

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT,  
IN AND FOR LEON COUNTY, FLORIDA

ERIC M. HERSH, individually as a  
registered voter and taxpayer, and as  
the Mayor of the City of Weston, Florida,

Case No. 37-2007-CA-1862

Plaintiff,

v.

KURT S. BROWNING, as Secretary of  
State, State of Florida, and FLORIDA  
DEPARTMENT OF REVENUE,

Defendants.

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**NOTICE OF APPEAL**

NOTICE IS GIVEN that Kurt S. Browning, Secretary of State, Defendant/Appellant, appeals to the First District Court of Appeal the Order of this Court rendered September 24, 2007. The nature of the Order is a final order that, in part, concludes that the ballot summary corresponding to a legislatively-proposed constitutional revision in Senate Joint Resolution 4-B (Count 1 of Plaintiff's Complaint) is invalid. A copy of the Order is attached.

Respectfully submitted,

**BILL McCOLLUM**  
**ATTORNEY GENERAL**



Scott D. Makar (FBN 709697)  
Solicitor General  
Louis F. Hubener (FBN 0140084)  
Chief Deputy Solicitor General  
Timothy D. Osterhaus (FBN 0133728)  
Deputy Solicitor General  
Office of the Attorney General  
The Capitol - PL-01  
Tallahassee, Florida 32399-1050  
(850) 414-3681; (850) 410-2672 (fax)

Lynn C. Hearn (FBN 012366)  
General Counsel, Department of State  
R.A. Gray Building  
500 South Bronough Street  
Tallahassee, Florida 32399  
(850) 245-6536; (850) 245- 6127 (fax)

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that the foregoing has been furnished electronically and by U.S. Mail this 26th day of September, 2007 to:

Jamie A. Cole, Esq.  
Weiss Serota Helfman Pastoriza Cole and Boniske, P.L.  
200 East Broward Boulevard, Suite 1900  
Ft. Lauderdale, Florida 33301

J. Bruce Hoffmann, Esq.  
General Counsel  
Department of Revenue  
Post Office Box 6668  
204 Carlton Building  
Tallahassee, Florida 32314-6668



\_\_\_\_\_  
Attorney

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**FINAL SUMMARY JUDGMENT AND CROSS SUMMARY JUDGMENT**

THIS CAUSE was heard by the Court on Plaintiff's, ERIC M. HERSH, Motion for Summary Judgment, and upon Defendants', KURT S. BROWNING, as Secretary of State, State of Florida, and FLORIDA DEPARTMENT OF REVENUE, Cross-Motion for Summary Judgment.

Plaintiff seeks the following relief from this Court:

- a) a declaration that the ballot summary proposed by Senate Joint Resolution 4-B (SJR 4-B) is unconstitutionally misleading and improper and enjoining the Secretary of State from placing the same on the ballot; and
- b) a declaration that the placing of the proposed constitutional amendments in SJR 4-B on a ballot in a special election as called for by House Bill 5B (HB5) is unconstitutional because there are multiple amendments, as opposed to a single amendment, proposed, and enjoining the Secretary of State from placing the proposed amendments on the ballot; and

- c) a declaration that Sections 1 through 12 of House Bill 1B (HB 1B) are unconstitutional, and enjoining the Department of Revenue from implementing the same prior to the passage of the amendments proposed in SJR 4-B.

#### JURISDICTION, VENUE AND STANDING

This Court has jurisdiction to grant declaratory and injunctive relief. *See* Section 86.011, Florida Statutes; *Martinez v. Scanlan*, 582 So.2d 1167 (Fla. 1991); *Armstrong v. Harris*, 773 So.2d 7 (Fla. 2000). Venue is proper pursuant to Section 47.011, Florida Statutes. The parties stipulated on the record at the hearing in this proceeding that there are no issues raised by them as to the jurisdiction of this court, the venue of these proceedings, or the standing of Mr. Hersh to bring this action. The Court has found, and the parties agree, that the issues before the Court are pure issues of law and appropriate for determination by summary judgment.

The issues for this Court to resolve are whether the ballot summary for the proposed constitutional amendments set forth in SJR 4-B is clear and unambiguous and whether it provides fair notice of the effect of the proposed constitutional amendments; and whether the Legislature may enact the provisions of Sections 1-12 of HB 1B which condition and limit by general law the authority of local governments to levy ad valorem taxes that do not exceed ten mills. For the reasons set forth, this Court concludes that the ballot summary does not meet the constitutional fair notice requirements, and the Legislature does have such authority.

#### PROCEDURAL BACKGROUND

A Petition for Writ of Mandamus was initially filed in the Supreme Court of Florida on July 9, 2007, and transferred on July 12, 2007, by Order of the Supreme Court of Florida to this Court for expedited consideration. An Amended Petition for Mandamus and/or Other Relief was filed on

July 17, 2007. Thereafter on July 18, 2007, this Court entered its Order Denying Alternative Writ and Deeming Action One for Declaratory Judgment. A Second Amended Complaint for Declaratory Relief was filed on August 7, 2007, and answered by Defendants on August 10, 2007. Plaintiff filed its Motion for Summary Judgment on August 17, 2007, and Defendants filed their Cross-Motion for Summary Judgment on August 31, 2007. The Court finds, and the parties stipulated, that there are no genuine issues of material fact and the controversy between the parties is ripe for determination by summary judgment.

#### SENATE JOINT RESOLUTION 4B

SJR 4-B proposes amendments to sections 3, 4, 6 and 9 of Article VII, and the creation of a new section 27 of Article XII of the Florida Constitution. The full text of the ballot summary is as follows:

BE IT RESOLVED that the following statement be placed on the ballot:

#### CONSTITUTIONAL AMENDMENT ARTICLE VII, SECTIONS 3, 4, 6, AND 9; ARTICLE XII, SECTION 27

AD VALOREM PROPERTY TAXATION: ASSESSMENTS, EXEMPTIONS, LIMITATIONS, AND HOMESTEADS.—Proposing amendments to the State Constitution to increase the homestead exemption from \$25,000 to 75 percent of the just value of the property up to \$200,000 and 15 percent of the just value of the property above \$200,000 up to \$500,000, to subject the \$500,000 threshold to annual adjustments based on the percentage change in per capita personal income, to authorize an increase in the \$500,000 threshold amount by a two-thirds vote of the Legislature, and to specify minimum homestead exemption amounts of \$50,000 for everyone except low-income seniors and \$100,000 for low-income seniors; to provide for transitional assessments of homestead property under the increased homestead exemption that include preserving application of Save-Our-Homes provisions until an irrevocable election is made; to revise Save-Our-Homes provisions to conform to provisions providing for the increased homestead exemption and transitional assessments of homestead property; to require the Legislature to limit the authority of counties, municipalities, and special districts to

increase ad valorem taxes; to authorize an exemption from ad valorem taxes of no less than \$25,000 of assessed value of tangible personal property; to provide for assessing rent-restricted affordable housing property and waterfront property used for commercial fishing, commercial water-dependent activities, and public access at less than just value; and to schedule the amendments to take effect upon approval by the voters and operate retroactively to January 1, 2008, if approved in a special election held on January 29, 2008, or shall take effect January 1, 2009, if approved in the general election held in November of 2008.

Plaintiff argues that the summary is misleading in that it fails to advise the voter that the proposed amendments would phase out, and ultimately eliminate, "Save-Our Homes" protections contained in section 4, Article VII of the Florida Constitution, and that it falsely suggests a minimum homestead exemption of \$50,000 for everyone. The Defendants argue that the ballot language is clear and concise and is divided into distinct parts separated by semicolons, and must be read as such.

#### STANDARD OF REVIEW

The duty and responsibility of this Court in approaching this significant question is well established. The standard is:

In addressing our responsibility to assure that proposed amendments meet the requirements of section 101.161(1), we have stated that the purpose of this statute "is to assure that the electorate is advised of the true meaning, and ramifications, of an amendment," *Askew v. Firestone*, 421 So.2d 151, 156 (Fla. 1982). We have explained that the statute requires the title and summary to be (a) "accurate and informative," *Smith v. American Airlines*, 606 So.2d 618, 621 (Fla. 1992), and (b) objective and free from political rhetoric, see *Evans*, 457 So.2d 1355; *Save Our Everglades*, 636 So.2d at 1341.

*Advisory Opinion to the Attorney General re: Tax Limitation*, 644 So.2d 486 at 490 (Fla. 1994)

This Court is fully aware, and the Defendants have clearly pointed out to the Court, that its review should be "highly deferential" as it reviews and considers these legislatively-proposed amendments. (Defendants' Memorandum In Opposition to Plaintiff's Motion for Summary

Judgment and Cross-Motion For Summary Judgment at p. 5). The extent of that deference has been described as follows:

In conducting this review, we traditionally have accepted a measure of deference to the Legislature:

Another thing we should keep in mind is that we are dealing with a constitutional democracy in which sovereignty resides in the people. It is their Constitution that we are construing. They have a right to change, abrogate or modify it in any manner within the confines of the Federal Constitution. The legislature which approved and submitted the proposed amendment took the same oath to protect and defend the Constitution that we did and our first duty is to uphold their action if there is any reasonable theory under which it can be done. This is the first rule we are required to observe when considering acts of the legislature and it is even more impelling when considering a proposed constitutional amendment which goes to the people for their approval or disapproval.

*Armstrong v. Harris*, 773 So.2d 7 at 14 (Fla. 2000) citing *Gray v. Golden*, 89 So.2d 785, 790 (Fla. 1956).

Try as this Court has, and having considered all memoranda and argument presented to the Court, and having read, reread, examined and studied the ballot summary under review, the Court cannot find that the language is clear, concise, unambiguous, and fair. The language at issue is misleading and confusing, and does not provide fair notice to the voter, educated or otherwise, of the purpose and effect of the proposed amendments to the Florida Constitution. Justice Grimes spoke of the educated voter in *Smith v. American Airlines*, 606 So.2d 618 (Fla. 1992):

While we agree that voters may be presumed to have the ability to reason and to draw logical conclusions, we do not believe that the ballot summary here is written clearly enough for even the more educated voters to understand its chief purpose. . .

We also agree with appellant that voters are generally required to do their homework and educate themselves about the details of a proposal and about the pros and cons of adopting the proposal. However, the availability of public information about a proposed amendment cannot be a substitute for an accurate and informative ballot summary.

Id. at 621.

Currently, all citizens of Florida who own a homestead are entitled to the protection provided by section 4(c), Article VII of the Florida Constitution, known as the Save-Our-Homes provision. This provision effectively limits an increase in the assessment on a homestead to the lower of three percent (3%) of the assessment for the prior year, or the percent change in the Consumer Price Index. Fla. Const. Art. VII, §4(c)(1). The Supreme Court has said that “In brief, the amendment was designed to ensure that citizens on fixed incomes would not lose their homes on the tax block due to the rising value of Florida property.” *Smith v. Welton*, 729 So.2d 371, 373 (Fla. 1999). This right would be lost under the proposed amendments to anyone not entitled to a homestead exemption on the effective date of the proposed amendments, and nowhere is the loss of this valued constitutional protection disclosed in the ballot summary. (Proposed section 12, Article XII, SJR 4-B).

The ballot summary addresses this issue as follows:

;to provide for transitional assessments of homestead property under the increased homestead exemption that include preserving application of Save-Our-Homes provisions until an irrevocable election is made; to revise Save-Our-Homes provisions to conform to provisions providing for the increased homestead exemption and transitional assessments of homestead property;

SJR 4-B, lines 2-8, page 13.

The summary is just not correct. In fact, it is misleading. There is no “preserving application of Save-Our-Homes provisions” for all of those persons who are not entitled to a homestead tax exemption on the effective date of the amendments, or for anyone who sells or conveys title to their homestead after the effective date of the amendments whether or not an “irrevocable election” is made. We have nowhere to look as to the meaning of “preserving” and “revising” except the words as they are used and defined in the dictionary. *Green v. State*, 604 So.2d 471, 473 (Fla. 1992); *Frankenmuth Mut. Ins. Co. v. Magaha*, 769 So.2d 1012, 1020 (Fla. 2000) Merriam-Webster’s On-

line Dictionary, © 2006-2007 Merriam-Webster's, Incorporated, defines the word "preserving" as "to keep safe from injury, harm, or destruction; protect"; or "to keep alive, intact, or free from decay b: maintain." The word "revising" is defined as "to look over again in order to correct or improve." Merriam-Webster On-line Dictionary (2006-2007) at <http://www.merriam-webster.com/dictionary/revising>. After the effective date of the amendments, the constitutional protections currently provided will not be preserved for anyone who is not entitled to the homestead tax exemption on the effective date of the amendments. They also will not be available to anyone who sells or transfers their homestead after the effective date of the amendments. They will only be preserved for those who currently enjoy them and who do not choose to surrender those protections by making the "irrevocable election". Furthermore, for those who do not make the "irrevocable election," the protections currently being provided are not revised, but remain absolutely the same. See: *Evans v. Firestone*, 457 So.2d 1351, 1355 (Fla. 1984) (as to the use of the word "establishes"). Nowhere in the ballot summary is the voter alerted to the elimination of these constitutional protections on homestead assessments. They are simply led to believe that they are preserved or revised.

Plaintiff argues that the ballot summary is also misleading because it falsely suggests a minimum homestead exemption of \$50,000 for everyone. Plaintiff also appears to argue that the ballot summary is misleading in that there would not be an increase in the homestead exemption for those persons who keep their Save-Our-Homes treatment and do not make the "irrevocable election." In light of the Court's findings above determining that the ballot summary is misleading for the reasons stated, the Court does not deem it necessary to address these issues.

It is therefore **ORDERED and ADJUDGED** that Plaintiff's Motion for Summary Judgment is granted and the Court declares that the ballot summary for the proposed amendments relating to Ad Valorem Taxation: Assessments, Exemptions, Limitations, and Homesteads proposed by Senate Joint Resolution 4-B is misleading and inaccurate and shall not be placed on the ballot for a special election scheduled January 29, 2008. Defendants' Cross-Motion For Summary Judgment is denied.

#### HOUSE BILL 5B

In light of the fact this Court has determined that the ballot summary of SJR 4-B shall not be placed on the ballot for the special election scheduled for January 29, 2008, pursuant to HB 5B, the Court determines this issue to be moot and finds it unnecessary to render an opinion on whether or not HB 5B violates the "single amendment or revision" requirement of section 5, Article XI of the Florida Constitution.

#### HOUSE BILL 1B

Plaintiff has also requested a declaration that sections 1 through 12 of House Bill 1B (HB 1B) are unconstitutional, and an order enjoining the Department of Revenue from implementing the same prior to the passage of the amendments proposed in SJR 4-B. The Plaintiff contends that the provisions of sections 1 through 12 of HB 1B impermissibly limit the authority of local governments, and specifically municipalities, to levy ad valorem taxes up to ten mills in violation of section 7, Article VII of the Florida Constitution "as it currently reads." The provisions of sections 1 through 12 became effective on June 21, 2007, when HB 1B became law. These provisions do not relate to homestead protection. Sections 13 through 32 of HB 1B, "shall take effect only upon the effective date of amendments to the State Constitution contained in Senate Joint Resolution 4-B or House

Joint Resolution 3B revising the homestead tax exemption. . .” (Section 34, HB 1B, lines 1910-1915, page 69).

To resolve the present controversy, it is not essential that we examine the details of how the tax rate formulas are calculated or the exact nature of the limitations imposed upon the authority of municipalities. Plaintiff asserts, and Defendants do not contest, the effect of the challenged provisions is to place limits on the right of municipalities to assess up to ten mills of ad valorem taxes without meeting the appropriate requirements imposed by the challenged provisions contained in Sections 1-12 of HB 1B. Plaintiff contends that the Legislature has no authority to limit municipal authority to assess up to ten mills of ad valorem taxes. To the contrary, Defendants contend that the Legislature has the absolute inherent and constitutional authority to do just that.

Section 9, Article VII of the Florida Constitution provides in pertinent part:

- (a) Counties, school districts, and municipalities shall be authorized by law to levy ad valorem taxes. . .
- (b) Ad valorem taxes, . . . , shall not be levied in excess of the following millages upon assessed value of real estate and tangible personal property: . . . ; for all municipal purposes, ten mills; . . .

Plaintiff relies substantially on statements contained in *Advisory Opinion to the Attorney General re Tax Limitation*, 644 So.2d 486 (Fla. 1994) and the language in section 9, Article VII of the Florida Constitution. The Court finds that Plaintiff’s reliance on this authority is ill-founded. In the *Tax Limitation* decision, the Supreme Court was faced with the review of citizen initiated ballot initiatives and addressed them only to determine the single subject and fair notice requirements of those initiatives. *Id.* at 489. The language from section 9(a), Article VII quoted above specifically provides that the municipalities’ right to assess “shall be authorized by law.” The meaning and application of this language was discussed and decided in *Florida Dept. of Education*

*v. Glasser*, 622 So.2d 944 (Fla. 1993). As applied to school districts, the Supreme Court specifically rejected the argument Plaintiff makes in this proceeding, and the Court stated:

The issue presented here is whether a school district has constitutional authority to levy such taxes in the absence of enabling legislation. We answer the query in the negative for the reasons hereinafter expressed.

*Id.* at 946.

Defendants rely upon the expressed language of section 9, Article VII of the Florida Constitution, as well as the inherent power of the Legislature to tax, subject to the constitutional ten mill limit when applied to municipalities, described by the Supreme Court in *Belcher Oil Company v. Dade County*, 271 So.2d 118 (Fla. 1972):

As the Florida Constitution and the case law of this state evidence, the State, through the legislative branch of the government, possesses an inherent power to tax, and a municipality may exercise a taxing power only to the extent to which such power has been specifically granted to it by general law. (Citations omitted). The right to determine the subjects of taxation and exemptions therefrom is within the Legislature's prerogative in the exercise of its sovereign power. But this right is subject to the controlling constitutional limitations. (Citation omitted). This Court has held in *City of Tampa et al. v Birdsong*, *Supra*, municipalities may not impose a particular tax unless specifically authorized by general law to do so.

*Id.* at 122.

Plaintiff has correctly pointed out to this Court that the *Glasser* decision applied to school districts, and that the Supreme Court specifically declined to say whether the *Glasser* opinion should be applied to counties, when it footnoted a decision as follows:

We need not and therefore do not decide whether the full rationale of *Glasser* should be applied here. . . Whether the Legislature's power is any narrower in the context of county governmental taxation is a question we need not address today.

*Board of County Commissioners, Hernando County v. Fla. Dept. of Comm. Affairs*, 626 So.2d 1330, 1332 n. 2 (Fla. 1993).

This Court cannot so decline because the issue has been squarely presented to the Court by the enactment of HB 1B which is already in effect, and by the challenge to that legislation as it directly applies to municipal authority to levy taxes. The Court cannot find merit in Plaintiff's argument that municipalities should be treated differently than school districts for the purpose of determining the scope of the application to municipalities of section 9, Article VII of the Florida Constitution. Because the language granting and limiting the taxing authority contained in the constitutional provision is identical in pertinent part as to school districts and municipalities, and for all of the reasons set forth in *Glasser* as to the meaning of such language and authority, it is therefore

**ORDERED and ADJUDGED** that Plaintiff's Motion for Summary Judgment is denied, and Defendants' Cross-Motion for Summary Judgment is granted, and the Court declares that Sections 1 through 12 of HB 1B are not unconstitutional, and their application and enforcement shall not be enjoined until the passage of the constitutional amendments proposed in SJR 4-B and HB 5B.

Costs of this proceeding shall be paid by the party incurring the same.

Motions for rehearing or clarification will not be entertained.

**DONE and ORDERED** in Tallahassee , Leon County Florida this 24<sup>th</sup> day of September, 2007.

  
\_\_\_\_\_  
**CHARLES A. FRANCIS**  
Chief Judge

Copies furnished to:

Jamie A. Cole, Esq.  
Weiss Serota Helfman Pastoriza Cole & Boniske, PL  
200 E. Broward Blvd., Suite 1900  
Fort Lauderdale, FL 33301

Scott D. Makar, Esq.  
Solicitor General  
Officer of the Attorney General, State of Florida  
The Capitol PL-01  
Tallahassee, FL 32399-1050

Louis F. Hubener, III, Esq.  
Chief Deputy Solicitor General  
Office of the Attorney General, State of Florida  
The Capitol PL-01  
Tallahassee, FL 32399-1050

Lynn C. Hearn, Esq.  
General Counsel  
Secretary of State  
Florida Department of State  
R.A. Gray Building  
500 South Bronough St.  
Tallahassee, FL 32399-0250

J. Bruce Hoffman, Esq.  
General Counsel  
Department of Revenue  
204 Carlton Building  
P. O. Box 6668  
Tallahassee, FL 32314-6668

Robert Sugarman, Esq.  
Pedro Herrera, Esq.  
Sugarman and Susskind, PA  
100 Miracle Mile, Suite 300  
Coral Gables, FL 33134