

# New Reactions to Old Growth: Land Use Law Reform in Florida

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## INTRODUCTION

Over the last several years, a Florida interest group has advocated for a state constitution amendment—Hometown Democracy—that would remove land use policy decision-making power from elected officials and place it in the hands of the voting public. Can voters make better decisions than their elected representatives, and, specifically, is land use policymaking an area of governance that would be appropriate for the voters to reclaim from the local governments? I suggest that the Hometown Democracy proposal is an inappropriate solution to an overstated problem.

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Hometown Democracy is part of the new frontier of growth politics. As Sunbelt states continue to grow—at any pace—activists will work to find methods of restraining this growth. Some communities may resort to initiatives or referenda. Some communities may enact development moratoria. Tax disincentives may halt growth, too. The irony is that many anti-growth activists actually fueled the growth when they relocated to their particular communities ten or twenty years ago. Now, these residents do not want additional people spoiling the lifestyle they sought there.

Motivating voters to support anti-growth measures has proven to be a tough task. For example, Nicole Garnett pointed out that concern about the preservation of affordable housing can be a persuasive reason not to limit growth too drastically.<sup>1</sup> Voters may also be hesitant to approve technical or verbose amendments to their states' constitutions, reacting conservatively and preferring the status quo to ambiguous and unknown changes.<sup>2</sup> Arizona and Colorado are two states whose populations have expressed significant anti-sprawl feelings, yet these strong sentiments did not translate into successful anti-growth measures at the ballot box.<sup>3</sup> Initial reactions to forecasted growth may have been overreactions, with attitudes tempered over time. As Garnett noted, voters were fine with localized open space initiatives that used conservation as a means for controlling growth, but statewide moratoria and the removal of local governments' great land use authority appeared too dramatic a reaction to concerns over growth.<sup>4</sup> Some measures that made it to the ballot were overreactions that members of the general public were unwilling to approve.

In California, one study showed that more and more anti-growth initiatives were making the ballot, but fewer anti-growth measures were passing.<sup>5</sup> In this new era of land use law and politics, some groups seem to have overreached relative to what the public wants to accomplish. While there may be a flurry of anti-development ballot questions, by election time there is often inadequate backing to put these growth controls into law and initial, more visceral

1. Nicole Stelle Garnett, *Trouble Preserving Paradise?*, 87 CORNELL L. REV. 158, 174 (2001).

2. See, e.g., Richard B. Collins & Dale Oesterle, *Structuring the Ballot Initiative: Procedures that Do and Don't Work*, 66 U. COLO. L. REV. 47, 91 (1995).

3. Garnett, *supra* note 1, at 159.

4. *Id.* at 175–77.

5. Daniel J. Curtin, Jr. & M. Thomas Jacobson, *Growth Control by the Ballot Box: California's Experience*, 24 LOY. L.A. L. REV. 1073, 1075 (1991).

reactions subside.

Sometimes, residents and their elected officials must use creativity to enact laws that ultimately control growth. In California, for example, voters enacted Proposition 13 to benefit long-time residents at the expense of newcomers.<sup>6</sup> The California housing boom of the second half of the twentieth century fueled the inflation of home prices.<sup>7</sup> As a consequence, property taxes increased.<sup>8</sup> Voters used the ballot box to create a scheme by which current residents would lock in low tax rates while future Californians would pay a hefty price for contributing to local growth by way of higher property taxes on their homes.<sup>9</sup>

Some jurisdictions levy steep infrastructure fees on new developments that deter growth and force new arrivals to pay surcharges for deciding to move to these localities.<sup>10</sup> Any new growth therefore becomes expensive and lower- and middle-income families are priced out of the new developments. Established residents' taxes may not be affected much, as new residents are less likely to require extensive networks of social services.<sup>11</sup> If user or growth fees are the tool, growth is hard to stop or even direct. Instead, growth is simply more expensive for those who wish to develop land and those who wish to inhabit newly built structures. The infrastructure fee is but one means by which local governments have used the law to cope with population growth.

In Florida, a group of citizens concerned about development has proposed its own scheme to address purportedly problematic

6. John A. Miller, *Rationalizing Injustice: The Supreme Court and the Property Tax*, 22 HOFSTRA L. REV. 79, 93 (1993).

7. Kathryn Julia Woods, *California's Voters Revolt Lynwood, California and Proposition 13, A Snapshot of Property's Slipping from Whiteness's Grasp*, 37 UWLA L. REV. 171, 190 (2004).

8. *Id.* at 191-92.

9. Oliver A. Pollard, III, *Smart Growth: The Promise, Politics, and Potential Pitfalls of Emerging Growth Management Strategies*, 19 VA. ENVTL. L.J. 247, 269 (2000).

10. Charles C. Mulcahy & Michelle J. Zimet, *Impact Fees for a Developing Wisconsin*, 79 MARQ. L. REV. 759, 760 (1996). Generally, developers and/or new homebuyers pay these fees to the municipality so that the local government can fund new or expanded roadways, water systems, parks, and schools, the demand for which is created by these new residents.

11. No matter the income level of new residents, some service provisions will inevitably be necessary, such as new roads. Halting development across the socioeconomic spectrum could save taxpayers the most money. See Bill Kaczor, *Planning Amendment Statement Revised after Justices Rejected It*, ASSOCIATED PRESS FIN. WIRE, July 27, 2007, available at [http://www.lexisnexis.com/us/lnacademic/results/docview/docview.do?docLinkInd=true&risb=21\\_T5405654933&format=GNBFI&sort=RELEVANCE&startDocNo=1&resultsUrlKey=29\\_T5405654936&cisb=22\\_T5405654935&treeMax=true&treeWidth=0&csi=288311&docNo=2](http://www.lexisnexis.com/us/lnacademic/results/docview/docview.do?docLinkInd=true&risb=21_T5405654933&format=GNBFI&sort=RELEVANCE&startDocNo=1&resultsUrlKey=29_T5405654936&cisb=22_T5405654935&treeMax=true&treeWidth=0&csi=288311&docNo=2).

growth. Part I provides a brief overview of republican governance and contemporary land use law. Part II then describes the recent debate in Florida over land development controls and the positive and negative aspects of a Hometown Democracy regime. Part III discusses alternatives to the Hometown Democracy proposal and highlights the ironies surrounding the constitutional amendment's failure to qualify for the November 2008 ballot. Part IV offers some final thoughts on land use law reform in Florida.

## I. FOUNDATIONS OF LAND USE LAW

### A. The American Zoning Regime

America's republican form of government relies on electorates choosing enlightened leaders to conduct the day-to-day business of government. Americans elect their officials to, among other things, oversee schools and police protection. For some time, elected public servants have also taken charge of regulating private property. Land use controls first received federal validation in 1926. The United States Supreme Court ruled in *Village of Euclid v. Ambler Realty Co.* that zoning authority falls under state police power.<sup>12</sup> This decision provided state governments with a green light from the most powerful tribunal in the land. States (and, through delegation, localities) could control the use of land within their jurisdictions free, more or less, from threats of facial challenges.<sup>13</sup>

As a result of the decision, zoning regimes could be used to promote the health, safety, and welfare of citizens.<sup>14</sup> States and localities could define their own versions of order and stability. Government possessed the authority to tell land owners for which purposes the owners' land could be used. Quilts of residential, commercial, and industrial zones could be stitched together in various patterns to further social order. States and localities would protect sanctioned lifestyles and insulate favored groups from less

12. 272 U.S. 365, 397 (1926).

13. *Id.* By eliminating the facial challenge to land use controls, the Court ruled out future claims that a zoning ordinance was unconstitutional on its face simply for being a land use control. Thereafter, there would have to be a more specific or particularized claim.

14. For a discussion of the Court's modern views of zoning, including the reasons for which municipalities may enact restrictive zoning ordinances and use zoning to promote certain values, see *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

favorable ones along the socioeconomic spectrum. Planning would still give property owners the right to improve their lands, but within limits and in accordance with the values enunciated by states and localities.

If there was no government leadership in the planning process, development could be haphazard. A landowner, for example, could build a single-family home, only to see his neighbor develop the adjacent empty lot into an industrial plant. Without planning, there would not be coordination between private development and the development of infrastructure such as road networks and sewer systems. In the aftermath of *Euclid*, governments could be more assertive in their control over land use,<sup>15</sup> and in fact one of local governments' greatest powers is the authority to direct land development.<sup>16</sup> With the involvement of government in land use, growth issues have often dominated local politics.<sup>17</sup>

## B. Land Use in Florida

### 1. Underpinnings of Florida Land Use Law

Present-day Florida provides a case study of growth laws as reactions to increases in local real estate development. Rapid growth defined Florida's economy for much of the second half of the twentieth century. The state's population grew by 79 percent in the 1950s, 37 percent in the 1960s, 44 percent in the 1970s, and another 33 percent in the 1980s.<sup>18</sup> During the final decade of the last century, Florida's population grew by 24 percent—a more

15. See Katherine Dunn Parsons, *Billboard Regulation after Metromedia and Lucas*, 31 HOUS. L. REV. 1555, 1559–60 (1995).

16. See Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 3 (1990); Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 383 (1990).

17. See generally WILLIAM A. FISCHER, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* (Harvard University Press 2005). A “concern for home values is the central motivator of local government behavior.” *Id.* at 5. Moreover, “urban politics is above all the politics of land use.” *Id.* at 15 (quoting PAUL PETERSON, *CITY LIMITS* 25 (University of Chicago Press 1981)).

18. Population of Counties by Decennial Census: 1900 to 1990, <http://www.census.gov/population/cencounts/fl190090.txt> (last visited Nov. 16, 2008). The raw increases numbered as follows: 2,180,255 during the 1950s; 1,837,883 during the 1960s; 2,956,881 during the 1970s; 3,191,602 during the 1980s. The state's population increased by 10,166,621, or 367 percent, between 1950 and 1990. *Id.*

rapid pace than that experienced by the nation as a whole, but still a slower rate of growth than that which existed in Florida in earlier decades.<sup>19</sup> In the current decade, Florida has grown just 13 percent through 2006,<sup>20</sup> as rising living costs and several disastrous hurricanes have slowed the population's increase. Florida has dropped from the ninth-fastest growing state to the nineteenth, with the growth increase in 2007 declining by approximately 100,000 (or 75 percent) compared to the 2006 increase.<sup>21</sup>

One recent study found that local governments' land use plans currently accommodate a statewide population of 101 million.<sup>22</sup> (The state's 2006 population was estimated at approximately 18 million.<sup>23</sup>) In other words, the laws today permit building densities that would allow developers to increase the state's population five times over. While there is not enough demand today for such extensive construction, local governments would have to take affirmative steps to prevent developers from going to these extremes in the future, providing developers rather than local governments with the default position of land use control. This is, of course, based on the premise of supply and demand. If Florida's population growth is subsiding and there are not 80 million people anxious to move to the state, then it may not matter that current land use plans accommodate that number of residents. So, in the end, the question is whether it matters that present growth laws appear extremely accommodating given contemporary population trends. Further, if it is nonetheless desirable that growth be

19. States Ranked by Population: 2000, <http://www.census.gov/population/cen2000/phc-t2/tab01.txt>. Florida grew by 3,044,452 during the 1990s. *Id.*

20. U.S. Census Bureau, State & County Quick Facts, Florida, <http://quickfacts.census.gov/qfd/states/12000.html> (last visited Nov. 16, 2008). During the first six years of the current decade, Florida grew by 2,107,510 people. Since the growth began to slow down in 1990, Florida's population has grown by 5,151,962, or by 40 percent. *Id.*

21. Craig Pittman, *For Floridians, Enough May Finally Be Enough Growth*, ST. PETERSBURG TIMES, Feb. 10, 2008, at 1P.

22. Peter E. Howard, *Report Warns of State Growth to 101 Million*, TAMPA TRIBUNE, Apr. 2, 1999, at 1. The study was based, in part, on the number of housing units that would be allowed on each piece of property. The permissible growth is not limited to rural areas that might best accommodate future growth. In fact, "[t]he crush of rising population will be felt most along Florida's [populous] east coast and in the Tampa-Orlando-Naples triangle. For example, Tampa's Hillsborough County, already one of the state's most populous, could grow to a population of 6.5 million."

23. U.S. Census Bureau, State & County Quick Facts, Florida, <http://quickfacts.census.gov/qfd/states/12000.html> (last visited Nov. 16, 2008).

controlled, by which means should Florida act to rein in the developers?

Most present-day Floridians are a product of the boom of the last fifty years.<sup>24</sup> Many have lived in the state for several decades, witnessing increased development. The Florida they moved to was still in its relative infancy. Their tropical paradise had plenty of quiet and open space. Now, however, their dream state has morphed into a state of major urban centers. Long-time residents believe elected officials have been too cozy with developers, who have paved over paradise.<sup>25</sup> Again, though, the focus must be on whether the development that has horrified long-time residents in the past still continues, and therefore, from their perspective, requires restrictive growth laws to bring it under control.

## 2. Florida's Growth Management Act

In 1985, after some of the most bullish growth Florida had ever experienced,<sup>26</sup> the state legislature passed the Growth Management Act (the "Act").<sup>27</sup> The Act requires comprehensive land use plans at the local, regional, and state levels.<sup>28</sup> The plans must address a host of issues, including infrastructural and environmental concerns.<sup>29</sup> The governor, in concert with the state legislature, revises the state comprehensive plan biennially.<sup>30</sup> The

24. U.S. Census Bureau, American FactFinder, Place of Birth and Residence in 1995: 2000, Florida, [http://factfinder.census.gov/servlet/QTTable?\\_bm=y&-qr\\_name=DEC\\_2000\\_SF3\\_U\\_QTP22&-geo\\_id=04000US12&-ds\\_name=DEC\\_2000\\_SF3\\_U&-redoLog=false](http://factfinder.census.gov/servlet/QTTable?_bm=y&-qr_name=DEC_2000_SF3_U_QTP22&-geo_id=04000US12&-ds_name=DEC_2000_SF3_U&-redoLog=false) (last visited Nov. 16, 2008).

25. See Tom Palmer, *Business Lobby Aims at Amendment*, LAKELAND LEDGER, July 24, 2007, at B1.

26. See Population of Counties by Decennial Census: 1900 to 1990, available at <http://www.census.gov/population/cencounts/fl190090.txt> (last visited Nov. 16, 2008).

27. Mary Dawson, *The Best Laid Plans: The Rise and Fall of Growth Management in Florida*, 11 J. LAND USE & ENVTL. L. 325, 333 (1996).

28. See FLA. STAT. § 163.3167 (2007).

29. See FLA. STAT. § 163.3177. Comprehensive plans (infrastructural and environmental) address a large number of factors. They cover the need for, and potential locations of, public facilities, and also include the suggested capacities and expected costs of these facilities. The plans must also consider water resource management. Land use elements of the plans include the "distribution, location, and extent" of various zoning designations such as residential and agricultural. Local governments' plans must further address conservation projects both present and future, in addition to foreseeable transportation needs. The plans also have a housing element, which includes not only anticipated demand for housing generally but also concerns regarding housing affordability. A final feature of the comprehensive plan is the safety element that stresses preparation for natural disasters.

30. FLA. STAT. § 186.004 (2007).

comprehensive plans are nested: regional plans must be consistent with the goals and objectives outlined by the state plan, and local plans must be consistent with the goals and objectives featured in both the regional and state plans.<sup>31</sup> Various agencies review local plans and amendments to the local plans.<sup>32</sup>

The Act requires that all levels of government guide future development through an articulated vision.<sup>33</sup> The Act also involves the public in the land planning process.<sup>34</sup> Public participation is required throughout the comprehensive plan amendment process.<sup>35</sup> Even persons residing outside the jurisdiction amending its plan must be permitted to participate in the process if the jurisdiction's actions will affect non-residents.<sup>36</sup> It is worth noting that amendments of a smaller scale have fewer process requirements, though public participation is still a required component even if in a more limited role.<sup>37</sup>

Promoting good government is not constrained to the amendment process. The Act also requires local governments to conduct periodic evaluations of their comprehensive plans.<sup>38</sup> Once the plans are put into action, local governments must demonstrate to the public that the plans capably achieve governments' goals and objectives.<sup>39</sup> The public must then have the opportunity to comment on the cities' assessments of how well the plans and amendments are currently functioning.<sup>40</sup> Not only are local officials accountable generally (as all of their records are subject to public scrutiny during reelection campaigns), but the land use plans they put forth receive direct and specific feedback from the voters, too.<sup>41</sup> If local voters are concerned with the direction of growth, they have a state-mandated arena for voicing such

31. See FLA. STAT. § 163.3167.

32. FLA. STAT. § 163.3184. Agencies include the Department of Environmental Protection, the Department of State, the Department of Transportation, the appropriate regional water management district, the Fish and Wildlife Conservation Commission, and the Department of Agriculture and Consumer Services.

33. See FLA. STAT. § 163.3167.

34. FLA. STAT. § 163.3181.

35. *Id.*

36. FLA. STAT. § 163.3184.

37. See FLA. STAT. § 163.3187.

38. FLA. STAT. § 163.3191.

39. See *id.*

40. *Id.*

41. See FLA. STAT. § 163.3181.

concerns.<sup>42</sup> Local governments must defend their plans in the face of any criticism. Comprehensive plans are not stealthily created, but rather become part of a public debate.<sup>43</sup>

## II. REFORMING FLORIDA LAND USE LAW

With the Act in mind, I will now shift to the recent controversy in Florida land use law. Under the state's constitution, a non-governmental entity (such as a special interest group) may seek state supreme court approval of an amendment to the state constitution.<sup>44</sup> If the court finds that the amendment meets certain requirements,<sup>45</sup> the outside group must then obtain a set number of signatures in petition format.<sup>46</sup> The amendment finally proceeds to the ballot box after the state certifies the signatures.<sup>47</sup> Amendments must garner sixty percent of the vote at the next state election in order to take effect.<sup>48</sup> This is the procedural background of the amendment process.

A group named Florida Hometown Democracy put forth an amendment for the November 2008 ballot. The state supreme court approved the amendment.<sup>49</sup> If adopted, the amendment would require that local governments proposing comprehensive plan amendments receive voter approval at the ballot box before the amendments take effect.<sup>50</sup> In essence, Hometown Democracy would directly empower voters to control the direction of development, thereby ignoring political protections available through the evaluation comment period on local government

42. *Id.*

43. Even the courts have intervened in local governments' planning and zoning actions. *See infra* notes 85–95 and accompanying text.

44. FLA. CONST. art. XI, § 3.

45. FLA. STAT. § 101.161 (2007). The court will consider the language of the measure, such as whether the proposal is "clear and unambiguous." It will also make sure the explanatory statement fairly describes the "chief purpose" of the measure and that the petitioner has provided a "financial impact statement."

46. FLA. CONST. art. XI, § 3. The signature total must equal 8 percent of the votes cast in each of one half of the congressional districts in Florida representing no fewer than 8 percent of the votes cast in the state as a whole, with all numerical references pointing to the previous presidential election.

47. *Id.*

48. FLA. CONST. art. XI, § 5(e).

49. Advisory Opinion to the Attorney General Re Referenda Required for Adoption and Amendment of Local Government Comprehensive Land Use Plans, 902 So. 2d 763 (2005).

50. *Id.* at 764.

enactments, the non-binding public comments on local governments' land use policies, and at the ballot box.

#### A. Principles of Hometown Democracy

##### 1. Hometown Democracy: Promoting More Careful Planning

The question is whether, given the present slowdown in population growth in Florida and the growth laws already on the books, this brand of direct democracy is an overreaction to current land use concerns. Amendment supporters cited several reasons for why a change in the planning process is necessary. Supporters first focused on the need for more careful planning.<sup>51</sup> Proponents noted that a loophole in current state law allows local governments to enact non-complying comprehensive plan amendments as long as the local governments agree to face sanctions such as a loss of a portion of state transportation funding.<sup>52</sup> It remains unclear how effective, if at all, this sanction threat is.<sup>53</sup> It is possible for local governments to defy state planning guidelines and take, for example, a more aggressively pro-development stance. With Hometown Democracy, voters could directly prevent local governments from enacting such amendments. Localities would not have the option of withstanding state sanctions in the pursuit of haphazard development.

Next, Hometown Democracy supporters noted that requiring ballot box approval of comprehensive plan amendments would cut down on the number of such amendments.<sup>54</sup> The less often amendments are made, the more the plans can be long-term visions rather than malleable and ever-changing documents.<sup>55</sup> If

51. Tom Palmer, *Changes to Growth Plan on County Officials' Agenda*, LAKELAND LEDGER, Aug. 29, 2007, at B1 (citing the Hometown Democracy founder, who claims that plans are constantly changing and "don't mean anything").

52. FLA. STAT. § 163.3184 (2007).

53. In subsection 11 of the appropriate statute, the Administration Commission is instructed to direct state agencies to withhold funds for roads and water systems and name the local governments in violation ineligible for grants, such as those awarded by the Florida Small Cities Community Development Block Grant Program and the Florida Recreation Development Assistance Program. *Id.*

54. Tom Pelham, Op-Ed., *Hometown Democracy: The Wrong Idea*, TAMPA TRIBUNE, Sept. 9, 2007, at 1 (noting that Hometown Democracy supporters see their proposal as a "solution" to the "problem" of the "frequency of plan amendments").

55. Palmer, *supra* note 51, at B1.

thousands of land use amendments are approved annually,<sup>56</sup> then perhaps it makes sense to restrict the amendment process.<sup>57</sup>

Furthermore, legislation passed in the 2007 session allows several local governments to participate in a pilot program permitting amendments to pass with fewer state oversight protections.<sup>58</sup> Already, local governments may approve small-scale comprehensive plan amendments with less state oversight than that required for large-scale amendments. There are currently 32 exceptions to the state law's biannual restriction on amendment adoption.<sup>59</sup> Local governments have ways to amend their comprehensive plans more frequently, perhaps to the delight of pro-development factions. The bottom line is that Hometown Democracy proponents believed that their amendment would fill in loopholes that presently allow for lax oversight and less careful planning.

Bypassing the otherwise stringent amendment process can be damaging to the planning process. One of the strongest arguments in favor of Hometown Democracy was the need to control Developments of Regional Impact ("DRIs").<sup>60</sup> Of course, even if DRIs do need to be controlled, whether Hometown Democracy would do a good job of controlling them is an entirely different question. Under the Act, plan amendments related to DRIs face fewer restrictions, which is ironic because DRIs, as their name implies, affect the most people. Local governments, under current Florida law, may approve DRIs and any and all necessary amendments to the local comprehensive plan at any time of the year.<sup>61</sup> Normally, however, local governments may amend their plans only twice per year.<sup>62</sup> DRIs are exempt.<sup>63</sup> Local governments may enable developers to pursue DRIs at any time, and as often as officials so desire. Hometown Democracy proponents wanted to slow down the speed at which DRIs are approved by requiring local officials to confront their constituents and persuade voters that the amendments are good for the community at large and not just

56. Pelham, *supra* note 54, at 1.

57. *Id.*; Palmer, *supra* note 51, at B1.

58. H. 7203, 2007 Sess. (Fla. 2007).

59. Pelham, *supra* note 54, at 1.

60. FLA. STAT. § 380.06 (2007). A DRI is defined as "any development which, because of its character, magnitude, or location, would have a substantial effect upon the health, safety, or welfare of citizens of more than one county."

61. FLA. STAT. § 163.3187 (2007).

62. *Id.*

63. *Id.*

good for developers or future residents who would call a DRI home.

A key principle behind the Act is the need for visions of development.<sup>64</sup> The state and its municipalities should determine their destinies by thoughtfully mapping out future growth. The comprehensive plan amendment process can either strengthen or hinder local governments' visions for growth. On one hand, too many amendments to the comprehensive plan will prevent the plan from providing a stable vision of land use. Local officials ought to look to the long-term<sup>65</sup> and investors and speculators want to understand the path on which the city is headed, but public and private actors will encounter difficulties if the comprehensive plan is always changing. In other words, if the plan is routinely amended, it is not much of a long-term plan.<sup>66</sup> There will be no consistent perspective on how the local government ought to structure itself as it moves forward.

On the other hand, sudden influxes of residents, natural disasters, or other unforeseen changes to the landscape both literally and figuratively may demand a process by which local governments can alter their comprehensive plans. From this perspective, the emphasis is on major unforeseen changes. In 2005, Florida cities adopted more than 8,000 comprehensive plan amendments.<sup>67</sup> While cities can benefit from the flexibility the amendment process allows, some Hometown Democracy supporters worry that the substantial number of plan amendments threatens the objective of careful planning.<sup>68</sup> Regardless of whether the high number of amendments results from questionable dealings between developers and officials, and regardless of whether the high number of amendments actually translates into an undesirable amount of new development, the oft-used amendment process does appear to undermine the ability of comprehensive plans to act as thoughtful roadmaps for cities' futures.

64. FLA. STAT. § 163.3167.

65. *See id.*

66. Pelham, *supra* note 54, at 1.

67. *Id.*

68. *See, e.g., id.*

## 2. Hometown Democracy: Empowering People

In addition to encouraging more careful planning, Hometown Democracy supporters argued that their constitutional amendment would enhance the democratic nature of the planning process beyond the current provisions required by the Act. Although in 1985 the Act was hailed as a progressive model for land use planning because of its requirements for public involvement,<sup>69</sup> Hometown Democracy proponents suggested that their proposal would deliver more direct democracy to the people.<sup>70</sup> Citizens would now be voting on plan amendments. There are several other points to note.

First, under the current regime, affected parties may only challenge comprehensive plan amendments on the grounds that the amendments are inconsistent with the overall goals of the local and state plans.<sup>71</sup> It is possible, however, that an amendment could be consistent with these objectives but nonetheless undesirable from the voters' perspective. None of the public involvement provisions allow challenges to amendments that are consistent with the broader plans.<sup>72</sup> Hometown Democracy could rectify this problem. Whether this would lead to tyranny of the majority is another matter. The bottom line is that instead of limiting public comments to amendments inconsistent with plans' goals, the system would be expanded to permit public participation in the process of approving amendments that are consistent yet perceived as flawed on other dimensions. The general public may be able to strengthen its voice by providing criteria for comprehensive plan amendments beyond those provided for by the state's biennial guidelines.

Second, current comprehensive plans allow the state's population to grow to 101 million people.<sup>73</sup> Given that the plans permit a population more than five times as large as the present one, some Floridians argue local governments have conceded far too much to the developers and that it will take direct democracy

69. John M. DeGrove, *State and Regional Planning and Regulatory Activity: The Florida Experience and Lessons for Other Jurisdictions*, 930 ALI-ABA 397, 430-31 (1994).

70. William Kelly, *Land-Use Initiatives May Vie for Voters*, PALM BEACH DAILY NEWS, Sept. 30, 2007, available at <http://www.florida2010.org/media2.php?id=22&t=2>.

71. FLA. STAT. § 163.3213 (2007).

72. *See id.*

73. Howard, *supra* note 22, at 1.

to stop further amendments allowing even greater growth.<sup>74</sup> After all, elected officials oversee the local planning offices at city halls. These elected officials require money to run successful campaigns and keep their positions.<sup>75</sup> Developers tend to have deep coffers. Under a public choice regime, as long as developers fund city commissioners' campaigns, those public officeholders will return favors to those developers.<sup>76</sup> With direct democracy, voters could thwart the connections between candidates for reelection and their donors by voting down land use proposals that appear more like corrupt deals than sound public policy.

Third, the local government officials who author and approve comprehensive plan amendments often have no more technical expertise in the land use field than do average voters.<sup>77</sup> In other words, there may not be a competency argument in favor of restricting public participation in the planning process. If a small business owner who sits on the city council can approve amendments, then a small business owner who is a constituent should be able to have that power as well. Voters should be empowered to enjoy self-governance to the greatest extent possible. The Act does not provide voters with the fullest control feasible.

## B. Flaws of a Hometown Democracy Framework

### 1. Current Safeguards Provided by Florida Land Use Law

While there are many arguments in support of Hometown Democracy, there are also many arguments against the constitutional amendment. The first category of arguments against Hometown Democracy points to the current safeguards provided

74. See Kelly, *supra* note 70.

75. For a discussion of the link between real estate developers and local elected officials, see Timothy A. Canova, *Campaign Finance, Iron Triangles & the Decline of American Political Discourse*, 12 NEXUS 57, 64 (2007).

76. See Mary Shedden, *Retailers Oppose Land-Use Veto Plan*, TAMPA TRIB., Aug. 14, 2007, available at <http://www2.tbo.com/content/2007/aug/14/132055/bz-retailers-oppose-land-use-veto-plan1/news-money/>.

77. See Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as Problems of Local Legitimacy*, 71 CAL. L. REV. 837, 869 (1983) (suggesting that "commissioners are normally ordinary citizens with no special expertise"). See also Mark Strain, *Land Planning at the Voting Booth*, NAPLES NEWS, Mar. 2, 2007, available at <http://www.floridahometowndemocracy.com/Articles/On%20The%20Mark%20-%20Land%20planning%20at%20the%20voting%20booth.pdf> (pointing out that "all of our elected officials [are] inexperienced" when they arrive at city hall).

by the Act that already prevent local governments from pursuing real estate development agendas in clear opposition to the public interest or public opinion.

Local governments must provide grounds for their decisions including those made in response to challenges to land development regulations the governments have proposed.<sup>78</sup> Of course, local governments may dismiss citizens' challenges every time—provided a reason is given—but at least officials must publicly explain why they denied the challenges. These local officials will, after all, face the public again at election time, with their grounds for land use decision-making attributed to their names.<sup>79</sup> Further, if the local government does in fact overrule a challenge, the citizen challenger may appeal to a state administrative law judge (the "ALJ").<sup>80</sup> Then, if the challenger loses the appeal before the ALJ, the challenger is entitled to formal judicial review of that decision.<sup>81</sup> So, while local governments have the power to dismiss challenges to land use decisions for any reason, there are avenues of appeal to check the cities' power.

Another current check on local governments' power is the consistency requirement. Local comprehensive land use plans must be compatible with regional and state plans.<sup>82</sup> Developers may try to buy the votes of local officials, but those officials can only amend the land use plans if the regional and state plans will allow the kind of development the builders desire. Developers are often highly localized and may have less influence on the state planners.<sup>83</sup> While they may have decades of experience dealing with local planners, they are likely less connected to state officials. Moreover, technical and expert agencies—often neutral state-level actors—review the amendments to the state plan prior to approval.<sup>84</sup>

78. FLA. STAT. § 163.3213 (2007).

79. See Edward L. Rubin, *Public Choice and Legal Scholarship*, 46 J. LEGAL EDUC. 490, 493 (1996) (noting that elected officials will probably not take a position that would dampen their prospects for reelection).

80. See FLA. STAT. § 163.3213.

81. *Id.* Pursuant to FLA. STAT. § 120.68 (2007), the courts will remand a case to the agency if the agency action is not supported by findings of fact and substantial evidence in the record, if there has been a failure to follow prescribed procedures, or if there has been an abuse of discretion.

82. FLA. STAT. § 163.3167.

83. See David A. Dana, *Land Use Regulation in an Age of Heightened Scrutiny*, 75 N.C. L. REV. 1243, 1294–95 (1997).

84. FLA. STAT. § 163.3184.

Courts have also provided a safeguard. Judges have been more than willing to strike down development proposals that violate local governments' comprehensive plans. On August 8, 2007, the Florida Third District Court of Appeal (the "DCA") overruled an administrative law judge's opinion by enjoining the Hurricane Cove condominium project in Miami.<sup>85</sup> The DCA noted that Miami's development rules required local government protection of marine industry lining the Miami River.<sup>86</sup> The Hurricane Cove towers would have been located on the riverfront<sup>87</sup> and would have been out of step with the comprehensive plan's goals.<sup>88</sup> The only Miami River self-help boatyard would be supplanted by more than 1,000 residential units,<sup>89</sup> and an adjacent marina would shrink in size, too.<sup>90</sup> The DCA wrote in its opinion that the Miami City Commission would need to amend its development plan if it wanted to pursue residential development along the industrial riverfront.<sup>91</sup> In the meantime, the courts would ensure that project approvals were in line with the current comprehensive plan.

Just three weeks later, on August 29, 2007, the DCA again stymied a Miami condo project. The Coastal on the River complex would have installed 633 residential units in two high-rise towers on the banks of the Miami River.<sup>92</sup> Marine industrial uses were supposed to be protected under the city's own comprehensive plan,<sup>93</sup> yet Miami city government continued to approve high-density residential projects on riverfront properties.<sup>94</sup> The court held that without amending its comprehensive plan (using appropriate process and public participation), the Miami city government could not violate the goals by which it previously bound itself.<sup>95</sup>

85. *Payne v. City of Miami*, 32 Fla. L. Weekly D1885, 2007 WL 2254570 (Dist. Ct. App. 2007).

86. *Id.* at \*6–8.

87. *Id.* at \*1.

88. *Id.* at \*11.

89. Andres Viglucci, *Zoning for Miami River Condos Overturned*, MIAMI HERALD, Aug. 11, 2007, at A1.

90. The "number of slips" at the marina would be reduced. *Id.*

91. *Payne*, 32 Fla. L. Weekly D1885, at \*19.

92. Andres Viglucci, *Court Overturns Approval of River Condo*, MIAMI HERALD, Aug. 30, 2007, at B6.

93. *Payne v. City of Miami*, 32 Fla. L. Weekly D2055, 2007 WL 2428453, at \*12 (Dist. Ct. App. 2007).

94. *Id.* at \*14.

95. *See id.* at \*18 ("If the City's vision . . . has changed, then that change should be clearly reflected in its Comprehensive Plan . . .").

The Florida courts have demonstrated the firm authority of comprehensive plans. Under current Florida law, if comprehensive plans restrict the quantity and the placement of new construction, builders will not often succeed in receiving ambitious development permits, even if local governments want to cozy up to their campaign contributors. Local governments would first have to relax their comprehensive plans through more liberal amendments. These amendments would have to pass public scrutiny<sup>96</sup> as well as state agency review,<sup>97</sup> and would also have to meet state requirements for comprehensive plans.<sup>98</sup> In the end, the builders' goals either harmonize with the process just outlined, or the courts frustrate these goals on the basis of the comprehensive plan violations exhibited by the developers' proposals. The bottom line is that the courts function as a solid check on out-of-control development. Builders are unable to avoid the restrictions of local governments' land use plans and while simultaneously surviving judicial challenges.

Not only may residents challenge their governments' land use actions, but non-residents may challenge proposed amendments as well. With Hometown Democracy, those non-residents would be disempowered to challenge the amendments because they would not be registered to vote inside the jurisdiction, but the new developments may nonetheless adversely affect the non-residents. In this instance, Hometown Democracy would constrain rather than expand direct democracy. Owners of commercially-zoned land inside the jurisdiction may not be registered to vote in the jurisdiction, either, and would be disempowered to enjoy the ballot box power.

## 2. The Ill Effects of a Hometown Democracy Regime

Along the lines of disfranchisement, some voters may enjoy ballot box power under Hometown Democracy but may find their power diluted anyway. At election time, some neighborhoods may be better mobilized.<sup>99</sup> Some neighborhoods may have a disproportionate number of persons not registered to vote. Direct

96. FLA. STAT. § 163.3181 (2007).

97. FLA. STAT. § 163.3184.

98. FLA. STAT. § 163.3167.

99. For a discussion of disparate voter turnout across demographic groups, see Richard Briffault, *Distrust of Democracy*, 63 TEX. L. REV. 1347, 1352-53 (1985).

democracy in theory sounds all-empowering, but in practice may leave some residents in too weak a position to effect change through the ballot box. By contrast, under current law, persons need not be registered to vote in the city to make a challenge; they need not be registered at all.<sup>100</sup>

With ballot box zoning applied to the comprehensive plan amendment process, tyranny of the majority beckons. Not only may some residents be better able to mobilize for or against an amendment, but elected officials may find themselves in too weak a position to carry out public policy. Comprehensive plan amendments may be necessary for the local government to add a water treatment facility, public schools, mass transit hubs, or pockets of affordable housing. When in control of the planning process, city council members may be willing to put their reelection prospects on the line for the good of the general welfare, and push on the dais for amendments that would allow local government to enhance the public infrastructure. Voters, however, if permitted to vote on these amendments, will likely act under the influence of NIMBYism.<sup>101</sup> Opening up government administration to popular vote can derail public projects because some voters will not want certain infrastructure in the vicinity of their properties.<sup>102</sup> One of the values of republican government is that important policymaking decisions are left to a select group of individuals, and if citizens are displeased with the outcomes of those decisions, they can vote their representatives out of office. At the same time, policymaking is left to a government body so that this set of officials

100. Under a Hometown Democracy regime, decisions would be made at the ballot box, where presumably only registered voters of a particular locality would be able to show their support or dissent. When, on the other hand, the ballot box is not a key component of the zoning and planning processes, as is currently the case, meaningful discussion and dissent is not limited to a select group of voters. *See, e.g.*, FLA. STAT. § 163.3184(1)(a) (recognizing that an “affected person” may include any persons who own property “within the boundaries of the local government” and who may, pursuant to paragraph (6)(a), demand review of proposed local governmental actions—even though such property owners may not claim that jurisdiction to be their primary residence and may therefore not be registered to vote in that jurisdiction).

101. For a description of “NIMBYism” (Not In My Back Yard), *see* 1000 Friends of Florida, Florida Hometown Democracy Constitutional Ballot Amendment: Position of 1000 Friends of Florida, Oct. 2007, <http://www.1000friendsofflorida.org/planning/fhd.asp> (last visited Nov. 18, 2008).

102. For one look at the problem of NIMBYism with regard to locating public works, *see* Peter C. Krier, *Ohio’s Sanitary Landfills: State and Local Regulation of Solid Waste Disposal Facilities*, 63 U. CIN. L. REV. 817 (1995).

can make the tough decisions that are best for the community at large. If every decision was left to the voters, it is possible that one faction of society would always prevail over a less powerful faction. One group of homeowners might be able to mobilize to keep the less desirable public infrastructure out of its neighborhoods, and put the landfills in another part of town.<sup>103</sup> Or, there could be total gridlock, in which the city not only fails to develop a landfill in one particular neighborhood, but is unable to locate the landfill in any neighborhood. Then, much needed public facilities would never be constructed.

For Hometown Democracy supporters, perhaps a recent Florida court ruling will prove promising. The Fourth District Court of Appeal ruled that the City of West Palm Beach should not have embarked on the construction of a City Hall, library, and adjacent parking garage without a citywide voter referendum.<sup>104</sup> According to the court, if local governments wish to engage in substantial public projects and develop some of their own lands, voters will enjoy referendum power over the public financing of such development. This particular ruling came at a time when the city of Miami was seeking a \$1 billion tunnel to the Port of Miami and two new museums downtown, while Fort Lauderdale was planning to upgrade its Aquatic Complex, which is also the site of the International Swimming Hall of Fame.<sup>105</sup>

There are two ways to interpret this recent court decision. First, voters should have power over how their tax dollars are used, particularly when public projects will cost significant sums of money, such as a billion-dollar tunnel that many residents may never have reason to use.<sup>106</sup> Voters may have problems with out-of-control private development, and they may be especially uneasy about ambitious public sector land use. On the other hand, just as Hometown Democracy may strangle local governments needing to amend their comprehensive plans in order to construct necessary public infrastructure, these court-mandated referenda may allow public opposition to stymie plan amendments that have been

103. Craig S. Keys, *Book Review*, 21 COLUM. J. ENVTL. L. 361, 373–75 (1996).

104. *Wright v. Frankel*, 965 So. 2d 365, 366–67 (Fla. 2007).

105. Michael Vasquez et al., *Court: Let Voters OK Big Projects: Community Redevelopment Agencies Across the State Must Now Get Voter Approval Before Issuing Bonds for Big-Ticket Spending Projects*, MIAMI HERALD, Sept. 7, 2007, at A1.

106. See Sally Apgar, *Appeals Court Says West Palm Needed Voter OK for City Center Project*, SOUTH FLORIDA SUN-SENTINEL, Oct. 4, 2007, at B1.

vetted through the current process. The prospect of formulating a ballot question and executing a public referendum may force local officials to compromise with local residents over the exact nature of the project and the finance structure for making the project possible. At a minimum, local governments will move forward with the initial step of amending their comprehensive plans cognizant of the fact that they must later persuade the voters on the issue. Either way, the court ruling makes public land development more difficult but also provides a mechanism by which anti-development residents can stop specific types of construction without the need for a Hometown Democracy regime. Even if voters cannot determine the fate of amendments to growth management plans, they can at least use the ballot box to sever funding for certain government proposals.

Another problem with changing the amendment process to a ballot box system is the issue of accountability. When the public at large makes the final decision through a referendum, no organ of government can be held accountable should the result prove detrimental in practice.<sup>107</sup> Instead of an elected official or a city council making a land use decision and then going before voters for reelection with a record on the line, a faceless electorate will make crucial decisions affecting the direction of local growth. Under the current system, it may be reasonable to conclude that a comprehensive amendment so undesired by the general public would not be approved by elected officials anyway; with reelection prospects in mind, officials will not attach their names to loathsome land use changes.<sup>108</sup> Ideally, however, public officials will advocate policies that are best for the entire community. Hometown Democracy's concern was that officials are so out of touch with residents that unpopular proposals pass muster with the city council.<sup>109</sup> This is not consistent with the conventional wisdom that elected officials are less likely to promote a policy that will hurt their reelection prospects.<sup>110</sup> But if voters mistakenly approve

107. Daniel P. Selmi, *Reconsidering the Use of Direct Democracy in Making Land Use Decisions*, 19 UCLAJ. ENVTL. L. & POL'Y 293, 321 (2002).

108. See Rubin, *supra* note 79, at 493.

109. Kelly, *supra* note 70.

110. Rubin, *supra* note 79, at 493. To Hometown Democracy founder Lesley Blackner's credit, some elected officials have in fact approved deals sought by developers. See *id.* But, given that these officials are now "former" public servants, it is clear that politicians who are too cozy with developers are less likely to succeed in reelection bids. *Id.*

something that ultimately hurts the general welfare, there is no figurehead to hold responsible.

### 3. The Expense of a Hometown Democracy Regime

Besides the general effectiveness of current safeguards and Hometown Democracy's potential ill effects, costs are a relevant issue, too. Election administration and ballot campaigns cost money.<sup>111</sup> If a comprehensive plan amendment is up for voter approval in the middle of the year, there may need to be a special election just for one amendment question, and this will come at a price.<sup>112</sup> Turnout is often low for special elections so the election may not fully embody direct democracy if only a handful of residents ultimately make the decision.<sup>113</sup> Alternatively, if there are several lengthy and technical plan amendments on the same ballot on a given Election Day,<sup>114</sup> voters may not take the time to consider all of the amendments after already spending time voting on the plethora of elected offices atop the ballot.<sup>115</sup> Down-ballot questions often receive fewer votes cast than the top-of-the-ballot races for United States Senate or President.<sup>116</sup>

Further, developers could buy the votes of voters if buying the council votes of officials is no longer enough to hold sway.<sup>117</sup> This would increase the cost of Hometown Democracy while also cutting into its effectiveness. Deep-pocketed developers could spend thousands of dollars on lavish advertising while citizen opponents may lack organization and finances. The election will appear democratic but the well-funded builders may turn the process into a smoke-and-mirrors illusion. The potential for a developer-

111. Kaczor, *supra* note 11.

112. This is disputed. See Kaczor, *supra* note 11.

113. David B. Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. COLO. L. REV. 13, 31 (1995).

114. See Kelly, *supra* note 70.

115. Becky Kruse, *The Truth in Masquerade: Regulating False Ballot Proposition Ads Through State Anti-False Speech Statutes*, 89 CAL. L. REV. 129, 144 (2001) (citing Magleby, *supra* note 113, which notes that drop-off increases for long ballots).

116. HENRY E. BRADY ET AL., COUNTING ALL THE VOTES: THE PERFORMANCE OF VOTING TECHNOLOGY IN THE UNITED STATES 8 (2001), [http://ucdata.berkeley.edu:7101/new\\_web/countingallthevotes.pdf](http://ucdata.berkeley.edu:7101/new_web/countingallthevotes.pdf).

117. See Iver Peterson, *Land-Use Decisions Via the Ballot Box*, N.Y. TIMES, May 22, 1988, available at <http://query.nytimes.com/gst/fullpage.html?res=940DE1DC1431F931A15756C0A96E948260#> (noting that developers in Tucson, Ariz. "forge[d] an alliance with landowners" during a land use debate, isolating environmentalists and preventing environmental groups from attempting to win the hearts and minds of elected officials).

dominated election campaign is both a real and an ironic danger associated with moving amendment decisions from the dais to the ballot box.

One previous study sheds light on the costs of land use campaigns. Glickfeld et al. found the median ratio of pro-growth to anti-growth groups' spending was 8:1.<sup>118</sup> When anti-development ballot measures failed, they failed after opponents spent, on average, \$64,000 for campaigns.<sup>119</sup> In contrast, supporters of such measures only managed to spend an average of \$9,600 on campaign operations.<sup>120</sup> Granted, the study also notes that developers pushing pro-growth ballot measures spent an average of \$86,900 for each of twenty losing campaigns.<sup>121</sup> (Opponents of these ballot questions spent just one-tenth of that.<sup>122</sup>) Money did not always win elections in the California study. Regardless, campaigns waged under Hometown Democracy would be expensive.

A final cost could come in terms of negative economic impact. Builders may look elsewhere if a jurisdiction's voters consistently reject comprehensive plan amendments at the ballot box despite expensive advertising campaigns. If the resulting ancillary transaction costs of a referendum prove too expensive to developers, the state economy as a whole could suffer as development projects become scarce. Local tax bases would fail to expand, and local governments would not be able to extract from developers public goods such as schools or parks. These ancillary transaction costs may even be passed on to consumers through higher housing prices, further damaging the housing market and the general economy.

Not only might a Hometown Democracy regime cost Florida some economic growth, but the current housing slowdown means that economic growth is already less robust than it has been in recent memory.<sup>123</sup> Migration to Florida is at a substantially slower

118. Madelyn Glickfeld et al., *Trends in Local Growth Control Ballot Measures in California*, 6 UCLA J. ENVT'L. L. & POL'Y 111, 125 (1987).

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. See, e.g., Laura Layden, *Economic Growth Slows Dramatically in Southwest Florida*, NAPLES DAILY NEWS, Sept. 25, 2008, available at <http://www.naplesnews.com/news/2008/sep/25/economic-growth-slows-dramatically-sw-florida/>; see also Michael Grunwald, *Is Florida the Sunset State?*, TIME, July 10, 2008, available at <http://www.time.com/time/magazine/>

pace now compared to the last 50 years.<sup>124</sup> Lower demand for new housing<sup>125</sup> means developers will not be seeking as many comprehensive plan amendments as in the past. In other words, Hometown Democracy proponents wanted to take a process in place for almost 25 years and change it considerably when the ills of the past will likely not be as prominent in the future. To conclude, if a problem with the present system is the abundance and frequency of comprehensive plan amendments and slower growth will naturally lead to fewer such amendments, then perhaps there is less of a problem in need of a solution in the first place. Moreover, the state may not be able to afford a greater slowdown than the one already taking place.

#### 4. Ineffectiveness of Referenda

The last argument against Hometown Democracy is a criticism of the referendum process's effectiveness. When land use plan amendments are made through the legislative process, there is open and deliberative debate.<sup>126</sup> A referendum, by contrast, does not allow for debate, or negotiation and compromise between the parties.<sup>127</sup> Once the language goes on the ballot and voters go to the ballot box several months later, the only choices are 'yes' or 'no'.<sup>128</sup> Voters cannot directly deal with the developers to strike a deal. Voters may have a say at the voting booth, but in the end they are likely hurt by the simplification of the process to little more than a yes or no decision.

Not only may the referendum process stifle debate and deal-making, it may cause developers to bypass the process altogether. Developers may, when possible, switch from comprehensive plan amendments to a series of parcel-by-parcel rezonings in order to avoid the referenda. In fact, these rezonings may be more of a problem for anti-growth activists than are the comprehensive plan amendments. Regardless, developers who have worked the system

article/0,9171,1821648-1,00.html

124. See *supra* notes 12–15 and accompanying text; Carl Hiasen, *Good News: Fewer People Moving to Florida*, MIAMI HERALD, Jan. 13, 2008, at L1.

125. Pittman, *supra* note 21, at 1P.

126. Selmi, *supra* note 107, at 319.

127. Of course, compromises, while allowing municipalities to exact from developers goods such as new public schools, could also allow powerful developers to win over concessions from city officials.

128. FLA. STAT. § 101.161 (2007).

for decades and who know how to deal with local officials may find a way to avoid any new restrictions imposed by Hometown Democracy. And if Hometown Democracy is in fact penetrable, then it will not accomplish its goals.

### III. ALTERNATIVES TO THE HOMETOWN DEMOCRACY PROPOSAL

One tangential side note worth mentioning is the response to the reactionary Hometown Democracy proposal put forth by two factions that organized around alternative reforms. The first organization, 1000 Friends of Florida, called itself a growth management watchdog.<sup>129</sup> This group was alarmed by the potential for high-priced campaigns on comprehensive plan amendment issues that a Hometown Democracy regime would spur.<sup>130</sup> So, even though 1000 Friends opposed excessive development, like Hometown Democracy's supporters, it had a different conception of what ought to be done.<sup>131</sup> As an alternative to Hometown Democracy, 1000 Friends favored greater notice by local governments to neighborhoods affected by proposed amendments.<sup>132</sup> It also wanted local governments to approve amendments with supermajorities rather than with simple majorities.<sup>133</sup> The 1000 Friends proposal was called a Citizen Bill of Rights.<sup>134</sup> The Bill of Rights was also different from Hometown Democracy in that it was a legislative proposal rather than a proposed constitutional amendment.<sup>135</sup> The goal of 1000 Friends was to work with sympathetic state legislators to popularly agree to a compromise law that would reform Florida land use law to a less dramatic extent than might Hometown Democracy.<sup>136</sup>

The second alternative to Hometown Democracy was offered by Floridians for Smarter Growth in the form of a constitutional amendment. This proposal functioned similarly to Hometown Democracy in that it permitted voters to decide on comprehensive

129. Bill Kaczor, *Businesses Mobilize Effort to Defeat Growth Measure*, SARASOTA HERALD-TRIBUNE, Nov. 19, 2007, at BCE1.

130. 1000 Friends of Florida, *Florida Hometown Democracy Constitutional Ballot Amendment: Position of 1000 Friends of Florida* (Oct. 2007) (on file with author).

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

plan amendments. The difference was that residents had to petition their local governments to put such amendments up for a plebiscite.<sup>137</sup> Ten percent of registered voters had to provide signatures for the petition.<sup>138</sup> In other words, there would be no automatic public vote on comprehensive plan amendments. Presumably, only the most contentious and controversial proposals would succeed in garnering enough signatures to initiate a public referendum. As such, the Smarter Growth alternative would get rid of one negative aspect of Hometown Democracy—too many costly elections.<sup>139</sup>

There is, however, a third alternative. Instead of changing state laws and constitutions, citizens could urge local governments to redefine the goals and objectives of the land use controls by adopting “smart growth” policies. If growth is inevitable, current residents could at least structure and guide that growth. Instead of overreacting to growth, residents could take control of the growth to make it work best for them. The smart growth concept (unrelated to the aforementioned Floridians for Smarter Growth) is one framework that does this. While Florida’s comprehensive plans already exhibit some of the characteristics of smart growth (namely, well thought-out land use visions), the concept tends to have some specific features that may allay Floridians’ concerns about new growth.

In Maryland, for example, smart growth objectives include the encouragement of growth in selected areas.<sup>140</sup> To comply with this goal, local governments should funnel new development to areas that already have infrastructural networks that can accommodate it.<sup>141</sup> They should also keep undeveloped areas undeveloped, preserving natural resources that still remain.<sup>142</sup> Although not everyone supports increasing the density of existing neighborhoods, a similar smart growth objective in Florida would probably limit a sort of endless sprawl from creeping across open lands. Additionally, denser development could foster viable mass

137. Kelly, *supra* note 70.

138. *Id.*

139. *See* Kaczor, *supra* note 11.

140. Manan M. Yajnik, *Challenges to “Smart Growth”: State Legislative Approaches to Comprehensive Growth Planning and the Local Government Issue*, 2004 WIS. L. REV. 229, 245 (2004).

141. *Id.*

142. *Id.*

transit systems that keep cars off the roads and thus keep congestion low. The bottom line is that Floridians need not urge politicians to enforce a moratorium on development. They need not demand a right to vote on every land use proposal on the table. Florida's growth has slowed, and the growth that is to continue can be constrained by smart growth principles. The problem is not necessarily the comprehensive plan amendments. The problem may be that the existing comprehensive plans do not act as ideal frameworks for directing future development.

An example in Florida illuminates how local residents can try to push their own alternatives to Hometown Democracy. In Gainesville's Alachua County, some area residents were concerned by a proposed mixed-use development.<sup>143</sup> The development, Newberry Village, could only move forward with the approval of a comprehensive plan amendment.<sup>144</sup> Newberry Village would feature 900 residential units, 240,000 square feet of retail, and 27,000 square feet of office space.<sup>145</sup> The comprehensive plan amendment needed for Newberry Village would allow the builder to avoid traffic alleviation requirements by providing a special transit service, discouraging customers' and residents' use of automobiles and thus minimizing traffic impacts.<sup>146</sup> Many voters were dissatisfied with this plan and did not want their neighborhood's density increased as a result of the new construction.<sup>147</sup>

On May 22, 2007, citizen opponents of Newberry Village urged the Alachua County Commission to allow voters the choice of whether to approve the comprehensive plan amendment necessary for moving the project forward.<sup>148</sup> While the County refused to permit such a referendum, the Commission was clearly fazed by the citizen groups' pending lawsuit against the County, and offered instead to engage in robust negotiations in order to smooth out differences between commissioners and voters.<sup>149</sup> Future

143. Cindy Swirko, *Newberry Village Debate a Preview of Constitutional Amendment Battle*, GAINESVILLE SUN, May 21, 2007, at 1.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. ALACHUA COUNTY BOARD OF COUNTY COMMISSIONERS, MAY 22, 2007 REGULAR BOCC MEETING, <http://www.alachuacounty.us/documents/bocc/agendas/2007-05-22/49644D02-8005-411B-9DE2-E84522B3CA45Agenda.htm>.

149. *Id.*

opponents of specific comprehensive plan amendments could similarly urge their city and county commissions to conduct referenda for particularly heated and sensitive land use issues. Perhaps the kind of negotiations that took place in Alachua County could result in exactions from developers that would satisfy initial opponents of comparable projects in the future. This option can allow for appropriate economic growth while also giving long-time local residents additional benefits. Case-by-case negotiations at the most grassroots level are less drastic than state constitutional amendments and can be equally if not more successful.

#### IV. FINAL OBSERVATIONS

Florida's present slowdown and the public participation measures already in place seem to frame Hometown Democracy as an overreaction to growth. Florida's development laws involve the public to a great length, and turning to direct democracy for every single comprehensive plan amendment may be a costly move for a problem that, even if it is major, continues to subside.

One final irony is that the threat posed by the Hometown Democracy reaction to growth prompted a sudden surge in development.<sup>150</sup> Builders were nervous that angry and hostile voters would approve the constitutional amendment.<sup>151</sup> If the voters did, builders would have a tougher time achieving comprehensive plan amendments that would allow them to develop their lands as they see fit because voters might not provide such amendments with a majority of votes. In response, builders and governments acted quickly to amend comprehensive plans prior to the passage of Hometown Democracy. For example, Tampa's Hillsborough County rapidly considered a wide swath of amendments ranging from road infrastructure in currently rural areas to increased density levels to urban services provided by county government in areas outside the county's growth

150. Editorial, *Proposed Changes to Growth Plan Foresee Subdivisions Everywhere*, TAMPA TRIBUNE, Sept. 16, 2007, available at <http://www.tbo.com/news/opinion/editorials/MGBI0HXUM6F.html>. Cf. David A. Dana, *Natural Preservation and the Race to Develop*, 143 U. PA. L. REV. 655, 677 (1995) (discussing, in "the natural preservation context," how landowners will engage in "accelerated development" in order to "beat the regulatory clock" that looms in the form of "future uncompensated regulation").

151. See Carl Hiaasen, *Land-Use Initiative Facing Sneaky Tactics*, MIAMI HERALD, Sept. 30, 2007, at L1.

boundary.<sup>152</sup> Perhaps this kind of response by developers and counties provides voters with good reason to think growth is out of control. The statistics show that developers may be providing too much short-term supply,<sup>153</sup> while the residents may be voicing too much concern. Growth and the threat of growth continue to spark reactions of varying degree, and it is clear at this new frontier of growth politics that all parties will continue to become ever more creative and ever more manipulative in the legal arena in order to further their pro- or anti-growth agenda.

In the end, Hometown Democracy fell just 20,000 signatures short of the 611,000 signatures needed to make the November 2008 ballot. Although supporters had until February 1 to obtain the required signatures for the November 2008 ballot, they still have four years to collect the additional signatures needed for ballot eligibility,<sup>154</sup> and it is plausible to expect the measure on a Florida statewide ballot in either 2010 or 2012. Nonetheless, it is interesting to consider that for all the hype created by Hometown Democracy proponents, for all the broad statements about Floridians' purported disgust with present-day growth, and for all the claims of benefits a Hometown Democracy regime would bring, supporters could not qualify the measure for the November ballot. The voters simply would not accept the petitioners' overreactions to the sort of growth that existed in a Florida now past.

152. Editorial, *supra* note 150.

153. See Kelly, *supra* note 70. Newly constructed residential high-rises in West Palm Beach remain largely vacant because developers have not found public demand for new additional housing units. *Id.*

154. FLA. STAT. § 100.371 (2007). Petition signatures are valid for four years. *Id.*