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COMMENTARIES

FLORIDA'S RETIREMENT HOMES: A TAX-FREE PLACE IN THE SUN?*

Traditionally in America, inability to remain gainfully employed because of advanced age meant the loss of economic self-sufficiency. The initial response to the plight of the aged was to provide them with care in old people's homes maintained by religious and benevolent associations. These homes, which often represented the last available alternative to the trip "over the hill to the poor-house," were generally accorded preferred treatment for ad valorem property tax purposes.¹ As a result of Social Security, pension plans, and similar developments, however, many of the elderly now approach old age with at least modest guaranteed incomes. This improved economic condition of a substantial segment of the nation's aged has spawned a new generation of retirement homes catering to their medical and housing needs. For a substantial fee, these nonprofit retirement homes provide the elderly with places of congregate living, possessing many of the usual incidents of a middle-income life style. The courts have increasingly been called upon to decide whether the preferred property tax treatment accorded the traditional charitable home for the aged should be extended to these newer and more opulent nonprofit, but fee-charging, retirement homes. Of course the crucial issues are whether there exist differences in the purposes and operations of the two, and, if such differences exist, whether they are sufficient to justify a distinction in tax treatment. It is the purpose of this commentary to discuss the cases dealing with this question, point out the reasons for the lack of judicial consensus, and consider the desirability of expanding the charitable tax exemption in this area.

Exemptions from taxation are probably as ancient as taxation itself. Both *Genesis* and *Ezra* alluded to exemptions for religious organizations, the primary charitable organs of the time.² In 1601, Parliament enacted the Statute of Charitable Uses, which began its recitation of charitable purposes with relief for the aged.³ The charitable tax exemption in Florida is also of less than recent vintage. The Reconstruction Constitution of 1868 excluded from taxation property of corporations that had religious, educational, or "charitable

*EDITOR'S NOTE: This commentary received the *University of Florida Law Review Alumni Association Commentary Award* as the outstanding commentary submitted during the Winter 1975 quarter.

1. *Milwaukee Protestant Home for the Aged v. City of Milwaukee*, 41 Wis. 2d 284, 290, 164 N.W.2d 289, 291 (1969).

2. "And Joseph made it law over the land of Egypt unto this day, that Pharoah should have the fifth part, except the land of the priests only." *Genesis* 47:26 "Also we certify you, that touching any of the priests and Levites, singers, porters, Nethmins, or ministers of this House of God, it shall not be lawful to impose the toll, tribute, or custom upon them." *Ezra* 7:24. See also Warren, Krattenmaker & Snyder, *Property Tax Exemptions for Charitable, Educational, Religious and Governmental Institutions in Connecticut*, 4 CONN. L. REV. 181, 184 (1971).

3. 43 Eliz. c. 4 (1601).

purposes."⁴ The Constitution of 1875 retained the charitable exemption for corporate property, but amended the provision to exempt only corporate property that was exclusively used for "charitable purposes."⁵ The provisions of the 1885 constitution were substantially the same.⁶

A recurring problem for both the legislature and judiciary in Florida has been to define the term "charitable purpose."⁷ The concept of "charitable" has proven especially difficult to delineate in the area of homes for the aged, not only in Florida but also in many other jurisdictions.⁸ The similarity in language and purpose of charitable exemption provisions in Florida and in other states makes the handling of the problem in these other states both relevant and persuasive in Florida.

DETERMINATION OF "CHARITABILITY"

The question of whether a given home for the elderly is exempt from taxation has been decided by an examination of the purpose of the corporation and the use of the corporate property.⁹ Whether the purpose of the retirement home is "charitable" has often been determined by an examination of the corporate powers as stated in the corporate charter.¹⁰ While some courts have held that a statement of charitable purposes in the corporate charter was determinative, others have also examined whether the actual use of the corporate lands was consistent with its stated purposes.¹¹ These latter courts have treated the statement of purposes in the corporate charter as *prima facie* evidence of charitable use, which might be rebutted by evidence that the corporate use of land did not in fact follow its chartered purposes.¹²

4. FLA. CONST. art. XVI, §24 (1868) provides: "The property of all corporations, whether heretofore or hereafter incorporated, shall be subject to taxation, unless such corporation be for religious, educational, or charitable purposes."

5. FLA. CONST. art. XVI, §24 (1875): "The property of all corporations, whether heretofore or hereafter incorporated, shall be subject to taxation, unless such property be *held and used exclusively* for religious, educational, or charitable purposes." (emphasis added).

6. FLA. CONST. art. XVI, §16 (1885). FLA. CONST. art. IX, §1 (1885) allowed the legislature to exempt any property used for charitable purposes, and has also been utilized to exempt nonprofit corporations.

7. For historical background see Note, *Property Tax Exemptions Under Article VII, Section 3(a) of the Florida Constitution of 1968*, 21 U. FLA. L. REV. 641 (1968); Note, *The "Public Purpose" and "Charitable" Tax Exemption in Florida: A Judicial Morass*, 19 U. FLA. L. REV. 330, 330-35 (1966).

8. Cases specifically dealing with charitable tax exemptions for homes for the aged have arisen in at least 24 states.

9. Note, *Exemption of Educational, Philanthropic and Religious Institutions from State Real Property Taxes*, 64 HARV. L. REV. 288 (1950).

10. *Defenders' Townhouse, Inc. v. Kansas City*, 441 S.W.2d 365, 370 (Mo. 1969); *Oregon Methodist Homes, Inc. v. Horn*, 226 Ore. 298, 308, 360 P.2d 293, 297 (1961).

11. *Oregon Methodist Homes, Inc. v. Horn*, 226 Ore. 298, 308, 360 P.2d 293, 297 (1961).

12. *Id.* The court in *Oregon Methodist Homes* stated that it was a sound and salutary rule grounded in human experience. "Unselfish declarations of intended purpose and promises of future worthy endeavor are many times rendered meaningless by inaction and should give the declared no preferred status unless ultimately resolved into concrete and tangible reality." *Id.*

Cases wherein the use of the retirement home has generated income to the corporation fall generally into two categories according to the source of the income. Where income has been derived from a commercial transaction with the public at large, such as the lease or rental of a portion of the retirement home for commercial purposes, the courts have been nearly unanimous in holding that such direct use of property to earn a profit was not consistent with "charitable purposes."¹³ Cases involving payments by residents for the services of a retirement facility, though the home is technically nonprofit, have caused greater problems for the courts. While the decisions have usually been based on a case-by-case examination of the facts, those courts not inclined to grant an exemption have emphasized that the payments by residents have a similar commercial flavor.¹⁴ The process of judicial decision-making has been influenced by certain persuasive factors, though no single criterion has been found to be universally decisive.

Admissions Criteria

The courts have frequently required as a condition of charitable tax exemption that retirement homes provide service to the general public — that is, an indefinite number of people without restriction. The courts have reasoned that to be a public charity, a retirement home must benefit the entire community by providing care to all those who need and apply for it.¹⁵ Admission restricted to members of a certain class has been viewed as evidence that the institution does not qualify for exemption. For example, where the obvious purpose of an institution was to furnish low-cost housing at its actual cost to a limited class of people, it has been held that the facility did not serve a charitable purpose.¹⁶

One of the most frequently litigated requirements for admission to a home has been payment of a fee. Entrance fees were held by an Illinois court to be irreconcilable with that state's constitutional requirement of "exclusive charitable use." Thus, even though approximately 68 percent of the corporate assets were derived from gifts and only 32 percent from required payments by res-

13. *E.g.*, *Peachtree on Peachtree Inn, Inc. v. Vamp*, 120 Ga. App. 403, 170 S.E.2d 709 (Ct. App. 1969); *People ex rel. Baldwin v. Jessamine Withers Home*, 312 Ill. 136, 143 N.E. 414 (1924).

14. See text accompanying notes 20-24 *infra*.

15. *People ex rel. Nordlund v. Association of Winnebago Home for Aged*, 40 Ill. 2d 91, 101, 237 N.E.2d 533, 539 (1968). A charitable or beneficent situation is one which provides benefits to an indefinite number of people, dispensing charity to all who need and apply for it and not appearing to place obstacles of any character in the way of those who need and would avail themselves of the benefits defendant provides. *Id.* at 101, 237 N.E.2d at 539.

16. *County of Douglas v. OEA Senior Citizens, Inc.*, 172 Neb. 696, 707, 111 N.W.2d 719, 725 (1961). The retirement home in that case was operated by the Omaha Education Association. While occupancy was not limited to retired teachers, applications were subject to review by the board of directors of the Association, and it was anticipated that those unable to pay the admission or monthly fees would qualify as residents only if the Association were willing to pay the fees or if contributions could be secured from some other source. *Id.* at 707, 111 N.W.2d at 725.

idents, the charitable home was denied tax exemption.¹⁷ The more prevalent view would appear to be that the charging of fees to residents will not by itself necessarily foreclose a charitable exemption. Decisions have supported the exemption for retirement homes that require payment by their residents according to ability to pay¹⁸ since such fees have been held not to change the basic benevolent purpose of a retirement home. In so holding, the Wisconsin supreme court noted that "charging pew rent does not make a church not a church."¹⁹

In some instances, however, the charging of fees has weighed against a finding that the retirement home was a charitable rather than a commercial or business enterprise. Where admission is limited by a flat fee not determined by reference to need, the exemption has been denied. The rationale for these decisions has been that such a flat fee, required of all residents, was one of the indicia of a commercial or business rather than a charitable purpose.²⁰ The Supreme Court of Montana²¹ took the opposite position, however, stating that a retirement home's charitable status is not destroyed by the charging of fees for admission, since qualification as a charity does not require that a home have an exclusive relationship to the poor. While acknowledging that such mandatory fees functioned as an admission criterion, the court held that the fees were consistent with charitable methods since such requirements applied to all elderly persons equally.²²

The courts have also noted the commercial nature of the relationship where the accommodations assigned and services provided varied according to the fees paid rather than the needs of the residents.²³ A similar though more ethereal consideration of responsiveness to need as a criterion for determining charitable status was made by an Illinois court which held that a home that required residents to be in good health and to pay a mandatory fee and which

17. *People ex rel. Nordlund v. Association of Winnebago Home for Aged*, 40 Ill. 2d 91, 98, 237 N.E.2d 533, 537 (1968).

18. *E.g.*, *Peachtree Inn, Inc. v. Camp*, 120 Ga. App. 403, 70 S.E.2d 709 (Ct. App. 1969); *People ex rel. Nordlund v. Association of Winnebago Homes for Aged*, 40 Ill. 2d 91, 101, 237 N.E.2d 533, 539 (1968).

19. *Milwaukee Protestant Home for the Aged v. City of Milwaukee*, 41 Wis. 2d 284, 298, 164 N.W.2d 289, 295 (1969). The court noted this was particularly true where the charges were reasonably required and related to the maintenance of the institution and the extension of its services. In dispute was exemption of an addition to an existing retirement home. The home had previously been run at a deficit that was made up by private gifts. The new wing, however, did not operate at a loss and there was in fact net "income." The "income" was used to repay, with interest, the loan from the home's endowment, which had funded construction of the addition. *Id.* at 298, 164 N.W.2d at 295.

20. *E.g.*, *United Presbyterian Ass'n v. Board of County Comm'rs*, 167 Colo. 485, 500, 448 P.2d 967, 974 (1968); *People ex rel. Nordlund v. Association of Winnebago Home for Aged*, 40 Ill. 2d 91, 98, 237 N.E.2d 533, 537 (1968).

21. *Bozeman Deaconess Foundation v. Ford*, 151 Mont. 143, 439 P.2d 915 (1968).

22. *Id.* at 145, 439 P.2d at 918. The decision was perhaps influenced by the fact that the fees, though mandatory, were insufficient to pay the mortgage indebtedness of the home. *Id.* at 145, 439 P.2d at 916.

23. *Madonna Towers v. Commissioner of Taxation*, 283 Minn. 111, 120, 167 N.W.2d 712, 717 (1969).

provided services according to the fee paid, simply lacked the "warmth and spontaneity indicative of charitable impulse."²⁴

"Profitable" Altruism

One of the more frequently utilized criteria for determining charitable status has been the presence or absence of "profit." Use of a profit test to determine the charitableness of nonprofit retirement homes would seem to involve an apparent contradiction. Many retirement homes, however, now utilize a plan of financing involving "founder's" contracts, which require payment by residents of a lump sum "founder's" fee and monthly payments thereafter. Operational gains, or "profits," resulting from such payments have often been the basis for determining the charitableness of retirement homes.²⁵

The fact that a retirement home is, or plans to be, self-supporting has been viewed as weighing against a finding that the home is charitable.²⁶ The Supreme Court of Minnesota in *Madonna Towers v. Commissioner of Taxation*²⁷ denied exemption to a retirement home that was capitalized entirely by membership fees. While the home purported to be available to the general public without restriction, the court stated that the record did not support a finding that its charitable aid reached an indefinite number of people.²⁸ The court noted that if the financing of the operation were to be successful, the home could not seek or encourage indigent residents; by its very financing scheme the home demonstrated that the concept was to "provide the good life for elderly people who can afford it."²⁹ Similarly, a Missouri decision denied exemption to a rental facility for the low income elderly where rents were used

24. *Methodist Old Peoples Home v. Korzen*, 39 Ill. 2d 148, 158, 233 N.E.2d 537, 542 (1968). The court noted that while charging fees would not necessarily remove plaintiff from the category of a charitable institution, the allocation of living space (desirability of location and size) on the basis of the amount of fees paid seemed more related to the bargaining of the commercial market place than to charitable impulse. *Id.*

25. In discussing the concept of "profitable" nonprofit retirement homes, the court in *Milwaukee Protestant Home for the Aged v. City of Milwaukee*, 41 Wis. 2d 284, 164 N.W.2d 289 (1968) stated that where income comes from and where it goes are both material in determining whether there is an operation for profit. It is not an excess of income over outgo that makes a retirement home profitable, but only income from activities not within the objects of such organization. Likewise, where the profit made is payable to no one, but is only used for benevolent purposes, the profit element becomes immaterial. *Id.* at 296, 164 N.W.2d at 294-95. The gain or profit that destroys the charitable nature of an institution is profit to someone other than the benevolent association itself. *Id.* at 297, 164 N.W.2d at 294-95. For a discussion of an operational gain's effect on the charitable status of Florida corporations, see Note, *The "Public Purpose" and "Charitable" Tax Exemption in Florida: A Judicial Morass*, *supra* note 7, at 343-46.

26. *E.g.*, *Madonna Towers v. Commissioner of Taxation*, 283 Minn. 111, 117-18, 167 N.W.2d 712, 716-17 (1969); *Defenders' Townhouse, Inc. v. Kansas City*, 441 S.W.2d 365 (Mo. 1969); *Paraclete Manor v. State Tax Comm'r*, 447 S.W.2d 311 (Mo. 1969). The decision in *Defenders' Townhouse* involved a facility for the elderly that fixed rents at an amount necessary to pay all expenses and debts. The Missouri supreme court could see no reason why taxes should not be one of the expenses borne, as it was with comparable private institutions.

27. *Madonna Towers v. Commissioner of Taxation*, 283 Minn. 111, 167 N.W.2d 721 (1969).

28. *Id.* at 117, 167 N.W.2d at 715.

29. *Id.*

to pay all operating expenses and retire the debt on the home. The court reasoned that such a self-sustaining facility could not be considered to have a charitable purpose, since its financial scheme did not contemplate that private donations would support any of its activities or that it would provide any care without payment.³⁰

Other decisions have taken the position that the focus should not be the issue of financial self-sufficiency of the home, but whether the charges to the residents of the home exceed the cost of the services and facilities provided to them. These decisions would seem to view any care for the elderly as per se charitable, requiring merely that it be rendered *at cost* or less.³¹ The court in *Milwaukee Protestant Home for the Aged v. City of Milwaukee*,³² however, allowed charges even in excess of the cost of services, noting that a benevolent association is "not required to use only red ink in keeping its books and ledgers."³³ That decision viewed the profit element as immaterial, since the profit made by such institutions is irrevocably dedicated to charitable purposes and may be used only to improve facilities or extend the institution's benevolence.³⁴ At the opposite pole, *Oregon Methodist Homes, Inc. v. Horn*³⁵ held that even the fact that a retirement home operated at a loss did not conclusively establish that it was charitable, since tax exemptions are strictly construed and the patrons involved were people able to pay their way.³⁶

The Rich as Objects of Charity

A great deal of judicial attention in this area has been devoted to the issue of who may be the object of charity. Homes for the aged that restrict occupancy to the indigent have almost universally been recognized as charitable in purpose.³⁷ A more difficult question is presented where the facilities are open to both self-supporting and indigent residents. While the extent to which the retirement home provided free care to the elderly has been held to be determinative in at least one instance,³⁸ other authority has denied that charitable exemption is conditioned upon the providing of free services.³⁹ The most equivocal judicial response has involved the question of whether retirement

30. *Paraclete Manor of Kansas City v. State Tax Comm'n*, 447 S.W.2d 311, 314 (Mo. 1969).

31. *E.g.*, *Fredericka Home for the Aged v. County of San Diego*, 35 Cal. 2d 789, 221 P.2d 68 (1950); *Fifield Manor v. County of Los Angeles*, 188 Cal. App. 2d 1, 10 Cal. Rptr. 242 (Dist. Ct. App. 1961).

32. 41 Wis. 2d 284, 164 N.W.2d 289 (1969).

33. *Id.* at 296, 164 N.W.2d at 294.

34. *Id.*

35. 226 Ore. 298, 360 P.2d 293 (1961).

36. *Id.* at 311-12, 360 P.2d at 299-300.

37. The decisions that have held homes for the indigent to be non-exempt have usually done so on the ground that they were restricted to members of a particular class. *See, e.g.*, *City of Philadelphia v. Masonic Home*, 160 Pa. 572, 28 A. 954 (1894), where residents of the home were restricted to members of a fraternal organization.

38. *Friendsview Manor v. State Tax Comm'n*, 247 Ore. 94, 420 P.2d 77 (1967), required some degree of unpaid service as a *quid pro quo* for tax exemption.

39. *Milwaukee Protestant Home v. City of Milwaukee*, 41 Wis. 2d 284, 300, 164 N.W.2d 289, 297 (1969).

homes which cater entirely to financially independent elderly are charitable and thus entitled to exemption.

The apparent lack of judicial agreement on whether the financially independent may be the objects of charity stems from two conflicting judicial theories of exemption — the “doing the state’s duty” theory and the “humanitarian” theory.⁴⁰ The reason for exemption under the “doing the state’s duty” theory is that the state will gain if the loss in tax revenue is exceeded by savings resulting from private performance of functions that would otherwise be the state’s responsibility.⁴¹ The “humanitarian” theory is based on a belief that the state should encourage by tax exemptions, not only functions easing the state’s burdens, but all activities devoted to general benevolence.⁴²

The stricter “state’s duty” theory has paralleled the common conception of charity as relief for the needy, equating charity with the personal giving of alms to the destitute.⁴³ This theory would, of course, defeat any finding of “charity” in the performing of services for the financially independent. The “humanitarian” theory has given charity a much broader meaning than that accorded it in common speech. The rationale given has been that the scope of charity and the standards under which it is administered are not frozen by the past, but keep pace with the times and the needs of society.⁴⁴ Jurisdictions accepting the “humanitarian” theory have held that relief of poverty is not a condition of charitable assistance since “man, especially the old, does not live by bread alone.”⁴⁵

The Rich as Objects of Their Own Charity

The phenomenon of privately organized retirement homes supported entirely by fees from their members has raised the issue of whether members of an association may be the beneficiaries of their own charity. The exact point in question seems to have arisen at a fairly early date in a somewhat analogous context involving religious and communal societies.⁴⁶ In an 1834 case involving a Shaker religious community, a Kentucky court said:

If it be conceded, [that property given by] a stranger [to the use of the society] would be a charitable use, it will be impossible to discriminate

40. Comment, *Taxation: The Property Tax Exemption and Non-Profit Homes for the Aged*, 53 MARQ. L. REV. 140, 144 (1970).

41. Note, *supra* note 9, at 288-89.

42. *Id.* at 289.

43. Note, *Property Taxation of Nonprofit Rental Housing for the Aged*, 39 TEMP. L.Q. 88, 89 (1965).

44. *Bozeman Deaconess Foundation v. Ford*, 151 Mont. 143, 149, 439 P.2d 915, 918 (1968).

45. *Fifield Manor v. County of Los Angeles*, 188 Cal. App. 2d 1, 11, 10 Cal. Rptr. 242, 248 (Dist. Ct. App. 1961). In *Fredericka Home for the Aged v. San Diego County*, 35 Cal. 2d 789, 221 P.2d 68 (1950), the court noted that aged people require care other than financial assistance, and that fulfilling the special needs of the elderly is as much a charitable and benevolent purpose as is fulfillment of their financial needs. *Id.* at 792, 221 P.2d at 70.

46. *Holbrook, Maxwell & Rourke, Fifield Manor Tax Refund Cases: True Meaning of "Charity" Under California Welfare Tax Exemption Restated*, 35 S. CAL. L. REV. 276, 290-93 (1962).

a sufficient distinction between such a gift, and that from a person, [or] number of persons, who give their property at the time of becoming members. If the society be really charitable in its ends and objects it cannot be any less so because its founders, or the most of them, are its members also.⁴⁷

A more recent case, *Fifield Manor v. County of Los Angeles*,⁴⁸ has provided support for this position. The court in *Fifield Manor* treated payments by retirement home residents as "contributions" rather than fees even though the payments were based on a schedule for paying off the debts of the facility.⁴⁹ In *Oregon Methodist Home v. Horn*, however, the court noted the *quid pro quo* nature of the "donations" made by members in return for lifetime accommodations and viewed the payments as being in the nature of contingent charities or contingent debts.⁵⁰ Several other cases have similarly held that, where the people who provided the capital for a retirement institution were also the residents and received the benefit of their own payments, no charitable purpose existed.⁵¹ In *Friendsview Manor v. State Tax Commissioner*,⁵² the Oregon court denied that it was required to exempt such self-help projects merely because they provided services which, if provided to others, would be considered charitable. The court noted:

This is identical to what exists when an individual aged person provides his own home or a group of aging persons constructs a cooperative apartment. The purpose of all three is providing housing for the aged. . . . It is not suggested that the latter two categories also should [be considered] tax-exempt housing.⁵³

The Supreme Court of Minnesota has expressed a similar opinion, stating that where an elderly person contributes to the capital structure of a retirement

47. *Gass v. Wilhite*, 32 Ky. 170, 178 (Cir. Ct. 1834). *Gass* involved an attempt by several members of a Shaker community to withdraw from the community either the goods that they had contributed or their equivalent value. It was argued unsuccessfully that this was not a charitable use, since the trust was created for the individual benefit of the members of the society who created it, and there can never be a charitable use created for one's own benefit. *Id.* at 178.

48. 188 Cal. App. 2d 1, 10 Cal. Rptr. 242 (Dist. Ct. App. 1961).

49. *Id.* at 5, 10 Cal. Rptr. at 245.

50. 226 Or. 298, 360 P.2d 293 (1961). The court in *Oregon Methodist Home* noted that on dissolution of the home, the corporate assets were to be apportioned among the members according to their respective contributions, which violates the generally accepted rule that charitable corporations are trustees in perpetuity for funds held by them. *Id.* at 318, 360 P.2d at 302. The court did not elaborate on its use of the terms "contingent charities" and "contingent debts" but the reference was apparently to the contractual nature of the relationship created. *Id.* at 318, 360 P.2d at 302. In *United Presbyterian Ass'n v. Board of County Comm'rs*, 167 Colo. 485, 502, 448 P.2d 967, 976 (1968), the court also noted the *quid pro quo* nature of the agreement, and stated that where material reciprocity between alleged recipients and their alleged donors exists, then charity does not.

51. *E.g.*, *Friendsview Manor v. State Tax Comm'r*, 247 Ore. 94, 420 P.2d 77 (1967); *Madonna Towers v. Commissioner of Taxation*, 283 Minn. 111, 167 N.W.2d 712 (1969).

52. 247 Ore. 94, 420 P.2d 77 (1967).

53. *Id.* at 100, 420 P.2d at 80.

home in return for the right to reside in that home, the arrangement was more akin to a long-term lease or participation in a commercial venture than to charity. The focus there was upon the inequality that would result from granting charitable exemption to retirement homes that provided accommodations similar to those that other elderly persons might acquire by renting an apartment or buying a house.⁵⁴ The rule of thumb established by those decisions denying exemption is that in order to qualify for exemption, a retirement home must be calculated to benefit some persons other than those who supply its capital.⁵⁵

EXEMPTION OF RETIREMENT HOMES IN FLORIDA

Cases in Florida have utilized many of the same criteria that have been found to be determinative in other jurisdictions. One of the first Florida decisions passing upon the question of whether fee-charging retirement homes are in fact charitable was *Haines v. St. Petersburg Methodist Home, Inc.*⁵⁶ In a very comprehensive opinion, the Second District Court of Appeal denied exemption to the retirement home involved on several grounds. First, the court defined "charity" to require gifts to the poor or the taking of positive steps to relieve the distress and suffering of those unable to help themselves. The residents of the home were not viewed as charity cases in the sense necessary to sustain exemption because 133 residents paid more than their monthly pro rata share of the cost of operation, while only 79 residents paid less.⁵⁷ Moreover, the court noted that although the establishment of the retirement home may have been altruistically motivated, the home was substantially recompensed for its expenditures by the residents and was thus a financially viable, taxable institution.⁵⁸ The court found three additional grounds for denying tax exemption: the home was not available to the general public and applicants were not accepted unless they were able to pay;⁵⁹ there existed a possibility of eventual private gain to association members since the charter did not state what would happen to the assets of the corporation in the event of dissolution;⁶⁰ and finally, the granting of charitable tax exemption to such a self-sustaining corporation would give it an undue preference over private operations, which competed for residents from the same group of elderly people — those able to "purchase their retirements."⁶¹

54. *Madonna Towers v. Commissioner of Taxation*, 283 Minn. 111, 121-22, 167 N.W.2d 712, 718 (1969).

55. The court in *Oregon Methodist Home v. Horn*, 226 Ore. 298, 360 P.2d 293 (1961), stated that the group benefited may be large or small, definite or indefinite in number; but in the benefaction, some motive of altruism must clearly shine through. *Id.* at 315, 360 P.2d at 301.

56. 173 So. 2d 176 (2d D.C.A. Fla. 1965).

57. *Id.* at 178.

58. *Id.* at 185.

59. *Id.* at 183.

60. *Id.* The court noted that residents' payments had in fact increased the home's assets from \$50,000 to \$823,000. *Id.* at 178.

61. *Id.* at 185.

The Florida supreme court took a substantially similar approach in *Presbyterian Homes of the Synod of Florida, Inc. v. City of Bradenton*.⁶² The court there denied exemption to a home where only 24 of 180 residents were provided care at less than required fees, even though the home operated at a deficit that was made up by private charitable contributions.

More liberal decisions subsequent to *Haines* and *Presbyterian Homes* have placed Florida squarely among those jurisdictions utilizing a "humanitarian" definition of charity. Those decisions clearly established in Florida the tenets that the elderly of *any* financial status may be the objects of charity, and that retirement homes may restrict their charity to members of a select group of elderly.

*Jasper v. Mease Manor, Inc.*⁶³ was the first case decided in Florida under a statute⁶⁴ specifically exempting homes for the aged. That statute was construed at the trial level as a legislative pronouncement that actual operation of a home for the elderly was the *sole* requirement for a tax exemption. The court stated that the residents of a home may at all times be "self-sustaining in a financial and functional sense." The Florida supreme court held that the statutory definition of "charitable" was constitutional as construed and that it was within the legislative prerogative to define the term without reference to the dependence or independence of the aged residents involved.⁶⁵

In *City of Winter Park v. Presbyterian Homes For the Synod of Florida*,⁶⁶ the Fourth District Court of Appeal interpreted the then-applicable statutory provisions,⁶⁷ which specifically exempted homes for the aged if they were non-profit or if their gains were used for charitable purposes, including improvement or expansion of facilities. The criteria suggested by the statute for determining whether a home was a profit-making venture and thus ineligible for exemption included the existence of contractual agreements favorable to insiders, the reasonableness of payments made for services and supplies furnished by insiders, and the reasonableness of founder's fees and maintenance charges in light of the value of services provided to the tenants. Though the founder's fees involved ranged up to \$20,000, with monthly fees as high as \$200, the court found that the fees were reasonable and that the home was eligible for tax exemption.

In *Johnson v. Presbyterian Homes of the Synod of Florida, Inc.*,⁶⁸ the Florida supreme court granted exemption to a retirement home in which 76 residents were members of the religious corporation which owned and operated the home. The court held that organizations operating otherwise-exempt homes for the aged may qualify for a tax exemption even though their own members reside in the homes.⁶⁹

62. 190 So. 2d 771 (Fla. 1966).

63. 208 So. 2d 821 (Fla. 1968).

64. Fla. Laws 1967, ch. 67-568, at 1669 (repealed 1971) exempted "any bona fide home for the aged."

65. *Jasper v. Mease Manor, Inc.*, 208 So. 2d 821, 825 (Fla. 1968).

66. 242 So. 2d 733 (4th D.C.A. Fla. 1970).

67. Fla. Laws 1969, ch. 69-55, at 247 (repealed 1971). See note 64 *supra*.

68. 239 So. 2d 256 (Fla. 1970).

69. *Id.* In *Memorial Home Community v. Smith*, 214 So. 2d 77 (1st D.C.A. Fla. 1968), the

Following these decisions the Florida legislature in 1971 enacted a statute⁷⁰ that provides criteria for determining the tax status at homes for the aged. The statute, which provides in substance that retirement homes will be exempted *pro tanto* in accordance with the proportion of residents who have annual incomes of not more than \$5000, makes residents' income the primary criterion. In 1974, however, the Florida supreme court held the "income test" portion of the statute unconstitutional.⁷¹ The test was held to be too narrow in scope to comply with the constitutional provision stating:

Such portions of property as are used predominantly for educational, literary, scientific, religious or charitable purposes may be exempted by general law from taxation.⁷²

The court noted that charitable concern for the aged is not to be measured solely by reference to their pecuniary status, since advanced age has its special problems and needs which are merely aggravated by indigency.⁷³

The frequency with which the tax status of retirement homes has been litigated in Florida suggests that their exemption presents a real problem for beleaguered local governments, which are singularly dependent upon property taxes for the revenue required to provide services for Florida's burgeoning population. Yet, in light of recent decisions by the Florida courts, the exemption of such homes is likely to present a greater threat to the tax base in the future. Viewed collectively, these decisions seem to invite financially independent members of "Florida's welcome aggregation of elderly citizens"⁷⁴ to take advantage of state law to create for themselves a tax-free place in the sun.

CONCLUSION

There are several basic objections to the apparent trend in Florida toward broadening the scope of the charitable exemption. The exemption method accentuates the regressive nature of the property tax, conferring the greatest benefits upon the wealthy organizations that own the greatest amount of property.⁷⁵ Moreover, even the benefits conferred upon the elderly by the charitable tax exemption are conferred unequally, for elderly persons of similar means

court granted exemption to a retirement home whose membership was restricted to retired social workers and missionaries, most of whom were financially dependent. Though the home in *Johnson* provided care at less than cost, residents were required to pay substantial founder's fees. Deficits were made up by private gifts. However, the holding in *Johnson* that restricted membership retirement homes are exempt does not condition exemption upon any showing that residents are financially dependent.

70. Fla. Stat. §196.197 (1973).

71. *Presbyterian Homes of the Synod of Florida v. Wood*, 297 So. 2d 556 (Fla. 1974).

72. FLA. CONST. art. VII, §3(a).

73. *Presbyterian Homes of the Synod of Florida v. Wood*, 297 So. 2d 556, 559 (Fla. 1974). The court noted that an "income" test for exempting retirement homes raised an equal protection argument, since the legislature allows tax exemptions for fraternity houses, schools, churches, fraternal orders, and many other organizations without regard to the pecuniary status of the members. *Id.*

74. *Haines v. St. Petersburg Methodist Home*, 173 So. 2d 176, 185 (2d D.C.A. Fla. 1965).

75. Note, *supra* note 9, at 293.

residing in private housing are denied the tax benefits accorded those in retirement homes. Their tax burden is in fact increased by the charitable tax exemption since every exemption results in a smaller tax base and a correlatively higher rate of taxation on non-exempt property.⁷⁶ Finally, the charitable exemption would seem to bestow a competitive advantage on exempt retirement homes, which, in reality, are in competition with private commercial concerns.

Caring for the special needs of the elderly, whether rich or poor, is in the broadest sense charitable and humanitarian and deserving of encouragement. Yet the purpose of the ad valorem property tax is to finance local governments, which are almost entirely dependent upon this source of revenue. Ideally, a property tax is imposed upon all property without exception, since "every exemption *pro tanto* violates the fundamental requirement of tax uniformity and equality."⁷⁷ Additionally, a liberal exemption policy raises the possibility that an ad valorem property tax system might in fact disintegrate under the weight of its own exceptions.⁷⁸ While encouraging aid to the elderly is commendable, it is a policy goal that is incompatible with the revenue functions of the ad valorem property tax. Therefore, exemption would seem to be an inappropriate vehicle for providing aid to Florida's large population of elderly residents.⁷⁹

Thus, it would be highly desirable for the legislature to seek other more direct means of encouraging adequate care for the elderly.⁸⁰ A grant system

76. Becker, *Property Tax Problems Confronting State and Local Governments*, in *STATE AND LOCAL TAX PROBLEMS* 41 (H. Johnson ed. 1969), states that the policy of assisting unfortunates and the aged by means of property tax exemptions is of relatively little help in its partial approach to their problems. The aged and disabled cannot be helped by means of exemptions without seriously weakening the property tax in terms of equity, yield, and economic productivity. Redistribution of income by means of exemptions is an uncertain and risky approach. The risk is increased by the difficulty of determining where the property tax burden lies and where it will be after the change is made. *Id.*

77. Holbrook, Maxwell & Rourke, *supra* note 46, at 281.

78. Becker notes that the overall fiscal role of the property tax has been diminished in the United States during this century by means of a precession of exemptions that have eroded the tax base. This is an especially significant problem in communities whose economic activities revolve around government or educational facilities and thus have a relatively high proportion of their total assessed realty exempted from taxation. Becker, *supra* note 76, at 39.

In Alachua County, Florida, which is the home of a large university and several public hospital facilities, more than half the total assessed realty is exempt from taxation. DEPARTMENT OF REVENUE, *FLORIDA AD VALOREM VALUATIONS AND TAX DATA* (1972-73).

79. A redistribution of income for persons paying property taxes could be better achieved by means of supplemental income payments. Moreover, Becker suggests that the responsibility for income redistribution cannot be assumed by local governments without seriously injuring their limited and sole source of tax revenues. See Becker, *supra* note 38, at 39. Considering the financial resources of the various levels of government, the burden is more realistically assumed by the state.

80. The standard recommended to the legislature by the FLORIDA COMMISSION FOR TAX REFORM, *REPORT ON THE REVENUE SYSTEM OF STATE AND LOCAL GOVERNMENT IN FLORIDA* 111-25 (1968), was that exemption should be extended only to those properties serving secular purposes that the legislature would willingly support through annual legislative appropriations. The report endorsed the position set forth by the ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *THE ROLE OF THE STATES IN STRENGTHENING THE PROPERTY TAX* 11-12

would serve as an incentive for the legislature to take a more studied approach to its actions in this area.⁸¹ Given the longevity of the property tax and exemption system in Florida, however, it is improbable that such major reform will be forthcoming soon. It is to be hoped, however, that the legislature will at least take steps within the framework of the existing exemption system to protect the state's tax base from erosion due to judicial expansion of the charitable exemption. One possible solution is to seek amendment of the Florida Constitution to permit, or even require, the use of the "income test." Another method that might be used to avoid the possibility of retirement homes serving as conduits for self-conferred charity in the form of tax savings is to require that such institutions be supported in whole or in part by public donations. A third possible solution is that adopted by the city of Pittsburgh, which passed an Institutional and Services Privilege Tax Ordinance, levying a tax on the gross receipts of institutions performing services in the city.⁸²

Because of the nearly infinite variety of organizational schemes adopted by retirement homes, it is questionable whether the legislature can effectively establish definite guidelines requiring a more conservative approach to exemption of such facilities. Given the dubious efficacy of any possible legislative solution, it can only be hoped that the courts in Florida will recognize the necessity for judicial retreat to the more conservative position of earlier decisions, which recognized that exemptions from taxation are in the nature of special favors and should be subject to a rule of strict construction.⁸³

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(1963) that outright grants ordinarily are more in keeping with sound public policy and financial management, more economical, and more equitable than tax exemptions.

81. Under the current system there is a tendency for the state to be liberal in the granting of property tax exemptions since it is the local government and its revenue that bear the burden imposed by these exemptions. The FLORIDA COMMISSION FOR TAX REFORM, *supra* note 80, suggests that another method of insuring that the state does not recklessly establish property tax exemptions at the expense of local government would be to require the state to reimburse the local government for tax "losses" resulting from state-mandated tax exemptions.

82. 9 DUQUESNE L. REV. 308 (1950).

83. In *Miami Battlecreek v. Lummus*, 140 Fla. 718, 728, 192 So. 211, 216 (1939), the court stated: "Exemptions from taxation, being in the nature of special privileges, are viewed with disfavor by the courts unless it clearly appears that they are upon property being held and used solely and exclusively for a purpose or purposes recognized by our constitution and laws as being exempt. To allow exemptions other than in this manner would place an unjust proportion of the tax burden upon other classes of property."