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From: Douglas N. Yeargin, Assistant City Attorney

Subject: Town of Gulf Stream v Palm Beach County; Inspector General, 11-10974.003

Date: August 13, 2012

Pages: 18 (Including Cover Page)

Please find attached Plaintiffs' Reply to Defendant, Palm Beach County's, Amended Affirmative Defenses and Counter-Defendants' Motion to Dismiss Amended CounterClaim.

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

CASE NO.: 502011CA017953XXXXMB
DIVISION: AN

TOWN OF GULF STREAM, VILLAGE OF TEQUESTA, CITY OF RIVIERA BEACH, TOWN OF JUPITER, CITY OF DELRAY BEACH, TOWN OF PALM BEACH SHORES, TOWN OF MANALAPAN, TOWN OF 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,

Plaintiffs,

vs.

PALM BEACH COUNTY, a political subdivision,

Defendant.

_____________________________________/

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

Intervenor.

_____________________________________/

PLAINTIFFS' REPLY TO DEFENDANT, PALM BEACH COUNTY'S, AMENDED AFFIRMATIVE DEFENSES

Plaintiffs, TOWN OF GULF STREAM, et al. (the "Municipalities"), by and through their undersigned counsel, hereby file their reply to the amended affirmative defenses asserted by the Defendant, PALM BEACH COUNTY (the "County"), and state as follows:

1. The Municipalities avoid the First, Third and Fifth Affirmative Defenses on grounds that the charges to the Municipalities for the Inspector General Program do not constitute regulatory fees. There is no constitutional or statutory provision that allows the

County to impose regulatory fees on the Municipalities for this Program. In addition, regulatory fees can be imposed only where there is actual regulation. The IG is not regulating the Municipalities. Rather, the IG provides a countywide service, which is limited to making recommendations. Thus, the fees cannot be "imposed" on the Municipalities.

2. The Municipalities avoid the Second and Fourth Affirmative Defenses on grounds that the County cannot do something by referendum vote that it cannot do on its own. Gaines v. City of Orlando, 450 So. 2d 1174 (Fla. 5th DCA 1984). On its own, the County does not have the legal authority to tax the Municipalities for the countywide Inspector General Program. Therefore, the County cannot use the referendum process to give itself such authority.

3. The Municipalities avoid the Fifth Affirmative Defense on grounds that they have no constitutional or statutory authority to pass the County's "regulatory fee" onto their municipal vendors. Section 166.211, Florida Statutes, clearly states that only the governmental entity providing the regulation can impose the regulatory fee. Even assuming that the IG provides actual regulation, which is refuted by the plain language of both the Charter Amendment and the Implementing Ordinance, the Municipalities are not the ones providing the regulatory service. Section 166.211 also states that a municipality may not impose a regulatory fee if the regulation has been preempted by a county charter. The County claims it has preempted the regulatory activity based on its charter amendment. Therefore, the statute prohibits the Municipalities from passing on the fee or imposing the fee on their municipal vendors. Finally, the County has admitted during public meetings that the fee collected from vendors will not cover the entire cost of the IG Program. Therefore, even if the Municipalities could pass on the costs to their vendors, the Municipalities will still have to fund a portion of the IG Program through general fund tax dollars.

4. The Municipalities avoid the Sixth Affirmative Defense on the following grounds:

a. The County's charges for the IG Program constitute unlawful taxes. The County cannot impose taxes under a contract implied in law or a quasi-contract theory. An illegal tax is still an illegal tax.

b. The Ordinance that implemented the IG Program in the Municipalities constitutes a writing outlining the obligations of the parties. A claim under a contract implied in law or quasi contract theory cannot exist when there is a writing.

c. The Municipalities dispute that they are required to pay for the IG Program under a contract implied in law or quasi contract theory. If, however, the Municipalities are required to pay, then they are only required to pay for the benefit actually received. The County's current demand for payment for the IG Program is not commensurate with the benefits received by any of the Municipalities.

d. The taxpayers of the Municipalities already pay for the IG Program with their County taxes. There is no additional benefit conferred on the Municipalities, which would require additional payment.

e. The County demands that the Municipalities pay for the IG Program in perpetuity under a contract implied in law or quasi contract theory. The County, however, can only recover costs commensurate with benefits actually conferred. Alleged benefits for future years have not been conferred. Therefore, the County has no right to payment in perpetuity. The County's claims for future years are not yet ripe.

f. The County demands that the Municipalities pay for the IG Program in perpetuity under a contract implied in law or quasi contract theory. Florida law, however, provides that perpetual contracts cannot be enforced in equity.

g. The County demands that the Municipalities pay for the IG Program in perpetuity under a contract implied in law or quasi contract theory. It is unlawful, however, for the Municipalities to commit unspecified amounts of taxpayer dollars to the IG Program in perpetuity. Florida law requires that Municipalities maintain control over their own budgets and appropriations including, but not limited to, appropriations for obligations extending beyond the current fiscal year. See Art. VIII, § 2, Fla. Const.; and Chapters 166 and 200, Fla. Stat.

h. The County's claim for implied contract or quasi-contract is barred by the doctrine of sovereign immunity.

i. The County demands that the Municipalities pay for the IG Program in perpetuity under a contract implied in law or quasi contract theory. The County's claim is barred by the statute of frauds given that any alleged contract cannot be performed within the space of one (1) year.

j. The County fails to state a claim for implied contract or quasi-contract. The Florida Statutes, certain municipal charters and certain municipal ordinances provide specific requirements for the creation and execution of interlocal agreements between the County and the Municipalities. The County failed to follow these requirements. Therefore, any alleged contract is void ab initio.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and U.S. Mail to: Andrew J. McMahon, Esq., Chief Assistant County Attorney, P.O. Box 1989, West Palm Beach, Florida 33402, Martin Alexander, Esq., Holland & Knight, LLP, 222 Lakeview Avenue, Suite 1000, West Palm Beach, Florida 33401, and Nathan A. Adams, IV, Esq., Post Office Drawer 810, Tallahassee, Florida 32302, this 13 day of August, 2012.

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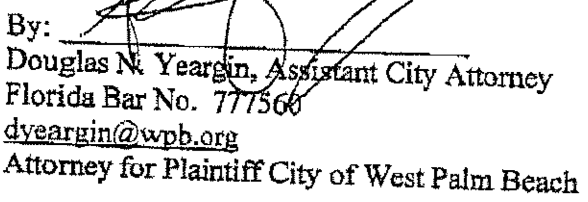

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IN THE CIRCUIT COURT FOR THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 502011CA017953XXXXMB
DIVISION: AO

TOWN OF GULF STREAM, VILLAGE OF TEQUESTA, CITY OF RIVIERA BEACH, TOWN OF JUPITER, CITY OF DELRAY BEACH, TOWN OF PALM BEACH SHORES, TOWN OF MANALAPAN, TOWN OF 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,

Plaintiffs,

vs.

PALM BEACH COUNTY, a political subdivision,

Defendant.

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

Intervenor.

_______________________________________/

COUNTER-DEFENDANTS' MOTION TO DISMISS AMENDED COUNTERCLAIM

Counter-Defendants, TOWN OF GULF STREAM, et al., ("Municipalities "), by and through undersigned counsel, pursuant to Fla. R. Civ. P. 1.140 (b)(6), and by the filing of this Motion to Dismiss, move this Court for entry of an Order dismissing Amended Counterclaim. Counter-Plaintiff, PALM BEACH COUNTY ("County") has failed to state a claim against Municipalities upon which relief can be granted. As grounds in support of this Motion, Municipalities state as follows:

MEMORANDUM IN SUPPORT

INTRODUCTION

County brings a two count Amended Counterclaim against Municipalities, seeking damages for an alleged violation of its Inspector General Ordinance. Count I is an action for breach of County Ordinance No. 2011-009 and Count II is an action for breach of contract implied in law or quasi-contract based on County Ordinance No. 2011-009. Dismissal is warranted as to all counts because County is not entitled to enforce its ordinance by requesting an award of damages. Dismissal further is warranted as to Count II because 1) the action is barred by sovereign immunity; and 2) the County's claim for future damages under a contract implied in law or quasi-contract theory is not ripe for review.

STANDARD FOR DISMISSAL

A motion to dismiss "tests whether a plaintiff has alleged a good cause of action in his or her complaint." *Visor v. Buhl*, 760 So. 2d 274, 275 (Fla. 4th DCA 2000); see also Fla. R. Civ. P. 1.140 (b)(6). The Fourth District Court of Appeal in *Rubenstein v. Primedica Healthcare, Inc.*, 755 So. 2d 746, 748 (Fla. 4th DCA 2000) explained, "[w]hen ruling on a motion to dismiss for failure to state a cause of action, the trial court must accept the allegations of a complaint as true and in the light most favorable to the plaintiffs." This court is confined to a consideration of the allegations found within the four corners of the complaint. *Bell v. Indian River Mem. Hosp.*, 778 So. 2d 1030, 1032 (Fla. 4th DCA 2001). The court must assume that all allegations in the complaint are true and decide whether the plaintiff would be entitled to relief. *Id.* Here, the allegations contained in the counts against City demonstrate with certainty that Plaintiff is not entitled to relief under any set of facts which could be proved in support of each claim.

ARGUMENT

Dismissal as to Count I of the Amended Counterclaim is warranted because the County ordinance cannot be enforced by awarding damages. Dismissal as to Count II of the Amended Counterclaim also is warranted because: (1) under Florida law, sovereign immunity bars such claim; and (2) the County's claim for future damages under a contract implied in law or quasi-contract theory is not ripe for review. As such, judgment should be granted in favor of Municipalities on all counts, as a matter of law.

ORDINANCE CANNOT BE ENFORCED BY AWARDING DAMAGES

In paragraph 10, Count I and paragraph 19, Count II of the Amended Counterclaim, the County alleges that Article XII, Sec. 2-431, provides that Ordinance No. 2011-009 is *enforceable* by all means provided by law, including injunctive relief in this Court. (Emphasis added). In its prayer for relief, however, rather than seeking *enforcement*, the County seeks damages for the breach of the Ordinance or for the value or cost of the benefit conferred by the OIG oversight of the Municipalities. There are no set of facts that the County can allege which would entitle it to *enforce* its ordinance by demanding an award of damages. *See generally* Art. VIII, §1, Fla. Const.; §125.01, *et seq*., Fla. Stat. Therefore, this Court should dismiss Counts I and II of the County's Amended Counterclaim.

COUNT II IS BARRED BY SOVEREIGN IMMUNITY

The doctrine of sovereign immunity which provides that a sovereign cannot be sued without its own permission was part of the common law and has been adopted and codified by the Florida Legislature. *American Home Assurance Company v. National Railroad Passenger Corporation*, 908 So. 2d 459, 471 (Fla. 2005). The Florida Supreme Court has identified three policy considerations that underpin the doctrine of sovereign immunity: 1) the preservation of the constitutional principal of separation of powers; 2) protection of the public treasury; and 3)

maintenance of the orderly administration of government. *Id.* However, the Florida Constitution permits the Legislature to abrogate the state's sovereign immunity. *Id.* Any such waiver of sovereign immunity must be clear and unequivocal. *Id.* at 472. In 1973, the Legislature authorized a limited waiver of state sovereign immunity in tort for personal injury, wrongful death, and loss or injury to property by enactment of section 768.28. *Id.* In addition to tort actions, the Florida Supreme Court held that sovereign immunity from contractual suits is waived for suits based on express written contracts to which the state and agency had the authority to enter. *Pan-Am Tobacco Corp. v. Department of Corrections*, 471 So. 2d 4, 6 (Fla. 1984). In *Pan-Am*, the Florida Supreme Court specifically limited its holding to written contracts stating, "[w]e would also emphasize that our holding here is applicable only to suits on express, written contracts which the state agency has statutory authority to enter." *Id.* The waiver recognized in *Pan-Am* is inapplicable to actions brought for oral or implied contracts. *County of Brevard v. Miorelli Engineering*, 703 So. 2d 1049, 1051 (Fla. 1997) (finding the doctrine of sovereign immunity precluded recovery for cost of extra work performed without a written change order); *City of Key West v. Florida Keys Community College*, 81 So. 3d 494, 497 (Fla. 3d DCA 2012) (finding College protected by sovereign immunity against an action by City to collect stormwater utility fees where no agreement existed between College and City obligating College to pay City's stormwater utility fees).

In Key West, the City enacted an ordinance creating a stormwater utility system and establishing stormwater utility fees to fund the system. *Id.* at 496. There is no written contract or agreement between the City and the College obligating the College to pay the City's stormwater fees. *Id.* at 496. Nevertheless, the City billed the college for stormwater services. *Id.* The College filed an action seeking a declaration that it enjoyed sovereign immunity, the trial

court granted summary judgment for the college and the Third District Court of Appeals affirmed. *Id.* at 496-97.

The City adopted its ordinance pursuant to the authority granted by 403.0893, Florida Statutes, which states in pertinent part:

> In addition to any other funding mechanism legally available to local government to construct, operate, or maintain stormwater systems, a county or municipality may:
>
> (1) Create one or more stormwater utilities and adopt stormwater utility fees sufficient to plan, construct, operate, and maintain stormwater management systems set out in the local program required pursuant to section 403.0891(3). *Id.* at 497.

The court pointed out that 'sovereign immunity is the rule, rather than the exception,' citing *Pan-Am Tabacco Corp. v. Dep't of Corrs.*, 471 So. 2d 4, 5, (Fla. 19840). The court stressed that the State enjoys sovereign immunity unless immunity is expressly waived. *Id.* at 498.[1] The court held that because Chapter 403 relating to stormwater fees, does not expressly waive sovereign immunity, it is clear that the State has not waived sovereign immunity. *Id.*

In this case, the County seeks to recover costs for its Inspector General Program through filing a claim based on a contract implied in law or quasi-contract. The County, however, has failed to state how sovereign immunity has been waived. Without an express waiver, the County's claim for breach of an implied contract is barred by the doctrine of sovereign immunity. *See County of Brevard v. Miorelli Engineering*, 703 So. 2d 1049, 1051 (Fla. 1997); *City of Key West v. Florida Keys Community College*, 81 So. 3d 494, 497 (Fla. 3d DCA 2012). Therefore, this Court should dismiss Count II of the Amended Counterclaim.

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[1] The sovereign immunity granted to the State has been interpreted to extend to municipalities. *Commercial Carrier Corp. v. Indian River County*, 371 So. 2d 1010, 1016 (Fla. 1979).

COUNT II'S DEMAND FOR FUTURE DAMAGES IS NOT RIPE FOR REVIEW

Count II of the Amended Counterclaim alleges a claim for contract implied in law or quasi-contract. In this Count, County demands that Municipalities pay for the Inspector General's oversight "in the future," including, but not limited to payments for the "benefit conferred" on Municipalities through "Fiscal Year 2013." See paragraphs 14, 16, and 18 of Amended Counterclaim. In essence, County demands that Municipalities pay for the Inspector General Program in perpetuity based on alleged future benefits conferred. Florida law is clear, however, that a claim for implied contract or quasi-contract only allows the County to recover benefits actually conferred on Municipalities, if any. *See e.g., Swafford v. Schweitzer*, 906 So. 2d 1194, 1195 (Fla. 4th DCA 2005) (claim does not accrue until benefits conferred). Alleged benefits for "future years," by their very nature, have not yet been conferred on Municipalities. It would be impossible to do so. This includes any alleged benefits conferred on Municipalities for Fiscal Year 2013, which has not yet begun. For these reasons, the County cannot state a cause of action for a contract implied in law or quasi-contract based on alleged future benefits conferred. Such claim is not ripe for review and should be dismissed.

CONCLUSION

Based on the legal and factual scenario set forth within the four corners of the Amended Counterclaim it is legally impossible to cure the fatal defects in County's pleading against the Municipalities. There is no legal authority to enforce an ordinance by awarding damages. There has been no waiver of sovereign immunity to allow County's claim for implied or quasi-contract to stand. County's claim for future damages based on future benefits conferred under an implied or quasi-contract theory also is not ripe for review.

WHEREFORE, the Municipalities request that this Court enter an Order Dismissing the County's Amended Counterclaim.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and U.S. Mail to: Andrew J. McMahon, Esq., Chief Assistant County Attorney, P.O. Box 1989, West Palm Beach, Florida 33402, Martin Alexander, Esq., Holland & Knight, LLP, 222 Lakeview Avenue, Suite 1000, West Palm Beach, Florida 33401, and Nathan A. Adams, IV, Esq., Post Office Drawer 810, Tallahassee, Florida 32302, this 13th day of August, 2012.

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