NO.: 4D12-4325
L.T. CASE NO.: 502011CA017953AN

IN THE FLORIDA DISTRICT COURT OF APPEAL,
FOURTH DISTRICT

SHERYL STECKLER, in her Official Capacity
As Inspector General of Palm Beach County, Florida,
Appellant,

v.

TOWN OF GULF STREAM, et al.,
Appellees.

From the Circuit Court for the Fifteenth Judicial Circuit
Palm Beach County, Florida

APPELLEE PALM BEACH COUNTY'S ANSWER BRIEF

LEONARD W. BERGER, ESQ.
HELENE C. HVIZD, ESQ.
Co-counsel for Appellee Palm Beach County
Assistant County Attorneys
Palm Beach County Attorney's Office
300 North Dixie Hwy., Suite 359
West Palm Beach, Florida 33401
Florida Bar Numbers: 896055; 868442
Tel.: (561) 355-6337
Fax.: (561) 655-7054

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INTRODUCTION

Appellant, the Palm Beach County Office of Inspector General, will be referred to as such, as the Inspector General, as "OIG," or as Appellant.

Plaintiffs/Appellees, the fourteen municipalities which filed the underlying lawsuit against Palm Beach County, will be referred to collectively as "the municipalities."

Defendant/Appellee, Palm Beach County will be referred to as such or as "the County."

Intervener/Appellee, Sharon R. Bock, Clerk & Comptroller of Palm Beach County, will be referred to as "the Clerk."

Appellant's Appendix will be referenced by Volume Number (Vol) and Record Page Number (R).

STATEMENT OF THE CASE AND FACTS

STATEMENT OF THE CASE

The Palm Beach County Office of Inspector General brings this appeal from the trial court's order denying the OIG's motion to intervene in a civil lawsuit brought by numerous municipalities against Palm Beach County, which challenges the legality of the County Ordinance establishing the method for funding the Palm Beach County OIG (Vol 1 – R 1-83; Vol 3 – R 423-24).

STATEMENT OF THE FACTS

The County is compelled to provide a Statement of the Facts because the Palm Beach County OIG's Statement of the Facts contains numerous gratuitous comments unsupported by citation to its Appendix, and makes no mention of record facts and circumstances essential to a determination of this cause. For example, the second true paragraph on page 3 of the Initial Brief, concerning televised drafting committee meetings, is utterly outside the record before this court. Such unsupported contentions have no place in an appellant's Statement of the Facts. *See Davis v. Sails*, 306 So. 2d 615 (Fla. 1st DCA 1975) (striking appellant's initial

brief for failure to cite the record as required by Florida Rule of Appellate Procedure 9.120(b)(3)).

Additionally, the Initial Brief makes no mention whatsoever of the fact that the County provided additional funding to the Palm Beach County Office of Inspector General during the pendency of the underlying suit (Vol 2 – R 301). The County's Amended Counterclaim seeks to recover that additional funding from the municipalities, including $687,864 expended by the County on the County's OIG during Fiscal Year 2012, and a projected $2,512,276 to be expended by the County on its OIG during Fiscal Year 2013 (Vol 2 – R 301). This fact contradicts Appellant's implication in its Statement of the Facts that the Palm Beach County OIG is suffering a tremendous budget shortfall during the pendency of the municipalities' underlying suit against the County.

MUNICIPALITIES' LAWSUIT

The municipalities' lawsuit questions whether the method of funding the Palm Beach County OIG, as contained in Article XII, Section 2-429 of the Palm Beach County Code, comports with law (Vol 1- R 1-83).[1] Palm Beach County,

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1 Regarding footnotes 1 and 4 in the municipalities' Answer Brief, the County obviously disputes the allegations of the municipalities' claims.

through its County Attorney's Office, has defended against the municipalities' lawsuit from the suit's inception (Vol 1 – R 130-143; Vol 2 – R 286-306).

Despite the County's on-going defense of the municipalities' lawsuit, the Palm Beach County Office of Inspector General filed a motion attempting to intervene in the on-going litigation (Vol 2 – R 180-221). The OIG contended it was entitled to intervene based on language in the Palm Beach County Ordinance creating the Office of Inspector General which refers generally to the independence of that Office (Vol 2 – R 181-82). The Palm Beach County OIG contended it was "independent in all material respects" from the Palm Beach County Board of County Commissioners (Vol 2 – R 181). It based this contention, in part, on the fact that the Inspector General is the "sole determiner" of the contents of her reports and "which matters she will refer to other agencies" (Vol 2 – R 182).

The Palm Beach County OIG attached to its Motion to Intervene four pleadings it sought to file in the action, including: 1) a motion to dismiss the Clerk and Comptroller's amended complaint in intervention, cross-claim, and counterclaim for declaratory relief (Vol 2 – R 191-98); 2) a petition for writ of mandamus seeking to compel the Clerk to prepare allocation schedules to determine the County's and municipalities' proportionate shares of funding, to invoice the

County and municipalities, to deposit funds received, and to "cease segregating and prohibiting the expenditure of funds received from municipalities (Vol 2 – R 199-210); 3) a Motion to Dismiss Municipalities' Complaint for Declaratory Relief (Vol 2 – R 211-14); and 4) a Crossclaim for Issuance of Writ of Mandamus to Plaintiff Municipalities, which sought to compel the municipalities to pay their respective shares of funding as outlined in the OIG Ordinance (Vol 2 – R 215-21).

The County and the municipalities responded to the motion, noting the County Attorney's Office had sole responsibility for defending against the municipalities action; the Palm Beach County OIG is a County department and lacks capacity to sue; the Palm Beach County OIG lacks standing in the underlying lawsuit; and intervention should not be granted (Vol 2 – R 245-56; Vol 2 – R 257-64). Hearing on the Palm Beach County OIG's Motion to Intervene was held on October 24, 2012, following which the motion was denied (Vol 5 – R 1-32; Vol 3 – R 423-34).

SUMMARY OF ARGUMENT

The trial court properly exercised its discretion in denying the Palm Beach County OIG's Motion to Intervene for any one of four reasons. First, the Florida Constitution grants to the Palm Beach County Board of County Commissioners the power to hire a County Attorney. The Palm Beach County Charter expressly provides that the County Attorney shall prosecute and defend actions on behalf of Palm Beach County. On this basis alone, the Palm Beach County OIG's attempt to intervene in the underlying lawsuit was improper, and thus properly denied.

Second, the Palm Beach County Office of Inspector General lacks capacity to sue or be sued. The Office of Inspector General was created by County ordinance, not pursuant to a state statute which granted the County the authority to create a separate body corporate and politic with the capacity to sue. The Palm Beach County OIG's reference to vague language in the County ordinance granting that County department the right to investigate, issue subpoenas or seek injunctive relief is of no consequence to a determination of capacity to sue. The Office's power to seek injunctive relief is similar to authority granted to other departments in the County, and does not equate with a capacity to sue.

Third, the Palm Beach County OIG lacks standing in the underlying suit. The Palm Beach County Board of County Commissioners is the sole body with authority and control over that Office's budget. A department of the County, such as the County OIG, lacks any stake whatsoever in a controversy concerning the Palm Beach County Budget.

Fourth, application of the factors to be considered when ruling on a motion to intervene reveals that the Palm Beach County OIG has no interest in the matter, and sought to inject new issues into the case, thus intervention was properly denied.

To the extent Appellant's argument under Issue II concerns whether intervention was properly denied given the OIG's attempt to file motions to dismiss and mandamus actions, and thus to inject new issues into the case, the County responds to these arguments under the fourth subissue of Issue I. To the extent the Palm Beach County OIG asserts under Issue II that it should be allowed to intervene and it should enjoy "full party" rights, the law is clear that an intervenor takes the case as he or she finds it. Finally, to the extent the OIG asks this court for an advisory opinion concerning an issue not yet reached by the trial court, such a request is improper and should be declined. There has been no ruling below addressing what actions may be taken if intervention were to be allowed. The

County respectfully suggests that the trial court is the proper court to address the extent of an intervenor's rights in the first instance.

The Order here appealed should be affirmed.

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED THE PALM BEACH COUNTY OFFICE OF INSPECTOR GENERAL'S MOTION TO INTERVENE BECAUSE THE COUNTY IS REPRESENTED BY THE COUNTY ATTORNEY'S OFFICE; THE OIG IS A DEPARTMENT OF PALM BEACH COUNTY GOVERNMENT WHICH LACKS CAPACITY TO SUE; THE OIG LACKS STANDING; AND THE OIG HAS NO INTEREST IN THE UNDERLYING LITIGATION AND SOUGHT TO INJECT NEW ISSUES INTO THE CASE (RESTATED).

STANDARD OF REVIEW

The Palm Beach County Office of Inspector General incorrectly contends the standard of review applicable to the trial court's denial of its motion to intervene is *de novo*. To the contrary, it is well-established that a trial court's ruling on a motion to intervene is reviewed for an abuse of discretion. *Hausmann ex rel. Doe v. L.M.*, 806 So. 2d 511, 513 (Fla. 4th DCA 2001); *Barnhill v. Florida Microsoft Anti-Trust Litigation*, 905 So. 2d 195, 198 (Fla. 3d DCA 2005) (citing *Hausmann*); *Kissoon v. Araujo*, 849 So. 2d 426, 429 (Fla. 1st DCA 2003). "Whether or not to grant a motion for intervention is within the court's discretion, and will not be reversed unless it is shown to have been an abuse of discretion." *Kissoon*, 849 So. 2d at 429 (citing *Union Cent. Life Ins. Co. v. Carlisle*, 593 So. 2d 505 (Fla. 1992); *Grimes v.*

Walton County, 591 So. 2d 1091 (Fla. 1st DCA 1992); and *Park A Partners, Ltd., East Brickell Ass'n v. City of Miami*, 844 So. 2d 792 (Fla. 3d DCA 2003)).

The abuse of discretion standard is satisfied only "when 'the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court.'" *Lynch v. State*, 2 So. 3d 47, 80 (Fla. 2008) (quoting *Huff v. State*, 569 So. 2d 1247, 1249 (Fla. 1990) (quoting *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980))).

The OIG cites *Adhin v. First Horizon Home Loans*, 44 So. 3d 1245 (Fla. 5th DCA 2010) in support of its contention that a *de novo* standard of review applies. *Adhin* is distinguishable as concerning solely the question of whether a statutory provision unconstitutionally conflicted with a rule of civil procedure. *Id.* at 1249. The instant case concerns issues which involve application of disputed facts to the law, including, among others, whether a department of county government may sue or be sued as concerns a claim challenging a funding provision contained in a county ordinance, and whether a department of Palm Beach County government may be found to have an interest in the County's budget sufficient to support standing.

The well-established abuse of discretion standard of review applies, and Appellant has failed to satisfy that standard.

THE COUNTY ATTORNEY HAS EXCLUSIVE AUTHORITY TO DEFEND THE MUNICIPALITIES' ACTION

Section 125.01(1)(b) of the Florida Statutes grants to the governing body of a county the power to prosecute and defend legal causes on behalf of a county. That section provides in pertinent part:

> 125.01 Powers and duties
>
> (1) The legislative and governing body of a county shall have the power to carry on county government. To the extent not inconsistent with general or special law, this power includes, but is not restricted to, the power to:
>
> * * *
>
> (b) Provide for the prosecution and defense of legal causes in behalf of the county or state and retain counsel and set their compensation.

§ 125.01(1)(b), Fla. Stat. (2010).

Pursuant to this section, the Palm Beach County Board of County Commissioners is the sole legislative and governing body authorized to provide for the defense of legal causes brought against the County, such as the municipalities' underlying suit.

The Palm Beach County Charter expressly authorizes the Board of County Commissioners to select the County Attorney, and further provides that the Office of the County Attorney shall have sole responsibility for defending cases such as the municipalities' underlying suit. Section 4.3 of the Palm Beach County Charter provides in pertinent part:

> Sec. 4.3. – Office of the county attorney.
>
> There shall be a county attorney selected by the board of county commissioners who shall serve at the pleasure of the board.
>
> * * *
>
> The office of the county attorney shall be responsible for the representation of Palm Beach County, 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. **The office of county attorney shall prosecute and defend all civil actions for and on behalf of Palm Beach County and the board of county commissioners**, and shall review all ordinances, resolutions, contracts, bonds, and other written instruments.

Palm Beach County Charter, Art. 4, § 4.3, January 2011 (emphasis supplied).

The Palm Beach County Charter is the "constitution and the fundamental law" of Palm Beach County. *Metro-Dade Fire Rescue Serv. Dist. v. Metro-Dade County*, 616 So. 2d 966, 968 (Fla. 1993) (characterizing Dade County charter thusly). "'The main purpose in construing constitutional provisions is to ascertain

the intent of the framers and to effectuate the object designed to be accomplished.'" *Id.* (quoting *Metropolitan Dade County v. City of Miami Beach*, 396 So. 2d 144, 146 (Fla. 1980)).

The intent of the Palm Beach County Charter is clear and unambiguous. The only office empowered to prosecute and defend all civil actions for and on behalf of Palm Beach County and the Board of County Commissioners is the Palm Beach County Office of County Attorney.

To the extent the Palm Beach County OIG suggests that the Inspector General Ordinance grants to the OIG a right to prosecute or defend civil actions, such a grant would be in conflict with section 125.01(1)(b), and would fail. "[M]unicipal ordinances are inferior in status and subordinate to the laws of the state." *City of Wilton Manors v. Starling*, 121 So. 2d 172, 174 (Fla. 2d DCA 1960). "[A]n ordinance must not conflict with any controlling provision as principle of law, and if any doubt exists as to the extent of a power attempted to be exercised which may affect the operation of a state statute, the doubt is to be resolved against the ordinance and in favor of the statute. *Id.*

THE OIG LACKS CAPACITY TO SUE

INTERVENTION WAS SOUGHT IN THE OIG'S OFFICIAL CAPACITY

The Palm Beach County Office of Inspector General argues that it has capacity to sue because the individual who heads that County department is a "natural person who is sui juris with no legal disability" (Initial Brief at 13). Appellant's argument rests on the faulty premise that because Sheryl Steckler's name appears in the style of Appellant's various pleadings, Sheryl Steckler, the individual, is the party attempting to intervene in the underlying action.[2]

It cannot be disputed that the party attempting to intervene below, as taken from the style of this Appeal, is "Sheryl Steckler, **in her Official Capacity** as Inspector General of Palm Beach County, Florida." It is the Palm Beach County Office of Inspector General which is attempting to intervene, not Sheryl Steckler personally. The record demonstrates that Appellant is represented before this Court, and was before the trial court, by an attorney employed by the Office of Inspector General, not an attorney employed by Ms. Steckler personally. This Court may take judicial notice of its records in this case, which demonstrate that the filing fee for this appeal, brought by the Palm Beach County OIG, was paid by the

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2 As argued below, the Palm Beach County OIG lacks standing because that Office has no direct interest in the outcome of this case, which concerns a funding mechanism approved by the County through its Board of County Commissioners, and ultimately under the Board's control. Surely, Sheryl Steckler, the individual, would have no interest whatsoever in this case, and thus lacks standing.

Palm Beach County Board of County Commissioners, not by Ms. Steckler personally. It is implausible to think that Ms. Steckler is seeking to intervene in the underlying suit in her individual capacity, and is expending public funds to assert an individual claim.

Rather, the party attempting to intervene, the Palm Beach County Office of Inspector General, is not an individual, or a "natural person," but is a department of county government. The issue presented before the trial court was whether a department of county government has the capacity to sue or be sued as concerns a constitutional challenge to a funding provision of a County ordinance. By its denial of the motion to intervene, the trial court implicitly, and properly, answered that question in the negative.

To rule otherwise, and to find that a department of County government has the capacity to sue and to inject itself into litigation being defended by the County, would be to turn local government law on its head, establishing precedent which would wreak havoc in the administration of local governments.

THE OIG ORDINANCE

Understanding the issue of the Palm Beach County OIG's lack of capacity to sue requires an examination of the OIG Ordinance, Chapter 2, Article XII of the

Palm Beach County Code. The OIG Ordinance contains fourteen sections, section 2-421 through 2-432:

- Section 2-421 contains the title of the Article XII, and provides that the ordinance applies to the County, all County departments, the municipalities who approved the County's charter amendment in the referendum held November 2, 2010, any other entity which elects to be bound by the article, and any municipality formed after January 1, 2011.

- Section 2-422 establishes the Office of Inspector General and provides that the inspector general shall initiate, conduct, supervise and coordinate investigations of county and municipal officials, employees, agencies, and others doing business with the county or municipalities and/or receiving funds from them. This section provides that "**the organization and administration of the office of inspector general shall be independent** to assure that no interference or influence external to the office of inspector general adversely affects the independence and objectivity of the inspector general."

- Section 2-423 outlines the authority of the inspector general to make investigations, publish results of investigations, review and audit county and municipal programs, accounts, records, etc., and prepare reports and recommendations to the County Board, municipalities, or entities. This section requires that those to whom the ordinance applies cooperate with the inspector general during the course of investigations, audits, or reviews. **As concerns these investigations, audits, and reviews, if a person refuses to obey the inspector general's request for documents or an interview, "the inspector general shall have the power to subpoena witnesses, administer oaths, and require production of documents."** This section further provides that the inspector general may exercise "any of the powers contained in this article upon his or her own initiative." Finally, this section provides for the OIG to enter into agreements with entities wishing to benefit from the services of the OIG, which shall include a provision for payment of fees.

- Section 2-423.1 provides for public awareness strategies to inform the public of the OIG's authority and responsibilities.

- Section 2-424 addresses the minimum qualifications for the inspector general, the method of selecting the inspector general, and the term of office.

- Section 2-425 addresses the inspector general's contract of employment, and provides that "the contract must be approved by a majority of the board [of county commissioners] at a regularly scheduled board meeting."

- Section 2-426 provides that the County shall provide office space and physical facilities to the OIG, and the OIG shall have the power to appoint, employ, and remove personnel.

- Section 2-427 addresses finalization of the inspector general's reports, and provides for a person or entity to dispute findings in those reports.

- Section 2-428 requires the inspector general to prepare and publish an annual report.

- Section 2-429 is the first of two sections addressing financial support and budgeting of the OIG. This section provides that "the county and each municipality shall provide sufficient financial support for the inspector general's office to fulfill its duties . . . ." It provides that "the county and municipalities shall fund the inspector general's office proportionately, based on actual expenses of each governmental entity . . . ." This section requires the OIG to "deliver to the board a budget request . . ." and provides that "[t]he budget of the inspector general shall be subject to final approval of the board." It addresses the office of the clerk and comptroller's duty to prepare an allocation schedule and invoice the county and each municipality for its proportionate share of the approved budget. Funds received are to be placed in a special revenue fund, and if payment is not timely received, "**the county or any municipality in compliance with this section may pursue any available legal remedy**."

- Section 2-429.1 addresses the funding base, or minimum level of funding, and provides the method of calculating the funding base and adjustments to that funding base. This section provides that the board of county commissioners may adjust the funding base percentage, subject to review by the review committee, whose recommendation may be overruled by a supermajority vote of the board.

- Section 2-430 provides the procedure for removing an inspector general.

- Section 2-431 addresses enforcement of Article XII of the county code, and provides that "[t]his 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." This section **does not** name the inspector general as the entity entitled to seek injunctive relief.

- Section 2-432 provides for penalties for threatening a person who is cooperating with the inspector general, and for obstructing an OIG investigation.

Ch. 2, Art. XII, Palm Beach County Code.

Examination of the OIG ordinance reveals that the ordinance does not grant any authority or power to the Palm Beach County OIG to sue or be sued. The "independence" language highlighted by the OIG is expressly limited to organization and administration of the office.

THE OIG ORDINANCE EXPRESSLY GRANTS "THE COUNTY" A RIGHT TO ENFORCE THE ORDINANCE, NOT THE OIG

The "financial support and budgeting" provision of the OIG Ordinance, section 2-429, addresses the circumstance of the County or a municipality not timely

paying an invoiced proportionate share, and in those circumstances, grants the right to pursue a legal remedy to "the county or any municipality in compliance with this section . . . ." Palm Beach County Code, Ch. 2, Art. XII, § 2-429(7). This grant of power to pursue a legal remedy to "the county," is in keeping with section 125.01(1)(b) and the County Charter, and evidences a clear intent that the County Attorney defend the municipalities' underlying suit.

Pursuant to Florida Statutes and the Palm Beach County Charter, the Palm Beach County Attorney has sole responsibility to defend the municipalities' underlying claim, thus the Palm Beach County Office of Inspector General necessarily lacks capacity to defend that action. The trial court properly denied the OIG's motion to intervene, and its ruling should be affirmed.

THE POWER TO SUBPOENA AND SEEK INJUNCTIVE RELIEF

As to investigations, audits, and reviews, the OIG may subpoena witnesses and require production of documents, but this provision does not state that the OIG may do so independently of the County Attorney. Finally, the section of the Palm Beach County Code which speaks of the right to seek injunctive relief does not name the inspector general as an entity entitled to do so.

In sum, examination of the OIG ordinance yields the conclusion that, in keeping with the County Charter, the limited subpoena power and injunctive relief addressed in the ordinance are remedies to be sought by the County through the County Attorney.

THE OIG IS NOT A BODY CORPORATE AND POLITIC WITH CAPACITY TO SUE

By enacting the County OIG ordinance, the County did not create an independent body corporate and politic, as the OIG contends. Indeed, the County **could not** have done so, as there exists no enabling statute which would allow the County to do so. Authority for the Board of County Commissioners to create a legally independent entity must come from the State Legislature through statutes.

To explain, section 1(g) of Article VIII of the Florida Constitution grants charter counties "all powers of local self-government not inconsistent with general law, or with special law approved by vote of the electors." Art. VII, § 1(g), Fla. Const. (1968). This Article of the 1968 revision furthered the home rule movement, which grants local government broad authority to govern its affairs. The 1968 revision also provided some limits on what the Legislature could do as concerns local governments. Article III, section 11 of the 1968 revision contains a

long list of special acts or laws of local application which the Legislature is prohibited from adopting. Art. III, § 11, Fla. Const. (1968).

With this background, charter counties are understood to have broad authority to pass an ordinance as long as it does not contradict state law. But that authority extends only to the management of its own affairs. Charter counties cannot be understood to have the authority to create an entirely independent governmental entity, as the Palm Beach County OIG suggests. That is not the power of self-government; that is the power of creating someone else's government.

This is not to say there is no instance when the County may create a separate body corporate and politic; however, to do so, the legislature must grant counties that authority. The following are a few examples of such enabling statutes. Section 159.604 provides: "Each county in this state may create by ordinance a separate public body corporate and politic, to be known as the "Housing Finance Authority" of the county for which it is created, to carry out only the powers granted in this Act." § 159.604(1), Fla. Stat. (2010). Section 159.45 provides: "In each county, there is hereby created a local governmental body as a public body corporate and politic known as the "_____ County Industrial Development Authority." § 159.45(1), Fla. Stat. (2010)Section 159.701 provides: "Subject to the provisions of

this part, each county or group of counties may create by ordinance a local governmental body as a public body corporate and politic to be known as "_____Research and Development Authority . . . ." § 159.701(1), Fla. Stat. (2010). Section 163.356 provides: "[A]ny county or municipality may create a public body corporate and politic to be known as a 'community redevelopment agency.'" § 163.356, Fla. Stat. (2010). Section 190.005(2) provides: "the exclusive and uniform method for the establishment of a community development district of less than 1,000 acres in size shall be pursuant to an ordinance adopted by the county commission of the county having jurisdiction over the majority of land in the area in which the district is to be located . . . ." § 190.005(2), Fla. Stat. (2010). The case relied on by Appellant, *Lederer v. Orlando Utilities Commission*, 981 So. 2d 521 (Fla. 2d DCA 2008) illustrates how a body corporate and politic, such as the OUC, which is created pursuant to the Laws of Florida, will be found to have a capacity to be sued. No similar statute exists as concerns the Palm Beach County OIG.

Obviously, if a county were given the power under its home rule authority alone to create a separate governmental agency, the above statutes would be unnecessary. Such an interpretation flies in the face of the "'basic rule of statutory construction . . . that the Legislature does not intend to enact useless provisions . . .

.'" *Larimore v. State*, 2 So. 3d 101, 114 (Fla. 2008) (quoting *State v. Goode*, 830 So. 2d 817, 824 (Fla. 2002)). Absent a statutory provision granting a county the authority to create a body corporate and politic, a county may not do so. No such enabling statute exists as to the Palm Beach County OIG.

Moreover, where the County has indeed created a body corporate and politic pursuant to legislative mandate, the County ordinance makes clear that a separate legal entity is being created. Again, by way of illustration, section 2-183 of the Palm Beach County Code provides: "There is hereby created a **separate public body corporate and politic** to be known as the housing finance authority of the county . . . ." Palm Beach County Code, Ch. 2, Art. V, Div. 3, § 2-183 (emphasis supplied). Section 2-202 provides: "There is hereby created a **public body corporate and politic** to be known as the Florida Atlantic Research and Development Authority." Palm Beach County Code, Ch. 2, Art. V, Div. 4, § 2-202 (emphasis supplied). Section 2-231 provides: "There is hereby created a **public body corporate and politic** to be known as the Westgate/Belvedere Homes Community Redevelopment Agency . . . ." Palm Beach County Code, Ch. 2, Art. V, Div. 6, § 2-231 (emphasis supplied).

No such language is present in the Palm Beach County OIG ordinance. The language highlighted by the Palm Beach County OIG in a strained attempt to portray a county department as something it is not, is completely different from the above-noted "body corporate and politic" language. For example, section 2-422 of the OIG ordinance states that the "administration and organization shall be independent" – a far cry from the language in County ordinances which create bodies corporate and politic pursuant to statutory authority. The Palm Beach County Charter provision which requires the creation of an Inspector General, states merely that the county shall establish an office, "to provide independent oversight . . . ." Again, in no way does this language compare to truly independent agencies which the county has created through specific legislative mandate.

THE PALM BEACH COUNTY OIG'S AUTHORITY TO SEEK REDRESS IN COURT DOES NOT CREATE CAPACITY TO SUE ON ITS OWN BEHALF

As noted above, the Palm Beach County Charter specifies that only the county attorney's office prosecutes and defends all legal actions on behalf of the County. Palm Beach County Charter, § 4.3. The OIG ordinance provides for subpoenas and injunctive relief, but it does not specify that the OIG may independently seek injunctive relief. Other county ordinances include the same sort of language the Palm Beach County OIG highlights, and it is unreasonable to suggest that these

ordinances all give departments of the County the capacity to sue on their own behalf.

For example, the Consumer Affairs Ordinance gives the executive director, among other "powers," the ability to "investigate complaints, institute actions and proceedings under this chapter" and to "take whatever action is necessary to preserve such status quo or to prevent such irreparable harm, including, but not limited to, seeking temporary restraining orders and preliminary injunctions, without bond." Palm Beach County Code, Ch. 9, Art. I, §§ 9-10(4) & 9-16. The Roadside Vendor Ordinance grants a similar enforcement power to the County Engineer. Palm Beach County Code, Ch. 23, Art. V, § 23-114. The Wellfield Protection Ordinance states that nothing in that chapter of the Unified Land Development Code "shall preclude or be deemed a condition precedent to [Environmental Resources Management] seeking a temporary or permanent injunction." Palm Beach County Unified Land Development Code, Art. 14, Ch. B, Sec. 13.G.

When these officials or departments want to use these ordinance provisions to go to court, the county attorney does so on behalf of the department. That is the

only reasonable way to read each ordinance in concert with section 4-3 of the Palm Beach County Charter.

Alternatively, even if one were to conclude that the OIG had the capacity to proceed to court independent of the County Attorney, such capacity could only be read as applying to the functions specifically enumerated in the OIG Ordinance, functions implicated in the conduct of investigations, audits, and reports. The OIG Ordinance cannot reasonably be read as allowing the OIG to proceed to court to defend a legal challenge to an ordinance of the Board of County Commissioners, such as in the underlying case, even if that ordinance involves the OIG.

To read the OIG Ordinance this broadly would have wide-ranging effects on the conduct of County governance, creating a precedent which would undo long-standing principles of law and turn local government law on its head. It is well-settled that claims challenging the actions of a county department should be brought against the county itself, rather than against the county department. *Masson v. Miami-Dade County*, 738 So. 2d 431, 432 (Fla. 3d DCA 1999); *Florida City Police Dep't v. Corcoran*, 661 So. 2d 409, 410 (Fla. 3d DCA 1995). A holding that a county department has the capacity to sue and be sued flies in the face of this

long-standing principle of law, setting up the very real possibility of legal challenges which would cripple counties.

The trial court correctly concluded that the OIG lacks capacity to sue and be sued. The order denying intervention should be affirmed.

THE PALM BEACH COUNTY OIG LACKS STANDING

This Court explained the principle of standing in *Weiss v. Johansen*, 989 So. 2d 1009 (Fla. 4th DCA 2005):

> Standing depends on whether a party has a sufficient stake in a justiciable controversy, with a legally cognizable interest which would be affected by the outcome of the litigation. *See Nedeau v. Gallagher*, 851 So. 2d 214, 215 (Fla. 1st DCA 2003). The interest cannot be conjectural or merely hypothetical. *See id.* at 216. Furthermore, the claim should be brought by, or on behalf of, the real party in interest. *See id.* Standing encompasses not only this "sufficient stake" definition, but also the requirement that the claim be brought by or on behalf of one who is recognized in the law as a "real party in interest," that is the person in whom rests, by substantive law, the claim sought to be enforced. *See Kumar Corp. v. Nopal Lines, Ltd.*, 462 So. 2d 1178, 1183 (Fla. 3d DCA), *review denied*, 476 So. 2d 675 (Fla. 1985).

Weiss, 989 So. 2d at 1011.

There is no legal authority for the proposition that any County department whose funding base or budget may be affected by litigation will have an interest that confers standing. Moreover, and assuming *arguendo* that the Palm Beach County OIG has a sufficient stake in the outcome of this litigation, the OIG does not have a

legally cognizable interest recognized by substantive law to make her the real party in interest. As stated previously, substantive law gives the County alone, not the OIG, the legally cognizable interest in this litigation. Therefore, it is the County, not the OIG, which is the real party in interest. Payment obligations under the OIG Ordinance are to the County.

The OIG also must have alleged that she suffered or will suffer a special injury. *Wexler v. Lepore*, 878 So. 2d 1276, 1280 (Fla. 4th DCA 2004). *See also, Alachua v. Scharps*, 855 So. 2d 195 (Fla. 1st DCA 2003) (generally, to have standing to bring an action the plaintiff must allege that he has suffered or will suffer a special injury). A special injury is an injury different in kind than those similarly situated. *Jack Eckerd Corp. v. Michels Island Village Pharmacy, Inc.*, 322 So. 2d 57 (Fla. 2d DCA 1975). The OIG has failed to allege a special injury that is separate and distinct from any other County department.

No County department has a legally cognizable interest in its own budget given that the Board of County Commissions has the discretion to amend its overall budget at any time to shift the loss or budget shortfall from one department to another, or to revise the budget to cover any shortfall. The OIG Ordinance is clear

that the OIG's budget is subject to approval by the Board of County Commissioners. Ch. 2, Art. XII, § 2-429(6).

Moreover, the Board of County Commissioners has sole responsibility to prepare and adopt its budget, which obviously includes the OIG's funding. *See* § 129.01(2)(a), Fla. Stat. (2009) (providing "[t]he budget must be prepared, summarized, and approved by the board of county commissioners of each county."). Allowing a department of a county to sue the county over its budget, which is tantamount to what the Palm Beach County OIG sought to do in the underlying case, is a sure invitation to chaos.

The trial court properly denied the OIG's motion to intervene because the OIG lacks standing as to the underlying suit.

INTERVENTION PROPERLY DENIED ON THE MERITS

Even assuming the OIG was able to avoid the roadblocks of a lack of capacity to sue, and lack of standing, application of the tests to be applied when ruling on a motion to intervene pursuant to Florida Rule of Civil Procedure 1.230 supports the trial court's ruling denying intervention because the Palm Beach County OIG lacks

an interest in the pending litigation, and also sought to interject new issues into the case.[3]

Rule 1.230 provides:

> Anyone claiming an interest in pending litigation may at any time be permitted to assert a 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.

Fla. R. Civ. P. 1.230.

As this Court explained in *Hausmann*:

> The test to determine what interest entitles a party to intervene is set forth in *Morgareidge v. Howey*, 75 Fla. 234, 238-39, 78 So. 14, 15 (1918):
>
> > [T]he interest which will entitle a person to intervene ... must be in the matter in litigation, and 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. 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.
>
> It then explained a two step analysis: "First, the trial court must determine that the interest asserted is appropriate to support intervention. *See Morgareidge*. Once the trial court determines that

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3 "[A] pronouncement of the trial court may be right for the wrong reason and should be affirmed if it is right for any reason." *Community Fed. Sav. And Loan Ass'n of Palm Beaches v. Wright*, 452 So. 2d 638 (Fla. 4th DCA 1984) (citing *Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150 (Fla. 1979).

> the requisite interest exists, it must exercise its sound discretion to determine whether to permit intervention." *Id.* at 507.

Hausmann, 806 So. 2d at 513.

The factors a court should consider in exercising its discretion include: "the derivation of the interest, any pertinent contractual language, the size of the interest, the potential for conflicts or new issues, and any other relevant circumstance." *Union Cen. Life Ins. Co.*, 593 So. 2d at 507-508. "It has long been the rule that the appropriateness of intervention is evaluated by whether the intervenor will either gain or lose by the direct legal operation and effect of the judgment." *Park A Partners*, 844 So. 2d at 783 (citing *Union Central Life, Ins. Co.* and *Morgareidge*).

In addition, in assessing whether the interest claimed is "in pending litigation," and whether "intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding," as provided in Rule 1.230, courts may look to pleadings which the party seeking to intervene intends to file. In *Oster v. Cay Construction Co.*, 204 So. 2d 539 (Fla. 4th DCA 1967), this Court affirmed the trial court's denial of a petition for leave to intervene where the petition showed on its face that the petitioner stockholders sought to inject four new issues into the pending litigation, and thus were not seeking to intervene in subordination to and in recognition of the main proceeding. *Id.* at 541-42. This Court quoted with

approval *Riviera Club v. Bell Mead Development Corp.*, 194 So. 783 (Fla. 1939), which interpreted an intervention rule "in all material respects similar to the present rule" and affirmed the denial of intervention because the answer attached to the petition to intervene showed on its face that the intervenor sought to inject new issues. *Oster*, 204 So. 2d at 542. The opinion in *Riviera Club* noted:

> "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."

Oster, 204 So. 2d at 542 (quoting *Riviera Club*, 194 So. at 784).

Application of these principles of law to the facts of the instant case reveals the trial court properly denied intervention because the Palm Beach County OIG, a department of Palm Beach County, would neither gain nor lose by the direct legal operation and effect of a judgment in the underlying action. Additionally, the Palm Beach County OIG attached to its Motion to Intervene several pleadings which it sought to file, which showed, on their face, that the OIG sought to inject new issues into the litigation.

As to a lack of interest in the case, as noted above, the Palm Beach County OIG is a department of Palm Beach County. The Board of County Commissioners

has ultimate responsibility for the Palm Beach County OIG's funding. The OIG's funding is approved by the Board of County Commissioners. It is Palm Beach County which has the responsibility and interest to defend its ordinance and to manage its budget as a result of the underlying litigation. The OIG's assertion that it is best suited to protect the interest of the voters is simply conjecture, unsupported by reference to any facts. Therefore it is Palm Beach County which stands to gain or lose from a judgment in the underlying action, not a department of the County such as the OIG, as evidenced in part by the fact that Palm Beach County has funded its OIG above and beyond what is required of the County pursuant to the OIG Ordinance during the pendency of this action. The OIG does not stand to gain or lose by the underlying action, the County does.

As to injecting new issues into the litigation, the Palm Beach County OIG sought to file four pleadings on intervention, including motions to dismiss the municipalities' complaint and the Clerk's complaint in intervention, answer and crossclaim; and mandamus petitions which sought relief wholly outside the claims and defenses raised in the pleadings. The trial court properly exercised its discretion to deny intervention because these pleadings showed on their face that the OIG sought to inject new issues into the action. *See Oster*, 204 So. 2d at 542.

Additionally, as the Court noted in *Krouse v. Palmer*, 179 So. 762 (Fla. 1938):

> The law is settled that an intervenor is bound by the record made at the time he intervenes and must take the suit as he finds it. He cannot contest the plaintiff's claim against the defendant, but is limited to an assertion of his right to the res. He cannot challenge sufficiency of the pleadings or the propriety of the procedure, nor can he move to dismiss or delay the cause without permission of the [court].

Id., 179 So. at 763.

The Palm Beach County OIG's pleadings attached to its motion to intervene sought to contest the plaintiff municipalities' claims and to challenge the sufficiency of the pleadings, in clear contravention of long-settled law. On this basis alone, the order denying the Palm Beach County OIG's Motion to Intervene should be affirmed.

On any one of the four bases advanced under Issue I, the trial court's order denying intervention should be affirmed.

II. ANY QUESTION CONCERNING WHETHER THE PALM BEACH COUNTY OIG SHOULD HAVE "FULL PARTY RIGHTS" ON INTERVENTION IS NOT RIPE FOR REVIEW BECAUSE THE TRIAL COURT HAS NOT ADDRESSED THIS QUESTION IN THE FIRST INSTANCE (RESTATED).

To the extent the Palm Beach County OIG's argument under Issue II asserts that intervention was improperly denied based on the OIG's failure to take the case as it found it and its attempt to inject new issues into the case, the County has

addressed this argument under the fourth subissue of Issue I above. As the case law above demonstrates, "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 . . . ." *Oster*, 204 So. 2d at 542 (quoting *Riviera Club*, 194 So. at 784). A motion to intervene is properly denied when an intervenor seeks to inject new issues into the case.

To the extent the Palm Beach County OIG asks this Court to determine what rights it should have on intervention, such an issue is not properly before this Court because the trial court has not addressed this issue. It is axiomatic that "[a]n appellate court may not decide issues that were not ruled on by a trial court in the first instance." *Alamagan Corp. v. Daniels Group, Inc.*, 809 So. 2d 22 (Fla. 3d DCA 2002) (citing *Sierra by Sierra v. Public Health Trust of Dade County*, 661 So. 2d 1296, 1298 (Fla. 3d DCA 1995); *Chipola Nurseries, Inc. v. Div. of Admin.*, 335 So. 2d 617, 619 (Fla. 1st DCA 1976) (noting question not ruled on by trial court would not be considered on appeal); *Margolis v. Klein*, 184 So.2d 205, 206 (Fla. 3d DCA 1966) (noting that before trial court will be held in error, it must be presented with an opportunity to rule on the matter before it); *Beaty v. Beaty*, 177 So. 2d 54, 57

(Fla. 2d DCA 1965) (noting an appellate court will review only those questions timely presented and ruled upon in trial court).

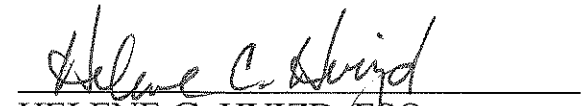
In essence, the Palm Beach County OIG is seeking an advisory opinion by its second issue on appeal. Such a request is improper, and should be denied.

CONCLUSION

Palm Beach County respectfully requests this Court affirm the trial court's ruling denying the Inspector General's Motion to Intervene.

Respectfully submitted,

LEONARD W. BERGER, ESQ.
Assistant County Attorney
Florida Bar Number 896055



HELENE C. HVIZD, ESQ.
Assistant County Attorney
Florida Bar Number 868442

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing Appellee Palm Beach County's Answer Brief was efiled at efiling@flcourts.org and served by mail this 28th day of January, 2013, to:

ROBERT B. BEITLER, GENERAL COUNSEL
Counsel for Appellant Sheryl Steckler,
Inspector General
P.O. Box 16568
West Palm Beach, FL 33416;

CLAUDIA M MCKENNA, CITY ATTORNEY
DOUGLAS N. YEARGIN, ASSISTANT CITY ATTORNEY
KIMBERLY L. ROTHENBURG, ASSISTANT CITY ATTORNEY
City of West Palm Beach
Co-counsel for Appellee City of West Palm Beach
P.O. Box 3366
West Palm Beach, FL 33402;

JOHN C. RANDOLPH, ESQ.
Jones, Foster, Johnson & Stubb, P.A.
Counsel for Appellee Town of Gulf Stream
P.O. Box 3475
West Palm Beach, FL 33402-3475;

KEITH W. DAVIS, ESQ.
Corbett and White, P.A.
Counsel for Appellee Village of Tequesta,
Appellee Town of Palm Beach Shores, and
Appellee Town of Mangonia Park
1111 Hypoluxo Road, Suite 207
Lantana, FL 33462-4271;

PAMELA HANNA RYAN, CITY ATTORNEY
City of Riviera Beach Attorney's Office
Counsel for Appellee City of Riviera Beach
600 W. Blue Heron Boulevard
Riviera Beach, FL 33404-4311;

THOMAS JAY BAIRD, ESQ.
Jones, Foster, Johnson & Stubbs, P.A.
Counsel for Appellee Town of Jupiter, and
Appellee Town of Lake Park
801 Maplewood Drive, Suite 22A
Jupiter, FL 33458-8821;

R. BRIAN SHUTT, CITY ATTORNEY
TERRILL PYBURN, ASSISTANT CITY ATTORNEY
City of Delray Beach
Co-Counsel for Appellee City of Delray Beach
200 NW 1st Avenue
Delray Beach, FL 33444-2768;
TRELA J. WHITE, ESQ.
Corbett and White, P.A.
Counsel for Appellee Town of Manalapan
1111 Hypoluxo Road, Suite 207
Lantana, FL 33462-4271;

R. MAX LOHMAN, ESQ.
Corbett and White, P.A.
Counsel for Appellee City of Palm Beach Gardens
1111 Hypoluxo Road, Suite 207
Lantana, FL 33462-4271;

GLEN J. TORCIVIA, ESQ.
Torcivia & Associates, P.A.
Counsel for Appellee Town of Highland Beach
Northpoint Corporate Center

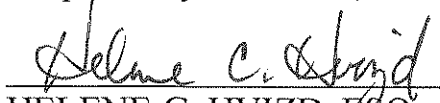
701 Northpoint Pkwy, Suite 209
West Palm Beach, FL 33407;

KENNETH G. SPILLIAS, ESQ.
Lewis, Longman & Walker
Counsel for Appellee Town of Ocean Ridge
515 N. Flagler Drive, Suite 1500
West Palm Beach, FL 33401-4327;

DIANA GRUB FRIESER, CITY ATTORNEY
City of Boca Raton
Counsel for Appellee City of Boca Raton
201 W. Palmetto Park Road
Boca Raton, FL 33432-3730;

MARTIN ALEXANDER, ESQ.
LARRY A. KLEIN
Holland & Knight, LLP
Co-counsel for Appellee Palm Beach County Clerk & Comptroller
222 Lakeview Avenue, Suite 1000
West Palm Beach, FL 33401;
NATHAN A. ADAMS, IV, ESQ.
Co-counsel for Appellee Palm Beach County Clerk & Comptroller
P.O. Drawer 810
Tallahassee, FL 32302;

Respectfully submitted,



HELENE C. HVIZD, ESQ.
Assistant County Attorney
Palm Beach County Attorney's Office
300 North Dixie Hwy., Suite 359

West Palm Beach, FL 33401
Tel: (561) 355-6337; Fax: (561) 655-7054
Email: hhvizd@pbcgov.org
Florida Bar No. 868442

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2) and is being filed in Times New Roman 14-point font.

HELENE C. HVIZD, ESQ.
Assistant County Attorney