

SC20-1479

IN THE SUPREME COURT OF FLORIDA

BILL FURST, ET. AL.,
Petitioner,

v.

ROD REBHOLZ, ET AL.,
Respondents.

ON APPLICATION FOR DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA
Case No. 2D18-3323

Petitioner State of Florida, Department of Revenue's Initial Brief

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PRELIMINARY STATEMENT

This Brief will refer to Petitioner, Department of Revenue, as the “Department.” Petitioner, Bill Furst, as Sarasota County Property Appraiser, will be referred to as “Property Appraiser.” Respondent, Don Rebholz, as trustee of the Rod Rebholz Revocable Trust, will be referred to as “Rebholz.” References to the Record on Appeal will be prefixed with the letter R, followed by the page number, e.g., “R, 15.”

IDENTITY AND INTEREST OF THE DEPARTMENT

The Department of Revenue (“Department”) is a state administrative agency charged with general oversight of the ad valorem property tax process in each county. *See, generally*, Ch. 192-195, *Fla. Stat.* The Department is required to prescribe “reasonable rules and regulations for the assessing and collecting of taxes . . . [to] be followed by the property appraisers, tax collectors ... and value adjustment boards.” *See* § 195.027(1), *Fla. Stat.* The Department is a party to the instant action pursuant to Section 194.181(5), *Florida Statutes*. Given its array of statutory duties in Florida’s property tax system, and its experience with the statutes and rules at issue in this case, the Department is interested in the correct and uniform application of law.

Of particular interest to the Department in this proceeding is that portion of the Second District Court's opinion declaring Rule 12D-7.013(5), F.A.C., an invalid exercise of delegated legislative authority. See *Furst v. Rebholz*, 302 So. 3d 423, 431 (Fla. 2d DCA 2020). Therefore, the Department's Brief will be limited to addressing that issue.

SUMMARY OF ARGUMENT

The Second District Court's opinion erroneously declares Rule 12D-7.013(5), F.A.C., an invalid exercise of delegated legislative authority. An administrative agency may promulgate rules, upon receiving rulemaking authority from the legislature, that provide for the operation and enforcement of general or constitutional law. Article VII, Section 6 of the Florida Constitution, which provides an exemption from ad valorem taxation for the homestead, is (1) dependent upon and limited by a subject property's ownership and use, and (2) available only upon establishment of right thereto in the manner prescribed by law. Several provisions of Chapter 196, *Florida Statutes*, which implement the exemption provided by Article VII, Section 6, establish that the homestead exemption applies only to the portion of property used by the owner as the primary residence, and not to any portion of property used for commercial purposes, specifically in this case any

portion of such property that is rented. Rule 12D-7.013(5) fairly implements Article VII, Section 6 and several portions of Chapters 196 and 193, *infra*, which clearly reflect legislative policy and state what the law is, and does nothing more than provide for how Article VII, Section 6 and the cited portions of Chapters 196 and 193 operate and are to be enforced. As such, Rule 12D-7.013 does not violate separation of powers or non-delegation principles.

ARGUMENT

- I. Rule 12D-7.013(5) is Not an Invalid Exercise of Delegated Legislative Authority.**
 - (A) The Non-Delegation Doctrine**

The non-delegation doctrine derives from the separation of powers doctrine and, in the context of this case, essentially operates to limit the legislature's delegation of its law-making powers to the Department. However, Florida courts have long recognized that enforcing a strict prohibition against delegation of authority is impractical, as the legislature is in session for limited periods, and cannot always anticipate and provide for the needs of the state through statute. Some aspects of policy implementation must therefore be left to other branches or agencies that can adequately handle changing circumstances and unforeseen conditions. *Florida Motor Lines v. Railroad Commissioners*, 129 So. 876 (1930).

The legislature is constitutionally empowered to delegate “...subordinate functions to ‘permit administration of legislative policy by an agency with the expertise and flexibility to deal with complex and fluid conditions.” *Sloban v. Florida Board of Pharmacy*, 982 So. 2d 26, 29 (Fla. 1st DCA 2008), *citing Microtel v. Florida Public Service Commission*, 464 So.2d 1189, 1191 (Fla. 1985). Such delegation must include ascertainable minimal standards and guidelines. *Id.*, at 30, *citing Dep’t of Bus. Regulation v. Jones*, 474 So. 2d 359, 361 (Fla. 1st DCA 1985). *See also, Askew v. Cross Key Waterways*, 372 So. 2d 913, 918-19 (Fla. 1979) (“When legislation is so lacking in guidelines that neither the agency nor the courts can determine whether the agency is carrying out the intent of the legislature in its conduct, then, in fact, the agency becomes the lawgiver rather than the administrator of the law.”). “[T]he legislature may delegate some discretion in the **operation** and **enforcement** of the law, but it cannot delegate the power to say what the law is.” *Sloban*, 982 So. 2d at 31 (emphasis added). **In the context of taxation**, the Supreme Court has acknowledged that “...courts cannot realistically require the legislature to dictate every conceivable application of the law down to the most minute detail....[T]he subordinate factors in complex areas such as taxation should be left to the appropriate

agency having expertise and flexibility. Otherwise, the legislature would be forced to remain in perpetual session and devote a large portion of its time to regulation.” *Southern Alliance for Clean Energy v. Graham*, 113 So. 3d 742, 750 (Fla. 2013) (internal citations omitted), *citing In re Advisory Opinion*, 509 So. 2d 292, 311-12 (Fla. 1987).

The Department’s general rulemaking authority regarding property taxes is granted by Section 195.027, *Florida Statutes*, which provides, in pertinent part:

(1) The Department of Revenue shall prescribe reasonable rules and regulations for the assessing and collecting of taxes, and such rules and regulations shall be followed by the property appraisers, tax collectors, clerks of the circuit court, and value adjustment boards. It is hereby declared to be the legislative intent that the department shall formulate such rules and regulations that property will be assessed, taxes will be collected, and the administration will be uniform, just, and otherwise in compliance with the requirements of the general law and the constitution.

§ 195.027, *Fla. Stat.*, (2019) (emphasis added). The statute is replete with sufficient ascertainable minimal standards and guidelines for Departmental rulemaking. Generally, under subsection (1), rules promulgated by the Department are to be limited to the purpose of assessing and collecting taxes; are to be limited in application to property appraisers, tax collectors, clerks of court, and value adjustment boards; and are to be designed to

ensure that property will be assessed, taxes will be collected, and the administration will be uniform, just, and otherwise in compliance with the requirements of the general law and the constitution.

(B) The Article VII, Section 6 Homestead Exemption and Apportionment Based on Ownership and Use

The homestead exemption from ad valorem taxation is granted by Art. VII, Section 6(a), of the Florida Constitution which provides, in pertinent part:

Every person who has the legal or equitable title to real estate and maintains thereon the permanent residence of the owner, or another legally or naturally dependent upon the owner, shall be exempt from taxation thereon, except assessments for special benefits, up to the assessed valuation of twenty-five thousand dollars and, for all levies other than school district levies, on the assessed valuation greater than fifty thousand dollars and up to seventy-five thousand dollars, upon establishment of right thereto in the manner prescribed by law.

The constitution clearly limits the homestead exemption based on ownership and use – the owner, or holder of legal or equitable title, must maintain on the property the permanent residence of the owner, or another legally or naturally dependent on the owner. Further, a property owner’s right to claim the homestead tax exemption is not self-executing, since Article VII, Section 6(a), conditions the exemption upon establishment of the right in accordance with the manner prescribed by law. *Horne v. Markham*, 288 So. 2d 196, 199

(Fla. 1973); *Zingale v. Powell*, 885 So. 2d 277, 284-85 (Fla. 2004) (reaffirming the holding of *Horne* and extending its reasoning to hold that there is no self-executing right to the “Save Our Homes” cap found in Article VII, Section 4, of the Florida Constitution).

The legislature implemented the homestead exemption granted by Article VII, Section 6 in Chapter 196, *Florida Statutes*. Consistent with the constitutional limitation of the exemption based on ownership and use, the legislature defined “real estate used and owned as a homestead” as “...real property to the extent provided in s. 6(a), Art. VII of the State Constitution, *but less any portion thereof used for commercial purposes*, with the title of such property being recorded in the official records of the county in which the property is located. *Property rented for more than 6 months is presumed to be used for commercial purposes.*” § 196.012(13), *Fla. Stat.* (*emphasis added*). Section 196.031, *Florida Statutes*, entitled “Exemption of Homesteads,” provides that “(4) The exemption provided in this section applies only to those parcels classified and assessed as owner-occupied residential property *or only to the portion of property so classified and assessed.*” § 196.031(4), *Fla. Stat.* (*emphasis added*).¹

¹ The legislature amended Section 196.031 during the 2022 legislative

In establishing exemption application requirements, the legislature has provided in Section 196.011, *Florida Statutes*:

(1)(a) Except as provided in s. 196.081(1)(b), every person or organization who, on January 1, has the legal title to real or personal property, except inventory, which is entitled by law to exemption from taxation *as a result of its ownership and use* shall, on or before March 1 of each year, file an application for exemption with the county property appraiser, listing and describing the property for which exemption is claimed and certifying its ownership and use. The Department of Revenue shall prescribe the forms upon which the application is made. Failure to make application, when required, on or before March 1 of any year shall constitute a waiver of the exemption privilege

session by HB7071 (2022), which has not become law as of this writing, to provide:

Section 5. Subsections (5), (6), and (7) of section 196.031, Florida Statutes, are renumbered as subsections (6), (7), and (8), respectively, and a new subsection (5) is added to that section to read:

196.031 Exemption of homesteads.—

(5) For the purpose of applying the exemptions in this section, the real property includes portions of the real property and contiguous real property assessed solely on the basis of character or use pursuant to s. 193.461 or s. 193.501, or assessed pursuant to s. 193.505.

Section 6. The amendments made by this act to s. 196.031, Florida Statutes, are intended to be remedial and clarifying in nature and apply retroactively, but do not provide a basis for an assessment of any tax or create a right to a refund of any tax paid before the effective date of this act. The amendments do not affect the provisions set forth in s. 193.155, Florida Statutes, limiting the application of that section only to the residence and curtilage.

for that year, except as provided in subsection (7) or subsection (8).

§ 196.011(1)(a), *Fla. Stat.* (emphasis added). The homestead exemption provided by Article VII, Section 6 and implemented by Section 196.031 is made subject to the application requirement by Section 196.011(1)(b),

Florida Statutes.² Finally, Section 196.193, *Florida Statutes*, provides:

All property exempted from the annual application requirement of s. 196.011 shall be returned, but shall be granted tax exemption by the property appraiser. *However, no such property shall be exempt which is rented or hired out for other than religious, educational, or other exempt purposes at any time.*

§ 196.193(1)(a), *Fla. Stat.* (emphasis added).

Indeed, qualification for property tax exemptions, and apportionment of property for exemption purposes based on ownership and use, are

² However, “A county may, at the request of the property appraiser and by a majority vote of its governing body, waive the requirement that an annual application or statement be made for exemption of property within the county after an initial application is made and the exemption granted. The waiver under this subsection of the annual application or statement requirement applies to all exemptions under this chapter except the exemption under s. 196.1995. Notwithstanding such waiver, refiling of an application or statement shall be required when any property granted an exemption is sold or otherwise disposed of, when the ownership changes in any manner, when the applicant for homestead exemption ceases to use the property as his or her homestead, or when the status of the owner changes so as to change the exempt status of the property.” § 196.011(9)(a), *Fla. Stat.*

prevailing principles of Florida property tax law. See [(1) Art. VII § 3(a), *Fla. Const.*: “Such portions of property as are used predominantly for educational, literary, scientific, religious or charitable purposes may be exempted by general law from taxation.” (2) § 193.155(4)(a) and (b)1., *Fla. Stat.*: “(4) Except as provided in paragraph (b) and s. 193.624, changes, additions, or improvements to homestead property shall be assessed at just value as of the first January 1 after the changes, additions, or improvements are substantially completed....(b)1. Changes, additions, or improvements that replace all or a portion of homestead property” (3) § 193.155(6), *Fla. Stat.*: “(6) Only property that receives a homestead exemption is subject to this section. No portion of property that is assessed solely on the basis of character or use pursuant to s. 193.461 or s. 193.501, or assessed pursuant to s. 193.505, is subject to this section. When property is assessed under s. 193.461, s. 193.501, or s. 193.505 and contains a residence under the same ownership, the portion of the property consisting of the residence and curtilage must be assessed separately, pursuant to s. 193.011, for the assessment to be subject to the limitation in this section.” (4) § 193.461(3)(d), *Fla. Stat.*: “(d) When property receiving an agricultural classification contains a residence under the same ownership, the portion of the property consisting

of the residence and curtilage must be assessed separately, pursuant to s. 193.011, to qualify for the assessment limitation set forth in s. 193.155. The remaining property may be classified under the provisions of paragraphs (a) and (b).” (5) § 196.196, *Fla. Stat.*: “Determining whether property is entitled to charitable, religious, scientific, or literary exemption-

(2) Only those portions of property used predominantly for charitable, religious, scientific, or literary purposes are exempt. The portions of property which are not predominantly used for charitable, religious, scientific, or literary purposes are not exempt. An exemption for the portions of property used for charitable, religious, scientific, or literary purposes is not affected so long as the predominant use of such property is for charitable, religious, scientific, or literary purposes. In no event shall an incidental use of property either qualify such property for an exemption or impair the exemption of an otherwise exempt property.

(C) Rule 12D-7.013(5)

Consistent with Article VII, Section 6 and the requirements of general law, the Department promulgated Rule 12D-7.013(5), F.A.C., which provides:

Property used as a residence and also used by the owner as a place of business does not lose its homestead character. The two uses should be separated with that portion used as a residence being granted the exemption and the remainder being taxed.

Rule 12D-7.013(5) fairly implements Article VII, Section 6 and those portions of Chapter 196, *supra*, which clearly reflect legislative policy and state what the law is, to wit: qualification for the homestead tax exemption is dependent upon ownership and use, and the exemption is to be applied only to that portion of property used as the owner's permanent residence. As noted above, "[T]he legislature may delegate some discretion in the **operation** and **enforcement** of the law, but it cannot delegate the power to say what the law is." *Sloban*, 982 So. 2d at 31 (emphasis added). Rule 12D-7.013(5) does nothing more than provide for how Article VII, Section 6 and the cited portions of Chapter 196 operate and are to be enforced. *Sloban*. As such, Rule 12D-7.013 does not violate separation of powers or non-delegation principles. *Id.*

CONCLUSION

Based upon the authorities cited herein, the Department respectfully requests that this Court reverse the decision of Second District Court declaring Rule 12D-7.013(5) an invalid exercise of delegated legislative authority.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof was furnished on April 20, 2022, via email to: Sherri L. Johnson, Esquire, Johnson Legal of Florida, P.L., 5602 Marquesas Circle, Suite 208, P.O. Box 20998, Sarasota, Florida 34276, sjohnson@johnsonlegalfl.com; John Geoffrey Pflugner, Esquire, Jason A. Lessinger, Esquire, Anthony J. Manganiello, III, Esquire, Icard Merrill Cullis Timm, et al., 32033 Main Street, Suite 600, Sarasota, Florida 34237, jpfugner@icardmerrill.com, dmartin@icardmerrill.com,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the Department's Answer Brief complies with the font requirements of Florida Rules of Appellate Procedure 9.045(b) and 9.210(a)(2)(B), in that this Brief uses Arial 14-point font.

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