IN THE SUPREME COURT OF FLORIDA

RONALD SCHULTZ, CITRUS COUNTY PROPERTY APPRAISER,

Petitioner,

vs.

LOVE PGI PARTNERS, L.P., and SUGARMILL WOODS, INC.,

Respondents.

CASE NO. 92,803
DCA CASE NO. 96-01973

ON REVIEW FROM THE FIFTH DISTRICT COURT OF APPEAL

FLORIDA DEPARTMENT OF REVENUE'S AND MIAMI-DADE COUNTY PROPERTY APPRAISER'S AMICUS CURIAE BRIEF ON BEHALF OF PETITIONER

ROBERT A. BUTTERWORTH
Attorney General
Office of the Attorney General
The Capitol - Tax Section
Tallahassee, Florida 32399-1050
Tel: (850) 414-3300
Fax: (850) 488-5865

by

Joseph C. Mellichamp, III
Senior Assistant Attorney General
Florida Bar No. 133249

Counsel for the Florida Department of Revenue

ROBERT A. GINSBURG
Dade County Attorney
Stephen P. Clark Center
Suite 2810
111 N.W. 1st Street
Miami, Florida 33128-1993
Tel: (305) 375-5151
Fax: (305) 375-5634

by

Melinda S. Thornton
Assistant County Attorney
Florida Bar No. 261262

Counsel for the Miami-Dade County Property Appraiser

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INTRODUCTION AND STATEMENT OF ISSUE

This Amicus Curiae Brief is submitted on behalf of Petitioner Schultz by the Florida Department of Revenue (hereinafter "DOR") and the Miami-Dade County Property Appraiser, Joel Robbins (hereinafter "Property Appraiser"). More specifically, DOR and Property Appraiser seek to address the Fifth District's ruling as to Respondent Sugarmill Woods, Inc.'s cattle-grazing operation and the role that the Third District's opinion in Robbins v. Yusem, 559 So. 2d 1185 (Fla. 3d DCA), rev. denied, 569 So. 2d 1282 (Fla. 1990) should play in determining Respondent's entitlement to agricultural classification of its land for ad valorem taxation purposes.

For ease of reference, the Third District opinion in Robbins v. Yusem, which is being argued as the basis for the conflict jurisdiction of the Court, shall be referred to herein as "Yusem". The holding in the Yusem decision, set forth in this Brief, will be referred to as the "Yusem Rule."

All emphasis is supplied by counsel unless otherwise indicated.

SUMMARY OF THE ARGUMENT

The Yusem Rule provides

> . . . as a matter of law, agricultural use of property in violation of applicable zoning regulations cannot be considered 'good faith' commercial use of the land entitling its owner to an agricultural exemption. 559 So. 2d at 1188.

In the context of laws governing and interpreting entitlement to the substantial tax savings afforded by agricultural classifications and other tax exemptions, the Yusem Rule supports the public policy of this State. It ensures that no taxpayer profits from his own wrongdoing with respect to his property, to the detriment of the taxpaying community which would bear the burden of making up the lost revenue. If the Fifth District decision is not reversed, the salutary policy advanced by Yusem and the common sense requirement that landowners act in good faith will be compromised.

When Petitioner's denial of agricultural classification of Respondent Sugarmill Woods, Inc.'s cattle-grazing activities was upheld by the trial court based on the finding that such use was illegal under the zoning regulations of Citrus County, the cited authority of the Yusem case was particularly appropriate. Based on the finding of illegal use, the Yusem Rule applied.

When, however, the Fifth District reversed the trial court and agreed with Respondent that its cattle-grazing activities were not illegal under what the Court perceived

to be the applicable land use regulations, the Yusem Rule no longer applied. Yet the Fifth District gratuitously weakened the impact of the Yusem Rule by downplaying the significance of compliance with zoning regulations in determining entitlement to agricultural classification. There was no need for the Fifth District to create conflict by "disagreeing" with Yusem, for in Yusem there was no issue as to the legality of the use.

There was no case cited in the Fifth District's opinion in which a zoning violation was found to have occurred and the agricultural classification was granted. Rather, the cases cited by the Fifth District involve cases where the agricultural activities were allowed, thereby justifying the findings that the uses were "bona fide." Yusem only applies if the existence of a violation, not otherwise overcome by a legal, non-conforming use, is established.

The premise of the Yusem Rule is sound, and the taxpayers of this State are served by its viability. DOR and Property Appraiser submit that the Fifth District opinion should not be allowed to stand, given that its analysis will create confusion and inconsistency among property appraisers attempting to determine whether agriculture use is "bona fide."

ARGUMENT

WHEN IT IS CLEARLY ESTABLISHED THAT A TAXPAYER IS USING PROPERTY IN A MANNER WHICH VIOLATES APPLICABLE LAWS REGULATING ITS USE, THE PROPERTY APPRAISER MUST, AS A MATTER OF LAW, DETERMINE THE TAXPAYER'S ENTITLEMENT TO THE PRIVILEGE OF AN AD VALOREM TAX EXEMPTION IN ACCORDANCE WITH THE RULE SET FORTH IN ROBBINS v. YUSEM.

I. The Yusem Rule Establishes That "Bona Fide" Use Of Property Cannot Coexist With Use Conducted In Violation Of Land Use Laws.

The Yusem Rule was firmly established by the Third District in Robbins v. Yusem, 559 So. 2d 1180, 118 (Fla. 3d DCA), rev. denied, 569 So. 2d 1282 (Fla. 1990) when it stated:

> Accordingly, we conclude that, as a matter of law, agricultural use of property in violation of applicable zoning regulations cannot be considered 'good faith' commercial agricultural use of land entitling its owner to an agricultural exemption.

The Yusem holding has been followed consistently in the Third District when determinations have been made that property is being used in violation of zoning laws. Palm Springs General Hospital, Inc. of Hialeah v. Robbins, 638 So. 2d 96 (Fla. 3d DCA 1994); Yusem v. Metropolitan Dade County, 582 So. 2d 176 (Fla. 3d DCA 1991); Robbins v. Tabor, 573 So. 2d 207 (Fla. 3d DCA 1991); Robbins v. Stuart International Corp., 559 So. 2d 1188 (Fla. 3d DCA 1990); Robbins v. Carol Management Corp., 559 So. 2d 1189 (Fla. 3d DCA 1990). See also Kogan v. Robbins, 594 So. 2d 355 (Fla. 3d DCA 1992) (Yusem holding extended to denial of homestead

exemption where zoning code violation existed[1]) and Bower v. Edwards County Appraisal District, 752 S.W. 2d 629 (Tex. App. 1988) (agricultural exemption denied where state law prohibited private ownership of wild deer and the claimed exemption was for land used for raising deer).

As stated by the Second District in St. Petersburg Kennel Club, Inc. v. Smith, 662 So. 2d 1270, 1271 (Fla. 2d DCA 1995) the classification of land as agricultural results in a more favorable ad valorem tax assessment; therefore, it is in the "nature of an exemption." The Yusem court recognized the necessity of strictly analyzing a taxpayer's claim to agricultural classification, reaffirming that

> '[I]n 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.' *Jar Corp. v. Culbertson*, 246 So. 2d 144, 145 (Fla. 3d DCA), *cert. denied*, 249 So. 2d 690 (Fla. 1971).

See also, Green v. Pederson, 99 So. 2d 292 (Fla. 1957)and Schooley v. Judd, 149 So. 2d 587 (Fla. 2d DCA), rev'd on other grounds, 158 So. 2d 615 (Fla. 1963), both cases which

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[1] In Kogan, the Court dealt not only with the taxpayer's zoning code violation, but also with her failure to abide by her condominium's articles of incorporation. Hence, it is important to note that zoning codes and master plans are not the only regulations which can substantially govern the use of property. See Metropolitan Dade County v. Fontainebleau Gas & Wash., Inc., 570 So. 2d 1006, 1007 (Fla. 3d DCA 1990), where the court reminded property owners that they ". . . are deemed to purchase property with constructive knowledge of applicable land use regulations."

confirm the rule of strict construction with respect to exemption statutes.

The appropriateness of strict construction of the agricultural classification statute, Section 193.461, Florida Statutes, is particularly evident where the reason for denial is the taxpayer's use of property in violation of law. To proceed otherwise would violate ". . . the fundamental principle of equity that no one shall be permitted to profit from his own fraud or wrongdoing. . . ." Yost v. Rieve Enterprises, Inc., 461 So. 2d 178, 184 (Fla. 1st DCA 1984), rev. denied, 469 So. 2d 750 (Fla. 1985).

Such a principle of equity is paramount when tax exemptions are claimed. This Court's Justice Overton, specially concurring in Redford v. Department of Revenue, 478 So. 2d 808, 812 (Fla. 1985), said it best when he made the following point:

> Because a given amount of tax revenue is needed to operate the government, it should be recognized that *one person's tax exemption will become another person's tax.* (emphasized in original)

See also this Court's opinion in Dade County Taxing Authorities v. Cedars of Lebanon Hospital Corp., Inc., 355 So. 2d 1202, 1205 (Fla. 1978), where the potential harm of too-liberally construed exemption statutes was recognized as "...placing a greater proportion of the tax burden upon other classes of property."

II. The Fifth District Decision Wrongly And Unnecessarily Diminishes The Yusem Rule, Thus Creating Confusion Regarding The Significance Of Non-Compliance With Zoning Regulations.

The Fifth District below in Love PGI Partners, L.P. v. Schultz, 706 So. 2d 887, 892, 893 (Fla. 5th DCA 1998) made the following statements, causing the confusion which in part has led to this Court's review:

> The appropriateness of agricultural classification of land for ad valorem tax purposes depends on the general statutory laws of this state, not a county code.
>
> * * *
>
> Zoning may be a consideration under the catchall 'other factors' provision in section 193.461(3)(b)(7), but it is not determinative. Wilkinson v. Kirby, 654 So. 2d 194 (Fla. 2d DCA 1995).
>
> * * *
>
> . . . zoning is at best only a rebuttable presumption. Lackey v. Little England, Inc., 461 So. 2d 281 (Fla. 5th DCA 1985).
>
> * * *
>
> We disagree with Robbins, to the extent that it holds agricultural classification for ad valorem tax purpose is controlled by a county code adopted pursuant to chapter 163.[2]

[2] The origin and interpretation of the zoning code in the Yusem case was not an issue. The Fifth District's statement is gratuitous in this regard.

A. Analysis of relevant statutory factors in determining entitlement to agricultural classification should include implementation of the Yusem Rule.

Pursuant to Section 193.461(3), Florida Statutes, the property appraiser, when asked to classify land as agricultural, has the responsibility of determining ". . . whether the use of land for agricultural purposes is bona fide . . . ." The statute defines "'[b]ona fide agricultural purposes'" as "good faith commercial agricultural use of the land." Rule 12D-5.004(2), Florida Administrative Code, clarifies that zoning should be considered as a factor which may be applicable in the property appraiser's determination, as contemplated by Section 193.461(3)(b)(7), Florida Statutes.

When zoning, or, for that matter, any other relevant land use restriction, is a consideration[3] the appropriate analysis contains the following elements:

1. Is the use being made of the property governed by a land use regulation?

2. Is the use, if governed, permitted or prohibited?

3. If the use is prohibited, is there an exception based on a legal, nonconforming use? (i.e.: a "grandfathered" use, or an approved variance)

If a use is not governed by land use regulations or, if governed, is a permitted use, then its actual use is the

[3] It is submitted that zoning is always an appropriate factor to check, especially in large, urban areas where mixed uses are common and ever-changing.

guidepost to its classification, Giancarlo v. Markham, 564 So. 2d 1131 (Fla. 4th DCA 1990), assuming the use is otherwise the required commercial use. Compare Markham v. Fogg, 458 So. 2d 1122 (Fla. 1984) and Champion Realty Corp. v. Burgess, 541 So. 2d 615 (Fla. 1st DCA), rev. denied, 549 So. 2d 1013 (Fla. 1989), both of which are cited in the Yusem decision, as a caveat that "[a]gricultural use alone does not entitle a taxpayer to an agricultural exemption." 559 So. 2d at 1187.

However, if a governed activity is prohibited and the landowner cannot show a legal, nonconforming use, then the Yusem Rule applies. As the Yusem court opined

> At the outset, a finding that commercial agricultural use is not bona fide because it is prohibited under the zoning laws may be overcome by a showing that the use is a legal nonconforming use. Once the Property Appraiser determines, however, that the use is prohibited and is not a legal nonconforming use, the use, as a matter of law, is *not* bona fide and is *not* in good faith. That conclusion is a rule of substantive law, not an evidentiary presumption. (emphasized in original)

B. Based on the Fifth District's finding that the taxpayer's agricultural activity was bona fide, the court's discussion of Yusem was not necessary and incorrectly minimized the importance of a property owner's adherence to applicable land use regulations.

DOR and Miami-Dade County Property Appraiser agree with Petitioner, the Citrus County Property Appraiser, that, at

the time of the trial court's ruling that the taxpayer's cattle-grazing activities violated the local zoning code, the agricultural classification was properly denied based on the application of the Yusem Rule. However, the Fifth District has decided that the cattle grazing was not prohibited by the local zoning code and, in fact, was not subject to regulation by virtue of Chapter 163, Florida Statutes. Therefore, according to the Fifth District, nothing prohibited a finding that the use was "bona fide." If the Fifth District's finding stands, the Yusem Rule does not apply.[4]

It is troubling that the Fifth District, even after finding "bona fide" use, minimized the importance of a property owner's adherence to applicable land use regulations, contrary to the policy discussed in Yusem. The court below cited Wilkinson v. Kirby, 654 So. 2d 194 (Fla. 2d DCA 1995) as support for the proposition that zoning is not a determinative factor. However, in Wilkinson, where the property appraiser had denied agricultural status because zoning had been changed to allow future planned unit development, the City of Cape Coral itself supported the

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[4] Other than to note that the Yusem court found a clear violation of Miami-Dade County's zoning code and did not need, nor was asked, to deal with the factual issues presented in the case herein, DOR and Property Appraiser defer to Petitioner with respect to its arguments regarding the Fifth District's error in overruling the factual findings of the trial court.

taxpayer's requested agricultural classification. Therefore, the Second District held that the presumption of nonagricultural status had been overcome. The Yusem Rule would not be reached under the facts of Wilkinson.

Likewise, the court below stated that zoning is "at best only a rebuttable presumption, 706 So. 2d 893, citing Lackey v. Little England, Inc., 461 So. 2d 281 (Fla. 5th DCA), rev. denied, 471 So. 2d 43 (Fla. 1985). However, in Lackey, another case where agricultural classification was denied based on a zoning change, the presumption of nonagricultural status again was overcome based on the continuous (i.e.: grandfathered) use of the property for agriculture. The Yusem Rule would not be reached under the facts of Lackey.

The Fifth District's analysis, as it applies to the Yusem case is factually and legally out of context. There is no case cited in the decision that stands for the proposition that an illegal use could be considered "bona fide" for purposes of the ad valorem agricultural classification. As firmly stated by the Yusem court:

> No statute, judicial decision, or principle of equity permits us to sanction an illegal act by conferring upon the taxpayer substantial tax relief at the expense of other taxpayers. 559 So. 2d at 1188.

If the Fifth District's opinion is allowed to become precedent, the harm envisioned by the Yusem court could become reality, to the detriment of the taxpaying public.

CONCLUSION

Property Appraiser and DOR submit that the Fifth District opinion gratuitously has raised a conflict between the Third and Fifth Districts as to the proper analysis of the significance of a property owner's land use violation vis-à-vis entitlement to ad valorem tax exemption. DOR and Property Appraiser urge this Court to recognize the better framework for analysis in such cases - the Yusem Rule.

For the reasons discussed herein, the Florida Department of Revenue and the Miami-Dade County Property Appraiser join the Petitioner in requesting that the Fifth District's opinion be reversed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Office of the Attorney General
The Capitol - Tax Section
Tallahassee, Florida 32399-1050
Tel: (850) 414-3300
Fax: (850) 488-5865

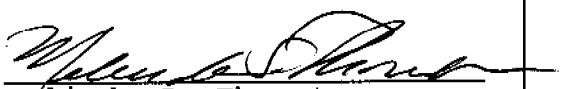
by

Joseph C. Mellichamp, III
Senior Assistant Attorney General
Florida Bar No. 133249

Counsel for the Florida
Department of Revenue

ROBERT A. GINSBURG
Dade County Attorney
Stephen P. Clark Center
Suite 2810
111 N.W. 1st Street
Miami, Florida 33128-1993
Tel: (305) 375-5151
Fax: (305) 375-5634

by



Melinda S. Thornton
Assistant County Attorney
Florida Bar No. 261262

Counsel for the
Miami-Dade County
Property Appraiser

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Joint Amicus Brief was served by mail upon Clark A. Stillwell, Esq., Brannen, Stillwell & Perrin, P.A., Post Office Box 250, Inverness, Florida 33451-0250, Counsel for Petitioner, Enola T. Brown, Robert L. Rocke, Annis, Mitchell, Cockey, Edwards & Roehn, Post Office Box 3433, Tampa, Florida 33601, Counsel for Respondents on this 23 day of July, 1998.

Assistant County Attorney