

**IN THE SUPREME COURT
STATE OF FLORIDA**

Case No. SC06-521

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

**SUPPLEMENTAL BRIEF
OF THE SPONSOR
FLORIDA HOMETOWN DEMOCRACY, INC.**

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STATEMENT OF THE CASE AND FACTS

STATEMENT OF THE CASE

By letter dated March 27, 2006, Florida's Attorney General requested this Court's opinion on whether the Financial Impact Statement prepared by the Financial Impact Estimating Conference "is in accordance with" Section 100.371, Florida Statutes. The letter attached a March 7, 2006 letter to the Attorney General from the Legislature's Office of Economic and Demographic Research signed by the Financial Impact Estimating Conference ("FIEC") members, which in turn, attached a one-page "Financial Impact Statement" and a two-page "Financial Information Statement." No other materials were filed.

The Attorney General's letter and attachments pertain to the constitutional amendment initiative petition Serial Number 05-18, sponsored by Florida Hometown Democracy, Inc. ("the 2005 Initiative").

The 2005 Initiative only differs from the 2003 version previously reviewed in that the first sentence of the ballot summary was removed. Advisory Op. to the Att'y. Gen. re: Referenda Required for Adoption and Amendment of Local Gov't Comprehensive Land Use Plans, 902 So.2d 763 (Fla. 2005). This Court did not consider the merits of the 2003 financial impact statement (Case No. SC04-1479).

On April 4, 2006, this Court established briefing requirements. On April 24, 2006, the Sponsor filed a brief. No other briefs were filed.

On September 22, 2006, this Court directed the Attorney General and interested parties to file supplemental briefs and set oral argument.

STATEMENT OF THE FACTS

Florida Hometown Democracy, Inc. is the political action committee sponsor of a citizen initiative petition proposed pursuant to Article XI, Section 3 of the Florida Constitution (1968). The title of the Initiative is "Referenda Required for Adoption and Amendment of Local Government Comprehensive Land Use Plans." (the "2005 Initiative"). The text of the 2005 Initiative is identical to the text of the Sponsor's 2003 Initiative. The Financial Impact Estimating Conference prepared a financial impact statement for the 2003 Initiative, which provided:

The overall financial impact of this amendment on state and local governments cannot be determined. Additional costs will be incurred by local governments and will vary depending upon future statutory changes and on the processes employed by cities and counties in obtaining approval for changes to comprehensive land use plans. The impact to state government will be minimal under current law.

On June 21, 2005, the Florida Division of Elections approved the 2005 Initiative, and assigned it Serial Number 05-18. On March 10, 2006, the FIEC sent the Attorney General a "financial impact statement" and a "financial information statement" for the 2005 Initiative. The text of the 69-word financial impact statement for the 2005 Initiative provides:

The direct impact of this amendment on local government expenditures cannot be determined precisely. Over each two year election cycle, local governments cumulatively will incur significant costs (millions of dollars statewide). Costs will vary depending upon the processes employed by cities and counties in obtaining approval for plan amendments. The direct impact on state government expenditures will be insignificant. There will be no direct impact on government revenues.

The financial information statement is slightly over one-page, and refers to "information provided through public workshops and collected through staff research" and "survey responses from local government planners and county supervisors." None of the information considered by the FEIS was submitted to this Court. While the FEIS is required to draft a financial information statement which includes: a "summary of not more than 500 words" and "additional detailed information that includes assumptions that were made to develop the financial impacts,"

"workpapers" and any other information deemed relevant, there is no requirement that the financial information statement be provided to the Attorney General, to this Court, or to the sponsor of the initiative at issue. §100.371(6)(d)3, Fla. Stat. (2005).

The "summary" of the financial information statement (not the financial impact statement) is required to be printed by the Secretary of State and furnished to each Supervisor of Elections. §100.371(6)(d)4, Fla. Stat. (2005). In turn, each Elections Supervisor is required to have the summary "available at each polling place and the main office...upon request" at some unspecified time. Id. If a Supervisor of Elections maintains an Internet site, the summary is required to be posted to the site at an unspecified time. §100.371(6)(d)5, Fla. Stat. (2005).

Additional provision is made for Internet posting of the full financial information statement by the Secretary of State and Office of Economic and Demographic Research, and for each Supervisor of Elections to include those Internet addresses in each publication or mailing made under Section 101.20, Florida Statutes. §100.371(6)(d)5, Fla. Stat. (2005). Section 101.20, Florida Statutes requires publication of a sample ballot prior to the day of

the election, or mailing to each registered elector at least seven days prior to an election.

SUMMARY OF ARGUMENT

The constitutional basis for this Court's jurisdiction is infirm. Section 100.371(6), Florida Statutes (2005) is not appropriately authorized by Article XI, Section 5(c) of the Florida Constitution. The Constitution does not authorize placement of a FIS on the ballot.

The standard for review has been de novo, based upon whether or not the FIS complies with Article XI, Section 5(c) and Section 100.371(6), Florida Statutes (2005).

The FIS fails to comply with Article XI, Section 5(c) of the Florida Constitution applied in conjunction with Section 100.371(6), Florida Statutes.

ARGUMENT

STANDARD OF REVIEW: The standard of review has been de novo and has been limited to whether the FIS complies with Article XI, Section 5(c) of the Florida Constitution in conjunction with Section 100.371(6), Florida Statutes. See, Advisory Op. to the Att’y Gen. re: Repeal of High Speed Rail Amendment, 880 So.2d 628, 629 (Fla. 2004).

I. THIS COURT'S CONSTITUTIONAL JURISDICTION IS LACKING.

Although this Court has issued advisory opinions on financial impact statements, the constitutional basis for the exercise of such jurisdiction is insufficient.

Article V of the Florida Constitution ("Judiciary") establishes Florida's court system. Article V, section 3, sets forth this Court's organization and jurisdiction. Nothing in Article V grants this Court jurisdiction to render an advisory opinion to the Attorney General on a FIS. One would expect to find a basis for such jurisdiction in Article V, however. See, Gandy v. State, 846 So.2d 1141, 1143 (Fla. 2003)((jurisdiction extends only to narrow class of cases enumerated in Art. V, section 3(b)).

In contrast, Article V of the Florida Constitution specifically requires this Court to render an advisory opinion on the validity of a citizens' initiative petition. Art. V, §3(b)(10), Fla. Const. There is also an express grant of authority for the Attorney General to request such an advisory opinion. Art. IV, §10, Fla. Const. Although misplaced, that section also sets a deadline for this Court to render an opinion on the Attorney General's request. Id. (establishing deadline as "no later than April 1 of the year in which the initiative is to be submitted to the voters....").

Other non-Article V jurisdictional anomalies are Article III, section 16(c), which authorizes the Attorney General to petition this Court for a declaratory judgment determining validity of apportionment; and Article IV, section 1(c), which authorizes the Governor to request this Court's advisory opinion regarding the Florida Constitution. Accordingly, the Sponsor acknowledges that Article V is not a perfect, exclusive expression of this Court's jurisdiction.

This Court has expressed the constitutional basis for FIS-review jurisdiction under Article XI, section 5(c), Florida Constitution. See, Advisory Op. to the Att'y Gen.

re: Repeal of High Speed Rail Amendment, 880 So.2d 628, 629
(Fla. 2004).

Article XI, section 5(c) provides:

The legislature shall provide by
general law, prior to the holding an
election pursuant to this section, for
the provision of a statement to the
public regarding the probable financial
impact of any amendment proposed by
initiative pursuant to section 3.

This provision was approved in the November 2002
general election based on the ballot statement:

ECONOMIC IMPACT STATEMENTS FOR PROPOSED
CONSTITUTIONAL AMENDMENTS OR REVISIONS

Requires the Legislature to provide by
general law for the provision of an
economic impact statement to the public
prior to the public voting on an
amendment of the Florida Constitution
proposed by initiative.

House Joint Resolution 571 (2001).

The 2002 revision antedated Smith v. Coalition to
Reduce Class Size, 827 So.2d 959 (Fla. 2002), where this
Court affirmed that Chapter 2002-390, Laws of Florida, was
an unconstitutional imposition on the initiative process.
Id. at 960. The invalidated law amended various statutes to
provide for a fiscal-impact statement to be placed on the
general election ballot, upon judicial review and approval.
Ch. 2002-390, §§3, 4, 5, Laws of Fla.

Unlike the unconstitutional 2002 law, the Legislature-sponsored 2002 constitutional amendment spoke neither to judicial review, nor to ballot placement of an "approved" FIS.

Nevertheless, when this Court has determined that a FIS met constitutional and statutory criteria, the FIS has been approved for ballot placement. See, Advisory Op. to Atty. Gen. re: Protect People, Especially Youth, From Addiction, Disease, and Other Health Hazards of Using Tobacco, 926 So.2d 1186, 1195 (Fla. 2006)("we approve the amendment and financial impact statement for placement on the ballot"). Conversely, this Court has rejected such statements. Advisory Op. to Att'y Gen. re: Public Protection from Repeated Medical Malpractice, 880 So.2d 686 (Fla. 2004)(J. Lewis specially concurring).

In response to this Court's Order requiring jurisdictional briefs, the Sponsor has reconsidered the issue, and the arguments in its Initial Brief in the case at bar. In particular, the plain language of Article XI, section 5(c) has been carefully considered, along with the ballot statement on the 2002 general election ballot.

Notwithstanding advisory opinions approving ballot placement of financial impact statements, the Sponsor does not understand the plain meaning of Article XI, section

5(c) to authorize this practice. Moreover, if the Court determines that the text is ambiguous, the plain language of the ballot statement supports the view that the voters did not authorize ballot placement. See, Zingale v. Powell, 885 So.2d 277, 282-83 (Fla. 2004)(plain language of amendment is first consideration); Florida League of Cities v. Smith, 607 So.2d 397, 400 (Fla. 1992)(exact letter of constitutional language must be enforced and extrinsic aids may not be allowed to defeat plain language).

This Court should first consider the phrases with regard to the timing and manner of informing the public of probable financial impacts: "prior to the holding of an election" and "provision of a statement to the public," respectively.

Sections 101.161(1) and 100.371(6)(c), Florida Statutes (2005) mandate placement of a financial impact statement on the ballot.

The "holding of an election" is distinguishable from "election day." See, Town of Palm Beach v. City of West Palm Beach, 55 So.2d 566 (Fla. 1951)(discussing expenses for holding an election). For example, Section 101.657 ("Early Voting") mandates that "early voting" begin on the 15th day before a general election. Since a sample ballot need not be published or mailed to registered electors

prior to the start of early voting, mere publication of the financial impact statement on the ballot (and sample) will not ensure that such statement be provided prior to the holding of the early voting part of the election.

As to the phrase "provision of a statement to the public," the term "public" is broader than the phrase "registered electors." As noted, in lieu of newspaper publication of a sample ballot, Elections Supervisors may mail a sample ballot to each registered elector at least seven days prior to Election Day. Section 101.20(2), Florida Statutes (2006). Moreover, the Legislature has provided alternative means for provision of financial information statements, and summaries thereof, to the public by hard copy and Internet posting. Sections 100.371(6)(d)4,5, Florida Statutes (2005).

The use of the phrase "provision of a statement to the public" is more akin to the "full and public disclosure of financial interests" in Article II, section 8, than to the phrases "shall be submitted to the electors" in Article XI, sections 4 and 5. The use of different terms and phrases in the different parts of the Florida Constitution on the same subject implies that the terms have a different meaning. See, Zingale v. Powell, 885 So.2d at 283 (citation omitted).

Notwithstanding the lack of express constitutional authority for the Attorney General to request an advisory opinion, for this Court to issue an advisory opinion, and for the Secretary of State to include a financial impact statement on the general election ballot, the Legislature enacted Section 100.371(6), Florida Statutes (2003), and amended it in 2004. Ch. 2004-33, s. 3, Laws of Fla.

In 2005, the statute was further amended and renumbered to Section 100.371(5), Florida Statutes (2005). Ch. 2005-278, s. 28, Laws of Fla. (effective January 1, 2007).

In 2006, the statute was further amended, but the effective date of the 2005 and 2006 amendments is now contingent upon the (prospective) effective date of the constitutional amendment proposed by Senate Joint Resolution 2144 (2005), or a similar constitutional amendment. Ch. 2006-119, §§4, 11 Laws of Fla. The amendment proposed by Senate Joint Resolution 2144 has not been voted on by Florida's electors.

In the case at bar, the version of Section 100.371(6), Florida Statutes (2005) is presently in effect.

Nothing in Section 100.371(6), Florida Statutes (2005) expressly purports to establish a basis for this Court to render an advisory opinion to the Attorney General on a

financial impact statement. The Legislature cannot expand this Court's jurisdiction beyond that authorized by the Constitution. See, City of Dunedin v. Bense, 90 So.2d 300, 302-03 (Fla. 1956)(original jurisdiction of Florida Supreme Court limited by Florida Constitution); Jenkins v. State, 385 So.2d 1356, 1357-59 (Fla. 1980)(discussing history of limitation of Florida Supreme Court's jurisdiction under Art. V, section 3).

Instead, judicial review has been inferred. In Section 100.371(6)(b)3, Florida Statutes (2005)(emphasis supplied), there is a general reference to judicial review: "Any financial impact statement that a court finds not to be in accordance with this section shall be remanded...." Other provisions of that statute refer to "the Supreme Court." Sections 100.371(6)(b)4 & (d)1,2, Florida Statutes (2005). In contrast, Article XI, section 5(b) provides in relevant part that a proposed amendment by initiative "shall be submitted to the electors at the general election...." Article VI, section 5 of the Florida Constitution ("Suffrage and Elections") likewise does not authorize placement of a financial impact statement on the general election ballot, but it does provide in part: "Special elections and referenda shall be held as provided by law." Article VI, section 5(a), Florida Constitution.

Upon information and belief, no legal challenge has been filed to question whether or not Section 100.371, Florida Statutes, which provides for the placement of a FIS on the ballot, is authorized by the Florida Constitution. Instead, the law has been presumed to be constitutional, and authorized by Article XI, section 5(c) of the Florida Constitution.¹ See, Advisory Op. to the Att'y Gen. re: Repeal of High Speed Rail Amendment, 880 So.2d at 629 (considering Section 100.371, Florida Statutes and Article XI, section 5(b) together to remand FIS).

Nothing in Chapter 25, Florida Statutes (2006) ("Supreme Court") provides a basis for jurisdiction to render an advisory opinion on a FIS, either.

There is insufficient constitutional support for this Court to render an advisory opinion on a FIS, and for the Secretary of State to place a FIS on the ballot.

II. THE STANDARD OF REVIEW HAS BEEN DE NOVO.

As noted above, Article XI, section 5(c) of the Florida Constitution authorizes the Legislature to enact a general law for "the provision of a statement to the public regarding the probable financial impact of any amendment proposed by initiative...."

¹ Chapter 2002-390, Laws of Florida, expressly authorized placement of a fiscal-impact statement on the ballot.

The Legislature interpreted the phrase "probable financial impact of any amendment" to mean

the estimated increase or decrease in any revenues or costs to state or local governments resulting from the proposed initiative.

§100.371(6)(a), Fla. Stat. (2005). In addition, the Legislature has authorized a financial impact statement to set forth "a range of potential impacts." §100.371(6)(b)3, Fla. Stat. (2005). This phrase has been interpreted to refer to "probable" impacts. Advisory Op. to Att'y Gen. re: Public Protection from Repeated Medical Malpractice, 880 So.2d 686, 687 (Fla. 2004)("range of potential impacts" must relate to "probable financial impact"); Advisory Op. to the Att'y Gen. re: Repeal of High Speed Rail Amendment, 880 So.2d 628, 629 (Fla. 2005)("range of potential impacts" must relate to "probable financial impact" and "to state or local governments").

"Probable" means:

1: supported by evidence strong enough to establish presumption but not proof
<a ^ hypothesis> 2: establishing a probability <^ evidence> 3: likely to become true or real <^ events>.

Webster's Ninth New Collegiate Dictionary (1984) at 937.

Absent consensus of a Financial Impact Estimating Conference, the Legislature allows for a statement to provide: "The financial impact of this measure, if any, cannot be determined at this time." §100.371(6)(b)4, Fla. Stat. (2005). See, Advisory Op. to Att'y Gen. re: Marriage Protection, 926 So.2d 1229, 1240-41 (Fla. 2006).

While not specifically authorized by either the Florida Constitution or Florida Statutes, the Court has approved a FIS that included "direct" and ("indeterminate") "indirect" financial impacts. See, Advisory Op. to Att'y Gen. re: Protect People, Especially Youth, From Addiction, Disease and Other Health Hazards of Using Tobacco, 926 So.2d 1186, 1195 (Fla. 2006).

This Court has not endeavored to compare the financial impact statement with the associated "financial information statement". See, §100.371(6)(d)3, Fla. Stat. (2005). In that regard, review has been unlike this Court's review of a citizen's initiative ballot summary to ensure that it fairly characterizes the ballot text. See, Advisory Op. to the Att'y. Gen. re: Referenda Required for Adoption and Amendment of Local Gov't Comprehensive Land Use Plans, 902 So.2d 763 (Fla. 2005).

This Court is not provided with a "record" from the FEIC consisting of "additional detailed information that

includes the assumptions that were made to develop the financial impacts, workpapers, and any other information deemed relevant...." §100.371(6)(d)3, Fla. Stat. (2005)². A FIS can be wrong, but if it is clear and is 75 words or less, it apparently meets the standard of review. See, Advisory Op. to Att'y Gen. re: Public Protection from Repeated Medical Malpractice, 880 So.2d 686 (Fla. 2004)(J. Lewis specially concurring).

Apparently, this Court will review a financial impact statement to determine whether or not the language is an "attempt to editorialize or sway the voter by the inclusion of emotional or political rhetoric." Advisory Op. to Att'y Gen. re: Marriage Protection, 926 So.2d 1229, 1240-41 (Fla. 2006).

Without any means for a Sponsor to ensure that the FIS is appropriately justified by the financial information statement, and in turn, whether the financial information statement is based upon appropriate assumptions and data; what appears to be a neutral, apolitical FIS could in reality be an attempt to defeat the amendment.

² The financial information statement provided to the Court along with the financial impact statement only included the summary and did not include the "additional detailed information" portion thereof. Section 100.371(6)(d)3, Florida Statutes (2005).

A comparison of FIS for the 2003 Initiative with the FIS for the 2005 Initiative is illustrative. The FIS differences for identical text are not based on any changed economic conditions due to the passage of time. The original FIS acknowledged that costs to local government and State government would be contingent upon present and future statutes and further stated that such costs could not be determined. The new FIS does not acknowledge that probable costs could be affected by statutory law, but posits a multi-million dollar cost to local governments.³

This Court's de novo review has been limited, and has not included a substantive review of the accuracy of a FIS.

III. THE FINANCIAL IMPACT STATEMENT IS FLAWED.

This Court's Order requested additional briefing regarding the whether the financial impact statement "as presently drafted" complies with the requirements of Section 100.371, Florida Statutes, "including any further arguments regarding whether there are any ambiguities...."

Accordingly, the Sponsor will not repeat the argument previously submitted in the Initial Brief, but respectfully

³ The frequency with which local government comprehensive plans have been amended has increased since the 1985 enactment of Chapter 163, Part II, Florida Statutes. The 1985 legislation instituted a twice-per-year cap, with two exceptions, but at present there are scores of exceptions

requests the Court to consider those arguments in view of the supplemental arguments on jurisdiction and the standard of review.

CONCLUSION

Florida Hometown Democracy, Inc. respectfully requests this Court to determine that it does not have FIS advisory opinion jurisdiction, and that the Florida Constitution does not authorize placement of a FIS on the general election ballot. Should this Court find a lawful basis for review and ballot placement, this Court should find that the Financial Impact Statement does not comply with Article XI, Section 5(c) of the Florida Constitution in conjunction with Section 100.371(6), Florida Statutes (2005), and remand the Financial Impact Statement to the Financial Impact Estimating Conference.

Respectfully submitted,

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to the twice-per-year limitation. Compare, §163.3187, Fla.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to the following persons this ___ day of October, 2006:

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I HEREBY CERTIFY that the foregoing was word-processed using Courier New, 12-point font in compliance with Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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Stat. (1986) with §163.3187, Fla. Stat. (2006).