

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC14-1603

FLORIDA BANKERS ASSOCIATION,

Appellant,

vs.

L.T. Case No. 2014 CA 000548

STATE OF FLORIDA, et al.,

Appellees.

On appeal from the Circuit Court of the Second Judicial
Circuit in and for Leon County, Florida

**BRIEF OF *AMICUS CURIAE* FLORIDA MUNICIPAL ELECTRIC
ASSOCIATION, INC. IN SUPPORT OF APPELLEE, THE FLORIDA
DEVELOPMENT FINANCE CORPORATION**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES..... iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT..... 2

ARGUMENT 3

I. THE FLORIDA PACE ACT PROVIDES FOR THE FUNDING OF SPECIAL BENEFITS TO PROPERTY TO CONVEY COMMUNITY AND BROADER BENEFITS SUPPORTIVE OF THE STATE’S CLEARLY ARTICULATED POLICY GOALS 3

 A. Florida’s Public Power Communities are local governments the Legislature intended to make use of the Florida PACE Act 3

 B. The Florida PACE Act provides for the funding of improvements to property that are critical to meeting the State’s energy policy goals in a legally and fiscally sound manner, and which help overcome disincentives to such investments 5

 1. Florida PACE Act improvements are investments that provide a special benefit to property 5

 2. The Florida PACE Act is legally and fiscally sound public policy that achieves the State’s compelling interest in promoting and providing for energy conservation, energy efficiency, and renewable energy improvements, while overcoming the most prominent barriers to such investment..... 9

 3. The special benefit conferred on property by the Florida PACE Act creates a broader benefit for Florida’s communities and the State as a whole..... 12

CONCLUSION 14

CERTIFICATE OF SERVICE..... 15

CERTIFICATE OF COMPLIANCE 20

TABLE OF AUTHORITIES

CASES

Boschen v. City of Clearwater,
777 So. 2d 958 (Fla. 2001)..... 7

City of Boca Raton v. State,
595 So. 2d 25 (Fla. 1992)..... 8

City of Winter Springs v. State,
776 So. 2d 255 (Fla. 2001) 7

Fla. Dep’t of Rev. v. Fla. Mun. Power Agency,
789 So. 2d 320 (Fla. 2001)..... 7-8

Strand v. Escambia Cnty.,
992 So. 2d 150 (Fla. 2008)..... 7

STATUTES

§ 163.08, Fla. Stat. (2014) 1-2

§ 163.08(1), Fla. Stat. (2014)..... 7

§ 163.08(1)(b), Fla. Stat. (2014)..... 5-6, 7

§ 163.08(1)(c), Fla. Stat. (2014) 6, 7

§163.08(2)(a), Fla. Stat. (2014) 5

§ 163.08(15), Fla. Stat. (2014)..... 8

§ 163.08(16), Fla. Stat. (2014)..... 8

OTHER AUTHORITIES AND CITATIONS

Fla. H.R. Comm. on Energy & Utils. Pol’y, CS/HB 7197 (2010) Staff Analysis (Apr. 14, 2010)	2
<i>PACE (Property Assessed Clean Energy) Financing—A Policy to Help Property Owners Access Financing for Renewable Energy and Energy Efficiency Improvements—Frequently Asked Questions,</i> http://votesolar.org/wp-content/uploads/2009/06/PACE_FAQGeneral1. pdf (last visited Dec. 9, 2014)	11

INTEREST OF *AMICUS CURIAE*

Florida Municipal Electric Association, Inc., (“FMEA”) is the statewide trade association for 33 of Florida’s public power retail electric utilities.¹ Florida’s public power electric utilities are diverse in geography, size, revenue, number of customers, and other characteristics, but they are committed to providing highly reliable, low-cost electric service to their customers, while operating for the overall benefit of those communities they serve. Founded in 1942 in response to the WWII fuel shortages, FMEA has for more than 70 years been committed to supporting its public power members in their goals for reliable and low cost electric service to their communities.

In this pursuit, FMEA is the statewide advocate for Florida’s public power communities before the Legislature and various state agencies. FMEA’s member utilities serve approximately fifteen percent (15%) of Florida’s electric load, or approximately three million Floridians. Uniquely situated for the purposes of this action, FMEA’s public power members are both local governments and retail electric utilities. As such, FMEA has a significant interest in the preservation and enforcement of the provisions of the “Florida PACE Act,” § 163.08, Fla. Stat.

¹ General information concerning FMEA as well as specific data about its public power members can be found at its website: www.publicpower.com.

(2014), for the benefit of both its 33 public power members and the communities they serve.²

SUMMARY OF ARGUMENT

The Florida PACE Act is legally and fiscally sound public policy that provides for energy conservation, energy efficiency, and renewable energy investments. These PACE program investments provide a special benefit to the property that is the subject of the investments. FMEA's public power members are exactly the sort of local governments that the Legislature intended to make use of the Florida PACE Act to carry out the policy objectives of the State.

The Legislature has found and determined that there is a special benefit to property improved through PACE programs, there is a compelling state interest in local governments assisting with such improvements, and the entire Florida PACE Act regime is necessary and appropriate to achieve the State's compelling interests. These legislative findings must be presumed valid, as they have not been demonstrated to be patently erroneous.

² As noted in the staff analysis of the legislation that gave rise to the Florida PACE Act in 2010, at the time, the Property Assessed Clean Energy (PACE) program was a legislative model gaining in popularity "as an innovative way for local governments to encourage property owners to reduce energy consumption and increase energy efficiency." Fla. H.R. Comm. on Energy & Utils. Pol'y, CS/HB 7197 (2010) Staff Analysis 1 (Apr. 14, 2010). Appellee Florida Development Finance Corporation ("FDFC") also reasonably sketches the history of PACE programs, beginning in 2008 in California. (FDFC Answer Br. 1-2.)

The Florida PACE Act overcomes the two most significant barriers to electric consumers making conservation, efficiency, and renewable energy investments: high initial costs and the recoupment of the cost of the investment over time, despite changes in property ownership.

Finally, the special benefit conferred upon improved properties by the Florida PACE Act also provides benefit to communities and the State itself, which truly makes the benefit of PACE programs public in nature as well.

FMEA urges this Court to affirm the court below and affirm the Florida PACE Act.

ARGUMENT

I. THE FLORIDA PACE ACT PROVIDES FOR THE FUNDING OF SPECIAL BENEFITS TO PROPERTY TO CONVEY COMMUNITY AND BROADER BENEFITS SUPPORTIVE OF THE STATE'S CLEARLY ARTICULATED POLICY GOALS.

A. Florida's Public Power Communities are local governments the Legislature intended to make use of the Florida PACE Act.

Florida's 33 public power communities represented by FMEA traverse the State from the Panhandle to the Southernmost Point. FMEA's public power members are: the City of Alachua; the City of Bartow; the City of Blountstown; the City of Bushnell; the City of Chattahoochee; the City of Clewiston; the City of Fort Meade; the Fort Pierce Utilities Authority; the City of Gainesville (Gainesville Regional Utilities); the City of Green Cove Springs; the Town of Havana; the City

of Homestead; JEA (the City of Jacksonville); the City of Jacksonville Beach (Beaches Energy Services); the Utility Board of the City of Key West, Florida (Keys Energy Services); the Kissimmee Utility Authority; the City of Lake Worth, the City of Lakeland (Lakeland Electric); the City of Leesburg; the City of Moore Haven; the City of Mount Dora; the Utilities Commission, City of New Smyrna Beach; the City of Newberry; the City of Ocala; the Orlando Utilities Commission; the City of Quincy; the City of Starke; the City of Tallahassee; the City of Wauchula; the City of Williston; the City of Winter Park; and Reedy Creek Improvement District.

The illustration below demonstrates the expanse of FMEA's public power membership.



Florida's public power communities are exactly the type of local governments that the Legislature has intended to make use of the Florida PACE Act to provide funding for energy conservation and efficiency improvements, and renewable energy improvements. *See* § 163.08(2)(a), Fla. Stat. (2014). In government that is closest to the people it serves, municipalities served by Florida's public power communities are empowered by the Florida PACE Act to provide for improvements that confer special benefits to property, and convey direct benefits to the local community and more broadly.³ These benefits are directly in line with the findings and articulated policy of the Legislature.

B. The Florida PACE Act provides for the funding of improvements to property that are critical to meeting the State's energy policy goals in a legally and fiscally sound manner, and which help overcome disincentives to such investments.

1. Florida PACE Act improvements are investments that provide a special benefit to property.

The findings and determinations of the Legislature, establishing the State's energy policy goals as focused on energy conservation and efficiency and the increased availability of renewable energy resources, could not be more clear:

(b) The Legislature finds that all energy-consuming-improved properties that are not using energy conservation strategies contribute

³ This is not to say that FMEA objects to the appropriateness of FDFC's issuance of PACE bonds. However the importance of PACE bonds to public power communities illustrates the significant interest FMEA's members have in the outcome of this appeal.

to the burden affecting all improved property resulting from fossil fuel energy production. Improved property that has been retrofitted with energy-related qualifying improvements receives the special benefit of alleviating the property's burden from energy consumption. All improved properties not protected from wind damage by wind resistance qualifying improvements contribute to the burden affecting all improved property resulting from potential wind damage. Improved property that has been retrofitted with wind resistance qualifying improvements receives the special benefit of reducing the property's burden from potential wind damage. Further, the installation and operation of qualifying improvements not only benefit the affected properties for which the improvements are made, but also assist in fulfilling the goals of the state's energy and hurricane mitigation policies. In order to make qualifying improvements more affordable and assist property owners who wish to undertake such improvements, the Legislature finds that there is a compelling state interest in enabling property owners to voluntarily finance such improvements with local government assistance.

(c) The Legislature determines that the actions authorized under [section 163.08], including, but not limited to, the financing of qualifying improvements through the execution of financing agreements and the related imposition of voluntary assessments are reasonable and necessary to serve and achieve a compelling state interest and are necessary for the prosperity and welfare of the state and its property owners and inhabitants.

§ 163.08(1)(b) and (c), Fla. Stat. (2014).

In adopting the Florida PACE Act, the Legislature has determined that (i) PACE program improvements for energy conservation, energy efficiency, and renewable energy projects constitute a specific benefit to property that is the subject of those improvements; (ii) there is a compelling state interest in enabling property owners to finance such PACE improvements with the assistance of local governments; and (iii) the entire regime of actions authorized by the Florida PACE

Act are “reasonable and necessary to serve and achieve a compelling state interest” § 163.08(1)(c), Fla. Stat. (2014). This Court has clearly set out that “legislative declarations of public purpose are presumed valid and should be considered correct unless patently erroneous.” *Strand v. Escambia Cnty.*, 992 So. 2d 150, 156 (Fla. 2008) (quoting *Boschen v. City of Clearwater*, 777 So. 2d 958, 966 (Fla. 2001)). FMEA cannot find from the record of this action any challenge to these findings by the Appellant. (FDFC Answer Br. 32 (in this respect, FMEA relies on FDFC’s assertion that the Appellant has not challenged the Legislature’s findings)). Much less does it appear the Appellant has demonstrated the Legislature’s findings and determinations set forth in § 163.08(1) to be patently erroneous.⁴

Absent such a demonstration, which is clearly lacking in this action, the findings of the Legislature must be taken as valid and correct. *Cf. Fla. Dep’t of*

⁴ By analogy, this Court in *City of Winter Springs v. State*, 776 So. 2d 255 (Fla. 2001), held that a special assessment funding a bond issuance must meet a two-prong test: “(1) the property burdened by the assessment must derive a special benefit from the service provided by the assessment; and (2) the assessment for the services must be properly apportioned among the properties receiving the benefit.” *Id.* at 257. In this action, it is impossible to maintain the Florida PACE Act voluntary assessments do not meet both requirements. The Legislature’s findings and determination of a special benefit, set out in section 163.08(1)(b), are uncontroverted. Further, the voluntary assessments will be repayment installments on loans made for PACE program improvements, which by their nature must be related to the costs of the actual PACE program improvements and, thus, cannot be anything other than properly apportioned.

Rev. v. Fla. Mun. Power Agency, 789 So. 2d 320 (Fla. 2001) (holding that the courts, under fundamental principles of separation of powers, do not have the authority to depart from the wording of statutes where the Legislature has not done so); *City of Boca Raton v. State*, 595 So. 2d 25 (Fla. 1992) (holding that if reasonable persons differ on whether property subject to an assessment was benefited by a local improvement, the legislative findings of a benefit must be sustained).

Building upon this legislative foundation, the Florida PACE Act expressly states that it is additional and supplemental to county and municipal home rule authority and not a derogation or limitation upon such authority, recognizing the long-held right to use assessments to achieve public goals. § 163.08(16), Fla. Stat. (2014). To ensure successful implementation, the Florida PACE Act also specifically prevents utilities from limiting local governments that pursue PACE programs. *See* § 163.08(15), Fla. Stat. (2014). Further, the Florida PACE Act provides that no provision in any agreement between a local government and an energy, power, or utility provider shall limit or prohibit any local government from exercising its authority under the Act. *Id.* These provisions provide guarantees that FMEA's public power members can pursue PACE program improvements in addition to the other conservation, efficiency, or renewable initiatives that these retail utilities might also offer.

2. The Florida PACE Act is legally and fiscally sound public policy that achieves the State's compelling interest in promoting and providing for energy conservation, energy efficiency, and renewable energy improvements, while overcoming the most prominent barriers to such investment.

Florida's public power retail utilities serve customers in the communities who expect their product—electricity, which is an essential commodity for contemporary life—to be available to all customers who seek it. FMEA's members accomplish this by constructing power plants to generate electricity or buying wholesale power, and by building and maintaining electrical distribution and transmission systems to deliver electricity to every locale in their service territories.

FMEA's members must provide electricity as their customers use it. Despite different demands for electricity at day and night, in different seasons, and under different conditions, Florida's public power utilities must match their customers' demands through self-generation or purchased power.

The generation of electricity produces emissions which can impact human health. FMEA's members seek to minimize these emissions and meet or maintain emissions below all environmental requirements. They are keenly aware of the impact of electric generation on Florida's environment.

The best method of reducing emissions is to incentivize customers not to use electricity. Effectively, this idea is to help customers use less electricity, which

recognizes this truism: the cleanest kilowatt hour is the kilowatt hour not produced. Florida's public power utilities provide this incentive by offering customers financial rewards and rebates to install the most efficient air conditioners, heat pumps, light bulbs, and other energy-consuming products.

However, when electric utilities offer rebates, all customers pay for those rebates through their electric bills, and only a small fraction of customers receive the benefit of (i) the financial incentive, and (ii) the lower bills that result from less electrical consumption. This creates a tension among customer interests, as the general body of utility customers pays for a benefit going to just a few customers. More concerning is the fact that the customers who can afford to make investments in large-scale and expensive equipment improvements tend to be those who can well afford to make the investment on their own. Utility rebates therefore can result in a "reverse Robin Hood" situation, whereby poorer utility customers are actually giving financial incentives to wealthier customers to install efficient heat pumps, refrigerators, air conditioners, *etc.*, which will ultimately lower the bills of the wealthier customers.

PACE programs generally, and the Florida PACE Act particularly, address this conflict while serving the Legislature's goal of lowering energy consumption and reducing emissions from electric generation. Particularly, the Florida PACE Act allows electric consumers to overcome two hurdles that make it difficult for

them to make energy conservation and efficiency investments: (i) electric consumers often lack sufficient capital to replace an expensive device or piece of equipment (such as an air conditioner) with high efficiency equipment, even though it will save money over time, and (ii) the disincentive a customer faces who wants the ability to sell his or her property to next owner, who will benefit from the energy conservation and efficiency investment, but who did not have to bear the initial investment cost.⁵ Consumers frequently choose not to make such energy conservation and efficiency investments because of the possibility of not recovering those costs if they decide to sell the improved property. *Id.* When this occurs, Florida loses from an environmental standpoint—the State’s utilities must continue to produce the electricity to supply existing and inefficient equipment.

Extending the payment of an energy conservation or efficiency investment for the life of that investment, regardless of property ownership, is the key benefit of the Florida PACE Act and its key public policy justification. Energy conservation, energy efficiency, and renewable energy investments confer a special benefit on a subject property by giving that property a higher economic value and lower cost of ownership. Through loans available under the Florida PACE Act,

⁵ *PACE (Property Assessed Clean Energy) Financing—A Policy to Help Property Owners Access Financing for Renewable Energy and Energy Efficiency Improvements—Frequently Asked Questions*, http://votesolar.org/wp-content/uploads/2009/06/PACE_FAQGeneral1.pdf (last visited Dec. 9, 2014).

property owners can afford a new energy efficient device that will save them money. Second, the occupant of the household or facility with the new, energy efficient equipment will benefit from the financial savings, as well as repay the loan for the equipment, instead of the general body of utility customers.

From a public policy perspective, everyone wins. Consumers who invest in energy efficiency win with lower bills, consumers who do not invest are financially unharmed, utilities win by not having to invest in new or expanded electric generation plants, and the State of Florida wins with lower overall pollutant emissions.

3. The special benefit conferred on property by the Florida PACE Act creates a broader benefit for Florida's communities and the State as a whole.

The special benefit conferred on property by a PACE improvement is not only a benefit to that property, but it creates broader benefits. FMEA's public power members and all Florida's electric utilities can realize lower generation resource demand obligations and lower system costs from the widespread use of the Florida PACE Act and its qualifying improvements in energy conservation, energy efficiency, and renewable energy investments. Utility consumers can benefit from reduced consumption of electricity, correspondingly lower utility bills, and lower up-front improvement investment costs.

These benefits are not mere private benefits that inure to those who own property and take advantage of PACE programs, these benefits are by their nature public—as they cannot be subscribed only to an individual or a single property. The Appellant’s argument that the Florida PACE Act does not provide a special benefit that has a public nature (Appellant’s Br., 18-19) misses the mark on this point. Cleaner air and lower utility system demands and costs are not mere private benefits. Beyond the special benefit provided to each and every improved property, the Florida PACE Act provides these greater benefits in the public context as well.

Altogether, these benefits fulfill the policy vision of the Legislature set forth in the Florida PACE Act and provide broader benefits to the State of Florida that should be affirmed.

CONCLUSION

WHEREFORE, for the foregoing reasons, the Amicus Curiae, FMEA, respectfully prays that this Court affirm the validity of the bonds subject to this action and, indirectly, the validity of the Florida PACE Act.

Respectfully submitted,



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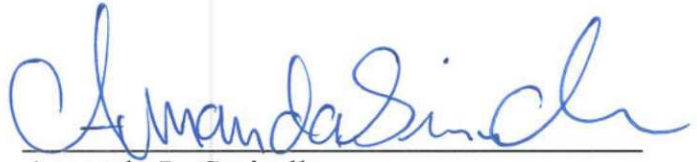
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the following Service List via the Florida Courts E-Filing Portal, as well as all Electronic Service Recipients listed on the Electronic Service List of the Florida Courts E-Filing Portal, on this 11th day of December, 2014:



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CERTIFICATE OF COMPLIANCE

I FURTHER CERTIFY that this motion is typed in 14-point Times New Roman font, and otherwise complies with the font requirements of Fla. R. App. P. 9.100(l) and 9.210(a)(2).



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