

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

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,

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. 09-CA-2639

**MOTION FOR FINAL  
SUMMARY JUDGMENT**

**MOTION FOR FINAL SUMMARY JUDGMENT**

Plaintiffs, 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 (collectively, the “Local Governments”), pursuant to Fla. R. Civ. P. 1.510, move this Court for entry of final summary judgment on the ground that there is no genuine issue of material fact and the Local Governments are entitled to judgment in their favor as a matter of law.

Specifically, the Local Governments seek a declaration against defendants, The Honorable Charlie Crist, Governor of the State of Florida (“Governor”), The Honorable Kurt S. Browning, Secretary of State (“Secretary”), The Honorable Jeff Atwater, President of the Senate (“Senate President”), and The Honorable Larry Cretul, Speaker of the House (“Speaker”) (collectively, “Defendants”), each in his official capacity only, declaring that Senate Bill 360, entitled “An Act Relating to Growth Management” (“SB 360”) (now codified at Ch. 2009-096, Laws of Fla.):

(a) violates Article III, Section 6 of the Florida Constitution, also known as the single subject provision, because it addresses multiple subjects unrelated to its stated single subject of “growth management”; and

(b) violates Article VII, Section 18(a) of the Florida Constitution, also known as the unfunded mandate provision, because it requires all counties and municipalities, including the Local Governments, “to spend funds or take an action requiring the expenditure of funds” without providing funding for those expenditures and or falling within the limited exceptions to the provision.

The Local Governments further request that the Court direct the Secretary to strike SB 360 from the recorded laws of Florida.

### **OVERVIEW**

SB 360, enacted by the Florida Legislature in May 2009, suffers from two serious constitutional infirmities. First, it addresses three separate and distinct subjects: (a) growth management; (b) security cameras; and (c) tax exemptions and valuation methodologies relating to affordable housing. *See* SB 360 at App. 1.<sup>1</sup> These three subjects were improperly combined by the Legislature in the waning hours of the legislative session. The Legislature’s last minute combination of these three subjects has resulted in a classic violation of the single subject provision of the Florida Constitution.

Second, SB 360 violates the unfunded mandate provision by improperly requiring the Local Governments “to spend funds or take an action requiring the

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<sup>1</sup> / All documents, affidavits, case law and other pertinent citations are included in the appendix which is being filed contemporaneously herewith in support of this motion. Citations to the appendix will be made as “App. \_\_\_.”

expenditure of funds” without appropriating funds in SB 360 to allow the Local Governments to implement the new requirements of SB 360. Furthermore, the Legislature failed to satisfy the requirements of the unfunded mandate provision of the Constitution.

The matters to be determined in this action are purely legal issues, dependent upon undisputed facts and the language of the Florida Constitution and SB 360. The alleged affirmative defenses raised by Defendants are inapplicable, as a matter of law. Accordingly, this matter is ripe for summary adjudication.

### **PROCEDURAL BACKGROUND**

On July 9, 2009, the Local Governments filed their Complaint for Declaratory and Injunctive Relief (“Complaint”) raising the challenges to SB 360 asserted *sub judice*. Thereafter, Defendants filed a motion to dismiss on the grounds that they were not proper parties to the lawsuit and that they were immune from suit in connection with the enactment of SB 360. After hearing argument of counsel, this Court entered an order on November 23, 2009 denying Defendants’ motion to dismiss.

The Governor, Senate President and Speaker filed their collective answer to the Complaint (“Answer”) on December 14, 2009. The Answer raises only two affirmative defenses –failure to state a cause of action and legislative immunity – both of which were previously argued in Defendants’ motion to dismiss and

ultimately rejected by the Court. While the Governor, Senate President and Speaker deny some allegations of the Complaint, they conspicuously fail to assert any defenses as to how SB 360 actually complies with the single subject or unfunded mandate provisions of the Constitution. *See Answer at 5.*

The Secretary filed his answer to the Complaint (the “Secretary’s Answer”) on December 14, 2009, in which he contends that he is not a proper party to the action, but then states that he does not take any position on the merits of the Complaint. *See Secretary’s Answer at 5.* Instead, the Secretary avers that he will do whatever the Court orders him to do. *Id.*

### **JURISDICTION AND VENUE**

This is a cause of action for declaratory and related injunctive relief, pursuant to Chapter 86, Florida Statutes, seeking a declaration that SB 360 was enacted in violation of Art. III, Sec. 6 and Art. VII, Sec. 18(a) of the Florida Constitution. The Court has jurisdiction to grant declaratory relief. *See* § 86.011, Fla. Stat.; *Martinez v. Scanlan*, 582 So. 2d 1167, 1170 (Fla. 1991) (holding that constitutionality of a statute may be challenged in declaratory judgment action).

Defendants admit the Court has jurisdiction to grant declaratory relief, that venue is proper in this Court and that all conditions precedent to the institution of this lawsuit have been, or will be, satisfied or waived. *See Answer at 2* (admitting relevant portions of ¶¶ 2-4 of Complaint).

**UNDISPUTED FACTS<sup>2</sup>**

**A. The Parties and Their Relationship to SB 360**

1. The Local Governments are all incorporated municipalities or counties existing under the laws of the State of Florida. *Id.* (admitting ¶ 5). Each of the Local Governments is subject to and must comply with the provisions of Chapters 163 and 380, Florida Statutes. *Id.*

2. The Honorable Charlie Crist is the Governor of the State of Florida and, as head of the Executive branch of government, is charged with administering and executing the laws of the State. *Id.* (admitting ¶ 6). The Governor signed SB 360 into law. *Id.*

3. The Governor 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

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<sup>2</sup> / Since the Secretary takes no position on the merits of the Complaint and has agreed to comply with any order issued in this lawsuit directed to him, the Local Governments’ citations to undisputed facts will refer to those facts admitted in the Answer filed by the Governor, Senate President and Speaker.

Comprehensive Plan”; (iii) “establishing guidelines and standards for developments of regional impact”; and (iv) “designating areas of critical state concern.”<sup>3</sup>

4. The Honorable Jeff Atwater served as President of the Senate during the 2009 legislative session, during which SB 360 was enacted. *See Answer at 2* (admitting relevant portions of ¶ 8). As set forth in Florida Senate 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....” App. 3.

5. The Honorable Larry Cretul was the Speaker of the House during the 2009 legislative session, during which SB 360 was enacted. *See Answer at 2* (admitting relevant portions of ¶ 9). Pursuant to Florida House of Representatives Rule 2.6, “The Speaker may initiate, defend, intervene in, or otherwise participate in any suit on behalf of the House....” App. 4.

6. The Senate President and Speaker, as the presiding officers of their respective houses of the Legislature, are responsible for overseeing aspects of SB 360. *See, e.g., SB 360, §§ 2 and 4.*

7. Under SB 360, the Office of Economic and Demographic Research (“OEDR”), within the Legislature, is required annually to calculate the population

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<sup>3</sup> / *See* <http://www.myflorida.com/myflorida/cabinet/cabprocess.html>, last accessed on December 30, 2009, at App. 2. Unless otherwise indicated, all web sites were last accessed on December 30, 2009.

and density criteria needed to determine which jurisdictions qualify as Dense Urban Land Areas. *Id.* at § 2.

8. The OEDR 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* <http://edr.state.fl.us/aboutus.htm>, at App. 5. In addition, it provides research support for Legislative committees and analyzes the impact of proposed legislation for the Legislature. *Id.*

9. Further, the Office of Program Policy Analysis and Government Accountability (“OPPAGA”), within the Legislature, is required to submit to the *Senate President and the Speaker* by February 1, 2015, a report on transportation concurrency exception areas (“TCEAs”) created by SB 360. SB 360, § 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 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.<sup>4</sup>

10. Lastly, the Honorable Kurt S. Browning is Florida’s Secretary of State and is responsible for registering, indexing, segregating and classifying all acts of the Legislature, including SB 360. *See* §§ 15.01, 15.155, Fla. Stat.; *see also* Answer at 2 (admitting ¶ 7). The Local Governments are seeking injunctive relief against the Secretary either to prevent SB 360 from being registered as a valid law or to be stricken – a responsibility that clearly falls upon the Secretary. *Id.* (admitting ¶ 2).

**B. The History of SB 360**

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

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<sup>4</sup> / *See* <http://www.oppaga.state.fl.us/shell.aspx?pagepath=about/about.htm>, at App. 6. It also bears noting that SB 360 provides that the Legislature is to receive from the Florida Department of Transportation and the Florida Department of Community Affairs a report on mobility issues raised by the implementation of SB 360. SB 360, § 13. The purpose of this report is to recommend legislation and implement a plan to replace the existing transportation concurrency system. *Id.*

Affairs.”<sup>5</sup> Also, on March 3, 2009, SB 1040 was filed by Senator Bennett, entitled “an Act relating to Affordable Housing.”<sup>6</sup>

12. 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.” *See* Answer at 2 (admitting relevant portions of ¶ 10). SB 360 traveled between the House and Senate in messages from April 14, 2009 through May 1, 2009. *Id.*

13. 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. *Id.* (admitting relevant portions of ¶ 11); *see also* SB 1040, version c1, at App. 9.

14. The Senate passed SB 360 by a vote of 30 “yeas,” 7 “nays,” and 3 “not voting.”<sup>7</sup>

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<sup>5</sup> / <http://www.flsenate.gov/data/session/2009/Senate/bills/billtext/pdf/s0360.pdf>, at App. 7, last accessed on January 6, 2010.

<sup>6</sup> / [http://www.flsenate.gov/session/index.cfm?BI\\_Mode=ViewBillInfo&Mode=Bills&ElementID=JumpToBox&SubMenu=1&Year=2009&billnum=1040](http://www.flsenate.gov/session/index.cfm?BI_Mode=ViewBillInfo&Mode=Bills&ElementID=JumpToBox&SubMenu=1&Year=2009&billnum=1040), at App. 8, last accessed on January 6, 2010.

<sup>7</sup> / [http://www.flsenate.gov/cgi-bin/view\\_page.pl?Tab=session&SubMenu=1&FT=D&File=session/2009/Senate/bills/votes/html/SSB03600501090039.html](http://www.flsenate.gov/cgi-bin/view_page.pl?Tab=session&SubMenu=1&FT=D&File=session/2009/Senate/bills/votes/html/SSB03600501090039.html), at App. 10.

15. The House passed SB 360 by a vote of 78 “yeas,” 37 “nays,” and 5 “not voting.”<sup>8</sup>

16. The Governor signed SB 360 into law on June 1, 2009. SB 360 became effective immediately. *See Answer at 2-3* (admitting relevant portions of ¶ 13).

**C. The Substance of SB 360**

17. SB 360 contains 35 sections, amending and creating various sections of Florida Statutes. Included at App. 12 is a chart describing what each section of SB 360 does.

18. The first half of SB 360 predominantly relates to amending the State’s growth management laws. *See Answer at 3* (admitting relevant portions of ¶ 14).

19. 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). *Id.* (admitting ¶ 15).

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<sup>8</sup>/ [http://www.flsenate.gov/cgi-bin/view\\_page.pl?Tab=session&Submenu=1&FT=D&File=session/2009/Senate/bills/votes/html/hSB03600501090478.html](http://www.flsenate.gov/cgi-bin/view_page.pl?Tab=session&Submenu=1&FT=D&File=session/2009/Senate/bills/votes/html/hSB03600501090478.html), at App. 11.

20. SB 360 creates the new term “dense urban land area” or “DULA.”<sup>9</sup> 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.*

21. There are 246 counties and municipalities statewide that have been deemed DULAs by the Legislature’s OEDR.<sup>10</sup> Sixteen of the twenty Local Governments are included in the designation by OEDR. *Id.*

22. In general, 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.

23. 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

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<sup>9/</sup> With regard to the allegations in paragraphs 16, 18-20, 27, 31, 38, 43, 44 and 45 of the Complaint, the Governor, Senate President and Speaker have stated that the pertinent statutes, documents, etc., “speak for themselves.” As a result, the Local Governments are reciting the pertinent portions of those statutes, documents, etc., in the Undisputed Facts section of this motion.

<sup>10/</sup> *See* <http://www.dca.state.fl.us/fdcp/dcp/Legislation/2009/CountiesMunicipalities.cfm>, at App. 13.

improvements schedules, and notice requirements for impact fee increases. SB 360, §§ 4, 5, 14.

24. 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.

25. 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.*

**D. The Fiscal Impacts of SB 360**

**1) The State's own analysis.**

26. During the legislative session, Senate staff reviewed SB 360 and on March 19, 2009, issued its Analysis and Fiscal Impact Statement (the "Senate Staff Analysis"), at 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.

27. The State's Department of Community Affairs ("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." See DCA policy analysis (the "DCA Analysis") at 7, at App. 15 (emphasis added). DCA further noted that "the fiscal impact on local governments is *extensive* but the full effects are indeterminate." *Id.* at 25 (emphasis added).

28. In its policy analysis, DCA observed that "[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).

## **2) The actual financial consequences to local governments.**

29. In more specific terms, the cost of compliance with Section 4 of SB 360 alone for each of the 246 DULAs will be approximately between \$41,264 and \$104,170, consisting of three principal areas where governmental action is needed: the amendment of existing comprehensive plans, the development and implementation of a mobility fee, and the revision of existing land development regulations to bring them into conformity (plus the required advertising costs). See Affidavit of Shelley Eichner at ¶ 10, at App. 16; Affidavit of Patricia A. Bates at ¶¶

10 and 11, at App. 17; Affidavit of Erika Gonzalez-Santamaria at ¶¶ 10 and 11, at App. 18.

30. Additionally, SB 360 removes the primary state-mandated procedures and mechanisms by which developers are currently required to address the transportation impacts of their projects, known as “transportation concurrency.” SB 360, § 4. It is unclear, however, whether the elimination of state-mandated transportation concurrency in the affected areas means that those local governments must also eliminate local transportation requirements. Development interests, as well as the sponsors of SB 360, have argued this position; local governments have contended otherwise. *Compare* Secretary Tom Pelham, *DCA’s Statement Regarding Permit Extensions Under Senate Bill 360 (“DCA Letter”)*, June 16, 2009, at App. 19; and Gary K. Hunter, Jr., Esq., *Florida Chamber of Commerce SB 360 Issue Paper (“Chamber Letter”)*, June 23, 2009, at App. 20.

31. Thus, *at a minimum*, affected local governments will be forced to spend funds determining how to interpret and apply this aspect of SB 360, including possible litigation expenses. In addition, if the broader interpretation is accepted, then the affected Local Governments will lose the ability to require developers to pay (through concurrency fees) their proportionate share of the roadway improvements necessitated by their development. These transportation costs associated with roadway improvements will be shifted to the Local

Governments, which will have no alternative but to spend the funds or risk violating level of service standards in their comprehensive plans.

32. SB 360 also eliminates the DRI review process in DULAs. SB 360, § 12. This process formerly allowed all local governments affected by a large project (including those that do not have direct approval authority, such as contiguous cities and counties) to have developers mitigate impacts inside and outside the boundaries of the city or county where the project is located. The elimination of this process will allow developers to ignore cross-jurisdictional impacts, thus passing the cost of mitigating such impacts on to local governments and their taxpayers.

33. SB 360 extends certain permits for two years in *all* local governments. SB 360, § 14. Development interests and sponsors of SB 360 contend this extension applies to all building permits and local development orders, while many local government interests contend it applies only to water management district and Department of Environmental Protection (and related local) permits. *See DCA Letter*, App. 19; *Chamber Letter*, App. 20. The Local Governments will be forced to spend funds determining how to interpret and apply this aspect of SB 360, including possible litigation expenses. Regardless of which interpretation prevails, the Local Governments will be forced to expend funds implementing and

administering the permit extensions (with no provision in SB 360 authorizing a pass through of those costs to developers).

34. SB 360 preempts local governments from adopting business regulations for security cameras for “lawful businesses” that require the expenditure of money “to enhance the services or functions provided by local governments unless specifically provided by general law.” SB 360, § 6. At least one Local Government has adopted, and several local governments were considering adopting, such requirements in order to deter crime and reduce expenditures for police services. *See* Affidavit of Steven Alexander at ¶¶ 3 and 4, App. 21. This transfer of costs from business owners to taxpayers will necessarily cause the Local Governments to expend additional funds.

**E. The Other Impacts of SB 360**

35. The Local Governments have been required to comply with different provisions of the statute since it was signed into law on June 1, 2009. *See* SB 360, § 35.

36. The Local Governments are being required to process requests for two-year extensions of permits (including those already expired) because permit holders and former permit holders are contending they are entitled to such relief under SB 360. *See* Affidavit of John R. Flint at ¶¶ 4 and 5, App. 22; Alexander Affidavit at ¶ 8, App. 21.

37. As previously noted, the elimination of DRI review for certain developments precludes a local government's ability to require development conditions necessary to mitigate the impacts of development. For example, plaintiff, City of Weston, has during the last 6 years attended numerous public meetings and hearings to express its opposition to a pending DRI in an adjacent community. *See Flint Affidavit*, App. 22, at ¶ 7. This pending development will now be exempt from the DRI review process under SB 360. *See SB 360*, § 12.

38. Also, since all local governments are prohibited from adopting or maintaining security camera regulations for businesses (SB 360, § 6), plaintiff, Town of Cutler Bay, is now prohibited from enforcing its existing security camera legislation. *See Alexander Affidavit* at ¶¶ 6 and 7, App. 21.

### MEMORANDUM OF LAW

#### **I. STANDARD FOR ENTRY OF SUMMARY JUDGMENT.**

“It is axiomatic that summary judgment may be entered whenever the pleadings, affidavits, depositions or other factual showings reveal there exists no genuine issue of material fact and that the movant is entitled to judgment as a matter of law.” *See Mahl v. Dade Pipe & Plumbing Supply Co., Inc.*, 546 So. 2d 740, 741 (Fla. 3d DCA 1989). The initial burden of demonstrating that there is no genuine issue of material fact is upon the movant for summary judgment. *See Continental Concrete, Inc. v. Lakes at La Paz III Ltd.*, 758 So. 2d 1214, 1217 (Fla.

4th DCA 2000). After this burden has been met, the burden shifts to the non-moving party to demonstrate existence of an issue of a material fact, which for summary judgment purposes is a fact that is “essential to the resolution of the legal questions raised in the case.” *Id.*

Summary judgment is particularly appropriate in declaratory judgment actions involving purely legal questions. *See JEA v. Fla. Power & Light Co.*, 6 So. 3d 1247, 1247-48 (Fla. 1st DCA 2009) (affirming final summary judgment in declaratory judgment action).

## **II. SB 360 VIOLATES THE SINGLE SUBJECT PROVISION.**

The enactment of SB 360 violates the single subject provision by attempting to logroll three separate and distinct subjects into one bill. Defendants have generally denied the allegations of constitutional violations, but have not articulated how the three subjects of growth management, security cameras, and tax exemptions and valuation methodologies relating to affordable housing constitute a “single subject” that would pass constitutional muster. Instead, Defendants acknowledge that the requirements of Article III, Section 6, of the Florida Constitution, “speak for themselves.” *See Answer at 3; Secretary’s Answer at 3.*

### **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.<sup>11</sup>

The Florida Supreme Court held in *State v. 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, 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

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<sup>11</sup>/ 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).

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.<sup>12</sup> “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 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.”<sup>13</sup> *Id.*

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<sup>12/</sup> 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.

<sup>13/</sup> 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 Higgs v. State*, 759 So. 2d 620, 627 (Fla. 2000) (chapter law which contained disparate

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.

*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.<sup>14</sup> See SB 360, §§ 6, 17-20.

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provisions added near the end of the session constituted a “classic act of logrolling”).

<sup>14/</sup> 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,

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 “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.

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*

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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 App. 23 (citing Gleeson, Ball, Chinn, Einsweiller, 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.”)).

*Florida Housing Finance Corporation* (see, e.g., SB 360, §§ 15-19, 26). *Id.* These 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 <http://www.gainesville.com/article/20090520/NEWS/905209931>, at App. 25. 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 App. 1 (SB 360), §§ 15-34, with App. 9 (SB 1040c1).

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 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.*<sup>15</sup> (quoting *Heggs v. State*, 718 So. 2d 263, 264 (Fla. 2d DCA 1998)).

The First District’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

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<sup>15/</sup> 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.

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.

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). Accordingly, the Court should declare that the enactment of SB 360 violated Art III, Sec. 6 of the Florida Constitution, enjoin the enforcement of its requirements and direct the Secretary to strike SB 360.<sup>16</sup> *Id.*

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<sup>16/</sup> An injunction following declaratory relief to preclude enforcement of an unconstitutional statute is the appropriate remedy for a court to issue to the prevailing party. *See, e.g., Department of Bus. Reg. v. Nat'l Manufactured Housing Fed., Inc.*, 370 So. 2d 1132, 1136-37 (Fla. 1979) (affirming order declaring statute unconstitutional and enjoining implementation of the statute); *Seminole Ent., Inc. v. City of Casselberry*, 866 So. 2d 1242, 1245 (Fla. 5th DCA 2004) (“[W]hen an aggrieved party asserts a constitutional challenge to the facial validity of an ordinance, an original declaratory judgment or injunction action in the circuit court is the proper vehicle.”); *Florida Horsemen Benevolent Protective Assoc. v. Rudder*, 738 So. 2d 449, 451-53 (Fla. 1st DCA 1999) (affirming trial court’s order holding statute to be unconstitutional and enjoining enforcement of the statutory provisions); *County of Pasco v. Riehl*, 620 So. 2d 229, 232 (Fla. 2d DCA 1993) (affirming trial court order holding statute to be unconstitutional and

### III. SB 360 VIOLATES THE UNFUNDED MANDATE PROVISION.

SB 360 was improperly enacted without the Legislature allocating funds (or establishing methods for obtaining funding) for the Local Governments to comply with the requirements imposed on them therein. The requirements of Florida's unfunded mandate provision are not contested by the Defendants. *See Answer at 4; Secretary's Answer at 4 (admitting the existence of Art. VII, Sec. 18(a) and stating that it "speaks for itself").*

#### A. History of The Unfunded Mandate Provision – Art. VII, Sec. 18(a), Fla. Const.

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. *See Florida Advisory Council on Intergovernmental Relations, 1991 Report on Mandated and Measures Affecting Local Government Fiscal Capacity 15 (91-3 September 1991) ("IR Report"), at App. 26.* In 1977, after public outcry, the Florida Legislature created the Florida Advisory Council on Intergovernmental Relations in order to

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granting injunction); *Board of Commissioners of State Institutions v. Tallahassee Bank & Trust Co.*, 100 So. 2d 67, 69 (Fla. 1st DCA 1958) ("The traditional procedure by which to test the validity of and secure relief against the immediate or prospective adverse effect of an allegedly invalid statute or ordinance is by suit in equity to enjoin the enforcement. ... The statutory proceeding for declaratory judgments and decrees has also been recognized as a proper vehicle for this purpose.")

examine the effect of state mandates on municipalities and counties. *Id.* In 1978, the Legislature passed a statute mandating that any bill that would require additional expenditures by local governments be accompanied by an economic statement explaining the resulting costs of implementing the bill. *Id.* at 16. This legislation did not solve the problem, however, and the Florida Legislature adopted 362 unfunded mandates between the years of 1981 through 1990. *Id.* at 17.

As a result, by 1988, local governments started a petition drive to enact a constitutional amendment that would restrict the ability of the Legislature to adopt unfunded legislative mandates. *Id.* at 18-19. By 1990, the Florida Legislature adopted a joint resolution, which proposed the adoption of Article VII, Section 18 of the Constitution. *Id.* 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.

*Id.* at 19-20.

One of the primary purposes underlying the unfunded mandate provision was, in fact, to preclude unfunded mandates related to *growth management*. See William A. Buzzett and Deborah K. Kearney, *Commentary to Art. VII, § 18, Fla. Const.*, at App. 27. Accordingly, SB 360's violation of the unfunded mandate provision goes directly to the heart of the Constitutional intent of that provision.

**B. The Test for Unfunded Mandates**

The constitutional provision regarding unfunded mandates essentially establishes a three-part test:

1. Does the general law require counties and municipalities 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?

Art. VII, Sec. 18(a), Fla. Const.; *see also IR Report* at 23, App. 26.

**C. The Enactment of SB 360 Violated Art. VII, Sec. 18(a), Fla. Const.**

The Legislature's conclusory statement that SB 360 "fulfills an important State purpose" – *see* SB 360, § 34 – essentially constitutes an admission that the unfunded mandate provision has potential application. The inclusion of this legislative "finding" effectively brings the analysis directly to the third step of the test and leaves only the question of whether the Legislature can satisfy one of the five exceptions to the unfunded mandate provision. Otherwise, why would the finding have been included?<sup>17</sup> However, even without this implicit admission, the undisputed facts establish that SB 360 requires the Local Governments "to spend funds or to take an action requiring the expenditure of funds" in violation of the unfunded mandate provision. These expenditures, individually and cumulatively, will be significant, and none of the five exceptions is met.

**1. SB 360 Requires Counties and Municipalities to Spend Funds or Take Action Requiring Expenditure of Funds.**

The significant costs of SB 360 on local governments throughout Florida were well-known to (but *ignored* by) the Legislature. In fact, during the legislative session, Senate staff reviewed SB 360 and observed that SB 360 "will have a

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<sup>17/</sup> The Senate Staff Analysis recognized the unfunded mandate problem, and discussed the exceptions to the unfunded mandate provision. *See* App. 14 at 12.

*negative fiscal impact* on local governments that are designated TCEAs by requiring updated comprehensive plans.” App. 14 at 2 (emphasis added).

DCA’s review of SB 360 yielded similar conclusions. On May 20, 2009, DCA warned, as part of its policy analysis, that meeting the bill’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.” App. 15 at 7 (emphasis added). DCA acknowledged that “the fiscal impact on local governments is *extensive* but the full effects are indeterminate.” *Id.* at 25 (emphasis added). In its policy analysis, DCA addressed this shifting of the burden and observed that “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.” *Id.* (emphasis added).

While these unfunded mandate issues were ignored by the Legislature, they cannot be ignored by this Court. The specific “unfunded mandates” imposed by SB 360 include, but are not limited to, the following:

- 1) SB 360 requires that, within two years, those local governments designated as TCEAs, by virtue of their being defined as DULAs, “shall” adopt comprehensive plan amendments and transportation strategies “to support and fund mobility.” SB 360, § 4. This amendment process requires that consultants be retained, studies commissioned, legislation drafted, plan amendments printed, and

hearings advertised and conducted, at an expense of approximately \$15,000 per local government.<sup>18</sup> See Eichner Affidavit at ¶ 9(a), App. 16.

- 2) SB 360 requires DULAs to develop strategies to fund mobility. In order to fund mobility DULAs will need to create and adopt a mobility fee. This will require consultants to be retained, studies commissioned, and the creation of methodologies and formulas for assessing the fee at a cost of approximately \$25,000 per local government.<sup>19</sup> *Id.* at ¶ 9(b), App. 16.
- 3) The comprehensive plan amendments that are required by SB 360 will need to be implemented by land development regulations. The drafting of the land development regulations will require consultants to be retained, legislation drafted, regulations printed, and advertised meetings conducted at a cost of approximately \$10,000 per local government.<sup>20</sup> *Id.* at ¶ 9(c).
- 4) SB 360 removes the primary state-mandated procedures and mechanisms by which developers are currently required to address the transportation impacts of their projects, known as “transportation concurrency.” SB 360, § 4. It is unclear, however whether the elimination of state-mandated transportation concurrency in the affected areas also precludes enforcement of local transportation requirements. See paragraph 30, *supra*. At a minimum, affected local governments will be forced to spend funds determining how to interpret and apply this aspect of SB 360, including possible litigation expenses. If the local governments lose the ability to require developers to pay (through concurrency fees) their proportionate share of the roadway

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<sup>18</sup> / The cost of \$15,000 is the actual amount that will be charged to plaintiff, City of Weston. See Eichner Affidavit at ¶ 9, App. 16.

<sup>19</sup> / The cost of \$25,000 is the actual amount that will be charged to plaintiff, City of Weston. *Id.*

<sup>20</sup> / The cost of \$10,000 is the actual amount that will be charged to plaintiff, City of Weston. *Id.* For all other local governments, the cost range for compliance with the requirements set forth in sub-paragraphs 1-3 is approximately \$41,264 to \$104,170. *Id.*; see also Bates Affidavit at ¶¶ 10 and 11, App. 17; and Gonzalez-Santamaria Affidavit at ¶¶ 10 and 11, App. 18.

improvements necessitated by their development, those costs will be shifted to the Local Governments (and their residents), which will have no alternative but to spend the funds or risk violating of level of service standards in their comprehensive plans.

- 5) SB 360 also extends certain permits for two years in *all* local governments. SB 360, § 14. Development interests and sponsors of SB 360 contend this extension applies to all building permits and local development orders, while many local government interests contend it applies only to water management district and Department of Environmental Protection (and related local) permits. *See* paragraph 33, *supra*. The Local Governments will be forced to spend funds determining how to interpret and apply this aspect of SB 360, including possible litigation expenses. Regardless of which interpretation prevails, the Local Governments may be forced to expend funds implementing and administering the permit extensions (with no provision in SB 360 authorizing a pass through of those costs to developers).
- 6) SB 360 eliminates the DRI process in DULAs. SB 360, § 12. This process formerly allowed all local governments affected by a large project (including those that do not have direct approval authority, such as contiguous cities and counties) to have developers mitigate impacts inside and outside the boundaries of the city or county where the project is located. The elimination of this process will allow developers to ignore cross-jurisdictional impacts, thus shifting the cost of mitigating such impacts to local governments and their taxpayers.
- 7) SB 360 preempts local governments from adopting business regulations for security cameras for “lawful businesses” that require the expenditure of money “to enhance the services or functions provided by local governments unless specifically provided by general law.” SB 360, § 6. At least one Local Government has adopted, and several local governments were considering adopting, such requirements in order to deter crime and reduce expenditures for police services. *See* paragraph 34, *supra*. This transfer of costs from business owners to taxpayers will necessarily cause the Local Governments to expend additional funds.

The findings of the Senate Staff and the DCA, as well as the undisputed facts presented by the Local Governments (and the admission through the inclusion by the Legislature of the “important state interest” finding), are sufficient to establish the first step in the unfunded mandate analysis: SB 360 will require counties and municipalities to spend funds or take actions requiring the expenditures of funds.

**2. Finding That SB 360 Fulfills an “Important State Interest.”**

As noted above, the Legislature, apparently recognizing that SB 360 would required counties and municipalities to expend significant funds, expressly included Section 34: “The Legislature finds that this act fulfills an important state interest.”

**3. None of The Five Exceptions to Article VII, Sec. 18(a) is Applicable.**

The final step of the unfunded mandate analysis requires consideration of each of the five exceptions set forth in Article VII, Section 18(a) of the Constitution.

**a. The Legislature did not appropriate funding.**

On its face, SB 360 does not appropriate any fund to allow counties and municipalities to implement the requirements of the legislation. Defendants certainly have not identified any such appropriation in defense to the unfunded mandate challenge of the Local Governments.

**b. The Legislature did not authorize a new funding source.**

Nowhere in SB 360 did the Legislature authorize (or even identify) a new funding source sufficient to allow the Local Governments to implement the requirements of the legislation. Defendants have not identified such a provision as an affirmative defense to the unfunded mandate challenge of the Local Governments.

**c. SB 360 failed to obtain a two-thirds vote of the membership of each house of the Legislature.**

The undisputed facts establish that the Senate passed SB 360 by a vote of 30 “yeas,” 7 “nays,” and 3 “not voting,” while the House passed SB 360 by a vote of 78 “yeas,” 37 “nays,” and 5 “not voting.” While the Senate vote met the requirement of a two-thirds vote of the entire membership of the Senate, the House fell two votes short. *See* Art. VII, Sec. 18(a), Fla. Stat. (requiring approval by a “two-thirds of the *membership* in each house of the legislature”) (emphasis added). A two-thirds vote of the House would have required 80 affirmative votes, not 78. Accordingly, this exception is unavailable to Defendants (nor have they cited it in defense of this action).

**d. SB 360 does not apply the same to all persons similarly situated, including the state and local governments.**

While no Florida Court has interpreted the fourth exception to the unfunded mandate provision, its non-applicability in this instance is self-evident. SB 360 does

not apply to all similarly situated persons because it requires expenditures *only* by local governments. The exception requires the expenditure to apply to all similarly situated persons, *including* the local governments. Any other reading that would attempt to define the relevant class as consisting only of the local governments would render the term “including” superfluous and meaningless. Such an interpretation must be avoided. *Strand v. Escambia County*, 992 So. 2d 150, 163 (Fla. 2008) (“It is a fundamental rule of construction of our [C]onstitution that a construction ... which renders superfluous, meaningless or inoperative any of its provisions should not be adopted by the courts.”)

An example of when this exception 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 exception would not apply. *See IR Report*, App. 26 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 applicability of exception where law required newly

constructed private or public buildings to have specific ratio of urinals to water closets because law “affected all persons similarly situated”), at App. 28.

**e. SB 360 does not seek to comply with any federal requirement.**

Neither SB 360 nor its legislative history reflects that it was enacted in order to comply with any federal requirements. Defendants, for their part, have not identified such a federal requirement in defense to the Local Governments’ unfunded mandate challenge. Accordingly, this exception is also unavailable.

Insofar as SB 360 (1) requires the Local Governments to expend funds or take actions that require the expenditure of funds; (2) reflects the Legislature’s determination that it was enacted to fulfill an important state purpose; and (3) none of the five exceptions enumerated in Article VII, Section 18(a) has been met, the Court must declare that SB 360 violates the unfunded mandate provision of the Florida Constitution and enjoin its further enforcement. *See* Note 16, *supra*.

**IV. THE PRESENT EFFECTS OF SB 360 AND NEED FOR DECLARATORY RELIEF.**

In the context of a constitutional challenge to enacted legislation, a party seeking declaratory relief must demonstrate (1) a bona fide, actual present need for the declaration that deals with a present, ascertained (or ascertainable) state of facts; (2) that some power, privilege or right of the complaining party is dependent upon the facts or the law applicable to the fact; (3) that there is some person or

persons before the court who have, or reasonably may have an actual, present, adverse and antagonistic interest in the subject matter, either in fact or law; and (4) that the relief sought is not merely the giving of legal advice by the court or the answer to questions propounded from curiosity. *Coalition for Adequacy and Fairness in School Funding, Inc. v. Lawton Chiles*, 680 So. 2d 400, 404 (Fla. 1996) (“*Coalition for Adequacy*”).

While Defendants have already *admitted* that the Court has jurisdiction to render declaratory relief – Answer at 2 – and have not asserted any affirmative defense directed to the Court’s lack of jurisdiction to do so, it is readily apparent that the requirements for obtaining declaratory relief have been met.<sup>21</sup> SB 360 is already in effect, and the Local Governments are having to comply with different provisions of the statute. SB 360, § 35. By way of example, the Local Governments are having to process applications for two-year extensions of permits (including those already expired) because permit holders and former permit holders are contending they are entitled to such relief under SB 360. *See* Flint Affidavit at ¶¶ 4 and 5, App. 22; Alexander Affidavit at ¶ 8, App. 21.

If the Local Governments deny or do not respond to the permit extension requests, based on their belief that SB 360 is unconstitutional, they unquestionably

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<sup>21/</sup> In fact, the Court previously considered and decided this issue upon supplemental briefing of the parties in connection with Defendants’ motion to dismiss.

expose themselves to expensive litigation brought by those very same permit holders and former permit holders. If they grant or concede the requests, the Local Governments risk creating rights in the permit holders that would subsequently be enforceable against the Local Governments, notwithstanding a later determination of the unconstitutionality of SB 360. This is the spot between the proverbial rock and the hard place; local governance of growth management issues should not proceed either in the dark or in a vacuum. The Local Governments have filed this declaratory judgment action, at least in part, so as not to proceed at their peril and to avoid the expense and other burdens associated with such inevitable litigation.<sup>22</sup>

In addition to the permit extension requests, SB 360 arguably imposes a series of other obligations on the Local Governments, compliance with which must commence now. For example, SB 360 allows pending developments that qualify as DRIs to be exempt from DRI review within DULAs. SB 360, § 12. The removal of the DRI review process for these developments eliminates a valuable forum in which local governments can require development conditions necessary

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<sup>22</sup> / Since the Local Governments' constitutional challenges to SB 360 are premised upon violations of the single-subject and the unfunded mandates provision of the Florida Constitution, rather than a dispute as to a possible future interpretation of the legislation, the challenges cannot be resolved by allowing SB 360 to be construed through implementation.

to mitigate the impacts of development.<sup>23</sup> Plaintiff, City of Weston, for example, has during the last 6 years attended numerous public meetings and hearings to express its opposition to a pending DRI in an adjacent community and was afforded the opportunity to negotiate several proposed DRI development order conditions. *See* Flint Affidavit at ¶ 7, App. 22. SB 360 would allow this pending development to be exempt from the DRI review process and would prevent the enforcement of these proposed conditions, which are necessary to mitigate the impacts of the proposed development. SB 360, § 12; *see also* Flint Affidavit at ¶¶ 7-9, App. 22.

By way of other examples, DULAs will be required to begin immediately the process of amending their comprehensive plans in order to comply with SB 360's mandate that their comprehensive plans be amended within two years to provide strategies to support and fund mobility. *Id.* at § 4. These amendments will require the Local Governments to incur thousands of dollars in expenses. *Id.* Also, all local governments are prohibited from adopting or maintaining security camera regulations for businesses. *Id.* at § 6. Plaintiff, Town of Cutler Bay, for example, is prohibited from enforcing its existing security camera legislation. Alexander Affidavit at ¶¶ 3 – 7, App. 21.

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<sup>23</sup> / Ironically, the elimination of DRI review is occurring in the densest urban areas, where such review is most needed. To be certain, though, the Local Governments are not here questioning the “wisdom” of SB 360, such as it is.

The present application and implementation of SB 360 has created an actual controversy with respect to the Local Government's rights and obligations under SB 360. Defendants are adverse to the Local Governments in that they contend SB 360 is entirely constitutional and that the Local Governments must comply with its requirements. Declaratory relief is appropriate to resolve this controversy.

**V. THE DEFENDANTS ARE NOT IMMUNE FROM THIS LAWSUIT.**

The affirmative defense that the Governor, Senate President and Speaker are somehow either not proper parties or are legislatively immune from this lawsuit finds no support in the law.

First, the issues of legislative immunity and the propriety of naming these Defendants were *previously raised* in Defendants' motion to dismiss (*see* motion to dismiss at 5-6) *and rejected* by this Court when it denied the motion. *See* Order dated November 23, 2009.

Second, 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 v. Scanlan*, 582 So. 2d 1167 (Fla. 1991) (Governor named as defendant in a successful single subject challenge to the Comprehensive Economic Development Act of 1990); *Brown v. Butterworth*, 831 So. 2d 683 (Fla. 4th DCA 2002) (Senate President and Speaker of the House were named as defendants in a constitutional challenge claiming that 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 successful constitutional challenge to an appropriations bill based on a violation of the single subject provision). As Defendants conceded in their motion to dismiss, 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. *See* motion to dismiss at 6. In short, Defendants are not 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 was originally cited by Defendants in their motion to dismiss – 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 Governor, 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 defendants' 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).<sup>24</sup>

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<sup>24/</sup> Defendants appear to confuse this lawsuit, which seeks a declaration that the enactment of SB 360 fails to comply with certain constitutional mandates, with that of a lawsuit seeking a declaration of rights *under* SB 360. To be clear, this lawsuit

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.<sup>25</sup> *Id.* at 778. 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 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.<sup>26</sup>

The Complaint and relief sought are clear: the Local Governments are seeking a declaration that the Legislature failed to meet the constitutional

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is directed at the constitutional infirmities and failure to perform certain duties related to the *enactment* of SB 360. The Local Governments are not seeking a declaration of rights under SB 360.

<sup>25/</sup> A copy of the first page of the second amended complaint in the *Lewis* declaratory judgment action is included at App. 29 for ease of reference, since the First District's decision does not specifically identify all the defendants in that action by name.

<sup>26/</sup> The trial court denied the Speaker's motion to dismiss, which asserted he was not a proper party (*see* App. 30), and then in the same order added the Senate President as a defendant to the amended complaint. *See* App. 31. To the extent the Speaker or Senate President appealed these rulings, the First District affirmed the trial court's decision "on all grounds." *Lewis*, 15 So. 3d at 778.

requirements to exempt SB 360 from the single subject and unfunded mandate provisions. The Local Governments are not suing Defendants because they exercised their legislative discretion in supporting or opposing legislation (which *would be* legislatively immune). Instead, the Local Governments are suing Defendants because they 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.”).

Finally, Defendants have roles in overseeing and enforcing SB 360.<sup>27</sup> As previously noted, the Governor, as Chair of the Administration Commission, which is part of the Executive Office of the Governor (§ 14.202, Fla. Stat.), 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” in accordance with Chapters 163 and 380 and sections 186.007 and 186.008, Florida Statutes.

The Senate President and Speaker, as the presiding officers of their respective bodies, oversee the OEDR *within the Legislature*, and receive a mandatory report from OPPAGA relating to TCEAs created by SB 360.<sup>28</sup> SB 360, §§ 2 and 4; *see* paragraphs 6-9, *supra*. As a result, Defendants are not legislatively immune from suit here. *Walker v. Pres. of the Senate*, 658 So. 2d 1200, 1200 (Fla. 5th DCA 1995) (in constitutional challenge to statute, state official designated to enforce the rule is

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<sup>27</sup> / *Defendants* raised the issue of enforcement responsibilities in their motion to dismiss. *See* motion to dismiss at 4-7.

<sup>28</sup> / The mandatory report addresses “the methods that local governments have used to implement and fund transportation strategies to achieve the purposes of designated [TCEAs], and the effects of those strategies on mobility, congestion, urban design, the density and intensity of land use mixes, and network connectivity plans used to promote urban infill, redevelopment, or downtown revitalization.” SB 360, § 4.

the proper defendant); *see also Supreme Court of Va. v. Consumers Union of the U.S.*, 446 U.S. 719, 734-36, 100 S. Ct. 1967, 1976-77 (1980) (finding Virginia Supreme Court justices immune from suit for their decision to enact regulations governing the practice of law, but declining to extend immunity to their responsibility to oversee and regulate the profession).

### **CONCLUSION**

SB 360 violates Florida's Constitutional mandate that all legislative bills encompass a single subject, just as it violates the Florida Constitution's unfunded mandate provision. Legislative immunity does *not* protect the Governor, Senate President and Speaker from suit where the violations arise from either their failure to comply with Constitutional requirements in the enactment of SB 360 or their enforcement responsibilities under SB 360. SB 360 cannot stand in the face of these Constitutional infirmities. As a result, SB 360 should be declared unconstitutional and stricken.

### **RELIEF SOUGHT**

**WHEREFORE**, the Local Governments pray that the Court enter summary judgment in their favor, and:

- A. Issue a declaratory judgment declaring that SB 360 violates Art. III, Sec. 6, and Art. VII, Sec. 18(a), of the Florida Constitution;
- B. Enjoin further enforcement of SB 360;

- C. Direct the Secretary of State to strike SB 360 from the Laws of Florida;
- and
- D. Grant such other relief as the Court deems appropriate.

**CERTIFICATE OF SERVICE**

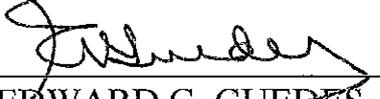
WE HEREBY CERTIFY that a true copy of the foregoing was sent via email and U.S. Mail to **Jonathan A. Glogau, Esq.**, *Attorney for the Governor, Senate President and Speaker*, 400 South Monroe Street, Room PL-01, Tallahassee, Florida 32399-6536; and **Lynn C. Hearn, Esq.**, General Counsel, and **Staci 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, this 8th day of January, 2009.

*Respectfully submitted,*

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