

**IN THE SUPREME COURT OF FLORIDA**

COLLIER COUNTY BOARD OF  
COUNTY COMMISSIONERS,

Petitioner,

v.

Case No.: SC09-2190

2<sup>nd</sup> DCA Case No.: 2D07-4549

L.T. Case No.: 04-941-CA

DWIGHT E. BROCK, CLERK OF  
THE CIRCUIT COURT OF  
COLLIER COUNTY,

Respondent.

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**PETITIONER'S INITIAL BRIEF**

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## PREFACE

Petitioner, Collier County Board of County Commissioners, has prepared an Appendix to its Initial Brief. The Appendix to the Board's Initial Brief will be referenced as "C. App.," followed by the exhibit letter of the document included. "APA MI" refers to the Appeal Clerk's Appellant Master Index; and "APP MI" refers to the Appeal Clerk's Appellee Master Index. Asterisks are used in the Appendix to the Board's Initial Brief, pursuant to Rule 9.220(b) of *Florida Rules of Appellate Procedure*, to indicate when only a portion of a transcript is attached.

### I. JURISDICTION OF THE FLORIDA SUPREME COURT

This Court has jurisdiction pursuant to article V, section 3(b)(3) of the *Florida Constitution* because the opinion of the District Court of Appeal of Florida, Second District, ("District Court"), expressly affects two classes of constitutional officers in all sixty-seven (67) Florida counties: the Florida Boards of County Commissioners and the Florida Clerks of Court, in their roles as Clerks to the Boards. The opinion is one of first impression that expressly expands the powers of the Clerk and expressly limits the powers of the Boards. The decision also conflicts with this Court's opinion in Alachua County v. Powers, 351 So. 2d 32 (Fla. 1977).

The District Court used statutory public depository categorizations under Chapter 136.01 *et seq.*, Fla. Stats. and language pertaining to budgets in § 129.09,

*Fla. Stat.*, to enlarge the power of county clerks. This increase included the power to conduct postpayment audits of discretionary spending decisions made by boards. The decision does not appear to limit the types of audits that may be performed, since both the Board and the Clerk conduct tests of their internal controls. The District Court justifies this decision as being needed to “tests the soundness of existing internal controls.” What is patently unclear is whose internal controls need to be tested; the Board’s or the Clerk’s? The District Court’s decision conflicts with past authorized functions and powers of boards and clerks, and creates a considerable conflict of interest for clerks.

## II. STATEMENT OF THE ISSUE

**THE TRIAL COURT PROPERLY RULED, AS A MATTER OF LAW, THE CLERK, AS A CONSTITUTIONAL OFFICER, HAS NO POWER THAT IS NOT CONFERRED UPON HIM BY THE FLORIDA CONSTITUTION OR GENERAL LAW. THE DISTRICT COURT ERRED WHEN IT DETERMINED THE CLERK OF COURTS HAS THE POWER TO CONDUCT POSTPAYMENT AUDITS OF THE BOARD, SINCE SUCH POWER IS NEITHER PRESCRIBED BY LAW NOR PROVIDED FOR UNDER THE FLORIDA CONSTITUTION.**

## III. STATEMENT OF THE CASE AND FACTS

This appeal involves a dispute between the Collier County Board of County Commissioners [“Board,” “Commission,” or “County”], a non-charter Florida county, and Dwight E. Brock, Clerk of Courts of the Circuit Court of Collier County [“Clerk”], over the scope of the Clerk’s audit authority in his non-court-related role as clerk to the Board. The Clerk appealed three rulings of the Trial

Court on issues raised by competing motions for summary judgment. [APA MI Vol. LXI, 11153-11165].

The litigation began on February 23, 2004, when the Clerk filed suit against the Board, as *ex officio* the Governing Board of the Ochopee Area Fire Control and Emergency Medical Care Special Taxing District, (“Fire District”), its Chief, Paul Wilson, and the Chief’s secretary, Linda Swisher. [APA MI Vol. II, 47-77]. By that time, the Clerk had conducted approximately fifty-six (56) audits, examinations, or investigations of Board expenditures, policies, personnel, and procedures; by 2005, he had conducted approximately sixty-seven (67) audits. [C. App. Vols. I(b) through V; “A” through “G”, APA MI Vol. XII, 2139-2276; APA MI Vol. XIII, 2277-2588; APA MI Vol. XIV, 2589-2796; APA MI Vol. XV, 2797-3026; APA MI Vol. XVI, 3027-3255]. During the litigation, this activity continued. [*Id.*] Nine (9) of these audits were unconnected to the Board. [*Id.*] Four (4) of the sixty-seven (67) audits were requested by the Board. [*Id.*] There was an attempted audit by the Clerk of the County’s Affordable Housing Program in 2006 in spite of the fact, and after the Board selected its independent certified public accounting firm to conduct the audit. [C. App. “S” and “T”; APA MI Vols. XLIX through LIV, 8956-9996]. The vast majority of these audits were conducted during election years; 1995-1996 (14); 1999-2000 (14); and 2003-2004 (20). [C. App. Vols. I(b) through V; “A” through “G”, APA MI Vol. XII, 2139-2276; APA



MI Vol. XIII, 2277-2588; APA MI Vol. XIV, 2589-2796; APA MI Vol. XV, 2797-3026; APA MI Vol. XVI, 3027-3255].

The Clerk's Complaint alleged, *inter alia*, improper retention of a 2002 \$21,000.00 donation for a fire boat by the Fire District Chief and his Secretary, [APA MI 47-77]. Instead of delivery to the Clerk, the donated funds were placed in a volunteer's bank account that had been opened in 1983; [C. App. "H", APA MI Vol. III, 299-305], and used historically by the Fire District's volunteers to hold donations. [C. App. "H", APA MI Vol. III, 299-305; APP MI Vol. XXXV, 5868-6080; APP MI Vol. XIX, 3722-3812; pg. 30, lines 2-17; APA MI Vol. XXXIII, 6304-6445; pg. 177, lines 7-13]. The donation had not been brought to the Board's attention when made. [APA MI Vol. XXXVIII, 7066-7210; pg. 122, lines 20-25; APA MI Vol. XLI, 7566-7611; pg. 30, line 16].

On February 24, 2004, at a publicly noticed hearing, [C. App. "X"; APA MI Vol. XXIII, 4721-5002] and shortly after the matter was brought to the attention of the Board, the Board accepted the donated funds, which had been previously delivered to the Clerk by the County Manager. [APA MI Vol. XLI, 7566-7611; pg. 43, lines 15-25; pg. 44, lines 1-2; APA MI Vol. XXXVIII, 7066-7210; pg. 123, lines 13-20; APA MI Vol. XXIII, 4721-5002]. On March 15, 2004, the Board moved to dismiss the lawsuit. [APA MI Vol. II, 78-81]. On June 3, 2004, the Board filed a Final Accounting Report by Mark Curtis, an independent CPA hired

by the Board to audit the account. [C. App. “H”; APA MI Vol. III, 299-305]. Mr. Curtis reported no money was missing or misappropriated. [*Id.*]. On June 22, 2004, the Trial Court entered an order dismissing the complaint in its entirety as to the Board. [APA MI Vol. III, 361-362].

On August 20, 2004, the Clerk filed an Amended Complaint, [APA MI Vol. III, 371-413], seeking declaratory judgment, *inter alia*, as to the extent of his auditing powers. The Clerk specifically requested a declaration he could:

conduct audits of departments and divisions of the Board of County Commissioners of Collier County...*audit and examine all accounts operated, controlled or maintained by the County, or any of its employees or personnel*; to audit and examine all accounts containing County funds whatsoever and wheresoever situated, and to obtain custody of all County funds in all accounts, whatsoever and wheresoever situated. [Paragraph 95, Amended Complaint; emphasis added].

On June 6, 2005, the Board filed suit in *quo warranto* against the Clerk, alleging usurpation and attempted usurpation of the power of the Board by having conducted and attempting to continue to conduct unauthorized post audits. [APA MI Vol. VI, 951-1285]. On September 29, 2006, the cases were consolidated. [APA MI Vol. XXVI, 5337-5339].

In the consolidated proceedings, the Trial Court entered three summary judgments in favor of the Board. [C. App. “T”; APA MI Vol. LXI, 11153-11165]. In granting the Board’s cross-motion for summary judgment on the undisputed roles of the Clerk, the Trial Court held:

The Court finds that the Board of County Commissioners' powers, as granted by statute, are inclusive and encompass all tasks necessary to effectively perform its duties. No such general grant of power has been given to the Clerk. All of the Clerk's power must arise from either the *Florida Constitution* or general law. The Court finds no grant of authority to the Clerk that gives him the duty of preparing and certifying the accuracy of the County's financial statements, including the annual management representation letter ...the Court finds that the Clerk's authority to prepare financial statements on behalf of the County is not derived from a specific grant of constitutional or statutory power, but rather is derived from a delegation of authority by the Board of County Commissioners. The scope of this delegation is within the discretion of the Board of County Commissioners, and may be granted, removed or modified...

In granting the Board's motion for summary judgment as to the issuance of a writ in *quo warranto*, the Trial Court held, *inter alia*:

...absent a grant of power from the *Florida Constitution* or general law, the Clerk does not have the authority to perform certain duties unless these tasks are delegated by the Board of County Commissioners. ... the Court finds as a matter of law, that to the extent that the Clerk is the custodian of all County funds, he necessarily can only be the custodian of those funds to which he has been given custody, which would presumably encompass all County funds. Even if the Clerk becomes aware or suspects that there are County funds of which he has not be[sic] given custody, this Court is unaware of any constitutional or statutory authority that would allow the Clerk to initiate an independent investigation or attempt to recover those funds, absent instruction from the Board of County Commissioners... This does not preclude the Clerk from seeking authority to pursue these funds or making these funds known to any appropriate authority, but as stated above absent any constitutional or statutory grant of power the Court cannot acquiesce to the Clerk making unilateral investigations into these funds...The Court finds as a matter of law, that prior to signing any warrant for payment of any claim, bill or indebtedness from County funds, the Clerk is required to insure that the payment is lawful...Consequently, any auditing necessary to insure the legality of the expenditure prior to the payment

is proper. However, the Court is unable to find that the Clerk has been granted any specific constitutional or statutory authority to perform further audits beyond the time that the warrant is signed, unless so directed by the Board of County Commissioners.

In granting the Board's cross-motion for summary judgment as to the Clerk's Declaratory Judgment Count, the Trial Court held, *inter alia*:

*Florida Statute* § 125.01(s) gives the Board of County Commissioners the authority to "make investigations of county affairs; inquire into accounts, records, and transactions or any county department, office or officer; and, for these purposes, require reports from any county officer or employee and the production of official records." *Florida Statute* § 125.74(1)(g) gives the County Administrator or manager the authority to supervise the care and custody of all county funds. *Florida Statute* § 125.01(b) gives the Board of County Commissioners the right to provide for the prosecution and defense of legal causes on behalf of the County. This Court is unable to find any constitutional or statutory authority that would give the Clerk the power to investigate the nature of funds not currently in its custody or to supervise the care and custody of funds not currently in its custody or to file a lawsuit regarding those funds.

Accordingly, the Court finds that, as a matter of law, this Court can find no constitutional or statutory authority that would give the Clerk the unbridled right to audit any and all outside bank accounts "whatsoever and wheresoever situated" into which the Clerk believes county funds may have been improperly deposited. However, this finding does not preclude the Clerk from reporting any such suspicions of impropriety to the appropriate authority or person for further investigation.

The Trial Court denied the Clerk's motion for summary judgment. [*Id.*].

Both parties agree the Clerk, in his role as clerk to the Board, by Constitution and statute, is auditor, recorder and custodian of all Board funds; the accountant for the Board; and has the duty to determine the legality of all Board expenditures before

issuing a warrant for payment. [APA MI Vol. LVII, 10394-10404; APA MI Vol. XLIX, 8940-8955]. Both parties agree there was no dispute as to any material fact, and defining the scope of the Clerk's duties and powers pertained purely to issues of law appropriate for the Trial Court's determination on summary judgment. [APA MI Vol. LVII, 10394-10404; APA MI Vol. XLIX, 8940-8955].

In making its determinations, the Trial Court confined itself to the text of the constitutional and statutory provisions pertaining to the Clerk, reasoning:

This Court does not have the authority to either agree or disagree with legislation, but rather is obligated to apply the laws of the State of Florida as enacted. Unless there is some ambiguity or inconsistency, this Court will not offer its own independent interpretation of the laws. Regardless of whether this Court may agree or disagree with the laws, this Court is unable to find any ambiguity or inconsistency.

The Court noted the Legislature had given the Board all powers necessary to carry on county government not inconsistent with general law. [C. App. "I"; APA MI Vol. LXI, 11153-11165]. Essentially, finding the Clerk had no power, except that provided by the Constitution or general law. [*Id.*]. In the absence of a constitutional or statutory grant of power, the Court concluded the Clerk's only authority to perform Board tasks must be delegated to him by the Board. [*Id.*]. The Court entered the Final Judgment incorporating these rulings on September 12, 2007. [C. App. "J"; APP MI Vol. I, 1-16]. The Clerk immediately appealed the decision to the District Court. [APP MI Vol. I, 17-35].

On September 23, 2009, the District Court affirmed the Trial Court on the

issue of preparation of the Board's financial statements. [C. App. Vol. I(a)]. On the issue of the Clerk's power to investigate county funds which are not in the Clerk's custody, the District Court reversed. [*Id.*]. Similarly, the District Court reversed the ruling prohibiting post audits, holding the Clerk could conduct postpayment audits to verify "the legality of payments already made" through "a process which tests the soundness of existing internal controls." [*Id.*]. The District Court used the term "Postpayment audit," a term not used in the litigation, but did not define its parameters, standards, or procedure. [*Id.*]. The District Court did not discuss the role of the Board's independent certified public accounting firm, [*id.*], which was discussed at length in Alachua County v. Powers, *supra* and in the record. [C. App. "Q"; APA MI Vol. XVI, 3027-3255; C. App. "K"; APA MI Vol. XXIX, 5723-5877; APA MI Vol. XI, 2120-2138; APA MI Vol. XLIX, 8956-9098].

#### IV. SUMMARY OF ARGUMENT

There is no authority for the Clerk, in his role as clerk to the Board, to conduct independent audits of the Board. *See* Art. II § 5(c), *Fla. Const.* Audit is defined by *Black's Law Dictionary* as "a formal examination of an...organization's accounting records, financial situation, or compliance *with some other set of standards.*" [Emphasis added]. The term audit is further defined by generally accepted auditing standards, pertaining to expenditures, policies, and practices of

the Board of County Commissioners; that go beyond an examination and review of documents related to the Clerk's pre-payment audit function. See §§ 11.45(1)(a) and 11.45(1)(c), *Fla. Stats.*; § 218.31(15) *Fla. Stat.*; § 218.31(17), *Fla. Stat.*; § 218.32(b), *Fla. Stat.*; § 218.39(1)(a), *Fla. Stat.*; § 218.39(2), *Fla. Stat.*; § 218.33(2), *Fla. Stat.*; 119.01 *et seq.*, *Fla. Stats.*, § 136.08, *Fla. Stat.*; see Alachua County, *supra*; see also *Op. Atty. Gen. Fla.* 86-38 (1986). There is no statutory provision providing for the Clerk to perform internal audits of Board departments or employees. See Art. II § 5(c), *Fla. Const.* There is no authority for the Clerk, independent of Board direction or his pre-audit function under Alachua County, *id.*, to inspect or examine Board departments or interrogate County employees. See §119.01 *et seq.*, *Fla. Stats.* §136.01 *et seq.*, *Fla. Stats.* See also Art. II § 5(c), *Fla. Const.* Florida law limits the Clerk's audit to the review of public records and accounts. See § 136.08, *Fla. Stat.* See also §119.01 *et seq.*, *Fla. Stats.* The Clerk's duties and powers are limited to those provided by general law. See Art. II § 5(c), *Fla. Const.* No authority mandates the Clerk prepare the Board's financial statements; [*id.*], nor gives him investigatory powers over County funds not in his custody; [*id.*], nor entitles him to more than a pre-payment determination to ensure county expenditures are legal. See Alachua County, *supra*. In fact, not all County funds need to be delivered directly to the Clerk; some may be deposited directly into public depositories. See §136.03 *Fla. Stat.*

The *Florida Constitution* contemplates that as *ex-officio* auditor, the clerk of the circuit court shall audit all claims *against the county* that are presented for payment by the county, not that such clerk as “ex-officio Auditor of the County” shall audit the books and records of other county officers *or perform other auditing duties*. See Landis v. Wheat, 103 Fla. 1, 14, 137 So. 277, 283 (Fla.1931). [Emphasis added]. The changes to the Florida Constitution since this opinion was issued have not altered the Court’s basic premise. See Art. II § 5(c), *Fla. Const.*

The Trial Court’s rulings are consistent with, *inter alia*, § 136.08, *Fla. Stat.*, which limits the county’s auditor to inspection and examination of documents, such as accounts and accounts in depositories, not interrogations of employees. See § 28.12 *Fla. Stat.*; § 125.01 *et seq.*, *Fla. Stats.*; § 11.45(3)(a) *Fla. Stat.*, and § 119.01 *et seq.*, *Fla. Stats.*, see also Alachua County, *supra*.

The Clerk has made much of the fact that the term “post-audit” as used in Alachua County, *supra*, is no longer statutorily defined. At the time Alachua County, *id.*, was decided, a post-audit was defined as “an audit made at some point after the completion of a transaction or a group of transactions.” See § 11.45(1)(c), *Fla. Stat.* (1975). It has been replaced with the term “financial audit,” which is defined as “an examination of financial statements in order to express an opinion on the fairness with which they are presented in conformity with generally accepted accounting principles and an examination to determine whether



operations are properly conducted in accordance with legal and regulatory requirements.” *See* § 11.45(1)(c), *Fla. Stat.* (2007).

The Clerk agrees, to the extent post-audits are the equivalent of financial audits, he is not claiming the power to perform them. [C. App. “O” pg.20, lines 3-7; APA MI Vol. XL, 7364-7565]. To the extent that post-audits are internal audits, the Clerk argues that Alachua County, *id.*, did not say what the Clerk could not do, therefore he was not prohibited from performing postpayment audits. [C. App. “V”, pg. 22, lines 22-25, Transcript of June 8, 2008 Oral Argument before the District Court]. The lack of a prohibition, however, is not the same thing as a prescription or a mandate. He has been given no mandate to perform postpayment audits or internal audits. *See* Art. II § 5(c), *Fla. Const.*

Under generally recognized auditing standards, *See* § 218.31(17), *Fla. Stat.*, the Clerk suffers from impairments that prevent him from being the internal auditor for the Board. since, *inter alia*, he is not independent and refuses to be accountable to the County Manager. [C. App. “U”; APP MI Vol. XXXII, 5193-5406]. *See* Chapter 3, United States General Accounting Office (“GAO”) *Government Auditing Standards* (“GAS”), (2003), by the Comptroller General of the United States, United States General Accounting Office. [C. App. “M”; APA MI Vol. XXIII, 4721-5002; pgs. 48, 49 of GAS]. Whatever post-audit means, it does not mean pre-audit, which is the only auditing function the Clerk has the

authority to perform. *See Alachua County, id.* The power and duty to audit, [*see* §125.01 (1)(x), *Fla. Stat.*], and allow or disallow claims against counties is generally vested in the Board. *See* §125.01 (1)(b), *Fla. Stat.* §125.01 (3)(a), *Fla. Stat.*, provides, *inter alia*, for the Board to employ personnel, *expend funds*, enter into contractual obligations, and purchase or lease and sell or exchange real or personal property. [Emphasis added]. *See also* 218.70 *et seq.*, *Fla. Stats.*, known as the “Local Government Prompt Payment Act”.

The Clerk’s duty is to attest to the Board’s signature on all warrants, and pay only lawful claims. *See* §129.09, *Fla. Stat.* The Board's power and duty to audit is satisfied under § 125.01(1)(x), *Fla. Stat.*, by employing an independent certified public accounting firm to audit any funds, accounts, and financial records. *See also* §218.39(1)(a), *Fla. Stat.*; §218.39(2), *Fla. Stat.* The power to pre-audit was given to the Clerk by the Court in *Alachua County, supra*, to allow or to reject certain claims as a condition precedent to payment by the Board. *See Corpus Juris Secundum*, COUNTIES § 402.

The County retains an external independent certified public accounting firm, pursuant to § 125.01(1)(x), *Fla. Stat.*, to, *inter alia*, conduct its post audits and test the soundness of its existing internal controls. [C. App. “Q”; APA MI Vol. XVI, 3027-3255]. *See* Ch. 10.557, *Rules of the Auditor General*. [C. App. “N”; APA MI Vol. XXIII, 4721-5002; pg. 12 of Rules]. Thus, the Commission relies upon

the customary definition of the word “audit” as defined by the Florida Auditor General, in Chapter 10.554, *Rules of the Auditor General*. [C. App. “N”; APA MI Vol. XXIII, 4721-5002; pgs. 4-9 of Rules]; United States General Accounting Office (“GAO”) *Government Auditing Standards* (“GAS”), (2003), by the Comptroller General of the United States, United States General Accounting Office [C. App. “M”; APA MI Vol. XXIII, 4721-5002]; and the Florida Legislature in § 11.45, *Fla. Stat.* Under these authorities, the Clerk cannot conduct internal, financial, or postaudits. Any rationale for doing so requires a tortured definition of the word, “audit.”

The Clerk’s definition of audit is tortured. He has said an audit is an expression of opinion as to the reliability of financial statements. [C. App. “L”; APA MI Vol. XX, 4023-4224; pg. 14, lines 14-25]. He has defined audit as “nothing more than a common term used for examination.” [*Id.*; pg. 15, lines 1-4]. In his opinion, audit and an examination are the same. [*Id.*; pg. 15, lines 5-8]. He alleges authority under Article VIII, § 1, Fla. Const., to conduct random audits of any kind. [*Id.*; pg. 45, lines 5-8; pg. 47, lines 10-15]. He made no distinction between pre-audits, post audits, financial audits, performance audits, or operational audits. [APA MI Vol. XI, 2055-2088]. The Clerk uses the term “internal audit;” however, his employees are not Board employees and the Board does not have an

internal audit department; nor has it delegated the task to the Clerk. [C. App. “P”; APP MI Vol. XLVI, 7670-7799; pg. 10, lines 13-25].

The focus of the auditor independence standard in the GAO’s *Government Auditing Standards* (2003), is to maintain a high degree of integrity, objectivity, and independence for audits of governmental entities [C. App. “M”; APA MI Vol. XXIII, 4721-5002]. This standard is based on two principles, which constitute organizational impairments:

- a. Auditors should not perform management functions or make management decisions; and
- b. Auditors should not audit their own work or provide non-audit services in situations where the amounts involved are significant and material to the subject matter of the audit. [*Id.*]

Financial audits are conducted in accordance with generally accepted auditing standards. § 218.31(17), *Fla. Stat.*, *See also* Rule 10.552(1) of the Auditor General [C. App. “N”; APA MI Vol. XXIII, 4721-5002; pg. 2 of Rules] and § 11.45, *Fla. Stat.* The Clerk does not have the capacity to conduct any of the categories of audits listed in § 11.45, *Fla. Stat.* Under GAO Standards 3.11 and 3.13, [C. App. “M”; APA MI Vol. XXIII, 4721-5002], the Clerk’s management assignments prevent his independence. The Clerk has organizational impairments to his independence. [C. App. “W”]. These include preparing payroll; developing account balances; posting transactions; and handling the County’s investments pursuant to § 28.33, *Fla. Stat.* [APA MI Vol. IX, 1596 – 1838]. The GAO

Standards are applicable to all governmental audits beginning on or after October 1, 2002. [C. App. “M”; APA MI Vol. XXIII, 4721-5002]. §125.17, *Fla. Stat.*, authorizes the Clerk to collect and reflect on the books of the County, funds that are provided to him. If more power is to be provided, it must be provided by general law. See Escambia County v. Bell, *supra*, at page 87 (citing White v. Crandon, 156 So. 303, 305 (Fla. 1934)). The Legislature, however, chose not to set forth the specific duties of the Clerk as auditor.

§ 125.01(1)(s), *Fla. Stat.*, empowers the Board, not the Clerk, to make investigations of county affairs and inquire into accounts, records, and transactions of any county department, office, or officer. The Court in Alachua County, *supra*, also determined:

While the clerk has the responsibility to act as pre-auditor of county funds, the board has the right to audit its own funds and make such investigations as may be necessary before the use of any public funds. The constitutional and statutory language discussed above require that the auditing function in making such an investigation be carried out by one of three entities: pre-auditing by the clerk in his capacity as county auditor, performance audit by an independent certified public accountant (or independent accounting firm), and post-audit by the auditor general or the independent auditing firm. *Id.* at 37.

This division of authority conforms with the Court’s opinion in Landis v. Wheat, in which the Court stated:

The Constitution contemplates that as ex officio Auditor of the County, the clerk of the circuit court shall audit all claims against the county that are presented for payment by the county, not that such

clerk as ‘ex Officio Auditor of the county’ shall audit the books and records of other county officers or perform other auditing duties...unless so required by statute.

*Supra* at 283.

At all times material to this appeal, the Board had retained the services of an independent certified public accounting firm, KPMG, LLC., to perform all auditing functions deemed needed by the Board. [C. App. “Q”; APA MI Vol. XVI, 3027-3255].

## V. ARGUMENT

### A. No Statutory or Constitutional Provision Authorizes the Clerk to Conduct Post-Transaction Audits of Board Expenditures Or Interrogate Board Employees

The Clerk is *ex-officio* clerk of the Board, auditor, recorder and custodian of all county funds. *See* Art. VIII, §1(d); Art. V, § 16, *Fla. Const.* The Clerk’s duties must be fixed by law. *See* Art. II, § 5(c), *Fla. Const.* The Clerk has not been afforded the power to micro-manage the fiscal and administrative affairs of the Board nor intrude into its legislative mandate. Florida general law specifically limits the duties of the Clerk as follows:

The clerk of the circuit court for the county shall be clerk and accountant of the board of county commissioners. He or she shall keep their minutes and accounts, and perform such other duties as their clerk *as the board may direct*. [Emphasis added]. *See* § 125.17, *Fla. Stat.*

In Alachua County, *supra*, at 36, the Florida Supreme Court held: “there must be some type of pre-audit review.” *Citing* Mayes Printing Company v. Flowers, 154 So.2d 859 (Fla.1st DCA 1963). The Trial Court correctly determined the Clerk is to act as county auditor in all auditing functions except when the Board employs an independent auditing firm. *See* § 125.01(1)(x), *Fla. Stat.* The Clerk has neither independent power nor a blanket assignment by the Board to conduct audits, including internal audits of the Board. No interrogation rights have been afforded the clerk, *see* § 119.01, *et. seq.*, *Fla. Stats.*, yet any review of prior actions of the Clerk demonstrate he routinely conducted interrogations of staff. [C. App. “A” through “G”, Vols. I(a) through V; APA MI Vol. VI, 951-1285; C. App. “U”; APP MI Vol. XXXII, 5193-5406].

Florida law forbids courts from inferring any authority in public officers that is not expressly conferred by the Legislature, or that requires the exercise of a substantive power that has not been conferred. *See* Escambia County. When the Legislature has described particular duties, “[t]he authority of public officers to proceed in a particular way...implies a duty *not* to proceed in any manner other than that which is authorized by law.” *Id.* At 87-88 (quoting White v. Crandon, (emphasis added).

Any argument that preparing the County’s financial statements and routinely interrogating County employees are not substantive in nature is unavailing. These

are specific, discrete duties the Legislature has not vested in the Clerk. *See* § 218.32, *Fla. Stat.* *See also* § 125.01, *et seq.*, *Fla. Stats.* By contrast, the kind of authority that can be implied with regard to a county officer is the authority to hire personnel to assist in carrying out a statutorily-required task. *See, e.g., Peters v. Hansen*, 157 So.2d 103, 105 (Fla. 2<sup>nd</sup> DCA 1963). The ability to audit is a substantive power and should be conducted appropriately, without bias. As the Court stated in *Escambia County v. Bell*:

If there is no statutory grant of power by the Florida Legislature or the Board, the Clerk has no authority to assume any substantive powers. If there is uncertainty as to the existence of a particular power, it should not be assumed. *supra*, at 87.

In every auditing issue material to this appeal, the Board had employed an independent certified public accounting firm. [C. App. “Q”; APA MI Vol. XVI, 3027-3255].

The powers and duties of the Clerk are in statutory provisions that place limitations on the powers enumerated. *See* § 28.12 *Fla. Stat.*; § 125.17, *Fla. Stats.*; § 11.45(3)(a) *Fla. Stat.*; §136.08 *Fla. Stat.*; and § 119.01 *et seq.*, *Fla. Stats.*, There is an enumerated power to review public records, but not to conduct interrogations. *See* § 119.01, *et. seq.*, *Fla. Stats.* The Clerk is responsible for keeping the accounting records for the Board. § 116.07, *Fla. Stat.*, (1975), requires "all . . . clerks of the circuit court and *ex officio* clerks of the boards of county



commissioners . . . [to] keep books of account and of record.” An “accounting” is defined in *Black’s Law Dictionary* as:

The act or a system of establishing or settling financial accounts; especially, the process of recording transactions in the financial records of a business and periodically extracting, sorting, and summarizing the recorded transactions to produce a set of financial records.

Legislative intent can be gleaned from statutes pertaining to the Clerk. The Legislature simply did not intend to give the Clerk the power he seeks. In Dobbs v. Sea Isle Hotel, 56 So.2d 341, 342 (Fla. 1942), the Florida Supreme Court, in discussing a statute of limitations issue, held:

the rule "Expressio unius est exclusio alterius" is applicable in connection with statutory construction. This maxim, which translated from the Latin means: *express mention of one thing is the exclusion of another*, is definitely controlling in this case. The legislature made one exception to the precise language of the Statute...We apprehend that had the legislature intended to establish other exceptions it would have done so clearly and unequivocally. We must assume that it thoroughly considered and purposely preempted the field of exceptions to, and possible reasons...We cannot write into the law any other exception, nor can we create by judicial fiat a reason, or reasons, for tolling the statute since the legislature dealt with such topic and thereby foreclosed judicial enlargement thereof.

Concepts of statutory construction apply. For instance, in Rinker Materials Corporation v. City of North Miami, 286 So.2d 552, 553 (Fla. 1973), the Court reasoned that “[i]n statutory construction, statutes must be given their plain and obvious meaning and it must be assumed that the legislative body knew the plain and ordinary meaning of the words.” The courts have no authority to alter the

language of a statute. *See* Tatzel v. State, 356 So.2d 787 (Fla. 1978). Florida Department of Revenue v. Florida Municipal Power Agency, 789 So.2d 320 (Fla. 2001), held a court's function is limited to interpreting statutes as they are written and to give effect to each word in the statute as it is written.

**B. The Powers of the Board to Conduct the Affairs of County Government Exceed Those of the Clerk**

The “Florida Home Rule Powers Act”, § 125.01, *et. seq.*, *Fla. Stats.*, is liberally construed to secure for counties the broad exercise of powers authorized by the Florida Constitution. No such broad power has been given the Clerk. The County, pursuant to Article VIII, § 1(f), *Fla. Const.*, has such power of self-government as is provided by general or special law. The Board is the governing body of Collier County. *See* Article VIII, § 1(e), *Fla. Const.* The Board may perform any acts not inconsistent with law, which acts are in the common interest of the people of the county, and exercise all powers and privileges not specifically prohibited by law. *See* § 125.01(1)(w), *Fla. Stat.* The Board, not the Clerk, has exclusive authority to exercise, direct, manage, and supervise the fiscal and administrative affairs of the County. *See* § 125.71, *Fla. Stat.*; and Article VIII, §§ 1(e) and 1(f), *Fla. Const.* The Board, not the Clerk, conducts investigations of county affairs, including interrogations of County employees. *See* § 125.01(1)(s), *Fla. Stat.* Article VIII, § 1(b), *Fla. Const.*, provides the care, custody and method of disbursing county funds shall be provided by general law.

The Board determines, by policy and legislative acts, the particular expenditures of county government. § 125.71, *Fla. Stat.*, is indicative of how the Florida Legislature intended the broad powers granted to Boards are to be carried out. § 125.71, *Fla. Stat.*, authorizes the Board to act through a County Manager. *See* § 125.74, *Fla. Stat.* The Commission adopted this statutory scheme. *See* Chapter 2, Article 3, §§ 2-76, 2-77, 2-78 of *Collier County Codes of Laws and Ordinances*.

The County Manager has, by way of enumeration, and not by way of limitation, specific powers and duties, such as supervision of the care and custody of all Board property. *See* § 125.74(1)(g), *Fla. Stat.* Article V, § 16 *Fla. Const.* authorizes the Clerk to be custodian of County funds delivered to him or placed in a county depository. *See* § 136.03, *Fla. Stat.* If more power is to be provided, it must be provided by general law. *See* Escambia County v. Bell, *supra*, at page 87 (citing White v. Crandon. The Legislature, however, chose not to set forth the specific duties of the Clerk as auditor. Instead, it adopted §125.17, *Fla. Stat.*, limiting the Clerk to “such other duties as the board may direct.”

### **C. The Clerk Does Not Have the Capacity to Perform Post-Audits of Board Expenditures**

The Clerk’s Internal Audit Department, which is not a Board department, conducted over sixty-seven (67) audits, many at random, many could be defined as

post-audits, performance audits, financial audits, and unconnected to any on-going pre-audit. [C. App. “A” through “G”, Vols. I(a), through V; APA MI Vol. XII, 2139-2276; APA MI Vol. XIII, 2277-2588; APA MI Vol. XIV, 2589-2796; APA MI Vol. XV, 2797-3026; APA MI Vol. XVI, 3027-3255]. The Clerk’s staff described the audits as “looking at whatever we can find” and trying to determine what areas were “worth giving a long hard look to.” [C. App. “R”; APP MI Vol. L, 8360-8421, pg. 41, lines 12-25]. The Clerk’s staff routinely interviewed Board staff. [C. App. “A” through “G”, Vols. I(a) through V; APA MI Vol. XII, 2139-2276; APA MI Vol. XIII, 2277-2588; APA MI Vol. XIV, 2589-2796; APA MI Vol. XV, 2797-3026; APA MI Vol. XVI, 3027-3255].

The Board has no internal audit department [C. App. “W”; APA MI Vol. XXIII, 4721-5002, Page 6 of Clerk’s Initial Brief below]. In 2003 the Board employed KPMG, LLC to conduct its audits, including testing the Board’s internal controls. [C. App. “K”; APA MI Vol. XXIX, 5723-5877; pg. 6, lines 22-23; C. App. “Q”; APA MI Vol. XVI, 3027-3255]. KPMG was specifically retained to report on the structure of the Board’s internal controls. [*Id.*; pgs. 2, 4 of RFP]. It is undisputed the Board retained KPMG to conduct the Board’s annual audit of all its departments and divisions according to generally recognized auditing standards. [*Id.*].

The term “internal controls”, was defined by KPMG’s representative as a “system of checks and balances to protect County funds and make sure the transactions that take place are authorized and appropriate and recorded appropriately.” [C. App. “K”; APA MI Vol. XXIX, 5723-5877; pg. 31, lines 18-21]. KPMG opined each of the Constitutional Officers “take their own responsibilities in that area...and likewise, at the County...”. [*Id.*, pg. 31, lines 22-25; pg. 32 lines 1-9]. KPMG looked at the internal auditing role played by the Clerk only “a little bit;” [*id.*, pg. 32, lines 10-13], and confirmed the Board “monitors and tests its own internal controls.” [*Id.*, pg. 35, lines 9-12]. KPMG had approximately four or five people on site for 3 months of the year. [*Id.*; pg. 74; lines 13-19].

On the other hand, the Clerk doesn’t even have a protocol for performing audits, [C. App. “O”; APA MI Vol. XL, 7364-7565; pg. 50, lines 13-19]; nor any official policy or procedure his employees are required to follow [*Id.*, lines 20-25, pg. 51, lines 1-20]; [C. App. “ R”; APP MI Vol. L, 8360-8421; pg. 28, lines 19-24]. He admits there are no statutes that determine his authority to audit. [C. App. “O”; APA MI Vol. XL, 7364-7565; pg. 24, lines 14-23; pg. 20, lines 3-7; pg. 23, lines 15-19]. There’s only one certified public accountant on the Clerk’s internal audit staff. [C. App. “P”; APP MI Vol. XLVI, 7670-7799; pg. 14, lines 1-16].

Inspections and examinations do not include interrogation of Board employees, which the Clerk has routinely done in conducting his audits. [C. App. “A” through “G”, Vols. I(a) through V; APA MI Vol. VI, 951-1285; APA MI Vol. XII, 2139-2276; APA MI Vol. XIII, 2277-2588; APA MI Vol. XIV, 2589-2796; APA MI Vol. XV, 2797-3026; APA MI Vol. XVI, 3027-3255]. One was attempted over the specific objections of the Board; after the Board specifically retained its CPA firm to conduct the audit. [C. App. “S”; C. App. “T”; APA MI Vols. XLIX, L, LI, LII, LIII, LIV, 8956-9996].

**D. The Clerk Has No Post Audit Authority Independent of Board Direction**

Ultimately, there should be cooperation between the Clerk and the Board because the Clerk has no authority to independently enforce or correct alleged improprieties found as the result of an audit of Board funds. § 125.01(1)(b), *Fla. Stat.*, provides the Board shall “provide for the prosecution and defense of legal causes in behalf of the county or state and retain counsel and set their compensation”. No such power has been given to the Clerk. The Clerk has no enforcement powers. Nor as custodian of County funds, does he need enforcement powers. § 219.07, *Fla. Stat.*, requires each officer to distribute all public money collected by him within seven working days to the officer, agency or fund entitled to receive it. *Fla. Stat.* § 219.01(2) provides:

The term "public money" shall be taken to mean and include all money collected by a county officer which he or she is required or authorized by law, as such county officer, to collect, and underpayments, overpayments, partial payments and deposits of such money, except the county officer's salary when his or her sole compensation is provided by such salary.

§ 219.08 *Fla. Stat.* provides for each officer handling public money to have a continuing duty to perform, and states:

“Each of the duties required to be performed or done under the provisions of this act which is not done or performed at or within the time or times herein prescribed shall continue to be the duty of the person charged therewith until it is actually and completely performed.”

§ 116.01, *Fla. Stat.*, requires these funds to be paid into the county treasury. The Clerk, pursuant to § 218.35(2)(b), *Fla. Stat.*, is the custodian or treasurer of all county funds; therefore, all public moneys are deposited into the county treasury by him after receipt of such funds.

§§ 28.12 and 125.17 *Fla. Stats.*, authorize the Clerk to be clerk and accountant of the Board and to keep their minutes and accounts. See Alachua County, *supra*, at page 38. § 116.07, *Fla. Stat.* (1975), requires all *ex officio* clerks of the boards to keep books of account and of record, except as are otherwise provided by law. There are no statutes that give the Clerk the authority he seeks. For example, the Board, not the Clerk, has the authority to implement disciplinary

actions against Board employees and file lawsuits on behalf of the Board. *See* § 125.01, *et. seq.*, *Fla. Stat.* *See* Speer v. Olson, 367 So.2d 207, 211 (Fla.1978).

Article VIII, § 1(d), *Fla. Const.*, provides: “...Clerk of Courts shall be *ex officio* clerk of the Board of County Commissioners...” and pursuant to Alachua County v. Powers, *supra*, and Article V, § 16, *Fla. Const.*, the Clerk is the “...auditor, recorder, and custodian of all County funds.” Pursuant to § 125.17, *Fla. Stat.*, the Clerk, in his capacity as auditor, *ex officio* clerk, and accountant, works “for” the Board and shall “...perform such other duties as their clerk *as the Board may direct.*” [Emphasis added]. The Board has not directed the Clerk, in his capacity as auditor, *ex officio* clerk and accountant, to perform independent “post-audits” or internal audits of the Board.

Permitting the Clerk to challenge every single decision involving an expenditure of public funds after the fact, would be tantamount to providing the Clerk with the power to micro-manage the executive and legislative functions of the Board, even though the specified powers of the Board far exceed the powers of the Clerk. To permit the Clerk to assume post audit power will result in an unconstitutional transfer of legislative authority from the Board. The court cannot confer powers the Clerk does not have.

## **VI. CONCLUSION**

The Clerk has neither the authority nor the capacity to perform post audits of



expenditures of Board funds. The Board hires its own independent CPA firm to test the internal controls of the Board's departments, divisions, projects, agencies, and affiliates. The Clerk acts as county auditor *except* when the board employs an independent auditing firm pursuant to Section 125.01(1)(x), *Fla. Stat.*; *see also Alachua County, supra*, page 36. The Clerk has not, could not, and cannot comply with generally accepted auditing standards for audits of the Commission; including internal audits, because of generally recognized organizational impairments and lack of independence.

The Clerk argued, absent his audits, Board business would grind to a halt as he would be forced to examine every Board warrant to determine whether or not it is a lawful expenditure, a statutory mandate he wishes to avoid. If there is a problem of inconvenience or inefficiency, or if counties have outgrown the statutory scheme the Legislature saw fit to impose on counties and their clerks, that is something for the Legislature to remedy. The Legislators determined the scope of the Clerk's audit authority and only they have the authority to further enlarge it. The Clerk does not have the independent authority he seeks. The decision of the District Court should be reversed and the decisions of the Trial Court reinstated.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

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**I HEREBY FURTHER CERTIFY** that the type size and style used throughout this brief is 14-point Times New Roman double-spaced, and that this brief fully complies with the requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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