IN THE SUPREME COURT
STATE OF FLORIDA

Case No. SC06-161

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 ASSOCIATION OF COUNTIES, INC., FLORIDA LEAGUE OF CITIES, INC., AND FLORIDA SCHOOL BOARDS ASSOCIATION

Filed in Opposition to the Initiative Petition

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SUMMARY OF ARGUMENT

The Court is not precluded by its previous advisory opinion in *Referenda I* from reviewing the proposed amendment for compliance with the single subject requirement of Article XI, section 3, nor from reviewing the ballot title and summary for compliance with section 101.161, Florida Statutes.

The proposed amendment violates the single subject requirement because the ballot summary fails to state that it substantially affects Article IX, section 1, and Article IX, section 4(b) of the Florida Constitution. In addition, the proposed amendment violates the single subject requirement because it substantially alters the functions of school districts in their ability to comply with Article IX, section 4(b), and substantially impacts the ability of multiple branches of State government to carry out the mandates of Article IX, section 1.

Finally, the proposed ballot title and summary of the proposed amendment are ambiguous and misleading in violation of section 101.161, Florida Statutes. The ballot summary fails to define key terms used in the ballot title and summary. The definitions provided in the amendment text provide no clarification and only perpetuate the ambiguities. In addition, the ballot summary is misleading in its use of the term "local government."

ARGUMENT

I.
The Court's Previous Opinion in *Referenda I* Does Not Preclude It From Reviewing the Proposed Amendment on Single Subject Grounds

Florida's Constitution requires each citizen initiative proposing to amend the constitution to comply with the single subject requirement of Article XI, section 3. Proponent Florida Hometown Democracy (FHD) contends this Court should refrain from reviewing its proposed initiative for single subject sufficiency due to the Court's prior opinion in *Advisory Op. to the Att'y Gen. Re Referenda Required For Adoption and Amendment of Local Government Comprehensive Land Use Plans*, 902 So. 2d 763 (Fla. 2005) ("*Referenda I*"). FHD Initial Brief at 7-9. The Court should reject FHD's argument and review the newly submitted initiative for compliance with the single subject requirement.

The cases cited by FHD to support its argument are distinguishable from the facts at hand. For example, in *Ray v. Mortham*, the Court considered whether provisions of an adopted amendment imposing term limits on state officials were severable from unconstitutional provisions imposing term limits on federal legislators. *Mortham*, 742 So. 2d at 1276 (Fla. 1999). In addition to addressing the severability issue, several *amici* urged the Court to reconsider whether the adopted amendment satisfied the single subject requirement of the Florida Constitution. *Id.* at 1284. The Court refrained from doing so because it had

previously issued an advisory opinion for the same amendment in which it addressed single subject compliance. *Id.* at 1285. Unlike the adopted amendment at issue in *Mortham*, FHD's proposed initiative is newly submitted. It is similar, but not the same as, the proposed initiative reviewed in *Referenda I.*

Similarly, in *Florida League of Cities v. Smith*, the Court was petitioned for a writ of mandamus directing the Secretary of State to remove a proposed amendment from the ballot that had been reviewed previously by the Court in an advisory opinion. *Florida League of Cities v. Smith*, 607 So. 2d 397, 397 (Fla. 1992). Unlike the amendment at issue in *Florida League of Cities*, the proposed amendment at hand is a similar, but newly submitted initiative. In addition, the Court in this instance is not requested to exercise its discretionary jurisdiction to issue a writ of mandamus to remove an amendment from the ballot; rather, the Court is required to review the proposed amendment pursuant to request of the Florida Attorney General under Article V, section 3(b)(10) of the constitution.

The situation before the Court is very different from that presented in *Mortham* and in *Florida League of Cities*. In *Referenda I*, the Court reviewed and found deficient FHD's first proposed initiative. The proposed amendment was struck from the ballot. Now, the Court is requested to review a substantially similar, but entirely new amendment. The Court's opinion in *Referenda I* is certainly persuasive authority, but it does not prohibit review of the new

amendment, nor does it require that extraordinary circumstances exist before such review may occur.

Even if this Court finds that extraordinary circumstances must exist, however, such circumstances are present in the instant case. The new public school facility planning and concurrency provisions in Chapter 2005-290, Laws of Florida, did not exist when the Court issued its opinion in *Referenda I.* As discussed in section I.B. of the Initial Brief of the Florida Association of Counties, the Florida League of Cities, and the Florida School Boards Association ("Associations' Initial Brief"), these new statutory changes underscore the substantial impact the proposed initiative will have on the ability of various branches of government to comply with Article IX. These impacts are further discussed in sections II and III, *infra*.

Finally, the policy reasons underlying the single subject requirement compel a thorough review of every proposed initiative, even when the initiative is substantially similar to those previously reviewed. Unlike other methods of amending the constitution, citizen initiatives do not provide a "filtering process" for drafting an amendment. *Fine v. Firestone*, 448 So. 2d 984, 988 (Fla. 1984). There is no opportunity for public hearing and debate on citizen initiatives to protect against "multiple precipitous changes" in the state constitution. If there are constitutional deficiencies with an initiative, this Court's advisory opinion provides

a crucial backstop to prevent voters from unwittingly forcing a constitutional impasse. Accordingly, every new initiative should be reviewed with equal scrutiny.

II.
The Proposed Amendment Violates the Single Subject Requirement by Substantially Altering the Constitutional Duty of School Boards to Plan For and Construct School Facilities

Florida's constitution charges Florida school boards with the duty to "operate, control and supervise all free public schools within the school district and determine the rate of school district taxes within the limits prescribed herein." Art. IX, s. 4(b), Fla. Const. School districts carry out this charge in part by planning for and constructing public educational facilities pursuant to Chapter 1013, Florida Statutes. The location and need for public school facilities is driven by population growth and land use patterns. In recognition of this relationship, Chapter 1013 requires that school planning and siting decisions be compatible and consistent with local government comprehensive plans and land development regulations. *See* ss. 1013.31(2)(a); 1013.13(10); 1013.35(2)(a), (b), (e); 1013.35(3), Fla. Stat. Similarly, Chapter 163, Part II, directs local governments to coordinate with school boards in developing their local comprehensive plans. *See* ss. 163.3177(6), (12); 163.31777; 163.3180, Fla. Stat.

Until very recently, general-purpose local governments' and school boards' planning efforts were coordinated to a degree but for the most part proceeded down

parallel paths.[1] With the passage of Chapter 2005-290, however, local government land use planning and school board planning decisions must now be fully integrated with each another. *See* Associations' Initial Brief at 7-12. In this respect, local government comprehensive plans have become more than just documents governing land use planning decisions. Comprehensive plans must now address public schools as necessary infrastructure attendant to population growth, and must incorporate levels-of-service standards to measure the capacity of this infrastructure to accommodate new development.

The impact of this amendment on Florida's school boards with respect to their ability to plan for and site public school facilities will be substantial. The potential for voters to reject through referenda comprehensive plan amendments and other development permits necessary to site schools is heightened with the passage of Chapter 2005-290. With the advent of school concurrency and implementation of the class size reduction amendment to Article IX, it will be necessary for school boards to plan and build additional facilities with increasing frequency. As noted in the Associations' Initial Brief at pages 18 and 28-29, the

[1] The need to better integrate the processes of school boards and local government land use planning has long been recognized but not fully addressed. *See generally* David L. Powell, *Back To Basics on School Concurrency*, 26 Fla. St. U. L. Rev. 451 (Winter 1999). The dilemma facing legislative policy makers was in crafting a solution that accommodated and recognized the separate constitutional responsibilities of general-purpose local governments and school districts. *See* David L. Powell, *Growth Management: Florida's Past as Prologue for the Future*, 28 Fla. St. U. L. Rev. 519, 535 (Winter 2001).

scope of the proposed amendment may also encompass rezonings and other development applications, in addition to comprehensive plan amendments. A negative vote on a comprehensive plan amendment or development permit that is necessary for such facilities will substantially impair the ability of school districts to meet their obligations under Article IX, section 4 of the constitution. For this reason, the proposed amendment violates the single subject requirement. Moreover, the proposed amendment's failure to specifically reference Article IX is alone grounds for invalidation.

III.
The Proposed Amendment Violates the Single Subject Requirement by Altering the Paramount Constitutional Duty Placed on Multiple Branches of the State to Make Adequate Provision For a High Quality Education

As discussed in the Associations' Initial Brief, the proposed initiative violates the single subject requirement because of its substantial impact on multiple branches of government to comply with Article IX, section 1, and because the initiative fails to specifically reference this provision of the constitution. The substantial impact of the proposed initiative on multiple branches of the state can be more readily understood when considered against the ramifications of Article IX, section 1.

Revision No. 6 to Article IX, section 1, proposed by the 1997-98 Constitutional Revision Commission and approved by the people in 1998

substantially revised Article IX, section 1, in several respects.[2] First, the Article now clearly states that the education of children is a fundamental value of the people of the State of Florida. Second, it placed a paramount duty on the State as an entity – not just the legislative branch – to make adequate provision for the education of all children. Third, Revision No. 6 added standards and context to the phrase "adequate provision" in Article IX, section 1. To be adequate, the law must provide for a "uniform, efficient, safe, secure, and high quality system of free public schools." *See* William A. Buzzett and Deborah K. Kearney, Commentary, art. IX, s. 1, 26A Fla. Stat. Annot. (West Supp. 2006); *see also Bush v. Holmes*, 919 So. 2d 392, 402-05 (Fla. 2006) (discussing history and development of Article IX and explaining that Article IX, section 1(a) contains "three critical components with regard to public education).

[2] The following excerpt illustrates the substantial changes that occurred to Article IX, section 1, in blackline format:

> SECTION 1. ~~System of~~ Public education.--The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders. Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education and for the establishment, maintenance, and operation of institutions of higher learning and other public education programs that the needs of the people may require.

Compare Art. IX, s.1(a), Fla. Const. (2005) *with* Art. IX, s.1(a), Fla. Const. (1997).

The intent of the 1997-98 Constitutional Revision Commission to place the paramount constitutional duty to make adequate provision for a high quality education on all branches of the State is clear from the Commission debate. *See* Appendix A for the colloquy from Commissioner Brochin during the debate on Revision No. 6. This colloquy represents the tenor of the Commission debate to expand the State's scope and duties in Article IX in response to the decision of the Court in *Coalition for Adequacy and Fairness in School Funding v. Chiles*, 680 So. 2d 400 (Fla. 1996).

The adoption of Revision No. 6 affected a paradigm shift in the State's approach to education issues. It elevated the Florida education article from Category I (the lowest level of duty imposed on the State) to Category IV (the highest level of duty imposed on the State). *Bush v. Holmes*, 919 So. 2d at 404.

In addition to the monumental changes wrought by Revision No. 6 in 1998, the people in 2002 further amended Article IX to require a reduction in class sizes by the year 2010. The class size reduction amendment provides an objective standard to "assure children attending public schools obtain a high quality education." Art. IX, § 1(a), Fla. Const. The number of students assigned to each teacher in a classroom cannot exceed a constitutionally mandated limit. The class size limitation amendment incorporated a public schools capital facilities commitment to ensure "there are a sufficient number of classrooms so that" the

maximum assignments to each teacher are not exceeded. Art. IX, § 1(a), Fla. Const.

Adequate public school facilities are an integral and constitutionally mandated component of the provision of a high quality education under Article IX. Because of the proportional relationship between residential land development and school capacity, the legislature determined that Chapter 163, part II comprehensive plans offered a means to address the state's constitutional obligations under Article IX, section 1. Chapter 163, Part II, now requires adequate public school facilities as a mandatory element in every local government comprehensive plan. It requires that adequacy be measured in terms of both financial feasibility and capacity, or levels-of-service. School facilities must be available concurrent with the impacts of land development. These provisions are designed to satisfy the duty placed on both the Legislature and the Executive Branch to ensure that the public school facilities incorporated into the local government comprehensive plans are sufficient to meet the constitutional standard both as to class size and the provision of high quality education. In sum, the state has changed the nature of Chapter 163 comprehensive plans into more than just land use planning guides; they are school planning tools through which the state intends to meet its constitutional duties under Article IX as to the provision of adequate public school facilities.

Within the next several years, general-purpose local governments will be required to amend their comprehensive plans to incorporate the new school facility planning and concurrency requirements. If the proposed initiative is adopted, referenda will be required in order to bring local government comprehensive plans into compliance with the state's chosen scheme for implementing its paramount duty under Article IX. This simple change of the manner in which comprehensive plan amendments are adopted takes on a whole new meaning when considered in the context of public school facilities planning. Under the proposed amendment, voters will be free to reject amendments that are necessary to carry out the state's chosen scheme for implementing a critical and essential component of its paramount duty under Article IX.

As noted above, the paramount duty under Article IX rests not just with the legislature. The requirement of elector approval of the various comprehensive plan amendments will substantially alter the functions of multiple branches of government in carrying out the mandates of Article IX. For this reason, the proposed amendment violates the single subject requirement. The failure of the proposed ballot title and summary to specifically reference Article IX as an affected constitutional provision is an additional ground for invalidation.

IV.

This Court's Previous Opinion in *Referenda I* Does Not Preclude It From Fully Reviewing The Ballot Title and Summary

The fact that one offending sentence was removed from the ballot summary while the remainder of the summary is the same as it was in *Referenda I* does not alter this Court's obligation to examine the new ballot title and summary and does not infer that the remainder of the summary passes muster. This Court in *Referenda I* provided no comment, let alone analysis on the remainder of the ballot summary in *Referenda I* because the Court did not have to do so. The first sentence of the original summary was as far as the judicial scrutiny needed to extend. Since that opinion was issued, Chapter 2005-290, Laws of Florida, passed during the 2005 legislative session. This intervening event, coupled with the fact that the Court in *Referenda I* did not need to spend any judicial energy on the ballot summary after the first sentence, compel the Court's thorough examination this time. Vital issues exist with this already rejected, but renewed constitutional proposal and nothing precludes this Court's examination of the renewed proposal. *See Adv. Op. to the Att'y Gen. re. Tax Limitation*, 673 So. 2d 864, 866 (Fla. 1996). Accordingly, the Court should fully scrutinize the new ballot title and summary to ensure the integrity of the amendment process and of the Constitution.

V.
The Ballot Title and Summary Are Ambiguous and Misleading

The ballot title and summary are fundamentally flawed. The plain language of what will be presented on the ballot raises too many questions without answers for the voter. Any voter who looks to the proposed constitutional amendment for guidance finds only more questions as to the meaning of the terms in the ballot title and summary. The ballot title and summary cannot be clarified by reference to existing law, either. The voter is left confused and unable to cast an "intelligent and informed" vote. *See Advisory Op. to the Att'y Gen. Re Term Limits Pledge*, 718 So. 2d 798, 803 (Fla. 1998).

The ballot title and summary fail to define terms necessary for a voter to understand the proposed initiative. When definitions of ambiguous terms are not provided, the ballot summary is defective. *See Advisory Op. to the Att'y Gen. Re People's Property Rights*, 699 So. 2d 1304 (Fla. 1997). In *Property Rights*, the Court concluded that the terms "owner," "common law nuisance," and "loss in fair market value which should be borne by the public," each needed to be defined for the voter. The Court found that without these definitions, "the voter is not informed as to . . . the terms of the amendment." *Id.* at 1309, n. 2. In addition, the Court has also found that the lack of a "more complete" definition in the ballot summary is misleading. *See id.* at 1311. Similarly here, the sponsor does not provide any definitions for the ambiguous terms in the ballot title and summary.

Rather, the ballot summary simply informs the voter that some definitions are provided in the text of the amendment. The lack of definitions in the summary is itself problematic and the definitions in the proposed amendment conflict with their statutory counterparts, thus leaving the voter with only questions and no answers.

A. The term "local government" is misleading

The term "local government" leads the voter to believe that only cities and counties are impacted by the proposed amendment when the current state of the law is that other governmental entities – also local in nature – are directly and inherently a part of local comprehensive plans. After the passage of Chapter 2005-290, the school districts of the state are an integral part of the comprehensive planning process. Accordingly, the term "local government" misleads the voter from understanding the impact the proposed amendment has on school districts and their capacity to fulfill their constitutional and statutory duties. Furthermore, the term "local government" tells the voter nothing about the impact of the proposed amendment on the State and its duty to fulfill the mandates of Article IX, section 1.

B. The term "comprehensive land use plan" is ambiguous

The term "comprehensive land use plan" suffers fatal ambiguities. It fails to inform the voter what will be voted on in the future if this constitutional proposal passes. Is this the "comprehensive plan" defined by Chapter 163, part II? Is it

some other category of "land use" document? Does the voter understand that the "plan" and the functions that accompany the statutory comprehensive plan are different from the zoning plans that govern parcels and areas? Does it mean the same as the "local government comprehensive land use plan" that is defined in the proposed amendment and used in the ballot title? Is it all of these and more? Or, is it something entirely different? The ballot summary does not answer these questions.

Instead, the ballot summary tells the voter that definitions are provided in the constitutional proposal.

> **BALLOT TITLE:** REFERENDA REQUIRED FOR ADOPTION AND AMENDMENT OF LOCAL GOVERNMENT COMPREHENSIVE LAND USE PLANS.
>
> **BALLOT SUMMARY:** 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.

(emphasis added). While the amendment defines the term "comprehensive land use plan," that definition[3] is different from, and inconsistent with, the statutory

[3] Interestingly, the term that the proposed amendment defines is not "comprehensive land use plan." The defined term is "local government comprehensive land use plan." This term appears in the ballot title but not in its

definition for "comprehensive plan." Chapter 163, Part II, Florida Statutes, provides the statutory framework for the adoption and enforcement of local government comprehensive plans. Compare the proposed amendment's definition of "comprehensive land use plan" to the short title provided in section 163.3161, Florida Statutes: the "Local Government Comprehensive Planning and Land Development Regulations Act." Also compare the definition in section 163.3164(4), Florida Statutes, where the term "comprehensive plan" is defined to mean a plan meeting the requirements of sections 163.3177 and 163.3178, Florida Statutes. Finally, compare the definition of "land development regulations" in section 163.3164(2), Florida Statutes, which enumerates the regulatory tools available to enforce the adopted local government comprehensive plan.

Because the conflict between these two definitions perpetuates rather than resolves any ambiguity, a voter might further examine the amendment in the context of where it will be placed in the Constitution. That reference furthers the confusion, however. The placement in the "Natural Resources and Scenic Beauty" provision of the Constitution, Article II, Section 7, might lead the voter to believe that only "plan" amendments that concern natural resources and aesthetics are what

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entirety in the ballot summary. This Court has noted that inconsistent use of terms between the ballot title and summary, without definitions provided to the voter is grounds to strike a petition from the ballot. *See Property Rights*, 699 So. 2d at 1308-09 (finding that the use of the term "people" in the ballot title but "owner" in the ballot summary, without definitions on the ballot summary, was "confusing.").

would be voted on in the future. But this belief conflicts with the broad definition of "local government comprehensive land use plan" provided in the proposed amendment, and conflicts with the statutory definition of "comprehensive plan" in that those plans control much more than just natural resources and scenic beauty.[4]

A different interpretation can also reasonably be made by a voter as to what the term "comprehensive land use plan" refers. A voter might conclude that only "land use" features of the statutory comprehensive plan would be voted on in the future, such as those contained in the future land use plan element required by section 163.3177(6), Florida Statutes. *See also* § 163.3164(12), Fla. Stat. (defining "land use"). But that element is only one piece of the entire comprehensive plan. Accordingly, that voter might believe that features such as the capital improvements element; the traffic circulation element; the general sanitary sewer, solid waste, drainage, potable water, and natural groundwater aquifer recharge element; the conservation element; the recreation and open space element; the housing element; the coastal management element; and the intergovernmental coordination element, are not to be voted on in the future because the elements are distinguished from the "future land use element." These elements are, however, part of a statutorily-defined comprehensive plan.

[4] For an extensive but not exhaustive list of all the elements of a statutory "comprehensive plan," *see Associations' Initial Brief* at 30; *see also Referenda I* at 772; *see generally* §163.3177, Fla. Stat.

C. The term "local planning agency" is ambiguous

The term "local planning agency" also suffers a fatal flaw. While the summary does not define the term, the amendment offers the following definition:

> "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.

This definition again conflicts with the statutory definition of "local planning agency." Section 163.3164(14), Florida Statutes, states as follows:

> "Local planning agency" means the agency designated to prepare the comprehensive plan or plan amendments required by this act.

Id. It is unclear whether the statutory "local planning agency" is the same entity referenced in the constitutional amendment and ballot summary. The definitions would lead the voter to the conclusion that they are, in fact, different entities. The statutory agency is defined by reference to statutory law; the proposed constitutional "agency" appears to exist separate and apart from the Local Government Comprehensive Planning and Land Development Regulation Act, Ch. 163, Part II, Florida Statutes. The ballot summary does not resolve this ambiguity.

While the sponsors have removed from the ballot summary the sentence that the Court in *Referenda I* found offensive, other fatal problems with the ballot title

and summary remain. One fatal problem is that only limited and ambiguous information is provided to the voter in the ballot title and summary. No definitions to the technical terms are provided. A voter, who might seek to resolve these problems by following the ballot summary's directive that definitions are provided in the amendment, is only met with more ambiguity. Those definitions conflict with their current statutory counterparts. A voter has no way of resolving these conflicts and thus cannot be reasonably informed as to what the amendment does. In addition some phrases, like "local government" are not so much ambiguous as misleading. A voter has no way to know the dramatic impact that the amendment has on school districts because they are not a "local government" as that term is commonly understood and as defined by law. In the end, the ballot title and summary fail to clearly identify or define what documents the voter will be voting on in the future. Because of this, voters will not be able to understand the chief purpose of the proposed amendment. Accordingly, without any such clarity for the voter, the ballot title and summary are fatally ambiguous and misleading and should be struck from the ballot.

CONCLUSION

The proposed amendment is clearly and conclusively defective. The Court is respectfully requested to have it stricken from the ballot.

Respectfully submitted,

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