D.A. 5-7-93 Dr7

IN THE SUPREME COURT OF FLORIDA

BOARD OF COUNTY COMMISSIONERS,
HERNANDO COUNTY, etc., et al.,

Petitioner,

vs. CASE NO. 80,158

FLORIDA DEPARTMENT OF COMMUNITY
AFFAIRS,

Respondent.
_____/

**BRIEF OF THE FLORIDA DEPARTMENT OF REVENUE
AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT**

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STATEMENT OF THE CASE AND FACTS

In this Brief the parties will be referred to by name unless the context dictates otherwise. The Petitioner will be referred to as "the County". The Department of Revenue accepts the Respondent's Statement of the Case and Facts.

SUMMARY OF ARGUMENT

The County and the Amicis Dade County and Orange County argue that the Legislature has "no power" over local government millage even though the Constitution clearly contemplates that millage is to be "authorized by law." Art. VII, § 9(a), Fla. Const.

The controlling language on local government millage is not changed in the 1968 Revision from that in the 1885 Constitution and the very Legislature which proposed the 1968 Revision adopted legislation to restrict local government millage.

The use of the word "shall" -- the same word used in the 1885 Constitution -- does not make the provision on ad valorem taxation self-executing and comparison with other uses of the word "shall" illustrates this. Further comparison with truly self-executing provisions of the Constitution (such as the separation of powers) further demonstrates that Art. VII, § 9(a) does not give all power over ad valorem taxation to local government as the opposing parties contend.

The sweeping proposition advanced by the County and Amicis would also invalidate the inherent power of the Legislature to control, guide and provide methods of exercising the home rule power of counties under Art. VIII, Fla. Const.; the important

state tax policies such as the "TRIM BILL"; and, the Legislature's ability to control and hold accountable special districts (both dependent and independent) as expressed in the Uniform Special District Accountability Act.

The County and the Amicis have also failed to address the issue that the decision can be sustained on the express authority of the Legislature to appropriate funds "upon such conditions as may be provided by law." Art. VII, § 8, Fla. Const.

ARGUMENT

I. THE COUNTY AND AMICIS ARGUE FOR A BOLD PROPOSITION, WHICH IS, THAT THE LEGISLATURE HAS NO POWER OVER LOCAL GOVERNMENT MILLAGE, EVEN THROUGH LANGUAGE IN THE CONSTITUTION CLEARLY COMTEMPLATES LEGISLATION.

We will show that the 1966-68 Legislature used the power to control local government millage just as previous Legislatures had used this power. That authority to control millage has also been exercised since the 1966-68 Session. Some appreciation of this fact is essential in analyzing the attempt in this case to wipe away all legislative control over millage, to establish a constitutional regime which, as the County would like it, the Legislature will have no say in local government ad valorem taxation. Actually, the sweeping argument is even more radical for it asserts that the state, (presumably including the Department of Revenue), will have no say in local ad valorem taxation.

Likewise we will show that the legislative effort to ensure compliance with the ten mill cap in Art. VII, § 9, Fla. Const., rests on the legislative authority challenged in this case. That is not the end of the Legislature's exercise of this power. A

particularly important illustration of this power is the enactment of the "TRIM" bill (Ch. 80-274, Laws of Fla.). This legislation, still an important part of the tax policy of Florida (§ 200.065, Fla. Stat.), is an attempt to control local government millage rates through the device of "rollback," the requirement of procedures for notice, budget adoption, and the requirements for the manner of setting millage. It is doubtful that even these procedural requirements could stand in the face of the County's sweeping assertion that if its position is adopted, the state would have no say in local government ad valorem taxation. That doctrine would undoubtedly render the TRIM Bill unconstitutional, along with the other statutes now governing ad valorem taxation.[1]

The County and the Amici Counties have put before this Court a stark proposition: It is that the "state" (including, we assume, the Legislature) has "no power" to control local government millage rates because the Constitution authorizes local government to set ad valorem taxes without enabling legislation.[2] This curious reading of Art. VII, § 9(a), Fla. Const., does not explain why the words "shall ... be authorized by law" are included in this section, and why the very

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[1] See e.g. §§ 193.1145(7), (11), Fla. Stat.; § 218.23(1)(f) and § 218.63(1), Fla. Stat.

[2] The County's Brief sets forth in quite direct language, the reach of this argument: "The aggregation of special district millage with the county-purpose millage by the statutory scheme of special district classification is an unconstitutional denial or impairment of the direct grant of ad valorem taxing power expressly provided to counties in the 1968 constitutional revision." (p. 8, County's Brief.)

Legislature which proposed the 1968 Revision acted to reduce local government millage. These and other flaws in the reasoning of the County and the Amici counties are discussed below.

A. THE CONTROLLING LANGUAGE OF THE 1968 REVISION IS DRAWN FROM THE 1885 CONSTITUTION.

It is important to realize that the critical language of Art. VII, § 9(a), Fla. Const. (1968) is similar to language of the 1885 Constitution. A side-by-side comparison makes this point:

Art. IX, § 5 1885 Constitution	Art. VII, § 9(a) Revision of 1968
The Legislature shall authorize the several counties and ... cities ... to assess and impose taxes ... (Emphasis added.)	Counties, school districts, and municipalities shall ... be authorized by law to levy ad valorem taxes ... (Emphasis added.)

If the County was correct, that the 1968 Revision accomplished a sweeping change in local government finance[3] (County Brief, pp. 10-13), you would expect to see some change in the language of the Constitution -- a change which would eliminate any reference to the authorization by law. But there was no change. The operative language is the same in both the 1885 Constitution and the 1968 Revision. Therefore, the interpretation by this Court should be the same.

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[3] The County has their history half right, for there was a large constitutional (and statutory) change on local government powers, freeing local governments (municipalities and counties) from some legislative control under the "local bill" practice. But in the area of finance, the opposite occurred, and the 1966-68 Legislature stepped into local government finance in a most direct way, passing statutory and constitutional limitations on millage. See Chs. 67-395 and 67-396, Laws of Fla.

B. THE VERY LEGISLATURE WHICH PROPOSED THE 1968 REVISION ADOPTED A MILLAGE LIMITATION FOR LOCAL GOVERNMENTS.

Since the 1966-68 Legislature which proposed the 1968 Revision was dealing with a major ad valorem taxation crisis and was operating under the same controlling language which exists in its later proposed revision, it is useful to see what authority that very Legislature assumed over local governments' powers to adopt ad valorem taxes. As anyone familiar with this period would understand, the Legislature was under considerable pressure to control ad valorem taxes following massive court ordered reassessments.[4] The Legislature did act, first by statute and then by amendment to the pending draft constitution.

Drawing on its power under the then Art. IX, § 5, Fla. Const. (1885), (the same power in Art. VII, § 9(a), Fla. Const. (1968)), the Legislature adopted a millage limitation for county and municipal governments. In Chs. 67-395 and 67-396, Laws of Fla., the Legislature limited county, district, and municipal millage. This Legislation became law in July 1967, about a year before the very same Legislature proposed the constitution revision of 1968. The Legislature exercised a power it had used before.[5] It was also acting under the language in the 1885 Constitution, which it did not modify in submitting the 1968 Revision.

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[4] See State ex rel. Dade County v. Dickinson, 230 So. 2d 130, 132-134 (Fla. 1969) which recounts this history.

[5] The Legislature restricted millage in 1963 and 1965. See footnote 6, infra.

The County and Amici counties are asking this Court to accept the theory that the same Legislature which exercised a power to control millage under constitutional language ("The Legislature shall authorize ...") and then proposes a revision containing essentially the same language ([Local government] "shall ... be authorized by law ...") is, also proposing that there be a new constitutional order in which the Legislature loses this power. The proponents suggest no legislative history or case authority to support this alchemy.

C. THE HISTORY OF CONSTITUTION REVISION DEMONSTRATES THAT THE DRAFT SOUGHT TO KEEP CONTINUITY IN THIS AREA OF THE CONSTITUTION.

Perhaps the point has been made, but it must be emphasized. There is no constitutional history to support the argument that the 1968 Revision intended to change the allocation of powers to control levels of ad valorem taxation and that this radical change was accomplished by continuing with the same language. Indeed, it would be a remarkable act of self-denial if the Legislature, which was so concerned with growth of ad valorem taxes that it adopted millage controls,[6] were to surrender that authority. It would be all the more remarkable if the instrument of this surrender was the use of the same words from which the same Legislature derived its powers to limit millage.[7]

The only attempt to address legislative history by the County consists principally of trying to "spin" the Constitution Revision Commission debate. It is quite impossible to read this

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[6] See Chs. 63-250; 65-258; 67-395; and 67-396, Laws of Fla.

[7] Id.; see also Art. IX, § 5, Fla. Const. (1885).

entire debate without concluding that everyone engaged in the debate sought to retain the status quo of the 1885 Constitution. They succeeded and left the Legislature with the same power to control local government millage.[8]

If the drafters had wanted the result sought by the local governments in this case, they would certainly have changed the language and would have eliminated all references to implementing legislation. It is useful to compare Art. VII, § 9(a), Fla. Const., which contemplates "a law" with a provision which is truly self-executing like the requirement of Art. II, § 3, Fla. Const., that there be three branches of government:

> The powers of the state government shall be divided into legislative, executive and judicial branches.

Note that there is no reference in this section to "law." If the drafters had not contemplated a legislative role, there was no reason to insert the language "authorized by law" because the self-executing provision does not need a law.

The County speaks of the "direct language" of Art. VII, § 9(a), Fla. Const., but it never quite gets around to explaining what the words "be authorized by law"[9] contribute to its "direct

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[8] The Commission's draft was modified by the Legislature which added the millage cap contained in Art. VII, §9(b), Fla. Const. (1968).

[9] The phrase has been construed to mean a legislative enactment upon a specific subject matter. Lewis v. Florida State Board of Health, 143 So. 2d 867, 869 (Fla. 1st DCA 1962), cert. denied, 149 So. 2d 41 (Fla. 1963). See also Ison v. Zimmerman, 372 So. 2d 431 (Fla. 1979). The drafters of the 1968 Revision intended the meaning of "by law" to encompass both "by general law" and "by special or local law." Id. at 434. In each instance, legislative action is required.

language." It is clear that the Constitution contemplates a legislative act and that is not denied. It is equally clear, but not acknowledged, that the Constitution which contemplates this legislative act does not limit the Legislature in its discretion any more than legislative discretion is limited in any of the other sections where the Constitution states that there "shall" be legislation.

Under the "direct language" as proposed by the County, the following constitutional provision will be impacted. The language that the County would read out of the Constitution is lined through and the underlined word will have to be added:

> Art. VII, § 1(a). ~~No tax shall be levied except in pursuance of law.~~ No state ad valorem taxes shall be levied upon real estate or tangible personal property. All other forms of taxation shall be preempted to the state except as provided by general law.
>
> . . .
>
> Art. VII, § 8. State funds may be appropriated to the several counties, school districts, municipalities or special districts. ~~upon such conditions as may be provided by general law. These conditions may include the use of relative ad valorem assessment levels determined by a state agency designated by general law.~~
>
> Art. VII, § 9(a). Counties, school districts, and municipalities are ~~shall,~~ and special districts may, be authorized ~~by law~~ to levy ad valorem taxes and may be authorized by general law to levy other taxes, for their respective purposes, except ad valorem taxes on intangible personal property and taxes prohibited by this constitution.
>
> . . .

The County never explain why a self-executing constitutional provision would include the "provided by law"

language and why this Court should now read that language out of the Constitution.[10] The County also fail to explain why this Court should read limitations on the Legislature which are not in the Constitution and are inconsistent with the history of the Constitution and the long time practice of the Legislature.

The County takes a unique approach to the important constitutional issues raised by this case and it appears to rely largely on one authority -- State, Dept. of Education v. Glasser, ___ So. 2d ___, 17 Fla. L. Weekly D1846 (Fla. 2nd DCA July 31, 1992), review pending, Florida Supreme Court Case No. 80,286.

Reliance on that decision is misplaced because the District Court did not deal with a number of the significant issues in that case. It failed to examine the historical context of the Constitution and fails to explain how Legislatures, including the very Legislature which proposed the 1968 Revision, acted to limit local government millage. The District Court did not explain how its ruling would impact other, similar, sections of the Florida Constitution, nor how it would destroy the entire public policy governing local taxation. Nor did the District Court explain how its decision could be reconciled with the explicit power of the Legislature to provide funding grants to local government "upon conditions," Art. VII, § 8, Fla. Const. Most important, it did

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[10] In construing the Constitution, each section should be considered so that the Constitution will be given effect as a harmonious whole; a construction leaving without effect any part of the Constitution should be rejected. Askew v. Game and Fresh Water Fish Commission, 336 So. 2d 556, 560 (Fla. 1976).

not explain why a self-executing provision of the Constitution would contain a requirement for legislative action.

Florida's political and constitutional history demonstrates that the Legislature has the power to determine county millage, that this power has been used over the course of years (even by the very Legislature which adopted the 1968 Revision). The legislative power over county millage comes from the general legislative power (Art. III, § 1) and the Taxation Article (Art. VII, §§ 1, 8, and 9 ". . . counties . . . shall . . . be authorized by law to levy ad valorem taxes . . ."). These provisions leave no doubt that the legislature is empowered to control millage and the history of the drafting confirms this.

There are over thirty parallel constitutional provisions giving authority to the legislature and case law construing those provisions demonstrates that the Constitution confers on the legislature power over county millage. To construe it otherwise renders Art. VII, § 9(a), Fla. Const., meaningless.

II. FLORIDA'S CONSTITUTIONAL HISTORY DEMONSTRATES THAT THE LEGISLATURE HAS AUTHORITY TO DETERMINE COUNTY MILLAGE.

This Court has for determination the question of whether the Legislature has the authority, within constitutionally defined limits, to determine county millage. To answer this question, the Court must deal with the Florida Constitution provision on taxation (Art. VII, § 9). This case also implicates other sections of the Constitution -- the authority of the legislature, (Art. III, § 1: "The legislative power shall be vested in a legislature of the State of Florida. . ."), the basic principle

of legislative authority over taxes (Art. VII, § 1: "No tax shall be levied except in pursuance of law"), the principle that state funding to local governments may contain conditions, (Art. VII, § 8: "State funds may be appropriated to the . . . counties or special districts . . . upon such conditions as may be provided by general law."), and the control the Legislature has over the subject of special laws and the classification in general laws concerning political subdivisions and other governmental entities (Art. III, §§ 11(a)(21) and (b) prohibited special laws), and the authority of the Legislature over the various counties and thus, exercise of home rule powers (Art. VIII, §§ 1(f) and (g), Fla. Const.)

The County does not treat any of these constitutional provisions in the context of their history nor the context of their practical operation.

A. THE FLORIDA CONSTITUTION WAS REVISED AT A TIME WHEN TAX POLICY WAS AT THE TOP OF THE AGENDA OF THE NEWLY APPORTIONED LEGISLATURE.

(1) The Constitution Revision Commission Draft of what is now Art. VII, § 9(a), Fla. Const. (1968), demonstrates that there is "no inherent right to levy taxes."

The language of Art. VII, § 9, Fla. Const., is the focus of this appeal and that section has two subsections. Subsection (a) was drafted by the Constitution Revision Commission, Subsection (b) (the millage cap provision) was added by the Legislature in response to the growing issue of property tax relief. We first address the history of the Constitution Revision Commission.

It is clear that the drafters of the original document which led to the revision of the Constitution of Florida in 1968

believed that the legislature had the authority to control the millage of local governments. In the transcript of proceedings from the Constitution Revision Commission, the record reveals that the Commission at one point debated an amendment to § 9 which is now Art. VII, § 9, Fla. Const. (1968). The following dialogue is especially revealing because it takes place between Ralph Marsicano (longtime general counsel and lobbyist for the Florida League of Cities and an outspoken proponent of power for local government), Ralph Turlington (then a State Representative, a longtime advocate for education, later Speaker of the House, and then Commissioner of Education), and former Justice Harold Sebring (one of the most tenacious advocates for constitutional reform). The discussion reveals their understanding of legislative power in Art. VII, § 9, Fla. Const.[11] In this discussion, Commission member Ralph Marsicano offered an amendment to change the word "may" to the word "shall":

> MR. MARSICANO: . . .
> Now, that does not mean that a tax has to be levied, but the word "shall" there would be the same word that is in the present constitution, which says that the Legislature shall be authorized to levy taxes for counties and cities.
> I move the adoption of the amendment.
>
> CHAIRMAN SMITH: You have heard the motion. Is there a discussion?
>
> MR. TURLINGTON: Mr. Chairman?
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> CHAIRMAN SMITH: Mr. Turlington.
>
> MR. TURLINGTON: Mr. Marsicano, what does this actually do? Can you think of any legal rights that this gives the cities[12] that the word "may" doesn't give

[11] The full transcript of this portion of the proceeding and the text of Amendment No. 73, are in the County's Appendix H.

them?

MR. MARSICANO: I think it makes the Legislature more conscious of the fact that it's got to make provisions for the finances of our local governments.

MR. TURLINGTON: You say that this is exactly like the present constitution?

MR. MARSICANO: That is right. If you put the word "shall" in, it goes back to the present constitution.[13]

MR. SEBRING: Will the gentleman yield?

CHAIRMAN SMITH: Do you yield to Mr. Sebring, Mr. Marsicano?

MR. MARSICANO: Yes, sir.

MR. SEBRING: May I suggest, sir, that what you are proposing has more far-reaching implications than the mere substitute of the word "shall" for "may."

MR. MARSICANO: Judge, I will be glad to have you suggest it.

MR. SEBRING: May I suggest to you, sir, that the counties and municipalities of the state -- and this is in partial answer to you, Mr. Turlington -- have no inherent right to levy taxes. Such right as they have is just purely by delegation from the congress (sic) and without that delegation, the counties and the municipalities would be entirely impotent.

MR. MARSICANO: That is correct.

(Emphasis added.)

This transcript reveals that the drafters of the 1968 revision agreed to the idea expressed so directly by Judge Sebring -- the idea that the units of local government have "no inherent right to levy taxes," and that, as Mr. Marsicano said, this was the way to return the draft "back to the present

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[12] Note that the language of this section ultimately deals with county millage as well.

[13] The County omitted this important statement from its Initial Brief. See County's Brief, p. 15.

constitution." The intent of Ralph Marsicano in placing the word "shall" into the constitution was "to make the Legislature more conscious of the fact that it's got to make provisions for the finances of our local governments." There is in this colloquy no suggestion of any limitation of legislative powers to control millage. To the contrary, there was agreement that local government had "no inherent right to levy taxes" and that the Legislature would have to make provisions for the taxes, as under the then present 1885 Constitution.

(2) The History of Art. VII, § 9(b), Fla. Const., demonstrates that it was not intended to lessen legislative power nor increase local government power, but rather, to place an upper limit on legislative authorization of millage.

The Constitutional Revision Commission offered a taxation article to the legislature which did not contain a cap on millage but, during the months of 1967 and 1968 that the Legislature considered the issues of constitution revision, the tax crisis grew. It is not necessary to recount each step in this crisis because this Court has covered much of the relevant history in State ex rel. Dade County v. Dickinson, 230 So. 2d 130 (Fla. 1969). In reaching its decision in Dickinson, this Court dealt with an act of the Legislature adopted in July 1967 and since this was the same legislature which adopted the 1968 Constitution Revision, it is useful to see the Court's analysis of the political motivation at the time. 230 So. 2d at 133.

The Court also cited the work of a distinguished University of Florida political scientist, Dr. Manning Dauer, who, with his colleagues, wrote a commentary entitled "Should Florida Adopt the

Proposed 1968 Constitution?" An Analysis, Studies in Public Administration No. 31, U. of Fla. Public Administration Clearing House, commented on the "drastic departure" of millage caps:

> Why then did the legislature take the drastic step of setting limits for each unit of local government? Undoubtedly, this reflects the public reaction to the sharp increases in tax bills incurred by many following assessment of their properties at full value. In many of the legislators' campaigns property tax limitation was a key issue.

230 So. 2d at 134. (Emphasis added.)

The fact that the very Legislature which adopted the Revision of 1968 was itself setting limits on millage (as had the 1965 Legislature) and the fact that property tax limitation was such a "key issue" for legislators is strong evidence that the Legislature did not surrender its authority to determine millage except to constitutionally limit (in Art. VII, § 9(b), Fla. Const.), the maximum property tax which could be levied.[14] Nothing in this history supports the position of the County.

B. OTHER PROVISIONS OF THE CONSTITUTION, IGNORED BY THE COUNTY, SUPPORT THE LEGISLATIVE AUTHORITY.

The County does not understand the Constitution it attempts to apply and it entirely displaces legislative authority over county millage despite the clear requirement of Art. VII, § 9(a), Fla. Const., that there be a legislative act to authorize millage. The county also failed to note, much less reconcile, its sweeping theory to the provisions of the following sections of the 1968 Revision:

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[14] See Chs. 65-258, 67-395, and 67-396, Laws of Fla. See also Chs. 63-250, Laws of Fla.

> Art. III, § 1: The legislative power of the state shall be vested in a legislature of the State of Florida . . .
>
> Art. VII, § 1: (a) No tax shall be levied except in pursuance of law. . . .

Finally, the County failed to explain how its holding can be accommodated to the provisions of Article VII, Section 8,[15] new to the Constitution in 1968. The legislative design of public finance conditions county participation in revenue sharing (§ 218.23, Fla. Stat.), local government half-cent sales tax (§ 218.63, Fla. Stat.),[16] and the gas tax (§ 336.025(6), Fla. Stat.) distribution to compliance with § 200.065, Fla. Stat.

It is difficult to think of how any person drafting a constitution could make the legislative power over county finance more clear in more places than in this 1968 Revision.

III. THE COUNTY'S CONTENTION WOULD UNDERMINE THE AUTHORITY RESERVED TO THE LEGISLATURE IN ARTICLE VII OF THE CONSTITUTION.

In Point I, we demonstrated that legislative control of county millage has been historic, was clearly contemplated by those who drafted the 1968 Revision of the Florida Constitution, and was consistent with traditions of finance reform. In Point

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[15] Article VII, § 8, Fla. Const., has been applied in several cases which are unremarkable, precisely because they apply the clear language of the Constitution. Board of Public Instruction of Brevard County v. State Treasurer, 231 So. 2d 1 (Fla. 1970) and Community Ass'n of Community Colleges v. State Department of Education, 43 Fla. Supp. 135 (Fla. 2nd Cir. Ct. 1975, Judge Hugh Taylor).

[16] The total amount of state funds appropriated in this fiscal year in revenue sharing and local government half-cent sales tax is approximately 444.7 million and 777.6 million respectively, for a total of approximately 1.2 billion. Ch. 92-293, § 1B at 2636, Laws of Fla.

II, we look at the many other places in the Constitution where the Legislature is given authority to act.

A. THE ART. VII, § 9, FLA. CONST., LANGUAGE PROVIDING FOR MILLAGE TO BE SET BY THE LEGISLATURE REQUIRES A LEGISLATIVE ACT TO AUTHORIZE COUNTY MILLAGE.

The focus of this case is Art. VII, Fla. Const., which begins with a clear statement, "no tax shall be levied except in pursuance of law." Art. VII, § 1, Fla. Const., and in particular, the provisions of Art. VII, § 9, Fla. Const. Incredibly, the County states that the language of Art. VII, § 9(a), Fla. Const., providing that the County "shall be authorized by law" to levy ad valorem taxes is sufficient to conclude that the County's power of taxation is expressly authorized by the Constitution and, therefore, the Legislature has no power to restrict the County's millage.[17]

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[17] There are, of course, principles which are well known to this Court:

> It is fundamental that the State possesses the inherent power to tax as an attribute or characteristic of its sovereignty, Cheney v. Jones, 14 Fla. 587, 610 (1874); Hunter v. Owens, 80 Fla. 812, 86 So. 839 (1920) and that a county has no inherent power to tax and may levy taxes only when expressly granted the power to do so. See, Amos v. Mathews, 126 So. 308 (Fla. 1930); Weaver v. Heidtman, 245 So. 2d 295 (Fla. 1st DCA, 1971); Wilson, infra.
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> It is universally understood that our state constitution is not a grant of power, but a limitation upon power. State ex rel. Collier Land Inv. Corp. v. Dickinson, 188 So. 2d 781 (Fla. 1966); Fowler v. Turner, 157 Fla. 529, 26 So. 2d 792 (1945).
>
> This Court should not forget that "[t]he presumption of constitutionality imposes a heavy burden of proof upon one attacking the validity of a statute." Department of Business Regulation, Division of Florida Land Sales and Condominiums v. Smith, 471 So. 2d 138, 142 (Fla. 1st DCA 1985). Indeed, an act of the Legislature is presumed valid and will not be declared unconstitutional unless it is determined to be invalid beyond a reasonable doubt. Knight and Wall Co. v. Bryant, 178 So. 2d 5, 8

The critical language of Art. VII, § 9(a), Fla. Const., states: ". . . county . . . shall . . . be authorized by law to levy ad valorem taxes . . ." and this language has many parallels in other sections of the Florida Constitution. There are numerous articles in Florida's Constitution which are not self-executing and contain language authorizing the Legislature to implement those articles: See, e.g., Art. I, § 15(b); Art. I, § 18; Art. II, § 7; Art. IV, § 8(c); Art. IV, § 9; Art. V, § 3(b)(2); Art. V, § 4(b)(1); Art. V, § 4(b)(2); Art. V, § 17; Art. VI, § 2; Art. VI, § 5; Art. VII, § 1; Art. VII, § 6; Art. VII, § 6(d); Art. VII, § 9(a); Art. VII, § 9(b); Art. VII, § 12(a); Art. VII, § 14(a); Art. VIII, § 1(e); Art. VIII, § 2(b); Art. VIII, § 4; Art IX, § 4(a); Art. X, § 7; Art. X, § 11; and, Art. XII, § 9(a)(2), Fla. Const. (1968).

It is apparent that the County rather carelessly ignored these other sections of the Florida Constitution in much the same way it ignored the history of the Constitution.

The County also does not explain why its theory would actually read out of the Constitution a phrase -- "shall . . . be authorized by law" -- which simply has no meaning under its theory.

There is not space here to review all the decisions in this area but some discussion will make clear what is at issue here. A provision of the constitution is self-executing when it clearly establishes a right which may be implemented without the aid of

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(Fla. 1965), cert. denied, 383 U.S. 958 (1966). The County has not carried out this burden.

any legislative enactment. See e.g. State ex rel. Citizens Proposition for Tax Relief v. Firestone, 386 So. 2d 561 (Fla. 1980), wherein this Court held that the constitutional provision pertaining to initiative petition was self-executing. Article XI, § 5, Fla. Const., "establishes a right to propose by initiative a constitutional amendment and that right may be implemented without the aid of any legislative enactment." Id, at 566. Cf. Williams v. Smith, 360 So. 2d 417, 418 (Fla. 1978); Horne v. Markham, 288 So. 2d 196 (Fla. 1974).

Subsection (a) of Art. VII, § 9, Fla. Const., directs the Legislature to authorize by law counties to levy ad valorem taxes[18] and is not self-executing.[19] In Lewis v. Florida State Board of Health, 143 So. 2d 867, 869 (Fla. 1st DCA 1962), cert. denied, 149 So. 2d 41 (Fla. 1963), the Court explained that:

> It is elementary that a constitutional provision may be self-executing which requires no legislative action to put its terms into operation, or it may not be self-executing in which case legislative action is required to make it operative. The phrase 'provided by law' means a legislative enactment upon the specific subject matter. . . . (Footnote omitted, emphasis supplied.)

Lewis at 869.

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[18] A levy is a limited legislative function which declares the subject and rate of taxation (the setting of millage). Metro Dade County v. Golden Nugget Group, 448 So. 2d 515 (Fla. 3rd DCA 1984), (citing Atlantic Coast R. Co. v. Amos, 94 Fla. 588, 115 So. 315, 320 (1927)), aff'd, 464 So. 2d 535 (Fla. 1985).

[19] See e.g. Desert Ranches of Florida, Inc. v. St. Johns River Water Management District, 406 So. 2d 1132 (Fla. 5th DCA 1981), modified, 421 So. 2d 1067 (Fla. 1982), where the Supreme Court held that §373.503, Fla. Stat., provided the implementing legislation which allowed the District to levy ad valorem taxes authorized in Art. VII, § 9, Fla. Const., for water management purposes. Id., 421 So. 2d, at 1070.

Without the legislative authorization contained in § 200.071, Fla. Stat., there is no authority in the counties to levy any millage. Counties do not have the unbridled inherent authority to levy ad valorem taxes. Amos v. Mathews, 126 So. 308 (Fla. 1930); Weaver v. Heidtman, 245 So. 2d 295, 296 (Fla. 1st DCA 1971). See also Wilson v. School Board of Marion County, 424 So. 2d 16, 19 (Fla. 5th DCA 1983), citing, In Certain Lots upon which Taxes Are Delinquent v. Town of Monticello, 159 Fla. 134, 31 So. 2d 905 (1947).

The County claimed that the counties have inherent power to tax and sought support for its conclusion in dicta from the case of Mallard v. Tele-Trip Co., 398 So. 2d 969 (Fla. 1st DCA 1981), rev. denied, 411 So. 2d 384 (Fla. 1981). Such reliance is misplaced. The Mallard Court stated that the use of the word "shall" in Art. VII, § 9, Fla. Const., mandates the Legislature to authorize the power to levy ad valorem taxes. Mallard at 973. Mallard does not stand for the proposition that entities, such as the County, have the inherent power to tax.

Unlike Mallard, this is not a preemption case. In this case, the Legislature is following the mandate of the Constitution and authorizing counties to levy ad valorem taxes within the framework of Art. VII, §§ 9(a) and (b), Fla. Const.[20] The county seems to feel that it is unwise to limit the available 10 mills provided in Art. VII, § 9(a), Fla. Const., forgetting

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[20] Section 200.071, Fla. Stat. See § 166.211, Fla. Stat. (Authorization of municipalities to levy ad valorem tax not to exceed ten mills pursuant to Art. VII, § 9, Fla. Const.)

that the wisdom of the Legislature is not a proper inquiry for the judiciary.[21]

The provisions of Art. VII, § 9(a), Fla. Const., directs the Legislature to authorize the counties to levy ad valorem taxes. Then in subsection (b), it limits the power of the Legislature to authorize ad valorem taxes in excess of ten mills for all county purposes. The language of the millage cap contemplates that the legislative authorization under subsection (a) shall be in excess of zero (0) mills but shall not exceed ten (10) mills. Read together these provisions of the Constitution specify that no ad valorem tax shall be levied except in pursuance of law. Thus, no county may levy ad valorem taxes absent legislative authorization. Lewis, 143 So. 2d at 869.

Chapter 189, Fla. Stat., and § 200.071, Fla. Stat., do not contradict these constitutional provisions; they implement them. They are general laws describing precisely what millage is "authorized."

B. ARTICLE VII, § 9, FLA. CONST., PERMITS THE LEGISLATURE TO LIMIT DEPENDENT DISTRICT MILLAGE AS SPECIFIED IN §200.001(8)(d), FLA. STAT.

Article VII, § 9(b), Fla. Const., provides that ad valorem taxes may not be levied for county, municipal, or school purposes in excess of ten mills upon the assessed value of real estate and tangible personal property. In the 1885 Constitution, the only millage limitation analogous to the 1968 limitations was for

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[21] Holley v. Adams, 238 So. 2d 401 (Fla. 1970); Just Valuation and Taxation League, Inc. v. Simpson, 209 So. 2d 229 (Fla. 1968); and, Miller v. Higgs, 468 So. 2d 371 (Fla. 1st DCA 1985).

school districts under Art. XII, § 8, Fla. Const. (1885). Dickinson, 230 So. 2d at 134.

It is without question that the Legislature has the authority to enact the authorization in § 200.071, Fla. Stat., for counties to levy ad valorem tax, for without such authorization the counties are without the power to levy any taxes. It is also beyond serious contention that the statutory authorization, which includes dependent special districts in the county propose limitation, does not deny or impair any ad valorem taxes authority of the counties to levy power. Finally, it will become equally clear from the wording in the Constitution was intended that dependent special districts millage would be included within the constitutional county purpose millage limitation.

The constitutional limitations of ten mills for all municipal purposes, and ten mills for all county purposes, is all-inclusive and embraces home rule and consolidated governments, as well as traditional counties and municipalities. Dickinson, 230 So. 2d at 134. Special districts may levy a millage authorized by law approved by vote of the electors who are owners of freeholds therein not wholly exempt from taxation. However, the Constitution authorizes a county furnishing municipal services, to the extent authorized by law, to levy additional taxes within the limits fixed for municipal purposes, and provides that such millage limitations do not apply to taxes levied for the payment of bonds and taxes levied for periods not longer than 2 years when authorized by vote of the electors who

are the owners of freeholds therein not wholly exempt from taxation. Both the Legislature and the people intended to limit ad valorem taxation for county purposes and municipal purposes in all areas of the state to a twenty mill maximum, beyond which millages could be raised only if approved by referendum of the taxpaying property holders directly affected.

The Legislature found that there were many areas in the state in which the combined millage levied against real and tangible personal property by the various taxing authorities was oppressive, and therefore has enacted legislation intended to reduce such taxation to where it is no longer oppressive. Section 200.161, Fla. Stat. (1969). It was the Legislature's intent to provide replacement revenues for the operation of local government bodies which were faced with millage roll backs. Section 200.132, Fla. Stat. (1969).

The same Legislature which was considering the Constitution revision limited the aggregate ad valorem tax millage which counties and districts may levy against real and tangible personal property. Section 200.071, Fla. Stat.[22]

Where counties, when operating as its alter ego, maintain municipal service taxing units covering a specific area not within the boundaries of any municipality, and such a district

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[22] Millage authorized for county or district purposes may be increased in certain circumstances if approved by a majority of those voting in an election participated in only by the qualified electors of the county or district who pay taxes on real or personal property. Section 200.091, Fla. Stat.

Similar provision is made for a municipal referendum regarding an increase of millage in excess of that ordinarily permitted. Section 200.101, Fla. Stat.

provides services or facilities of the kind commonly provided by municipalities, the counties were authorized to levy millages in addition to those otherwise provided for by law, against property within each such district. Independent of this county taxing power is the authority provided for "special districts" to meet the need for special purposes services in any geographical area which may (but need not) be within one county, under legislatively-set and voter-approved millage limitations.[23] Gallant v. Stephens, 358 So. 2d 536, 540 (Fla. 1978). Such an independent special district is neither a county, a municipality, nor an agency thereof, but are in place of county government. See Ops. Att'y Gen. Fla. 77-105 (1977); 72-340 (1972). However, the additional millages of the Municipal Service Taxing Unit, which are intended to pay for such services or facilities provided through the district, may not exceed ten mills. Section 200.071(3), Fla. Stat.[24] However, for each such increase in the county millage which is attributable to an assumption of municipal services by a county having "home rule," or for each such increase in the municipal millage which is attributable to an assumption of county services by a city having "home rule,"

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[23] This Court in Gallant v. Stephens, 358 So. 2d 536 (Fla. 1978), referenced as a definition for special districts the provisions of §§ 165.031(5) and 218.31(5), Fla. Stat. (1975). Additionally, §§ 218.31(6) and (7), Fla. Stat., contained a definition for both dependent and independent special districts.

[24] Like counties and districts, municipalities are subject to millage restrictions, and must no levy ad valorem taxes for real and tangible personal property in excess of a designated percentage of the assessed value thereof, except for special benefits and debt service on obligations issued with the approval of those taxpayers subject to ad valorem taxes on real and tangible personal property. Section 200.081, Fla. Stat.

there must be a decrease in the millage levied by each municipality which has services assumed by the county, or by the county which has services assumed by the city. Dickinson, 230 So. 2d at 136.

These provisions for millage counterbalancing obviously were intended to preserve a uniform statewide millage ceiling for all purposes. In Dickinson, this Court stated that home-rule governmental bodies were not exempted from this overriding intent to establish a statewide millage ceiling that Chs. 67-395 and 67-396, Laws of Fla., specifically requires an automatic readjustment in millages whenever a "home rule" city or county exceeds the designated limitation by taking on any function previously rendered by the entity which surrendered the function.

In attacking the constitutionality of the special district "dependent/independent" classification scheme, the County's only argument is one of inference. It wishes this Court to infer that by revising one draft of Art. VII, § 9, Fla. Const., which specifically included special district millage in county millage, the drafters intended to exclude all special district millage from county millage. The County's position is simply not supported by the plain language of Art. VII, Fla. Const., or by legislation enacted contemporaneously with the Revised Constitution.

Chapters 189 and 200, Fla. Stat., do not contradict this Constitutional provision; they implement it. They are general laws describing precisely what millage is "authorized" for county purposes.

By enacting Ch. 200, Fla. Stat., the Legislature has prescribed the millage for a certain class of dependent special districts to be that millage which "when added to the millage of the governing body to which it is dependent, shall not exceed the maximum millage applicable to such governing body." Section 200.001(8)(d), Fla. Stat. Any effect that this legislation has on special districts existing prior to the 1968 revision, is authorized and contemplated by Art. XII, §§ 2 and 15, Fla. Const.[25]

C. GENERAL LAWS ENACTED CONTEMPORANEOUSLY WITH THE ADOPTION OF ART. VII, § 9, FLA. CONST., INDICATE THAT SPECIAL DISTRICT MILLAGE WAS INTENDED TO BE INCLUDED IN COUNTY MILLAGE.

The County is making two contentions, the first is stated, the second is implied:

1. THE 1968 REVISION OF THE FLORIDA CONSTITUTION DIRECTLY GRANTED AD VALOREM TAXING POWER TO COUNTIES WITHIN CONSTITUTIONAL MILLAGE LIMITS AND THAT THE STATUTORY MILLAGE LIMITATIONS APPLICABLE TO DEPENDENT SPECIAL DISTRICTS AND COUNTY PURPOSE MILLAGE ARE UNCONSTITUTIONAL.

2. THE 1968 REVISION OF THE FLORIDA CONSTITUTION GRANTED HOME-RULE TO BOTH CHARTER COUNTIES AND NON-CHARTER COUNTIES UNFETTERED BY LEGISLATIVE CONTROL.[26]

In considering the issues in this case one must not lose sight of the true position of counties under the 1968 Constitution. We have previously shown that, as to the taxing power contained in Art. VII, §§ 1 and 9, Fla. Const., it without

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[25] The only limitation to this restriction or withdrawal of the power to levy ad valorem tax from special districts by the Legislature is not present in this case. That limitation deals with the ability of a special district to pay off any outstanding debts.

[26] See County's Brief, pp. 10-13.

serious debate that the County's contention is just not supported either by the history of the proceeding leading up to the adoption of the Constitution; the plain reading of the provisions themselves; nor by the legislative contemporaneous implementation of the provisions.

Likewise when one reads the constitutional provisions concerning the home-rule authority of charter and non-charter counties, contained in Art. VIII, §§ 1(f) and (g), it is equally clear that the Constitution reserves in the Legislature the inherent power to control, guide and provide methods of exercising the home-rule power.[27]

The Department recognizes the impact of these provisions, and that with the enactment of, and amendments to Ch. 125, Fla. Stat., the Legislature has implemented the relevant provisions of Art. VIII, § 1, Fla. Const. See State v. Orange County, 281 So. 2d 310 (Fla. 1973); Speer v. Olson, 367 So. 2d 207 (Fla. 1979) and Taylor v. Lee County, 498 So. 2d 424 (Fla. 1986). Further, it is recognized that Art. XII, § 2, Fla. Const., provided that tax millages authorized in "counties, municipalities and special districts" may be continued until reduced by law. Also, that Art. XII, § 15, Fla. Const., provided that the ad valorem taxing power vested by law in special districts as of the date of the 1968 revision "shall not be abrogated by Section 9(b) of Article

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[27] See Deal, Local Government Law, Constitutional home rule of unchartered counties - fantasy or fact?, The Florida Bar Journal, 469 (May 1982).

VII herein, but such powers, except to the extent necessary to pay outstanding debts, may be restricted or withdrawn by law."

What the County refused to recognize is that the Legislature has by the enactment of general laws (Ch. 200 and Ch. 189, Fla. Stat.) reduced, restricted or withdrawn by law the tax millages authorized to counties and special districts therein prior to the adopting of the 1968 Constitution. The Legislature has also restricted or withdrawn by general law taxing powers vested in dependent special districts prior to the adoption of the 1968 Constitution.

The Legislature has exercised the power reserved to it in Art. VIII, § 1, Fla. Const., to ensure compliance by the counties with the provision in Art. VII § 1, Fla. Const., (no tax shall be levied except in pursuance of law), and Art. VII, §§ 9(a) and (b), Fla. Const., that ad valorem taxes shall not be levied in excess of ten mills for all county purposes.

The Constitution with its implementing statutes have delegated or redistributed to counties the sovereign power of the state to legislate at the local level in matters of local concern. The Legislature may continue to ensure compliance by the counties because of the express reservation in the Constitution of the Legislative power to do so - by special law as to non-charter counties, and by general law as to both non-charter and charter counties.[28] The County is, in reality,

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[28] State ex rel Dade County v. Dickinson, 230 So. 2d 130 (Fla. 1969); See also Bailey v. Ponce de Leon Port Authority, 398 So. 2d 812 (Fla. 1981); Board of County Commissioners of Marion County v. McKeever, 436 So. 2d 299 (Fla. 5th DCA 1983).

questioning the wisdom of the action of the Legislature, because the authority of the Legislature to exercise its inherent power to control millage, of even charter counties, regardless of the wisdom of the action, was decided over 23 years ago with the adoption of the 1968 Constitution and this Court's decision in the Dickinson case. 230 So. 2d at 135.

D. HISTORY OF ESTABLISHMENT OF SPECIAL DISTRICTS.

The important constitutional distinction, relevant to the ad valorem taxing power of special districts, is whether the purpose served by the district is a "county purpose" or a "municipal purpose" and thus, within the ten mill cap imposed by the Florida Constitution for each of those purposes, or whether the special district escapes those limitations and falls under the broader provision permitting a maximum millage of whatever has been approved by referendum of the resident electors.

Florida's constitutions have never contained a provision specifically authorizing the creation of special districts, either by way of general enabling legislation or by special act. This Court addressed the issue of the Legislature's authority to create a special district relief on the fundamental concept that the State Constitution is one of limitation, and unless it contains an express prohibition, the Legislature has the inherent power to use such a vehicle to effect valid public purposes. Stewart v. DeLand-Lake Helen Special Road & Bridge Dist. in Volusia County, 71 Fla. 158, 71 So. 42, 50 (1916).[29] The present

[29] See Samuels, The Florida Supreme Court and Taxing Districts with Ad Valorem Taxing Powers, 6 Miami L. Quarterly 554 (1951-52); Note, Special District Taxation, 13 Fla. L. Rev. 531 (1960).

Florida Constitution is likewise silent on the issue of legislative power to create special districts.[30]

Prior to 1974, special districts in Florida were established either directly by the Legislature, or by legislation that established the procedures to follow in creating a special district. When the Legislature itself created the special district it was generally by special act. General law authorization for the creation of special districts on the initiative of local citizens became a popular approach and the Florida Statutes became filled with provisions for creating special districts for numerous purposes. Each of these laws had its own unique procedure to be followed in creating a district, but the general approach may be illustrated by the general law authorizing the creation of special districts of the purpose of mosquito control. See Ch. 388, Fla. Stat. (1973).[31]

As part of the trend toward home rule, the Legislature passed Ch. 71-14, Laws of Fla. Section 125.01(1)(g), Fla. Stat. This specific legislation came as a result of an opinion of the Attorney General which had stated that, in the absence of such general law authorization, a county could not establish by home rule ordinance a special taxing district in the unincorporated

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[30] The Constitution did continue the powers, jurisdiction and government of special districts existing on the effective date of the 1968 revision, November 5, 1968. Art. VIII, § 6(b), Fla. Const. Similarly, the ad valorem taxing powers and authorized tax millages of special districts were continued. Art. XII, §§ 2, 15, Fla. Const. Limitations on the taxing and bonding powers of special districts were imposed. Art. VII, §§ 9, 10, 12 and 14, Fla. Const.

[31] Hudson, Special Taxing Districts in Florida, 10 Fla. St. L. Rev. 49 (1982).

area of the county to provide therein a municipal-type service. Op. Att'y Gen. Fla. 71-95 (1971), See Gallant, 358 So. 2d at 538, n. 1.[32]

In 1974 two more laws that affected the procedures for creating special districts were enacted. The first was Ch. 74-191, Laws of Fla., which amended the provisions of Ch. 125, Fla. Stat., relating to the home rule powers of counties.

The second enactment pertaining to the establishment of special districts was the Formation of Local Governments Act, Ch. 74-192, Laws of Fla. The Legislature had created a Commission on Local Government two years prior to study the operation and organization of counties, school districts, municipalities and special districts, and to recommend changes necessary to improve local government. See Ch. 72-44, Laws of Fla. The Commission issued a number of interim reports and drafted proposed legislation addressing many of the problem areas it had uncovered. Among the Commission's recommendations was that the many procedures for the creation of special districts be repealed and replaced by one single, uniform procedure.[33] The legislative intent in this regard was expressly contained in Ch. 74-192, § 1, Laws of Fla.

The Legislature was attempting to control the future development of special districts by providing that the only methods for creating a special district would be "by special act

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[32] Hudson, Special Taxing Districts in Florida, 10 Fla. St. L. Rev. 49 (1982).

[33] Hudson, Special Taxing Districts, Fla. State and Local Taxes, Vol. II, Chapter 9, (The Florida Bar 1984).

of the Legislature or by ordinance of a county or municipal governing body having jurisdiction over the area affected."

Chapter 165, Fla. Stat. (Supp. 1974), was an attempt by the Legislature to control the use of dependent special districts by the counties as a method of exceeding the ten mill cap provided for county purposes contained in Art. VII, § 9(b), Fla. Const. (1968). Dependent special districts, by their very nature, perform only county purposes.[34] Since dependent special districts were merely "alter egos" of the counties, levying taxes for county purposes, the Legislature was rightfully concerned. In fact, the Legislature defined county millage as that county millage included that non-voted millage rate set by the governing body of the county. This is the same body which sets the millage for dependent special districts (Ch. 73-349, § 9, Laws of Fla., creating § 200.191, Fla. Stat. (1973)).

These dependent special districts were again addressed by the Legislature in Ch. 82-154, Laws of Fla. The Legislature, in amending § 200.001, Fla. Stat., provided classifications of dependent and independent special districts as the terms were used in § 200.071, Fla. Stat., which is entitled: Limitations of millage - counties. Dependant special districts were not new to the political landscape. These are the same dependent special districts referred to and defined by the Legislature in Part III, 218, Fla. Stat. (Supp. 1974). Chapter 73-349, § 2, Laws of

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[34] Special districts created by the counties to perform municipal functions were created pursuant to Ch. 125, Fla. Stat. These special districts are referred to as Municipal Service Taxing Units (MSTU).

Florida. The Legislature, through the use of an extraordinary vote under Art. III, § 11 (a)(21), Fla. Const., had now obtained some simulation of control over the creation both dependent and independent special districts.[35]

The problems did not cease with this legislation[36] and again, in 1989 the Legislature addressed the issues involving special districts. The Legislature was concerned about irresponsible proliferation, lack of information, inconsistent coding and the absence of statutory provisions considered essential for the accountable creation and operation of these special purpose local governments led to the passage of the "Uniform Special District Accountability Act of 1989." Chapter 89-169, Laws of Fla. The Act, codified in Ch. 189, Fla. Stat. (1989), consolidates many provisions of existing law and provides for the central location for statutes relating to the formation and accountability of special districts. Six major areas are addressed in the act: definitions, creation, elections, participation in local government comprehensive planning, bond

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[35] Section 165.041(2), Fla. Stat. (Supp. 1982), was amended to require the creation of independent special districts only by general law.

[36] See generally the Staff Analysis and Economic Impact Statements to (Ch. 89-169, Laws of Fla.), HB 599 and SB 566 and 764 on file at the Florida State Archives, located in the R. A. Gray Building, Tallahassee, Florida. These Staff Analysis are located in the following: Series 19 Carton 1811, contains three House Staff Analysis to HB 599, dated March 10, March 20, and April 5, 1989; Series 18 Carton 1691 contains two Senate Staff Analysis to SB 566 and 764, dated April 21 and April 26, 1989, (also contained within this Series is a bill vote sheet that outlines the difference between these two Senate Bills); and finally, Series 18 Carton 1692 contains a House Staff Report on CS/HB 599, dated April 12, 1989.

issuance and state responsibility regarding information and technical assistance.[37] The legislative intent behind this legislation is contained in § 189.402, Fla. Stat.

The previous preemption language, along with all other special district references found in Ch. 165, Fla. Stat. (1987), has been deleted. The new prohibition, based on the Legislature's authority under Art. III, § 11(a)(21), Fla. Const., prohibits the creation of independent special districts by general or special laws that do not conform to the act's minimum requirements and other specified election, bonding, reporting, and notice and public meetings requirements of the act. Section 189.404, Fla. Stat.[38]

1. Current Statutes

Thus, Ch. 189, Fla. Stat., does not represent a substantial change in the law. In fact, all special district millage was included in county millage at the time these Districts involved in this case were created. Section 193.321(1), Fla. Stat. (1967), later renumbered as § 200.071(1), Fla. Stat. (1969).[39] This section, which became effective January 1, 1968 and remained unchanged until the 1982 comprehensive revision of Ch. 200, Fla. Stat., indicates that special district millage was intended to be

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[37] See Dempsey, Hetrick and Falconer, Local Government Law, Solving the Accountability Puzzle: Putting the Peices Together Under the Uniform Special District Accountability Act of 1989, The Florida Bar Journal 43 (January 1990).

[38] For a history of questions concerning the issue of millage of special districts from 1969 through 1986. See Ops. Att'y Gen. Fla. 69-71 (1969); 84-23 (1984); 85-9 (1985); and 86-70 (1986).

[39] See also § 193.321(2), Fla. Stat. (1967), later renumbered as § 200.971(2), Fla. Stat. (1969).

included in county millage long before the enactment of Ch. 189, Fla. Stat.

The exception noted in § 200.071(1) above for "special benefits and debt service on obligations issued in connection therewith" refers to the Art. VII, § 9(b), Fla. Const., provision which excludes from general ad valorem millage limits those "taxes levied for the payment of bonds and taxes levied for periods not longer than two years." The exception for "that millage authorized in § 9, Article VII" refers to the millage authorized under the second sentence of Art. VII, § 9(b), Fla. Const., which provides that:

> A county furnishing municipal services may, to the extent authorized by law, levy additional taxes within the limits fixed for municipal purposes.

This sentence is the only constitutional provision which expressly authorizes additional millage for counties furnishing municipal services. There is no similar express authorization concerning special districts. Article VII, § 9, Fla. Const., merely states that special districts may be authorized by law to levy ad valorem taxes, and any millage rate must be authorized by law and approved by a vote of the electors. Thus, the exception for "that millage authorized in § 9, Art. VII" does not refer to special district millage.

Further evidence that dependent special district millage was intended to be included in county millage is found in § 200.091, Fla. Stat. (1969). That section provided in pertinent part that:

> The millage authorized to be levied in §200.071 for county purposes, including

> districts therein,[40] may be increased for periods not exceeding two years, provided such levy has been approved by a majority of those voting in an election participated in only by the qualified electors of the county or district....[41]

This section, and § 200.071(1), Fla. Stat. (1969), provide clear intent that Art. VII, § 9, Fla. Const., was never intended to exclude all dependent special district millage from the county's ten mill cap as proposed by the County.

IV. THE CLASSIFICATION OF SPECIAL DISTRICTS INTO INDEPENDENT AND DEPENDENT CATEGORIES IS REASONABLY RELATED TO THE SUBJECT OF CHS. 189 AND 200, FLA. STAT., AND THEREFORE THE CLASSIFICATION SCHEME IS CONSTITUTIONAL UNDER ART. III, § 11(b), FLA. CONST.

The County argues that the classification scheme in Ch. 189, Fla. Stat., violates Art. III, § 11(b), Fla. Const.

A. THE SPECIAL DISTRICT CLASSIFICATION SCHEME IS REASONABLE RELATED TO THE SUBJECT OF CH. 189, FLA. STAT.

In 1989, the Legislature enacted the "The Uniform Special District Accountability Act," § 189.401, Fla. Stat., et seq. (the "Act"). One of the stated purposes of the Act was to clarify special district definitions and ensure consistent application of those definitions across all levels of government. Section 189.402(2)(e), Fla. Stat.

Accordingly, the Act required the Department of Community Affairs to compile an official list of special districts indicating the dependent or independent status of each using the

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[40] As amended by Ch. 82-154, § 19, Laws of Fla., the phrase now reads "including dependent districts therein."

[41] The term "district" was defined as a special district having the power to levy taxes or require the levy of taxes. § 200.111, Fla. Stat. (1969).

criteria contained in § 189.403(3), Fla. Stat. This section provides that a district is "dependent" if it meets any of the four (4) criteria. If the district does not meet any of the criteria stated above, or if the district includes more than one county, it is an "independent" district. Section 189.403(3), Fla. Stat.

As can be seen a "dependent special district" would include a special district whose governing head is the governing body of the county or municipality "ex officio or otherwise, or whose budget is established by said local government authority." So, if a special district's budget is established by the local government authority which would be the governing body of the county or a municipality, such district would be considered a "dependent special district." Also, if the head of special district is the governing body of the county where a municipality, ex officio, or otherwise, the district would be a "dependent" special district. The language used by the Legislature is in the alternative so that if either of the two factual situations exist, the special district would be a "dependent special district." Thus, if the governing head of a special district was the governing body of the county, such would be a "dependent special district." Also, if the budget of the special district was established by the local government authority such district would be a "dependent special district."

Contrasted with the definition of "dependent special district" an "independent special district" is defined to mean a special district whose governing head is an independent body,

either appointed or elected, and whose budget is established independently of the local governing authority, thus pursuant to the language of the statute, for a special district to be classified and defined as a "independent special district," two situations must exist. This is so because the Legislature has used the word "and" as distinguished from the work "or". The two situations are (1) the governing head of the special district must be an independent body either appointed or elected and (2) the budget of the special district must be established independently of the local governing authority. A specific procedure is provided in subsection (12) for the levying of millage by an independent special district. The statute mandates that independent special district millage shall not be levied in excess of a millage amount authorized by general law and approved by vote of the electors pursuant to § 9(b), Art. VII, of the State Constitution, except for those independent special districts levying millage for water management purposes as provided in said section. Thus, independent special district requires an approval by vote of the electors.

These criteria do not represent a strict departure from the elements which previously defined dependent and independent special districts. The dichotomy of special districts as dependent and independent has been used since 1979. See Ch. 79-183, Laws of Fla.[42] Beginning in that year, a special district

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[42] Section 1, Ch. 79-183, Laws of Fla., amended § 189.003, definition to include independent special districts through a cross-reference to § 218.31, Fla. Stat. Section 2, Ch. 73-349 provided for the definition of dependent and independent special districts. This act was known as the Florida Revenue Sharing Act of 1972.

was deemed independent if it had an independent governing head and its budget was established independently of the local governing authority. Conversely, a district was deemed dependent if its governing head was the governing body of a county or municipality, ex officio, or otherwise, or if its budget was established by the local government authority. Chapter 82-154, § 13, Laws of Fla.

The effect of classifying a district "dependent" was the same in 1982 as it is today. By clarifying the definition of "dependent" and "independent" special districts[43] and requiring the Department to compile and official list indicating the status of each, the Act accomplishes its purpose of ensuring that such definitions will be consistently applied across all levels of government.

A second, and related, purpose of the Act is to help ensure that special districts are accountable to the public, the state, and to the appropriate local general-purpose governments. Sections 189.402(2) and (6), Fla. Stat. The classification scheme is central to the issue of accountability.

A dependent district is characterized as a political subdivision of the governing body which originally established it. Section 189.4035(6)(a), Fla. Stat. Its administrative and financial affairs are well known to the local general-purpose government which has oversight authority in at least one of the areas listed in §189.403(2), Fla. Stat. For this reason, the Act

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[43] See Op. Att'y Gen. Fla. 85-9 (1985) and Op. Att'y Gen. Fla. 86-70 (1986) for a discussion of the statutory definitions of independent/dependent special districts.

does not subject dependent districts to the same accountability requirements as independent districts. Dependent districts appear as "line items" on the annual budgets of counties and municipalities. They operate with county or municipal oversite in the form of board makeup and budget approval.

As indicated above, the classification of special districts is reasonable related to at least two of the stated purposes of Ch. 189, Fla. Stat.: consistency and accountability. The County has not shown otherwise. It have not even addressed the issue of how the classification scheme operates with respect to Ch. 189, Fla. Stat. The County's sole contention is that the classification scheme in Ch. 189, Fla. Stat., is not reasonably related to the ad valorem millage determinations contained in Ch. 200, Fla. Stat.

B. THE CLASSIFICATION SCHEME IS REASONABLY RELATED TO THE SUBJECT OF CH. 200, FLA. STAT.

Article III, § 11(b), Fla. Const., requires that, "[i]n the enactment of general laws on another subject, [special districts] may be classified only on a basis reasonably related to the subject of the law." Chapter 200, Fla. Stat., is a general law concerning millage determinations for all units of local government: counties, municipalities, school districts and special districts. Article VII, § 9(b), Fla. Const., limits the amount of ad valorem taxes which may be levied for "all county purposes" to ten mills.

As defined by § 189.402(2), Fla. Stat., a dependent special district is a district which a county or municipality controls either through board makeup or budget approval. In determining

which millage rates should be assigned to each unit of government, the Legislature quite reasonably concluded that the millage for dependent special districts should be included in the millage of the entity which controls it. Thus "county dependent special district millage" is classified as one of the four categories of county millages. Section 200.001, Fla. Stat.

It is well settled that the Legislature has wide discretion in making classifications, Shelton v. Reeder, 121 So. 2d 145, 151 (Fla. 1960), particularly in the field of taxation. Eastern Air Lines, Inc. v. Department of Revenue, 455 So. 2d 311 (Fla. 1984), appeal dismissed, 474 U.S. 892, (1985). Moreover, when a classification is made in the enactment of general laws, the presumption is in favor of the classification's reasonableness, Metropolitan Dade County v. Golden Nugget Group, 448 So. 2d 515, affirmed, 464 So. 2d 535 (Fla. 1985), and the burden is on the party attacking the statute to negate every conceivable basis which might support it. Eastern Air Lines, supra, at 314.

In this appeal, the County has failed to consider the obvious: a county dependent special district is controlled by, and accountable to, the county. Maintaining control and ensuring the accountability of dependent special districts very definitely serves a county purpose.

The County's contentions that there are other more reasonable basis' for classifying dependent district millage is irrelevant. Article III, § 11(b), Fla. Const., does not require a qualitative analysis. It merely requires that the classification of special districts be reasonably related to the subject of Ch. 200, Fla. Stat. As indicated above, it is.

V. THE APPLICATION OF THE CLASSIFICATION OF SPECIAL DISTRICTS INTO INDEPENDENT AND DEPENDENT CATEGORIES TO SPECIAL DISTRICTS CREATED PRIOR TO THE PASSAGE OF CH. 89-169, LAWS OF FLA., IS CONSTITUTIONAL.

The County can not disagree that the Department of Community Affairs correctly classified these districts as dependent.[44] It argues, however, that the classification contained in § 189.403, Fla. Stat. is unconstitutional as it is applied in Ch. 200, Fla. Stat.

Section 200.001(1)(d), Fla. Stat. (1991), states that county millages shall be composed of four categories of millage rates, one of which is county dependent special district millage. As amended in 1990, § 200.001(8)(d), Fla. Stat. (Supp. 1990), provides that:

> 'Dependent special district' means a dependent special district as defined in s. 189.403(2). Dependent special district millage, when added to the millage of the governing body to which it is dependent, shall not exceed the maximum millage applicable to such governing body.

The effect of classifying these Districts as dependent is to require Hernando County to include their millage within the County's constitutionally capped ten mills. The issue, therefore, is whether the Constitution prohibits legislation, the effect of which is, to require counties to include a certain class of special district millage in county millage in order to comply with the ten mill cap for county purposes.

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[44] Contrary to the County's assertions on p. 4 of its Brief, the Department of Revenue has not agreed with the County's position that the dependent districts millage in question was separate from the County.

The County's entire argument presumes the Districts are unalterably independent. A parade of horrors ensues: The County will not be able to levy its ten mill slice of the ad valorem tax pie; the County will have to choose whether to reduce the millage rate in the County or the Districts; and, ultimately, the people's right to tax themselves will be thwarted. In effect, the County hopes to avoid the constitutional ten mill cap on ad valorem taxes for "county purposes" by running a host of dependent special districts within the County. It is precisely this type of taxation chicanery which the Constitution and the Legislature have sought to avoid since the adoption of the 1968 Constitution.

The County argues that the political power inherent in the counties, as provided in Art. VIII, § 1, Fla. Const., prohibits the Legislature from abrogating, or allowing the County to abrogate, the voter-approved millage for the districts. First, the County has misstated the law as it existed at the time these districts were created. They claim there was no express authority, for a county to reduce the voter-approved millage of a special district. Yet at the time each of the districts were created, § 193.321(2), Fla. Stat. (1967), renumbered as § 200.071(2), Fla. Stat., (1989), and as amended in 1982,[45] provided in pertinent part:

> The board of county commissioners in counties not having a budget commission or board, shall have authority in the event the aggregate of the proposed millage for said

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[45] See Ch. 82-154, § 16, Laws of Fla.

> county and districts therein, aggregate more than the maximum allowed hereunder to apportion the millage to be levied for county officers, departments, divisions, districts, commissions, authorities and independent taxing agencies, so as not to exceed the maximum millage provided herein. . . (Emphasis added).

The County had the authority to reduce special district millage when the districts were created. It has that authority today. The County erroneously contend that, because the millage was approved by the voters, it may not be reduced by operation of law without the approval of the voters. Clearly, voters may not adopt or approve an ordinance by referendum which would conflict with general law. See Board of County Commissioners of Dade County v. Wilson, 386 So. 2d 556 (Fla. 1980) (voters could not adopt an ordinance fixing the millage rate where such procedure would conflict with general law); See also Board of County Commissioners of Marion County v. McKeever, 436 So. 2d 299 (Fla. 5th DCA 1983) (voters could not adopt a millage cap as an exercise of their sovereign power if the cap conflicts with general law). Because general law has consistently authorized the County to reduce special district millage, nothing in the referenda-approved charters of these districts may be used to infer otherwise.

Moreover, the County has mischaracterized the voter's participation in the referendum process. Contrary to Petitioner's claim that voters authorized the imposition of millage in addition to that already imposed for county purposes, voters merely approve creation of the district with the power of taxation up to "X" mills which millage authority has been authorized by law.

The County seems to suggest that because the districts were permitted to levy their current millage rate at the time the districts were created, the legislature may not subsequently enact a general law which abrogates that right. However, it is well established that one Legislature cannot bind its successors with respect to the exercise of the taxing power. See Straughn v. Camp, 293 So. 2d 689, 694 (Fla. 1974) (upholding the repeal of a 1941 ad valorem tax exemption for all property on Santa Rosa Island). The fact that the millage rate for each district was approved in a referendum, does not effect the Legislature's authority to limit such rates. In fact, Art. XII, §§ 2 and 15, Fla. Const., authorizes just such a result as is present in this case.

The County contends that the districts are "independent special districts" as the term is defined in § 200.001(12), Fla. Stat., as created in Ch. 82-154, Laws of Fla., or in the alternative, that the specific millage levied by the County for the use and benefit of the fire districts are "voted millages" as defined in § 200.001(13), Fla. Stat. The County contends that there is some ambiguity in these definitions. The County contends that since an election was held whereby certain millage was approved for the districts that such a levy constitutes a voted levy as defined in § 200.001(13), Fla. Stat. (1982), and therefore should be excluded from the aggregate millage rate of the County.

Article VII, § 9(b), Fla. Const., refers to two situations were taxes may only be levied pursuant to a vote of the

freeholders. The first of these situations deals with ". . . taxes levied for periods not longer than two years when authorized by vote of the electors who are the owners of freeholds therein. . . ." This language provides the mechanism for exceeding the ten mill cap provided in the provision. Thus, if a county was levying ten mills it could exceed the ten mill cap only if such was approved by vote of the electors as provided therein. This could only exist for a two year period.

Moreover, the County has mischaracterized the voter's participation in the referendum process. Contrary to Petitioner's claim that voters authorized the imposition of millage in addition to that already imposed for county purposes, voters merely approve creation of the district with the power of taxation up to "X" mills which millage authority has been authorized by law. Such approval does not give the millage perpetual existence.

The other language in Art. VII, § 9(b), Fla. Const., which deals with a millage approved by a vote of the electors is that found in the last clause of the first sentence of Art. VII, § 9(b), Fla. Const. This language was dealt with by this Court in the case of Gallant v. Stephens, 358 So. 2d 536 (Fla. 1978). In the Gallant case, this Court considered the constitutionality of §§ 125.01(1)(q) and (r), Fla. Stat., which authorizes counties to create Municipal Service Taxing Units and levy millage therein without a vote of the electors who are the owners of freeholds therein. It was contended that a Municipal Service Taxing Unit was a "special district" within the purview of the last quoted

language from Art. VII, § 9(b), Fla. Const., and accordingly, no millage could be levied therein without an election whereby such a millage was approved by vote of the electors who were the owners of freeholds therein not wholly exempt from taxation. This Court rejected the argument, holding that Municipal Service Taxing Units were not special districts and thus, no election was required. 358 So. 2d at 539.

This Court stated that the constitutional mechanism set forth in Art. VII, § 9, Fla. Const., establishes ad valorem taxing power in four separate and distinct entities which are counties, municipalities, school districts and special districts. The special districts referred to are wholly independent of the county taxing power; they are separate and autonomous special districts created by an act of the Legislature. This Court expressly recognized this and so stated that the millage limits must be prescribed by the Legislature. This means that a special district created pursuant to an ordinance of a county would not be a "special district" as referred to in the last phrase of Art. VII, § 9(b), Fla. Const., nor would a district created by special act of the Legislature, wherein the membership of the governing body of that district is identical to the governing body of the county.

Here this Court stated unequivocally that the taxing power of "special districts" referred to in Art. VII, § 9(b), Fla. Const., is wholly independent of the county taxing power. This Court further pointed out that these legislatively created special districts may, but need not be within one county and

again emphasized that the millages must be legislatively set and voter approved. The districts in this case are not and could not be a special district as referred to in Art. VII, § 9(b), Fla. Const. Since the districts involved in this litigation are not the "independent" special districts referenced in Art. VII, § 9, the question arises: Whose millage are they levying? The millage is not the municipalities, nor school district millage, it is county millage for county purposes and as such the millage is within the constitutional 10 mill cap for county purposes. Art. VII, § 9(b).

CONCLUSION

For the foregoing reasons, this Court should affirm the opinion of the First District Court of Appeal in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by U.S. Mail to **Alfred O. Bragg, III**, Department of Community Affairs, 2740 Centerview Drive, Tallahassee, FL 32399-2100; **Williaim J. Roberts**, Roberts & Egan, P.A., Post Office Box 1386, Tallahassee, FL 32302; **Robert L. Nabors, Sarah M. Bleakley, Thomas H. Duffy**, Nabors, Giblin & Nickerson, P.A., Post Office Box 11008, Tallahassee, FL 32302; and **Robert Bruce Snow**, 112 North Orange Avenue, Brooksville, FL 34601; **Jay W. Williams**, Assistant County Attorney, Metro-Dade Center, Suite 2810, 111 N.W. 1st Street, Miami, Florida 33128-1993; on this 30th day of March, 1993.

JOSEPH C. MELLICHAMP, III
SENIOR ASSISTANT ATTORNEY GENERAL