IN THE
SUPREME COURT OF FLORIDA

JAMES A. ZINGALE, as
Executive Director of the
Department of Revenue of
the State of Florida,

Petitioner,

Case No. SC03-1270

LT No. 4D02-3754

vs.

ROBERT O. POWELL and
ANN S. POWELL,

Respondents.
_____/

RESPONDENTS' AMENDED ANSWER BRIEF

On Petition For Review Of A Decision of The
District Court of Appeal, Fourth District,
State of Florida

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES.....iv

INTRODUCTION.....1

STATEMENT OF CASE AND FACTS.....2

SUMMARY OF ARGUMENT.....7

STANDARD OF REVIEW.....10

ARGUMENT.....10

I. THE FOURTH DISTRICT PROPERLY HELD THAT A TAXPAYER WHO IS ENTITLED TO A HOMESTEAD EXEMPTION IS ENTITLED TO THE "SAVE OUR HOMES" PROTECTION OF ARTICLE VII, SECTION 4 OF THE FLORIDA CONSTITUTION EVEN THOUGH THE TAXPAYER HAS NOT BEEN GRANTED A HOMESTEAD EXEMPTION FOR THE PRIOR YEAR.....10

A. Article VII, Section 4 imposes no filing requirement, implied or otherwise, for "Save Our Homes" benefits 10

B. F.S. § 193.155 contains no bar to "Save Our Homes" benefits in the absence of an application for homestead exemption.....13

C. The decision of the Fourth District does not open the door to

multi-year applications for “Save Our Homes” benefits.....21

D. The decision of the Fourth District does not leave property appraisers without a procedure for the orderly determination of who is and who is not entitled to the Assessment Cap Guaranteed by “Save Our Homes” nor does it require a suit to be filed in order to establish one’s entitlement to “Save Our Homes” protection.....23

II. THE TRIAL COURT DID NOT LACK JURISDICTION TO ENTERTAIN THIS ACTION BECAUSE THE POWELLS CHALLENGED THEIR 2001 ASSESSMENT WITHIN THE TIME PROVIDED BY F.S. § 194.171(2).....28

CONCLUSION.....32

CERTIFICATE OF SERVICE.....33

CERTIFICATE OF FONT COMPLIANCE.....34

TABLE OF AUTHORITIES

FLORIDA CONSTITUTION

PAGE

Article VII, Section 4.....*passim*

Article VII, Section 4 (c).....*passim*

Article VII, Section 4(c) 3.....17

Article VII, Section 4 (c) 4.....11, 21, 33

Article VII, Section 4(c) 6.....18, 19

Article VII, Section 6.....*passim*

STATUTES

FL Statute § 95.11(3)
m.....21

FL Statute §
193.155.....*passim*

FL Statute §
194.011.....*passim*

FL Statute §
194.011(1).....*passim*

FL Statute § 194.011(2).....9, 25, 26, 27

FL Statute § 194.011(3).....10, 26, 27, 28

FL Statute §
194.011(3)(d).....10, 33

FL Statute § 194.032 (1)(a)(1).....footnote, p.5

FL Statute § 194.034 (1)(a).....footnote, p.5

FL Statute § 194.034 (2).....footnote, p.5

FL Statute §
194.171.....*passim*

FL Statute § 194.171
(2).....*passim*

FL Statute § 194.181.....5,

footnote p5

FL Statute § 196.011.....11, 14, 15

FL Statute § 196.011(1)(a).....12,16,footnote p.19, 33

FL Statute § 196.011(8).....16

FL Statute § 196.011(9)(a)..... footnote p.19

FL Statute § 196.015.....25

FL Statute § 196.031.....11, 15

FL Statute § 196.031(1).....15

FL Statute § 196.151.....22

CASES

Agency for Health Care Admin v. Associated Industries
678 So. 2d 1239 (Fla. 1996).....14

Brown v. Firestone
382 So. 2d 654 (Fla. 1980).....14

City of St. Petersburg v. Briley, Wild & Associates, Inc.

239 So. 2d 817 (Fla.
1970).....14

General GMC Truck Sales and Service, Inc. v. Simm
40 So. 2d 998 (Fla. App. 4th DCA 1983).....footnote p.3

Greater Loretta Imp. Ass'n. V. State, ex rel. Boone
234 So. 2d 665
(Fla.1970).....14

Horne v. Markham
288 So. 2d 196 (Fla.
1973).....17

Nikolits v. Ballinger
736 So. 2d 1253 (Fla. App. 4th DCA
1999).....31

Nikolits v. Delaney
719 So. 2d 348 (Fla. App. 4th
DCA).....32

State Department of Education v. Glasser
622 So. 2d 1003 (Fla. App. 2nd DCA
1992).....20

Sun Insurance Office, Limited v. Clay
133 So. 2d 735 (Fla.
1961).....20

Williams v. Howard
329 So. 2d 277 (Fla. 1976).....footnote p.3

INTRODUCTION

This is an appeal of a decision of the Fourth District Court of Appeal which reversed a Final Judgement on the Pleadings entered in favor of the Broward County Property Appraiser and the Broward County Revenue Collection Division, Defendants in the trial court. This Amended Answer Brief is filed pursuant to the Court's March 3, 2004, order. Pursuant to the Court's February 13, 2004, orders which granted the Motions of various parties seeking to appear as *amici curiae*, Respondent's Amended Answer Brief is filed in response to the Petitioner's Initial Brief and the following five Briefs of *Amici Curiae*:

1. Brief of *Amicus Curiae*, Property Appraisers' Association of Florida, Inc. (hereinafter, "The Association");

2. Miami-Dade County Property Appraiser's *Amicus Curiae* Brief

(hereinafter, “The Dade Appraiser”;

3. Brief of *Amicus Curiae*, Ed Crapo, as Property Appraiser of Alachua County, Florida, Ervin Higgs, as Property appraiser of Monroe County, Florida, Ken Wilkinson, as Property Appraiser of Lee County, Florida, and Timothy “Pete” Smith, as Property Appraiser of Okaloosa County, Florida (hereinafter, “ the Alachua, et. al. Appraisers);

4. Brief of *Amicus Curiae* Morgan Gilreath, As Volusia county Property Appraiser, H.W. “Bill” Suber, as Seminole county Property Appraiser, Sharon Outland, As St. Johns County Property Appraiser and Alvin Mazourek, as Hernando County Property Appraiser (hereinafter, “The Volusia, et. al. Appraisers); and

5. *Amicus* Brief of Gary R. Nikolits, Palm Beach County Property Appraiser (hereinafter “The Palm Beach Appraiser).

The Respondents will be referred to as Respondents, MR. & MRS. POWELL or The POWELLS. The Petitioner will be referred to as Petitioner or by his office. References to the record on appeal will be by (R-).

STATEMENT OF CASE AND FACTS

Petitioner appeals the decision of Fourth District Court of Appeal holding that property owners who are entitled to, but did not apply for, a homestead exemption are entitled to the protections guaranteed by the “Save Our Homes” provisions of Article

VII, Section 4 of the Florida Constitution. Contrary to the assertion of Petitioner and various *Amici*, this action is not and has never been an action seeking to obtain a homestead exemption for the year 2000, or any other year. It has at all times been an action contesting the assessment of the Respondents' property for the year 2001.

On June 22, 1990, MR. & MRS. POWELL purchased their current residence located at 1750 S.E. 11th Street, Fort Lauderdale, Florida 33316, more particularly described as:

> Lot 2 in MA ME ESTATES, a resubdivision of part of Block 13 and all of Block 1 of RIO VISTA ISLES, according to the plat thereof recorded in Plat Book 16, Page 70 of the Public Records of Broward County, Florida. (hereinafter "the Property") (R-6, admitted in Appellees Answer).

On June 22, 1990, The POWELLS occupied the Property as their primary residence and have resided thereon, continuously, through and including the present.(R-2)[1].

Through inadvertence and oversight, MR. & MRS. POWELL failed to apply

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[1] While the Defendants admitted this allegation only "as of and after January 1, 2001," no issue was raised in the trial court regarding these facts, the Defendants did not, in response to the POWELLS' Motion for Judgment on the Pleadings, contend that this was a disputed fact issue and, in any event, upon the filing of their Motion for Judgement on the Pleadings the Defendants below admitted all well plead allegations of the POWELLS' Complaint. *See, e.g. Williams v. Howard*, 329 So. 2d 277(Fla. 1976) and *General GMC Truck Sales and Service, Inc., v. Simm*, 40 So. 2d 998 (Fla. App. 4th DCA 1983).

for and obtain a homestead exemption from taxation for their property for the year 2000 and prior years. (R-2).

In 2001, MR. & MRS. POWELL received a notice of proposed property taxes for the Property which indicated a significant increase in the assessed value of the Property between the years 2000 and 2001. (R-7). As a consequence of the notice of proposed property taxes and the gravity of the increase in the assessed value of their homestead, MR. & MRS. POWELL realized for the first time that they had failed to apply for a homestead exemption.

On August 31, 2001, MR. & MRS. POWELL filed with the Value Adjustment Board a petition contesting the proposed increase in the assessed value of the Property for the year 2001(R-8); and On September 17, 2001, they also filed an application to obtain a homestead exemption for the Property for the year 2001.(R-9).

The Property Appraiser approved The POWELLS' application for homestead exemption for the year 2001.(R-10).

On February 21, 2002, The POWELLS appeared before the special master assigned by the Broward County Value Adjustment Board to present their position seeking a reduction in the 2001 assessment for the Property to comply with the cap provided by Article VII, Section 4, of the Florida Constitution (the "Save Our Homes" provision). Rather than consider MR. & MRS. POWELL'S application for

an adjustment to the assessed value of the Property, the special master determined that he had no jurisdiction to consider the application and denied same without prejudice for The POWELLS to reapply to the full Value Adjustment Board. (R-11).

In due course the special master's recommendations were set for an April 18, 2002, hearing before the Value Adjustment Board.(R-12). On April 18, 2002, the Value Adjustment Board refused to allow The POWELLS to make any presentation, offer evidence, or otherwise be heard on their petition for an adjustment to the assessed value of the Property[2] but announced their decision to deny MR. & MRS. POWELL'S application. To date, the Value Adjustment Board has failed to issue any written order, opinion or other ruling with respect to The POWELLS' application[3].

On July 3, 2002, The POWELLS, filed the underlying action challenging the Property Appraiser's failure to apply the assessment cap set forth in the "Save Our Homes" provisions of the Constitution when determining the 2001 tax assessment of their property. (R-1). In compliance with the mandates of F.S. § 194.181, the POWELLS joined the Broward County Property Appraiser, the Director of Broward

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[2] The refusal of the Value Adjustment Board to hear the Plaintiffs' petition or to allow the Plaintiffs to present evidence was in direct violation of Fla. Stat. §194.032(1)(a)(1) and §194.034(1)(a).

[3] The failure of the Value Adjustment Board to render a written decision containing findings of fact and conclusions of law was in direct violation of Fla. Stat. § 194.034(2).

County Florida Revenue Collection Division, and the Executive director of the Department of Revenue[4].

Contrary to Petitioner's assertion, the POWELLS have consistently and repeatedly sought the protections from assessment increases provided by Article VII, Section 4 of the Florida Constitution commencing with the year 2001. Paragraphs 6, 7, and 8 of the POWELLS' complaint allege the POWELLS' purchase of their home in June 1990, and their occupation of same as their permanent residence "through and including the filing of this action." (R- 2). These allegations satisfy the only two requirements for **entitlement to** a homestead exemption (ownership and residency) by the POWELLS for each year from 1991 forward.

Paragraph 10 of their complaint recounts the receipt of a notice advising the POWELLS of the increase in the assessment for their property for the year 2001, and a copy of that notice was attached to the Complaint. Id.

Paragraph 12 of the Complaint alleged the filing of a petition with the Value Adjustment Board challenging the Assessment of the POWELLS' property for the year 2001, and a copy of that petition was attached to the Complaint, (R- 3).

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[4] The Value Adjustment Board was not joined because the POWELLS sought no relief from the VAB and because under F.S. § 194.181, the VAB is a necessary party only to actions commenced by a property appraiser.

Finally, because on January 1, 2000, the Plaintiffs were "entitled to" a homestead exemption, pursuant to Article VII, Section 4(c) of the Florida Constitution they were entitled to the benefit of the "Save Our Homes" cap on increases to the assessed value of the property for the year 2001.

The cause came to issue on the answers and affirmative defenses of all Defendants (R-15 & 34); and in due course the Property Appraiser and Broward County Revenue Collection Division filed a Motion for Judgement on the Pleadings (R-36). In response The POWELLS filed their reply and Cross-Motion for Judgement on the Pleadings.(R-45).

On August 23, 2002, the trial court granted The Property Appraiser's Motion for Judgement on the Pleadings and entered a Final Judgement On the Pleadings for Defendants and the POWELLS timely perfected their appeal of that order to the Fourth DCA. The Fourth District reversed the trial court and remanded the cause "with instructions to reinstate the POWELLS' complaint." A copy of the Fourth District opinion here under review appears in the Appendix to Petitioner's Brief.

SUMMARY OF ARGUMENT

As did the Property Appraiser in the trial court and before the Fourth DCA, Petitioner and various *Amici Curiae* insist on characterizing the POWELLS' action as an attempt to obtain a homestead exemption for the year 2000, or challenge the

assessment of their property for the year 2000[5]. As such, Petitioner's Brief and, in particular, the Volusia, et. al. Appraisers' Brief engage in the common but logically infirm tactic of conquering legally flawed arguments which Respondent and *Amici* attribute to but were never made by the POWELLS. The flaw of such technique is exemplified in part II. (p. 20) of Petitioners' brief where he makes the practically and legally untenable assertion that the trial court lacked jurisdiction to hear a challenge to the 2001 assessment of the POWELLS' property because MR. & MRS. POWELL, failed to challenge the property appraiser's assessment in 2000, a year before the 2001 assessment was made.

MR. & MRS. POWELL do not now nor have they ever sought to obtain a homestead exemption for the year 2000, or any prior year. MR. & MRS. POWELL applied for and received a homestead exemption for the year 2001. They seek, by this suit, to require the Property Appraiser to apply to the assessment of their property for the year 2001, the limitations on increases to assessed value which are guaranteed by Article VII, Section 4, of the Florida Constitution to all persons **entitled to** a homestead exemption.

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[5] Perhaps Petitioner believes that if this statement is repeated often enough it will become the truth. It is not the truth and it is not supported by a shred of paper, testimony or argument within or without the record before this Court.

Article VII, Section 4, contains no requirement that one apply for and receive a homestead exemption for the prior year in order to be eligible for the benefits provided therein. Rather, Article VII, Section 4, limits increases in annual assessments (in this case the year 2001) for all those who were **entitled to** a homestead exemption for the prior year (in this case the year 2000), whether or not they applied for and received their homestead exemption for such prior year.

F.S. § 193.155, contains no bar to the relief Plaintiff's seek. There is no provision in § 193.155, placing any obligation upon or requiring any action by a taxpayer. Section 193.155, merely establishes procedures to govern the manner in which the Property Appraiser must appraise property which has been granted a homestead exemption. It governs the actions of Property Appraisers not the actions of taxpayers.

Contrary to Petitioner's assertion, and that of various *Amici Curiae*, property appraisers need not guess as to who is entitled to "Save Our Homes" protection. Nor are property appraisers left with no process for determining who is and who is not entitled to "Save Our Homes" protection. Neither are they left with a "sue first" procedure for determining entitlement. F. S. § 194.011 provides a comprehensive non-judicial, administrative process by which taxpayers may bring their claim to 'Save Our Homes" protections to the attention of their local property appraiser.

Section 194.011(1), requires property appraisers to notify taxpayers of the assessment of their property. Under § 194.011(2) a taxpayer who objects to the assessment is given the right to confer informally with the property appraiser's office regarding the assessment.

Taxpayers who are dissatisfied with the result obtained in this informal conference may then avail themselves of the administrative remedy of a petition to the value adjustment board as provided in § 194.011(3). Pursuant to F.S. § 194.011(3)(d), these procedures must be instituted within 25 days of the date the notice of assessment required by § 194.011(1), is mailed to the taxpayer. It is only after resort to these procedures that a taxpayer is required to file suit[6].

Since this is an action challenging an assessment for the year 2001, and not 2000, it was filed within the time constraints of F.S. § 194.171.

STANDARD OF REVIEW

Respondent agrees with Petitioner and The Association that this appeal presents legal issues only and, accordingly, the standard of review is de novo.

ARGUMENT

[6] This is not to say that a taxpayer may not institute suit without resort to these administrative remedies, but the taxpayer is not required to do so without first attempting these remedies.

I. THE FOURTH DISTRICT PROPERLY HELD THAT A TAXPAYER WHO IS ENTITLED TO A HOMESTEAD EXEMPTION IS ENTITLED TO THE "SAVE OUR HOMES" PROTECTION OF ARTICLE VII, SECTION 4 OF THE FLORIDA CONSTITUTION EVEN THOUGH THE TAXPAYER HAS NOT BEEN GRANTED A HOMESTEAD EXEMPTION FOR THE PRIOR YEAR.

A. Article VII, Section 4, imposes no filing requirement, implied or otherwise, for "Save Our Homes" benefits.

When the language of the Article VII, Sections 4 and 6, of the Florida Constitution is analyzed and reviewed in light of the legislative pronouncements contained in Florida Statutes §§ 196.011 and 196.031, it is clear the decision of the Fourth District Court of Appeal was correct and Article VII, Section 4, of the Constitution imposes no filing requirement upon taxpayers in order for their property to be eligible for "Save Our Homes" protection.

Petitioner's opening salvo in the portion of his argument he characterizes as a description of the "Nature of the Case" forcefully makes Respondents' point. (page 1, Brief of Petitioner) Petitioner quotes from Article VII, Section 4(c), with emphasis on the precise portion of this section that grants Respondents' entitlement to "Save Our Homes" treatment notwithstanding no homestead exemption had been granted for the prior year- "(c) All persons entitled to a homestead exemption under Section 6 of

this Article . . . ." (Emphasis Petitioner's) This section does not require a homestead exemption to be granted in order to be eligible for "Save Our Homes" protection, it guarantees "Save Our Homes" benefits to "All persons entitled to a homestead exemption." More telling is Petitioner's quote from Article VII, Section 4(c)4, appearing on page 2 of his brief - "New homestead property shall be assessed at just value as of January 1st of the year following the establishment of the homestead." (Emphasis Petitioner's) This section does not guarantee "Save Our Homes" benefits to property following the granting of a homestead exemption, rather it guarantees those benefits following the establishment of a homestead.

The POWELLS' argument is driven home by Petitioner's reference to F.S. § 196.011(1)(a), which declares that persons who own property which is **entitled to** a homestead exemption waive the homestead exemption if they do not apply for same. As such, this section makes the clear distinction between property **entitled to** a homestead exemption and property that did not receive an exemption because it was waived by the homeowner. In both cases the taxpayer was **entitled to** the exemption. As quoted by Petitioner § 196.011(1)(a), states:

> "Every person . . . who, on January 1, has the legal title to real . . . property . . . which is entitled by law to exemption from taxation as a result of its ownership and use shall on or before March 1 of each year, file an application for exemption with the county property appraiser. . . ."

(Emphasis added).

This language could hardly be more clear in its expression that property may, as a matter of law, be entitled to a homestead exemption by reason of its ownership and use but not obtain that exemption if no application is made. It is apparent that the legislature appreciated the distinction between an "entitlement to" a homestead exemption and the granting of same.

In analyzing this issue it is important to keep in mind that Article VII, Sections 4 and 6, of the Florida Constitution provide separate and distinct benefits to Florida taxpayers. Section 6, provides an exemption from taxation. Section 4, is not an exemption provision but an assessment provision which places a limitation on the authority of Property Appraisers to increase the assessed value of property from one year to the next. The only requirement imposed by Section 4, is that the person who owns the property must have been **entitled to a homestead exemption** for the prior year. Section 4, contains no application or filing requirement. Nor does Section 4, contain any requirement that a homestead exemption be granted.

Article VII, Section 4, of the Florida Constitution extends "Save Our Homes" treatment to "All persons **entitled to** a homestead exemption under Section 6" of Article VII. (Emphasis added)

Article VII, Section 6, of the Florida Constitution provides: "Every person who

has the legal title . . . to real estate and maintains thereon the permanent residence of the owner . . . shall be exempt from taxation . . . upon establishment of right thereto in the manner prescribed by law."

Section 6, limits entitlement to those who own real property and maintain their permanent residence thereon and further provides that the exemption commences when the right is established in the manner prescribed by law.

As observed by Petitioner in his citation to *City of St. Petersburg v. Briley, Wild & Associates, Inc.*, 239 So 2d 817, 822 (Fla. 1970), where language of a constitutional provision is clear and not unreasonable or illogical the court should not go outside the constitution to change its meaning. Yet it is the Petitioner who would have this Court go outside the plain language of Article VII, Section 4, to add a requirement that a homestead exemption be applied for and granted in order for property to receive "Save Our Homes" protection when all that is required by the plain language of the Constitution is that the taxpayer be "entitled to" a homestead exemption.

If, however, one is to look outside the plain language of the Constitution, Respondent agrees with Petitioner's citation to *Agency for Health Care Admin. v. Associated Industries*, 678 So. 2d 1239, 1247(Fla 1996); *Greater Loretta Imp. Ass'n. v. State, ex rel. Boone*, 234 So. 2d (Fla. 1970) and *Brown v. Firestone*, 382 So. 2d

654, 671 (Fla. 1980) for the proposition that legislative construction of constitutional provisions is instructive.

Article VII, Section 4, of the Constitution does not define the phrase "entitled to" and Article VII, Section 6, does not even use the phrase "entitled to." We do, however, find guidance in the legislative pronouncements embodied in Florida Statutes §§ 196.031 and 196.011.

Florida Statutes § 196.031(1), declares, "Every person who, on January 1, has the legal title . . . to real property in this state and who resides thereon and in good faith makes the same his or her permanent residence . . . **is entitled to an exemption**. . . ." This section does not require one to apply for and receive the homestead exemption in order to be **entitled to** the exemption. Rather, the statute defines those **entitled to** a homestead exemption as those who own property upon which they maintain their permanent residence. MR. & MRS. POWELL have owned the property for which they seek "Save Our Homes" treatment and have maintained their permanent residence thereon since June 22, 1990. The POWELLS were, therefore, **entitled to** a homestead exemption even though they failed to apply for a homestead exemption for the year 2000.

This distinction between entitlement to a homestead exemption and the actual grant of same is again emphasized in Florida Statutes § 196.011, which states all

persons who own property **"entitled by law to exemption"** shall file an application with the property appraiser. The failure to file such application merely constitutes a waiver of the exemption privilege for that year. It does not affect the eligibility of the property for the exemption in such year. This statute clearly assumes one's property may be **entitled to** an exemption without applying for it. It is only the exemption which is waived if no application is made, not the "Save Our Homes" assessment cap which, under the Constitution, is available to all who are **entitled to** a homestead exemption. Indeed, the waiver of a homestead exemption for a particular year has no affect upon whether the parties owned and resided on the property as their primary residence, the only two requirements set forth in Article VII, Section 6, for **entitlement to** the exemption.

In F.S. § 196.011(1)(a), the legislature provided:

> Every person or organization who, on January 1, has the legal title to real or personal property, except inventory, which is entitled by law to exemption from taxation as a result of its ownership and use shall, on or before March 1 of each year, file an application for exemption with the county property appraiser . . . .

This is followed by F.S. § 196.011(8) which provides, in pertinent part:

> Any applicant who is qualified to receive an exemption under subsection (1) and who fails to file an application by March 1, may file an application for the exemption and may file pursuant to s. 194.011(3), a petition

> with the value adjustment board requesting that the exemption be granted.
>
> * * *
>
> Upon reviewing the petition, if the person is qualified to receive the exemption and demonstrates particular extenuating circumstances judged by the property appraiser or the value adjustment board to warrant the exemption, the property appraiser or the value adjustment board may grant the exemption. (emphasis added)

This section precisely identifies persons "qualified to receive an exemption" because they hold "the legal title to real . . . property . . . which is entitled by law to exemption from taxation as a result of its ownership and use" but have not been granted an exemption because they did not timely file an application.

Had the drafters of Article VII, Section 4, intended "Save Our Homes" benefits to be limited only to those who had been granted a homestead exemption in the prior year, Section 4 (c) would read "All persons who have been granted a homestead exemption under Section 6 . . . ." rather than "All persons entitled to a homestead exemption under Section 6 . . . ."

Nor is *Horne v. Markham*, 288 So. 2d 196 (Fla. 1973) instructive with regard to the procedures that must be followed to avail onself of "Save Our Homes" benefits. *Horne* was an action seeking to obtain a homestead exemption. It was not nor could it have been a case construing entitlement to "Save Our Homes" benefits under Article VII, section 4 of the constitution. *Horne* was decided nearly 20 years before "Save

Our Homes" even existed. The insistence of Petitioner and various *Amici* that *Horne* is in any way dispositive of this action is the equivalent of the POWELLS arguing that they are entitled to the assessment cap provided by the "Save Our Homes" for all the years they owned and resided on thier property before the "Save Our Homes" amendment was adopted. The POWELLS agree one cannot be granted a homestead exemption without applying for one. That is all that *Horne* held. *Horne* did not and could not possibly shed any light on the assessment cap guaranteed by Article VII, Section 4, of the Constitution which was not adopted until nearly 20 years after *Horne* was decided.

THE ASSOCIATION argues that because Article VII, Section 4(c)3, requires reassessment after a change of ownership and Section 4(c)6, speaks to a termination of homestead status, the only way homestead status could be terminated is by the failure to file an application for same. Based on the forgoing, THE ASSOCIATION argues there must be a filing requirement implied in Article VII, Section 4. This argument is unsound for two reasons.

First, sub-paragraph 6 must be read in conjunction with subsection (c) which speaks to "[a]ll persons **entitled to** a homestead exemption" (emphasis added) not all persons who have applied for and received a homestead exemption. That is to say, the phrase "homestead status" appearing in subparagraph 6 can only refer to an

entitlement to homestead as used in subsection (c). Section 4(c) refers to property owned by persons **entitled to** a homestead exemption under Section 6. It does not refer to property owned by persons who have applied for and received a homestead exemption. There is no filing required in order for property to become entitled to a homestead exemption. The homestead status of a person's property is not determined by filing or failing to file for the homestead tax exemption. Homestead status under Section 4(c) is determined by ownership and residency.

Secondly, while a homestead exemption may be terminated by a failure to file,[7] a failure to file is not the only way a homestead exemption may be terminated other than by a sale of the property. The owner(s) of the property could change their domicile to another state and retain the Florida property as a second home, in which case it would no longer be "entitled to" a homestead exemption or "Save Our Homes" treatment. The owners of the property could purchase a new home, make it their primary residence, retain ownership of their old home and rent it to third parties. Again, the old home would no longer be "entitled to" a homestead exemption or "Save Our Homes" treatment. Since failure to file is not the only way, other than a sale, to

[7] In those counties where the property appraiser and county commission have not elected to waive the requirement for annual renewal of homestead exemptions. See F.S. §§ 196.011(1)(a) and 196.011(9)(a).

terminate a homestead exemption, no filing requirement can be inferred from section 4(c)6 of Article VII.

B. F.S. § 193.155 contains no bar to "Save Our Homes" benefits in the absence of an application for homestead exemption.

F.S. § 193.155, contains no bar to the relief Petitioners seek. There is not a single subsection, paragraph or phrase contained in § 193.155, placing any obligation upon or requiring any action by a taxpayer. Section 193.155, merely establishes procedures to govern the manner in which the Property Appraiser must appraise property that has been granted a homestead exemption. It governs the actions of property appraisers not the actions of taxpayers. Section 193.155, governs the actions of property appraisers in those cases where a taxpayer has received a homestead exemption. No provision of § 193.155, precludes a property appraiser from applying the mandates of Article VII, Section 4, of the Florida Constitution to property owners who have not received a homestead exemption but were otherwise **entitled to** a homestead exemption in the year preceding the year for which they seek "Save Our Homes" treatment.

To construe F.S. § 193.155, as denying "Save Our Homes" treatment to those taxpayers who are **entitled to** a homestead exemption but did not apply for same in the year preceding the year for which they seek "Save Our Homes" treatment would

be to exclude persons guaranteed "Save Our Homes" treatment under Article VII, Section 4. Such a construction would constitute a deprivation of a constitutionally guaranteed right to persons upon whom the Constitution has conferred the benefit. Nothing in Article VII, section 4, requires a taxpayer to have been granted a homestead exemption in order to qualify for "Save Our Homes" treatment. It requires only that the property owner be **entitled to** a homestead exemption.

"A statute may not constrict a right granted under the ultimate authority of the constitution." *State Department of Education v. Glasser*, 622 So. 2d 1003 (Fla. App. 2nd DCA 1992). " . . . a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score," *Sun Insurance Office, Limited v. Clay*, 133 So. 2d 735 (Fla. 1961) (Citations omitted). To construe F.S. § 193.155, as excluding from the benefits of Article VII, Section 4, those who are persons **entitled to** a homestead exemption because they had not applied for same would be to constrict a right granted under the constitution. And such construction is not necessary when one recognizes that § 193.155, governs only property appraisers and not taxpayers. This is particularly so when one recalls the mandate of Article VII, section 4(c)4, of the Constitution which requires "new homestead property . . . [to] be assessed at just value as of January 1 of the year following the establishment of the homestead" not January 1 of the year following the

granting of a homestead exemption.

The POWELLS did not in the trial court or the Fourth District, nor do they here, challenge the constitutionality of § 193.155. When this section is construed consistent with the mandates of Article VII, Section 4, it is not unconstitutional. It is only the construction urged by Petitioner and various *Amici* that is unconstitutional.

C. The Decision of the Fourth District does not open the door to multi-year applications for "Save Our Homes" benefits.

THE ASSOCIATION argues that because the trial court held the 60 day time limit imposed by F.S. § 194.171(2), inapplicable, the only limitation applicable is the 4 year period provided in § 95.11(3)(m)[8]. Accordingly, THE ASSOCIATION argues, under the decision of the Fourth District, the POWELLS and, presumably, all taxpayers could seek "Save-Our-Homes protection for many years prior to the tax year 2000...." THE ASSOCIATION'S argument is based upon a false premiss. The trial court never ruled F.S. § 194.171(2) inapplicable (R- 58)[9], and even if it had, the judgment of the trial court was reversed by the Fourth District. F.S. § 194.171(2), is, indeed, applicable to this case precisely because the POWELLS did challenge their

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[8] See pp 10 and 11 of THE ASSOCIATION'S BRIEF. The same argument appears at page 18 of the Dade Appraiser's Brief.

[9] See the copy of the Final Judgement on the Pleadings in Favor of Defendant appearing in the Appendix to the Petitioner's Brief.

assessment and not the failure to receive a homestead exemption.

In this regard the Florida Legislature has established separate and distinct procedures to challenge the denial of a homestead exemption and to challenge an assessment. F.S. § 196.151, governs challenges to the denial of a homestead exemption and requires taxpayers to appeal the denial of a homestead exemption by filing suit "within 15 days from the date of refusal of the application by the [value adjustment] board." F.S. § 194.171(2), requires actions contesting a tax assessment to be brought within:

> 60 days from the date the assessment being contested is certified for collection . . . or . . . 60 days from the date a decision is rendered concerning such assessment by the value adjustment board.

Accordingly, the ability of taxpayers to seek application of the "Save Our Homes" assessment cap is not open ended, and the decision of the Fourth DCA will not open the door to an avalanche of multi-year applications for "Save Our Homes" treatment. Taxpayers must challenge the failure of a property appraiser to afford "Save Our Homes" caps to their assessments within the 60 day period set forth in F.S. § 194.171(2).

D. The decision of the Fourth District does not leave property appraisers without a procedure for the orderly determination of who is and who is not entitled to the assessment cap guaranteed by "Save Our Homes" nor does it require a suit to be filed in order to establish one's entitlement to

"Save Our Homes" protection.

The decision of the Fourth District Court of Appeal is not contrary to sound policy. Neither does the opinion of the Fourth District leave property appraisers without an orderly process to determine who is and who is not entitled to the benefit to the "Save Our Homes" assessment cap or leave property appraisers and tax payers with a "sue first" approach for such determinations.

More than any other issue, this issue is universally asserted by all *Amici*. To a person, they protest that the decision of the Fourth District will leave them with no procedure and no guidance for determining which taxpayers are entitled to "Save Our Homes" protection and generally create chaos and havoc throughout the State. These protests range from the relatively mild pronouncement by The Association that "[t]he district court's holding leaves no statutory mechanism for a property appraiser to identify which property is claimed as a homestead for Save-Our-Homes amendment implementation"(Association Brief, page 3) to the extreme statements contained in the Volusia, et. al. Appraisers' Brief. In an apparent burst of over-exuberance the latter brief declares:

1. "each of the *amici*, as well as their 63 colleagues, will have to determine who is "entitled" to the homestead exemption without the benefit of any information from property owners . . . and to make determinations concerning eligibility for the exemption absent any information with which to do so;" Volusia, et. al. Appraisers Brief, page 2.

2. "The determination of the Fourth District Court would require that property appraisers ascertain, without any request made by the taxpayer, who would qualify for homestead exemption but did not apply for it, to not grant such person an exemption, but to limit increases in assessment to property owned by such persons. This to be done, of course, without so much as an application or phone call from the property owner." Id. at page 8.

3. ". . . the taxpayer seeking a homestead cap need not even alert the official that he wants the benefit until he sues for failure to get it! As the Red Queen said, 'Off with his head!'" Id. at page 14.

My goodness, as Chicken Little observed, "the sky is falling, the sky is falling." No ladies and gentlemen, the sky is not falling. Contrary to the assertions made in the Volusia et. al. Appraisers' Brief, the POWELLS have never once asserted nor advocated a "sue first" method for determining "Save Our Homes" entitlement. Indeed, it was only after the POWELLS had first availed themselves of all the administrative remedies provided in F.S.§194.011 that they filed this action.

Moreover, the over-exuberance of the Volusia et. al. Appraisers has led these *amici* to ignore (overlook?) the comprehensive, multi-layered, non-judicial, administrative procedures established by the legislature in F.S. § 194.011; procedures which are carefully designed to provide property appraisers with the information necessary to determine who is and who is not entitled to the assessment cap guaranteed by "Save Our Homes," the very information the Volusia et. al. Appraisers

claim the decision under review deprives them of[10].

Section 194.011(1), requires property appraisers to annually notify taxpayers regarding the assessment of their property. Under § 194.011(2), a taxpayer who objects to the assessment is given the right to confer informally with the property appraiser's office regarding the assessment. F.S. § 194.011(2), provides that during the informal conference provided by the statute, "the taxpayer shall present those facts considered by the taxpayer to be supportive of the taxpayer's claim for a change in the assessment of the property appraiser." At such conference the property appraiser would be advised of the taxpayer's claim to eligibility for "Save Our Homes" treatment as well as evidence of the 9 factors listed in F.S. §196.015 referenced at page 3 of The Volusia et. al. Appraisers' Brief.

Moreover, taxpayers who are dissatisfied with the outcome of this informal conference may then avail themselves of the administrative remedy of a petition to the value adjustment board as provided in § 194.011(3).

Far from mandating a "sue first" approach, the Legislature has provided two layers of administrative remedies whereby taxpayers may bring their eligibility for

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[10] Despite the predictions of chaos contained in all 6 briefs filed by the Respondent and *Amici*, it is interesting to observe that with the exception of the brief filed by The Association, none of the briefs filed in this proceeding even mentions § 194.011.

"Save Our Homes" treatment to the attention of the property appraiser.

Nor does the decision of the Fourth District leave property appraisers guessing as to who is and who is not entitled to "Save Our Homes" treatment. Pursuant to F.S. § 194.011(3)(d), these administrative procedures must be instituted within 25 days of the date the notice of assessment required by § 194.011(1), is mailed to the tax payer and pursuant to F.S. § 194.171(2), suits challenging the assessment or the decision of the value adjustment board must be filed within 60 days from certification of the tax roll or entry of the value adjustment board's order. Accordingly, property appraisers are left to "guess" regarding "Save Our Homes" treatment no longer than they must "guess" whether taxpayers will contest their assessment for any other reason.

The burden at all times remains on the taxpayer. No guesswork is involved. If taxpayers do not timely avail themselves of the remedies provided by §§ 194.011 and 194.171, property appraisers are free to indulge the presumption that the taxpayer is not entitled to the assessment cap provided by "Save Our Homes." Nothing in the decision here under review provides otherwise. Nothing in the decision of the Fourth District wrote § 194.011 out of Florida Statues.

Not only is the Brief of the Volusia et. al. Appraisers bereft of any mention of the assessment remedies provided in F.S. § 194.011, their fear of collision with a falling sky has lead them to inaccurately state that in this case, ". . . Respondents

employed the 'sue first' policy endorsed by the Fourth District Court. . . ."(Page 10, Volusia et. al. Appraisers' Brief) In point of fact, prior to filing suit, the POWELLS engaged in the informal consultations with the Broward County Property appraiser provided by F.S. § 194.011(2) and when those efforts proved unsuccessful, the POWELLS filed a petition for relief before the Broward County Value Adjustment Board as provided by F.S. § 194.011(3)[11].(R- 3)

Even in the face of this comprehensive statutory scheme designed to inform property appraisers of all facts relevant to the assessment of a taxpayer's property, the Petitioner, and *Amici* argue that the decision of the Fourth District which declares that persons **entitled to** a homestead exemption are entitled to the protection of the "Save Our Homes" assessment cap absent application for a homestead exemption is not "sound policy."

The procedure urged by Petitioner and *Amici* would have this Court adopt a policy designed to ignore Article VII, Section 4, and the procedures established by F.S. § 194.011, so as to penalize persons who overlook filing for a homestead exemption even though they are clearly entitled to the exemption. Certainly, Petitioner

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[11] And the same law firm that represented the Broward County Property Assessor in the pre-suit proceedings before the Broward County Value Adjustment Board wrote the brief filed by the Volusia et. al. Appraisers where it is asserted the POWELLS engaged in a "sue first policy."

does not argue that "sound policy" dictates that government obtain its revenue based upon a procedure that takes advantage of a taxpayer's mistake or oversight rather than a procedure that allows a taxpayer to alert the property appraiser of his claim to "Save Our Homes" treatment within 25 days from the date an assessment notice is mailed to the taxpayer. Surely, this type of "Gotcha" policy is not what was intended by the drafters when they added the "Save Our Homes" guarantee to the Constitution.

II. THE TRIAL COURT DID NOT LACK JURISDICTION TO ENTERTAIN THIS ACTION BECAUSE THE POWELLS CHALLENGED THEIR 2001ASSESSMENT WITHIN THE TIME PROVIDED BY F.S. § 194.171(2).

In its decision the Fourth District properly acknowledged that the POWELLS were challenging the assessment assigned to their property for the year 2001, and not the assessment assigned to their property for the year 2000. Their assessment increased in 2001, not 2000. No matter how many times Petitioner and the Broward County Property Assessor assert that the POWELLS are challenging the assessment assigned to their property for the year 2000, they will find no support for this assertion. The only challenge the POWELLS have mounted is to the assessment assigned to their property for the year 2001, and that challenge was timely made in accordance with F.S. § 194.171(2). Section 194.171(2), requires suit to be brought

within the later of 60 days from certification of the assessment or 60 days from the decision of the value adjustment board. Respondent's argument to the contrary produces the absurd requirement that taxpayers challenge their assessment a year before the assessment is made.

Petitioner blithely quotes F.S. §194.171, and then ignores his own quote. §194.171 requires actions contesting a tax assessment to be brought within:

> 60 days from the date the assessment being contested is certified for collection . . . or . . . 60 days from the date a decision is rendered concerning such assessment by the value adjustment board. (Emphasis added.)

The "assessment being contested" in this action is the **2001** assessment which the property appraiser made without application of the cap guaranteed by Article VII, Section 4 of the Florida Constitution. MR. & MRS. POWELL have never contested the assessment of their property for the year 2000. It was not the property appraiser's assessment for the year 2000, that increased the assessed value of MR. & MRS. POWELLS' property by over $1,000,000.00, it was the assessment for the year 2001. And it is the year 2001 assessment that MR. & MRS. POWELL have timely challenged.

In 2001, MR. & MRS. POWELL received a notice of proposed property taxes and assessment for their home which advised them that if they wished to contest the

assessed value of their property they should file a petition with the value adjustment board before September 19, 2001. (R-7) On August 31, 2001, MR. & MRS. POWELL filed their petition with the value adjustment board. (R-9). On February 22, 2002, the value adjustment board special master determined he had no jurisdiction over the POWELL'S application and denied same without prejudice to apply to the full value adjustment board. (R-11). On April 18, 2002, the value adjustment board refused to allow MR. & MRS. POWELL to present their case, and announced their intention to deny MR. & MRS. POWELL'S application. Through and including the date of this brief the value adjustment board has failed to issue a written order, opinion or other ruling with respect to MR. & MRS. POWELL'S application. As a consequence of the value adjustment board's failure to issue a ruling, the 60 day period provided by F.S. §194.171, has yet to commence.

Nor is this Court's decision in *Nikolits v. Ballinger*, 736 So. 2d 1253 (Fla. App. 4th DCA 1999) dispositive. In *Ballinger* the refusal of the property assessor to apply the 3% cap prescribed by the Constitution was triggered by the property assessor's decision to remove Ballinger's homestead exemption for 1996. Such decision could only have resulted from the property appraiser's determination that Mr. Ballinger was not **entitled to** a homestead exemption for 1996. Since Ballinger failed to challenge the removal of his 1996 homestead exemption within the time provided by §194.171, his

application was deemed untimely. In the instant case the first notice received by MR. & MRS. POWELL advising them that their assessment would be increased beyond the 3% cap provided in Article VII, Section 4, of the Constitution was the notice of proposed property taxes for the year 2001, which advised them that they had until September 19, 2001, to challenge the assessment.

Under Petitioners' argument MR. & MRS. POWELL would be required to challenge their year 2001 assessment within 60 days of the certification of the year 2000 tax roll even though they have not sought to challenge the year 2000 assessment of their property. If accepted, Appellants' position would require taxpayers to challenge tax assessments an entire year before the assessment had been made, much less communicated to the taxpayer.

Likewise, the decision under review is not inconsistent with the *Nikolits v. Delaney,* 719 So. 2d 348 (Fla. App. 4th DCA) decision cited by the Palm Beach Appraiser at page 5 of his Brief. In *Delaney* the Fourth District held that actions challenging the failure of a property appraiser to apply the "Save Our Homes" assessment cap were challenges to an assessment to which the sixty-day time limit provided by F.S. § 194.171 applied. It next determined that the trial court lacked jurisdiction to hear the Delaneys' case because they did not challenge their assessment within the sixty-day time limit. Here the POWELLS challenged their year 2001

assessment well within the time limit provided by F.S. § 194.171.

CONCLUSION

The POWELLS seek the application of the "Save Our Homes" cap to the assessment of their property for 2001, not a homestead exemption for 2000. Nor have they challenged their assessment for 2000.

Article VII, Section 4, of the Florida Constitution guarantees "Save Our Homes" protection to property "entitled to" a homestead exemption not property granted the exemption. Article VII Section 4(c)4, provides "Save Our Homes" protection begins when a homestead is established, not when an exemption is granted.

Nothing in F.S. § 193.155, prevents property appraisers from affording "Save Our Homes" protection to property which is entitled to but has not received a homestead exemption.

F.S. § 194.011 provides procedures for taxpayers to notify appraisers of a claim to "Save Our Homes" protections without resort to litigation and taxpayers must act within the 60 day limit of § 194.171(2), or the assessment becomes final.

The POWELLS' challenge to their 2001 assessment was timely.

The decision of the Fourth District Court of Appeal should be affirmed.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Charles J. Crist, Jr., Attorney General, Christopher M. Kise, Solicitor General, Louis F. Hubener, Chief Deputy Solicitor General, Office of the Attorney General, The Capitol -PL-01, Tallahassee, Florida 32399; Gaylord A. Wood, Jr., Wood & Stuart, P.A., 304 S.W. 12th Street, Fort Lauderdale, Florida, 33315-1549; Edward A. Dion, Governmental Center, Suite 423, 115 South Andrews Avenue, Fort Lauderdale, FL 33301; Sherri L. Johnson, Dent & Associates, P.A., P.O. Box 2359, Sarasota, Florida 34230; B. Jordan Stuart, Wood & Stuart, 206 Flagler Avenue, New Smyrna Beach, Florida 32169; Eddie Stephens; Christiansen & Jacknin, C/o Property Appraiser's Office, Governmental Center, Fifth Floor, 301 North Olive Drive, West Palm Beach, Florida 33401; Robert A. Ginsburg, County Attorney, Stephen P. Clark Center Suite 2810, 111 N.W. First Street, Miami, Florida 33128-1993; and Loren E. Levy, The Levy Law Firm 1828 Riggins Road, Tallahassee, Florida 32308,via United States first class, postage pre-paid mail, on this _____of March, 2004.

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that this Brief was prepared using WordPerfect 8, Legal Times New Roman 14 point font.

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By:_____
Harry S. Raleigh Jr.