

Florida's New Property Tax Landscape

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On January 29, 2008, Florida voters approved Amendment One, the biggest change to Florida's property tax structure since the "Save Our Homes" ("SOH") assessment cap was adopted by the voters in 1992. It remains to be seen whether this action is: (1) the first step in comprehensive property tax reform and aids a flagging real estate market; (2) all we will get in the name of property tax reform; (3) the final straw that breaks Florida's existing property tax system; (4) as harmful to education and local government services as the opponents claimed; or, most likely, (5) some combination of these possibilities. The following summarizes the events leading up to the voters' decision, the tax reform efforts of the 2007 Florida Legislature, the specifics of the new laws, and issues and events on the horizon.

Florida's Property Tax Revolt

Florida voters approved a citizen's initiative establishing the SOH assessment cap in November of 1992. By doing so, they approved the most profound change ever to the 1968 constitutional requirement that real property in Florida generally be valued at "just value," or its fair market value, for ad valorem tax purposes. The SOH cap limits annual increases in property tax assessments for homestead properties to the lesser of three percent (3%) or the change in the Consumer Price Index. The stated rationale for the cap was to keep Florida residents from being taxed out of their homes. By 2006, the average SOH assessed value was approximately \$150,000, compared to an average just value of nearly \$243,000, reflecting an average SOH differential or benefit of \$93,000 and a statewide annual tax savings for Florida residents of approximately \$8 billion.¹ However, the value of the SOH benefit varies greatly depending upon the locale and value of the home. The SOH value as a percent of market value of a home ranges from a low of 49.9% in Monroe County (roughly 50% of the home value is taxed) to a high of 86.1% in Jackson County (86.1% of the home value is taxed).² Additionally, higher-priced homes have enjoyed a disproportionate share of the total SOH differential because they increased in value at rates faster than lower-priced homes.³

The mechanics of the cap called for re-valuing the homestead property at fair market value when it was sold. By 2004, with housing values escalating at unprecedented rates,⁴ SOH was recast as the ball and chain tying residents to their homes. And those who did move were faced with property taxes wildly disparate from those of their neighbors. Citizens and lawmakers—particularly those in South Florida coastal areas—began calling for "portability" of this valuable SOH benefit so Florida residents could take their preferred property tax status with them when they bought a new home.

Meanwhile, the impact of rising property values for non-homestead property, combined with the lack of hom-

owner participation in local government budget hearings and the Legislature's decision to establish school funding requirements in a manner that capitalized on these value increases, resulted in redistribution of significant tax increases onto non-homestead properties. A study undertaken for a Property Tax Study Commission established by former Governor Jeb Bush found that homestead property would be 45.5% of the tax base without SOH, and was 32.1% with SOH.⁵ Meanwhile, non-homestead property would be 54.5% of the tax base without SOH, but was 67% with SOH. Unfettered by homeowner complaints, governmental bodies allowed taxes to ride up with the value increases. In 2005, local governments (and the Florida Legislature via the state-controlled school funding requirement) levied tax rates 11% above the "rolled-back rate" that is the rate calculated under law to produce the prior year's revenues. In other words, they increased property taxes 11%. In 2006, they increased taxes 14.4%.⁶

2007 Legislative Efforts

Against this backdrop, lawmakers began the 2007 session with property tax hearings across the state. They routinely heard the following complaints: businesses were experiencing property tax increases at rates far in excess of their revenue increases; rents charged by investment property owners (particularly those for affordable housing) could not support the tax increases; waterfront properties were seeing assessment increases that were forcing them out of business; first-time homebuyers could not gain entrance into the housing market as a result of home prices, insurance and taxes; homebuyers who moved were paying taxes at discriminatory levels; and homeowners wishing to upsize or downsize were "locked in their homes."

Governor Charlie Crist, elected in 2006 to succeed the term-limited Bush, started the bidding with a plan that looked very much like the final product approved by the voters. He proposed doubling the homestead exemption, portability of SOH benefits, a \$25,000 tangible personal property tax exemption, and a 3% SOH-type cap on non-homestead property. The House Speaker proposed buying out school taxes on homestead property with a 2.5% increase in the sales tax and a rate rollback. The Senate

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proposed a mix of relief that included rate reductions and a multi-year phase-out of SOH and replacing it with an increased homestead exemption. However, efforts to reach agreement on a property tax package during the regular session failed.

Lawmakers returned for a Special Session "B" (the session following a session devoted to property insurance reform) and reached accord on a proposed constitutional amendment that would have swapped out the SOH benefit for a new super homestead exemption. Due to a flaw in the ballot wording, a Leon County Circuit Court judge struck the proposal from the ballot, but lawmakers decided not to simply fix the ballot language after constituent reaction and internal polling suggested that voters may not approve the proposal because they did not want to give up their SOH cap. However, Special Session B also produced significant legislation (discussed below) changing the way in which millage rates are computed under the Truth in Millage (TRIM) law.

Amendment One, the proposed constitutional amendment approved by the voters, was ultimately approved by lawmakers in Special Session "D" (which followed Session "C" devoted to budget reductions). Legislative negotiators reached tentative accord on this plan before the House leadership developed an alternative plan that many observers considered superior. The House plan would have injected more reform into the mix by creating a new homestead exemption equal to 40% of the median homestead value in the county and allowing taxpayers to enjoy the larger of their SOH value or the new super homestead exemption. It also would have imposed a 5% assessment cap on non-homestead properties and provided relief for affordable housing, working waterfronts, and taxpayers challenging their assessments. However, leadership in a politically divided Senate, forced to cobble together sufficient votes to pass something, refused to return to the negotiating table at the eleventh hour and thereby forced the House to either accept the amendment as tentatively agreed upon or fail again to adopt any property tax relief.

Rate Rollbacks and Caps

Chapter 2007-321, Laws of Florida (HB 1B), effective for 2007 property taxes, revised the manner in which millage rates are calculated for cities, counties and special districts, but not for schools, which constitute approximately 40% of the average property tax bill. This component of the property tax legislation provided across-the-board tax relief. It required local governments, but not schools, to reduce taxes in 2007 by 0-9%, depending upon how fiscally prudent the local governments had been over the past five years. Those who raised property taxes the most during this period had to suffer the largest rate rollbacks. Special districts (including dependent districts and municipal service taxing units for emergency medical and fire rescue purposes) were required to reduce taxes by 3%. Local

governments were allowed to override the rate rollbacks by extraordinary vote, with the needed vote increasing as the rate increased.

Prospectively, city, county and special district tax rates will be capped at the rolled back rate (the rate that produces the same taxes as the prior year, exclusive of taxes from new construction), plus growth in personal income. These caps can be overridden by extraordinary vote of the governing board. Again, these caps are not applicable to school taxes, which are levied on a countywide basis with a minimum rate established by the Legislature each year under its complex school-funding formula. Language in HB 1B would have prohibited local governments from automatically increasing tax rates to offset tax base reductions resulting from the proposed constitutional amendment. However, this language was negated when a different constitutional amendment was proposed in Special Session D, thus the fear that many local governments will simply offset the Amendment One tax base reductions by increasing millage rates without the necessity of an extraordinary vote and thereby redistribute more of the tax burden onto non-homestead properties.

Amendment One

Voters surprised the pollsters and pundits, approving Amendment One 64% to 36%, with strong support in South Florida and in coastal areas of the state where property values have risen the fastest. Many believe that Governor Crist's enthusiastic support for the proposal engendered its success. Certainly, he was the central figure in the campaign that urged voters to approve Amendment One. In any event, the property tax landscape has changed dramatically, and most provisions of Amendment One will take effect retroactively to apply to the tax year beginning January 1, 2008. The following summarizes the changes. More detailed information on implementation of Amendment One can be found on the Department of Revenue's website: <http://dor.myflorida.com/dor/property/sb4d.html>.

Portability

Amendment One allows homestead owners to transfer (or, in legislative jargon, "port") the assessment benefit of SOH (the "differential") when moving from one home used as a permanent residence to another. This benefit applies with respect to homes sold in 2007 or later as long as the homeowner purchases a new home within two years. Unlike many other provisions in the package, portability is applicable to school taxes.

The SOH differential is calculated differently depending upon whether the homeowner is transferring to a more or less expensive home. The amount of differential that can be moved by a homeowner who is "upsizing" is the difference between the old home's market value and its SOH assessed value, not to exceed a \$500,000 differential. For a taxpayer moving from a \$250,000 home with a SOH assessed value of \$150,000, to a new \$400,000 home, the differential to be transferred would equal \$100,000 ($\$250,000 - \$150,000 = \$100,000$). For a taxpayer moving

from a \$1,000,000 home with a SOH value of \$400,000, to a new home valued at \$2,000,000, the differential would not be the \$600,000 difference between the old home's market and SOH assessed value, but instead would be capped at \$500,000.

The amount of differential that can be transferred by a homeowner who is "downsizing" is a pro rata share of the differential of the old home based upon the just value of the new home as a percentage of the just value of the old home, not to exceed \$500,000. For example, a taxpayer moving from a \$500,000 home with a SOH value of \$300,000, to a new \$400,000 home would not be allowed to "port" the full \$200,000 SOH differential, but would instead transfer \$160,000, which is 80% of that \$200,000 (\$400,000 market value of new home divided by \$500,000 market value of old home = 80%, multiplied by \$200,000 differential on old home). Ironically, the mechanism for measuring the transferable tax benefits encourages a higher market value on the old home. As a result, following years of homeowners complaining about excessive assessments, property appraisers are reporting calls from homeowners complaining

that their assigned market values are understated and should be increased.

Complications to portability arise when multiple owners of property do not all move simultaneously to a new home. Amendment One authorizes the Legislature to provide by general law for application of portability where there are multiple owners, and while the legislature attempted to address these situations in its implementing legislation in Chapter 2007-339, Laws of Florida (SB 4-D), additional work likely is needed. While some property appraisers disagree, the law appears to contemplate that no SOH differential can be transferred unless the old homestead is abandoned by all owners. Thus, the amount of the SOH differential is likely to become an asset in dissolution of marriage and similar proceedings. Where multiple owners abandon a single homestead and move to separate new homes, the law provides for a pro rata sharing of the SOH differential based upon the number of owners without regard to the value of the ownership interests of the various owners. When individuals move from different homesteads to a new shared homestead, the law calls for transferring

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only the highest of the various owners' SOH differentials—a result that has caused officials at the Department of Revenue to jokingly suggest that the question “what is your SOH differential?” be added to dating websites.

The Department of Revenue is in the process of developing an application form for portability, but is considering whether the application can simply be folded into the one used to establish a new homestead exemption. In any event, because the SOH differential can be transferred across counties, administration of portability is going to require significant intergovernmental coordination that has not been necessary in the past.

Doubled Homestead Exemption

Amendment One increases the \$25,000 homestead exemption to \$50,000, but does so by applying the additional \$25,000 to exempt the value between \$50,000 and \$75,000. This approach was taken to provide some relief to smaller, poorer counties whose tax bases would have been seriously impacted by a straight doubling of the homestead exemption that exempted the first \$50,000 of value. The increased exemption is not applicable to school taxes. Many have questioned the rationale for this relief since homestead properties have enjoyed the greatest benefits under the system. However, Governor Crist campaigned on this pledge, and it remains both simple to understand and popular with the voters.

Assessment Cap

Beginning in 2009, Amendment One provides for a new assessment cap on non-homestead real property.

The assessment cap is not applicable to tangible personal property, meaning that manufacturing plants, power plants, telecommunications and cable systems do not receive this potential benefit. However, because the cap is set so high (10% a year), the run-up in values has already occurred for most taxpayers, and the cap is not applicable for school taxes, few business and investment properties will experience any real benefit from this cap. And, unlike the SOH cap, there is no portability of this tax benefit.

The implementing legislation (SB 4-D) differentiates between “non-homestead residential property” defined as nine or fewer dwelling units or vacant residential land, and “nonresidential property.” For the former, a change in ownership or control of the property results in resetting the value to market value. For the latter, either a change in ownership or control or an improvement that increases the value of the property by at least 25% results in resetting the value to market value. A change of control means “the cumulative transfer of control or of more than 50 percent of the ownership of the legal entity that owned the property when it was most recently assessed at just value.”

Implementation of this cap portends administrative nightmares. SB 4-D requires any landowner seeking protection under the cap to file an application before March 1st of each year. Counties have the option of replacing the application with an automatic renewal process, similar to that used for homestead exemption, in subsequent years. Property appraisers have warned that the application requirement will result in a flood of applications that they are not equipped to handle. Because the cap is available without qualification to any class of property that does not otherwise receive the benefit of some special assessment rules, the only ostensible rationale for requiring an application is to ensure that there has been no change in ownership or control or qualifying improvement that triggers a resetting to fair market value in any given year. Yet

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large public corporations that own real property will find it difficult, if not impossible, to monitor the change in control condition because it requires monitoring over multiple years to ascertain whether 50% of the ownership of the entity owning the property has changed since the property was last valued at market value. Anyone seeking protection of the 10% cap who later is determined not to have been entitled to it is subject to a tax lien for ten years of back taxes, plus a penalty equal to 50% of those taxes and interest at the rate of 15% per year. In light of the minimal benefits afforded by the cap and the potential to incur substantial penalties for inadvertent violation of the change of control requirement, many taxpayers would be well-advised to forgo application for this benefit.

Tangible Personal Property Exemption

Amendment One provides some relief to small businesses via the \$25,000 exemption for tangible personal property. This exemption was suggested initially by the Florida Association of Counties as a way to simplify administration of the tax for small businesses and property appraisers. Property appraisers, who deal with multiple small accounts that produce little revenue, and small business taxpayers who complained that they were paying more to have their annual returns prepared than the government was receiving in tax dollars, rallied around this proposed change and it was in every plan proposed during every session.

Because taxpayers must file annual returns for tangible personal property in every county and for every business location, the exemption was made applicable to each return for each county and each business location. As a result, the exemption could shield substantially more than \$25,000 of an individual taxpayer's property. However, the legislature carved out certain "freestanding property" placed at multiple sites and required a single return per county for that property. Freestanding property includes vending and amusement machines, LP/propane tanks, utility and cable company property, billboards, leased equipment, and similar property not customarily located in the offices, stores or plants of the owner.

Looking Ahead

Many opponents of Amendment One, and those who supported it but without enthusiasm, complained that while it provided some tax relief, it did not constitute comprehensive tax reform. Homeowners in similar homes will still pay wildly disparate taxes; first-time homebuyers and newcomers to Florida are disadvantaged relative to long-time homeowners; rental properties and second homeowners and snowbirds received little relief; non-homestead waterfront properties are still hurting; and business taxpayers and investment properties face the possibility of picking up more of the tab if local governments increase millage rates to offset reductions to the tax base resulting from portability and an increased homestead exemption. Indeed, some of these shortcomings in the existing property tax system ultimately may be exacerbated by Amendment One. Suffice it to say, the need for property

tax reform has not been satisfied.

Tax & Budget Reform Commission

Florida's Tax & Budget Reform Commission meets once every 20 years and is authorized under the Florida Constitution to place proposed constitutional amendments directly onto the ballot. They are meeting now and must have their work product to the Secretary of State by May 8th for the November 2008 ballot. Commissioners have identified "taxpayer fairness" issues as a subject that deserves their attention. Thus far they have discussed replacing property taxes with consumption taxes; relief for conservation lands; exemptions for improvements tied to renewable energy; relief for working waterfront property and affordable housing; and changes to the highest and best use requirements and the burden of proof in property tax challenges. Interested parties can monitor the efforts of this group at their website: www.floridatbrc.org/.

2008 Florida Legislature

The Governor and House leadership have publicly stated that Amendment One is the beginning, not the end, of property tax reform. Senate Republicans have sent mixed messages, while some Senate Democrats have publicly declared that they are done because schools and local governments cannot afford further cuts. Numerous pre-filed bills suggest that individual legislators are interested in continuing the conversation on property tax reform. At a minimum, lawmakers appear interested in dealing with procedural issues including the process for challenging property tax assessments, which many leading lawmakers view as unfairly skewed in favor of property appraisers at the expense of taxpayers.

Citizen Initiatives

Meanwhile, numerous citizens' initiatives have been filed and are in the process of securing signatures in an effort to make the ballot. The requirement for more than 600,000 signatures makes it highly unlikely that any of the pending proposals will make the 2008 ballot. However, House Speaker Marco Rubio has backed the efforts of one group to limit taxes to 1.35% of the value of property—a facially simple concept for voters to grasp and one that could gain traction in the future.

Legal Challenges

Passage of Amendment One means a pending legal challenge to SOH and portability is now ripe for consideration by the courts. Newcomers to Florida have filed a class action lawsuit in Leon County asserting that they, as permanent residents of Florida, are entitled to protection under numerous constitutional provisions, including the right to travel. Prior to passage of Amendment One, the Florida Legislature retained the services of Walter Hellerstein, one of the nation's foremost constitutional scholars in the area of state and local taxation. He warned that layering portability onto SOH could violate the constitutional right

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to travel.⁷ While SOH standing alone has withstood challenges, it resulted in treating intrastate and interstate moves the same. However, layering portability onto SOH means that persons moving intrastate enjoy a benefit not afforded to persons moving interstate. This distinction threatens the viability of the entire system and we are likely to see some ruling on this issue in the near future. Of great concern to those watching this issue is the fact that the United States Supreme Court has ruled that states must provide "meaningful backward looking relief" to taxpayers who are required under duress to promptly pay taxes later declared to be unconstitutional.⁸ Generally, this means that government must either recoup taxes from those who have enjoyed an unconstitutional advantage, or refund taxes to those who have been discriminated against. Thus an adverse ruling on portability could have far-reaching and costly ramifications.

Conclusion

The bottom line is that while much has changed with property taxation in Florida as a result of the work of the 2007 Florida Legislature and passage of Amendment One, the final chapter of this book remains unwritten. All eyes should remain on the Tax and Budget Reform Commission, the 2008 Florida Legislature, the citizens who are passion-

ate about tax reform and are promoting various constitutional amendments, and the courts as they consider the legal challenges to Florida's existing property tax system and potential remedies to address the same. ■

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Endnotes:

- 1 University of Florida, Final Report to the Florida Legislature Office of Economic and Demographic Research, Analytical Services Relating to Property Taxation, Part 1: Assessment Component, Page 21 (July 31, 2007) available at <http://edr.state.fl.us/property%20tax%20study/property%20tax%20study.htm>.
- 2 Id. at page 22.
- 3 Id. at page 29.
- 4 Annual house price appreciation in Florida was 16.81% in 2004 and 27.92% in 2005, following an average 5% increase during the period 1971 to 2000. Id. at page 19.
- 5 Florida Legislature, Legislative Office of Economic and Demographic Research, Florida's Property Tax Study, Interim Report, at page 29 (February 15, 2007), available at <http://edr.state.fl.us/property%20tax%20study/property%20tax%20study.htm>.
- 6 Id. at Appendix A, page 50.
- 7 Id. at Appendix B.
- 8 McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18, 110 S.Ct. 2238 (1990).

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