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MEMORANDUM

TO: Board of County Commissioners

FROM: Andrew J. Meyers, County Attorney 

DATE: October 26, 2017

RE: **Regulations on Trees Planted and Maintained Near Power Lines**
CAO Files: 17-026 & 17-114

The Board directed this Office to research the available mechanisms through which the County may encourage or require property owners to (1) refrain from planting trees or other foliage in locations on their property that may foreseeably cause foliage-related power outages in storm events, (2) maintain trees and other foliage on their property so as to minimize or avoid such foliage-related power outages, and (3) allow FP&L to enter their properties, as necessary, to cut trees and other foliage to reduce the risk of such power outages. This memorandum responds to each question by first discussing the regulations currently in place and next addressing legal options available to the County.

Analysis

I. Prospective Prohibition on Planting of Trees Near Power Lines

Currently, the County regulates where trees are planted in two ways. First, those in the unincorporated areas seeking a site plan review as part of land development must comply with guidelines regulating the distance trees must be from power lines.¹ Second, a property owner who must replace a removed tree must place the new tree a safe distance from power lines.² Apart from these two circumstances, however, the County does not currently prohibit a property owner from planting trees, even large trees, near power lines. Based on our review of regulatory practices of our neighboring counties, larger municipalities within those counties, and Broward County municipalities, it appears that almost all of these local governments regulate tree planting similarly to the County.

¹ Broward County Code of Ordinances Section 39-84(c).

² Broward County Code of Ordinances Section 27-408(i)(4)b.

We believe the County has the regulatory power to enact an ordinance prohibiting certain trees from being planted near power lines within the unincorporated areas of the County. An example of this type of ordinance was enacted by the City of Parkland, which requires newly planted trees to be planted a safe distance from electrical lines.³

II. Required Maintenance of Trees Near Power Lines

Currently, no County code provision requires residents to maintain trees and foliage near power lines, and almost no other counties and municipalities within South Florida require the pruning of trees near power lines. As discussed to a greater extent in section III of this memorandum, FP&L has historically been responsible for maintaining trees and foliage within its easement areas. Therefore, this section focuses on possible mechanisms to encourage or require property owners to assist with maintaining trees near power lines.

The County could enact an ordinance requiring property owners to prune, or even remove, trees near power lines within the unincorporated areas of the County. To again use the City of Parkland as an example, the City has an ordinance stating that any existing tree planted too close to a power line must be pruned if required pruning would remove no more than twenty percent (20%) of the tree's canopy. Trees that cannot be pruned may be removed, and permitting fees are waived for those seeking to remove offending trees.⁴ Other municipalities have similar tree removal ordinances. For example, the City of Plantation requires the removal of any damaged tree that could interfere with utilities,⁵ and the City of Dania Beach requires the removal of trees that have caused or could cause damage to a utility.⁶

Requiring property owners to prune or remove trees on their property could create constitutional concerns. If the County were to require the removal of trees near power lines, the action could arguably qualify as a taking requiring compensation to the property owner. Also, a homeowners' or neighborhood association might have covenants in place limiting a property owner's ability to remove or maintain trees. Under the United States and Florida Constitutions, a law may not impair a contract unless the government can demonstrate a significant public purpose that outweighs the significance of the impairment.⁷ To avoid constitutional challenge, it is recommended that any ordinance requiring pruning or removal be enacted with a savings clause indicating that it is effective to the full extent it does not abrogate existing agreements.

³ City of Parkland Code Section 95-1550A.

⁴ City of Parkland Code Section 95-1550B.

⁵ City of Plantation Code Section 13-48(a).

⁶ City of Dania Beach Code Section 820-10.

⁷ See *Searcy, Denney, Scarola, Barnhart & Shipley v. State*, 209 So. 3d 1181, 1190-94 (Fla. 2017).

The County could also attempt to incentivize property owners to proactively maintain trees near power lines. For example, the County could waive permitting fees or subsidize property owners that wish to prune, remove, or transplant trees near power lines. The County could also amend sections of Chapter 27 of the Broward County Code of Ordinances to decrease restrictions on the removal or transplanting of historical and specimen trees when those trees are near power lines. Additionally, although the County already exempts shaping of trees to protect infrastructure from the general prohibition on tree abuse,⁸ it could further amend that chapter to promote the removal of dangerous trees by making proximity to a power line an express justification for the removal of a tree.⁹

III. FP&L Access to Private Property to Maintain Trees

Legally, FP&L has a right-of-way easement across those areas in which it runs its power lines. As an easement holder, it has the ability to maintain the easement and may enter onto private property to do so without the permission of the property owner.¹⁰ FP&L's standard form easement agreement grants it broad authority to keep its easement area free of trees and other foliage as well as the authority to cut dead, leaning, or damaged trees outside of its easement area where those trees may interfere with its power lines.¹¹ Additionally, to the extent a dangerous tree might be within an area not covered by FP&L's easement, as a public utility, FP&L has limited eminent domain powers and may destroy dangerous trees for the purpose of maintaining its power lines.¹² By state statute, the County may not impede FP&L from maintaining its power lines and exempts FP&L from tree removal licensing requirements.¹³

The County could make it an offense to obstruct an FP&L employee or contractor in its trimming or removal of trees within the unincorporated areas. The Town of Southwest Ranches, for example, has an ordinance that makes it unlawful for anyone to impede the ability of a utility company to enter private property to maintain its easement or to prevent a utility company from removing or pruning a hazardous tree.¹⁴ However, enforcing such an ordinance could potentially inject the County into what amounts to a private property dispute between FP&L (the easement holder) and a private property (fee) owner, and the obstruction of FP&L employees and contractors does not appear to be a pervasive problem.

⁸ Broward County Code of Ordinances Section 27-410(a)(3).

⁹ Broward County Code of Ordinances Section 27-408(c)(5).

¹⁰ Fla. Admin. Code. R. 25-6.037; *Collom v. Holton*, 449 So. 2d 1003, 1005 n.1 (Fla. 2d DCA 1984).

¹¹ Florida Power & Light Company, Index of Standard Forms (<https://www.fpl.com/rates/pdf/electric-tariff-section9.pdf>).

¹² Sections 74.011, 361.01, Fla. Stat.

¹³ Section 163.3209, Fla. Stat.

¹⁴ Town of Southwest Ranches Code Section 26-1.

IV. Enacting a Countywide Ordinance

This Office's response to the Board's three questions has been with regard to the County's powers within the unincorporated areas. Any ordinance regulating the matters discussed above could be enacted countywide, but municipalities would be empowered to "opt out" by passing a conflicting ordinance. If there is an interest in any such ordinance having countywide application, it is recommended that the ordinance provide that it will only be applicable within municipal boundaries if the applicable municipality and the County have entered into an agreement requiring the municipality to enforce the ordinance within its boundaries. For this reason, it might be more practical for any such County ordinance to apply only within unincorporated Broward County, and for municipalities to adopt similar ordinances to be applicable within their boundaries.

Conclusion

Historically, it has been the obligation of the electrical utility, here FP&L, to maintain power lines. Nevertheless, the County may require private property owners to assist with keeping trees and other foliage from damaging power lines. The County can also waive certain existing requirements, such as fees, where a property owner wishes to transplant or install a new tree at a safe location. Finally, the County could engage in efforts to make the public aware of the danger of planting certain trees near power lines and of the importance of regular maintenance near power lines.

We await the Board's further direction regarding this matter. To obtain municipal input and in an effort to maximize uniformity, we are prepared to discuss this matter with attorneys for Broward County municipalities or to provide legal support for the County Administrator as she discusses the matter with her municipal colleagues. In the interim, please feel free to contact Deputy County Attorney Maite Azcoitia or me with any questions or concerns.

AJM/MA/JKJ/gmb

c: Bertha Henry, County Administrator
Bob Melton, County Auditor
Maite Azcoitia, Deputy County Attorney
Joseph K. Jarone, Assistant County Attorney