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**Legal Analysis: Property Tax Reform  
Referendum Requirement for Mandatory Millage Reduction**

We have analyzed various proposals that would prohibit local governments from levying ad valorem property taxes in excess of a certain “rolled-back” millage rate, based upon the ad valorem revenues generated by that local government in some prior year (between 2001 and 2006, depending upon the proposal) (collectively, the “Proposed Legislation”). Although each version of the Proposed Legislation has unique provisions, all would interfere with the Constitutional ability and right of local governments to levy ad valorem property taxes up to ten mills. See Article VII, Section 9 of the Florida Constitution.<sup>1</sup> It is our opinion that any Proposed Legislation mandating a millage rate roll-back can only legally be implemented through an amendment to the Florida Constitution, approved by the voters in a referendum, and that any attempt to implement a mandatory millage cap of less than 10 mills purely by Statutory enactment would violate Article VII, Section 9 of the Florida Constitution.

**History of Local Government Property Taxes**

The 1885 Florida Constitution contained no limitation on local governments (other than school districts) as to the ad valorem millage rate that could be levied on property. Over time, some local government ad valorem tax rates exceeded the people’s tolerance, resulting in the inclusion in the 1968 Constitution of caps on local government millage rates. See *State of Florida v. Dickinson*,

<sup>1</sup> While the specific details and implementation procedures of the various versions of the Proposed Legislation vary, the essence of each is similar, enabling us to do this general analysis. Of course, depending upon what, if anything, actually becomes the law, this analysis could change.

230 So.2d. 130, 133 (Fla. 1969). Specifically, Article VII, Section 9 of the Florida Constitution provides:

(a) Counties, school districts, and *municipalities shall*, and special districts may, *be authorized by law to levy ad valorem taxes* and may be authorized by general law to levy other taxes, for their respective purposes, except ad valorem taxes on intangible personal property and taxes prohibited by this constitution.

(b) *Ad valorem taxes*, exclusive of taxes levied for the payment of bonds and taxes levied for period 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; for water management purposes for the northwest portion of the state lying west of the line between ranges two and three east, 0.05 mill; for water management purposes for the remaining portions of the state, 1.0 mill; 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.

Unlike most other provisions of the Florida Constitution regarding municipal powers, through the use of the term “shall,” Section 9(a) *requires* that the legislature authorize municipalities to levy ad valorem taxes, up to the ten mill cap set forth in Section 9(b). The Florida Supreme Court has interpreted Section 9 to be “both a grant and a limitation on the authority of local governmental entities to tax.” *Advisory Opinion to the Attorney General re: Tax Limitation (“Tax Limitation Decision”)*, 644 So.2d 486, 492 (Fla. 1994). Thus, municipalities and counties are each permitted under the Constitution to levy ad valorem taxes, but are capped at ten mills (1% of property value).

The Florida Constitution also contains express provisions setting forth certain exemptions from property taxes, such as the “homestead exemption,” which exempts the first \$25,000 in value of a homestead from taxation. *See* Florida Constitution, Article VII, Section 6. In the early 1990s, Florida voters approved “Save Our Homes,” which caps increases in the taxable value of homesteaded property to the lower of 3% or the change in the Consumer Price Index. *Id.*, Article VII, Section 4.

### **Current Proposals to Roll-Back Millage Rates**

As a result of the “Save Our Homes” amendment, discrepancies have grown between the property taxes paid on long-held homesteaded properties (the taxable values of which have been capped) and non-homesteaded or recently purchased homesteaded properties. These discrepancies, as well as a general perception that taxes are too high, have led to the Proposed Legislation to reform and reduce property taxes.<sup>2</sup>

During the 2007 legislative session, numerous proposals were discussed, but no consensus was reached. Thus, a special session of the legislature was called from June 12-22, 2007. On June 1, 2007, the Honorable Ken Pruitt, President of the Senate, and the Honorable Marco Rubio, Speaker of the House issued a joint letter announcing a “substantial agreement” regarding tax reform (the “Substantial Agreement”). The first part of the Substantial Agreement calls for “Immediate Tax Relief and Reform (Statutory),” under which “Cities and Counties will be required to cut their property taxes.” See Substantial Agreement, pg. 2. Specifically, in FY2007-08, local governments would be prohibited from levying ad valorem property taxes in excess of a certain “rolled-back” millage rate, based upon the ad valorem revenues generated by that local government in some prior year (yet to be determined). In addition, “a cap on future property taxes will ensure that government cannot grow faster than personal income.” *Id.* at pg. 1.<sup>3</sup> The millage roll back and caps, according to the Substantial Agreement, are to be implemented solely through the enactment of a Florida Statute. No amendment to the Florida Constitution or referendum is proposed.

The second part of the Proposed Legislation is “Further Tax Relief and Reform (Constitutional Amendment),” and would propose a Constitutional Amendment expanding and modifying tax exemptions.<sup>4</sup> The second portion of the Proposed Legislation is not addressed in this opinion.

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<sup>2</sup> Whether taxes overall are too high is a subject of debate and is beyond the scope of this opinion; however, the total state and local tax burden on Florida residents is actually lower than most other parts of the country. According to the Tax Foundation Special Report in April 2007, the average combined state and local tax burden on Florida residents equals \$3,962 per person (or 10% of the average per capita income), ranking Florida 38<sup>th</sup> out of the 50 States. There is little debate, however, that Save Our Homes has resulted in similar properties paying substantially different taxes, creating a strong feeling of inequity.

<sup>3</sup> The impact on Cities and Counties could be great, resulting in substantial reductions in ad valorem property tax revenues. Some Cities and Counties have reported that they could be forced to significantly reduce services and lay off personnel.

<sup>4</sup> We agree that any expansion or modification of tax exemptions would require Constitutional amendment through referendum approval.

### **Requirement of a Constitutional Amendment for a Mandatory Millage Roll-Back**

The ability of Cities and Counties to levy ad valorem taxes up to the ten mill cap is rooted in Article VII, Section 9 of the Florida Constitution. In 1994, the Florida Supreme Court referred to this provision as “a cornerstone of home-rule power” and stated that it “is both a grant and a limitation on the authority of local governmental entities to tax.” *Tax Limitation Decision, supra.*, 644 So.2d at 492. The ability to tax up to 10 mills is “an important part of the home-rule powers granted to local governments by our present constitution.” *Id.* In short, municipalities have the Constitutional power to tax up to 10 mills. *See also Board of County Commissioners of Marion County v. McKeever*, 436 So.2d 299, 302-303 (Fla. 5<sup>th</sup> DCA 1983) (referring to the “prerogative under the state constitution to levy a millage of up to ten mills”) (emphasis added).

The 1994 *Tax Limitation Decision* by the Florida Supreme Court is directly on point. There, the Florida Supreme Court was asked for an advisory opinion as to the validity of four initiative petitions to amend the Florida Constitution. One of the amendments proposed to create a new section of the Florida Constitution that would prohibit any “new tax,” which would include any increase in an existing tax rate. The proposed amendment, however, did not mention, amend or delete Article VII, Section 9 (which gives local governments the right to levy ad valorem taxes up to ten mills). Under Florida law, an initiative can not substantially affect existing provisions of the Florida Constitution without identifying such provisions. *Fine v. Firestone*, 448 So.2d 984, 989 (Fla. 1984). Thus, the Florida Supreme Court ruled:

While some local governmental entities are currently close to the ten-mill cap, other governmental entities have considerable leeway left in their taxing authority under this provision. *There is no question that this proposed initiative amendment eliminates the ten-mill authorization without voter approval.* Nothing has been said in this proposal concerning this substantial change in article VII, section 9, of the present constitution. It is, as previously stated, an important part of the home-rule powers granted to local government by our present constitution.

*Tax Limitation Decision, supra.*, 644 So.2d at 493. Thus, the Supreme Court disallowed the initiative, holding that “[t]he “Voter Approval of New Taxes” initiative substantially affects article VII, section 9, without identifying it.”

The same rationale applies here. The proposed roll-back proposals would similarly eliminate the authorization of Cities and Counties to levy up to ten mills. It therefore directly conflicts with Article VII, Section 9 of the Florida Constitution, and would be invalid. *See, e.g. Gammon v. Cobb*, 335 So.2d 261 (Fla. 1976) (legislative enactments which purport to limit

constitutionally created rights are invalid).<sup>5</sup> The only way that this could be accomplished would be for the voters to approve an amendment to the Florida Constitution in a referendum.<sup>6</sup>

### Conclusion

Mandatory millage rate reduction may not be accomplished simply by the enactment of a Florida Statute by the legislature. Rather, it can only be implemented through an amendment to the Florida Constitution, adopted by the voters of Florida.

Respectfully,



Jamie A. Cole

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<sup>5</sup>In the Substantial Agreement, Senator Pruitt and Speaker Rubio state that an agreement was reached “to include a provision allowing local governments by a super majority vote, referendum, or other heightened standard to override the mandatory cuts.” *Id.* at pg. 2. Although no details were provided, such an “opt out” provision does not ameliorate the need for a Constitutional Amendment. A majority of a City Commission has a Constitutional right to levy ad valorem taxes up to ten mills, and that authority cannot be taken away by the legislature. These same types of “opt outs” were contained in the New Tax initiative petition considered by the Florida Supreme Court in the 1994 *Tax Limitation* decision. There, the proposed Constitutional amendment would have prohibited any new tax or increase of any existing tax, *except* if approved by voters or adopted by a super majority vote (three fourths) of the governing body. *Tax Limitation, supra.*, 644 So.2d at 491-92. Notwithstanding the “opt out” provision, the Supreme Court found that the proposed initiative would have eliminated the ten-mill authorization and thus necessitated the identification of Article VII, Section 9 in the proposal.

<sup>6</sup>Moreover, the Legislature cannot attempt to find an indirect method to force local governments to abandon their Constitutional authorization to levy taxes up to ten mills (such as onerous procedures or voting requirements, or penalties for exceeding a certain millage rate), because the law is well-settled that the legislature may not do indirectly that which it cannot do directly. *Maloney v. Kirk*, 212 So.2d 609, 613 (Fla. 1968); *Town of Enterprise v. State*, 29 Fla. 128, 108 So. 740 (Fla. 1892). *See also County of Volusia v. State*, 417 So.2d 968 (Fla. 1982); *State v. Halifax Hospital District*, 159 So.2d 231 (Fla. 1963); *Frankenmuth Mutual Insurance Co. v. Magaha*, 769 So. 2d 1012 (Fla. 2000); *Archer v. Marshall*, 355 So.2d 781 (Fla. 1978); *Jones v. Tanzler*, 238 So.2d 91, 93 (Fla. 1970) (“It is elementary that the officials cannot do indirectly what they are prevented from doing directly.”).