IN THE SUPREME COURT
STATE OF FLORIDA

Case No. SC04-1134

IN RE: ADVISORY OPINION TO THE ATTORNEY GENERAL
RE: REFERENDA REQUIRED FOR ADOPTION AND AMENDMENT
OF LOCAL GOVERNMENT COMPREHENSIVE LAND USE PLANS

CORRECTED INITIAL BRIEF ON BEHALF OF FLORIDA LEAGUE OF CITIES AND FLORIDA ASSOCIATION OF COUNTIES, INC.

Filed in Opposition to the Initiative Petition

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STATEMENT OF THE INTERESTS OF THE PARTIES

The Florida League of Cities is a non-partisan, statewide, voluntary organization dedicated to representing municipal and other local units of government in Florida. The League's membership consists of 405 of Florida's 408 municipalities, and six charter counties in Florida. The charter purpose of the League is to work for the general improvement and efficient administration of municipal government, and to represent its members before various legislative, executive, and judicial branches of government on issues pertaining to the welfare of its members.

The Florida Association of Counties, Inc. is a non-partisan, statewide voluntary organization serving county governments in Florida. The Association's membership consists of 66 of Florida's 67 counties, represented by 372 county commissioners.

The proposed constitutional amendment now before the Court, which will require referenda for the adoption and amendment of comprehensive land use plans ("the Proposed Amendment"), will directly impact every municipality and county in Florida in the performance of local government functions and the delivery of local government services which are mandated by the Florida Constitution and the laws of Florida. The League and the Association believe they are uniquely positioned to assist the Court in determining the Proposed Amendment's compliance, or not, with the single subject requirement of Article XI, section 3 of

the Florida Constitution, and with the ballot title and summary requirements of section 101.161, Florida Statutes (2003).[1]

STATEMENT OF THE CASE

The Florida Attorney General has requested the Court's advisory opinion on the Proposed Amendment's compliance with the one subject requirement of Article XI, section 3 of the Florida Constitution, and with the requirements for a ballot title and summary in section 101.161.

The Court initially ordered initial briefs from interested parties to be filed on or before July 26. On motions of the League and the Association, the Court set August 9 as the due date for initial briefs.

THE PROPOSED AMENDMENT

The ballot title for the Proposed Amendment is:

> Referenda Required for Adoption and Amendment of Local Government Comprehensive Land Use Plans.

The summary for the Proposed Amendment states:

> Public participation in local government comprehensive land use planning benefits Florida's natural resources, scenic beauty and citizens. Establishes that before a local government may adopt a new comprehensive land use plan, or amend a comprehensive land use plan, the proposed plan or amendment shall be subject to vote of the electors of the local government by referendum, following preparation by the local planning agency, consideration by the governing body and notice. Provides definitions.

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[1] For simplicity, all further references in this brief to provisions of the Florida Statutes will be made by section number only, without repeating "Florida Statutes (2003)."

The full text of the Proposed Amendment provides:

BE IT ENACTED BY THE PEOPLE OF FLORIDA THAT:

Article II, section 7. Natural resources and scenic beauty of the Florida Constitution is amended to add the following subsection:

Public participation in local government comprehensive land use planning benefits the conservation and protection of Florida's natural resources and scenic beauty, and the long-term quality of life of Floridians. Therefore, before a local government may adopt a new comprehensive land use plan, or amend a comprehensive land use plan, such proposed plan or plan amendment shall be subject to vote of the electors of the local government by referendum, following preparation by the local planning agency, consideration by the governing body as provided by general law, and notice thereof in a local newspaper of general circulation. Notice and referendum will be as provided by general law. This amendment shall become effective immediately upon approval by the electors of Florida.

For purposes of this subsection:

(1) "Local government" means a county or municipality.

(2) "Local government comprehensive land use plan" means a plan to guide and control future land development in an area under the jurisdiction of a local government.

(3) "Local planning agency" means the agency of a local government that is responsible for the preparation of a comprehensive land use plan and planned amendments after public notice and hearings and for making recommendations to the governing body of the local government regarding the adoption or amendment of a comprehensive land use plan.

(4) "Governing body" means the board of county commissioners of a county, the commission or council of a municipality, or the chief elected governing body of a county or municipality, however designated.

PRELIMINARY REMARKS

If adopted, the Proposed Amendment would require citizen referenda on all new comprehensive land use plans adopted by local governments, defined as municipal and county governments, and on all amendments to existing comprehensive land use plans. Amendments to a comprehensive land use plan are either designated as "small scale," meaning amendments to a plan's "future land use map" that affect less than 10 acres, or "standard." § 163.3187(1)(c). In the five-year period running from 1999 through 2003, final action was taken by local governments on 50,066 standard amendments and 3,775 small scale amendments.[2] Florida law allows two cycles a year for the submission of standard amendments. § 163.3187.[3]

The term "comprehensive land use plan" is not defined in the Proposed Amendment or explained in the ballot summary. An explanation of the nature and

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[2] Memorandum from Ray Eubanks, Bureau of State Planning of the Department of Community Affairs, to Eliza Hawkins, Florida House of Representatives Appropriations Committee, on file with the Financial Impact Estimating Conference. The Court is requested to take judicial notice of this document pursuant to section 90.202(5).

[3] Local governments took final action on: 15,940 standard amendments in 1999; 12,353 standard amendments in 2000; 10,053 standard amendments in 2001; 8,148 standard amendments in 2002; and 3,572 standard amendments in 2003. *See* Eubanks memorandum, note 2 above. The number of amendments reviewed each year varies greatly, because the law requires an Evaluation and Appraisal Report every seven years which is tantamount to the submission of an entirely new plan. (Testimony of Ray Eubanks, Bureau of State Planning, Department of Community Affairs, Financial Impact Estimating Conference on July 19, 2004, on file with The Florida Senate Document Center, for which judicial notice is requested pursuant to section 90.202(5)).

scope of comprehensive land use plans is essential to the Court's understanding of the effects on local governments and voters of the electorate's adoption of the Proposed Amendment. To assist the Court, the League and the Association have summarized the statutory framework of the comprehensive land use planning process, and has referenced appellate court decisions which have described and addressed the statutory scheme.

I. Statutory framework for comprehensive land use planning.

The Florida Constitution grants cities the power to conduct municipal government, perform municipal functions, and render municipal services. Art. VIII, § 2(b). The Constitution grants similar powers to Florida's counties. Art. VIII, § 1.

The Local Government Comprehensive Planning and Land Development Regulation Act, found in sections 163.3164-.3217, requires that local governments prepare a local comprehensive plan or amend existing local plans to address a wide range of functions and services. Local governments are defined as being municipalities and counties. § 163.3164(13). Comprehensive land use plans, which have multiple "elements" (§ 163.3177), are implemented by local governments through land development regulations which may not be inconsistent with the local government's comprehensive land use plan. § 163.3202. All development undertaken by local governments, and all local government decisions on development orders, must be consistent with the plan. § 163.3194(1)(a). Under

the Act, the comprehensive land use plan is controlling law for all local government land use decisions.

Local government comprehensive land use plans must be adopted in accordance with the state's procedures and standards which require public participation "to the fullest extent possible." § 163.3181(1). They are initially prepared by local planning agencies whose meetings and records are open to the public. § 163.3174(5). After an advertised public hearing, a complete proposed comprehensive plan or a plan amendment is transmitted by the local government for review by a myriad of agencies. § 163.3184(3) and (15). The public has 30 days after transmittal to submit written comments. § 163.3184(4).

A review of comprehensive land use plans is performed by the Department of Community Affairs ("the Department"), with input from regional planning councils, water management districts, the Department of Transportation, the Department of Environmental Protection, the Florida Fish and Wildlife Conservation Commission, the Department of Agriculture and Consumer Services (for county plans), the Department of Education (for public education facilities element only), and county governments (in the case of municipal plans). § 163.3184(3). Each of the reviewing agencies and entities submit comments to the Department, which then prepares a report that contains objections, comments and recommendations, if any. § 163.3184(6).

If a local plan or amendment is determined to be out of compliance with the requirements of chapter 163 by the Department or the reviewing agencies, or if a substantially affected party wants to challenge an amendment, administrative

remedies are provided to resolve any dispute. § 163.3184(10). The final step in the administrative review process is a review of a plan or amendment by the Governor and Cabinet, serving as the Administration Commission. § 163.3184(11). If the Commission finds an inconsistency with state law or the state comprehensive plan, it must specify remedial actions which would bring the comprehensive plan or plan amendment into compliance. *Id*.

Local governments then have 60 days after receiving the Department's report to act on a comprehensive plan or amendment. § 163.3184(7). After a second advertised public hearing, the local governments will vote either to adopt or not to adopt plan amendments with or without recommended changes. §§ 163.3184(7) and (15). To assist the Court, the League and the Association have attached as Appendix 1 to this brief a schematic diagram of the comprehensive land use process, prepared by the Department.[4]

[4] Appendices are abbreviated in this brief by appendix number and page as follows: "A:1 at _."

II. An illustration of a comprehensive land use plan and amendments.

An understanding of the nature and scope of a comprehensive land use plan is best shown by reference to an actual local government comprehensive land use plan. To that end, the League and the Association have attached as an appendices to this brief the Comprehensive Development Master Plan adopted by Miami-Dade County as amended through April of 2001 ("the Miami-Dade Plan") (Appendix 2), and a Compendium of Amendments updating the Miami-Dade Plan ("the Miami-Dade Amendments"). (Appendix 3). The Miami-Dade Plan and its Amendments are more extensive and inclusive than many plans and amendments adopted by other local government units, for obvious reasons, but all of the plans of Florida's 408 municipalities and 67 counties have the same required elements. The Miami-Dade Plan gives the Court an exposure both to the range of subjects within plans, and to the multiplicity of matters within the mandatory elements which would be subject to citizen referenda if the Proposed Amendment were to become a part of the Florida Constitution.[5]

A. The Miami-Dade plan.

The following is an overview of the Miami-Dade Plan, which contains ten elements. (A:2 at i).

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[5] The website of the Municipal Code Corporation (www.municode.com) contains other comprehensive land use plans adopted by local governments which may be referenced: namely, Comprehensive Plan of the City of Melbourne (March 9, 2004); Comprehensive Plan of the City of Rockledge (Feb. 5, 2003); Comprehensive Plan of the City of Stuart (Dec. 15, 2003); and Florida Comprehensive Plan of Walton County (Nov. 7, 1996).

1 1. The Land Use Element (A:2 at I-1-81) addresses the intensification of physical development and expansion of the urban area, identifies locations where various land uses and intensities of use will be permitted, contains all of the material required by section 163.3177(6)(a) and includes the Land Use Plan maps for 2005 and 2015. (A:2 at I-1).

2. The Transportation Element (A:2 at II-1-74) provides a plan for an integrated multimodal transportation system for the county, and contains five separate sub-elements with maps that address traffic circulation, mass transit, aviation, and ports. (A:2 at II-1).

3. The Housing Element (A:2 at III-1-9) provides a framework for the housing needs of the county and addresses both the private sector and public sector developments such as streets and highways, parks, playgrounds, water, and waste disposal. (A:2 at III-1).

4. The Conservation, Aquifer Recharge and Drainage Element (A:2 at IV-1-27) is mandated by section 163.3177(6)(d) and is geared to the identification, conservation, appropriate use, protection and restoration of the biological, geological and hydrological resources of the county. (A:2 at IV-1).

5. The Water, Sewer and Solid Waste Element (A:2 at V-1-20), addresses the present and future needs for potable water, sanitary sewers, and solid waste disposal. (A:2 at V-1).

6. The Recreation and Open Space Element (A:2 at VI-1-16), with ten separate sub-elements, addresses area-wide and local open spaces and facilities for recreational opportunities, other than national or state parks, water conservation areas and wetlands. (A:2 at VI-1).

7. The Coastal Management Element (A:2 at VII-1-22) seeks to protect coastal resources, to protect people and property from natural disasters, to improve public access to beaches and shores, to maintain and increase shoreline for water-related uses, and to preserve historical and archaeological sites in coastal areas. (A:2 at VII-1).

8. The Intergovernmental Coordination Element (A:2 at VIII-1-14) is designed to identify and resolve incompatibilities between the county's comprehensive planning and that of the 34 municipalities within the county, three adjacent counties and their municipalities, as well as regional, state and federal agencies. (A:21 at VIII-1).

9. The Capital Improvements Element (A:2 at IX-1-63) is an element of every comprehensive land use plan which addresses the total fiscal capability of a local governmental body through public expenditures, revenues, taxes and other funding sources. (A:2 at IX-1).

10. The Educational Element (A:2 at X-1-8) addresses the maintenance of a public education system in the county in cooperation with other governmental agencies. (A:2 at X-1).

B. Miami-Dade amendments.

The following are examples of amendments which have been adopted to the Miami-Dade Plan. In the "small scale" category, an amendment was adopted to redesignate a two block area in Miami-Dade County to change the density from "low-medium density residential" to "business and office." (A:3 at § 2 at 12). Another amendment redesignated a 1-acre parcel adjacent to a shopping center from "low density residential" to "business and office." (A:3 at § 3 at 19).

In the "standard" category, amendments have been adopted which (i) redesignate the corner of one block in the county from "office/residential" to "business and office" (A:3 at § 2 at 13), and (ii) redesignate a street being widened from 2 lanes to 4 lanes on the Land Use Plan map from "Minor Roadway (2 lanes)" to "Major Roadway (3 or more lanes)" and in the "Planned year 2015 Roadway Network" of the Transportation Element (A:3 at Oct. 2001 Cycle at 13-14). Another example is a text amendment adopted to the "Residential Communities" section of the Land Use Element, in order to insert a paragraph adopting a "Thematic Resource District" (A:3 at the April 2001-02 Amendment Cycle at 7).

III. Sample judicial decisions which have addressed the comprehensive land use plan amendment process.

The Court is familiar with the comprehensive land use planning process, its history, and the roles of state agencies and local governmental bodies in applying the statutory scheme. *See Board of County Comm'rs of Brevard County v. Snyder*, 627 So. 2d 469, 472-74 (Fla. 1993). Other appellate courts in the state have also been exposed to the range of matters and the complexity of the statutory scheme. A mention of just a few decisions will give the court an insight into the required interaction of different levels of government in the area of land use planning, and as to the scope of the local governments' exercise of legislative responsibilities in land use planning.

In *Machado v. Musgrove*, 519 So. 2d 629 (Fla. 3d DCA 1987), *review denied*, 529 So. 2d 694 (Fla. 1988), the court held that zoning is a means by which a comprehensive land use plan is implemented, and went on to hold that a zoning request for professional offices was not consistent with the neighborhood study which the county had adopted as an element of the Miami-Dade County comprehensive land use plan.

In *Village of Key Biscayne v. Department of Community Affairs*, 696 So. 2d 495 (Fla. 3d DCA 1997), the court held invalid a proposed amendment to density provisions in the Miami-Dade County comprehensive land use plan which was "in compliance" (a term of art in land use planning) with rules of the Department, on the ground that it was *not* in compliance with chapter 163.

In *Village of Key Biscayne v. Dade County*, 627 So. 2d 1180 (Fla. 3d DCA 1993), *review denied*, 639 So. 2d 976 (Fla. 1994), the court reversed the approval of permits to build commercial and entertainment facilities on property leased by the Miami Seaquarium, based entirely on the meaning of the word "complementary" in the Parks and Recreation Element of the county's plan.

In *Martin County v. Department of Community Affairs*, 771 So. 2d 1268 (Fla. 4th DCA 2000), the court had for consideration a series of land use amendments adopted by the city of Stuart which Martin County, and initially the Department, considered not to be in compliance with chapter 163 and other statutes dealing with interlocal planning issues. In a challenge brought by Martin County, an administrative law judge found the amendments to be in compliance and the Department adopted his findings in a final order. Martin County challenged that order on appeal. The determinative issue in the case was whether a Future Annexation Area Map constituted an amendment to the city's comprehensive land use plan which had to be supported by adequate data and analysis, or whether it was just data and analysis supportive of other amendments to the plan. The court held that the map was an amendment itself.

SUMMARY OF ARGUMENT

The Proposed Amendment is clearly and conclusively defective. It violates the ballot title and summary requirements of section 101.161 by misstating the substance of the Proposed Amendment with emotional rhetoric, by omitting the full range of matters on which referenda will be required of the voters, by failing to inform voters that they will be required to vote on land use decisions made by state agencies, and by implying that there is presently no public participation in comprehensive land use planning at the local level.

The Proposed Amendment also violates the single subjection requirement of the Constitution by substantially altering and performing legislative functions of local governments, by affecting multiple levels of state and local government, by logrolling, and by failing to disclose significant collateral effects.

ARGUMENT

On July 15, the Court issued ten advisory opinions on proposed constitutional amendment initiatives which had been submitted by the Attorney General for the Court's review. The two issues considered in those ten cases were the two issues before the Court in this case: compliance with the single subject requirement of Article XI, section 3 of the Florida Constitution, and compliance with the ballot title and summary requirements of section 101.161.

In light of the Court's intimate familiarity with the principles governing its review, the League and the Association will not use exhaustive case law references for the two issues under consideration. Rather, based on their unique familiarity

with local government land use planning, they will explain why the Proposed Amendment is flawed under both the single subject requirement of the Constitution and the ballot disclosure requirements of section 101.161.

The ballot title and summary are clearly and conclusively defective.

Section 101.161 requires that the substance of a proposed constitutional amendment be set out in a explanatory statement of the "chief purpose" of the measure. The purpose of the ballot title and summary is to tell voters the legal effect of a proposed amendment only, with fair and accurate notice of its content. A summary may not include political rhetoric that invites an emotional response by materially misstating the substance of the amendment. *E.g.*, *Advisory Op. to the Att'y Gen. re Additional Homestead Tax Exemption*, 29 Fla. L. Weekly S405 (Fla. July 15, 2004) ("*Additional Homestead Exemption*"). The ballot summary for this Proposed Amendment does not comply with these requirements.

The starting point for analysis of a proposed constitutional amendment is an identification of its chief purpose. *See, e.g., Additional Homestead Exemption*, 29 Fla. L. Weekly at S407. The chief purpose of the Proposed Amendment is stated in both its title and its summary; namely, to require a citizen vote on local government comprehensive land use plans and amendments. The ballot summary, however, contains emotional rhetoric to misstate the substance of the amendment, omits the full range of matters on which referenda will be required of the voters, fails to inform voters that they will be required to vote on land use decisions made

by state agencies, and implies that there is presently no public participation in comprehensive land use planning at the local level.

A. The ballot summary materially misstates the substance of the Proposed Amendment with emotional rhetoric.

The first sentence of the ballot summary states that public participation in local government comprehensive land use planning benefits Florida's "natural resources" and " scenic beauty." This misleads the public, or as the Court has often said "flies under false colors," and the Court's decisions require that the Proposed Amendment be invalidated.

In *Additional Homestead Exemption*, the Court addressed a ballot summary which, in its opening sentence, said that the amendment "provides property tax relief." The Court held that the promise of tax relief "constitutes political rhetoric that invites an emotional response from the voter by materially misstating the substance of the amendment." *Id*. at S408. That is precisely the effect of the opening sentence of the summary in the Proposed Amendment.

As was the case with "tax relief" in *Additional Homestead Exemption*, the use of the terms "natural resources" and "scenic beauty" misstate the substance of a proposed amendment whose chief purpose is to require citizen votes on all comprehensive land use plans and amendments. Those terms are no less emotional hot button terms than "tax relief." The only possible explanation for their use in the ballot summary here is to invite an emotional response like the one that was condemned in *Additional Homestead Exemption*. *See* 29 Fla. L. Weekly at S408, and in the other decisions which the Court there referenced.

A key to exposing gratuitous and unnecessary emotional rhetoric was utilized by Justice Bell during the oral argument in *Additional Homestead Exemption*, when he questioned the need for using the phrase "provides tax relief" in a ballot summary for that amendment, when the chief purpose of the proposal was otherwise adequately and accurately stated.[6] That approach to the use of the phrase "tax relief" results in the same invidious revelation here with respect to the terms "natural resources" and "scenic beauty." The chief purpose of this proposal is fully and accurately set out in the second sentence of the ballot summary, so that the reference to natural resources and scenic beauty is completely unnecessary in the ballot summary.

It is no accident that the ballot summary places emphasis on natural resources and scenic beauty. The intention of the framers to capitalize on those buzz words is evident from their placement of the Proposed Amendment in the "Natural Resources and Scenic Beauty" provision of the Constitution (Article II, section 7), although its chief purpose is more consistent with either "Suffrage and Elections" (Article VI) or "Local Government" (Article VIII).

The first sentence of the ballot summary also states that public participation in local government comprehensive land use planning "benefits" Florida's natural resources, scenic beauty and citizens. This, too, is an emotional appeal which in no way explains or describes the substance of the proposal, but what's worse is that it misstates the Proposed Amendment in a manner designed to put a positive spin on all citizen votes with respect to land use plans and amendments. Any particular

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[6] http://wfsu.org/rafiles/archives/04-942.ram at 6:40.

vote of citizens on a land use plan or amendment could as readily be *detrimental* to natural resources, or scenic beauty, or to the citizens themselves, as it could be beneficial. The effect of any vote is entirely subjective and speculative. The word "benefit" has no place in the proposal except as emotional rhetoric. Saying that citizen referenda "benefits" natural resources and scenic beauty is no less inaccurate and misleading political rhetoric than saying that an additional homestead exemption will provide tax relief.

B. The ballot summary misleads voters by omitting the full range of matters on which referenda will be required.

A ballot summary which leaves out material information is clearly and conclusively defective. *Advisory Op. to the Att'y Gen. re Stop Early Release of Prisoners*, 642 So. 2d 724, 727 (Fla. 1994). Put another way:

> The problem . . . lies not with what the summary says, but, rather, with what it does not say.

Askew v. Firestone, 421 So. 2d 151, 156 (Fla. 1982).

The ballot summary of the Proposed Amendment prominently declares that citizens voting on comprehensive land use plans will benefit Florida's natural resources, scenic beauty and citizens.[7] Comprehensive land use plans involve much more than just environmental and aesthetic considerations and the right of citizens to publicly participate in comprehensive land use planning, however. By

[7] The League and the Association assume that the benefit to "citizens" is intended to be that which is stated in the text of the amendment; namely, the "long-term quality of life of Floridian's."

failing to tell voters the range of matters on which citizen referenda will be required, the summary materially misstates the substance of the amendment.

According to the statistics from the Department, hundreds of amendments might be put before the voters in some years if the proposed amendment passes.[8] The Miami-Dade Amendments show how detailed, complex and technical the amendments to comprehensive land use plans can be. Mundane issues that will be put in front of voters will include establishing procedures for local governments to coordinate with local schools boards (§§ 163.3177(6)(h) and 163.3177(6), to set and revise the level of service standards for roads (§ 163.3177(6)(b)), and to coordinate on incompatible land uses with military bases (§ 163.3175). The ballot title and summary give no hint of either the number of referenda that will be required or the extent of detail and complexity.[9]

In Miami-Dade County, citizens will be required to vote on a broad range of plans and amendments dealing with such matters as traffic circulation, mass transit, aviation (from the Miami-Dade County Transportation Element), sanitary sewers, and solid waste disposal (from the Miami-Dade County Water, Sewer and Solid

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8 *See*, for example, Comprehensive Weekly Report of ELMS Amendments, prepared by Ray Eubanks, Bureau of State Planning of the Department at 1 (8/4/04), showing that the city of Alachua transmitted 628 standard amendments and that the city of Apopka transmitted 272 standard amendments. This document is on file with the Department, and the Court is requested to take judicial notice pursuant to § 90.202(5).

9 As of August 3, 2004, the majority of respondents to a survey of local government planning officials conducted by the Financial Impact Estimating Conference (on file with that entity) indicate that the Proposed Amendment would necessitate a minimum of two special elections a year.

Waste Element). They will be burdened with voting on such picayune matters unrelated to natural resources, scenic beauty, or quality of life as whether the corner of a city block should be re-designated "business and office" instead of "office/residential" (A:3 at § 2 at 13), and whether the Land Use Plan map for 2015 should rename a Minor Roadway as a Major Roadway because it's proposed to be enlarged from two to four lanes. (A:3 at Oct. 2001 Cycle at 13-14a). The ballot summary in no way conveys either the breadth or the minutiae of matters on which referenda will be mandated.

A summary which contains an undisclosed "important consequence" – and the range of matters requiring a vote is a *very* important consequence of the Proposed Amendment – will render a proposed amendment defective. *Advisory Op. to the Att'y Gen. re Fairness Initiative Requiring Legislative Determination that Sales Tax Exemptions and Exclusions Serve a Public Purpose*, 29 Fla. L. Weekly S410, 412 (Fla. July 15, 2004) ("*Sales Tax Exemptions*"). Here, voters have not been given all the necessary information to cast an intelligent and informed vote on the Proposed Amendment because the ballot summary unfairly hides the ball. *See Armstrong v. Harris*, 773 So. 2d 7, 16 (Fla. 2000), *cert. denied*, 532 U.S. 958 (2001).

C. The ballot summary misleads voters by failing to inform voters that they will be required to vote on land use decisions of state agencies.

The Court has stricken proposed amendments that create a factual impression which is misleading because the ballot summaries failed to communicate material information. In *Additional Homestead Exemption*, for example, the Court identified the chief purpose of the amendment as providing an additional homestead exemption. It then struck the proposal because property taxes are composed of a property valuation and a millage rate, and since the latter was not addressed by the amendment the ballot summary was flying "under false colors" with its promise of tax relief. 29 Fla. L. Weekly at S407.

The same reasoning had been applied in *Advisory Op. to the Att'y Gen. re Casino Authorization, Taxation and Regulation*, 656 So. 2d 466 (Fla. 1995) ("*Casino Authorization*"), where the ballot summary said that voters could authorize casinos at "hotels" when the proposed amendment itself authorized casinos in the much broader category of "transient lodging establishments." 656 So. 2d at 468. *See also, Advisory Op. to the Att'y Gen. re Tax Limitation*, 644 So. 2d 486, 494 (Fla. 1994) ("*Tax Limitation*") (ballot summary was held misleading which said the proposed constitutional amendment "requires voter approval of new taxes" and "increases in tax rates," because it implied that the Constitution didn't already have caps or limits on taxes when it fact it did).

The chief purpose of the Proposed Amendment in this case is to require voter approval of *local government* land use plans and amendments, following preparation by the *local planning agency* and "consideration by the governing

body" of the *local government*. The legislative scheme for comprehensive land use plans and amendments, however, and especially those dealing with Florida's natural resources and scenic beauty, requires that comprehensive land use plans be considered not just by local governments, but by several state and regional agencies. In fact, no amendment to a comprehensive land use plan can even become effective until the Department, or the Governor and Cabinet sitting as the Administration Commission, has issued a final order of compliance with state planning laws. § 163.3189(2)(a).

The ballot summary does not tell voters they will be voting on plans and amendments considered and evaluated by state and regional agencies with statutory responsibility to assure compliance with the state's environmental and land use laws. This is a significant piece of omitted information, conceptually no different than the omission of information which resulted in the invalidation of a proposed amendment in *Advisory Op. to the Att'y Gen. re Fish and Wildlife Conservation Comm'n*, 705 So. 2d 1351 (Fla. 1998). There, the Court found defective a ballot summary which advised voters that the amendment being proposed would unify two Commissions, one of which was a legislative creation and the other a constitutional body, although the ballot summary "accurately points out that the two commissions will be combined into one." 705 So. 2d at 1355. The summary was held misleading because voters weren't told it "strips the legislature of its exclusive power to regulate marine life and grants it to a constitutional entity." *Id*. In the same vein, the ballot summary here accurately says that voters will participate in "local government" comprehensive land use planning, but does not

say that the amendment strips state and regional agencies of power to carry out their land use responsibilities.

D. The ballot summary misleads voters by implying that there is presently no public participation in comprehensive land use planning at the local level.

The first sentence of the ballot summary touts the benefits to natural resources, scenic beauty, and citizens that will come from "public participation" in local government comprehensive land use planning. The clear implication is that citizens presently cannot participate in comprehensive land use planning at the local government level. This is grossly misleading and false, however, as public participation is presently available throughout the comprehensive land use plan process.

The legislature specifically declared its intent "that the public participate in the comprehensive planning process to the fullest extent possible," and mandated that agencies and local governments are to adopt procedures to provide effective public participation. § 163.3181(1). All meetings and records of local planning agencies are public. § 163.3174(5). Public comments are not only permitted, but all comments must become part of a plan or amendment file and the review process. § 163.3184(4) and (7). Local governments are required to hold at least two advertised public hearings, one when they seek required state agency input, and one when a plan or amendment is being considered for adoption. § 163.3184(10). Moreover, the legislature conferred broad "standing" upon citizens who wish to challenge comprehensive land use plan amendments. *See*

Michael C. Soules, *Constitutional Limitations of State Growth Management Programs*, 18 J. LAND USE & ENVTL. L. 145, 165-66 (Fall 2002); § 163.3184(1)(a). To have standing, a citizen need only be an "affected person" which is defined in the statute as including

> [t]he affected local government; persons owning property, residing, or owning or operating a business within the boundaries of the local government whose plan is the subject of the review; owners of real property abutting real property that is the subject of a proposed change to a future land use map; and adjoining local governments . . .

§ 163.3184(1)(a).

The unmistakable implication that the Proposed Amendment will provide public participation that does not now exist is highly misleading. *See Tax Limitation*, 644 So. 2d at 494. Precisely this kind of misimpression led the Court to strike a proposed amendment with a ballot summary statement that the "amendment prohibits casinos unless approved by the voters," because the summary "creates the false impression that casinos are now allowed in Florida" when in fact "most types of casino gaming" were already prohibited by statute. *Casino Authorization*, 656 So. 2d at 469.

II. The Proposed Amendment violates the single-subject requirements of the Florida Constitution.

An initiative petition may not embrace more than one subject and matter directly connected therewith. Art. XI, § 3, Fla. Const. This limitation prevents a single amendment "from substantially altering or performing the functions of multiple branches of government and thereby causing multiple 'precipitous' and 'cataclysmic' changes in state government." *See Advisory Op. to the Att'y Gen. re Right to Treatment and Rehabilitation for Nonviolent Drug Offenses*, 818 So. 2d 491, 495 (Fla. 2002). It also prevents logrolling: the formulation of a proposed amendment with one or more provisions which electors may want to support but with other provisions they will have to accept in order to adopt the ones they want. *Sales Tax Exemptions*, 29 Fla. L. Weekly at S411-12. It also produces undisclosed collateral effects.

A. The Proposed Amendment would alter multiple functions of governmental entities.

Local governments are considered to be affected branches of government for purposes of the single subject test. *E.g.*, *Advisory Op. to the Att'y Gen. re Amendment to Bar Gov't from Treating People Differently Based on Race in Public Educ.*, 778 So. 2d 888, 894-96 (Fla. 2000) ("*Race in Public Education*"). The Proposed Amendment has a "very distinct and substantial affect" on all local governments which alters and in reality performs their legislative functions. *See Tax Limitation*, 644 So. 2d at 494-95. It also substantially alters the functions of the executive and legislative branches of state government. In fact, the Proposed Amendment affects exactly the same swath of executive, legislative and local government land use responsibilities that were the basis for the Court's invalidation of a proposed amendment in *Advisory Op. to the Att'y Gen. re People's Property Rights Amendments Providing Comp. For Restricting Real Prop. Use*, 699 So. 2d 1304, 1308 (Fla. 1997).

1. Local branches of government.

Local comprehensive land use planning, and the regulation of a broad range of public services, are among the most important functions of local governments. *See* §§ 163.3177 (setting forth elements of local comprehensive land use plans), § 125.01 and §§ 166.021 *et seq.* (setting forth the powers of counties and municipalities, respectively, to provide for and regulate services). Within the ambit of these responsibilities, local governments must plan and provide for (i) roads, bridges, parking and traffic circulation, (ii) air, rail, and bus terminals and public transportation systems, (iii) sanitary sewer systems, solid waste collection and disposal, drainage, and potable water, (iv) conservation of natural resources, (v) parks, preserves, playgrounds, recreation areas, open spaces, libraries, museums, and other recreational and cultural facilities, (vi) public buildings, (vii) housing and community redevelopment, and (viii) establish zoning, housing and building codes. *Id*. All of these functions must also be regulated by local governments. *Id*.; § 163.3202.

Local governments perform these planning and regulatory functions by preparing, amending and adopting local comprehensive land use plans in accordance with chapter 163, and by enacting regulations consistent with those plans pursuant to section 163.3202. The Proposed Amendment would alter the performance of these responsibilities by overlaying them with voter negation at the ballot box, effectively taking the legislative function of land use planning out of the hands of local governments and ceding the performance of those functions to

citizens. Put another way, local governments may not regulate land use in a manner that is inconsistent with their comprehensive plans, and the Proposed Amendment usurps the ability of local governments to perform that function.

The Proposed Amendment effects a substantial alteration of the functions of local government which are presently provided in the Florida Constitution and in Florida statutes. Those effects extend to the planning and regulation of all public and private uses of land, including residences, businesses, industry, agriculture, and recreation, and to conservation, education, public buildings, public utilities, infrastructure, and transportation. By anyone's definition, these are cataclysmic changes which the single subject rule was designed to prohibit. *See, e.g.*, *Race in Public Education*, 778 So. 2d at 895-96 (this Court holding a proposed amendment invalid, as a violation of the single subject requirement, on the basis (among other grounds) that it would eliminate the ability of local government to perform legislative responsibilities).

Another proposed amendment was also invalidated in *Tax Limitation*, 644 So. 2d at 494, where the Court held that providing full compensation for the value of vested property rights would substantially alter the ability of local governments

> to enact zoning laws, to require development plans, to have comprehensive plans for a community, to have uniform ingress and egress along major thoroughfares, to protect the public from diseased animals or diseased plants, to control and manage water rights, and to control or manage storm-water drainage and flood waters . . . .

644 So. 2d at 495. These local government responsibilities are the heart and soul of comprehensive land use planning, and subjecting each to a citizen referenda is no less an alteration of the functions of local government.

2. State branches of government.

Local government comprehensive land use plans and amendments must be reviewed by a host of state agencies and adopted in accordance with the state law. §§ 163.3177(9) and (10), 163.3184(4). If local comprehensive land use plans and amendments can be rejected by popular vote, then there is no mechanism to assure that local plans will be consistent with the state law or the comprehensive plan prepared by the Governor,[10] amended by the Administration Commission,[11] and adopted into general law biennially by the Legislature.[12] The entire state review process is substantially altered, and indeed may be set aside altogether. If local government comprehensive amendments are rejected by the voters, the consequence to local governments may be an inability to participate in state revenue sharing or drawing down state and federal funds for coastal management, transportation or housing programs (§ 163.3184(11)), and multiple functions of the executive and legislative branches of state government are thereby substantially altered.

Where an initiative has a substantial effect on local government entities, coupled with a curtailment of the powers of the other branches of government, it is

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10 *See* § 186.008(1), Fla. Stat.

11 *See* § 186.008(1), Fla. Stat.

12 *See* § 186.008(3), Fla. Stat.

fatally defective and violative of the single-subject requirement. *Race in Public Education*, 778 So. 2d at 896; *Tax Limitation*, 644 So. 2d at 494-95. Here, the Proposed Amendment virtually creates a new branch of government – the citizenry – with authority to exercise the powers and perform the functions of the legislative and executive branches of state government in the area of land use. The impact of the proposal is as permeating as was the effect in *Advisory Op. to the Att'y Gen. – Save Our Everglades*, 636 So. 2d 1336 (Fla. 1994), and effects changes in the functions of state government that are more than sufficient to warrant invalidating the Proposed Amendment. *See Race in Public Education*, *Tax Limitation*, *supra.*

B. The Proposed Amendment constitutes logrolling.

The Proposed Amendment is a classic example of logrolling. It invites citizens to have the last word on natural resources and scenic beauty in order to get their ballot approval, but then requires that they vote on a multitude of subjects which include capital improvements, potable water, school planning, public facilities, land use, traffic circulation, housing, coastal management, education, mass transit, parking, neighborhood design, safety, and commercial and industrial development, along with the re-designation of a 2-lane street to a 3-lane street. A voter wishing to have a vote on natural resources and scenic beauty is obligated to vote on all of the other issues and items that compose a comprehensive land use plan and its amendments, even though they may vehemently oppose having so many votes on so many subjects.

This is exactly the kind of situation the prohibition on logrolling was designed to prevent. *Sales Tax Exemptions*, 29 Fla. L. Weekly at S411-12.

C. The Proposed Amendment will involve undisclosed collateral effects.

The Proposed Amendment creates collateral effects that are not readily apparent to the electorate, such as the number and complexity of amendments on which referenda will be required, and the time expended and disruption to local government which those referenda will cause. If disclosed, these collateral effects might very well affect the electorate's decision about whether to support the Proposed Amendment.

Florida law mandates two amendment cycles each year, but also allow many amendments to be submitted on a different time schedule at the applicant's election. § 163.3187. It is estimated that twenty-five percent of proposed amendments to comprehensive plans are time sensitive, such as those needed to comply with federal funding requirements, and would require special elections.[13] Local governments would have to hold at least two elections every year, and in all likelihood even more,[14] in order to meet the voting requirements of the Proposed Amendment. The significance of this undisclosed collateral effect cannot be understated if one considers the requirements for a major metropolitan area such as Miami-Dade County, where in addition to land use plan amendments for the

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13 Eubanks testimony, note 3 above.

14 *See* note 9 above.

County itself there will be land use plan amendments for 34 separate municipalities situated within the boundaries of the County.

The existence of undisclosed collateral effects from the Proposed Amendment is just another reason for the Court to remove it from the ballot. *See, e.g., Race in Public Education*, 778 So. 2d at 900; *Advisory Op. to the Att'y Gen. – Restricts Laws Related to Discrimination*, 632 So. 2d 1018, 1024 (Fla. 1994) (Kogan, J., concurring).

CONCLUSION

The Proposed Amendment is clearly and conclusively defect. It violates the single subject requirement of the Constitution and the requirements for ballot disclosure set out in section 101.161. The Court is respectfully requested to hold that it shall not be submitted to a vote of the electorate.

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I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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