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Amber Donner-Froelich

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"Fogg" Lingers Over the Supreme Court of Florida

I. Introduction

E.C. Fogg, III, Alan S. Fogg, and Elizabeth Lane Fogg owned a parcel of unimproved land in Broward County, Florida.[1] Prior to 1974, the tax assessor had classified the parcel as agricultural land, but in 1974 he reclassified and reassessed the property as nonagricultural.[2]

Through 1975, the Foggs carried out agricultural pursuits on the property.[3] They leased part of the land for cattlegrazing, and on the other part they boarded horses. The Foggs also carried out activities indicative of an intent to develop the property. They made contracts for sale, applied for rezoning, attended hearings before the city council, applied for project approval by the South Florida Regional Planning Council, conducted engineering studies, obtained approvals of solid waste plans, and secured approval for bonds that the Hollywood Reclamation District was to issue.[4]

The Foggs brought an action for a declaratory judgment that they were using the property for agricultural purposes, and in the same action, they sought injunctive relief to prevent the tax assessor from taxing the property at the higher nonagricultural value for the years 1974 and 1975. The trial court denied the relief sought and upheld the nonagricultural classification.[5] The trial court found that section 193.461(4)(c) of the Florida Statutes primarily controlled the outcome of the case.[6] Subsection (4)(c) cre-

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1. The facts were taken from Markham v. Fogg, 458 So. 2d 1122 (Fla. 1984), Fogg v. Broward County, 397 So. 2d 944 (Fla. 4th DCA 1981), and Fogg v. Broward County, No. 74-13642 (Fla. Cir. Ct. Dec. 22, 1978).

2. Markham v. Fogg, 458 So. 2d at 1124.

3. Fogg v. Broward County, 397 So. 2d at 946. The tax assessor alleged that the agricultural use was merely "incidental" to development. *Id.*

4. *Id.*

5. Fogg v. Broward County, No. 74-13642.

6. Subsection (4)(c) states:

> Sale of land for a purchase price which is three or more times the agricultural assessment placed on the land shall create a presumption that such land is not used primarily for bona fide agricultural purposes. Upon a showing of special circumstances by the landowner demonstrating that the land is to be continued in bona fide agriculture, this presumption may be rebutted.

FLA. STAT. § 193.461(4)(c) (1983). Subsection (4)(c) will be referred to as the "three times

ates a rebuttable presumption that land is no longer used agriculturally once it has been sold for a purchase price that is three or more times the agricultural assessment placed on the land. The trial court found that the Foggs had sold the land at a price more than three times the agricultural assessment and that they had not successfully rebutted the statutory presumption.[7] Additionally, the trial court found that the land had been rezoned to a nonagricultural use at the request of the owner. Subsection (4)(a)3[8] creates a presumption that land is no longer used agriculturally when, at the owner's request, the land has been rezoned "nonagricultural." Thus, subsection (4)(a)3 required the tax assessor to reclassify the land to nonagricultural. Finally, pursuant to subsection (3)(b),[9]

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purchase price presumption."

7. Fogg v. Broward County, No. 74-13642, slip op. at 2. There are three possible explanations for the trial court's finding that a sale occurred. The trial court may have based its holding on its determination that "[t]he August contract of sale . . . did close . . . ." *Id.* at 3. This justification for the court's holding is unlikely, however, because both parties agreed that no closing took place. Thus the court's finding that a contract closed is apparently a typographical error. *See* Answer Brief of Respondents on the Merits at 6, Markham v. Fogg, 458 So. 2d 1122 (Fla. 1984). Alternatively, the court may have determined that because a contract purchaser holds equitable title to the property once the contract is signed, a sale, for the purposes of section (4)(c), had occurred when the parties signed the contract for sale. *See* Fogg v. Broward County, 397 So. 2d at 948. Finally, the trial court may have confused the issue of whether a sale had occurred with the issue of the Foggs' good faith agricultural use of the land, by determining that because the Foggs evidenced an intent to sell the land, a sale had occurred for the purposes of subsection (4)(c). *See infra* text accompanying notes 97-100.

The trial court apparently found that the Foggs failed to rebut the "three times purchase price presumption" because they intended to sell the property for development, and thus they could not make the required showing under subsection (4)(c) that the land was to be continued in bona fide agriculture. Fogg v. Broward County, No. 74-13642.

8. Subsection (4)(a)3 provides that "[t]he property appraiser shall reclassify . . . as nonagricultural . . . [l]and that has been zoned to a nonagricultural use at the request of the owner . . . ." FLA. STAT. § 193.461(4)(a)3 (1983). Subsection (4)(a)3 will be referred to as the "rezoning presumption."

9. Subsection (3)(b) provides:

> Subject to the restrictions set out in this section, only lands which are used primarily for bona fide agricultural purposes shall be classified agricultural. "Bona fide agricultural purposes" means good faith commercial agricultural use of the land. In determining whether the use of the land for agricultural purposes is bona fide, the following factors may be taken into consideration:
>
> (1) The length of time the land has been so utilized;
>
> (2) Whether the use has been continuous;
>
> (3) The purchase price paid;
>
> (4) Size, as it relates to specific agricultural use;
>
> (5) Whether an indicated effort has been made to care sufficiently and adequately for the land in accordance with accepted commercial agricultural practices, including, without limitation, fertilizing, liming, tilling, mowing, reforesting, and other accepted agricultural practices;

which requires that only lands used primarily for good faith commercial agricultural use shall be classified agricultural, the trial court found that the land should not be classified as agricultural because the Foggs had not shown that they were using the land primarily for agricultural purposes.[10]

The Fourth District Court of Appeal reversed the trial court's decision.[11] In so doing, the Fourth District held that the "three times purchase price presumption," applied only to completed sales of realty and that, although the Foggs made numerous contracts to sell the land, they did not sell it.[12] The Fourth District also held that although the land had been rezoned from agricultural to planned unit development, the "rezoning presumption" did not require the tax assessor to reclassify the land as nonagricultural because the owners continued to use the property for agricultural purposes.[13] Finally, the appellate court held that the evidence failed to support the trial court's finding that the owners were not using the land primarily for bona fide agricultural purposes.[14]

On certiorari,[15] the Supreme Court of Florida quashed the appellate court's decision.[16] In accord with the appellate court, the supreme court held that the "three times purchase price presumption" of subsection (4)(c) was not applicable to a property owner who had not in fact sold the land.[17] The supreme court, however, quashed the lower court's opinion because it found the evidence sufficient to sustain the trial court's finding that the Foggs had

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> (6) Whether such land is under lease and, if so, the effective length, terms, and conditions of the lease; and
> (7) Such other factors as may from time to time become applicable.

Id. at (3)(b). Subsection (3)(b) will be referred to as the "good faith commercial agricultural use" subsection.

10. Fogg v. Broward County, No. 74-13642, slip op. at 4-7.

11. Fogg v. Broward County, 397 So. 2d at 950.

12. *Id.* at 948-49. The Fourth District determined that the "Legislature [did not intend] to bar land from an agricultural classification for tax purposes upon the mere signing of a contract to sell it." *Id.* at 949.

13. *Id.* at 949-50.

14. *Id.* at 950. The Fourth District held that the test employed in determining bona fide agricultural use was actual use. *Id.*

15. The Supreme Court of Florida accepted certiorari pursuant to article V, section 3(b)(3) of the Florida Constitution because the Fourth District Court of Appeal's holding in *Fogg* directly conflicted with the Third District's holding in Lauderdale v. Blake, 351 So. 2d 742 (Fla. 3d DCA 1977). The *Blake* court relied on section (4)(a)3 the "rezoning presumption" to uphold the denial of agricultural classification where the landowners rezoned their property from agricultural to a multiple family district. *Id.* at 743.

16. Markham v. Fogg, 458 So. 2d at 1127.

17. Markham v. Fogg, 458 So. 2d at 1125.

used the land primarily for bona fide agricultural purposes, and thus, the Foggs presented insufficient evidence to rebut subsection (4)(a)3, the "rezoning presumption." Moreover, the court upheld the constitutionality of subsection (4)(a)3 under both the due process and equal protection clauses of the Florida Constitution.[18]

II. PERSPECTIVE

A. *Constitutional and Legislative History of the Greenbelt Law*

In 1959, in response to the threat of "urban sprawl,"[19] the Florida Legislature enacted section 193.201 of the Florida Statutes.[20] This law gave preferential tax treatment to land used exclusively for agriculture purposes.[21] Section 193.201 was the precursor of Florida's greenbelt law, section 193.461.[22]

Prior to the enactment of the 1968 constitution, which recognizes the right of the legislature to enact preferential agricultural assessment statutes,[23] the legislature passed Florida's current

18. The Foggs challenged the constitutionality of section (4)(a)3 for the first time on appeal in the district court. Fogg v. Broward County, 397 So. 2d at 949. The district court declined to resolve the constitutional issues presented because the Foggs failed to assert them at the trial level. *Id.*

19. The legislature observed that real estate development that increased assessment of agricultural lands to unreasonable and unprofitable proportions forced farmers to abandon their livelihood. 1959 Fla. Laws ch. 59-226 (Preamble of House Bill No. 831).

20. FLA. STAT. § 193.201 (1959) (current version at FLA. STAT. § 193.461 (1983)).

21. *Id.* Preferential assessment refers to lands that are assessed at a more favorable tax rate than other lands for various policy reasons. With respect to agricultural land, the justification given for the special treatment falls into two categories:

> The first argument is the farmland preservation theory. Agricultural land tax breaks save farmers money and make agricultural activities more profitable, consequently giving farmers an economic incentive to continue farming. The second justification given for treating farmers differently for tax purposes is that agricultural activities do not make demands on governmental services that urban land uses make. Farmers are therefore entitled to tax breaks because they otherwise would be paying more than their fair share of the costs of governmental services.

Juergensmeyer, *Farmland Preservation: A Vital Agricultural Law Issue for the 1980's*, 21 WASHBURN L.J. 443, 466 (1982).

22. FLA. STAT. § 193.461 (1983). "A 'greenbelt' is an area of land bordering on an urban center that has deliberately been preserved in its undeveloped state; the land is not used at all or is used only for agriculture." Note, *Florida Greenbelts: Preservation of Public and Private Interests*, 27 U. FLA. L. REV. 142, 142 n.1 (1974). For an in-depth discussion of section 193.201, see Wershow, *Agricultural Zoning in Florida—Its Implications and Problems*, 13 U. FLA. L. REV. 479 (1960).

23. Prior to the enactment of the new constitution, the Supreme Court of Florida, in Tyson v. Lanier, 156 So. 2d 833 (Fla. 1963), sanctioned preferential assessment for agricultural lands. The court articulated its rationale two years later in Lanier v. Overstreet, 175 So. 2d 521 (Fla. 1965). It said: "The organic requirements of Section 1 of Article IX do not

greenbelt law.[24] The present constitution states that "[a]gricultural land . . . may be classified by general law and assessed solely on the basis of character or use."[25] Pursuant to this constitutional provision, Florida's greenbelt statute attempts to balance conflicting agricultural and urban interests "to assure an orderly development of the community"[26] and "to promote agricultural use of the land."[27]

The Supreme Court of Florida has espoused a similar purpose with respect to the most recent articulation of the greenbelt law:

> [T]he reduced taxation for farmland is based on a legislative determination that agriculture cannot reasonably be expected to withstand the tax burden of the highest and best use to which such land might be put. The agricultural assessed value is the amount that could be invested with a reasonable expectation of an annual return to the owner similar to what he would gain from other commercial enterprises with similar risks, liquidity, degree and level of management, etc.[28]

In other words, "the primary legislative purpose of the 'green belt' law [is] to encourage continued agricultural use by assisting a farmer-owner to make a reasonable profit from such use, vis-a-vis, a like profit should it be put to nonagricultural use."[29]

B. *Case Law—the Greenbelt Statute Interpreted*

Historically, Florida courts have interpreted the greenbelt law with relative consistency. The courts had in the past held uniformly that agricultural use was the primary criterion of the greenbelt law and that the speculative intent of the landowner was irrelevant.[30] *Matheson v. Elcook*[31] is an early articulation of this

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forbid the classification of property in providing for the 'just valuation' of taxable property; on the contrary, the organic mandate to the legislature to 'prescribe such regulations as shall secure a just valuation of all property' contemplates such classifications . . . ." *Id.* at 523. Chief Justice Drew, joined by Justices Thomas and O'Connell, authored a vigorous dissent in *Overstreet*, arguing that the legislature had no power to grant exemptions from taxation to certain classes. *Id.* at 525-26 (Drew, C. J., dissenting).

24. FLA. STAT. § 193.461 (1983).

25. FLA. CONST. art. VII, § 4(a).

26. Rainey v. Nelson, 257 So. 2d 538, 539 (Fla. 1972).

27. Harbor Ventures, Inc. v. Hutches, 366 So. 2d 1173, 1174 (Fla. 1979).

28. Straughn v. K & K Land Management, Inc., 326 So. 2d 421, 424 (Fla. 1976).

29. Walden v. Tuten, 347 So. 2d 129, 131 (Fla. 2d DCA 1977).

30. *See, e.g.*, Harbor Ventures, Inc. v. Hutches, 366 So. 2d 1173 (Fla. 1979); Roden v. K & K Land Management, Inc., 368 So. 2d 588 (Fla. 1978); Straughn v. Tuck, 354 So. 2d 368 (Fla. 1977); Conrad v. Sapp, 252 So. 2d 225 (Fla. 1971); Greenwood v. Oates, 251 So. 2d 665 (Fla. 1971); Lanier v. Overstreet, 175 So. 2d 521 (Fla. 1965); The Glades, Inc. v. Colding, 422

principle. The *Matheson* court held that the greenbelt statute did not require the agricultural use of the land to be efficient or profitable.[32] The tax assessor in *Matheson* alleged that the court's holding would result in speculators taking advantage of the tax benefits by farming their land merely to obtain favorable tax treatment rather than to pursue long-term agricultural use. The Third District pointed out, however, that the tax advantages under the greenbelt law accrued where there was a bona fide agricultural use of the land.[33]

In *Hausman v. Rudkin*,[34] the Fourth District expressly acknowledged that the landowners had purchased the property as a speculative venture. The *Hausman* court held that: "As we interpret the statute, the intent of the title holder and his desire for capital gain are immaterial to the application of agricultural zoning. The favorable tax treatment provided by the statute is predicated on land use, that is, physical activity conducted on the land."[35] In the same year that the Fourth District decided *Hausman*, the Second District, in *Schooley v. Wetstone*,[36] determined that a zoning board's contention that the land was used primarily for speculation was "of no consequence" where the actual use of the land was for bona fide agricultural purposes.[37]

So. 2d 349 (Fla. 2d DCA 1982); Czagas v. Maxwell, 393 So. 2d 645 (Fla. 5th DCA 1981); Department of Revenue v. Goembel, 382 So. 2d 783 (Fla. 5th DCA 1980); Fisher v. Schooley, 371 So. 2d 496 (Fla. 2d DCA 1979); Hausman v. Rudkin, 268 So. 2d 407 (Fla. 4th DCA 1972); Schooley v. Wetstone, 258 So. 2d 483 (Fla. 2d DCA 1972); McKinney v. Hunt, 251 So. 2d 6 (Fla. 1st DCA 1971); Matheson v. Elcook, 173 So. 2d 164 (Fla. 3d DCA 1965). *But see* Bass v. General Dev. Corp., 374 So. 2d 479 (Fla. 1979); Harbor Ventures, Inc. v. Hutches, 366 So. 2d 1173, 1174-75 (Fla. 1979) (Boyd, J., dissenting); Markham v. Nationwide Dev. Co., 349 So. 2d 220 (Fla. 4th DCA 1977); Walden v. Tuten, 347 So. 2d 129 (Fla. 2d DCA 1977); First Nat'l Bank v. Markham, 342 So. 2d 1016 (Fla. 4th DCA 1977); Firstamerica Dev. Corp. v. County of Volusia, 298 So. 2d 191 (Fla. 1st DCA 1974). The text accompanying notes 49-58 contains a discussion of courts that have held that the use standard is not legislatively mandated.

31. 173 So. 2d 164 (Fla. 3d DCA 1965).

32. *Id.* at 166. The landowners operated an unprofitable coconut plantation on approximately 67 acres that "could have been accomplished just as well on five or ten acres." *Id.*

33. *Id.*; *see also* The Glades, Inc. v. Colding, 422 So. 2d 349, 351 (Fla. 2d DCA 1982) ("Once the court finds a bona fide good faith agricultural use pursuant to section 193.461(3)(b), the prior or future use of the land is irrelevant."); Fisher v. Schooley, 371 So. 2d 496, 500 (Fla. 2d DCA 1979) ("It is not required that the owner be a farmer or that there be a profit realized on the owner's overall investment.").

34. 268 So. 2d 407 (Fla. 4th DCA 1972).

35. *Id.* at 409. In *Hausman*, the seller, who raised cattle for twenty-two years, sold the land to the present landowners but remained under a written lease and continued his livestock operation. The lease was subject to cancellation on ninety days notice. *Id.* at 408-09.

36. 258 So. 2d 483 (Fla. 2d DCA 1972).

37. *Id.* at 485; *see also* The Glades, Inc. v. Colding, 422 So. 2d 349, 351 (Fla. 2d DCA

Prior to the passage of the current greenbelt law, the Supreme Court of Florida classified land based on its actual use, irrespective of the landowners' motives.[38] In 1965, in *Lanier v. Overstreet*,[39] the supreme court noted that "all of the legislative directives in this field appear to have been designed to make sure that, in doubtful areas, the assessment will be made on the basis of actual use to which the property is designed to be put during the particular tax year."[40] In *Greenwood v. Oates*,[41] the Supreme Court of Florida stated that "once [agricultural use] has been established we expect that it would be a rare situation where the claim for agricultural assessment would not be 'bona fide.' "[42]

Subsequent to the passage of the current greenbelt statute, the supreme court continued its adherence to the use standard.[43] In *Straughn v. Tuck*,[44] the court noted that "in order to qualify for preferential agricultural classification prior to 1968 one had to prove agricultural 'use.' "[45] The court further noted that "[i]n 1972, section 193.461 was substantially modified . . . . However, as evidenced by subsection (3)(b) of the statute, 'use' is still the guidepost in classifying land . . . ."[46] In *Harbor Ventures, Inc. v. Hutches*,[47] the supreme court again pledged allegiance to the use standard by expressing its continued "adherence to the actual use test."[48]

1982) ("[H]aving made the initial finding of a bona fide good faith agricultural use, the trial judge erred in considering the possible future development."); Czagas v. Maxwell, 393 So. 2d 645, 647 (Fla. 5th DCA 1981) ("[P]rofit is an element that should be considered but it is not the determinative or controlling factor."); Department of Revenue v. Goembel, 382 So. 2d 783, 785 (Fla. 5th DCA 1980) ("While profit is a factor for consideration it is clear that it is not by itself, a determinative or controlling factor."); Fisher v. Schooley, 371 So. 2d 496, 500 (Fla. 2d DCA 1979) ("It is not required that the owner be a farmer or that there be a profit realized on the owner's overall investment."); McKinney v. Hunt, 251 So. 2d 6, 9 (Fla. 1st DCA 1971) ("[T]he use of the land is what is involved in the Statutes, and not whether the owner or operator was earning a livelihood from such use.").

38. Roden v. K & K Land Management, Inc., 368 So. 2d 588 (Fla. 1978); Straughn v. Tuck, 354 So. 2d 368 (Fla. 1977); Conrad v. Sapp, 252 So. 2d 225 (Fla. 1971); Greenwood v. Oates, 251 So. 2d 665 (Fla. 1971); Lanier v. Overstreet, 175 So. 2d 521 (Fla. 1965).

39. 175 So. 2d 521 (Fla. 1965).

40. *Id.* at 524.

41. 251 So. 2d 665 (Fla. 1971).

42. *Id.* at 667.

43. Harbor Ventures, Inc. v. Hutches, 366 So. 2d 1173 (Fla. 1979); Straughn v. Tuck, 354 So. 2d 368 (Fla. 1977).

44. 354 So. 2d 368 (Fla. 1977).

45. *Id.* at 370.

46. *Id.*

47. 366 So. 2d 1173 (Fla. 1979).

48. *Id.* at 1174.

Despite the plethora of cases holding that use is the applicable standard under Florida's greenbelt law, a number of aberrant cases exist.[49] Since the amendment of section 193.461 in 1972, Florida courts have been unable to reconcile their decisions concerning the correct standard to be applied in determining eligibility for agricultural status. *Markham v. Nationwide Development Co.*[50] exemplifies this inconsistency. In construing subsection (4)(c) of Florida's greenbelt law, the "three times purchase price presumption," the court held that absent a showing of special circumstances, a showing of existing agricultural use was not enough to overcome the nonagricultural use presumption.[51] The Fourth District based its holding on language in subsection (4)(c) that requires "special circumstances" to be shown. The circumstances must indicate that the land is to be continued in bona fide agriculture use to rebut the presumption. Alternatively, the *Nationwide Development* court also held that subsection (3)(b), the "good faith commercial agricultural use" subsection required more than mere agricultural use: "To be a good faith commercial agricultural use, there must be at least a reasonable expectation of meeting investment cost and realizing a reasonable profit."[52]

In 1977, the Second District, in *Walden v. Tuten*,[53] determined that "absent a profit motive from the agricultural use, the . . . presumption of non bona fide agricultural use would be *fortified* rather than rebutted."[54]

The Supreme Court of Florida in *Bass v. General Development Corp.*[55] apparently receded from its previous commitment to the use standard by stating that some of its prior holdings were misleading to the extent that they held that the use standard be

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49. Bass v. General Dev. Corp., 374 So. 2d 479 (Fla. 1979); Harbor Ventures, Inc. v. Hutches, 366 So. 2d 1173, (Fla. 1979) (Boyd, J., dissenting); Markham v. Nationwide Dev. Co., 349 So. 2d 220 (Fla. 4th DCA 1977); Walden v. Tuten, 347 So. 2d 129 (Fla. 2d DCA 1977); First Nat'l Bank v. Markham, 342 So. 2d 1016 (Fla. 4th DCA 1977); Firstamerica Dev. Corp. v. County of Volusia, 298 So. 2d 191 (Fla. 1st DCA 1974).

50. 349 So. 2d 220 (Fla. 4th DCA 1971).

51. *Id.* at 222.

52. *Id.* Although indicative of the theories behind the cases holding that mere agricultural use is not sufficient under the greenbelt law, this case may not be good law. It relied on First Nat'l Bank v. Markham, 342 So. 2d 1016 (Fla. 4th DCA 1977), which was expressly disapproved by the Supreme Court of Florida in Roden v. K & K Land Management, Inc., 368 So. 2d 588 (Fla. 1978).

53. 347 So. 2d 129 (Fla. 2d DCA 1977).

54. *Id.* at 131.

55. 374 So. 2d 479 (Fla. 1979).

adhered to when classifying land for taxation purposes.[56] In *Harbor Ventures*,[57] Justice Boyd noted in dissent that

> [i]f the greenbelt law and the decisions interpreting it have established actual use of land as the general test for entitlement to the agricultural assessment, then clearly section 193.461(4)(a)(3) [the rezoning presumption] constitutes a legislatively-mandated exception to that test. For the enactment directs that the preferential tax treatment be denied upon the happening of an event, regardless of actual use.[58]

III. Analysis

A. *To Use or Not to Use the Use Standard?*

The Supreme Court of Florida's opinion in *Fogg* only increases the confusion of Florida courts over what standard they should apply to determine the agricultural status of land under the greenbelt law. Moreover, this confusion is reflected in the opinion itself. The court held that a court should not employ a use standard when dealing with the rezoning presumption of section 193.461(4)(a)3.[59] Despite having thus articulated a nonuse criterion, the court nevertheless proceeded to apply the traditional use standard. The *Fogg* court found that even though they rezoned their property to a nonagricultural use, the Foggs could present evidence that they continued to use the property primarily for bona fide agricultural purposes.[60]

B. *The Constitutionality of Subsection (4)(a)3*

1. Due Process Analysis

The Supreme Court of Florida in *Fogg* held that subsection (4)(a)3, the "rezoning presumption," did not violate the due pro-

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56. *Id.* at 482. In response to the language in *Tuck* declaring that "[a]gricultural use is now and has always been the test," Straughn v. Tuck, 354 So. 2d 368, 370 (Fla. 1977), the supreme court in *Bass* determined that the "statement merely constitutes a recognition that the legislature has generally *chosen* to classify land on the basis of use . . . ." *Bass*, 374 So. 2d at 482. The *Bass* court noted that the legislature has the prerogative, however, and in fact, prior to the present section 193.461 has exercised that prerogative, to classify land on a basis other than use. *See infra* text accompanying notes 79-83 (discussion of when the legislature previously adopted a nonuse standard).

57. 366 So. 2d 1173 (Fla. 1979) (Boyd, J., dissenting).

58. *Id.* at 1175.

59. Markham v. Fogg, 458 So. 2d 1122, 1126 (Fla. 1984).

60. *Id.*

cess or equal protection clauses of the Florida Constitution.[61] In discussing the due process challenge, the court characterized the operation of the subsection as a "mandatory presumption."[62] It applied a three-fold test to determine the constitutionality of subsection (4)(a)3:

> [C]onstitutionality . . . under the Due Process Clause must be measured by determining (1) whether the concern of the legislature was reasonably aroused by the possibility of an abuse which it legitimately desired to avoid; (2) whether there was a reasonable basis for a conclusion that the statute would protect against its occurrence; and (3) whether the expense and other difficulties of individual determinations justify the inherent imprecision of a conclusive presumption.[63]

The court determined that the first prong was satisfied because "it [was] apparent that the 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."[64] The court concluded that the second prong was satisfied because there was a rational connection between the putative purpose of the greenbelt statute and that of the mandatory reclassification of lands to nonagricultural. The court noted that the legislature "could have concluded that since rezoning to nonagricultural use was an obvious and necessary prerequisite to development, the statute in question would protect against the abuse of this special tax classification"[65] by speculative rezoning.[66]

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61. *Id.* at 1127.

62. *Id.* at 1125. The court's classification of subsection (4)(a)3 as a mandatory presumption appears inconsistent with its later discussion of the rebutability of the subsection. *See infra* text accompanying notes 86-92.

63. Markham v. Fogg, 458 So. 2d at 1125 (quoting Bass v. General Dev. Corp., 374 So. 2d 479, 484 (Fla. 1979)).

64. *Id.*

65. *Id.*

66. *Id.* The supreme court in *Fogg* derived the notion that § 193.461 prohibited speculative rezoning from its prior holding in Harbor Ventures, Inc. v. Hutches, 366 So. 2d 1173 (Fla. 1979). *Harbor Ventures* presented the Supreme Court of Florida with the identical issue dealt with in *Fogg*, i.e., the constitutionality of section 193.461 (4)(a)3, the "rezoning presumption." The *Harbor Ventures* court, however, never reached the issue presented because it found the statute inapplicable to the particular facts of the case. *Id.* at 1174. The court held that because the landowners had zoned their property from one nonagricultural use to another, and not from an agricultural use to a nonagricultural use as the statute required, subsection (4)(a)3 was not controlling. The supreme court in *Harbor Ventures* reasoned: "The legislature could not have intended to deny the benefits of the Greenbelt law where a clear bona fide commercial agricultural use was being made of land that was re-

The court buttressed its conclusion with respect to the second prong by proclaiming that its decision was consistent with the rationale in *Bass v. General Development Corp.*[67] In *Bass*, the supreme court held unconstitutional subsection (4)(a)4, the "platting presumption."[68] Subsection (4)(a)4 required the assessor to reclassify land as nonagricultural upon the recording of a subdivision plat.[69] The *Bass* court held that the platting presumption violated due process and equal protection.[70] The court reasoned that because the filing of a subdivision plat had little to do with the use of the property, there was no rational connection between the legislative purpose "to preclude preferential ad valorum tax treatment for property which [was] not being used primarily for good faith agricultural purposes"[71] and the mandatory reclassification. Thus, the platting presumption failed the second prong of the test for constitutionality.[72] The *Fogg* court distinguished the *Bass* decision by finding that a use standard did not govern subsection (4)(a)3.[73]

An inherent defect in the court's analysis is its failure to delineate the reason why subsection (4)(a)3, the "rezoning presumption," does not require a use standard but subsection (4)(a)4, the "platting presumption" does require a use standard. The court in *Fogg* merely looked to its prior holding in *Harbor Ventures* where it determined that the general mandate of the greenbelt law prohibited speculative rezoning because "speculative rezoning must have been viewed by the legislature as a first step toward non-agricultural use,"[74] to justify its determination that subsection (4)(a)3 was rationally related to the purpose of the greenbelt law.

This argument proves too much. If rezoning is the first step toward nonagricultural use, then platting must be considered a final step toward nonagricultural use. For example, a developer will postpone filing a subdivision plat until he or she is certain of immi-

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zoned from one nonagricultural use to another nonagricultural use." *Id.*

67. 374 So. 2d 479 (Fla. 1979).

68. *Id.* at 486.

69. Subsection (4)(a)4 provides that "[t]he property appraiser shall reclassify . . . as nonagricultural . . . [l]and for which the owner has recorded a subdivision plat . . . ." FLA. STAT. § 193.461 (4)(a)4 (1983).

70. *Bass*, 374 So. 2d at 485-86.

71. *Id.* at 484.

72. *Id.* "[I]t is unreasonable and constitutionally impermissible to presume *conclusively* from the recording of a subdivision plat that the platted land is not *presently* being used primarily for good faith commercial agricultural purposes . . . ." *Id.* at 485-86.

73. Markham v. Fogg, 458 So. 2d at 1126 ("with the instant section, however, use is not the standard").

74. *Harbor Ventures*, 366 So. 2d at 1174.

nent development because filing a subdivision plat entails posting subdivision bonds.[75] On the other hand, a zoning change has no equivalent expenses. Thus, if the legislature adopted the present greenbelt law because of its concern that certain acts create a presumption of nonagricultural use, it appears that, contrary to the holdings of the supreme court in *Bass* and *Fogg*, the filing of a subdivision plat *is* evidence of imminent nonagricultural use and, at the very least, is more indicative of nonagricultural use than rezoning.[76]

The court's reliance on *Harbor Ventures* is misplaced because the court in *Harbor Ventures* held, in spite of its finding that the greenbelt law served to discourage speculative rezoning, that "[t]he legislature could not have intended to deny the benefits of the Greenbelt law where a clear bona fide commercial agricultural use was being made of land . . . ."[77] Thus, the *Fogg* court's use of *Harbor Ventures* to support its analysis of the second prong of the due process test backfired: subsection (4)(a)3 fails the second prong because, as held in *Harbor Ventures*, use is the standard courts should employ under subsection (4)(a)3, and because rezoning is not rationally related to the actual use of property.[78]

The *Fogg* court also relied on *Rainey v. Nelson*[79] to support its conclusion that the use standard was not constitutionally man-

75. FLA. STAT. § 163.270 (1983).

76. The analysis that filing a subdivision plat is more indicative of future nonagricultural use than rezoning is consistent with the language of the statute. Subsection (4)(a)3 requires the property appraiser to reclassify to nonagricultural "[l]and that has been zoned to a nonagricultural use . . . ." Subsection (4)(a)4 requires the property appraiser to reclassify to nonagricultural "land for which the owner has recorded a subdivision plat . . . ." Hence, the express language of the statute mandates a use standard when property is rezoned, but does not mandate a use standard when property is platted. This conclusion is further buttressed by looking at subsections (4)(a)1-4 as a whole:

> The property appraiser shall reclassify the following lands as nonagricultural:
>
> 1. Land diverted from an agricultural to a nonagricultural use;
>
> 2. Land no longer being utilized for agricultural purposes;
>
> 3. Land that has been zoned to a nonagricultural use at the request of the owner . . . or
>
> 4. Land for which the owner has recorded a subdivision plot . . . .

FLA. STAT. § 193.461 (1983). These subsections encompass four situations where the legislature has directed the property appraiser to reclassify lands upon the occurrence of a condition. Three out of four conditions expressly relate to the nonagricultural use of the property; the only subsection not specifically requiring the land to be used nonagriculturally is subsection (4)(a)4, the "platting presumption."

77. *Harbor Ventures*, 366 So. 2d at 1174.

78. *See supra* text accompanying notes 75-76.

79. 257 So. 2d 538 (Fla. 1972).

dated.[80] *Rainey*, however, is inapposite because it is distinguishable. In *Rainey*, the supreme court upheld the constitutionality of subsection (4)(b),[81] which provides for reclassification of lands that are zoned agricultural when an urban or metropolitan development is contiguous on two or more sides of the property.[82] In determining that subsection (4)(b) was constitutional, the Supreme Court of Florida identified an underlying public policy interest in "assur[ing] an orderly development of the community."[83]

The court in *Fogg* did not articulate any public policy interest underlying subsection (4)(a)3, the "rezoning presumption," sufficient to condone a nonuse standard, which is insufficient under subsection (4)(a)4, the "platting presumption." In other words, the court determined that there was a public policy interest in discouraging land developers from "taking advantage of the agricultural classification provisions to minimize their holding costs prior to development."[84] This public policy interest, however, seems equally applicable to subsection (4)(a)4, the "platting presumption" because the filing of a subdivision plat is indicative of a developer's intent to develop the land.[85] The preceding analysis suggests that the *Fogg* court's determination that subsection (4)(a)3 does not violate the second prong of the due process clause is inconsistent with *Bass* and is theoretically unsound.

With respect to the third prong of the due process test, the *Fogg* court determined that although the landowner had no right to rebut subsection (4)(a)3, the statute could be read *in pari materia* with subsection (3)(b),[86] thus satisfying the third prong.[87] Subsection (3)(b), the "good faith commercial agricultural use" subsection, provides that only those lands that are used for good faith commercial agricultural purposes are to be classified as agri-

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80. Markham v. Fogg, 458 So. 2d at 1126.

81. *Rainey*, 257 So. 2d at 540.

82. Subsection (4)(b) provides:

> The board of county commissioners may also reclassify lands classified as agricultural to nonagricultural when there is a contiguous urban or metropolitan development and the board of county commissioners finds that the continued use of such lands for agricultural purposes will act as a deterrent to the timely and orderly expansion of the community.

FLA. STAT. § 193.461(4)(b) (1983).

83. *Rainey*, 257 So. 2d at 539.

84. Markham v. Fogg, 458 So. 2d 1122, 1125 (Fla. 1984).

85. *See supra* text accompanying notes 75-76.

86. *See supra* note 9.

87. Markham v. Fogg, 458 So. 2d at 1126.

cultural.[88] After the *Fogg* holding, a landowner who has rezoned property from agricultural to nonagricultural may present evidence under subsection (3)(b) to prove that the use of the property is in fact a bona fide agricultural use.[89] The difficulty with the court's opinion is twofold: it is inconsistent with the letter of the statute, and it is inconsistent with the court's holding in *Bass*.

If the legislature had intended subsection (4)(a)3 to be rebuttable, then it would have provided for such. For example, in subsection (4)(c),[90] the legislature provided that a landowner may rebut the presumption of nonagricultural use where land was sold "for a purchase price which is three or more times the agricultural assessment placed on the land [by proving] special circumstances."[91] Conversely, subsection (4)(a)3, the "rezoning presumption," delineates no such opportunity for rebuttal. The subsection is a command to the property appraiser to reclassify property once it has been rezoned to a nonagricultural use, with no allowances for rebuttal. The *Fogg* court, however, affectively allowed rebuttal. There is simply nothing in the statute that would support the court's interpretation.

Furthermore, the holding in *Fogg* is in complete derogation of the court's earlier holding in *Bass*. The *Bass* court, in concluding that subsection (4)(a)4 failed to satisfy the third prong of the due process clause, reasoned that the crucial difference between section (4)(c), the "three times purchase price presumption," which was held constitutional in *Straughn*, and section (4)(a)4, the "platting presumption," was that the former section enables the landowner to overcome the presumption of nonagricultural use through evidence of special circumstances whereas the latter section failed to contain a "similar curative provision."[92] The *Fogg* court gave no

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88. FLA. STAT. § 193.461(3)(b) (1983).

89. Markham v. Fogg, 458 So. 2d at 1126; Lackey v. Little England, Inc., 9 FLA. L. WEEKLY 2448 (Nov. 30, 1984), *vacated and replaced*, 461 So. 2d 281 (Fla. 5th DCA 1985). *But see* text accompanying notes 126-29.

90. *See supra* note 6.

91. FLA. STAT. § 193.461(4)(c) (1983). In Straughn v. K & K Land Management, Inc., 326 So. 2d 421 (Fla. 1976), the Suprème Court of Florida determined that in order to satisfy the special circumstances criterion, subsection (4)(c) must be read *in pari materia* with subsections (3)(b). *Id.* at 423. This interpretation of the statute's presumption is consistent with the express language of the statute providing that the landowner may rebut the statute through a showing of special circumstances. *See* Czagas v. Maxwell, 393 So. 2d 645 (Fla. 5th DCA 1981); Department of Revenue v. Goembel, 382 So. 2d 783 (Fla. 5th DCA 1980).

92. *Bass*, 374 So. 2d at 484-85. The *Bass* court thus concluded:

> subsection (4)(c) of Chapter 193 is in fact reasonably related to the legislative goal of granting preferential tax treatment only to property which is in fact be-

clues as to why subsection (4)(a)3, the "rezoning presumption" allowed evidence of actual use to be proved, but subsection (4)(a)4, the "platting presumption" did not allow such evidence.

Concluding its due process discussion of subsection (4)(a)3, the supreme court in *Fogg* deferred to the trial court's conclusion that the landowners did not use the land for bona fide agricultural purposes.[93] The supreme court determined that the evidence was conflicting and there was ample evidence to sustain the finding of a non bona fide agricultural use.[94] The supreme court also determined that the trial court engaged in the type of analysis espoused by the supreme court—subsection (4)(a)3 was to be read *in pari materia* with subsection (3)(b).

The supreme court noted that the issue of whether the land was primarily being used for agricultural purposes was one of fact.[95] Close scrutiny of the trial court's order, however, makes it clear that the trial court treated the issue as a question of law. The trial court stated: "The primary intention of the plaintiffs . . . 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."[96]

The trial court failed to separate the issue of agricultural use from the issue of the landowner's intent. It determined:

> At the times material to this cause all but 100 acres of the parcel under consideration had been *used* under a lease with one Joseph Bregman, cancellable with 90 days notice to Bregman, under which the lessee guaranteed to keep cattle on the land at all times during the life of the lease. The 100 acres excluded from the lease have been *used* by the plaintiffs to pasture some horses boarded on the property . . . .[97]

Notwithstanding the trial court's recognition of the agricultural use of the property,[98] the trial court held:

> ing utilized for agricultural purposes as of the date of assessment. The failure of Section 193.461(4)(a)4 to contain a similar curative provision renders its test for eligibility for agricultural classification one of *intended future use*, rather than actual agricultural use as of the assessment date.

Id.

93. Markham v. Fogg, 458 So. 2d at 1126.

94. *Id.*

95. *Id.*

96. Fogg v. Broward County, No. 74-13642, slip op. at 5 (Fla. Cir. Ct. Dec. 22, 1978).

97. *Id.* at 4 (emphasis added).

98. Subsection (5) provides that: " 'agricultural purposes' includes horticultural; floriculture; viticulture; forestry; dairy; *livestock*; poultry; bee; pisciculture, when the land is

> It is difficult to reconcile the claim of the plaintiffs to "good faith commercial agricultural use of the land" when at the same time they were making extensive efforts to sell the land, and co-operating in rezoning procedures, at sale prices greatly in excess of three or more times the agricultural assessment placed on the land.[99]

Thus, the trial court effectively held as a matter of law that regardless of the actual use of the property, the intent to develop the property rendered the benefits of the greenbelt law inapplicable.[100]

Furthermore, the supreme court's finding that the trial court employed a subsection (3)(b) analysis in determining the use of the Fogg parcel is erroneous. A critical reading of the trial court opinion evidences no such analysis. Even if the trial court did employ a subsection (3)(b) analysis, the factors it relied on were insufficient. Subsection (3)(b) enumerates seven factors[101] relevant in determining whether the use of the land is for bona fide agricultural purposes. Of these seven, the trial court mentioned only two: the purchase price paid, and the length, term, and conditions of the lease. Because the supreme court held that no sale occurred, there obviously was no purchase price paid. Thus, only the lease factor remained as a valid consideration for determining agricultural use. It is clear from the trial court's opinion that the terms of the lease

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used principally for the production of tropical fish; and all forms of farm products and farm production." FLA. STAT. § 193.461(5) (1983) (emphasis added).

It is clear that the Foggs were carrying out agricultural pursuits on the land because during the relevant times in question, the city had granted only preliminary approval of the Foggs' zoning application under the terms of the Miramar Planned Unit Development ordinance. *Only* agriculture was permitted pending the completion of the zoning process. Answer Brief of Respondents on the Merits at 35. The district court determined "that the City of Miramar herein condoned the continued agricultural use on the property in question at least pending its actual use as a residential development under the PUD zoning. Thus, although perhaps the cows should have gone, they were allowed by the City to stay for at least the two years in question." Fogg v. Broward County, 397 So. 2d 944, 949 (Fla. 4th DCA 1981).

99. Fogg v. Broward County, No. 74-13642, slip op. at 5.

100. The trial court's error lies in large part on its reliance on subsection (4)(c), which provides that a presumption of nonagricultural use arises where land is sold for a purchase price of three or more times its agricultural assessment. The supreme court held this subsection inapplicable because the parties had not consummated a sale. Markham v. Fogg, 458 So. 2d at 1125. Because much of the trial court's reasoning relied on the facts pertaining to the attempts to sell the land, the supreme court would have been more consistent if it had remanded the case to the trial court to determine whether the land was being used for bona fide commercial agricultural purposes. The fact that the court did not remand the case is evidence of the illusory nature of the rebuttability of subsection (4)(a)3, which the supreme court relied on to uphold the second prong of the due process test. *See infra* text accompanying notes 126-29.

101. *See supra* note 9.

were not decisive of the trial court's holding. The trial court merely mentioned the terms in a one-paragraph discussion.[102] Even if the court had relied on the terms of the lease for its holding, it would have been prone to attack because the supreme court previously held that the tax assessor may not rely on only one factor under subsection (3)(b) for its determination of the use of the property.[103]

The trial record does not support the supreme court's determination that there was conflicting evidence concerning the actual use of the property. There was conflicting evidence only as to the issue of whether a completed sale had occurred.[104]

The supreme court's reliance on the trial court opinion is further misplaced. In determining the use of the Fogg parcel, the trial court relied on decisions that the Supreme Court of Florida expressly or impliedly disapproved or that were factually distinguishable from *Fogg*. The trial court relied principally on three cases[105] to support the proposition that "good faith commercial agricultural use of the land requires more than mere agricultural use . . . there must be at least a reasonable expectation of meeting investment cost and realizing a reasonable profit."[106] The trial court noted that in *First National Bank v. Markham*, the owner's intent was to hold the property for resale as an investment. Although the land was being used for agricultural purposes, the Fourth District Court of Appeal held "that agricultural use of the land is not in and of itself sufficient to entitle one to fall within the definition of 'good faith commercial agricultural use.' "[107] The Supreme Court of Florida, however, in *Roden v. K & K Land Management, Inc.*,[108] ex-

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102. Fogg v. Broward County, No. 74-13642, slip op. at 4.

103. Roden v. K & K Land Management, Inc., 368 So. 2d 588, 589 (Fla. 1979); *see also* Department of Revenue v. Goembel, 382 So. 2d 783, 785 (Fla. 5th DCA 1980) ("[T]he assessor must consider the other six factors as well.").

One could surmise that the trial court considered subsection (3)(b)7 which provides for consideration by the tax assessor of "[s]uch other factors as may from time to time become applicable." FLA. STAT. § 193.461(3)(b)7. Nothing in the text of the trial court's opinion, however, supports this interpretation.

104. Fogg v. Broward County, No. 74-13642, slip op. at 1-5. In fact, the district court noted that "agricultural pursuits were being carried out on the property at all times in question." Fogg v. Broward County, 397 So. 2d at 946.

105. Markham v. Nationwide Dev. Co., 349 So. 2d 220 (Fla. 4th DCA 1977); Walden v. Tuten, 347 So. 2d 129 (Fla. 2d DCA 1977); First Nat'l Bank v. Markham, 342 So. 2d 1016 (Fla. 4th DCA 1977).

106. Fogg v. Broward County, No. 74-13642, slip op. at 7 (citing Markham v. Nationwide Dev. Co., 349 So. 2d 220 (Fla. 4th DCA 1977)).

107. *First Nat'l*, 342 So. 2d at 1017.

108. 368 So. 2d 588 (Fla. 1978).

pressly disapproved of *First National.* The *Roden* court held that:

> The issue in conflict is whether more than just agricultural use is required to establish for purpose [sic] of tax assessment that land may be classified agricultural and be entitled, therefore, to preferential treatment. . . . As the Department of Revenue has done before, it stresses that commercial success is a necessary circumstance for rebuttal. We reject this notion.[109]

Markham v. Nationwide Development Co.,[110] another case cited by the trial court, expressly relied on *First National.* It held that the purchaser did not have a reasonable expectation of meeting investment cost or realizing a reasonable profit through agricultural use of the land because he paid a purchase price grossly in excess of the land's agricultural value.[111] *Nationwide,* however, has no precedential value because it relied on a case explicitly disapproved by the supreme court. The trial court's reliance on *Walden v. Tuten*[112] for the proposition that good faith commercial agricultural use means more than mere use of the land agriculturally was also unsound because the *Roden* court held that agricultural use was the determinative factor under the greenbelt statute.[113]

First National, Nationwide, and *Walden* are factually distinguishable from *Fogg.* The Fourth District Court of Appeal in *First National* and *Nationwide* concluded that the purchasers were not making a profit on their agricultural endeavors because the lands were sold for a purchase price greatly in excess of the land's agricultural value.[114] This failure to make a profit was decisive in each courts' denial of agricultural status, notwithstanding that in each case the actual use of the land was agricultural.[115] On the other hand, in *Fogg,* the supreme court held that no sale occurred; hence, profit was not decisive. *Walden* is also inapposite because the Second District remanded the case to determine whether the lessees

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109. *Id.* at 589 (citing Straughn v. Tuck, 354 So. 2d 368 (Fla. 1978)).

110. 349 So. 2d 220 (Fla. 4th DCA 1977).

111. *Id.* at 222.

112. 347 So. 2d 129 (Fla. 2d DCA 1977).

113. "Agricultural use is now and has always been the test." *Roden,* 368 So. 2d at 589 (quoting Straughn v. Tuck, 354 So. 2d 368 (Fla. 1978)).

114. *See, e.g., Nationwide,* 349 So. 2d at 222 ("True, the [lessees] continued their dairy operation, but the dairy could no longer be considered a good faith commercial operation *when measured against Nationwide's* land cost.") (emphasis added).

115. *Nationwide,* 349 So. 2d at 222 ("[T]he [lessees] continued their dairy operation."); *Walden,* 347 So. 2d at 130 ("[T]he [lessees] were in fact using the property as a 'cattle ranch operation.' "); *First Nat'l,* 342 So. 2d at 1017 ("Nor was there any question that the land had for some time been used for agricultural enterprises.").

were making a profit on their agricultural enterprise.[116] The trial court in *Fogg* never determined whether the agricultural endeavors of the Foggs or their lessees were profitable.

Thus, the supreme court's reliance on the trial court opinion is misplaced because the supreme court erred in determining that the evidence was conflicting as to the actual use of the property. Its reliance is further misplaced because the supreme court erred in determining that the trial court engaged in a subsection (3)(b) analysis. Finally, the supreme court erred in its reliance on the trial court because the lower court relied on decisions that had little precedential value and were distinguishable.

2. EQUAL PROTECTION ANALYSIS

The Foggs also challenged subsection (4)(a)3 under the equal protection clause of the Florida Constitution. In discussing this challenge, the supreme court stated and applied the following test:

> 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. . . . [T]he 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.[117]

Referring back to its analysis in *Harbor Ventures*, the court stated that "the legislature could have concluded that the statute was rationally related to the legitimate state goal of minimizing and discouraging speculative rezoning. . . . The treatment afforded the instant landowners [is] not so disparate from others as to be wholly arbitrary."[118] Thus, the court held that (4)(a)3 did not violate the equal protection clause.[119]

Consistent with its due process analysis, the supreme court in *Fogg* has ignored its own precedent. In *Bass*, the supreme court addressed the issue of equal protection with respect to subsection (4)(a)4, the "platting presumption." There, the court determined that given that the legislature had chosen an agricultural classification based on agricultural use of the land, "[E]qual protection prohibits [the legislature] from singling out a class of property owners

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116. *Walden*, 347 So. 2d at 131-32.
117. Markham v. Fogg, 458 So. 2d at 1127.
118. *Id.*
119. *Bass*, 374 So. 2d at 479.

and classifying their land according to a standard different from that applied to other real property owners unless there exists a valid and substantial reason for this disparate treatment."[120] The *Bass* court found no valid and substantial reason. It held that because "the act of platting, without more, is indicative only of the use which the taxpayer intends to make of the platted land *in the future* . . . those in [the landowner's] class have been unreasonably singled out for classification under this disparate standard . . . ."[121] The *Fogg* court, on the other hand, found the goal of minimizing and discouraging speculation to be a compelling reason for the legislative enactment. The *Fogg* court gave no explanation of why this compelling reason was not also applicable to subsection (4)(a)4. In fact, the *Fogg* court never mentioned *Bass* in its equal protection analysis.

III. Comment

A. *Confusion Abounds*

Given the case precedent, the Supreme Court of Florida should have found that section 193.461(4)(a)3,[122] violated the due process and equal protection clauses of the Florida Constitution. The court's contrary holding creates confusion in an already confused area of the law under the greenbelt statute.[123] Most importantly, the court's decision has threatened the integrity of the use standard.[124]

Whether the use standard has only been "threatened" and not destroyed is the heart of the problematic *Fogg* opinion. The *Fogg* court stated that the use standard was a legislative creation and that the legislature had the choice of whether or not to require it. The court subsequently decided that subsection (4)(a)3 did not require employment of the use standard. Nevertheless, the court applied the use standard in analyzing subsection (4)(a)3.[125] The court's inconsistency has diluted the authoritative value of the *Fogg* opinion.

It appears from a cursory reading of *Fogg*, that subsection (4)(a)3, the "rezoning presumption," is rebuttable by proving agri-

120. *Id.* at 485.

121. *Id.*

122. Fla. Stat. § 193.461(4)(a)3 (1983).

123. *See supra* text accompanying notes 30-60.

124. *See supra* text accompanying notes 59-60.

125. Markham v. Fogg, 458 So. 2d 1122, 1126 (Fla. 1984).

cultural use of the land.[126] This interpretation, although correct, is inconsistent with the general thrust of the *Fogg* opinion for two reasons. First, the supreme court stressed its determination that subsection (4)(a)3 does *not* employ a use standard.[127] Second, in determining the actual use of the Fogg parcel, the supreme court deferred to the trial court, which employed factors other than actual use.[128] Hence, an equally valid interpretation of the *Fogg* opinion would be that actual use is irrelevant under subsection (4)(a)3.[129] The opinion lends itself to two diametrically opposed interpretations, and thus, it is of questionable authoritative value.

By pushing the *Fogg* opinion to its logical conclusion, one reaches a result seemingly unanticipated by the supreme court: a reasonable expectation of meeting investment cost and realizing a profit is now insufficient to prove good faith commercial agricultural use. No evidence was presented in *Fogg* to show whether the Foggs were making a profit on their agricultural endeavors. Thus, the supreme court's opinion effectively holds that even if the Fogg's agricultural pursuits were profitable, that would not have been sufficient to prove agricultural use sufficient to satisfy the requirements of the greenbelt statute.

Looking solely at the express language of the greenbelt statute, it appears that neither a reasonable expectation of meeting investment nor profit are required to prove good faith commercial agricultural use of land, despite the case law and authorities to the contrary.[130] Any other conclusion would render the rebuttability of

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126. *Id.* "After property has been reclassified under subsection (4)(a)3 as nonagricultural, the landowner is not precluded from presenting evidence under subsection (3)(b) [the "bona fide commercial agricultural use" subsection] to show that his property is indeed being used primarily for bona fide agricultural purposes. . . . The procedure, in essence, would be the same as if subsection (4)(a)3 itself were rebuttable." *Id.*

127. *Id.* "With the instant section [subsection (4)(a)3], however, use is not the standard." *Id.*

128. *See supra* text accompanying notes 95-103.

129. Initially, the Fifth District Court of Appeals in Lackey v. Little England, Inc., 9 FLA. L. WEEKLY 2448 (Nov. 30, 1984), *vacated and replaced*, 461 So. 2d 281 (Fla. 5th DCA 1985), purportedly relying on *Fogg*, held that agricultural use was irrelevant under subsection (4)(a)3. "Although there is some discussion in [*Fogg*] regarding evidence of bona fide agricultural use, we interpret the statute and [*Fogg*] to be mandatory." *Id.* at 2449. Later, the court vacated its prior opinion, holding that *Fogg* allows a landowner to present evidence of bona fide agricultural use. *Lackey*, 461 So. 2d 281.

130. *See* Markham v. Nationwide Dev. Co., 349 So. 2d 220 (Fla. 4th DCA 1977); Walden v. Tuten, 347 So. 2d 129 (Fla. 2d DCA 1977); First Nat'l Bank v. Markham, 342 So. 2d 1016 (Fla. 4th DCA 1977); Firstamerica Dev. Corp. v. County of Volusia, 298 So. 2d 191 (Fla. 1st DCA 1974); text accompanying notes 49-58; *see also* FLA. ADMIN. CODE § 12D-5.01(2) (1983) ("Good faith commercial agricultural use of property is defined as the pursuit [by the fee owner] of an agricultural activity for reasonable profit or at least upon a reasona-

subsection (4)(c), the "three times purchase price" presumption, superfluous. Subsection (4)(c) provides the landowner with an opportunity to overcome the presumption of non bona fide agricultural use even though the purchase price is three or more times the agricultural assessment placed on the land.[131]

In virtually every situation where the purchase price is three or more times the agricultural assessment placed on the land, the landowners will not have a reasonable expectation of meeting investment cost or making a profit by continuing the present agricultural use. This is especially the case if they have high mortgage payments. If the greenbelt statute required the landowner to either break even or make a profit, then subsection (4)(c) in most instances could not be rebutted.

The legislature's failure to enumerate profit motive as a factor indicative of good faith commercial agricultural use under subsection (3)(b)[132] indicates that the legislature did not intend to require it. This is evidenced by the fact that "[m]ost of the factors set out in § 193.461 (3)(b) have been adopted through acceptance or rejection of the various results of the cases involving prior statutes affording preferential tax treatment to agricultural lands."[133] Prior to the adoption of section 193.461, profit motive did not render the benefits of the greenbelt law inapplicable.[134] If the legislature intended to reverse case law, it would have included profit motive as a factor under subsection (3)(b).

For the same reasons, profit motive does not appear to be the type of "other factor" mentioned by the legislature in subsection (3)(b)7. Subsection (3)(b)7 provides that the tax assessor must consider "[s]uch other factors as may from time to time become

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ble expectation of meeting investment cost and realizing a reasonable profit."); Finance & Tax Comm. Rep., Florida House of Representatives, Free Market v. Agricultural Assessment (1980) (presented to the Ad Valorem Tax and Local Gov't Subcomm.) (There is no distinction between a bona fide commercial agricultural operation and an agricultural operation that earns a fair return on investment.); Comment, *The Continuing Preferential Tax Treatment Accorded the Florida Land Speculator*—Roden v. K & K Land Management, Inc., 7 FLA. ST. U.L. REV. 571 (1979) ("[Rule 12D-5.01 of the Florida Administrative Code] appears to complement the intent of the amendments [to the greenbelt law].")

131. *See supra* note 6.

132. *See supra* note 9.

133. Florida State and Local Taxation § 6.03 (1984).

134. *See, e.g.*, Greenwood v. Oates, 251 So. 2d 665, 668 (Fla. 1971) ("There is nothing in the statute to require a landowner to be a good businessman or to make a profit."); Matheson v. Elcook, 173 So. 2d 164, 166 (Fla. 3d DCA 1965) ("There is nothing in the law that requires a person to operate a business efficiently or at a profit.").

applicable."[135] Given that the factors enumerated in subsections (3)(b)1-6 indicate the good faith *commercial* agricultural use of the land, profit motive appears to be a factor that the legislature would have specifically provided for, had it so intended.[136]

B. *A Resolution*

Resolution of the plethora of problems surrounding the greenbelt statute must come from the legislature.[137] The statutory changes that the legislature made in 1972[138] appear to be the genesis of the present problems. Prior to 1972, case law had clearly established that actual use of the land was the criterion for determining classification of land under the greenbelt law.[139] The decisions attempting to interpret the statute subsequent to the passage of the 1972 changes are irreconcilable.[140] *Fogg* is a painful consequence of the legislature's inability to articulate clearly and consistently the intent underlying the greenbelt statute.[141]

AMBER DONNER-FROELICH*

135. FLA. STAT. § 193.461(3)(b)7 (1983).

136. *But see* Walden v. Tuten, 347 So. 2d 129, 131 (Fla. 2d DCA 1977) (profit motive is a factor compensated under subsection (3)(b)7).

137. *See generally* Cooke & Power, *Preferential Assessment of Agricultural Land*, 47 A.B.A. J. 636 (1973); Currier, *An Analysis of Differential Taxation as a Method of Maintaining Agricultural and Open Space Land Uses*, 30 U. FLA. L. REV. 821 (1978); Wershow & Schwartz, *Ad Valorem Assessments in Florida—Recent Developments*, 36 U. MIAMI L. REV. 66 (1981); Wershow, *Ad Valorem Assessment in Florida—The Demand for a Viable Solution*, 25 U. FLA. L. REV. 49 (1972); Note, *Differential Assessment for Agricultural Land Creates a Tax Haven for Speculators*, 13 U. FLA. L. REV. 848 (1982).

138. 1972 Fla. Laws 571 (current version at FLA. STAT. § 193.461 (1983)).

139. *See supra* text accompanying notes 30-48.

140. *See supra* text accompanying notes 49-58.

141. Notwithstanding the inadequacies of *Fogg*, the supreme court's opinion may not have as substantial an impact on the status quo as this comment may suggest. Consistent with *Bass* (although inconsistent with its analysis), the court has seemingly once again determined that agricultural use is the standard under the greenbelt statute. At least one district court has so interpreted the *Fogg* opinion. *See* Lackey v. Little England, Inc., 461 So. 2d 281 (Fla. 5th DCA 1985). Furthermore, developers who intend to develop large tracts of land may cease to use land agriculturally in stages, thus retaining agricultural status for those lands still used agriculturally. Finally, creative lawyers may suggest that their clients set up separate corporations—one corporation that maintains the agricultural operation and one that negotiates the development aspects. Of course, there is the possibility that a court may pierce the corporate veil, thus the corporate form must be strictly adhered to.

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