IN THE DISTRICT COURT OF APPEAL OF FLORIDA,
FOURTH DISTRICT

CASE NO. 4D12-4325

SHERYL STECKLER, in her official capacity as Inspector General of Palm Beach County, Florida,

Appellant,

V.

TOWN OF GULF STREAM, VILLAGE OF TEQUESTA, CITY OF RIVIERA BEACH, TOWN OF JUPITER, CITY OF DELRAY BEACH, TOWN OF PALM BEACH SHORES, TOWN OF MANALAPAN, TOWN OF MAGNONIA PARK, CITY OF PALM BEACH GARDENS, TOWN OF HIGHLAND BEACH, TOWN OF LAKE PARK, CITY OF WEST PALM BEACH, TOWN OF OCEAN RIDGE, CITY OF BOCA RATON, municipal Corporations of the State of Florida, PALM BEACH COUNTY, a political subdivision, And SHARON R. BOCK, in her Official capacity as the Clerk & Comptroller of Palm Beach County, Florida,

Appellees.

INITIAL BRIEF OF APPELLANT, SHERYL STECKLER, in her official capacity as Inspector General of Palm Beach County, Florida

Appeal of an Order, which is final as to the Appellant, of the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida

Robert B. Beitler
Attorney for Appellant
Inspector General
Palm Beach County P.O. Box 16568
West Palm Beach, FL 33416
Fla. Bar No. 327751
Email: RBeitler@pbcgov.org
Tel: 561-233-2350
Fax: 561-233-2370

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PREFACE

This is an appeal from an Order rendered by the circuit court on November 19, 2012, which denied the Inspector General's Motion to Intervene in a legal action challenging various aspects of the Inspector General's funding.

Appellant Sheryl Steckler will be referred to as "the IG."

Appellee Municipalities, plaintiffs below, will be referred to as "the Municipalities."

Appellee Palm Beach County, defendant below, will be referred to as "the BOCC."

Appellee Sharon R. Bock, in her Official capacity as Clerk & Comptroller of Palm Beach County, Florida, intervenor below, will be referred to as "the Clerk."

The county's Inspector General Ordinance, Chapter 2, Article XII of the Palm Beach County Code of Ordinances, will be referred to as "the IG Ordinance".

References to the record throughout this Initial Brief will be made to the IG's Appendix, and referred to as "R" with pages numbered 1 through 548, except that any reference to the transcript of the hearing below will be designated "T", with pages numbered 1 through 32.

STATEMENT OF THE FACTS AND OF THE CASE

The Inspector General of Palm Beach County ("the IG") is a government official whose position was mandated in the county Charter by 72% of the voters on November 2, 2010, when they were presented the following ballot question:

> "Shall the Palm Beach County Charter be amended to require the Board of County Commissioners to establish by ordinances applicable to Palm Beach County and all municipalities approving this amendment: a Code of Ethics, an independent Commission on Ethics funded by the County Commission, and an independent Inspector General funded by the County Commission and all other governmental entities subject to the authority of the Inspector General?" (R55)

The ballot question was the BOCC's and County Attorney's summary of the ethics reform Charter provisions that would be enacted by an affirmative vote.

As a result of this vote, Article VIII, titled "Ethics Regulation" became part of the county Charter. (R51-55) Section 8.3 of the Charter now requires the establishment of an Office of Inspector General (OIG) "to provide independent oversight of publicly funded transactions, projects, and other local government operations." It also requires that the IG be chosen by a "Selection Committee" comprised of the State Attorney, the Public Defender, and the five members of the independent Commission on Ethics, and that the IG be retained for a fixed term. During that term the IG may only be removed for cause, and then only by a supermajority of both the Selection Committee and the Board of County Commissioners. It also specifies a minimum funding level for the IG:

> The Office of Inspector General shall be funded at minimum in an amount equal to one quarter of one percent of contracts of the County and all other governmental entities subject to the authority of the Inspector General (the "Funding Base") as determined by the Implementing Ordinance. (R52)

Because the voters in each of the County's 38 municipalities approved the ballot question, the IG has oversight authority relating to each of the 38 municipal governments, as well as authority relating to the BOCC and its departments.

Pursuant to Charter section 8.4, an "Initial Ordinance Drafting Committee," comprised of three county representatives, three municipal representatives, and the IG, met over a period of months. Meetings were locally televised and open to the public, and many attended and provided comments. In the end, the committee unanimously agreed on language for an implementing IG Ordinance to present to the BOCC. In May, 2011, the BOCC unanimously approved the draft ordinance without substantive change. (R57-59) The IG Ordinance (R60-69) became effective on June 1, 2011.

In September, 2011, in accordance with Charter and IG Ordinance requirements, the BOCC adopted the OIG's budget for the fiscal year beginning October 1, 2011. Collectively, the 38 municipalities were to pay 45% ($1.263 million), with the BOCC projected to pay the remaining 55% ($1.536 million) of the OIG's County/Municipal Budget.

As required by the IG Ordinance, on or about October 10, 2011, the Clerk sent each of the county's 38 municipalities a bill for its respective quarterly share of the IG's funding.

On November 14, 2012, 15 of the county's municipalities filed a Complaint for Declaratory Relief in the circuit court in Palm Beach County (Wellington later withdrew). (R1-31, Exhibits R32-83) In paragraph 2 of the complaint the Municipalities assert: "The Municipalities do not bring this action to overturn the Inspector General Program. Instead, the Municipalities bring this action solely to contest the funding mechanism for the Program." (R8) The complaint contains four counts.

a. In count I the Municipalities assert that the requirement that they contribute to IG funding constitutes an unlawful tax. (R18-21)

b. In count II the Municipalities assert that the requirement that they contribute to IG funding constitutes an unlawful double billing for the same services. (R21-23)

c. In count III the Municipalities challenge the Ordinance's mechanism for determining the IG's annual funding, claiming that it results in too much funding. (R23-25)

d. In count IV the Municipalities assert that the requirement that they contribute to IG funding constitutes an unlawful interference with their

home rule authority under Art. VIII § 2(b), Fla. Const. and Chapter 166, Fla. Stat., and specifically violates their budgetary authority under §166.241, Fla. Stat. In this count the Municipalities also challenge the procedures in the IG Ordinance for approving an annual budget for the IG which exceeds the minimum specified, and the procedures for authorizing "supplemental funding" during the year for the IG. (R25-28)

The BOCC was the named defendant in this suit. The IG was neither named as a defendant nor served.

Eight days later, on November 22, 2011, the Clerk filed a Motion to Intervene (R81-95), attaching her Complaint in Intervention (R96-125). The Clerk stated that she "takes no position on the merits of the complaint...." (R-98) Her only request for relief was that at the end of the case, if the Court determined that "the funding mechanism in the IG Ordinance is not lawful," that the Court then declare whether the Clerk should:

> "a. permanently cease any further collection efforts (including without limitation preparing allocation schedules, invoicing, collecting, and depositing funds received into the IG Account) pursuant to the Ordinance with respect to any of the Municipalities;
>
> b. return all funds paid by Municipalities pursuant to the Ordinance that have been segregated and maintained pending the resolution of this Lawsuit;
>
> c. refrain from processing or attesting to any payments from the IG Account with respect to funds budgeted to be received from the Municipalities pursuant to the Ordinance; and

d. otherwise perform her duties with respect to the IG account in accordance with the remaining provisions of the Ordinance and constitutional, statutory and other duties imposed on the Clerk & Comptroller under applicable law." (R-107)

But in the cover letter to the County Attorney, dated November 22, 2011, which accompanied delivery of her Motion to Intervene and Complaint in Intervention (R196-198), the Clerk advised the BOCC that prior to receiving direction from the court, unless the BOCC agreed to fund any deficit in the OIG budget resulting from the non-payment by the suing municipalities, and further agreed to refund any expenditures of funds submitted by paying municipalities in the event the municipalities prevailed in their lawsuit, she would:

a. Discontinue further collection efforts pursuant to the Ordinance;

b. Segregate all funds paid by Municipalities under the ordinance; and

c. Discontinue processing payments from the IG Account, once County funds are exhausted.

The BOCC did not provide the requested guarantees to the Clerk, who then implemented this, including prohibiting the expenditure of funds received under the IG Ordinance from municipalities not participating in the lawsuit.

All parties agreed to the Clerk's intervention and on December 1, 2011, an Agreed Order was filed granting the Clerk's Motion to Intervene. (R126-129)

On December 5, 2011, the BOCC filed its Answer, Affirmative Defenses, and Counterclaim. (R130-143) In its Counterclaim it demanded damages from the Municipalities at the conclusion of the lawsuit, based on the premise that the absence of funding from the Municipalities during the pendency of the lawsuit will result in OIG oversight that is "substantially less comprehensive than it would be with full funding of the OIG." The BOCC further alleged that, as a result of the underfunding of the OIG, the County had already been damaged "by the OIG's diminished oversight of its vendors and other activities the OIG conducts." (R139)

On December 15, 2011, the Clerk filed an Amended Complaint in Intervention, but the positions mentioned above in her initial complaint were unchanged. (R154)

All parties, including the Clerk, then executed a Stipulation to Abate the proceedings in order to engage in dispute resolution proceedings under Chapter 164, Florida Statutes. (R156-160) The Agreed Order of Abatement was filed on December 21, 2011. (R166-168)

On May 21, 2012, a Mediation Report was filed which advised that the parties had reached a total impasse and Court action was required. (R172-173)

On June 7, 2012, the IG filed a Motion to Intervene in the case. (R180-190) Attached to the motion were pleadings the IG proposed to file after intervention which were intended to address the ongoing underfunding of the OIG. (R191-221)

On June 12, 2012, the IG filed an initial Notice of Hearing, setting the Motion to Intervene for hearing on Friday, July 6, 2012. (R222-226)

On June 19, 2012, an Agreed Order was entered lifting the abatement of the proceedings. (R232-236)

On June 27, 2012, the Clerk filed a Response to Inspector General's Motion to Intervene, in which she objected to the IG's intervention. (R237-243)

The next day, June 28, 2012, the BOCC filed its Response to the Inspector General's Motion to Intervene, in which it objected to the IG's intervention. (R245-256)

The following day, June 29, 2012, the Municipalities filed Plaintiffs' Response in Opposition to the Inspector General's Motion to Intervene. (R257-264)

On July 5, 2012, the day before the scheduled hearing, the assigned judge entered an Order of Disqualification removing herself from the case, which necessitated a rescheduling of the hearing. (R265-267)

After the case was reassigned, on July 18, 2012 the IG filed a new Notice of Hearing, rescheduling the hearing for September 14, 2012. (R277-278)

On July 26, 2012, the BOCC filed a Motion for Leave to Amend its Answer, Affirmative Defenses, and Counterclaim. An "Unopposed Order" granting this

motion was filed on August 3, 2012. (R307-308), approving the filing of the Amended Answer, Affirmative Defenses, and Counterclaim. (R291-306)

On September 4, 2012, the office of the assigned circuit judge advised that the hearing on the IG's Motion to Intervene scheduled for September 14, 2012, needed to be rescheduled.

On September 10, 2012, the IG filed an Amended Notice of Hearing, rescheduling the hearing for October 24, 2012. (R400-401)

On October 9, 2012, the Inspector General's Amended Memorandum of Law in support of the Motion to Intervene was served on the parties and provided to the judge, who filed it on October 23, 2012. (R402-412)

On October 15, 2012, the Clerk filed a pleading titled Opposition to Inspector General's Motion to Intervene and Amended Memorandum of Law on Motion to Intervene. (R413-422)

The hearing on the Inspector General's Motion to Intervene was finally conducted on October 24, 2012. A transcript of the hearing is included in the Appendix. (T1-32)

On November, 19, 2012, an Order was rendered denying the Motion to Intervene. (R423-424) That Order is the subject of this appeal.

SUMMARY OF THE ARGUMENT

Charter provisions requiring an independent county IG, and providing minimum funding for the IG, were a key component of an ethics reform initiative approved by 72% of the voters in November, 2010.

The case below has one primary subject, a challenge to the IG's funding. The parties advanced two primary arguments for denying the IG's Motion to Intervene, that the IG lacked capacity to sue and lacked standing.

The IG has the capacity to sue because the IG is an adult natural person who is sui juris with no legal disability. Additionally, the IG Ordinance expressly specifies the right of the IG to enforce all of its provisions in court, also providing the capacity to sue. A ruling that the IG lacks the capacity to sue would nullify the requirements of the IG Ordinance by making them unenforceable and therefore voluntary instead of mandatory.

The IG has standing to intervene because the IG is the primary, perhaps the only, party directly at risk from the plaintiffs' claims. In fact, as to some of the plaintiffs' claims, the defendant BOCC would also benefit financially if the plaintiffs prevail.

An additional issue was raised in the BOCC's counterclaim, the failure to fully fund the IG during the pendency of the suit, which directly impacts the IG and also provides the IG standing to intervene.

As to each of these matters the IG is a "necessary party" to the litigation. The failure to include a necessary party constitutes reversible error, and requires the reversal of any portion of a judgment that may affect the excluded party.

The denial of the Motion to Intervene also violates constitutional due process requirements.

The IG is the primary party whose interests are in jeopardy and the primary party being harmed by the current failure to fund, and should have been named as a party defendant at the outset. The plaintiffs' failure to include the IG does not entitle them to a permanent advantage in the case, or sentence the IG to a permanent disadvantage after intervention.

The Municipalities claim that they do not intend to attack the entire IG program but by their conduct, they and the other Appellants are doing precisely that.

STATEMENT OF JURISDICTION

This is an appeal of the Order entered by the circuit court denying the Inspector General's Motion to Intervene. This court has jurisdiction pursuant to Article V, §4(b)(1) of the Florida Constitution, and Fla. R. App. P. 9.030(b)(1)(A).

This Order is final as to, and appealable by, the IG. *Adhin v. First Horizon Home Loans*, 44 So. 3d 1245, 1249 (Fla. 5th DCA 2010); *Citibank, N.A. v. Blackhawk Heating & Plumbing Co.*, 398 So. 2d 984, 986 (Fla. 4th DCA 1981).

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING THE INSPECTOR GENERAL'S MOTION TO INTERVENE.

Standard of Appellate Review

Ordinarily, a trial court's denial of a motion to intervene is reviewed for an abuse of discretion. However where, as here, the appeal concerns pure questions of law, the standard of review is de novo. *Adhin v. First Horizon Home Loans*, 44 So. 3d 1245, 1249 (Fla. 5th DCA 2010). Because no disputes of material facts relating to the Motion to Intervene were ever raised, this standard applies to all sub-issues involved. Alternatively, under an abuse of discretion standard the trial court's ruling was clear error. *Citibank, N.A. v. Blackhawk Heating & Plumbing Co.*, 398 So. 2d 984, 986-987 (Fla. 4th DCA 1981).

General Statement

The trial court's Order denying the IG's Motion to Intervene failed to provide any rationale for the decision. The two main arguments by the parties in opposition to intervention were that the IG lacked the capacity to sue and that the IG lacked standing.

A. The Inspector General Has the Capacity to Sue

In urging the trial court to deny the IG's Motion to Intervene, the parties all challenged the IG's capacity to sue. Under Fla. R. Civ. P. 1.120(a), capacity to sue

is presumed and any party seeking to challenge one's capacity must raise the issue through a "specific negative averment."

> "'Capacity to sue' is an absence of legal disability which would deprive a party of the right to come into court. *59 Am.Jur.2d Parties § 31* (1971). This is in contrast to 'standing' which requires an entity have sufficient interest in the outcome of litigation to warrant the court's consideration of its position." (cites omitted)

Keehn v. Mackey, 420 So. 2d 398, 400, headnote 1 (Fla. 4th DCA 1982).

The IG filed the Motion to Intervene as "Sheryl Steckler, in her official capacity as Inspector General of Palm Beach County." This is precisely how the Clerk filed her own Motion to Intervene (R84), which was readily agreed to by all parties. The IG is an adult natural person who is sui juris with no legal disability. The IG therefore has the capacity to sue. This is a matter involving constitutional due process.

No party suggested any legal disability the IG may have. Nor did any party present a single case in the history of Florida jurisprudence where a court has ruled that an adult without legal disability lacked the capacity to sue.

The County cited only two cases to support its argument that the IG lacks capacity to sue, *Larkin v. Buranosky*, 973 So. 2d 1286 (Fla. 4th DCA 2008) and *Johnston v. Meredith*, 840 So. 2d. 315 (Fla. 3d DCA 2003) (R247). But these cases are factually and legally distinguishable from the instant case. Both cases stand only for the proposition that, under Florida law, unincorporated associations

have no legal existence, and hence no capacity to sue. However, their individual members can sue. IG Steckler is not an unincorporated association with no legal existence.

Additionally, the IG Ordinance expressly affirms the IG's capacity to sue by specifying the IG's right to enforce the entire Ordinance in circuit court in Palm Beach County. It states:

a. "The inspector general may exercise any of the powers contained in this article upon his or her own initiative." Section 2-423(7) (R62), and

b. "This article is enforceable by all means provided by law, including seeking injunctive relief in the Fifteenth Judicial Circuit Court in and for Palm Beach County." Section 2-431. (R69)

And section 2-423(3) specifies that the IG may enforce subpoenas in any circuit court in Florida, reiterating the IG's capacity to sue:

> In the case of a refusal to obey a subpoena served to any person, the inspector general may make application to any circuit court of this state which shall have jurisdiction to order the witness to appear before the inspector general and to produce evidence if so ordered, or to give testimony relevant to the matter in question.

The capacity to sue is critical to the viability of the IG Ordinance, which requires the IG to:

> initiate, conduct, supervise and coordinate investigations designed to detect, deter, prevent and eradicate fraud, waste, mismanagement, misconduct, and other abuses by elected and appointed county and municipal officials and employees, county

> and municipal agencies and instrumentalities, contractors, their subcontractors and lower tier subcontractors, and other parties doing business with the county or a municipality and/or receiving county or municipal funds. Section 2-422

To enable the IG to accomplish that mandate, the Ordinance imposes certain obligations on governmental officials, employees, and contactors, subcontractors, and lower tier subcontractors subject to the IG's authority, including:

a. The obligation to;

> "fully cooperate with the inspector general in the exercise of the inspector general's functions, authority and powers. Such cooperation shall include, but not be limited to providing statements, documents, records and other information, during the course of an investigation, audit or review. The inspector general may obtain sworn statements, in accordance with Florida Statutes, of all persons identified in this subsection as well as other witnesses relevant to an investigation, audit or review."

Section 2-423(1)

The obligation to provide "full and unrestricted access" to records.

Section 2-423(2)

The obligation to notify the IG;

> " in writing prior to any duly noticed public meeting of a procurement selection committee where any matter relating to the procurement of goods or services by the county or any municipality is to be discussed. The notice required by this subsection shall be given to the inspector general as soon as possible after a meeting has been scheduled."

Section 2-423(8)

The IG can require any of these parties "to provide statements" and can;

> " administer oaths; and, require the production of documents, records and other information. In the case of a refusal by an official, employee or other person to obey a request by the inspector general for documents or for an interview, the inspector general shall have the power to subpoena witnesses, administer oaths, and require the production of documents."

Section 2-423(3)

If the Ordinance cannot be enforced by the IG in court, these provisions are no longer requirements and compliance will be voluntary only.

The BOCC also argued that the IG is just another county department (T19), and therefore lacks the capacity to sue. This is incorrect for numerous reasons, including those set out above: the IG is a natural person with capacity to sue who is not a "department" of anything; and the IG Ordinance specifies the IG's capacity to sue.

Moreover, unlike county departments which are under the control of the BOCC, whose department heads can be removed for disagreeing with the BOCC, and which the BOCC speaks for and directs, both the IG and the Office of the Inspector General are independent of the BOCC and its departments, which they must oversee.

Even assuming *arguendo* that the OIG was the intervenor and the Ordinance was silent as to its capacity to sue, its independence would be the key factor in establishing its capacity to sue. That is demonstrated by *Lederer v. Orlando*

Utilities Commission, 981 So. 2d 521, 524-525 (Fla. 2d DCA 2008). In *Lederer*, the utilities commission was similarly situated to the OIG. The Court noted that "the interconnected relationship between the City and the OUC is both unique and strange" and that "While the OUC is part of the City for some purposes, it is independent and beyond the control of City as to the powers granted to it under the special act." The Court ultimately held that the OUC had the capacity to sue and be sued because of its "substantial autonomy to operate independently from the city government." *Lederer s*hould be compared with *North Miami Water Board v. Gollin*, 171 So 2d. 584, 585 and footnote 1 (Fla. 3rd DCA 1965), where the water board was held to lack the capacity to sue because it was controlled by the city manager, and therefore was not independent.

The argument that no other county entity other than the BOCC can have the capacity to sue ignores the following:

a. The plain language in the BOCC's own IG Ordinance, specifying that the IG may enforce all of its provisions in court in Palm Beach County and may enforce subpoenas in any circuit court in the state.

b. The fact that any adult who is sui juris and without a legal disability has the capacity to sue.

c. The overwhelming public vote for an "independent inspector general", supported by Art. VIII, § 1(g), Fla. Const., which provides charter counties

broad powers of local self government, and Art. I, § 1, Fla. Const., which provides that "All political power is inherent in the people," (rather than the BOCC), and

d. The fact that numerous parties, including but not limited to constitutional officers and special districts, have the capacity to sue,

The BOCC also argued that Article IV, §4.3, Palm Beach County Charter, which provides for a county attorney to be employed by the BOCC, deprives the IG of the capacity to sue. (R248, T17) This provision specifies that the county attorney represents:

> "... the board of county commissioners, the county administrator, and all other departments, divisions, regulatory boards and the advisory boards of county government in all legal matters relating to their official responsibilities."

But this provision has nothing to do with capacity to sue. It addresses only legal representation. The County lacks the authority to deprive an adult natural person who is sui juris of his or her constitutional due process rights and the capacity to sue.

Even as to legal representation alone, this argument is incorrect for the following reasons:

a. There is absolutely no conflict between the cited language and the IG's ability to retain his or her own counsel. The IG is not a "department,

division, regulatory board, or advisory board of county government," and is not required to use the BOCC's attorney for legal advice and representation.

b. Principles of statutory construction require the more recently enacted provision, which requires IG independence, to prevail in the event of a conflict with an older provision. *Kiesel v. Graham*, 388 So. 2d 594, 596 (Fla. 1st DCA 1980).

c. Florida Bar Rule of Professional Conduct 4-1.7 would prevent the County Attorney from even attempting to represent the IG in a case such as this, where the County Attorney has taken positions on behalf of her paying client, the BOCC, which directly conflict with both the wishes and interests of the IG.

The IG has the capacity to sue.

B. Standing to Intervene

The other main argument for denying the Motion to Intervene was the claim that the IG lacked standing to participate in the case. But even the most rudimentary application of Florida law to the facts of this case demonstrates that the IG has standing.

> "Standing is, in the final analysis, that sufficient interest in the outcome of litigation which will warrant the court's entertaining it."

General Development Corp. v. Kirk, 251 So.2d 284, 286 (Fla. 2d DCA 1971).

Intervention should be liberally allowed. *National Wildlife Fed, Inc. v. Glisson*, 531 So. 2d 996, 997 (Fla. 1988).

A more thorough analysis of the facts and the law shows that the IG is not merely an interested party, but a necessary party to the litigation below.

The appellee/plaintiff Municipalities' primary claim in the case below is that it is illegal to require them to fund the IG. In counts I, II, and IV, they advance different rationales to support this contention. Each of these arguments places 40-45% of the IG's minimum funding directly at risk. (R18-27)

In their count III the Municipalities claim that the IG Ordinance's methodology for determining the IG's minimum funding overstates the value of their contracts, and therefore results in too much IG funding. (R23-25) If they prevail with this argument and force a change in the manner in which IG funding is determined, the defendant BOCC's obligation will also be proportionately reduced and both the plaintiff and the defendant will benefit financially. The only party to lose will be the IG, whose minimum funding will be reduced.

The IG Ordinance also provides procedures for approving IG funding which exceeds the current minimum funding, and procedures for approving supplemental IG funding during the course of any year. Although these procedures may never be used, in count IV the Municipalities challenged both. (R25-27) If they prevail with either of these arguments, the result again would be that both the plaintiff

Municipalities and the defendant BOCC will benefit financially and the IG will lose.

In sum, as to the plaintiffs' claims in the circuit court action, the IG is the party most directly impacted.

The IG also has standing to intervene in view of additional facts arising as a result of the Municipalities' case; facts already made an issue in the case through the BOCC's counterclaim. Those facts are more completely addressed in the related case before this Court, the IG's Petition For Writ(s) of Mandamus (case #4D12-4421). But briefly, they are as follows:

a. The plaintiff Municipalities refused to pay their bills for IG funding, with their claims in the lawsuit as the sole justification;

b. The Clerk then refused to send out bills to any municipality, even those not challenging the Ordinance, or to allow any municipal funds to be spent;

c. The BOCC, which has primary responsibility for IG funding under the Charter and its own IG Ordinance, then refused to fully fund the IG or guarantee the IG's minimum funding, although doing so would have prevented the Clerk from acting as described in b. above. The BOCC took this position despite the absence of language in the Charter or Ordinance making the IG's funding contingent on the BOCC's timely receipt of full reimbursement from each of the 38 municipalities.

On December 5, 2011, the BOCC filed a counterclaim raising the issue of the failure to fully fund the IG, and stating that the failure to fund will result in OIG oversight that is "substantially less comprehensive than it would be with full funding of the OIG." The BOCC further stated that as a result of the underfunding, the County had already been damaged "by the OIG's diminished oversight of its vendors and other activities the OIG conducts." But as relief the BOCC merely requested a monetary award for itself at the conclusion of the lawsuit. (R138-139)

The IG is the only direct victim of this underfunding, another basis for the IG's standing to intervene in the case.

This Court has explained the standard for intervention in the following manner:

> "In determining whether the court has abused its discretion we believe the appropriate test for intervention to be: '[T]hat the interest which will entitle a person to intervene under this provision must be in the matter in litigation, and of such a direct and immediate character that the intervener [sic] will either gain or lose by the direct legal operation and effect of the judgment. In other words, the interest must be that created by a claim to the demand in suit or some part thereof, or a claim to, or lien upon, the property or some part thereof, which is the subject of litigation.'" (citations omitted)
>
> "...Citibank had a very real interest in the transfer of the Miami National Bank stock and the proceeds arising out of such transfer. The determination of the rights of Data Lease and Blackhawk would have a direct effect on the rights of Citibank. Therefore, it was an abuse of discretion to deny the motion to intervene."

Citibank, N.A. v. Blackhawk Heating & Plumbing Co., 398 So. 2d 984, 986-987 (Fla. 4th DCA 1981).

The IG is the party most directly at risk from each of the Municipalities' claims and is being directly affected by the facts in the BOCC's counterclaim. The IG is therefore a necessary party.

> It is a longstanding principle of Florida law that '[a]ll persons materially interested in the subject matter of a suit and who would be directly affected by an adjudication of the controversy are necessary parties.' ... Necessary parties must be made parties in a legal action." (citation omitted)

Everette v. Fla. Dept of Children and Families, 961 So. 2d 270, 273 (Fla. 2007).

The case below is an action for a declaratory judgment, to which §86.091, Fla. Stat., statutorily imposes the same standards:

> "When declaratory relief is sought, all persons may be made parties who have or claim any interest which would be affected by the declaration. No declaration shall prejudice the rights of persons not parties to the proceedings..."
>
> The Florida Supreme Court observed more than 80 years ago:
>
> "The proposition that a court cannot properly adjudicate matters involved in a suit when it appears that necessary and indispensable parties to the proceedings are not before the court is well settled."

Fain v. Adams, 121 So. 562 (Fla. 1929).

These standards reflect the fundamental constitutional right to due process of law. If a party with sufficient interest in a case is not included, any part of the judgment which affects the excluded party will be reversed. See *Everette v. Fla.*

Dept of Children and Families, 961 So. 2d 270 (Fla. 2007); *Yorty v. Abreu*, 988 So. 2d 1155, 1157 (Fla. 3d DCA 2008); and *Green v. Hood*, 98 So. 2d 488 (Fla. 1957).

Additionally, as explained above, the IG Ordinance itself provides the IG standing to enforce all of its provisions, including the provisions regarding IG funding which are being both attacked and ignored in the instant case.

To support its argument that the IG lacks standing, the BOCC pointed to language in the Ordinance which gives the BOCC and municipalities authority to take action in the event that timely payment is not received. (R247) This provision states:

> "In the event payment is not timely received, the county or any municipality in compliance with this section may pursue any available legal remedy." Section 2-429(3)

But this provision is irrelevant to the issues in the Municipalities' complaint, which do not involve timely payment or collection.

More significantly, this provision is not exclusionary, and assuming it is even relevant it must be read in pari materia with the other Ordinance language which gives the IG the right to enforce all Ordinance provisions in court.

> "The doctrine of in pari material requires the courts to construe related statutes together so that they illuminate each other and are harmonized. (cite omitted) 'In pari materia' in Latin means 'on the same matter.'"

McGhee v. Volusia County, 679 So. 2d 729, footnote 1 (Fla. 1996).

Nor is there any merit to the BOCC's argument that it alone has the right to defend county ordinances. (R248) The BOCC presented no legal support for this bare assertion, which is both irrelevant and incorrect. It is irrelevant because in the Ordinance the BOCC expressly delegated to the IG the authority to enforce its requirements.

The argument is incorrect because any person whose rights result from an ordinance has the right to defend their rights, and in the process defend the ordinance that afforded those rights, even without such an express delegation. For examples see *Dade County and Yellow Cab Company of Miami, Inc. v. Mercury Radio Service, Inc.*, 134 So. 2d 791 (Fla. 1961); *Hialeah et al v. Woods*, 121 So. 2d 41 (Fla. 3d DCA 1960); and *Rinker v. Dade County, Inversiones Armadeni, and Statewide Land Corp.*, 528 So. 2d 904 (Fla. 3d DCA 1987). None of this precludes the BOCC from also defending its ordinances, if it chooses to do so.

The ballot question presented to the public asked whether the County Charter (the county's "constitution") should be "amended to require ... an independent Inspector General funded by the County Commission and all other governmental entities subject to the authority of the Inspector General?" Over 72% of the voters approved. The resulting Charter language also sets parameters for the IG's minimum funding, which are necessary both to insure the

independence of the IG and to provide the IG the minimum resources necessary for effective oversight.

In view of the foregoing, the argument that the IG lacks standing:

a. Disregards the expressed will of the voters for an independent IG with a specified minimum level of funding;

b. Disregards constitutional due process requirements;

c. Disregards all Florida case law on standing;

d. Disregards the plain language of §86.091, Fla. Stat.; and

e. Disregards the plain language of the IG Ordinance.

The IG has standing and is a necessary party to the case below.

II. UPON INTERVENTION THE IG SHOULD HAVE FULL PARTY RIGHTS IN THE CASE.

Although the trial court, in addition to failing to specify its reasons for denying intervention, also avoided ruling on this issue, much argument below was devoted to what rights the IG would have upon intervention. This issue involves the rule on intervention. Fla. R. Civ. P. 1.230, provides:

> Anyone claiming an interest in pending litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding, unless otherwise ordered by the court in its discretion.

This rule is intended to prevent a non-essential party from injecting itself into disputes regarding issues which are none of its business, or diverting a case in which its interests are only tangential to the primary issues being litigated.

The appropriate limits have been explained as follows:

> We conceive this to mean that the intervenor may not assert matters extraneous to his own interests, but that he may avail himself of any and all arguments which relate to derivation and extent of his own interests, whether or not these matters have been previously asserted by one of the original parties.

Williams v. Nussbaum, 419 So. 2d 715 (Fla 1st DCA 1982), footnote 1.

The Clerk and the Municipalities each argued that, even if intervention was granted, the IG should be prohibited from filing pleadings intended to address the failure to fully fund during the pendency of the lawsuit. (R 240-241, 260, 421-422) As noted above, the failure to fund had already been made an issue in the case through the BOCC's counterclaim.

In attempting to limit the IG's ability to fully participate in the litigation the Municipalities cited the following dicta from *Omni National Bank v. Georgia Banking Company*, 951 So. 2d 1006 (Fla. 3d DCA 2007):

> "the law of intervention provides that an intervenor must accept the pleadings in the case as it finds them at the time of intervention," and
>
> "The intervenor is not permitted to contest the plaintiff's claim." (R-260)

However *Omni*, actually supports the IG. In *Omni*, the 3rd DCA reversed the judgment entered by the trial court because it had denied Omni's motion to intervene. And *Omni* itself relies on *Williams v. Nussbaum*, 419 So. 2d 715 (Fla 1st DCA 1982) , which explains that a necessary party may advance "any and all arguments which relate to derivation and extent of his own interests, whether or not these matters have been previously asserted by one of the original parties."

The Municipalities should not gain advantage from their decision to improperly exclude the most impacted party, the IG, at the beginning of the case. Nor should the IG be disadvantaged by that improper action.

> Where, by reason of the nature of the case, a party defendant as such in an equity suit, is in reality a necessary party, and not a mere nominal party, our holding is that an express statement in the bill undertaking to make an actually necessary party a nominal party only, is to be treated as the equivalent of an entire omission of the necessary party, and dealt with accordingly in the court's decree.

Gray v. Standard Dredging, 149 So. 733 (Fla. 1933).

The Clerk also argued that, by attempting to address the failure to fully fund, the IG was inserting extraneous matters into the case, which justified punishing the IG by denying intervention entirely. (R-240) But as discussed earlier, the IG was not attempting to insert extraneous matters into the case. The IG was requesting authorization to address the current underfunding, which had already been made an

issue through the BOCC's counterclaim and which was directly related regardless. It would have been irresponsible not to have attempted to address that problem.

And even if the IG had proposed to insert an extraneous matter into the case, that would not justify denial of intervention. It would only have justified limiting the IG's right to address the extraneous matters. As the Clerk noted in her own Motion to Intervene:

> "The intervention standard involves a two step analysis: 1) the court must determine the interest asserted is appropriate to support intervention, and (2) the court must determine the parameters of intervention." (R90)

No party produced a case in which a necessary party was ever denied intervention because it proposed to insert extraneous materials. The Clerk cited to *Allstate v. Johnson*, 483 So. 2d 524 (Fla. 5th DCA 1986), as supporting her premise, but this case actually supports the IG's position. There, Allstate had no real interest in the outcome of the case. Its only interest would arise if the case had a certain outcome. If that occurred, Allstate's interests could be fully protected in a subsequent legal action. Allstate failed to meet the test for intervention.

> "A person is entitled to intervene when his interest in the matter in litigation is 'of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment.'" (citations omitted)

Barnhill v. Fla. Microsoft Anti-Trust Litig., 905 So. 2d 195, 199 (Fla. 3d DCA 2005).

Ironically the Clerk, whose motion to intervene with "full participation" status (R90, par. 22) was unopposed by the parties despite her express disavowal of any position on the merits of the complaint (R98, par. 3) and the fact that her interest would arise only at the end if the Court determines that "the funding mechanism in the IG Ordinance is not lawful," (R107) is similarly situated to Allstate. The IG, whose material interests are directly at stake in every issue currently before the circuit court, is not similarly situated to Allstate.

The Municipalities also argued that allowing the Inspector General to contest the failure to fund would prejudice them by delaying the litigation. (R-260) But the IG did not delay the proceedings below. The IG's Motion to Intervene was timely filed on June 7, 2012, even before the six month abatement of the proceedings was formally lifted. Virtually no litigation had occurred by that time. Seven weeks after the filing of the IG's Motion, the parties stipulated to the filing of an Amended Answer, Affirmative Defenses, and Counterclaim by the BOCC, without complaining of any delay that it would cause.

In sum, any delay which might occur is the fault of the Municipalities themselves, first by not including the IG, later by vigorously disputing the IG's right to be a party to a case in which the IG's material interests are at the center of the dispute.

Even more significant is the fact that Florida law on intervention does not allow a possible delay to justify a necessary party's deprivation of rights. As shown above, numerous cases hold that reversal is required when a necessary party is not included, even if a Final Order has been entered and the parties will have to re-litigate the entire case.

CONCLUSION

The IG has capacity to sue. Because the IG's material interests are at the center of the case below, the IG is a necessary party to the case and has standing to intervene. By any standard, including abuse of discretion, the trial court erred in denying the IG's Motion to Intervene.

As a necessary party, the IG should be entitled to fully litigate all issues in and related to that case that are impacting, or will impact the IG. If this Court does not resolve the failure to fund the OIG through the IG's related Mandamus case, the IG should be permitted to fully address that matter in the case below.

The IG program is a key part of the local ethics reform instituted by an overwhelming vote of the public in response to the high profile criminal convictions of local officials. The Municipalities assert in their complaint that they are not attempting "to overturn the Inspector General Program." The Clerk asserts that she takes no position on the merits of the case. And the BOCC purports to

only be interested in defending its IG Ordinance. But all three parties, in combination, are in fact using the judicial system to undermine the entire IG program, contrary to the clear will of the voters.

Despite the Charter's requirement that IG funding be no less than "one quarter of one percent of contracts of the County and all other governmental entities subject to the authority of the Inspector General," all three Appellants are taking actions, without leave of court, that deprive the IG of the minimum required funding during the pendency of the suit below, contrary to the will of the public.

Additionally, the positions of the Municipalities and the BOCC in the case below could lead to the Charter mandated minimum IG funding never being implemented, although no party has directly challenged that requirement.

Finally, the Appellants are all maintaining that the IG lacks the capacity to sue, despite plain language in the IG Ordinance to the contrary which reflects the public intent that provisions relating to IG oversight of their governments be mandatory. Without the capacity to enforce those requirements in court they will become voluntary only, the IG program rendered ineffective, and the public will thwarted.

The order of the circuit court should be reversed, with instructions to allow the IG to participate in the case with full party rights, as if the IG had been a named defendant at the outset of the case.

Respectfully submitted this 11th day of January, 2013.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Appellant Inspector General has been provided by email this 11th day of January, 2013, to those on the attached service list.

Robert B. Beitler
P.O. Box 16568
West Palm Beach, FL 33416
Fla. Bar No. 327751
Email: RBeitler@pbcgov.org
Tel: 561-233-2350
Fax: 561-233-2370
Attorney for Appellant
Sheryl Steckler, Inspector General

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this Initial Brief is Times New Roman 14-point font, in compliance with Fla. R. App. P. 9.210(a)(2).

Robert B. Beitler

SERVICE LIST

Claudia M. McKenna, City Attorney
Douglas N. Yeargin, Assistant City Attorney
Kimberly L. Rothenburg, Assistant City Attorney
City of West Palm Beach
P.O. Box 3366
West Palm Beach, Florida 33402
Phone: (561) 822-1350
Fax: (561) 822-1373
Emails: cmckenna@wpb.org
dyeargin@wpb.org
krothenburg@wpb.org
COUNSEL FOR CITY OF WEST PALM BEACH

John C. Randolph, Esquire
Jones, Foster, Johnson & Stubb, P.A.
P.O. Box 3475
West Palm Beach, Florida 33402-3475
Phone: (561) 659-3000
Fax: (561) 832-1454
Email: jrandolph@jones-foster.com
COUNSEL FOR TOWN OF GULF STREAM

Keith W. Davis, Esquire
Corbett and White, P.A.
1111 Hypoluxo Road, Suite 207
Lantana, Florida 33462-4271
Phone: (561) 586-7116
Fax: (561) 586-9611
Email: keith@corbettandwhite.com
COUNSEL FOR VILLAGE OF TEQUESTA,
TOWN OF PALM BEACH SHORES and
TOWN OF MANGONIA PARK

Pamela Hanna Ryan, City Attorney
City of Riviera Beach Attorney's Office
600 W. Blue Herron Boulevard
Riviera Beach, Florida 33404-4311
Phone: (561) 845-4069
Fax: (561) 845-4017
Email: pryan@rivierabch.com
COUNSEL FOR CITY OF RIVIERA BEACH

Thomas Jay Baird, Esquire
Jones, Foster, Johnson & Stubbs, P.A.
801 Maplewood Drive, Suite 22A
Jupiter, Florida 33458-8821
Phone: (561) 650-8233
Fax: (561) 746-6933
Email: tbaird@jones-foster.com
COUNSEL FOR TOWN OF JUPITER and
TOWN OF LAKE PARK

R. Brian Shutt, City Attorney
Terrill Pyburn, Assistant City Attorney
City of Delray Beach
200 NW 1st Avenue
Delray Beach, Florida 33444-2768
Phone: (561) 243-7090
Fax: (561) 278-4755
Email: shutt@MyDelrayBeach.com
pyburn@MyDelrayBeach.com
COUNSEL FOR CITY OF DELRAY BEACH

Trela J. White, Esquire
Corbett and White, P.A.
1111 Hypoluxo Road, Suite 207
Lantana, Florida 33462-4271
Phone: (561) 586-7116
Fax: (561) 586-9611
Email: trela@corbettandwhite.com
COUNSEL FOR TOWN OF MANALAPAN

Jennifer Gardner Ashton, Esquire
Corbett and White, P.A.
1111 Hypoluxo Road, Suite 207
Lantana, Florida 33462-4271
Phone: (561) 586-7116
Fax: (561) 586-9611
Email: Jennifer@corbettandwhite.com
COUNSEL FOR TOWN OF MANALAPAN
TOWN OF MANGONIA PARK
VILLAGE OF TEQUESTA
CITY OF PALM BEACH GARDENS
TOWN OF PALM BEACH SHORES

R. Max Lohman, Esquire
Corbett and White, P.A.
1111 Hypoluxo Road, Suite 207
Lantana, Florida 33462-4271
Phone: (561) 586-7116
Fax: (561) 586-9611
Email: max@corbettandwhite.com
COUNSEL FOR CITY OF PALM BEACH GARDENS

Glenn J. Torcivia, Esquire
Torcivia & Associates, P.A.
Northpoint Corporate Center
701 Northpoint Pkwy, Suite 209
West Palm Beach, Florida 33407
Phone (561) 686-8700
Fax (561) 686-8764
Email:glenn@torcivialaw.com

COUNSEL FOR TOWN OF HIGHLAND BEACH

Kenneth G. Spillias, Esquire
Lewis, Longman & Walker
515 N. Flagler Drive, Suite 1500
West Palm Beach, Florida 33401-4327
Phone: (561) 640-0820
Fax: (561) 640-8202
Email: kspillias@llw-law.com
COUNSEL FOR TOWN OF OCEAN RIDGE

Diana Grub Frieser, City Attorney
City of Boca Raton
201 W. Palmetto Park Road
Boca Raton, Florida 33432-3730
Phone: (561) 393-7700
Fax: (561) 393-7780
Email: dgrioli@myboca.us
COUNSEL FOR CITY OF BOCA RATON

Martin Alexander, Esquire
Holland & Knight, LLP
222 Lakeview Avenue, Suite 1000
West Palm Beach, Florida 33401
Phone: (561) 833-2000
Fax: (561) 650-8399
Email: martin.alexander@hklaw.com

Larry A. Klein
Holland & Knight, LLP
222 Lakeview Avenue, Suite 1000
West Palm Beach, Florida 33401
Phone: (561) 833-2000
Fax: (561) 650-8399
Email: larry.klein@hklaw.com

Nathan A. Adams, IV, Esquire
Post Office Drawer 810
Tallahassee, Florida 32302
Phone: (850) 224-7000
Fax: (850) 224-8832
Email: Nathan.adams@hklaw.com

Sharon Bock, Clerk and Comptroller
Clerk and Comptroller
301 North Olive Avenue, 9th Floor
West Palm Beach, Florida 33401
Phone: (561) 355-1640

Fax: (561) 355-7040
Email: COC_DM-CLERK_E-SERVICE@mypalmbeachclerk.com
COUNSEL FOR PALM BEACH COUNTY CLERK & COMPTROLLER

Andrew J. McMahon, Esquire
Palm Beach County Attorney's Office
P.O. Box 1989
West Palm Beach, FL 33402
Phone: (561) 355-6021
Fax: (561) 355-4234
Email: amcmahon@pbcgov.org

Philip Mugavero, Esquire
Palm Beach County Attorney's Office
P.O. Box 1989
West Palm Beach, FL 33402
Phone: (561) 355-6021
Fax: (561) 355-4234
Email: pmugaver@pbcgov.org

Helene C. Hvizd, Esquire
Palm Beach County Attorney's Office
P.O. Box 1989
West Palm Beach, FL 33402
Phone: (561) 355-6021
Fax: (561) 355-4234
Email: hhvizd@pbcgov.org

Leonard W. Berger, Esquire
Palm Beach County Attorney's Office
P.O. Box 1989
West Palm Beach, FL 33402
Phone: (561) 355-6021
Fax: (561) 355-4234
Email: lberger@pbcgov.org

COUNSEL FOR PALM BEACH COUNTY (BOCC)