IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC01-1562
(L.T. CASE NO. 3D00-2754)

THE CITY OF MIAMI, a municipal corporation,

Appellant,

vs.

PATRICK MCGRATH III, MIAMI-DADE
COUNTY, a political subdivision of the State
of Florida and LAUREEN VARGA,

Appellees,

CITY'S CONSOLIDATED REPLY BRIEF

ON APPEAL FROM
A DECISION OF THE THIRD DISTRICT COURT OF APPEAL

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STATEMENT OF THE CASE

In its statement of the case and facts, McGrath claims that a question of fact exists as to the issues raised by the City's motion for summary judgment in the trial court. The record below does not support McGrath's position. In the Complaint, McGrath admits that the population of the City and the City of Jacksonville ("Jacksonville") exceeded 300,000 on April 1, 1999 (Complaint, ¶ 26). (R. 19-28) The City submitted an affidavit prior to the hearing on the motions for summary judgment stating that the population of the City of Tampa ("Tampa"), within reasonable statistical certainty, was in excess of 300,000 on April 1, 1999. (R. 52-54)

McGrath advised the trial court that there were no issues of fact to be determined.[1]

(S.R. 4-5)

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[1] / In response to a direct question from the trial court, counsel for McGrath agreed that there were no issues of fact:

> MR. SEROTA: Your Honor, we are here on the city's motion for summary judgment in this case….The matter presented to you, this court, is strictly a legal issue, one which is ripe to be determined by summary judgment. We have filed an affidavit in support of our motion. The affidavit, in fact, contains the same factual information that is attached to the response memo filed by the plaintiff. The plaintiff has filed a cross motion also based on our affidavit. So we submit there are no factual issues.
>
> THE COURT: Do you agree with that?
>
> MR. KORGE: Essentially, we disagree with their interpretation of the Florida estimate of population, but for purposes of this hearing, we have accepted for purposes of our cross motion, we have accepted their assertions of facts.
>
> THE COURT: Do you agree it's a question of law and there are no issues of fact?
>
> MR. KORGE: Yes, I definitely agree it is a question of law and the facts that matter in this case, the only fact that matters is the statute. So I agree with that.

(S.R. 4-5) Counsel for the County was present at the hearing and made no assertion that an issue of fact exists.

INTRODUCTION TO ARGUMENT

McGrath and the County make the same mistake as did the Third District by ignoring or failing to distinguish the facts and precedent established by this Court in *Golden Nugget Group v. Metropolitan Dade County*, 464 So.2d 535, 536 (Fla. 1985) and *State of Florida v. City of Miami Beach,* 234 So.2d 103, 106 (Fla. 1970). These cases constitute the most recent pronouncements of this Court with regard to the constitutionality of classifications and both support the conclusion in the instant case that there is a reasonable relationship between the classification created by the Legislature and the purpose of the law. The Court also applied the reasonable relationship test in *Ocala Breeders v. Florida Gaming Centers,* 26 Fla.L.Weekly S521A (2001).

These cases are consistent with the Florida Constitution, which provides that classifications of possible users of general law must be "reasonably related" to the subject of the law. *Golden Nugget* unquestionably contains a closed class of governments, which are specifically named in the Florida Constitution, yet this Court upheld the classification as constitutional and reasonably related to the subject of the law. The *City of Miami Beach* creates a closed class limited by time and population. However, again, this Court held the class to be constitutional, finding that the classification is reasonably related to the purpose of the Statute.

As this reply brief will show, the classification created by the Statute, although closed for seven years, is reasonably related to the subject matter of the law and, consistent with the cases of *Golden Nugget* and *City of Miami Beach,* is constitutional. Because of the Statute's sunset provision, the classification, which uses the April 1, 1999 cut-off date for achieving the population threshold, will only be effective until 2006. After that date, the Legislature is free to change the date for establishing the population figure or eliminate it all together. Both McGrath and the County frequently argue that a population classification cannot be tied to a particular census, citing comments of this Court in *Fort v. Dekle,* 190 So. 542 (Fla. 1939) and *Walker v. Pendarvis,* 132 So.2d 186 (Fla. 1961). However, because of the sunsetting provision, no other census, such as the one in 2010, would ever even come into play.

As a result, the reasonable relationship test remains the key to the constitutional analysis of the Statute. Under that test, the classification created by the Statute is reasonable and constitutional.

ARGUMENT

I. THE STATUTE IS A VALID GENERAL LAW AS THE CLASSIFICATION IT CREATES IS REASONABLY RELATED TO THE PURPOSE OF THE STATUTE.

A. The Statute Operates Uniformly Within The Classification Created.

There is no dispute that the classification created by the Statute is limited to three cities, which are the only ones potentially eligible, until the sunsetting provision of the Statute takes effect in 2006.[2] Within the classification created, the Statute operates uniformly, as required by law. *Department of Business Regulation v. Classic Mile, Inc.*, 541 So.2d 1155, 1157 (Fla. 1989). ("Uniformity of treatment within the class is not dependent upon the number of persons in the class." *Department of Legal Affairs v. Sanford Kennel Club, Inc.,* 434 So.2d 879, 881 (Fla. 1983), citing *Cesary v. Second National Bank of North Miami,* 369 So.2d 917, 920 (Fla. 1979).)

McGrath erroneously claims that the Statute can only be a valid law if it applies to "every municipality that may in the future have the same population size and other attributes as the City had when the Statute was enacted." (McGrath brief, pp. 4, 11, 14). However, the law does not require a statute to operate universally throughout the state, nor uniformly upon certain subjects throughout the state. *Classic Mile, Inc.*, 541 So.2d 11 at 1157. A statute can still be a general law if it operates "uniformly within

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[2] / The County claims that the Statute creates a population requirement which is "forever anchored to a specific date: April 1, 1999." (County brief, p. 5) In fact, the Legislature only authorized the Statute to be tied to this date for seven years.

a permissible classification." *Id.* In this case, the Statute does operate uniformly as to the members of this class.

Therefore, the narrow question created by this appeal is whether a statute creating a classification with three potential members, and which operates uniformly within that class for a period of seven years, is rationally related to the purpose of the act, and therefore, constitutional? Based upon *Golden Nugget* and *City of Miami Beach,* the presumption in favor of the constitutionality and the clear relationship between the class and the purpose of the Statute, the Statute is constitutional.

B. ***Golden Nugget* Creates A Closed Classification Which Is Constitutional As The Class Is Reasonably Related To The Purpose Of the Act.**

McGrath is flat wrong when he says that Golden Nugget "created an open, not a closed class." (McGrath brief, p. 30) McGrath erroneously states that the statute at issue in that case, which applies only to constitutional, home-rule charter counties, is open "to every county that subsequently adopted a constitutional home rule charter." *Id.* A county does not become a "constitutional home rule charter county" under Section 10, 11 and 24 of Article VIII of the Florida Constitution by simply adopting a home rule charter. Only those counties specifically named in the Constitution would be eligible to use the Convention Development Tax, which is the basis of the *Golden Nugget* case. Unless the Constitution is amended, only "Dade, Hillsborough and Monroe Counties potentially meet this definition . . . ." *Golden Nugget,* 464 So.2d at 536.

Although all counties in Florida may adopt a county charter, this does not give them the special constitutional home rule charter status described in Section 6(e) of Article VII of the Florida Constitution. Only counties with this special status can acquire the benefits of the Convention Development Tax, the statute as issue in *Golden Nugget*, since the Convention Development Tax statute described "eligible

counties" as "[e]ach county, as defined in S. 125.011(1)." *Id.* at 536. Section 125.011(1), Fla.Stat., provides as follows:

> County means any County operating under a home rule charter adopted pursuant to ss. 10, 11, and 24, Art. VIII of the Constitution of 1885, as preserved by Art. VIII, Section 6(e) of the Constitution of 1968 . . .

The only counties meeting this definition under the Constitution are Miami-Dade, Hillsborough and Monroe.

This Court in *Golden Nugget* recognized that only three counties could "potentially" use the Statute. Contrary to McGrath's claims, no other county can fall within this classification merely by adopting a home rule charter. As a result, McGrath's attempt to distinguish *Golden Nugget* is likewise erroneous. Approving the opinion of the district court, this Court held in *Golden Nugget* as follows:

> The district court pointed out that the three counties potentially eligible to implement the tax have substantial tourist-oriented economies, and they have concentrated on developing facilities that will attract convention tourists in order to improve their tourist industry.

Id. at 537. The fact that only three counties were "potentially eligible" to use this tax did not deter this Court from upholding its constitutionality because of the reasonable relationship between the classification and the purpose of the statute.

In its brief, the County apparently recognizing the closed nature of the class in *Golden Nugget*, attempts to distinguish the case by saying that *Golden Nugget* "does not even involve a population classification." (County brief, p. 28) While it is true that *Golden Nugget* does not create a closed class based upon population, this is a distinction that should make no difference in the constitutional analysis. If, as appellees contend, the creation of a closed class makes a statute per se unconstitutional, what difference is there between a class based upon a government's ability to adopt a home rule charter or based upon the population of a city or county?

The fact is that this Court has not analyzed the constitutionality of classifications on the basis of open class versus closed class for many years. Utilizing the reasonable relationship test, the classification created in Golden Nugget*, just as the classification created in the instant case, are both constitutional and should be upheld.*

C. ***City Of Miami Beach* Creates A Closed Classification Based Upon Population On A Date Certain**

The clear facts embodied in *City of Miami Beach* lead to the inescapable conclusion that this Court approved a closed class based upon population and a specific cut-off date. In that case, cities are only eligible to impose a resort tax if they comply with certain strict and limited population criteria and if they adopt a charter change on a date certain. The statute in *City of Miami Beach* provides that after January 1, 1968, no city can ever enter the class if it failed to adopt a charter change by that date. Put another way, the class of users is closed on January 1, 1968, and any city or county that subsequently qualifies for the use of the statute based upon a change in population is forever excluded from the class if their charters were not changed by the January 1, 1968 deadline.

Despite the strict population requirements and the January 1, 1968 cut-off, this Court held the Statute constitutional in light of "this state's interest in the promotion and further development of the tourist industry." *City of Miami Beach*, 234 So.2d at 106. This Court further held that "the population classifications are reasonable and Ch. 67-930 is a valid general law." *Id.* In *City of Miami Beach,* only cities which have population between 330,000 and 340,000, and which are located in counties having a population in excess of 900,000 are potentially eligible. In addition, this extremely narrow class is further limited to cities which adopted a charter change

providing for the collection of the tax prior to January 1, 1968. It is no surprise that, as the opinion points out, only two cities in all of Florida can ever enact the resort tax. *Id.*

In the instant case, the Statute also has a population and date restriction, both very comparable to the ones in *City of Miami Beach*. Three cities are potentially within the class created by the Statute. The strong public interest promoting the fiscal soundness of municipal governments is surely as strong a public interest as that of tourism, upon which this Court relied in *City of Miami Beach*, when it upheld the classification created. As stated earlier, within this class of three cities, the Statute operates uniformly and, as a result, it is a valid general law. *Id.* at 1157.

<u>D.</u> <u>**Classifications Based On Population Are Constitutional If Rationally Related To The Purpose Of the Statute.**</u>

If the precedent of this Court is analyzed and applied to the use of population classes, it is amenable to a logical construction. Population may serve as the basis for classifying counties as a valid general law if there is a reasonable relationship between the use of population to delineate the class and the purpose of the statute. *City of Miami Beach*, *supra.* According to this persuasive precedent, there is nothing in the least irrational or arbitrary about such legislative line drawing when conceived to serve a critical public purpose, such as the fiscal solvency of the largest cities in the State. However, where legislation does not rest upon a population class which is reasonably related to a critical public purpose, it is not deemed to be a valid general law.

This Court has upheld classifications which have proper distinctions and differences appropriate to a particular class. *City of Miami Beach, supra; Golden Nugget, supra.*; *Department of Legal Affairs*); *supra*. Under the instant facts, the class of cities created by the population threshold certainly contain distinctions and attributes appropriate to the class and purpose of the Statute. Only large municipalities can effectively use a parking surcharge. It is unlikely that smaller cities have enough public garages and paid parking facilities to make a parking surcharge a viable tool for generating revenue.

As a result, the Statute's use of population to create a class of potential uses is consistent with the criteria for valid general laws due to the rational relationship between the class created and the purpose of the Statute.

E. The "Open Class Versus Closed Class" Analysis Has Not Been Used By This Court For Forty Years.

Other than *Classic Mile*, the principal cases upon which the appellants rely were decided between forty and sixty years ago; e.g. *Dekle, supra* (1939); *Ocala Breeders, supra* (1960); *Pendarvis, supra* (1961). The strict reliance upon "closed-class, open-class" analysis based upon population is no longer the test utilized by the Florida Supreme Court. *See City of Miami Beach, supra; Golden Nugget, supra;* and *Classic Mile, supra; and Ocala Breeders, supra.*[3]

The Court should also note that the Florida Constitution was amended between the line of cases cited by appellees and the line of cases cited by the City. In 1968, the Florida Constitution was revised to provide that the enactment of general laws may be classified only on a basis reasonably related to the subject of the law. Art. III, § 11(b), Fla. Const.§§ (emphasis added). The commentary to Florida Statutes Annotated states:

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[3] / It is important to note that none of the post 1968 cases even cite to *Dekle* anywhere in these opinions. In fact, *Dekle* has only been cited one time by another appellate court in 1961; *Pendarvis*, 135 So.2d at 195.

> The reasonableness standard for the classification of political subdivisions and governmental entities in general laws covering subjects not listed in subsection (a) is set out in subsection (b). Such classification must be on a basis reasonably related to the subject matter of the law. This is an <u>entirely</u> <u>new</u> <u>provision</u> . . .

(emphasis added) Both Dekle and Pendarvis were decided prior to the 1968 revision.[4]

At pp. 21-23 of his answer brief, McGrath attempts to refute the City's argument that the adoption of Article III, Section 11(b) in the 1968 revision to the Florida Constitution has "changed the rules" as to the test to be applied in determining whether a valid general law exists. At p. 22 of his brief, McGrath concedes that:

> Prior to its revision in 1968, the Florida Constitution did not express any constitutional guidelines for determining what constitutes special or local laws, including population acts.

This is precisely the point that the City is making. The constitutional guidelines were first instituted in the 1968 revision to the Florida Constitution. It is one thing for courts to, out of necessity, develop a line of reasoning or analysis in the absence of a constitutional guideline. It is quite another, however, for courts to develop a system of reasoning and analysis which is based on a specific constitutionally mandated guideline.

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[4]/ Stare decisis, as applied to *Dekle*, does not always control where the law and the constitution have changed. *See Haag v. State*, 591 So.2d 614, 617 (Fla. 1992) and *Weiand v. State*, 732 So.2d 1044, 1055 (Fla. 1999).

When the Constitution is silent, courts must develop their own set of guiding principles. However, once the Constitution speaks, it is a court's limited task to construe and apply the Constitution.

The judicial analysis of the validity of legislative enactments which maintain population provisions must, since adoption of the 1968 amendments of the Constitution, be driven by a constitutionally based analysis, rather than by an ad hoc judicial analysis. Accordingly, the applicable judicial precedents are those opinions rendered subsequent to the applicability of the 1968 Florida Constitution revision, not those opinions issued without benefit of the constitutional criteria.

As recently as this year, this Court applied the rational basis analysis in reaching its decision in *Ocala Breeders*. While the Court found the statute in *Ocala Breeders* to be unconstitutional, it did so because it could find that "no rational relationship existed between this purpose and [the field created] in the disputed statue." *Id*. at 521. Thus, the rational-basis test is the test applied in determining the constitutionality of statutes.

F. Appellee's References To An Advisory Opinion Are Misplaced And Have No Precedential Value.

McGrath and the County cite to *In Re Advisory Opinion to the Governor*, 132 So.2d 163, 168 (Fla. 1961) on at least six separate occasions. It should first be noted advisory opinions do not constitute opinions of the Florida Supreme Court and, therefore, are not binding in any future judicial proceeding. *In Re Advisory Opinion to the Governor,*509 So.2d 292, 301-302 (Fla. 1987). In addition, the advisory opinion upon which McGrath and the County rely was decided prior to the *City of Miami Beach, Golden Nugget* and the Florida Constitution of 1968. Other than being cited in the dissenting opinion by Justice Drew in the *City of Miami Beach* case in 1970, the most recent reference to this advisory opinion by this Court was forty years ago. As a result, references to the Advisory Opinion provides no legal support to appellees' argument.

CONCLUSION

The Statute is a constitutional general law based upon the analysis utilized by this Court and the language of the Florida Constitution. The Decision fails to apply this analysis. Until the Statute sunsets in 2006, the classification it creates consists of the three largest cities in the State. The classification is reasonable and bears a direct and substantial relationship to the purpose of the Statute, which is to assist cities experiencing financial emergencies by allowing the imposition of a surcharge on the revenue generated by public parking facilities. The Statute operates uniformly within this classification and two other cities are "potentially eligible to implement the tax" if they are declared in a financial emergency. *See Golden Nugget,* 464 So.2d at 537.

The Decision is at odds with *Golden Nugget, City of Miami Beach,* and the other cases from this Court, as well as the Florida Constitution, which apply the "reasonable relationship" test to statutory classification.

Based on the foregoing law, undisputed facts and argument, the City respectfully requests a decision from this Court reversing the Decision and affirming the Final Declaratory Judgment.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was hand delivered this 21st day of **September, 2001**, to MARK J. HEISE, ESQ., Heise Markarian Foreman, Co-Counsel for Appellees, 1950 Miami Center, 201 South Biscayne Blvd., Miami, FL 33131; THOMAS J. KORGE, ESQ. Korge & Korge, Co-Counsel for Plaintiff, 230 Palermo Avenue, Coral Gables, Florida, 33134; and to JESS M. MCCARTY, ESQ.; Robert A. Ginsburg, Miami-Dade County Attorney, Counsel for Intervenors, Stephen P. Clark Center, Suite 2810, 111 N.W. First Street, Miami, Florida 33128.

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Joseph H. Serota

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that the font used in this brief is Times New Roman, 14 point, which complies with Rule 9.210(a)(2).

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Joseph H. Serota