

IN THE FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

CASE No. 1D10-5094

HONORABLE JEFF ATWATER, et al.,

Appellants,

v.

CITY OF WESTON, FLORIDA, et al.,

Appellees.

ANSWER AND CROSS-INITIAL BRIEF
OF LOCAL GOVERNMENT APPELLESS

ON APPEAL FROM A FINAL JUDGMENT ENTERED IN THE SECOND JUDICIAL CIRCUIT IN
AND FOR LEON COUNTY, FLORIDA

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RECORD REFERENCE ABBREVIATIONS USED IN THIS BRIEF

References to the record below shall appear as "R:" followed by the appropriate pagination.

References to the initial brief shall appear as "IB:" followed by the appropriate pagination.

References to the brief of amicus curiae, Florida League of Cities, shall appear as "AmB:" followed by the appropriate pagination.

INTRODUCTION

This appeal arises from a corrected final judgment of the Leon County Circuit Court holding (1) that chapter 2009-96, Laws of Florida (the “Act” or “SB 360”) is unconstitutional on the grounds that it violates article VII, section 18(a) of the Florida Constitution (the “Unfunded Mandate Prohibition”); and (2) that the Local Governments’¹ constitutional challenge to the Act on the grounds of violating article III, section 6 of the Florida Constitution (the “Single Subject Provision”) is moot by virtue of the Legislature’s annual reenactment and codification of the Act in the Florida Statutes.

STATEMENT OF THE CASE AND FACTS AS TO BOTH THE APPEAL AND CROSS-APPEAL

The Local Governments accept the statement of the case and facts submitted by appellants, the President of the Senate Jeff Atwater and the Speaker of the House Larry Cretul (hereafter, the “Legislative Defendants”). However, the Local Governments supplement the statement of the case and facts to provide the following record information omitted by the Legislative Defendants.

¹ The Local Governments consist of the City of Weston, Florida; Village of Key Biscayne, Florida; Town of Cutler Bay, Florida; Lee County, Florida; City of Deerfield Beach, Florida; City of Miami Gardens, Florida; City of Fruitland Park, Florida; City of Parkland, Florida; City of Homestead, Florida; Cooper City, Florida; City of Pompano Beach, Florida; City of North Miami, Florida; Village of Palmetto Bay, Florida; City of Coral Gables, Florida; City of Pembroke Pines, Florida; Broward County, Florida; Levy County, Florida; St. Lucie County, Florida; Islamorada, Village of Islands, Florida; and Town of Lauderdale-By-The-Sea, Florida.

A. Additional facts relating to unfunded mandates challenge.

In support of their motion for summary judgment, the Local Governments relied upon the Legislature's own staff analyses, the published analysis of the Department of Community Affairs ("DCA") and also submitted five separate affidavits. During the legislative session, Senate staff reviewed SB 360 and on March 19, 2009, issued its Analysis and Fiscal Impact Statement. [R: 326-341; SJ App. 14]. Senate staff observed that SB 360 "will have a *negative fiscal impact* on local governments that are designated TCEAs by *requiring updated comprehensive plans.*" *Id.* at 2 (emphasis added). DCA also reviewed SB 360 and observed on May 20, 2009, as part of its policy analysis, that meeting SB 360's requirements would be "a *very onerous and expensive* task. However, no financial support or new revenue sources have been provided for the local governments to undertake this planning." [R: 343-369; SJ App. 15]. DCA further noted that "the *fiscal impact on local governments is extensive* but the full effects are indeterminate." *Id.* at 25 (emphasis added). DCA went on to observe "[t]he reduced control of the timing of development, loss of transportation mitigation, and reduction in other sources of revenues to support transportation facilities will have a *serious impact* on local governments and ultimately force choices between severe transportation congestion and increased taxes." *Id.* (emphasis added).

The affidavit of municipal planner, Shelley Eichner ("Eichner") (R: 371-374), reflected that she had rendered comprehensive planning services for multiple local governments during her 28 years as a certified planner, and had been asked by the Local Governments to estimate the costs of compliance with the Act. *Id.* at

372. She testified in detail as to the various procedures that would have to be followed to implement the Act's comprehensive planning requirements, and estimated the costs of compliance by the City of Weston at \$50,000. *Id.* at 372-374. Included in those compliance efforts were the following components:

- (1) the drafting of comprehensive plan amendments, the development of supporting data and analysis, and attendance at public hearings relating to the enactment of those amendments;
- (2) the preparation of a mobility fee study, followed by the creation and adoption of a mobility fee; and
- (3) the drafting of land development regulations to implement the new comprehensive plan amendments and attendance at public hearings relating to the enactment of those regulations.

Id. Contrary to the Legislative Defendants' assertion on appeal, Eichner also testified that the costs of implementing the Act's comprehensive planning requirements "for other local governments besides the City [of Weston]" would range from \$40,000 to \$100,000. *Id.* at 374. In addition, the affidavits of the municipal clerks of the Town of Cutler Bay and the City of Weston established uncontradicted evidence that the cost of advertising each proposed comprehensive plan amendment required by the Act would average \$4,170 and \$1,264, respectively. [R: 377;381].

In considering the fiscal impact of the Act on local governments and determining whether the mandated expenditures exceeded the threshold of an "insignificant" expenditure, the trial court focused solely on the *first* component of Eichner's cost estimation – the drafting of the plan amendments. Using Weston's sample figure of \$15,000 for that first component of compliance, the trial court

concluded that the 246 designated DULA's (a term defined in the Act as "Dense Urban Land Areas") would "at the very least," expend "not less than \$3,690,000" to comply with the Act, an amount almost twice the parties' stipulated threshold of \$1,860,000. [R: 911]. As the trial court observed, if all three components of compliance identified by Eichner and the advertising costs identified by two separate municipal clerks were factored in, the total expenditures for compliance would range from a minimum of \$10,150,944 to \$25,625,820. [R: 910].

In opposition to the Local Governments' summary judgment motion and affidavits, but *more than three months after briefing was completed*,² the Legislative Defendants submitted the affidavit of Darrin Taylor, also a certified planner ("Taylor"). [R: 828-831]. The Taylor affidavit did not reflect interaction with or any personal knowledge regarding the planning requirements or procedures of any of the Local Governments. It also contained no specific factual information as to any dollar amounts associated with implementation of the Act, either as an expense to be incurred or as a cost savings.

Notwithstanding his lack of personal knowledge³ and his failure to identify interaction with *any* of the Local Governments, Taylor made the following conclusory assertions:

² Briefing had been completed pursuant to an agreed briefing schedule. R:779-803. Nevertheless, the Taylor affidavit was filed three business days before the hearing, and three months after the agreed-upon date.

³ While Taylor indicates that he once worked for DCA and the Tallahassee-Leon County Planning Department (*id.* at 828, ¶ 1), he does not indicate
(continued . . .)

- (1) that a particular interpretation of SB 360 by DCA “has been accepted by local governments” and those local governments “have moved forward consistent with that interpretation” [R: 830, ¶¶ 7, 8];
- (2) that DCA has made a number of “determinations” regarding the plan amendment requirements of SB 360, *id.*;
- (3) that local governments have “relied upon interpretations from DCA, the Florida League of Cities and other entities for guidance” with respect to SB 360, *id.* at ¶ 8; and
- (4) that DCA implemented a particular strategy in 2008 regarding House Bill 697 relating to transportation strategies, *id.* at 826 ¶ 6.⁴

The remainder of the Taylor affidavit consisted of a series of legal “interpretations” of various statutory and regulatory provisions. *Id.* at 828-829, ¶¶ 3, 4, 5, 6.

The trial court described the Taylor affidavit as follows:

The Taylor affidavit is replete with legal argument and opinion as to existing and new obligations imposed on local government, but there is simply a total lack of any factual basis set forth to refute the costs of the obligations associated with the comprehensive plan amendments, which alone exceeds the formula for “insignificant” funding mandates prohibited by Article VIII, § 18(a) of the Florida Constitution.

(... continued)

when that employment occurred. His affidavit reflects that since 2006, he has worked for the law firm of Carlton Fields. *Id.*

⁴ Taylor did not cite to any authority for his assertions regarding DCA’s interpretations or implementations of SB 360 or local governments’ alleged acceptance of such interpretations.

[R: 912]. The Local Governments attacked the Taylor affidavit on similar grounds, pointing out that Taylor's assertions were not based on personal knowledge, but the trial court nonetheless considered the Taylor affidavit as part of its analysis of the unfunded mandates challenge. [R: 912].

With respect to the issue of a severance remedy, the Legislative Defendants' specifically argued for severance in their opposition to summary judgment, but *only* with respect to the single subject challenge. [R: 653-668]. Absent from the Legislative Defendants' summary judgment papers was any reference to severance of any offending unfunded mandate from the Act. The issue, however, specifically arose during the summary judgment hearing before the trial court:

THE COURT: Before you sit down ... [w]ill you address the issue – if I can get by the single subject somehow and get to unfunded mandate, address the severance issue as it applies to the unfunded mandate issue within this statute. Otherwise, can I find a particular section or not to be an unfunded mandate, not a single subject violation, but an unfunded mandate but that others not to be, the others to be valid to carry out the intent of the legislature under growth management.

MR. GLOGAU [Attorney for Defendants]: Well, Your Honor, I think that would be inconsistent with my position that you have to look at the statute as a whole. Because if you pull one section out and say this is an unfunded mandate, then you're ignoring the fact that somewhere else in the statute the legislature has sort of given them an opportunity to save money to offset that.

The constitution – one of the ways to get over the unfunded Mandate Prohibition is that if there is a mandate and the legislature in fact provides a method for raising the money to do that. So if your severance argument will allow you to say, well, this section is an unfunded mandate, this section – but we're not going to look at this

section over here that says you can raise the money to cover that. *So I don't think severance is appropriate in the unfunded mandate world.*

THE COURT: So you're in agreement with I think their position.

MR. GLOGAU [Attorney for Defendants]: I don't think they addressed that with respect to unfunded mandate. I think they were addressing that with respect only to the single subject.

THE COURT: But I think they have the same position – well, I'll let you address it.

MR. COLE [Attorney for Plaintiffs]: We do.

THE COURT: *So I'm looking at an all or nothing if I get past the single subject –*

MR. GLOGAU: *Yes.*

THE COURT: *-- and I determine there is or is not an unfunded mandate, it's all up or all down.*

MR. GLOGAU: *I think that's right, Your Honor.*

[T: 73-75] (emphasis added).⁵

B. Additional facts relating to single subject challenge.⁶

On February 26, 2009, the first version of SB 360 was filed by Senator Bennett, entitled “an Act relating to the Department of Community Affairs.” Also,

⁵ The June 3, 2010 hearing transcript was not included in the record prepared by the Clerk, but was supplemented by Court Order on December 9, 2010. As a result, references to the June 3, 2010 hearing transcript shall appear at “T:” followed by the appropriate pagination.

⁶ The additional facts relating to the single subject challenge were set forth in the Local Governments’ motion for summary judgment and accompanying appendices (R: 147-633), and were not disputed below by the Legislative Defendants.

on March 3, 2009, SB 1040 was filed by Senator Bennett, entitled “an Act relating to Affordable Housing.” In the months following the introduction of SB 360, it was subjected to various revisions and a change of title to “an Act relating to growth management.” SB 360 traveled between the House and Senate in messages from April 14, 2009 through May 1, 2009.

At approximately 6:30 p.m., on May 1, 2009, the last day of the regular legislative session, the Senate passed SB 360, with the inclusion of nearly all of the provisions from SB 1040 relating to affordable housing amendments. The Senate passed SB 360 by a vote of 30 “yeas,” 7 “nays,” and 3 “not voting.” The Governor signed SB 360 into law on June 1, 2009. SB 360 became effective immediately.

SB 360 contains 35 sections, amending and creating various sections of Florida Statutes. The first half of SB 360 predominantly relates to amending the State’s growth management laws. Some of the changes related to growth management contained in SB 360 affect all local governments in Florida (including the Local Governments), while others apply only to some (including some of the Local Governments).

SB 360 creates the new term “dense urban land area” or “DULA.” SB 360, § 2. A DULA is defined as (a) a municipality that has an average population density of at least 1,000 people per square mile of land area and a minimum population of 5,000; or (b) a county – including the municipalities within its boundaries – that has an average population density of at least 1,000 people per square mile of land area *or* a population of at least 1 million. *Id.* There are 246 counties and municipalities statewide that have been deemed DULAs by the

Legislature's Office of Economic and Demographic Research ("OEDR"). Sixteen of the twenty Local Governments are included in the designation by OEDR. *Id.*

Under SB 360, development of land within DULAs will no longer be subject to state-mandated transportation concurrency or Development of Regional Impact ("DRI") review. SB 360, § 12. Other significant growth management changes within the first half of SB 360 relate to school concurrency requirements, extension of certain permits for two years, extension of the deadline for financial feasibility for capital improvements schedules, and notice requirements for impact fee increases. SB 360, §§ 4, 5, 14. The first half of SB 360 also includes a provision that prohibits all cities and counties, including the Local Governments, from adopting business regulations for security cameras that would require lawful businesses to expend money to enhance local police services. SB 360, § 6.

The entire second half of SB 360 consists of substantial revisions to several Florida Statutes relating to affordable housing. SB 360 §§ 16-34. Among the revised provisions are additional tax exemptions, methods for valuing community land trust property, discretionary sales surtaxes, and the powers ascribed to the Florida Housing Finance Corporation. *Id.*

STANDARD OF REVIEW

While the Local Governments generally concur with the Legislative Defendants' recitation of the standard of review, they would clarify the standard further by noting that Florida courts have repeatedly held that the "movant for summary judgment has the initial burden of demonstrating the nonexistence of any genuine issue of material fact, but once he tenders competent evidence to support

his motion, *the opposing party must come forward with counterevidence sufficient to reveal a genuine issue.*” *Landers v. Milton*, 370 So. 2d 368, 370 (Fla. 1979) (emphasis added); *see also Olson v. Crowell Plumbing & Heating Co., Inc.*, ___ So. 3d ___, 2010 WL 4721150, *4 (Fla. 5th DCA Nov. 19, 2010) (same holding); *Gomez v. Fradin*, 41 So. 3d 1068, 1071 (Fla. 4th DCA 2010) (same holding); *Arce v. Wackenhut Corp.*, 40 So. 3d 813, 815 (Fla. 3d DCA 2010). Such counterevidence must be admissible at trial. *Fla. Dep’t of Fin. Servs. v. Assoc. Indust. Ins. Co., Inc.*, 868 So. 2d 600, 602 (Fla. 1st DCA 2004) (“[O]pposing affidavits for summary judgment ‘shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein....’”) (citing Fla. R. Civ. P. 1.510(e)).

SUMMARY OF ARGUMENT

The Legislative Defendants devote approximately half of the initial brief to disputing their status as proper parties in this action and challenging the trial court’s authority to render a declaratory judgment. It is important to note, however, that the Governor and Secretary of State were also deemed to be proper parties. The Legislative Defendants lack standing to raise a defense or argument that was personal to the Governor and Secretary of State, neither of whom appealed the judgment below. The proper party status of the Governor and Secretary of State, therefore, is now conclusive. Moreover, to the extent the Legislative Defendants are correct in their assertion that they are not now nor have they ever been proper parties to this action, then they lack standing to challenge the

merits of the trial court's decision below and the appeal of the unfunded mandates determination should be dismissed as moot.

The Local Governments sued to obtain a declaration regarding the constitutionality of SB 360 because of specific defects in the manner in which the Legislature enacted the law. The lawsuit did not relate to enforcement of the Act or seek a declaration of rights under the Act. As such, the Legislative Defendants – as well as the Governor and Secretary of State – *were* proper parties to the action, as they have been in prior single subject and unfunded mandate challenges. The Legislative Defendants are not immune from suit arising from their failure to abide by constitutional limitations on the exercise of their legislative authority.

The trial court was correct in granting summary judgment as to the unfunded mandates challenge because the Local Governments presented unrebutted factual evidence of the costs that would be incurred by them in having to comply with the planning mandates set forth in SB 360. The Local Governments relied not only on the fiscal impact findings by legislative staff and the Department of Community Affairs, but also on detailed affidavits from certified planners and municipal officials, which established that the costs of SB 360 compliance for each Local Government would range from approximately \$40,000 to more than \$100,000. The Legislative Defendants failed in their burden to come forward with competent, admissible evidence that would establish the existence of a genuine issue of material fact as to those mandated costs.

Lastly, the trial court was correct in declaring SB 360 unconstitutional in its entirety. The Legislative Defendants never sought severance of any unfunded

mandates and specifically stipulated in open court that severance was inappropriate when considering unfunded mandates. Even if they had not so stipulated, severance of the unfunded mandates in the Act would be improper because the plain language of Article VII, Section 18(a) precludes severance and SB 360 lacked a severability clause. Additionally, the provisions imposing the unfunded mandate are so intertwined with other growth management provisions in SB 360 that (1) it would be unreasonable to conclude that the Legislature would have enacted SB 360 without the offending provisions, and (2) the remaining portions of the Act could not stand alone, since they cross-reference the offending provisions.

ARGUMENT

II. THE DEFENDANTS BELOW, INCLUDING THE LEGISLATIVE DEFENDANTS, WERE PROPER PARTIES, AND THUS THE TRIAL COURT HAD JURISDICTION TO RENDER A DECLARATORY JUDGMENT.

A. The Governor and Secretary of State have not appealed their status as proper parties, and the Legislative Defendants lack standing on appeal to challenge the party status of the other defendants.

The Legislative Defendants erroneously contend the trial court lacked the authority to enter a declaratory judgment as to SB 360 because it did not have before it any proper defendants. IB:9. In doing so, they ignore or overlook that neither the Governor nor the Secretary of State has appealed the trial court's determination that they were proper parties in the action. As such, the trial court's final judgment as to them is conclusive with respect to their status as proper parties. Florida courts have more than once held that a co-defendant may not

assert defenses that are personal to another defendant. *See, e.g., Super Service, Inc. v. Larsen*, 791 So. 2d 1118, 1118-19 (Fla. 4th DCA 2000) (holding appellant lacked standing to raise issue relating to defense personal to another defendant below); *Ghali v. Smith*, 575 So. 2d 1386, 1386 (Fla. 3d DCA1991) (holding appellant lacked standing to appeal the denial of improper service on co-defendant below); *Kaufman v. Metro Limo Fund, Inc.*, 503 So. 2d 967, 967 (Fla. 3d DCA 1987) (same holding).

Here, the Legislative Defendants lack the standing to contest on appeal whether the Governor and Secretary of State were proper parties to the action below. As such, even if the Legislative Defendants were correct that they were not proper parties – which the Local Governments dispute (see Argument I.C, *infra*) – the trial court nonetheless properly had before it the Governor and Secretary of State and, therefore, had the authority to enter a declaratory judgment as to the constitutionality of SB 360. Consequently, the Legislative Defendants’ alleged lack of party status cannot – standing alone – defeat the trial court’s declaratory judgment.

B. If the Legislative Defendants are correct that they have never been proper parties, then they lack standing to challenge the merits of the trial court’s decision, their appeal becomes moot, and the trial court’s judgment on unfunded mandate stands.

This Court has previously observed that a party must have standing at each stage of litigation; otherwise, the case becomes moot as to that party. *Montgomery v. Dep’t of Health and Rehab. Servs.*, 468 So. 2d 1014, 1016 (Fla. 1st DCA 1985);

see also *WFTV, Inc. v. Robbins*, 625 So. 2d 941, 943 (Fla. 4th DCA 1993) (“Mootness occurs when the issues presented are no longer live or *when the parties lack a legally cognizable interest in the outcome.*”) (emphasis added; citing *Montgomery*, 468 So. 2d at 1016); *Buffalo Tank Corp. v. Environmental Control Equip., Inc.*, 544 So. 2d 1037, 1039 (Fla. 2d DCA 1989) (holding when appeal becomes moot, court cannot afford relief) (citing *Montgomery, supra*).

The Legislative Defendants’ argument as to proper party status – if correct – effectively hoists them on their own legal petard. Either they were proper parties below or they were not. If they were, their argument as to party status on appeal obviously fails. If they were not, then this appeal is moot as to them and must be dismissed. *Adamson v. McNeil*, 20 So. 3d 1004, 1004 (Fla. 1st DCA 2009); *Allan v. Allan*, 12 So. 3d 924, 924 (Fla. 1st DCA 2009); *Gray v. Gray*, 958 So. 2d 955, 956 (Fla. 1st DCA 2007); *DeGroat v. Moore*, 794 So. 2d 693, 694 (Fla. 1st DCA 2001). The Local Governments maintained below, and continue to maintain here, that the Legislative Defendants are proper parties to this action. However, if this Court disagrees, then the proper remedy is to dismiss as moot the Legislative Defendants’ appeal of the unfunded mandates challenge; in which case the trial court’s judgment in that regard below remains in effect.

C. In an action challenging the constitutional sufficiency of the enactment of legislation, the leaders of the legislative bodies that enacted it are proper parties.

Despite the Legislative Defendants’ current attempt to re-characterize the claims asserted by the Local Governments (IB:11-12), this case is now and has

always been about the Legislature's failure to enact SB 360 properly, either by limiting it to a single subject, or by observing the constitutional requirements for enacting a law that imposes an unfunded mandate. The complaint below is replete with allegations as to these legislative shortcomings. [R: 9-27]. The Legislative Defendants make the remarkable assertion – unsupported by case law, of course – that “the procedures followed by the Legislature are irrelevant to the issues the [Local Governments] have raised.” IB:12. This is the lynchpin to their argument that the action should have been brought against the Department of Community Affairs (“DCA”), rather than against them. *Id.* (“The procedures followed by the Legislature in enacting the law simply are irrelevant to the issues the plaintiffs have raised. Rather, plaintiffs assert that the product of the legislative process, the law itself, violates the constitution. Therefore, plaintiffs must bring their suit against the enforcing agency.”).

It is difficult to know how to respond to an argument that so plainly misses the point of the lawsuit filed. The Local Governments' challenge to the “product of the legislative process” – that is, SB 360 – is premised *entirely* on the Legislature's failure to observe constitutional requirements in the enactment of the law. The Local Governments are not, as the Legislative Defendants assert, challenging internal voting procedures or other legislative mechanisms purely internal to the legislative branch of government, but rather the Legislature's failure to abide by clearly articulated constitutional requirements that are *expressly intended* to restrict how the Legislature may enact legislation.

Accepting the Legislative Defendants' arguments at face value would render the protections afforded by Single Subject Provision and Unfunded Mandate Prohibition completely illusory. The Legislature could simply violate either provision safe in the knowledge that their "process of legislating" is immune from judicial review. This simply is not and cannot be the case.

(1) The Local Governments' challenge to SB360 relates to the manner in which the Act was enacted, not how it will be interpreted, applied or enforced.

The Legislative Defendants mistakenly rely on a number of cases that involve constitutional challenges to the manner in which particular legislative enactments have been applied or enforced and cite to *no case law* involving a constitutional challenge based on a violation of either the Single Subject Provision or the Unfunded Mandate Prohibition. Unlike constitutional challenges to the manner in which a statute is applied or enforced, or constitutionally-based interpretive challenges to statutes for vagueness, overbreadth or similar defects in the language of the statutes, the Local Governments' challenge here goes only to the enactment process rather than to how the Act is to be interpreted or applied subsequently.⁷ As such, it is eminently reasonable to conclude that those

⁷ Notwithstanding the Legislative Defendants' suggestion to the contrary (IB:10 n.3), the Local Governments never sought a declaratory judgment as to their rights *under* the Act.

government officials charged with ensuring proper enactment of the Legislation be made defendants to the lawsuit.⁸

A proper party in litigation is “one who has an interest in the subject matter of the action, but whose absence will not prevent a judgment determining substantial issues between the parties.”⁹ *N & C Properties v. Vanguard Bank and Trust Co.*, 519 So. 2d 1048, 1052 (Fla. 1st DCA 1988). Defendants *conceded* before the trial court that it was entirely appropriate for them to be named as party defendants when the lawsuit is directed to their failure to perform duties ascribed to them. [R: 56; motion to dismiss]. Citing to *Coalition for Adequacy and Fairness in School Funding, Inc. v. Lawton Chiles*, 680 So. 2d 400 (Fla. 1996) (“*Coalition for Adequacy*”), the Legislative Defendants pointed out that they *are* proper defendants when the lawsuit “address[es] the alleged failure of the political branches to fulfill their responsibilities directly under the constitution,” [R: 58; Motion to Dismiss at 6], but they disavow any responsibility here. The irony, of course, is that *Coalition for Adequacy* involved allegations that the Senate President and Speaker of the House failed to fund adequately public schools, just as the allegations here relate, in part, to the Legislative Defendants’ constitutional failure to provide for funding for certain growth management mandates set forth in

⁸ In fact, the Single Subject Provision is found within Article III, which more broadly relates to composition and constitutional duties of the Legislature. Art. III, Fla. Const.

⁹ It bears noting that the Legislative Defendants never argued below that DCA was an indispensable party, but rather that they were not “proper” parties. [R: 53-60] (motion to dismiss).

SB 360 (or otherwise meet the requirements for being exempted from such funding obligations).

There appears to be little doubt – and the Legislative Defendants do not dispute on appeal – that naming the Senate President and Speaker of the House as representatives of their respective bodies is appropriate. *Coalition for Adequacy*, 680 So. 2d at 403; *see also* Fla. H.R. Rule 2.6 (“The Speaker may initiate, defend, intervene in, or otherwise participate in any suit on behalf of the House”); Fla. Sen. Rule 1.4(3) (“The President may authorize counsel to initiate, defend, intervene in, or otherwise participate in any suit on behalf of the Senate”). Moreover, when the challenge asserted centers of the failure of legislative bodies to abide by certain constitutional enactment requirements, who else but the presiding officers of those bodies should be held to account for and defend against this failure? In fact, Art. III, Sec. 2 of the Florida Constitution provides that there shall be a “permanent presiding officer selected from its membership, who shall be designated in the senate as President of the Senate, and in the house as Speaker of the House of Representatives.”

Underlying the Legislative Defendants’ “enforcement” theory is the flawed notion that officials or agencies charged with enforcing legislation *after* it is enacted should be made to answer for and defend (1) defects in the manner the legislation was enacted, or (2) legislative findings that purportedly justified its enactment. This simply makes no sense. *See, e.g., In re Constitutionality of House Joint Resolution 1987*, 817 So. 2d 819, 831 (Fla. 2002) (noting in constitutional challenge based on gerrymandering that “the Legislature and other proponents of

the redistricting plan must be afforded an opportunity to respond to any evidence of discriminatory effect”).

Other cases similarly support the idea that one or more of the defendants below were proper defendants in a lawsuit challenging the constitutionality of enacted legislation.¹⁰ For example, in *Martinez v. Scanlan*, 582 So. 2d 1167 (Fla. 1991), the Governor was named as a defendant in a successful single-subject challenge to the Comprehensive Economic Development Act of 1990. *Id.* at 1170. The same situation existed in *Florida Defenders of the Environment, Inc. v. Graham*, 462 So. 2d 59 (Fla. 1st DCA 1984), where both the Governor and the Secretary of State were sued in a successful constitutional challenge to an appropriations bill based on a violation of the single-subject requirement of Art. III, Sec. 6 of the Florida Constitution.¹¹

In *Brown v. Butterworth*, 831 So. 2d 683 (Fla. 4th DCA 2002), the plaintiffs challenged the constitutionality of legislation, claiming that the Legislature had

¹⁰ While the Legislative Defendants have not specifically addressed the issue, so long as the trial court had one proper party before it to answer to the allegations of the complaint, it could render declaratory relief. Consequently, even though the Governor and Secretary of State have not appealed their status as proper parties, the Local Governments are addressing their status in an abundance of caution.

¹¹ Strangely, the Legislative Defendants’ sole response to this Court’s decision in *Florida Defenders* essentially is that it should be disregarded, either because it is 25 years old or because it “stands alone” or because it does not appear that the Secretary’s role was at issue. IB:21. They fail, however, to cite contrary authority as to the Secretary’s role, and even concede that the Secretary’s role as to the laws of Florida is that of record keeper. *Id.*

gerrymandered voting districts. *Id.* at 684-85. Both the Senate President and the Speaker of the House were named as defendants. *Id.* As it happens, the *Brown* plaintiffs voluntarily dropped the Senate President as a defendant, who then turned around and sought leave to intervene. *Id.* at 685. In the context of the Senate President's appeal of the denial of his re-intervention, the Fourth District observed that the Senate President was "a proper party, one certainly with a cognizable interest in the action."¹² *Id.* at 690; *see also Florida Senate v. Forman*, 826 So. 2d 279 (Fla. 2002) (Senate President proper party in gerrymandering challenge).

Most recently, in *Lewis v. Leon County*, 15 So. 3d 777 (Fla. 1st DCA 2009), twenty-five Florida counties sued the Senate President and Speaker of the House, among others, challenging the constitutionality of Chapter 2007-62, Laws of Florida, which established the Office of Criminal Conflict and Civil Regional Counsel.¹³ *Id.* at 778-79. Among the counties' claims was a challenge based on the unfunded mandate provision in Art. VII, Sec. 18(a) of the Florida Constitution. *Id.* Like the Local Governments here, the counties in *Lewis* asserted that the Legislature had failed to meet the constitutional requirements to exempt the

¹² The Local Governments find it difficult to imagine that, had they sued only DCA and the Legislative Defendants had sought to intervene to address the validity of their enactment of SB 360, this Court would have concluded they lacked the requisite "cognizable interest" to deny intervention.

¹³ A copy of the first page of the second amended complaint in the *Lewis* declaratory judgment action was attached to the Local Governments' response to the motion to dismiss and motion for summary judgment, since the First District's decision does not specifically identify all the defendants in that action by name. [R: 81-82; 612-613].

legislation from the Unfunded Mandate Prohibition. *Id.* at 781. Tellingly, neither the Speaker of the House nor the Senate President appealed the trial court's decision to keep them as proper party defendants in the *Lewis* action.¹⁴ Similarly, in this appeal, the Legislative Defendants have failed to address *Lewis* (or even bring it to the Court's attention), except in the context of the appropriate remedy for an unfunded mandates violation.

The claims against the Secretary of State were viable insofar as the Local Governments were seeking injunctive relief either to prevent SB 360 from being registered as a valid law or to be stricken. That responsibility clearly falls upon the Secretary of State. *See Florida Defenders of the Environment, Inc. v. Graham*, 462 So. 2d 59, 62 (Fla. 1st DCA 1984) (in single-subject challenge naming Governor and Secretary of State as defendants, directing Secretary to strike appropriations bill as relief for unconstitutionality of provision); *see also Gray v. Golden*, 89 So. 2d 785, 786 (Fla. 1956) (Secretary of State named as defendant in single-subject challenge where relief was directed to Secretary's duties to advertise and submit proposed amendment).

The cases on which the Legislative Defendants rely are inapposite. Their reliance on *Walker v. President of the Senate*, 658 So. 2d 1200 (Fla. 5th DCA

¹⁴ The trial court denied the Speaker's motion to dismiss, which asserted he was not a proper party (R: 83-100) Exhibit "B" to response to motion to dismiss), and then in the same order added the Senate President as a defendant to the amended complaint. [R: 99; Exhibit "C"]. To the extent the Speaker or Senate President appealed these rulings, this Court affirmed the trial court's decision "on all grounds." *Lewis*, 15 So. 3d at 781-82.

1995) is arguably the most curious. They assert that “[w]hen the facial constitutionality of a rule of law is challenged, ‘it is the state official designated to enforce the rule who is the proper defendant’” IB:10. A challenge to a rule of law is not comparable to a challenge to an enacted statute. The distinction is not without a difference, inasmuch as “rules” are not enacted by the Legislature but rather adopted by state agencies to which rulemaking authority has been delegated. *See, e.g., State, Dept. of Children and Family Servs. v. I.B.*, 891 So. 2d 1168, 1171 (Fla. 1st DCA 2005). In a challenge to the constitutionality of a rule, therefore, it is logical to conclude that the agency that enacted the rule would be the proper defendant.

The Legislative Defendants neglect to point out to the Court that the *Walker* case was premised upon inmates’ complaints “regarding certain operations of the Department of Corrections.” 658 So. 2d at 1200. It is hardly surprising, given these facts, that the Department of Corrections might be the proper defendant in that action, rather than the Speaker of the House or the Senate President. The Legislative Defendants’ anticipatory attempt to diminish the Local Governments’ argument regarding *Walker* – IB:10 n.3 – misses the point entirely. Even the *Walker* Court acknowledged that individual legislators are not proper parties when a plaintiff is seeking a declaratory judgment “under a particular statute.” 658 So. 2d at 1200. The Local Governments here have not sought a declaration of their rights “under the statute,” but rather a declaration that SB 360 was improperly enacted and therefore is unconstitutional. If the Local Governments had, for example, sought a declaration as to whether or how a particular provision of SB

360 applied to them, then the rationale of *Walker* might conceivably be relevant. Since such relief was *not* sought, *Walker* is inapposite.

The remaining cases cited by defendants similarly provide little refuge. In *Florida Senate v. Fla. Pub. Employees Council 79, AFSCME*, 784 So. 2d 404 (Fla. 2001), the issue presented was whether the trial court had the authority to issue a temporary restraining order to prohibit certain legislators from convening scheduled public hearings. *Id.* at 405-06. There was no constitutional challenge to enacted legislation at issue in the case.

Comparably, *Moffitt v. Willis*, 459 So. 2d 1018 (Fla. 1984) involved a declaratory judgment action by newspaper publishing companies to have certain secret meetings of legislative committees declared unlawful. *Id.* at 1019. In carving out the limited authority of the trial court to afford declaratory relief, the Speaker and Senate President conceded that “the authority of each house of the legislature ... to determine its own internal procedure is at issue and that *neither the constitutionality of any enacted statute, nor any policy commitment of the state of Florida, nor the balancing of compelling interests of the state [is] at issue.*” *Id.* at 1020-21 (emphasis added). The Florida Supreme Court agreed, finding that the trial court lacked the authority to grant declaratory relief, but observed that the plaintiffs “do not complain of or challenge any specific act or law promulgated by the legislature.” *Id.* at 1021.

Lastly, *Howard v. Commonwealth*, 957 A.2d 332 (Pa. Commw. Ct. 2008), involved a criminal defendant’s constitutional challenge to a transfer statute on grounds of vagueness and overbreadth. *Id.* at 334. The claim there did not involve

a challenge the legislature's compliance with enactment requirements. The case also did not involve the proper party status of legislators, but only that of the governor and secretary of state. *Id.* at 335. Since those defendants in this case have not appealed their proper party status, the case is inapposite for that reason alone. Regardless, even the *Howard* court acknowledged that public officials may be "proper parties" when "their own actions are at issue." *Id.* at 335. In this case, the Legislative Defendants' "own actions" in improperly enacting SB 360 "are at issue."

To reiterate, the Local Governments have *not* asserted that the constitutional flaws of SB 360 lie in its enforcement or even in its interpretation, but rather in its enactment. Each of the Legislative Defendants had and continues to have a "cognizable interest" in the manner by which SB 360 was enacted. As such, they were each proper party defendants below.

- (2) **Even if "enforcement" were the relevant standard for determining proper party status, the Legislative Defendants and Governor would still be proper parties.**

The Legislative Defendants have carefully avoided actually identifying DCA as "the" agency with responsibility for implementing and enforcing SB 360. This is not surprising in that the Legislation is silent with respect to entrusting such responsibilities to any one agency or individual. While it is certainly true that DCA is charged with some enforcement responsibility under the Act, no less than

eight separate agencies or offices are responsible for implementing or enforcing SB 360.¹⁵

More germane to this appeal, though, SB 360 designates certain local governments as DULA's. [R: 13-14; Complaint at ¶¶ 16-18]. This designation is generally based upon the population and density of the local governments. Under SB 360, the Office of Economic and Demographic Research *within the Legislature* is required annually to calculate the population and density criteria needed to determine which jurisdictions qualify as Dense Urban Land Areas. Ch. 2009-096, Laws of Fla., § 2. This determination is crucial to implementing the transportation concurrency exemption area ("TCEA") and development of regional impact provisions within SB 360.¹⁶

¹⁵ For example, the Department of Community Affairs ("DCA") is called upon to implement several aspects of SB 360. *See* Ch. 2009-096, Laws of Fla., §§ 2, 13. The Florida Housing Finance Corporation ("FHFC"), which functions under the auspices of the DCA, is required to implement various housing provisions and adopt new administrative rules. *Id.* at §§ 15, 22, and 25. The Department of Children and Families is directed to coordinate with the FHFC, as well as other agencies, to provide affordable housing available whenever and wherever possible to young adults who leave the child welfare system. *Id.* at § 25. The Department of Environmental Protection, along with numerous Water Management Districts around the state, is required to process and implement the legislatively mandated permit extensions. *Id.* at § 14. In addition, numerous municipalities and counties will also be called upon to implement and enforce provisions relating to permit extensions. *Id.* One wonders whether the Legislative Defendants would have found it sufficient if one or more of the Local Governments had sued other local governments to have the Act declared unconstitutional.

¹⁶ The Local Governments' unfunded mandate challenge was premised, in large part, on the financial consequences of those provisions of SB 360 that
(continued . . .)

The Office of Economic and Demographic Research reports directly to the Legislature and is the research arm of the Legislature principally concerned with forecasting economic and social trends that affect policy making, revenues, and appropriations. See [R: 265; <http://edr.state.fl.us/aboutus.htm>, last accessed on January 3, 2011]. In addition, it provides research support for Legislative committees and analyzes the impact of proposed legislation for the Legislature.¹⁷ *Id.*

Finally, the Office of Program Policy Analysis and Government Accountability (“OPPAGA”) is required to submit to the *President of the Senate and the Speaker of the House* by February 1, 2015, a report on TCEAs created by SB 360. Ch. 2009-096, Laws of Fla., § 4, p. 12. This report, at a minimum, is required to “address the methods that local governments have used to implement and fund transportation strategies to achieve the purposes of designated transportation concurrency exception areas, and the effects of those strategies on mobility, congestion, urban design, the density and intensity of land use mixes, and

(... continued)

relate to DULAs and TCEAs. [R: 14; 21-26; Complaint at ¶¶ 18-21, 21, 41-46].

¹⁷ The Legislative Defendants attempt to discount this argument in their initial brief by asserting that “the mere participation by an entity in the workings of a law does not mean that the entity is at all involved in enforcement.” IB:18. Nothing more is said about this assertion, nor is authority cited in support of it. Moreover, no attempt is made to draw a distinction between a lawsuit relating to the unconstitutional enforcement of a statute and one that challenges the constitutionality of its enactment.

network connectivity plans used to promote urban infill, redevelopment, or downtown revitalization.” *Id.* OPPAGA is a special staff unit of the Legislature, which when directed by the Legislature, examines agencies and programs.¹⁸

Additionally, SB 360 imposes numerous implementation and enforcement requirements that specifically tie in the Governor’s office. The Governor, for his part, sits as Chair of the Administration Commission, which is part of the Executive Office of the Governor. § 14.202, Fla. Stat. Pursuant to Chapters 163 and 380 and sections 186.007 and 186.008, Florida Statutes, the Administration Commission is charged with, among other duties, (i) “considering proceedings relating to comprehensive plans or plan amendments and land development regulations”; (ii) “revision and implementation of the State Comprehensive Plan”; (iii) “establishing guidelines and standards for developments of regional impact”; and (iv) “designating areas of critical state concern.”¹⁹ Each of these areas of responsibility is directly affected by and implicates the implementation and enforcement of the Act.²⁰

¹⁸ See <http://www.oppaga.state.fl.us/shell.aspx?pagepath=about/about.htm>, last accessed on January 3, 2011. It also bears noting that SB 360 provides that the Legislature is to receive from the Department of Transportation a report on mobility issues raised by the implementation of Legislation. Chap. 2009-096, Laws of Fla., § 13. The purpose of this report is to recommend legislation and implement a plan to replace the existing transportation concurrency system. *Id.*

¹⁹ See [R: 253-257; <http://www.myflorida.com/myflorida/cabinet/cabprocess.html>, last accessed on January 3, 2011].

²⁰ Certainly, the Governor’s direct involvement in the regulation of comprehensive planning matters is completely unlike the attenuated link
(continued . . .)

(3) The Legislative Defendants are not immune from suit when the challenge is based on defects in the legislative enactment of the Act.

The doctrine of legislative immunity has never been extended to encompass violations of the constitutionally mandated procedures for the enactment of legislation. *See, e.g., Martinez*, 582 So. 2d at 1169-70 (Governor named as defendant in a successful single subject challenge to the Comprehensive Economic Development Act of 1990); *Brown*, 831 So. 2d at 683-85 (Senate President and Speaker of the House and Secretary of State named as defendants in a constitutional challenge claiming the Legislature had gerrymandered voting districts); *Florida Defenders of the Environment*, 462 So. 2d at 60-61 (both the Governor and the Secretary of State were sued in a constitutional challenge to an appropriations bill based on a violation of the single subject provision). As the Legislative Defendants conceded before the trial court (R: 58), it is entirely appropriate for them to be named as party defendants when the lawsuit is directed to their failure to perform duties ascribed to them. In short, Defendants are not

(. . . continued)

between the Governor and the enforcement of the Baker Act at issue in *Harris v. Bush*, 106 F. Supp. 2d 1272 (N.D. Fla. 2000), the Legislative Defendants' principal authority for the Governor's lack of party status. *See Harris*, 106 F. Supp. 2d at 1277 ("Plaintiff does not allege or even suggest that Governor Bush intends to enforce the statutory provision under attack. Nor does he cite the Court to authority stating the Governor of Florida *bears a sufficient connection with* the enforcement of the Baker Act.") (emphasis added).

legislatively immune from suit when the lawsuit is directed at their failure to perform their duties, as is the case here.

The case of *Coalition for Adequacy* – which is relied upon by the Legislative Defendants on appeal – holds that they are proper defendants when the lawsuit addresses the alleged failure of the political branches to fulfill their responsibilities directly under the constitution. 680 So. 2d at 402-03. Furthermore, *Coalition for Adequacy* involved allegations that the Senate President and Speaker of the House failed to adequately fund public schools, *id.* at 402, just as the allegations here relate, in part, to their constitutional failure to provide for funding for certain growth management mandates set forth in SB 360 (or otherwise meet the requirements for being exempted from such funding obligations). Just as in *Lewis*, 15 So. 3d at 778, where twenty-five Florida counties sued the Senate President and Speaker of the House challenging the constitutionality of Chapter 2007-62, Laws of Florida, on, among other grounds, failure to comply with the Unfunded Mandate Prohibition, the Local Governments here asserted that the Legislature had failed to meet the constitutional requirements to exempt the legislation from the Unfunded Mandate Prohibition. *Id.* at 781.

The Local Governments sought a declaration that the Legislature failed to meet the constitutional requirements to exempt SB 360 from the Single Subject Provision and Unfunded Mandate Prohibition. The Local Governments have not sued the Legislative Defendants because they exercised their legislative discretion in supporting or opposing legislation (which *would be* legislatively immune). Instead, the Legislative Defendants, as heads of their respective legislative bodies,

were sued because those bodies failed to follow the constitutional requirements for lawfully *enacting* SB 360. It cannot seriously be argued that compliance with the Florida Constitution is an issue of legislative discretion. Accordingly, since Defendants have not complied with constitutionally established procedures for enacting legislation in Florida, legislative immunity provides no defense for the Defendants here. *See Ryan v. Burlington County, N.J.*, 889 F.2d 1286, 1291 (3d Cir. 1989) (holding legislative immunity may be invoked only when “the act [is] ... passed by means of established legislative procedures. The principle requires that constitutionally accepted procedures of enacting legislation must be followed”); *State Employees Bargaining Agent Coalition v. Rowland*, 494 F.3d 71, 93 (2d Cir. 2007) (holding legislative immunity “presents no obstacle” where the relief requested does not seek to enjoin legislative functions, but rather is directed at “unconstitutional legislation ... that [Governor and Secretary] participated in enacting.”).

The cases relied upon by the Legislative Defendants in support of their immunity argument are inapposite inasmuch as none of them involves a challenge to legislation for failure to comply with constitutionally mandated enactment requirements. *See Supreme Court of Va. v. Consumers Union of United States, Inc.*, 446 U.S. 719, 732 (1980) (individual justices immune from suit for decision to promulgate code of professional responsibility); *Junior v. Reed*, 693 So. 2d 586, 589 (Fla. 1st DCA 1997) (holding in action for damages under 42 U.S.C. § 1983, by way of example, that “[a] county commissioner could assert a valid claim of absolute immunity for *the act of voting* on a proposed county budget, for example,

because that is a legislative function.”) (emphasis added); *Gravel v. United States*, 408 U.S. 606, 617 (1972) (interpreting Speech and Debate Clause of U.S. Constitution as providing immunity from criminal prosecution for subcommittee activities of U.S. Senator and aide); *Penthouse, Inc. v. Saba*, 399 So. 2d 456, 458 (Fla. 2d DCA 1981) (holding in suit arising from denial of application for approval of site plan that county officials “would have had absolute immunity from suit under section 1983 if, for instance, they had enacted (legislative power) an unconstitutional zoning ordinance ...”); *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002) (interpreting a state’s sovereign immunity from suit in federal court); *Drombowski v. Eastland*, 387 U.S. 82, 85 (1967) (in civil suit for individual liability against U.S. Senator for tortious conspiracy to seize property and records, Speech and Debate Clause held to afford immunity because the “record does not contain evidence of his involvement in any activity that could result in liability”).

The “threat of liability” with which this Court was concerned in *Junior* is not at issue here. The Legislative Defendants stand before this Court as the authorized representatives of their respective bodies, which failed to comply with the constitutional requirements for enacting SB 360. No individual liability is sought with respect to either Legislative Defendant.

III. THE LOCAL GOVERNMENTS PRESENTED UNREBUTTED FACTUAL EVIDENCE THAT SB 360 IMPOSED A FISCAL IMPACT THAT WAS NOT INSIGNIFICANT.

Despite the Legislative Defendants' assertion to the contrary, the record before the trial court was not "silent" with respect to the fiscal impacts of SB 360 on the Local Governments. In fact, the record reflects un rebutted evidence of significant fiscal impacts in the form of (1) legislative and agency findings of fiscal impacts resulting from SB 360, and (2) affidavits as to the actual costs of implementing the comprehensive planning requirements imposed by SB 360.

As an initial matter, it must be noted that the Legislative Defendants have abandoned on appeal the principal argument raised before the trial court with respect to unfunded mandates, namely, that summary judgment could not be granted as to that challenge because a question of fact remained as to purported "offsets" or cost savings afforded by the Act. [R: 664 ("Plaintiffs are not entitled to summary judgment on this issue because the affidavits supplied to support their motion fail to take into account any possible setoffs to the alleged increased costs.")] The initial brief contains no arguments relating to unsubstantiated offsets, and therefore the argument has been abandoned. *Chamberlain v. State*, 881 So. 2d 1087, 1103 (Fla. 2004) (stating that because the appellant failed to advance an argument in his brief, the court would consider it abandoned); *Hall v. State*, 823 So. 2d 757, 763 (Fla. 2002) (stating that the petitioner was "procedurally barred" from making an argument in the reply brief that he did not raise in the initial brief).

Instead, the Legislative Defendants have raised *for the first time on appeal* two different arguments: (1) that the Local Governments failed to establish in the

supporting affidavits that compliance with the Act “would require the assistance of private planning firms” (IB:23, 25); and (2) that the trial court was required to “average out” the compliance costs over two years (IB:24). Neither argument was raised before the trial court and, therefore, neither has been preserved.²¹ *McWatters v. State*, 36 So. 3d 613, 639 (Fla. 2010) (holding “that specific legal argument or ground must be presented to trial court to preserve issue for appellate review”); *Martin v. State*, 936 So. 2d 1190, 1191 n. 1 (Fla. 1st DCA 2006) (“This precise argument was not made to the trial court, however, and, thus, has not been preserved for review by this court.”) (citing *F.B. v. State*, 852 So. 2d 226 (Fla. 2003)). Assuming *arguendo* these arguments had been preserved, neither is supported by the record.

A. The Legislature’s and DCA’s own analyses establish that SB. 360 would impose significant expenses on the Local Governments.

The initial brief is surprisingly dismissive of the Legislature’s own fiscal impact analysis of SB 360 and conspicuously silent with regarding to the analysis performed by DCA with respect to comprehensive planning costs mandated by SB

²¹ The Legislative Defendants limited their attack on the affidavits to the fact that they failed to account for alleged cost savings resulting from the Act. [R: 664-665; SJ response]. There was no mention of failure to establish the need for outside consultants or the existence of in-house planning staffs at local governments. As for the averaging out of costs over a two-year period, while the Senate and House memoranda *were* before the Court, the Legislative Defendants never argued that the averaging provision was applicable.

360. Senate staff reviewed SB 360 and on March 19, 2009, issued its Analysis and Fiscal Impact Statement, in which staff observed that SB 360 “will have a *negative fiscal impact* on local governments that are designated TCEAs by requiring updated comprehensive plans.” (emphasis added) [R: 327]. DCA’s policy analysis of SB 360 was even more explicit: meeting SB 360’s requirements would be “a *very onerous and expensive* task. However, *no financial support or new revenue sources have been provided for the local governments* to undertake this planning.” (emphasis added) [R: 349]. DCA further observed that “the fiscal impact on local governments is *extensive* but the full effects are indeterminate. ... The reduced control of the timing of development, *loss of transportation mitigation*, and *reduction in other sources of revenues to support transportation facilities* will have a *serious impact* on local governments and ultimately force choices between severe transportation congestion and increased taxes.” (emphasis added) [R: 367].

The Legislative Defendants’ response to *their own* staff’s analysis is relegated to the observation that the analysis does not constitute evidence of the actual fiscal impact of SB 360. IB:26. DCA’s more comprehensive analysis – originating with the agency the Legislative Defendants insist is responsible for enforcing SB 360 – goes completely unaddressed.

B. The Legislative Defendants’ new arguments are unsupported by the record.

In lieu of pursuing the offset argument they presented below, the Legislative Defendants now insinuate (1) that the comprehensive plan amendments are not

required by SB 360, and (2) that there is no indication that local governments would need to hire private planning firms. IB:23. The former insinuation is belied by the Senate staff analysis, which explicitly acknowledges SB 360's requirement for "updated comprehensive plans," and by the plain language of SB 360, which states:

A local government that has a transportation concurrency exception area designated pursuant to subparagraph 1., subparagraph 2., or subparagraph 3. *shall, within 2 years after the designated area becomes exempt, adopt into its local comprehensive plan land use and transportation strategies to support and fund mobility within the exception area, including alternative modes of transportation.* Local governments are encouraged to adopt complementary land use and transportation strategies that reflect the region's shared vision for its future. *If the state land planning agency finds insufficient cause for the failure to adopt into its comprehensive plan land use and transportation strategies to support and fund mobility within the designated exception area after 2 years, it shall submit the finding to the Administration Commission, which may impose any of the sanctions set forth in s. 163.3184(11)(a) and (b) against the local government.*

SB 360, Sec. 4. It is also contradicted by the position the Legislative Defendants took before the trial court: "[C]oncerns about litigation, possible increased costs of roads, and mitigation costs related to DRI developments are not 'mandates' covered by the amendment. *As to the other alleged costs to local governments, Plaintiffs fail to show that they are not 'insignificant' as that term is defined by the Legislature in the analysis under Art. VII, § 18.*" [R: 663; SJ Resp. at 11].²²

²² It is also contradicted by their counsel's representation at the hearing on the motion for summary judgment: "So there are – admittedly there are some provisions this year that are going to cost them some money. *There's no* (continued...)

The assertion about private planning firms is supported by nothing more than wholesale speculation about the existence or non-existence of planning staffs in unspecified local governments and the alleged lack of complexity of local government planning needs, neither of which was raised before the trial court. In fact, other than their now-abandoned argument regarding cost savings generated by SB 360, the Legislative Defendants lodged no other objection to or criticism of the Local Governments' supporting affidavits before the trial court. Certainly, the Legislative Defendants never suggested to the trial court that the cost estimates provided by the Local Governments were not representative of those to be incurred by other DULA's or that local governments would not hire outside consultants.²³ In fact, the Legislative Defendants' own supporting affidavit reflects that local governments often hire outside consultants to assist with planning issues. [R: 830

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question about that. The question is how much. Because the constitution does have this insignificant provision." [R: T:67].

²³ The only reference to the issue of retaining outside consultants was a passing reference in the Taylor affidavit that because local governments had supposedly accepted DCA's interpretation of SB 360 and because they rely on interpretations from the Florida League of Cities and "other entities," local governments have not had to "seek outside counsel." Of course, Taylor does not reflect (i) the basis for his personal knowledge as to DCA's interpretation or the interpretation of unidentified "other entities," (ii) the basis for his assertion that local governments have accepted such interpretations, or (iii) the basis for his assertion that local governments have not made such engagements. More to the point, the argument was not included in the Legislative Defendants' summary judgment papers or raised during oral argument at the summary judgment hearing. [R:653-750, 751-773; T:65-73].

(pointing out that the City of Gainesville hired outside legal counsel and planning consultants to assist with processing a DRI application)].²⁴

The Local Governments presented specific factual evidence establishing comprehensive planning mandates under SB 360 as well as the range of costs to be incurred in order to comply with those planning mandates. The closest the Legislative Defendants came to rebutting that information was a series of *legal* conclusions by Taylor as to alleged planning requirements imposed by an entirely separate piece of legislation (House Bill 697). Nowhere in his affidavit, though, does Taylor assert that SB 360 imposes no planning obligations. On the contrary, Taylor acknowledges that “the full costs of SB 360 are not yet known....” The Legislative Defendants failed in their burden to “come forward with counterevidence sufficient to reveal a genuine issue” that would preclude summary judgment.²⁵ *Landers*, 370 So. 2d at 370.

²⁴ The irony, of course, given the argument regarding the City of Weston’s “relatively small” population of 61,697, is that the 2008 population of the City of Gainesville was estimated by the University of Florida at 124,491, more than twice the population of Weston. See http://en.wikipedia.org/wiki/Gainesville,_Florida, last accessed January 3, 2011. Additionally, Gainesville’s municipal web site clearly reflects the existence of an in-house planning department. See <http://www.cityofgainesville.org/GOVERNMENT/CityDepartmentsNZ/PlanningDepartment/tabid/244/Default.aspx>, last accessed January 3, 2011. Notwithstanding the larger size of the population and the existence of a planning department, Gainesville felt it necessary to hire outside consultants to assist with the processing of a DRI application.

²⁵ The Legislative Defendants’ argument regarding the trial court’s purported failure to “average out” the costs of compliance over two years is not developed in the initial brief, other than by passing reference. IB:24, 25.

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IV. THE TRIAL COURT CORRECTLY DECLARED SB 360 UNCONSTITUTIONAL IN ITS ENTIRETY.

Although the Legislative Defendants specifically requested the remedy of severance with respect to the Local Governments' single subject challenge to SB 360, they did *not* request such relief with respect to the unfunded mandate challenge. [R: 653-668]. On the contrary, when specifically prompted by the trial court during oral argument to take a position regarding severance of any unfunded mandates, counsel for the Legislative Defendants responded that it was an "all up or all down" situation and that severance "is [not] appropriate in the unfunded mandate world." [T: 74-75]. Counsel did not qualify his response, arguing instead that the absence of severance as a remedy was consistent with the Legislative Defendants' argument that SB 360 had to be read as a whole. [T: 74]. In fact, the Legislative Defendants have conceded they did not seek severance, not even in their post-judgment motion for rehearing.²⁶ IB:30 n.9.

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However, since the trial court's calculation of fiscal impact was a threshold calculation based upon only *one* of the established cost components set forth in the Local Governments' affidavits, any shortcoming in the calculation may be quickly overcome. For example, if the lowest of the undisputed costs for advertising the mandated plan amendments (\$1,264) is added to the threshold \$15,000 figure used by the trial court, the resulting figure multiplied by the number of DULA's (246) yields a total fiscal impact of \$4,000,944. This amount, "averaged out" over two years, yields an annual impact of more than \$2 million, an amount that exceeds the stipulated \$1.86 million threshold. No further argument will be devoted to this issue in this brief.

²⁶ However, they make the surprising statement that they have been unable to find Florida case law holding that the failure to raise the severance argument
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On appeal, the Legislative Defendants now seek to disavow their position before the trial court contending that because the trial court did not accept their offset argument – a position they themselves have abandoned on appeal – they should not be held to their stipulation as to severance. The strategy underlying their decision to make the stipulation is irrelevant – they cannot change their stipulation simply because their strategy did not work. *See, e.g., Henrion v. New Era Realty IV, Inc*, 586 So. 2d 1295, 1298 (Fla. 4th DCA 1991) (holding that defendant could not revoke prior voluntary stipulation after jury verdict so as to permit new trial of case). Even assuming the Legislative Defendants *could* side-step their trial court stipulation, their severance argument is substantively mistaken.

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before the trial court constitutes a waiver of the argument. IB:30 n.9. There is *abundant* case law that stands for the fundamental principle of appellate preservation that, with the exception of fundamental error, the failure to present an argument before the trial court waives the argument. *See, e.g., McWatters*, 36 So. 3d at 639 (holding “that specific legal argument or ground must be presented to trial court to preserve issue for appellate review”); *Martin*, 936 So. 2d at 1191 n.1 (“This precise argument was not made to the trial court, however, and, thus, has not been preserved for review by this court.”). The cases cited by the Legislative Defendants in favor of severance do not address the situation where the representatives of the Legislature, themselves, concede that severance is not appropriate. They also do not suggest that the failure to sever is a fundamental error, and the Local Governments are unaware of such a precedent.

A. Severance of the unfunded mandates is inconsistent with the plain language of Article VII, Section 18(a).

The applicable constitutional provision (Article VII, Section 18(a)) states that “no county or municipality shall be bound by *any general law* requiring such county or municipality to spend funds or to take an action requiring the expenditure of funds” It does not refer to any “portion of any general law” or “provision of any general law”; neither does it speak to severance. Unfortunately, it does not appear that any appellate court has previously interpreted this particular constitutional provision in ascertaining a proper remedy.²⁷

The Legislative Defendants’ argument regarding the different language used in section 18(b) and (c) of Article VII misses the mark. While such an argument *might* be relevant to the question of whether the Act should be invalidated and stricken from the laws of Florida as opposed to simply ignored by local governments (see Argument III.B, *infra*), it is *not* relevant to the issue of severance, which instead posits the question of whether the entire law or only a particular provision of it is unconstitutional. The Legislative Defendants improperly conflate the two concepts. Section 18(a) speaks in terms of general laws, not provisions of general law. As such, if the general law imposes an

²⁷ While it is true that the Circuit Court in *Lewis* severed the challenged unfunded mandate, 15 So. 3d at 778, it did so because that was the only relief sought by the parties and because Section 33 of Chapter 2007-62 explicitly provided for severance. The issue was not raised at the trial or appellate levels. Importantly, in this case, severance was not sought by any party, nor was a severance provision included in SB 360 (Chapter 2009-96).

unfunded mandate, the entire law is unconstitutional and local governments are not required to comply with it.²⁸

As the Legislative Defendants have correctly pointed out – though insufficiently argued²⁹ – severance of a provision is generally determined by considering the factors set forth in *Ray v. Mortham*, 742 So. 2d 1276 (Fla. 1999): “(1) the unconstitutional provisions can be separated from the remaining valid provisions, (2) the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void, (3) the good and the bad features are not so inseparable in substance that it can be said that the Legislature would have passed the one without the other and, (4) an act complete in itself remains after the invalid provisions are stricken.” *Id.* at 1281. For numerous reasons, the factors in this case weigh heavily against severance.

Severance would make no sense in the case *sub judice* because the various provisions in SB 360 related to growth management are too intertwined to permit

²⁸ Moreover, the use of different language in these other sections does not lead to a contrary conclusion. For example, Article III, Section 6 requires that “every law embrace but one subject,” and does not specify any remedy. Yet there is no doubt that invalidation in its entirety of a law in violation of that section is appropriate. *See Heggs v. State*, 759 So. 2d 620 (Fla. 2000).

²⁹ The Legislative Defendants’ treatment of the *Ray* factors is given short shrift in one paragraph consisting of a series of conclusory assertions without factual or analytical support. IB:31. They accuse the Local Governments of having failed to meet their burden of proof, all the while neglecting to remind the Court that they conceded the issue of severance below, thereby depriving the Local Governments of an opportunity to address the issue before the trial court.

severance. For example, Section 4 of SB 360 requires 246 local governments to adopt comprehensive plan amendments within two years “to support and fund mobility.” It also mandates a host of revisions to section 163.3180, Florida Statutes, the statutory provision governing concurrency. Section 3 of the Act, by comparison, amends section 163.3177, Florida Statutes, in such a way as to reference a statutory provision revised by Section 4:

(f) A local government’s comprehensive plan and plan amendments for land uses within all transportation concurrency exception areas that are designated and maintained in accordance with s. 163.3180(5) shall be deemed to meet the requirement to achieve and maintain level-of-service standards for transportation.

(underscoring in the original). If Section 4 is severed from the Act, Section 3 cannot be consistent with the Legislature’s intent in enacting SB 360 since Section 3 was specifically tied to a *revised* version of section 163.3180(5), Florida Statutes, which would no longer exist. By way of another example, Section 4 contains a provision relating to traffic concurrency that cross-references section 380.06(29)(e), Florida Statutes, a provision *newly created* in Section 12 of the Act:

(f) The designation of a transportation concurrency exception area does not limit a local government's home rule power to adopt ordinances or impose fees. This subsection does not affect any contract or agreement entered into or development order rendered before the creation of the transportation concurrency exception area except as provided in s. 380.06(29)(e).

(underscoring in original). It is unreasonable to conclude that the Legislature would have necessarily created section 380.06(29)(e) in Section 12 of SB 360 had it known that Section 4, which was partly dependent on that provision, was going

to be severed from the Act. The other growth management provisions are similarly connected and interdependent (possibly explaining the lack of a severability provision in SB 360).

In an act “relating to growth management,” it is unreasonable to conclude that the Legislature would have nonetheless adopted SB 360 with Section 4 – its most significant provision consisting of six pages of the Act and cross-referenced in other sections – excised from it. *See B.H. v. State*, 645 So. 2d 987, 994-95 (Fla. 1994) (refusing to sever unconstitutional provision where remainder of legislation would yield absurd results). Severance of Section 4 of SB 360, therefore, fails to satisfy all of the factors set forth in *Ray*.

B. Invalidation is an appropriate remedy available to a trial court in an unfunded mandate case.

No reported decisions have addressed the appropriate remedy in an unfunded mandate case. The trial court here chose the remedy of invalidation, striking the entire law (the “Invalidation Remedy”). The Legislative Defendants and amicus curiae Florida League of Cities (the “League”)³⁰ suggest the alternate

³⁰ Florida law is clear that an amicus curiae may not advocate an issue that has not been raised or preserved by the parties. *See Michels v. Orange County Fire/Rescue*, 819 So. 2d 158, 159-60 (Fla. 1st DCA 2002) (“Two amicus curiae raised a total of four issues, none of which were raised by the parties. ... The issues raised by amici were not properly before this court and were not considered.”); *Acton v. Ft. Lauderdale Hosp.*, 418 So. 2d 1099, 1100-01 (Fla. 1st DCA 1982), *approved*, 480 So. 2d 1282 (Fla. 11983); *Keating v. State*, 157 So. 2d 567, 569 (Fla. 1st DCA 1963). In this instance, the Legislative Defendants stipulated that severance was not available as a remedy, thus inviting the court to conclude that the entire Act had to be

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remedy of leaving the law in place, but declaring that each local government in the state is excused from complying with the law and can therefore opt to either follow or not follow the law (the "Optional Compliance Remedy"). The Local Governments contend that, depending upon the circumstances, either remedy may be appropriate, and thus the trial court did not commit reversible error by choosing the Invalidation Remedy in this case.

The Local Governments do not doubt that there may be situations where the Optional Compliance Remedy would be an appropriate remedy for an unfunded mandate constitutional violation. These situations generally would involve simple laws that are aimed only at local governments, have little regional impacts, involve no strong interest in uniformity, and where local government involvement is not intertwined with the purpose of the law. An example where the Optional Compliance Remedy may be appropriate would be a general law that would require local governments to provide and pay for long term care insurance for all employees. Assuming the law were determined to violate the Unfunded Mandates Prohibition, a sufficient remedy for the violation might be to allow local governments the option of either complying (by providing and paying for long term care insurance) or not complying (by not providing long term care insurance).

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declared unconstitutional. Notwithstanding the Legislative Defendants' belated attempts to disavow that stipulation, the League is precluded from addressing those issues as amicus. Nonetheless, in an abundance of caution, the Local Governments will address the League's positions.

The decision by each local government has no impact on other local governments, nor is there any strong public interest in ensuring uniformity in the provision of long term care insurance, or a need for all local governments to comply for the law to meet its purpose.

However, Optional Compliance cannot be the *exclusive* remedy available to trial judges for *all* cases involving unfunded mandates.³¹ Such a remedy would not

³¹ It is not enough, as the League suggests, to rest upon the plain language of section 18(a) and the dictionary definition of the term “bound.” AmB:6-7, 10-11. A well established corollary to the doctrine of plain language construction is that language will not be given its ordinary meaning if doing so either defeats the legislative intent underlying the statute or produces absurd results. *Polite v. State*, 973 So. 2d 1107, 1111 (Fla. 2007) (holding plain language interpretation of legislation controls unless it produces unreasonable result or is contrary to legislative intent); *V.K.E. v. State*, 934 So. 2d 1276, 1289 (Fla. 2006) (holding courts “will deviate from a statute’s plain language when necessary to avoid an absurd result. No literal interpretation should be given that leads to an unreasonable or ridiculous conclusion...” (internal quotation marks omitted)); *State v. Burris*, 875 So. 2d 408, 414 (Fla. 2004) (stating that “[a] statute’s plain and ordinary meaning controls only if it does not lead to an unreasonable result”); *Sloban v. Fla. Bd. of Pharmacy*, 982 So. 2d 26, 33 (Fla. 1st DCA 2008) (“The plain meaning of a statute controls unless this leads to an unreasonable result or a result contrary to legislative intent.”). The legislative history of section 18(a) shows that the reason that the “no county or municipality shall be bound” language was used was to limit standing to local governments and prevent others from challenging laws as unfunded mandates. See *House of Representatives Committee on Community Affairs Final Staff Analysis & Economic Impact Statement*, June 2, 1989 (the “Final Staff Analysis”), pg. 5 (“This provision is intended to give standing only to local governments to litigate unless they are challenged for not complying with the law. However a local government could ask for a declaratory judgment. Without this provision, the courts could be deluged with lawsuit using this constitutional amendment as the basis for challenging general laws.”)

work in cases involving more complicated laws, including, but not limited to, laws that have impacts across jurisdictional boundaries, laws that involve legislative schemes that intertwine or are dependent upon the participation of multiple local governments, and situations where uniformity of laws is necessary. The best way to demonstrate these types of situations are by means of examples:

- The Legislature passes a general law creating a statewide building commission that adopts rules applicable to all building activities in the state, and requires that the regulatory program be funded by local governments. Allowing individual local governments to “opt in” and comply with the law would be unworkable if an insufficient number of local governments failed to do so, thereby creating a shortfall in funding for the program. Moreover, Optional Compliance would raise the question of whether the building rules established by the commission applied only in cities that opted in. If so, there would be different building rules in each local government, in violation of the purpose of the new law. Invalidation of the law, in that instance, would be appropriate.
- The Legislature could determine that the traffic system of the state should be changed to the British system. It could pass a general law amending Chapter 316, Florida Statutes, to require that, henceforth, all motorists drive on the left (rather than right) side of the road, and mandate that local governments implement the law by, among other things, installing new traffic signs, relocating signals, and re-marking roadways (all of which would, of course, cost significant amounts of money). For obvious safety reasons, it would be inappropriate to allow some local governments to “opt in” and comply while other neighboring jurisdictions could “opt out” and continue to operate under the old system. This would also violate the intent of Chapter 316 to “make uniform traffic laws to apply throughout the state and its several counties and uniform traffic ordinances to apply in all municipalities.” § 316.002, Fla. Stat. Invalidation of the law, in that instance, would be appropriate.

- The Legislature could decide to change its philosophy regarding marijuana use from one of criminalization to one of education. It could pass a general law that would repeal all of the criminal statutes that make possession, use or sale of marijuana crimes, and mandate that all local governments spend money on education campaigns regarding the dangers of marijuana use. If a court determined that this violates the Unfunded Mandates Prohibition, the remedy of Optional Compliance would not work. If some local governments chose to “opt out” and not do the education programs (in order to avoid the unfunded mandate), would it be a crime for individuals to use, possess or sell marijuana within the boundaries of those local governments? If so, under what statute would violators be prosecuted? If not, then the Legislature’s goal of replacing criminalization with education would be compromised, resulting in legalized marijuana with no education. The only possible remedy in that case would be invalidation of the law, which would enable the Legislature to reenact the decriminalization while, at the same time, not improperly placing the funding burden for education on local governments.

SB360 clearly falls into the category of general laws where a declaration of invalidity as to the law in its entirety is appropriate because of the regional issues implicated by the Act and because of the intertwining interests and obligations of local governments and others potentially subject to the Act’s requirements. For example, one of the primary purposes of SB 360, as enacted, was to eliminate the Chapter 380 DRI review process in all DULA’s. SB 360, § 12. DRI’s, by *definition*, have “regional” impacts, not just local ones; which is to say that a particular DRI development in one DULA might have impacts in neighboring DULA’s (traffic, noise, school overcrowding, water and sewer issues, etc.).³²

³² Section 380.06(1), Florida Statutes, defines a DRI 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.” Section 163.3161(4), Florida Statutes, which sets forth part of
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However, if the DULA where the DRI was located had elected to comply with the unfunded mandates in SB 360 – and thus, been excused from DRI review requirements – neighboring DULA’s that were unable or had chosen not to incur the unfunded mandates (and therefore would *still* be subject to DRI review requirements as to that same project) would inevitably suffer the consequences of optional compliance. Of course, an even more problematic situation would exist if a portion of a DRI project is located in one city that elects to participate in SB360 and another part is in a neighboring city that does not.

Optional Compliance with SB would produce unworkable and absurd results. It would create planning chaos, likely engender additional

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the purpose of the “Local Government Comprehensive Planning and Land Development Regulation Act,” states that “[i]t is the intent of this act to encourage and assure cooperation *between and among municipalities and counties* and to encourage and assure *coordination of planning and development activities of units of local government with the planning activities of regional agencies and state government* in accord with applicable provisions of law.” (emphasis added). Section 380.021, Florida Statutes, describes the purpose of Chapter 380, in relevant part, “to protect the natural resources and environment *of this state* as provided in s. 7, Art. II of the State Constitution, ensure a water management system that will reverse the deterioration of water quality and provide optimum utilization of our limited water resources, facilitate orderly and well-planned development, and protect the health, welfare, safety, and quality of life of the *residents of this state*, it is necessary adequately to plan for and guide growth and development within this state. In order to accomplish these purposes, it is necessary that the *state establish land and water management policies to guide and coordinate local decisions relating to growth and development*” (emphasis added).

intergovernmental litigation and undermine broad statewide and regional growth management objectives. There would be laws in the statute books, but no one would know whether such laws are in effect in any given jurisdiction. This would be particularly problematic in the case at bar, where different rules for growth management would apply in patchwork fashion across the state, with no one knowing either if a local government has chosen to comply or which version of state law governs in a particular jurisdiction. There is no indication in the Act that the Legislature crafted SB 360 with this concept of piecemeal, optional compliance in mind. To engraft onto the Act such an intent after the fact has the potential for doing more harm than good, and would unnecessarily involve this Court in crafting compliance procedures that more appropriately belong in the realm of the Legislature.³³ The very limited interpretation of the remedy available under the

³³ Subsection (e) of the Unfunded Mandates Prohibition authorized the Legislature to enact implementing legislation. See Article VII, Section 18(e), Florida Constitution. As pointed out by the League in its amicus brief, in 1991, the Legislature attempted to do so by passing SB 2000. That bill, however, was vetoed by the Governor, and no other implementing legislation has been enacted. In order to implement the remedy of Optional Compliance, clear procedures would need to be enacted to answer the many questions that would arise. For example, would a local government have to take action to “opt in” or take action to “opt out”? What procedures would it utilize to do so? Would it do so by resolution or ordinance? Would there be a deadline by which each local government would need to choose? If a local government chooses to “opt out,” can it change its mind in the future and then “opt in”? If a local government “opts out,” does that mean the law does not apply to people/companies within that local governments’ jurisdictional boundaries, or just that the local government itself need not follow the law? These issues are appropriate for the legislative/executive branch to determine, not a trial judge on a case by case basis. However, no
(continued . . .)

Unfunded Mandates Provision suggested by the Legislative Defendants and League yields unreasonable results and should be rejected. The only workable solution in this case is to do as the trial court has done and declare the entirety of SB 360 unconstitutional and invalid.

C. The League's home rule powers argument does not warrant that Optional Compliance be the only remedy available for an unfunded mandate violation.

The Local Governments certainly do not take issue with the League's general assertion of broad home rule powers for municipalities or with its description of the historical context in which the Unfunded Mandates Prohibitions arose. However, it does not advance the "cause" of municipal protection from state-imposed financial mandates to say that in *every* case of an unfunded mandates violation the only remedy available is that municipalities *must* be permitted to decide whether to comply with the law in question.³⁴ As previously noted, in cases involving more complicated laws, including, but not limited to,

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implementing legislation has been adopted. Accordingly, except in the simplest of cases, where the interests implicated by the general law are purely insular local governmental interests, the only available remedy to trial judges in unfunded mandates cases is invalidation (unless and until the Legislature implements a Optional Compliance mechanism).

³⁴ This limited interpretation of the remedies available under the Unfunded Mandates Prohibition is also contrary to its legislative intent, which was to "give local governments greater bargaining power on the subject of unfunded mandates and to protect existing local revenue sources." Final Staff Analysis, pg. 9.

laws that have impacts across jurisdictional boundaries, laws that involve legislative schemes that intertwine or are dependent upon the participation of multiple local governments, and situations where uniformity of laws is necessary, the remedy of invalidation is more appropriate.³⁵

The municipal home rule interest in preventing the State from imposing unfunded mandates is equally served in this case by declaring the entire offending general law unconstitutional and unenforceable. Permitting optional compliance in this instance, simply in furtherance of elevating municipal home rule authority, would likely result in unintended planning consequences that cannot be foreseen at this time from an application of SB 360 that was never contemplated by the Legislature when it was enacted.

CONCLUSION

For all the foregoing reasons, the trial court correctly reached the conclusion that SB 360 violates the Unfunded Mandate Prohibition and that the entire Act should be declared unconstitutional. The judgment of the trial court, therefore, should be affirmed in this regard.

³⁵ The League's home rule powers argument ignores that many municipal DULA's are so designated solely because they lie within the boundaries of a county meets the definition of a DULA. *See* SB 360, § 2 (defining a DULA, in part, as "[a] county, including the municipalities located therein, which has an average of at least 1,000 people per square mile of land area; or ... which has a population of at least 1 million."). The League's argument fails to address the situation where the county in which the municipality is located rejects the unfunded mandates imposed by SB 360, while one or more municipalities within the county opt to participate.

CROSS-INITIAL BRIEF

The Local Governments have cross-appealed the trial court's decision to declare moot the single-subject challenge to SB 360.

SUMMARY OF ARGUMENT ON CROSS-APPEAL

The Single Subject Provision provides: "Every law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title." SB 360 clearly violates this provision because it addresses three separate and distinct subjects: (a) growth management; (b) security cameras; and (c) tax exemptions and valuation methodologies relating to affordable housing. These three subjects were improperly combined by the Legislature in the waning hours of the 2009 legislative session. The Legislature's last minute combination of these three subjects resulted in a classic violation of the Single Subject Provision.

Nevertheless, the trial court refused to hear the single subject challenge, finding that the Legislature's enactment in the subsequent 2010 legislative session of a law that codified all prior enacted laws into statutes "cured" the violation and mooted the challenge. The trial court's finding was based upon several decisions of the Florida Supreme Court and District Courts of Appeal under the Legislature's prior biennial statutory codification procedure. Now, however, the statutory re-enactment occurs every year (rather than every other year), reducing the "window period" for a single subject challenge to one year and effectively emasculating any remaining semblance of meaning for the Single Subject Provision. Thus, the Local Governments request that this Court respect the Single Subject Provision, distinguish earlier precedent decided under the prior *biennial* statutory codification

procedure, and find that statutory codification under the new annual codification system does not “cure” the clear violation of the Single Subject Provision that occurred in the enactment of SB 360.

STANDARD OF REVIEW ON CROSS-APPEAL

A trial court’s decision granting summary judgment is subject to *de novo* review. *Acosta Inc. v. Nat’l Union Fire Ins. Co.*, 39 So. 3d 565, 573 (Fla. 1st DCA 2010) (citing *Castleberry v. Edward M. Chadbourne, Inc.*, 810 So. 2d 1028, 1029 (Fla. 1st DCA 2002)).

ARGUMENT ON CROSS-APPEAL

I. THE TRIAL COURT ERRED IN REFUSING TO CONSIDER THE LOCAL GOVERNMENTS’ SINGLE SUBJECT CHALLENGE ON THE GROUNDS OF MOOTNESS.

The trial court pretermitted its consideration of the Local Governments’ single-subject challenge to SB 360 because it concluded that the reenactment and codification of SB 360 into the Florida Statutes “cured” the violation and rendered the challenge moot. The trial court erred in its analysis.

A. The trial court’s findings of “cure” and mootness were premised upon decisions under the old biennial statutory codification process.

Despite the clear violation of the Single Subject Provision evident in the enactment of SB 360 (*see infra*, at pp. 65-79), the trial court determined that any single subject challenge to SB 360 was rendered moot as a result of the Legislature’s statutory codification (Chapter 2010-3), which took effect on June 29, 2010 (*less than one year* after SB 360 was enacted, 26 days after the final

hearing in the challenge, but almost two months before the trial court entered its final summary judgment).

The trial court's finding of mootness was based upon several decisions of the Florida Supreme Court (and other District Courts of Appeal) that held that the *biennial* statutory codification "cured" any single subject violations. As noted below, the rationale for those decisions is based upon a *biennial* statutory codification and a two-year "window" or "challenge" period. Now, however, the Legislature has reduced the "window" or "challenge" period to less than one year, necessitating further review of the effect of the statutory codification.

(1) The early history of statutory codification jurisprudence.

For many years, the Legislature has utilized a codification method for keeping general statutory law up to date and readily available. See *Preface to Florida Statutes* at vi. Prior to 1999, the Florida Statutes were published following each odd-year session. *Id.* Thus, statutory codification bills were passed by the Legislature every *two years* (in the odd-year sessions).

In 1980, the Florida Supreme Court was faced with a single subject challenge to section 316.193, Florida Statutes, in *Santos v. State of Florida*, 380 So. 2d 1284 (Fla. 1980). Santos claimed that section 316.193 contained two subjects, one in subsection 316.193(1) and another in subsection 316.193(3). These two subsections had been adopted by the Legislature in *separate* laws (chapters 71-135 and 74-384, respectively). The Court found that the single subject provision applied to the enactment of the "laws" not the subsequently

codified statute, and thus found no single subject violation because each subsection had been adopted by a separate law. *Santos*, 380 So. 2d at 1285. Shortly thereafter, in *State of Florida v. Combs*, 388 So. 2d 1029 (Fla. 1980), the Court went further and found that the Single Subject Provision applied to a “law” only so long as it remained a “law” – “once re-enacted as a portion of the Florida Statutes, it was not subject to challenge under article III, section 6.” *Id.* at 1030. In short, a single subject challenge could not be asserted against a “law” once it had already been codified into the Florida Statutes.

(2) The further development of the doctrine.

Subsequent to *Santos* and *Combs*, the Florida Supreme Court seemed to ignore (or at least overlook) the effect of the biennial statutory codification in single subject challenges. The following year, in *Chenoweth v. Kemp*, 396 So. 2d 1122 (Fla. 1981), the Court evaluated a single subject challenge to the medical malpractice statute (Ch. 76-260), found no single subject violation, but failed to mention that two biennial statutory codifications (Chs. 77-266 and 79-281) had taken place between original enactment in 1976 and the Court’s decision in 1981. A similar result occurred in *Bunnell v. State of Florida*, 453 So. 2d 808 (Fla. 1984), where the Court found that Chapter 82-150 violated the single subject law, but did not mention the 1983 biennial codification in Chapter 83-61.³⁶

³⁶ This Court similarly addressed single subject cases without addressing the effect of statutory codification. *See, e.g., Alachua County v. Florida Petro. Marketers Ass’n*, 553 So. 2d 327 (Fla. 1st DCA 1989) (finding that Chapter 88-156 violated single subject rule without referencing the later statutory (continued . . .)

The Supreme Court sought to clarify the state of the law in *Loxahatchee River Environ. Control Dist. v. School Bd. of Palm Beach County*, 515 So. 2d 217 (Fla. 1987). There, the Supreme Court held that “a law passed in violation of the requirements of article III, section 6 is invalid until such time as it is reenacted for codification into the Florida Statutes.” *Id.* at 219. Thus, the Court went ahead and considered the single subject challenge to Chapter 81-223 (which exempted school boards from impact fees), because “the dispute arose” before the statutory reenactment. *Id.* The Court held that if the law was found to be invalid, the school board would have to pay the impact fee for that year, but would be under no obligation to pay after the statute was reenacted. *Id.*

The Court thus created a “window” or “challenge” period for single subject violations. The Court then proceeded to apply this rule to several criminal cases involving sentencing, holding that in order to have standing to bring a single subject challenge, the criminal defendant must have committed his or her offense during the “window period” between the enactment of the challenged law and the effective date of the biennial statutory reenactment. *See State v. Johnson*, 616 So. 2d 1, 3 (Fla. 1993) (“Johnson’s offense was committed before the reenactment of chapter 39-280 and during the window period in which that chapter was subject to attack as being violative of the constitution’s single subject requirement.”); *State v.*

(. . . continued)

codification in Chapter 89-64); *State of Florida v. Leavins*, 599 So. 2d 1326 (Fla. 1st DCA 1992) (invalidating Chapter 89-175 without mentioning the 1991 statutory codification in Chapter 91-44).

Thompson, 750 So. 2d 643, 646 (Fla. 1999) (holding Thompson had “standing to challenge chapter 95-182 on single subject rule grounds because she committed her offenses on November 16, 1995.”); *Heggs v. State of Florida*, 759 So. 2d 620, 623 (Fla. 2000) (finding that Heggs had “standing” to challenge Chapter 95-184 because he committed his offenses in the “applicable window period”); *Tormey v. Moore*, 824 So. 2d 137, 143 (Fla. 2002) (finding that Tormey could bring single subject challenge because his relevant offense was committed during the “window period.”).³⁷ However, a successful single subject challenge would benefit only those whose offenses occurred during the “window period,” after which the single subject violation was viewed as “cured.”³⁸

³⁷ This Court has also utilized the “window period” for single subject challenges. See *Environ. Conf. of Southwest Fla. v. State of Florida*, 852 So. 2d 349, 350 (Fla. 1st DCA 2003) (finding appeal moot because 2003 statutory codification “cured” any single subject defect and appellants failed to articulate any practical purpose that would be served by allowing the appeal to continue “now that the window period has closed”); *Gillman v. State of Florida*, 860 So. 2d 1099, 1100 (Fla. 1st DCA 2003) (finding that chapter 98-223 violated single subject rule and that appellant had committed offense during the window period); *Environ. Conf. of Southwest Fla. v. State of Florida*, 886 So. 2d 1013, 1016-17 (Fla. 1st DCA 2004) (finding that single subject challenge to permit was filed within window period and that statutory codification was not retroactive).

³⁸ It is unclear how the subsequent statutory codification can “cure” a single subject violation where the statutory codification law itself contains hundreds of unrelated subjects. This query has not been addressed by an appellate decision the Local Governments have found.

B. The Legislature changes the foundation of the “cure by codification” doctrine.

The Florida Supreme Court judicially created a two-year “window period” during which challenges could be brought. However, beginning in 1999, the Legislature began to publish Florida Statutes every year, instead of every two years. “With the change to annual publication of the *Florida Statutes*, the adoption act is now submitted to the Legislature annually instead of biennially.” *Id.* Thus, the statutory codification bills were passed every two years from 1941 through 1999, and then every year starting in 2003 (there was no 2000 Adoption Act and the 2001 and 2002 Adoption Acts did not pass). *Id.*; §§ 11.2421, *et seq.*, Fla. Stat. (Legislative history shows initial adoption in 1941, then amendments every 2 years through 1999, then every year beginning in 2003).

The original two-year “window period” envisioned by the Florida Supreme Court in its jurisprudence as the foundation for its judicially created doctrine was, therefore, reduced to one year by the 2003 Adoption Act. *See Preface to Florida Statutes*, at vi (“The 2-year ‘curing period’ was reduced to 1 year” in the 2003 statutory adoption act.). Neither the Florida Supreme Court nor this Court has addressed whether the reduction in half of the “window period” affects single subject jurisprudence, nor have any decisions been rendered on single subject challenges to laws passed after the change took place.³⁹

³⁹ The only reported decision that appears to address a single subject challenge since the “window period” was reduced from two years to one year is *Ellis v. Hunter*, 3 So. 2d 373 (Fla. 5th DCA 2009). Although the Fifth District there noted “parenthetically” that the adoption acts are now submitted annually, (continued . . .)

(1) The Legislature's cutting in half of the "window period" necessitates further review and modification of the effect of statutory codification on single subject challenges.

The Legislature's reduction of codification to a one-year "window period" practically renders illusory what little remained of the constitutional limitations on legislative authority found in Article III, Section 6 of the Florida Constitution. This process (and particularly the reduction) suggests a deeply troubling disruption of the balance of power among the co-equal branches of Florida's government. While, as noted above, there is unquestionably a number of decisions holding that the *biennial* reenactment and codification of session laws as statutes removes those laws from the Single Subject Provision, not a single one of those cases articulates a constitutionally founded policy reason for doing so, nor do they address the shortened one-year "window period."

Article III, Section 6 of the Florida Constitution provides: "Every *law* shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title." (emphasis added). Nothing in this language suggests that fundamental constitutional deficiencies may be cured simply by having the Legislature reenact, in one fell swoop, all previously adopted and unrelated defective laws as "statutes," and there does not appear to be any analysis

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there was no substantive discussion as to the issue. *Id.* at 381. It is not surprising that there is a dearth of single subject challenges since the change to annual codification, given that the laws are codified into statutes before any litigant can possibly hope to have a challenge completed through appeal.

in any of the cases that would justify eviscerating the Single Subject Provision of the Florida Constitution in this manner.⁴⁰

The reduction in half of the “window period” exacerbates the problem. During the prior two-year “window period”, constitutional challenges to single subject violations could be meaningfully prosecuted. The public, in turn, would have a longer period of time in which to discover unlawful logrolling in legislation and either abide by it or demand corrective action. However, one year (or in this case, less than one year) is simply not sufficient time to discover and prosecute a matter to completion. Thus, for example, assume that the Legislature passed a law that, among other subjects, prohibits cities from requiring businesses to have security cameras (as it did in SB 360), in clear violation of the single subject rule. A city may decide to challenge that law. Then, before the lawsuit is completed (which would certainly take more than a year, including appeals), the annual statutory codification would be enacted, thus mooting the lawsuit – a true paradigm of “justice delayed is justice denied.” The Single Subject Provision was clearly violated, but the public would have no meaningful way to enforce the constitutional limitation on legislative authority. Under the old two-year “window period,” there was at least a reasonable chance that the law would be declared

⁴⁰ While there appears to be some internal constitutional “logic” to the Supreme Court’s analysis in *Santos* and *Combs*, inasmuch as those cases effectively mandated that a single subject challenge be filed before a “law” is codified into a “statute,” the internal logic diminishes and eventually disappears as the jurisprudence continued to develop.

invalid and stricken from the books before it could be included in the statutory codification.

Moreover, there does not appear to be any functional limitation should the Legislature decide next year that they will wait only six months or maybe even three months before codifying session laws. Frankly, there does not appear to be anything to stop the Legislature from immediately codifying session laws as soon as they are enacted.

The Florida Supreme Court has repeatedly held that the primary purpose of the Single Subject Provision in Article III, Sec. 6, is to protect the public from legislative fraud in the form of logrolling. *See, e.g., Thompson, 750 So. 2d at 646-47.*

The present trend by the Legislature towards abbreviating the curative period is nothing less than constitutionally perilous and risks rendering the Single Subject Provision of the Florida Constitution utterly meaningless. In effect, the Legislature could amend the Constitution (at least from a functional perspective) without the approval of Florida's citizens simply by further shortening the reenactment period and premitting any challenges based on single subject violations. This simply cannot be and must not be the law.⁴¹

⁴¹ The Court need only imagine a simple example of legislative slight-of-hand to appreciate the constitutional precipice upon which we presently stand. If the Legislature, during the final hours of a legislative session, were to logroll within an act relating to growth management a highly controversial piece of legislation (for example, a provision allowing any and all third-term abortions), such an attempt would undoubtedly violate the single subject (continued . . .)

(2) The Local Governments' constitutional concerns are not uniquely held.

The Local Governments do not stand alone in their concern as to this apparent usurpation of constitutional authority. Judge Altenbernd, writing for the Second District Court of Appeal in *State v. Rothausser*, 934 So. 2d 17 (Fla. 2d DCA 2006), made the following observations regarding the legislative "cure" of single subject violations by reenactment and adoption (even under the old biennial codification):

The single subject requirement in article III, section 6, of the Florida Constitution has three well-recognized purposes:

(1) to prevent hodge podge or "log rolling" legislation, i.e., putting two unrelated matters in one act; (2) to prevent surprise or fraud by means of provisions in bills of which the titles gave no intimation, and which might therefore be overlooked and carelessly and unintentionally adopted; and (3) to fairly apprise the people of the subjects of legislation that are being considered, in order that they may have opportunity of being heard thereon. [citation omitted].

Invariably, "logrolling" seems to be the first evil that courts and commentators rely upon in explaining the wisdom of this [single subject] constitutional requirement, which is common in state constitutions. [citations omitted].

"Codification" rules or exceptions ... delay the effective enactment of a law and give the public more time to discover the law and abide by it. Thus, a codification rule can be seen as a remedy for the third

(... continued)

rule. However, by shortly thereafter reenacting and adopting those session laws as statutes, the Legislature would remove the controversial legislation beyond the reach of the constitutional single subject mandate, despite the public's having been utterly deceived as to the Legislature's intent in adopting an act relating to "growth management."

purpose of the single subject rule as explained in the above-quoted language. Arguably, such a rule serves some remedial function for the second purpose. *But the wholesale reenactment of the laws of Florida by amending section 11.2421 is undeniably the ultimate act of logrolling; thus, it cannot serve as a remedy to cure logrolling.*

In 1999, the Supreme Court of Illinois was urged by the State in a criminal proceeding to adopt a codification rule comparable to the rule in Iowa and Florida. *People v. Reedy*, 186 Ill.2d 1, 237 Ill.Dec. 74, 708 N.E. 2d 1114 (1999). After a lengthy analysis of the issue, the court refused to adopt the codification rule, explaining, "In our view, a codification rule would unjustifiably emasculate the single subject rule in Illinois, and we, therefore, reject such a proposition." *Id.* at 1120.

Judicial remedies are often affected by the paradigm we use to make decisions. It is rare for lawyers or judges to envision a law or some other legal right or obligation as "dormant." More often, we think of legal rights or obligations being "void" or "voidable." If laws unconstitutionally enacted as a result of single subject violations were viewed as "void" from their inception, then it is obvious that they would need to be reenacted in a constitutional manner by a new bill with a single subject before they could ever be treated as constitutional. [footnote omitted]. If they were viewed as "voidable," then presumably any judicial determination voiding the law within an applicable period of time would require the legislature to reenact the law in a constitutional manner by a new bill with a single subject. Such reenactment has occasionally occurred in Florida. [footnote omitted]. *See Martinez v. Scanlan*, 582 So. 2d 1167, 1172 (Fla. 1991). On the other hand, so long as this constitutional violation is deemed to place the law into a dormant status, like a hibernating bear awaiting the spring, then the [codification] rule ... has a degree of logic, *even if it does not solve the primary evil intended to be addressed by the constitutional requirement of single-subject legislation. At this point, Florida law is controlled by the paradigm of dormancy, and we must reverse the trial court's order of dismissal.*

Rothausser, 934 So. 2d at 20 (emphasis added).

Of course, Judge Altenbernd's acknowledgment of the relative merits of the codification rule with respect to two of the three evils addressed by the single subject rule diminishes substantially as the Legislature arbitrarily chooses to shorten the time frame within which it reenacts and codifies session laws.

In addition to Illinois and Judge Altenbernd, the Iowa Supreme Court has also limited the effect of the codification process on pending challenges. In *Tabor v. State of Iowa*, 519 N.W. 378 (Iowa 1994), the Iowa Supreme Court held:

The codification process only cuts off a right of constitutional challenge under [the single subject provision of the Iowa Constitution] if no one has lodged such a challenge before codification is complete If some litigant does lodge a constitutional challenge prior to codification of the flawed legislation and prevails, then the resulting invalidation of the statute inures to the benefit of other persons adversely affected by the legislation.

Id. at 380. In this regard, the Iowa Supreme Court's reasoning appears to be in line with the Florida Supreme Court's early analysis of the issue in *Santos* and *Combs*.

The Legislature's reduction in the "window period" to one year necessitates review of single subject jurisprudence by this Court (and the Supreme Court), without which the single subject rule will be rendered meaningless. Rather than view single subject violations as "cured" and challenges "moot" following statutory codification, the Court instead should hold that the one year period is a "challenge period" after which a challenge will be barred. However, any challenge brought within that period should be allowed to proceed to completion, and, if

successful, result in an invalidation of the law as to all persons adversely affected.⁴²

II. SB 360 VIOLATED THE SINGLE SUBJECT PROVISION.

A. The History And Application of The Single Subject Provision – Art. III, Sec. 6, Fla. Const.

The Single Subject Provision has a long history in Florida, being a part of the Constitution since 1868. *See* Art. IV, § 14, Fla. Const. (1868). It is now codified in Article III, Section 6, of the Florida Constitution and provides, in part, that “every law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title.” Art. III, § 6, Fla. Const.⁴³

The Florida Supreme Court held in *Thompson*, 750 So. 2d 643 (Fla. 1999), that the purposes of the Single Subject Provision are:

(1) to prevent hodge-podge or “log rolling” legislation, *i.e.*, putting two unrelated matters in one act; (2) to prevent surprise or fraud by means of provisions in bills about which the titles gave no intimation,

⁴² This would be similar to the five year limitations period for a person claiming that a municipality failed to strictly follow advertising or other requirements for the adoption of an ordinance or resolution. *See* Section 166.041(7), Florida Statutes (“Five years after the adoption of any ordinance or resolution adopted after the effective date of this act, no cause of action shall be commenced as to the validity of an ordinance or resolution based on the failure to strictly adhere to the provisions contained in this section.”).

⁴³ Florida does not stand alone in imposing this constitutional restraint on legislative authority. *See Franklin v. State*, 887 So. 2d 1063, 1071 (Fla. 2004) (noting that as of 2004, 43 of the 50 states had a single subject provision).

and which might therefore be overlooked and carelessly and unintentionally adopted; and (3) to fairly apprise the people of the subjects of legislation that are being considered, in order that they may have opportunity of being heard thereon.

Id. at 646. The Court also noted a corollary iteration of this policy: “The purpose of this constitutional prohibition against a plurality of subjects in a single legislative act is to prevent “logrolling” where a single enactment becomes a cloak for dissimilar legislation having no necessary or appropriate connection with the subject matter.” *Id.* at 646-47 (citing *State v. Lee*, 356 So. 2d 276 (Fla. 1978)); *Tormey v. Moore*, 824 So. 2d 137, 139 (Fla. 2002), *receded from on other grounds*, *Franklin*, 887 So. 2d at 1075 n.23.

The *Thompson* Court also observed that the most common Single Subject Provision violations frequently occur – as precisely occurred in this case – when a bill is *amended several times*, the *title of the bill is changed*, and the *bill is passed near the end of the legislative session*. *Id.* at 648. The Court, therefore, examined the legislation in order to determine if its various sections had a “natural or logical connection.” *Id.* at 647.

In *Franklin*, the Supreme Court endeavored to provide greater clarity as to the test for applying the Single Subject Provision. 887 So. 2d at 1071 (“[T]he methods for determining both the single subject of an act and those matters that are properly connected to that subject vary. We take this opportunity to...clarify the single subject analysis.”). Reaffirming its decision in *Thompson*, the Court went on to note:

Thus, the single subject clause contains three requirements. First, each law shall “embrace” only “one subject.” Second, the law may

include any matter that is “properly connected” with the subject. The third requirement, related to the first, is that the subject shall be “briefly expressed in the title.”

Id. at 1072 (quoting Art. III, Sec. 6, Fla. Const.). The Court went on to explain the mechanics of the test:

We resolve the uncertainty as to the source of the single subject by relying on the precise language of the constitution itself, which mandates that the single subject be “*briefly* expressed in the title.” Although the full title may be as lengthy as the Legislature chooses, the actual expression of the single subject within the full title must be *briefly* stated. Therefore, ... the single subject of an act is derived from the short title, i.e., the language immediately following the customary phrase “an act relating to” and preceding the indexing of the act’s provisions. In so doing, we specifically note that although many acts may contain a citation name by which either the entire act or portions of it may be identified, the citation name is not synonymous with the single subject.

Id. at 1075.⁴⁴ “Ordinarily, determining the single subject of an act by reference to the short title will be a straightforward process.” *Id.* at 1077.

As for the second part of the single subject analysis – the question of whether a particular subject is “properly connected” to the title – the Court held:

After reviewing these various methods of defining a “proper connection,” we take this opportunity to set forth the correct test to be

⁴⁴ The Court cautioned, however, that the short title cannot be so overly broad as to render the single subject provision meaningless by incorporating almost any conceivable related subject. *Id.* at 1076. The Court went on to explain that in *Thompson*, the revised title of the legislation – an act relating to the justice system – was so broad that the Court examined the entirety of the legislation and reverted to the earlier title – an act relating to career criminals. *Id.* at 1076-77.

applied when determining whether a connection between a provision in the act and the act's subject is "proper" within the meaning of the single subject clause: A connection between a provision and the subject is proper (1) if the connection is natural or logical, or (2) if there is a reasonable explanation for how the provision is (a) necessary to the subject or (b) tends to make effective or promote the objects and purposes of legislation included in the subject.

Id. at 1078. In applying this test and examining the purposes of the legislation, however, caution must be exercised that "the purposes of an act []not be used to either define or expand the single subject."⁴⁵ *Id.*

The importance of enforcing the single subject constitutional limitation on legislative authority must prevail over practical concerns. As the Supreme Court pointedly observed:

We realize that our decision here will require the resentencing of a number of persons who were sentenced as violent career criminals.... We also realize that a number of persons affected by other amendments contained in chapter 95-182 may rely on our decision here in obtaining relief.... However, as this Court stated in *Johnson*, "This result is mandated by the [L]egislature's failure to follow the single subject requirement of the constitution." [citation omitted]. Had the Legislature complied with the single subject rule, this case would not be before us today.

⁴⁵ The Court reiterated its holding in *Thompson* that where "the offending... provisions were added to the bill near the end of the regular session...[i]t is in circumstances such as these that problems with the single subject rule are most likely to occur." *Id.* at 1079 (citing *Thompson*, 750 So. 2d at 648); see also *Heggs v. State*, 759 So. 2d 620, 627 (Fla. 2000) (chapter law which contained disparate provisions added near the end of the session constituted a "classic act of logrolling").

Thompson, 750 So. 2d at 649 (quoting *State v. Johnson*, 616 So. 2d 1, 4 (Fla. 1993)).

B. The Enactment of SB 360 Violated Art. III, Sec. 6, Fla. Const.

SB 360's short title is "An Act Relating to Growth Management." SB 360, at 1. Although the short title defines SB 360's single subject as "growth management" – see *Franklin*, 887 So. 2d at 1075 – it is readily apparent that SB 360 addresses a number of subjects not "properly connected" to the single subject of growth management.⁴⁶ See SB 360, §§ 6, 17-20.

(1) SB 360 Contains Provisions Unrelated to Growth Management.

(a) The security camera provision.

SB 360 includes an incongruous provision that prohibits all counties and municipalities, including the Local Governments, from adopting business regulations for security cameras if doing so would require lawful businesses to expend money to enhance local police services. *Id.* at § 6. There is simply no

⁴⁶ Neither SB 360 nor Florida Statutes, in general, define "growth management." However, at least one treatise in the field of zoning and planning has defined "growth management" as referring to "governmental planning, regulation, and infrastructure controls that guide the pattern and pace of development." 2 *Rathkopf's The Law of Zoning and Planning*, § 15:1 (4th ed. 2009), at [R: 399-400] (citing Gleeson, Ball, Chinn, Einsweiler, Freilich & Meagher, *Urban Growth Management Systems: An Evaluation of Policy-Related Research iv* (1975) ("Urban growth management systems are designed to control or influence the rate, amount, or geographic pattern of growth within one or more local jurisdictions.")).

“natural or logical” connection between “managing growth” – that is, regulating and guiding the pattern and pace of development – and *regulating security cameras at private places of business*. It similarly cannot be said that incorporating security camera provisions in SB 360 is “necessary to the subject” of growth management or “tends to make effective or promote the objects and purposes” of growth management. *Franklin*, 887 So. 2d at 1078.

Instead, the Legislative Defendants below tried to salvage the security camera provision by instead contriving a different purpose – the promotion of economic development in population centers – and arguing that the security camera provision related to that unstated purpose.⁴⁷ Defendants’ proffered connection to economic development (assuming that were the proper purpose to consider) – that local requirements for security equipment *might* dissuade developers from locating in those jurisdictions – is so attenuated that its reasoning would have justified the inclusion of any conceivable provision within SB 360.

For example, a provision precluding local governments from regulating the cleanliness of toilets in public accommodations could be justified on the basis that

⁴⁷ This position fails, first and foremost, because it is tethered entirely to the new purpose of promoting economic development in population centers, rather than to growth management or any statutorily expressed purpose within the body of SB 360. Even then, the application of local regulations pertaining to security cameras would have a disproportionately greater impact on *existing* businesses than on future economic development. Theoretically, for every hypothetical future business supposedly dissuaded by the regulations from locating in the jurisdiction, there would be dozens, if not hundreds, of existing businesses that would have to comply with the regulations.

the local regulations might have discouraged hotel developers from building new hotels or renovating existing ones, because the increased labor costs associated with the “onerous” obligation of maintaining cleaner toilets would have made those ventures less profitable and less desirable. This “discouragement,” so the argument goes, would “properly connect” toilet cleanliness to imagined economic development, which in turn connects it to the stated single subject of “growth management.”

(b) The provisions relating to tax credits, valuation of community land trust property, discretionary sales surtaxes and amendments to the powers of the Florida Housing Finance Corporation

Additionally, approximately half of SB 360 was appended by the Senate at the proverbial last minute and *summarily* approved by the House after the amendment was made. *See* SB 360, version e1, floor amendment 478902, at App. 24. As previously noted, this “other half” of SB 360, drawn from *other* House and Senate bills, relates to *tax exemptions*, methods for *valuing community land trust property*, *discretionary sales surtaxes* and *amendments to the powers of the Florida Housing Finance Corporation* (*see, e.g.*, SB 360, §§ 15-19, 26). *Id.* These enumerated provisions do not relate to managing growth within the State or the asserted purpose of the sponsor of SB 360, which is “encourage[ing] urban infill and redevelopment by removing costly and unworkable state regulations” such as transportation concurrency and DRI review. *See* [R. 445-447; <http://www.gainesville.com/article/20090520/NEWS/905209931>]. Interestingly, the short title of SB 1040, from which most of the second half of SB 360 was

derived, was “an Act relating to *affordable housing*,” not *growth management*. Compare R. 230-251(SB 360), §§ 15-34, with R. 274-312 (SB 1040c1).⁴⁸

(2) Florida Precedent Demonstrates the Clear Violation of the Single Subject Provision.

An examination of the Florida Supreme Court’s jurisprudence applying the Single Subject Provision demonstrates why SB 360 cannot survive constitutional scrutiny.

For example, the legislation in *Thompson* was initially entitled, “An act relating to career criminals,” before later being changed to read, “An act relating to justice system.” *Thompson*, 750 So. 2d at 648. It encompassed provisions relating to violent career criminals and created a new sentencing category; it also modified definitions for habitual violent offenders and their sentencing categories. *Id.* at 647. The Legislature, however, added three sections relating to domestic violence

⁴⁸ For example, section 15 of SB 360 amends section 159.807, Florida Statutes, entitled “State allocation pool,” by adding a new subsection that, inter alia, limits “the Florida Housing Finance Corporation’s access to the state allocation pool...to the amount of the corporation’s initial allocation under s. 159.804.” The Legislative Defendants never even attempted to explain how this provision of SB 360 “tends to make effective or promote the objects and purposes” included in the single subject of growth management. For that matter, they never even articulated any connection to their asserted purpose of “economic development in the state’s population centers.” The same observation may be made with respect to any of the enumerated provisions the Local Governments have challenged. The Legislative Defendants never explained how any of the challenged provisions tends to make effective or promote the objects and purposes included within the single subject of growth management.

and made those changes “on the floor of the House..., very near the end of the regular legislative session.” *Id.* at 648.

In rejecting the State’s claim of a natural and logical connection between the subjects of career criminal and domestic violence, the Supreme Court endorsed the analysis of the Second District before it:

After reviewing the various sections of chapter 95-182, we find it clear that those sections address two different subjects: career criminals and domestic violence. ... [A]s the Second District observed: “*Nothing in sections 2 through 7 addresses any facet of domestic violence, and, more particularly, any civil aspect of that subject. Nothing in sections 8 through 10 addresses the subject of career criminals or the sentences to be imposed upon them.*” We agree with the Second District’s observation.

Id. at 647-48 (emphasis added). The analogy to the present case is striking.

Nothing in those portions of SB 360 relating to growth management addresses the subjects of security cameras or tax exemptions and valuation methodologies associated with affordable housing. Similarly, nothing in the SB 360 provisions relating to the latter two subjects addresses the title subject matter of growth management. This absence of any connection among the three subjects clearly demonstrates the single subject violation, while the circumstances surrounding the eleventh hour doubling of the size of SB 360 to include the affordable housing subjects establishes that the second half of SB 360 was “glommed” on without any real thought being given to its relationship to the rest of the legislation.

Similarly, in *Florida Dep't of Hwy Safety & Motor Veh. v. Critchfield*, 842 So. 2d 782 (Fla. 2003), the Florida Supreme Court held that the late amendments to a bill relating to "bad check debt" added subjects relating to "driver's licenses, vehicle registrations and operation of motor vehicles." *Id.* at 785-86. Since the new provisions had "no natural or logical connection" to bad check debt, the *Critchfield* Court declared the legislation invalid as it violated the Single Subject Provision. *Id.* at 786. The Court went on to explain:

This Court's precedent supports our conclusion. In *State v. Thompson*, 750 So. 2d 643, 644 (Fla. 1999), this Court held that chapter 95-182, Laws of Florida, violated the single subject rule because the law addressed two different subjects: domestic violence and career criminals. This Court analyzed the legislative history of the Senate bill which enacted the law, *noting that the Legislature amended the bill several times, changed its title, and passed it near the end of the regular legislative session.* *See id.* at 648. This Court stated that single subject rule problems "are most likely to occur" under these circumstances. *Id.* (quoting *Thompson v. State*, 708 So. 2d 315, 317 (Fla. 2d DCA 1998)). Similar to the legislative history of chapter 95-182, the legislative history of chapter 98-223 indicates that the Legislature unconstitutionally combined two subjects into one law.

This Court's decision in *State v. Johnson*, 616 So. 2d 1, 4 (Fla. 1993), also supports our conclusion that chapter 98-223 violates the single subject rule. In *Johnson*, this Court held that a chapter law violated the single subject rule by combining the subject of habitual offenders with the subject of licensing private investigators. *See id.* Similarly, chapter 98-223 improperly combines the subject of assigning the collection of bad check debt to a private debt collector with the subject of driving, motor vehicles, and vehicle registration.

Id. (emphasis added).

The Supreme Court's decision in *Heggs v. State*, 759 So. 2d 620 (Fla. 2000) also lends support to the Local Governments' single subject argument. As in *Thompson*, the legislation in *Heggs* was challenged because it purported to address sentencing guidelines, yet included provisions relating to domestic violence. *Id.* at 624-25. Of the 40 sections in chapter 95-182, 37 of them related to sentencing guidelines; three related to domestic violence. *Id.* at 625. The State attempted to justify the legislation by arguing that the subjects "are cogent and interrelated and directed to one primary object: the definition, punishment, and prevention of crime and the concomitant protection of the rights of crime victims." *Id.* at 626. The *Heggs* Court rejected the argument:

Following our own precedent in *Thompson*, we believe that chapter 95-184 violates the single subject rule because it, too, embraces civil and criminal provisions that are not logically connected. The two subjects "are designed to accomplish separate and dissociated objects of legislative effort." [citations omitted]. Likewise, as in *Thompson*, here there is no legislative statement of intent to implement comprehensive legislation to solve a crisis.

*Id.*⁴⁹ (quoting *Heggs v. State*, 718 So. 2d 263, 264 (Fla. 2d DCA 1998)).

⁴⁹/ The reference to a "crisis" is a reference to the Court's distinguishing its prior single subject decisions in *Burch v. State*, 558 So. 2d 1, 2-3 (Fla. 1990); *Smith v. Department of Insurance*, 507 So. 2d 1080, 1085-87 (Fla. 1987); *Chenoweth v. Kemp*, 396 So. 2d 1122, 1124 (Fla. 1981); and *State v. Lee*, 356 So. 2d 276, 282-83 (Fla. 1978). In each of these cases, the Legislature had made an affirmative finding of an ongoing crisis that necessitated comprehensive legislation. *Heggs*, 759 So. 2d at 627. No comparable finding was made in SB 360.

This Court's decision in *Alachua County v. Fla. Petroleum Marketers Ass'n*, 553 So. 2d 327 (Fla. 1st DCA 1989), affirmed and adopted by the Florida Supreme Court in *Alachua County v. Fla. Petroleum Marketers Ass'n, Inc.*, 589 So. 2d 240 (Fla. 1991), also demonstrates why SB 360 falls short of the constitutional mark in terms of single subject compliance. The legislation in *Alachua County* related to the construction industry, but included a section relating to "pollutant discharge prevention and removal," which was appended to the pending construction bill. 553 So. 2d at 329. In upholding the single subject challenge to the legislation, the Court stated:

Section 18 of Chapter 88-156 also violates the single subject requirement of Article III, Section 6 of the Florida Constitution in that it contains multiple subjects. Article III, Section 6 provides that every law shall embrace but one subject and matter properly connected therewith. The purpose of the constitutional prohibition ... is to prevent a single enactment from becoming the "cloak" for dissimilar legislation having no necessary or appropriate connection with the subject matter of the act. [citation omitted]. However, the subject of an act may be as broad as the legislature chooses as long as the matters included in the act have a natural or logical connection. [citations omitted]. In this case the pending bill containing some 16 sections amending Chapter 489, relating to the regulation of the construction industry, was amended by adding Section 18 to amend Chapter 376, relating to pollutant discharge prevention and removal, a subject totally distinct and different from the subject matter of the act before the amendment. The provisions of Section 18 are not germane to the construction industry, the subject of the pending act it amended, nor are its provisions such as are necessary incidents to, or which tend to make effective or promote, the objects and purposes of the pending construction industry legislation.

Id. at 329.

Much like the bills in *Critchfield*, *Thompson*, *Johnson*, *Heggs* and *Alachua County*, SB 360 seeks to combine three separate and distinct subjects: growth management, security cameras and tax exemptions and valuation methodologies relating to affordable housing. The latter subjects have no natural or logical connection to, nor are they necessary incidents to, or which tend to make effective or promote, the objects and purposes of the expressed single subject: growth management.

While there are limited instances where subjects may be properly grouped together in order to establish a requirement and then a means of enforcing that requirement, SB 360 is not in that vein. *Critchfield*, 842 So. 2d at 786. Compare *Franklin*, 887 So. 2d at 1081-82 (no violation where single subject of act was “sentencing” and provisions included (i) reporting of *sentences* of non-citizen offenders be provided to INS; and (ii) expanding certain offenses to be “qualifying offenses” for purposes of providing for harsher *sentences*); *State ex rel. Flink v. Canova*, 94 So. 2d 181, 185-86 (Fla. 1957) (Act entitled the “Florida Pharmacy Act” did not violate Single Subject Provision even though the act covered practice of pharmacy and regulation of drug stores, since such provisions are matters properly connected with the express subject).

Instead, these three disparate subjects were improperly combined in the last hour of the legislative session. Simply put, SB 360 represents the classic case of a violation of the Single Subject Provision of the Florida Constitution.

C. The Proper Remedy for the Single Subject Violation is the Invalidation of SB 360.

It is axiomatic that the only proper remedy for a violation of the Single Subject Provision is ordering that the legislation be stricken from the laws of Florida. *See Heggs*, 759 So. 2d at 629 (“Finally, in accordance with the rule set forth by this Court in [*Colonial Investment Co. v. Nolan*, 100 Fla. 1349, 131 So. 178 (1930)], a chapter law that violates the single subject rule contained in article III, section 6 of the Florida Constitution must be voided in its entirety should the body of such law contain more than one subject.”); *Florida Defenders of the Environment, Inc. v. Graham*, 462 So. 2d 59, 62 (Fla. 1st DCA 1984) (in single-subject challenge naming Governor and Secretary of State as defendants, directing Secretary to strike appropriations bill as relief for unconstitutionality of provision). If the Legislature chooses to re-enact the provisions of SB 360 in separate bills in compliance with Constitutional requirements, it is free to do so (if there are sufficient votes for the passage of each of the three bills).⁵⁰ However, until it does so properly, SB 360 should not be in force.

CONCLUSION

The enactment of SB 360 unquestionably violated the Single Subject Provision. However, the trial court erred in concluding that the Legislature’s reenactment and codification of SB 360 one year after it was enacted “cured” any

⁵⁰ In fact, three bills have been filed for the 2011 legislative session that separate SB 360 into its three subjects, in order to truly (and properly) “cure” the single subject violation. *See* HB 93; SB 174; and SB 176.

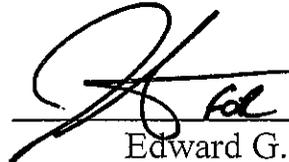
single subject violation and rendered the single subject challenge moot. This analysis was flawed because it was premised on precedents applying a doctrine of codification based on biennial codification of session laws. Those cases are inapposite. To the extent this Court concludes that existing precedents relating to biennial codification of sessions laws control the outcome in this case, the Local Governments respectfully request that the Court certify the following question to the Florida Supreme Court as being of great public importance: "Whether the judicially created single subject doctrine of cure by codification adopted in *Santos v. State of Florida* and developed in subsequent progeny remains viable in single subject jurisprudence in light of the Legislature's decision to shorten the reenactment and codification 'cure window period' to one year."

Respectfully submitted,

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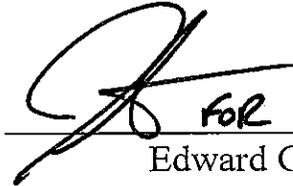


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CERTIFICATE OF SERVICE

I certify that a copy of this answer and cross-initial brief was mailed and served electronically on January 3, 2011 on **Jonathan A. Glogau, Esq.**, *Attorney for the Governor, Senate President and Speaker*, 400 South Monroe Street, Room PL-01, Tallahassee, Florida 32399-6536; and **Lynn C. Hearn, Esq.**, General Counsel, **Staci A. Bienvenu, Esq.**, Assistant General Counsel, *Attorneys for the Secretary*, Department of State, R.A. Gray Building, 500 S. Bronough Street, Tallahassee, FL 32399-0250, and **Christine Davis Graves, Esq.**, **Andrew D. Manko, Esq.**, Attorneys for the Florida League of Cities, Carlton Fields, P.A., 215 S. Monroe Street, Suite 500, Post Office Drawer 190, Tallahassee, FL 32302 on this 3rd day of January, 2011.

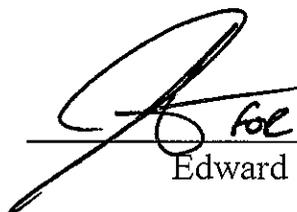


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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.



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