



CITY OF PORT ST. LUCIE
OFFICE OF THE CITY ATTORNEY

MEMORANDUM

TO: CLYDE CUFFY, PUBLIC WORKS

THRU: JAMES D. STOKES, CITY ATTORNEY

FROM: FRANK X. MOEHRLE JR., SENIOR DEPUTY CITY ATTORNEY

DATE: March 7, 2023

RE: FPL RIGHT-OF-WAY CONSENT AGREEMENT – INTAKE 9006 –
EXTENSION OF TOM MACKIE BLVD.

FPL owns right-of-way at the extension of Tom Mackie Blvd. The City requires use of this property for stormwater management. FPL is permitting the City, via a Right-of-Way Consent Agreement, to place infrastructure on its property (the “Consent Agreement”). FPL is the current holder of right-of-wayⁱ and FPL consents to City using its real property located within the Easements solely for the purpose of the City which is requesting to which is, constructing a culvert purposed to discharge stormwater from the proposed lake to the outfall. The City Attorney’s Office would like to highlight certain provisions which can expose the City to significant monetary liability:

- A. A provision requiring the City to reimburse FPL for all costs and expenses if, because of the City’s use of the land, FPL decides it becomes necessary to relocate, rearrange or change any of its facilities, in FPL’s sole discretion.
- B. A provision requiring the City to indemnify FPL Entities, subject to monetary limits, for FPL’s negligence, and not subject to monetary limits for contamination of the involved property.
- C. A provision which excuses FPL of any responsibility for damage or loss to the City because of FPL’s use of the lands.
- D. A provision requiring the City to obtain insurance limits that are substantially more than the City’s requires for Employer’s Liability.

A. Relocation/Rearrangement/Modification:

The Consent Agreement contains two provisions regarding relocation, rearrangement, and modification to City facilities and to FPL facilities. The first provision (paragraph 5 in the Consent Agreement) relates to the City’s facilities and requires FPL and the City to coordinate any activities that may require the City to relocate, alter or remove City facilities which interfere with or prevent FPL from properly and safely constructing, improving, and maintaining its facilities. Within a reasonable time after receiving notice from FPL, the City agrees to relocate, alter or remove its facilities at the City’s sole cost and expense.

The cost associated with the possibility of having to relocate, alter or remove City facilities cannot be determined at this time since it would depend on exactly what would be needed to alleviate the interference that the City facilities are causing to FPL facilities.

The second provision (paragraph 14 of the Consent Agreement) relates to FPL's facilities and requires the City to reimburse FPL for all costs and expenses for any damage to FPL facilities resulting from the City's use of the lands and that, if in the opinion of FPL, it is necessary for FPL to relocate, rearrange, or change any of its facilities, to promptly reimburse FPL for all costs and expenses involved.

The costs associated with the possibility of having to reimburse FPL if FPL determines it is necessary to relocate, rearrange, or change any of its facilities cannot be determined since it would depend on several factors such as, what facilities are affected, how are the facilities affected and the action required by FPL to correct the issue. The cost has the potential to be substantial as it may involve removal and relocation of major substation components. Further, the provision may apply to any of FPL facilities that are affected by the City's use of the lands, including off-site facilities.

B. Assumption of Risk:

The Consent Agreement (paragraph 13) requires the City to use the lands at its sole risk and expense. The Consent Agreement also provides that FPL is relieved of any responsibility for damage or loss to the City or the City's agents, employees, or contractors, resulting from FPL's use of the lands for its purposes.

This provision essentially excuses FPL from liability for damage or loss resulting from FPL's use of the lands. For example, if FPL causes damage to the City's stormwater infrastructure because of anything it does on the property, such as construction, the City will have no recourse against FPL.

C. Indemnification:

The Consent Agreement requires the City to indemnify FPL Entities from all liability and loss, including attorney's fees, which may be sustained by FPL Entities to any person, natural or artificial, by reason of the death of or injury to any person or damage to any property, arising out of or in connection with the Consent Agreement, unless caused by FPL's gross negligence.

The indemnification provision is limited on the amount the City must pay out per claim or judgment to \$200,000.00, or when totaled with all other claims or judgments arising out of the same incident, to \$300,000.00. While the indemnification provision is limited on the amounts that the City may have to pay per claim and per incident, the number of claims or incidents is indeterminate, and the City will be responsible for indemnifying claims/incidents in perpetuity, unless the Consent Agreement is terminated. It is also important to note that under the Consent Agreement, the City would be responsible for paying claims, subject to the monetary limits, for **FPL's negligence** as well as its own.

The Consent Agreement also requires the City to indemnify FPL for all losses, damage or injuries resulting from contamination of the land subject to the Consent Agreement that constitutes a violation of the Comprehensive Environmental Response Compensation and Liability Act.

D. Insurance:

The insurance limit that FPL is requiring City contractors and subcontractors to carry is more than what the City currently requires of its contractors and subcontractors. FPL is requiring an Employers' Liability Insurance limit of \$1,000,000.00, and the City currently requires \$100,000.00 each accident, disease, employee, \$500,000.00 each policy. Risk Management has advised that the City would have to issue separate bids to obtain contracts/contractors to perform work at the site affected by the Consent Agreement. The City may have a difficult time procuring contracts/contractors willing to carry the additional insurance that FPL is requiring.

ⁱ Official Record Book 97, at Page 505, in the Public Records of St. Lucie County, Florida (“Easement”).