



# Alachua County Attorney's Office

Sylvia E. Torres,  
County Attorney

## MEMORANDUM

TO: Charles S. Chestnut, IV, Board of County Commissioners Chair

FROM: Corbin F. Hanson, Assistant County Attorney *CFH*

VIA: Sylvia E. Torres, County Attorney *SET*

DATE: January 28, 2019

SUBJECT: *Landscaping and Utilities within County Rights-of-Way*

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At its December 4, 2018 meeting, the Board of County Commissioners directed the County Attorney's Office to research the County's ability to require the relocation of utilities within County-owned rights-of-way for the purpose of allowing and accommodating landscaping. Additionally, the Board asked for potential ways in which the County could "shift the balance-of-power" from utilities in the rights-of-way to the County and the County's desired outcomes for development of rights-of-way. This memorandum analyzes the County's options as they relate to previously permitted utilities in the County's existing rights-of-way and to potential standards for utilities in future rights-of-way.

### Relocation of Currently Permitted Utilities in Existing Rights-of-Way

Florida law currently provides local governments with flexibility to prescribe and enforce reasonable rules and regulations on placing and maintaining utilities across, on, or within rights-of-way owned and controlled by the local government. Section 337.401(1)(a), *Florida Statutes*. In accordance with this allowance, Alachua County adopted Chapter 367, Article I of the Alachua County Code, entitled "Utility Installation Regulations."

Section 367.03 of the County Code prescribes certain standards and rules for utility installation and requires an approved utility permit for all utility facilities installed within a County right-of-way. A "utility permit" is defined in the County Code as "an application for permission to install a system or facility in public right-of-way for the intention of providing a utility service. *This document is a legally binding contract between the County and the permitted utility [emphasis added].*" A utility company may apply to the County for issuance of a utility permit, which, if issued, then authorizes the utility company to place utilities within the right-of-way in the location approved by the County.

With issuance of a utility permit, the County agrees to allow the location of utilities within the

designated right-of-way and the utility company agrees to remove or relocate said utilities if the Public Works Department determines “that roadway reconstruction, enhancement, or maintenance is restricted or in conflict with an installed” utility. Section 367.05(3), Alachua County Code. The current language contained in Chapter 367 of the Alachua County Code, the County’s standard utility permit, and the County’s Utility Accommodation Guide, does not anticipate the addition of new landscaping in the right-of-way as a condition requiring removal or relocation of permitted utilities. As discussed in a 2016 opinion from the County Attorney’s Office, nothing in the County’s utility permit limits the County’s use of the right-of-way for tree planting and other landscaping, so long as the County’s landscaping does not interfere with the utility permitted by the County. That opinion may be viewed [here](#).

Therefore, the County has the following options for relocating utilities or planting landscaping within current County-owned rights-of-way with existing utility lines:

- 1) Enter into an agreement with the utility to relocate the utilities at the County’s expense;
- 2) Plant landscaping near, over, or under the utilities. If the landscaping interferes with the utility’s rights, the utility company may trim or remove the landscaping;
- 3) When undertaking a “roadway reconstruction, enhancement, or maintenance” project that necessitates utility relocation, require the utility to move its utilities at its own expense;
- 4) Wait for a utility company to seek a new utility permit, potentially for the expansion of existing utility capacity, and require the utility company to locate its expanded utility lines in a portion of the right-of-way that allows landscaping and utilities to coexist.

Pursuant to section 367.03 of the Alachua County Code, “criteria for permit approval, location in the right-of-way, and approved methods of installation shall be contained in the ‘Alachua County Utility Accommodation Guide,’ most current revision.” To clarify the County’s interest in considering landscaping when reviewing a utility permit application, the County should amend its “Alachua County Utility Accommodation Guide” to include the consideration of current and future landscaping in the right-of-way when determining where in the right-of-way to allow utilities to locate.

#### Utilities Located in Future Right-of-Way

As discussed above, the County has flexibility under Chapter 337, *Florida Statutes*, to prescribe and enforce reasonable regulations for the location of utilities within County-owned rights-of-way. However, for the County to exercise this authority within its rights-of-way, the County must have already accepted ownership of the right-of-way prior to the installation of utilities within the subject right-of-way, thereby requiring the utility company to apply for a utility permit from the County to locate within the right-of-way.

Under the County’s current land development code, the County does not take ownership of, or accept jurisdiction over, the rights-of-way contained in the development until a formal dedication of ownership is offered by the developer and accepted by the County. For residential developments, this typically happens as a part of the plat approval process. Until ownership is transferred to the County, the developer retains the authority to grant utility easements or fee simple ownership to utility companies in those locations requested by the utility company. Then, later in the development process, the developer dedicates to the County rights-of-way that may come to the County subject to

existing utility rights or confined on either side by existing utility rights, severely limiting the County's ability to place landscaping in the rights-of-way or expand the right-of-way in the future.

However, as the regulatory entity responsible for reviewing proposed developments for compliance with the County's code of ordinances and comprehensive plan, the County has the ability to include criteria regarding the placement of utilities as part of the development review process. The County already requires developers to indicate the "location of utilities that will serve the site" as part of a developer's preliminary development plan ("PDP"). Section 402.43(a) Alachua County Code. If the PDP is approved, the subsequent final development plan will then be reviewed for compliance with the PDP. Currently, the County requires the developer to show the location of utilities on the PDP, but does not have development criteria requiring that the utilities be located in any particular manner to avoid future conflicts with landscaping. Establishing land development criteria that favor landscaping is one potential mechanism for "shifting the balance-of-power" in favor of landscaping. This option may place the potential developer in a "catch 22" if the utility company refuses to allow utilities to be located where the County's development standards mandate they be located.

Additionally, the County does not have an obligation to accept ownership or maintenance responsibilities for unsatisfactory rights-of-way offered to the County by developers. The County could adopt additional criteria for accepting rights-of-way to consider the location of utilities installed in the right-of-way prior to acceptance, as well as a requirement that a right-of-way be free and clear of any encumbrances prior to the County accepting ownership. As noted above, this route also places the burden on the developer to navigate the potentially inconsistent requirements imposed by the County and the utility company.

Formal agreement between the County and the major utilities serving unincorporated County presents another way of addressing future conflicts between the location of utilities and the location of landscaping on future County-owned rights-of-way. Through these agreements, the County may be able to secure assurances from the relevant utility companies that they will locate their utilities in proposed rights-of-way in a manner consistent with the County's landscaping standards. The County and the utility companies could negotiate preferred utility locations within the rights-of-way and assign costs for the future relocation of utilities within County-owned rights-of-way.

CH/ch

xc: Members of Board of County Commissioners  
Michele L. Lieberman, County Manager  
James Harriott, Deputy County Manager