

IN THE SUPREME COURT OF FLORIDA

Case No. SC04-1497

Upon Request from the Attorney General
for an Advisory Opinion as to the
Validity of a Financial Impact Statement

**ADVISORY OPINION TO
THE ATTORNEY GENERAL**

RE: REPEAL OF HIGH SPEED RAIL AMENDMENT

**BRIEF OF FLORIDA TRANSPORTATION ASSOCIATION, INC.
AND C. C. ADOC@ DOCKERY**

IN OPPOSITION TO THE REDRAFTED FINANCIAL IMPACT STATEMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
STATEMENT OF THE CASE AND STANDARD FOR REVIEW	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. The Proposed Financial Impact Statement Is Misleading And Fails to Accurately Disclose Probable Financial Impact.....	3
a. Athe repeal of associated laws@.....	3
b. Athe use of state bonds to finance construction@.....	7
c. Afederal or private sector funding@.....	7
II. The Proposed Financial Impact Statement Summary Demonstrates Fatal Flaws In the Impact Statement	8
CONCLUSION.....	10
CERTIFICATE OF SERVICE	12
CERTIFICATE OF TYPEFACE COMPLIANCE.....	13

TABLE OF AUTHORITIES

Cases:

<i>Chiles v. Phelps, et al.</i> , 714 So.2d 453 (Fla. 1998)	6
<i>In re Advisory Opinion to Att’y. Gen.-Additional Homestead Tax Exemption</i> , Case No. SC04-942 (Fla. 2004)	3 fn 1
<i>In re Advisory Opinion to the Attorney General- Authorizes Miami-Dade & Broward County Voters to Approve Slot Machines in Parimutuel Facilities</i> , Case No. SC04-1057 (Fla. 2004)	2
<i>In re Advisory Opinion to the Attorney General- Authorizes Miami-Dade & Broward County Voters to Approve Slot Machines in Parimutuel Facilities</i> , Case No. SC04-1290 (Fla. 2004)	10
<i>In re Advisory Opinion to the Attorney General- Public Protection From Repeated Medical Malpractice</i> , Case No. SC04-1053 (Fla. 2004)	2, 10
<i>State of Florida ex rel. Collier Land Investment Corp.</i> 188 So.2d 781 (Fla. 1966)	6

Florida Constitutional Provisions:

Article X, Section 19	4, 6
Article XI, Section 5	2

Florida Statutes:

Section 100.371(6), as amended by Chapter 04-33, Laws of Florida	2, 6
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Section 100.371(6)(b), as amended by Chapter 04-33, Laws of Florida..... 2

Section 100.371(6)(b)4, as amended by Chapter 04-33, Laws of Florida 10

Section 187.201(19)(b) (2004)YY..YYYYYYYYYYYYYYYYYYY5

Sections 341.3201-341.386 (1992)YYYYYYYYYYYYYYYYYYY..5

STATEMENT OF THE CASE AND STANDARD OF REVIEW

The intent of this brief is to address the duties and responsibilities of the Court in reference to the redrafted financial impact statement on the initiative to Repeal the High Speed Rail Amendment. The redrafted financial impact statement does not accurately reflect the probable impact of the amendment. In drafting the revised language to be included on the ballot, the Financial Impact Estimating Conference clearly exceeded the scope of its limited authority.

The Conference redrafted a financial impact statement that assumes, and then relies entirely upon, the effects of changes in legislation other than the repeal of the High Speed Rail Amendment itself in order to support the financial impact claimed. The financial impact claimed relies upon a financial analysis that pertains exclusively to the Conference's hypothetical route, which is not authorized by either the Constitution or statutory law. This arbitrary approach calls into serious question the reliability of this and previous calculations of the Conference. The redrafted impact statement and the process by which the Conference drafted the new language does not comply with the Florida Constitution and Florida Statutes, and should not be allowed to appear on the ballot.

On August 12, 2004, Attorney General Charles Crist forwarded the following proposed redrafted financial impact statement to this Court for an Advisory Opinion:

The probable financial impact of passage of this amendment is a state cost savings ranging from \$20 billion to \$25 billion over the next 30 years. This estimate assumes the repeal of associated laws, the use of state bonds to finance construction, and could be reduced by federal or private sector funding.

In reviewing financial impact statements under Article XI, section 5, Florida Constitution, and Section 100.371(6), Florida Statutes, this Court has determined that the statutory phrase "Range of potential impacts" in Section 100.371(6)(b), F.S., must relate to the phrase "Probable financial impact" set forth at Article XI, Section

5, of the Constitution. In re Advisory Opinion to Att=y Gen.-Authorizes Miami-Dade & Broward County Voters To Approve Slot Machines In Parimutuel Facilities, Case No. SC04-1057 (July 15, 2004); In re Advisory Opinion to Att=y Gen.-Public Protection From Repeated Medical Malpractice, Case No. SC04-1053 (July 15, 2004).

SUMMARY OF ARGUMENT

The proposed financial impact statement relies upon a number of assumptions which are *outside of the scope of, and independent of, the amendment*, and which are *not probable*. Because of this, the statement is *misleading*. Furthermore, the Conference improperly attempts to influence the vote for a political agenda. The Financial Impact Estimating Conference *exceeded their legal charge* by redesigning the geographical path of the high speed rail system in order to create a calculus that supports a statement of alleged cost savings. For these reasons the financial impact statement clearly, and conclusively, violates statutory and constitutional requirements, and should be rejected.

ARGUMENT

I. THE PROPOSED FINANCIAL IMPACT STATEMENT IS MISLEADING AND FAILS TO ACCURATELY DISCLOSE PROBABLE FINANCIAL IMPACT

As was the case with the Additional Homestead Exemption initiative petition which was stricken from the ballot,¹ by the Court on July 15, 2004, the question of

¹ Because the Homestead Exemption initiative would affect only the assessed value of property, and not the local government taxing authority's power to raise the millage rate, a factor independent of the proposed amendment, this Court held that the summary which states that the amendment **provides property tax relief** to all Florida homeowners was misleading. In re Advisory Opinion to Att=y. Gen.-Additional Homestead Tax Exemption, Case No. SC04-942 (July 15, 2004). The error is compounded in the high speed rail revised financial impact statement by several factors entirely independent of the literal wording of the amendment.

whether the amendment would ultimately result in state cost savings depends upon a variety of factors *apart from, and independent of, the amendment*. In the second sentence of the redrafted proposed language the Conference qualifies the redrafted language with three incredible and far from probable assumptions; ~~A~~This estimate assumes the repeal of associated laws, the use of state bonds to finance construction, and could be reduced by federal or private sector funding.[@]

a. ~~A~~The repeal of associated laws[@]

The financial impact statement predicates its numbers on *the repeal of associated laws*. Essentially, the Financial Impact Estimating Conference has developed an impact statement as if the proposed repeal amendment contained the following sentence: ~~A~~The Legislature is directed to repeal statutes providing for the development and operation of a high speed ground transportation system.[@] This is markedly different from the actual full text of the proposed amendment which reads as follows: ~~A~~Article X, Section 19, Florida Constitution is hereby repealed in its entirety.[@]

Nothing in the actual proposed amendment directs the Florida Legislature to repeal laws which currently authorize or promote the construction of a high speed rail system. Nor is there any indication that the Legislature would be likely to do so.

To the contrary, it is a matter of public record that for the last three years, the Legislature has refused to pass a Joint Resolution proposing repeal of Article X, Section 19, regardless of continuous urging to do so by the Governor and other public officials who oppose the construction of a high speed rail system.² During this period, the Governor has resorted to using his Veto authority to block appropriations made to further construction of the high speed rail system, and,

² See 2004 Senate Joint Resolution 1502, died in Committee; 2003 Senate Joint Resolution 1400, died in Committee; and 2002 Senate Joint Resolution 1348, died in Committee.

finally, has fallen back to the tactic of circulating an initiative petition to circumvent the Legislature's rejection of his recommendations. To assume, as the Financial Impact Estimating Conference obviously does, that the Legislature would now suddenly move to strip from Florida Statutes all authorization for a high speed rail system, when the repeal amendment does not require such legislative action, is not supported by law, logic, or history, and is simply not a probable result. High Speed Rail has been under development in Florida through legislative directives as long ago as 1976 when the Legislature created a "Florida Transit Corridor Study" and mandated the evaluation of a high speed rail link between Daytona Beach and St. Petersburg. It has been the policy of the State of Florida to proceed with construction of a high speed rail system since the mid 1980's when the construction of such a system was included as an element of the State Comprehensive Plan. The plan provides, at Section 187.201(19)(b), Florida Statutes, that it is the specific policy of Florida to "By 1995, establish a high-speed rail system that links the Tampa Bay area, Orlando, and Miami." In 1984, the Legislature Created the "Florida High Speed Rail Commission" and charged it with the implementation of high speed rail through a franchise selection process. Subsequently, in 1992, eight years prior to the approval of the High Speed Rail amendment in 2000, the Legislature approved Sections F.S. 341.3201 to 341.386, vesting authority in the Department of Transportation and the directive to implement a high speed rail system.

The redrafted financial impact statement relies upon the assumption that approval of the amendment repealing Article X, Section 19, of the Florida Constitution will mean an end to efforts to develop a high speed rail system in the State of Florida. As the history of high speed rail in Florida demonstrates this is not the probable result of a repeal of the High Speed Rail Amendment, hence, the financial impact statement is impermissible under 100.371(6).

As a *matter of law*, the repeal of a constitutional requirement to construct a system of high speed ground transportation does not, in itself, require or result in the repeal of statutes authorizing a statewide high speed rail system. The repeal of Article X, Section 19 does not require the Legislature to repeal any existing statutes authorizing a high speed rail system, nor does it preclude the Legislature from adopting subsequent high speed rail legislation or making appropriations for it. This was pointed out effectively by counsel for the sponsor of this amendment, at page 9 of the Initial Brief of the Sponsor when the sponsor was making arguments to the Court that the repeal amendment did not violate the single subject requirement for initiative petitions:

"Thus, the only effect of repealing the above-referenced provision is that the State will no longer be constitutionally mandated to implement a high speed rail system. Further, repeal of the ~~A~~High Speed Rail Amendment~~@~~ does not remove the power and authority of the Legislature, Governor or Cabinet to, at some time in the future, implement a high speed rail system. The Florida Constitution is not a grant of power to the Legislature, but rather provides limitations on the Legislature's powers. Chiles v. Phelps, et. al., 714 So. 2d 453 (Fla. 1998); State of Florida ex rel. Collier Land Investment Corp., 188 So. 2d 781 (Fla. 1966). Thus, repeal of Article X, Section 19, Florida Constitution, in no way limits the Legislature's power and authority to implement a high speed rail system in the future. The Proposed Amendment simply removes the Mandate to do so from the Florida Constitution.~~@~~Initial Brief of Sponsor, Page 9, June 18, 2004.

The assumption made by the Financial Impact Estimating Conference, that associated laws would be repealed, is neither a direct consequence of passage of the amendment, nor an assured result. Thus, the Financial Impact Statement is based merely upon a speculation which flies in the face of both fact and law, and should not be allowed on the ballot. The Financial Impact Statement does not state the *probable* impacts as required by law.

b. ~~A~~the use of state bonds to finance construction~~@~~

The redrafted financial impact statement assumes the use of state bonds to finance construction of the entire high speed rail system in a 30 year time period. There is no consideration of different funding options or of the fact that neither the Constitution nor existing statute specifies funding options or prescribes a specific timeline for completion of a high speed rail system in Florida. The Conference does not address the actual funding scheme currently being negotiated by the High Speed Rail Authority. This arbitrary assumption, again, calls into question the methodology and motivation of the Conference and, therefore, the validity of their redrafted language.

c. Afederal or private sector funding@

The financial impact statement further conditions its numbers on the *complete absence of federal or private sector funding*. This third critical variable is also *independent of the amendment itself*. The presence of both federal and private sector funding make the promised savings to the voters invalid.³ This assumption is *not probable*.

II. THE PROPOSED FINANCIAL IMPACT STATEMENT SUMMARY DEMONSTRATES FATAL FLAWS IN THE IMPACT STATEMENT

The Financial Impact Estimating Conference's calculus abandoned the system route mandated by the Constitution and defined by the Legislature. Putting aside what current law specifies, the Estimating Conference selected *its own new route, from whence it arrived at its calculus of financial impacts*. The

³ The Summary of Initiative Financial Information Statement, prepared by the Financial Impact Estimating Conference, states that **A**The Conference agrees that if federal or private sector funding can be obtained, the cost to the state to build the system would be reduced.**@** Initiative Financial Information Statement, page 1. See also, page 5 of the Statement, which states: **A**It is conceivable that, if not repealed, the Legislature could redefine the total system as feasibility estimates are established. At this time it is not possible to predict changes to the system currently defined in law.**@**

Constitution requires that the system link the five largest urban areas of the State *as determined by the Legislature*. The Estimating Conference decided, however, that they would not use the statewide system as it is currently determined by the Legislature, but would, instead, analyze financial impacts based upon a hypothetical system it created from the whole cloth, redefining the scope of the project *based upon information from the U.S. Department of the Census*. The Conference describes this manipulation as follows:

The description of the service area of the high speed rail system to be used to determine the scope of the project *would not be the statewide system as defined in statute, but would be the five largest population areas as defined by the U.S. Department of the Census: Miami-Ft. Lauderdale-Palm Beach, Orlando, Tampa-St. Petersburg, Jacksonville, and Sarasota.* Initiative Financial Information Statement, at page 1 (Appendix-AA@)

The Summary Statement then concludes: *From these major assumptions, the Conference developed a total system cost ranging between \$20 billion and \$25 billion over the next 30 years*. This cost is then translated into an alleged savings in the statement to be placed on the ballot.

In a letter directed to the conference and read into the record at the August 12, 2004, meeting, Senator Paula Dockery succinctly identified the greatest flaw in the Financial Impact Statement process in general **B** the inherent political nature of the Conference. Due to the nature of how the Financial Impact Estimating Conference is determined there is tremendous potential for politics to be **A**injected into the process. (Appendix-AB@).

The integrity of the entire process is clearly now at stake, as both Justice Lewis and Justice Pariente have forewarned in two recent Advisory Opinions. One month ago, Justice Lewis wrote:

My concern is that these constructions will render financial impact statements a vehicle for any manner of content and language, including politicized statements designed as an attempt to sway the voters of this state, as

long as those statements are clear and unambiguous. I submit that this process cannot be divorced from its constitutional base of authority and if the statute does so, as the dissents posit, the entire legislative scheme is of very questionable constitutional validity. In re Advisory Opinion to Att-y Gen.-Public Protection From Repeated Medical Malpractice ,Case No. SC04-1053, at 4 (July 15, 2004).

Last week, Justice Pariente, sounded another warning in recognition of the short time frame within which the Court must respond to the rapid fire of financial statements:

As we begin our uncharted course of reviewing financial impact statements, we ought to insist on statements that are precise, accurate, and neutralY.*** The voters of this state, who will be determining whether to approve or reject the ballot initiative, deserve no lessY.***

Strict compliance is especially important because the financial impact statement will have the imprimatur of the government. Financial impact statements cannot and should not be used by the government to sway the electorate by using language designed to achieve a desired result---that is, to vote in favor or against the initiative. In re Advisory Opinion to Att-y Gen.-Authorizes Miami-Dade and Broward County Voters To Approve Slot Machines in Parimutuel Facilities, Case No. SC04-1290, at 3,7-8 (August 11, 2004).

CONCLUSION

It is respectfully submitted that the proposed financial impact statement for the Repeal of the High Speed Rail Amendment is unconstitutional, violates Florida Statutes, and is fatally flawed. Pursuant to Section 100.371(6)(b)4, Florida Statutes, the following statement should appear on the ballot: AThe financial impact of this measure, if any, cannot be reasonably determined at this time.@

Respectfully submitted,

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