IN THE FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

HONORABLE JEFF ATWATER, et al., Appellants, v. CITY OF WESTON, FLORIDA, et al., Appellees.	CASE NO. 1D10-5094

APPELLEES' MOTION FOR REHEARING AND REHEARING EN BANC

Pursuant to Fla. R. App. P. 9.330(a) and 9.331(d), appellees, the twenty local governmental plaintiffs below (the "Local Governments"),[1] hereby move for panel rehearing and rehearing en banc with respect to the Court's opinion rendered on May 2, 2011 (the "Opinion"). The Local Governments respectfully request that the Court vacate the Opinion and dismiss the appeal as moot.[2]

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1 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.

2 Appellants had previously filed a motion to dismiss the appeal as moot on the basis that the Legislature had enacted new legislation curing both the single-subject and unfunded mandates violations inherent in the enactment of SB 360. Appellees concur that the new legislation addresses the defects in SB 360 and that the appeal should be dismissed.

I. PANEL REHEARING.

1. In the Opinion, the Court reversed the trial court's final summary judgment in favor of the Local Governments on the grounds that they had essentially sued the wrong parties. The Court concluded that the proper defendant in the action should have been the Secretary of the Department of Community Affairs, as the "responsible official" seemingly charged with enforcement of SB 360. Opinion at 6. It appears that the Court may have misapprehended or overlooked (1) the fundamental nature of the Local Governments' single-subject and unfunded mandates challenges; and (2) that the Department of Community Affairs ("DCA") had formally expressed a position regarding SB 360 that was ***not adverse*** to the Local Governments' challenges. Consequently, to have named the DCA Secretary as a defendant would have deprived the trial court of jurisdiction to render a declaratory judgment.

2. The general rule announced by the Court in the Opinion insufficiently addresses the question of proper party status because (1) a single-subject or unfunded mandate challenge to the enactment of legislation addresses aspects of the legislation in which an enforcing agency has no cognizable interest; (2) an entity purportedly charged with enforcement – as occurred in this instance with the DCA – may espouse a position that aligns with the plaintiff's position, thus eliminating the requisite adverse interest that would support a declaratory judgment action; and (3) certain legislation – like SB 360 – identifies numerous entities that have some degree of enforcement or implementation obligation,

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leaving plaintiffs uncertain which enforcement entity should be made to answer for the defects in the enactment process.

A. The Nature of the Challenges.

3. Unlike constitutional challenges to the manner in which a statute is applied or enforced, or constitutionally-based interpretive challenges to statutes for vagueness, overbreadth or similar defects in the language of the statutes, the Local Governments' challenges addressed only the ***enactment*** process rather than the interpretation or application (and, therefore, enforcement) of SB 360. In fact, both the single-subject challenge and the unfunded mandates challenge questioned how the legislative defendants exercised their ***legislative duties*** in enacting SB 360.[3]

4. In that respect, *Coalition for Adequacy & Fairness in School Funding, Inc. v. Chiles*, 680 So. 2d 400 (Fla. 1996) ("*Coalition*") controls the outcome of this appeal. The Court sought to distinguish *Coalition* on the grounds that "the declaratory action at issue here does not involve a broad constitutional duty of the State implicating specific responsibilities of the defendants." Opinion at 6. It appears, however, that the Court may have overlooked that the Local Governments' challenges had ***everything*** to do with how the Legislative Defendants exercised their "specific responsibilities" and ***nothing*** to do with how the DCA Secretary exercised his. It was the Legislative Defendants, and not the

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[3] To be clear, the Local Governments did not name the Legislative Defendants because of the manner in which either cast his vote, but rather how each, as head of his respective legislative body, allowed legislation to be enacted without observing constitutional requirements for enactment.

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DCA Secretary, who elected to incorporate multiple subjects within SB 360 and to impose and proceed with unfunded mandates without ensuring a 2/3 vote of the House and Senate. In fact, it is difficult to imagine what "adverse interest" the DCA Secretary, in the course of his official responsibilities, might have had in either of those uniquely legislative concerns.[4]

5. In light of these undisputed facts, and the Court's observation about the necessity of having a "cognizable interest" in the challenges (Opinion at 6), it certainly cannot be said that the DCA Secretary had a cognizable interest in what subjects were log-rolled into SB 360 or whether the necessary 2/3 votes were obtained. Only the Legislative Defendants had such an interest.[5]

B. DCA Was Not a Proper Party Defendant Because Its Interests Were Not Adverse.

6. As this Court correctly observed, there must exist adverse interests in order to support a trial court's jurisdiction over a declaratory judgment action. Opinion at 7 (quoting *Martinez v. Scanlon*, 582 So. 2d 1167, 1170-71 (Fla. 1991)).

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[4] The Opinion also appears to conflict with this Court's decision in *Lewis v. Leon County*, 15 So. 3d 777 (Fla. 1st DCA 2009). *See* Argument II, *infra.*

[5] An additional difficulty in this case with the "enforcement" theory of proper party status is that officials or agencies charged with enforcing legislation should not (and practically speaking, cannot) be made to answer for and defend (1) defects in the manner the legislation was enacted, or (2) legislative findings that purportedly justified its enactment. *See, e.g., In re Constitutionality of House Joint Resolution 1987*, 817 So. 2d 819, 831 (Fla. 2002) (noting in constitutional challenge based on gerrymandering that "the Legislature and other proponents of the redistricting plan must be afforded an opportunity to respond to any evidence of discriminatory effect").

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The DCA Secretary did ***not*** have such an adverse interest. In fact, the DCA 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 at 7 (R:159-60) (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).

7. In its policy analysis, DCA also 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).

8. These formally expressed positions by DCA were not adverse to the Local Governments' position in the lawsuit. Consequently, suing the DCA Secretary for violations of the unfunded mandates provision of the Florida Constitution would not have created the necessary jurisdiction for the trial court to provide declaratory relief.

9. For the foregoing reasons, the Court should entertain panel rehearing, vacate the Opinion, and dismiss the appeal as moot.

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C. SB 360 Identified Several Entities with Enforcement or Implementation Obligations.

10. SB did not entrust enforcement or implementation to any one agency or individual. No less than eight separate agencies or offices were responsible for implementing or enforcing SB 360.

11. For example, DCA was called upon to implement several aspects of SB 360. *See* Ch. 2009-096, Laws of Fla., §§ 2, 13. The Department of Environmental Protection, along with numerous Water Management Districts around the state, was required to process and implement the legislatively mandated permit extensions. *Id.* at § 14. The Florida Housing Finance Corporation ("FHFC") was required to implement various housing provisions and adopt new administrative rules. *Id.* at §§ 15, 22, and 25. The Department of Children and Families was directed to coordinate with the FHFC, as well as other agencies, to provide affordable housing available whenever and wherever possible to young adults who leave the child welfare system. *Id.* at § 25.

12. Additionally, SB 360 imposed numerous implementation and enforcement requirements that tied in the Governor's office and the Legislature (and by extension, the Speaker of the House and the President of the Senate). The Governor, for his part, sits as Chair of the Administration Commission, which is part of the Executive Office of the Governor. § 14.202, Fla. Stat. Pursuant to Chapters 163 and 380 and sections 186.007 and 186.008, Florida Statutes, the Administration Commission is charged with, among other duties, (i) "considering proceedings relating to comprehensive plans or plan amendments and land

development regulations"; (ii) "revision and implementation of the State Comprehensive Plan"; (iii) "establishing guidelines and standards for developments of regional impact"; and (iv) "designating areas of critical state concern."[6]

13. Additionally, Senate Bill 360 designated certain local governments as Dense Urban Land Areas. This designation was generally based upon the population and density of the local governments. Under SB 360, the Office of Economic and Demographic Research *within the Legislature* ("OEDR") was required annually to calculate the population and density criteria needed to determine which jurisdictions qualify as Dense Urban Land Areas.[7] Ch. 2009-096, Laws of Fla., § 2.

14. Finally, the Office of Program Policy Analysis and Government Accountability ("OPPAGA") was required to submit to the *President of the Senate and the Speaker of the House* by February 1, 2015, a report on TCEAs created by SB 360. Ch. 2009-096, Laws of Fla., § 4, p. 12. This report, at a minimum, is required to "address the methods that local governments have used to implement and fund transportation strategies to achieve the purposes of designated

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6 *See* http://www.myflorida.com/myflorida/cabinet/cabprocess.html, last accessed on May 16, 2011.

7 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, last accessed on May 16, 2009. In addition, it provides research support for Legislative committees and analyzes the impact of proposed legislation for the Legislature. *Id.*

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.[8]

15. While the Opinion suggests that only DCA had enforcement responsibility for SB 360, the Court may have overlooked all of the aforementioned agencies and entities charged, in one way or another, with implementing SB 360.

II. REHEARING *EN BANC*.

16. The Opinion does not address (or attempt to reconcile its reasoning with) this Court's prior decision in *Lewis v. Leon County*, 15 So. 3d 777 (Fla. 1st DCA 2009), the ***only*** other reported appellate decision addressing an unfunded mandate challenge. In *Lewis*, twenty-five Florida counties filed a declaratory judgment action against 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. *Id.*

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[8] *See* http://www.oppaga.state.fl.us/shell.aspx?pagepath=about/about.htm, last accessed on August 27, 2009. It also bears noting that SB 360 provides that the Legislature is to receive from the Department of Transportation a report on mobility issues raised by the implementation of Legislation. Chap. 2009-096, Laws of Fla., § 13. The purpose of this report is to recommend legislation and implement a plan to replace the existing transportation concurrency system. *Id.*

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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.*

17. 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 779, 781. Tellingly, neither the Speaker nor the Senate President appealed the trial court's decision to keep them as proper party defendants in the *Lewis* action.[9]

18. The Opinion cannot be reconciled with this Court's affirmance in *Lewis* of the trial court's decision to allow an unfunded mandate challenge to be brought against the Speaker and the Senate President. Accordingly, en banc review is necessary to maintain uniformity in this Court's jurisprudence.

19. Additionally, the questions of proper party status and jurisdiction to entertain declaratory judgments are ones of exceptional importance. It is critically important to potential plaintiffs to understand who the proper parties are in a constitutional challenge to legislation based on single-subject or unfunded mandates violations. The effort and expense incurred by the Local Governments in pursuing their largely successful constitutional challenges to SB 360 – in reliance on cases such as *Coalition* and *Lewis* – has largely been rendered for naught by this

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[9] The trial court denied the Speaker's motion to dismiss, which asserted he was not a proper party, and then in the same order added the Senate President as a defendant to the amended complaint. To the extent the Speaker or Senate President appealed these rulings, this Court affirmed the trial court's decision "in all respects." *Id.* at 781-82.

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Court's determination that the wrong defendants were sued. A similar fate appears to have befallen the plaintiffs in this Court's more recent decision in *Haridopolos v. Alachua County*, ___ So. 3d ___, 2011 WL 1744414 (Fla. 1st DCA May 9, 2011).

20. Single-subject and unfunded mandate challenges go to the very heart of the Legislature's authority to enact legislation, and the principles are enshrined in the Florida Constitution. The important issue of proper party status, therefore, is likely to arise anew in future legislative challenges.

21. Consequently, for the foregoing reasons, the Local Governments respectfully request the Court vacate the Opinion and rehear the appeal *en banc*.

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 16th day of May, 2011.

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Respectfully submitted,

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CERTIFICATION OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is of exceptional importance and that it is contrary to *Lewis v. Leon County*, 15 So. 3d 777 (Fla. 1st DCA 2009) and that a consideration by the full court is necessary to maintain uniformity of decisions in this court.

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