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IN THE SUPREME COURT OF FLORIDA

NAEGELE OUTDOOR ADVERTISING CO., ET AL.,

Petitioners,

vs.

Case No. 83,734

CITY OF JACKSONVILLE, FLORIDA, ET AL.,

Respondents.

ORIGINAL

# ANSWER BRIEF OF RESPONDENT CAPSIGNS, INC.

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## PRELIMINARY STATEMENT

This Answer Brief is filed on behalf of respondent Capsigns, Inc. ("Capsigns"), the sponsor of the 1987 citizens' initiative that led to the enactment of the 1987 Charter Amendment.

Petitioners Naegele Outdoor Advertising Co. ("Naegele"), Sam E. Newey ("Newey"), Les Loggins Advertising & Public Relations, Inc. ("Loggins"), Will Wes Rappaport, Tracey Rappaport, and Dare Hawkins d/b/a Classic Outdoor Advertising, a Pennsylvania general partnership (collectively referred to as "Classic"), and Whiteco Metrocom, a division of Whiteco Industries, Inc. ("Whiteco") will be referred to by name.

Respondent Consolidated City of Jacksonville will be referred to as the "City."

The Charter of the Consolidated City of Jacksonville will be referred to as the "Charter."

Article 23 (formerly Article 31) of the Charter, as adopted by the voters on May 26, 1987, will be referred to as the "1987 Charter Amendment."

The legislative body of the Consolidated City of Jacksonville, Florida will be referred to as the "City Council."

Ordinances of the City will be referred to by a number that identifies (1) the year of introduction, (2) the consecutive number assigned to the ordinance upon introduction, and (3) the consecutive number assigned to the ordinance upon passage, e.g., Ordinance No. 86-1523-871.

References to the petitioners' Amended Appendix will be referred to as "[AA.__]." References to the Appendix to Capsigns' Answer Brief will be referred to as "[ACAP.__]."

## STATEMENT OF THE CASE

This appeal involves the issue of whether the petitioners acted with "due diligence" in seeking temporary injunctive relief on October 28, 1992 to toll the accrual of fines while challenging the validity of a Charter Amendment enacted on May 26, 1987.

In April, 1987, Capsigns, Inc., a Florida not-for-profit corporation, sponsored a citizens' initiative for the purpose of amending the Charter by public referendum. By April 16, 1987, the petition drive had been substantially completed and 17,000 separate signed petitions were submitted to the Assistant Secretary of the City Council and the Supervisor of Elections. [ACAP.6].

On April 22, 1987, the Supervisor of Elections formally certified that a sufficient number of signatures had been verified in accordance with Section 18.05 of the Charter [ACAP.8]. On April 24 and May 8, 1987, the ballot question was duly advertised in a newspaper of general circulation in Duval County, Florida. [ACAP.9].

The petitioners did not file any challenge to the ballot question or the proposed 1987 Charter Amendment prior the general election held on May 26, 1987, at which time the 1987 Charter Amendment was enacted by the vote of the electors.

Under the 1987 Charter Amendment, further construction of off-site commercial billboards was prohibited. Off-site

commercial billboards located along roads other than the interstate highway system and the federal aid-primary highway system (hereinafter "Non-FAP Billboards") were required to be removed by June 1, 1992, following a 5-year amortization period. [ACAP.4].

During 1987, 1988, 1989, and 1990, the petitioners did not challenge the validity of the 1987 Charter Amendment.

On May 24, 1991, just two days before the 4-year anniversary of its passage, petitioners Naegele, Newey, and Loggins filed a complaint (Case No. 91-07793-CA), challenging the validity and constitutionality of the 1987 Charter Amendment [AA.1]. Although Naegele, Newey, and Loggins prayed for injunctive relief and a declaratory judgment that the 1987 Charter Amendment was null and void, no hearing was then noticed or scheduled by the petitioners.

On December 16, 1991, petitioners Naegele, Newey and Loggins filed an amended complaint and added additional counts [AA.2], but still did not schedule or notice any hearing in connection with their claim for injunctive relief.

On May 26, 1992, petitioners Classic and Whiteco filed their own complaint (Case No. 92-07516-CA) challenging the validity and constitutionality of the 1987 Charter Amendment. [AA.3]. No hearing was then scheduled or noticed by Classic and Whiteco in connection with any of the relief requested in their complaint.

On June 1, 1992, following the end of the 5-year amortization period established by the May 26, 1987 enactment, the Non-FAP billboards had to be removed. There was no variance procedure. Fines of $500 per day began to accrue on those Non-FAP billboards that had not been removed by the June 1 deadline. [ACAP.4].

On October 28, 1992, petitioners Naegele, Whiteco and Classic filed motions for temporary injunctive relief. [AA.4].[1]

On October 29, 1992, the petitioners' cases were consolidated and a hearing on their motions for temporary injunctive relief was scheduled for November 6, 1992.

On November 6, 1992, respondent Capsigns filed its motion to intervene in the consolidated cases.

On November 17, 1992, the petitioners renoticed the hearing on their motions for temporary injunctive relief for November 23, 1992.

On November 23, 1992, the Court entered an order permitting respondent Capsigns to intervene, and on the same day conducted an evidentiary hearing on the motions for temporary injunctive relief filed by petitioners Naegele, Whiteco, and Classic.

On December 29, 1992, the trial court entered an order granting temporary relief to Naegele, Whiteco, and Classic. The trial court's order also extended injunctive relief to Newey,

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[1]/ Petitioners Newey and Loggins did not seek temporary injunctive relief. [AA.4]

Loggins, and non-party landowners who had not sought injunctive relief. [ACAP.1].

The trial court concluded that unspecified public interest considerations favored the issuance of an injunction, but made no specific factual findings as to public interest considerations or the other elements of the four-prong test required for the issuance of a preliminary injunction. As to whether petitioners showed a substantial likelihood of success on the merits, the trial court simply stated that both sides had presented substantial facts and law in support of their position. [ACAP.1].

On January 27 and 28, 1993, respondents City and Capsigns filed notices of appeal with the Florida First District Court of Appeal.

On March 30, 1994, following oral arguments, the Florida First District Court of Appeal reversed the trial court's order. [ACAP.2].

The petitioners have sought this Court's review of the First District Court of Appeal's decision to the extent that it did not prohibit the accrual of fines during the pendency of the underlying litigation.

On September 6, 1994, this Court accepted jurisdiction and scheduled oral argument for December 8, 1994.

## STATEMENT OF THE FACTS

This Statement of the Facts pertains to the petitioners' challenge to the 1987 Charter Amendment.[2]

### Petition Drive

Beginning April 8, 1987, respondent Capsigns, a Florida not-for-profit corporation, sponsored a petition drive to place on the general election ballot a proposed amendment to the Charter, having discussed the mechanics of the petition drive in advance with the Supervisor of Elections' Office. [ACAP.12: 178-179].

The proposed amendment to the Charter banned further construction of off-site commercial billboards, and required certain off-site commercial billboards located along non-federal roads to be removed after a 5-year amortization period. [ACAP.4]. The proposed amendment to the Charter also contained a separate section for enforcement and penalties. [ACAP.4].

### Submission of Petitions and Affidavits on April 16, 1987

On April 16, 1987, Capsigns submitted approximately 17,000 separate signed petitions from registered voters in accordance with the procedure described in the Charter. Each petition

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[2]/ The Order permitting Capsigns to intervene limited Capsigns' intervention to "the issue of the procedural and substantive validity of the 1987 Charter Amendment." For that reason, Capsigns' Statement of the Facts focuses on the 1987 Charter Amendment.

contained a single signature from a single registered voter, and the petitions were submitted together with multiple affidavits in a manner that was acceptable to the Supervisor of Elections. [ACAP.6; ACAP.8; ACAP.12: 178-179, 182].

**Certification on April 22, 1987**

On April 22, 1987, the Supervisor of Elections certified the validity of the signatures. [ACAP.8] [ACAP.12: 174-175].

**Publication and Notice of Referendum on April 24, 1987**

Under the Charter, notice of the referendum had to be published twice in a newspaper having a general circulation in Duval County, and had to set forth the date of the election and the "exact language of each proposed amendment" as it would appear on the ballot. Chapter 67-1320, Section 23.05, Laws of Florida.

On April 20, 1987, pursuant to his role as the chief legal officer for the consolidated government's agencies, the City's General Counsel[3] provided the Supervisor of Elections[4] with his opinion as to the preparation and wording of the referendum notice. [ACAP.7]

Thereafter, the proposed Amendment was duly published in a newspaper of general circulation, bearing the title "Special

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[3]/ The General Counsel's duties are described in Article 7 of the Charter. See Chapter 85-435, Laws of Florida.

[4]/ The Supervisor of Elections' duties are described in Article 9 of the Charter. See Chapter 67-1320, Laws of Florida.

Referendum," containing a summary, and setting forth the exact language of the proposed amendment in accordance with the requirements of the Charter. [ACAP.9].

On April 24, 1987, the first of two notices of the referendum was published in a newspaper of general circulation in Duval County. The second notice was published on May 8, 1987. [ACAP.9]

## Billboard Industry Response

Following the Supervisor of Elections' April 22, 1987 Certification and the publication of the first notice of the referendum on April 24, 1987, members of the billboard industry formed two Political Action Committees ("PACs"), known as Citizens Against Charter Amendment ("CACA") and the Junior Poster Group Committee ("Junior Poster Committee"), to oppose the proposed amendment to the Charter. [ACAP.11; ACAP.12: 189-196].

One of the two PACs, CACA, was formed by petitioners' own counsel on May 8, 1987 [ACAP.11; ACAP.12: 209]. Petitioner Naegele's predecessor in interest contributed $167,807 in fourteen days to this PAC as reflected by CACA's financial report. [ACAP.11]:

| Date | Name/Address | Amount |
|---|---|---|
| 05/08/87 | Naegele Advertising, Inc.<br>1120 Crestwood Street<br>Jacksonville, Florida 32208 | $ 20,000.00 |

| | | |
|---|---|---|
| 05/12/87 | Naegele Advertising, Inc.<br>1120 Crestwood Street<br>Jacksonville, Florida 32208 | 50,000.00 |
| 05/13/87 | Naegele Advertising, Inc.<br>1120 Crestwood Street<br>Jacksonville, Florida 32208 | 50,000.00 |
| 05/19/87 | Naegele Advertising, Inc.<br>1120 Crestwood Street<br>Jacksonville, Florida 32208 | 17,807.00 |
| 05/21/87 | Naegele Advertising, Inc.<br>1120 Crestwood Street<br>Jacksonville, Florida 32208 | 30,000.00 |
| | TOTAL: | $167,807.00 |

Naegele Advertising, Inc.'s address, 1120 Crestwood Street, was the same address as CACA's President, James R. Shine, Jr., and CACA's Treasurer Rita Donaldson. [ACAP.11].

The express purpose of the Naegele-funded PAC, CACA, as formed by petitioners' counsel, was "to oppose the Jacksonville City Charter Amendment." [ACAP.11].

The CACA PAC's Campaign Finance Report reflected the payment of $2,515 to Naegele for attorneys' fees and expenses on June 5, 1987, and an additional $4,713 in attorney's fees paid directly to Naegele's counsel on June 9, 1987. [ACAP.11].

Petitioners' counsel testified that in May, 1987, he "felt" that the 1987 Charter Amendment violated "constitutional rights" by taking private property without payment of compensation. [[ACAP.12: 211].[5] Petitioners' counsel also testified that he

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[5]/ Petitioners' counsel did not attempt to reconcile his feelings with the wide acceptance accorded the use of amortization by judicial precedent. See case law, infra, at pp. 16-22.

"did not feel" that the $500 fine was "particularly appropriate," and that he felt in May, 1987 that the $500 per day fine "wasn't the right thing to do." [ACAP.12: 212].

During the campaign waged by the billboard industry, the Naegele-funded PAC utilized direct mailings to households at a cost in excess of $76,000, took out full-page and other newspaper advertisements at a cost in excess of $11,000, paid management and phone bank fees in excess of $31,000, paid professional and planning fees of $31,500, paid ad agency commissions in excess of $7,500, paid survey fees of $6,950, paid for radio advertising in excess of $4,800, paid attorneys' fees in excess of $7,000, and had its counsel participate in two television debates. [ACAP.11; ACAP.12: 209].

## Adoption by Voters on May 26, 1987

On May 26, 1987, the voters adopted the proposed Charter Amendment by majority vote during the general election.

## Delay in Legal Challenge

Despite the "feelings" of petitioners' counsel, no suit was instituted to contest the Supervisor of Elections' certification of the petitions on April 22, 1987, to challenge the ballot summary, or to keep the proposed Charter Amendment off the ballot. Nor did any of the Petitioners file suit later in 1987 after the Charter Amendment's adoption on May 26, 1987.

The 1987 Charter Amendment required the removal of Non-FAP billboards after a 5-year amortization period (May 26, 1987 - June 1, 1992). It is this provision that is at the heart of the litigation. The billboard industry has repeatedly attacked amortization periods and has sought to portray them as an unconstitutional taking of property without compensation.[6]

The 1987 Charter Amendment provided a $500 per day penalty for any Non-FAP billboard which was not removed by June 1, 1992, the end of the amortization period [ACAP.5]:

> Section 31.04. Removal of Certain Offsite Commercial Billboards on or before June 1, 1992. - Except for offsite commercial billboards located along any portion of the "interstate highway system" or the "federal-aid primary system" as defined in Chapter 479, Florida Statutes (1985), all offsite commercial billboards shall be removed on or before June 1, 1992 by the owner of the billboard and the owner of the property on which the billboard is affixed or attached.
>
> * * *
>
> Section 31.06. Enforcement and Penalties. -
>
> * * *
>
> (c). In connection with any offsite commercial billboard which is not removed as required by section 31.04, each person responsible for said removal shall pay the city a penalty of $500.00 per day until the offsite commercial billboard is removed.

On May 26, 1987, the useful lives of petitioners' Non-FAP billboards were shortened to 5 years, and the present value of

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[6]/ See case law, infra, at pp. 16-22.

those billboards was reduced accordingly. The penalty for the petitioners' failure to remove the affected billboards was clearly spelled out in the 1987 Charter Amendment: $500 per day. [ACAP.4]

**Affected Billboards**

Under the 1987 Charter Amendment, Naegele was required to remove 45% of its structures [ACAP.12: 71], Classic Outdoor was required to remove 6 of its 18 structures [ACAP.12: 117], and Whiteco was required to remove 4 of its 37 structures [ACAP.12: 142-143]. The structures required to be removed represented the petitioners' Non-FAP structures.

**Belated Challenges**

On May 24, 1991, just two days before the 4-year anniversary of the 1987 Charter Amendment, petitioners Naegele, Newey, and Loggins filed their initial complaint and challenged the 1987 Charter Amendment. [AA.1].

On May 26, 1992, Whiteco and Classic filed their initial complaint and challenged the 1987 Charter Amendment. [AA.3].

By delaying their challenges, the petitioners, including Naegele's predecessor in interest,[7] gained the full advantage of

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[7]/ According to petitioners, "Naegele, the largest billboard company in the City of Jacksonville, disseminates commercial and noncommercial messages on approximately 1,500 company-owned outdoor advertising structures in the City and Duval County, and, directly and through its predecessors, has been in business there for over 35 years." Petitioners' Second Amended Brief, at p. 3.

most (in the case of Naegele) or all (in the case of Whiteco and Classic) of the 5-year amortization period before filing their challenges.

On June 30, 1992, after the petitioners filed their complaints, the Florida Legislature re-adopted the Charter, including the 1987 Charter Amendment, by passage of Chapter 92-341, Laws of Florida.

On October 28, 1992, petitioners Naegele, Whiteco, and Classic filed motions for temporary injunctive relief. [AA.4]

## SUMMARY OF ARGUMENT

On May 26, 1987, the 1987 Charter Amendment was enacted, requiring the removal of Non-FAP billboards after a five-year amortization period. There was no variance procedure. Naegele was required to remove 45% of its billboards, Classic Outdoor was required to remove 33% of its billboards, and Whiteco was required to removed 11% of its billboards on or before June 1, 1992. Fines of $500 per day would be assessed as to those billboards not removed by the June 1, 1992 deadline.

Amortization periods of five years for the removal of billboards have been judicially upheld in Florida and elsewhere against constitutional challenges. The billboard companies waited four years or more before filing their challenges, even though their causes of action arose on April 16, 22, or 24, 1987

as to any procedural challenges, and on May 26, 1987 as to any substantive challenges. Even after belatedly filing their suits on May 24, 1991 and May 26, 1992, the petitioners delayed still further until October 28, 1992 before seeking temporary injunctive relief.

Petitioners did not act with "due diligence" in mounting their legal challenges or in seeking temporary injunctive relief. Accordingly, petitioners cannot now avail themselves of a "constitutional tolling" principle. This is especially true where the petitioners waited to gain the full benefit of the five-year amortization period before seeking temporary injunctive relief, and where their procedural challenges to the 1987 Charter Amendment have been barred by Florida's four-year statute of limitations.

## ARGUMENT

**THE DISTRICT COURT DID NOT ERR BY REFUSING TO ENJOIN THE FINES WHICH BEGAN TO ACCRUE AT THE END OF THE AMORTIZATION PERIOD.**

### A. Amortization periods for the removal of billboards are valid and constitutional if the length of time is reasonable.

This case involves a community's effort to remove billboards along non-federal roads ("Non-FAP billboards") through the establishment in 1987 of (a) a 5-year amortization period for the removal of Non-FAP billboards, and (b) a $500 per day fine for those billboards that were not removed by the end of the 5-year period.

The expectancy of maintaining a billboard does not rise to the level of an immutable or vested right. Inhabitants, Town of Boothbay v. National Advertising Co., 347 A.2d 419 (Me. 1975). In Boothbay, in upholding a 10-month amortization period, the Maine Supreme Court noted:

> The extensive history of litigation surrounding the billboard and advertising industry persuades us that it is no surprise when billboards are subject to regulation; on the record in this case, so far as the fact is relevant, defendant had notice since 1970 that the Town was planning to circumscribe the use of off-premise billboards. Every regulation or reasonable prohibition is an impairment of the interests of the industry in the conduct of its affairs. Yet we cannot say on that account that every regulatory impairment must be accompanied by compensation. Within the confines of the

> constitution and the enabling statutes, the police power is plenary. The police power would be throttled if its every impairment of a private interest entailed compensation for the constraint imposed. Compensation is due only when the impairment is so substantial as to amount to a taking.
>
> Here, we are satisfied that there is no taking. The ordinance provides a period of 10 months during which the non-conforming billboards are to be tolerated. By the end of the tolerance period, the billboards are to be removed.
>
> 347 A.2d at 424.

Florida has long recognized that outdoor advertising can be regulated to promote highway safety, and has sustained regulatory measures based on aesthetic considerations as promoting the general welfare. E. B. Elliott Adv. Co. v. Metropolitan Dade County, 425 F.2d 1141, 1151 (5th Cir.), cert. dismissed, 400 U.S. 805, 91 S.Ct. 12, 27 L.Ed.2d 35 (1970).[8]

"Once it be conceded that aesthetics is a valid subject of legislative concern, the conclusion seems inescapable that reasonable legislation designed to promote that end is a valid and permissible exercise of the police power." Id., quoting with approval People v. Stover, 12 N.Y.2d 462, 466, 240 N.Y.S.2d 734, 738, 191 N.E.2d 272, 276 (1963), appeal dismissed, 375 U.S. 42,

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[8]/ Indeed, the 1987 Charter Amendment provided that the continued presence of Non-FAP billboards would degrade the aesthetic attractiveness of the natural and manmade attributes of the community, thereby undermining the economic value of tourism and the permanent economic growth that is necessary for the promotion and preservation of the public welfare, and would have a further detrimental effect on traffic safety. [ACAP.4].

84 S.Ct. 147, 11 L.Ed.2d 107 (1963). "The same can be said with equal vigor of highway safety." Id.

In addressing the constitutionality of a 5-year amortization provision for the removal of billboards in E. B. Elliott, the Fifth Circuit observed:

> [I]t cannot be denied that outdoor advertising signs tend to interrupt what would otherwise be the 'natural' landscape as seen from the highway, something it is apparently more and more felt that the American public has a right to see unhindered by billboards, whether the view is untouched or ravished by man. [Citation]. Moreover, the importance of the tourist industry to Dade County tends to make Ordinance No. 63-26 reasonable in an economic sense because of the commercial benefits hoped to be realized from beautification.
>
> 425 F.2d at 1152.

In E. B. Elliott, the Fifth Circuit upheld the five-year amortization period, stating:

> Ordinance No. 63-26 was enacted on July 2, 1963, and provides that nonconforming signs may continue to be maintained until March 1, 1968, thus providing an amortization period of five years. In Standard Oil Co. v. City of Tallahassee, N.D. Fla. 1949, 87 F.Supp. 145, aff'd. 5 Cir. 1950, 183 F.2d 410, cert. den. 340 U.S. 892, 71 S.Ct. 208, 95 L.Ed. 647, it was held a zoning ordinance requiring the discontinuance of a nonconforming use after the expiration of a five-year amortization period did not constitute a deprivation of property without due process of law. Accord, Naegele Outdoor Adv. Co. v. Village of Minnetonka, Minn. 1968, 162 N.W.2d 206; City of Seattle v. Martin, 1959, 54

> Wash.2d 541, 342 P.2d 602; Grant v. Mayor and City Council of Baltimore, 212 Md. 301, 129 A.2d 363 (1957); City of Los Angeles v. Gage, 1954, 127 Cal.App.2d 442, 274 P.2d 34. Therefore, the requirement contained in the ordinance that all nonconforming signs be removed by March 1, 1968, does not constitute a taking of property for which compensation must be given under the Fourteenth Amendment.
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> 425 F.2d at 1155.

In Webster Outdoor Advertising Co. v. City of Miami, 256 So. 2d 556 (Fla. 3rd DCA 1972), the Florida Third District Court of Appeal also upheld an ordinance requiring the removal of billboards after a five-year amortization period.

In Lamar Advertising Associates of East Florida, Ltd. v. City of Daytona Beach, 450 So. 2d 1145 (Fla. 5th DCA), petition for review denied, 458 So. 2d 272 (Fla. 1984), the Florida Fifth District Court of Appeal upheld a ten-year amortization period against an attack on constitutional grounds. In so doing, the Fifth District noted the long line of cases holding that amortization of nonconforming signs is a valid alternative to compensation if the period is reasonably long enough to allow the sign owner to recoup his investment. 450 So. 2d at 1150.

Many other states have joined Florida in upholding the constitutionality of reasonable amortization periods. In Markham Advertising Company v. State, 73 Wash. 2d 405, 439 P.2d 248 (1968), appeal dismissed, 393 U.S. 1112, 89 S.Ct. 854, 21 L.Ed.2d 813 (1969), the Washington Supreme Court held that a three-year amortization period was reasonable and did not constitute a

taking of property without compensation. 439 P.2d at 261. Similarly, in Naegele Outdoor Advertising Co. v. Village of Minnetonka, 281 Minn. 492, 162 N.W.2d 206 (1968), the Minnesota Supreme Court held that a three-year amortization period was reasonable and therefore constitutional. 162 N.W.2d at 213-214.

In Grant v. Mayor and City Council of Baltimore, 212 Md. 301, 129 A.2d 363 (1957), in upholding a five-year amortization period, the Maryland Court of Appeals observed:

> We cannot say that the remedy chosen was arbitrary, nor that the City Council was wrong in its conclusion that the effect for good on the community by the elimination of billboards within five years would far more than balance individual losses. Certainly, that is the unanimous view of those expert in the field and of the forty civic and improvement associations which studied the problem and endorsed the ordinance.
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> * * *
>
> That many lawmaking bodies throughout the country have adopted the same approach does not make the approach valid, but certainly the fact that after full consideration, they have followed the same course to meet the same problem, is some indication of the reasonableness of the course. Too, some support for the validity of the amortization method of eliminating nonconforming uses is found in the law reviews. Almost unanimously they commend the method as the best available and find it valid and constitutional.
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> 129 A.2d at 372.

In Newman Signs, Inc. v. Hjelle, 268 N.W.2d 741 (N.D. 1978), appeal dismissed 440 U.S. 901, 99 S.Ct. 1205, 59 L.Ed.2d 449 (1979), the North Dakota Supreme Court upheld a five-year amortization period against constitutional attack, noting that "[a]mortization has been found to be a constitutionally acceptable way of compromising the competing interests of private property owners and the public." 268 N.W.2d at 758. The North Dakota Supreme Court recognized that restoring, enhancing, and preserving scenic beauty was within the proper scope of the state's police power. Id. at 757.

In Suffolk Outdoor Advertising Co., Inc. v. Hulse, 43 N.Y.2d 483, 402 N.Y.S.2d 368, 373 N.E.2d 263 (1977), appeal dismissed, 439 U.S. 808, 99 S.Ct. 66, 58 L.Ed.2d 101 (1978), the New York Court of Appeals noted that a three-year amortization period was constitutional on its face. In addressing its reasonableness "as applied," the court noted:

> While the purpose of an amortization period is to provide a billboard owner with an opportunity to recoup his investment, an owner may not be given that period of time necessary to permit him to recoup his investment entirely. Nor, however, should the amortization period be so short as to result in a substantial loss of his investment.
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> 373 N.E.2d at 266.

In determining whether a 5½-year amortization period was reasonable, the U.S. Fourth Circuit Court of Appeals held that the analysis should include the number of affected signs as

compared to the remaining signs, and other aspects of the billboard company's business. Naegele Outdoor Advertising, Inc. v. City of Durham, 844 F.2d 172, 178 (4th Cir. 1988). In Durham, the City had adopted an ordinance on September 4, 1984 that required all commercial, off-premise advertising signs except those along the interstate or federal-aid primary highways, i.e., all Non-FAP billboards, to be removed by March 4, 1990, a period of 5½ years. Nine months after its enactment, Naegele filed suit against the City of Durham, challenging the 5½-year amortization period on constitutional grounds. The Durham ordinance required the removal within 5½-years of all of Naegele's Non-FAP billboards, which constituted 45% of the signs (the same percentage of Naegele's signs as in the case here). [ACAP.12: 71]. Also, as in the case here, there was no variance procedure. After protracted litigation, the court granted summary judgment to the City of Durham, and the court's judgment was affirmed on appeal. Naegele Outdoor Advertising, Inc. v. City of Durham, 803 F. Supp. 1068 (M.D.N.C. 1992), affirmed, 19 F.3d 11 (4th Cir. 1994), cert. denied, ___ U.S. ___, 115 S.Ct. 317, ___ L.Ed.2d ___, 63 U.S.L.W. 3283 (October 11, 1994) (No. 94-109).

**B. The Petitioners had the right to challenge the validity and constitutionality of the 1987 Charter Amendment since on or before May 26, 1987.**

While the reasonableness of a five-year amortization period for the removal of Non-FAP billboards has been repeatedly upheld

by the courts, it is also clear that a billboard company's cause of action to challenge such a provision arises on the date of its enactment.

In National Advertising Co. v. City of Raleigh, 947 F.2d 1158 (4th Cir. 1991), cert. denied, ___ U.S. ___, 112 S.Ct. 1997, 118 L.Ed.2d 593 (1992), the billboard company delayed for five years before challenging an ordinance requiring the removal of Non-FAP billboards. There was no variance procedure for the affected Non-FAP billboards. Their removal was mandated by the ordinance after 5½ years. National's belated challenge was held to be more than just a lack of reasonable diligence. 947 F.2d at 1168. National's federal takings claims were held to be time-barred by the state's three year statute of limitations. Id. at 1161-1162.[9] As the court in National Advertising observed, the billboard company suffered actual, concrete injury on October 23, 1993, the date of the ordinance's enactment. On that date the useful lives of National's non-conforming signs were shortened to 5½-years. Id. at 1163. Thus, the present value of the non-conforming signs was reduced accordingly. Id. at 1163-1164. National was required to remove 20 of 36 signs. Id. at 1164.

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[9]/ Applying the analogous statute of limitations in Florida (Section 95.11(3), Florida Statutes), the petitioners' federal takings claims would be forever barred after four years. Naegele filed its challenges just two days before the four-year anniversary of the 1987 Charter Amendment. Whiteco and Classic waited five years before filing their challenges, a full year after the statute of limitations expired.

Any injury to National was real and could be calculated in terms of reduced present value on October 23, 1983: the date of enactment of the amortization period. It was on that date that National's cause of action arose.[10] Id. at 1165.

In holding that no unfairness resulted in its decision that National's claims were time-barred, the Fourth Circuit stated:

> National was aware of the 1983 ordinance from at least the date of its enactment. National participated in rule making proceedings prior to the adoption of the ordinance and clearly knew of its terms in 1983; moreover, National was required by law to be cognizant of the numerous restrictions placed on its signs upon the ordinance's enactment. Upon the adoption of the ordinance, National was in a position to challenge it. "[A]'continuing wrong' theory should not provide a means of relieving plaintiff from its duty of reasonable diligence in pursuing its claims." Ocean Acres, 707 F.2d at 107. Permitting National to challenge the 1983 ordinance's amortization scheme more than 5½-years after its adoption would enable National to retain its signs well beyond expiration of the amortization period and would be unfair to the City.
>
> Id. at 1168.

The petitioners' suggestion that they have somehow acted with due diligence by delaying four or five years before filing their challenges to the 1987 Charter Amendment is unfounded.

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[10]/ National attempted to argue that a 1989 letter from the City of Raleigh, informing National that its non-conforming signs would have to be removed by April, 1989, was a later wrongful act committed by the City within three years of the suit. As the court noted, the billboard company's argument missed the mark. The letter was not a new wrongful act, but was merely a reminder of the restriction placed on National's signs five years earlier, on October 23, 1983. 947 F.2d at 1167.

The petitioners have sought to obtain as much a benefit as possible from the amortization period before filing their suits, and now seek to secure an additional amortization period through the use of a belated legal challenge, but without risk that an unsuccessful challenge will result in fines. Permitting the petitioners to retain their Non-FAP billboards beyond the 5-year amortization period without risk of fines during a belated legal challenge unduly benefits the petitioners and is unfair to the City and the public.

In addition to their tardy challenge to the 5-year amortization provision of the 1987 Charter Amendment, the petitioners have belatedly challenged the 1987 Charter Amendment on procedural grounds. The petitioners waited to commence their procedural challenge more than four years after the April 16, 1987 submission of the petitions and affidavits, more than four years after the April 22, 1987 certification of the petitions by the Supervisor of Elections, and more than four years after the April 24, 1987 publication of the notice of referendum containing the ballot summary and exact text of the referendum.[11] The petitioners could certainly have brought a challenge before the general election on May 26, 1987. In fact, it is a better procedure to bring a challenge before an election, and not wait until after the election has been held and the results

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[11]/ In doing so, the petitioners have delayed their challenge beyond any applicable statute of limitations. See Sections 95.11(3)(h), (3)(k), (3)(p), and (6), Florida Statutes.

proclaimed. State v. City of St. Augustine, 235 So. 2d 1 (Fla. 1970).

In Wadhams v. Board of County Commissioners of Sarasota County, 567 So. 2d 414 (Fla. 1990), the Florida Supreme Court considered a ballot summary which did not adequately reflect the chief purpose of the measure. The Florida Supreme Court rejected the argument that the challenge had to be instituted prior to the election; however, the court's majority stated:

> We agree with the dissent below that although there would come a point where laches would preclude an attack on the ordinance, such is not the situation in the present case where the suit was filed only a few weeks after the election.
>
> Id. at 417 (emphasis added).

The dissent observed that the burden was on the challenger to initiate a timely challenge, and noted that the Amendment was printed in full in a local newspaper on October 1 and 15, 1984. Id. at 419. In Wadhams, the legal challenge was filed on January 9, 1985, less than nine weeks after the election.

The submission of petitions and affidavits starts the running of any statute of limitations as to a challenge to a petition process. In re Initiative Petition No. 4 for Repeal of Charter of City of Cushing, 165 Okla. 8, 23 P.2d 677 (1933). Here, the petitions and affidavits were submitted on April 16, 1987, and the signatures were certified on April 22, 1987. [ACAP.6; ACAP.8].

As this court stated in Pearson v. Taylor, 159 Fla. 775, 32 So. 2d 826 (1947), an "aggrieved party cannot await the outcome of the election and then assail preceding deficiencies which he might have complained of to the proper authorities before the election." 32 So. 2d at 827.

Generally, delay and sloth in the exercise of rights will not be countenanced and good faith and reasonable diligence must be shown before equity will grant relief. 34 Fla. Jur.2d Limitations and Laches, Section 84, p. 103.

The petitioners' procedural challenges to the 1987 Charter Amendment were all time-barred by the four year statute of limitations which began to run on April 16, 22 or 24, 1987.

### C. The case of Holzendorf v. Bell is not on point or applicable to the case at bar.

In its second amended initial brief, the petitioners erroneously suggest that the City has taken a different position than it took in Holzendorf v. Bell, 606 So. 2d 645 (Fla. 1st DCA 1992). Petitioners go on to argue that the City cannot now adopt an opposite legal position.[12] The petitioners' argument fails for many different reasons.

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[12]/ In any event, petitioners' argument does not and cannot apply to respondent Capsigns. Moreover, the trial court did not address the Holzendorf case and did not determine whether either party had shown a substantial likelihood of success on the merits. [ACAP.1]. In fact, neither the City nor Capsigns had even filed answers or affirmative defenses to the petitioners' complaints at the time of the hearing.

First, in the case at bar, there was no determination by the City's General Counsel that the Capsigns' initiative had "not substantially complied" with the Charter.[13] In fact, the General Counsel had even advised the Supervisor of Elections as to the proper ballot language for the subject referendum. [ACAP.5]. The City's position as to the 1987 Charter Amendment has remained consistent, and it is the petitioners themselves who would have the City adopt an inconsistent position.

Second, petitioners have not been prejudiced by the City's consistent position as to the validity of the 1987 Charter Amendment. The City has never taken any different position. If the City did take a different position, it would be respondent Capsigns that would be prejudiced, not petitioners.

Third, in Holzendorf, the City's General Counsel halted the petition and initiative process, and the referendum did not proceed to the ballot. Here, the referendum proceeded to the ballot and, as noted above, the ballot language was approved by the City's General Counsel. [ACAP.7].

Fourth, in Holzendorf, there were repeated irregularities in the petition drive and initiative process. Only one affidavit was submitted with multiple petitions containing multiple signatures, including the purported signature of "President George Bush, 1600 Pennsylvania Avenue, Washington, D.C." The

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[13]/ In Holzendorf, the First District held that the petition procedure was "not substantially complied with." 606 So. 2d at 651. Here, respondent Capsigns' petition procedure did substantially comply with the petition procedure.

sole affiant did not supervise the collection of the petitions. Finally, her affidavit was belatedly submitted thirteen days after the petitions were presented to the Supervisor of Elections. 606 So. 2d at 651. Here, there were multiple affidavits executed by affiants who did supervise the collection of the petitions. [ACAP.12: 184-188]. Inasmuch as the petitions were in identical counterparts with one signature for each petition, affidavits accompanied the separate bundles of petitions. Furthermore, the affidavits were timely submitted and accompanied the petitions at the time of their presentation, not thirteen days after the fact. [ACAP.12: 184]. Clearly, there was substantial compliance with the Charter's provisions.[14]

Fifth, petitioners cavalierly argue that the 1987 Charter Amendment "effectively repealed" the preexisting city ordinance regulating signs, Ordinance 86-1563-871 [ACAP.3]. Petitioners' Second Amended Initial Brief, at p. 17. The fact is that the 1987 Charter Amendment simply imposed "additional" restrictions on off-site commercial billboards, no more. [ACAP.3]. Also, the restrictions were imposed on a county-wide basis. This is far different from the facts in Holzendorf. In Holzendorf, the City Council in early 1990 had adopted a non ad valorem tax (a garbage fee) by ordinance. The Holzendorf initiative provided that this tax (which had already been passed) could not be imposed without

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[14]/ Petitioners appear to argue that there must be 17,000 separate affidavits for the 17,000 separate counterparts of the petition. This argument is absurd and elevates form over substance where there is no question as to the validity or genuineness of the signatures.

a referendum vote of the people. The initiative provided an effective date of January 1, 1990, which was retroactive back to the beginning of the calendar year before the ordinance had passed. In that manner, the Holzendorf initiative sought to entirely repeal the previously enacted ordinance. Such is not the case here.[15]

Sixth, unlike the proposed referendum in Holzendorf, the 1987 Charter Amendment did not "usurp" the right of the legislature's authority to grant the right of referendum, nor did it embrace matters of financial management, such as appropriations or tax levies.[16] [ACAP.4]. In Holzendorf, the doomed initiative sought to add the referendum requirement as a condition precedent to any enactment of a non ad valorem tax assessment for a garbage fee. Tax levies and budgetary matters are usually not considered the proper subject of a charter initiative or referendum. Here, there is no requirement that any future sign or billboard law be subject first to a referendum,

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[15]/ In fact, petitioners Whiteco and Classic in their complaint at ¶35 even acknowledge that the 1987 Charter Amendment "failed to expressly repeal or otherwise address Ordinance 86-1523 or any other ordinance enacted by the City of Jacksonville." [AA.3]. The 1987 Charter Amendment simply provided additional restrictions county-wide, and was not a "repeal" of any ordinance. Comparing the 1987 Charter Amendment [ACAP.4] with Ordinance 86-1523-871 [ACAP.3] clearly shows that the 1987 Charter Amendment could not and did not repeal Ordinance 86-1523-871.

[16]/ Traditionally, matters of fiscal management are deemed to be outside the scope of charter initiatives. State ex rel. Keefe v. City of St. Petersburg, 145 So. 175, 176 (Fla. 1933).

nor does the 1987 Charter Amendment address tax levies, appropriations, or other matters in the budgetary process.

Finally, the readoption of the 1987 Charter Amendment by Chapter 92-341, Laws of Florida, renders moot most, if not all, of the petitioners' arguments.[17]

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[17]/ Although not applicable to the case at bar, the First District in Holzendorf misapprehended the effect of Chapter 78-536, Section 4, Laws of Florida, which permitted the consolidated government (through the City Council) to amend certain provisions of the Charter by ordinance. The First District expressed its belief that Chapter 78-536 "must be construed as a limitation upon the general grant of authority to the citizens to amend the charter." 606 So. 2d at 649.

The original City Charter was adopted effective October 1, 1967 by the voters of Duval County. Chapter 67-1320, Laws of Florida. The Charter as adopted by the electorate in 1967 could be amended by one of two methods: (1) by the Florida Legislature, or (2) by public referendum proposed either by ordinance or by the initiative process. Any public referendum had to be conducted at a general election in which all qualified voters of Duval County are entitled to participate. These two methods effectively limited the frequency of amendments to the Charter -- since the Legislature usually convenes only once a year, and county-wide general elections occur only three times every four years.

Chapter 78-536, Section 4, Laws of Florida, adopted 11 years later, simply allowed for greater flexibility in amending the Charter, by allowing a third party, namely the City Council, to amend the Charter as well. Chapter 78-536 did not amend Article 18.05 (formerly 23.05) of the Charter, which provides for amendment of the Charter by public referendum.

The City Council's very first Charter Amendment (after the passage of Chapter 78-536, Laws of Florida) simply dispensed with the necessity of reading an ordinance or resolution "by title on the third reading." Ordinance 78-723-360 [ACAP.14]. Chapter 78-536, Section 4, Laws of Florida, gave the City Council the flexibility to make these types of changes.

By providing the City Council with the flexibility to make amendments of this type to the Charter, the Florida Legislature by no means limited or restricted the general grant of referendum

**D. The Petitioners did not proceed with due diligence in challenging the 1987 Charter Amendment; therefore, the "constitutional tolling" principle described in Florida East Coast cannot be used to retroactively toll the accrual of fines.**

Although not part of their complaints, petitioners now claim that they have been denied access to the courts through the accrual of fines in violation of Article I, Section 21, Florida Constitution. Petitioners' Second Amended Initial Brief, at pp. 26-28.

Petitioners Naegele, Loggins and Newey also claim that in their complaint they have alleged that the sign ban regulations (including by definition the 1987 Charter Amendment) were void

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authority to the citizens to amend the Charter - which continued unchanged in Article 18.05 (originally 23.05) of the Charter. A dramatic shift in, or limitation on, the power exercisable by the electorate cannot simply be "read into" Chapter 78-536, Section 4, Laws of Florida.

Under Article I, Section 1, Florida Constitution: "[A]ll political power is inherent in the people." The same constitutional provision recites, "[t]he enumeration herein of certain rights shall not be construed to deny or impair others retained by the people." When the people of Duval County adopted the City Charter in 1967, they retained their inherent political power to amend that Charter by referendum. This was an essential ingredient of the new form of government adopted by the people of Duval County, Florida, in 1967. Chapter 67-1320, Section 23.05, Laws of Florida. A limitation on that right should not, and must not, be read into Chapter 78-536, Laws of Florida -- a special law which simply allowed for greater flexibility (not more restrictions) in the Charter amendment process.

Such a construction does not change the result in Holzendorf in view of its other flaws (e.g., retroactive application, interference with budgetary process, etc.) which precluded the Holzendorf initiative from reaching the ballot.

under various provisions of the Florida Constitution, including (1) Article I, § 9 (due process), (2) Article I, § 17 (prohibition against excessive fines), (3) Article III, § 11(a)(4), (8) and (12) (prohibited special laws), and (4) Article I, § 18 (prohibition of unauthorized administrative agency penalties). Petitioners' Second Amended Initial Brief, p. 7, n.7. However, petitioners Naegele, Loggins, and Newey never made such allegations in either their original complaint [AA.1] or their amended complaint [AA.2].[18]

In making their due process and excessive fines arguments, the petitioners seek to fit themselves within the factual background of Florida East Coast Railway Co. v. State, 79 Fla. 66, 83 So. 708 (1920). However, in Florida East Coast, the railroad company pursued its challenge with "due diligence." The petitioners also cite Wadley Southern Ry. Co. v. Georgia, 235 U.S. 651, 35 S.Ct. 214, 59 L.Ed. 405 (1915), and United States v. Pacific Coast European Conference, 451 F.2d 712 (9th Cir. 1971); however, those cases dealt with "due diligence" challenges in

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[18]/ By order dated October 18, 1994, this court granted respondent Capsigns' motion to strike, and directed petitioners to serve a second amended initial brief and an appendix which conforms to the Record on Appeal and deletes of all material outside the record. This directive included the deletion of petitioners' second amended complaint, which was not served until February 14, 1994 (more than a year after the injunction hearing), and which contained some of the allegations which petitioners Naegele, Loggins, and Newey now suggest were part of their amended complaint at the time of the injunction hearing. Simply put, petitioners Naegele, Loggins, and Newey did not assert claims under Article I, § 9, Article I, § 17, and Article I, § 18, Article III, § 11(a)(4),(8) and (12), Florida Constitution, as of the date of the injunction hearing. Such allegations were only made by petitioners Whiteco and Classic.

terms of days or weeks, not years. The petitioners avoid mentioning the case of National Advertising Co. v. City of Raleigh, supra, which provides the best analysis of what constitutes reasonable diligence in a case such as the one here.

### 1. Florida East Coast

In Florida East Coast, the Florida Supreme Court addressed challenges to the rates, rules and orders of the Railroad Commission. This court noted that the Railroad Commission's rates and rules were deemed to be legislative in nature, and their validity as it affected private property rights was entitled a judicial review. If the affected party reasonably and in good faith regarded a rule as an unconstitutional violation of his property rights, then the affected party would be entitled to a tolling of heavy and onerous fines for a violation of the rule if the party proceeded in good faith and with due diligence to test the rule. 83 So. at 715.

Conversely, if the affected party did not pursue the challenge to the rule's validity with due diligence, then the affected party would not be entitled to a tolling of fines while the challenge was pending.

The Railroad Commission had promulgated Rule 19, which dealt with joint rates and provided as follows:

> Joint Rates
>
> 19. On interstate shipments of freight passing over two or more lines, and not governed by rule 1, no railroad which is a

> party to the haul shall charge or receive for its services in connection with such equipment more than its maximum rate for the distance hauled by it, less ten per cent., when the entire haul is over two lines, nor more than its maximum rate, less twenty per cent., when the entire haul is over three or more lines, nor in any instance more than the published rate applicable for the same movement when handled as a one-line haul;
>
> 83 So. at 714. See also State v. Florida East Coast Ry. Co., 65 Fla. 424, 62 So. 591, 592 (1913).

In connection with the Railroad Commission's Rule 19, and its mandatory rate reductions of ten percent and twenty percent, the Florida East Coast Railway Company ("FEC") believed that the rule was confiscatory of its property and a violation of its property rights. FEC claimed that upon the Railroad Commission's adoption of Rule 19, FEC had "prepared to test by a bill in equity . . . the question as to whether its order as applied to the defendant [FEC] was unreasonable, arbitrary, unjust, or confiscatory." 83 So. at 712.

FEC further claimed that while it was proceeding "with all due and reasonable speed" to prepare its bill in equity to challenge the validity of Rule 19, the Railroad Commission instituted a mandamus action to compel FEC to abide by Rule 19. Id. In response to the mandamus action, FEC filed a return, the relators filed a replication, and testimony was thereafter taken and evidence introduced to determine Rule 19's validity. Id. FEC's return to the State's mandamus action to enforce Rule 19, together with the State's demurrer to the return, was addressed

in State v. Florida East Coast Ry. Co., 65 Fla. 424, 62 So. 591 (1913), where the State's demurrer to, and motions to strike portions of, the return were overruled.

This is the critical aspect of Florida East Coast - the validity of Rule 19 had been raised in a mandamus action filed shortly after Rule 19's enactment. The mandamus action was filed before FEC had a chance to file its own complaint. In response to the mandamus action, FEC challenged Rule 19's validity. In that manner, the validity of the rule was placed in issue. There was no delay.

It was FEC's position that it was proceeding with all due and reasonable speed to prepare its own bill in equity before the mandamus action was filed. When the mandamus action was filed, FEC then raised the issue of Rule 19's validity in that proceeding. In view of FEC's averments as to its speed and diligence in contesting Rule 19's validity shortly after its enactment, the Florida Supreme Court held that "a lack of diligence on the part of the defendant [FEC] in contesting the validity of the rule does not appear." 83 So. at 716 (emphasis supplied).

While the validity of Rule 19 was still pending in the mandamus proceeding, which challenge was being prosecuted according to FEC with all reasonable speed, FEC then issued its supplement rate nos. 6 and 7 to Rate Issue Nos. 1135 and 1142, respectively, without submitting them to the Railroad Commission for approval, and without making the rate reductions required by

Rule 19 (which Rule 19 was then being challenged by FEC in the pending mandamus proceeding). FEC took the position that it had to issue its rate supplements in order to "test" the right of the Railroad Commission to make Rule 19, and that without issuing its rate supplements FEC would have been obliged to submit to a deprivation of its property rights by yielding without contest to the demands of Rule 19. During this contest, FEC sought to toll accrual of the fines. Id. at 712.

In Florida East Coast, the Florida Supreme Court held that under the facts of that case, heavy, onerous and intimidating fines could not be imposed because the defendant had already proceeded in good faith and with due diligence to test the validity of the contested rule. Id. at 715. There was no delay after the passage of the contested rule (Rule 19) before there was legal action contesting the rule's validity (the mandamus action, return, and replication). There was certainly no delay of four or more years.

**2. Wadley Southern**

The petitioners also cite Wadley Southern Ry. Co. v. Georgia, 235 U.S. 651, 35 S.Ct. 214, 59 L.Ed. 405 (1915), where the U.S. Supreme Court addressed the issue of what constituted reasonable promptness in a challenge to the validity of an order by the Georgia Railroad Commission.

In Wadley Southern, the Georgia Legislature had passed a statute on August 26, 1907, providing that all corporations

subject to the public utility law shall comply with every order made by the railroad commission under authority of law, and any corporation which neglected to comply with any such order shall forfeit to the State of Georgia not more than $5,000 for each and every offense, the amount to be fixed by the presiding judge. 235 U.S. at 653-654.

On March 12, 1910, the Railroad Commission passed an order requiring the Wadley Southern Railway to desist from requiring prepayment of freight for goods shipped over the Macon & Dublin R.R., and on receipt of said order to afford shippers via the Rockledge route the same facilities for the interchange of freight that was afforded to shippers over the Central of Georgia Railway Line. Id. at 653.

On March 14, 1910, Wadley Southern received the Commission's order. Id.

On April 4, 1910, Wadley Southern advised the Railroad Commission that it would not comply with the order dated March 12, 1910. Id.

On May 26, 1910, only ten weeks after the passage of the March 12, 1910 order, the Railroad Commission brought suit to recover a single penalty of $5,000. At that point, Wadley Southern asserted a defense and attacked the validity of the Railroad Commission's March 12, 1910 order. Id.

By failing to avail itself of the right to immediately challenge the March 12, 1910 order and by delaying for ten weeks until the Railroad Commission brought suit, the U.S. Supreme

Court determined that Wadley Southern had not acted with reasonable promptness so as to entitle Wadley Southern to avoid accrual of penalties pending the conclusion of its judicial challenge to the validity of the Railroad Commission's order. Id. at 669.

The U.S. Supreme Court noted that Wadley Southern had the statutory right to test the validity of the Railroad Commission's orders. However, in concluding that Wadley Southern was not entitled to a tolling of the penalties, the court stated:

> If the Wadley Southern Railway Company had availed itself of that right and - with reasonable promptness - had applied to the courts for a judicial review of the order, and if, on such hearing, it had been found to be void, no penalties could have been imposed for past or future violations. If in that proceeding, the order had been found to be valid, the carrier would thereafter have been subject to penalties for any subsequent violations of what had thus been judicially established to be a lawful order - though not so in respect of violations prior to such adjudication.
>
> But, where, as here, after reasonable notice of the making of the order, the carrier failed to resort to the safe, adequate and available remedy by which it could test in the courts its validity, and preferred to make its defense by attacking the validity of the order when sued for the penalty, it is subject to the penalty when that defense, as here, proved to be unsuccessful.
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> Id.

In the case at bar, the petitioners had a safe, adequate, and available remedy since May 26, 1987, and utterly failed to act with reasonable promptness to test the validity of the 1987 Charter Amendment for at least four years. Petitioners have failed to meet the standard established in Wadley Southern, where even ten weeks was too long.[19]

3. **Pacific Coast**

The petitioners also rely upon United States v. Pacific Coast European Conference, 451 F.2d 712 (9th Cir. 1971).

In Pacific Coast, three shipping conferences (Pacific Coast, Brazil and Latin-America) had submitted dual-rate contracts to

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[19]/ Petitioners cite Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), as the case where the "constitutional tolling" principle was first articulated. There, the U.S. Supreme Court addressed a statute enacted by the Minnesota State Legislature on April 18, 1907. The statute established new rates for certain commodities transported by rail. The new rates went into effect on June 1, 1907, 43 days later. The same statute directed every railroad company to publish and put into effect the rates specified in the statute, but also provided that any officer, director, agent, or employee of any railroad company who violated the statute or who advised or assisted a railroad company to violate the statute shall be guilty of a misdemeanor punishable by imprisonment in the county jail for a period not exceeding 90 days.

On May 31, 1907, only six weeks after the statute's enactment, stockholders of nine railroad companies brought suit to enjoin enforcement of the April 18, 1907 enactment. The Circuit Court thereupon entered a temporary restraining order, and on September 23, 1907 entered a temporary injunction restricting the railroad companies from putting into effect the April 18, 1907 enactment. There was no contention that the railroad company's shareholders had not proceeded with due diligence by pursuing their challenge six weeks after passage of the disputed statute.

the Federal Maritime Commission ("Commission") for approval pursuant to the provisions of the Act of October 3, 1961 (the "1961 Act"). The contracts had to be submitted within a six-month deadline that expired on April 3, 1962, and the Commission had to act on the applications by April 3, 1963, which date was later extended until April 3, 1964 (Act of April 3, 1963, Pub. L. No. 88-5, 77 Stat. 5). 451 F.2d at 714.

The shippers did not know whether their dual-rate contracts would be lawful beyond April 3, 1964 until the Commission acted on their applications.[20] Id.

On March 27, 1964, the Commission entered orders approving the dual-rate contracts, but only as to a uniform contract form which differed in substantial respects from the proposed contracts submitted by the three conferences. The conferences declined to accept the uniform contract form approved on March 27, 1964 and continued to use their then-existing contract forms after April 3, 1964, contrary to the terms of the 1961 Act and the Commission's Order dated March 27, 1964, thereby subjecting the conferences to a civil penalty of up to $1,000 per day for each day of violation. Id.

Within 21 days of the Commission's March 27, 1964 Orders, the three conferences applied to the Ninth Circuit for

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[20]/ In the case at bar, the petitioners knew on May 26, 1987 that their Non-FAP billboards would have to be removed by no later than June 1, 1992.

preliminary injunctions to stay enforcement of the March 27, 1964 Orders.[21] By orders entered on April 17, 1964, the Ninth Circuit set argument on the injunction motions for April 27, 1964, and granted a temporary stay of the March 27, 1964 orders until April 28, 1964. The Ninth Circuit subsequently denied the injunction motions and the temporary stays terminated pursuant to their own terms. Id. at n.2.

Thereafter, the three conferences continued their judicial challenge in the Ninth Circuit and obtained an adverse decision on February 3, 1965. In that decision, the Ninth Circuit determined that the conferences were not afforded an opportunity to participate in the rule making which led to the entry of the Commission's March 27, 1964 Orders, and remanded the causes to the Commission for further proceedings. Id. at 715.

The Latin-American Conference declined to participate in the remanded agency proceedings, and came into full compliance with the Commission's March 27, 1964 Order on September 14, 1965. The Brazil and the Pacific Coast Conferences sought certiorari by the U.S. Supreme Court, which was denied on December 13, 1965. The Brazil Conference then complied with the Commission's March 27, 1964 Order on December 27, 1965. Id.

The Pacific Coast Conference then participated in remanded Commission proceedings upon the Commission's reactivation of

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[21]/ In the case at bar, the petitioners waited for four to five years, not 21 days, before pursuing their challenges.

Pacific Coast's docket. On September 22, 1966, the Commission entered an order rejecting certain contentions made by Pacific Coast and allowing Pacific Coast 20 days for comment on two contract clauses still at issue. Pacific Coast then advised the Commission that it would not object to the clauses still in question, and Pacific Coast entered into dual-rate contracts in full compliance with the March 27, 1964 Order on January 1, 1967. Id.

The three conferences acted within 21 days of the March 27, 1964 Orders, the orders which failed to approve their proposed dual-rate contracts in the forms they desired. It was not until March 27, 1964 that the shipping conferences knew that their dual-rate contracts would not be approved. Within 21 days of the adverse orders, all three conferences applied to the Ninth Circuit for preliminary injunctions, and obtained oral argument before the court on their motions on April 27, 1964, which oral argument was held within 31 days of the Commission's March 27, 1964 Orders.

This is a far cry from the facts here, where the billboard companies waited at least four years before filing suit, and then delayed another year or more before seeking temporary injunctive relief.

**4. National Advertising Co.**

While reported cases involving railway rates (Florida East Coast and Wadley Southern) or maritime rates (Pacific Coast) may

be useful in analyzing "due diligence", it is more instructive to look at cases involving billboards, especially a belated challenged to nearly identical enactment which required the removal of Non-FAP billboards after an amortization period of 5 years.

As discussed previously, National Advertising Co. v. City of Raleigh, 947 F.2d 1158 (4th Cir. 1991), cert. denied, ___ U.S. ____, 112 S. Ct. 1997, 118 L.Ed.2d 593 (1992), involved an ordinance which established a 5½ year amortization period for the removal of Non-FAP billboards. The Fourth Circuit held that the ordinance interfered in a clear, concrete fashion with the property's primary use immediately upon enactment. There, as here, the act mandated that the billboard company's primary use of the existing signs change or cease within five years, and the useful lives of the billboard company's nonconforming signs were shortened to five years upon enactment.

In National, twenty of the billboard company's thirty-six billboards, i.e., 55% of its billboards, were required to be removed within 5½ years. The billboard company's cause of action arose on that date. There, as here, there was no variance procedure.

In National, the billboard company was not only guilty of failing to pursue its challenge with "reasonable diligence," but it waited so long (more than three years) that its takings claims were actually time-barred by North Carolina's three-year statute of limitations.

The Fourth Circuit's observations in National are well worth repeating because of their applicability to the case at bar:

> National was aware of the 1983 ordinance from at least the date of its enactment. National participated in rule making proceedings prior to the adoption of the ordinance and clearly knew of its terms in 1983; moreover, National was required by law to be cognizant of the numerous restrictions placed on its signs upon the ordinance's enactment. Upon the adoption of the ordinance, National was in a position to challenge it. "[A] 'continuing wrong' theory should not provide a means of relieving plaintiff from its duty of reasonable diligence in pursuing its claims."
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> 947 F.2d at 1168 (emphasis added).

The petitioners have failed to act with due diligence in pursuing their challenges to the 1987 Charter Amendment. Delay in the exercise of such challenges should not be countenanced and the petitioners' delay prohibits them from any entitlement to a tolling of fines.

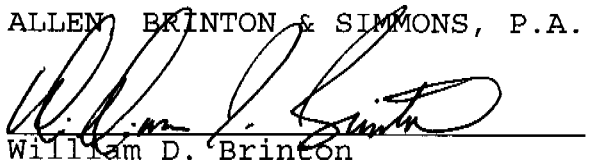
Where conscience, good faith, and reasonable diligence are wanting, a court of equity will remain passive and do nothing toward granting a complainant relief, even though he might have been entitled to the very relief he seeks had he acted with due diligence. Smith v. Daffin, 115 Fla. 418, 155 So. 658, 660 (1934); Sharrow v. City of Dania, 131 Fla. 641, 180 So. 18, 21 (1938).

## CONCLUSION

For the reasons set forth above, this court should hold that the petitioners failed to exercise "due diligence" in mounting their legal challenges to the 1987 Charter Amendment. The decision of the First District Court of Appeal should be affirmed.

Dated this 16th day of November, 1994.

ALLEN, BRINTON & SIMMONS, P.A.



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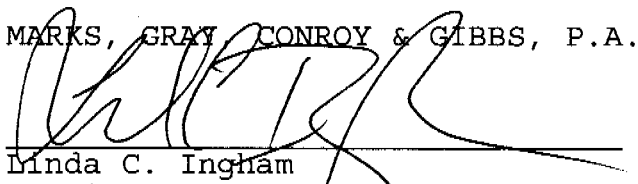

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 16th day of November, 1994 to:

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AND I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by **HAND DELIVERY** this 16th day of November, 1994 to:

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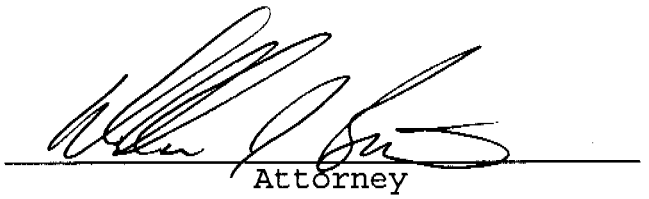

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