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 REPLY BRIEF

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

ROBERT L. NABORS
Florida Bar No. 097421
SARAH M. BLEAKLEY
Florida Bar No. 291676
THOMAS H. DUFFY
Florida Bar No. 470325
Nabors, Giblin & Nickerson, P.A.
315 South Calhoun Street
Barnett Bank Building, Suite 800
Tallahassee, Florida 32302
(904) 224-4070

ROBERT BRUCE SNOW
Florida Bar No. 134742
Hernando County Attorney
112 North Orange Avenue
Brooksville, Florida 34601
(904) 796-1441

Attorneys for Petitioner

TABLE OF CONTENTS

PAGE

TABLE OF CITATIONS iii

PREFACE iv

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. 1

A. While the 1968 Constitutional Revision Directly Granted Ad Valorem Taxing Power to Counties, Such Direct Grant is Not Self-executing. 1

B. The Controlling Language in the 1968 Constitutional Revision Fundamentally Differs from that in the 1885 Constitution and Additionally Provides Constitutional Millage Limits. 3

C. The Rejected Amendments to Article VII, Section 9 in the Record of Proceedings are Consistent with the Constitutional Interpretation of the County. 4

D. The Direct Grant of Ad Valorem Taxing Power to Counties in the 1968 Constitutional Revision is Limited to County Purpose Millage. The 1968 Constitution Expressly Requires Legislative Authorization for Counties to Levy Ad Valorem Taxes Within the Constitutional Millage Limits Fixed for Municipal Purposes. 6

E. Nowhere in Article VII, Section 9 is a Distinction Made Between Independent or Dependent Districts and the Constitutional Millage Limitations Incorporated Into the 1968 Revision Clearly Distinguishes Between County Purpose Millage and Special District Millage. 7

PAGE

F. Incorporation of Millage Limitations in the 1968 Constitutional Revision Renders Unnecessary the Prior Legislative Efforts to Aggregate Special District Millage for those Special Districts Created after the 1968 Constitutional Revision. 11

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. 14

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 VIII, SECTION 4. 16

POINT IV

THIS CAUSE HAS ALWAYS BEEN JUSTICIABLE. 17

CERTIFICATE OF SERVICE 21

TABLE OF CITATIONS

PAGE

CASES

Barr v. Watts,
70 So.2d 347 (Fla. 1953) 18

Department of Education v. Lewis,
416 So.2d 455 (Fla. 1982) 18

Department of Revenue v. Leon County,
560 So.2d 318 (Fla. 1st DCA 1990) 17

Department of Revenue v. Markham,
396 So.2d 1120 (Fla. 1981) 18

Eastern Air Lines, Inc. v.
Department of Revenue,
455 So.2d 311 (Fla. 1984) 15

Gallant v. Stephens,
358 So.2d 536 (Fla. 1978) 7-9

Gallie v. Wainwright,
362 So.2d 936 (Fla. 1978) 19

Hernando County v. State, Dept. of Revenue,
No. 90-4876 (Fla. 2d Cir. Ct.
complaint filed Nov. 5, 1990) 20

Jones v. Department of Revenue,
523 So.2d 1211 (Fla. 1st DCA 1988) 18

Miller v. Higgs, 468 So.2d 371 (Fla. 1st DCA),
rev. denied, 464 So.2d 556 (Fla. 1985)
disapproved, other grounds Capital City
Country Club v. Tucker, 613 So.2d 488 (Fla. 1993) 18

Sarasota County v. Town of Longboat Key,
355 So.2d 1197, 1201 (Fla. 1978) 16

St. Johns River Water Management Dist.
v. Deseret Ranches of Florida, Inc.,
425 So.2d 1067 (Fla. 1982) 15

PAGE

State ex rel. Dade County v. Dickinson,
230 So.2d 130 (Fla. 1969) 6, 7, 17

State ex rel. Utilities Operating
Co. v. Mason,
172 So.2d 225 (Fla. 1965) 19

LAWS OF FLORIDA

Chapter 67-395 12

Chapter 67-395, Section 4 12

Chapter 69-55 12

Chapter 83-204 14

FLORIDA STATUTES

Section 125.01(1)(b) 17

Section 125.01(1)(q) 6-8, 19

Section 125.01(1)(r) 7

Section 166.021(2) 9

Section 189.4035(6) 19

Section 200.001(8) (Supp. 1982) 13

Section 200.001(8)(f) (Supp. 1982) 13

Section 200.065 2

Section 200.071(1) (1969) 12, 13

Section 200.071(1) (Supp. 1982) 13

Section 200.071(3) 19

PAGE

CONSTITUTIONAL PROVISIONS

Article III, section 11(a)(2) 3

Article III, section 11(b) 15

Article VII, section 1(a) 4

Article VII, sections 2, 3, 4, and 6 3

Article VII, section 9 . . . . . passim

Article VII, section 9(a) 4, 6, 7

Article VII, section 9(b) 6, 8, 9, 13

Article VIII, section 4 16

Article IX, section 5, 1885 Constitution 3

Article XII, sections 2 and 15 . . . . . 7, 12

MISCELLANEOUS

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, 1968, page 2 (located in file 35, Supreme Court of Florida Library, Room 314.) 5

Transcript of Public Hearing of December 2, 1966, Constitutional Revision Commission, at 1095-96, Vol. 59, Room 314, Supreme Court of Florida Library 4

PREFACE

The abbreviations and terms used in the Initial Brief will be continued in this Reply Brief. The Department and Amicus DOR will be collectively referred to as the "State." References to the Appendix to the Initial Brief will be so indicated. Attached to this Reply Brief as an appendix under Tab A is a copy of section 200.071(1), Florida Statutes (1969), cited in this Reply Brief and frequently by the State in their Answer Brief.

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.

For clarity and brevity, this reply of the County under this Point to the argument of the Department and the DOR will be organized under subheadings.

A. While the 1968 Constitutional Revision Directly Granted Ad Valorem Taxing Power to Counties, Such Direct Grant is Not Self-executing.

The County does not maintain that the direct constitutional grant of ad valorem taxing power to counties in article VII, section 9, is self-executing. Obviously, under the 1968 constitutional scheme, the Legislature is required to establish uniform assessment and collection procedures. The State apparently fails to understand the County's constitutional argument. To repeat, 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."[1]

The fact that the Legislature is required to implement county ad valorem taxing power by establishing uniform assessment and collection procedures does not diminish the impact of the direct constitutional grant of ad valorem taxing power to local governments in the 1968 revision. The fundamental point that apparently escapes the State is that the right to establish uniform taxation principles does not carry with it the right to impair or diminish the county purpose ad valorem taxing capacity of counties. Such ad valorem taxing capacity within a ceiling of ten mills for county purposes is constitutionally granted and thereby constitutionally preserved. The limitation on the

---

[1]See page 16 of the Initial Brief.

Legislature in article VII, section 9, does not touch on its ability to establish uniform assessment and collection procedures but restricts its power to diminish the ad valorem taxing powers directly granted to counties in the 1968 constitutional revision.

The County does not argue that the Legislature has "no power" or "no say" over local government ad valorem taxation. The characterization of the County's argument as "radical" and the tenor of the State's "the sky will fall in" argument underscore the fundamental misunderstanding of the State of the historic changes incorporated in the 1968 constitutional revision. The clear language of article VII, section 9 of the 1968 constitutional revision does not render counties free agents in the exercise of the power of ad valorem taxation. Obviously, for example, the Legislature retains the power to require the millage disclosure required under the TRIM process.[2] What the Legislature is powerless to do in its labor to establish uniform taxation and assessment procedures is to impair or diminish the county purpose ad valorem taxing capacity of counties.

Under the 1968 constitutional scheme, local governments cannot exceed the millage ceilings incorporated into article VII, section 9. However, within such constitutional millage limitations, the direct constitutional grant of ad valorem capacity to counties is an express limitation on the power of the Legislature. While the Legislature has a constitutional directive to authorize county ad valorem taxation by the establishment of uniform assessment and collection provisions, it does not possess the constitutional power to diminish or impair the county purpose ad valorem taxing capacity.[3]

---

[2] Truth in Millage: see § 200.065, Fla. Stat.

[3] Although never faced, a constitutional confrontation would arise if the Legislature refused to authorize county ad valorem taxation by failing to provide uniform assessment and collection procedures. The appropriate constitutional response would be a mandamus action against the Legislature to force legislative authorization.

The Revision Commission clearly did not intend to remove the power of the Legislature to provide a uniform method for the collection and assessment of ad valorem taxes. Other constitutional provisions mandate general legislation to achieve uniformity in the ad valorem collection and assessment provisions.[4] However, just as clearly, the Revision Commission constitutionally preserved and protected the ad valorem taxing power of counties under a constitutional ceiling of ten mills for county purposes.

B. The Controlling Language in the 1968 Constitutional Revision Fundamentally Differs from that in the 1885 Constitution and Additionally Provides Constitutional Millage Limits.

Much ado is made by the State in a comparison of the local government taxing provisions of the 1885 Constitution with that of the 1968 constitutional revision. The focus is to compare the phrase "shall authorize" in the 1885 Constitution with the phrase "shall be authorized" in the 1968 revision. The immediate and unshakable conclusion of the State is that there is no difference.[5] However, a side-by side comparison of the complete constitutional taxing provisions shouts a different conclusion.

---

[4] See, e.g., taxation principles established in the following constitutional provisions: Art. VII, §§ 2 (uniform rate); 3 (property tax exemption); 4 (just valuation assessment); and 6 (homeland 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..."

[5] The Department asserts in footnote 10 on page 10 of its Answer Brief:

> There is no difference between the substance of this language and that of the corresponding passage in the Constitution of 1885. The resemblance in meaning is unmistakable.

The Amicus DOR states without qualification: "The operative language is the same ..." (page 4 of its Answer Brief).

Art. IX, § 5, 1885 Constitution	Art. VII, § 9, Revision of 1968
The legislature shall authorize the several counties and incorporated cities or towns in this State to assess and impose taxes for county and municipal purposes, and for no other purposes, and all property shall be taxes upon the principles established for State taxation.	(a) Counties ... and municipalities shall, and special districts may, be authorized by law to levy ad valorem taxes ... for their respective purposes ... (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 ... shall not be levied in excess of the following millages ... : for all county purposes, ten mills; for all municipal purposes, ten mills; ... and for all other special districts a millage authorized by law approved by vote of the electors .... A county furnishing municipal services may, to the extent authorized by law, levy additional taxes within the limits fixed for municipal purposes.

This comparison of the entire constitutional taxing provisions rather than isolated phrases leads to the inescapable conclusion that ad valorem taxing power and capacity is directly granted to counties in the 1968 constitutional revision.[6] Such constitutional grant is complete in its scope and detailed. The only missing detail is the establishment by the Legislature of uniform assessment and collection procedures.

C. The Rejected Amendments to Article VII, Section 9 in the Record of Proceedings are Consistent with the Constitutional Interpretation of the County.

The salient moment in the colloquy between Ralph Marsicano and Judge Sebring during the Constitutional Revision Commission debate is the caution by Judge Sebring that substitution of the word "shall" for "may" has "far-reaching implications" beyond

---

[6] Under the 1968 constitutional revision, when the taxing power is reserved the language used is equally clear. Compare article VII, section 1(a): "All other forms of taxation shall be preempted to the state except as provided by general law." Compare also article VII, section 9(a) "[c]ounties ... and municipalities ... may be authorized by general law to levy other taxes ..."

"going back to the present constitution."[7] As Judge Sebring pointed out, counties and municipalities had no inherent right to tax under the 1885 Constitution. Use of the word "shall" had far-reaching implications and such an amendment changed article VII, section 9, so that it would not be "exactly like the present constitution." (Initial App. I, H-4)

The Department concludes that the amendments to article VII, section 9, that were rejected by the Legislature "leaves us with a picture which is somewhat equivocal" and "underscores the futility of generalizations concerning the intent of the Legislature based on its rejection of a small number of amendments." This conclusion of the Department misses the point. All rejected amendments have a common characteristic. Each would change the constitutional construction of article VII, section 9, from the construction asserted by the County in this case.

The rejected amendments of Representative Yarborough and Representative Mann discussed on pages 17 and 18 of the Initial Brief would have granted the Legislature the power to limit or diminish county purpose millage. The requested amendment of Representative Brantly and Representative Graham discussed on page 13 of the Department's Answer Brief would have made the power to levy ad valorem taxes by counties and municipalities self-executing, thereby ignoring the necessity for the Legislature to establish uniform assessment and collection procedures. The rejected amendment by Representative Gissendanner discussed on page 13 of the Department's Answer Brief would have altered the separate millage authority provided for each

[7] The County's omission of a portion of Marsicano's response was an unintentional drafting error for which counsel apologizes. However, such omission does not change the thrust of the colloquy and the significance of the correction by Judge Sebring of the representation of Mr. Marsicano of the implications of his one word amendment.

category of local government in article VII, section 9(a). (App. I, H-1; pages 50-54, Appendix to Brief of the Department).

D. The Direct Grant of Ad Valorem Taxing Power to Counties in the 1968 Constitutional Revision is Limited to County Purpose Millage. The 1968 Constitution Expressly Requires Legislative Authorization for Counties to Levy Ad Valorem Taxes Within the Constitutional Millage Limits Fixed for Municipal Purposes.

The County did not mention State ex rel. Dade County v. Dickinson, 230 So.2d 130 (fla. 1969), in its Initial Brief simply because that case has little, if any, reference to the constitutional issues before this Court.

This Court in Dade County v. Dickinson was faced with the application of the millage framework under the 1968 constitutional revision to Dade County. Dade County argued that because of its constitutional charter it had the authority to levy 20 mills for county purposes and municipal purposes regardless of the millage levy by municipalities within Dade County.[8] This Court looked to the legislative millage environment at the time of the approval of the 1968 revision to conclude that the millage ceiling applicable to both Dade County and the municipalities within the county was 20 mills, not 30 mills as Dade County had argued.[9]

The Dade County v. Dickinson case is an important case in understanding the second sentence of section 9(b) of article VII. However, its holding offers little

---

[8] The requirement of legislative authorization for a county to have the capacity to levy ad valorem taxes within the constitutional municipal purpose ceiling, or as one of the requirements for special district millage, is clear. Art. VII, § 9, Fla. Const.

[9] The holding of this Court in Dade County v. Dickinson has been applied to the reconciliation of millage limits within a municipal service taxing unit that includes municipal boundaries. Section 125.01(1)(q) provides: "the millage levied on any parcel of property for municipal purposes by all municipal service taxing units and the municipality may not exceed 10 mills."

assistance in understanding the direct grant of county purpose millage embodied in article VII, section 9, of the 1968 constitutional revision.

E. Nowhere in Article VII, Section 9 is a Distinction Made Between Independent or Dependent Districts and the Constitutional Millage Limitations Incorporated Into the 1968 Revision Clearly Distinguishes Between County Purpose Millage and Special District Millage.

The construction of the State of the article VII, section 9, millage limitations is mind numbing. Such construction and supporting argument is completely blind to the clear and direct language contained in the 1968 constitutional revision.

In light of the Dade County v. Dickinson decision, discussed previously, the ad valorem burden on property for local government services is limited to ten mills for county purposes and ten mills for municipal purposes unless the voters consent to additional millage.[10] Under the 1968 constitutional revision, voters can approve millage in excess of 20 mills under the following circumstances: (1) for payment of bonds; (2) for periods not longer than two years; and (3) for special district millage.[11] Under this constitutional millage framework, no parcel is subject to an ad valorem millage burden for local government services in excess of 20 mills unless the voters approve.

The State strains for a constitutional interpretation that somehow sanctions voter approval of additional millage for independent special districts while rejecting voter

---

[10] A municipal service taxing unit is the authorization for all counties to levy taxes within the constitutional limit fixed for municipal purposes under the second sentence of article VII, section 9. See section 125.01(1)(q) and (r) for statements of legislative intent. Such taxing units are not special districts within the contemplation of the special district millage provisions of article VII, section 9(a) and no referendum is constitutionally mandated. Gallant v. Stephens, 358 So.2d 536 (Fla. 1978).

[11] This analysis obviously does not include school district millage. Additionally, special district millage was not required to be voter approved under the 1885 Constitution. Such special district millage was continued under constitutional scheduling provisions until reduced or restricted, or withdrawn by law. Art. XII, §§ 2 and 15, Const. (1968).

approval of additional millage for dependent special districts. At the same time, the Department admits that, "The independent special district as we know it was nonexistent when the Constitution of 1968 was ratified."[12] Then, inconsistently, Amicus DOR presumes that the County's "entire argument presumes the Districts are unalterably independent."[13] In this confusion, Amicus DOR completely misreads the holding of this Court in Gallant v. Stephens, 358 So.2d 536 (Fla. 1978), as support for its constitutional fantasy.

In Gallant v. Stephens, this Court construed the constitutionality of the levy of ad valorem taxes without referendum within the boundaries of a municipal service taxing unit created under section 125.01(1)(q). The constitutional issue was whether the taxing unit was a special district within the contemplation of article VII, section 9, and thereby requiring voter approval prior to any ad valorem levy or whether the taxing unit was the authorization by law for all counties to levy ad valorem taxes within the limits fixed for municipal purposes within the contemplation of the second sentence of article VII, section 9(b). This Court in Gallant v. Stephens agreed that special districts were separate and distinct units of local government and stated:

> Wholly independent of this county taxing power is the authority provided for "special districts" to meet the need for special purpose services in any geographic area which may (but need not) be within one county, under legislatively-set and voter-approved millage limitations.

(368 So.2d at 540).

Based upon an apparent misunderstanding of the Gallant v. Stephens holding, Amicus DOR concludes at page 47 of its brief that: "a district created by special act of the Legislature, wherein the membership of the governing body of that district is

---

[12] Page 24 of the Department's Answer Brief.

[13] Page 43 of DOR's Answer Brief.

identical to the governing body of the county" could not be a special district contemplated within article VII, section 9(b). A leap is then made by Amicus DOR that only independent districts are referred in article VII, section 9. Whereupon, Amicus DOR on page 48 dramatically asks whose millage is the special district levying? The simple and obvious answer is that special districts levy special district millage, which the 1968 constitutional revision requires to be voter approved. There is no constitutional distinction or qualification for special district millage other than authorization by law and approved by the voters. Article VII, section 9 does not recognize, sanction, or even mention an independent or dependent classification of special district millage.

In addition to a misunderstanding of the Gallant v. Stephens holding, the root of the confusion of both the Department and Amicus DOR is based in two additional constitutional misinterpretations.

First, Amicus DOR mysteriously concludes on page 29 of its brief that if the purpose served by the special district is a municipal purpose, the voter approved special district millage is within the constitutional limits of ten mills for municipal purposes, and if the purpose of the special district serves a county purpose it is within the constitutional ten mills for county purposes. Such statements ignore common sense and the plain meaning of common terms. It is impossible to conceive a local government service to be provided by a special district that would not constitute a municipal or county purpose.[14] If a special district is authorized to provide a service by legislative act that could have been provided by either a county or city, or both, the service to be provided is a special district purpose. To the extent the special district is authorized to

---

[14] Section 166.021(2) defines the term "municipal purpose" to mean "any activity or power which may be exercised by the state or its political subdivisions." The absurdity of DOR's argument is obvious -- all governmental services constitute either a state, county or municipal purpose. Otherwise, the service serves a purely private purpose and cannot be provided with public funds.

levy ad valorem taxes, the millage is required to be voter approved. Such is the constitutional millage protection approved by the people in the 1968 constitutional revision.

Second, Amicus DOR concludes on page 44 of its Answer Brief that the voters do not understand when they approve special district millage that such millage is "in addition to that already imposed for county purposes." (Emphasis in Original) No authority or support for this patronizing proposition is set forth. Such tortured logic and the argument on page 43 of the Answer Brief of Amicus DOR that a county can avoid the ten-mill ceiling for county purposes by the "taxation chicanery" of creating dependent special districts underscores the fundamental misunderstanding.

The constitutional millage framework of the 1968 constitutional revision reserves to the people the power to approve millage that increases the tax burden for local government services beyond 20 mills. If the affected voters approve, what "taxation chicanery" occurs if the cost of a specific service is placed on a limited geographic area rather than being absorbed by all property taxpayers countywide? If the affected voters approve, why should the county purpose millage capacity of the entire county be diminished by a special district levy in a small geographic area to provide a special service? Using the words of then Senator Askew, the County asks: Why should the county purpose taxing power be diminished by allowing "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?"[15]

Apparently the State's fear of taxation chicanery is eliminated if the additional special district millage placed on the ballot is to seek approval of a levy by a special district classified as independent under the statutory scheme. Under such blind

---

[15] See the discussion of the Askew inquiry on page 21 of the Initial Brief.

confidence in the statutory scheme, the State asserts that the voters then know what they are doing -- approving special district millage in addition to the county purpose millage. What nonsense! The argument that voters know the governance structural differences of special districts under the statutory scheme when they approve special district millage throws common sense out the window. What every voter knows when he or she votes for special district millage is that they are voting for additional property taxes.[16] Requiring voter approval of additional special district millage is precisely the millage limitation framework forged into the 1968 constitutional revision.

F. Incorporation of Millage Limitations in the 1968 Constitutional Revision Renders Unnecessary the Prior Legislative Efforts to Aggregate Special District Millage for those Special Districts Created after the 1968 Constitutional Revision.

The fundamental error of the State in its legislative history analysis is its failure to distinguish special district millage authorized under the 1885 Constitution with special district millage authorized and voter approved under the 1968 revision. No voter approval of special district millage was required under the 1885 Constitution. In stark contrast, the 1960's ad valorem controversy was addressed in the millage limitation framework codified in article VII, section 9 of the 1968 constitutional revision. A local government millage ceiling was established at 20 mills -- 10 mills for county purposes and 10 mills for municipal purposes. All additional local government millage, including special district millage, required voter approval.

---

[16] As we see from the legislative history, the impact of special district millage aggregation can change with a whim of the Legislature. Under the statutory scheme, the taxpayers of the Orange County Library District originally approved dependent special district millage. However, the addition of a single city council member to the governing board changed the statutory classification to independent and thus removed the prior approved special district millage from aggregation with the County's county purpose millage. See discussion of the Orange County Library District on pages 34 and 35 of the Initial Brief.

Thus, all special district millage levied subsequent to the 1968 constitutional revision is required to be voter approved. In contrast, special district millage existing on the effective date of the 1968 constitutional revision was subject to restriction or reduction by law pursuant to the constitutional scheduling provisions. Art. XII, §§ 2 and 15, Fla. Const. (1968).

The State places great reliance on the existence of the millage aggregation requirements of Chapter 67-395, adopted simultaneously with the effective date of the 1968 revision, and Chapter 69-55, adopted subsequent to such effective date. Such reliance is misplaced.

First, it is accurate that Chapter 67-395 provided for an aggregation of county and special district millage authorized prior to the effective date of the 1968 constitutional revision. However, Section 4 of Chapter 67-395 continued a greater rate of taxation until January 1, 1970, for any county if such aggregation exceeded 10 mills. It is difficult to gleam support for the State's construction of article VII, section 9 from the struggle of the Legislature to address ad valorem millage limitations in Chapter 67-395. A more compelling argument is that the preservation of 10 mills for county purposes in any special district millage aggregation in Section 4 of Chapter 67-395 supports the interpretation of the County that article VII, section 9, constitutionally preserves the county purpose millage taxing capacity of counties.

Second, that portion of Chapter 69-55, Laws of Florida, codified as section 200.071(1) (1969) excepted from the special district millage aggregation "that millage authorized in Section 9, Art. VII of the state constitution." (See Tab A to this Reply Brief) Voter approved special district millage is authorized in section 9 of article VII

of the 1968 constitution.[17] Thus, under section 200.071(1) (1969), the special district millage that was aggregated with the county purpose millage was only that millage authorized prior to the 1968 constitutional revision.

The special district millage aggregation exception in section 200.071(1) (1969), of millage authorized by article VII, section 9 is similar to the "except for voted levies" exception to the millage aggregation provisions of section 200.071(1) (Supp. 1982). As discussed on page 25 of the Initial Brief, the definition of "voted levies" in section 200.001(8) (Supp. 1982) included voter approved special district millage.

The State's analysis of the history of special millage aggregation is fundamentally flawed by the failure to recognize the constitutional distinction between voter approved special district millage authorized by article VII, section 9 of the 1968 constitutional revision and special district millage existing on the effective date of the revision. The misconstruction of the State of the legislative history of special millage aggregation results in numerous erroneous assertions that, at the time the Districts were created, their voter approved millage was required to be aggregated with the County's county purpose millage. Ignored in this analysis is section 200.071(1), Florida Statutes (Supp. 1982), which excluded "voted levies" from such aggregation and the definition of "voted levies" in section 200.001(8)(f), Florida Statutes (Supp. 1982), which included voter authorized millage pursuant to section 9(b), article VII. As discussed on page 26 of the Initial Brief, it was the ambiguity resulting from a change in the definition of "voted

---

[17] The Department admits on page 21 of its Answer Brief that the deletion of the phrase "including special taxing districts lying wholly within a county" as a qualification of the term "county purpose" during the constitutional debate of article VII, section 9 created an ambiguity. Such deletion occurred as a result of the Askew inquiry discussed on page 21 of the Initial Brief. However, its argument that section 200.071(1) (1969) "lays that ambiguity to rest" is not supportable under the exception in section 200.071(1) (1969) to special district millage aggregation for any millage authorized by article VII, section 9 of the 1968 Constitution.

levies" in Chapter 83-204, Laws of Florida that arguably resulted in the aggregation of voter approved special district millage with county general purpose millage. The constitutional issue faced under their Point I is whether aggregation of voter approved special district millage with county purpose millage is an unconstitutional impairment of the direct grant of county purpose millage provided in the 1968 constitutional revision. The argument of the State on the legislative history of special millage aggregation is unresponsive.

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 County does not argue that special district millage can only be decreased by the adoption of a special act preceded by constitutionally mandated local notice as asserted by the Department on page 29 of its Answer Brief. Nor does the County argue that voter approval gives special district millage "perpetual existence" as asserted on page 46 of the Answer Brief of Amicus DOR. The fundamental point missed by the State is that the withdrawal or reduction of special district millage must be done constitutionally.

To summarize, if a special act is not the chosen legislative vehicle, the general law is constitutionally required to classify special districts on a basis reasonably related

to millage aggregation or special district millage reduction.[18] The statutory scheme is patently arbitrary as it relates to the subject of special district millage aggregation. As such, it is an impermissive general law relating to political subdivisions in avoidance of the constitutional local notice required for special acts.[19]

The State founded its reasonable classification argument on the premise that dependent special districts are surrogates or "alter egos"[20] of the County and, as a consequence, the millage is appropriately aggregated with county purpose millage. This argument's foundation crumbles under the weight of an examination of the Orange County Library District example. The abrupt change in millage consequence from a dependent to independent classification by the addition of one city council member to the Library District governing board is a dramatic example of the arbitrariness of the statutory scheme for purposes of millage aggregation. The argument that the additional city council member renders the Library District independent because such member may hold "the swing vote" on a controversial issue is a weak response in justification of an absurd result. To argue that the Library District is now independent and not "controlled" by the county commission as a result of one vote out of eight jars any sense of logic. Under the millage limitations approved in the 1968 constitutional revision, the

---

[18] On page 33 of the Initial Brief, the County suggested that separation of special districts into classifications of those whose millage was voter approved and those whose millage was authorized without voter approval prior to the 1968 constitutional revision was an example of a special district millage classification that would meet constitutional standards.

[19] The St. Johns River Water Management Dist. v. Deseret Ranches of Florida, Inc., 425 So.2d 1067 (Fla. 1982), case dealt with whether a particular act was a special act or general law and is irrelevant to the issue in this cause. Eastern Air Lines, Inc. v. Department of Revenue, 455 So.2d 311 (Fla. 1984), dealt with a classification under an equal protection challenge and not a construction of the reasonable classification of governmental entities under article III, section 11(b).

[20] See page 32 of Amicus DOR's Answer Brief.

guardian of property from oppressive property taxes is the voter. All special district millage is constitutionally required to be voter approved. No manner of county commission control can avoid this power reserved to the people.

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 VIII, SECTION 4.

The Department argues curiously that no transfer has occurred since it is "revokable."[21] It is assumed that this means that if the County was not "intransigent" and agreed with the Department, no transfer of power need occur. Such argument is of small constitutional comfort to the Districts. In this case, the protection of article VIII, section 4 serves the Districts, not the County. It is their power to govern and establish necessary millage than its being transferred to the sole discretion of the County. Placing the voter approved taxing authority of the Districts at the mercy of the County is the essence of a transfer of power within the meaning of article VIII, section 4.

The Department does not address the specific language of article VIII, section 4, which states that transfers of power from one body politic to another cannot be effected without the expressed will of the voters. Nor does the Department counter the effects of the opinion of this Court that while the Legislature may sanction alternatives to voter approval, it must do so specifically. Sarasota County v. Town of Longboat Key, 355 So.2d 1197, 1201 (Fla. 1978).

---

[21] See page 35 of the Department's Answer Brief.

POINT IV

THIS CAUSE HAS ALWAYS BEEN JUSTICIABLE.

As it did by motion and in its brief on the merits before the District Court of Appeal and in its Brief on Jurisdiction to this Court, the Department attempts to concoct an argument based on the theory that this case is not appealable. This approach has been through several incarnations, and now is phrased in terms of justiciability, which typically has three components: standing, ripeness and mootness.

In arguing that the County has no standing, the Department has cited cases that establish conclusively a point that is not an issue here: that government officials may not challenge the constitutionality of statutes they are by law required to administer. As is obvious in this case, the County is not the entity that applies the statutory scheme; the statutes call for the Department to fulfill that role. In order to defeat standing on this ground, the Department would have to cite a case that holds that a county that has been damaged by operation of a statute that a state agency applies against it cannot challenge the constitutionality of that statute. The Department has cited no such case, and in fact, there is no general prohibition to a county government challenging a state statute as unconstitutional. See, e.g., Department of Revenue v. Leon County, 560 So.2d 318 (Fla. 1st DCA 1990) (affirming a trial court order that invalidated a state service charge deduction from local gasoline tax revenues).[22] Counties have home rule power to take appeals from the adverse rulings of any tribunal. § 125.01(1)(b), Fla. Stat.

Instead of cases on point, the Department has cited several decisions in which an individual officer did not want to exercise a statutory duty and sued to have the statute

---

[22] This case presents no procedural differences than were present in State ex rel. Dade County v. Dickinson, 230 So.2d 130 (Fla. 1969), a case upon which the Department relies elsewhere in its brief, where the County challenged the state Comptroller's decision not to allow it to levy more than 10 mills of ad valorem taxation.

declared unconstitutional. That is not the situation here, where the Department is the entity charged with applying the statute, and the County is the object of its application.[23]

An examination of Jones v. Department of Revenue, 523 So.2d 1211 (Fla. 1st DCA 1988), demonstrates how the difference in status determines standing. Jones was a property appraiser who challenged the Department of Revenue's methodology in estimating counties' assessment levels by arguing that the statute empowering DOR to estimate the levels of assessment was an unlawful delegation of power from the Legislature. The First District Court of Appeal held that Jones had no standing to challenge the statute in his role as property appraiser, in which role he had suffered no injury, but did have standing as a taxpayer, who could have been injured in the form of higher taxes. 523 So.2d at 1214.[24] Hernando County has standing because the statutory scheme calls for the County to reduce the amount of revenue it has to use in the entire county in order to fund the special needs of smaller areas, or to let the smaller areas (i.e., special districts) wither -- which would mean that the County would have to provide the services provided by the special districts. Either way, the result is lower tax revenues for county purposes, which is an injury to the County.

Furthermore, the constitutional status of counties in the area of ad valorem taxation confers standing on the County to attack the statutory scheme, which diminishes its authority to levy ad valorem taxes. The heart of the County's argument is that the County has constitutional authority, pursuant to article VII, section 9, Florida

---

[23] Thus, Department of Education v. Lewis, 416 So.2d 455 (Fla. 1982); Department of Revenue v. Markham, 396 So.2d 1120 (Fla. 1981); Barr v. Watts, 70 So.2d 347 (Fla. 1953); and Miller v. Higgs, 468 So.2d 371 (Fla. 1st DCA), rev. denied, 464 So.2d 556 (Fla. 1985) disapproved, other grounds Capital City Country Club v. Tucker, 613 So.2d 488 (Fla. 1993), have no bearing on the issue before the Court.

[24] Miller v. Higgs, a case relied upon by the Department, also supports this point, though in that case there was no allegation that Higgs, the property appraiser, qualified as a taxpayer. 468 So.2d at 375.

Constitution, to levy 10 mills of ad valorem tax, and the Legislature may not restrict or impair that authority.

The Department also argues that the County can avoid having to aggregate county-purpose and special district millage by adopting "solutions" to the predicament the statutory scheme inflicted on the County. The County can convert the special districts to independent or can, as the County has done with two districts, fund them through Municipal Services Taxing Units (MSTUs).

There are three problems with this approach. First, it invades the discretionary province of county government; under separation of powers a court should not order a county to seek one solution to a problem simply in order to save an otherwise unconstitutional statute. Second, the County cannot necessarily convert a special district, especially one that was established by the Legislature. See § 189.4035(6), Fla. Stat. Third, the MSTU approach would restrict the County's ability to levy MSTU millage, which is capped at 10 mills for all MSTUs in each county. §§ 125.01(1)(q), and 200.071(3), Fla. Stat.

Finally, the Department has cited no case that supports its position that all "legal and political" remedies be exhausted before the constitutionality of a statute is challenged. The cases it does cite are not remotely on point.[25]

Finally, the Department appears to suggest in footnote 9 at page 7 of its brief that the case somehow is moot because the County has funded two of the special districts by means of establishing MSTUs. First of all, the fate of the third special

---

[25] State ex rel. Utilities Operating Co. v. Mason, 172 So.2d 225 (Fla. 1965), held that a utility had not suffered an injury by means of a statute that had never been applied. Id. at 229. Gallie v. Wainwright, 362 So.2d 936 (Fla. 1978), held that a state prisoner who had not applied to have his civil rights restored when he had been released from prison could not challenge the procedures of the rule that allowed such an application. Id. at 939.

district still has not been settled. The Department notes in its statement of the facts, at pages 1-2 of its brief, that two of the districts now are funded by MSTUs, and then argues in Section I of its brief that the case is moot because the problem is solved. That argument does not address the situation of the Spring Hill district, which remains dependent by Department decision.

Second, the Department ignores the fact that its decision in 1990 caused the Department of Revenue to threaten to deny the County's millage certification for the 1990 fiscal year, an issue that is as yet unresolved. Hernando County v. State, Dept. of Revenue, No. 90-4876 (Fla. 2d Cir. Ct. complaint filed Nov. 5, 1990). (Initial App. I, F) The Department also ignores the fact that the millage of the Spring Hill Fire and Rescue District for the fiscal year ending in September 1991 is still in doubt. There is nothing the County could do today, or could have done at the onset of these proceedings, that could alter those situations.

Respectfully submitted,

ROBERT L. NABORS
Florida Bar No. 097421
SARAH M. BLEAKLEY
Florida Bar No. 291676
THOMAS H. DUFFY
Florida Bar No. 470325
Nabors, Giblin & Nickerson, P.A.
315 South Calhoun Street
Barnett Bank Building, Suite 800
Post Office Box 11008
Tallahassee, Florida 32302
904) 224-4070

ROBERT BRUCE SNOW
Florida Bar No. 134742
Hernando County Attorney
112 North Orange Avenue
Brooksville, Florida 34601
(904) 796-1441

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by United States Mail to the parties on the attached Service List, this 26th day of April, 1993.

ROBERT L. NABORS

SERVICE LIST

ALFRED O. BRAGG, III, Esquire
Office of the General Counsel
Department of Community Affairs
2740 Centerview Drive
Tallahassee, Florida 32399-2100

and

G. STEVEN PFEIFFER, Esquire
General Counsel
Department of Community Affairs
2740 Centerview Drive
Tallahassee, Florida 32399-2100

Counsel for Appellee, Department of Community Affairs

JOSEPH C. MELLICHAMP, III
Department of Legal Affairs
The Capitol - Tax section
Tallahassee, FL 32399-1050

Counsel for Amicus Curiae, Department of Revenue

THOMAS J. WILKES, Esquire
Orange County Attorney
Post Office Box 1393
Orlando, Florida 32802-1393

and

KAYE COLLIE, Esquire
Assistant County Attorney
Post Office Box 1393
Orlando, Florida 32802-1393

Counsel for Amicus Curiae, Orange County

CHAPTER 200

DETERMINATION OF MILLAGE

200.011 Duty of county commissioners and school board in setting rate of taxation.
200.071 Limitation of millage; counties.
200.081 Millage limitation; municipalities.
200.091 Referendum to increase millage.
200.101 Referendum for millage in excess of limits.
200.111 Definition of "district."
200.121 Existing millage in excess of limits; millage increase to offset revenue lost.
200.131 Existing millage in excess of limits.
200.141 Millage following consolidation of city and county functions.
200.151 Millage to replace lost revenue.
200.161 Legislative intent.
200.171 Mandamus to levy tax; limitations; etc.
200.181 Bond payments; tax levies; restrictions.

200.011 Duty of county commissioners and school board in setting rate of taxation.—

(1) The county commissioners shall determine the amount to be raised for all county purposes except for county school purposes, and shall enter upon their minutes the rates to be levied for each fund respectively, together with the rates certified to be levied by the board of county commissioners for use of the county, special taxing district, board, agency or other taxing unit within the county for which the board of county commissioners is required by law to levy taxes.

(2) The county commissioners shall ascertain the aggregate rate necessary to cover all such taxes and certify the same to the county assessor of taxes within thirty days after adjourning as a *board of equalization. The assessor shall carry out the full amount of taxes for all county purposes, except for county school purposes, under one heading in the assessment roll to be provided for that purpose, and the county commissioners shall notify the clerk and auditor and tax collector of the county of the amounts to be apportioned to the different accounts out of the total taxes levied for all purposes.

(3) The county depository, in issuing receipts to the tax collector, shall state in each of his receipts, which shall be in duplicate, the amount deposited to each fund out of the deposits made with it by the tax collector. When any such receipts shall be given to the tax collector by the county depository, he shall immediately file one of the same with the clerk and auditor of the county, who shall credit the same to the tax collector with the amount thereof and make out and deliver to the tax collector a certificate setting forth the payment in detail, as shown by the county depository's receipt.

(4) The county commissioners and school board shall file written statements with the county assessor of taxes setting forth the boundary of each special school district and the district or territory in which other special taxes are to be assessed, and the county assessor of taxes shall, upon receipt of such statements and orders from the board of county commissioners and school board setting forth the rate of taxation to be levied on the real and personal property therein, proceed to assess such property and enter the taxes thereon in the assessment rolls to be provided for that purpose.

(5) The assessor shall designate and separately identify by certificate to the tax collector the rate of taxation to be levied for the use of the county and school board and the total rate of taxation for all other taxing authorities in the county.

(6) The school board shall certify to the county assessor of taxes millage rates set by said board within thirty days after the board of county commissioners adjourns as a *board of equalization. All other governing boards or governing authorities of all other taxing districts within the counties, including municipalities whose taxes are assessed on the tax roll prepared by the county assessor of taxes, shall certify to the board of county commissioners millage rates set by said boards within fifteen days after the board of county commissioners adjourns as a *board of equalization.

History.—§2, ch. 4885, 1901; GS 532; §30, ch. 5596, 1907; RGS 731; CGL 937; §6, ch. 20722, 1941; §1, ch. 67-227; §1, ch. 67-512, §§1, 2, ch. 69-55; §1, ch. 69-300.

*Note.—Boards of equalization were superseded by boards of tax adjustment, authorized by ch. 69-140.

Note.—See former §193.31.

200.071 Limitation of millage; counties.—

(1) Except as otherwise provided herein, no aggregate ad valorem tax millage shall be levied against real and tangible personal property by counties and districts as herein defined in excess of ten mills on the dollar of assessed value, except for special benefits and debt service on obligations issued in connection therewith, and except for that millage authorized in §9, Art. VII of the state constitution. However, nothing in §§200.071, 200.091, 200.111, 200.121, 200.141, and 200.161 shall prevent any board of county commissioners or district school board to each levy at least five mills.

(2) The board of county commissioners in counties not having a budget commission or board shall have authority, in event the aggregate of the proposed millage for said county and districts therein aggregate more than the maximum allowed hereunder, to apportion the millage to be levied for county officers, departments, divisions, districts, commissions, author-

ities and independent taxing agencies so as not to exceed the maximum millage provided herein under this section or §200.091. The budget commission or budget board in counties presently having such a commission or board shall make the apportionment as above provided, in event the apportionment is necessary.

History.—§1, ch. 67-395; §§1, 2, ch. 69-55; §28, ch. 69-216; §1, ch. 69-300.
Note.—See former §193.321.

200.081 Millage limitation; municipalities.—No municipality shall levy ad valorem taxes for real and tangible personal property in excess of one per cent of the assessed value thereof (ten mills), except for special benefits and debt service on obligations issued with the approval of those taxpayers subject to ad valorem taxes on real and tangible personal property.

History.—§1, ch. 67-396; §§1, 2, ch. 69-55.
Note.—See former §167.441.

200.091 Referendum to increase millage.—The millage authorized to be levied in §200.071 for county purposes, including districts therein, may be increased for periods not exceeding two years, provided such levy has been approved by a majority of those voting in an election participated in only by the qualified electors of the county or district who pay taxes on real or personal property. Such elections may be called by the governing body of any such county or district on its own motion, or shall be called upon submission of a petition specifying the amount of millage sought to be levied and the purpose for which the proceeds will be expended and containing the signatures of at least ten per cent of the persons qualified to vote in such election, signed within sixty days prior to the date said petition is filed.

History.—§2, ch. 67-395; §§1, 2, ch. 69-55.
Note.—See former §193.322.

200.101 Referendum for millage in excess of limits.—Those taxpayers subject to ad valorem taxes on real and tangible personal property may approve an increase of millage above those limits imposed by §200.081 in a referendum called for such purpose by the governing body of the municipality, provided that such increase does not exceed a period of two years. Such referendum also may be initiated by submission of a petition to the governing body of the municipality containing ten per cent of the signatures of those persons eligible to vote in such referendum which signatures are affixed to the petition within sixty days prior to its submission.

History.—§2, ch. 67-396; §§1, 2, ch. 69-55.
Note.—See former §167.442.

200.111 Definition of "district."—The term "district" is defined to mean special districts having the power to levy taxes or require the levy of taxes, including but not limited to boards, commissions, authorities and agencies having authority to levy taxes or require the levy of taxes but shall not include special school districts or multicounty districts.

History.—§3, ch. 67-395; §§1, 2, ch. 69-55.
Note.—See former §193.323.

200.121 Existing millage in excess of limits; millage increase to offset revenue lost.—(1) Any county whose rate of taxation as defined in §200.071 exceeds ten mills on January 1, 1968 shall be authorized to continue at such greater rate of taxation until January 1, 1970, without the referendum provided for in §200.091. No increase beyond that rate shall be permissible except through a referendum as provided for in §200.091; provided, however, should county or district revenue be reduced due to the loss of income from proprietary activities, state distributions of revenue or other non ad valorem sources, the millage may be increased in an amount sufficient to restore such loss of revenue.

(2) The provisions of this section shall not apply to those counties undergoing total revaluation in 1967 until after such counties have completed such revaluation and have set millage rates.

History.—§4, ch. 67-395; §§1, 2, ch. 69-55.
Note.—See former §193.324.

200.131 Existing millage in excess of limits.—

(1) Any municipality whose rate of taxation as defined in §200.081 exceeds one per cent (ten mills) on January 1, 1968, and whose assessment roll complies with the requirements set forth below, shall be authorized, upon majority vote of the governing body of the municipality after reasonable public notice and hearing, to continue at such greater rate of taxation until January 1, 1971, without requiring the referendum provided for in §200.101. However, no increase beyond that rate shall be permissible except through a referendum as provided for in §200.101.

(2) No municipality whose 1970 assessment roll is less than just value may continue its existing millage rate in excess of ten mills after January 1, 1970. Applications for continued noncompliance with §§200.081 and 200.101 shall be submitted to the department of revenue, together with sales ratio studies in such method, form, and content as the department may require. If the department finds, on the basis of such studies, that the average assessment level of such municipality is not at least just value, such municipality shall be required to hold a referendum as set forth in §200.101 before assessing any millage in excess of one per cent (ten mills), unless such municipality had caused a good faith program of reassessment to be commenced prior to January 1, 1971, or has commenced court proceedings prior to January 1, 1971, to require the responsible party to commence such good faith program of reassessment.

History.—§4, ch. 67-396; §§1, 2, ch. 69-55; §§21, 35, ch. 69-106; §1, ch. 69-278.
Note.—See former §167.444.

200.141 Millage following consolidation of city and county functions.—Those cities or