IN THE SUPREME COURT OF FLORIDA

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

Petitioners,

v.

DEPARTMENT OF COMMUNITY AFFAIRS, State of Florida,

Respondent

NO. 80,158

SUPPLEMENTAL BRIEF OF RESPONDENT AND AMICUS CURIAE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JOSEPH C. MELLICHAMP, III
SENIOR ASSISTANT
ATTORNEY GENERAL
Office of the Attorney General
Tax Section-The Capitol
Tallahassee, FL 32399-1050
(904) 487-2142

Attorney for Amicus Curiae
Department of Revenue

G. STEVEN PFEIFFER
GENERAL COUNSEL

ALFRED O. BRAGG, III
ASSISTANT GENERAL COUNSEL
Department of Community Affairs
2740 Centerview Drive
Tallahassee, FL 32399-2100
(904) 488-0410

Attorney for Respondent
Department of Community
Affairs

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SUPPLEMENTAL ARGUMENT

POINT I.

THE CONSTITUTIONAL ANALYSIS BY THIS COURT IN GLASSER PRESERVES THE AUTHORITY RESERVED TO THE LEGISLATURE IN ARTICLE VII OF THE CONSTITUTION.

The contention of the County is that "the unique Constitutional Relationship between the Legislature and School Funding demands a Different Construction of the 'Direct Grant' of Ad Valorem Taxing Capacity to Counties in the 1968 Constitutional Revision from the Construction of the Constitutional Authorization of School Millage in Article VII, Section 9."

The issues presented by this case, conceded to by the County and then qualified by the County[1] are:

1. Whether a county has the constitutional authority to levy ad valorem taxes in absence of enabling legislation; and,

2. Whether the inclusion by the Legislature of dependent special districts within the 10 mill limitation for "county purposes" provided for in Art. VII, § 9(b), is unconstitutional.

This Court answered the first question unequivocally in the negative in the recent case of Florida Department of Education v. Glasser, ___ So. 2d ___, 18 Fla. Law Weekly S301 (Fla. May 20, 1993) by stating:

> We attribute to the words 'shall . . . be authorized by law' their plain meaning: legislative authorization is required to trigger this provision; it is not self-executing.[2]

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[1] See County's Supplemental Brief, at 2-3.

[2] While that case dealt with school districts, Art. VII, § 9(a), Fla. Const., also lists counties, together with municipalities. Thus, this Court's decision in Glasser is dispositive of the first issue in the instant case.

The County tries unsuccessfully several different ways to distance itself from the Glasser opinion. One such way appears on page 4 of the Supplemental Brief where the County states that under the FEFP the state sends money to the school districts, "thus relieving the school district of a considerable revenue-producing burden. There is no such similar program available for other local governments." However, there are similar revenue replacement programs for local government. This is self evident by the County's fear for the loss of revenue sharing monies if it is found in non-compliance with §§ 200.065 and 200.071, Fla. Stat. (See paragraph 36 of the Complaint in Case No. 90-4876, Second Judicial Circuit, App. P, to Hernando County's Reply Brief in Case Nos. 91-194, 91-195 and 91-196, First District Court of Appeal[3]). The legislative design of public finance conditions county participation in revenue sharing (§ 218.23, Fla. Stat.), local government half-cent sales tax (§ 218.63, Fla. Stat.), and the gas tax (§ 336.025(6), Fla. Stat.) distribution, upon compliance with § 200.065, Fla. Stat.

The County does not understand the Constitution it attempts to apply. The County's contention entirely displaces legislative authority over county millage despite the clear requirement of

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[3] See Ch. 218, Parts II and VI, Fla. Stat., specifically § 218.64 (expenditures for countywide tax relief). The total amount of state funds appropriated in fiscal year 1992-1993 in revenue sharing and local government half-cent sales tax is approximately 467.7 million and 772.3 million respectively, for a total of approximately 1.2 billion. Ch. 92-293, § 1B, items 1627BB and 1627BH, respectively at 2636, Laws of Fla. The total amount of state funds appropriated in fiscal year 1993-1994 in revenue sharing is approximately 270.3 million, and in local government half-cent sales tax is approximately 881.1 million. See 93-184, § 1B, items 1715 and 1721 at 1149.

Art. VII, § 9(a), Fla. Const., that there be a legislative act to authorize millage. The County also failed to note, much less reconcile, its sweeping theory with Art. III, § 1 and Art. VII, § 1(a), Fla. Const. (1968).

It is difficult to think of how any person drafting a constitution could make the legislative power over county finance more clear in more places than in this 1968 Revision. The fact that the very Legislature which adopted the Revision of 1968 was itself setting limits on millage (as had the 1965 Legislature) and the fact that property tax limitation was such a "key issue" for legislators is strong evidence that the Legislature did not surrender its authority to determine millage except to constitutionally limit (in Art. VII, § 9(b), Fla. Const.), the maximum property tax which could be levied.[4] Nothing in this history supports the position of the County.

Florida's political and constitutional history demonstrates that the Legislature has the power to determine county millage, that this power has been used over the course of years (even by the very Legislature which adopted the 1968 Revision). The legislative power over county millage comes from the general legislative power (Art. III, § 1), and the taxation article (Art. VII, §§ 1, 8, and 9, ". . . counties . . . shall . . . be authorized by law to levy ad valorem taxes . . ."). These

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

provisions leave no doubt that the legislature is empowered to control millage and the history of the drafting confirms this.[5]

The County also argues that the change from former Constitution, Art. IX, § 5, (1885), to Art. VII, § 9(a), revision of 1968 accomplished a sweeping change in local government finance. If this was correct one would expect to see some change in the language of the Constitution. But there was no change from Art. IX, § 5, to Art. VII, § 9(a). The operative language is the same, therefore the interpretation by this Court should be the same. However, there was a sweeping change in local government finance not recognized by the County and that change is contained in Art. VII, § 9(b), referred to as the "10 mill cap." This is a constitutional limitation in § 9(b), which prevents the Legislature from authorizing a millage in excess of 10 mills. This limitation cannot be exceeded by subsequent Legislatures. This sweeping limitation sought to avoid the problem facing Florida at the time of the revision. See State ex

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[5] It is fundamental that the State possesses the inherent power to tax as an attribute or characteristic of its sovereignty, Cheney v. Jones, 14 Fla. 587, 610 (1874); Hunter v. Owens, 80 Fla. 812, 86 So. 839 (1920) and that a county has no inherent power to tax and may levy taxes only when expressly granted the power to do so. See, Amos v. Mathews, 126 So. 308 (Fla. 1930); Weaver v. Heidtman, 245 So. 2d 295 (Fla. 1st DCA, 1971); Wilson v. School Board of Marion County, 424 So. 2d 16 (Fla. 5th DCA 1983). Finally, it is universally understood that our state constitution is not a grant of power, but a limitation upon power. State ex rel. Collier Land Inv. Corp. v. Dickinson, 188 So. 2d 781 (Fla. 1966); Fowler v. Turner, 157 Fla. 529, 26 So. 2d 792 (1945). The County has also failed to explain how its position can be reconciled with Art. VII, § 8, Fla. Const.

rel. Dade County v. Dickinson, 230 So. 2d 131, 132-134 (Fla. 1969).[6]

The second question should also be answered in the negative. The Court should not let these side issues hide the County's stark proposition: That the 'state' has 'no power' to control local government millage rates because the Constitution authorizes local government to set ad valorem taxes without legislative authorization.[7]

Section 200.071(1), Fla. Stat., provides the legislative authorization required to implement Art. VII, § 9(a), Fla. Const., for counties to levy 10 mills of ad valorem tax. Such authorization is within the constitutional millage limitation for county purposes contained within Art. VII, § 9, Fla. Const. Thus, § 200.071, Fla. Stat., is constitutional.

However, the County is not satisfied with this authorization because it complies with the limitation in Art. VII, § 9(b), Fla. Const., and is limited to 10 mills for "county purposes." The County refuses to recognize and discuss, not only the millage restriction contained in § 9(b), on the legislative authorization

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[6] The County also draws on the change in home-rule authority to charter and non-charter counties for its theory of unbridled authority to levy ad valorem taxes. However, when one reads Art. VII, §§ 1(f) and (g), it is equally clear that the Constitution reserves in the Legislature the inherent power to control, guide and provide methods of exercising the home-rule power.

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

provided for in § 9(a), but also, ignores or misunderstands that the 10 mill limitation is not addressed to "counties" but to "county purposes."

This is evident when the County, in its Supplemental Brief at 2-3, states: "Obviously, under the 1968 constitutional scheme, the Legislature is required to authorize ad valorem taxation. However, this constitutional direction for legislative authorization does not include the power to limit the county purpose millage capacity of counties."

The Legislature has not limited the counties to less than 10 mills for "county purposes"; just the opposite has occurred. The Legislature has authorized 10 mills. See § 200.071(1), Fla. Stat. One would ask the question, what then is the County's real problem with this statutory scheme? The County has tried to create a problem of constitutional proportion where no such problem exists, in order to avoid the millage limitation for "county purposes" of 10 mills in § 9(b). Thus, the County hopes to be able to levy 20 mills for "county purposes" through the creation of dependent districts, which are without question performing "county purposes".

Section 200.071(2), Fla. Stat., requires counties to reduce "county purpose" millage to comply with the 10 mill authorization contained in § 200.071(1), Fla. Stat., as provided for in Art. VII, § 9(b), stating:

> The board of county commissioners shall, in the event the sum of the proposed millage for the county and dependent districts therein is more than the maximum allowed hereunder, reduce the millage to be levied for county officers, departments, divisions, commissions, authorities, and dependent special districts so as not

to exceed the maximum millage provided under this section or s. 200.091. (e.s.)

It is without question that the Legislature has the authority to enact the authorization for counties to levy ad valorem tax contained in § 200.071, Fla. Stat. Without such authorization the counties are without the power to levy any taxes. See Glasser, at S301. It is also beyond serious contention that the statutory authorization, which includes dependent special districts in the county purpose limitation, does not deny or impair any ad valorem taxing authority of the counties to levy any ad valorem taxes. Finally, it is equally clear that the wording in the Constitution was intentionally drawn to include within the constitutional "county purpose" millage limitation, millage for dependent special districts.

The constitutional limitations of ten mills for all municipal purposes, and ten mills for all "county purposes", is all-inclusive and embraces home rule and consolidated governments, as well as traditional counties and municipalities. Dickinson, 230 So. 2d at 134. Both the Legislature and the people intended to limit ad valorem taxation for county purposes, school districts and municipal purposes in all areas of the state to a ten mill maximum respectively, beyond which millages could be raised only if approved by referendum of the taxpaying property holders directly affected.

The Legislature found that there were many areas in the state in which the combined millage levied against real and tangible personal property by the various taxing authorities was oppressive, and therefore has enacted legislation intended to

reduce such taxation, to where it is no longer oppressive. Section 200.161, Fla. Stat. (1969). It was the Legislature's intent to provide replacement revenues for the operation of local government bodies which were faced with millage roll backs. Section 200.132, Fla. Stat. (1969). The history of § 200.071, Fla. Stat., is set forth in detail on pages 23 through 36 of the Department of Revenue's Amicus Brief on the Merits, and pages 18 through 27 of the Department of Community Affairs' Brief on the Merits. The County's real problem is with the special district "dependent/independent" classification[8] scheme contained in Ch. 189 and § 200.071(2), Fla. Stat.[9]

In attacking the constitutionality of the special district "dependent/independent" classification scheme, the County's only argument is one of inference. It wishes this Court to infer that by revising one draft of Art. VII, § 9, Fla. Const., which specifically included special district millage in county millage, the drafters intended to exclude all special district millage from county millage. The County's position is simply not supported by the plain language of Art. VII, Fla. Const., or by legislation enacted contemporaneously with the Revised Constitution. Chapters 189 and 200, Fla. Stat., do not contradict Art. VII, § 9; they implement it. They are general

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[8] See also the Department of Revenue's Amicus Brief at pages 23 through 26 for the definitional distinction between dependent/independent special districts.

[9] See County's Complaint in Case No. 90-4876, Second Judicial Circuit, Appendix P to Reply Brief of Hernando County, filed in Case Nos. 91-194, 91-195 and 91-196, First District Court of Appeal.

laws describing precisely what millage is "authorized" for county purposes. See Glasser, at S301.

By enacting Ch. 200, Fla. Stat., the Legislature has prescribed the millage for a certain class of dependent special districts to be that millage which, ". . . when added to the millage of the governing body to which it is dependent, shall not exceed the maximum millage applicable to such governing body." Section 200.001(8)(d), Fla. Stat. Any effect that this legislation has on special districts existing prior to the 1968 revision, is authorized and contemplated by Art. XII, §§ 2 and 15, Fla. Const.[9]

From the beginning the Legislature has had ample authority under Art. VII, § 9(b), of the Constitution to impose limits on levies of ad valorem taxes by counties and cities. The requirement in Art. VII, § 9(a), that ad valorem levies "be authorized by law" gave the Legislature the same authority it had under Art. IX, § 5, of the Constitution of 1885, which it replaced. Of the three coordinate branches of government, the one with the broadest discretion is the Legislature.[10] If the Legislature has authority over ad valorem taxes under Art. VII, § 9(a), then the aggregation of dependent district millage with county millage is a fortiori within its discretion. The

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

[10] See Chiles v. Children A, B, C, D, E and F, 589 So. 2d 260, 263-264 (Fla. 1991).

aggregation of special district millage with county millage is only one of a number of conditions the Legislature has the power to impose. This is what § 200.071(1), Fla. Stat., did from the very beginning.[11] Sections 200.001(8)(d) and 189.403(2), Fla. Stat., do no more than that today.

Thus, the issue becomes whether the Legislature's inclusion of "dependent" special districts of a county, into the 10 mill constitutional cap for "county purposes" provided for in Art. VII, § 9(b), is unconstitutional. To do otherwise would be an unquestionable evasion of the constitutional millage limitations for "county purposes."

CONCLUSION

The constitutional analysis of this Court in Glasser is dispositive on the first issue in this case and should control the answer to the second issue, in favor of the constitutionality of the statutes in question.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JOSEPH C. MELLICHAMP, III
SR. ASSISTANT ATTORNEY GENERAL
Fla. Bar No. 133249
Office of the Attorney General
Tax Section-The Capitol
Tallahassee, FL 32399-1050
(904) 487-2142
Attorney for Amicus Curiae
Department of Revenue

G. STEVEN PFEIFFER
GENERAL COUNSEL

ALFRED O. BRAGG, III
ASSISTANT GENERAL COUNSEL
Fla. Bar No. 334650
Depatrment of Community Affairs
2740 Centerview Drive
Tallahassee, FL 32399-2100
(904) 488-0410
Attorney for Respondent
Department of Community Affairs

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[11] Section 200.071, Fla. Stat., was originally enacted as § 193.321, Fla. Stat. (1969).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by U.S. Mail to **Alfred O. Bragg, III**, Department of Community Affairs, 2740 Centerview Drive, Tallahassee, FL 32399-2100; **William J. Roberts**, Roberts & Egan, P.A., Post Office Box 1386, Tallahassee, FL 32302; **Robert L. Nabors, Sarah M. Bleakley, Thomas H. Duffy**, Nabors, Giblin & Nickerson, P.A., Post Office Box 11008, Tallahassee, FL 32302; **Robert Bruce Snow**, 112 North Orange Avenue, Brooksville, FL 34601; and, **Jay W. Williams**, Assistant County Attorney, Metro-Dade Center, Suite 2810, 111 N.W. 1st Street, Miami, Florida 33128-1993; on this 8th day of July, 1993.

JOSEPH C. MELLICHAMP, III
SENIOR ASSISTANT ATTORNEY GENERAL