IN THE SUPREME COURT OF FLORIDA
CASE NO. 80,158

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

Petitioner,

v.

FLORIDA DEPARTMENT OF COMMUNITY
AFFAIRS,

Respondent.
_____/

PETITIONER'S BRIEF ON THE MERITS

On Appeal from the District Court of Appeal, First District
Case Nos. 91-194, 91-195, and 91-196

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PREFACE

The following terms will be used in this brief to refer to the entities noted. The "Department" refers to the Florida Department of Community Affairs. The "County" and "Hernando County" will be used interchangeably. The Department of Revenue will be referred to as "DOR." The "Board" and the "Board of County Commissioners" will refer to the Board of County Commissioners of Hernando County, Florida. The "State" will be used generically for either the Department or DOR.

The term "Districts" will refer collectively to the districts at issue here: the Spring Hill Fire District, the Istachatta-Nobleton Recreation District and the Township 22 District. The Township 22 District will be referred to individually as the "Special Act District," and the Spring Hill Fire District and the Istachatta-Nobleton Recreation District as the "Ordinance Districts."

References to documents provided in the Appellant Hernando County's Appendix I to its Brief on the Merits (Ordinances, Cases and Constitutional Revision Materials) will be cited as "App. I" followed by the tab number. References to documents provided in Appellant Hernando County's Appendix II to its Brief on the Merits (Constitutional Provisions, Statutes, and Laws) will be cited as "App. II" followed by the appropriate tab number. Other references will be made as noted.

STATEMENT OF THE CASE AND FACTS

Pursuant to section 120.68, Florida Statutes, the Board of County Commissioners of Hernando County appeals the Declaratory Statements of the Florida Department of Community Affairs classifying three districts within the County as dependent districts.

The special districts are voter-approved ad valorem tax districts providing services to different geographic areas within the County. The three districts are the Township 22 Fire District, the Istachatta-Nobleton Recreation District, and the Spring Hill Fire District (collectively, the "Districts"). None of the district boundaries are countywide. Each district provides services in a limited geographic portion of the County. For example, the Spring Hill Fire District provides "special fire and rescue protection" in "all units of Spring Hill, a subdivision in Hernando County, Florida, as per plat thereof recorded in the Public Records." Hernando County, Florida Ordinance No. 73-12 (App. I, C). As a further example, the Township 22 Fire District provides "special fire protection" only in the unincorporated portions of "Township 22 South, Range 19 East of Hernando County." Chapter 67-1453, Special Acts of Florida, 1967 (App. I, D).

The Township 22 Fire District was created by special act of the Legislature in 1967 to provide fire services in a portion of the unincorporated area of the County (the "Special Act District"). Chapter 67-1453, Special Acts of Florida 1967 (App. I, D). It has the authority to impose up to three mills of ad valorem tax, which millage was approved by the voters within the district. Chapter 67-1453, § 5, Special Acts of Florida, 1967. (App. I, C).

The other two districts, the Spring Hill Fire District and the Istachatta-Nobleton Recreation District, were created by County ordinances adopted pursuant to section

125.01(5), Florida Statutes (1974 Supp.) (collectively, the "Ordinance Districts"). The Spring Hill Fire District was created and approved by the voters in 1973 and has the authority to impose up to 2.75 mills of ad valorem tax. Hernando County, Florida, Ordinance No. 73-12, 75-10 (App. I,C). The Istachatta-Nobleton Recreation District was created and approved by the voters in 1976 and may levy up to 0.4 mills of ad valorem tax. Hernando County, Florida, Ordinance No. 76-12 (App. I, B).

The governance structure of the Districts varies. The Board of County Commissioners serves as the governing body of the Special Act District, establishing the budget, setting the millage rate and directing the provision of services. Chapter 67-1453, §§ 2-5, Special Acts of Florida 1967. (App. I, D). Members of the governing boards of the Ordinance Districts are elected by the respective district electors. They may be removed from office for cause by the Board of County Commissioners. Hernando County, Florida, Ordinance No. 82-8, § 2(g), 75-10, § 2(i) (App. I, B & C). The budgets of the Ordinance Districts are subject to the approval of the Board. Hernando County, Florida, Ord. No. 76-12, § 5, 73-12, § 6(c). (App. I, B & C)

Section 189.4035, Florida Statutes, created in section 5, Chapter 89-168, Laws of Florida, the Uniform Special District Accountability Act of 1989 required the Department to classify every special district as either independent or dependent and publish an official list on October 1, 1990, of its determination as to the status of the districts. Sections 189.403(2) and (3) provide the following definitions:

> (2) "Dependent special district" means a special district that meets at least one of the following criteria:
>
> (a) The membership of its governing body is identical to that of the governing body of a single county or a single municipality.

(b) All members of its governing body are appointed by the governing body of a single county or a single municipality.

(c) During their unexpired terms, members of the special district's governing body are subject to removal by the governing body of a single county or a single municipality.

(d) The district has a budget that requires approval through an affirmative vote or can be vetoed by the governing body of a single county or a single municipality.

(3) "Independent special district" means a special district that is not a dependent special district as defined in subsection (2). A district that includes more than one county is an independent special district.

The Districts meet the statutory criteria for dependent districts. The Special Act District's governing board is identical to the Board of County Commissioners. Therefore, it meets criterion (2)(a). The Board of County Commissioners approves the budgets of the Ordinance Districts and may remove the governing board members for cause. Thus, they meet the (2)(b) and (d) criteria.

The principal consequence of statutory millage limitation resulting from a dependent special district classification is that dependent special district millage and county millage cannot exceed in the aggregate the ten mills provided constitutionally for county purposes. §§ 200.0071, 200.001(1)(d), and 200.001(8)(d). Additionally, section 200.071(2) provides that the board of county commissioners has the duty to reduce either the proposed dependent special district millage or the proposed county millage so that the aggregate millage does not exceed the ten mills total provided constitutionally for county purposes. § 200.071(2). Millage levied by special districts classified as independent is separate from, and in addition to, the county-purpose millage. §§ 200.001(4) and 200.001(8)(e).

Article VII, section 9(a), the Florida Constitution, provides that "Counties ... shall and special districts may, be authorized by law to levy ad valorem taxes..." Section 9(b) of article VII imposes a non-voted ten mill limitation for county purposes and provides that special districts can levy such millage "authorized by law and approved by vote of the electors." Under the State interpretation of statutory millage authorization, no distinction is made based on the fact that a dependent special district millage authorization was voter approved. Additionally, article XII, sections 2 and 15 provides that special district millage authorized on the effective date of the 1968 constitutional revision continues until reduced by law.

Prior to the adoption of the requirement that the Department of Community Affairs classify every special district, the County had considered the Districts' millage as separate from the County's for the purpose of determining its millage cap. The Department of Revenue (the "DOR"), the agency responsible for determining compliance with the millage cap, had not disagreed with the County's position even though the aggregate millage of the Districts and the County had exceeded ten mills for several years.

The controversy in this cause arose in 1990 after section 189.4035, Florida Statutes, took effect, authorizing the Department to classify districts and requiring the DOR to use the Department's classification as the basis for determining local government compliance with the statutory millage limitations. The aggregate county-purpose millage for the County and the Districts exceeded ten mills in 1990 and the DOR threatened to impose sanctions against the County. The County filed for declaratory and injunctive relief against the DOR and the Circuit Court entered an order granting a temporary injunction prohibiting the DOR from imposing any sanctions against

the County while the County pursued its statutorily-authorized administrative remedies with the Department of Community Affairs. Hernando, Florida v. Florida Department of Revenue, No. 90-4876 (Fla. 2d Cir.Ct.) (Complaint filed November 5, 1990) (Order of Temporary Injunction entered November 8, 1990). (App I, F-G).

Pursuant to section 189.4035, the Districts submitted to the Department that they were independent districts under chapter 189, based upon the supremacy of the local tax sections of the Florida Constitution: article VII, section 9, and article XII, sections 2 and 15. Contrary to this submission, the Department classified each of the Districts as dependent in its October 1, 1990 determination, based upon the statutory criteria contained in section 189.403 for determining the status of the districts rather than the provisions of article VII, section 9 and article XII, sections 2 and 15.

As authorized by section 189.4035(6), the County petitioned the Department for a declaratory statement on each of the Districts' status, raising the constitutional issues. (App. II, B-D). The Department issued declaratory statements reaffirming its determination that the Districts were dependent. (App. I, B-D) The County appealed the special district classification determination in the declaratory statements to the First District Court of Appeal. The First District Court of Appeal rejected the County's arguments that the millage limitations under the statutory scheme of Chapter 189 and 200 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. Florida Dept. of Community Affairs, 598 So.2d 182 (Fla. 1st DCA 1992) (App. I, A). The First District Court of Appeal denied the County's motion for reconsideration and motion to certify questions.

The County filed a notice to invoke the discretionary jurisdiction of this Court under article V, section 3(b)(3), Florida Constitution. The basis for the request was that the First 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. An additional basis for requesting discretionary jurisdiction was that the decision of the First District Court of Appeal will have a broad, adverse impact on county governments throughout the State. This Court accepted jurisdiction by its Order dated January 26, 1993.

SUMMARY OF ARGUMENT

At issue in this case is not one statute but an interplay between several that is, for shorthand purposes, 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.[1] The millage levied by those classified as dependent districts is added to the countywide millage levied by a county and both millages in the aggregate cannot exceed the constitutional millage limit of ten mills for county purposes provided in article VII, section 9(b), Florida Constitution. § 200.071 and § 200.001(1)(d), Fla. Stat. The millage levied by those classified as independent districts are separate from the county-purpose millage. § 200.001(4), Fla. Stat.

In the event the millage proposed to be levied by a dependent special district when added to the county-purpose millage proposed to be levied by the county exceeds ten mills, the board of county commissioners has the statutory duty to lower the dependent special district millage or the countywide county millage so as not to exceed an aggregate ten mills for county purposes. § 200.071(2), Fla. Stat. This statutory scheme of millage aggregation has several constitutional infirmities.

The 1968 Constitutional revision crafted a fundamental re-alignment of regulatory and taxing powers between the State and county government. Except when inconsistent

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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.

with law, counties are given full regulatory power to legislate by ordinance. Additionally, the ad valorem tax within stated millage limits is directly granted to counties by the 1968 constitutional revision as its constitutional local taxing source. Art. VII, § 9, Fla. Const. All other forms of taxation are preempted to the State except as delegated to counties by general law. Art. VII, §§ 1, 9(a), Fla. Const.

The direct grant of ad valorem taxing power to counties is self-evident by the direct language used:

> SECTION 9. Local taxes -
>
> (a) Counties ... 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 . . .
>
> (b) Ad valorem taxes ... shall not be levied in excess of the following millages ... for all county purposes, ten mills; ... and for all other special districts a millage authorized by law approved by vote of the electors....

Art. VII, § 9, Fla. Const.

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. That the drafters of the 1968 Constitution meant the word "shall" to have its plain meaning as a direct grant of ad valorem taxing power to counties is amply supported by the record of proceedings leading to the adoption of article VII, section 9. Equally clear in the record is that the drafters did not intend that county-purpose millage be aggregated with special district millage, and several attempts to include special district millage within the constitutional limit of ten mills for county purposes were rejected.

The special district classification within the statutory scheme is an unreasonable and arbitrary classification for purpose of millage determination and violates the requirement of article III, section 11, of the Florida Constitution for the enactment of general laws relating to political subdivisions. For example, under such statutory classification scheme, two special districts identical in all respects are treated differently in their power to levy their voter approved millage if under the charter of one of the districts the governing board of the county has the power to remove members of the district governing board during their unexpired terms. Such classification distinction is arbitrary and not reasonably related to millage authorization. The impermissive classification of political subdivisions in a general law avoids the public notice and special enactment procedures relating to the adoption of a special act and is unconstitutional under article III, section 11, Florida Constitution.

The statutory power granted to a board of county commissioners to eliminate the taxing power of a special district without elector approval is an invalid transfer of power under the statutory scheme in violation of article VIII, section 4, of the Florida Constitution.

POINT I

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

The central question in this case involves article VII, section 9(b), the Florida Constitution. The main issue below was whether, when determining its countywide ad valorem tax millage, a county is required to include the millage of dependent special districts. The addition of dependent special district millage, which almost invariably is levied less than countywide, impairs the county's ability to levy ad valorem taxes and to provide essential countywide services. 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 statutory scheme in Chapters 200 and 189, Florida Statutes, limits counties' ability to levy the full ten mills of ad valorem taxation the Constitution grants.

A. The 1968 Constitutional Revision Dramatically Altered the Governmental Relationship Between Counties and the State.

The people, in approving the 1968 constitutional revision, fundamentally altered the relationship between local governments and the State. A misunderstanding of the fundamental nature of this dramatic realignment of governmental power to tax, to regulate and to provide essential services confuses any current constitutional analysis.

Under the 1885 Florida Constitution, all county government power required express authorization in a general law or special act.[2] The customary legislative vehicle was a special act. Likewise, under the 1885 Constitution, all taxing power rested with the State and required express legislative delegation by either a special act or general law.[3] Local government possessed no "inherent power" to tax under the 1885 Constitution. This antique relationship between counties and the State is significant only to the extent it enhances an understanding of the fundamental change crafted in the 1968 constitutional revision. Any reliance on the old governmental relationship is misplaced and misleading. The disagreement in this cause is over the blind refusal of the Department to see the changes in the framework of government adopted in the 1968 constitutional revision which render prior ways of thinking about local government dated and irrelevant.

First, article VIII of the 1968 revision unleashed a revolution in its authorization of county home rule power to legislate. This novel constitutional delegation of the power of self-government to counties lies in article VIII, section 1(f) and (g), Florida Constitution. The county power of self-government is legislatively implemented by the adoption of an ordinance by the county commission. The need for a special act is eliminated.[4]

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[2]See Art. VIII, § 1, Fla. Const. (1885); and Amos v. Matthews, 126 So. 308 (1930).

[3]Art. IX, §§ 1 and 5, Fla. Const. (1885).

[4]As noted by the Florida Supreme Court in State v. Orange County, 281 So.2d 310, 312 (Fla. 1973): "Instead of going to the Legislature to get a special bill passed ... the Orange County Commissioners under the authority of the 1968 Constitution and enabling statutes now may pass an ordinance for such purpose."

Second, article VII of the 1968 revision sorted out the sovereign taxing power and required general law authorization by the Legislature of all taxes except the ad valorem tax. The use of the special act as a method of legislative authorization of a tax was abandoned in the 1968 constitutional framework. All forms of taxation other than the ad valorem tax are "preempted" to the State except as provided by "general law."[5]

This fundamental revision of governmental power diminishes the value of prior constitutional precedents. As subsequently implemented by general law, under the 1968 Constitution, the power to legislate by ordinance is granted directly to a county unless the Legislature preempts county authority by enacting an inconsistent special or general law.[6] Conversely, all forms of taxation, other than the ad valorem tax, is preempted to the State to be authorized by the Legislature only by general law. The ad valorem tax is constitutionally protected by clear and direct language. This traditional local tax source is directly granted to the counties by the Florida Constitution and such constitutional mandate can be implemented by general or special law: "Counties ... shall ... be authorized by law to levy ad valorem taxes...." Art. VII, § 9(a), Fla. Const. (1968).

Thus, the relationship between the State Legislature and county governments is precisely the opposite of what it was under the 1885 Constitution. Today, counties are presumed to have the power to govern unless specifically prohibited by the Legislature. An essential component of the power to govern and provide essential services is the power to tax. Wisely, the drafters of the 1968 Constitutional revision ensured that its

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[5]Art. VII, §§ 2 and 9(a), Fla. Const. (1968).

[6]§ 125.01(3)(a), Fla. Stat. Speer v. Olson, 367 So.2d 207 (Fla. 1978); and Taylor v. Lee County, 498 So.2d 424 (Fla. 1986).

revolutionary delegation of home rule power to counties and other local governments was not meaningless by constitutionally preserving the ad valorem tax as the local revenue source.[7] That the constitutional drafters intended to constitutionally protect the ad valorem tax from impairment by the Legislature is clear from the language used and the record of their deliberations.

B. Article VII, Section 9 of the 1968 Constitutional Revision on its Face Provides a Direct Constitutional Grant of Ad Valorem Taxing Power to Counties and the Record of Proceedings Leading up to its Adoption Supports this Obvious Conclusion.

The foundation of constitutional construction is the plain meaning of the language used. Article VII, section 9 of the Florida Constitution states:

> (a) Counties, school districts, and municipalities shall, and special districts may, be authorized by general law to levy ad valorem taxes and may be authorized by law to levy other taxes, for their respective purposes, except ad valorem taxes on intangible personal property and taxes prohibited by this constitution.
>
> (b) Ad valorem taxes, exclusive of taxes levied for the payment of bonds and taxes levied for periods not longer than two years when authorized by vote of the electors who are the owners of freeholds therein not wholly exempt from taxation, 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; for all municipal purposes, ten mills; for all school purposes, ten mills; ... and for all other special districts a millage authorized by law approved by vote of the electors who are owners of freeholds therein not wholly exempt from taxation. A county furnishing municipal services may, to the extent authorized by law, levy additional taxes within the limits fixed for municipal purposes.

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[7]Under the constitutional design, the state is specifically prohibited from levying an ad valorem tax. "No state ad valorem taxes shall be levied upon real estate or tangible personal property." Art. VII, § 1(a), Fla. Const.

Art. VII, § 9, Fla. Const. (emphasis supplied). The unusual detail and explicitness of section 9, combined with its clear language shouts to the reader that counties may levy up to ten mills of ad valorem taxation and circumscribes the Legislature's power and control over such local revenue source. This constitutional section addresses taxes for all forms of local governments and strictly prescribes the millages the various types may levy. The Legislature is not explicitly given any power to reduce or eliminate any ad valorem taxes. There is an obvious intent to cover as many possible contingencies as possible within the constitution, so that the Legislature need act only by passing enabling legislation.

Thus, the only reasonable construction of the entire section is that the drafters granted ad valorem taxing power directly to local governments, and commanded the Legislature, through the use of the mandatory word "shall," to put into law what the constitution had granted. Had the drafters, as the Department has consistently argued, intended to make the ten mills a ceiling, under which the Legislature could operate freely, they would have employed a limiting phrase such as "for all county purposes, a millage authorized by law but not exceeding 10 mills." No such phrase applies to county-purpose millage and no such phrase should be implied.

When the words used in the Constitution are clear and unambiguous on their face, as they are in article VII, section 9, there is no need to resort to historical materials to discern the intent of the framers. See, e.g., Florida State Racing Comm'n v. McLaughlin, 102 So.2d 574 (Fla. 1958). If, however, the Court were to find an ambiguity in article VII, section 9, the history of the passage of the 1968 Constitution conclusively points to the fact that the drafters intended that document as a grant of

power to local governments to levy ad valorem taxes and imposed only a millage limit on that power.

The fact that "shall" means what it says is amply supported by the record of proceedings leading to the adoption of article VII, section 9. As originally considered, this section said that local governments "may" be empowered to levy ad valorem taxes, but an amendment was proposed by Revision Commission Member Ralph Marsicano that would change the phrase "may be authorized by law" to "shall be authorized by law." Commission Member Ralph Turlington inquired about the effect of the amendment.

> MR. TURLINGTON: Mr. Marsicano, what does this actually do: Can you think of any legal rights that this gives the cities that the word "may" doesn't give them?
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> 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.
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> MR. TURLINGTON: You say that this is exactly like the present constitution?
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> MR. SEBRING: Will the gentleman yield?
>
> CHAIRMAN SMITH: Do you yield to Mr. Sebring,[8] Mr. Marsicano?
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> 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."
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> MR. MARSICANO: Judge, I will be glad to have you suggest it.
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> 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

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[8]In addition to serving on the Supreme Court of Florida and as Dean of the Stetson University College of Law, Justice Harold L. Sebring was a Florida constitutional law and taxation scholar, having written books on both subjects.

> levy taxes. Such right as they have is just purely by delegation from the congress and without that delegation, the counties and the municipalities would be entirely impotent.
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> MR. MARSICANO: That is correct.
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> MR. SEBRING: Would you yield further?
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> MR. MARSICANO: Yes, sir.
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> MR. SEBRING: Would you yield to the possibility that not only -- and I hope that I am talking directly to your amendment -- that not only should that section contain the change of the word from "may" to "shall," but that it ought to carry with it the language of present Article IX, which not only imposes on the Legislature the duty to authorize the several counties and incorporate its cities to assess and impose taxes for county and municipal purposes, and for no other purposes, but that one line also carries with it an extremely vital elementary provision, that all property shall be taxed upon the principles established for state taxation, which is a very meaningful thing.
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> MR. MARSICANO: I have no objection to that further amendment, Judge.

Transcript of Public Hearing of December 2, 1966, Constitution Revision Commission, at pages 1094-96, vol. 59, Supreme Court of Florida Library (App. I, G).

Thus, the colloquy shows that the intent of the drafters was to give local governments direct constitutional authority to levy ad valorem taxes. Under this direct constitutional authorization to tax, the role of the Legislature is limited to establishing an assessment and collection process to ensure that property, in Judge Sebring's words, "shall be taxed upon the principles established for state taxation."[9]

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[9]See, e.g., the taxation principles established in the following constitutional provisions: Art. VII, §§ 2 (uniform rate); 3 (property tax exemptions); 4 (just valuation assessment); and 6 (homestead exemption). See also Art. III, § 11(a)(2), which prohibits special laws or general laws of local application pertaining to the "assessment or collection of taxes for state or county purposes."

That article VII, section 9, standing alone, authorizes counties to levy ad valorem taxes is also recognized in the commentary on the provision:

> This section empowers counties, school districts and municipalities to levy ad valorem taxes within the limitations of subsection (b) below.
>
> * * *
>
> The Revision Commission had recommended that counties and municipalities be authorized to levy any taxes for their respective purposes except those prohibited by the Constitution. That language was changed in the new constitution so that only counties, municipalities and school districts have constitutional authority to levy ad valorem taxes. The language, mandatory in tone, does contemplate a legislative act for they "shall be authorized by law" to levy ad valorem taxes ....

T. D'Alemberte, Commentary, Art. VII, § 9, 26A Fla. Stat. Ann. 142-143 (1970) (emphasis supplied). This commentary makes no mention of the authority of the Legislature to limit county millage because no such authority exists.

The history of what became subsection 9(b) also is pertinent. As originally drafted, that subsection 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....

Amendment No. 731 to HJR 3 XXXX (67), found in Minutes, Committee of Whole House, House of Representatives Constitutional Revision Sessions, July 31 and August 21, 1967, page 2 (located in loose leaf, Art. VII, 59 materials, Supreme Court of Florida Library.) (App. I, G). Representative Yarborough suggested an amendment that would have made subsection (b) read: "Ad valorem taxes may be limited by general or special law." Id. at 4. It was defeated. Id.

Thereafter, Representative Mann proposed an amendment to subsection (b) that would have read:

> Ad valorem taxes may be limited by general or local law, provided that millages in excess of those provided by law may be levied for periods not longer than two years when authorized by vote of the owners of freeholds not wholly exempt from taxation.

It was defeated, also. Id. The Legislature's rejection of these provisions, which would explicitly have given it the power to reduce counties' ability to levy ad valorem taxes to below ten mills for county purposes, shows that the original intent of the drafters was to allow counties the unfettered freedom to levy up to the ten-mill county purpose cap.[10]

The courts have said that the Legislature has no authority to preempt counties in the levy of ad valorem taxation. In Mallard v. Tele-Trip Co., 398 So.2d 969 (Fla. 1st DCA 1981), rev. denied, 411 So.2d 384 (Fla. 1981), the court considered a challenge to a levy of ad valorem taxes on leasehold property. The property owner argued that such taxes had been preempted to the state by statute, but the First District Court of Appeal disagreed.

> Article VII, Section 9, by the use of the mandatory word "shall," appears to mandate the legislature to authorize only the counties the power to levy ad valorem taxes. Hence, it does not appear that the legislature has the power to revoke the counties' authority to levy such taxes in part or in full.

Id. at 973 (emphasis supplied).

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[10]Throughout this litigation, the State has argued that the Legislature has the power to reduce county-purpose millage below the ten mills established in the Constitution. The First District Court of Appeal did not address this issue directly, holding that the statutory scheme did not impair county-purpose millage, but special district millage. 598 So.2d at page 184. (App. I, A). This analysis ignores the expressed will of the framers that county-purpose millage not be aggregated with special district millage (see Argument, post, at subsection c) and also would allow an unconstitutional transfer of power from special districts to counties (see Argument, post, at Section III).

This Court in City of Tampa v. Birdsong Motors, Inc., 261 So.2d 1,3 (Fla. 1972), has recognized that the authority to tax may be authorized by the Constitution: "Taxation by a city must be expressly authorized by either the constitution or grant of the Legislature...." The only city tax authorized by the Constitution is the ad valorem tax in article VII, section 9. As is obvious, no constitutional distinction exists between a city and county in the power to levy nonvoted ad valorem taxes for their respective purposes.

Throughout this litigation, the Department has argued that the Legislature is constitutionally required only to permit counties to levy some amount of ad valorem taxation, up to ten 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 in regard to 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, 17 F.L.W. D1846 (Fla. 2d DCA July 31, 1992) (App. I, 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 ten mills. The Second District Court of Appeal 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...." Glasser at D1848. The Court added:

> We find that the mandatory language of section 9(a) alone providing that the school districts "shall" be authorized by law to levy ad valorem taxes is sufficient to conclude that the school district's power of taxation in this area 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 had no power to revoke authority in part or in full).

Id.

The direct constitutional grant of ad valorem taxing power is even clearer for counties when compared to school districts since counties are not required to balance the constitutional requirement for a "uniform system of free public schools" and since counties do not receive an appropriation of state funds dependent upon a millage fixed by statute. See art. IX, § 1; and art. VII § 8, Fla. Const. (1967).[11]

Thus, as to counties, the plain language of Article VII, section 9(b) is supported by a clear record of the proceedings leading to its adoption. That the Legislature has the authority to prescribe the process for the levy of the tax does not equate with the power to restrict or infringe upon the levy by counties within its constitutional authority of ten mills for county purposes.

C. The Legislative History Demonstrates that the Framers of the 1968 Constitutional Revision did not Intend that Dependent Special District Millage be Included Within the Constitutional County Purpose Millage Limitation.

The history of the deliberations of the Constitutional Revision Committee demonstrates that in adopting article VII, section 9 the draftees 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:

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[11]If the Legislature had the constitutional authority to reduce the amount of ad valorem millage counties could levy, it would not merely condition counties participation in State-shared revenue on counties reducing their millage. See chapter 82-154, § 18, Laws of Fla. (county participation in half cent sales tax distribution contingent upon millage reduction) (App. II, H). Instead, the Legislature would simply exercise its constitutional power and mandate counties to reduce their millage, and not coax them with shared state imposed taxes.

> 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 addressed value for the following purposes: For all county purposes, including special taxing districts lying wholly within a county, ten mills....

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),[12] 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 requests 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. I, G). The Reporter noted that the section has been "[r]edrafted as per joint committee recommendation to exclude special taxing districts which do not operate countywide from the overall county millage limitations." Analysis Reflecting Changes Through June 24, 1967, in House and Senate Resolution of September 1967, page 14 (Supreme Court of Florida Library) (App. I, G).

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[12]Apparently, in some of the drafts of 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. I, G).

The concern of Senator Askew in the original language arises again and is clearly faced by the County in its cause. Here, the voter approved millage of three "small taxing districts ... affect the limitation on the entire county's tax millage when 9/10 of the county had nothing to do with these small districts." This result, which constitutional drafters clearly attempted to avoid, occurs as a direct consequence of a dependent district classification under the statutory scheme of millage limitations challenged in this case. 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.

D. The Statutory Scheme of Special District Classification Relating to Millage Limitation is an Unconstitutional Denial or Impairment of the Direct Constitutional Grant of Ad Valorem Taxing Powers to Counties.

Until the adoption of an ambiguous amendment to the Chapter 200 definition of "voted levies" in 1983, the Legislature's treatment of millage limitations was consistent with the clear language of section 9 of Article VII of the Constitution and the intent of the drafters. Most statutory millage enactments were directed at the scheduling of previously authorized special district millages within the millage framework of the 1968 Constitution revision under the constitutional authority of the Legislature to reduce special district millage existing at the time of the revision. The 1983 ambiguity of the "voted levies" definition combined with the statutory scheme of dependent district classification to raise the constitutional challenge in this cause. To understand the unconstitutional denial or impairment of the direct constitutional grant of ad valorem

taxing power to counties in the statutory scheme of special district classification it is essential to focus on the legislative history of statutory millage limitations.[13]

One year prior to legislative considerations of the 1968 Constitution revision, the Legislature, by general law, imposed a ten-mill limit on all local government millage, except school millage, granting local governments a reprieve from complying until 1970. Ch. 67-395, §§ 1, 4, Laws of Fla.[14]

After the 1968 revision the Legislature exempted the millage levied by special districts providing municipal services in the unincorporated areas from the statutory millage aggregate adopted in chapter 67-395. Ch. 70-368, Laws of Fla. (App. II, C). Such unincorporated area special district millage was in the aggregate subject to an additional statutory millage limit of ten mills regardless of the method of special district creation.[15]

The dependent/independent classification of special district concept first appeared in chapter 73-349, Laws of Florida. (App. II, E). Chapter 73-349 required special district millage, whether countywide or less then a countywide, to be stated in two categories, millage set by the board of county commissioners (dependent special districts)

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[13]It is important to recall that there were no millage limitations in the 1885 Constitution and no requirement for voter approval of special district millage.

[14]Codified respectively at sections 193.321 and 193.324, Florida Statutes (1967). (App II, B).

[15]Article XII, section 2, of the 1968 Florida Constitution authorized the Legislature to allow the continuation of millages by local governments without regard to the article VII, section 9 millage limitations if the millage authority existed under the 1885 constitution.

and millage set by an independent governing board (independent special districts.)[16] The purpose of these categories of special districts was for the financial reporting of special district millage.[17]

In chapter 74-191, Laws of Florida, the Legislature authorized all counties to create "municipal service taxing units" in the unincorporated areas and levy additional ad valorem taxes without voter approval within the constitutional limits of ten mills for municipal purposes.[18] (App. II, F). Chapter 74-191 amended section 200.071(3) to add municipal service taxing units to the ten-mill authorization for "special taxing districts" providing municipal services in the unincorporated areas.[19]

Chapter 82-154, Laws of Florida, established dramatically new statutory millage limitations. (App. II, H) Essentially, special districts were divided into three categories: (1) independent and dependent special districts whose millages was voter approved; (2) independent special districts created prior to the 1968 revision whose millage was not voter approved; and (3) dependent special districts created prior to the 1968 revision

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[16]All special district millage was included "whether authorized by a special act approved by the electors, authorized pursuant to Article XII, Section 15 of the Constitution, or otherwise." Ch. 73-349, § 9, Laws of Fla. (App. II, E).

[17]See § 218.34, Fla. Stat. (1973). (App. II, B). In summary, the four categories were: (1) countywide independent millage; (2) countywide dependent millage; (3) less than countywide dependent millage; and (4) less than countywide independent millage.

[18]Such tax authorization implemented the second sentence of article VII, section 9(b), Florida Constitution, which provides:

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

[19]Constitutionally, a municipal service taxing unit is not a "special district" and its millage authorization is not constitutionally required to be voter approved. See Gallant v. Stephens, 358 So.2d 536 (Fla. 1978).

whose millage was not voter approved. Only this third category of special district millage, dependent special district millage not voter approved, was aggregated with the county purpose millage.[20] The key statutory provision which formed the distinguishing basis between the two categories of dependent special district millage established in chapter 82-154 was the definition of "voted levies" in section 200.001(8)(f), Florida Statutes (1982 Supp.):

> "Voted millage" or "voted levies" means ad valorem taxes authorized by vote of the electors pursuant to s. 9(b) or s. 12, Art. VII of the State Constitution.

Ch. 82-154, § 13, Laws of Fla. (App. II, H).

Thus, under chapter 82-154, the elimination of dependent special district millage from aggregation with the county purpose millage was a consequence of whether the dependent district millage was voter approved or not. If the special district millage was voter approved, its millage was independent from the county purpose millage whether the boundaries of the special district were countywide or less than countywide.[21]

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[20]While section 200.001(8)(d), Florida Statutes (1982 Supp.) aggregated dependent special district millage with county purpose millage, section 200.071(1), Florida Statutes (1982 Supp.), excluded "voted levies" from such aggregation. Ch. 82-154, §§ 13 and 16, Laws of Fla. (App. II, H). Section 200.001(8)(e), Florida Statutes (1982 Supp.) preserved millage authorization of all independent special districts, whether voter approved or grandfathered in under the provisions of article XII, section 2, Florida Constitution. Ch. 82-154, § 13, Laws of Fla. (App. II, H).

[21]The fact that voter approved dependent special district millage was not aggregated with county purpose millage combined with the ability of a county to levy ad valorem taxes within municipal service taxing units within the unincorporated areas without voter approval eliminated the need to include "special taxing districts" in the additional millage authorized in the unincorporated areas in section 200.071(3), Florida Statutes (1982 Supp.). As a consequence, the term "special taxing districts" was stricken from section 200.071(3) in chapter 82-154, Section 16, Laws of Florida. (App. II, H).

A serious ambiguity in the statutory millage limitations provisions was created as a result of the change in the definition of "voted levies" in chapter 83-204, Laws of Florida:

> (f) "Voted Millage" or "voted levies" means ad valorem taxes in excess of maximum millage amounts authorized by law approved for periods not longer than 2 years by vote of the electors pursuant to s. 9(b) or ad valorem taxes levied for purposes provided in s. 12, Art. VII of the State Constitution. "Voted millage" does not include levies approved by voter referendum not required by general law or the State Constitution.

Ch. 83-204, § 9, Laws of Fla. (words underlined were added by § 9, chapter 83-204.) (App. II, J) [codified at § 200.001(8)(f), Fla. Stat. (1983)]. Such ambiguity is the seed of the constitutional controversy that arises in this cause. A narrow interpretation of this change in the definition of voted millage is that the term "voted levies" only applies to: voter approved debt service millage or millage exceeding county purpose limitations for "periods not in excess of two years." A broader interpretation is that the last sentence of the definition provides that special district millage that is constitutionally required to be voter approved is still included in the definition of voted levies and thus excluded from aggregation with county purpose millage.[22]

The Districts at issue here were all created prior to 1983 when the first arguably applicable statutory millage limitation took effect through the ambiguous definition of "voted levies" established in Chapter 83-204. Until the classification of special districts

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[22]With its dual negative phrasing, the last sentence of section 200.001(8)(f) is confusing. It makes sense only upon realizing that the change in the section 200.001(8)(f) definition of "voted millage" was accompanied in the 1983 act by the addition of a separate and different definition of "voted millage" in section 200.085 that was to be used for allowing local governments to exceed a millage limitation enacted for participation in certain revenue sharing if the voters approved it. Cf. the definitions of "voted millage" in Ch. 83-204, §§ 9, 10, Laws of Fla. (App. II, I)

by the Department pursuant to section 189.4035, Florida Statutes, the constitutional impact of the ambiguity in the amendment to the definition of "voted levies" in chapter 83-204 was not felt by counties or special districts.[23] The trigger for the constitutional issue raised in this case is the curtailment of constitutionally authorized and voter-approved ad valorem millage resulting from the dependent classification of the Districts by the Department. The agency action forced the application of the narrow interpretation of the term "voted levies" in section 200.001(8)(f) by the Department of Revenue regardless of the constitutional authorization of the millage levied by the Districts and the County.[24]

As county millage approaches the ten-mill cap, the statutory aggregation requirement and the millage reduction authority granted to a county creates a political dilemma for a county governing board. County governing boards are statutorily responsible for providing a variety of services and facilities with limited revenue. For example, the Sheriff's patrol and other aspects of law enforcement including jails and county and circuit court facilities, are funded at least in part with ad valorem revenues generated on a countywide basis. A dependent district with ad valorem tax authority in a limited geographic area of the county provides services or facilities specially approved

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[23]During the time period between the amendment to the definition of voted levies in 1983 until the effective date of the Uniform Special District Accountability Act in 1990, the County had not included the millage of the Districts with the county purpose millage in reporting to the state's millage overseer. The Department of Revenue never objected. See paragraphs 26-28, Hernando County, Florida v. State Department of Revenue, No. 90-4876 (Fla. 2d Cir.Ct.) (complaint filed Nov. 5, 1990), (App. I, F), which was uncontested by the Department of Revenue.

[24]As a consequence, DOR notified the County pursuant to section 200.065 that it intended to find its millage certification in non-compliance on the basis that its certified county-purpose millage when aggregated with the property millage of the Districts would exceed ten mills in violation of section 200.071.

by a majority of the district's electors. If the aggregate countywide millage and dependent district millage exceed the statutory ten-mill limitation provided in section 200.071(1), the governing board of the county must exercise its authority under section 200.071(2) to reduce the total countywide or dependent district millage, or both.

The governing board of the county is then upon the horns of a dilemma: Should it honor the proposed district millage needed to fund the district functions, and thereby reduce its available countywide millage, or should it reduce the special district millage that the electors had approved? Deferring to the voter approved special district millage diminishes the countywide ad valorem taxing power needed to provide essential countywide services. It is that type of dilemma the constitutional framers sought to avoid in drafting the clear provisions of article VII, section 9 and rejecting the idea that district millage can dilute countywide purpose millage.

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 38 of the 67 counties levy more than 7.5 mills. The survey also shows that there are 117 less then countywide dependent special districts. Report in Brief, Ad Valorem Taxes: Public Reaction & Policy Response, Florida Advisory Council on Intergovernmental Relations, January 17, 1992, T 10-11. (App. II, N).

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. Such analysis ignores the expressed will of the framers that special district millage not be included in county-purpose millage. Such analysis also ignores the

fundamental impairment such choice places upon the direct constitutional grant of ad valorem taxing power to local governments. 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 district whose millage was voter approved.

POINT II

AS TO A DETERMINATION OF MILLAGE LIMITATIONS, THE SPECIAL DISTRICT CLASSIFICATION UNDER THE STATUTORY SCHEME OF CHAPTERS 200 AND 189, FLORIDA STATUTES, IS UNCONSTITUTIONAL SINCE IT CLASSIFIES SPECIAL DISTRICTS IN A MANNER NOT REASONABLY RELATED TO AD VALOREM MILLAGE LIMITATIONS IN VIOLATION OF ARTICLE III, SECTION 11, FLORIDA CONSTITUTION.

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 or other governmental entities may be classified only on a basis reasonably related to the subject of the law.

No similar restriction on general laws relating to "political subdivisions or other governmental entities" existed in the 1885 Constitution.[25] Under this limitation on the power of the Legislature in article III, section 11(b), novel to the 1968 Constitutional revision, all classifications of "political subdivisions or other governmental entities" are required to be on a basis reasonably related to the subject matter of the general law. Otherwise, the proposed legislation is a special law requiring publication of a "notice of

[25]Article III, section 20 of the 1885 Constitution prohibited "special or local laws" on certain enumerated subjects similar to the prohibition in article III, section 11(a) of the 1968 Florida Constitution of "special laws or general laws of local application."

intention to seek enactment" to ensure that the local citizens are aware of the potential legislative change. Art. III, § 10, Fla. Const.[26]

Article III, section 21 of the 1885 Constitution had also specifically required publication of a notice of intent for any "local or special law establishing or abolishing municipalities, or providing for their government, jurisdiction and power, or altering or amending the same..." The legislative history under the 1885 Constitution is replete with examples of the Legislature avoiding local publication of the constitutionally mandated notice of intent to adopt a special act by the use of "population acts" or other classifications of political subdivisions in a manner unrelated to the subject matter of the legislation.

The constitutional limitation on general laws relating to "political subdivisions or other governmental entities" in article III, section 11(a) and the prohibition of certain "general laws of local applications" as well as "special laws" in article III, section 11(a) are clear constitutional restraints on the Legislature in the 1968 revision to prevent the prior abuse of evading the constitutionally required publication of local notice on matters of local concern.[27] A classification of political subdivisions in a general law on a basis not reasonably related to the subject of the law has the pure and single consequence of avoiding the constitutionally mandated local public notice. Under such circumstances,

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[26]Both Florida Constitutions required the publication of notice when a "special act" was to be considered by the Legislature. Policies of the House of Representatives require special procedure for consideration of local bills. See Local Bill Policies and Procedure Manual, Committee on Community Affairs, Florida House of Representatives, Dec. 17, 1990 (on file at the Legislative Library, 7th Floor, the Capitol).

[27]Another reason for such revision in the 1968 Constitution is to prevent the enactment of special acts on subject matters constitutionally prohibited under the disguise of general laws of local application.

unless the subject matter is in an area in which special acts are prohibited, the Legislature may still enact the legislation but it is constitutionally required to adopt a special act and meet the constitutional and statutory process for its enactment.

There are numerous cases documenting legislative efforts to avoid the constitutionally required public notice requirements for local legislation.

In Shelton v. Reeder, 121 So.2d 145 (Fla. 1960), a general law attempted to establish a comprehensive salary scale for county sheriffs and to abolish the fee system method of compensation. The use of population brackets that excluded some counties and provided salary discrepancies for sheriffs of counties with substantially similar population was held to be invalid. This Court agreed that such general law contained arbitrary classifications related to the purpose of the act and thus violated:

> ... Article III, Sections 20 and 21, Florida Constitution [1885], in that it is either a local or special act passed without compliance with the requirements of Section 21, or that it is a general law not of uniform and general operation throughout the state.

121 So.2d at 150 (emphasis in original).

In striking a general population act that applied to a single county, this Court in Housing Authority of St. Petersburg v. City of St. Petersburg, 287 So.2d 307 (Fla. 1974), summarized the constitutional problem as follows:

> There are numerous other cases holding specific acts subject to the constitutional restrictions on passage of special laws. The great bulk of these cases involved so-called population acts applicable to a single county which was not described by name, but instead by population bracket into which it alone fell. This Court has uniformly held these acts invalid where there obviously is no reasonable basis for the classification.

287 So.2d at 311.

In Waybright v. Duval County, 196 So. 430 (Fla. 1940), this Court made the following observations at page 433 in holding invalid still another general law classifying counties by population:

> It should be emphasized that the same end could have been accomplished by the passage of a local bill in the manner prescribed by the Constitution and that those very restrictions were calculated to prevent the enactment of local or special laws under the guise of general ones.
>
> Regardless of the merits of the legislation, which are not under question, and dealing only with the manner of enactment ... we conclude that because of the indistinct relationship between the purposes of the law and the populations of counties where it would be applicable or available, it is in reality a special act, hence cannot stand, having been enacted by the Legislature as a general one.

196 So. at 433 (citations omitted) (emphasis supplied).

Likewise the independent/dependent classifications of special districts provide an "indistinct relationship" between those special districts classified as dependent and the statutory attempts to place ceilings on county-purpose millage. If the millage of a special district, whether voter-approved or grandfathered in, is to be reduced, the constitutionally approved method is a special act where enactment is constitutionally mandated to be preceded by local notice. Any general law classification must be reasonably related to the constitutional framework of local government millage limitations and ad valorem taxation authorization. For example, a special district classification that separates special districts into a classifications of those whose millage was voter approved and those whose millage was authorized without voter approval prior to the 1968 constitutional revision would stand constitutional muster.

There can be no doubt that the statutory 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 for Hillsborough County, 136 So. 334, 337 (Fla. 1931). In discussing a classification for purposes of legislation, this Court in the Anderson v. Board of Public Instruction case stated the following statutory construction standards:

> But when a classification is made, the question always is whether there is any reasonable ground for it, or whether it is only and simply arbitrary based upon no real distinction and entirely unnatural. Classifications must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.

136 So. at 337. (citations omitted). There may be valid purposes to classify special districts based upon the criteria in section 189.403(2) for reasons other than millage limitation. However, there is no "reasonable and just relation" between the independent/dependent classifications of special districts and the aggregation of special district millage with county-purpose millage under the statutory scheme. The Constitution demands that the classification of political subdivisions be only on a basis reasonably related to the subject of the law. The independent/dependent special district classifications under the statutory scheme bear no reasonable relationship to millage limitations and are unconstitutional.

A comparison of the statutory scheme's treatment of the Orange County Library District before and after its revision by the Legislature in 1991 provides an example of the absurd effect the classification scheme has on millage limitations. The Library District, as created in 1980 by special act and approved by the electors, encompassed all of the unincorporated area and contained all of the area of some, but not all, of the county's municipalities. The governing board of the Library District was identical to the

Board of County Commissioners. Ch. 80-555, § 2, Laws of Fla. (App. II, G) After being classified as a dependent district, the Library District charter was amended to provide for the addition of a city council member to the governing board. Ch. 91-372, Laws of Fla. (App. II, K) With such addition, the Library District is now classified as independent under the statutory scheme. The governing Board continues to be controlled by the Board of County Commissioners; the city council member is but one vote among eight. And yet the millage of the revised Library District is excluded from the county purpose millage limitation. What conceivable public policy reason could be imagined to distinguish the Library District before and after such an amendment and justify the differing millage treatment?[28]

A worse problem which is constitutionally mandated and thus cannot be legislatively cured exists in Dade County. The Dade County Charter requires that all districts be governed by the Board of County Commissioners. Art. 1, § 1.01 (A)(11), Dade County Charter. (App. II, L) As a consequence, the Act classifies all such districts as dependent. Thus, all special district millage that is voter approved in Dade County must be aggregated with the county's in determining the county purpose millage. Is it rational for the most populous county in the state to be prevented from having additional constitutionally authorized millage regardless of the desire of the voters paying the tax bill because of a special district legislative classification scheme?

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[28]The statutory scheme also irrationally classifies certain types of districts as independent without regard to the statutory criteria provided in the Act. For example, certain downtown development authorities are statutorily classified as independent notwithstanding the definition criteria in the Act. See § 200.001(8)(e), Fla. Stat. Also, chapter 155 hospital districts are characterized as independent districts by section 189.404(4)(b), but hospital districts may meet the criteria for dependent districts, in that Section 155.12 gives the board of county commissioners approval power over a hospital district governing board.

A more logical classification of special district millage would be the one that was recognized initially in chapter 73-349: whether the special district millage is levied countywide or less than countywide.[29] At least under such a classification scheme a clear distinction of special district millage could be made based on whether the countywide millage was voter approved or not. If not voter approved, then the non-voter approved countywide special district millage could be reduced in the same manner that non-voter approved special district millage levied solely in the unincorporated areas was eliminated in chapter 82-154, Laws of Florida.[30] Thus, the constitutional framework would be honored and the right of the people to approve ad valorem taxation beyond twenty mills would be preserved.[31]

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, this absence of special legislation is precisely one of the constitutional problems

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[29]Such distinction is also practical. Under the current special district millage classification scheme, a voter approved dependent district that levies 2 mills in a small portion of the unincorporated area reduces the county purpose millage to eight mills! The only county alternative is to eliminate the service provided by the special district and desired by the voters or absorb its cost in the county budget and potentially require all taxpayers to fund its cost.

[30]See footnote 20 on page 25 which explained the substitution of the municipal service taxing unit concept for non-voter approved dependent special district millage in the unincorporated area by chapter 82-154.

[31]The 1968 constitutional millage framework can be summarized as follows: no parcel of property can be subject to ad valorem taxes by counties and municipalities in excess of twenty mills, ten mills for county purposes and ten mills for municipal purposes, unless the voters approve the following additional millage: (1) special district millage authorized by law; (2) millage pledged to pay debt service on bonds; and (3) millage beyond the applicable ten mill limits for two years for general county purposes. Art. VII, § 9, Fla. Const. (1968).

of the statutory scheme. Article III, section 11 requires 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. The special act notice or 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). 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.[32] The scheme is not rationally related to general law ad valorem taxation or millage limitations, and is unconstitutional.

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[32]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 levies," which is excluded from the county-purpose millage calculation under Section 200.071. See § 200.001(8)(f), Fla. Stat.

POINT III

THE STATUTORY CONSEQUENCES OF THE SPECIAL DISTRICT CLASSIFICATION UNDER THE STATUTORY SCHEME OF CHAPTERS 200 AND 189, FLORIDA STATUTES, CONSTITUTES AN UNCONSTITUTIONAL TRANSFER OF SPECIAL DISTRICT POWER IN VIOLATION OF ARTICLE VII, SECTION 4.

If the County elects to eliminate the dependent district's millage, the method the First District Court of Appeal sanctions, that act would effectively end the ability of the special district to govern. Thus, the First District Court of Appeal's construction of the statutory scheme leads directly to the violation of article VIII, section 4, Florida Constitution, 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 of 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 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 initiation of a transfer, that is, "by law or by resolution of the governing bodies of each of 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). 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."[33] Thus, the statutory scheme violates either article VII, section 9 or article VIII, section 4.

In Fire Control Tax Dist. No. 7, Trail Park v. Palm Beach County, 423 So.2d 539 (4th DCA 1982), a special act granted the board of county commissioners the power to "create, establish and abolish fire control districts and to fix the boundaries for these districts."[34] Pursuant to this statutory authority, the county established five fire control

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[33]Id. at n. 5. 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 Dist. v. Roberts, 585 So.2d 1110 (Fla. 5th DCA 1991).

[34]Mysteriously, the First District Court of Appeal dismissed this transfer of power argument on the basis that it involves "factual disputes as to each individual district" citing as authority the Fire Control decision. Contrary to the reliance by the First District Court of Appeal, a close reading of such decision reveals that it was decided as a matter of law. Florida law does not require that a transfer of power actually take place before a legislative act that would effect a transfer is reviewable. See the landmark case of Sarasota County v. Town of Longboat Key, 355 So.2d 1197 (Fla. 1975), which construed proposed amendments to the county charter.

districts prior to the 1968 constitutional revision. Subsequently, pursuant to the same special act, the county by resolution first modified the boundaries of two of the fire districts and, by a second resolution, merged the two districts. As recognized by the Court: "Neither the Board of Fire Commissioners for either district nor the voters were consulted." 423 So.2d at 540. The Court held that the provision of the special act which

> allows the Board of County Commissioners of Palm Beach County, Florida to create, establish and abolish Fire Control Tax Districts and fix the boundaries thereof in Palm Beach County without a resolution by the governing body of the areas to be affected or petition of ten percent of the qualified voters in each area is invalid as contrary to Article VIII, Section 4, of the Florida Constitution.

Id. at 541.

It is difficult to imagine a more dramatic transfer of power than the authority to reduce all millage authorization of a special district. Such dependent special district millage reduction power granted to counties in section 200.071(2), Florida Statutes, is in clear violation of the mandated constitutional process of article VIII, section 4.[35]

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[35]At the time of the decision in Fire Control, the provisions of chapter 165, Florida Statutes (1974), provided the statutory procedure for the dissolution of special districts. Currently, the special district dissolution provisions of section 189.4043 control. Such statutory procedure provides that the charter of any special district may be revoked and the special district dissolved by either a special act of the Legislature or a resolution of the governing body of the district.

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 certain special districts. This impairment of the County's 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.

This Court is requested to declare unconstitutional the independent/dependent classifications of special districts for the purpose of the determination of dependent special district millage and for the purpose of the determination of any limitations of the constitutional authority of a county to levy ad valorem taxes within the constitutional limit of ten mills for county purposes. In the alternative, this court is requested to construe the term "voted levies" in section 200.001(8)(f) and section 200.071 to include special district millage approved by the electors pursuant to article VII, section 9 of the Florida Constitution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petitioner's Brief on the Merits and Appendices I and II has been furnished by United States Mail to Alfred O. Bragg, III and G. Steven Pfeiffer, Esquire, Office of the General Counsel, Department of Community Affairs, 2740 Centerview Drive, Tallahassee, Florida, 32399-2100; and Joseph C. Mellichamp, III, Department of Legal Affairs, Office of the Attorney General, The Capitol, Tax Section, Tallahassee, Florida, 32399-1050, this 22nd day of February, 1993.

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