

WILLIAM T. PRESTON, P.A.

ATTORNEY AT LAW

ADMITTED TO PRACTICE IN VIRGINIA AND FLORIDA

November 9, 2010

Ray Mitchum CEO/GM
Utilities Commission, City of New Smyrna Beach
200 Canal Street
New Smyrna Beach, FL 32168

Re: Structure, Financing, Policies and Costs for Development

Mr. Mitchum:

As a "part of the government of the City of New Smyrna Beach" the Utilities Commission was established by Special Act of the Legislature Ch 67-1754 Laws of Florida. This Enabling Act gave the Utilities Commission "*full and exclusive authority over the management, operation and control of all of the city's utilities and the property of the Commission.*" As created by Special Act, the Utilities Commission was fully empowered under the authority of the 1885 Florida Constitution as a municipality. As a municipality, the Utilities Commission serves the public and, in particular, its ratepayers.

A significant reason for operational autonomy of the Utilities Commission is the manner in which long term debt is used. Like most utilities, issuance of revenue bonds is an important aspect in capital construction and is secured and retired through rate payments rather than tax dollars. Bond covenants of the Utilities Commission are secured through rates and constitute a contract between bond holders and utility. None of the obligations of the Utilities Commission are obligations of the City of New Smyrna Beach and do not affect credit worthiness of the City.

Florida Statutes, Section 366.03. "General duties of public utility" states that "All rates and charges made, demanded, or received by any public utility for any service rendered, or to be rendered by it, and each rule and regulation of such public utility, *shall be fair and reasonable. No public utility shall make or give any undue or unreasonable preference or advantage to any person or locality, or subject the same to any undue or unreasonable prejudice or disadvantage in any respect.*"

Likewise, Utilities Commission Resolution 28-78 which authorized the issuance of Revenue Bonds specifically states that the "*Commission will not render or cause to be rendered any free service of any nature by the System, nor will any preferential rates be established ...*" This mandate has been revisited and reincorporated in every funding vehicle since its adoption. As an example, the Utilities Commission is required under §366.03 of the Florida Statutes to back bill for uncollected revenues for services used. Any under-charge to one customer results in overcharges to other customers in the community. As upheld in *Corporation de Gestion Ste-Foy, Inc. v. Florida Power and Light Company*, 385 So.2d 124 (Fla. 3d DCA 1980) which held that public policy embodied in §366.03 and similar statutory provisions precludes a business

143 CANAL STREET • NEW SMYRNA BEACH, FL 32168

Ray Mitchum CEO/GM
Utilities Commission, City of New Smyrna Beach
November 9, 2010
Page Two

whose rates are governmentally regulated from granting preferential treatment to any particular individual. It is universally held that a public utility or common carrier is required to provide *no free service*.

Maintenance and improvements of the system are required and necessary for the protection of the health, safety, and welfare of the Utilities Commission's customers. Mandated through Resolution 28-78 to maintain, in good condition, the system and all parts thereof, which also includes a requirement for a Triennial Report on the Condition and Operation of the System (electric, water, wastewater, and reuse water systems) to be conducted by Consulting Engineers.

For over 40 years, the Utilities Commission has *provided vital municipal services* to the New Smyrna Beach area. The Utilities Commission is a not for profit entity owned by the ratepayers and a valuable community asset. Pursuant to its Charter, it pays to the general fund of the City a sum equal to six (6) percent of its gross revenues. This amount totaled approximately 3.5 million dollars (\$3,500,000.00) in 2009. The Utilities Commission also contributes an additional monies to the City, approximately 1.5 million dollars (\$1,500,000.00) indirectly through the 9% utilities services City tax. Also, in 2009, the Utilities Commission was the sixth (6th) Largest Employer in the City providing High-Tech Jobs.

The Utilities Commission is a *local business with local concern* and is driven with *local incentive by local people*. Its strategy is to develop and maintain effective and efficient services fairly apportioned and partial to none. It has a fiduciary duty to its ratepayers and, in addition to its bond requirements, will not offer service or incentive to anyone at the cost of another. The Utilities Commission enables this community to retain local control of essential life infrastructure services - water resources and electricity, for approximately 25,000 customers (includes approx. 30% County of Volusia ratepayers).

One manner in which this is done is to have development pay for itself.

At the regular meeting held July 17, 2006, the *Utilities Commission approved Resolution 11-06* incorporating an *Addendum to the Utilities Commission Developer Agreement*. The Developer Agreement is a contract specifying terms and conditions among the signatory parties (Developer and Utilities Commission) for services, fees, and infrastructure needs and costs for water, wastewater, and reuse water within a new development. The Addendum to the Developer Agreement provides for water, wastewater, reuse water, and electric system infrastructure contributions external to the new development. Approving these UC Agreements occur near the end of the local development process (after P&Z, City Commission, and preliminary reviews).

One primary purpose and goal of the Developer Agreement and its Addendum is to further the mandates set by Statute, our Funding documents and foundational Resolution 28-78 (“*Commission will not render or cause to be rendered any free service of any nature by the System, nor will any preferential rates be established ...*”) and to further the purposes of Chapter 163, Florida Statutes to have policy which *avoids the disproportionate distribution of costs upon existing customers for necessary services for new customers.*

The Developer Agreement and its Addendum have been a concern by those who fail to understand its origin, purpose and rationale.

In 2005, Robert J. Rodi, then CEO/GM of the Utilities Commission, took steps to evaluate the infrastructure status relative to the projected growth with emphasis on the western corridor where new growth in undeveloped areas was expected. Utility infrastructure studies focused upon the condition of each existing utility system. Rodi segmented the service area into three (3) zones or areas to address an equitable distribution of costs noting the mix of existing infrastructure and development in the service area. Zone 1 is west of I-95; Zone 2 is east of I-95 and west of US1; and, Zone 3 is east of US1. The zone approach provides financial leverage and accommodation for development in areas with existing infrastructure while also accounting for the impacts of new development on the existing infrastructure.

Chapter 2005-290 (SB-360) infrastructure planning and funding requirements were incorporated into the Addendum by developing *proportional contributions* which are tendered by Developers at the time of the Addendum signing. The Utilities Commission *equitably apportions costs to the developers* for the future or existing infrastructure to meet needs to serve multiple developments. To establish the costs for the Utility Infrastructure needs to support a given area an ERU (a common measure used to estimate the number of units which can need utility service based upon the maximum permitted by zoning or by existing land use regulations) concept was used to establish proportions and relative infrastructure sizing through models developed from the formal studies conducted by the Utilities Commission.

In order to *even more equitably and accurately apportion the costs to the developers*, the Utilities Commission is keeping record of all payments made pursuant to the Addendum as well as the demands placed on the system for a period of ten (10) years to “true up” the actual costs for infrastructure needs vs. projected.

The Utilities Commission has taken steps in every instance to *assist the developer with understanding and implementation* of this Addendum and the developers of the bigger projects, especially, have come to an understanding of the rational basis and the methodology of the

Ray Mitchum CEO/GM
Utilities Commission, City of New Smyrna Beach
November 9, 2010
Page Four

development and use of the Addendum. To assist the Developer, an irrevocable letter of credit was created and may be tendered to satisfy the financial requirements of the Addendum to allow additional timing and financing flexibility for Developer contributions. Such contributions are deposited into an interest bearing escrow account and may be withdrawn from the account by the Utilities Commission after an infrastructure project is approved at a public meeting. These system infrastructure projects are for construction and related construction costs of assets deemed necessary to be built or upgraded in order for the system to adequately supply the new development and other developments of that region.

The Utilities Commission is a mature, contributing, effective service provider for the City and surrounding ratepayers and has demonstrated good working partnerships with surrounding business. The Strategic Initiatives for 2010 well express its integrity and direction. The stated mission is *to profitably provide timely, cost-effective, high-quality services and products in our marketplace*. In addition to the Strategic Initiatives, various significant accomplishments of the Utilities Commission can be found in Resolutions 2-07 and 7-07, as well as Key Management Accomplishments in Proclamation 7-09.

I trust that this adequately explains the legal mandates for fair and equitable treatment under which the Utilities Commission is controlled; that “no free service” can be provided in any way, including incentives, rebates or the like for any business or residential enterprise; and, that the Utilities Commission has taken the fair and equitable approach to development by placing the cost of such development on those who develop.

Respectfully,



William T. Preston, Esq.

WTP/bp

CC: Debbie Simmons