

**IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT**

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

Petitioner,

Case No. 4D12-4421

v.

TOWN OF GULF STREAM, VILLAGE OF
TEQUESTA, CITY OF RIVIERA BEACH,
TOWN OF JUPITER, CITY OF DELRAY
BEACH, TOWN OF PALM BEACH SHORES,
TOWN OF MANALAPAN, TOWN OF
MAGNOLIA 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,

Respondents.

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**RESPONDENT CLERK & COMPTROLLER'S
RESPONSE TO ORDER TO SHOW CAUSE
(IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS)**

Sharon R. Bock, in her official capacity as the Clerk & Comptroller of Palm Beach County, Florida ("Clerk & Comptroller"), by and through undersigned counsel, and pursuant to Florida Rule of Appellate Procedure 9.100(j) and this Court's Order dated January 14, 2013, hereby submits her response to the order to show cause in opposition to the Petition for Writ of Mandamus (the "Petition") of

Sheryl Steckler, in her official capacity as Inspector General of Palm Beach County, Florida, who is the head of the Office of Inspector General, created by County Ordinance No. 2011-009 (hereinafter referred to as "Petitioner" or "OIG").

The Petition must be denied because the relief it requests is inappropriate and cannot issue for these reasons: (1) the Clerk & Comptroller does not have a mere ministerial duty to perform the actions requested; (2) Petitioner has no clear legal right to the relief requested, by virtue, *inter alia*, of her lack of capacity to sue and standing to file this action; and (3) Petitioner has another remedy available to her. The Clerk & Comptroller also agrees that the OIG lacks capacity and standing to sue and incorporates the arguments of the Respondent Municipalities and County on this point to the extent not inconsistent with this brief as if set forth herein.¹

STATEMENT OF THE CASE

The Clerk & Comptroller is an independent constitutional officer elected by the electors of Palm Beach County, Florida, pursuant to Article V, section 16 and Article VIII, section 1(d) of the Florida Constitution, to serve, *inter alia*, as "ex

¹ The County's and the Municipalities' Responses to the Order to Show Cause address the OIG's lack of capacity and standing to sue. In the interests of economy, the Clerk & Comptroller does not restate their arguments; however, a ruling that the OIG indeed lacks capacity or standing to sue also precludes mandamus against the Clerk & Comptroller. The Clerk & Comptroller also does not restate the arguments in the Appellees' Motion to Dismiss, but hereby incorporates and preserves them.

officio clerk of the board of county commissioners, auditor, recorder and custodian of all county funds." (*Accord P7*).² She is a neutral third party in this litigation drawn into the dispute between the Respondent County and Municipalities because of conflicting constitutional and statutory duties.

This case is intertwined with another pending before this Court in Case No. 4D12-4325 (the "Related Appeal"). At root, both cases relate to the mechanism for financial support and budgeting for the OIG adopted by the County Commission on May 17, 2011 in County Ordinance No. 2011-009 (the "IG Ordinance"):

Sec. 2-429. - Financial support and budgeting.

(4) No later than the fifth business day of July of each year, the office of the clerk and comptroller shall prepare an allocation schedule based on the most current LOGER system data. The proportionate share to be paid by the county and each municipality shall be reduced proportionately by the anticipated revenues from sources other than the county and municipalities and the amount of funds estimated to be received but not expended by the inspector general in the current fiscal year.

(7) The office of the clerk and comptroller shall invoice the county and each municipality one-fourth of the proportionate share as adjusted on October 10, January 10, April 10 and July 10 of each year. Payment shall be submitted to the board and due no later than thirty (30) days from the date of the invoice. Upon receipt, all funds shall be placed in the *Office of Inspector General*, Palm Beach County, Florida Special Revenue Fund. **In the event**

² References to the Petition for Writ of Mandamus are designated by "P[page number(s)]". References to the Appendix are designated by "A[document number]. [any page number(s)] ¶ [any paragraph section]".

payment is not timely received, the county or any municipality in compliance with this section may pursue any available legal remedy.

(8) The county and each municipality's proportionate share for the period of June 1, 2011 through September 30, 2011 shall be as set forth in Exhibit A which is attached to Ordinance 2011-009 and incorporated herein by reference. The office of the clerk and comptroller shall invoice the county, upon adoption of this article, nine hundred forty-six thousand seven hundred sixty-four dollars (\$946,764.00). This amount is based on the estimated expenses through June 1, 2011 of four hundred eighty-three thousand three hundred thirty-three dollars (\$483,333.00), plus the county's proportionate share as reflected on Exhibit A. The office of the clerk and comptroller shall invoice each municipality for their proportionate share as set forth in subsection (7) beginning with the first invoice on October 10, 2011.

Art. XII, § 2-429, Cnty. Code (the "Funding Mechanism") (emphasis added).

For Fiscal Year 2011, the Clerk & Comptroller took all of the steps required by the Funding Mechanism, including preparing allocation schedules, invoicing the County and all Palm Beach County municipalities (*accord* P6 ("As required by the IG Ordinance ... the Clerk sent each of the county's 38 municipalities bills")), and depositing funds received in the Office of Inspector General, Palm Beach County, Florida Special Revenue Fund (the "OIG Account"). The Clerk & Comptroller did this until the Respondent municipalities ("Respondent Municipalities") declined to pay their invoices on the grounds that "the funding mechanism for the inspector general program is unlawful." (A1; *accord* P7 ("Respondent Municipalities "refused to remit payment for the OIG")). Days later, the Respondent Municipalities filed suit in *Town of Gulf Stream, et al. v. Palm Beach County*, in the Circuit Court of the Fifteenth Judicial Circuit of Florida ("Trial Court"), in and

For Palm Beach County, Case No. 50 2011 CA 017953 (the "Lower Court Proceeding").

The Clerk & Comptroller has statutory responsibilities pursuant to section 28.12, Florida Statutes, to serve as the "accountant of the board of county commissioners" who shall "keep ... accounts and perform such other duties as provided by law" and "have custody of the seal and affix the same to any paper or instrument as required by law." The Clerk & Comptroller's duties include attesting to the legality of all checks or warrants drawn on County accounts including the OIG's and, if proper, affixing the corporate seal thereto. *Id.*; § 136.06(1), Fla. Stat. (*Accord* P8 (warrants)).

The Clerk & Comptroller has potential personal and criminal liability under section 129.09, Florida Statutes, in the exercise of these duties as follows:

County auditor not to sign illegal warrants.--Any clerk of the circuit court, acting as county auditor, who shall sign any warrant for the payment of any claim or bill of indebtedness against any county funds in excess of the expenditure allowed by law, or county ordinance, or to pay any illegal charge against the county, or to pay any claim against the county not authorized by law, or county ordinance, shall be personally liable for such amount, and if he or she shall sign such warrant willfully and knowingly he or she shall be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

§ 129.09, Fla. Stat.

Elaborating on the Clerk & Comptroller's audit responsibilities, section 136.08, Florida Statutes, states:

The accounts of each and every board and the county accounts of each and every depository, mentioned or provided for in this chapter, shall at all times be subject to the inspection and examination by the county auditor and by the Auditor General.

§ 136.08, Fla. Stat.

Unable to collect from the Respondent Municipalities, having received and deposited funds from other municipalities pursuant to the contested Funding Mechanism, and uncertain how to balance her constitutional, statutory, and municipal duties, the Clerk & Comptroller intervened in the Lower Court Proceeding with the consent of the parties without taking a position on the merits of the lawsuit. (*Accord* P8). The Clerk & Comptroller requested declaratory relief as to whether her compliance with the Funding Mechanism accords with her other duties, and sought direction regarding further collection efforts and about the disposition of the funds she had already received and deposited. (A2. 2 ¶1)

The Clerk & Comptroller also asked the County whether the County would reimburse her if she released the municipal funds that she had received and deposited in the OIG Account if the Funding Mechanism is declared unconstitutional and the municipalities later demand repayment. The Clerk & Comptroller also asked the County if it would fund any budget deficit in the OIG Account resulting from the nonpayment by the Respondent Municipalities. (A3) The County declined to do either. (*accord* P9) Therefore, the Clerk & Comptroller segregated the municipal funds received and has continued to process withdrawals

from the OIG Account up to the County's enhanced contribution toward the OIG budget, pending direction from the Trial Court.

The Trial Court held a hearing on a motion for summary judgment filed by the Respondent Municipalities on the constitutionality of the Funding Mechanism before the OIG filed its notice of appeal of the Trial Court's order denying the OIG's motion to intervene. Attached to the OIG's motion to intervene was, inter alia, a petition for mandamus against the Clerk & Comptroller (to compel the Clerk & Comptroller to prepare allocation schedules, invoice, deposit funds received, and disburse funds collected) and another against the Respondent Municipalities (to compel the Municipalities to pay their invoices). (A6; P12) This Court has agreed to expedite the Related Appeal (*Accord* P12)

After the OIG filed its notice of appeal of the Lower Court Proceeding, Petitioner also filed the instant Petition in this case.³ In the OIG's motion to expedite the Related Appeal, it states that granting the Petition in this case "is likely to require a determination that the Inspector General has both standing and the capacity to sue, thereby expressly or implicitly reversing the [trial court] Order on appeal." (A4. 8) The OIG's Initial Brief claims the trial court erred in denying its motion to intervene, because the OIG has the capacity to sue and has standing to

³ On its face, the Petition is not brought in Sheryl Steckler's personal capacity. (P1) She is utilizing the OIG's resources paid by the County to file suit. Her counsel is the OIG's general counsel.

intervene. These same questions are at the core of the instant Petition, because the OIG has no more capacity or standing to file this Petition than the OIG does to intervene in the Lower Court Proceeding.⁴

Without taking any position on the merits of the underlying dispute, the Clerk & Comptroller opposes the OIG's Petition for the reasons set forth herein and incorporated by reference (*see supra* note 1 and related text).

ARGUMENT

Mandamus Relief Is Not Appropriate.

The Clerk & Comptroller has acted responsibly in the underlying dispute to balance the various conflicting constitutional, statutory and municipal duties upon her by seeking a declaration as to the constitutionality of the Funding Mechanism. The ruling is essential for the Clerk & Comptroller to collect, control and disburse funds from the OIG Account in keeping with her constitutional, statutory, and municipal duties. Mandamus relief is not available to the OIG, because (1) the Clerk & Comptroller does not have a mere ministerial duty to perform the actions

⁴ Piecemeal review of cases is not favored; it is not allowed for claims that are legally interrelated and which substantively involve the same transaction. *S.L.T. Warehouse Co. v. Webb*, 304 So. 2d 97, 99 (Fla. 1974); *Florida Real Estate Comm'n v. Harris*, 134 So. 2d 785, 788 (Fla. 1961), *cert. denied*, 371 U.S. 7 (1962); *Bernas v. Knowles*, 648 So. 2d 272, 273-74 (Fla. 4th DCA 1995). The proper place to review the Trial Court's order on the OIG's motion to intervene, and the Trial Court's refusal to allow the OIG to seek mandamus relief in the underlying lawsuit, is in the Related Appeal.

requested; (2) Petitioner has no clear legal right to the relief requested; and (3) Petitioner has another remedy available to her.

1. The Clerk & Comptroller Does Not Have a Mere Ministerial Duty to Perform the Requested Actions.

In these circumstances involving potentially conflicting constitutional, statutory, and municipal duties, the Clerk & Comptroller has discretion and may exercise her judgment to seek declaratory relief about the steps she should take pursuant to the Funding Mechanism. In contrast, to be entitled to a writ of mandamus, a petitioner must establish an indisputable and ministerial duty on the part of the respondent.⁵ *RHS Corp. v. City of Boynton Bch.*, 736 So. 2d 1211, 1213 (Fla. 4th DCA 1999); *Wuesthoff Mem'l Hosp., Inc. v. Fla. Elections Comm'n*, 795 So.2d 179, 180 (Fla. 1st DCA 2001); *Adams v. State*, 560 So. 2d 321, 322 (Fla. 1st DCA 1990); *Fla. Soc'y of Newspaper Editors, Inc. v. Fla. Pub. Serv. Comm'n*, 543 So. 2d 1262, 1265 (Fla. 1st DCA 1989), *rev. denied*, 551 So. 2d 461 (Fla. 1989); *Solomon v. Sanitarians' Reg. Bd.*, 155 So. 2d 353, 356 (Fla. 1963); *Holland v. Wainwright*, 499 So. 2d 21, 22 (Fla. 1st DCA 1986). More than this,

⁵ A "duty or act is determined as ministerial when there is no room for the exercise of discretion, and the performance being required is directed by law." *Architectural Sheet Metal, Inc. v. RLI Ins. Co.*, 936 So. 2d 1181, 1182 (Fla. 5th DCA 2006), *rev. denied*, 946 So. 2d 1069 (Fla. 2006) (*citing Town of Manalapan v. Rechler*, 674 So. 2d 789 (Fla. 4th DCA 1996), *rev. denied*, 684 So. 2d 1353 (Fla. 1996) (*citing Solomon*, 155 So. 2d at 356 ("A ministerial duty is one that is positively imposed by law to be performed at a time and in a manner or upon conditions which are specifically designated by the law itself *absent any authorization of discretion* to the agency.") (emphasis added)).

"[m]andamus may be granted only if there is a clear legal obligation to perform a duty in a prescribed manner." *Adams*, 560 So. 2d at 323. (emphasis added).

Ordinarily, legislation affecting the duties of state officers and agencies is presumed valid and such parties do not have standing to assert otherwise. *State ex rel. Atlantic Coast Line RR Co. v. State Bd. of Equalizers*, 84 Fla. 592, 94 So. 681 (1922). The so-called *Atlantic Coast* rule relied upon by the OIG is that public officials "have no authority to decline the performance of purely ministerial duties which are imposed upon them by law," *id.* at 685, but there are multiple exceptions to this rule that control this case which are not discussed in the Petition, such as when (1) the law requires an expenditure of public funds and (2) the objecting party can show that she will be injured in her person, property or other material right by virtue of the statute in question. These are enhanced by the nature of the Clerk & Comptroller's office which is responsible to collect, control, and disburse public funds.

- a. *A Comptroller Is Entitled to Seek Judicial Relief with Respect to a Potentially Invalid Law Pertaining to the Collection and Disbursement of Public Funds.*

"It has long been held that the general rule that a ministerial officer cannot in a judicial proceeding attack the validity of a law imposing duties on him is subject to the exception that such a law may be challenged where it involves the disbursement of public funds." *Kaulakis v. Boyd*, 138 So. 2d 505, 507 (Fla. 1962)

(county commissioners had the right and duty to challenge the validity of a portion of their home rule charter, which purported to make the county liable in tort to the same extent as municipalities since a judgment for the plaintiff would have required the commissioners to expend public funds in satisfaction thereof).⁶

In particular, a comptroller is entitled to seek judicial relief with respect to a potentially invalid law pertaining to the collection and disbursement of public funds because it is the comptroller's duty to collect, audit, control and disburse them. *Harrell*, 177 So. at 856-57 (comptroller has right and authority to challenge any act providing for disbursement of public funds); *Green v. City of Pensacola*, 108 So. 2d 897, 900-01 (Fla. 1st DCA 1959) (comptroller entitled to question

⁶ *Accord Crossings at Fleming Island Cmty. Dev. Dist. v. Echeverri*, 991 So. 2d 793 (Fla. 2008); *Sunset Harbour Condo. Ass'n v. Robbins*, 914 So. 2d 925, 937 (Fla. 2005) (Bell, J., concurring) (acknowledging the validity of the public funds exemption referenced in *Barr v. Watts*, 70 So. 2d 347, 350 (Fla. 1953) and approving Justice Bell's concurrence in *Sunset Harbour*, 914 So. 2d at 935-37); *Branca v. City of Miramar*, 634 So. 2d 604, 606 (Fla. 1994) (city had standing to attack the constitutionality of its own ordinance where it required expenditure of public funds); *Arnold v. Shumpert*, 217 So. 2d 116, 119 (Fla. 1968) (board of county commissioners had necessary standing to question constitutionality of special act authorizing county to purchase public liability insurance and waive governmental immunity because they would have to expend public funds to pay insurance premiums); *State ex rel. Harrell v. Cone*, 130 Fla. 158, 177 So. 854, 856 (1938) ("Many cases hold that if an act requires a ministerial officer to perform duties particularly affecting him personally, as where ... he is charged with the control and disbursement of public funds, his official capacity gives him such an interest in the matter that he may challenge the validity of the act in mandamus.") (collecting citations); *State ex rel. Fla. Portland Cement Co. v. Hale*, 129 Fla. 588, 176 So. 577, 608-09 (1937) (state road department could challenge act that required it to pledge or expend public funds).

constitutionality of special act which purports to exempt the City of Pensacola from payment of gross receipts tax as required by general law).⁷

Crossings, Green, Kaulakis, and Barnes control this case and preclude issuance of a writ of mandamus, because they establish that the Clerk & Comptroller has discretion to challenge special acts that it considers inconsistent with the comptroller's legal obligations. Naturally, if a comptroller may affirmatively challenge the constitutionality of a special act affecting her duty to

⁷ *Accord Department of Educ. v. Lewis*, 416 So. 2d 455, 458-59 (Fla. 1982) ("The comptroller is one officer that has been allowed by Florida courts to initiate litigation in his official capacity seeking to establish the unconstitutionality of a statute."); *Dickinson v. Stone*, 251 So. 2d 268, 271 (Fla. 1971) (comptroller entitled to raise constitutional concerning validity of General Appropriations Act); *Board of Pub. Instruction for Santa Rosa Cnty. v. Croom*, 57 Fla. 347, 48 So. 641, 642 (1908) (comptroller had right to challenge the constitutionality of a special act requiring payment of money from the general revenue fund in satisfaction of certain claims); *State ex rel. Russell v. Barnes*, 25 Fla. 75, 5 So. 698 (1889) (comptroller did not transcend his authority by paying officer less than amount prescribed in superseded constitution as comptroller has duty of auditing the accounts of all officers).

Although this language explicitly applies to the state comptroller, it is no less true for the clerk and county comptroller who is equally a constitutional officer with similar responsibilities. Art. V, § 16 and Art. VIII, § 1(d), Fla. Const. *Escambia Cnty. v. Flowers*, 390 So. 2d 386 (Fla. 1st DCA 1980) (affirming denial of motion for summary judgment against suit for declaratory relief filed by county comptroller against board of county commissioners over comptroller's budget); *Green v. Walter*, 161 So. 2d 830 (Fla. 1964) (mandamus would lie on application of county comptroller); *Alachua Cnty. v. Powers*, 351 So. 2d 32 (Fla. 1977) (granting declaratory relief to clerk and comptroller); *W & F Ltd v. Dunkle*, 444 So. 2d 554 (Fla. 4th DCA 1984) (similar); *Brock v. Bd. of Cnty. Comm'rs of Collier Cnty.*, 21 So. 3d 844 (Fla. 2d DCA 2009), *rev. dismissed*, 48 So. 3d 810 (Fla. 2010) (similar).

collect, control and disburse public funds, it is all the more plain that this Clerk & Comptroller may ask the Trial Court for a declaration about an ordinance affecting each of these duties while she remains neutral and uncertain, but concerned about and affected by the outcome.

For the proposition that the Clerk & Comptroller has a mere ministerial duty to undertake the relief the OIG requests, Petitioner relies upon *Crossings at Fleming Island Cmty. Dev. Dist. v. Echeverri*, 991 So. 2d 793 (Fla. 2008) (P14). But *Crossings* actually supports the Clerk & Comptroller's position. In *Crossings*, a property appraiser relied upon an exemption to the *Atlantic Coast* Rule, not relied upon by the Clerk & Comptroller in this case; *i.e.*, that a public official may assert the unconstitutionality of an act as a defense against a taxpayer's lawsuit. Whereas the court found no support for this so-called defensive posture exception, *id.* at 799 (*disapproving* dictum in *Fuchs v. Robbins*, 818 So. 2d 460, 463-64 (Fla. 2002)), it recognized the continued validity of the two exemptions upon which the Clerk & Comptroller relies: (1) the public funds exemption and (2) the personal injury exemption. *Id.* The court observed that, although *Barr v. Watts*, 70 So. 2d 347, 350 (Fla. 1953), was critical of dicta in *City of Pensacola v. King*, 47 So. 2d 317 (Fla. 1950) and *State ex rel. Harrell v. Cone*, 130 Fla. 158, 177 So. 854 (1938), that endorsed the defensive posture exception, the *Barr* court equally reaffirmed the public funds and personal injury exemptions, and observed that the ruling in

King and *Harrell* may be explained on this basis alone. *Accord Sunset Harbour*, 914 So. 2d at 936 (also drawing into question dictum in *Fuchs* and *Dep't of Educ. v. Lewis*, 416 So. 2d 455, 458 (Fla. 1982), but reaffirming the public funds exemption).

The court in *Crossings* declined to review whether the public funds exception applied to the property appraiser because it was not argued below. But the court warned in dicta that the public funds exemption probably did not apply to the property appraiser, 991 So. 2d at 802 (citing *Dep't of Revenue v. Markham*, 396 So.2d 1120 (Fla. 1981)), as distinguished from the comptroller mentioned in *Lewis*, 416 So. 2d at 459. *Id.* at 797. In this manner, the court in *Crossings* both recognized the elevated status of the comptroller enabling her to challenge the constitutionality of an act requiring the expenditure of public funds, and declined to recede from *Lewis*. *Crossings* is dispositive of this case inasmuch as it unambiguously establishes that a comptroller has discretion to do exactly what the Clerk & Comptroller has done in this case.

Three more cases are material. In *Green*, municipalities argued that the comptroller had no standing to question the constitutionality of a special act offering the City of Pensacola a tax exemption for the reason that the immunities accorded thereunder allegedly did not affect the comptroller in his person, property or material rights. 108 So. 2d at 900. The "prime question," and issue upon which

the court ruled the matter "turn[ed]," was whether the comptroller fit within the public funds exception to the general rule that a ministerial officer cannot in a judicial proceeding attack the validity of a law imposing duties on her. The court answered the question affirmatively: "[W]e think it worthy of note that the Comptroller of the State of Florida is a constitutional officer charged with the duty to protect the public funds..." *Id.* at 901. The court added, the case "directly affects public funds and the comptroller's duty to collect, control, and disburse the same." *Id.* Consequently, the court reversed the Trial Court's order quashing the writ and dismissing the petition. *Id.* The Funding Mechanism in the instant case also squarely concerns the Clerk & Comptroller's duty to collect, control and disburse public funds; therefore, the Petitioner is not entitled to mandamus relief.

This conclusion also follows inexorably from *Kaulakis*, where the question was whether the Board of County Commissioners of Dade County had standing to question the validity of a provision of the home rule charter of Dade County providing for tort liability. When sued by a plaintiff in a personal injury action for allegedly failing to maintain a county road right of way, Dade County and its Board of County Commissioners moved to dismiss on the ground that they are immune from liability under state statutes inconsistent with the charter provision. In dismissing the plaintiff's claim, the trial judge ruled that the charter provision upon which the plaintiff relied was invalid and contrary to the Florida Constitution.

The plaintiff appealed and presented the question whether the commissioners could question the validity of their own charter provision. Following Petitioner's logic in this case, the court in *Kaulakis* should have reversed. Instead, the court there ruled "we hold that the trial judge was correct in ruling that the appellees had the right and, indeed, the duty, to challenge the validity" of the charter provision, because "a judgment rendered for the appellant would have required the appellees to expend public funds in satisfaction of such a judgment."

Whereas *Green* primarily concerned the collection of tax funds and *Kaulakis* the disbursement of tax funds, *Russell* primarily addressed auditing public funds. In *Russell*, the superintendent of public instruction sued the comptroller for refusing to pay him more than \$1,500 per annum for the year 1887. 5 So. at 698. The superintendent requested a mandamus to compel the comptroller to pay him an additional \$500 under the terms of the 1868 Constitution (as amended in 1871), which expressly provided for such payment. *Id.* The 1886 Constitution provided for payment at the rate the comptroller paid for those offices it retained permanently without addressing the compensation of those which it retained temporarily, including the superintendent. *Id.* at 702. The legislature appropriated the additional funds, but the comptroller responded to the petition for mandamus by claiming that the appropriation was unconstitutional. *Id.* at 698. The superintendent replied that the comptroller was without authority to challenge the

act, *id.* at 702, but the court disagreed:

The constitution and law have imposed upon the comptroller the duty of auditing the relator's claim and drawing a warrant for the amount found to be due him. This duty necessarily involved his deciding upon the amount payable to relator as salary, and he has decided it. If there was any conflict between the constitution and statute as to the amount payable, he could not avoid a decision; it was within the official duty imposed.

Id. at 703.

In this case, the Clerk & Comptroller has asked the Trial Court for a declaration about the constitutionality of the Funding Mechanism because it directly affects public funds and her "duty to collect, control and disburse the same." *Green*, 108 So. 2d at 901. The Respondent Municipalities have declined to pay invoices that the Clerk & Comptroller sent to them pursuant to the Funding Mechanism, just like the City of Pensacola declined to pay the invoice the controller sent in *Green*. The OIG contends the Clerk & Comptroller should disburse the funds, but just as the court in *Kaulakis* held that the commissioners had "the right and, indeed, the duty" to raise the question of the constitutionality of their charter provision, the Clerk & Comptroller here has requested a declaratory judgment about the constitutionality and enforceability of the Funding Mechanism to avoid expending public funds in a manner that may be contrary to law. As in *Russell*, the constitution and statutory law imposes upon the Clerk & Comptroller the duty to audit the OIG Account and draw a warrant only for that amount

unambiguously due the OIG. Art. V, § 16; Art. VIII, § 1(d); § 129.09, Fla. Stat. This duty necessarily requires the Clerk & Comptroller to exercise discretion in deciding the amount payable to the OIG. If there is any legal conflict as to the amount owing, it is within the Clerk's official duty to resolve it the way she has. *See Harrell*, 177 So. at 856 (comptroller is authorized to challenge any act disbursing public funds).

In *Alachua Cnty. v. Powers*, 351 So. 2d 32, 37 (Fla. 1977), the court made plain that a comptroller, "as the watchdog of the board," is required to evaluate the "legality of expenditure" and, thus, must ensure that "the expenditure does not overspend any account or fund of the budget." In *Brock v. Bd. of Cnty. Comm'rs of Collier Cnty.*, 21 So. 3d 844, 847 (Fla. 2d DCA 2009), the court ruled that the comptroller may complete not only prepayment audits, but also postpayment audits "to ensure that all payments of county funds comply with applicable legal requirements"; "to ensure that county funds are expended only as authorized by law"; and to "guard against the illegal use of county funds." *Accord W&F Ltd. v. Dunkle*, 444 So. 2d 554, 557 (Fla. 4th DCA 1984) (affirming "the trial court's determination that appellee clerk had the authority to pre-audit the contemplated expenses of the project and to audit those which have been expended.")

Put simply, the OIG is not entitled to mandamus relief because the Clerk & Comptroller is entitled to act as she has and to seek declaratory relief about the

Funding Mechanism inasmuch as it pertains to the Clerk & Comptroller's collection, disbursement, control, and auditing duties. This is sufficient reason to deny the Petition.

- b. *A Public Official Is Entitled to Seek Judicial Relief with Respect to a Potentially Invalid Law that will Injure Her in Her Person, Property or Other Material Right.*

Another reason to deny the Petition is that it is well established that a public official is entitled to seek judicial relief with respect to a potentially invalid law that will injure her in her person, property or other material right. *Green*, 108 So. 2d at 900 (*citing, inter alia, State ex rel. Watson v. Kirkman*, 158 Fla. 11, 27 So. 2d 610 (1946)). Once again, this exception applies especially to a comptroller with constitutional and statutory duties to protect public funds. Art. V § 16 and Art. VIII, § 1(d), Fla. Const. Section 129.09, Florida Statutes, provides that the Clerk & Comptroller has possible personal and criminal liability for willfully signing any warrant for the payment of any claim against County funds in excess of the expenditure allowed by law. The Clerk & Comptroller is required to attest to the legality of all checks or warrants drawn on the OIG Account. §§ 28.12; 136.06(1), Fla. Stat. As the court put it in *State ex rel. Fla. Portland Cement Co. v. Hale*, 129 Fla. 588, 176 So. 577, 585 (1937) (*cited in Sunset Harbour*, 914 So. 2d at 936): "[o]ne who is required to pay out public funds should be at least reasonably certain that the same are paid out under valid law."

The Constitution, statutory law, *Powers*, *Brock* and *Dunkle* make clear that the Clerk & Comptroller cannot simply bury her head in the sand when the Respondent Municipalities file a lawsuit challenging the constitutionality of a taxing provision requiring her to estimate, invoice, collect, deposit and withdraw public funds, a share of which are uncollectable because of the Respondent Municipalities' position. To the extent the OIG received any public funds and the Funding Mechanism was declared unlawful, then any use of the funds collected from any municipality and deposited in the OIG Account also would be unlawful. The Clerk & Comptroller may not issue payment from funds not lawfully available for expenditures of the OIG and may be held personally liable for doing so. *Dunkle*, 444 So. 2d at 557-58 (citing *Powers*, 351 So. 2d at 36) (section 129.09, Florida Statutes, "forbids the clerk "acting as county auditor," from signing illegal warrants and provides both personal and criminal liability for violation of this provision. The clerk, as auditor, is required by law to refuse to sign and deliver a county warrant for an unlawful expenditure, even though approved by the board of county commissioners.")

The law does not require the Clerk & Comptroller to risk public funds or personal liability in this fashion. Rather, it is well established that her "reasonable doubt of the constitutionality of a legislative act may justify an officer, charged with the duty of expending public funds only pursuant to valid law, in declining in

the absence of a controlling court order, to pay out public funds under provisions of such a doubtful statute." *Hale*, 176 So. at 585.

For this additional reason that the potential invalidity of the Funding Mechanism could injure the Clerk & Comptroller in her person, property or other material right, Petitioner is not entitled to mandamus.⁸

2. Petitioner Has No Clear Legal Right to the Relief Requested.

Owing to the extraordinary and drastic character of mandamus, the parties are in agreement that Florida law requires that it be used only to enforce a right that is "clear," "certain," and even "indisputable," as opposed to "doubtful or not complete, but merely inchoate, or where it depends on determination of controverted questions of fact." *Florida League of Cities v. Smith*, 607 So. 2d 397, 400 (Fla. 1992) (*citing, inter alia, Pino v. Dist. Ct. of App.*, 604 So. 2d 1232 (Fla. 1992) (withholding issuance of a writ of mandamus in light of the reinstatement of petitioner's appeal)); *accord Holcomb v. Dep't of Corr.*, 609 So. 2d 751, 753 (Fla.

⁸ Another exception to the general rule that a public official may not seek a declaratory judgment as to the nature of her duties arises when the official "is willing to perform his duties, but is prevented from doing so by others." *Graham v. Swift*, 480 So. 2d 124, 125 (Fla. 3d DCA 1985); *Reid v. Kirk*, 257 So. 2d 3, 4 (Fla. 1972). As the OIG concedes, the Clerk & Comptroller was unable to collect payment from the Respondent Municipalities under the Funding Mechanism. (P7) Petitioner asks this Court to order the Clerk & Comptroller to undertake a futile act; *i.e.*, preparing the invoices and billing the Respondent Municipalities, which will not pay the invoices unless also ordered to do so despite their pending declaratory judgment action in the Lower Court Proceeding. For this additional reason, mandamus is not proper.

1st DCA 1992); *RHS Corp. v. City of Boynton Bch.*, 736 So. 2d 1211, 1213 (Fla. 4th DCA 1999); *State, Dep't of Health and Rehab. Servs. v. Hartsfield*, 399 So. 2d 1019, 1020 (Fla. 1st DCA 1981) (per curiam); *State ex rel. Smith v. City of Margate*, 155 So. 2d 165, 167 (Fla. 2d DCA 1963).

Mandamus may not be used to establish the existence of a right, but only to enforce a right already clearly and certainly established in the law. *Smith*, 607 So. 2d at 401 (citing *State ex rel. Glynn v. McNayr*, 133 So. 2d 312, 316 (Fla. 1961); *Fla. Soc'y of Newspaper Editors, Inc. v. Fla. Pub. Serv. Comm'n*, 543 So. 2d 1262, 1265 (Fla. 1st DCA 1989); accord *Milanick v. Town of Beverly Bch.*, 820 So. 2d 317 (Fla. 5th DCA 2001); *Morse Diesel Int'l, Inc. v. 2000 Island Blvd., Inc.*, 698 So. 2d 309, 312 (Fla. 3d DCA 1997); *State v. Gamble*, 339 So. 2d 694, 695 (Fla. 2d DCA 1976), *cert. denied*, 345 So. 2d 422 (Fla. 1977) (per curiam); *Fasenmyer v. Wainwright*, 230 So. 2d 129 (Fla. 1969). Petitioner has no clear legal right to the relief requested because (a) the OIG does not clearly or certainly have the capacity or standing to seek it and (b) the Petition raises controverted questions of fact.

a. *The OIG's Capacity and Standing to Sue is Uncertain.*

To seek the writ of mandamus, Petitioner must "have a specific legal right for the enjoyment, protection or redress of which the discharge of that duty is necessary." *Pace v. Singletary*, 633 So. 2d 516, 517 (Fla. 1st DCA 1994) (per curiam). Mandamus is a remedy "that the person deprived has a *right* to demand."

Town of Malapan v. Rechler, 674 So. 2d 789, 790 (Fla. 4th DCA 1996), *rev. denied*, 684 So. 2d 1353 (Fla. 1996) (emphasis added). The unambiguous evidence that the OIG lacks any such concrete legal right to file the Petition is the Related Appeal, filed by the OIG before filing this case, in which the OIG has appealed the lower court's decision in *Town of GulfStream, et al. v. Palm Beach County, etc.*, 15th Judicial Circuit, in and for Palm Beach County, Florida, Case No. 50 2011 CA 017953 to deny its motion to intervene. The single court thus far to consider the OIG's capacity and standing to sue denied its motion to intervene and seek mandamus. The Trial Court's order does not state whether it was for these or other reasons, but the primary basis for the OIG's appeal of the ruling centers on these two questions. In the Initial Brief, the OIG claims to have the capacity to sue and standing to intervene. Accordingly, the OIG's appeal betrays the doubtful, uncertain, and controverted character of its position.

The court's ruling in *Smith and Morse Diesel* is particularly instructive. In *Smith*, cities and counties brought a mandamus action seeking removal of an initiative petition on the grounds that a provision of the Florida Constitution requiring repealing part of the homestead exemption was not disclosed in the ballot summary. The court could not find any clear or certain authority implicating repealer, any more than this Court can find any such authority supporting the OIG's capacity or standing to seek relief:

In order to grant petitioner's request, we would be required to create a controversy and then resolve it, thereby establishing the 'clear' and 'certain' legal right in the same opinion in which mandamus would be granted. This we may not do.

Florida League of Cities v. Smith, 607 So. 2d 397, 401 (Fla. 1992).⁹

Likewise, to grant the OIG's Petition, this Court would have to explicitly or impliedly find that the OIG clearly and unambiguously has capacity and standing to sue, thereby establishing the right for the first time with all of the radical repercussions that will flow from it as briefed in the Related Appeal, fostering piecemeal litigation and (according to the OIG) potentially rendering the Related Appeal partially moot.¹⁰ (*Accord* A4. 8) In contrast, by denying the OIG's Petition, this Court does not need to comment at all on such issues, except to rule narrowly that the OIG has not demonstrated all of the requisites to sue for mandamus. *Accord State ex rel. Glynn v. McNayr*, 133 So. 2d 312, 316 (Fla. 1961).

⁹ In *Smith*, the court emphasized its reluctance to interfere in the electoral process and to create a controversy where none need exist. 607 So. 2d at 400. The same public policy also disfavors mandamus in this action, because the Funding Mechanism, approved by the electors of Palm Beach County, together with the County Charter and statutory law, provide that it is the County through its County Attorney who has the authority to seek relief in the event the IG is underfunded, not the IG. The issues in the circuit court action relate only to the enforceability of the Funding Mechanism. The issues of her standing and capacity have arisen exclusively because the IG's effort to intervene implicates them and creates a controversy where none need exist.

¹⁰ There are valid grounds asserted in the Related Appeal, other than the IG's lack of capacity or standing to sue, that warrant the denial of that appeal.

In *Morse Diesel*, the court reversed a writ of mandamus for the release of a cash bond which was the corpus of pending litigation between the parties in another circuit court division, much as the question whether the OIG has capacity or standing to sue is on appeal before this Court in the Related Appeal. In *Morse Diesel*, the court found that the lower court "improperly adjudicated rather than enforced an established right to these funds," inasmuch as there was a genuine dispute as to whether a claim of lien had expired by operation of law. 698 So. 2d at 312-13. This Court should not do what the lower court was rebuked for in *Morse Diesel*; *i.e.*, impinging upon other pending litigation addressing the subject matter of Petitioner's request for mandamus. For this additional reason, this Court should deny the Petition.

b. *The Petition Raises Controverted Questions of Fact.*

Mandamus is also not available when the right to which the petitioner "claims he clearly is entitled depends on the determination of controverted questions of fact." *State ex rel. Blatt v. Panelfab Int'l Corp.*, 314 So. 2d 196, 198 (Fla. 3d DCA 1975); *accord Chavis v. Dugger*, 538 So. 2d 120, 120 (Fla. 1st DCA 1989) (no clear legal right to gain time where there was a question whether petitioner successfully completed treatment program); *Brooks v. City of W. Miami*, 246 So. 2d 115, 116 (Fla. 3d DCA 1971), *cert. denied*, 249 So. 2d 691 (Fla. 1971) ("The right in question was doubtful and depended upon a determination of

controverted and conflicting facts."). A right dependent on controverted facts is not clear, certain, or indisputable.

There are a number of controverted questions of fact alleged in the Petition, the most important of which are: (1) whether and the extent to which the OIG is "underfunded" or has fallen below the alleged funding threshold stated in the County Charter, *see* Cnty. Charter § 8.3 ("The Office of Inspector General shall be funded at minimum in an amount equal to one quarter of one percent of contracts of the County and all other governmental entities subject to the authority of the Inspector General") (P4-5); and (2) whether any such "underfunding" has resulted in diminished oversight of County vendors or ongoing harm to the public welfare.

Without doubt, most public agencies involved in this dispute including the courts, the County, municipalities, and Clerk & Comptroller desire additional public funding to carry out their important governmental missions and could, most likely, carry out their functions better with more of it, but this does not entitle any of them by itself to the extraordinary and drastic remedy of mandamus, much less when the constitutionality of the funding mechanism itself is drawn into question. *Accord Escambia Cnty. v. Flowers*, 390 So. 2d 386, 389 (Fla. 1st DCA 1980) (denying mandamus relief to direct the board of county commissioners to increase the comptroller's funding, but affirming denial of summary judgment as to the comptroller's declaratory relief action). The County contends that it provided

additional funding to the OIG in 2012 beyond that required in the Funding Mechanism and has budgeted for even more additional funding in 2013. Appellee Palm Beach County's Answer Brief at 3, in *Steckler v. Town of Gulf Stream*, Fourth District Court of Appeal, Case No. 4D12-4325. Whether this funding is insufficient is a controverted question of fact.

Likewise, the OIG concedes that whether any underfunding has resulted in diminished oversight of vendors is speculative: "Because what is not discovered by the OIG is incapable of proof, this claim is speculative" that any underfunding has resulted in diminished oversight of County Vendors. (P10) Other mixed questions of law and fact are also controverted in this case including (1) the extent to which the OIG is independent enough to demand a particular funding level; and (2) the extent of the OIG's oversight responsibilities. The key rights the OIG wishes to establish depend upon controverted facts and issues of law; therefore, mandamus is inappropriate.

3. Petitioner Has Another Remedy Available to Her.

To be entitled to a writ of mandamus, a petitioner must have no other legal remedies available to her. *RHS Corp. v. City of Boynton Bch.*, 736 So. 2d 1211, 1213 (Fla. 4th DCA 1999); *Morse Diesel Int'l, Inc. v. 2000 Island Blvd., Inc.*, 698 So. 2d 309, 312 (Fla. 3d DCA 1997); accord *Fla. Soc'y of Newspaper Editors, Inc. v. Fla. Pub. Serv. Comm'n*, 543 So. 2d 1262, 1266 (Fla. 1st DCA), *rev. denied*, 551

So. 2d 461 (Fla. 1989). Petitioner cannot satisfy this test for two reasons: (1) the pendency of the Lower Court Proceeding and (2) the pendency of the Related Appeal.

In the Lower Court Proceeding, the Trial Court was already postured after oral argument on the Municipalities' motion for summary judgment to decide whether the Funding Mechanism is constitutionally sound. (A5. 7 ("the issue of whether the BOCC will be entitled to an award of monetary damages at the conclusion of the lawsuit due to the underfunding of the OIG is before the lower court.")) If the Trial Court ultimately rules in favor of the County, the OIG will be made whole whether or not she is permitted to intervene. Money damages are recoverable and already sought by the County against the Respondent Municipalities.

Also in the Lower Court proceedings, two mandamus actions against the Clerk & Comptroller and Respondent Municipalities were attached to the OIG's motion to intervene denied by the Trial Court. (P12) Before the OIG filed the instant action, it filed the Related Appeal of the trial court's order denying the OIG's motion to intervene. Any "alleged error in the circuit court's ruling can be remedied on appeal." *Wuesthoff Mem'l Hosp., Inc. v. Fla. Elections Comm'n*, 795 So. 2d 179, 180 (Fla. 1st DCA 2001). This Court even agreed to expedite its

review of the trial court's decision not to permit the OIG's intervention, so that the Petitioner has a timely avenue to seek relief.

The availability of an appeal generally precludes a writ of mandamus. *Holman v. Fla. Parole and Prob. Comm'n*, 407 So. 2d 638, 638 (Fla. 1st DCA 1981) (per curiam) ("Since an adequate and ordinary remedy by direct appeal is available to challenge the propriety of the Commission's action, this petition [for writ of mandamus] must be denied."); *Wuesthoff*, 795 So. 2d at 180 ("In light of the adequacy of this [appellate] remedy, we determine that mandamus will not lie").¹¹ Because of the pendency of the appeal and Lower Court Proceedings, mandamus is improper.

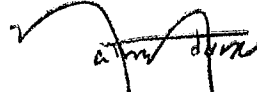
CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Mandamus.

¹¹ When the petitioner has not exhausted ordinary avenues of appeal, a petition for a writ of mandamus will not be considered. *McKahn v. Fla. Parole and Prob. Comm'n*, 399 So. 2d 476, 477 (Fla. 1st DCA 1981); *Sturdivant v. Blanchard*, 422 So. 2d 1028, 1029 (Fla. 1st DCA 1982); *Shevin ex rel. v. Public Serv. Comm'n*, 333 So. 2d 9, 12 (Fla. 1976).

Respectfully submitted this 29th day of January 2013.

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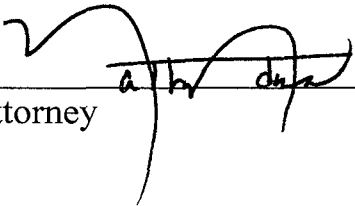
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CERTIFICATE OF SERVICE

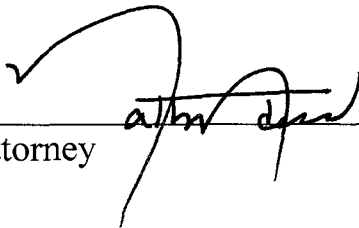
I HEREBY CERTIFY that a true and accurate copy of the foregoing was furnished by email to those on the attached service list on this 29th day of January 2013.



Attorney

CERTIFICATE OF COMPLIANCE

I certify that this Response in Opposition to Petition for Writ of Mandamus complies with the font requirements set forth in Rule 9.100(1) of the Florida Rules of Appellate Procedure, as it has been prepared in Times New Roman 14-point font.



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