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TELECOPIER TRANSMITTAL

DATE: Monday, August 30, 2010 4:27:14 PM
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FROM: David Miller
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MESSAGE :

Re: City of Weston v. Crist, Case No. 2009 CA 2639

Please find attached Emergency Motion to Intervene, Order and letter to Judge regarding the above case. Thank you.

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IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT, IN AND
FOR LEON COUNTY, FLORIDA

CITY OF WESTON, FLORIDA, et al.,

Plaintiffs

vs.

CASE NO. 2009 CA 2639

THE HONORABLE CHARLIE CRIST,
Governor of the State of Florida;
THE HONORABLE KURT S. BROWNING,
Secretary of State, State of Florida;
THE HONORABLE JEFF ATWATER,
President of the Senate, State of Florida;
THE HONORABLE LARRY CRETUL,
Speaker of the House, State of Florida,

Defendants.

**EMERGENCY MOTION TO INTERVENE TO SEEK REHEARING, AMENDMENT,
OR APPEAL ON ISSUE OF SEVERING PORTIONS OF CH. 2009-096 THAT ARE NOT
HELD TO BE UNCONSTITUTIONAL AS UNFUNDED MANDATES**

IMMEDIATE ORDER OR HEARING REQUESTED

Movant, Affordable Housing Solutions for Florida, Inc., a Florida nonprofit corporation, seeks leave of the Court to intervene pursuant to Fla. R. Civ. P. 1.230, in order to seek emergency rehearing or amendment of the Court's Final Judgment of August 26, 2010, under Fla. R. Civ. P. 1.530(a) or (g), on the issue that affordable housing provisions of Ch. 2009-096, Laws of Florida, including provisions pertaining to affordable housing tax exemptions, which are not unconstitutional as unfunded mandates under Fla. Const. Art. VII § 18, should be severed and remain constitutional and in effect; or if the Court denies such relief, to appeal on this issue.

Movant would show:

BASIS FOR MOTION TO INTERVENE AND EMERGENCY REQUEST

1. Movant is a Florida nonprofit I.R.C. § 501(c)(3) corporation, and is the general partner of Florida limited partnerships that own affordable housing projects that are eligible for charitable tax exemption from ad valorem tax under Fla. Stat. §§ 196.196 and 196.1978, as amended by Ch. 2009-096, §§ 17 and 18, Laws of Florida.

2. Movant has relied on the availability and presumed constitutionality of the tax exemption statutes enacted in Ch. 2009-096 in organizing its business and financial affairs of its limited partnership affordable housing property, in order to increase the supply of affordable housing to meet the public need for such housing.

3. Movant, and the affordable housing industry and its residents generally, will suffer grave hardship if the tax exemption provisions of Ch. 2009-096 are denied effect. The Court may judicially notice the general economic downturn and foreclosure crisis, which make the increased supply of affordable housing a critical public need. The Court's ruling that the entire act, including the affordable housing tax exemption provisions, must be stricken as unconstitutional, may effectively deny the right to a tax exemption, and seriously impact eligible affordable housing projects, and the supply of affordable housing statewide, and affect the interests of low income residents that these projects serve, and the public interest in avoiding homelessness and resulting social and economic problems.¹

4. Movant has the requisite interest in the litigation to permit intervention. Movant seeks to raise issues that are encompassed by the Court's ruling that Ch. 2009-096 is

¹ Legislative findings that the act fulfills an "important state interest," see Ch. 2009-096, § 34, apply to the affordable housing provisions. Ch. 2009-096, § 25, enacting Fla. Stat. § 420.628, makes additional findings that children and young adults leaving foster care and the child welfare system need affordable housing. Even before the current recession, the Legislature found a need to stimulate affordable housing construction, see Fla. Stat. §§ 420.002 and 420.502.

unconstitutional, and its interests are of a direct and immediate character so that Movant will gain or lose by the direct legal operation and effect of the judgment. *See Union Cent. Life Ins. Co. v. Carlisle*, 593 So. 2d 505, 507 (Fla. 1992) (announcing this standard for intervention).

5. Rule 1.230 allows intervention by one claiming an interest in the litigation "at any time." As the municipal intervenors pointed out in their Unopposed Motion to Intervene in this case on August 11, 2009, intervention is freely given when justice so requires and is greatly favored, citing Rule 1.230, *National Wildlife Fed'n, Inc. v. J.T. Glisson*, 531 So. 2d 996, 997 (Fla. 1st DCA 1988), and *Miracle House Corp. v. Haige*, 96 So. 2d 417, 418 (Fla. 1957).

6. Intervention after final judgment to seek appellate review is allowed in circumstances where required in the interests of justice. *See WAGS Transportation System, Inc. v. City of Miami Beach*, 88 So. 2d 751, 752 (Fla. 1956); *In re Adoption of a Minor Child*, 593 So. 2d 185, 190 (Fla. 1992); *Williams v. Nussbaum*, 419 So. 2d 715, 717 (Fla. 1st DCA 1982); *Litvak v. Scylla Props., LLC*, 946 So. 2d 1165, 1173-74 (Fla. 1st DCA 2006). Where a trial court judgment declares a law unconstitutional, the Attorney General is normally allowed to intervene post-judgment to appeal the judgment and assert the law is constitutional. *State ex rel. Shevin v. Metz Constr. Co.*, 279 So. 2d 836, subs. op., 285 So. 2d 598 (Fla. 1973).

7. In this case, Movant's interest in preserving the affordable housing provisions, including the tax exemption, is not protected by either the Plaintiff local governments or the Defendant State officers. The State, while seeking to defend the constitutionality of the entire act, failed to argue that portions of Ch. 2009-096 that were not specifically held unconstitutional should be severed. Thus the State may choose not to appeal or be prevented from appealing this point. Therefore, Movant as a directly interested private party, should be allowed to intervene to defend these provisions on rehearing or appeal.

8. Even if the Legislature adopts some corrective act in the future to take effect at some undetermined future date, that may not cure the loss of current tax exemption rights. Accordingly, if the final judgment is not timely reheard and amended, then Movant should be allowed to intervene to appeal, to protect its tax exempt status under the current law.

9. The Court has a very short window of opportunity to consider this argument under Rule 1.530. Accordingly, the Court should allow Movant to intervene immediately to assert this issue. If intervention is granted, the points that follow should be treated as Intervenor's motion on the merits to rehear or amend the final judgment.

MOTION FOR REHEARING OR AMENDMENT OF FINAL JUDGMENT

10. The final judgment does not indicate any reason why the provisions of Ch. 2009-096 relating to affordable housing, including the ad valorem tax exemption, cannot be given effect, but holds that SB 360 (Ch. 2009-096) is unconstitutional, and orders the Secretary of State to expunge the law from the official records. Final Judgment p. 11.

11. The Legislature has express constitutional authority to enact terms and conditions for charitable ad valorem tax exemptions by general law. Fla. Const. Art. VII, § 3(a). Plaintiffs do not appear to have not challenged the affordable housing tax exemption provisions or other affordable housing provisions of the act on any substantive grounds. Plaintiffs' procedural challenge to the act as a whole based on the "single subject" provision, Fla. Const. Art. III, § 6, was dismissed on grounds that this challenge is moot as a matter of law.

12. The only substantive issue expressly discussed in the final judgment is whether other provisions of Ch. 2009-096 relating to *growth management* are unconstitutional under the "unfunded mandate" provision in Fla. Const. Art. VII § 18. Plaintiffs do not challenge the affordable housing provisions as an unfunded mandate, and the Court did not find any affordable

housing provisions were an unfunded mandate. Art. VII, § 18, deals only with spending mandates and not with ad valorem tax exemptions. The State's affordable housing tax exemptions are not unfunded mandates for spending within the meaning of Art. VII § 18.

13. The Court ruled that one provision in Ch. 2009-096 § 4, described on page 5, paragraph a. of the final judgment, that "mandated adoption of comprehensive plan amendments and transportation strategies 'to support and fund mobility,'" is an unconstitutional unfunded mandate. It held that constitutionality of other growth management provisions, described in paragraphs b.-g., involve disputed issues of material fact that cannot be determined by summary judgment. See final judgment page 7. There is no finding of any connection between the provision held unconstitutional (relating to plan amendments and transportation) and the affordable housing provisions, including the tax exemption provisions.

14. An act that satisfies the "single subject" requirement can still, if one provision is invalid, be severed to preserve constitutionality of the remaining provisions. *Ray v. Morham*, 742 So. 2d 1276, 1281-82 (Fla. 1999) (dealing with constitutional initiative amendment). "Severability is a judicial doctrine recognizing the *obligation of the judiciary* to uphold the constitutionality of legislative enactments where it is possible to strike only the unconstitutional portions." *Id.* at 1280 (c.s.). *Florida Hosp. Waterman, Inc. v. Buster*, 984 So. 2d 478, 493 (Fla. 2008), recently confirmed this obligation:

Although section 381.028 does not contain a severability clause, this does not affect our ability to sever the unconstitutional portions of the statute. See *Ray v. Morham*, 742 So. 2d 1276, 1280 (Fla. 1999) ("Severability is a judicial doctrine recognizing the obligation of the judiciary to uphold the constitutionality of legislative enactments where it is possible to strike only the unconstitutional portions." (citing *State v. Calhoun County*, 127 Fla. 304, 170 So. 883, 886 (Fla. 1936))).

Buster then provided guidance to be used in analyzing severability issues:

The following questions guide this Court's severability analysis: (1) whether the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void; (2) if the good and bad features are not inseparable and if the Legislature would have passed one without the other; and (3) whether an act complete in itself remains after the invalid provisions are stricken. *See Moreau v. Lewis*, 648 So. 2d 124, 128 (Fla. 1995) (quoting *Presbyterian Homes v. Wood*, 297 So. 2d 556, 559 (Fla. 1974)). We conclude that section 381.028 easily satisfies this analysis.

Cases are legion applying this analysis to hold that provisions of an act should be severed from any invalid provisions to preserve constitutionality of legislative acts to the extent possible. *E.g.*, *Smith v. Department of Ins.*, 507 So. 2d 1080, 1089-90 (Fla. 1987).

15. The Court's final judgment in this case does not refer to the severability guides or explain why the provisions relating to affordable housing, including the tax exemption, cannot be severed. These provisions are presumed to be constitutional, and must be upheld unless the party challenging constitutionality meets the heavy burden to plead and prove they are unconstitutional beyond a reasonable doubt. *See generally, Florida League of Cities v. Administration Comm'n*, 586 So. 2d 397, 412 (Fla. 1st DCA 1991).

16. If anything, the record of this case indicates that these provisions are severable. Plaintiffs expressly argued that the provisions in §§ 15-33 of the act, which relate to affordable housing, were a separate legislative bill that was added to the bill containing the challenged growth management provisions, and have "absolutely nothing to do with" the challenged growth management provisions. *See* excerpt of transcript of hearing before the Court on June 3, 2010, pp. 16-17, copy attached as Exhibit A. In the face of this argument, Plaintiffs cannot contend that the affordable housing provisions are so integrally related to the growth management provision found to be unconstitutional that they cannot be severed.

17. If the Court has overlooked this point, and feels that its judgment striking the entire act in Ch. 2009-096 is overbroad, it can sua sponte amend its judgment under Rule

1.530(d), to limit its ruling of unconstitutionality to the growth management provisions in Ch. 2009-096 that are under specific challenge in this case, and provide for severability of other provisions, specifically the affordable housing provisions including the tax exemption provisions. The trial court has authority to correct its judgment on rehearing, *Pensacola Chrysler-Plymouth, Inc. v. Costa*, 195 So.2d 250, 254 (Fla. 1st DCA 1967), especially where the correction is a pure issue of law, see Padovano, *Florida Civil Practice* §22.9 (2010):

There are some kinds of issues that could be decided on a motion for rehearing that are not discretionary. If the motion for rehearing presents a pure issue of law, the trial judge must decide the issue according to the applicable principles of law and may not exercise discretion. (e.s.)

Although this issue was certainly raised by the Court at the hearing, even a new legal issue is allowed on rehearing. See *Hollywood, Inc. v. Clark*, 15 So.2d 175, 184-85 (Fla. 1943).

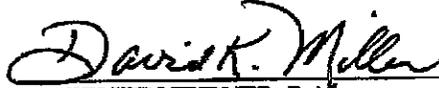
18. However, if the Court is not inclined to take this action on its own, then it should allow the Movant to intervene to seek this relief by motion for rehearing under Rule 1.530(a) or to amend the judgment under Rule 1.530(g). The Court should treat this motion as a timely motion under this Rule, or alternatively, allow intervention to seek appellate review on this very important public issue. See *WAGS Transportation System, Inc. v. City of Miami Beach*, 88 So. 2d 751, 72 (Fla. 1956), and other authorities cited in par. 5 and 6 above.

WHEREFORE, the Court should enter an immediate Order granting Movant leave to intervene, and deem this motion a timely filed Motion for Rehearing or Amendment; and direct the parties to respond to such motion on its merits; and grant rehearing or amendment of the judgment to hold that the provisions in Ch. 2009-096 that are not integrally related to the unfunded growth management mandate provision which was held to be unconstitutional, in

particular §§ 17 and 18 of the act (now Fla. Stat. §§ 196.196 and 196.1978), are severable and not unconstitutional, and are in full force and effect.

Dated this 30 day of August, 2010.

Respectfully submitted,



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Florida Bar No. 095691

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Florida Bar No. 213128

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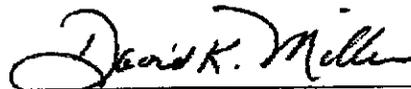
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served on counsel listed below as indicated, this 30 day of August, 2010.

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Attorney

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

CITY OF WESTON, FLORIDA,
et al.,

Plaintiffs,

vs.

THE HONORABLE CHARLIE CRIST,
Governor of the State of
Florida; THE HONORABLE KURT
S. BROWNING, Secretary of
State, State of Florida; THE
HONORABLE JEFF ATWATER,
President of the Senate,
State of Florida; THE
HONORABLE LARRY CRETUL,
Speaker of the House, State
of Florida,

Defendants.

CASE NO. 2009 CA 2639

PROCEEDINGS:	Motion Hearing
BEFORE:	CHARLES A. FRANCIS CIRCUIT JUDGE
DATE:	June 3, 2010
TIME:	Commenced at 1:39 p.m. Concluded at 3:23 p.m.
LOCATION:	Leon County Courthouse Tallahassee, Florida
REPORTED BY:	CAROLYN L. RANKINE Notary Public in and for the State of Florida at Large

ACCURATE STENOTYPE REPORTER, INC.
2894-A Remington Green Lane
Tallahassee, Florida 32308
850.878.2221

7

1 would like to hear about that and address that
2 particular issue.

3 I know you have kind of in your replies,
4 but I could not find any case out there where
5 there had been a legislative enactment -- a
6 legislative action enacting that law and yet
7 it's not effective. I don't think any case
8 cited by anybody, or any one cite, or any of
9 the cases cited by you all could I find a
10 situation where the court left with the
11 legislature having taken action by the time of
12 this hearing or possibly the time of the
13 decision that's yet to be determined, it's not
14 effective in how that applies to a single
15 subject challenge and reenactment, curation by
16 reenactment provisions apply to single issue,
17 please address that. I'm not getting a lot of
18 help out of the case law.

19 MR. COLE: Your Honor, we have two have
20 copies of the cases as well, a folder it might
21 be easier to find the cases.

22 THE COURT: I got it; no problem. Got it
23 right here. Got my index and I'm ready to go.

24 MR. COLE: May it please the court: my
25 name is Jamie Cole, I represent 20 local

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1 very difficult to figure out how prohibiting a
2 city from regulating security cameras in
3 private businesses does that.

4 Because this provision doesn't just apply
5 to new development. In a city, if there are
6 existing businesses and the city wanted to
7 require those existing businesses to have
8 security cameras, they can't do that under SB
9 360. It has nothing to do with development,
10 this is mainly dealing with existing
11 businesses.

12 Then sections 15 through 33 are a whole
13 bunch of provisions that came from a totally
14 separate bill that was added in the last
15 seconds. There was another bill that was an
16 act related to affordable housing. And these
17 provisions were all in that bill. And then at
18 the 11th hour on the last day of the session
19 all these provisions from the after went into
20 affordable housing were thrown into this act
21 related to growth management even though they
22 really have nothing to do with each other.

23 And if look at the specific provisions --
24 and you can't look at them all as a whole.
25 When you look at the first provision, section

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1 15, limit -- what it does is limit access to
2 the state allocation pool by the Florida
3 Housing Finance Corp. There is just no way
4 that has anything to do with growth
5 management.

6 And you can go through all these different
7 provisions. There's issues about how taxes
8 owed by community land trusts are going to be
9 assessed. That deals with existing community
10 land trusts. It has nothing to do with growth
11 management.

12 And we can go on and on. All these
13 different provisions, they just have absolutely
14 nothing to do with growth management. You
15 know, arguably they all have something to do
16 with affordable housing, but they don't have
17 anything to do with growth management.

18 Then in section 34 there's a finding of
19 important state interest which really is in
20 there just so they can try to get around the
21 unfunded mandate provision. We'll deal that
22 later. And then there's an effective date.
23 And that is basically SB 360, and it is very
24 clear there are three subjects here not just
25 one.

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CERTIFICATE OF REPORTER

STATE OF FLORIDA:

COUNTY OF LEON:

I, CAROLYN L. RANKINE, do hereby certify that the foregoing proceedings were taken before me at the time and place therein designated; that my shorthand notes were thereafter translated under my supervision; and the foregoing pages number 1 through 86 are a true and correct record of the aforesaid proceedings.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor relative or employee of such attorney or counsel, or financially interested in the foregoing action.

DATED THIS _____ day of June, 2010.

CAROLYN L. RANKINE
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August 30, 2010

Hand Delivery

Honorable Charles A. Francis
Chief Judge, Second Judicial Circuit
Leon County Courthouse, Room 365-K
Tallahassee, FL

Re: City of Weston v. Crist, Case No. 2009 CA 2639
Emergency Motion to Intervene

Dear Judge Francis:

Please find enclosed a copy of our Emergency Motion to Intervene in the above-styled case. We seek to contend that provisions in Ch. 2009-096 relating to affordable housing, including ad valorem tax exemption for affordable housing projects, can be severed from the growth management provision that was held to be unconstitutional, and should not be held unconstitutional but should remain in effect.

If a hearing is needed to decide the Motion to Intervene, we would request the hearing be set immediately so the matter can be presented within the time frame of Rule 1.530. If the Court is disposed to grant intervention without a hearing, we enclose a proposed order to that effect, which directs the parties to respond to the issue on the merits. We also enclose stamped, addressed envelopes to counsel.

We appreciate your attention to this matter.

Respectfully submitted,

BROAD AND CASSEL

David K. Miller, P.A.

Enclosures

cc (by fax): Jamie A. Cole
Susan L. Trevarthen
Edward G. Guedes
John J. Quick
Jonathan A. Glogau

IN THE CIRCUIT COURT FOR THE
SECOND JUDICIAL CIRCUIT, IN AND
OR LEON COUNTY, FLORIDA

CITY OF WESTON, FLORIDA, et al.,

Plaintiffs

vs.

CASE NO. 2009 CA 2639

THE HONORABLE CHARLIE CRIST,
Governor of the State of Florida;
THE HONORABLE KURT S. BROWNING,
Secretary of State, State of Florida;
THE HONORABLE JEFF ATWATER,
President of the Senate, State of Florida;
THE HONORABLE LARRY CRETUL,
Speaker of the House, State of Florida,

Defendants.

**ORDER GRANTING AFFORDABLE HOUSING SOLUTIONS FOR FLORIDA, INC.'S
EMERGENCY MOTION TO INTERVENE**

This matter came before the Court on Affordable Housing Solutions for Florida, Inc.'s Emergency Motion to Intervene to Seek Rehearing, Amendment, or Appeal on Issue of Severing Portions of Ch. 2009-096 That Are Not Held to be Unconstitutional as Unfunded Mandates, filed on August 30, 2010. The Court grants the Motion to Intervene, limited to the issues raised in the Motion, which is deemed a timely filed Motion for Rehearing or Amendment under Rule 1.530(a) and (g).

The existing parties to this case shall have ___ days in which to file and serve written responses to the merits of the Motion concerning severance of provisions in Ch. 2009-096, so the Court may be fully advised. If any party opposes the severance relief requested by the Intervenor's Motion, then any party may so advise the Court and a hearing will be scheduled on

the issue. If no party opposes this relief, then the Intervenor may circulate and present a proposed order granting severance relief as requested.

DONE and ORDERED this ____ day of _____, 2010.

Charles A. Francis
Chief Judge

Copies furnished to:
M. Stephen Turner
David K. Miller
Jamie A. Cole
Susan L. Trevarthen
Edward G. Guedes
John J. Quick
Jonathan A. Glogau