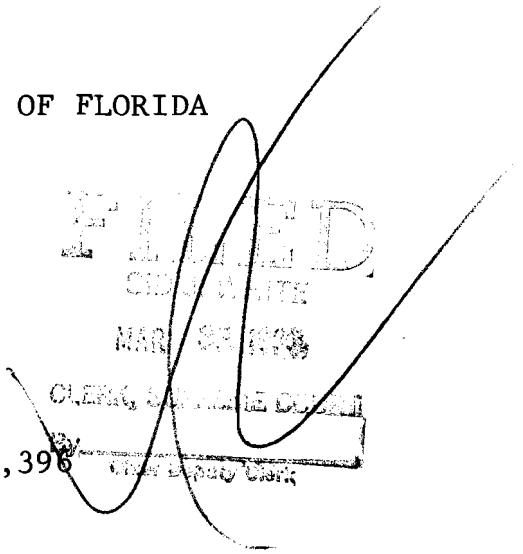
IN THE SUPREME COURT OF THE STATE OF FLORIDA



WILLIAM MARKHAM, ETC., et al.,

Petitioners,

vs. CASE NO. 68,396

EVANGELICAL COVENANT CHURCH OF AMERICA, et al.,

Respondents. /

On Discretionary Review to the Fourth District Court of Appeal, Case No. 85-974

# INITIAL BRIEF ON THE MERITS OF PETITIONERS, DEPARTMENT OF REVENUE AND WILLIAM MARKHAM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## PRELIMINARY STATEMENT

The Petitioner, RANDY MILLER, as Executive Director of the Florida Department of Revenue, will be referred to as the "Department." The Petitioner, WILLIAM MARKHAM, as Property Appraiser of Broward County, Florida, will be referred to as the "Property Appraiser." The Respondents, THE EVANGELICAL COVENANT CHURCH OF AMERICA and COVENANT VILLAGE OF FLORIDA, INC., will be referred to collectively as the "Taxpayers."

The term "trial court" will be used to refer to the Honorable J. Cail Lee of the Seventeenth Judicial Circuit, in and for Broward County, Florida. The term "District Court" will be used to refer to the Fourth District Court of Appeal of Florida.

The symbol "A" followed by a page number will be used to refer to the Appendix located at the bak of this brief of the Department. The symbol "R" followed by a page number will be used to refer to the record on appeal.

## STATEMENT OF THE CASE AND FACTS

The Taxpayers filed their original Complaint in this action on July 16, 1981, challenging the Property Appraiser's decision not to grant them a full exemption from 1980 property taxes on a home for the aged owned and operated by the Taxpayers in the City of Plantation, Broward County, Florida. (R. 181-201). In their Complaint, the Taxpayers claimed that the Property Appraiser's decision to deny a full tax exemption on "charitable" grounds was invalid because the denial was allegedly based on facially unconstitutional criteria established by the Legislature in §196.1975, Fla. Stat. (1979).

The Taxpayers specifically claimed that their home for the aged would have received a full exemption from 1980 property taxes but for the Property Appraiser's application of two allegedly 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 eligibility for tax exemption of a home for the aged is made partially dependent on the income of the occupants of the home; and (2) the "five-year residency test," applicable to occupants of a home for the aged seeking an exemption from ad valorem taxation. (R. 181-201).

Pursuant to stipulation of the parties (R-224-27), the original Complaint was amended to include 1981 property taxes

in the action (R. 228-29). This same amendment was subsequently stipulated to with respect to 1982, 1983, & 1984 taxes as the action progressed (R. 236-39, 267-70-277).

A final hearing in the trial court was held on Feburary 13, 1985. Following the final hearing, which consisted primarily of argument of respective counsel, the trial court ruled (among other things) that (1) the "five-year residency test" was unconstitutional (R-128) and that (2) the "income test" set forth in §196.1975(4) was not facially unconstitutional (A. 1). A Final Judgment reflecting these rulings was entered on March 20, 1985. (A. 1-2).

It is from that portion of the Final Judgment (R 324-25) upholding the constitutionality of the "income test" set forth in §196.1975(4) that an appeal was taken by the Taxpayers to the District Court. Briefs were submitted on behalf of the respective parties and oral argument was subsequently presented to the Distirct Court.

On February 5, 1986, the District Court filed an opinion holding that the "income test" set forth in §196.1975(4) was unconstitutional relying solely on the prior decision of this Court in Presbyterian Homes Synod v. Wood, 297 So.2d 556 (Fla. 1974) (A. 3). However, the District Court did certify as a question of great public importance the following question:

DOES THE COURT'S RULING IN PRESBYTERIAN HOMES V. WOOD, 297 So.2d 556 (FLA. 1974), CONTINUE TO HAVE VALIDITY AND, IF SO, DOES THE "INCOME TEST" IN SECTION 196.1975(4), FLORIDA STATUTES (1985), PASS CONSTITUTIONAL MUSTER? (A. 4)

The Department and the Property Appraiser subsequently filed a timely Petition for Review with this Court based on the question certified by the District Court.

## SUMMARY OF ARGUMENT

The provisions of Art. VII, §3(a), Fla. Const., do not make it mandatory that any property be exempted from taxation due to its use for a "charitable purpose". The pertinent language of Art. VII, §3(a) is permissive in nature and expressly requires promulgation of general law by the Legislature to make it operative.

In addition, there is no constitutional definition of the critical term "charitable purpose." Thus, the Legislature should be accorded great freedom by the courts in prescribing conditions by general law for granting the special privilege of tax exemption to property based on its "charitable" use.

The decision of the District Court holding the "income test" provisions of §196.1975(4) facially unconstitutional is based solely on the prior opinion of this Court in Presbyterian Homes of Synod v. Wood, supra. However, the Presbyterian Homes decision was rendered prior to the enactment in 1976 of the current provisions of §196.1975 pursuant to the passage of Ch. 76-234, Laws of Fla. Section 13 of Ch. 76-234 also amended the related language in §196.012(6), Fla. Stat., defining "charitable purpose" by inserting the more restrictive term _ legally into the definition.

These 1976 legislative amendments evidence the clear intent of the Legislature to incorporate into the general law of Florida the principle that the amount of income available

to residents of homes for the aged is a primary criteria in determining the eligibility of this property for exemption from taxation. The "income test" set forth in §196.1975 complements the related restrictive definition of "charitable purpose" in §196.012(6), which incorporates the rationale of the potential necessity of the allocation of public funds for providing for the needs of the residents of such facilities in the event the services are discontinued by the private entity.

The holding of the Presbyterian Homes case improperly amends, by judicial fiat, the statutory definition and conditions pertaining to property tax exemption based on its "charitable" use. Thus, the decision in the Presbyterian Homes case constitutes an unwarranted judicial intrusion into the inherent power of the Legislature to classify property for taxation and for exemption from taxation. If it is necessary to uphold the constitutional validity of the "income test" provisions of §196.1975, this Court should recede from its decision in Presbyterian Homes of Synod v. Wood.

## ARGUMENT

### THE PROVISIONS OF §196.1975(4), (5) AND (6), FLA. STAT., ESTABLISHING MAXIMUM INCOME LIMITATIONS OF RESIDENTS OF OLD AGE HOMES AS ADDITIONAL CRITERIA FOR GRANTING AD VALOREM TAX EXEMPTIONS FOR CHARITABLE USE OF THE PROPERTY ARE NOT UNCONSTITUTIONAL ON THEIR FACE.

Before proceeding to the merits of this issue, the Department would direct the Court's attention to certain basic guidelines applicable to actions challenging the constitutionality of tax statutes:

(1) It is a fundamental rule of constitutional law that acts of the Legislature are presumed to be valid, and that the courts should indulge every presumption in favor of the constitutional validity of a challenged statute. Eastern Airlines, Inc. v. Dept. of Revenue, 455 So.2d 311 (Fla. 1984); Peoples Bank v. State, Dept. Banking & Finance, 395 So.2d 521, 524 (Fla. 1981); Just Valuation & Taxation League, Inc. v. Simpson, 209 So.2d 229 (Fla. 1968); and Gaulden v. Kirk, 47 So.2d 567, 571 (Fla. 1950).

(2) The burden is upon the party challenging the constitutionality of a statute to make its invalidity clearly apparent by showing a "clear and demonstrated usurpation of power" on the part of the Legislature. See, Eastern Airlines, supra, at page 314.

(3) The burden on a person attacking a statute is an unusually heavy one in that this Court has held that a party challenging the constitutionality of a statute has the burden of proving its invalidity "beyond a reasonable doubt." Knight & Wall Co. v. Bryant, 178 So.2d 5,8 (Fla. 1965), cert. den., 383 U.S. 958.

(4) The challenged "income test" provisions pertain to additional criteria for exempting from ad valorem taxation homes for the aged on charitable purpose grounds. The appellate courts of this state have repeatedly held that statutes granting exemptions and special benefits to particular taxpayers that relieve them from the tax burdens generally placed on others should be construed strictly against the exemption or special benefit. State v. Thompson, 101 So.2d 381, 386 (Fla. 1958); Withers v. Metropolitan Dade County, 290 So.2d 573 (Fla. 3rd DCA 1974); and Jar Corporation v. Culberston, 246 So.2d 144 (Fla. 3rd DCA 1971).

The decision of the District Court being reviewed in this proceeding reversed the trial court by holding that the "income test" set forth §196.1975(4), Fla. Stat. (1985), was unconstitutional on its face. (A. 3). The opinion of the District Court was expressly based solely on the prior decision of this Court in Presbyterian Homes of Synod of Florida v. Wood, 297 So.2d 556 (Fla. 1974) (A. 3). The Department respectfully submits that the holding in the Presbyterian Homes case should not be controlling on this proceeding because:

A. The provisions of §196.1975, Fla. Stat., were enacted by the Florida Legislature in the year 1976 in an obvious direct response to the 1974 decision in Presbyterian Homes. The provisions of §196.1975 evidence the clear intent of the Florida Legislature to establish by general law the principle that the amount of income of residents of old aged homes is a primary factor in determining whether a particular facility is being used for a "charitable purpose" as defined in §196.012(6), Fla. Stat. These provisions enacted in 1976 should be given effect by the courts of this state.

B. The holding of the Presbyterian Homes case improperly prohibits the Florida Legislature from utilizing an "income test" as a primary factor in determining the eligibility of an old aged home for exemption from ad valorem tax on charitable grounds. The Presbyterian Homes decision amends and broadens by judicial fiat the statutory definiton of "charitable purpose;" and such holding constitutes an unwarranted infringement by the judiciary on the power of the Legislature to prescribe by general law the conditions upon which tax exemption may be granted on "charitable grounds". Consequently, this Court should recede from the holding of the Presbyterian Homes case.

A. THE PROVISIONS OF §196.1975, FLA. STAT., WERE ENACTED IN THE YEAR 1976 BY THE FLORIDA LEGISLATURE IN AN OBVIOUS DIRECT RESPONSE TO THE 1974 DECISION IN PRESBYTERIAN HOMES. THE PROVISIONS OF §196.1975 EVIDENCE THE CLEAR INTENT OF THE FLORIDA LEGISLATURE TO ESTABLISH BY GENERAL LAW THE PRINCIPLE THAT THE INCOME OF RESIDENTS OF OLD AGED HOMES IS A PRIMARY FACTOR IN DETERMINING WHETHER A PARTICULAR FACILITY IS BEING USED FOR A "CHARITABLE PURPOSE" AS DEFINED IN §196.012(6), FLA. STAT. THESE STATUTORY PROVISIONS ENACTED IN 1976 SHOULD BE GIVEN EFFECT BY THE COURTS OF THIS STATE.

In the Presbyterian Homes case, supra, this Court did hold the "income test" set out in the former provisions of §196.197(2)(1973), to be in violation of the provisions of Art. VII, §3(a), Fla. Const. The former statutory provisions that were held unconstitutional in the Presbyterian Homes decision read as follows:

> (2) After removing the assessed value exempted in subsetion (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 the year 1976, the Florida Legislature (in an obviously direct response to the Presbyterian Homes decision) enacted Ch. 76-234, Laws of Fla., creating the statutory provisions of §196.1975. The material provisions of §196.1975 challenged in this proceeding are substantially the same as originally enacted in 1976 and are set forth in the current provisions of §196.1975(4),(5) & (6), Fla. Stat. (1985), 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.

(5) Nonprofit housing projects which are financed by a mortgage loan made or insured by the United States Department of Housing and Urban Development under ss. 202-208, 221(d)(3) or (4) or 236 of the National Housing Act, as amended, and which are subject to the income limitations established by the department shall be deemed to be used for charitable purposes.

(6) For the purposes of this section, gross income includes social security benefits payable to the person or couple or assigned to an organization designated specifically for the support or benefit of that person or couple. 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 particuar home for the aged is being used for a charitable purpose and is thereby entitled to an exemption from ad valorem taxation. (e.s.)

A comparison of the language in current §196.1975(4), (5) & (6) with the former provisions of §196.197(2) reflect the following substantial changes:

(1) The maximum permissible gross income of residents has been increased from $5,000 to $7,200, individually, and from $6,000 to $8,000 per couple.

(2) The objectionable provisions of former §196.197(2)(d) providing for a "sliding scale" based upon future acts of Congress or future federal agency rulings of the U.S. Department of Housing and Urban Development were deleted in the 1976 enactment. Under the current provisions of §196.1975(4)(b), an adjustment to the maximum income limitations is permitted based upon the average cost-of-living index for the preceding calendar year.

(3) A separate subsection (6) was added which sets forth the express 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." These provisions of §196.1975(6) manifest the unmistakable intent of the Legislature that the income of residents of an home for the aged is germane to the issue of whether they are primarily indigent and may need public funds to provide the necessities of life in their elder years and would therefore, constitutes a charitable purpose under §196.012(6), F.S..

In addition, in the same 1976 legislative Act which created §196.1975 (Ch. 76-234), the Legislature also amended the definition of "charitable purpose" in §196.012(6) by inserting the restrictive term legally in the statutory language. See, §13, Ch. 76-234, Laws of Fla.

In 49 Fla. Jur.2d., Statutes, §165, at page 199, set forth the following statement of law:

> It is not uncommon for the legislature to insert in a statute a provision containing findings and determinations relating to the matter involved. These may properly be examined by the courts to determine the legislative intent, and are presumed correct. Although the legislative determination of public purpose is not binding on the courts such a declaration is very persuasive.

See also, State v. Cotney, 104 So.2d 346 (Fla. 1958), where this Court upheld the validity of a special act by noting on page 349 of the opinion that "While the legislative determination of the public purposes is not binding on the courts, such a declaration is very persuasive. . . ."

The Taxpayers contended below that the newly enacted provisions of §196.1975 are no different in essence from the former provisions of §196.197(2) held to be unconstitutional by this Court in the Presbyterian Homes decision. However, such contention ignores basic conclusions of law pertaining to revisions and re-enactments of statutory law promulgated by the Legislature to replace former provisions held unconstitutional by the courts.

In the leading case of Dickinson v. Davis, 224 So.2d 262 (Fla. 1969), this Court upheld a statute providing for separate taxation of subsurface rights under certain statutory conditions, even though former provisions of a successor statute were held to be unconstitutional by this Court in a prior decision. On page 264 of the Dickinson opinion, this Court stated in pertinent part as follows:

> The Legislature is presumed to know existing law when a statute is enacted Collins Investment Company v. Metropolitan Dade County (Fla. 1964) 164 So.2d 806, and, also, in re-enacting a a statute the Legislature is presumed to be aware of constructions placed upon it by the Court. Delaney v. State (Fla. 1966), 190 So.2d 578. It necessarily follows that the Legislature in considering and passing a statute to replace one previously held unconstitutional by the Court intended to correct the constitutional defect causing the invalidation of the previous statute. It is never presumed that the Legislature intended to enact purposeless or useless legislation. Sharer v. Hotel Corporation of America (Fla. 1962) 144 So.2d 813. (e.s.)

The decision of the District Court below effectively negates the new provisions added by the Legislature by the creation of §196.1975 in the year 1976. The Department submits that the decision of the District Court (giving no effect to the 1976 statutory amendments made by the Legislature in enacting the critical provisions of §196.1975) violates an established rule of statutory construction that "it should never be presumed that the Legislature intended to enact meaningless and useless legislation,and it must be assumed that the provisions enacted by the Legislature are intended to have some useful purpose." See, Smith v. Piezo Technology & Professional Administrators, 427 So.2d 182 (Fla. 1983); and Dickinson v. Davis, supra.

In the treatise on statutory construction in 49 Fla. Jur.2d, Statutes, §134, page 176, the following general rule of statutory construction is set forth:

> With regard to a statutory amendment, the rule of construction is to assume that the legislature intended the amendment to serve a useful purpose. In making material changes in the language of a statute, the legislature is presumed to have intended some objective or alteration of the law unless the contrary is clear from all the the enactments on the subject. The courts should give appropriate effect to the amendment. (e.s.)

B. THE HOLDING OF THE PRESBYTERIAN HOMES CASE IMPROPERLY PROHIBITS THE FLORIDA LEGISLATURE FROM UTILIZING AN "INCOME TEST" OF RESIDENTS AS A PRIMARY FACTOR IN DETERMINING THE ELIGIBILITY OF AN OLD AGED HOME FOR EXEMPTION FROM AD VALOREM TAX ON CHARITABLE GROUNDS. SUCH HOLDING, IN EFFECT, AMENDS AND BROADENS THE STATUTORY DEFINITION OF "CHARITABLE PURPOSES" BY JUDICIAL FIAT AND CONSTITUTES AN UNWARRENTED INFRINGEMENT ON THE POWER OF THE LEGISLATURE TO PRESCRIBE BY GENERAL LAW THE CONDITIONS UPON WHICH A TAX EXEMPTION MAY BE GRANTED ON CHARITABLE GROUNDS. THIS COURT SHOULD RECEDE FROM THE HOLDING OF THE PRESBYTERIAN HOMES CASE.

A re-examination of whether a statutory "income test" of residents passes constitutional muster in determining the eligibility of an old aged home for ad valorem tax exemption on "charitable purpose" grounds requires scrutiny of the critical organic provisions of the Florida Constitution and the implementing provisions of the general law. The subject provisions of Art. VII, §3(a), Fla. Const., read in pertinent part as follows:

> . . . Such portions of property as are used predominantly for . . . charitable purposes may be exempted by general law from taxation. (e.s.)

The above cited provisions of Art. VII, §3(a), Fla. Const., clearly are not self-executing and therefore do not establish a constitutional right that any property shall be exempt from taxation on charitable grounds. Furthermore, the term "charitable purpose" is not defined in said provisions of the Florida Constitution. The language that property used predominantly for charitable purposes may be exempted by general law undeniably requires the enactment of general law by the

Legislature to make the constitutional "charitable" exemption provisions operative.

It is a well settled rule of ad valorem taxation that the State has the inherent legislative power to select the subjects of taxation and to provide for exemption from taxation, subject only to controlling constitutional limitations. See, Williams v. Jones, 326 So.2d 425, 432 (Fla. 1975), app. dismissed, 97 S.Ct. 34, 429 U.S. 803, 50 L.Ed.2d 63 (1976); Belcher Oil Co. v. Dade County, 271 So.2d 118 (Fla. 1972); and Gaulden v. Kirk, supra.

As discussed above, it is undeniable that the subject provisions of Art. VII, §3(a) are obviously not self-executing. Thus, the Taxpayers have no constitutional right to have their subject property exempt from ad valorem taxation on "charitable purpose" grounds. Consequently, the Legislature should be accorded great freedom by the courts of the state in prescribing the conditions for granting special relief from the burden of property taxation generally placed on all property by exempting certain property from taxation based on "charitable" use.

The Department respectfully submits that one of the basic problems underlying the Presbyterian Homes decision is that the holding erroneously focused on the change between the 1885 constitutional provisions requiring "exclusive use" for charitable purposes, and the revised 1968 Constitution

requiring only "predominant use"for charitable purpose. The Presbyterian Homes opinion totally failed to deal with what the Department submits was the real issue, i.e., whether the challenged "income test" provisions were reasonably germane to the definition of "charitable purpose" as set forth in §196.012(6). The Presbyterian Homes opinion is conspicuous in its failure to focus on the rationale embodied on the statutory provisions of §196.012(6), Fla. Stat. (1971), which read as follows:

> "Charitable Purpose" means a function or service which is of such a community service that its discontinuance could result in the allocation of public funds for the continuance of the function or service.

This definition as set forth in the 1971 statutes is admittedly a somewhat restrictive definition, which expressly limits the term "charitable purpose" in the context of ad valorem tax exemption to property upon which is provided services of a nature that could require the expenditure of public funds if they were discontinued by the owner of the subject property. Thus, the rationale of the potential necessity of providing financial aid to the needy from public funds clearly pervades the definition of "charitable purpose" under Florida statutory law.

There are other jurisdictions which have a much broader statutory definition of the term "charitable purpose" in the context of ad valorem tax exemption. One of these

jurisdictions is the State of North Carolina, wherein "charitable purpose" is defined in North Carolina Gen. Stat. §105-278.6 (1983) Real and Personal Property used for Charitable purposes.

* * * * *

> . . . (b) A charitable purpose within the meaning of this section is one that has humane and philanthropic objectives; it is an activity that benefits humanity or a significant rather than limited segment of a community without expectation of pecuniary profit or reward. The humane treatment of animals is also a charitable purpose.

The above cited statutory definition of "charitable purpose "under North Carolina law purportedly would allow tax exemption even for a home for abandoned pets! This North Carolina statutory language obviously reflects a more liberal approach to the granting of tax exemption for property on "charitable" grounds than is embodied in the provisions of §196.012(6), Fla. Stat. Furthermore, the statutory definition of "charitable purpose" in §196.012(6) was made even more restrictive in the year 1976.

The Legislature, in 1976 inserted the word "legally" into the definitional language of §196.012(6) by the passage of the same act (Ch. 76-234, §13, Laws of Fla.), which created the provisions of §196.1975 containing the "income test" provisions now before this Court for review. It is a general rule of statutory construction that statutes which relate to the same or a closely allied subject should be regarded in pari materia, and such enactments should be construed together and compared with each other. See 49 Fla. Jur.2d, Statutes, §175, page 208.

In addition, statutes passed at the same session of the Leislature dealing with the same subject must be considered in pari materia so as to harmonize, and at the same time, give effect to the legislative intent. 49 Fla.Jur.2d, Statutes, §176, page 211.

When the "income test" provisions of §196.1975 are read in pari materia with the related provisions of §196.012(6) defining "charitable purpose" as "a function or service which is of such a community service that its discontinuance could legally result in the allocation of public funds for the continuance of the function or service", then such income limitation provisions of §196.1975 do not appear to be substantially narrower in scope than the related restrictive definitional provisions set forth in §196.012(6). Why would not the amount of income available to residents of an old aged home be reasonably related to the question of whether public funds of the State of Florida might be required to continue the support of such residents in the event of the discontinuance of such services by the private entity?

The seemingly logical connection between the income available to residents of housing facilities seeking tax exemption on charitable grounds with the basic determination of whether such property is being used to perform a "charitable" service for tax exemption purposes has been recognized by other courts. In the case of Community Park Village, Inc. v. State Tax Commission, 652 S.W.2d 179 (Mo. Ct. App. 1983), the court stated in pertinent part as follows:

> . . . It is not enough that the benefits relieve burdens from those directly participating, society as well must gain. The use of the property taken from the tax roll must relieve some public obligation as by reducing the likelihood that persons will become public charges or will be forced into living conditions conducive to increasing society's problems. In some measure, the third element extracts a quid pro quo in consideration for tax relief. . . . Id., at pages 181-182. (e.s.)

Subsequent to the Presbyterian Homes decision, the Second District Court of Appeal of Florida rendered its opinion in the case of Mikos v. Plymouth Harbor, Inc., 316 So.2d 627 (Fla. 2nd DCA 1974). On page 634 of the Mikos opinion, the Second District Court stated in pertinent part as follows:

> Our attention has been more specifically directed to the applicability of the statutory definition of charitable purpose set forth in Fla. Stat. §196.012(6) (1971), which reads as follows:
>
> > "(6) 'Charitable purpose' means a function or service which is of such a community service that its discontinuance could result in the allocation of public funds for the continuance of the function or service."
>
> This definition was not disturbed by the decision of Presbyterian Homes of Synod of Florida v. Wood, Fla. 1974, 297 So.2d 556. In fact, it was quoted in that case and referred to as being significant in the determination of whether to grant a tax exemption to a home for the aged.

> In deciding whether a home for the aged meets this criterion, it is pertinent to ask whether the financial status of the residents is such that if the services of the home were discontinued public monies would be spent to provide housing for an appreciable number of them. While Presbyterian Homes struck down the "income test" as the sole criterion for the tax exemption of homes for the aged, the court observed.
>
> > ". . . Religious or church or charitable concern for the aged is not to be measured solely by individual pecuniary or income criteria although they play a part. . . ."
>
> A facility which is the equivalent of a high priced condominium providing luxury living cannot expect to receive tax exempt status as fulfilling a charitable purpose even though its use is limited to older persons and operated by a licensed non-profit organization. See Small v. Pangle, 1975, 60 I11.2d 510, 328 N.E.2d 285. (e.s.)

The Taxpayers also contended in the District Court that the challenged provisions of §196.197(4), (5) and (6) are violative of the Equal Protection Clauses of the State and Federal Constitutions. However, the Department suggests that this contention is devoid of merit.

This Court recently reiterated in its opinion in Eastern Airlines, supra, its long-standing adherence to the rule of constitutional law that ". . . In the field of taxation particularly, the legislature possesses great freedom in classification. The burden is on the one attacking the

legislative enactment to negate every conceivable basis which might support it. . . . " Id., at page 314. (e.s.)

In its earlier landmark decision in the case of Just Valuation & Taxation League, Inc. v. Simpson, supra, this Court cited with approval on pages 231-232 of the Simpson opinion from a U.S. Supreme Court decision as follows:

> "In Madden, Executor v. [Commonwealth] of] Kentucky, 309 U.S. 83, 60 S.Ct. 406 [84 L.Ed. 590], the court stated:
>
> > "'The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized. This Court fifty years ago concluded that "the Fourteenth Amendment was not intended to compel the state to adopt an iron rule of equal taxation," and the passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies. Traditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden. It has, because of this, been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.'" (e.s.)

The statutory definition of "charitable purpose" for exemption from ad valorem taxation [§196.012(6)] expressly incorporates therein the test of a potential legal necessity for public funding to continue a community service upon termination by a private entity. Consequently, the Legislature's express intent to limit the special privilege of tax exemption to old aged homes having residents with gross incomes not exceeding the stated amounts is not so arbitrary as to negate every conceivable basis which might support the reasonableness of the stated maximum income limitation provisions. The subject provisions of §196.1975(4), (5) and (6) prescribing income limitations on residents of homes for the aged seeking exemption from ad valorem taxation complement the related restrictive definition of "charitable purpose" in §196.012(6), and said provisions of §196.1975 should be upheld as constitutionally valid.

## CONCLUSION

The provisions of §196.012(6), Fla. Stat., which were not challenged in either this proceeding or in the case of Presbyterian Homes of synod v. Wood, set forth a rather restrictive statutory definition of the critical term "charitable purpose" for ad valorem tax exemption determinations. When the challenged "income test" provisions of §196.1975(4) are construed in pari materia with the related provisions of §196.012(6), said "income test" provisions are not significantly narrower than the rationale underlying §196.012(6), which is expressly based on the criteria of whether public funds could legally be required to be allocated to continue providing for the needs of the residents of the old aged homes. The express intent of the Legislature as evidenced in the 1976 amendments to §196.1975 and §196.012(6) should be given effect by this Court.

The Department further respectfully submits that the holding in Presbyterian Homes improperly intrudes into the inherent power of the Legislature to formulate the policy considerations underlying the grant of a tax exemption to a certain class of property (homes for the aged). This Court may sincerely and soundly disagree with the wisdom of the Legislature in limiting tax exemption relief to only those homes for the aged which provide services to residents with limited incomes.

However, the constitutional provisions of Art. VII, §3(a) do not expressly (or even implicitly) require the Legislature to provide "charitable" tax relief to property based solely or primarily on the age factor of the residents of the property, rather than on the financial needs of such residents. This Court is respectfully urged to recede from its opinion in the Presbyterian Homes case, if the Court determines that the 1976 statutory amendments creating §196.1975 do not constitute a substantial change from the statutory provisions stricken as unconstitutional in the Presbyberian Homes decision.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail to GERALD L. KNIGHT, ESQ., 540 N.E. 4th St., Ft. Lauderdale, FL 33301; & JOHN F. WADE, Assistant General Counsel, Broward County, 115 South Andrews Ave., Suite 423, Ft. Lauderdale, FL 33301, this 28th day of March, 1986.

Respectfully submitted,

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