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DATE:	Wednesday, September 01, 2010 2:14:40 PM
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FROM:	Polly Probert for David K. Miller, P.A.
TOTAL NUMBER OF PAGES:	06 (including cover)
CLIENT AND MATTER:	22887-0067

MESSAGE:

Re: City of Weston v. Crist
Circuit Court of Leon County/Case No. 2009 CA 2639

Copies of:
Letter to Judge Francis dated 9/1/10; and
Movant's Reply on Emergency Motion to Intervene dated 9/1/10.

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September 1, 2010

VIA HAND DELIVERY

Honorable Charles A. Francis
Chief Judge, Second Judicial Circuit
Leon County Courthouse
301 S. Monroe Street, Room 365-K
Tallahassee, FL 32301

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

Dear Judge Francis:

Enclosed please find a courtesy copy of Movant's Reply on Emergency Motion to Intervene in the above referenced case.

Thank you for your attention to this matter.

Respectfully submitted,

BROAD AND CASSEL

David K. Miller

David K. Miller, P.A.

DKM: pmp

Enclosure

(Via facsimile and U.S. Mail)
cc: Jamie A. Cole
Susan L. Trevarthen
Edward G. Guedes
John J. Quick
Jonathan A. Glogau

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

CITY OF WESTON, FLORIDA, et al.,

Plaintiffs

vs.

CASE NO. 2009 CA 2639

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

Defendants.
_____/

MOVANT'S REPLY ON EMERGENCY MOTION TO INTERVENE

Movant, Affordable Housing Solutions for Florida, Inc., files this Reply to address the Plaintiffs' objections to the Emergency Motion to Intervene:

1. Plaintiffs accuse Movant of "standing on the sidelines" while the case progressed to judgment. However, Plaintiffs' *single subject* challenge was mooted when the 2010 session reenacted the laws. Thereafter, even if some growth management provisions were held invalid as an unfunded mandate, the affordable housing provisions were not affected as they are severable under established criteria for severability, *see* Motion to Intervene par. 14 at p. 6; and Plaintiffs' argument, *id.* App. A (excerpt of hearing transcript). Movant had no reason to intervene to argue over whether the growth management provisions were an unfunded mandate.

2. Plaintiffs' Complaint does not allege any challenge to the affordable housing provisions in Ch. 2009-096, including the tax exemption provisions, as an unfunded mandate.

The Complaint Count II par. 42 a.-g. alleges only certain growth management provisions are an unfunded mandate; *and see* Plaintiffs' Motion for Summary Judgment pp. 36-38, identifying the challenged provisions as §§ 4, 6, 12, and 14 of the act. Plaintiffs have the burden to plead and prove which provisions are unconstitutional and why. The Court should reconsider its ruling because the affordable housing provisions were not even challenged as an unfunded mandate, *see State v. Turner*, 224 So. 2d 290, 291 (Fla. 1969) (court should not consider constitutional issue not raised in pleadings); much less proved invalid.

3. By considering whether its relief ruling is overbroad, the Court is not considering any "new issue." The failure of the parties to assert severability cannot limit the Court's inherent power and "judicial obligation" to consider severability and preserve the constitutionality of the act to the extent possible. *See* cases cited in Movant's Motion par. 14 at p. 5. Indeed, at the oral argument, the Court on its own initiative asked about severability of the unchallenged provisions in Ch. 2009-096, as quoted in Plaintiffs' Response, p. 5. The Court properly raised the issue itself, then at least impliedly ruled on it in the relief section of its judgment by striking the entire act. No "new issue" is presented by seeking to limit the relief granted to issues in the pleadings.

4. If the Court is persuaded this is not an issue in the case, and does not bind or preclude the Movant or other nonparties to assert rights under Ch. 2009-096, including specifically tax exemption rights, then the Court should amend and clarify its judgment, to assure that Movant's and other nonparties' rights under the affordable housing provisions are fully preserved. If Movant is going to be bound in any way, the "interests of justice" and basic due process and fundamental fairness require that Movant be allowed to intervene.

5. On the merits, Plaintiffs continue not to offer any argument that the affordable housing provisions must be declared invalid as non-severable under the established guidelines

for severability, *see* Movant's Motion, par. 14. Plaintiffs instead ask the Court to invent a new standard for severability in "unfunded mandate" cases, and must consider the session law as a whole, including unrelated provisions that do not impose any spending mandate, so that if any provision is invalid, the whole act, including unrelated provisions and even provisions that do not impose spending mandates, must fall. Plaintiffs are simply attempting to treat the act as a whole in order to revive their dismissed-as-moot "single subject" challenge, under the rubric of an unfunded mandate challenge.

6. The unfunded mandate provision, Art. VII § 18, does not purport to abrogate long established severability criteria. *See Lewis v. Leon County*, 15 So. 3d 777, 781 (Fla. 1st DCA 2009), review pending, declaring only one section (§ 19) of the law challenged there to be invalid as an unfunded mandate. Art. VII § 18 provides that "no county or municipality shall be bound by any general law requiring such county or municipality to spend funds...." The reference to "general law" simply preserves the Legislature's power to adopt an unfunded mandate by special act, and does not disturb long-standing constitutional rules of severability. Thus if § 4 of Ch. 2009-096, enacting amendments to Fla. Stat. § 163.3180, is an unfunded mandate, or at most, if growth management provisions collectively are an unfunded mandate, the remedy under Art VII, § 18, is that Plaintiffs are not bound to spend funds under the invalid provisions, although local governments (*e.g.*, nonparty local governments) may elect to do so. Unlike a single subject violation, Art. VII § 18 does not require the Court to strike all provisions of Ch. 2009-096 if one severable provision creates an unfunded mandate and others do not.[1]

[1] Plaintiffs' merits argument objecting to rehearing, if accepted, would seem to require granting rehearing. The Court did not make any rulings on fiscal impacts of any provisions in the act other than § 4. But Plaintiffs' argument would require the Court to make some kind of fiscal analysis of the entire act, including any savings to local governments, such as by having private investors support affordable housing rather than spending public funds to meet this need.

Dated this 1st day of September, 2010.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served on counsel listed below as indicated, this 1st day of September, 2010.

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