

IN THE SUPREME COURT OF FLORIDA

LEE COUNTY ELECTRIC
COOPERATIVE, INC.,

Petitioner,

Case No. SC14-1239

vs.

L.T. Case No. 2D10-3781

CITY OF CAPE CORAL,

Respondent.

ON REVIEW FROM THE DISTRICT COURT OF APPEAL,
SECOND DISTRICT OF FLORIDA

JURISDICTIONAL BRIEF OF PETITIONER

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INTRODUCTION

This case concerns the Second District's violation of the fundamental constitutional right of every citizen to be protected from a governmental taking without compensation. Florida law has long held that, when the government interferes with a party's right to an easement, the government must pay for the resulting loss incurred by the easement holder. Florida law is consistent with cases decided by the United States Supreme Court and other courts around the country.

Long ago, Petitioner, Lee County Electric Cooperative, Inc. ("LCEC"), was granted an easement by the developer of what is now the City of Cape Coral for the placement of LCEC's utility lines and poles. More than forty years later, the City of Cape Coral widened the roadway next to those poles and demanded that LCEC move its equipment from the easement and bear the cost for that relocation. LCEC believed that the City should bear that cost. The parties litigated the issue, resulting in the decision of the Second District Court of Appeal below holding that LCEC, not the City, must bear the costs of relocation.

LCEC seeks review of that decision because it conflicts with this Court's precedents protecting the rights of easement holders and misconstrues the applicable Florida and federal constitutional provisions protecting against a governmental taking without compensation.

This Court should grant jurisdiction to resolve the conflict and constitutional violations created by the decision below. The decision is of statewide importance because it impacts easement holders across the state, particularly utility companies, which routinely run their electrical, water, or cable lines in easements similar to the easements at issue in this case. The decision below dramatically alters the relationship between the government and these utilities and other easement holders by holding that the government's police power trumps the constitutional right to compensation for a governmental taking. This conclusion is contrary to long-settled law and must be reversed.

STATEMENT OF THE CASE AND FACTS

Years before the founding of the City of Cape Coral, a private developer laid out the plats for the new community that was later to be called Cape Coral (A.2). For the new community to be successful, the developer needed to facilitate the development of electric power and other utilities. Thus, the developer created a six-foot easement at the edge of virtually every property for public utilities (the "Utility Easement") (A. 2). The easement reads:

The owners of this property do hereby dedicate EASEMENTS along each boundary of each home site for County drainage purposes, and for Public Utilities, said easements not to exceed six feet each side of said boundaries, unless otherwise shown.

(A. 2). LCEC decided to supply power for the new community. Before the subdivisions were even built (and before the City came into existence), LCEC

began to install its electrical lines and other related equipment, much of it in the Utility Easement granted by the developer (A. 2-3).

After the City was incorporated, the City and LCEC entered into a franchise agreement ("Franchise Agreement"). The City granted LCEC the "right, privilege and franchise to construct, maintain and operate an electric utility in, over, upon, under and across present and future streets, alleys, avenues, easements for public utilities, highways, bridges, and other public places of the City of Cape Coral, Florida" (A. 2-3). The Franchise Agreement was later amended (A. 2-3). Both the original and amended Franchise Agreements are silent as to which party is responsible for the costs of relocation when the City orders LCEC to move its equipment (A. 3).

Many years later, the City embarked on a construction project to widen a roadway. As part of the project, the City needed to expand the road into the Utility Easement (A. 1-2). Complying with its obligations under Article X, Section 6 of the Florida Constitution (the eminent domain provision), the City paid the private property owners for the loss of their fee interest in the six foot strip that served as the Utility Easement. As to LCEC, however, the City demanded that LCEC remove its equipment and relocate it at LCEC's expense (A. 1-2). LCEC refused, pointing out that the City was taking its property and was required to compensate LCEC for that loss (A. 2).

The trial court ruled for the City and LCEC appealed (A. 2). Ultimately, the Second District affirmed (A. 1-14).¹ Although the court acknowledged that property in private easements is entitled to constitutional protection, the court held that the City could exercise its police powers over the Utility Easement and thus take property within the easement without compensation (A. 4-9). In reaching this conclusion the court applied a series of right of way cases holding that private property located on a right of way *granted by the government* is subject to the government's police powers (A. 4-8). As we discuss below, and as we would demonstrate were review granted, this "right of way exception" does not apply to easements granted by private parties.

LCEC now asks this Court to take jurisdiction over this case to resolve the conflict created by the decision below and to protect the constitutional property rights of easement holders throughout the state.

SUMMARY OF THE ARGUMENT

Florida law has long held that an easement holder is entitled to compensation when the government interferes with that easement interest. *See, e.g., City of Jacksonville, v. Shaffer*, 144 So. 888 (Fla. 1932). This law is

¹ The appeal below had an extraordinarily lengthy procedural history suggesting that the court struggled with its decision. Oral argument was held on December 20, 2011, and a decision was reached on August 29, 2012. After LCEC timely sought rehearing, rehearing *en banc*, or certification in September 2012, the court took until May 23, 2014, to issue a new decision reaching the same result.

consistent with other cases around the country holding that a utility must be compensated when the government interferes with its easement rights or requires the utility's equipment to be relocated out of that easement. *See infra* at 6-7.

The Second District's decision below expressly and directly conflicts with cases like *Shaffer* by requiring LCEC to bear the costs of relocating from the Utility Easement. In reaching this conclusion, the Second District erroneously relied on a series of cases both in and out of Florida in which the utility had placed its lines, *with the city's permission*, over or under the city's streets. These cases hold that the city's permission to utilize the city's right of way comes with the implied agreement that the utility must remove or move its lines at its own expense when the city requests. These cases have no relevance to this case because LCEC's right to be in the easement came from the original developer, not from the City.

This Court has jurisdiction to hear this case because of the express and direct conflict with cases like *Shaffer* and because the Second District has misconstrued the Florida and United States constitutional provisions protecting against a taking without compensation. The conflict and constitutional violation impacts every easement holder in the state, and this Court should accept jurisdiction to resolve the conflict and address the important constitutional issues presented.

ARGUMENT

Florida law has long recognized that a taking results from the sovereign's interference with an easement. *See City of Jacksonville, v. Shaffer*, 144 So. 888 (Fla. 1932) (interference with a utility easement constituted a taking requiring compensation); *Glessner v. Duval County*, 203 So. 2d 330 (Fla. 1st DCA 1967) (an easement is property in the constitutional sense and its taking requires compensation to the owner of the easement); *see also Div. of Admin. v. Ely*, 351 So. 2d 66 (Fla. 3d DCA 1977) (although finding that the gas company did not have an easement in the traditional sense, the state could not require the gas company to remove its trade fixtures without compensation).²

Shaffer is virtually on point. In that case, the developer dedicated the streets to the city but reserved the exclusive right to operate and maintain water pipes and mains. The city later sought to use the developer's easement to operate its own water system. The city's use of that easement without the developer's permission constituted an interference with the developer's easement, which entitled the developer to compensation. *Shaffer*, 144 So. at 889-90.

Shaffer, *Glessner*, and *Ely* are consistent with other cases from around the country holding that interference with an easement results in an unconstitutional

² *See also Pinellas County v. General Telephone Co. of Florida*, 229 So. 2d 9 (Fla. 2d DCA 1970). While we recognize that *Pinellas County* cannot serve as a basis for conflict jurisdiction, the case nicely illustrates the principles we discuss here.

taking. See *Panhandle Eastern Pipe Line Co. v. State Highway Comm'n of Kansas*, 294 U.S. 613 (1935) (government had to pay for the cost of moving gas lines which were within an easement); *City of New York v. Consolidated Edison Co. of New York, Inc.*, 274 A.D. 2d 189 (N.Y. App. Div. 2000) (where the utility's installations are in an easement, the city must bear the cost of interfering with that easement); *Buckeye Pipe Line Company v. Keating*, 229 F.2d 795, 798 (7th Cir. 1956) (an easement is an interest in real property and is taken when the adverse party interferes with the owner's use of the easement).

Instead of applying this settled law, the Second District relied on a series of cases in which the utility had placed its lines, *with the city's permission*, over or under the city's streets (A. 4-8, 13 n.6). See, e.g., *Qwest Corp. v. Chandler*, 217 P.3d 424 (Ariz. App. 2009) (collecting and describing the cases). The reasoning of these cases is simple. If a city grants permission for a utility to place its lines over or under the city's streets, that use is subject to an implied common law duty to move those lines, at the city's request.³ Simply put, what the city giveth, it can taketh away. See e.g., *New Orleans Gaslight v. Drainage Commission of New Orleans*, 197 U.S. 453 (1905) (the gas company's right to use the city's streets was subject to the city's reasonable regulation); *Southern Bell Tel. Co. v. State ex rel.*

³ To be clear, LCEC concedes that it must pay the cost of relocating its lines to the extent they cross over the City's streets because LCEC needs the City's permission to do so. At issue here is LCEC's equipment that is located within the Utility Easement and is not over or under the City's right of way.

Ervin, 75 So. 2d 796, 800 (Fla. 1954) (permission to place utility lines in city streets is at the sufferance of the city).

The Second District's opinion mistakenly treated the Utility Easement as if it were the same as a street right of way, suggesting that this was a "public" easement subject to the City's police powers (A. 4-8). But LCEC's rights were not granted by the City in this case. LCEC is in the Utility Easement pursuant to an easement granted to LCEC by the original developer of the property -- an easement granted before the City was even in existence. The Utility Easement was not dedicated to the "public" as the court suggests (A. 6-7). To the contrary, the easement is dedicated for the use of "Public Utilities" (A. 2). Thus, unlike the right of way cases applied by the Second District, there was no implied understanding between LCEC and the City that LCEC would move its lines on demand. Instead, LCEC's position is identical to the utilities in cases like *Shaffer*, *Glessner*, and *Panhandle*, discussed above. LCEC is in an easement, and the City, a stranger to the relationship between the developer and LCEC, is interfering with that easement. LCEC is entitled to compensation.

Although recognizing that the Franchise Agreement says nothing about relocation (A. 2), the court also suggests that the City's exercise of its police powers is implied in the Franchise Agreement. Not so. The Franchise Agreement gives LCEC permission to place its lines over and under the City's rights of way.

LCEC needed no permission to place its lines in a dedicated Utility Easement created by the developer long before the City's existence.⁴ LCEC's rights arose from an easement granted by the developer, not from its Franchise Agreement.

There are at least two bases for jurisdiction in this Court. First, the Second District's decision is in express and direct conflict with *Shaffer*, *Glessner*, and *Ely*, and misapplies right of way cases like *Southern Bell* to the Utility Easement.

Second, the court has misconstrued the Florida and United States constitutional provisions prohibiting the taking of private property without just compensation. Article I, Section 2, Florida Constitution; U.S. Const. Amend. V. LCEC specifically argued that forcing it to pay for relocation of its facilities within the Utility Easement was an unconstitutional taking. Relying on the right of way cases, the Second District held that there was no taking because the City was merely exercising its police powers (A. 3-8). This construction of these constitutional provisions gives rise to discretionary jurisdiction in this Court. *See, e.g., Key Haven Associated Enterprises, Inc. v. Board of Trustees of the Internal Improvement Trust Fund*, 427 So. 2d 153, 154-55 (Fla. 1983) (accepting

⁴ The Court also justified its decision with reference to section 337.403, Florida Statutes, which simply codifies the right of way exception (A. 9) and applies to only the relocation of utilities in or along a right of way. For the reasons discussed above, section 337.403 does not apply. And if it did, it would be unconstitutional. The Legislature cannot by statute simply take LCEC's private property.

jurisdiction to address whether an unconstitutional taking without compensation had occurred).

The conflict and confusion created by the Second District should be resolved. At its narrowest, this opinion affects the constitutional rights of every cable, electric, water, or other utility company in the state. Each of these companies has placed its equipment in easements relying on long-settled law that such placement protects the utility from paying the costs of relocation. At its broadest, the Second District's opinion places the property rights of every easement holder in jeopardy. If the City of Cape Coral can utilize its "police power" to eliminate LCEC's property rights in this case, then what is to stop other governmental entities from arguing that its police powers also trump private property interests? This Court should grant review and restore the long-settled balance between the public and private interests at stake in this case.

CONCLUSION

For all the foregoing reasons, this Court should exercise its discretionary jurisdiction and accept this case for review.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by email to Dolores D. Menendez (dmenendez@capecoral.net, bscheuer@capecoral.net, parsenau@capecoral.net), City Attorney and Steven D. Griffin (sgriffin@capecoral.net), Assistant City Attorney, City of Cape Coral, P.O. Box 10027, Cape Coral, Florida 33915 on this 18th day of July 2014.



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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rules of Appellate Procedure 9.210(a)(2).



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