

CITY COUNCIL AGENDA STATEMENT



Date: December 8, 2020

To: Honorable Mayor and Council Members

From: George Garrett, City Manager / Planning Director

Subject: Appeal of Planning Commission Decision Regarding Right-Of-Way Permit P2020-0785

BACKGROUND:

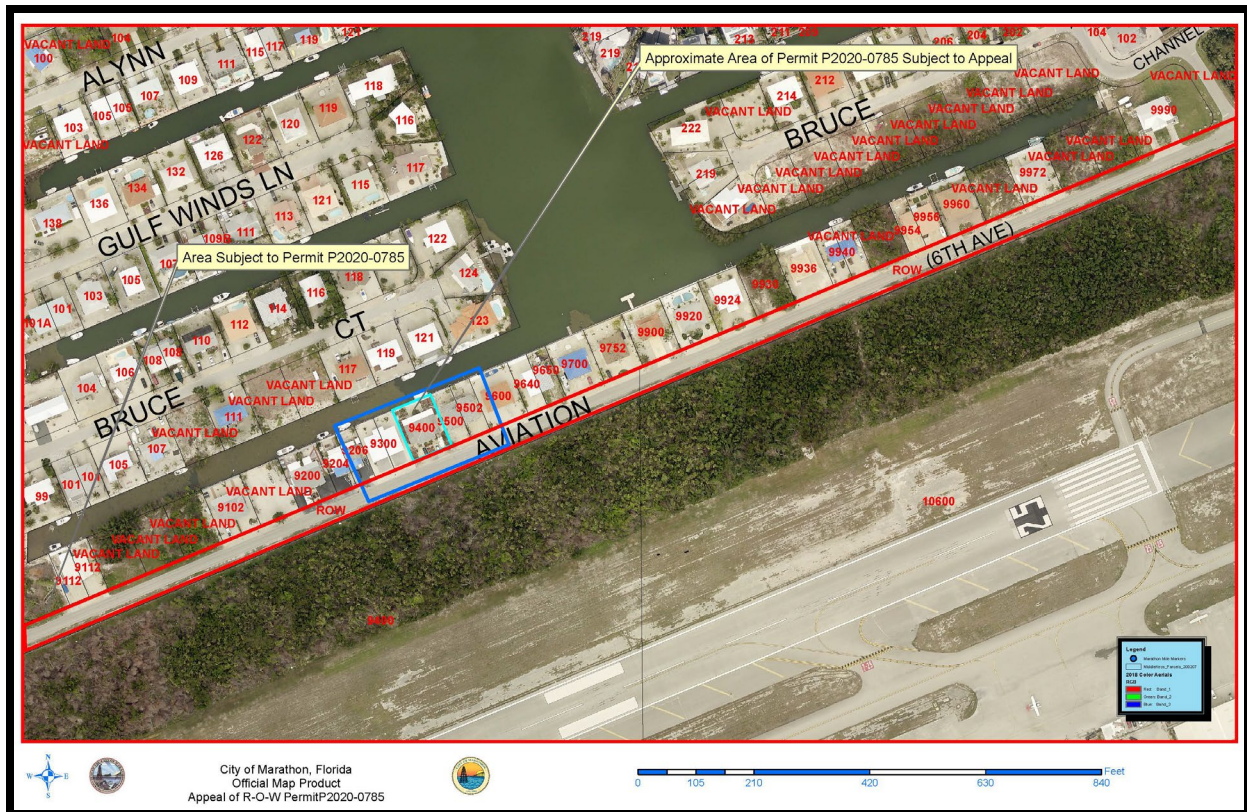
On or about June 23, 2020, the Florida Keys Electric Cooperative (FKEC) began replacement of power poles on the south side of Aviation Boulevard to be replaced by a roughly equivalent number of power poles on the north side of Aviation Boulevard.

In the removal and replacement of approximately 60 power poles, all but two are now in place and the subject of the present appeal (see also Monroe County Case # 20-CA-000117-M), particularly those that would be placed near 9400 Aviation Boulevard, Appellant's residence.

City Right-Of-Way – Aviation Boulevard & 109th Street, Gulf
Location



City Right-Of-Way – Aviation Boulevard & 109th Street, Gulf Location



Appellant’s Counsel references in their appeal, the City’s ignorance of Chapter 337.401. The City states that it has fully complied with Florida Statute 337 and in particularly 337.401 through 337.403 in the adoption of City Ordinance, Chapter 26, Article II of the City’s Code of Ordinances See **Attachment 1**.

The City, the City’s litigation Council, City attorney (Vernis & Bowling at the time), the FKEC, and it’s attorney’s met agreeing that the FKEC would cease construction activity on the replacement and ultimate removal of the old power poles. These parties also agreed that the City would issue a permit (Permit P2020-0785) to the FKEC for the poles, as a consideration to limiting further movement in litigation (Case # 20-CA-000117-M). The City did not agree that a Permit was necessary under Chapter 26, Article II. However, issuance of a Permit thereby offered the Appellants a venue, other than the court, for appeal of the permit and now, of the Planning Commission decision See **Attachment 2ai, 2aii, and 2b**.

The Planning Commission, through the authority vested in it pursuant to Chapter 102, Article 17, “Appeals” of the City’s Land Development Regulations, heard the appeal of the City’s issuance of Permit P2020-0785. On October 19, 2020, the Planning Commission heard testimony from all parties, the appellant – Bolon & Wolff, the City of Marathon, and the Florida Keys Electric Cooperative (FKEC) and various expert witnesses presented by attorneys for Bolon and Wolff and by the FKEC. Upon review of this information and pursuant to their authority under Section

102.97 the Planning Commission voted to deny the appeal raised by the Appellants in a 4/0 vote (L. Mike Leonard absent with an excuse). Under Chapter 102, Article 17, the decision of the Planning Commission is final, barring any further appeal. An appeal of the decision of the Planning Commission shall be heard by the City Council.

On or about November 6, 2020 Bolon and Wolff registered an appeal of the Planning Commission's decision with the Planning Department. It is under the same authority vested in the Planning Commission, that the City Council would review the appeal of the Planning Commission decision. As provided in Section 102.97 A.:

“Upon taking of an appeal, the ruling body (*in this case the City Council*) shall conduct a de novo hearing and shall consider the rationale for the decision of the administrative official or the Planning Commission, it may confirm, reverse, or modify the appealed action based upon its interpretation of the findings required and the evidence submitted. Any action by the Council shall be deemed final.”

The following Analysis was provided to the Planning Commission based upon the agreements between attorneys in the pending lawsuit and a review of the relevant City Code. In addition, the City Council is provided the appeal documents and the transcript of the Planning Commission hearing, as provided by the Appellants, Bolon and Wolff, through their attorney Ronald I. Strauss, Esq. Based upon the City's review of the case leading to the initial appeal, staff has not modified its analysis provided to the Planning Commission.

ANALYSIS:

In review, Chapter 26, Article II provides an exemption (Section 26.27) or general permit (Section 26-30) for the “. . . the installation, maintenance and repair . . . “ of their facilities, “. . . except as provided for as provided in Section 26-30.”

Clearly, under Section 26-27, no Right of Way Permit is required of the FKEC. They were and are “installing” new power poles, as allowed.

Section 26-30 grants a General and Continuing Permit to public and private utilities “to perform maintenance and emergency repairs as may be required to maintain their service, . . . “ Exceptions to this section are applied in Subsections (1) through (7). None apply to the subject of this appeal, except points (1) and (3) as repeated immediately below:

- “(1) A formal permit will be required by a public or private utility without the payment of a fee when:
 - a. Installation or repair of a service will cause damage to an existing roadway or disrupt a previously permitted or grandfathered driveway access or other permitted feature in the City right-of-way.
 - b. In cases where an emergency repair causes damage to an existing roadway, an after-the-fact permit will be issued the next business day (See Section 26-38).

- (3) A permit will not be required when a public or private utility will perform work in the City right-of-way that will not cause damage to any City-owned or permitted feature within the right-of-way,

provided, however, that the City Manager or designee is duly noticed in writing by the public or private utility that such work will be in progress and when completion is anticipated.”

In review of these subsections, the City indicates that the FKEC continues to qualify for a complete exemption to the requirement for a permit under Section 26-27 for the following reasons:

- No damage to City roadway or disruption of a previously permitted or grandfathered driveway was contemplated and has not occurred as a result of the project.
- No damage to any City owned or permitted feature was contemplated to occur and has not occurred as a result of the project to date.

Note, there are conflicts of language between Section 26-27 and 26-30. In this instance, Section 26-27 should control as the reference to Section 26-30 is only found in Section 26-27. The conflict is in the following language which in 26-27 references an exemption for installations (etc.), while Section 26-30 references maintenance and emergency repairs. Since 26-27 grants the exception, the only reason for reviewing 26-30 is to make sure that there is not a Condition there that would warrant a permit.

CONCLUSION:

The City of Marathon indicates that:

- Its Ordinances, particularly Chapter 26, Article II complies with the requirements of Chapter 337 F.S.
- That under Chapter 26, Article II, a public utility is provided an exception to the need for a permit in Chapter 26-27 or is granted a General and Continuing Permit under Section 26-30 to install, repair, and maintain its utilities within the City’s Rights-of-Way.
- Though referenced by the Appellant’s attorney, there is not need or requirement for a utility easement in a street fully owned and maintained by the City. There may be in plats / subdivisions within which roads may have initially been private and maintained by the property owners.

RECOMMENDATION

Based on the conclusions identified immediately above, the City Council should deny the Appeal of the Planning Commission decision brought by Roger Bolon and Alexandria Wolff determining that the decision of the Planning Commission should be upheld and that:

- The City was not required to issue Permit P2020-0785.
- That Public and Private Utilities are allowed to install, repair and maintain their facilities under Section 26-27 and 26-30 without a City Right-Of-Way Permit, so long as relevant subsections of Section 26-20 do not apply.

ATTACHMENT 1
Chapter 26, Article II
Public Right-Of-Way Use Permit

ATTACHMENT 2
Bolon / Wolff Appeal Documentation
Appeal & Planning Commission Transcript

ARTICLE II. - PUBLIC RIGHT-OF-WAY USE PERMIT

Sec. 26-25. - Purpose and intent.

The purpose and intent of this Article is to provide standards and procedures and a fee schedule for permitting the use of City public rights-of-way in order to preserve the function of each street and highway; provide for smooth, logical traffic flow patterns, require the application and safe standards, procedures and principles, provide for environmental compatibility, provide for stormwater management, and provide for technical standards and specifications.

(Code 1999, § 16-17)

Sec. 26-26. - Permit required.

City public right-of-way use permits shall be required for all roads and streets to be constructed or improved in existing rights-of-way; and all roads and streets which are to be dedicated to the City; all construction or installation or maintenance of any public or private utility as provided for in Section 26-30; and any structure, driveway, culvert, pavement or object in the right-of-way or easement, other than those constructed or maintained by the City, within rights-of-way of the City road system as defined in Fla. Stat. § 334.03. Construction or installation within City-owned canals and City-owned waterways will likewise require a permit. A permit from the Florida Department of Transportation is required for the construction of accessways to or construction with the rights-of-way of any part of the State highway system as defined in Fla. Stat. § 334.03.

(Code 1999, § 16-18)

Sec. 26-27. - Exemptions.

No right-of-way use permit shall be required for the following:

- (1) Construction of public or private utilities in subdivisions in accordance with engineering drawings and specifications approved by the City and prepared in accordance with the land development regulations where such construction will be completed prior to acceptance of roads by the City;
- (2) **The installation, maintenance and repair of physical plant by public or private utilities except as provided for in Section 26-30.**

(Code 1999, § 16-19)

Sec. 26-28. - Permit review by City.

The City Council hereby authorizes and empowers the City Manager or designee to receive and review permit applications, collect fees and issue permits in a timely manner allowing the permittee to enter onto the public rights-of-way within the City road system to perform specified construction or installation. No work may be performed in City rights-of-way or easements, except as noted in Sections 26-27, 26-30 and 26-38. Until plans have been submitted in conformance with Section 26-31 and a City public right-of-way use permit has been issued by the City Manager or designee.

(Code 1999, § 16-20)

Sec. 26-29. - Definitions.

The following words, terms and phrases, when used in this Article, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

Arterial road means a road carrying a higher volume of traffic than a local or collector road, which is used primarily for traffic traveling a considerable distance and as otherwise defined in Fla. Stat. § 334.03(15). An arterial road is generally continuous and is used as a main traffic artery.

Collector road means a road which carries traffic from local roads to major thoroughfares and includes the principal entrance roads of a residential subdivision and as otherwise defined in Fla. Stat. § 334.03(16).

Governmental or subgovernmental agencies means the State of Florida and its various agencies and departments, the United States of America and its various agencies and departments, political subdivisions of the State of Florida, including Counties, incorporated Municipalities of the State of Florida, drainage Districts, and such taxing Districts and special agencies and bodies as are created by County ordinances, City ordinances, Florida Statutes or by special act of the legislature, and as otherwise defined in Fla. Stat. § 334.03(3).

Local road means a road designed and maintained primarily to provide access to abutting property, and as otherwise defined in Fla. Stat. § 334.03(17). A local road is of limited continuity and not for through traffic.

Permit means the written permission of the City Council through the office of the City Manager or designee to enter onto the public rights-of-way within the City road system to perform the construction or installation as specified in that instrument.

Permittee means any individual, firm, association, syndicate, copartnership, corporation, trust or any other legal unit commencing proceedings under this Article or obtaining a permit as provided herein to effect construction within the public rights-of-way of the City.

Public or private utility means and includes any pipeline, gas, electric, heat, water, oil, sewer, telephone, telegraph, radio, cable television, transportation, communication or other system by whomsoever owned and operated for public use, including but not limited to the Florida Keys Aqueduct Authority, Southern Bell, the Florida Keys Electric Cooperative Association, Inc. and/or their successors, affiliates, subsidiaries or assigns (See Fla. Stat. § 876.37).

Public rights-of-way means land that is dedicated or deeded to (or is now used or will be used by) the City as a road, street, alley, walkway, drainage facility, access for ingress and egress, or for other purposes, including those rights-of-way which by virtue of bilateral agreements between the City and the County are subject to the jurisdiction and control of the County Public Works Department; and those State secondary roads for which maintenance has been assigned to and accepted by the County and as otherwise provided for in Fla. Stat. § 335.04. Until such time as the City Council accepts ownership and responsibility for the maintenance of a right-of-way, it shall not be considered part of the public rights-of-way for the purposes of this Article.

Road means as defined in Fla. Stat. § 334.03(7).

(Code 1999, § 16-21)

Sec. 26-30. - Public and private utility; special provisions and general permits.

All public and private utilities, as defined in Section 26-29, are hereby granted a general and continuing permit to perform maintenance and emergency repairs as may be required to maintain their service, without the issuance of a formal permit or the payment of a fee, except as provided for in Subsection (1) of this section, and subject, however, to the notice requirements of Subsection (3) of this section.

(1) A formal permit will be required by a public or private utility without the payment of a fee when:

- a. Installation or repair of a service will cause damage to an existing roadway or disrupt a previously permitted or grandfathered driveway access or other permitted feature in the City right-of-way.
 - b. In cases where an emergency repair causes damage to an existing roadway, an after-the-fact permit will be issued the next business day (See Section 26-38).
- (2) Any work other than installation of a wooden or concrete pole and overhead wires that a utility proposes to accomplish in the City right-of-way that will be accomplished within six (6) feet of an existing roadway or any other previously permitted features within the City right-of-way will be brought to the attention of the City Manager or designee, for a determination as to possible effect on the roadway or other permitted features and whether the issuance of a permit is required.
 - (3) A permit will not be required when a public or private utility will perform work in the City right-of-way that will not cause damage to any City-owned or permitted feature within the right-of-way, provided, however, that the City Manager or designee is duly notified in writing by the public or private utility that such work will be in progress and when completion is anticipated.
 - (4) Request for permits as prescribed by Subsection (1) of this section with the exception of an emergency repair permit (see Subsection (5) of this section) will be as prescribed by the Section 26-31 application procedures. No fee will be required. Insurance and bonding requirements as outlined in Section 26-32 are waived for a public or private utility; however, a subcontractor for a public or private utility shall be required to obtain such insurance and bonding, and the public or private utility shall submit evidence of such insurance and bonding to the City Manager or designee prior to the commencement of work by a subcontractor.
 - (5) Emergency repair of a utility as prescribed by Subsection (1)b of this section may be accomplished immediately and a permit request in a written form outlining the type of work to be done, and the location may be obtained the next business day from the City Manager or designee.
 - (6) It is not the intent of this section to restrict a public or private utility in any way from performing their service to the public as required and regulated by the public service commission or applicable law.
 - (7) Construction standards and specifications as outlined in Section 26-35 hereof shall be incorporated into all work accomplished for a public or private utility by its own personnel or contracted out to City or State licensed contractors. A concrete slab is not required when repairing roadways; however, the utility will assure and certify to the City that the base being installed as a result of excavation within a right-of-way conforms to City standards and has been compacted to a density not less than 98 percent of density as determined by the AASHTO test method T-180.

(Code 1999, § 16-21.1)

Sec. 26-31. - Application procedures.

- (a) All applications for City public right-of-way use permits, accompanied by the appropriate fee, and including four (4) sketches, plans or drawings of the proposed construction or alteration, shall be submitted to the City Manager or designee. All construction within City public rights-of-way shall conform to and meet the technical specifications of the City and/or land development regulations, as applicable. Applications for access to or construction within State road rights-of-way shall be submitted to the Florida Department of Transportation.
- (b) All applications for City public right-of-way use permits submitted by the owner or permittee, his engineers or legal representative, shall contain the following:

- (1) Name, address, including zip code, and telephone number of the owner and permittee, and his or their engineers.
- (2) Name, address, including zip code, and telephone number of the applicant's authorized agent for permit application coordination, together with proof of authorization.
- (3) General description of the proposed project, its purpose and intended use, including a description of the nature and type of construction; composition, etc.; date when the activity is proposed to commence and approximate date when the proposed activity will be completed; including legal description, or street address and approximate nearest mile marker and key; and an explanation or detailing of any additional information reasonably required by the City Manager or designee, including, as applicable, survey drawings, aerial photographs, topographic maps, soil percolation test, etc.
- (4) Four (4) copies of sketches, plans or drawings of the proposed construction or alterations showing project location; location within the right-of-way; and typical cross-sections of topographical and drainage details showing existing utilities, underdrains, culverts, headwalls, driveways or any other existing structures, if affected by the activity, together with all proposed structures, modifications and activities when deemed necessary by the City Manager or designee. All drainage structures shall be constructed in accordance with the County technical specifications of the City and applicable land development regulations. The drawings shall be drawn to scale, or otherwise prepared so as to reasonably depict the activity and shall show a north arrow for orientation.

(Code 1999, § 16-22)

Sec. 26-32. - Insurance and bonding.

- (a) *Insurance.* Unless specifically waived by the City Council or the City Manager or designee, the permit shall not be effective for any purpose whatsoever until the applicant, or his designated representative, delivers to the City Manager or designee a certificate of general liability insurance and automobile liability insurance with combined single limits of liability of not less than \$300,000.00 for bodily injury and property damage coverage equal to or in excess of the following limits: \$300,000.00 (combined single limit for property damage and/or bodily injury). The certificate of insurance shall name the City as an additional insured, shall be effective for all periods of work covered by this use permit, and shall be in a form acceptable to the City Manager or designee. A statement of insurance from a self-insured entity may be accepted as a substitute.
- (b) *Bonding.* An executed right-of-way bond or other form of surety acceptable to the City Manager or designee may, at the discretion of the City Manager or designee, be required in an amount equal to 110 percent of the estimated cost of construction. Said bond shall be in effect for a period of not less than 30 days and not more than 90 days after final inspection and acceptance of work by the City Manager or designee. A letter guaranteeing performance of work may be deemed acceptable in lieu of a bond. All restoration shall leave the right-of-way or easement in a condition which is as good or better than that which existed prior to construction.

(Code 1999, § 16-23)

Sec. 26-33. - Responsibilities of permittee during construction or repair work.

- (a) Where any City road or right-of-way is damaged or impaired in any way because of construction, installation, inspection or repair work by any permittee pursuant to this Article, the permittee shall, at his own expense, promptly restore the road or right-of-way as nearly as possible to its original condition before such damage. If the permittee fails to make such restoration, the City is authorized to do so and charge the cost thereof against the permittee in accordance with general provisions of law.

- (b) The applicant shall declare that all existing aerial and underground utilities will be located and the appropriate utilities notified of the proposed work.
- (c) The applicant receiving a permit shall make all necessary provisions for the accommodation and convenience of traffic and shall take such safety measures, including the placing and display of caution signs and signals as required by applicable provisions of the current edition of the Florida Department of Transportation Manual on Uniform Traffic Control Devices for Streets and Highways. The applicant shall further prevent obstructions or conditions which are or may become dangerous to the traveling public. The authority to temporarily close off a street or easement in its entirety rests entirely with the City Council.
- (d) The applicant shall notify, in writing, the Sheriff's Department and the concerned ambulance and fire districts prior to any street closing when approved by the City Council.
- (e) Fire hydrants shall be left accessible at all times.
- (f) All permitted work will be subject to inspection by the City Manager or designee.
- (g) Existing utility service shall not be disrupted without specific authority of the concerned utility and public notification by newspapers or the airways, that the disruption will occur. Repairs determined to be of an emergency nature are not subject to the notification procedure.

(Code 1999, § 16-24)

Sec. 26-34. - Access driveways.

- (a) Request to install single-family residential driveway accesses shall be submitted indicating the street address, lot and block number, a description of the nature of the construction (size), and the amount of intrusion into the City right-of-way. No insurance or bonding is required.
- (b) Access driveways onto rights-of-way shall be limited to the least possible number required to adequately serve the intended use and shall conform to all applicable traffic safety standards. Prior to installation within City rights-of-way, the application shall be reviewed by the City Manager or designee regarding any effects on sidewalks, ditches, swales, curbs or other facilities located within rights-of-way or easements. Once a permit is issued, all construction and improvements shall be subject to inspection by the City Manager or designee.

(Code 1999, § 16-25)

Sec. 26-35. - Construction standards and specifications.

All construction, repairs and/or restorations within City public rights-of-way and easements shall conform to the City's technical specifications and applicable land development regulations.

(Code 1999, § 16-26)

Sec. 26-36. - Fees.

- (a) The City Council hereby establishes reasonable application and permit fees to be charged by the City Manager or designee for activities permitted hereunder.
- (b) The following fee schedule shall be applied to all construction or installation upon or within the public rights-of-way, except in the following instances:
 - (1) Where the construction performed is for the benefit of a governmental or subgovernmental agency and applicable fees are specifically waived on an individual project-by-project basis by the City Manager or designee;

- (2) Where the permittee is under contract to deliver the constructed project over to a governmental agency upon completion of the project and the City Manager or designee has waived applicable fees for such project consistent with Subsection (b)(1) of this section;
- (3) Work performed by a public or private utility as outlined in Section 26-30.
- (c) The permit fees designated hereinafter shall be payable upon issuance of the construction permit in an amount determined by the City Manager or designee pursuant to Subsection (d) of this section. In the event a construction permit is denied, only the application fee shall be payable.
- (d) The City Manager or designee shall charge and collect fees for the items and rates listed in the amount established by resolution.
 - (1) *Application fee.* A nonrefundable processing fee shall accompany all City public right-of-way use permit applications. If the permit application is approved, the application fee will be applied to the permit fees as detailed under Subsection (d)(2) of this section.
 - (2) *Permit fees.* Fees for public works construction, under permit issued by the City Manager or designee, in canal, road and street rights-of-way and easements that are maintained by the City shall be as established by resolution.
 - (3) *Penalty fees.*
 - a. When work for which permit is required is commenced prior to obtaining a permit, a penalty fee will be imposed. If the applicant can show that failure to apply for a permit is based on a good faith belief that the construction is not affecting the City right-of-way, the penalty fee may be waived at the discretion of the City Manager or designee, provided, however, that violators promptly apply for a permit and pay all applicable fees.
 - b. The payment of such penalty fee shall not relieve any person, firm or corporation from fully complying with all of the requirements of all applicable regulations and codes, nor shall it relieve them from being subject to any of the penalties therein.

(Code 1999, § 16-27)

Sec. 26-37. - Relocation upon notice by City.

All permission granted for construction under this Article does not constitute and shall not be construed as permitting a permanent installation within any public right-of-way. Any facility permitted within the public right-of-way shall be relocated or reconstructed by the owner at his sole cost and expense when in irreconcilable conflict with any construction, reconstruction, or any project performed by the City or its authorized representative, which is deemed to be in the interest of the general public within 30 days of the request. It shall be the responsibility of the City Manager or designee to provide notice to the affected permittees at the earliest possible time prior thereto of any such conflicts, whether actual, possible or planned. Where the owner requests additional time up to a maximum of 180 days, this may be granted by the office of the City Manager or designee upon receipt of a letter stating adequate grounds to support the owner's position that additional time is necessary to complete the relocation. If the extension of time requested by the owner is denied by the City Manager or designee or an extension in excess of 180 days is desired by the owner, the owner may appeal to the City Council by written request; and the time for relocation shall be stayed while the appeal is pending. Where the City has requested a relocation, permits will be required to approve the new sites of the utility facility, but permit fees shall be waived. Utility placements and relocations shall be governed by the prescriptions of applicable law.

(Code 1999, § 16-28)

Sec. 26-38. - Emergency repairs.

In the event of an emergency requiring repairs by utility companies to some portion of their facilities, nothing in this Article shall be deemed to prohibit the making of such repairs, however, emergency repairs shall be reported to the City Manager or designee the next business day as provided for in Section 26-30 hereof. Traffic safety measures must be implemented by the utility. Work performed as a result of such emergency repairs may continue pending the granting of an after-the-fact permit.

(Code 1999, § 16-29)

Sec. 26-39. - Appeals.

Any party claiming to be aggrieved by a decision of the City Manager or designee may appeal to the City Council by filing a written notice of appeal with the City Manager or designee within 30 days of the date of denial.

(Code 1999, § 16-30)

Sec. 26-40. - Time limits.

- (a) Within seven (7) days after receipt of an application for a permit under this Article, the City Manager or designee shall review the application and shall request submittal of any additional information the City Manager or designee is permitted by law to require. If the applicant believes any request for additional information is not authorized by law or rule, the applicant may file an appeal to the City Council pursuant to Section 26-39. Within 15 days after receipt of such additional information, the director shall review it and may request only that information needed to clarify such additional information or to answer new questions raised by or directly related to such additional information. If the applicant believes the request of the City Manager or designee for such additional information is not authorized by law or rule, the City Manager or designee, at the applicant's request, shall proceed to process the permit application. Permits shall be approved or denied within 30 days after receipt of the original application, the last item of timely requested additional material, or the applicant's written request to begin processing the permit application. If the application is not approved or denied in writing within 30 days, it shall be deemed approved. Applications for permits may be denied solely on the basis of actual and irreconcilable conflict of the proposed work with City technical specifications or land development regulations. Any denial of an application must state the specific basis upon which the denial is based. The permit shall be considered valid for six (6) months beginning on the date of issuance unless the commencement date shall be beyond such time. If work does not commence by the end of this period, the permit shall be considered void and reapplication will be necessary. Work must be completed by the completion date indicated on the application unless the permit is extended upon request to the City Manager or designee with an explanation of the basis for such request.
- (b) A request may be made to the City Manager or designee with the filing of an application for expedited review and processing; and provided that all information required as described in Subsection (a) of this section is submitted with said application, the director shall make a reasonable effort to review and process the same within five (5) days after receipt.

(Code 1999, § 16-31)

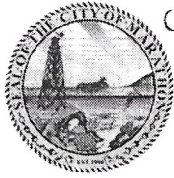
Sec. 26-41. - Restoration and penalty.

No person shall use City rights-of-way or easements for any purpose for which a permit is required by this Article without first obtaining a permit therefor unless said use is existing upon the effective date of the ordinance from which this section is derived or unless otherwise authorized by law. In the event City rights-of-way or easements are used and/or construction takes place without a permit, upon written notice by the City Manager or designee, the person shall apply for an after-the-fact permit and pay all fees and

penalties therefor and shall restore the area to its original condition and cease any nonpermitted use except as noted in Section 26-36(3).

(Code 1999, § 16-32)

Secs. 26-42—26-70. - Reserved.



CITY OF
MARATHON, FLORIDA
Planning Department

9805 Overseas Hwy, Marathon, FL 33050
Phone (305) 743-0033 www.ci.marathon.fl.us

Office Use Only	
Recv'd: _____	By: _____
App #: _____	
#: _____	
Meeting Date: _____	

Appeal Application 2017

FEE: \$1,500.00. The fee is payable upon application submittal.

*Any additional meeting with mailed & published notice will be charged additional \$1,500.00

Please check: Administrative Appeal Planning Commission Appeal

Applicant Name: Roger Bolon and Alexandria Wolff

Mailing Address: 9400 Aviation Blvd, Marathon, FL 33050

Phone Number: (305) 743-7653 **Phone (Alt):** _____

Email: roger@bbolon.com

Agent Name: Ronald I. Strauss, Esq.

Mailing Address: 5196 Overseas Highway

Phone Number: (305) 743-9073 **Phone (Alt):** _____

Email: rslawpa@ronstrausslaw.com

*Property owner must submit a notarized letter authorizing the agent to act on his/her behalf.

Property Owner Name: City of Marathon ROW

Mailing Address: 9805 Overseas Highway, Marathon, FL 33050

Phone Number: (305) 743-0033 **Phone (Alt):** _____

Email: _____

Legal Description of Property:

City of Marathon Right of Way

Key: _____ **Mile Marker:** _____

RE Number: 77777777-777777

If in metes and bounds, attach a legal description on separate sheet.

Property Description:

Street Address of Property (if applicable), or General Location Description:

Aviation Blvd from street address 8146 to 109th Street, Gulf, then toward US 1 ending 117 feet North of US 1 and 109th Street

Parcel Number(s): _____

Land Use District: _____

Zoning District: _____

Present Use of Property: Right of Way

Proposed Use of Property: _____

Property Size: _____

Decision Being Appealed

Planning Commission decision of denial regarding the ROW Permit #72020-2047

Date of Decision Being Appealed 10/19/2020

A COPY OF THE BASIS FOR THE APPEAL IN THE NATURE OF AN INITIAL BRIEF AND ANY EVIDENCE INCLUDING TESTIMONY, AFFIDAVITS, AND THE CURRICULUM VITAE OF ANY EXPERT WITNESS THAT WILL BE CALLED MUST BE ATTACHED TO THIS APPLICATION. The brief must at a minimum state all grounds for the appeal, including, but not limited to, the law being appealed and any facts necessary for the interpretation of those laws. *(Attach additional sheets of paper as necessary.)*

Names and addresses of all expert witnesses that you propose to call at the hearing:

Thomas D. Wright, 9711 Overseas Highway, Marathon, Florida 33050, (305) 743-8118
Lawrence Hagen, P.E., Lawrence T. Hagen, P.E., PTOE, Hagen Consulting Services, LLC, 361 Strawder Road, Ray City, GA 31645,

Are there any pending code violations on the property? No Yes If yes, please explain:

Empty box for explaining pending code violations.

I certify that I am familiar with the information contained in this application, and that to the best of my knowledge such information is true, complete and accurate.

Ronald I. Strauss, Esq.

Applicant or Agent Name (Please Print)

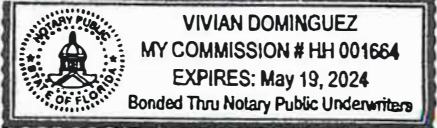
[Signature]
Signature of Applicant or Agent

11/6/2020
Date

NOTARY STATE OF FLORIDA
 COUNTY OF ~~MONROE~~ Miami-Dade, Florida

The foregoing instrument was acknowledged before me on this 9th day of November, 2020, by Ronald Strauss who is personally known or who produced _____ for identification.

[Signature]
Signature of Notary Public – State of Florida



My commission Expires: _____

OWNER'S AUTHORIZATION FOR AGENT REPRESENTATION

CITY OF MARATHON PLANNING DEPARTMENT



CITY OF **MARATHON**, FLORIDA

Planning Department

9805 Overseas Hwy, Marathon, FL 33050
Phone (305) 743-0033 www.ci.marathon.fl.us

Office Use Only	
Recv'd: _____	By: _____
App #: _____	
#: _____	
Meeting Date: _____	

Appeal Application 2017

FEE: \$1,500.00. The fee is payable upon application submittal.

*Any additional meeting with mailed & published notice will be charged additional \$1,500.00

Please check: Administrative Appeal Planning Commission Appeal

Applicant Name: Roger Bolon and Alexandria Wolff

Mailing Address: 9400 Aviation Blvd, Marathon, FL 33050

Phone Number: (305) 743-7653 **Phone (Alt):** _____

Email: roger@bbolon.com

Agent Name: Ronald I. Strauss, Esq.

Mailing Address: 5196 Overseas Highway

Phone Number: (305) 743-9073 **Phone (Alt):** _____

Email: rslawpa@ronstrausslaw.com

*Property owner must submit a notarized letter authorizing the agent to act on his/her behalf.

Property Owner Name: City of Marathon ROW

Mailing Address: 9805 Overseas Highway, Marathon, FL 33050

Phone Number: (305) 743-0033 **Phone (Alt):** _____

Email: _____

Legal Description of Property:

City of Marathon Right of Way

Key: _____ **Mile Marker:** _____

RE Number: 77777777-777777

If in metes and bounds, attach a legal description on separate sheet.

Property Description:

Street Address of Property (if applicable), or General Location Description:

Aviation Blvd from street address 8146 to 109th Street, Gulf, then toward US 1 ending 117 feet North of US 1 and 109th Street

Parcel Number(s): _____

Land Use District: _____

Zoning District: _____

Present Use of Property: Right of Way

Proposed Use of Property: _____

Property Size: _____

Decision Being Appealed

Right of way Permit #72020-2047

Date of Decision Being Appealed 8/17/2020

A COPY OF THE BASIS FOR THE APPEAL IN THE NATURE OF AN INITIAL BRIEF AND ANY EVIDENCE INCLUDING TESTIMONY, AFFIDAVITS, AND THE CURRICULUM VITAE OF ANY EXPERT WITNESS THAT WILL BE CALLED MUST BE ATTACHED TO THIS APPLICATION. The brief must at a minimum state all grounds for the appeal, including, but not limited to, the law being appealed and any facts necessary for the interpretation of those laws. *(Attach additional sheets of paper as necessary.)*

Names and addresses of all expert witnesses that you propose to call at the hearing:

Thomas D. Wright, 9711 Overseas Highway, Marathon, Florida 33050, (305) 743-8118
Lawrence Hagen, P.E., Lawrence T. Hagen, P.E., PTOE, Hagen Consulting Services, LLC, 361 Strawder Road, Ray City, GA 31645,

Are there any pending code violations on the property? No Yes If yes, please explain:

Empty box for explaining pending code violations.

I certify that I am familiar with the information contained in this application, and that to the best of my knowledge such information is true, complete and accurate.

Ronald I. Strauss, Esq.

Applicant or Agent Name (Please Print)

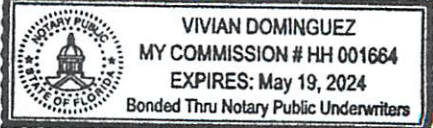
[Signature]
Signature of Applicant or Agent

11/6/2020
Date

NOTARY STATE OF FLORIDA,
COUNTY OF ~~MONROE~~ Miami-Dade, Florida

The foregoing instrument was acknowledged before me on this 9th day of November, 2020, by Ronald Strauss who is personally known or who produced _____ for identification.

[Signature]
Signature of Notary Public - State of Florida



VIVIAN DOMINGUEZ
MY COMMISSION # HH 001664
EXPIRES: May 19, 2024
Bonded Thru Notary Public Underwriters

My commission Expires: _____

OWNER'S AUTHORIZATION FOR AGENT REPRESENTATION

CITY OF MARATHON PLANNING DEPARTMENT

I/WE Roger Bolon and Alexandria Wolff

Print name(s) of property owner(s)

Hereby
Authorize:

Ronald I. Strauss, Esq.

Print name of Agent

to represent me/us in processing an application
for:

Administrative Appeal

Type of Application

on our behalf. In authorizing the agent to represent me/us, I/we, as owner/owners, attest that the application is made in good faith and that any information contained in the application is accurate and complete.

Roger B. Bolon
(Signature of owner)

Alexandria M. Wolff
(Signature of owner)

Roger Bolon

(Print name of owner)

Alexandria Wolff

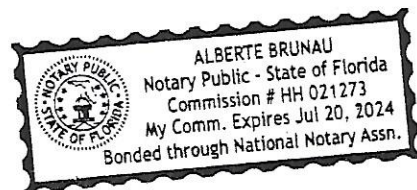
(Print name of owner)

**NOTARY STATE OF FLORIDA,
COUNTY OF MONROE**

The foregoing instrument was acknowledged before me on this 06 day of Nov, 2020, by Roger Bolon and Alexandria Wolff who is personally known or who produced FL Driver Licenses for identification.

[Signature]
Signature of Notary Public - State of Florida

July 20, 2024
My commission Expires:



CITY OF MARATHON PLANNING DEPARTMENT

Phone (305) 743-0033 | planning@ci.marathon.fl.us | www.ci.marathon.fl.us/government/planning/

Appeals

- An appeal of the decision of the administrative official or body may be made **within 30 working days from the date of such decision**. If filed, an appeal stays any further action on the permit until final resolution of the appeal, unless the administrative official or body, whose action is the subject of the appeal, certifies in writing that the stay poses an imminent peril to life or property.

IMPORTANT NOTES:

- A concept meeting with the Planning Department is recommended prior to submitting your application; this informal meeting allows you to become acquainted with all requirements and processes involved with your application. To guide you through the process and ensure that your application is understood and properly processed, it is recommended that you also meet with a City Planner at the time you submit your completed application. Appointments can be scheduled by contacting the Department ahead of time.
- The Council and PC shall consider only those items cited in the appeal. In its deliberation, it may use the record and any additional evidence relative to the application and may confirm, reverse, or modify the appealed action based upon its interpretation of the findings required and the evidence submitted.
 - *Commission:* The PC shall hear and make decisions on appeals of an action by any administrative official or the TRC made pursuant to the provisions of the LDRs.
 - *Council:* The Council shall hear and make decisions on appeals of an action taken by the PC made pursuant to the provisions of the LDRs.
- The decision of the Council and PC on an appeal shall be effective immediately.
- An appeal of the decision of the Planning Commission may be made within 30 working days from the date of such decision. The appeal will be heard by the City Council within 45 working days of receipt of a complete appeal application.
- **In accordance with FL Statute 286.0105** if a person decides to appeal any decision made by the board, agency, or commission with respect to any matter considered at such meeting or hearing, he or she will need a record of the proceedings, and that, for such purpose, he or she may need to ensure that a verbatim record of the proceedings is made, which record includes the testimony and evidence upon which the appeal is to be based. The requirements of this section do not apply to the notice provided in s. 200.065(3).

2017 Planning Commission Meeting Schedule

Application Deadline											
12/01/16	01/01/17	02/01/17	03/01/17	04/01/17	05/01/17	06/01/17	07/01/17	08/01/17	09/01/17	10/01/17	11/01/17
Planning Commission Meeting Date											
01/17/17	02/21/17	03/20/17	04/17/17	05/22/17	06/19/17	07/17/17	08/21/17	09/18/17	10/16/17	11/20/17	12/18/17

Meetings are held the 3rd Monday of the month at 5:30pm.

STAFF CONTACTS: The Planning Department will guide your application from start to finish, engaging other City departments or agencies as needed. You will receive a copy of the staff report one week before your meeting.

George Garrett
 Planning Director
garrettg@ci.marathon.fl.us
 305-289-4111

Brian Shea
 City Planner
sheab@ci.marathon.fl.us
 305-289-4112

Geovanna Torres
 City Planner
torresg@ci.marathon.fl.us
 305-289-4109

CITY OF MARATHON PLANNING DEPARTMENT

Application Requirements Appeal Applications

These requirements are not to be considered ALL inclusive of the requirements for the proposed work. The City may require additional drawings, specifications or information in order to complete the review of the application.

THE FOLLOWING MUST BE PROVIDED IN ORDER TO BE A COMPLETE APPLICATION:

- ⇒ **Application completed in full.**
- ⇒ **Proof of ownership** (copy of deed or tax statement)
- ⇒ **Agent authorization** (as applicable)
- ⇒ **Property Survey** no older than two years from date of application.
- ⇒ **Site Plans.** As applicable
- ⇒ **A copy of the document(s) which comprise the decision being appealed.**
- ⇒ Letters of Coordination may be required. The applicant must check with the Planning Department to identify other agencies expected to review the project. These may include:
 - City of Marathon, City Fire Chief – (305) 743-5266
 - City of Marathon, Utilities Manager- (305) 289-5009
 - Florida Department of Environmental Protection (FDEP) – (305) 289-2310
 - Florida Department of State, Division of Historic Resources
 - Florida Department of Transportation (FDOT) – (305) 289-2350
 - Florida Keys Aqueduct Authority (FKAA) – (305) 743-5409
 - Florida Keys Electric Cooperative (FKEC) – (305) 743-5344
 - Monroe County Department of Health – (305) 289-2721
 - South Florida Water Management District (SFWMD)
 - U.S. Army Corps of Engineers (ACOE) – (305) 743-5349
 - U.S. Fish and Wildlife Service (USFWS) – (772) 562-3909, ext. 306
 - Other, as applicable to the project

Chapter 102, Article 17 – Appeals

Provide an explanation of the basis for the appeal and any other evidence that may be pertinent to the application.

Use additional sheets as necessary

PLEASE SEE ATTACHED EXPLANATION FOR APPEAL

APPEAL BY ROGER BOLON AND ALEXANDRIA WOLFF

Administrative Appeal to the City Council of the City of Marathon of the Planning Commission Denial of Appeal Regarding Permit Number #P2020-0785

UNDERLYING HISTORY

- On or about June 23, 2020, FKEC began the *Aviation Blvd. Project* by crews marking areas in the City's adjacent "right-of-way" in front of residential areas, as well as marking trees in and on the property of residential homes for removal. The project designated the removal of existing FKEC utility poles from their current location south side of Aviation Blvd. (abutting the airport side), to the residential locations on the north side of Aviation Blvd.
- The FKEC Aviation Blvd. Project was scheduled without any prior notice to the residential neighbors. The FKEC Aviation Blvd. Project was commenced without obtaining a building permit from the City of Marathon.
- The extent and detail of the FKEC Aviation Blvd Project, known only to FKEC and its subcontractors, was planned for the removal of multiple utility poles currently existing on the south side of Aviation Blvd. abutting the airport and adjacent bike path, and the installation of much larger multiple utility poles to the residential north side of Aviation Blvd. constructed in the City's right-of-way, which admittedly was without any submission for a permit to the City of Marathon, without any submission for approval to the FAA, or to the DOT Aviation Office, which required such approvals because the extended height of the utility poles were in the *Airport Hazard Zone*.
 - The residential homeowners objected to large utility poles in front of their residences to be constructed in the City Right-of-Way, which the residents asserted blocked safe ingress and egress in part to the residential properties, which had historically a grandfathered right of access to their respective properties, and as such, the to be constructed utility poles in the Right of Way, statutorily recognized by City Code, Section 26(1)(a), to access and exit from their driveways of their residences and further asserted that such construction would block their vision regarding ingress and egress when trailing boats from and to the docking area to the rear of the residential properties, which were abutting the adjacent canal behind the residential properties.
 - Specifically, the original safety concerns were elevated because FKEC did not conduct pre-commencement of construction, any negative impact/safety, or required 10 foot off road placement as determined, and presented by applicants expert during the Planning Commission hearing, the noncompliance with the statutory "Manual of Uniform Minimum Standards for Design, Construction and Maintenance for Streets and Highways," commonly referred to as the "Florida Greenbook", developed by the Florida Department of Transportation as required by F.S. Section 336.045 required the removal of the obstructions which are statutorily objectionable.

- On July 15, 2020, a zoom meeting with the residents and property owners of Aviation Blvd., was scheduled. The residential homeowners objected to large utility poles in front of their residences, blocking safe ingress and egress in part, and other safety concerns (no negative impact/safety studies were done pre-construction), inquired to FKEC as to whether FKEC considered placing utility connections underground, to cross from its current location south side of Aviation Blvd. to the residential locations on the north side. In Attendance were Bill Lee of FKEC, Michael Roberge of FKEC, and Carlos Solis of City of Marathon and several of the residential neighbors participated. The issues were not resolved by the meeting and FKEC announced it would commence construction immediately.
- In that FKEC did not have utility easement for such construction work on Aviation Blvd. and did not have a City or County construction permit when it subcontracted The Aviation Blvd. Project, for the removal of utility poles on the south airport side of Aviation Blvd. and implanting replacement large metal utility poles and electric utility transmission lines in the City's abutting right-of-way on the north residential side of Aviation Blvd. (on information and belief the subcontract was in the amount of \$500,000.00), the residential homeowners Roger Bolon and Sandy Wolff, engaged legal counsel to seek legal redress in the Circuit Court of Monroe County Florida, Case Number 20-CA-000117-M.
- On July 17, 2020, a Verified Complaint for Declaratory Relief and Motion for Emergency Temporary/Permanent Injunction and Damages was filed. A copy of same was attached to the Planning Committee Appeal Application as incorporated by reference herein.
- On July 20, 2020 FKEC notwithstanding receiving copies of the filed Circuit Court Complaint, commenced the installation of the utility poles on the north side of Aviation Blvd., and duly served with process, FKEC accelerated construction on the residential north side of Aviation Blvd. and installed multiple large metal utility poles without a valid permit.
- **City Code, Section 26(1)(a)**: Pursuant to City Code, Section 26(1)(a), a private utility, FKEC, is required to obtain formal permit from the City. Also, formal permit is required by a public or private utility when installation of a service will cause damage to an existing roadway *or disrupt a previously permitted or grandfathered driveway access or other permitted feature in the City right-of-way. (Emphasis Supplied)* [The Plaintiffs owned their property for over 30 years, and their use of the city's right-of-way putting their property therefore was without dispute grandfathered in when the City of Marathon was in incorporated).
- On August 7, 2020, after multiple utility poles were implanted by the subcontractor for FKEC on the north side of Aviation Blvd., without a permit, litigation counsel for City of Marathon conceded that the City of Marathon must require that FKEC obtain a permit for planned construction for its FKEC Aviation Blvd (Please see Exhibit A attached, acquired from the Public Records of the City of Marathon).
- On August 10, 2020, the parties to the Circuit Court litigation, entered into an "*Agreement Regarding Cessation of Work and Appeal of Issuance of Permit.*" (previously submitted to the Planning Commission and attached hereto by reference)

- On August 17, 2020 counsel for appellants received a copy by email of the City of Marathon Right-of-Way permit #P2020-0785 (dated 8/14/20) to Pike Electric, and again no negative/safety impact studies were required to be submitted to the City prior to construction. The City Permit, dated 8/14/2020, and revised permit dated 8/26/2020, did not address the multiple utility poles which were installed *without a permit* on the north side of Aviation Blvd., and without a utility easement.
- On August 18, 2020 Roger Bolon and Alexandria Wolff filed their Appeal of the Permit to the Planning Commission, which is incorporated herein by reference and available for review by the City Council.
- The Planning Commission Appeal was premised on the undisputable violation of Section 26 (1)(A) because initially FKEC failed to acquire the required construction permit, and secondarily the City and the Applicant failed to recognize the potential safety impact on adjacent property owners, including grandfathered driveway access or other permitted feature(s) in the city right-of-way as recognized in city code, noncompliant with the “Manual of Uniform Minimum Standards for Design, Construction and Maintenance for Streets and Highways,” commonly referred to as the “Florida Greenbook”, developed by the Florida Department of Transportation as required by F.S. Section 336.045.
- The Appeal was also premised on the undisputable statute violations by FKEC or its subcontractor, F.S. 333.03 or ultimately the City, because of the failure of any such entity, prior to commencement of the work, pursuant to Chapter 333, F.S 337.401.
- At the Planning Commission hearing on October 19, 2020, FKEC acknowledged that prior to commencement of construction it failed to obtain pre-approval of the permit FAA/FDOTAO (Federal Aviation Administration; Florida Department of Transportation Aviation Office) which is required because it is in the area of the Florida Keys Marathon International Airport (Airport Hazard Zone) and such preconstruction approval is statutorily required by F.S. 333.03 and F.S. 333.025 (4)(5).
- During the pre-appeal process, but prior to the hearing at the Planning Commission, it was also discovered that work project on Aviation Blvd. in the close proximity of Florida Keys Marathon International Airport did not comply with Chapter 333, Florida Statutes Airport zoning (2016) because the City or the Applicant did not acquire preconstruction approval by FAA and FDOTAO regarding construction of the utility poles and electricity transmission lines in that same could be determined to be *airspace obstructions per 14 CFR Part 77.9, FAA*.
- It is also material and relevant to the permit issued by the City, that the City has extremely clear directives to the Permit Applicant (each subcontractor duly designated by for construction) agreed to obey the permit conditions on the reverse side of the permit excised and copied herein to facilitate review, issued by the City Planning Commission, which specifically requires the applicant to comply with,

FEDERAL AGENCIES, STATE AGENCIES OR WATER MANAGEMENT DISTRICT, **FCAA**, **FKEC**, **FDOT**, AND ANY OTHER APPLICABLE OUTSIDE AGENCY ISSUANCE OF THIS PERMIT DOES NOT CREATE ANY RIGHTS ON THE PART OF THE **APPLICANT TO OBTAIN A PERMIT FROM ANY FEDERAL AGENCY, STATE AGENCY**, THE WATER MANAGEMENT DISTRICT, **FCAA**, **FKEC**, **FDOT**, AND ANY OTHER APPLICABLE OUTSIDE AGENCY. ISSUANCE OF THIS PERMIT DOES NOT CREATE ANY RIGHTS ON THE PART OF THE APPLICANT TO OBTAIN A PERMIT FROM ANY FEDERAL AGENCY, STATE AGENCY. **(Emphasis supplied)**

IT IS A CONDITION OF THIS PERMIT THAT THE APPLICANT OBTAIN ALL APPLICABLE/REQUIRED FEDERAL, STATE, WATER MANAGEMENT DISTRICT INCLUDING BUT NOT LIMITED TO **FCAA**, **FKEC**, **FDOT**, AND ANY OTHER APPLICABLE OUTSIDE AGENCY PERMITS **BEFORE COMMENCEMENT OF DEVELOPMENT**. **(Emphasis supplied)**

Please refer to the transcript of record (TR) of the proceedings before the Planning Commission for the following references, which are incorporated by reference herein:

FKEC CURRENTLY SEEKING FAA DESIGN APPROVAL:

TR 16- On the date of this submission to the City Council, FKEC has now submitted for review by the FAA its Aviation Blvd Project, which is pending

TR:89-The Aviation Blvd Project construction has not recommenced pending FAA approval

TR:91 The Aviation Blvd Project construction pending FAA design criteria approval.

TR:92 FKEC acknowledges that did not seek bids for underground utility connection to the residential side of Aviation Boulevard

TR:93,99- FKEC acknowledges that there is not any utility easement on the north side of aviation Boulevard.

TR:95: If the FKEC design does not meet FAA criteria, FKEC will remove the utility poles planted without a permit without any cost to the City of Marathon

CITY OF MARATHON PUBLIC WORKS

TR:95: City did not determine prior to issuing the permit for The Aviation Blvd Project that it was in violation of the Aviation Hazard Zone

TR:103-The existing utility poles on the airport south side from the Aviation Boulevard asphalt roadway are 10 to 13 feet from the roadway.

TR:104-the newly constructed utility poles are 6 feet from the roadway

TR:105 The newly constructed utility poles on the north side of Aviation Boulevard, to be compliant with the “Green Book” F.S. Section 336.045, requires a 10 foot setback; FKEC must seek and obtain an exception

EXPERT OPINION AREA OF 6 FEET IS IN VIOLATION OF F.S. 333

TR:35-37: Expert Opinion: The 6 foot offset from the Aviation Boulevard roadway on the residential north side is not compliant with Florida Safety Standards, FS 333, and therefore is substandard fixed object hazard and subjects the City to liability; the existing utility north side poles installed without a permit, such poles must be 10 feet from the roadway (as is the existing utility poles on the airport south side of the road way), and without FAA approval unless same are removed from their current locations the City is now on notice of the obstruction hazard created by FKEC.

TR:48: The City of Marathon specifically adopted F.S. 333 as part of its municipal City Code.

Please see CV and Opinion of Larry Hagan, PE attached as Exhibit B

CONCLUSION

- Therefore, the City delegated and required that the permit holder acquire all other federal state statutory regulations as a condition of granting the permit, which was not done here, and since it is without dispute that the permit holder did not comply with the clear City permit requirements or FAA and FDOTAO, the direct violation of F.S. 333, the circumstances mandate that the City implement its authority pursuant to the issue permit "...REMOVAL AT ANY TIME BY ANY UTILITY OR THE CITY WITHOUT GUARANTEE OF REPLACEMENT.

"CONDITIONALLY APPROVED: A PERMIT ISSUED SHALL BE CONSTRUED TO BE A LICENSE TO PROCEED WITH THE WORK AND NOT AS AUTHORITY TO VIOLATE, CANCEL, ALTER OR SET ASIDE ANY OF THE PROVISIONS OT THE CODES, NOR SHALL THE ISSUANCE OF A PERMIT PREVENT THE BUILDING.

ALL CONSTRUCTION IN THE RIGHT OF WAY IS SUBJECT TO REMOVAL AT ANY TIME BY ANY UTILITY OR THE CITY WITHOUT GUARANTEE OF REPLACEMENT."

- Further, to knowingly not comply with safety standards set forth under Chapter 333, subjects the City to both civil liability (not protected by sovereign immunity) and criminal liability pursuant to F.S. 333.13(1) "Enforcement and Remedies - Each violation of this chapter or of any regulations, orders, or rulings promulgated or made pursuant to this chapter shall constitute a misdemeanor of the second degree, punishable as provided in s. [775.082](#) or s. [775.083](#), and each day a violation continues to exist shall constitute a separate offense."

From: Carlos Solis
Sent: Friday, August 07, 2020 3:08 PM
To: Bill Lee
Cc: Samuel I. Zeskind; 'Dirk Smits'; Dale Coburn; George Garrett; Charles Lindsey; Elizabeth Schut; Adam M. Hapner; Olga M. Zuniga; Douglas Lewis
Subject: Aviation Blvd. Utility Pole relocation
Attachments: Right of Way Application - download.pdf

Bill, the City's legal team, after further consideration of all the factors surrounding the project, has determined that a formal R/W permit is required to continue with the project. Please fill out, and sign the attached application, and forward it back to me along with the schematic plans you have for the project. We will in turn issue the permit. Let me know if you have any questions. Thanks

Carlos A. Solis, P.E.
Director of Public Works & Engineering
City of Marathon | Public Works
9805 Overseas Highway | Marathon, FL 33050
Office: 305-289-5008 | Cell: 305-481-0451
solisc@ci.marathon.fl.us | www.ci.marathon.fl.us

EXHIBIT A

Résumé of Lawrence T. Hagen, P.E., PTOE, RSP

Education

University of Florida:

Master of Engineering, Civil Engineering -- 1988

Graduate work specializing in transportation engineering

Bachelor of Science in Civil Engineering -- 1985



Experience

Hagen Consulting Services, LLC

Owner / Principal – July 2006 - Present

Providing engineering consulting services in areas related to traffic operations, traffic safety, road safety audits, and intelligent transportation systems. Current FDOT projects include: Safety Studies & Minor Design (D1); Traffic Safety and Minor Design (D3); Community Safety Studies and Design (D5); Pedestrian Bicycle Safety (D6), Plans Review (D6), Traffic Signal Retiming (D6 & D7), Safety Studies & Minor Design (D7), Traffic Operations Support (D7), Connected and Automated Vehicle Support (Central Office), and Pedestrian and Bicycle Safety Engineering (Central Office). Also providing professional development training and PDHs for engineers nationwide including Highway Safety Manual, Engineering Ethics, and Florida's Laws & Rules.

Technology Transfer Center / University of Florida

Safety Circuit Rider Manager – July 2006 - July 2012

Responsibilities include providing training and technical assistance to transportation agencies throughout Florida. Courses taught included “Low-Cost Safety Improvements,” “Road Safety Audits,” “Safe Mobility for Life,” and “Traffic Engineering Fundamentals” workshops. Also taught Intermediate and Advanced Maintenance of Traffic certification courses.

Center for Urban Transportation Research / University of South Florida

Program Director; ITS, Traffic Operations, & Safety – September 2002 - June 2006

Responsibilities included research in the areas of Intelligent Transportation Systems, Traffic Operations, and Safety. Worked on several projects related to improving freeway interchange operations, transit signal priority, traffic incident management, and improved safety for bus operations. Established the foundation for the Automated Lighting Measurement System. Also taught graduate and undergraduate transportation engineering courses.

Broward County Traffic Engineering

Signal System Engineer – March 2001 - September 2002

Responsibilities included managing the operation of the centralized traffic signal control center which controls over 1000 signalized intersections throughout the Ft. Lauderdale metro area. Responsible also for design efforts for new intersections. Worked to upgrade outdated UTCS signal system to 21st Century ATMS

Kimley-Horn & Associates, Inc.

Senior Transportation Engineer – September 1999 - March 2001

Responsibilities included design and review of roadway plans in the areas of Work Zone Traffic Control, Signing and Pavement Markings, and Signalization. Also involved in traffic studies, traffic impact reports, and intelligent transportation systems projects.

Faller, Davis & Associates, Inc.

Vice President for Transportation Services – March 1998 - August 1999

Responsible for all transportation projects including the preparation of roadway plans in the areas of Work Zone Traffic Control, Signing and Pavement Markings, Signalization and Highway Lighting. Responsible also for marketing and project development.

Faller, Davis & Associates, Inc.

Senior Traffic Engineer – January 1994 - March 1998

Involved in the development of the technical specifications and testing for the SunPass AVI/ETTM system (Florida's statewide electronic toll collection system). Also involved in the development of the concept studies for the Turnpike Advanced Traveler Information System, Highway Advisory Radio system, and other ITS applications for Florida's Turnpike. Worked on special traffic studies, project concept development, and the review of roadway plans in the areas of signing and pavement marking, signalization, and work zone traffic control.

Barr, Dunlop & Associates, Inc.

Traffic Engineer – May 1992 - December 1993

Responsibilities included a variety of traffic engineering tasks for public and private clients including roadway design, signalization design, signing and pavement markings and access management studies.

Florida Department of Transportation

Assistant State Traffic Operations Engineer – April 1990 - May 1992

Responsibilities included development of sign designs, Quality Assessment Reviews of school zones and traffic studies, travel time studies, corridor efficiency reviews, training for Department personnel and Computer-Aided Design (CAD).

Transportation Research Center, University of Florida

Assistant in Engineering - Civil Engineering Faculty – May 1988 - April 1990

Responsibilities included providing technical support for several traffic engineering computer models (TRANSYT-7F, HCS, PASSER II, Traf-NETSIM, etc.) to traffic engineers worldwide. Also involved in presenting training courses, development of signal timing plans and developing methods for field data collection.

McTrans Center, University of Florida

Acting Manager – March 1987 - May 1988

Responsibilities included managing the daily operation of the Center for Microcomputers in Transportation (McTrans). Duties also included technical support to users worldwide for software covering traffic engineering, transportation planning, and other areas.

Transportation Research Center, University of Florida

Graduate Research Assistant – August 1985 - March 1987

Responsibilities included assisting on a variety of research projects for the Florida Department of Transportation.

Professional Activities and Awards

Registered Professional Engineer in Florida and Georgia.

Certified Professional Traffic Operations Engineer (PTOE) and Road Safety Professional (RSP)

Fellow of the Institute of Transportation Engineers (ITE).

Frequent presenter at Florida Puerto Rico District ITE meetings.

Florida Board of P.E.'s approved provider of Professional Development Hours

Recipient of Florida Section ITE's "Woody Hiller Distinguished Service Award" 2007

Recipient of ITE District 10 "Edward Mueller Transportation Engineer of the Year" Award 2005

Recipient of Florida Section ITE's "Young Transportation Engineer of the Year" Award 1995

Authored chapter on traffic control devices ITE's [Toolbox on Intersection Safety and Design](#)

Served as technical reviewer for ITE's [Manual of Transportation Engineering Studies](#)

Member of the Board of Directors for ITS Florida (2005-2006)

President of Florida Section ITE (2002)

Webmaster for Florida Section ITE (www.floridasectionite.org)

Wolff & Bolon v. FKEC & City of Marathon

In reviewing the information that I have been provided regarding the installation of utility poles on the North side of Aviation Boulevard I have the following preliminary observations that are specifically related to protection of the health and safety of the residents of the area where the work is being performed:

1. Based on my many years of experience with roadway projects, any work in the close proximity of an airport typically requires notification and permission from the Federal Aviation Administration (FAA). In researching this issue more closely, I contacted people that I know in the Florida DOT Central Office in Tallahassee and they verified that any work like this in the immediate vicinity of a public airport requires notification of the FAA and a permit from the Florida DOT Aviation Office in Tallahassee. Per Florida Statute 333 the local government is required to follow the appropriate processes when issuing permits related to what may be airspace obstructions. Per 14 CFR Part 77.9, FAA notification is required for any construction that falls within the area described as follows:

(b) Any construction or alteration that exceeds an imaginary surface extending outward and upward at any of the following slopes:

- (1) 100 to 1 for a horizontal distance of 20,000 ft. from the nearest point of the nearest runway of each airport described in paragraph (d) of this section with its longest runway more than 3,200 ft. in actual length, excluding heliports.

The length of the runway at the Marathon airport is over one mile, so it fits this condition. Since Aviation Boulevard is approximately 500 feet away from the centerline of the runway, at a slope of 100 to 1 extending out from the runway would include anything that is 5 feet above the elevation of the runway which would certainly include these utility poles. Thus, notification of FAA and the FDOT Aviation Office is required. Pursuant to F.S. 333.025(8), I believe that any permit issued by the City that does not include these required notifications would not be considered a valid permit for the construction of the improvements, as these notifications are required to be made prior to beginning construction.

2. In viewing the video of the new pole installations along Aviation Boulevard, it appears that many of the new pole locations do not meet the requirements for horizontal clearance as required by the “Manual of Uniform Minimum Standards for Design, Construction and Maintenance for Streets and Highways,” commonly referred to as the “Florida Greenbook.” The Florida Greenbook is developed by the Florida Department of Transportation as required by F.S. Section 336.045 to provide uniform minimum criteria for the design, construction, and maintenance of all public streets. The Florida Greenbook requires a minimum clear zone width of 10 feet for collector roadways with design speeds of 30 – 40 miles per hour (Greenbook Table 3-15). Per the Functional Classification Map for Monroe County, Aviation Boulevard is classified as an Urban Major Collector roadway and would thus fall under these criteria. Failure to meet the minimum clear zone (or horizontal clearance) criteria constitutes a significant safety hazard. If a fixed above-ground hazard, like a utility pole, were to be placed within the clear zone, a design exception would be required, in accordance with Chapter 14 of the Greenbook. Satisfying the design exception requirements of the Greenbook requires a design exception package that has been approved by a responsible professional engineer for the agency responsible for maintaining the roadway. Any permit that would be issued that would not include the design exception documentation should not be considered a valid permit, as the design exception needs to be approved prior to construction.

Respectfully submitted,

Lawrence T. Hagen, P.E.
Florida P.E. #43968

THOMAS D. WRIGHT, ESQ.

Tom Wright is a sole practitioner in Marathon. He received his JD degree from the Ohio State University College of Law. He is Board Certified in Real Estate Law and his practice consists primarily of residential and commercial real estate transactions. Tom has served for 20 years on the Florida Realtor Attorney Joint Committee, which drafts the FR-BAR contract forms. Tom began his legal career in Key West as a Navy JAG officer, and he retired from the Naval Reserve in 2001 as a Captain. Tom currently serves as City Attorney for the City of Key Colony Beach and represents the Marathon and Lower Keys Association of Realtors, Inc.

1 CITY OF MARATHON, FLORIDA.

2 PLANNING COMMISSION

3
4
5 Hearing re: An Appeal by Roger Bolon and Alexandria
6 Wolff

7
8 Held on Monday, October 19, 2020, at Marathon, Florida
9 City Hall, 9805 Overseas Highway, Marathon, Florida

10
11 In attendance:

12 Lynn Landry, Planning Commissioner/Vice Chair
13 Eugene Gilson, Planning Commissioner
14 Matt Sexton, Planning Commissioner
15 James Leonard, Planning Commissioner

16 George Garrett, Planning Director
17 Steven Williams, City Attorney
18 Lorie Mullins, Planning Administrative Assistant
19 Brian Shea, Sr. Planner

20 Ron Strauss, Esq.
21 Attorney for Appellants

22 E. Blake Paul, Esq.
23 Attorney for FKEC

24 Reported by: Tina M. Roberge, Court Reporter

25

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1 (The following proceedings were had:)

2 MS. MULLINS: Okay. The next item is Item
3 Number 1, an appeal by Roger Bolon and Alexandria
4 Wolff for the decision of the City of Marathon
5 Public Works Director to issue a permit to the
6 Florida Keys Electric Co-Op, Inc., to move electric
7 transmission poles from the south side of Aviation
8 Boulevard to the north side of Aviation Boulevard,
9 from 8146 Aviation Boulevard to 109th Street Gulf,
10 then toward U.S. 1 ending 117 feet north of U.S. 1
11 and 109th Street. Said appeal is premised on a
12 belief that the parties -- by the parties that the
13 City violated City Code Section 26(1)(A) and
14 337.401 of Florida Statutes because the City failed
15 to recognize the potential impact on adjacent
16 property owners including grandfathered driveway
17 access or other permitted features in the City
18 right-of-way as recognized in the City Code and
19 subsequently discovered violation of Florida
20 Statute Chapter 333 because the City failed to
21 obtain an FAA/FDOT approval of the permit prior to
22 it being issued and prior to the commencement of
23 work as required by Florida Statute 333.03 and
24 Florida Statute 333.025(4)(5).

25 MR. GARRETT: Again, good evening. George

1 Garrett for the record.

2 What you have before you obviously is an
3 appeal of a permit issued by the City of Marathon
4 2020-0785. The history of this is a little broader
5 than that, obviously. Utilities typically within
6 the rights-of-way of the City of Marathon and many
7 other areas are -- well, 26(1)(A), as we've noted
8 already, or Chapter 26 really relates to an
9 ordinance that has been provided City's code
10 allowing utilities a general permit to operate
11 within the City's rights-of-way. There are
12 conditions within those, that ordinance within
13 which what is a general permit and allows utilities
14 to simply operate under that general permit. There
15 are conditions under which that would not be true.
16 I will elucidate those in just a few minutes, but
17 the bottom line as Lorie read in the item is
18 question of compliance with Florida Statute
19 377.401, couple others. That statute lies with
20 City's code 26(1)(A). Actually goes to 26(7) as
21 well.

22 So the way the item reads is intended to
23 reflect the intent of the appeal, not necessarily
24 the City's position on the appeal. I think that's
25 reflected in the City's staff report. You will

1 have I believe Mr. Strauss who represents the
2 appellants and his expert speaking to you as well.
3 And I believe the FKEC who obviously is the utility
4 in question here will also have time to present and
5 provide some expert testimony.

6 So here is the area in question. It's in your
7 staff report. Basically the electric co-op has in
8 fact proceeded to modify their poles, to remove
9 poles on the south side of Aviation Boulevard and
10 move them to the north side. And they found over
11 the length of the north portion of Aviation
12 Boulevard portion that essentially parallels the
13 airport and then it comes down 107th Street to
14 almost U.S. 1.

15 In particular, however, the appeal concerns an
16 area which has not been modified yet. Poles have
17 not been moved. And that's at 9400 Aviation
18 Boulevard, and that actually is the subject of the
19 appeal by the appellants in question. You can see
20 that area highlighted specifically.

21 So first of all, you know, if under the
22 premise of 377.401, you know, the City believes
23 that it does in fact comply with those statutes,
24 and the ordinance does as well. We believe then
25 that 26 allows the City to -- well, allows

1 utilities to move forward under a general permit to
2 install, modify, maintain, repair their utilities
3 within our right-of-way. It then applies a series
4 of conditions in 27-30 -- or 26-30, which
5 essentially says that if on the other hand
6 something that that utility would do would affect
7 our actual road bed, it would affect somebody's
8 driveway or access to a driveway, whether
9 grandfathered or new, whether in one way or the
10 other would affect components of the City's
11 infrastructure and facilities within that
12 right-of-way, then the applicant or the utility
13 would have to seek a specific permit through the
14 City.

15 In review of that ordinance, the City believed
16 and continues to believe that we have complied with
17 the ordinance and the statute.

18 Now, there was in fact a lawsuit filed on
19 this. The history then becomes one of discussion
20 between the electric co-op attorneys, the City's
21 attorneys and the Plaintiff's attorneys or the
22 Appellants' attorneys in this. In an agreement
23 that the best way forward in fact would be to issue
24 a permit in this case, which then gave the
25 Appellants the opportunity for an appeal to the

1 City directly. And may go beyond that. But at
2 least that was the starting point. And we would
3 then move forward with your deliberations, your
4 decisions and what might come from that.

5 So I think I've given you most of the analysis
6 at this point. We believe we've complied, the City
7 believes we've complied with 377. We believe in
8 review of the City's ordinances we've complied with
9 the City's ordinances. There are some things I
10 think will come up on the FKEC's perspective and
11 their further review, because I think the agreement
12 now is that under that permit that was issued,
13 whether we agree it had to be or not, we did agree
14 that we would issue the permit, we would abide by
15 it, and in fact the electric co-op would abide by
16 it.

17 So one of the conditions there was that they
18 would seek any other permits that might be
19 necessary. So they may take the additional step of
20 talking to other agencies to make sure they are
21 fully in compliance. I want to let the FKEC rep
22 speak to that.

23 So with that, I will conclude a relatively
24 short presentation. City of Marathon believes that
25 it complies with 377.401. We believe we comply

1 with the City of Marathon's Ordinance 26. We have
2 agreed to again issue a permit in the understanding
3 that this is fairly debatable and we have a lawsuit
4 in front of us. So at that point it gives the
5 Appellants the opportunity to speak their case.
6 And we will hopefully then come to a conclusion.

7 So with that, however, the City's position is
8 that we are in compliance, City is in compliance.
9 The electric co-op did what it should have done.
10 And therefore, based on the conclusions I have made
11 to the previous slide, and they are in your
12 package, the appeal should be denied.

13 And with that, if you have any questions, I'd
14 be happy to speak to them.

15 MR. WILLIAMS: First question. Mr. Garrett,
16 would you please state your current position with
17 the City of Marathon.

18 MR. GARRETT: I am the planning director for
19 the City of Marathon.

20 MR. WILLIAMS: And how long have you had that
21 position?

22 MR. GARRETT: With the City of Marathon,
23 12 years.

24 MR. WILLIAMS: And any other similar positions
25 prior to the City of Marathon?

1 MR. GARRETT: Actually within the City of
2 Marathon four years as deputy city manager. With
3 the County I was the environmental resources
4 director for about two years. Going way back to
5 the '80s I was the senior director of marine
6 resources and GIS services for I think it was
7 17 years. So before I came here.

8 MR. WILLIAMS: In total what do you think your
9 growth management planning experience totals in
10 terms of years?

11 MR. GARRETT: Thirty-five.

12 MR. WILLIAMS: And your education prior to
13 that?

14 MR. GARRETT: I have a degree in biology and
15 chemistry from the University of California Santa
16 Cruz. I have a degree in zoology, which is a
17 master's degree from University of Rhode Island,
18 and that's in zoology. I have various planning
19 degrees or experience and certificates. I am the
20 floodplain manager for the City of Marathon. So...

21 MR. WILLIAMS: And have you kept all training
22 and experience current? Continue to keep those up
23 to date year to year in your capacity as planning
24 director?

25 MR. GARRETT: Yes, sir.

1 MR. WILLIAMS: No further questions.

2 VICE CHAIR LANDRY: No questions.

3 MR. GARRETT: -- actually having to do this,
4 but I think in continuity maybe we would do the
5 electric co-op next since essentially they're --

6 MR. WILLIAMS: I think I go with the
7 Appellant. Let's go with the Appellant.

8 MS. MULLINS: Mr. Commissioner, we need to
9 swear everybody in?

10 VICE CHAIR LANDRY: Yes. Anybody who signed
11 up to speak on anything tonight, would you stand
12 up, please, and face --

13 MS. MULLINS: Whether you signed up or not,
14 just stand up if you're going to speak.

15 VICE CHAIR LANDRY: If you're going to speak,
16 yes, turn to Ms. Lorie, she's going to swear you
17 in. And raise your right hand, please.

18 MS. MULLINS: Everybody raise your right hand.

19 (Potential speaking persons sworn in by Ms.
20 Mullins.)

21 VICE CHAIR LANDRY: Thank you.

22 MR. STRAUSS: Good evening. My name's Ron
23 Strauss, attorney in Marathon.

24 VICE CHAIR LANDRY: Put the mic close to your
25 mouth.

1 MR. STRAUSS: Is that better?

2 VICE CHAIR LANDRY: Yes.

3 MR. STRAUSS: Okay, thank you. My name is Ron
4 Strauss. I'm an attorney in Marathon. Been
5 practicing law about 50 years. I think a little
6 bit beyond, but I don't want to think beyond that.

7 I represent Sandy Wolff and Roger Bolon
8 sitting over here. They are the Appellants in this
9 matter. Sandy and I guess Roger will speak to the
10 issue that they own a property for 30 years and
11 they grandfathered in the right of ingress and
12 egress by the Florida Statute 26, and there is no
13 doubt that that is being blocked or interfered with
14 by this permit.

15 Let me give you a little bit of history
16 because I think it will be very helpful in your
17 evaluation. The evaluation basically starts with
18 was the permit issued properly to start with? It's
19 not as simple as they applied for a permit and got
20 a permit. They did not apply for a permit and the
21 statute specifically requires them to get the
22 permit unless they're going to do repairs. And
23 this wasn't repairs, this was transferring
24 electricity utility poles --

25 VICE CHAIR LANDRY: I'm sorry to interrupt.

1 Could you pull the mic a little bit closer to you?
2 People in the back of the room just can't hear you.

3 MR. STRAUSS: I'm sorry. And the issue then
4 became there was no permit and there was no
5 application for a permit. Get into the -- our
6 expert will get into the area you have to have a
7 permit when you're within proximity of the airport,
8 that's called the hazard zone, and you cannot have
9 a utility, construct anything without a permit
10 through the FAA. And they have a Florida D.O.T.
11 Office of Aviation. Both must be applied for.
12 And, in fact, it's very simply put that even if you
13 issue a permit, the permit is not valid until
14 approved by the FAA, and that's a federal agency.

15 The facts of your permit says specifically
16 that the applicant will comply with all federal and
17 state agencies, including the FAA specifically. It
18 wasn't done. So when we brought that to the
19 attention of the City and we had a meeting that was
20 called a Zoom meeting, I believe, and everybody
21 from the City who was in attendance and also people
22 from Florida Keys Electric, it was not resolved.
23 The issue then became can they go ahead without a
24 permit? We then started the litigation and that
25 fell in front of Judge Jones. And before we had

1 the first hearing, the then litigation counsel for
2 the City concluded the same thing we concluded,
3 that it was necessary to have a permit.

4 So it wasn't as simple as -- we all agreed --
5 it came down to the, I have the public records
6 request that I think I appended to my outline. Do
7 you all have my outline that I provided? The
8 public records request established that the City's
9 litigation counsel concluded the same thing that I
10 had concluded, that you need a permit. So then a
11 retro permit was provided. Well the retro permit
12 did not address the issue of the poles being
13 placed, the utility poles being placed on the
14 easement side -- I'm sorry, not the easement side.
15 I misspoke. It was placed on the City's
16 right-of-way, which is the, you measure that, as
17 our expert will tell you, from the center line and
18 then from the asphalt over. Our expert will be
19 able to tell you from Florida Statute 333, which
20 has been specifically adopted by the City of
21 Marathon. They call it the integration statute.
22 And they agreed that Florida 333 must be complied
23 with. Well, unfortunately it wasn't until we
24 started the litigation. And then it turned out
25 that they did not start, they did not comply with

1 the FAA regulations either.

2 So I represent citizens of Marathon. They're
3 not here to cause Marathon any problems, but they
4 have now through their legal counsel produced an
5 edification on what must be done. I don't know
6 this for a fact, but I've been told that the
7 Florida Keys Electric is going to agree to go
8 through the FAA proper procedure and get an
9 approval, which takes, if they're going to, takes
10 half my argument out that I was going to present to
11 you.

12 So the outline is essentially that there was
13 an appeal. There was an agreement. And the
14 litigation that we've all come before the City
15 without going through the litigation and come back
16 to the Planning Board, explain to the Planning
17 Board that the procedure was not followed when
18 you're that close or in proximity to the airport.

19 Now I don't think there's any objection to
20 what I'm going to say. I think Florida Keys
21 Electric through their counsel will agree that they
22 have to go through FAA and therefore the permit is
23 invalid. And that's what our expert will testify
24 to.

25 And also this area that's been adopted is

1 called the Florida Green Book. Probably you've
2 heard of it. I have printed it out and it's about
3 the size of the Yellow Pages. And the Green Book
4 basically says at what distance -- I'm sorry.

5 THE COURT: You keep drifting away from it.

6 MR. STRAUSS: Maybe I'm afraid of it.

7 The Green Book basically says what distance
8 you must put in the poles and where you can put in
9 the poles. All right? And the Florida Green
10 Book's been adopted by the Florida legislature into
11 a statute, and our expert will tell you about that.

12 And also if you don't comply with the Green
13 Book, and that's Section 2 of this argument,
14 Section 1 being the FAA regulations which have not
15 been complied with, and Section 2 being that the
16 Florida Statute 333 is a, is a Bible of really
17 highway construction and safety. And there's
18 noncompliance with that as well.

19 So when we finish our total presentation, and
20 it's not going to be long because I'm told that
21 basically, and I'm hoping it's true, that Florida
22 Keys Electric has agreed to go to the FAA, and that
23 takes out a big chunk of my presentation.

24 I don't know if -- Blake, is that correct?
25 Blake represents the Florida Keys Electric.

1 MR. PAUL: Good evening. My name is Blake
2 Paul. I'm an attorney with Peterson and Myers and
3 I represent Florida Keys Electric Cooperative.

4 Mr. Strauss is a hundred percent correct
5 regarding the FAA. Florida Keys has already
6 started the process of going through the FAA,
7 making sure that we have their approval with
8 respect to every single pole that is going out
9 there that either it is a pole that is under the
10 height that is required by the FAA, or if it's over
11 the height that is required by the FAA, either we
12 dig the pole out, bury it deeper so that it's under
13 the height or we otherwise mitigate it. So he's a
14 hundred percent correct that Florida Keys Electric
15 Cooperative is complying with the FAA requirements.

16 There's no official permit that the FAA
17 actually issues like the yellow piece of paper that
18 the City of Marathon issues. They simply issue you
19 a letter whether you are a hazard or whether you
20 are not a hazard. Once you complete your
21 construction, they come out and inspect it again to
22 make sure you built what you told them you were
23 building. But we're going through that process and
24 we're committed to complying with that process.

25 MR. STRAUSS: I think the short answer, I

1 think the short answer is they're going to comply.
2 Is that correct, Blake? The short answer is yes?

3 MR. PAUL: The short answer is we have the
4 Florida Keys Electric Cooperative has already
5 started the process of applying for no hazard
6 letters for all of its poles. And in fact has
7 received no hazard letters for all the poles on the
8 section that goes northbound which is on the east
9 side of the airport.

10 MR. STRAUSS: Okay. Let me read -- what was
11 just said to you, it's not accurate, unfortunately.
12 Let me read from the public records request from
13 the FAA. I have it in front of me and it was done
14 by e-mail. And the, this was directed to me from
15 Greg Jones. Greg Jones is the D.O.T.
16 representative of the aviation department. And
17 Greg Jones says to me in his September 15th
18 response. I'd be happy to give everybody a copy.
19 It says, The following is the Department of
20 Transportation Aviation Office response to your
21 public records request for the following records.
22 Any -- this is the indent is -- any completed
23 permit applications submitted by the City of
24 Marathon before a permit was issued in compliance
25 with Florida Statute 333.025(4). And the response

1 is the Department of Aviation Office has not
2 received a complete permit application from local
3 government City of Marathon, Florida in compliance
4 with 333.025(4) regarding construction adjacent in
5 or the vicinity Florida Keys Marathon airport as of
6 the date of this e-mail.

7 Now, then I asked the second question, and
8 second question is pertinent as well, and the
9 second question is, and this was a day later, and
10 their response was, it says, Mr. Jones, thank you
11 for your request for public records from this
12 office at 12:00 p.m. this date. Additionally, can
13 you provide us with any permit applications
14 submitted by the City of Marathon before a permit
15 was issued in compliance with Florida Statute
16 333.025(4).

17 I said, thank you for your prompt attention.
18 And his response is, This will confirm the
19 Department of Transportation Aviation Office
20 receipt of verbal public request from Ron Strauss.
21 And then it says again, repeat, all airport zoning
22 regulations City of Marathon, Florida in the course
23 of 333 Florida Statute airport zoning 2016 response
24 to public records request asserts for the record
25 and Florida Department of Transportation office do

1 not reflect receipt of any airport zoning
2 regulations from the City of Marathon in accordance
3 with Chapter 333 Florida Statutes.

4 VICE CHAIR LANDRY: You keep backing away from
5 the microphone. People in the back cannot hear
6 you.

7 MR. STRAUSS: I'm sorry.

8 VICE CHAIR LANDRY: Pull the microphone closer
9 to you. When you back away from it, you --

10 MR. WILLIAMS: And I'm really close to you and
11 I can't hear you.

12 MR. STRAUSS: Yeah, I'm sorry. I'm not used
13 to this. So let me make -- may I present the copy?
14 Let me give her a copy.

15 So for further explanation, D.O.T. has a
16 aviation office that they share the responsibility
17 with the FAA. And everything that counsel said
18 that they had always done it, always will do it,
19 well the public records do not reflect that they
20 have. So I'll just leave you with that thought for
21 a moment.

22 To shorten where we're at, essentially if they
23 do indeed apply to the FAA, then everything has to
24 be on hold here for any permit construction. And
25 basically, and I think it's important that the back

1 of the permit that was issued says exactly what I
2 just said to you. It said that the, and I'll read
3 it because I think it's important that you have it
4 exactly the way it's said.

5 If you have my outline, I put it in the last
6 part of the outline. Last page of it. It says --
7 and I'm sorry, it's Page 3 of 3. It says that it's
8 material -- I say -- it's material relevant for the
9 permit issued by the City that the City extremely
10 has cleared the records the permit applicant to
11 obey and the permit conditions and portions of
12 excise and copy below to facilitate your review.
13 And it says federal agencies, state agencies or
14 water management districts FCAA, FKEC, FDOT, which
15 is the D.O.T. section of aviation, many other
16 applicable outside agencies of this permit does not
17 create any rights on the part of the applicant to
18 obtain a permit from any federal agency.

19 So although counsel says it's a handshake
20 deal, there's nothing presented to you that says
21 they have acquired that.

22 And then very specifically underneath that on
23 the back of your permit it says, It is a condition
24 of this permit that the applicant obtain all
25 applicable required federal, state, water district

1 including but not limited to FCAA, FKEC, EFDOT and
2 any other applicable outside agent permits before
3 commencement of development.

4 Well, they've admitted they didn't do that.
5 They started the construction and inserted these
6 gigantic poles which are out of compliance with
7 Florida Statute 333 as well. And our expert will
8 tell you that.

9 And then to get to the issues that we have
10 before the committee, and in bullet point outline,
11 apparently without any notice to the homeowners the
12 FKEC decided that they were going to put these
13 poles in. First time our clients found out about
14 it there were red marks on their lawn or near their
15 lawn and there was yellow tape around trees and
16 they wanted to know what was going on. So that's
17 the creation of the birth of the Zoom meeting. So
18 there's nothing in advance.

19 And on July 15th after the Zoom meeting
20 concluded, they accelerated actually their contract
21 because we told them then we were about to go seek
22 court relief. And instead of waiting until the
23 court ruled, they went ahead -- and, in fact, I
24 want to tell you this. I think that meeting was on
25 Thursday or a Friday, and we filed it on Friday,

1 and then we had it e-mailed to everybody in charge,
2 and that is the lawyers, and we served them on
3 Monday. But on that Monday they accelerated
4 construction and it was in pouring rain and we have
5 a video of it, and they were putting in everything
6 before the court even had a chance to rule. So
7 that's how this thing started and nobody agreed to
8 anything.

9 Then it came to the point where the agreement
10 was hammered out and we come back to the City
11 Council. So let me point out to you, please, that
12 the verified complaint that we filed was on
13 July 17th. And on July 20th with multiple poles we
14 have identified and asserted all along Aviation
15 Avenue, even though we filed an injunctive relief
16 with the court, they kept putting in the poles
17 without any respect for the litigation that was
18 about to occur. And that's why we're here. I mean
19 usually what happens, you tell somebody you're
20 going to file a lawsuit and you file, they wait for
21 the court to rule, but none of that happened here.
22 It was like running to the first base line. And
23 under section, which was mentioned by George, that
24 under Section 26.1 that doesn't give them any right
25 to put in their poles. Section 1 says they only

1 can do it when they're servicing a broken line or
2 something of that nature. But they don't have an
3 existing permit and they have to know that.

4 It says, Also if the closest damage to an
5 existing roadway -- the permitted grandfathered
6 driveway or access permitted feature the City
7 right-of-way. Well once they started putting in
8 these poles that disrupts that right-of-way, they
9 put the poles from left to right. I have to
10 explain, my client will tell you that their house
11 is on the water. So they back a boat down into
12 their lift to get it in, but they have to come
13 through that right-of-way. When they pull out on
14 Aviation Avenue and they have the boat in tow, they
15 pull out into the right-of-way. And that's been
16 grandfathered in. And you just can't take that
17 away because FKEC wants to put in some poles. You
18 have to be able to accommodate the citizens of
19 Marathon. So that wasn't done.

20 And I point out to you also that Blake
21 Electric was the permit holder, not FKEC. So they
22 subcontracted to Blake Electric. Well then Blake
23 Electric had to go through the permit process
24 because it wasn't FKEC doing it, it was
25 subcontracted out.

1 Now, I'll point out again, and I'll make it
2 real brief at this point, that Chapter 33, and
3 we'll have the expert testify to back this up.
4 Just giving you a preview. That the
5 pre-construction permit by the FAA and FDOTAO,
6 which is the office of FDOT, was not even contacted
7 at all before they started construction.

8 So now if the court please, just to identify
9 for the purposes of the record, call Roger Bolon.
10 He's the owner, one of the owners. He'll speak for
11 both owners. Three minutes. Roger?

12 Thereupon,

13 ROGER BOLON

14 was called as a witness and, having been previously
15 sworn, was examined and testified as follows:

16 EXAMINATION

17 BY MR. STRAUSS:

18 Q. Roger, state your name and address, please.

19 A. I'm Roger Bolon. I and my life partner,
20 Alexandra Wolff, own the property duplex at 9400-9402
21 Aviation Boulevard. We bought this in December of 1991
22 and retired in 2000. Became residents of Florida
23 shortly after that.

24 Q. And, Roger, your house abuts the waterway behind
25 Aviation; is that correct?

1 A. We are on a canal system behind the house.
2 And, yes, we park our trailer when we're not there on
3 our front driveway using the access that's along the
4 roadway.

5 Q. And when you take your boat out on the trailer,
6 do you pull it into the right-of-way?

7 A. We trailer it to the local, the launch ramp
8 where we either keep the boat in the water behind the
9 house or when we're not there we'll have the boat on the
10 trailer in the driveway in front of the house.

11 Q. And basically do that same procedure for the
12 30 years?

13 A. Pretty much for 25, 30 years, correct.

14 Q. To your knowledge is there any easement, utility
15 easement in front of your property?

16 A. We're not aware that there was ever any kind
17 of an easement on our property when we bought it back in
18 '91.

19 Q. So without a utility easement, do you give
20 permission to Florida Keys Electric to put in any poles in
21 front of your property?

22 A. Short answer's no.

23 Q. And do you object to that?

24 A. We do object strongly about putting the poles
25 on the north side. There's a number of safety issues

1 we're concerned about and property value issues. But I
2 think the most important is the safety issues with these
3 poles that we perceive apply to us.

4 Q. You attended, did you not, the Zoom meeting with
5 FKEC?

6 A. Yes, I was there.

7 Q. And one of the suggestions from your side that
8 they do underground connections would avoid all these
9 problems?

10 A. We strongly believe that the underground
11 system would be better. The federal government is
12 promoting the (not understandable) of the facilities,
13 particularly putting in underground conditions in the
14 areas where there are hurricanes. In fact, one of your
15 council members in response to my first complaint when I
16 found my tree being marked for removal responded saying
17 he felt that the wiring should be underground as well.

18 Q. Now, you're retired, are you not?

19 A. Yes. Retired in year 2000. Been Florida
20 residents since then.

21 Q. I see your background. What were you doing
22 before you retired?

23 A. I worked for General Electric at their
24 corporate research laboratory. My background is
25 physics. I was a physicist but I was in charge of

1 microanalytics.

2 MR. STRAUSS: Thank you. Any questions?

3 VICE CHAIR LANDRY: No.

4 PLANNING COMMISSIONER GILSON: No.

5 MR. STRAUSS: Thank you, sir. Next I call Tom

6 Wright. Tom Wright of course is an attorney in

7 Marathon specializing in real estate.

8 Thereupon,

9 THOMAS WRIGHT, ESQ.

10 was called as a witness and, having been previously

11 sworn, was examined and testified as follows:

12 EXAMINATION

13 BY MR. STRAUSS:

14 Q. Tom, you can take the mask off if you're more
15 comfortable. Can you identify yourself and your
16 background, please?

17 A. Yes. My name is Thomas Wright. I am an
18 attorney in Marathon. I am board certified since 1997
19 as an expert in the area of real estate law.

20 Q. And did I ask you to look at the plat and the
21 easement rights and/or the right-of-way regarding this
22 property?

23 A. Yes. The property we're referring to runs
24 along Aviation Boulevard, and that is the southernmost
25 extent of the Sea Estates plat. That's the subdivision

1 in which this property, these properties or this project
2 is located. It was platted by Alan Schmidt and Douglas
3 Gaines.

4 And in examining the plat, the interior roads
5 do have platted utilities easements, by foot utility
6 easements running along the interior roadways. But the
7 plat does not have a platted utility easement along the
8 lots along Aviation Boulevard. There is a platted road.
9 The roads within the subdivision were platted to the
10 public for proper uses, but there is no utility easement
11 along Aviation like there are along the other lots of
12 the subdivision.

13 Q. Are you aware of any grant, utility grant for
14 the Florida Keys Electric either through the City or
15 anyone else to put in this, these utility poles in the
16 right-of-way without permission of the owners?

17 A. I don't really have any particular knowledge
18 of that. I haven't represented any of the owners. But,
19 you know, my examination was primarily to see if there
20 was a grant of the utility easement along Aviation
21 within the plat, and I determined there was not.

22 MR. STRAUSS: Thank you. Any questions?

23 MR. WILLIAMS: Mr. Wright, what's the
24 right-of-way width off of Aviation?

25 A. The aviation appears to be in their plat, even

1 our master plat book is somewhat fuzzy, but as I read it
2 looking at it with a magnifying glass it's 30 feet on
3 each side of the center line. I think I'm reading it
4 correctly. I'm not swearing on my grave to that or my
5 mother's grave to that, but it looks to me like it's 60
6 foot wide from end to end, 30 feet on each side of the
7 center line.

8 MR. WILLIAMS: I don't have any other
9 questions unless the Planning Commission does.

10 MR. STRAUSS: Thank you. I'd like to call
11 Larry.

12 Thereupon,

13 LARRY HAGEN

14 was called as a witness and, having been previously
15 sworn, was examined and testified as follows:

16 EXAMINATION

17 BY MR. STRAUSS:

18 Q. Larry, state your full name, please.

19 A. My name is -- can you hear me? My name is
20 Larry Hagen.

21 Q. And, Larry, would you tell us a little bit about
22 your background?

23 A. I'm a professional engineer registered in
24 Florida. My initial registration in Florida was in
25 1991. I've been practicing continually throughout the

1 State of Florida. I've worked in the public sector,
2 private sector and academia. I have a bachelor of
3 science in civil engineering degree and a master of
4 engineering degree from the University of Florida. Like
5 I said, I've worked all over the state of Florida. I
6 literally have worked from Pensacola to Jacksonville to
7 Key West and everywhere in between. I'm currently
8 working, doing work supporting Florida D.O.T. throughout
9 the state.

10 Q. Larry, currently do you teach or give classes on
11 any part of the Florida Statutes?

12 A. I give, I give classes, new training classes
13 through what's called the Local Technical Assistance
14 Program, LTAP. And the LTAP program was set up by the
15 Federal Highway Administration. Every state has an LTAP
16 center. And the purpose of the LTAP center is to reach
17 out to the local agencies, the city and county agencies,
18 and give them technical training in the traffic
19 transportation field. So I'm currently an instructor
20 for the Florida LTAP center which is located at the
21 University of South Florida. And I recently did a
22 series, a training series on the Florida Green Book,
23 which is the minimum standards for roadway design for
24 all roadways in Florida.

25 Q. What is that book called, the Green Book?

1 A. Well, the Green Book is the short name of it,
2 the formal name of the book is the Manual on Uniform
3 Minimum Standards for Design and Construction and
4 Maintenance.

5 Q. Has that been adopted by the City of Marathon?

6 A. Well it's adopted by Florida Statutes, and so
7 I believe, and currently it is adopted -- it is a
8 standard that applies to every city, every county in the
9 state of Florida.

10 And a little background on the Florida Green
11 Book. The Green Book is something that was established
12 by the legislature. The legislature says, you know, in
13 the statutes that in the interest of protecting public
14 health, safety and welfare, which is what us engineers
15 are obligated to do, that the D.O.T. is directed to
16 create this book, Florida Green Book, the standards by
17 which all roadway construction projects should be done.
18 Interestingly enough, the Florida Green Book is for,
19 it's for the local rules. For the city and county
20 rules. D.O.T. has different standards for their state
21 rules, which are higher than the Green Book standards.
22 But the Green Book standards are, as the name implies,
23 the minimum standards for construction and roadways in
24 the State of Florida.

25 Q. That's part of what you teach, through your

1 program?

2 A. Yes, that's correct. And just a little more
3 background real quickly on the Green Book so you
4 understand. It's not the D.O.T. forcing this down on
5 cities and the counties or anything. The statutes by
6 which the Green Book was created also spell out who the
7 members are that are on the committee that created the
8 Green Book. And there's seven geographic districts for
9 D.O.T. Each district has one representative from
10 D.O.T. They have a representative from a local city or
11 county government. And a rural area, a representative
12 from a local city or county government in a rural area,
13 and an independent, a private consultant. So there's
14 four members for each of the seven D.O.T. districts that
15 make up the committee and they create these Green Book
16 standards.

17 Q. Before I had asked you whether the City, if you
18 acknowledge whether the City of Marathon by resolution had
19 adopted the Florida Statute 333.031(b), and I believe I
20 had shown you and you recall seeing the, it's called the
21 Interlock Agreement that was dated by city resolution
22 signed off by the, also the Board of County Commissioners
23 as well. And this interlock agreement basically provides,
24 and I'll just read the whereas clause making sure,
25 Whereas, by entering this interlock agreement pursuant to

1 Florida Statute 163.01, Florida Statute 333.031(b)(1), the
2 County and the City acknowledge their obligation in
3 conformity with Florida Statute 333.031(b)(1) to adopt,
4 administer, enforce airport zoning regulations applicable
5 to the airport hazard areas and restrict the use of land
6 adjacent to or immediate vicinity of the MTH to activities
7 and purposes compatible.

8 There's more, but that's -- are you familiar
9 with that?

10 A. Yes. Yes, I've seen.

11 Q. So not only is it in Florida Statutes, it's been
12 adopted by the City of Marathon?

13 A. That's correct.

14 Q. Would you explain, please, and I think in your
15 opinion is easily made, can you go to your opinion and
16 based upon what you have been presented do you have
17 certain opinions as to whether or not there is a valid
18 permit for the construction of these utility poles?

19 A. Yeah. Certainly, FAA involvement is certainly
20 required for this kind of thing. And my experience,
21 I've been involved in a number of projects close to the
22 airports. I was reviewing a project. Did a lot of
23 reviews of plans and reports that go along with planned
24 roadway improvements. I was reviewing one just a couple
25 weeks ago. And there was a roadway that was, the

1 nearest point of the roadway to the airport runway was
2 one mile, or a little over a mile. And the farthest
3 point was over six miles. And, you know, the FAA said
4 clearly everything within that roadway limits required
5 FAA notification. And so certainly in this case we have
6 Aviation Boulevard, which is less than a tenth of a mile
7 when you measure it as the crow flies from the runway,
8 this clearly needs FAA notification. And again, as one
9 of the conditions stated on the permit you must have all
10 the federal and other regulatory agency approval before
11 you can begin work.

12 And so as was indicated, I saw the e-mail that
13 counsel had received from the aviation office in
14 Tallahassee and they have seen no indication of any
15 application for Aviation Boulevard.

16 Q. So is it illegal now to do construction near the
17 airport without approval by the FAA or the D.O.T. Florida
18 office?

19 MR. WILLIAMS: Object to the form of the
20 question. You may answer.

21 Q. (By Mr. Strauss) Do you have an opinion as to
22 whether it's a valid -- valid permits are outstanding?

23 A. In my opinion I would not be doing
24 construction there until those permits are properly
25 secured.

1 Q. All right. And with regard to the Florida
2 Statute 333, is that obligatory?

3 A. Absolutely, yes.

4 Q. And is there any compliance under your study by
5 the City of Marathon or FKEC with Florida Statute 333?

6 A. I have seen no evidence of compliance, no.

7 Q. All right. Now, in regard to Florida Statute
8 333, what are the penalties if you don't comply?

9 A. I believe it is a federal misdemeanor for
10 noncompliance.

11 Q. And that is if you knowingly not comply?

12 A. That's correct.

13 Q. Is that correct?

14 A. That's correct.

15 Q. So now that you've presented to the Council --
16 I'm sorry, to the Committee -- your opinion as an expert,
17 is it your remaining opinion that the -- I want to use the
18 proper word here because I don't want to suggest that I'm
19 a prosecutor -- but is it the penalty set forth clearly in
20 the statute?

21 A. I believe so, yes.

22 Q. Okay. Do you have any other opinions you'd like
23 to share with the Committee?

24 A. Well, I'm very glad to hear that the electric
25 co-op is moving forward with the notification and

1 coordination with the FAA.

2 One of the other real opinions I want to bring
3 up is in relation to the Florida Green Book. And the
4 Florida Green Book, as I said, it's, it's the minimum
5 standards for design and construction of roadway
6 facilities such as Aviation Boulevard. And, you know a
7 lot of my practice is in the area of traffic safety,
8 keeping people alive. You know 37,000 people die on
9 highways in America every year. 37,000 people. That's
10 a lot of people. Roughly half of those people that died
11 on our highways is a single vehicle leaving the road
12 hitting a fixed object. Single vehicle leaving the road
13 and hitting a fixed object, like a utility pole, for
14 instance. And so one of the most critical design
15 criteria is what we call the clear zone, the offset, the
16 travel lane to the face of the pole. And the Green Book
17 specifications for Aviation Boulevard based on its
18 functional classification is that it needs to be a
19 minimum of ten foot. Now the permit that's issued shows
20 a six-foot offset as being permitted. And says the
21 poles must be (not understandable) But the Florida
22 Green Book criteria is ten foot for that type of
23 roadway. So even if you were to put that in with the
24 permit, if they get FAA, you know, approval and
25 everything goes forward, putting a pole six foot from

1 the roadway endangers the public. It makes the roadway
2 less safe. It makes the roadway in my professional
3 opinion unsafe. Those criteria are there for a reason
4 and it's really also to help cities and counties, local
5 governments. I used to work for a local government as
6 well. And it helps you when you build things to
7 standards. When you build things that are substandard,
8 it opens you up to a lot of liability.

9 So I really and truly believe that we need to
10 really go back and look at that and we need to meet the
11 Green Book criteria. That's really critical. And
12 again, it goes to health and safety of the people that
13 go up and down that road.

14 You know, like I said, the number one cause of
15 fatalities on our highways is single vehicle leaving the
16 road, we call it a roadway departure crash. They crash
17 into something --

18 MR. WILLIAMS: At this point I'm going to
19 object to narration and lack of a question
20 presented to the witness.

21 Q. (By Mr. Strauss) Larry, can you please tell us
22 did you have an opportunity not only by visual photographs
23 provided to you but by your visual inspection of the poles
24 and their location?

25 A. Yes. I went out and I measured the distance,

1 the offset distance of those poles. And there are many
2 that are certainly less than ten feet and many that are
3 less than six feet. There's one that was, you know,
4 under six feet, and so it clearly is within the clear
5 zone of the road. So again, in roadway design
6 terminology you would call that a fixed object hazard in
7 the roadway.

8 Q. And is it your opinion that the hazard is
9 covered by the Florida Statute 333 as a hazard area?

10 A. Well the 333 is really the aviation statute
11 and it's something that also could be an aviation hazard
12 as well. That's for FAA to clearly decide that. This
13 is clearly a Florida Green Book hazard, if you will.

14 Q. And this is what you teach on a daily basis?

15 A. Yes.

16 Q. All right. Thank you. Any questions, please?

17 PLANNING COMMISSIONER LEONARD: I have a
18 question. I have a question. Sir, thank you very
19 much for your presentation.

20 Is Green Book a law or a guideline?

21 A. It is a law. I mean it's adopted by statute
22 and so it is required that the cities and counties
23 follow the Green Book.

24 PLANNING COMMISSIONER LEONARD: Okay. So it's
25 not just a guideline?

1 A. It's not a guideline, no, sir. It has a lot
2 of shall conditions in it. And again, the horizontal
3 clearance, the clear zone is one of those shall
4 conditions.

5 VICE CHAIR LANDRY: I have one more question.

6 A. Yes, sir.

7 VICE CHAIR LANDRY: Not real familiar with the
8 Green Book. Does it allow for exceptions in
9 situations where you just can't meet the minimum
10 standards? I mean you can't just be cut and dry
11 black and white. There's got to be some --

12 A. That's a great question. There is procedures
13 in there for what they call design exceptions. And so
14 one of these critical criteria like horizontal
15 clearance, you can go after a design exception, but
16 there are four really, really extenuating circumstances,
17 really extreme circumstances. For instance, if you have
18 one pole that was next to, you know, like a Native
19 American burial ground or something, there's no way you
20 could move it. That one pole you could request, you
21 could do a design exception and it would make sense.
22 That would be a logical design exception. But to go the
23 entire length of the roadway and just say we're going to
24 do a design exception, again, when there is that
25 inevitable crash, someone crashes into a pole, it's

1 going to come up in court that it was built substandard.
2 It was not built to the standard. And you're going to
3 open yourself up I believe to a lot of liability when
4 you continuously build substandard. Like I said, if
5 it's one particular location and you try, you can do a
6 design exception. Design exception, there's a process.
7 It's spelled out in the Green Book what that process is.
8 But a professional engineer has to design and seal that
9 design exception. And really they end up taking
10 responsibility for deviating from the standards.

11 VICE CHAIR LANDRY: Thank you.

12 PLANNING COMMISSIONER LEONARD: So it could be
13 that some of the measurements you did along the
14 poles that you found out by the electric company
15 did out at Aviation Boulevard, it could be that
16 those already had exceptions and were approved;
17 correct or incorrect?

18 A. I have not seen any evidence of any exception.
19 We did a pretty thorough public records request. I've
20 seen no evidence of that.

21 PLANNING COMMISSIONER LEONARD: Okay. Thank
22 you.

23 VICE CHAIR LANDRY: Did you measure poles on
24 both sides of the road or just one side?

25 A. Just the ones on the north side, the newer

1 poles. The ones on the other side appear to be more
2 than ten feet because there is that bike path over
3 there. So they seem to be set back up against the
4 fence. So those seem to be outside of the ten foot. So
5 those seem to be okay. But the ones on north side of
6 Aviation Boulevard, many of them appear to be way less
7 than ten feet.

8 Q. (By Mr. Strauss) Just so I understand it and
9 it's clear, that on the north side the implanted poles
10 that are already there are in violation of Florida Statute
11 333?

12 A. That would be my understanding, yes.

13 Q. Okay. And most of them are what, six foot back
14 from the roadway?

15 A. Yeah, most of them are -- many of them were
16 around six foot, some appear to be much closer. I
17 measured one that was much closer. But I don't think
18 any of them meet the ten-foot criteria.

19 Q. And the proper place would be beyond ten feet?

20 A. Yes.

21 Q. All right. And if the easement -- I'm sorry --
22 if the right-of-way is only say eight feet, is it possible
23 for them to put it anywhere else?

24 A. They have to purchase right-of-way or put it
25 on the other side.

1 Q. And have you reviewed the various articles and
2 government grants for underground utilities?

3 A. Yes, I've seen several agencies even in
4 Florida have received FEMA grants for putting utilities
5 underground in excess of a million dollars.

6 Q. To your knowledge is that something the City has
7 to apply for?

8 A. I think the City would be the one to apply for
9 it through FEMA and could get the grant and assist the
10 utility.

11 Q. All right. Thank you. Any questions? Thank
12 you, sir.

13 MR. WILLIAMS: And I do have questions before
14 you take your seat.

15 EXAMINATION

16 BY MR. WILLIAMS:

17 Q. In preparation for your testimony this evening,
18 were you provided any documents by counsel?

19 A. Yes.

20 Q. What documents were you provided?

21 A. Correspondence related to his conversation
22 with the Aviation Administration. And trying to think
23 of any other.

24 Q. You testified at length about the Green Book.
25 Did counsel give you a copy of the resolution or ordinance

1 wherein the City of Marathon adopted the Green Book?

2 A. No, I have not seen that.

3 Q. Would that not be pertinent to your testimony
4 here this evening?

5 A. It would. But again, it's a statutory
6 requirement. State of Florida requires it. All cities
7 and counties.

8 Q. But you didn't ask for a copy to see if the City
9 ever did adopt it?

10 A. No, I did not.

11 Q. Were you provided a copy of Section 26-30 of the
12 Marathon Code regarding permitting?

13 A. Is that the one where you --

14 Q. It's the one that says a permit will not be
15 required by public or private utility performed within the
16 city right-of-way, that one.

17 A. I think I did see that. But again, it's not
18 really pertinent.

19 Q. There's no work being done by a utility in a
20 right-of-way?

21 A. Well there's work being done by a utility in a
22 right-of-way, but still, you don't a blanket permission
23 to issue permits that violate the FAA. And again, I
24 don't believe --

25 Q. Does it not say that the permit -- it's not the

1 right to, it doesn't say it's not required. Isn't that
2 what it says?

3 A. I'm not an attorney.

4 Q. But it's, okay. So no further questions. Thank
5 you, sir.

6 MR. PAUL: I have some cross.

7 MR. STRAUSS: You'd like to ask questions?

8 MR. PAUL: Yeah, I'd like to have cross
9 examination.

10 EXAMINATION

11 BY MR. PAUL:

12 Q. Again, for the record, my name is Blake Paul.
13 I'm attorney with Peterson and Myers.

14 Sir, Chapter 336 is the chapter that you
15 referenced that talks about the Green Book; is that
16 correct?

17 A. I believe so, yes, sir.

18 Q. And Chapter 336 is actually is entitled County
19 Road Systems; is that true?

20 A. I don't recall if that's the title.

21 Q. Let me show you the statute. Can you read
22 designation and title of the Chapter 336?

23 A. Designation P.

24 MR. WILLIAMS: Apologize. You need a
25 microphone. We need to be able to hear your

1 questions.

2 VICE CHAIR LANDRY: Blake, could you get a
3 little closer to the microphone, please?

4 Q. (By Mr. Paul) Yes. Can you please read the
5 title of Chapter 336?

6 A. Designation of County Road System.

7 Q. Thank you. The road system that we're talking
8 about in this case is not a county road system, is it,
9 sir?

10 A. It's a city.

11 Q. It's a city road system. And in fact, those
12 terms are also defined in Chapter 334.03. And I'll ask
13 you to read those two sections for me. First read
14 Section 334.03(3). Subsection 3, sir.

15 A. City street system means all local roads
16 within a municipality and all collected roads inside
17 that municipality which are not in the county road
18 system.

19 Q. And then the next section is Section 334.03(8).

20 A. County road system means all collector roads
21 in the unincorporated areas of the county and all
22 extensions of such collector roads into and through any
23 incorporated areas, all local roads in the
24 unincorporated areas, and all urban minor arterial roads
25 not in the State Highway System.

1 Q. And Aviation Boulevard meets none of those
2 criteria, correct?

3 A. Aviation Boulevard according to the adopted
4 functional classification is a major collector roadway.

5 Q. But it is not a collector roadway within the
6 county road system; it is completely within the municipal
7 system, is that true?

8 A. Well, that's correct, yes, sir.

9 Q. And we do not have a ordinance that you've been
10 shown or you've been able to find that indicates that City
11 of Marathon has in fact adopted the Green Book, correct?

12 A. That's correct.

13 Q. The only reference that you've seen to the Green
14 Book is in a statutory section entitled County Road
15 Systems, which is not the road system we're dealing with
16 here; is that true?

17 A. I believe so.

18 Q. You also indicated that there are exceptions in
19 the Green Book. In other words, if you can't for whatever
20 reason, for a good practical reason comply with the
21 ten-foot or six-foot setback, then you can apply for if
22 you're dealing with the Department of Transportation road
23 or a county road where the county has dually adopted the
24 Green Book, you can apply for an exception; is that true?

25 A. That's correct, yes.

1 Q. Now, when we look at the Green Book, there's
2 actually a chart. I'd like for you to tell the Commission
3 what the clear zone is for local collectors, collector
4 roads -- excuse me -- local roads of 30 and 35 miles an
5 hour.

6 A. Well for local roads it is six feet, but this
7 is not a local road. The adopted functional
8 classification for Aviation Boulevard is a collector.
9 And as you see in that same chart for collectors at
10 30 miles an hour, it says ten feet.

11 Q. And if the Green Book applied to this particular
12 road because it is collector road, then the Green Book
13 would suggest that there be a ten-foot clear zone,
14 correct?

15 A. That's correct, yes, sir.

16 Q. However, the Florida Department of
17 Transportation in its wisdom has determined that on roads
18 of speed limits of up to 35 miles an hour, if they're
19 local roads you can have a six-foot clear zone, correct?

20 A. For local roads, yes.

21 Q. And what is the speed limit of this road, sir?

22 A. It's 30 miles an hour. But Aviation Boulevard
23 is functionally classified as a collector road.

24 Q. It's also functionally classified as a municipal
25 road, true?

1 A. Yes.

2 Q. All right. Section 333 is the statute dealing
3 with FAA compliance, correct?

4 A. Yes.

5 Q. And pursuant to that statute each municipality
6 is required to adopt an aviation zoning code, correct?

7 A. That's correct.

8 Q. And the City of Marathon has indeed adopted such
9 a code, correct?

10 A. Yes.

11 Q. And under that statute you were only required,
12 whether it's the City that is giving a permit or the FAA
13 that is giving a permit or the D.O.T. Aviation Office or
14 Office of Aviation, you are only required to seek and
15 obtain a permit if you have an obstruction, correct?

16 A. Yes.

17 Q. So if the FAA has determined that the height of
18 a pole, for instance, is not an obstruction or hazard,
19 then a permit is not required, is that true?

20 A. Well, they first must receive the application
21 or receive information.

22 Q. And that determination is made by the FAA,
23 correct?

24 MR. STRAUSS: Excuse me. You're interrupting
25 the witness. Please.

1 Q. (By Mr. Paul) If the FAA determines that there
2 is no hazard, then no permit application or permit is
3 required from the FAA office -- excuse me, D.O.T. Office
4 of Aviation?

5 A. They at least must be notified. But if they
6 determine they don't want to permit it or they don't
7 want to go through the process, they don't have to issue
8 permit. And if they decide there's no obstruction, then
9 a obstruction analysis is required.

10 Q. And so you said here earlier that you wouldn't
11 build anything within a aviation zone, what you really
12 meant to say is you wouldn't build something that had been
13 deemed by the FAA to be a hazard or obstruction, correct?

14 A. Certainly at least without their concurrence
15 or what we're going to construct is one to not be
16 rendered by them as being an obstruction.

17 Q. And so if the FAA ultimately determined that
18 it's not an obstruction, you are free to build it even
19 without a permit or a piece of paper from the FAA other
20 than the determination that it is not a hazard?

21 A. Then you would at least have some letter of
22 determination that you're okay to proceed.

23 MR. PAUL: Thank you. I have no further
24 questions.

25

FURTHER QUESTIONS

1 BY MR. STRAUSS:

2 Q. Has any of the questions presented by counsel --
3 has any of the questions presented by counsel changed any
4 of your opinions?

5 A. No, none of the questions changed my opinion.

6 Q. Counsel brought to everybody's attention, I'm
7 glad he did, and he said that it was only a County
8 resolution --

9 VICE CHAIR LANDRY: The microphone's turned
10 off. Just flip it back on.

11 Q. (By Mr. Strauss) Counsel suggested that it
12 wasn't a city regulation, it was a county regulation. So
13 I will share this. And this is called the City of
14 Marathon Resolution 2017-51. And I think I read that to
15 you before, so I don't know why counsel presented it to
16 the contrary. And it starts out with, The County is the
17 owner and operator of Florida Keys Marathon International
18 Airport. And then it says, Whereas -- this is the second
19 paragraph -- Whereas the County and the City constitute
20 political subdivisions.

21 So by suggesting that the City wasn't a part of
22 this is erroneous. They are part of it because it's the
23 City and County as part of this agreement. And that is in
24 the first whereas -- second whereas clause.

25 So it reminds what I said before, and I'm not

1 going to repeat it at any length, but it says, Whereas
2 entering this interlock agreement pursuant to the
3 provisions of Florida Statute 163.01, Florida Statute
4 333.031(b)(1), the County and City, all right, acknowledge
5 their obligation in conformity with the Florida Statute.

6 So I don't know where he was coming from saying
7 that County -- the City did not approve it, it was just
8 the County.

9 Thank you. We have no further questions.

10 Thank you, Robert.

11 MR. CINTRON: Can you hear me? Okay.

12 MR. STRAUSS: Robert is co-counsel with me on
13 this matter and I've asked him to present a portion
14 of the presentation. Robert.

15 MR. CINTRON: Thank you very much. My name is
16 Robert Cintron and I'm an attorney from Key West.

17 I want to say as an aside that you all don't
18 know yet how lucky you are to have Steve Williams
19 as your attorney. I can't recall a time when I had
20 an issue with the County that when Steve was on the
21 other side, he didn't prevail. So that's strong --
22 you've got a good lawyer.

23 MR. WILLIAMS: In other words, don't ruin it
24 for me.

25 MR. CINTRON: And I'm not here to give you

1 legal advice. That's for Mr. Williams. What I
2 wanted to do was raise a few issues, and I'm sure
3 Mr. Williams, if he thinks they're important, will
4 address those.

5 The problem that the City has is these poles
6 or some of these poles are already up. When they
7 were put up, there was no permit and the City took
8 the position at that time it didn't need a permit.
9 And Mr. Strauss pointed out, the City said you do
10 need a permit. And so they did get a permit.
11 However, there is this doctrine that we lawyers
12 know about and most lay people don't which is
13 called sovereign immunity. And what sovereign
14 immunity means is the king can do no wrong. And
15 that comes back from the time when the United
16 States was subservient to the British Empire, and
17 that's where this doctrine of sovereign immunity
18 came.

19 Well the Florida legislature many, many years
20 ago passed the statute that basically said the
21 state, county and cities are immune from lawsuits
22 by private citizens for most purposes. However,
23 there are exceptions, and one exception is if a
24 city or municipality or county is aware of a known
25 dangerous condition and allows that condition to

1 exist, and if someone God forbid is killed or
2 injured, possibly the city would not -- (not
3 understandable). So therefore in evaluating this
4 appeal, it seems to me it would be prudent to take
5 into account the fact that you already have these
6 poles sticking in the air and the gentleman who
7 represents FKEC says that they're now getting
8 whatever approval they think they need from the
9 FAA. Well, you're really supposed to do that
10 first. You don't put the poles up and then get
11 your approval.

12 So as you sit here right now, how many poles
13 are out there? You have all these poles not
14 approved by the FAA if they have to be approved,
15 and there's a risk right now. My understanding is
16 that Sheriff Ramsay uses that airport to fly Life
17 Flight helicopters in and out of that airport.
18 Think about the tragedy that a person who's lucky
19 enough to be on Life Flight to be air lifted to
20 Miami or wherever and they don't get there because
21 they hit one of these poles, and then their familiy
22 says, Well how did these poles get put up and who's
23 liable? And that's where Mr. Williams steps in.

24 So I would suggest to you that you ought to
25 take that issue at heart and keep it in your mind

1 when you're thinking about whether this deal has
2 any merit given the fact that there's at least a
3 partial acknowledgment that no FAA approval was
4 ever made to put however many poles out there.

5 So thank you very much for your time and I'm
6 happy to answer any questions you all might have.
7 Thank you.

8 MR. STRAUSS: Thank you, Mr. Cintron.

9 I would just share with concluding. I'd like
10 to share with you the Florida Statutes 333.025, and
11 I think this answers all of your questions that you
12 might have. And it says essentially that a -- I'll
13 just read the first paragraph -- The person
14 proposing construction or alteration of an
15 obstruction must obtain a permit from the
16 Department subject to Sections 2, 3 and 4; however,
17 the permit from the Department will be required
18 within an airport hazard zone where the federal
19 obstruction standards exceeded or proposed
20 construction alterations within ten nautical miles
21 from the airport reference point.

22 So there can't be any question in anybody's
23 mind whether or not these were within the airport
24 hazard zone. They were. And as Mr. Cintron
25 indicated to you, that there wasn't a permit

1 pulled. And it's fine for counsel for FKEC to come
2 up and say we're working with so forth and so on.
3 I guess the only question I would have if he took
4 the stand would be show me a permit approved by the
5 FAA or Florida Department of Aviation. There is no
6 such thing.

7 So he says we're always there. We're always
8 working with, but apparently they haven't in this
9 case. So the bottom line is that the permit that
10 has been issued by the City and by this department
11 here, the permit basically says that they have no
12 right to, to the use of those facilities if those
13 facilities in violation of any code or federal
14 ordinance, they should be removed. The City's, the
15 permit says we have a right to order you to remove
16 them. And so the only correction here that could
17 possibly happen that would be appropriate would be
18 that as they are applying to the FCC -- I'm sorry,
19 the FAA, and the Florida Department of Aviation and
20 part of the D.O.T., if they're applying to that,
21 then when they're finished, then they can go back
22 into their construction. But everything they've
23 done now is without a permit and in violation of
24 the ordinances that we have talked to you about the
25 statutes. And I'll leave this statute with the

1 clerk so that you'll have it if you want to read
2 it. And it's ten nautical miles and obviously
3 there's airport hazard zone. You can't say that
4 the Florida Keys Electric through their attorneys
5 did not know that they have to do this. They just
6 ignored it. So I ask the County do what is
7 appropriate and that is have them remove those
8 poles until they get the approvals, if they get the
9 approvals.

10 And I thank you. I appreciate your time. And
11 I'll leave this with the clerk. Thank you so much.

12 VICE CHAIR LANDRY: Thank you.

13 MR. PAUL: Mr. Chairman, may I proceed?

14 VICE CHAIR LANDRY: Absolutely.

15 MR. PAUL: Can I have just a second to grab my
16 stuff?

17 VICE CHAIR LANDRY: Absolutely.

18 MR. PAUL: All right. Again, for the record
19 my name is Blake Paul. I'm an attorney with
20 Peterson Myers and I represent FKEC.

21 First, Mr. Garrett, can you confirm that
22 indeed Aviation Boulevard is a City of Marathon
23 right-of-way and not a County or Department of
24 Transportation right-of-way?

25 MR. GARRETT: Yes, it is. It is a City

1 right-of-way.

2 MR. PAUL: Okay. So before we -- we've heard
3 a lot of legal argument today, so I feel like I
4 need to spend a few minutes on that. Your City
5 attorney can correct me if he thinks I'm wrong. He
6 can certainly correct Mr. Strauss and Mr. Cintron
7 if he believes that they are wrong. But let's
8 start with the sovereign immunity issue.

9 So there are two kinds of actions the City can
10 take that are subject to sovereign immunity. One's
11 not subject to sovereign immunity. There's a
12 planning aspect and there's the operational aspect.
13 Planning aspects are whether or not to place a stop
14 sign at a particular intersection. That is a
15 planning decision and the City is immune from being
16 sued for making that decision. Someone can't come
17 back and say, You should have put a stop sign
18 there, you know that people are running through
19 this intersection, you know that it's very
20 dangerous, you should put a stop sign there. But
21 the decision, the legislative decision on whether
22 to put a stop sign there is a planning level
23 decision, and you are immune.

24 The operational decision is when that stop
25 sign gets knocked down by a storm or a car and the

1 City knows that it's knocked down and doesn't
2 properly maintain it, that's an operational
3 decision. That's a decision that can subject a
4 city to liability and is not subject to sovereign
5 immunity.

6 What we are dealing with here today, whether
7 or not the City allows these poles, continues to
8 allow the permit that's been issued by your staff,
9 that is a planning level decision and you are
10 immune. I'll leave it at that because your
11 lawyer's an excellent lawyer over there. He can
12 correct me if I'm wrong and let you know what his
13 opinion is.

14 Let's talk about for a moment the order of
15 obtaining the permits. The City has presented to
16 you that when the FKEC initially started this
17 project, FKEC was informed that no permit is
18 required, and the City has maintained that decision
19 that technically no permit is required because we
20 have a standing permit to install these kinds of
21 facility within the right-of-way so long as we're
22 not interfering with the existing roadway itself or
23 interfering with someone's existing grandfathered
24 driveway or permitted driveway.

25 That's consistent with Section 337.401.

1 Section 337.401 is a statute titled Use of
2 right-of-way For Utilities Subject to Regulation
3 Permitted Fees. The purpose of 337.401 is to
4 encourage utilities and to require cities to allow
5 utilities to use their right-of-way where possible.
6 That makes a lot of sense, because if you have the
7 right-of-way and then you had to scooch a little
8 bit off the right-of-way and put the utility in and
9 then scooch a little farther along and put sewer
10 in, you're continually encroaching on personal
11 property. And the State of Florida wants utilities
12 to use the existing highway systems, road systems,
13 county and city road systems where it's possible,
14 which is why they passed 337.401, which actually
15 gives utilities the right to use right-of-ways.

16 So the City said you don't need a permit. And
17 when Mr. Roberge comes up, we're going to actually
18 give you a copy of the letter that was sent to the
19 City. The City knew that the FKEC was engaging in
20 this project and did not require a permit. Your
21 code, Section 26.41 actually provides for when a,
22 an entity needs to get an after-the-fact permit.
23 Essentially what your code says is that if an
24 entity in good faith believed that a permit was not
25 necessary, then it can apply for, pay the permit

1 fees, apply for the permit, be given the permit
2 after the fact. And so long as they in good faith
3 thought the permit wasn't needed, then whatever
4 penalty fees, et cetera, they can be waived. And
5 that's precisely what happened.

6 So a number of statutes were thrown around and
7 we're going to talk about those in a little bit.
8 But I think what's important to remember is you
9 have two sections here. You have Section 333,
10 Section 333 of Florida Statutes requires all
11 municipalities and counties to have the airport
12 within their jurisdictional limits to pass a zoning
13 code dealing with the airports and to issue special
14 permits if an entity is going to create an
15 obstruction to that airport. If no zoning code is
16 provided for and no special permit is provided for,
17 then you need to go get an FDOT permit. That's
18 what Section 333 says.

19 Section 336 deals with county roads, and you
20 heard my cross examination of the engineer, that
21 section allowed the D.O.T. to create the Green Book
22 but it applies to county roads, doesn't necessarily
23 apply to municipal ones.

24 So I think that keeping those two statutes in
25 mind will be important.

1 Do I have the clicker? Okay. Just a little
2 bit of background. The Florida Keys Electric
3 Cooperative is a not-for-profit corporation. It
4 serves 34,000 electric meters in the Upper Keys,
5 which is roughly a little more than 50,000
6 residents. It covers 900 linear miles. The
7 current project that we are undertaking as you saw
8 earlier, just to orient you, is Aviation Boulevard,
9 which is north of the airport, moving the lines
10 from the south side to the north side.

11 The purpose of the project is really storm
12 hardening. You guys have seen some pictures and
13 we'll show you some pictures here shortly. What we
14 have on the south side of the road are the old
15 wooden telephone poles. They are not up to current
16 wind standards. And it is FKEC's goal and their
17 stated intent to storm harden these poles and move
18 them to the north side of the road for several very
19 good reasons. We're going to upgrade the poles to
20 current wind loading standards.

21 The reason for the move to the north side of
22 the road is really several reasons. Number one,
23 getting to the poles, accessing the poles when they
24 go down when they're so close to the FAA property,
25 they are inside the right-of-way on the

1 right-of-way side of the fence. If those poles
2 were to go down on the fence, we now have to get on
3 the FAA property and there are all sorts of
4 problems with getting on the FAA property. So
5 accessing the equipment is very difficult.

6 The other issue is is these poles are guide
7 structures, we are eliminating guide structures and
8 we'll talk about why that's a safety component.

9 The other reason to moved them to the north
10 side of the road is to eliminate aerial, the
11 overhead of aerial lines going from the south to
12 the north. We'll show you some pictures that will
13 demonstrate that. Those are all safety issues.

14 One of the things that Mr. Roberge will talk
15 about is the fact that during a storm one of our
16 primary concerns is overhead lines coming down,
17 blocking the street and taking up first responders'
18 time as they cannot move until FKEC can get out to
19 that facility. We eliminate the overhead lines, we
20 eliminate that problem.

21 I think we talked about the issues, so I'm
22 going to skip that, and I think I'd like to bring
23 up Mr. Roberge right now. Mr. Roberge is the
24 director of engineering for the Florida Keys
25 Electric Cooperative.

1 Thereupon,

2 MICHAEL ROBERGE
3 was called as a witness and, having been previously
4 sworn, was examined and testified as follows:

5 EXAMINATION

6 BY MR. PAUL:

7 MR. ROBERGE: Good evening. My name is Mike
8 Roberge and I just met my long-lost, my fifth
9 cousin here, Tina. Apparently we both have the
10 same last name.

11 Can I say one or two quick things? Number
12 one, I apologize to the third agenda item because
13 we are really going long and I hope most of these
14 people are sitting here for that.

15 Q. Mr. Roberge, can you provide -- first of all,
16 give us your address.

17 A. My address is 94220 Overseas Highway,
18 Tavernier, Florida.

19 Q. And by whom are you employed?

20 A. Florida Keys Electric. I've been with them
21 for two years. I've been with the co-op industry for
22 33. So I have full experience in cooperative
23 construction and building facilities from transmission
24 systems, substations and distribution.

25 Q. Can you give us your educational background?

1 A. Yes, I have a bachelor of science degree in
2 electrical engineering with a focus on power systems
3 from Michigan Technological University in Houghton,
4 Michigan. Anybody know where Houghton is?

5 Q. Mr. Roberge, does your experience in working for
6 electric co-ops include the location and placement of
7 utility poles?

8 A. Yes, sir.

9 Q. All right. So give the Planning Commission a
10 little bit of background on FKEC and this particular line
11 of poles.

12 A. I can't read any of those charts. But first
13 of all, just real quick, I want to remind everybody that
14 we are a not-for-profit electric co-op.

15 VICE CHAIR LANDRY: Could you speak into the
16 microphone? I'm sorry.

17 A. We are a not-for-profit electric utility.
18 What that means is almost everybody in this room barring
19 our attorney from Key West are owners of the co-op. We
20 are not a for-profit entity like FPL or AT&T. They're
21 publicly traded. They're investor owned. We're owned
22 by everybody in this room who has an electric meter at
23 their house. That's different in a world of things that
24 makes us unique. The other thing is we work on the
25 not-for-profit basis, so everything we do we intuitively

1 look at it and say, Does that make sense money wise?
2 Because it's not our money, it's your money. It's not
3 ours.

4 The other thing is when we do good work and we
5 are under budget, we return money back to members in the
6 forms of credits. This May everybody in this room if
7 you were a member and using electricity in 2019, got a
8 refund. That was part of the being a not-for-profit
9 co-op. Different than an investor-owned where just the
10 investors get the dividends. Just want to make that
11 clear because we are clearly different than most of the
12 for-profit entities.

13 So that picture there, that chart is awful,
14 but what we want to show just real quick is the red box
15 down on the left is our Marathon substation, and the red
16 box way up at the upper right is our Crawl Key
17 substation. And that, Aviation is right in the middle
18 of that screen and you can see that piece of line when
19 we get done rebuilding it and have it installed, we'll
20 be able to feed all the way up into the north, the east.
21 You can see the line -- if you're familiar with Key
22 Colony Beach and Coco Plum, that's one of the areas that
23 in a storm we'll be able to feed up there and pick up
24 those members if we have a catastrophic failure at the
25 Crawl Key sub or anywhere on the line coming back. And

1 the same would happen the other way. All the way back
2 down, all the way to the Marathon. So that's one of the
3 things where we'll be able to pick up alternate numbers
4 of members.

5 Q. How many members does this particular line down
6 Aviation Boulevard currently serve?

7 A. Well, there's a section on the very south end
8 just around the corner by the Boat Works, there's a
9 recloser there. And from there to the end of that meter
10 serves 1,145 members. From that point up towards Crawl
11 Key we pick up at least 2,600 more once this line is
12 done in the event we have an issue.

13 Q. What do you mean an issue? Does this line, when
14 you finish this line, will it provide redundancy coverage
15 in the event of an outage elsewhere?

16 A. Yes, that's really the key. So if we have a
17 catastrophic failure, the Crawl sub or if we have a pole
18 that was broken there on the way down from Crawl, we
19 could open up that segment, feed all the way back up
20 through, pick up Key Colony Beach and all the residents
21 and members and businesses on Coco Plum.

22 Q. And when was this line originally built on
23 Aviation Boulevard?

24 A. It's a 1980s vintage, and in our world we
25 depreciate things on a 3.33 percent basis, so it's a

1 30-year life cycle. So it's basically fully
2 depreciated.

3 Q. What are the goals of the Aviation Boulevard
4 project?

5 A. Well, there's a couple things, and we talked a
6 little bit about it, but one of them is we're storm
7 hardening. We have a policy that was established in
8 2006 set by our board, which is again is elected by our
9 members to represent the board and drive the ship, if
10 you would. In 2006 we asked the board resolution to say
11 we will build to extreme wind loading. So one of the
12 things we're doing is going through on old lines when
13 they're fully depreciated, we're going to upgrade those
14 to fully storm hardened conditions.

15 The big thing we talked about a second ago is
16 elimination of the overhead line crossings. Not all
17 overhead lines, but the overhead lines crossing across
18 roadways. We have a picture later you can see it.
19 Anybody's driven down that road might not see it the way
20 we do, but it's very cluttered and there's tons of
21 overhead line crossings. All of those represent the
22 potential for a dump truck or a sailboat or anything to
23 get, to hook it, cause an inconvenience to whoever's
24 served by that line, possibly cause a pole to break and
25 have a public safety issue.

1 One of the other issues on this particular
2 line is the existing line is set over on the other side
3 of the bike path close to the fence by the airport
4 property. And guides and anchor facilities which
5 strengthen those poles and hold them are actually in the
6 airport property. It's a difficult job to go in there
7 and access that. It's actually activity with the
8 Homeland Security just to get in there and do work
9 there. So it makes to us good sense to get that line
10 off of there, get those guides out of there and put them
11 closer to the residents.

12 Q. Now, sir, the FKEC is not a Johnny Come Lately
13 organization, is it?

14 A. I'm sorry?

15 Q. The FKEC is not a Johnny Come Lately
16 organization, is it?

17 A. No. We have 80 years.

18 Q. So I'm going to hand you a copy of the original
19 articles of incorporation of the Florida Keys Electric
20 Co-Op and I'm going to enter it into the record. And I'll
21 ask you to read into the record what is the date of the
22 original incorporation of this entity?

23 A. This was the 22nd day of January 1940. One
24 good thing is I will not be speaking on sovereign
25 immunity.

1 Q. I'm sure we're all riveted.

2 A. That drawing there was just a little closer up
3 on the project. We've seen that. We've cleaned it up.

4 Q. So what is the aerial that we're seeing here,
5 sir?

6 A. This is just a drill down of a typical, what
7 we call our steak and cheese for our work drawings and
8 it shows proposed pole locations. It's really hard to
9 see on the screen, but in general the poles from the
10 south side of the road will be abandoned and the poles
11 will go on the north side of the road. We have proposed
12 pole locations. The locations are not on private
13 property. And if I can, we heard comments about
14 easements and road right-of-way. There are no
15 easements. We do not have easements on private property
16 there. So we won't be using the driveway. That's the
17 intent of the road right-of-way. That's why they're
18 inherently exempt, as you heard from the Marathon city
19 attorney.

20 Q. So, Mr. Roberge, my laser pointer doesn't work
21 on the TV, so I'm going to be a manual laser pointer. So
22 I would like for you to have me point out to the
23 Commission the old pole locations, the new pole locations,
24 and also the Bolon/Wolff residence.

25 A. So the old pole locations are all on the south

1 side of the road near the wood line. And if you're out
2 there, there's a fence there. The new locations are on
3 the north side of the road, and in particular the pole
4 nearest the Bolon property is on the south and west
5 corner. And that is again in the road right-of-way, not
6 on private property, and not encumbering any private
7 property.

8 There was a night shift that we were out there
9 with paint and tape and everything else, and we were out
10 with red paint to mark the locations of where the poles
11 would go. Not the exact pole location, but we were
12 working property corners, we were doing a pseudo survey.
13 The tree tape was yellow tape. It was not to be
14 removed. Not to be cut down. They were there so that
15 our vegetation group could come back and meet with the
16 members and talk to them about getting them trimmed or
17 removed, whichever was better for both the co-op and the
18 member. There was never intent to go through, mark the
19 tree and come in and cut it without any customer
20 contact. We do not do that. Even if it's in the road
21 right-of-way, we will make sure that somebody knows.
22 It's the last thing we want to do is be in there with
23 chain saws and the people not know about it.

24 Q. Now, Mr. Roberge, before the project,
25 construction on the project was started, did you notify

1 the City of Marathon that you were going to perform this
2 project?

3 A. Yes, we did.

4 Q. I'm going to show you a letter dated July 8,
5 2020, signed by you and Bill Lee, the director of
6 distribution operations, and ask you if you can confirm
7 that this letter was indeed sent to the City of Marathon?

8 A. Yes, it was. It was sent on July 8th, 2020.

9 Q. And after submitting that notice to the City,
10 were you told by the City that you needed to have a permit
11 to perform this work?

12 A. No, we were not. And if I can add just a
13 little bit. I'm sorry if I'm going off script, but many
14 of the poles were set before we got to we needed a
15 permit. Because I think two-thirds of us don't think we
16 needed a permit. And we did set several poles after we
17 got the permit prior to any lawsuit or any litigation
18 action. I think I heard some spinning of some dates and
19 times, but we did not, we have not and did not do any
20 work after we committed to cessation of the work.

21 Q. So the timeline of events was you submitted
22 notice to the City in July that you were going to start
23 this project?

24 A. Yes, sir.

25 Q. And the City did not inform you that you needed

1 a permit?

2 A. Correct.

3 Q. You started the project?

4 A. Yes.

5 Q. Then a lawsuit was filed?

6 A. Yes.

7 Q. After the lawsuit was filed, although you
8 continued to do work, there was a point where the City
9 reversed course and said you do need a permit?

10 A. That's correct.

11 Q. Once the city said you needed a permit, have any
12 more poles been set?

13 A. To my knowledge, no.

14 Q. Looking at the Bolon/Wolff residence, and I'm
15 going to point it out again, is your pole blocking any
16 access to any of the their existing driveways? And I'll
17 point out their -- wait to answer until I can get up there
18 and do my best Vanna White impersonation.

19 A. It is not. That pole is located on the
20 southwest corner in road right-of-way, not in private
21 property. And I believe there's actually personal stuff
22 in the road right-of-way presently, maybe a flower
23 bed/rock garden, something that's encroaching into the
24 right-of-way.

25 Q. Now it appears to me that all of the, all the

1 new pole locations are located right on the property line
2 between each residence; is that true?

3 A. Yes, that was the goal of going out and
4 marking what we call the pseudo survey. We didn't
5 survey -- but we did pseudo so that we could share the
6 property line with that new pole location, and we got in
7 as close as we could to keep the line in configuration.
8 And the big key is to not encumber many trees on private
9 property. That's one of the things that, one of the
10 goals, and I think -- I'm sorry, I missed your name --
11 but the Green Book also talks about if it's
12 impractical -- it is impractical to go full distances
13 back on -- if there's encumbrance on private property
14 features.

15 Q. If you would have gone back ten feet instead of
16 six feet, would you have been encroaching on some of the
17 residents' landscaping and other features?

18 A. Yes, there was numbers of locations that were
19 if we go much more than that we will be disturbing, like
20 I said, some already present stuff as well as more
21 trimming that would need to be done either now or in the
22 future.

23 Q. And this pattern of placing the poles on the
24 property line rather than in the middle of someone's lot,
25 does that repeat itself for the entire length of Aviation

1 Boulevard?

2 A. As a rule it does. We did make some
3 adjustments and we do those if a member has a good,
4 there's a reason that that property line is a shared
5 driveway between the two, we will adjust the shift, but
6 we did not send any structures that encumbered anybody's
7 existing --

8 Q. I'm going to show you a three-page document,
9 three sets of photographs that represents plans for this
10 particular project. I'd like for you to confirm that so I
11 can put that in the record as well.

12 A. Yes, these would be typical drawing plans.

13 Q. Okay. Now what are we looking at here,
14 photograph marked FKEC Number 6?

15 A. That's a photo looking down Aviation
16 Boulevard. Obviously the old existing structures are on
17 the left-hand side. I can't see that screen because I'm
18 blind, but all of the overhead aerial conducted, you can
19 see them, and it's a pretty good mess. And, you know,
20 it's one of those things that, A, it doesn't
21 aesthetically look good; and, B, if we move those closer
22 to the other side of the road, there will be a number of
23 improvements. One was the reduction in overhead
24 crossings so that we will have less likelihood of having
25 lines torn down, poles torn down and outages, and then

1 the public safety issue. If anybody in here is in
2 public safety, they can tell you after a storm or
3 hurricane one of the biggest pains in the butt is
4 guarding wire down. There's wire down everywhere and
5 the first responders are there. They have a duty to
6 protect people. And we have limited resources and we
7 can't be everywhere. So it's one of those things we try
8 to get rid of through our storm hardening process is
9 eliminating road crossings.

10 Q. So this next picture, Photograph Number FKEC 08,
11 what is that?

12 A. So that picture shows a couple, several of the
13 new poles that are set and the typical structure top
14 assembly that we will be using. And you can see all the
15 stuff on the left is going to go and be all on the
16 right. There will be no road crossings for our electric
17 wires and it will be a lot cleaner.

18 Q. All right. Now have you had -- does FKEC get
19 notice when there is an interaction between a vehicle and
20 one of its poles or some of its lines?

21 A. As a rule there's a, usually a contact with
22 the sheriff, somebody does a police report of some sort
23 or the resulting car accident results in conductor
24 slapping, we have an outage, we go out and find that
25 somebody had run into a pole.

1 Q. And does the FKEC maintain statistics on
2 vehicles versus poles and vehicles versus overhead wires
3 and vehicles versus guide wires?

4 A. We do have a management system that has outage
5 code logging. I wouldn't say we strictly use
6 statistics, but we can look backwards and see how many
7 outage records did we have coded as different types of
8 outages.

9 Q. And starting back in May 3rd of 2019, did you
10 have your staff prepare a list of the vehicles versus
11 poles versus overhead wires and versus guidewires?

12 A. Yes, we did a assortment run on the computer.
13 I believe we had 28 incidents, 14 of which were we call
14 it car versus pole and vehicle versus pole, and 14 were
15 vehicle versus wire. So pretty much even up. Every one
16 of the vehicle versus wire is an outage, it's a member
17 inconvenience, somebody's out of power. We may then
18 have a damaged pole, we certainly have damaged
19 infrastructure. But not all of the car versus poles end
20 up in an outage. They may be just bumped into it, they
21 backed out into it, somebody turned a corner and they
22 went off the road for whatever reason.

23 Q. And is that piece of paper that I gave you, is
24 that a tabulation of the vehicle versus poles, overhead
25 wires and guide wires?

1 A. Yes.

2 Q. And how many vehicles versus poles do we see on
3 there?

4 A. The sort was 14.

5 Q. And how many vehicles versus overhead?

6 A. There was 11 overhead and three that hit
7 guidewires. So there's 14 wires and 14 poles.

8 Q. Did any of those instances occur on Aviation
9 Boulevard?

10 A. No.

11 Q. Okay, Mr. Roberge, please discuss with the
12 Commission why you all made the decision to maintain
13 overhead lines at this location, above-ground lines as
14 opposed to underground.

15 A. Well I touched on it a little bit initially.
16 Underground construction is much, much more expensive to
17 get done. I think anybody that's in a construction
18 facet here understands that, number one. Number two, in
19 our world it's usually 5 to 10X, 5 to 10 times the cost
20 of doing overhead facilities. This one is at least
21 five, and that's just doing it on a pure, simple,
22 easy-to-do job. This one might not be that easy because
23 you've got other utility infrastructure in there. If
24 you're going to put on another facility, you gotta bore
25 or trench the entire length of that road, and there's

1 water in there already for sure. We'd have to fight
2 with that a bit. When you set a pole, you're setting a
3 pole with a hole, you know, 24-inch diameter. A lot
4 less likely chance of hitting water lines when you do
5 the locates.

6 Q. How about the, when you install poles -- or
7 excuse me -- lines under ground, is there anything that's
8 above ground?

9 A. Absolutely. Underground facilities are just
10 the conductor and the conduit system. The transformers
11 are above ground. The sectionalizing cabinets are above
12 ground. The switch gear is above ground. And all of
13 these have a footprint much, much larger than the
14 footprint of that pole. The pole is 12 to 13 inches in
15 diameter. The pad mount is three-foot by three-foot and
16 it requires an eight-foot clear zone off one side to
17 open the doors so the linemen can operate the, actually
18 pull the elbows and get at the transformers with an
19 insulated stick. So that's a big chunk of ground that
20 you take up. A sectionalizing cabinet or switch gear is
21 twice the size of that table. It's the size of a dinner
22 table and it still has doors you have to access. So
23 it's a big chunk of real estate that gets taken up.

24 Q. Now how about reliability? Are there any
25 reliability concerns about going underground versus above

1 ground?

2 A. Well, in general people always think that
3 underground is more reliable than overhead, and in
4 general it is. But the issue is when you have an
5 underground issue, it's typically a long time. You
6 can't see anything, so you gotta come out and
7 troubleshoot. You gotta use the radar equipment to try
8 to find out where the issues are. And it just, it takes
9 time. Then when you find it, it has to be a hole in the
10 cable from digging or from a defect. Now you have to
11 pole the entire length, might be 2,000 feet in that run,
12 pull the whole section out, pull the whole other
13 section. So it's not like going out, you see a tree on
14 the line, might be energized, grounded. Take the tree
15 out of the line and get re-energized. It's a whole
16 different game.

17 Q. I think we skipped over this. The poles that
18 are to be set in front of or at the property lines in the
19 area of where the Bolon/Wolffs live and other residential
20 areas along Aviation Boulevard, how wide are those poles
21 at the site line level?

22 A. They're between 12 and a half or 13 and a half
23 inches.

24 Q. So not a significant impediment to seeing what's
25 out there?

1 A. Not at all.

2 Q. We talked to safety?

3 PLANNING COMMISSIONER SEXTON: What are the
4 wind loads on the new poles?

5 Q. (By Mr. Paul) What are the wind loads on the
6 new poles?

7 A. Well, the extreme wind loading is up to
8 150 miles an hour and it's not as easy to say this pole
9 that will handle it. It's the pole, the span length,
10 the wire, the size of the wire, the tension that it's
11 pulled at. But it's 150 miles an hour top end on the
12 design.

13 Q. And what's the maximum width of some of the
14 poles?

15 A. There's a few larger structures that are in
16 the 22-inch range wide. And those would be, well, we're
17 turning a corner, we're going guides and anchor lifts,
18 so they're little bigger structure so that we don't have
19 to put guidewires and anchors down, which are weak
20 links.

21 Q. And those would be in the extreme ends of
22 Aviation Boulevard?

23 A. There's a major road intersection and we tap
24 off and go back up to most of the residences.

25 Q. All right. So let's talk about the

1 international airport. Have you submitted all the pole
2 locations to the Federal Aviation Administration?

3 A. Yes, we have. And every location was turned
4 in through the FAA. They have an online portal where
5 they can determine whether you have an obstruction or
6 not. And you give them the GPS location, the top of
7 your structure, whether it's the top of the pole, the
8 pole insulator, wherever you're at, top of the
9 structure, they take that and they add their mean sea
10 level calculation and then they come back and say this
11 meets our requirements or it's too high and here's the
12 level that if it's at this or less, you're okay. Every
13 structure on the project was applied for and we do have
14 in the neighborhood of 30 that were exceeding their
15 first level hazard obstruction height.

16 Q. And I'm going to show you a letter dated
17 September 16, 2020, from the Federal Aviation
18 Administration determining that there was no hazard at
19 transmission line Number 47 and ask you to confirm that
20 this is indeed a communication from the FAA?

21 A. One thing, yes, this is one of the feedback
22 information that says you're good to go. One thing that
23 I would note is this does say that it's transmission
24 line. It is not a transmission line, it's a
25 distribution line. The reason it says transmission on

1 here is because it was applied and not, just not
2 everybody has access to the FAA portal. And it was
3 applied to through our transmission engineering
4 consultant, so it has a transmission line, but it is not
5 a transmission structure.

6 Q. And what is FKEC's commitment with respect to
7 the FAA rulings on its poles and height requirements?

8 A. We will have every structure at or below their
9 height requirement or appropriately mitigated through
10 the FAA. That's -- we will do that. We have to do
11 that.

12 Q. And why is it that the FKEC did not submit its
13 materials to the FAA sooner?

14 A. Quite frankly we were not aware that we had to
15 do it for a parallel run with the driveway. We did know
16 and we had done requests for the end of the
17 right-of-way -- of the runways, but quite frankly on the
18 parallel run we blew it.

19 Q. All right. What are the -- so you are, the new
20 planned poles which are on the north side of Aviation
21 Boulevard are farther away from the airport, correct?

22 A. Yeah. There's a differential of roughly
23 30 feet in most of the poles. They're all just under
24 500 foot from the runway.

25 Q. So what's the current status of work on this

1 project?

2 A. We have been on cessation since our commitment
3 to not do any more work.

4 Q. And so how many poles are currently in the
5 ground?

6 A. I think we have 47 in and we have five or six
7 that are still to be set.

8 Q. And how much has the FKEC spent so far on these,
9 on this --

10 A. Oh, boy, someone's going to hollar. I should
11 have that handy, but I'm not sure I do.

12 Q. I've got on the PowerPoint about 396,000; does
13 that sound about right?

14 A. Just shy of 400, yes, correct.

15 Q. With respect to the six-foot setback that was
16 required by the City of Marathon in its permit, what's
17 FKEC's position with respect to applying that setback
18 requirement?

19 A. We will meet that. We intend to meet that.
20 And that is -- I heard a couple varying information
21 also -- that is six foot from the edge of the travel
22 lane. The travel lane is determined as ten foot wide
23 for the center line, so it is not edge of pavement. I
24 think I heard somebody reference edge of pavement. That
25 is not necessarily where it is set. This is edge of

1 travel lane. Travel lane is ten feet wide. The whole
2 road pavement might be 24. So there's actually two feet
3 of asphalt and then there would be four more feet to the
4 face of the pole.

5 MR. PAUL: Okay. I don't have any further
6 questions.

7 MR. WILLIAMS: Before you go much further,
8 just like to inquire of the court reporter if she
9 needs a break. We're almost two and a half hours
10 into the meeting. Not to keep everyone here all
11 evening, but she has the hardest part.

12 VICE CHAIR LANDRY: Could we take a
13 five-minute break at this time? Okay. Five
14 minutes, everybody. Thank you.

15 (Recess taken at 7:46 p.m. until 7:54 p.m.)

16 MR. PAUL: Mr. Chairman, before I tender the
17 witness, I'd just like to just introduce into
18 evidence the PowerPoint that was presented. I
19 printed it out.

20 MR. WILLIAMS: If there's no objection from
21 either side, Mr. Strauss or Blake, we're going to
22 accept all tendered evidence by both parties. If
23 there's no objection, we'll just deem them all
24 admitted.

25 MR. STRAUSS: No objections.

1 MR. PAUL: No objection.

2 MR. WILLIAMS: So everything they've handed to
3 Lorie I'll consider part of the record and for
4 future documents as well.

5 EXAMINATION

6 BY MR. STRAUSS:

7 Q. Sir, thank you for your testimony. Let me ask
8 you a series of one, two, three questions. Question
9 number one is prior to the construction, you being the
10 engineer, are you not a certified engineer for Florida
11 Electric?

12 A. I am not a certified engineer.

13 Q. Are you an engineer?

14 A. Yes, sir, I have a bachelor of science degree
15 in electrical engineering.

16 Q. But you're not a professional engineer?

17 A. Correct.

18 Q. And in your job that you're working at, did you
19 have -- and did you know that in the vicinity of the
20 airport you had to get FAA and Florida D.O.T. approval
21 before the construction?

22 A. I believe I mentioned that we do get approval
23 and apply on both ends of the runway. And I think I
24 even said we blew it on the parallel --

25 Q. So is the answer to my question, yes, you knew

1 that before you started construction?

2 A. It's yes and no.

3 Q. All right. Now coming to the next thing, if you
4 knew that before you started construction, can you explain
5 to the panel, please, why you did not on behalf, and I
6 guess you're the target as engineer, why did you not apply
7 for FAA approval before construction?

8 A. I think I was pretty clear. I said we did not
9 know about anything going parallel to the roadway. This
10 project is parallel to the runway. The ends of the
11 runway we had applied.

12 Q. Would it be fair, sir, that you recognize
13 Florida Statute 333 as the Highway Safety standards
14 applicable to this project?

15 A. I don't recognize any standards. When we were
16 asked to apply with the permit and the permit said all
17 other entities, that's where we said, Hey, look, we need
18 to go to the FAA.

19 Q. Would you agree that you did no negative impact
20 studies before you started construction?

21 A. I would agree that we did no traffic studies
22 at all.

23 Q. I didn't hear that.

24 A. I would agree that we did no traffic studies.

25 Q. So there are no studies done at all?

1 A. No traffic studies.

2 Q. None at all?

3 A. I said none.

4 Q. Okay. And then would you agree also that -- I
5 think you said that you've always complied with FAA
6 standards working in your position. Do you have a copy
7 that you have submitted to the FAA for approval before
8 this date?

9 A. Before which date?

10 Q. Yes.

11 A. Before which date?

12 Q. I mean today's the day we're here before the
13 panel.

14 A. Oh, yes.

15 Q. Do you have a copy that you now submitted to the
16 FAA for approval?

17 A. Blake entered that into evidence quite a bit
18 ago.

19 Q. Is that a written -- you understand that we
20 received from the FAA a notice that there has been no
21 certified application?

22 A. I think you checked with the FDOT FAA? We
23 applied directly through the FAA portal online. We did
24 not go through FDOT because this is not an FDOT road or
25 any kind of restriction on it.

1 Q. Was that after September 15th of this year?

2 A. It was September 15, 16. I don't have a date
3 but it's --

4 Q. Can you look at the date so you can advise the
5 panel?

6 A. The issue date was 9-16 of 2020. We applied
7 prior to that. I don't know the date of the
8 application, but this is the date that we got feedback
9 back from the FAA. So in general, two weeks on this.
10 So probably right around the 2nd or 3rd of September is
11 when we applied. I can get you the exact date, but I
12 don't have it.

13 Q. Your poles that you've put in have not yet been
14 approved by the FAA, correct?

15 A. No, that's not correct. A number of them post
16 no obstruction and a number of them do exceed their
17 obstruction limits. We have 60 days to work with them
18 to mitigate that process. And we're only 30 days into
19 that. Not even -- we're 30 days into that process.
20 60-day window for mitigating with the FAA.

21 Q. The short answer to my question is that you
22 don't have FAA approval as we stand here right now,
23 correct?

24 A. That's not true. We have FAA approval.

25 Q. Tell me where you have the approval.

1 A. We have FAA approval saying that it's not an
2 obstruction on a number of structures. On the -- the
3 number of structures in my head is 34 to the end.

4 Q. Even though you can't start construction until
5 you have the FAA approval?

6 A. We started construction before we had the
7 permit. The permit is what indicated to us that, uh-oh,
8 we need to look.

9 Q. As of today you have stopped construction; is
10 that correct or not correct?

11 A. Yes, we have.

12 Q. Okay. And you stopped construction because you
13 do not now as you stand here have FAA approval to start
14 construction again?

15 A. That is not correct.

16 Q. Well then why are you --

17 A. We stopped construction because we have an
18 agreement, a cease work agreement. That is why we
19 stopped construction.

20 Q. Then why have you could stopped construction if
21 you have the permit to go forward?

22 A. I didn't say we have a permit. I said we
23 stopped construction because we had a legal agreement to
24 not do any work until we settle this.

25 Q. All right. Well let me try it a different way.

1 A. Go ahead.

2 Q. You're aware that the City attorney for the City
3 of Marathon said you needed a permit to do any
4 construction and that was retro after you started
5 construction, right?

6 A. I'm not sure that that, I can't attest to
7 that.

8 MR. WILLIAMS: I see people looking at me for
9 input here -- and I'm sorry to interrupt, but I was
10 not city attorney at that point and I have nothing
11 to say to verify the accuracy of what I've been
12 told, so I will not pepper the testimony with
13 hearsay by saying what I believe to be the case.
14 But it wasn't me. Thank you.

15 VICE CHAIR LANDRY: Okay, thank you.

16 Q. (By Mr. Strauss) I have filed as part of my
17 filing the city attorney stating -- the then city attorney
18 stating you needed to have a permit. All right? And that
19 was their litigation attorney I believe in litigation.
20 Have you seen that?

21 A. The permit from the City?

22 Q. Yes. Have you seen it?

23 A. Yes, I have.

24 Q. All right. And you disagree with that too,
25 right?

1 A. I disagree that we need it. I don't disagree
2 that I saw it.

3 Q. Now let me ask you this question. The poles
4 that were on the south side, the airport side, how far
5 away from the roadway were those poles?

6 A. I have not measured.

7 Q. Well, more than ten feet? You've been there,
8 right?

9 A. I would conjecture that probably more than ten
10 feet.

11 Q. And there's a bicycle path as well, right?

12 A. Yes, sir.

13 Q. And did you estimate that to more than ten feet
14 back?

15 A. I have no idea how far back the bicycle path
16 is.

17 Q. Would you agree that underground connections
18 would avoid this entire problem?

19 A. What entire problem?

20 Q. The problem of how high your poles are and
21 whether the FAA is going to approve construction or not?

22 A. That is not really a problem because we are
23 going to meet design criteria for the FAA. So in my
24 opinion that's not a problem. The problem is I don't
25 think you and your clients want to have the poles or the

1 line built on their side of the road. If we go and
2 switch gear and transformers on that side of the road,
3 they're going to lose more property and more ground to
4 the sides of that street. They are transformers and
5 they're going to be more upset than they would be having
6 a single pole not on their property.

7 Q. Let's try the short question. Did you ever
8 consider underground facilities before you put in the
9 poles?

10 A. Intuitively, yes. We know by default that is
11 way more expensive to do a main feeder with underground
12 facilities. It's just not worth spending all of the
13 members' money for a small number of members that might
14 have a better aesthetically pleasing look.

15 Q. Would the short answer to my question be that
16 there is no study that you know of that's in writing
17 anywhere about the cost of underground poles as compared
18 to was it a \$500,000 contract you awarded to put in the
19 poles?

20 A. The nuts of the contract are I guess neither
21 here nor there. We did intuitively look at it and say
22 this does not make sense to put underground in. Is
23 there a documented study that says we went through and
24 converted and compared all the pricing? No.

25 Q. Okay. So the short answer to my question is

1 that there was no study done for underground facilities
2 before you started construction?

3 A. We use historical experience.

4 Q. And can you answer the question? It's a yes or
5 no question.

6 A. Yes, what we used to determine was historical
7 experience based on cost.

8 Q. You don't have anything in writing to show the
9 panel, do you, that you made an inquiry as to what are the
10 costs?

11 A. No.

12 Q. All right. Now let's go to the next subject.
13 The next subject is the poles that you are now putting
14 over on the, on the north side, that is the residential
15 side, that's not a utility easement, is it?

16 A. No, sir. There's no utility easement down
17 there. We are using the road right-of-way which is
18 designated to us.

19 Q. Would you explain for the panel what utility
20 easement is since you work for the utility company?

21 A. Yes.

22 MR. WILLIAMS: At this point I'm going to
23 object as to why we're testifying as to something
24 that doesn't exist. I'm not seeing a whole lot of
25 relevance. If there were an easement, I would love

1 to hear him explain what it is. It should be in
2 the record. He just said it doesn't exist, so why
3 are we having to spend time discussing something
4 that's not there?

5 MR. STRAUSS: Well, he's engineer, he's in
6 charge of the project. I think a fair question, I
7 think a fair question would be what is a utility
8 easement? I don't know why that's objectionable.

9 MR. WILLIAMS: You can answer, but we've been
10 at it for quite a while and we're trying to keep
11 this relevant to the appeal. And to my knowledge
12 the appeal is whether or not a utility easement is
13 present. I think everyone in the room including
14 previous experts have, including your own expert,
15 has testified there's no easement here. So why are
16 we talking about what is?

17 MR. STRAUSS: Then I withdraw the question if
18 it's understood there is no utility easement.

19 A. Yes, sir. We agree on something.

20 Q. (By Mr. Strauss) Now would you agree that once
21 you put in underground connections to the various
22 residences, there is no further maintenance of that
23 underground --

24 A. Not at all. Not at all. There is ongoing
25 maintenance on underground switch gear, underground pad

1 mounted equipment. And there's lots of maintenance
2 activities that go on.

3 Q. Well, the bottom line is, I guess what we're
4 talking about is that you can't tell the panel or tell me
5 what the cost would be to put in -- well, first of all,
6 it's a \$500,000 contract approximately that you awarded to
7 the subcontractor to put in the utility poles?

8 A. I'm not entirely sure that the costs are
9 relevant. I did say that is a 5X or more adder for the
10 project. And knowing again from experience those are
11 legitimate costs and those do not include all of the
12 service wire trenching and all of the members along that
13 road having to change their meter cans to a underground
14 meter can, which also may require them to raise their
15 meter can up to the new flood standards. There's a lot
16 of unknowns for the members. It's all member costs.

17 Q. So hypothetically if the FAA said the poles are
18 too high and they're in the airport hazard zone, would
19 your company then be in a position to remove them?

20 A. We are in the process of finalizing a design
21 for poles that will meet that. The existing poles may
22 stay because we may be able to mitigate. If not, we
23 will take them out and we will put appropriately sized
24 poles in their place.

25 Q. You'll do that without any cost to the City,

1 right?

2 A. Yes, sir.

3 MR. STRAUSS: Okay, we do not have any further
4 questions of this witness.

5 MR. PAUL: I'm sorry? I didn't hear you.

6 VICE CHAIR LANDRY: Were there any further
7 questions?

8 MR. STRAUSS: We have no further questions.
9 We'd like to call back based upon the testimony for
10 just one or two questions --

11 MR. PAUL: I have two more people.

12 MR. WILLIAMS: He's not finished yet, Mr.
13 Strauss. He's not finished with his presentation
14 yet.

15 MR. STRAUSS: I'm sorry. May I ask is it more
16 argument or is it witnesses?

17 MR. PAUL: Witnesses. I'd like to ask
18 Mr. Carlos Solis a few questions.

19 Thereupon,

20 CARLOS SOLIS
21 was called as a witness and, having been previously
22 sworn, was examined and testified as follows:

23 EXAMINATION

24 BY MR. PAUL:

25 Q. Good afternoon, Mr. Solis. Can you state your

1 full name, please?

2 A. Yes, Carlos A. Solis.

3 Q. And, Mr. Solis, how are you employed?

4 A. I am the director of public works and
5 engineering for City of Marathon.

6 Q. And were you involved in the City of Marathon's
7 decision to issue the permit in this case, and more
8 specifically to issue the permit which contained a
9 six-foot clear zone setback requirement for the poles?

10 A. Yes, I was.

11 Q. And how is it that you defined that six-foot
12 clear zone setback?

13 A. Couple of reasons. Six-foot, actually speed.
14 Actually, a few years ago with FDOT when they were
15 working on the U.S. 1 project, particularly Hilltop,
16 which the speed limit's 35 miles an hour, and I had some
17 issues with some of the recovery out there. And they
18 did send me a memo that said on that 35 mile-an-hour
19 right-of-way, they actually quoted one of the sections,
20 but they found there we got clear recovery and terrain
21 recovery with six feet for that road resection. And it
22 was six feet to U.S. 1 and it's 35 miles an hour, I
23 deemed that six feet on Aviation would be sufficient.

24 Q. And how many lanes is U.S. 1?

25 A. In the area where I was talking about where I

1 had the issues, it was a two-lane road at that area. If
2 you go down, it goes to four, but in that area it was
3 two lanes.

4 Q. So in that area of U.S. 1, which is also a
5 collective road, correct?

6 A. That actually is arterial road.

7 Q. Arterial road, which is a busier road, correct?

8 A. Oh, yes.

9 Q. So a busier road with a higher speed limit had a
10 six-foot setback according to D.O.T.?

11 A. That's the memo that they sent me and that was
12 -- yes.

13 Q. And was that based upon a review of the
14 available right-of-way and the interactions of the clear
15 zone with property owners adjacent to U.S. 1?

16 A. I can't tell you what the basis of their
17 review was. I don't know.

18 Q. When the City of Marathon set the clear zone
19 setback requirement for Aviation Boulevard at six feet,
20 did it consider the speed limit of Aviation Boulevard?

21 A. I considered it, yes.

22 Q. Did the City of Marathon consider the residents
23 there on Aviation Boulevard and how the poles would impact
24 those residents in the event that they were pushed back to
25 ten feet versus six feet?

1 A. Yes, we did.

2 Q. And the conclusion was?

3 A. Kind of the same issue I have on the other
4 side of the road. I always want the electric co-op to
5 put those poles right at the property line of the
6 airport side and at that time they basically couldn't
7 because the maintenance of the poles, the lines would
8 actually overhang to the property, so you had to pull it
9 away from the right-of-way line to be able to maintain
10 those to not have the lines on private property -- -
11 public right-of-way, you're right, there's no utility
12 easement, so we really can't encroach overhead into
13 someone's property.

14 Q. So in this particular case there was sort of a
15 push and pull, you wanted to make a clear zone that was
16 sufficient for safety, but you also needed to take into
17 consideration the effects on the private property?

18 A. I took those into consideration, yes.

19 Q. And does the City of Marathon consider that
20 clear zone to be sufficiently safe based upon the speed
21 limit of this particular road as well as the traffic on
22 this road?

23 A. For that, 30 miles an hour, yes.

24 MR. PAUL: I don't have any further questions.

25

EXAMINATION

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BY MR. WILLIAMS:

Q. Mr. Solis, you were briefly asked your position with the City. Would you please give your experience prior to taking your position with the City and how long you've had your current position?

A. I've had my current position here with the City going on 11 years. I started in November of 2009. Prior to that I spent 25 years in the private sector, most as a consultant, and I was president of my own engineering and surveying company. I've been a registered engineer in the state of Florida since January 1, 1990.

Q. And prior to coming a registered engineer, what's your education?

A. I have a bachelor's degree in civil engineering.

MR. WILLIAMS: No further questions.

Examination

BY MR. STRAUSS:

Q. Good afternoon, Mr. Solis.

A. Good afternoon, sir.

Q. I want to make sure I speak into the mic. I made a public records request for all of the communications that you're aware of between yourself and

1 Florida Keys Electric.

2 A. Yes, sir.

3 Q. You're aware that I made that request?

4 A. Yes, sir.

5 Q. And you helped put together that, the response,
6 right?

7 A. Just put our IT department to where the
8 e-mails were, what have you.

9 A. Without me bringing that full stack out, would
10 you agree that there was nothing in any of your
11 communications to and from Florida Keys Electric that
12 ever mentioned aviation hazard zone?

13 A. No.

14 Q. You think you did? I'll bring out the public
15 records. You think you mentioned the aviation hazard zone
16 and the need for an FAA approval to Florida Keys Electric?

17 A. No.

18 Q. You did not?

19 A. No, sir.

20 Q. When you say no, sir, the answer is you did not,
21 correct?

22 A. I did not bring that topic, that subject up.

23 Q. So that wasn't even a consideration, was it?

24 A. No, it wasn't.

25 Q. Do you agree that Florida Statute 333 applies to

1 the City of Marathon?

2 A. I'm not familiar with Florida Statute 333, so
3 I can't answer that.

4 Q. -- highway safety called the Green Book, are you
5 familiar with the Green Book?

6 A. I'm familiar with the Green Book, not Statute
7 333.

8 Q. Okay. So under the Green Book are you familiar
9 with that highway safety provisions?

10 A. Not the whole book, but yes, I'm familiar with
11 the Green Book.

12 Q. Okay. And you heard --

13 MR. WILLIAMS: Again, at this point I'm going
14 to object to improper foundation because I do not
15 believe that's what Chapter 333 calls for at all
16 in the Florida Statute section dealing with airport
17 zoning.

18 Q. (By Mr. Strauss) Did you hear the testimony of
19 Mr. Hagen?

20 A. Yes, I did.

21 Q. All right. And did you hear he is a
22 professional engineer that teaches the Green Book?

23 A. I heard him say that, yes.

24 Q. And did you hear in his opinion that the Green
25 Book requirements were not complied with?

1 A. If that's what he said, I'll acknowledge that.

2 Q. You have no way to dispute that, do you, from
3 your position?

4 A. No.

5 Q. All right. Then let me ask you the next
6 question. With regard to the existing poles on the south
7 side, that's the airport side, how far back from the
8 street are you?

9 A. I'm not sure. Prior to our project obviously
10 we were closer. We shifted the road to the north a
11 little bit. Bike path right now is eight feet to the
12 other side of the bike path, and I have five feet, so
13 possibly 13 feet some areas, maybe less.

14 Q. Okay.

15 A. Around the curve there's probably a lot less
16 we actually --

17 Q. Give or take, around 13 feet?

18 A. Some may be ten feet, nine feet. Depends.

19 Q. Were any of them three feet or four feet?

20 A. No, sir.

21 Q. They're all 10 to 13 feet?

22 A. I'm going to say there was a couple poles
23 towards the very west edge of Aviation that we actually
24 had to move for the path. I can't tell you what the
25 distance were, but they were fairly close to the road

1 because there's just not a whole lot of room out there.

2 Q. So the new poles are four to six feet off the
3 road, the old poles were 10 to 15 feet or 13 feet off the
4 road?

5 A. I'm not sure where the four feet. I thought
6 we were talking about six feet here and that's the
7 requirement, six feet from the travel lane.

8 Q. Well, maximum is six feet, I'll give you that.
9 There was a maximum of six feet off the road; is that
10 right?

11 A. I think the minimum is six feet.

12 Q. And if that's a violation of the Green Book
13 standards, you would agree that they should not, they
14 should be ten feet off the road consistent with the
15 standards testified by Mr. Hagen?

16 MR. WILLIAMS: Object to the form. You can
17 answer.

18 Q. (By Mr. Strauss) Do you understand the
19 question, sir?

20 A. The Green Book says -- what the Green Book
21 does allow exceptions for, for example, if you push the
22 poles to the property line, then your overhead is
23 encroaching on somebody's property. As you mentioned,
24 there's utilities out there. They have to work within
25 the public right-of-way and it does provide provisions

1 for those.

2 Q. I understand and I appreciate your response. If
3 it's more than ten feet, then it cuts into somebody's
4 property and you need their permission, right?

5 A. If it's inside somebody's property, yes, sir.

6 Q. And if you're going to do it more than six feet
7 and it's required to be ten feet, you have to get an
8 exception, do you not?

9 A. According to the Green Book, yes.

10 Q. And no exception to your knowledge was ever
11 granted?

12 A. No. We issued a permit based on the six-foot
13 minimum.

14 Q. Okay. And the last question in a series of
15 questions, did you ever discuss with Florida Keys Electric
16 or any representative to do an underground facility
17 connection?

18 A. No, I didn't.

19 Q. That never came up in any conversations that you
20 had?

21 MR. WILLIAMS: Objection. Asked and answered.
22 He just said no, he didn't.

23 MR. STRAUSS: Thank you. Nothing further.

24 MR. PAUL: Last witness, Mr. Chairman, is
25 Reggie Mesimer.

1 MR. MESIMER: Good news. Most of what I was
2 going to cover was already covered, so I'm going to
3 be quick.

4 VICE CHAIR LANDRY: Could you pull the mic a
5 little closer to your face, please?

6 MR. MESIMER: Sure. Mr. Paul, can you put
7 that slide up? I believe Slide 12 that had to do
8 with the vehicle --

9 MR. GARRETT: Hey, Brandon, can you put their
10 slide presentation up again?

11 MR. PAUL: Thank you, Brandon.

12 Thereupon,

13 REGINALD V. MESIMER, P.E.,
14 was called as a witness and, having been previously
15 sworn, was examined and testified as follows:

16 EXAMINATION

17 BY MR. PAUL:

18 Q. Before we get there, Mr. Mesimer, can you please
19 provide the Commission with an overview of your
20 educational and work history as a professional engineer?

21 A. Yeah, of course. I'm sorry, I should have
22 done that.

23 My name is Reginald Mesimer and I'm a civil
24 engineer. So I'm a civil engineer licensed in Florida,
25 Alabama, and North Carolina. I got my first license in

1 Florida in 1982. I went right out of high school
2 straight into the Army. The Army tested me and said you
3 need to go to engineer school.

4 So I'm just going to talk loud, how about
5 that?

6 So after a couple years in the Army, I got to
7 go home and enrolled at Georgia State University and
8 studied biology and physics. I graduated there in 1978.
9 Couldn't make any money, so I went to engineering school
10 at University of South Florida. And because of my
11 unique situation, I was in the process of working on --
12 I was in the process of getting a degree. Because of my
13 unique situation, I had was able to take the PE and EIT
14 exam and the PE exam prior to graduating from college.
15 I took them and I passed both of them the first time in
16 1982, when I finished, by the way, University of South
17 Florida.

18 And then, you know, I worked for large
19 engineering firms. I started two different engineering
20 firms. My current firm is Mesimer and Associates, Inc.
21 We've been around for 30 years.

22 Oh, and speaking of me, I've been around for a
23 while too and I'm no stranger here. I've been paying
24 Monroe County property taxes since 1988. I've been a
25 member of the Florida Keys Electric Co-op since 1992 and

1 I built my house on Flamingo Island. I'm formerly a
2 full-time resident here, now I'm a full-time resident of
3 St. Pete, but I spend every other weekend here. Also,
4 you know, I'm able to do that because I'm a licensed
5 pilot and I have 41 years of experience. I've logged
6 over 8,000 hours and I've landed and taken off at this
7 airport across the street over 5,000 times --sorry, 500
8 times. That would be a stretch.

9 Okay. Can you go to that slide with
10 the incidents? Okay. So this list, there are, if you
11 look at that, over the past 15 months there were 28
12 vehicle/infrastructure incidents. Fourteen of those
13 were vehicles running into poles, three of them were
14 vehicles -- running into overhead wires. That's half
15 and half. Half involved poles, half involved non-poles.
16 If you get rid of the non-pole incidents like the
17 overhead wires and the guidewires, you wouldn't have any
18 problems. I mean that's what the statistics up there
19 are showing.

20 There also has been a lot of talk about the
21 Green Book and the requirements of the Green Book.
22 Whether or not Aviation Boulevard is County road. It's
23 not. Doesn't really have to apply, doesn't really have
24 to do what the Green Book says. But they could. What's
25 important is know is they could put those poles in the

1 back --

2 PLANNING COMMISSIONER SEXTON: I know, it's
3 directional, so you have to speak directly into it.
4 It's designed not to hear you from the side.

5 A. So what I just said, there's room to put the
6 poles ten feet from the road. The co-op didn't do it
7 because they felt that was going to be too much of an
8 impact to the property owners. So they looked for
9 another solution and came up with the six-foot solution,
10 which is in the Green Book for local roads, it's not for
11 collector roads.

12 But if you look to the Florida Utility
13 Accommodation Guide, you look at their requirements,
14 their requirements are 18 feet. And that's interesting.
15 Eighteen feet of travel lanes on roads with less than
16 45 mile an hour speed limit. But with the D.O.T.,
17 that's a utility in their right-of-way, to put a utility
18 they leave room for growth. And they say so in the very
19 first paragraph under Purpose. This rule is established
20 to regulate the location, manner for installation and
21 adjustment of utility facilities along any D.O.T.
22 right-of-way in the interest of safety and protection,
23 utilization and future development of such rights of
24 way. Due to consideration given to the public service
25 afforded by adequate economical utility installations

1 and provide procedures for issuance of permits.

2 I'm sorry, that was only one sentence and I
3 actually read that better myself, I think.

4 Anyway, what it says is --

5 MR. WILLIAMS: At this point, two thoughts is
6 you're doing much better. Thank you. Same point,
7 we're getting the same narration issue we had with
8 the last expert. If we could try to keep this to
9 questions and answers to some degree. Yes, you're
10 allowed your opinion, but your counsel hasn't asked
11 you a question in ten minutes.

12 MR. PAUL: We're just trying to streamline the
13 process.

14 MR. WILLIAMS: I know you are, but you might
15 be able to help with that because we're really
16 rolling here.

17 MR. PAUL: Sure.

18 Q. (By Mr. Paul) Mr. Mesimer, does the utility
19 Accomodation Manual provide for exceptions to those rules,
20 those setbacks rules?

21 A. Yes, they do. And they do but I was making a
22 totally different point. My point was that if you have
23 18-foot setback, pole setback 18 feet and you allow for
24 future growth, you allow for a future right turn lane or
25 deceleration lane, you still have the six-foot mentioned

1 in the Green Book. And incidentally, in the
2 Accommodation Guide they don't talk about whether or not
3 that's for an arterial or a local street. So Utility
4 Accommodation Guide, they're leaving room for addition
5 of a lane and still have six feet of clearance. And I
6 think that's important. That hasn't been brought up
7 yet.

8 Q. Mr. Mesimer, one last area of inquiry and that
9 deals with the airport and the poles at this location.
10 And one of the things that the City is required to do in
11 the airport zoning area is consider whether or not these
12 poles represent a practical danger to public health and
13 safety with respect to the use of the airport. As a civil
14 engineer and someone who's also a licensed pilot who is
15 instrument rated, what's your reaction to these poles and
16 whether they provide any sort of safety concerns for
17 pilots?

18 A. Well, if you go to the Chapter 333 of the
19 Florida Statutes, the statute actually defines an
20 obstruction and separately defines an airport hazard.
21 They might be the same, but they're not necessarily one
22 in the same. If I could, I'm just going to read in a
23 few definitions.

24 Obstruction means any existing or proposed
25 object, terrain or structure construction or alteration

1 that exceeds the federal obstruction standards contained
2 in 14 C.F.R., part 77, subpart C. The term includes a
3 number of things, but I won't read them into.

4 And then the definition of airport hazard is
5 an obstruction -- I just read the definition of
6 obstruction -- an obstruction to air navigation which
7 affects the safe and efficient use of navigable airspace
8 or the operation of planned or existing air navigation
9 and communication facilities.

10 What the co-op has received so far is letters
11 of a perceived hazard. That determination hasn't been
12 made. It will likely be made in the next 60 days, but
13 it hasn't been made yet. What we have now is just an
14 obstruction.

15 Q. And permits are only required once the object is
16 determined to -- is finally determined to be an
17 obstruction or a hazard?

18 A. That's correct.

19 MR. PAUL: I don't have any further questions.

20 A. Told you I'd be quick.

21 MR. STRAUSS: See if I can get this right.

22 Can you all hear me now? Sorry, just have a couple
23 questions.

24 VICE CHAIR LANDRY: Speak a little closer to
25 the mic, please.

1 MR. STRAUSS: It's late in the hour. Just
2 have a few questions.

3 EXAMINATION

4 BY MR. STRAUSS:

5 Q. Question number one is do you agree that the FAA
6 is a final arbiter of whether or not there's an
7 obstruction?

8 A. They're the final arbiter of whether or not
9 that obstruction is a hazard. There's either an
10 obstruction or there isn't. That's just a matter of
11 measurements.

12 Q. I understand, but you can't be the FAA, correct?

13 A. I'm not the FAA.

14 Q. And the FAA is the final word on whether there's
15 an obstruction or not, yes?

16 A. Whether there's a defined obstruction under
17 the rules or whether there's a hazard, they're the final
18 arbiter, yes, sir.

19 Q. Is the answer to my question yes?

20 A. No, it's no. Because if there's an
21 obstruction, it's a matter of measurement, it's not a
22 matter of public opinion. It's a matter of either it is
23 or it isn't.

24 Q. I'm not looking for your opinion, I'm trying to
25 find out from you based upon your experience, education

1 and background, when you submit an application to the FAA
2 to do any construction in the proximity of the airport,
3 the FAA has a final say as to whether you can or you
4 can't, yes?

5 A. That is correct.

6 Q. All right.

7 A. That's true.

8 Q. Now, then you talk somewhat about an exception.
9 Have you seen anything up to this date where the FAA has
10 given the Florida Keys Electric an exemption?

11 A. No, sir.

12 Q. All right. Now, let me ask you the obvious
13 question I think that everybody has to kind of figure out
14 here. Have you been physically out to the site?

15 A. Yes, sir, of course.

16 Q. All right. And you're aware that there are
17 previous utility poles on the south side airport side,
18 correct?

19 A. Yes, sir.

20 Q. How far in are those poles? How far in from the
21 asphalt roadway?

22 A. Well, that's -- I've never measured that
23 distance. I mean they're probably, you're on the other
24 side of the fence, they're probably 12 to 15 feet.

25 Q. All right. Now let's go to the other side of

1 the roadway where FKEC is putting in these utility poles
2 originally you would agree without a permit, yes?

3 A. Yes.

4 Q. All right. Now when they put in the poles do
5 you know if any of those poles, or have you observed or
6 measured any of those poles to be ten feet away from the
7 roadway?

8 A. I measured many of those poles and I do
9 believe there were some that were ten feet from the edge
10 of the travel lane.

11 Q. All right. Let's try this way. Were there
12 poles that were four and six feet away from the roadway,
13 asphalt road?

14 A. The closest I found was 4 foot 7 inches.

15 Q. Okay. And so they varied in front of the
16 residential properties, yes?

17 A. Yes, sir.

18 Q. And if the, if the standards from 333 are, if
19 they are that they are to be ten feet away from the
20 roadway, would you agree with that?

21 A. Yes, sir. Standards from whom did you say?

22 Q. You would agree that the 333 highway standards
23 provide that such construction of putting in the utility
24 poles must be ten feet away from the asphalt, yes?

25 A. No.

1 Q. You think it could be six feet?

2 A. You're working way back to the Green Book and
3 the Green Book does necessarily apply and there are
4 exceptions from the Green Book. And you've got to take
5 into consideration Utility Accomodation Guide.

6 Q. Are you testifying before this group that it can
7 be four feet away? Six feet away?

8 A. No, I'm not testifying to that. I'm
9 testifying the permit is six feet away by the City. The
10 Green Book says ten feet if it's a collector and if it's
11 applicable to FDOT rules. And then if it's not
12 applicable to FDOT rules, the City of Marathon says it
13 is.

14 Q. If the Green Book says it should be ten feet
15 away, if that's the calculation, you would agree it can't
16 be ten feet away because there's not that much in the City
17 right-of-way, correct?

18 A. I would have to say if the Green Book applies
19 to this particular situation, which I don't think it
20 does, but if it did, and if this is a collector, which
21 is the second if, then the ten-foot would apply.

22 Q. So if it applies, you can't put it ten feet away
23 from the asphalt?

24 A. Absolutely you can. And I said that right
25 away. These poles can go back ten feet. There's room

1 to push them back ten feet. But if the co-op would push
2 them back ten feet, the number of people were here would
3 be ten times this number because nobody wants those
4 poles four feet closer to their house.

5 Q. I understand that. That's why I'm asking the
6 question. If the Green Book says it has to be ten feet
7 away, you would say that none of the people on Aviation
8 would want it in front of their house, right?

9 A. No, I think what I said was if the plans were
10 to put those poles ten feet into the property as opposed
11 to six feet from the road, ten feet from the road, there
12 would be a lot more concerned people and likely the
13 group that's here tonight would be much larger.

14 Q. Well, I'm trying to get to the final question
15 here. The final question is if you put it underground,
16 you wouldn't have any problem at all, right?

17 A. If you put it underground, you can do that but
18 there's a lot of other problems with that: Money, salt
19 water intrusion, complexity during construction. There
20 are reasons it's not underground. But if you put it
21 underground, you would eliminate a lot of problems, yes.

22 Q. Okay. If it was underground, there wouldn't be
23 any airport aviation problems, correct?

24 A. There wouldn't be any poles and that's what's
25 caused the problems. So with regard to that, there

1 wouldn't be.

2 Q. If there's poles, there's no aviation problem.

3 A. I think I heard earlier tonight if there's any
4 construction whatsoever within a certain distance, I
5 think it was ten miles of the airport, there still has
6 to be FAA approval. So even if there were underground
7 conduit and power, based on what I learned you still
8 have to have an FAA permit.

9 Q. And I'm glad you said that. Could you tell the
10 panel, please, why, Florida Keys Electric with all the
11 powers that they have and all the experience they have
12 testified here why they did not seek FAA approval before
13 they started construction?

14 A. I can't do that. I got involved after they
15 had gotten in trouble for not getting the permit, so...

16 Q. You can't answer?

17 A. I can't answer that question.

18 Q. You cannot answer that question.

19 MR. STRAUSS: Okay. Thank you.

20 MR. PAUL: FKEC does not have any other
21 witnesses.

22 MR. WILLIAMS: Okay. Mr. Strauss, are you
23 wishing to recall someone tonight? And I would
24 stress very briefly.

25 MR. STRAUSS: Very briefly.

1 MR. WILLIAMS: I think we've been at it for
2 over two hours on this issue. It's certainly up to
3 the Chair if he wishes to hear a brief question.

4 VICE CHAIR LANDRY: Brief question, please.

5 MR. WILLIAMS: Okay.

6 CONTINUED EXAMINATION OF LARRY HAGEN

7 QUESTIONS BY MR. STRAUSS:

8 Q. Larry, you've been previously sworn?

9 A. Yes.

10 Q. Have you heard the testimony of the various
11 experts and other people called by FKEC?

12 A. Yes, I have.

13 Q. And do you have any comments on that?

14 A. One thing real quick. The question as to the
15 classification of Aviation Boulevard. We adopted
16 classification. I pulled this classification off of
17 Florida D.O.T.'s website. It shows Aviation Boulevard
18 as a major urban collector, and that was signed off by
19 the City of Marathon mayor, signed off by the County,
20 Florida D.O.T. and Federal Highway Administration. So I
21 think certainly you can say it certainly is a major
22 collector, and that's what the City and mayor signed off
23 on this. And I'll provide this if you'd like.

24 Q. So you disagree that it's just a city road?

25 A. It's not just a local road. I mean the

1 functional classification adopted by the City is that it
2 is a urban major collector.

3 Q. And the purpose of that testimony is that it
4 must be in compliance with the Green Book?

5 A. Then I believe the Green Book ten-foot
6 standard is the applicable standard.

7 Q. Okay. And you remain in your opinion that
8 noncompliance in this instance is a hazard?

9 A. Yes. Making the road less safe.

10 Q. All right. And the panel is well aware of that
11 testimony.

12 MR. STRAUSS: We have introduced and provided
13 a copy of your opinion so we don't have to go back
14 over it again, and so it's available through the
15 clerk if you care to read his opinions.

16 Thank you very much.

17 MR. WILLIAMS: Chairman, I believe that
18 concludes from the appellant and from FKEC to the
19 best my understanding from Ms. Mullins.

20 MR. PAUL: Can I just put in Mr. Mesimer's
21 C.V.?

22 MR. WILLIAMS: Certainly. I believe we had
23 one member of the public submit a card. Granted,
24 this is an appeal. Communication from the public
25 in an appellate matter is a matter of some debate,

1 but in a matter of being safe than sorry, if the
2 member of the public would like to speak on this,
3 or if they would not, speak now, that will be fine.

4 MS. SUSAN NICHOLS: Briefly.

5 VICE CHAIR LANDRY: Can you state your name
6 for the record, please?

7 MS. SUSAN NICHOLS: Susan Nichols. I live at
8 9204 Aviation Boulevard. I think what we have here
9 is you have a lot of attorneys fighting a lot of
10 different things, but here's what you gotta look
11 at: The client, the homeowner, the member of FKEC
12 was never given any notice. One day we appear and
13 there's these big poles stuck in our yard. And I
14 need the photographer that took those pictures
15 because those pictures, I would look thin in those
16 pictures. The poles are not thin. And the fact
17 that they moved them from 10 or 12 or whatever
18 amount it is on one side plus the space of the
19 road, which we gave you extra space of the road
20 last year, and then six, ten, four, whatever it is,
21 that's right up on my house. On a new product that
22 they haven't been using.

23 Yeah, yeah, yeah, yeah. Everybody's telling
24 FKEC that it's a good product. But it's new. They
25 don't know.

1 You can't get out of your house without having
2 this big thing blocked. That's the way the houses
3 were built there. That's why, probably, when they
4 did all of those easements -- because I come from
5 Broward County, we have easements. We don't play
6 games. But what's interesting tonight that I just
7 heard is there's easements on the back properties
8 on the other side of the canal. They all have
9 electric easements. But this one doesn't. So
10 whether you're calling it a right-of-way, which
11 allows them to go 30 feet in, or you're calling it
12 an easement that wasn't recorded, I don't
13 understand why simple notice wasn't given to people
14 who pay property taxes and pay FKEC for their
15 electric when you're going to put something on our
16 property. Yeah, there's a right-of-way, but
17 everywhere else that I've lived, and I've lived in
18 several places, there's -- and why do we do that?
19 We put people on notice and have these fights
20 before they shove poles into your ground. And, you
21 know, after we started to question it, they went
22 out in a thunderstorm to put some of those poles
23 up. Now, I've only been down in the keys for five
24 years, but when I ran the State of Florida
25 dependency here for two years, we didn't get any

1 work done in the rain. And yet they found it
2 necessary to start doing that. Why? I'm going to
3 offer to you that I don't have knowledge but it's
4 -- they knew they were wrong.

5 Those poles can stay over on the airport side.
6 They wanted to tell you all the times where the
7 poles came down, all the times where the -- but
8 that wasn't on Aviation Boulevard.

9 VICE CHAIR LANDRY: I'm sorry, time's up.

10 MS. SUSAN NICHOLS: It wasn't Aviation
11 Boulevard.

12 VICE CHAIR LANDRY: Thank you for your input.

13 MS. SUSAN NICHOLS: Thank you.

14 MR. WILLIAMS: I think we're done hearing from
15 everyone. I realize we don't do appeals that
16 often. We've heard from both sides, they've
17 presented their witnesses, their testimony. I
18 don't think we're looking for closing statements
19 from anyone at this hour in the evening with
20 another full-on appeal still in front of us. I
21 certainly don't wish to make one. You can
22 certainly ask questions of me, you can ask
23 questions of staff if you have anything else to
24 make your consideration.

25 What is before you is an appeal of a permit

1 issued by Carlos. Any motion should be in the form
2 of either denying the appeal or affirming the
3 appeal. And it's not the findings of fact. It's
4 not the foot conditions. It's not to say you have
5 to go do something. So it's different than a usual
6 Planning Commission item. This is in favor of
7 granting the appeal or to deny the appeal. Got any
8 questions from there, you're free to discuss
9 amongst yourself. Ask questions or otherwise
10 before you take your vote.

11 VICE CHAIR LANDRY: Thank you. Any questions
12 or comments? Can I just ask one question of the
13 co-op?

14 MR. WILLIAMS: Certainly.

15 VICE CHAIR LANDRY: I mean I've been in this
16 city for some time. I live in a neighborhood where
17 a telephone pole is literally on my property line,
18 no easements, maybe a foot. I just want to clarify
19 that even without utility easements, the co-op
20 still puts electric transmission lines in
21 right-of-ways or as close to a property line as
22 they can based on the room that they have. So it
23 doesn't necessarily have to have utilities.

24 MR. ROBERGE: Correct. We have many
25 facilities not in a private utility easement. It's

1 far the majority of our facilities are in road
2 right-of-way.

3 MR. WILLIAMS: And to address this. Sorry to
4 interrupt. But this would -- type of plat. So
5 whether there is an easement there or not is
6 something that the developer of the neighborhood
7 would have platted those easements at the time of
8 the platting not knowing on down the road 10, 20,
9 50 or sometimes 100 years in the future where
10 technology would require that we have each item's
11 place. So that's much more original plat question.

12 VICE CHAIR LANDRY: I got it.

13 MR. PAUL: And the reason you don't see
14 utility easements on certain roadways is because
15 there's enough room on the road to accommodate
16 utilities. The reason why you see utility
17 easements on more narrow neighborhood roads is
18 because the roads aren't wide enough to accommodate
19 the utility, so you have to, you have to continue
20 to encroach on property owner's property, which is
21 what 337.401 doesn't want us to do. They want us
22 to put these poles on the road right-of-way.

23 VICE CHAIR LANDRY: Thank you.

24 MR. WILLIAMS: If he has a question for you,
25 Ron, he'd call you.

1 MR. STRAUSS: My last comment. All right.

2 VICE CHAIR LANDRY: I think we're ready.

3 We're going to deliberate and take a vote.

4 MR. STRAUSS: All right. Thank you.

5 VICE CHAIR LANDRY: No deliberations. We have
6 a motion?

7 PLANNING COMMISSIONER LEONARD: Move to take a
8 vote.

9 PLANNING COMMISSIONER GILSON: Second that.

10 VICE CHAIR LANDRY: Can we, can we -- what
11 exactly are we voting on?

12 PLANNING COMMISSIONER LEONARD: Move to take a
13 vote on the appeal as found in our packet. How is
14 that?

15 MR. WILLIAMS: Probably not going to be
16 legally sufficient.

17 PLANNING COMMISSIONER LEONARD: Tell me what
18 to say on this.

19 VICE CHAIR LANDRY: You either have to make a
20 motion to vote or deny.

21 PLANNING COMMISSIONER LEONARD: My motion is
22 to deny the appeal.

23 PLANNING COMMISSIONER SEXTON: I second.

24 VICE CHAIR LANDRY: Okay. Can we call the
25 roll, Ms. Lorie.

1 MS. MULLINS: Matt Sexton.

2 PLANNING COMMISSIONER SEXTON: Yes.

3 MS. MULLINS: Eugene Gilson.

4 PLANNING COMMISSIONER GILSON: Yes.

5 MS. MULLINS: Mike Leonard.

6 PLANNING COMMISSIONER LEONARD: Yes.

7 MS. MULLINS: Lynn Landry.

8 VICE CHAIR LANDRY: Yes.

9 MS. MULLINS: Motion to deny is passed.

10 VICE CHAIR LANDRY: Thank you everyone for
11 your time being out for this and we're going to
12 hear the next item.

13 (The hearing was concluded at 8:48 p.m.)

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STATE OF FLORIDA
COUNTY OF MONROE


I, Tina M. Roberge, Notary Public in and for the State of Florida at large, do hereby certify that I was authorized to and did stenographically report the foregoing proceedings, and that the foregoing pages, numbered from 1 to ^, inclusive, are a true and correct transcription of my shorthand notes.

I further certify that said proceedings were taken at the time and place hereinabove set forth and that the taking of said proceedings was commenced and completed as hereinabove set out.

I further certify that I am not an attorney or counsel of any of the parties, nor am I a relative or employee of any attorney or counsel of party connected with the action, nor am I financially interested in the action.

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Tina M. Roberge