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

CASE NO: 50 2011 CA 017953

TOWN OF GULF STREAM, VILLAGE OF TEQUESTA, CITY OF RIVIERA BEACH, TOWN OF JUPITER, CITY OF DELRAY BEACH, TOWN OF PALM BEACH SHORES, TOWN OF MANALAPAN, TOWN OF MAGNONIA PARK, CITY OF PALM BEACH GARDENS, TOWN OF HIGHLAND BEACH, TOWN OF LAKE PARK, CITY OF WEST PALM BEACH, TOWN OF OCEAN RIDGE, CITY OF BOCA RATON, municipal Corporations of the State of Florida,

Plaintiffs,

vs.

PALM BEACH COUNTY, a political subdivision,

Defendant.

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

Intervenor.

INSPECTOR GENERAL'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND INCORPORATED MEMORANDUM OF LAW

SHERYL STECKLER, in her official capacity as Inspector General of Palm Beach County (IG Steckler or the IG), by and through her undersigned counsel, files this, her Response in Opposition to Plaintiffs' Motion for Partial Summary Judgment and Incorporated Memorandum of Law, and states:

A. Legal Standard Applicable to Motions for Summary Judgment.

The Inspector General does not dispute the plaintiffs' representation of the applicable legal standard. But plaintiffs omit additional requirements applicable to this case. The plaintiffs must also "*either factually refute the affirmative defenses or establish that they are legally insufficient.*" *Sanchez v. Soleil Builders*, 37 Fla. L. Weekly D 2345 (Fla. 5th DCA, October 5, 2012). Although the plaintiffs have filed a separate Reply attacking to the County's affirmative defenses, the arguments in their Reply are the same arguments advanced in their Motion for Partial Summary Judgment, addressed herein. As such, they are deficient for the reasons explained herein.

Additionally, the Court must consider all counterclaims "*to determine if no genuine issue of material fact exists and if the moving party is entitled to a judgment as a matter of law.*" *Sanchez,* supra.

B. Plaintiff's Arguments for Summary Judgment on Counts I and IV of their Complaint.

1. The plaintiffs assert that "the County cannot do something by referendum that it cannot do on its own," citing to *Gaines v. City of Orlando,* 450 So. 2d 1174 (Fla. 5th DCA 1984). But *Gaines* is inapplicable. In *Gaines* the voters were presented with an amendment to the city charter relating to the Orlando Utility Commission, an independent entity created by the state legislature. The Court held that: "*Any amendment to the City's Charter which purports to diminish or take away the OUC's powers over the utilities would necessarily be in conflict with those state laws.*" But the plaintiffs here have failed to identify any state law that is "necessarily in conflict" with this voter mandate and charter requirement.

2. The plaintiffs assert that "the County has no legal authority to charge the Municipalities for the IG program." But the County has ample legal authority in: Article I, § 1 and Article VIII, § 1.(g) of the Florida Constitution; section 125.01(1) (w)and (y), (3)(a) and (b),

F. S; section 125.86(2), (5), (7), and (8) F.S; section 163.3171(2), F.S.; and section 1.3(6) of the County Charter. Section 163.3171(2), F.S. provides, in relevant part: *"In the case of chartered counties, the county may exercise such authority over municipalities or districts within its boundaries as is provided for in its charter."* See also *Seminole County v. Winter Springs*, 935 So. 2d 521, 529 (Fla. 5th DCA 2006).

The plaintiffs also argue that the fee does not meet requirements for a valid fee, so by default it must be an illegal tax. They are incorrect. The Inspector General fee meets the requirements in each of the following categories: a user fee, a regulatory fee, and a contract fee. It therefore is not an illegal tax.

a. The plaintiffs assert that the IG fees "do not constitute user fees." They argue that: "To be legal, user fees must be paid voluntarily." But the IG fee meets this test. The voters of each municipality elected to have the Inspector General assume oversight over their respective local governments, and to require their governments to share in the cost of the funding. Although this may not please certain municipal officials, section 1, Article I of the Florida Constitution provides: *"All political power is inherent in the people. The enunciation herein of certain rights shall not be construed to deny or impair others retained by the people."*

Apparently aware of this, the plaintiffs claim there is an additional requirement, that "the party paying the fee has the ability to 'opt out' at any time and avoid the fee." But no case law imposes such a requirement. The difference between a tax and a user fee is explained in *City of Miami v. Quik Cash Jewelry & Pawn*, 811 So. 2d 756, 758-759 (Fla. 3rd DCA 2002):

> "The Arizona Supreme Court when sorting out taxes from fees, stated:
> 'A tax is imposed upon the party paying it by mandate of the public authorities, without his being consulted in regard to its necessity, or having any option as to its payment. The amount is not determined by any reference to the service which he receives from the government, but by his ability to pay, based on property or income. On the other hand, a fee is always voluntary, in the sense that the party who pays it **originally has, of his own volition,** asked a public officer to perform

> certain services for him, which presumably bestow upon him a benefit not shared by other members of society. We think it is clear that the payment which plaintiff is seeking to recover is in no sense a tax, but is rather a fee. In the first place, the necessity of its payment does not arise unless and until the individual requests the public authority to perform some particular service. So long as the service is not asked, the money will never be demanded. In the second place, the service which is requested of the defendant is one which obviously and admittedly will confer a particular benefit on plaintiff alone, and upon no other person, natural nor artificial. ...' *Stewart v. Verde River Irrigation & Power Dist.*, 49 Ariz. 531, 534, 68 P.2d 329, 334 (1937). *See also Emerson College v. City of Boston*, 391 Mass. 415, 462 N.E.2d 1098, 1105 n.16 (Mass. 1984) and *City of Vanceburg, Kentucky v. Federal Energy Regulatory Comm'n*, 187 U.S. App. D.C. 196, 571 F.2d 630, 644 (D.C. Cir. 1977), both citing *National Cable*'s language differentiating user fees from taxes." (Bold added)

Contrary to the plaintiff's assertion, the only requirement is that the party who pays the fee "originally has, of his own volition, asked a public officer to perform certain services for him, which presumably bestow upon him a benefit not shared by other members of society." The IG fee meets this requirement in all respects. But there is no legal requirement that "the party paying the fee has the ability to 'opt out' at any time and avoid the fee."

Moreover, even if that additional requirement actually existed, the IG fee would comply because the voters can change this obligation at any time. See Sections 5.1 and 6.3 of the County Charter.

Additionally, *City of Clearwater v. School Board*, 905 So 2d 1051 (2nd DCA 2005), stands for the proposition that the voluntariness of the fee is not dispositive in determining its legality as a user fee, but is only one factor to consider. This point was also made in *Gargano v. Lee County*, 921 So. 2d 661 (Fla. 2nd DCA 2006), where the Court ruled that a toll charged by the county to use a bridge to an island was a user fee, not a tax, even though the plaintiff had no other means to access her home. The Court first found that the fee was paid by choice, as the plaintiff could live elsewhere, then in footnote 4 observed:

"Many user fees are similar in that a true choice does not exist. One cannot realistically choose to forego water or sewer service to a home or avoid user fees for garbage pickup. Even

in areas with designated water service, the choice to forego the service may result in the death of one's yard. These realities do not transform the charges for these services into taxes."

Under any applicable standard, or even the plaintiffs' imagined standard, the Inspector General fee qualifies as a valid user fee.

b. The plaintiffs next assert that the IG fee does not constitute a special assessment. The Inspector General accepts this assertion.

c. The plaintiffs next assert that the fees "do not constitute regulatory fees." They present two arguments for this. First, they argue that section 166.221, F.S., limits regulatory fees to "classes of businesses, professions, and occupations, the regulation of which has not been preempted by...a county pursuant to a county charter." But section 166.221, F.S., applies only to municipalities. It has no relevance to the County's ability to impose the IG fee on municipalities.

The plaintiffs then argue that the IG fee is not a valid regulatory fee because there are no "mandatory and binding" regulations. But they present no case law establishing such a requirement. Nevertheless, even if regulations were required, the Inspector General Ordinance would still qualify as a valid regulatory scheme. The ballot amendment created an entirely new Article in the County Charter, Article VIII, titled "Ethics Regulation." It had three components. One required adoption of a county Ethics Code, to regulate certain conduct of public officials and employees. Another required the establishment of an independent Commission on Ethics to enforce that Ethics Code.

The third and final component required an independent Office of Inspector General to oversee all governmental entities subject to the IG's authority, and an Inspector General (IG) Ordinance. The IG Ordinance establishes the Office of Inspector General "in order to promote economy, efficiency, and effectiveness in the administration of and, as its priority, to prevent and

detect fraud and abuse in programs and operations administered or financed by the county or municipal agencies." It authorizes the Inspector General to conduct audits, investigations, and contract oversight and reviews involving County and Municipal activities. And to enable this, the IG Ordinance itself imposes requirements (regulations) on county and municipal officials, employees, contractors, subcontractors, and their employees. Specifically:

1) It requires such persons to "*fully cooperate with the inspector general in the exercise of the inspector general's functions, authority and powers. Such cooperation shall include, but not be limited to providing statements, documents, records and other information, during the course of an investigation, audit or review.*"

2) It requires that the IG be provided "*full and unrestricted access to the records of the board, each municipality, county administrator, city administrator, city manager or other municipal executive, all elected and appointed county and municipal officials and employees, county and municipal departments, divisions, agencies and instrumentalities, contractors, their subcontractors and lower tier subcontractors, and other persons and entities doing business with the county or a municipality and/or receiving county or municipal funds regarding any such contracts or transactions with the county or a municipality.*"

3) It requires *"[t]he county administrator and each municipal manager, or administrator, or mayor where the mayor serves as chief executive officer*" to "*promptly notify the inspector general*" of certain specified types of conduct.

4) It makes all of the above requirements enforceable by the IG in circuit court.

5) It makes it a crime for any person to retaliate against, punish, threaten, harass, or penalize (or attempt to do so) any person for assisting, communicating or cooperating with the inspector general, or to knowingly interfere, obstruct, impede, or attempt to interfere, obstruct, or impede any investigation conducted by the Inspector General.

Therefore, the Inspector General Ordinance does impose new regulations.

6) The Ordinance also provides additional tool in the ethics regulation package, including the following: "The inspector general may recommend remedial actions and may provide prevention and training services to county and municipal officials, employees, and any other persons covered by this article. The inspector general may follow up to determine whether recommended remedial actions have been taken."

The Ordinance meets all criteria for a valid regulatory fee.

Finally, the plaintiffs assert that a charge imposed for general revenue purposes is a tax. However, the IG fee is not imposed for general revenue purposes. All funds derived from the fee go toward the Inspector General's operating expenses; none go to the County's general revenue.

d. The plaintiffs next assert that the fees "do not constitute a valid imposition of taxes." But this is a valid as a user fee and valid as a regulatory fee. It is not a tax.

e. The plaintiffs next assert that the "Charter Amendment and Implementing Ordinance "impose an illegal tax on the Municipalities." But this is not a tax and it is not illegal. It is valid as a user fee and valid as a regulatory fee.

f. The plaintiffs next assert that they "are prohibited under state law from 'passing on' regulatory fees to their municipal vendors in order to pay for the IG program's funding." For this assertion they point to section 166.221, Florida Statutes. But this assertion is totally irrelevant, as the legality of the IG fee is not dependent on the ability of the municipalities to pass the fee on to their vendors. And in any case, section 166.221, Florida Statutes, imposes no such limitation on the plaintiffs.

3. The plaintiffs then argue that the IG fee would violate Article VIII, Section 2(b) of the Florida Constitution, and Chapter 166, Florida Statutes, by interfering with their "home rule" powers.

But as explained in paragraph 2 above, the County has ample legal authority in the Florida Constitution, Florida Statutes, and the County Charter. In particular, section 163.3171(2), F.S. states in part: *"In the case of chartered counties, the county may exercise such authority over municipalities or districts within its boundaries as is provided for in its charter."* Moreover, this argument ignores the basic fact that the IG fee was imposed on the municipalities by their own citizens, who voted for it.

The plaintiffs further maintain that the IG fee would "usurp municipal budget or appropriation authority for itself" and "To hold otherwise would make municipal government superfluous." As legal authority for this proposition the plaintiffs rely on *Charlotte County* v. *Taylor*, 650 So. 2d 146 (Fla. 2nd DCA 1995) and *State ex rel. Keefe v. City of St. Petersburg,* 145 So. 175, (Fla. 1933). This argument, too, ignores the basic fact that the IG fee was imposed on the municipalities by their own citizens.

And once again, the cases cited by the plaintiffs fail to support the claimed premise. In *Charlotte County,* a county charter amendment prohibited increasing the millage under certain circumstances. The Court ruled that the amendment conflicted with state laws that specified how millage is to be determined. But the IG fee conflicts with no state law.

In *St. Petersburg,* one city charter provision allowed the public, by referendum, to nullify city ordinances. Another charter provision required the city council to establish an annual budget, adopted by ordinance. The Court ruled that the first provision was not intended to apply to budget ordinances. The Court's rationale was that repeated rejections of an entire budget, which may take months to develop, would create chaos and could prevent the city council from complying with its statutory duty to enact the budget. But less than 0.25% of any municipal budget will go to the OIG. The IG fee does not constitute the unpredictable rejection of an entire

budget, will not create chaos, and will not prevent any municipal council from being able to fulfill its legal responsibility to establish an annual budget.

4. The plaintiffs' final argument is directed to one of the County's counter-claims, "a contract implied in law or quasi-contract theory." The plaintiffs again incorrectly assert that the fee is an illegal tax and not the product of a contract.

The plaintiffs next assert that there cannot be a contract in perpetuity. But the County is not claiming a contract in perpetuity. As noted above, section 6.3 of the Charter sets out the procedure for the voters to initiate charter amendments, and section 5.1 sets out the procedure for the voters to initiate changes to ordinances.

In *City of Daytona Beach v. Stansfield*, 258 So. 2d 809 (Fla. 1972), the Florida Supreme Court ruled that the city, which in a contract to obtain a private water system had agreed to never charge the users more than 133 1/3% of the rate charged city residents, could not eliminate that obligation by arguing that it was perpetual and therefore illegal. In doing so the Court cited to an exception to the general rule, *"i.e., where there is a continuing benefit to the city."* Inspector General oversight of the municipal governments also provides a continuing benefit. See, also, *City of Gainesville v. Board of Control*, 81 So. 2d 514 (Fla. 1955), in which the Florida Supreme Court ruled that the city could not eliminate a contractual obligation to provide water free of charge to the University of Florida. The Court observed that it was not an illegal perpetual obligation because it only was valid so long as the university remained in Gainesville.

The plaintiffs also assert that sovereign immunity protects the municipalities from being required to pay for a contract. For this they rely on *Commercial Carrier Corp. v. Indian River County*, 371 So. 2d 1010 (Fla. 1979), *Pan-Am Tobacco Corp. v. Department of Corrections*, 471 So. 2d 4 (Fla. 1984), *County of Brevard v. Miorell Engineering*, 703 So. 2d 1049 (Fla. 1997), *City of Key West v. Florida Keys Community College*, 81 So. 3d 494 (Fla. 3rd DCA 2012), and

American Home Assurance v. National Railroad, 908 So. 2d 459 (Fla. 2005). But once again, none of the cited cases stand for the proposition suggested. Municipalities have absolutely no sovereign immunity from contract claims. See Justice Cantero's concurring opinion in *American Home Assurance* which explains that a municipality has no common law sovereign immunity, and only limited tort (not contract) immunity solely due to the provisions of section 768.28, F.S..

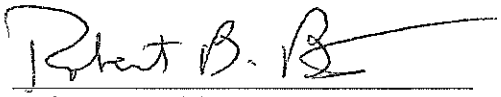
In sum, as with their other arguments, the plaintiffs' attack on the County's contract defense does not withstand scrutiny.

As a final point, the legal standard for any challenge to an ordinance is as follows: *"An ordinance is presumed to be valid. Therefore, the burden of demonstrating the invalidity...is upon the person who attacks the ordinance." Brevard v. Woodham*, 223 So. 2d 344, 348 (Fla. 4th DCA 1969). In *Brevard*, the Court concluded: "*The validity of the ordinance was at least fairly debatable, and the trial court erred in substituting his judgment for that of the zoning authority, which in this case was the County Commission of Brevard County, Florida.*"

In the instant case, the plaintiffs have failed to present any argument that, upon scrutiny, renders the validity of the ordinance even "fairly debatable." The Motion for Partial Summary Judgment should be denied.

Certificate of Service

I hereby certify that a copy of the foregoing Inspector General's Response in Opposition to Plaintiffs' Motion for Partial Summary Judgment and Incorporated Memorandum of Law has been provided by email this 16th day of October, 2012, to those on the attached service list.



Robert B. Beitler
General Counsel
Fla. Bar No. 327751
Email: RBeitler@pbcgov.org
Attorney for Intervenor
Office of Inspector General
Palm Beach County P.O. Box 16568
West Palm Beach, FL 33416
Tel: 561-233-2350, Fax: 561-233-2370

SERVICE LIST

Claudia M. McKenna, City Attorney
Douglas N. Yeargin, Assistant City Attorney
Kimberly L. Rothenburg, Assistant City Attorney
City of West Palm Beach
P.O. Box 3366
West Palm Beach, Florida 33402
Phone: (561) 822-1350
Fax: (561) 822-1373
Emails: cmckenna@wpb.org
dyeargin@wpb.org
krothenburg@wpb.org
COUNSEL FOR CITY OF WEST PALM BEACH

John C. Randolph, Esquire
Jones, Foster, Johnson & Stubb, P.A.
P.O. Box 3475
West Palm Beach, Florida 33402-3475
Phone: (561) 659-3000
Fax: (561) 832-1454
Email: jrandolph@jones-foster.com
COUNSEL FOR TOWN OF GULF STREAM

Keith W. Davis, Esquire
Corbett and White, P.A.
1111 Hypoluxo Road, Suite 207
Lantana, Florida 33462-4271
Phone: (561) 586-7116
Fax: (561) 586-9611
Email: keith@corbettandwhite.com
COUNSEL FOR VILLAGE OF TEQUESTA,
TOWN OF PALM BEACH SHORES and
TOWN OF MANGONIA PARK

Pamela Hanna Ryan, City Attorney
City of Riviera Beach Attorney's Office
600 W. Blue Herron Boulevard
Riviera Beach, Florida 33404-4311
Phone: (561) 845-4069
Fax: (561) 845-4017
Email: pryan@rivierabch.com
COUNSEL FOR CITY OF RIVIERA BEACH

Thomas Jay Baird, Esquire
Jones, Foster, Johnson & Stubbs, P.A.
801 Maplewood Drive, Suite 22A
Jupiter, Florida 33458-8821
Phone: (561) 650-8233
Fax: (561) 746-6933
Email: tbaird@jones-foster.com
COUNSEL FOR TOWN OF JUPITER and
TOWN OF LAKE PARK

R. Brian Shutt, City Attorney
Terrill Pyburn, Assistant City Attorney
City of Delray Beach
200 NW 1st Avenue
Delray Beach, Florida 33444-2768
Phone: (561) 243-7090
Fax: (561) 278-4755
Email: shutt@MyDelrayBeach.com
pyburn@MyDelrayBeach.com
COUNSEL FOR CITY OF DELRAY BEACH

Trela J. White, Esquire
Corbett and White, P.A.
1111 Hypoluxo Road, Suite 207
Lantana, Florida 33462-4271
Phone: (561) 586-7116
Fax: (561) 586-9611
Email: trela@corbettandwhite.com
COUNSEL FOR TOWN OF MANALAPAN

R. Max Lohman, Esquire
Corbett and White, P.A.
1111 Hypoluxo Road, Suite 207
Lantana, Florida 33462-4271
Phone: (561) 586-7116
Fax: (561) 586-9611
Email: max@corbettandwhite.com
COUNSEL FOR CITY OF PALM BEACH GARDENS

Glenn J. Torcivia, Esquire
Torcivia & Associates, P.A.
Northpoint Corporate Center
701 Northpoint Pkwy, Suite 209
West Palm Beach, Florida 33407
Phone (561) 686-8700
Fax (561) 686-8764
Email:glenn@torcivialaw.com

COUNSEL FOR TOWN OF HIGHLAND BEACH

Kenneth G. Spillias, Esquire
Lewis, Longman & Walker
515 N. Flagler Drive, Suite 1500
West Palm Beach, Florida 33401-4327
Phone: (561) 640-0820
Fax: (561) 640-8202
Email: kspillias@llw-law.com
COUNSEL FOR TOWN OF OCEAN RIDGE

Diana Grub Frieser, City Attorney
City of Boca Raton
201 W. Palmetto Park Road
Boca Raton, Florida 33432-3730
Phone: (561) 393-7700
Fax: (561) 393-7780
Email: dgrioli@myboca.us
COUNSEL FOR CITY OF BOCA RATON

Martin Alexander, Esquire
Holland & Knight, LLP
222 Lakeview Avenue, Suite 1000
West Palm Beach, Florida 33401
Phone: (561) 833-2000
Fax: (561) 650-8399
Email: martin.alexander@hklaw.com

Nathan A. Adams, IV, Esquire
Post Office Drawer 810
Tallahassee, Florida 32302
Phone: (850) 224-7000
Fax: (850) 224-8832
Email: Nathan.adams@hklaw.com

Denise Coffman, Esquire
General Counsel for Clerk and Comptroller, Sharon Bock
301 North Olive Avenue, 9th Floor
West Palm Beach, Florida 33401
Phone: (561) 355-1640
Fax: (561) 355-7040
Email: DCOFFMAN@mypalmbeachclerk.com
COUNSEL FOR PALM BEACH COUNTY CLERK & COMPTROLLER

Andrew J. McMahon, Esquire
Palm Beach County Attorney's Office
P.O. Box 1989
West Palm Beach, FL 33402
Phone: (561) 355-6021
Fax: (561) 355-4234
Email: amcmahon@pbcgov.org

Philip Mugavero, Esquire
Palm Beach County Attorney's Office
P.O. Box 1989
West Palm Beach, FL 33402
Phone: (561) 355-6021
Fax: (561) 355-4234
Email: pmugaver@pbcgov.org
COUNSEL FOR PALM BEACH COUNTY (BOCC)