IN THE SUPREME COURT OF FLORIDA

JIM SMITH, as Secretary of State of Florida,

Defendant, Appellant,

vs.

CASE NO. 80,438

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

Plaintiffs, Appellees.

APPELLANT'S INITIAL BRIEF

ON CERTIFICATION FROM THE DISTRICT COURT OF APPEAL, FIRST DISTRICT OF FLORIDA

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STATEMENT OF THE CASE AND FACTS

A. The Case.

This case was filed in the Leon County Circuit Court on July 23, 1992. The complaint consisted of five counts, all challenging a proposed amendment to the state constitution -- Proposition 7 -- that was to be submitted to the electorate at the general election scheduled for November 3, 1992.

The circuit court held a final hearing on August 25, 1992. At the hearing the plaintiffs voluntarily dismissed counts II and V, and the court granted defendant's motion to dismiss count III. (R.) (App. 2) The court then heard evidence and argument as to count IV, alleging a denial of equal protection, and argument as to count I, alleging a defective ballot summary under section 101.161(1), Fla.Stat. (Tr. 12, 13, 38, 58-121)

The circuit court ruled that the ballot summary was defective and hence found it unnecessary to address the equal protection claim. Final judgment was entered on August 31, 1992, and the defendant filed a notice of appeal the same day.

The District Court of Appeal, First District, pursuant to Rule 9.125, Fla.R.App.P., certified that this case required immediate resolution because of the approaching November election.

B. **The Facts.**

Article XI, section 6 of the Florida Constitution creates the Taxation and Budget Reform Commission ("Commission") whose mandate is to review, inter alia, the revenue needs of the state and the appropriateness of its tax structure, to recommend statutory changes, and to propose revisions to the state constitution.

The Cornmission consists of 25 voting members, eleven of whom are appointed by the Governor, 7 by the Speaker of the House and 7 by the President of the Senate. There are also 4 nonvoting members who are appointed from the House and Senate. Article XI, section 6, Fla.Const.

The Commission, beginning in 1990, met periodically until May of 1992. Under article XI, section 6(e), the Commission is required to file any proposed amendment dealing with taxation or the state budgeting process with the Secretary of State not later than 180 days before the general election.

Proposition 7 was approved by a vote of 21 to 1, with one member abstaining, on April 22, 1992. (Pl. Ex. 6, p. 5) On May 7, 1992, the Commission timely filed a proposed amendment which the Secretary of State designated as Proposition 7. (Pl. Ex. 1) Proposition 7 proposes to add the following language to article VII, section 3, Florida Constitution:

SECTION 3. Taxes; exemptions --

(e) Effective January I, 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.

The ballot summary the Commission prepared for Proposition 7 states that the proposed amendment:

> 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.

The trial court found that the ballot summary failed to comply with the requirements of section 101.161(1), Fla.Stat. The court's reasons are stated in the final judgment. (R.) (App. 3-6) Accordingly, the final judgment enjoined the Secretary of State from placing Proposition 7 on the November 1992 general election ballot.

SUMMARY OF ~~ARGUMENT~~

I.A. Case law uniformly holds that a ballot summary is sufficient as long as it gives the voter fair notice of what the voter must decide and is not misleading. This Court's

decisions, particularly with regard to proposed tax ordinances or amendments, have held that voters have a duty "to do their homework," and to investigate the details and the pros and cons of the issues presented by such tax proposals. In other words, in this area the voter is not entitled to rely on the ballot summary for everything he or she needs to know to make an intelligent and informed decision. The final judgment of the trial court rejected this Court's decisions in tax cases in favor of two decisions that found ballot summaries defective because they failed to inform the electorate that existing provisions -- in one case of the state constitution, in the other a county charter -- were being substantially weakened.

B. The ballot summary for Proposition 7 fairly states its chief purpose: to constitutionalize taxation of leaseholds in government owned property. It clearly says that such leaseholds will be subject to ad valorem taxation. The second sentence informs voters that pre-1968 leases will be taxed at intangible rates. Because it is common knowledge that ad valorem taxes include taxes on real property (at other varying rates) the voter will know that post-1968 leases will be taxed at a different rate -- the real property rate. To know more, to know what the precise rate is, the voter must have investigated beforehand because these rates can vary from taxing unit to taxing unit.

Beyond this, the faults found by the trial court are directed at the implications or ramifications of Proposition 7. The case law is clear that under section 101.161(1), and in view of its 75-word limitation, an explanation of the implications of a proposed amendment is not required.

11. It is questionable whether a proposed constitutional amendment can be attacked on constitutional grounds prior to its being approved and becoming law, as a ruling on such an issue would merely be an advisory opinion. Assuming such an attack is permissible, the plaintiffs did not meet their burden of showing that the classification of leases for purposes of taxation under Proposition 7 was a hostile and oppressive discrimination, or palpably arbitrary, or not based upon some reasonable distinction. As shown, ~~infra~~, the distinction is based upon changes adopted in the 1968 state constitution.

ARGUMENT

I. THE TRIAL COURT ERRED IN RULING THAT THE BALLOT SUMMARY FOR PROPOSITION 7 WAS DEFECTIVE UNDER SECTION 101.161, FLA.STAT.

Section 101.161(1), Fla.Stat., provides in relevant part that

> the substance of [a constitutional] amendment ... shall be printed in clear and unambiguous language on the ballot ... the substance of the amendment ... shall be an explanatory statement, not exceeding 75 words in length, of the chief purpose of the measure.

Appellant submits that the 75-word limitation on the summary was not intended to make it impossible to amend the constitution if all the details and possible ramifications of the amendment could not be explained in 75 words or less. See In re Advisory Opinion to the Attorney General -- English, 520 So.2d 25 (Fla. 1988) ("We cannot accept the contention that the seventy-five word ballot summary required by the statute must explain in detail what the proponents hope to accomplish by the passage of the amendment"). In cases specifically concerning taxation proposals, this Court has repeatedly stated that the voters have a duty to educate themselves about the issue, to learn the details of the proposal and to decide the matter before entering the voting booth.

The reasoning of the circuit court essentially rejected both of these propositions and ignored controlling case law on ballot summaries in the field of taxation.

A. A Ballot Summary Is Sufficient If It Provides Notice Of The Issue To Be Decided; Voters Must Exercise Their Responsibility To Learn The Details Of A Proposed Amendment.

This suit asks the Court to deny the people of Florida their right to vote on a proposed amendment to the state constitution because of a defective ballot summary. The Court has articulated the following test for such a challenge:

> The requirement for proposed constitutional amendment ballots is the same as for all ballots, i.e.,
>
> > that the voter should not be misled and that he have an opportunity to know and be on notice as to the proposition on which he is to cast his vote ... All that the Constitution requires or that the law compels or ought to compel is that the voter have notice of that which he must decide .... What the law requires is that the ballot be fair and advise the voter sufficiently to enable him intelligently to cast his ballot.
>
> Simply put, the ballot must give the voter fair notice of the decision he must make. Miami Dolphins, Ltd. v. Metropolitan Dade County, 94 So.2d 981 (Fla. 1981) ....

Grose v. Firestone, 422 So.2d 303, 305 (Fla. 1982), quoting Hill v. Milander, 72 So.2d 796, 798 (Fla. 1954) (emphasis added), and Askew v. Firestone, 421 So.2d 151 (Fla. 1982). The ballot "need not explain every detail or ramification of the proposed amendment." In re Advisory Opinion to the Attorney General -- Term Limitations, 592 So.2d 225, 228 (Fla. 1991).

It is also well-established that "[i]n order for a court to interfere with the right of the people to vote on a proposed constitutional amendment the record must show that the proposal is clearly conclusively defective." Askew v. Firestone, 421 So.2d 151, 154 (Fla. 1982) (emphasis added). As a general rule, a court of equity "will not

restrain the holding of an election because a free election in a democracy is a political matter to be determined by the electorate and not the courts." Metropolitan Dade County v. Shiver, 365 So.2d 213 (Fla. 3d DCA 1978), aff'd sub nom. Miami Dolphins v. Metro. Dade County, 394 So.2d 981 (Fla. 1981).[1]

The gravamen of the trial court's ruling is that voters will not be apprised of the details and the effects of Proposition 7. This Court has repeatedly rejected such challenges:

> Appellants effectually seek an exhaustive explanation reflecting their interpretation of the amendment and its possible future effects. To satisfy their request would require a lengthy history and analysis of the law of search and seizure and the exclusionary rule. Inclusion of all possible effects, however, is not required in the ballot summary. Smathers v. Smith, 338 So.2d 825 (Fla. 1976). The ballot summary of Amendment 2 clearly states the chief purpose of this amendment and provides the electorate with fair notice of the intent of the amendment. This ballot summary complies with all the requirements of law.

Grose v. Firestone, 422 So.2d at 305.

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[1] See also Askew v. Firestone, 421 So.2d 151, 157 (Overton, J., concurring) ("Infringing on the people's right to vote on an amendment is a power this Court should use only where the record clearly and conclusively establishes that the public is being misled on material elements of the amendment") (emphasis added).

Voters have a duty to inform themselves about issues they must decide before entering the voting booth:

> All that the Constitution requires or that the law compels or ought to compel is that the voter have notice of that which he must decide. It is a matter of common knowledge that many weeks are consumed, in advance of elections, apprising the electorate of the issues to be determined and ... it is idle to argue that every proposition on a ballot must appear at great and undue length. Such would hamper instead of aiding the intelligent exercise of the privilege of voting. It is a matter of common knowledge that one does not wait until he enters the election booth to decide how he is going to cast his ballot. What the law requires is that the ballot be fair and advise the voter sufficiently to enable him intelligently to case his ballot.

Hill v. Milander, 72 So.2d at 798. See also Miami Dolphins v. Metropolitan Dade County, 394 So.2d 981, 987 (Fla. 1981) (quoting Hill).

Particularly with respect to taxation proposals, which are often complex, this Court's decisions have consistently imposed upon the voters in this state a clear responsibility to "do their homework:"

> The ballot question contains an essential, although not exhaustive, description of the tourist tax ordinance and its purposes. Surely, no voter who had done his homework would be misled thereby. It is true, as the trial court found, that certain of the details of the ordinance as well as some of its ramifications were either omitted from the ballot question or could have been better explained therein. That,

> however, is not the test. There is no requirement that the referendum question set forth the ordinance verbatim nor explain its complete terms at great and undue length. Such would hamper instead of aiding the intelligent exercise of the privilege of voting. Under our system of free elections, the voter must acquaint himself with the details of a proposed ordinance on a referendum together with the pros and cons thereon before he enters the voting booth. If he does not, it is no function of the ballot question to provide him with that needed education.

Metropolitan Dade County v. Shiver, **365** So.2d at 210 (footnote omitted) (emphasis added), aff'd sub nom. Miami Dolphins v. Metropolitan Dade County, **394** So.2d **981** (Fla. 1981). See also Rowe v. Pinellas Sports Authority, 461 So.2d **72** (Fla. **1984)** (not every aspect of tourist tax proposal need be explained in voting booth).

Appellant submits that any voter who has investigated the issue posed by Proposition 7 and "acquainted himself with the details of [the] proposed [amendment]" would neither be misled nor "given inadequate notice of that which he must decide" by the ballot summary prepared for Proposition **7.**

Contrary to these principles, however, the judgment of the trial court implicitly rejects established rulings that the details and ramifications of a proposed amendment need not be stated in the summary and that voters have a duty to educate themselves to some extent on the "details" and the "pros and cons" before entering the voting booth.

The trial court relied chiefly upon two decisions of this Court in ruling the ballot summary defective, Wadhams v. Board of County Commissioners of Sarasota County, 567 So.2d 414 (Fla. 1990), and Askew v. Firestone, 421 So.2d 151 (Fla. 1982). In Wadhams, the County proposed a lengthy and complex change to the existing county charter. Instead of preparing a summary of 75 words or less, the County placed the entire amendment on the ballot. This Court, finding the provisions of section 101.161(1), Fla.Stat., mandatory, ruled that the County had failed to advise the electorate of the "true meaning and ramifications" of the amendment. The ballot was defective because it did not provide the requisite explanatory statement of the amendment. It should have informed the electorate that the amendment actually rewrote a provision of the existing charter to curtail the frequency with which the Charter Review Board could meet. The fact that the amendment was well publicized before the vote did not excuse the Board's failure to comply with section 101.161(1), Fla.Stat.

The trial court's interpretation of Wadhams was that this Court rejected the contention -- and presumably much prior case law -- to the effect that the voters had a duty to educate themselves and ruled that this was the function of the ballot summary. (Tr. 108-109) Appellant submits the trial court's conclusion is in error and that it is not

consistent with prior case law or with this Court's recent decision in In re Advisory Opinion to the Attorney General -- Homestead Valuation Limitation, 581 So.2d 586 (Fla. 1991), which involves a more complex taxation amendment and a more succinct ballot summary than that prepared for Proposition 7. (The trial court did not have the benefit of this decision at the hearing.)

In Askew v. Firestone this Court was concerned with a similarly defective ballot summary. The legislature, at the end of the session, had approved a proposed amendment to article II of the state constitution. The proposed amendment substantially weakened restrictions on lobbying by legislators and statewide elected officers during the two-year period after they left office. The ballot summary did not inform the electorate that a provision of the state constitution was being rewritten and that the chief purpose of the proposed amendment was "to remove the two-year ban on lobbying by former legislators and elected officers." 421 So.2d 156. Hence, the summary was "so misleading" that the Court ordered the proposed amendment stricken from the ballot. In Evans v. Firestone, 457 So.2d 1351 (Fla. 1984), this Court characterized the defective summary in Askew v. Firestone as one "which represented an amendment as granting citizens greater protection against conflicts of interest in government without revealing that it also removed an established constitutional protection." Id. at 1355.

Proposition 7 does not rewrite any provision of the existing state constitution or remove any constitutional protection. The appellant submits that the ballot summary for Proposition 7 is not misleading and that Wadhams and Askew decisions are no authority for so holding.

Appellant further submits that the trial court's decision requires a level of detail that directly conflicts with controlling decisions on proposed taxation ordinances or amendments, specifically, Metropolitan Dade County v. Shiver, 365 So.2d 210 (Fla. 3rd DCA 1978), aff'd sub nom. Miami Dolphins v. Metropolitan Dade County, 394 So.2d 981 (Fla. 1981), and the very recent decision of this Court In re Advisory Opinion to the Attorney General -- Homestead Valuation Limitation, 581 So.2d 586 (Fla. 1991). It is particularly significant that in Shiver and Miami Dolphins the Third DCA and this Court relied on earlier decisions that imposed an obligation upon voters to educate themselves about the details of proposed amendments. Askew and Wadhams did not overrule those decisions.

B. The Ballot Summary For Proposition 7 Provides A Sufficient Explanatory Statement That Is Not Misleading.

The chief purpose of Proposition 7 is to constitutionalize taxation of leaseholds in government property. Together, both sentences of the summary state this purpose, one referring to leaseholds entered into since

1968, the other to leaseholds entered into prior to 1968. Although the word "constitutionalizes" or some equivalent is not used, such a statement was not required in this Court's most recent decision in In re Advisory Opinion -- Homestead Valuation Limitation, 581 So.2d 586. Although the homestead amendment proposes to add to the constitution a limit on increases in valuation of homestead property, its ballot summary makes no reference to the constitution.

The summary for Proposition 7 further states that the leaseholds are subject to ad valorem taxation -- that is, tax on value. It is common knowledge that ad valorem taxation includes taxation of real property. In fact, "[t]he more common ad valorem tax is that imposed by states, counties, and cities on real estate." Black's Law Dictionary at 51 (6th ed. 1990) (emphasis added).[2] The second sentence states that leases entered into after 1968 will be taxed as "intangible personal property." The logical, and indeed the compelling inference, is that leaseholds entered prior to 1968 will be taxed at another rate -- that applicable to real property. This being so, the ballot language will not mislead anyone, especially those who "do their homework". Furthermore, real property rates can vary from county to county. In order to learn

[2] The trial court recognized this fact, observing that "the term [ad valorem] is being used loosely among many people to make reference to real property taxation." (Tr. 80)

what those are and to understand the true financial implications of the amendment voters must do their homework, for a ballot summary cannot tell them what millage rates will apply unless it is written for each individual county. Section 101.161 does require the impossible.

The reasoning and conclusions of the trial court, if correct, would make compliance with section 101.161(1) all but impossible. There is a difference between the "chief purpose" of an amendment and its "effects;" between notice of what must be decided and the ramifications of the amendment or policies effectuated.

The trial court's objections may be summarized as followed:

1. Because the summary's first sentence does not reference real property rates, the voter is not informed that as to post-1968 leaseholds "the tax rate will be shifted from the intangible rate to the much higher real property rate." Moreover, the voter is not "alert[ed] ... to the fact that the taxing power ... is shifted ... from the state to local government." (R.) (App. 3-4)

As explained above, the voter clearly would understand the post-1968 leases are taxed as ad valorem property from the literal language of the summary. The voter should understand from the second sentence that leaseholds would be

taxed as either intangible or real property, depending on the date entered. The chief concern of the final judgment seems to be that voters are not told the exact tax rate that will be imposed on post-1968 leases. This would be impossible. Ad valorem real property tax rates can range in theory from 0 to in excess of 30 mills, see article VII, section 9, Florida Constitution, and they vary not only from county to county but also among the various taxing subunits -- cities, school boards, taxing districts etc. It is impossible for one summary to tell all voters what the actual rate will be. The voters must learn this for themselves. Hence, because there is such a large potential range for the real property rate the voters will not be misled simply because they are informed the post-1968 are taxed on an ad valorem basis.

The fact that for some leases the taxing power is "shifted from state to local government," would be, in the absence of an elaborate explanation, an essentially meaningless caveat. Voters know ad valorem real property taxes are local. Moreover, the shift in power is at best theoretical if there are no outstanding leases in a given jurisdiction. The 75-word limitation does not require or permit a discourse on potential implications. Discussion of the political and economic implications must take place elsewhere. *See* Evans v. Firestone, 457 So.2d 1351, 1355

(Fla. 1984) ("the ballot summary is no place for subjective evaluation of special impact"). The summary for the Homestead Valuation Limitation, as a further example, does not inform the voters that local government revenues may be reduced by the limitation. See 581 So.2d at 588.

Moreover, as discussed, the changes being effected in Wadhams and Askew, on which the trial court placed such heavy reliance, were changes to the county charter or constitution as then written. Here, Proposition 7 adds new language to article VII; it does not rewrite that article. The summary for proposition 7 does not mislead as did the summaries in Wadhams and Askew.

2. The second sentence of the summary creates "an erroneous impression" that pre-1968 leaseholds are being taxed for the first time when they are already taxed at the intangible rate. It also fails *to* inform voters that the "real purpose" of Proposition 7 is to "exempt a select class of taxpayers from the newly imposed and substantially higher real property rate." (R.) (App. 4)

Here, the final order finds fault because it would require that voters be informed that a change is not being made, i.e., that pre-1968 leases will be taxed as they are now taxed. The only authority cited, the Askew decision, is inapposite since there the legislature sought to rewrite,

and substantially weaken, a portion of the state constitution. The second sentence of the summary clearly states one of the chief purposes of Proposition 7: to tax pre-1968 leases at intangible rates. As to the second objection, it is patently wrong to hold that the summary fails to state that a select class is exempted from taxation at real property rates. The second sentence precisely states the tax treatment accorded pre-1968 leases.

3. The ballot summary is "affirmatively deceptive" because references to leaseholds entered into "since 1968" and "prior *to* 1968" exclude the entire year of 1968; hence, as written, 1968 leases are not taxed at all. (R.) (App. 5)

There is, first, an evidentiary problem with this conclusion because there was no proof that *any* leases were entered into in the year 1968. For all the record shows, this problem is nonexistent. There is certainly no clear and conclusive proof the asserted flaw could have any real consequence, and hence no clear and conclusive proof the public is being misled. A proposed amendment should not be removed from the ballot because of a problem that is strictly hypothetical. See Askew v. Firestone, 421 So.2d at 157 (Overton, J., concurring).

Moreover, this purported defect is not one that misleads, as the trial court found. The voters may not be

given the precise date, but they are told the critical year and that that year marks a change in tax treatment. Obviously, the date could be stated more exactly, but exactitude is not the test. The voter need only be given fair notice of what he or she must decide. The objection here is de minimis and presents no fair basis for striking the work of the Commission from the ballot. This is precisely the sort of detail the voter has been required to investigate. See Miami Dolphins, 394 So.2d at 987; Metro Dade County v. Shiver, 365 So.2d 213 and n. 2. As stated in Shiver:

> It is true, as the trial court found, that certain of the details were either omitted from the ballot question or could have been better explained therein. That, however, is not the test. There is no requirement that the referendum question set forth the ordinance verbatim nor explain its complete terms at great and undue length.

365 So.2d at 213. See also In re Advisory Opinion -- Homestead Valuation Limitation, 581 So.2d at 588 (ballot summary not defective because it failed to explain that increases in valuation would be limited to lesser of the annual change in the Consumer Price Index or three percent).

4. The summary is unclear as to whether Proposition 7 eliminates historical exemptions for property used for educational, literary, scientific, religious and charitable purposes. If it does, the summary should so state. If it does not, the summary wrongly implies that all leaseholds in government owned property are subject to taxation. (R) (App. 5-6)

This paragraph of the final order is somewhat disingenuous in failing to reference article VII, section 3(a), which provides that such purposes may be exempted by law from taxation. Proposition 7 does not attempt to modify section 3(a). Once again, plaintiffs' objection is that the voter is not told that a certain change is not being made. Such an omission is hardly misleading. But the summary cannot be held invalid because it implies that all leaseholds are subject to taxation. In this sense the summary is absolutely true because ~~all are~~ constitutionally subject ~~to~~ taxation unless the legislature, pursuant to 3(a), creates exemptions by law for this narrow class. The operative word "subjects," as used in the summary, does not mean that there can be no exceptions. "Subject," as a verb, means "to expose to." American Heritage Dictionary (Rev. ed. 1985).

In any event, to the extent the voters are not fully informed about this rather minor ramification, it is one of

much less significance than those which the court found no cause for concern in Shiver because they were not explained in the ballot summary. See 365 So.2d 213 n. 2 (one of several things the ballot summary did not state was that tax revenues could be used for purpose other than that proposed -- modernizing the Orange Bowl),

11. APPELLEES ARE NOT ENTITLED TO ANY RELIEF ON THEIR EQUAL PROTECTION CLAIM.

A. The Claim Is Not Justiciable Nor Is Proposition 7 Void On Its Face.

This Court has indicated in two recent decisions that constitutional challenges to ballot summaries do not present a justiciable issue before the vote of the electorate. Grose v. Firestone, 422 So.2d 303, 306 (Fla. 1982), relying on Gray v. Winthrop, 115 Fla. 721, 156 So. 270 (1934), and Gray v. Moss, 115 Fla. 701, 156 So. 262 (1934), and In re Advisory Opinion to the Attorney General -- Term Limitations, 592 So.2d 225 (Fla. 1991). This is certainly reasonable because, unless the proposal is enacted, the opinion would be advisory only.

Gray v. Winthrop and Gray v. Moss, however, did permit a facial constitutional attack. Even if the Court did not recede from these cases in Grose and In re Advisory Opinion -- Term Limitations, and thus foreclose a premature

constitutional challenge, plaintiffs cannot show the facial invalidity of Proposition 7.[3]

Gray v. Winthrop holds that a proposed amendment may not be enjoined from submission to the electorate unless it is "wholly void on its face." 156 So. 272. The mere fact that Proposition 7 creates two classes of leaseholds for different tax treatment cannot constitute a distinction that is constitutionally void on its face. As Gray v. Winthrop states:

> Subject only to applicable and controlling federal law, state taxation is authorized, limited, and regulated by the state Constitution and by statutes enacted thereunder. The state Constitution may itself designate or may authorize statutory designations of classes of property that shall be taxed or that shall be exempt from taxation when organic property rights secured by the Federal Constitution are not thereby violated ... A denial of the equal protection of the laws is not involved in these cases.

Id. (citations omitted) (emphasis added). The complaint in this action nicely illustrates the point. All it contains is conclusory language to the effect that different tax treatment for pre-1968 and post-1968 leases violates equal protection. (R. , paragraphs 41 and 42 of the complaint)

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[3] The trial court did not rule on the merits of the equal protection claim.

Gray v. Winthrop and Gray v. Moss require more than wholly conclusory assertions.

B. Proposition 7 Is Based On A Reasonable Distinction.

To the extent the constitutionality of Proposition 7 is open to review prior to a vote of the electorate, Eastern Airlines, Inc. v. Department of Revenue, 455 So.2d 311 (Fla. 1984), establishes the standard of review by which tax legislation, challenged on equal protection grounds, is to be evaluated:

> When the state Legislature, acting within the scope of its authority, undertakes to exert the taxing power, every presumption in favor of the validity of its action in indulged. Only clear and demonstrated usurpation of power will authorize judicial interference with legislative action. Walters v. City of St. Louis, 347 U.S. 231, 74 S.Ct. 505, 98 L.Ed. 660 (1954). In the field of taxation particularly, the legislature possesses great freedom in classification. The burden is on the one attacking the legislative enactment to negate every conceivable basis which might support it. Madden v. Kentucky, 309 U.S. 83, 60 S.Ct. 406, 84 L.Ed. 590 (1940); Just Valuation & Taxation League, Inc. v. Simpson, 209 So.2d 229, 323 (Fla. 1968). The state must, of course, proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. Department of Revenue v. AMREP Corp., 358 So.2d 1343, 1349 (Fla. 1978). A statute that discriminates in favor of a certain class is not arbitrary if the discrimination is founded upon a reasonable distinction or difference in state policy. Allied Stores v. Bowers, 358 U.S. 522, 79 S.Ct. 437, 3 L.Ed.2d 321 (1959).

455 So.2d 314.

In Coy v. Florida Birth-Related Neurological Injury Compensation Plan, 595 So.2d 743 (Fla. 1992), this Court restated with approval the Eastern Airlines standard of review, further remarking that "[o]bviously, this test provides the rational basis standard for weighing claims that a tax statute violates equal protection." 595 So.2d at 945.

This Court went on to say:

> We find that the rational basis test applies in the present case, as opposed to the strict-scrutiny standard, because physicians are not a "suspect" class within the meaning of the equal protection provision of the Florida Constitution. Id. A "suspect class" is any group that has been the traditional target of irrational, unfair, and unlawful discrimination. DeAvala v. Florida Farm Bureau Casualty Ins. Co., 543 So.2d 204, 206 (Fla. 1989); Palm Harbor Special Fire Control Dist. v. Kelly, 516 So.2d 249, 251 (Fla. 1987). Physicians do not meet this definition, and the applicable standard thus is the "rational basis" test described in Eastern Air lines.

Id.

In Coy the Court found that assessing all licensed physicians, not just those practicing obstetrics, was a permissible way to fund the Birth-Related Neurological Injury Compensation Plan and that the mandatory assessment did not deny equal protection.

A tax will not be nullified unless it is palpably arbitrary or grossly unequal in its application. Pittsburgh v. Alco Parking Corporation, 417 U.S. 369 (1974). The presumption of constitutionality of a license tax, for example, can be overcome "only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes," Madden v. Kentucky, 309 U.S. 83 at 88 (1940), and even if everyone subject to a tax is not taxed equally, that in and of itself does not make taxation arbitrary or violative of the equal protection clause. Smith v. Department of Revenue, 512 So.2d 1008 (Fla. 1st DCA 1987).

Proposition 7 does not offend equal protection requirements. Providing differing tax treatment to leases depending on whether they were entered into before or after November 5, 1968, creates no suspect class nor does it constitute oppressive or invidious discrimination against particular persons and classes. Moreover, Proposition 7 is founded upon a reasonable distinction or difference in state policy.

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. Thus, in Park-N-Shop v.

Sparkman, 99 So.2d 571 (Fla. 1958), Hillsborough County leased county-owned land to private interests for commercial use, the lease providing that no ad valorem taxes should be levied against the property. The Florida Supreme Court upheld this provision, ruling that since county (and state) property was immune from taxation, it would not require the county to tax itself and then surcharge the lessees for that amount. The Court observed that "for all we know, the estimated amount of taxes which the lessees would likely have paid on property of similar value was taken into consideration in fixing the amount of rent to be paid." Id. at 574.

On November 5, 1968, a new constitution was adopted that included article VII, section 10(c), prohibiting the state, its counties and municipalities, etc., from using the taxing power to aid any entity, see Miller v. Higgs, **468 So.2d 371, 377** (Fla. 1st DCA 1985), and article VII, section 3(a), that strictly limits public purpose tax exemptions. A history of the relevant decisional law that followed may be found in Roberts, Ad Valorem Taxation of Leasehold Interests in Governmentally Owned Property, 6 Fla.St.L.Rev. 1084, 1091-1102 (1978).[4]

[4] A few of the cases discussed in the article particularly highlight the impact on pse-1968 leaseholders. In Straughn v. Camp, **293** So.2d **689, 695** (Fla. 1974), the Court found that article VII, section 10, Florida Constitution (1968), required taxation of leaseholds in government property,

In Miller the First District ruled that there was no constitutional prohibition against a law that classified leasehold interests in government-owned land as intangible personal property instead of real property. The First District's reasoning is dispositive of the plaintiffs' equal protection challenge to Proposition 7:

> The question before us is not whether this law is wise, fair, or well drafted. It is within the legislative prerogative to classify property for the purpose of taxation, so long as the classification is based upon some reasonable distinction rationally related to the purpose for which the statute was enacted, and so long as it does not conflict with any provision of the state or federal constitution. Perfect equality in the operation of laws imposing a tax on real property is impossible. Gray v. Central Florida Lumber Company, 104 Fla. 446, 140 So. 320, rehearing denied, 104 Fla. 446, 141 So. 604 (Fla. 1932), cert. den., 287

notwithstanding that the legislature had previously made the leaseholds in question (on Santa Rose Island) exempt from ad valorem taxation. Such leaseholds were taxable as real property for ad valorem tax purposes. See id. and Williams v. Jones, 326 So.2d 425 (Fla. 1976) (Santa Rosa Island leaseholds). Similar leaseholds allegedly for "public purposes" were likewise found to be no longer exempt under article VII, section 3(a). Volusia County v. Daytona Beach Racing and Recreational Facilities District, 341 So.2d 498 (Fla. 1977), and Daytona Beach Racing and Recreational Facilities District v. Volusia County, 372 So.2d 419 (Fla. 1979). In 1980, the legislature provided, through enactment of Chapter 80-368, Laws of Florida, that leasehold interests in government property for which rental payments are due would be taxed as intangible personal property. See Miller v. Higgs, 468 So.2d at 376. Proposition 7 would change that for leases entered into after November 5, 1968, the date the people adopted a new state constitution.

> U.S. **634,** *53* S.Ct. 84, *77* L.Ed. 549 (1932). The legislature may use its taxing power to accomplish goals other than the immediate raising of revenue to cover government services. Some of these legitimate purposes include encouraging economic expansion, increasing the potential for employment of its citizens, encouraging development of its undeveloped land, and relieving the burden of those who, in reliance upon government promises of tax exempt status, chose an otherwise less advantageous method of obtaining possession of land. bv leasina from a governmental entity.
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> Although some may doubt **the** wisdom of classifying a leasehold interest for which the lessee pays a nominal rent as intangible personal property, while a lessee who pays no rent is treated as the "owner" of the property for taxpaying purposes, we are not prepared to say that the basis for this disparate treatment is not reasonably related to legitimate legislative purposes. Certainly appellee has not demonstrated to the court that this is so. We also note that a distinction is made between leaseholds of one hundred years or more and leaseholds of less than one hundred years, but this is also a distinction which we are not prepared to say is arbitrary or unreasonable.

468 So.2d *377-378* (emphasis added).

Proposition 7 exempts pre-November 5, 1968 leaseholds in government property from taxation as real property only for the term of the lease, not permanently. These 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 principles for Proposition 7 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. Park-N-Shop v. Sparkman, 99 So.2d at 574.

Most pertinent to the equal protection issue plaintiffs raise is the decision of the U.S. Supreme Court in June 1992 in Nordlinger v. Hahn, 112 S.Ct. 2326 (1992), which upheld California's Proposition 13 (an amendment to its state constitution) against an equal protection challenge. That amendment provided for an "acquisition value" system of taxation, whereby property was reassessed up to current appraised value upon new construction or a change in ownership. The result was that new owners paid dramatically more in property taxes than did longer term owners owning similar pieces of property.

The Supreme Court found a number of reasons that would justify the different tax treatment of similar property, but one is particularly relevant:

> [T]he State legitimately can conclude that a new owner at the time of acquiring his property does not have the same reliance interest warranting protection against higher taxes as does an existing owner. The State may deny a

> new owner at the point of purchase the right to "lock in" to the same assessed value as is enjoyed by an existing owner of comparable property, because an existing owner rationally may be thought to have vested expectations in his property or home that are more deserving of protection than the anticipatory expectations of a new owner at the point of purchase.
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> * * * *
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> This Court previously has acknowledged that classifications serving to protect legitimate expectation and reliance interests do not deny equal protection of the laws. "The protection of reasonable reliance interests is not only a legitimate governmental objective: it provides an exceedingly persuasive justification...." (internal quotations omitted). Heckler v. Mathews, 465 U.S. 728, 746 **(1984).**

112 S.Ct. at 2333. ~~See also~~ Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 352, 363, 93 S.Ct. 1001, 1003 (1973), holding that there is a presumption of constitutionality of tax laws that can be overcome "only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes," and that the burden is on the one attacking the law to negative every conceivable basis that might support it. Plaintiffs failed to meet this heavy burden in the trial court proceedings.

The distinction made in Proposition 7 is acceptable under Miller v. Higgs and Nordlinger v. Hahn, and

plaintiffs' equal protection claim, to the extent it is now justiciable, must fail.

CONCLUSION

The ballot summary for Proposition 7 complies with section 101.161(1), Fla.Stat. The proposed amendment does not violate the equal protection clause.

The decision of the trial court should therefore be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing APPELLANT'S INITIAL BRIEF has been furnished by Hand Delivery to BARRY RICHARD, Esquire, 101 East College Avenue, Post Office Drawer 1838, Tallahassee, Florida 32301 and CASS D. VICKERS, Esquire, Post Office Box 1876, Tallahassee, Florida 32302; and by U.S. Mail to JOHN R. LaCAPRA, Esquire, 2701 Ponce de Leon Boulevard, Coral Gables, Florida 33134 and S. LaRUE WILLIAMS, Esquire, 150 S. Palmetto Avenue, Box A, Daytona Beach, Florida 32114 this 16th day of September, 1992.

Louis F. Hubener
Assistant Attorney General

AmericanSCtBr/lh/ds