
IN THE SUPREME COURT OF FLORIDA

Case No. SC15-780 and SC15-890
(Consolidated)

Upon Request From the Attorney General
For An Advisory Opinion As To The
Validity Of An Initiative Petition

**ADVISORY OPINION TO THE ATTORNEY GENERAL RE:
LIMITS OR PREVENTS BARRIERS
TO LOCAL SOLAR ELECTRICITY SUPPLY**

**ANSWER BRIEF OF
THE CITY OF CORAL GABLES**

Craig E. Leen, B.C.S.
City Attorney
City of Coral Gables
405 Biltmore Way
Coral Gables, Florida 33134
cleen@coralgables.com
Phone: (305) 460-5218
Florida Bar No. 701696

Floyd R. Self, B.C.S.
Berger Singerman LLP
125 South Gadsden St., Suite 300
Tallahassee, Florida 32301
fself@bergersingerman.com
Phone: (850) 521-6727
Florida Bar No. 608025

And

Javier L. Vazquez, Esq.
Berger Singerman LLP
1450 Brickell Avenue, Suite 1900
Miami, FL 33131-3453
jvazquez@bergersingerman.com
Phone: (305) 714-4378
Florida Bar No. 861121

Counsel for the City of Coral Gables

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF THE ANSWER ARGUMENT	2
ARGUMENT	2
I. THE AMENDMENT APPEARS TO NOT COMPLY WITH THE SINGLE-SUBJECT REQUIREMENT.....	2
A. THE AMENDMENT IS NOT LIMITED TO THE PSC.	3
B. THE EFFECT OF THE AMENDMENT ON LOCAL GOVERNMENTS IS POTENTIALLY BROADER THAN STATED BY THE SPONSOR.....	5
CONCLUSION	9
CERTIFICATE OF SERVICE	12
CERTIFICATE OF COMPLIANCE.....	15

TABLE OF AUTHORITIES

Page

CASES

<i>Advisory Op. to the Att'y Gen. re Fairness Initiative Requiring Leg. Determination That Sales Tax Exemptions and Exclusions Serve a Pub. Purpose,</i> 880 So.2d 630 (Fla.2004).....	5
<i>Advisory Opinion to Atty Gen. re Tax,</i> 644 So.2d 486 (Fla. 1944).....	9
<i>Advisory Opinion to the Attorney General re People's Property Rights,</i> 699 So.2d 1304 (Fla. 1997).....	4
<i>Evans v. Firestone,</i> 457 So.2d 1351 (1984).....	5

STATUTES

Section 101.161(1), Florida Statutes.....	5
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PRELIMINARY STATEMENT

Within this Answer Brief, the City of Coral Gables shall continue to refer to itself as “the City” or “Coral Gables.” The subject of these proceedings, the proposed amendment to the Florida Constitution titled the “Limits or Prevents Barriers to Local Solar Electricity Supply,” will be referred to as the “Solar Initiative” or the “Amendment.” The Sponsor of the Amendment, Floridians for Solar Choice, Inc., shall be referred to as the “Sponsor” or “FSC,” and the Sponsor’s Initial Brief shall be cited as the “FSC B. at__.” The City’s sole concern is its continued ability to use aesthetics as a zoning tool if the proposed solar amendment to Florida’s constitution passes. The City is very supportive of the use of solar, and as the economics of solar power generation continue to improve, the City looks forward to more people being able to utilize energy from the sun.

STATEMENT OF THE CASE AND FACTS

The City takes no issue with the Sponsor’s statement of the case and facts. The City believes that all of the briefs submitted on June 10, 2015, in this matter are in basic agreement as to the facts, that the standard of review for this Court is *de novo*, and that the Amendment cannot violate the single subject requirements or the title and summary requirements for initiative amendments.

SUMMARY OF THE ANSWER ARGUMENT

The City's concerns regarding the status of its aesthetic-based regulations and approval process stem from several issues with the Amendment that were fully addressed in the City's Initial Brief and will not be repeated here. Instead this Answer Brief shall address two matters raised by the Sponsor in its Initial Brief that appear inconsistent with the language in the Amendment. First, the Amendment is not limited just to matters within the jurisdiction of the Florida PSC. Second, the effect of the Amendment on state and local governments is potentially greater than the Sponsor has represented due to the exception language in the Amendment for regulations that "prohibit or have the effect of prohibiting the supply of solar-generated electricity by a local solar electricity supplier."

ARGUMENT

I. THE AMENDMENT APPEARS TO NOT COMPLY WITH THE SINGLE-SUBJECT REQUIREMENT.

The Initial Brief of the Amendment Sponsor, Floridians for Solar Choice, paints a picture of a very limited amendment to the Florida Constitution, one that seeks to only affect the jurisdiction of the Florida Public Service Commission by creating a new class of exempt solar providers and to preclude electric utilities from imposing discriminatory rates on the customers of those exempt solar providers.¹ If this is all that the Amendment proposed, then the City would have

¹ FSC B. at 6 and 21-22.

no issues with the Amendment. But the language in the Amendment is not consistent with the intent and scope offered by the Sponsors in their Initial Brief. This inconsistency only further muddies the ambiguity within the Amendment that may potentially restrict or prohibit the ability of the City of Coral Gables to promote solar power usage while preserving its unique local aesthetic standards through its architectural review board process. There are two issues with the Sponsor's statements when compared to the language in the Amendment.

A. THE AMENDMENT IS NOT LIMITED TO THE PSC.

The Sponsor's attempt to draw the Amendment as a very limited change to the jurisdiction of the PSC is simply not in agreement with the language of the Amendment.

The Sponsor states:

The Solar Amendment's impacts on law and government are **limited in scope**. The Amendment's restrictions apply only to the legislative function of government and only to a narrow class of persons or entities, leaving government's regulation of electricity supply largely unchanged. Furthermore, **the regulatory activity proscribed by the Amendment is currently performed only by the FPSC**, not local governments, so the Solar Amendment's impacts affect only one level of government.²

If the Sponsor intended to affect only the jurisdiction of the PSC, then the

² FSC B. at 21 (emphasis added).

language used in the Amendment could have been so limited. But nowhere in the Amendment is there any identification of the PSC or any other language that could be construed so as to limit the Amendment to matters “only” within the PSC’s authority. Quite the contrary, the language used in the Amendment speaks to multiple levels of government: “A local solar electricity supplier, as defined in this section, shall not be subject to **state or local government regulation** with respect to rates, service, or territory, or be subject to any assignment, reservation, or division of service territory between or among electric utilities.”³ The phrase “state” government is not defined, but it would be unreasonable and illogical for “state” government to mean just the PSC.

Similarly, the fact that the Amendment also includes “local government” within its scope evidences an intent to affect more than the PSC. Indeed, the Amendment expressly defines “local government” in broad language to include “any county, municipality, special district, district, authority, or any other subdivision of the state.”⁴ As this Court has said, an initiative like this one that includes both state and local governments certainly has “a distinct and substantial effect on more than one level of government.”⁵

If the Sponsor intended to only affect the PSC by creating an exception to

³ Amendment, Section 29(b)(1) (emphasis added).

⁴ Amendment, Section 29(c)(4).

⁵ *Advisory Opinion to the Attorney General re People’s Property Rights*, 699 So.2d 1304, 1308 (Fla. 1997).

the PSC's jurisdiction and to carve out a restriction on electric utilities, then the Amendment could have easily been drawn to be so limited. But it is not. This Court should not be swayed by the Sponsor's commentary regarding the scope of the Amendment. Rather, the Court should focus solely on the express terms in the proposal. Given the words used, this Court must look to the functional effect of the Amendment to determine if it satisfies the single subject requirement.⁶ While there is some ambiguity as to the full scope and effect of the Amendment, it is not limited to just the PSC.

B. THE EFFECT OF THE AMENDMENT ON LOCAL GOVERNMENTS IS POTENTIALLY BROADER THAN STATED BY THE SPONSOR

The problems with the Sponsor's representations regarding the scope and effect of the Amendment on local governments go beyond any PSC or utility regulatory issues. The Sponsor's Initial Brief simply does not address language in the Amendment that potentially threatens the locally tailored, aesthetics-based regulatory requirements and process utilized by Coral Gables to promote solar usage while preserving the distinctive visual design features that constitute the

⁶ *Evans v. Firestone*, 457 So.2d 1351, 1354 (1984). Similarly, as the City addressed in its Initial Brief, the ballot summary and title also confuse voters and do not disclose the true purpose and effect of the amendment's text. *See, Advisory Op. to the Att'y Gen. re Fairness Initiative Requiring Leg. Determination That Sales Tax Exemptions and Exclusions Serve a Pub. Purpose*, 880 So.2d 630, 635–36 (Fla.2004) (detailing this Court's review of the validity of a ballot title and summary under section 101.161(1), Florida Statutes).

signature “look” and appeal of the City.

Initially, to address the Amendment’s single subject obligations, the Sponsor attempts to minimize the scope of the Amendment’s impact by discussing some of what will not be impacted by the Amendment – individual property owners installing solar panels for the owner’s own use, power sales to an electric utility, or power producing entities serving only themselves.⁷ These representations regarding the continuation of state and local regulatory authority with respect to anything other than the new exempt local solar electricity suppliers defined in the Amendment appear to be accurate.

But the disconnect occurs when the Sponsor discusses the scope of that state and local authority when it comes to regulating the conduct of the new local solar electricity suppliers. The Sponsor’s brief states, “government entities shall continue to have the authority to exercise their powers for the enhancement and protection of the health, safety and welfare of the public as they have under current law,” with the Sponsor citing to Paragraph (b)(4) of the Amendment.⁸ The Sponsor then explains that the purpose of this “limiting language” is to continue to protect the public health, safety, and welfare “while still accomplishing the chief purpose of the Amendment to limit or prevent barriers to the supply of local solar

⁷ FSC B. at 19-20.

⁸ FSC B. at 20.

electricity.”⁹ If this was true, the City would be satisfied. But paragraph (b)(4) of the Amendment contains additional language regarding the scope and purpose of the Amendment.

Paragraph (b)(4) of the Amendment starts by stating the state and local government reservation identified in the Sponsor’s brief: “nothing in this section shall prohibit reasonable health, safety and welfare regulations, including, but not limited to, building codes, electrical codes, safety codes and pollution control regulations.” But the sentence does not end at that point. Rather, the sentence continues by stating that reasonable health, safety, and welfare regulations may be imposed so long as they “**do not prohibit or have the effect of prohibiting** the supply of solar-generated electricity by a local solar electricity supplier.”¹⁰

This language may be the exception that swallows the rule. If the Amendment included some type of qualifier on the phrase “prohibit or have the effect of prohibiting,” then there may be some validity to the Sponsor’s statement that the Amendment retains some degree of state and local government control over the new local solar electricity suppliers. But the Sponsor is silent regarding the rest of the sentence.

Looking at the actual language in the Amendment, the exception language in (b)(4) appears to challenge the City’s aesthetics-based regulatory authority.

⁹ *Id.*

¹⁰ Amendment Paragraph (b)(4) (emphasis added).

Consider, for example, a local solar electric supplier that wanted to level a lot in a residential neighborhood in order to cover the lot with solar panels and sell electricity to contiguous properties. If a city like Coral Gables found such a proposal to be inconsistent with its aesthetics-based regulatory requirements, such that the city would not permit the solar facility, could the local solar provider still build without the city's permit?

Alternatively, consider the same proposed facility scenario but the local government sought changes in the proposed solar facility. If the local solar electricity supplier refused to make the changes – whether the changes were material or not, whether the cost of the changes was material or not, or whether the supplier agreed to make some changes but refused to make others – again, could the local solar electricity supplier proceed as it chooses irrespective of the city's decision?

Beyond aesthetics-based regulatory standards, there are a variety of historic preservation laws, restrictive covenants, setbacks, nuisance, tree standards, franchise fees, taxes, utility coordination and restoration services, zoning, businesses licenses, and any number of other state and local government regulations that may be applicable to a proposed local solar facility. If the intent of the Amendment is to remove any state or local government health, safety, and welfare regulations that “prohibit or have the effect of prohibiting the supply of

solar-generated electricity by a local solar electricity supplier,” then this would appear to impact multiple levels of government in violation of the single subject requirement.¹¹ While Coral Gables intends to continue with its aesthetics-based regulations, if the intent of this Amendment is to eliminate such authority, then such intent should be clearly communicated to the public so the voters will understand the full effect of this Amendment.

As Coral Gables discussed in its Initial Brief, the ambiguities in the language of the proposed Amendment raise serious and important questions and how the Amendment may impact the City’s long-standing aesthetics-based regulatory policies and procedures. The Sponsor’s Initial Brief only reinforces those questions and the effect of the Amendment on the City.

CONCLUSION

The City in its Initial Brief fully addressed the various legal standards regarding the single subject requirements and the standards governing titles and ballot summaries. The City has not repeated those arguments in this answer since nothing the Sponsor said in its Initial Brief refute what the City or other opponents have said regarding the many deficiencies in the Amendment. Opportunities for

¹¹ See, *Advisory Opinion to the Attorney General re Tax*, 644 So.2d 486, 494-495 (Fla. 1944) (ballot summary violates the single-subject rule because it substantially alters the functions of multiple branches of government and the ability of the legislature to comply with the directive in article II, section 7 (“It shall be the policy of the state to conserve and protect its natural resources and scenic beauty)).

the further expansion of solar energy production are already the policy of this State, and the authorization for the direct sale of solar energy to unaffiliated customers is a matter best addressed by the Florida Legislature.

For purposes of this Answer Brief, the City has addressed two specific matters raised by the Sponsor in its Initial Brief – the fact that the Amendment is not limited only to matters within the scope of the PSC’s jurisdiction and that the Sponsor’s incomplete commentary about the scope of the Amendment calls into question the potential impact and ability of Coral Gables to continue with its aesthetics-based regulatory policies and procedures for advancing the use of solar power within the City. These issues need to be addressed by this Court before the Amendment is permitted to advance to a vote.

Respectfully submitted, this 30th day of June, 2015.

Respectfully submitted,

BERGER SINGERMANN LLP

By: /s/ Floyd R. Self
Floyd R. Self, B.C.S.

Craig E. Leen, B.C.S.
City Attorney
City of Coral Gables
405 Biltmore Way
Coral Gables, Florida 33134
cleen@coralgables.com
Phone: (305) 460-5218
Florida Bar No. 701696

Floyd R. Self, B.C.S.
Berger Singerman LLP
125 South Gadsden St., Suite 300
Tallahassee, Florida 32301
fself@bergersingerman.com
Phone: (850) 521-6727
Florida Bar No. 608025

And

Javier L. Vazquez, Esq.
Berger Singerman LLP
1450 Brickell Avenue, Suite 1900
Miami, FL 33131-3453
jvazquez@bergersingerman.com
Phone: (305) 714-4378
Florida Bar No. 861121

Counsel for the City of Coral Gables

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 30, 2015, a true and correct copy of the foregoing was electronically filed with the Florida Courts E-Filing Portal with noticed furnished to all registered users, and as indicated below:

Via Electronic Mail:

The Honorable Pamela Jo Bondi
Attorney General
Lagran Saunders, Esq.
Assistant Attorney General
State of Florida, PL 01, The Capitol
Tallahassee, FL 32399-1050
oag@civil.eserve@myfloridalegal.com
Lagran.Saunders@myfloridalegal.com

Allen Winsor
Solicitor General
RACHEL NORDBY (FBN 056606)
Deputy Solicitor General
Office of the Attorney General
The Capitol - PL-01
Tallahassee, Florida 32399-1050
allen.winsor@myfloridalegal.com
rachel.nordby@myfloridalegal.com

The Honorable Rick Scott
Governor, State of Florida
Attn: Timothy Michele Cerio, Esq.
The Capitol, 400 South Monroe Street
Tallahassee, FL 32399-0001
tim.cerio@eog.myflorida.com

The Honorable Steve Crisafulli
Speaker, Florida House of
Representatives
Attn: Matthew Joseph Carson
General Counsel
420 The Capitol, 402 South Monroe St.
Tallahassee, FL 32399-1300
matthew.carson@myfloridahouse.gov

Robert L. Nabors
Gregory Thomas Stewart
William C. Garner
Nabors, Giblin & Nickerson, P.A.
1500 Mahan Drive, Suite 200
Tallahassee, FL 32308
rnabors@ngnlaw.com
gstewart@ngnlaw.com
bgarner@ngn-tally.com
legal-admin@ngnlaw.com

Stephen H. Grimes
D. Bruce May, Jr.
P.O. Drawer 810
Tallahassee, Florida 32302
Stephen.grimes@khlaw.com
Bruce.may@hklaw.com

The Honorable Kenneth J. Detzner
Florida Department of Secretary of State
Att: Adam Scott Tanenbaum
General Counsel
R.A. Gray Building
500 South Bronough Street
Tallahassee, FL 32399
adam.tanenbaum@dos.myflorida.com

Raoul G. Cantero
T. Neal McAliley
White & Case LLP
200 S. Biscayne Boulevard, Suite 4900
Miami, Florida 33131-2352
raoul.cantero@whitecase.com
nmcaililey@whitecase.com

The Honorable Andy Gardiner
President, The Florida Senate
Attn: George Levesque
General Counsel, 409 The Capitol
404 South Monroe Street
Tallahassee, FL 32399-1100
glevesque4@comcast.net

Dan R. Stengle
Dan R. Stengle LLC
502 North Adams Street
Tallahassee, Florida 32301
dstengle@comcast.net

Linda Lomis Shelley
Buchanan, Ingersoll & Rooney, PC
101 North Monroe Street Suite 1090
Tallahassee, Florida 32301
Linda.Shelley@bipc.com

William B. Willingham
Michelle L. Hershel
2916 Apalachee Parkway
Tallahassee, FL 32301
fecabill@embarqmail.com
mhershel@feca.com

Harry Morrison, Jr.
Florida League of Cities, Inc.
301 South Bronough Street, Suite 300
Tallahassee, Florida 32302-1757
Cmorrison@flcitites.com

Donna E. Blanton
Radey Law Firm
301 S. Bronough St., Ste.
Tallahassee, FL 32301
sclark@radeylaw.com
dblanton@radeylaw.com

M. Stephen Turner
Broad and Cassel
215 S. Monroe St.
Ste. 400 (32301
P.O. Drawer 11300
Tallahassee, FL 32302
sturner@broadandcassel.com
pwilliams@broadandcassel.com
mubieta@broadandcassel.com

Jeffrey A. Stone
Terrie L. Didier
Beggs & Lane, RLLP
P.O. Box 12950
Pensacola, FL 32591
jas@beggslane.com
md@beggslane.com
tld@beggslane.com
aeh@beggslane.com

Jody Lamar Finklea
Amanda L. Swindle
2061-2 Delta Way
Tallahassee, FL 32303
jody.finklea@fmpa.com
amanda.swindle@fmpa.com

Barry Richard
Greenburg Traurig, PA
101 E. College Ave.
Tallahassee, FL 32301
richardb@gtlaw.com

Kenneth B. Bell
Gunster, Yoakley & Stewart, PA
215 S. Monroe St., Ste. 601
Tallahassee, FL 32301
(850) 521-1980
kbell@gunster.com

Alvin Davis
Squire Patton Boggs, LLP
200 S. Biscayne Blvd., Ste. 4100
Miami, FL 33131-2362
(305) 577-2835
alvin.davis@squirepb.com

John Burnett
Duke Energy Florida
P.O. Box 14042
St. Petersburg, FL 33733-4042
john.burnett@duke-energy.com

Major B. Harding
James D. Beasley
Ausley McMullen
123 S. Calhoun St.
Tallahassee, FL 3301
mharding@ausley.com
jbeasley@ausley.com

Carlos Muniz
McGuire Woods LLP
215 S. Monroe St., Ste. 602
Tallahassee, FL 32301
cmuniz@mcguirewoods.com

Tory Perfetti, Chairperson
George Cavros, Esquire
Floridians for Solar Choice, Inc.
120 East Oakland Park Blvd., Suite 105
Ft. Lauderdale, FL 33334
George@cavros-law.com

W. Christopher Browder
Vice President and General Counsel
Orlando Utilities Commission
100 West Anderson Street
Orlando, Florida 32801
cbrowder@ouc.com
ttressler@ouc.com

Via United States Mail:

Financial Impact Estimating Conference
ATTN: Amy Baker, Coordinator
Office of Economic and Demographic
Research
111 West Madison Street, Suite 574
Tallahassee, FL 32399-6588

By: s/ Floyd R. Self

CERTIFICATE OF COMPLIANCE

Counsel for Appellant hereby certifies that this Answer Brief is typed in 14 point Times New Roman, in compliance with Fla. R. App. P. 9.100(l).

By: s/ Floyd R. Self

Craig E. Leen, B.C.S.
City Attorney
City of Coral Gables
405 Biltmore Way
Coral Gables, Florida 33134
cleen@coralgables.com
Phone: (305) 460-5218
Florida Bar No. 701696

Floyd R. Self, B.C.S.
Berger Singerman LLP
125 South Gadsden St., Suite 300
Tallahassee, Florida 32301
fself@bergersingerman.com
Phone: (850) 521-6727
Florida Bar No. 608025

And

Javier L. Vazquez, Esq.
Berger Singerman LLP
1450 Brickell Avenue, Suite 1900
Miami, FL 33131-3453
jvazquez@bergersingerman.com
Phone: (305) 714-4378
Florida Bar No. 861121