IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO: 50 2011 CA 017953

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, VILLAGE OF WELLINGTON, 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,

Plaintiffs,

vs.

PALM BEACH COUNTY, a political subdivision,

Defendant.

SHARON R. BOCK, in her official capacity as the Clerk & Comptroller of Palm Beach County, Florida,

Intervenor.

INSPECTOR GENERAL'S MOTION FOR LEAVE TO SUBMIT MEMORANDUM OF LAW IN EXCESS OF TEN PAGES

SHERYL STECKLER, in her official capacity as Inspector General of Palm Beach County ("Inspector General"), by and through her undersigned counsel, and in accordance with Rule 1.100 Florida Rules of Civil Procedure, files this Motion For Leave to Submit a Memorandum of Law in Excess of Ten Pages, and states:

1. On Monday July 2, 2012, in advance of the hearing on the Inspector General's Motion to Intervene then scheduled for Friday July 6, 2012, before the Honorable Sandra K. McSorley, Circuit Judge, the Inspector General served a Memorandum of Law on all parties to this proceeding, and delivered it to the courthouse for presentment to Judge McSorley. The Memorandum of Law was approximately 25 pages in length.
2. On Thursday, July 5, 2012, Judge McSorley entered an Order of Disqualification and the case was subsequently assigned to the Honorable Catherine M. Brunson, Circuit Judge. Judge Brunson's Standing Order on Specially Set Motions states in part:

   "All memoranda, **not to exceed ten double spaced pages without Court approval**, with case authority shall be delivered to the first floor information desk or mailed so as to be received **seven (7) days in advance of the hearing and should designate the date and time of the hearing which they reference**." (Emphasis original)
3. The Inspector General's original Memorandum of Law addressed arguments and case law presented in the County's Response to the Motion to Intervene. Since that time the Inspector General received Responses from both the plaintiff Municipalities and the Clerk challenging her Motion to Intervene which present arguments and case law which must also be addressed.
4. At issue are both the Inspector General's right to intervene and the appropriate extent of her rights as an intervenor. Additionally, each of the parties opposing intervention has also challenged the Inspector General's capacity to sue and be sued, which under Rule 1.120 must first be raised by the party challenging capacity.
5. The Inspector General has worked diligently to address in her revised Memorandum of Law (Attached as Exhibit 1) the additional issues and case law presented in the additional challenges, while at the same time substantially reducing the size of the Memorandum.

6. The portion of the revised Memorandum of Law that addresses the issues relating to intervention is 10 pages, even counting the style which takes almost a full page.
7. The portion of the revised Memorandum of Law that addresses the issue of capacity to sue is 6 3/4 pages long.
8. Thus, the total Memorandum is 16 3/4 pages.
9. The Inspector General's Motion to Intervene has been specially set for hearing at 9:00 a.m. Friday, September 14, 2012. A copy of the Memorandum of Law is being provided to all counsel of record with service of this Motion, 42 days prior to the scheduled hearing and significantly longer in advance than the seven (7) days required by this Court's Standing Order. Therefore, the parties opposing the Inspector General's Motion to Intervene will suffer no prejudice if this Court grants this Motion and allows this Memorandum of Law to be submitted. The Inspector General also respectfully asserts that this Memorandum could benefit this Court and any appellate court which may subsequently consider this matter.

WHEREFORE, the Inspector General respectfully requests that this Court enter an Order approving the submission of the attached Memorandum of Law.

I HEREBY CERTIFY that a copy of the foregoing has been provided by email and U.S. Mail this 3rd day of August, 2012, to those on the attached service list.

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EXHIBIT 1

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO: 50 2011 CA 017953

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, VILLAGE OF WELLINGTON, 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,

Plaintiffs,

vs.

PALM BEACH COUNTY, a political subdivision,

Defendant.

SHARON R. BOCK, in her Official capacity as the Clerk & Comptroller of Palm Beach County, Florida,

Intervenor.

INSPECTOR GENERAL'S MEMORANDUM OF LAW ON MOTION TO INTERVENE

SHERYL STECKLER, in her official capacity as Inspector General of Palm Beach County (the IG), by and through her undersigned counsel, presents this Memorandum of Law on her Motion to Intervene, currently set for hearing at 9:00 a.m. September 14, 2012, and states:

1. An independent Inspector General of Palm Beach County (IG) was mandated by the

County's voters when they approved a ballot question stating, in part:

> "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...**an independent Inspector General** funded by the County Commission and all other governmental entities subject to the authority of the Inspector General?" (Bold added)

In the election held on November 2, 2010, more than 72% of the County's voters and a majority in each of the County's 38 municipalities voted "Yes."

2. Charter sections 1.3(6), 8.3 and 8.4 relate to the IG. They include a number of requirements to insure the independence of the IG, including: that the IG be chosen by an independent "selection committee;" that she have a term contract; and that during the contract period she may only be removed for cause and by a supermajority of both the selection committee and the Board of County Commissioners (BOCC).

3. Section 8.3 of the Charter also establishes a minimum level of funding for the IG:

   "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 (funding base) as determined by the implementing ordinance."

   This is critical to both the independence and the operational efficiency of the IG. If the IG had to fear defunding or even a significant diminution in her budget if she displeased public officials by looking into certain matters or reporting certain facts, her independence would be seriously compromised. And without a dependable budget from year to year, her ability to recruit quality staff and efficiently plan her activities would also be compromised.

4. The Implementing Ordinance (Chapter 2, Article XII) also reflects the fundamental requirement of IG independence. The IG determines who she will hire, what she will

investigate or audit, the records she will obtain, the witnesses she will question, and the contents of her reports.

Intervention

5. 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.** (Bold added)

6. "Intervention should be liberally allowed." *National Wildlife Fed, Inc. v. Glisson*, 531 So. 2d 996, 997 (Fla. 1988), citing *Miracle House Corp. v. Haige*, 96 So.2d 417 (Fla. 1957).

7. The Clerk points to *Allstate v. Johnson*, 483 So. 2d 524 (Fla. 5th DCA 1986) for the premise that a court **may** deny intervention when the intervenor seeks to inject new issues into the proceedings. This is misleading. In *Allstate,* the insurance company's **only interest** was to inject a new issue into the proceedings, attempting to establish that it would not be liable for any judgment against its insured. It was not a necessary party, and its rights could be fully protected in a subsequent proceeding, if necessary. The Court in *Allstate* relied on only one case, *Riviera Club v. Belle Mead Dev. Corp.* 194 So. 783 (Fla. 1940), which provides a more complete explanation of the law:

   "...**we have repeatedly held that intervention, by any interested party, is a matter of right and not dependent upon leave of court.** *Bancroft v. Allen*, 128 Fla. 14, 174 South. Rep. 749; *Fruger v. Acme Fruit Co.*, 129 Fla. 107, 176 South. Rep. 437. However, we again direct attention to what has already been stated in this opinion relative to the status of an intervenor's rights with regard to the pleadings, matters and issues already involved in the suit. We would like also to point out the fact that the Act provides that '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,'" *Riviera Club v. Belle Mead Dev. Corp.* 194 So. 783, 785 (Fla. 1940). (Bold added)

A trial court may not deny an interested party the right to intervene and the IG's fundamental interests in this case involve matters already at issue.

8. The criteria for intervention is also related to the criteria for "standing," which has been explained in the following manner:

"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. 2nd DCA 1971).

9. The plaintiff's Complaint is an action for declaratory relief under Chapter 86, Florida Statutes. Section 86.091, Florida Statutes provides:

"§ 86.091. Parties
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.** In any proceeding concerning the validity of a county or municipal charter, ordinance, or franchise, such county or municipality shall be made a party and shall be entitled to be heard. If the statute, charter, ordinance, or franchise is alleged to be unconstitutional, the Attorney General or the state attorney of the judicial circuit in which the action is pending shall be served with a copy of the complaint and be entitled to be heard." (Bold added)

10. All issues in this case involve the IG's budget and funding. No one is at risk of incurring greater harm as a result of this case and its related matters than the IG, who clearly has standing and meets the criteria to be a party and to intervene. These standards reflect the fundamental constitutional right to due process of law.

The Complaint

11. The plaintiffs complaint challenges their obligations to provide funding for the IG:
    a. In Counts I and II, the plaintiffs maintain that it is unlawful to require them to pay any portion of the IG's funding. Absent a stipulation by the Board of County Commissioners (the BOCC) that it would fund the IG at the minimum level specified

in the Charter if the municipalities prevail with this claim, the IG's fundamental interests are at risk and she must be permitted to defend these Counts.

b. In Count III, the plaintiffs challenge the current methodology for calculating the IG's funding. If they prevail, the replacement methodology is likely to result in less funding for the IG. The IG must be permitted to defend this count.

c. In Count IV, the plaintiffs challenge provisions establishing "minimum" funding for the IG; procedures for approving funding which exceeds the "minimum"; and procedures for awarding supplemental funding. The IG will be the party most directly and materially affected and must be permitted to defend.

12. The IG both has and claims an interest in these matters which will be impacted by the declaration of the court, and as such must be party to these proceedings per section 86.091, F. S.

The Current Failure to Fund

13. The Charter requirement for the IG's minimum funding has not been challenged in this case. The IG's budget for the 2011-2012 fiscal year was adopted by the BOCC in compliance with the Charter and Ordinance. But the budget is not being fully funded in accordance with the Charter's requirements:

a. The plaintiffs generally refused to remit their respective shares.

b. The intervenor Clerk ceased sending out quarterly bills to all 38 municipalities (24 of which are not contesting the Ordinance) and announced that she would not permit the expenditure of any municipal funds.

c. As a consequence all 38 municipalities are no longer remitting payment.

14. The County's position is that it is only obligated to fully fund the Inspector General if all municipalities timely pay. In its counterclaim the County makes the underfunding of, and resulting injury to, the IG an issue, but requests an award of money for itself at the conclusion of the litigation.

15. This case may not be resolved for years. The failure to provide the IG the minimum funding required by the Charter seriously impedes her ability to retain and hire staff and to plan and undertake activities at the level mandated in the Charter, and is causing irreparable harm.

16. The County and the Municipalities argue that the IG has no standing because the Ordinance states that once the Clerk has sent out quarterly billings, if "payment is not timely received, the county or any municipality in compliance with this section may pursue any available legal remedy."

    a. This argument is not relevant to the IG's right to intervene to defend the Charter and Ordinance which establish her rights and responsibilities, and to seek her minimum Charter-mandated funding during the pendency of this suit.

    b. This argument is only relevant to whether, after intervention, the IG should be permitted to file a specific pleading seeking to compel the Municipalities to pay during this suit.

    c. If, as the County argues, the funding of the IG's budget depends on all 38 municipalities timely paying all assessments every quarter, then construing that sentence in this manner would produce the absurd result of the IG being unable to access the courts to address a matter causing her irreparable harm. The BOCC lacks authority to enact an ordinance to prohibit an independent person from accessing

Florida's judicial system. Any such attempt would be "ultra vires" and contrary to public policy.

d. The BOCC could only have the authority to enact an ordinance prohibiting the IG from pursuing payment from municipalities if non-payment by municipalities was irrelevant to the IG and only affected the BOCC. That would be the case if, after adopting the IG's budget, the BOCC is required to honor and fund that budget. There is significant support for this view: The BOCC approves and actually funds the IG's budget; nothing in either the Charter or the Ordinance makes the IG's funding contingent on timely receipt by the BOCC of payment from each municipality; and it is the BOCC's practice to honor its budgets, even if the receipt of certain third party funds is anticipated.

17. The failure to fund the IG has been made an issue in this case due to the County's counterclaim. But it can be raised by the IG in a new suit which almost certainly would be combined with the present case, thereby making the IG a party to this case.

Inspector General as a Necessary Party

18. The criteria in Florida for determining whether one is a "necessary party" to a legal proceeding has remained unchanged for many years and has been explained as follows:

> "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.' *W.F.S. Co. v. Anniston Nat'l Bank of Anniston, Ala.*, 140 Fla. 213, 191 So. 300, 301 (Fla. 1939). **Necessary parties must be made parties in a legal action.** *See Oakland Properties Corp. v. Hogan*, 96 Fla. 40, 117 So. 846 (Fla. 1928)." *Everette v. Fla. Dep't of Children & Families*, 961 So. 2d 270 (Fla. 2007). (Bold added)

19. The IG would be materially affected by an adjudication of the issues before the Court, and is therefore a necessary party.

20. This is an action for declaratory relief. "No declaration shall prejudice the rights of persons not parties to the proceedings." Section 86.091, Florida Statutes.

21. A Court should not adjudicate this matter without the inclusion of all necessary parties:

> "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." (cites omitted) *Fain v. Adams*, 121 So. 562, 563 (Fla. 1929).

22. "The rule is that where indispensably necessary parties are omitted from an appeal, such appeal will be dismissed, *sua sponte,* by the court." (cites omitted) *Jones v. Miller*, 81 So. 413, 414 (Fla. 1919).

23. In Green v. Hood, 98 So. 2d 488 (Fla. 1957), the Supreme Court of Florida reversed the order of the lower court because the State Comptroller, a necessary and indispensible party, had not been included.

24. In Yorty v. Abreu, 988 So. 2d 1155, 1157 (Fla. 3rd DCA 2008), the Third District Court of Appeal stated:

> "Second, we find that the trial court also abused its discretion in denying the Tax Collector's motion for relief from final judgment. **Because the failure to join the Tax Collector as a necessary party rendered the final judgment void**, we find that relief was proper under Rule 1.540(b)(4)." (Bold added.)

Extent of Inspector General's Rights as an Intervenor

25. "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).

This Court need not have its labors reversed on appeal because it has deprived a necessary party of its rights to fully litigate the issues. Both its equity powers and the

specific language of Rule 1.230, Florida Rules of Civil Procedure ("unless otherwise ordered by the court in its discretion") provide this Court all the authority it requires to avoid such a result.

26. The plaintiffs rely on *Omni National Bank v. Georgia Banking Company*, 951 So. 2d 1006 (Fla. 3rd DCA 2007) for their claim that: "The law of intervention provides that an intervenor must accept the pleadings of the case as it finds them at the time of intervention," and for their claim that: "The intervenor is not permitted to contest the plaintiff's claims." But a more thorough analysis of "the law of intervention," including the cases cited in *Omni*, paints a different picture.

    a. "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

    b. "In disposing of this case, it is necessary to consider only one principle of law, which is well founded and has been previously settled in this jurisdiction; namely, that an intervenor must accept the pleadings of a case as he finds them, -- he will not be heard to raise new matters or issues not embodied in the original suit, *unless otherwise ordered by the court in its discretion.*" (Emphasis original) *Riviera Club v. Belle Mead Dev. Corp.* 194 So. 783, 784 (Fla. 1940).

    c. "All the parties and the res were before the court; and in view of the aim of the rules to allow liberal joinder of parties and claims and the policy of equity to grant complete relief and avoid a multiplicity of suits, we think the lower court had full authority to allow the intervention and decide the issue therein made. See *Switow v. Sher*, 1939, 136 Fla. 284, 186 So. 519, 525, holding that an intervenor's cross-bill raising a new issue is proper "where some special circumstances such as insolvency and nonresidence exist, which render it necessary to depart therefrom in order to avoid irreparable injury." (cites omitted) *Miracle House v. Haige*, 96 So 2d 417, 418 (Fla. 1957)

27. The Municipalities and the Clerk appear particularly concerned about the IG's proposed motions that request dismissal of their respective complaints.

    a. These proposed motions are based on the following premise:

"In Florida, the general rule is that a public official may not seek a declaratory judgment as to the nature of his duties unless he 'is willing to perform his duties, but is prevented from doing so by others.'" *Reid v. Kirk*, 257 So.2d 3, 4 (Fla. 1972)" *Graham v. Swift*, 480 So. 2d 124, 125 (Fla. 3rd DCA 1985).

b. The parties hereto have improperly used the instant action as a predicate for refusing to perform their respective duties relating to the IG's funding.

c. This case addresses only the IG's funding. The IG should have been included as a party defendant at the outset. Had that been done, her right to file pleadings seeking dismissal would be beyond dispute, as she would not be an intervenor. The plaintiffs should not be permitted to gain advantage from their decision to exclude the IG, a necessary party, from this case.

d. If the Court permits the IG to file such motions, that need not result in the dismissal of the respective complaints even if the Court determines the motions to be meritorious, as the Court could allow the affected parties a limited period of time to cure their failures and thereby avoid dismissal of their complaints.

28. In their Response, the plaintiffs also claim that allowing the IG to intervene as a full party in this case will prejudice their rights because:

"The Municipalities are filing a Motion for Partial Summary Judgment shortly. This Motion, if granted, could resolve the case," and "The Municipalities are concerned that the OIG's filings will interfere with the scheduling of a hearing on their Motion for Partial Summary Judgment, and will also unnecessarily prolong the litigation."

This lawsuit was filed in November 2011, but virtually no activity occurred prior to the filing of the IG's Motion to Intervene and nothing of substance has occurred to date. See, *Beeler v. Banco Industrial de Venezuela*, 834 So. 2d 952, 953 (Fla. 3rd DCA 2003). The

IG has as great an interest in the expeditious resolution of this case as do the original parties. The IG should be a full party to this case.

Capacity to Sue and Be Sued

29. The County (BOCC), the Municipalities, and the Clerk have each filed Responses in which they challenge the IG's capacity to sue.

> "'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).

30. Rule 1.120(a), Florida Rules of Civil Procedure, states:

> "Rule 1.120. Pleading Special Matters
> (a) *Capacity.* --It is not necessary to aver the capacity of a party to sue or be sued, the authority of a party to sue or be sued in a representative capacity, or the legal existence of an organized association of persons that is made a party, except to the extent required to show the jurisdiction of the court. The initial pleading served on behalf of a minor party shall specifically aver the age of the minor party. **When a party desires to raise an issue as to** the legal existence of any party, **the capacity of any party to sue or be sued**, or the authority of a party to sue or be sued in a representative capacity, **that party shall do so by specific negative averment which shall include such supporting particulars as are peculiarly within the pleader's knowledge."** (Bold added)

31. The claim that the IG lacks capacity to sue ignores a number of determinative factors. One is that the Ordinance clearly acknowledges the IG's capacity to sue. If any person refuses to comply with a subpoena issued by the IG:

> "... **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." Section 2-423(3) (Bold added)

This is the capacity to sue. And having provided the capacity to sue, the corollary, the capacity to be sued, must follow. A person who wishes to dispute a subpoena issued by

the IG must have the right to seek issuance of a Writ of Prohibition or similar protective order. Naming the BOCC as the respondent would be a useless act, as it neither issued the subpoena nor controls the IG in this or any other material respect.

32. The County also maintains that "The IG is simply a department of the County with functional or investigative independence." This raises the second determinative factor the parties ignore. The IG is a natural person and an independent County officer with no legal disability. She is not a department of the county or of any other entity. No party has presented a single legal precedent for ruling that an individual with no legal disability lacks the capacity to sue or be sued.

33. To support its argument the County cites only two cases; *Larkin v. Buranosky*, 973 So. 2d 1286 (Fla. 4th DCA 2008) and *Johnston v. Meredith*, 840 So. 2d. 315 (Fla. 3rd DCA 2003). These cases stand only for the proposition that, under Florida law, unincorporated associations have no legal existence, and hence no capacity to sue or be sued. Only their individual members can sue or be sued. A close reading shows that *Larkin* relies on *Johnston* for authority, which in turn relies on *Asociacion De Perjudicados Por Inversiones Efectuadas En U.S.A. v. Citibank, F.S.B.*, 770 So. 2d 1267, 1269 n.3 (Fla. 3d DCA 2000), which explains in footnote 3:

> "'An unincorporated ... association has no legal existence and generally does not have the capacity to sue or be sued as an entity; thus in the absence of an enabling or permissive statute conferring associational standing, such an association must sue or be sued in the names of the individuals composing it rather than its firm name.' *Fla. Jur. 2d, Associations and Clubs § 15* (1994) (citing *Hunt v. Adams, 111 Fla. 164, 149 So. 24 (Fla. 1933)*; *Johnston v. Albritton, 101 Fla. 1285, 134 So. 563 (Fla. 1931)*; *I. W. Phillips & Co. v. Hall, 99 Fla. 1206, 128 So. 635 (Fla. 1930)*; *Guyton v. Howard, 525 So. 2d 948 (Fla. 1st DCA 1988)*; *Walton-Okaloosa-Santa Rosa Medical Soc. v. Spires, 153 So. 2d 325 (Fla. 1st DCA 1963)*; *Florio v. State, 119 So. 2d 305 (Fla. 2d DCA 1960))*."

But as explained above, the IG is not an unincorporated association with no legal existence. The IG is a natural person.

34. In their Response, the plaintiff Municipalities erroneously argue that the Office of Inspector General (OIG) is seeking to intervene. Even if the OIG, rather than the IG, was seeking to intervene, these arguments would still be without merit. The OIG is an independent organization, required by the County's Charter (*"The County shall, by ordinance, establish an Office of Inspector General to provide independent oversight of publicly funded transactions, projects, and other local government operations."*), and under the sole control of the independent IG.

35. In contrast, County departments are not independent of the BOCC. They report to the BOCC, either directly or through the BOCC's appointed County Administrator, who is himself an "at will" employee of the BOCC. County departments perform the services specified by the BOCC, in the manner directed by the BOCC, with the budgets deemed appropriate by the BOCC. The BOCC has authority to establish policy and procedures for each County department. If a department fails to perform in the manner desired by the BOCC, the BOCC has the authority to make the necessary changes. Because the BOCC controls County departments, it is the entity that is accountable for their conduct and it is the party that has capacity to sue and be sued in matters relating to its departments.

36. The County also asserts that "the IG's independence does not as a matter of law give it the legal capacity to sue or be sued in its own name..." The County again provides no legal authority to support this assertion, which is incorrect. Independence is the key factor in determining whether an organization, such as the OIG, has the capacity to sue. A recent case, *Lederer v. Orlando Utilities Commission*, 981 So. 2d 521 (Fla. 2nd DCA 2008), is instructive. In *Lederer* the issue was whether the Orlando Utilities Commission

(OUC) had the capacity to sue and be sued, or whether it was merely a department of the City of Orlando. Indications that the OUC was part of the City included that it had been created by the legislature "as a part of government of the City of Orlando," the City Mayor sat on its Board, and its other Board members were selected by the Orlando City Council.

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 pointed to the OUC's "substantial autonomy to operate independently from the city government," then stated that "while the OUC may be a public utility designated as part of the City's government, it remains a distinct legal entity that operates mostly independently of the City." The Court also noted that:

"For these reasons, we conclude that the OUC is not a city department, as argued by Ms. Lederer" and added

"We recognize that the distinction between a municipal department and a municipal or quasi-municipal agency is not always clear. Generally, a municipal department is not a separate legal entity and does not have the capacity to sue or be sued."

Despite the apparent absence of express language granting the OUC "the capacity to sue and be sued," the Court held that the OUC had that capacity.

37. The County's position also defies common sense. The BOCC should not be legally responsible for the conduct of an independent person (the IG) or entity (the OIG) which it does not control. On the other hand, an independent person or entity should not be dependent on the BOCC to adequately defend her or its legal rights, particularly when they may have divergent or even conflicting views or interests.

38. The Clerk cites *North Miami Water Board v. Gollin*, 171 So 2d. 584 (Fla. 3rd DCA 1965) as an example of an entity created by ordinance which lacks the capacity to sue and be sued. But the North Miami Water Board was not independent of the city. The *Gollin* court pointed to various factors proving the lack of independence, including that the city manager had authority to control and direct the Water Board's operations. The Water Board's lack of independence was determinative. The *Lederer* court mentioned *Gollin*, but reached the opposite result because the OUC was functionally independent, as is the OIG.

39. Another example of entities whose independence results in their capacity to sue and be sued is found in section 20.121, Florida Statutes, which creates the Department of Financial Services (DFS) and establishes its organizational structure. Subsection (3) does the following:

    a. It establishes within DFS the "Financial Services Commission" (FSC) comprised of the Governor and Cabinet, which "...shall not be subject to control, supervision, or direction by the Department of Financial Services in any manner ..."

    b. It creates the Office of Financial Regulation and the Office of Insurance Regulation as subunits of the FSC, and requires DFS to provide "...administrative and information systems support to the offices."

    Although the words "capacity to sue and be sued" appear nowhere in this law, it is necessarily implied. A Lexis search shows that, since the creation of the Offices in 2003 there have been more than 100 recorded Florida appellate decisions in either the Office of Financial Regulation or the Office of Insurance Regulation was a named party. For example, see *Kligfeld v. OFR*, 876 So 2d 36 (Fla. 4th DCA 2004) and *Roche Surety and Casualty v. OIR*, 895 So. 2d 1139 (Fla. 2nd DCA 2005). Furthermore, it is respectfully

submitted that no one has every successfully sued the Department of Financial Services for conduct of either of these Offices, over which it lacks control.

40. The above examples demonstrate that even if it were the OIG rather than the IG that was moving to intervene, its independence would provide it the capacity to sue and be sued.

41. Both the County and the Clerk also argue that the IG lacks capacity to sue or be sued because section 4.3 of the County Charter provides for a county attorney to be employed by the BOCC and represent the Board, the County, and its departments. But the Charter also requires an independent IG and OIG, and all Charter provisions must be read in pari material and where possible reconciled. Nothing in the Charter requires that the independent Inspector General use the BOCC's attorney for her legal representation. And any such provision would contradict the Charter's requirement of IG independence.

42. Moreover, it is absurd to maintain that the IG, which must oversee the conduct of the BOCC and its departments, is required to use the BOCC's attorney for representation, especially when the interests of the IG and the BOCC diverge. In the instant case:

    a. From the outset, the County Attorney has specifically refused to disclose to the IG her "litigation strategy" or "mental impressions" of the merits of the Municipalities' complaint, due to what her office refers to as the IG's "functional independence."

    b. The County Attorney, in response to the failure to fully fund the IG, requested monetary damages **for the County** at the conclusion of this litigation rather than relief for the IG.

    c. In response to the IG's request for supplementary funding from the BOCC, the County Attorney publicly recommended that the BOCC deny the request, based on

her alleged concern that providing such funding could harm the BOCC's position in this lawsuit.

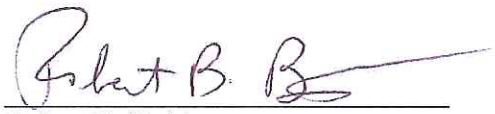
d. These positions and actions are contrary to the interests of the IG.

43. Under the Florida Bar's Rule of Professional Conduct 4-1.7, the County Attorney is prohibited from representing both her employer, the BOCC, and the IG in any matter where their interests diverge, especially when both clients have not waived the conflict.

44. In arguing that the IG may only use the County Attorney for her legal representation, the County is essentially arguing that when the interests of the IG and the BOCC diverge, only the BOCC's position and interests may be heard and considered by the Court.

45. The rights provided to the Inspector General in the County Charter, including but not limited to her rights to independence and a minimum level of funding, would prove illusory if she were denied due process and prohibited from accessing the courts to defend those rights. The Inspector General surely has the capacity to sue and be sued.

I hereby certify that a copy of the foregoing Memorandum of Law has been provided by email and U.S. Mail this 3rd day of August, 2012, to those on the attached service list.



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