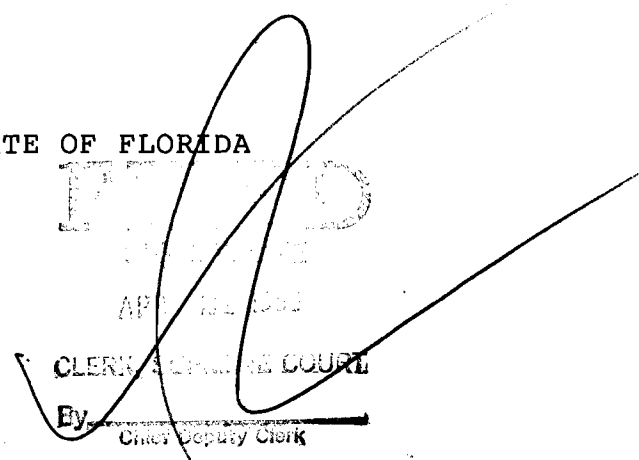
IN THE SUPREME COURT OF THE STATE OF FLORIDA



WILLIAM MARKHAM, ETC., et al.,

Petitioners,

vs.

EVANGELICAL COVENANT CHURCH OF AMERICA, et al.,

Respondents.
_____/

CASE NO. 68,396

ANSWER BRIEF OF THE RESPONDENTS, EVANGELICAL COVENANT CHURCH OF AMERICA AND COVENANT VILLAGE OF FLORIDA, INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

UNITED STATES CONSTITUTION:

OTHER:

ARGUMENT

ISSUE ONE

THE "INCOME TEST" CONTAINED IN PARAGRAPHS (a) AND (b) OF SUBSECTION 196.1975(4), FLORIDA STATUTES (1985), FAILS TO CONFORM TO THE CONSTITUTIONAL STANDARD FOR GRANTING TAX EXEMPTIONS SET OUT IN SECTION 3, ARTICLE VII, FLORIDA CONSTITUTION.

ISSUE TWO

THE "INCOME TEST" RESULTS IN UNREASONABLE AND DISCRIMINATORY TREATMENT OF HOMES FOR THE AGED IN VIOLATION OF THE FEDERAL AND FLORIDA CONSTITUTIONS' EQUAL PROTECTION CLAUSES.

PRELIMINARY STATEMENT

The Respondents, EVANGELICAL COVENANT CHURCH and COVENANT VILLAGE OF FLORIDA, INC., Plaintiffs in the Circuit Court below and Appellants in the District Court of Appeal below, will be referred to collectively as "Covenant".

The Petitioners, WILLIAM MARKHAM, the Property Appraiser of Broward County, Florida, and the Department of Revenue of the State of Florida, Defendants in the Circuit Court below and Appellees in the District Court of Appeal below, will be referred to as the "Property Appraiser" and the "Department of Revenue" respectively, and collectively as the "Taxing Authorities".

The term "Circuit Court" will be used to refer to the 17th Judicial Circuit in and for Broward County, Florida (J. Cail Lee, Judge). The term "District Court" will be used to refer to the District Court of Appeal of Florida, Fourth District.

The record on appeal will be referred to as "(R-)".

STATEMENT OF THE CASE AND THE FACTS

The original Complaint in this action was filed on July 16, 1981, challenging the decision of the Property Appraiser of Broward County, Florida, not to grant Covenant a full exemption from 1980 property taxes for a home for the aged owned and operated by Covenant in the City of Plantation, Florida (R-181-201). In the Complaint, Covenant claimed that the Property Appraiser's decision to deny a full exemption was based on unconstitutional criteria established by Section 196.1975, Florida Statutes (1979). Specifically, Covenant claimed that the home for the aged would have received a full exemption from 1980 property taxes but for the Property Appraiser's application of two unconstitutional tests contained in Paragraphs (a) and (b) of Subsection 196.1975(4). The two challenged tests were (1) the "income test", by which the tax liability of a home for the aged is made dependent on the income of the occupants of the home, and (2) the "five-year residency test", by which the tax liability of a home for the aged was made dependent on the length of time occupants of the home had resided in the State of Florida.

Answers were filed by the Taxing Authorities (R-204-06, 207, 208). In his Answer (R-207) the Property Appraiser raised two affirmative defenses: (1) that Covenant's home for the aged did

not qualify as a charitable use of property; and (2) that Covenant failed to join indispensable parties, to-wit: occupants of the home. Covenant subsequently moved to strike these affirmative defenses (R-209-10), which motion was granted as to the second affirmative defense but denied as to the first, with instructions to the Property Appraiser to provide a more definite statement (R-220-21). The Property Appraiser subsequently filed a more definite statement; Covenant moved to strike it (R-230-32), and that motion was denied (R-235).

Pursuant to a stipulation of the parties (R-224-27), the original Complaint was amended to include 1981 property taxes in the action (R-228-29). In other words, the original Complaint was also made applicable to the Property Appraiser's decision not to grant Covenant a full exemption from 1981 property taxes for the home for the aged. This same amendment was subsequently stipulated to and made with respect to 1982, 1983 and 1984 taxes as the action progressed (R-236-39, 267-70, 277).

On April 14, 1982, the Property Appraiser moved for Summary Judgment on the grounds that as of January 1, 1980 and January 1, 1981, Covenant's home for the aged was not owned by a Florida corporation and was, therefore, not entitled to an exemption under Subsection 196.1975(1), Florida Statutes (1979), and that Covenant's home for the aged did not qualify as a charitable use of property (R-233-34). This motion was denied (R-248).

Covenant then moved for Partial Summary Judgment as to Count IV of the Complaint relating to the "five-year residency test" and as to the Property Appraiser's first affirmative defense relating to the charitable use of Covenant's property (R-246-47). Covenant also submitted a memorandum of law in support of this motion (R-251-58). In the motion and memorandum of law and at the hearing on the motion (R-139-80), Covenant argued that (1) the "five-year residency test" was violative of the equal protection clauses of the Florida and United States Constitutions and due process clauses and privileges and immunities clause of the United States Constitution; and (2) the issue of whether Covenant's home for the aged qualified as a charitable use of property was foreclosed by the doctrine of administrative res judicata and estoppel and by the Property Appraiser's lack of statutory authority to change his position after a final determination of tax status due to an alleged mistake in judgment. This motion was also denied (R-260).

Covenant then moved to consolidate another pending action into this action (R-271-72). The other action involved a challenge by Covenant to the Property Appraiser's 1983 assessment of the value of Covenant's home for the aged. This motion was granted (R-273). Another pending action challenging the Property Appraiser's 1984 evaluation of Covenant's property was

consolidated into this action by stipulation of the parties (R-284-85).

Prior to the final hearing in this action, Covenant filed a Motion in Limine in which Covenant again sought to eliminate the claim raised by the Property Appraiser in his first affirmative defense and more definite statement that Covenant's home for the aged did not qualify as a charitable use of property (R-286-88). Again, Covenant pointed out that the Property Appraiser was attempting, in effect, to reverse a judgment which he had made concerning the tax status of Covenant's property and that such a belated reversal was legally impermissible. The motion was argued at the final hearing.

A final hearing in this action was held on February 13, 1985. Covenant submitted a memoranda of law (R-289-303, 306-20) and a Stipulated Statement of Facts (R-304-05). Following the hearing, which consisted primarily of the argument of counsel, the Circuit Court ruled that (1) Covenant's Motion in Limine was granted (R-127); (2) the "five-year residency test" is unconstitutional (R-128); and (3) the "income test" is constitutional (R-). Final Judgment reflecting these rulings was entered on March 20, 1985 (R-324-25). An Agreed Final Judgment on the 1983 and 1984 valuation of Covenant's property was also entered on March 20, 1985 (R-323).

On April 2, 1985, Covenant filed a Notice of Appeal to the District Court seeking review of the Circuit Court's decision upholding the constitutionality of the "income test". The Property Appraiser filed a Notice of Cross-Appeal, but did not file a brief or appear in the District Court. Thus, the only issue before the District Court on appeal was the validity of the "income test".

Briefs were submitted to the District Court on behalf of Covenant and the Department of Revenue, and oral argument was subsequently presented to the District Court. On February 5, 1986, the District Court rendered its decision reversing the Circuit Court and holding the "income test" unconstitutional. It also certified the following question as being one of great public importance:

> Does the Court's ruling in Presbyterian Homes v. Wood, 297 So.2d 556 (Fla. 1974), continue to have vitality and, if so, does the "income test" in Section 196.1975(4) Florida Statutes (1985), pass constitutional muster?

The Department of Revenue subsequently filed a Notice to Invoke Discretionary Jurisdiction in this Court.

SUMMARY OF ARGUMENT

The "income test" established by Paragraphs (a) and (b) of Subsection 196.1975(4), Florida Statutes (1984 Supp.), for determining the tax exempt statuts of homes for the aged, is too narrow to conform to the "used predominantly" standard for granting tax exemptions set out in Section 3, Article VII, Florida Constitution. The definition of "charitable purpose" contained in Section 196.012(b), Florida Statutes, is inapplicable to this action.

In addition, the "income test" violates the equal protection clauses of the Federal and Florida Constitutions in that it unreasonably discriminates between homes for the aged and other charitable and religious uses, and between homes for the aged themselves.

ARGUMENT

ISSUE I

THE "INCOME TEST" CONTAINED IN PARAGRAPHS (a) AND (b) OF SUBSECTION 196.1975(4), FLORIDA STATUTES (1985), FAILS TO CONFORM TO THE CONSTITUTIONAL STANDARD FOR GRANTING TAX EXEMPTIONS SET OUT IN SECTION 3, ARTICLE VII, FLORIDA CONSTITUTION.

A. Introduction:

Before proceeding to the merits of this Issue, Covenant would direct the Court's attention to several fundamental points concerning this action:

(1) The only issue raised on appeal to the District Court was the validity of the "income test" contained in Paragraphs (a) and (b) of Subsection 196.1975(4), Florida Statutes (1985). There was no other issue raised on appeal by either Covenant or the Taxing Authorities. In fact, although the Property Appraiser filed a Notice of Cross-Appeal, he did not file a brief in the District Court or otherwise participate in that appeal.

(2) Consistent with the foregoing point, there was no issue raised in the District Court concerning the "charitable" status of Covenant's home for the aged. The Circuit Court, in granting Covenant's Motion in Limine, had ruled that the Property

Appraiser's determination that Covenant's home for the aged was a charitable use of property was a final determination, and that the Property Appraiser could not, through his affirmative defenses in this action, attempt to reverse that determination due to an alleged mistake in judgment.

(3) In their argument in the Circuit Court below, the Taxing Authorities' essential position was that changes made by the 1976 Florida Legislature to Section 196.1975, Florida Statutes, cured the constitutional defects identified by this Court in its decision in Presbyterian Homes of the Synod of Florida v. Wood, 297 So.2d 556 (Fla. 1974). The primary change effected in the statute by the 1976 Florida Legislature, according to the Taxing Authorities, was the inclusion of a declaration of legislative intent. This was also the Taxing Authorities' essential position in the District Court. Now, for the first time in this Court, the Taxing Authorities are placing great reliance on the amendment of the definition of "charitable purpose" contained in Subsection 196.012(6), Florida Statutes (1985), also enacted by the 1976 Florida Legislature. Apparently, having come to realize that the changes to Section 196.1975 were unavailing to cure the constitutional defect recognized by this Court in Presbyterian Homes and asserted by Covenant below, the Taxing Authorities have shifted the focus of their argument to a definitional change

which has absolutely no application to this action. Again, no issue was raised by the Taxing Authorities in the District Court concerning the charitable status of Covenant's home for the aged, nor did the Taxing Authorities seek review of the Circuit Court's determination that the Property Appraiser could not resurrect and reverse his determination that Covenant's home for the aged was a charitable use of property.

B. Application of Presbyterian Homes to Subsection 196.1975(4):

Within the perspective established by the foregoing points, Covenant next directs the Court's attention to the specific language of Paragraphs (a) and (b) of Subsection 196.1975(4), Florida Statutes (1985), which provide as follows:

> (4)(a) After removing the assessed value exempted in Subsection (3), homes for the aged shall be deemed to be used for charitable purposes only to the extent that residency in the applicant home is restricted to or occupied by persons who have resided in the applicant home and in good faith made this state their permanent residence as of January 1 of the year in which exemption is claimed and who also meet the requirements set forth in one of the following subparagraphs:
>
> 1. Persons who have gross incomes of not more than $7,200 per year and who are 62 years of age or older.
>
> 2. Couples, one of whom must be 62 years of age or older, having a combined gross income of not more than $8,000 per year, or the surviving spouse thereof, who lived with the deceased at the time of the deceased's death in a home for the aged.

> 3. Persons who are totally and permanently disabled and who have gross incomes of not more than $7,200 per year.
>
> 4. Couples, one or both of whom are totally and permanently disabled, having a combined gross income of not more than $8,000 per year, or the surviving spouse thereof, who lived with the deceased at the time of the deceased's death in a home for the aged.
>
> However, the income limitations do not apply to totally and permanently disabled veterans, provided they meet the requirements of s.196.081.
>
> (b) The maximum income limitations permitted in this Subsection shall be adjusted, effective January 1, 1977, and on each succeeding year, by the percentage change in the average cost-of-living index in the period January 1 through December 31 of the immediate prior year compared with the same period for the year prior to that. The index is the average of the monthly consumer price index figures for the stated 12-month period, relative to the United States as a whole, issued by the United States Department of Labor.

These provisions were enacted in essentially their present form by Chapter 76-234, Laws of Florida, following the decision of this Court in Presbyterian Homes. That decision invalidated Subsection 196.197(2), Florida Statutes (1973), which contained provisions virtually identical to those contained in Paragraphs (a) and (b) quoted above. 1/

1/ Subsection 196.197(b), Florida Statutes (1973), provided as follows:

Footnote Continued

The only significant change made by the Legislature in Paragraphs (a) and (b) since the inception of this action was to eliminate the "five-year residency test" following this Court's decision in Osterndorf v. Turner, 426 So.2d 539 (Fla. 1982). See Chapter 83-271, Laws of Florida.

Continued

> (2) After removing the assessed value exempted in Subsection (1), homes for the aged shall be exempt to the extent that residency in the applicant home is actually restricted to:
>
> (a) Persons having a gross income of not more than five thousand dollars per year who are sixty-two years of age or older;
>
> (b) Couples, one of whom must be sixty-two years of age or older, having a combined gross income of not more than six thousand dollars per year;
>
> (c) Persons who are totally and permanently disabled and have gross incomes of not more than five thousand dollars per year; and
>
> (d) Couples, one or both of whom are totally and permanently disabled, having a combined gross income of not more than six thousand dollars per year.
>
> The foregoing maximum income limitations applicable to residents of homes for the aged shall be adjusted to conform to any increase in maximum income restrictions established by the United States Department of Housing and Urban Development for housing facilities for the lower income elderly financed under §202 or §236 of the National Housing Act, or of corresponding sections of any subsequently enacted National Housing Act.

In its decision in Presbyterian Homes, this Court held that the criteria contained in Subsection 196.197(2), Florida Statutes (1973), i.e., the "income test", failed to conform to that portion of Section 3, Article VII, Florida Constitution, which states as follows:

> Such portions of property as are used predominantly for educational, literary, scientific, religious or charitable purposes may be exempted by general law from taxation. (Emphasis supplied.)

According to the Court,

> The "income test" prescribed in the statute is too narrow in scope to conform to the true intent of the constitutional limitation. General laws providing tax exemptions must contain criteria which correspond to the constitutional limitation that portions of property predominantly used for religious or charitable purposes may be exempted from taxes. The "income test" has reference more to the personal economics of a resident or residents of an apartment or room in a home for the aged or disabled than to the overall purpose or use of a home as a religious or charitable institution. It is restrictive in that it is applied pecuniarily and selectively to particular individuals and their apartments or rooms rather than to the general objects of a home provided by church or charitably oriented organizations for their eleemosynary programs.
>
> Inasmuch as an "income test" is the primary determinant of the eligibility for tax exemption of a home, other factors traditionally used in determining the status of such a home are minimized contrary to the intent of the constitutional limitation.

297 So.2d at 558. The Court then referred to its previous decisions in Orange County v. Orlando Osteopathic Hospital, 66 So.2d 285 (Fla. 1953); Miami Battlecreek v. Lummus, 140 Fla. 718, 192 So. 211 (1939); Simpson, Tax Collector v. Jones Business College, 118 So.2d 779 (Fla. 1960); Jasper v. Mease Manor, Inc., 208 So.2d 821 (Fla. 1968); and Johnson v. Presbyterian Homes of Synod of Florida, Inc., 239 So.2d 256 (Fla. 1970), as setting out the traditional criteria utilized in determining the tax exemption eligibility of charitable institutions.

The Court also traced the history of Section 3, Article VII, Florida Constitution, which, as part of the 1968 revision, was amended to change the standard relating to tax exemptions for property used for religious and charitable purposes. The 1885 Florida Constitution had required that such property be "used exclusively" for religious or charitable purposes. The 1968 Florida Constitution requires only that such property be "used predominantly" for religious or charitable purposes.

The Court then discussed its earlier decision in Jasper v. Mease Manor, Inc., supra, in which it had upheld a precursor of Section 196.197(2), Florida Statutes (1973), as meeting the 1885, "used exclusively" standard. In that case the taxing entities involved had argued that the statute in question did not insure a "charitable" purpose in that it failed to require income

generated by a home for the aged to be used for some charitable purpose other than the operation of the home. Rejecting this argument, the Court held that a home for the aged was "used exclusively" for a charitable purpose if it operated under the conditions of the statute "for persons who are chronologically aged without regard to dependence or independence otherwise". 208 So.2d at 825. Elaborating on this point, the Court stated that "[r]eview of similar legislation in other states has prompted recognition of the fact that care of the aged, poor and otherwise, has become a problem of widespread governmental concern", and, in a footnote, quoted from a report of the White House Conference on International Cooperation as follows:

> Twentieth-century advances in medicine and technology have sharply increased the numbers of people who live into old age, not only in the United States, but in most of the world. The increase in the proportion of older people coincides with a steadily diminishing role for them in modern society. Technical development and urbanization afford fewer opportunities for the older segment of society. Modern mobility and massmigration also contribute to the isolation, poverty and lack of place of a good number of old people.
>
> These dual phenomena of modern times -- the gift of longer life and the loss of a role in society for the older people -- give rise to one of the most universal of social problems.

208 So.2d at 826. Thus, in its decision in Jasper this Court

recognized that a home for the aged can serve a charitable purpose, even under the severe "used exclusively" standard of the 1885 Florida Constitution, by meeting the peculiar social needs associated with old age, notwithstanding the dependence or independence otherwise of the persons receiving such service.

This position was reaffirmed by this Court in its Presbyterian Homes decision under the more liberal "used predominantly" standard of the 1968 Florida Constitution. In that case, as indicated above, this Court essentially held that it was inconsistent with the constitutional concept of granting tax exemptions for charitable purposes to reduce or eliminate the tax exemption of an otherwise charitable home for the aged (i.e., a non-profit home for the aged serving the peculiar social needs associated with old age) merely because of the financial status of the persons receiving such service.

In reenacting the "income test" in 1976, the Florida Legislature did nothing to cure the constitutional infirmity in the "income test" recognized by this Court in Presbyterian Homes and raised by Covenant below. The only changes made by the 1976 law which any way relate to the "income test" were the inclusion of a declaration of legislative intent; the creation of a new standard for adjusting income limitations; and an increase in the minimum income limits prescribed in the statute.

With respect to the declaration of legislative intent set out in Subsection 196.1975(6), Florida Statutes (1985), [2/] it should go without saying that a constitutional defect in a statute cannot be remedied merely by including a legislative statement as to why the constitutionally defective statute was enacted. In fact, the only legitimate purpose which appears to be served by such a declaration of legislative intent, is to aid the courts in resolving some possible statutory ambiguity. See Southwest Florida Production Credit Ass'n v. Schirow, 388 So.2d 338 (Fla. 4th DCA 1980).

2/ Section 196.1975(6), Florida Statutes (1985), provides in part as follows:

> It is hereby declared to be the intent of the Legislature that this section implements the ad valorem tax exemption authorized in the third sentence of s.3(a), Art. VII, State Constitution, for purposes of granting such exemption to homes for the aged. The Legislature, while recognizing that problems facing the aged of the state frequently require the expenditure of public funds or the extending of charity to the aged by nongovernmental entities, realizes that not all aged persons are in need of public or private assistance. Age has its drawbacks and hardships which require special care and attention and are aggravated by indigency. Homes for the aged frequently provide such care and attention, but a home for the aged does not necessarily serve a charitable purpose. Charity is a function performed to help those in need of assistance and is not necessarily based exclusively on age. It is for this reason that the Legislature hereby provides criteria to be used by the state's property appraisers and property appraisal adjustment boards in determining whether a particular home for the aged is being used for a charitable purpose and is thereby entitled to an exemption from ad valorem taxation.

In the instant action no claim has been made by the Taxing Authorities that the "income test" is ambiguous or that it is susceptible of more than one interpretation. Thus, the declaration of legislative intent contained in Subsection 196.1975(6) is, at best, mere legislative surplusage. At worst, it evidences an attempt on the part of the Florida Legislature to "overrule" this Court's decision in Presbyterian Homes. In this regard, it is axiomatic that the Florida Legislature cannot legally alter a prior decision of this Court interpreting the Florida Constitution. See Sarmiento v. State, 371 So.2d 1047, 1051 (Fla. 3d DCA 1979), aff'd, 397 So.2d 643 (Fla. 1981).

The second change effected by the 1976 law relating to the "income test", was to adopt a new standard for adjusting the income limitations contained in Paragraph (a) of Subsection 196.1975(4). The prior law had used a "sliding scale" tied to future acts of Congress or future rulings of the United States Department of Housing and Urban Development relating to the income levels of those elderly persons eligible for federal housing assistance. The 1976 law replaced this standard with a cost-of-living index tied to the United States Department of Labor's consumer price index. See Subsection 196.1975(b). Obviously, the adoption of this new standard -- which was apparently in response to the ruling of this Court in Presbyterian Homes

that the prior law's standard violated the principle enunciated in Freimuth v. State, 272 So.2d 473 (Fla. 1972) -- did nothing to cure the constitutional defect in the "income test" discussed above. That is, it did not make the "income test" more compatible with the "used predominantly" standard for granting tax exemptions set out in Section 3, Article VII, Florida Constitution.

The third change in the 1976 law relating to the "income test" was an increase in the maximum income limits prescribed in Paragraph (a) of Subsection 196.1975(4) from $5,000 and $6,000 to $7,200 and $8,000. Again, this change obviously had no impact on the constitutional infirmity discussed above. Rather, it appears to be merely a legislative recognition of the rate of inflation during the 1970's. In fact, in real dollars, the new limits may even be lower than the limits established by the prior law, originally enacted in 1971.

The futility of the 1976 Florida Legislature's effort to re-enact a valid "income test" in the face of the Presbyterian Homes decision has been cogently summarized in the following excerpt from a CLE publication of the Florida Bar:

> In an attempt to remedy the constitutional defect in F.S. 196.197, the Florida Legislature revised the statute. F.S. 196.1975 was created, in which the sliding scale was tied to the cost-of-living index, as opposed to future federal action. The income test was moved to this statute and the maximums were raised from $5,000 and $6,000 to $7,200 and $8,000. There is some doubt, however, as to

> whether an increase in the amount of the income bracket cures the original defect inherent in the use of an income test.

The Florida Bar CLE, Non-Profit Corporations in Florida, §6.11 (1981).

C. Department of Revenue's Position:

In its brief in this Court the Department of Revenue makes several arguments relating to this Issue. First, the Department argues that the burden is on Covenant to show constitutional invalidity of the "income test" contained in Subsection 196.1975(4), Florida Statutes (1985). Covenant agrees; however, it is submitted that Covenant has met this burden. See Evangelical Covenant Church of America v. Bauer, ___ So.2d ___ (Fla. 4th DCA 1986), 11 FLW 362 (Opinion filed February 5, 1986); cf. Presbyterian Homes.

As to the Department of Revenue's reliance on appellate decisions relating to the construction of tax statutes granting exemptions, Covenant did not ask the Circuit Court or the District Court, and is not asking this Court, to "construe" the provisions of Subsection 196.1975(4). There is no dispute in this action with respect to the meaning or effect of Subsection 196.1975(4), only its validity. Covenant is asking this Court to uphold the decision of the District Court declaring the "income test" unconstitutional on its face, as this Court previously did in Presbyterian Homes.

Next, the Department of Revenue would have this Court believe that the Presbyterian Homes decision is not controlling here because Subsection 196.1975(4) was enacted following that decision. However, as indicated above, the "income test" contained in Subsection 196.1975(4) is a virtual reiteration of the "income test" contained in Section 196.197(2), Florida Statutes (1973), invalidated in Presbyterian Homes. The Department points out the differences in the two statutes (as did Covenant above), but fails to demonstrate how any of those differences remedy the constitutional defect raised by Covenant and found by this Court to exist in Presbyterian Homes.

One of the differences in the two statutes which the Department of Revenue mentions is the increase in maximum permissible incomes. However, the Department fails to point out how this "increase" (which, again, probably represents a decrease in real dollars from the original 1971 levels) makes the "income test" more compatible with the "used predominantly" standard for granting tax exemptions set out in Section 3, Article VII, Florida Constitution.

Another difference which the Department of Revenue mentions is the use of a new cost of living guideline for adjusting maximum permissible income levels. As indicated above, this change probably cured the constitutional defect in the previous

guideline which had been found by this Court to constitute an improper delegation of legislative authority, but again the Department fails to demonstrate how the adoption of this new guideline makes the "income test" consistent with the Florida Constitution's "used predominantly" standard.

The Department of Revenue also emphasizes the declaration of legislative intent included in Subsection 196.1975(6). This declaration of intent, which does not affect the operative provisions of the "income test", is basically a legislative pronouncement as to why the Legislature thought the Presbyterian Homes decision was wrong. In fact, the declaration is, in part, a verbatim restatement of a portion of the Presbyterian Homes decision. It is submitted that the view expressed in such declaration was known to this Court and was, in fact, argued to the Court during the Presbyterian Homes case. There was, and is, no question about the Legislature's intent in enacting the "income test". However, the simple truth is that no matter how clearly or strongly the Legislature states its intent, the constitutional problems with the "income test" still exist.

Finally, with respect to changes effected by the 1976 Legislature, the Department of Revenue makes much of the amendment to the definition of "charitable purpose" contained in Subsection 196.012(6), Florida Statutes (1985). The Department's increased

reliance upon this definitional change to support its position in this action seemingly indicates a recognition by the Department that the changes made by the Legislature in Section 196.1975 did nothing to cure the constitutional defect in the "income test" identified by this Court in Presbyterian Homes and raised by Covenant below. Moreover, such increased reliance is clearly misplaced. The definition of "charitable purpose" contained in Section 196.012(6) has no relation to the issue raised by Covenant on appeal to the District Court. Rather, it relates to the issue of whether Covenant's home for the aged constitutes a charitable use of property. As determined by the Circuit Court in its decision granting Covenant's Motion in Limine, this issue has been foreclosed by the Property Appraiser's action in granting a tax exemption to Covenant's home for the aged for the years in issue. Again, this determination by the Circuit Court was not appealed by the Property Appraiser or any of the other Taxing Authorities to the District Court.

In effect, therefore, Covenant is in the same position in this action as was the appellant, non-profit religious organization in Presbyterian Homes. There, the issue as to whether the appellant's home for the aged met all statutory criteria for receiving a tax exemption, other than the "income test", had been foreclosed by a stipulation between the parties. Here, the

eligibility of Covenant's home for the aged for a tax exemption as a charitable institution has been foreclosed by the Property Appraiser's action in granting a tax exemption, albeit limited in amount by an application of the "income test", and by the failure of the Taxing Authorities to seek appellate review of the Circuit Court's determination that such eligibility cannot be legally revived as an issue in this action.

Next, the Department of Revenue cites Florida Jurisprudence 2d and State v. Cotney, 104 So.2d 346 (Fla. 1958), for the proposition that a legislative determination of public purpose is persuasive with the courts. However, unlike the situation in State v. Cotney, in the instant action there is no issue as to whether a statutorily authorized expenditure of public funds will serve a public purpose. Rather, the Legislature's determination here, as reflected in its declaration of intent, reflects nothing more than the Legislature's disagreement with the Presbyterian Homes decision.

The Department of Revenue also relies on Dickinson v. Davis, 224 So.2d 262 (Fla. 1969), for the proposition that the Legislature is presumed to be aware of a judicial decision invalidating a statute when it reenacts that statute, and that, therefore, the Legislature intends to correct the defect by reenactment. Covenant does not dispute this concept of "legislative

rehabilitation"; however, the concept does not apply in this action. The 1976 Legislature does not appear to have intended to correct the constitutional defect in the "income test" recognized in Presbyterian Homes and raised by Covenant in its appeal to the District Court, but rather it appears to have attempted, through its declaration of intent, to convince this Court that the "income test" is constitutional "as is".

In contrast, in Dickinson v. Davis, supra, the Legislature, by rewording the operative provisions of a statute relating to the taxation of subsurface rights, had, in fact, cured the constitutional defect found in the prior law. The Legislature had removed the offending language and replaced it with language which this Court could interpret in a way that rendered the new statute constitutional.

Finally, in its brief in this Court, the Department of Revenue, apparently recognizing that its other arguments have fallen short of the mark, takes the unusual position that this Court's decision in Presbyterian Homes is itself unconstitutional, in that it "amends and broadens by judicial fiat the statutory definiton [sic] of charitable purpose, and such holding constitutes an unwarranted infringement by the judiciary on the power of the Legislature". In support of this unusual position, the Department relies on the law of the States of North Carolina and

Missouri and on the decision of the Second District Court of Appeal in Mikos v. Plymouth Harbor, Inc., 316 So.2d 627 (Fla. 2d DCA 1974), rev. denied, 337 So.2d 975 (Fla. 1976).

In response, Covenant submits that the Department of Revenue is taking the same approach that the 1976 Legislature took in re-enacting the "income test" without any real attempt to address the constitutional defect recognized by this Court in Presbyterian Homes and raised by Covenant below. That is, the Department, like the Legislature, is basically contending that the Department can understand and apply Florida constitutional law better than can this Court. Covenant also submits that the proper interpretation of the Florida Constitution cannot be based on the law of the States of North Carolina and Missouri. It is ultimately the function of this Court to interpret and apply the Florida Constitution based upon its understanding of the express language of the Constitution and the intent of its authors. This function was performed in the Presbyterian Homes decision in a way that was consistent with prior decisions of this Court dating back to at least 1939. If the Florida Legislature and the Department disagree with this Court's interpretation and application of the Florida Constitution in the Presbyterian Homes decision, the remedy is not to attempt to "overrule" this Court or take the position that such decision is "invalid", but either to

amend the Florida Constitution in accordance with established procedures or amend the Florida Statutes to comport with the Florida Constitution as interpreted by this Court.

As to the decision of the Second District Court of Appeal in Mikos v. Plymouth Harbor, Inc., supra, that case is totally inapplicable to the instant action. Again, the issue which was raised by Covenant on appeal to the District Court, and which is now before this Court, deals with the validity of the "income test" on its face, nothing more, nothing less. If the decision of the District Court invalidating the "income test" is upheld, then Covenant will be entitled to a full charitable exemption from property taxes for the years involved. The Mikos case dealt with the issue of whether a particular home for the aged was, in fact, a charitable operation, not the validity of the "income test". Here, as indicated above, any question concerning whether Covenant's home for the aged met the other requirements in Chapter 196 for obtaining a tax exemption, including any question as to whether Covenant's home for the aged comes within the purview of the definition of "charitable purpose" contained in Subsection 196.012(6), Florida Statutes (1985), has been resolved in Covenant's favor by the Broward County Property Appraiser (R-209-10, 230-32, 246-47, 251-58 and 286-88). 3/

3/ It should be remembered that the Mikos decision was rendered after this Court's decision in Presbyterian Homes, but prior

Footnote Continued

ISSUE II

THE "INCOME TEST" RESULTS IN UNREASONABLE AND DISCRIMINATORY TREATMENT OF HOMES FOR THE AGED IN VIOLATION OF THE FEDERAL AND FLORIDA CONSTITUTION'S EQUAL PROTECTION CLAUSES.

A. Application of Presbyterian Homes to Subsection 196.1975(4):

In Presbyterian Homes this Court also cast serious doubt on the validity of the "income test" from an equal protection standpoint. The Court first referred to the dissenting opinion in Presbyterian Homes v. City of Bradenton, 190 So.2d 771, 775-76 (Fla. 1966), in which Justice Roberts observed that he was "unable to see the distinction between the case sub judice [involving a church-operated home for the aged] and a church-operated college which charges tuition, board and room, or a church-operated hospital which charges the customary room,

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Continued

to the 1976 amendment to Chapter 196, Florida Statutes, reinstating the "income test" as a mechanism for reducing the tax exemption of an otherwise "charitable" home for the aged. In that case, the tax assessor had looked to the details of the operation of the home for the aged, including the income of the home's residents, in making his determination as to whether the home was a "charitable purpose" under the statute. In this case, the Property Appraiser determined that Covenant's home for the aged was an otherwise qualified "charitable" institution and then mechanistically applied the "income test" and reduced Covenant's tax exemption.

board and other charges". The Court then went on to state as follows:

> . . . most importantly and taking into account the fact the Section 3(a), Article VII limitation has reference only to "predominant use," a strong case can be made that it is unequal treatment for the Legislature to allow tax exemptions for sorority or fraternity houses, schools, churches, nursing homes, hospitals, fraternal organizations, veterans' groups, Boy and Girl Scouts, and a host more when none has coupled with it an appreciable indigency or pecuniary status restriction as is prescribed in Section 196.197(1) , (2), (3) as a condition precedent to allowance of tax exemption for the charitable or religious housing and care of the aged.

297 So.2d at 559.

As indicated by the foregoing language, Chapter 196, Florida Statutes, does not impose the "income test" on other similar charitable and religious institutions. The tax exempt status of fraternities, sororities, fraternal organizations, veterans groups, schools, churches and a "host more" is determined without regard to the pecuniary status of the persons benefitting from their services and operations. In contrast, the tax exempt status of a home for the aged under Chapter 196 is made primarily dependent on the indigency of its occupants. As suggested by this Court, sufficient practical differences to legally warrant this disparate treatment do not exist. In other words, there is

no rational basis for singling out homes for the aged for special classification through imposition of the "income test".

In addition, the "income test" unreasonably discriminates between members of the same classification, i.e., homes for the aged. Covenant submits that it is irrational to provide a total exemption from property taxes for a home for the aged whose occupants have incomes of one dollar less than the income limitations established by Subsection 196.1975(4), but deny any exemption to a home for the aged whose occupants have incomes of one dollar over those limitations. Such a result is compelled by the "income test" regardless of the services provided by the two homes or the costs to the homes or their occupants of providing those services. Such a distinction in treatment has no relevance to the purpose for which the "income test" was ostensibly established, i.e., the determination of a charitable use of property. Therefore, the "income test" should be invalidated as violative of the constitutional guarantee of equal protection of the laws. cf. LeBlanc v. State, 382 So.2d 299 (Fla. 1980); ABC Liquors, Inc. v. City of Ocala, 366 So.2d 146 (Fla. 1st DCA 1979); Department of Revenue v. Amrep Corp., 358 So.2d 1343 (Fla. 1978); and Wiggins v. City of Jacksonville, 311 So.2d 406 (Fla. 1st DCA 1975).

B. The Department of Revenue's Position:

In its brief to this Court, the Department of Revenue has referred to this Court's recent decision in Eastern Airlines, Inc. v. Department of Revenue, 455 So.2d 311 (Fla. 1984), in which it was held that the Legislature must proceed on a rational basis when resorting to legislative classification. The Court, in that case, found such a rational basis to exist because of the "many obvious distinctions between public road and highway transportation of persons and property and air transportation."

Here, the Department of Revenue fails to point out any such "obvious distinction" between homes for the aged and other charitable uses, or between homes for the aged themselves, as outlined above, which would justify the discriminatory treatment afforded homes for the aged by the "income test". It is just such discriminatory treatment which was expressly disfavored by this Court in the Presbyterian Homes decision.

CONCLUSION

As reflected in the District Court's decision below, the 1976 law enacted by the Florida Legislature did nothing to cure the constitutional defects in the "income test" identified by this Court in Presbyterian Homes and raised by Covenant in its appeal to the District Court. The amended statute continues to suffer from the same constitutional infirmities. Accordingly, this Court should uphold the decision of the District Court invalidating Paragraphs (a) and (b) of Subsection 196.1975(4), Florida Statutes (1985).

In its Brief to this Court the Department of Revenue totally fails to address the issues raised by Covenant in its appeal to the District Court regarding the constitutional defects in the "income test" identified in the Presbyterian Homes decision. It is not surprising that the Department has been unable to effectively address these issues since the Presbyterian Homes decision leaves little doubt that the "income test", as reenacted by the 1976 Legislature, is fatally defective. The mere inclusion of a statement by the 1976 Legislature as to its thought processes in reenacting the "income test" cannot, and did not, cure the constitutional infirmities identified in the Presbyterian Homes decision. Moreover, the amendment of the definition of "charitable

purpose" contained in Section 196.012(6), Florida Statutes, has absolutely no application to this action since there is no issue properly before this Court concerning the qualification of Covenant's home for the aged for a tax exemption as a charitable institution, other than the validity of the "income test". Accordingly, this Court should follow its earlier decision in Presbyterian Homes and uphold the District Court in invalidating Paragraphs (a) and (b) of Subsection 196.1975(4).

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a copy of the foregoing Brief was mailed this 17th day of April, 1986 to GAYLORD A. WOOD, ESQ., 304 S.W. 12th Street, Fort Lauderdale, Florida 33316; and J. TERRELL WILLIAMS, ESQ., Assistant Attorney General, Tax Section, State of Florida, The Capitol, Department of Legal Affairs, Tallahassee, Florida 32301.

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