IN THE SUPREME COURT OF FLORIDA

Case No. 80,158

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

Petitioner,

vs.

FLORIDA DEPARTMENT OF COMMUNITY
AFFAIRS,

Respondent
_____/

PETITIONER'S SUBSTITUTED BRIEF ON JURISDICTION

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INTRODUCTION

Petitioner will be referred to herein as "Hernando County" or "the County." Respondent will be referred to by its full name or "the Department." The phrase "the State" refers to both the Department of Community Affairs as well as the Department of Revenue, which appeared below as amicus curiae. References to the Appendix are made parenthetically (e.g. App. A, App. B-2).

STATEMENT OF THE CASE AND FACTS

Hernando County appealed three declaratory statements involving three voter-approved special districts located within the County and considered by the County to be independent under a statutory definition. The Department of Community Affairs, however, declared the districts to be dependent. One effect of this classification was to require the ad valorem millage of each district to be aggregated with that levied by the County, which appealed, arguing that the statutory authority for the classification was unconstitutional for purposes of millage aggregation. Dade and Orange Counties and the Florida Association of Counties joined the appeal as amici curiae on behalf of the County; the Florida Department of Revenue filed a brief as amicus curiae for the Department of Community Affairs. The First District Court of Appeal rejected the County's arguments that the statutes in question violated Article VII, section 9, Article III, section 11(b) and Article VIII, section 4 of the Florida Constitution. Board of County Commissioners, Hernando County v. State, Dept. of Community Affairs, 598 So.2d 182 (Fla. 1st DCA 1992) (App. A). The Court denied the County's motion for reconsideration and motion to certify questions.

SUMMARY OF ARGUMENT

This Court has jurisdiction under Article V, section 3(b)(3), Florida Constitution. The District Court of Appeal expressly declared section 200.071, Florida Statutes (1989) to be valid, and also expressly construed Article VII, section 9, Article III, section 11(b) and Article VIII, section 4 of the Florida Constitution. The Court should take jurisdiction because the decision below will have a broad, adverse impact on county governments throughout the state.

ARGUMENT

At issue in this case is not one statute but an interplay between several that has, for shorthand purposes, been referred to as a "statutory scheme." Under this statutory scheme special districts are categorized as dependent or independent based upon certain criteria having to do with governance structure or budget control. §189.403(2), Fla. Stat. (App. D-1.)[1] The millage of those defined as dependent districts must be aggregated with county-purpose millage, and if this aggregation results in the County exceeding the ten mills authorized by the Constitution in Article VII, section 9(b) (App. C-1), the County must reduce county-purpose millage, the dependent district millage, or both. §200.071(2), Fla. Stat. (App. D-2).

This statutory scheme of millage aggregation has many constitutional infirmities, principally: it violates Article VII, section 9(b)'s direct grant of up to ten mills of taxing power for county purposes; it sanctions a transfer of governmental power without voter approval, as required by Article VIII, section 4 (App. C-2); and it classifies governmental entities arbitrarily and irrationally without notice or voter approval, as required by Article III, section 11(b) (App. C-3).

Argument Concerning Article VII, section 9(b).

The central question in this case involves Article VII, section 9(b). The main issue below was whether, when determining its ad valorem tax millage, a county must include the millage of any dependent special districts within the county. The addition

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[1] The criteria for dependent districts are: (1) the entire governing body of the special district is identical to that of a single county or municipality, (2) a single county or city government appoints all members of the district governing body, (3) the governing body of a single county or municipality can remove district members during unexpired terms and (4) a single county or municipal government has approval or veto power over the district's budget.

of dependent special district millage, which almost invariably is levied less than county-wide (see App. F), impairs counties' ability to levy taxes and fund county government, even if the county itself is, at the present time, levying less than the full ten mills for county purposes. A right may be impaired without being completely denied, and any legislation that detracts in any way from a right is unconstitutional. See Dewberry v. Auto-Owners Ins. Co., 363 So.2d 1077, 1080 (Fla. 1978)(contract law); Pinellas County v. Banks, 19 So.2d 1 (1944) (property law, tax lien foreclosure).

The First District Court of Appeal refused to invalidate this legislation, despite the fact that it violates the intent of the framers of the 1968 Florida Constitution. The history of the deliberations of the Constitutional Revision Committee demonstrates that in adopting Article VII, section 9 the drafters did not intend such a result and expressly rejected the concept that special districts should be included in the ten-mill cap for county purposes.

Article VII, section 9(b) now reads, in pertinent part:

> Ad valorem taxes . . . shall not be levied in excess of the following millages upon the assessed value of real estate and tangible personal property: for all county purposes, ten mills . . . .

As originally drafted and proposed, however, this section read:

> Ad valorem taxes shall not be levied in excess of the following millages on the dollar of assessed value for the following purposes: For all county purposes, including special taxing districts lying wholly within a county, ten mills . . . .

Minutes, Constitutional Revision Committee of the Whole House, August 8, 1967, page 2, (Supreme Court of Florida Library) (emphasis supplied) (App. B-1).

Thus, the drafters specifically deleted language that would have included special districts within the constitutional ten-mill cap for county purposes. When the language

of a statute or a proposed constitutional provision is deleted and another provision gives a different meaning, "a construction based on the provision before its amendment will be avoided." Piezo Technology v. Smith, 413 So.2d 121, 123 (Fla. 1st DCA 1982), approved 427 So.2d 182 (Fla. 1983).

Further proof that the Revision Committee specifically did not intend to include services or facilities provided by special districts in the ten-mill cap for county purposes may be found elsewhere in the Minutes of the Interim Constitution Revision Joint Committee. The section was changed upon specific inquiry by one of the members. As the official history states:

> Senator Askew requested the Committee to return its attention to Section 8 of this article, subsection (b),[2] on page 55 of the October 30 draft. In answer to Senator Askew's inquiry, the Chair stated that apparently neither the House nor the Senate recognized that they allowed small taxing districts to levy millage which would affect the limitation on the entire county's tax millage when 9/10 of the county had nothing to do with these small districts. At the request of Representative Wolfson, after further discussion, Style and Drafting was requested to take this section and prepare language which will be correct as to intent and in proper form to be introduced in the Legislature.

Interim Constitution Revision Joint Committee Minutes (1967-68), page 32 (Supreme Court of Florida Library) (App B-2). The Reporter noted that the section had been "[r]edrafted as per joint committee recommendation to exclude special taxing districts which do not operate county-wide from the overall county millage limitations." Analysis Reflecting Changes Through June 24, 1968, in House and Senate Resolution of September 1967, page 14 (Supreme Court of Florida Library)(App. B-3).

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[2] Apparently, in some of the drafts what is now section 9 was called section 8, but it is clear that what was under discussion was what would become Article VII, section 9(b). (See App. B-3).

Thus, it is apparent that the Constitutional Revision Committee was fully aware of the nature and the implications of the change suggested by Senator Askew and that it intended that the taxes levied by special districts not be counted within the ten mills allowed to counties to be used for county purposes (and without referendum approval). Section 200.071, however, conflicts with that clear intent, as it allows dependent special districts to dilute the ten mills for county purposes permitted by the Constitution.

Throughout this litigation, the state has argued that the Legislature is constitutionally required only to permit counties to levy some amount of ad valorem taxation, up to 10 mills, but may restrict the amount. Recently, the Second District Court of Appeal resoundingly rejected that contention in a case involving school districts, which are identical to counties as regards the right to levy nonvoted ad valorem millage. ["Counties, school districts and municipalities shall . . . be authorized by law to levy ad valorem taxes . . . ." Art. VII, § 9(a), Fla. Const.] In State, Dept. of Education v. Glasser, No. 91-02336 (Fla. 2d DCA July 31, 1992) (App. E) the school district in Sarasota County had challenged an existing statute and a provision in the 1991 appropriations act that limited the district's millage to less than 10 mills. The Second DCA struck down the provisions as violative of Article VII, section 9, holding that "the legislature cannot usurp the school district's authority to levy within the ten mill limit . . . ." Slip op. at 9.[3] The Court added:

> We find that the mandatory language of section 9(a) alone providing that school districts "shall" be authorized by law to levy ad valorem taxes is sufficient to conclude that the school district power of taxation in this area

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[3] The Glasser opinion correctly recognizes that the ability to levy up to ten mills ad valorem taxation for county purposes is a direct constitutional grant of taxing power. See the discussion of the framers on this issue in Transcript of Public Hearing of December 2, 1966, Constitution Revision Commission, at 1092-96. (App. B-4).

> is expressly authorized by the constitution. Cf. Mallard v. Tele-Trip Co., 398 So.2d 969 (Fla. 1st DCA), review denied, 411 So 2d 384 (Fla. 1981) (use of word "shall" in article VII, section 9 mandates legislature to authorize power to levy; legislature has no power to revoke authority in part or in full).

Id. at 10.

The problem the instant case presents is not hypothetical or illusory. A recent report from the Florida Advisory Council on Intergovernmental Relations shows that fourteen counties are at the ten-mill cap, and that thirty-eight of the sixty-seven counties levy more than 7.5 mills. The survey also shows that there are 117 less than countywide dependent special district. Report in Brief, Ad Valorem Taxes: Public Reaction & Policy Response, Florida Advisory Council on Intergovernmental Relations, January 17, 1992, at 10-11, (App. F).

The First District Court of Appeal attempted to dodge this issue by reasoning that county governments' power to tax up to ten mills was not impaired because counties could reduce the millage of the special districts, thus leaving the county-purpose millage intact. Of course, such an analysis ignores the expressed will of the framers that special district millage not be included in county-purpose millage. There is another fundamental infirmity in this reasoning, however: county governments must either reduce their own county-purpose millage, which constitutes an unconstitutional infringement upon their power to levy up to ten mills, or reduce, possibly to zero, the sole funding mechanism of one or more special taxing districts.

Argument Concerning Article VIII, section 4.

If the County elects to eliminate the dependent district's millage, the method the First DCA sanctions, that act would effectively end the ability of the special district to govern. Thus, the District Court of Appeal's construction of the statutory scheme

leads directly to the violation of Article VIII, section 4, Florida Constitution (App. C-2), which governs transfers of governmental power or function, and which states:

> Transfer of powers. By law or by resolution of the governing bodies of each of the governments affected, any function or power of a county, municipality or special district may be transferred to or contracted to be performed by another county, municipality or special district, after approval by vote of the electors of the transferor and approval by vote of the electors of the transferee, or as otherwise provided by law.

Simply stated, Article VIII, section 4 requires direct voter approval before the power or function of one government -- such as its ability to tax -- is transferred to that of another government, unless specifically otherwise provided by law. Thus, by permitting the county commission to eliminate the funding source of a dependent district, without the consent of the voters who approved the creation of that district, section 200.071 violates Article VIII, section 4, and is therefore facially unconstitutional.

The Department of Community Affairs has previously suggested that by enacting the statutory scheme at issue here the Legislature has complied with Article VIII, section 4. An opinion of this Court, however, demonstrates that while the Legislature may sanction alternatives to voter approval, it must do so specifically.

> A plain reading of Article VIII, Section 4 reflects that a transfer of governmental powers requires distinctive procedures for the initiating of a transfer, that is, "by the governments affected." We think it clear from the specificity of the procedure in Section 4 that the "by law" reference connotes the need for a separate legislative act addressed to a specific transfer, in the same manner that two or more resolutions of the affected governments would address a specific transfer.

Sarasota County v. Town of Longboat Key, 355 So.2d 1197, 1201 (Fla. 1978)(footnote omitted) (App. G). The Court further explained, in the footnote omitted from the previous passage, that the phrase "as otherwise provided by law" "does not describe an alternate method for initiating a transfer; it addresses only the means for approval." Id.

n.5.[4] Thus, the statutory scheme either violates Article VII, section 9(b) or Article VIII, section 4.

Argument Concerning Article III, section 11(b).

The statutory scheme also violates Article III, section 11(b), Florida Constitution, which mandates that when the Legislature classifies governmental entities by general law, the law must have a reasonable relationship to the classification. It provides:

> In the enactment of general laws on other subjects [than those listed in subsection (a)], political subdivisions and other governmental entities may be classified only on a basis reasonably related to the subject of the law.

There can be no doubt that the classification scheme divides all special districts into two classes. A classification is a "grouping of things in speculation or practice because they agree with one another or in certain particulars, and differ from other things in those same particulars." Anderson v. Board of Public Instruction, 136 So. 334, 337 (Fla. 1931) (citation omitted). There may be valid reasons to classify special districts based upon the criteria in section 189.403(2) (App. D-1); however, no nexus exists between the method of classification here and the result of that classification, and that is what the Constitution demands. Therefore, the classifications are unconstitutional.

This lack of a relationship can be seen in some of the anomalous results that the scheme produces. For example, one of the special districts in issue now is not defined as dependent because the Board of County Commissioners changed the structure of the governing board to make its members subject to removal by the Governor rather than

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[4] Contrary to the First District Court of Appeal's belief that county governments may lawfully reduce the millage of special districts, the Fifth District Court of Appeal recently held that counties may not, under sections 200.001(4), 200.001(7) and 218.34(4), Florida Statutes, reduce the millage of a hospital district. North Brevard County Hospital District v. Roberts, 585 So.2d 1110 (Fla. 5th DCA 1991).

by the board of county commissioners (see § 189.403(2)(c), Fla. Stat.). The district performs the same functions as it always did and is administered as before, and geographically constitutes only a small portion of the county, as before, but now its millage need not be aggregated. Similarly, Orange County added to the governing board of its library district an eighth member who joins the seven county commissioners who previously comprised the board. Since all of its governing board was not appointed by the single county or municipality, an independent district was thus created where a dependent district had stood, with no effect on the board's operation.

The District Court of Appeal misapprehended the nature of Article III, section 11(b), and dismissed its application to this case because, in the court's reasoning, Article III, section 11(b) concerns prohibited special acts, and no special act is at issue here. In fact, that is one of the problems. Article III, section 11 appears to require that if the subject matter of the general law is such that a reasonable classification between political subdivisions cannot be crafted, then the Legislature may act only through the adoption of a special act, notifying the public prior to the introduction of the legislation or subjecting the legislation to local referendum approval. See Art. III, § 10, Fla. Const. (App. C-4). The special act notice and referendum requirements assure that the local citizens have an opportunity to express their views on the legislation and its effect on the local political subdivision.

The Court also predicated its conclusion upon the mistaken assumption that by declaring the special district classification scheme unreasonable for purposes of defining county-purpose millage it would necessarily invalidate the entire act. This Court has rejected such an "in toto" analysis. State ex rel. Limpus v. Newell, 85 So.2d 124 (Fla. 1956)(provisions of a general election code revision that provided qualifying dates based

on county population invalid under predecessor to Article III, section 11).[5] There is no reasonable connection between defining county-purpose millage and the criteria for a dependent special district as provided in section 189.403, Florida Statutes. The scheme is not rationally related to general law ad valorem taxation, and is unconstitutional.

CONCLUSION

The First District Court of Appeal ignored the expressed will of the drafters of the 1968 Florida Constitution and sanctioned a statutory scheme that requires counties to aggregate county-purpose millage with the millage of special districts. This impairment of the constitutional taxing power violates Article VII, section 9 of the Florida Constitution. Furthermore, by sanctioning county commissions to reduce the millage of special districts without approval of the electorate, the statutory scheme violates Article VIII, section 4 of the Florida Constitution. The statutory scheme classifies special districts through legislation unrelated to ad valorem taxation, in violation of Article III, section 11(b) of the Florida Constitution. The First District Court of Appeal construed Article VII, section 9(b), Article VIII, section 4, and Article III, section 11(b) and explicitly found section 200.071, Florida Statutes, not to violate those sections. This Court thus has jurisdiction under Article V, section 3(b)(3) of the Florida Constitution to review the decision of the First District Court of Appeal. It should exercise that jurisdiction to settle an issue of great importance to all county governments, and many special districts, in Florida.

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[5] For example, the classification scheme may be held to be reasonable for every purpose except for determining whether a district's millage should be defined as "county-purpose" millage. An alternative approach, one suggested by the County since the inception of the litigation, would be to include voter-approved dependent special district millage as "voted millage," which is excluded from the county-purpose millage calculation under section 200.071. See § 200.001(8)(f) Fla. Stat. (App. D-2).

Respectfully submitted,

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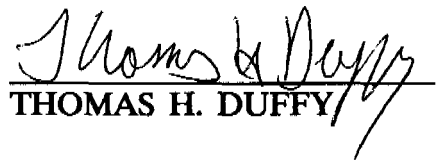
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing and a copy of the Appendix to Petitioner's Substituted Brief on Jurisdiction have been furnished by hand delivery to ALFRED O. BRAGG, III, Esquire, and G. STEVEN PFEIFFER, Esquire, Office of the General Counsel, Department of Community Affairs, 2740 Centerview Drive, Tallahassee, Florida, 32399-2100, counsel for the Department of Community Affairs this 14th day of September, 1992.



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