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; AND ST. LUCIE COUNTY, FLORIDA,

Plaintiffs,

v.

THE HONORABLE CHARLIE CRIST, Governor of the State of Florida; 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

**PLAINTIFFS' RESPONSE TO DEFENDANTS' SUGGESTION OF MOOTNESS OF SINGLE SUBJECT CLAIM**

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"), hereby file their response in opposition to defendants' suggestion of mootness.

**INTRODUCTION**

This case has been marked by a disturbing tendency on the part of the legislative branch to trivialize the constitutional requirements that form the foundation for the Local Governments' challenge in this case. This tendency was first manifested when the sponsor of SB 360 informed the press that he would "get the last laugh because [the Legislature] will be back in session before they get a court date." It arose again in defendants' eleventh-hour invocation of a legislative litigation privilege to postpone this Court's determination of the pending motion for summary judgment, even though they had previously agreed in writing to that hearing date (knowing that it was within 15 days of the start of the legislative session). And now, as the parties approach a final determination of the merits of



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the case, defendants file a suggestion of mootness based on the Legislature's adoption of last year's session laws in a failed attempt to redeem the single subject violation, without ever actually curing the defect by reenacting the different subjects in separate pieces of legislation.

Defendants' suggestion of mootness is without merit, and this Court should proceed to decide the challenges asserted by the Local Governments.[1]

## ADDITIONAL FACTUAL BACKGROUND

Notwithstanding Senator Bennett's statement to the press that the Legislature would avail itself of the expected delay in litigation by "fixing" the problems with SB 360 – *see* Amended Complaint at ¶ 29 – the Legislature, in fact, did *not* "fix" the single subject violation in SB 360 by enacting separate pieces of legislation covering the multiple subjects encompassed by SB 360. Instead, it defaulted to what can only be described as a technicality by reenacting and adopting the entirety of the 2009 session laws and statutes as the 2010 Florida Statutes just one year after SB 360 became law. *See* Suggestion of Mootness at ¶ 2 (citing § 11.2421, Fla. Stat., as amended).

[1] At the outset, it must be noted – as defendants concede – that the suggestion of mootness is limited to the Local Governments' single subject violation challenge and does *not* extend to their challenge based on violation of the unfunded mandate provision found at Art. VII, Sec. 18 of the Florida Constitution. *See* Suggestion of Mootness at 1. Accordingly, at a minimum, this Court must still decide whether SB 360 violates Art. VII, Sec. 18 of the Florida Constitution.



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*Every* defect that was inherent in SB 360 remains inherent in the reenacted laws. The only purported difference is that now, apparently, the single subject provision of the Florida Constitution no longer is relevant.

## ARGUMENT

### I. The Single Subject Claim is not Moot Because Chapter 2010-003, Laws of Florida, is Not Yet Effective

Defendants' suggestion of mootness fails on its face because the legislation upon which it relies to purportedly "cure" the single subject violation inherent in SB 360 – Chapter 2010-003, Laws of Florida (amending Section 11.2421, Florida Statutes) – does not become effective until 60 days after the adjournment of the legislative session. *See* Suggestion of Mootness at ¶ 2. The legislative session ended on April 30, 2010; consequently, Chapter 2010-003 does not become effective until June 29, 2010. When this Court considers on June 3 the merits of the Local Governments' motion for summary judgment, the single subject violation will not have been "cured" by the Legislature's reenactment of the 2009 session laws. The single subject challenge, therefore, will not be moot. Accordingly, this Court should declare SB 360 to be unconstitutional in violation of Art. III, Sec. 6 of the Florida Constitution.

### II. The Single Subject Claim is not Moot Because Actions Were Taken Pursuant to the Invalid SB 360 Prior to the Statutory Codification.

The cases relied upon by the Defendants (even if they are correct, *see* Point 3 below), only provide for a cure as to conduct that occurs *after* the effective date



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of the statutory reenactment. *See, e.g., Loxahatchee River Environmental Control Dist. V. School Bd. Of Palm Beach County,* 515 So.2d 217, 219 (Fla. 1987) (holding a law passed in violation of the requirements of article III, section 6, is invalid until such time as it is reenacted for codification into the Florida Statutes). Thus, for example, if a person were cited for violating a law prior to its reenactment as a statute, the later statutory reenactment would not moot that person's single subject claim as to that law (because, if it is deemed invalid, that person's citation would be invalid).

Here, many actions that affect the Local Governments were taken pursuant to SB360 since its enactment that may or not be valid, depending upon the outcome of the Local Governments' single subject challenge. For example, holders of certain types of permits were able to submit notices to the Local Governments prior to December 31, 2009, that automatically extended their permits for two years. *See* SB 360, Section (14)(3); Affidavit of Steven Alexander (Plaintiffs' Appendix, Tab 31), at paragraph 18. If SB 360 violated the single subject rule, then these notices (and the automatic extensions) would be invalid because they were undertaken during the time period when the law was invalid.[2]

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[2] The Local Governments are aware that the Legislature recently enacted SB 1752 (which has not been signed by the Governor as of the date of this response), which contained within its 162 pages an apparent attempt to retroactively ratify any automatic two-year extensions that were requested in accordance with SB 360 during the preceding year. *See* SB 1752, Section 47. Interestingly, these extensions (which, in SB 360, related to "growth management"), now appear in SB 1752 (an act relating to "economic development"). Serious questions exist as to (continued . . .)

Additionally, under SB 360, the Office of Economic and Demographic Research determined the list of counties and municipalities that qualified as dense urban land areas, and transmitted that list to the Department of Community Affairs on July 1, 2009 (*see* Plaintiffs' Appendix, at tab 13). If SB 360 was invalid, this determination and transmission would also have been invalid.[3] SB 360 also contained numerous other provisions related to affordable housing pursuant to which conduct was taken during the past year that may or may not have been valid depending upon the outcome of the single subject challenge.[4]

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(. . . continued)
validity of SB 1752 under the single subject rule and the ability of the Legislature to lawfully afford such retroactive relief. Those issues, however, are for another day. Consequently, just as the Supreme Court did in *Martinez v. Scanlan*, this Court should proceed to decide the constitutionality of the enactment of SB 360 in the event a subsequent invalidation of SB 1752 might leave unresolved certain questions about the legal effect of SB 360 during the preceding year. *Martinez v. Scanlan*, 582 So. 2d 1167, 1173 (Fla. 1991)("[A]lthough it might seem to be an exercise of judicial futility to render an opinion on the constitutionality of a statute which no longer exists, [citations omitted], the declaratory judgment action in this case, concerning the validity of chapter 90-201, is of sufficient importance to require it. The [corrective] 1991 act is not properly before this Court, and we are unable to make a binding ruling on its effect. Nevertheless, if a court were to find that the 1991 act could not be constitutionally applied because of the reenacted provisions, the question of the constitutionality of chapter 90-201 would still remain. We wish to avoid such possible duplication of effort to the extent possible.").

[3] SB 1752 did not purport to retroactively authorize this determination and transmission.

[4] For example, Sections 16 and 17 of SB 360 relate to tax assessments for land owned by community land trusts and tax exemptions for property being prepared for affordable housing. The validity of SB 360 as of January 1, 2010 will have a (continued . . .)



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## III. The Single Subject Claim is not Moot Because the Reenactment and Codification Process is Fundamentally Improper.

Lastly, there is inherent in defendants' suggestion of mootness a deeply troubling disruption of the balance of power among the co-equal branches of Florida's government. While there is unquestionably a host of decisions – most of which are cited in defendant's suggestion of mootness – holding that the reenactment and codification of session laws as statutes removes those laws from the scope of Art. III, Sec. 6 of the Florida Constitution, not a single one of those cases articulates a constitutionally founded policy reason for doing so.

The most that can be said of any of those decisions is that they hold in conclusory fashion that Article III, Sec. 6 applies only to chapter or session laws and not to codified statutes. *See, e.g., State v. Johnson*, 616 So. 2d 1, 2 (Fla. 1993) (citing *State v. Combs*, 388 So. 2d 1029 (Fla. 1980); *Dep't of Highway Safety and Motor Vehicles v. Critchfield*, 804 So. 2d 1034, 1038 (Fla. 5th DCA 2002), *affirmed*, 842 So. 2d 782 (Fla. 2003).[5] Of course, Article III, Sec. 6, does not read in that manner. Instead, it reads: "Every *law* shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in

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(. . . continued)
major impact in determining the amount of property taxes that need to be paid to the Local Governments and other counties and municipalities for these types of properties.

[5] Ironically, as is the case here, the underlying law challenged in *Critchfield* was not yet the subject of an adoption act that had become law at the time the trial court ruled upon the validity of the law and declared it unconstitutional in violation of the single subject provision in Art. III, Sec. 6. *Critchfield*, 805 So. 2d at 1038.

the title." (emphasis added). Nothing in this language suggests that fundamental constitutional deficiencies may be cured simply by having the Legislature reenact defective laws as "statutes," and there does not appear to be any analysis in any of the cases cited by defendants that would justify eviscerating the single subject provision of the Florida Constitution in this manner.

It was only as recently as 2003 that the Legislature would reenact and codify session laws every two years. *See* Ch. 2003-25, Laws of Fla. During that two-year period, constitutional challenges to single subject violations could be meaningfully prosecuted. The public, in turn, would have a longer period of time in which to discover unlawful logrolling in legislation and either abide by it or demand corrective action. However, in 2003, the Legislature unilaterally decided to shorten the "curative" time frame from two years to one year. There does not appear to be any functional limitation should the Legislature decide next year that they will wait only six months or maybe even three months before codifying session laws. Frankly, there does not appear to be anything to stop the Legislature from immediately codifying session laws as soon as they are enacted.

As the Local Governments have already pointed out in their motion for summary judgment, the Florida Supreme Court has repeatedly held that the primary purpose of the single subject provision in Article III, Sec. 6, is to protect the public from legislative fraud in the form of logrolling. *See, e.g., State v. Thompson*, 750 So. 2d 643, 646-47 (Fla. 1999).



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The present trend by the Legislature towards abbreviating the curative period is nothing less than constitutionally perilous and risks rendering the single subject provision of the Florida Constitution utterly meaningless. In effect, the Legislature could amend the Constitution (at least from a functional perspective) without the approval of Florida's citizens simply by further shortening the reenactment period and pretermitting any challenges based on single subject violations. This simply cannot be and must not be the law.[6]

The Local Governments do not stand alone in their concern as to this apparent usurpation of constitutional authority. Judge Altenbernd, writing recently for the Second District Court of Appeal in *State v. Rothauser*, 934 So. 2d 17 (Fla. 2d DCA 2006), made the following observations regarding the legislative "cure" of single subject violations by reenactment and adoption:

> The single subject requirement in article III, section 6, of the Florida Constitution has three well-recognized purposes:
>
> (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 of which the titles gave no intimation, and

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[6] The Court need only imagine a simple example of legislative slight-of-hand to appreciate the constitutional precipice upon which we presently stand. If the Legislature, during the final hours of a legislative session, were to logroll within an act relating to growth management a highly controversial piece of legislation (for example, a provision allowing any and all third-term abortions), such an attempt would undoubtedly violate the single subject rule. However, by shortly thereafter reenacting and adoption those session laws as statutes, the Legislature would remove the controversial legislation beyond the reach of the constitutional single subject mandate, despite the public's having been utterly deceived as to the Legislature's intent in adopting an act relating to "growth management."



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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. [citation omitted].

Invariably, "logrolling" seems to be the first evil that courts and commentators rely upon in explaining the wisdom of this [single subject] constitutional requirement, which is common in state constitutions. [citations omitted].

"Codification" rules or exceptions ... delay the effective enactment of a law and give the public more time to discover the law and abide by it. Thus, a codification rule can be seen as a remedy for the third purpose of the single subject rule as explained in the above-quoted language. Arguably, such a rule serves some remedial function for the second purpose. *But the wholesale reenactment of the laws of Florida by amending section 11.2421 is undeniably the ultimate act of logrolling; thus, it cannot serve as a remedy to cure logrolling.*

In 1999, the Supreme Court of Illinois was urged by the State in a criminal proceeding to adopt a codification rule comparable to the rule in Iowa and Florida. *People v. Reedy,* 186 Ill.2d 1, 237 Ill.Dec. 74, 708 N.E.2d 1114 (1999). After a lengthy analysis of the issue, the court refused to adopt the codification rule, explaining, "In our view, a codification rule would unjustifiably emasculate the single subject rule in Illinois, and we, therefore, reject such a proposition." *Id.* at 1120.

Judicial remedies are often affected by the paradigm we use to make decisions. It is rare for lawyers or judges to envision a law or some other legal right or obligation as "dormant." More often, we think of legal rights or obligations being "void" or "voidable." If laws unconstitutionally enacted as a result of single subject violations were viewed as "void" from their inception, then it is obvious that they would need to be reenacted in a constitutional manner by a new bill with a single subject before they could ever be treated as constitutional. [footnote omitted]. If they were viewed as "voidable," then presumably any judicial determination voiding the law within an applicable period of time would require the legislature to reenact the law in a constitutional manner by a new bill with a single subject. Such reenactment has occasionally occurred in Florida. [footnote

> omitted]. *See Martinez v. Scanlan,* 582 So. 2d 1167, 1172 (Fla. 1991). On the other hand, so long as this constitutional violation is deemed to place the law into a dormant status, like a hibernating bear awaiting the spring, then the [codification] rule ... has a degree of logic, *even if it does not solve the primary evil intended to be addressed by the constitutional requirement of single-subject legislation. At this point, Florida law is controlled by the paradigm of dormancy, and we must reverse the trial court's order of dismissal.*

*Rothauser*, 934 So. 2d at 20 (emphasis added).

Of course, even Judge Altenbernd's acknowledgment of the relative merits of the codification rule with respect to two of the three evils addressed by the single subject rule diminishes substantially as the Legislature arbitrarily chooses to shorten the time frame within which it reenacts and codifies session laws.

The Court need not reach or decide this constitutionally critical issue in this case since the law relied upon by defendants to establish mootness is not yet and will not be effective as of the hearing date. Additionally, a precautionary ruling on the single subject validity of SB 360 (similar to what occurred in *Martinez*) would be prudent to address the validity of actions taken pursuant to SB 360 during the preceding year.

Nonetheless, the Local Governments, like Judge Altenbernd, acknowledge that there exists a body of case law relating to curative reenactment and adoption that *may* be applicable, depending upon the Court's perspective. Assuming the Court finds both that the single subject challenge in this case *can* be rendered moot by a law that is not yet effective and that a determination of the merits consistent with the rationale in *Martinez* is not appropriate, the Local Governments advance



WEISS SEROTA HELFMAN PASTORIZA COLE & BONISKE, P.L.
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their argument relating to the reenactment and codification of SB 360 for purposes of preserving the argument for subsequent review.

WHEREFORE, the Local Governments respectfully request that the Court reject defendants' suggestion of mootness and decide the case on the merits, declaring SB 360 to be unconstitutional in violation of Article III, Sec. 6 and Article VII, Sec. 18, of the Florida Constitution.

*Respectfully submitted,*

WEISS SEROTA HELFMAN
PASTORIZA COLE & BONISKE, P.L.
200 East Broward Blvd., Ste. 1900
Fort Lauderdale, FL 33301
Telephone: (954) 763-4242
Facsimile: (954) 764-7770

By: _____
JAMIE A. COLE
Florida Bar No. 767573
jcole@wsh-law.com
SUSAN L. TREVARTHEN
Florida Bar No. 906281
strevarthen@wsh-law.com

WEISS SEROTA HELFMAN
PASTORIZA COLE & BONISKE, P.L.
2525 Ponce de Leon Boulevard
Suite 700
Coral Gables, Florida 33134
Telephone: (305) 854-0800
Facsimile: (305) 854-2323

By: _____
EDWARD G. GUEDES
Florida Bar No. 768103
eguedes@wsh-law.com
JOHN J. QUICK
Florida Bar No. 648418
jquick@wsh-law.com

*Counsel for Local Governments*

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served via U.S. Mail upon the following counsel of record this 26th day of May, 2010:

| | |
|---|---|
| **Jonathan A. Glogau, Esq.,**<br>*Attorney for the Governor, Senate President and Speaker*<br>400 South Monroe Street, Room PL-01<br>Tallahassee, Florida 32399-6536 | **Lynn C. Hearn, Esq.**, General Counsel<br>**Staci A. Bienvenu, Esq.**, Asst. Gen. Counsel<br>*Attorneys for the Secretary*<br>Department of State<br>R.A. Gray Building<br>500 S. Bronough Street<br>Tallahassee, FL 32399-0250 |

EDWARD G. GUEDES



WEISS SEROTA HELFMAN PASTORIZA COLE & BONISKE, P.L.
2525 PONCE DE LEON BOULEVARD, SUITE 700, CORAL GABLES, FLORIDA 33134 • TEL. 305-854-0800 • FAX 305-854-2323