IN THE SUPREME COURT
STATE OF FLORIDA

Case No. SC08-318

IN RE: ADVISORY OPINION
TO THE ATTORNEY GENERAL
RE: FLORIDA GROWTH MANAGEMENT
INITIATIVE GIVING CITIZENS THE RIGHT
TO DECIDE LOCAL GROWTH MANAGEMENT CHANGES

ANSWER BRIEF
OF INTERESTED PERSON
FLORIDA HOMETOWN DEMOCRACY, INC.

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

FLORIDA CONSTITUTION

FLORIDA STATUTES (all references to 2007 unless noted)

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

Florida Hometown Democracy, Inc. ("FHD") takes issue with some aspects of Floridians for Smarter Growth, Inc.'s ("FSG") Statement of the Case and Facts. [FSG Initial Brief, pp. 1-6].

The second sentence of FSG's Statement of the Case and Facts provides:

> The chief purpose of the proposed Smarter Growth amendment is to create a process for allowing voters to petition for a referendum on changes to local growth management plans.

[FSG Initial Brief, p. 1].

However, the actual text of the FSG Initiative provides, in part, in its "Statement and Purpose"

> The Legislature has enacted growth management and land use planning legislation; these laws do not provide for voters' direct approval of the resulting plans or amendments. The purpose of this amendment is to provide a limited opportunity for voters to approve or disapprove these plans or amendments.... This amendment is intended to modify existing law, permit flexibility in future growth-management related legislation (except rules which would affect voters' ability to petition for referenda), and pre-empt or supersede recent proposals to subject all comprehensive land use plans and amendments to votes, thus balancing competition interests without over-burdening voters.

FSG's Statement of the Case and Facts did not set forth the express "purpose" and "intent" of the proposed amendment as set forth in the actual text of the measure. The Court should reject FSG's Statement of the Case and Facts in this regard.

Next, under the heading "The Competing Land Use Plans Amendment," FSG's Statement of the Case and Facts inaccurately discusses the FSG proposal in reference to the "major difference" between the FSG and FHD proposed amendments. [FSG Initial Brief, pp. 5-6]. FSG's description of its proposal provides in relevant part:

> [t]he Smarter Growth amendment allows for a referendum only if a valid and sufficient petition for referendum is duly filed and at least 10% of the voters of the affected city or county sign the petition.

FSG's characterization omits key limitations on the proffered referendum process, specifically: (1) the original petitioner(s) must provide extensive personal and financial information in order to submit a petition; (2) every petition must be signed by a registered voter in person at the local Supervisor of Elections (or similar local authority) office; and (3) only a 60-day period is provided for ten (10) per cent of the registered voters to

sign the petition from the date the first petition is signed.

Finally, FSG's Statement of the Case and Facts fails to note that the FSG proposal is intended to "preempt or supersede recent proposals to subject all comprehensive land use plans and amendments to votes...." If FHD's proposed constitutional amendment were to be approved by the voters before FSG's appeared on the ballot, or if both proposals appeared on the same ballot, then the voter would not be appraised by the FSG ballot title and summary of the intent to "pre-empt or supersede" the FHD proposal.

SUMMARY OF ARGUMENT

The FSG Initiative fails to meet the requirements of the single subject rule, in that it fails to identify all substantially affected provisions of the Constitution.

The proposal substantially affects fundamental rights in the Florida Constitution, including the right to privacy, but the text of the proposed amendment does not identify such provisions.

The ballot title and summary for the FSG Initiative, read together, do not meet the accuracy requirements of Section 101.161(1), Florida Statutes (2007).

In addition to not identifying Constitutional provisions that would be substantially affected, the ballot title and summary do not provide a fair, accurate and objective statement of the chief purpose of the measure.

The ballot title and summary do not fairly appraised the voter of the intent to preempt or supersede other proposals such as the Florida Hometown Democracy proposed constitutional amendment.

Because the FSG Initiative does not meet the single-subject requirements, and the ballot title and summary do not comply with Section 101.161(1), Florida Statutes, the measure should be removed from ballot consideration.

ARGUMENT

I. THE FSG INITIATIVE VIOLATES THE SINGLE-SUBJECT REQUIREMENT.

STANDARD OF REVIEW: The standard of review is de novo. The Court's review is limited to two legal issues: whether the Initiative satisfies the single-subject requirement in Article XI, Section 3 of the Florida Constitution; and if the ballot title and summary meet the requirements of Section 101.161(1), Florida Statutes. See, Advisory Op. to the Att'y Gen. re Funding of Embryonic Stem Cell Research, 959 So.2d 195, 197 (Fla. 2007), citing Advisory Op. to the Att'y Gen. re Amendment to Bar Gov't From Treating People

Differently Based on Race in Pub. Educ., 778 So.2d 888, 890 (Fla. 2000)(internal citations omitted).

Each citizen initiative must identify all substantially affected provisions of the Florida Constitution. See, Advisory Op. to the Att'y Gen. re Tax Limitation, 644 So.2d 486, 492 (Fla. 1994); Fine v. Firestone, 448 So.2d 984, 989 (Fla. 1984).

In Fine v. Firestone, 448 So.2d 984, 989 (Fla. 1984), this Court noted that a citizen initiative "should identify the articles or sections of the Constitution substantially amended."

In discussing this aspect of the single-subject requirement, FSG cites Advisory Op. to the Att'y Gen. re Physician Shall Charge the Same Fee for the Same Heath Care Service to Every Patient, 880 So.2d 659, 663 (Fla. 2004). [FSG Initial Brief, pp. 15-16]. In that decision, this Court evaluated whether a citizen initiative substantially affected the right to privacy in Article I, section 23 of the Florida Constitution. Id. The Court looked to then-existing statutory law that provided that Florida executive agencies already have access to "physician fee schedules and payment information." Id. citing §408.061, Fla. Stat.

(2003)[1]. Since these records were "public records" already, the Court concluded that the right to privacy was not impacted or affected by the proposed Constitutional amendment.

Just as in Advisory Op. to the Att'y Gen. re Physician Shall Charge the Same Fee for the Same Heath Care Service to Every Patient, this Court should consider existing law in evaluating whether FSG's proposal would substantially affect the right to privacy guaranteed by Article I, section 23 of our State Constitution. See, Alterra Heathcare Corp. v. Estate of Francis Shelley, 827 So.2d 936, 941 (Fla. 2002)(Art. I, s. 23 is a strong right to privacy provision and central concern is inviolability of one's own thought, person and personal action); Winfield v. Div. of Pari-mutuel Wagering, 477 So.2d 544, 548 (Fla. 1985)(right to privacy phrased in strong terms and includes privacy in financial information).

The general right to privacy in Article I, section 23 is subject to an "except as otherwise provided herein" clause. For example, Article II, section 8 "Ethics in

[1] The text of the proposal provided in part: "The right of access is not intended to conflict with, supercede or alter any rights or obligations under general law related to the privacy of patient records." Id. 880 So.2d at 660. In contrast, FSG's proposal "is intended to modify existing law."

Government" of the Florida Constitution constitutes one such exception. Specifically, all elected constitutional officers and candidates for such offices" must make a public disclosure of their financial interests, and the Legislature can enact general law to require other public officers, candidates and employees to make such disclosure. Art. II, §8a, Fla. Const.

As to the disclosure of financial information, it is necessary to consider Article I, section 23 and Article II, section 8, *in pari materia* with respect to the right to privacy issue in the case at bar given the express exception in Article I, section 23.

Another notable exception to the right of privacy in our State Constitution is Article I, section 24, concerning the right of access to public records.

What FSG characterizes as "certain information" includes: names, address, telephone numbers[2], any Internet address or website owned, operated or used which contains or will contain information on the subject plan or plan amendment, and disclosure of "whether they have a financial interest in the particular plan or amendment ... (including interests involving personal, commercial or other land uses

affected by the plan or amendment), and, if so, describing the financial interest."

At present, required public disclosure of one's private financial information within the context of an election is expressly limited by Article I, section 23 and the exception in Article II, section 8a. FSG's proposed amendment would substantially affect Article I, section 23 by creating another exception to that privacy right in Article II, section 7. FSG's proposal expressly states the intent to "modify existing law" without limitation.

In addition to the substantial impact on the existing right to privacy in one's financial records, FSG's proposed amendment also mandates that a petitioner who initiates the referendum process provide "identification information" including: "name, address, telephone numbers, any Internet address or website owned, operated, or used by the individuals which contains or will contain information on the particular plan or amendment...."

Of the enumerated "identification information," under present Florida law, only the name and address of each

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[2] Use of the plural "numbers" suggests that a petitioner would be required to provide home, business and cellular numbers.

registered voter is a public record[3]. See, §§97.052(2), 97.053(2), 97.0585, 119.07(1) Fla. Stat. & Art. I, §24(a), Fla. Const.

There are numerous exemptions from public records disclosure of home addresses and telephone numbers of active or former law enforcement personnel, current or former State attorneys, current or former United States attorneys, current or former Federal judges, current or former code enforcement officers, current or former guardians ad litem, and other officials. See, §119.071(4)(d) Fla. Stat. & Art. I, §24(a), Fla. Const. Should any of those current or former officials wish to initiate a petition under FSG's proposal, then their right to privacy of such personal identification information would be sacrificed in the process.

It is beyond dispute that FSG's proposed amendment requires a person who initiates the petition process to waive existing privacy rights to personal information, including but not limited to Internet sites visited by the individual that "contains or will contain information on the particular plan or amendment...." See, Menke v. Broward County School Bd., 916 So.2d 8, 9-11 (Fla. 4th DCA 2005) (a

[3] The registrant has the option of providing a telephone number. §97.052(2)(o), Fla. Stat.

person's computer like an "electronic filing cabinet" and noting right to privacy associated with "what internet sites an individual might access....").

FSG attempts to downplay the substantial impact on privacy rights that would result from passage of its proposed amendment by suggesting that the requirement to "provide certain information" is "fair and logical" because its "gives the public relevant information about the Sponsor's interest in offering the initiative." [FSG Initial Brief, p. 17].

It is ludicrous to assert that public disclosure of a citizen's telephone numbers (including unlisted or cellular numbers) could provide information about a Sponsor's interest in an amendment. Moreover, public disclosure of a citizen's visitation of any Internet site that "contains information" on a land use plan or plan amendment (including news media and government sites) may or may not be relevant to the citizen's interest in the subject amendment.

The draconian disclosure requirements for citizen-petitioners are, in reality, meant to chill the exercise rights to petition the government. FSG concedes that a prospective petitioner who wishes to retain his or her

Constitutional right to privacy "may simply decline to offer an initiative."[4] Id.

Notwithstanding FSG's proffered justification that these requirements are "fair and logical," the mandatory public disclosure of private financial and other information lacks the requisite "oneness of purpose" with the opportunity for voters to approve or disapprove plans or amendments. The public disclosure of the petitioning voter's "interest in sponsoring the amendment" (purportedly accomplished through the disclosure requirements) has nothing to do with the merits of whether or not a voter might wish to "approve or disapprove" a plan or plan amendment by referendum.[5]

The FSG proposal would substantially affect sacrosanct privacy rights guaranteed by Article I, section 23 of the Florida Constitution, but fails to disclose that legal effect. Accordingly, the proposal does not meet the "single subject" requirements and must be stricken. Advisory Op. to

[4] FSG's use the term "initiative" is inaccurate, what is at issue is the initiation of a petition for a *referendum*.
[5] The text of FSG's proposal indicates that the "criteria for signing and filing a petition...are based, in part, on existing Section 550.175, Fla. Stat." that law does not require a person signing a petition to disclose private personal and financial information, but instead one must only demonstrate qualification as an elector in the jurisdiction.

the Att'y Gen. re Tax Limitation, 644 So.2d 486, 492 (Fla. 1994); Fine v. Firestone, 448 So.2d 984, 989 (Fla. 1984).

II. THE BALLOT TITLE AND SUMMARY DO NOT MEET THE REQUIREMENTS OF SECTION 101.161(1), FLORIDA STATUTES.

STANDARD OF REVIEW: The standard of review is de novo. The Court's review is limited to two legal issues: whether the Initiative satisfies the single-subject requirement in Article XI, Section 3 of the Florida Constitution; and if the ballot title and summary meet the requirements of Section 101.161(1), Florida Statutes. See, Advisory Op. to the Att'y Gen. re Funding of Embryonic Stem Cell Research, 959 So.2d 195, 197 (Fla. 2007), citing Advisory Op. to the Att'y Gen. re Amendment to Bar Gov't From Treating People Differently Based on Race in Pub. Educ., 778 So.2d 888, 890 (Fla. 2000)(internal citations omitted).

FSG fallaciously contends that the ballot title and summary "easily pass each applicable test." [FSG Initial Brief, p. 21]. FSG argues that the "chief purpose and legal effect" of the proposal "is to create a process for allowing voters to petition for a referendum on changes to local growth management plans." [Id. at 1, 22].

However, FSG's Brief fails to credit the actual language of the measure, which casts the "process" as a "limited opportunity" and expresses the intent to "pre-empt or supersede recent proposals" (which includes the Florida Hometown Democracy, Inc. initiative).

What the initiative text terms a limited opportunity" is mischaracterized in the ballot title as "giving citizens the right to decide." A "limited opportunity" is hardly a "right." The primary definition of the word "limited" is: "confined within limits: restricted in number, extent or duration." Webster's Third New International Dictionary (1986) Vol. II, p. 1312. The primary definition of the word "opportunity" is: "a combination of circumstances, time, and place suitable or favorable for a particular activity or action." Id. at p. 1583. The phrase "limited opportunity" accurately describes the mechanics of FSG's proposal.

FSG properly notes that a ballot title and summary need not explain every detail, ramification or effect of the proposal. [FSG Initial Brief, p. 22, citing Grose v. Firestone, 422 So.2d 303, 305 (Fla. 1982)]. Nevertheless, FSG contends, without merit, that the "principal structural details of the ""right to decide"" process are disclosed in the summary." [FSG Initial Brief, p. 26].

FSG accurately notes that the ballot summary is a mere 52-words long, well within the 75-word maximum limit. [FSG Initial Brief, p. 32].

FSG posits that because the ballot summary includes the phrase "Defines terms and establishes petition[6] requirements" the voter "knows to look further in order to obtain additional details if desired." [FSG Initial Brief, p. 23]. The definitions include one for the "Florida Growth Management Initiative Petition" and another for the phrase "Offer a Florida Growth Management Initiative Petition."

FSG's ballot title and summary, when read together, fail the basic "truth in packaging" requirements. Stressing the importance of the ballot title and summary, this Court has noted:

> [the] constitutional amendment process relies on an accurate, objective ballot summary for its legitimacy. Voters ... never see the actual text of the proposed amendment. They vote based *only* on the ballot title and summary. Therefore, an accurate, objective, and neutral summary of the proposed amendment is the *sine qua non* of the citizen-driven process of amending our constitution.

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[6] FSG does not indicate whether the word "petition" is used as a noun or as a verb. See, Webster's Third New International Dictionary (1986) Vol. II, p. 1690. The noun usage of the word is defined first, and a separate definition is provided for the verb.

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, 770 (Fla. 2004) (emphasis in original), quoting Advisory Op. to the Att'y Gen. re Additional Homestead Tax Exemption, 880 So.2d 646, 653-54 (Fla. 2004).

What FSG characterizes as secondary details of the "right to decide" or "call for approval" a/k/a the "limited opportunity" are, in fact, material omissions that FSG could have addressed in the 23 words that could have been used under the 75-word statutory limit. These material omissions include: (1) waiver of privacy rights for petitioning voters; (2) the requirement that each registered voter may only sign the petition in person at the supervisor of elections office (or City Clerk's office): the time-limited 60-day window of opportunity to sign the petition after the first petition is signed; and the intent to "pre-empt of supersede" other proposals.

FSG argues that the use of disparate terms in the ballot title -- "giving citizens the right to decide" -- and ballot summary -- "allows Floridians to call for voter approval" -- is of no consequence because the ballot title and summary are to be read together. [FSG Initial Brief, pp. 25-26]. However, given the express use of the phrase

"limited opportunity" in the initiative text, and the onerous conditions attendant to that "limited opportunity," FSG's argument is specious. Undoubtedly, FSG omitted reference to these onerous conditions in the ballot title and summary because the limitations imposed would be unpalatable to Florida voters.

The use of such divergent terms renders the FSG Initiative ineligible for the ballot.

> [t]his Court has repeatedly held that ballot summaries which do not adequately define terms, use inconsistent terminology, fail to mention constitutional provisions that are affected, and do not adequately describe the general operation of the proposed amendment must be invalidated.

Advisory Op. to the Att'y Gen. re Amendment to Bar Gov't From Treating People Differently Based on Race in Pub. Educ., 778 So.2d at 899.

In the context of the use of disparate terms "citizen" and "voter," FSG correctly notes that the Court has stated that voters must be presumed to have a certain amount of common sense and knowledge. [FSG Initial Brief, p. 27, citing Advisory Opinion to the Atty. Gen.-Tax Limitation, 673 So.2d 864, 868 (Fla. 1996)].

By omitting any reference to the key limitations of the "limited opportunity" in the ballot title and summary,

FSG turns this principle on its head. Most Florida voters know that they can sign a political petition (e.g., for a candidate, local charter amendment, or State Constitutional amendment) anywhere of their choosing -- at their home, at the mall, in the park, at a friend's house, or any other place. FSG's proposal would create a unique new requirement for Florida voters -- travel to the Supervisor of Election's office (or City Clerk etc) to sign a petition in person. Thus, under FSG's proposal Hardee County voters would be required to drive to Wauchula, Taylor County voters would be required to drive to Perry, Collier County voters would be required to drive to Naples, and Washington County voters would be required to drive to Chipley in order to initiate a referendum petition, or to sign such a petition if one were initiated, under FSG's proposal. With gasoline priced at about $4.00 per gallon, that is indeed, a severe limitation on the opportunity presented by the FSG proposal; one not properly characterized as allowing a "right to decide" or "call for voter approval."

Similarly, Florida voters are generally aware that they do not have to disclose private personal and financial information in order to initiate a local charter amendment or citizen's initiative to amend the Constitution, to support a candidate for public office or to vote. FSG's

"limited opportunity" capitalizes on that premise in the deficient ballot title and summary.

The omission of material information from the ballot title and summary is misleading and violates the accuracy requirement. See, Advisory Op. to the Att'y Gen. re Amendment to Bar Gov't From Treating People Differently Based on Race in Pub. Educ., 778 So.2d 888, 897-99 (Fla. 2000); Advisory Op. to Att'y Gen. re Term Limits Pledge, 718 So.2d 798, 803 (Fla. 1998); Askew v. Firestone, 421 So.2d at 156.

Unlike FHD's ballot title and summary, which clearly place voters on notice that the measure would apply to "adoption and amendment" of local government comprehensive land use plans (and "adopt a new ... plan" or "amend a ... plan"), FSG's ballot title and summary only refer to "changes" to local growth management plans. Another difference is FSG's use of the phrase "or similar document" in the text definition of "growth management plan."

FSG's Brief asserts that these omissions are "not materially misleading." [FSG Initial Brief, pp. 27-29]. In part, FSG's argument is based upon a misunderstanding of Chapter 163, Part II, Florida Statutes, since it asserts that "Thus, in practice, all referenda under the Smarter Growth Amendment will literally address ""changes"" to

existing plans." Id. at 29. In the case of a newly incorporated municipality, FSG correctly notes that existing statutes allow a one-year period for the adoption of the initial comprehensive land use plan for the newly created municipality. §163.3167(4), Fla. Stat. However, it will not be County voters who have the limited opportunity for a referendum to amend the County's land use plan for the new municipality; instead, only the voters of the new municipality can take advantage of the limited opportunity for a referendum to approve (or reject) the new land use plan for that municipality.

Given the surplus of available words for FSG's ballot summary, an accurate rendition of the legal effect of the measure could have easily been provided. Perhaps, FSG's overly simplistic application of the concept of "change" to include a completely new local government land use plan for a newly created municipality resulted in the material omission.

With respect to the ambiguity created by the use of the phrase "or similar document" in the definition of "growth management plan," FSG asserts that the issue goes to the merits of the initiative, or in the alternative, argues that the principle of construction "*ejusdem generis*" renders the phrase surplus in conjunction with "growth

management plan." FHD relies upon the statutory authorities cited in its Initial Brief in this case for the proposition that the use of the phrase "or other similar document" is material to the text of the amendment, and renders the ballot title and summary misleading.

Existing Florida statutes contain references to other types of plans than "local government comprehensive land use plans" adopted pursuant to Chapter 163, Part II, Florida Statutes, including for example: "community redevelopment plan" in Section 163.360(2), Florida Statutes (2007); “comprehensive plan” in Sections 373.470(2)(a) and 373.1502(2)(a), Florida Statutes (2007); “safe neighborhood improvement plan” in Section 163.516(1), Florida Statutes (2007); “military base reuse plan” in Section 288.975(5), Florida Statutes (2007)[7]; “long- range transportation plan” in Section 339.175(6), Florida Statutes (2007). Some of these plans "guide and control future land development in an area under the jurisdiction of a local government" and therefore fall within the definition of "growth management plan" in the text of the FSG Initiative. The ballot title and summary do not inform voters of the legal effect of the proposal.

Finally, as noted in the Attorney General's request to this Court for an advisory opinion, FSG's ballot summary does not advise that the proposal would "pre-empt or supersede" other proposals. The FSG proposal is intended to pre-empt or supersede the Florida Hometown Democracy proposed initiative. The FHD proposal may be approved by voters prior to consideration of FSG's proposal. If so, then FSG's proposal would supersede the FHD amendment. If both measures are considered during the same general election, and both receive voter approval, then the FSG proposal would pre-empt FHD's proposal. This is true even if the FHD proposal passes by 99% of the votes cast while FSG only passes by 60.01%. The failure to include this legal effect renders the ballot title and summary misleading.

The ballot title and summary are inconsistent with the requirements of Section 101.161(1), Florida Statutes (2007), and the FSG Initiative must be declared ineligible for ballot placement.

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[7] The host local government has the discretion to adopt the military base reuse plan as a separate component of the

CONCLUSION

Florida Hometown Democracy, Inc., an interested person, respectfully requests the court to find that the FSG Initiative does not meet the constitutional and statutory requirements and disqualify the Initiative for placement on the ballot.

Respectfully submitted,

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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 1st day of July, 2008:

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