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Availability of Initiative and Referendum Power to Florida's Electorate in Land Use Decisions: A Survey of Caselaw

Introduction

The initiative is a power given to the people of a municipality by the state constitution, statutes or city charter to propose or initiate laws or ordinances which would be passed or rejected by the municipality's voters. Scott v. City of Orlando, 173 So.2d 501, 503 (Fla. 2nd DCA 1965). A referendum typically allows voters to reject at the polls legislation that has already been enacted. 42 Am. Jur. 2d, Initiative and Referendum § 1 (2002). Florida grants initiative power to its citizens both through its constitution and by statute:

> All political power is inherent in the people. The enunciation herein of certain rights shall not be construed to deny or impair others retained by the people.

FLA. CONST. art. I, § 1 (2002).

In the state constitutional provision for primary, general and special elections, "[s]pecial elections and referenda shall be held as provided by law." FLA. CONST. art. I, § 1 (2002).

> The governing body of a municipality may, by ordinance, or the electors of a municipality may, by petition signed by 10 percent of the registered electors as of the last preceding municipal general election, submit to the electors of said municipality a proposed amendment to its charter, which amendment may be to any part or to all of said charter except that part describing the boundaries of such municipality.

FLA. STAT. ch. 166.031(1) (2002).

With the initiative, the people of a municipality exercise their inherent or political power over the city council on matters of local concern. Id. The initiative power may only extend to matters over which the council has authority, and "generally applies to ligislative *[sic]* matters,

sometimes including ordinances, resolutions, orders or votes, but not to administrative, executive or judicial functions." Id., citing to Charles S. Rhyne, Municipal Law, § 9-14 (1957). The power of initiative is meant to be liberally construed in favor of granting the power. Id. at 504.

Some may argue that since land use planning, comprehensive plans and zoning ordinances are very complex matters, zoning decisions should be the sole province of the elected members of the city council. Nicolas M. Kublicki, Land Use By, For, and Of The People: Problems With The Application of Initiatives and Referenda to the Zoning Process, 19 Pepp. L. Rev. 99, 100 (1991). However, one argument in support of citizen authority in zoning decisions is that these decisions affect the citizens' own communities, and thus citizens should be entitled in all fairness to take part in these decisions. Id.

Advisory Opinions to the Attorney General of Florida

The attorney general of Florida is required to request an advisory opinion from the Supreme Court of Florida regarding the constitutionality and legal sufficiency of a proposed amendment to the state constitution, within thirty days of its receipt. FLA. STAT. ch. 16.061(1) (2002). If requested to do so by the attorney general, the supreme court must make an independent evaluation of the constitutionality of a proposed amendment to the Florida constitution, even if no interested party appears before the court. Advisory Opinion to the Attorney Gen. re Stop Early Release of Prisoners, 642 So.2d 724, 725 (Fla. 1994).

When the supreme court is called upon by the Attorney General to determine whether an initiative petition is valid, the court is "limited to two legal issues: whether the petition satisfies

the single-subject requirement of article XI, section 3, Florida Constitution, and whether the ballot titles and summaries are printed in clear and unambiguous language pursuant to section 101.161, Florida Statutes (1999)." Advisory Opinion to the Attorney Gen., re Amendment to Bar Gov't from Treating People Differently Based on Race in Public Educ., 778 So.2d 888, 890 (Fla. 2000). Before the supreme court can invalidate a proposed amendment to the Florida constitution, the record must show that the proposal is clearly and conclusively defective on either ground. Id. The supreme court may not rule on the merits of the proposed amendments in determining the validity of the initiative petitions. Id. at 891.

The Single Subject Requirement

Article XI of the Florida constitution provides various methods by which the constitution may be amended, but the citizen initiative is the only method which must conform with the single subject requirement; that is, any revision or amendment proposed by initiative "shall embrace but one subject and matter directly connected therewith." Id., citing to FLA. CONST. art. XI, § 3. The purpose for this single subject requirement is that there is no public hearing or debate accompanying the initiative process, unlike other methods of proposing amendments. Id. at 891. The single subject requirement insures that the electorate, in voting on a citizen initiative, will not be forced to "accept part of an initiative proposal which they oppose in order to obtain a change in the constitution which they support." Id., citing to Fine v. Firestone, 448 So.2d 984 (Fla. 1984).

To determine whether a proposed amendment complies with the single-subject

requirement, the supreme court must determine whether the amendment has a "logical and natural oneness of purpose." Id. at 891-892, citing to Advisory Opinion to the Attorney Gen. re Term Limits Pledge, 718 So.2d 798 (Fla. 1998). The "oneness of purpose" test requires an evaluation of how "the proposal affects separate functions of government and how the proposal affects other provisions of the constitution." Id., citing to Advisory Opinion to the Attorney Gen. re People's Prop. Rights Amendments Providing Compensation for Restricting Real Property Use May Cover Multiple Subjects, 699 So.2d 1304 (Fla. 1997). A proposal that affects several branches of government **and** alters or performs the functions of these branches violates the single-subject test. Id. It is important that an initiative inform its voters of any constitutional provision that the initiative seeks to affect or change, so that the electorate will fully understand the consequences of their votes, and to also prevent the initiative's effect on other unnamed provisions being open to interpretation. Id.

"Clear and Unambiguous" Requirement

> Section 101.161 of the Florida Statutes also provides that:
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> > Whenever a constitutional amendment or other public measure is submitted to the vote of the people, the substance of such amendment...shall be printed in clear and unambiguous language on the ballot...The substance of the amendment...shall be an explanatory statement, not exceeding 75 words in length, of the chief purpose of the measure. The ballot title shall consist of a caption, not exceeding 15 words in length, by which the measure is commonly referred to or spoken.

Id., citing to FLA. STAT. ch. 101.161(1) (1999).

Essentially, the ballot title and summary of an initiative proposal are required to state their main goal in clear and unambiguous language. Id. The ballot title and summary must also be accurate

and informative. Id. The "clear and unambiguous" requirement ensures that fair notice of the content of the proposed amendment is conveyed to the voters, and guards against the electorate being misled as to the proposal's goal. Id. However, it is not required that title and summary explain every detail or ramification of the proposed amendment. Id., see also Rowe v. Pinellas Sports Auth., 461 So.2d 72, 76-77 (Fla. 1984) (it was not necessary that the referendum ballot question inform voters that a stadium project could be the subject of the tourist tax revenues instituted by the proposed ordinance).

A problem may arise even if the language of the ballot summary is accurate - the summary may still be found to be incomplete. Advisory Opinion to the Attorney Gen. re Fish and Wildlife Conservation Comm'n: Unifies Marine Fisheries and Game and Fresh Water Fish Comm'ns, 705 So.2d 1351 (Fla. 1998). In that case, the problem lay "not with what the summary [said], but, rather, what it [did] not say." Id. at 1355, citing to Askew v. Firestone, 421 So.2d 151 (Fla. 1982). The summary in Fish and Wildlife Conservation Comm'n did not explain to a reader that the legislature retains the sole power to regulate marine life, and has delegated that power to the Department of Environmental Protection and the Department of Agriculture, not just the Marine Fisheries Commission. Id. The summary was faulty in that it encroached on the legislature's exclusive power to regulate marine life and purported to unify the Marine Fisheries Commission with the Game and Fresh Water Fish Commission, which did not share the same status of power. Id. Therefore, since the summary was deficient, the supreme court struck the entire proposed amendment from the ballot. Id.; but see Advisory Opinion to the Attorney

Gen. re Limiting Cruel and Inhumane Confinement of Pigs During Pregnancy, 815 So.2d 597 (Fla. 2002) (both single-subject and ballot summary requirements were fulfilled).

The United States Supreme Court: The Eastlake Decision

In City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 670 (1976), the Supreme Court dealt with the issue of "whether a city charter provision requiring proposed land use changes to be ratified by 55% of the votes violates the due process rights of a landowner who applies for a zoning change." In that case, the respondent, a real estate developer, applied to the Eastlake, Ohio city planning commission for a zoning change allowing the construction of multi-family, high rise apartment buildings on an eight-acre parcel of real estate. Id. The real estate parcel had originally been zoned for "light industrial uses at the time of purchase." Id.

The city council approved the planning commission's recommendation that the respondent's property be reclassified to permit the proposed construction. Id. at 671. However, the voters of Eastlake had amended the city charter "to require that any changes in land use agreed to by the [City] Council be approved by a 55% vote in a referendum." Id. at 670. As a result, the city planning commission rejected the respondent's application as the city council's rezoning action had not been ratified by the city's voters. Id. at 671.

In reversing the decision of the Ohio Supreme Court, the Court stated that a zoning referendum is not a delegation of legislative power, but rather a reservation of power by the people. Id. at 672-673. The power of referendum is subject to certain limits; for example, "a property owner can challenge a zoning restriction if the measure is 'clearly arbitrary and

unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.'" Id. at 676, citing to Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

However, the Court found that the respondent did not argue that the Eastlake referendum violated the guidelines promulgated by Euclid. Id. at 676-677. Further, the Court held that "[a]s a basic instrument of democratic government, the referendum process does not, in itself, violate the Due Process Clause of the Fourteenth Amendment when applied to a rezoning ordinance." Id. at 679. The Ohio Supreme Court had erred in invalidating the charter amendment giving veto power on rezoning issues to Eastlake voters, since the Ohio Constitution already granted the voters the power to make rezoning decisions. Id.

Even though the decision in Eastlake dealt specifically with the constitutionality of referenda to review zoning decisions, this case has not particularly encouraged the widespread adoption of referendum zoning. Brian L. Lerner, Restoring Accountability at the Municipal Level: The "Save Miami Beach" Zoning Referendum, 53 U. Miami L. Rev. 541, 557 (1999). Since the Supreme Court will give deference to state court determination of whether an action is legislative or quasi-judicial, it is ultimately state law that controls the success of referendum petitions. Id.

Statutory Limitation

The Florida Legislature has prohibited the use of referenda or initiatives "in regard to any development order or in regard to any local comprehensive plan amendment or map amendment that affects five or fewer parcels of land." FLA. STAT. ch. 163.3167 (12) (2002). Questions have

been raised as to whether this law is a violation of separation of powers, or consistent with caselaw holding that the people may exercise the referendum power wherever the people, acting through their legislative bodies, decide that power should be used. 53 U. Miami L. Rev. 541, 572 (1999).

Opposition to Rezoning Actions

The Florida Supreme Court

The Florida Supreme Court has held that a city ordinance directing a zoning change for a specific land parcel can be subject to a referendum vote of the electorate. Florida Land Co. v. City of Winter Springs, 427 So.2d 170, 171 (Fla. 1983). In that case, the petitioner, Florida Land Company, bought land zoned for rural urban development within the City of Winter Springs (the respondent). Id. The petitioner then made an application to the respondent to rezone the land for single family dwelling. Id. After a public hearing on the rezoning issue, the city council adopted Ordinance No. 210 which rezoned the petitioner's land for single family dwellings, and amended the city's official zoning map and comprehensive land use map. Id. at 172.

Upon the adoption of this ordinance, citizens of Winter Springs formed a committee to commence referendum proceedings under authority granted by the city code. Id. The committee sought, by this referendum, to "reconsider the adoption of Ordinance No. 210, and if the council declined to repeal it, to require its submission to a vote of the electorate." Id. The city council refused to repeal the ordinance, and the petitioner brought suit to enjoin the referendum. Id.

The supreme court followed Eastlake in declaring that "[t]he referendum, then, is the

essence of a reserved power." Id. "The concept of referendum," the court continued, "is thought by many to be a keystone of self-government, and its increasing use is indicative of a desire on the part of the electorate to exercise greater control over the laws which directly affect them." Id.

The Florida constitution has reserved the referendum power to the people, and therefore it may be utilized any time a particular legislative body chooses to exercise that power. Id. at 172-173. In Winter Springs, the electorate was granted the power through the city charter to require the city council to submit a passed ordinance to a vote if the electorate calls for the repeal of that ordinance and the council refuses. Id. at 173. The supreme court then found that the citizens' referendum did not deprive the petitioner of due process. Id. at 174.

The petitioner's argument to the court that zoning changes are strictly administrative decisions and not subject for referendum was also unavailing. Id. The court recalled another case in which it found that since an original zoning ordinance was a legislative function, the amendment of it was also a legislative function. Id., citing to Schauer v. City of Miami Beach, 112 So.2d 838 (Fla. 1959). Similarly, in Winter Springs the court concluded that Ordinance No. 210 was a legislative act and subject to referendum, as provided in the city charter. Id. at 174.

The referendum power was only available to the electorate in Winter Springs because the city charter granted it that power. Id. at 173. Even though the Florida Constitution makes the power of referendum a possibility for state citizens, the constitutional language is general and a local governing body must specifically grant the power of initiative or referendum to its electorate in order for the electorate to possess that power. 53 U. Miami L. Rev. 541, 560 (1999).

Controversies can arise as to whether a municipality's charter has actually granted its voters initiative or referendum power, as can be seen in the following cases.

Has Referendum Power Been Granted by the Municipality Charter?

Duval County

In 1990, the Jacksonville City Council enacted an ordinance which assessed a non ad valorem tax which would be levied every year against each residential unit in the city for the city's collection, disposal and recycling of solid waste. Holzendorf v. Bell, 606 So.2d 645, 646 (Fla.1st DCA 1992). Citizens sought by petition to amend the city charter to prohibit the imposition of the tax without public approval by referendum. Id. Even though the supervisor of elections found that the petitions contained a sufficient amount of signatures, but was advised by the city attorney that the proposed amendment to the city charter was "constitutionally invalid on its face," and therefore the proposal was not placed on the ballot. Id.

The charter of Duval County, adopted in 1967, granted the county's electorate the power of referendum by stating that the charter could be amended by "by petition signed by at least five percent of the qualified voters of the county, thereafter to be submitted to the voters at a public referendum for approval or disapproval of the proposed amendment." Id. at 647. However, in 1978 an ordinance was passed providing that the consolidated government had the power to "repeal or amend any provision of this charter, and adopt other provisions of this charter, by ordinance, to the same extent as could be done by the legislature of the state of Florida...." Id. (alterations in original).

Since the Florida Constitution specifically provides that the power of referendum may only be granted by the legislature, the electorate does not have the authority to dictate what shall and what shall not be done by referendum. Id. at 648, citing to FLA. CONST. art. XI, § 5. Thus, the electorate does not have the power, by initiative or referendum, to enact a charter amendment by which it grants itself the power to restrict action by the city council by making the council's action subject to referendum. Id. The 1978 ordinance was construed to be a limitation upon the general grant of referendum power of Jacksonville's citizens to amend the city's charter. Id. at 649. Since the ultimate authority to amend the city's charter was vested in the city council, and there was no language in the charter whatsoever granting a referendum power to the electorate to adopt or repeal ordinances, there was a legislative intention to expressly exclude that power as to ordinances. Id.

Lake County

However, in Ennis v. Town of Lady Lake, 660 So.2d 1174, 1175 (Fla. 5th DCA 1995), citing to 606 So.2d 645, the 5th DCA distinguished Holzendorf, finding that its holding had been limited to the unusual provision of Jacksonville's charter. The issue in Ennis was "whether the citizens of the Town of Lady Lake, Florida, have the right, by initiative, to amend the town charter in order to require a referendum in the event that the Town Commission decides to relocate the city hall." Id. The electorate of Lady Lake had been granted referenda by the Florida Constitution, as stated by Winter Springs. Id., citing to 427 So.2d 170.

The 5th DCA found that since there was no referendum power currently in Lady Lake's

charter, and the town commission was unwilling to amend the city charter to permit one, it would be unfair to leave the citizens powerless against the commission, in contradiction of the Florida constitution. Id., citing to FLA. CONST. art. I, § 1. Additionally, the ballot question was not too vague to be placed on the ballot by its use of the word "feasible." Id. at 1176. Since the citizens had met their procedural statutory requirements by having a petition signed by ten percent of the electorate which did not relate to boundary issues, they were entitled to have their proposal placed on a ballot. Id. at 1175, citing to FLA. STAT. ch. 166.031(1) (1995).

May Bond Validation Actions Be Subject to Referenda?

As permitted by its charter, the City of Clearwater enacted Ordinance No. 6352-99 on May 6, 1999, which authorized the issuance of Infrastructure Sales Tax Revenue Bonds in an amount not to exceed $12,000,000.00, to help fund the cost of roadway and other capital improvements in the city. Boschen v. City of Clearwater, 777 So.2d 958, 959-960 (Fla. 2001). The bond ordinance provided that repayment of the bonds would be derived solely from the city's infrastructure sales tax revenues. Id. at 960. The city's charter requires a public referendum for the issuance of bonds in excess of one million, except when the bonds are issued for public health, safety, industrial development, or refunding. Id. After the capital improvements were financed without approval by referendum, and the trial court concluded that the city had the authority to issue the bonds, appeal was made to the supreme court. Id. at 961-962.

In response to the appellant's argument that the city lacked authority to issue the bonds

without referendum approval, the court responded that only if the bonds had been payable from ad valorem taxation would the issuance of the bonds be subject to referendum, according to the state constitution. Id. at 963. Since, however, the bonds were not derived from ad valorem taxes, but from infrastructure tax revenues, the city's issuance of the bonds was not subject to the state constitutional referendum requirement. Id. The court ultimately concluded that there was competent, substantial evidence to support the city's decision that the issuance of the bonds promoted public health and safety, thus making the issuance of bonds exempt from referendum under the city's charter. Id. at 968. Therefore, the court affirmed the bond validation judgment. Id..

Legislative v. Quasi-Judicial Actions

Since initiative and referendum power is a reservation of legislative power to the people, only actions that are legislative in nature may be subject to initiatives or referenda review. 19 Pepp. L. Rev. 99, 119 (1991). As previously mentioned, states have a great deal of control over whether a municipality's action may be subject to referendum or initiative as the Supreme Court has afforded a great deal of deference to state courts's judgement as to whether an action is legislative or quasi-judicial. 53 U. Miami L. Rev. 541, 557 (1999). The Supreme Court of Florida had the occasion to define characteristics between the two classes of actions in the following case. Bd. of County Comm'rs of Brevard County v. Snyder, 627 So.2d 469 (Fla. 1993). Following the discussion of the Supreme Court's approach are examples of interpretations of legislative and quasi-judicial actions as made by several district courts of

appeal.

A. Snyder

Respondents Jack and Gail Snyder, owned a small parcel of property on Merritt Island, in Brevard County. Id. at 471. The property was zoned for general use, allowing construction of a single-family residence. Id. Then, the respondents applied to have their property rezoned under RU-2-15, which allows fifteen units to be constructed per acre. Id. The Brevard County Planning and Zoning staff reviewed the respondent's application and found that their property was located in the one-hundred-year flood plain in which a maximum of only two units per acre were authorized. Id. Accordingly, the planning and zoning staff recommended that the respondents' application be denied. Id. However, at the planning and zoning board meeting, it was determined that if the respondents' development plan was executed, the land elevation would be raised to the point where the one-hundred-year flood plain restriction would no longer be applicable. Id. Therefore, the board voted to approve the respondents' rezoning request. Id.

The respondents testified before the board of county commissioners that they intended to build only five or six units on the property; nonetheless, numerous citizens spoke in opposition to the development plan, on the grounds that it would cause increased traffic. Id. The commission later denied the rezoning request without stating its reasons for doing so. Id.

The first issue the supreme court addressed was whether the board of county commissioners' denial of the respondents' zoning request was a legislative or quasi-judicial action. Id. at 474. Legislative actions will be subject to attack in circuit court, but in deference to

the policy-making function of a board, its legislative actions will be sustained as long as they are fairly debatable. Id. Quasi-judicial actions, on the other hand, are subject to review by certiorari and require substantial competent evidence in order to be upheld. Id.

A well-established principle of law is that original zoning ordinances have always been legislative actions. Id. Whether or not a board action is legislative or quasi-judicial depends on the nature of the hearing. Id. Typically, a legislative action yields a **formulation** of a general policy rule, while a judicial action, in contrast, involves the **application** of a general policy rule. Id.

The Snyder court concluded that while "comprehensive rezonings affecting a large portion of the public are legislative in nature," it agreed with the Fifth District Court of Appeal ("5th DCA")'s finding that three factors will form a quasi-judicial action:

> Rezoning actions which [1] have an impact on a limited number of persons or property owners, on identifiable parties and interests, [2] where the decision is contingent on a fact or facts arrived at from distinct alternatives presented at a hearing, and [3] where the decision can be functionally viewed as policy application, rather than policy setting, are in the nature of...quasi-judicial action...

Id., citing to Snyder v. Bd. of County Commr's, 595 So.2d 65 (Fla. 5th DCA 1991).

The board's action on the respondents' application, then, was indeed a quasi-judicial proceeding and was properly reviewable by petition for certiorari. Id. at 474-475. The review of the board's quasi-judicial action on the respondents' application was also properly found by the 5th DCA to be subject to strict scrutiny. Id. at 475. The strict scrutiny standard arises from the necessity for strict compliance with the city's comprehensive plan. Id.

Ultimately, however, the respondents' petition was properly denied by the board of commissioners because "the comprehensive plan is intended to provide for the *future* use of land, which contemplates a gradual and ordered growth." Id. Even if the denial of the respondents' application would be inconsistent with the comprehensive plan, the local government had the discretion

> to decide that the maximum development density should not be allowed provided the governmental body approves some development that is consistent with the plan and the government's decision is supported by substantial, competent evidence.

Id.

Also, the respondents were not entitled to approval of their development simply because their plan was consistent with the comprehensive plan, when the board action was also consistent with the comprehensive plan. Id. The new test for whether or not an application to rezone land should be approved became a three-step process. Id. at 476. First, "a landowner seeking to rezone property has the burden of proving that the proposal is consistent with the comprehensive plan and complies with all procedural requirements of the zoning ordinance." Id. The second part of the test involves a shifting of the burden to the "governmental board to demonstrate that maintaining the existing zoning classification with respect to the property accomplishes a legitimate public purpose." Id. Third, if the board can demonstrate that if its refusal to rezone property is not arbitrary, discriminatory, or unreasonable, the application should be denied. Id.

B. Miami-Dade County

In Coral Gables, the legislative nature of the initial comprehensive plan dictated that its

progeny of amendments would be legislative as well. City of Coral Gables v. Carmichael, 256 So.2d 404, 408 (Fla. 3rd DCA 1972). The City Commission of Coral Gables established an ordinance amending the city's comprehensive zoning ordinance to change the zoning on the Cocoplum Beach property from single-family residence use to multi-family and other more liberal uses. Id. at 406. The city's charter provided that its electorate would have the power to "approve or reject at the polls any ordinance passed by the Commission or submitted by the Commission to a vote of the electors, except an appropriation ordinance or an ordinance making the annual tax levy, such power being known as the referendum." Id.

In accordance with this charter provision, a referendum petition was prepared to submit the Cocoplum Beach ordinance to a vote. Id. While the city clerk was in the process of determining whether the referendum petition was sufficient, appellees Guy Carmichael and others filed a complaint in which they sought to enjoin the city clerk from declaring the petition sufficient, and also sought a permanent injunction blocking the referendum. Id.

The Third District Court of Appeal ("3rd DCA") determined the trial court's order granting the injunction should be reversed. Id. at 408. The action of the city commission in enacting an ordinance that amended its comprehensive zoning ordinance was a legislative action, since the action to adopt a comprehensive zoning ordinance is itself legislative. Id. As phrased by a Virginia court,

> [i]t would be flagrantly inconsistent to hold that the adoption of a comprehensive zoning law is legislative in character and that the amendment to such a law was a quasi-judicial act. If the original act is wholly legislative, an amendment to it partakes of the same character.

Id., citing to Blankenship v. City of Richmond, 49 S.E.2d 321 (Va. 1948).

Also, the charter provision granting referendum power to the electorate of Coral Gables must stand, as the legislative processes of the state or of the state's governmental agencies will not be prevented by the courts, without a demonstration of illegality. Id. at 409.

Also, a submission of the ordinance to the electorate for a referendum vote would not deprive the proponents for the ordinance their due process rights. Id. The court adopted the rationale of the California Supreme Court, which declared that both proponents and opponents of an ordinance subjected to referendum will have the right to express themselves in an open election, within the keeping of a democracy and a republican form of government. Id., citing to Dwyer v. City Council of Berkeley, 253 P. 932 (Cal. 1927).

The Carmichael court concluded that there had been no showing that the referendum proceeding sought by the electorate of Coral Gables would be inapplicable under the law or in violation of the law. Id. at 411. Therefore, the court directed that the complaint be dismissed, and that the city clerk complete her duties in determining the sufficiency of the referendum petition. Id.

C. Martin County

Martin County denied an application by appellant Section 28 Partnership to amend the county's Comprehensive Growth Management Plan and Future Land Use Map to allow appellant to develop its parcel of land as a planned unit development. Section 28 Partnership, Ltd. v. Martin County, 642 So.2d 609 (Fla. 4th DCA 1994). In deciding the case, the 4th DCA relied on

the Snyder tests to determine whether the county's decision was legislative or quasi-judicial. Id. at 612, citing to Snyder, 627 So.2d at 469. It was significant that in Snyder, the proposed zoning was consistent with the existing comprehensive plan. Id.

In Section 28 Partnership, the county's decision not to amend the comprehensive plan to allow Adjacent County Urban Service Areas ("ACUSA") was a legislative or policy making decision under Snyder. Id. Since an ACUSA would be a new classification that was not in the existing comprehensive plan, it would be the formulation of a new policy, not the application of existing policy. Id. at 612. Also, the parcel sought to be rezoned was bordered on two sides by Jonathan Dickinson State Park and the Loxahatchee River Preserve Area, which were widely used by the public and the proposed rezoning would thus have had a broad effect on the general public. Id. "Comprehensive rezonings affecting a large portion of the public are legislative in nature." Id., citing to Snyder, 627 So.2d at 469. Thus, the court found that the county's decision to deny appellant's application was a legislative decision. Id.

D. Palm Beach County

In Brooks v. Watchtower Bible and Tract Society of Florida, Inc., 706 So.2d 85, 86 (Fla. 4th DCA 1998), the residents of West Palm Beach (the "City") successfully challenged the trial court's order preventing a city referendum to repeal an ordinance enacted by the City Commission which granted the sale of the West Palm Beach Auditorium and surrounding property to the Watchtower Bible Society ("Watchtower"). The sale of land from the City to Watchtower took place on August 7, 1997. Id.

As permitted by the City's charter, some of the City's registered voters filed a referendum petition to repeal the ordinance authorizing the sale between the City and Watchtower. Id. This petition was certified after Watchtower had substantially performed its duties under its contract with the City. Id. at 86-87. The City then advised Watchtower that it could not fulfil the contract until the city commission had held an election on the referendum petition. Id. at 87. Watchtower subsequently filed an action to prevent the City from holding a special election to allow the City's electorate to vote on the referendum. Id.

The Fourth District Court of Appeal ("4th DCA") reiterated Winter Springs' language that "[t]he referendum..is the essence of a reserved power." Id., citing to 427 So.2d at 170. The City's charter had been amended by a referendum vote of the electorate in 1988 to provide that all powers of the City would be vested in the city commission except for those powers explicitly reserved to the voters, which include the power of initiative and referendum. Id.

The district court of appeal rejected the trial court's view that the charter provision granting referendum power to the electorate did not apply to the ordinance in question on the grounds that the ordinance was administrative. Id. at 88-89. The court resolved to interpret the City's code and charter provisions in a light most favorable to sustaining the electorate's exercise of its referendum and initiative power. Id. An ordinance permitting the sale of a "major city asset" can, therefore, be subject to referendum. Id. at 89.

In determining what might constitute legislative as opposed to administrative actions, the court derived definitions of "ordinance" and "resolution" from section 166.041 of the Florida

Statutes. Id. According to this statute, an ordinance is defined as legislative, being of a general and permanent nature and enforceable as a local law. Id. A resolution, on the other hand, is administrative, and deals with more temporary matters. Id. While these definitions are helpful, they still do not define what subjects constitute regulations of a general and permanent nature. Id. In the City's case, its code specifically provided that the selling or leasing of the city's real property must be done by ordinance, thereby becoming a matter of permanent nature and legislative. Id.

The district court noted that in another case, the siting of a municipal theater had been an appropriate subject for an initiative petition that required an election. Id., citing to Scott, 173 So.2d at 501. Seeing no reason why the sale of a public building should be any different, the court concluded that the sale of the property to Watchtower was a legislative act, and thus subject to referendum. Id. at 89.

Propriety of Rezoning Ordinances

In order for direct electoral zoning decisions to be valid, a three-prong test must be met: "(1) initiatives and referenda must be applied only to decisions that are legislative in nature; (2) initiatives and referenda must fulfill the procedural requirements of state zoning enabling acts; and (3) all zoning decisions must be made in the consideration of a comprehensive plan. 19 Pepp. L. Rev. 99, 116-117 (1991). Deference to the police powers of the municipality's legislature will also be given in favor of the zoning decision, as is seen in the following case. Trachsel v. City of Tamarac, 311 So.2d 139-140 (Fla. 4th DCA 1975).

Broward County

Appellant owners of a parcel of land in Tamarac attempted to have the city's zoning Ordinance No. 72-6 declared unconstitutional, either as a whole or as applied to their property. Id. at 139. When appellants had originally acquired their property, it had been zoned under a general commercial classification under which uses such as banks, motels and restaurants with attendant liquor licenses were not excluded. Id. After Ordinance No. 72-6 was adopted in 1972, appellants' property was reclassified under the neighborhood business classification, which excluded banks, motels and the sale of alcoholic beverages in conjunction with restaurants. Id. at 139. Appellants brought suit after they had made an unsuccessful administrative attempt to have their property reclassified for general business use. Id.

The validity of a zoning classification depends not on whether there has been a change in the character and use of the subject area, but whether the rezoning is "not [] arbitrary but reasonably related to the public health, safety or welfare." Id. at 139-140, citing to Oka v. Cole, 145 So.2d 233 (Fla. 1962). "It is well-settled in Florida that zoning regulations which promote the integrity of a neighborhood and preserve its residential character are related to the general welfare of the community and are valid exercises of the legislative power." Id. at 140.

A zoning ordinance will also not be rendered insufficient simply because it prevents a landowner from using his property in the most economically advantageous manner. Id. Only if the zoning ordinance completely deprives the owner of any beneficial use of his property will the ordinance be repealed. Id. This was not argued to be the case in Trachsel. Id. Therefore, the

court affirmed the trial court's ruling upholding Ordinance No. 72-6. Id. at 141.

Miami-Dade County

In Bennett M. Lifter, Inc. v. Metropolitan Dade County, 482 So.2d 479 (Fla. 3rd DCA 1986), the action of the legislative body enacting a ordinance for land development also enjoyed a presumption of validity. The appellant corporation had argued that the validity of an ordinance providing an administrative procedure for subdivision in a hotel and motel district could only be measured by the record before the county commission "which must include formal studies of the matter." Id. at 480-481. This ordinance required subdividors of hotels and motels to give written notice of subdivision to the building and zoning director, and prior to receiving any new permits, the subdividors must have demonstrated continuing compliance with the pre-existing county code. Id. at 481. The 3rd DCA adopted the trial court's holding as follows:

> Such legislative ascertainments and *determinations of facts, unless plainly contrary to those matters of common knowledge* of which the court may take judicial notice, are entitled to such weight as to require clear allegation and *proof showing the contrary* before the courts would be justified in overturning them, thus *casting the burden of allegation and proof upon the party attacking such legislative determinations;* it being the general rule that *all reasonable presumptions will be indulged in favor of the constitutionality of a legislative act.*

Id., citing to Miami Home Milk Producers Ass'n v. Milk Control Bd., 169 So. 541 (Fla. 1936)(alterations in original).

Evidence sufficient to overturn the presumption of the legislative validity of an ordinance, then, must be "clear, cogent and conclusive." Id., citing to Rosche v. City of Hollywood, 55 So.2d 909 (Fla. 1952). Additionally, zoning ordinances enacted by legislative bodies should be upheld if they meet the "fairly debatable test," outlined as follows:

> An ordinance may be said to be fairly debatable when for any reason it is open to dispute or controversy on grounds that make sense or point to a logical deduction that in no way involves its constitutional validity.

Id., citing to City of Miami Beach v. Lachman, 71 So.2d 148 (Fla. 1954).

Even in consideration of the appellant's numerous other challenges to the ordinance, the 3rd DCA adopted the trial court's opinion virtually in its entirety and determined that the ordinance was valid and constitutional. Id. at 486.

Voting on Enlargement of Corporate City Limits

The Gainesville Corporate Limits Council recommended that specific land be annexed to include in Gainesville's corporate city limits in 1978. Capella v. City of Gainesville, 377 So.2d 658, 659 (Fla. 1979). The city then adopted an ordinance which extended the corporate limits to include the adjacent lands described in the council's recommendation. Id. At an election, a majority of the qualified electorate approved of the annexation. Id.

The appellant, Mr. Capella, contended that the annexation violated the Florida Statutes in that the area sought to be annexed had already been subject to a referendum vote less than two years prior, and that property could not be the subject of an annexation ordinance for two years following the referendum. Id., citing to FLA. STAT. ch. 171.0413(2)(e) (1977).

However, there was a difference between section 171.0413 and its predecessor, in that the predecessor statute prohibited "any part of the area proposed for annexation" to be included in an annexation ordinance for two years, while the subsequent statute simply stated "the area proposed to be annexed." Id. at 660. As a result of this change in statutory language, the supreme

court found that the city's action to annex only part of the original area set for annexation, not the identical area, was proper. Id.

The appellant also argued that the ordinance governing the annexation election was unconstitutional since the majority of the votes would come from the city's corporate limits rather than from those residing in the area to be annexed. Id. at 660-661. This argument was found to be unavailing by the supreme court, which stated that "[t]here is no absolute right to vote on proposed alteration of municipal boundaries." Id. at 661. The legislature was authorized to obtain an annexation with or without any votes of the electorate. Id. Nonetheless, in the subject election each qualified voter had the right to vote, and those living in the area to be annexed were protected by having the majority vote of the five county commissioners as a prerequisite to the council's recommendation to the city that lands be annexed. Therefore, the ordinance governing the annexation election was not unconstitutional. Id.

Constitutionality of Referenda

Orange County

Several members of the electorate in the city of Orlando sought by referendum to amend the city's charter to prohibit the Orlando Utilities Commission or the city from building any coal-fired electrical generating plant in Orange County. Gaines v. City of Orlando, 450 So.2d 1174, 1176-1177 (Fla. 5th DCA 1984). The city would not verify or process the signatures in support of the proposed amendments due to advice from the city attorney that the "substantive matters of the proposed amendments were beyond the scope of the City's powers given to it by the

Municipal Home Rule Powers Act, Chapter 166, Florida Statutes (1983)." Id. at 1177. The appellant then filed a petition for writ of mandamus in the trial court to require the city to continue with the referendum process. Id.

When considering a mandamus petition to enforce a referendum or initiative process, courts often restrict their inquiry to "potential legal problems which could affect the validity of an ordinance or charter amendment, should it become law by voter approval." Id. If allegations are made, sufficient enough to warrant the execution of the referendum or initiative process, the proposals will be submitted to the electorate. Id. Since the appellant had alleged that fifteen percent of the electorate had signed the referendum petition, the requirements of the statute granting referendum power had been satisfied. Id., citing to FLA. STAT. ch. 166.021(1) (1983).

Courts may, at their determination, "make an initial determination as to whether or not the substantive provisions of the proposed amendments, are facially constitutional and are within the powers of the enacting body." Id. at 1178. In Gaines, "the elector's power to legislate by initiative or referendum is co-extensive with the City's power to act on the proposals in this case." Id. Also, "where part of an initiative or referendum is unconstitutional and other parts are constitutional, the valid proposals should nevertheless be submitted to the voters, if they would have a possible field of operation." Id.

Since the referendum sought to prevent the building of an electrical plant by the city, and decisions dealing with the building and location of an electrical plant constitute the exercise of the city's legislative powers, these decisions were the proper subjects for an initiative or

referendum vote. Id. at 1179. This power of the city was the subject of sections two and three of the proposed amendments to the city charter, and were found to be facially constitutional except for their attempt to alter the Municipal Home Rule Powers Act regarding future charter changes. Id. at 1182. Section one, however, which attempted to prohibit the Orlando Utilities Commission ("OUC") from construction the electrical plant, "[was] facially unconstitutional because it [was] in direct conflict with state laws which grant the OUC complete authority and control over the utility." Id. Yet, the valid parts of the initiative were still be permitted to be submitted to the voters. Id.

Due Process Rights Conflicts

Volusia County

In the city of New Smyrna Beach, a particular parcel of land was zoned to permit single family residences only, prior to 1970. City of New Smyrna Beach v. Andover Dev. Corp., 672 So.2d 618, 619 (Fla. 5th DCA 1996). Later, the city enacted Zoning Ordinance No. 797 which dictates that if a particular development plan is approved, the city commission will amend the zoning map to show a district for Residential Resort-Planned Unit Development (R-R PUD). Id. at 620.

In Andover, the appellee developer had obtained approval for a project and the subject parcel of land was rezoned to reflect R-R PUD. Id. The city voters sought by referendum to repeal the R-R PUD classification. However, the First District Court of Appeal ("1st DCA") had previously determined that a referendum used for this purpose violated the developer's due

process rights, finding that the referendum improperly attempted to "overrule the fact-finding of the planning commission and its function, and the administrative decision of the city commission." Id. at 620-621, citing to Andover Dev. Corp. v. City of New Smyrna Beach, 328 So.2d 231 (Fla. 1st DCA 1976). In the prior case, the 1st DCA determined that the electorate is precluded from interrupting a project which the city commission has previously approved. Id. at 621.

However, in the second Andover case before the Fifth District Court of Appeal ("5th DCA"), the appellee attempted to amend its previously approved project to obtain an increase in the height of the subject property's buildings, from twenty to twenty-nine stories. Id. The appellee also sought to relocate particular buildings due to the recently enacted Coastal Construction Control Line. Id. The 5th DCA reversed the trial court's holding that there were no height restrictions applied to the appellee's project by Ordinance 797. Id. Ordinance 797 did in fact contain a height limitation as it had been set by the development plan submitted by the developer and accepted by the city of New Smyrna Beach. Id. The 5th DCA dictated that the appellee must follow the amendment process contained in Ordinance 797, and not use an eighteen-year-old judgment as a shortcut to obtain an amendment of its plan. Id. at 622.

Permissibility of Flat Density Cap

Volusia County

Innkeepers Motor Lodge, appellant, appealed the trial court's judgment upholding a density cap passed by the electorate of New Smyrna Beach in a referendum election. Innkeepers

Motor Lodge, Inc. v. City of New Smyrna Beach, 460 So.2d 379, 380 (Fla. 5th DCA 1984). The density cap, enacted in 1973, had limited multifamily dwellings to twelve dwelling units per acre and hotels/motels to twenty-four dwelling units per acre. Id. The citizen group that had initiated the referendum had not conducted any study to justify the numerical density limits; the 5th DCA considered these figures to have materialized "out of the air." Id.

"Zoning plans cannot be arbitrarily adopted," and the flat density cap limits were impermissibly arbitrary. Id. Additionally, zoning laws must usually provide for variances that might be granted in cases of unique hardship, for example. Id. The density cap was further flawed in that it did not make an allowance for the possibility of a variance. Id. Therefore, the 5th DCA essentially repealed the density cap as it was arbitrarily adopted. Id.

Standing to Appeal Zoning Board Decisions

Monroe County

In Izaak Walton League of America v. Monroe County, 448 So.2d 1170, 1173-1174 (Fla. 3rd DCA 1984), the Monroe County Code provided:

> Any person or persons claiming to be aggrieved on account of any ruling of the zoning board or board of adjustment which enforces this chapter may appeal in writing to the board of county commissioners. Any such appeal must be filed within thirty (30) days after the act or decision upon which any appeal is made and must specify the grounds thereof.

The 3rd DCA relied on a case it had previously decided in which "a representative association like the Izaak Walton League was not 'aggrieved' by an adverse zoning decision under a Dade County ordinance indistinguishable from [Izaak] and thus could not maintain an appeal from the

Dade County Zoning Appeals Board to the county commission." Id. at 1174. The 3rd DCA could not distinguish that case on "any principled basis" and thus followed it, denying the league standing to challenge the zoning board's decision. Id. However, the 3rd DCA certified the following question to the Supreme Court of Florida, which has yet to be answered: "[w]hether a representative group has standing as an 'aggrieved' person or party to maintain an appeal of a zoning decision of a lower tribunal to the governing board of a county or municipality?" Id.

Conclusion

As is evident, the question of whether citizens of a municipality may invoke powers of initiative or referendum to challenge a development or zoning decision by the legislature depends on many factors, perhaps most importantly, whether the challenged decision is legislative or quasi-judicial, 53 U. Miami L. Rev. 541, 557 (1999), and also importantly, whether the municipality's charter grants any referendum or initiative power to its electorate. Id. at 560. The availability of referendum or initiative power seems to differ greatly between the numerous municipalities of Florida. Even if an individual charter does not provide such power, the people may still argue for and create that power, as was done in Ennis, 660 So.2d at 1174. Through the initiative or referendum, an individual may make a crucial difference in preserving the luxuries of dwindling open land. These powers must continue to be sought by the people.