NO.: 4D15-1753
L.T. CASE NO.: 502011CA017953XXXXMB

IN THE FLORIDA DISTRICT COURT OF APPEAL,
FOURTH DISTRICT

TOWN OF GULFSTREAM, et al.,
Appellants,
v.

PALM BEACH COUNTY,
Appellee,
and

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

From the Circuit Court for the Fifteenth Judicial Circuit
Palm Beach County, Florida

APPELLEE PALM BEACH COUNTY'S ANSWER BRIEF

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INTRODUCTION

Appellants, the thirteen plaintiff municipalities, will be referred to collectively as "Municipalities" or as "Appellants."

Appellee, Palm Beach County, will be referred to as "the County" or as "Appellee."

Intervener/Appellee, Sharon R. Bock, Clerk & Comptroller of Palm Beach County, will be referred to as "the Clerk" or "Intervenor."

Amicus Curiae, Florida League of Cities, will be referred to as "Amicus."

The Record on Appeal, as contained in the Second Amended Index to the Record on Appeal, will be referenced as follows:

- The consecutively numbered pleadings and orders contained in volumes 1-12 of the record will be referenced by record page number (R);
- The consecutively numbered trial exhibits contained in volumes 13 and 14 of the record will be referenced by volume (Vol) and record page number (R);
- The trial transcripts contained in volumes 15-17 of the record will be referenced by transcript record page number (TR).

STATEMENT OF THE CASE AND FACTS

Palm Beach County (the County) is compelled to provide a Statement of the Case and Facts because Appellants' Initial Brief presents only a partial recounting of the evidence presented below. Additionally, beyond the first paragraph and perhaps the first two sentences of the second paragraph of the "Introduction" subsection of Appellants' Statement of the Case and Facts, the Court should disregard this portion of Appellants' brief as it contains neither argument advanced at trial nor facts borne out in the record (IB 2-3). Position papers belong in a different forum.

The following is a complete recitation of the facts on which the trial court relied in upholding the 2011 Office of Inspector General Ordinance (OIG Ordinance).

STATEMENT OF THE CASE

After the municipalities participated in drafting the November 2010 ballot question that gave municipal electors the choice of approving OIG oversight of municipalities, and after the majority of electors in all thirty-eight municipalities in Palm Beach County resoundingly approved that ballot question, representatives of the municipalities participated in drafting the 2011 OIG Ordinance as members of the drafting committee and finance subcommittee (R. 626-7; TR. 142-5;155-9).

Following adoption of the OIG Ordinance, the municipalities received their first invoices issued by the Clerk pursuant to that OIG Ordinance, and fifteen of the municipalities proceeded to file suit against the County (R. 1-77,928-57; Vol. 13-R. 111-69).

The Municipalities' Amended Complaint, filed in 2013, alleged a new claim based on sovereign immunity, and the Municipalities' Motion for Summary Judgment on that claim was heard and denied pretrial (R. 928-57,991-1027,1163-4).

The trial court conducted a three-day non-jury trial, following which it entered its ten-page Final judgment, denying each of the Municipalities' four claims, and concluding: 1) the Municipalities do not enjoy sovereign immunity from suit to collect the charges provided for in the OIG Ordinance; 2) the OIG Ordinance constitutes both a valid user fee and a valid regulatory fee; 3) the OIG Ordinance is not invalid for requiring payment for the same services twice; and 4) the OIG Ordinance is not inconsistent with Florida Statute 166.241 (R. 1686-96).

This appeal followed, challenging the trial court's ruling on the Municipalities' first and second claims (R. 2116-33).

STATEMENT OF THE FACTS

INCEPTION OF THE PALM BEACH COUNTY OFFICE OF INSPECTOR GENERAL

The OIG was created in direct response to the recommendations of a Grand Jury convened in the Spring Term of 2009, by Fifteenth Judicial Circuit State Attorney Michael McAuliffe (R. 630,634; TR. 131). On May 21, 2009, the Final Presentment of that Grand Jury was released (the Grand Jury Report) (R. 630; TR. 131). The Grand Jury Report noted that "in the past several years, three county and two West Palm Beach city commissioners have pled guilty to federal corruption charges" (R. 633). The Grand Jury found that Palm Beach County was facing "a crisis of trust in public governance" that "has undermined the legal, political and economic pillars which support this community" (R. 633). It noted that solutions to these problems would prove elusive "until meaningful independent oversight exists to identify waste, fraud and abuse," further concluding that such oversight was "a necessary ingredient in good governance and **not an option**" (R. 633) (emphasis supplied).

The Grand Jury Report recommended the creation of a "watchdog entity" (R. 634,680; TR. 131-2). It discussed the Miami-Dade OIG, in existence since 1998, which had an annual budget of approximately $5.5 million, had identified over $106 million in questionable costs, damages, and lost revenues in its first decade of operations, and had achieved over $60 million in future savings and restitution since its inception (R. 677-8).

The Grand Jury Report recommended that the County pass an ordinance creating an OIG with functions, responsibilities, and funding modeled after the Miami-Dade OIG (R. 634,680-2; TR. 131-2). As to funding, the Grand Jury recommended the BCC: 1) "require an agreement with county revenue producing departments" to reimburse investigative costs; and 2) access "a built-in proprietary fee of ¼ of 1%" on all vendor contracts to help fund the OIG (R. 682; TR. 132).

In a prompt response to comply with the Grand Jury's findings, recommendations, and conclusions, the Palm Beach County Board of County Commissioners (BCC) directed its staff to draft an OIG ordinance (TR. 137). Assistant County Administrator James B. Merriman (Merriman) was assigned to implement these steps, and shepherd the process through to completion, including the creation and implementation of a Commission on Ethics and OIG (TR. 130-1,138). The process involved cooperation with members of the public, including the Palm Beach County League of Cities, the Palm Beach County Ethics Initiative, Leadership Palm Beach County, and other individuals (TR. 133-4,138). The Palm Beach County League of Cities' membership is composed of the thirty-eight municipalities in Palm Beach County, including the thirteen Municipalities that remain in this appeal (TR. 135).

In late 2009, an OIG ordinance that applied solely to the County was approved by the BCC (R. 626; TR. 137-8). This ordinance allowed other governmental entities the choice of participating in the OIG's oversight (TR. 139).

A final Grand Jury Presentment issued in the spring of 2010, in which the Grand Jury now recommended that the County present to voters a ballot question in November of 2010, asking whether the Palm Beach County Charter should be amended to give the OIG oversight powers over both the County and all municipalities approving the 2010 ballot question (TR. 139-40). The 2010 ballot question was necessary to extend OIG oversight to the municipalities because of a 2008 Palm Beach County Charter Amendment initiated by municipal representatives who referred to themselves as the "Let Us Vote PAC" or "LUV PAC" (TR. 150-1). The 2008 County Charter Amendment added a provision which states: "Approved charter amendments that transfer or limit a service, function, power or authority of a municipality shall be effective in a municipality only if the amendment is also approved by a majority of voters in that municipality voting in the referendum" (Vol. 13 - R. 186; TR. 153). This "opt out" provision allows voters in a municipality to opt out of proposed County Charter Amendments (TR. 153).

Merriman was involved in the drafting of the ordinance that placed the question regarding OIG oversight of municipalities on the November 2010 ballot, and he testified to the continued involvement of many groups, including the League of Cities (R. 626-7; TR. 142-5). The 2010 ballot question, contained in Ordinance No. 2010-019, gave the municipalities the option to opt out of OIG oversight, and provided:

> REQUIRING COUNTY CODE OF ETHICS, INDEPENDENT ETHICS COMMISSION AND INDEPENDENT INSPECTOR GENERAL
>
> Shall the Palm Beach County Charter be amended to require the Board of County Commissioners to establish by ordinances applicable to Palm Beach County and all municipalities approving this amendment; a Code of Ethics, an independent Commission on Ethics funded by the County Commission, and an independent Inspector General funded by the County Commission and all other governmental entities subject to the authority of the Inspector General?
>
> YES _____
>
> NO _____

(Vol. 13 – R. 27; TR. 153-4)

The proposed County Charter amendment was overwhelmingly approved by the voters (72%), including a majority of the voters of every municipality in the County (TR. 155). The voters having expressed their consent to OIG oversight and its attendant cost, the drafting committee that was required by Ordinance No.

2010-019 was formed, and included: 1) on behalf of the County - David Baker, then State Senator David Aronberg, and an Assistant County Attorney; and 2) on behalf of the municipalities - Michael Bornstein (then City Manager of Lantana and current City Manager of Lake Worth), Kurt Bressner (then City Manager of Boynton Beach), and Attorney Trela White (a partner in the firm that represents four Appellant Municipalities in this appeal), who was ultimately replaced on the drafting committee by Attorney Jennifer Ashton (also a partner in the Corbett, White, Davis and Ashton firm that represents four Appellant Municipalities here) (IB at 2; TR. 156-7).

The drafting committee formed a distinct funding subcommittee with three members possessing fiscal expertise, who were tasked with arriving at the funding mechanism to be included in the OIG Ordinance (TR. 159). The League of Cities was represented on the funding subcommittee, as was the County and the Office of Inspector General (TR. 159). The funding subcommittee had a lot of conversation about the ¼ of 1% vendor contract fee which was utilized in Miami-Dade, discussed by the Grand Jury, and part of the initial OIG ordinance which applied only to the County (TR. 160). The subcommittee received input from various representatives from the municipalities who did not want the County to impose on municipalities the requirement to charge a ¼ of 1% vendor contract fee (TR. 160). The subcommittee

believed it was important to develop a structure that was consistent, auditable, and would set a "level playing field" for the County and all of the municipalities (TR. 160-1). The subcommittee arrived at a formula to apportion funding for the OIG based on .25% of select County and municipalities' actual expenses "as recorded in the most recent audited year and reported in the Florida Department of Financial Services Local Government Electronic Reporting system (LOGER)"; however, the OIG Ordinance does not require municipalities to charge a .25% contract fee to its vendors (Vol. 13 – R. 39-41;TR. 160-1). The OIG Ordinance apportions the cost of funding the OIG between the County and Municipalities, without dictating the source of those funds (Vol. 13 – R. 39-41).

Merriman confirmed that governmental entities, including municipalities, could voluntarily enter into agreements with the OIG for services; however, at the time of trial, only five municipalities had voluntarily entered into such interlocal agreements (TR. 167).

John Wilson, Director of the Budget Division of the County's Office of Financial Management and Budget, was the County's representative on the funding subcommittee (TR. 333,350). He explained that the funding subcommittee recommended using the LOGER methodology as the funding mechanism for the OIG, and the full drafting committee adopted that recommendation (TR. 350).

Under the LOGER methodology, the percentage of total actual expenditures for the County and municipalities determines the entity's percentage of OIG funding (TR. 351). For example, if total expenditures in a fiscal year were $2 billion, and the County's expenditures were $1 billion, the County would be allocated 50% of the OIG budget for the upcoming year (TR. 351). The County learns in July the precise amount of its share of the OIG funding for the upcoming fiscal year (October 1 through September 30), in time for the budget process (TR. 349).

VENDOR PAID .25% CONTRACT FEE

Palm Beach County Commissioner Jess R. Santamaria, who holds an MBA from the Wharton School and has over 40-years experience negotiating contracts for construction and other businesses, opined that a .25% vendor contract fee was insignificant for purposes of contract negotiation (TR 289-300). To a vendor doing business with the County or municipalities, a .25% vendor contract fee is a "non-issue" (TR. 300). For example, on a $100,000 contract, the .25% fee equals $250 (TR. 301). Commissioner Santamaria testified a vendor contract fee could be passed on to the vendor (TR. 310).

PALM BEACH COUNTY'S OFFICE OF INSPECTOR GENERAL

Sheryl Steckler, the County's first Inspector General who served from the inception of the OIG in June of 2010, through June of 2014, testified regarding the

myriad of functions performed by the OIG and her employees (TR. 184-250). Ms. Steckler, a Certified Inspector General, explained she was involved in drafting the OIG Ordinance, which gave the Inspector General the power, without limitation, to audit, investigate, monitor, inspect and review the operations, activities, performance and procurement processes of governmental entities (TR. 221-2,241-2). The OIG is bound to conduct its audits in accordance with: the International Standards for the Professional Practice of Internal Auditing; Standards for Office of Inspector General; and general auditing standards (TR. 224).

The Inspector General was given the power to receive, review and investigate any complaints regarding any municipal or county-funded projects, programs, contracts or transactions (TR. 241). The IG is required to notify appropriate law enforcement agencies when a possible violation of any state, federal, or local law is suspected, and Ms. Steckler testified her office referred several cases for prosecution (TR. 239,243). Section 2-423.1 requires the Inspector General to coordinate public awareness and outreach programs with the County and municipalities and to maintain contact with the public through the internet (Vol. 13 – R. 36).

Ms. Steckler explained the OIG has three main functions: audit, investigations, and contract oversight (TR. 190). Investigation may begin with a "correspondence," which is a written complaint or statement made by anyone, from

citizens to employees, that is investigated within five days of receipt, at which time a determination is made whether the OIG will continue the investigation (TR. 191-3).

Ms. Steckler explained that the number of correspondences "spiked up very high" when the OIG began oversight of municipalities (TR. 194). The City of West Palm Beach had the greatest number of correspondences for the period through December of 2013, and several large municipalities were in the top ten for number of correspondences, including Delray Beach, Boca Raton, Boynton Beach, Riviera Beach, Palm Beach Gardens, and Lake Worth (Vol. 13 – R. 219; TR. 194). In the roughly four-year period from the OIG's inception through the time of trial, Ms. Steckler estimated her office received over 1,000 written correspondences and phone complaints, and well over 5,000 general phone calls (TR. 242).

The OIG conducts a risk analysis on complaints received, to prioritize the complaints and best utilize its small staff (TR. 195). (Because of the funding shortfall associated with the Municipalities' lawsuit, only 58% of the 40 positions approved for the OIG have been filled (Vol. 14 – R. 207)). Ms. Steckler found that many of the municipalities did not have policies and procedures in place, which is one of the OIG's risk factors when prioritizing investigations (TR. 198-9). The audit function of the OIG is similarly prioritized because of the limited staff, and the dollar amount involved in the audit becomes an issue in prioritizing (TR. 200). If a

municipality is relatively small, with very little money, its risk factor is low, though it may receive some attention from the OIG (TR. 278).

Ms. Steckler detailed several of the OIG's investigations of municipalities, including:

- Open Sky – an investigation of the police radio system acquired by a consortium of municipalities, including West Palm Beach (TR. 201). West Palm Beach was left with a police radio system that was not operable, and officers were required to carry cell phones (TR. 201-2). The OIG investigation discovered where the consortium broke down, and led to recommendations and answers about how to make the consortium function (TR. 202-3).

- North Palm Beach Fleet Department – an investigation initiated by the City Manager that revealed a lack of internal controls and security measures, and led to countless recommendations for improvements in the City (TR. 208-9).

- Delray Beach Waste Management – an investigation begun by a citizen complaining that a $60 million contract was going to be renewed and not put out for bid (TR. 219). The OIG's investigation revealed that a bid was necessary and that was reported to Delray Beach (TR. 219). The City renewed the contract, rather than putting it out for bid (TR. 219). Following the renewal, the Delray Beach City Manager retired, and newly elected council members investigated the OIG's report, which was ultimately determined by the courts to be correct, resulting in the City's Council voiding the renewed contract (TR. 220).

- South Bay – following a complaint about several council members and the City Manager in South Bay, the OIG opened an audit that revealed countless problems from a lack of segregation of duties, to the City Manager's misuse of credit cards issued for people who were no longer with the City, to a completely inappropriate use of the City's funds (TR. 244-5). The City Manager was subsequently charged criminally (TR. 245). The OIG issued numerous recommendations to the new city manager, that were being

implemented to help save the relatively small city following the loss of at least 25% of its funds (TR. 245).

Separate and apart from the OIG's audit, investigations, and contract oversight functions, the OIG also provides outreach and reporting functions to the County and municipalities, including: conducting surveys of city managers to help assess where emphasis should be placed in auditing, and conducting bi-monthly topic session training with city managers (TR. 203-4,238-9); receiving notice of all procurement selection meetings, and sitting in on those meetings (TR. 210); issuing reports for the municipalities on contract monitoring to help prevent the municipalities from losing money (TR. 214); posting on its website every report that the OIG issues, making them available for municipalities, which have modified their behavior based on such reports (TR. 230,250); providing on-line and classroom training to the Municipalities and the County, as well as speakers available for public entities and organizations (TR. 228-9).

Ms. Steckler testified that of the 311 recommendations made by the OIG in its various reports issued to the County, Municipalities, Solid Waste Authority, and the Children's Services Council following OIG investigations and audits, 84% were implemented, and another 10% were pending implementation at the time of trial, for a total implementation rate of 94% (TR. 222-3).

As to results obtained, from the time of its inception through December of 2013, the OIG had uncovered: questioned costs (costs without supporting documentation, or costs deemed unnecessary or unreasonable) of over $10 million; and identified costs (costs that should not have been spent and should be returned to the governmental entity) of $1.7 million (TR. 232-3). From 2012 through December of 2013, the OIG calculated a cost avoidance (costs to a governmental entity that were not incurred because of OIG oversight) of $8 million (TR. 234-6).

USER FEES AND REGULATORY FEES

The Municipalities called Marion Radson, the former City Attorney for Gainesville, who repeated that a user fee must be: 1) voluntary ; 2) commensurate with the cost of the service provided; and 3) charged to all who use the service (TR. 46, 57-9). A regulatory fee must be reasonably related to the cost of the regulation (TR. 61).

Mr. Radson opined that if he was faced with the task of funding the Office of Inspector General, he would first ask the municipalities to enter into interlocal agreements (TR. 71). If that was not successful, he would look at the Miami-Dade model for funding its OIG (TR. 71-2). Mr. Radson explained that vendors would know they would be required to pay the OIG fee upfront (TR. 72). According to Mr. Radson, a vendor fee would pass the "voluntary test" for a user fee because

vendors who choose to do business with a municipality or a county would be subject to the vendor fee (TR. 82).

MUNICIPAL BUDGETS

Jeffry Green, City Administrator for West Palm Beach, testified that "all governments in Florida follow the same format" for municipal budgeting and finance (TR. 86,100-1). County finance and municipal finance "work similarly" (TR. 110-1).

He explained that with a user fee such as a building permit, a municipality will attempt to forecast how many permits will be issued in the coming year, then it will divide the anticipated costs for building department personnel and office supplies by the anticipated number of permits, to determine the permit user fee (TR. 103-4). If the municipality receives more fees than needed, excess is saved for a subsequent year (TR. 104). If the municipality comes up short, "[w]e try and, you know, cushion so we have that" (TR. 104).

Mr. Green admitted that he had no idea how many times the City of West Palm Beach would be sued in the next year, and to budget for in-house attorneys, the City makes an assumption which is based in part on a look back at historical data (TR. 113-4).

John Wilson, the County's Budget Division Director in the Office of Financial Management and Budget testified that municipalities and counties operate under similar statutes with regard to the budget process (TR. 340-1). Municipalities and the County adhere to the same principles when they prepare a budget (TR. 341). He defined a budget as a best guess of what future expenses will be, based on the past and new, relevant information (TR. 348).

Mr. Wilson explained that when he identifies the budget for a particular cost or category, he looks at historical trends of that expenditure (TR. 343). Identifying the budget for unknown costs, such as litigation expenses would be done similarly, examining historical trends and arriving at a best guess for litigation costs in the next year (TR. 344). If the budget does not allocate enough for a particular expense, a budget transfer would be processed, or the additional amount would be taken from contingency reserves (TR. 344). These processes are fairly common (TR. 344-5).

Mr. Wilson explained that payments may be made from the County in situations where no contract exists (TR. 346). For example, the County makes payments to municipalities for their community redevelopment agencies based on an ordinance which has been adopted, and without requiring a written agreement or invoice (TR. 346-7). The County pays over $1 million for dues and memberships

every year, and none of those payments require a written agreement (TR. 347). Travel-related expenses are also paid without requiring a contract (TR. 347).

THE FINAL JUDGMENT

In its ten-page final judgment, the trial court considered, and rejected, each of the municipalities' four claims (R. 1686-96). The trial court noted the history leading up to adoption of the OIG Ordinance, including the 2009 Grand Jury investigation, the Grand Jury's Final Presentment in 2010, the referendum vote approving OIG oversight in all thirty-eight municipalities, and adoption of the OIG Ordinance including the funding mechanism requiring all municipalities to fund the OIG (R. 1686-87). The trial court noted that the OIG Ordinance required the OIG to submit a budget request each year to the League of Cities, and to be available to discuss that request with the League (R. 1687). The BCC must also meet with a delegation of the League regarding the budget (R. 1687). The BCC must approve the OIG budget (R. 1687).

As to the Municipalities' first claim, the trial court concluded that the Municipalities do not enjoy sovereign immunity from suit to collect the charges allowed by the OIG Ordinance (R. 1687-91,1696). The court cited *American Home Assurance Company v. National Railroad Passenger Corporation*, 908 So. 2d 459 (Fla. 2005), in which the Court noted that the doctrine of sovereign immunity

provides that "a sovereign cannot be sued without its own permission" (R. 1688). The trial court found: "By approving the charter amendment, the voters in the respective municipalities approved the funding for the OIG. This eliminated any discretion by the municipalities to avoid funding the program" (R. 1688).

The trial court also found that the municipalities misinterpreted section 166.241, Florida Statutes, by suggesting that statute affords municipalities complete exclusive discretion to make a budget (R. 1689). The trial court noted that section 166.241 merely provides that each municipality must make a balanced budget each fiscal year (R. 1689). It noted Attorney General Opinions that support the conclusion that "each municipality's power to make a budget is not a purely discretionary function as its discretion may be modified or restricted by the electorate through its referendum powers (R. 1689). The trial court concluded that "the approval by the voters of the referendum authorized the governing bodies to establish a line item in the budget to contribute to funding the OIG" (R. 1689).

Significantly, the trial court noted that the Florida Constitution provides that all political power is inherent in the people (R. 1690). It concluded:

> In this case, the people exercised their referendum power when a majority of the voters from each municipality voted to extend the operations of the OIG to their respective municipality and contribute funding thereto. The governing bodies now attempt to circumvent the actions of their people by invoking the doctrine of sovereign immunity.

> This suit to enforce the charges is based on the legal obligations approved by the citizens of the respective municipalities. Further, the municipalities present no persuasive legal authority to support these assertions that sovereign immunity invalidates the vote of approval by their respective citizens.

(R. 1690-1). The trial court concluded sovereign immunity could not be used to defeat the will of the people (R. 1691).

As to the claim that the OIG Ordinance created an unlawful tax, the trial court concluded that the OIG fee was both a valid user fee and a valid regulatory fee (R. 1691-4,1696). The OIG fee is a valid user fee because it: 1) is charged in exchange for a particular government service; 2) benefits the party paying the fee in a manner not shared by other members of society; and 3) is paid by choice (R. 1692-3). Additionally, the trial court found the OIG fee is a valid regulatory fee, and cited the extensive regulatory provisions of the OIG Ordinance (R. 1693-4). It concluded: "Therefore, because the county has the power to regulate, the OIG regulated the county and municipalities, and the fee is charged to offset the cost of regulation, the fee is a valid regulatory fee" (R. 1694).

The trial court rejected the Municipalities' Count III, which has been abandoned.

Finally, as to the Municipalities' claim that the OIG Ordinance was contrary to general law, section 166.241, Florida Statutes, the trial court concluded there was

no conflict between the OIG Ordinance and the state statute which merely requires municipalities to adopt a budget each fiscal year (R. 1695-6). This Municipalities have not briefed this claim on appeal.

SUMMARY OF ARGUMENT

The first words of the first article of the Florida Constitution are: "All political power is inherent in the people." Art. I, § 1, Fla. Const. The Florida Constitution expressly grants to charter counties broad powers of self-government, which include the power of local citizens to enable their charter county to enact regulations of county-wide effect which preempt conflicting municipal ordinances. Art. VIII, § 1(g); *Seminole County v. City of Winter Springs,* 935 So. 2d 521 (Fla. 5th DCA 2006).

On November 2, 2010, the people of Palm Beach County exercised their inherent political power, and in each of the thirty-eight municipalities in the County, the people overwhelmingly approved a referendum requiring that an independent Inspector General be established, and that the Inspector General be funded by the County and all other governmental entities subject to the authority of the Inspector General. The Palm Beach County League of Cities was represented on the drafting committee tasked with creating the Office of Inspector General Ordinance (OIG

Ordinance). The League of Cities was representation on the funding subcommittee that drafted the funding mechanism about which the Municipalities now complain. After months of meetings, drafting, and compromises, the OIG Ordinance was finalized and considered during two public hearings held by the Palm Beach County Board of County Commissioners (BCC). In May of 2011, the OIG Ordinance was approved, and on June 1, 2011, it became law. Five months later, the Appellant Municipalities filed suit seeking to block enforcement of the law their citizens requested and they helped to craft.

The trial court properly rejected the Municipalities' argument that sovereign immunity precludes their citizens from exercising their constitutional rights. The OIG Ordinance is a valid user fee, a valid regulatory fee, and a valid exercise of the power of the people. The trial court's final judgment should be affirmed.

ARGUMENT

I. THE TRIAL COURT CORRECTLY CONCLUDED THAT THE MUNICIPALITIES DO NOT ENJOY SOVEREIGN IMMUNITY FROM SUIT TO COLLECT THE OIG FEE (RESTATED).

STANDARD OF REVIEW

The County agrees that the standard of review of this purely legal issue is *de novo*. *See, e.g.*, *Plancher v. UCF Athletics Assoc.*, 175 So. 3d 724, 725 n.3 (Fla. 2015); *Beach Comty. Bank v. City of Freeport*, 150 So. 3d 1111, 1113 (Fla. 2014).

MERITS

COUNTY'S HOME RULE POWER TO CONDUCT REFERENDUMS

Article VIII, section 1(g) of the Florida Constitution of 1968 provides:

Article VIII, Local Government, Section 1. Counties

* * *

> (g) Charter government. Counties operating under county charters shall have all powers of local self-government not inconsistent with general law, or with special law approved by vote of the electors. The governing body of a county operating under a charter may enact county ordinances not inconsistent with general law. The charter shall provide which shall prevail in the event of conflict between county and municipal ordinances.

Art. VIII, § 1(g), Fla. Const.

It is well-established that the County, as a charter county, has the authority to conduct referendums under Article VIII, section 1(g) of the Florida Constitution.

Watt v. Firestone, 491 So. 2d 592, 593 (Fla. 1986) (noting charter counties have authority pursuant to Article VIII, section 1(g) of the Florida Constitution to conduct an initiative referendum permitting casino gambling). *See, also, Hillsborough County v. Florida Rest. Ass'n, Inc.*, 603 So. 2d 587, 591 n.3 (Fla. 2d DCA 1992) (noting Article VIII, section 1(g) of the Florida Constitution, which first appeared in the Florida Constitution of 1968, "provides for the broadest extent of county self-government or 'home rule' as it is commonly described" citing D'Alemberte commentary, *reprinted* in 26A Fla. Stat. Ann. 266, 271 (West 1970)).

As the Florida Supreme Court noted in *Florida Land Co. v. City of Winter Springs*, 427 So. 2d 170 (Fla. 1983), cited by this Court in *Archstone Palmetto Park, LLC v. Kennedy*, 132 So. 3d 347, 350 (Fla. 4th DCA 2014):

> The citizens of the State of Florida in drafting and adopting the 1968 Constitution reserved certain powers to themselves, choosing to deal directly with some governmental measures. The referendum, then, is the essence of a reserved power. *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 96 S.Ct. 2358, 49 L.Ed.2d 132 (1976). A reading of article I, section 1 along with the words of article VI, section 5 of our state constitution, makes this abundantly clear:
>
> > ARTICLE I. SECTION 1. Political power.—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.

> ARTICLE VI. SECTION 5. General and special elections.—... Special elections and referenda shall be held as provided by law.
>
> This referendum provision was not provided for in such a general fashion in the Constitution of 1885. Referendum provisions in that constitution dealt with certain specific sections. The concept of referendum is thought by many to be a keystone of self-government, and its increasing use is indicative of a desire on the part of the electorate to exercise greater control over the laws which directly affect them.
>
> Once the referendum power is reserved, particularly as done in our current constitution, this power can be exercised wherever the people through their legislative bodies decide that it should be used.

Florida Land Co., 427 So. 2d at 172-3 (footnotes omitted). The Court in *Florida Land Co.* proceeded to examine the City of Winter Springs' charter to interpret the will of the people. *Id.*

As the United States Supreme Court noted recently in affirming the right of the people to provide for redistricting by independent commission:

> The Framers may not have imagined the modern initiative process in which the people of a State exercise legislative power coextensive with the authority of an institutional legislature. But the invention of the initiative was in full harmony with the Constitution's conception of the people as the font of governmental power. As Madison put it: "The genius of republican liberty seems to demand . . . not only that all power should be derived from the people, but that those intrusted with it should be kept in dependence on the people."

Arizona State Legislature v. Arizona Indep. Redistricting Comm'n, 576 U.S. __, 135 S. Ct. 2652, 2674-5 (2015) (quoting The Federalist No. 37, at 223).

CHARTER COUNTY'S BROAD POWER OF SELF-GOVERNMENT

As the court explained in *Seminole County v. City of Winter Springs*, 935 So. 2d 521 (Fla. 5th DCA 2006):

> The most significant feature of charter counties is the direct constitutional grant of broad powers of self-government, which include local citizens' power to enable their charter county to enact regulations of county-wide effect which preempt conflicting municipal ordinances. *See* Art. VIII, § 1(g), Fla. Const., D'Alemberte commentary, *reprinted* in 26A Fla. Stat. Ann. 155, 157 (West 1995) ("This entirely new subsection provides for the broadest extent of county self-government or 'home rule' as it is commonly described … the power which may be granted to county governments under a charter is the power to have county ordinances take precedence over municipal ordinances.").

Id. at 523.

That Court concluded:

> Florida's Constitution recognizes that: "All political power is inherent in the people." Art. I § 1, Fla. Const. **When it comes to charter counties and municipalities within those counties, the Constitution expressly grants the electorate a right to determine by charter which government they desire to vest with preemptive regulatory power**. Art. VIII, § 1(g), Fla. Const.

Id. at 528 (emphasis supplied).

In keeping with these well-established principles, the trial court noted Palm Beach County's home rule charter provides that municipal ordinances prevail over

county ordinances when there is a conflict, except when both unincorporated county residents and municipal residents vote in a referendum to amend the charter to create a countywide program (R. 1686; Vol. 13 – R. 175-6); Art. I, § 1.3, Palm Beach County Charter. Once a referendum is approved by a majority of the voters in the County and a municipality, the countywide program is created and applies to Palm Beach County and that municipality (R. 1686). The OIG Ordinance created such a program.

SOVEREIGN IMMUNITY OF MUNICIPALITIES STRICTLY CONSTRUED

The trial court cited *American Home Assurance Company v. National Railroad Passenger Corporation*, 908 So. 2d 459 (Fla. 2005), for the proposition that the doctrine of sovereign immunity provides that "a sovereign cannot be sued without its own permission." *Id*. at 471. As Justice Cantero noted in his concurring opinion in *American Home*, because a County's sovereign immunity derives directly from the Florida Constitution, while no similar provision exists as to municipalities, "these common law differences dictate that the sovereign immunity of municipalities must be strictly construed, whereas the immunity of the state must be construed more broadly." *Id*. at 477 (Cantero, J., concurring).

In keeping with the required strict construction, the trial court properly rejected the Municipalities' argument that establishing their respective budgets is a legislative or discretionary function for which sovereign immunity applies. It rejected the argument that a requirement to allocate a line item in their respective budgets to fund the OIG is an unconstitutional infringement on their legislative budget making authority. The trial court correctly concluded that the Municipalities overstate the extent of their discretion with respect to establishing a budget (R. 1688). As the trial court reasoned, by approving the County Charter Amendment, the voters in the Municipalities approved the funding for the OIG, thus eliminating any discretion on the part of the Municipalities to avoid funding the program (R. 1688).

As explained in the Attorney General Opinions cited by the trial court, the statutory framework for establishing municipal budgets does not vest absolute discretion in its governing body, but rather allows for the amendment of a city charter to restrict specific legislative powers. In AGO 2009-12, for example, the Attorney General opined that a city's charter could be amended pursuant to a petition initiative requiring voter approval for capital projects exceeding $500,000. In explaining its decision, the Attorney General contrasted a city government's budgeting authority with that of a county's. The Attorney General has observed,

"the statutes governing the adoption of a budget for a municipality, however, are not as extensive as those provided in Chapter 129 (the statutory framework by which counties establish budgets and millage rates). Section 166.241, Florida Statutes, merely provides that the governing body of each municipality shall adopt a budget each fiscal year." Op. Att'y Gen. Fla. 2009-12.

Throughout their brief under Point I, The Municipalities present sweeping generalizations regarding application of the law of sovereign immunity to the municipal budget process, which simply are not supported by reference to the cases they cite after these sweeping generalizations. The law of sovereign immunity as the Municipalities have created it in their Initial Brief simply does not exist.

The Municipalities assert they have sovereign immunity "and cannot face liability or suit for their actions and decisions including, but not limited to, budgetary decisions, decisions regarding what programs to fund or not fund, and decisions regarding the allocation of scarce public resources, unless that immunity has been waived by general law or contract." (IB at 21). They cite *Commercial Carrier Corp. v. Indian River County*, 371 So. 2d 1010, 1020-22 (Fla. 1979), which did not addresses sovereign immunity for "decisions including, but not limited to budgetary decisions, decisions regarding what programs to fund or not fund, and decisions regarding the allocation of scarce public resources." *Commercial Carrier*

addressed the waiver of sovereign immunity for negligent failure to maintain a stop sign and painted "STOP" markings at an intersection, and negligent maintenance of a traffic light. *Id.* at 1013. The principle of law created by the Municipalities simply is not found in the *Commercial Carrier* Court's survey of state and federal law regarding immunity from tort.

Immediately following *Commercial Carrier* the Municipalities cite the eighty-three-year-old case of *State ex rel. Keefe v. City of St. Petersburg*, 145 So. 176 (Fla. 1933), which is factually distinguishable and has nothing to do with sovereign immunity. In *Keefe*, the Court considered whether the initiative and referendum provisions of the City of St. Petersburg could be used by the citizenry of the City to challenge an individual budget appropriation ordinance. *Id.* The Court reasoned that the system of budgetary control established by special law could not operate if each budget appropriation ordinance "prepared after weeks of study and adjustment of its provisions could be rendered ineffective by being subject to revision upward or downward, according to the hazard of a municipal election, or so delayed in its taking effect, that the interests of the city would financially suffer thereby." *Id.* at 176. The concerns addressed in *Keefe*, the undoing of a particular budget appropriation by municipal election, and delayed effectiveness of a city budget have nothing whatsoever to do with the suggestion that a city has sovereign

immunity "and cannot face liability or suit for their actions and decisions including, but not limited to, budgetary decisions, decisions regarding what programs to fund or not fund, and decisions regarding the allocation of scarce public resources, unless that immunity has been waived by general law or contract." *Keefe* is equally irrelevant each of the several times the Municipalities cite it under their Point I.

The Municipalities' argument that Article V, section 5.1 of the County's Charter prohibits the OIG Ordinance lacks merit. This section addresses a distinct initiative procedure, and prohibits the type of "change, or modification of County budgetary provisions" at issue in *Keefe.* Art. V, § 5.1, Palm Beach County Charter. Again, the OIG Ordinance is not an attempt to undue a particular budget appropriation of the type at issue in *Keefe* and prohibited by the County's Charter.

The Municipalities also generalize: "Case law is clear that a municipality's decisions to budget and spend money on certain programs or services, or not to budget and spend money, are by their very nature policy-level, planning decisions and, thus, discretionary" (IB at 32). The Municipalities again cite *Keefe*, which continues to provide no support for the Municipalities' generalizations, and *Department of Health & Rehabilitative Services v. Lee*, 665 So. 2d 304, 307 (Fla. 1st DCA 1995). *Lee* concerned the question of whether HRS was immune from tort liability for negligent supervision when a severely disabled adult woman became

pregnant while in HRS care. *Id.* at 304-5. The Court first determined that the facts were insufficient to allow application of the four factor test announced in *Evangelical United Brethren Church v. State*, 407 P.2d 440 (1965). *Id.* at 305. The Court recognized prior precedent that equated the role of HRS in caring for those who by reason of age or circumstances cannot care for themselves to that of a parent, and noted parents are granted almost unlimited discretion in caring for their children. *Id.* at 307 (quoting *Dep't of Health and Rehabilitative Services v. B.J.M.*, 656 So. 2d 906, 914 (Fla. 1995)). The Court stated: "The wisdom of the normalization policy [letting the client obtain an existence as close to the normal as possible] with its attendant benefits and risks, is a discretionary matter involving budgetary and public policy considerations outside the realm of the courts." *Lee* provides no support for the Municipalities' generalization that a municipality's decisions to budget and spend money on certain programs is discretionary. The Court in *Lee* equated the role of HRS to that of a parent in noting the broad discretion granted a parent by the court. The facts of the instant case are wholly dissimilar. *Lee* addressed a public policy, the normalization policy. No such policy is at issue here. The *Lee* case simply does not support the Municipalities' sweeping generalization.

The Municipalities have failed to provide support for their suggestion that they enjoy sovereign immunity from suit as to the OIG fee.

THE OIG ORDINANCE DOES NOT IMPACT THE MUNICIPALITIES' COFFERS

The trial court also correctly concluded that even assuming Municipalities have absolute authority to allocate their budgetary dollars, there is no evidence that the LOGER funding mechanism in the OIG ordinance will impact their respective budgets because the OIG ordinance does not require the Municipalities to fund the OIG out of their general fund; does not dictate how the Municipalities should obtain the money for their contribution to the OIG; and does not indicate how the Municipalities should budget to pay the fee (R. 1690).

The Municipalities' own expert opined that a vendor contract fee would be a viable funding alternative. As the Municipalities note, Commissioner Santamaria advocated for a vendor contract fee, opining that a contract fee of .25% was a "non-issue" because the amount is so small it could easily be absorbed by vendors. The OIG Ordinance gives municipalities the option of relying on a vendor contract fee, or any other method they choose to employ, to provide their portion of OIG funding.

THE REFERENDUM

Appellants are correct in asserting at page 26 of the Initial Brief that the County never argued the referendum in question created a contract between the County and the Municipalities, as contained in the Final Judgment (R. 1691). But the Appellants are not correct in suggesting that the trial court's reasoning hinges on that point. The Final Judgment casts the power of municipal voters to bind their city in terms of contractual obligations, but only to make the point that sovereign immunity is not absolute for the Municipalities, and in this case, cannot be applied by a city to thwart the will of its voters.

The trial court referred to this Court's opinion in *Brooks v. Watchtower Bible & Tract Society of Florida, Inc.*, 706 So. 2d 85 (Fla. 4th DCA 1998), but only to illustrate the limits of a governing body's ability to ignore the wishes of its own voters. Paragraph 25 of the Final Judgment, quoted only in part by the Appellants (IB at 27), goes on to explain that the voters in our case: "voted that the OIG should apply to their respective municipalities and that the municipalities should contribute to the funding of the program" (R. 1691). The thrust of the *Brooks* opinion for the purposes of this case is simply to point out the power of the electorate. As this Court has noted, "[c]itizens are free to express their views on municipal matters through the power of referendum and . . . courts should not interfere with the

exercise of their referendum rights except in very narrow circumstances." *Wright v. Frankel*, 965 So. 2d 365, 372 (Fla. 4th DCA 2007). This case does not implicate such narrow circumstances.

This portion of the Final Judgment contains reasoning very similar to reasoning presented in persuasive case law from other jurisdictions which was cited by the County below. The highest court of Massachusetts has held that sovereign immunity is waived when a majority of voters approve a law that necessarily implicates a waiver of sovereign immunity. Should this Court determine that the Municipalities enjoy sovereign immunity as concerns the OIG fee, this Court is urged to adopt the reasoning of the Massachusetts Court.

In *Bates v. Director of Office of Campaign and Political Finance*, 436 Mass. 144 (Mass. 2002), the Supreme Judicial Court of Massachusetts was presented with the question of whether the people's enactment of the clean elections law, pursuant to initiative, waived sovereign immunity, despite the lack of a specific statement or clear implication of waiver by the legislature. *Id*. at 172-73. The court concluded that the people's enactment of the law constituted a waiver of sovereign immunity:

> The people, not the Legislature, enacted the clean elections law, under the initiative provisions of art. 48. To the extent that we are required to ascertain whether there has been a waiver of sovereign immunity, it is to the wishes of the people, not the Legislature, that we must look. Their position is clear: the abrogation of sovereign immunity is

> inherent in the certification process and in the regulatory purpose of the statute that we have described above. The power to bind the Commonwealth to payments of public funds by the process of certification is required "by necessary implication" from the clean elections law; . . . the certification process, and the director's role in it, has no meaningful function without the obligation for payment. We will not impute to the voters who enacted the clean elections law an "intention to pass an ineffective statute."

Id. at 173 (citations omitted); *see also City of Canyon v. Fehr*, 121 S.W.3d 899 (Tex. App. 2003) (noting initiative and referendum entail the exercise of a power reserved to the people who become the legislative branch of government when they do so, and concluding sovereign immunity did not bar a suit brought by citizens against a municipality as a means of enforcing the initiative and referendum provisions contained in the city charter); *compare Arizona State Legislature*, 576 U.S. __, 135 S. Ct. 2652 (2015) (noting the power reserved by law to the state legislature can be altered by referendum).

The opinions of the Massachusetts and Texas courts are in line with the fact that sovereign immunity is not an "absolute" for Florida municipalities, because the Florida Constitution allows for the electors in a county to adopt a county charter, which among other things, allows a county to adopt ordinances that trump city ordinances when in conflict. This charter power is clearly a limit on a city's legislative authority.

The Municipalities cite no case that stands for the proposition that a city can use sovereign immunity to thwart a county's charter authority, nor can they. In the instant case, political power inhered in the people of Palm Beach County who voted on November 2, 2010, to "establish by ordinances applicable to Palm Beach County and all municipalities approving this amendment: . . . an independent Inspector General funded by the County Commission and all other governmental entities subject to the authority of the Inspector General." Palm Beach County Ordinance No. 2010-019. Any sovereign immunity the municipalities might claim to enjoy was waived by the vote of the people.

SECTION 125.0101 DOES NOT PRECLUDE ENACTMENT OF THE OIG ORDINANCE

The Municipalities and Amicus place heavy emphasis in their respective briefs on the ability of local governments to enter into interlocal agreements for the provision of services. The Municipalities and Amicus incorrectly interpret section 125.0101 as precluding enactment of the OIG ordinance. They reason that because a Florida Statute allows counties to contract with municipalities for the provision of services, if follows that an interlocal agreement is necessary before one entity may be required to provide funding for services provided by the other. This reading of section 125.0101 ignores the plain language of the statute, which notes its

cumulative nature, rather than the preclusive nature ascribed to the statute by the Municipalities and Amicus.

Section 125.0101 provides in pertinent part:

> **125.0101. County may contract to provide services to municipalities and special districts**
>
> (1) It is the legislative intent of this act to permit counties to contract for services with municipalities and special districts as provided by s. 4, Art. VIII of the State Constitution.
>
> (2) **In addition to the powers enumerated in this chapter**, the legislative and governing body of a county shall have the power to contract with a municipality or special district within the county for fire protection, law enforcement, library services and facilities, beach erosion control, recreation services and facilities, water, streets, sidewalks, street lighting, garbage and trash collection and disposal, waste and sewage collection and disposal, drainage, transportation, and other essential facilities and municipal services . . . .
>
> * * *
>
> (4) **Except as otherwise provided in this section, the powers granted by this section shall not be deemed to be a limitation of powers already existing but shall be deemed to be cumulative.**

§ 125.0101, Fla. Stat. (2011) (emphasis supplied).

As Assistant County Administrator Merriman noted, the BCC offered municipalities the opportunity to enter into interlocal agreements concerning provision of OIG oversight. Only five of the thirty-eight municipalities have done so. The fact that the County may enter into interlocal agreements with

municipalities' for OIG oversight does not preclude the people from exercising their power via referendum.

As to Point I, the trial court correctly concluded that sovereign immunity does not bar the Municipalities from suit to collect the OIG fee, and the Final Judgment should be affirmed as to this Point on appeal.

II. THE TRIAL COURT CORRECTLY DETERMINED THE FEE REQUIRED OF THE MUNICIPALITIES TO FUND THE OIG IS BOTH A VALID USER FEE AND A VALID REGULATORY FEE (RESTATED).

STANDARD OF REVIEW

The County agrees this issue presents a mixed question of fact and law. Findings of fact are reviewed for competent, substantial evidence and legal conclusions are reviewed *de novo*. *City of Gainesville v. State,* 863 So. 2d 138, 143 (Fla. 2003).

THE OIG FEE IS A VALID USER FEE

The trial court correctly determined that the OIG fee constitutes a valid user fee. A user fee is typically described as a charge for the use of a particular public facility or service that must be reasonably based on the cost in providing that facility or service. *See generally Jacksonville Port Authority v. Alamo Rent a Car, Inc.*, 600 So. 2d 1159 (Fla. 1st DCA 1992). User fees "share common traits that

distinguish them from taxes: [1] they are charged in exchange for a particular governmental service [2] which benefits the party paying the fee in a manner not shared by other members of society, and [3] they are paid by choice, in that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge." *City of Miami v. Haigley*, 143 So. 3d 1025, 1029 (Fla. 3d DCA 2014) (quoting *State v. City of Port Orange*, 650 So. 2d 1 (Fla. 1994) and citing *Collier County v. State*, 733 So. 2d 1012, 1018 (Fla. 1999) ("[U]ser fees are similar to special assessments, in that the fee must result in a benefit not shared by persons not required to pay the fee.")).

The trial court found the OIG fee was charged in exchange for a particular governmental service. This finding is supported by competent substantial evidence, including the former Inspector General's lengthy testimony regarding the audit, investigations, and contract oversight functions which are provided to the municipalities pursuant to the OIG Ordinance, as well as the outreach, training, and reporting functions provided to each and every municipality.

The Municipalities cite the cross-examination testimony of Assistant County Administrator Merriman, that the OIG Ordinance "does not describe any particular service that the OIG is bound to provide to an individual municipality." (IB at 41). In fact, Mr. Merriman was asked whether the Ordinance named any specific

municipality with respect to a benefit, and it was this question which he answered in the negative:

> Q. I'm not sure how to make it any more specific. Just show me, under your understanding of a specific service, where it describes a specific service that the Office of Inspector General, without discretion, has to deliver to a specific municipality.
>
> A. A specific municipality or municipalities in general?
>
> Q. A specific municipality.
>
> A. **You mean, like, a municipality by name**?
>
> Q. **By name**.
>
> A. **No, doesn't have - - it's not in there**.

(TR. 169) (emphasis supplied).

On cross-examination, the Inspector General was asked specifically whether the amount of contract-oversight, investigations, or audits a municipality received was connected to the OIG fee a municipality would pay (TR. 277,281-2). The scope of her cross-examination did not address the myriad of functions performed by the IG and her employees, including, among others, outreach, training, selection committee meeting attendance, and speaking (TR. 182-250). The OIG fee is plainly charged in exchange for particular services.

As to the second prong, the trial court concluded that the Municipalities received benefits not shared by persons not required to pay the fee because the Municipalities had the opportunity to make complaints and seek investigations and audits. This is a benefit not shared by persons not required to pay the OIG fee. Again, this finding is plainly supported by competent substantial evidence.

As to the third prong, voluntariness, while it is true that the OIG fee is imposed by ordinance, as the trial court correctly concluded, the OIG fee can easily meet the voluntary standard described. First, the voters of each municipality volunteered to have their respective municipalities submit to OIG oversight, and to provide funding, when they approved the 2010 referendum rather than opting out. Additionally, as the trial court noted, the voters are also able to undo any or all of the OIG through the citizens' initiative process. *See* Art. V. § 5.1 (as to ordinances), and Art. VI, § 6.3, (as to Charter amendments), Palm Beach County Charter.

The Municipalities assert that "the parties paying the fee are the Municipalities" and the Municipalities "must be able to opt out at any time." (IB at 43-4). The Municipalities' apparent attempt to distance themselves from their citizens lacks merit given the Florida Constitution's mandate: "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." Art. I, § 1, Fla. Const.

Arizona State Legislature v. Arizona Indep. Redistricting Comm'n, 576 U.S. __, 135 S. Ct. 2652, 2674-5 (2015)

The Municipalities cite Mr. Merriman's testimony on cross-examination that the ordinance does not contain language making participation voluntary. In fact, Mr. Merriman testified on re-direct examination that the municipalities had an opportunity to opt out of the ordinance on election day in 2010 (TR. 172-3). Mr. Merriman, a non-lawyer, could not provide a legal opinion regarding voluntariness.

Moreover, the notion of voluntariness is not dispositive of the user fee issue, rather it is only one factor to consider, and the least significant of those factors. *City of Clearwater v. School Board*, 905 So. 2d 1051 (Fla. 2d DCA 2005). In *Gargano v. Lee County*, 921 So. 2d 661 (Fla. 2d DCA 2006), the court found 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 way to get to her home. The court reasoned that the fee was voluntary because the plaintiff could live elsewhere. According to the court: "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 use fees for garbage pickup…These realities do not transform the charges for these services into taxes." *Id.* at 667, n. 4. *Gargano* supports a conclusion that the third prong of the

user fee analysis is met here. The trial court correctly determined the OIG fee is a valid user fee.

THE OIG FEE IS A VALID REGULATORY FEE

Additionally, the trial court correctly concluded that the OIG fee constitutes a valid regulatory fee. As explained by this Court in *Hollywood, Inc. v. Broward County*, 431 So. 2d 606 (Fla. 4th DCA 1983) in order to pass muster as a regulatory fee: 1) the fee amount cannot exceed the cost of the regulatory program; 2) the fee amount charged to each fee payer must represent a reasonable pro rata share of the program; and 3) the fees collected must be limited by law to ensure they are spent in furtherance of the program. *Hollywood, Inc.*, 431 So. 2d at 611. *See also Flores v. City of Miami*, 681 So. 2d 803 (Fla. 3d DCA 1996).

That the funding method at issue easily meets this test is made plain by the funding mechanism of the OIG Ordinance, section 2-429. First, the total amount of funding all the governments must share is based on the OIG budget for the coming year. Therefore, the amount of the fees cannot exceed the cost of the program. Second, each government's proportionate share of the total OIG budget is based on the contract activity of that government. For example, as John Wilson explained, if a government's contract activity equals fifty percent of the contract activity of the County and all municipalities, that government is responsible for fifty percent of the

OIG budget. This is an entirely reasonable approach because a government with a great deal of transactional activity is more likely to require more OIG services than a government with little transactional activity.

Inspector General Steckler testified that relatively small municipalities, with small budgets, would be assigned lower risk factors, which are used to prioritize the audit, investigations, and contract-oversight functions provided to a municipality. She testified that West Palm Beach, the County's largest city, had the largest number of correspondences for the period from the inception of the OIG through December of 2013. The County's largest municipalities are in the top ten municipalities in terms of the number of correspondences they have generated. The number of correspondences "spiked up" when the municipalities fell within the OIG's jurisdiction. This competent substantial evidence supports the trial court's finding that the OIG fee charged to each Municipality, based on the LOGER calculation, represents a reasonable pro rata share of the program. The second prong of the regulatory fee analysis is met.

Finally, the OIG Ordinance provides that fees imposed pursuant to the Ordinance are dedicated specifically for the OIG program, put in a specific fund for this purpose alone, and are not being used for general revenue purposes. This

evidence supports the trial court's finding that the fees collected are limited by law to ensure they are spent in furtherance of the OIG program.

The Municipalities assert that the OIG fee cannot be a regulatory fee because there is no real or substantial benefit to the Cities which are required to pay the OIG regulatory fee in that the OIG's activities may not involve every City at any given time. This assertion is unsupportable with reference to case law. As the Court explained in *Hollywood, Inc.*, any measure of benefit is sufficient to satisfy the real and substantial benefit test.

The Municipalities' suggestion that the OIG does not regulate is simply unfounded. Former Inspector General Steckler testified the OIG works closely with, and has made referrals to state regulatory agencies. As part of this regulatory program, the OIG has coordinated and participated in investigations with local law enforcement agencies and the State Attorney's Office, that have resulted in arrests and convictions. The activities of the OIG can be described as directed to behavior modification, no different than, and indeed an adjunct to, the criminal justice system.

The Municipalities' argument that the OIG does not regulate is based on an exceedingly narrow understanding of regulatory fees and not in accord with established case law. For example, this Court in *Homebuilders and Contractors Association of Palm Beach County v. Board of County Commissioners of Palm*

Beach County, 446 So. 2d 140 (Fla. 4th DCA 1983), described impact fees as regulatory fees. Obviously there is no regulatory aspect to impact fees as envisioned by the Municipalities. No one gets fined, reprimanded, removed from office, or sent to jail in the impact fee regulatory scheme. This court characterized the charge as a regulatory fee because it is tied to government's ability to plan and provide for capital facilities in order to keep pace with development. It is still a regulatory fee because it is tied to the exercise of valid governmental power. The OIG is part of a regulatory scheme that provides oversight to government operations, including transactional activity between government and its vendors. Payments to fund the OIG are no less a regulatory fee than an impact fee.

Finally, the Municipalities assert that the OIG fee cannot be a regulatory fee because municipalities do not fall within the "businesses, professions and occupations" which may be regulated pursuant to section 166.221, Florida Statues (2014). This assertion fails for any one of three reasons. First, the Municipalities did not raise this argument below, and thus it is waived. *See Tillman v. State*, 471 So. 2d 32, 35 (Fla.1985) (holding specific legal argument or ground to be argued on appeal or review must be presented to trial court). Second, the OIG Ordinance is "valid as a proper exercise of the County's broad, residual power of self-government granted in Article VIII, section 1(g) of the state constitution." *Hillsborough*

County, 603 So. 2d at 592. Third, the regulatory OIG fee plainly regulates the municipalities in their capacity as businesses, and thus municipalities fall within the groups who may be regulated pursuant to section 166.221.

The OIG fee is a valid regulatory fee.

CONCLUSION

Palm Beach County respectfully requests this Court affirm the trial court's Final Judgment upholding the OIG Ordinance.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2) and is being filed in Times New Roman 14-point font.

/s/ Helene C. Hvizd
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