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

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

Filed in Opposition to the Initiative Petition

ORIGINAL PROCEEDING

Arthur J. England, Jr., Esq.
Greenberg Traurig, P.A.
1221 Brickell Avenue
Miami, Florida 33131
Telephone: (305) 579-0605
Facsimile: (305) 579-0723

Lorence J. Bielby, Esq.
Robert C. Apgar, Esq.
M. Hope Keating, Esq.
Greenberg Traurig, P.A.
101 East College Avenue
Tallahassee, Florida 32301
Telephone: (850) 222-6891
Facsimile: (850) 681-0207

Counsel for Florida League of Cities
and

Florida Association of Counties, Inc.

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INTRODUCTION

The initial brief filed by Florida Hometown Democracy, Inc., the sponsor ("Sponsor") of the proposed amendment ("Proposed Amendment"), recites a number of the general principles which the Court applies in reviewing initiative petitions for compliance with single subject and ballot summary requirements, and offers the Sponsor's opinion that the Proposed Amendment meets these requirements. The brief's generalized and non-specific treatment of the Proposed Amendment does not address the scope of its proposal, however, and in failing to do so inferentially confirms the contention of the League and the Association ("the Local Governments") that the proposal is clearly and conclusively defective as to both single subject and ballot summary requirements.

SUMMARY OF ARGUMENT

The ballot summary contains impermissible political rhetoric. It misleads voters by failing to inform them of the full range of matters, and the multiple levels of governmental decision-making on which referenda will be required. It implies that there is presently no public participation in comprehensive land use planning at the local government level, when in fact there are many opportunities for such participation. The ballot summary misleads voters by further implying that the proposal will allow the public to participate in comprehensive land use planning, when the legal effect of the proposal is to give the public the determinative say on comprehensive land use plans and amendments.

The Proposed Amendment violates the single subject requirement of the Constitution by altering multiple functions of governmental entities. It combines

multiple subjects into one "all or nothing" proposal, as a prohibited form of logrolling. It conceals significant collateral effects which would result if the proposal is adopted.

ARGUMENT

I. The ballot summary is clearly and conclusively defective.

In their initial brief, the Local Governments identified four distinct defects in the ballot summary of the Proposed Amendment: the use of an emotional appeal to voters which does not express the chief purpose of the proposal; the failure to inform voters of the full range of matters on which referenda will be required; the several levels of governmental decision-making which will be impacted by the proposal; and the implication that there is presently no public participation in comprehensive land use planning at the local government level. The Sponsor's initial brief does nothing to dispel these deficiencies, some of which are not even addressed.

1. <u>Emotional rhetoric</u>. The Local Governments pointed out in their initial brief that the ballot summary materially misstates the substance of the Proposed Amendment by drawing voters' immediate attention to the benefits of referenda with respect to natural resources and scenic beauty. The Sponsor's discussion of the ballot summary altogether ignores this improper use of emotional rhetoric – buzz words that carry an emotional wallop – with no explanation for its use or prominence when those subjects are but a small part of comprehensive land use planning.

A ballot summary analysis starts with the requirement in section 101.16, Florida Statutes, that a ballot summary shall state the "chief purpose" of the measure. *E.g., Advisory Op. to the Att'y Gen. re Additional Homestead Tax Exemption*, 29 Fla. L. Weekly S405 (Fla. July 15, 2004) ("*Homestead Tax Exemption*"). The Sponsor appears to believe that the chief purpose of the Proposed Amendment is implementation of Article II, section 7 of the Florida Constitution, which deals with "Natural resources and scenic beauty." Sponsor's initial brief at 16. That belief explains the Sponsor's placement of its proposal in the "natural resources and scenic beauty" section of the Constitution. Indeed, the Sponsor argues that the "single dominant plan" of the proposal is "to enhance Florida's environmental policy." Sponsor's initial brief at 8.

With all due respect to the Sponsor, no reading of the text of the Proposed Amendment suggests that those environmental considerations constitute the chief purpose of the Proposed Amendment. The unmistakable purpose and effect of the Proposed Amendment taken as a whole – *i.e.*, its "chief" purpose – is to inject the public into all comprehensive land use planning decisions of local governments. Those decisions of necessity involve a broad range of subjects, of which natural resources and scenic beauty are a very small part. In their initial brief, the Local Governments pointed out that comprehensive land use planning, even as the

Sponsor understands that term,[1] involves many more subjects, and impacts far more governmental decision-making, than just those which relate to natural resources and scenic beauty.

By reason of the Sponsor's misperception of the chief purpose of its proposal, the ballot summary gives prominence to emotional political rhetoric which diverts voters from a fair understanding of the proposal. The Sponsor misuses the ballot summary to induce a favorable vote by drawing the attention of voters away from the permeating effects of the proposal. The Court has invalidated proposed amendments with equal or less emotional rhetoric in a ballot summary. *See Advisory Op. to the Att'y Gen. – Save Our Everglades*, 636 So. 2d 1336, 1342 (Fla. 1994) ("*Save Our Everglades*").

The misleading nature of the ballot summary is made worse by the further suggestion that citizen votes will provide a "benefit" to natural resources and scenic beauty. With any particular vote, the electorate can either approve or disapprove a land use plan or amendment. It cannot be said that every citizen vote will "benefit" natural resources and scenic beauty, rather than impact them adversely.

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[1] The Sponsor recognizes that the Proposed Amendment is inextricably tied to Chapters 163, 171, 380 and 403 of the Florida Statutes. *See* Sponsor's initial brief at 19-20.

The Sponsor argues that public participation is simply an "expression of public policy," comparable to that which the Court approved in its decisions on marine net fishing,[2] high speed rail,[3] and pregnant pigs.[4] Sponsor's initial brief at 16-17. This defense of the ballot summary is misdirected, however. The issue for a ballot summary is not whether it states a public policy. Every proposed constitutional amendment expresses a public policy. The issue is whether the ballot summary informs the voters of the proposal's chief purpose. This ballot summary does not.

2. <u>Omission of the full range of matters</u>. In their initial brief, the Local Governments detailed the wide range of matters on which citizens votes will be required to vote if the Proposed Amendment is adopted, including matters far removed from, and completely unrelated to, natural resources and scenic beauty. The range of matters include sanitary needs, mass transit, commercial development, and educational facilities, to name a few. *See* Local Governments' initial brief at 9-11. The ballot summary mentions none of these significant features of the comprehensive land use planning process. The Sponsor fails to acknowledge the significance of omitting them.

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2 *Advisory Op. to the Att'y Gen. – Limited Marine Net Fishing*, 620 So. 2d 997 (Fla. 1993).

3 *Advisory Op. to the Att'y Gen. re Fla. Transp. Initiative for Statewide High Speed Monorail, Fixed Guideway or Magnetic Levitation System*, 769 So. 2d 367 (Fla. 2000).

4 *Advisory Op. to the Att'y Gen. re Limiting Cruel and Inhumane Confinement of Pigs During Pregnancy*, 815 So. 2d 597 (Fla. 2002).

As illustrated by the Miami-Dade County comprehensive development plan (Local Governments' initial brief at 9-11), comprehensive land use plans involve much more than environmental and aesthetic considerations. In fact, under the Proposed Amendment voters would be required to vote on such issues as the level of service standards for roads, minor roadway changes, traffic circulation, and solid waste disposal. Nothing in the ballot summary alerts voters to the scope of matters which would require referenda, or to the fact that comprehensive plans and amendments are technical, complex and minutely detailed. The ballot summary similarly fails to inform voters of the large number of referenda that would be required by the Proposed Amendment, which could be hundreds per year according to the Department of Community Affairs. Local Governments' initial brief at 19.

The Sponsor glosses over these hidden implications of the Proposed Amendment by suggesting that the Court presumes that voters have a certain amount of common sense and knowledge. Sponsor's initial brief at 18. The Local Governments respectfully suggest that voters are not apt to be familiar with the intricacies of Chapters 163, 171, 380 and 403, or aware of the number of decisions that are made each year in adopting or amending comprehensive land use plans. Indeed, if voters possessed that degree of knowledge of what is involved in comprehensive land use planning, the Sponsor's rationale for the Proposed Amendment would fall away in light of the extensive public participation in comprehensive land use planning which the Sponsor acknowledges citizens already have. *See* Sponsor's initial brief at 11, 19.

The Proposed Amendment does not give voters all of the information necessary to cast an intelligent and informed vote. Rather, they are being asked to vote on a proposal that would result in consequences not readily apparent, with no notice of its true meaning. These are hidden effects of the type the Court has held render a proposal clearly and conclusively defective. *See, e.g., Askew v. Firestone*, 421 So. 2d 151, 155-56 (Fla. 1982); *Advisory Op. to the Att'y Gen. – Restricts Laws Related to Discrimination*, 632 So. 2d 1018, 1021 (Fla. 1984) ("*Restricts Laws*"); *Armstrong v. Harris*, 773 So. 2d 7, 18 (Fla. 2000), *cert. denied*, 532 U.S. 958 (2001).

3. <u>Omission of any mention of state agency involvements</u>.

Comprehensive land use plans and amendments are framed and amended pursuant to an intricate scheme enacted by the Florida Legislature which assigns statutory responsibilities to many state and regional entities to assure compliance with the state's environmental land use laws. *See* Local Governments' initial brief at 5-7. The Sponsor has nowhere recognized that the voting required by the Proposed Amendment will encompass, and either validate or invalidate, the decisions of state and regional agencies which have a mandatory role in the comprehensive land use planning process.

While the ballot summary accurately states that voters will participate in decision-making for "local government" comprehensive land use plans at the end of that process, it fails to mention that the amendment will strip state and regional governmental entities of their powers over land use and development. Such an omission of critical information requires invalidation of the Proposed Amendment.

See Advisory Op. to the Att'y Gen. re Fish & Wildlife Conservation Comm'n, 705 So. 2d 1351, 1355 (Fla. 1998).

4. Implication of no present public participation. The Sponsor points out in its initial brief that there is already widespread public participation in the comprehensive land use planning process. *See* Sponsor's initial brief at 11, 19. Yet the ballot summary conveys to voters the clear implication that the Proposed Amendment will give them an opportunity for public participation in local government decision-making which they do not already have. The affirmative statement that "public participation" will benefit natural resources and scenic beauty, consequently, is misleading in the same way that the Court has found misleading other initiative proposals that imply a non-existent state of affairs under the Constitution. *E.g., Homestead Tax Exemption*, 29 Fla. L. Weekly at S405; *Advisory Op. to the Att'y Gen. re Casino Authorization, Taxation and Regulation*, 656 So. 2d 466 (Fla. 1995).

Further, the Proposed Amendment promises "public participation" in the comprehensive land use planning process, when in fact the legal effect of the proposal would give the public a determinative vote on comprehensive land use plan adoptions and amendments. There is a drastic difference between the public's "participation" and its conclusive determination of the validity of plans and amendments by public plebiscite. *See* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 315, 847 (10th ed. 1999) (defining "participate" to mean "to have a part or share in something," and defining "determine" to mean "to fix conclusively or authoritatively"). The Proposed Amendment's representation that the public will

merely participate is misleading, and fails to convey accurately the role the public would play in the comprehensive land use planning process.

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

In their initial brief, the Local Governments identified three distinct violations of the single subject requirement of the Florida Constitution: the alteration of multiple functions of local and government; logrolling; and undisclosed collateral effects. The generalized treatment given the first two of these issues in Sponsor's initial brief, with the third not being discussed at all, is telling.

1. <u>Alteration of multiple governmental functions</u>. The Local Governments have identified several distinct functions of local government which are directly affected by the Proposed Amendment. Local Governments' initial brief at 25-27. The Sponsor suggests, however, that the Proposed Amendment would only alter one function of local government, referencing a statement from the Court's decision in *Advisory Opinion to the Attorney General re People's Property Rights Amendments Providing Comp. for Restricting Real Property Use May Cover Multiple Subjects*, 699 So. 2d 1304 (Fla. 1997) ("*Real Property Use*"). Sponsor's initial brief at 11-12. That case is a poor choice of authority for the Sponsor, and in fact confirms the Local Governments' analysis of this defect in the proposal.

In *Real Property Use*, the Court held unconstitutional a proposed amendment involving compensation to land owners for restrictions placed on their properties. The Court's analysis of that proposal revealed that it affected several

legislative and executive branch functions performed by "*state, special districts, and local governments* . . . applicable to land use *including comprehensive planning*, zoning, controlling storm-water drainage and flood waters." 699 So. 2d at 1308 (emphasis added). Comprehensive land use planning was not held by the Court to constitute a "singular governmental function," as the Sponsor states. Sponsor's initial brief at 12. Rather, it was identified as being one of the activities that in and of itself affects functions of governments at more than one level. *See also Advisory Op. to the Att'y Gen. re Tax Limitation*, 644 So. 2d 486, 494-95 (Fla. 1994).

As shown in section 163.3177, and as reflected in comprehensive land use plans such as the Miami-Dade Plan, comprehensive plans necessarily encompass an imposing list of local government functions. Moreover, comprehensive land use plans become controlling law for all local land use decisions. *See, e.g., Board of County Comm'rs of Brevard County v. Snyder*, 627 So. 2d 469 (Fla. 1993). Since local governments may not regulate land use in a manner inconsistent with their comprehensive plans, the effect of requiring citizen referenda is to directly affect the regulatory functions of local governments with respect to all public and private uses of land. These functions include regulations for the development of residences, businesses, industry, agriculture and recreation. They include the function of maintaining consistency with comprehensive plan elements relating to conservation, education, public buildings, public utilities, infrastructure, and transportation.

The Sponsor also suggests that the Proposed Amendment doesn't address or suggest any change to any existing processes of the executive branch.

Sponsor's initial brief at 12. That is distinctly not the case. The intricate legislative scheme for comprehensive land use planning requires pre-adoption and pre-amendment review by state and regional agencies, in order to assure compliance with the state's environmental land use laws. The Department of Community Affairs, and in certain situations the Governor and Cabinet acting as the Administration Commission, are mandated to pass on a plan's or an amendment's compliance with state planning laws. The effect of giving citizens a veto power over the decisions of these executive branch agencies directly affects their functions, with the power to displace them. *See Save Our Everglades*, 636 So. 2d at 1340.

A proposed constitutional amendment which has a substantial effect on local land use responsibilities, and which curtails the powers of the executive branch, violates the single subject requirement. *Real Property Use*, 699 So. 2d at 1308.

2. Logrolling. The Local Governments have shown that comprehensive land use plans of local governments encompass a multitude of subjects. A voter who might support this initiative because it gives him or her direct participation on issues relating to natural resources or scenic beauty, might well not want to vote on every decision on traffic circulation, parking, potable water, school planning, sewage, and solid waste disposal. The Proposed Amendment, however, creates an all or nothing situation.

The Sponsor argues, though, that the Proposed Amendment meets the requirement of being "logically viewed as a single dominant plan to enhance Florida's environmental policy by increasing public participation in local

government comprehensive land use planning." Sponsor's initial brief at 8. Stating the effect of the proposal in the broadest possible terms does not overcome the diverse effects that comprise prohibited logrolling.

> The very broadness of the proposed amendment amounts to logrolling because the electorate cannot know what it is voting on –the amendment's proponents' simplistic explanation [of "revenue"] reveals only the tip of the iceberg.

Fine v. Firestone, 448 So. 2d 984, 995 (Fla. 1984) (McDonald, J. concurring). *See also Restricts Laws*, 632 So. 2d at 1020.

3. <u>Undisclosed collateral effects</u>. The Sponsor does not address the collateral effects not readily apparent to the voter that would come to pass if the Proposed Amendment were to be adopted. The Court need only consider the number of local elections the proposal will generate to conclude that this proposal fails to reveal significant undisclosed collateral effects. *See Advisory Op. to the Att'y Gen. re Amendment to Bar Gov't from Treating People Differently Based on Race in Public Education*, 778 So. 2d 888, 900 (Fla. 2001); *Restricts Laws*, 632 So. 2d at 1023 (Kogan, J. concurring).

CONCLUSION

The Proposed Amendment is clearly and conclusively defective. The Court is respectfully requested to strike it from the ballot.

Respectfully submitted,

Arthur J. England, Jr., Esq.
Florida Bar No. 022730
Greenberg Traurig, P.A.

1221 Brickell Avenue
Miami, Florida 33131
Telephone: (305) 579-0605
Facsimile: (305) 579-0723

- and -

Lorence J. Bielby, Esq.
Florida Bar No. 393517
Robert C. Apgar, Esq.
Florida Bar No. 254126
M. Hope Keating, Esq.
Florida Bar No. 981915
Greenberg Traurig, P.A.
101 East College Avenue
Tallahassee, Florida 32301
Telephone: (850) 222-6891
Facsimile: (850) 681-0207

Co-counsel for Florida League of Cities and Florida Association of Counties, Inc.

By: _____
Lorence J. Bielby

CERTIFICATE OF SERVICE

I hereby certify that a copy of this answer brief was mailed on August 30, 2004 to:

Honorable Jeb Bush, Governor
State of Florida
The Capitol
400 South Monroe Street
Tallahassee, Florida 32399-0001

Honorable James E. King, Jr.
President, Florida Senate
The Capitol, Suite 409
404 South Monroe Street
Tallahassee, Florida 32399-1100

Honorable Johnnie Byrd
President, Florida House of Rep.
The Capitol, Suite 420
402 South Monroe Street
Tallahassee, Florida 32399-1300

Honorable Glenda E. Hood
Secretary of State
Florida Department of State
R. A. Gray Building
500 South. Bronough Street
Tallahassee, Florida 32399-0250

Honorable Charles J. Crist, Jr.
Office of the Attorney General
The Capitol, PL-1
Tallahassee, Florida 32399-1050

Lesley G. Blackner, Chairperson
Florida Hometown Democracy,
Inc. PAC
Post Office Box 636
New Smyrna Beach, Florida 32170

Ross Stafford Burnaman
1018 Holland Drive
Tallahassee, Florida 32301

Barry Richard
Greenberg Traurig, P.A.
101 East College Avenue
Tallahassee, Florida 32301

Lorence J. Bielby

CERTIFICATE OF COMPLIANCE

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.

Lorence J. Bielby

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