SUPREME COURT OF FLORIDA

CITY OF HOMESTEAD,	**)**	
Appellant,	**)**	
v.	**)**	**CASE NO. 9 1- 8 2 0**
JULIA L. JOHNSON, etc., et al.,	**)**	**Public Service Commission Case No. 9 7 0 0 2 2 - E U**
Appellees.	**)**	
_ _ _ _ _ _ _ _ _ _ _ _	**)**	

APPELLANT, CITY OF HOMESTEAD'S REPLY BRIEF

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March 19, 1999

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PRELIMINARY STATEMENT

In this Reply Brief, the Appellant, City of Homestead, will sometimes be referred to as the "City."

The Appellee, the Florida Public Service Commission, will be referred to as the "PSC."

The Florida Power & Light Company, will be referred to as "FPL."

ARGUMENT

I. THE EXHAUSTION OF ADMINISTRATIVE REMEDIES ISSUE

The City of Homestead, pursuant to this Court's March 26, 1998, Order, addressed the exhaustion of administrative remedies issue. This issue was fully and completely addressed and briefed in the City's April 9, 1998, Response By The City of Homestead To Issue Of Failure To Exhaust Administrative Remedies. Appellees cite no authority nor give any reason why further argument on this issue is necessary.

Procedurally, the case followed a fairly straightforward path at the PSC. FPL filed its petition in the nature of a declaratory judgment action and requested the PSC's interpretation of the term "City-owned facilities" in the Agreement between the City and FPL.

After the pleadings were at issue, the PSC, in essence, entered judgment on the pleadings in favor of FPL. The City's position is that the procedure followed was correct, however the decision itself, is incorrect and should be reversed. See Camino Gardens Ass'n, Inc. v. McKim, 612 So. 2d 636, (Fla. 4th DCA 1993); State Farm Mut. Auto. Ins. Co. v. Chapman, 415 So. 2d 47,(Fla. 5th DCA

1982), *petition for review denied* 426 So. 2d 29 (Fla. 1983); Trail Burger King, Inc. v. Burger King of Miami, Inc., 187 So. 2d 55 (Fla. 3rd DCA 1966). After the PSC Order became final, the City filed its Notice of Administrative Appeal.

II. THE CITY'S MOTION FOR JUDGMENT ON THE PLEADINGS SHOULD HAVE BEEN GRANTED AND IS BEFORE THIS COURT FOR REVIEW.

a. The denial of the City's Motion For Judgment On The Pleadings is before this Court for review.

FPL argues that the City should have filed a Notice of Appeal within thirty days of the denial of its Motion for Judgment on The Pleadings. That is not the way the appellate process works.

The denial of the City's Motion For Judgment On The Pleadings was not an appealable final order. See Henry v. Finta, 559 So. 2d 434 (Fla. 4th DCA 1990). This Court does not have jurisdiction to review non-final (interlocutory) orders. See Art V, § 3, Fla. Const.

An appeal of a final order "calls up for review all necessary interlocutory steps leading to that final order, whether they were separately appealable or not. Saul v. Basse, 399 So. 2d 130, 132 (Fla. 2d DCA 1981) (citing *Auto Owners Insurance Co. v. Hillsborough County Aviation Authority*, 153 So.2d 722, 724 (Fla. 1963)). In addition, Florida Rule of Appellate Procedure 9.110(h), specifically provides that the appellant "court may review

any ruling or matter occurring before filing of the notice" of appeal.

b. The City's Motion for Judgment on The Pleadings should have been granted because the buildings and other permanent improvements are "City-owned facilities."

Appellees cite no authority contrary to long established Florida law that the "buildings and other fixtures actually or constructively annexed to the freehold become a part of it." Burbridge v. Therrell, 148 So. 204, 206 (Fla. 1933). "Improvements such as a dwelling become a part of the freehold." Yowell v. Rogers, 175 So.772, 773 (Fla. 1937). See also Crawford v. Gulf Cities Gas Corp., 387 So. 2d 993 (Fla. 2d DCA 1980) (holding that 10,000 square foot masonry building constructed on a solid concrete slab is part of the fee); Illinois Grain Corp. v. Schleman, 114 So. 2d 307 (Fla. 2d DCA 1959) (holding that large grain elevator is part of the real property, i.e., the realty).

Since it is undisputed the City of Homestead owns the real property and since the buildings and other permanent improvements, as they were constructed became

part of the real property, they are owned by the City of Homestead and are "City-owned facilities." Therefore, the City's Motion for Judgment On The Pleadings should have been granted.

III. THE ATTORNEY FEE ISSUE

Appellees cite no authority for the proposition that section 120.69, Fla. Stat.(1997), and specifically section 120.69(7),Fla. Stat. authorizes the PSC to award attorney fees. This proceeding before the PSC was a territorial dispute involving differing interpretations of a contract. It was not a section 120.69, Fla.Stat. proceeding. As stated by the PSC in its April 28, 1997, Order on City of Homestead's Motions, "the purpose of this proceeding is to resolve a territorial dispute between two utilities." (ROA, page 83.). Had it been a section 120.69, Fla.Stat. proceeding, it would not have been before the PSC, it would have been in Circuit Court.

In addition, section 120.69(1)(b)(1). Fla. Stat. requires FPL to have noticed the Attorney General of the City's alleged violation sixty (60) days prior to FPL filing a petition for enforcement in Circuit Court. Perhaps, FPL can advise this Court when it complied with this statutory requirement if FPL seriously contends this is a §120.69, Fla.Stat. proceeding.

Furthermore, the PSC's argument on this issue is

misleading at best. The PSC should know this is not a section 120.69, Fla.Stat. proceeding and should, as a State agency, be candid with this Court. The cases cited by the PSC for the proposition that section 120.69(7), Fla. Stat., authorizes the PSC to award attorney fees lend no credence to the PSC's argument.

For example, in Hitchcock & Driver Enterprises, Inc. v. Department of Labor, 652 So. 2d 970 (Fla. 1st DCA 1995), at issue was whether the appellant was entitled to attorney fees and costs pursuant to Section 57.111, Fla. Stat.(1993). This section is the "Florida Equal Access to Justice Act." It authorizes, an award of attorney fees to "the prevailing small business party" against a state agency under certain conditions and in certain actions initiated by the state agency. Neither the statutory section nor this case applies to this pleading. Furthermore, in State ex. rel. Pettengill v. Copelan, 466 So. 2d 1133 (Fla. 1st DCA 1985), the appellants, after a section 120.57 hearing and the issuance of a final order, filed an action in Circuit Court to enforce the final order. Here the PSC, not a Court, is erroneouslly

attempting to award attorney fees.

Even more unrelated is the representation that a prior PSC Order, St. Johns North Utility Corp., 89 FPSC 10.342 (January 27, 1989), authorizes the PSC to award attorney fees under section 120.69(7) Fla. Stat.[1] The attorney fee issue in that PSC Order was whether attorney fees should be awarded under subsection 120.59(6) Fla. Stat.(1987)[2] which provided that in a section 120.57(1) proceeding, the prevailing party was entitled to reasonable attorney fees "only where the nonprevailing adverse party has been determined by the hearing officer to have participated in the proceeding for an improper purpose." "Improper purpose" was further defined in section 120.59 (b)(e)(1) Fla. Stat. to mean the "participation in a proceeding pursuant to s. 120.57(1) primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of licensing or securing the approval of an activity." Thus, that PSC Order does not apply to this

[1] Even if that were the holding, it would be wrong.

[2] Now §120.595 (1)(b), Fla. Stat. by virtue of Chapter 96-159, §25, Laws of Florida.

situation and, the PSC has no statutory authority to award attorney fees in this or any other proceeding by virtue of §120.69(7), Fla. Stat.

CONCLUSION

Because the buildings and other permanent improvements are "City-owned facilities," the City of Homestead's Motion for Judgment On The Pleadings should have been granted.

There is no authority for the PSC to award attorney fees to FPL or the City of Homestead in this proceeding.

RESPECTFULLY SUBMITTED this 19TH day of March, 1999.

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CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the City of Homestead's Reply Brief were furnished to:

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by United States Mail on this 19th day of March, 1999.

I also HEREBY CERTIFY the Reply Brief of Appellant, City of Homestead is in Courier New (Font 12), 10 characters per inch.
The original Reply Brief filed with the Court is accompanied by a diskette which contains in WordPerfect 8.0 the Reply Brief of Appellant, City of Homestead. The diskette has been scanned for viruses.

_____
L. Lee Williams, Jr.

llw/23-2/replybrief