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**Updated Legal Analysis: Property Tax Reform**

We have analyzed the legislation that was recently enacted by the Florida Legislature and signed by the Governor regarding property tax reform.<sup>1</sup> The enacted legislation consists of:

SJR 4-B: proposing various amendments to the Florida Constitution that would, among other things, replace Save Our Homes and the current homestead exemption with larger “super exemptions;”

HB 5B: setting a special election on January 29, 2008 for consideration of the Constitutional amendments; and

HB 1B: amending various Florida Statutes, including a limitation on the ability of local governments from levying ad valorem property taxes in excess of a certain “rolled-back” millage rate.

Each of these legislative acts has potentially serious legal problems. The proposed Constitutional amendments contain a misleading ballot statement that there would be a minimum homestead exemption of \$50,000 for *everyone* (when, in fact, those property owners who choose to remain under the Save Our Homes system would continue to have only a \$25,000 homestead exemption), is improperly scheduled for vote during a special election (even though it includes more than a “single amendment or revision”), and violates the equal protection clause of the United States Constitution (by creating two classes of homesteaded property taxpayers). Although the proposed

<sup>1</sup> This analysis updates the legal analysis done by this Firm dated June 6, 2007. The prior analysis addressed the various legislative proposals existing at that time. This analysis addresses the actual legislation that has been enacted.

Constitutional amendments would, if approved, give the State Legislature the power to limit the authority of local governments to increase ad valorem taxes, the Statutory enactment purports to exercise that power immediately in 2007, before the Constitutional amendments take effect (even if approved). The statutory enactment would therefore interfere with the current ability and right of local governments to levy ad valorem property taxes up to ten mills under Article VII, Section 9 of the Florida Constitution.

### History of Local Government Property Taxes

Property taxes have a long history in Florida. Under the 1885 Florida Constitution, local governments had the power to levy ad valorem taxes with no millage limitation, except for public schools, for which counties were required to assess and collect a tax of between 3 and 10 mills. Florida Constitution (1885), Article XII, Section 8. In 1934, the Florida Constitution was amended to add Article X, Section 7, to provide a \$5,000 exemption from ad valorem taxes for homesteaded properties. The 1968 Florida Constitution preserved the \$5,000 homestead exemption, and enacted a new provision regarding the levy of ad valorem taxes by local governments in Article VII Section 9:

(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).

On March 11, 1980, a special election was held in Florida in which the homestead exemption was increased to \$25,000 for school district ad valorem taxes. On October 7, 1980, the voters again amended the Constitution, increasing the homestead exemption as applied to other local government ad valorem taxes, to \$15,000 in 1980, to \$20,000 in 1981, and to \$25,000 in 1982. Thus, by 1982, the Florida Constitution provided that all local ad valorem taxes were subject to a \$25,000 homestead exemption. *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.

As a result of the homestead exemption and “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. Thus, in 2006, homesteaded properties constituted 42.8% of the value of all properties, but paid only 32.2% of the taxes.<sup>2</sup> In contrast, non-homesteaded properties constituted 57.2% of the value of all properties, but paid 67.8% of the taxes. These discrepancies, as well as a general perception that taxes are too high, have led to the tax reform legislation enacted in June 2007.<sup>3</sup>

### Summary of Property Tax Reform Legislation

During the 2007 legislative session, numerous proposals for property tax reform were discussed, but no consensus was reached. A special session of the legislature was called beginning on June 12, 2007. On June 14, 2007, the third day of the session, three pieces of legislation were enacted by both houses of the Legislature, which were signed by the Governor on June 21, 2007.

#### **1. SJR 4-B: Constitutional Amendments Related to Property Taxes, Including Creation of “Super Exemptions” in Place of Save Our Homes**

SJR 4-B proposed amendments to Sections 3, 4, 6 and 9 of Article VII and the creation of Section 27 of Article XII of the Florida Constitution (the “Proposed Constitutional Amendments”). If adopted by the electors, taxpayers who purchase their homesteads after the effective date will no longer be eligible for the Save Our Homes 3% cap on assessed value and \$25,000 exemption, but

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<sup>2</sup> *See Florida’s Property Tax Structure: An Analysis of Save Our Homes and Truth in Millage Pursuant to Chapter 2006-311, L.O.F.*, Florida Department of Revenue, January 2, 2007, pg. 9, Table 2 (showing “just values” and “taxable values” of each category of properties).

<sup>3</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.

instead will be given a "super exemption" equal to 75% of the first \$200,000 of value, and 15% of the next \$300,000 (increasing as statewide personal income increases), with a minimum exemption of \$50,000 (\$100,000 for low income seniors). Current owners of homesteaded properties may, at any time, make an irrevocable election to take the "super exemption" and abandon their Save Our Homes protection and \$25,000 exemption forever. The Constitutional amendments would also provide for at least \$25,000 exemptions for tangible personal property, exemptions for affordable housing properties, and exemptions for fishing and commercial water dependent activity properties. Finally, the Constitutional amendments would amend Article VII, Section 9 to require that the legislature, by general law, limit the authority of local governments to increase ad valorem taxes. The Proposed Constitutional Amendments would be effective as of January 1, 2008 (if approved at January 29, 2008 special election), or on January 1, 2009 (if approved in November 2008 general election).

## **2. HB 5B: Setting Special Election on January 29, 2008 for Constitutional Amendments**

HB 5B sets a special election pursuant to Article XI, Section 5 for January 29, 2008, for consideration by the voters of the Proposed Constitutional Amendments. As required by Article XI, Section 5, HB 5B was enacted by a vote of at least three-fourths of the membership of each house.

## **3. HB 1B: Amending Various Florida Statutes, Including Roll Back of Local Government Millage Rates**

HB 1B, which is effective immediately, makes substantial changes to local government ad valorem taxing procedures. Most significantly, it limits the authority of local governments (other than school districts) to levy ad valorem taxes *prior to* the approval of the Proposed Constitutional Amendments that would give the legislature the authority to do so. For 2007-2008, local governments, by majority vote, may only levy taxes up to the "rolled back" rate (which is the millage rate necessary to produce the same amount of ad valorem tax revenue as generated in the prior year) *minus* 0-9%, depending upon the compound annual growth in that local government's ad valorem tax levy from 2001-2006. Thus, local governments that have seen the largest growth in ad valorem tax revenues (for whatever reason), have the largest reductions. Local governments may, however, exceed this cap through a 2/3<sup>rd</sup> vote (up to the rolled back rate) or unanimous vote (up to the 2006-2007 millage rate). A local government may not exceed the 2006-2007 millage rate (even if the proposed new rate is under the Constitutionally authorized 10 mills) without voter approval in a referendum.<sup>4</sup>

In subsequent years, local governments, by majority vote, may only levy taxes up to the "rolled back" rate adjusted for growth in per capita Florida personal income. Once again, local governments may exceed this cap through a 2/3<sup>rd</sup> vote (up to 110% of prior year's "rolled back" rate adjusted for personal income growth) or unanimous vote/referendum (any higher rate, up to

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<sup>4</sup> Logistically, it would be impracticable for a local government to hold a referendum this year to exceed its prior year's millage rate because of the time involved in scheduling and holding an election.

Constitutional 10 mill cap). However, if the Proposed Constitutional Amendment passes in January 2008, HB 1B provides for a different calculation for 2008-2009 only, presumably to prevent the local governments from offsetting the reduced taxable value (caused by the super exemption) by increasing the millage rate.<sup>5</sup> That limitation, however, is also subject to override by the local government by 2/3<sup>rd</sup> vote (up to 67% of the offset amount) or unanimous vote (for any higher rate).

HB 1B also provides that local governments that violate its provisions would be required to post a new hearing notice, conduct a new hearing and remedy the violation. If it is not remedied, the excess funds are held in escrow, and ultimately the local government would forfeit its half-cent sales tax revenue. HB 1B also makes numerous procedural changes, allows the Department of Revenue to adopt emergency rules and extend certain deadlines and repeals the 2006 law requiring the Department of Revenue to perform a tax study. It also codifies the "super exemption," subject to the approval of the Proposed Constitutional Amendments, and enacts various provisions regarding affordable housing and community land trusts.

### **Potential Legal Problems**

#### **1. Misleading Ballot Statement Language**

Florida law provides that ballot language must not be misleading. *See, e.g., Askew v. Firestone*, 421 So.2d 151, 155 (Fla. 1982) ("The requirement for proposed constitutional amendments is the same as for all ballots, i.e., that the voter should not be misled and that he have an opportunity to know and be on notice as to the proposition on which he is to cast his vote..."). The ballot statement here is set forth at pp. 12-13 of SJR 4-B. The statement includes the following: "to specify minimum homestead exemption amounts of \$50,000 for everyone except low-income seniors and \$100,000 for low-income seniors." *Id.* at pg. 12 line 31 through pg. 13, line 1 (emphasis added). The text of the amendment, however, does not have a minimum \$50,000 homestead exemption for everyone; rather, existing owners of property with homestead exemptions who choose to keep their Save Our Homes protection will continue to have a \$25,000 exemption, not a \$50,000 exemption. Thus, those voters who own homesteaded property and intend to keep their Save Our Homes protection may be misled into thinking that they will be getting an increase in their homestead exemption from \$25,000 to \$50,000, even though they will not.

#### **2. Improper Special Election**

HB 5B calls a special election pursuant to Article XI, Section 5 of the Constitution. That provision states:

A proposed amendment to or revision of this constitution, or any part of it, shall be submitted to the electors at the next general

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<sup>5</sup> The language regarding the affect on the setting of the millage rate for 2008-2009 if the Proposed Constitutional Amendment passes is unclear. *See* HB 1B, pp. 60-61. It can be read to increase either the taxable value of property in 2007-2008 or in 2008-2009 by the reduction in taxable value resulting from the amendments. There are also two different override procedures, further complicating the provision. *Id.* at pg. 61-62.

election held more than ninety days after the joint resolution or report of revision commission, constitutional convention or taxation and budget reform commission proposing it is filed with the custodian of state records, unless, pursuant to law enacted by the affirmative vote of three-fourths of the membership of each house of the legislature **and limited to a single amendment or revision**, it is submitted at an earlier special election held more than ninety days after such filing.

Article XI, Section 5(a), Florida Constitution (emphasis added).

SJR 4-B specifically refers to “the following **amendments** to Sections 3, 4, 6, and 9 of Article VII and the creation of Section 27 of Article XII . . .” SJR 4B, pg. 1, line 22 (emphasis added). It further uses the plural “amendments” throughout the joint resolution. *Id.* at pg. 1, line 2 (in the title); pg. 11, line 29; pg. 12, line 23 (in the ballot statement); pg. 13, line 17 (also in ballot summary). Similarly, the plural “amendments” is used throughout HB 5B and HB 1B. *See* HB 5B at pg. 1, line 6; pg. 1, line 24; pg. 2, line 34; and HB 1B at pg. 61, line 1687; pg. 63, line 1747; pg. 69, line 1913. This repeated use by the legislature of the plural “amendments,” as well as the text of SJR 4-B (which makes amendments and revisions to four sections in Article VII and creates an entirely new Section in Article XII) shows that the issue being submitted to the electorate is not a **single amendment or revision**, but rather is several amendments and revisions.<sup>6</sup> Thus, this issue must be placed on the ballot in the November 2008 general election, not the January 2008 special election.

### 3. Violation of Equal Protection Clause of the United States Constitution

The United States Constitution expressly provides that no State may “...deny to any person within its jurisdiction the equal protection of the laws.” U.S. Constitution, 14<sup>th</sup> Amendment, Section 1.<sup>7</sup> Although tax exemption and disparity in taxes are not prohibited, there must at least be a rational basis for disparities to exist. *See, e.g., Osterndorf v. Turner*, 426 So.2d 539, 545 (Fla. 1983); *Zobel v. Williams*, 457 U.S. 55 (1982).

Here, SJR 4B and HB 1B create a two class property tax system for homesteaded properties – those who are entitled to the protection of the 3% Save Our Homes cap (with a \$25,000 exemption) and those who are not (but instead must participate in the “super exemption” with no cap). In contrast, in the current system, all owners of homesteaded properties are treated the same – they all get the 3% Save Our Homes cap. Although the application of the system and amount of benefit they receive is different (depending upon how long they have owned the homestead), all are in the same system.

<sup>6</sup> Interestingly, the legislature put in alternative effective dates in SJR 4-B depending upon whether the issue is on the January or November ballot, and thus must have foreseen this deficiency. *See* SJR 4B, pg. 12, lines 8-16.

<sup>7</sup> The Florida Constitution also contains an equal protection clause. Florida Constitution, Article 1, Section 2 (“All natural persons, female and male alike, are equal before the law...”).

Highly instructive is the 1982 decision of the Florida Supreme Court in *Osterndorf*. There, the legislature limited the applicability of the homestead exemption to those homeowners who have lived in Florida for five consecutive years. Thus, owners of homesteads were broken into two classes, each of which was treated differently. The State advanced four reasons for this distinction<sup>8</sup>, each of which was rejected by the Court as not being rationally related to a legitimate governmental purpose. The Court held:

We find there is no rational basis for distinguishing between *bona fide residents* of more than five consecutive years and *bona fide residents* of less than five consecutive years in the payment of taxes on their homes. This disparate treatment of resident homeowners cannot be allowed if our equal protection clause is to have any real meaning.

*Id.* at 545. The Court further ruled: "The reason for the equal protection clause was to assure that there would be no second class citizens. To approve the validity of the statute would in reality establish a second class of citizens in Florida." *Id.* at 545-46.

The same is true here. There is simply no rational basis for treating bona fide owners of homesteaded property differently based upon whether they purchased their home before January 1, 2008 or after January 1, 2008.<sup>9</sup> The legal analysis<sup>10</sup> prepared for the Legislative Office of Economic and Demographic Research (and appended to Florida's Property Tax Study – Interim Report dated February 15, 2007), warned of this precise problem:

On balance, we believe that a repeal of Save Our Homes that grandfathered existing Save Our Homes beneficiaries would make the post-repeal Save Our Homes assessment benefit more vulnerable to attack under the Court's precedents, especially *Zobel v. Williams*, because it would create a "fixed, permanent distinction" between "classes of concededly bona fide residents, based on how long they have been in the State." (citing *Zobel*, 455 U.S. at 59).

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<sup>8</sup> The four legislative bases were: (1) that new residents have an immediate fiscal impact upon local government's capital outlay and should pay their own share of this tax burden; (2) that tax savings should be passed on to longer term residents who have in recent years contributed tax dollars that have created a revenue surplus and made the increased tax exemption possible; (3) that the statute would discourage fraudulent homestead exemption applications; and, (4) that the statute would avoid the possibility of excessive immigration of individuals who desire lower taxes but are in need of many governmental services if Florida became too much of a tax haven. *Osterndorf*, 426 So.2d. at 542.

<sup>9</sup> No justification was given by the Legislature for this disparate treatment and thus it is impossible to determine whether it would be rationally related to a legitimate governmental purpose.

<sup>10</sup> The legal analysis was prepared by Walter Hellerstein, W. Scott Wright and Charles C. Kearns, of Sutherland Asbill & Brennan LLP, and is entitled "Legal Analysis of Proposed Alternatives to Florida's Homestead Property Tax Limitations: Federal Constitutional and Related Issues."

Nevertheless, the legislature did precisely that: it repealed Save Our Homes but grandfathered existing Save Our Homes beneficiaries.

#### 4. Requirement of a Constitutional Amendment for a 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.”

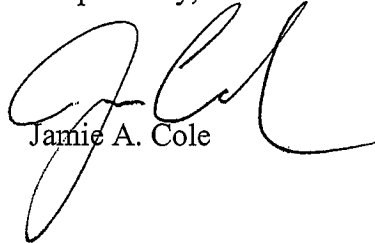
The same rationale applies here. The proposed roll-back proposals would similarly limit the authorization of Cities and Counties to levy up to ten mills. It therefore directly conflicts with Article VII, Section 9 of the Florida Constitution as it currently reads, and would be invalid. *See, e.g. Gammon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

limit constitutionally created rights are invalid).<sup>11</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 (such as one of the amendments proposed in SJR 4-B).<sup>12</sup> Unless and until the Constitution is amended, the legislature lacks the power to limit local governments from levying ad valorem taxes up to the 10 mill cap.

### Conclusion

The measures passed by the State Legislature each have potentially serious legal problems. The Proposed Constitutional Amendments contain a misleading ballot statement that there would be a minimum homestead exemption of \$50,000 for *everyone*, is improperly scheduled for vote during a special election, and violates the equal protection clause of the United States Constitution by creating two classes of homesteaded property taxpayers. Although the Proposed Constitutional Amendments would, if approved, give the State Legislature the power to limit the authority of local governments to increase ad valorem taxes, the Statutory enactment purports to exercise that authority immediately in 2007, before the Constitutional amendment take effect (even if approved).

Respectfully,



Jamie A. Cole

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<sup>11</sup>The provisions in HB 1B that allow local governments by a 2/3<sup>rd</sup> or unanimous vote or referendum do 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>12</sup> Moreover, the inclusion of a penalty for the exercise of a Constitutional right, in this case the forfeiture of the half-cent sales tax revenue, is also impermissible. The Legislature cannot utilize that type of indirect method to force local governments to "voluntarily" abandon their Constitutional authorization to levy taxes up to ten mills 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.").