SUPREME COURT OF FLORIDA

FLORIDA POWER CORPORATION,

Appellant,

vs. CASE NO. 76,743

SEMINOLE COUNTY and CITY OF LAKE MARY,

Appellees.
_____/

BRIEF OF AMICUS CURIAE FLORIDA ASSOCIATION OF COUNTIES, INC. ON BEHALF OF APPELLEES

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PRELIMINARY STATEMENT

The Florida Association of Counties, Inc., appearing as amicus curiae under leave of court and with permission of all parties, is providing this brief on behalf of the Appellees. In this brief we will address two main issues, the self-government powers of all county governments and whether section 366.04(7)(a), Florida Statutes, preempts local governments from requiring that electric utilities using county rights of way bury their transmission and distribution lines.

STATEMENT OF THE CASE AND FACTS

Amicus curiae the Florida Association of Counties accepts the statements of the case facts set out in the parties' briefs.

SUMMARY OF ARGUMENT

The Florida Constitution and section 125.01, Florida Statutes, have broadly granted power home rule power to all Florida counties. If no general or special law prohibits it, a county may legislate by ordinance on any subject matter that serves a county public purpose. As no Florida law prohibits Seminole County from governing the use of its rights of way by public utilities, the county had the power to require that the distribution and transmission lines using the Lake Mary Boulevard right of way be buried.

A statute will preempt a county ordinance only when the statute is part of a pervasive regulatory scheme and there is a danger that the ordinance and the statute would conflict. While the Public Service Commission does have broad regulatory powers over public utilities, that scheme is not concerned with the placement of individual lines in specific instances. The section relied upon by Appellant does not confer upon the PSC the right to decide how local governments use their rights of way. Thus, even though the PSC decided that underground lines are not necessary statewide, that finding does not conflict with local ordinances that found them appropriate in a specific instance. Indeed, the nature of the statute and the outcome of the PSC's study shows that the Legislature has abandoned the field to local governments. In any event, the local ordinance and the statute may coexist.

I. HOME RULE

A. All Florida Counties Possess Broad Home Rule Powers

Every county in the State of Florida has available to it exceptionally broad powers of self-government. For charter counties, such as Seminole County, the Florida Constitution provides that they:

> 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.

Art. VIII, s. 1(g), Fla. Const.[1]

General law grants generously and takes away very little. County powers are set out in section 125.01, Florida Statutes, which states:

> The legislative and governing body of a county shall have the power to carry on county government. To the extent not inconsistent with general or special law, this power includes, but is not restricted to: . . .

Section 125.01(1), Florida Statutes (1989). The statute goes on to enumerate powers in twenty-seven subsections, one of which is

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[1] Non-charter counties also possess broad powers. The constitution, in Article VIII, section 1(f) gives non-charter counties "such power of self-government as is provided by general or special law." In fact non-charter counties have as much, if not more, self-governing power as charter counties. The only differences are that a charter county may make its ordinances superior to municipal ordinances (a non-charter county's ordinances must yield) and that any special law that would be inconsistent with the charter must be approved by the voters. Indeed, some charter counties may have less power than their non-charter neighbors, since a charter county's powers can be limited in the charter itself.

especially pertinent here:

> (w) Perform any other acts not inconsistent with law, which acts are in the common interest of the people of the county, and exercise all powers and privileges not specifically prohibited by law.

Section 125.01(1)(w), Florida Statutes (1989). Also pertinent is section 125.01(3)(a), which states: "The enumeration of powers herein shall not be deemed exclusive or restrictive, but shall be deemed to incorporate all implied powers necessary or incident to carrying out such powers enumerated . . . ."

There could not be a broader grant of self-government powers than what is contained in section 125.01. Thus, it is abundantly clear that the legislature wants counties to have sufficient powers to govern effectively, and not to depend on specific grants of power by the state. Chapter 125 is a broad framework, intended to be filled out by individual counties as they perceived their own needs. Thus, the focus in any examination of county powers should be whether there is specific authority that prevents the county from taking a particular action, not whether the county is specifically empowered to take the action.

B. No County Is Specifically Prohibited from Denying Electric Utilities the Use of its Rights of Way

Appellant argues that "Florida law does <u>not</u> give local governments the power to so exclude public utilities from public rights-of-way and thereby prevent them from providing the service they are mandated by law to provide." Brief of Appellant at page 23 (emphasis in original).

This argument is based on the faulty premise that counties must be specifically empowered to govern the use of their own property. In fact, as this Court has repeatedly held, the inquiry is not whether the county has the power, but whether it specifically does not. Before the 1968 Constitution took effect, county governments did have to receive special approval for all powers that were not explicitly statutorily authorized. See, e.g., Colen v. Sunhaven Homes, Inc. 98 So.2d 601 (Fla. 1957). The new constitution drastically expanded the power of county self-government and lessened the dependence on Tallahassee. This fundamental change was recognized by the Court in State v. Orange County, 281 So.2d 310 (Fla. 1973), which said:

> Instead of going to the Legislature to get a special bill passed authorizing such building fund revenue bonds, the Orange County Commissioners under the authority of the 1968 Constitution and enabling statutes now may pass an ordinance for such purpose, as they did in this case, because there is nothing inconsistent thereto in general or special law. On the contrary, there is ample delegated authority for such purpose.

Id. at 312(emphasis in original). Later, in Speer v. Olson, 367 So.2d 207 (Fla. 1978), this Court elaborated:

> The first sentence of Section 125.01(1), Florida Statutes (1975), grants to the governing body of a county the full power to carry on county government. Unless the Legislature has pre-empted a particular subject relating to county government by either general or special law, the county governing body, by reason of this sentence, has full authority to act through the exercise of home rule power.

Id. at 211. The Court went on to note that since no statute

"specifically authorize[d] or restrict[ed]" the county's proposed action, "[t]he first sentence of Section 125.01(1), Florida Statutes (1975), therefore, empowers the county board to proceed under its home rule power to accomplish this purpose." Id.

Nowhere in chapter 125 or in anywhere else in the Florida Statutes is a county prohibited from barring electric companies access to its roads and highways. In fact, since there is no explicit statutory authority that prevents it, any county may refuse to allow a utility to use its rights of way for the utility's transmission and distribution lines, may order the lines removed, or may charge the utility a fee for the use of that right of way, which remains county property. It follows that, so long as there is a valid public purpose behind the county's decision, the county may require an electric utility to bury its lines.[2]

There being no statute prohibiting such an action, Seminole County had the power to order Florida Power Corporation to bury the transmission and distribution lines that use the right of way along Lake Mary Boulevard.

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[2] While explicit statutory authority exists whereby telegraph and telephone companies may use county rights of way without permission (section 362.01, Florida Statutes), other utilities are not so empowered.

II. PREEMPTION

A. Statutes May Preempt County Ordinances Only when the State's Regulatory Scheme Is Pervasive and There Is A Danger that the Ordinances Would Conflict with the Statutes.

A state statute will preempt county or municipal ordinances when both seek to control the same conduct. For example, the state's Clean Indoor Air Act, sections 386.201-209, Florida Statutes, displaced a number of county and municipal ordinances that regulated or prohibited smoking in public places. It is also true, however, that both state and local government may operate in the same general area without conflict.

Tribune Co. v. Canella, 458 So.2d 1075 (Fla. 1984) is the seminal Florida case on preemption. In that case this Court adopted a two-prong test for preemption, which occurs when "the senior legislative body's scheme of regulation of the subject is pervasive" and "further regulation of the subject by the junior legislative body would present a danger of conflict with that pervasive regulatory scheme." Id. at 1077.

The fact that a statute and an ordinance deal with the same general subject is not dispositive of preemption. Ordinance and statute may coexist (See Board of County Commissioners of Dade County v. Wilson, 386 So.2d 556 (Fla. 1980) where the statutory scheme is not pervasive or there is no danger of conflict, especially if the ordinance imposes additional requirements not present in, but not contrary to, the statute.

For example, in Broward County v. Fort Lauderdale Christian School, 366 So.2d 1264 (Fla. 4th DCA 1979) the court upheld a

county ordinance that required school cafeterias to obtain a permit, even though -- and, in fact, because -- a state statute exempted schools from state licensing requirements. Likewise, in Jordan Chapel Freewill Baptist Church v. Dade County, 334 So.2d 661 (Fla. 3d DCA 1976) a state statute that permitted charitable and nonprofit organizations to hold bingo games was held not to be in conflict with a Dade County ordinance that imposed stricter regulations on the games. And, in Lee v. Kirkpatrick, 298 So.2d 215 (Fla. 1st DCA 1974), a Duval County ordinance that banned obscene books was held not to conflict with a state law banning "harmful motion pictures, exhibitions, shows representations and presentations." Id. at 216.

A similar situation applies with Acts of Congress and state or local statutes or ordinances.[3] In Askew v. American Waterways Operations, 411 U.S. 325 (1973) a Florida statute was held not to be preempted by the federal Water Quality Improvement Act, though the Florida law imposed greater restrictions than did the federal act. One rationale relied upon by the Court was that the Florida legislation allowed, though it did not require, cooperation of the federal regime with the state regime.

While often the presence of pervasive regulatory scheme will ensure that any act of a junior legislative body seeking to operate in that area will be in conflict, such is not always the case.

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[3] Since the analysis in Tribune Co. v. Canella was expressed in terms of senior and junior legislative bodies, it can fairly be said that Florida statutes stand in the same relation to Federal statutes as county ordinances do to state statutes.

Peterman v. Coleman, 764 F.2d 1416 (11th Cir. 1985) involved a Federal statute and a Pinellas County ordinance, both of which dealt with the sale of gold. The federal law provided that "no provision of any law . . . may be construed to prohibit any person from purchasing, holding, selling or otherwise dealing with gold in the United States or abroad."[4] The county ordinance placed a five-day holding period on sales of second-hand goods, some of which contained gold. Merchants argued that Congress had chosen to occupy the field (sales of gold) and that since the waiting period discouraged sales, the laws were in conflict. The Eleventh Circuit disagreed, holding that the ordinance's waiting period did not prohibit sales, and therefore was not in conflict.

Thus, the fact that the senior legislative body passes laws that operate in a particular area will not automatically bring its acts into conflict with those of a junior body, unless an intent to occupy the entire field is express or obvious, and the two laws are absolutely contrary to each other.

B. Section 366.04(7), Florida Statutes, Does not Demonstrate a Legislative Intent to Regulate Pervasively; Rather, the State Has Left Regulation to Local Governments.

Appellant argues that the Public Service Commission has exclusive jurisdiction over all things relating to public utilities. This is not so. The PSC is given exclusive jurisdiction over rates and service, but not over the location of lines. Thus, counties and municipalities may take any reasonable

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[4] The Gold Reserve Act of 1934, as amended by Act of August, 14, 1974, Pub. L. No. 93-370, s. 2, 88 Stat. 445.

action governing the placement of utility lines along their rights of way (but could not, for example, mandate that rates to a certain area be changed).

Appellant relies specifically on section 366.04(7), Florida Statutes (1989) to prove that the Legislature impliedly intended that the PSC possesses complete authority over whether transmission and distribution lines should be placed underground. That reliance is misplaced because the nature of the statute and the action that it engendered mean exactly the opposite.

Section 366.04(7) is a mandate from the Legislature to the PSC, a legislative agency. In subsection (a) the PSC is told: to study the cost-effectiveness of requiring underground lines in new construction and when lines have to be moved because of road work, what factors are be considered, and, upon a finding that it would be cost effective to do so, order that all lines be converted from overhead to underground. Subsection (b) makes a similar command regarding existing overhead lines that will not have to be moved to accommodate road work.

There is no explicit statement of intent by the Legislature to regulate pervasively in the field of underground wiring, let alone in the general area of placement of lines in rights of way, nor can any such intent be implied. This Court has held that preemption will be implied only if "it is clear that the legislature has clearly preempted local regulation of the subject." Barragan v. City of Miami, 545 So.2d 252, 254 (Fla. 1989). In

Barragan the preemption was clear.[5] In this case it was not.

The most that could be said about section 366.04(7) is that it represents a legislative intent that its agency, the PSC, regulate pervasively in the field of underground distribution and transmission lines only if a study showed that requiring such lines on a statewide basis was cost-effective. The PSC study determined that there was insufficient evidence to determine cost-effectiveness.[6] The statute did not require that the PSC ban underground lines upon a showing that they are not cost-effective. Thus, the Legislature not only has not occupied the field, it has abandoned it, leaving counties free to regulate in this area.

Even if this Court were to find that Chapter 366 or any part of it does demonstrate legislative intent to regulate pervasively

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[5] The Court said:

> There can be no doubt that chapter 440 has preempted local regulation on the subject of workers' compensation. Section 440.03, Florida Statutes (2987) states that every "employer" and "employee" as defined in section 440.02 shall be bound by the provisions of chapter 440. The definition of "employer" in section 440.02(12), Florida Statutes (1987), includes all political subdivisions of the state. Section 440.10 Florida Statutes (1987), requires every employer coming within the workers; compensation law to provide the compensation set forth therein.

545 So.2d 254. The local ordinance also was in conflict, as it reduced pension benefits by the amount of work-comp benefits. Id. at 254-55.

[6] Order on the Investigation into Underground Wiring, No. 23126 (June 28, 1990).

in the area of underground wiring,[7] the county action in this case still would not be preempted, because it is not in conflict with section 366.04(7). The PSC's determination was that there was insufficient evidence that underground wiring would be cost-effective statewide, not that underground wiring was undesirable. A county ordinance requiring underground wiring can easily coexist with section 336.04(7).

To sum up: While the PSC does regulate pervasively in certain areas involving public utilities, it does not regulate the relationship between the utilities and local governments regarding the placement of transmission and distribution lines in, on or over government-owned rights of way.

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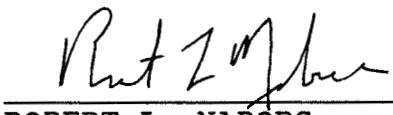
[7] The circumstances of this case would not support a holding by this Court, which Appellants seem to urge and certainly would welcome, that the PSC has total control over the placement of power lines. At issue is whether the PSC controls the mandating of underground lines.

CONCLUSION

Succinctly put, this case raises this single issue: Whether section 366.04(7), Florida Statutes (1989) is proof that the Florida Legislature intended that all counties' broad powers of self-government be restricted in the area of right of way use by power companies. The answer is that there is no clear statement by the legislature that it intends to arrogate to the Public Service Commission the power to regulate use of local governments' rights of way by public utilities.

Amicus curiae the Florida Association of Counties thus urges the Court to approve the order of the Circuit Court of Seminole County.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the parties on the attached Service List, this 14th day of January, 1991.

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