IN THE SUPREME COURT OF FLORIDA

Case No. SC04-1134

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

BRIEF OF OPPONENT FOUNDATION FOR PRESERVING FLORIDA=S FUTURE, INC.

On Direct Review of Validity of an Initiative Petition

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STATEMENT OF THE CASE AND FACTS

On June 25, 2004, the Secretary of State submitted to the Attorney General an initiative petition containing the following proposed amendment to the Florida Constitution:

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 plan 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.

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.

On July 13, 2004, the Attorney General petitioned this Court for an advisory opinion as to whether the proposed amendment complies with Article XI, Section 3 of the Florida Constitution, and whether the amendment=s ballot title and summary comply with Section 101.161, Florida Statutes.

SUMMARY OF ARGUMENT

Single-Subject Requirement

The proposed amendment substantially alters and performs the functions of multiple branches and levels of government. It does so by requiring public approval in a referendum election as a prerequisite to the adoption of any change in local land planning or regulation.[1] The consequence of adoption of the amendment would be to shift the current broad discretion as to land planning and regulation that currently resides in state and local government agencies from those agencies to the public-at-large at the local level.

Adoption of the amendment would radically change the manner in which municipal and county governments control land development and regulate its use, one of the most significant and widely exercised powers of local government, by effectively reducing the power currently exercised by such governments to nothing more than the ability to recommend changes to the public. The amendment would also severely hamper, if not entirely curtail, the exercise of power by the Legislature to mandate minimum and coordinated standards of land planning by local governments, and the authority of the Governor, the Department of Community Affairs and the State Administration Commission to implement and enforce those standards.

By incorporating into the same amendment a restriction upon the discretion of government agencies at both the state and local level, the sponsors have confronted voters with an all-or-nothing choice that

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[1] The amendment refers to adoption or amendment of a Acomprehensive land plan,@ but broadly defines that term as Aa plan to guide and control future land development in an area under the jurisdiction of a local government.@

constitutes prohibited logrolling.

The amendment also fails to comply with the independent requirement that it identify all affected provisions of the constitution. The amendment identifies only the provision it would expressly revise, Article II, Section 7, relating to natural resources and scenic beauty. It makes no reference to other substantially affected articles and sections such as Article III (legislative powers), Article IV (executive powers), and Article VIII (local government powers). The problems created by the failure of the amendment to identify all affected sections are exacerbated by the fact that the amendment creates a conflict between the requirement of the new provision and Article II, Section 7=s mandate that the Legislature make adequate provision Afor the conservation and protection of natural resources.@ This conflict, coupled with significant ambiguities in the amendment, would require the Court to engage in a degree of judicial construction that the Court has condemned as being contrary to the intent of the authors of the initiative provision and the electorate and a dangerous precedent.

Ballot Title And Summary

There are three separate defects in the ballot title and summary, any one of which would be sufficient to disqualify it for ballot position:

(1) The title and summary refer to Alocal government comprehensive land use planning.@ The quoted phrase gives the voter the impression that the amendment would apply only to broadly encompassing land plans and, in particular, to those plans meeting the criteria set forth in the Local Government Comprehensive Planning and Land Development Regulation Act, which uses the same terminology. The title and summary are misleading because they fail to disclose the existence in the amendment of a definition that would result in application to any enactment designed to guide and

control future land development;

(2) The title and summary convey the impression that the amendment has solely local impact when, in fact, it would effectively dismantle a series of long-standing, statewide programs designed to establish minimum standards of environmental preservation and maintain coordinated state, regional and local land planning;

(3) The opening line of the summary states: APublic participation in local government comprehensive land use planning benefits Florida's natural resources, scenic beauty and citizens.@ The statement is political rhetoric designed to curry voter favor and obscure the fact that the amendment would provide far more than Apublic participation.@ The summary thus fails to meet the requirement that it be objective and free from political rhetoric.

ARGUMENT

I
THE PROPOSED AMENDMENT VIOLATES THE SINGLE-SUBJECT REQUIREMENT OF ARTICLE XI, SECTION 3 OF THE FLORIDA CONSTITUTION.

A. The amendment would alter and perform functions of multiple branches and levels of government.

In its evaluation of proposed amendments with respect to the single-subject requirement, this Court has recognized an important dichotomy. The fact alone that a proposed amendment affects different branches of government or the possibility that an amendment might interact with other parts of the constitution is not sufficient to invalidate it. *Race In Public Education*, 778 So. 2d 888 (Fla. 2001). On the other hand, a proposal violates Article XI, Section 3 when it Asubstantially alters or performs the functions of multiple aspects of government@ or Achanges more than one government function.@ *Voluntary Universal Pre-Kindergarten Education*, 824 So. 2d 161 (Fla. 2002).[2] In this case, there is no question that the proposed amendment both alters and performs the functions of multiple levels and branches of government and is directly analogous to prior cases in which the Court has invalidated initiatives for violation of the single-subject requirement.

1. Local Government

The amendment would have a direct and substantial impact upon the

[2] The Court has interchangeably referred to altering or performing the functions of Amultiple aspects of government@ with Amultiple branches,@ *Race In Public Education*, 778 So. 2d at 892, or changing Amore than one government function.@ *Voter Approval of New Taxes*, 644 So. 2d 486, 490.

exercise of power by municipalities and counties. Both are empowered by Article VIII of the Constitution (and by general law in the case of non-charter counties) to regulate land use within their jurisdictions to the extent not inconsistent with general law. The regulation of land use is one of the most significant and widely exercised powers of local government. Today, the discretion of local legislative body and administrative agencies to exercise that power is limited only by parameters set by the Legislature and state agencies exercising delegated legislative authority.

The proposed amendment would severely limit the discretion of governing bodies of municipalities and counties and would shift the ultimate decision on land planning and regulation from city and county commissions to popular vote. Even if the amendment were truly limited as the title and summary suggest to Acomprehensive land use plans,@ its impact on local government authority would be substantial. However, the proposed amendment contains a definition of the term that significantly broadens its application to include virtually every land use regulation. The amendment defines the term to include any plan Ato guide and control future land development.@ That would include any zoning regulation, road construction plan, parks and recreation facilities plan, environmental regulation, and so on.

In the significant area of land planning and regulation, the broad legislative policy and decision-making power currently possessed by city and county commissions would be transformed into the limited power to Arecommend@ changes to the public-at-large. Control over land regulation by elected officials would be limited not only by the legal necessity for public approval of every change, but by the practical prospect of having to undertake the disruption and expense of an election before any change could

take effect. The amendment would effectively eliminate the ability of local governments to carry out state-mandated land planning obligations and to achieve regional coordination.

2. The Florida Legislature

The amendment would both alter and perform significant legislative functions. Article II, Section 7 of the Florida Constitution imposes upon the Legislature the duty of conserving and protecting the state=s natural resources and scenic beauty.[3] The Legislature has enacted a series of major, interrelated programs for the express purpose of fulfilling its duty as mandated by Article II, Section 7. Included among those programs are the Environmental Land and Water Management Act, ' 380.012, Fla. Stat., *et seq.* (1972),[4] the Local Government Comprehensive Planning and Land Development Regulation Act, ' 163.3161, Fla. Stat., *et seq.* (1975),[5] the Coastal Management Act, '

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[3] AAdequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise and for the conservation and protection of natural resources.@

[4] Section 380.21, Florida Statutes states:

It is the legislative intent that, in order to protect the natural resources and environment of this state as provided in s. 7, Art. II of the State Constitution, ensure a water management system that will reverse the deterioration of water quality and provide optimum utilization of our limited water resources, facilitate orderly and well-planned development, and protect the health, welfare, safety, and quality of life of the residents of this state, it is necessary adequately to plan for and guide growth and development within this state. In order to accomplish these purposes, it is necessary that the state establish land and water management policies to guide and coordinate local decisions relating to growth and development; that such state land and water management policies should, to the maximum possible extent, be implemented by local governments through existing processes for the guidance of growth and development; and that all the existing rights of private property be preserved in accord with the constitutions of this state and of the United States.

[5] Section 163.3161, Florida Statutes, provides:

380.20, Fla. Stat., *et seq.* (1978), and the Growth Policy Act, ' 163.2511, Fla. Stat. *et seq*,(1999). All of these acts constitute an exercise of Legislative discretion to set policy or impose requirements upon local government in the planning and regulation of land development. For example, local governments are required by the Local Government Comprehensive Planning and Land Development Regulation Act, ' 163.3161, Fla. Stat., *et seq.*, to adopt local comprehensive land plans that are consistent with the state comprehensive plan.

The proposed amendment would substantially alter the land planning functions of the Legislature because the local referendum required by the amendment is not limited to land planning acts initiated by local governments at their own discretion. It applies to all such acts occurring at the local level, including those mandated by the Legislature or state executive agencies. Thus, the amendment would significantly reduce the Legislature=s power to exercise discretion with respect to local land planning. The Legislature would no longer have the ability to mandate that cities and counties adopt or change land planning or regulatory ordinances since any such change would require approval by local referendum. For this reason, the Legislature would also lose the ability to accomplish statewide and regional coordination.

In addition to altering and performing the land planning and regulatory function of two levels of government, the amendment would substantially alter the performance of the functions of both the legislative and executive branches. In addition to the alteration of legislative functions already

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In conformity with, and in furtherance of, the purpose of the Florida Environmental Land and Water Management Act of 1972, chapter 380, it is the purpose of this act to utilize and strengthen the existing role, processes, and powers of local governments in the establishment and implementation of comprehensive planning programs to guide and control future development.

discussed, the amendment would alter the functions of at least four executive branch agencies.

3. The Governor

The Governor, as chief executive officer of the state, is charged by Article IV, Section 1 of the Florida Constitution with the responsibility for state planning, and by Article III, Section 19 with responsibility for development and biennial review and revision of the state planning document. In keeping with those responsibilities, the Legislature has delegated to the Governor the duty of preparing, updating, revising, and implementing the state comprehensive plan. ' 186.006, 186.008, Fla. Stat. The Governor is specifically mandated to Acoordinate planning among federal, state, regional, and local levels of government and between this state and other states,@ Afor the purpose of establishing consistency and uniformity in the state and regional planning process and in order to ensure that the intent of ss. 186.001-186.031 and 186.801-186.901 is accomplished.@ ' 186.006, Fla. Stat. The cited sections deal with the preparation by the Governor of the state comprehensive plan and, in particular, the growth management portion of the plan. Within the Legislature=s statement of findings and intent is the following language:

186.002 Findings and intent.--

(1) The Legislature finds and declares that:

(a) The issues of public safety, education, health care, community and economic development and redevelopment, protection and conservation of natural and historic resources, transportation, and public facilities *transcend the boundaries and responsibilities of individual units of government, and often no single unit of government can plan or implement policies to deal with these issues without affecting other units of government.*

(b) Coordination among all levels of government is necessary to ensure effective and efficient delivery of governmental services to all the citizens of the state. It is therefore necessary to establish *an integrated planning system and to ensure coordinated administration of government policies that*

address the multitude of issues posed by the state's continued growth and development.

(c) To promote intergovernmental coordination and the effective allocation of resources, the state should set goals to provide direction and guidance for state, regional, and local governments and agencies in the development and implementation of their respective plans, programs, and services. *The preservation and enhancement of the quality of life of the people of this state require that a state comprehensive plan be adopted by the Legislature to provide policy direction for all state and regional agencies and local governments*.

(d) Regular evaluation of the state comprehensive plan is necessary to inform the public whether state goals are being attained. To accomplish this purpose, *the state comprehensive plan should be evaluated biennially with any necessary revisions prepared through coordinated action by state and regional agencies and local governments.*

(emphasis added) The proposed amendment severely limits the Governor=s ability to fulfill his constitutional responsibility for state planning and his statutory obligation to carry out the Legislature=s intent to establish a coordinated and integrated state and local program of growth management that is regularly evaluated and updated.

4. The Florida Department of Community Affairs

The Department of Community Affairs,[6] acting in its capacity as the State Land Planning Agency, ' 163.3164(20), Fla. Stat., is responsible for adopting rules setting forth minimum criteria for local comprehensive plans, which rules must include criteria for the purpose of determining whether the local plan is consistent with the state comprehensive plan. ' 163.3174(9), Fla. Stat. The Department retains authority and responsibility to review new local comprehensive plans or plan amendments, and to issue a

[6] The Department of Community Affairs is an executive branch agency, the head of which is appointed by the Governor. ' 20.18(1), Fla. Stat.

report with its objections, recommendations, and comments regarding each such proposal. ' 163.3184(6). The proposed amendment will eliminate the ability of the Department of Community Affairs to implement rules relating to local comprehensive plans. As with the Legislature, the Governor, and city and county commissions, the amendment would reduce the Department=s role to one of making recommendations.

5. The Administration Commission

The Administration Commission, composed of the Governor and Cabinet, ' 163.3164(1), Fla. Stat., has responsibility for making the final executive determination of whether a local comprehensive plan or plan amendment is in compliance with the Act. ' 163.3184(11), Fla. Stat. Both the Administration Commission and the Department of Community Affairs have similar powers and responsibilities under Chapter 380, Florida Statutes, with respect to review of local comprehensive plans and enforcement of state standards in areas of critical state concern and with respect to developments of regional impact. The proposed amendment would shift final determination of acceptability of local plans from the Administration Commission to the public-at-large at local referendums.

The proposed amendment would significantly alter the performance of the above-noted functions of the Governor, the Department of Community Affairs and the Administration Commission. Those functions involve the imposition and enforcement of state uniform standards on local land planning. The aforesaid acts require continuing evaluation and revision in light of state growth patterns. The three agencies are empowered to require local governments to amend their comprehensive plans when necessary to make them conform to evolving state standards. The proposed amendment would limit the discretion of the three agencies and make it impossible for them to ensure uniformity or compliance because of the necessity for approval by

referendum before any local plan could be amended.[7]

This Court has previously found a proposed amendment that required local referenda to be in violation of the single-subject requirement. In *Voter Approval* Required for New Taxes, 699 So. 2d 1304 (1997), the amendment would have required voter approval of all new taxes. The Court struck the petition for violation of the single-subject requirement, finding that it substantially affected the provision in Article IX of the Constitution requiring that adequate provision be made for a uniform system of free public schools. The Court noted that a negative vote in a local referendum Acould scuttle the state plan@ for public school funding and that the amendment Awould plainly impact the constitutional requirement for adequate provisions for free public schools.@ The Court concluded that: ASince this initiative impacts several branches of government and several levels of government *** it violates the single-subject rule.@ *Voter Approval Required for New Taxes,* 699 So. 2d 1304, 1311 (Fla. 1997).

There is no material difference between the circumstances that controlled the Court=s single-subject analysis in *Voter Approval for New Taxes* and the circumstances in the case-at-bar. Just as a negative vote in a local referendum could scuttle a state plan for public school funding, a negative vote under the instant petition could scuttle state plans for statewide and regional land planning. Just as the amendment under scrutiny in the *Voter*

[7] It is not suggested here that a separate amendment would be necessary for every executive branch agency affected. To the extent that an agency=s authority depends upon delegation from the Legislature, an amendment restricting the Legislature=s power to make such delegation would suffice. However, where, as here, the amendment would have a material impact upon multiple constitutionally based government functions, it is surely multiple subject. The Department of Community Affairs and Administration Commission are discussed only to illustrate the broad impact of the proposed amendment upon the Legislature=s implementation of its constitutional duties, an impact that reaches multiple executive agencies as well as the Legislature.

Approval for New Taxes amendment Awould plainly impact the constitutional requirement for adequate provisions for free public schools,@ the proposed amendment now before the Court would plainly impact the constitutional requirement for Aadequate provision@ for Athe conservation and protection of natural resources.@

In the same opinion as *Voter Approval for New Taxes*, the Court reviewed an initiative that would have required full compensation to landowners for certain government restrictions on use of private real property. The Court found that this provision also violated the single-subject requirement. In a conclusion that could as readily apply to the current petition, the Court stated:

> The issue of property rights clearly affects the powers of the legislature. The legislative branch is empowered to enact legislation which establishes standards and criteria for regulating the use of land. Additionally, the legislature is required by article II, section 7 of the Florida Constitution to regulate the use of land to protect Florida's natural resources and scenic beauty.
>
> However, the subject of land use also substantially affects the executive branch of government. The executive branch is charged with the responsibility of carrying out the various functions of government which in multiple ways impact the use of real property in Florida. Restriction of use of real property inherently affects multiple functions of the executive branch in executing its responsibility. These functions include zoning, fire-protection regulations, storm-water drainage, garbage removal, clean-air requirements, and numerous others. This initiative affects not just legislative appropriations and statutory enactments but executive enforcement and decision-making. Consequently, it is the substantial impact of this initiative on both the legislative and executive branches of government that distinguishes it from the initiative in *Tax Limitation I. See Fee on Everglades Sugar Production*, 681 So.2d at 1128 (finding that while a proposal may affect multiple branches of government, it may not substantially alter or perform the

> functions of these branches). In addition, we find that this initiative would have a distinct and substantial effect on more than one level of government. The state, special districts, and local governments have various legislative, executive, and quasi-judicial functions which are applicable to land use including comprehensive planning, zoning, and controlling storm-water drainage and flood waters. *See, e.g., Tax Limitation I,* 644 So. 2d at 494-95. Therefore, we hold that the proposed initiative is constitutionally deficient because it violates the single-subject requirement.

Property Rights, 699 So. 2d 1304, 1308 (Fla. 1997).

The proposed amendment does not simply have an incidental effect upon cities and counties, the Legislature, the Governor, the Department of Community Affairs, the Administration Commission. It significantly *alters and performs* the constitutional and statutory functions of each in violation of the single-subject restriction.

B. The distinct purposes and effects included in this single amendment constitute impermissible logrolling.

Among the several purposes of the single-subject requirement is the prevention of logrolling, Aa practice wherein several separate issues are rolled into a single initiative in order to aggregate votes or secure approval of an otherwise unpopular issue.@ *Sales Tax Exemptions*, __ So. 2d __; 2004 WL 1574248(Fla. July 15, 2004); *Save Our Everglades*, 636 So. 2d 1336, 1339 (Fla. 1994). In order to prevent logrolling, the Court has employed a Aoneness of purpose@ test. In *Save Our Everglades*, the Court found that the proposed amendment violated the test:

> We note that the initiative embodies precisely the sort of logrolling that the single-subject rule was designed to foreclose. There is no "oneness of purpose," but rather a duality of purposes. One objective--to restore the Everglades--is politically fashionable, while the other--to compel the sugar industry to

> fund the restoration--is more problematic. Many voters sympathetic to restoring the Everglades might be antithetical to forcing the sugar industry to pay for the cleanup by itself, and yet those voters would be compelled to choose all or nothing.

Id. at 636 So. 2d 1341.

The proposed amendment would have two separate purposes, one revealed in the summary and one not. First, as indicated in the summary, the amendment would impose a referendum requirement upon the adoption or amendment of land regulations by local governments. Second, and unrevealed in the summary, the amendment would limit the ability of state level agencies to impose new land planning and regulatory requirements without a local referendum.[8]

In its recent decision in *Sales Tax Exemptions*

, the Court held that a proposed amendment constituted logrolling based upon its finding that:

> A voter may support requiring the Legislature to periodically review tax exemptions on the sale of certain goods, but oppose the actual creation of a broad sales tax on undefined services that are currently excluded from the sales tax. This initiative requires the voter to Achoose all or nothing@ among three apparent effects of the amendment.

Sales Tax Exemptions at Slip Opinion, p. 11. Similarly with the current petition, a voter may support requiring a referendum as a prerequisite to adoption of a new or amended land regulation initiated exclusively at the local level, but oppose hamstringing the ability of the Legislature or state environmental agencies to impose new or amended land regulation

[8] The failure of the summary to disclose this significant effect is a subject of Point II below.

requirements upon local governments in order to preserve resources of importance to the state as a whole or to ensure state and regional coordination. However, as in *Sales Tax Exemptions* and *Save Our Everglades*, the voter is not given that choice. The proposal presents the voter with an all or nothing proposition. It is the essence of logrolling. The sponsors can offer the voters the opportunity to do what they wish, but they must do so in separate proposals.

C. The amendment fails to identify all of the substantially affected provisions of the Constitution.

This Court has required that initiative petitions identify all substantially affected provisions of the Constitution. *Tax Limitation,* 644 So. 2d 486 (Fla. 1994); *Fine* v. Firestone, 448 So. 2d 984 (Fla. 1984). The requirement applies whether or not the single-subject requirement is met and is an independent ground for invalidation. Thus, in *Tax Limitation*, the Court stated:

> While a debatable issue exists as to whether this AVoter Approval of New Taxes@ initiative violates the single-subject requirement by dealing with three subjects, we need not address that claim because this initiative substantially affects specific provisions of the constitution without identifying those provisions for the voters, in violation of the principles we established in *Fine.*

Tax Limitation, 644 So. 2d at 492.[9]

[9] Three years after *Tax Limitation*, the Court reviewed another requirement

As discussed above, the petition under review would substantially affect Article II, Section 7 (Natural Resources and Scenic Beauty), Article III (Legislature), Article IV (Executive), and Article VIII (Local Government). The amendment refers solely to Article II, Section 7 and thereby violates the principles set forth in *Fine* and *Tax Limitation*

. The proposed amendment is also in conflict with Article II, Section 7 =s imposition on the Legislature of the duty to make adequate provision A for the conservation and protection of natural resources.@

In *Fine*, the Court noted that reference to affected articles and sections is important not only so that the public is able to comprehend the contemplated changes, but also, Ato avoid leaving to this Court the responsibility of interpreting the initiative proposal to determine what sections and articles are substantially affected by the proposal.@ *Fine v. Firestone*, 448 So. 2d at 989. The Court emphasized the importance of not leaving it to the Court to interpret the intent of the proposal, particularly where, as here, the proposal would create an apparent conflict with an existing constitutional provision:

> The problem of conflicting provisions resulting from the adoption of an initiative proposal cannot be satisfactorily addressed by the application of the principle of constitutional construction that the most recent amendment necessarily supersedes any existing provisions which are in conflict. We recede from *Floridians* to the extent that it conflicts with this view. Reliance on the application of this principle of constitutional construction in these circumstances would grant to this Court broad discretionary authority in determining the effect of a proposed amendment or revision on the existing constitution. No official record of legislative history or debate would be available to aid this Court in the construction of an amendment resulting from an

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for voter approval of new taxes and concluded that it did, indeed, violate the single-subject requirement. *Voter Approval for New Taxes, supra.*

> initiative proposal. We do not believe it was the intent of the authors of the initiative-amendment provision, nor the intent of the electorate in adopting it, that the Supreme Court should be placed in the position of redrafting substantial portions of the constitution by judicial construction. This, in our view, would be a dangerous precedent.

Id.

II

THE BALLOT TITLE IS MATERIALLY MISLEADING IN VIOLATION OF SECTION 101.161, FLORIDA STATUTES.

A. There is a material and misleading discrepancy between the language of the summary and the language of the amendment.

The ballot summary states in pertinent part that:

> [B]efore 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.

The references to comprehensive land use plans and local planning agencies reflect terminology unique in Florida law, which appears in the Local Government Comprehensive Planning and Land Development Regulation Act, codified in Section 163.3164, Fla. Stat., *et seq*. That act defines a comprehensive plan as one that Ameets the requirements of ss. 163.3177 and 163.3178.@ ' 163.3164(4), Fla. Stat. The cited statutory provisions require local governments to adopt plans that are all-encompassing from both a geographic and regulatory standpoint, that project 5-year and 10-year horizons, and that meet certain other specified criteria. A voter having knowledge of the state=s land planning statutes is likely to conclude from the language of the summary that the proposed amendment requires a referendum only with respect to local plans adopted in conformance with the Local Government Comprehensive Planning and Land Development Regulation Act or, at very least, to plans that are as detailed and far-reaching as those provided for in the Act.

A voter having no knowledge of the state provisions would also reasonably conclude from the summary that the proposed amendment

applies only to local plans that are Acomprehensive.@ The dictionary definition of Acomprehensive@ is consistent with common usage:

covering a matter under consideration completely or nearly completely:
> accounting for or comprehending all or virtually all pertinent considerations

Webster=s Third New International Dictionary of the English Language p. 467 (1993). The summary thus communicates to voters that a referendum is required only in the case of adoption or amendment of a land use plan that conforms to the requirements of Sections 163.3177 and 163.3178 or that to a voter not familiar with the Act is virtually all-encompassing. Voters who make such an assumption, however, would be gravely mistaken since the proposed amendment is not limited in its application to either Chapter 163 land use plans or to plans that are otherwise Acomprehensive.@

The text of the proposed constitutional amendment includes its own definition of Acomprehensive land use plan,@ which differs markedly from the definition in Chapter 163, and the dictionary definition and common usage of the term Acomprehensive.@ The proposed amendment states:

ALocal 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.

A plan Ato guide and control future land development@ is broad enough to cover virtually any land use ordinance or administrative regulation. The language would include every zoning ordinance, setback requirement, environmental use restriction, tree ordinance, riparian regulation, etc.[10]

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[10] Section 163.3167, the Ascope of act@ section of the state comprehensive plan act, grants cities and counties the power to adopt comprehensive plans Ato guide their future development and growth.@ Had the state act stopped there, its application would be as broad that indicated by the summary. However, as noted, the state act goes on to expressly define Acomprehensive

Based upon the definition, the referendum requirement is clearly not, as indicated by the summary, limited to land use plans that meet the requirements of Chapter 163 or that are Acomprehensive@ within the common understanding of that word. The definition contained in the text of the measure results in a requirement for a referendum before adoption or amendment of *any* local land use regulation, regardless of how limited from a geographic, regulatory or temporal standpoint. However, the summary fails to alert the voter to the existence of the definition in the measure itself or to the significant effect of the definition on the applicability of the amendment.

The result can have a meaningful impact upon a voter=s decision. The comparison of the italicized text below illustrates the discrepancy between the language of the summary and the language of the actual amendment when the definition is applied:

SUMMARY LANGUAGE	AMENDMENT LANGUAGE AS DEFINED
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	before a local government may adopt a new ***plan to guide and control future land development*** or amend ***a plan to guide future land development***, the proposed plan or amendment shall be subject to vote of the electors of the local government by referendum

A voter might be inclined to vote for the measure upon reading the summary

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plan@ in a manner that narrowly restricts its application. The definition contained in the proposed amendment uses the broad Ascope of act@ language of the state act, but fails to limit the scope of the term Acomprehensive plan@ as does the state act.

language, but the same voter might balk upon reading an accurate statement of the amendment language as defined.

This court has consistently rejected proposed amendments that contain summaries that, while technically accurate in a literal sense, are misleading because of material information that is left out. *Race In Public Education*, 778 So. 2d 778 So. 2d at 896 (2001) (AAs this Court has noted with other initiatives, the problem >lies not with what the summary says, but, rather, with what it does not say.@); *Term Limits Pledge,* 718 So. 2d 798 (Fla. 1998). The Court has also stricken proposals as misleading when the common definition of terms used in the summary is materially different from the definition of terms used in the actual text of the amendment. *Casino Authorization, Taxation and Regulation*, 656 So. 2d 466 (Fla. 1995); *Smith v. American Airlines,* 606 So. 2d 618 (Fla. 1992).

Even if the Court were willing to engage in the construction that would be necessary to limit the amendment=s application to that of the state act, the summary would not cure the impermissible discrepancy between the summary and the text of the proposed amendment. The voter=s understanding of the scope of the proposal is limited to the language of the summary and the voter cannot be expected to anticipate a possible future judicial construction of that language.

At very least, the language of this summary would leave the voter guessing as to the parameters of a local Aplan@ that would require a referendum. How Acomprehensive@ does the plan have to be in order to require a referendum? Does it apply to a zoning ordinance? Must such a zoning ordinance cover an entire city or county or would the referendum be required for a single subdivision? Must it include all subjects of land

development before a referendum is required or would it apply to a plan that is limited to location of roads or parks and recreation facilities? Does the term include state land use rules applicable at the local level? Does an Aamendment@ include a zoning variance? An exception granted by a regulatory official?

Section 101.161 requires that the summary state the substance of the amendment in Aclear and unambiguous language.@ This Court has refused to allow amendments to reach the ballot when the summaries included material terms that were ambiguous and that Aleave the voter guessing@ as to their meaning or application. *E.g.*, *Race In Public Education*, *supra*; *Health Care Providers*, 705 So. 2d 563, 566 (1998).[11]

The use of use of divergent terms in the summary and the text of a proposed amendment, the meaning of which control the breadth of the amendment=s application, further imposes upon the Court the necessity of Aredrafting substantial portions of the constitution by judicial construction,@ the Adangerous precedent@ rejected by the Court in *Fine.*

B. The summary is misleading because it gives voters the erroneous impression that the effect of the summary would be strictly local.

The ballot title refers to Alocal government land use planning.@ The summary states that Apublic participation in local government comprehensive land use planning@ is beneficial and that the amendment requires a local

[11] See *Property Rights*, 644 So. 2d 486 (Fla. 1994), in which the Court struck an initiative when the ballot summary stated that it Awould entitle an owner to full compensation when government action damages the value of the owner=s home.@ The Court found that the word Aowner@ was ambiguous, and that the summary was misleading because, like the summary in the instant petition, it suggested a far narrower application than called for by the actual language of the amendment.

referendum Abefore a local government may adopt a new comprehensive land use plan@ or amend such a plan. The title and summary give the reader the distinct impression that only local government agencies adopting or amending their own land use plans are affected by the amendment. If the amendment required a referendum only in the case of adoption or amendment of land use plans *voluntarily initiated* at the local level, the impression might be accurate. However as has been discussed in detail under Point I, this is far from the case.

In reality, the measure would create a significant impediment to an extensive, integrated set of state-wide legislative programs that have been the subject of continuing study and evolution for more than thirty years. Primarily codified in Chapter 380 as The Florida Environmental Land and Water Management Act of 1972 and Chapter 163 as the Local Government Planning and Land Development Regulation Act, they represent one of the country=s most ambitious efforts to preserve the environment and control growth. At the core of the two acts are three factors: coordination between the state and local governments and among local governments; compliance with minimum state standards; and mandatory periodic evaluation and appropriate revision. The proposed constitutional amendment would seriously interfere with the entire scheme, if not render it entirely unworkable. The summary gives no hint of the impact that the proposed amendment would have upon this major long-standing statewide program.

C. The summary contains misleading, emotionally charged political rhetoric.

The discrepancy between the summary language and the actual amendment is exacerbated by the use of misleading political rhetoric in the very first line of the summary. This reflects a growing trend among initiative sponsors in recent years to begin summaries with emotionally charged

rhetoric designed to curry voter favor. That practice is inconsistent with the objectivity required in a ballot summary and was condemned again just last month in the Court=s opinion in *Additional Homestead Tax Exemption*, ____So. 2d____; 2004 WL 1574226 (July 15, 2004).

The ballot summary begins with the statement that, APublic participation in local government comprehensive land use planning benefits Florida=s natural resources, scenic beauty and citizens.@[12] That is a proposition with which no one could reasonably disagree, which is undoubtedly what motivated the sponsors to lead off the summary with the statement. Unfortunately, it is deceptive. The amendment would do far more than provide for Apublic participation@ at the local level. It would require affirmative voter approval in a local level referendum election before any change in land use regulation could become effective. This would include minimum state standards designed to preserve Florida=s natural resources and scenic beauty for all the people of Florida. Such a veto power clearly would not benefit Florida=s natural resources, scenic beauty and citizens in many instances.

In *Additional Homestead Tax Exemption*, *supra*, the Court found a ballot summary to be misleading when it stated that the amendment Aprovides property tax relief to Florida homeowners.@ The Court noted that the majority of counties have not reached the constitutional 10 mill cap on ad valorem taxation. Therefore, even if the amendment passed, some homeowners might not realize any property tax reduction. The Court concluded that, AThe use of

[12] In an effort to give the summary language a gloss of objectivity, the sponsors of the current petition include the political rhetoric in the amendment itself as well as the summary. Bootstrapping the language from the amendment into the summary makes it no less objectionable.

the phrase ›provides property tax relief= clearly constitutes political rhetoric that invites an emotional response from the voter by materially misstating the substance of the amendment.@ *Id.*, Slip Opinion, p. 17. The same is true of the amendment in the case at bar.

CONCLUSION

The Court is respectfully urged to strike the proposed amendment from the ballot.

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CERTIFICATE OF SERVICE

I certify that a copy of this brief has been served by email upon Ross Burnaman, Attorney for Florida Hometown Democracy, Inc., 1018 Holland Drive, Tallahassee, FL 32301, and by hand delivery to Charlie Crist, Attorney General of Florida, The Capitol, Tallahassee, Florida 32301, this 6th day of August, 2004.

CERTIFICATE OF COMPLIANCE

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

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Barry Richard