0+7 original F.A. 2-4-91

FILED
SID J. WHITE
DEC 11 1991
CLERK, SUPREME COURT
By _____ Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

FLORIDA POWER CORPORATION,

Appellant,

vs.

CASE NO. 76,743

SEMINOLE COUNTY and CITY OF LAKE MARY

Appellees.
_____/

ANSWER BRIEF OF
APPELLEE CITY OF LAKE MARY

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PRELIMINARY STATEMENT

Appellant, FLORIDA POWER CORPORATION, will be referred to in this brief as "FPC." Appellees, SEMINOLE COUNTY and the CITY OF LAKE MARY, will be referred to respectively as "the County" and "the City." THE FLORIDA PUBLIC SERVICE COMMISSION will be referred to in this brief as "the PSC."

References to the record on appeal will be indicated as ROA ____.

STATEMENT OF THE CASE AND FACTS

Several years ago, the City of Lake Mary, located Northeast of Orlando, learned that Lake Mary Boulevard, a two-lane roadway connecting I-4 with U.S. Highway 17-92 and which runs through the middle of the City, was going to be expanded to four lanes and would become a major East-West corridor.

Hoping to preserve the character and charm of the City, and to insure that the roadway would be safe, a committee was appointed by the County and City to study the impending road-widening and to make recommendations. The Lake Mary Boulevard Study Committee met over a long period of time and received input from all sectors of the community. (ROA 129, 2091). The committee recommended that the City and the County adopt certain requirements involving the road-widening project. Those recommendations included heights of buildings, building setback lines, landscaping and buffering, median, sidewalks, and the placement of directional signals adjacent to the roadway rather than overhead. The committee also recommended that all utility lines, be they cable television, telephone, or electric, be placed underground. The concerted action of the committee, city and county government, comprises a comprehensive planning and growth management effort relating to a roadway development.

The committee's recommendations were ultimately adopted as Ordinance No. 421 (The Gateway Corridor Ordinance) and was implemented by Ordinance No. 490. Ordinance No. 421 requires that upon the widening of Lake Mary Boulevard, those measures contained

in the Ordinance would be complied with, including the placement of all utility lines underground.

Upon receipt of notice from Lake Mary directing it to underground that portion of its local electrical power distribution line in the Lake Mary Boulevard right-of-way, Florida Power Corporation initiated an action for declaratory and injunctive relief in the Circuit Court of Seminole County, Florida. The suit challenged the authority of the City of Lake Mary to regulate the use of its right-of-way by a franchise holder by compelling FPC to relocate a portion of its distribution lines underground.

The lawsuit challenged the home rule authority of the City of Lake Mary to establish broad-based land use controls over a critical area of the City. These comprehensive and interrelated controls do more than simply address the placement of utility lines.

FPC admitted that the placement of the distribution lines underground along Lake Mary Boulevard involves the use of conventional construction methods using off-the-shelf technology that is currently employed by FPC in other similar underground installations. FPC also admitted that it had completed its engineering for the installation of the underground lines along Lake Mary Boulevard.

This dispute involves a local electrical distribution line. A local distribution line is totally distinct from a transmission line which carries bulk power from power plants and distributes it throughout the State of Florida, and which are regulated by the PSC

through the Transmission Line Siting Act. Local distribution lines take power from a local distribution substation and distribute it to local retail commercial and residential electrical customers. A local electrical distribution line serves a purely local function.

The trial court, in entering its final judgment denying FPC relief, recognized the fundamental right of municipalities to oversee land use by those which hold utility franchises. The trial court further recognized that FPC's franchise rights were subject to reasonable local governmental regulation. It is from that final judgment that FPC initiated its appeal.

SUMMARY OF ARGUMENT

FPC contends that no statute expressly confers on local government the authority to order FPC to convert its overhead distribution line to an underground line. This statement completely misses the point. The City of Lake Mary has the inherent power to control utilities located in its rights-of-way. It is not up to the City to point to an express grant of authority giving it the power to control franchise uses, rather it is incumbent on FPC to point to a specific statute that expressly pre-empts the inherent power of the City to control the placement of utilities along its rights-of-way.

Local government has been granted an open-ended and broad mandate by both the Florida constitution and state statute to control the use of its rights-of-way. Both, Article VIII, Section 2(b) of the Florida Constitution and Home Rule Powers Act, Section 166 of the Florida Statutes, grant local governments all legislative power unless expressly prohibited by law.

Additionally, local governments have further authority under Florida Statutes 366.041 - 366.403. These statutes give local government the authority to prescribe and enforce rules and regulations for placing and maintaining electric distribution lines in their rights-of-way and provide that upon the widening of a roadway, the cost of the relocation of utility lines is to be done at the utility's own expense.

The City has never attempted to dictate to FPC the method by which FPC would provide its electrical service. The City fully

anticipates, regardless of whether the electrical distribution lines are located above or below ground, that the quality of service, the amount of voltage and all other aspects of the service will be essentially equal regardless of method.

The only justification given by FPC to avoid what is otherwise a perfectly valid and legitimate exercise of police power by the local government, is that the State of Florida has pre-empted the authority over the location of distribution lines underground and has transferred that authority to the PSC. FPC points to Section 366.04(7)(a)(b), Florida Statutes. This Florida Statute merely mandates that the PSC undertake a study of the cost-effectiveness of installing underground power lines. The statute further grants the PSC the authority to order undergrounding where it finds that it is cost-effective and feasible.

The statute does not grant the PSC any form of exclusive jurisdiction. The statute does not give the PSC any type of supervisory or regulatory review over the decisions of local government concerning the use of road rights-of-way within local government jurisdiction. The statute totally lacks any consistent pervasive scheme of regulation. The statute provides no mechanism for local government to seek to impose an obligation on any electrical power company through a petition to the PSC.

The statute has no standard other than cost-effectiveness. If a city were to come before the Public Service Commission for relief, it would be precluded from using other legitimate justifiable grounds which might be appropriate in determining that

a electrical distribution line should be placed underground.

In its summary of argument, FPC seeks to convey a sense of impending doom and has outlined the potential dire consequences which will occur if the lower court's order is permitted to stand. The specter of unconstrained municipalities arbitrarily ordering massive sections of electrical power lines underground and the resulting chaos has been suggested as an outcome to the court. However, no justification exists for this contrived concern over an impending catastrophe. All actions of the local government in the exercise of their police powers are constrained standards of reasonableness which protect the public, including Florida Power Corporation. Local governmental action can only be sustained and upheld if it is exercised within the clear prerogative and authority of local government. This particular case involves the narrow subject matter which is limited to the widening of a roadway. The Ordinance was adopted after a great deal of public input and debate. FPC has even stipulated to its reasonableness. The City does not question the proposition that any attempt by it to arbitrarily pass an ordinance that orders all FPC distribution lines within the City to be placed underground would not be valid.

FPC also states in its summary of argument that other state Supreme Courts have recognized that local governments cannot mandate electrical line undergrounding in the face of a state regulatory agency. An analysis of those cases reveals that not a single one of the nine cases cited by FPC involves a local distribution line. Virtually every case cited by FPC involves a

transmission line. The City does not dispute the fact that it has no power or authority to regulate transmission lines which carry power throughout Florida.

Finally, the City is at somewhat of a loss to understand FPC's concern about the potential dire economic consequences to them of being forced to place distribution lines underground. By statute, all publicly regulated investor-owned utility companies in the State are entitled to realize a reasonable rate of return on all legitimate capital expenditures. That is the way utilities make a profit. Once FPC constructs its underground distribution line, it will be entitled to include that capital expenditure in its rate base and realize a reasonable rate of return on that expenditure. The Florida Public Service Commission will then be in a position to determine which group of electrical customers of FPC will pay for that capital expenditure. The PSC might well seek to carve out a rate structure which is limited to the electric customers in the City and County and to impose upon them the burden of paying for the underground installation. In no event will that expense be born by the stockholders, owners, or investors of FPC. Catastrophe averted.

ARGUMENT

Introduction

The dispute before the court concerns the issue of who has the authority to make a local land use regulation decision concerning a segment of a local road which lies within Lake Mary, Florida, the city or the Public Service Commission. The origin of the dispute finds its roots in the decision of Seminole County to four-lane Lake Mary Boulevard from I-4 to Country Club Road (C-15). The Lake Mary Boulevard Study Committee recommended that the boulevard be developed into a well-landscaped, scenic gateway through the adoption of standards, for the purpose of preventing visual pollution, maximizing traffic circulation functions from the standpoints of safety, roadway capacity, vehicular and non-vehicular movement, enhancing property value and preserving as many natural features as possible. (Lake Mary Boulevard Model Gateway Concept, Final Report - ROA 2207-2244; Appendix Exhibit A)

The goals announced by the committee mirror those established by Section 163.3161, Florida Statutes, the "Local Government Comprehensive Planning and Land Development Regulation Act," which, as an expression of public policy on the issue of land use, grants broad land use regulatory power to Florida's counties and municipalities. The recommendations were unanimously approved by Lake Mary's City Commission and adopted as Ordinance 421. (ROA 709-724; Appendix Exhibit B).

Ordinance No. 421 addresses much more than just the land use requirement that electric power distribution, telephone and cable

television utility lines be placed underground when a designated gateway corridor was improved. Ordinance 421 also addresses building heights, building set backs, signage, landscaping and buffering, and parking and lighting requirements for all development within and adjacent to a gateway corridor. The ordinance represents a totally integrated approach to the comprehensive control of development of a local road, of which undergrounding of utility lines is but one of many elements.

In issuing an order to FPC to underground that segment of its distribution line on Lake Mary Boulevard, the City did nothing more than exercise its authority and responsibility for planning and growth management. The City's actions are consistent with the needs of the community and the mandate of current legislation that growth be regulated and that the infrastructure be adequate to meet the demands of growth.

Although it is acknowledged that the underground installation of electric power distribution lines costs more than overhead installation, the City's requirement for undergrounding did not call for anything other than off-the-shelf hardware and ordinary construction techniques.

Charles Manning, the manager of engineering and operations for Florida Power Corporation in charge of the relocation of the Lake Mary Boulevard distribution lines, characterized those lines as being "just distribution feeder circuits," which originate at a substation and which serve local customers in contrast to transmission lines which carry power from the generating plants to

all areas of the state at high voltage. With respect to the distribution system to be placed underground along a segment of Lake Mary Boulevard, Mr. Manning testified that all of the components required are standard components in Florida Power's possession. Mr. Manning further testified that the construction is straight forward and typical of construction that Florida Power does throughout its territory and the engineering of the task was not difficult. (ROA 63-65; 86-88; 90-92).

In characterizing the City's decision, Florida Power Corporation made it very clear to the lower court that it did not consider the decision to be unreasonable or arbitrary. FPC did not challenge the public need or that the ordinance served a valid, local governmental interest.

In the final analysis, the parties and the lower court concurred that the issue for resolution was not one of costs to Florida Power for undergrounding, not one of alternative design options presented by Florida Power, and not one of impact of the City's decision on Florida Power or its ratepayers; but simply an issue of authority over who has the right to determine how FPC utilized a segment of a local road.

In ruling, the court observed that Florida Power has not contested the overall validity of the ordinance. The court stated that the singular issue before it was whether or not the City of Lake Mary and Seminole County have the authority to require Florida Power Corporation to put a distribution line underground at no expense to local government, rather than the effect that such a

decision would have on rates.

In response to FPC's prediction of dire consequences, the trial court had this to say: "Why does it make any difference as a matter of law what the consequences are of this thing if the City and County have done what is lawful and then are entitled to it, then the consequences of it is just something they are going to have to live with." (ROA 130).

The City takes exception with the statement that there is some kind of fundamental collision between the principal of centralized statewide regulation of rates and services of the investor-owned utilities and the City's ordinance requiring a local distribution line to be placed underground.

First of all, the City has acknowledged from the onset that this was a two-stage process. The first stage in that process was a circuit court determination of whether the City had the authority to order the distribution lines to be placed underground. By both common law and Section 337.401, Florida Statutes, the City was precluded from paying for the placement of those lines underground.

The principal case outlining a municipal corporation's right to dictate the placement of utilities of a franchise holder which lie within the rights-of-way, and the question of who will pay for those, is the Supreme Court decision of Anderson v. Fuller, 41 So. 684 (Fla. 1906). At page 688 of that decision, the Supreme Court had this to say:

> And while municipalities may by ordinance grant to individuals and corporations the privilege of occupying the streets and public ways for lawful purposes, such as railroad

> tracks, poles, wires, and gas and water pipes, such rights are at all times held in subordination to the superior rights of the public. . . if in consequence of the exercise of this right the water company is compelled to relay its pipes, in the absence of unreasonable or malicious conduct, it has no cause of action against the corporation for reimbursement on account thereof. . . . The city of Tampa was, therefore, not authorized directly or indirectly to burden itself or its citizens with the cost of removing and replacing the water pies, gas pipes, telegraph, telephone and electric light poles, drains, or conduits, or railway tracks that might necessarily have been interfered with in laying its sewers in the streets.

This longstanding decision makes it clear that even if the City desired to compensate FPC for the additional cost of placing its facility underground, it would not have the right to do so.

The second issue of who would ultimately bear the cost will be for the Public Service Commission to determine. The PSC may attempt to carve out a class of customers consisting of those located in the County and the City and impose the cost of the underground distribution line on that class of customer. It is suggested that this could be done by the PSC without impacting the rates of FPC's other customers.

The statement that if the lower court decision stands, there would be potential chaos throughout the state is absurd. Equally absurd is the statement that FPC will lose billions of dollars by having to convert all of their electrical distribution lines from overhead to underground. Of course if FPC were suddenly required to convert all existing overhead distribution lines to underground lines, that would involve a vast capital expenditure. But to

suggest that this particular decision would have that result is groundless. This case involves the proper exercise of police power. The widening of a two-lane road to a four-lane road, and the adoption of an ordinance after extensive community input. The ordinance is extremely limited in its application. There is no doubt that a utility company could successfully resist any attempt by a local government to arbitrarily impose a requirement to place all overhead electrical lines underground. As recognized by the trial court, if the City and County have done what is lawful, then the potential future consequence to FPC are irrelevant.

FPC also suggests that there is some type of national uniform judicial recognition of the pre-emption, and points to no less than nine cases from around the country which it claims supports that proposition. Not a single one of those cases is applicable.

The case of Potomac Electric Power Co. v. Montgomery County, 560 A.2d 50 (Md. App. 1989) is cited for the proposition that "to permit counties to regulate utilities and supersede the rulings of the PSC would be to allow chaos to rein throughout the state." A review of the case revealed that the county involved attempted to regulate the construction of electric transmission lines. The City has always acknowledged that it has no jurisdiction over transmission lines which carry power throughout the State of Florida. The Potomac case clearly has no application to local distribution lines.

The next case is cited by FPC for the proposition that local authorities are not equipped to comprehend the needs of the public

beyond their own jurisdictions. Duquesne Light Company v. Upper St. Clair TP., 105 A.2d 287 (Pa. 1954). However, a review of that case revealed that the local authorities attempted to forbid the public utility from constructing a transmission line across city property. Again, this case about transmission lines has no application to local distribution lines.

The next case cited by FPC is the case of Willits v. Pennsylvania Public Utilities Commission, 128 A.2d 105 (1956). FPC cited that case for the proposition that a town's attempt to require undergrounding electric lines was invalid because the issue was controlled by the Public Utilities Commission. That case, once again, involved transmission lines. A case involving transmission lines which clearly lies beyond the power of local government to control has no application whatsoever to the issues at hand.

The next case cited by FPC at pp. 13, 14 was that of Union Electric Co. v. City of Crestwood, 499 S.W.2d 480 (Mo. 1973). FPC suggested that case stood for the proposition that a local ordinance was invalid because it impermissibly invaded an area regulated by the Public Service Commission. That ordinance in Union Electric was arbitrary in that it sought to place all electric lines within the entire city underground whether the lines were transmission lines, distribution lines and whether or not the lines passed private or public property. Again, that case was on totally different facts and has literally no application.

The next case cited by FPC was the case of Public Service Co. v. Town of Hampton, 120 N.H. 68, 411 A.2d 164 (1980). FPC

suggested that case stood for the proposition that a town's ability to require underground lines was pre-empted by the Public Utilities Commission's authority to regulate that area. Public Service Co. involved the construction of the now infamous Seabrook Nuclear Power Plant. The reason the court ruled against the town's attempts to require undergrounding of utility lines from this one plant was (a) because of the environmental impact and, (b) due to the special nature of the plant, the Public Utility Commission was granted special permission to oversee the project. Also, the grant of authority to regulate the underground lines did not come from the town in the form of a franchise or license. Again, that case has no application to the facts before this Court.

Following that, FPC offered the case of Vandehei Developers v. Public Service Commission of Wyoming, 790 P.2d 1282 (Wyo. 1990). FPC suggested that case was authority for the proposition that a county cannot regulate a public utility by requiring that a utility line be placed underground. The Vandehei case also involved the placement of a transmission line, not a local distribution line. Also unique to Wyoming was the fact that the state legislature had granted the PSC all police power relating to public utilities in that state and reserved none of the police powers to municipalities. Id. at 1286. This case not only does not apply because of the fact that it involved transmission lines as opposed to distribution lines, but also for the fact that the legislative scheme in the State of Florida is opposite of the one in Wyoming. In Florida, local governments are granted specific authority over

utility lines which lie in their rights-of-way.

FPC next cites the case of Chester County v. Philadelphia Electric Co., 218 A.2d 331 (Pa. 1966). FPC suggested that case stood for the proposition that a county may not regulate or control electric wires but that power is vested with the statewide Public Utilities Commission. A review of that case reveals that a natural gas pipeline was involved, not an electric utility. Also, in Pennsylvania, the county is a subdivision of the state and enjoys no sovereign power over statewide matters. The case specifically distinguished the county from a municipal corporation. In the instant case, the City does have sovereign power and has specific authority granted by the Constitution and Florida Statutes to require public utilities to move utility lines at their own expense.

Finally, FPC presents the court with the case of Niagara Mohawk Power Corp. v. City of Fulton, 188 N.Y.S.2d 717 (1959). FPC cites this case for the proposition that the power of a municipality to enact a zoning ordinance must yield to the Public Utilities Powers granted by state statutes to render safe and adequate service. A review of that case shows that an administrative body overturned a local zoning board's denial of a permit to a local utility to build a electric substation. The administrative board stated that the power of the municipality must yield to the Public Utilities which has a duty under state statutes to render safe and adequate service. The appellate court, however, reversed the administrative board's decision stating that the

Public Utilities had not made a showing that no other location within the community would be proper for building a substation. In contrast, the City has not denied FPC the right to run its local distribution lines. The City has merely required that FPC place certain of its local distribution lines underground.

In all of the out-of-jurisdiction cases cited above by FPC, there is not a single case in the entire United States of America cited by FPC that involves a local distribution line. All of the cases cited by FPC involve transmission lines. What FPC has done is to extract convenient quotes from a series of inapplicable cases and has strung them together to create an illusion of legal precedents that do not exist.

In contrast to transmission line cases there are a limited number of cases involving local distribution lines which have reached a different result. In Central Maine Power Company v. Waterville Urban Renewal Authority, 281 A.2d 233 (1971), the Supreme Court of Maine determined that an Urban Renewal Authority had the power to require Central Maine Power Company to install its electrical distribution lines underground. In that particular case, Central Maine Power Company questioned the right of the Urban Renewal Authority to exercise police power to compel it to go underground with its facilities for the distribution of power. The power company further urged that the permission of the Public Utilities Commission was mandatory. The Supreme Court of Maine decided against the electric company. The court recognized that the issue was whether or not this had been a reasonable exercise

of a police power. The court determined that not only did the power exist to require the underground installation of the local distribution lines, but also the company would have to bear the cost and expense.

A similar result was reached in the case of Benzinger v. Union Light, Heat & Power Co., 170 S.E.2d 38 (Ct. App. Ky. 1943). In that case the City of Covington, Kentucky enacted an ordinance requiring certain utilities operating within the city to place their facilities underground. The utility company challenged this, taking the position that the matter was one for the Public Service Commission to control and determine. The court determined that there had been no pre-emption of the field over municipal authority, over the streets, public ways and property so as to deny cities the right to choose for themselves the method and manner of the installation of utility lines. The court further noted that placing its wires would not materially affect the quantity or quality of the transmission of the electrical product. The court noted:

> "The requirement of the ordinance is but an exercise of the city of its constitutional rights with reference to burdening its streets or public ways with the necessary facility for furnishing utility service."

None of these cases cited by FPC apply. Not one deals with a local distribution line. As for the issue of pre-emption discussed at greater length in Point One, the PSC itself, in its recently completed study on the cost-effectiveness of underground utilities, recognized that it had not been given any pre-emptive

authority over local government.

FPC's suggestion that Section 361.01 permits it to arbitrarily invade a municipal road right-of-way is without merit. Although Section 361.01 extends the privilege to obtain land by condemnation to public utilities, the reference to public lands is conditional, not absolute. FPC would only be permitted to enter upon public lands as necessary to conduct its business, when those public lands had not already been appropriated to prior public use. City of Miami v. Florida East Coast Railway, 286 So.2d 247 (Fla. 3d DCA 1973).

In this case, the ownership of the right-of-way is in Seminole County. Had the land not been appropriated to use as a road by the County, then the City agrees that FPC would have the right to condemn that land for its use. However, as that is not the case, FPC's entitlement to enter into the roadway for the conduct of its business is dependent upon its franchise and other law, not upon its authority to obtain land by eminent domain.

Point One

The City of Lake Mary has the Constitutional and Statutory Power to Dictate the Use of Its Rights-of-way by Franchise Holders.

FPC challenges the City to point to an express grant of power which speaks directly to the singular issue of the placing of electrical distribution lines underground and suggests that this would be a prerequisite to the City being able to exercise that authority. The City's response is that it has the constitutional and legislative authority which is open-ended and broad-based. Unless FPC can convince this Court that the power of the County and City has been pre-empted by Statute, the City and County should prevail. Article VIII, Section 2(b) of the Constitution of the State of Florida states as follows:

> Municipalities shall have the governmental, corporate and proprietary powers to enable them to . . . perform municipal functions . . . and may exercise any power for municipal purposes except as otherwise provided by law.

In addition to the constitutional grant of authority, the legislature, through the Home Rule Powers Act, Section 166 of the Florida Statutes, states in part as follows:

> municipalities . . . may exercise any power for municipal purposes except when expressly prohibited by law." (emphasis added).

Subsection 4 states as follows:

> it is the further intent of the legislature to "extend to municipalities the exercise of powers for municipal governmental, corporate or proprietary purposes "not expressly prohibited by the constitution, general or special law . . . .

In addition to the broadly mandated grant of power to local government, the legislature also has adopted several laws which speak directly to a city's control of its roadways. Florida Statutes 366.041 is entitled "Use of Right-of-Way for Utilities Subject to Regulation; Permit; Fees." Subsection 1 reads in part:

> Local governmental entities have jurisdiction and control over public roads and are authorized to prescribe and enforce reasonable rules or regulations with reference to placing and maintaining along, across or on any roadway under their respected jurisdictions any electrical transmission, telephone or telegraph line, pole line; . . . or other structures hereinafter referred to as the utility." (emphasis added).

This statute specifically authorizes the City to adopt any reasonable restriction on the placement of electrical distribution lines on any roadway which lies within their jurisdiction. Clearly, the local electrical distribution line running along Lake Mary Boulevard falls squarely within this provision.

In addition to Section 366.041, Florida Statutes, the legislature has further addressed the question of the relocation of utility lines along roadways that are being widened and has further strengthened the city's hand. Section 337.403, Florida Statutes, entitled "Relocation of Utility Lines Expense," subsection 1, states in part that:

> Any utility heretofore, hereafter placed upon, under, over or along any public road that is found by the authority to be unreasonably interfering in any way with the convenient, safe or continuous use or maintenance improvement, extension or expansion, or such public roads shall upon 30 days written notice to the utility or its agent or by the authority, be removed or relocated by such

> utility at its own expense . . . . (emphasis added).

FPC comes within the definition of the term "any utility." Electric utility lines located along Lake Mary Boulevard are included within the terms of the statute. The City has expressed its opinion that above-ground utility lines will interfere with what it feels is the convenient use of its right-of-way, and has instructed FPC to "relocate" them to an underground location. Contrary to FPC's protestations to the contrary, underground is a location.

The City has never attempted to dictate to FPC the methods by which FPC will provide its electrical service. The City fully anticipates that regardless of whether the location of the lines is above the surface of the ground or below ground level, the quality of service, the amount of voltage, and all other aspects of the service will be essentially equal. The methods for providing that service are solely at the discretion of Florida Power Corporation.

Further support of the City's position is also found in several companion statutes. Section 337.403, Florida Statutes, is just one of four related sections of Chapter 337 which sets forth the legislative mandate and scheme for the use of the various road rights-of-way of the State of Florida and is a part of the "Florida Transportation Code." Section 334.035 states the purpose of the Code, which is to establish the responsibilities of the state, counties and municipalities for the planning and development of the state's transportation system, including roads, and that the code

is necessary for the protection of the public safety and general welfare.

The four related sections pertinent to this dispute are found at Section 337.401 through Section 337.404, Florida Statutes. Section 337.401 vests jurisdiction and control of public roads in the Department of Transportation and local governmental entities and authorizes them to enact and enforce reasonable rules or regulations with regard to the placing and maintaining of electric power distribution lines, among others, and further, that no electric power distribution lines shall be installed, located or relocated without permission of the authority.

Most importantly, Section 337.404 vests jurisdiction for the resolution of disputes between local governmental authorities and utilities over the reasonableness of the order of relocation or removal in the circuit court of the county in which the relocation took place, by judicial review through certiorari.

Clearly Section 337.401 through Section 337.404, Florida Statutes, are legislative pronouncements specific to the use of local government road rights-of-way by public utilities. To construe the grant of legislative authority, to promulgate and enforce reasonable rules for the use of public road rights-of-way to mean reasonable rules, except rules relating to the manner in which the utilities are placed in the rights-of-way, would clearly frustrate the stated intention of the legislature.

In suggesting that Section 366.03, Florida Statutes stands for the proposition that Florida Power cannot legally be required to

relocate its distribution line in Lake Mary Boulevard underground while maintaining overhead lines in other areas, misconstrues the meaning of the word service. To understand the regulatory use of that word, one must look to the rules of the PSC which defines service as the supply of electricity to customers and which requires that each utility shall make all reasonable efforts to prevent interruption of service, and where interruption occurs, to make very effort to restore it as quickly as possible. Fla. Adm. Code Rule 25-6.003 and 25-6.044. The term service refers to the electrical current itself, not the means by which it is delivered as is made clear in rule 25-6.0438, which permits service to be interrupted by contract with the customer.

Section 366.03 simply requires that Florida electric utilities must deliver electric current to each customer who wants it on the same basis that it delivers current to others similarly situated, and at the same rate. That statute does not impact on whether the lines that deliver that current are underground or overhead, that is a matter for decision by local government.

Yes, the authority of the PSC is preeminent, but only within the confines of statutes and organic law. The legislature has exempted out of that authority the power to direct how and when power companies will place their lines in public rights-of-way. Sections 337.403 and 366.11, Florida Statutes. Section 366.11 means exactly what it says and is clearly recognized by the Commission in rule 26-6.061(3) which provides:

> (3) If the utility is required by governmental or other valid authority to

> install underground distribution, and abandon overhead distribution . . .

Finally, by its own terms Section 366, Florida Statutes does not apply to the question of the control by municipalities over their road rights-of-way. Section 366.11 entitled "Certain Exemptions" states that nothing in the statute shall restrict the police power of municipalities over the streets, highways and public places. Not only does the language of 366.04(7) on its face fail to indicate that any pre-emption has been intended by the legislature, but also Section 366.11, Florida Statutes makes it clear that there is no attempt to restrict the power of cities and counties over their streets and highways and public places.

The courts of this state have repeatedly recognized that municipalities have broad authority to legislate with regard to land use including the authority to discontinue an existing use; legislate solely for aesthetic purpose; and legislate in the general exercise of police power for the protection of public health, safety and general welfare. This is true even when the legislative act requires the subordination of a utility's franchise rights to the superior right of the public, as long as that power is exercised reasonably and in the public interest. Standard Oil Co. v. City of Tallahassee, 183 F.2d 410 (5th Cir. 1950). City of Lake Wales v. Lamar Advertising Association of Lakeland, Florida, 414 So.2d 1030 (Fla. 1982). Metropolitan Dade County Fair Housing and Employment Appeals Board v. Sunrise Village Mobile Home Park, Inc., 511 So.2d 962, 965 (Fla. 1987).

A.

Other States Support the Right of the City of Lake Mary to Require the Placement of Local Distribution Lines Underground.

At page 17 of its brief, FPC suggests that local government cannot prevent a public utility from carrying out its public charge by prohibiting its use of a public right-of-way. It cites to the case of the City of Jacksonville v. Ortega Utility Co., 531 So.2d 370 (Fla. 1st DCA 1988). In the City of Jacksonville, the city would not grant a permit to a utility providing water service in order for it to upgrade its service and comply with fire codes. The court found that the city gave no legitimate basis for the denial and concluded that the utility had a right, as well as a duty to provide adequate fire protection. Unlike the City of Jacksonville case, the City of Lake Mary is not depriving its citizens of service nor endangering them. On the contrary, by widening Lake Mary Boulevard and requiring the underground of utility lines for convenience, safety, and aesthetics, the City is insuring the adequate service for all of its citizens. It is in no way attempting to prohibit FPC from the use of a right-of-way or in providing its electrical service to its customers.

The argument that the City is requiring that FPC install a completely new and different utility system is simply not true. FPC installs underground distribution lines all the time. Their own expert witness on cross-examination admitted that there was nothing unique or different about the underground installation they had planned for the distribution line running along Lake Mary

Boulevard. It is the same construction means and techniques they have utilized for similar underground installations.

Furthermore, at page 19 of the brief, FPC implies that Section 337.403, Florida Statutes, says that remove or relocated does not encompass placing its electrical power lines underground. "Underground" is a location just as above ground is a location. The only difference between an above ground installation and a below ground installation is construction techniques. Both distribution systems will serve essentially the same purpose. Both will have the same line capacity, and both will distribute electrical power locally to retail customers.

At page 20 of its brief, FPC seizes on the word "conversion" contained in Florida Statute 366.04(7)(a). It suggests that this word conversion is indication of legislative intent to describe the process of changing an overhead distribution line to an underground distribution line. It then argues from that point that since other statutes deal with "removal and relocation," the legislature by implication did not mean "conversion" from overhead to underground distribution. FPC then states that by the use of this term "conversion," the legislature demonstrated that it knows how to grant power when it intends to do so.

If the legislature knows how to grant power and the City agrees with the proposition that it does, then why did it not simply grant exclusive jurisdiction to the PSC in 366.04(7)(a)? It would have been simple for the legislature to say "the PSC has exclusive authority throughout the State of Florida to determine

all questions regarding the placing of distribution lines underground." The legislature could have given the PSC a comprehensive statutory scheme. It could have prescribed a method for local governments to file with the PSC an action to require that electrical distribution lines be placed underground. The legislature could have provided standards and criteria against which a petition to require the installation of underground lines could be judged. The legislature did none of those things in Florida Statute, Section 366.04(7)(a).

Under the current legislative scheme, it is certainly within the PSC's power and authority to make a determination of cost-effectiveness and to order lines to be placed underground where feasible. The fact that local governments also have the power and authority to determine within their rights-of-way that distribution lines will be placed underground, in no way conflicts with the authority of the PSC. The only potential way in which the power of the City and the PSC could conflict, would be if the PSC ordered a distribution line placed underground and the City attempted to block that decision. Clearly if the PSC acts and orders a distribution line placed underground under Section 366.04(7)(a)(b), Florida Statutes, then local city government would be powerless to override that decision.

In subsection (b) on page 23 of its brief, FPC has a section entitled "Other States have Refused to Allow Local Governments to Require Undergrounding." PSC argues that other states have rejected the concept that local governments can force an electric

utility to place its lines underground through zoning or land use ordinances. The first case cited by FPC is a case of Vandehei Developers v. Public Service Commission of Wyoming, 790 P.2d 1282 (Wyo. 1990). As previously discussed, this case involves transmission lines, not local distribution lines. The City agrees that it has no power and authority over the placing of transmission lines which carry electrical power throughout the State of Florida, nor has it attempted at any time to exercise any control over the two transmission lines which cross Lake Mary Boulevard. Furthermore, the Vandehei Developers case revealed that under Wyoming law, the Public Service Commission was granted all police powers relating to public utilities and that none of those powers were reserved for municipalities. Vandehei at 286. This is completely different from the legislative scheme in Florida which specifically grants police power to municipalities to control utilities placed in local rights-of-way. The next case cited by FPC is Union Electric Co. v. City of Crestwood, 499 S.W.2d 480 (Mo. 1973). A review of that case revealed that the statute was invalid because the ordinance was over broad. The ordinance sought to eliminate rights and to require all subsequent construction, even of high voltage lines carrying power throughout the city on private rights-of-way for use by other communities, to be placed underground. Again, the Union Electric case involved the question of transmission lines, instead of local distribution lines. Clearly this case has no application to the facts before the Court. At page 25, FPC also suggests that the case of Public

Service Co. v. Town of Hampton, 120 N.H. 68, 411 A.2d 164 (1980) is applicable. This case centered around the construction of the Seabrook Nuclear Power Plant. The court ruled against the town's attempts to require undergrounding of utility lines at this plant because of the environmental impact undergrounding of utility lines would have, and because there was a special grant to the Public Utility Commission to completely oversee the project. Again, this case and its facts have no application to the matter at hand.

The next case cited by FPC was Cincinnati & Suburban Bell Telephone Company v. City of Cincinnati, 215 N.E.2d 631 (Ohio 1964). This case is cited for the proposition that a city could not force a telephone company to provide free undergrounding under its local powers. A review of the case shows that whether or not the city paid for the undergrounding was not the issue at all. The statutes in Ohio specifically provided that public utilities may construct and maintain lines along the highways of a municipality, which had been interpreted as meaning above ground. State law also provided that the telephone company could not place its wires underground without a municipality's consent, and likewise, a municipality could not require a utility to place its lines underground without the consent of the utility. The court held that the local ordinance requiring undergrounding of telephone lines conflicted with the state statute which stated that the municipality could not require it without the utility's consent. This statutory scheme in Ohio is totally different and

completely divorced, and bears no relationship to the statutory scheme in Florida. None of these various cases involved local distribution lines or statutory schemes similar to that of Florida.

Point Two

Chapter 366.04 Makes no Attempt to Pre-empt Local Governmental Authority, Lacks any Scheme of Regulation, and does not Conflict with Local Authority.

The authority of the City of Lake Mary to determine the placement of utility lines within its road rights-of-way has not been pre-empted by Section 366, Florida Statutes, or usurped by the PSC.

In this section of its brief, FPC argues that the PSC's jurisdiction over public utilities is exclusive in that it also has jurisdiction over underground service which has been directly conferred to it. While it is true that the PSC has been granted regulatory authority over FPC and similar investor-owned utilities, the PSC's regulatory authority is not without limitation.

The Public Service Commission has no statutory right to dictate to an investor-owned utility the specific means and method by which it will carry out the process of providing electrical power to individual customers as long as it is safe and efficient, and complies with the standards for quality of service. The PSC cannot require that FPC install vertical, as opposed to horizontal, construction when building a distribution line. The PSC cannot require FPC to utilize any particular grade of material or observe any particular construction technique. The PSC, before the passage of 366.04, which mandates that the PSC investigate the cost-effectiveness of underground utility construction and authorize it, had no statutory authority to order any investor-owned utility to place a distribution line underground.

The court's attention is directed to 366.04(2) which details what the PSC can regulate with respect to investor-owned utilities. The PSC has the power to:

> (a) to prescribe uniform system of classifications of accounts; (b) to prescribe rate structure for all utilities; (c) to require electric power conservation and reliability within a coordinate grid for operational as well as emergency purposes; (d) to approve territorial agreements . . . (e) to resolve . . . any territorial disputes . . . (f) to prescribe and require filing of periodic reports . . . .

Subparagraph 5 grants the jurisdiction over the planning and development of a coordinated electric power grid. Subparagraph 6 says that the commission shall have the jurisdiction to prescribe and enforce safety standards for transmission and distribution facilities.

Nothing in these enumerated powers gives the PSC the right to dictate a means and method by which electrical services will be delivered to individual customers. The City challenges FPC to concede that the PSC has this type of regulatory authority over them.

While it is true that the PSC has chosen to adopt a rule respecting the providing of underground electrical distribution systems to new residential subdivisions, the City can see no statutory authority for the proposition that the PSC had the right to adopt such rules and regulations. The fact that these rules have not been challenged is no surprise. There would be no incentive for anyone to challenge these rules which authorize underground distribution to new residential customers. From the

developer standpoint, the rule gives them an option to require the installation of underground distribution systems. From the investor-owned utility's standpoint, this is a good rule because it mandates that the cost to provide those underground utilities will be born by the individual developer. Both sides have everything to gain and nothing to loose by the adoption of that rule. Since there is no affected party who has any incentive to challenge the rule, it has not been challenged. The City strongly feels that if FPC timely opposed adoption of that rule, the PSC would lack statutory authority to sustain it.

In the face of this clear line of authority running to local governments from the constitution and the statutes, the question arises of why should FPC or any other investor-owned electrical utility be exempt from an otherwise perfectly valid exercise of police power by local government? If this case involved the location of a cable television line or a telephone line, there would be no question that the City could order an existing overhead telephone or cable television line to be placed at a new location underground. Under those circumstances, an argument that the City did not have "express authority to order an overhead cable television line underground" would be patently absurd! What is different about an electric company? Viewed in the abstract, the answer is nothing. All utility companies have lines located in the right-of-way. All derive the right of usage from local government.

The thing which sets electrical utilities apart from other utilities, claims FPC, is that the authority of the City in this

particular instance is pre-empted by Section 366.04(7)(a)(b), Florida Statutes.

In considering whether or not pre-emption is intended by the legislature, one must keep in mind that Florida's municipalities have reserved to them by the constitution the broad power to legislate concerning any subject matter upon which the state legislature may act, except as to any subject prohibited by law or constitution or matter pre-empted by state government. Section 166.021(3). The statute itself precludes the imposition of a judicial limitation upon home rule. In construing the pre-emption exception to municipal home rule power the court wrote in Tribune Co. v. Canella, 438 So.2d 516, 525 (Fla. 2d DCA 1983):

> Under that doctrine a subject is pre-empted by a senior legislative body from action by a junior legislative body if the senior body's scheme of the regulation of the subject is pervasive and if further regulation of the subject by the junior legislative body presents a danger of conflict with that pervasive regulatory scheme. . . .

Article VIII, section 2(b) of the Florida Constitution, includes a more restrictive application of the pre-emption doctrine, precluding pre-emption and leaving "home rule" to municipalities unless the legislature has expressly said otherwise.

That rule of law has been reaffirmed in Florida League of Cities, Inc. v. Department of Insurance and Treasurer, 540 So.2d 850 (Fla. 1st DCA 1989), Board of Trustees of the City of Dunedin Municipal Firefighters Retirement System, 453 So.2d 177 (Fla. 2d DCA 1984), and City of Venice v. Valente, 429 So.2d 421 (Fla. 2d DCA 1983). For pre-emption to occur, there must be something more

than inference or implication. The legislative intent to pre-empt must be definite, clear, explicit, unmistakable, not dubious or ambiguous. Pierce v. Division of Retirement, 410 So.2d 669, 672 (Fla. 2d DCA 1982).

The constitutional declaration of municipal home rule power is so strong that the legislative restatement as found in Section 166.021 precludes the imposition of judicial limitations on that power. The court may only determine the existence or nonexistence of pre-emption or a specific constitutional or statutory prohibition as a limit upon the exercise of the power.

It is fundamental that the various enactments of the law must be read in harmony, and that every effort must be made to reconcile perceived conflicts so as to give each statute a field of operation, rather than to render one meaningless or repealed by implication, Palm Harbor Special Fire Control District, 516 So.2d 249 (Fla. 1987). It is only when that cannot be done that the last expression of the legislative will is the law, with the exception that the effectiveness of the prior, more specific act is retained unless the subsequent general act is intended as an overall restatement of the law on the same subject, Floyd v. Bentley, 496 So.2d 862 (Fla. 2d DCA 1986) review denied, 504 So.2d 767 (Fla. 1987).

FPC's pre-emption argument lacks substance. For pre-emption to occur, the mandate must be specific and cannot be made by implication or inference. Furthermore, the pre-emption must consist of a pervasive scheme of regulation which specifically

conflicts with local governmental action. A reading of Section 366.04(7)(a)(b), Florida Statute, shows that the pre-emption argument falls short of both those standards.

Florida Statute, Section 366.04(7)(a)(b) merely mandates that the PSC undertake a study of the cost-effectiveness of the installation of underground power lines. Upon a finding by the Commission that undergrounding is cost-effective, it gives the PSC the authority to order the utilities to place their lines underground where feasible. The statute does not, even by implication, grant any form of exclusive jurisdiction to the PSC, nor does it suggest an intent to remove the historical right of counties and cities to control the placement of utilities in public roadways.

The statute does not give the PSC any power of supervision or regulatory review power over decisions of local government concerning the use of road rights-of-way. Section 366.04(7)(a)(b), Florida Statutes, totally lacks any scheme of regulation, much less one that is consistent or pervasive. The statute does not provide any mechanism for local city and county governments to seek to impose an obligation on FPC through the PSC. The singular standard of determining that undergrounding is cost-effective does not constitute a pervasive scheme for regulation of undergrounding. The statute provides no other legitimate justifications which might be proper in the consideration of local government desire that utility lines be placed underground. Assuming that FPC is right in that the question has been pre-empted and placed in the hands

of the PSC, what standards and criteria would the PSC apply for determining the merits of a petition by local government to place distribution lines underground? Other than cost-effectiveness, the answer is that PSC has none. Lacking any form of statutory regulatory scheme or standards, and lacking even an inference of pre-emption, the argument fails.

The best that can be said for Section 366.04(7)(a)(b), Florida Statutes, is that it gives the PSC authority concurrent with that held by the county and municipal governments to order undergrounding of utilities. This limitation on the application of Section 366.04, Florida Statutes was recognized by the PSC in their recently completed study on cost-effectiveness of underground utilities. The PSC at page 17 of its "ORDER ON THE INVESTIGATION INTO UNDERGROUND WIRING" stated as follows:

> "to determine the appropriate test for cost-effectiveness, we have requested further policy direction from the legislature in the following areas: (1) a determination of legislative intent as to pre-emption by this commission of state or local code and zoning requirements and the resulting effect on the cost to government or rate payers (with regard to the issue of undergrounding of utility distribution lines)."

In its letter to the legislature, the Chairman of the PSC also made specific reference to the fact that the statute had not granted to the PSC any pre-emptive rights over county and municipal governments. Furthermore, the PSC's own rules recognize the authority of the cities to order distribution lines underground. Fla. Adm. Code 25-6.061 and 25-6.074.

Point Three

Local Governments have the Power to Dictate the Use of its Rights-of-way by Franchise Holders.

FPC argues that to permit the City of Lake Mary to require undergrounding of a segment of its distribution line constitutes an impairment of its franchise.

Without hesitation, the City agrees that it has granted FPC a license to construct, operate and maintain its utility lines in the streets of Lake Mary for a time certain. However, it is fundamental that a municipal government may not abdicate or contract away its police power and, therefore, that all property rights held by its citizens are subject to the authority of the government to make necessary and reasonable regulations for the protection of the health, safety and general welfare of those citizens. Tampa Northern R. Co. v. City of Tampa, 107 So. 364 (Fla. 1926); Southern Utilities Co. v. City of Palatka, 99 So. 236 (Fla. 1923); Yellow Cab Company of Dade County v. Dade County, 412 So.2d 395 (Fla. 3d DCA 1982); and Greyhound Lines, Inc. v. Mayo, 207 So.2d 1, 4 (Fla. 1968).

The Tampa Northern R. Co., which dealt with a franchise granted by the City of Tampa to a railroad permitting it to construct and maintain railroad tracks in certain of the city's streets, is particularly instructive as it concerns facts such like those of the instant case. Subsequent to the grant of franchise and due to changing circumstances and the increase in traffic on those streets, the city enacted an ordinance which had the effect

of precluding the railroad from exercising its franchise privilege with regard to a portion of one of the streets subject to the original grant of the franchise. In the face of a petition brought by the railroad company to enjoin the operation of the ordinance, and the theory that the ordinance operated to impair its franchise rights, the court wrote:

> Contract and property rights of a railroad [power company] in respect of the operation of track in a public street [operation of electric power distribution lines in Lake Mary Boulevard] are held subject to the fair exercise . . . by a municipality . . . of the power to make and enforce regulations reasonably necessary to secure public safety [promote the health, safety and general welfare of its citizens]. (parenthetical supplied)

FPC having stipulated that the adoption of the "Gateway Corridor Standards Ordinance" (ROA 130, line 25-131, line 12) was a reasonable exercise of its police powers, it is only necessary for this court to determine if the City properly implemented Ordinance No. 421 in requiring Florida Power Corporation to underground a portion of its local distribution line.

In the instant situation, the adoption of Ordinance 421 with its requirement that relocated utility lines be placed underground in designated "Gateway Corridors" and its implementation, as to only a portion of FPC's local distribution line, upon the event of expansion of the roadway represents a valid exercise of the policy power of the City of Lake Mary, Florida undertaken to serve the health, safety and general welfare of it citizens. FPC's franchise has neither been impaired nor burdened contrary to Art. I, Section

10, Florida Constitution nor can it be said that the requirement does other than serve a legitimate public interest.

CONCLUSION

The City of Lake Mary has properly exercised its home rule and land planning obligations, both to its citizens and to Florida Power Corporation. It has acted judiciously and with restraint. Its actions are fully authorized by the Florida Constitution and applicable statutes.

There has been no pre-emption of the authority of the City to act, nor are the City's actions in conflict with any contrary state law.

Florida Power Corporation's concerns about catastrophic potential economic results are unjustified. Florida Power Corporation has nothing to fear from the judicious and measured exercise of local governmental police powers.

By ordering a local distribution line to be relocated and placed underground in connection with a road-widening project, the City has not violated its franchise agreement with Florida Power Corporation.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to ROBERT PASS, ESQ. and SYLVIA H. WALBOLT, ESQ., Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., One Harbour Place, Post Office Box 3239, Tampa, Florida 33601; ALBERT H. STEPHENS, ESQ. and PAMELA I. SMITH, ESQ., Office of the General Counsel, Florida Power Corporation, 3201 34th Street South, Post Office Box 14042, St. Petersburg, Florida 33733-4042; and to LONNIE N. GROOT, ESQ. Assistant County Attorney, Seminole County Services Building, 1101 East First Street, Sanford, Florida 32771 by Federal Express on this 11th day of December, 1990.

Attorney

IN THE SUPREME COURT OF FLORIDA

FLORIDA POWER CORPORATION,

Appellant,

vs. CASE NO. 76,743

SEMINOLE COUNTY and CITY OF LAKE MARY

Appellees.
_____/

APPENDIX TO ANSWER BRIEF OF APPELLEE CITY OF LAKE MARY

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