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IN THE SUPREME COURT OF FLORIDA

CASE NO. 60, 759

WILLIAM MARKHAM, as
BROWARD COUNTY PROPERTY APPRIASER

Petitioner,

-vs-

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

Respondents.

INITIAL BRIEF ON THE MERITS OF PETITIONER, WILLIAM MARKHAM, AS BROWARD COUNTY PROPERTY APPRAISER

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STATEMENT OF THE CASE

This case arises under this Court's certiorari jurisdiction. Petitioner, William Markham, is the Property Appraiser of Broward County, and was a party Defendant in the trial Court. Respondents, E. C. Fogg, III; Alan S. Fogg and Elizabeth Fogg Lane were Plaintiffs in the Circuit Court of the Seventeenth Judicial Circuit for Broward County. The remaining Respondents were nominal Defendants in the trial Court.

Petitioner had denied an agricultural classification which Respondents Fogg had applied for in 1974 and 1975. Respondents, Fogg, exhausted their administrative remedies before the Broward County Property Appraisal Adjustment Board, which denied them relief. They timely filed a civil action to contest the denial of the agricultural classification on the 270 acres of land. Trial was held before the Court, the Hon. Lamar Warren, who entered final judgment in favor of Petitioner and against Respondents, Fogg. Respondents appealed to the District Court of Appeal, Fourth District, which reversed the Final Judgment and directed further proceedings not inconsistent with its Opinion.

References in this Brief to the Record on Appeal in the District Court of Appeal and this Court shall be R-(page number). References to the Appendix to this Brief shall be A-(page number). Unless specifically mentioned otherwise, references to Respondents shall mean only the Foggs and not the Department of Revenue or Broward County.

STATEMENT OF THE FACTS

Respondents applied for agricultural classification for the years 1974 and 1975 on 270 acres of land, bounded on the east by a major thoroughfare, University Drive; on the south by Miramar Boulevard, an east-west street that serves an immediately adjoining residential subdivision known as The Knolls; on the west by Douglas Road, and on the north by Pembroke Road. The area is generally developing in residential uses; University Drive is a major north-south thoroughfare in Broward County.

Respondents acquired title to the property when the corporation that had previously owned the property, Land O'Sun Investment Company, was liquidated in 1971. Their father obtained Class "A" stock worth $1,000,000; Appellants obtained the land. (R-124) Respondent E. C. Fogg III testified that "they" (meaning himself, his brother and sister) had owned the property "since 1943", and that "they" had paid $75,000 for it. (R-113). Respondents' cost basis for the property was, at a minimum, a mortgage to Connecticut Mutual Insurance Company for $580,000 which encumbered it at the time of the liquidation. (R-422) While Respondents stated that the mortgage had nothing whatsoever to do with the property, they considered the interest payable on this mortgage to be an offset against the 'agricultural' income received from a billboard lease, the horse pasture lease, and the lease to a cattleman. (R-468)

Petitioner, William Markham, determined that the Respondents were not primarily using the property for bona-fide commercial agriculture, as they must do to qualify for the agricultural classification. While Respondents' predecessors in title had used the property in connection with the Land o'Sun dairy, Appellants in 1972 decided to sell the property

and leased all but 100 acres to Joseph Bregman, who ran cattle on that portion of the land. This was a different 'agricultural' operation than that which had theretofore been conducted on it. Mr. Bregman paid $10,200 per year to use the land (R-123), and the owners of the pleasure horses who board their horses on the land and the billboard company paid the difference between that amount and the approximately $20-30,000 received each year by Respondents. (R-468) Respondents' accounting shows a net loss of from $4,500 to $12,000 a year, including that mortgage interest. (R-468) Approximately 100 acres of the land was leased out to the owners of pleasure horses who graze them on the property. The Foggs own no horses; they are owned by young people who ride them for pleasure. The property is not of such a size as to require using horses in connection with the cattle operation. Donnelly Sign Company leases a portion of the property for billboards on University Drive, none of which have anything to do with the alleged agricultural use of the land. (R-148, 168) The foregoing constitutes the 'agricultural' uses of the land, which the trial Court termed "minimal at best". Now, let us examine what else was happening to this property.

On December 8, 1972, Respondents contracted to sell the land to Cal-Florida Corporation for a price of $26,426 per acre; a total of $7,135,111.61. Paragraph 4 of the contract provided that the transaction was subject to the Purchaser being able to obtain all necessary zoning, zoning variances and building permits from the City of Miramar, or other governmental agencies exercising jurisdiction over the property, and Purchaser's determining to its satisfaction that adequate sewage and water services and other utilities are available to the property line, or can otherwise be arranged. The buyer had until December 8, 1973 to

accomplish these conditions and determinations. Paragraph 6 of the contract required all of the conditions mentioned in Paragraph 5 to be accomplished:

> pursuant to and in accord with a Land Use Plan to be developed by Purchaser with the co-operation of Seller and subject to the approval of Seller, which approval shall not be unreasonably withheld, and in this regard, Seller agrees to deliver or make available to Purchaser all surveys, topos, engineering studies and reports, and such other preliminary or planning work as has been done on the property and which is in Sellers' possession or available to Seller. (page 3)

Paragraph 7 of the contract is highly indicative of the non-agricultural purposes both Buyer and Sellers had in mind for the land, as it clearly states the Foggs' continuing obligations under the contract to hasten its approval for a residential development:

> 7. Seller shall execute such subdivision plats, Planned Unit Development applications, or similar type development plans or plats, zoning or variance petitions, or applications and take such other steps and perform such other acts as may reasonably required...

Paragraph 8 of the Contract required Cal-Florida to diligently pursue the conditions of the contract, to prepare a Land Use Plan, and after its approval by the Foggs, to pursue "with due diligence" all zoning and other matters in order to meet the preconditions and determinations to which the contract is subject.

In Paragraph 9 of the contract, the Foggs and Cal-Florida agreed to co-operate with regard to the drainage and grading of the property, so as not to cause drainage into the Foggs' 31-acre parcel in the northeast corner of the property which they retained. It was contemplated in the contract that fill taken from one party's lands might be used on the lands of the other, in which event the party receiving the fill would pay nothing for it, but only for the cost of moving it.

Paragraph 20 gave Cal-Florida an option to purchase the 31-acre commercial parcel in the northwest corner of the property at a price to be agreed upon later by an independent appraiser, but not less than $75,000 per acre.

E. C. Fogg III testified that the Foggs were in no way compelled by the City of Miramar to consent to the rezoning applications which the buyer was going to submit; it was to the Foggs' benefit to see that the purchaser obtained its rezoning so that the sale would close. (R-131, 132)

E. C. Fogg III further testified that no one from the City of Miramar nor from any other governmental agency required that these paragraphs be placed in the contract; it was the buyer's idea. Mr. Berns, President of University Park Corp., agreed.

Acting in accordance with its rights under the 1972 contract, on April 16, 1973, Cal-Florida Corporation requested the City of Miramar rezone the property from agricultural to Planned Unit Development, a non-agricultural zoning classification. (R-384, 518) Respondent Alan Fogg signed the application, certifying that he was the owner of the subject lands, and that he had authorized the petitioner to make and file the petition for rezoning. E. C. Fogg, III acknowledged that when Alan Fogg signed this application, he was acting not only for himself, but also for the other two owners. (R-132, R-517)

Mayor Rosen of Miramar testified that it is the standard procedure of the City to require that the owner of property join in the petition if the owner is not the applicant. He has never seen an application for rezoning in which the application was not joined in by the owner. He verified that this zoning request was in no way initiated by the City of Miramar. (R-176) If an application for rezoning were made

by an optionee, or a mortgagee, the City would also require the owner to join in the application. (R-99, 175)

The application was considered by the Advisory Planning Zoning and Variance Board of the City, which on May 1, 1973, recommended approving the rezoning. (R-269) The City Commission formally approved the application for rezoning and zoned the lands "P" by Ordinance 73-19, on November 19, 1973.

The City Ordinance No. 68-4 provides procedures for rezonings to Planned Unit Development. The text is included in the Record at R-336-349, see Paragraph E, at R-343, for the procedure for rezoning to Planned Unit Development. The property was rezoned by Option "B"--Master Development Plan (Overall Plan). The City of Miramar, by Resolution No. 73-149, approved the Master Development Plan. (R-274) Respondents contended vigorously in the trial Court and District Court of Appeal that because there were contingencies in the rezoning that had not been met as of 1974 or 1975, the property had not really been 'rezoned'. Under Respondents' view of the Miramar zoning procedures, you didn't really have a 'rezoning' until such time as you actually began turning the earth. The District Court of Appeal found that there was ample evidence in the record to support the trial Court's finding of fact that a rezoning had in fact occurred in 1973, thus meeting the criteria of Sec. 193.461(4)(a)(3), F.S.

Even though the December, 1972 contract was not due to expire by its terms until December 8, 1973, and apparently, about the same time of the favorable consideration of the zoning request by the Advisory Planning & Zoning Board of Miramar, on May 1, 1973, Respondents contracted with Arthur J. August, as Trustee, or his nominee, for purchase of a smaller, 160 acre tract out of the overall 300+ acre tract, for $6,342,321.42.

(R-452-461) That contract called for a closing on March 1, 1974. The basic terms and conditions were identical to the December 8, 1972 contract. (R-490-502)

That contract apparently did not close, for on April 30, 1974, a new contract was signed between Respondents as sellers, and University Park Corp. as buyer. (R-434-451) It is interesting to note that during the short 'hiatus' period when apparently no contract was in effect, the Development of Regional Impact application was filed with the South Florida Regional Planning Council, indicating that neither the Foggs nor the University Park Corp. were too concerned about the lack of a formal contract; they were committed to proceeding with the D.R.I. process, as it was to their mutual benefit. (R-473-481) The April 30, 1974 contract increased the price from $7,135,111.61 to $7,814,198.08. Martin Berns, President of University Park Corp., testified that the increased purchase price was basically capitalized interest at the rate of 4% per annum. (R-76) E. C. Fogg III not unreasonably wanted some money before they would renew the agreement, and that this is why there was to be paid $400,000 under the April 30, 1974 contract. (R-434, 448) Under that contract, University Park Corp. borrowed $400,000 from City National Bank, paid it to the Foggs, and received a deed to a portion of the 270 acres which was delivered in July, 1974. (R-488) University Park Corp. did not have the funds to consummate the contract, and the mortgage with City National Bank was in default at the time of trial in December, 1977. (R-43)

The April 30, 1974 contract was supposed to close on December 31, 1974. However, by subsequent agreement, that date was extended to

June 31, 1975. No closing was held under that contract except for the previously-mentioned closing on Parcel "8", 12 acres of the P.U.D. lands. On October 28, 1975, the Foggs and University Park Corp. entered into still another contract for the remaining 258 acres, which contract did not close, but expired January 3, 1977; however, a new contract was signed in May, 1977 and amended in July, 1977. (R-70)

It should be noted that the Foggs were legally obligated to convey the subject lands to University Park Corp. throughout the years 1974 and 1975, according to the contracts; limited only by the financial condition and ability of the buyer to perform. The Foggs had voluntarily placed it beyond their control as to whether or not they were able to continue with any use (or even ownership) of the land.

One magic elixir that enabled the financially-troubled University Park Corporation to bring the deal to fruition was an ingenious financing device. A drainage district from the boom-time days of the 1920's, the Hollywood Reclamation District, was approached to see if it would issue bonds to pay for the improvements to be made to the land: such items as fill, road grading and construction, street lights, sanitary sewers, water, and the like. (R-135) University Park Corp. made the application for these improvements, asking the Hollywood Reclamation District to issue bonds in the face amount of $13,500,000. The ever-cautious Foggs did not join in the application, but did agree to subordinate their lands to the bonds, when the bonds were sold. As of the date of the trial of this cause, some $2,500,000 of the bonds had been marketed. (R-74) In connection with these development improvements, the "guitar shaped lake" shown on the Master Plan was conveyed--BY THE FOGGS--directly to the Hollywood Reclamation District. (R-73) At the time of trial, the digging of that lake by HRD had commenced, even though the

University Park Corp. never took title to the land. (R-73) University Park's President, Mr. Berns, explained that even though Appellants conveyed this land to the HRD without consideration to themselves, the consideration was that the land so dedicated was to be paid for as part of the overall purchase price paid for the entire tract in the 1977 contract. (R-79)

E. C. Fogg III testified that the purpose of the bond issue was to pay for non-agricultural improvements to the land such as roads, bicycle paths, water and sewer lines, electrical lines, and the fill for these improvements. (R-136) Respondents consented in writing to the bond issue procedure sometime before June 16, 1975. (R-137) They advised the attorney for the District, Mr. Easthope:

> Please be advised that for the record, we are in favor of the assessment as outlined in these papers against our property, and would hope that the Reclamation District will proceed with the work outlined, both in these papers and in the overall plan, as expediently as possible. (R-137)

A significant revelation made by Mr. Fogg at the trial was that the 31-acre tract in the northeast corner of the property, not under contract to University Park Corp., was encumbered by the bond issue, in that the Foggs agreed to let HRD fill that parcel from the lake and bring it to a certain grade. (R-138) Mr. Fogg agreed that the bond issue and the HRD's activities were of no value whatsoever in regard to 'their' cattle and horse operation; that the Foggs had spent money to fence out the area where the men were working as of the time of trial. (R-138)

The record is clear that University Park Corp. was not acquiring the land to use for any agricultural purpose whatsoever. The zoning that was granted showed no agricultural uses whatsoever as a permitted use.

(R-68) The buyer never looked into agricultural income and expenses of the property, since that was never its intention or motive for the purchase. (R-69, 70) The buyer never received any of the agricultural income, nor bore any of the agricultural expenses of the land. (R-40) E. C. Fogg III thought it was "a rather silly question" to ask whether there was any way that University Park Corp. or Cal-Florida Corp. could have made a reasonable return on their investment from the grazing of cattle and horses. The reason advanced by Mr. Fogg for the ridiculousness of this question was that University Park Corp. bought the land for development. (R-142, 143)

Mr. Fogg testified at R-143 that there is no way that the rezoning of the property by Miramar in any way contributed to Appellants' continued ability to graze horses and cattle on the property. Mayor Calhoun agreed that the agricultural uses of the property would not be enhanced by a rezoning to Planned Unit Development. (R-98)

The "University Park Planned Unit Development" fell into the classification as a Development of Regional Impact, under Chapter 380, Florida Statutes. Accordingly, a voluminous application was filed with the South Florida Regional Planning Council early in 1974. The Council approved the application with certain conditions, and the City of Miramar entered its Development Order, which is the culmination of the D.R.I. process, on July 12, 1974. (R-411) No party appealed the Development Order. (R-61, 62) Development today is no longer finding a piece of ground and building something on it, but an interminable process of governmental approvals, all of which have become essential to what we term today to be 'development'. Let us therefore examine the City of Miramar's Development Order and determine just what was done to carry

it out during the tax years 1974 and 1975.

Paragraph 1 of the Development Order required the developer to meet with the School Board and designate a nine acre tract to be sold to the Board on terms acceptable to the Board. Mr. Berns testified that a Chinese stand-off had developed; the Board wanted the site donated, and the developer was unwilling to do so. (R-54) It is clear, however, that the first phase of the development is proceeding apace without this school site having been donated.

The second paragraph of the Development Order required written assurance from a solid waste management agency that it had sufficient disposal capacity to meet the needs of each phase of the development. It was understood that the City was the solid waste management agency, and that the City would not have approved the zoning without being in a position of being able to handle the solid waste. Mr. Berns testified that this condition was met by January 1, 1975, indicating approval during 1974. (R-56, 94)

Third, the Order required that the developer show sufficient utilities to serve the property. Mayor Calhoun testified that it was met by January 1, 1975. (R-56, 95)

The fourth requirement of the Development Order was whether flood control district permits had been obtained. Mr. Berns testified that all these permits were obtained during the year 1974. (R-57)

The fifth provision was that as plats were submitted, the City would have the right to disapprove the plat based on the impact the development would have on trafficways and roadways in Miramar and adjacent areas. It is apparent that this requirement would not come into being until such times as plats were presented to the City Commission.

The sixth paragraph in the Development Order was that the

developer comply with the letter from the developer to the City of Miramar, which letter was attached to Plaintiffs' Exhibit 3, the Development Order. The letter is nothing more than a way of keeping the development under control.

The seventh requirement of the Development Order was that the developer 'comply with the Planned Unit Development ordinances and laws of the City'. This catch-all requirement was observed throughout; the developer was never found in violation of City ordinances. (R-62)

It is clear from the record that the developer was working at full speed to develop a high-density Planned Unit Development. Mr. Berns testified that he never asked the Foggs to co-operate where they refused. From time to time, of course, the developer didn't do anything, but overall, step by step, work continued on development of the property, and there has been no time since 1972 when Mr. Berns has not been actively seeking to obtain the permits and various things that must be done to develop it. (R-60) Mayor Rosen testified that the project's development is proceeding generally in accordance with the rezoning ordinance 73-19, the development order, the Development of Regional Impact, the Master Plan, and the preliminary Plat. (R-179)

The most significant circumstance is that Appellants did not show that they were in any way bound to continue the agricultural uses of the property. The testimony showed that as University Park Corp. began the development, there was no problem in displacing the agricultural activities. (R-139) The Foggs were contractually bound to discontinue their agricultural operations when the purchasers paid them the agreed-upon monies and obtained a deed to the lands. However, the Foggs were determined to have the best of both worlds: not to become irrevocably

committed to development in the event the project went sour (as shown by the fact that they would not subordinate the land to any construction financing and turned to the HRD bonds as a way of accomplishing these things that needed to be done to develop the property; the fact that they would not become irrevocably committed to any particular plan of development, etc.), yet to look like farmers for purposes of the agricultural classification. They had formed a specific intention to sell the property 'when somebody came along with any money and offered the price we want for it'. (R-142) The Foggs never retreated from their intention to sell the property for development. When asked why they continued to enter into contracts with the developer, E. C. Fogg III replied, "It was the only game in town!"

Petitioner William Markham, the Broward County Property Appraiser, testified about his reasons for denying the agricultural classification. First, he determined that as a result of the rezoning by the City of Miramar, the property would not be properly granted an agricultural classification. (R-157) Second, he determined that the Foggs were not farmers per se, and he did not really feel that they were predominantly engaged in good faith commercial agriculture on the land. (R-157) Third, as to the 100-acre 'horse boarding parcel', he determined that the boarding of pleasure horses is not a bona-fide agricultural activity. Fourth, he felt that there had been a sale (since Ordinance 73-19 reflected the application for rezoning had been made by Cal-Florida Corp.), although he did not know the exact terms of the sale. (R-158) He testified that based on his knowledge and his being personally involved in the cattle business in Florida and Ohio, the maximum that could be paid for cattle grazing lands to make a return from the agricultural operation is $1,500 to $1,800 per acre. He felt that the purchase price paid the Foggs

would be $25,000 per acre, and that there was no way a person paying such a price could meet his investment cost and make a return on that investment from agriculture. (R-159)

Based on the foregoing facts, the trial Court made important findings of fact, based on conflicting evidence: The Court found that Respondents had made a conscious decision to sell the property, and were actively co-operating with the efforts to rezone and develop it into a high-density residential development. The Court found that the primary intention of Appellants during the relevant years was to sell the property; during those years, the agricultural uses were wholly incidental to the predominant use of the land--preparation for development. The Court found those uses to be temporary by the lease (which had a 90-day cancellation clause) and that the activities would be immediately discontinued upon the commencement of physical development of the land. (R-375) The Court found that the land was rezoned to a non-agricultural use, thus triggering the provisions of Section 193.461(4)(a)(3), F.S., which provides for a reclassification of lands rezoned non-agricultural at the request of the owner.

The Court took particular notice of the decision of this Court in *Roden v. K & K Land Management, Inc.*, 368 So.2d 588 (Fla. 1978), but found after carefully reviewing it, that Appellants were not entitled to the agricultural classification and ordered a judgment to be entered in favor of the taxing authorities. (A-1)

I. THE DISTRICT COURT OF APPEAL ERRED WHEN IT SUBSTITUTED ITS JUDGMENT FOR THE JUDGMENT AND FINDINGS OF THE TRIAL COURT.

The decision of the trial Court was made upon conflicting evidence, and was entitled on appeal to be accorded the weight of a jury verdict. This Court has stated in an agricultural classification case, *Greenwood v. Oates*, 251 So.2d 665 (Fla. 1971):

> 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 (agricultural classification) 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. Id. at 669.

To like effect, see *Firstamerica Development Corporation v. County of Volusia*, 298 So.2d 191 (Fla. 1st.DCA 1974).

The trial Court found (A-6):

> It was necessary for the plaintiffs to show that for the years 1974 and 1975 the lands were "used primarily for bona fide agricultural purposes", meaning "good faith commercial agricultural use of the land." F.S. 193.461(3)(b). This they did not show. The primary intention of the plaintiffs after December, 1972, and during the contested years was to sell the property; such agricultural uses, *minimal at best,* as Plaintiffs engaged in were only incidental to rezoning and development of the land by the purchasers after its sale. Firstamerica Develop. Corp. v County of Volusia, Fla.App., 298 So.2d 191. The uses were of a temporary nature, by the lease, to be immediately discontinued upon the commencement of physical development of the land. (e.s.)

The Fourth District, to reverse the Final Judgment, necessarily had to find that the agricultural uses of the land were not "incidental", but were "primary", the term used in Sec. 193.461, F.S.

It should be noted that *Firstamerica* arose under the pre-1972 statute, where the only test of entitlement to the agricultural classification was a physical use of the land for agricultural purposes. Even though there was a physical use of the land in *Firstamerica* for cattle grazing, the First District Court of Appeal held that such uses were incidental to the primary 'use' of the land, which was acquired by the landowner for the primary purpose of subdividing it and marketing it as lots in a land installment sales promotion; that although plaintiff made an agricultural use of the land during the calendar year 1968 such was not the primary use but rather a "clearly incidental" use; and that therefore the subject land did not qualify for agricultural classification. The Court's holding cited this Court's decision in *Walden v. The Borden Company*, 235 So.2d 300 (Fla. 1970). That decision likewise held that even under the old law, a property held as a phosphate reserve which was leased to a cattleman was not entitled to the agricultural classification:

> The tax assessor argues that the lessees' agricultural use is only "servient, temporal and incidental" to the primary and dominant use of the property by the owner for non-agricultural purposes and that the company could not, therefore, claim a right to the preferential tax treatment accorded to "bona fide" agricultural lands by the statute. Our examination of the history of the applicable statutes persuades us of the soundness of the assessor's position. Id. at 301.

The record in our case amply supports the trial Court's finding as a matter of fact that the "minimal" agricultural uses of the property were not the "primary" uses required by the agricultural classification statute. The use of the land by Respondents was not a continuing use, but was newly instituted by

them after they acquired the land in 1971. Almost half of the property was used for pleasure horse boarding, which could hardly be said to be a bona-fide 'agricultural' use of land. Respondents had contracted to sell the property, and thus were unable to control its use for agriculture. No part of the activity relative to development of the land in any way enhanced the so-called agricultural uses; in fact, when actual construction of the "guitar shaped lake" in the middle of the property began, Respondents moved their fences so as not to interfere with the workmen. The evidence supporting this finding of fact as to whether the land was "primarily" being used for agricultural purposes, should not have been reweighed by the appellate Court and thus the Opinion of the Fourth District should be quashed and the Final Judgment of Judge Warren reinstated.

II. THE DISTRICT COURT OF APPEAL IMPROPERLY APPLIED SEC. 193.461(4)(c), THE "THREE TIMES RULE", TO THIS CASE.

The trial Court found that Respondents had entered into a binding contract to sell the property to Cal-Florida Corporation for over $26,000 per acre. (A-2) While that contract did not close, Respondents continued to enter into successive contracts with the principals of Cal-Florida. One of those contracts was partially executed by the conveyance in July, 1974 of twelve acres to that corporation for $400,000. It was the trial Court's opinion that the Respondents made a conscious decision to sell their property and never retreated from that intention. The trial Court found it difficult to reconcile the claim of Respondents that they were engaged in "good faith commercial agricultural use of the land" while at the same time they were making extensive efforts to sell it and co-operating in the rezoning procedures. (A-7) The trial Court correctly applied the "three times rule" by finding that the agricultural activities of Respondents were "minimal at best" and thus did not show 'special circumstances demonstrating that the land is to be continuted in bona-fide agriculture'.

This Court in *Straughn v. K & K Land Management, Inc.*, 326 So.2d 421 (Fla. 1976), simply directed that whenever a sale occurred, and the "three times rule" was triggered, the taxing officials should examine the six statutory factors found in subsection (3)(b) to establish that the land continues to be used for "bona fide agricultural purposes". If a sale does occur and the three times rule is triggered, this Court has directed that the Property Appraiser simply apply the factors in subsection (3)(b) to determine eligibility for continued

agricultural classification.

For this reason, it does not matter whether a sale did or did not occur of the subject property. However, it is respectfully submitted that under Florida law, when vendor and purchaser enter into a binding contract for the sale of real estate, from the moment the contract is executed, full equitable title passes to the purchaser, with the vendor having a security interest for payment of the purchase price. See the cases collected in 33 Fla.Jur. Vendor and Purchaser, Sec. 102:

> ...once (the seller) has entered into a binding contract for the sale of realty, he is no longer the sole and unconditional owner of the property. ...It is more exact, then, to say that the vendor is deemed to be the holder of the legal title for the benefit of his vendee, and it is on this theory that equity enforces a contract for the sale of land, deeming that to have been done which should have been done. The legal title in fee is retained by the vendor as security for the payment of the purchase price, or as it is otherwise expressed, he has a lien on the vendee's equitable interest as security for the payment of purchase money.

Cases cited in the text as authority for this proposition of law are *Jasper v. Orange Lake Homes, Inc.*, 151 So.2d 331 (Fla. 2d.DCA 1963), and *First Mortgage Corp. v. deGive*, 177 So.2d 741 (Fla.3d.DCA 1965)

The real importance of a sale bears on the question of the "good faith" required by the statute. How can a person contend at the same time that they are engaged in good faith commercial agriculture, while on the other hand, they are doing everything within their power to encourage development of the property, the floating of a bond issue, the rezoning of the land, and the other actions taken both by Respondents and their contract vendees?

The trial Court correctly applied the "three times rule" to this case; the District Court of Appeal, Fourth District, in

finding that subsection (4)(c) only applies to <u>completed</u> sales, violates long established Florida law as to the legal effect of a contract for sale. Additionally, the District Court opens the door to a variety of "creative sale devices" such as agreements for deed, where legal title and a deed never pass from vendor to purchaser until the purchase price is paid in full. The Florida courts have always held that a purchaser under an agreement for deed has sufficient title that it is necessary for the vendor to file a foreclosure action against the purchaser if payments are not made under the terms of the Agreement.

III. THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT, IMPROPERLY GRAFTED A CRITERION ONTO SECTION 193.461(4)(a)(3), F.S., NOT PLACED THERE BY THE LEGISLATURE.

Sec. 193.461(4)(a)(3), F.S., states that the Property Appraiser shall reclassify the following lands as nonagricultural: (3) Land that has been zoned to a non-agricultural use at the request of the owner subsequent to the enactment of this law. The District Court of Appeal found that if, as a matter of fact, the governing body that granted the non-agricultural zoning suffered the agricultural uses to continue on the land, the clear language of the statute would not be given effect. The statute's language does not support the District Court's interpretation. Neither the Appraiser nor the Courts are authorized to promulgate a formula in derogation to a statute. *Sherwood Park Ltd., Inc. v. Meeks,* 234 So.2d 702 (Fla. 4th.DCA 1970, aff'd 244 So.2d 129 (Fla. 1971) This Court held in *Chaffee v. Miami Transfer Company, Inc.*, 288 So.2d 209 (Fla. 1974), at 215:

> To say, as the employer would have us do, that in merger cases the true meaning of s.440.15(3)(u) is that disability for purposes of that section is the greater of physical impairment or loss of earning capacity only if there is a loss of earning capacity is to invoke a limitation or to add words to the statute not placed there by the Legislature. This we may not do. State v. Barquet, 262 So.2d 431 (Fla. 1972): State v. Tindell, 88 So.2d 123 (Fla. 1956); Ervin v. Collins, 85 So.2d 852 (Fla. 1972) (sic--should be 1956) Id. at 215.

In the last cited case, this Court observed, at 855:

> We are called on to construe the terms of the Constitution, an instrument from the people, and we are to effectuate their purpose from the words employed in the document. We are not permitted to color it by the addition of words or the engrafting of our views as to how it should have been written. ...The method by which appellant proposes to amend the Constitution to speak where it is now silent does not comply with the pattern provided by Sec. 1, Art. XVII, but

> if it did, it should be addressed to the Legislature, instead of to this court. (855, 858)

The statute in question was properly applied in *Lauderdale v. Blake*, 351 So.2d 742 (Fla. 3d.DCA 177). In that case, as of January 1, 1974, the property was being used for agricultural purposes. However, during 1973, the Appellants sought and received a zoning change from agricultural to a multiple-family zoning classification. The request for an agricultural classification was denied, solely on the authority of Sec. 193.461(4)(a), F.S. The trial Court upheld the denial of the agricultural classification, and the District Court of Appeal agreed. The Third District Court of Appeal cited its holding in *Jar Corp. v. Culbertson*, 246 So.2d 144 (Fla. 3d.DCA 1971), wherein it stated that in order for a taxpayer to receive a benefit different in kind from other taxpayers, it is necessary for him to strictly comply with all conditions which would be necessary to entitle him to the special treatment. One of the things the agricultural classification statute says you can't do is to obtain a rezoning of your lands to a non-agricultural use. An owner of land does not need a high-density, planned unit development zoning on the property if he is truly, in good faith, engaged in agriculture. Such zoning does nothing to encourage the agricultural operation of the property, and even serves to increase the attractiveness of the land to speculators and developers who would use it for non-agricultural purposes.

Sec. 193.461(4)(a)(3), F.S., has been before this Court before--very shortly after its enactment in 1972. In *Miami Beach First National Bank v. Markham*, Case No. 50,941, cert.disch. at 357 So.2d 167 (Fla. 1978), this Court reviewed a per curiam affirmed decision from the Fourth District Court of Appeal, 341 So.2d 1104 (Fla. 4th. DCA 1976).

From the Briefs that are on file in this Court's records, it appears that a large tract of land in Broward County was owned by the Bank, as Trustee. Leadership Housing, Inc. filed an application for rezoning to "Planned Unit Development--PUD" with the City of Parkland on Oct. 22, 1973. The Bank consented to the application for rezoning, just as did the Foggs in our case. The City of Parkland rezoned the land "PUD" on December 20, 1973. The Property Appraiser moved for summary judgment, which was opposed by the Bank, stating that since they had not received Development of Regional Impact approval from the South Florida Regional Planning Council, they could do nothing with the land other than graze cattle and raise sod and nursery stock. The trial Court entered summary judgment in favor of the Property Appriaser; the Fourth District affirmed, per curiam, and this Court first granted certiorari, then determined it had improvidently granted it and discharged the writ. Thus, this Court found no difficulty whatsoever in approving a denial of the agricultural classification based solely upon the operation of Sec. 193.461(4)(a)(3), F.S. 1972.

Included in the record on appeal in that case, and attached hereto at A-11, is as close to a legislative history of the 1972 amendments to Sec. 193.461 as we have. It is highly significant that Rep. Turlington indicated that it was the intention of the Legislature to retreat, in at least two instances, from a "use" test to determine entitlement to the agricultural classifications--one of which is when land is rezoned to a non-agricultural use at the request of the owner. Rep. Turlington stated:

> 2. ...While the Constitution of Florida authorizes a preferentially low assessment to qualified properties, it was and is up to the Legislature to establish criteria for granting those properties an agricultural classification.

3. It was the intention of the Committee, as stated in Committee discussion on this bill, and myself as Chairman of the Committee, to change the pre-existing law on agricultural classification, which was that agricultural classification could be granted upon a showing of physical use of the property for agriculture, regardless of the intentions or bona-fides of the owner. Too many speculators and developers were obtaining the benefits of the agricultural classification after purchasing property for development. We re-wrote the law so as to deny agricultural classification to speculators and land developers, while allowing legitimate farmers to have the classification.

4. It was and is my intention and that of the Committee on Finance and Taxation that a loss of agricultural classification was to be mandatory in those cases where pursuant to Sec. 193.461 (4)(a)(3), F.S., land was rezoned to a non-agricultural use at the request of the owner subsequent to July 1, 1972 (the effective date of Chapter 72-181). This was the reason for use of the mandatory "shall" in that paragraph. It was our intention that the physical use of the land would have nothing to do with the agricultural classification for tax purposes in at least two cases--that involving a rezoning, and where the owner recorded a subdivision plat subsequent to July 1, 1972, as stated in Sec. 193.461(4)(a)(4), F.S.

Petitioner attempted to introduce the Deposition of Mr. Turlington into evidence into this case, to show the evils of the pre-existing law that the 1972 amendments were directed to, but the proffer was refused by the trial Court.

Platting of land is simply another way of referring to it--platting land changes a lengthy and cumbersome legal description into a shorthand form of reference. Chapter 177, F.S., governs maps and plats in Florida and establishes how permanent reference markers will be set, and other general requirements involving platting. Platting, however, has nothing to do with changing the use of land as permitted by local government. If a farmer owned a six hundred acre farm, zoned agriculture, and chose to file a plat splitting the land into six one hundred acre parcels, it would still be limited to use as a farm until the zoning were changed. It is the rezoning from an agricultural to a non-agricultural use that clearly signals that development is about to commence and that

the land should be considered as other than agricultural. In the case of a rezoning by other than the owner, however, it does not evince such an intention, which is why the statute reads as it does and excludes zoning changes made by governmental authorities.

It is respectfully submitted that there is no requirement in the Florida Constitution that agricultural lands be classified solely upon a test of agricultural use, to the exclusion of any other factor. As stated by then-Rep. Turlington, the Legislature was very concerned about conserving and protecting and encouraging the development and improvement of agricultural lands for the production of food and other agricultural products. (See the preamble to Ch. 72-181, Laws of Florida, included in the Appendix at A-12) The Legislature was concerned that urban pressures were taking the form of scattered development around urban areas, bringing conflicting land uses into juxtaposition, creating high costs for public services, and stimulating land speculation. To put it another way, the Legislature's intention was to reward those who chose to keep their land from sale and development, and not to give an extra benefit to those who were proceeding apace with plans to sell and develop their property. The Legislature's ire was aroused by the famous "Hardy Matheson Cocoanut Plantation" case involving sixty eight acres on Key Biscayne whose entire 'crop' could have been produced on five acres; and cases where the agricultural classification had been granted despite the fact that 'no modern forestry methods' had been utilized. The Legislature specifically approved of this Court's holding in *Walden v. The Borden Company*, op.cit., as disallowing the agricultural classification on a phosphate reserve, and on forestry lands where there was no forestry operation, citing this Court's holding in *Greenwood v. Oates*. The author having possibly the only copy of the Committee's report on the

proposed Ch. 72-181 (note that the draft was somewhat different than the final product), the Report is incorporated in the Appendix. Note that the Legislature intended that there be "threshholds" across which a landowner would need to step prior to being entitled to an agricultural classification--those "threshholds" being not filing a subdivision plat and not seeking a rezoning to a non-agricultural use.

It is submitted that Art. VII, Sec. 4(a) plainly states, "Agricultural land...may be classified by general law...". The language which follows that statement simply permits valuation of those lands, once they have been classified by general law, according to a "use" standard rather than a "just value" (fair market value) standard. It is thus further submitted that the Legislature accomplished its goal of preserving preservation of agricultural lands by plainly telling people who would seek a rezoning, not to do so unless they find it more attractive to have the rezoning and forego the agricultural classification. This type of choice is a part of life--how often does a person owning a home in Florida but a legal resident of another state have to decide whether it is more valuable not to pay the intangible tax on Florida residents' stocks and bonds and forego the benefits of the Homestead exemption for tax purposes, or to become a resident and accept the yang while enjoying the benefits of the accompanying yin.

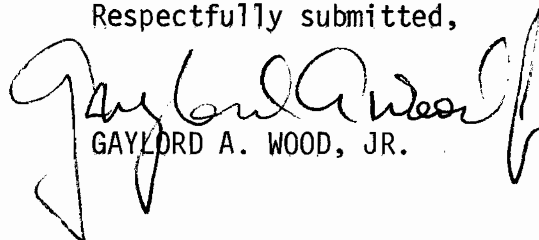
Since the District Court of Appeal improperly added words to Sec. 193.461(4)(a)(3), F.S. not placed there by the Legislature, the plain language of the legislation should be given effect and the Opinion reversed for that reason.

CONCLUSION

The trial Court, one of the most able judges in the State of Florida, heard extensive testimony that took days to present, considered the demeanor of the witnesses, considered documentary evidence, and issued a well-reasoned Order in which he found as a matter of fact that the Respondents' minimal agricultural activities did not amount to a primary use of the land for bona-fide agriculture. The District Court of Appeal departed from established precedent when it overturned those findings of fact. The District Court further found that no "sale" of the land had taken place, even though the Respondents had the land in question under a binding contract, thus limiting their ability to continue to use the land. It failed to follow precedent from the District Court of Appeal, Third District, and did not find that a rezoning of land at the request of the owner should operate to deny the agricultural classification to that property. It added words to the agricultural classification statute not placed there by the Legislature. For all of these reasons, the Opinion of the District Court of Appeal should be reversed.

It is respectfully submitted that the Opinion of the District Court of Appeal, Fourth District, should be reversed and that the Final Judgment of the trial Court be reinstated without further proceedings.

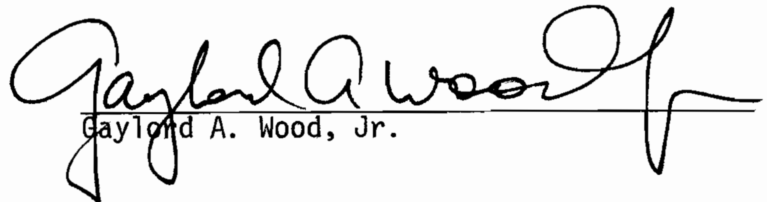
Respectfully submitted,



GAYLORD A. WOOD, JR.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief On The Merits Of Petitioner, WILLIAM MARKHAM, As Broward County Property Appraiser and Appendix has been furnished, by mail to E. WILSON CRUMP, III, Assistant Attorney General, Room LL04, The Capitol, Tallahassee, Florida 32304; HARRY A. STEWART, ESQ., General Counsel, Room 248, Broward County Courthouse, Ft. Lauderdale, Florida 33301; ALTON B. PARKER, ESQ., P.O. Box 1531, Tampa, Florida 33601 and ALAN S. GOLD, ESQ., Greenberg, Traurig, Askew, 1401 Brickell Avenue, Penthouse 1, Miami, Florida 33131, this 9th day of November, 1981.



Gaylord A. Wood, Jr.