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SUPREME COURT OF FLORIDA

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WILLIAM MARKHAM, etc., et al.,

Petitioners,

vs.

Case No. 60,759

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

Respondents.

_____/

REPLY BRIEF OF PETITIONER,
DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE AND OF THE FACTS

Petitioner, Department of Revenue of the State of Florida, will continue to rely on the statement of the case contained in its initial brief and on the statement of facts contained in the Property Appraiser's initial brief.

POINT INVOLVED

POINT I

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

ARGUMENT

This reply brief will be limited in scope to the application of Subsection 193.461(4)(a)3, F.S., which requires reclassification of lands as nonagricultural which have been rezoned to a nonagricultural use at the request of the owner. The Department will continue to rely on its initial brief in support of the other points involved in this appeal.

The property owners seek to avoid the impact of this statute in several ways, none of which is effective. First, the property owners argue that the property in question was not actually rezoned as of January 1 of either of the two tax years. On this particular point, even the Fourth District ruled against the property owners, the Court saying:

> The question of whether the property was actually rezoned was a mixed one of fact and law. The trial court determined it based upon the statute and from the conflicting evidence presented. Abundant evidence appears in the record supporting the trial court's conclusion that the property was in fact rezoned and we are not prepared to reverse this factual or legal conclusion.

Just as the Fourth District could not reverse the trial court on this mixed question of fact and law, neither can this Court.

The property owners next argue, and the Fourth District agreed, that the zoning in effect at the time was not to a "nonagricultural use" within the meaning of the statute because the property owner was permitted to continue agricultural activities on the property after it was rezoned for a planned unit development. In this respect, the position of the property owners and the holding of the Fourth District collide with this Court's decision in Harbor Ventures, Inc. v. Hutches, 366 So.2d 1173 (Fla. 1979). In Harbor Ventures the Court was faced with a situation where the subject property had been rezoned from an R-1 AA classification, which was nonagricultural, to a planned unit development (PUD) classification. The case clearly reveals that an agricultural use of the property continued after it was rezoned to planned unit development. The Court was called on to determine whether Subsection 193.461(4)(a)3, F.S., the same subsection at issue here, applied to deny the property agricultural classification.

The Court found that the change in zoning was from one nonagricultural use to another nonagricultural use as the term "nonagricultural use" was used in this statutory subsection. Thus, the holding in Harbor Ventures clearly included a finding that a rezoning of property to a planned unit development classification with a physical agricultural use of the property continuing after the zone change was nevertheless a reclassification to a nonagricultural use within the meaning of this statutory subsection.

As pointed out in the Department's first brief, it would not make sense to limit this subsection to a situation where the agricultural use was actually discontinued after the rezoning. Such a narrow construction would render this subsection meaningless and redundant since the previous two subsections already require reclassification of lands which are diverted from agricultural to nonagricultural use and lands which are no longer being utilized for agricultural purposes. The subsection at issue can only be given a viable independent sphere of operation if it is applied to situations where a physical agricultural use is continued after the rezoning.

The property owners go on then to argue that if the statute in question is construed in such a way as to deny then the benefits of agricultural classification, the statute would then be unconstitutional, citing to this Court's decision in Bass v. General Development Corp., 374 So.2d 479 (Fla. 1979). There are several reasons why this point is not well taken.

In the first place, the standing of the property owners

to raise this point at this stage of the litigation is questionable at best. Although the property owners did attempt to inject this issue into the proceedings before the Fourth District, they did not raise this issue in the trial court. The Fourth District seems to have rejected their attempts to raise this issue, although the decision does reflect some concern for the constitutional issue perhaps explaining the strained construction which the Fourth District placed on the statute. However, on the constitutional issue, the Fourth District stated:

> Since these issues were not presented or tried before the Circuit Court, we decline to answer the constitutional question which appellants now urge. 397 So.2d at 949

Assuming, however, that the property owners'constitutional argument is now properly before the Court, the Department feels strongly that the rationale of Bass does not by any means dictate the unconstitutionality of the statute in question. Basically, the property owners rely on a constitutional due process argument contending that there is no rational connection between the irrebutable presumption that land which is rezoned to a nonagricultural use will not in fact thereafter be used for agricultural purposes. Initially, it should be noted that the Property Appraiser's argument is too narrow in its scope. Article VII, Sec. 4, of the Florida Constitution, permits the legislature to classify property

according to use or character. Without conceding that this subsection does not properly relate to the use of the land as well, the Department would nevertheless point out that zoning and rezoning of property does have a strong and pronounced relationship to the character of that property. Since Subsections 193.461(4)(a)1 and 2 already require reclassification of land which is not being used for agricultural purposes, the following subsections 3 and 4, in order to have an independent sphere of operation, were arguably intended to deal with something else, i.e., classification of lands based on their changing character, even though a physical agricultural use may be continued. This analysis is not inconsistent with the existing case law which held that the statute embodies a use test. The initial case which developes this proposition was Straughn v. Tuck, 354 So.2d 368 (Fla. 1978). In Tuck, the property owner was contending that an agricultural character for his property, standing alone without any agricultural use, entitled that property to special ad valorem treatment. In rejecting this contention, the Court quite correctly held that agricultural use was required. From this, however, it does not necessarily follow that an agricultural use is the only test. If it were, the legislature could certainly have drafted a much shorter statute. Instead, it is submitted that in reading the statute as a whole, the legislative intent is that use is required in all situations in order for the agricultural

classification to be available; however, it may be denied in some situations where the agricultural use continues, but the character of the property has changed to nonagricultural, as manifested by certain overt acts by the owner, such as securing a reclassification to a nonagricultural use.

Even if the Court should feel that the proper interpretation for the statute is limited to a use requirement, the subsection in question does not fail to pass constitutional muster under the Bass rationale. Actually, Bass involved two constitutional analyses. The first was a due process analysis in which the Court hypothesized that because a different subsection presumes irrebutably that property for which a subdivision plat is filed will not thereafter be used for agricultural purposes, the statute is unconstitutional. The Court deals with the proposition that a statute which creates an irrebutable presumption that an ultimate fact exists, from another given fact, will be struck down if there is not a proper relationship between those two facts. The Court cites to two cases, Weinberger v. Salfi, 422 U.S. 749, 95 S.Ct. 2457, 45 L.Ed.2 522 (1975), and Gallie v. Wainwright, 362 So.2d 936 (Fla. 1978). In this Court's decision in Gallie, the Court recognized that the irrebutable presumption analysis was held in disfavor by the United States Supreme Court. In Weinberger, the majority opinion suggested that the previous conclusive presumption

cases out of the United States Supreme Court were decided on other grounds. However, in the slightly later case of Turner v. Department of Employment Security, 423 U.S. 44, 96 S.Ct. 249, 46 L.Ed.2d 181 (1975), the doctrine was employed again, although arguably in a context limited to various vital personal rights, which would not include the privilege of receiving preferential agricultural assessments involved in this litigation.

As stated in Salfi, the test applicable to this case appears to be as follows:

> . . . the question raised is not whether a statutory provision precisely filters out those, and only those, who are in the factual position which generated the congressional concern reflected in the statute. Such a rule would ban all prophylactic provisions, and would be directly contrary to our holding in Mourning, supra. Nor is the question whether the provision filters out a substantial part of the class which caused congressional concern, or whether it filters out more members of the class than nonmembers. The question is whether Congress, its concern having been reasonably aroused by the possibility of an abuse which it legitimately desired to avoid, could rationally have concluded both that a particular limitation or qualification would protect against its occurrence, and that the expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule. 422 U.S. at 777, 45 L.Ed.2d at 545-546

Using this test, it is submitted that the Florida Legislature's concern was reasonably aroused by the possibility of land developers taking advantage of the agricultural classification

provisions to minimize their holding costs prior to development, while they had no bona fide interests in agricultural pursuits for the land. The legislature could then have concluded that since rezoning to a nonagricultural use was an obvious prerequisite to development, the statute in question would protect against the abuse of this special tax classification. This relationship was in fact recognized by this Court in Harber Ventures, the Court saying:

> Such an interpretation provides an incentive for agricultural lands to remain devoted to agricultural production by discouraging speculative rezoning. Such speculative rezoning must have been viewed by the legislature as a first step toward non-agricultural use. 366 So.2d 1174

Thus, the Court has already recognized that the legislature properly perceived a relationship between rezoning and nonagricultural use of the property.

It is not entirely clear in fact whether the Bass decision actually turned on the due process issue at all. In Bass, the Court recognized that its earlier decision in Rainey v. Nelson, 257 So.2d 538 (Fla. 1972), had denied agricultural classification to lands which were being used for agricultural purposes. Although the dissent in Bass advocated receding from Rainey, the majority would not do so and recognized Rainey as continuing to be sound law. In recognition of the continuing viability of Rainey v. Nelson, the Court then

went on to analyze the statute in question from an equal protection standpoint. It concluded that the statute could not pass muster on this basis because it created two classes of property, both of which were potentially used for agricultural purposes, but one of which would be denied special agricultural treatment solely because a subdivision plat had been filed. In the present case, the property owners would argue that the rezoning subsection is similarly fatal because it denies agricultural classification to property on which an agricultural use is continued simply because of the rezoning, while allowing agricultural classification for property similarly situated and used, but which has not been rezoned. The Department would urge in passing that there is another side to this coin as well. If the present property owners do succeed in receiving agricultural classification, their property will receive a more beneficial tax treatment than similar property in the process of development which is allowed to lie unused, while the initial stages or development are underway.

Be all of that as it may, the Department feels that under the current equal protection test, the statutory subsection in question passes muster. This Court has recently summarized the test as follows:

> The rational basis or minimum scrutiny test generally employed in equal protection analysis requires only that a statute bear some reasonable relationship to a legitimate state purpose. That the statute may result incidentally in some inequality or that it is not drawn with mathematical precision will not result in its invalidity. Rather, the statutory classification to be held unconstitutionally violative of the equal protection clause under this test must cause different treatments so disparate as relates to the difference in classification so as to be wholly arbitrary. In Re Estate of Greenberg, 390 So.2d 40, 42 (Fla. 1980)

The most recent United States Supreme Court decision dealing with the concept of equal protection as applied to a state's tax structure is Western & S.L.I. Co. v. Bd. of Equalization, __U.S.__101 S.Ct.__, 68 L.Ed.2d 514 (1981). In Western the Court recognized the wide latitude the states have in making reasonable classifications for tax purposes. The Court upheld a retaliatory insurance premium tax which had the effect of taxing a foreign insurance company at the same rate which that foreign home state would impose on companies from the taxing state doing business there, even though that rate was higher than that which the taxing state (California) might impose on its domestic companies. The Supreme Court upheld this statute even though it recognized that there was a body of opinion which held that the statute would not succeed in accomplishing its goals. The Court said:

> Parties challenging legislation under the Equal Protection Clause cannot prevail so long as 'it is evident from all the considerations presented to [the legislature], and those of which we may take judicial notice, that the question is at least debatable.' 68 L.Ed.2d 534.

As pointed out above, this Court has already recognized in Harbor Ventures that the legislature could have rationally concluded that rezoning to a nonagricultural use was a first step in the discontinuance of the agricultural use. Thus, this statute clearly passes the "reasonable relationship test," and the question of a legitimate relationship between the statute and the legislative legitimate goals is "as least debatable." Thus, the statute in question cannot be said to deny these property owners equal protection even when it is properly construed to prevent agricultural classification on lands rezoned to a nonagricultural use where physical activities continue on the land thereafter.

CONCLUSION

For the reasons stated herein and in the Department's initial brief, as well as the briefs of the Property Appraiser and amicus curiae, the decision of the Fourth District should be reversed with instructions to reinstate the final judgment of the trial court.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by U.S. Mail this 29th day of December, 1981, to: Clifford Schulman, Esq., Greenberg, Traurig, Askew, Hoffman, Lipoff, Quentel & Wolff, P.O. Box 012890, Miami, Florida 33101; Gaylord A. Wood, Jr., Esq., 304 S.W. 12th Street, Ft. Lauderdale, Florida 33375; Harry Stewart, Esq., Room 248, 201 S.W. Sixth Street, Ft. Lauderdale, Florida 33301; Ted R. Manry, Esq., Macfarlane, Ferguson, Allison & Kelly, P.O. Box 1531, Tampa, Florida 33601; Stephen W. Metz, Esq., P.O. Box 1259, Tallahassee, Florida 32302; and Robert M. Rhodes, Esq., and Terry E. Lewis, Esq., Messer, Rhodes & Vickers, P.O. Box 1876, Tallahassee, Florida.

Respectfully submitted,

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