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

CASE NO. 4D15-1753
L.T. 15th Cir. No. 502011CA017953XXXXMB

TOWN OF GULF STREAM, et al.,

Appellants/Cross-Appellees,

v.

PALM BEACH COUNTY, a political subdivision,

Appellee/Cross-Appellant,

and

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

Intervenor/Appellee.
_____/

A Final Appeal from the Fifteenth Judicial Circuit Court for Palm Beach County

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PREFACE

Plaintiffs/Appellants/Cross-Appellees, TOWN OF GULF STREAM, VILLAGE OF TEQUESTA, CITY OF RIVIERA BEACH, TOWN OF JUPITER, TOWN OF PALM BEACH SHORES, TOWN OF MANALAPAN, TOWN OF MANGONIA PARK, CITY OF PALM BEACH GARDENS, TOWN OF HIGHLAND BEACH, TOWN OF LAKE PARK, CITY OF WEST PALM BEACH, TOWN OF OCEAN RIDGE, and CITY OF BOCA RATON, municipal corporations of the State of Florida, appeal from the final declaratory judgment entered in favor of defendant/appellee/cross-appellant, PALM BEACH COUNTY. The County filed a cross-appeal. The parties are referred to as "the Municipalities" and "the County." All emphasis is supplied unless indicated otherwise. The following symbols are used:

R[vol]:[page]	-	Record on appeal (references are to the .pdf page number).

STATEMENT OF CASE AND FACTS

Introduction

In November 2010, the voters of Palm Beach County (the "County") approved a referendum amending the County Charter to create a countywide Office of Inspector General (the "OIG Program"), which applies in the County and in all 38 municipalities located within the County. The referendum stated that the OIG

Program would be funded by the County and "all other governmental entities subject to the authority of the Inspector General" (R13:2402). After the referendum passed, the County adopted an ordinance implementing the countywide OIG Program and sent invoices to all 38 municipalities demanding payment for their "share" of funding.

Fourteen of the municipalities (the "Municipalities") sued the County after receiving the invoices. In their suit, the Municipalities challenged the County's demand for payment on grounds that it violated sovereign immunity and was an unlawful tax. The Municipalities did not challenge the creation or continued existence of the County's OIG Program. The Municipalities respect the will of the voters in their desire to have such a Program. The Municipalities simply want it funded lawfully, meaning the County pays for it or negotiates mutually agreed-upon interlocal agreements with the governing bodies of each Municipality to voluntarily contribute funding. Importantly, the OIG Program will continue to exist, even absent funding from the Municipalities, just as it has done since the Municipalities filed suit in 2011, and just as other countywide programs do, like the County Commission on Ethics.

Despite the evidence at trial, the trial court entered judgment for the County. This appeal followed. If the trial court's judgment is affirmed, meaning the

County can use a referendum to extract money from municipal coffers, there will be nothing stopping the County from using this mechanism to fund other countywide programs. This ruling will profoundly impact municipal sovereign immunity and the ability of municipalities to control their budgets. The effects will echo throughout the State.

A. The County's Charter

The County adopted a home rule charter in 1985 (R9:1668; R13:2547, 2560). Article I, section 1.3 of the Charter provides that municipal ordinances prevail over County ordinances if there is a conflict, except where a majority of the voters in the County and the Municipalities have voted in a referendum to amend the Charter to create a "countywide" ordinance, program or regulation (R9:1668, 1735; R13:2550-51). The referendum process is initiated by a "charter ordinance" adopted by the Board of County Commissioners ("BCC") (R9:1668-69, 1735; R13:2561). The charter ordinance describes the proposed countywide program, ordinance or regulation to be voted on (R9:1668-69). Once a referendum is approved, the countywide program applies in both the unincorporated areas and the incorporated municipal areas of the County (R9:1669, 1735).

Before the creation of the OIG Program at issue here, the County Charter contained five amendments creating countywide programs (R5:972; R13:2550-51).

The County fully funded all five programs (R5:972). The Municipalities were not forced to share in the costs of these programs (R5:973). The OIG Program is the first countywide program that mandates funding by the Municipalities (R5:977).

B. The Ballot Ordinance

In 2009, a Palm Beach County grand jury convened to investigate county governance and public corruption issues in the County (R9:1735). The Grand Jury recommended that the BCC enact an ordinance to create an OIG to provide oversight for County operations (R9:1735-36; R13:2377). The grand jury recommended that funding for the OIG come from the County's vendors and contractors (R15:2887-88).

In accordance with the Grand Jury's recommendation, the BCC adopted a set of ordinances that created: (1) a new Code of Ethics, (2) a Commission on Ethics to enforce the Code of Ethics, and (3) the OIG (R5:973; R9:1669; R13:2377-88; R15:2886-87). These ordinances applied only to County governmental operations (R9:1669, 1736; R15:2887). The County was solely responsible for funding these programs (R5:973-74; R9:1669; R13:2886-87). Other governmental entities, including municipalities, could participate on a voluntary basis through mutually agreed-upon interlocal agreements (R13:2381; R15:2888).

Originally, the County Implementing Ordinance for the OIG stated that the costs of the Program would be "defrayed in part" by the County charging a 0.25% fee to its vendors and contractors based on their contract values (the "vendor fee") (R9:1669; R13:2379-80). The County would pay any remaining costs not covered by the vendor fee through County ad valorem taxes (R9:1669; R13:2386).

In September 2010, the BCC adopted Ordinance No. 2010-041 to amend the funding mechanism for the OIG (R9:1669; R13:2390-94). This Ordinance eliminated the vendor fee and stated that the County would fund the OIG from County tax revenues and interlocal agreements, and that the minimum funding each year would be in an amount equal to 0.25% of the County's total contract values (R13:2390-91). Municipal residents pay County taxes at the same tax rate as residents of the unincorporated areas (R15:2855). Therefore, a portion of municipal residents' county taxes go toward OIG funding (R15:2855, 2913).

In 2010, the BCC adopted Ordinance No. 2010-019, the "Ballot Ordinance" (R9:1670; R13:2396-2403). The Ballot Ordinance proposed a referendum to amend the County Charter to create a countywide OIG, Code of Ethics, and Commission on Ethics to enforce the Code of Ethics, and to extend these programs into the Municipalities (R9:1670; R13:2396-2403; R15:2894-95).

Section 8.1 of the Ballot Ordinance describes the County Code of Ethics

(R13:2398). The County Code of Ethics regulates the conduct of individuals such as elected and appointed government officials, government employees, vendors and lobbyists (R13:2460-85). Section 8.2 describes the Commission on Ethics (R13:2398). It states that "[t]he Commission on Ethics shall be adequately funded by the County Commission and all other governmental entities that elect to be subject to the authority of the Commission on Ethics **pursuant to interlocal agreement**" (R13:2398). The Ballot Ordinance does not require the Municipalities to fund the Commission on Ethics, consistent with the existing countywide programs previously adopted by County Charter amendment (R9:1670; R13:2398).

With respect to the funding for the countywide OIG Program, the Ballot Ordinance proposed a funding requirement materially different than the one for the Commission of Ethics and for the then-existing OIG (R9:1670; R13:2399). Section 8.3 states that "[t]he Office of Inspector General shall be funded at minimum in an amount equal to one quarter of one percent of contracts of the County and **all other governmental entities subject to the authority of the Inspector General (the "Funding Base") as determined by the Implementing Ordinance**." (R13:2399). Instead of using voluntary interlocal agreements to fund the OIG Program, the County asserts that the Ballot Ordinance forces "other governmental entities" to contribute the funding (R13:2399). Nowhere does the Ballot Ordinance state that the "other governmental entities" include

Municipalities (R13:2396-2403). Section 8.3 gives the BCC the exclusive power to determine the amount of funding for the OIG and to increase or decrease the funding base (R13:2399).

The Ballot Ordinance gives no details about the funding mechanism for the countywide OIG Program except stating that "other governmental entities" would contribute funding and the minimum funding each year would be in an amount equal to 0.25% of contracts (R13:2399). It does not state which contracts would be included in calculating the funding base, the total amount each municipality would be required to contribute each year, or provide an estimated cost for the OIG Program. The Ballot Ordinance states in section 8.3 that these items will be determined in a County Implementing Ordinance at a future date (R13:2399).

The Ballot Ordinance set forth the following language to be presented to the voters for the November 2010 referendum:

> 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, and 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 _____

(R13:2402). This ballot language, like the Ballot Ordinance, contains no details regarding funding for the OIG Program (R13:2402). It does not provide the cost of the Program, the cost of each Municipality's share, the duration of the Program, or explain how each Municipality's "share" of the funding would be calculated (R13:2402). In November 2010, the majority of voters in the unincorporated areas of the County and in each Municipality approved this countywide referendum question (R13:1736; R15:2903-04).

C. The Implementing Ordinance

In May 2011, the BCC adopted ordinance No. 2011-009 (the "Implementing Ordinance"), which set up the countywide Inspector General's Office (R9:1671, 1736; R13:2405-31; R15:2910). The Implementing Ordinance states in section 2-429 that "the county and municipalities shall fund the Inspector General's Office" (R13:2414). It requires each Municipality in the County to budget for and appropriate specific funds for the OIG Program "[p]ursuant to their annual budgeting processes" (R13:2414). The Municipalities' contributions are not based solely on contract expenditures for the previous fiscal year. Instead, each

Municipality's contribution to the Program is based on the Municipality's "actual expenses" for the previous fiscal year as reported to the Florida Department of Financial Services Local Government Electronic Reporting system, known as "LOGER" (R13:2414). Section 2-429.1(1) of the Implementing Ordinance sets the minimum "funding base" for the OIG Program in an amount equal to 0.25% of the contracts specified in section 2-429(2) (R13:2416). The County Clerk and Comptroller must invoice the County and each Municipality quarterly (R13:2415).

The Implementing Ordinance gives the BCC complete control over the OIG budget (R9:1671; R13:2414-16). The Municipalities have no input, even though they must fund the OIG Program (R9:1671). The Ordinance states that the Inspector General will meet with the Palm Beach County League of Cities to discuss the preliminary budget each year, but the final budget for the OIG "shall be subject to final approval of the [BCC]." (R13:2415). The Palm Beach County League of Cities is a non-profit social and educational organization whose members include, but are not limited to, the Municipalities in the County (R15:2822-23). The Palm Beach County League of Cities has no authority to bind the Municipalities (R15:2917). No such similar discussion is required to occur with the individual governing bodies of each Municipality (R13:2415; R15:2914-15).

The Implementing Ordinance also authorizes the BCC to approve supplemental budget requests for the OIG Program throughout a fiscal year, which would be charged to the Municipalities (R13:2415-16). Again, the Municipalities have no right to decide whether these supplemental budget requests should be approved, even though the Municipalities already will have adopted their annual budgets for that fiscal year, and already will have pledged their monies to other programs and services (R9:1671; R13:2416). The additional costs will simply be invoiced to the Municipalities and must be paid regardless of the impact to municipal budgets (R13:2416; R15:2915).

D. The lawsuit

In October 2011, the County Clerk & Comptroller sent invoices to the Municipalities for the OIG Program per the Implementing Ordinance (R9:1672; R13:2487-2538). None of the Municipalities who are parties to this suit paid these invoices, except for the Town of Ocean Ridge (R9:1672).

The next month, the Municipalities filed suit for declaratory relief in the Circuit Court for the Fifteenth Judicial Circuit (R1:26-102; R5:965-94, 995). They challenged the County's efforts to force them to pay for a County program by way of referendum (R5:980-91). The Municipalities did not challenge the creation or

establishment of the OIG Program (R5:980-91). The County's counterclaim for damages was dismissed and never re-filed (R5:961).

The Clerk and Comptroller of Palm Beach County, Sharon R. Bock, moved to intervene in the lawsuit (R1:107-48, 174-206). Clerk Bock sought declaratory relief as to whether her compliance with the Implementing Ordinance by invoicing the Municipalities was legal (R1:120-31, 174-89). The trial court granted Clerk Bock's motion to intervene by agreed order (R1:149-50).

Sheryl Steckler, the County's Inspector General at that time, also moved to intervene (R2:246-87). The County, the Municipalities and Clerk Bock opposed this motion (R2:298-319, 320-31, 332-38). The trial court denied Steckler's motion, and this Court affirmed (R4:635; *see* Case No. 4D12-4325).

E. The non-jury trial

The trial court held a non-jury trial in August 2014. At trial, Jeffrey Green, city administrator for the City of West Palm Beach and its former chief financial officer, explained the process by which a Municipality pays invoices it receives (R15:2838-46). First, the finance official for the Municipality must make sure that the item or service has been budgeted (R15:2839). Then, the official must confirm that there is an agreement for the goods or services named in the invoice, and that the amount on the invoice is accurate (R15:2839-41). Finally, the official must confirm that the

municipality has actually received the goods or services (R15:2839-41). If these three requirements are not met, the finance officer, as a fiduciary for the municipality, cannot pay the invoice (R15:2840-42, 2866). All municipalities follow similar procedures (R15:2849-50).

Green explained that the City of West Palm Beach does not have a line item in its budget for the OIG Program because it does not have an interlocal agreement with the County for services from the OIG (R15:2842-43, 2854-55). There is no special revenue fund to pay the OIG charges, so they would have to be paid from the City's finite general fund (R15:2847-48). In order to allocate funds to the OIG Program, the City would have to take them from another program, most likely police, fire, or public works (R15:2848-49).

Green testified that municipalities need flexibility in their budgets, and that a mandate from the County to budget a specific amount of money each year would cause "great havoc" in the budgeting process (R15:2846). Even if the City had an interlocal agreement with the County allowing it to budget for the OIG funding, the City still could not pay because the City cannot verify that it has actually received any goods and services from the OIG (R15:2841-43).

Green explained that each Municipality's "share" of the funding for the OIG Program is determined using the LOGER system (R15:2850-51; *see also* R17:3157-

58). LOGER was set up by the State of Florida to keep track of local governments' expenditures (R15:2850). There is no standard for the way local governments report their expenditures, and they can take a year or more to make their reports (R15:2850-51). Under the Implementing Ordinance, the County Clerk and Comptroller compares the expenditures of each Municipality to the total expenditures of all Municipalities and the County to calculate the OIG charges (R15:2850-51). Since the information in LOGER is historical, these calculations rely on data from prior years (R15:2851). Green testified that relying on historical expenditures to determine the OIG's funding base and each Municipality's share of funding is problematic because the historical expenditures may not reflect current expenditures (R15:2852).

County witness James "Brad" Merriman, Assistant County Administrator, testified that the ballot question submitted to the voters for the OIG Program omitted all details about funding the OIG except that it would be funded by the County and the entities covered by the OIG (R15:2908-09). The BCC did not determine the funding specifics until after the referendum vote (R15:2908-09).

Merriman agreed that the BCC approves the OIG budget (R15:2914). Under the Ordinance, the Municipalities do not get a vote on the OIG's budget, no matter how it affects the Municipalities' budgets or whether they have the funds available

to pay (R15:2914). Once the budget is approved, the County Clerk & Comptroller sends each Municipality an invoice (R15:2915). The OIG is the only countywide program where a Municipality receives invoices from the County to fund the program (R15:2913).

Merriman admitted that the calculation of each Municipality's financial responsibility for the OIG Program has no relation to the service the OIG provides to that Municipality (R15:2913-16). It is based solely on the municipality's expenditures from prior years (R15:2913-15). There is no guarantee of services to be provided by the OIG each year (R15:2918). He acknowledged that, under this system, the Municipality that pays the most toward the OIG Program could get the least amount of services and attention from the OIG (R15:2914). The Inspector General has total discretion to determine what audits and investigations it will conduct (R15:2919).

Merriman also admitted that the funding from the Municipalities set forth in the Implementing Ordinance is not voluntary because the Municipalities cannot opt out and avoid funding the OIG Program (R15:2917-18, 2920). In his view, the only opportunity the Municipalities had to "opt out" was if the voters disapproved the ballot question in the November 2010 election (R15:2921-22).

Merriman agreed that the Implementing Ordinance does not describe any

particular service that the OIG is bound to provide to an individual Municipality (R15:2918). Nor does it establish any specific standards of conduct for the Municipalities to abide by and follow (R15:2920-21).

Former County Inspector General Sheryl Steckler testified that decisions about OIG investigations have "absolutely nothing to do with what [the Municipalities are] paying" (R16:3037-38). Instead, the Ordinance gives the OIG complete discretion to determine what audits, investigations, and contract oversight services will be provided to any governmental entity (R16:3036-37). Nothing in the Implementing Ordinance guarantees that a Municipality will receive any services from the OIG in any given year (R16:3060-62). Steckler also testified that the OIG does not have the power to force local governments to change their policies; it can only issue reports and make recommendations based on those reports (R16:3039-40, 3047).

Former County Commissioner Jess Santamaria served as the County's expert witness and testified that there was never supposed to be public funding for the OIG (R16:3094-95, 3097-3100). He was surprised the Implementing Ordinance requires the County and the Municipalities to pay for the OIG Program out of general fund dollars instead of the 0.25% vendor fee that he believed all County Commissioners

voted to use and that the voters were promised (R16:3094-95). Santamaria explained:

> **We never, in all of the public hearings, ever mentioned public funding at all.** So, in a way, it was a surprise because that was the expectation of the grand jury, the seven commissioners who voted on it and **the public was told that this was not going to be funded by public funds but primarily and exclusively by vendor fees.**

(R16:3095; *see also* R16:3099-3100).

F. The final judgment

The trial court entered final judgment on March 13, 2015, in favor of the County (R9:1735-45). The court found that the charges to the Municipalities for the OIG Program are not barred by sovereign immunity (R9:1736-39). The court concluded that the voters, through the referendum, entered into a contract "on behalf of their governing bodies" to fund the OIG Program and, therefore, waived sovereign immunity (R9:1740). The court also concluded that the charges were valid user fees and regulatory fees, not unlawful taxes (R9:1740-43).

The Municipalities moved for rehearing (R9:1746-R11:2137). They argued that the court's sua sponte ruling that the voters can contract through referendum and waive sovereign immunity was error (R9:1754-57). Further, the ballot question in this case never could have created a contract because it failed to give

the voters adequate notice of the contract's material terms (R9:1755-57). They also pointed out that it was improper for the County to even have a referendum on budgetary items given that the County's own charter expressly prohibits the voters from initiating, changing or modifying County budgetary provisions (R9:1753-54). Similar prohibitions exist in the charters of seven of the fourteen plaintiff Municipalities (R9:1747-52). The trial court denied rehearing (R11:2148). The Municipalities appealed and the County cross-appealed (R11:2171-88, 2254-73).

SUMMARY OF ARGUMENT

The trial court erred in concluding that the County could force the Municipalities to pay for the OIG Program by way of a referendum vote. The Municipalities have sovereign immunity that protects them from such forced payment. Sovereign immunity can be waived **only** by the Florida Legislature through statute or by the Municipalities' own governing bodies through a written interlocal agreement with the County. Such waiver must be clear and unequivocal. Neither type of waiver occurred here. Florida law is clear that a local law, like a referendum, cannot waive the Municipalities' sovereign immunity. The final judgment, finding a waiver by referendum, should be reversed.

The trial court also erred in concluding that the County's charges to the Municipalities for the OIG Program constitute valid user fees and regulatory fees.

The County's charges are unauthorized taxes. A referendum vote does not change this result. The referendum only allowed the County to create a countywide OIG Program. It in no way gave the County the authority to charge the Municipalities for the Program. The trial court's conclusion that the charges were lawful should be reversed.

ARGUMENT
POINT I

THE DOCTRINE OF SOVEREIGN IMMUNITY BARS THE COUNTY FROM COLLECTING FUNDS FROM THE MUNICIPALITIES FOR THE COUNTY'S OIG PROGRAM.

The trial court relied exclusively on the referendum to permit the County to forcibly collect monies from the Municipalities for the OIG Program. In effect, the trial court concluded that the referendum gave the County a "free pass" to avoid all constitutional and statutory requirements in Florida that protect Municipalities from such forced intrusions into their treasuries.

The County's efforts to forcibly collect funds from the Municipalities for the OIG Program are barred by the doctrine of sovereign immunity. The Municipalities cannot face liability or suit for making budgetary decisions or for deciding what programs to fund or not fund. The Municipalities' sovereign immunity can be waived only by the Florida Legislature through statute or by the

Municipalities' own governing bodies through a written interlocal agreement with the County. Neither occurred here. A referendum vote cannot waive sovereign immunity. As demonstrated below, the trial court erred in upholding the Implementing Ordinance and concluding that the Municipalities "do not enjoy sovereign immunity from suit to collect the charges in the invoices pursuant to the Implementing Ordinance." (R9:1745).

A. Standard of review

The issue of sovereign immunity is a legal issue subject to de novo review. *See, e.g., Plancher v. UCF Athletics Assoc.*, 40 Fla. L. Weekly S302, S302 n.3 (Fla. May 28, 2015).

B. The referendum does not allow the County to bypass legal requirements that restrict it from collecting funds from the Municipalities for the OIG Program.

"Referendum is the right of the people to have an act passed by the legislative body submitted for their approval or rejection." *Archstone Palmetto Park, LLC v. Kennedy*, 132 So. 3d 347, 350 (Fla. 4th DCA 2014) (quoting *City of Coral Gables v. Carmichael*, 256 So. 2d 404, 411 (Fla. 3d DCA 1972)). Under Florida law, a referendum allows the County to ask voters only whether it should exercise an already existing power. *See Gaines v. City of Orlando*, 450 So. 2d 1174, 1178 (Fla. 5th DCA 1984) (explaining that the voters' power to legislate by referendum is co-

extensive with the municipality's power to act). A referendum does not allow the County to obtain or create new powers. *See id.* at 1178, 1182. For the County and the trial court to rely on the referendum vote to charge the Municipalities here, the County was required to prove that it already had the authority under the Constitution or Florida Statutes to do so. *See id*. at 1179, 1182. The County failed to make such a showing.

Many referenda have been overturned because they violate a constitutional or statutory right. *See, e.g., Bd. of Cnty. Comm'rs v. Wilson*, 386 So. 2d 556, 560 (Fla. 1980) (electors of Dade County could not adopt ordinance fixing millage rate where such procedure would conflict with general law); *Bd. of Cnty. Comm'rs v. McKeever*, 436 So. 2d 299, 302-03 (Fla. 5th DCA 1983) (referendum approving a cap on millage rates for the county's transportation fund was held unlawful given that it was inconsistent with general law; mere fact that the voters approved the cap was of little relevance since it conflicted with general law). The trial court failed to recognize that even referenda have limitations. The trial court simply put too much weight on the power of referendum to justify the County's actions.

C. The Municipalities have sovereign immunity from suit and from efforts to collect monies from their coffers, unless waived by general law or contract.

1. The doctrine of sovereign immunity governing municipalities

The Municipalities 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. *See Commercial Carrier Corp. v. Indian River Cnty.*, 371 So. 2d 1010, 1020-22 (Fla. 1979); *State ex rel. Keefe v. City of St. Petersburg*, 145 So. 176, 176-77 (Fla. 1933). The doctrine of sovereign immunity prevents governmental entities, including municipalities, from being sued or having money taken from their coffers without their permission. *See, e.g., Cauley v. City of Jacksonville*, 403 So. 2d 379, 381 (Fla. 1981). The doctrine derives exclusively from the separation of powers provision found in Article II, section 3 of the Florida Constitution and maintains the orderly administration of governments. *Wallace v. Dean*, 3 So. 3d 1035, 1045 (Fla. 2009). Courts interpret this doctrine to preserve the important function of governments to make legislative and executive discretionary decisions, without fear of judicial intrusion or judicial second-guessing. *See Am. Home Assur. Co. v. Nat'l R.R. Passenger Corp.*, 908 So. 2d 459, 471 (Fla. 2005). Courts also deem the doctrine necessary to protect the public

treasury against encroachments. *Id.*

"In Florida, sovereign immunity is the rule, rather than the exception." *See Pan-Am Tobacco Corp. v. Dep't of Corr.*, 471 So. 2d 4, 5 (Fla. 1984) (quoting Art. X, § 13, Fla. Const.); *City of Fort Lauderdale v. Israel*, No. 4D15-1008 (Fla. 4th DCA Oct. 14, 2015). Sovereign immunity can be waived only by (1) statute/general law, or (2) written contract. *See Am. Home Assur. Co.*, 908 So. 2d at 471-72, 476; *City of Orlando v. W. Orange Country Club, Inc.*, 9 So. 3d 1268, 1272-73 (Fla. 5th DCA 2009). "[A]ny waiver of sovereign immunity must be clear and unequivocal." *Am. Home Assur. Co.*, 908 So. 2d at 472. "[W]aiver will not be found as a product of inference or implication." *Id.*; *see also Israel*, No. 4D15-1008.

The doctrine of separation of powers mandates that legislative and executive branch discretionary acts remain immune from liability, even when the Florida Legislature adopts a waiver, such as in section 768.28, Florida Statutes. *See, e.g.*, § 768.28, Fla. Stat. (2014) (limited waiver in tort); *Wallace*, 3 So. 3d at 1053; *Commercial Carrier Corp.*, 371 So. 2d at 1020-22. Discretionary acts are those that involve "an exercise of executive or legislative power such that, for the court to intervene . . . it inappropriately would entangle itself in fundamental questions of policy and planning." *See Kaisner v. Kolb*, 543 So. 2d 732, 737 (Fla. 1989).

"Planning level functions are generally interpreted to be those requiring basic policy decisions, while operational level functions are those that implement policy." *Commercial Carrier*, 371 So. 2d at 1021. A municipality's budgetary and appropriation decisions, which involve decisions on what programs to fund and how to allocate scarce public resources, are inherently legislative and, thus, discretionary. *See, e.g., Keefe*, 145 So. at 176-77; *Dep't of Health & Rehab. Servs. v. Lee*, 665 So. 2d 304, 307 (Fla. 1st DCA 1995), *approved* and remanded, 698 So. 2d 1194 (Fla. 1997); *see generally Junior v. Reed*, 693 So. 2d 586, 589 (Fla. 1st DCA 1997).

2. The Municipalities' sovereign immunity was not waived by the referendum because it is not a general law.

Sovereign immunity may be waived by general law. *Donisi v. Trout*, 415 So. 2d 730, 730-31 (Fla. 4th DCA 1981). General law is defined as a statute adopted by the Florida Legislature "that operates universally throughout the state, uniformly upon subjects as they may exist throughout the state, or uniformly within a permissible classification." *Dep't of Bus. Regulation v. Classic Mile, Inc.*, 541 So. 2d 1155, 1157 (Fla. 1989). A countywide referendum, like the one in this case, is not a general law. *See id.* A referendum approving a countywide charter amendment is a local law. *See generally Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 885-86 (Fla. 2010). The Municipalities' sovereign

immunity cannot be waived by local law. *See Arnold v. Shumpert*, 217 So. 2d 116, 120 (Fla. 1968) (holding that "waiver of a [government body's] sovereign immunity cannot be accomplished by a local law"); *Donisi*, 415 So. 2d at 730-31 (power to waive sovereign immunity is vested exclusively in the Legislature; therefore, a city may not waive such immunity by local ordinance). Importantly, the County cited no case holding sovereign immunity can be waived by referendum.

No statute authorizes the County to forcibly charge the Municipalities for its OIG Program. And no statute obligates the Municipalities to pay for the OIG Program. The trial court relied solely on the referendum to find a waiver. This was error.

3. The Municipalities' sovereign immunity was not waived by contract.

In the section of the final judgment titled, "The Citizens of the Municipalities Entered into a Contract on Behalf of Their Governing Bodies to Fund the OIG," the trial court concluded that "because the citizens of a municipality through a referendum may repeal a contract, it follows that the citizens of a municipality may enter into a contract (or force the city officials to do so) by exercising their referendum power." (R9:1740 ¶ 25). In short, the trial court ruled that voters could use their referendum power to enter into a contract on

behalf of the governing bodies of the Municipalities, and this contract waived the Municipalities' sovereign immunity (*Id*.).

a. Section 125.0101 requires an interlocal agreement be in place before the County can charge the Municipalities for its OIG Program and create a waiver of sovereign immunity.

The Florida Legislature has given the County a clear roadmap on how to charge a Municipality for a county program and thereby waive the Municipality's sovereign immunity with respect to payment—enter into a mutually agreed upon contract with the Municipality. *See* § 125.0101(2), Fla. Stat. (2014) ("Such services shall be funded as agreed upon between the county and the municipality. . . ."). A forced imposition is not permitted. *See id.* ("This section shall not be construed to authorize the county to **impose** any service charge or special assessment or to levy any tax within the municipality. . . ."). When the Legislature prescribes the manner of doing a thing, it cannot be done another way. *Cf. Bush v. Holmes*, 919 So. 2d 392, 407 (Fla. 2006). Therefore, if the County wants to charge the Municipalities for the OIG Program, it can do so **only** by entering into a voluntary and mutually agreeable contract with the individual Municipalities. *E.g., St. Lucie Cnty. v. City of Fort Pierce*, 676 So. 2d 35 (Fla. 4th DCA 1996) (interlocal agreement between city and county authorized city to dispose of garbage at county landfill in exchange for paying county tipping fees). The County has no interlocal agreement with the

Municipalities.

When the County first established the OIG Program in 2009, before the referendum, the County's Ordinance followed the requirements of section 125.0101 (R13:2381). The Ordinance stated that the OIG applied only to County governmental operations, but if the Municipalities wanted to participate and voluntarily contribute to the funding, they could do so by an interlocal agreement (R13:2381; R15:2887-88).

The County later decided to forego mutually agreed-upon interlocal agreements with the Municipalities for funding the OIG Program, and instead decided to force payment through a referendum. These forced charges directly violate the legislative mandates contained in section 125.0101 and, therefore, are unenforceable. *See* Art. VIII, §1(g), Fla. Const. ("Counties operating under county charters shall have all powers of local self-government **not inconsistent with general law**. . . .").

b. There is no legal authority for forming a contract on budgeting and appropriation items by referendum.

The County did not argue at trial that the referendum created a contract between the County and the Municipalities for OIG funding. This issue appeared for the first time in the final judgment. The trial court concocted this theory to fit

within the contract prong of waiver of sovereign immunity. This was wrong. Most basically, there is no legal authority for forming a contract on budgeting and appropriation items by referendum. *See Charlotte Cnty. Bd. of Cnty. Comm'rs v. Taylor*, 650 So. 2d 146, 147-49 (Fla. 2d DCA 1995) (amendment to home rule county charter invalid on grounds that it was inconsistent with general law requirements that county commission, **not electors**, establish a budget and levy ad valorem taxes based upon certain statutory requirements); *Keefe*, 145 So. at 177 (initiative and referendum provisions of city charter were inapplicable to budgeting and appropriations ordinances because they would "materially obstruct, if not entirely defeat, the purpose of having a budget system"; city's budgeting and appropriation functions are "regarded as legislative in character").

The trial court mischaracterized and then misapplied the main case it relied on, *Brooks v. Watchtower Bible & Tract Society of Florida*, 706 So. 2d 85 (Fla. 4th DCA 1998) (R9:1740 ¶¶ 24-25). The court extended the holding of this case to mean that "**because the citizens of a municipality through a referendum may repeal a contract**, it follows that the citizens of a municipality may enter into a contract (or force the city officials to do so) by exercising their referendum power." (R9:1740 ¶ 25). This reasoning is flawed.

Critical to this case, the citizens in *Brooks* were not "repeal[ing] a contract"

(R9:1740 ¶ 25). In *Brooks*, the City of West Palm Beach had passed an ordinance authorizing the sale and purchase of the municipal auditorium. 706 So. 2d at 86. Voters petitioned **to repeal the ordinance** authorizing the sale, not the sales contract. *Id.* The purchaser of the auditorium sued to enjoin the city from holding the election, arguing repeal would be futile because the purchaser could sue for specific performance of the contract to sell the property. *Id.* at 87-89. This Court reversed and held that the referendum on repealing the ordinance could proceed. *Id*. at 89. The effect the referendum would have on the sales contract was not ripe for review and would be determined later, if the referendum passed. *Id*. at 90.

Brooks has nothing to do with sovereign immunity. And it certainly does not stand for the proposition that citizens of a municipality may force their city officials to enter into a contract by exercising their referendum power as the trial court found (R9:1740 ¶ 25). Moreover, a citizen's power to repeal an ordinance by election simply does not equate to citizen's power to contract on behalf of a municipality without the municipal governing body's consent. *See, e.g., Let Miami Beach Decide v. City of Miami Beach*, 120 So. 3d 1282, 1284-93 (Fla. 3d DCA 2013) (referendum on lease approval initiated by governing body seeking to be bound); *City of Orlando v. West Orange Country Club, Inc.*, 9 So. 3d 1268, 1272-73 (Fla. 5th DCA 2009) (written contracts waive sovereign immunity only where they are properly enacted by the governing body seeking to be held liable).

c. Even if it were proper to have a referendum on OIG funding, the referendum here did not form a contract between the County and the Municipalities for such funding.

In those instances where a contract is properly before voters, Florida law requires that the voters have notice of the material terms of the contract they are being asked to approve. *See Let Miami Beach Decide*, 120 So. 3d at 1289-90, 1292 (holding that a lease approval ballot question initiated by governing body of city was improperly placed on the ballot where it failed to give voters notice of the material terms of the lease); *see also Farrell v. Phillips*, 414 So. 2d 1119, 1120 (Fla. 4th DCA 1982) (explaining that contract "terms must be expressed with reasonable certainty considering 'the subject-matter of the agreement, the purposes for which it was entered into, the situation and relation of the parties, and the circumstances under which it was made'") (quoting *Rundel v. Gordon*, 111 So. 386, 389 (Fla. 1927)).

Here, the referendum does not meet the basic requirements of a contract. Neither the ballot title nor the summary refers to approving a contract (R13:2402). Neither contains the material terms, like the cost of the OIG Program, the length of the contract (perpetual), the amount of funding the Municipalities will contribute, the fact that the funding had no cap, the services the Municipalities will receive in exchange for the funding contribution, or the County's exclusive control over the

amount of the contribution (R13:2402). *See Farrell*, 414 So. 2d at 1120 ("A court may not supply material contract terms which the parties have omitted."); *Let Miami Beach Decide*, 120 So. 3d at 1290 n.5. Instead, the ballot title and summary only ask the voters whether there should be an OIG Program and, if yes, should it be funded by the County and "all other governmental entities subject to the authority of the Inspector General." (R13:2402). The Ballot Ordinance indicates that the County would address all of the material terms relating to the OIG Program services and funding in an Implementing Ordinance after the referendum (R13:2399).

In short, the ballot question and Ballot Ordinance did not create a contract between the County and "other governmental entities" for OIG funding. At best, the ballot question and Ballot Ordinance created only a one-sided arrangement that allowed the County to dictate the material terms of that agreement in the future. Agreements to agree are illusory and unenforceable. *E.g.*, *Bergman v. DeIulio*, 826 So. 2d 500, 503 (Fla. 4th DCA 2002).

The County's own expert witness, former Palm Beach County Commissioner, Jess R. Santamaria, testified that there was no meeting of the minds between the voters and the County with respect to funding for the OIG Program. Santamaria testified there was never going to be public funding (R16:3094-95,

3097-3100). The voters in public hearings were told that the funding would come from County vendors and municipal vendors, not the taxpayers (R16:3094-95, 3099-3100). The County, however, set up the Program in the Implementing Ordinance so that it would be funded with general fund dollars (i.e., tax revenues), and would mandate municipal contributions. Thus, voters never had notice of the funding mechanism that the Implementing Ordinance established. The evidence at trial proved there was no contract.

Even if the law allowed a referendum on OIG funding, the voters had no idea they were approving a contract, much less its material terms. With respect to funding for the OIG Program, this referendum is not a contract and violates the requirements of ballot clarity and accuracy.

4. A municipality's decision whether to fund the County's OIG Program is a discretionary decision protected by sovereign immunity.

The trial court agreed that sovereign immunity bars an action against the Municipalities by the County for discretionary budgetary decisions, but concluded that the Municipalities' obligation to fund the OIG Program was an operational decision and not a discretionary decision (R9:1739 ¶¶ 19-20). As a result, the court concluded that sovereign immunity protections did not apply (*Id.*). The court articulated two reasons for this determination: (i) the County's Implementing

Ordinance only required the Municipalities to put a line item in their budget for the OIG Program; it did not tell the Municipalities how to fund the OIG Program; and (ii) any "discretion" that the Municipalities had in determining whether to fund the OIG Program was eliminated by the voters in the referendum. (R9:1739 ¶¶ 17, 19-20). The court's reasoning on both counts is flawed.

a. The trial court erroneously concluded that the Municipalities' decision whether to fund the County's OIG Program was an operational decision.

The trial court erred in concluding that the Municipalities' decision regarding OIG funding was not a discretionary decision for sovereign immunity purposes. 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. *See, e.g.*, *Keefe*, 145 So. at 176-77; *Dep't of Health & Rehab. Servs.*, 665 So. 2d at 307.

The Municipalities' decision whether to fund the OIG Program is clearly a discretionary budgetary decision. The County's Implementing Ordinance requires the Municipalities to put a line item in their budgets for the OIG Program (R13:2414). That equates to telling the Municipalities they must allocate resources to the Program. *See McKeever*, 436 So. 2d at 301-302 (the budget controls the levy of taxes and the expenditure of money for all governmental purposes during

the ensuing fiscal year). The Municipalities have no say as to the amounts (R9:1671; R13:2415). Section 2.429(6) of the Implementing Ordinance provides that "[t]he budget of the Inspector General shall be subject to final approval of the [BCC]" (R13:2415). Municipalities must appropriate a direct payment for the countywide OIG Program regardless of how the payment affects other municipal programs. Moreover, the Implementing Ordinance gives the County the unilateral authority to approve supplemental budget requests for the OIG Program throughout the course of a fiscal year, and to pass those costs onto the Municipalities, even though municipal budgets may already have been set for that fiscal year (R9:1671; R13:2415-16; R15:2914). This system results in the County's usurping the exclusive budgeting function of the Municipalities, in clear violation of Florida law.

Counties and municipalities are separate and distinct general purpose local governmental entities under the Florida Constitution. *See* Art. VIII, §§ 1, 2, Fla. Const. Section 166.241, and Chapter 200, Florida Statutes, outline the specific framework that municipalities must follow in adopting and amending their budgets. Chapters 125 and 200, Florida Statutes, outline the specific framework that counties must follow in adopting and amending their budgets. No provision in section 166.241, chapter 125, chapter 200, or in the remainder of the Florida Statutes states that a county or the electorate can interfere with a municipality's

budgeting or appropriation process. Therefore, under Florida law, the Municipalities, and not the County, decide when to spend municipal monies, what programs to spend monies on, how much to spend, and how to allocate limited resources. These are the discretionary decisions at the very heart of this case.

The trial court ignored the only evidence at trial relating to how the Implementing Ordinance interferes with municipal budgetary decisions. Jeffrey Green, current City Administrator for the City of West Palm Beach, testified that the funds to pay the OIG invoice "would come out of the city's **general fund**" (R15:2847). The general fund is a "finite fund" that pays for police, fire, road improvements, parks and recreation and general administration costs (R15:2848). If the Municipalities were forced to pay for the OIG Program, the city commission would have to take the money from another program (R15:2847-49). The allocation of scarce public resources is the exact type of policy, planning-level decision that sovereign immunity is designed to protect. Contrary to the trial court's conclusion, the existence of other policy, planning-level decisions that still need to be made (e.g., how the Municipality is going to raise funds to pay for the OIG Program; will the money come from tax dollars or some other revenue source; what other programs must be cut to pay for the OIG Program) does not change the fact that the initial decision to fund, or not fund, is discretionary.

The trial court's conclusion that the Municipalities' decisions relating to budget and the allocation of scarce resources are somehow operational decisions is error alone that compels reversal.

b. The referendum did not convert the discretionary decision about funding the OIG Program into an operational decision.

Additionally, the trial court erred in concluding that voters by referendum can transform the Municipalities' discretionary decisions relating to budget and the allocation of resources into operational decisions. The court ruled that the voters made the initial policy, planning decision to fund the OIG Program through approval of the referendum and, therefore, the act of actually funding it was a ministerial task for the Municipalities to perform at a later date (R9:1738-39). This conclusion is wrong for three separate reasons: (1) sovereign immunity cannot be waived by referendum; (2) Florida law provides that it is improper for voters to vote on discretionary budgetary and appropriation items; and (3) the County Charter and many of the Municipal charters here prohibit budget or appropriation referendums.

First, Florida law does not allow the electorate to waive sovereign immunity by referendum. A referendum is a local law and, therefore, cannot create a waiver. *See Arnold*, 217 So. 2d at 120. The trial court's ruling that the electorate can

transform a discretionary act protected by sovereign immunity into an operational act is just another way of using the referendum to improperly create a waiver. The court cited to several Attorney General Opinions to support its erroneous conclusion: AGO 2009-12; 90-38; and 86-89 (R9:1738). The court's reliance on these opinions is misplaced. None of these AGOs discusses the issue of sovereign immunity and whether the electorate can waive immunity.

Second, it was improper for the voters to vote on municipal discretionary budgetary and appropriation items. Courts will not approve a charter amendment, adopted by referendum, that interferes with the municipality's budgeting authority. *See, e.g., Taylor*, 650 So. 2d at 147-49; *Keefe*, 145 So. at 175-77. The Implementing Ordinance here clearly interferes with the Municipalities' budgeting authority; therefore, the trial court erred in upholding the charter amendment as it relates to OIG funding.

The trial court cited to AGO 2009-12, 90-38, and 86-89 for the proposition that voters could vote on budgetary items (R9:1738). However, the trial court acknowledged that AGO 2009-12 makes clear that "the propriety of referendum approval . . . may depend upon the particular project in question and the existence of any general laws providing for such projects." (R9:1738). Therefore, a referendum is improper if general law precludes it or would conflict with it. Here,

the trial court's conclusion that the County's referendum could force the Municipalities to contribute funding to the OIG Program conflicts with the general law found in section 125.0101.

Third, the trial court erroneously assumed that all the Municipal Charters are the same. They are not. The Florida Constitution and Florida Statutes authorize the citizens of the county and each municipality to decide their own charter powers and to provide limited or expansive powers to the voters. *See* Art. VIII, §§ 1, 2(a), Fla. Const.; § 166.031, Fla. Stat. (2014). Each charter is the people's voice on how they want their elected representatives to govern and what powers, if any, are reserved to the people through the initiative and referendum process. *See* Art. VIII, §§ 1, 2(a), Fla. Const.; § 166.031. Case law is clear that the referendum power can be limited by the governing body's charter. *See, e.g., Holzendorf v. Bell*, 606 So. 2d 645, 648-50 (Fla. 1st DCA 1992).

The Charter for Palm Beach County has an express prohibition on the power of county electorates to initiate, change or modify county budgetary provisions. (R9:1753-54; R13:2560). Under the trial court's interpretation of the ballot question, the voters were asked whether the County should be forced to fund the OIG Program in perpetuity, just like the Municipalities. Thus, the County arguably did not even follow its own rules when it put the referendum for

OIG funding to vote. Seven of the fourteen plaintiff Municipalities in this case also have charters that expressly prohibit initiatives or referendums by voters regarding budget or appropriation matters (R9:1747-52; R9:1764-R10:1918).[1] Twelve of the remaining twenty-four non-plaintiff municipalities have similar prohibitions (R9:1752-53; R10:1919-R11:2137).[2] These charters are consistent with the Florida Supreme Court's decision in *Keefe*, which recognized that a charter amendment cannot interfere with a municipality's budgeting authority. 145 So. at 175-77.

For these three separate reasons, the trial court erred in concluding that the voters, through referendum, transformed the Municipalities' discretionary decision to fund the OIG Program into an operational one, thereby waiving the Municipalities' sovereign immunity.

Sovereign immunity bars the County from collecting funds from the Municipalities for the OIG Program. No statute or contract waives that sovereign

[1] City of Boca Raton, City of Delray Beach, Town of Jupiter, Town of Manalapan, City of Riviera Beach, Village of Tequesta, and City of West Palm Beach (R9:1747-52; R9:1764-R10:1918).

[2] City of Belle Glade, City of Greenacres, Town of Juno Beach, Town of Jupiter Inlet Colony, City of Lake Worth, Town of Lantana, Town of Loxahatchee Groves, Village of North Palm Beach, Village of Palm Springs, Village of Royal Palm Beach, Town of South Palm Beach, and Village of Wellington (R9:1752-53; R10:1919-R11:2137).

immunity. Reversal is required.

POINT II

THE COUNTY'S CHARGES TO THE MUNICIPALITIES FOR THE OIG PROGRAM CONSTITUTE AN UNAUTHORIZED TAX BECAUSE THEY ARE NOT VALID USER FEES OR VALID REGULATORY FEES.

Even if the County could bypass the Municipalities' sovereign immunity and collect the charges for the OIG Program, the County still must demonstrate that it has the authority to charge the Municipalities in the first place. The evidence at trial demonstrated that the County lacks this authority.

Under Florida law, local governments have a limited number of ways they can generate revenue to pay for their services and programs. The primary methods for generating revenue include levying user fees, regulatory fees, special assessments, or taxes.[3] *See, e.g., State v. City of Port Orange*, 650 So. 2d 1 (Fla. 1994); *City of Boca Raton v. State*, 595 So. 2d 25 (Fla. 1992); *Broward Cnty. v. Janis Dev. Corp.*, 311 So. 2d 371 (Fla. 4th DCA 1975). Doubt as to the legality of a charge must be resolved against the local government imposing that charge. *City of Port Orange*, 650 So. 2d at 3.

[3] The County does not contend that the charges to the Municipalities for the OIG Program are special assessments.

The trial court concluded that the County's charges to the Municipalities for the OIG Program are valid user fees and regulatory fees. These charges, however, are a "tax in fee's clothing." *Pinellas County v. State*, 776 So. 2d 262, 266 (Fla. 2001); *see also City of Port Orange*, 650 So. 2d at 3 (Fla. 1994) (the characteristics of a charge controls, not semantics). Because no general law or Florida Constitutional provision allows the County to impose a tax on the Municipalities for the OIG Program, these charges constitute an illegal tax. Reversal is required.

A. Standard of review

The validity of the County's charges to the Municipalities for the OIG Program is reviewed under a mixed standard of review. The trial court's factual findings are reviewed for competent, substantial evidence and the legal conclusions are reviewed de novo. *See City of Gainesville v. State*, 863 So. 2d 138, 143 (Fla. 2003).

B. The County's charges for the OIG Program are not valid user fees.

In *City of Port Orange*, the Florida Supreme Court established a three-prong test to determine whether a particular charge is a user fee: (1) the charges must be in exchange for a particular governmental service; (2) the service must benefit the party paying the fee in a manner not shared by others; and (3) the charges must be paid voluntarily. 650 So. 2d at 3. The County's charges for the OIG Program here

fail all three prongs.[4]

1. The charges are not in exchange for a particular government service and the Municipalities do not receive a unique benefit.

The trial court stated that the OIG charges meet the first requirement for a valid user fee because "[t]he Inspector General is performing a service in the form of investigations, audits and reviews of municipalities' governments." (R9:1741 ¶ 28). However, a review of the evidence at trial clearly demonstrates that this requirement was not met. James "Brad" Merriman, Assistant Palm Beach County Administrator, was involved in creating the Office of Inspector General in Palm Beach County (R15:2879). Merriman testified that the Implementing Ordinance does not describe any particular service that the OIG is bound to provide to an individual Municipality (R15:2918). Former County Inspector General Sheryl Steckler, who served as the County's first Inspector General from June 2010 through June 2014, also testified that nothing in the Implementing Ordinance guarantees that a Municipality will receive any services from the OIG in any given year (R16:2965, 3060-61).

The trial court found that the OIG charges satisfy the second requirement for a valid user fee because the OIG Program provides unique benefits to only those

[4] The trial court mistakenly stated the Municipalities only challenged the second and third prongs (R9:1741 ¶ 27).

Municipalities covered by the referendum (R9:1741 ¶ 28). According to the court, "[t]he fee is also proportionate to the amount of services the municipalities may receive from the OIG" (R9:1741 ¶ 28). The evidence was directly to the contrary.

The OIG charges do **not** benefit the Municipality paying the fee in a way not shared by others, and the amount charged is **not** proportionate to the amount of services received (R15:2914, 2918; R16:3037-38). Therefore, there is no unique benefit to the Municipalities.

Merriman admitted that there is no proportionality between the fees charged to the Municipalities and the services provided (R15:2913-16). He testified that the calculation of each Municipality's financial responsibility for the OIG Program has no relation to the service that it provides to that Municipality (R15:2913-16). It is based solely on the Municipality's expenditures from prior years (R15:2913-15). He acknowledged that, under this system, the Municipality that pays the most toward the OIG Program could get the least amount of services and attention from the OIG (R15:2914).

Steckler also testified on proportionality and stated that her Office's decisions on what issues to investigate, audit or review have "absolutely nothing to do with what [the Municipalities are] paying" (R16:3037-38; *see also* R16:3057). Instead,

the Ordinance gives the OIG complete discretion to determine what services will be provided to any governmental entity (R16:3036-37).

2. The charges to the Municipalities for the OIG Program are not voluntary.

Voluntariness in the context of a user fee means the party paying the fee—the municipality—has "the option of not utilizing the governmental service and thereby avoiding the charge." *City of Port Orange*, 650 So. 2d at 3. In other words, the fee is not mandatory and the party subject to the fee can opt out at any time and avoid it. *Id*; *see also St. Lucie Cnty.*, 676 So. 2d at 36. A mandatory fee is indicative of a tax. *See City of Port Orange*, 657 So. 2d at 4.

The trial court concluded that the voluntariness prong was satisfied because the voters had the opportunity to opt out at the time of the 2010 referendum vote and could opt out at a future election (R9:1742 ¶ 30). Again, the law and evidence are to the contrary.

First and foremost, the court erred in concluding that voters could satisfy the voluntariness prong by a referendum. *City of Port Orange* and *St. Lucie County* hold that the party paying the fee must be able to opt out at any time to satisfy the voluntariness requirement. *City of Port Orange*, 650 So. 2d at 3; *St. Lucie Cnty.*, 676 So. 2d at 36. Here, the parties paying the fee are the Municipalities. The

invoices are sent to the municipalities, not to individual voters. The Municipalities, therefore, must be able to opt out at any time. The referendum prohibits them from doing so. Thus, there is no voluntariness. Second, the fact that the voters could possibly repeal the funding requirement in another referendum does not mean the funding is voluntary. *See McKeever*, 436 So. 2d at 302-303 (possibility that voters may repeal a referendum in the future does not make the original referendum lawful). Third, the court ignored that the County failed to follow section 125.0101, which expressly requires a mutually agreed upon (i.e., voluntary) written interlocal agreement before the County can charge the Municipalities for the OIG Program. Section 125.0101(2) expressly states that a forced charge or imposition is unauthorized.

Merriman testified that the County sends an invoice to a Municipality for the OIG Program regardless of whether the Municipality has funds to pay for it (R15:2915). The Implementing Ordinance has no language that permits the Municipality to avoid payment (R15:2918). Merriman agreed that participation in the OIG Program is not voluntary (R15:2920).

Under no view do the County's charges to the Municipalities for the OIG Program meet the user fee criteria. The charges are not in exchange for a particular government service. They do not benefit the individual Municipality paying the fee

in a manner not shared by other Municipalities. The charges are mandatory and the Municipalities have no ability to opt out of the Program at any time and avoid them. The trial court erred in concluding the OIG charges are valid user fees.

C. The County's charges for the OIG Program are not valid regulatory fees.

Local governments may charge regulatory fees to cover the costs of regulating certain activities, but not for general revenue purposes. *Janis Dev. Corp.*, 311 So. 2d at 375. If a charge is not in any sense regulatory, but is imposed for general revenue purposes, then it is a tax and not a fee. *Id.* at 374-375. The County's ability to impose regulatory fees is governed by section 166.221, Florida Statutes (2014), which sets forth the requirements as follows:

> A municipality may levy [1] reasonable business, professional, and occupational regulatory fees, [2] commensurate with the cost of the regulatory activity, including consumer protection, [3] on such classes of businesses, professions, and occupations, the regulation of which has not been preempted by the state or county pursuant to a county charter.[5]

The County's charges to the Municipalities for the OIG Program are not valid regulatory fees. A plain reading of the statute makes clear that a municipality

[5] A charter county, such as the County here, is "akin" to a municipality for purposes of levying fees so long as all legal requirements for imposing the fees are met. *See Palm Beach Cnty. v. Bellsouth Telecomm.*, 819 So. 2d 876, 877 (Fla. 4th DCA 2002).

is not a "business[ ], profession[ ] or occupation[ ]" § 166.221. The phrase, "businesses, professions, and occupations," does not include municipalities. The statute does not provide that a fee can be charged **to** a municipality. It states that a fee can be charged **by** a municipality. Research reveals no case allowing a county to impose a regulatory fee under section 166.221 **on** a municipality. *Cf. City of Key West v. Marrone*, 555 So. 2d 439 (Fla. 3d DCA 1990). In short, a municipality cannot be the target of a regulatory fee.

Even if the County were authorized to impose regulatory fees on a municipality under section 166.221, they must be imposed pursuant to a regulatory scheme. A regulatory scheme exists if the ordinance contains detailed standards, rules, guidelines and requirements relating to the conduct sought to be regulated (the "regulations"), and makes compliance mandatory. *Compare City of Key West*, 555 So. 2d at 440, *with City of N. Miami Beach v. Williams*, 555 So. 2d 399, 400 (Fla. 3d DCA 1989), *and Tamiami Trail Tours*, 120 So. 2d 170, 172-173 (Fla. 1960). The County knows how to create a valid regulatory scheme. It did so with the countywide Code of Ethics that was adopted at the same time as the Implementing Ordinance for the OIG Program. The Implementing Ordinance for the OIG, however, does not meet this requirement.

The trial court acknowledged that the OIG Implementing Ordinance "does

not include explicit regulations directing the management of the Municipalities' departments, upon an investigation, audit, or review." (R9:1743 ¶ 33). The trial court minimized this finding, however, by stating that the OIG provides recommendations on how "such departments" may be more efficiently operated (R9:1743 ¶ 33). This conclusion is wrong.

The Charter Amendment and Implementing Ordinance fail to provide identifiable standards of conduct that Municipalities must follow. The Charter Amendment and Ordinance do not provide rules to restrict a Municipality or regulate its activities. Instead, the Charter Amendment and Implementing Ordinance simply set up the Office of Inspector General and outline the duties and obligations of that Office (R13:2408-18, 2563-64). Merriman, testifying on the behalf of the County, agreed with this analysis (R15:2920-21).

The Charter Amendment and Implementing Ordinance also are clear that the Inspector General only reviews County and municipal functions in an advisory capacity and does not regulate a municipality's conduct (R13:2408-11, 2413-14, 2563-64). The Implementing Ordinance expressly states that the Inspector General can only make recommendations to the Municipality and cannot force the Municipalities to comply with its recommendations (R13:2408). Therefore, even if the Charter Amendment and Implementing Ordinance could somehow be read to

contain standards of conduct for Municipalities, compliance is not mandatory. This is not sufficient to create a regulatory scheme.

Further, section 166.221 requires that the fees charged must be commensurate with the cost of the regulatory activity. Here, both Merriman and former Inspector General Steckler testified that the charges in no way relate to the cost of the alleged regulatory activity (R15:2913-16; R16:3037-38, 3057). The County uses LOGER to compare a Municipality's actual expenses from the last fiscal year with the total expenditures of all the Municipalities and the County to come up with each Municipality's share of the OIG budget (R17:3159). These are flat charges not based on the cost of providing the alleged regulation (R15:2915-16; R16:3057). In fact, the County did no analysis to determine whether the fees charged were commensurate with the cost of the regulatory activity (R16:3104). This is indicative of a tax imposed for general revenue purposes. *See Janis Dev. Corp.*, 311 So. 2d at 375.

D. The County's charges for the OIG Program are an unlawful tax.

The County's charges for the OIG Program do not constitute valid user fees or regulatory fees. Therefore, the charges are a tax on the Municipalities. *See City of Port Orange*, 650 So. 2d at 3-4; *Janis*, 311 So. 2d at 375-76. This tax is unlawful given that there is no authorization in general law or the Florida

Constitution allowing the County to impose an OIG tax on the Municipalities. The trial court erred in upholding the charges. Reversal is warranted.

CONCLUSION

The final judgment should be reversed and the case remanded with directions to enter declaratory judgment for the Municipalities.

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