SUPREME COURT OF FLORIDA

WILLIAM F. ("BILL") POE, SR.,

Appellant/Cross-Appellee,

vs. **CASE NO. 90,223**

HILLSBOROUGH COUNTY, etc., et al.,

Appellees/Cross-Appellants.

ANSWER/REPLY BRIEF OF APPELLANT/CROSS-APPELLEE

**(Appeal from Final Order of the
Circuit Court of the Thirteenth Judicial Circuit
in and for Hillsborough County, Florida)**

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INTRODUCTION

This Brief is filed on behalf of Appellant/Cross-Appellee, WILLIAM F. ("BILL") POE, SR., in Answer and Reply to the Cross Appellants'/Appellees' Brief of Hillsborough County ("County"), the City of Tampa ("City") and the Tampa Sports Authority ("TSA"), collectively, the "government," as well as the Amicus Curiae Brief filed on behalf of the Buccaneers Limited Partnership (the "BUCs").

References to the record on appeal will be as indicated in the Introduction to Mr. Poe's Initial Brief. References to the government's Brief will be indicated by "Gov. Brief," followed by the page number and, where appropriate, the footnote number (i.e., Gov. Brief, p. 10, footnote 13). References to the BUCs' Amicus Curiae Brief will be indicated by "BUCs' Brief," followed by the page number and, where appropriate, the footnote number (i.e., BUCs' Brief, p. 10, footnote 4).

The "Introduction" in both the government's Brief and the BUCs' Brief contain inappropriate factual assertions and inappropriate legal argument. Those assertions will be addressed in the Statement of the Case and Statement of the Facts, as well as in the Argument sections of this Brief.

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STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

The factual and legal misrepresentations contained within the government's Statement of the Facts necessitate a response in this Answer/Reply Brief. First, however, it is necessary to reply to the suggestion contained within footnote I, pages 1 and 2 of the BUC's Amicus Brief to the effect that the trial court lacked jurisdiction to render a decision on Poe's Amended Complaint for Declaratory Judgment and Permanent Injunction. A review of Poe's Amended Complaint reveals that the relief sought was a judicial declaration that the actions of the County, the City and the TSA with regard to expending public funds, incurring debts, pledging credit and using their taxing power for the construction and operation of the proposed stadium project violates the Florida Constitution, and an injunction restraining such actions. If, indeed, such actions are unconstitutional, as the trial court partially found, such a declaration is not adverse to the interests of the BUCs. Mr. Poe's Amended Complaint was directed to the role and activities of public bodies, and not to the rights of the BUCs. The BUCs have no right to require the government to perform unconstitutional acts. Also, while it is true that the BUCs were not named as a party in Mr. Poe's Complaint, they certainly could have become a party had they so desired. And, the bond validation Complaint named as Defendants, in addition to Mr. Poe, all property owners and citizens, including nonresidents owning property or subject to taxation in Hillsborough County and the City of Tampa. In addition, the BUCs participated in pretrial discovery and other pretrial proceedings in this case, provided testimony as government witnesses at trial and are participating in the instant appeal as Amicus Curiae. The BUCs can hardly claim that their interests are not well represented in this proceeding.

The government asserts, at footnote 2, page 5 of their Brief, that Poe "downplays" the serious nature of the repairs needed at the existing stadium. However, the government's own witness agreed that the TSA had aggressively pursued continued improvements to ensure public safety and also testified that the TSA had done a good job and had been successful in maintaining that stadium. (III, 463, Bryant) Indeed, there was testimony that the only reason more improvements had not been made to the existing stadium was "because the community basically knew they needed to deal with a new stadium for the Buccaneers." (II, 345, Barton) The government's assertion, at footnote 2, page 5, that neither the community investment tax nor the sales tax rebate could be utilized to pay for repairs of the existing stadium is not only unsupported by any evidence of record, but is refuted by the specific language of both Sections 125.055 (infrastructure includes the "construction, reconstruction, or improvement of public facilities") and 288.1162, Florida Statutes (funds may be used for "construction, reconstruction, or renovation" of a facility or to pay debt service on bonds issued for "construction, reconstruction, or renovation" of a facility). Even if the BUCs were to leave Tampa, it is pure speculation to assume that another professional sports franchise would not come to Tampa so as to make the existing stadium eligible for funding pursuant to Section 288.1162, Florida Statutes.

At page 5 of their Brief, the government asserts that the BUCs lost $60 million in 1995 and $33 million in 1996 "playing in the existing stadium." The General Manager of the BUCs acknowledged that the BUCs had experienced profits of between $10 million and $15 million per year for the three previous years in which they played at the existing stadium, and that the 1995-96 losses were due primarily to the $192 million purchase

price which Mr. Glazer paid for the team and the interest required to service the debt associated with that purchase. (III, 409-12, McKay) In fact, while playing at the existing stadium in 1996, the BUCs collected $69,308,975 in revenues (probably the most revenues ever collected), and their losses in that year had nothing to do with playing in the existing stadium but were, instead, related to the purchase price paid by Mr. Glazer for the team. (Ill, 411-12, McKay)

At footnote 3, pages 5 and 6, the government asserts that Poe misstated the costs to the BUCs were they to leave Tampa. It is submitted that each of Poe's statement in that regard are amply supported by the record, as cited in Poe's Initial Brief.[1] Further, in the same footnote, the government references "the concessions Baltimore made to the Browns to induce the team to abandon Cleveland." As evidenced by the fact that the government itself includes no record citation, there was, indeed, no testimony of record on that subject in this proceeding.

The government's assertion, at footnote 7, page 7, that the TSA could apply both the $3.5 million BUC rent and the $1.93 million ticket surcharge (which does not come from the BUCs) to debt service on the bonds is contradictory to all evidence of record in this proceeding. The government well knows that these revenues, albeit insufficient, are essential to pay the operating and maintenance expenses of the facility, and are intended to be utilized as such. (IV, 553, Saavedra) Without such revenues, the TSA would have no money at all to pay for the operation and maintenance of the stadium.

[1] Likewise, contrary to the assertion in footnote 5 of the government's Brief, at page 6, the TSA Interim Director testified that while an appraisal of the existing stadium had not been performed, the appraisal value probably would not have been less than $80 million. (IV, 617-18, Saavedra)

Also, the Stadium Agreement clearly provides that the BUCs are not responsible for the payment of any of the sums due under the financing documents for the stadium project" (XII, 70, 88)[2]

Moreover, it is important to recognize **that the BUCs currently pay no rent of any kind until January 31, 1999, and that, in effect and reality, will continue to pay no rent for the 30 plus-year use of the $400+ million stadium project. Instead, the government pays the BUCs $2 million annually in non-BUC event revenues, plus 50% thereafter (XII, 41-43), between $500,000 and $2 million annually in the value of the naming rights given to the BUCs (III, 401, McKay), at least an uninflated amount of $2 million annually for the operation and maintenance of the club lounges and luxury suites, the revenues from which go solely to the BUCs (IV, 557-60, Saavedra), at least $400,000 annually for the separately-located practice facility ($12 million, without considering interest, divided by 30 years), an undisclosed amount for upfront concessionaire payments, an undisclosed amount for exclusive advertising, merchandising and broadcasting rights, and at least $2 million for development rights ((VI, 856, Pallardy) -- all in addition to the totality of revenues from all BUC events. Such gifts to the BUCs will greatly exceed the fixed $3.5 million "rent" which the BUCs pay and, in fact, these gifts are payable to the BUCs long before their annual "rental" payment is due.**

The government asserts, at footnote 8, page 9 of their Brief, that Poe has

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[2] The government's footnote 7 further refers to Mr. Kleman's testimony regarding the Internal Revenue Code. As noted in Appellant's Initial Brief, at page 46, Mr. Kleman, a lay witness, was not competent to render such opinion testimony. Likewise, Mr. Kleman was incompetent to render his opinion, cited on page 7 of the government's Brief, as to the **contents of modern NFL leases. (See page 46 of Appellant's Initial Brief.)**

inflated the operation and maintenance deficit that will occur in both the existing and the proposed stadium, and has made other misstatements of fact. Each of Poe's statements of fact are supported by record citations, all of which come from the testimony of, or documents produced by, the government's own witnesses. (Poe Initial Brief, pages 14-17, Poe App. D)

Contrary to the statements made on page 8, including footnote 10 of the government's Brief, Poe does not "carefully avoid mention of the Super Bowl." Instead, Poe's witnesses demonstrated that prior Super Bowls in Tampa had no measurable impact upon the local economy. (Appellant's Initial Brief, page 20) Moreover, as can be seen by the record citations provided, the NFL witness did not testify that without a new stadium, Tampa would not have been recommended as a Super Bowl host. Indeed, in the two examples given by that witness, Super Bowls had been awarded to cities which were renovating an existing stadium. (VI, 851-42, Goodell)

The government totally misrepresents to this Court, at page 10 of their Brief, the result of Mr. Poe's prior proceeding seeking to have the referendum on the community investment tax removed from the ballot. In that proceeding, the Circuit Judge ruled that he could not engage in a piecemeal analysis of the constitutionality of the various aspects of the contemplated infrastructure surtax spending. He specifically found that "regardless of whether or not the stadium financing aspect of the tax satisfies the paramount public purpose test," the court must determine whether the tax, in its entirety, was constitutional. (XVI, 37 at page 13) The Court did not find, as erroneously and misleadingly stated by the government, that the

"bonds" for the stadium project served a paramount public purpose.[3] Indeed, at the time that decision was rendered on August 26, 1996, no referendum had been held, no Stadium Agreement had been executed and no bonds had been proposed. The bonds which are the subject of this suit were not proposed until December of 1996, long after the government commenced construction of the proposed new stadium.

The government states, on page 10 of its Brief, that "neither the full faith and credit nor the taxing power of the Issuers is pledged for the repayment of the bonds." The proclamation that neither the government's credit nor its taxing power is pledged or utilized for this project constitutes a clear insult to this Court and to the public in general. The evidence clearly establishes that the sole source of repayment of the bonds is state and local tax monies. (IV, 530, Saavedra; XIII, 14) Revenues generated by the stadium project will not be utilized for debt service on the bonds. Moreover, both the County and the City have pledged their credit to pay any and all budgetary shortfalls of the TSA related both to the financing of the new stadium project and to the operation and maintenance thereof. (IV, 591, Saavedra; XIII, 13)

In discussing the facts relating to the economic impact of the BUCs, it is noteworthy that neither the government nor the BUCs, in their Amicus Brief, attempt to respond to the unrefuted facts that there are many other private businesses in Hillsborough County which have a much larger economic impact upon the local

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[3] **Such an assertion is not only knowingly misleading to this Court, it is violative of the Stipulation between** all parties regarding the prior history of Mr. Poe's declaratory judgment action and contradictory to the representation made at trial by counsel for the City of Tampa that "we're not suggesting that Judge Whittemore's order in any way established res judicata or collateral estoppel by which Your Honor would dispose of this matter." See pages 1026-1030 of Volume VII of the trial transcript.

Community than the BUCs. Indeed, the BUCs represent only two-one thousandths of the local economy in terms of net income and only .00027 percent of the effective buying power of the Tampa Bay economy. (VII, 1076-77, Zimbalist)[4]

Likewise, neither the government nor the BUCs respond to the numerous provisions of the Stadium Agreement, as set forth on pages 10 through 14 of Poe's Initial Brief,' which so clearly illustrate that the second stadium and related facilities which the government intends to construct and operate with public monies constitute a governmental subsidy solely for the economic benefit of a private business. No other private business in the community has received such treatment. (II, 256, Wilson) As expressed by Mr. Carl Cosil, a member of the public who was permitted to testify in this proceeding, "I'm in the trucking business, and no one raises sales tax for me to build a truck stop." (VII, 1058, Cosil) "I've got to go to NationsBank or the Bank of America or somewhere. I feel he [Malcolm Glazer] should go there and borrow money, too . . . " (VII, 1061, Cosil)

The factual assertions of the government with regard to the purported economic impact and intangible benefits of the BUCs will be addressed in the Argument section of this Brief. However, a response to footnote 16, at pages 11 and

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[4] Also see page 19 of Appellant's Initial Brief which summarizes other testimony on this issue.

[5] A correction is necessary in Paragraph C on page 11 of Poe's Initial Brief. During the period from August 1, 1996, until the exhibition of the BUC's first game at the proposed new stadium, the BUCs pay no rental or fees of any kind for the use of the existing stadium and they receive 50% (not 27.5%) of all revenues, less direct costs, from all other non-BUC stadium events. (IV, 570-72, Saavedra)

12 of the government's Brief, is necessary to provide this Court with an accurate recitation of the facts regarding Dr. Porter's testimony. Dr. Porter's analysis utilized data from the months of December, January, February and March, not simply December data. (VIII, 1188, 1208-15, Porter) Thus, his testimony was not discredited in any manner. Further, the government's statement that hotel/motel occupancy rates increased by 20 percent during the 1991 Super Bowl in Tampa is totally contradicted by the very governmental witness cited by the government in its Brief. Mr. Clark candidly admitted that hotel occupancy rates were lower in January of 1991 (the month of the 1991 Super Bowl in Tampa) than in the same month of the two years immediately preceding and following that event (V, 778-79), and that Super Bowls do not affect the January monthly hotel occupancy rates in Hillsborough County. (V, 781) In the same footnote 16, the government asserts that Dr. Baade admitted his conclusions were "highly tenuous." A review of the transcript reveals that that statement did not apply to his opinions rendered in this proceeding, but instead was applicable to only one specific conclusion in another study and was caused by a paucity of data with regard to that particular, unrelated study. (IX, 1290-91, Baade)

Throughout their Statement of the Facts, the governmental parties admit that the sole purpose for the proposed new stadium project was to satisfy the economic demands and threats of the BUCs. For example, on page 5, the government asserts that "the team required additional stadium-related revenue sources (such as luxury suites, club seats and the like)" and that the new owner, Mr. Glazer, made it clear that he intended to relocate "if a new stadium were not constructed incorporating such

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amenities," On page 6, the government asserts that the existing stadium "could not be economically rehabilitated to provide the required revenue enhancing amenities the BUCs needed." On page 2 of its Brief, the government discusses how elected officials were confronted with the potential loss of a business, offered concessions and "struck their best deal" to keep the BUCs. For the government to later assert, in the Argument portion of its Brief, that this stadium project was conceived to serve a predominant public purpose is contradictory to the facts stated in its own Brief.

Finally, at page 13 and also in footnote 1 on page 3 of the government's Brief, it is suggested that Poe's appeal "was purely tactical" and that "Poe had no legitimate basis to file an appeal because he was not aggrieved by the trial court's ruling." It is apparent that Poe did not receive the totality of the relief requested in his declaratory judgment action, nor did the trial court grant his request for an injunction against unlawful government actions. It is further suggested that Poe's "premature notice" upset the normal appellate process. Such assertions reflect either a complete misunderstanding or disregard of the rules of civil and appellate procedure, or a failure to read Poe's Initial Brief, which clearly demonstrates the manner in which Appellant Poe is aggrieved by the trial court's Final Judgment. If the government believed that Poe improperly filed his Notice of Appeal, it should have moved to dismiss that Notice of Appeal. It did not. The filing of Poe's Notice of Appeal was not a "tactical" move "designed to prevent the trial court from considering any modifications that the TSA might make in its lease with the BUCs," as asserted on page 13 of the government's Brief. Once the trial court denied the government's Motion for Rehearing, as it did orally at the hearing conducted on March 27, 1997 (X, Tab A) and by written Order

on March 27, 1997, its judicial labors in this case were at an end" and the time for appeal was ripe. The parties had previously stipulated that any appeal from the trial court's Final Judgment must be perfected within five days. The trial court's Order on Plaintiffs' Motion for Rehearing was received by counsel for Appellant Poe on Saturday, March 29, and Poe's Notice of Appeal was filed on Monday, March 31, 1997, four days after the Final Judgment became final for appellate purposes.

[6] State ex rel. Cantera v. District Court of Appeal, Third District, 555 So.2d 360 (Fla. 1990); Capital Bank v. Knuck, 537 So.2d 697 (Fla. 3d DCA 1989); Markevitch v. Van Harren, 429 So.2d 1255 (Fla. 3d DCA 1983).

SUMMARY OF ARGUMENT

The government and the BUCs would have this Court believe that if the organic law of this State -- the Florida Constitution, is applied to this proposed stadium project, our system of government will somehow be compromised or destroyed. What immediately comes to mind is the admonition utilized by Justice Hobson in the case of Gwin v. Citv of Tallahassee, 132 So.2d 273 (Fla. *1961); fiat justicia ruat caelum,* "Let justice be done, though the heavens fall."

In fact, the heavens will not fall if this Court enforces the Constitutional mandate that no governmental entity shall use its taxing power or pledge its credit to aid a private entity. That mandate has governed this State for 112 years, and this case certainly presents no occasion for a departure therefrom.

The suggestions that this Court's determination that the proposed project is illegal will somehow negate economic development in this State or otherwise intrude upon the authority of local governments to make business decisions are absurd. The government well knows (though it is not apparent from their Brief) that there are means by which projects which have a paramount public purpose, even though they incidentally benefit private entities, may be pursued. It has simply chosen to ignore those means with respect to the instant project.

Our system of government requires that legislative and executive branch findings, decisions and actions be subject to judicial review. The record of this proceeding amply demonstrates that the private interests of the BUCs tarnish the public character of this stadium project and that the taxing power and credit of the government are being used and pledged therefor. The Constitution does not allow

such action.

This Court may not conditionally approve an unconstitutional project, nor may it rewrite the lease agreement between local government and the BUCs. The Appellees/Cross-Appellants have failed to demonstrate reversible error with regard to the trial court's ultimate conclusions regarding the constitutionality of the Stadium Agreement and the refusal to validate the bonds. On the other hand, Appellant Poe has demonstrated that the Final Judgment does not go far enough with regard to the total project, does not adequately interpret Florida's Constitution, erroneously declined to enjoin unlawful activity and relies upon incompetent evidence for its factual and legal analysis.

ARGUMENT

The arguments of the government and the BUCs are basically that the trial court misconstrued the paramount public purpose test and the Florida Constitution[7] (an argument which, for different reasons set forth in Poe's Initial Brief, Mr. Poe agrees); that the trial court failed to defer to the legislative and voter determinations of public purpose, thereby usurping its authority, unlawfully second-guessing the decisions of elected officials and attempting to "micromanage" the results of the lease negotiations;[8] and that an "absurd" rule of law will result if this Court does not validate the bonds due to the underlying Stadium Agreement between the government and the BUCs.[9] In addition, although such relief is not sought by the BUCs in their Amicus Brief, the government asserts, as Point III, that if this Court affirms the trial court or finds any other clause of the Stadium Agreement unconstitutional, it should still validate the bonds upon the condition that the "offending" provisions be removed. Finally, the government urges, at Point IV, that the trial court's evidentiary rulings are somehow immaterial and, in any event, did not constitute an abuse of discretion. The Appellant/Cross-Appellee Poe responds to these arguments in the order set forth above.

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[7] Point I of the government's Brief; Point II of the BUC's Brief.

[8] Point II of the government's Brief; Point I of the BUC's Brief.

[9] Page 25 of the government's Brief; Point III of the BUC's Brief.

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POINT I. THE FLORIDA CONSTITUTION PROHIBITS THE PROPOSED STADIUM PROJECT WHICH IS THE SUBJECT OF THE PROPOSED BONDS AND THE SUBJECT OF POE'S REQUEST FOR A DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF.

In light of the assertions made by the government earlier in its Brief that Mr. Poe is not aggrieved by the trial court's decision below, it must be emphasized that Poe does indeed seek reversal of the trial court's Final Judgment insofar as it limits its holding of unconstitutionality to the single provision of the Stadium Agreement which grants the BUCs the right to receive the first $2 million of revenues from non-BUC events, and insofar as it did not specifically enjoin unlawful governmental actions. While the $2 million provision may have been the straw which broke the trial judge's back, Appellant Poe submits that the remaining provisions of the Stadium Agreement, such as the exclusive naming rights, development rights, control and retention of revenues from advertising, merchandising, concessions and parking rights, expansion rights, and practice facility rights -- all with no contribution from the BUCs for the costs associated with the facilities, render this project unconstitutional. The trial court correctly determined that the BUC's right to receive the first $2 million of non-BUC event revenues rendered the purpose of the project to be predominantly private, as opposed to public. However, it is impossible to justify the remaining provisions of the Stadium Agreement in light of Florida's Constitutional provision prohibiting the use of the government's taxing power or credit to aid a private person or entity. Is it any less offensive that the BUCs are granted the sole and exclusive right to commercially develop the entire publicly-owned property surrounding the stadium, which property is described by the government's own witness as the best location in Hillsborough County for commercial and retail development? (VI, 882, Pallardy) Is it only one-half

constitutional for the BUCs to receive 50% of all revenues from non-BUC events which take place at the stadium? If the BUC's purported right to receive the first $2 million of such revenues is removed, but the 50/50 split remains, does that mean that the BUCs receive the first $1 million from non-BUC events or does it mean that the TSA retains the first $2 million, and the BUCs receive 50% of the remaining non-BUC revenues? Can the government lawfully give to the BUCs naming rights, development rights, concession rights, advertising rights, merchandising rights, all revenues from BUC events and a $12 million practice facility -- all in addition to the gift of a $400 + million stadium free from the obligation to contribute to its costs and essentially free from the obligation to pay for its operation, maintenance and capital improvements? Appellant submits that the answer to these questions is clearly "NO" and that the entire "deal" must be declared unconstitutional.

The government incorrectly states, at page 16 of its Brief, that "Poe does not question the Issuers' authority to issue the bonds." Poe certainly does contest the authority of the "Issuers" to issue bonds for an unconstitutional purpose, and has demonstrated that the stadium project as contemplated by the various project documents is unconstitutional. Mr. Poe contests such governmental actions both in his Complaint for Declaratory Judgment and Injunctive Relief and by his participation in the bond validation proceeding, to which he is a named party.

In their arguments concerning Article VII, Section 10 of the Florida Constitution, the government and the BUCs assert that once a public purpose for a project is found, a court should not inquire further into the nature of the project. Indeed, it is suggested that courts are not permitted to weigh the public interest against the private

benefit. (Gov. Brief, p. 29) This is clearly not an accurate representation of either the Florida Constitution or the many decisions of this Court interpreting Article VII, Section 10, or its predecessor. That constitutional provision prohibits the government from using its taxing power or lending its credit to aid private persons or entities. When a project proposed for public funding has elements of private economic benefit, as is overwhelmingly evident in this case, the public purpose must predominate, the private benefit must be incidental **and** the project must be paid for by revenues derived therefrom. Neither the government nor the BUCs cite a single case (and, indeed, none exist) which contradicts this statement of the law of the State of Florida.

Instead, the cases relied upon by the government and the BUCs clearly demonstrate that when a private entity stands to benefit from a proposed project, the court will approve the project **only** if the bonds are payable from revenues derived from the project. This is a requirement not only of Article VII, Section 10 of the Florida Constitution, but also of the many statutes which allow revenue bonds to be issued for certain private enterprises." In that manner, the government is not using its taxing power or lending its credit to aid a private person or entity. Linscott v. Orange County Industrial Development Authority, 443 So.2d 97 (Fla. 1983). Indeed, in State v. City of Panama City Beach, 529 So.2d 250, 251 (Fla. 1988), this Court

[10] For example, Section 159.827(1), Florida Statutes, requires that bonds issued pursuant to Chapter 159 NOT be secured "by any revenues of such governmental unit derived **other** than from the sale, operation or leasing of the project financed with such taxable bonds or from the investment or reinvestment of proceeds of such taxable bonds." Section 154.223, Florida Statutes, requires that bonds be payable from revenues of the project. Chapter 418 bonds are required to be paid by revenues derived from special assessments, as well as from fees derived from the use of the facilities and services. Section 418.304(5), Florida Statutes.

recognized that "revenue bonds are not considered to be, strictly speaking, debts of the issuer."

An analysis of the cases cited by the government and the BUCs reveals that in each and every case where a private entity was apparent to benefit from a project, there was a requirement that the bonds be repaid from revenues derived from the project. In International Brotherhood of Elect. Workers, Local Union No.1 77 v. Jacksonville Port Authority, 424 So.2d 753 (Fla. 1982), a revenue bond issue was approved for a floating drydock and associated mooring facilities which were to be sold to a private entity on an installment purchase contract. The private entity was obligated to make timely payments in amounts sufficient to pay the principal, premium and interest on the bonds as such amounts became due. The bonds were thus paid solely with the revenues derived from the sales contract. In Linscott, supra, the project consisted of a regional headquarters office of a multi-state insurance company, and the bonds were payable solely from revenues and proceeds derived from the sale, operation and leasing of the project. Murahv v. Citv of Port St. Lucie, 666 So.2d 879 (Fla. 1995), involved the issuance of Special Assessment Bonds for the expansion of water and sewer utility lines. Thus, neither the government's taxing power nor its credit were affected. In Noble v. Martin County Health Facilities Authoritv, 682 So.2d 1089 (Fla. 1996), wherein bonds were issued for improvements to a not-for-profit medical center, the authorizing statute, Section 154.223, Florida Statutes, required that the bonds be payable from the revenues of the project. The case of Nohrr v. Brevard County Educational Facilities Authoritv, 247 So.2d 304 (Fla. 1971), approved bonds for the construction of dormitories and cafeterias at the Florida Institute of

Technology. The rents and other revenues received from the project were to be assigned and pledged as security for the payment of the principal and interest on the revenue bonds. In Northern Palm Beach County Water Control District v. State, 604 So.2d 440 (Fla. 1992), bonds were approved for on-site roads and landscaping for a private residential development. This Court noted that the bonds were payable solely from drainage assessments to the landowners located within the development, and that no governmental taxing power or pledge of credit was involved. In Orange County Industrial Development Authority v. State, 427 So.2d 174 (Fla. 1973), a case involving the expansion of a television station by a private entity, this Court held that even though the bonds were to be payable solely from the sale, operation or leasing of the project, the paramount purpose of the project was a private one, and thus the bonds could not be approved. State v. City of Miami, 379 So.2d 651 (Fla. 1980), involved bonds for the construction of a convention center and garage, including a hotel to be leased to a private developer. Parking spaces for the University of Miami and the developer, as well as the rental of conference center areas to the University of Miami, were contemplated. This Court noted that the bonds were secured by a pledge of the net revenues derived by the City from or in connection with the convention center/garage and other revenues of the City.[11] In State v. City of Panama City Beach, 529 So.2d 250 (Fla. 1988), bond proceeds were to be invested

[11] This case is noteworthy in that it points out that the need and justification for the convention center and garage was determined long before the contemplation of the hotel and retail area, and that the lease of those areas was only incidental to the paramount public purpose of the convention center. In the instant case, there is no need for a new stadium with club and luxury seats absent the economic demands and threats of the BUCs, and the lease of the stadium to the BUCs is the primary and predominant purpose of the entire proposed project.

with an insurance company and the profits were to be used for park and recreational facilities, self-insurance and other municipal purposes. This Court noted that the principal invested in the contract plus the earnings thereon will be pledged as security for repayment of the bonds, will constitute the sole source of repayment of the bonds and will be sufficient for that repayment. State v. Davtona Beach Racing and Recreation Facilities District, 89 So.2d 34 (Fla. 1956), approved bonds for the construction and operation of a racing and recreational facility to be leased to a private corporation. The bonds were payable solely from revenues derived from the facility. In State v. Leon Counts, 400 So.2d 949 (Fla. 1981), this Court approved revenue bonds for the construction of a privately-owned nursing home facility, noting that the bonds in no way pledged the credit of the state or of Leon County. State v. Okaloosa County Airport and Industrial Authority, 168 So.2d 745 (Fla. 1964), involved bonds to be issued for the construction of repair and maintenance facilities at an airport, such facilities to be leased to a private corporation for operation of the same. These bonds were payable solely from rentals, and were thus approved. In State v. Orange County Industrial Development Authority, 417 So.2d 959 (Fla. 1982), this Court approved bonds for the construction of a public lodging and restaurant facility to be operated by a private entity, noting that there is no direct or indirect undertaking by any public body to pay the bonds from public funds. Similarly, in State v. Osceola County Industrial Development Authority, 424 So.2d 739 (Fla. 1982), this Court again approved bonds for a privately-owned and operated lodging facility when the purchase payments by the private entity were sufficient to operate, maintain and repair the project and to make the payments of the principal, premium and interest on the bonds.

The Court specifically found that there was no direct or indirect undertaking by any public body to pay the bonds from public funds. State v. Reedv Creek Improvement District, 216 So.2d 202 (Fla. 1968), involved drainage bonds which were payable from revenues derived solely from the services and facilities of the project. In State v. Sunrise Lakes Phase II Special Recreation District, 383 So.2d 632 (Fla.1980), this Court approved bonds for the purchase of condominium recreational facilities. These bonds were proposed pursuant to Chapter 418 of the Florida Statutes, wherein special assessments are assessed against improved residential parcels and bonds are paid by the revenues from the special assessments, as well as from fees derived from the use of the facilities and services. Again, in State v. Volusia Countv Development Authoritv, 400 So.2d 1222 (Fla. 1981), this Court approved bonds for a nursing home, where the nursing home would pay all costs of the bonds and would operate and maintain the project at its own expense. As noted by this Court, the bonds would not constitute a debt, liability or obligation of the County, the State or any political subdivisions of the State, and would not contain a pledge of the faith and credit or taxing power of any of them. Another health care facility bond was approved in Wald v. Sarasota Countv Health Facilities Authoritv, 360 So.2d 763 (Fla. 1978), with this Court noting that the rental payments were sufficient to pay the principal of, premium and interest on the bonds. In Wilson v. Palm Beach Countv Housing Authoritv, 503 So.2d 893 (Fla. 1987), this Court approved bonds for the acquisition and construction of low income housing, where the bonds were payable solely from the housing projects' revenues and the bond proceeds investment earnings. Davtona Beach Racing and Recreational Facilities District v. Paul, 179 So.2d 349 (Fla. 1965), cited

by the government at page 28 of its Brief as the "clearest statement" of this Court regarding the public purpose test, involved review of a tax assessment imposed upon land leased by the City to a private speedway company. This Court relied heavily on its prior bond validation decision, reported at 89 So.2d 34 (Fla. 1958), approving bonds for the same facility. That earlier decision, as noted above, reveals that the bonds approved for the construction and operation of the racing and recreational facility were "payable solely from revenues derived from the facility." State v. Davtona Beach Racing and Recreational Facilities District, 89 So.2d at 35 (Fla. 1956).

In State v. City of Miami, 41 So.2d 545 (Fla. 1949), even though it does not appear that there was a private entity involved in the project, this Court's approval of bonds for the expansion of the Orange Bowl noted that the bonds were payable solely from the net revenues derived from the operation of the project. Similarly, see State v. Escambia Countv, 52 So.2d 125 (Fla. 1951), State v. Citv of Miami, 76 So.2d 294 (Fla. 1954); and State v. Citv of Miami, 26 So.2d 672 (Fla. 1946).

Other cases not cited by the government or the BUCs include State v. Board of Control, 66 So.2d 209 (Fla. 1953), where this Court approved bonds for the construction of ten dormitories at the University of Florida when the certificates were payable solely and exclusively from the net revenue and income to be derived from the project;[12] State v. Citv of Miami, 72 So.2d 655 (Fla. 1954), where this Court approved revenue certificates to finance the construction of a warehouse to be leased to a non-profit organization known as the "Orange Bowl Committee," when the

[12] The Court noted that "if the real and dominant purpose of the projects was the promotion of a private enterprise for private gain, the [constitutional] contentions of the appellants would be sound." State v. Board of Control, 66 So.2d at 211 (Fla. 1953).

revenues from leasing the warehouse to the Committee would provide ample funds for servicing the revenue certificates; State v. Inter-American Center Authority, 84 So.2d 9 (Fla. 1955), where Justice Terrell approved bonds for an international cultural and trade center when the bonds were payable solely from revenues generated from the facility; State v. County of Dade, 210 So.2d 200 (Fla. 1968), where this Court approved revenue certificates for improvements to be leased to National Airlines when the rental payments were scheduled to pay off the certificates; State v. County of Dade, 250 So.2d 875 (Fla. 1971), where this Court approved industrial revenue bonds for the acquisition of a meat processing plant to be owned and operated by a private entity when the principal, interest and redemption premiums on the bonds were to be payable solely from the revenues derived from the facility; Penn v Pensacola-Escambia Governmental Center Authority, 311 So.2d 97 (Fla. 1975), where this Court approved a revenue bond issue to finance construction of a governmental center when the bonds were payable from rental payments from leases with the County and the City; McCoy Restaurants, Inc. v. City of Orlando, 392 So.2d 252 (Fla. 1980), where this Court validated revenue bonds for the expansion and improvements of facilities at Orlando International Airport when bond repayments were to be made solely through funds derived from the rental and lease of the airport's physical plant to various airlines, concessionaires and others; and State v. City of Pensacola, 397 So.2d 922 (Fla. 1981), where this Court validated bonds for the purpose of financing the purchase of low interest mortgage loans for the construction, purchase, reconstruction or rehabilitation of single family residences when the principal and interest on the bonds would be paid solely from and secured by the repayment proceeds from the

sales of the mortgages and from certain insurance proceeds.

Notably absent from the government's and BUC's recitation of case law is the decision rendered by this Court in Ranev v. City of Lakeland, 88 So.2d 148 (Fla. 1956). There, this Court sustained the validity of a 99-year lease of publicly-owned land by a municipality to a non-profit corporation, the Garden Club of Lakeland. While the Garden Club paid an annual rental of only $1, the public library to be constructed on the land was to be at the expense of the Garden Club, and the lease contained restrictions which precluded the exploitation of the land and the contemplated improvements for private gains. Also, this Court placed great emphasis upon the fact that the Garden Club was not a private corporation for profit, holding that "if it were, this lease could not stand." 88 So.2d at 151. Most importantly, this Court, speaking through Justice Thornall, states:

> We wish to clothe this opinion with the protective observation that it is not to be construed as carte blanche authority to municipal corporations to exploit publicly owned land or extend the favor of the public funds and credit directly or indirectly to promotional schemes or devices aimed immediately or ultimately at lining the pockets of private business or individuals. When such situations appear this court would undoubtedly adhere to its pronouncements in State v. Town of North Miami, Fla. 1952, 59 So.2d 779.... we find a useful public purpose being served by the municipal government in cooperation with progressive citizens at no profit to the latter except the satisfaction of improving the community as a place in which to live.

Ranev v. City of Lakeland, 88 So.2d at 152 (Fla. 1956). Obviously, the rationale for approving the lease in Ranev cannot be applied to the facts presently before this Court. Here, the government alone, through the use of public taxpayer dollars and the pledging of its credit, is paying for both the costs of construction of the proposed

facilities and the costs of operating and maintaining the stadium. The revenues from the project will line the pockets of the BUCs, a private business. The BUCs are not concerned with improving the community, but, instead, are concerned only with increasing their own revenues at the expense of the taxpaying public.

The government asserts at age 29 of its Brief, footnote 32, that the cases cited by Poe are outdated and unhelpful. It is acknowledged that some of the pre-1968 cases which refused to validate bond issues even where the bonds were to be paid solely from revenues derived from the project[13] might have a different result if measured against the 1968 Florida Constitution. However, the fact remains, as demonstrated by the numerous post-l 968 cases of this Court, that if government bonds for projects benefitting a private person or entity are not paid solely from revenues derived from the project, they will not be validated by this Court.

The government's only attempt to distinguish the long line of cases interpreting Article VII, Section 10 of the Florida Constitution appears at pages 24 and 25 of its Brief. There, it is asserted that "no case" holds that bonds issued for the benefit of a private entity must be repaid entirely from revenues generated by the project. Appellant Poe responds that the Constitution itself requires that conclusion, and that the many cases of this Court affirm that requirement. The Florida Constitution emphatically states that governmental entities shall not give, lend or use their taxing powers or credit to aid any corporation, association, partnership or person. It further states that this mandate does not prohibit the issuance of revenue bonds for airports,

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[13] State v. Jacksonville Port Authority, 204 So.2d 881 (Fla. 1967); State v. Clay County Development Authority, 140 So.2d 576 (Fla. 1962); and State v. Town of North Miami, 59 So.2d 779 (Fla. 1952).

port facilities, or industrial or manufacturing plants "when . . . the revenue bonds are payable solely from revenue derived from the sale, operation or leasing of the projects." Article VII, Section 1 O(c), Florida Constitution (1968). As stated in more detail in Appellant's Initial Brief (pages 30-31), this Court has interpreted Section 1 O(c) as being non-exclusive in its listing of airports, ports, industrial and manufacturing plants, but has adhered to its position that other projects must run the gauntlet of prior case decisions regarding a paramount public purpose. This Court has consistently ruled that such projects, if otherwise permissible, must be repaid from revenues generated by the project, for it is only then that the government's taxing power and pledging of credit is not utilized to benefit a private entity.

The government erroneously claims that there are cases which stand for the proposition that the stadium project bonds need not be repaid entirely from revenues derived from the stadium. Three cases are cited to support that erroneous claim. The first is Panama Citv v. State, 93 So.2d 608 (Fla. 1957), decided before the 1968 Constitution which specifically requires bonds supporting projects benefitting a private interest to be paid from revenues derived from the project. Even so, the facts of that case demonstrate that the private interests occupied only 1.22% of the space in the overall waterfront project, which included a city hall, a civic auditorium, an administration building, a marine sales and service building, docking facilities, a parking area and other public facilities. Yet, the private interests, consisting of commercial shops, would pay 20% of the total revenues expected to be derived from the total project, said payments to be utilized to repay the bonds. This Court, citing from Gate Citv Garage v. City of Jacksonville, 66 So.2d 653 (Fla. 1953), found that private

improvements may be incorporated in a public project so long as they "are mere incidents to the main or primary purpose of the buildings [and] are for the convenience of those who use the buildings or facilities for a public purpose." Appellant Poe requests this Court to contrast the instant factual situation with that involved in the Panama Citv case. Here, the new stadium project is occasioned solely by the demands of the BUCs for greater revenues, and there is no other purpose for that project. The BUC's interest in the stadium project is not merely incidental. The BUC's interest is the *raison d'etre* for the project. It is the principal and sole purpose of the undertaking. The entire scheme, like that found to be unconstitutional in the case of State v. Town of North Miami, 59 So.2d 779 (Fla. 1952), is for the purpose of inducing a private corporation operated for private profit and gain to remain in the community. The primary purpose is to erect a stadium and provide a separate practice facility and a commercial development area for the BUCs to carry on a private business for private gain. The public recreational benefits are merely incidental to the proposed project, particularly given the fact that the public already has a community stadium for recreational purposes. If the new proposed stadium constituted a paramount public purpose, and were, indeed, a "community stadium, " the revenues derived therefrom, as well as the revenues from the naming and development rights attendant thereto, are public revenues and cannot be given to the BUCs. The new stadium project is **certainly not for the convenience of those who will utilize the stadium for recreational purposes,[14] but instead is for the sole purpose of economically enriching the BUCs.**

[14] Indeed, the proposed new stadium will contain 21,000 fewer regular seats for the general public. Yet, the people who pay for those regular seats will not even be permitted to enter the club seat lounges or luxury suites for which "fan amenities" the

The second case cited by the government is State v. Sunrise Lakes Phase II Special Recreation District, 383 So.2d 631 (Fla. 1980). As previously noted, that case concerned bonds to be issued for the purpose of purchasing condominium recreation facilities as authorized by Chapter 418, Florida Statutes. That Chapter requires such bonds to be paid by revenues derived from special assessments, as well as from fees derived from the use of the facilities and services.

The third and final case cited by the government is State v. Citv of Miami, 379 So.2d 651 (Fla. 1980). In that case, this Court approved bonds for the construction of a convention center with a parking garage, portions of which were to be leased to private entities, One private entity was to construct, at its own expense, a hotel and other facilities, and the other, the University of Miami, agreed to rent a portion of the conference center area. The bonds were secured by a pledge of the net revenues from or in connection with the proposed facility and other revenues of the City exclusive of ad valorem tax revenues. While the Court does not elucidate the amount of revenues anticipated from the private entities, the Court does note that "the incidental benefits accruing to the developer and the University are not so substantial as to tarnish the public character of this convention center-garage." State v. City of Miami, 379 So.2d at 653. This Court further remarked that "there was an existing need and justification for the convention center-garage long before the contemplation of a hotel and retail area," and that "the lease of property by the City is only incidental

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proceeds from their tax dollars and ticket surcharges will be used to operate and maintain. (IV, 558-59, 594-96, Saavedra) The sole reason the club seat areas and luxury lounges are included in the proposed new stadium is so that the BUCs will generate greater revenues. (IV, 559, Saavedra)

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to the paramount public purpose." 379 So.2d at 653. Obviously, these factors are not here present. There was and is no existing need and justification for the proposed stadium project absent the demands of the BUC's new owner for a stadium which would provide greatly increased revenues. The "deal" with the BUCs is not incidental to the public purpose. It is the sole reason for the undertaking and it tarnishes any public character which might otherwise attend to a sports stadium.

The government asserts that the "deal" with the BUCs was necessary to keep them from relocating,[15]" and bemoans the potential loss of a business. (Gov. Brief, p. 2) Such a contention has been heard before, and this Court responded by taking judicial knowledge of

> the Martin complex in Orange County, Westinghouse and Anheuser-Busch in Hillsborough County, Honeywell in Pinellas County, Pratt &Whitney in Palm Beach County and many others including pulp mills, paper plants and phosphate plants, all of which so far as the records of this Court show have moved into this state without the aid of financing of the nature here proposed.

State v. Jacksonville Port Authority, 204 So.2d 881, at 886 (Fla. 1967).

A series of cases are cited by the government and the BUCs for the proposition that the construction of sports stadiums and other recreational and cultural facilities

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[15] The government, at page 30 of its Brief, points to "the fate of cities like Baltimore, Cleveland, Oakland, St. Louis, Houston, and Los Angeles, all of whom have experienced the loss of a professional football franchise . . ." There is no evidence whatsoever in the proceedings below concerning the "fate" of those cities, and this Court can not assume such a negative impact from the relocation of a sports franchise. Indeed, Dr. Zimbalist testified, in general, that a professional sports team is a very diminutive part of a city's economy (VII, 1076), that it could have a negative economic impact (VII, 1073, 1084-85), that "if you lose a team and it strengthens your fiscal dimension, it could possibly improve the image of the city (VIII, 1146), and "it's very likely, judging by recent experience in the NFL, if you lose a team, you get one back."

serve a public purpose.'" Appellant Poe does not dispute such holdings. The issue in this case, however, is whether this particular stadium project, as evidenced by the various project documents, meets the constitutional test for the expenditure of public funds.[17] In the cases cited by the government and the BUCs, the projects were not occasioned solely by the demands, accompanied with a threat to leave town, of a private entity for greater revenues. Indeed, in each of the cases cited by the opposing parties, there was no private entity involved in the project for which governmental financing was intended. Thus, the constitutional prohibition against the use of the taxing power and the pledge of public credit for the benefit of a private enterprise was not applicable. In the cases cited by the government and the BUCs, this Court was called upon only to determine whether the project served a public purpose.[18] Here, this Court is confronted with the issue of whether the bonds and other aspects of the stadium project are for the benefit of a private entity, and, if so, whether the use of the government's taxing power and credit is prohibited by the Florida Constitution.

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[16] **See cases cited in footnotes 21 through 25 on page 20 of the government's Brief. From the body of its Brief, it appears that the government intended to cite, in footnote 21, the case of State** v. Tampa Sports Authority, 188 So.2d 795 (Fla. 1966), in lieu of the case cited therein. Also cited in the text of the government's Brief is the case of Miami Dolphins, Ltd. v. Metropolitan Dade County, 394 So.2d 981 (Fla. 1981), with the notation, at footnote 30, that "Poe completely ignores that the improvements were the result of a stadium lease with the Miami Dolphins." That case involved the constitutionality of the tourist development tax, and there is nothing contained within that reported decision which indicates that the lease with the Dolphins was in any manner at issue in that proceeding.

[17] As stated in Nohrr v. Brevard County Educational Facilities Auth., 247 So.2d 304, 309 (Fla. 1971), the validity of each proposed public revenue bond financing project depends upon the circumstances.

[18] The opposing counsels' suggestions that this is a distinction without merit and will lead to an "absurd" result is addressed in Point III below.

There can be no doubt that the stadium project is intended to benefit a private enterprise for private gain, and that the use of the government's taxing power and credit to accomplish that result is constitutionally prohibited.

The only two cases cited by the government which involve a private interest in a recreational facility are Daytona Beach Racing & Recreational Facilities v. Paul, 179 So.2d 349 (Fla. 1965), and Rolling Oaks Homeowners Ass'n. v. Dade County, 492 So.2d 686 (Fla. 3d DCA 1986). As previously discussed, the Daytona Beach project was paid for by revenues generated by the facility. The Rollins Oaks case was not a bond validation proceeding, but did involve a 99-year lease of public property for the construction of a large sports stadium and attendant commercial facilities. It is clear from that case, as well as the latter cases on the same subject,[19] that the private lessee was to construct the sports stadium with the use of industrial revenue bonds, bonds which are repayable from revenues generated by the project.

The unavailing attempts of the opposing parties, as well as the trial judge, to distinguish the case of Brandes v. City of Deerfield Beach, 186 So.2d 6 (Fla.1966), has previously been addressed in Appellant's Initial Brief, at page 34 - 36. In response to the government's argument that Brandes is out of step with modern precedent which takes a broader view of paramount public purpose, the Appellant simply states that neither "modern precedent" nor the 1968 Florida Constitution allows the government to use its taxing power or credit to aid a private enterprise. The power of local government to use bond financing was expanded by the 1968 Constitution

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[19] Lake Lucerne Civic Ass'n. v. Dolphin Stadium Corp., 878 F.2d 1360 (11 th Cir., 1989), and Lake Lucerne Civic Ass'n. v. Dolphin Stadium Corp., 801 F.Supp. 684 (S.D.Fla. 1992).

only to the extent that revenue bonds which aid a private entity, if the project otherwise serves a paramount public purpose, are allowed if they are payable solely from revenue derived from the sale, operation or leasing of the project. Art. VII, Sec. 10(c), Fla. Const. (1968).

Finally, the majority of the cases from jurisdictions other than Florida cited by the government have been discussed and distinguished in Appellant's Initial Brief, at pages 37 - 39. The remaining cases also are distinguishable in that they involve no specific private lease or agreement under which to measure the contemplated project,[20] or because of the particular facts involved in those cases.[21] However, even if the non-Florida cases were directly on point, which they are not, the State of Florida has a clear constitutional mandate that prohibits the government's taxing power and its credit from being utilized to benefit a private entity. Even if the stadium serves a public purpose, when the revenues and other benefits therefrom flow almost exclusively into the pockets of a private entity, as is the case herein, the project can NOT be financed wholly by taxpayer dollars and operated through the use of a pledge of the government's credit.

As children, and perhaps even as adults, we have all been asked the simple question: "If all your friends jump off a cliff, does that mean you must follow?" By analogy, if other states are expending public tax dollars and pledging their credit solely

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[20] Lifteau v. Metropolitan Sports Facilities Comm., 270 N.W.2d 749 (Minn. 1978); Meyer v. City of Cleveland, ;171 N.E. 606 (Ohio Ct.App. 1930); Martin v. City of Philadelphia, 215 A.2d 894 (Pa. 1966); and New Jersey Sports & Exposition Auth. v. McCrane, 292 A.2d 850 (N.J. Super. Ct. Law Div. 1971) aff'd 292 A.2d 545 (N.J. 1972).

[21] For example, in Reyes v. Prince George's County, 380 A.2d 12 (Md. 1977), bonds issued to refinance an arena were payable by a private entity through a note in an amount equivalent to the borrowing.

for the benefit of a privately-owned NFL team or other professional sports franchise, does that mean Florida must follow? The facts of this case, the Florida Constitution and this Court's judicial interpretations thereof all require that question to be answered with a resounding "NO."

POINT II. JUDICIAL DEFERENCE TO LEGISLATIVE DECLARATIONS AND ACTIONS IS NOT REQUIRED WHEN THE SUCH DECLARATIONS AND ACTIONS CONSTITUTE A CLEAR VIOLATION OF THE FLORIDA CONSTITUTION.

The arguments of the government and the BUCs are that courts may not disturb legislative findings of public purpose and may not interfere with the business judgment of elected officials. These entities further assert that this is particularly true where the voters have approved a project by referendum. The government and the BUCs state that any contrary ruling would give the courts "a line item veto to be used to renegotiate transactions" and would be "nonsensical" (BUC's Brief, p. 9), that decisions about what financial concessions should be made to sports teams to prevent them from relocating should be made by the voters and elected officials, and not by the courts (Gov. Brief, pp 2, 30), and that the courts should not attempt to "micromanage" stadium negotiations (Gov. Brief, p. 14) or second-guess the wisdom of lease negotiations (Gov. Brief, p. 17).

The government and the BUCs misconceive the very purpose of this judicial proceeding. Appellant Poe does not challenge the wisdom or the economic feasibility of the stadium project or the Stadium Agreement. The financial terms of the Stadium Agreement and the financing documents, as well as the project costs, are emphasized only to demonstrate the unconstitutionality of the entire project. Those documents, as well as the other evidence of record in this proceeding, clearly demonstrate the government's use of tax dollars and pledges of credit to aid a private entity. Appellant Poe is challenging the legality of the stadium project, and not its wisdom or economic

feasibility.[22] As acknowledged by the BUCs on page 5 of their Brief, one of the purposes of a bond validation proceeding (a purpose which the government's Brief declines to acknowledge) is to determine if the purpose of the bonds is legal. Poe contends, both in the bond validation proceeding and in his declaratory and injunctive relief complaint, that the stadium project is illegal.

Surely, the government and the BUCs are not suggesting that our judicial branch of government has no power or authority to judicially review legislative findings. Surely, those entities are not suggesting that the legality and validity (as opposed to the wisdom or the economic feasibility) of the acts of government may not be tested by applicable constitutional provisions. If so, this Court has ruled otherwise on numerous occasions.[23]

Legislative determinations of public purpose are not conclusive and are not binding upon the courts of this State.[24] Likewise, the actions of legislative bodies and elected officials may be constitutionally challenged and are subject to judicial review. Such is the nature and essence of our system of government. While legislative bodies are free to choose the means by which to carry out valid public purposes and proper governmental functions, they may do so only if the means

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[22] Interestingly, while the government and the BUCs assert that taxpayers and the judiciary may not inquire into the economics or wisdom of a project funded entirely and exclusively by tax dollars and a pledging of the government's credit, the government's entire case was based upon the alleged economic and intangible benefits accruing to the community from the presence of the BUCs.

[23] See, for example, State v. Escambia County, 52 So.2d 125 (Fla. 1951); Raney v City of Lakeland, 88 So.2d 148 (Fla. 1956).

[24] State v. Town of North Miami, 59 So.2d 779 (Fla. 1952); State v. Cotney, 104 So.2d 346, 349 (Fla. 1958); State v. Reedy Creek Imp. District, 216 So.2d 202 (Fla. 1968).

chosen do not run afoul of any specific constitutional prohibition.

Justice Shaw's characterization of the role of the courts as the ultimate "masters" of the constitutional meaning of such terms as "public purpose" in judicial proceedings is particularly enlightening and applicable in response to the arguments of the government and the BUCs in this proceeding. In his dissenting opinion in Northern Palm Beach County Water Control District v. State, 604 So.2d 440, 446-47 (Fla.1992), Justice Shaw observes:

> Simply designating a project "public" by legislative fiat does not necessarily make it so, especially where uncontroverted facts attest otherwise. A quote from Lewis Carroll makes the point:
>
> > "I don't know what you mean by 'glory,"' Alice said.
> >
> > Humpty Dumpty smiled contemptuously. "Of course you don't -- til I tell you. I meant 'there's a nice knock-down argument for you.!"'
> >
> > "But 'glory" doesn't mean 'a nice knock-down argument,"' Alice objected.
> >
> > "When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean -- neither more nor less."
> >
> > "The question is," said Alice, "whether you can make words mean so many different things."
> >
> > "The question is," said Humpty Dumpty, "which is to be master -- that's all."
>
> Lewis Carroll, Through the Looking Glass 113 (Dial Books for Young Readers, NAL Penguin, Inc. 1988) (1872). Under our constitutional system of government in Florida, courts, not legislators or water control districts, are the ultimate "masters" of the constitutional meaning of such terms as "public purpose" in judicial proceedings.

Appellant Poe acknowledges that legislative determinations of public purpose

are entitled to great weight and should only be overturned when they are so clearly and patently erroneous as to be beyond the power of the legislative body. The BUCs assert that the trial judge failed to apply that clearly erroneous standard to the legislative determinations of public purpose which were received into evidence in this proceeding. To the contrary, a review of the Final Judgment below clearly reveals that the trial judge recognized the limits of his authority to review legislative determinations of public purpose, and specifically found and concluded that "any finding by Plaintiffs [the County, the City and the TSA] that the Stadium Agreement serves a paramount public purpose was clearly erroneous . . . " (Poe App. A, page 10 at paragraph 12)

The trial court did not declare the State legislature's finding of a public purpose enunciated in Section 288.1162(7), Florida Statutes, to be clearly erroneous, and Appellant Poe does not urge such a declaration by this Court. As explained at page 35 of Appellant's Initial Brief, that statute contemplates a constitutional use of state funds by a unit of local government for the construction, reconstruction or renovation of a facility utilized by a professional sports franchise. It does not, on its face, authorize local government to enter into agreements with such a franchise that clearly violate Section 10, Article VII of the Florida Constitution. That statute, on its face, does not authorize local government to use its taxing power or lend its credit to aid a private business.

The government and the BUCs argue that the referendum conducted on September 3, 1996, legitimatizes the entire stadium project. That election resulted in the approval of a community investment tax for twelve different areas of

infrastructure spending, one of which was "a community stadium." As the trial judge correctly observed, it is impossible to know whether the voters cast their ballots based upon their feelings about a new stadium; the Stadium Agreement itself was never submitted to the voters; and, most importantly, "the Plaintiffs [the County, the City and the TSA] may not violate the Florida constitution whether or not they conduct a referendum." (Poe App. A, page 15, at paragraph 22) Appellant would add to that rationale the fact that the electorate may neither approve nor effectuate actions by their governmental leaders which are clearly unconstitutional.

III. THE UNDERLYING STADIUM AGREEMENT UPON WHICH THE STADIUM PROJECT IS BASED IS THE CRUX OF THIS CASE, AND AN "ABSURD" RESULT WILL NOT OBTAIN IF THIS COURT DECLARES THAT AGREEMENT TO BE IN VIOLATION OF THE FLORIDA CONSTITUTION.

Both the government (Gov. Brief, p. 25, footnote 30) and the BUCs (BUC Brief, pages 15-17) assert that an absurd rule of law will result if this Court fails to approve the construction of a stadium with tax monies not repayable with stadium revenues merely because local government has a preexisting lease with an existing professional sports franchise. These entities claim that it is fiscally prudent for local government to first secure a long-term lease agreement with a franchise as a tenant prior to issuing the bonds and constructing the stadium.[25]

Once again, the government and the BUCs miss the point. "A" preexisting lease agreement, by itself, is not what renders this project unconstitutional. Rather, it is the contents of the Stadium Agreement which render this project unconstitutional. What is "absurd" is the suggestion that this Court, upon a proper challenge, may not judicially review that Stadium Agreement for its constitutionality. When the preexisting lease agreement itself clearly demonstrates that the project serves a predominant private purpose, does not serve a paramount public purpose and will not be paid for by revenues derived from the project, the judicial branch of government, having all facts before it, must intervene to prohibit a violation of the Florida Constitution.

This Court cannot ignore the facts established upon the record of this

[25] Their contradictory arguments are again apparent. While asserting that the courts may not make inquiry into the economic wisdom of a project, they now ask this Court to consider the "fiscal prudence" of the instant project.

proceeding. The project for which the government proposes to use its taxing powers and pledge its credit is dictated solely by the demands of the BUCs to generate greater revenues. As clearly established, there is no other purpose for this project. The BUC's windfall will come from a new, publicly-financed and operated facility from which the BUCs will derive substantial revenues from the naming rights, the totality of revenues from its own events, the advertising rights, the merchandising rights, the concessions rights, the parking rights, the broadcasting rights, the Team Space, the club seats, club lounges and luxury suites, and still additional revenues from other events which take place at the "community" stadium. In addition, the BUCs will receive a separately located $12 million practice facility and the right to commercially develop the entire publicly-owned stadium property, save the footprint of the stadium itself, and retain all revenues derived therefrom.

In short, it is not the mere existence of the Stadium Agreement which renders the project unconstitutional. It is the contents of that Agreement, as well as the evidence of record which establish the purpose of that Agreement --to keep the BUCs at all costs. Mr. Poe does not contend that a preexisting lease with a major sports franchise is unlawful. Mr. Poe contends that this particular Stadium Agreement is violative of the Florida Constitution. The fiscal prudence of first securing a lease agreement is not questioned. It is the contents of the Stadium Agreement itself which is challenged in this proceeding, and such Agreement is clearly unconstitutional.

IV. THIS COURT MAY NOT CONDITIONALLY VALIDATE BONDS WHICH ARE CLEARLY IN VIOLATION OF THE FLORIDA CONSTITUTION.

While previously arguing that neither the trial court nor this Court may second-guess the business judgment of elected officials or micromanage the lease negotiations between the government and the BUCs, the government nevertheless urges this Court, in Point III of its Brief, to validate the bonds upon the condition that the underlying Stadium Agreement be revised so as to remove the provisions found offensive by this Court. In effect, the government urges this Court to rewrite the Stadium Agreement so as to render it constitutional.

Noteworthy is the fact that the BUCs, the other party to the Stadium Agreement, do not urge such a result and, instead, contend that the various provisions of an arms-length negotiated lease agreement are interdependent and may not be isolated and rewritten by the courts. The BUCs urge that the courts have no "line item veto" to renegotiate lease transactions. (BUC's Brief, pages 8 and 9) Indeed, the BUCs suggest that isolated provisions of the Agreement cannot be removed because "the parties might well have negotiated a different" correlated provision of the Agreement. (BUC's Brief, pages 12-13, footnote 5)[26]

It must be emphasized that this is not a contract case wherein the contracting

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[26] The assertions made by the BUCs in their footnote 5 further demonstrate that the removal of one clause from this lease creates ambiguity in the remaining clauses. The BUCs suggest that if the provision granting them the first $2 million of non-BUC event revenues is deleted, the BUCs are still entitled to the first $1 million of such revenues. That is not apparent from the Stadium Agreement itself which states that the 50/50 split of other-event revenues comes **after** the first $2 million in revenues from such non-BUC events. (XII, 41-42, at paragraph 10) Moreover, the BUCs assert that the trial court "did not find fault with the provision that allowed a 50/50 split of revenues" from non-BUC events. The trial court's Order denying rehearing makes no such statement. The removal of the offending $2 million provision requires the removal of the 50/50 split.

parties are before this Court seeking an interpretation, enforcement or cancellation of contract provisions. Indeed, the BUCs, appearing before this Court as amicus curiae, are not even bound by the decision of this Court. Premier Industries v. Mead, 595 So.2d 122, 125 (Fla. 1 st DCA 1992). This is a proceeding seeking to validate bonds to be issued by the government and, consolidated therewith, a proceeding seeking a declaration of the unconstitutionality of governmental actions and an injunction restraining such unconstitutional actions.

The government asserts that the unconstitutionality of the Stadium Agreement is not fatal to the validation of bonds which are issued solely to effectuate that Agreement. (Gov. Brief, page 31) If that were true, there would be no purpose whatsoever for a bond validation proceeding, which serves to test the legality of the purpose for which the bond proceeds are to be applied.

The government further asserts that "time is of the essence" because construction on the new stadium is underway "even as this Court considers its decision" (Gov. Brief, age 31), and that a final decision on the merits must be quickly reached due to "the amount of taxpayer dollars at stake." (Gov. Brief, page 32)[27] Mr. Poe agrees that the amount of taxpayer dollars at stake is immense. However, it is without dispute that the government began spending public monies for the

[27] Appellant Poe agrees that the legality and the amount of taxpayer dollars at stake in this proceeding are at issue, and indeed, are the very basis for this proceeding. However, it is suggested that neither the BUC's arrogance in demanding a publicly-financed workplace solely for the purpose of earning greater revenues, nor the government's arrogance in acceding to that demand and continuing construction in the face of both a challenge to that action and an Order from the Circuit Court that the project is unconstitutional, provide grounds for this Court to either approve an unconstitutional undertaking on the part of the government or to rewrite a lease agreement.

construction of the proposed new stadium when it knew Mr. Poe's challenge and request for an injunction was pending and long before it instituted a proceeding to validate the bonds. It continues the expenditure of public monies for construction even after the Circuit Court of Hillsborough County refused to validate the bonds and declared the project unconstitutional. The government does not come before this highest Court of Florida with any mantel of legitimacy. It comes before this Court having been found to be spending public money in violation of the Florida Constitution, and now seeks this Court's assistance in rewriting a contract by which they have agreed to unconstitutionally expend taxpayer dollars to build a stadium for the BUCs, a private entity. This Court should not indulge such arrogance.

There are either unconstitutional elements to the Stadium Agreement, and thus the stadium project and the proposed governmental financing therefor, or there are not. If this Court finds such unconstitutional elements, as Appellant Poe urges it must, the stadium Agreement fails and the bonds, based upon that total Agreement, can not be approved. The contracting parties -- the BUCs and the government, are then left to determine what new contract, if any, they wish to enter into.

It is well established by the law of this State that the courts, even in a contract proceeding where all parties are properly before it, will not undertake and, indeed, are not authorized to rewrite a contract of the parties.[28] Here, the BUCs were not and are not a party to these proceedings and, even it they were, this Court cannot

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[28] Home Development Company of St. Petersburg v. Bursani, 178 So.2d 113 (Fla. 1965); Emergency Associates of Tampa, P.A. v. Sassano, 664 So.2d 1000 (Fla. 2d DCA 1995); Newkirk Construction Corn. v. Gulf County, 366 So.2d 813 (Fla. 1st DCA 1979); Paddock v. Bay Concrete Industries, Inc., 154 So.2d 313 (Fla. 2d DCA 1963).

undertake to rewrite the Stadium Agreement. As acknowledged by the government itself, at the bottom of page 31 of its Brief, any change in the Stadium Agreement must come through renegotiation by the contracting parties. The government's reliance upon the case of Nohrr v.Brevard Countv Educational Facilities Authority, 247 So.2d 304 (Fla. 1971), is misplaced. There, this Court declared invalid and deleted a provision of the bond resolution adopted by the governmental entity which was before the court.[29] Such is in sharp contrast to the government's request to this Court to write a contract between the BUCs and the government which would, presumably, meet the test of constitutionality.

The government's attempt to seek this Court's assistance in departing from established principals of law, in shortcutting appropriate procedures, and in cutting off citizen rights with respect to governmental actions (all under the guise of the government's own notion of expediency and cost-effectiveness) is consistent with its prior unauthorized actions in this matter, but should not be tolerated or sanctioned by this Court. This Court should unconditionally declare the bonds and the underlying stadium project invalid and unconstitutional. If an injunction or restraining order is necessary to cause the cessation of the unlawful expenditure of public monies, this Court should take such action.

[29] The Nohrr Court did not, as erroneously represented by the government, strike an offending provision from a mortgage with a third party not before the Court.

V. THE TRIAL COURT'S EVIDENTIARY RULINGS CONSTITUTED ABUSES OF DISCRETION AND WERE CLEARLY ERRONEOUS.

The government asserts that Poe's objection to the opinion testimony of its witnesses "is comparable to suggesting that a person should not be allowed to use a computer to solve a complex mathematical problem unless he can explain the underlying mechanics of the computer." (Gov. Brief, p. 33) It is not Mr. Poe who misses the point with respect to the government's "expert" witnesses, as suggested on page 32 of the government's Brief. Poe contends that a person should not be allowed to use a model to solve a complex mathematical problem unless he can explain the underlying model. Here, we are not confronted with the mechanics of a machine. The mechanics of a computer were not the driving factor of the government's economic expert opinions. Here, third persons not appearing as witnesses supplied their opinions (a particular "multiplier") to the testifying witnesses in the form of software containing a model which was generated solely by those third out-of-court persons. The testifying witnesses (Dr. Shils, Mr. Barton and Dr. Hogan) could not have rendered their ultimate opinions without the use of the multipliers, were unable to explain their derivation and had no experience or expertise in developing their own multipliers. Further, the government's "experts" performed no independent evaluation or verification of the appropriateness of the multipliers selected by the out-of-court persons, yet utilized the multipliers as the sole basis for their ultimate opinions. In fact, the economic process of developing a mathematical model to derive a multiplier was not within the expertise of the testifying government's witnesses. The record citations to Dr. Shils', Mr. Barton's and Dr. Hogan's admissions of these facts is contained in Appellant's Initial Brief, at page 41.

Counsel for the government objected when it was prematurely conceived that Mr. Poe's witness was going to render opinions based upon out-of-court studies, and the trial judge sustained that objection. (VIII, 1092) Yet, the trial judge improperly allowed and relied upon the incompetent evidence from the government's witnesses based wholly upon the out-of-court opinions of others. The numerous cases and rules of evidence cited in Point II of Appellant's Initial Brief support this conclusion.

Contrary to the government's statement, Mr. Poe does not contend that the government must "prove their economic calculations with absolute precision." (Gov. Brief, p. 32) However, Mr. Poe does contend that the rules of evidence must be properly applied, and that a court must not base its decision upon incompetent testimony and evidence. The issue here is not the "credibility" of witnesses, as suggested by the government in its footnote 34. The issue is the "competency" of a witness to render an opinion. Also, the issue is not (as asserted on page 33 of the government's Brief) "whether the public officials had a reasonable basis to believe that there were substantial economic and other benefits to be derived from the project." The issue is whether the government has acted and continues to act in an unconstitutional manner, regardless of the basis for its beliefs.

The fact that the government's experts partially relied upon financial data introduced into evidence does not make their ultimate opinions admissible. Obviously, the financial data relied upon for multiplication by the multiplier is meaningless absent the multiplier, and it is the multiplier which taints and renders incompetent their testimony. Without the multiplier, these witnesses could render no opinion at all based upon the methodologies they chose to employ.

While the government's witnesses may have had expertise in the conduct of economic impact studies, they had no expertise in the development of the multipliers upon which their opinions were based. The government's statement, at footnote 36, that Poe's counsel did not object to Dr. Hogan's acceptance as an expert witness is totally misleading to this Court. Mr. Poe's counsel did indeed object to Dr. Hogan's opinion on the ground that it was based upon inappropriate hearsay. (VI, 947)

The government has not provided any meaningful basis for distinguishing the cases cited in Appellant's Initial Brief with regard to either the "expert" opinion testimony or the opinions rendered by lay witnesses which were offered on behalf of the government and upon which the trial judge relied. Accordingly, those cases will not again be discussed herein. The trial judge clearly abused his discretion in allowing incompetent testimony into the record of this proceeding and in relying upon such testimony in the factual and legal analysis which formed the basis for his Final Judgment.

Finally, except to distinguish the four cases cited by the government on page 36 to support the exclusion of Mr. Wurdeman's expert testimony, Appellant Poe refers to the arguments made and cases cited in his Initial Brief, at page 48 and 49, on this issue. In Ramirez v. State, 542 So.2d 352 (Fla. 1989), the issue was not the qualification of the witness as an expert, but the reliability of the testing methods which formed the basis of the witness's conclusions. Here, Mr. Wurdeman's qualifications were rejected and he was never permitted to render his opinions or the bases therefore. The case of Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980), makes no reference whatsoever to the admission or exclusion of expert testimony.

In Rodriguez v. State, 413 So.2d 1303 (Fla. 3d DCA 1982), the court approved the exclusion of testimony from an expert witness called to give testimony on the reliability of eyewitness identification by a child. The court determined that such an issue did not require any special knowledge or experience in order for the jury to form conclusions on that issue from the facts. That principle of law is not here applicable. And, lastly, in Consolidated Mutual Insurance Co. v. Hampton Shops, Inc., 332 So.2d 101 (Fla. 3d DCA 1976), the appellate court approved the trial court's refusal to allow an insurance adjuster specializing in fire and property damage, who admittedly was not an expert as to wood, to testify as an expert regarding damages to the insured's lumber and manufacturing plant.[30] Here, there was no admission that Mr. Wurdeman was not an expert in determining the costs of the proposed stadium project and the economic benefits to be received by the BUCs over the term of the Stadium Agreement. The bases for his opinions on those matters were already in the record of this proceeding and his expertise in the areas of financial analysis and planning were clearly established. The trial court abused its discretion in excluding Mr. Wurdeman's testimony. This Court should consider the proffered testimony of Mr. Wurdeman, as set forth in Volume X, pages 1533-39 of the transcript and summarized at page 49, footnote 38 of Appellant's Initial Brief.

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[30] While the Consolidated Mutual case is not applicable to the testimony of Mr. Wurdeman, it does support Appellant's argument with respect to the testimony from Dr. Shils, Mr. Barton and Dr. Hogan, each of whom admitted he was not an expert in the development of multipliers.

CONCLUSION

Appellant Poe reiterates the Conclusion set forth in his Initial Brief. Further, Appellant contends that this Court may not conditionally approve the validation of bonds or the Stadium Agreement. Instead, this Court should declare the proposed stadium project, as evidenced by the totality of the project documents, to be in violation of the Florida Constitution and should prohibit the three governmental entities from continuing to spend public tax dollars and pledge their credit to effectuate that illegal project.

Respectfully submitted this 5th day of May, 1997.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the foregoing have been furnished by Hand Delivery to Mr. Sid J. White, Clerk of the Supreme Court, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida, 32399-1925; and a true and correct copy of the foregoing has been furnished by Facsimile and U. S. Mail to Emeline C. Acton, Esquire, and Christine M. Beck, Esquire, County Attorney's Office, 601 E. Kennedy Boulevard, Tampa, Florida, 33602; James Palermo, Esquire, and Jerry Gewirtz, Esquire, City Attorney's Office, City Hall, 6th Floor, 315 E. Kennedy Boulevard, Tampa, Florida, 33602-521 1; Donald Griffin, Esquire, and John Van Voris, Esquire, Shackleford, Farrior, Stallings & Evans, 501 E. Kennedy Boulevard, 17th Floor, Tampa, Florida, 33602; J. Michael Hayes, General Counsel, State Attorney's Office, Thirteenth Judicial Circuit, 5th Floor, County Courthouse Annex, Tampa, Florida, 33602; Raymond Ehrlich, Esquire, Steven L. Brannock, Esquire, Henry M. Morgan, Jr., Esquire, Holland & Knight, 400 North Ashley Drive, Tampa, Florida, 33602, in c/o Susan L. Turner, Esquire, Holland & Knight, 315 South Calhoun Street, Tallahassee, Florida, 32301; and Benjamin H. Hill, Ill, Esquire, Dennis P. Waggoner, Esquire, and Gregory P. Brown, Esquire, Hill, Ward & Henderson, Suite 3700 - Barnett Plaza, 101 E. Kennedy Boulevard, Tampa, Florida, 33602, this 5th day of May, 1997.

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