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

MOTION TO VACATE AUTOMATIC STAY

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PLAINTIFFS' MOTION TO VACATE AUTOMATIC STAY

Plaintiffs, City of Weston, Florida; Village of Key Biscayne, Florida; Town of Cutler Bay, Florida; Lee County, Florida; City of Deerfield Beach, Florida; City of Miami Gardens, Florida; City of Fruitland Park, Florida; City of Parkland, Florida; City of Homestead, Florida; Cooper City, Florida; City of Pompano Beach, Florida; City of North Miami, Florida; Village of Palmetto Bay, Florida; City of Coral Gables, Florida; City of Pembroke Pines, Florida; Broward County, Florida; Levy County, Florida; St. Lucie County, Florida; Islamorada, Village of Islands, Florida; and Town of Lauderdale-By-The-Sea, Florida (collectively, the "Local Governments"), pursuant to Florida Rule of Appellate Procedure 9.310(b), hereby file their motion to vacate defendants' automatic stay ("Motion"), and in support thereof, state as follows:

BACKGROUND

The inequities resulting from the automatic stay imposed pursuant to Fla. R. App. P. 9.310 mandate its vacation. The primary "unfunded mandate" found unconstitutional by this Court was the requirement under SB 360 that local governments throughout the State amend their comprehensive plans and adopt transportation strategies "to support and fund mobility" within two (2) years of being designated as a DULA. SB 360, § 4. The Court found that this would result in a cost state-wide of "not less than $3,690,000." *See* Final Judgment at p. 9. The

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deadline for final adoption of these costly amendments is **July 8, 2011**. The plan amendment process requires that consultants be retained, studies commissioned, legislation drafted, plan amendments printed, and two public hearings advertised and conducted. *Id.* As a result, if the automatic appellate stay is not vacated under Rule 9.310(b)(2), the Local Governments will be forced to expend significant funds, notwithstanding the Court's judgment to the contrary (and even if the judgment is ultimately upheld on appeal).

Moreover, since SB 360 became effective on June 1, 2009, local governments throughout the State, including the Local Governments, as well as the Department of Community Affairs, have struggled to interpret and administer SB 360. This, coupled with the Court's Final Judgment, has resulted in continuing uncertainty throughout the development community.

Accordingly, the automatic stay of the Final Judgment should be vacated pursuant to Fla. R. App. P. 9.310(b)(2) to ensure that the Local Governments are not required to comply with the unconstitutional provisions of SB 360, notwithstanding that they succeeded in having the law ordered stricken from the official records of the State.

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ARGUMENT

A. The Automatic Stay Should be Vacated Because of The Compelling Circumstances of This Case.

The definite and irreparable harm facing the Local Governments requires the vacation of the automatic stay pending appeal. Florida law dictates that trial courts have the discretion to vacate an automatic stay when "compelling circumstances" so require. *Tampa Sports Auth. v. Johnston*, 914 So. 2d 1076, 1081-82 (Fla. 2d DCA 2005); *see also Thurman v. Cobb*, 2006 WL 3077423 at *1 (Fla. 2d Cir. Ct. Oct. 19, 2006) (Ferris, J.) (vacating automatic stay because irreparable injury would result). Compelling circumstances certainly exist here – more specifically, the almost certain likelihood that the Local Governments will be required to expend significant funds in order to comply with the unconstitutional provisions of SB 360. This reality compels the vacation of the automatic stay here.

In *Tampa Sports Auth.*, the Second District found that "the balance of equities [was] . . . 'overwhelmingly tilted' [because, if] the stay were to remain in force during this appeal, [the appellee] would suffer definite, irreparable, and irremediable harm to his important constitutional interests." *Tampa Sports Auth.*, 914 So. 2d at 1083. The court went on to explain that "the harm to the [appellant's] interests that would be occasioned by lifting the stay is uncertain at most." *Id.* In effect, the appellant in *Tampa Sports Auth.*, like the defendants/appellants here, "would be left in the same posture" it was in the prior

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years. *Id.* As a result, the court concluded that "the equities [were] overwhelmingly tilted against maintaining the stay," that any judicial deference to the legislature was "diminished," and that the stay should be lifted. *Id.* at 1084.

Similarly here, the balance of the equities is overwhelming tilted against maintaining the stay. This Court previously determined that the provisions of SB 360 violated the Florida Constitution's prohibition against unfunded mandates. *See* Final Judgment at pp. 5-11. Notwithstanding this fact, it seems there can be no more of a hollow victory than what the Local Governments are currently facing. The Local Governments are faced with the very real likelihood of having to comply with the very mandates already determined to be unconstitutional. The harm of having to comply with the unconstitutional statutory provisions (namely, the payment of no less than $3,690,000), much like the harm at issue in *Tampa Sports Auth.*, is incapable of being remedied after the fact.[1] On the flip side, the harm to Senate President Atwater and Speaker Cretul is virtually non-existent. Instead, they will be left in virtually the same position they were prior to the unconstitutional enactment of SB 360. As a result, compelling circumstances exist to vacate the automatic stay pursuant to Rule 9.310(b)(2).

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[1] Allowing the automatic stay to remain in effect would essentially render the Local Governments' rights on appeal illusory.

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B. <u>The Automatic Stay Should be Lifted Because it Appears Review is Being Sought Solely to Ensure That All Local Governments Still Pay The $3,690,000 Required to Comply With SB 360</u>.

The Florida Supreme Court has held that a stay may be lifted if it appears that the governmental entity is seeking review in bad faith solely as a delaying tactic. *City of Lauderdale Lakes v. Corn*, 415 So. 2d 1270, 1272 (Fla. 1982). It appears that this is precisely what is occurring here.

First, as previously briefed before this Court, Senate President Atwater and Speaker Cretul moved to continue the original summary judgment hearing in this case pursuant to section 11.111, Florida Statutes, notwithstanding their *<u>express and repeated agreement</u>* to conduct a summary judgment hearing on a date certain. Then, after summary judgment was, in part, entered in favor of the Local Governments, Senate President Atwater and Speaker Cretul (but not Governor Crist or Secretary Browning) filed a notice of appeal relating to the Court's unfunded mandate decision.

Now, Senate President Atwater and Speaker Cretul again seek to continue the appeal because of a one-day organizational legislative session.[2] Remarkably, in doing so, Senate President Atwater and Speaker Cretul claim – without the slightest irony – that the Local Governments are at the root of this continuance because the Local Governments "insist" that they "remain parties to this case."

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[2] They have actively opposed the Local Governments' efforts to expedite the appeal before the First District Court of Appeal.

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This, however, ignores the fact that the *sole reason* both Senate President Atwater and Speaker Cretul are parties to the appeal is because *they filed a notice of appeal* of the Final Judgment. Instead, this continuance appears to be a calculated decision that will enable Senate President Atwater and Speaker Cretul to further delay the appeal until the regular 2011 legislative session beginning on March 8, 2011, and ending on May 6, 2011 – thus almost certainly delaying the resolution of this case beyond the July 8, 2011 deadline to comply with SB 360. As a result, it appears that Senate President Atwater and Speaker Cretul are simply seeking to delay this cause so as to require the Local Governments to expend the millions of dollars required to comply with the unconstitutional provisions of SB 360.

Accordingly, the automatic stay should be lifted here. *See generally Tampa Sports Auth.*, 914 So. 2d at 1081-82; *Lauderdale Lakes*, 415 So. 2d at 1272; *see also Reform Party of Fla. v. Black*, 885 So. 2d 303, 307 (Fla. 2004) (imposing conditions on governmental entity's automatic stay, in order to preserve the rights of the parties).

CONCLUSION

The irreparable harm that the Local Governments will suffer absent an order lifting the automatic stay establishes the compelling circumstances necessary to vacate the stay here. On the one hand, you have Senate President Atwater and Speaker Cretul, who will be in no worse a position if the stay is lifted (in fact, it

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appears that they will not even be impacted at all). On the other hand, you have the Local Governments who will be required to pay "not less than $3,690,000" in order to comply with SB 360, even though it has been declared unconstitutional and ordered stricken from the official records of the State. As a result, the automatic appellate stay should be vacated.

WHEREFORE, the Local Governments respectfully request that the Court enter an order vacating the automatic stay pending appeal, and for such other relief that the Court deems proper.

Respectfully submitted,

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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 18th day of November, 2010.

FOR
EDWARD G. GUEDES

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