITH COMMERCIAL USE OF THE LAND.

In its Order, the Circuit Court concluded that the Foggs failed to show that "for the years 1974 and 1975 the lands were 'used primarily for bona fide agricultural purposes,' meaning 'good faith commercial use of the land.' F.S. 193.461(3) (b)" (R. 374). The basis for the Trial Court's conclusion was that the Foggs' primary intent as landowners, after December 1972 and during the contested years, was to sell the property and that the agricultural uses on the land "were only incidental to rezoning and development of the land by the purchasers after its sale" (R. 375) (emphasis added).* In so ruling, the Circuit Court misconstrued the applicable statute and the legal effect of the

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* The sale aspect of the case was most significant to the Circuit Court. Initially, the Court found that the case was primarily governed by Section 193.461(4)(c), dealing with sale of land for a purchase price which is three or more times the agricultural assessment (R. 371). In another part of the Order, the Circuit Court stated: "The Plaintiffs made a conscious decision to sell the property; they never retreated from that intention" (R. 374). Finally, it concluded: "It is difficult to reconcile the claim of the Plaintiffs to 'good faith commercial agricultural use of the land,' when at the same time they were making extensive efforts to sell the land, and cooperating in rezoning procedures, at sales prices greatly in excess of three or more times the agricultural assessment placed on the land" (R. 375).

evidence, thereby requiring reversal by the Fourth District Court of Appeal. See Hill v. Parks, 373 So.2d 376, 377 (Fla. 2d DCA 1979); accord, Overstreet v. Sea Containers, Inc., 348 So.2d 628, 630 (Fla. 3d DCA 1977); Becklin v. Travelers Indemnity Co., 263 So.2d 629, 630 (Fla. 1st DCA 1972). For cases on ad valorem classification that implicitly applied the principle that findings based on a misapplication of the law require reversal, see St. Joe Paper Co. v. Adkinson, 400 So.2d 983 (Fla. 1st DCA 1981); Czagas v. Maxwell, 393 So.2d 645 (Fla. 5th DCA 1981); Fisher v. Schooley, 371 So.2d 496 (Fla. 2d DCA 1979); Sapp v. Conrad, 240 So.2d 884 (Fla. 1st DCA 1970), aff'd, 252 So.2d 225 (Fla. 1971); Matheson v. Elcook, 173 So.2d 164 (Fla. 3d DCA 1965).

Section 193.461(3) of the Florida Statutes mandates that to gain agricultural classification land must be "actually used for a bona fide agricultural purpose," which means "good faith commercial agricultural use of the land." Roden v. K & K Land Management, Inc., 368 So.2d 588, 589 (Fla. 1979). As stated in Straughn v. Tuck, 354 So.2d 368, 370 (Fla. 1977), and reaffirmed in Roden, 368 So.2d at 589, "use" is still the guide post in classifying land, and although other specifically enumerated factors in Section 193.461(3)(b) relative to use may also be considered in making the determination of good faith agricultural use, none is determinative. See Roden, 368 So.2d at 589.

In addressing the nature of the "use" standard, the Supreme Court recognized in Bass v. General Development Corp., 374 So.2d 479 (Fla. 1979), that the Legislature has failed to expressly define the term "use." Id. at 483. Therefore, it has been the responsibility of the Florida courts to determine the meaning which that body intended to accord the term. In Bass this Court stated the controlling test applicable to the use standard:

> Because the legislature has failed to expressly define the term "use," however, it has been the responsibility of our courts to determine the meaning which that body intended to accord the term. In construing those statutory provisions related to agricultural property wherein the legislature has chosen to employ the "use" standard for determining eligibility for preferential tax treatment, the courts have consistently held that actual (present) use, rather than intended (future) use is the controlling test. See Interlachen Lake Estates v. Snyder, 304 So.2d 433 (Fla. 1973); Hausman v. Rudkin, 268 So.2d 407 (Fla. 4th DCA 1972); Schooley v. Wetstone, 258 So.2d 483 (Fla. 2d DCA 1972); McKinney v. Hunt, 251 So.2d 6 (Fla. 1st DCA 1971).

Bass, 374 So.2d at 483.

As a result of Bass and the cases cited therein, it is clear that, in applying the use standard under the statute, the courts do not treat a property owner's intended future use for the land as controlling. Likewise, whether such land is used primarily for agricultural purposes or is bona fide is not controlled by the property owner's intended future use. Although the statute does not define the word "primary," it has been interpreted to signify simply that the agricultural use must be the most significant activity on the land where the land supports diverse activities. Hausman v. Rudkin, 268 So.2d 407, 409 (Fla.

4th DCA 1972) (citing Walden v. Borden Co., 235 So.2d 300 (Fla. 1970)). In addition, the term "bona fide," as used in the statute, imposes the requirement that the agricultural use be real, actual, and genuine--as opposed to a sham or deception. Hausman v. Rudkin, 268 So.2d at 409.

In determining whether the use of the land for agricultural purposes is bona fide, the statute now requires that the following factors be taken into consideration.

> 1. The length of time the land has been so utilized;
>
> 2. Whether the use has been continuous;
>
> 3. The purchase price paid;
>
> 4. Size, as it relates to specific agricultural use;
>
> 5. Whether an indicated effort has been made to care sufficiently and adequately for the land in accordance with accepted commercial agricultural practices, including, without limitation, fertilizing, liming, tilling, mowing, reforesting, and other accepted agricultural practices;
>
> 6. Whether such land is under lease and, if so, the effective length, terms, and conditions of the lease; and
>
> 7. Such other factors as may from time to time become applicable.

Fla. Stat. § 193.461(3)(b) (1979).

In its Order, the Circuit Court failed to consider or apply these factors. Instead, it incorrectly ruled that, notwithstanding that the land was physically being used for

agriculture,* such use was not for a bona fide agricultural purpose because the property owner's primary intent was to sell the land and earn capital gain. This holding, however, is in direct conflict with Hausman v. Rudkin, 268 So.2d 407

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* At pages 16 through 19 of his Brief, the Petitioner Property Appraiser argues that the use of the land by Respondents was not a continual use, but was newly instituted by them after they acquired the land in 1971. (R. 123). This is contrary to the fact that the land was owned by a family corporation until 1971. In any event, agricultural tax classification was granted from 1971 through 1973 and continued to be granted during the tax years on the Pembroke and Contiguous Parcels. The Property Appraiser also argues that half of the property was used for pleasure horse boarding, which could hardly be said to be a bona fide "agricultural" use of the land. This assertion, however, is contrary to the Court's finding that the 100 acres excluded from the lease had been used by the Plaintiffs to pasture some horses boarded on the property, mostly breeding mares, during which time a small number of cattle grazed among the horses, owned by an employee who was permitted to graze his cattle as part of his compensation (R. 374). In any event, "agricultural purposes" is specifically defined to include "livestock." Fla. Stat. § 193.461(5) (1979). Under both statutory law and case law, "livestock" has been defined to include horses. See Austin v. Hardin, 152 So.2d 751, 753 (Fla. 2 DCA 1963) and Section 588.13 of the Florida Statutes ("livestock shall include all animals of the equine, bovine, or swine class, including goats, sheep, mules, horses, hogs, cattle, and other grazing animals."). Finally, the Tax Appraiser claims that no part of the activity relative to development of the land in any way enhanced the so-called agricultural uses. In particular, he refers to the "guitar-shaped lake." As indicated in the Statement of the Facts, the digging of the "guitar-shaped lake" did not commence until 1978 and, therefore, has no bearing on the tax years in question. See Lanier v. Overstreet, 175 So.2d 521 (Fla. 1965); Greenwood v. First America Dev. Corp., 265 So.2d 89 (Fla. 1st DCA 1972); McKinney v. Hunt, 251 So.2d 742 (Fla. 3rd DCA 1977).

(Fla. 4th DCA 1972), which has been cited by this Court as the leading case on the subject. See Straughn v. Tuck, 354 So.2d 368, 370 (Fla. 1977).

In Hausman, the Fourth District upheld the agricultural classification notwithstanding that the property was purchased as a speculative venture for the purpose of making a gain on resale. In fact, two years before the tax year in question, the then owners gave an option for a prospective purchase at more than two times the purchase price, but the option was never exercised. During the tax year in question, the agricultural activities on the land, conducted pursuant to a written lease agreement with the original owner, were the only significant activities, although the lease was subject to cancellation on 90 days' notice in the event the property was sold.

Based upon these facts, the Tax Assessor in Hausman argued that the Plaintiff's "use" of the land was not for agricultural purposes, but for the realization of a gain on resale and, therefore, such use disqualified the land for agricultural zoning under the terms of Section 193.461, of

the Florida Statutes (1969).* In rejecting the Tax Assessor's contention, the District Court stated:

> 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. 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.) The term "primarily" simply signifies that the agricultural use must be the most significant activity on the land where the land supports diverse activities. See Walden v. Borden Company, Fla.1970, 235 So.2d 300. The terms "bona fide" as used in the statute impose the requirement that the agricultural use be real, actual, of a genuine nature -- as opposed to a sham or deception. See Sapp v. Conrad, Fla. App.1970, 240 So.2d 884, 889 (dissent) and Smith v. Ring, supra.

268 So.2d at 409 (emphasis added).

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* The statute governing that case required that all lands which are used primarily for bona fide agricultural purposes shall be zoned agricultural. Fla. Stat. § 193.461 (3) (1969). Contrary to the Attorney General's Brief for Petitioner Department of Revenue at 14, then, the requirements that agricultural use be primary and bona fide were not "first injected into the statute in 1972." As noted in Straughn v. Tuck, 354 So.2d at 370, all subsequent enactments have been consistent, at least with reference to the use requirement. Consequently, the Hausman rationale is still applicable in determining when lands are used primarily for bona fide agricultural purposes.

Before Hausman v. Rudkin, the First and Second District Courts of Appeal reached the same conclusion in Smith v. Parrish, 262 So.2d 237 (Fla. 1st DCA 1972) and in Schooley v. Wetstone, 258 So.2d 483 (Fla. 2d DCA 1972), respectively.* In Smith v. Parrish, the First District upheld the Trial Court's determination that the property in question was actually being used for bona fide forestry operation notwithstanding the Tax Assessor's contention that it was purchased for the primary purpose of holding it for future real estate development and not for any bona fide agricultural purposes. In so holding, the Court stated:

> Appellants' sole contention is that the land involved herein was purchased by appellee and a group of investors for the primary purpose of holding it for future real estate development and not for any bona fide agricultural purpose. Appellants argue that appellee's use of the land for grazing cattle and growing timber is purely incidental to the primary purpose of land speculation and therefore does not constitute a bona fide agricultural purpose. Such a contention was rejected by this court in the case of Smith v. Ring in which we held that the fact that the land may have been purchased and was being held as a speculative investment is of

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* In Schooley v. Wetstone, 258 So.2d 483, 485, the Second District stated: "The contention by [the Appellant Tax Assessor] that the primary use of the lands is for speculative purposes is of no consequence if its actual use is for a bona fide agricultural purpose. Lanier v. Overstreet, Fla. 1965, 175 So.2d 521; Matheson v. Elcook, Fla.App. 1965, 173 So.2d 164; Smith v. Ring, Fla.App.1971, 250 So.2d 913; McKinney v. Hunt, Fla.App.1971, 251 So. 2d 6; St. Joe Paper Company v. Mickler, Fla. 1971, 252 So.2d 225; Conrad v. Sapp, Fla.1971, 252 So.2d 225; cf. Greenwood v. Oates, Fla. 1971, 251 So.2d 665."

> no consequence provided its actual use is for a bona fide agricultural purpose. The holding of this court was reaffirmed by the Supreme Court in Greenwood v. Oates in which it said:
>
> "However, once a 'forestry operation' has been established we expect that it would be a rare situation where the claim for agricultural assessment would not be 'bona fide'. For example, it is foreseeable that a party, acting in good faith, could invest in unimproved land, knowing its potential as a merchantable timber operation, utilize it as such, and yet anticipate increases in land values as well as deductions afforded on income tax schedules through depreciation and expenditures. The concern of the property owner with these incidental objectives would not disqualify his land for consideration as a bona fide forestry operation."

Smith v. Parrish, 262 So.2d at 238 (emphasis added).

The District Court's reversal of the Circuit Court finds additional support in Fisher v. Schooley, 371 So.2d 496 (Fla. 2d DCA 1979), in which the Second District reversed the Trial Court because both the Tax Appraiser and the lower court misconstrued the statutory requirement that land must be used for "bona fide agricultural purposes." As noted in Fogg, 397 So.2d at 947, the Court in Fisher considered the situation where property was bought at more than three times its agricultural assessment for purposes of shopping center development. Before the sale and as a condition thereof, the zoning on the property was changed from "agricultural" to "commercial." The zoning change occurred in 1971 before the effective date of Section 193.461(4)(a)(3) of the Florida Statutes (Supp. 1972). After the rezoning and purchase,

the new owner attempted to develop the property as a shopping center. The services of a land planner were engaged, and market, population, and traffic studies and surveys were done. Tentative commitments from prospective tenants of the planned shopping center were solicited. Early loan commitments were secured and financial preparation was done. The owner had every intention of devoting the property to future development as a shopping center as soon as possible. While engaged in these processes, the owner actually used the land for the growing of vegetables. Both before and after the sale, the property was leased to the same vegetable farmer who grew crops on it. In short, the property was being used for agriculture while the paper work was being done to build the shopping center. Although the lower court found that the owner, since he purchased the property, had not made bona fide agricultural use of the land, the District Court reversed on the basis that the evidence conclusively established a good faith commercial agricultural use and concluded that actual use was the determinative factor, rather than future motive or expectancy.

In opposition to these cases, the Property Appraiser and Department of Revenue cite Walden v. Borden Co., 235 So.2d 300 (Fla. 1970) and First America Development Corp. v. County of Volusia, 298 So.2d (Fla. 1st DCA 1974). In Walden, the Supreme Court determined that the Trial Court's judgment, as affirmed by the District Court of Appeal, was in conflict with those cases

that preclude summary judgment when there is a genuine issue of material fact. Walden 235 So.2d at 301. The issue of material fact in Walden was whether the phosphate company's property, under the applicable lease, was "primarily" being used for the required agricultural purposes. On the basis of the record presented, the actual use of the land was in dispute because the applicable lease reserved an easement on the property for the discharge of smoke fumes and other by-products that arose out of the phosphate operation. Thus, the question was whether the land was purchased for use in connection with the company's phosphate operation and was still being used for that purpose, even though it also accommodated an incidental use for agricultural purposes.

Borden's narrow holding was addressed by the Second District in both Atlantic Richfield Co. v. Walden, 277 So.2d 815 (Fla. 2d DCA 1973), and Schooley v. Wetstone, 258 So.2d 483, 485 (Fla. 2d DCA 1972). In Atlantic Richfield, the company claimed entitlement to an agricultural assessment of an extensive tract that its predecessor had purchased as a phosphate reserve. It was conceded that the present bona fide use of the property was a cattle ranch. Nevertheless, the Trial Judge denied the relief sought, on the authority of Borden. In construing Borden, the Second District said:

> We think the crucial factor in that case is missing in this one. There the Supreme Court held that there was sufficient evidence that the agricultural use was not primary, as the statute requires, and overturned a summary judgment in the taxpayer's favor. The Borden

> Company's lands were peripheral to an existing phosphate operation, and its lease excluded damages on account of injury done the lessee's agricultural operations by the lessor's industrial ones. Thus Borden stands for the proposition that a peripheral area necessary to the operation of a mine could make the agricultural use of that land secondary to the industrial purpose. If that is the case, a finding of primary agricultural use is unwarranted.
>
> This case involves land which has never been mined, and an owner whose intention to mine it was never carried out. That the land was acquired with the thought of mining it does not negate the bona fides of an agricultural use any more than does the anticipation of speculative profits. The case is therefore controlled by Greenwood v. Oates, Fla. 1971, 251 So.2d 665. See also Hausman v. Rudkin, Fla.App. 4th 1972, 268 So.2d 407, and cases therein cited.

277 So.2d at 815-16 (emphasis added).

Finally, both the Property Appraiser in its Brief and the Trial Court in its opinion below relied upon First American Development Corp. v. County of Volusia, 298 So.2d 191 (Fla. 1st DCA 1974), cert. denied, 312 So.2d 755 (1975). Although this case was decided in 1974, it has not since been cited by any Florida appellate court in an agricultural classification case. Moreover, it is unclear from the recitation of facts presented in the District Court's opinion whether the Plaintiff was actually in the process of marketing the property as lots in land installment sales promotion on the taxing date or conducted the agricultural use on the property in bad faith as a sham or deception. It is submitted that the First American case has little precedential

value and is limited to the findings of the Trial Judge as contained in that cause. It was in view of those findings that Hausman v. Rudkin and similar cases were deemed not controlling. 298 So.2d at 193.

In sum, the Circuit Court's finding on "good faith commercial use" rests primarily on its interpretation of the significance of the sales contract and the zoning efforts as indicating the intended future use. This is contrary to the controlling tests stated in Bass and the cases interpreting the tests over the years, including Hausman v. Rudkin. In addition, as discussed by the District Court in Fogg, the sales contract and the zoning efforts are specifically addressed by separate portions of the statute. Therefore, the disposition of these issues above should be sufficient to eliminate their use as factors in finding a lack of "good faith commerical use." That is, the creation of specific, separate sections of the statute in order to specify the significance and relevance of sale and zoning matters would be illogical and superfluous if actions related to those statutory sections were to be given one significance under those sections and yet another under the "good faith commercial use" section. This is the reasoning of the District Court in Fogg and it should be sustained on that basis alone.

II. THE DISTRICT COURT CORRECTLY REVERSED THE TRIAL COURT'S MISAPPLICATION OF SECTION 193.461(4)(c), BECAUSE NO SALE WITHIN THE MEANING OF THE STATUTE OCCURRED MERELY UPON THE CREATION OF THE VARIOUS CONDITIONAL SALES CONTRACTS, ALL OF WHICH EXPIRED.

A. The term "sale" does not include expired conditional sales contracts.

Use of the term "sale" to include conditional sales contracts that never close is contrary to the common accepted usage of the term and illogical within the context of the agricultural assessment statute itself.

Under established principles of statutory construction, the phrase "sale of land" requires an actual transfer of legal title by an appropriate instrument of conveyance for actual consideration paid.* A basic rule of statutory construction prescribes that courts construe words of common usage in their plain and ordinary sense, when used in a statute. See, e.g., State v. Cormier, 375 So.2d 852, 854 (Fla. 1979); Harper v. State, 217 So.2d 591, 592 (Fla. 4th DCA 1968), cert. disch'd, 224 So.2d 684 (Fla. 1969). Although no Florida case has construed the meaning

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* The Uniform Commercial Code similarly defines a "sale" of goods as "the passing of title from the seller to the buyer for a price." Fla. Stat. § 672.106(1) (1979). Although parties to a sale of goods may provide for the passing of title whenever they desire, Fla. Stat. § 672.401, the Respondent Foggs had no duty to transfer title to their land until both parties fulfilled the conditions laid down in these contracts. Since all four contracts expired without fulfillment of those conditions, the duty never arose, title never passed, and no sale ever took place.

of "sale," courts in other jurisdictions may offer some guidance. See Rolls v. Bliss & Nyitray, Inc., Nos. 80-82 & 80-260 (Fla. 3d DCA Nov. 3, 1981). Thus, in Dittman v. Nagel, 43 Wis. 2d 218, 168 N.W.2d 190 (1969), the Wisconsin Supreme Court rejected an argument that the acceptance of an offer to sell constituted a sale. Instead, the acceptance merely gave rise to a contract to sell--"an executory contract, to be performed in the future, [that], if fulfilled, results in a sale". Id. at 194 (quoting from 91 C.J.S. Vendor and Purchaser § 1(d) (1955) (emphasis added). The same passage emphasizes that "[the agreement to sell . . . is preliminary to a sale and is not the sale itself; . . . anything short of passing title is not a sale, but an agreement of sale". Id. at 194-95 (cases cited). Using similar language, the Supreme Court of Alabama has stressed the difference between a present actual sale and an executory agreement to sell that will eventually result in a sale only if performed. Ashurst v. Rosser, 153 So.2d 240, 243 (Ala. 1963). In the same vein are Henry v. Irwin, 401 Ill. 364, 82 N.E.2d 633, 638 (1948); Southwestern Improvement Co. v. Whittington, 193 So. 483, 486 (La. Ct. App. 1940); Lewis v. Bowman, 113 Mont. 68, 121 P.2d 162, 166 (1942). According to the common understanding of the word "sale" as reflected by these and similar cases, a transaction is not a sale unless both parties have performed their duties under the agreement of sale, transferring title for the present payment of price. Thus, the District Court in Fogg correctly concluded

that Section 193.461(4)(c) of the Florida Statutes "applies only to a completed sale of realty," in referring to a sale of land.

Reinforcing this conclusion is its consistency with other language in the statute. Context often illuminates or even determines meaning. See Third National Bank v. Impac Ltd., 432 U.S. 312, 320-21 (1977); Carraway v. Armour & Co., 156 So.2d 494, 495 (Fla. 1963). The rest of subsection (4)(c) of Section 193.461 permits an owner to rebut the presumption that his land is not "to be continued in bona fide agriculture," by showing "special circumstances." In Straughn v. K & K Land Management, Inc., 326 So.2d 421 (Fla. 1976), this Court decided that the language just quoted "should be read in pari materia with" subsection (3)(b), setting forth the criteria for determining whether agricultural use is bona fide. Among those criteria is the "purchase price paid" (emphasis added), reflecting the legislative intent that the statute apply to a completed sale rather than an executory agreement with an offering price not yet paid. Similarly, in Straughn v. Tuck, 354 So.2d 368 (Fla. 1977), the Court reiterated the duty of appraisers to take into account all factors enumerated in Section 193.011 when assessing property. Subsection (8) of 193.011 reads: "The net proceeds of the sale of the property, as received by the seller." In referring to "sale" and "sale price," then, the legislature means actual completed sales and prices paid, not contracts with conditions and anticipated prices that never materialize.

In upholding the constitutionality of Section 193.461 (4)(c), this Court used language suggesting that the statute applies only to a completed sale. In Straughn v. K & K Land Management, the Court noted that "[t]he rational presumption imposed by the Legislature is that the land purchased for three or more times its assesed agricultural value is not intended to be put to 'good faith commercial agricultural use' . . . ." 326 So.2d at 424 (emphasis added). The court spoke of land "purchased," using the past tense. The phrase "is not intended" refers to the intentions of the purchaser, whose intentions may reasonably be inferred from the purchase price he is willing to pay. The reference can hardly be to the intentions of the seller, who ordinarily intends not to make any use of the property after selling it and who in all cases will accept as high a sales price as possible, so that nothing about an owner's future use of the land could be inferred from his present intent to sell his land at a high price.

Even under the doctrine of equitable conversion an intended or attempted sale does not amount to a sale. If such a sale were complete or the contract enforceable without fulfillment of its express conditions, there would be no need for such a doctrine from equity. The very concept of an equitable conversion recognizes that legal title has not passed and that no legal sale has yet occurred. Invoking this doctrine and labelling the various contracts in this case "binding" does not bolster the Property

Appraiser's position. These contracts were subject to several conditions precedent beyond the control of either the buyer or the seller, including rezoning, financing, and approval for a development of regional impact. In Florida, such conditions make the contract not specifically enforceable. See, e.g., Merritt v. Davis, 265 So.2d 69, 70 (Fla. 3d DCA 1972). It is undisputed that every contract in this case expired without the fulfillment of all its conditions precedent. It is undisputed that neither legal title or possession ever passed to the would-be buyer. Moreover, expired contracts had no effect on the actual use of the land. The Property Owners continued to use their land for agriculture as they had for thirty years, both before and after the dissolution of the family corporation by which they had formerly held the property (R. 123). These facts put into perspective the Property Appraiser's emphasis on the doctrine of equitable conversion, which tactily recognizes that no sale in its legal or ordinary sense ever occurred. The illogical comment that "it does not matter whether a sale did or did not occur" in Petitioner's Brief at 19 suggests that the Property Appraiser wants to deprecate the significance of these facts in applying the statute. The Department of Revenue goes farther, "quite candidly" admitting that it "has some reservations about the trial court's ruling on this point." Brief for Respondent Department of Revenue at 15 (because if the buyer under contract to purchase has not taken possession of the land, even the doc-

trine of equitable conversion does not seem to justify taxing the would-be buyer). The District Court avoided an unreasonable interpretation of "sale" by holding that the trial court had erred as a matter of law in applying Section 193.461(4)(c) to a series of unenforceable conditional contracts that all expired and never constituted a sale.

B. A presumption of nonagricultural use imposed on a continuing owner solely because of expired sale contracts is irrational and therefore unconstitutional.

Ultimately, the Trial Court's position that an expired, unexecuted sales contract for agricultural land places a burden on the continuing owner to overcome a presumption of nonagricultural use must fail under the test used by this Court to uphold the general constitutionality of the statutory presumption in Section 193.461(4)(c). In Straughn v. K & K Land Management, Inc., the Court reviewed the constitutional test:

> The test for the constitutionality of statutory presumptions is two-fold. First, there must be a rational connection between the fact proved and the ultimate fact presumed. Tot v. United States, 319 U.S. 463 . . . (1943); United States v. Gainey, 380 U.S. 63 . . . (1965). Second, there must be a right to rebut in a fair manner. Goldstein v. Maloney, 62 Fla. 198, 57 So. 342 (1911); Black v. State, 77 Fla. 289, 81 So. 411 (1919).

326 So.2d at 424.

The Court in Straughn v. K & K Land Management found that there was "a rational connection" between the purchase price

actually paid and the probability of agricultural use because a buyer paying more than three times the land's agricultural value probably would not use the land for agriculture. For an owner who tries unsuccessfully to sell his land, however, no such "rational connection" exists. It simply does not follow from the willingness of someone to sell his agricultural land for more than three times its value that if no one will buy the land at such a price he will then cease to use the land for agricultural purposes. To impose such a presumption without a rational connection between the fact proved and the ultimate fact presumed is to fail the first constitutional test set forth in Straughn. See also Czagas v. Maxwell, 393 So.2d 645, 647 (Fla. 5th DCA 1981) (irrational presumption that parcel of land containing less than 20 acres could not be used for agriculture in good faith).

The Court in Straughn also found that the imposition of a statutory presumption on a new purchaser met the second requirement for constitutionality, because the new purchaser had "a right to rebut [the presumption] in a fair manner." A new purchaser, coming into possession of the land after having paid more than three times its agricultural value, is in a position to show why he paid such a high price even though he intends to continue the agricultural use. On the other hand, an owner who is willing to sell his agricultural land for more than three times its value has no way to "rebut" such a "presumption" imposed on him by a trial court. The Trial Court in Fogg held that mere willingness

to sell the land, shown by the formation of a sales contract that later terminates unexecuted, shows that the continuing owner harbors a desire to profit from the sale of his land and is therefore putting it to a nonagricultural "use." Even an owner who proves his continued actual use of the land for agriculture cannot rebut such a subjective characterization of intent. Instead of following the "actual use" test reaffirmed by this Court in Straughn v. Tuck, 354 So.2d 368, 370 (Fla. 1977) and Bass v. General Development Corp., 374 So.2d 479, 482 (Fla. 1979), basing classification solely on the actual "physical activity conducted on the land," the Trial Court applied a subjective and abstract concept of "use." Instead of imposing a fairly rebuttable presumption, the Trial Court applied a rigid rule of law, in effect. The District Court correctly reversed this misapplication of the statute, under the constitutional standards set forth in Straughn.

III. THE DISTRICT COURT CORRECTLY CONSTRUED SECTION 193.461(4)(a)3 TO AVOID AN UNCONSTITUTIONAL IMPOSITION OF THE STATUTE'S PRESUMPTION OF NONAGRICULTURAL USE ON LAND WHOSE ZONING STATUS CHANGES FROM ONE THAT PERMITS AGRICULTURAL USE TO ANOTHER THAT PERMITS ONLY AGRICULTURAL USE FOR THE PRESENT.

A. Adhering to the principle that the presumption of Section 193.461(4)(a)3 applies only to land whose zoning no longer permits its actual present use for agriculture, the District Court properly concluded that because rezoning had not affected the actual agricultural use of the Fogg Parcel, the statute did not require reclassification of the land as nonagricultural as a matter of law.

The District Court corrected the Trial Court's erroneous application of the law in holding that the Fogg Parcel had been rezoned "in total effect" (R. 375) to a nonagricultural use although its only permitted actual use as of the assessment date in question was agricultural. Section 193.461(4)(a)3 does not apply to every rezoning--the change must be "to a nonagricultural use." Since this provision of the statute employs a use standard, actual use remains the test of whether the land merits an agricultural classification. See Bass, 374 So.2d at 483, 485. In the context of zoning, a reasonable modification of the test is to determine the nature of the actual uses permitted by the zoning status of the property. The District Court properly concluded that since the PUD zoning of the Fogg Parcel permitted its continued actual use for agriculture, the change in zoning status did not suffice to trigger the presumption raised by Section 193.461(4)(a)3, which would have required reclassification of the land as a matter of law. 397 So.2d at 950.

Existing zoning regulations continue to apply to land included in a proposed planned unit development until the development receives final approval and the final plan is filed of record in accordance with the local ordinance. Doran Investments v. Muhlenberg Township, 10 Pa. Commw. Ct. 143, 309 A.2d 450, 457 (1973) ("[i]t is true that existing zoning regulations continue to apply to the land included in a proposed planned residential development until the development plan receives final approval

and is filed of record"). Consistent therewith, the P.U.D. ordinance of the City of Miramar, like most planned unit development ordinances, mandates a complex process of determining what use can be made of the land within the development area. That is, unlike zoning ordinances of a traditional nature, the Miramar P.U.D. ordinance requires many steps in the process of determining appropriate land use, and the initiation of that process does not alter the prior permitted zoning use. In other words, the P.U.D. "rezoning" process begins with a P.U.D. application, but the existing permitted use of the land does not change (the agricultural use is not legally discontinued), until the P.U.D. process is completed much later. If the process is not completed fully to the end, the zoned use of the land never changes from the use that was permitted at the beginning of the process. Hence, "rezoning a nonagricultural use" within the meaning of F.S. §193.461(4)(a)3 is not accomplished until the P.U.D. process is complete or until the agricultural use is no longer ordered.

In Harbor Ventures, Inc. v. Hutches, 366 So.2d 1173 (Fla. 1979), this Court held that Section 193.461(4)(a)3 applies only when land zoned agricultural is changed to a nonagricultural zoning at the request of its owner and that the statute was not applicable where land was zoned from one nonagricultural use to another nonagricultural use. 366 So.2d at 1174.* Fogg poses the

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* As noted in the Trial Court's decision, the City Council, on November 19, 1973, passed Ordinance No. 73-19, (Continued)

narrower question of whether Section 193.461(4)(a)3 applies when land is zoned from an agricultural use to a nonagricultural classification but only agriculture is permitted pending the completion of the zoning process. Here, not only the actual use of the property continued in agriculture notwithstanding the change in the zoning classification from "A" to "P," but under the terms of the Miramar Planned Unit Development Ordinance, no other use was permitted until the City granted approval of the final development plan (i.e., the final plat) (R. 20, 97, 101).* In fact, the City of Miramar, through its Mayor, advised the Foggs in writing that use of their land for other than agriculture would not be allowed "until the completion of the Development of Regional Impact process and additional completion of platting" (R. 97; Plaintiff's Exhibit No. 12).

Hypothetically, the following situations can arise under Section 193.461(4)(a)3:

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entitled An Ordinance Granting Application No. 072-333 For Rezoning From "R-1B" Residential District and "A" Agricultural District to "P" Planned Unit Development District (R. 372). The Record on appeal, however, does not indicate how many acres of the Fogg Parcel were previously zoned "R-1B" or when the property was so zoned. Consequently, while this Court's ruling in Harbor Ventures may apply to the portion zoned from "R-1B" to "P," the remaining acreage is still in dispute.

* As noted in the Statement of the Facts, the Final Development Plan was not approved as of the relevant tax dates (R. 38-39).

1. Property zoned for an agricultural use is reclassified to a nonagricultural zoning under which the agricultural use is neither permitted nor condoned. This is the situation in Lauderdale v. Blake, 351 So.2d 743 (Fla. 3d DCA 1977). Under such circumstances, the statute applies even though an agricultural use continues on the land.

2. Property is rezoned from an agricultural designation to a nonagricultural designation under which agricultural uses are also permitted, or, in the case of Fogg, agricultural use remains the only permissible use, pending the completion of the rezoning process. This is not the factual situation considered by the Third District in Lauderdale. As stated in Lauderdale, the Court's ruling was based upon the particular zoning "provision and the facts in the appeals sub judice." 351 So.2d at 743. Rather, the situation in Fogg more closely resembles Harbor Ventures, in which this Court declared that the Legislature could not have intended to deny the benefits of the Greenbelt Law where a clear bona fide commercial agricultural use was being made of land that ostensibly was rezoned from one nonagricultural use to another nonagricultural use. 366 So.2d at 1174. As in Harbor Ventures, the Fourth District correctly construed Section 193.461(4)(a)3 in Fogg to avoid what would otherwise be an unconstitutional result.

B. In light of this Court's decision in Bass v. General Development Corp., the Fogg Parcel could not be considered rezoned to a nonagricultural use except under an unconstitutional application of Section 193.461(4)(a)3.

1. Since the decision in Bass held unconstitutional the "platting" subsection of Section 193.461, Bass contains applicable law for this Court's determining the validity of the analogous "zoning" subsection of 193.461, as applied by the Trial Court.

The Trial Court's application of Section 193.461(4)(a)3 of the Florida Statutes could not stand constitutional scrutiny, in light of this Court's subsequent decision in Bass v. General Development Corp., 374 So.2d 479 (Fla. 1979).* Although the District Court of Appeal decided not to reach the issue of constitutionality of subsection (4)(a)3, the Court carefully avoided any unconstitutional application of the zoning statute by concluding that the admittedly "not actually completed" rezoning (Trial Court's Order at R. 375) had had no "effect on the actual

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* In Bass, the Court struck down Section 193.461(4)(a)4 of the Florida Statutes; at issue in Fogg is the validity of Section 193.461(4)(a)3. The two subsections provide that

> (4)(a) The property appraiser shall reclassify the following lands as nonagricultural:
>
> ********
>
> 3. Land that has been zoned to a nonagricultural use at the request of the owner subsequent to enactment of this law;
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> 4. Land for which the owner has recorded a subdivision plat subsequent to the enactment of this law.

use of the property in agriculture." Fogg v. Broward County, 397 So.2d 944, 949 (Fla. 4th DCA 1981). From this point of view there was no need to reach the constitutional question. The District Court obviated that need by choosing an available constitutional construction of the zoning statute. See, e.g., Aldana v. Holub, 381 So.2d 231, 237-38 (Fla. 1980). If this Court could not approve the District Court's approach, however, the Respondent Property Owners would urge that the Court consider the question in light of Bass, because applying the law of that case would certainly affect the outcome in Fogg.

Although the Property Owners have repeatedly raised the question of the constitutionality of Section 193.461(4)(a)3 only since the time of the Bass decision on 193.461(4)(a)4 after completion of the trial in Fogg, the holding on the analogous issue in Bass provides law for an appellate court to apply even now. As this Court declared in Florida East Coast Railway v. Rouse, 194 So.2d 260 (Fla.1966), an appellate court must apply any change in case law up to the time of the appellate decision, whether or not the issue was raised at trial:

> [N]otwithstanding the failure of the parties, at the trial level, to attack the validity of the statute, the appellate court was required to apply the law as it existed at the time of appeal.

Id. at 262. In Florida East Coast Railway the Court specifically reversed the decision of the Third District Court of Appeal "because the appellate court thought the point, not raised at the trial level, could not be considered on appeal." Id. at 261-62.

Moreover, although the dissent urged that a party could not raise a constitutional issue for the first time on appeal unless it involved fundamental error, id. at 263, the majority ignored that argument. The Court remanded the case for a new trial merely because a supervening constitutional decision between the time of trial and the date of the Third District's decision had wrought "a change in the law which affected the result." Id. at 262. The Court laid down no technical requirement that the effect on the result involve fundamental error.* To the contrary, the Court quoted at great length from an appellate decision in General Capital Corp. v. Tel Service Co., 183 So.2d 1 (Fla. 2d DCA 1966) (per curiam), in which the Court had remanded a case merely because legislation enacted after trial "may have some effect on [the statute applied below]." See 194 So.2d at 262 (quoting from General Capital, 183 So.2d at 2).

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* Even if the Court were to apply new case law only when failure to do so would amount to fundamental error, Bass would apply to the Fogg case unless the Court affirmed the District Court's holding on the application of the zoning statute. Fundamental error goes to the foundation or merits of an action. Sanford v. Rubin, 237 So.2d 134 (Fla. 1970) An error is fundamental if "the result would have been different" had the error been avoided. Marks v. Delcastillo, 386 So.2d 1259, 1267 n.15 (Fla. 3d DCA 1980). To the extent that the Trial Court relied on the zoning statute, the result would have been different if the Court had scrutinized the subsection under the principles of Bass. See also Palm Beach County v. Green, 179 So.2d 356, 362-63 (Fla. 1965).

Recently, this Court has reiterated the doctrine of Florida East Coast Railway. In Linder v. Combustion Engineering, Inc., 342 So.2d 474 (Fla. 1977), the Court pointed out that in some instances it specifically rules that a new decision will have only prospective application or that it should be applied according to some determined schedule. But

> [i]n the absence of such a determination, the doctrine [i.e., the new case] would be applied at the appellate level even though the question was not raised before the trial judge. We have held that on appellate review the issues must be resolved in accordance with the case law in effect at the time the appellate decision is rendered. Florida East Coast Railway Company v. Rouse, 194 So.2d 260 (Fla. 1967); Clark v. Lowe, 261 So.2d 567 (Fla. 4th DCA 1972).

Linder, 342 So.2d at 475-76. In Linder, the Court formulated a special formula for the application of the decision at issue, because of its source as a certified question from a federal court and because of its drastic effect on so "many pending negligence cases." Id. at 476. Bass, however, arose through the Florida courts. Ad valorem tax cases involving Section 193.461 (4)(a)3 are far fewer than the negligence cases discussed in Linder. No good reason exists for not applying in this case "the general and Florida rule . . . that an appellate court . . . will dispose of the case acording to the law prevailing at the time of the appellate disposition," rather than the law at the time of trial. Florida East Coast Railway, 194 So.2d at 262. See also Hendeles v. Sanford Auto Auction, Inc., 364 So.2d 467, 468 (Fla.

1978) (per curiam) (following Florida East Coast Railway); Florida Forest & Park Service v. Strickland, 154 Fla. 472, 18 So.2d 251, 253 (1944) (en banc) (decision of Supreme Court ordinarily has both retrospective and prospective effect unless expressly limited to prospective effect).

Furthermore, the decision in Bass striking down an analogous provision to the zoning statute at issue here makes that case law applicable to the present appeal. The "applicable law" changed by an intervening decision need not be precisely on point, but only "controlling or material to the merits of [the later] action." Ingerson v. State Farm Mutual Automobile Insurance Co., 272 So.2d 862, 864 (Fla. 3d DCA 1973). Thus, in Williams v. Estate of J.D. Long, 338 So.2d 562 (Fla. 1st DCA 1976), an action brought by allegedly illegitimate children asserting their right to inherit from their natural father, the Court applied the principle that in a suit for support, a married woman could testify that her children are illegitimate. This Court's decision in Gammon v. Cobb, 335 So.2d 261 (Fla. 1976), had established that principle after the trial in Williams. 338 So.2d at 566. The principle was the same in the support action as in the inheritance suit, although the contexts were merely analogous. Involving analogous subsections of Section 193.461, Bass and Fogg pose the same kind of constitutional issue and call for application of the same principles going to the merits of the case. The decision in Bass is therefore material and applicable to the present disposition of the Fogg case.

2. As applied by the Trial Court, Section 193.461(4)(a)3 violates principles of due process and equal protection by imposing an irrational and irrebuttable presumption.

As in Bass, this case involves an unconstitutional application of a subsection of Section 193.461 imposing an irrebuttable presumption that land (platted for subdivision, in Bass, or rezoned at the request of the owner, in Fogg) is no longer used for agriculture. The arguments set forth by the Court in Bass apply with equal force against the Trial Court's construction of subsection (4)(a)3 in Fogg.

First, as the Trial Court applied the statute, the automatic denial of agricultural classification under Section 193.461 (4)(a)3 to land otherwise entitled to such classifiction solely because of the obtaining of rezoning violates the due process clauses of the Florida and Federal Constitutions, under the Bass approach. In Bass, the Court listed the criteria by which it tested the constitutionality of Section 193.461(4)(a)4. The same three criteria should apply to the irrebuttable presumption imposed in Fogg:

> (1) whether the concern of the legislature was reasonably aroused by the possibility of an abuse which it legitimately desired to avoid; (2) whether there was a reasonable basis for a conclusion that the statute would protect against its occurrence; and (3) whether the expense and other difficulties of individual determinations justify the inherent imprecision of a conclusive presumption.

374 So.2d at 484. As acknowledged in Bass, the legislative desire to extend preferential tax treatment only to individuals who in fact are using property for agriculture is reasonable. Id. But Section 193.461(4)(a)3, like Section 193.461(4)(a)4, fails to meet the second criterion, since it is not rationally related to the achievement of that goal. There is no rational connection between the fact proved and the ultimate fact presumed. See id. It is simply not reasonable to presume that a landowner who has done no more than obtain a zoning change has ceased to use his property for agricultural purposes, or that such a zoning change precludes further agricultural use. Obtaining a zoning change has even less to do with the present use of property than has an owner's filing of a subdivision plat.

Indeed, the infirmity triggering the irrebuttable presumption is not the rezoning per se (i.e., representing a future new use of the land) but the fact that the owner requested the rezoning. If a non-owner (lessee or assignee) requests and obtains rezoning to a nonagricultural classification, the subsection is not triggered. But mere ownership cannot constitutionally affect character and use of property for ad valorem tax purposes:

> It is true that at some point in the development of most subdivisions the character of the land therein changes and the lots may increase in value, but the change is not dependent upon who owns the lots. Indeed, in some subdivisions, such a change might not occur until long after all the lots have been sold by the developers. Any change in the value of lots in a subdivision can be measured by the same criteria used for other

> lands--the presence of roads, sewers, and telephone connections; improvements; the location; and many other factors, including those listed in Fla. Stat. § 193.011, F.S.A. Ownership in one party or another, however, would not be a valid criterion.

Interlachen Lake Estates, Inc. v. Snyder, 304 So.2d 433, 435, (Fla. 1973) (emphasis added).

Any rational nexus between land use changes, ownership, and the criteria of Section 193.461 becomes even more remote when viewed in relation to the Local Government Comprehensive Planning Act. See Fla. Stat. §§ 163.3161-.3211 (1979). Under this Act, zoning become a mere tool to implement the land use element of a comprehensive plan. See id. §163.3201. Once adopted, all development orders and regulations must conform to the comprehensive plan. Id. § 163.3194. Thus, land uses may be changed as part of the comprehensive planning process from agricultural to residential, and thereafter all actions by both the government and the private sector must conform to Section 163.3194. Yet the tax exempt status of lands classified as agricultural under Section 193.461 is not affected by a comprehensive plan (regardless of the land use designation) so long as the land meets the criteria set forth in Section 193.461. See Fla. Stat. § 163.3194(4) (1979). A landowner, then, is free to request and obtain the reclassification of his land from agricultural to residential as part of the comprehensive planning process and not lose his tax exempt status. Subsequent rezoning becomes a ministerial act that merely implements the land use element of the plan.

Another reason why rezoning has even less to do with actual use of land than platting has is that, as a practical matter, recording a subdivision plat usually occurs after or at the same time as a change in zoning. An illustration is the Miramar Ordinance in question (R. 395-596, 400-461). The Property Appraiser has argued that a change in zoning occurred before platting, i.e., when the Fogg property was reclassified from "A" (agricultural) to "P" (planned unit development district) in conjunction with the adoption of the Master Development Plan. On the other hand, the Property Owners argue that zoning to a nonagricultural classification under the Miramar Ordinance could not have occurred until after adoption of the final plat (i.e., permitting the property to be used for the purpose for which it was zoned). Under either argument, the same constitutional infirmity exists. If platting has little to do with actual use of land, then rezoning by itself also has little to do with actual present use. Thus, the zoning presumption under (4)(a)3, like the platting presumption under (4)(a)4, fails to satisfy the second criterion of the due process test.

Similarly, both presumptions fail to satisfy the third criterion, since the provision for rebuttal under the "sale" rule of subsection (4)(c) shows "that there is a reasonable alternative means of making the determination of whether platted [or rezoned] land is continuing to be used for agricultural purposes." Bass, 374 So.2d at 485. The basis for such rebuttal

would be a showing that actual present agricultural use of the land was continuing, since Section 193.461(4)(a)3 implicitly incorporates a use standard ("zoned to a nonagricultural use") even more clearly than subsection (4)(a)4. See id.; Harbor Ventures, Inc. v. Hutches, 366 So.2d 1173, 1174 (Fla. 1979). The Trial Court applied its own version of a use standard, finding that the Foggs' actual physical uses of the land "were only incidental" in comparison with the "rezoning and development [uses] of the land by the purchaser after its sale" (R. 375). But although not constitutionally mandated for tax classification, the use standard must be applied constitutionally once chosen by the legislature. Bass, 374 So.2d at 485. In applying the use standard, the Court has consistently held that actual present use, rather than intended future use, is controlling. See id.; accord, Harbor Ventures, 366 So.2d at 1174; Roden v. K & K Land Management, Inc., 368 So.2d 588, 589 (Fla. 1978). Despite the failure of subsection(4)(a)3 (like (4)(a)4 in Bass) to provide for fair rebuttal of a presumption that the land is no longer used for agriculture, the Trial Court imposed such a presumption, in effect, by concluding that the Fogg Parcel was "in total effect rezoned" even if the rezoning was "not actually completed" (R. 375). Not mere rezoning, but rezoning to a nonagricultural use, is necessary before subsection (4)(a)3 may apply. If the Trial Court's implicit construction of this statute as raising a presumption of nonagricultural use is correct, the failure of

subsection (4)(a)3 (like (4)(a)4) to provide for rebuttal "renders its test for eligibility for agricultural classification one of intended future use, rather than actual agricultural use as of the assessment date." Bass, 374 So.2d at 485. Furthermore, such lack of rebuttal even precludes showing that agriculture was the only permitted use pending completion of the zoning process. The lack of a curative rebuttal provision thus underscores the irrationality of such an application of the statute and highlights the statute's failure to meet the requirement that the administrative expense and inconvenience of individual determinations justify the imprecision of an irrebuttable presumption. On both grounds, such an application of the statute violates due process.

Even if Section 193.461(4)(a)3 made actual agricultural use of land irrelevant to its classification, the statute still would violate the Constitution, by denying equal protection. Having provided generally for classification based on actual agricultural use, the legislature may not

> singl[e] out a class of property owners and classify[ ] their land according to a standard different from that applied to other real property owners unless there exists a valid and substantial reason for this disparate treatment.

Bass, 374 So.2d at 485.* In the Fogg case, the Trial Court's finding that the land had been "rezoned" rested on an intepretation of "use" as including the zoning request itself and the paperwork needed to prepare for future development. If no other construction were possible, the zoning statute would represent an attempt by the legislature to single out certain owners for a treatment based on future potential use rather than present actual use. A request for rezoning does not in itself change the present use of the land. It merely suggests the future use that the taxpayer intends to make of the eventually rezoned lands. Yet actual present use remains the test when the legislature chooses a use standard at all. Id. The Trial Court's failure to apply that test to the Appraiser's denial of agricultural classification for the Parcel under Section 193.461(4)(a)3 stands in stark contrast to the consistent application of that test by other courts construing Section 193.461. See, e.g., Straughn v.

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* As this Court pointed out in Bass, such a reason for not employing a use standard did exist in Rainey v. Nelson, 257 So.2d 538 (Fla. 1972), in which the Court sustained Section 193.461(4)(b). That provision permits the denial of agricultural classification for property bounded by "urban or metropolitan development" if "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." In that context, the agricultural use of lands that the legislature generally sought to promote by enacting Section 193.461 loses its value, and abandonment of the actual use test is proper for that situation. No similar justification for applying another test appears in the present case.

Tuck, 354 So.2d 368 (Fla. 1977) (Section 193.461(3)(b)); Department of Revenue v. Goembel, 382 So.2d 783 (Fla. 5th DCA 1980) (Sections 193. 461(3)(b) & (4)(c)); Hausman v. Rudkin, 268 So. 2d 407 (Fla. 4th DCA 1972) (Section 193.461 generally); Schooley v. Wetstone, 258 So. 2d 483 (Fla. 2d DCA 1972) (Section 193.461 generally). Absent some "valid and substantial reason for this disparate treatment" under the Trial Court's construction, the statute violates the equal protection clauses of the state and federal constitutions. See Bass, 374 So. 2d at 485.

Of course, an alternative interpretation of Section 193.461(4)(a)(3) is possible. Proper emphasis on the phrase "zoned to a nonagricultural use" led this Court to construe the statute as inapplicable to a parcel already zoned to a nonagricultural use and thereafter rezoned to another nonagricultural use. Harbor Ventures, 366 So. 2d at 1174. The District Court in Fogg concluded by analogy with the approach of Harbor Ventures that the statute does not apply when rezoning has no effect on the actual present agricultural use of the land because the rezoning is "from one designation where agriculture [is] permitted to another designation where agriculture [is] also permitted." 397 So. 2d at 950. Thus, such rezoning does "not require the reclassification of the property as nonagricultural as a matter of law," and the District Court's choice of this permissible construction of the statute avoided the unconstitutional effects of the Property Appraiser's approach.

CONCLUSION

For the reasons stated above, Respondent Property Owners ask that this Court discharge the writ of certiorari and affirm the opinion of the District Court of Appeal in its entirety.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief was hand-delivered this 3rd day of December 1981 to GAYLORD A. WOOD, JR., 304 SW 12th Street, Fort Lauderdale, Florida 33315, and to E. WILSON CRUMP, III, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32304.*

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*Copies have also been sent by mail this date to all Amicus.