

FCCMA White Paper
Florida Hometown Democracy Initiative

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Background

The 1985 Local Government Comprehensive Planning and Land Development Regulation Act, also referred to as the 1985 Growth Management Act, require every city and county to adopt a comprehensive plan ("comp plan") containing various "elements" relating to the community's growth. The elements address such growth policies as, future land use, affordable housing, conservation lands, provision of infrastructure, capital improvements, and intergovernmental coordination.

Comprehensive planning is a dynamic process, and the Act recognizes this by providing a process for the amendment of comp plans. Comprehensive plans may be amended two times a year (although there are some exemptions for small map amendments and some other types of amendments in s. 163.3187(1)). This amendment process includes review by regional and state agencies and approval by the State Department of Community Affairs ("DCA").

Citizen involvement is built into the state mandated planning process. As part of the amendment process, the Act requires a minimum of three public hearings: one to be held by the Local Planning Agency, one to be held by the City or County Commission prior to submitting amendments for state review, and one to be held by the City or County Commission at the time of adoption of an amendment. , If a citizen believes that a plan amendment approved by a local government is not consistent with the Act, that citizen has appeal rights under the Act. DCA's webpage describes this right as follows:

Pursuant to Section 163.3184, F.S., an "affected person" can challenge the Department's decision that a comprehensive plan or plan amendment is, or is not, in compliance with the Growth Management Act. "Affected persons" are (1) the local government that adopted the plan or plan amendment; (2) an adjoining local government that can demonstrate substantial impacts; (3) persons who own property, reside, or own or operate a business within the boundaries of the local government that adopted the plan or plan amendment AND submit comments between the proposed hearing and the adopted hearing; and (4) for future land use map amendments, persons who own property outside of the local government jurisdiction, and that property abuts the property affected by the future land use

map

amendment."¹

The so-called Hometown Democracy Initiative (the “Initiative”) proposes to amend Article II, Section 7 of the Florida Constitution to require the adoption or amendment of a local comp plan be approved by a vote of the citizens. If passed, this amendment will fundamentally alter the process and nature of local land use decisions.

The Initiative: “We put our trust in the people, not politicians”

The following information regarding the initiative is from Florida Hometown Democracy’s webpage:

Florida’s Hometown Democracy Amendment simply replaces county or city commission votes to adopt or change a comprehensive plan with votes by the citizens in a referendum election to be held at the same time as the general election. No special elections will be necessary. If a community so desires, a referendum could even be held by mail. Florida’s Hometown Democracy Amendment gives greater stability and certainty to comprehensive plans by locking in existing land use categories and giving the keys to the voters. *THE VOTERS WILL DECIDE IF A PROPOSED CHANGE WILL MAKE THEIR COMMUNITY A BETTER PLACE TO LIVE. IF THE MAJORITY VOTES YES, THE CHANGE HAPPENS. IF THE MAJORITY VOTES NO, THE CHANGE DOESN’T HAPPEN.*

Under the present Elections laws, voters would receive either newspaper or direct mail Notice of the Referendum Election. It would provide for a “yes or no” vote on one or more comprehensive plan amendments with the substance of the amendment set out in “clear and unambiguous language.” The election could be conducted in conjunction with a general election, special election, or by mail-in ballot. If a majority of voters casting ballots voted “yes” then the amendment(s) would be “adopted.”²

The Initiative is premised on a perception the local comprehensive planning process in Florida is broken.

Consider the following excerpt from the group’s website www.floridahometowndemocracy.com:

It is well documented that developers are among the biggest campaign contributors to local politicians. The result has been predictable: most elected

¹ www.dca.state.fl.us/fdcp/dcp/compplanning/index.cfm

² www.floridahometowndemocracy.com/

officials have never seen a development they wouldn't approve. They just can't say no to bad development proposals. Did you know that when your city or county commission votes on a comprehensive plan change, those officials are exercising the people's power? When a city or county council votes to approve a land use change, they are supposed to do so on the grounds that the change will not harm the public interest, which is defined very broadly to include all those concerns that make a place a good community: protection of public health, safety, quality of life, the beauty of a particular place and the environment. Too often local officials in Florida define the public interest as being the developers' economic return. And other values for the community- quality of life, uncrowded schools, managed population growth, clean water - are not being given any consideration. Too often our local officials forget that they are standing in the shoes of the people, forget that they are supposed to represent the entire community when a proposed land use change comes up for vote. Land use decisions affect people and communities more than almost any other governmental decision.

The Initiative is backed by the Florida Hometown Democracy Political Action Committee,

The Initiative Process:

Art. XI, Sec. 3, Fla. Const., permits Florida's electors to amend Florida's Constitution by citizen initiative. The amendment may only embrace one subject and matter directly connected therewith.

The power to amend the state constitution by citizen initiative is invoked by filing with the Secretary of State a petition containing a copy of the text of the proposed amendment and the signatures of a number of electors equal to 8% of the votes cast in each of one-half of the congressional districts of the state, and of the state as a whole, in the last preceding presidential election. At this time, the number of required signatures is 488,722.

When the Division of Elections confirms an initiative petition has obtained 48,869 signatures, the Secretary of State submits the initiative petition to the Florida Attorney General and to the State Revenue Estimating Conference, Sec. 15.21, Fla. Stat.

Within 45 days of receiving a proposed amendment from the Secretary of State, the Revenue Estimating Conference must complete an analysis and fiscal impact statement on the estimated increase or decrease in any revenues or costs to state or local governments resulting from the proposed initiative. The impact statement is placed on the ballot along with the proposed amendment. Sec. 100.371(6)(a), Fla. Stat. The Revenue Estimating Conference must provide an opportunity for any entity to submit information or analysis regarding the proposed amendment's fiscal impact. *Id.*

Within 30 days of receiving a proposed amendment from the Secretary of State, the Attorney General must request from the Florida Supreme Court an advisory opinion regarding the proposed amendment's compliance with Art. XI, Sec. 3, Fla. Const., its ballot title and summary's compliance with Section 101.161, Fla. Stat., and the fiscal impact statement's compliance with Sec. 100.371 and 101.161, Fla. Stat. Sec. 16.061(1), Fla. Stat. There is no timeframe within which the Supreme Court must issue its opinion.

The Supreme Court's review of the proposed amendment is limited to two issues: whether the ballot title and summary is printed in clear and unambiguous language, and whether the proposed amendment complies with the single subject requirement of Art. XI, Sec. 3, Fla. Const. The Court does not examine the merits of the proposal nor does it address such issues as the proposed amendment's consistency with the federal or state constitutions.

If the amendment survives the Court's scrutiny, and the petition obtains the requisite 488,722 signatures, the proposal is then placed upon the ballot. A proposed amendment must pass by simple majority in order to be effective.

Status of the Initiative:

On March 17, 2005, the Florida Supreme Court issued an advisory opinion to the state Attorney General. As noted above, the Court reviews proposed amendments under two criteria. The Court found that the Hometown Democracy amendment complied with the single subject test. However, the Court also found that the amendment did not comply with the requirement in s. 101.161(1), F.S., that the substance of the amendment be printed in clear and unambiguous language on the ballot. The Supreme Court found that the "...the ballot summary fails to provide an accurate, objective, neutral summary of the proposed amendment."

Therefore, the amendment is not eligible to be placed on the ballot. However, according to information on the Hometown Democracy web site, the sponsors of the amendment have filed for a rehearing. At this time, it appears likely that efforts to place this amendment on the ballot will continue.

Reasons to Oppose the Initiative

There are a number of reasons for Florida's cities and counties to oppose this proposed amendment.

The Tyranny of the Majority:

The American form of government rejects the concept of a direct democracy (where governing decisions are put to popular vote) in favor of a representative democracy (where governing decisions are voted on by an elected body). A representative democracy, with its system of checks and balances, is simply better suited to make long term planning and policy level

decisions that impact a diverse number of individuals and interest groups. Direct democracy through citizen initiative can trample minority interests and ignore a community's long-term needs and goals. It can be used to reject affordable housing measures, reject urban infill and redevelopment initiatives, and disrupt essential infrastructure such as water, sewer, and solid waste facilities, and roads. Zoning and comprehensive planning powers should be vested in an elected governing body and not subject to the whims and caprices of a majority of the citizenry. Land use decisions made in a representative democracy by a representative governing body protects minority groups from the tyranny of the majority. If citizens are dissatisfied with the performance of their elected officials, they are free to elect others to take their place.

The Tyranny of the Few:

Perhaps even worse than the potential for tyranny of the majority is tyranny of a few. Given that voter turnout in local elections is often less than 20%, there is no certainty that land use changes under the proposed amendment will actually reflect the will of the people. Important decisions will be made by a small group of voters rather than a council or board that represents the entire citizenry.

Decisions by "Sound Bite"

Both sides in a controversial land use amendment will use 30-second sound bites to influence the public on complex land use decisions. Sure, there may well be a core group of citizens who attempt to become educated on the issue, but the reality is that most votes will be based on potentially misleading and inflammatory media campaigns. Imagine trying to adopt your EAR-based amendment package (a statutorily mandated, 5-year comp plan update), which may involve multiple land use changes and multiple portions of your comprehensive plan, only one of which is controversial. The entire package could be rejected on the basis of one controversial item.

Anti-Home Rule:

Proponents of the measure claim it supports local home rule. This is a gross mischaracterization. Florida law is clear that the citizens of a municipality already have the power to amend their city's charter to provide for citizen initiative. And, the courts have upheld the citizens' use of charter based initiative powers to effect zoning changes. For example, this has been done in the Town of Surfside, in the City of Winter Springs, and in the City of Miami Beach. One-size-fits-all mandates, whether by the Legislature or by 51% of Florida's electors, are the antithesis of home rule. This decision should be left to the citizens on a city-by-city basis.

The Price is NOT Right:

Florida's cities and ultimately their taxpayers will foot the added expense of putting every comp plan amendment to a popular vote. Proponents downplay the added election expenses associated with the proposal because they say the vote can be held in conjunction with regularly scheduled

elections. But every issue that's added to a ballot drives up the cost (not to mention whether it's even feasible to add scores of plan amendments to the ballot at a general election). Likewise, regularly scheduled elections are typically held every two years. Is it reasonable to wait two years to effect clearly needed zoning changes?

You Can't Win For Losing:

Given the arbitrary and capricious results the initiative is likely to produce, there's no doubt landowners who are on the losing side of a land use referendum will seek redress in the courts, either through a state or federal takings claim or a Bert Harris Private Property Rights Act claim. Municipalities will face tremendous liability under a land use referendum system, and will have to pay damages as well as attorneys fees to a prevailing landowner. Because damages are not typically insured, these judgments will have to be paid out of tax revenues. Proponents of the measure gloss over this problem by pointing out how difficult it is for landowners to prevail on a takings claim (they don't even mention Harris Act lawsuits, which are a lot easier to bring and win). But the costs associated with simply defending against such claims – if only to the point of getting the case dismissed – will be staggering.

Additionally, most takings and Harris Act claims settle out of court because the local government is able to negotiate with the landowner and adjust the land use decision to avoid the claims. It will become virtually impossible to negotiate and settle these cases under the proposal because even the adjusted land use decision will have to go back to the entire citizenry for a vote. In the final analysis, cities will be forced to take an "all or nothing" position when defending these claims, which will invariably lead to increased damages and attorney's fees.

A Parade of Implementation Horribles:

This amendment will require every single comprehensive plan amendment to be put to popular vote, no matter the size or complexity. Even simple text changes, even amendments that are currently exempt from state review (e.g., small scale amendments or certain capital improvement changes) will undergo voter approval. Municipalities will be unable to predict the outcome of their planning efforts. All of the time and expense spent by planning staff analyzing and preparing recommendations on plan amendments will be meaningless. The endless hours spent in public hearings on land use changes will be wasted. If all of the time and resources expended by a local government in reaching an informed decision can be nullified by a public vote based on headlines and sound bites, why even bother?

Likewise, decisions on needed infrastructure will be delayed because all will be subject to the referendum requirement, including siting decisions on schools, transfer stations, and water and wastewater facilities. Redevelopment of blighted urban areas will come to a standstill. How can proponents in good conscience state the initiative will protect our quality of life and our environment?

Moreover, the measure is silent on the applicability and timing of the current statutory processes requiring a review and compliance determination of plan amendments by the State Department of Community Affairs. Another uncertainty is how the measure will affect existing citizen remedies under the Growth Management Act. Assuming current DCA review and citizen remedies remain unaffected, the measure will certainly extend the time for plan amendments from the current 12 to 18 months by at least one or two years. Imagine finally adopting a plan amendment after going through a lengthy and expensive administrative hearing process on the amendment's "compliance" with Florida law, only to have the decision "undone" by a citizen referendum. Even worse, imagine facing economic sanctions from the Florida Administration Commission because a citizen initiative required the city to adopt a plan amendment that was found "Not in Compliance" by the Department of Community Affairs.

In the nearly 20 years since the enactment of Florida's Growth Management Act, Florida has experienced explosive population growth (nearly 800 people move here every day). In spite of this, Florida's municipalities continue to offer people a quality of life that is seldom matched in other states. This is in large part due to the Growth Management Act and how Florida's cities and counties have implemented the Act through their local comprehensive plans. Florida's current scheme of comprehensive planning allows local elected municipal officials to implement policies that balance the dynamic and sometimes competing growth management pressures within their individual communities. There will be no balancing under the proposed amendment – only reaction. This will lead to chaos and confusion that will disrupt Florida's quality of life for years to come.

Alternatives to the Hometown Democracy Amendment.

It appears the Hometown Democracy amendment has tapped into dissatisfaction with planning and growth management in the state. The Sierra Club, the Florida Consumer Awareness Network, and a number of local neighborhood and environmental groups around the state have formally endorsed the amendment. To the extent that citizens believe local planning processes are not responsive to public's interest, such an amendment will receive support. In addition to opposing the Hometown Democracy Amendment, local governments may wish to consider ways to improve citizen participation in the planning process.

One mechanism for reviewing and revising local strategies for meaningful public participation is through the comprehensive planning process. Rule 9J-5.004, F.A.C. sets forth the public participation requirements for local comprehensive planning. It states:

- (1) The local government body and the local planning agency shall adopt procedures to provide for and encourage public participation in the planning process, including consideration of amendments to the comprehensive plan and evaluation and appraisal reports.
- (2) The procedures shall include the following:
 - (a) Provisions to assure that real property owners are put on notice, through advertisement in a newspaper of general circulation in the area or

- other method adopted by the local government, of official actions that will affect the use of their property;
- (b) Provisions for notice to keep the general public informed;
 - (c) Provisions to assure that there opportunities for the public to provide written comments
 - (d) Provisions to assure that the required public hearings are held; and
 - (e) Provisions to assure the consideration of and response to public comments.

Governor Bush's Growth Management Study Commission noted the importance of meaningful public involvement and made a number of recommendations in this regard³. Some of the Commission's recommendations are listed below, along with some comments by the authors as to how these recommendations may be implemented:

- Enhanced public notice requirements regarding plan amendments. Some local governments use on site signs and expanded mailed notice.
- The availability of any full cost accounting information regarding plan amendments. The Department of Community Affairs is proposing that the fiscal impacts of plan amendments be evaluated. If this requirement becomes effective, this information can be provided as part of the public notice for a plan amendment.
- Citizen involvement plans that clearly specify the opportunities for citizen involvement. Again, local governments can use the plans developed under 9J-5.004 and update them.
- Use of the Internet to convey information to the public. Public participation plans, comprehensive plan amendments, and notice of other land use activities can be plans can be posted on local government web sites.
- Visioning, to create a community-based picture of the future. The use of pictures and surveys to determine how citizens would like to grow are becoming popular tools. Both the South Florida Regional Planning Council and the Treasure Coast Regional Planning Council provide these services and are a good source of information.

Conclusion:

Although the Hometown Democracy Amendment will not appear on the upcoming ballot, local governments should assume that the amendment, or a similar version, will be back at some point. In addition to opposing the amendment, local governments can take steps to help residents feel more effectively involved in the local planning process.

³ "A Liveable Florida for Today and Tomorrow," Florida's Growth Management Study Commission Final Report