

WEISS SEROTA HELFMAN
PASTORIZA COLE & BONISKE, P.L.

ATTORNEYS AT LAW

A PROFESSIONAL LIMITED LIABILITY COMPANY
INCLUDING PROFESSIONAL ASSOCIATIONS

BROWARD OFFICE

200 EAST BROWARD BOULEVARD
SUITE 1900
FORT LAUDERDALE, FLORIDA 33301

TELEPHONE 954-763-4242

FACSIMILE 954-764-7770

WWW.WSH-LAW.COM

MIAMI-DADE OFFICE

2525 PONCE DE LEON BOULEVARD • SUITE 700
CORAL GABLES, FLORIDA 33134
TELEPHONE 305-854-0800 • FACSIMILE 305-854-2323

* OF COUNSEL

MITCHELL BIERMAN, P.A.
NINA L. BONISKE, P.A.
MITCHELL J. BURNSTEIN, P.A.
JAMIE ALAN COLE, P.A.
STEPHEN J. HELFMAN, P.A.
GILBERTO PASTORIZA, P.A.
MICHAEL S. POPOK, P.A.
JOSEPH H. SEROTA, P.A.
SUSAN L. TREVARTHEN, P.A.
RICHARD JAY WEISS, P.A.
DAVID M. WOLPIN, P.A.

DANIEL L. ABBOTT
GARY L. BROWN
IGNACIO G. DEL VALLE
ALAN L. GABRIEL
DOUGLAS R. GONZALES
MATTHEW H. MANDEL
ALEXANDER L. PALENZUELA-MAURI
SCOTT A. ROBIN
BRETT J. SCHNEIDER

LORI ADELSON*
LILLIAN M. ARANGO*
CARLA M. BARROW*
RAQUEL ELEJABARRIETA

CHAD S. FRIEDMAN
MACADAM J. GLINN
R. BRIAN JOHNSON
JOHN J. KENDRICK III
HARLENE SILVERN KENNEDY
KAREN LIEBERMAN*
JOHANNA M. LUNDGREN
KATHRYN M. MEHAFFEY
HARRIS S. NIZEL
MATTHEW PEARL
JOHN J. QUICK
ANTHONY L. RECIO
AMY J. SANTIAGO
DANIEL A. SEIGEL
GAIL D. SEROTA*
JONATHAN C. SHAMRES
ESTRELLITA S. SIBILA
ANTHONY C. SOROKA
EDUARDO M. SOTO
MICHAEL L. STINES
NANCY STUPARICH*
GLORIA M. VELAZQUEZ-MEITIN*
CHRISTOPHER J. VOLK
MICHELLE D. VOS
MICHAEL J. WEISS
LAURA K. WENDELL*
JAMES E. WHITE
DEREK R. YOUNG

June 15, 2009

John Flint, City Manager
City of Weston
17200 Royal Palm Boulevard
Weston, FL 33326

Re: Potential Constitutional Challenge to Growth Management Act (SB 360)

As requested, we have analyzed Senate Bill 360 ("SB 360" or the "Bill"), which was recently enacted by the Florida Legislature and signed by the Governor, to determine whether there are any constitutional deficiencies in its enactment. Based upon our review, we believe that the Bill violates: (1) Article VII, Section 18 of the Florida Constitution, which prevents the legislature from imposing requirements on local governments without providing a means to pay for such requirements (the "Unfunded Mandate Provision"); and (2) Article III, Section 6 of the Florida Constitution, which requires that every law embrace only one subject (the "Single Subject Provision").

LEGISLATIVE HISTORY AND SUMMARY OF SB 360

Legislative History

On February 26, 2009, the first version of SB 360 entitled "An Act Relating to the Department of Community Affairs" was filed, which was likely a placeholder bill because it contained no substantive provisions. One week later, the Bill was amended to include substantive provisions and was entitled "An Act Relating to Growth Management." Over the next two and a half months, there were over 60 amendments proposed to the Bill, with several of them passing. However, until the closing moments of the session, the House and the Senate had difficulty coming to a consensus on the Bill.

At 6:31 p.m. on May 1, 2009, the last day of the session, the Senate passed an amendment to SB 360, which doubled the size of the Bill by adding numerous provisions regarding affordable housing from several different House and Senate bills (i.e., HB 161, SB

1040, and SB 1042). Approximately one hour later, at 7:38 P.M, the House passed SB 360, as amended by the Senate, and the Bill was ordered engrossed and then later enrolled. Despite strong requests from Florida cities and counties, as well as the League of Cities and the Association of Counties, to veto the Bill, the Governor signed SB 360 into law on Monday June 1, 2009. The Bill became effective immediately.

Summary of SB 360

SB 360 is entitled "An Act Relating to Growth Management." Senator Bennett, the sponsor of the Bill, has stated that the primary purpose of SB 360 is to "encourage urban infill and redevelopment by removing costly and unworkable state regulations in urban areas." *See Mike Bennett: Stimulating smart growth in Florida, Gainesville Sun, published May 20, 2009.* The first half of SB 360 includes sweeping revisions to the State's growth management laws, which will change the face of planning and growth management within the State. The crux of the first half of the Bill is the creation of the term "dense urban land area" or "DULA," which is defined as: (a) a municipality that has an average of at least 1,000 people per square mile of land area and a minimum total population of at least 5,000; or (b) a county, including its municipalities, which has an average of (i) at least 1,000 people per square mile of land area or (ii) a population of at least 1 million.

Approximately 245 local governments will likely qualify as DULAs, which means that approximately half of the State's 15 million people are affected. Generally speaking, development within DULAs will no longer be subject to transportation concurrency as well as Development of Regional Impact ("DRI") review¹. Other significant growth management changes within the first half of the Bill relate to school concurrency requirements; extension of the deadline for financial feasibility for capital improvements schedules; impact fee procedures; and automatic permit extensions. Unrelated to growth management, the Bill also includes a provision that prohibits local governments from adopting standards for security cameras in private businesses.

Also unrelated to growth management, the entire second half of the Bill (added to SB 360 in the closing minutes of the session) substantially revises and updates several Florida statutes relating to affordable housing. These provisions include, but are not limited to, additional tax exemptions, the method for valuing community land trust property, discretionary sales surtaxes and the powers of the Florida Housing Finance Corporation.

¹ For purposes of Davie Commons, SB 360 appears to eliminate the need for Davie Commons to go through the DRI process. In addition, the development appears to no longer be subject to transportation concurrency. This means that the City of Weston would lose the ability to require DRI development order conditions related to the roadway improvements that are necessitated by the development, including the requirement that the developer pay for such improvements.

POTENTIAL CONSTITUTIONAL VIOLATIONS

1. **SB 360 Creates an Unfunded Mandate to Local Governments in Violation of Article VII, Section 18 of the Florida Constitution.**

A. **History of the Unfunded Mandate Provision.**

In the late 1970s, the Florida Legislature repeatedly adopted legislative measures that imposed costly requirements on local governments without providing funds for (or methods for funding) compliance with the requirements. In 1977, after public outcry, the Florida Legislature created the Florida Advisory Council on Intergovernmental Relations in order to examine the effect of state mandates on municipalities and counties. Shortly thereafter, in 1978, the Legislature passed a statute that required any bill that would require additional expenditures by local governments to be accompanied by an economic statement explaining the resulting costs of implementing the bill. See generally, the Florida Advisory Council on Intergovernmental Relations 1991 Report on Mandates and Measures Affecting Local Government Fiscal Capacity.

This legislation did not solve the problem, and the Florida Legislature adopted 362 unfunded mandates between the years of 1981 through 1990. As a result, by the mid-1980s, local governments started a petition drive to put forth a constitutional amendment that would restrict the ability of the Legislature to adopt unfunded legislative mandates. In 1989, the Florida Legislature adopted House Joint Resolutions 139 and 40, which proposed the adoption of Article VII, Section 18 of the Constitution. On November 6, 1990, Article VII, Section 18(a) of the Constitution was ratified by the electorate, which provides, in relevant part, as follows:

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 unless the legislature has determined that such law fulfills an important state interest and unless: funds have been appropriated that have been estimated at the time of enactment to be sufficient to fund such expenditure; the legislature authorizes or has authorized a county or municipality to enact a funding source not available for such county or municipality on February 1, 1989, that can be used to generate the amount of funds estimated to be sufficient to fund such expenditure by a simple majority vote of the governing body of such county or municipality; the law requiring such expenditure is approved by two-thirds of the membership in each house of the legislature; the expenditure is required to comply with a law that applies to all persons similarly situated, including the state and local governments; or the law is either required to comply with a federal requirement or required for eligibility for a federal entitlement, which federal requirement specifically contemplates actions by counties or municipalities for compliance.

B. Test for Unfunded Mandates.

The Unfunded Mandate Provision thus creates a three-part analysis:

1. Does the general law require local governments to **spend funds** or take an action requiring the expenditure of funds?
2. If so, did the Legislature determine that the law “fulfills an **important state interest**”?
3. If so, did the general law **either**:
 - a. include an **appropriation** of sufficient funds, or
 - b. authorize a **new funding source** sufficient for the expenditure, or
 - c. obtain **approval by 2/3 vote** of the membership of each house, or
 - d. **apply the same to all similarly situated persons** (including local governments), or
 - e. **comply with a federal requirement**?

C. SB 360 Violates the Test for Unfunded Mandates.

1. SB 360 Requires Local Governments to Spend Funds and Take Actions Requiring the Expenditure of Funds.

There can be no question that SB 360 will require local governments to expend substantial funds. The staff analysis supporting the Bill states that “the bill will have a negative fiscal impact on local governments that are designated TCEAs by requiring updated comprehensive plans.” Fla. Senate Staff Analysis and Fiscal Impact Statement, CS/CS/SB 360, at 2 (March 19, 2009). Furthermore, the Department of Community Affairs’s analysis of the Bill provides that the Bill’s requirements “will 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.” Fla. Dept. of Community Affairs 2009 Policy Analysis, SB 360ER, at 7 (May 20, 2009); *see also*, at 25 (“the fiscal impact on local governments is extensive but the full effects are indeterminate”).

For example, under SB 360, local governments that are designated an automatic transportation concurrency exception area are required within two years to adopt into their comprehensive plans land use and transportation strategies to support and fund mobility. This process to amend the comprehensive plans is expensive (including studies, drafting, advertising, public hearings, etc.), generally costing each local government at least \$50,000. Implementation of the provisions, of course, will be even more costly. In addition, local governments designated as an automatic transportation concurrency exception area will no longer be able to require developers to pay their proportionate share (i.e. concurrency fees) of

the necessary roadway improvements necessitated by the development.² Instead, local governments will likely be forced to pay for such roadway improvements (or be in violation of the level of service standards within their comprehensive plans). In analyzing this provision within the Bill, the Department of Community Affairs' analysis observed that "the reduced control of the timing of development, loss of transportation mitigation, and reduction in other sources of revenue to support transportation facilities will have a serious impact on local governments and ultimately force choices between severe transportation congestion and increased taxes." *Id.* at 25. Therefore, the shifting of the cost of mitigation of traffic impacts from developers to taxpayers is impossible to quantify, but would be very large.

2. **The Legislature Found that SB 360 Fulfills an Important State Purpose.**

SB 360 contains a legislative finding that the law fulfills an important state purpose, although it does not specify the purpose in the Bill.

3. **None of the Five Criteria in Part 3 of the Test is Satisfied.**

a. **Appropriation of Funds.**

No funds were appropriated in SB 360, and thus this criterion is clearly not met.

b. **New Funding Source.**

No new funding source is created in SB 360, and thus this criterion is clearly not met.

c. **Two-Thirds Vote in Each House.**

In order to obtain a two-thirds vote of the membership in each house, SB 360 needed to obtain 27 "Yes" votes in the Senate (out of 40), and 80 "Yes" votes in the House (out of 120). It obtained the necessary votes in the Senate (30 "Yes" votes, 7 "No" votes, and 3 not voting), but did not obtain the necessary votes in the House (78 "Yes" votes, 37 "No" votes, and 5 not voting).³

² SB360 also provides that "the designation of a transportation concurrency exception area does not limit a local government's home rule power to adopt ordinances or impose fees." It is unclear whether, under this provision, local governments may establish fees, other than concurrency fees, in order to mitigate the roadway impacts of a development.

³ After the session ended, some of the non-voting members of the House did submit to the clerk an indication of how the member would have voted. Pursuant to House voting rules, those votes do not count towards voting requirements. House Rule 9.4(a), the Rules of the Florida House of Representative. See also, Chapter 10, Section 15.2(b), Principles, Practices & Priorities: A Handbook on Parliamentary Practice in the Florida House of Representatives ("If an absent member wishes to submit a vote for the purpose of indicating how the member would have voted had he or she been present, the member may submit a vote after roll call, typically through the Leagis system. Such votes will not be counted in determining the outcome of the vote.")

d. Applicability to All Similarly Situated Persons.

No Florida court has interpreted the fourth criterion in part 3 of the test, that “the expenditure is required to comply with a law that applies to all persons similarly situated, including the state and local governments.” SB 360 does not apply to all similarly situated persons because it requires expenditures only by local governments. An example of when this criterion would apply is if the legislature enacted a bill that required all buildings to use energy efficient lighting. This would force local governments to spend money to comply, just as it would also require private persons to comply. In contrast, if the legislature enacted a law requiring local governments to use energy efficient lighting, but not private persons, then the provision would not apply. *See* Florida Advisory Council on Intergovernmental Relations, “1991 Report on Mandates and Measures Affecting Local Government Fiscal Capacity” at 21 (an expenditure is not an “unfunded mandate” if “the expenditure is required to comply with a law that applies to all persons ‘similarly situated,’ that is, laws not specific to cities and counties alone”); *see also* Perkins, “Florida’s Constitutional Mandate Restrictions,” 18 Nova L.R. 1403, 1425 (Winter 1994) (noting approval of law which required newly constructed private or public buildings to have specific ratio of urinals to water closets because law “affected all persons similarly situated”).

e. Compliance with Federal Requirement

There is no known federal requirement related to the enactment of SB 360, so this criterion is not met.

2. SB 360 Includes Multiple Unrelated Subject Matters in Violation of Article III, Section 6 of the Florida Constitution

A. Description and History of the Single Subject Provision

As of 2004, at least 43 states had some type of single subject requirement either within their constitutions or statutes. *Franklin v. State*, 887 So. 2d 1063, 1072 (Fla. 2004). In Florida, the single subject provision has been part of the Florida Constitution since 1868. *Id.* This provision is 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.” The underlying purpose of the Single Subject Provision is: (1) to prevent hodge-podge or “log rolling” legislation (*i.e.*, putting two unrelated matters in one act, and thus forcing legislators to vote for one item in order to get another); (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) fairly to apprise the people of the subjects of legislation that are being considered, in order that they may have the opportunity of being heard thereon. *State v. Thompson*, 750 So. 2d 643, 646 (Fla. 1999). The most common Single Subject Provision violations are most likely to occur 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. An act that violates the Single Subject Provision is void and never becomes law. *Amos v. Mathews*, 126 So. 308, 315 (Fla. 1930).

Florida case law provides that in order to comply with the Single Subject Provision, a law must meet the following three requirements: (1) the law must “embrace” only “one subject”; (2) the law may include any matter that is “properly connected” within the subject; and (3) the subject of the law shall be “briefly expressed in the title.” *Thompson*, 750 So.2d at 646. Although legislative acts are presumed to be constitutional and the standard of review is highly deferential, the Florida Supreme Court has found several legislative acts to be in violation of the Single Subject Provision, such as Chapter 95-182 (included domestic violence provision with career criminals) and Chapter 98-223 (included private debt collector provisions with driving, motor vehicles, and registration). *Florida Department of Highway Safety and Motor Vehicles v. Critchfield*, 842 So. 2d 782 (Fla. 2003).

B. SB 360 Violates the Single Subject Provision

Courts have provided that in order to determine the subject of a bill it is necessary to look at its short title. *Franklin*, 887 So. 2d at 1075-76. SB 360’s short title is “An Act Relating to Growth Management.” However, an examination of SB 360 reveals that the Bill fails to address only the single subject of growth management, as well as matters properly connected with growth management. For example, the Bill includes a provision that prohibits local governments from adopting standards for security cameras that require lawful businesses to expend money to enhance local police services. Clearly, there is no logical or functional connection between the subjects of managing growth and regulating security cameras.

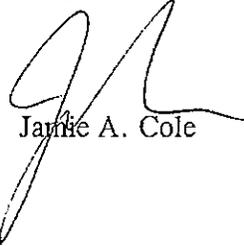
In addition, as discussed above, the Bill was amended at the very end of the session to include substantial provisions relating to affordable housing. As noted above, courts have noted that when a bill is amended at the end of session, Single Subject Provision violations are likely to occur. The last minute affordable housing amendments to SB 360 resulted in impermissible log rolling in violation of the Single Subject Provision. Although, theoretically, affordable housing provisions could fall under the umbrella of growth management – comprehensive plans are required to have a housing element with goals, objectives, and policies that provide for the provision of affordable housing – the provisions regarding affordable housing in SB 360 do not relate to growth management or the purpose of the Bill, which is to “encourage urban infill and redevelopment by removing costly and unworkable state regulations in urban areas.” For example, tax exemptions, methods for valuing community land trust property, discretionary sales surtaxes, qualifications of affordable housing developers and amendments to the powers of the Florida Housing Finance Corporation are not properly connected with managing growth within the State and encouraging urban infill and redevelopment by removing costly and unworkable state regulations in urban areas (*i.e.*, transportation concurrency and the development of regional impact process). Thus, the provisions of SB 360 run afoul of the Single Subject Provision, because the Bill includes multiple subjects that are not properly connected.

Mr. John Flint, City Manager
June 15, 2009
Page 8

CONCLUSION

SB 360, passed by the Florida Legislature, has serious constitutional deficiencies. The Bill violates both Article VII, Section 18 of the Florida Constitution, which precludes the Legislature from imposing funding requirements on local governments without providing a means to pay for such requirements, and Article III, Section 6 of the Florida Constitution, which limits every law to a single subject.

Respectfully,

A handwritten signature in black ink, appearing to be "JA Cole", written over the printed name.

Jamie A. Cole