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MEMORANDUM

TO: **2016 Brevard County Charter Review Commission**
FROM: **Wade C. Vose, Esq., General Counsel**
DATE: **February 27, 2016**
SUBJECT: **Analysis of Legality and Constitutionality of Section 2.9.3.1 of the Brevard County Charter, Providing for Limitations on Growth in Ad Valorem Tax Revenues**

Pursuant to the Commission's request, this office has prepared an analysis of the legality and constitutionality of Section 2.9.3.1 of the Brevard County Charter, providing for limitations on growth in ad valorem tax revenues.

History of Charter Tax Caps in Brevard County

Prior to 2004, the Brevard County Charter included a provision at Section 5.4 that stated:

> "Brevard County shall not increase its ad valorem tax revenue for operating funds (exclusive of revenues from new construction and improvements) in any one year by more than three percent (3%) or the percentage change in the Consumer Price Index for the previous year, whichever is less, over the ad valorem revenues in the previous year, without approval of a majority of the electors of the County voting thereon at a general election or special election called for purposes of such approval."

An action was brought in Brevard County Circuit Court challenging the constitutionality of this provision. A final judgment was entered in that case holding that this charter provision was inconsistent with Chapters 129 and 200, Florida Statutes, and therefore violative of Article VIII, section 1(g) of the Florida Constitution.

The Fifth District Court of Appeal in *Ellis v. Burk,* 866 So.2d 1236 (Fla. 5th DCA 2004), *rev. denied*, 879 So.2d 621 (Fla. 2004), affirmed the circuit court decision, holding that the "trial court correctly concluded that section 5.4 of the Brevard County Charter is unconstitutional as being in conflict with Chapters 129 and 200, Florida Statutes, which set forth the statutory framework by which counties are to establish budgets and millage rates." *Id.* at 1237.

In reaching this conclusion, the court in *Ellis* quoted and adopted the trial court's finding that "The Second District Court of Appeal [in *Charlotte County Board of County Commissioners v. Taylor*, 650 So.2d 146 (Fla. 2d DCA 1995)] found that Chapters 129 and 200 set forth the exclusive statutory scheme for establishing the budget and the resulting millage rate." *Ellis*, 866 So.2d at 1238. [Emphasis supplied.] The *Ellis* court further quoted with approval the trial court's interpretation that "the [Florida] Supreme Court [in *Board of County Commissioners of Dade County v. Wilson*, 386 So.2d 556 (Fla. 1980)] found that Chapter 200 set forth the exclusive manner by which to set countywide millage rates." *Ellis*, 866 So.2d at 1238. [Emphasis supplied.]

Thereafter, in 2007, the Florida Legislature enacted a special act, Chapter 2007-310, Laws of Florida, that provided in pertinent part:

> "Section 1. Brevard County may cap, through a provision in its charter, the annual growth in ad valorem tax revenues. Any such cap may not restrict the annual growth at a rate below the lesser of 3 percent or the percentage change in the Consumer Price Index as provided in section 193.155(1)(b), Florida Statutes. Any such cap specified in a county charter must allow for the cap to be overcome by a finding of necessity due to emergency or critical need by a super majority vote of the county commission. In applying the increase or growth cap, the county shall compute a millage rate that, exclusive of new construction, additions to structures, deletions, increases in the value of improvements that have undergone a substantial rehabilitation which increased the assessed value of such improvements by at least 100 percent, and property added due to geographic boundary changes, will provide the same ad valorem tax revenue for each taxing authority as was levied during the prior year. It is the rate that shall be subject to any cap in growth or increase in ad valorem revenues established by county charter.

It is important to note that the special act did not itself impose a cap on ad valorem tax revenues or millage rates within Brevard County. Rather, the special act purported to authorize Brevard County, through a provision in its county charter, to impose such a cap, and then set parameters on how that authority could be exercised. As a result, the special act does not prohibit the repeal of any such charter tax cap, and it does not prohibit an amendment of the terms of such tax cap, so long as the provision continues to be consistent with the requirements of the special act.

The special act was subsequently approved by a vote of the electors at referendum on January 29, 2008, pursuant to a referendum requirement conditioning its effectiveness on passage as set forth in sections 2 and 3 of the special act.

Thereafter, an amendment to the Brevard County Charter was prepared, proposed, and approved by a vote of the electors on November 4, 2008, creating Section 2.9.3.1 of the Brevard County Charter, which provides the following:

> "2.9.3.1. Limitations on growth in ad valorem tax revenues.
>
> "(a) Unless otherwise allowed by this subsection 2.9.3.1, the Board of County Commissioners shall not impose any ad valorem tax for county purposes at a millage rate which causes the budgeted revenue therefrom to the County to increase over the budgeted ad valorem revenue for the previous fiscal year by more than the lesser of: (1) three percent, or (2) the percentage change in the Consumer Price index from the preceding calendar year, as measured in accordance with Section 193.155(1)(b), Florida Statutes (as that Section exists in 2008 or may thereafter be amended or transferred).

> "(b) Unless otherwise allowed by this subsection 2.9.3.1, the Board of County Commissioners shall not impose any ad valorem tax for municipal purposes within any municipal services taxing unit, or for district purposes of any district for which the Board has the power to fix or approve the millage rate, at a rate which, for such unit or district, causes the budgeted revenue of the unit or district from ad valorem taxes to increase over the budgeted ad valorem revenue for the previous fiscal year by more than the lesser of (1) three percent, or (2) the percentage change in the Consumer Price Index from the preceding calendar year, as measured in accordance with Section 193.155(1)(b), Florida Statutes (as that Section exists in 2008 or may thereafter be amended or transferred).
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> "(c) Notwithstanding paragraphs (a) and (b) of this subsection, the Board of County Commissioners may impose an ad valorem tax for county, municipal or district purposes at a rate which exceeds the limitations in paragraphs (a) and (b), if a supermajority of the Board concurs in a finding that such an excess is necessary because of emergency or critical need. The finding shall set forth the ultimate facts upon which it is based, and shall be valid for a single budget year.
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> "(d) In calculating the allowable increase in ad valorem revenues over the ad valorem revenues budgeted for the previous year under paragraphs (a) and (b) of this subsection, the Board of County Commissioners shall exclude from the anticipated revenues all revenue changes from the following kinds of property not appearing on the previous year's roll: (1) new construction; (2) additions to or demolitions in whole or in part of existing construction; (3) changes in the value of improvements that have undergone renovation to an extent of not less than 100% increase in assessed value (as measured from the last year of assessment prior to commencement of renovation); and (4) in the case of municipal service taxing units or districts, any properties added since the previous year's roll by reason of boundary changes.
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> "(e) Nothing in this subsection shall authorize imposition of a millage rate which exceeds the rate prohibited by the constitution or general laws of Florida, or prohibit imposition of a millage rate which is required by the constitution or general laws of Florida or by any final order of a court of competent jurisdiction. Nothing in this subsection shall apply to any millage necessary to the payment of general obligation bonds in accordance with all bond covenants, or to any other millage approved by referendum of the electors, whether before or after the effective date of this subsection."

The tax cap and procedures set forth in Section 2.9.3.1 are plainly inconsistent with general law as provided in Chapters 129 and 200, Florida Statutes. Most obviously, Chapter 200, Fla. Stat., does not contain limitations on millage rates such that revenue increases are limited to the lesser of 3% or CPI. More subtly, however, the tax cap specified in Section 2.9.3.1 applies independently to each individual millage levied by the county, each individual millage levied by a county municipal services taxing unit, and each individual millage levied by a county

dependent special district.[1] In stark contrast, Section 200.065(5)(b), Fla. Stat., allows counties the flexibility to raise any individual millage rate above the statutory maximum millage rate (basically, the roll back rate adjusted for change in per capita personal income) so long as a decrease in one or more other levies causes the total county aggregate levy to not exceed a maximum aggregate levy.

In light of Section 2.9.3.1's patent inconsistency with general law, any analysis of the legality of Section 2.9.3.1 must include an analysis of and be contingent upon the validity (in particular, the constitutionality and legality) of the special act itself.

Constitutionality of Chapter 2007-310, Laws of Florida

Generally, when a valid special law and a general law conflict, the special law prevails. *Rowe v. Pinellas Sports Auth.,* 461 So. 2d 72, 77 (Fla. 1984). However, that general proposition would not hold true if the special law were not itself valid, i.e., constitutionally permissible.

The Florida Constitution contains a section entitled "Prohibited Special Laws", at Article III, Section 11, which provides in part:

> (a) There shall be no special law or general law of local application pertaining to:
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> > (2) assessment or collection of taxes for state or county purposes, including extension of time therefor, relief of tax officers from due performance of their duties, and relief of their sureties from liability"

Accordingly, an analysis of the special act is necessary to determine whether it is a "prohibited special law" under Article III, Section 11(a)(2) of the Florida Constitution.

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[1] It may not be immediately apparent from a review of the special act that this cap on each individual millage is authorized or contemplated by the terms of the special act. Indeed, most of the language of section 1 of the special act refers to the nouns "cap" and "rate" in the singular. However, the individual millage caps appear consistent with the computation methodology provided in the fourth sentence of section 1, stating "In applying the increase or growth cap, the county shall compute a millage rate that... will provide the same ad valorem tax revenue <u>for each taxing authority</u> as was levied during the prior year." While "the county" and "a millage rate" are both referred to here in the singular, reference to "for each taxing authority" appears to indicate, if obliquely, a contemplation of a separate cap for the county general fund, each MSTU, and each dependent special district. While it may seem that there is only one "taxing authority" involved (the county), pursuant to Rule 12D-17.002, F.A.C., the term "taxing authority" "includes, but is not limited to, any county, municipality, authority, special district… or other public body of the state, [or] municipal service taxing or benefit unit (MSTU or MSBU)…." Notably, it appears that if any one taxing authority levied two or more millages subject to Section 2.9.3.1, an inconsistency would arise between the special act and the charter provision, as the special act appears to apply a limit on a per-taxing-authority basis, while the charter provision applies a limit on a per-millage basis. It appears this clash would have arisen had Section 2.9.3.1(e) not exempted "any millage necessary to the payment of general obligation bonds in accordance with all bond covenants, or to any other millage approved by referendum of the electors" (roughly, the categories of county millage other than general county millage under Section 200.001(1), Fla. Stat.).

There is support for a broad reading of the term "assessment" as used in the phrase "assessment… of taxes".[2] As set forth in *Jackson Lumber Co. v. McCrimmon,* 164 F. 759, 763-764 (N.D. Fla. 1908):

> The word "assessment," as used in tax statutes, does not mean merely the valuation of the property for taxation. It includes the whole statutory mode of imposing the tax. It embraces all the proceedings for raising money by the exercise of the power of taxation from the inception to the conclusion of the proceedings.

Only a small set of appellate cases have endeavored to interpret Article III, Section 11(a)(2) and its identical antecedent, Article III, Section 20, of the Florida Constitution of 1885. Taken together, these cases hold that the prohibition on a special law pertaining to the assessment of taxes for county purposes is interpreted to prohibit any local enactment that effects the manner or method of assessing taxes, that interferes with the uniformity of the assessment and collection process, or that bears upon the mechanics of tax assessment and collection, but does not prohibit special acts that empower a local government to levy or impose a tax. *Wilson v. Hillsborough County Aviation Authority,* 138 So.2d 65 (Fla. 1962); *Metropolitan Dade County v. Golden Nugget Group,* 448 So.2d 515 (Fla. 3d DCA 1984); *McMullen v. Pinellas County,* 90 Fla. 398 (Fla. 1925); *Kroegel v. Whyte*, 56 So. 498 (Fla. 1911).

Ch. 2007-310, Laws of Florida, does not authorize or empower Brevard County to impose a tax. Rather, the special act purports to authorize the Brevard County Charter to modify central portions of the uniform assessment process, namely, the uniform processes provided by Chapters 129 and 200, Florida Statutes, for establishing the budget and the resulting millage rate. Accordingly, at first glance it would appear that Chapter 2007-130, Laws of Florida, may be a prohibited special law.

However, there is a forty year old appellate opinion that, without setting forth any legal reasoning whatsoever, held that a special act providing for a tax cap in Broward County, Ch. 74-434, Laws of Florida, did not violate Article III, Section 11(a)(2), of the Florida Constitution. *See Coe v. Broward County,* 327 So.2d 69, (Fla. 4th DCA), *affd*., 341 So.2d 762 (Fla. 1976). On appeal, the Florida Supreme Court, in a two sentence affirmance, cited *Wilson v. Hillsborough County Aviation Authority,* 138 So.2d 65 (Fla. 1962) as authority without discussion. In the absence of any legal reasoning whatsoever for the Fourth DCA's holding, *Wilson* must be examined in an attempt to determine whether Ch. 2007-310, Laws of Florida, would fall under the ambit of the holding in *Coe*.

The court in *Wilson* opined that "[t]he provision of Section 20, Article III, Florida Constitution, proscribing local laws for 'the assessment and collection of taxes' for county purposes was designed merely to provide uniformity in the assessment and collection process."

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[2] *See Metropolitan Dade County v. Golden Nugget Group,* 448 So.2d 515 (Fla. 3d DCA 1984) (noting that Article III, Section 11(a)(2), Fla. Const., concerns "the assessment of taxes", clarifying that "of taxes" modifies the word "assessment" as well as "collection".

It merits noting that the tax cap in *Coe* was specifically imposed by the Florida Legislature in the special act itself, rather than purporting to grant to Broward County the authority to enact its own version of a tax cap. Accordingly, the requirement for "uniformity", apparently integral to the Florida Supreme Court's interpretation of Article III, Section 11(a)(2) in *Wilson*, and presumably by extension in *Coe*, is maintained, in that only one body, the Florida Legislature, is vested with the authority to specify the assessment process.

While this may seem like a low bar, it nonetheless fails to be satisfied by the Chapter 2007-310, Laws of Florida. Where the Florida Legislature merely purports to assign the option to impose a tax cap to Brevard County (exercisable and repealable in Brevard County's own discretion, and in amounts subject to its control), this mandated "uniformity" would appear to be lost, as the Florida Legislature has not specified the assessment process in such an instance. Accordingly, the option to elect to self-impose a tax cap set forth in Chapter 2007-310, Laws of Florida, appears distinguishable from the *Coe* case and the Broward County tax cap imposed directly by the Florida Legislature, and thus may yet be a prohibited special law in violation of Article III, Section 11(a)(2) of the Florida Constitution.

Legal Interaction of Chapter 2007-310, Laws of Florida and Chapter 200, Florida Statutes

As stated *supra*, it is generally the case that when a valid special law and a general law conflict, the special law prevails. *Rowe,* 461 So. 2d at 77. However, where a general act is intended as an overall restatement of the law on the same subject, this precedence does not necessarily maintain. *See Floyd v. Bentley*, 496 So.2d 862, (Fla. 2d DCA 1986), *rev. denied*, 504 So.2d 767 (Fla. 1987) (effectiveness of more specific act is retained unless general act is intended as overall restatement of the law on the same subject). *See also State v. Dunmann*, 427 So. 2d 166, 168 (Fla. 1983) (focusing such an analysis on the "manifest intent" of the general law).

As recognized by the Fifth DCA in *Ellis v. Burk*, "Chapters 129 and 200 set forth the exclusive statutory scheme for establishing the budget and the resulting millage rate." 866 So.2d at 1238. Moreover, in at least two places, Chapter 200, Fla. Stat., clearly manifests the specific intent of such general law to regulate the chapter's interaction with special acts.

First, Section 200.001(7), Fla. Stat. provides:

> "Millages shall be fixed only by ordinance or resolution of the governing body of the taxing authority in the manner specifically provided by general law or by special act."

This statutory provision explicitly requires that millages must be fixed only "in the manner specifically provided by general law or by special act", and thus appears to require that the "manner" be "specifically provided" within the four corners of the general law or special act. However, the Brevard tax cap is not contained within the four corners of a special act, but rather is specified in Section 2.9.3.1 of the Brevard County Charter. This section was enacted under the stated authority of a special act, which purported to provide Brevard County with an option to self-impose a tax cap (exercisable and repealable in Brevard County's own discretion, and in

amounts subject to its control), but the actual terms of the millage cap were not "specifically provided" by the special act, but by the charter provision itself. Notably, the magnitude of the tax cap was left in the discretion of Brevard County to set by charter amendment, subject only to a floor below which revenue increases could not be prohibited.

This distinction is analogous to that recognized by the court in *Pinellas County v. City of Key Largo,* 964 So.2d 847, 854-55 (Fla. 2nd DCA 2007), which held that where Section 171.044(4), Fla. Stat. specified that an exclusive method of voluntary annexation may be provided for in a county charter, it was nonetheless legally impermissible for a Pinellas County Charter provision to purport to empower the Pinellas County Commission to enact an exclusive method of voluntary annexation by ordinance. In that case, the exclusive method of annexation was not set forth within the four corners of the charter itself, but only purported to authorize an ordinance outside the charter enacting an exclusive method of voluntary annexation. Stated differently, where a statute specifically indicates that a "manner" or "method" must be set forth within a particular type of legislative instrument, it is not legally permissible that such instrument purport to authorize yet another legislative instrument to specify such "manner" or "method". *See id.*

Therefore, although Section 200.001(7), Fla. Stat. allows millages to be fixed "in the manner specifically provided… by special act", it does *not* provide that they can be fixed "in the manner specifically provided" by a provision of a county charter.

In addition, Section 200.065, Fla. Stat., (Method of fixing millage) provides at subsection 15:

> (15) The provisions of this section shall apply to all taxing authorities in this state which levy ad valorem taxes, and shall control over any special law which is inconsistent or in conflict with this section, except to the extent the special law expressly exempts a taxing authority from the provisions of this section. This subsection is a clarification of existing law, and in the absence of such express exemption, no past or future budget or levy of taxes shall be set aside upon the ground that the taxing authority failed to comply with any special law prescribing a schedule or procedure for such adoption which is inconsistent or in conflict with the provisions of this section.

This provision manifests the clear legislative intention that this section "shall control over any special law which is inconsistent or in conflict with" it, notwithstanding the fact that it is a general law, and provides an exception only "<u>to the extent the special law expressly exempts</u> a taxing authority from the provisions of this section."

An examination of Ch. 2007-310, Laws of Florida, reveals that such special act does not appear to "expressly exempt" Brevard County or any taxing authority from the provisions of Section 200.065, Fla. Stat. There is no language within the special act that references the words "exempt" or "exemption" or any synonyms thereof. Indeed, Brevard County continues to be required to comply with each requirement of Section 200.065, Fla. Stat. However, it must also comply with the additional requirements of Section 2.9.3.1. Conceivably, it could be asserted that the special act "impliedly" exempts Brevard County from Section 200.065, Fla. Stat., to the

extent that the requirements of the charter provision it purports to authorize are inconsistent as containing requirements in addition to those set forth in Section 200.065, Fla. Stat. However, the Legislature's use of the words "expressly exempts" appears to draw a clear distinction with any thought that such a hypothetical "implied exemption" would actually satisfy the requirement of "express exemption" set forth clearly and repeatedly in Section 200.065(15), Fla. Stat.

Notably, the specific special act requirements of both Section 200.001(7) and 200.065(15), Fla. Stat., harmonize perfectly with the Florida Supreme Court's holding as recognized by the Fifth DCA in *Ellis* that "Chapter 200 set[s] forth the exclusive manner by which to set countywide millage rates." 866 So.2d at 1238 (citing *Board of County Commissioners of Dade County,* 386 So.2d at 560). In particular, these two provisions specify that millages will be set in a manner set forth in the chapter directly, or in a manner complying with the chapter's particular requirements that any changes to the general process be "specifically provided" within such a special act, and requiring that any such special act "expressly exempt[]" a taxing authority from the provisions of Section 200.065, Fla. Stat. As discussed above, Section 2.9.3.1 and Chapter 2007-310, Laws of Florida, fail to satisfy either of these requirements.

In addition, these specific special act requirements also harmonize with the distinction drawn *supra* with respect to the *Coe* case and the uniformity protected by the prohibition on special laws pertaining to the "assessment or collection of taxes", by lodging only with the Florida Legislature the authority to specify the assessment process, via processes "specifically provided" in general law or within the four corners of a special act, and requiring that any such special act "expressly exempt[]" a taxing authority from the provisions of Section 200.065, Fla. Stat.

However, it must be noted that a court could yet decide that the most recent expression of legislative will should control, notwithstanding this manifest intent of legislative will set forth in the seemingly mandatory requirements for special acts modifying the assessment process set forth in Section 200.001(7) and Section 200.065(15), Fla. Stat. *See Palm Beach Cty. Canvassing Bd. v. Harris*, 772 So. 2d 1273, 1287 (Fla. 2000) ("The more recently enacted provision may be viewed as the clearest and most recent expression of legislative intent."). Ch. 2007-310, Laws of Florida, was enacted in 2007, while both Section 200.001(7) and Section 200.065(15), Fla. Stat. predate its enactment. Accordingly, it is not clear whether a court would find more convincing the recency of Ch. 2007-310, Laws of Florida, or the manifest intent of the Section 200.001(7) and Section 200.065(15), Fla. Stat. to regulate the effect of special acts on the manner of fixing millages, in ruling on which has precedence.

Based on the above analysis, it appears that there is a persuasive argument that Section 2.9.3.1 of the Brevard County Charter is illegal because it violates Section 200.001(7), Fla. Stat., in that it provides for millages to be fixed in a manner other than "specifically provided" in either general law or by a special act, and because the special act purporting to authorize it, Chapter 2007-310, Laws of Florida, conflicts with the clear expression and manifest intent of legislative will ("The provisions of this section… shall control over any special law which is inconsistent or in conflict with this section") set forth in Section 200.065(15), Fla. Stat., because it does not "expressly exempt" Brevard County or any taxing authority from the provisions of Section 200.065, Fla. Stat. However, a court may find that the more recent enactment of the special act nonetheless

overrides the manifest intent of Chapter 200, Fla. Stat. to regulate the effect of special acts on the manner of fixing millages.