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

CITY OF WESTON, FLORIDA; VILLAGE OF KEY BISCAYNE, FLORIDA; TOWN OF CUTLER BAY, FLORIDA; LEE COUNTY, FLORIDA; CITY OF DEERFIELD BEACH, FLORIDA; CITY OF MIAMI GARDENS, FLORIDA; CITY OF FRUITLAND PARK, FLORIDA, CITY OF PARKLAND, FLORIDA, CITY OF HOMESTEAD, FLORIDA; COOPER CITY, FLORIDA; CITY OF POMPANO BEACH, FLORIDA; CITY OF NORTH MIAMI, FLORIDA; VILLAGE OF PALMETTO BAY, FLORIDA; CITY OF CORAL GABLES, FLORIDA; CITY OF PEMBROKE PINES, FLORIDA; BROWARD COUNTY, FLORIDA; LEVY COUNTY, FLORIDA; ST. LUCIE COUNTY, FLORIDA; ISLAMORADA, VILLAGE OF ISLANDS, FLORIDA; and TOWN OF LAUDERDALE-BY-THE-SEA, FLORIDA,

Plaintiffs,

vs.

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

Defendants.

CASE NO. 09-CA-2639

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR REHEARING

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PLAINTIFFS' RESPONSE TO
DEFENDANTS' MOTION FOR REHEARING

Plaintiffs, City of Weston, Florida; Village of Key Biscayne, Florida; Town of Cutler Bay, Florida; Lee County, Florida; City of Deerfield Beach, Florida; City of Miami Gardens, Florida; City of Fruitland Park, Florida; City of Parkland, Florida; City of Homestead, Florida; Cooper City, Florida; City of Pompano Beach, Florida; City of North Miami, Florida; Village of Palmetto Bay, Florida; City of Coral Gables, Florida; City of Pembroke Pines, Florida; Broward County, Florida; Levy County, Florida; St. Lucie County, Florida; Islamorada, Village of Islands, Florida; and Town of Lauderdale-By-The-Sea, Florida (the "Local Governments"), hereby respond to "Defendants' Motion for Rehearing" (the "Motion") filed on behalf of defendants The Honorable Jeff Atwater, President of the Senate, and The Honorable Larry Cretul, Speaker of the House (the "Legislative Defendants") on September 7, 2010.[1]

OVERVIEW

Rehearing should be denied because the Motion fails to point out any matters overlooked by the Court. In fact, the first issue raised by the Motion ("remedy") was expressly discussed at the hearing and agreed to by all of the Defendants. Now, at (or after) the eleventh hour, the Legislative Defendants seek to renege on their stipulation and argue that only one Section of the law should have been found unconstitutional, and that the rest should have been severed. In addition to the argument being legally wrong, the Legislative Defendants cannot be

[1] Interestingly, the other two defendants, The Honorable Charlie Crist, Governor, and The Honorable Kurt S. Browning, Secretary of State, did not join in the motion for rehearing.

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permitted to strategically change their position in a motion for rehearing (or later on appeal). The second argument ("all costs are not mandates") was expressly made below and is merely an improper repetition of argument (and also relies entirely on the improper severance argument). Thus, the Motion should be denied.

I. A Rehearing is Not Appropriate on the Issue of Remedy

The first issue raised in the Motion is the "remedy." The Legislative Defendants ask that the Court grant rehearing "to reconsider the remedy of declaring the entire law unconstitutional." This position is contrary to the stipulation made by the Legislative Defendants at the hearing and is simply wrong.

The issue of remedy and severance was not raised by defendants in their defense of the unfunded mandate challenge, and was expressly discussed at the hearing.[2] Both parties agreed that severance was not appropriate in this case, and that "it's all up or down":

> THE COURT: Before you sit down I'm going give you a chance, I'll let you close. Will you address the issue – if I can get by the single subject somehow and get to unfunded mandate, address the severance issue as it applies to the unfunded mandate issue within this statute. Otherwise, can I find a particular section or not to be an unfunded mandate, not a single subject violation, but an unfunded mandate but that others not to be, the others to be valid to carry out the intent of the legislature under growth management.

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[2] Defendants did raise severance in connection with the single subject challenge. However, if the Court had found a single subject violation (and found that it was not moot), severance nevertheless would not be appropriate in this case. *See Heggs v. State*, 759 So.2d 620, 629-30 (Fla. 2000); *see also* Plaintiffs' Reply in Support of Motion for Final Summary Judgment and in Opposition to Defendants' Cross-Motion For Partial Summary Judgment at pp. 11-15.

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

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

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

MR. GLOGAU [Attorney for Defendants]: I don't think they addressed that with respect to unfunded mandate. I think they were addressing that with respect only to the single subject.

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

MR. COLE [Attorney for Plaintiffs]: We do.

THE COURT: *So I'm looking at an all or nothing if I get past the single subject –*

MR. GLOGAU [Attorney for Defendants]: *Yes.*

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

MR. GLOGAU [Attorney for Defendants]: *I think that's right, Your Honor.*

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See June 3, 2010 hearing transcript at p. 73, line 18 – page 75, line 15 (emphasis added). The Legislative Defendants made a calculated, strategic decision to make this stipulation – they cannot now argue that it was incorrect.[3]

Moreover, the Legislative Defendants' new position on severance is wrong. The applicable constitutional provision (Article VII, Section 18(a)) states that "no county or municipality shall be bound by *any general law* requiring such county or municipality to spend funds or to take an action requiring the expenditure of funds ...." It does not refer to any "portion of any general law," nor does it speak to severance. In addition, Section 18(d) provides that "laws having insignificant fiscal impact ... are exempt ...." This exemption requires the Court to look at the entirety of the law, not merely one provision, making severance impossible.

The case relied upon by the Legislative Defendants - *Lewis v. Leon County,* 15 So. 3d 777 (Fla. 1st DCA 2009) - does not support their new position on severance. Although it is true that the trial court in *Lewis* severed the one challenged provision, it did so because that was the only relief sought by the parties and because Section 33 of Chapter 2007-62 explicitly provided for severance. Importantly, no such severance was sought by any party in this case, nor was a severance provision included in SB 360 (Chapter 2009-96). Severance would make no sense in the case *sub judice* because the various provisions in SB

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[3] The Legislative Defendants now contend that the reason they made this stipulation was to enable them to argue offsetting savings. The strategy underlying their decision to make the stipulation is irrelevant – they cannot change their stipulation simply because their strategy didn't work. *See, e.g., Henrion v. New Era Realty IV, Inc*, 586 So. 2d 1295, 1298 (Fla. 4th DCA 1991) (holding that defendant could not revoke prior voluntary stipulation after jury verdict so as to permit new trial of case).

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360 related to growth management are too intertwined to permit severance. For example, Section 4 of SB 360 requires 246 local governments to adopt comprehensive plan amendments within two years "to support and fund mobility." This requirement replaced the abolished state-mandated transportation concurrency. If the Legislative Defendants' view of severance were followed, then *neither* would exist (Section 4 would be invalidated, but the abolishment of state-mandated transportation concurrency would stand), resulting in a wholly unworkable and unintended situation. The other growth management provisions are similarly connected and interdependent (possibly explaining the lack of a severability provision in SB 360).

The Legislative Defendants further argue that Courts in unfunded mandate cases should never make any finding of unconstitutionality and invalidity, but rather should simply declare that no local government is bound by that provision or law. Then, according to the Legislative Defendants, "local governments would be free to comply or not at their discretion." Motion at pg. 3. Although this is an interesting and creative reading of the provision, it is simply wrong and would be unworkable. If correct, then there would be laws in the Statute books but no one would know whether such laws are in effect in any given jurisdiction. This would be particularly problematic in the case at bar, where different rules for growth management would apply in each jurisdiction (with no one knowing whether a

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local government would choose to comply or not), leading to mass confusion.[4] No case has ever held that a violation of the unfunded mandates provision merely creates the unworkable situation of each local government choosing whether to follow the law. Even in *Lewis*, relied upon by the Legislative Defendants, the lower court did both – it declared the unfunded mandate "to be unconstitutional and not binding upon the Counties." The Court's finding of unconstitutionality and invalidity here was correct.[5]

II. Rehearing is Not Appropriate on the Issue of Whether the Costs are Mandates

The Legislative Defendants' second argument for rehearing is merely a repetition of an argument that they made in their Motion for Summary Judgment and at the hearing – that some of the challenged costs are not "mandates." The Court did not overlook the argument; it simply did not agree. "The purpose of a motion for rehearing is to give the trial court an opportunity to consider matters which it failed to consider or overlooked." *Pingree v. Quaintance*, 394 So. 2d 161, 162 (Fla. 1st DCA 1981) (*citing Diamond Cab Co. of Miami v. King*, 146 So. 2d 889 (Fla. 1962)). Rehearing is not appropriate to merely reargue positions

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[4] A more reasonable interpretation of the language in Art. VII, Section 18(a) that "no county or municipality shall be bound by any general law . . ." is that such language merely limits standing to bring unfunded mandate challenges to local governments (as opposed to any citizens).

[5] The use of different language in other sections of the Constitution does not lead to a contrary conclusion. For example, Article III, Section 6 states that "every law embrace but one subject," and does not contain any remedy. Yet there is no doubt that invalidation of a law in violation of that section is appropriate.

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previously rejected by the Court. *See Cole v. Cole*, 130 So. 2d 126, 130 (Fla. 1st DCA 1961); *Cocalis v. Cocalis*, 103 So. 2d 230, 233 (Fla. 3d DCA 1958).

This position is also wholly dependent upon the Legislative Defendants' new position on severance. Because Section 4 of SB 360 clearly constitutes a "mandate" and violates Article VII, Section 18(a), that one finding is sufficient to invalidate the entire law without even looking at the other costs to be incurred by the local governments.[6]

CONCLUSION

Rehearing should be denied because the arguments raised in the Motion are contrary to the express stipulation by the Legislative Defendants at the hearing, are incorrect and/or have been previously raised and rejected.

Respectfully submitted,

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[6] The Local Governments do not agree that the other costs are not "mandates." These other costs, although not easily quantifiable, are significant and will be thrust upon the Local Governments, and their taxpayers, against their will if SB 360 is upheld.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was sent via email and U.S. Mail to **Jonathan A. Glogau, Esq.**, *Attorney for the Governor, Senate President and Speaker*, 400 South Monroe Street, Room PL-01, Tallahassee, Florida 32399-6536; and **Lynn C. Hearn, Esq.**, General Counsel, and **Staci A. Bienvenu, Esq.**, Assistant General Counsel, *Attorneys for the Secretary*, Department of State, R.A. Gray Building, 500 S. Bronough Street, Tallahassee, FL 32399-0250, this 10th day of September, 2010.

EDWARD G. GUEDES

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