

Charter amendment, land development

Number: INFORMAL

Date: October 17, 2007

Mr. Jose Smith
City of Miami Beach Attorney
1700 Convention Center Drive
Fourth Floor
Miami Beach, Florida 33139

Dear Mr. Smith:

On behalf of the City Commission for the City of Miami Beach, you have asked whether the city's charter may be amended by referendum approval to impose a general policy regarding land development regulations for a hospital district, but with no requirement for future referenda, without violating section 163.3167(12), Florida Statutes.

The City of Miami Beach has proposed the following ballot question:

Shall the Charter be amended to provide that when a "Hospital District" is rezoned, such property shall (in accordance with procedures established by ordinance) be rezoned to a district or combination of districts with a floor area ratio no greater than the abutting land (sharing lot line), except that "Hospital District" property exceeding 15 acres may exceed this limitation if adequate buffers are provided to protect abutting uses?

Section 166.031, Florida Statutes, provides for the amendment of municipal charters and requires, among other things, approval by referendum.[1] Your inquiry arises in light of the provisions of section 163.3167(12), Florida Statutes, which provides:

"An initiative or referendum process in regard to any development order or in regard to any local comprehensive plan amendment or map amendment that affects five or fewer parcels of land is prohibited."

The plain language of the statute precludes the use of an initiative or referendum process to approve any development order or any local comprehensive plan amendment or map amendment affecting five or fewer parcels of land. For development orders or comprehensive plan amendments or map amendments affecting six or more parcels, however, the courts have held that an initiative or referendum process may be used.[2]

This office has not been provided with information as to whether the proposed charter amendment effectively applies to five or fewer parcels of land. This would be a factual determination that would clearly affect the application of section 163.3167(12), Florida Statutes. Nor is it evident from your letter whether the adoption of this amendment is directed toward the expansion of a specific hospital which occupies a single parcel of land, or the effect it has on the city's comprehensive plan. In the absence of such information, this office cannot definitively

comment on this matter. In an effort to be of assistance, however, the following general comments are offered.

It is a well settled rule that municipalities may not do indirectly what cannot be done directly.[3] The passage of a charter amendment by referendum approval which effectively rezones fewer than six parcels in a hospital district would accomplish the same result as requiring referendum approval a development order or comprehensive plan amendment for such parcels. Thus, this office is concerned that by adopting a charter amendment approved by referendum, the city is in effect accomplishing indirectly that which it is prohibited from doing directly by section 163.3167(12), Florida Statutes.

As noted, however, this office has insufficient information to resolve this issue. In light of the issues raised only by the city and those raised by other interested parties, it would appear to be appropriate in this instance to seek a declaratory judgment from the circuit court. The court would have the benefit of having specific facts in order to determine whether the action proposed by the city complies with the provisions in section 163.3167, Florida Statutes.

I trust that these informal comments will be of assistance to you in the resolution of this matter.

Sincerely,

Lagran Saunders
Assistant Attorney General

ALS/t

[1] See ss. 166.031(1) and (2), Fla. Stat.

[2] See *Citizens for Responsible Growth v. City of St. Pete Beach*, 940 So. 2d 1144, 1150 (Fla. 2nd DCA 2006). See also *Advisory Opinion to Att'y Gen. Re: Referenda Required for Adoption & Amendment of Local Gov't Comprehensive Land Use Plans*, 938 So. 2d 501, 504 (Fla. 2006) (statutory scheme allows local governments to utilize a referendum process in regard to a plan amendment if the plan amendment affects more than five parcels of land).

[3] See *Solomon v. City of Miami Beach*, 187 So. 2d 373 (Fla. 3d DCA 1966), *cert. denied*, 196 So. 2d 927 (Fla. 1967).