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, 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 AMENDED MEMORANDUM OF LAW ON MOTION TO INTERVENE

SHERYL STECKLER, in her official capacity as Inspector General of Palm Beach County (IG Steckler or the IG), by and through her undersigned counsel, presents this Memorandum of Law on her Motion to Intervene, currently set for hearing at 9:30 a.m. on Wednesday, October 24, 2012, and states:

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

On November 2, 2010, more than 72% of the County's voters approved.

2. The resulting provisions in the County Charter [1.3(6), 8.3 and 8.4] provide that the Office of Inspector General (OIG) is to "provide independent oversight of publicly funded transactions, projects, and other local government operations" and include requirements to insure the independence of the IG. The IG is chosen by an independent "selection committee;" has a term contract; and may only be removed for cause and by supermajorities 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 OIG:

> "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 OIG. If IG Steckler 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.

4. The Implementing Ordinance (Chapter 2, Article XII) also reflects the fundamental requirement of IG independence. IG Steckler 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. All issues in this case involve the budget and funding for the IG. As such, IG Steckler has an absolute right to intervene, and in fact is a "necessary party." This is a matter of fundamental due process.

6. This is an action for declaratory relief under Chapter 86, Florida Statutes. Section 86.091, Florida Statutes provides, in relevant part:

> "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 proceeding."

IG Steckler claims an interest which would be affected by this Court's declaration and has such an interest. No declaration may be issued which could affect her rights, unless she is a party.

7. The Supreme Court of Florida, in *Riviera Club v. Belle Mead Dev. Corp.* 194 So. 783 (Fla. 1940), stated at 785:

> "...we have repeatedly held that intervention, by any interested party, is a matter of right and not dependent upon leave of court." (cites omitted)

8. More recently, the Supreme Court of Florida observed:

> "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.**" (citations omitted, bold added) *Everette v. Fla. Dept of Children and Families*, 961 So. 2d 270 (Fla. 2007)

IG Steckler is materially interested in the subject matter of this suit and will be directly affected by this Court's adjudication. She is therefore a necessary party who must be included.

9. This Court cannot properly adjudicate the matters before it without including IG Steckler.

> "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).

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10. 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. DCF*, supra; *Yorty v. Abreu*, 988 So. 2d 1155, 1157 (Fla. 3rd DCA 2008); and *Green v. Hood*, 98 So. 2d 488 (Fla. 1957).

11. None of the cases cited by any of the opposing parties contradict these principles.

Capacity to Sue

12. All the parties have challenged IG Steckler's capacity to sue. Under Rule 1.120(a), Florida Rules of Civil Procedure capacity to sue is presumed, and any party seeking to challenge one's capacity must raise the issue through a "specific negative averment." Although only the County has set out a specific negative averment, the arguments of all parties will be addressed.

> "'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).

13. The Inspector General Ordinance (Article XII) expressly provides IG Steckler's capacity to sue. It states: "The inspector general may exercise any of the powers contained in this article upon his or her own initiative." Section 2-423(7). One of those powers is: "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. The parties simply ignore this. The Ordinance also provides that if any person fails to comply with a subpoena issued by the IG "...the inspector general may make application to any circuit court of this state..." Section 2-423(3). This is the capacity to sue.

14. All arguments that IG Steckler lacks capacity to sue ignore the specific language of the Ordinance, and are based on the erroneous premise that the Office of Inspector General

(OIG), rather than IG Steckler, is seeking to intervene. Even without the specific authorization provided in the Ordinance, IG Steckler has the capacity to sue. She is a natural person and an independent County officer with no legal disability. No one has presented a single legal precedent for ruling that an individual with no legal disability lacks the capacity to sue.

15. The County cites only two cases to support its argument that IG Steckler lacks capacity to sue, *Larkin v. Buranosky*, 973 So. 2d 1286 (Fla. 4th DCA 2008) and *Johnston v. Meredith*, 840 So. 2d. 315 (Fla. 3rd DCA 2003). But 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. But their individual members can sue or be sued. See also *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). IG Steckler is not an unincorporated association with no legal existence.

16. Even if the OIG, rather than IG Steckler, were seeking to intervene, all arguments presented by the parties on this point would still be meritless. For starters, unlike an unincorporated association the OIG is mandated in the County Charter and has a legal existence.

17. The County argues that "The IG is simply a department of the County with functional or investigative independence." But IG Steckler is a person, not a department.

18. The County also asserts that "the IG's independence does not as a matter of law give it [sic] the legal capacity to sue or be sued in its own name..." The County provides no legal authority to support this assertion, which is both irrelevant and incorrect.

a. This assertion is irrelevant because IG Steckler is an individual person.

b. This assertion could be relevant if intervention was sought by the OIG, which is an organization. But it would be totally incorrect, as independence is the key factor in determining whether an organization, such as the OIG, has the

capacity to sue. In *Lederer v. Orlando Utilities Commission*, 981 So. 2d 521 (Fla. 2nd DCA 2008), 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 determined that the OUC had the capacity to sue and be sued because of its "substantial autonomy to operate independently from the city government." *Lederer* should be compared with N*orth Miami Water Board v. Gollin*, 171 So 2d. 584 (Fla. 3rd DCA 1965), where the utilities board was held to lack the capacity to sue because it was controlled by the city manager, and therefore was not independent.

19. All this is simple common sense. No party can be responsible for the conduct of another party over which it lacks control. Nor can a functionally independent party be deprived of access to the courts to defend and enforce its own rights. And with the capacity to sue, the corollary, the capacity to be sued, must follow. As just one example, any person who wishes to dispute a subpoena issued by IG Steckler 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 IG Steckler in this or any other material respect.

20. The final argument that IG Steckler lacks capacity to sue is based on the erroneous notion that Section 4.3 of the County Charter, which provides for a county attorney to be employed by the BOCC, also requires the county attorney to represent the IG. The Charter 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."

This argument is also without merit for numerous reasons, including:

a. IG Steckler is not the board of county commissioners, the county administrator, or a department, division, regulatory board or advisory board of county government (nor is the OIG).

b. Both IG Steckler and the OIG are independent of the listed entities and have their own representation.

c. The County Attorney, in her representation of the BOCC in this case, has taken a number of positions and actions which conflict with the interests of IG Steckler and the OIG. Under these circumstances, the Florida Bar's Rule of Professional Conduct 4-1.7, prohibits her from representing both her employer, the BOCC, and the IG.

d. The County Charter provides the IG's right to independence and a minimum level of funding. Those rights would prove illusory if IG Steckler were denied due process and prohibited from accessing the courts to defend and enforce them, and the Ordinance recognizes that fact by setting out IG Steckler's right to enforce all of its provisions in circuit court.

21. In conclusion, IG Steckler has the capacity to sue, as does the OIG.

Extent of the Inspector General's Rights as an Intervenor

22. The final issue relates to the extent of the authority this Court will allow IG Steckler upon intervention.

> "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) Rule 1.230, Florida Rules of Civil Procedure

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23. Because IG Steckler is a party whose interests are likely to be directly and significantly impacted by this Court's rulings on the issues already before it, she should not be merely a nominal party, but should be permitted to contest every issue.

24. The Clerk cites to *Omni National Bank v. Georgia Banking Company*, 951 So. 2d 1006 (Fla. 3rd DCA 2007), for the premise that an intervenor "is not permitted to contest the plaintiff's claims." But this statement is mere dicta and taken out of context. In *Omni*, the 3rd DCA actually reversed the trial court's order which had denied Omni's right to intervene and litigate the issues material to it. As a matter of common sense, there is no point in a party intervening in a case which would materially impact its interests unless it could challenge those very claims. *Williams v. Nussbaum*, cited in *Omni*, explains the standards that actually apply:

> "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, footnote 1 (Fla 1st DCA 1982)

25. IG Steckler does not currently propose to insert any new issues into this litigation, but rather to assert her interests as to the matters already at issue. Her interests extend to both the original complaint and the failure of the parties to provide the minimum funding required by the Charter during this litigation, which has been made an issue by the County's counterclaim.

26. Even if the failure to properly fund the OIG during this litigation had not already been made an issue, IG Steckler could have filed a separate suit. As noted above, the Ordinance specifies her right to file in circuit court to enforce its provisions, including the requirements that Clerk calculate proportionate shares and send out bills, and that the Municipalities pay their shares. Any such suit would likely then be combined with the instant case.

27. Furthermore, even if the IG wished to raise entirely new claims against the parties relating to her funding, Rule 1.230 authorizes the Court to permit this, and doing so would promote justice and judicial economy.

> "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." (cites omitted) *Miracle House v. Haige*, 96 So 2d 417, 418 (Fla. 1957)

28. Regarding the failure to fund the OIG, Clerk Bock and the Municipalities seem especially concerned with IG Steckler's proposed motions that would request dismissal of their respective complaints.

a. IG Steckler's 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. Because this case addresses only OIG's funding, IG Steckler should have been included as a party defendant at the outset. Had that been done, her right to file these same pleadings seeking dismissal would be beyond dispute. The plaintiffs should not be permitted to gain advantage from their attempt to exclude IG Steckler, a necessary party, from this case.

c. If the Court permits IG Steckler to file such motions and ultimately determines them to be meritorious, that need not result in dismissal of the complaints. The Court could allow a limited period of time to comply and thereby avoid dismissal of its complaint. (The Municipalities would have to become current with their bills, and Clerk Bock would have to send out billings and cease blocking the expenditure of municipal funds by the OIG.)

29. In their Response, the Municipalities also claim that allowing IG Steckler 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). IG Steckler has as great an interest in the expeditious resolution of this case as do the original parties, and should herself have been an original party. IG Steckler should be a full party to this case with the right to fully litigate all issues and advance her related claims.

Certificate of Service

I hereby certify that a copy of the foregoing Memorandum of Law has been provided by email this 9th day of October, 2012, to those on the attached service list.

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