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June 28, 2012

Via Hand Delivery

The Honorable Sandra K. McSorley
Palm Beach County Courthouse
205 North Dixie Highway, Room 10.1216
West Palm Beach, FL 33401

RE: Town of Gulfstream, et al. v. Palm Beach County
Case No.: 502011CA017953XXXMB(AN)

Dear Judge McSorley:

Please find enclosed Palm Beach County's Hearing Notebook containing the County's Response to the Inspector General's Motion to Intervene that is specially set for hearing on Friday, July 6, 2012 at 4:00 p.m. The Notebook includes the pertinent legal authority cited in order, supporting the County's position, string citations are omitted.

Additionally, should the Court desire more in depth background, the Plaintiff's Complaint and County's Answer, Affirmative Defenses and Counterclaim are also included herein.

If I can be of any further assistance, I will be at the Court's disposal. Thank you.

Very truly yours,

Philip Mugavero, Esq.
Assistant County Attorney

PM:aa
encls.

cc: Denise Nieman, County Attorney
Andrew J. McMahon, Chief Assistant County Attorney
All Counsel of Record (*PBC's Response only*)

IN THE CIRCUIT COURT OF THE 15TH
JUDICIAL CIRCUIT, IN AND FOR
PALM BEACH COUNTY, FLORIDA

TOWN OF GULF STREAM, et al.,

CASE NO. 502011CA017953XXXXMB

Plaintiffs,

DIVISION: AN

v.

PALM BEACH COUNTY, a political
Subdivision of the State of Florida,

Defendant.

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

Intervenor.

**DEFENDANT, PALM BEACH COUNTY'S RESPONSE TO THE
INSPECTOR GENERAL'S MOTION TO INTERVENE**

COMES NOW, Defendant, Palm Beach County, a political subdivision of the State of Florida (hereinafter the "County"), and files its Response to the Inspector General's Motion to Intervene, and in support thereof, states the following:

I. Pertinent Background

The Inspector General's (hereinafter the "IG") Motion to Intervene was filed in this lawsuit between 15 municipalities (now 14, as the Village of Wellington withdrew) and the County, challenging the legality of County Ordinance No. 2011-009 (hereinafter "County Ordinance") which established the Palm Beach County Office of Inspector General. The funding methodology used to fund the IG is at the heart of the municipalities' challenge. In its Motion to Intervene, the IG considers itself "the public official most likely to be directly

and seriously impacted by this litigation," because the IG is funded pursuant to the County Ordinance. The exhibits attached to the IG's Motion to Intervene are of no consequence whatsoever in determining this Motion to Intervene.

The Palm Beach County Clerk and Comptroller intervened in the lawsuit, by agreement of all parties, to obtain a judicial determination as to the extent of its responsibilities under the County Ordinance in light of the municipalities' challenge.

II. Summary

The IG's Motion to Intervene must be denied because: a) the IG has no legal capacity to sue or be sued in its own name or on behalf of the County to defend the legality of the County Ordinance; b) the IG has no standing to intervene in this lawsuit; and c) the IG cannot meet the legal requirements to intervene in this lawsuit.¹

III. Legal Argument

A. The IG has no legal capacity to sue or be sued in its own name or on behalf of the County to defend the legality of the County Ordinance.

The County Ordinance created the IG and contains the funding mechanism for the department. The IG is seeking to intervene in this lawsuit to protect the funding mechanism contained in the County Ordinance. In so doing, however, the IG will be defending the County Ordinance that contains the funding mechanism. This is exclusively the responsibility of the County Attorney's Office. The IG has no legal capacity to sue or be sued in its own name or to defend the County Ordinance.

¹ To the extent the Court agrees that the IG has no legal capacity to sue or be sued in its own name or on behalf of the County, the analysis as to the IG's ability to intervene ends with denial of the Motion. However, for completeness of the record, all points will be addressed in order.

The legal authority establishing the required legal capacity to sue is typically set forth in an enabling statute, but may also be created by the Constitution, special law, or County Charter. *Larkin v. Buranosky*, 973 So.2d 1286, 1287 (Fla. 4th DCA 2008) (requiring enabling statute to establish capacity to sue or be sued); *Johnston v. Meredith*, 840 So.2d 315 (Fla. 3rd DCA 2003) (recognizing that an enabling statute required to establish capacity to sue or be sued).

To the extent the County Ordinance can be misconstrued to be an enabling authority, each cited case allows the independent entity only such authority as specifically permitted in the enabling law. In this case, the County Ordinance does not authorize the IG to sue or be sued in its own name or on behalf of the County. The County Ordinance only gives the County and municipalities the authority to enforce payment under the County Ordinance. (See, ex. 1 at pg.8, lines 352-354.)

The IG is simply a department of the County with functional or investigative independence. This means that the IG operates independently of any restrictions or influence by the Palm Beach County Board of County Commissioners (hereinafter the "BCC"). (See, ex. 1, at pg. 1, lines 31-33.) The IG's independence does not as a matter of law give the IG the required legal capacity to sue or be sued in its own name or on behalf of the County to defend the legality of the County Ordinance. The IG has not cited any legal authority for this proposition. On the contrary, the Palm Beach County Charter, Florida Statutes and the County Ordinance do not support the IG's capacity to sue, be sued, or to undertake the legal defense of the County Ordinance. The County is solely responsible for the defense of the County Ordinance.

Florida law states in pertinent part:

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:

* * *

(b) Provide for the prosecution and defense of legal causes in behalf of the County or State and retain counsel and set their compensation.

Section 125.01(1)(b), Florida Statutes (2010) (emphasis added).

The BCC is the sole legislative and governing body authorized to act on behalf of the County and provide for the prosecution and defense of legal causes on behalf of the County and in this case, is properly defending the legality of the County Ordinance.

The County Charter specifically gives this authority solely to the County Attorney's Office, stating:

The office of 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 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, January 2011, Section 4.3 (emphasis added).

The IG was created by the BCC pursuant to the County Ordinance. (See, ex. 1 at pg. 1, lines 21-33.) Nowhere in the County Ordinance is there an intention, express or implied, of the County to create an office of equal legal status to itself. In fact, any contracts or related agreements deemed necessary by the IG to carry out its specific functions are "subject to final approval of the BCC." (See, ex. 1, at pg. 2, lines 68-69.)

Even the Inspector General's employment contract itself is subject to final approval of the BCC. (See, ex. 1 at pg. 6, lines 246-248.) Finally, as stated earlier, the County Ordinance places the authority to enforce funding the IG with the County or paying municipalities, not the IG.

Therefore, the IG's Motion to Intervene must be denied for lack of capacity to sue or be sued in its own name or on behalf of the County. The issues of standing or the legal requirements to intervene need not be reached. However, as stated earlier, these issues will be addressed.

B. The IG has no standing to intervene in this lawsuit.

To the extent this issue needs to be reached by the Court, the IG asserts that it should be able to intervene in this lawsuit for a variety of reasons including: a) the IG "is the public official most likely to be directly and seriously impacted by this litigation"; b) the IG is the party best situated to defend the interests of the voters that sought IG oversight; and c) the IG is a necessary or indispensable party because its funding base as set forth in the County Ordinance is at stake.

The IG's Motion to Intervene puts the cart before the horse. The issue of whether the IG should be permitted to intervene must not even be reached unless the Court first determines that the IG has the capacity to sue or be sued in its own name or on behalf of the County, and then whether it has legal standing to intervene. The IG's Motion to Intervene is silent on the issue of its capacity to sue or be sued or its legal standing to intervene in this lawsuit. The Motion starts at step three, without addressing steps one and two.

Rule 1.230, Florida Rules of Civil Procedure, states in pertinent part that “[a]nyone claiming an interest in pending litigation may at any time be permitted to assert a right by intervention” 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.

As explained by the Fourth District Court of Appeal:

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 this litigation. The interest cannot be conjectural or merely hypothetical. **Furthermore, the claim should be brought by, or on behalf of, the real party in interest.** 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.

Johansen, 898 So.2d at 1009, 1011 (Fla. 4th DCA 2005) (internal citations omitted) (emphasis added).

Further, a party must allege that he has suffered or will suffer a special injury. Wexler v. Lepore, 878 So.2d 1276, 1280 (Fla. 4th DCA 2004). See also, Alachua v. Sharps, 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 Corporation v. Michels Island Village Pharmacy, Inc., 322 So.2d 57 (Fla. 2nd DCA 1975).

Even assuming that the IG has alleged a sufficient stake in this litigation for the reasons asserted in its Motion to Intervene, the Motion must still be denied because: a) it does not have a legally cognizable interest recognized by substantive law to make it the

real party in interest; b) it is not the real party in interest in this litigation; and c) it cannot allege a special injury any different than any other County department that simply has an interest in the subject matter or outcome of the litigation.

No substantive law gives the IG the required legally cognizable interest in this litigation, nor is any such legal authority cited by the IG in its Motion to Intervene. Instead, all substantive law gives the County alone, not the IG, the legally cognizable interest in this litigation. Art. V, §1(g), Fla. Const.; Section 125.01, Florida Statutes (2010); Palm Beach County Charter, January 2011, Article I, Sec. 1.1.; Palm Beach County Ordinance No. 2011-009, pg. 8, lines 352-354. Therefore, it is the County, not the IG, that is the real party in interest under the law.

Finally, to the extent that the IG's funding base or budget can be considered a legally cognizable interest, the IG cannot allege any special injury separate and distinct from any other County department. No County department has a legally cognizable interest in its own budget, because litigation concerning one department's budget does not impact the BCC's discretion to amend its overall budget to shift the loss or budget shortfall from one department to another or revise the budget to cover any shortfall.

It is clear that the IG has no legal standing to intervene in this lawsuit and therefore, the IG's Motion to Intervene must be denied.

C. The IG has not met the legal requirements to intervene in this lawsuit.

To the extent the Court needs to reach this issue, the IG has not met the legal requirements to intervene in this lawsuit.

When deciding a Motion to Intervene, the Court goes through a two step analysis:

First, the trial court must determine that the interest asserted is **appropriate** to support intervention. Once the trial court determines that the requisite interest exists, it must exercise its sound discretion to determine whether to permit intervention. In deciding this question the court should consider a number of factors, including 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.

Second, the court must determine the parameters of the intervention. . . . Thus, intervention should be limited to the extent necessary to protect the interests of all parties.

Farese v. Palm Beach Partners, Ltd., 781 So.2d 419, 420-421 (Fla. 4th DCA 2001) (emphasis added) (quoting *Union Central Life Insurance Co. v. Carlisle*, 593 So.2d 505 (Fla. 1992)).

For the same reasons asserted in the rest of this Response, the IG's Motion to Intervene does not identify the appropriate interests that would allow its intervention in this lawsuit. As already argued, the IG does not have the capacity to sue or be sued in its own name. Furthermore, the County, with its own Ordinance to defend and its own budget to manage as a result of the litigation, is the real party in interest.

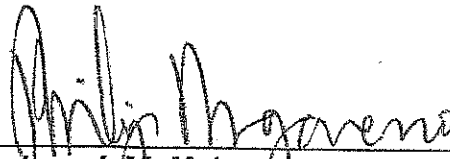
The IG's argument that it is best suited to protect the interest of the voters is simply conjecture, unsupported by any facts. The IG also argues that the County's legal strategy is being withheld from the IG. But as with any other County department, the County Attorney's litigation strategy will not be disclosed where there is a chance it may be made public or revealed to other third parties outside the County Attorney's Office when a case of this importance is being presented.

While it is clear from the Motion to Intervene that the IG seeks to fully participate in this case, analysis regarding the second prong of the intervention test is not necessary as the IG fails to demonstrate any interest to support intervention.

Therefore, for all the reasons cited herein (lack of capacity, lack of standing, and failure to meet the standard for intervention), the IG's Motion to Intervene must be denied in its entirety.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and copy of the foregoing has been provided by U.S. mail and electronic mail (e-mail) this 29th day of June, 2012, to those on the attached service list.



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