Home Rule and Exercise of Taxing Power

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COUNTY HOME RULE Pre-1968

- Prior to 1968 constitutional revision: County power subject to "Dillon's Rule"
- Express grant from Legislature
- No implied power not within scope of express grant
- Primary scope of power: special act

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COUNTY HOME RULE Post-1968

- 1968 Constitution abolished Dillon's Rule and unleashed county home rule
- Charter Counties: Art. VIII, § 1(g), Fla. Const.
- Non-charter Counties: Art. VIII, § 1(f), Fla. Const.

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CHARTER COUNTIES

- Direct constitutional grant of home rule upon elector approval of charter
- ". . . all powers of local sell-government not inconsistent with general law, or with special law approved by the electors."
- "The charter shall provide which shall prevail in the event of conflict between county and municipal ordinances."

Art. VIII, § 1(g), Fla. Const.

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NON-CHARTER COUNTIES

- "…shall have such power of self-government as is provided by general or special law."
- "... an ordinance in conflict with a municipal ordinance shall not be effective within the municipality to the extent of such conflict."

  Art. VIII, § 1(f), Fla. Const.
- Section 125.01, Florida Statutes: implemented home rule for all counties.

  Broadly construed by courts

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DIFFERENCE BETWEEN CHARTER AND NON-CHARTER COUNTIES

- Source of home rule power
- Charter counties are insulated from special acts not approved by the electors
- Charter counties are treated differently by Legislature: section 100.361, Florida Statutes – municipal recall
- Charters can preempt municipal authority
- Charter counties are vested with municipal taxing power in unincorporated areas

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SUMMARY: COUNTY HOME RULE POWER

- Amount of home rule power possessed by charter and non-charter counties is essentially the same
- Charter county may have less home rule power
  - State v. Sarasota County, 549 So. 2d 659 (Fla. 1989)
- Counties are not dependent upon the Legislature for authorization to act in pursuit of county purposes. Legislative statutes are relevant only to determine limitations of authority.

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Municipal Home Rule Pre-1968

- Dillion's Rule
- Express Grant
- No implied power not within an express grant
- Proliferation of special acts and population acts

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Municipal Home Rule Post- 1968

- 1968 Constitution abolished Dillion's Rule and unleashed municipal home rule
- Article VIII, §2

"Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions, and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law…."

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Municipal Home Rule Powers Act

- Home Rule legislatively implemented in Municipal Home Rule Powers Act, section 166.021, F.S.
- Must serve municipal purpose
- Must not be inconsistent with general law or special act or municipal charter
- Limitations on exercise of extraterritorial power, creation of cities, terms of elected officers and other matters listed in (3) and (4).

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COUNTY PREEMPTION OF MUNICIPAL POWER

- Non-charter county ordinance in conflict with a municipal ordinance is not effective within the city to the extent of the conflict
- Municipal purpose exception to the validity of a municipal “opt-out” ordinance
- Charter county charter provides which ordinance prevails in the event of conflict
- Dual referenda may be required for the resulting transfer of powers: Art. VIII, § 4, Fla. Const.

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Transfer of Powers

“By law or by resolution of the governing bodies of each of the governments affected, any function or power of a county, municipality or special district may be transferred to or contracted to be performed by another county, municipality or special district, after approval by vote of the electors of the transferor and approval by vote of the electors of the transferee, or as otherwise provided by law.”

Article VIII, §4, Fla. Const.

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Balancing Transfer of Powers and Charter County Preemption

Art. VIII, §1(g) v. Art. VIII, §4

- Power of a charter county to preempt an inconsistent municipal ordinance has been judicially balanced with the constitutional transfer of power provisions to require dual approval of both county and municipal electors of a charter amendment transferring a municipal service to the county
- Power of a charter county to preempt a municipal ordinance in regulatory matters does not require referenda
- Interlocal service agreements where actual control or supervision is not transferred are permissible
- Legislature retains authority to provide for assignments of authority as “otherwise provided by law.”

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Transfer of Powers Inquiry

(1) Whether the transfer from one unit of government to another involves the provision of services or the preemption of regulatory authority, and

(2) Whether the transfer from one unit of government to another involves total relinquishment of power and control over the service at issue.

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Home Rule Summary

- Counties and municipalities are not dependent upon the Legislature for authorization to act in pursuit of county or municipal purposes. Legislative statutes are relevant only to determine limitations of authority.
- Home rule powers of all counties and municipalities cannot be inconsistent with general law
- Home rule power of charter counties is derived directly from the Florida Constitution and can be diminished by special act only if the special act is approved by a vote of the electors
- Home rule power for municipalities and non-charter counties can be preempted by special act
- County charter can contain limitations on county power not inconsistent with general law that apply only to that charter county

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Home Rule Summary (cont.)

- Non-charter county ordinance that is in conflict with a municipal ordinance shall not be effective within the municipality to the extent of such conflict
- County charter can provide which shall prevail in event of a conflict between a county and municipal ordinance
- Charter County enjoys same taxing authority of a city unless contrary legislative intent
- Regulatory preemption by a county does not implicate the dual referenda requirement of the Transfer of Powers provision
- Transfer of Powers provision requires dual referenda to transfer functions or powers related to services.

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Special Districts

- Limited purpose governments
- Express grant of power
- No implied authority not within the scope of the express grant
- Authority embodied in district charter

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Dependent Districts

- Section 189.012(2), F.S.
- “Dependent" if it meets one of the following criteria:
  - Its governing body is identical to that of a single county or municipality
  - All members of the governing body are appointed by a single county or municipality
  - The members of the governing body can be removed during their unexpired term by a single county or municipality, or
  - Its budget requires approval of or can be vetoed by a single county or municipality

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Dependent District Creation

- County or city ordinance
  §189.02(1), F.S.
- Special act with consent
  §189.02(5), F.S.
- Ordinance adopted under section 125.01(5), Florida Statutes
- Minimum criteria for charter
  §189.02(4), F.S.

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Independent Districts

- Section 189.012(3), F.S.
- Special district that is not defined as "dependent" under the criteria of section 189.012(2), Florida Statutes, or any district that includes more than one county unless the district lies wholly within the boundaries of a single municipality

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Independent District Creation

- Special Act
  ad valorem millage with referendum approval
- General Law
  other tax revenues optional
- Ordinance adopted under section 125.01(5), Florida Statutes
- Interlocal adopted per 163.01, Florida Statutes
- Minimum requirements for charter
  §189.031(3), F.S.

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PREEMPTION OF HOME RULE POWERS BY LEGISLATURE

Constitutional provision, general law, or properly approved special act can limit the home rule authority of a county or city.

(1) Local government acts in conflict with state law

(2) Local government acts inconsistent with a pervasive regulatory scheme

(3) Local government acts contrary to state assignment of discretion and responsibility

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Waves of Preemption

Vacation Rentals

Tree Trimming

BUSINESS DAMAGES??

vegetable gardens

FIREARMS

Minimum Wage

Sunscreen

Styrofoam

PLASTIC BAGS

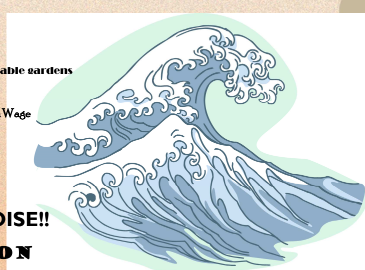
smoking

Workplace Standards

NOISE!!

SUPER PREEMPTION

ATTORNEYS' FEES



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Constitutional Preemption

(1) Conflict with Constitutional Provision; and

(2) **Reservation of State Power**

- matters inherently of a purely statewide concern are not proper subjects for local treatment
- "substantial degree a matter of state concern"
- employment law, landlord/tenant, estates etc.

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Preemption by Direct Conflict

- Legislature can preempt county and municipal home rule authority by adopting an express general law prohibition
- Local governments can impose more stringent requirements than state law, but cannot forbid what the Legislature has authorized or authorize what the Legislature has forbidden

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Section 57.112, Florida Statutes

- Authorizes prevailing party attorney's fees in certain actions alleging express preemption of a local ordinance by state law.
- No fees allowed if:
  - local government is provided notice of the preemption; and
  - acts within 30 days to withdraw or repeal the preempted ordinance.

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Pervasive Regulatory Scheme

- Implied preemption due to area of comprehensive regulation by the state
- Implied preemption when state intended to occupy the field rendering legislation by a "junior legislative body" in danger of conflict
- More stringent local ordinance allowed if the state law does not preempt local action or advance a policy that the Legislature intended to be uniform
- Legislative provisions are inconsistent if to comply with one provision, a violation of the other is required

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Contrary to State Assignment of Responsibility

- Implied preemption when action is contrary to or in conflict with assignment of authority by the Legislature
- Stay in your lane preemption

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CONSTITUTIONAL PREEMPTION OF TAXATION TO STATE

- Prior to 1968 constitutional revision, taxes could be authorized by special act
- Article VII, section 1(a): constitutional preemption of all taxes (except ad valorem taxes) to state
  - "No tax shall be levied except in pursuance of law."
  - "No state ad valorem taxes shall be levied upon real estate or tangible personal property."
  - "All other forms of taxation shall be preempted to the state except as provided by general law."

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Ad Valorem Taxes

"A direct tax is one that is imposed directly upon property, according to its value. It is generally spoken of as a property tax or an ad valorem tax. An indirect tax is a tax upon some right or privilege, or corporate franchise, and is most often called an excise or occupational tax."

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Constitutional Millage Limitations

"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."

Art. VII, §9(a), Fla. Const.

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Constitutional Millage Limitations

- Ten mills for municipal purposes.
- Ten mills for county purposes.
- To the extent authorized by law, a county furnishing municipal services may levy additional taxes within the limits fixed for municipal purposes.
- Special districts may levy a millage: (1) authorized by law, and (2) approved by voters.
- The ten mills for county purposes and municipal purposes may be exceeded if approved by electors: (1) for two years for general governmental purposes, and (2) for payment of bonds.

Art. VII, §9(b), Fla. Const.

- See also Section 200.071, Fla. Stat.

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Statutory Revenue Limitations

- Section 200.065(5), F.S.
- Apply to aggregate millage, including dependent special districts and MSTUs
- Limited to Rolled-Back Rate, adjusted by change in per capita Florida personal income, unless approved by super majority vote (up to 110%) or unanimous vote/referendum (excess of 110%)

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Ad Valorem Benefit Requirement

- Questions of benefits and of unlawful burdens do not arise when the tax is uniform, for a public purpose, and within the power of the Florida Legislature to prescribe
- Dual Tax

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Constitutional Dual Taxation

- "Property situate within municipalities shall not be subject to taxation for services rendered by the county exclusively for the benefit of the property or residents in unincorporated areas."

  Art. VIII, §1(h), Fla. Const.
- Prohibits the taxation of city-located property by a county where no "real and substantial" benefit accrues to municipal residents and property from the county service
- "direct benefit" not required
- Only applies to ad valorem taxes

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Statutory Dual Taxation

- "No county revenues, except those derived specifically from or on behalf of a municipal service taxing unit, special district, unincorporated area, service area, or program area, shall be used to fund any service or project provided by the county when no real and substantial benefit accrues to the property or residents within a municipality or municipalities."

  §125.01(7), Fla. Stat.
- Applies to non-ad valorem revenues
- Revenues derived from or on behalf of the unincorporated area are excluded

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THE MSTU CONCEPT

- Not a special district
- A levy by a county within the limits fixed for municipal purposes
- No referendum required
- Can include municipal areas with the municipality's consent by ordinance
- Ad valorem tax less than countywide without violating Art. VII, §2, Fla. Const.

§125.01(q) and (r), F.S.

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MSTUs

Creation:	Ordinance
Deadlines:	January 1 or July 1 per Section 200.066, Florida Statutes
Consent:	Municipal consent by ordinance if includes incorporated areas
Millage:	Levied through annual budget process

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What is a Home Rule Revenue Source?

Any Charge Imposed Under Local Government Authority

- Except a tax (must be authorized by general law)
- That is not inconsistent with general or special law

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Home Rule Revenue Sources

- Fees
  - User fees
  - Regulatory Fees
  - Impact fees
- Special Assessments
  - Capital
  - Service

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AUTHORITY TO IMPOSE FEES

- Florida Legislature
  - General laws
  - Special acts
- Florida Constitution
  - Home rule

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TWO CATEGORIES OF FEES

Local governments generally impose fees in one of two ways:

1) Regulatory Fees imposed pursuant to police powers (i.e., building permit fees, inspection fees, impact fees)
2) Proprietary Fees imposed in the exercise of a proprietary power (i.e., utility fees, franchise fees, traditional user fees)

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REGULATORY FEES

- Offset Cost of Processing, Review or Monitoring
- Limited To Cost of Service

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IMPACT FEES

Impact fees are charges imposed against new development to fund capital facilities made necessary by that growth.

The purpose of the charge is to impose upon newcomers, rather than the general public, the cost of new facilities made necessary by their arrival.

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IMPACT FEES

Dual Rational Nexus Test

A reasonable connection between the *need* for additional capital facilities and the growth.

AND

A reasonable connection between the *expenditure* of fee proceeds and the *benefits* accruing to the growth.

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MOST FREQUENTLY IMPOSED IMPACT FEES

- Roads
- Parks Construction or Expansion
- Fire and EMS Facilities
- Water & Sewer Facility Expansion
- School Facilities
- Libraries
- Law Enforcement
- Public Buildings

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SECTION 163.31801, FLORIDA STATUTES

- Adopted by Legislature During 2006 Session
- First State Codification of Legislative Requirements for Impact Fee
- Sets Forth Minimum Requirements

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REQUIREMENTS UNDER SECTION 163.31801, FLORIDA STATUTES

- Fee Must Be Based Upon the Most Recent Localized Data
- Provides Accounting of Collection and Expenditure of Impact Fees
- Administrative Charge For Collection Limited to Actual Cost
- Requires Notice No Less Than 90 Days Before Effective Date
- Requires credits to be transferable under certain circumstances

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REQUIREMENTS UNDER SECTION 163.31801, FLORIDA STATUTES

- Fee cannot be collected prior to Building Permit
- Impact Fee Credit Holders entitled to "full benefit of intensity or density" as of date credit is established
- Exactions must be credited against impact fees
- "Infrastructure" and "Public Facilities"
- Impact Fees cannot be used to pay debt except under certain circumstances
- Water and sewer fees are exempt

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Phasing

Pursuant to plan for imposition, collection, and use.

- Increase up to 25% = two, equal annual increments
- Increase up to 50% = four equal installments
- May not exceed 50% of current rate
- May not increase more than once every 4 years.

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Extraordinary Circumstances

Local government may increase impact fees beyond the phase-in limitations if:

1. Demonstrated-need study within past 12 months that demonstrates extraordinary circumstances
2. No less than two dedicated workshops
3. Approved by no less than 2/3 vote of the governing body

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Proprietary/User Fees

- Utility fees, franchise fees etc.
- Reasonable in Amount
- Reasonable Profit – (Proprietary/Enterprise Activities Only)
- May Fund Capital, O&M or Sometimes Both
- Just and Equitable
- Charged in Exchange For a Governmental Service or Facility
- Are Paid by Choice (Voluntary)

SPECIAL ASSESSMENTS

Special assessments are charges assessed against the property of some particular locality because that property derives some *special benefit* from the expenditure of the money.

CASE LAW REQUIREMENTS

Special Benefit to Property

and

Fair and Reasonable Apportionment

EXAMPLES OF SPECIAL BENEFIT

- Fire Protection
- Street Improvements
- Parking Facilities
- Downtown Redevelopment
- Solid Waste
- Sewer Improvements
- Water and Sewer Lines
- Stormwater
- Beach Renourishment

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FAIR AND REASONABLE APPORTIONMENT

- Logically and factually driven method must be developed to spread the costs among the benefited properties.
- Does method of apportionment make sense in terms of what is being provided?
- Legislative determination receives judicial deference.

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THE END

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