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IN THE SUPREME COURT OF FLORIDA

JIM SMITH, as Secretary of State of the State of Florida,

Appellant,

vs.

CASE NO. 80,438

AMERICAN AIRLINES, INC.; DELTA AIRLINES, INC; FLAGSHIP AIRLINES, INC.; NORTHWEST AIRLINES, INC.; UNITED AIR LINES, INC.; USAIR, INC.; FLORIDA PORTS COUNCIL, INC.; PANAMA CITY PORT AUTHORITY; PORT EVERGLADES AUTHORITY; GATX TERMINALS CORPORATION, and HVIDE SHIPPING, INCORPORATED,

Appellees.

ANSWER BRIEF OF APPELLEES, FLORIDA PORTS COUNCIL, INC. PANAMA CITY PORT AUTHORITY PORT EVERGLADES AUTHORITY GATX TERMINALS CORPORATION HVIDE SHIPPING, INCORPORATED

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PRELIMINARY STATEMENT

This is an appeal from a Final Judgment rendered by the Circuit Court, Second Judicial Circuit, entered in favor of Plaintiffs/Appellees. Defendant/ Appellant, Secretary of State Jim Smith, appeals. The Final Judgment enjoined Defendant Smith from placing on the November, 1992 general election ballot a proposed amendment to the Florida Constitution which Defendant Smith has designated "Proposition 7." The District Court of Appeal, First District, certified this appeal as requiring immediate resolution by this Court. Fla. R. App. P. 9.125.

This Answer Brief is filed on behalf of the Florida Ports Council, two Florida port authorities, and two lessees of port property. These plaintiffs will collectively be referred to herein as "Port Parties." Counsel for the Plaintiff/Appellee airlines ("Airline Parties") will file a separate Answer Brief on their behalf. Appellant Jim Smith is referred to herein as "Appellant Smith or the "State." The Taxation and Budget Reform Commission is referred to as the "Commission." The terms "government lease" and "government leasehold" as used herein refer to a lease of real property from a public body as lessor to a nonpublic tenant as lessee. The term "Resolution" refers to the Resolution of the Commission submitted to the Secretary of State with Proposition 7 on May 7, 1992.

An Appendix to this Answer Brief contains pertinent portions of the record on appeal and other authorities. References to the Appendix in the text of this Brief are designated [A]. References to the Record on Appeal are designated [R]. Defendant Smith's Initial Brief and the Amicus Brief of Terence Brown are designated [I.Br.] and [Am.Br.], respectively. The transcript of the final hearing is designated [Tr.]. Exhibits from the record on appeal are designated [Exh.].

STATEMENT OF THE CASE AND THE FACTS

Port Parties accept the State's Statement of the Case and Facts, as supplemented below.

The Appellees consist of parties with direct interests in the taxation of government leaseholds. The Airline Parties lease property from airports. The Florida Ports Council, Inc. consists of the seaports of Florida. Each is a lessor and/or lessee under leases creating leasehold interests in government owned property. [A 9-10; Tr. 56]. GATX Terminals Corporation and Hvide Shipping, Incorporated are lessees of port property. The current tax treatment of the leaseholds held by these lessees varies. For example, the Panama City Port Authority has a leasehold that is currently exempt, while GATX Terminals Corporation has a leasehold that is taxed as intangible personal property. The leaseholds include interests created before and after November 5, 1968. [Id.]

Article XI, Section 6, Florida Constitution was adopted in 1988, and provided for the establishment of the Taxation and Budget Reform Commission beginning in 1990 and each tenth year thereafter. The Consitution directs the Commission to study Florida's systems of taxation and budgeting, a function that has been removed from the purview of the Constitution Revision Commission. Art. XI, § (2)(c), Fla. Const. The Commission consists of eleven members appointed by the Governor, seven members appointed by the Speaker of the House of Representatives, and seven members appointed by the President of the Senate. There are also four non-voting ex officio members. Art. XI, § 6(a), Fla. Const.

Article XI, Section 6(d) directs the Commission to examine a comprehensive list of matters:

> The Commission shall examine the state budgetary process, the revenue needs and expenditure processes of the state, the appropriateness of the tax structure of the state, and governmental productivity and efficiency; review policy as it relates to the ability of state and local government to tax and adequately fund governmental operations and capital facilities required to meet the state's needs during the next ten year period; determine methods favored by the citizens of the state to fund the needs of the state, including alternative methods for raising sufficient revenues for the needs of the state; determine measures that could be instituted to effectively gather funds from existing tax sources; examine constitutional limitations on taxation and expenditures at the state and local level; and review the state's comprehensive planning, budgeting and needs assessment processes to determine whether the resulting information adequately supports a strategic decisionmaking process.

The Commission is not a representative body, but nevertheless has the power to place proposed constitutional amendments directly on the ballot. Art. XI, § 6(e), Fla. Const. To do so, a 2/3 vote is required of the full Commission, with the "concurrence" of a majority of the members of each group of appointees. Art. XI, § 6(c), Fla, Const.

Article XI, Section 6(e), Florida Constitution, provides in pertinent part:

> Not later than one hundred eighty days prior to the general election in the second year following the year in which the commission is established, the commission shall file with the secretary of state its proposal, if any, of a revision of this constitution or any part of it dealing with taxation or the state budgetary process.

The 1990 Commission filed four constitutional amendments with the Secretary of State on the 180th day prior to the next general election. One proposal involves budgeting and spending, and the other three relate to taxation.[1]

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[1]In addition to Proposition 7, the Commission submitted a one sentence proposal to require the legislature to prescribe a Taxpayers' Bill of Rights, and a proposed amendment which would allow municipalities and counties to levy a

The Commission adopted Proposition 7 on April 22, 1992. It received no public testimony before voting. [Tr. 73-74]. The proposal was approved by a vote of 21 to 1. [A 49]. The text of Proposition 7 is as follows:

> Effective January 1, 1993, leaseholds and other possessory interests created after November 5, 1968, in property of the United States, of the state or any of its political subdivisions, municipalities, authorities, districts, agencies or other public bodies corporate of the state, shall be taxed as real property for ad valorem tax purposes. All such leasehold interests created prior to November 5, 1968, including renewal options and extensions thereof provided in the initial lease, shall be taxed as intangible personal property.

Thereafter, the Commission minutes reflect that there was a request to take public testimony, whereupon representatives of Florida cities, ports, airlines, and International Speedway Corporation appeared. Concern was expressed by those testifying and some Commissioners that Proposition 7 would tax land leased for purposes which are currently exempt under the Florida Constitution. [A 56-62; 64-65; 68-69]. Specifically, it would tax land leased for educational, literary, scientific, religious, or charitable purposes, Article VII, Section 3(a), Florida Constitution, and leases between governmental bodies.

Commissioners thereupon proposed several alternatives in an attempt to ensure that such leases would not be taxed. Included in the efforts was an attempt to adopt a substitute for what is now Proposition 7. Another effort would have "linked another proposal with Proposition 7. All these efforts failed to gain the required vote for inclusion on the ballot. [A 59-65].

Having voted to propose a constitutional amendment which by its terms would subject all leaseholds created after November 5, 1968 to taxation, and

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discretionary sales and use tax.

having voted down proposals to exclude government-to-government leaseholds and leaseholds for exempt uses pursuant to Article VII, Section 3(a), the Commission adopted a resolution which purported to do what Proposition 7 clearly does not:

> The Commission further intends that leaseholds for educational, literary, scientific, religious, or charitable purposes may be exempted from taxation by general law pursuant to Article VII, Section 3(a). Nothing in the government leasehold provision is intended to conflict with the authorization for the exemptions in Article VII, Section 3(a), which grants an exemption for property owned by a municipality and used exclusively by it for municipal or public purposes.

With its transmittal letter to the Secretary of State, the Commission Chairman expressed the view that the information contained in its resolutions "will assist Floridians in understanding the proposed revisions." He therefore requested that the Secretary of State and the supervisors of elections "reproduce and distribute the resolutions along with the revisions." [Exh. 1].

The ballot summary submitted by the Commission with Proposition 7 reads as follows:

> Subjects leaseholds in government owned property entered into since 1968 to ad valorem taxation. All leaseholds in government owned property entered into prior to 1968, and subsequent renewal options and extensions provided in the initial lease, shall be taxed as intangible personal property.

Proposition 7, the Resolution, and the ballor summary were submitted to the Secretary of State (together with the Commission's three other proposals) on May 7, 1992, the 180th day prior to the November 3, 1992 general election.

On July 22, 1992 Port Parties and Airline Parties filed a joint Complaint in the Circuit Court, Second Judicial Circuit, challenging Proposition 7. [A 8]. The Complaint alleged, among other things, that the ballot summary is defective because it fails to comply with the requirements of Section 101.161, Florida Statutes (1991) (Count I); that Proposition 7 was not adopted in compliance with

Article XI, Section 6, Florida Constitution (Count II); and that Proposition 7 is facially invalid under the Equal Protection Clause of the Constitution of the United States because it discriminates without rational basis between similarly situated leaseholds (Count IV).[2]

At final hearing, the Circuit Court dismissed Count II of the Complaint and denied the State's motion to dismiss Count IV. The Court thereupon received evidence and argument, and concluded that the ballot summary is defective. Final Judgment was entered, and the State has appealed. The Court granted leave to Terence M. Brown to file a brief as *Amicus* Curiae.

[2] The Complaint also included two counts requiring factual development that plaintiffs voluntarily dismissed to facilitate prompt disposition of the cause.

SUMMARY OF THE ARGUMENT

The Circuit Court correctly determined that the ballot summary submitted by the Taxation and Budget Reform Commission with Proposition 7 fails to comply with Section 101.161, Florida Statutes (1991). Port Parties agree with and adopt as their own the argument of the Airline Parties on this issue. Proposition 7 would impose different burdens of taxation on different leaseholds, and the summary is unclear as to which leaseholds will be subject to which type of tax. The summary is in addition affirmatively misleading in creating the impression that government leaseholds are not currently subject to ad valorem taxes. By inducing the voter to believe that leaseholds currently escape taxation (as distinguished from being subject to it at a lower rate), the summary unfairly encourages an elector to vote in favor of it. The power to tax is ordinarily a legislative function, which allows for informed judgments by individuals who have studied the subject. If the electorate is to be asked to exercise the power of taxation directly, as it is here, it is essential that the ballot summary be clear and unambiguous. The requirements of Section 101.161, Florida Statutes should not be relaxed when the subject is taxation, as the State appears to contend, but should be strictly enforced.

Independently of the defective ballot summary, Proposition 7 should not be submitted to the voters because it is facially unconstitutional. Contrary to the State's argument, there is no impediment in this Court's decisions to Consideration of a facial constitutional challenge. Proposition 7 fails to withstand scrutiny under the Equal Protection Clause of the Constitution of the United States. Proposition 7 classifies leaseholds solely according to date of creation, subjecting those created after November 5, 1968 to ad valorem taxation as real property, while conferring

preferential treatment upon those created prior to November 5, 1968 and allowing them to be taxed as intangible personal property.

The applicable standard of review in this case is the rational basis test. Modern formulations of this test call for an inquiry to determine: (1) whether there is a plausible policy reason for the classification; (2) whether the legislative facts upon which the classification is apparently based could reasonably have been believed by the decisionmakers; and (3) whether the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational. Nordlinger v. Hahn, ___ U.S. ___, 112 S.Ct. 2326, 2332 (1992). If a classification does not satisfy these three requirements, it violates the Equal Protection Clause.

Although the State's asserted reason for the classification (protection of reasonable reliance interests) has been held to be a legitimate interest, Proposition 7 fails to satisfy the other two requirements of rational basis scrutiny. With respect to the second prong in Nordlinger, it is apparent that the State and the Commission have misapprehended the jurisprudence relating to economic development tax incentives. Contrary to their assertion, which is also reflected in the text of Proposition 7, the power of local government to confer tax-based incentives has always been strictly limited. Without valid legislative authority, local government has always been without power to confer such benefits. Even the Legislature's freedom of action has been circumscribed, in that only property devoted to a public purpose could constitutionally be accorded preferential tax treatment. Only in a narrow class of cases involving the scope of the permissible

public purpose exemption has the law changed, and the changes are not solely attributable to the adoption of the 1968 Constitution.

The State and the Commission also assert factually that lessees under leases created prior to November 5, 1968 were promised freedom from ad valorem taxes. There is absolutely no evidence of this, It is also apparent that the State and the Commission are focusing only on the limited situation in which a lessee qualified for a public purpose exemption under prior statutes, constitutional provisions, and judicial decisions, but no longer qualifies. This ignores the more general case of public bodies leasing property to commercial tenants with no public purpose issue involved. In short, the Commission had no reasonable basis for believing either that local governments had unfettered authority to confer ad valorem tax preferences under the 1885 Constitution, or that government leaseholds created prior to November 5, 1968 generally contained promises of such preferences.

Proposition 7 also fails to pass muster under the third prong of the rational basis test. That is, the relationship between the classification and its asserted objective is simply too attenuated. The favored class includes every lease created prior to November 5, 1968, regardless of whether the lease contained valid covenants against taxation. Further, the only basis for any "reliance interest" under a lease created prior to November 5, 1968 would be legislation which was valid at the time of enactment. To the extent that there are pre-November 5, 1968 leaseholds supported by such legislation, the lessees are situated no differently than lessees under leases created after 1980. Lessees or parties to post-1980 leases are just as entitled to claim "reliance" on continued taxation of their leasehold interests as intangibles, as pre-November 5, 1968 lessees are entitled to claim reliance on

any valid legislative exemptions they enjoyed. The classification in Proposition 7 is not based upon actual differences between leases created before and after November 5, 1968; the distinction between them is created by Proposition 7. This is impermissible under the Equal Protection Clause. Williams v. Vermont, 472 U.S. 14, 105 S.Ct. 2465, 86 L.Ed. 2d 11 (1985).

Finally, Proposition 7 was not adopted in compliance with Article XI, Section 6, Florida Constitution, in that its meaning is too uncertain to be considered a "proposal" within the meaning of Article XI, Section 6(e). The Commission's Resolution accompanying Proposition 7 is in direct conflict with it, and it is impossible for the voter (even one who reads the entire text of Proposition 7 and the Resolution) to know the consequences of adoption.

For all these reasons, the decision of the trial court was imminently correct and should be affirmed.

POINT I.

THE CIRCUIT COURT WAS CORRECT IN HOLDING THAT THE BALLOT SUMMARY IS DEFECTIVE

The Port Parties adopt the arguments on this point set forth in the separate Answer Brief of the Airline Parties. The Port Parties would offer only three observations for emphasis. First, Proposition 7 is a proposal to impose taxes. Therefore, the ballot summary should explain what would be taxed, and how it would be taxed, in "clear and unambiguous language." § 101.161, Fla. Stat. (1991). This is not a matter of "semantics" [Am.Br. 10], but of substance. The public is being asked to impose taxation in a manner that is effectively unalterable, without being told clearly which tax would apply to which leaseholds. These are not "details," they are the essence of the proposal.

Second, the potential consequences of the misleading nature of the first sentence of the summary cannot be overstated. There is a strong implication that leaseholds in government property are not currently subject to ad valorem taxation. Although the rate is lower than it is for real estate, lessees in government property presently pay ad valorem taxes. At a time when there is great public interest in "loopholes," voters should not be led to an erroneous impression of the current system. They should not be induced to vote to impose increased taxes on leaseholds by being told erroneously that leaseholds are currently escaping taxation.

Finally, the State seems to argue that compliance with Section 101.161 is too difficult because this is a tax proposal and taxes are complicated. Port Parties submit that the more complicated the area, the more important the ballot summary. The statute allows 75 words for a ballot summary; the Commission

used 43. The complexity of the subject matter can hardly excuse noncompliance with the statute when it is obvious that no serious effort to comply was undertaken.

The Circuit Court was eminently correct in concluding that the ballot summary for this tax proposal is defective. For these reasons and the reasons set forth in the Answer Brief of the Airline Parties, the Final Judgment should be affirmed.

POINT II.

PROPOSITION 7 VIOLATES THE EQUAL PROTECTION CLAUSE OF THE CONSTITUTION OF THE UNITED STATES

A. Introduction

As an independent ground for affirmance in this case, Port Parties submit that Proposition 7 is violative of the Equal Protection Clause of the United States Constitution because it discriminates between leaseholds created before and after November 5, 1968, without any rational basis. See Applegate v. Barnett Bank of Tallahassee, 377 So. 2d 1150 (Fla. 1979) (conclusion of a trial court will generally be affirmed if the evidence or an alternative theory supports it).

Proposition 7 would tax leaseholds in government property created prior to November 5, 1968 as intangible personal property. Intangible personal property taxes are levied by the State pursuant to Article VII, Section 2, Florida Constitution. The intangible personal property tax rate is currently 1.5 mills, and will increase to the constitutional maximum of 2 mills effective December 31, 1992. Ch. 92-319, § 1, Laws of Fla.

The other category of leaseholds, those created after November 5, 1968, would be taxed as real property under Proposition 7. The tax rate applicable to real property varies according to the needs of the local taxing authority levying the millage. The Taxation and Budget Reform Commission estimates a statewide average millage of 21 mills. [A 35]. The Constitution authorizes maximum rates of 10 mills for each county, school board, and municipality. Additional millages and conditions for levying them are also prescribed. Art. VII, § 9, Fla. Const.

Proposition 7 actually creates a third class of leaseholds, those created on November 5, 1968. The proposal does not address how these leases would be taxed. Presumably, this was an oversight.

Currently, all leaseholds in government property used for commercial or residential purposes are taxed as intangible personal property. §§ 196.199(2)(b), 199.023(1)(d), Fla. Stat. (1991). This has been the treatment for twelve years, and does not depend on the date of the leasehold's creation. See Chapter 80-368, §§ 2, 3, Laws of Fla. From 1971 to 1980, all leaseholds in government property (except public purpose leaseholds) were taxed as real property, pursuant to Chapter 71-133, Laws of Florida." Leaseholds in government property used for governmental, municipal, or public purposes are currently exempt from all ad valorem taxation. § 196.199(2)(a), Fla. Stat. (1991). See also § 196.012(6), Fla. Stat. (1991) (defining "governmental, municipal, or public purpose or function").

To illustrate the effect of Proposition 7, consider two adjacent parcels of realty owned by the same governmental body, One was leased on November 4, 1968, the other on November 6, 1968. Both parcels were leased for commercial purposes, and the provisions of the leases (except for the date of commencement) are identical. Assume that applying the appropriate valuation methodology[4] each lease is worth $100,000.

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[3]There is evidence, discussed subsequently herein, that statutes enacted as early as 1961 were construed as prescribing taxation of government leaseholds as real property.

[4]The Department of Revenue has incorporated its view of the proper valuation methodology in Rule 12C-2.010(1)(j), Florida Administrative Code.

Under current law, both leases will be subject to a tax of $200 in the year beginning January 1, 1993 (and comparable amounts in subsequent years). If Proposition 7 were adopted, the November 4, 1968 lease would be subject to the $200 tax, while the November 6, 1968 lease would be subject to real estate taxes of up to $3,000 (30 mills). At the average statewide millage the annual tax bill would be $2,100.

Nothing in Proposition 7 makes the preferred treatment accorded the November 4, 1968 lease conditioned in any way on the terms and conditions of the lease, in particular, whether it contains any provision relieving the lessee of the obligation to pay ad valorem taxes. Indeed, even if the lease instrument contained the common commercial covenants by which the lessee promises to pay any ad valorem taxes imposed, the lease would qualify for the preferred treatment.

To change the hypothetical slightly, assume that the lessee under the November 6, 1968 lease, like the lessor, is a governmental body. Although the Commission has disclaimed this intent, Proposition 7 literally would impose real estate taxes of up to 30 mills on the leasehold interest of the governmental body, while the commercial leasehold created on November 4 would be subject to intangible taxes.

The significance of the November 5, 1968 date, according to the State and the Commission, is that it is the date of adoption of the 1968 Florida Constitution. It was, in fact, the date Florida voters approved the revision. The 1968 Constitution became effective January 7, 1969. See Art. XVII, § 4, Fla. Const. (1885). A leasehold created November 6, 1968, while the 1885 Constitution was still in effect, would be taxed as real property.

Overlooking this anomaly, the State defends the differential treatment as follows:

> These [pre-November 5, 1968] leases were entered into with the expectation of, or in reliance upon, continuing tax exempt status; the leaseholders now face various inequities and the loss of a good faith bargain. [I.Br. 28-29].

In other words, the purpose of according real estate tax exemption to these early leases is to preserve for unspecified lessees the benefits of unspecified "bargains" negotiated a quarter century ago or more, This justification is advanced despite the facts that: (1) these "bargains" were altered long ago, in that government leaseholds were taxed as realty for at least nine years: and (2) during that period this Court repeatedly rejected claims of certain lessees that they had any basis to "rely" upon permanent exemption from taxation, as explained in detail later in this brief,

The defense offered for the discrimination which inheres in Proposition 7 does not withstand scrutiny. The Port Parties' disagreement with the State begins with its apparent thesis that the modern rational basis test is an empty abstraction, essentially no test at all. Also in dispute is the State's characterization of the history of leasehold taxation and the effect of the 1968 Constitution thereon. However, the State raises as a threshold issue the justiciability of the Equal Protection claim in this proceeding. The Port Parties address that issue first.

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[5] See supra, note 2.

B.
The Equal Protection Claim is Justiciable

The Circuit Court was correct in rejecting the State's contention that the equal protection claim raised in the Complaint is not justiciable, and in denying the State's motion to dismiss it.

This Court's longstanding precedent holds that a pre-election challenge to a proposed amendment to the Florida Constitution is justiciable if the challenge is to the facial constitutionality of the proposition. Gray v. Winthrop, 115 Fla. 721, 156 So. 270 (1934); Gray v. Moss, 115 Fla. 701, 156 So. 262 (1934). This is a rational and practical principle, since submitting a proposal to the electorate is a futile act if it would be invalid in every conceivable application. The State has admitted, both in argument before the trial court and in its brief, that the Gray cases authorize a pre-election facial constitutional attack. [Tr. 44; I.Br. 21].

The State invites this Court to recede from those cases. It cites Grose v. Firestone, 422 So. 2d 303 (Fla. 1982) and In Re Advisory Opinion to the Attorney General -- Term Limitations, 592 So. 2d 225 (Fla. 1991), as indicating this Court's willingness to do so. In Grose v. Firestone, this Court considered the sufficiency of a ballot summary and noted in passing that the constitutional challenge to the substance of the amendment was "not justiciable in this case." 422 So. 2d at 306. There is no way to determine from the Grose opinion the scope or nature of the constitutional issues presented there or whether the challenge was facial as applied. This Court's opinion in Grose cites both Gray cases, however, affirming their continuing vitality and creating the inference that the rejected constitutional claims were not to the facial validity of the proposed amendment. Id.

The decision in In Re Advisory Opinion - Term Limitations, 592 So. 2d 225 (Fla. 1991), is likewise inapposite because it dealt only with the proper scope of this Court's review of an initiative petition upon the Attorney General's request for an advisory opinion. The scope of such advisory opinions is restricted, by Article IV, Section 10 of the Florida Constitution and by general law, to whether the proposed amendment meets single subject, ballot title and ballot summary requirements. Id. at 227, Even so, Justice Overton, concurring in part and dissenting in part, would have expanded the Court's inquiry, based upon the Gray cases and the Court's recognized responsibility to consider facial violations of the United States Constitution in proposed amendments to the Florida Constitution. Id. at 229. He noted that allowing the people to vote and then, if the measure is adopted, holding a provision unconstitutional on its face, "perpetrates a fraud on the voting public." Id. at 230. In Re Advisory Opinion does not signal a departure from the Gray cases -- it simply determines the proper scope of an advisory opinion issued to the Attorney General pursuant to express constitutional and statutory constraints. No such constraints are applicable in this case.

The State's brief also asserts that the creation of two classes of leaseholds in Proposition 7 cannot "constitute a distinction that is constitutionally void on its face." [I.Br. 22]. This argument misconceives the nature of a facial constitutional challenge. If a proposition might be permissible as applied to certain fact patterns, and unconstitutional as to others, then it should be submitted to the electorate so that, if passed, it can operate to the extent that the federal constitution permits. Gray v. Moss, 156 So. at 266. If a proposal would be invalid as applied to any set of circumstances, it is facially void. Gray v.

Winthrop, 156 So. at 272. In this case, the classification imposed by Proposition 7 appears on its face, and it is this very classification which constitutes a denial of equal protection of the laws, rendering it invalid in every instance!

The Circuit Court correctly determined that the gravamen of Plaintiffs' equal protection claim, as set forth in Count III of the Complaint, is a justiciable, facial challenge to the validity of Proposition 7. [A 2].

C.
The Rational Basis Test

The State devotes considerable attention to the applicable standard of review, citing decisions for the proposition that a state has broad freedom of classification under the Equal Protection Clause. However, to say the State's latitude is wide is not to say that it is unlimited, and none of the decisions cited by the State holds that states are free to discriminate in any way they choose. The reason tax classifications are generally upheld is that they are generally grounded on a plausible public policy and are reasonably designed to achieve that policy. It is unusual for a state to adopt a classification which is palpably arbitrary. When this occurs, the Supreme Court strikes down the measure, even if it is a tax case, and even though the rational basis standard applies. See, e.g., Hooper v. Bernalillo County Assessor, 472 U.S. 612, 105 S.Ct. 2862, 86 L.Ed.2d 487 (1985); Williams v. Vermont, 472 U.S. 14, 105 S.Ct. 2465. 86 L.Ed.2d 11 (1985).

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[6]Contrast U.S. Fidelity & Guar. Co. v. Dept. of Ins., 453 So. 2d 1355, 1362 (Fla. 1984), rejecting an equal protection challenge because the statute in question did not on its face classify insurers into different categories.

None of the decisions cited by the State involve classifications remotely resembling the classification embodied in Proposition 7. See Madden v. Kentucky, 309 U.S. 83, 60 S.Ct. 406, 84 L.Ed. 590 (1940) (tax on bank deposits outside the state which is higher than bank deposits within the state does not offend equal protection, as difficulties of collection may be different); Cov v. Birth-Related Injury Compensation Plan, 595 So. 2d 943 (Fla. 1992) (taxing all physicians to fund a birth-related neurological injury plan that benefits them as a class not an equal protection violation); Eastern Airlines. Inc. v. Department of Revenue, 455 So. 2d 311 (Fla. 1984), appea1 dismissed, 474 U.S. 892, 106 S.Ct. 213, 88 L.Ed.2d 214 (1985) (taxation of fuel purchased by airlines but not railroads does not violate equal protection); Smith v. Department of Revenue, 512 So. 2d 1008, 1010 (Fla. 1st DCA 1987) (county tax on fuel purchases does not violate equal protection, although some fuel use may occur outside county; court observed that the tax "treats all persons buying gas in Jackson County alike").[7]

Even the decision of the First District Court of Appeal in Miller v. Higgs, 468 So. 2d 371 (Fla, 1st DCA 1985) presents a markedly different issue. The discrimination asserted in that case was between private owners of realty, who must pay real estate taxes, and private lessees of government property, who are subject to intangible taxes. There was no attempt, as there is here, to discriminate

[7]The State also cites City of Pittsburgh v. Alco Parking Corporation, 417 U.S. 369, 94 S.Ct. 2291, 41 L.Ed.2d 132 (1974). Although the equal protection issue had been litigated in the Pennsylvania courts, it was not addressed in the Supreme Court's opinion.

between lessees or between the holders of any other interests in realty based upon the date their interests were created?

In the absence of a decision on point, the inquiry turns to an application of the rational basis standard of review. In this regard, Nordlinger v. Hahn, ___ U.S. ___, 112 S.Ct. 2326 (1992), upon which the State relies, is instructive. In this June 18, 1992 decision, the United States Supreme Court upheld California's Proposition 13 against an equal protection challenge, applying the rational basis test. Several features of the Court's opinion are pertinent.

The Court began its equal protection analysis by pointing out that the Equal Protection Clause does not forbid classifications. "It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." 112 S.Ct. at 2331. The Court continued by explaining that absent impact on a fundamental right or suspect classification (neither of which are present in the case at bar), "the Equal Protection Clause requires only that the classification rationally further a legitimate state interest." Id. at 2331-2332. The opinion then elaborates on how the test is to be applied:

> In general, the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, see United States Railroad Retirement Bd. v. Fritz, 449 U.S. 166, 174, 179, 101 S.Ct. 453, 459, 461, 66 L.Ed.2d 368 (1980), the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, see Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456,464, 101 S.Ct. 715, 724, 66 L.Ed.2d 659 (1981), and the relationship of the classification to its goal is not so attenuated as to render the

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[8]The Higgs court's review of the merits appears to have been dictum, as it follows the holding that the pleadings and record were deficient as to the plaintiffs standing, and the court's criticism of the attack as "vague and uncertain." 468 So, 2d at 375.

distinction arbitrary or irrational, see Cleburne v. Cleburne Living Center, Inc., 473 U.S., at 446, 105 S.Ct., at 3257.

Id. at 2332.

Later in its opinion, the Court explained that although the rational basis test does not require the State to articulate its purpose or rationale, the Court's review does require that there be an identifiable rationale. The Court also observed that once a state's asserted purpose is determined not to be legitimate, other possible purposes need not be considered. Id. at 2334-2335.

Thus, although the rational basis test allows the states considerable latitude, it nevertheless prevents the states "from treating differently persons who are in all relevant respects alike." Nordlinger, 112 S.Ct. at 2331. It requires an identifiable purpose for the classification and calls upon the reviewing court to examine the legitimacy of that purpose, the factual basis underlying the classification, and the relationship of the classification to its goal. A statute that does not satisfy all the components of the test is unconstitutional, whether the subject matter is taxation or any other matter. See Hooper v. Bernalillo County Assessor, 472 U.S. 612, 105 S.Ct. 2862, 86 L.Ed.2d 487 (1985); Williams v. Vermont, 472 U.S. 14, 105 S.Ct. 2465. 86 L.Ed.2d 11 (1985); Metropolitan Life Insurance Co. v. Ward, 470 U.S. 869, 105 S.Ct. 1676, 84 L.Ed. 751 (1985); Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985).

It is noteworthy that the Court's opinion in Nordlinger does not contain language which characterized rational basis decisions in the past and which appears in many of the authorities cited in the State's brief. The Nordlinger opinion does not say that "the burden is on the one attacking the legislative enactment to negate every conceivable basis which might support it." Madden, 60

S.Ct. at 408. Although the Court has applied the rational basis test in at least 20 decisions since 1983, that formulation has not appeared in a majority opinion since Regan v. Taxation with Representation of Washington, 461 U.S. 540, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983) (quoting Madden).[9]

It is not necessary to decide whether the Court has retreated from the notion that one who challenges a classification has the burden articulated in Madden. In this case, the State and the Commission have identified the putative purpose (i.e., policy reason) for the discrimination which Proposition 7 would create. To recapitulate the components of the rational basis analysis as framed in Nordlinger, the issues are: (1) whether that purpose is legitimate; (2) whether the Commission could have reasonably believed the facts underlying the classification; and (3) whether the relationship of the classification to its objective is not so attenuated as to be arbitrary or irrational, 112 S.Ct. at 2332. These components are examined separately with reference to Proposition 7 in the ensuing pages. According the State all the deference to which it is entitled under the rational basis standard, Proposition 7 cannot survive scrutiny.

[9]For an excellent historical review of the Supreme Court's rational basis jurisprudence, which concludes that the recent decisions reflect a more meaningful scrutiny than has been the case historically, see Long Island Lighting Company v. Cuomo, 666 F. Supp. 370 (N.D.N.Y. 1987), appeal dismissed 888 F.2d 230 (2d Cir. 1989).

D.
Applying the Rational Basis Test

I. Plausible Policy Reason

The first component of the rational basis test is the identification of a plausible policy reason, which the Nordlinger Court also describes as a legitimate state interest, in creating the challenged classification.

The State does not specifically articulate the policy reason for this classification, but implies that the purpose is to alleviate "various inequities" confronting pre-November 5, 1968 leaseholders. The State quotes extensively from Nordlinger for the proposition that protection of reasonable reliance interests is a legitimate governmental objective. The Commission's resolution does not frame the objective in those terms, but its import is similar.

Although the "real" purpose of Proposition 7 was a disputed matter among members of the Commission,[10] for purposes of this Brief Port Parties accept that the purpose of the classification "may conceivably" have been the protection of reasonable reliance interests. See Nordlinger, 112 S.Ct. at 2334. Port Parties acknowledge that this would be a legitimate governmental interest under Nordlinger.

However, to recognize the legitimacy of such a purpose in the abstract is not to concede that "the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental

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[10] One commissioner expressed the view that "the only reason this issue was on the agenda was because on [sic] the International Speedway." [A60]. See also the transcript of the April 29, 1992 meeting: "In my opinion, if the international speedway in Volusia County had been located in Baxley, Georgia, we would not be in any of this discussion today. That is the only purpose for us being here." [Exh. 3, p. 124].

decisionmaker," or that "the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." Id. at 2332. In fact, Proposition 7 fails to satisfy these two elements of the rational basis test.

II. Facts on Which the Classification is Apparently Based

The second component of the rational basis test inquires whether the "legislative facts upon which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker." Id. If the purpose of the classification in Proposition 7 is to protect reasonable reliance interests, it is necessary to ascertain whether there are facts underlying the classification that the Commission "rationally may have . . . considered to be true." Id.

The State's factual predicate consists of two elements. The first is a portrayal of the law under the 1885 Constitution that is patently incorrect. The second element is the assertion that leases entered into before November 5, 1968, "were entered into with the expectation of, or in reliance upon, continuing tax exempt status," and that "the leaseholders now face various inequities and the loss of a goad faith bargain." [I.Br. 28]. The two components of the State's thesis are discussed separately below.

The State begins with the following assertion:

> Before the Florida Constitution was amended on November 5, 1968, there was no constitutional impediment to state and local government providing tax-based incentives to encourage private development, particularly as to publicly owned land leased to a private entity.

[I.Br. 25].[11] The State then cites Park-N-Shop v. Sparkman, 99 So. 2d 571 (Fla. 1958), where Hillsborough County leased county-owned land to private interests for commercial use, the lease providing that no county or city ad valorem taxes should be levied against the property. But this decision had nothing to do with the proposition for which the State cites it. This Court determined that county property is immune from taxation, and that there was no statutory authority for taxing the leasehold interest. To the extent the tax clause in the lease can be characterized as affording a "tax based incentive to encourage private development," it was irrelevant to the disposition.

The State cites no other authority far its position that the 1885 Constitution posed no impediment to tax-based incentives for development. The assertion directly conflicts with decisions of this Court dating back to 1898. In City of Tampa v. Kaunitz, 23 So. 416 (Fla. 1898), the City contracted to accept $200 annually from a property owner in lieu of ad valorem taxes in return for a promise to construct and operate a hotel. This Court held:

> Without valid legislative authority, no city or town has power to bind itself, by contract, either to forbear to impose taxes on particular property, or to impose them only under given limitations, or on certain given conditions.

Id. at 420.

A similar contract was held void in Tampa Shipbuilding & Engineering Co. v. City of Tampa, 136 So. 458 (Fla. 1931), where, pursuant to an ordinance, a

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[11] A similar statement appears in the Resolution: "Under the 1885 Florida Constitution, which was in effect before the 1968 constitutional revision, local governments attempted to encourage business development by leasing government-owned property to private businesses and by exempting those leases from ad valorem taxes." [A 34].

landowner promised to construct a shipbuilding plant in return for a remission of property taxes. After observing that Article IX, Sections 1 and 5 of the 1885 Constitution[12] precluded either the Legislature or the city from adopting a valid act or ordinance of the kind presented, this Court said:

> The great weight of authority appears to be that municipal contracts providing for exemptions from taxation or for the remission of taxes levied without legislative authority, even when there are no constitutional limitations, are ultra vires and void. In this state, at the time this contract was made, there was not only a lack of legislative authority, but there existed the constitutional inhibition which precluded the Legislature from granting such authority.

Id. at 463 (emphasis added).

In City of Daytona Beach v. King, 181 *So.* 1 (Fla. 1938), a city contracted with the owner of a golf course to reimburse him for all state, county, and municipal ad valorem taxes, if he constructed a clubhouse, improved the golf course, and operated the course as a public facility. Subsequently, the Legislature enacted a special act purporting to ratify and validate the contract. This Court held the contract ultra vires, and that the special act was insufficient to validate the contract, despite claims the golf course served a public purpose. The Court relied upon Article IX, Section 7, Florida Constitution (1885), which prohibited

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[12]Article IX, Section 1 of the 1885 constitution, among other things, required the Legislature to provide for a uniform and equal rate of taxation and to prescribe regulations to secure a just valuation of all property, except property exempted by law for municipal, educational, literary, scientific, religious, or charitable purposes. The comparable provisions in the 1968 revision appear in Article VII, Sections 2, 3(a), and 4, Florida Constitution. Article IX, Section 5 of the 1885 Constitution required the Legislature to authorize local taxation for county and municipal purposes. Cf. Article VII, Section 9(a), Florida Constitution (1968).

levy of taxes for the benefit of any chartered company.[13] See also City of Naples v. Conboy, 182 So. 2d 412 (Fla. 1965) (city's attempt to promote residential development by agreeing to assess property as acreage was invalid under Article IX, Sections 1 and 5 of the 1885 Constitution).

The decision in Lykes Brothers, Inc. v. City of Plant City, 354 So. 2d 878 (Fla. 1978) reiterates the same principles that had been applied in the earlier cases. In Lykes Brothers, a city induced Lykes to relocate a meat packing plant to a city-owned location outside the municipal limits. The city leased the property to Lykes in 1964, with a covenant promising never to annex or impose municipal taxes on the property. Referring to the absence of any legislative authority for a tax exemption at the time the lease was entered (in 1964), this Court held the covenant against taxation ultra vires, relying upon Tampa Shipbuilding & Engineering Co., and Kaunitz. Id. at 880, In other words, this "tax-based incentive" lease provision was invalid under the 1885 Constitution.

Another pertinent decision is Hillsborough County Aviation Authority v. Walden, 210 So. 2d 193 (Fla. 1968). In that case, this Court was presented with challenges to ad valorem tax assessments for 1963, 1964, and 1965, upon properties of the Aviation Authority, a public body. One parcel was owned by the county and leased to a motel. The properties were located at the Tampa International Airport and leased to private firms operating other businesses such as a car rental company, service station, construction company, aircraft repair company, and communications company.

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[13] The comparable (but not identical) current provision is Article VII, Section 10, Florida Constitution (1968).

By special act, Authority property was exempt from ad valorem taxation. In addition, a general law enacted in 1961 provided that any property otherwise exempt or immune but used for profit was to be taxed, except for property leased prior to the effective date of the act, This Court upheld a lower court's decision that all of the Authority property (except one parcel) was taxable under the 1885 Constitution, and upheld taxation of the leasehold in the motel. Walden, 210 So. 2d at 196. The provision exempting property leased prior to the effective date of the general law was held unconstitutional. Id. at 196-197.[14]

Although the Walden decision does not involve a covenant against the levy of taxes, it is nevertheless relevant. Since the 1885 Constitution did not permit the Legislature to exempt property, it follows that no local government would have had the power either.[15]

In sum, the State's assertion that there was no constitutional impediment to local tax-based incentives to encourage development is simply incorrect. As the decisions discussed above clearly show, this Court repeatedly found such an "impediment" in the 1885 Constitution.

The State's position appears to rest upon a misapprehension of a narrow body of law involving legislative public purpose declarations and related exemption provisions. Several of these decisions involved government-owned land leased to

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[14]The statutory basis for taxation of the leasehold was apparently Section 192.62, Florida Statutes (1963). Although this statute did not by its terms tax leaseholds, Walden and Miller v. Higgs, 468 So. 2d at 376, support the inference that it was so construed.

[15]In the Walden case, the courts relied upon Article IX, Section 1 and Article XVI, Section 16, Florida Constitution (1885). The latter provision subjected corporate property to taxation unless held and used for specified exempt purposes.

private persons prior to 1968. The controversy was spawned when the Legislature repealed certain public purpose declarations and exemptions, and enacted legislation imposing taxation. See, Ch. 71-133, Laws of Florida, § 14. E.g., compare, Daytona Beach Racing & Recreational Facilities Dist. v. Paul, 179 So. 2d 349 (Fla. 1965) with Volusia County v. Daytona Beach Racing & Recreational Facilities Dist., 341 So. 2d 498 (Fla. 1976). Compare also, State v. Escambia County, 52 So. 2d 125 (Fla. 1951) with Straughn v. Camp, 293 So. 2d 689 (Fla. 1974), appeal dismissed, 419 U.S. 891, 95 S.Ct. 168, 42 L.Ed.2d 135 (1974).

The issues at the heart of these disputes were whether the Legislature and the courts are permanently bound by prior public purpose determinations, and whether the uses at issue served public purposes under modern statutes and constitutional provisions. The issue was not whether the 1968 Constitution had divested local governments of some broad authority to grant tax-based incentives. They never had such authority. Depicting these cases as the law of Florida with respect to local tax incentives is like depicting the earth as the universe.

With respect to the first question raised in the cited decisions, that is, whether legislative declarations of public purpose are permanently binding, this Court repeatedly answered the question in the negative. Straughn, 293 So. 2d at 695; Volusia County, 341 So. 2d at 502. With respect to the second question, the Court found the lessees were not serving public purposes or functions within the meaning of the current statutes and constitutional provisions.

In those limited situations in which exemption is sought on the ground that the lessee performs a public purpose or function, the requirements are now more exacting than they were in the past. See Williams v. Jones, 326 So. 2d 425 (Fla.

1975), appeal dismissed, 429 U.S. 803 (1976). However, for the typical commercial tenant of space that happens to be owned by government, who does not claim to serve a public purpose, this development in the law is irrelevant. Further, a more restrictive public purpose test cannot be entirely attributed to the enactment of the 1968 Florida Constitution. Statutory changes have played a major role in the decisions, and different judicial constructions of the same 1968 constitutional provisions have also contributed.[16]

It is theoretically possible that a pre-1968 leasehold exists which contains a covenant against taxation which was supported by valid statutory authority prior to the 1968 constitutional revision, but which is invalid today because the public purpose test has become more strict. However, the past and current tax treatment of such leaseholds is not the asserted factual basis for the classification. The basis offered by the State and the Commission is that local government had unfettered power to grant tax-based incentives under the 1885 Constitution. The text of Proposition 7 appears predicated on this assumption, as it confers the preferential treatment on all government leaseholds created prior to November 5, 1968. This treatment is not limited to leaseholds containing local government tax covenants supported by legislative authority. Indeed, it is not even limited to leases containing tax covenants.

As the decisions discussed above demonstrate, the premise offered is erroneous; this was settled long ago, and the Florida Constitution of 1968 effected

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[16] Compare, Dade County v. Pan American World Airways, 275 So. 2d 505 (Fla. 1973), with Walden v. Hillsborough County Aviation Authority, 375 So. 2d 283 (Fla. 1979). In the latter decision, the Court receded from its affirmance in Hertz Corp. v. Walden, 299 So. 2d 121 (Fla. 2d DCA 1974), aff'd, 320 So. 2d 385 (Fla. 1975).

no change in this respect. With limited exceptions involving valid authorizing legislation, a covenant against taxation in a lease created prior to the 1968 revision was no more enforceable than such a covenant in a lease created thereafter.

Thus, Proposition 7 fails the requirement of Nordlinger that the facts upon which the classification is apparently based may rationally have been considered to be true. The Commission could not rationally have believed something that was clearly not true. The "facts" relating to the power of local governments under the 1885 Constitution appear unambiguously and consistently in the decisions of this Court. The Commission's inability to distinguish between the general issue of local governmental power and the peculiar problems arising from repeal of public purpose declarations is fatal.

The second element of the State's factual premise also fails. The State asserts:

> These [pre-November 5, 1968] leases were entered into with the expectation of, or in reliance upon, continuing tax exempt status; the leaseholders now face various inequities and the loss of a good faith bargain. See Roberts, 6 Fla. St.L.Rev. 1099-1102. It does not violate equal protection to accord them somewhat different treatment. Miller v. Higgs. It is after all a likelihood that the consideration due the government under the lease took into account the amount of taxes that could otherwise have been assessed.

[I.Br. 28-29]. The Commission received no public testimony prior to voting on Proposition 7; no lessee came forward to assert such an "expectation" or "reliance." There is no indication in the record that any specific lease document was considered or was even in the Commission's possession. See Cleburne v. Cleburne Living Center, Inc. 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) (striking classification under rational basis test due to absence in record of facts justifying classification).

Ironically, the decisions cited in the State's brief affirmatively reveal that the lessees who were parties lacked any basis for asserting that they had been promised permanent freedom from taxation. In Straughn v. Camp, Santa Rosa Island leaseholds were held taxable despite claims that taxation impaired the obligation of contract. The 750 leases in existence when that case was decided were either silent with respect to taxation or contained a clause affirmatively requiring the lessee to "pay any such taxes that may lawfully be assessed. . . ." 293 *So,* 2d at 693.

Similarly, in Volusia County v. Daytona Beach Racing: & Recreational Facilities Dist., the Court rejected a claim that the International Speedway Corporation was entitled to rely on a covenant against taxation in a lease to which it was not a party. 341 So. 2d at 502. The leasehold subject to assessment was the Corporation's leasehold, and no such covenant is mentioned.

The same leaseholders appear repeatedly in the decisions, testing additional theories and approaches. In Daytona Beach Racing and Recreational Facilities Dist. v. Volusia County, 372 So. 2d 419 (Fla. 1979), this Court rejected claims of the Speedway Corporation and the District that taxation impaired the obligation of contract, In Am Fi Investment Corporation v. Kinney, 360 So. 2d 415 (Fla. 1978), this Court struck down special acts requiring reimbursement of Santa Rosa lessees of county and school taxes paid in prior years.

Finally, in a case decided on the basis of the same factual deficiency as is present here, the Court struck down a special act providing for a reduction in rent to Santa Rosa Island leaseholders equal in amounts to the ad valorem taxes paid for county and school purposes in the prior year. Archer v. Marsha, 355 So. 2d

781 (Fla. 1978). The legislation contained findings of fact to the effect that the lessees acted "in reliance upon the pornise of the Island Authority that the leaseholders would never be subject to ad valorem taxes." Id. at 783. The Court quoted from Seagram"Distillers Corp. v. Ben Greene, 54 So. 2d 235, 236 (Fla. 1951), as follows:

> The general rule is that findings of fact made by the legislature are presumptively correct. However, it is well recognized that the findings of fact made by the legislature must actually be findings of fact. They are not entitled to the presumption of correctness if they are nothing more than recitations amounting only to conclusions and they are always subject to judicial inquiry. Moreover, findings of fact made by the legislature do not carry with them a presumption of correctness if they are obviously contrary to proven and firmly established truths of which courts may take judicial notice.

Id. at 783-784.

Similar to this Court's application of Florida constitutional provisions, the Supreme Court of the United States has unambiguously declared that there must be a factual basis which could rationally be believed in order to satisfy the rational basis equal protection test. Nordlinger, 112 S.Ct. at 2332, See also Panama City Medical Diagnostics, Ltd. v. Williams, Case No. TCA 92-40198-WS (July 21, 1992), appeal pending (holding that provision of the Patient Self-Referral Act of 1992 fails to satisfy rational basis test, after exhaustive review of legislative history disclosed no basis for classification). The classification embodied in Proposition 7 has no factual basis. The Commission had nothing relevant before it other than a confused view of the law in this area. As a result, the classification fails to satisfy this requirement, and Proposition 7 is unconstitutional.

111. Relationship of Classification to its Goal

Proposition 7 also fails the third prong of the Nordlinger rational basis ***test*** because the relationship of the classification granting tax preference **to** pre-November 5, 1968 leaseholds to its asserted **goal** of protecting **the** reasonable reliance interests is so attenuated **as** to become arbitrary or irrational. The preferential class is not limited to those lessees with **a** reasonable reliance interest. All leaseholds created prior to November 5, 1968 would be in the preferred class. The preferred class would thus include leaseholds which were created prior to November ***5,*** 1968 and which:

1. were silent with respect to ad valorem taxes;

2. affirmatively required the lessee to pay ad valorem taxes;

3. promised relief from ad valorem taxes, without valid legislative authority (such a lease would have been unenforceable under the 1885 Constitution); and

4, contained covenants against taxation which were supported by appropriate legislation.

Except for the fourth **category,** none of the leases described would furnish a basis for reasonable reliance upon permanent freedom from ad valorem taxes. None of them is situated any differently than leases entered into **after** November ***5,*** 1968 (such **as** those of several Appellees **now** before the **Court).** The preferred class is thus overinclusive when measured against the stated purpose of creating a preferred class. In other words, the relationship between the classification and its stated objective is so attenuated **as** to be arbitrary. Nordlinger, 112 S.Ct. **at** 2332.

In Williams v. Vermont, this Court said in striking down a state's tax classification as failing to satisfy the rational basis test:

> The classification must reflect pre-existing differences; it cannot create new ones that are supported by only their own bootstraps.

105 S. Ct. at 2474. The classification in the case at bar suffers from the same deficiency identified in Williams v. Vermont. Government leaseholds created before and after November 5, 1968 are, with the exception of any that may exist in category 4 above, identically situated in that none has any greater basis for a "reliance interest" than any other. The distinction between them is not "pre-existing," but is created solely by the classification in Proposition 7.

The relationship between the classification in Proposition 7 and its asserted objective is tenuous for another reason. Consider a municipality which enters into a lease similar to the one in the Lykes Brothers case, promising not to impose municipal taxes. Assume also that, unlike the situation in Lykes Brothers, the municipality had valid statutory authority to enter into such a covenant. Proposition 7 would not merely accord the lessee the benefit of its bargain relating to municipal taxes. Rather, Proposition 7 would relieve the lessee from county, school board, and special district taxes as well. It would thus place such a lessee in a position far superior to that which he enjoyed prior to November 5, 1968. The benefits Proposition 7 would confer upon the privileged class substantially exceed what is needed to achieve the asserted purpose of protecting reasonable reliance interests.

In an important respect, Proposition 7 is also underinclusive. As explained previously, the authority of local government to covenant against the imposition of taxes has always depended entirely upon the existence of valid statutory authority.

See Tampa Shipbuilding & Engineering Co. v. City of Tampa, 136 So. at 462-463; Lykes Bros., Inc. v. City of Plant City, 354 So. 2d at 880. In theory, if a valid special act or general law authorized such a covenant, a pre-November 5, 1968 lessee may claim reasonable reliance thereon.

The difficulty is that the same theoretical possibility exists with a leasehold created today which contains a covenant against imposition of local ad valorem taxes on the leasehold. Such a covenant would clearly be lawful because leaseholds are currently taxed at the state level as intangible personal property. §§ 196.199(2)(b), 199.023(1)(d), Fla. Stat. (1991). A lessee under a lease created under current law has at least as valid a basis for claiming an "expectation" or "reliance" upon a continuation of the current tax treatment as the lessee under a lease created prior to November 5, 1968. There is simply nothing about that date that creates a rational distinction between leaseholds."[17]

No matter how one approaches the analysis, Proposition 7 fails under the third prong of the rational basis test. If one compares post-November 5, 1968 leaseholds with all leaseholds created prior to that date except those that were the subject of covenants against taxation and valid public purpose legislation authorizing tax exemptions, the two groups are identically situated: both have always been subject to exactly the same tax treatment. On the other hand, if one compares leaseholds created since the intangible tax treatment was adopted in 1980 with pre-November 5, 1968 leaseholds which were entitled to tax exemption

[17]It is interesting that, in referring to the pre-November 5, 1968 lessees, the State mentions the "likelihood that the consideration due the government under the lease took into account the amount of taxes that could otherwise have been assessed." [I.Br. 29] It does not occur to the State that the expected tax expense would also influence the establishment of an agreed rental under current law.

when they were created, these groups are also identically situated: each *can* claim "reliance" upon continuation of the law in effect at the time of creation. But **only** one group is favored. Proposition 7 treats persons differently who **are** in all material respects alike, and therefore violates the Equal Protection Clause. Nordlinger, 112 S.Ct. at 2331.

Port Parties **do** not contend that classifications must be scientifically precise to withstand scrutiny under the rational basis test, However, the choice of a criterion for distinction "cannot be so **casual as** this, particularly when **a** more precise and direct classification is easily drawn." Williams v. Vermont, **472** U.S. 14, 24, 105 S.Ct. **2465,** 2472, 86 L.Ed.2d 11 (1985).[18]

However, the Commission did not adopt a more precise and direct classification. One can only speculate why, but the reason is unimportant. What is important is that the relationship between the classification created in Proposition 7 and its putative goal is so tenuous **as** to be irrational, The Equal Protection Clause requires more. Proposition 7 thus fails under the both the second and third prongs of the rational basis test as set forth in Nordlinger.

In Williams v. Jones, 326 So. 2d 425 (Fla. 1975), this **Court** was presented with a variety of challenges to the taxation of leaseholds on Santa Rosa Island **as** real property. In the course of its opinion, the Court made the following observation about the consequences of taxing a private use of property when it is

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[18] "Proposition 7 could easily have been drawn so **as** to avoid violation of the Equal Protection Clause. By making the classification applicable to leaseholds created after the effective date of the amendment, the Commission would have accommodated all reliance interests without discrimination, and future leaseholders would have notice of the new tax treatment at the time their leaseholds are created.

privately owned, and not taxing the same type of use when the property is owned by government and privately leased:

> The operation of the commercial establishments represented by appellants' cases is purely proprietary and for profit. They are not governmental functions. If such a commercial establishment operated for profit on Panama City Beach, Miami Beach, Daytona Beach, or St. Petersburg Beach is not exempt from tax, then why should such an establishment operated for profit on Santa Rosa Island Beach be exempt? No rational basis exists for such a distinction.

326 So. 2d at 433 (emphasis added). Given that no rational basis exists for discriminating between private use of privately-owned property and private use of publicly-owned property, it follows that discrimination between leaseholds in public property, based solely on the date of creation, cannot stand.

The Final Judgment should be affirmed.

POINT 111.

THE FINAL JUDGMENT SHOULD BE AFFIRMED BECAUSE PROPOSITION 7 WAS NOT ADOPTED IN COMPLIANCE WITH ARTICLE XI, SECTION 6, FLORIDA CONSTITUTION

Another ground supports the Circuit Court's decision striking Proposition 7 from the ballot. The proposed amendment was not adopted by the Commission in compliance with Article XI, Section 6, Florida Constitution because Proposition 7 does not represent a "proposal" within the necessary meaning of this constitutional provision. Because Article XI, Section 6 is of recent vintage, Appellees were unable to cite precedent to the Circuit Court in support of this theory. The Circuit Court looked no further than the fact that Proposition 7 was apparently adopted by the constitutionally required vote, and did not consider other aspects of the Commission's actions relevant. Accordingly, Count III of Plaintiffs' Complaint was dismissed.[19] [A 2]. However, the record is adequate to consider the issue, which furnishes another alternative ground for affirmance. Applegate, 377 So. 2d 1150.

Article XI, Section 6(e), Florida Constitution, provides in pertinent part:

> Not later than one hundred eighty days prior to the general election in the second year following the year in which the commission is established, the commission shall file with the secretary of state its proposal, if any, of a revision of this constitution or any part of it dealing with taxation or the state budgetary process.

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[19] The minutes of the Commission's April 29, 1992 meeting indicate that a motion to reconsider was passed at that meeting. According to Roberts Rules of Order, such an action restores the original question to exactly the same condition that it was in before the first vote was taken on its adoption. It does not appear that the Commission voted on Proposition 7 following passage of the motion to reconsider. [A 56].

This requirement that the Commission file its proposal is the centerpiece of the difficulty here because the Commission's proposal is impossible to identify with certainty.

As background, Article XI, Section 6, Florida Constitution was adopted in 1988, and provided for the establishment of the Taxation and Budget Reform Commission beginning in 1990 and each tenth year thereafter. The addition of Article XI, Section 6 followed repeal of the unpopular sales tax on services, and has been described as creating a "major opportunity to revamp Florida's outdated tax structure." Donna Blanton, The Taxation and Budget Reform Commission: Florida's Best Hope for the Future, 18 Fla. St. U. L. Rev. 437 (1991).

The Commission is an extraordinary body. Its sole charge is the study of Florida's systems of taxation and budgeting, a function that has been removed from the purview of the Constitution Revision Commission. Article XI, Section (2)(c), Florida Constitution. It consists of eleven members appointed by the Governor, seven members appointed by the Speaker of the House of Representatives, and seven members appointed by the President of the Senate. There are also four non-voting ex officio members. Art. XI, § 6(a), Fla. Const. Article XI, Section 6(d) directs the Commission to examine a comprehensive list of matters:

> The Commission shall examine the state budgetary process, the revenue needs and expenditure processes of the state, the appropriateness of the tax structure of the state, and governmental productivity and efficiency; review policy as it relates to the ability of state and local government to tax and adequately fund governmental operations and capital facilities required to meet the state's needs during the next ten year period; determine methods favored by the citizens of the state to fund the needs of the state, including alternative methods for raising sufficient revenues for the needs of the state; determine measures that could be instituted to effectively

> gather funds from existing tax sources; examine constitutional limitations on taxation and expenditures at the state and local level; and review the state's comprehensive planning, budgeting and needs assessment processes to determine whether the resulting information adequately supports a strategic decisionmaking process.

The Commission is not a representative body, but nevertheless has the power to place proposed constitutional amendments directly on the ballot. Art. XI, # 6(e), Fla. Const. To do so, a 2/3 vote is required of the full Commission, with the "concurrence" of a majority of the members of each group of appointees. Art. XI, § 6(c), Fla. Const.

The 1990 Commission filed four constitutional amendments with the Secretary of State on the 180th day prior to the next general election. One proposal involves budgeting and spending, and the other three relate to taxation.[20] Proposition 7 has a tortured history, most of which begins with its adoption by the Commission on April 22, 1992. The Commission received no public testimony before voting on April 22, 1992 [Tr. 73-74], and approved the proposal 21 to 1. [A 49]. Thereafter, the Commission minutes reflect that there was a request to take public testimony, whereupon representatives of Florida cities, parts, airlines, and International Speedway Corporation appeared.[21] Concern was expressed by those testifying and some Commissioners that Proposition 7 would tax land leased

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[20] In addition to Proposition 7, the Commission submitted a one sentence proposal to require the legislature to prescribe a Taxpayers' Bill of Rights, and a proposed amendment which would allow municipalities and counties to levy a discretionary sales and use tax. The Commission proposed none of the fundamental constitutional reforms which some had urged upon it. See Note, The Taxation and Budget Reform Commission; Florida's Best Hope for the Future, 18 Fla. State L.R. 437 (Winter 1991).

[21] International Speedway was represented by counsel who appears on this appeal on behalf of amicus curiae Terence M. Brown. [A 60].

for purposes which are currently exempt under the Florida Constitution. [A 56-62; 64-65; 68-69]. Specifically, it would tax land leased for educational, literary, scientific, religious, or charitable purposes, Article VII, Section 3(a), Florida Constitution, and leases between governmental bodies.

In response, Commissioners proposed several alternatives in an attempt to ensure that such leases would not be taxed. Included in the efforts was an attempt to adopt a substitute for what is now Proposition 7. Another effort would have "linked" another proposal with Proposition 7. All these efforts failed to gain the required vote for inclusion on the ballot. [A 59-65].

Having voted to propose a constitutional amendment which by its terms would subject all leaseholds created after November 5, 1968 to taxation, and having voted down proposals to exclude government-to-government leaseholds and leaseholds for exempt uses pursuant to Article VII, Section 3(a), the Commission adopted a resolution which purported to do what Proposition 7 clearly does not:

> The Commission further intends that leaseholds for educational, literary, scientific, religious, or charitable purposes may be exempted from taxation by general law pursuant to Article VII, Section 3(a). Nothing in the government leasehold provision is intended to conflict with the authorization for the exemptions in Article VII, Section 3(a), which grants an exemption for property owned by a municipality and used exclusively by it for municipal or public purposes.

With its transmittal letter to the Secretary of State, the Commission Chairman expressed the view that the information contained in its resolutions "will assist Floridians in understanding the proposed revisions." He therefore requested that the Secretary of State and the supervisors of elections "reproduce and distribute the resolutions along with the revisions." [A 30].

Port Parties submit that this introduces an unacceptable uncertainty as to the effect of the measure the Commission offers for the ballot. In prescribing taxation of all government leaseholds created before November 5, 1968, Proposition 7 is unambiguous, despite the Commission's attempt to modify it by Resolution. There is no way a voter can predict whether, despite the clear language of the proposal, the courts will adopt a construction which varies from that language. The speculation is rendered especially difficult given the Commission's rejection of attempts to make Proposition 7 say what the Commission in its Resolution claims it intended. Amending the Constitution is a serious exercise, and this is no way to go about it.

In establishing the requirement in Article XI, Section 6(e) that Commission file "its proposal" for revision of the Constitution, the people of Florida must have had something other than this result in mind. They could not have intended to vest such extraordinary power in an unrepresentative group with the expectation that its "proposal" would be directly contradicted by its extrinsic expressions of "intent." The people are entitled to a "proposal" that means what it says. This Court should hold that a measure that does not conform to this basic imperative is not a "proposal" within the meaning of Article XI, Section 6, and should not be submitted to the voters.

Proposition 7 does not conform, and therefore does not belong on the November 3, 1992 election ballot.

CONCLUSION

For the foregoing reasons the Final Judgement of the Circuit Court should be affirmed.

Respectfully submitted,

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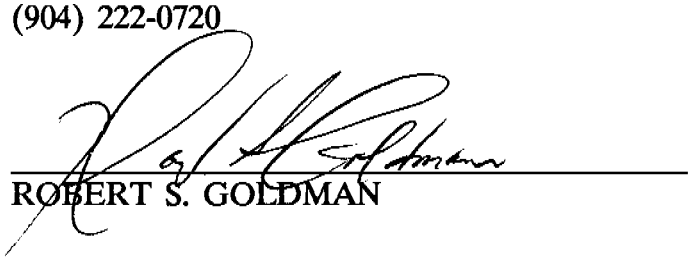

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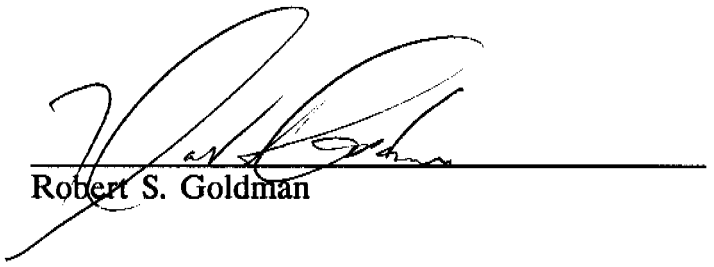
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Answer Brief of Appellees have been furnished by hand delivery to Louis F. Hubener, Assistant Attorney General, Department of Legal Affairs, The Capitol, Suite 1603, Tallahassee, FL 32399-1050; and Barry S. Richard, Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P. A., 101 East College Avenue, Tallahassee, FL 32301; and by U. S. Mail upon S. LaRue Williams, Kinsey, Vincent, & Pyle, 150 South Palmetto Avenue, Box A, Daytona Beach, FL 32114, this 23rd day of September, 1992.



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