IN THE SUPREME COURT OF FLORIDA

FLORIDA POWER CORPORATION,

Appellant,

vs. CASE NO. 76,743

SEMINOLE COUNTY and CITY OF LAKE MARY,

Appellees.
_____/

APPELLEE, SEMINOLE COUNTY'S
ANSWER BRIEF

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PRELIMINARY STATEMENT

Appellant, Florida Power Corporation, will be referred to in this brief as "FPC." Appellees, Seminole County and City of Lake Mary, will be referred to respectively as the "County" and the "City."

References to the record on appeal will be indicated as "R.____". References to the supplemental record on appeal will be indicated as "SR. ___". Exhibits used at the evidentiary hearing below will be referred to as "Pl. Exh. ____" for FPC's exhibits, "LM. Exh. ____" for the City's exhibits and "Co. Exh. ____" for the County's exhibits and pages from the transcript are referred to as "Tr. ____." All references to the Appendix to this answer brief are designated "App.___."

All emphasis is supplied unless otherwise noted.

STATEMENT OF THE CASE

The Statement of the case submitted by FPC can be concurred with by the County to some extent.

It should be pointed out, however, that, although the trial court sustained the validity of the County's and City's ordinances, the trial court largely relied upon Section 337.403(1), Florida Statutes (1989), as support for its decision sustaining the County's order to FPC to either remove its facilities from the County's publicly owned right-of-way or to utilize the public right-of-way in a manner consistent with and in accordance with permit conditions acceptable to the County which has plenary control and authority over its publicly owned right-of-way.

STATEMENT OF THE FACTS

I. INTRODUCTION

The Statement of Facts set forth in FPC's Initial Brief contains legal argument and disputed matters and, moreover, focuses, narrowly, upon only some of the facts which were adduced as evidence before the trial court. FPC's Statement of the Facts relates to oftentimes interesting, but not dispositive, utility issues to the exclusion of facts which pertain to the significant issues relating to public right-of-way involved in this case. The County will, therefore, set forth its specific disagreements as to statements set forth in FPC's Statement of the Facts and will, thereafter, set forth pertinent and material facts that should be considered by this Court in making its decision in this case.

II. SPECIFIC AREAS OF DISAGREEMENT

Contrary to the statement at footnote 2 on page 3 of FPC's Initial Brief, the County is not bound by the franchise agreement (Pl. Exh. 4; R. 706-708) between the City and FPC and, moreover, the City does not have proprietary control over County roads located within the municipal limits of the City. This matter will be discussed below in the County's legal argument. Nevertheless, it should be noted that FPC stipulated below that FPC did not have a franchise agreement with the County. (Tr. 160-161, SR. 160-161). Similarly, contrary to FPC's statement on the same page of its Initial Brief, the County's enactment of Ordinance Number 89-5 (Pl. Exh. 1; R. 601-602) did not implement the provisions of Section 337.273, Florida Statutes (1989), which is essentially a right-of-way reservation statute by another name. The term "corridor" in the County's ordinance is utilized in its generic sense and not in the technical sense utilized in Section 337.273, Florida Statutes (1989). In any event, FPC also stipulated below that the City's franchise agreement had not been breached and was not in default and at the hearing before the trial court only the City reserved a point of argument as to the franchise agreement. (Tr. 58, SR. 58).

Secondly, on pages 4 and 5 of FPC's Initial Brief FPC states that FPC "protested the enactment" and expressed "objections" to the enactment of the County's and City's ordinances. In fact, FPC did not express opposition or objection to the ordinances at the public hearings at which they were enacted. (Pl. Exh. 12, R. 1599-1611). Indeed, it was stipulated below that no representative of

FPC spoke in opposition to the action of the Board of County Commissioners at an advertised public hearing at which the decision which is now the subject of dispute was made. (Tr. 161, SR. 161; see, also, Co. Exh. 1, R. 2245 and Tr. 146, SR. 146). The log of FPC's liaison with the County indicates that he was not in attendance. (Pl. Exh. 24, R. 1637-1639).

As to the costs of undergrounding the utilities which costs are referred to on page 6 of FPC's Initial Brief, the trial court found that "[w]hen the public interest demands, as it does here, that a utility relocate or remove its lines from a right-of-way, the cost of such removal or relocation must fall upon the person or corporation occupying the right-of-way and not upon the taxpayers." (Final Judgment at 3; R 567; App. A). The trial court did not order any particular group of citizens to pay or not pay for the costs incurred by FPC in the event it decided to place its utilities underground or in the event it determined to utilize an alternative utility corridor. The Florida Public Service Commission would, of course, determine in which rate base costs for the utility removal or relocation would be placed whether occurring overground or underground.

Finally, as to the argument that FPC has no feasible way to serve its customers, FPC could, of course, place its facilities underground or utilize its powers of eminent domain to acquire a substitute utility corridor. (See Ch. 361, Fla. Stat. (1989)). The only reasons recited by FPC as to the unfeasibility of an alternative utility corridor are reasons that are unremarkable and

not unique and, indeed, are commonplace issues as to all condemning authorities; i.e., that right-of-way must be obtained and that impacts to businesses, residences, etc., occur. (Tr. 83, SR. 83; Tr. 96, SR. 96). FPC acknowledges that condemning an alternative utility corridor is possible. (Tr. 96, SR. 96).

III. ADDITIONAL PERTINENT FACTS

The roadway which is the subject of this dispute is Lake Mary Boulevard. Lake Mary Boulevard is functionally classified as a minor arterial and is a County Road. (Tr. 176, SR. 176). The portion of Lake Mary Boulevard that is essentially within the municipal limits of the City is located between Interstate Highway 4 and Country Club Road (which is also known as County Road 15) and that portion of Lake Mary Boulevard is operating at level of service "F" which is a failing level of service. (Tr. 178-179, SR. 178-179; Tr. 184-185, SR. 184-185). That part of Lake Mary Boulevard essentially bisects the City and is particularly significant to the community character of the City for that reason. (Tr. 119, SR. 119). The County is in the process of reconstructing Lake Mary Boulevard and, essentially, converting the existing two (2) undivided lanes into a four (4) lane divided highway with sidewalks and with the capability of the roadway being expanded into a six (6) lane divided highway. (Tr. 181-183, SR. 181-183). The level of service for the roadway should be "B" or "C" after the road improvement project is completed and the road should then operate at adequate service levels. (Tr. 185, SR. 185).

Anticipated County project costs for the Lake Mary Boulevard road improvement project are at least $13,000,000.00. (Tr. 193, SR. 193). Almost $7,000,000.00 had been spent by the County on additional right-of-way costs as of the date of the hearing before the trial court. (Tr. 193, SR. 193). The County has also filed condemnation actions to acquire additional Lake Mary Boulevard right-of-way. (Tr. 194-195, SR. 194-195; Co. Exh. 5, R. 2442-2555). FPC was a defendant in a County condemnation action in that it held an easement over an affected property owner's parcel. That parcel has proceeded to final judgment and FPC failed to assert any claims in such action. (Def. Exh. 5, R. 2442-2555; Tr. 231-233, SR. 231-233). Approximately ten (10) property owners have dedicated right-of-way to advance the project. (Tr. 195, SR. 195). FPC has neither donated right-of-way nor contributed money to the County in order that Lake Mary Boulevard might be improved. (Tr. 161, SR. 161; Tr. 195, SR. 195). FPC does, however, utilize Lake Mary Boulevard right-of-way for its utility facilities. (Tr. 196, SR. 196). If FPC were to relocate its poles overground during the course of the road improvement project, FPC's poles would be located in newly purchased County right-of-way. (Tr. 198, SR. 198). FPC utilizes the County's public right-of-way along Lake Mary Boulevard pursuant to a right-of-way utilization permit. (Tr. 198-200, SR. 198-200). FPC's utility lines, that are the subject of this dispute, are used for the distribution of electricity to local customers and the County has not ordered FPC to underground its major transmission lines which transmits high voltages of

electrical power throughout Florida. (Tr. 95, SR. 95). The County requires a right-of-way utilization permit for the use of any of its right-of-way whether located within or without of the jurisdictional limits of a municipality. (Tr. 200, SR. 200). FPC has no property right of record as to the Lake Mary Boulevard right-of-way except for a transmission line cutting over a small portion of the road and which transmission line is not impacted by the County's actions in this case. (Tr. 161-162, SR. 161-162).

FPC routinely applies for County right-of-way utilization permits and twenty-five (25) of such permits issued by the County to FPC relating to Lake Mary Boulevard were introduced into evidence before the trial court. (Co. Exh. 2, R. 2246-2272; Tr. 200-202, SR. 200-202). Standard conditions set forth upon of the County's right-of-way utilization permits are that:

> It is understood and agreed that the rights and privileges herein set out are granted only to the extent of the County's right, title and interest in the land to be entered upon and used by the permittees; and the permittee will at all times, assume all risk of and indemnify, defend, and save harmless the County of Seminole from and against all loss, damage, cost or expense arising in any manner on account of the exercise or attempted exercise by said permittee of the aforesaid rights and privileges.
>
> The construction and/or maintenance of a utility shall not interfere with the property and rights of a prior occupant.

(Co. Exh. 2, R. 2272 (last page); see Tr. 203, SR. 203).

The County Engineer is the approval/denial authority as to County right-of-way utilization permits. (Tr. 199, SR. 199; Tr. 203-204, SR. 203-204; see Pl. Exh. 10, R. 822-1587 at Pages 11-1

through 11-3 or Sections 11.1 through 11.8 of said exhibit which is the Land Development Code of Seminole County).

On March 16, 1990 the County Engineer, under authority of the Board of County Commissioners of Seminole County, notified FPC to relocate its utilities underground along the segment of Lake Mary Boulevard to be improved " . . . in the event that Florida Power Corporation desires to continue utilizing the County's right-of-way." (Pl. Exh. 21, R. 1627-1628; App. B). Indeed, the County, early on in the proceeding before the trial court below noted that FPC was not being required to underground its utilities. (Tr. 47, SR. 47). In the event that FPC did not desire to continue utilizing the County's right-of-way under the conditions of the County's permit, FPC was to promptly advise the County of its choice. (Pl. Exh. 21, R. 1627-1628; App. B; Tr. 207, SR. 207). All utilities of any type in Seminole County use County right-of-way by permit only. (Tr. 203, SR. 203).

FPC stipulated before the Trial Court that the placement of utility lines underground serves a valid local government interest. (Tr. 131, SR. 131). Indeed, FPC's liaison with the County wrote a county commissioner on October 8, 1988 and stated as to the development of the Lake Mary Boulevard Gateway Concept that:

> [w]e (FPC) applaud the (Lake Mary Boulevard) Study Committee on such a detailed and well thought out report which indicates many of our common concerns as residents of Seminole County. (Pl. Exh. 28, R. 1658).

The Lake Mary Boulevard gateway corridor concept began with a 1976 study which was followed up by the City funding a $47,000.00 transportation study in 1986. (Tr. 117, SR. 117). The gateway

corridor concept reached fruition when a January, 1989 Lake Mary Boulevard corridor report was published. (LM. Exh. 2, R. 2091-2206; LM. Exh. 3, R. 2202-2244). A review of the report will show that the gateway concept was essentially intended to avoid the creation of a "strip" such as West Tennessee Street in Tallahassee or U.S. Highway 17/92 from Sanford to Orlando (for those familiar with the Central Florida area) and to facilitate the development of an alternative roadway with a pleasing and meaningful community character. The concept calls for tree plantings which result in a canopied effect with supplemental landscaping. Overhead utilities defeat the viability or and are antagonistic of the implementation of the concept.

SUMMARY OF ARGUMENT

This case involves the question of whether FPC, as a result of its decision not to seek an alternative utility distribution corridor in accordance with its powers of eminent domain, may impose its predilections upon the County and utilize publicly owned right-of-way free of charge thereby eliminating and violating the County's right to regulate, manage and control the publicly owned right-of-way which is an integral part of the County Road System. Although, FPC asserts that the County is attempting to obtain free undergrounding of utility facilities; the converse is true in that FPC seeks to have free use of publicly purchased right-of-way while denying the public the right to control, manage and regulate the use of its own right-of-way based upon local community plans and quality of life determinations.

FPC seeks for this Court to grant it "super sovereign" status. FPC seeks to convince this Court that the regulatory jurisdiction of the Florida Public Service Commission extends into matters relating to local government decisions involving roadway systems, right-of-way purchased with local government revenues and growth management and zoning issues. The Florida Public Service Commission has not even stated that it believes it can preempt local government issues such as those just mentioned. The trial court's order does not address issues of utility rates and utility service. The trial court's order does, however, recognize the historically well protected rights of counties to regulate publicly owned right-

of-way within the jurisdiction of the various counties within the State of Florida.

The Florida Legislature and the courts have historically respected the rights of counties to exercise dominion and control over their road systems particularly in juxtaposition to utilities who only have (at best) guest status in such rights-of-way. The statutory powers of the County with regard to right-of-way regulation have neither been specifically or explicitly repealed by the Florida Legislature.

The County's direction to FPC with regard to FPC's use of publicly owned real property does not violate the so-called "antipreference" law set forth at Section 366.03, Florida Statutes (1989). The County owns the property that FPC desires to use. FPC does not give an "undue or unreasonable" preference to a customer or locality by giving due respect to the customer's or locality's private or public property rights. Indeed, under FPC's theory of the antipreference statute, FPC would only be bound to abide by the least stringent local zoning code or tax structure because it would, otherwise, be giving a preference to those local governments which have developed sophistication and meaningfulness in the exercise of their local government powers for the benefit of the public.

FPC also argues that the franchise agreement between the City and FPC has been breached and, somehow, is applicable to the County. Initially, FPC stipulated before the trial court that the franchise agreement had not been breached and was not in default.

Moreover, the franchise agreement relates to streets, etc., of the City. Lake Mary Boulevard was a State Road at the time the franchise agreement was made and is now a County Road after being functionally reclassified from a State Road to a County Road. Thus, in no way can the franchise agreement be effective upon or applicable to the County. Franchise Agreements are, in any event, taken subject to statutory enactments and the police powers of local governments and FPC is subject to such statutes and regulatory provisions.

Additionally, FPC failed to exhaust administrative remedies which were available below and failed to even appear (much less make a record) at the advertised public hearing held by the Board of County Commissioners of Seminole County at which the decision which gave rise to this appeal occurred.

Accordingly, for the foregoing reasons, it is clear that FPC cannot, in an attempted power play, convert its guest status in public right-of-way into a preeminent status. The trial court correctly recognized the public's property rights in the right-of-way that has been purchased with all too scarce tax dollars. The decisions of the trial court should be sustained.

ARGUMENT

INTRODUCTION

This is not a utility rate case. It is a property rights case. This is a case which will determine whether the predilections of FPC will be allowed to relegate the public's property rights to a second class status. The question before this Court is whether the County (or any county or city in Florida for that matter) has the right to control the use of its publicly owned right-of-way by electric utility companies that are guests of the public and use road right-of-way only by permit or license. It would be an extremely unjust result if, after the citizens of Seminole County have spent millions of dollars in purchasing road right-of-way to expand and improve Lake Mary Boulevard, those citizens are subsequently forced to watch the use of purchased public right-of-way by FPC with FPC unilaterally determining the conditions of that use. FPC has not contributed the first dollar toward the purchase of the right-of-way necessary to improve Lake Mary Boulevard. Nevertheless, FPC asserts that it can use the public's property in whatever manner that FPC deems to be desirable notwithstanding the desires and plans of the owner of the real property.

Indeed, FPC's overall argument appears to be "whatever is good for FPC is good for all." FPC would like to convince this Court to believe that the issue in this case is that the County and the City are seeking to obtain free utility relocation. FPC is the party,

however, that seeks to have free use of public right-of-way in which it is a guest while also being an ungrateful guest by rejecting the public's conditions placed upon that beneficial use.

Point One

FPC Has No Right, Title Or Interest In The County's Publicly Owned Real Property And Has No Regulatory Authority Over Local Government Activities, Generally, And The Use, Management And Control of Public Right-of-Way, Specifically.

A.

The County's Status As Fee Owner Of Public Right-of-Way With The Real Property Not Being Subject To Any Easement Owned By FPC Is Conclusive As To The County's Exercise Of Dominion And Regulatory Control Over The Publicly Owned Right-of-Way.

The County owns the real property in question -- the Lake Mary Boulevard public right-of-way. FPC has no easement right or other real property right in the publicly owned property.

Without belaboring the point or getting into a Real Property I discourse on property rights, let it simply be said by the County that this Court should sustain the decision below based upon the simple fact that FPC has no right, title or legal interest or property right in the publicly owned right-of-way which is Lake Mary Boulevard in Seminole County, Florida. The right-of-way is County property with title and ownership thereto being vested in the public.

B.

The County's Broad And Expansive Powers Of Local Self Government In Conjunction With Its Status As Fee Owner Of The Real Property In Question Mandates That FPC Abide By The

County's Determinations As To How The Publicly Owned Right-of-Way Will Be Used.

Under Florida law (see § 125.01(1), Fla. Stat. (1989)), the Board of County Commissioners of Seminole County has ". . . the full power to carry on county government." Speer v. Olson, 367 So.2d 207, 211 (Fla. 1978). See, also, Op. Att'y Gen. Fla. 84-42 (April 20, 1984). Section 125.01(3)(a)(b), Florida Statutes (1989), provides that:

> [t]he 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, including, specifically, authority to employ personnel, expend funds, enter into contractual obligations, and purchase or lease and sell or exchange real or personal property.
>
> . . .
>
> [t]he provisions of this section shall be liberally construed in order to effectively carry out of the purpose of this section and to secure for the counties the broad exercise of home rule powers authorized by the State Constitution.

Additionally, the County operates under a charter form of government (Pl. Exh. 2, R. 613-617) and Article VIII, Section 1(g) of the Florida Constitution provides as to charter counties that:

> [c]ounties operating under county charters shall have all powers of local self-government not inconsistent with general law, or with special law approved by vote of the electors. . . .

Accordingly, the County is vested with all municipal powers which are summarized in Section 166.021(1), Florida Statutes (1989), as:

> . . . the governmental, corporate, and proprietary powers . . . to conduct municipal government, perform municipal functions, and render municipal services, and may

exercise any power for municipal purposes, except when expressly prohibited by law.

Section 166.021(2), Florida Statutes (1989), defines "municipal purpose" as "any activity or power which may be exercised by the state or its political subdivisions." Section 166.021(3), Florida Statutes (1989), recognizes broad powers to "enact legislation concerning any subject matter upon which the state legislature may act" with limited exceptions which include legislation relating to

> "[a]ny subject expressly preempted by the constitution or by general law . . ." .

Thus, the bedrock of local government regulatory powers is broad and expansive. The Legislature has not expressly preempted the County's authority over its publicly owned right-of-way vis-a'-vis utility facilities. Indeed, as will be seen below, the Legislature has consistently recognized the broad local government powers of counties in the Florida Transportation Code, in growth management legislation and in other legislative actions. The County's status as fee owner of the public right-of-way in question in conjunction with its broad regulatory powers should cause this Court to reject FPC's grab at publicly owned real property.

C.

The Laws Of Florida Relating To The County's Power And Control Over County Roads Provides For Plenary Authority By The County To Fully And Completely Manage, Regulate And Control The Use Of County Roads Which Are Placed Upon Publicly Owned Real Property.

Lake Mary Boulevard is a County Road which was previously (prior to the functional reclassification of State roads resulting

from the enactment of Chapter 77-416, Laws of Florida) a State Road. The County Road System is defined in Section 334.04(7), Florida Statutes (1989), and:

> . . . consists of all collector roads in the unincorporated areas and all extensions of such collector roads into and through any incorporated areas, and all urban minor arterial roads not in the State Highway System.

The actual roadway is placed upon and located within right-of-way owned by the County and for which the County has recently expended millions of dollars to purchase. The term "right-of-way" is defined in Section 334.03(17), Florida Statutes (1989), as:

> [l]and in which the state, the department [Florida Department of Transportation], a county, or a municipality owns the fee or has an easement devoted to or required for use as a transportation facility or other road.

The term "road" is defined in Section 334.03(18), Florida Statutes (1989), and means far more than just the pavement on which motor vehicles drive and:

> . . . includes streets, sidewalks, alleys, highways, and other ways open to travel by the public, including the roadbed, right-of-way, and all culverts, drains, sluices, ditches, water storage areas, waterways, embankments, slopes, retaining walls, bridges, tunnels, and viaducts necessary for the maintenance of travel and all ferries used in connection therewith.

The term "transportation facility" is defined in Section 334.03 (26), Florida Statutes (1989), and means:

> [a]ny means for the transportation of people and property from place to place that is constructed, operated or maintained in whole or part from public funds. The term includes the property or property rights, both real and personal, which have been or may be established by public bodies for the transportation of people and property from place to place.

Lake Mary Boulevard is functionally classified as an urban minor arterial road. That term is defined in Section 334.03(28), Florida Statutes (1989), as:

> [r]outes which generally interconnect with and augment urban principal arterial routes and provide service to trips of shorter length and a lower level of travel mobility. Such routes include all arterials not classified as "principal" and contain facilities that place more emphasis on land access than the higher system.

As to the County Road System, under Section 336.02(1)(a), Florida Statutes (1989), the Board of County Commissioners of each county:

> . . . are invested with the general superintendence and control of the county roads and structures within their respective counties, and they may establish new roads, change and discontinue old roads, and keep the roads in good repair in the manner herein provided. They are responsible for establishing the width and grade of such roads and structures in their respective counties.

The term "structure" is defined in Sections 163.3164(20) and 380.031(19), Florida Statutes (1989), as:

> . . . anything constructed, installed, or portable, the use of which requires a location on a parcel of land. It includes a movable structure while it is located on land which can be used for housing, business, commercial, agricultural or office purposes either temporarily or permanently. "Structure" also includes fences, billboards, swimming pools, poles, pipelines, transmission lines, tracks and advertising signs.

Section 125.01(1)(m), Florida Statutes (1989), sets forth the broad powers that county commissioners have as to roads in that they may:

> [p]rovide and regulate arterial, toll and other roads, bridges, tunnels, and related facilities; . . .

Section 336.08, Florida Statutes (1989), provides that the boards of county commissioners may establish, locate, change or discontinue public county roads. Section 336.09, Florida Statutes

(1989), authorizes the boards of county commissioners to vacate, abandon, discontinue the use of, close, renounce or disclaim any interest in any county road.

Both Chapter 334 and Chapter 336, Florida Statutes (1989), are part of the "Florida Transportation Code". See, § 334.01, Fla. Stat. (1989). Section 334.035, Florida Statutes (1989), provides that the purpose of the Florida Transportation Code is:

> . . . to establish the responsibilities of the state, the counties and the municipalities in the planning and development of the transportation systems serving the people of the state and to assure the development of an integrated, balanced statewide transportation system. The code is necessary for the protection of the public safety and general welfare and for the preservation of all transportation facilities in the state.

The County Road System is separate and distinct from the roads within the City Street System which is defined in Section 334.03(3), Florida Statutes (1989), as:

> . . . all local roads within . . . [a] municipality, and all collector roads inside . . . [a] municipality, which are not in the county road system.

Thus, it is clearly discernable that the County has plenary control over its road system. The various county boards of county commissioners are charged with the responsibility of and granted full authority to control, manage and regulate county roads and right-of-way as well as facilities and structures that may be or become located in the roadway or right-of-way.

Initially, among the several statutory provisions specifically relating to the use of public road rights-of-way by utility companies, Section 125.42, Florida Statutes (1989), provides as follows:

125.42. Water, sewage, gas, power, telephone, other utility, and television lines along county roads and highways

(1) The board of county commissioners with respect to property located without the corporate limits of any municipality, is authorized to grant a license to any person or private corporation to construct, maintain, repair, operate, and remove lines for the transmission of water, sewage, gas, power, telephone, other public utilities, and television under, on, over, across and along any county highway or any public road or highway acquired by the county or public by purchase, gift, devise, dedication, or prescription. However, the board of county commissioners shall include in any instrument granting such license adequate provisions:

(a) To prevent the creation of any obstructions or conditions which are or may become dangerous to the traveling public;

(b) To require the licensee to repair any damage or injury to the road or highway by reason of the exercise of the privileges granted in any instrument creating such license and to repair the road or highway promptly, restoring it to a condition at least equal to that which existed immediately prior to the infliction of such damage or injury;

(c) Whereby the licensee shall hold the board of county commissioners and members thereof harmless from the payment of any compensation or damages resulting from the exercise of the privileges granted in any instrument creating the license; and

(d) As may be reasonably necessary, for the protection of the county and the public.

(2) A license may be granted in perpetuity or for a term of years, subject, however, to termination by the licensor, in the event the road or highway is closed, abandoned, vacated, discontinued, or reconstructed.

. . .

(4) This law is intended to provide an additional method for the granting of licenses and shall not be construed to repeal any law now in effect relating to the same subject.

(5) In the event of widening, repair or reconstruction of any such road, the licensee shall move or remove

such water, sewage, gas, power, telephone, and other utility lines and television lines at no cost to the county.

This specific grant of licensing powers expresses one aspect of the general range of powers available to each board of county commissioners in the State of Florida when permitting or licensing the use of county road right-of-way.

Chapter 337, Florida Statutes (1989), is also part of the Florida Transportation Code and is clear and unambiguous as to its intended effect and has neither been repealed by implication nor preempted in any way. Section 337.401, Florida Statutes (1989), provides as follows in relevant part:

> **337.401. Use of right-of-way for utilities subject to regulation; permit; fees**
>
> (1) The department and local governmental entities, referred to in ss. 337.401-337.404 as the "authority," that have jurisdiction and control of public roads are authorized to prescribe and enforce reasonable rules or regulations with reference to the placing and maintaining along, across, or on any road under their respective jurisdictions any electric transmission, telephone, or telegraph lines; pole lines; poles; railways; ditches; sewers; water, heat, or gas mains; pipelines; fences; gasoline tanks and pumps; or other structures hereinafter referred to as the "utility."
>
> (2) The authority may grant to any person who is a resident of this state, or to any corporation which is organized under the laws of this state or licensed to do business within this state, the use of a right-of-way for the utility in accordance with such rules or regulations as the authority may adopt. No utility shall be installed, located, or relocated unless authorized by a written permit issued by the authority. The permit shall require the permitholder to be responsible for any damage resulting from the issuance of such permit.
>
> . . .

Furthermore, Section 337.403, Florida Statutes (1989), provides as follows:

> **337.403. Relocation of utility; expenses**
>
> (1) Any utility heretofore or 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 convenience, safe, or continuous use, or the maintenance, improvement, extension, or expansion, of such public road shall, upon 30 days' written notice to the utility or its agent by the authority, be removed or relocated by such utility at its own expense except as provided in paragraphs (a) and (b).
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> . . .
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> . . .
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> (2) If such removal or relocation is incidental to work to be done on such road, the notice shall be given at the same time the contract for the work is advertised for bids, or 30 days prior to the commencement of such work by the authority.
>
> (3) Whenever an order of the authority requires such removal or change in the location of any utility from the right-of-way of a public road, and the owner thereof fails to remove or change the same at his own expense to conform to the order within the time stated in the notice, the authority shall proceed to cause the utility to be removed. The expense thereby incurred shall be paid out of any money available therefor, and such expense shall, except as provided in subsection (1), be charged against the owner and levied and collected and paid into the fund from which the expense of such relocation was paid.

It should be noted that, as part of this comprehensive statutory scheme, Section 337.402, Florida Statutes (1989), requires utilities to compensate counties for damages caused by utilities to county roads. Similarly, Section 337.404, Florida Statutes (1989) authorizes counties to place liens on the property of utilities when it is necessary for a county to relocate or

remove utility facilities as a result of a utility failing or refusing to do so.

The statutory provisions set forth above are well summarized as follows at 29 Florida Jurisprudence 2d, Highways, Streets and Bridges, Section 103 (1981), which states that:

> [a]uthority is given to require the removal or relocation of certain public utility structures maintained on public roads whenever they are found to be unreasonably interfering with the use and maintenance or expansion of the public road. However, thirty days' written notice must be given to the proper person by the authority in such a case.

The Attorney General of Florida answered a question pertaining to the above quoted statutes when he addressed the following question:

> [w]here public utilities, under §§ 125.42, 338.17-338.21 or 362.01, F.S., have located their facilities upon the right-of-way of state, county or district highways or roads, other than interstate highways . . ., may such utilities be reimbursed their costs for relocating their said facilities? (The above quoted provisions of Chapter 337 were previously codified in Chapter 338 of the Florida Statutes). Op. Att'y Gen. Fla. 059-80 (April 16, 1959).

The Attorney General discussed Florida case law and diverse legal maxims generally accepted throughout the nation and concluded as follows while answering the above quoted question in the negative:

> . . . in the absence of a statute providing otherwise, public utilities locating their facilities over, on or under public highways and roads in this state, are required to bear the costs and expenses of removing or relocating their such facilities when because of the relocation, widening, double laning, etc., of such public highways or roads, such relocation or removal of such utilities becomes necessary. Utilities using highways or road rights-of-way for their facilities under said §§ 125.42, 338-17-338.21 or 362.01, F.S., exercise such

> rights as or in the nature of licensees or tenants at sufferance. Op. Att'y Gen. Fla. 059-80 (April 16, 1959).

The most applicable case law in Florida was referred to by the Attorney General. The case law clearly pronounces that the licensed use of public rights-of-way by utility companies is secondary and subservient to the rights of the public in using the publicly owned rights-of-way in such manner as may be in the public interest. See, Anderson v. Fuller, 41 So. 684, 688 (Fla. 1906) (privilege of utilities to use roadways "are at all times held in subordination to the superior rights of the public"); Peninsular Telephone Co. v. Marks, 198 So. 330, 332 (Fla. 1940); Southern Bell Telephone and Telegraph Company v. State ex rel Ervin, 75 So.2d 796 (Fla. 1954). This Court in Southern Bell, at page 799, stated that the utility involved in that case was authorized to use the road facility only for so long as the utility did not obstruct or impede the use of the road and further stated at the same page that, even if a broad statutory right of use had been granted to the utility:

> it would not have conferred upon the company any absolute or indefeasible right to have such [utility] facilities remain in the same place forever. . . . [i]t (the utility) knew then that its facilities and business was then and always would be subservient to the rights of the public.

This Court has recently cited the Southern Bell decision with approval. See, Joint Ventures, Inc. v. Department of Transportation, 563 So.2d 622, 626 (Fla. 1990). This Court agreed with the proposition stated at page 799 in the Southern Bell decision that the transportation needs of the public "makes safe, adequate

highways . . . one of the clearest fields for the exercise of the police power."

In terms of decisional law from outside of Florida, the Supreme Court of Arizona held in the case of Arizona Public Service Company v. Town of Paradise Valley, 610 P.2d 449, 451 (Ariz. 1980), that ". . . we believe that the legislature has given cities and towns the power to require the undergrounding of utility poles as part of the town's zoning powers." The broad land use and zoning powers of local governments in the State of Florida will be discussed below.

The conditions set forth on the County's Right of Way Utilization Permit (over twenty of which had been issued to FPC relating to Lake Mary Boulevard were admitted into evidence as Co. Exh. 2, R. 2246-2272) paraphrases the above discussed law in that it clearly declares that licensee's (such as FPC) occupy County road right-of-way in a subservient relationship to the public. The permit conditions, among other things, state that:

> [i]t is expressly stipulated that this permit is a license for permissive use only and that the placing of facilities upon public property pursuant to this permit shall not operate to create or to vest any property right in said holder.
>
> . . .
>
> In the event of widening, repair or reconstruction of such road or highway, upon reasonable notice, the permittee shall move its facilities to clear such construction at no cost to Seminole County, insofar as such facilities are within the public right-of-way. (Co. Exh. 2, R. 2272).

FPC has acknowledged on repeated occasions the County's supreme right to the use and control of publicly owned County

right-of-way by applying for right-of-way utilization permits to be issued by the County. (Co. Exh. 2, R. 2236-2272). Although FPC now attempts to preempt the County's right to control and regulate the public's property, FPC has demonstrated in a consistent pattern of conduct clearly indicating that FPC acknowledges that it is using the County's right-of-way at the will of the County. It appears that FPC acknowledges, in its legal arguments and in its actions, that the County has the right to order utilities to move, relocate or remove utilities from the County's publicly owned road right-of-way, but denies that the County has the right to make undergrounding of facilities a condition of continued use. Surely, if the power exists to require removal of utilities, the power exists to provide for conditions upon future usage.

The Ordinances of the County referred to in the FPC's Complaint implement, to varying extents, the authority vested in the County to regulate the public rights-of-way owned by the citizens of the County. Chapter 11 of the Land Development Code of Seminole County (Pl. Exh. 10, R. 822-1587) generally regulates the use of the public's right-of-way. Additionally, Section 5.849 of the Land Development Code of Seminole County, relating to gateway transportation corridors, articulates certain policies relating to the use of the public's right-of-way relating to Lake Mary Boulevard. (See. Pl. Exh. 1, R. 601-612).

When all applicable statutes are read together it is clear that the Board of County Commissioners of Seminole County has the power, right and authority to regulate, manage and control the

County Road System of Seminole County. No provision of Chapter 350, Florida Statutes (1989), purports to grant the Florida Public Service Commission dominion or control over county roads. The County's authority extends comprehensively over its roads whether located in unincorporated or incorporated areas of the County.

Point Two

The County's Actions Are Supported By Its Zoning And Land Use Powers As Well As Its Comprehensive Planning Powers Under State Growth Management Laws.

The County's actions in this matter are consistent with and further the numerous provisions of the Florida State Comprehensive Plan. (See, Ch. 187, Fla. Stat. (1989)). For example, Section 187.201(20)(b)6, Florida Statutes (1989), provides that it is a State transportation policy to: "[p]romote timely resurfacing and repair of roads and bridges to minimize costly reconstruction and to enhance safety." Section 187.201(16)(b)3, Florida Statutes (1989), sets forth a State land use policy to "[e]nhance the livability and character of urban areas through the encouragement of an attractive and functional mix of living, working, shopping and recreational activities." The Lake Mary Boulevard Gateway Corridor project clearly is consistent with and furthers that policy. (See LM. Exhs. 2 and 3, R. 2091-2244; Pl. Exh. 1, R. 601-612).

Section 125.01(1)(g) and (h), Florida Statutes (1989), provides that counties are authorized to:

> [p]repare and enforce comprehensive plans for the development of the county.

. . .

> [e]stablish, coordinate, and enforce zoning and such business regulations as are necessary for the protection of the public.

The Local Government Comprehensive Planning and Land Development Regulation Act unequivocally articulates the broad powers vested in local governments in order to implement State goals and policies and enhance the quality of life at the local level. Section 163.3161(c), Florida Statutes (1989), provides that:

> [i]t is the intent of this act that its adoption is necessary so that local governments can preserve and enhance present advantages; encourage the most appropriate use of land, water, and resources, consistent with the public interest; overcome present handicaps; and deal effectively with future problems that may result from the use and development of land within their jurisdictions. Through the process of comprehensive planning, it is intended that units of local government can preserve, promote, protect, and improve the public health, safety, comfort, good order, appearance, convenience, law enforcement and fire prevention, and general welfare; prevent the overcrowding of land and avoid undue concentration of population; facilitate the adequate and efficient provision of transportation; water, sewerage, schools, parks, recreational facilities, housing, and other requirements and services; and conserve, develop, utilize, and protect natural resources within their jurisdictions.

The County's statutory authority under Section 163.3161, Florida Statutes (1989), is extremely broad, preemptive and all encompassing with regard to land use decisions and policies. Specific provisions of the Seminole County Comprehensive Plan are set forth below. The County cited its comprehensive plan in a whereas clause in the preamble of the Lake Mary Boulevard Gateway Corridor Ordinance enacted by the County. (Pl. Exh. 1, R. 601). Two District Courts of Appeal have held that strict scrutiny

applies where an action is alleged to be inconsistent with the provisions of a local government comprehensive plan. Machado v. Musgrove, 519 So.2d 632 (Fla. 3rd DCA 1987); Southwest Ranches Homeowners Association, Inc. v. Broward County, 502 So.2d 931 (Fla. 4th DCA 1987).

Additionally, Section 380.021, Florida Statutes (1989), provides, as to developments of state and regional impacts, that:

> **380.021 Purpose.** It is the legislative intent that, in order to protect the natural resources and environment of this state as provided in s. 7, Art. II of the State Constitution, insure a water management system that will reverse the deterioration of water quality and provide optimum utilization of our limited water resources, facilitate orderly and well-planned development, and protect the health, welfare, safety, and quality of life of the residents of this state, it is necessary adequately to plan for and guide growth and development within this state. In order to accomplish these purposes, it is necessary that the state establish land and water management policies to guide and coordinate local decisions relating to growth and development; that such state land and water management policies should, to the maximum possible extent, be implemented by local governments through existing processes for the guidance of growth and development; and that all the existing rights of private property be preserved in accord with the constitutions of this state and of the United States.

Assuming, arguendo, that aesthetics is the sole goal and purpose of the County's actions, it is clear that the County has the right and power to base zoning and other decisions on aesthetic concerns and desired community enhancements. Stone v. Maitland, 446 F.2d 83 (5th Cir. 1971); City of Lake Wales v. Lamar Advertising Association of Lakeland, Florida, 414 So.2d 1030 (Fla. 1982); Campbell v. Monroe County, 426 So.2d 1158 (Fla. 3rd DCA 1983). The general concept of land use planning and regulation is to enhance the quality of life of the residents of a community through various

land use and other planning concepts and approaches. Glisson v. Alachua County, 558 So.2d 1034 (Fla. 1st DCA 1990) (implementation of a special area protection plan for the Cross Creek area surrounding the Marjorie Kinnan Rawlings home and sustained under Florida's comprehensive planning statutes).

The County has long been a leader in comprehensive planning in the State of Florida having enacted its first comprehensive plan in 1977. (See Introduction in Co. Exh. 4, R. 2358-2441 which is the Seminole County Comprehensive Plan). Several provisions of the Seminole County Comprehensive Plan enacted into law by the Board of County Commissioners of Seminole County specifically support the actions of County in this matter. For example, a policy in the County's Recreation and Open Space Element of its Comprehensive Plan reads as follows:

OBJECTIVE

5. Preserve the visual quality of scenic roadways in the County

   Measure: Lineal miles of designated and protected roadways.

POLICIES

5.a. Designate specific sections of heavily wooded roadways as scenic roadways based upon:

- Amount of existing vegetation cover and development along the roadway;
- Number of curbcuts, traffic signals and other obstructions to through traffic movement; and
- Future land use designations along the roadway.

5.b. Develop standards for future development along scenic roadways including:

- Building setbacks and heights;

- Signage, lighting and outdoor advertising;

- Curbcuts and utilities in the right-of-way;

- Fences and walls and other structures within the setback; and

- Supplemental landscaping.

Comprehensive Plan provisions in the County's Traffic Circulation Element likewise support the County's actions in this matter:

GOAL

1. Provide a coordinated, comprehensive and cost-effective transportation system which operates safely and efficiently.

OBJECTIVES

1. Provide transportation facilities which will conveniently and safely collect and distribute traffic.

   Measure: Number of high accident intersections improved.

   Improvements in level of service in high congestion areas.

. . .

2.c. Encourage landscaped buffers between highway frontage and non-residential development in order to enhance community aesthetics and maintain neighborhood compatibility.

Additionally, the Future Land Use Element of the County's Comprehensive Plan sets forth numerous goals and policies which support the County's actions in this matter. For example, consider the following provisions:

. . .

2. To encourage development that builds upon existing development in a contiguous fashion; uses existing capital facilities to the maximum extent possible; and maximizes compatibility with existing uses.

Measure: - Performance of guidelines and regulations for maintaining neighborhood viability and community aesthetics. (From overall land use policies).

. . .

2g. Maintain the viability of established neighborhoods by developing guidelines for:

- vehicular and pedestrian access;
- roadway buffers;
- landscaping;
- fences and walls;
- the maintenance and use of common open space areas through homeowners associations.

. . .

2i. Require additional setbacks and buffers for residential development adjacent to future major collector and arterial roadways to minimize the impacts resulting from future roadway improvements. (From residential land use policies).

2r. Require a landscaped buffer between all commercial areas and highway frontage in conjunction with sign controls in order to enhance community aesthetics, maintain neighborhood viability, and shade parking areas. (From non-residential policies).

It is abundantly clear that the County has taken timely, prudent and progressive action in adopting salient and beneficial comprehensive plan provisions for the benefit of the citizens of Seminole County. FPC argues that its corporate fiscal desires should be more highly respected than the legal rights of local citizens and the legal obligation of local government's to plan their communities and to use public right-of-way as deemed to be in the best interest of the public by those in charge of the public roads. In S. A. Healy Co. v. Town of Highland Beach, 355 So.2d

813, 815 (Fla. 4th DCA 1978), the broad powers of local governments to regulate the use of land within their jurisdictional limits. See, also, Arizona Public Service Company v. Town of Paradise Valley, 610 P.2d 449 (Ariz. 1980). The County has attempted to do just that in terms of Lake Mary Boulevard. FPC asks this Court to allow it and other utility companies to preempt land regulation and the police powers of local governments and become a law unto themselves. The Court should not give cognizance to this grab for preeminence.

Point Three

The So-Called Anti-Preference Statute Is Inapplicable To The Factual Context Of This Case. The Anti-Preference Provisions Do Not Operate To Deny Local Governments Of A Range Of Uniqueness And Diversity Or Allow FPC To Only Be Subject To The Least Progressive Of Land Use Controls.

Florida has 67 political subdivisions called counties and about 360 municipal corporations called cities. FPC conducts its operations and activities in a large number of those local government jurisdictions. The amici serve a large number of the jurisdictions that FPC does not serve. Each local government jurisdiction has its own unique comprehensive land use plan and zoning code as well as other ordinances which implement and address the priorities, cares and concerns of the local populace through home rule forms of local government.

FPC asserts that Section 366.03, Florida Statutes (1989), provides that FPC may ignore the distinctive qualities, goals, policies and concerns of the diverse local governments throughout

the State of Florida. Clearly, Section 366.03, Florida Statutes (1989), prohibits FPC from giving "undue or unreasonable preference or advantages" to various customer groups. But, FPC is not exempt from local regulatory or zoning codes or requirements which, of course, markedly differ from jurisdiction to jurisdiction. The case law relating to Section 366.03, Florida Statutes (1989), appears to center around charges made to customers. See, Corporation De Gestion Ste-Foy, Inc. v. Florida Power and Light Co., 385 So.2d 124 (Fla. 3rd DCA 1980); Clay Utility Co. v. City of Jacksonville, 227 So.2d 516 (Fla. 1st DCA 1969). The so-called anti-preference statute does not operate to exempt FPC from a particular local government's codal or regulatory requirements although those requirements may be more demanding than requirements which other (or indeed most) local governments impose. If one local government's zoning code requires a brick wall around FPC's office building and another local government's zoning code requires a board fence around FPC's office building; does FPC violate the anti-preference statute by complying with the more expensive zoning code? Of course not! Likewise, FPC does not violate the anti-preference statute by complying with a local government's right-of-way permitting/zoning conditions relating to the placement of FPC's utility facilities within publicly owned real property.

As outlined above, the County has virtually all encompassing powers relating to land use and zoning decisions. The Arizona Supreme Court determined that a legislative grant to local government to regulate, pursuant to zoning powers, the location,

height, bulk, number of stories and size of buildings also granted unto these local governments the power to require utility poles to be placed underground. Arizona Public Service Company v. Town of Paradise Valley, 610 P.2d 449 (Ariz. 1980). Clearly, the County is operating well within its home rule powers in ordering FPC to underground its utility facilities if FPC desires to continue to use public property owned by the County.

Point Four

FPC Does Not Have The Right To Appropriate County Owned Property And Not Compensate The Public For The Taking Of Public Rights In Real Property.

FPC argues that Section 361.01, Florida Statutes (1989), provides for an unconditional and unqualified use of the County owned road right-of-way by FPC without compensation being paid to the public. Section 361.01, Florida Statutes (1989), simply does not provide for such unbridled use of public property purchased with public tax dollars by utility companies.

Section 361.01, Florida Statutes (1989), (which is entitled "Eminent Domain" and thereby clearly assumes that compensation is due for appropriations of property) provides that FPC may exercise its condemnation powers to appropriate public or private "lands". The statute does not grant unto FPC the right to appropriate roads, rights-of-way or transportation facilities. In its broadest reading, Section 361.01, Florida Statutes (1989), may authorize FPC to use, for particular purposes, timber, stone, earth or similar material from public property in a non-confiscatory manner without paying compensation. To read Section 361.01, Florida Statutes

(1989), as FPC suggests would make the FPC a "super-sovereign" entity with rights superior to those of the sovereign. The provisions of Chapters 73 and 74 of the Florida Statutes (1989), relating to eminent domain actually are more onerous upon utilities who, for example, must deposit twice the good faith estimate of value when obtaining a "quick take" under Chapter 74. See, § 74.051(2), Fla. Stat. (1989).

FPC's lack of respect for public property rights is indicated in its argument before the trial court (Tr. 24, R. 24) in which FPC argued that the County would be required to pay for the costs of undergrounding FPC's utilities if, as a result of a road improvement project, there was no room in the County's right-of-way to relocate FPC's utilities anywhere except underground!

If the provisions of Chapter 361, Florida Statutes (1989), are read in pari materia with the provisions of Chapters 125 and 166, Florida Statutes (1989), the Florida Transportation Code and the provisions of the Local Government Comprehensive Planning and Land Development Regulation Act it is clear that FPC should not be ascribed with "super sovereign" powers.

Section 360.01, Florida Statutes (1989), does not grant unto FPC the right to ignore the concerns of local governments. The Lake Mary Boulevard right-of-way has been put to a public use that is prior in right to and superior to FPC's use as licensee. A utility company cannot merely consider its own convenience in placing or siting its utility facilities. In Florida Power Corporation v. Gulf Ridge Council, 385 So.2d 1155, 1157 (Fla. 2nd

DCA 1980) the Court rejected a utility company's attempt to acquire property and stated that:

> . . . appellant [FPC] abused its discretion in considering only the most direct and economical route and in failing to weigh other important factors, such as safety and the impact of the proposed project on the environment.

Also, in Seadade Industries, Inc. v. Florida Power & Light Company, 245 So.2d 209, 213-214 (Fla. 1971), this Court stated that:

> [w]e have consistently held that even though statutory requirements regarding condemnation and taking appear to have been satisfied, the action [by the utility] will be overthrown or prohibited if a gross abuse of discretion is apparent [citations omitted] or if it can be shown that because of the passage of time and changed conditions, the public interest will be impaired [citations omitted]. A utility does not have within the discretion accorded to it the right to act in violation of the public interest. Similarly, it does not have within the discretion accorded to it the right to act precipitously when the public interest has not been ascertained.

Again, the Lake Mary Boulevard right-of-way is in public use at the present time. The utility poles and facilities that are the subject of this action would be in the paved roadway area of the road after the Lake Mary Boulevard Road Improvement Project is completed. (Tr. 198, SR. 198). The County Engineer, Jerry McCollum, advised FPC that it must relocate its utilities underground if FPC desired to continue using the publicly owned Lake Mary Boulevard road right-of-way. (Pl. Exh. 21, R. 1627-1628, App. B). FPC was not required to use the Lake Mary Boulevard road right-of-way in the future, but it was given the option to do so if it complied with certain right-of-way utilization conditions. The County (in conjunction with the City) has made plans as to exactly how the Lake Mary Boulevard right-of-way will be used. Consider-

able amounts of tax dollars (both County and City) have been expended to implement public policy determinations made in furtherance of the public interest as to how the Lake Mary Boulevard road right-of-way will be utilized. FPC attempts to preempt the public policy decisions made by elected officials. Under the so-called "prior use" doctrine, the Fourth District Court of Appeal has said in Florida East Coast Railway Company v. Broward County, 421 So.2d 681, 683 (Fla. 4th DCA 1982) that:

> . . . property devoted to a public use cannot be taken and appropriated to another or different public use unless the authority to do so has been expressly given by the legislature or may be necessarily implied. Thus, the power of condemnation may not be exercised where the proposed use will destroy an existing public use in the absence of specific legislative authority [citation omitted]. However, when taking will not materially impair or interfere with or is not inconsistent with the existing use, and the proposed use is not detrimental to the public, then a court possesses authority to order a taking of the property.

FPC does not have specific legislative authority to appropriate public uses such as those currently used and planned for use for Lake Mary Boulevard. In any event, FPC cannot take actions which fly in the face of the public policy decisions made as to Lake Mary Boulevard and which would use the Lake Mary Boulevard road right-of-way in a manner that has been determined to be detrimental to the public. If FPC is authorized to use the Lake Mary Boulevard right-of-way in the manner that it desires, it would destroy the anticipated, planned and funded public uses of Lake Mary Boulevard.

FPC's rights, to the extent they exist, are secondary and subservient to those of the public.

Point Five

FPC Failed To Exhaust Available Administrative Remedies Below And Waived Its Right To Challenge The County's Actions.

The Board of County Commissioners of Seminole County made the decision to require FPC to install its utilities underground (if FPC desired to continue using the County's public right-of-way) in conjunction with the Lake Mary Boulevard road improvement project on March 13, 1990 at an advertised public hearing. (See Co. Exh. 1, R. 2245; Pl. Exh. 12, R. 1599-1611; Pl. Exh. 21, R. 1627-1628). The testimony, evidence and stipulations before the trial court clearly proved that FPC did not appear at the advertised public hearing or make any presentation in opposition to the decision of the Board of County Commissioners.

Likewise, FPC did not appeal the decision placing a condition upon the use of County's Lake Mary Boulevard road right-of-way. The County Engineer wrote FPC on March 16, 1990 and issued an order setting forth required conditions <u>if</u> continued use of Lake Mary Boulevard right-of-way was desired by FPC. The Land Development Code of Seminole County (Pl. Exh. 10, R. 822-1587) sets forth at Section 11.8 an appellate procedure which FPC did not pursue. That provision states that:

> **Sec. 11.8 Appeals.** Any party claiming to be aggrieved by a decision of the approving authorities may appeal to the Board of County Commissioners by filing a notice of appeal with the approving authority within thirty (30) days of the date of denial.

The law is clear as to the obligation of a party to exhaust all available administrative remedies prior to taking a dispute to the Courts:

> The exhaustion of administrative remedies before resort to the courts is a well established doctrine and requirement of administrative law, as is recognized in the Administrative Procedure Act. The rule, subject to certain limitations or exceptions, is that where an administrative remedy is provided by statute, relief must be sought by exhausting this remedy before the courts will act. The court will not entertain an action if the person bringing the action has administrative remedies which he has not exhausted, and this is true whether the application to the courts is for a writ of certiorari, mandamus, injunction or other relief. A party must exhaust his administrative remedies before resorting to the court for the review of administrative action, and courts will not review any quasi-judicial action of an administrative agency until all remedies available at the administrative level have been exhausted. 1 Fla. Jur. 2d, Administrative Law, Section 147 (1977).

A good example of the soundness of the exhaustion doctrine and the firmness with which the Courts abide thereto is demonstrated in this Court's decision in Key Haven Associated Enterprises, Inc., v. Board of Trustees of the Internal Improvement Trust Fund, 427 So.2d 153 (Fla. 1982). This Court, in Key Haven, went so far as to reconcile a party's ability to make a constitutional challenge to the actions of an administrative agency even in the context of the administrative hearing process.

This Court also stated the following rule in Florida Welding & Erection Service, Inc. v. American Mutual Insurance Company of Boston, 285 So.2d 386, 389-390 (Fla. 1973):

> [w]here a method of appeal from an administrative ruling has been provided, such method must be followed to the exclusion of any other system of review. Where an administrative remedy is provided by statute, relief must

be sought by exhausting this remedy before the courts will act.

See, also, the recent article "Exhaustion of Administrative Remedies in Florida" (The Florida Bar Journal (June 1989) PP. 73-76) for a good review of the soundness and efficacy of the exhaustion of administrative remedies doctrine.

FPC has not only waived its right to challenge the County's actions by failing to exhaust an administrative remedy that was available to it, but should also be estopped from challenging the March 13, 1990 actions of County insomuch as FPC failed to appear at the March 13, 1990 advertised public hearing of the Board of County Commissioners of Seminole County and did not express opposition at or make a record of that proceeding as to the County's decision. FPC's untimely attempt to revise its administrative remedies was flatly rejected by the County. (Pl. Exh. 20, R. 1626).

Point Six

The Provisions of Chapter 366, Florida Statutes, Do Not Preempt The Authority Of The County To Exercise Ownership Rights Over Publicly Owned Real Property, Do Not Preempt The County's Powers To Regulate, Manage And Control Its Road System And Do Not Preempt The County's Powers To Regulate Land Uses And Implement Growth Management Policies.

FPC broadly asserts that the provisions of Chapter 366, Florida Statutes (1989), preempt the powers of the County in this matter. FPC speaks of the provisions of Chapter 366, Florida Statutes (1989), as if Holy Writ delivered from on high. The Florida Public Service Commission, however, did not express any

similar degree of clarity as to the preemption issue. Indeed an exhibit relied upon heavily by FPC at the trial court and before this Court, (Pl. Exh. 8, R. 733-763) contains a July 1, 1990 letter from Mr. Michael M. Wilson, the Chairman of the Florida Public Service Commission, to the President of the Florida Senate and the Speaker of the Florida House of Representatives as well as the minority party leaders for each respective body in which letter Mr. Wilson requests, on behalf of the Florida Public Service Commission:

> . . . further policy direction from the Legislature in the following areas:
>
> 1. Determination of legislative intent as to preemption by this Commission of state or local code and zoning requirements and the resulting effect on costs to government or ratepayers.
>
> 2. Weight to be given to future or present societal benefits, i.e., those health, aesthetic, or public convenience considerations to which dollar amounts cannot be directly ascribed by this Commission.
>
> 3. Affirmation of, or objection to, current Commission policy which provides for direct costs being borne by cost causers rather than the full body of ratepayers.

The doctrine now expounded by FPC to the unwashed local masses of governments is clearly a doctrine which the regulatory agency with jurisdiction over FPC has expressed considerable doubt. Indeed it should. The actions of the County do not interfere with or conflict with the rate setting activities that are exclusively within the province of the Florida Public Service Commission. The Court can and should harmonize the provisions of Chapter 366,

Florida Statutes (1989), with the provisions of Chapter 125, Florida Statutes (1989), relating to the powers of the counties; with the provision of Chapter 166, Florida Statutes (1989), relating to the powers of cities (and charter counties); with the provisions of Chapter 163, Florida Statutes (1989), relating to growth management and local government land development regulation and comprehensive planning; and with Chapters 334 through 339, 341, 348, and 349 and parts of 332, 351 and 861, Florida Statutes (1989), which collectively constitute the "Florida Transportation Code." See, 49 Fla. Jur. 2d, Statutes, Section 180 (1984).

All statutory enactments must be given effect and be read in harmony in order to give each statute a field of operation while reconciling perceived conflicts without rendering any statute meaningless or repealed by implication. Palm Harbor Special Fire Control District v. Kelly, 516 So.2d 249 (Fla. 1987).

Once again, it is clear that in matters affecting land use decisions, local governments are provided broad and virtually exclusive powers. Section 366.11, Florida Statutes (1989), specifically provides as to the powers that FPC claims to be preemptive that:

> [n]othing herein (Chapter 366) shall restrict the police power of municipalities (this usage would clearly include counties - particularly charter counties) over their streets, highways, and public places or the power to maintain or require the maintenance thereof . . . .

Two recent decisions in which preemption arguments were raised against local governments are The City of Key West v. Marrone, 555

So.2d 439, (Fla. 3rd DCA 1990) and Sexton, Inc. v. City of Vero Beach, 555 So.2d 444 (Fla. 4th DCA 1990).

In the City of Key West decision, the Court concluded that the city's mobile vendor regulatory ordinance did not conflict (was not preempted) by the State laws relating to occupational licenses. In the City of Vero Beach decision, the Court determined that the city's charter provision which provided that no expenditure of tax dollars could be made upon beach restoration projects unless authorized to do so in a referendum election did not conflict with the provisions of Section 161.161, Florida Statutes (1989), which provides for the funding of beach restoration and renourishment projects. The Court said at 555 So.2d 446 that ". . . the [charter] amendment does not interfere or conflict with activities that are exclusively within the State's power."

Indeed, it should be noted that as to the siting of electrical transmission lines, the provisions of the Transmission Line Siting Act (§ 403.52 through § 403.536, Fla. Stat. (1989)), provide for extensive involvement by local governments in the transmission line siting process. For example, Section 403.529(3)(d), Florida Statutes (1989), provides that consistency with the local government comprehensive plan must be considered in determining whether or not to approve a transmission line application. Section 403.527(4)(a), Florida Statutes (1989), provides that local governments are parties in the proceeding relating to the siting of the transmission lines. And, as to transmission lines that are

exempt from the provisions of the Act, Section 403.524(3), Florida Statutes (1989), provides that:

> [t]he exemption of a transmission line under this act does not constitute an exemption for the transmission line from other applicable permitting processes under other provisions of law or local government ordinances.

FPC attempts to make much of "cost causing" in the course of its arguments regarding the claimed preemptive powers of the Florida Public Service Commission. In point of fact, however, the County has not caused any costs to be incurred by FPC for the undergrounding of utilities. FPC need not place its utilities underground if it determines not to use the County's right-of-way.

The Florida Statutes provide for State regulation of numerous fields and professions. State regulation of hypnotists, podiatrists, midwifes, etc., does not result in those professions being subject to local land use and zoning codes. Indeed, this Court's exclusive regulation of attorneys (which is at least comparable to the Public Service Commission's regulation of FPC) does not exempt attorneys from payment of local occupational license taxes or other local government regulations such as zoning matters.

In order to save space and this Court's time, the County adopts the City's arguments with regard to the preemption issue, in terms of the City's analysis of the out of state case used by FPC to support its preemption arguments and in terms of the City's analysis of Chapter 25-6, Florida Administrative Code, which concludes that several rules actually recognize the authority of local governments to require electrical utilities to be placed underground. The County would also point out that the Florida

Public Service Commission appears to be somewhat inconsistent with regard to the position taken in its brief and those taken in correspondence with the Legislature and by means of adopted rules.

It is abundantly clear that FPC would like this Court to grant unto it "super sovereign" rights and privileges. It is equally clear, however, that the FPC must comply with local government land use, zoning and right-of-way regulatory requirements.

Point Seven

Nothing The County Has Done Has Breached FPC's Franchise Agreement With The City. FPC Stipulated Before The Trial Court That The Agreement Had Not Been Breached. In Any Event, The Agreement Only Pertains To City Streets And Lake Mary Boulevard Is Not A City Street.

FPC claims in its Initial Brief that its franchise agreement with the City has been breached. FPC stipulated before the trial court, however, that the franchise agreement had not been breached and was not in default. (Tr. 58, SR. 58). The County does not have a franchise agreement with FPC. (Tr. 160-61, SR. 160-161). The franchise agreement (Pl. Exh. 4, R. 706-708) relates only to " . . . streets, . . . and other public places of Grantor (the City)."

Lake Mary Boulevard is not a city street. It is a county road. Thus, the franchise agreement is inapplicable to the County and its roads.

In order to save space and the Court's time, the County adopts by reference the City's argument with regard to franchise agreements incorporating statutory provisions and relating to the

general police powers of the diverse local government jurisdictions.

CONCLUSION

FPC owns no right, title or interest in the public property which is the subject of this appeal. FPC is a guest in public property purchased by the public utilizing public tax dollars. FPC is acting as an ungrateful and hostile guest. If FPC does not desire to utilize the public's right-of-way, it is not required to do so. The County did not require FPC to use its publicly owned right-of-way by means of installing underground or overground utility facilities. The use of the County's right-of-way is something FPC desires. FPC is now attempting to place itself in the position of a "super-sovereign". FPC has eminent domain powers and may condemn or acquire its own utility corridor in which case FPC need not deal with the lawful conditions placed upon the use of the public's right-of-way by the owner of that property. FPC is, however, obligated to adhere to the conditions of use placed upon that use by the public when FPC elects to continue using public property. FPC is subject to the statutes and ordinances relating to its use of publicly owned right-of-way and to the comprehensive plans and land development codes adopted by the citizens of Seminole County relating to quality of life and growth management issues in Seminole County.

FPC has no legal right to use the public's right-of-way (Lake Mary Boulevard). FPC's use of right-of-way is at will and is subservient to the County's use of the right-of-way in such manner

as it deems appropriate. The public owns the right-of-way not FPC and the County has broad and expansive legal authority to control the use of its roads.

The County's actions are not violative of the anti-preference statute or any other statute impacting the jurisdiction of the Florida Public Service Commission. The jurisdiction of the Florida Public Service Commission does not preempt the jurisdiction of the County over its roads or in the area of zoning, land use regulation or comprehensive planning.

FPC failed to exhaust its administrative remedies below. By failing to exhaust said remedies, FPC should not now be heard in this Court as a result of such waiver.

Lastly, FPC's franchise agreement with the City has not been breached by the County in any way. The agreement relates to city streets not county roads, in any event, FPC stipulated that the agreement had not been breached and was not in default.

For the above stated reasons this Court should affirm the decision of the trial court and reject FPC's attempt to obtain the free use of public property while imposing its will upon the public as to how the public's property will be used.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Appellee, Seminole County has been sent to the parties listed below, by U. S. Mail this 11th day of December, 1990.

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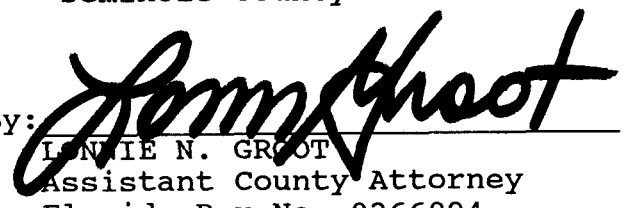
By: 
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