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M E M O R A N D U M

TO: Alachua County Charter Review Commission
FROM: Wade C. Vose, Esq., General Counsel
DATE: April 8, 2020
SUBJECT: Legal Analysis and Initial Ballot and Charter Language – Charter Amendment Establishing County Land Use Regulation Area

Pursuant to the Charter Review Commission's request, this office has evaluated and prepared draft ballot and charter language for Proposal 1, advanced for legal review at the CRC's January 22, 2020 meeting. To generally summarize, this proposal contemplates that land that presently lies in unincorporated Alachua County would remain under the land use authority of the County if and when the land is subsequently annexed into one of the County's municipalities.

As we have previously discussed at a number of your meetings, the conceptual underpinnings of this proposal generally conform to what we have referred to as the "Seminole County Model", referencing Seminole County's successful defense of its Rural Area charter amendment in *Seminole County v. City of Winter Springs*, 935 So. 2d 521 (Fla. 5th DCA 2006).

As I have previously advised the CRC, this office is of the opinion that a properly drawn charter amendment in this vein would presently constitute a permissible exercise of Florida county charter authority, pursuant to the principles enunciated in the *Seminole County* case. As we have further discussed, the primary threat to such a proposal does not lie from a potential judicial reevaluation of *Seminole County*, but rather from the provisions of Section 1 of Senate Bill 410 (2020), recently passed by the Florida Legislature and presently awaiting presentment to the Governor.

As such, this memorandum will not be directed to an exhaustive review of *Seminole County*, but will rather address a few key principles addressed in that case and a prior Florida Supreme Court case upon which it relies, *Broward County v. City of Ft. Lauderdale*, 480 So.2d 631 (Fla. 1985), in order to demonstrate the Florida constitutional right of a charter county, and of the voters of a charter county, via an appropriate charter provision, to vest in a charter county exclusive land use authority within the boundaries of a municipality, and thereby to suggest at least some substantive reasons why Section 1 of Senate Bill 410, if signed into law, may nevertheless be unconstitutional.

The memorandum will conclude with a brief explanation of two alternative drafts of charter and ballot language.

Seminole County and Broward County, and County Charter Preemption of Municipal Regulatory Authority

Article VIII, Section 1(g), of the Florida Constitution provides in pertinent part:

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(g) CHARTER GOVERNMENT. Counties operating under county charters shall have all powers of local self-government not inconsistent with general law, or with special law approved by vote of the electors. The governing body of a county operating under a charter may enact county ordinances not inconsistent with general law. *The charter shall provide which shall prevail in the event of conflict between county and municipal ordinances.* [Emphasis added.]

It is important to note at the outset that Florida courts have construed the authority granted by the italicized sentence more broadly than the language might suggest at first glance. In *Broward County*, the Florida Supreme Court repeatedly referred to such authority as the “power to preempt”, stating:

Section 1(g), as we conclude both from the commentary and an understanding of the constitutional scheme vis-a-vis charter counties, was intended to specifically give charter counties two powers unavailable to non-charter counties: the power to preempt conflicting municipal ordinances, and the power to avoid intervention of the legislature by special laws. *The power to preempt is the power to exercise county power to the exclusion of municipal power. Preemption is a transfer of power, from exclusive municipal authority or concurrent authority, to exclusive county authority.*

Id. at 634.

Further, the preemptive nature of the authority granted by the Florida Constitution to charter counties is expressly recognized in the Municipal Home Rule Powers Act, Sec. 166.021, Fla. Stat.:

(3) The Legislature recognizes that pursuant to the grant of power set forth in s. 2(b), Art. VIII of the State Constitution, the legislative body of each municipality has the power to enact legislation concerning any subject matter upon which the state Legislature may act, except:

...

(d) Any subject preempted to a county pursuant to a county charter adopted under the authority of ss. 1(g), 3, and 6(e), Art. VIII of the State Constitution.

In *Broward County*, the Florida Supreme Court grappled with reconciling this preemptive power with the provisions of Article VIII, Section 4 of the Florida Constitution, which requires, *inter alia*, the approval at a dual referendum of any transfer of a “function or power” between a county, municipality, or special district. The court resolved the conflict by holding that “section 1(g) permits *regulatory* preemption by counties, while section 4 requires dual referenda to transfer functions or powers relating to *services*.” *Id.* at 635.

In *Seminole County*, the court began its analysis by noting:

The most significant feature of charter counties is the direct constitutional grant of broad powers of self-government, which include local citizens' power to enable their charter county to enact regulations of county-wide effect which preempt conflicting municipal ordinances. *See* Art. VIII, § 1(g), Fla. Const., D'Alemberte commentary, reprinted in 26A Fla. Stat. Ann. 155, 157 (West 1995) (“This entirely new subsection provides for the broadest extent of county self-government or ‘home rule’ as it is commonly described... the power which may be granted to county governments under a charter is the power to have county ordinances take precedence over municipal ordinances.”).

935 So.2d at 523.

Relying on *Broward County*, the court in *Seminole County* found that “Land use regulation is just that – regulation”, and as such, “the electorate of a charter county may preempt a city's land use regulation by charter, without a dual vote of the city's electorate.” *Seminole County*, 935 So.2d at 529. The court proceeded to note:

This obvious conclusion is also memorialized in the [Local Government Comprehensive Planning and Land Development Regulation] Act itself, which expressly recognizes that: “In the case of chartered counties, the county may exercise such authority over municipalities or districts within its boundaries as is provided for in its charter.” § 163.3171(2), Fla. Stat. (2005).

Id.

The court in *Seminole County* concluded its opinion with the following:

In summary, Florida's Constitution recognizes that: “All political power is inherent in the people.” Art. I § 1, Fla. Const. When it comes to charter counties and municipalities within those counties, the Constitution expressly grants the electorate a right to determine by charter which government they desire to vest with preemptive regulatory power. Art. VIII, § 1(g), Fla. Const. The voters of Seminole County have made that election. With respect to the “Rural Area” of Seminole County, the people have chosen to grant preemptive land use regulatory power exclusively to the County. Their decision to do so constituted a perfectly valid election under the Florida Constitution.

Id.

Summary of Section 1 of Senate Bill 410

Section 1 of Senate Bill 410 (2020) adds a subsection 11 to Sec. 163.3167, Fla. Stat., and reads in pertinent part as follows:

(11) A county may not adopt, after January 1, 2020, any comprehensive plan, land development regulation, or other form of restriction that serves as a limitation on a municipality from establishing land use and zoning on lands located within a municipality unless the municipality, through its own ordinances, adopts and imposes the provision, goal, objective, or policy on lands located within the municipal jurisdiction. A county may not limit a municipality from deciding the land uses, density, and intensity allowed on lands annexed into a municipality as long as the municipality is in compliance with subsection (3). This subsection does not apply to a charter county with a population in excess of 750,000 as of January 1, 2020, which has in place as of that date charter provisions governing land use or development, which provisions apply to all jurisdictions within the county.

Notably, the “limit” or “limitation” the first two sentences seek to prohibit could only exist in Florida’s 20 charter counties. Art. VIII, Sec. 1(f), Fla. Const. makes clear that within non-charter counties, “a[] [county] ordinance in conflict with a municipal ordinance shall not be effective within the municipality to the extent of such conflict.” Sec. 163.3171, Fla. Stat., reiterates that a non-charter county has land use authority only “for the total unincorporated area under its jurisdiction”.¹

As such, the bill provision is a legislative attempt to deprive charter counties of the ability to exercise the direct and seemingly unqualified grant of constitutional authority for their charters to “provide which shall prevail in the event of conflict between county and municipal ordinances”, as that power has been characterized in the *Broward County* and *Seminole County* cases.

Florida law is generally clear that “A statute enacted by the Legislature may not constrict a right granted under the ultimate authority of the Constitution.” *Austin v. State ex rel. Christian*, 310 So. 2d 289, 293 (Fla. 1975). However, as a practical matter, preliminary research has not revealed an example of litigation challenging the Legislature’s attempt to restrict a county’s unqualified constitutional right. This is probably because almost all of the other rights that (both charter and non-charter) counties have under the Florida constitution are expressly qualified in some way, with clauses such as “as is provided by general or special law”, “not inconsistent with general or special law”, “not inconsistent with general law, or with special law approved by vote of the electors”, and “shall... be authorized by law”.

By way of analogy, the Florida Constitution grants Florida counties another seemingly unqualified right, added in 1998 at Art. VIII, Sec. 5(b), which states in pertinent part:

¹ Also notable, although not essential to this analysis, is the lack of a time qualifier on the second sentence’s prohibitions. While the first sentence prohibits the adoption of certain restrictions after January 1, 2020, the second sentence, without a time qualifier, prohibits a county from “limit[ing] a municipality from deciding the land uses, density, and intensity allowed on lands annexed into a municipality.” In light of the lack of a time qualifier, the second sentence would appear to nullify the effect of Seminole County’s preexisting Rural Area charter provision. This reading is further supported by the third sentence, which exempts from the subsection only certain charter counties (those with a population in excess of 750,000 as of January 1, 2020) with relevant preexisting charter provisions. Seminole County’s estimated population in 2017 was roughly 462,000.

- (b) Each county shall have the authority to require a criminal history records check and a 3 to 5-day waiting period, excluding weekends and legal holidays, in connection with the sale of any firearm occurring within such county.

It is notable that when the Legislature amended Sec. 790.33, Fla. Stat. (preempting the local regulation of firearms) in 2011 to otherwise add many of its more draconian punishments for county and city officials who violated the preemption, the Legislature nevertheless went out of its way to add the qualifier “Except as expressly provided by the State Constitution”. See Ch. 2011-109, Laws of Florida. The House final bill analysis makes clear that the clause was added to respect the direct constitutional grant of authority to counties, notwithstanding the Legislature’s preemptive desires and intent.

The ultimate question, with respect to the constitutional rights of charter counties, is whether the Legislature can prohibit a charter county from exercising its seemingly unqualified constitutional right for its charter to “provide which shall prevail in the event of conflict between county and municipal ordinances.” I believe that there are persuasive arguments that the Legislature cannot do so, and that Section 1 of Senate Bill 410 may be subject to being found unconstitutional on this basis.

In addition, while the *Broward County* case referred to the aforementioned right as being a “power” “specifically give[n]” to charter counties, 480 So.2d at 634, the *Seminole County* case characterized it as being a right granted to “the electorate” and “the people”, stating “the Constitution expressly grants the electorate a right to determine by charter which government they desire to vest with preemptive regulatory power. Art. VIII, § 1(g), Fla. Const.” 935 So. 2d at 529. While the State may try to argue that the Legislature may nevertheless prohibit a charter county from exercising one of its unqualified constitutional rights, such arguments would seem likely to fail with respect to limiting the constitutional rights of the people, as recognized by the court in *Seminole County*.

Explanation of Two Alternative Drafts – Regulation of All Presently Unincorporated Area, and Regulation of Only Some Presently Unincorporated Area

This charter amendment proposal as originally presented contemplated the County’s retention of land use authority for all of the presently unincorporated area of the County (i.e., all land lying outside of the County’s municipalities). The draft charter amendment at Exhibit “A” hereto implements this version of the proposal. Subsequently, the Board of County Commissioners continued to fine tune their inquiries into this same subject matter, and asked County staff to formulate additional maps options identifying subsets of the unincorporated area of the County over which the County might exercise exclusive land use authority pursuant to a charter amendment, with each map guided by stated planning rationales. Those map options, as presented to the County Commission on March 3, 2020, are attached as Exhibit “C”.

The Map Options generally proceed from encompassing more presently unincorporated land to less. Map Option #1 generally comports with the draft charter amendment at Exhibit “A”. Map Option #1A excludes the unincorporated Urban Cluster as designated in the County

comprehensive plans from the land covered by Map Option #1. Map Option #2 alternatively excludes all of the former Reserve Areas under the former Boundary Adjustment Act. Map Option #2A, according to the County staff presentation, excludes “modified versions” of the former Reserve Areas from exclusive County land use authority. At this point, the guiding rationale in formulating these “modified versions” is not immediately clear, so additional clarification from County staff would be warranted to accurately describe this option to voters. Finally, Map Option #3 excludes from the land covered by Map Option #1 all lands not designated “Critical Ecological Corridors”, “Strategic Ecosystems”, or “Preservation” areas in the County’s comprehensive plan, or otherwise subject to conservation easements.

At this point, an alternative draft has been prepared at Exhibit “B” as a general starting point to use to implement Map Options #1A through 3. Keep in mind that with each of these options, the CRC will have to decide whether or not to endeavor to describe the contours of the “County Land Use Regulation Area” to the voters within the ballot summary. If you do, please keep in mind that you will have precious little space to do so, and it will have to be very accurate. The ballot summary at Exhibit “A”, implementing Map Option #1, does so with the following 11 words: “consisting of all lands outside municipal boundaries on April 1, 2020”. It is notable that the ballot summary for the Seminole County Rural Area amendment did not endeavor to describe or summarize the contours of the “Rural Boundary” or “Rural Area”, but only stated that one was being created. As such, the ballot summary for the alternative draft at Exhibit “B” presently excludes a description or summary of the contours of the County Land Use Regulation Area, and references a map in a manner similar to the language in the Seminole County Rural Area charter provision.

Both draft charter amendments resolve some of the questions raised by County staff in their March 3, 2020 presentation to the Board of County Commissioners. The amendment drafts make clear that the “comprehensive plan” and “land development regulations” of the County will exclusively govern the development of lands within the County Land Use Regulation Area. Both quoted terms are well defined in Ch. 163, Fla. Stat., thus avoiding the need to redefine such terms (and the risk of introducing potential ambiguity). Also, by having the “land development regulations” (which includes zoning) of the County exclusively govern, the amendment avoids certain ambiguities inherent in the Seminole County charter provision (such as whether a municipality can impose its own zoning regulations in the Rural Area so long as they are consistent with the County’s comprehensive plan).

Both draft charter amendments also allow for the Board of County Commissioners to remove lands from the County Land Use Regulation Area. In contrast to the Seminole County charter provision, the draft amendments require the affirmative vote of at least four commissioners to do so. This, of course, can be changed at the CRC’s discretion.

Exhibit “A”

QUESTION #X

Ballot Proposal: The ballot title and ballot summary for Question #X are as follows:

COUNTY CHARTER AMENDMENT
ESTABLISHING COUNTY LAND USE
REGULATION AREA

Shall the County Charter be amended, effective countywide, to establish a County Land Use Regulation Area (“Area”), consisting of all lands outside municipal boundaries on April 1, 2020, provide for removal of lands from the Area, provide that the County’s comprehensive plan and land development regulations will exclusively govern land development in the Area, whether inside or outside municipal boundaries, authorize implementing ordinances, and provide that the charter and implementing ordinances supersede conflicting municipal ordinances?

_____ Yes
_____ No

Text Revisions: Upon approval of this question at referendum, the following portions of the Alachua County Charter are amended to read as follows:

Sec. 1.4. - Relation to municipal ordinances.

Except as otherwise provided by this charter, Mmunicipal ordinances shall prevail over county ordinances to the extent of any conflict. Notwithstanding the foregoing, if the county and a municipality enact ordinances establishing different standards for the purpose of protecting the environment by prohibiting or regulating air or water pollution, the ordinances imposing more stringent standards shall prevail to the extent of the difference and be fully enforceable within the boundaries of such municipality; however, the ordinances imposing less stringent standards shall not be deemed to conflict with ordinances imposing more stringent standards and shall also be fully enforceable within the boundaries of such municipality.

Sec. 1.5. - Land use planning.

A. Except as provided in Section 1.5(B), Eeach municipality shall be responsible for land use planning within its respective boundaries and the county shall be responsible for land use planning in the unincorporated area. Notwithstanding the foregoing, the county and any municipality may enter

into an interlocal agreement to provide for joint planning in portions of the unincorporated area not located within any area designated pursuant to general or special law as a reserve for annexation by another municipality or in portions of the area within such municipality.

B. County Land Use Regulation Area

- (1) There is hereby established a County Land Use Regulation Area, initially consisting of all those lands lying within Alachua County that are not within the municipal boundaries of a municipality pursuant to Florida law as of April 1, 2020. The board of county commissioners may, by ordinance approved by affirmative vote of no less than four commissioners, remove lands from the County Land Use Regulation Area.
- (2) After the effective date of this subsection, the comprehensive plan and land development regulations of Alachua County shall exclusively govern the development of lands lying within the County Land Use Regulation Area, regardless of whether some or all of the lands lying within the County Land Use Regulation Area are located or subsequently annexed into a municipality.
- (3) The board of county commissioners may enact ordinances to implement this subsection. Municipal ordinances in conflict with this subsection or any implementing county ordinance are superseded to the extent of such conflict.
- (4) Pursuant to Section 4.2(D), the charter amendment effectuating this subsection is expressly declared to be effective county-wide, and the proposing charter review commission has determined that such county-wide amendment fulfills an important county purpose.

Exhibit “B”

QUESTION #X

Ballot Proposal: The ballot title and ballot summary for Question #X are as follows:

COUNTY CHARTER AMENDMENT
ESTABLISHING COUNTY LAND USE
REGULATION AREA

Shall the County Charter be amended, effective countywide, to establish a County Land Use Regulation Area (“Area”), provide for removal of lands from the Area, provide that the County’s comprehensive plan and land development regulations will exclusively govern land development in the Area, whether inside or outside municipal boundaries, authorize implementing ordinances, and provide that the charter and implementing ordinances supersede conflicting municipal ordinances?

_____ Yes
_____ No

Text Revisions: Upon approval of this question at referendum, the following portions of the Alachua County Charter are amended to read as follows:

Sec. 1.4. - Relation to municipal ordinances.

Except as otherwise provided by this charter, Mmunicipal ordinances shall prevail over county ordinances to the extent of any conflict. Notwithstanding the foregoing, if the county and a municipality enact ordinances establishing different standards for the purpose of protecting the environment by prohibiting or regulating air or water pollution, the ordinances imposing more stringent standards shall prevail to the extent of the difference and be fully enforceable within the boundaries of such municipality; however, the ordinances imposing less stringent standards shall not be deemed to conflict with ordinances imposing more stringent standards and shall also be fully enforceable within the boundaries of such municipality.

Sec. 1.5. - Land use planning.

A. Except as provided in Section 1.5(B), Eeach municipality shall be responsible for land use planning within its respective boundaries and the county shall be responsible for land use planning in the unincorporated area. Notwithstanding the foregoing, the county and any municipality may enter into an interlocal agreement to provide for joint planning in portions of the

unincorporated area not located within any area designated pursuant to general or special law as a reserve for annexation by another municipality or in portions of the area within such municipality.

B. County Land Use Regulation Area

- (1) There is hereby established a County Land Use Regulation Area, initially consisting of all those lands so designated on that certain map titled “County Land Use Regulation Area Map” dated May 1, 2020, which is on file in the official records of the clerk of the board of county commissioners. The board of county commissioners may, by ordinance approved by affirmative vote of no less than four commissioners, remove lands from the County Land Use Regulation Area.
- (2) After the effective date of this subsection, the comprehensive plan and land development regulations of Alachua County shall exclusively govern the development of lands lying within the County Land Use Regulation Area, regardless of whether some or all of the lands lying within the County Land Use Regulation Area are located or subsequently annexed into a municipality.
- (3) The board of county commissioners may enact ordinances to implement this subsection. Municipal ordinances in conflict with this subsection or any implementing county ordinance are superseded to the extent of such conflict.
- (4) Pursuant to Section 4.2(D), the charter amendment effectuating this subsection is expressly declared to be effective county-wide, and the proposing charter review commission has determined that such county-wide amendment fulfills an important county purpose.

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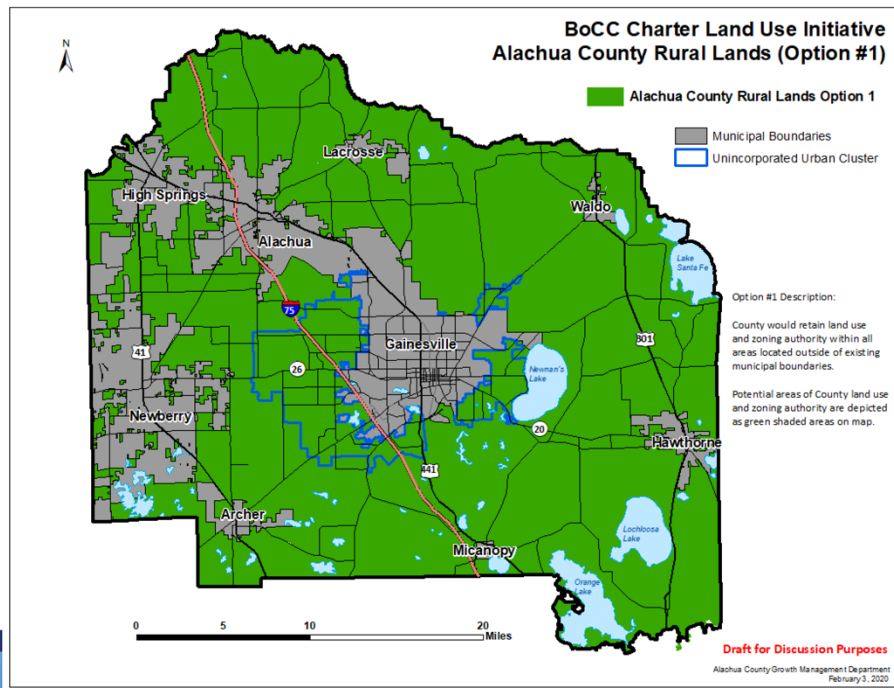
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Exhibit “C”

Map Option #1

County retains land use and zoning authority within all unincorporated areas outside of existing city boundaries.

Shown as green shaded areas on map

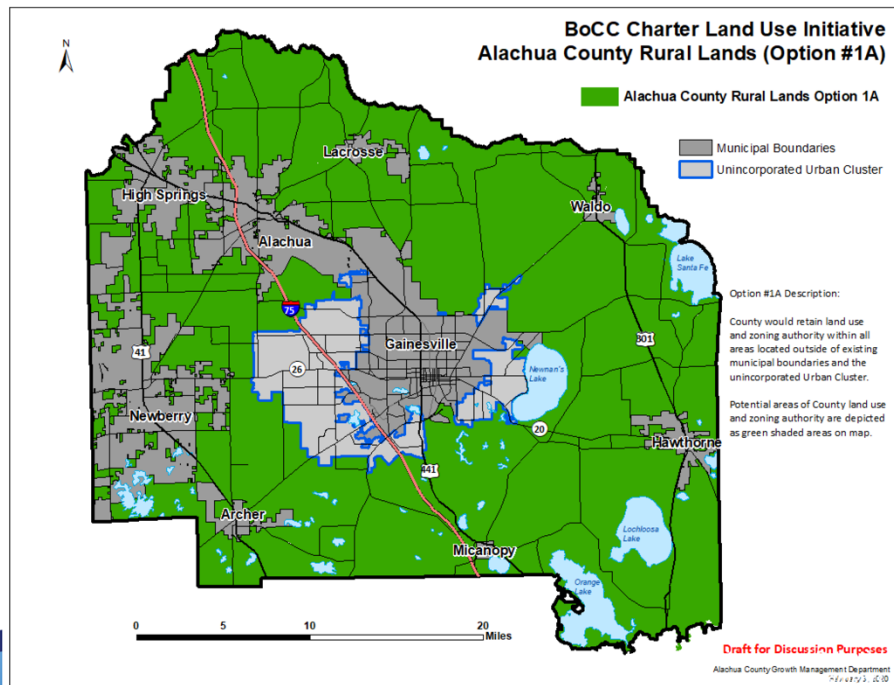


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Map Option #1A

County retains land use and zoning authority within all unincorporated areas outside of existing city boundaries and the unincorporated Urban Cluster.

Shown as green shaded areas on map



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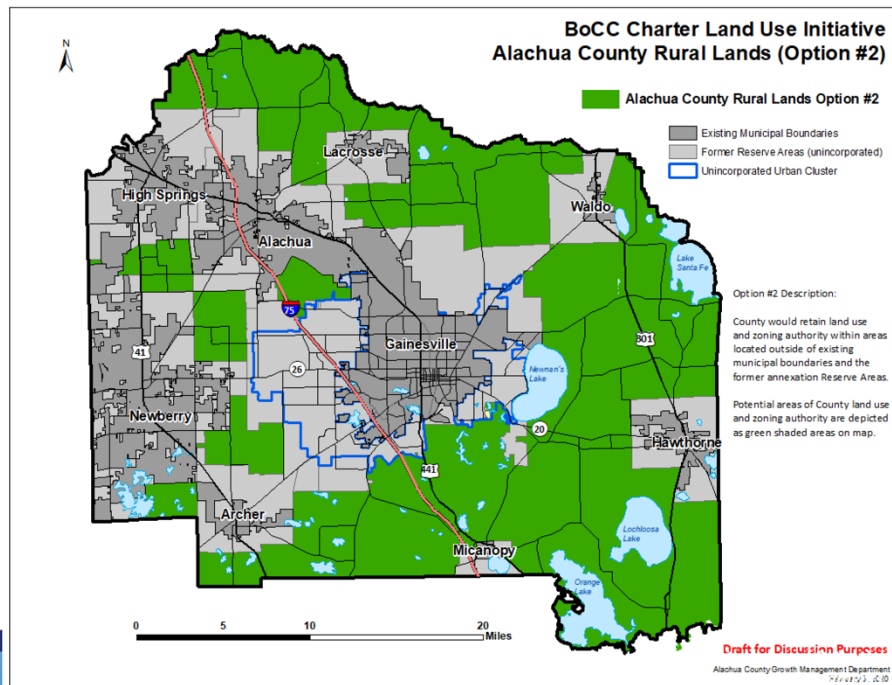
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Map Option #2

County retains land use and zoning authority within all unincorporated areas outside of existing city boundaries and former Reserve Areas.

Shown as shaded green areas on map

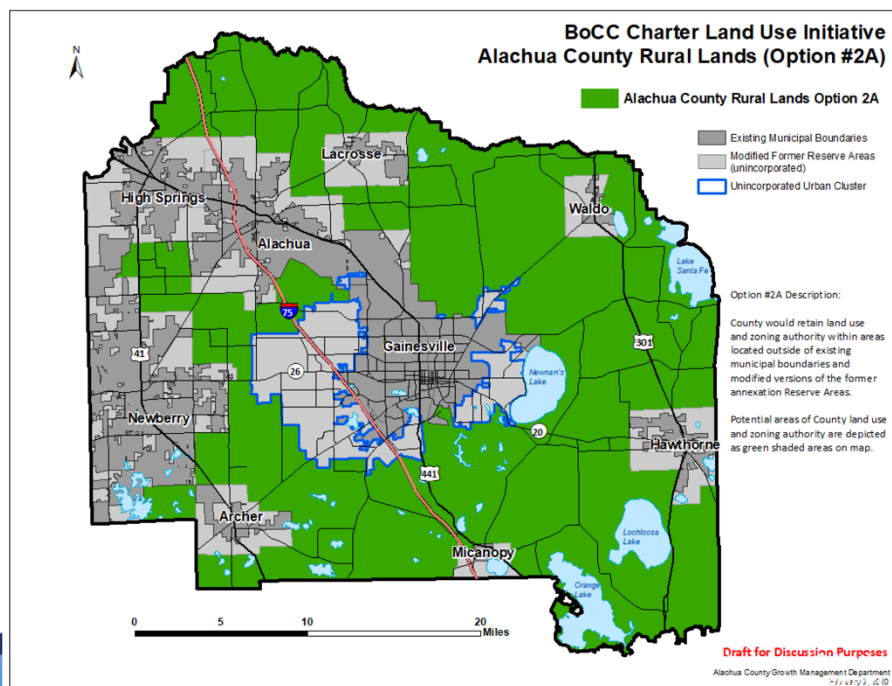


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Map Option #2A

County retains land use and zoning authority within all unincorporated areas located outside of existing city boundaries and modified versions of former Reserve Areas.

Shown as shaded green areas on map



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Map Option #3

County retains land use and zoning jurisdiction within “Critical Ecological Corridors”, “Strategic Ecosystems”, and “Preservation” areas as designated in the Alachua County Comprehensive Plan, as well as within conservation easements.

Shown as shaded green areas on map

