

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

ATTORNEYS AT LAW

A PROFESSIONAL LIMITED LIABILITY COMPANY
INCLUDING PROFESSIONAL ASSOCIATIONS

MIAMI-DADE OFFICE

2525 PONCE DE LEON BOULEVARD
SUITE 700
CORAL GABLES, FLORIDA 33134

TELEPHONE 305-854-0800

FACSIMILE 305-854-2323

WWW.WSH-LAW.COM

BROWARD OFFICE

200 EAST BROWARD BOULEVARD • SUITE 1900
FORT LAUDERDALE, FLORIDA 33301
TELEPHONE 954-763-4242 • FACSIMILE 954-764-7770

*OF COUNSEL

June 18, 2010

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

DANIEL L. ABBOTT
AARON BEHAR
GARY L. BROWN
IGNACIO G. DEL VALLE
ALAN L. GABRIEL
DOUGLAS R. GONZALES
EDWARD G. GUEDES
JONATHAN Z. KURRY
MATTHEW H. MANDEL
ALEXANDER L. PALENZUELA-MAURI
ANTHONY L. RECIO
SCOTT A. ROBIN
BRETT J. SCHNEIDER
CLIFFORD A. SCHULMAN
LAURA K. WENDELL

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

BROOKE P. DOLARA
RAQUEL ELEJABARRIETA
CHAD S. FRIEDMAN
OLIVER GILBERT*
MACADAM J. GLINN
R. BRIAN JOHNSON
JOHN J. KENDRICK III
HARLENE SILVERN KENNEDY*
KAREN LIEBERMAN*
JOHANNA M. LUNDGREN
KATHRYN M. MEHAFFEY
MATTHEW PEARL
JOHN J. QUICK
AMY J. SANTIAGO
DANIEL A. SEIGEL
GAIL D. SEROTA*
JONATHAN C. SHAMRES
ESTRELLITA S. SIBILA
ALISON F. SMITH
ANTHONY C. SOROKA
EDUARDO M. SOTO
JOANNA G. THOMSON
MICHELLE D. VOS
PETER D. WALDMAN*
JAMES E. WHITE
DEREK R. YOUNG

Via Federal Express

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

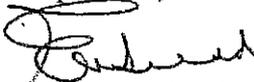
Re: City of Weston, Florida, et al. v. The Honorable Charlie Crist, et al.
Case No.: 09-CA-2639

Dear Chief Judge Francis:

Enclosed is a courtesy copy of plaintiffs' response to defendants' second notice of supplemental authority, as well as a courtesy copy of the transcript of final hearing on the parties' cross-motions for summary judgment.

Should you have any questions or concerns, please do not hesitate to have your judicial assistant contact us.

Respectfully,


Edward G. Guedes

470.250

Enclosures

cc: Jonathan A. Glogau, Esq. (w/encl.)
Lynn C. Hearn, Esq. (w/encl.)
Jamie A. Cole, Esq. (w/o encl.)
John J. Quick, Esq. (w/o encl.)

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

CITY OF WESTON, FLORIDA, *et al.*,

Plaintiffs,

v.

CASE NO. 09-CA-2639

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.

**PLAINTIFFS' RESPONSE TO DEFENDANTS' NOTICE OF SUPPLEMENTAL
AUTHORITY RE SB 1752**

Plaintiffs, City of Weston, Florida, *et al.* (collectively, the "Local Governments"), hereby respond to defendants' purported notice of supplemental authority regarding Chapter 2010-147, Laws of Florida (also known as SB 1752).

INTRODUCTION

While it is unusual for the Local Governments to "respond" to a notice of supplemental authority and argue its lack of merit, it is even more unusual -- in fact, it is *improper* -- for defendants to assert an entirely new argument long after the briefing schedule has been concluded and oral argument has taken place. For the first time, defendants are suggesting that the enactment of SB 1752 -- which purports to retroactively ratify certain permit extensions

granted under SB 360 – is somehow relevant to the Court’s analysis of the unfunded mandate challenge asserted by the Local Governments.¹ It is not.

ARGUMENT

I. THE UNFUNDED MANDATE CHALLENGE IS PREMISED ON MORE THAN THE TWO-YEAR EXTENSION OF PERMITS UNDER SB 360.

Defendants’ reliance on SB 1752 relates to a provision in that act that purports to retroactively ratify certain two-year permit extensions that may have been granted pursuant to SB 360. No other provision of SB 1752 is referenced in the notice. The Local Governments’ unfunded mandate challenge, however, has little – if anything – to do with the two-year permit extensions. Instead, the unfunded mandate challenge is based on expenditures mandated by SB 360 relating to the enactment of comprehensive plan amendments, funding of mobility fee studies, and development and enactment of land development regulations to implement the new comprehensive plan amendments.

Regardless of whether the Legislature has attempted to retroactively validate permit extensions granted under SB 360, SB 1752 says nothing about the extensive costs the Local Governments will incur in order to comply with SB 360. As such, the enactment of SB 1752 is irrelevant to the Court’s unfunded mandate analysis.

¹ While the Local Governments briefly referenced SB 1752 in a footnote to their response to defendants’ suggestion of mootness of the single subject challenge, *defendants never argued to the Court* that SB 1752 was relevant to the Court’s unfunded mandate analysis.

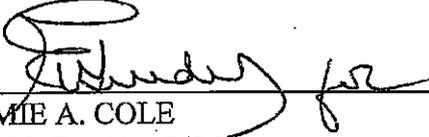
Whatever effect defendants may believe the enactment of SB 1752 has on the Local Governments' unfunded mandate challenge, it is clear that the legal validity of SB 1752 is not before this Court. As such, the Court should proceed to decide the unfunded mandate challenge *without regard for SB 1752*. The effect of SB 1752 on the continuing efficacy of SB 360, if any, is an issue for resolution in another action at a later date.

Respectfully submitted,

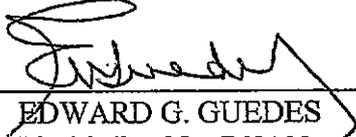
WEISS SEROTA HELFMAN PASTORIZA
COLE & BONISKE, P.L.
200 East Broward Blvd., Ste. 1900
Fort Lauderdale, FL 33301
Telephone: (954) 763-4242
Facsimile: (954) 764-7770

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: _____


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

By: _____

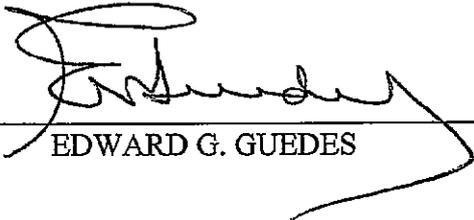

EDWARD G. GUEDES
Florida Bar No. 768103
eguedes@wsh-law.com
JOHN J. QUICK
Florida Bar No. 648418
jquick@wsh-law.com

Counsel for Local Governments

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served via e-mail and U.S. Mail upon the following counsel of record this 18th day of June, 2010:

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

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

CITY OF WESTON, FLORIDA,
et al.,

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,

CASE NO. 2009 CA 2639

Defendants.

PROCEEDINGS: Motion Hearing

BEFORE: CHARLES A. FRANCIS
CIRCUIT JUDGE

DATE: June 3, 2010

TIME: Commenced at 1:39 p.m.
Concluded at 3:23 p.m.

LOCATION: Leon County Courthouse
Tallahassee, Florida

REPORTED BY: CAROLYN L. RANKINE
Notary Public in and for
the State of Florida at
Large

ACCURATE STENOGRAPHY REPORTER, INC.
2894-A Remington Green Lane
Tallahassee, Florida 32308
850.878.2221

APPEARANCES:*REPRESENTING THE PLAINTIFF:*

JAMIE A. COLE, ESQUIRE
 jcole@wsh-law.com
 EDWARD G. GUEDES, ESQUIRE
 eguedes@wsh-law.com
 Weiss Serota Helfman Pastoriza
 Cole & Boniske, P.L.
 200 East Broward Boulevard
 Suite 1900
 Ft. Lauderdale, Florida 33301
 Telephone: 954.763.4242

*REPRESENTING THE DEFENDANTS GOVERNOR,
 PRESIDENT, & SPEAKER:*

JONATHAN A. GLOGAU, ESQUIRE
 jon.glogau@myfloridalegal.com
 Office of the Attorney General
 Chief, Complex Litigation
 PL-01, The Capitol
 Tallahassee, Florida 32399-1050
 Telephone: 850.414.3330

*REPRESENTING THE DEFENDANTS GOVERNOR,
 PRESIDENT, & SPEAKER:*

STACI A. BIENVENU, ESQUIRE
 sabienvenu@dos.state.fl.us
 Department of State
 Office of General Counsel
 R.A. Gray Building
 500 South Bronough Street
 Tallahassee, Florida 32399-0250
 Telephone: 850.245.6536

* * *

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PROCEEDINGS

1
2 THE COURT: Please be seated. Good
3 afternoon, counsel, and thank you for your
4 patience. We have our lights back in place I
5 guess. They have a habit of going out
6 especially during jury trials. All right.
7 Counsel, you want to make your appearances for
8 the record.

9 MR. COLE: Jamie Cole and Ed Guedes on
10 behalf of the local governments and with us is
11 John Flint the City Manager of Weston.

12 MR. GLOGAU: Jon Glogau on behalf of the
13 legislative president, the speaker, and the
14 governor.

15 MS. BIENVENU: Staci Bienvenu on behalf of
16 the Department of State.

17 THE COURT: All right. We're here on
18 plaintiffs' motion for summary judgment. Now,
19 let me ask this, I didn't even think about it
20 before I asked the clerk to attend, I don't see
21 any reason for our clerk to be here, there are
22 no exhibits that are going go admitted at this
23 point because it's a summary judgment hearing,
24 so none can be admitted for this purpose.

25 MR. GLOGAU: That's correct, Your Honor.

1 The only thing that I would request is that I
2 had filed an affidavit and I wanted to
3 substitute the original for the copy that I
4 sent to the court.

5 THE COURT: Objection?

6 MR. COLE: No objection.

7 THE COURT: Without objection the clerk
8 can take that and I'll let you go back to your
9 duties.

10 We have I think plenty of time set aside
11 to take care of our issue today. Again, I'd
12 like to -- although I know there's a lot of
13 legal issues here some of which could resolve
14 this. I do want to remind counsel one of the
15 reasons we're here on summary judgment is my
16 determination initially, if it's going to be
17 determined that we have a genuine issue of
18 material fact that's still in dispute, that
19 might resolve all or part of this case, there
20 will be no summary judgment being issued. So I
21 would like you to concentrate early on whether
22 there is or is not, and then we'll get on to
23 specific legal if there is any disagreement. I
24 think there's disagreement that there's not. I
25 know I saw that one affidavit, some argument

1 seems to indicate at least the amounts, whether
2 the amounts that the counties are required --
3 or the local governments -- excuse me -- are
4 required to fund exceeds this legislative
5 guideline of what, 10 cents per person based
6 upon the population most recent, so is that an
7 issue or not today that we have in front us?

8 MR. GLOGAU: Well, we believe it is,
9 Your Honor.

10 MR. COLE: But we believe it's not.

11 THE COURT: I'd like you to concentrate at
12 least initially on that fact because, you know,
13 if we get by the single subject, if we do get
14 by the single subject issue, get on to the
15 unfunded mandate issue, that will be a
16 determinative factor, whether I will need to
17 listen at this time to all the argument, legal
18 argument on the unfunded mandate. I read it
19 all. But whether I listen to that will
20 determine, if there is a material issue of
21 fact, material issue of fact here, that would
22 preclude me from issuing summary judgment on
23 unfunded mandate, then that might be where we
24 will end up. So I just wanted to give counsel
25 notice to concentrate your arguments, if you

1 would.

2 And for your benefit, I have everything
3 and I have actually read every page that you
4 have submitted including the appendix and every
5 page of that appendix, and all of cases, each
6 and every one that you cited. If you cited it
7 here, I got it here and I read it. So if you
8 are referring to a case and you need me to look
9 at a particular point, please let know so I can
10 get to it here. And I got all of the key
11 pleadings here also.

12 MR. GLOGAU: Your Honor, we had filed a
13 suggestion of mootness on the single subject
14 violation, the allegations, and so I just
15 wanted to raise with you and see how you wanted
16 to proceed. If you want to hear the mootness
17 issue first, and then the substance, or just
18 lump it all together, whatever your pleasure
19 is.

20 THE COURT: I'd rather let them lump that
21 together with the legal argument. I have read
22 your arguments, your replies, suggestion and
23 reply, raising a very interesting question for
24 me with this difference between now and June
25 29th, what the status with the courts, and I

1 would like to hear about that and address that
2 particular issue.

3 I know you have kind of in your replies,
4 but I could not find any case out there where
5 there had been a legislative enactment -- a
6 legislative action enacting that law and yet
7 it's not effective. I don't think any case
8 cited by anybody, or any one cite, or any of
9 the cases cited by you all could I find a
10 situation where the court left with the
11 legislature having taken action by the time of
12 this hearing or possibly the time of the
13 decision that's yet to be determined, it's not
14 effective in how that applies to a single
15 subject challenge and reenactment, curation by
16 reenactment provisions apply to single issue,
17 please address that. I'm not getting a lot of
18 help out of the case law.

19 MR. COLE: Your Honor, we have two have
20 copies of the cases as well, a folder it might
21 be easier to find the cases.

22 THE COURT: I got it; no problem. Got it
23 right here. Got my index and I'm ready to go.

24 MR. COLE: May it please the court: my
25 name is Jamie Cole, I represent 20 local

1 governments set forth in this chart. As you
2 can see this includes cities, large and small,
3 counties, it includes people from east, west,
4 north, south, basically it's a broad coalition
5 of local governments encompassing over 2
6 million people.

7 We are here to challenge SB 360, the
8 enactment. There are two issues, the single
9 subject rule and the unfunded mandate. I would
10 like to start with the single subject rule and
11 then get on to the unfunded mandate.

12 The single subject rule has been in the
13 Florida Constitution since 1868. It's
14 something that's very pervasive throughout the
15 United States. The purpose of the single
16 subject rule set forth in the cases is really
17 threefold.

18 First is to prevent logrolling. Which
19 basically is to make it so there's not a bill
20 that has something that one legislator might
21 want and another legislator might want on a
22 different subject, then they kind vote for each
23 one, and get something passed. Maybe the
24 majority of legislature might not want any of
25 them, but they all pass because everyone wants

1 a little piece of it.

2 Second is to prevent surprise and fraud,
3 and third is to fairly apprise the people of
4 the subject of the legislation being heard.
5 And over the years there have been many
6 decisions where they have overruled and
7 invalidated laws based on single subject.

8 What I would like to do to start with the
9 single subject is go through the *Franklin case*
10 which is the supreme court decision from 2004.
11 And the reason I refer to that one first is
12 because that's the case that really restated
13 and clarified what the test is for the single
14 subject rule. And this was an act relating to
15 sentencing. It was the Three-Strike Violent
16 Felony Offender Act.

17 And what the court said in that case --
18 and I'm going to read certain sections from
19 that case. First it says that "As the cases
20 from the district courts illustrate" -- and
21 this is at page 1071 after footnote 11 -- "As
22 the cases from the district courts illustrate,
23 the methods for determining both the single
24 subject of an act and those matters that are
25 properly connected to that subject vary. We

1 take this opportunity to review our
2 jurisprudence in the area of law and clarify
3 the single subject analysis." So this is where
4 the supreme court clarifying the analysis so
5 that everyone will know, you know, how to do
6 it. The end notes that 43 states have some
7 form of the single subject clause, so it's a
8 pervasive type of thing. And they go through
9 the three purposes of single subject, which are
10 ones that I set forth before.

11 They then note that the judiciary does
12 have a role with the single subject rule. They
13 say, "Extant in our constitution since 1868,
14 the single subject clause is a direct
15 expression of the people's intent to provide a
16 limitation on the Legislature's power to enact
17 laws. The judiciary's obligation is to apply
18 the constitutional limitation to legislation
19 that violates the constitution."

20 The supreme court made it very clear that
21 the regular role for the legislature aren't --
22 unlike one of the cases that was from the third
23 district which basically said the court has no
24 role, and the third district had said that the
25 legislature only needs to determine if they're

1 violating it. And in footnote 27 *Franklin*
2 explicitly disagrees with that and they say the
3 court does have a role in the single subject
4 issues.

5 So the first issue that they dealt with
6 was how to determine what is the single
7 subject, and what the court said at the end of
8 page 1075 is "We resolve the uncertainty as to
9 the source of the single subject by relying on
10 precise language of the constitution itself,
11 which mandates that the single subject be
12 'briefly expressed in the title.' Although the
13 full title may be as lengthy as the Legislature
14 chooses, the actual expression of the single
15 subject within the full title must be briefly
16 stated." Therefore, they adopted ". . . that
17 portion of Judge Cope's dissent in *Franklin* in
18 which he concluded that the single subject of
19 an act is derived from the short title, i.e.,
20 the language following the customary phrase 'an
21 act relating to' and proceeding the indexing of
22 the act's provisions." So in order to be on the
23 single subject, you don't look at other things,
24 what you look at is the act relating to blank.

25 The court then went on to set forth the

1 tests for the, what is necessary and proper.
2 So they say, "A connection between a provision
3 and the subject is proper (1) if the connection
4 is natural or logical, or (2) if there is a
5 reasonable explanation for how the provision is
6 (a) necessary to the subject or (b) tends to
7 make effective or promote the objects and
8 purposes of legislation included in the
9 subject."

10 And very importantly the supreme court
11 says, "However, the purposes of an act cannot
12 be used to either define or expand the single
13 subject." So you can't -- the single subject
14 is an act relating to whatever. You cannot
15 then go look at the purpose and expand or
16 define what that subject is. Because the
17 subject is what it says it is.

18 The court then says, ". . . in determining
19 whether a reasonable explanation exists for the
20 correction between the specific provision and
21 the single subject, the court may consider the
22 citation name, the full title, the preamble,
23 and the provisions in the body of the act."
24 What it does not allow the court to do is look
25 outside of the act to try to determine what the

1 legislators were thinking or what the
2 legislature's purposes were in enacting it.

3 Then the court says, "However, if, after
4 examining act in its entirety, we cannot
5 discern a 'reasonable explanation' for the
6 inclusion of a seemingly disparate provision,
7 we will look to the history of the legislative
8 process to determine how the challenge
9 provision was added to the act. In other
10 words, this Court has looked to legislative
11 history of enactment to buttress our conclusion
12 that the provision is not properly connected."

13 Where it then cites *Thompson* and *Heggs*,
14 two cases where at the last minute the
15 legislature added something, presumably to get
16 enough votes to get it passed. So that is
17 basically the test that is set forth in
18 *Franklin* and that the court should follow. And
19 I don't think there's disagreement that
20 *Franklin* is the test.

21 So as you look at the test, this sets
22 forth the test from *Franklin*. So the first
23 thing is each law shall embrace one subject,
24 and it is -- the single subject is derived from
25 the short title, an act relating to. In this

1 case, no question, it is an act relating to
2 growth management. That is what the
3 legislature decided was going be the single
4 subject here.

5 Then it says, ". . . although many acts
6 may contain a citation name by which either the
7 [entire] act or portions . . . identified, the
8 citation name is not synonymous with single
9 subject." So in this case the citation name,
10 which is Community Renewal Act is irrelevant.
11 The key is what is the single subject. The
12 single subject is growth management.

13 Then you need to look at whether the law
14 is -- what the other things are to see
15 whether the law may include any matters
16 properly connected with the subject and that is
17 the test. Connection between a provision and
18 the subject is proper if it's natural or
19 logical, if there is a reasonable explanation,
20 and it's necessary, tends to make effective;
21 however, the purposes of the act cannot be used
22 either to define or expand the single subject.

23 So what do we have in this case. This
24 chart which is also in our appendix is SB 360.
25 SB 360 is this 35 sections. And I think in

1 appendix 12. The first section is just the
2 citation, so that's not a substantive
3 provision.

4 All these yellow provisions, which are
5 sections 2 through 5 and 7 through 14, really
6 are growth management. We don't contest that
7 those relate to growth management. This deals
8 with comprehensive plans, and impact fees,
9 dispute resolution for growth management
10 issues. We're not really dealing with those
11 issues.

12 But section 6, which I have in red,
13 prohibits regulations, security cameras in
14 private businesses. That one simply has
15 nothing to do with growth management, and
16 there's really no logical way to argue that it
17 does have something to do with growth
18 management. What the -- and I'll deal with
19 this later.

20 What they tried to do is that has to do
21 with economic development and economic
22 development is the purpose and, therefore, it
23 has something to do with economic development.
24 That is not the test. The test is whether it
25 has to do with growth management, and it is

1 very difficult to figure out how prohibiting a
2 city from regulating security cameras in
3 private businesses does that.

4 Because this provision doesn't just apply
5 to new development. In a city, if there are
6 existing businesses and the city wanted to
7 require those existing businesses to have
8 security cameras, they can't do that under SB
9 360. It has nothing to do with development,
10 this is mainly dealing with existing
11 businesses.

12 Then sections 15 through 33 are a whole
13 bunch of provisions that came from a totally
14 separate bill that was added in the last
15 seconds. There was another bill that was an
16 act related to affordable housing. And these
17 provisions were all in that bill. And then at
18 the 11th hour on the last day of the session
19 all these provisions from the after went into
20 affordable housing were thrown into this act
21 related to growth management even though they
22 really have nothing to do with each other.

23 And if look at the specific provisions --
24 and you can't look at them all as a whole.
25 When you look at the first provision, section

1 15, limit -- what it does is limit access to
2 the state allocation pool by the Florida
3 Housing Finance Corp. There is just no way
4 that has anything to do with growth
5 management.

6 And you can go through all these different
7 provisions. There's issues about how taxes
8 owed by community land trusts are going to be
9 assessed. That deals with existing community
10 land trusts. It has nothing to do with growth
11 management.

12 And we can go on and on. All these
13 different provisions, they just have absolutely
14 nothing to do with growth management. You
15 know, arguably they all have something to do
16 with affordable housing, but they don't have
17 anything to do with growth management.

18 Then in section 34 there's a finding of
19 important state interest which really is in
20 there just so they can try to get around the
21 unfunded mandate provision. We'll deal that
22 later. And then there's an effective date.
23 And that is basically SB 360, and it is very
24 clear there are three subjects here not just
25 one.

1 So what are defendants' arguments. They
2 have several arguments. The first argument --
3 actually, I guess they have five arguments.
4 The first one is that you should defer to the
5 legislature. Now, it is true you should defer
6 to the legislature in determining what the
7 single subject is. The legislature decided it
8 was growth management and you should defer to
9 that. You shouldn't come up with some other
10 subject. The court said you should defer to
11 the legislature's findings.

12 However, at that point you can't just
13 defer to the legislature because if that were
14 the case, you know, all these other cases that
15 went the other way would have been found, well,
16 we're deferring to the legislature. What you
17 got to do, you got to look at the subjects and
18 decide whether there is a proper connection.

19 And what we got here the issues are less
20 connected than they have been in several cases
21 that we cited. We cited the *Heggs case*, which
22 dealt with sentencing guidelines and said it's
23 about domestic violence; we cited the *Thompson*
24 *case*, which was related to career criminals and
25 does not include domestic violence; we cited

1 the *Johnson* case, which is habitual offenders,
2 that does not include private investigators;
3 the *Alachua* case, that dealt with the
4 construction industry, it doesn't deal with
5 environmental discharge; and the *Pritchfield*
6 case saying bad debt does not relate to
7 driver's licenses and vehicle registrations, *et*
8 *cetera*.

9 In this case these things are so much
10 further apart than in any of those cases, and
11 they haven't really responded to any of that.
12 They haven't responded to specific cases that
13 we held. So you shouldn't just defer to the
14 legislature. The judicial branch clearly has a
15 role as set forth in *Franklin*. It's your duty
16 to make sure they follow the constitution.

17 They say that you should disregard the
18 stated single subject of growth management and
19 instead you should look at the alleged purpose
20 of the law, which they say, according to
21 statements by the head of DCA and sponsor of
22 the bill was to promote economic development in
23 dense urban areas. Now, there are a lot of
24 problems with that.

25 The first problem is that it clearly

1 violates *Franklin*. *Franklin* explicitly says
2 that you got to look at the stated single
3 subject which is growth management and, quote,
4 the purposes of an act cannot be used to either
5 define or expand the single subject. End
6 quote. And that's exactly what they're doing.
7 They're trying to say, no, don't look at growth
8 management, look at economic development in the
9 dense urban area as the single subject and all
10 these things somehow relate to that. And that
11 is not proper.

12 The second problem they have is, according
13 to *Franklin*, when you -- in order for you to
14 determine the purpose of the law you can only
15 look at the law: the citation name, the full
16 title, the preamble, and the body of the act.
17 You can't look outside of SB 360 to figure out
18 what the purpose was and that's exactly what
19 they did. Because out of court statements made
20 by Pelham and Bennett said that is what the
21 purpose of this law is, economic development in
22 the urban areas. You're not allowed to do
23 that.

24 Now, let's assume that they were correct,
25 that economic development -- that this said an

1 act relating to economic development instead
2 of, you know, growth management. What's
3 interesting is the *Martinez case*. In the
4 *Martinez case*, which was a '91 supreme court
5 case, the issue was that the state said -- this
6 was the workers' compensation law, if you may
7 recall, and in it were some provisions
8 regarding international trade.

9 So the argument by the state was that
10 workers' compensation, international trade both
11 relate to comprehensive economic development.
12 That was a bill related to economic
13 development, comprehensive economic
14 development. And they argued that workers'
15 compensation, international trade was really
16 economic development and, therefore, that was
17 okay.

18 Well, the court rejected that. The court
19 determined the opposite and determined instead
20 that workers' compensation and international
21 trade are not sufficiently related, even though
22 theoretically they both might have something to
23 do with economic development. So their
24 argument that security cameras somehow helps
25 economic development, or affordable housing

1 helps economic development and growth
2 management helps economic development, they all
3 have some purpose in common, does not cure this
4 problem. Even if that was the subject which it
5 clearly isn't. Because growth management is
6 the only subject.

7 Their third argument is that you can't
8 look at the history of the legislative
9 process. Specifically, this whole argument
10 that we've made that at the last minute they
11 threw in this whole bottom part into the act,
12 the affordable housing portions. And they say
13 you're not allowed to do that.

14 Well, that's not what *Franklin* says. In
15 fact, *Franklin* says the exact opposite, and
16 *Franklin* says you can look at the history of
17 the legislative act and that's exactly what the
18 supreme court did in *Thompson*, and it's exactly
19 what the supreme court did in *Heggs*. So the
20 fact that they brought this in at the last
21 minute, you know, and merged it in is clearly
22 relevant to something you are suppose to
23 consider.

24 Those are all of the substantive arguments
25 that have been made, and we think based on the

1 substance it's very clear that there is a
2 single subject violation here. Which then
3 leads to the two other arguments: one is
4 severance and two is mootness.

5 So first I'm going to deal with
6 severance. What they suggest is that if you
7 find say the security camera provision does not
8 deal with growth management, you should just
9 strike the security camera provision, and leave
10 the rest of the act. For some reason they
11 don't make that argument to affordable housing,
12 but it doesn't matter because the argument is
13 wrong in the first place.

14 Because the law is very clear that you
15 cannot sever in this kind of situation. The
16 key case is *Heggs*, which is a 2000 case. And
17 in *Heggs* the court says there are three
18 different categories of potential violations
19 and they're dealt with differently.

20 The first category deals with general
21 appropriation laws, and the supreme court in
22 *Heggs* said in that situation the single subject
23 violation you can sever, but that's not us.
24 We're clearly not an appropriations law.

25 The second situation is if there is a

1 single subject but the title is not adequate,
2 so it's a title problem, in that case you may
3 sever. And the reason you can sever that is
4 because if the only problem is the title, and
5 the title has all the other issues, well,
6 public had notice, there's no -- none of the
7 problems in there like logrolling because it's
8 all one subject.

9 The third category which is our category
10 there is more than one subject in the bill.
11 And in *Heggs* the Florida Supreme Court said no,
12 you cannot sever it, because to sever it you
13 would not cure the whole logrolling problem.
14 You don't know which legislators voted for the
15 bill because of one provision or a different
16 provision and, therefore, because of this
17 logrolling problem you cannot sever.

18 Now, they rely on the case of *Tormey* to
19 try to suggest you can sever it, but in
20 *Franklin* which was two years after *Tormey*, the
21 supreme court explicitly recedes from *Tormey*
22 and says that *Tormey* was a category 2 case, or
23 one subject not adequately -- adequate title so
24 that's why severance was allowed; whereas, this
25 is a single subject case not allowed

1 severance. So severance is not available
2 assist a remedy here.

3 Which leads us to the final argument, the
4 one that they raised just recently which is
5 mootness. There are really three responses we
6 have. The first response is a timing issue.
7 And that is that the law that they're relying
8 on is not effective until the end of June. No
9 cases have really addressed that issue. But
10 because of that, it's clear that the law is not
11 currently moot.

12 Now, there are several cases that talk
13 about when the challenge period will -- and
14 they say you can you bring the challenge. Most
15 of these cases, Your Honor, deal with criminal,
16 situations, and most of them are not civil. So
17 most of them -- what happens is someone
18 violated the law and then the law is later
19 found to be violative of the single subject,
20 and then it gets statutorily codified. And the
21 courts have said if you want to challenge it,
22 you need to have had done your thing, your
23 crime, or been sentenced, or whatever the
24 subject is during that time period before the
25 statutory reenactment took effect.

1 So in our case, you know, we're here, it
2 is not yet moot. You know, it will not be moot
3 theoretically -- well, we're arguing it's not
4 moot anyway. But because of that, all those
5 cases it doesn't happen until that date and
6 that date hasn't happened.

7 And the second argument, which I'm really
8 making just to preserve for appeal is that we
9 think this whole process is fundamentally
10 improper as you saw from our brief. That you
11 can't solve a single subject logrolling problem
12 by passing one bill that logrolls everything
13 into one bill. If that's that the case, the
14 single subject rule has absolutely no meaning
15 whatsoever.

16 (Computer technical problem.)

17 (Discussion off the record.)

18 MR. COLE: Obviously, if the first law
19 violated the single subject was logrolling when
20 you have one bill that takes all of them and
21 then everything was enacted prior to that time,
22 that would clearly be the ultimate logrolling.
23 And we also note that no court dealt with the
24 issue since we began a one year as opposed to
25 two year, it really makes the entire provision

1 of the single subject irrelevant.

2 The third argument which is probably the
3 most important is that actions have been taken
4 pursuant to SB 360 prior to the statutory
5 codification, so prior to now because that
6 hasn't even happened yet, and need to determine
7 the validity to determine whether those actions
8 were valid. And if you look here over all of
9 these cases on this issue, first one, there are
10 not mootness cases. I'm not sure why this is
11 really called mootness. Because none of them
12 found that the case was moot. There is not one
13 case that finds this moot.

14 What the cases say is in order to have
15 standing to challenge, you needed to have
16 take -- you have to take an action during that
17 period, before the statutory cure happens.
18 Here lots of things happened in it to happen
19 between the enactment of SB 360 really today
20 because, you know, codification hasn't happened
21 yet.

22 First of all, there were many applications
23 for permit extensions that were before December
24 31st, 2009. So people put in applications,
25 they got automatic extensions. So all of that

1 has already happened. There was a designation
2 of the dense urban land areas in July of 2009.
3 So there were questions as to whether that's
4 valid. Affordable housing tax exemptions and
5 assessments all as of January 1, 2010. There
6 is a question as to whether or not those tax
7 exemptions and assessments are valid. And all
8 these three things affect the local
9 governments. So the local governments clearly
10 have standing to bring the single subject
11 challenge because they are affected by all of
12 those -- by all those issues.

13 In the *Martinez* case which was the
14 workers' comp case. After the court ruled that
15 workers' comp and international trade were
16 different, they went into special session and
17 they passed two separate laws, one was dealing
18 with workers' comp and one was dealing with
19 international trade. In order to fix the
20 problem the supreme court nevertheless
21 considered the case. Just as the same as all
22 these other cases -- all the cases, they still
23 considered the case and they decide whether the
24 single subject violation happened, and then,
25 you know, we'll leave it for another day to see

1 whether -- you know, what the impacts are, et
2 cetera.

3 THE COURT: Was there a crisis finding in
4 *Martinez*? Didn't they do it based upon the
5 crisis urgency, it wasn't just -- and they
6 cautioned every trial judge in the world in
7 that case not to --

8 MR. COLE: They did -- they did talk about
9 that. I don't know if it was a crisis finding
10 as much as the finding of it was extreme state
11 importance.

12 THE COURT: We don't have that in this
13 case.

14 MR. COLE: Well, I'm not sure. Growth
15 management there are issues going on right now
16 throughout the state that are extremely
17 important.

18 THE COURT: I don't think we've had that
19 same determination.

20 MR. COLE: No, there has not been. There
21 has not been. But at the same time there is
22 not one case, there's not one case that they
23 can show you where a court has ruled that it's
24 moot and not went ahead and dealt with the
25 issue. So there's no reason for you not to go

1 forward and deal with the issue and, you know,
2 what the impacts of that will be left for
3 another day. And that's sort of the arguments
4 we have on mootness.

5 So on single subject, you know,
6 substantively it's clearly a violation, you
7 can't sever it and we don't think it's moot,
8 because actions have been taken and we need to
9 determine the validity. And there's no case
10 law to support that has found any case moot
11 they also --

12 THE COURT: Don't they use the language of
13 cures the violation.

14 MR. COLE: Yes. It cures it
15 prospectively, not curing retroactively. So if
16 someone -- for example, if someone was cited
17 for violating a law during the one-year
18 challenge period, which is what they call it in
19 some cases, you still have standing to bring
20 law to challenge even if it was cured later.
21 Now, if you got the citation after the cure,
22 then you don't have standing because the law is
23 cured. Here actions have been taken during the
24 challenge period and we need determine their
25 validity and, therefore, there's no mootness.

1 We still have standing is really the proper
2 vernacular.

3 So I'm going to move on to unfunded
4 mandates unless you have any other questions,
5 Your Honor. Okay. Historically the unfunded
6 mandates in the '70s the legislature was
7 adopting lots of laws causing cities and
8 counties to spend money. In '78 they passed a
9 statute requiring an economic impact statement,
10 and it didn't work. There were 362 unfunded
11 mandates between '81 and 1990.

12 In '88 the local governments started a
13 petition drive to do something about it and to
14 put it in the constitution. And on November
15 6th, 1991, the voters of this state approved an
16 amendment to the constitution -- it didn't
17 prohibit unfunded mandates, but it imposed
18 checks and balances on them. Basically, it
19 said there are certain things you got to do in
20 order to have an unfunded mandate.

21 The test for unfunded mandates is as
22 follows: the first question is does the
23 general law require counties and municipalities
24 to spend funds or take an action requiring the
25 expenditure of funds. Now, if that is the

1 case, then you got to do one of these things:
2 first you got to do 2 and 3. 2. If so, did
3 the legislature determine that the law fulfills
4 an important state interest. Then 3, if it
5 meets 1 and 2 both, then get to 3, and these
6 are basically expectations. One exception is
7 including an appropriation of funds; one is
8 authorizing a new funding source sufficient to
9 the expenditure; one is to obtain approval by
10 two-thirds vote of the membership; (d) is it
11 applies the same to all similarly situated
12 persons, including local government; and
13 finally comply with a federal requirement.

14 Now, in our case all of this is clearly
15 met. The issue really is number 1 -- well, we
16 don't think it is, but they do and that's what
17 we're mainly going to talk about. The
18 question, we say that it clearly requires
19 counties and municipalities to spend funds, and
20 I'm going to talk about that in a second.

21 The other things -- there isn't a finding
22 fulfilling an important state interest, but
23 that raises an immediate question: why did
24 they make this finding if the other things are
25 not met. There will be no reason for them to

1 make this finding unless it requires them to
2 spend funds and it's significant. So this is
3 the ultimate admission by the legislature that
4 this is an unfunded mandate and they got to
5 meet one of those things.

6 There is no dispute that none of these are
7 met. There is no appropriation of funds,
8 nothing is in the bill appropriating funds.
9 There is no new funding sources for
10 expenditure, there is no new funding sources at
11 all in the bill.

12 Obtain approval by two-thirds vote of the
13 membership of each house and they got 78 votes
14 in the house; they needed 80 so they didn't
15 make it.

16 Apply the same to all similarly situated
17 persons including local government. It is
18 not. This only applies to local government, it
19 does not affect anyone other than local
20 government. So that is clearly not met.

21 Comply with federal requirement. There's
22 no federal requirement.

23 And then they'll contend, they have not
24 contended any of those are met. So the real
25 question is does it require counties and

1 municipalities to take actions requiring the
2 expenditure of funds that are significant. And
3 that's really what this comes down to, the
4 dispute comes down to because the rest is taken
5 care of.

6 So the evidence on significant expenditure
7 of funds -- first of all, the senate staff
8 analysis. Before this was passed the senate
9 said SB 360 will have a negative fiscal impact
10 on local governments that are designated TCEAs
11 by requiring updated comprehensive plans.
12 That's a pretty clear statement.

13 The Department of Community Affairs said
14 so too, they said compliance will be a very
15 onerous and expensive task. However, no
16 financial support or new revenue sources have
17 been provided for the local governments to
18 undertake this planning.

19 They also said that the fiscal impact on
20 local governments is expensive but the full
21 effects are indeterminate. Now, that's real
22 interesting language, the fiscal impact on
23 local government is extensive. Extensive and
24 significant are basically the same words.

25 What are the specific costs. Well, we put

1 in an affidavit, and I'm going to go through
2 it, that show it's going to cost between 41,000
3 and 104,000 for each of the dense urban land
4 areas. There are 246 of them. So at the low
5 end 41,000, 264 [sic], we're talking about 10.1
6 million; at the high end, we're talking about
7 25 million.

8 In order to be significant, according to
9 the legislature, and according to the
10 defendants, there is 18.6 million population,
11 Florida population times 10 cents, we need 1.8
12 million. So we have demonstrated, we have
13 satisfied our burden of proof to come forward
14 to show that it's significant. Because 10.1 at
15 the low end is five times -- more than five
16 times the amount for significance.

17 So what evidence is there, what is actual
18 evidence. Well, first time I'm going to go
19 over our evidence, and then I'll talk about
20 theirs. This is the specific and quantifiable
21 planning and advertising cost.

22 Now, we had in our complaint a whole bunch
23 of different costs, costs that we're going to
24 have to spend to mitigate traffic because
25 developers don't have to pay for it, costs of

1 legal review, all these different costs that
2 are not easily quantifiable. These are the
3 ones that are easily quantifiable. Because if
4 we came to you with unquantifiable ones, we
5 can't prove the significance. So these are the
6 quantifiable costs, because you got to quantify
7 it.

8 So we put an affidavit from
9 Shelley Eichner. Shelley Eichner is with the
10 company called Calvin Giordano. They're the
11 city planners, they're a company that does city
12 planning that works for cities, they're the
13 city planners for the City of Weston. They're
14 also city planners in many other cities, and
15 that's all set forth in her affidavit.

16 Her affidavit is based on personal
17 knowledge, it explicitly says so. And what she
18 did is she said what her exact proposal is to
19 the City of Weston. How much is it going to
20 cost the City of Weston to do these three
21 things. She also said what it's going to cost
22 all the other cities, based on her -- this is
23 what her company is going to charge to do it.
24 So this is actual clearly competent personal
25 knowledge evidence.

1 So she says the range for everything to do
2 the comprehensive plan, to develop the
3 strategies to fund mobility and to amend the
4 land development regs would be between 40 and a
5 hundred thousand for each of the local
6 governments, the 246. And for Weston she said
7 it's going to be 50,000, which is right in the
8 mid -- lower part but in the range.

9 She says the comprehensive plan
10 amendments, to draft the amendments, to create
11 the supporting data, and to attend the hearings
12 is going to be 15,000. To prepare studies, to
13 develop strategies to fund mobility, will be
14 25,000. And to do land development regulations
15 to implement the comprehensive plan, which
16 we'll have to do will be 10,000.

17 Advertising public hearings. In order to
18 do these, the comprehensive plan amendments,
19 you have to have two hearings, and you have to
20 place nice size ads in the newspaper. So the
21 city clerks from Weston and from Cutler Bay
22 have submitted affidavits saying how much it
23 costs to place ads in the newspaper.

24 In Broward County where Weston is it's
25 \$1,264 to place the two ads. In Cutler Bay in

1 Dade County it's \$4170. So that gives you an
2 idea of what it would cost to place the ads.
3 And that's the specific quantifiable exact
4 personal knowledge evidence that is clearly
5 competent that is before you, and that it
6 clearly shows you it will be more than \$1.8
7 million. It's going to be in the 10-million to
8 \$25-million range. So that's our evidence.

9 Now, what have they done. They have put
10 forth the affidavit of Darrin Taylor. And I
11 would note they had five months to prepare this
12 affidavit. We filed this motion in January, we
13 got this affidavit on Thursday night or
14 Thursday afternoon.

15 The affidavit -- the problem with the
16 Taylor affidavit -- and I'm going to get into
17 the specifics of it in a minute. But the
18 initial problem is that when you looked at the
19 affidavit it is not -- does not satisfy the
20 requirements. Basically you can't just put
21 forth an affidavit. The affidavit has to be
22 based on personal knowledge, it has to be
23 competent, it can't be based on hearsay, *et*
24 *cetera*.

25 The affidavit of Mr. Taylor, when you look

1 at it -- first of all nowhere in the affidavit
2 does it say it's based on personal knowledge.
3 Unlike the Eichner affidavit and the other
4 affidavits that we put in, they all
5 specifically said based on personal knowledge.
6 And the Eichner affidavit is how much she's
7 going to charge for various things.

8 The Taylor affidavit is just -- he says he
9 had generalized knowledge of this lawsuit.
10 That's what he says. And then he talks about
11 things that are being done by local
12 governments. He talks about things that the
13 City of Gainesville did. He doesn't talk about
14 things -- he doesn't have any personal
15 knowledge as to any of this. Even at the end
16 where he talks about Gainesville he says that
17 the City of Gainesville hired Carlton Fields
18 and someone else, not him, to do work. But how
19 does he have personal knowledge as to any of
20 this.

21 Now, the first district has been very
22 clear on this, and this is not a case that's in
23 our papers obviously, because we didn't get
24 this till Thursday, but in the *Florida*
25 *Department of Financial Service vs. Associated*

1 *Industries Insurance Company*, which is 868
2 So.2d. 600, which is March 5th, 2004.

3 THE COURT: Excuse me a second. If you
4 can approach.

5 MR. COLE: And if you look at the right
6 side under headnotes 1 and 2, on the second
7 page, yes, the court says, "As to the contents
8 of supplemental affidavit, pursuant to Florida
9 Rules of Civil Procedure, 1.510(e), supporting
10 and opposing affidavits for summary judgment
11 'shall be made on personal knowledge, shall set
12 forth such facts as would be admissible in
13 evidence, and shall show affirmatively that the
14 affiant is competent to testify to the matters
15 stated therein. . . . The court may permit
16 affidavits to be supplemented or opposed
17 by . . . further affidavits.'" "

18 And then explain it a little further it
19 says, "The purpose of the personal knowledge
20 requirement is to prevent the trial court from
21 relying on hearsay when ruling on a motion for
22 summary judgment . . . and to ensure that there
23 is an admissible evidentiary basis for the case
24 rather than mere supposition or belief."

25 And if you look over the affidavit of

1 Mr. Taylor, that's exactly, you know, what the
2 problem is. There is no personal knowledge in
3 that affidavit. He's basically saying what
4 other people have done, or other people have
5 told him, or what other cities have done, or
6 what he's learned.

7 What they needed to do, what they needed
8 to do to defeat this summary judgment motion,
9 they needed to put in an affidavit saying the
10 city of so and so, it won't cost \$15,000, or it
11 will only cost a thousand dollars, or it won't
12 cost anything, or to amend land development
13 regulation will cost less than \$10,000. They
14 didn't do that. They don't have anyone with
15 any personal knowledge refuting any of the
16 things that we raised. So what do they say.

17 We say Shelly Eichner said it will be 40
18 to a hundred thousand dollars for each. So
19 assuming that Mr. Taylor's affidavit is
20 competent for now. What does he say. Well, he
21 says the full cost of SB 360 are not yet
22 known. So basically Shelley Eichner says it's
23 going to cost 40 to hundred thousand, he said I
24 don't know what it's going to cost. Does that
25 create a factual dispute, no.

1 Comprehensive plan amendments. SB 360
2 explicitly says they have to amend the
3 comprehensive plan within two years. We have
4 until sometime early next year to amend our
5 comprehensive plan. Ms. Eichner says it will
6 cost \$15,000. Their response. There's no
7 response to that. Mr. Taylor does not respond
8 to that. So even if you threw out everything
9 else, we got \$15,000 to amend the comprehensive
10 plan which we clearly have to do. No
11 response. And you take 15,000 times 246,
12 you're still way over 1.8 million. You're at
13 three or \$4 million.

14 The mobility fee. Ms. Eichner says it
15 will cost \$25,000 for the study. His response
16 is not that it will cost less than \$25,000,
17 what Mr. Taylor's response is, is legal
18 argument. He says the mobility plan is already
19 required in one capacity or another under
20 growth management laws. That's what he says.
21 That's just his opinion except it's a legal
22 argument.

23 And the fact is it's different. The
24 mobility planning is not the same as what SB
25 360 requires. What SB 360 requires is that you

1 amend the comprehensive plan to have strategies
2 to fund, to fund mobility. Not just plan for
3 mobility, and that's the difference. So yes,
4 it may be true that a mobility plan is
5 required, but that's irrelevant. Now, we're
6 going to have to spend \$25,000 to fund
7 mobility, which is a different thing. So this
8 is really not responded to.

9 Land development regulations will cost
10 \$10,000 to adopt -- to implement the
11 comprehensive plan. Absolutely no response.

12 Advertising for public hearings, clearly
13 required because we have to amend the
14 comprehensive plan, the law requires us to
15 advertise, 1200 to 4100. No response. No
16 response. So that is where you are on the
17 specific costs that the cities are going to
18 have to incur.

19 So where are their arguments, what other
20 arguments do they have. First, they say that
21 some of the expenses are not mandates. Section
22 4 of SB 360, which is really the key one that
23 we're focusing on, says that all of the 246
24 local governments it designated as DULAs,
25 quote, shall within two years after designated

1 areas become exempt, adopt into its local
2 comprehensive plan land use and transportation
3 strategies to support and fund mobility. That
4 is explicitly in section 4 of SB 360.

5 Now, is that a mandate, well, they said
6 shall so it's not optional, we shall do it, we
7 have to do it within two years, and to do that
8 is going to cost about \$50,000, between 40 and
9 a hundred thousand for each of the 246. That
10 is a mandate.

11 Now, the other things that they talk
12 about, that we talked about, the other
13 expenses, the traffic, all the traffic
14 improvements, for things that will probably
15 cost -- that will dwarf the 1.8 million or the
16 10 million, dwarf it. We're not even talking
17 about those now because we can't quantify
18 them. And if you can't quantify them, how are
19 you ever supposed to make a ruling on it. So
20 we're just focusing on these because we can
21 quantify them.

22 Then they say it's an insignificant fiscal
23 impact. And they rely on section 18-D of the
24 constitution, which has an exemption for laws
25 having insignificant fiscal impact. Now,

1 what's important about that is that's in a
2 separate section, we're in 18-A. In 18-D there
3 is a list of exemptions.

4 First of all, for an exemption, the burden
5 is on the defendants, it is not on us to show
6 that fiscal impact will not be significant.
7 That is their burden. And they have failed in
8 their burden. Even if you accept everything
9 that Taylor says, they have not put forth any,
10 any quantifiable numbers to you to show that
11 this is less than \$1.8 million. They talk
12 theoretically, they talk speculatively, but
13 they have not given you any evidence to show
14 any specific offsets, or any specific savings,
15 or that this will cost you less than this
16 amount, nothing.

17 Second, the test for significance
18 according to defendants is 10 cents per person,
19 1.8 million statewide. We're between five and
20 10 times that. So we're not even -- it's not
21 even close.

22 So that leaves them with their third
23 argument, which is they claim, based on
24 Mr. Taylor, some offsetting savings, that SB
25 360 will save the city money, cities and

1 counties money in other ways. Well, first of
2 all, there is no legal support for this
3 conclusion. I mean, where does it say in the
4 constitution that if there's an offset that
5 it's not significant. There is no case law
6 that says that, there is no support for that
7 whensoever.

8 So just because there's some other
9 provision in the law that might theoretically
10 save money does not necessarily mean it's still
11 not a significant mandate. We still have a
12 mandate here and it's a significant mandate,
13 and there is no legal support that they cite,
14 there is no case law. The supreme court hasn't
15 said, it's not in the constitution, it's not
16 even in a statute, there's nothing that says
17 you should look at this offset.

18 Even if it's true, there's no evidence of
19 this offsetting savings. Because in Taylor's
20 affidavit there is no specific quantifiable
21 savings. Now, if I came to you today and said,
22 you know, we want you to rule for us, and we
23 don't know how much it's going to cost but we
24 think it's a lot, you know, obviously we
25 haven't satisfied our burden. Here it's their

1 burden, their burden to show this exemption, to
2 show if it's there. So if they're going to
3 claim the offset, they need to show that the
4 savings will exceed, they will deduct the
5 savings from the costs, that there won't be
6 \$1.8 million left. And they have failed
7 utterly in this burden. Even if you accept
8 Mr. Taylor's affidavit as competent, which we
9 don't think it is, they still have completely
10 and utterly failed to do so.

11 So what are his two savings. First, he
12 says that local governments won't need to hire
13 outside counsel and consultants to review DRIs,
14 because there won't be DRIs in these cities.
15 Well, that's true. There won't be DRIs, the
16 cities won't review the DRIs so, of course,
17 that means the cities are going to have to pay
18 all traffic impacts instead of the developer,
19 but they won't have to review them. That's
20 true.

21 Does that save the cities any money, no.
22 Because when someone applies for a DRI, they
23 pay an application and a cost recovery fee that
24 offsets the cost to the city to review the
25 DRI. And that's what cities have to do. So

1 there are no cost savings here in reviewing.
2 And it's certainly speculative, how many DRIs
3 are there going to be, how much are they going
4 to cost. None of that is in the affidavit.
5 It's totally unquantified.

6 Then there's a general statement that
7 local governments will save money through the
8 elimination of traffic concurrency. Once again
9 no specific dollar savings, and it's completely
10 speculative. Who knows what that means, and
11 how is it going to save money. If there's no
12 traffic concurrency, does that mean, well, the
13 developer won't have to build it. Well, then
14 the cities are going to have to build the
15 traffic improvement, it's going to cost the
16 cities money.

17 All these speculative arguments can be
18 made on both sides as to cost, and they may
19 offset, but the quantifiable costs are clear,
20 and those are the only ones proven to you with
21 competent evidence. Now, beyond that, what
22 about senate staff's analysis and the DCA's
23 analysis that both said that it's going to be
24 an extensive cost. They don't even respond to
25 that. That's a clear admission by the state as

1 to the significance.

2 And finally what about the finding by
3 state legislature of an important state
4 interest. Now, what's interesting is if you
5 have look at -- this is the basic staff
6 guidelines for local mandates. This is what
7 the legislative staff uses, this chart, and it
8 was included in their appendix. And what's
9 interesting is the -- you don't get to this
10 part, this legislature, not staff, in terms of
11 an important state interest, you don't get to
12 this unless you get past the insignificant
13 fiscal impact. If there is an insignificant
14 fiscal impact, you stop. So they weren't
15 stopped. They didn't stop. They kept going
16 and they said in section 35 that there is an
17 important state interest. And the only reason
18 they would have done that is because they knew
19 that it is a significant fiscal impact. That
20 is a major concession that they've made.

21 THE COURT: I'm going ask you, you got
22 about five minutes to wrap up so I can give
23 equal time.

24 MR. COLE: And the other thing to note is
25 the staff in the DCA analysis and comments,

1 that was all part of the enactment process.
2 And this determination to put the important
3 state interests was part of the enactment
4 process, not some after-the-fact thing that
5 they came up with.

6 And so based on that, Your Honor, we think
7 it's very clear that the evidence here is
8 really uncontroverted. The affidavit of
9 Mr. Taylor is not competent but even if it is
10 we have still demonstrated significance, more
11 than 1.8 million. They have utterly failed in
12 their burden to attack that or to show
13 offsetting savings to the extent offsetting
14 savings are to be considered. So we ask you to
15 invalidate the law on those grounds.

16 THE COURT: Thank you for your
17 presentation. Yes.

18 MR. GLOGAU: Good afternoon, Your Honor.
19 Jon Glogau for the state defendants. I'm going
20 to address the mootness issue first because I
21 think that's the more logical way to address
22 this case. Notwithstanding, Judge Altenbrand's
23 comments about the state of the law, the state
24 of the law is that the reenactment every year
25 of these *Florida Statutes* cures any single

1 subject violations. And contrary to my
2 colleague's argument, it's not about standing.
3 None of those cases have the word standing in
4 them that I'm aware of.

5 And it is about mootness because as I
6 think Your Honor recognizes, if you come to the
7 court and say there's a problem, and the
8 problem is then cured, then the claim is moot.
9 That's the definition of mootness. So our
10 position here today is that even if there was a
11 single subject violation, that the enactment of
12 the *Laws of Florida* 2010-25 which -- I mean,
13 2010-03 which reenacted the *Florida Statutes*
14 cures that problem.

15 Now, the other thing that came up several
16 times was the so-called -- what he called the
17 challenge period. I call it the window
18 period. And that is the period between the
19 time the statute -- the allegedly offending
20 statute is passed and the cure, the reenactment
21 statute.

22 Now, the cases that we've looked at are
23 almost all criminal cases or there is an
24 ongoing saga having to do with the DUI
25 statute. You can get your license reinstated

1 and I'll go through that saga in a minute. But
2 those cases are decided the way they are,
3 because when you have criminal violations, or
4 semicriminal, as I'll call the DUI statute, you
5 have an *ex post facto* problem. You can't
6 charge somebody with a crime under a statute
7 that's unconstitutional.

8 So if you are charged with an offense that
9 occurred during the window period, if you will,
10 then you must have the opportunity to defend
11 that criminal violation by saying the statute
12 was unconstitutional. That's what these cases
13 are about. The ones that talk about the window
14 period.

15 There aren't any civil cases like this one
16 where the window period comes into play. The
17 civil cases they simply say, it's cured. And
18 there's a fundamental reason for that. In the
19 civil context when a challenge is brought to a
20 statute, the court doesn't determine that the
21 statute is void *ab initio*. It's a prospective
22 decision.

23 In the *Johnson* case they say, you know, in
24 *Pritchfield*, which is the big case on this DUI
25 statute, they said they didn't find that the

1 statute was void *ab initio*. So in the civil
2 context, which is what we're in, the way things
3 work is the law is presumed constitutional
4 unless and until the court says it's not.

5 So when the court finds a statute
6 unconstitutional, it's prospective. And I can
7 give you -- I can explain it this way: there's
8 a statute on the books -- it's been on the
9 books for 10 years. Someone wakes up one
10 morning and decides to bring a challenge to it
11 and wins. Does that mean everything that
12 happened for the last 10 years is somehow
13 undone. Of course not. The finding of
14 unconstitutionality is prospective.

15 And so in the case we have here you can
16 only find, if you address it, that the statute
17 is unconstitutional prospectively. Well, I
18 submit, Your Honor, you only got two-and-a-half
19 weeks because even if they are right and the
20 fact that the adoption act is effective on June
21 29th and, therefore, you have the ability to
22 address this. I submit Your Honor that if you
23 do, then on June 29, I'll be back here telling
24 you it's moot again, and if you issued a final
25 order, I'll be saying it to the First DCA. So

1 what's the point.

2 Now, the really interesting thing about
3 the series of cases under that DUI statute is
4 98.223 is that the Supreme Court of Florida in
5 the *Pritchfield* case in 2003 found that statute
6 to be unconstitutional on the single subject
7 rule. Before the ink on that opinion was even
8 dry, one month later the reenactment statute
9 took effect and from then on the statute, as it
10 was passed in 1998 was in effect. You could
11 look in the statute books today and you will
12 find the statute as amended.

13 And there's a whole series of cases that
14 go through this history at various stages of
15 the window period people are attempting to get
16 their licenses back and depending on when there
17 was one case, the *Fountain* case -- and I can
18 give you the citation. It's 883 So.2d. 300.
19 I'm sorry.

20 THE COURT: No problem. You're getting
21 there.

22 MR. GLOGAU: I'm handing them the series
23 of cases on that DUI statute that I was talking
24 about. Your Honor, may I approach?

25 THE COURT: Yes, you may.

1 MR. GLOGAU: The *Fountain* case is in that
2 stack there. And in the *Fountain* case the
3 defendant applied for his driver's license
4 reinstatement in May of 2003. That was
5 actually in the window period. By the time he
6 sought *certiori* in the district court he was
7 outside the window period.

8 And what the court said was had the '97
9 statute been in effect, they would have had to
10 remand it to the department for them to make a
11 determination as to whether he was entitled to
12 have his license. But under the '98 statute
13 there was no discretion. And so what they did
14 they granted cert and quashed the order. They
15 didn't remand it. So even though he applied
16 for the driver's license during the window
17 period, by the time he sought cert, he was
18 outside the window period and they said, sorry,
19 the amended statute is what applies.

20 So when you look at all these cases,
21 Your Honor, it's just clear to me that this is
22 a civil regulatory statute and it's been
23 reenacted. And so the question -- you know, we
24 can sit here and agree with Judge Altenbrand
25 that this is not the way it should be, and that

1 some would even say that this legal doctrine
2 that's evolved over this has in fact written
3 the single subject rule out of the
4 constitution. But you know what, I didn't make
5 that up. That's what the supreme court has
6 said and until they say differently, I submit
7 that we're bound by it.

8 So moving on to the question of whether
9 there actually is a single subject violation.
10 One thing I do agree with the plaintiffs is
11 that the *Franklin* case is an important case.
12 However, the plaintiffs skipped over a bunch of
13 it and I would like to go back.

14 First of all, *Franklin* says that the
15 standard of review is highly deferential and
16 that doesn't mean what the plaintiff says it
17 means. It doesn't mean that you defer to the
18 legislature. What that means is when you apply
19 the standard that you apply to this question is
20 one that is deferential and that means that
21 they have to show beyond a reasonable doubt is
22 actually the standard that's used that it is a
23 single subject violation.

24 We are not arguing that there's no role
25 for the judiciary. There is. It's a highly

1 deferential role. And Your Honor is familiar
2 with that role because almost every statute
3 that comes before you is challenged on a
4 rational basis test which is very highly
5 deferential. The -- so the first thing -- and
6 of course as every statute that comes before
7 you comes with a presumption of validity.

8 So the first thing that the court has to
9 do in the single subject analysis is determine
10 what's the subject of this statute. And as
11 plaintiff said that is generally shown in the
12 short title. And once that's been determined,
13 the court has to determine whether all the
14 parts of the statute are, quote, properly
15 connected. So you don't just simply look at
16 the words and act relating to and stop there.
17 That's what the plaintiffs want you to do, they
18 want you to stop there. Say growth management,
19 that's it.

20 But what is growth management,
21 Your Honor. What is it. And as the supreme
22 court said -- I mean, the First DCA said in the
23 *Enterprise case*, if the provisions of the act
24 can be unified under a single umbrella of
25 legislative intent, then the constitutionality

1 of the act will be upheld. And so in the
2 *Franklin case* again the standard -- and I
3 always kind of chuckle when they say they're
4 clarifying for us -- but the clarifying
5 standard, Your Honor, and the one that I would
6 suggest is sufficient to uphold the statute is
7 that a connection between a provision and the
8 subject is proper if there is a reasonable
9 explanation for how the provision tends to make
10 effective or promote the objects and purposes
11 of the legislation be included in the subject.

12 A reasonable explanation that intends to
13 make effective and promote the objects and
14 purposes -- I'm sorry, Your Honor.

15 THE COURT: No problem.

16 MR. GLOGAU: The plaintiffs say that
17 you're not allowed to look at the purposes of
18 the legislation, but how do you apply this
19 standard. It says the objects and the purposes
20 of the legislation, you have to look at that.
21 And the reason is because the subject is a
22 broad subject, and there can be many objects
23 and purposes within that subject. That's what
24 the *Franklin case* says.

25 It also said that the accomplishment of

1 several purposes may be logically embraced in
2 one subject. So you don't simply stop with an
3 act relating to, you have to go deeper and say
4 what is this statute trying to accomplish.

5 And with the plaintiffs' permission, I'm
6 going to put their little chart up here with
7 the provisions of the law. So we begin with an
8 act relating to growth management. Well,
9 growth management is a very broad subject. In
10 fact, I teach growth management at FSU law
11 school and I can tell you it's very broad.

12 But the question is are the three sort of
13 groups that they've identified related to
14 growth management in a way that the sections
15 tend to make effective and promote the objects
16 and purposes of legislation. So they say,
17 well, the first part, the yellow part there, 1
18 through 5 and 7 through 14, that's growth
19 management. So they're okay with that. They
20 then say that the blue part 15 through 33, that
21 has to do with the affordable housing. That
22 was an act related to affordable housing.
23 That's what he said. I didn't know that. And
24 I think I heard a concession that in fact they
25 related to affordable housing. I think that's

1 what he said.

2 So how does affordable housing relate to
3 growth management. Well, Your Honor, it's
4 integral to it. Growth management plans, land
5 use plans, the statutes and the rules require
6 the housing element of the land use plans to
7 have provisions for affordable housing in
8 them.

9 In New Jersey there's a series of cases
10 that I cited in my paper called the Mount
11 Laurel cases. In those cases they found it was
12 a constitutional imperative that affordable
13 housing be provided for in growth management
14 planning. It hasn't reached that level in
15 Florida but certainly all growth management
16 plans have to deal with this very important
17 subject. So affordable housing in my mind is
18 at least clearly a part of growth management.

19 Now, they say that I think even if
20 affordable housing can be construed to be part
21 of growth management these sections aren't
22 because they deal with this like tax
23 exemptions, and housing finance corporation,
24 but you see if you look into what these
25 sections address, Your Honor, these are the

1 ways that you effectuate the affordable housing
2 requirement. These are the tools that allow
3 local governments and help local governments to
4 provide affordable housing.

5 So in fact going back to the *Franklin*
6 standard these sections tend to make effective
7 or promote the object and purposes of the
8 legislation. The object and purposes of
9 legislation are to promote growth management,
10 affordable housing. These are related to the
11 provisions of affordable housing. So I think
12 the main dichotomy that they show on this thing
13 is nonexistent.

14 The fact that it was two bills that were
15 put together at the end of the session doesn't
16 prove anything. I think that the case that
17 they cite says that you can look to the history
18 to buttress your conclusion that there's no
19 connection, but if you find that there is a
20 connection there, you don't go looking into the
21 legislative history to find a reason to strike
22 the statute. And I submit there is a
23 connection here.

24 And so the fact that it was put together
25 as two different statutes at the end of the

1 session doesn't prove anything. Anybody that's
2 lived on this hill long enough knows that
3 happens every year. That the rush at the end
4 of the session, things get put together, it
5 doesn't prove anything. It can buttress a
6 conclusion that you've already made, but you
7 don't want the -- if you find that there's the
8 connection that I have been talking about, you
9 don't go back to the legislative history to
10 prove otherwise. That's part of this
11 deferential review.

12 So then we get to the security cameras.
13 Now, the plaintiffs have argued this as a
14 matter of law. They haven't made any factual
15 assertions with regard to the single subject
16 alleged violation. This is argued as a facial
17 legal challenge, and I submit, Your Honor, that
18 under a deferential standard I can tell you
19 that under the regional basis test if any
20 reasonable person could see that there's a
21 connection, then you win.

22 Well, I submit that in the highly
23 deferential standard review that's applicable
24 here, there is a connection between security
25 cameras and growth management. If you have a

1 development that's being proposed and the
2 developer is required to engage in this
3 security camera program that would maybe cost
4 him a lot of money and create a liability on
5 him for security, this easily could, you know,
6 cause him to take his development elsewhere.
7 And since this facial attack, I don't have to
8 prove that. It makes sense, it's a logical
9 connection. That's all that's required.

10 So that's a logical connection to growth
11 management. It's helping to -- the developers
12 to be able to do what they -- what developers
13 do. Not provide security, developers develop.
14 And so they're freeing the developers from --
15 the fact that this also might apply to some
16 other existing facilities is -- really doesn't
17 change the calculation here that this is
18 related to growth management because of what I
19 said.

20 And so if you do get to the single subject
21 violation which as I said before I think is
22 clearly moot, then I think that it passes
23 muster because under the highly deferential
24 standard review, there is a logical
25 connection. It may not be a connection that

1 everybody agrees to, but debatable issues -- in
2 a -- you know, a tie goes to the runner in
3 baseball, the tie goes to the legislature here,
4 if it's a close call, we win. That's what
5 deferential review is about.

6 Certainly between the blue and yellow, I
7 don't think that's close, Your Honor.
8 Affordable housing is clearly an element of
9 growth management, and with respect to the
10 security cameras, even if it's a close call, I
11 think that there is a logical connection
12 there. Developers should not be saddled -- in
13 the opinion of the legislature developers
14 should not be saddled with this requirement
15 because it inhibits their ability to do what
16 they do and that's sufficient.

17 On the severance issue, Your Honor, *Tormey*
18 says what it says. I think that the cases
19 apply the same standards to -- from title
20 issues to single subject issues and the
21 severance section 6, the camera provision,
22 would not hinder the accomplishment of the
23 valid provisions concerning growth management.
24 So if you find that section is a problem.

25 And, frankly, if you look back at the

1 history of this, you'll see that in fact that
2 was in from the beginning. That doesn't come
3 within the argument that plaintiffs make that,
4 well, if you juggle things in to try to get
5 votes, then that's evidence that there's
6 something wrong, that was in there from the
7 beginning. So that doesn't -- the history
8 doesn't bolster any argument that this was
9 logrolling or anything like that. So I think
10 that you could reasonably apply *Tormey* to this
11 situation and find that if you feel that the
12 camera provision is not logically related, that
13 you can sever that out and let the rest of the
14 growth management provisions survive. Because
15 there's nothing that would indicate that was
16 logrolling to get votes. It was in from the
17 beginning.

18 So moving on to the unfunded mandate
19 issue. First of all, as we say in our papers
20 many of the costs that plaintiffs allege are
21 simply not mandates. There is no case law to
22 tell us what a mandate is. There is only one
23 reported case that I'm aware of having to do
24 with the unfunded mandate provision and I know
25 about it because I lost it. And that one was

1 an easy case because -- easy for the
2 plaintiffs -- because what the statute did was
3 it created this new office, the Office of
4 Criminal Conflict and Civil Regional Council,
5 created a new office and said to the counties
6 and said, thou shall pay for it. That's pretty
7 clear, you know, they're telling the counties
8 to pay for something new.

9 So that analysis doesn't help us here.
10 Because we don't have that here. What we have
11 is a series of growth management sort of
12 changes and some subtle, some not so subtle
13 changes to the requirements of growth
14 management provisions of the law.

15 Now, there is a federal unfunded mandate
16 provision and that definition, any provision in
17 the legislation, statute, or regulation that
18 would impose an enforceable duty on the
19 government, in this case it's state, local, or
20 tribal government, an enforceable duty. The
21 fact that the local governments might make a
22 discretionary decision to, for example,
23 jettison their concurrency requirements, and
24 that discretion decision ends up costing them
25 money down the line, that's not a mandate.

1 That's a discretionary decision that they
2 made. And most of the -- and certainly the
3 idea that they may have to defend legal
4 challenges, that certainly is not an unfunded
5 mandate. I don't see how that comes within the
6 rubric of the constitution at all.

7 So there are -- admittedly there are some
8 provisions this year that are going to cost
9 them some money. There's no question about
10 that. The question is how much. Because the
11 constitution does have this insignificant
12 provision. Now, plaintiffs keep saying that we
13 did not meet our burden. Well, Your Honor, I
14 didn't ask for summary judgment on the unfunded
15 mandate provision. I don't have the burden
16 here. All I have to do is what I'm attempting
17 to do and that is to show you that there are
18 some disputed issues of material fact. I don't
19 have to prove anything. Because I'm not asking
20 for anything.

21 So they're trying to force us to shoulder
22 a burden because they characterize the
23 insignificant issue as an exemption, if I was
24 seeking summary judgment, I might even agree
25 with them but I'm not. I'm just saying that

1 they can't get summary judgment because they
2 have not overcome these disputed issues of
3 fact. And they attack the affidavit of
4 Darrin Taylor.

5 So who is Darrin Taylor, 20 years of
6 planning experience, seven years at the
7 Department of Community Affairs, five years at
8 the Tallahassee-Leon County Planning
9 Department, and since August 2006 he's been
10 working for a private firm, 80 percent private
11 developers and 20 percent of time with public
12 entities. This is someone that knows the
13 growth management regime of the State of
14 Florida. He's been working in it for 20 years
15 at various levels of local government and now
16 in the private sector.

17 So when he said -- when the plaintiffs say
18 they got an affidavit that says it's going to
19 cost 40,000 to develop strategies to fund
20 mobility and amend land development
21 regulations, well, Mr. Taylor says that local
22 government is already doing a lot of that
23 stuff. That calls into question this number, I
24 think. This number -- if they were starting
25 from scratch, you know, you get a private

1 consultant in there to give you a proposal to
2 do something that the law now requires, they're
3 not going to come in and say, well, you're
4 already doing 90 percent of it, it won't cost
5 you so much. That's what you're going to get.

6 He says that local governments are already
7 required to address alternative modes of
8 transportation including public transportation,
9 pedestrian, and bicycle travel. That's
10 multimodal transportation, Your Honor. That's
11 what that requirement is. 9J-5.019, he says it
12 requires them to identify existing multimodal
13 systems, establishing levels of service
14 standards for multimodal systems, analyzing
15 capacity of facilities and any deficiencies,
16 and required to establish strategies to fund
17 improvements to address efficiencies. They're
18 already doing that. So that calls into
19 question the estimates of the amount of money
20 that is going to be required to comply with
21 this statute.

22 I don't have to have an affidavit that
23 says, well, no, it's not going to cost 40,000
24 it's going to cost 20. I'm just saying that
25 these estimates aren't reliable and don't prove

1 anything because they don't take into account
2 the things that local government is already
3 doing. And he's competent to testify to this.
4 He's been doing it for 20 years.

5 With regard to the adopted transportation
6 concurrency requirements. I submit,
7 Your Honor, that if you read the analysis of
8 the Department of Community Affairs, that was
9 an early analysis that was done during the
10 legislative process and it was based on an
11 understanding of the statute that would have
12 required local governments to jettison their
13 concurrency management systems and jettison
14 their concurrency requirements. That's not the
15 case.

16 The interpretation of the statute today is
17 that they don't have to do that. That's in the
18 affidavit. The interpretation now is that what
19 was taken away was the requirement and the
20 state minimum standards. Under their home rule
21 power, local governments can maintain their
22 concurrency systems if they want. And so this
23 statement in DCA's analysis that -- I forget
24 exactly what the wording was -- but that it's a
25 significant burden on local governments, you

1 know, to borrow a phrase from the Nixon
2 administration, it's not operative any more
3 because interpretation of the law is not today
4 what it was back then.

5 As addressing the cost savings to local
6 governments. Plaintiffs say it doesn't matter
7 if there are cost savings. Well, Your Honor,
8 if you have a statute that -- and -- well, let
9 me back up.

10 The constitution has this exemption if you
11 will for insignificant expenditures. Let's say
12 you have a statute that in one part of the
13 statute enacted a requirement for local
14 governments to spend a thousand dollars, just
15 to pick a number out of thin air, but the next
16 section of the statute created a cost savings
17 in the same statute of a million dollars.
18 Well, is that statute an unfunded mandate
19 because they have to spend a thousand over
20 here, to get a million back over here.

21 I'm not saying that's what happened in
22 this statute. All I'm saying is you can't take
23 one section out of the statute and say this one
24 requires us to spend money and then all of a
25 sudden win an unfunded mandate case. You have

1 to look at the statute as a whole and look at
2 the entire balance of what's going on in the
3 statute.

4 And in this case Mr. Taylor says that
5 there are opportunities in this statute for the
6 local governments to save money. That's enough
7 to create a disputed issue of material fact as
8 to how much this statute is going to cost the
9 local governments. And in order to get over
10 their motion for summary judgment, that's all I
11 have to do. That's a disputed issue of
12 material fact. How much is the actual cost of
13 this statute as a whole.

14 The examples that he gives in here are --
15 well, he gives the examples, and the fact that
16 he doesn't say this is -- this is of my
17 personal knowledge, I don't know that this --
18 the rule requires those specific words in
19 there. The way it's worded is he's clearly
20 talking from his personal knowledge. He didn't
21 say somebody told me this or whatever. Just
22 because he wasn't the one that got hired in
23 Gainesville to do that planning job -- I mean,
24 it was his firm, he's talking about what was
25 done. This is clearly from his personal

1 knowledge. The rule doesn't require those
2 words verbatim.

3 So, Your Honor, I think that there is --
4 are several genuine issues of material fact
5 here and, as I said before, I don't have a
6 burden here. They have the burden of
7 overcoming any question of material fact in
8 order to get summary judgment. I don't have to
9 prove anything. All I have to do is raise the
10 issues, and I think we've done that
11 sufficiently.

12 And just so the record is complete,
13 Your Honor, I have to raise the legislative
14 immunity issue and say that the governor, the
15 president, and the speaker are absolutely
16 immune from suit in court and should have been
17 and still should be dismissed from this case.

18 THE COURT: Before you sit down I'm going
19 give you a chance, I'll let you close. Will
20 you address the issue -- if I can get by the
21 single subject somehow and get to unfunded
22 mandate, address the severance issue as it
23 applies to the unfunded mandate issue within
24 this statute. Otherwise, can I find a
25 particular section or not to be an unfunded

1 mandate, not a single subject violation, but an
2 unfunded mandate but that others not to be, the
3 others to be valid to carry out the intent of
4 the legislature under growth management.

5 MR. GLOGAU: Well, Your Honor, I think
6 that would be inconsistent with my position
7 that you have to look at the statute as a
8 whole. Because if you pull one section out and
9 say this is an unfunded mandate, then you're
10 ignoring the fact that somewhere else in the
11 statute the legislature has sort of given them
12 an opportunity to save money to offset that.

13 The constitution -- one of the ways to get
14 over the unfunded mandate provision is that if
15 there is a mandate and the legislature in fact
16 provides a method for raising the money to do
17 that. So if your severance argument will allow
18 you to say, well, this section is an unfunded
19 mandate, this section -- but we're not going to
20 look at this section over here that says you
21 can raise the money to cover that. So I don't
22 think severance is appropriate in the unfunded
23 mandate world.

24 THE COURT: So you're in agreement with I
25 think their position.

1 MR. GLOGAU: I don't think they addressed
2 that with respect to unfunded mandate. I think
3 they were addressing that with respect only to
4 the single subject.

5 THE COURT: But I think they have the same
6 position -- well, I'll let you address it.

7 MR. COLE: We do.

8 THE COURT: So I'm looking at an all or
9 nothing if I get past the single subject --

10 MR. GLOGAU: Yes.

11 THE COURT: -- and I determine there is or
12 is not an unfunded mandate, it's all up or all
13 down.

14 MR. GLOGAU: I think that's right,
15 Your Honor. Just one last thing with respect
16 to senate staff analysis: we need to be real
17 careful about relying on those things. Because
18 first of all we know that at the top of every
19 one of these things, it says this is not the
20 official position of the legislature. Those
21 are staff people writing those things. And in
22 fact there are four senate staff reports on
23 this bill and there are two of them that say
24 what they pointed out, and two of them don't.
25 So I think we need to be real careful in giving

1 weight to what a senate staffer says, and it's
2 borne out by what it says on the face of the
3 document, it says that you're not suppose to do
4 that. So I submit that on the face of the
5 document there is no unfunded mandate. Well,
6 on the face of the document there is no single
7 subject violation and with respect to the
8 unfunded mandate, we don't believe there is an
9 unfunded mandate, but even if there is, we
10 raised a genuine issue of material fact as to
11 whether or not it's a violation of the
12 constitution.

13 THE COURT: Thank you. I'm going to give
14 you -- we have a few minutes. I'll give you a
15 few minutes to close.

16 MR. COLE: Thank you, Your Honor. First
17 of all, on mootness. Not one case that he's
18 given you was dismissed for mootness. He has
19 not shown you one case. The cases say that
20 it's cured, but there's not one case that ever
21 dismisses a case for mootness.

22 What the cases talk about is who has
23 standing to challenge in a criminal context.
24 If you want to challenge the law, you have to
25 have violated or been cited for violating the

1 law during the challenge period. Then if you
2 did after it was cured, then you can't
3 challenge it. You don't have standing to
4 challenge it, you need to get injured.

5 Here he doesn't dispute lots of things
6 have happened during the so-called challenge
7 period, a one-year period, because those things
8 have happened, this cannot be moot. The cities
9 have been adversely affected because things
10 that have happened that affect the cities
11 during the one-year period and you're going to
12 get a response to that.

13 Other than saying that they're all
14 criminal cases, well, not really true.
15 *Martinez* is not a criminal case. *Martinez*
16 dealt with the workers' comp statute, not
17 criminal. So what he's asking you to do is
18 extend this concept that the Second DCA judge
19 thinks is a little bit off course, he wants to
20 extend it now to say that it applies to all
21 acts and conduct during the window period,
22 which is contrary to what the cases say. So he
23 wants you to extend even further.

24 Now, if that's true, what's left of the
25 single subject. I mean, if you're going to

1 extend it so that they pass a law that violates
2 the single subject law, and then a year later
3 they recodify it. But if you did things in the
4 interim period, you know, some of them violated
5 the single subject law. So they're saying in a
6 criminal context a single subject violation is
7 absolutely meaningless and the judiciary has no
8 role, you might as well strike it from the
9 constitution. That would be an unbelievable
10 extension of this concept which we think is
11 kind of questionable in the first place.

12 As to the issue about growth management,
13 he says that growth management is very broad.
14 Well, the only definition before you on growth
15 management is in our brief in footnote 14. And
16 we define from a treatise what growth
17 management is. It's governmental planning,
18 regulation, and infrastructure controls that
19 guide the pattern and pace of development. And
20 that's from Rascoff. So it really goes to the
21 pattern and pace of development.

22 Now, you look at the different things in
23 the second part of SB 360, the stuff that use
24 to be in the act related to affordable
25 housing. Now, all these things do relate to

1 affordable housing. Now, what he's saying is
2 affordable housing might also deal with growth
3 management, that's true.

4 In fact, section 20 is in chapter 163,
5 which maintains the existing density of
6 residential properties or RV parks. That
7 probably could be argued does deal with growth
8 management. It's in chapter 163 which is the
9 main growth management, but all the other ones
10 don't. And under the single subject -- you got
11 to look at each individual provision. You
12 don't look at them as a whole.

13 So section 15, for example, limits access
14 to state allocation pool by Florida Housing
15 Finance Corp., how does that affect the pace of
16 development. It just has nothing to do with
17 it. You know, other than maybe section 20,
18 which is dealing with chapter 163, these are
19 all mainly in 420, which has nothing to do with
20 growth management. And under single subject
21 rule, you got to look at individual provisions,
22 and if any one of these individual provisions
23 doesn't fit, the whole law has to be stricken.

24 On the security cameras. His argument is
25 just so attenuated. Basically what he's saying

1 is the legislature says you can't require
2 security cameras, therefore, more people will
3 want to develop because they'll be a little bit
4 less money to develop if you don't have to do
5 security. All right. Well, why not pass a law
6 that cities can't require you to clean
7 bathrooms. Well, if you develop a property and
8 you don't have to clean the bathroom it's going
9 to less money, so you'll be more likely to
10 develop.

11 If you accept that analysis, then any
12 business regulation, no matter how attenuated,
13 is growth management which just doesn't make
14 sense. A business regulation applies primarily
15 to existing business, is not related to growth
16 management. So the security camera provision
17 is an obvious one, it clearly doesn't fit it.
18 We think that most of the other provisions
19 under tax exemptions and, you know, housing
20 finance and like that also don't really apply.

21 As to severance, he wasn't making an
22 argument, he just said under *Tormey*. The
23 problem is *Franklin* receded from *Tormey*.
24 *Franklin* says that *Tormey* is just a title case
25 which falls under category 2 of *Heggs* and can

1 be severed. But this is a category 3 case.
2 And under *Heggs* you cannot sever. And that's
3 it for single subject. Basically the substance
4 of argument is pretty clear, you got three
5 subjects here and, you know, the real issue --
6 what their only issue is the mootness and no
7 case was ever dismissed on mootness so there's
8 really no reason for you to do so.

9 On the unfunded mandates he mentioned
10 criminal -- the case he was involved in, the
11 one unfunded mandate case dealing with the
12 office for criminal courts. Well, what if in
13 that case, Your Honor, they had put in an
14 affidavit and it said if you have this office
15 for criminal courts, it would reduce crime; and
16 if you reduce crime, you don't need as many
17 police and, therefore, the cities save money.

18 That's what we have in our case. They've
19 come up with some attenuated unquantifiable
20 speculative savings and said even though we
21 have specific costs, we have possible savings
22 and, therefore, it's okay. And that's really,
23 you know, what you got here: you got
24 quantifiable costs, you got speculative
25 savings, even if you accepted the affidavit,

1 and that's not enough for them.

2 They say that it's a discretionary
3 decision whether you jettison concurrency.
4 Well, we're not talking -- the four things that
5 we have on the chart, the cost between -- you
6 know, the ones that are specific on the chart
7 that cost between 50 and a hundred thousand --
8 40 and a hundred thousand dollars, those are
9 mandated by section 4, those are not
10 discretionary. There are other discretionary
11 things, but that's not what we're talking
12 about.

13 For the purpose of this motion we have
14 come up with four concrete things that get you
15 to \$10 million, way beyond the 1.8. They do
16 admit that this is going to cost money. That
17 was a pretty big concession. So they admit
18 it's going to cost money, we say it's going to
19 cost way in excess of 1.8 million, and they
20 have nothing, they have no quantifiable
21 amounts.

22 As to the burden, he says they don't have
23 any burden, they didn't move for summary
24 judgment, well, that's just wrong. The issue
25 here is an exemption, they are claiming an

1 exemption. We have satisfied our burden to
2 show the constitution provision is violated.
3 They have the burden to show that the exemption
4 applies.

5 We cited a case in our briefs that
6 explicitly says that and, no, they've never
7 responded to it. Now, under a normal summary
8 judgment motion, well, once we satisfy our
9 burden, they then have a burden, they do have a
10 burden to come forward with competent evidence
11 to conflict with ours and create a dispute.
12 And they have failed to do that.

13 As far as the affidavit, we don't dispute
14 that he has 20 years experience. Yes, he may
15 be qualified. The issue isn't qualification,
16 the issue is lack of personal knowledge. All
17 the things that he's talking about are what
18 other governments have done, and what someone
19 else in his office did. How could he know
20 about what someone else in his office did if he
21 didn't do it other than them telling him which
22 is hearsay.

23 And the first district explicitly says you
24 can't do that, Your Honor, and that's the
25 *Department of Financial Services* case was very

1 clear. And then he says there was no real
2 requirement of personal knowledge. Well,
3 that's not what the first district says. The
4 first district says that the ". . . affidavits
5 for summary judgment 'shall be made on personal
6 knowledge, shall set forth such facts as would
7 be admissible in evidence,'" and shall
8 affirmatively state that the affiant is
9 competent to testify. They didn't satisfy
10 that. That affidavit just doesn't satisfy
11 that.

12 But beyond that, even if you accepted --
13 accept the affidavit, where is the conflict in
14 the evidence, where is the conflict.
15 Ms. Eichner says it's going to cost a certain
16 amount to amend the comprehensive plan. No
17 conflict. She says it's going to cost a
18 certain amount to the mobility study, no
19 conflict. It's going to cost a certain amount
20 to do the land development regs, no conflict.
21 And then the other affidavit says it's going to
22 cost a certain amount to do the advertising, no
23 conflict. There's no conflict in the
24 affidavits.

25 Then on transportation concurrency part of

1 this, he says that DCA's statement does not
2 apply and, therefore the DCA statement that
3 says it's going to cost a lot of money dealing
4 with transportation concurrency, that's not --
5 that's not actually complete because the senate
6 staff was not talking about that. The senate
7 staff was talking about requiring updated
8 comprehensive plans, and that's what
9 Ms. Eichner is talking about in her \$50,000
10 thing. Not the transportation concurrency that
11 he's talking about.

12 On the offsets, none of them are
13 quantified. So we still have no idea of how
14 much those offsets are. In the affidavit there
15 are two examples, the DRI and the
16 transportation, and I specifically talked to
17 you about how for the DRI it doesn't save money
18 because cities have application fees, and cost
19 recovery that offset it, no response. I
20 responded to each of the ones and he didn't
21 respond to even specific offsets.

22 The legislative immunity, I just want to
23 reiterate and incorporate our arguments from
24 the motion to dismiss that we made in our
25 briefs and that Mr. Guedes made in front of

1 you, you denied that motion. They haven't
2 really argued again to the extent they
3 incorporate their argument, I'll incorporate
4 ours as well.

5 And on the severance on an unfunded
6 mandate, we agree, you can't sever it. So it
7 is all or nothing. So we ask you to find on
8 both the single subject and the unfunded
9 mandate that the constitution holds.

10 THE COURT: All right, good people. I'm
11 going to take it under advisement, I got to go
12 back and read at least three cases you cited.
13 I want to reread *Fountain*. I think both of you
14 relied heavily on that. I read it but I want
15 to go back now in light of the argument and my
16 notes to see what it is.

17 I still want to think through this 25-day
18 period we have here between moot possibly or
19 cure by reenactment, not cured, and what effect
20 that has on the ruling I might make if I go
21 there. And I also want to look a little closer
22 at some particular provisions each of you
23 pointed out today in the staff analysis. I
24 want to take a little closer look at your
25 points about that analysis.

1 So with that I'll do it as soon as I can,
2 but I don't know when. But I know it's quick.
3 Thank you. I appreciate the arguments too,
4 well done, good materials and they were right
5 on point. We're in recess.

6 (Hearing concluded at 3:23 p.m.)

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<p style="text-align: center;">*</p> <p>* (2:20)</p> <p style="text-align: center;">[</p> <p>[entire] (14:7) [sic] (35:5)</p> <p style="text-align: center;">A</p> <p>ability (53:21) (64:15) able (63:12) absolutely (17:13) (26:14) (43:11) (73:15) (78:7) accept (45:8) (47:7) (80:11) (84:13) accepted (81:25) (84:12) access (17:1) (79:13) accomplish (59:4) accomplishment (58:25) (64:22) according (19:20) (20:12) (35:8) (35:9) (45:18) account (70:1) act (9:14) (9:16) (9:24) (11:19) (11:21) (11:24) (12:11) (12:14) (12:23) (12:25) (13:4) (13:9) (13:25) (14:1) (14:7) (14:10) (14:21) (16:16) (16:20) (20:4) (20:16) (21:1) (22:11) (22:17) (23:10) (53:20) (57:16) (57:23) (58:1) (59:3) (59:8) (59:22) (78:24) action (7:6) (7:11) (27:16) (31:24) actions (27:3) (27:7) (30:8) (30:23) (34:1) acts (14:5) (77:21) act's (11:22) actual (11:14) (35:17) (36:24) (72:12) actually (6:3) (18:3) (55:5) (56:9) (56:22) (85:5) added (13:9) (13:15) (16:14) address (7:1) (7:17) (50:20) (50:21) (53:16) (53:22) (60:25) 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borne (76:2)	(18:24) (19:1) (19:3) (19:6)	cite (7:8) (46:13) (61:17)	complete (73:12) (85:5)
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