

ORIGINAL

FILED

SIG. WHITE

IN THE SUPREME COURT OF FLORIDA

SEP 17 1997

Case No. 91,193

CLERK SUPREME COURT
By *[Signature]*

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: FISH
AND WILDLIFE CONSERVATION COMMISSION: UNIFIES
MARINE FISHERIES AND GAME AND FRESH WATER
FISH COMMISSIONS

(CORRECTED) BRIEF FOR THE SOUTHEASTERN FISHERIES
ASSOCIATION, INC.,
an interested party.

GRANGER, SANTRY, MITCHELL & HEATH, P.A.

FRANK J. SANTRY
FL BAR ID # 0202231
VICTORIA E. HEULER
FL BAR ID # 0984825
2833 Remington Green Circle
Post Office box 14129
Tallahassee, Florida 32317
(904) 385-3800; FAX (904) 385-3862

for the Southeastern Fisheries Assoc.,
Inc.

TABLE OF CONTENTS

Table of Authorities ii

Summary of Argument 1

Argument:

I. THE BALLOT TITLE AND SUMMARY DO NOT COMPLY WITH SECTION 101.161, FLORIDA STATUTES 1

 A. The title and summary are misleading 2

 B. The summary fails to inform voters of the amendment's sweep and effect 3

II. THE PROPOSED AMENDMENT VIOLATES THE SINGLE SUBJECT RULE OF ARTICLE XI, SECTION 3, FLORIDA CONSTITUTION 8

Conclusion 11

Appendices:

Appendix A - Letter from Attorney General to Florida Supreme Court regarding proposed amendment to Article IV, section 9, Florida Constitution.

Appendix B - § 370.025, Fla. Stat. (1995).

TABLE OF AUTHORITIES

| CASES | PAGE # |
|---|---------------|
| <u>Advisory Op. to Attorney General re People's Property Rights Amendments</u> , 22 Fla. Law Weekly S271 (May 15, 1997) | 10 |
| <u>Advisory Op. to Attorney General - Save Our Everglades</u> , 636 So. 2d 1336 (Fla. 1994) | passim |
| <u>Advisory Op. to Attorney General - Restricts Laws Related to Discrimination</u> , 632 So. 2d 1018 (Fla. 1994) | 2,8 |
| <u>Askew v. Firestone</u> , 421 So. 2d 151 (Fla. 1982) | 2,3 |
| <u>Smith v. American Airlines, Inc.</u> , 606 So. 2d 618 (Fla. 1992) | 8 |

OTHER AUTHORITIES

| | |
|---|--------|
| Art. II, § 7, Fla. Const | 10 |
| Art. XI, § 3, Fla. Const. | passim |
| § 101.161, Fla. Stat. (1995) | passim |
| § 369.25, Fla. Stat. (1995) | 5 |
| § 370.021, Fla. Stat. (1995) | 5 |
| § 370.025, Fla. Stat. (1995) | 7 |
| § 370.026, Fla. Stat. (1995) | 7 |
| § 370.027, Fla. Stat. (1995) | 6,7 |
| § 370.071, Fla. Stat. (1995) | 6 |
| Chapter 369, Florida Statutes | 5 |
| Chapter 581, Florida Statutes | 5 |

SUMMARY OF ARGUMENT

The proposed initiative to amend Article IV, section 9, Florida Constitution, does not comply with the ballot summary requirements of section 101.161, Florida Statutes, and fails the single subject test of Article XI, section 3, Florida Constitution.

The ballot title and summary fail to comply with section 101.161, Florida Statutes, and should be stricken from the ballot because they mislead voters into believing that the scope of the amendment is limited to "conservation," when the amendment language is clear that the Commission will have broad regulatory power over all aspects of aquatic and wild animal life. The ballot title and summary also violate section 101.161 because they fail to notify the public of the myriad of laws and rules that will be affected, if not rendered completely void, by the amendment.

The proposed amendment also violates the single-subject rule under article XI, section 3, Florida Constitution, because it affects the legislative and executive branches of government and performs the functions of these branches of government.

I.

THE BALLOT TITLE AND SUMMARY DO NOT COMPLY WITH
SECTION 101.161, FLORIDA STATUTES

Section 101.161, Florida Statutes, "requires that the ballot title and summary for a proposed constitutional amendment state in clear and unambiguous language the chief purpose of the measure." Advisory Op. to Att. Gen. - Save Our Everglades, 636

So. 2d 1336, 1341 (Fla. 1994). This Court has repeatedly held that the purpose of section 101.161, Florida Statutes, is "to assure that the electorate is advised of the true meaning, and ramifications, of an amendment." Advisory Op. to Att. Gen. - Restricts Laws Related to Discrimination, 632 So. 2d 1018, 1020 (Fla. 1994), quoting Askew v. Firestone, 421 So. 2d 151, 156 (Fla. 1982).

The ballot title and summary for the proposed amendment to Article IV, section 9, Florida Constitution, do not advise the electorate of the true meaning or ramifications of the proposal because, together, they are misleading and fail to put voters on notice of the proposal's ramifications.

A. The title and summary are misleading.

The ballot title reads "**Fish** and Wildlife Conservation Commission: Unifies Marine Fisheries and Game and Fresh Water Fish Commissions." The substantive portion of the ballot summary states that it "authorizes the Commission to exercise executive and regulatory powers of the state pertainins to conservation of freshwater and marine aquatic life and wild animal life , . . ." Unlike the ballot title and summary, however, the full text of the amendment states that the Commission "**shall** exercise the regulatory and executive powers of the state with respect to wild animal life, freshwater aquatic life and marine aquatic life"

The ballot title and summary purport to inform the electorate that the newly-formed "Conservation Commission" will only have authority to regulate the conservation of aquatic and

wild animal life, when the amendment actually gives the Commission authority to regulate anything having to do with wild animal life or aquatic life. The ballot title and summary will mislead the voter into believing that the Commission's scope of authority is narrow - related only to conservation - when, in fact, the Commission's authority under the amendment is very broad.

The misleading ballot title and summary should be stricken from the ballot. See Advisory Op. to Att. Gen. - Save Our Everslades, 636 So. 2d 1336, 1341 (Fla. 1994) (striking ballot summary due to misleading language). See also Askew v. Firestone, 421 So. 2d 151, 154-55 (Fla. 1982) (voter must have notice of the issue contained in the amendment so as to not be misled **as** to the amendment's purpose, and in order to cast an intelligent and informed ballot) .

The title is further misleading because it encompasses only "Fish and Wildlife," whereas the amendment itself clearly gives the Commission authority to regulate all aquatic life in Florida, not just "fish."

B. The summary fails to inform voters of the amendment's sweep and effect.

A proposed constitutional amendment must inform voters of the "sweep of [the] proposal from a fair notification in the proposition itself that it is neither less nor more extensive than it appears to be." The Conservation Commission proposal is, indeed, more extensive than its ballot summary makes it appear. As previously discussed, the amendment is not limited only to

conservation, or "fish and wildlife," but creates a new Commission with full regulatory power over all aquatic and wild animal life in this state.

This proposal does not simply "unite" the Marine Fisheries Commission (MFC) with the Game and Fresh Water Fish Commission (GFWFC). It creates an entirely new Commission which will not only have the power of the MFC and the GFWFC, but will also have the power once belonging to the Department of Environmental Protection, the Department of Agriculture, the Marine Patrol, and the Governor and Cabinet. According to the amendment's language, it will create a Commission with "**regulatory** and executive power of the state with respect to wild animal life, freshwater aquatic life and marine aquatic life."

The summary is ambiguous. The amendment states that the Commission will regulate "freshwater aquatic life and marine aquatic life," but fails to provide a definition of "aquatic life." Presumably, the terms mean any and all life within any type of water-based environment. This is unclear, however, considering that the ballot title refers only to fish and fisheries. Does "aquatic life" include only those organisms which live in the water, or does it include organisms whose life depends on water, but who do not necessarily "live" in the water? Does the term encompass regulation of aquatic plants? Does it include regulation of endangered species, both aquatic and land-based?

Assuming that the amendment will affect all types of water, and all types of life forms living in or around "aquatic"

environments, the amendment grossly fails to inform the electorate of the many existing state agencies and regulatory bodies that will be divested of regulatory power over organisms which these agencies currently regulate. For example, "aquatic life" would appear to encompass plants living in or around water, which is currently under the jurisdiction of the Department of Environmental Protection, chapter 369, Florida Statutes, and the Department of Agriculture, chapter 581, Florida Statutes.

Neither the MFC nor the GFWFC have, nor have they ever had, authority to regulate aquatic plant life, but it is only these two commissions which the ballot title and summary declare will be combined and their respective authority "united." Will the electorate know through the ballot title and summary that the Department of Agriculture will also be affected by this amendment and that its authority over aquatic plant life will be divested? Clearly, it will not.

Further, the amendment places all enforcement powers over aquatic and wild animal life in the hands of the Commission, but other entities are currently charged with enforcement of laws and rules pertaining to aquatic life. See e.g. § 370.021(5), Fla. Stat. (1996) (conferring powers on law enforcement officers for enforcement of laws and regulations under jurisdiction of Department of Environmental Protection, including the Florida Marine Patrol); § 369.25(5) (establishing enforcement powers over aquatic plant control and conservation in the various law enforcement officers of the state who have power to make

arrests] ; § 372.071, Fla. Stat. (establishing enforcement powers for protection of endangered plant and animal species).

The ballot title and summary give no notice to the electorate of the vast changes to take place in the current structure of government regarding all aspects of regulation related to aquatic or wild animal life. Voters must have notice that the agencies and regulatory bodies which currently control various aspects of aquatic and wild animal life will be divested of their specific powers and that the new Commission will be the sole regulatory body over aquatic and wild animal life in this state.

The amendment purports to confer power on the new commission to regulate life in all types of water, whether private or public, natural or man-made, saltwater, brackish or fresh. However, the Legislature, in forming the MFC and conferring powers upon it, specifically reserved to itself the right to regulate fishing gear in residential, manmade saltwater canals. § 370.027(1), Fla. Stat. (1995). Again, the ballot title and summary do not provide the electorate with any hint that reserved legislative powers will be stripped if this amendment is adopted. Voters have a right to know how their vote affects other provisions of law in order to determine whether or not the effect is one with which the voter agrees. See Advisory Op. to Att. Gen. - Save Our Everslades, 636 So. 2d at 1341.

Another example of reserved legislative power that will be stripped by the adoption of the amendment, and of which the electorate will not have notice, is the power to regulate

endangered species. Again, in conferring power on the MFC, the Legislature gave rulemaking authority to the MFC in specific areas, but reserved rulemaking on endangered species to the Department of Environmental Protection.

Other than ambiguity regarding the extent of the Conservation Commission's power, and the failure to advise the electorate that the amendment will divest the executive and legislative branches of retained power, the ballot title and summary also fail to inform the electorate that current protections from abuse built into the regulatory scheme of the MFC will be destroyed. These protections were specifically created by the Legislature and provide:

1. that all rules relating to marine life adopted by the Department of Environmental Protection, or the MFC, had to be approved by the Governor and Cabinet (§ 370.027(1) and (3) (a), Fla. Stat. (1995));
2. that all rules of the MFC related to saltwater fisheries had to be consistent with a set of eight standards which governed rulemaking in the area of marine fisheries (§ 370.025(2), Fla. Stat. (1995) (see also Appendix "A")).
3. that the MFC must be composed of members who have lived in Florida for at least 5 years (§ 370.026(1), Fla. Stat.);
4. that, in appointing MFC members, the Governor had to consider affected interests when making appointments (Id.); and
5. that no single interest group could dominate the membership of the MFC (Id.).

The need for these protections were important enough that the Legislature studied them and enacted them, but the electorate will have no knowledge of these protections through the ballot title and summary, and will not be able to intelligently

determine whether the proposed amendment should be adopted in light of the vast changes it will make to current regulatory schemes. As this Court has consistently held, the ballot title and summary must give the electorate "fair notice" of the meaning and effect of the proposal so that each voter may intelligently cast his or her ballot. Advisory Op. to Att. Gen. - Restricts Laws Related to Discrimination, 632 So. 2d 1018, 1021 (Fla. 1994) ; Smith v. American Airlines, Inc., 606 So. 2d 618, 620 (Fla. 1992).

II.

THE PROPOSED AMENDMENT VIOLATES THE SINGLE SUBJECT RULE OF ARTICLE XI, SECTION 3, FLORIDA CONSTITUTION

Article XI, section 3, Florida Constitution, provides that:

The power to propose the revision or amendment of any portion or portions of this constitution by initiative is reserved to the people, provided that any such revision or amendment shall embrace but one subject and matter directly connected therewith.

The single-subject requirement is a "rule of restraint" to allow singular changes through initiative in the functions of government. Advisory Op. to Att. Gen. - Save Our Everglades, 636 so. 2d 1336, 1339 (Fla. 1994). No single proposal for amendment of the constitution may substantially alter or perform the functions of multiple branches of state government. Id. at 1340. As this Court has decreed, "where such an initiative performs the functions of different branches of government, it clearly fails the functional test for the single-subject limitation the people

have incorporated into article XI, section 3, Florida Constitution." Id.

In the Save Our Everglades decision, this Court struck the amendment from the ballot, in part, due to the amendment's failure to contain itself to a single subject. The amendment failed the single-subject requirement because it performed the functions of multiple branches of government, such as implementing a public policy decision, which is a legislative function; creating a board with complete autonomy in deciding how revenues will be spent; giving the board complete authority to "administer" the trust fund, determine which pollutants were offensive, and operate treatment systems, all of which impinged on the authority granted to various executive agencies. Id.

The Conservation Commission proposal is equally violative of the single-subject requirement for its performance of the functions of multiple branches of government. The Commission would have authority to implement public policy decisions regarding any wild animal or aquatic life, including plants. It will perform various functions of the executive **branche**. For example, the Commission would perform a function of the Department of Agriculture, an executive agency, by completely taking over regulation of aquatic plant life.

The Commission will be completely self-contained, having authority over "management, research, enforcement and public information functions," "**with respect to wild animal life, freshwater aquatic life and marine aquatic life.**" This includes enforcement related to regulation, management and conservation of

marine life, which functions are currently dispersed among various agencies. See infra, at 4 & 5. See also Advisory Op. to Att. Gen. Save Our Everslades, 636 So. 2d 1336, 1340 (Fla. 1994) (single subject rule violated where various agencies of the state have jurisdiction in areas which will be impinged under proposed constitutional amendment).

This Court has held that the Legislature is required under article II, section 7, Florida Constitution, to regulate land use to protect Florida's natural resources'. Advisory Op. to Att. Gen. - People's Property Rights Amendments, 22 Fla. Law Weekly S271 (May 15, 1997). The same dictate would logically apply to the Legislature in regulating aquatic resources. In People's Property Rights, the Court struck the proposed amendment from the ballot for violation of the single-subject requirement, in part, because the amendment would have affected the Legislature's duty under the constitution to protect natural resources. Id. at 272.

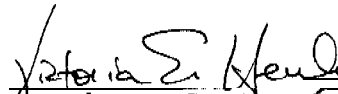
Like the faulty amendment in Save Our Everslades, the instant amendment creates "a virtual fourth branch of government with authority to exercise the powers of the other three [branches] . . ." regarding any issue related to all aquatic and wild animal life. 636 So. 2d at 1340. The instant amendment's multifarious effect on state government operations violates the single-subject requirement. See e.g. Advisory Op. to Att. Gen. - People's Property Rights Amendments, 22 Fla. Law Weekly 271 (May 15, 1997) (amendment proposing to allow more than single subject in proposed property rights amendments failed single subject

requirement because it affected multiple levels of state government).

CONCLUSION

The proposed ballot title and summary violate section 101.161, Florida Statutes, and the amendment violates the single-subject requirement of article XI, section 3, Florida Constitution. The proposed amendment to article IV, section 9 should be stricken from the ballot.

GRANGER, SANTRY, MITCHELL &
HEATH, P.A.



Frank J. Santry ✓

FL BAR ID #0202231

Victoria E. Heuler ✓

FL BAR ID #0984825

2833 Remington Green Circle

Post Office Box 14129

Tallahassee, Florida 32317

904/385-3800 FAX-904/385-3862

for the Southeastern Fisheries
Association, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the corrected brief of the Southeastern Fisheries Association, Inc., has been sent by U.S. Mail to the Florida Attorney General, The Capitol, Tallahassee, Florida 32399-1050 on September 17, 1997.



Attorney

¹ Article II, section 7, Florida Constitution, provides, in part, that "[i]t shall be the policy of the state to conserve and protect its natural resources and scenic beauty."