The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Community Affairs

BILL:	SB 1048
INTRODUCER:	Senator Lee
SUBJECT:	Linear Facilities
DATE:	March 21, 2017
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Wiehle	Caldwell	CU	**Favorable**
2.	Cochran	Yeatman	CA	**Pre-meeting**

I. Summary:

SB 1048 amends the exemptions from the land-use-consistency provisions of the Power Plant Siting Act (PPSA) and Transmission Line Siting Act (TLSA) to provide that they apply to established rights-of-way and corridors, to rights-of-way and corridors yet to be established, and to creation of distribution and transmission corridors.

The bill establishes the standard to be used in authorizing variances in a site certification under the PPSA and the TLSA. It also provides that the PPSA and TLSA cannot affect in any way the Public Service Commission's (PSC) exclusive jurisdiction to require transmission lines to be located underground.

II. Present Situation:

The bill overturns a Third District Court of Appeal (the court) decision in a power plant siting case.[1] The bill addresses two issues: application of specific local laws in a siting proceeding and the authority of the siting board to order undergrounding, or burying, of a transmission line.

Application of Local Laws / "Development"

Statutes

The application for certification of a site for a power plant and associated facilities must include a statement on the consistency of the site, and any associated facilities[2] that constitute a

[1] *Miami-Dade County, et al, v. In Re: Florida Power & Light Co., etc., et al*, Opinion filed April 20, 2016, available at http://www.3dca.flcourts.org/opinions/3D14-1467.pdf. The Florida Supreme Court denied Florida Power and Light's petition for review, Friday, February 24, 2017, available at https://efactssc-public.flcourts.org/casedocuments/2016/2277/2016-2277_disposition_137996.pdf.

[2] "Associated facilities" means, for the purpose of certification, those onsite and offsite facilities which directly support the construction and operation of the electrical power plant such as electrical transmission lines, substations, and fuel unloading facilities; pipelines necessary for transporting fuel for the operation of the facility or other fuel transportation facilities; water

"development," with existing land use plans and zoning ordinances that were in effect on the date the application was filed and a full description of the consistency.[3] This information must include an identification of those associated facilities that the applicant believes are exempt from the requirements of land use plans and zoning ordinances under the Community Planning Act provisions of ch. 163 and s. 380.04(3), F.S. Each affected local government must file a determination of the consistency of the site and non-exempt associated facilities with existing land use plans and zoning ordinances in effect on the date the application was filed. Any substantially affected person may file a petition with the designated administrative law judge (ALJ) to dispute the local government's determination.[4] If a petition is filed, the ALJ must hold a land use hearing at which the sole issue for determination is whether the proposed site or non-exempt associated facility is consistent and in compliance with existing land use plans and zoning ordinances.[5] After the hearing, if the Siting board determines that the proposed site or non-exempt associated facility does not conform with existing land use plans and zoning ordinances, the board may authorize a variance or other necessary approval to the adopted land use plan and zoning ordinances required to render the site consistent with the local land use plans and zoning ordinances.[6]

Associated facilities that are exempt from the term "development" are not subject to the land use consistency and compliance requirements. The relevant definition of "development" is set out in s. 380.04, F.S., which expressly excludes the following activities from the term "development":

- Work by any utility and other persons engaged in the distribution or transmission of gas, electricity, or water, for the purpose of inspecting, repairing, renewing, or constructing on established rights-of-way any sewers, mains, pipes, cables, utility tunnels, power lines, towers, poles, tracks, or the like.
- The creation or termination of rights of access, riparian rights, easements, covenants concerning development of land, or other rights in land.[7]

Administrative Orders

Several administrative orders on this issue have held that siting of the transmission line is exempt from "development" and thus exempt from application of the land-use-consistency provisions. This interpretation turns on the meaning of "established."

One illustration of this interpretation is the following quote.

> First, Gulf Power will create a new right-of-way for the powerline. A right-of-way is a 'right of access,' an easement, or an "other right[] in land. Second, Gulf Power will construct the powerline on the newly established right-of-way. Gulf Power is a utility engaged in the distribution or transmission of electricity. The construction of the powerline in the established right-of-way falls within

or wastewater transport pipelines; construction, maintenance, and access roads; and railway lines necessary for transport of construction equipment or fuel for the operation of the facility. Section 403.503(7), F.S.

[3] Section 403.50665(1), F.S.

[4] Section 403.50665(2)(a), F.S.

[5] Section 403.508, F.S.

[6] Section 403.508(1)(f), F.S. To do this, the Siting Board must determine after notice and hearing and upon consideration of the recommended order on land use and zoning issues that it is in the public interest to authorize the use of the land for a site or associated facility.

[7] Section 380.04(3)(b) and (h), F.S.

> s, 380.04(3)(b). See, *Bd. Of County Commrs. of Monroe County v. Dept. of Community Affairs*, 560 So.2d 240 (Fla. 3d DCA 1990); *Friends of Mantanzas, Inc. v. Dept. of Environmental Protection*, 729 So.2d 437 (Fla. 5th DCA 1999), and *1000 Friends of Florida, Inc. v. St. Johns County*, 765 So.2d 216 (Fla. 5th DCA 2000), interpreting the similar exemption for road improvements within the right-of-way in s. 380.04(3)(a), *Fla. Stat*. (2004).
>
> Therefore, the proposed powerline is not 'development' as defined in section 380.04, *Fla. Stat.* (2003).[8]

This interpretation involves both exemptions: first an applicant establishes a right-of-way, which constitutes a right-of-access or easement and so is exempt under s. 380.04(3)(h), F.S.; and second, the applicant seeks approval to construct a power line within "the newly established right-of-way," which is exempt under s. 380.04(3)(b), F.S.

Another illustration relies only on the second basis for exemption.

> After certification of this project, TECO will acquire the necessary property interests in a ROW within the certified corridor for placement of the line. Construction of transmission lines on such established ROWs is excepted from the definition of 'development' in Section 163.3164(5), Florida Statutes. Accordingly, the provisions of the local comprehensive plans related to 'development' that have been adopted by the local governments crossed by the line are not applicable to this project.[9]

Miami-Dade County vs. In Re: Florida Power & Light

In this case, Florida Power & Light Company (FPL) filed an application under the PPSA to obtain a permit to construct and operate two new nuclear generating units and associated facilities at Turkey Point, including new transmission lines. They obtained a recommended order and a final order on certification, both approving FPL's West Preferred Corridor as a back-up western transmission corridor if adequate right-of-way could not be obtained in the primary corridor in a timely manner and at a reasonable cost. Neither order considered local regulations nor required FPL to underground its lines.

The final order was appealed and the court reversed and remanded the final order based on three errors, including an incorrect application of the "development" exemption based on an erroneous interpretation of the exemption for:

> Work by any utility and other persons engaged in the distribution or transmission of gas, electricity, or water, for the purpose of inspecting, repairing, renewing, or constructing on established rights-of-way any sewers, mains, pipes, cables, utility tunnels, power lines, towers, poles, tracks, or the like.[10]

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[8] *In re Petition for Declaratory Statement by Hughes*, 2004 Fla. ENV LEXIS 166, 4 ER FALR 113.
[9] *In Re: Tampa Electric Company Willow Oak-Wheeler-Davis Transmission Line Siting Application*, 2008 Fla. ENV LEXIS 115, 2008 ER FALR 175, at 50 (DOAH May 13, 2008), adopted in toto 2008 E.R. F.A.L.R. 175 (Siting Bd. Aug. 1, 2008). ROW is an acronym for right-of-way.
[10] *Miami-Dade County*, supra note 1, at 11.

The court found the following errors in the siting board's application of the exemption law:

- In the siting process, the siting board certifies a corridor, not a right-of-way, and the exemption cannot be applied to the entire corridor.[11]
- The record reflects that the corridor is made up of parcels within and outside established rights-of-way, so the board has no way of knowing whether construction will take place in a right-of-way or an easement.[12]
- The exemption is for work conducted on "established rights-of-way." "And as the City of Miami contends, were this Court to accept FPL's argument on this issue, that an established right-of-way is not the same as an existing right-of-way, this would make the word 'established' meaningless."[13]

Analysis of Decisions

The court appears to have based its decision solely on interpretation of the statutes at issue, without consideration of the previous administrative orders as precedent. The court's interpretation is supported by the plain English meaning of the words in the statute: establish means to institute, to make firm, to bring into existence, to put on a firm basis, to gain full recognition or acceptance, or to put beyond doubt.[14] The past tense usage means the act has been accomplished, that the right-of-way is in existence at the time of the siting proceedings. Unfortunately, the decision appears to conflict with the legislative intent for the PPSA and TLSA.

The stated intent for the siting acts is to establish a centralized, efficient procedure for approving a single license for power plant and transmission line sites, through application of both the state and local standards and recommendations of all involved agencies, while balancing the need for additional electricity against the need to minimize adverse effects on citizens and the environment, without undue conflict with the goals established by the applicable local comprehensive plan.[15]

However, if the statutes were interpreted and implemented as the court has held, it is doubtful a transmission line could ever be sited. The local land use laws classify property uses into multiple types of residential, commercial, and industrial property, with different permitted uses for each type. Each municipality and county is a different patchwork of these types of property, but application of the land use laws of each would likely restrict a transmission line to industrial use property. A transmission line cannot be constructed across multiple local governments using only the unconnected industrial property within each.

The previous administrative orders, on the other hand, appear to achieve the statutory intent, but appear to do so by a tortured interpretation of the word "established" within the context of "development."[16]

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[11] *Miami-Dade County*, supra note 1, at 12.
[12] *Miami-Dade County*, supra note 1, at 12.
[13] *Miami-Dade County*, supra note 1, at 13-14.
[14] *See*, e.g., https://www.merriam-webster.com/dictionary/establish and https://ahdictionary.com/word/search.html?q=establish
[15] Sections 403.502 and 403.521, F.S., respectively.
[16] *See In re: Petition for Declaratory Statement filed by Hughes and Knowles*, Case No. DCA-03-DEC-295 (April 9, 2004).

It appears that the s. 380.04, F.S., standard for "development," incorporated into the PPSA and TLSA by cross reference, is ambiguous in those contexts. The apparent intent of the bill is to clarify this ambiguity.

Authority of the Siting Board to Order Undergrounding of Transmission Lines

Statutes

The PPSA and TLSA authorize the siting board to include conditions in the certification.[17] Both also contain a limitation that the act does not affect in any way the ratemaking powers of the PSC under ch. 366, F.S.

Miami-Dade County vs. In Re: Florida Power & Light

In the *Miami-Dade* decision, the court also reversed and remanded based on a finding that the siting board erroneously thought it did not have the power to require FPL to install the lines underground at FPL's expense.

The court made the following finding.

> The general grant of power in the PPSA to "impose conditions" upon certification, other than those listed in the PPSA, gave the Siting Board the power to impose the condition of requiring that the power lines be installed underground, at FPL's expense. See s. 403.511(1), Fla. Stat.; s. 403.511(2)(b)(2). Undergrounding of the transmission lines is a condition upon certification encompassed by the Siting Board's ability to impose "site specific criteria, standards, or limitations" on FPL's project. As such, the Siting Board had the power to require it, contrary to the Siting Board's conclusion that it had no such power. Accordingly, reversal is required on this point.[18]

FPL had argued that the siting board did not have jurisdiction to order undergrounding based on a previous case on an issue unrelated to the siting act. The court distinguished that case on the basis that it contained nothing regarding whether undergrounding could be required as a condition of certification in a siting case.

> The Seminole holding was made in the context of rate-making with regard to the power vested in the Public Service Commission and not in the context of any of the Siting Board's powers. The Siting Board's power in no way infringes on the PSC's authority with regard to rate-making, and there is no conflict with the PSC's role. The Seminole case is simply inapplicable to the case before us.[19]

Analysis

Again, the court appears to have based its decision solely on interpretation of the siting statutes. Interpretation and implementation is more complex when ch. 366, F.S., and the facts of economic regulation and undergrounding of power lines are considered as well.

[17] Sections 403.511 and 403.531, F.S., respectively.
[18] *Miami-Dade County*, supra note 1, at 14-15.
[19] *Miami-Dade County*, supra note 1, at 18.

Undergrounding of transmission lines is more expensive than placing them on poles. The actual amount of the cost difference depends on the actual circumstances of the transmission line site. For the Turkey Point line, the estimate was that undergrounding would cost nine times more; $13.3-$18.5 million per mile compared to $1.5-$2.5 million. An estimated average is that the costs are around ten times more to underground a transmission line.[20]

Additionally, when an agency with regulatory authority over a regulated public utility orders that public utility to incur costs, the PSC *must* allow the utility to recover those costs. This affects the ratemaking power of the PSC under ch. 366, F.S., in at least two significant ways:

- It denies the PSC its oversight and ratemaking function of making the initial determination of whether the higher costs of undergrounding the transmission line are prudent and reasonable under the circumstances. This determination is an essential element of determining what utility costs are recoverable, which, in turn, is the first step in ratemaking.
- It denies the PSC the ability to make a determination of how undergrounding would affect grid reliability. Grid reliability is a part of ratemaking through the underlying regulatory compact, which includes customer service requirements.

III. Effect of Proposed Changes:

The bill amends ss. 380.04(b) and (h), F.S., which contain the exemptions from "development" discussed above. The bill provides that the exemption for work done on established rights-of-way applies to established rights-of-way and corridors and to rights-of way and corridors yet to be established. It also provides that the exemption for the creation of specified types of property rights applies to creation of distribution and transmission corridors.

The bill makes the same changes to s. 163.3221, F.S., which provides definitions for use in the Florida Local Government Development Agreement Act, which provides for agreements between local governments and developers to improve the growth management and public planning processes.

The bill also amends ss. 403.511 and 403.531, F.S., which relate to the effect of certification under the PPSA and the TLSA, respectively. First, the bill specifies that the standard for granting variances in the certification is to be the standards set forth in s. 403.201, F.S. Section 403.201, F.S., authorizes variances in the following conditions:

- There is no practicable means known or available for the adequate control of the pollution involved.
- Compliance with the particular requirement or requirements from which a variance is sought will necessitate the taking of measures which, because of their extent or cost, must be spread over a considerable period of time. A variance granted for this reason shall prescribe a timetable for the taking of the measures required.
- To relieve or prevent hardship of a kind other than those provided for above. Variances and renewals thereof granted under authority of this paragraph shall each be limited to a period of 24 months, except that variances granted pursuant to part II may extend for the life of the permit or certification.

[20] Email from David Childs; Hopping Green & Sams, on March 10, 2017.

The bill also provides that the PPSA and TLSA cannot affect in any way the PSC's exclusive jurisdiction to require transmission lines to be located underground.

The bill takes effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill will clarify the application of local land use laws to transmission line corridors in siting cases under the PPSA and TLSA. This will provide certainty to both the utilities and the local governments, and will reduce expenses of siting and legal proceedings.

The express prohibition against the siting board ordering undergrounding of transmission lines will save utility ratepayers additional costs. As the PSC is a party to PPSA proceedings and may be a party to TLSA proceedings, it is possible that some coordination of siting proceedings and PSC ratemaking could be accomplished to incorporate undergrounding as a condition of certification while still maintaining PSC ratemaking authority.

C. Government Sector Impact:

The bill will clarify the application of local land use laws to transmission line corridors in siting cases under the PPSA and TLSA. This will provide certainty to both the utilities and the local governments, and will reduce expenses of siting and legal proceedings.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 163.3221, 380.04, 403.511, and 403.531.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.