IN THE
SUPREME COURT OF FLORIDA

JAMES A. ZINGALE, as the Executive Director of the Department of Revenue, State of Florida,	)	
Petitioner,	)	
vs.	)	**Case No. SC03-1270**
	)	**LT No. 4D02-3754**
ROBERT O. POWELL and ANN S. POWELL,	)	
Respondents.	)	

AMENDED REPLY BRIEF OF PETITIONER, JAMES A. ZINGALE

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

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CHARLES J. CRIST, JR.
ATTORNEY GENERAL

CHRISTOPHER M. KISE
Solicitor General

LOUIS F. HUBENER
Chief Deputy Solicitor General

MARK T. ALIFF
Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
The Capitol - PL-01
Tallahassee, FL 32399
(850) 414-3300
(850) 410-2672 (fax)

Counsel for Petitioner,
James A. Zingale

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REPLY TO APPELLEES' STATEMENT OF THE CASE AND FACTS

In their statement of the case and facts the Powells contend that

> [c]ontrary 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.

Ans. Brief at 2. The Powells contest the assessment for the year 2001 because they claim the assessment limitation in article VII, section 4(c) should be applied to that year. As shown herein, application of the assessment limitation to the 2001 assessment depends on the establishment of the right to a homestead exemption for the year 2000. The Powells did not file an application for homestead exemption until September 17, 2001. R 3.[1]

The Powells also complain at length about the actions of the Broward County Value Adjustment Board, particularly the Board's failure to render a written decision. The Board was never a party to this action, and the trial court did not rule on any of the purported Board-related issues discussed in the Powells' brief.

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[1] The Save Our Homes amendment became effective on January 5, 1993. The year 1994 was the base year for assessing "just value," and 1995 the first year in which the assessment limitation could apply. Fuchs v. Wilkinson, 630 So. 2d 1044 (Fla. 1994).

REPLY ARGUMENT

I. THE FOURTH DISTRICT ERRED IN HOLDING THERE CAN BE AN ENTITLEMENT TO THE HOMESTEAD EXEMPTION WITHOUT APPLICATION THEREFOR.

No principle of interpretation is more fundamental than that requiring provisions of organic law to be construed harmoniously and every part of the constitution given meaning. See Advisory Opinion to Governor -– 1996 Amendment 5 (Everglades), 706 So. 2d 278, 281 (Fla. 1997)("Where the constitution contains multiple provisions on the same subject, they must be read in pari materia to ensure a consistent and logical meaning that gives effect to each provision"); In re Apportionment Law Senate Joint Resolution No. 1305, 263 So. 2d 797, 807 (Fla. 1972) (construction is favored that gives effect to every clause and part of constitution).

The Powells' argument rejects this principle at the outset by focusing on one word in article VII, section 4(c), Florida Constitution, that would produce an inefficient, even incoherent, tax scheme. The Powells contend they were "entitled" to the homestead exemption without having applied for it in 2000 and therefore they could claim the benefit of the assessment limitation for the year 2001. Their theory is that section 4(c) references no homestead exemption application requirement, that subsection 4(c)(4) guarantees the benefit of the assessment limitation without the filing of an application, and that sections 196.011(1) and

196.031(1), Florida Statutes, recognize an "entitlement" to the homestead exemption irrespective of a homeowner's failure to apply for the exemption in the manner provided by law.

Neither article VII, section 4(c) nor the statutes support this argument.[2]

A. Entitlement To The Article VII, Section 4 Cap On Assessment Of Homestead Property Is Dependent On Establishment Of The Right To The Homestead Exemption In The Manner Prescribed By Law.

Article VII, section 4(c) affords the benefit of the assessment limitation to those persons "entitled to a homestead exemption under section 6 of this Article." (Emphasis added.) Pursuant to section 6, the right to the exemption does not exist until established "in the manner prescribed by law." According to the Powells, however, their "entitlement" to the exemption exists apart from and independent of its establishment under section 6. This view would render superfluous section 4(c)'s reference to section 6. Amendments to the constitution may not be so construed. See Department of Environ. Protection v. Ellender, 666 So. 2d 882, 886 (Fla. 1996) (constitutional amendment should be construed as a whole in order to ascertain the general purpose and meaning of each part; each subsection, sentence, and clause must be read in light

[2] The Powells' brief is not clear as to whether their claim rests on the first sentence of section 4(c) or 4(c)(4). This brief, like the initial brief, addresses both possibilities.

of the others to form a congruous whole so as not to render any language superfluous).

This Court squarely rejected the Powells' argument in Horne v. Markham, 288 So. 2d 196 (Fla. 1973), when it held that the right to the homestead exemption was "dependent," i.e., dependent on filing an application in accordance with the law. Id. at 199. See also Lisboa v. Dade County Property Appraiser, 705 So. 2d 704 (Fla. 3d DCA 1998), appeal dismissed, 737 So. 2d 1078 (Fla. 1999) (relying on Horne v. Markham and rejecting claim that homestead tax exemption is a constitutional right). The Powells' argument necessarily reads out section 4(c)'s reference to section 6 because they cannot explain how they can be "entitled" to a homestead exemption if they have no right to it. Not surprisingly, they adduce no case law from any jurisdiction supporting the distinction they would make between a right and an entitlement.

The Powells also assert that the failure to file an application under section 196.011 "merely constitutes a waiver of the privilege for that year" and that the statute "clearly assumes that one's property may be entitled to an exemption without applying for it." Hence, the Powells conclude that "'Save Our Homes' treatment is still available" to those who file no application. Ans. Br. at 15. This argument is unavailing because section 196.011 cannot change the constitutional language (or this

Court's construction thereof in Horne v Markham) which specifies that the right can be established only through the application process. The right does not exist if the property owner does not apply for the exemption. Here, the Powells did not file an application for the exemption until September 17, 2001. R 3, ¶¶ 13,14. Therefore, they were not entitled to the benefit of the assessment limitation for the year 2001. Art. VII, § 4(c)(4), Fla. Const., and § 193.155, Fla. Stat.

The Powells' further reliance on section 196.031(1), Florida Statutes, is also misplaced. They quote that statute only in part and omit critical language. See Ans. Br. at 14. Reading the omitted language (underscored below), it is obvious that the statute simply states the amount of the exemption to which a property owner may be entitled:

> Every person who, on January 1, has the legal title . . . to real property in this state who resides thereon and in good faith makes the same his or her permanent residence . . . is entitled to an exemption from all taxation, except for assessments and special benefits, up to the assessed valuation of $5,000 on the residence and contiguous real property, as defined in s. 6, Art. VII . . . .

§ 196.031(1) (emphasis added). Contrary to the Powells' reading, this section recognizes no entitlement to the exemption absent compliance with section 196.011(1). As sections 196.011 and 196.031 address the same subject they must be read in pari materia,

not in isolation. McGhee v. Volusia County, 679 So. 2d 729, 730 n.1 (Fla. 1991)(doctrine requires courts to construe related statutes together and in harmony).

The argument the Powells advance seeks the benefit of the assessment limitation–-effectively a partial tax exemption-–for persons who, though they may qualify, have never established their right to the homestead exemption as article VII, section 6 expressly requires. A long line of authority holds that a constitutional provision or statute creating a tax exemption must be construed strictly against those claiming to fall within the terms of the exemption. Palethorpe v. Thomson, 171 So. 2d 526, 532 (Fla. 1965); Steuart v. State ex rel. Dolcimascola, 161 So. 378, 379 (Fla. 1935); Schooley v. Judd, 149 So. 2d 587, 590 (Fla. 2d DCA 1963), rev'd on other grounds, 158 So. 2d 514 (Fla. 1963). The Powells' distinction between "right" and "entitlement" does not justify extending the assessment limitation on homestead property to those who have never established the right to the homestead exemption.

Accordingly, there is no "entitlement" to the homestead exemption apart from establishment of the right thereto in the manner prescribed by law.

B. The Powells' Claim Is Barred By Article VII, Section 4(c)(4), and Section 193.155, Florida Statutes.

Article VII, section 4(c)(4), provides:

> (4) New homestead property shall be assessed at just value as of January 1st of the year following the establishment of the homestead. That assessment shall only change as provided herein.

The Powells claim that subsection 4(c)(4) supports their free-standing "entitlement" theory and conclude that the directive to the property appraiser in section 193.155(1), Florida Statutes––to apply the assessment limitation to the just value assessment made "the year following the year the property receives homestead exemption"––conflicts with subsection 4(c)(4). This argument also must fail.

Section 193.155 implements the general directive in the first sentence of article VII, section 4 stating that "[b]y general law regulations shall be prescribed which shall secure a just valuation of all property for ad valorem taxation. . . ." Pursuant to section 193.155, the property appraiser was obligated to assess the Powells' homestead property at just value for the year 2002. The assessment limitation would then apply to limit any increase in the 2002 just value assessment because the Powells received their homestead exemption in 2001. That could not be more clear.

The Powells admit they have not heretofore challenged the

constitutionality of section 193.155. Ans. Brief at 21. Even if the Powells had pleaded the case they now want to make–-that section 193.155 is invalid because it conflicts with subsection 4(c)(4)–-their argument again ignores logic and basic principles of constitutional construction. Neither section 4 nor any other provision of the constitution states any criteria for "establishment of the homestead." Subsection 4(c)(4) thus confers no clear right to the assessment limitation if the exemption is not established according to law. Because section 4(c) concerns the assessment and taxation of homestead property, the most logical interpretation of subsection 4(c)(4)-–a clear directive to property appraisers--is that new homestead property is assessed at just value as of January 1 of the year following establishment of the homestead exemption. This is so because a property appraiser can apply the assessment limitations in subsection 4(c)(1) only to property that has received the homestead exemption. A property appraiser has no way of identifying "homestead property" whose owners have not established their right to the exemption in accordance with section 196.011(1). Constitutional provisions should not be read to impose a duty that is impossible to perform.

Aside from the failure to explain how property appraisers could implement their interpretation of subsection 4(c)(4), the Powells' argument founders on basic principles. First, article

VII, section 4 directs the legislature to enact implementing laws. Section 193.155 is one of those laws and it adopts exactly the interpretation petitioner sets forth above. Property receiving the homestead exemption is reassessed at just value in the year following the year in which the property receives the exemption, and the assessment limitation applied thereafter to that just value determination. The legislature's interpretation of section 4(c) is presumptively correct unless manifestly erroneous. American Bankers Ins. Co. v. Chiles, 675 So. 2d 922, 924 (Fla. 1996); State v. Kaufman, 430 So. 2d 904, 907 (Fla. 1983). The Powells have not argued, much less demonstrated, that the legislature's construction is manifestly erroneous. They have offered only an alternative and unworkable interpretation of subsection 4(c)(4).

Furthermore, in that the Powells' interpretation would expand the tax benefits of section 4(c) to those who do not clearly fall within its embrace, that interpretation must be rejected. Palethorpe, Steuart and Schooley, supra.

C. The Decision Of The Fourth District Is Contrary To Sound Policy And Cannot Be Supported By Section 194.011, Florida Statutes.

Receding from the contention in their jurisdictional brief that homeowners who neglect to file an application for homestead exemption should first sue the property appraiser under section 194.171, Florida Statutes, to contest their tax assessment, the

Powells now contend that a neglectful homeowner's "entitlement" to the assessment cap can be brought to the property appraiser's attention pursuant to section 194.011. Nothing in article VII, section 4(c) or section 6 supports this argument. Section 194.011 does not "prescribe the manner" for establishing the right to the exemption. Section 196.011 effects that constitutional directive. See Horne v. Markham, 288 So. 2d at 199 ("'the manner prescribed by law' is set forth in Chapter 196, Florida Statutes...").

What the Powells suggest--an informal conference with the property appraiser or petition to the Value Adjustment Board pursuant to section 194.011(2) or (3)--is nothing more than an attempt to circumvent the procedures for laying claim to the homestead exemption specified in section 196.011. Homeowners like the Powells who fail to meet the March 1 application deadline set forth in section 196.011(1) must proceed under section 196.011(8). This subsection allows for further consideration by the property appraiser or the Value Adjustment Board and requires a showing of "particular extenuating circumstances." It is precisely this showing that the Powells seek to avoid by contending that homeowners in their position, rather than follow section 196.011(8), should proceed under section 194.011(2) and (3), and

failing that, with a suit under section 194.171(2)).[3]

Neither the Powells nor other neglectful homeowners should be excused from showing extenuating circumstances, and neither section 194.011(2) and (3) nor section 194.171(2) should be read to usurp the application process prescribed in section 196.011. Again, not only does the Powells' argument render superfluous article VII, section 4(c)'s reference to section 6, its disregard for section 196.011 violates basic principles of statutory construction. "A specific statute covering a particular subject always controls over a statute covering the same and other subjects in more general terms." McKendry v. State, 641 So. 2d 45, 46 (Fla. 1994). The property owner must therefore demonstrate entitlement to the homestead exemption pursuant to the procedures set forth in section 196.011, not 194.011 or 194.171(2).

II. THE TRIAL COURT LACKS JURISDICTION OVER THIS ACTION BECAUSE IT IS UNTIMELY UNDER SECTION 194.171(2), FLORIDA STATUTES (2000).

In response to the decision in Nikolits v. Ballinger, 736 So. 2d 1253 (Fla. 4th DCA 1999), the Powells contend they are challenging only the assessment for the year 2001 and they neither seek a homestead exemption, nor challenge the assessment, for the

[3] The argument is not surprising as the phrase "particular extenuating circumstances" would likely not embrace, in the case of the Powells, ten years of "oversight and inadvertence."

year 2000, or any prior year. Amended Ans. Br. at 2, 8, 29, 32.

Notwithstanding this disclaimer, it is clear that the Powells were not granted a homestead exemption until 2001 and that the purpose of this action is to claim the benefit of the assessment limitation as applied to the year 2001 assessment. The Powells' theory seems to be that they were "entitled" to a homestead exemption even before the year 2001, irrespective of their failure to apply, and therefore the property appraiser should have applied the assessment cap to the 2001 assessment. Article VII, section 4(c)(4) and section 193.155, however, require that the cap be applied to the just value determined the year after entitlement to the homestead exemption is established. In this case that would be 2002, as the trial court found. Therefore, regardless of their disclaimer, the Powells' claim would depend on proof that they were entitled to a homestead exemption for the year 2000.[4]

The Nickolits decision bars this claim because it recognizes

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[4]The complaint alleges only that the Powells were "entitled" to a homestead exemption on January 1, 2001, even though at that time they had not applied for it. R 4, ¶¶ 26, 27. But Article VII, section 4(c) clearly provides that the assessment cap is applied either to a just value assessment made on the January 1 following the effective date of the amendment (for then-existing homestead property) or on the January 1 of the year following establishment of the exemption for "new" homestead property. Therefore, if the Powells are entitled to have the benefit of the cap applied to the January 1, 2001, just value assessment, they must prove their right to the homestead exemption for the year 2000.

that the homestead exemption is integral to the assessment. The 2000 assessment on the Powells' property did not allow for the homestead exemption because the Powells had not bothered to seek the exemption. Therefore, admitted or not, it is the 2000 assessment that is the real focus of their challenge since the Powells seek to have the assessment cap applied to the year 2001 assessment. As Nikolits holds, their challenge is untimely under section 194.171(2), Florida Statutes.

Finally, although the Powells repeatedly insist they seek no homestead exemption for the year 2000, that is not the same under their reasoning as disclaiming "entitlement" to the exemption for that year. If the Powells were to clearly disclaim any "entitlement" to the homestead exemption for all years prior to 2001, this argument would not apply. But such a disclaimer would implicitly concede that the assessment limitation could not apply to the January 1, 2001 just value assessment under article VII, section 4(c) (or subsection 4(c)(4)), Florida Constitution, and section 193.155, Florida Statutes. The Powells have been careful to avoid this concession.

CONCLUSION

The decision of the Fourth District should be reversed, and the judgment of the trial court affirmed.

Respectfully Submitted,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

CHRISTOPHER M. KISE
Solicitor General
Florida Bar No. 0855545

_____
LOUIS F. HUBENER
Chief Deputy Solicitor General
Florida Bar No. 0140084

MARK T. ALIFF
Assistant Attorney General
Florida Bar No. 349568

OFFICE OF THE ATTORNEY GENERAL
PL- 01 - The Capitol
Tallahassee, Florida 32399-1050
(850) 414-3300

Counsel for Defendant/Petitioner
State of Florida
Department of Revenue

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this _____ day of March, 2004, to the following:

HARRY S. RALEIGH, JR.
Niles, Dobbins, Meeks,
Raleigh & Dover, L.L.P.
P. O. Box 11799
Fort Lauderdale, FL 33339-1799

GAYLORD A. WOOD, JR.
304 S.W. 12th Street
Fort Lauderdale, FL 33315-1521

LARRY E. LEVY
LOREN E. LEVY
The Levy Law Firm
1828 Riggins Lane
Tallahassee, Florida 32308

EDDIE STEPHENS, ESQ.
Christiansen & Jacknin
c/o Property Appraiser's Office
Governmental Center
Fifth Floor
301 North Olive Avenue
West Palm Beach, Florida 33401

ROBERT A. GINSBURG
Miami-Dade County Attorney
Melinda S. Thornton
Assistant County Attorney
Stephen P. Clark Center
Suite 2810
111 N.W. 1st Street
Miami, Florida 33128-1993

SHERRI L. JOHNSON
JOHN C. DENT, JR.
Dent & Associates, P.A.
330 South Orange Avenue
Sarasota, Florida 34236

GAYLORD A. WOOD, JR.
B. JORDAN STUART AND
J. CHRISTOPHER WOOLSEY
Wood & Stuart, P.A.
206 Flagler Avenue
New Smyrna Beach, FL 32169

_____
Louis F. Hubener

CERTIFICATE OF COMPLIANCE

I certify that this brief was prepared with Courier New 12-point in compliance with Fla. R. App. P. 9.210(a)(2).

_____
Louis F. Hubener