SUPREME COURT OF FLORIDA

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

Appellant/Cross-Appellaa,

vs. CASE NO. 90,223

HILLSBOROUGH COUNTY, etc., et al.,

Appellees/Cross-Appellants.

INITIAL 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

Throughout this Initial Brief, Appellant/Cross-appellee William F. ("Bill") Poe, Sr. will be referred to as "Poe." Appellees/Cross-appellants Hillsborough County, the City of Tampa and the Tampa Sports Authority will be referred to, respectively, as the "County," the "City" and the "TSA," or, collectively, as the "governmental agencies" or the "government."

Upon agreement of all parties to this appeal, and in addition to the Appendix filed with their respective briefs, the parties have filed a Joint Appendix with this Court. The first ten (10) Volumes of that Joint Appendix consist of the trial transcript (Volumes I through X) and the transcript of the hearing on the government's Motion for Rehearing (Volume X, Tab A). The remaining six Volumes of the Joint Appendix contain the exhibits received into evidence at the trial, the Final Judgment and the Order denying the Motion for Rehearing. References to the trial transcript contained within the Joint Appendix will be by Volume number, page number and witness's name (i.e., II, 6, Jones). References to the exhibits will be by Volume number, tab number and page number (i.e., XII, 8, 6). References to Poe's Appendix will be designated as "Poe App.," followed by the tab number and the page number (i.e., Poe App., A, 6).

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STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

This appeal is from the Final Judgment rendered on March 21, 1997, by the Circuit Court of the Thirteenth Judicial Circuit in and for Hillsborough County, Florida, Judge Sam D. Pendino (Poe App. A), and the Order on Plaintiffs' Motion for Rehearing rendered on March 27, 1997 (Poe App. B). This Court has jurisdiction pursuant to Article V, Sections 3(b)(2) and (7) of the Florida Constitution. See also Rowe v. Pinellas Sports Authority, 461 So.2d 72, 74 (Fla. 1984).

These consolidated proceedings began on September 27, 1996, with the filing of Mr. Poe's Complaint for Declaratory Judgment and Permanent Injunction, as amended on January 30, 1997 (Poe App. C). That Complaint sought a declaration that the actions of the County, the City and the TSA with regard to incurring debts, using the taxing power and pledging public credit for the construction and operation of the proposed new Tampa stadium project, as envisioned by various project documents and interlocal agreements, violate Article VII, Section IO of the Florida Constitution. The Complaint further sought an Order permanently enjoining and restraining the governmental agencies from unconstitutionally incurring debts, pledging tax monies and credit and expending public funds for the construction and operation of the new Tampa stadium project. On December 26, 1996, the TSA, the County and the City filed a Complaint seeking to validate a series of revenue bond issues in the total principal amount of $204.5 million for the construction and equipping of a new stadium, the acquisition and construction of a practice facility and the demolition of the existing stadium. Upon agreement of all parties, the two complaints were consolidated for trial and appellate proceedings. The consolidated trial commenced on March 3, 1997, and continued on

March 4, 5, 7 and 12, 1997.

The existing Tampa stadium (renamed "Houlihan's" in 1995) presently hosts approximately 40 major events per year, including ten home games of the Tampa Bay Buccaneers ("BUCs"), a National Football League ("NFL") franchise. (IV, 544, Saavedra) It has been used by the BUCs since 1976 (III, 367, McKay), and it has been the host for Super Bowls in 1984 and 1991. The existing stadium contains 74,000 seats, including approximately 960 seats located within luxury suites or sky boxes. (Ill, 424, McKay) Thirty-six of those luxury suites, containing 576 luxury seats, were added to the stadium in 1981, and were paid for entirely by the BUCs through an industrial development bond guaranteed by the Culverhouse family. (IV, 551-52, Saavedra) The existing stadium is encumbered with over $11 million in outstanding bonded debt for which the governmental agencies are responsible,[1] and its worth is at least $80 million. (IV, 615-18, Saavedra) The cost of operating and maintaining the existing stadium is approximately $3 million to $3.5 million per year. (IV, 557, Saavedra) From 1990 through 1994, the TSA had an operating surplus at the end of each year. Due to the current agreement with the BUCs, the TSA will have an operating deficit. (IV, 614, Saavedra) It is estimated that the cost to demolish the existing stadium will be $4 million. (IV, 620, Saavedra)

Current users of the existing stadium, in addition to the BUCs, include the Tampa Bay Mutiny (a professional soccer team), the Outback Bowl, the Florida Classic,

[1] If the BUCs were to leave Tampa prior to the year 2000, the BUCs would be responsible for the repayment of that $11 million debt outstanding on the bonds. (Ill, 372, McKay)

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the new University of South Florida football team (commencing with the 1997 season), one or two tractor pulls and motor sport events, equestrian events and various other single event users, such as concerts. (IV, 543-44, Saavedra) All the events which are anticipated to occur in the proposed new stadium' are presently taking place in the existing stadium. Unlike the other current users of the existing stadium, the BUCs pay no rent for 1996, 1997 or until such time as they play in the proposed new stadium. (III, 430, McKay) No current or intended user of the existing stadium, other than the BUCs, expressed a need for the construction of a new stadium[3] and, in fact, a new stadium is not needed for other events. (I, 67-8, 75-6, Greco; V, 714, Kleman; IV, 262-66, Saavedra)

BUC season ticket prices at the existing stadium are between $234 and $432 for regular seats (or $23 to $43 per game) and between $35,000 and $55,000 for a luxury suite. The BUCs currently make $6 million or $7 million a year from the sale of luxury suites and from concessions and parking at the existing stadium. (III, 413-14, McKay) In the proposed new stadium, there will be an increase in the regular seat ticket price and the luxury suites will cost between $65,000 and $85,000 per season. In addition, 12,000 of the formerly regular seats will be converted to club seats at the proposed new stadium, and those club seats will be priced at between $950 and $2450 per season (or $95 to $245 per game). (III, 419-426, McKay) From the club and luxury seats in the proposed new stadium alone, the BUCs will earn $15 million to $23 million

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[2] Indeed, the new Stadium Agreement with the BUCs encourages the use of the new facility by other users in that the BUCs "have a piece of the action." (IV, 544, Saavedra)

[3] While there was evidence that the Tampa Bay Mutiny expressed a desire for a wider field for soccer, the evidence established that such could be accomplished at the existing stadium at an estimated cost of $190,000. (III, 456, Bryant)

in revenues. (IV, 569, Saavedra; III, 416, McKay) The BUCs projected that if the new stadium were not completed by their 1997-98 NFL season, they would forego $25 million in lost revenue opportunity. (Ill, 418, McKay)

The existing stadium, built in 1967, is in need of some repairs and renovations. In order to have a structurally sound, functional and safe facility and to extend its useful life for another 30 years, the cost of such renovations will be approximately $52 million. (Xl, 9; III, 439, 457, Bryant; III, 476, Schwanaveck) However, the existing stadium is not unsafe for patrons or users, is currently being used and will continue to be used in its present condition for several years. No evidence was presented that the existing stadium constitutes any present danger to the health, safety or welfare of the public or that the needed repairs could not be accomplished over a period of time. Likewise, no evidence was presented that the three forms of taxation intended to be utilized in the current bond validation proceeding (the infrastructure surtax or the community investment tax, the tourist development tax and/or the state sales tax rebate) could not be utilized to pay for the cost of repairs to the existing stadium. If the improvements identified in the 30-year serviceability report were made, the existing stadium can be properly maintained for the next 30 years for about $455,000 a year. (Ill, 463, Bryant)

In mid-l 995, the BUCs team was purchased for $192+ million by an entity or entities owned or controlled by an individual named Malcolm Glazer. (I, 48, Greco) Immediately after that acquisition, the new owner informed the TSA and the community that a new stadium was necessary to enable the owner to generate higher profits. (Ill, 370, McKay) Mr. Glazer required additional revenue in order to pay off the acquisition

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debt and to recoup his investment for his purchase of the team.[4] (I, 66-7, 69, Greco; III, 410, 412, McKay) The new owner further informed the TSA and the community that if his demand for a new stadium were not met, the team would be moved to another city. The evidence established that if a new stadium were constructed, the BUCs would generate, from club and luxury seats alone, from $8 million to $16 million in additional annual revenues beyond the total revenues which they presently generate in the existing stadium. That amount does not include other revenues they will earn as a result of the terms of the Stadium Agreement. (IV, 568-69, Saavedra; III, 413-17, McKay) By adding other revenues payable to the BUCs under the Stadium Agreement, the BUCs will receive total revenues from the new stadium in excess of $40 million per season (IV, 629, Saavedra), or $1.2 **billion** before inflation over the initial 30-year term of the lease.

The BUC's demands were predicated upon their assertion that they were losing money in the existing stadium and needed to earn higher revenue levels to remain competitive. During negotiations with the new owner of the BUCs, neither the TSA, the County, the City nor other community leaders made inquiry into the financial condition of the BUCs, nor did they make inquiry as to whether the BUCs were making a profit from the existing stadium. (I, 67-8, 75-6, Greco; V, 676, 717, Kleman; IV, 567-68, Saavedra; II, 256-57, Wilson) Neither the TSA, the County nor the City had any evidence that other binding offers were made to the BUCs for relocation to another city, nor did they inquire as to the terms of any potential offers. (V, 703-04, 719, Kleman) Indeed, the evidence establishes that one of the two alleged relocation proposals, neither

[4] When asked why the BUCs would not build their own stadium in order to generate greater revenues, Mayor Greco replied: "I wouldn't build one either. Would you if there is some city willing to build it for you? Why would you do that?" (I, 68, lines 13-15)

of which constituted binding contractual offerings, was not available to the BUCs after November of 1995, and that neither proposal was as favorable to the BUCs as the Stadium Agreement entered into by the BUCs in Tampa. (VII, 1094-95, 1102-1112, Zimbalist; X, 8) In addition, if the BUCs were to leave Tampa, they would have had to pay a relocation fee to the NFL ($29 million), a fee to the Culverhouse estate (approximately $15 million), $1 1 million for the repayment of the existing stadium bond indebtedness, moving costs and they would not be entitled to share any expansion revenue if an expansion team replaced them in Tampa. (VII, 1107-1 1, Zimbalist; III, 372, McKay) In fact, the BUCs never submitted a relocation application to the NFL, which requires approval by 3/4 of the member teams, and the NFL preferred that the BUCs remain in Tampa. (VI, 841-42, Goodell)

Without knowledge as to the financial condition of the BUCs and without knowledge as to whether there were real and existing incentives for the BUCs to leave Tampa and relocate to another city, the governmental officials nevertheless believed that they must do and, in fact, did "everything in our power" to keep the BUCs in Tampa. (I, 35, Greco) The immediate past-Chairman of the Greater Tampa Chamber of Commerce was aware of no similar offer by local government (the expenditure of over $400 million in public monies) to keep a business in Tampa. (II, 256, Wilson)

During the stadium lease negotiations in 1995, the TSA conveyed to the BUCs, without consideration, the naming rights of the existing Tampa stadium. The exercise of those rights, resulting in a change in the name of the Tampa Stadium to "Houlihan's," have an economic value to the BUCs of between $500,000 and $2 million per year. (III, 401, McKay) As discussed below, the BUCs were later granted the naming rights to the

proposed new stadium and premises.

In order to meet the economic demands of the BUCs, who threatened to move to another city, the TSA, the County and the City agreed in April of 1996 to demolish the existing 74,000-seat stadium; to construct and equip a new 65,000-seat stadium containing 12,000 club seats, club lounges and 100 luxury suites for an estimated construction cost of $168.5 million; to continue the BUC's exclusive naming rights to the new stadium; to contribute $12 million for the acquisition and development of a new practice field for the exclusive use of the BUCs and at a design and location to be determined by the BUCs; and to grant the BUCs commercial development rights to an approximately 35-acre parcel of public property located upon the stadium premises. The reason for building a new stadium was to enable the BUCs to earn more revenues so that they would remain in Tampa. (I, 48, Greco) The focal point of the stadium design was to satisfy the BUCs. (IV, 516, Boyle) The BUC's primary concern was luxury boxes, club seating and lounges and other fan amenities (IV, 518, Boyle), from which they could earn greater revenues.

In May of 1996, the Greater Tampa Chamber of Commerce commissioned a poll of Hillsborough County voters to determine whether a stadium-only tax would be approved by the voters of Hillsborough County. The result of that poll was that if a stadium-only tax were placed upon the ballot, it would be defeated by a margin of two (2) to one (I). (II, 257-59, Wilson; V, 714, Kleman)

On July 10, 1996, the Hillsborough County Board of County Commissioners passed an Ordinance levying a one-half cent local government infrastructure surtax for a period of 30 years "to acquire infrastructure for general government purposes, public

education, and public safety." (XIV, 19, 2 and 3) As required by law for the passage of an infrastructure surtax,[5] the Ordinance provided for a referendum. The purpose of the half-cent sales tax, as presented to the electorate, was

> to finance infrastructure for jails, police and Sheriffs equipment, fire stations, emergency vehicles, school construction, a community stadium, transportation improvements, libraries, parks, trails, stormwater improvements and public facilities. (XIV, 19, 5)

The referendum was approved on September 3, 1996, by a vote of 52.8 percent. (XIV, 20)

Hillsborough County, the Cities of Tampa, Plant City, and Temple Terrace, and the Hillsborough County School Board entered into an Interlocal Agreement for Distribution of Community Investment Tax Revenue. That Agreement provided that the net proceeds from the local option infrastructure surtax during the 30-year duration of the tax would be distributed as follows: the School Board would receive 25% of the net proceeds each year; $318 million of the proceeds would be disbursed for construction of a new Tampa stadium (with that amount subject to change should there be a significant change in the debt service costs for the new stadium) and any remaining proceeds would be distributed among the county and municipalities pursuant to the distribution formulae in Section 218.62, Florida Statutes. (XIV, 28, 2)

On August 28, 1996, the TSA and the BUCs, with the approval of the County and the City, entered into a Stadium Agreement, a Stadium Parcel Development Agreement and a Practice Area Development and Lease Agreement. (XII) In relevant

[5] Section 212.055(2), Florida Statutes.

part, these Agreements provide as follows:[6]

A. The TSA agreed to construct, at its sole expense, a new 65,000 seat, expandable capacity football stadium with 12,000 club seats and 100 luxury suites, at an estimated cost of construction of $168,561,522, with the TSA responsible for all costs over and above that estimate.[7] (1, 70) The Recitals to the Stadium Agreement acknowledge that the TSA agreed to construct the new stadium as an inducement to the ownership to continue to operate an NFL franchise in Hillsborough County. (1) The BUCs have the sole and exclusive right of final approval of the design and construction of the new stadium. (73-78; III, 427, McKay) The BUCs also have the right to choose all graphics, signs, color schemes, including seat colors, and the like in and around the stadium and on the premises, as well as to select the uniforms to be worn by working personnel at the stadium for all events. (65-66)

B. The BUCs retain 100% of all revenues of any kind derived from BUC NFL games and BUC events at the new stadium. With regard to all other non-BUC stadium events, the BUCs receive (in addition to all revenues from advertising rights, naming rights, fees for sublease of luxury suites and the merchandising of goods within the Team Space), the first $2 million of revenues, net of direct operating costs, received by the TSA in the form of rent, license or other fees, ticket sales and other admission charges, parking, concessions, broadcasting and merchandising and any other revenues,

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[6] Except as noted otherwise, all citations in subparagraphs A - P are to the page number of the Stadium Agreement and its Exhibits, as contained within Volume XII of the Joint Appendix.

[7] At the time of the trial in this matter, no guaranteed maximum price had been established for the new stadium. (IV, 609-10, Saavedra) The engineering firm responsible for the design of the new stadium does not know whether the stadium can be constructed for $168.5 million. (IV, 518-19, Boyle)

plus 50% of all such revenues in excess of $2 million, less sales taxes, surcharges and direct costs. All such revenues are payable to the BUCs within 30 days after the stadium event. (35, 41-43) The $2 million amount which the BUCs receive from other stadium events is increased if the number of parking spaces available on the stadium premises are decreased. (86)

C. The BUCs pay no rental or fees of any kind for the right to use the existing stadium from August 1, 1996, until the exhibition of the BUC's first game at the new stadium, a period that will span for at least the 1996-97 and 1997-98 NFL season. (13) During that period, the BUCs continue to receive 27.5% of the revenues from all other non-BUC stadium events. (IV, 568, Saavedra)

D. The BUCs have the sole and exclusive right to exercise the naming rights of the new stadium and premises and to receive and retain all monies or other consideration for the exercise or sale of such rights. (29)

E. The BUCs have the sole and exclusive right to choose and sell all food, beverages and other concessions within the stadium or elsewhere within the premises for all stadium events, and to retain all up-front payments from exclusive concessionaires. The TSA has no rights of approval with regard to the items to be sold, the prices to be charged or the concessionaire(s) selected. The TSA has no right to offer any food or beverage items for sale at any stadium event. (24-25)

F. The BUCs have the sole and exclusive right to undertake any and all advertising or marketing of any kind on the stadium premises at all times, and to retain all compensation received therefrom, subject only to the TSA's right to grant sponsorship rights to other stadium users during other stadium events. However, such sponsorships

of other stadium events may not be awarded to businesses which conflict or compete with the business holding the BUC's naming rights. (18-24)

G. The BUCs have the sole and exclusive right to sublease all luxury suites upon their own terms and to retain all revenues derived therefrom for all stadium events, less the admission ticket price for other stadium events. (31-32)

H. The BUCs have the exclusive right to use and control the scoreboards, video screens, matrix boards, message boards and all similar items for all stadium events. The TSA pays for the operational costs during non-BUC events. (34)

I. The TSA must make available as parking for any stadium event not less than 9,900 parking spaces, with 300 free spaces to the BUCs at all times. Revenues from parking are distributed in accordance with subparagraph B above. (26-27)

J. The BUCs have the sole and exclusive use, at all times, of the new stadium Team Space, comprised of a ticket office with 6 windows, two stores to be used as a retail shopping area for retail sales (with all revenues therefrom to be retained by the BUCs), a studio for the production of television and/or radio broadcasts of stadium events or other productions, and storage areas. (11, 12, 31)

K. With the exception of the Team Space and the provision of cable television and telephone services in the luxury suites, the TSA is **solely** responsible for all operation and maintenance of the new stadium and parking facility, and the costs associated therewith, as well as the funding and performance of all capital repairs. (40-49) In addition, the TSA must establish and maintain a capital improvement fund so that a total of $2.5 million is on deposit by the year 2007. Thereafter, the TSA must make deposits of $750,000 per year until an aggregate of $15 million in deposits have been

made. (50-51)

L. At their own expense, the BUCs may alter the new stadium to expand the number of luxury suites to 162 and may reconfigure the club lounge without any increase in rent or responsibility for increased operating and maintenance costs. (40)

M. The BUCs have the exclusive right to develop for private commercial use the adjoining 35-acre parcel of publicly-owned property on the stadium premises and to retain all revenues or payments of any kind arising from the transaction of any private business within the development area. For example, the BUCs may construct a multi-story parking deck(s) on said property, and may construct within or above such parking deck(s) retail shops, restaurants, offices and other private, for-profit commercial facilities. The BUCs have full control of the operation of the development area and all improvements constructed thereon. (29; Stadium Parcel Development Agreement, Ex. B) If the BUCs deem it necessary to obtain land use, zoning or site plan approval or any permit, the TSA must execute such documents or join in such a request. (Stadium Parcel Development Agreement, Ex. B, 9-10)

N. The TSA must contribute up to $12 million for the acquisition of real property at a site chosen by the BUCs and for the design, planning, construction and outfitting of a practice and training facility for the BUCs. The BUCs have the exclusive right to use that facility for practice, training, administrative offices and other commercial uses, and any revenues derived therefrom belong to the BUCs. (29-30; Practice Area Development and Lease Agreement, Ex. E)

0. Assuming the new stadium is completed for BUC home games in the 1998-99 NFL season, the BUCs make rental payments in arrears in the form of one annual

lump sum payment of a fixed amount of $3.5 million on January 31, 1999, and on January 31st of each year thereafter for a period of 30 years. That fixed $3.5 million payment is allocated as $2 million for stadium rent, $1 million for practice area rent and $500,000 as compensation for the development rights, and is not increased over the life of the Stadium Agreement to account for inflation. If the BUCs elect not to lease the practice area or not to exercise their development rights, the stadium rent remains at $3.5 million. If construction is not completed in time for home games in the BUC/NFL 1998 season, the BUC's rent is reduced by $437,500 for each game not played in the new stadium. If the stadium is not completed by January 31, 1999, the BUCs may defer payment of $1 million of its $3.5 million rent until January 31, 2028. Two similar $1 million deferrals occur if the stadium is not completed by February 28, 1999 and by March 31, 1999. (13-15)

P. At their sole discretion, the BUCs have the right to renew the 30-year Stadium Agreement for four, five-year renewal periods. After the initial 30-year period, the BUC's rent increases to a fixed annual fee of $7 million for each of the 20-years of renewal.[8] (89)

As a result of the Stadium Agreement, the TSA will incur an immediate operating and maintenance ("O & M") deficit of approximately $2 million per year, increasing each year by the rate of inflation. Due to the fan amenities insisted upon by the BUCs, primarily the air-conditioned club seat lounges, the new stadium will have 0

[8] The present value of a $7 million lease payment, 30 years hence, is only $1.6 million annually, The government has, accordingly, committed itself to charging the BUCs lower and lower rent every year of the 50-year Stadium Agreement. (Poe App. D; IV, 601, Saavedra)

& M costs of approximately $5.4 million per year, increasing each year by the rate of inflation. (IV, 557, Saavedra) The $2-$2.5 million additional expense for 0 & M of the new stadium, over and beyond the 0 & M costs of the existing stadium, is caused almost entirely by the BUC's demands for club seats and lounges, from which the BUCs, and not the TSA, will derive additional revenues. (IV, 558-59, Saavedra) While the government pays to construct and operate the club seat areas, and pays 0 & M costs therefor of over $2 million per year before inflation, the government will realize no profit nor share any revenues therefrom. (IV, 560, Saavedra) The two club seat lounges will be large carpeted, air-conditioned areas (large enough to accommodate 6,000 people on each side of the stadium), with a nicer variety of concessions, waiters and video walls. (IV, 594-96, Saavedra) Members of the public purchasing regular seats (non-club seats and non-lounge suite seats) will not be allowed to enter the club lounge areas. (IV, 596, Saavedra) The sole reason the club seat areas are included in the new stadium is so that the BUCs will generate greater revenues and remain in Tampa. (IV, 559, Saavedra)

Subsequent to the execution of the August 28, 1996 Stadium Agreement, the TSA sold to the Hillsborough County Aviation Authority ("HCAA"), another governmental entity, approximately one-half of the stadium property for $19 million. In return, the TSA will pay the HCAA $150,000 per year, adjusted by the Consumer Price Index, (or at least $4.5 million over a 30-year period) for parking privileges upon that land which it formerly possessed. (IV, 593, Saavedra) Construction of the new Tampa stadium began in October, 1996, and the TSA is currently utilizing $9 million of the $19 million received from the HCAA to finance those construction efforts. The TSA initially planned to use

the remaining $10 million as an 0 & M reserve for the deficits it would incur in the new stadium. However, $3.5 million of that remaining $10 million will be needed to pay the 0 & M deficits for the existing stadium created by the current agreement which charges the BUCs no rent. The remaining $6.5 million will be placed in a reserve fund to pay for 0 & M deficits in the new stadium. The TSA does not expect to earn any revenues from the new stadium for at least three years, and possibly five years. Even after that period of time, the BUC's rental payments, ticket surcharges and the TSA revenues from other stadium events will not be sufficient to offset the costs of 0 & M at the new stadium. (IV, 575-76, Saavedra)

Over the 30-year period of the Stadium Agreement, and utilizing an inflation rate of only 3%, there will be a deficit in 0 & M expenses of at least $24 million. (IV, 584-88, Saavedra; XVI, 2, Poe App. D) That amount does not take into consideration the $3.5 million of the $10 million reserve fund which will have previously been spent for 0 & M deficits in the existing stadium. (IV, 588-90, Saavedra) In addition, based upon an analysis of inflation rates over the past 30 years, a more appropriate inflation factor for 0 & M expenses over the next 30-year period is 5.4%. (IX, 1321-22, Baade) A 5.4% inflation factor results in an 80% greater 0 & M deficit for the proposed new stadium. (IX, 1324, Baade) Due to the terms of the Stadium Agreement with the BUCs, the TSA will not derive from operation of the new stadium sufficient revenues to pay the 0 & M costs of the new stadium (IV, 574-75, Saavedra), and will lose money every year, which loss must be made up by the County and the City with public funds. The BUCs, on the other hand, who pay a fixed rent not based upon inflation, will derive from the new stadium greater than $40 million in revenue annually, or $1.2 **billion** before inflation, over the

initial 30-year term of the Stadium Agreement. (IV, 629, Saavedra)

While the BUCs pay a fixed rent for each year of their lease,[9] the 0 & M costs of the stadium will increase due to inflation, and the 0 & M deficit will be in the "tens of millions" of dollars. (IV, 580-81, Saavedra) Other users of the stadium, unlike the BUCs, will pay higher rental or license fees throughout the years due to inflation, and the BUCs will receive the first $2 million from such other user fees, as well as 50% beyond the first $2 million. (IV, 629, Saavedra)[10]

Although public officials did not know, and made no prior inquiry to establish, the value of the development rights awarded to the BUCs (V, 721-12, Kleman), the development rights are worth at least $2 million, based solely upon land values. (VI, 856, Pallardy) That $2 million does not include the amount of revenues the BUCs can generate by developing the publicly-owned property and operating it for private commercial use, or by assigning such rights to other private entities. (VI, 865, Pallardy) The parcel upon which the BUCs are granted development rights (basically, the entire TSA parcel not covered by the new stadium footprint) is zoned for any type of commercial or retail development and is described by the government's appraiser as the best location in Hillsborough County for commercial and retail development. (VI, 882, Pallardy) Mr. Pallardy opined that anyone who developed property in that location would be able to make a significant return on the development. (VI, 882),

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[9] The TSA admitted that a fixed rental payment over 30 years is not a normal lease arrangement. (IV, 577, Saavedra)

[10] When asked why the TSA, a governmental entity, treats the BUCs differently than other users of the stadium, the answer was "that that was the best deal that could be done by our governmental leaders in order to maintain an NFL team in our city." (IV, 629, Saavedra)

The existing stadium contains 74,000 seats, which includes 73,040 regular-priced seats. The proposed new stadium will contain 65,000 seats, with only 51,400 regular-priced seats. The remaining 13,600 seats will be club and luxury seats." (IV, 555, Saavedra) According to NFL standards for a Super Bowl, the TSA will be required, at its sole expense,[12] to add to the new stadium 5,000 additional temporary seats, which would not be required at the existing stadium if a Super Bowl is played there, (V, 762-65, Clark)

In order to pay for all or a portion of the cost of the acquisition, construction and equipping of the new stadium and related facilities and improvements, including the practice facility and the demolition of the existing stadium, the TSA proposes to issue bonds in the principal amount of $204.5 million.[13] (IV, 530, Saavedra; XIII, 14) Interest costs will be greater than the principal amount of the bonds, approximately $212-220 million (IX, 1326, Baade), and with reserve funds and issuance costs, the total amount of the bond indebtedness will be far in excess of $400 million. (IV, 612, Saavedra) The bonds are guaranteed solely by the taxing power of the County and the State, through local infrastructure, tourist development and Florida sales taxes. Revenues generated from the proposed new stadium will **not** be utilized to guarantee or pay-off the bonds.

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[11] City Mayor Greco believed it was in the public interest to reduce the number of regular-priced seats by over 21,000 in order to keep the BUCs in Tampa. (I, 59, Greco)

[12] It is estimated that the cost will be $400,000 to $1 million. (V, 763, Clark)

[13] It was admitted that the actual project cost, assuming that the estimated construction cost of the new stadium does not exceed $168.5 million, will be $208 million, not including interest costs associated with the bonds. That amount includes new stadium costs, demolition costs, the $12 million practice facility, a $13 million debt service reserve fund, bond issuance costs and a $9-10 million equity contribution derived from the sale of stadium property to the HCAA. (IV, 541-42, Saavedra)

The BUCs pay no part of the costs or bonds associated with the construction of the new stadium, and their rental payments will be used solely to reduce, but not pay for, the costs of 0 & M. (IV, 552-53, Saavedra; XII, 70) In addition to the $400+ million for the bonds, the TSA must, pursuant to the Stadium Agreement, provide $15 million for the stadium capital improvement fund. That $15 million will also be funded with public tax monies. (IV, 612-13, Saavedra)

The County is obligated to pay to the TSA two-thirds (2/3) of any budgetary shortfalls of the TSA related to the financing of the new stadium project and the operation and maintenance thereof. The City is likewise obligated to pay to the TSA one-third (1/3) of all such budgetary shortfalls of the TSA. (IV, 591, Saavedra; XIII, 13)

Expert economists offered their opinions regarding the economic benefits and costs associated with having an NFL franchise team in the community. Lay and expert witnesses alike agreed that there are other private businesses located in the Tampa Bay area which have much larger revenues, a greater number of employees and a greater direct economic impact upon the community than the BUCs, and that the BUCs constitute only a small to medium-sized business, compared to other private businesses in the area. (I, 62, 75-78, Greco; II, 252, 257, Wilson; IX, 1325, Baade; II, 221, Shils)[14] Indeed, the BUCs represent only .00027% (or twenty-seven/ten thousandths) of the effective buying income in the Tampa Bay area. (VII, 1076-77; Zimbalist)

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[14] The government's expert witness acknowledged that his methodology for predicting the economic impact of the BUCs would be applicable to all businesses and economic activity in an area, and that a large existing wholesale food business located in Tampa would have an economic impact in the community of about $17.3 billion over a 30-year period, a much larger impact than the BUCs. (II, 214-21, Shils)

A 30-year retrospective analysis of objective statistical data concerning the economic impact in all cities with professional sport teams, including the City of Tampa, reveals that the presence of a professional sports team had no statistically significant impact upon those metropolitan or regional economies. (IX, 1311-14; Baade; VII, 1073, Zimbalist) A more recent time series regression analysis of such data demonstrates that there has been no measurable or appreciable difference in personal income, personal income per capita, the number of jobs, wages or salaries since the BUCs came to Tampa in 1976. (VIII, 1184-85, Porter) Expert testimony demonstrates that professional sports realigns leisure activity spending within a community rather than adding to it. (IX, 1316-17, Baade) Most spending which occurs in a ball park is spending that would have occurred in the community on other leisure activities had there been no game. (VII, 1079-80, Zimbalist)

An analysis of objective statistical data recording sales tax transactions for Hillsborough County also demonstrates that the 1984 and 1991 Super Bowls held in Tampa had no discernible or measurable impact upon the local economy. (VII, 1186-88, Porter) Indeed, hotel occupancy rates during the January 1991 Super Bowl were lower than occupancy rates in the months of January of the years immediately before and after that Super Bowl event. (V, 778-79, Clark) It was admitted that Super Bowls do not effect the January monthly hotel occupancy rates in Hillsborough County. (V, 781, Clark)

Each of the government's witnesses who testified regarding the economic impact of the BUCs in Tampa, the economic impact of a Super Bowl and the economic impact of new stadium construction rendered subjective opinions based upon methodologies which utilized a "multiplier" to reach their ultimate conclusions. In each

instance, the multiplier was supplied by an unknown third person not called as a witness in this proceeding, and none of the government's witnesses were able to explain how the multiplier was derived. (I, 103, 110, 193-94, Shils; II, 284, 309, 313-21, Barton; VI, 932-35, 946-47, Hogan) Neither Dr. Shils, Mr. Barton nor Dr. Hogan have any expertise in the manner of choosing an appropriate multiplier for the purpose of analyzing the economic impact of a professional sports team or a Super Bowl in the community, nor do those witnesses have experience or expertise in writing the mathematical models which produce the multipliers utilized by them or in calculating the model results. (I, 197,201, 206-08, Shils; II, 311-21, Barton; VI, 946-47, 958, Hogan) It was established that there is no unanimity of opinion among economists as to the correct multiplier for professional sports events or other activities, and, in fact, there is disagreement among economists as to the validity and applicability of various models. (I, 203-05, Shils; VII, 1080-81, Zimbalist; IX, 1317, Baade) Yet, over objection by Poe, Dr. Shils, Mr. Barton and Dr. Hogan were permitted to offer their opinions regarding economic impacts based solely upon the use of multipliers supplied by out-of-court persons or entities, and the trial judge relied on those opinions in his Final Judgment. In addition, neither Dr. Shils nor Dr. Hogan were able to relate their prior Philadelphia and Arizona studies, which also used multipliers supplied by third parties, to the Tampa Bay community.

There are some qualitative, immeasurable benefits and/or costs associated with having a professional sports franchise located within a community. Such intangible considerations can include civic pride (or shame),[15] media coverage (positive or

[15] The Mayor testified that, while in Europe, people laughed when he mentioned the BUCs as the Tampa Bay area NFL franchise. (I, 62, Greco)

negative) and impacts upon other services provided in the area (positive or negative). (IX, 1327, Baade)

Although educated and regularly and consistently engaged in the business and practice of financial planning and analysis for over 17 years, Poe's witness, Jim Wurdeman, was excluded from testifying as an expert witness in those areas. (IX, 1230-53, Wurdeman) Had he been allowed to render his opinion, he would have testified that the total taxpayer costs of the stadium project over 30 years is $601,389,683, and that the total revenues received by the BUCs over 30 years is $1,139,011,200. Neither of these amounts include the values of the development or naming rights lost by the TSA and gained by the BUCs. (X, 1533-39, Proffer)

SUMMARY OF ARGUMENT

The issue before this Court is not whether local government may build a community stadium. The issue is not whether a professional sports franchise serves a public purpose or whether a stadium serves a public purpose. Instead, the issue before this Court is whether local government may, with the use of hundreds of millions of taxpayer dollars, tear down an existing community stadium and build and operate a new stadium for the predominant and paramount purpose of providing a private business entity with the means to increase its profits and earn over a billion dollars in revenues. But for the BUC's demands for greater revenues and their threat to relocate to another city, the proposed stadium project would not exist, The local government's desire to retain the BUCs at all costs and at a windfall from the public purse is not constitutionally permissible.

The Florida Constitution, Article VII, Section 10, 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 clearly and overwhelmingly the case herein, the public purpose must predominate, the private benefit and use must be incidental **and** the project must be paid for by revenues derived therefrom. None of these conditions are present herein.

The predominant purpose of the proposed stadium project, as demonstrated by the testimony and the terms of the Stadium Agreement, is to provide substantially greater revenues to the BUCs. The revenues derived from the project will not be used to retire the bonds for the project nor will the TSA's share of such revenues be sufficient to operate and maintain the project. Instead, those revenues will go directly into the

hands of the BUCs, a private entity. The Florida Constitution prohibits such a result.

The trial judge correctly refused to validate the bonds and correctly granted, in part, Poe's request for a declaration that the Stadium Agreement is unconstitutional. However, he erroneously interpreted the law by limiting such conclusions to only one of the unconstitutional provisions of the Stadium Agreement -- that which grants the BUCs the first $2 million of revenues from all non-BUC stadium events, thereby leaving intact all the remaining provisions (summarized on pages 10-14 of this Brief) which grant to the BUCs, not only 50% of all non-BUC revenues,[16] but over $40 million per year, not counting the values associated with the naming rights, the development rights or the practice facility rights. Constitutionality cannot be measured in degrees. An expenditure of public funds to benefit a private business is either constitutional or it is not. The same rationale the trial judge applied to the first $2 million of non-BUC revenues applies equally to numerous other elements of the Stadium Agreement such as giving a private entity the public's right to use and derive revenue from public lands, giving a private entity the public's right to derive revenues or other benefits from naming a publicly-owned facility and giving a private entity $12 million to construct a private training facility. The Florida Constitution, as interpreted by this Court, mandates that the entire Stadium Agreement be declared invalid and that the issuance of bonds secured by tax monies and the pledging of the government's credit for this project, as set forth in the Stadium Agreement, be prohibited.

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[16] The trial judge did not explain why that 50% of non-BUC revenues would pass constitutional scrutiny, **while the $2 million entitlement would not. Indeed, it is not even clear whether he seemingly sanctioned the BUC's receipt of 50% of all non-BUC revenues, or only 50% of those revenues beyond the first $2 million.**

In addition to his erroneous interpretations of the Florida Constitution, the trial judge had before him no competent evidence upon which to base the factual and legal analysis contained in the Final Judgment. His evidentiary rulings constituted an abuse of discretion, violated Poe's rights to due process of law and formed the basis for numerous impermissible and erroneous factual and legal conclusions. The trial court improperly allowed into evidence testimony from expert witnesses which was clearly inadmissible, improperly permitted lay witnesses to render opinion testimony, improperly excluded opinion testimony from a qualified expert, and improperly made findings which were not based upon any competent evidence of record -- all in violation of the Florida Evidence Code and all at great prejudice to Appellant Poe, The competent substantial evidence adduced at trial establishes that the private entity exclusively selected by the local government to receive well over $400 million of public taxpayer dollars, resulting in a windfall to that private business of well over one billion dollars, has no greater impact upon the Tampa Bay area economy than other similar-sized private businesses in Tampa and, indeed, has less impact than larger private businesses which receive no public funds for their facilities or operations.

This Court should reverse the Final Judgment, refuse to validate the proposed bonds, and declare the entire stadium project, as evidenced by the Stadium Agreement and other project documents, to be in violation of the Florida Constitution.

ARGUMENT

POINT I. THE TRIAL COURT'S FACTUAL AND LEGAL ANALYSIS OF THE ISSUES IS INCOMPLETE, ERRONEOUS AND DOES NOT COMPORT WITH FLORIDA LAW.

While the trial judge correctly refused to validate the bonds for the new stadium project and correctly declared that the stadium project, as constituted, violates Article VII, Section 10 of the Florida Constitution, his factual and legal analysis of the issues is incomplete, erroneous and does not comport with Florida law. The trial court found unconstitutional the fact that the BUCs will receive the majority of net revenues from non-BUC events at the new stadium. However, that conclusion was limited to the sole fact that the BUCs will receive the first $2 million in revenues from non-BUC events.[17] The trial court failed to address and declare unconstitutional the additional terms of the Stadium Agreement which award to the BUCs no responsibility for the costs of construction, financing, operation, maintenance or capital improvements for the new stadium which the BUCs alone have demanded for the sole purpose of generating greater revenues; complete control over the design and construction of the new stadium; rent-free use of the existing stadium while continuing to earn revenues, both from their

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[17] Judge Pendino's Final Judgment (Poe App. A, 2) states that the stadium project

> would serve a paramount public purpose, if not for the fact that the lease of the new stadium to the Tampa Bay Buccaneers grants the Buccaneers the first $2 million in net annual revenues from non-Buccaneer events.

In his Order on Motion for Rehearing (Poe App. B, 2), the trial judge erroneously granted the government leave to renew their motion for rehearing if an agreement could be reached with the BUCs to delete the clause that grants them the first $2 million from non-BUC events, and further stated that he would validate the bonds if that occurred. (Also see Judge Pendino's comments during the motion hearing at Volume X, Tab A, pages 17-19.)

own events and other events; exclusive control of and profits from the leasing of luxury suites for all stadium events; naming rights; merchandising rights; advertising rights; concession rights; parking rights; Team Space rights; stadium expansion rights with no increases in rent; a $12 million practice facility; private commercial development rights to public property; and the right to retain 100% of all revenues of any kind from their own events and to retain, not only the first $2 million, but an additional 50% of all revenues from all other stadium events." The revenues which the BUCs derive pursuant to the Stadium Agreement are revenues which are precluded from being earned not only by the government (the TSA, County and/or City) and taxpayers who pay to construct and operate the stadium, but also by other public agencies (the University of South Florida) and other private entities who use and pay rental or license fees for their use of the "community" stadium. It is clear, as evidenced by the Stadium Agreement and the testimony of every government witness in this proceeding, that the paramount, if not the sole, purpose of the entire stadium project is to subsidize a private entity operated for profit - the BUCs, and that the project constitutes an improper diversion of public funds, credit and privileges for the primary benefit of a private entity. The BUC's right to retain the first $2 million of non-BUC event revenues is only one small portion of the stadium deal which renders the project unconstitutional.

The trial court was presented with one central issue in these consolidated proceedings: Does the expenditure of at least $424 million in taxpayer dollars or other public funds for the construction and operation of the new stadium project, under the

[18] Having found that the BUC's entitlement to $2 million of other event revenues is unconstitutional, is the BUC's entitlement to an additional 50% of such other event revenues only one-half unconstitutional?

facts established in the record of these proceedings, constitute a violation of Article VII, Section 10 of Florida's Constitution? In analyzing the numerous cases of this Court which have interpreted that constitutional mandate, its history is instructive. In 1875, the following provision was added to the 1868 Florida Constitution:

> The credit of the State shall not be pledged or loaned to any individual, company, corporation or association . . . The legislature shall not authorize any county, city, borough, township or incorporated district to become a stockholder in any company, association or corporation or to obtain or appropriate money for, or to loan its credit to, any corporation, association, institution or individual.

As explained in Bailev v. Citv of Tampa, 111 So. 119 (Fla. 1926), O'Neill v. Burns, 198 So.2d 1 (Fla. 1967), and State v. Jacksonville Port Authoritv, 204 So.2d 881 (Fla. 1967), the reason for the 1875 amendment to the 1868 Florida Constitution was that, during the years immediately preceding its adoption, the State and many of its cities and counties had by legislative enactments become stockholders or bondholders in, and had loaned their credit to, the organizations and operations of commercial entities. Many of these entities were poorly managed and failed, leaving the governmental entities, and ultimately the taxpayers, responsible for their debts and obligations. The essence of the 1875 constitutional amendment was to restrict the activities and functions of the state, counties and municipalities to that of government, and to forbid their engaging directly or indirectly in commercial enterprises for profit. The policy reasons were to counter indiscriminately careless governmental spending. The amendment was intended to be a bulwark against the pledging or lending of the government's credit or the use of public funds for other than public purposes.

When confronted with proposals to issue public securities in which the private interests to be served by the project were apparent, this Court consistently required that

the public purpose of the project be "paramount," and that the private interest be only "incidental." Time and again, this Court has reiterated:

> Our organic law prohibits the expenditure of public money for a private purpose . . . under our organic law public money cannot be appropriated for a private purpose or used for the purpose of acquiring property for the benefit of a private concern. It does not matter that [sic] such undertakings may be called or how worthwhile they may appear to be at the passing moment. The financing of private enterprises by means of public funds is entirely foreign to a proper concept of our constitutional system. Experience has shown that such encroachments will lead inevitably to the ultimate destruction of the private enterprise system.

State v. Town of North Miami, 59 So.2d 779, 785 (Fla. 1952). With that philosophy in mind, this Court consistently refused to validate bonds where the project to be financed did not serve a predominantly or paramount public purpose, even where the bond indebtedness was repaid solely from rent or revenues generated by the project. See, for example, State v. Clay County Development Authority, 140 So.2d 576 (Fla. 1962) and State v. Jacksonville Port Authority, 204 So.2d 881 (Fla. 1967).

In the 1960's, these decisions began to have a significant effect upon Florida's economic development due to Internal Revenue Code provisions and rulings by the Internal Revenue Service which made the interest on industrial revenue bonds exempt from federal income taxation. Florida was placed at a competitive disadvantage with other states which could offer tax exempt, non-recourse revenue bonds to private entities for capital projects. Thus, in 1968, the Florida Constitution was rewritten to recognize that the public interest could be served by facilitating private economic development in certain instances. Such instances are, however, limited to those in which the revenue bonds are payable SOLELY from revenues derived from the project to be financed.

Article VII, Section 10 of the 1968 Florida Constitution provides, in pertinent

part, as follows:

> **Neither** the **state nor any county,** school district, **municipality, special district,** or agency of any of them, **shall** become a joint owner with, or stockholder of, or **give, lend or use its taxing power or credit to aid any corporation, association, partnership or person,** but this shall not prohibit laws authorizing:
> . . .
> (c) the issuance and sale by any county, municipality, special district or other local governmental body of (1) revenue bonds to finance or refinance the cost of capital projects for airports or port facilities, or (2) revenue bonds to finance or refinance the cost of capital projects for industrial or manufacturing plants to the extent that the interest thereon is exempt from income taxes under the then existing laws of the United States, **when, in either case, the revenue bonds are payable solely from revenue derived from the sale, operation or leasing of the projects.** If any project so financed, or any part thereof, is occupied or operated by any private corporation, association, partnership or person pursuant to contract or lease with the issuing body, the property interest created by such contract or lease shall be subject to taxation to the same extent as other privately owned property. (Emphasis supplied)

The 1968 Constitution thus continues to prohibit the pledging of public credit and the use of the taxing power to aid any private enterprise, but also interprets that prohibition, through subsection (c), to provide that non-recourse revenue bonds for airports, ports, industrial and manufacturing plants constitute a public purpose and do not, in fact, pledge the public credit or utilize the public taxing power. As clearly set forth in Linscott v. Orange County Industrial Development Authority, 443 So.2d 97, 100 (Fla. 1983), "nothing is permitted by subsection (c) which is prohibited by the first paragraph" of Article VII, Section 10. The Linscott court held that, under the 1968 Constitution, a governmental body still may not pledge the public credit for a private entity, but recognized that non-recourse bonds (bonds payable solely from capital project revenues) do not pledge the public credit. Thus, subsection (c) does not constitute an exception to the prohibition against the pledging of public credit contained in the first paragraph of

Section 10, but merely an interpretation thereof. Linscott, 443 So.2d at 100. In reliance upon the cases of Nohrr v. Brevard Countv Educational Facilities Authoritv, 247 So.2d 304 (Fla. 1971) and Wald v. Sarasota Countv Health Facilities, 360 So.2d 763 (Fla. 1978), the Linscott decision notes that the listing of airports, ports, industrial and manufacturing plants in subsection (c) was not intended to be exclusive. 443 So.2d at

Other projects may or may not fall within subsection (c), and must "run the gauntlet of prior **case** decisions to test whether the lending or use of public credit for any of them was contemplated." Wohre, 247 So.2d at 308. Where a pledge of public credit or the public taxing power is involved, the "paramount public purpose" test is applicable.

The gist of this Court's post-1968 decisions is that the "paramount public purpose" test is applicable where the pledge of public credit or the use of the taxing power is involved. If private interests are not involved in the project, the prohibition of Article VII, Section 10 does not apply. When a project proposed for public funding has elements of private economic benefit, the public purpose must predominate, the private benefit and use must be incidental **and the project must be paid for by revenues derived therefrom.** While there are conflicting decisions as to the degree to which the public purpose must be demonstrated (compare Linscott, supra, with Oranse County Industrial Development Authoritv v. State, 427 So.2d 174 (Fla. 1983)), there is no disagreement over the mandate that a publicly funded project which involves a predominant private benefit or use must be repaid from revenues derived from the project.

This Court has not approved a single bond or project secured by tax dollars or the public credit when there was a private interest readily apparent to reap the benefits

of the project **and** the indebtedness was not to be repaid from revenues derived from the project. Instead, this Court has approved the use of public funds to finance a project only when there has been no private leases or private interests involved[19] or, when private interests were involved, only when the sole source of repayment of the public funds or the bond indebtedness are the revenues derived from the project.[20]

Concomitantly, this Court has refused to approve projects financed by public funds absent a paramount public purpose when the project was not paid for by revenues derived from the project. In Bannon v. Port of Palm Beach, 246 So.2d 737 (Fla. 1971), a long-term lease between a port authority and a private developer was approved because there was no public expense involved. The Court specifically noted that if the project involved the issuance of revenue bonds or some other form of public financing to construct a facility for the use of a private concern, the result might be different. Orange County Industrial Development Authority v. State, 427 So.2d 174 (Fla. 1983), refused to validate industrial development bonds for the expansion of a television station by a private corporation upon a finding that the project, even though the bonds were to

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[19] Pepin v. Division of Bond Finance, 193 So.2d 1013 (Fla. 1986); Rowe v. Pinellas Sports Authority, 461 So.2d 72 (Fla. 1984); Miami Dolphins, Ltd. v. Metropolitan Dade County, 394 So.2d 981 (Fla. 1981); State v. City of Miami Beach, 234 So.2d 103 (Fla. 1970); State v. Tampa **Sports** Authority, 188 So.2d 795 (Fla. 1966); Rianhard v. Port of Palm Beach District, 186 So.2d 503 (Fla. 1966); State v. Manatee County Port Authority, 171 So.2d 169 (Fla. 1965)

[20] Linscott, supra; International Brotherhood of Electrical Workers v. Jacksonville Port Authority, 424 So.2d 753 (Fla. 1982); State v. Osceola County Industrial Development Authority, 424 So.2d 739 (Fla. 1982); State v. Oranse County Industrial Development Authority, 417 So.2d 959 (Fla. 1982); State v. Volusia County Industrial Development Authority, 400 So.2d 1222 (Fla. 1981); State v. Leon County, 400 So.2d 949 (Fla. 1981); McCoy Restaurants, Inc. v. City of Orlando, 392 So.2d 252 (Fla. 1980); Wald, supra; State v. County of Dade, 250 So.2d 875 (Fla. 1971); Nohrr, supra; State v. County of Dade 210 So.2d 200 (Fla. 1968); State v. Daytona Beach Racing and Recreational Facilities District, 89 So.2d 34 (Fla. 1956).

be repaid from the project revenues, did not satisfy the "paramount public purpose" test. While recognizing that jobs would be created by the project and that local news coverage would be improved, thus producing a more informed citizenry in the area and advancing the general welfare of the people, this Court nevertheless concluded that such "broad, general public purpose[s], though, will not sustain a project that in terms of direct, actual use, is purely a private enterprise." Orange County, at 179. This Court specifically ruled that if "the benefits to a private party are themselves the paramount purpose of a project, then the bonds will not be validated even if the public gains something therefrom," and even if the project is self-sustaining from the revenues produced thereby. Orange County, 427 So.2d at 179. In Bayfront Downtown Development Authority of the City of Fort Lauderdale, 315 So.2d 451 (Fla. 1975),[21] this Court refused to approve a parking project which was predominantly for the benefit of a private shopping center. The Court noted that the public purpose may not be simply incidental to a predominantly private purpose. The argument advanced in support of the required "public purpose" was basically "if you build it, they will come." It was argued that once private industry (a shopping center) was allowed to come in, then the necessity for parking in connection with it will thereafter develop.[22] The Court replied that "this is getting the cart before the horse," and allowing the "tail to wag the dog." The Court held that a "public benefit" is not synonymous with a "public purpose" which will justify governmental action to

[21] While the Bavcol case was an eminent domain proceeding, the standard for determining the "public purpose" question is the same as applied when the Court is called upon to construe Article VII, Section 10 regarding the expenditure of public funds. State v. Miami Beach Redevelopment Agency, 392 So.2d 875 (Fla. 1980). Indeed, the Bavcol decision cites previous bond validations cases rendered by this Court.

[22] This is strikingly similar to the argument advanced in this case: once a private entity purchases the BUCs for $192+ million, the "necessity" for a new stadium develops.

support a project. Baycol, 315 So.2d at 457.

In Brandes v. City of Deer-field Beach, 186 So.2d 6 (Fla. 1966), this Court was asked to validate a $1.5 million bond issue, secured by a pledge of certain tax revenues by the City of Deerfield Beach, to acquire property and construct facilities to be used as a spring training headquarters for the Pittsburgh Pirates, a major league baseball team. The lease with the Pirates provided that the City was to pay yearly the sum of $58,000 for all maintenance and utilities of the facility and provide police protection during all games. In return, the lessee was to pay an amount equal to the debt service on $1.36 million attributable to the project, as well as 50% of the net profits. This Court declined to validate the bonds, holding that

> the purpose of the proposed bond issue is not for a public purpose or municipal purpose, and furthermore that the City, by the proposed services to be rendered by it, is lending its credit in contravention to the provisions of . . . the Constitution.

Brandes, 186 So.2d at 12. Thus, even though this case was decided prior to the 1968 Constitution (which might otherwise have permitted bonds repaid by revenues generated by the project), the Court noted that the City's obligation to maintain the facility and provide police protection during games constituted an improper lending of its credit. Since no reimbursement was provided for this lending of credit, post-1968 review would not have saved that project from a constitutional attack.[23] The Brandes Court further found that the purpose of the constitutional prohibition against the pledging of public

[23] The trial judge's miscomprehension of the Florida Constitution, as interpreted by this Court, is demonstrated by his conclusion that the fact that the new proposed stadium "will be financed primarily by sales taxes" does not "defeat a finding of paramount public purpose." (Poe App. 14) First, the stadium project will be financed **wholly** by public funding, and second, Florida law requires such financing to be reimbursed from revenues derived therefrom.

credit **was** to keep government out of private business, to insulate government funds against loans to individuals and to withhold the government's credit from entanglement in private enterprise. Finally, this Court said

> . . . such taxing power may not be used or pledged to the end that trade may be accelerated by an experiment in practical economics through a particular private enterprise of a nongovernmental nature.

Brandes, 186 So.2d at 12.

The trial court's attempt to distinguish the Brandes case is unavailing. First, great reliance is placed upon Section 288.1162, Florida Statutes, which permits, in certain instances, **governmental entities** to receive $2 million per year (for 30 years) in State funds for the construction, reconstruction or renovation of facilities used by professional sport franchises or new spring training teams. This statute, by itself, does not authorize an unconstitutional use of the State's taxing power for the benefit of a private entity. It does not authorize the State to use its taxing power for the predominant purpose of economically benefitting, without reimbursement, a professional sports franchise. Instead, the statute authorizes State monies to be utilized to construct or renovate a sports facility which otherwise meets constitutional requirements. The Legislature should not be presumed to have acted in an unconstitutional manner, and to interpret that statute as **a** legislative intent to "give" the BUCs $60 million of state sales tax monies would clearly render that statute unconstitutional. Secondly, the trial judge drew **a** distinction with the Brandes case based upon the fact that the proposed new Tampa stadium will be a "multi-purpose" stadium, as opposed to the Brandes facility which was to be utilized only as a spring training facility for the Pirates. While the multi-purpose function of the proposed new stadium is an important consideration, the trial

judge failed to give proper weight to the facts that there is an existing stadium to serve multi-purpose events; that no other user of the existing stadium feels the need for a new stadium (I, 67-8, 75-6, Greco; V, 714, Kleman; IV, 262-66, Saavedra); that, unlike the Pirates in Brandes, the BUCs will not contribute one cent to the construction or financing costs of the new stadium; that, unlike the Pirates in Brandes, the BUCs retain 100% of all revenues (the amount of which they exclusively set and control) from their own games and events; and that, although the stadium will host other events, the BUCs are entitled to receive, not only the first $2 million, but also 50% of all revenues thereafter. The multi-purpose use of the new stadium is present, but it is the BUCs (and not the users or the public) which benefit therefrom. Lastly, the trial judge concluded that while there was no indication in the Brandes case of what the economic impact of a spring training team would be, the testimony in this case demonstrated that the BUCs provide a substantial economic benefit to the community. That conclusion was based upon subjective, incompetent and inadmissible opinion testimony, is contrary to competent and substantial objective statistical evidence of record and fails to recognize that many private enterprises, without entitlement or receipt of huge government subsidies, bring substantial economic benefit to the community.

While proclaiming that the government may not violate the Florida Constitution, the trial court nevertheless relies heavily upon the "public purpose" findings of various statutes[24] and local government enactments. (Poe App. A, 10-12) Such legislative

[24] One such statute cited is Section 196.199(2)(a) which appears to exempt private lessees from property taxation. Although not an issue currently before this Court, the constitutionality of that statute is doubtful in light of the last sentence of Section IO(c) of Article VII of the Florida Constitution.

enactments are quoted by the trial judge for the proposition that the BUCs and/or the proposed stadium project serve a "public purpose," a "valid public purpose" or a "commendable public purpose." Those buzz-words are not the test enunciated by this Court for a determination of constitutionality. The issue in this proceeding is not the "public purpose" of a sports stadium or the "public purpose " of the BUCs. Obviously, all governmental action must serve some public purpose. The issue is whether the proposed stadium project, as set forth in the 1996 Stadium Agreement and other project documents, satisfies the Florida Constitution as interpreted by this Court. When the public taxing power and credit is used and pledged to effectuate a project and when there is a private interest which will directly derive, to the exclusion of both the government and other public and private interests, substantial economic benefits from the project, the two-pronged test enunciated by this Court must be applied. First, it must be determined that the project is for a "predominant" or "paramount" public purpose. If that test is met, it must also be shown that the public monies advanced for the project will be repaid from revenues derived from the project. Obviously, that two-pronged test is not met by the facts before this Court. Instead, it is clear that the paramount purpose of the proposed stadium project is to enrich the BUCs and that the bonds and other public funds will not be repaid by revenues from the project. Instead, the bonds and 0 & M deficits will be repaid solely from public tax proceeds, and the BUCS will receive and retain most of the revenues generated by this publicly-owned and financed project.

Finally, the trial judge concluded from his review of cases involving sports facilities in other states that all but two states, one of which is Florida, have concluded that stadiums serve a "public purpose." (Poe. App. A, 12) Once again, whether or not

a project fosters a "public purpose" is not the test for reviewing a project for which the public credit is pledged or public tax monies are utilized when a private entity who will reap the benefits from the project is readily apparent. The Florida Constitution and this Court's interpretation thereof are clear and unequivocable in their absolute prohibition against the lending of public credit and the pledging of tax dollars to aid a private entity where there is not a predominant or paramount public purpose and where the project is not funded solely through revenues derived therefrom. This Court need not go beyond Article VII, Section 10 and its own interpretations thereof. In addition, the non-Florida cases cited by the trial judge are readily distinguishable, either because of the facts contained therein,[25] the particular constitutional provision at issue[26] or that State's own

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[25] For example, in Libertarian Party of Wisconsin v. State of Wisconsin, 546 N.W.2d 424 (Wis. 1996), the baseball team was required to make a $90 million contribution toward the cost of the new stadium and to pay an annual rent equivalent to 10% of the annual debt service. In Rice v. Ashcroft, 831 S.W.2d 206 (Mo.Ct.App. 1991), the lease payments used to retire the bonds and to maintain the stadium flowed from one governmental entity to another. In County of Eden v. Kerr, 373 N.Y.S.2d 913 (App.Div. 1975), the issue was whether the Rich Stadium, leased to the Buffalo Bills, was subject to real property taxation. The Court noted that the rental fees paid by the Buffalo Bills were established so as to repay the amount of money needed to retire the stadium bonds, plus the costs of repairs and replacements, In Bazell v. Citv of Cincinnati, 233 N.E.2d 864 (Ohio 1968), the challenging party failed to prove that the revenues from the project would not meet the requirements for debt service. [Here, it is not even anticipated that the revenues from the project will be used to retire the debt, the BUCs make no payments toward the construction or financing costs of the project and the BUC's rent is not sufficient to meet the 0 & M costs of the proposed stadium.] Another case cited to, but not mentioned by, the trial judge is Ginsbera v. Citv and County of Denver, 436 P.2d 685 (Col. 1968), where the principal and interest of the revenue bonds were payable solely from the net revenues produced by the stadium **after the payment of all operating and maintenance expenses** collected therefrom.

[26] In Kelly v. Man/landers for Sport Sanity, 530 A.2d 245 (Md. 1987), the issue before the court was whether the Maryland Constitution required a referendum. The constitutional provision before that court was one limiting the right of referendum so as to not include any law making any appropriation for maintaining the State government. Neither a referendum requirement nor any similar Florida constitutional provision is presently before this Court.

interpretation of its' constitutional provisions which are similar to Florida's constitutional provisions.*'

In summary, while the trial judge correctly ruled that the award of the first $2 million in revenues from non-BUC events is unconstitutional, he erroneously limited his consideration to that sole provision of the Stadium Agreement between the BUCs and the government. If paying the first $2 million is unconstitutional, then certainly paying 50% of the non-BUC revenues is also unconstitutional. Constitutionality cannot be determined in degrees. Because this stadium project is funded entirely by taxpayer monies and the pledging of the governments' credit and involves private interests, it can only be sustained if it serves a "paramount public purpose" and if it is paid for by the facility revenues. It is established that the paramount purpose of this proposed project is to enrich the BUCs at tremendous expense to the taxpayers and that any public purpose to be served by the project is, at best, only incidental. Even if a paramount

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[27] For example, the State of Washington's Constitution prohibits the giving of public monies or credit to aid private entities and further requires that taxes be levied and collected for public purposes only. However, those provisions are interpreted by the Washington Supreme Court much more broadly than similar Florida Constitutional provisions are interpreted by the Florida Supreme Court. In Washington, public expenditures need only confer a benefit of "reasonable general character to a significant part of the public" in order to survive a challenge that they do not serve a public purpose. Clean v. State of Washington, 928 P.2d 1054 (Wash. 1996). In Florida, the purpose to be served by a project paid for by public funds must be a "paramount public purpose," a general public benefit to the community does not satisfy that test, and the revenues from the project must pay for the project when private interests are involved. Interestingly, the Washington Supreme Court held that if the sports team were allowed to play in the stadium for only a nominal rent, the Washington constitutional prohibition against making a gift of state funds might be violated.

public purpose were apparent, which it is not, the obvious enhancement of the private, pecuniary interests of the BUCs requires that the financing of the construction and operation of the project be repaid with revenues derived from the project. Such is not the case before this Court.

POINT II. THE TRIAL COURT ERRED IN PERMITTING AND RELYING UPON INCOMPETENT AND INADMISSIBLE TESTIMONY FROM "EXPERT" WITNESSES.

The government's case in this proceeding rested almost entirely upon their claims of alleged economic benefits to the community from the presence of the BUCs. The accuracy and reliability of their economic assessments and predictions were pivotal issues in this case. However, the government's three expert economists (Dr. Shils, Mr. Barton and Dr. Hogan) were incompetent to render an expert opinion regarding the driving factor for the ultimate conclusion reached from each of the methodologies utilized by them to access economic impact. Each of these three witnesses relied upon a different methodology which utilized a different "multiplier" (the driving factor) derived from a different computer model prepared by a different person or entity to reach their different ultimate conclusions.

Dr. Shils, utilizing the same methodology and the same multiplier he utilized in Philadelphia studies conducted in the 1980's, applied a 2.6 multiplier to the 1994 total revenues of the BUCs, and concluded that the annual economic benefit of the BUCs was $183 million. (I, 125-30, Shils) Mr. Barton applied a 1.86 multiplier to the adjusted 1994 expenses of the BUCs, and derived an annual economic benefit of $83 million. (II, 283-89, Barton) In another analysis performed by Mr. Barton to reach his opinion regarding

impacts associated with construction of the proposed stadium, he applied a different multiplier from a different computer model. (II, 301-02, 309, Barton) In evaluating the economic impact of the 1996 Phoenix Super Bowl upon the entire State of Arizona, Dr. Hogan used yet another computer model[28] with a 1.88 multiplier and applied that to information gathered from attendees and community organizations regarding their spending patterns during that Super Bowl event. (VII, 929-33, Hogan)

Each of these three economists relied upon a different computer model to derive a multiplier factor which they then applied to a different multiplicand through their different methodologies. In each instance, the multiplier was supplied by a third person or entity who was not called as a witness in this proceeding. Neither Dr. Shils, Mr. Barton nor Dr. Hogan were able to explain the derivation of the multiplier upon which they relied to reach their respective conclusions. (I, 103, 110, 193-94, Shils; II, 284, 309, 313-21, Barton; VI, 932-35, 946-47, Hogan) None of these witnesses have any experience or expertise in developing a mathematical model for deriving a multiplier for economic impact purposes nor do they have any expertise in determining the factors or coefficients which go into such a model.[29] These witnesses made no independent calculations, evaluations or verifications as to the appropriateness of the multiplier chosen by a third person and utilized as a basis for their ultimate conclusions. (I, 197, 201, 206-08, Shils; II, 311-21, Barton; VI, 946-47, 958, Hogan) They simply called upon a third person or entity to tell them which multiplier to use. Indeed, by their own

[28] Dr. Hogan could not specifically identify the version of the model he used. (VII, 958, Hogan)

[29] At least one of the models utilized has over 4,563 different coefficients. (VI, 944-47, Hogan)

admissions, none of these witnesses had the expertise to independently verify the multipliers or their application to the Tampa Bay area.

Dr. Shils admitted that there is no unanimity within the profession of economics as to a specific multiplier to be used when analyzing the economic impact of a professional sports team or event in a particular community. (I, 203-05, Shils) Poe's economic experts confirmed that there is disagreement among economists as to the validity and applicability of various models and modeling techniques. (IX, 1317, Baade; VII, 1080-84, Zimbalist) The extent of that disagreement is reflected by the $100 million difference between the opinions of Dr. Shils and Mr. Barton as to the supposed impact of the BUCs in Tampa, as well as by the fact that each of the government's three witnesses utilized both a different multiplier and a different method of applying the different multipliers selected for them by different out-of-court witnesses. Moreover, Dr. Shils testified that the multiplier can range between 1 .O and 3.0, or higher (I, 195, Shils), thereby producing a wide variety of results. Thus, while the use of a multiplier concept is accepted within the profession of economics, the specific multiplier applied and the method of its application varies depending upon the particular industry or business evaluated, its location and other considerations, and the person who actually does the modeling to determine the multiplier. There is no single multiplier commonly and reasonably relied upon by economists.

The multipliers relied upon by Dr. Shils, Mr. Barton and Dr. Hogan are pure hearsay. The Florida Rules of Evidence permit expert reliance upon hearsay evidence, but only when "the facts and data are of a type reasonably relied upon by experts in the subject to support the opinions expressed." Section 90.704, Fla. Stats. As explained

in Department of Corrections v. Williams, 549 So.2d 1071 (Fla. 5th DCA 1989), in its discussion of Bender v. State, 472 So.2d 1370 (Fla. 3d DCA 1985),

> the hearsay rule poses no obstacle to expert testimony premised in part on tests, records, data or opinions of another, where such information is of a type reasonably relied upon by experts in the field . . .

Even then, however, the testifying expert may not be used as a conduit to place otherwise inadmissible evidence before the court. Where the expert's opinion parallels, and, indeed, is totally dependent upon that of the outside witness, then the outside witness should be produced to testify directly. Smithson v. V.M.S. Realty, Inc., 536 So.2d 260 (Fla. 3d DCA 1988).[30] Dr. Shils, Mr. Barton and Dr. Hogan served solely as conduits for inadmissible hearsay. Those three witnesses could not have rendered their economic impact opinions without relying solely upon the hearsay statement and opinions of others, which opinions are not readily accepted by others within the profession and which opinions counsel for Poe were precluded from challenging or assessing through cross-examination in the proceedings below.[31]

Here, the multipliers were the catalysts for reaching the conclusions and opinions expressed by Dr. Shils, Mr. Barton and Dr. Hogan, and there was no competent

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[30] Also see Riggins v. Mariner Boat Works, 545 So.2d 430 (Fla. 2d DCA 1989); Kurvnka v. Tamarac Hospital Corp., Inc., 542 So.2d 412 (Fla. 4th DCA 1989) rev. denied 555 So.2d 463 (Fla. 1989); Maklakiewicz v. Bet-ton, 652 So.2d 1208 (Fla. 3d DCA 1995); Sikes v. Seaboard Coast Line Railroad Co., 429 So.2d 1216 (Fla. lst DCA 1983); and Matter of James Wilson Assoc., 965 F.2d 160, 172-73 (7th Cir. 1992).

[31] The extreme prejudice to Poe is demonstrated by the trial judge's specific finding that Poe's experts were unable to present data "that directly contradicted the data relied on by Plaintiffs' experts in compiling their economic forecasts." (Poe App. A, 7) Without knowledge of the data upon which Plaintiffs' experts relied, Poe was precluded from contradicting it.

evidence before the Court regarding their derivation, accuracy or reliability. There was no independent testimony about how the multiplier models were prepared, what data went into the models or even, in the cases of Dr. Hogan and Mr. Barton, the identity of the person responsible for preparing the models or supplying the multipliers to the testifying witnesses. If the government wished to substantiate the use of a particular model or multiplier, it was incumbent upon it to produce a witness who had expertise in the derivation of an appropriate one. The witnesses presented did not.

Witnesses Shils, Barton and Hogan made no independent analysis of the correct multiplier to be applied, nor did they have the expertise to do so.[32] They simply assumed the validity of the multiplier supplied by third persons, and the facts assumed were not demonstrated in the record of this proceeding. A determination of economic impact was wholly dependent upon the correct multiplier being applied,[33] and the government did not meet its burden of proving the underlying assumption of the conclusions reached. By assuming the correctness of the multiplier, without any basis in fact or expertise for making such an assumption, witnesses Shils, Barton and Hogan assumed the very matter at issue upon which they were called to express an opinion, and their opinions were clearly inadmissible. TK-7 Corp. v. Estate of Barbouti, 993 F.2d

[32] For this reason alone, their testimony should have been excluded. As stated in Husky Industries, Inc. v. Black, 434 So.2d 988, 992 (Fla. 4th DCA 1983), "it is apodictic that expert testimony is not admissible at all unless the witness has expertise in the area in which his opinion in sought." Also see United States v. Tomasian, 784 F.2d 782 (7th Cir. 1986)

[33] Indeed, if witnesses Shils, Barton and Hogan did not know how the multiplier was derived and the coefficients considered, it is difficult to comprehend how they knew what it was to be multiplied against (i.e., gross or net revenues, adjusted or unadjusted expenses, spending patterns, etc.).

722 (10th Cir. 1993).[34] An opinion based upon unconfirmed assumptions and an absence of underlying facts is also inadmissible under Section 90.705(2), Florida Statutes. Dempsey v. Shell Oil Co., 589 So.2d 373, 380 (Fla. 4th DCA 1991).

There was certainly no evidence in the record of this proceeding that other economic experts would typically or reasonably rely upon the multipliers or the methodologies utilized by Dr. Shils, Mr. Barton or Dr. Hogan. Indeed, as noted above, the evidence is to the contrary. Consequently, Rule 90.704 of the Florida Evidence Code cannot supply the foundation for this inadmissible and incompetent testimony. The trial court abused its discretion in allowing, over objection, the opinion testimony of Dr. Shils, Mr. Barton and Dr. Hogan regarding the economic impact to the Tampa Bay area as a result of the BUCs, past or future Super Bowls and construction of a new stadium. The trial court's factual and legal conclusions based upon such incompetent testimony are clearly erroneous and constitute reversible error.

The record of this case establishes that the BUCs constitute only a small to medium-sized business, compared to other private businesses in the Tampa Bay area, and that their direct economic impact upon the community is no greater than other similar-sized businesses and much smaller than larger businesses in the area. (I, 62, 75-78, Greco; II, 252, 257, Wilson; IX, 1325, Baade; II, 221, Shils; VII, 1076-77, Zimbalist) Other businesses in Tampa do not receive huge subsidies from local or state government. (II, 256, Wilson) Analyses of previous Super Bowls in Tampa show no measurable impact upon the local economy. (VII, 1186-88, Porter; V, 778-79, 781, Clark)

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[34] It is appropriate to look to federal decisions construing Federal Rule of Evidence 703 since Florida Rule 90.704 is patterned after and virtually identical to the Federal Rule. § 90.704, Fla. Stat. (Sponsor's Note).

Barton's analysis concerning the economic impact of construction, which does not consider the offsetting impact of higher taxes in the community, if correct and carried to its logical extreme, "would unlock the secret of economic success. We could simply build a stadium, tear it down, built it again, tear it down, and each time there would be this multiple event magnifying the local economy." (VII, 1115, Zimbalist)

POINT III. THE TRIAL JUDGE ABUSED HIS DISCRETION IN ALLOWING LAY WITNESSES TO GIVE OPINION TESTIMONY AND IN RELYING UPON SUCH TESTIMONY IN HIS FACTUAL AND LEGAL ANALYSIS, IN MAKING FINDINGS NOT SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE AND IN EXCLUDING OPINION TESTIMONY FROM A QUALIFIED EXPERT.

In disregard of the fact that the government's witnesses Kleman, Wilson, Clark and Goodell were not offered[35] or qualified[36] as experts in this proceeding, nor were they disclosed as such in pretrial discovery, the trial court, over objection, allowed these witnesses to render expert opinions. For example, Kleman was permitted to render opinions as to the economic value of having a Super Bowl in Tampa (V, 704-05),[37] the intangible benefits of keeping the BUCs in Tampa (V, 707-09), an interpretation of the Internal Revenue Code (V, 676-80, 725-27) and the nature of modern NFL leases (V,

[35] The County Attorney specifically represented to the trial judge that she would not attempt to qualify or offer witnesses Kleman (IV, 661; V, 704-05), Wilson (11,245, 247) or Goodell (VI, 826) as expert witnesses.

[36] Witness Clark admitted that he was not an expert in economic impact analysis and had never performed such a study. (V, 792-93, Clark) That fact alone precluded him from offering opinion testimony concerning the economic impact of the BUCs. Tallahassee Memorial Regional Medical Center, Inc. v. Meeks, 543 So.2d 770 (Fla. 1st DCA 1989), modified on other grounds, 560 So.2d 770 (Fla. 1990).

[37] Kleman was not even the County Administrator in Hillsborough County during the two years in which Tampa hosted a Super Bowl. (V, 672, Kleman)

700-02). Wilson was permitted to render opinions regarding the economic feasibility of renovating the existing stadium (II, 242-44, 246-48) and the intangible benefits of having the BUCs in Tampa (II, 249-51). Clark was allowed to render opinions concerning the economic loss to Tampa were the BUCs to leave Tampa (V, 747) and the intangible economic impact of having an NFL franchise team in the community (V, 741-43). Goodell was permitted to render opinions as to whether a Super Bowl award would be withdrawn if the proposed new stadium were not constructed. (VI, 851-52) The Final Judgment (Poe App. A) demonstrates that the trial judge relied upon such opinion testimony from these lay witnesses as the basis for his factual and legal analysis.

The trial court abused its' discretion in allowing these lay witnesses to offer opinion testimony. These witnesses were neither tendered nor qualified as experts and, indeed, had no expertise in the areas in which their opinions were sought and given. As such, they were not competent to render the opinions offered at trial, and the trial judge erred in relying on such incompetent evidence as the basis for his factual and legal analysis. Huskv Industries Inc. v. Black, 434 So.2d 988 (Fla. 4th DCA 1983); Laffman v. Sherrod, 565 So.2d 760 (Fla. 3d DCA 1990).

The opinion testimony referenced above was not based upon first-hand, personal knowledge of facts within the meaning of Section 90.604, Florida Statutes, nor was it in the nature of perceptions based upon personal observations, so as to fall within Section 90.701 (I), Florida Statutes. National Communication Industries v. Tarlini, 367 So.2d 670 (Fla. 1st DCA 1979); Somerville v. State, 584 So.2d 200 (Fla. 1st DCA 1991); Fino v. Nodine, 646 So.2d 746 (Fla. 4th DCA 1995). Instead, the opinions expressed by each of these lay witnesses concerned matters of specialized knowledge, skill,

experience or training which required an expert witness to draw the conclusions reached. Accordingly, they were inadmissible pursuant to Section 90.701(2), Florida Statutes. Kelvin v. State, 610 So.2d 1359 (Fla. 1st DCA 1992); Adamson v. State, 569 So.2d 495 (Fla. 3d DCA 1990).

In addition, the trial court made several findings which find no support whatsoever in the record of this proceeding. For example, the Final Judgment contains a finding that even if the existing stadium were repaired, some users might relocate to a competing venue. (Poe App. A, 3) The sole inference in the record to such a finding came from lay witness Kleman, who stated: "I **suspect** at some point it **might** be more difficult to attract some of the large gate shows . . . " (Emphasis supplied) (V, 715) Such conjecture and speculation was inadmissible and certainly can not form any basis for the trial court's finding. Likewise, the trial court's finding that "without an NFL team the community would find it more difficult to compete with other cities for new business" (Poe App. A, 8) is not only unsupported by any competent evidence of record but is, in fact, contrary to the admission of Kleman that he was not aware of a single business that moved to Tampa because it had an NFL franchise team. (V, 720)

Finally, the trial judge abused his discretion by precluding Poe's witness, Jim Wurdeman, from providing expert testimony in the areas of financial analysis and planning. While allowing witness Barton (who was neither an economist nor an accountant and who had no degree in the area tendered) to testify as an expert in conducting economic impact studies of a professional sports team (Vol. II, 264-68), the trial judge disparately refused to accept Jim Wurdeman (who has a degree in accounting and finance, was previously licensed and practiced as a Certified Public Accountant, has

consistently practiced in the areas of financial analysis and planning in Tampa for the past 17 years, and has operated his own financial consulting firm since 1986) as an expert in financial analysis and planning, Mr. Wurdeman was not offered as an expert accountant or economist, yet he was disqualified because he was not presently licensed as a Certified Public Accountant. (IX, 1244, 1253) Mr. Wurdeman's knowledge, skill, experience, training and education clearly qualifies him as an expert under Section 90.702 of the Florida Evidence Code, and his qualifications clearly meet the four-prong test for the admissibility of expert testimony, as set forth in CSX Transportation, Inc. v. Whittier, 584 So.2d 579, 584 (Fla. 4th DCA 1991), rev.denied 595 So.2d 556 (Fla. 1992). The exclusion of Mr. Wurdeman's expert testimony regarding the actual costs of the proposed stadium project and the actual economic benefits which the BUCs will receive over the 30-year term of the Stadium Agreement,[38] matters clearly within the realm of financial analysis and planning, constitutes reversible error.

[38] Had Mr. Wurdeman been allowed to testify, he would have attested that, over the initial 30-year term of the Stadium Agreement, the actual total taxpayer costs of the stadium project is $601,389,683, that the total revenues received by the BUCs as a result of the Stadium Agreement is $1,139,011,200 and that these amounts do not include the values of the development rights or the naming rights lost by the TSA and awarded to the BUCs. (X, 1533-39, Proffer)

CONCLUSION

The proposed new stadium project clearly constitutes a violation of the Florida Constitution, which prohibits the government from using its taxing power or lending its credit to aid a private person or entity. The trial judge erred in his legal analysis and interpretation of Article VII, Section 10 of the Florida Constitution; and also erred in his evidentiary rulings, thereby resulting in his erroneous factual findings and legal analysis. While the Final Judgment's ultimate adjudications are correct (the denial of the governments' Complaint to validate the bonds and the granting of Mr. Poe's Complaint for a Declaratory Statement), the factual and legal analysis contained within the Final Judgment constitute reversible error. This Court should declare the entire Stadium Agreement in violation of Florida's Constitution, and refuse to validate the proposed bonds and other documents which are dependent upon the Stadium Agreement.

Respectfully submitted this 17th day of April, 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 Federal Express 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, 33602-5211; Donald Gifford, Esquire, and John Van Voris, Esquire, Shackleford, Farrior, Stallings & Evans, 501 E. Kennedy Boulevard, 17th Floor, Tampa, Florida, 33602; and J. Michael Hayes, General Counsel, State Attorney's Office, Thirteenth Judicial Circuit, 5th Floor County Courthouse Annex, Tampa, Florida, 33602, this 17th day of April, 1997.

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