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## Florida's Constitutional Mandate Restrictions

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## I. INTRODUCTION

"The bane of every budget director's existence is the rapid increase in unfunded state and federal mandates."<sup>1</sup> This statement reflects the widespread frustration felt by localities forced to comply with federal and state legislation that imposes duties on them without providing funding. The mandate era is thought to owe its existence to the Reagan/Bush administrations, whose aim was to lessen the federal government's responsibilities.<sup>2</sup>

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1. John R. Blinn, *When Cities Go Under*, MANHATTAN LAW., Dec. 1991, at 37.

2. William Tucker, *Rebellion Grows Against Federal Mandates*, PUB. FIN. WASH. WATCH, Feb. 1, 1993, at 4.

Congress, not sharing this view and eager to continue implementing social policy, engaged in cost shifting by enacting laws that passed the cost of program compliance along to state and local governments.<sup>3</sup>

At a time when the staggering cost of federal mandates has placed many a locality in a "financial straightjacket,"<sup>4</sup> state governments have only added to the load by enacting their own cost shifting legislation.<sup>5</sup> Florida is no exception. Between the years of 1981 and 1990, Florida's Legislature enacted 288 mandates, many of them unfunded.<sup>6</sup> These mandates required Florida's local governments to "manage growth, provide pension benefits, protect the environment, and otherwise take action to address various problems."<sup>7</sup> The 1988 state mandates alone were estimated to cost Florida's local governments close to \$39 million.<sup>8</sup> Responding to pressure from local governments to curtail the flood of mandate legislation, the Florida Legislature proposed an amendment to the state constitution that would restrict mandates. In 1990, the amendment received a favorable vote of the electorate and became section 18 of article VII of the Florida Constitution.<sup>9</sup>

Although the amendment's initial language excuses local governments from complying with state mandates,<sup>10</sup> other provisions within the amendment contain numerous exceptions and exemptions,<sup>11</sup> all the result of predictable compromises. Taken together, these exceptions and exemptions may not "swallow the rule," but they nevertheless take a few teeth out of local government's intended goals of the provision. In the three years since its enactment, the amendment appears to have had limited effect on curtailing mandates. However, it has raised legislators' awareness of the problem that results from unfunded mandates, has given local governments

3. *Id.*

4. *Id.* In early 1993, the date of Mr. Tucker's article, the annual cost of federal mandates was estimated to be between \$3 and \$4 billion. *Id.*

5. *See id.*

6. Staff of Fla. H.R. Comm. on Comm'y Aff., CS/HJR 139, 140 (1989) Staff Analysis 2 (April 5, 1989) (on file with comm.) [hereinafter April 5 Staff Analysis].

7. *Id.*

8. *Id.*

9. FLA. CONST. art. VII, § 18. Throughout this article the amendment will be interchangeably referred to as "the amendment" and "section 18."

10. *See infra* text accompanying note 39.

11. "Exception" is used to refer to an item that is excused from the operation of the amendment, while "exemption" refers to an item that falls outside the scope of the amendment. *See* BLACK'S LAW DICTIONARY 559, 571 (6th ed. 1990). As will be shown, this may well be a distinction without a difference.

a stronger voice in the legislative process, and has helped local governments maintain existing funding. To a limited extent, section 18 has fulfilled its purpose, as expressed in the legislative history.<sup>12</sup> While local governments feel section 18 has not gone far enough, they nevertheless welcome it, and now see a need to push the Legislature to enact implementing legislation. Reasonable implementing legislation, coupled with a new generation of mandate-conscious legislators, should further help alleviate Florida's intergovernmental frictions.

## II. BACKGROUND

The amendment's legislative history exposes the extent of the mandate problem that existed at the end of the 1980's. The seemingly non-stop enactment of mandates by the Florida Legislature resulted in a deepening crisis with no apparent end in sight.<sup>13</sup> The problem had worsened despite action taken in the previous decade. In 1977, as a partial response to the taxpayers' revolt and the constitutional limitations on local governments' revenue structure, the Legislature created the Florida Advisory Council on Intergovernmental Relations (ACIR).<sup>14</sup> The legislative findings and purpose underlying the creation of ACIR acknowledged a need to study problems with the intergovernmental aspects of state finance and interstate relationships.<sup>15</sup> ACIR was required to examine proposed state programs and "assess their impact upon Florida and its political subdivisions . . ."<sup>16</sup> ACIR was also required to issue annual reports of its findings and recommendations, and analyze all new state programs or expansion of existing programs that increased the expenditure or lessened the revenue-producing ability of local governments.<sup>17</sup>

In 1978, legislation was passed requiring each bill that affected the financial condition of local governments to include an economic impact

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12. See *infra* text accompanying note 41.

13. See generally Kristin Conroy Rubin, *Unfunded Mandates: A Continuing Source of Intergovernmental Discord*, 17 FLA. ST. U. L. REV. 591, 592 (1990) (discussing intergovernmental relations in Florida). In 1988, for example, the Legislature enacted legislation expanding the number of people eligible to receive local government pension benefits. *Id.*

14. FLA. STAT. §§ 163.701-.708 (1991); see also April 5 Staff Analysis, *supra* note 6, at 1.

15. FLA. STAT. § 163.702 (1991).

16. *Id.* § 163.705(1)(d).

17. *Id.* § 163.705(1)(g), (3).

statement.<sup>18</sup> Accordingly, section 11.076 of the Florida Statutes reads as a strong directive, not only requiring economic impact statements for all state mandated legislation, but additionally requiring the state to provide funding to offset certain mandated program costs.<sup>19</sup> However, this facially helpful legislation was largely ignored by subsequent legislatures, who were not bound by the acts of their predecessors.<sup>20</sup> Therefore, even though the statute was not repealed, it provided no help to Florida counties and cities.

Statistics showed that the number of mandates was increasing. From 1981 to 1988, 288 mandates were enacted; forty-nine mandates were enacted in 1987; sixty-five mandates were enacted in 1988. In 1988 alone, the mandate price tag for local governments was \$38,976,100.<sup>21</sup> Despite the escalation, the number of mandates was not out of proportion to the number of general acts.<sup>22</sup> However, the numbers alone did not reflect the full extent of the problem. ACIR found, in its 1985 report, that bills including mandates received less scrutiny by the Legislature than other legislation.<sup>23</sup> Mandates were also enacted during the last three days of the legislative session,<sup>24</sup> further indicating the decreased level of attention given them. ACIR also found many of the bills did not set forth their cost to local government.<sup>25</sup>

The significance of the large number of mandates and the corresponding cost to local governments was heightened by existing constitutional restrictions on local governments. Under the Florida Constitution, the state has considerable control over local government.<sup>26</sup> Article VIII, section 1(a) of the constitution provides that counties can be "created, abolished or changed by law . . ."<sup>27</sup> Similarly, Florida "municipalities may be established or abolished and their charters amended pursuant to general or special law."<sup>28</sup> Local governments have been given home rule power by

18. April 5 Staff Analysis, *supra* note 6, at 1; *see also* FLA. STAT. § 11.076 (1991).

19. FLA. STAT. § 11.076 (1991).

20. Rubin, *supra* note 13, at 598; *see also* April 5 Staff Analysis, *supra* note 6, at 2. For the Legislature to be bound, the mandate restriction had to appear in the state's constitution. Rubin, *supra* note 13, at 598.

21. April 5 Staff Analysis, *supra* note 6, at 2.

22. Staff of Fla. H.R. Comm. on Comm'y Aff., CS/CS/CS/CS/HJR 139, 140 (1989) Staff Analysis 2 (final June 2, 1989) (on file with comm.) [hereinafter Final Staff Analysis].

23. *Id.*

24. *Id.*

25. *Id.* at 3.

26. FLA. CONST. art VIII, § 1(a).

27. *Id.*

28. *Id.* § 2(a).

the Legislature,<sup>29</sup> but the Legislature still retains discretionary power over them.<sup>30</sup> This discretionary power allowed the Legislature to impose mandates as it saw fit.

This unrestrained mandate situation posed particular problems in light of limitations on local governments' revenue generating mechanisms. The Florida Constitution provides that "[n]o tax shall be levied except in pursuance of law."<sup>31</sup> Further, while the state cannot levy ad valorem taxes on real property, all other forms of taxation are preempted to the state unless otherwise provided by law.<sup>32</sup> Local governments are left to rely primarily on ad valorem taxes, service charges, and state-shared revenues for their funding<sup>33</sup> within the limits of the constitution.<sup>34</sup> Although counties and cities may have other lesser revenue sources, including utility service taxes and local option taxes, the state determines the extent of their taxing authority.<sup>35</sup>

Against this bleak fiscal backdrop, the 1989 Florida Legislature addressed the mandate problem. Relying on the 1985 ACIR Report, the Legislature considered five methods to address unfunded mandates: 1) a reimbursement program, requiring local governments to be paid for certain mandates; 2) a sunset provision, requiring local mandates to expire within a set time frame unless re-enacted; 3) a sunrise provision, requiring an extraordinary majority vote to enact unfunded mandates; 4) a monitoring mechanism, to identify and monitor mandate bills during the legislative process; and 5) a fiscal note protocol, to determine the impact of mandate legislation.<sup>36</sup> The final version of the amendment embraces, to an extent, all the alternatives except the sunset provision. An earlier proposal included both the sunset and sunrise alternatives, but gave way in committee to the provisions that were ultimately submitted to the voters.<sup>37</sup> The final joint resolution, replete with exemptions and special provisions, was finally adopted in 1990. However, it was not readily accepted by the Legislature.

29. County and municipal home rule is authorized by chapters 125 and 166 of the Florida Statutes, respectively. *Id.*

30. Final Staff Analysis, *supra* note 22, at 2; *see also* City of Boca Raton v. State, 595 So. 2d 25, 28 (Fla. 1992).

31. FLA. CONST. art. VII, § 1(a).

32. *Id.*

33. Rubin, *supra* note 13, at 594.

34. *See, e.g.*, FLA. CONST. art. VII, § 9(b) (amended 1976) (limiting the millage rate for ad valorem taxation at the county and municipal level).

35. Rubin, *supra* note 13, at 594.

36. Final Staff Analysis, *supra* note 22, at 3.

37. Rubin, *supra* note 13, at 603-06.

A separate initiative petition that would have placed before the voters an amendment prohibiting local mandates altogether unless they were funded, proved to be the catalyst for legislative approval.<sup>38</sup>

### III. ARTICLE VII, SECTION 18

The mandate restriction amendment is composed of five subsections: subsection (a) sets forth the limitation on laws requiring local governments to spend money and provides for exceptions that will allow their passage; subsection (b) sets forth limits on laws that reduce local government authority to raise revenues; subsection (c) limits legislation that would reduce local governments' share of state taxes; subsection (d) sets forth the laws that are exempt from the first three subsections; and subsection (e) provides that the Legislature may enact implementing legislation.<sup>39</sup> For the

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38. Fla. H.R. Comm. on Approp., tape recording of proceedings (May 22, 1989) (on file with author) (comments of Rep. Bloom).

39. The amendment in its entirety reads as follows:

SECTION 18. Laws requiring counties or municipalities to spend funds or limiting their ability to raise revenue or receive state tax revenue.—

(a) 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 unless the legislature has determined that such law fulfills an important state interest and unless: funds have been appropriated that have been estimated at the time of enactment to be sufficient to fund such expenditure; the legislature authorizes or has authorized a county or municipality to enact a funding source not available for such county or municipality on February 1, 1989, that can be used to generate the amount of funds estimated to be sufficient to fund such expenditure by a simple majority vote of the governing body of such county or municipality; the law requiring such expenditure is approved by two-thirds of the membership in each house of the legislature; the expenditure is required to comply with a law that applies to all persons similarly situated, including the state and local governments; or the law is either required to comply with a federal requirement or required for eligibility for a federal entitlement, which federal requirement specifically contemplates actions by counties or municipalities for compliance.

(b) Except upon approval of each house of the legislature by two-thirds of the membership, the legislature may not enact, amend, or repeal any general law if the anticipated effect of doing so would be to reduce the authority that municipalities or counties have to raise revenues in the aggregate, as such authority exists on February 1, 1989.

(c) Except upon approval of each house of the legislature by two-thirds of the membership, the legislature may not enact, amend, or repeal any general law if the anticipated effect of doing so would be to reduce the percentage of a

sake of clarity, this article's use of the word "exception" refers to those mandates allowed under subsection (a), and "exemption" refers to the laws that escape the reach of section 18, as listed in subsection (d).<sup>40</sup>

The Legislature's Final Staff Analysis for section 18 clearly sets forth its intent: "The intent of this proposed constitutional provision is to give local governments greater bargaining power on the subject of unfunded mandates and to protect existing local revenue sources."<sup>41</sup> Earlier versions of the proposed amendment were thought to go much further than the stated intent, and much of the language in the adopted amendment was aimed at preserving that intent.<sup>42</sup> This statement of intent is more restrictive than one which would indicate an intent to curtail unfunded mandates, which is what local governments likely desired.

Perhaps the statement of legislative purpose represents the greatest of all the compromises between local governments and the Legislature. It indicates that the Legislature was willing to present an amendment that would give local governments more of a voice in the legislative mandate process and assist them in maintaining funding. The Legislature recognized the amendment would "affect the legislature's ability to create, reorganize, and abolish programs" and "encourage greater cooperation between . . . all

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state tax shared with counties and municipalities as an aggregate on February 1, 1989. The provisions of this subsection shall not apply to enhancements enacted after February 1, 1989, to state tax sources, or during a fiscal emergency declared in a written joint proclamation issued by the president of the senate and the speaker of the house of representatives, or where the legislature provides additional state-shared revenues which are anticipated to be sufficient to replace the anticipated aggregate loss of state-shared revenues resulting from the reduction of the percentage of the state tax shared with counties and municipalities, which source of replacement revenues shall be subject to the same requirements for repeal or modification as provided herein for a state-shared tax source existing on February 1, 1989.

(d) Laws adopted to require funding of pension benefits existing on the effective date of this section, criminal laws, election laws, the general appropriations act, special appropriations acts, laws reauthorizing but not expanding then-existing statutory authority, laws having insignificant fiscal impact, and laws creating, modifying, or repealing noncriminal infractions, are exempt from the requirements of this section.

(e) The legislature may enact laws to assist in the implementation and enforcement of this section.

FLA. CONST. art. VII, § 18.

40. This follows legislative staff practice. *See also supra* note 11.

41. Final Staff Analysis, *supra* note 22, at 9.

42. *Id.* at 9-10.



levels of government.”<sup>43</sup> But nowhere does the legislative history indicate that the Legislature viewed the amendment as one that would significantly curtail its policy-implementing activity.<sup>44</sup> This point is important in assessing the success of section 18. A discussion of how the amendment was crafted to reflect that intent follows.

Subsection (a) deals with spending mandates, or those mandates that require local governments to spend money. Under its provisions, neither counties nor municipalities are bound by general laws that require them to spend funds unless the Legislature first determines that the law fulfills an important state interest.<sup>45</sup> In addition, the law must meet one of five requirements: the Legislature must appropriate funds for the mandate based on the estimated cost at the time of enactment; the Legislature must authorize the local government to enact a funding source to cover the estimated cost of the mandate; the mandate must be approved by two-thirds of the membership in each house of the Legislature; the mandate must be part of a law that applies to all persons similarly situated, including state and local governments; or the mandate must be necessary to comply with a federal requirement that contemplates local government involvement.<sup>46</sup> The subsection sets out a two-part test that must be met by mandates that require local government expenditures. All such mandates must fulfill an important state interest, and must additionally meet one of the five tests outlined above.<sup>47</sup>

Under this subsection, only local governments are given standing to challenge a mandate, and they are not further required to bring an action unless the State challenges them for noncompliance.<sup>48</sup> The limitation on standing prevents the courts from being otherwise flooded with challenges to general laws,<sup>49</sup> which was one of the concerns with earlier proposals.<sup>50</sup> It is both interesting, and perhaps significant, that the amendment does not begin with language expressly restricting the Legislature, such as, “Notwithstanding any other provision herein, the legislature shall not enact any law . . . .” Instead, the provision begins by stating that local governments are

43. *Id.*

44. *See* FLA. CONST. art. VII, § 18(a).

45. *Id.*

46. *Id.*

47. *Id.*

48. Final Staff Analysis, *supra* note 22, at 5. Local governments are free to bring a declaratory judgment action as well. *Id.*

49. *Id.*

50. *Id.* at 10.

not bound by certain types of general laws.<sup>51</sup> The latter language reads less as a restriction on the Legislature than a right of local governments. Further, the wording of the provision could be read to place the burden on local governments to prove a mandate fails to comply with section 18, as opposed to having the Legislature prove a law passes muster.<sup>52</sup>

The legislative history makes clear that the first prong of the spending mandate's provision, requiring an important state interest, is to be based on a purely legislative determination, not on fact finding.<sup>53</sup> In practice, this prong has proved to be easily met and is seen as weakening the amendment.<sup>54</sup> How the courts will deal with "important state interest" when confronted with a challenge is unclear.<sup>55</sup> It is likely, however, that courts will tend to defer to the legislative determination.<sup>56</sup>

The alternative second prongs to the test in subsection (a) were also the subject of compromise. An earlier proposal was read to prohibit the Legislature, without a two-thirds membership vote, from passing laws pursuant to its police power if the laws affected local government. In response, the amendment's exception for laws that apply to "all persons similarly situated, including the state and local governments" was added.<sup>57</sup> This provision, if interpreted liberally, could allow numerous mandates to be enacted; indeed, it can be said that most laws apply to all similarly situated persons and entities.<sup>58</sup> Local governments view this provision as a troublesome loophole.<sup>59</sup>

There was also concern under an earlier amendment proposal that legislation could be invalidated even if funding was provided in separate legislation.<sup>60</sup> The staff analysis notes that the amendment, as adopted, allows the Legislature to appropriate funds without necessarily tying them

51. FLA. CONST. art VII, § 18(a).

52. *But see* Telephone Interview with Lynn Tipton, Executive Assistant for Intergovernmental Relations, Florida League of Cities (May 26, 1993).

53. Final Staff Analysis, *supra* note 22, at 5.

54. *See infra* text accompanying notes 195, 205.

55. Final Staff Analysis, *supra* note 22, at 11.

56. Florida courts have been extremely deferential to the Legislature in analogous situations. *See, e.g.,* Linscott v. Orange County Indus. Dev. Auth., 443 So. 2d 97 (Fla. 1983) (the Legislature's determination of public purpose must be clearly wrong to be beyond the power of the Legislature).

57. FLA. CONST. art. VII, § 18(a); *see also* Final Staff Analysis, *supra* note 22, at 10.

58. Laws failing to treat those similarly situated in the same manner may raise equal protection questions.

59. *See infra* text accompanying notes 209-12.

60. FLA. CONST. art. VII, § 18(a); *see also* Final Staff Analysis, *supra* note 22, at 10.

to the mandate.<sup>61</sup> Another feared problem was that local governments might later challenge funded mandates, claiming that the funding was inadequate. In response, the amendment reflects that a funded mandate will qualify as an exception under subsection (a) as long as the sufficiency of funding is reasonable at the time of enactment.<sup>62</sup> As such, there should be no danger of later rehearings.<sup>63</sup> Further, while prior proposals would have prohibited mandates that were enacted in response to federal mandates, or those enacted to enable the state to be eligible for federal entitlements, the final language in subsection (a) provided exceptions to avoid these results.<sup>64</sup>

One perceived ambiguity was not remedied before the amendment was adopted. Subsection (a)'s focus on laws "requiring . . . [a] county or municipality to spend funds"<sup>65</sup> could refer to laws that both directly and indirectly require local governments to spend money. This ambiguity may lead to challenges brought against laws, the indirect effects of which require the expenditure of funds. The legislative history acknowledges the ambiguity, and notes that the phrase will likely be subject to later interpretation.<sup>66</sup>

Much of the language in subsection (a) was tailored to keep the focus of the amendment limited to its purpose of giving local governments more bargaining power in the Legislature and helping them maintain current funding levels.<sup>67</sup> The history also reveals that many of subsection (a)'s provisions were added to preserve legislative autonomy.<sup>68</sup> Language in the following subsections was similarly designed with that purpose in mind.

Subsection (b)'s aim is to prevent the Legislature from reducing the revenue sources available to local governments in the aggregate.<sup>69</sup> Similarly, subsection (c) prevents the Legislature from passing laws that reduce the percentage of state tax shared with counties and municipalities

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61. Final Staff Analysis, *supra* note 22, at 10. The staff analysis suggests that the Legislature designate the use of the funds, however. *Id.*

62. FLA. CONST. art. VII, § 18(a); *see also* Final Staff Analysis, *supra* note 22, at 12.

63. Final Staff Analysis, *supra* note 22, at 12.

64. *See* FLA. CONST. art. VII, § 18(a).

65. *Id.*

66. Final Staff Analysis, *supra* note 22, at 11.

67. *Id.* at 9.

68. *See generally id.*

69. FLA. CONST. art. VII, § 18(b); *see also* Final Staff Analysis, *supra* note 22, at 4 (this provision is tied to aggregate revenue sources as of February 1, 1989).

as an aggregate.<sup>70</sup> Under both subsections, a vote of two-thirds of the membership of the Legislature is required for any such legislation to be valid.<sup>71</sup> The language specifically looks to the “anticipated” effect of legislation, making clear that the effect will be determined at the time of enactment.<sup>72</sup> This language, as in the case of subsection (a)’s funding provision, seeks to limit future challenges based on inaccurate predictions.<sup>73</sup>

The use of the word “aggregate” is also significant, since it “clarifies that estimates will be made on the basis of the effect on all local governments grouped together, not on the basis of the effect on one municipality or county.”<sup>74</sup> The existing language appears to allow the passage of laws that would decrease either the revenue raising authority or state-shared revenues in a small number of counties, while at the same time increasing funds in others. As long as the aggregate revenue-raising authority or the percentage of state-shared tax revenues remained the same under the law, the law would be permissible with a simple majority vote.<sup>75</sup> Only if the law reduced the aggregate revenue raising authority or state revenue sharing percentage would a two-thirds vote be required.<sup>76</sup>

Earlier versions of the amendment had raised concerns that the Legislature could be prevented from restructuring local government funding and duties, even where the net result would be a zero decrease in funds.<sup>77</sup> Accordingly, the language in subsections (b) and (c) makes it clear that existing local government revenue sources and state-shared funds are not sacred; it is only the aggregate funds that are to be preserved.<sup>78</sup> It is interesting that the final staff analysis for the joint resolution notes that a two-thirds vote “would allow any restructuring.”<sup>79</sup> This language suggests that a super-majority vote would be needed to enact a law restructuring local government revenue sharing, even where the net effect was zero. As discussed above, a literal reading of the amendment’s language suggests that such a law would not be considered a mandate under the amendment. It is

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70. FLA. CONST. art. VII, § 18(c); *see also* Final Staff Analysis, *supra* note 22, at 4 (February 1, 1989, is also the pertinent date for this provision).

71. FLA. CONST. art. VII, §§ 18(a), 18(c).

72. Final Staff Analysis, *supra* note 22, at 6.

73. *Id.*

74. *Id.* at 11.

75. *See* FLA. CONST. art. VII, § 18(c).

76. *See id.*

77. Final Staff Analysis, *supra* note 22, at 11.

78. *Id.* at 12.

79. *Id.* at 11.

also noteworthy that subsection (c) places limits only on those laws reducing the percentage, rather than the amount, of state tax shared with local governments. Therefore, the Legislature is arguably free to pass laws liberalizing state tax exemptions that would reduce revenues, but that would keep existing percentages intact.<sup>80</sup>

Subsection (c) additionally includes a number of exceptions which permit the enactment of laws reducing state-shared tax revenues without a two-thirds vote.<sup>81</sup> These exceptions include, but are not limited to, laws enacted during a fiscal emergency, and situations “where the legislature provides additional state-shared revenues which are anticipated to be sufficient to replace the anticipated aggregate loss of state-shared revenues.”<sup>82</sup>

To pass a provision under either subsection (b) or (c), a two-thirds vote is required.<sup>83</sup> The two-thirds vote is based on the membership of both houses, rather than being based on those voting.<sup>84</sup> Since the Florida Senate has forty members and the House has 120 members, votes of twenty-seven and eighty would be required to meet the two-thirds vote in each house, respectively. Although this may seem to be a difficult hurdle to overcome, such a super-majority vote is not uncommon.<sup>85</sup>

Yet another indication of compromise can be seen in subsection (d), which lists those laws that are exempt from the amendment’s requirements. Exempt laws include those requiring “funding of pension benefits . . . criminal laws, election laws, the general appropriations act, special appropriations acts, laws reauthorizing but not expanding . . . existing statutory authority, laws having insignificant fiscal impact, and laws creating, modifying, or repealing noncriminal infractions . . . .”<sup>86</sup> Under an earlier proposal it appeared that the mandate restrictions could prevent the passage of appropriations acts,<sup>87</sup> which accounts for its inclusion as an exemption.

Legislators additionally felt that the amendment needed a dollar threshold to trigger the mandate restrictions, without which lawsuits would

80. *See id.* However, 1992 legislation provided for several sales tax exemptions and gave the Legislature full mandate review. They were generally determined to be exempt under the “insignificant fiscal impact” exemption. *See infra* text accompanying note 150.

81. FLA. CONST. art. VII, § 18(c).

82. *Id.*

83. *Id.*

84. Final Staff Analysis, *supra* note 22, at 7.

85. *See infra* text accompanying note 213.

86. FLA. CONST. art. VII, § 18(d).

87. Final Staff Analysis, *supra* note 22, at 13.

flourish.<sup>88</sup> Accordingly, the “insignificant fiscal impact” exemption was included, which lessened the load on legislative staff, since it removed the requirement of preparing fiscal analyses on bills with low price tags.<sup>89</sup> The exemption for laws having an insignificant impact could also prevent general laws coming within the provisions of the amendment if they have only an indirect effect on local government funding.<sup>90</sup> This exemption has been relied upon to enact numerous mandates, due largely in part to the Legislature’s calculation of insignificant fiscal impact.<sup>91</sup>

Finally, subsection (e) allows the Legislature to enact implementing legislation.<sup>92</sup> This provision allows the Legislature to define pertinent terms of the amendment, and also allows statutes to set venue for a challenge under the amendment.<sup>93</sup> Terms that would hopefully be defined in such legislation include “insignificant fiscal impact” and “criminal laws.”

When read against the background of intense anti-mandate sentiment existing at the end of the 1980’s, section 18 appears to be a weapon that was largely dismantled by its own provisions. Local government’s intended purpose of the amendment would have simply been to stop unfunded state mandates. However, the amendment must be read in light of its limited legislative purpose of protecting existing local government revenues and giving localities greater bargaining power in the Legislature.<sup>94</sup> Bearing that intent in mind, the amendment, on its face, appears useful. However, a review of legislative activity in the sessions following the amendment’s adoption, as well as consideration of the current perceptions of counties and cities, indicates that the amendment does not fully succeed, even based on its restricted purposes.

#### IV. ACIR’S RESPONSE

In fulfilling its statutory duties pursuant to section 163.705(3) of the Florida Statutes, ACIR prepared a detailed report in 1991 to inform the Governor and the Legislature about the status of the state mandates imposed

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88. *Id.* at 10-11.

89. *Id.*

90. *Id.* at 11. Laws can indirectly impact local governments by causing them to spend money to promulgate ordinances, or by causing them to use outside counsel more often. *Id.* But see *supra* text accompanying note 66.

91. See *infra* note 115 and accompanying text.

92. FLA. CONST. art. VII, § 18(e).

93. Final Staff Analysis, *supra* note 22, at 7.

94. *Id.* at 9.

on Florida's local governments in the 1991 legislative session.<sup>95</sup> This report was supplemented in both 1992 and 1993 to provide information about the state mandates imposed by the Legislature in those years.<sup>96</sup> These reports provide valuable and comprehensive information regarding mandate legislation passed since the adoption of section 18.<sup>97</sup> After initially suggesting a decrease in mandate activity, the reports reveal that mandate legislation has continued to be enacted, much of it falling within the amendment's exceptions and exemptions.<sup>98</sup>

For the purposes of its reporting activities, ACIR has defined "mandate" to comply with the definition it sees as implicit in section 18.<sup>99</sup> This includes laws that, previous to the amendment's passage, would not have been considered mandates, such as laws that applied proportionately to both the private and public sector,<sup>100</sup> laws applicable to a single jurisdiction, and laws that were optional or impacted non-mandated responsibilities.<sup>101</sup> Mandate reporting under section 18 has led ACIR to be more inclusive in the laws it examines. It may be, however, that legislative staff occasionally interprets "mandate" differently. This is evidenced by laws that appear as mandates in ACIR's post-1990 reports that were never given mandate consideration by legislative staff.<sup>102</sup>

To further help legislative staff make its determinations under the amendment, ACIR has established the ACIR/Local Government Facsimile Network, which allows local governments to provide input regarding mandate legislation.<sup>103</sup> Known as FAXNET, this tool enables ACIR to contact thirty-eight counties and fifty-five cities to acquire reliable information regarding proposed mandate legislation.<sup>104</sup> Legislative staff,

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95. FLORIDA ADVISORY COUNCIL ON INTERGOVERNMENTAL RELATIONS, 1991 REPORT ON MANDATES AND MEASURES AFFECTING LOCAL GOVERNMENT FISCAL CAPACITY, Sept. 1991, 91-3, at i. [hereinafter 1991 REPORT] (providing a fairly detailed background of the mandate problem, and also devoting a section to mandate restrictions and reimbursement programs in other states).

96. FLORIDA ADVISORY COUNCIL ON INTERGOVERNMENTAL RELATIONS, 1992 SUPPLEMENT TO THE 1991 REPORT ON MANDATES AND MEASURES AFFECTING LOCAL GOVERNMENT FISCAL CAPACITY, Oct. 1992, at 3. [hereinafter 1992 REPORT].

97. *See generally id.*

98. *Id.*

99. *Id.* at 5.

100. Here, ACIR uses the example of Workers' Compensation benefits. *Id.* at 5.

101. 1992 REPORT, *supra* note 96, at 5.

102. *See infra* text accompanying notes 157-59.

103. 1991 REPORT, *supra* note 95, at 28.

104. *Id.*

local government officials, and ACIR personnel may initiate a FAXNET transmission, to which local governments typically respond within forty-eight hours.<sup>105</sup>

## V. LEGISLATIVE STAFF PROCEDURES

The leadership of the 1991 House and Senate developed policies to review proposed legislation for mandate issues. The ACIR Report describes the early activity as follows:

Substantive committee staff were charged to provide initial review of proposed legislation for mandates on counties and municipalities. Each chamber designated a committee or ad hoc group to assist committee staff in screening pre-filed bills. These same entities were responsible to monitor [sic] amended bills for mandates. In the Senate, the Committee on Community Affairs assumed this task, with assistance from the Finance, Taxation, and Claims Committee and staff from the Executive Office of the Senate. In the House of Representatives, the Finance & Taxation and Appropriations Committees, together with staff from the Speaker's Office, were given this responsibility.<sup>106</sup>

Fiscal notes are prepared by staff members of those committees considering the legislation. Depending on the status of the legislation under section 18, the Speaker or the Senate President is notified so that the proper action can be taken on the bill.<sup>107</sup>

It was also important to the Legislature that staff members uniformly interpret the provisions of the amendment. In response to that concern, a "3-8-3: Local Mandate Analysis Procedure" was developed.<sup>108</sup> The procedure institutes a flow-chart approach to be used with proposed legislation.<sup>109</sup> Under this approach, each bill is initially reviewed to determine if it can be classified as one of three types of bills: 1) a general bill requiring local governments to spend money or take action requiring the expenditure of money; 2) a general bill anticipated to reduce local government authority to raise aggregate revenue; or 3) a general bill reducing the aggregate local government percentage share of state-shared revenue. If the

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105. *Id.*

106. *Id.* at 22.

107. *Id.*

108. 1991 REPORT, *supra* note 95, at 22-24.

109. *Id.* at 23.



bill can be classified as one of these three types of bills, staff must then determine if any of subsection (d)'s eight exemptions apply. The exemptions include: bills funding previous pension benefits, criminal laws, election laws, general appropriations bills, special appropriations bills, bills re-authorizing existing statutory authority, bills having insignificant fiscal impact, and bills establishing non-criminal infractions. If any one of the eight exemptions apply, the bill is deemed exempt.<sup>110</sup>

Any bill that cannot be classified as exempt must meet requirements that depend on which of the three original classifications apply. If the bill requires the expenditure of money by local governments, the Legislature must formally determine the bill serves an important state interest, and additionally, one of four requirements must be met: 1) estimated funding must be provided; 2) a local funding source must be provided; 3) the bill must require compliance by similarly situated persons; or 4) the bill must be required to comply with a federal mandate. If none of these exceptions apply, the bill must receive a vote of two-thirds of the membership of each house in addition to serving an important state interest.<sup>111</sup>

If the bill reduces the fund raising authority of local governments, there are no substantive exceptions, and the bill must pass with the two-thirds super-majority vote. If the bill reduces local governments' percentage share of state-shared revenues, the bill can be excepted from the mandate restrictions if it provides for enhancements to state tax sources, if there is a proclaimed state fiscal emergency, or if a revenue replacement source is included in the bill. If none of these exceptions apply, a two-thirds vote is required.<sup>112</sup>

The "3-8-3" legislative approach reformats the amendment's provisions into a uniform paradigm for staff members. Bills are first considered to see if they fall within one of the three types of mandates; they are then considered to determine if they fall within one of the eight exemptions to the amendment; if not, the three mandate classifications are then reconsidered to ensure compliance under the amendment.

Legislative guidelines from the 1991 session also reveal the Legislature's interpretation of some of the amendment's terms. For example, exempt criminal laws are interpreted by the guidelines to include laws that define the type of behavior that will subject persons to arrest and criminal sanction, as well as laws related to arrest and pre-trial detention.<sup>113</sup>

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110. *Id.*

111. *Id.*

112. *Id.*

113. 1991 REPORT, *supra* note 95, at 24.

Additionally, laws will be considered exempt under the criminal law exemption if they relate to defense and prosecution or deal with adjudication, sentencing, and implementation of criminal sanctions.<sup>114</sup> “Insignificant fiscal impact” was defined to be any amount less than \$1.4 million for 1991-92, an amount equal to ten cents or less per capita per year.<sup>115</sup>

Staff analyses, the uniform legislative history document in Florida, now devote an entire section to municipal and county mandate restrictions. The section typically appears as Section III, following the Bill Summary (Section I), and the Economic Impact and Fiscal Note section (Section II).<sup>116</sup> Staff first identifies whether the bill under analysis will require the expenditure of funds by local governments, and then addresses whether any exemptions or exceptions apply. If an accurate measure of costs to local governments cannot be determined, the notes will explain which other exemptions or exceptions may be applicable.<sup>117</sup>

## VI. THE 1991 LEGISLATIVE SESSION

### A. Mandate Legislation

During the 1991 legislative session, fourteen mandate bills were

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114. *Id.* This has been interpreted liberally by legislative staff in at least one instance. See *infra* text accompanying note 151.

115. 1991 REPORT, *supra* note 95, at 24.

116. Miscellaneous staff analyses in author's files.

117. By way of example, the following appears under the Mandates Restrictions section in a 1993 Staff Analysis for a bill aimed at streamlining the environmental permitting process:

As noted above, affected counties and municipalities will incur costs related to reviewing applications to determine consistency with local comprehensive plans and land use regulations. While the act provides for reimbursement of such costs to affected reviewing agencies, such reimbursement funds must be shared with state and regional agencies involved in the review process. If there are insufficient funds to completely reimburse all reviewing agencies, the funds are prorated. Thus, there may be instance in which counties and municipalities will be required to expend funds (for which reimbursement would not be provided) in order to comply with this act. Because the amount of any such reimbursed costs cannot readily be determined at this time, the bill may need to include a finding of important state interest and be enacted by a vote of 2/3 of the membership of each house in order to comply with article VII, section 18 (a), Florida Constitution.

Staff of Fla. S. Comm. on Comm'y Aff., CS/CS/SB 1606 (1993) Staff Analysis 5-6 (March 16, 1993) (on file with comm.).

enacted.<sup>118</sup> Most of the mandates (eleven of the fourteen bills) required local governments to either create new services or expand existing ones. The balance of the bills reduced the revenue-generating authority of local governments.<sup>119</sup> The mandate total represented a sharp decrease in the mandate levels of the immediately preceding years.<sup>120</sup> Interestingly, all of the fourteen mandates were determined to be either exempt under subsection (d) of section 18, or excepted under subsection (a).<sup>121</sup>

Thirteen of the fourteen mandate bills were exempt because they were determined to have an insignificant fiscal impact.<sup>122</sup> Those mandates touched on many areas, demonstrating the far reach of section 18. The laws dealt with many subjects, including building permits, taxation, transportation corridors, community development, and health care. In the area of health care, a law was passed increasing the Medicaid reimbursement for out-of-county indigent medical expenses from 80 to 100 percent. A community development law was passed that expanded the information required on the annual reports of local governments with enterprise zones.<sup>123</sup> A law expanding the notice statement on building permits was also included as a mandate.<sup>124</sup> Those mandates that represented revenue reduction measures included a law that broadened the classification of educational property for the purposes of an ad valorem tax exemption. Another law established a maximum amount for the total charges and fees that could be imposed on a party who initiates civil or appellate proceedings in circuit and county courts.<sup>125</sup>

The fourteenth bill passed in response to a federal requirement, and thus enjoyed an exception under the amendment. This bill required the Department of Community Affairs to ensure that energy assessments are conducted before a residence is weatherized.<sup>126</sup> Since this bill qualified for an exception under subsection (a), it also required a finding that it would fulfill an important state interest. However, the ACIR Report is silent as to

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118. 1991 REPORT, *supra* note 95, at 31.

119. *Id.*

120. *Id.* at 27.

121. *Id.* at 31. The ACIR 1991 Report notes that the 1991 session also resulted in the passage of revenue generating legislation which, to some extent, helped offset the impact of the new mandates. *Id.*

122. 1991 REPORT, *supra* note 95, at 32-34.

123. *Id.* at 33.

124. *Id.* at 32.

125. *Id.* at 32-33.

126. *Id.* at 33.

whether that finding was ever made.<sup>127</sup>

The 1991 Legislature also passed a number of bills expanding local government revenue sources. While a number of these bills were deemed to have an insignificant impact on the state, other programs represented substantial funds for local governments. One bill amended the sales tax statute to authorize an additional \$5.5 million in sales tax revenue for cities and counties.<sup>128</sup> Additional sales tax revenue was authorized for those local governments with professional sports facilities or new spring training facilities.<sup>129</sup> Laws also allocated funds to local governments to help them prepare their comprehensive plans.<sup>130</sup>

The 1991 mandate legislation demonstrates how broadly section 18 touches on the legislative process. For example, one might be surprised to find that bills dealing with the notice provisions of building permits would require review under the amendment. The same might also be said of the law requiring additional information on local government annual reports. The seemingly innocuous laws that were tracked by legislative staff, suggests that the Legislature had a heightened awareness of the cost of laws as they were considered, even though virtually all of the laws passed because their fiscal impact was determined to be insignificant.

ACIR's 1991 Report also provides a list of selected mandates that were not passed in that session. While one might think that their failure was due to the cost of the measures, some of the ill-fated mandates had been previously determined to be excepted by the "all persons similarly situated" language in the amendment.<sup>131</sup> A look at those bills is telling. One proposed bill deemed to affect all persons similarly situated dealt with eminent domain, requiring governments to pay cash compensation to billboard owners for the removal of billboards in certain situations.<sup>132</sup> Another proposed bill thought to qualify for the "similarly situated" exception, granted law enforcement employees the same disability benefits as fire fighters.<sup>133</sup> The bills would have unquestionably required local governments to spend significant amounts of money. The bills' broad-based police power character, however, would have allowed their passage under section 18, as long as they were also found to fulfill important state

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127. 1991 REPORT, *supra* note 95, at 33.

128. *Id.* at 35.

129. *Id.* at 36.

130. *Id.* at 35.

131. *Id.* at 38.

132. 1991 REPORT, *supra* note 95, at 38.

133. *Id.*

interests.

### B. *Implementing Legislation*

Pursuant to subsection (e) of the amendment, the 1991 Legislature passed implementing legislation that was vetoed by Governor Chiles.<sup>134</sup> The bill gave direction to any city or county choosing not to comply with a law that was allegedly violative of the amendment, and further established venue for such a challenge. The bill also defined “insignificant fiscal impact.”

Under the bill, known as Senate Bill 2000,<sup>135</sup> a local government that refused to comply with mandate legislation first had to pass an ordinance declaring that the mandate violated article VII, section 18, and that the local government was not bound by the mandate.<sup>136</sup> Within ten days, a certified copy of the ordinance was to be filed with the Secretary of State, who would immediately notify the Governor, the Attorney General, the President of the Senate, and the Speaker of the House.<sup>137</sup> Within thirty days after receiving notice of the ordinance, the Attorney General would file a petition for a writ of mandamus to compel the local government’s compliance with the law; however, if the Attorney General determined that the law on its face failed to meet the amendment’s requirements, he or she could decide not to file the petition for mandamus, and would then have to notify the Governor, the President of the Senate, and the Speaker of the House, of that decision.<sup>138</sup> Venue for the action was placed in the county in which the district court of appeal, having jurisdiction over the county or municipality, was located. All appeals were to be at the First District Court of Appeal.<sup>139</sup> Finally, the implementing legislation defined “insignificant fiscal impact” similarly to the definition in the Legislature’s guidelines: “an amount not greater than the product of the average statewide population for the applicable state fiscal year . . . multiplied by ten cents.”<sup>140</sup>

The Governor found a number of problems with the bill and addressed them in his veto message. First, he underscored the intent of the mandate amendment which, in his view, was “to discourage the Legislature’s

134. Governor’s Veto Message of S.B. 2000, *reprinted in* 2 FLA. S. JOUR. 10 (Spec. Sess. C 1991); *see also* 1991 REPORT, *supra* note 95, at 24.

135. S.B. 2000, *reprinted in* 1 FLA. S. JOUR. 132 (Reg. Sess. 1991).

136. *Id.*; *see also* 1991 REPORT, *supra* note 95, at 26.

137. Fla. SB 2000 (1991).

138. *Id.*

139. *Id.*

140. *Id.*

historical practice of reaping the benefit derived from enacting politically popular programs without facing the responsibility of funding the programs.”<sup>141</sup> The amendment, therefore, represents a strong restriction on the Legislature’s authority to pass mandates, and should not be interpreted to frustrate the will of the electorate, who had passed the amendment by a wide margin.<sup>142</sup> It is notable that the governor’s opinion of section 18’s purpose is more expansive and local government-friendly than the stated purpose of the amendment.

The veto message singled out a number of the bill’s provisions. For example, the Legislature’s definition of “insignificant fiscal impact,” an amount not greater than \$1.4 million, seemed too high, especially when compared to the amount used in the parallel provision applicable to the general appropriations process. That provision defines “insignificant fiscal impact” as an amount not greater than \$50,000.<sup>143</sup> The Governor was also concerned that the legislation placed an enormous burden on any local government that chose to challenge a mandate, since it was required to pass an ordinance and notify the Attorney General of its decision. Further, since the Attorney General was given very little discretion in deciding whether to seek mandamus, the legislation, in effect, forced local governments to spend “sorely needed” revenues to fund mandate challenges.<sup>144</sup> Governor Chiles suggested that ACIR become involved in the implementing legislation process, since it was charged to deal with intergovernmental relations.<sup>145</sup> The Governor’s veto put an end to Senate Bill 2000, and, in the intervening two legislative sessions, there has been no proposal for implementing legislation that has proceeded past the committee hearing stage.

## VII. THE 1992 LEGISLATIVE SESSION

### A. *Mandate Legislation*

The number of legislative enactments increased dramatically in 1992. Thirty-two laws, including fifty-two local government mandates,

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141. Governor’s Veto Message of SB 2000, *reprinted in* 2 FLA. S. JOUR. 10 (Spec. Sess. C 1991); *see also* 1991 REPORT, *supra* note 95, at 24.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

were enacted.<sup>146</sup> Of those laws, many were either exempt from the requirements of section 18 or enjoyed one of the exceptions.<sup>147</sup> Most of the laws were found either to have an insignificant fiscal impact, or met the “important state interest” test and were also funded, affected all persons similarly situated, or passed by the needed two-thirds vote.<sup>148</sup>

Laws determined to be exempt because of their insignificant fiscal impact included, among others, laws increasing emergency medical service license and certificate fees, and laws requiring simultaneous implementation of Unemployment Compensation Law amendments.<sup>149</sup> Other laws that passed by virtue of the insignificant fiscal impact exemption provided sales tax exemptions. For example, laws were passed exempting non-profit organizations from paying sales tax on equipment for pollution discharge cleanup; exempting educational institutions from paying sales tax on works of art; exempting the purchase of feed for ostriches from the sales tax; exempting out-of-state publishers from sales and corporate income taxes in certain situations; exempting Coast Guard auxiliary purchases from the sales tax; and exempting non-profit community cemetery purchases from the sales tax.<sup>150</sup> The laws were identified as reducing the tax base or the sales tax itself. While not clear, the staff apparently felt that the laws represented potential mandate problems under subsection (c), the provision limiting mandates that “reduce the percentage of state tax shared with counties and municipalities as an aggregate . . . .” However, these sales tax exemptions arguably decreased only the total amount of sales tax collected and did not alter the percentage share of the state tax revenue. If this is so, these laws were not mandates. Nevertheless, they were treated as such by legislative staff.

One law enjoyed the criminal law exemption; it imposed a new administrative requirement on law enforcement agencies that seize property under the Florida Contraband Forfeiture Act. It also provided for penalties for noncompliance.<sup>151</sup> Legislative staff determined this law qualified for the criminal law exemption, despite the fact that it was described as an administrative provision.

A number of the 1992 bills enjoyed exceptions under the amendment after first being found to fulfill important state interests. Only one was

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146. 1992 REPORT, *supra* note 96, at 7.

147. *Id.*

148. *Id.*

149. *Id.* at 8, 10.

150. *Id.* at 9-10.

151. 1992 REPORT, *supra* note 96, at 9-10.

excepted because offsetting fees were authorized. That law created a new service that required requiring that federal liens on real property to be filed with the circuit courts rather than the federal district courts.<sup>152</sup> Another law removed a statutory prohibition against including salary incentive pay in the calculation of police retirement benefits.<sup>153</sup> It passed by a two-thirds vote.<sup>154</sup> The subject of a third law, declared to deal with an important state interest, was "potty parity."<sup>155</sup> Under its provisions, newly constructed public or private buildings with public rest rooms must provide a specified ratio of water closets and urinals. This law passed muster since it affected all persons similarly situated.<sup>156</sup>

The 1992 Report is less enlightening in its treatment of a number of other mandates. Eight of the laws enacted during that session were found to raise mandate concerns but were amended in the House or Senate chamber, so there was no accessible documentation as to the applicability of section 18.<sup>157</sup> Fourteen laws were found to contain mandate provisions under the ACIR definition,<sup>158</sup> but the legislative staff failed to conclusively address the problem in the staff analysis. In ACIR's opinion, this could mean that the staff felt either an exemption or exception applied; alternatively, staff may have determined that section 18 was inapplicable.<sup>159</sup> This could indicate a discrepancy between ACIR's mandate definition and that used by legislative staff.

As in the case of the 1991 session, the 1992 session enacted various laws that provided new or expanded revenue sources for local governments. The fiscal impact of the vast majority of these provisions could not be determined.<sup>160</sup> However, a law increasing the cost of documentary stamps translated into an additional \$18.8 million for cities and counties.<sup>161</sup> However, these funds were earmarked for state and local affordable housing programs<sup>162</sup> rather than being freely available to local governments. A law that implemented a state-wide tax amnesty program was determined to

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152. *Id.* at 8.

153. *Id.* at 9.

154. *Id.*

155. *Id.* at 8.

156. 1992 REPORT, *supra* note 96, at 8.

157. *Id.* at 8-11.

158. *See supra* text accompanying notes 99-101.

159. 1992 REPORT, *supra* note 96, at 11.

160. *Id.* at 13-14.

161. *Id.* at 14.

162. *Id.*



yield local governments \$3 million in 1992-93 and \$8.1 million in 1993-94.<sup>163</sup> A law imposing additional fees for child support payments was determined to benefit county clerks of court in the amount of \$1.1 million.<sup>164</sup> Again, even though ACIR describes this law as one generating extra funds for local governments, the new revenue would only benefit clerks of court, rather than local governments in general.<sup>165</sup>

Local governments were also given some leeway in how they handle financial matters. Specifically, laws were passed allowing local governments to use certain tax revenues for expanded purposes.<sup>166</sup> For example, tourist development tax revenues were authorized to be used for museums.<sup>167</sup> Small counties were aided by a law allowing them to use local government infrastructure surtax revenues for operating purposes.<sup>168</sup> New legislation also authorized small counties to use the local option gas tax on motor and special fuel to pay for infrastructure projects.<sup>169</sup>

### B. *Implementing Legislation*

In response to Governor Chiles' veto of the 1991 implementing legislation, the House of Representatives Finance and Taxation Committee sought input from local government representatives and again introduced similar legislation.<sup>170</sup>

Although not enacted into law, the proposed legislation is interesting in how it differed from the 1991 attempt. Once again, the bill required a local government to document its determination that a mandate failed to meet the requirements of section 18 and, therefore, the county or city was not bound by the law. The Attorney General, as in the case of the earlier bill, was given the opportunity to seek a writ of mandamus, and venue was set in the circuit court having jurisdiction over the county or municipality.<sup>171</sup> The 1992 attempt differed most significantly from the 1991 version in its definition of "insignificant fiscal impact." The 1992 bill contained

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163. *Id.*

164. 1992 REPORT, *supra* note 96, at 14.

165. *Id.*

166. *Id.* at 18.

167. *Id.*

168. *Id.* Small counties include those with populations of 50,000 or less as of April 1, 1992. Use of the tax money would be subject to conditions. 1992 REPORT, *supra* note 96, at 18.

169. *Id.*

170. *Id.* at 19.

171. *Id.* at 19-20.

two detailed subsections devoted to the definition.<sup>172</sup>

Under the proposed definition, “insignificant fiscal impact” depended on the population of the affected local governments. The general definition provided that if a mandate affected either counties or municipalities, “insignificant fiscal impact” would respectively equal the product of five cents and the total statewide population or statewide municipal population.<sup>173</sup> If a mandate affected both counties and cities, “insignificant fiscal impact” would be tied to the total of the statewide municipal population and the statewide population.<sup>174</sup> However, under additional provisions of the proposed legislation, the “insignificant fiscal impact” threshold would apparently decrease if the mandate targeted less populated cities and counties.<sup>175</sup> Under this population adjustment formula, the “insignificant

172. Section (2) of the proposed legislation is the relevant provision. It provided:

Section 2. (1) As used in subsection (d) of section 18 of Article VII of the Florida Constitution, “insignificant fiscal impact” means an amount less than:

(a) The product of multiplying by 5 cents the total statewide municipal population, for mandates affecting only municipalities;

(b) The product of multiplying by 5 cents the total statewide population, for mandates affecting only counties; or

(c) The sum of the amounts derived under paragraphs (a) and (b), for mandates affecting municipalities and counties.

(2) Adjustments to insignificant fiscal impact shall be made as follows:

(a) If a mandate affecting only municipalities applies solely to municipalities that have a combined total population of less than 50 percent of the total statewide municipal population, insignificant fiscal impact means an amount less than the product of multiplying by 10 cents the sum of the populations of the affected municipalities.

(b) If a mandate affecting only counties applies solely to counties that have a combined total population of less than 50 percent of the total statewide population, insignificant fiscal impact means an amount less than the product of multiplying by 10 cents the sum of the populations in the affected counties.

(c) If a mandate affecting counties and municipalities applies solely to counties and municipalities that have a combined total population of less than 50 percent of the sum of the total statewide municipal population and the total statewide population, insignificant fiscal impact means an amount less than the product of multiplying by 10 cents the sum of the populations in the affected municipalities and in the affected counties.

(3) For the purposes of this section, “population” means the latest population estimates determined by the Demographic Estimating Conference pursuant to s. 216.136, Florida Statutes, for the applicable state fiscal year.

*Id.* at 20.

173. 1992 REPORT, *supra* note 96, at 19-20.

174. *Id.* at 20.

175. *Id.*

fiscal impact” exemption would be harder to meet where the affected local governments were sparsely populated, since the dollar amount threshold would be tied to their population, rather than to the population on a state-wide basis. In any event, the general formula is notable since it used a five cent multiple rather than the Legislature’s ten cent figure. This adjustable exemption was likely the result of lobbying by local government representatives, since its effect would have been to remove the “insignificant fiscal impact” exemption in certain instances. As previously mentioned, this proposed legislation was not enacted.

## VIII. THE 1993 LEGISLATIVE SESSION

### A. *Mandate Legislation*

In 1993, mandate legislation reached a post-amendment high. Forty-five laws were enacted that contained a total of eighty mandate provisions.<sup>176</sup> As were the majority of the 1992 mandates, most of the 1993 mandate provisions were classified as either exempt or excepted under the amendment’s language.

Sixteen of the exempt mandates were determined to have insignificant fiscal impact, among them a law requiring local governments to provide death benefits to local fire fighters, and another law creating a new program requiring the appointment of interpreters for deaf jurors.<sup>177</sup> Other mandates, classified as laws that would reduce the tax base, were also found to have an insignificant fiscal impact. One such law extends the government leasehold exemption to airport properties. Another expands homestead exemptions for spouses of deceased disabled veterans and spouses with life estates.<sup>178</sup>

Criminal law and federal mandate exemptions were also enacted. A law dealing with prostitution and HIV transmission was determined to be exempt under the amendment’s criminal law provisions. It requires mandatory HIV testing for defendants charged with certain crimes. Counties would incur the cost of the testing while the defendants are in their

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176. FLORIDA ADVISORY COUNCIL ON INTERGOVERNMENTAL RELATIONS, 1993 INTERGOVERNMENTAL IMPACT REPORT, Draft Edition, Aug. 1993, at 5. [hereinafter 1993 REPORT].

177. *Id.* at 6, 7.

178. *Id.* at 9, 10.

custody.<sup>179</sup> Another law, seeking to implement the Americans with Disabilities Act in the area of public transportation, was found to be exempt since it was passed in compliance with federal law.<sup>180</sup>

The 1993 legislation also included a number of laws that were determined to be excepted under the amendment. For example, one law increased the pension subsidy paid by local government employers by \$4 million. Another law requires state and local governments to spend funds to collect and segregate certain types of batteries. Both of these laws were found to fulfill important state interests and applied to similarly situated persons.<sup>181</sup> One law was found to fulfill an important state interest and was funded. It provides that local government involved in emergency management plans must develop their plans consistent with the state's plan.<sup>182</sup>

ACIR included a number of laws in its 1993 report that the legislative staff failed to identify as mandates. Some of these appear to require the expenditure of funds. One law, for example, lowers the blood/breath alcohol level to .08% for DUI's. The Report acknowledges the law will have an impact on county jails; however, staff determined the law was not a mandate.<sup>183</sup> Another law reduces the sales tax charged on milk and juice in vending machines. Again, staff determined that the amendment's language was not applicable to this law.<sup>184</sup>

The 1993 Report acknowledges those mandate provisions that lacked bill analyses to address the mandate problem as well as those mandate provisions that were added to laws within House and Senate chambers.<sup>185</sup> As to the former, the Report states that either an exemption or exception to the constitution's mandate provisions "may apply, but it is not documented in the Constitutional Restriction or Fiscal Impact sections of the staff analyses."<sup>186</sup>

The 1993 legislative activity shows no decrease in mandate activity; if anything, it demonstrates, much as the 1992 legislation, the widespread reliance on exemptions and exceptions to enact mandates.

179. *Id.* at 9.

180. *Id.* at 8.

181. 1993 REPORT, *supra* note 176, at 8.

182. *Id.* at 9.

183. *Id.* at 7.

184. *Id.* at 9.

185. *Id.* at 5.

186. 1993 REPORT, *supra* note 176, at 5.

## B. Implementing Legislation

There were no attempts to enact implementing legislation during the 1993 legislative session.

## IX. LOCAL GOVERNMENT'S ASSESSMENT

Since there have been virtually no cases construing section 18,<sup>187</sup> we are left to consider local government's critique of legislative activity in the wake of the amendment. Close observers of the post-amendment legislative activity raise questions about the effectiveness of the provision in light of the Legislature's interpretation of section 18's language. That interpretation will be very persuasive in the event of later challenges.<sup>188</sup>

Depending on which level of government is offering an opinion, differing views of the amendment emerge. Generally speaking, the Florida League of Cities has been more positive about the effect of the amendment than has been the Florida Association of Counties.<sup>189</sup> However, each county and municipality in the state is affected differently, depending on its peculiarities, and accordingly, the views expressed below are not meant to accurately reflect the views of all of Florida's local governments.

According to the League of Cities, Florida cities are generally "thrilled" with the passage of section 18.<sup>190</sup> The amendment is viewed as a success because it requires the mandate issue to be faced head-on early in the legislative process, and forces an awareness on the part of legislators.<sup>191</sup> Many freshman legislators arrive in Tallahassee with many good ideas, but without any thought as to how they will be funded. Put another way,

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187. As of the writing of this article, only one case has construed the constitutional provision. See *In re B.C.*, 610 So. 2d 627, 628 (Fla. 1st Dist. Ct. App. 1992) (holding that article VII, section 18 operates prospectively).

188. See *Greater Loretta Improvement Ass'n v. State ex rel. Boone*, 234 So. 2d 665, 669 (Fla. 1970) ("[W]here a constitutional provision may well have either of several meanings, it is a fundamental rule of constitutional construction that, if the Legislature has by statute adopted one, its action in this respect is well-nigh, if not completely, controlling.").

189. The author spoke to representatives of both the League of Cities and Association of Counties, and uses their views in this article to depict the general views of Florida's cities and counties, respectively.

190. Tipton, *supra* note 52.

191. *Id.*

government will run out of money before it runs out of ideas.<sup>192</sup> The amendment has helped to open the eyes of legislative newcomers.<sup>193</sup>

While the League of Cities is generally optimistic about the amendment and has pledged to work closely with legislators to deal with individual mandate issues,<sup>194</sup> it does pinpoint a few concerns. One problem stems from the ease with which the "important state interest" requirement can be met. It appears that a legislator merely has to say that a bill fulfills such an interest and the hurdle is met.<sup>195</sup> Once that simple step is taken, a mandate will qualify for an exception under section 18 if any of subsection (a)'s exceptions are met.<sup>196</sup> Viewed in this manner, the exceptions to the mandate restriction are really nothing more than additional exemptions.

A second concern raised by the League of Cities is the lack of legislation that defines "insignificant fiscal impact." The Legislature's current use of \$1.4 million<sup>197</sup> as the threshold below which an insignificant fiscal impact will be found is somewhat arbitrary and leads to an easier finding of an exemption. However, there may be some benefit in not having the term defined by way of implementing legislation, since it could give a challenging local government more leeway to argue that a mandate under this guideline is, in fact, significant.<sup>198</sup> Whether there is implementing legislation or not, the League's position is that the state would have to shoulder the burden of demonstrating that any mandate has an insignificant fiscal impact or is otherwise exempt or excepted from section 18's reach.<sup>199</sup>

Florida's Association of Counties gives section 18 a less favorable review. This is due, in part, to a feeling that county services are more broad-based than those of cities, which in turn makes counties more susceptible to mandate legislation.<sup>200</sup> As are the cities, counties are

192. *Id.*

193. *Id.*

194. For example, the League has used ACIR's FAXNET. *See supra* text accompanying note 103-05.

195. Tipton, *supra* note 52.

196. These include funding of the enactment, authorizing a funding source, approving the law by a two-thirds vote; finding that the law applies to all persons similarly situated; or finding that the law is required to comply with a federal mandate.

197. This figure is based on a Florida population of 14 million applied to a ten cents per capita formula.

198. Tipton, *supra* note 52.

199. *Id.*

200. Telephone Interview with Alma Gonzalez-Neimeiser, Legislative Director, Florida Association of Counties (May 26, 1993).

dissatisfied with section 18's exemptions, particularly the criminal law and "insignificant fiscal impact" exemptions.

Criminal laws are not defined in the amendment, and counties would be pleased if the term was defined to encompass only those laws creating criminal liability and fixing punishment. Due to the silence of the amendment and the absence of any implementing legislation, counties point out that a law requiring local government expenditures for prisons could be exempt.<sup>201</sup> This fear is not unfounded. The law passed during the 1992 session requiring law enforcement agencies to comply with new administrative requirements in contraband-related seizures was determined by staff to be exempt as a criminal law.<sup>202</sup> Similarly, the 1993 mandatory HIV testing law for certain criminal defendants also passed as an exempt criminal law.<sup>203</sup>

Counties further urge implementing legislation to define "insignificant fiscal impact." The current use of a \$1.4 million threshold before fiscal significance comes into play does not correspond to the \$50,000 figure the state uses to determine whether a fiscal impact is significant.<sup>204</sup> Furthermore, under current procedures, legislative staffers are left to determine the matter themselves, sometimes in situations where reliable figures are not available.

While the exemptions may be the largest source of the counties' concern, the procedures for establishing the exceptions under the amendment also raise questions. As do cities, counties point to the ease with which an important state interest is determined. Often the language is merely inserted in a bill with little, if any, debate or discussion.<sup>205</sup> The 1992 law allowing the inclusion of incentive pay in police retirement benefits, as well as the law aimed at achieving "potty parity," were both determined to fulfill important state interests.<sup>206</sup> Arguably, anything the Legislature does is

201. *Id.* It is likely, however, that such a law could also qualify as an exception if it applied to all counties under the "all persons similarly situated" exception.

202. 1992 REPORT, *supra* note 96, at 8.

203. 1993 REPORT, *supra* note 176, at 9.

204. Gonzalez-Neimeiser, *supra* note 200. The Revenue Estimating Conference, created by Florida Statutes section 216.053, uses the \$50,000 figure to determine fiscal significance. See FLA. STAT. § 216.053 (1991); see also Governor's Veto Message of SB 2000, reprinted in 2 FLA. S. JOUR. 10 (Spec. Sess. C 1991).

205. Gonzalez-Neimeiser, *supra* note 200.

206. 1992 REPORT, *supra* note 96, at 8. Unfortunately, the Report fails to articulate exactly what important state interests are involved.

important to the state.<sup>207</sup> The 1993 law increasing local government pension subsidies and regulating battery collection also passed under this provision.<sup>208</sup>

Counties also point to a more subtle problem. If the important state interest determination is made, a law will be excepted from the amendment's prohibition if "the expenditure is required to comply with a law that applies to all persons similarly situated, *including the state and local governments . . .*"<sup>209</sup> This exception has been relied upon by legislative staff and is becoming more of a concern to counties.<sup>210</sup> Because of the language which appears to treat local governments as "persons" for the purposes of the exception, a law could be deemed to fall within the exception if it equally affects all counties. Counties see this as a less conspicuous way to bypass the amendment's provisions.<sup>211</sup> For example, the "potty parity" law passed under this exception.<sup>212</sup>

A further claim made by the counties is that the two-thirds majority vote exception is not difficult to meet, since a two-thirds vote, even of the full membership, is not uncommon for many laws. This appears to be true. By way of example, of those general bills originated in the Senate during the Regular Session of the 1992 Legislature, 138 were passed by both houses. Of those bills, only twelve, or just less than ten percent, failed to meet the two-thirds membership vote.<sup>213</sup> Counties would prefer to see a three-fourths majority vote in its place.<sup>214</sup>

Even though counties appear less optimistic about the impact of section 18, they are not without any favorable response. The amendment is perceived as helping counties maintain revenues, particularly state-shared funds such as those generated by the sales tax.<sup>215</sup> Since any attempt by

207. The subjects determined to fulfill important state interests for the purposes of section 18's exceptions contrast sharply with those deemed by the courts to serve an important state interest in other constitutional law contexts. *See, e.g.,* Public Health Trust v. Wons, 541 So. 2d 96 (Fla. 1989) (preservation of life); Winn-Dixie Stores, Inc. v. State, 408 So. 2d 211 (Fla. 1981) (promoting the disclosure of campaign contributors); Kendrick v. Everheart, 390 So. 2d 53 (Fla. 1980) (protecting the welfare of children).

208. 1993 REPORT, *supra* note 176, at 8.

209. FLA. CONST. art. VII, § 18 (emphasis added).

210. Gonzalez-Neimeiser, *supra* note 200.

211. *Id.*

212. 1992 REPORT, *supra* note 96, at 8.

213. LEGISLATIVE INF. DIV., JOINT LEGISLATIVE MANAGEMENT COMM., FLA. LEGIS., FINAL LEGISLATIVE BILL INFORMATION, 1992 REGULAR SESSION 5, 22-194 (1992).

214. Gonzalez-Neimeiser, *supra* note 200.

215. *Id.*



the Legislature to redistribute revenue sharing to the detriment of local governments would bring section 18 into play, the Legislature has had to look for other ways to improve the state's fiscal condition.<sup>216</sup> The result has been more of a hands-off attitude toward local governments' existing funding. In fact, recent sessions have attempted to help local governments by passing laws authorizing more flexibility in collecting revenues at the local government level.<sup>217</sup>

Counties do agree that the amendment institutionalizes the mandate issue and forces the Legislature to confront it early on. While the political realities of trade-offs between local governments and the Legislature continue, the mandate provision seems to work more to the advantage of local governments, who were forced to work with less leverage before the amendment's passage. In that respect, the amendment has had significant impact.<sup>218</sup>

Despite the limited favorable views of Florida's counties and cities, any individual local government may be more or less pleased with the amendment, depending on that locality's particular circumstances. For example, in spite of the promise of section 18, the city of Fort Lauderdale has been losing money because its permanent population is decreasing. Since its share of state sales tax revenues depends on the population base,<sup>219</sup> Fort Lauderdale's share has decreased in recent years. Section 18 does not prevent that type of revenue loss.<sup>220</sup> To a certain extent, Fort Lauderdale does not see the amendment as necessarily helping it maintain its existing level of funding. In fact, Fort Lauderdale is further concerned that the amendment does not prevent the Legislature from separating large ticket items into a number of smaller components to enable it to pass a number of bills under the "insignificant fiscal impact exemption."<sup>221</sup> Cities such as Fort Lauderdale also struggle to meet federal mandates and mandates that pre-date the amendment's passage, which are also not implicated by section

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216. *Id.* Ms. Gonzalez-Neimeiser used the example of a law that repealed certain sales tax exemptions. The law resulted in more state funds. The legislative alternative would have been to cut back on local governments' share of sales tax funds. The latter course would have required compliance with section 18; the legislature opted for the former course of action. *Id.*

217. 1992 REPORT, *supra* note 96, at 8-10.

218. Gonzalez-Neimeiser, *supra* note 200.

219. See FLA. STAT. § 218 (1991).

220. Telephone Interview with Terry Sharp, Budget Director, City of Fort Lauderdale, Fla. (June 8, 1993).

221. *Id.*

18.<sup>222</sup> In the face of these difficulties, cities such as Fort Lauderdale are having to find help beyond section 18 to combat their fiscal problems.<sup>223</sup>

It is fair to say that local governments see the amendment as a mixed blessing. While it has created a legislative awareness of the mandate problem, the amendment's provisions nevertheless allow many mandates to be enacted, and do not help local governments comply with pre-existing mandates. Local governments are also awaiting almost certain mandates that would be allowed under the amendment, including federal environmental mandates and state mandates pertaining to the court system.<sup>224</sup>

## X. CONCLUSION

The great expectations harbored by struggling local governments have not been fully met by article VII, section 18, of the Florida Constitution. This is at once made apparent by the steady and dramatic increase in mandate legislation since the amendment's passage. At its worst, this spiral may indicate a legislative belief that any mandate can be made to fit one of the constitution's exemptions or exceptions. However, when considered in light of its articulated purpose—to give local governments greater bargaining power on the subject of unfunded state mandates and to protect local revenue sources—section 18 reaches some level of success. Cities and counties generally agree that the measure has institutionalized, at an early stage of legislation, the mandate issue, and that it has helped, to a certain extent, maintain existing funding.

Before the issue loses momentum, local governments should lobby for implementing legislation to restrict the Legislature's reliance on both the criminal law and "insignificant fiscal impact" exemptions.<sup>225</sup> A limiting clarification of the "similarly situated persons" exception should also be considered. Such legislation should also assign venue for future disputes and should expressly place the burden of demonstrating compliance with the

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222. *Id.* For example, 85% of Fort Lauderdale's water treatment costs stem from federal and state mandates that pre-dated section 18.

223. For example, some older cities are finding themselves working with counties to help maintain funding in the face of population loss to suburban areas. Telephone Interview with George Hanbury, City Manager of Fort Lauderdale, Fla. (June 4, 1993).

224. Tipton, *supra* note 52; Gonzalez-Neimeiser, *supra* note 200.

225. Tipton, *supra* note 52. Generating the legislative interest necessary to enact implementing legislation may prove difficult. There was no effort to pass implementing legislation in the 1993 legislative session. There is a feeling that the Legislature may believe it has provided enough assistance to local governments by originating the amendment. *Id.*

amendment on the Legislature. Other ambiguities in the amendment will likely have to await judicial determination. In the meantime, section 18 leaves Florida's local governments better off than they were prior to its adoption, but they are not yet where they want to be. To paraphrase the remarks of one city official, before section 18 was adopted, local governments operated in quicksand; now they have touched bottom, but they are still waiting for someone to throw them a rope.<sup>226</sup>

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226. Hanbury, *supra* note 223.